UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
ASSOCIATED PRODUCTS, INC.	)	**DKT NO. IF&R-III-412-C**
	)	
	)	
	)	
Respondent	)	
	)	

DECISION UPON RECONSIDERATION

I. Background

The complaint in this matter charged Respondent with unlawful acts under section 12(a)(2) of the Federal Insecticide, Fungicide and Rodenticide Act, as amended (FIFRA or "the Act"), 7 U.S.C. § 136j(a)(2). Specifically, Respondent was charged with two violations of Section 7 of the Act, for producing a pesticide without having registered its establishment with the U.S. Environmental Protection Agency, and one count of knowingly falsifying the date of a pesticide production reporting form submitted to EPA. Complainant sought a civil penalty of $4,500 for each count, for a total of $13,500.

The Decision and Order herein found Respondent liable for one violation of Section 7 of the Act, 7 U.S.C. § 136e, for failure as a pesticide producer to register its establishment with EPA. No civil penalty was assessed against Respondent, however. In addition, the Decision and Order provided that "the parties shall have thirty days in which to seek reconsideration of any issue decided herein, for good cause shown."

Within the period provided, Complainant filed a Motion for Reconsideration with regard to the penalty assessment. Good cause for modifying the penalty assessment has not been shown;

however, certain findings and conclusions in the Decision and Order will be revised to some extent as discussed below.[(1)]

II. Separate Penalties under Section 12(a)(2)(L) of FIFRA

The Decision and Order held that a violation of Section 12(a)(2)(L) results not from the act of producing a pesticide, but from the failure of a pesticide producer to comply with the provisions of Section 7 of FIFRA, 7 U.S.C. § 136e, and that where only one establishment is involved, only one failure to register in violation of Section 12(a)(2)(L) will lie. Upon reconsideration, it is concluded that, whether or not separate charges of violating section 12(a)(2)(L) may be assessed for each act of "producing" a pesticide at an unregistered establishment, Complainant has not demonstrated that two distinct acts of "producing" a pesticide occurred. [(2)] Consequently, as held in the Decision and Order, Respondent is liable for only one violation of Section 12(a)(2)(L).

Respondent produced a pesticide which it sold under the names "Fikes Disinfectant Pump Spray" ("Fikes") and "Sani-Germ Disinfectant Pump Spray" ("Sani-Germ"). Although "Fikes" and "Sani-Germ" have identical chemical formulations, and have the same EPA product registration number, they were marketed under two different labels. Complainant's position is that the production of each, "Fikes" and "Sani-Germ," are independently assessable charges warranting two separate penalties.

Determining the number of violations of one statutory provision, for which separate penalty assessments are warranted, is based upon statutory intent, and not upon proof of additional facts, or the "same evidence" test. *In re McLaughlin Gormley King Co.*, FIFRA Appeal Nos. 95-2 through 95-7), slip op. at 7-9, nn. 6, 7 (EAB, Order on Interlocutory Review March 12, 1996)(holding that only one violation of FIFRA § 12(a)(2)(Q) exists where one compliance statement results in failure to comply with four independent Good Laboratory Practice standards), *citing, inter alia, United States v. Christner,* 66 F.3d 922, n. 7 (8th Cir. 1995); *U.S. v. Freisinger,* 937 F.2d 383, 388 (8th Cir. 1991).

As to the relevant statutory provisions, civil penalties are authorized under Section 14 of FIFRA, which provides that "[A]ny . . . registrant . . . wholesaler, dealer, retailer, or other distributor who violates any provision of this subchapter may be assessed a civil penalty . . . of not more than $5,000 for each offense." Section 12 of FIFRA lists "unlawful acts" upon which

such penalties may be assessed. One of the unlawful acts, listed in Paragraph (a)(2)(L) of Section 12, is as follows:

2) It shall be unlawful for any person--

. . .

(L) who is a producer to violate any of the provisions of section 136e of this title;

. . . .

Section 136e states as follows, in Paragraph (a):

Registration of establishments [FIFRA § 7]

(a) Requirement--No person shall produce any pesticide subject to this subchapter or active ingredient used in producing a pesticide subject to this subchapter in any State unless the establishment in which it is produced is registered with the Administrator. The application for registration of any establishment shall include the name and address of the establishment and of the producer who operates such establishment.

Interpreting that provision, Complainant focuses on the prohibition of producing a pesticide, arguing that the "unit of violation" is an act of producing a pesticide or active ingredient, rather than the failure to register an establishment.[(3)] Complainant explains that in the context of specific enforcement under Section 16(c) of FIFRA by a U.S. district court, a pesticide producer could not be compelled to apply for establishment registration; rather, Complainant avers, the relevant provisions of FIFRA (Sections 7 and 12) would only support an injunction to cease production of pesticides at an unregistered establishment. Complainant is concerned that a person penalized for producing a pesticide at an unregistered facility could subsequently resume producing the pesticide at the unregistered facility "and be forever insulated from liability" if only one charge of failure to register the establishment would lie.[(4)]

Complainant also bases its argument on a statement in the Enforcement Response Policy for FIFRA dated July 2, 1990 (1990 penalty policy) that "[a] violation is independent if it results from an act (or failure to act) which is not the result of any other charge for which a civil penalty is to be assessed, or if

the elements of proof for the violations are different." [(5)] In Complainant's view, "[e]ach time Respondent placed a label (bearing the pesticide product name and fictitious establishment registration number) on the pesticide container, Respondent committed the act of producing a pesticide at an unregistered establishment."[(6)] Yet, Complainant concedes that in other enforcement cases in which more than one pesticide was produced at an unregistered establishment, EPA sought only one penalty for one violation of Section 12(a)(2)(L).[(7)]

Maintaining that a new violation may occur with each separate act of producing a pesticide, Respondent asserts that the distinct labels, "Fikes" and "Sani-Germ," are sufficient evidence of two separate and distinct acts of production.

Assuming *arguendo* that independent violations of Section 12(a)(2)(L) may result from each act of producing a pesticide, the fact that there were two different labels does not establish that Respondent's act of producing the pesticide labeled "Fikes" was separate and distinct from the act of producing the same pesticide labeled "Sani-Germ."[(8)] Even under the expansive definition of "produce" in the regulations, 40 C.F.R. § 167.3, "to manufacture, prepare, propagate, compound, or process any pesticide . . . or to package, repackage, label, relabel, or otherwise change the container of any pesticide . . .", the placement of two different labels onto the same product does not necessitate two separate and distinct actions. For example, if both "Fikes" and "Sani-Germ" originate from the same batch or shipment of pesticide, the act of labeling some containers with one label and others with the other label may be accomplished in one labeling operation.[(9)] To illustrate, the labeling operation for one batch of product, placing onto the containers labels which are identical except for the color of the labels, would be one act of producing a product regardless of the number of different colors of labels.

Complainant has pointed to no evidence, and none has been found in the record, to demonstrate that Respondent engaged in two separate and distinct acts of "producing" the pesticide. Indeed, Complainant's witness, Donald J. Lott, Chief of the Pesticides Management Division at EPA Region III, testified that EPA did not seek such evidence, as follows:

. . . [E]ach act of production on a day-to-day basis where they keep distinct and separate and different records of what they did, what activities were associated withthe production could, in fact, be a separate act of production of that pesticide or

multiple pesticides at that given site. . . . Had we gone in with a books and records inspection at the time andasked for that kind of production data, it is very conceivable that we would have ended up with a more lengthy complaint citing actual production dates. We didn't want to go that route. We didn't think that was prudent, and as a result, limited the scope of the inspection to just identifying what products they were, in fact, producing and focusing in on those particular products and lumping all production that had gone on prior to that date as one production of each of those specific products.[(10)]

Therefore, it is concluded that Respondent may be charged with only one violation of Section 12(a)(2)(L) of FIFRA, for which only one penalty may be assessed.

III. Respondent's Culpability

As found in the Decision and Order, Respondent's failure to register its establishment was not deliberate, knowing or willful. The Decision and Order in this matter concluded that the culpability factor as evaluated in the 1990 penalty policy is "zero" and the penalty was thus reduced to "zero," under Table 3 of Appendix C in the policy.

Prior to the Decision and Order, Complainant urged that the culpability factor should be assigned a value "4", based upon its belief that Respondent had knowledge of the registration process and that the violation was thus "[k]nowing or willful" or with "[k]nowledge of the general hazardousness of the action" as the value of "4" is defined in the 1990 penalty policy.[(11)] Complainant referred to the intermediate culpability value of "2" only as "culpability unknown," and indicated its inappropriateness where information in this proceeding, in Complainant's opinion, indicated Respondent knowingly and willfully violated FIFRA.[(12)]

Now, Complainant urges that the intermediate gradation of "2" should be assigned on the basis of Respondent's negligence. The 1990 penalty policy (at B-2) describes the value of "2" not only as "[c]ulpability unknown," but also as "[v]iolation resulting from negligence." Complainant asserts that Respondent failed to fully inform itself of the FIFRA Section 7 requirements and should not be treated as though it were without culpability.

The value of "zero" for culpability is described in the 1990 penalty policy (at B-2) as:

Violation was neither knowing nor willful and did not result from negligence. Violator instituted steps to correct the violation immediately after discovery of the violation.

The question is whether that description -- or "[v]iolation resulting from negligence" -- best fits the facts of this case.

Respondent took steps to register its establishment between the time it discovered the violation pursuant to an inspection by the Pennsylvania Department of Agriculture on March 29, 1988, and the date that an EPA establishment registration number was assigned to Respondent by EPA on July 25, 1988. CX 1-B; TR 82, 83, 87, 89. It is undisputed that Respondent initiated a request for a registration application soon after the inspection; the application was received by Respondent in June 1988, and completed and sent to EPA on or about June 22, 1988.[(13)]

As discussed in the Decision and Order, the testimony and evidence presented at the hearing was credible as to Respondent's belief, and the basis for its belief, that its establishment had been properly registered.[(14)] For example, according to testimony presented by Respondent, it relied upon its supplier, Onyx Chemical Company, for help with regard to labels and registration, and the supplier provided preformed labels with registration numbers.[(15)] Respondent also presented evidence that the same four digit prefix was assigned by the U.S. Department of Agriculture in 1962 to its two product registrations, and testimony that an EPA official to whom those records were sent had referred to the four digit number as Respondent's "existing site number." [(16)] These findings support a value of "zero" for culpability.

It is evident that Respondent did not obtain registration for its establishment until after the inspection, and did not verify its assumption that its establishment was properly registered. Clearly, Respondent as a pesticide producer is not relieved from its obligation to know the applicable statutory and regulatory requirements and to ensure that it is in compliance therewith. Nevertheless, "negligence" on the part of Respondent cannot be found here, where Complainant has not demonstrated that Respondent's lack of action rose to the level of "negligence," and where there is ample credible testimony as to why Respondent believed its establishment already had been properly registered.

Moreover, treating Respondent the same as a violator who had been seriously negligent in failing to register its establishment is not warranted here. To do so would result in a

penalty exceeding $3,000 under the 1990 penalty policy. That is, applying the value of 2 for culpability, the total gravity value would be 5 (including one each for "pesticide toxicity," "harm to human health" and "environmental harm"), for which the 1990 penalty policy directs a 30 percent reduction from the matrix penalty, which in this case is $5,000.(17)

The previous FIFRA penalty policy, dated July 31, 1974 (1974 penalty policy)(18) was in effect at the time of Respondent's violation and was not replaced by the 1990 penalty policy until approximately two months before the complaint was issued. Under the 1974 penalty policy, culpability for failure to register the establishment is described as "Knowledge of the Registration Requirement" or "No knowledge of the Registration Requirement." These descriptions do not represent the facts at hand. Further, it is not clear that the 1974 FIFRA penalty policy should be applied in this case, and Complainant urges that it does not apply.(19)

Applying the 1990 penalty policy, the culpability factor of "zero" rather than "2" fairly represents Respondent's level of culpability, resulting in a total gravity value of 3. Under Table 3 in Appendix C of the 1990 penalty policy, the enforcement remedies prescribed for a total gravity value of 3 is to take no action, issue a Notice of Warning, or reduce the matrix value by 50 percent. The latter solution is "recommended where multiple counts exist" in the 1990 penalty policy, and such is not the case here. Accordingly, a penalty amount of zero represents a fair assessment in the circumstances of this case, for Respondent's violation of Section 12(a)(2)(L) of FIFRA.

IV. Dicta in Footnote 37 of the Decision and Order

Finally, Complainant urges reconsideration of "the full implications of the *dicta* in footnote 37," and requests that it be stricken from the Decision and Order.(20) The "implications" having been considered, Complainant's request is denied. It is well settled that *dicta* is not binding in subsequent cases as legal precedent.

Furthermore, as to the statement in Footnote 37 that, if the penalty under the 1990 penalty policy was greater than under the 1974 penalty policy, "it would appear to have been unreasonable and unfair to retroactively apply the 1990 policy" where the violation occurred before it was issued, penalty policies are not binding upon the trial judge in assessing a penalty. The 1990 penalty policy merely states it supersedes the previous

penalty policies but does not state when it goes into effect with regard to pending enforcement matters.

REVISED FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Findings of Fact and Conclusions of Law stated in the Decision and Order of May 31, 1996 remain unchanged with the exception of the following paragraph, which is hereby revised as follows:

6. For Respondent's failure to comply with the provisions of Section 7(a) of FIFRA, where Respondent produced one registered pesticide, labeling it with two different names, only one penalty may be assessed for violating Section 12(a)(2)(L).

ORDER[(21)]

For the violation found herein, no civil penalty is assessed against Respondent.

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J. F. Greene

Administrative Law Judge

September 10, 1997

Washington, D. C.

1. While judges normally do not invite motions for reconsideration, the decision on such motion can be a useful occasion for amplifying issues and rationale.

2. The term "produce" is defined at Section 2(w) of FIFRA, 7 U.S.C. § 136(w) as "to manufacture, prepare, compound, propagate, or process any pesticide . . . ." The term "producer" is defined in the same section as "the person who manufactures, prepares, compounds, propagates, or processes any pesticide . . . ." Respondent did not dispute that it is a "producer" of pesticides.

3. In the text of Section 7(a) of FIFRA, Congress set forth requirements for application for registration of an establishment in which a pesticide is produced, and a prohibition on producing a pesticide in an unregistered establishment. Therefore, some ambiguity is apparent as to

whether a violation of Section 12(a)(2)(L) results from the production of a pesticide, or from the failure to apply for registration of a pesticide producing establishment.

It is observed that the titles of Section 7 and Paragraph (a) thereunder suggest that a violation would be based upon the latter. *INS v. Center for Immigrant's Rights,* 502 U.S. 183 (1991)(holding that the reference in statutory text to "employment" should be read as "unauthorized employment" identified in the paragraph's title, because "the title of a statute or section can aid in resolving an ambiguity in the legislation's text"); *Katzman v. Victoria's Secret Catalogue,* 923 F. Supp. 580, 584 (S.D. N.Y. 1996)("the title of a statutory provision can easily resolve 'any possible ambiguity' in interpreting that provision"), *quoting, Mead Corp. v. B.E. Tilley,* 490 U.S. 714, 723 (1989); *see also, FTC v. Mandel Bros.*, 359 U.S. 385, 388-389 (1959)(title of statute is "a useful aid in resolving an ambiguity"); *(continued . . .)*

(. . . continued)

Knowlton v. Moore, 178 U.S. 41, 65 (1900)(heading considered in interpreting statute).

Legislative history tends to support that construction as well. Explaining the bill which became the 1972 revisions to FIFRA, the Senate reported, with reference to Section 7, "The new bill would . . . strengthen enforcement by . . . requiring the registration of all pesticide producing establishments," and in reference to section 12, "Violation of record-keeping and establishment registration provisions is also prohibited." S. Rep. No. 838, 92nd Cong., 2d Sess. 3 (1972), *reprinted in* 1972 U.S.S.C.A.N. 3993, 3994, 4018.

Finally, EPA implements Section 7(a) of FIFRA in the federal regulations as a requirement to register the establishment: "Any establishment where a pesticidal product is produced must be registered with the Agency." 40 C.F.R. § 167.20(a). EPA describes a Section 12(a)(2)(L) violation in the FIFRA Penalty Policy dated July 31, 1974 (39 Fed. Reg. 27711, 27722) as "Violated a provision of Section 7 of the Act in that the establishment where the pesticide was produced was not registered."

In any event, the cause of action here requires two elements: failure to apply for registration of the establishment and production of a pesticide. Because Complainant failed to prove

each of these elements for two separate claims, the ambiguity does not affect the outcome of this proceeding.

4. Motion at 4. Nevertheless, as noted by Complainant, EPA may seek relief under FIFRA § 16(c) for specific enforcement, to prevent and restrain violations of FIFRA.

5. CX 2, 1990 penalty policy at 25.

6. Complainant's Brief in Support of Findings of Fact and Conclusions of Law at 35.

7. Id. at 39, *citing, In re World-Wide Industrial Supply,* FIFRA Docket No. 1085-01-13-012P, slip op. an 1-2 (Accelerated Decision, January 9, 1986); *In re L.B. Chemical Co., Inc.*, Docket No. I.F.& R.-04-8406-C, slip op. at 1, 4 (Initial Decision, February 8, 1985), *aff'd*, (CJO, Final Decision, June 17, 1986). *See also, In re Johnson Pacific, Inc.,* 5 EAD 696, FIFRA Appeal No. 93-4 (EAB, Final Order, February 2, 1995)(affirming Presiding Judge's penalty assessment of $750 for one violation of FIFRA § 12(a)(2)(L) for "failure to register producer establishment," where producer repackaged one pesticide which had two different registrations and labels, one for use in spas and the other for use in swimming pools.)

8. Indeed, one of Complainant's Proposed Conclusions of Law, at Paragraph 11, states "Respondent's production of the pesticide products "Fikes Disinfectant Spray" and "Sani-Germ Disinfectant Pump Spray" at its facility prior to July 25, 1988 was an unlawful act under Section 12(a)(2)(L) of FIFRA, 7 U.S.C. § 136j(a)(2)(L)" (emphasis added).

9. The 1990 penalty policy (at 25) provides, with regard to independently assessable charges, "the Agency considers violations that occur from each shipment of a product (by registration number, not individual containers), or each sale of a product, or each individual application of a product to be independent offenses of FIFRA."

10. TR 174-175.

11. 1990 penalty policy at 12-13, B-2.

12. Complainant's Brief in Support of Findings of Fact and Conclusions of Law at 30-31.

13. Answer ¶ 3; TR 21-22, CX 1-B.

14. Decision and Order at 4-5, 7-9; TR 59, 140-143, 148, 218, 225, 229; RX D, I, J.

15. TR 59, 225, 229.

16. RX D, E; TR 217, 218, 219.

17. 1990 penalty policy at C-1; Decision and Order at 14.

18. "Guidelines for the Assessment of Civil Penalties Under Section 14(a) of the Federal Insecticide, Fungicide and Rodenticide Act, As Amended," dated July 31, 1974 (39 Fed. Reg. 27711).

19. Motion at 8-9.

20. Motion at 9.

21. The dismissal of Count III of the complaint, as set forth in the Decision and Order dated May 31, 1996, is unaffected by this Order.