

7/26/93

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)
)
 FREHNER WHOLESALE, INC.,) Docket No. FIFRA-09-0692-C-90-01
)
 Respondent)
)

Penalty assessed against respondent, having been found in violation of section 12(a)(2)(K) of the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 136j(a)(2)(K), for the sale of Hi-Yield Chlordane Spray, in violation of a Cancellation Order. Proposed penalty of \$5,000 reduced to \$1,100.

INITIAL DECISION AND ORDER

By: Frank W. Vanderheyden
Administrative Law Judge

Dated: July 26, 1993

Appearances:

For Complainant: David M. Jones, Esquire
 Office of Regional Counsel
 United States Environmental
 Protection Agency
 Region IX
 75 Hawthorne Street
 San Francisco, CA 94105

For Respondent: Bruce M. Judd, Esquire
 WRIGHT & STEWART
 302 E. Carson Avenue, Third Floor
 Las Vegas, NV 89101

INTRODUCTION

An administrative complaint initiating this proceeding was served on January 30, 1990, by the United States Environmental Protection Agency (complainant or EPA), charging Frehner Wholesale, Inc., (respondent), with one count for violating the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA or Act), as amended, 7 U.S.C. § 136 et seq. The violation concerned the selling and distributing a chlordane product whose registration with EPA had been canceled under section 6(a)(1) of FIFRA, 7 U.S.C. § 136(d)(1), and the sale of which had been banned by an order of a federal District Court.¹ The effective date of the ban on sales of the chlordane products listed in the announcement was April 14, 1988. The product, Hi-Yield Chlordane Spray (Product), registered with the EPA by Voluntary Purchasing Group, Inc., Registration Nos. 7401-78 and 7401-348, was included in the April 8, 1988, Federal Register list of chlordane products included in the court's order.

The complaint alleges that respondent sold and distributed the Product after April 14, 1988, in violation of section 12(a)(2)(K) of FIFRA, 7 U.S.C. § 136j(a)(2)(K).²

¹ National Coalition Against the Misuse of Pesticides, et al. v. United States Environmental Protection Agency, et al., Civil Action No. 87-2089-LFO, D.D.C., Civil Action No. 87-2089, February 23, 1988, published at 53 Fed. Reg. 11800 (April 8, 1988).

² Section 12(a)(2)(K) of FIFRA makes it unlawful for any person to violate a cancellation order. Cancellation is found under section 6 of FIFRA. "Person" is defined under section 2(s) of FIFRA as being any corporation. Respondent is a Nevada corporation.

On April 15, 1991, complainant moved, pursuant to 40 C.F.R. § 22.20(a), for a partial accelerated decision concerning liability on the grounds that no genuine issue of material fact exists with respect to that issue. The motion was granted in an order by this Administrative Law Judge (ALJ), dated October 3, 1991, and the accelerated decision is incorporated herein by reference. The complaint sought a penalty of \$5,000. A hearing followed concerning the sole issue of the amount of civil penalty to be assessed. The remainder of this decision will focus solely on the penalty issue.

In determining the amount of penalty to be assessed, section 14 of FIFRA, 7 U.S.C. § 1361, provides in pertinent part, that:

(a) Civil Penalties.-

(4) Determination of penalty.- . . . the Administrator shall consider the appropriateness of such penalty to the size of the business . . . the effect on the person's ability to continue in business, and the gravity of the violation . . . (emphasis supplied).

The complainant's Guidelines for Civil Penalties Under FIFRA (Guidelines), 39 Fed. Reg. 27711-27722 (July 31, 1974), set forth a Civil Penalty Assessment Schedule (Schedule) designed as a guide to determine the appropriate penalty. The Schedule considers the nature of the violation, the size of the business based on gross sales, and in this case, the respondent's knowledge of the cancellation order. (Guidelines at 27717). In applying the Guidelines, the parties agree that the nature of the violation is described by charge code E32, "Violation of a Cancellation Order".

(TR 10) However, the parties disagree about the size of respondent's business, and concerning whether Mrs. Frehner (Frehner), the active operator of the business, had knowledge of the cancellation order. (TR 10, 137-41) First, these issues must be resolved, and then, the appropriate penalty determined by considering the Schedule which may be adjusted to reflect the gravity of the violation,³ and other pertinent considerations.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Size of Business

The parties' dispute concerning the size of business centers around two documents. The first, CX 6⁴, is a Dunn & Bradstreet (D&B) report on respondent. Complainant relies on the information contained in these reports when determining the size of business for penalty calculations. (TR 15) It is EPA's regional policy that when the D&B's report contains no information concerning gross sales, as here, EPA assumes that the business is Category V, with gross sales in excess of \$1,000,000 in the fiscal year prior to the violation. (TR 16) The second document, RX 6, is an unsigned, uncertified copy of respondent's 1988 tax return, given to Frehner by her certified public accountant. (TR 144) This return, which

³ Adjustments can also be made due to the effect a penalty would have on a person's ability to stay in business. In this case, respondent offered no evidence that even the maximum allowable penalty would adversely affect its ability to stay in business. Therefore no adjustment is appropriate.

⁴ CX represents complainant's exhibits, and RX is the designation for those of respondent.

she testified is an accurate copy of the one she filed with the Internal Revenue Service, (TR 144), shows that respondent's gross sales for the year prior to the violation was \$508,650. (RX 6) This would classify respondent as a Category III business, with gross sales between \$400,000 and \$700,000. (Guidelines at 27712) Frehner was a most credible witness, and in the ALJ's view her testimony outweighs the unsigned and uncertified copy of the 1988 tax return. It is concluded this tax return is sufficient evidence of respondent's size to overcome an assumption based on EPA's regional policy of relying on D&B reports. It is concluded that respondent is a Category III business for purposes of this penalty calculation.

2. Knowledge of Cancellation Order

The question of whether Frehner had knowledge of the Cancellation Order is not difficult to answer. Publication in the Federal Register, "is sufficient to give notice of the contents of the document to a person subject to or affected by it."⁵ The Cancellation Order was published in the Federal Register on April 8, 1988. (CX 14) Therefore, Frehner is deemed to have knowledge of it. The record contains evidence of Frehner's age, lack of knowledge concerning chlordane and its harmful effects, her husband's infirmity, and the lack of notice from the Nevada Department of Agriculture. (TR 77-80, 134-41) This evidence,

⁵ 44 U.S.C. 1507. See also In re Sidmar Enterprises, Inc., I.F. & R. Docket No. I-310 (1976), n.7. at 14; In re Redwood Chemical Corporation, I.F. & R. Docket No. VI-63C (1977) at 10.

however, is simply not relevant to the question of respondent's knowledge of the Cancellation Order.

Based on these findings, and in accordance with the Schedule, it is concluded that the appropriate penalty for the violation of a Cancellation Order, with knowledge of the order, by a Category III business, is \$2,750. (Guidelines at 27717) This figure may be adjusted further based on the gravity of the violation.

3. Gravity

The Guidelines, at 27712, provide that in assessing the "gravity of the violation" the following factors are to be considered in determining the penalty: (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 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 the actual knowledge of the Act; and (7) Evidence of good faith in the instant circumstance. In this case, several of these factors are in respondent's favor.

The relevant facts are as follows:

1. On March 21, 1989, three cases of the Product were delivered by respondent to Davis Nursery (Davis), but the latter never paid for same. (CX 3; TR 139-42)

2. Each case contained either four or six one-half gallon bottles of the Product, for a total of either six or nine gallons.

(TR 57, 142)

3. Davis was initially instructed by Michael Verchick, an investigator for the Nevada Department of Agriculture (NDA), to return the Product to respondent. No substantial effort was made by the NDA to arrange for the safe disposal of the Product. (TR 67-69)

4. Before cancellation, millions of pounds of chlordane was used annually. (TR 126)

5. Respondent has never been charged with any other violation of FIFRA. (TR 33-35)

6. At the time the Cancellation Order was published in the Federal Register, respondent was not actively involved in the sale of insecticides.

The pertinent section of the Consolidated Rules of Practice, 40 C.F.R. § 22.27(b), requires the ALJ to "consider" any civil penalty guidelines issued under the Act. He is not enjoined to follow them. In the Matter of High Plains Cooperative, Inc., FIFRA Appeal No. 87-4 (July 3, 1990). There is wisdom here. Where blind application of the criteria in the Guidelines would produce a result empty of justice, what should be condign penalty rests within the informed discretion of the ALJ. In doing so, he should relate those factors upon which he relies in reaching the assessed penalty. This is not a case of a flagrant violator, having sold and distributed the Product on a large scale. Further, Frehner was

making an attempt to manage a business at a time when her husband was incapacitated. This was not an easy task, indeed. Also, respondent has a history of spotless compliance with FIFRA. Additionally, it is established that respondent was completely unaware of the requirements of FIFRA at the time the violations were committed. Concerning good faith, respondent's violations were not deliberate or intentional. Rather, they were the result of attempting to accommodate Davis, who inquired about and sought the Product, resulting in an isolated offer for sale, for which respondent did not receive remuneration. Intent, however, is not an element of an offense under the civil penalty provisions of FIFRA. However, the absence of intent certainly bears some relationship to respondent's good faith or lack thereof.

In light of the above factors, the base penalty of \$2,750 should be adjusted downward by sixty percent or \$1,650, resulting in a total penalty of \$1,100. This penalty is sufficient to deter any further violations of FIFRA, and also protect the public.

ULTIMATE CONCLUSIONS

It is concluded that respondent is in violation of section 12(a)(2)(K) of FIFRA, 7 U.S.C § 136j(a)(2)(K).

ORDER

IT IS ORDERED⁶, pursuant to section 14(a) of FIFRA, 7 U.S.C. § 1361(a), that:

1. Respondent, Frehner Wholesale, Inc., be assessed a civil penalty of \$1,100.

2. Payment of the full amount of the penalty assessed shall be made by forwarding a cashier's or certified check, payable to the Treasurer of the United States, and mailed to the following address within sixty (60) days after the final order is issued:

Mellon Bank
EPA - Region IX
Regional Hearing Clerk
P.O. Box 360863M
Pittsburgh, PA 15251

3. Failure upon the part of the respondent to pay the penalty within the prescribed time frame after entry of the final order shall result in the assessment of interest on the civil penalty.

31 U.S.C. § 3717; 4 C.F.R. § 102.13(b),(c),(e).



Frank W. Vanderheyden
Administrative Law Judge

Dated: July 26, 1993

Unless appealed in accordance with 40 C.F.R. § 22.30, or unless the Administrator elects to review the 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). This decision concerning penalty, coupled with the partial accelerated decision issued previously finding respondent's liability, represents a complete initial decision and order in this matter.

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 9

In the Matter of) Docket No. FIFRA-09-0692-C-90-01
Frehner Wholesale,)
Incorporated) CERTIFICATE OF SERVICE
Respondent)

To: Bruce M. Judd, Esq.
WRIGHT & STEWARD
302 E. Carson Avenue, Third Floor
Las Vegas, NV 89101

certified Receipt P 389 856 367

David M. Jones, Esq.
Office of Regional Counsel, RC-2-1
U. S. Environmental Protection Agency
75 Hawthorne Street
San Francisco, CA 94105

PLEASE TAKE NOTICE that, on behalf of the U.S. Environmental Protection Agency, I have this day filed with the Regional Hearing Clerk of the U.S. Environmental Protection Agency, Region 9, Initial Decision and Order, a copy of which is attached hereto and hereby served upon you by mail.

8/3/92
Date

Danielle E. Carr
Danielle E. Carr,
Administrative Clerk