9/3/76

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE REGIONAL ADMINISTRATOR
REGION IX

76 SEP 13 A8:55

IN RE)
)
AMVAC CHEMICAL CORPORATION,) IFR Docket No IX-98C
)
Respondent.)

Respondent found to have been in violation of governing statut by holding for sale an adulterated product. Proposed civil penalty found in excess of amount authorized by the Guidelines for assessment of civil penalties. Proper penalty determined and order entered assessing such penalty.

Roland Childs for respondent.
Keith A. Takata and Matthew Walker for complainant.

INITIAL DECISION BY WILLIAM J. SWEENEY
ADMINISTRATIVE LAW JUDGE

By complaint filed on June 30, 1975, the United States Environmental Protection Agency, Region IX, alleged that the respondent had violated Section 12(a)(1)(E) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended, in the manner described in such complaint. The respondent requested a hearing. A hearing on the complaint was held in Los Angeles, California on May 18, 1976. At the conclusion of the hearing the counsel for the respondent, in lieu of filing a brief, argued for mitigation of the proposed penalty. The complainant has filed a brief and respondent has responded thereto in a reply brief.

The violations alleged in the complaint are that the pesticide ALCO L-T STOCK SPRAY was: (1) Misbranded in that the label showed that it contained 45 percent Toxaphene by weight

whereas it contained a lesser amount of Toxaphene, and contained also the active ingredient technical chlordane which was not shown on the label; (2) Adulterated in that technical chlordane had been substituted in part for the ingredients shown on the label; (3) Adulterated in that its strength or purity fell below the professed standard or quality under which it was sold.

The pesticide tested by the agency was identified as Sample No. 111602 and the label bore Lot No. 31218. Such label also stated in part:

ACTIVE INGREDIENTS	% BY WT.
Toxaphene	45.0
Gamma Isomer of Benzene Hexachloride from Lindane	2.0
Petroleum Distillate	37.0
Aromatic Petroleum Derivative Solvents	10.0
INERT INGREDIENTS	6.0
	100.0

Tests by the agency showed that Sample No. 111602 contained 18.1 to 19.8 percent by weight of chlordane, and that the stated percentage of Toxaphene was deficient by 30 to 35 percent. A duplicate of Sample No. 111602 was tested by the respondent and found to contain 17.7 percent by weight of chlordane.

In proposing penalties herein the following provisions of the GUIDELINES FOR THE ASSESSMENT OF CIVIL PENALTIES UNDER SECTION 14(a) OF THE FEDERAL INSECTICIDE, FUNGICIDE, AND RODENTICIDE ACT, AS AMENDED, are pertinent.

SECTION I: B(2) What constitutes an independently assessable charge. A separate civil penalty shall be assessed for each violation of the Act which results from an independent act

(or failure to act) of the respondent and which is substantially distinguishable from any other charge in the complaint for which a civil penalty is to be assessed. In determining whether a given charge is independent of and substantially distinguishable from any other charge for purposes of assessing separate penalties, complainant must consider whether each provision requires an element of proof not required by the other. Thus, not every charge which may appear in the complaint shall be separately assessed. Where a charge derives primarily from another charge cited in the complaint for which a penalty is proposed to be assessed, the subsequent charge may not warrant a separate assessment. The complaint (sic) will propose to assess an appropriate civil penalty for each inpendent and substantially distinguishable charge.

SECTION I: C(1) Factors considered in determining the proposed civil penalty. (a) Gravity of violation. One determinant of the amount of a proposed civil penalty is the gravity of the violation. The gravity of any violation is a function of (1) the potential that the act committed has to injure man or the environment; (2) the severity of such potential injury; (3) the scale and type of use anticipated; (4) the identity of the persons exposed to a risk of injury; (5) the extent to which the applicable provisions of the Act were in fact violated; (6) the particular person's history of compliance and actual knowledge of the Act; and (7) evidence of good faith in the instant circumstance.

SECTION I: C(2) Using the civil penalty assessment schedule to arrive at the proposed civil penalty. Violations, ordered according to their gravity, are listed along the vertical axis of the Civil Penalty Assessment Schedule. The coded citation charges which correspond to specific violations of the Act (as set forth in the Appendix to the Case Proceedings Manual and published herein as Appendix II) are also enumerated along the vertical axis. The size-of-business gradations run along the horizontal axis. Each independently assessible (sic) charge is translated into a dollar penalty assessment by (1) locating the appropriate charge on the charge code of the Assessment Schedule, and then (2) following that charge across the row of business sizes until reaching the approximate business size entry. Each cell in the Assessment Schedule corresponds to a given size-of-business category.

Within each gravity/size-of-business cell, there is a dollar amount representating the penalty base figure. In arriving at a civil penalty proposed to be assessed for a given charge, complainant may deviate as much as ten per cent (sic) (10%) above or below this base figure. In determining

whether to assess the proposed penalty above or below the base figure, complainant shall consider those criteria outlined in section I(C)(1)(a) above. For example, if the product involved is a highly toxic pesticide, or if the person charged has actual knowledge of the Act, has a history of noncompliance (sic), and has not evidenced good faith in his dealings with the Agency arising out of the current alleged violation, the proposed civil penalty should be assessed above the base figure.[2]

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[2]In no case may the proposed penalty for an independently assessable charge exceed $5,000.

The complainant proposes a civil penalty of $7,480 based on the following increments:

for chemical deficiency $1980.00

for chemical contamination $5500.00

The indicated increments are derived from Section II of the guidelines; they are the maximum penalties allowed for chemical deficiency, adverse effects not probable, and chemical contamination, significant level, respectively, by Category V firms, plus 10 percent added penalty because respondent has a history of noncompliance with the Act. The respondent is designated a Category V firm because its gross sales exceeded $1,000,000 in the prior fiscal year.

Under the provisions of footnote 2 to Section I(C)(2) the penalty of 10 percent should not have been applied to the permissible maximum penalty of $5,000 for chemical contamination at a significant level caused by a Category V firm; such footnote does not bar application of a 10 percent increase in the otherwise maximum penalty of $1,800 for chemical deficiency caused by a Category V firm.

No penalty is proposed for the misbranding violation which complainant deemed to be barred under the provisions of Section I(B)(2). Such provisions are not regarded as having prohibited the other two charges on the following grounds presented on brief. "For the chlordane contamination charge, EPA is required to prove that Sample No. 111602 contains chlordane not claimed on the label. This is not proof that Sample No. 11160 contains less toxaphene than claimed on the label. For the toxaphene deficiency charge, EPA is required to prove that Sample No. 111602 contains less toxaphene than claimed on the label. This is not proof that Sample No. 111602 contains chlordan not claimed on the label. Therefore, each charge requires an element of proof not required by the other and a separate civil penalty may be assessed for each violation of the Act."

The foregoing reasoning is an evasion of the obvious intent of the Acting Administrator in promulgating Section I(B)(2). That subsection, quoted in full hereinbefore, provides for the assessment of a separate civil penalty for each violation of the Act which results from an "independent act" of the respondent. The facts herein show only one independent act by the respondent, namely, the pouring of chlordane into a container which does not list that substance on the label; the amount of chlordane was 18.1 to 19.8 percent by weight as tested by complainant, and 17.7 percent by weight as tested by respondent. The latter independent act produced two effects: it contaminated the product as labeled and it caused space to be occupied in the container to the extent that there remained

insufficient room to accommodate the amount of toxaphene listed on the label, thus resulting in a chemical deficiency. Since the two violations flow from a single independent act by the respondent, only the more serious violation, contamination, should be proposed for penal assessment. As stated bef the maximum penalty for that violation is $5,000.

In addition to taking Sample No. 111602, the complainant also took Sample No. 111241 from Lot No. 31218 on April 9, 19 That sample was found to contain 19.7 percent of chlordane by weight and was 32 percent deficient in toxaphene. Sample No. 111240 taken from Lot No. 31208 on April 8, 1975 was tested by respondent and found to contain no chlordane and the proper amount of toxaphene.

The respondent referred to production work orders which indicate that only one batch of the subject pesticide was mixed and that Sample Nos. 111602 and 111241 should have been marked with Lot No. 31208 rather than Lot No. 31218. It is the belief and contention of the respondent that of the quart and gallon containers filled from the one batch only Sample Nos. 111602 and 111241, and perhaps two more bottles, containe chlordane. Such contention is based on the fact that the bottling machine used in filling the bottles has four nozzles and it is possible that the nozzles were not flushed after having been used to bottle chlordane, thus ejecting chlordane into the first bottles filled from the new batch. This theory of the contaminating process is plausible, and offers the only

explanation of record for the freedom from contamination in Sample No. 111240. Such theory also shows two acts of gross carelessness by respondent, namely, assignment of an incorrect Lot number to at least two bottles, and failure to exercise elementary product control by flushing the bottling machine after using it for bottling chlordane, a toxic product.

The respondent admits that a violation occurred but contends that assessment of any penalty in excess of $500 has the potential of causing bankruptcy. Amvac Chemical Corporation is the wholly owned subsidiary of American Vanguard Corporation. During 1975 the parent company had a net loss of $499,800 on gross sales of $12,653,000, and respondent had a net loss of $480,000. In the same year the respondent paid its president $50,000, and the president increased his indebtedness to the respondent from $43,000 to $52,700. The latter indebtedness to the respondent from $43,000 to $52,700. The latter indebtedness is secured by three 8 percent demand notes. At the close of 1975 American Vanguard Corporation and its subsidiaries had inventories of finished products valued at $1,711,000 and raw materials valued at $331,500. It does not appear that assessment of a penalty in excess of $500 would cause the respondent to be unable to continue in business.

It is argued by respondent that the penalty proposed should be mitigated because none of the batch of pesticide was sold, and because respondent has shown good faith in the instant circumstance by installing quality controls consisting

of an infrared system, two gas chromatographs, colorimetry test equipment, and a wet laboratory. These facts do not present good cause for mitigation. The fact that none of the batch was sold does not change the fact that all of the batch was being held for sale prior to the inspection. The installation of quality controls by a company producing toxic materials was long overdue, and in view of respondents history of compliance it has little or no weight as a mitigating factor. That history includes assessment of a civil penalty of $11,500 for non-registration and misbranding, an assessment of a criminal penalty of $500 for non-registration, and the issuance of two warning letters by complainant concerning misbranding.

Findings and conclusions - The respondent violated the Act as alleged in the complaint by adulteration of a product held for sale in that technical chlordane was substituted in part for the ingredients shown on the label. This adulteration caused by addition of an unlabeled toxic substance is a grave violation. Other facts of record do not warrant any mitigation in the penalty proposed for such violation by a respondent with knowledge of the Act and a history of other violations

Based on the foregoing findings and conclusions the following order is entered.

ORDER

1. Pursuant to Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended [86 Stat. 973; 7 USC 136 1(a)], a civil penalty of $5,000 is hereby assessed against Amvac Chemical Corporation.

2. Payment of the full amount of the civil penalty assessed shall be made within sixty (60) days of the service of the final order upon respondent by forwarding to the Regional Hearing Clerk, Region IX, a cashier's check or certified check payable to the United States of America in such amount.

Dated: September 2, 1976

William J. Sweeney
Administrative Law Judge

I hereby certify that a copy of the foregoing Initial Decision, addressed to the following, was mailed, certified mail, return receipt requested, postage prepaid, in a United States Postal mail box, or hand-delivered, or sent pouch mail, at San Francisco, California, on the 7th day of September 1976.

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Dated at San Francisco, California, this 7th day of September 1976.

Lorraine Pearson

Lorraine Pearson
Regional Hearing Clerk
Region IX