

The consolidated complaint alleges that on five separate occasions in 1977 through 1979, the respondent shipped, from St. Louis to customers located in Illinois, pesticides 1/ which were unregistered, in violation of Section 12 (a)(1)(A) of the Act, 7 U.S.C. 136j(a)(1)(A), and further that the pesticides in question were "misbranded," as that term is defined at 7 U.S.C. 136 (q), in five particulars 2/, in violation of 7 U.S.C. 136(q)(1)(G), 7 U.S.C. 136(q)(2)(A), 7 U.S.C. 136(q)(2)(C)(iii), and 7 U.S.C. 136(q)(2)(D)(i), (ii), (iii). The complaint alleges, in addition, that the respondent disposed of a drum of Phosdrin 4EC and/or Durham Duraphos, both pesticides, by dumping down a sewer, in violation of Section 12(a)(2)(G), 7 U.S.C. 136j(a)(2)(G). The total penalty sought by the Agency for the alleged violations is \$30,850.00. 3/

All jurisdictional facts were admitted, and it was further admitted that the pesticides shipped were in fact unregistered and "misbranded," as defined by statute. The respondent denies, however, that any pesticide was either dumped down a sewer or was dealt with in any other manner inconsistent with its labelling. The respondent also contests the appropriateness of the

1/ 57% Malathion concentrate; PF 65 (Phosdrin), PF 80 (Phosdrin).

2/ The labels did not bear a "warning or caution statement . . . " which constitutes "misbranding," Section 2(q)(1)(G) of the Act, 7 U.S.C. 136(q)(1)(G); neither did they "contain directions for use . . . ", which constitutes "misbranding," Section 2(q)(1)(F), 7 U.S.C. 136(q)(1)(F); the labels did not bear an "ingredient statement," as that term is defined in Section 2(n) of the Act, 7 U.S.C. 136(n), which constitutes "misbranding," Section 2(q)(2)(A), 7 U.S.C. 2(q)(2)(A); and they did not bear a net weight or measure of content, which constitutes "misbranding" pursuant to Section 2(q)(2)(C)(iii), 7 U.S.C. 136(q)(2)(C)(iii). With regard to four of the five shipments, the labels did not bear the warnings and other statements required, Section 2(q)(2)(D)(i), (ii), (iii), when the pesticide contains any substance or substances in quantities highly toxic to man, which constitutes "misbranding," 7 U.S.C. 136(q)(2)(D)(i), (ii), (iii).

3/ For each charge alleging failure to register pursuant to 7 U.S.C. 136j(a)(1)(A), \$800.00; for one of the misbranding charges, \$4050.00; for four of the misbranding charges, \$5000.00 each; for the "dumping down the sewer" charge, brought pursuant to 7 U.S.C. 136j(a)(2)(G), use of a pesticide in a manner inconsistent with its labelling, \$2800.00.

penalty sought by the government for each of the charges, on the grounds that (a) all of the admitted violations were unintentional, (b) that the respondent cooperated with the Agency and (c) the ability of the respondent to pay the amount asked is in doubt. The questions to be decided, therefore, are (1) whether the respondent used Phosdrin 4EC and/or Durham Duraphos in a manner inconsistent with the labels, in violation of 7 U.S.C. 136j(a)(2)(G), and (2) whether the penalties sought are appropriate.

The record, as it relates to the charge that the respondent used Phosdrin in a manner inconsistent with labelling, consists of testimony by an Environmental Protection Agency consumer safety inspector that the respondent's president had said that the contents of a drum containing PF 65, which had been returned by the City of Greenville, Illinois, had been dumped down a sewer. The inspector could not recall whether the word "we" or "they" had been used, but he believed from the conversation that the respondent's personnel had done it. ^{4/} The respondent's president testified that he had in fact used the word "they," and that he was referring, by this term, to a company that occasionally buys drums (sometimes still containing a product) from the respondent for salvage, and to whom the drum here in question had been sold, still containing the material PF 65-- which had been shipped to Greenville. He further testified that he had told the inspector that he did not know what had happened to the contents, but that the salvage company -- "they" -- could have dumped it. ^{5/}

While it is clear that dumping the contents of this drum down a sewer would have constituted use in a manner inconsistent with labelling, the record is insufficient to establish that the respondent did in fact dump, or was responsible for dumping, the drum's contents. Accordingly, it will be found that this charge, as it is set forth in the complaint, has not been established against the respondent.

In considering the appropriateness of the penalties sought for the violations admitted, it is noted that regulations issued by the Environmental Protection Agency pursuant to the Act provide for consideration of the gravity of the violation, the size of the respondent's business, and the effect of payment of the penalty as proposed on the respondent's ability to continue in business. In connection with the gravity of the violation, numerous factors may be taken into account, including the scale and type of use or anticipated use of the product, and evidence of good faith, or lack thereof, in the circumstances; the potential that the alleged acts have to injure persons or the environment; and the severity of such potential injury. In addition, the extent to which the applicable provisions of the Act were in fact violated may be considered. 39 Federal Register July 31, 1974, pp. 27712, 27718.

^{4/} See, however, TR at p. 44.

^{5/} TR 49-54.

On this record, it can reasonably be argued that the total of the penalties proposed by the government is sufficiently great to affect the respondent's ability to continue in business. The ability to pay, however, is only one dimension of an inquiry into the appropriateness of the penalty urged.

As to whether the violations here were sufficiently grave to warrant the penalties suggested, several factors may be considered. With respect to scale of use or anticipated use, the record discloses that the respondent's only customer for the Phosdrin-containing products (PF 65 and PF 80) was the city of Greenville, Illinois, which used them to control psychodid fly at a sewer treatment plant. The only evidence of volume, which was provided by the respondent, is that such sales amounted to about \$3500 per year. Further, the products were applied in some if not all instances by operators who are licensed and who are informed about or trained to some extent in safety and control techniques. Four of the five misbranding charges and four of the five "failure to register" charges relate to the Phosdrin-containing products. The remaining misbranding charge and the remaining "failure to register" charge relate to 57% Malathion concentrate, regarding which there is no evidence of scale of use or volume, except that one transaction (March 10, 1977) involved one-half drum, at a cost of \$990.00.

As to the potential for the respondent's acts 6/ to injure persons and the environment, there is little direct evidence. To the extent that the Phosdrin products were being used by trained personnel, it may be inferred that the potential for harm was less than it would have been in other hands. 7/ There is no direct evidence on this point regarding 57% Malathion concentrate. The record does suggest that a possibly unlabelled full drum of PF 65 was sold to a salvage company 8/ which might not be knowledgeable in the use and disposition of chemicals, and which perhaps did not even know -- if there was no label -- what the drum contained. The potential of this act to harm man or the environment is clearly much greater. No violation in this connection having been charged or proven, however, any harmful potential such a disposition may have had is not relevant here. 9/

6/ That is, misbranding and "failure to register" violations.

7/ The testimony of the licensed sewer treatment operator who may have been made 11 by PH 65 does not link the method of use to respondent's failure to register or to label the product. It cannot be determined on this record that he would have been using the material differently but for the failure to label. It is not sufficient merely to show that the product itself can cause harm, where the question is one of the potential of the alleged acts (violations) to cause injury to persons or to the environment.

8/ TR p. 51

9/ In any case, it has not been established that this drum was in fact dumped, or that it was in fact unlabelled.

There is no evidence of previous violations of the Act.

Taking all of the above considerations into account, including the respondent's financial position, and further taking into account the respondent's promise to dispose of Greenville's two drums of PF 80 in what will presumably be a safe and proper manner ^{10/}, it is determined that \$250.00 constitutes an appropriate penalty for each of the five "failure to register" charges, and that \$1000.00 constitutes an appropriate penalty for each of the five misbranding charges. The total penalty imposed, therefore, is \$6250.00. It is emphasized, however, that any future violation of these or related provisions of the Act would be viewed much more seriously, since a lack of good faith on the part of the respondent would inevitably be suggested thereby.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The respondent Cole Chemical Company is a corporation organized, existing, and doing business under the laws of the State of Missouri, having its principal place of business at 2153 Welsch Industrial Court, St. Louis, Missouri, with gross sales in excess of \$100,000 but less than \$400,000 per year for the calendar years here in question. At all relevant times herein, the respondent has been engaged in the sale and distribution of various products, including PH 65 and PH 80, pesticides within the meaning of 7 U.S.C. 136(u)(1) that contain Phosdrin, and 57% Malathion concentrate, which is a pesticide within the meaning of the Act. The respondent corporation is subject to the provisions of the Act.
2. On or about August 15, 1978, February 11, 1979, and July 11, 1979, the respondent shipped its product PF 80 from St. Louis, Missouri, to the City of Greenville, Illinois ^{11/}, its customer. On or about April 24, 1978, the respondent shipped its product PF 65 to the same customer.
3. The products so shipped were not registered, as required by Section 3(a) of the Act, 7 U.S.C. 136 a(a), in violation of Section 12(a)(1)(A) of the Act, 7 U.S.C. 136j(a)(1)(A).

^{10/} TR p. 75

^{11/} The customer meets the definition of "person," at 7 U.S.C. 136 (s); see 7 U.S.C. 136j(a)(1)(E).

4. The products so shipped were also in each instance "misbranded," as that term is defined at Section 2 (q)(1)(G) of the Act, 7 U.S.C. 136 (q)(1)(G), and at Section 2(q)(1)(F), 7 U.S.C. 136 (q)(1)(F), and at Section 2(q)(2)(A), 7 U.S.C. 2(q)(2)(A); and at Section 2(q)(2)(C)(iii), 7 U.S.C. 136(q)(2)(C)(iii); and at Section 2(q)(2)(D)(i), (ii), (iii), 7 U.S.C. 136(q)(2)(D)(i), (ii), (iii), in that the labels did not bear a "warning or caution statement", did not contain directions for use, did not bear an "ingredient statement", as that term is defined at Section 2(n), 7 U.S.C. 136(n), and did not bear a net weight or measure of content, and did not bear warnings or other statements required when the pesticide contains any substance in quantities highly toxic to man; each of these instances of misbranding constitutes a violation of Section 12(a)(1)(E) of the Act, 7 U.S.C. 136j(a)(1)(E).

5. On or about March 19, 1977, the respondent shipped its product 57% Malathion Concentrate from St. Louis, Missouri, to a person in Vienna, Illinois. ^{12/} The product so shipped was not registered, as required by Section 3(a) of the Act, 7 U.S.C. 136a(a), in violation of Section 12(a)(1)(A) of the Act, 7 U.S.C. 136 j(a)(1)(A).

6. The product so shipped was also "misbranded," as that term is defined at Section 136(q)(1)(G) of the Act, 7 U.S.C. 136(q)(1)(G), and at Section 2(q)(1)(F), 7 U.S.C. 136(q)(1)(F), and at Section 2(q)(2)(A), 7 U.S.C. 136(q)(2)(A), and Section 2(q)(2)(C)(iii), 7 U.S.C. 136q(2)(C)(iii), in violation of Section 12(a)(1)(E) of the Act, 7 U.S.C. 136j(a)(1)(E).

7. The respondent, being a distributor and having violated the above provisions of the Act, may be assessed a civil penalty of not more than \$5000 per offense, Section 14(a)(1) of the Act, 7 U.S.C. 136 1(a)(1).

8. Under the circumstances set forth herein, the amount of \$6250.00 constitutes an appropriate civil penalty to be assessed for the violations established.

^{12/} The Johnson County Housing Authority, Vienna, Illinois, is a "person" within the meaning of 7 U.S.C. 136(s); See 7 U.S.C. j(a)(1)(E).

FINAL ORDER

Accordingly, it is ORDERED, pursuant to Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended, 7 U.S.C. 1361(a)(1), and upon consideration of the entire record herein, after evaluating the gravity of the violations and the appropriateness of the penalty proposed, that the respondent Cole Chemical Company, pay, within sixty (60) days of service upon it of the final order, the amount of \$6250.00 as a civil penalty for violations of the said Act by forwarding to the Regional Hearing Clerk a cashier's check or a certified check for the said amount payable to the Treasurer, United States of America, 40 C.F.R. Sec. 22.31(b).



J. F. GREENE
Administrative Law Judge

October 30, 1980
Washington, D.C.

Note: This Final Order shall become the final order of the Regional Administrator unless appealed or reviewed as provided by 40 C.F.R. Sec. 168.51 of the Rules of Practice.



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION VII
324 EAST ELEVENTH STREET
KANSAS CITY, MISSOURI - 64106

10/23
66 3114 P12:24

November 10, 1980

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

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Mr. Harvey Rosen
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Gentlemen:

Re: Cole Chemical Company, Docket No. I.F.&R. VII-322C/347C

Pursuant to 40 CFR 168.46(a) of the Rules of Practice, enclosed is a copy of the Initial Decision in the above-entitled matter.

Sincerely yours,

Rita Ricks
Regional Hearing Clerk

Enclosure

bcc: Sonia Anderson (w/two enclosures)
HONORABLE J.F. GREENE
ARHM-TOPE L. Alderman

CERTIFICATE OF SERVICE

I certify that a copy of the Initial Decision was forwarded to the following on this the 10th day of November 1980.

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