UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

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IN RE	)	
	)	FIFRA-09-0405-C-84-38
DEXOL INDUSTRIES, INC.	)	
	)	
Respondent	)	

1. Federal Insecticide, Fungicide and Rodenticide Act - In determining whether a civil penalty should be assessed for each violation of the Act alleged in the complaint, one must determine whether each violation results from an independent act of the Respondent which is substantially distinguishable from any other violation enumerated in the complaint.
2. Federal Insecticide, Fungicide and Rodenticide Act - In determining whether or not an alleged violation is substantially independent and distinguishable from the other violations, one must consider whether each violation requires an element of proof not required by the others.
3. Federal Indsecitide, Fungicide and Rodenticide Act - Assessable counts reduced from four to two based upon failure of the Agency to show that each count was substantially distinguishable from the others.
4. Federal Insecticide, Fungicide and Rodenticide Act - Burden of proof is upon the Complainant to show that the penalty amounts proposed are appropriate. Failure to carry such burden may result in a concomitant reduction in the penalty assessed.

Appearances:

David M. Jones, Esquire
U.S. Environmental Protection Agency
San Francisco, California

E. George Pazianos, Esquire
Pazianos Associates
Washington, D.C.

INITIAL DECISION

This is a proceeding under §14(a) of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), as amended, 7 U.S.C. 136l(a), for assessment of civil penalties for violations of 7 U.S.C. 136-136y (1972), of the Federal Insecticide, Fungicide and Rodenticide Act, as amended.

This proceeding was initiated by a complaint issued on July 7, 1984 by the Director of Toxics and Waste Management Division, Region IX, USEPA, alleging violations of the above-mentioned Act on the part of the Respondent by: (1) distributing for sale a registered fungicide known as BENOMYL with an altered label in that the printed precautionary statements had been deleted from the approved label and furnished separately from the pesticide container itself in violation of §12(a)(2)(A) of FIFRA; (2) the above-mentioned pesticide was misbranded since the information required under the Act to appear on the label was not prominently displayed thereon with conspicuousness in violation of §12(a)(1)(E) of FIFRA; (3) that on or about November 6, 1981, Respondent shipped in commerce at least twelve, 12-ounce containers of DEXA-KLOR which contained an add-on sticker affixed to the label that the product can be used for

controlling termites when, in fact, the product is not registered for this use and, therefore, in violation of §12(a)(1)(E) of FIFRA; and (4) alleges a violation of §12(a)(2)(A) of FIFRA in that the add-on sticker violated said section in that it amounts to an alteration in whole or in part of the labeling required under the Act. The complaint suggested a civil penalty of $5,000.00 for each of the four counts above numerated, making a total proposed penalty of $20,000.00.

The Respondent, through its product manager, filed an answer on August 15, 1984 which, in essence, admitted the factual allegations of the complaint but argued strenuously that: (1) the penalty was too high given the facts surrounding the Respondent's acts; and (2) there should only be two penalties, if any, assessed inasmuch as Counts I and II stem from the same acts and Counts III and IV, likewise, arise from a single factual activity and, therefore, should the Agency ultimately assess a penalty, only two penalties should be assessed rather than four. The Respondent also presented a strong case that, given the low toxicity of the products in question, the likelihood of danger to man or the environment was extremely small and, therefore, the Agency erred in calculating the penalties proposed in the complaint. The Respondent also requested a hearing on this matter.

Attempts to settle the matter in the early stages of this case were apparently unsuccessful and by motion dated November 15, 1984, counsel for the Agency filed a motion for an accelerated decision pursuant to 40 CFR §§22.16 and 22.20, on the grounds that there is no genuine issue of material fact for determination at a hearing and that the Agency is entitled to a decision as a matter of law. In support of the motion,

counsel filed a brief, two affidavits of EPA inspectors along with three attachments consisting of the labels for the two pesticides in question and an enforcement case review document dated May 31, 1984. On December 7, 1984, counsel for the Respondent filed a response urging the Court to dismiss Complainant's motion for an accelerated decision. The grounds for the dismissal, as stated by counsel, were that the Agency failed to act in a timely fashion in accordance with my Order of September 24, 1984 that suggested to the parties that they may wish to agree to submit the matter to the Court for an accelerated decision and the Agency failed to do that and, therefore, their motion was untimely and should be denied. Counsel also suggested that the motion be denied because of the past history of compliance of the Respondent and the low toxicity of the pesticides in question which is germane to the issue of harm. Lastly, that the Complainant's views as to separate penalties are erroneous and excessive particularly in light of the above-noted issues.

No where in any of the filings from the Respondent in this case either through its employee or its later employed counsel are the facts alleged in the complaint denied except as to the uses allowed for DEXA-KLOR. As a matter of fact, counsel for the Respondent in its October 10, 1984 pre-hearing response indicates that he does not intend to call witnesses at the hearing and would rely on two documents prepared by the Office of Pesticides and Toxic Substances, USEPA, dated October 1, 1982 and another one prepared on October 13, 1981 both discussing the toxicity of the pesticides involved.

In view of the fact that no material factual issues are in controversy in this case, I am of the opinion that this matter is appropriately before me on a motion for accelerated decision and such motion is hereby granted.

The Complainant's motion for accelerated decision has attached to it a memorandum in support thereof, affidavits, and exhibits to support the factual allegations contained in the complaint. The Respondent did not file a brief, as such, but merely filed a two-page reply which raised the procedural and substantive defenses enumerated above. The answer, however, filed on behalf of the Respondent, prepared by its product manager, is in my opinion an excellent piece of legal work and provides the Court with sufficient legal and technical materials upon which a full examination of the issues before me can be decided without the necessity of seeking additional information from the Respondent.

Discussion

Dexol Industries, Inc. is a California corporation and owns and operates a place of business at 1450 West 228th Street, Torrance, California. At this facility it produces and distributes into commerce the two pesticidal products referred to above being "BENOMYL" and "DEXA-KLOR".

The facts in this case are relevantly simple and it is uncontested that on or about March 7, 1984, a California State Department of Food and Agriculture's inspector obtained samples of BENOMYL from the Connecticut Street Plant Supply located in San Francisco, California. An examination of the sample obtained revealed that the precautionary statements of the product's use and application were not displayed on the label, as required by the statute, but were found in a printed circular contained within the pesticide box itself.

The complaint also alleges and it is uncontested herein, that on or about November 6, 1981, Respondent shipped in commerce at least twelve, 12-ounce containers of DEXA-KLOR and on May 5, 1982, this shipment was received for sale by the Osterville House and Garden Center, 846 Main Street, Osterville, Massachusetts. The complaint recites that the label had attached thereto an add-on sticker identifying the product as being efficacious for controlling termites when, in fact, DEXA-KLOR is not registered for this use and, therefore, the addition of the add-on sticker constitutes a violation of the Act.

As noted above, the complaint alleges four separate counts and assesses a separate penalty of $5,000.00 for each of them; all arising out of the activities associated with the two pesticides described above.

In its answer, the Respondent makes a persuasive argument concerning the propriety and legality of the Agency's attempt to assess four separate penalties arriving out of what are essential only two acts. In its answer, Respondent refers the Court to the "Guidelines for the Assessment of Civil Penalties under Section 14(a) of FIFRA" which was published in the Federal Register on July 31, 1974. It is to this penalty guidance that the Agency, likewise, directs the Court's attention in its justification for the assessment of the penalties proposed in the complaint. The section to which the Respondent cites the Court's attention is Section I(B)(2) which states:

"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 charges for the 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 civil penalty is proposed to be assessed, the subsequent charge may not warrant a separate assessment. The complaint will propose to assess a civil penalty for each independent and substantially distinguishable charge".

The Respondent contends that the violations stated under Counts I and II and, likewise, Counts III and IV are not substantially distinguishable charges resulting from independent acts each supported by an element of proof not required by the other. The Respondent, therefore, urges that if the Agency and the Court ultimately feel that some penalty is warranted, there should be only two separate penalties assessed rather than four. In its response to this contention, the Complainant either did not understand the nature of the defense or sidestepped the entire issue by continuing to profess that Counts I and II, and Counts III and IV are, in fact, separate defenses since they deal with two different pesticides. That argument, of course, misses the point since no one is suggesting that there are not two separate counts involved, but rather whether or not there should be four.

Count I alleges that the label on BENOMYL had been altered in that the printed precautionary statement has been deleted and furnished separately from the inside the pesticide container, and Count II alleges that the Respondent distributed for sale the mis-branded pesticide BENOMYL since the required precautionary statements did not appear with conspicuousness on the label, but rather the information was furnished

separately from inside the pesticide container. Obviously, the only act giving rise to Counts I and II in the complaint is that the precautionary statements were placed inside the container rather than being displayed on the exterior label. No other act or acts either of commission or ommission on the part of the Respondent are alleged and, consequently, I must agree with the Respondent that only one separate and indistinguishable activity is involved in Counts I and II and that no additional independent proof is required to substantiate them. I am, therefore, of the opinion that the Agency erred in proposing a separate penalty for Counts I and II and that there should only be one penalty assessed as to the pesticide BENOMYL.

The same argument holds true for Counts III and IV of the complaint since the only act performed by the Respondent, for which the Agency attempts to hold them accountable, is that there was an add-on sticker label attached to the exterior of the container which stated that the product was efficacious for controlling termites when, in fact, no such claim for this product has been registered with the Agency. In addition, the Respondent argues that the complaint is factually in error since the product is, in fact, registered for the control of termites but that the label does not give instructions for its use in controlling these pests. The Company argues that the stick-on label was not intended to be placed on the older labels which did not contain directions for the control of termites, but rather it was to be placed on the new labels as an additional notification to the public that the product was formulated and is efficacious for the control of termites. Nothing contained in the materials submitted by the Complainant refutes this contention on the part of the Respondent

and, therefore, I will take as fact that the product is registered for control of termites, but that the old labels merely did not provide instructions for that purpose. The same argument in regard to Counts I and II of the complaint apply with equal force to Counts III and IV. Inasmuch as the only act done by the Respondent was the addition of the add-on label to the front of the product, I am of the opinion that the Agency erred in attempting to assess two penalties for Counts III and IV of the complaint and only one count should be considered in assessing a penalty in this matter.

THE PENALTY

In its complaint, the Agency, after determining that the gross sales of the Respondent were greater than $1 million, thereby placing it in category V of the civil penalty assessment schedule, and considering the gravity of the alleged violations, proposed a penalty in the amount of $20,000.00. As I have discussed above, the attempt by the Agency to assess a separate penalty for each count is inappropriate given the regulations and relevant case law. Only two counts should be considered when assessing a penalty in this case.

In determining the amount of the penalty which should be appropriately assessed, §14(a)(3) of the Act requires that there shall be considered the appropriateness of the penalty to the size of the Respondent's business, the effect on Respondent's ability to continue in business, and the gravity of the violation. The regulations further provide that in evaluating the gravity of the violation there should be considered the Respondent's history of compliance with the Act and any evidence of good faith efforts of the Respondent.

In previously decided civil penalty cases under FIFRA, it has been held that the gravity of the violation should be considered from two aspects--that is, gravity of harm and gravity of misconduct.

Although no evidence was presented which described the annual gross sales of the Respondent, the Respondent in its answer and pre-hearing filings did not dispute that it had gross sales of over $1 million annually and should therefore be placed in category V of the penalty matrix. I will, therefore, for purposes of this decision assume that category V is the appropriate category in which to place Respondent for this purpose.

As to past history of compliance, the Complainant in its initial pre-hearing filings stated that the Respondent has a history of non-compliance in Region IX. However, in its brief in support of its motion for accelerated decision, Complainant states that Region IX has no record of noncompliance involving this Respondent over the past two years, but EPA records do show an enforcement action was taken by the Commonwealth of Puerto Rico "some time past". I have no idea as to the nature of the action taken by the Commonwealth of Puerto Rico or how long ago this alleged enforcement action was undertaken, the nature of the offense involved, and whether the enforcement action resulted in a finding of guilt and the assessment of a penalty. Under the circumstances, I am of the opinion that the vague reference to some unknown enforcement action in Puerto Rico is not of sufficient specificity to provide the Court with any basis for considering past violations of this Respondent in the determination of the appropriate penalties to be assessed.

In its pre-hearing filing, the Agency states that the EPA views the gravity of the violations set forth in the complaint as being grave and as having the potential of harm or damage "in the extreme" to both man and the environment. In the memorandum associated with its motion for accelerated decision, the Agency does not expand on this notion with any particularity and, therefore, the Court is without any substantial guidance as to why the Agency considered the violations alleged in the complaint to constitute extreme hazards to both man and the environment. The only justification which one can find in the brief is to the effect that while the penalty proposed by the Complainant is the maximum penalty provided by FIFRA, the penalty amount is modest given the nature of the violations and Respondent's conduct for which Complainant "seeks to met (sic) out punishment". Counsel argues that the civil penalty proposed was established by Congress in 1972 and that given current economics, it is Complainant's view that any amount less than the maximum provided by the 14 year old provision would be an inadequate deterrant. While this is an interesting and novel argument, I find no support for it either in the law, the regulations or court decisions. The Complainant, no where in its filings, exhibits, affidavits or briefs addessses the question of the relative toxicity of the compounds in question nor does it postulate as to the nature of the harm which could befall man or the environment given the nature of the violations alleged in the complaint. Rather the documents merely indulge in self-serving conclusions for which no factual support is provided. The Respondent, on the other hand, has provided the Court with two substantial documents prepared and published by

Federal agencies which address in some detail the relative toxicity of the two products in question. The Respondent also points out that both products carry the signal word "CAUTION" because of their low-toxicity and low potential to cause harm to man and the environment. Also in regard to DEXA-KLOR, the toxicity is such that child-resistant packaging is not required by the appropriate Federal agencies. In addition, the consumer is not required to dispose of unused portions of either of the products in a waste disposal site, as would be required for highly toxic products that are capable of endangering man and the environment. Rather the Agency has approved for the disposal of both products in regular trash collection. In conclusion, the Respondent argues that the probability for adverse effects to occur to man or the environment, given the nature of the pesticides involved, is highly unlikely. My review of this entire file leads me to agree with the position set forth by the Respondent as to this issue.

The Respondent also asserts in its answer, that upon being advised of the inadvertent placing of the add-on sticker to the product in question, they immediately took steps to recall all of these products from the market and place thereon the new label which does contain the directions for use for the control of termites. The Respondent also argues that if the threat to man and the environment was as great as alleged why did the Agency wait a year and a half to take any action in regard to this matter and also why did it not immediately issue a "stop sale" notice which would have prevented the products in question in reaching the hands of the ultimate consumer. These arguments are helpful in determining the Agency's internal assessment of the hazards associated

with the violations alleged, but, of course, do not foreclose the bringing of the instant action on the basis of laches or equity since, as I understand the law, these defenses are not appropriate in matters such as this. They do, however, tend to bolster the Respondent's arguments as to the low toxicity of the products involved and the relative unlikelihood of the violations alleged causing serious harm to man or the environment and will be considered in that light.

As to the method of determination of the proposed penalty, the Complainant stated that the Agency utilized the published civil penalties guidance found in 39 FR 27711. Using that guidance, the Agency states that as to Count I they used charge code E3 category V; in Count II they used charge code E28 category V; in Count III they used charge code E28 category V; and as to Count IV they used charge code E17 category V. Counts I and II have to do with the product BENOMYL, wherein the precautionary statements were furnished separately from inside the pesticides container itself rather than being prominently displayed on the outside of the product. Code charge E3 is entitled: "Deficient Precautionary Statements: Lacks Required Precautionary Labeling". E28 which the Agency argues is also involved in the violations associated with BENOMYL is generically categorized in the guidance as a "use violation" and the title to that matrix states: "Use or Disposal of a Pesticide in a Manner Inconsistent with Its Labeling". Nothing in this case, or the record before me would lead me to believe that this is an appropriate charge code since there is no suggestion that the product in question was used or disposed of by anyone in a manner inconsistent with its labeling. In regard to BENOMYL the Respondent points out that the Agency should have more appropriately

used charge code E14 which is entitled: "Deficient Precautionary Statements: Precautionary Labeling not Prominently or Conspicuously Displayed". They suggest that this is exactly what the Agency is alleging since the precautionary statement was not missing, but was merely placed inside the container of the pesticide rather the outside label. I tend to agree with the Respondent in that charge code E14 seems to more accurately describe the offense committed by the Respondent in this case.

Based on the entire record before me, I am of the opinion that the appropriate charge code to be used in assessing a penalty for BENOMYL is E14. I further find that the toxicity level as found in the matrix associated therewith is "toxicity level - caution", which suggests a penalty of $1,200.00. Based on the prior history of the Respondent and considering past violations, of which none are demonstrated, and the other factors which the statute requires that I examine, I am of the opinion that a penalty of $1,000.00 is appropriately assessed for the combined violations characterized in the complaint as Counts I and II.

As to Counts III and IV which have to do with the add-on label, the Agency utilized charge codes E28 and E17 in category V in arriving at the penalty proposed in the complaint. Likewise as to Count III, I find nothing in this record which would suggest there was any violation involving the use or disposal of the pesticide in question and, therefore, the use of charge code E28 was not appropriate for this violation. As to charge code E17, the guidance describes this as "directions for use different from those accepted in connection with products registration". As indicated above, the allegations in regard to the registration for this

product leads me to believe that the registration does authorize and approve this product for use in controlling termites and, therefore, E17 is not an appropriate charge code to use. In this regard, I would consider charge code E_ (number undecipherable) entitled: "Inadequate Directions for Use". The record in this case, reveals that the directions for use of this pesticide as it applies to termites was inadvertently left off the label and that the add-on sticker was to alert the consuming public to the fact that the product was efficacious for use in controlling termites. The label did not, however, contain directions for use of the pesticide for that purpose and, therefore, I feel that the charge code above indicated is more appropriate for this volation. Resorting once again to the matrix in the guidance reveals that there are three potential categories under which this violation could fall and they are: (a) likely to result in mis-handling or mis-use; (b) likelihood of mis-handling or mis-use unknown; and (c) not likely to result in mis-handling or mis-use. Given the facts surrounding this violation, I am of the opinion that sub-code c represents the appropriate category to use and that under size category V, the guidance suggested a penalty of $1,200.00 for this offense. Given the cooperativeness of the Respondent and its immediate efforts to recall all of the products from the market which had the add-on lable, the precise number of which is not given by either the Complainant or the Respondent and considering all of the factors which the regulations and statute require that I examine, I am of the opinion that a penalty of $1,000.00 for Counts III and IV is appropriate in this case.

In making this decision, I have considered the entire record including the briefs and proposals of the parties and any argument, suggestion or finding therein which is inconsistent with this decision are hereby rejected.

Having considered the entire record, and based upon the discussions herein, it is proposed that the following order be issued:

PROPOSED FINAL ORDER[1/]

(1) Pursuant to FIFRA §14(a) (7 U.S.C. 136l(a)), as amended, a civil penalty of $2,000.00 is assessed against Respondent, Dexol Industries, Inc., violations of FIFRA §12(a), et. seq., as amended.

(2) Payment of $2,000.00, the civil penalty assessed, shall be made within 60 days after receipt of the final order by forwarding to the Regional Hearing Clerk, United States Environmental Protection Agency, Region IX, a cashiers check or certified check made payable to the Treasurer, United States of America.

Thomas B. Yost
Administrative Law Judge

DATED: January 9, 1985

1/ 40 C.F.R. 22.27(a) provides that this Initial Decision shall become the Final Order of the Administrator within 45 days after its service upon the parties unless an appeal is taken by one of the parties or the Administrator elects to review the Initial Decision. Section 22.30(a) provides for appeal herefrom within 20 days.