UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

ENVIRONMENTAL PROTECTION AGENCY Complainant	)	
v.	)	Docket No. IF&R VI-210C
EXSTEREX, INC. Respondent	)	

1. Federal Insecticide, Fungicide and Rodenticide Act, as amended. 7 U.S.C. § 136 et seq. (Act). Accelerated Decisions - Where the documentary evidence in the form of affidavits or otherwise clearly established that respondent has violated 7 U.S.C. §§ 136j(a)(2)(L); 136j (a)(1)(A); and 136j(a)(1)(E) for (1) failure to register a pesticide producing establishment, (2) failure to register a pesticide, and (3) misbranding, pursuant to 40 C.F.R. § 22.20, an accelerated decision finding the respondent in violation of the aforementioned sections of the Act will issue as to all or any part of the proceeding, as there is no issue of material fact relating to violation which requried a hearing.

2. Penalty Assessment under the Act. The respondent has the burden of submitting financial information indicating the adverse effect of the proposed penalty upon its ability to continue in business, and such information if bona fide shall be considered in reducing the penalty proposed insofar as necessary to permit the person charged to continue in business. (Penalty Guidelines, 39 Fed. Reg. 27711, 27712; (July 31, 1974)).

APPEARANCES:

For Complainant: Elizabeth A. Hurst, Esquire
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U.S. Environmental Protection Agency - Region VI
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For Respondent: Mr. John L. Daud, pro se
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ACCELERATED DECISION

Introduction

This proceeding was commenced by the issuance on October 25, 1984 of a complaint by the Director, Air and Waste Management Division, U.S. Environmental Protection Agency (EPA or Agency), Region VI, charging respondent, Exsterex, Inc., with violations of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended, 7 U.S.C. § 136 et seq. (Act), and certain implementing regulations.

Count One of the complaint alleged that respondent was engaged in the business of producing a pesticide product designated as "Bug Drug" (hereinafter without quotation marks.) It further alleged that Bug Drug was a pesticide as defined in 7 U.S.C. § 136(u). The Count charged respondent with a violation of 7 U.S.C. § 136j(a)(2)(L) for failing to register as a pesticide producing establishment. Count Two stated that respondent failed to register Bug Drug as a pesticide in violation of 7 U.S.C. § 136j(a)(1)(A). Count Three claimed respondent violated 7 U.S.C. § 136j(a)(1)(E), and certain implementing regulations, for selling a pesticide that was misbranded. The Count contained numerous illustrations of the purported misbranding which are set out more fully below in the Findings. The penalties sought in the complaint were $1,050 under Count One, $800 under Count Two, and $5,000 under Count Three, for a total of $6,850.

On May 31, 1985, complainant served a motion for an accelerated decision. Respondent served an answer to the motion on June 10, 1985. For reasons stated in the Ruling of July 31, 1985, the undersigned granted complainant's motion. By order of August 2, 1985, the parties were directed to submit briefs on the question of the assessment of a civil penalty. In its brief, complainant reduced the proposed penalty sought to $5,640. This reduction was based upon a recalculation of the penalty placing respondent in a Category I, business size (annual gross sales of less than $100,000.) More particularly, the proposed penalty under Counts One and Two is $320 each. For the alleged multiple misbranding charges under Count Three the penalty sought is $5,000.

FINDINGS OF FACT

Respondent, located at 334 Electra Drive, Houston, Texas, is a corporation organized under the laws of the State of Texas in 1982. There are 12 shareholders. It is in the business of producing and selling a product designed for the control and elimination of roaches. The operations of respondent are modest, indeed, and its income is nil. More precisely, respondent's sales for 1983 were $274 and it had a net loss of $1276. For the year 1984, its sales were $781 and there was a net loss of $2100. The respondent's fragile financial condition is supported by information submitted on U.S. Internal Revenue forms, attached to its certified

financial submissions, more of which will be said below. Stated starkly, the respondent is in poor financial health.

From on or about November 1983 to April 1984, respondent was engaged in the business of producing a product, stated by complainant to be a pesticide under the name of Bug Drug. On November 15, 1983, Jimmy Day, an inspector for the Texas Department of Agriculture, at the request of the EPA initiated an inspection of respondent's business in order to determine compliance with the Act and implementing regulations.

Day identified himself and issued a Notice of Inspection. He inquired of respondent's president, Mr. Daud, if respondent produced any other product except Bug Drug. Duad replied in the negative. Day requested and received a sample of the label used on the product. The label did not contain an EPA establishment number, or an EPA registration number. Nor did the label state by weight the active ingredients. Upon inquiry of Daud why such information was missing, the reply was that he considered the product a "natural pesticide" for the reasons that all the ingredients occur in a natural state and thus the product was man made. Daud's view was that the laws were too general. He was of the mind that if one were legally obligated to register the product, which was sodium tetraborate, then frogs, birds and the like should be registered as they all kill roaches. Daud further remarked that a party with the Capital Legal Foundation in Washington, D.C. advised him that the EPA was unconstitutional,

that he should go ahead and produce the product. Daud felt the law did not pertain to his situation. Thus, he neither registered his establishment or product. Day read the definition of pesticide in the Act, more of which will be said below, to Daud. When the inspector inquired why respondent's label did not at least show the percentage by weight of the active ingredients in his product, he was met with the answer that if respondent did that then the product could be produced by competitors. Day informed Daud that it was mandatory to list the active ingredients, but that all the inactive ingredients need not be listed.

During the inspection, Daud was advised what was required to bring the respondent into compliance. Among others, respondent first would have to apply to EPA for an establishment number; that it would have to change the label on the product to include the required information; and that it should be submitted to EPA for approval and a registration number. Daud was advised that until the aforementioned was accomplished respondent could not continue to sell Bug Drug or else it would be in violation of the Act and the companion Texas statute.

At the time of the inspection Daud was asked how much Bug Drug was sold and to whom. The latter stated 50 cases were produced and sold to customers, including the Spring Branch Independent School District (SBISD) in Houston, Texas, and the U.S. Coast Guard. Daud related that respondent was

also in the process of obtaining a stock number from the General Services Administration (GSA) in order that sales might be made to all Federal agencies.

On April 24, 1984, Day obtained documentation that respondent sold and shipped 25 cases of Bug Drug in November 1982 to SBISD, and that the product was used to kill roaches. Day also obtained 10 sample containers of the product on his visit to the school district, which samples contained respondent's labels.

On a GSA form entitled "Application for Presenting New Articles," dated May 24, 1983, the respondent offered Bug Drug for sale to that Agency. On this form respondent stated that the following organizations were commercial users of the product: (1) SBISD, (2) Omega Services, NASA Johnson Space Center, and (3) Harris County Buildings. Listed as Federal agencies that purchased the product were the Texas Air Guard and the U.S. Coast Guard. Respondent also represented on the GSA form that the active ingredient in Bug Drug was "sodium-tetraborate, other parts are foodstuffs" and that the basic functional purpose of the product was for "the control and elimination of roaches."

At the time respondent sold the product to the SBISD, and offered it for sale to GSA it had not registered the product as a pesticide with the EPA. Additionally, a search of EPA files on June 11, 1984 disclosed that respondent has failed to register with the EPA as a pesticide producing establishment.

An examination of the label on Bug Drug contained the following statements pertinent to this decision: (1) "Not a Pesticide." (2) "THE BUG DRUG is a new concept in pest control: It is not a pesticide! . . . Ordinary pesticides can be dangerous." (3) "And because it is probably the safest possible solution to the roach problem, it can be used freely throughout a home or apartment." (4) "The BUG DRUG contains all natural ingredients . . . ." The label did not contain directions addressing the limitations or restrictions on the use of the product concerning the protection of health and the environment. The ingredient statement was not on the front panel of the label and was not clearly distinguishable from other labeling text. The percentage or active and inert ingredients was not stated on the label. Additionally, the label warning and precautionary statements did not set forth adequate statements on practical treatments and hazards to human and domestic animals.

DISCUSSION AND CONCLUSIONS OF LAW

An examination of respondent's pleadings* shows with great clarity that the heart of its case is the contention that Bug Drug is not a pesticide, and thus not within the

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* Respondent's General Denial, and Answer to Complaint to Assess Civil Penalty, both documents served March 1, 1985.

purview of the Act. In pertinent party, 7 U.S.C. § 136(u) states:

> Pesticide. - The term "pesticide" means (1) any substance or mixture of substances intended for preventing, destroying, repelling or mitigating, any pest . . . .

"Pest" is defined, in significant part, as:

> . . . (1) any insect . . . . or (2) any other form of terrestial . . . . life . . . . which the Administrator declares to be a pest under section 136w(c)(1) . . . . 7 U.S.C. § 136(t).

"Insect" is defined, in pertinent part, as:

> . . . any of the numerous small invertebrate animals . . . for the most part belonging to the class insecta, . . . as for example, beetles, bugs . . . . 7 U.S.C. § 136(a).

A "roach" or "cockroach" fall clearly within the definition of "pest", and the respondent held his product out, and sold same, for the "control and elimination" of roaches. As such, Bug Drug came within the statutory definition of a pesticide. The fact that respondent stated on its containers that the product was "NOT A PESTICIDE" borders on the ludicrous and is without legal significance. Such an erroneous and self-serving disclaimer cannot absolve the respondent from legal responsibility.

Addressing Count One, 7 U.S.C. § 136(dd), defines "establishment" to mean "any place where a pesticide or device or active ingredient used in producing a pesticide is produced, or held, for distribution of sale." Respondent was required to register its pesticide producing establishment with the Administrator of the Agency. 7 U.S.C. § 7(e)(a). Its failure to so register was a violation of 7 U.S.C. § 136 j(a)(2)(L).

Turning to Count Two, respondent sold and offered for sale the pesticide Bug Drug. However, the respondent did not register the pesticide with the Administrator as required by 7 U.S.C. § 136(a). Its failure to do so was a violation of 7 U.S.C. § 136j(a)(1)(A).

Concerning Count Three, the appropriate section of the Act provides, in short, that a pesticide is misbranded if its labeling bears any statement which is false or misleading in any particular. 7 U.S.C. § 136(q). The misbranding section of the Act is further amplified and explained by 40 C.F.R. § 162.10. Respondent's claim that Bug Drug was not a pesticide was false on its face, and in violation of 7 U.S.C. § 136(q). The labeling claim the Bug Drug is a new concept in pest control in that it was not a pesticide, and that ordinary pesticides can be dangerous amounted to a false and misleading comparison with other pesticides. The toxicity of Bug Drug and the mode of action of the active

ingredient is similar to the toxicity characteristics in boric acid, the active chemical ingredient of other pesticides. The respondent's labeling was in violation of 40 C.F.R. § 162.10(a)(5)(4). Then there is respondent's labeling claim that Bug Drug is probably the safest possible solution to the roach problem and could be used freely. This was a false and misleading statement as it did not contain the qualifying phrase "when used as directed" as required by 40 C.F.R. § 162.10(a)(5)(ix). The respondent engaged in additional misbranding in using a labeling statement that the product contained "all natural ingredients." This was in violation of 40 C.F.R. § 162.10(a)(5)(x)(A) for the reason that the active ingredient in the pesticide was sodium tetraborate. Respondent was also in violation of 7 U.S.C. § 136(q)(1)(F) and 40 C.F.R. § 162.10(a)(1), for the reason that the label did not contain directions regarding the limitations or restrictions on the use of the product concerning the protection of health and the environment. Nor was respondent's ingredient statement on the front panel and clearly distinguishable from the other written parts of the label. This was a violation of 7 U.S.C. §§ 136(q)(1)(E), 136(q)(2)(A), and 40 C.F.R. § 162.10(g)(2). The respondent also engaged in additional misbranding infractions in that the label did not state the percentage of active and inert ingredients, in violation of 40 C.F.R. § 162.10(g)(1)(4). Respondent also ran afoul of 7 U.S.C. § 136(q)(1)(G), and

40 C.F.R. § 162.10(h), in that the label did not contain required warnings and precautionary statements concerning the general area of toxicological hazard, including dangers to children and the environment.

Penalty Issue

In determing the amount of penalty for a violation, 7 U.S.C. § 136 l(4) provides, in pertinent part, ". . . the Administrator shall consider the appropriateness of such penalty to the size of the business of the persons charged, the effect on the person's ability to continue in business, and the gravity of the violation . . . ." The Agency's Guidelines for Civil Penalties under the Act, 39 Fed. Reg. 27711-27722 (July 31, 1974), expand upon and refine the factors mentioned in the Act. The Guidelines provide that in assessing the "gravity of the violation" such factors as the following be considered: (1) The potential that the act committed has to injure man and 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 or injury; (5) The extent to which the applicable provisions of the Act were in fact followed; (6) The particular person's history of compliance and the actual knowledge of the Act; and (7) The evidence of good faith in the instant circumstances.

Applying the above criteria to respondent's violations show them to be something far less than grave. Violations

there were, but in the respondent's favor are the following factors: It is an exceedingly small business operation with a minuscule amount of sales, and thus the potential for harm was greatly reduced. Though flat-out wrong in its interpretation of pesticide, respondent relied upon information given to him by some source in Washington, D.C. that the "EPA was unconstitutional." This may have been supremely naive, but it was not bad faith. To the contrary, respondent showed good faith in ceasing sales and cooperating in the investigation. There is no convincing evidence that man was injured nor the environment damaged by the pesticides. Nor does the record evidence show that in the past respondent has been remiss in compliance. This is not a case of an engregious violator, having sold or distributed a highly dangerous pesticide on a massive scale. Stripped to its bare bones the record shows a small business, overzealously "puffing" its product to the extent of misbranding, and unintentionally violating the Act, with no harm caused.

Of the five categories concerning size of business set forth in the Guidelines, respondent's annual sales technically bring it within Category I. However, in actuality it experienced a financial operating loss for the two previous calendar years. At this juncture, it is necessary to consider the statutory mandate to weigh the respondent's ability to continue in business if the penalty proposed is levied against the respondent. The Guidelines provide that a respondent may submit financial information indicating the

adverse effect of the proposed penalty upon its ability to continue in business. Such information, if bona fide, shall be considered in reducing the penalty proposed insofar as is necessary to permit the person charged to continue in business. The Guidelines also provide for an "unlimited adjustment" in the proposed civil penalty upon a showing by a respondent that the proposed penalty would have a "significant adverse effect" upon its ability to continue in business, with the burden upon the respondent to show such adverse effect. The Guidelines require that the "certified financial records . . . . shall conform to generally recognized accounting procedures." The written income submissions, bore the corporate seal of respondent and Daud's signature. The documents met the general definition of "certified."* The ideal situation, of course, would be to have the records analyzed and a report submitted by a certified public accountant. Due to the ever so small operations of the respondent, and the additional costs this would mean to an already economically depressed business, such a requirement is not necessary, if the documentation submitted is otherwise credible. In this regard the genuineness of respondent's financial data is buttressed by information submitted on U.S. Internal Revenue forms attached to the certified submissions. The

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* "Certify" means to authenticate or vouch for a thing in writing. To attest as being true. Black's Law Dictionary, (5th Ed. 1979).

respondent has met its burden by the submission of its certified financial data.

On the facts of this case, any proposed civil penalty assessed must come to grips with the real world. One is led ineluctably to consider seriously the viability of the respondent to continue in business, by the imposition of the proposed civil penalty of $5,640. To assess such a penalty would be draconian. The Guidelines, however, have wisely provided for such a situation by incorporating the "unlimited adjustment" provision where the proposed civil penalty would have a significant adverse effect upon respondent's ability to continue in business.

ULTIMATE CONCLUSION AND ORDER

It is concluded that respondent has violated the following portions of the Act: 7 U.S.C. §§ 136j(a)(2)(L), 136j(a)(1)(A), and 136j(a)(1)(E). It further concluded that a penalty should be assessed respondent for its violations and as a deterrent commiting same in the future. It is concluded further that the penalty proposed by the complainant in its complaint of $5,640 be denied. Based uupon the totality of record evidence, 7 U.S.C. § 136 l(a)(4), and the Guidelines for Civil Penalty, is concluded that a condign penalty in this matter is $500. This amount is sufficient for the penalty, adequate to deter any future violations, and not financially fatal to respondent's fledgling business.

IT IS ORDERED that this assessed penalty of $500 against respondent Exsterex, Inc. shall be paid by submitting a certified or cashier's check in this amount, payable to the Treasurer of the United States, and mailed to "EPA - Region VI - (Regional Hearing Clerk) P.O. Box 360582M, Pittsburgh, PA 15251," within 60 days of the receipt of this decision and order.*

Frank W. Vanderheyden
Administrative Law Judge

DATED: August 23, 1985
Washington, D.C.

* Unless appealed in accordance with 40 C.F.R. § 22.30, or unless the Administrator elects to review same sua sponte as provided therein, this decision and order shall become the final order of the Administrator in accordance with 40 C.F.R. § 22.27(c).