7/24/74

ENVIRONMENTAL PROTECTION AGENCY

OFFICE OF ADMINISTRATIVE LAW JUDGES

In Re	:	
Beaulieu Chemical Company (John L. Beaulieu, Owner),	:	IF&R No. IX-10C Docket No. 141.12(P)
Respondent.	:	Initial Decision

Preliminary Statement

This is a proceeding under section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended (FIFRA 1972), 7 U.S.C. 136 1(a), [1] for assessment of a civil penalty for violations of sections 12(a)(1)(C) and 12(A)(1)(E) of the Act (7 U.S.C. 136j(a)(1)(C) and (E)). The proceeding is based on an amended complaint filed on February 13, 1974, [2] relating to the pesticide Beaulieu Udder-Dyne Sanitizing Udder Wash (Udder-Dyne) which was shipped from Stockton, California, to Manhattan, Montana, on November 12, 1972. In substance it is alleged that section 12(a)(1)(C) was violated in that the composition of the product differed from the composition as presented

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1/ The Federal Insecticide, Fungicide, and Rodenticide Act, as it existed prior to the 1972 amendments (FIFRA 1947), was amended by the Federal Environmental Pesticide Control Act of 1972 (FEPCA), P.L. 92-516. FIFRA 1972 has been codified in 7 U.S.C. 136 et seq.

2/ Original complaint was issued September 10, 1973.

in connection with its registration (7 U.S.C. 135a(a)(1)). [3/] It is also alleged that the product was misbranded in violation of section 12(a)(1)(E) in that the label of the product was different from the label submitted and approved in connection with the registration of the product. The complaint proposed to assess a civil penalty in the amount of $4,000.

The respondent [4/] filed an answer and requested a hearing. In the answer to the amended complaint the respondent in effect denied the allegations of the complaint and denied that violations had occurred. By way of affirmative defense respondent alleged certain factual matters which are considered later in the decision. The respondent challenged the appropriateness of the proposed penalty.

The proceedings were conducted pursuant to the Interim Rules of Practice governing hearings of this type, 38 F.R. 26360, et seq. Pursuant to section 168.36(d) of said Rules the Administrative Law Judge corresponded with the parties for the purpose of accomplishing some of the objectives of a prehearing conference. The correspondence is in the record.

3/ This reference is to FIFRA 1947. The registration provisions of FIFRA 1947 and regulations thereunder remain in effect until superseded by new registration regulations which are required to be promulgated by October 21, 1974. See sections 4(b) and 4(c)(1) of FEPCA. New registration regulations have not yet been promulgated.

4/ The term "respondent" herein refers to Beaulieu Chemical Company of which John L. Beaulieu is the sole owner. See Finding of Fact No. 1, infra.

A prehearing conference in this case was held in Stockton, California, on May 21, 1974, immediately followed by a hearing. The complainant was represented by Messrs. Matthew S. Walker and James L. Jaffe of the legal staff of EPA, Region IX and respondent was represented by Ms. Carol Atkinson of the law firm of Chargin & Briscoe of Stockton.

The respondent did not contest the interstate shipment of the product in question or the fact that a sample of the product was taken from one of the containers of the shipment.

Proposed findings and briefs were filed by the parties and have been duly considered by the Administrative Law Judge. After considering the entire record the Administrative Law Judge makes the following

Findings of Fact

1. The respondent Beaulieu Chemical Company, located in Stockton, California, is a sole proprietorship, wholly owned by John L. Beaulieu. The company has been in business since 1965. The company purchases and distributes chemical products and it also compounds chemicals into products which it distributes in California and interstate. Among the products that respondent distributes are pesticides as defined in Federal Insecticide, Fungicide, and Rodenticide Act, as amended (FIFRA).

2. The respondent compounds and distributes a product called Beaulieu Udder-Dyne which is a pesticide within the meaning of FIFRA.

3. Udder-Dyne has been registered under federal law as a pesticide (formerly called economic poison) since June 29, 1967, under registration number 9584-5. The Confidential Statement of Formula submitted by respondent in connection with the application for registration showed the formula as nonylphenol polyethylene glycol, 15.50%; phosphoric acid, 11.50%; inert ingredients, 73%. The label which was approved showed ingredients as follows: nonylphenoxy polyethylene glycol-iodine complex (provides 1.75% titratable iodine) 15.50%; inert ingredients 84.50%.

4. On November 12, 1972, the respondent shipped from Stockton, California, to Manhattan, Montana, 30 gallons of Udder-Dyne in cartons each containing six one-gallon plastic containers. On February 6, 1973, a Consumer Safety Officer of Environmental Protection Agency (formerly designated Inspector) took from the consignee, as a sample, a one-gallon container of the product that was so shipped.

5. The label of the container that was taken as a sample represented that it was registered under EPA Reg. No. 9584-5 and represented the product to contain 13.00% nonylphenoxypoly (ethylenexy)

ethanol-iodine complex (providing 1.75% titratable iodine); 8.25% phosphoric acid; and 78.75% inert ingredients. The product was so labeled when it was shipped from respondent's premises.

6. Chemical analyses of portions of the sample showed that the product contained 2.14% titratable iodine and 7.85% phosphoric acid.

Conclusions

The respondent violated section 12(a)(1)(C) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended, in that it distributed and shipped from Stockton, California, to Manhattan, Montana, a pesticide the composition of which differed at the time of distribution from its composition as described in a statement required and which it submitted in connection with the registration of the product. The respondent also violated section 12(a)(1)(E) of said Act in that the pesticide so distributed and shipped was misbranded in that the label was false and misleading since the product represented to be a registered pesticide and the representation as to ingredients on the label were different from those that were approved at the time of registration.

Having considered the size of respondent's business, the effect on respondent's ability to continue in business, and the gravity of the violations, it is determined that a penalty of $1,500 is appropriate for said violations.

John L. Beaulieu, the sole owner of Beaulieu Chemical Company, manages the company. His wife is in charge of the office. In addition, the company has nine employees -- six are in the plant, one is the foreman and the others are laborers. Neither Mr. Beaulieu nor any of the employees have had any formal training in chemistry or the sciences. In 1972 the gross sales of the company were approximately $452,000 and net income was $21,000. In 1973 the gross sales were $526,000 and net income was $31,000.

The company distributes its products in California and interstate. It has approximately 30 pesticides registered in California and some 10 or 15 registered under federal law. 5/ Approximately 15% of its sales are interstate. The product in question, Udder-Dyne, is a pesticide since its recommended uses include use as a germicide on equipment or utensils used in milking cows. Interstate shipments of Udder-Dyne represents a small percentage of respondent's total sales.

The respondent does not employ a chemist and no chemical tests are made on the ingredients that go into his products or on the finished products. The products are prepared by weight of ingredients by Mr. Beaulieu or one of the employees. Finished products containing iodine are tested with the use of a "test kit". Small pieces of specially treated paper are dipped into a sample of the finished product to give

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5/ Under section 3 of FIFRA 1972 all pesticides are required to be registered, whether distributed interstate or intrastate. However, this requirement is not effective until new regulations are promulgated. See footnote 3.

a reading of parts per million of iodine. No other control procedures are used by respondent.

On June 29, 1967, the respondent's registration for Udder-Dyne was approved by the U.S. Department of Agriculture, the predecessor of EPA, [6/] and this registration under number 9584-5 is still in effect. The product when diluted was to be used as a germicide on the udders of cows in milking and also on milking utensils. The confidential formula that respondent submitted in connection with this registration showed the product contained 15.50% nonylphenoxy polyethylene glycol-iodine complex; 11.50% phosphoric acid; 73% inert ingredients. The label that was approved in connection with the registration listed the iodine complex at 15.50% (provides 1.75% titratable iodine) and inert ingredients at 84.50%. [7/] The label directed that a solution be made using one ounce of the product to 5 gallons of water which would provide 25 ppm available iodine.

For all years from 1968 through 1974 (except 1972) the respondent has had registered with the Department of Food and Agriculture of the State of California a product called Udder-Dyne to be used for the same purposes as the federally approved product. The approved formula for the

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6/ Reorganization Plan No. 3 of 1970, 35 F.R. 15623, established the Environmental Protection Agency and, among other things, transferred from the Department of Agriculture to EPA the functions under the Federal Insecticide, Fungicide, and Rodenticide Act.

7/ At the hearing counsel for complainant stated that at the time of registration, the label that was approved permitted the phosphoric acid to be included as an inert ingredient, but that the present policy of the Registration Division is to require phosphoric acid to be listed as an active ingredient.

California registered product contains 11.30% of the iodine complex; 3.68% phosphoric acid; and 85.02% inert ingredients. The dilution directed is one ounce to 3 gallons of water which would also provide 25 ppm available iodine.

It appears from the evidence that in both products the iodine complex ingredient provides the germicidal properties.

In September 1972, the respondent applied to EPA to have the registration of Udder-Dyne changed to a formulation of 11.30% iodine complex and 3.68% phosphoric acid. The proposed formula was never approved and registration for such a product was never issued.

Also in 1972 the respondent was considering changing the registration of Udder-Dyne with the State of California to a formulation with 13% iodine complex. However, an application for this purpose was not filed.

Although respondent did not have registration for Udder-Dyne approved, either in California or with EPA, with a formulation of 13% iodine complex and 8.25% phosphoric acid, it had one-gallon plastic containers imprinted with a label (by the silk screen process) showing these percentages of active ingredients. Further, such label also bore the statement "EPA Reg. No. 9564-5."

On November 12, 1972, the respondent shipped from its plant in Stockton, California to Churchill Equipment Co., Manhattan, Montana, five cartons each containing six one-gallon containers of Udder-Dyne. The containers were those described in the preceding paragraph. Mr. Beaulieu testified that he had paper overlay labels of ingredients printed for

interstate shipments of this product which were to be superimposed over the imprinted statement of ingredients and that the overlay labels gave the ingredients according to the federally approved label.

One of the containers was taken as a sample from an unopened carton by an EPA inspector from Churchill Equipment on February 6, 1973. The carton taken as a sample did not have the overlay label and it bore the original imprint (13% iodine complex, 8.25% phosphoric acid).

Mr. Beaulieu testified that he instructed one of his employees to place the overlay label on the gallon containers before they were filled and that he was sure in his own mind that the overlay labels were on this particular shipment. He assumed that his instructions were carried out but he could not say for sure, and further he could not say that he saw these particular containers before they were shipped. He further testified that they were having a problem with paper labels sticking to plastic containers.

There was no direct evidence that the overlay labels were placed on the containers that were shipped on November 12, 1972. Such evidence could properly have come from the employee who was supposed to have affixed them to the containers. The respondent did not produce this employee as a witness or attempt to explain her absence.

Mr. Beaulieu also testified that he called the customer in Montana who had received this and other shipments of Udder-Dyne and asked him to check his stock of the product to see if the overlay labels were affixed to the containers. The customer reported that all containers

had the overlay labels and he could not recall one instance where the overlay label became detached. Accepting this testimony as true it would indicate that the overlay labels adhered firmly to the containers.

On consideration of all the evidence on this subject, we conclude that at the time of shipment there was no overlay label affixed to the container that was taken as a sample on Feburary 6, 1973.

Portions of the contents of the gallon container taken as a sample on February 6, 1973, were analyzed by qualified chemists in the Regional Office of EPA in San Francisco. These analyses showed that the product contained 2.14% titratable iodine and 7.85% phosphoric acid. 8/ The product was over-formulated for titratable iodine by approximately 22% and under-formulated for phosphoric acid by approximately 32%.

The provision authorizing civil penalties (section 14(a)) was a new provision that became effective with the 1972 amendments to FIFRA. Section 14(a)(3) (7 U.S.C. 136 l(a)(3) provides in pertinent part:

> In determining the amount of the penalty the Administrator shall consider the appropriateness of such penalty to the size of the business of the person charged, the effect on the person's ability to continue in business, and the gravity of the violation.

It is apparent that Congress intended that the penalty should fit the offender as well as the offense.

8/ There were three analyses for titratable iodine which showed 2.12%, 2.15% and 2.15%, an average of 2.14%. There were two analyses for phosphoric acid which showed 7.83% and 7.86%, an average of 7.85%. The differences in analyses were within the range of experimental error.

Section 168.53(b) of the Rules of Practice provides that in evaulating the appropriateness of the penalty, in addition to the above three factors, the following factors may also be considered: (1) respondent's history of compliance with the Act, and (2) any evidence of good faith.

We recently expressed our views in another case under section 14(a) that in considering appropriateness of the penalty to the "gravity of the violation" the evaluation should be made from two aspects -- gravity of harm and gravity of misconduct. We said:

> As to gravity of harm there should be considered the actual or potential harm or damage, including severity that resulted or could result from the particular violation. This must be viewed in the light of the purposes of the Act which includes protecting the public health and environment and affording to users the protection and benefits of the Act. Further, the Act provides enforcement officials with the means for preventing the marketing of violative products and also the means for obtaining speedy remedial action when necessary.
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> As to gravity of misconduct, matters which may be properly considered include such elements as intention 9/ and attitude of respondent; knowledge of statutory and regulatory requirements; whether there was negligence and if so the degree thereof; position and degree of responsibility of those who performed the offending acts; mitigating and aggravating circumstances; history of compliance with the Act; and good faith or lack thereof. It is observed that the Rules of Practice specify these last two elements as those that may be considered in evaluating the penalty (section 168.53(b)).

9/ Although intent is not an element of an offense in a civil penalty assessment case (cf. U.S. v. Dotterweich, 320 U.S. 277), intent to violate may be an aggravating factor.

In considering the gravity of harm, we look to the under-formulation of phosphoric acid and over-formulation of the iodine complex.

It is to be noted that the Udder-Dyne registered in California was approved with a phosphoric acid content of 3.68%. The product in question should have had 11.50% phosphoric acid but had only 7.85%. While the deficiency is substantial and shows inadequate quality control, we cannot find that there is any serious potential harm or inefficacy of the product by reason of this deficiency.

As to the over-formulation of the iodine complex, there was no evidence to show what harm, if any, might result therefrom. Were we permitted to do so we might conjecture that the use of this product with the excess of iodine complex might have some adverse effect in the purposes for which it was to be used. However, there is no evidence in this regard, and lacking such evidence we assess a degree of gravity of harm of a relatively low order.

On the matter of gravity of misconduct we first look at the respondent's history of non-compliance with the Act. The complainant offered no evidence of prior convictions or imposition of civil penalties. The complainant offered in evidence a number of citations and warning letters [10/] and

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10/ Counsel for complainant explained the difference between a citation and warning letter as follows:

> MR. JAFFE: A citation is a letter which was sent as a precursor for possible criminal action, a serious violation. A letter of warning is a violation which was felt not to be serious enough to warrant the possibility of any criminal action but merely to point out to the recipient of the letter that they had violat(ed) the law in a particular manner and that it should be corrected.

documents relating thereto that had been issued to respondent relating to alleged violations of the Act. 11/ We ruled that citations or warning letters to which respondent did not respond or with respect to which it did not deny the allegations would be admitted into evidence to show history of non-compliance, but that citations or warning letters in which respondent contested the alleged violations would not be admitted. Under this ruling, 15 citations for alleged violations that occurred from May 1967 through December 1972 and four warning letters for alleged violations from September 1970 through January 1973 were received into evidence. They were admitted over respondent's objection.

We are of the view that the same basic principles by which courts are guided in imposing sanctions in criminal cases are applicable in assessing civil penalties in cases of this type. It is well established that in imposing punishment in a criminal case the court may take into account the defendant's past record. Pennsylvania v. Ashe, 302 U.S. 51 (1937); Costner v. U.S., 271 F.2d 261 (6th Cir. 1959); Olson v. U.S., 234 F.2d 956 (4th Cir. 1956); 24B C.J.S. Criminal Law, section 1980b. Further, the Supreme Court has held that under Habitual Criminal Acts, prior convictions may be considered even though one of the convictions that entered into the calculations occurred before the Act was passed. Gryger v. Burke, 334 U.S. 728 (1948).

11/ The citations and warning letters were issued pursuant to section 6(c) of FIFRA 1947 (7 U.S.C., 135 d(c)).

The violations alleged in the citations and warning letters were violations of FIFRA which is the same Act under which respondent is charged in this proceeding. FEPCA 1972 amended FIFRA 1947 but did not repeal it. It is true that there were extensive amendments in 1972 but it is nevertheless the same Act.

As to those citations or warning letters in which respondent admitted the violations they were clearly extra-judicial admissions. The citations and warning letters to which it did not respond were admitted on the principle that "silence or acquiescence of a party may be shown where the facts stated tend to expose him to the consequences of a criminal act." 31A C.J.S., Evidence 295. In Megarry Brothers, Inc. v. U.S., 404 F.2d 479, 488 (8th Cir. 1968) the court quoted with approval the following language from McCormick, Evidence Sec. 247 (1954)

> Failure to reply to a letter containing statements which it would be natural under all circumstances for the addressee to deny if he believed them untrue, is receivable as evidence as an admission by silence.

See also Willard Helburn v. Spiewak, 180 F.2d 480, 482 (2nd Cir. 1950); 31A C.J.S., Evidence, Sec. 297.

Summarizing the allegations in the citations, we find charges relating to nine different products: four of the charges were non-registrati of the product; three were deficient active ingredients; three were non-registration for the particular distributor; considering the same charge against the same product as a single charge, there were four charges for absence of warnings and caution [12/] and three for failure to bear registration number; [12/] there was one charge for failure to bear statement

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12/ This charge was made against three shipments of the same product.

of weight or measure of contents. In the warning letters two of the charges were for non-registration for the named distributor and the other charges were for minor label deficiencies.

There was also received into evidence over respondent's objections documents and results of analyses relating to four products of which samples were taken by an EPA inspector during an inspection of respondent's plant on April 4, 1974. These were offered to show continuing violations by respondent and lack of good faith.

Mr. Beaulieu testified in substance that the company does not have stock on hand for products that are to be shipped outside of California and that such products are compounded in response to specific orders and that the products from which samples were taken were not intended for interstate shipment. However, records of interstate shipments of these products were examined by the EPA inspector and Mr. Beaulieu signed a statement to the effect that such products from which samples were taken had been shipped in interstate commerce. Further, the samples of the products were taken from stock on hand and the label of each product bore an EPA registration number. We find that products from which the samples were taken were being held for sale for interstate shipment.

Two of the products were deficient in active ingredients and one had an excess of active ingredients. The labels of three of the products were not in accordance with the labels as accepted at time of registration.

At the hearing on May 21, 1974, Mr. Beaulieu stated that he had sent samples of the four products to an independent chemical laboratory for

analysis about a week previously and that the results were expected in about a week. We granted respondent 10 days within which to submit results of these analyses. The respondent submitted a copy of letter from a laboratory dated June 20, 1974, showing results of analyses of four named products which the laboratory received on June 18, 1974. Although the names of the products were the same as those taken during the plant inspection there is no proof that they were from the same batch as the samples that were taken on April 4. Further, it is obvious that the samples tested were not the ones that Mr. Beaulieu said he sent to the laboratory around the middle of May. The complainant offered to furnish respondent with portions of the samples taken on April 4 but it appears that respondent did not accept the offer. We do not consider the letter from the laboratory as reliable evidence for the purpose of establishing the chemical content of the products of which samples were taken on April 4.

Mr. Beaulieu has been operating the respondent company since 1965. Prior thereto he was the owner of another chemical company. In May 1968, in response to a citation that was issued the previous month, Mr. Beaulieu acknowledged that he was fully aware of the regulations under FIFRA. Notwithstanding, the respondent continued to violate the provisions of the Act. We have not overlooked the fact that none of the violations for which the citations were issued were considered serious enough to warrant the institution of criminal proceedings.

The violations in question, from a harm point of view, were not shown to be of a high degree of gravity. However, respondent's operations over the years demonstrate carelessness, negligence, inadequate controls, and disregard for requirements of the Act. While it may be true that respondent corrected most of the deficiences following the citations and warnings this does not excuse the violations. The respondent's continued history of non-compliance with the Act has defeated some of its prime purposes which are to eliminate unregistered, adulterated, and misbranded pesticides from the channels of commerce.

The nature of the violations charged in this case ((1) composition differed from that presented in connection with registration and (2) misbranding in that ingredients stated on label of product differed from ingredients stated on label approved in connection with registration) are so closely connected that we are imposing a single penalty for the violations.

In determining the appropriateness of the penalty, we have considered not only the gravity of the violations but also the size of respondent's business and effect on respondent's ability to continue in business.

In addition to Mr. Beaulieu and his wife, the company has nine employees. Its sales in 1973 were $527,000 an increase of some $75,000 over 1972. The net profit in 1973 was $31,000, an increase of $10,000 over 1972. Mr. Beaulieu's taxable income increased almost four-fold from 1970 through 1973. It is apparent that respondent is engaged in a profitable and growing business.

An accountant's report, prepared without audit, for the year ending December 31, 1973, shows assets of $230,403 including cash of $13,000 and collectible accounts receivable of $80,000. Liabilities, including long term liabilities of $55,600, are shown as $258,000 for a net worth deficit of approximately $28,000. We have concluded that imposition of a penalty of $1,500 will not effect respondent's ability to continue in business.

The proposed Findings of Fact and Conclusions submitted by the parties have been considered. To the extent that they are consistent with Findings of Fact and Conclusions herein, they are granted, otherwise they are denied.

Having considered the entire record and based on the Findings of Fact and Conclusions herein, it is proposed that the following order be issued.

Final Order

Pursuant to section 14(a)(1) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended (7 U.S.C. 136 l(a)(1)), a civil penalty of $1,500 is assessed against Beaulieu Chemical Company (John L. Beaulieu, owner), Stockton, California, for violations of said Act which have been established on the basis of amended complaint filed on February 13, 1974.

Bernard D. Levinson
Administrative Law Judge

July 24, 1974