UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Scotts-Sierra Crop Protection Company	)	Docket No. FIFRA-09-0864-C-95-03
	)	
Respondent	)	

ORDER ON MOTIONS

On December 4, 1997, Complainant filed three Motions: a "Motion to take Official Notice and Close the Record as to the Risks and Benefits of Pesticide Products containing Mancozeb," a "Motion to Exclude," and a "Motion for Leave to Modify Prehearing Exchange." Respondent filed its responses to each of these motions on December 18.

Complainant's motion to take official notice and to close the record is denied, although the notice of cancellation is included in the record. Its motion to exclude is also denied. Complainant's motion to modify its prehearing exchange is granted, although the motion was unnecessary. Complainant is also directed to produce a witness to testify on the penalty calculation. Each Motion shall be discussed in turn.

Background

On January 29, 1996, the Region 9 Office of the United States Environmental Protection Agency (the "Complainant" or the "Region") filed a Complaint against the Scotts-Sierra Crop Protection Company, of Marysville, Ohio (the "Respondent" or "Scotts-Sierra").(1) The Complaint alleged that Respondent sold an unregistered and canceled pesticide on 157 occasions, comprising 157 violations of Sections 12(a)(1)(A) and 12(a)(2)(K) of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. §§136j(a)(1)(A) and 136j(a)(2)(K). The Complaint proposed a civil penalty of $785,000, on the basis of $5000 for each alleged violation, the

maximum authorized by FIFRA §14(a)(1), 7 U.S.C. §136*l*(a)(1).

On February 12, 1997, I issued an order on a motion for accelerated decision, finding Respondent liable for the alleged violations. The factual evidence essentially showed that Respondent had received the notice of cancellation, but apparently lost it. Scotts-Sierra then continued to sell the canceled pesticides without the required label modifications for about a year, while it was unaware of the cancellation. The hearing in this proceeding, scheduled to begin on February 24, 1998, will therefore be limited to determining the appropriate amount to assess as a civil penalty for Respondent's violations.

Motion to take Official Notice and to Close the Record

In this motion, Complainant seeks an order taking "official notice of all findings and determinations in the Notice of Intent to Cancel ("Notice") published in Volume 57, No. 41 at page 7484 of the Federal Register, dated March 2, 1992, regarding the risks and benefits of pesticide products containing mancozeb, . . . and closing the record in this proceeding with respect to the risks and benefits related to the use of pesticide products containing mancozeb." (Complainant's Memorandum in Support of Motion, p. 2). Mancozeb is an ethylene bisdithiocarbamate ("EBDC") pesticide, and the active ingredient in the products sold by Scotts-Sierra that were the subjects of the Complaint. The Notice, fully entitled "Notice of Intent to Cancel; Conclusion of Special Review," 57 FR 7484 (March 2, 1992), canceled certain food application uses of EBDC pesticides. The Notice further allowed certain other applications to continue, but only with prescribed label modifications.

The Region's motion must be denied for several reasons. Initially, the Notice is not a proper fact or matter for taking official notice. Official notice and judicial notice is intended to be taken of facts or matters *outside* the record of the proceeding. (See Administrative Procedure Act §556[e].). There is no need to take official notice of material already in evidence. If Complainant is making this motion to ensure that the Notice is received into evidence at the hearing, it need not worry in that regard. The Notice was already, for all intents and purposes, in evidence as a primary document considered in the accelerated decision phase of this proceeding. It proved that Respondent's products were canceled. The Notice was published in the Federal Register and remains unchallenged by Respondent. Although it is not yet formally received as a hearing exhibit, the Notice is included in Complainant's prehearing exchange. It will undoubtedly be received into evidence at the hearing. Thus there is no need to take official notice of the Notice document.

Although the Notice of Cancellation is, for all practical purposes, in evidence in this proceeding, the Region has not shown a proper basis to close the record with respect to the "risks and benefits of mancozeb." The Region's argument, taken to its logical conclusion, would preclude consideration of the issue of environmental risk in any penalty proceeding for violation of a cancellation order. This is contrary to the EPA's own FIFRA Enforcement Response Policy ("ERP"), which the Region used to calculate the proposed penalty. The fact that a pesticide registration was canceled subjects the respondent to liability for this violation, and assessment of a penalty. But the fact of cancellation is not in any sense a determination on the amount of the penalty that should be assessed. The cancellation found that the canceled pesticide posed unreasonable risks as used in general; the penalty proceeding is intended, in part, to focus on the degree of such risk in the particular circumstances of the respondent's violations.

The Region also couches its argument in the principles of res judicata and collateral estoppel. These doctrines are patently inapplicable here. The primary element necessary for application of these doctrines is the identity of issues in the two proceedings. (See 46 Am.Jur. 2d, Judgments, §§539-541.). As already discussed above, the issues in the cancellation proceeding and the upcoming penalty hearing are wholly different.

It is true that the EPA has determined, as stated in the Notice, that "the use of EBDCs without [such] modified terms and conditions will result in unreasonable adverse effects to humans or the environment." The issue in this proceeding, however, is the appropriate amount of a civil penalty to impose for Respondent's

violations. This requires consideration of the "gravity" of the violations, pursuant to FIFRA §14(a)(4). The gravity of the violation is, in turn, partly determined according to the FIFRA ERP by assessing the toxicity of the subject pesticide, and the actual or potential harm from the violations to human health and the environment. This requires consideration of the "actual circumstances of the violation." (ERP, p. 21). Although EPA found that the general uses of EBDCs posed an unreasonable risk, Respondent can still attempt to show that its particular violations did not result in significant actual or potential risks to human health or the environment.

The cancellation proceeding of course did not consider the actual circumstances of Scotts-Sierra's violations for the purpose of determining the gravity of those violations. The issues in the two proceedings are completely different. The doctrines of res judicata and collateral estoppel do not apply. There is no basis to close the record on the risks and benefits of the pesticide mancozeb in relation to the actual circumstances of Respondent's sales of that pesticide after the cancellation. Complainant's motion to take official notice and to close the record on the risks and benefits of the use of mancozeb is denied in its entirety.

In practical terms, it must be noted that Respondent has not proffered any specific evidence to this point that could challenge the findings in the Notice of Cancellation. Although Respondent may still supplement its prehearing exchange, it currently only includes a vague indication that one witness will testify regarding "previous Company practices concerning EBDC, the product labels, and restrictions on product use." The record of the exhibits exchanged thus far does show that Respondent's products were sold for turf and garden applications, and would not have been canceled if Respondent had modified the labels as required by the Notice. The contents of the Notice are in the record. Assuming the findings in the Notice will not be challenged by any substantive expert evidence, they will presumably be accorded considerable weight. As discussed above, however, the record will remain open for consideration of the penalty factor of actual or potential risk to human health or the environment from Respondent's actual violations. In terms of the ERP, that could lead to some adjustment of the final penalty calculations.[(2)]

Motion to Exclude

In this motion, Complainant first seeks to exclude a document included in Respondent's prehearing exchange, entitled "An Economic Profile of U.S. Crop Protection Pesticide Industry." This portion of the motion is denied at this time as premature. Respondent has offered this document as relevant to the statutory penalty factor of the size of respondent's business, and the company's financial status. At this time there is no basis to exclude this document, as it may be relevant to those issues, if they are litigated. Complainant may renew any objection to its admission at the appropriate time during the hearing.

The Region also seeks to exclude evidence, or to preclude the Respondent from litigating the issue of its claimed inability to pay the proposed penalty of $785,000. In its prehearing exchange, Scotts-Sierra has indicated it intended to present two unidentified witnesses who will address Respondent's financial status, presumably in relation to the issues of size of the business and ability to pay. Respondent is correct in pointing out that it has until 30 days before the hearing to complete its prehearing exchange. Since the hearing is scheduled to begin on February 24, 1998, that date is rapidly approaching. Therefore, if Respondent does intend to contest these financial issues, it must identify its witnesses and exchange supporting documentary evidence, or run the risk that it will be precluded on these matters. I will allow such supplementation of the prehearing exchange until January 29, 1998.

The Region also requests that "Respondent be instructed to refrain from the discussion of prior FIFRA cases to which Respondent was not a party." This request is denied as vague and premature. If and when Respondent presents any evidence or argument concerning prior FIFRA cases, any appropriate objections and rulings may be made at the proper time.

Motion to Modify Prehearing Exchange

The Region has proposed to add two additional witnesses and several documents identified in its recent submittal. The Prehearing Order expressly allowed such modification or supplementation of the parties' prehearing exchanges, without motion, until 30 days before the hearing. Therefore, the modified prehearing exchange is accepted, and no motion was necessary.

Complainant also submitted an expanded statement in support of its penalty calculation, with the modified prehearing exchange. There is an apparent contradiction, however, in that this latest recent submittal states that the Region does not now intend to present a witness to "testify to the appropriateness of the proposed penalty unless directed to do so by the Presiding Administrative Law Judge." However, the Region's initial exchange identified the witness Marcy Katzin as the person who prepared the actual penalty calculation, and who was offered to testify (under cross-examination) on, among other things, "explain[ing] in detail how the proposed penalty amount was determined." The recent modified prehearing exchange only states that two witnesses are added, and does not withdraw Ms. Katzin as a witness. Respondent asserts it is entitled to confront witnesses who made determinations on the factors underlying the penalty calculation.

Certainly, as Complainant asserts, witnesses should not be presented to testify on matters of law. The Complainant does, however, bear the burden of going forward and the burden of persuasion with respect to the appropriateness of the proposed penalty. *In re New Waterbury, Ltd.* 5 E.A.D. 529, 538 (EAB, 1994). The Region must show it considered all the statutory penalty factors, and may do so by applying the relevant enforcement response policy. *In re Employees Insurance of Wausau and Group Eight Technology*, TSCA Appeal No. 95-6 (EAB, 1997, p. 35). The Region's burden thus extends to showing how it applied its assessment of the facts to its interpretation of the penalty factors.

The Region's penalty proposal here required application of the facts to the FIFRA ERP's guidelines. Complainant states that both Ms. Katzin and one of the new witnesses, Julie Fairfax, will testify on the communications and dealings between the parties after they Respondent learned of the cancellation. This offer of evidence does not however specifically describe the proposed factual testimony or how those facts were applied to the penalty calculation. For example, in the Region's 25-page penalty dissertation there is no mention of an issue clearly raised by the pleadings and prehearing exchanges that could lead to a significant penalty reduction under the ERP: whether Respondent voluntarily disclosed the violations to the EPA. Respondent is entitled to cross-examine the witness, presumably Ms. Katzin, who was primarily responsible for preparing the penalty calculation in this case. Therefore I will direct that witness by presented by Complainant or made available for cross-examination.

Order

1. Complainant's motion to take official notice of the Notice of Intent to Cancel EBDC pesticides, and to close the record on the risks and benefits of the pesticide mancozeb, is denied. The Notice is however already considered part of the record of this proceeding and will be received as an exhibit at hearing.

2. Complainant's motion to exclude is denied as premature. The parties will have until January 29, 1998 to supplement or modify their prehearing exchanges.

3. Complainant is permitted to modify its prehearing exchange. Complainant is also directed to produce a witness who can testify concerning the appropriateness of the proposed penalty and the Region's penalty calculation.

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Andrew S. Pearlstein

Administrative Law Judge

Dated: January 15, 1998

Washington, D.C.

1. The original named Respondent was the Grace-Sierra Crop Protection Company, of Milpitas, California, the predecessor in interest of Scotts-Sierra.

2. This entire issue may well turn out to have limited effect on the decision in any event. The Region's penalty calculations only assign median values for Respondent's violations with respect to pesticide toxicity and actual or potential environmental and human health risks. Under the ERP, the potential impact of the adjustment factor of voluntary disclosure, for example, could be greater. Another significant penalty consideration here may be the fairness of charging Respondent with the number of violations alleged in the Complaint.