10/31/95

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Mia Rose Products, Inc.,	)	**Docket No. FIFRA-09-0824-C-92-41**
	)	
Respondent	)	

Federal Insecticide, Fungicide, and Rodenticide Act -- Civil penalty for failure to register pesticide and place of its production -- Respondent's good faith and the absence of significant environmental injury justify an assessment of no civil penalty.

Appearances

For Complainant:

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For Respondent:

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Before

Thomas W. Hoya
Administrative Law Judge

INITIAL DECISION

This Initial Decision determines the amount of the recommended civil penalty in this case, which has been brought under the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136-136y ("FIFRA"). Complainant is Region IX, U.S. Environmental Protection Agency ("EPA"); and Respondent is Mia Rose Products, Inc., a small California corporation that produces and distributes a line of citrus-based air fresheners.

The parties have stipulated that Respondent committed the violations of FIFRA charged in the September 14, 1992 Complaint. Respondent produced and sold an air freshener product that, as a result of label claims, was a pesticide as defined by Section 2(u) of FIFRA, 7 U.S.C. § 136(u); but Respondent had failed to make the required registration under FIFRA of either the pesticide or its place of production.[1]

What divides the parties, and presents the subject of this Initial Decision, is the amount of the civil penalty to be imposed under Section 14(a) of FIFRA, 7 U.S.C. § 136l(a). Complainant has proposed $7,000;[2] Respondent has suggested either no penalty, or else a substantial reduction in the proposed $7,000 penalty.

Background

This case stems from an August 18, 1989 inspection of Respondent's facility by a State of California environmental official. The official determined that Respondent was producing and selling an aerosol air freshener called "Air Therapy." Among other claims made in labels for Air Therapy was that it "[s]afely eliminates airborne bacteria & viruses, odors and smoke," and "[s]afely controls household insects (fleas, flies, ants and

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[1] The failure to register the pesticide violated FIFRA § 12(a)(1)(A), 7 U.S.C. § 136j(a)(1)(A); the failure to register the place of production violated FIFRA § 12(a)(2)(L), 7 U.S.C. § 136j(a)(2)(L), which makes it unlawful for "any person" who is a "producer" as that term is defined by Section 2(w) of FIFRA, 7 U.S.C. § 136(w), to violate any of the provisions of Section 7 of FIFRA, 7 U.S.C. § 136e(a).

[2] Complainant originally proposed a civil penalty of $4,000, using EPA's July 31, 1974 FIFRA penalty policy. See Complaint at 4 (September 14, 1992). Subsequently Complainant amended the Complaint to increase this amount to $7,000 because, when the Complaint had been issued, this 1974 penalty policy had been superseded by a July 2, 1990 policy, and this new policy supported the $7,000 figure. See Motion for Leave to Amend the Complaint and Notice of Opportunity for Hearing and to Modify Prehearing Exchange Memorandum (June 18, 1993).

crickets)."[3]

When told by the California official that these claims subjected Air Therapy to regulation as a pesticide, Respondent revised the labels and submitted them for review to the California Department of Food and Agriculture. On August 30, 1989 that Department approved the revisions, stating that "[s]ince your label no longer makes any pesticide claims, your product is not considered an economic poison and does not fall under the Food and Agricultural Code or the California Code Regulations."[4]

Respondent advanced several points in its behalf. It stressed its consistent intentions to comply with the law, stating that it had been unaware that its air freshener could be subject to regulations for pesticides, and that as soon as the problem was called to its attention it corrected the offending label, as noted above. (Complainant has cited no prior violations by Respondent.)

To explain its initial unawareness of the relevance of pesticide regulations, Respondent stated that Air Therapy is essentially nothing more than orange peel extract, or 90.7 percent Oil-Limonene by weight. The label claims that it contains "no harmful chemicals,"[5] and Respondent stated that a January 1990 EPA test "found it to contain no toxic or other dangerous ingredients."[6]

What may have led to the original label claim regarding household insects was, as noted by Respondent, that "orange peel extract ... is commonly recognized as a natural insect repellent" (emphasis omitted).[7] To emphasize the unlikelihood of Air Therapy's being considered as a pesticide, Respondent noted that it represented itself as an aerosol air freshener. Respondent suggested that such a product would hardly contain any harmful chemicals to be sprayed into the air that any consumer would then breathe.

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[3] Complaint at 2, ¶ 6 (September 14, 1992).

[4] Prehearing Exchange of Respondent (June 21, 1993), Attachment 1, Letter from Masuo Robinson, Pesticide Registration Specialist, California Department of Food and Agriculture, to Mia R. Palencar, President, Mia Rose Products, Inc. (August 30, 1989).

[5] Prehearing Exchange of Respondent, Exhibit 8 (June 21, 1993).

[6] Prehearing Exchange of Respondent at 2 (June 21, 1993).

[7] Id.

Civil Penalty

EPA Penalty Policy

To justify its proposed $7,000 civil penalty, Complainant applied EPA's Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act (July 2, 1990) ("ERP"). In contending for either no penalty or a substantial reduction, Respondent addressed its arguments to Complainant's application of the ERP.[8]

The ERP establishes a five-step procedure for calculating a penalty. It was Complainant's implementation of the second and fourth steps that Respondent specifically challenged.

Seriousness of Violation, Size of Business. In the first step, a so-called "gravity level" for each violation is determined from a listing of various FIFRA violations, ranging from a value of one for the most serious to four for the least serious. In this step, each of Respondent's two violations was assigned a gravity level of two.

The second step concerns the size of a respondent's business. A respondent is placed into one of three categories, based on its gross revenues during the prior calendar year, as follows: over $1,000,000--Category I; $300,001 to $1,000,000--Category II; and $0 to $300,000--Category III.

According to the ERP, Complainant may calculate the penalty using Category I "when information concerning an alleged violator's size of business is not readily available...."[9] When the Complaint was issued, little information was available regarding Respondent's size, and Respondent was placed in Category I.

Respondent subsequently submitted tax returns, however, maintaining that it belongs in Category III, for the smallest businesses. These tax returns show that Respondent's gross receipts or sales from 1989 through 1992 were between $400,000 and $800,000.

These gross revenue figures clearly place Respondent in

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[8] Certain of Respondent's arguments contended that Air Therapy is not a pesticide. Since Respondent eventually conceded this point and acknowledged liability, Respondent's arguments are considered only insofar as they affect the amount of the penalty.

[9] EPA's Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act ("ERP") at 21 (July 2, 1990).

Category II, the middle Category. This change from Complainant's initial determination will be taken into account in the review of the remaining steps in the ERP calculation.

The third step produces a dollar amount for each violation by using a matrix (Table 1)[10] in which one axis reflects the gravity level of the violation (determined in step one), and the other axis reflects the category of a respondent's size of business (determined in step two). For Respondent's gravity levels (two) and size (Category II), the figure produced by the matrix is $4,000 for each of the two violations of FIFRA, for a total penalty of $8,000. Complainant, using the Category I size of business, obtained a $5,000 per violation figure from the matrix, for a total of $10,000.

Harm, Culpability. In the fourth step, the amount produced by the first three steps is adjusted as warranted by considering: toxicity of the pesticide, the violation's harm to human health and to the environment, and the violator's compliance history and culpability. Here Respondent challenged Complainant's evaluation of the harm and of the culpability.

For harm to human health and to the environment, Respondent argued that the appropriate value is (0), rather than the (1) assigned by Complainant. (The lower the number assigned, the greater the downward adjustment of the penalty that becomes possible.)

Complainant's figure of (1) is, however, justified. The ERP provides only the alternatives of (1) (minor harm), (3) (unknown harm), and (5) (major harm). Thus Respondent's proposed (0) is not an option under the ERP.

Moreover, Respondent's violation was not totally free of harm. Protection of health and the environment depends on an effective regulatory system of which FIFRA is a part. The failure of registration of a pesticide and its place of production denies to EPA the information essential to administer FIFRA's regulation. Even when a substance comes within this regulation only because of a label claim, that claim means that consumers expect the substance's quality to be minimally assured by FIFRA regulation, an assurance that can be provided by the regulation only if registrations are complete. Finally, all environmental regulation depends on faithful compliance, and accordingly the integrity of the whole regulatory scheme is diminished by any noncompliance,

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[10] Id. at 20.

even when no actual environmental damage occurs.[11]

The other adjustment factor challenged by Respondent was culpability, for which Complainant assigned a value of (2), meaning "[c]ulpability unknown," or "[v]iolation resulting from negligence."[12] The other options are (4) for a "[k]nowing or willful violation ...," and (0) where the "[v]iolation was neither knowing nor willful and did not result from negligence ... [and] [v]iolator instituted steps to correct the violation immediately after discovery of the violation."[13] Respondent of course argued for the (0) value.

Respondent's argument has merit. Respondent has asserted that its failure to register stemmed simply from its unawareness that its air freshener could be a pesticide, and thus was "neither knowing nor willful." Respondent certainly moved quickly to correct the violation, obtaining a written approval of its revised labels from the California Department of Food and Agriculture on August 30, 1989, only twelve days after the August 18, 1989 inspection in which it learned of the problem. Complainant has disputed none of these points.

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[11] See In re Sav-Mart, Inc., FIFRA Appeal No. 94-3 at n. 13 (EAB, March 8, 1995) (citing Thornton v. Fondren Green Apartments, 788 F. Supp. 928, 932 (S.D. Tex. 1992)). In Sav-Mart, the EAB stated that "the failure to register either the establishment or the pesticide under FIFRA deprives the Agency of necessary information and therefore weakens the statutory scheme," and that "[a] finding of no harm from such violations would impermissibly reward businesses which fail to register their products by depriving EPA of information which could be used in an enforcement action." See also In re Sta-Lube, Inc., Docket No. FIFRA 09-0407-C-84-40, Initial Decision at 10-11 (April 11, 1985)("[r]egistration of pesticide producing establishments assists the Administrator in tracking down violations of the Act and accidental discharges or spillage. The usefulness of registration as an aid to enforcement would also be undermined if a party could escape sanctions for not registering its establishment ... in hope that if caught it can prove that its product presented no significant harm.")(footnote omitted); In re Time Chemical, Inc., IF&R Docket No. V-237-C, Initial Decision at 5 (October 16, 1975) ("[w]here a pesticide is not registered, the regulatory officials do not have the opportunity to eliminate unwarranted claims, to require such precautionary warnings as may be necessary, and to keep the channels of commerce free of products that may have unreasonable risks to man or the environment.").

[12] ERP, supra note 9, Appendix B, at B-2.

[13] Id.

Whether Respondent's violation "did not result from negligence" is less clearcut. Air Therapy's label did claim that it "eliminates airborne bacteria & viruses" and "controls household insects," and because of these claims Respondent should have considered the relevance of pesticide regulation. This relevance is sufficient to make plausible Complainant's selection of a (2) for culpability.

On the other hand, Air Therapy was designed and promoted primarily as an air freshener, and the pesticidal claims were secondary. Respondent's negligence in failing to appreciate that these secondary claims would involve it in the regulation of pesticides is minor.[14] On balance, Respondent's lack of knowledge or willfulness and its quick correction of the violation are enough to offset this minor degree of negligence. Hence it will be awarded the (0) value for culpability for which it contended.

As noted, the fourth step in the ERP penalty calculation is an adjustment as warranted after consideration of the various listed factors. Complainant's calculation, including the assignment of (1) for harm and (2) for culpability, entitled Respondent to a 30 percent reduction in the figure obtained from the matrix, which was $10,000. Thus Complainant derived its $7,000 proposal.

If, however, Respondent is instead given the benefit of (0) for culpability, a reduction of the penalty to zero becomes possible, although only a 50 percent reduction of the penalty "is recommended where multiple count violations exist."[15] Here Respondent is liable both for failure to register a pesticide and also for failure to register its place of production.

Nevertheless, Respondent will be accorded the reduction to

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[14] A recent similar case involved equipment to produce oxygen in aquariums, and the increased oxygen was said to reduce the growth of algae, fungi, and slime. In re Aquarium Products, Inc., IF&R Docket No. III-439-C, Initial Decision (June 30, 1995). In reply to EPA's complaint regarding respondent's failure to register under FIFRA, it was held that respondent "cannot reasonably be faulted for being unaware of the EPA position that a few incidental pesticide claims on the labeling of a product sold primarily for non-pesticidal purposes would render the product a pesticide under FIFRA." Id. at 27. For a contrary holding, see In re Sta-Lube, Incorporated, Docket No. FIFRA-09-0407-C-84-40, Initial Decision (April 11, 1985).

[15] ERP, supra note 9, at 22 Table 3.

zero for its penalty. Respondent has demonstrated good faith[16] throughout this matter: its initial violation stemmed from inadvertence rather than deliberateness or significant carelessness; it moved very quickly to correct the problem; and it has no prior violations. No physical pollution occurred, nor was threatened. Indeed, it may be that Air Therapy, which apparently controls insects through the natural qualities of orange peels, actually improves the physical environment by lessening the need for toxic chemical pesticides. These factors together are distinctive enough to reduce Respondent's penalty to zero.

Ability to Pay, In Sum. As noted, the ERP provides a five step procedure for the penalty calculation. The last step is to consider the effect of the penalty on the violator's ability to continue in business. Complainant gave Respondent no benefit in this regard, and Respondent raised no objection on this point.

In sum, a review of the ERP's application to this case produces a penalty of zero. Complainant's calculation of $7,000 was plausible, but it is reduced because of subsequently obtained information regarding Respondent's size, and because of awarding Respondent a more generous rating for culpability.

FIFRA

A more fundamental consideration in the penalty calculation is the relevant section of FIFRA itself, which supplies the legal authority for EPA's ERP.[17] Section 14(a)(4) of FIFRA, 7 U.S.C. § 136l(a)(4), provides as follows (emphasis in original).

> (4) Determination of penalty. -- In determining the amount of the penalty, the [EPA] Administrator shall consider the appropriateness of such penalty to the size of the business of the person charged, the effect on the person's ability to continue in business, and the gravity of the violation. Whenever the Administrator finds that the violation occurred despite the exercise of due care or did not cause significant harm to health or the environment, the Administrator may issue a warning in lieu of assessing a penalty.

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[16] Section 22.35 of the Consolidated Rules, 40 C.F.R. § 22.35, states that "the Presiding Officer shall consider, in addition to the criteria listed in section 14(a)(3) of the Act ... any evidence of good faith or lack thereof."

[17] Also, a question has recently been raised about the validity of EPA's penalty policies for the various statutes it administers. See In re Employers Insurance Company of Wausau, and Group Eight Technology, Inc., Docket No. TSCA-V-C-62-90, Docket No. TSCA-V-C-66-90, Initial Decision (September 29, 1995).

All of the considerations enumerated in this FIFRA section have been mentioned in the preceding review of the ERP's application to this case. The authorization for a warning in lieu of any penalty "when the violation ... did not cause significant harm to health or the environment" bears further attention, because it appears to fit this case.

As stated, this violation was not free of harm, because it injured the effectiveness and integrity of the FIFRA regulatory scheme. But this injury fell short of "significant harm." Nor has Complainant shown any injury in the nature of "significant harm." Thus assessing a zero penalty in this case finds solid support in the statute.[18]

A question that must be addressed any time a civil penalty is reduced drastically is whether the proceeding still serves to deter violations, both for this violator and also for others similarly situated. For Respondent, this proceeding has by no means been cost free, and the deterrence would seem to be sufficient. Respondent has been found in violation of FIFRA, so that any future violation will entail the increased sanction that applies to past offenders. For this proceeding, Respondent retained legal counsel for the answer and prehearing exchange, and then dispensed with counsel for the final major submission, evidently because of the cost. In that final submission, filed by the president of Respondent, she mentioned the personal strain of the proceeding.[19] Finally, Complainant showed no economic benefit that Respondent obtained from its noncompliance with FIFRA.[20]

As for other firms in a situation like Respondent's, the

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[18] Statutory justification for a zero penalty here can be found also in Section 9(c)(3) of FIFRA, 7 U.S.C. § 136g(c)(3), which declares as follows (emphasis in original).

> (3) Warning notices. -- Nothing in this subchapter shall be construed as requiring the [EPA] Administrator to institute proceedings for prosecution of minor violations of this subchapter whenever the Administrator believes that the public interest will be adequately served by a suitable written notice of warning.

[19] Respondent's Memorandum re: Docket No. FIFRA-09-0824-C-92-41, at 3 (April 30, 1994).

[20] In addition, Respondent is apparently a six-person operation (see Complainant's Prehearing Exchange, Exhibit 5 at 3), and as such should obtain some benefit from the spirit (although Respondent is outside the letter) of EPA's recently announced "Interim Policy on Compliance Incentives for Small Businesses," 60 Fed. Reg. 32,675 (June 23, 1995).

above costs borne by Respondent should give them pause if they contemplate a casual approach to FIFRA. Moreover, any future violator has no assurance it would receive the lenient treatment here accorded Respondent, even if it benefitted from all the features distinctive of Respondent's case. This point is all the more true given that each prosecuted case like Respondent's makes it that much less convincing for firms in the future to argue that they were unaware of the application of FIFRA to incidental pesticide claims for their products.

In conclusion, a penalty of zero is suitable for Respondent in this case. This conclusion is supported by a review both of the ERP and of FIFRA.

Order

For the violations, as alleged in the Complaint, of Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), and of Section 12(a)(2)(L) of FIFRA, 7 U.S.C. § 136j(a)(2)(L), Section 2(w) of FIFRA, 7 U.S.C. § 136(w), and Section 7 of FIFRA, 7 U.S.C. § 136e(a), no civil penalty is assessed against Respondent.

Thomas W. Hoya
Thomas W. Hoya
Administrative Law Judge

Dated: October 21, 1995