

5/2/89

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
BEFORE THE ADMINISTRATOR

In the Matter of )  
Babco Chemical Company, ) Docket No. I. F. & R.-04-8705-C  
Respondent )

Federal Insecticide, Fungicide and Rodenticide Act - Rules of Practice - Default - Determination of Penalty

Absent exceptional circumstances, not shown here, the full amount of the penalty proposed in the complaint will be assessed upon Respondent's default.

Appearance for Complainant: Edwin Schwartz, Esq.  
Assistant Regional Counsel  
U.S. EPA, Region IV  
Atlanta, Georgia

No appearance for Respondent

DEFAULT ORDER

This is a proceeding under § 14(a) of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. § 136 et seq., instituted by a complaint filed by the Director, Air, Pesticides, and Toxics Management Division, Region IV, U.S. EPA, dated September 30, 1987, which was served by hand delivery to Respondent on February 9, 1988. Respondent filed an answer, dated February 29, 1988. The matter was referred to the undersigned by Order, dated

March 21, 1988. A prehearing letter was issued on May 4, 1988, requiring the parties to submit certain information by July 8, 1988.

On July 13 and again on September 9, 1988, I granted extensions of time to file prehearing exchange information. The prehearing exchange was rescheduled for October 10, 1988. Complainant timely filed its prehearing information on October 11, 1988 (October 10 was a Federal holiday). Respondent has failed to furnish the information required by my letter, dated May 4, 1988, or to make any response to the letter. This failure constitutes a default within the meaning of the Rules of Practice (40 CFR § 22.17(a)) and an admission of the facts alleged in the complaint.

Based on the allegations in the complaint and the exhibits submitted in Complainant's prehearing exchange, I make the following:

#### FINDINGS OF FACT

1. Respondent, Babco Chemical Company (Babco), is a corporation which on February 7, 1986, had a place of business at 2045 Gilmore Street, Jacksonville, Florida. Babco is a person as defined in § 2(e) of FIFRA (7 U.S.C. § 136(s)).
2. On February 7, 1986, Babco held for sale or distribution at the mentioned address the product "Babco Bug Chek Concentrate." This product is a registered pesticide (EPA Registration No. 10736-3).
3. The label on "Babco Bug Chek Concentrate" indicated that the product was for "do-it-yourself pest control." The label also

indicated a six percent concentration of "O-Diethyl O-(2-isopropyl-4 Methyl-6-Pyrimidinyl) Phosphorothioate, the chemical name for Diazinon.

4. In letters, dated December 19, 1980, and January 16, 1985, Babco was informed by the Registration Division, EPA Headquarters, that extensive revisions were necessary in the labeling for Bug Chek Concentrate. Babco was informed that the concentration of Diazinon was too high for indoor homeowner use and that if the "do-it-yourself" labeling were to be retained, the Diazinon concentration must be reduced to 0.5%. If the Diazinon concentration remained at six percent, the labeling must indicate "(f)or PCO use only" or similar language. Babco was further informed that, among other things, a "Statement Of Practical Treatment," prescribed precautionary statements, e.g., "Keep Out Of Reach Of Children" and "(i)t is a violation of Federal law to use this product in a manner inconsistent with its labeling," and revised storage and disposal requirements must be added to the label. In the referenced letter of December 19, 1980, Babco was further requested to delete the claim "guaranteed to kill" unless the "money back guarantee" was returned to the label. A container of "Babco Bug Chek Concentrate" collected at the time of an inspection of Babco's premises on February 7, 1986, demonstrates that the prescribed changes to the labeling had not been made. Answering the complaint, Mr. Peter Yang,

President of Babco, alleged that the company had been purchased in 1985 and that no information regarding the referenced EPA letters was available.

5. Labeling on "Babco Bug Chek Concentrate" contained the following:

"ACTIVE INGREDIENTS BY WEIGHT	
*2,2 Dichlorovinyl Dimethyl Phosphate	0.46%
Related Compounds	0.04%
**0,0-Diethyl O-(2-isopropyl-4 Methyl 6 Pyrimidinyl) Phosphorothioate	6.00%
Aromatic Petroleum Derivative	
Solvents	85.29%
Petroleum Hydrocarbons	1.68%

\* \*

\*DDVP   \*\*Diazinon

\* \* \* \*"

Analysis of a sample from the container referred to in finding 4 reflects that the product contains 0.38% DDVP and 5.7% Diazinon.

6. Labeling on the pesticide referred to in the preceding finding contained the phrase "water based leaves no stains." This claim had not been accepted in connection with the product's registration.
7. On February 7, 1986, Babco held for sale or distribution the product "Babco Bug Chek Ready-To-Use." This product is a registered pesticide (EPA Registration No. 10736-5).
8. Labeling on the pesticide referred to in finding 7 indicates that active ingredients comprise 2.075% of the product,

including .50% chlorpyrifus, 0.05% pyrethrins and 0.125% piperonyl butoxide. Analyses of samples of this product show that concentrations of the mentioned ingredients were 60% or less of the concentrations indicated on the label.

9. On and prior to February 7, 1986, Babco was repackaging the pesticide "Babco Bug Chek Ready-To-Use" at its establishment at 2045 Gilmore Street, Jacksonville, Florida. Repackaging a pesticide constitutes the production of a pesticide in accordance with § 2(w) of FIFRA. The mentioned establishment was not registered with EPA until after February 7, 1986.
10. Storage and disposal statements on labels for "Babco Bug Chek Ready-To-Use" had not been updated as required by PR Notices 83-3 and 84-1, dated March 29, 1983 and February 17, 1984, respectively. The requirements of these notices were effective for products released for shipment on or after December 31, 1984.
11. The label on "Babco Bug Chek Ready-To-Use" bore the statement "EPA Est. 35236-FL. This, however, is the establishment registration number of Babco's supplier, Chemical Specialties Company, Jacksonville, Florida.

C O N C L U S I O N S

1. Babco's action in holding for sale or distribution on February 7, 1986, the pesticides "Babco Bug Chek Concentrate" and "Babco Bug Chek Ready-To-Use" without making label revisions required by EPA letters, dated December 19, 1980 and January 16, 1985, and PR Notices 83-3 and 84-1, dated March 29, 1983 and February 17, 1984, respectively, constitute the holding for sale or distribution of pesticides which are misbranded as defined in § 2(q)(1)(F) and (G) of the Act (7 U.S.C. § 136(q)) in that the labels did not contain directions for use and precautionary statements adequate to protect health and the environment. In accordance with § 12(a)(1)(E) of the Act (7 U.S.C. § 136j(a)(1)(E)), it is unlawful to, inter alia, hold, offer for sale or distribute a pesticide which is misbranded.
2. On February 7, 1986, Babco Bug Chek Concentrate" and "Babco Bug Chek Ready-To-Use" were adulterated as defined in § 2(c) of the Act (7 U.S.C. § 136(c)), because the concentrations of active ingredients were less than the concentrations stated on the labels. Babco's action in holding for sale or distribution pesticides which are adulterated is unlawful (FIFRA § 12(a)(1)(E), 7 U.S.C. § 136j(a)(1)(E)).
3. Babco's action in repackaging "Babco Bug Chek Ready-To-Use" makes Babco a pesticide producer as defined in § 2(w) of the

Act (7 U.S.C. § 136(w)) and on February 7, 1986, the establishment at 2045 Gilmore Street where the repackaging was accomplished was not registered with EPA as required by § 7(a) of the Act (7 U.S.C. § 136(e)).

4. On February 7, 1986, the label for "Babco Bug Chek Ready-To-Use" contained the establishment registration number of Babco's supplier, Chemical Specialties Company, Jacksonville, Florida. Accordingly, the label contained a statement which is false or misleading (§ 2(q)(1)(A) of the Act) and thus the mentioned pesticide was also misbranded for that reason.
5. For the violations of FIFRA herein found, Babco is liable for a penalty of \$860.00 in accordance with § 14(a)(1) of the Act (7 U.S.C. § 136 1(a)(1)).

#### D I S C U S S I O N

The Rules of Practice (40 CFR § 22.17(a)) provide that a default is an admission of all facts alleged in the complaint and for the assessment of the penalty proposed in the complaint without further proceedings. Nevertheless, it is worthy of note that the EPA order that Babco lower the Diazinon content of Babco Bug Chek Concentrate or change the label to provide "for PCO use only" or similar language appears to be an attempt to change the classification of the pesticide to restricted use without following

procedures specified by § 3(d)(2) of the Act.<sup>1/</sup> Equally dubious is the assertion (Count II of the complaint) that Babco's failure to delete the claim "guaranteed to kill" from the label of Babco Bug Chek Concentrate, unless a "money back guarantee" was restored to the label, is a violation of § 12(a)(1)(B) of the Act, which prohibits claims as part of the distribution or sale of a pesticide which substantially differ from those made in connection with its registration. Babco Bug Chek Concentrate was registered in 1973 and a failure to make label changes ordered by EPA is seemingly more properly regarded as misbranding.<sup>2/</sup> Complainant has not, however, proposed a separate penalty for Count II and thus it is unnecessary to decide this question.<sup>3/</sup>

The penalty proposed in the complaint was \$860.00, consisting of \$280.00 for the misbranding of Babco Bug Chek Concentrate charged in Count I, \$280.00 for the adulteration of Babco Bug Chek Ready-To-Use charged in Count III, \$180.00 for the failure to register the pesticide producing establishment as charged in Count IV and \$120.00 for the misbranding of Babco Bug Chek Ready-To-Use

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<sup>1/</sup> The cited section requires notice to the registrant and publication in the Federal Register. The registrant then has an opportunity to request a hearing in accordance with § 6(b) of the Act to contest the reclassification.

<sup>2/</sup> Any contention that registration is a continuous process is considered to be untenable.

<sup>3/</sup> Count II of the complaint alleges that the phrase "water based leaves no stains" was not accepted in connection with the product's registration. It is not clear that this claim differs substantially from claims made at the time Babco Bug Chek Concentrate was registered.



as charged in Count IV. These penalty amounts were determined in accordance with the Guidelines For The Assessment of Civil Penalties Under FIFRA (39 FR 27711, July 31, 1974), based on Babco being in Sales Category I, sales of \$100,000 or less.<sup>4/</sup> This is considered to comply with the "size of the business of the person charged," the first factor which the statute (FIFRA § 14(a)(4)) requires be considered in determining the amount of the penalty. See guidelines, Section I(C)(1)(b). The second statutory factor to be considered is "the effect of the [proposed penalty] on the person's ability to continue in business." The guidelines assume that the proposed penalty will not effect the ability of the person charged to continue in business (Section I(C)(1)(c)). It is noted, however, that in an affidavit, dated February 9, 1988, Mr. Yang stated that Babco was in the process of moving and was not presently manufacturing pesticides. There is no evidence that Babco has resumed pesticide production.<sup>5/</sup> Babco's default, however, constitutes an admission of all facts alleged in the complaint and it is determined that Babco was and is a pesticide producer. Under these circumstances, no further

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4/ The Establishment Inspection Report, dated February 17, 1986, quotes Babco's President, Mr. Peter Yang, as stating Babco had gross annual sales of approximately \$80,000.

5/ If Babco has gone out of business, this could constitute a "special circumstance" within the meaning of the penalty guidelines which, absent a default, would warrant a substantial reduction in the proposed penalty. See Custom Chemical & Agricultural Consulting, Inc. and David H. Fulstone, II, FIFRA Appeal No. 86-3 (CJO, March 6, 1989).

discussion of the effect of the proposed penalty on Babco's ability to remain in business is warranted.

The final factor which the statute requires be considered is the "gravity of the violation." This is usually considered from two aspects: gravity of the harm and gravity of the misconduct.<sup>6/</sup> The proposed penalty amounts follow the schedule in the guidelines, that is \$280.00 for the misbranding (adverse effects unknown) alleged in Count I, \$280.00 for the adulteration (active ingredients 60% or less of those shown on the label, resulting in a product which is partially inefficacious) alleged in Count III, \$180.00 for the failure to register the producer establishment as alleged in Count IV and \$120.00 for the misbranding (adverse effects not probable) alleged in Count V. These amounts prima facie adequately consider the potential harm to human health and the environment from the violations found.

Turning to the gravity of the misconduct, it is noted that Babco claims to have no knowledge of the EPA letters, dated December 19, 1980 and January 16, 1985, and PR Notices 83-3 and 84-1 upon which the misbranding alleged in Counts I and V of the complaint are based. Mr. Yang apparently purchased Babco in 1985, and his claims as to lack of knowledge are accepted as accurate.

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6/ High Plains Cooperative, Inc., Docket No. I.F.& R.-VIII-198C (Initial Decision, June 29, 1987), presently on appeal.

Lack of knowledge does not, of course, excuse failure to comply with applicable laws and regulations. Moreover, the \$120.00 penalty proposed for Count IV, failure to register producer establishment, takes into account lack of knowledge of the requirement and no separate penalty has been proposed for the minor adulteration alleged in Count II. Under these circumstances, it is concluded that the penalties as proposed adequately consider the gravity of Babco's misconduct.

The full amount of the penalty as proposed (\$860.00) is determined to be appropriate and will be assessed against Babco Chemical Company.

O R D E R

Respondent, Babco Chemical Company, having violated the Federal Insecticide, Fungicide and Rodenticide Act as charged in the complaint, a penalty of \$860.00 is assessed against it in accordance with § 14(a)(1) of the Act (7 U.S.C. § 136 l). Payment of the full amount of the penalty shall be made by submitting a cashier's or certified check payable to the Treasurer of the

United States within 60 days of receipt of this order<sup>7/</sup> to the following address:

Regional Hearing Clerk  
U.S. EPA, Region IV  
P.O. Box 100142  
Atlanta, Georgia 30384

Dated this 12<sup>th</sup> day of May 1989.

  
Spencer T. Nissen  
Administrative Law Judge

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7/ In accordance with Rule 22.17(b) (40 CFR Part 22), this default order constitutes an initial decision, which unless appealed in accordance with Rule 22.30 or unless the Administrator elects sua sponte to review the same as therein provided will become the final order of the Administrator in accordance with Rule 22.27(c).