10/25/79

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF THE ADMINISTRATOR

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IN RE	)	
	)	I. F. & R. No. IV-318-C-0
THEOCHEM LABORATORIES, INC.	)	
	)	ACCELERATED INITIAL DECISION
Respondent	)	

This is a proceeding under Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended, 7 U.S.C. 136 l(a) (supp. v, 1975), for assessment of civil penalties for violations of 7 U.S.C. 136-136y (1972), of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended. This proceeding was initiated by complaint issued on April 27, 1978, relating to an alleged unregistered pesticide produced by the Respondent called "Kool-Treet Water Treatment Compound". The Respondent filed an answer by letter dated May 16, 1978. The matter was referred to the Office of Administrative Law Judges by memorandum dated October 16, 1978, and was assigned to the undersigned Administrative Law Judge by letter dated October 20, 1978. A pre-hearing letter was issued on November 13, 1978, pursuant to Section 168.36(e) of the Rules of Practice [40 C.F.R. 168.36(e)], requiring the parties to submit certain pre-trial information. Several motions for extension of time were made and granted due to change of counsel for the Respondent. Additionally, during this time period, extended negotiations in an attempt to settle this matter were engaged in by counsel for the parties.

By motion dated August 21, 1979, counsel for the Complainant moved to have the matter disposed of by an accelerated decision and attached to the motion a stipulation of facts which disposed of all issues except the amount of penalties to be assessed in this case. The motion was granted and a briefing schedule was established, and memorandums of law on the sole issue of the amount of civil penalties to be assessed were filed and have been considered in this opinion.

The proposed penalty to be assessed in this case was $3,200. The aforementioned stipulation dated August 21, 1979, is attached to this opinion, and is hereby adopted as a finding of fact and law.

Discussion

Since the parties have stipulated that the product in question was, in fact, a pesticide and further stipulated that the product was not registered, the only matter left for decision is the amount of penalty which should be appropriately assessed in this case. In making this determination, §14(a)(3) of the Act require that there shall be considered the appropriateness of the penalties to the size of Respondent's business, the effect on the Respondent's ability to continue in business, and the gravity of the violation. §168.60(b) of the Rules of Practice provides that in evaluating the gravity of the violation there shall also be considered the Respondent's history of compliance of the Act and any evidence of good faith or lack thereof.

In previously decided civil penalty cases under FIFRA, it has been held that gravity of a violation should be considered from two aspects--gravity of harm and gravity of misconduct.

As to gravity of misconduct, I conclude that the violation was not the result of any improper motive of Respondent and was not a deliberate flaunting of the Act. They occurred by virtue of a honest mistake concerning the definition of the word "slimicide" as it appears on the label of the product in question. The Respondent has approximately 14 products registered with EPA and is familiar with the provisions and requirements of FIFRA as it relates to registration, distribution and handling of pesticide products. It is highly unlikely that the Respondent would have deliberately placed an unregistered pesticide on the market, particularly a product which accounts for a very small percentage of the total revenues and business of the Respondent. As indicated by the stipulation, only 2,000 gallons of the KOOL-TREAT product were sold by Respondent prior to being notified of a potential violation by EPA. Immediately upon being notified of this potential violation, Respondent removed the product from sale and took other prompt action to mitigate any violation of the Act. The mitigating action specifically taken by the Respondent in this case was to change its label to remove any references to its "slimicide" capabilities inasmuch as the Respondent does not offer the product as a "slimicide" or pesticide, and this alteration in the label removes the product from the perview from FIFRA. There is no evidence that the Respondent has a history of prior violations nor is there evidence that the Respondent did not act in good faith. The gravity of misconduct was therefore of a moderate degree.

As to the gravity of harm, it is pointed out by the Respondent that this product is used in self-contained systems, such as boilers and air conditioning units, and, therefore, is not released into the environment in any form, nor does its use provide opportunities for members of the general public to come in contact therewith.

Under the circumstances in this case, I am of the opinion that the gravity of harm was low.

The proposed civil penalty in this case was determined by a reference to the penalty guidelines set out in the Rules of Practice published in the Federal Register on July 31, 1974. These guidelines are in the form of a matrix which upon one axis is the sales of the Respondent and on the other axis is the violation alledged to have occurred and by cross referencing the two axis, one arrives at the authorized and suggested penalty for the particular violation involved.

The Respondent admits that the gross sales of the company correctly places it in Category V of the matrix and, therefore, the appropriate penalty is $3,200. The Respondent, however, argues that the Administrative Law Judge should assess a civil penalty in the amount of $150. It should be noted that, in its brief, the Complainant agrees with Respondent to a certain extent in that the brief states that:

> "...since the Respondent's violation was not deliberate or intentional and since the violative label claims were voluntarily deleted, the amount of the civil penalty should be appropriately reduced in accordance with the criteria set out in Section 168.46(b) of the Rules of Practice."

The Respondent does not allege that the size of the proposed penalty will affect its ability to continue in business, but rather alleges that the de minimus penalty of $150 and the experience gained by Respondent in this matter will be a more than adequate deterrent to any future violations of this nature on the part of the Respondent.

Reference to the above-mentioned civil penalty assessment schedule shows that under the violation of "failure to register", there are two categories: (1) entitled "no knowledge", which under Category V carries a suggested penalty of $2,200, and (2) "with knowledge and no application submitted", which under Category V has a suggested penalty of $3,200. It occurs to me that the Complainant mistakenly placed this Respondent in the wrong category in that the record before me does not indicate that this was, in fact, a knowing violation and, therefore, the appropriate penalty should have been $2,200, rather than $3,200. I am given to understand, based on testimony in previous cases, that the Agency in making a determination of whether or not knowledge of a non-registration was had by the Respondent would, through a search of the Agency's files rely on information obtained as to whether or not this particular Respondent had other products registered with the Agency under FIFRA. As indicated above, the Respondent has approximately 14 products currently under valid registration with the Agency and one must assume that based on that information the Agency determined that the violation was a knowing one and, therefore, placed a penalty of $3,200 on the Respondent in this case. I do not feel that this was the proper determination and that therefore we are talking about the difference between a suggested penalty by the Respondent of $150 versus a suggested penalty of $2,200, rather than what I consider to be the inappropriate original assessment of $3,200.

As we discussed above, the violation in this case occurred because of a question about the legal definition of the word "slimicide" which appears at one place on the product label. The Respondent takes the position that it did not feel that the use of that word on its label transformed its product into a pesticide and that therefore the violation was certainly not a knowing one. I agree with this evaluation.

Complainant argues that the fact that the Respondent has 14 products registered with the Agency, places it in the position of being judged to a higher level of care than a party having no previous knowledge or experience with the Act. The Respondent takes the opposite view and argues that the fact that Respondent has 14 products currently under registration with the Agency is indicative of the fact that it intends to and has, in fact, abided by the Act's requirements in the past and that it would not jeopardize its good reputation or business by deliberately failing to register a product which accounts for an extremely small volume of its total sales. Both arguments have merit, but neither are completely controlling in this case. Had this been a knowing violation on the part of the Respondent, I would agree with counsel for the Complainant in that they should be assessed the maximum penalty, i.e., $3,200. However, even though a penalty of $2,200 is suggested by the assessment guidelines' schedule, I feel that under the circumstances in this case, a penalty of that size would constitute an excessive punishment for a Respondent who has exhibited past good faith and compliance with the requirements of the Act.

On the other hand, the Respondent's previous experience with the Act and its knowledge of its provisions place it in the position of having to be held to a higher standard of care and knowledge, than one who is entirely unfamiliar with the Act and the regulations promulgated purusant thereto. Even though reasonable persons could argue as to whether or not the word "slimicide" rendered the product a pesticide, the Respondent in this case must accept some responsibility for its acts, and, therefore, I find that the $150 de minimus penalty proposed by the Respondent to be insufficient.

In view of all of the above, I assess a penalty of $625 for this violation.

I have considered the entire record in this case, consisting of the stipulation by the parties and the arguments presented by them in their briefs and 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, a civil penalty in the amount of $625 is hereby assessed against Respondent, Theochem Laboratories, Inc. for the violation which has been established on the basis of the complaint issued on April 27, 1978.

DATED: October 25, 1979

T. B. Yost

Thomas B. Yost
Administrative Law Judge

BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter /

THEOCHEM LABORATORIES, INC. / I. F. & R. No. IV-318-C

Respondent. /

STIPULATION OF FACT FOR THE ENTRY
OF AN ACCELERATED DECISION

This STIPULATION, entered into by and between the UNITED STATES ENVIRONMENTAL PROTECTION AGENCY (EPA), hereafter referred to as the "Petitioner," and THEOCHEM LABORATORIES, INC., hereafter referred to as the "Respondent,"

WITNESSETH:

WHEREAS, 7 U.S.C. 136-136y (1978), of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended, controls the manufacture, registration and marketing of pesticides; and

WHEREAS, the Respondent is subject to the provisions of said Act as a manufacturer, registrant and marketer of pesticides; and

WHEREAS, the Respondent from May 10, 1967 to October 22, 1975, had registered fourteen (14) pesticides with the Petitioner; and

WHEREAS, the Respondent had gross sales from all business revenues for the year 1977 of an amount in excess of $1,000,000.00 and was appropriately placed in Category V of the Civil Penalty Assessment Schedule; and

WHEREAS, the Respondent is the manufacturer and marketer of a product, known as "Kool-Treet Water Treatment Compound," a slimicide which is a pesticide within the meaning of 7 U.S.C. 136(u); and

WHEREAS, the Respondent's product was not registered as a pesticide as required by U.S.C. 136(a) (12(a)(1)(A); 7 U.S.C. 136j(a)(1)(A)); and

WHEREAS, the Respondent received a Complaint from the Petitioner on May 2, 1978, citing Respondent for shipping a non-registered pesticide, namely "Kcol Treet," and was assessed a

$3,200.00 civil penalty based on Respondent's knowledge of FIFRA as a prior registrant and its failure to submit a registration application for the product in controversy; and

WHEREAS, the Respondent admits that its product, "Kool-Treet Water Treatment Compound," is a pesticide within the meaning of the Act and that said product was inadvertently not registered as required by the Act due to the Respondent's erroneous interpretation of the term "Slimicide"; and

WHEREAS, the Respondent immediately changed the label of its product upon notification that the manufacture and sale of the non-registered product was in violation of the Act, so as to be in compliance with the provisions of the Act and ceased to sell the Kool-Treet product pending the resolution of the controversies alleged in the Complaint dated April 27, 1978; and

WHEREAS, the parties concerned have informally discussed the matter at issue in an attempt to reach a resolution of the controversies alleged herein, and the only remaining matter at issue is the amount of the civil penalty to be assessed to the Respondent; and

WHEREAS, the Respondent believes that the amount of the penalty discussed during negotiations with the Petitioner under the provisions and limitations of the Act and its regulations, is too great so as to be unreasonable in view of the nature of the violations, which consisted only of the manufacture and sale of less than two-thousand (2,000) gallons of the Kool-Treet product, and of the prompt action taken by the Respondent to mitigate its violations and comply with the Act; and

WHEREAS, the Petitioner and Respondent have agreed to the entry of this Stipulation herein pursuant to 40 CFR 168.37(a)(3), The Rules of Practice governing proceedings conducted in the assessment of civil penalties under the Act, on the following terms and conditions:

1. The Respondent admits that the product "Kool-Treet Water Treatment Compound" is a pesticide within the meaning of 7 U.S.C. 136(u) and that said pesticide was not registered as required by 7 U.S.C. 136a(a) of the Act.

2. Respondent agrees not to use the term "slimicide" in the advertisement and sale of the Kool-Treet product and will otherwise comply with the provisions of the Act in the advertisement and sale of said product in the future.

3. That Respondent will abide by any civil penalty deemed appropriate by the assigned Administrative Law Judge for its violation of the Act as set forth in the Complaint of April 27, 1978.

4. The Petitioner agrees to the imposition of a civil penalty as decided by the Administrative Law Judge for the Respondent's violation of the Act as described herein based upon consideration of the criteria set out at 39 Fed. Reg. 27712 (Vol. 148, July 31, 1974), including the extent, nature and gravity of the violation and the actions taken by the Respondent to mitigate its violation.

5. In the event that the Respondent fails to carry out its obligations in accordance with the Order of the Administrative Law Judge and/or Regional Administrator, the Petitioner shall have the right to seek the imposition of civil and/or criminal penalties as provided by law.

AGREED to this 21st day of August, 1979.

By: Bruce R. Granoff
For the Petitioner
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

AGREED to this 20th day of August, 1979.

By: O. C. Samuelson Vice President
For the Respondent
THEOCHEM LABORATORIES, INC.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IV

345 COURTLAND STREET
ATLANTA, GEORGIA 30308

IN RE	)	
	)	I. F. & R. DOCKET NO. IV-318-C
THEOCHEM LABORATORIES, INC.	)	
	)	ACCELERATED INITIAL DECISION
Respondent	)	

In accordance with §168.46(a) of the Rules of Practice Governing Proceedings Conducted in the Assessment of Civil Penalties under the Federal Insecticide, Fungicide and Rodenticide Act, as amended, I hereby certify that the original and two copies of the foregoing Accelerated Initial Decision issued by the Honorable Thomas B. Yost was received by me as Regional Hearing Clerk; that a copy was hand-delivered to Mr. John C. White, Regional Administrator, EPA Region IV; that two (2) copies were served by Certified Mail, Return Receipt Requested on Ms. Sonia Anderson, Hearing Clerk, EPA Headquarters, Washington, D.C. 20460; and that a copy was served on the individual parties by hand-delivery to Counsel for Complainant, Bruce R. Granoff, Esquire, EPA Region IV; and by Certified Mail, Return Receipt Requested to Counsel for Respondent, Banks B. Vest, Jr., Esquire, Suite 817, 412 East Madison Street, Tampa, Florida 33602; and Mr. A. C. Samarkos, Vice President, Theochem Laboratories, Inc., Post Office Box 15367, Tampa, Florida 33684. Dated in Atlanta, Georgia this 25th day of October 1979.

Sandra A. Beck
Regional Hearing Clerk