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UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY

Environmental Protection Agency, Complainant	)	I.F.&R. Docket No. VI-23C
v.	)	
Stauffer Chemical Company, Respondent	)	INITIAL DECISION

By complaint, filed April 10, 1974, pursuant to 40 C.F.R. 168.30, Environmental Protection Agency, Region VI (Complainant) alleged there was reason to believe that Stauffer Chemical Company (Respondent) had violated the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended [7 U.S.C. 135-135k; as amended, 86 Stat. 973, 7 U.S.C. 136-136y (1972)]. Specifically, it was alleged that on or about April 13, 1973, Respondent shipped the product "CHLORDANE 8-E" from Houston, Texas, to Shreveport, Louisiana, and that the claims on the products label did not conform to the registered label, in violation of 7 U.S.C. 135a(a)(1). A civil penalty assessment of $1,900.00 was proposed.

By amended complaint, filed August 15, 1974, accepted by Order of September 4, 1974, the proposed assessment was increased to $2,900.00.

By Answer, filed May 10, 1974, and amended Answer, dated September 24, 1974, Stauffer denied the alleged violation and requested a formal

hearing, which was held in Houston, Texas, on October 9, 1974, at which Stauffer was represented by Gary Ford, Attorney, of Westport, Connecticut, and complainant was represented by Harless Benthul and Stan Curry, Attorneys, of Dallas, Texas. Proposed Findings and Briefs, pursuant to 40 C.F.R. 168.45, were filed by complainant and respondent, and replies were filed on February 6, 1975.

Situs of Hearing: Initially, a controversy arose as to the location of the hearing which Stauffer had requested. Stauffer first requested that the hearing be held in Richmond, California, where it maintains offices. When advised that it would appear that Houston, Texas, was the proper site for the hearing, it then requested the hearing be held in Westport, Connecticut, where its corporate headquarters are located. Thereupon, the Notice of Hearing, dated September 6, 1974, specifying Houston, Texas, as the place of hearing was issued. By Motion, dated September 30, 1974, Stauffer objected to Houston, Texas, as the place of hearing, citing Section 14(a)(3) of FIFRA which specifies that hearings in this type of case must be held in the "county, parish, or incorporated city of the residence of the person charged." Certification of the Hearing Order to the Regional Administrator for decision was requested. In the Motion, it was contended the "residence" of Stauffer, is Wilmington, Delaware, as it was incorporated in that state (although a hearing at that city was not specifically requested).

The Motion for a Certification was denied by Order of October 4, 1974. The reasons for such denial are therein stated and are reaffirmed hereby. Respondent did not renew objection to the hearing site in its Proposed Findings and Brief.

FINDINGS OF FACT

A. Stipulated Facts

1. On or about April 13, 1973, Stauffer (Respondent) shipped the product "CHLORDANE 8-E" from Houston, Texas, to Shreveport, Louisiana, consigned to Planters Seed Company.

2. Said product is a pesticide within the meaning of FIFRA [7 U.S.C. 136(u)].

3. The claims which appear on the label on said sample of shipment, which relate to control of cut worms and mole crickets, do not appear on the registered label [Reg. No. 476-875].

4. The dosage rates for termite control which appear on the sample label differ from those on the registered label.

5. The claims made on the sample label regarding control of mole crickets and cut worms, which do not appear on the registered label, would be acceptable to EPA, and in the application of the Civil Penalty Assessment Schedule in effect at the time of the issuance, Complainant referred to Section 2(B) [claims would be acceptable] rather than Section 2(A) [claims unacceptable] in the

category "Labeling Violations." Stated otherwise, the product would be effective in the control of cut worms and mole crickets if those claims had been made as part of Stauffer's registration.

6. Respondent, Stauffer Chemical Company, is a corporation incorporated under the laws of the State of Delaware, with its principal office located in Westport, Connecticut, and manufactures a number of pesticides.

B. Additional Facts

7. Mr. Edward Bunch, an employee of the Pesticides Registration Division of EPA and its predecessor U.S. Department of Agriculture, for many years, conducted tests of termite preparations at the Beltsville Research Center of USDA for eleven or twelve years and subsequently reviewed labeling for registration and enforcement cases.

8. Bunch prepared the Enforcement Case Review (EPA Ex. No. 9) which led to this proceeding. He found the sample label did not conform to the registered label in that it bore claims for cut worms and mole crickets that do not appear on the registered label; in addition, the termite directions of the sample label do not provide a dosage rate of 1 gallon per linear foot for deep trenches, also appearing on the registered label.

9. The dosage rate on the sample label for termites would not be effective for deep trenches, but would be effective for shallow

trenches of 15" to 18" deep. The greater amount of dirt from the deeper trenches, which must be saturated, requires enough liquid to accomplish that. The deep trenches require four gallons per five linear feet, slightly less than one gallon per foot, rather than the one-half gallon per foot stated on the sample label.

10. The registered label specifies a rate of one gallon per linear foot for a 30" trench, which represents the regular laboratory policy for dosage rates of this type. A Department of Agriculture pamphlet on Subterranean Termites (Home and Garden Bulletin No. 64) specifies a similar treatment, as does a bulletin put out by Velsicol, the manufacturer of Chlordane.

11. A Summary of Registered Agricultural Pesticide Chemical Uses, issued by the U.S. Department of Agriculture lists dosages for many agricultural crops but does not include termite control.

12. EPA is in the process of preparing, but has not completed, a compendium of pesticides including the dosage rates for termite control, but permanent record cards are maintained containing this information for EPA use which have not been communicated to registrants.

13. Mr. Terrell Hunt of the Pesticides Enforcement Division of EPA explained the methods by which the Agency's civil penalty assessment schedule was constructed, to include the statutory factors of (1) size of business of the person charged, (2) his ability to continue in business, and (3) the gravity of the violation. The application

of the schedule to the facts of this case indicate assessment for a Category III firm (gross sales in excess of $1,000,000.00 a year), for labeling violations, Section Two (2)(B) -- claims would be acceptable -- of $600 to $900; for Section Three, (2)(D)(2) -- Partially Inefficacious (Economic Fraud) -- the assessment would be from $2,300.00 to $2,700.00, or together, the range would be from $2,700.00 (the amount proposed) to $3,600.00.

14. John Saylor, Stauffer's Labeling Registrar, supplied data from the company files on the registration of the product in issue and a related product.

15. By letter of July 14, 1971, EPA approved the registration of STAUFFER CHLORDANE 8-E, USDA Reg. No. 476-875 in response to a company submission dated April 28, 1971. The approval was conditioned on stated modification being made in the label. The formula of the approved product was 71.4 percent Chlordane Technical and 24 percent Xylene Range Aromatic Solvent, and 4.6 percent Inert Ingredients.

16. By letter of July 13, 1971, EPA also approved the registration of STAUFFER CHLORDANE 8-E USDA Reg. No. 476-493, in response to a company submission dated April 28, 1971. The approval was conditioned on stated modifications being made in the label. The formula of this product was somewhat similar, consisting of 72.3 percent Chlordane Technical, 22.3 percent Petroleum Hydrocarbon

Solvent, and 5.4 percent Inert Ingredients. The principal difference between the two products is in the solvent utilized, but as to each eight pounds of technical Chlordane per gallon, is provided. Stauffer has the two products because in California and the West it can buy the petroleum hydrocarbon solvent at a lower price than xyelene, whereas in the East and Southwest the reverse is true. In its regionalized operations, Stauffer marketed the two products in the same manner, i.e., the Reg. 476-493 product is distributed in the West Coast area and the product here in issue Reg. No. 476-875 is distributed in the East and Southwest.

18. In the shipment here in issue, from Houston, Texas, to Shreveport, Louisiana, the label was printed in Weslaco, Texas, in the Southwest sales and manufacturing region. The person in charge of the printing apparently took a West Coast label and its crop and insect claims, which differed from the eastern U.S. claims, and erroneously had it printed and they were applied to the shipment here in issue from Stauffer's former plant and warehouse in Houston, a facility which is being phased out.

19. The West Coast label, which had been approved by EPA, contained a dosage rate in termites of half a gallon per linear

foot in a trench 1 to 2 feet deep. It also provided that for buildings with deep footings, trenches should be 30" deep, but no mention was made of an increased dosage rate.

20. By letter of June 17, 1974, subsequent to the filing of the present complaint, EPA requested that Stauffer revise the label for Reg. No. 476-493 (the West Coast product) to "provide for a dosage rate of 1/2 gallon per linear foot for trenches up to 15 inches deep and 1 gallon per linear foot for trenches exceeding this depth. A 30" trench should be provided for buildings with deep footings."

21. After the EPA complaint was filed, Stauffer took corrective measures and sent out 44 Mail-O-Grams to its distributors, made a number of telephone calls, printed new labels, relabeled 315 5-gallon cans, and 2793 1-gallon cans, incurred freight costs for the return of the products for relabeling and reshipping to distributors, for which it incurred an estimated cost of $1,782.51 for corrective measures. The responsibility for printing labels has now been consolidated into the Richmond, California, office to prevent further mistakes such as here occurred.

CONCLUSIONS

The fact of violation in this proceeding is uncontested. The sole question is whether the act committed may be viewed as

two offenses for which two separate penalties may be imposed, and hence, the proper total penalty to assess. Additionally, Stauffer argues that, under the facts, no penalty should be imposed.

Both complainant and respondent treat the violation as falling under Section 3(a)(1) of the 1947 FIFRA (7 U.S.C. 135) as continued in effect by Section 4(b) of the Federal Environmental Pesticide Control Act of 1972 (PL. 92-516, 86 Stat. 973). That Section reads in pertinent part, as follows:

> Sec. 3a It shall be unlawful for any person to . . . ship . . . any of the following:
> (1) Any economic poison which is not registered pursuant to the provisions of Section 4 of this Act, or any economic poison if any of the claims made for its use differ in substance from the representations made in connection with its registration, or if the composition of an economic poison differs . . .
> [underscoring supplied to significant language]

Each of the offenses alleged by complainant falls within the underscored clause. While the construction of the Act suggests that the underscored clause constitutes a single statutory offense -- and both of the alleged offenses fall wholly within the clause -- it need not here be decided if the two elements of the underscored clause constitute a single statutory offense.[1/] In any event, the peculiar facts of this case, as set out below, justify the conclusion that, in effect, only a single penalty is appropriate.

1/ It is noted that had reliance been placed on the 1972 amended FIFRA Act (86 Stat. 975; 7 U.S.C. 136), the two "offenses" would apparently fall under separate provisions, i.e., additional claims not registered (Sec. 12(a)(1)(B), and inadequate directions for use Sec. 12(a)(1)(E) and Sec. 2(q)(F)).

Stauffer had two properly approved registrations for a product of the same name and generally of similar content, one distributed on the West Coast and the other in the Southwest and East Coast, the latter product being here involved. An employee in printing a supply of labels for the East Coast product somehow garbled portions of the text of the approved West Coast label into that used on the label for the East Coast product. These labels were thereupon affixed to the shipment here in question, resulting in the acknowledged violation. After learning of the error, Stauffer took corrective action, including recall and relabeling of stocks in the hands of distributors.

The West Coast label, which called for a dosage rate of 1/2 gallon per linear foot, had EPA approval, although subsequent to the institution of this proceeding, it advised Stauffer to amend the dosage of the West Coast product for termite use to that of the East Coast. That the "error" of EPA in accepting the 1/2 gallon dosage rate for the West Coast product, in spite of the obvious weight of authority that the 1 gallon (or 4/5 gallon) rate is necessary in deep trenches, and its subsequently requested correction, somehow contributed to Stauffer's offense, as urged in its proposed findings is wholly without merit. Accordingly, its proposed findings Nos. 7 and 14 are rejected.

Also, Stauffer's proposed finding No. 13 concerning EPA's failure to have published a compendium of uses and dosage rates, is rejected because, while factually correct, it has no bearing on the present issue.

With regard to the mistaken addition to the label of the cutworm and mole cricket usage and dosage (from its West Coast label), EPA had already approved it for the West Coast label and has stipulated that it would have been accepted for the East Coast label, had it been submitted. As heretofore found, the civil assessment schedule takes into account the several factors of appropriateness as to related size of business, effect on the ability to continue in business, and the gravity of the violation. In considering the "gravity" factor it has also been held that there are elements of gravity of harm and of misconduct to be considered. Compare Amvac Chemical Corporation, I.F.&R. Docket No. IX-4C.[2/] In this instance, there is neither potential harm nor misconduct involved and, even if considered a separate offense from the termite dosage rate discussed below, it would appear appropriate to assign a zero penalty. Moreover, it is noted that the item in the Civil Assessment Penalty Code

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2/ Initial Decision July 11, 1974; adopted by Final Order of October 31, 1974.

which serves as the basis of the $600.00 penalty proposed, appears under the grouping. "Section Two: Unwarranted Statements with Respect to Product Safety." Complainant does not explain or justify the classification of this act as relating to product safety.[3/]

Accordingly, there will be considered only the appropriateness of the penalty to be assessed for the offense as to the inadequate dosage rate for termite treatment in deep trenches. This offense is properly classified as "Section Three: Directions for Use . . . 2. Directions for use Materially differed from those accepted in connection with products Registration. . . Inefficacious (Economic Fraud) . . . 2. Partial." For this the penalty proposed in the former schedule is $2,300.00 to $2,700.00[4/], and the complaint proposed the bottom of that range.

Buyers of the product involved herein, had they observed the instructions in deep trench application, would have been subjected to economic fraud because the applications would have been inefficacious and, hence, wasted. Further, having gone to the expense of

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3/ The more recent Guidelines, published July 18, 1974, 39 F.R. 27711, specifies the same classification with some modification of the assigned penalties.

4/ While no financial or gross sales data was submitted of record, Stauffer has not questioned its classification as having sales in excess of $1,000,000.00 annually.

such treatment, extensive damage might result before the inefficacy of the treatment was discovered. Hence, the infraction is of a serious nature. In this case, however, the record does not disclose that any actual usage occurred, that the company took remedial action promptly, and that the violation was a result of mistake in printing the label rather than intended desire to defraud.

Under the circumstances, the penalty assessed herein is determined by applying a 40 percent reduction (an authority now vested in regional enforcement offices of EPA by the New Civil Penalty Assessment Schedule.)

The proposed Findings and Conclusions of the parties have been considered herein and, to the extent they are inconsistent with the foregoing, they are denied.

PROPOSED FINAL ORDER[5/]

Pursuant to Section 14 (a)(1) of the Federal Insecticide, Fungicide and Rodenticide Act, as amended (86 Stat. 973; 7 U.S.C. 136 l(a)(1), a civil penalty of $1,380.00 is assessed against Stauffer Corporation for violations of the said Act which have been established on the basis of the amended complaint herein, filed August 15, 1974.

Frederick W. Denniston

Frederick W. Denniston
Administrative Law Judge

March 13, 1975

5/ Unless appeal is taken by the filing of exceptions pursuant to 40 C.F.R. 168.51, or the Regional Administrator elects to review the initial decision on his own motion, the order may become the final order of the Regional Administrator.