
UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of:

**Timothy Wilson, d/b/a
Wilson's Pest Control,**

Respondent.

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Docket No. FIFRA-07-2023-0135

RESPONDENT'S INITIAL POST-HEARING BRIEF

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INTRODUCTION

Complainant's ("EPA") Motion for Accelerated Decision was granted as to liability of Counts 8 through 20 of the EPA's Amended Complaint, and the Respondent ("Wilson"), was found liable on those counts. The Motion for Accelerated Decision as to liability on Count 1 through 7 and Count 21 of the Amended Complaint was denied, and Wilson made a timely request for a hearing on those counts.

A hearing was held in St. Louis, Missouri on February 25, 2025.

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ARGUMENT

I. The civil penalty proposed by the EPA should not be assessed against Wilson based on evidence which is sufficiently mitigating to warrant rejection of the penalty or, alternatively, a significant reduction, at a minimum

A. Principles of law

The Agency has proposed and argues for imposition of a total penalty in the amount of \$149,659 on all counts. (EPA brief at 4, 5 and 32). The EPA argues that one of the main intents of imposing civil penalties is “to punish culpable individuals and deter future violations, not just to extract compensation or restore the status quo,” citing *Kelly v. EPA*, 203 F.3d, 519 (7th Cir. 2000) (EPA brief at 19). The penalty in *Kelly v. EPA*, *supra*, was assessed under the Clean Water Act, not under FIFRA. Punishment is not one of the main intents of civil penalties under FIFRA, and, therefore, is not applicable in this case, contrary to EPA’s argument. In assessing the penalty in *Kelly* there was a finding that the plaintiff, Kelly, had actual knowledge that he was violating the Clean Water Act as a result of a prior incident and, further, that Kelly directed the violation. The intent of civil penalties under FIFRA is to deter, not to punish, contrary to the EPA’s contention. “[C]ivil penalties under FIFRA ‘are intended to deter through regulation, not reprimand through punishment.’” *In re: Johnson Pacific, Inc., Respondent*, 5 E.A.D. 696 (E.P.A., 1995) WL 90174, *8) (internal citations omitted) (emphasis supplied). *In re: Johnson Pacific, Inc.* involved violations of FIFRA arising out of the sale of unlabeled and illegally repackaged product by Respondent Johnson. The presiding officer took equity into consideration in making a determination as to the appropriate penalty to be assessed

in that case.

Under 40 C.F.R. § 22.27(b) of the Consolidated Rules of Practice a penalty should be “based on the evidence in the record and in accordance with any penalty criteria set forth in the Act.” 40 C.F.R. § 22.27 (b) also provides that any civil guidelines issued under the Act shall be considered. However, such penalty guidelines “are not regulations and are not binding” upon the ALJ in making penalty determinations. *In the Matter of: Liphatech, Inc., Respondent*, 2014 WL 1012749 (2014) (E.P.A.), *73, citing *Rhee Bros., Inc.*, EPA Docket FIFRA-03-2005-0028, 2006 EPA ALJ LEXIS 32, at*33 (ALJ, Sept. 19, 2006; *Green Thumb Nursery, Inc.*, 6 E.A.D. 782, 802 n.38 (EAB 1977)). The reason that the EPA’s penalty policies do not bind the ALJ is policies of this type have not been subject to the rulemaking procedures of the Administrative Procedure Act and, therefore, lack the force of law. See *In the Matter of: Liphatech, Inc., supra* at *73, citing *M.A. Bruder & Sons, Inc.*, 10 E.A.D. 598, 610 EAB 2002). Thus, the ALJ has significant discretion in setting penalties. Under 40 C.F.R. § 22.24, Complainant bears the burdens of presentation and persuasion to show that the relief sought in this case.

Under FIFRA § 136l(a)(4) the Administrator, in determining the amount of the penalty, is required to consider the following: 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, as noted by the Agency (EPA brief at 19)

FIFRA § 136l(a)(4) further provides: “Whenever the Administrator finds that the violation occurred despite the exercise of due care *or did not cause significant harm to health or the environment*, the Administrator may issue a warning in lieu of assessing a

penalty” (emphasis supplied).

B. Respondent, upon notice from the EPA, changed his business practices and ceased selling the pesticides in question, in a good faith effort to comply with FIFRA

EPA official Bednar, upon discovering during the June 15, 2022 EPA inspection of Wilson’s activities of selling various rodenticides repackaged in unlabeled clear resealable plastic bags, requested Wilson to stop selling those particular products until the EPA had reviewed the regulation and requirements for correct rodenticide packaging. TR 36:18-24. Wilson agreed and said he would stop. TR 73:25; 74:1-3. “So, Mr. Wilson was really receptive to the information that we provided during the inspection, and did commit to not sell the bait blocks and throw packs in the plastic container – or the plastic Ziploc containers,” Bednar testified. 73:25; 74:1-3. Wilson testified that he stopped selling the subject pesticides upon receipt of the EPA’s Stop Sale, Use or Removal Order (“Stop Sale Order”), which put him out of business. TR 190:25; 191:1. Wilson did continue to supply the subject rodenticides to pest control technicians whom he employed in 2022 and 2023 who performed pest control services for his business, as noted below. TR 196:16-20. Wilson provided pest control services as a regular part of his business operations, as noted below. TR 173:5-25; 174:1-2.

C. Any violations of FIFRA by Respondent were not willful, knowing or intentional

The June 15, 2022 inspection of Wilson’s North Grand Blvd. facility was his first encounter with EPA regulators. Prior to that inspection Wilson was unaware that that he did anything wrong as to his practice in selling pesticides. TR 179:5-8. “All they [the

EPA] had to do was tell me what I was doing wrong with the label -- the labeling could have been corrected . . . the rodenticide packaging could have been corrected, Wilson testified. TR 186:9-11; 186: 14-15.

"I actually thought they [the EPA] were there -- if something were wrong, they would help me straighten it out. As opposed to going -- I mean, you lock the doors, get out of here, don't do this," Wilson testified. TR 199:9-11. *Cf. Kelly v. EPA*, 203 F.3d, 519 (7th Cir. 2000), on which the EPA relies in arguing that the full amount of its proposed penalty should be assessed. In *Kelly v. EPA, supra*, the court found that plaintiff Kelly had actual knowledge of the violation for which he was found liable as a result of a prior incident and, further, that Kelly had directed the violation.

Wilson noted that the EPA never provided him with any assistance regarding compliance with FIFRA's requirements as to repackaging and labeling of pesticides prior to selling those products. TR 185:25; 186:1. Nor did the State of Missouri ever notify Wilson of any violation or potential violations of state or federal law over the many years that it inspected his facility prior to June 2022. TR 174 – 176. The EPA does not have any policy, procedure or practice of assisting those in the business of selling and distributing pesticides with compliance matters -- registration, repackaging and labeling. There is only information on the internet and online, according to Bednar. TR 59, 60.

D. There is no evidence that any violations by Respondent caused any actual harm to health or the environment

Not only is there no evidence that any violations by Wilson caused significant harm to health or the environment, there is no evidence that Wilson's business practices

have caused *any* harm to health or the environment in the many years that he has been in the pest control business. TR 75:1-5. The EPA has presented no evidence that Wilson's business activities have caused any harm to health or the environment. It is likely that his effort in providing information to customers at the time of sale on how to use the pesticides safely may account for this, at least in part. The EPA points to the potential for harm to human health and the environment, which is a broad notion of harm. The fact of the lack of any evidence not only of any significant harm but any actual harm caused by Wilson's business activity to health and the environment is the most important consideration in determining the gravity of any violations for which Wilson is liable.

E. The effect of the proposed penalty on Wilson's ability to continue in business is significant and warrants rejection of the proposed penalty or, alternatively, a significant reduction, at a minimum

Even though Wilson did not provide any information regarding the ability to pay FIFRA § 136l(a)(4) requires the Administrator, in determining the amount of the penalty, to consider, among other things, the effect of the proposed penalty on Wilson's ability to continue in business, as noted above. See also *In the Matter of: Liphatech, Inc., Respondent*, 2014 WL 1012749 (2014) (E.P.A.) at *81.

Wilson, upon the request of EPA official Bednar, agreed at the conclusion of the June 22, 2022 inspection, to stop selling those particular products until the EPA had reviewed the regulation and requirements for correct rodenticide packaging, as noted above. TR 36:18-24; 73:25; 74:1-3. Shortly thereafter in July 2022, Wilson was compelled by the EPA's "Stop Sale Order" to cease the sale of the pesticides identified during the June 2022 inspection and in the Stop Sale Order, which virtually shut down his

entire business, as noted above. He continued providing pest control services only under contract, as noted below. Thus, Wilson had already experienced a devastating effect on his ability to continue his pest control business which occurred as a result of the Stop Sale Order. TR: 183:8-25; 186:4-6. The loss of pesticide sales resulted in a substantial decrease in his business revenue. Seventy-five (75) per cent to eighty (80) percent of Wilson's gross business sales consisted of sales to pest control professionals -- commercial applicators -- as noted below. TR 160:17-25; 161:1-9. Given these circumstances, the imposition of the EPA's proposed penalty would make the economic harm to Wilson infinitely worse.

II. The EPA failed to meet its burden of proof to show that Respondent violated FIFRA by refusing to allow an inspection of his Woodson Road, Overland, MO facility and held pesticides for distribution or sale

To meet its burden of proof that Wilson refused to allow EPA personnel to conduct an inspection of his Woodson Road facility on July 27, 2023 in violation of FIFRA 7 U.S.C. § 136j(a)(2)(B)(iii), the EPA must establish by a preponderance of the evidence that : (1) the Woodson Road facility held pesticides or devices for distribution or sale; (2) the EPA officers or employees entered the Woodson Road facility at a reasonable time for the purpose of inspecting and obtaining samples of those pesticides or devices; and (3) Respondent refused to allow the inspection. See Order on Complainant's Motion for Accelerated Decision As to Liability ("Order of AD") at 20. EPA official Candace Bednar testified at the hearing that she, along with another EPA inspector, Amelia Patterson, entered the facility for the purpose of a compliance inspection and were questioned by the lady behind the counter as to why they had not called ahead for

the inspection. TR 46:20-25; 50:1-3; CX 17 at 1. The EPA and Wilson stipulated that the lady behind the counter was Stacy Humphrey. Joint Exhibit 1, ¶ 3. Bednar was told to wait outside of the facility. TR 65:19-24. She and Patterson complied with this request until Wilson arrived at the facility, at which time Bednar and Patterson were allowed into the facility again. TR 65:10-16; 67:1-7. Bednar testified that she had conversation with Wilson after he arrived both inside of and outside of the facility. TR 67:1-3. After presenting her credentials and the Notice of Inspection Bednar further testified that "Mr. Wilson did not want to have the inspection occur that day. He wanted counsel to be there, as well". TR 67:8-15. Following a bit more conversation with Wilson, Bednar decided to leave and she "left it to the [EPA] attorney assigned to the case to have discussions with you, [Respondent's counsel Melvin Raymond], the attorney". TR 67:23-25; 68:1-6.

Wilson testified on direct examination that he was notified by Stacy Humphrey, identified by Bednar as the lady behind the counter, that the EPA officials were there at the Woodson Road facility to conduct an inspection. Wilson went to the Woodson facility immediately and allowed Bednar and Patterson to come into the facility. TR 189:5-24; 190:13-25. Wilson questioned Bednar as to why she did not call ahead to schedule the inspection. TR 190: 1-6. Wilson told Bednar that he did not have a problem with the inspection being conducted, but not without prior notice and not without counsel being present. TR 190: 7-12. It should be noted that the inspection of the North Grand Blvd. facility was scheduled several days in advance. TR 62: 9-16; 177: 8-15. Wilson testified that once inside of the Woodson facility Bednar and Patterson looked around, made

written notations of certain things. TR 190:22-25. Before Bednar left the facility she asked Wilson if any of the rodenticides or insecticides were being sold out of the Woodson Road facility. "And I said no. Most of those are for the technicians. And the secretary [Stacy Humphrey] would take all the calls . . . she actually work that store, take all the service calls," Wilson testified. TR 191:4-11. Bednar and Patterson then left the facility, according to Wilson. Humphrey had also notified Bednar when she appeared on July 27, 2023 that the pesticides at the facility were not for sale but "for her technicians to come into the store when they are in the area to pick up to use." FIFRA Site Memo, CX17 at 1. "I don't sell pesticides to the technicians [at the time of the inspection visit on July 23, 2023]. We give the pesticides to the technicians when they go out to service," Wilson testified. TR 196:16-20.

According to Bednar, she observed that "there were pesticide products for sale throughout the store, "bunches of containers of pesticides" on the left and, on the right, "more just liquid pesticides". TR 49:4-21.

Bednar, on cross examination, admitted that she was not able to make a definitive conclusion that Wilson was offering pesticides for sale at the Woodson Road facility in July 2023, only that "it appeared" that rodenticides were still being offered for sale at that facility. TR 64: 16-21; 65:1-8. Bednar did not testify that it appeared that Wilson was still offering or appearing to offer for sale insecticides, in particular, as opposed to rodenticides, although she did observe liquid pesticides (insecticides) at the facility. TR 64: 25; 65:1-3.

Importantly, EPA's Stop Sale, Use or Removal Order ("Stop Sale Order") issued

to Wilson ordered him “immediately not to distribute, sell, offer for sale, hold for sale, deliver for shipment, receive, *or having so received, deliver, offer for delivery, move or remove from any present location*” the various pesticides at issue in this case, including the rodenticide blocks, rodenticide throw packs and liquid insecticides. See CX13 ¶ 65 (emphasis supplied). “The directing of what to do is in the Stop Sale, Use or Removal Order . . . they’re directed to stop selling them. *Don’t remove them,*” Bednar testified. TR 77:2-6. Thus, under the Stop Sale Order, Wilson was prohibited from removing those very pesticides which the EPA officials observed at the Woodson Road facility on July 27, 2023 during their inspection visit.

Wilson testified that the pesticides observed by Bednar on July 27, 2023 to be priced and apparently offered for sale remained at the facility and he simply never removed the prices upon receipt of the Stop Sale Order. TR 196:21-24.

Wilson also testified that by 2023 he did not sell pesticides to technicians, as noted TR 196:16-20. In 2022 and 2023 Wilson’s regular business operations included performing pest control services. TR 173:5-21; 174:1-2. Wilson’s workforce included Wilson, who has a license to buy wholesale and distribute pesticides, and three other individuals who were licensed pesticide professionals, also referred to as “technicians” or “applicators.” TR 157:12-20; 158:5-12; 159:3-14; 160:1-12; 173:15-25. Wilson is also licensed as a technician or pesticide professional. TR 157:12-20; 158:5-12; 159:3-14. Bednar testified that she was aware from the June 2022 inspection of Wilson’s North Grand Blvd. facility that Wilson “had pesticide technicians that he was sending out and coming back in.” TR 52: 11-16. This evidence establishes that Wilson did not continue

to sell pesticides in 2023. Rather, he continued to supply the product to technicians whom he employed for the purpose of rendering pest control services to Wilson's clientele. TR 183:23-35; 184:1-5.

Regarding Respondent's business sales, 75 per cent to 80 percent of pesticide sales consisted of sales of pesticides to pest control professionals -- commercial applicators -- who are licensed to purchase rodenticides and insecticides, according to Wilson. TR 160:17-25; 161:1-9. The commercial applicators were independent contractors, not employees of Wilson. TR 161:1-6. The balance of Wilson's business sales, 15 to 25 per cent, consisted of sales of pesticides to the public or individual consumers. TR 161:10-17.

This evidence shows that the EPA officials did conduct an inspection of the Woodson facility on July 27, 2023 since they were allowed entry into the store and had the opportunity to observe pesticide products throughout the store, and inspect to the extent that Bednar concluded that pesticides appeared to be for sale at the Woodson location, according to Bednar's testimony. TR 49:22-25. This evidence shows that the EPA does not meet its burden of showing that Wilson refused to allow the inspection, though the inspection may have been cut short and the EPA officials did not continue the inspection as long as they wanted.

CONCLUSION

Based on the evidence and the reasons cited above, the EPA's proposed penalty should be rejected as excessive, of a magnitude disproportionate to the totality of the circumstances in this case, and far exceeds the amount necessary for the purpose of

deterrence, as civil penalties under FIFRA are intended to deter, not punish, as noted above. *In re: Johnson Pacific, Inc., Respondent*, 5 E.A.D. 696 (E.P.A.), 1995 WL 90174,

*8.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Melvin L. Raymond", is written over a horizontal line.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief of Respondent was sent this day to the following parties in the manner indicated below.

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