9/29/94

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of	:	
ASSOCIATED PRODUCTS, INC.	:	Docket No. IF&R-III-412-C
	:	Judge Greene
Respondent	:	

DECISION AND ORDER

Federal Insecticide, Rodenticide, and Fungicide Act, §§ 12 and 14, 7 U.S.C. §§ 136j and 136l: Under the circumstances of this case, the appropriate penalty to be assessed is $1000.00.

Appearances:

Janet E. Sharke, Assistant Regional Counsel, United States Environmental Protection Agency, Region II, 841 Chestnut Building, Philadelphia, Pennsylvania, 19107, for complainant.

Mr. Harlan W. Simons and Mr. Ralph Simons, Associated Products, Inc., 1479 Glenn Avenue, Post Office Box 8, Glenshaw, Pennsylvania 15116-0008, for respondent.

Before: J. F. Greene, Administrative Law Judge

Decided: September 29, 1994

DECISION AND ORDER

This matter arises under Section 12(a)(2) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended, 7 U.S.C. § 136j(a)(2) ["FIFRA," or "the Act"], which makes unlawful certain acts in connection with the production, labelling, and reporting of federally regulated pesticide products. The complaint alleges that respondent produced two pesticide products, "Sani-Germ Disinfectant Pump Spray," and "Fikes Disinfectant Pump Spray" at a site not registered with the United States Environmental Protection Agency [EPA] pursuant to Section 7 of FIFRA, 7 U.S.C. § 136e.[1] Production of a pesticide product at a site not registered pursuant to application to EPA is made unlawful by FIFRA § 12(a)(2)(L), 7 U.S.C. § 136e. The complaint further charges that respondent knowingly falsified the date of a pesticide production reporting form submitted to EPA pursuant to 40 C.F.R. §§ 167.3 and 167.85.[2] Complainant seeks $13,500 for these alleged violations, or $4500 per count, in accordance with EPA's "Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act [FIFRA]" of July 2, 1990, and pursuant to § 14(a) of FIFRA, 7 U.S.C. § 136l. [3] Respondent denied the charges, noting at the same

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[1] Complaint of September 27, 1990, at 1-3, paragraphs 1-16 (Counts I and II).

[2] Id. at 3-4, paragraphs 17-25 (Count III).

[3] Id. at 4-5.

time that both the Fikes and Sani-Germ sprays bore the same product registration number (EPA registration number 1839-82-3782). [4]

Discussion

A preliminary issue here is whether respondent, a Pennsylvania corporation, is entitled to an oral evidentiary hearing in connection with a determination as to the appropriate penalty for the violations found. That issue ultimately reduces itself, on the facts of this case, to whether the respondent corporation and its apparently sole owner have a right to argue the case orally where there has not only been no cooperation with government counsel or with this tribunal in furnishing material to support bald allegations of insufficiency of funds, but where respondent's activities respecting this matter border upon being contumacious.

Upon review of this record, it is clear that the government's basis for requesting imposition of a penalty in the amount of $3000[5] is unrebutted and that failure of respondent to participate meaningfully in supplying any underlying material to support his totally unsubstantiated inability to pay assertions leaves these defenses as nothing other than naked unsupported arguments which do not constitute a dispute over material facts

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[4] Letter of October 3, 1990, which served as an answer to the complaint.

[5] Complainant reduced its proposal from $5000 to $3000 (see pages 9-10, infra), based upon an unsupported written statement as to the size of respondent's business, despite respondent's unwillingness to cooperate in producting "ability to pay" information.

at issue that would require an oral hearing. These defenses, if they were to be stated orally without supporting data, would require no more weight than can be accorded now on the written record. For example, respondent's reasons for not supplying tax records, copies of which are easily obtainable by him either from the State of Delaware or from the U. S. Internal Revenue Service, even if his own records were in fact lost or destroyed, is not credible. Respondent has the burden of showing that there is something to be gained by going to trial. No such showing has been made. Furthermore, any party to a suit, including the federal government, is entitled not to be sandbagged by evidence produced for the first time in the courtroom. Despite a clear order to disclose his evidence, respondent here has failed to do so. It must be assumed that there is no evidence beyond mere unsupported statements, or, in the alternative, that respondent chooses not to reveal it. In either case, the result at this point in the proceeding is the same.

Assertions of negative impact of a penalty assessment upon ability to continue in business have been construed under FIFRA as affirmative defenses, which respondent must establish by producing credible evidence.[6] This interpretation is consistent with the Administrative Procedure Act, 5 U.S.C. § 551, § 556, and with EPA

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[6] Helena Chemical Company, FIFRA Appeal No. 87-3, at 14-19, slip opinion.

regulations.[7] Assertions of inability to pay must likewise be considered affirmative defenses (the establishment of which are peculiarly within respondent's ability) and for the same reasons. Not unreasonably, it is up to respondent to show inability to pay, after a decision finding liability has issued.

The question of whether an opportunity must be afforded to present evidence orally on the penalty issue in FIFRA matters has been addressed previously, and it has been held that in appropriate cases no oral oral evidentiary hearing is required.[8] An oral evidentiary hearing convened to hear further unsupported argument would be unproductive; opportunity to confront the government's witnesses serves no purpose for the parties or trier of fact when the issue is whether respondent can afford to pay a penalty, and when respondent has failed or refused to produce any credible evidence to support that assertion. Further, respondent stated that he has no witnesses "at this time."[9] Where the

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[7] Id. See also 40 C.F.R. § 22.24, which provides that ". . . . complainant has the burden of going forward with and of proving . . . that the proposed civil penalty is appropriate. Following establishment of a prima facie case, respondent shall have the burden of presenting and of going forward with any defense to the allegations set forth in the complaint."

[8] See In the Matter of Bestech, Inc., Docket No. IF&R-004-91-7073-C, March 13, 1992, at 4-5 slip opinion; Environmental Protection Agency v. Streeter Flying Service, Inc., IF&R VII-612C-85P, August 27, 1985, at 6-7 slip op.; In re World Wide Industrial Supply, FIFRA 1085-01-13-012P, January 9, 1986, at 4. See also Rainbow Paint and Coatings, Inc., EPCRA Docket No. VII-89-T-609, to the effect that respondent is not entitled to a hearing concerning the penalty question under all circumstances.

[9] Respondent's letter of September 19, 1991.

ultimate decision will not be enhanced or assisted by the receipt of evidence in an oral evidentiary hearing, an agency is not required to provide one, as opposed to "some form of hearing," in the absence of remarkable circumstances;[10] and due process does not mandate that a party be given an oral hearing as opposed to the opportunity to submit written comments.[11] It is sufficient in this case that respondent on more than one occasion has been given a "meaningful opportunity to present [its] case."[12]

A review of the facts and law here reveals no denial of respondent's rights. What is revealed, instead, is near contempt for lawful process.

This case represents an area of federal government enforcement which may be considered by some to be less urgent than much other government activity in protecting the public health and safety. But enforcement efforts must not be nibbled away even by "small" violations of the Act. It is quite possible -- even likely -- that complainant here could have agreed to a significant reduction of the penalty in exchange for a cease and desist order -- if reliable evidence of inability to pay had been produced and that a small corporate respondent whether represented by counsel or

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[10] See 2 Fed. Proc. LEd § 2:103; Mathews v. Eldridge, 424 U. S. 319, 332. See also discussion at 333-335, 343-349.

[11] 2 Fed. Proc. LEd §2.106; Allied Van Lines v. United States, 303 F. Supp. 742 (C. D. Cal. 1969).

[12] Id. at 349. See also 333: "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner,'" quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965). See also the discussion at 348-349.

appearing pro se could anticipate a somewhat sympathetic review by a judge or agency upon review. What is present here, however, is a contempt of law and an abuse of process by one who professes his "rights" but who is sophisticated enough to incorporate his business and to marshall both political and media support.[13] After significant attempts over many months on the part of complainant and this office to make the production of credible evidence of inability to pay as simple and easy as possible, this matter must come to an end without needless expenditure of public resources. Respondent has made no good faith effort to cooperate and has resisted efforts intended to assist him in producing credible evidence. There is no entitlement to further consideration. There is no legal or evidentiary reason in the current posture of this case to have an oral evidentiary hearing.

As has been noted above, the origial penalty proposed in the complaint was $5000. This calculation was based in part upon the assumption that respondent's business fell into "business category" I [see EPA Enforcement Response Policy for FIFRA, at 21] in the absence of information as to the size of respondent's business. Even after respondent was found liable and was ordered both to supply reliable information relating to ability to pay and to confer with complainant to attempt to settle the penalty issue, respondent failed to provide such information.

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[13] Three page typed letter of comment upon the Order of May 22, 1992, received in this office on June 5, 1992. Copies are shown to Senator William [sic] Biden, "Mr. Jack Anderson, Journalist," "Mr. William Reilly, Loudoun County, Virginia," "Editor, Delaware State News," and others.

Accordingly, it is concluded that the proper penalty here should be $1000.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent is a Pennsylvania corporation, operating under the laws of the Commonwealth of Pennsylvania. It owns and operates a facility at 221 Lansdown Road, Rogan Township, Brynmawr, Pennsylvania.

2. Respondent's plant was in fact not registered pursuant to the portions of the statute cited in the complaint. Accordingly, respondent was in violation of the Act, as charged in the complaint.

3. There is no evidence that respondent deliberately falsified information provided to EPA on forms which Respondent filed. Accordingly, it is concluded that respondent did not deliberately falsify information, and that the information on the forms was not in fact false. Therefore, respondent did not violate the Act as charged in Count II of the complaint.

4. The appropriate penalty to be assessed herein for violations of the Act as charged in Count I of the complaint is $1000, based upon all the circumstances of this case.

ORDER

Accordingly, respondent herein shall pay the sum of $1000, by cashier's check or certified check payable to the United States of America, no later than thirty days from the date of service of this

Order. The check shall be sent to:

Regional Hearing Clerk
U. S. EPA, Region III
Post Office Box 360515M
Pittsburgh, PA 15251

And it is FURTHER ORDERED that respondent shall transmit a copy of the signed check to the Regional Hearing Clerk, at the listed for complainant's counsel on the front of this Decision and Order, at the same time the check itself is transmitted to the above address.

J. F. Greene
Administrative Law Judge

Washington, D. C.
September 30, 1994