7/11/74

ENVIRONMENTAL PROTECTION AGENCY

OFFICE OF ADMINISTRATIVE LAW JUDGES

Amvac Chemical Corporation,	)	I.F.&R. No. IX-4C
	)	Docket No. 141.7(P)
Respondent.	)	

Initial Decision

Preliminary Statement

This is a proceeding under section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended (FIFRA 1972), 7 U.S.C. 136 l(a),[1/] for assessment of civil penalties for violations of sections 12(a)(1)(A) and 12(a)(1)(E) of the Act (7 U.S.C. 136j(a)(1)(A) and (E)). The proceeding was initiated by complaint dated September 7, 1973, alleging violations relating to three pesticides. In substance, the allegations are as follows:

1. Alco Nemagon Soil Fumigant Emulsible Concentrate (Nemagon); shipments on March 22, 1973, and April 4, 1973, from Los Angeles, California, to Phoenix, Arizona; product not registered as required by 7 U.S.C. 135a(a)(1) and 135b [2/] as

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[1/] The Federal Insecticide, Fungicide, and Rodenticide Act, as it existed prior to the 1972 amendments (FIFRA 1947), was amended by the Federal Environmental Pesticide Control Act of 1972 (FEPCA), P.L. 92-516. FIFRA 1972 has been codified in 7 U.S.C. 136 et seq.

[2/] These references are to FIFRA 1947. The registration provisions and regulations thereunder of FIFRA 1947 remain in effect until superseded by new registration regulations which are required to be promulgated by October 21, 1974. See section 4(b) and 4(c)(1) of FEPCA. New registration regulations have not yet been promulgated.

continued in effect by section 4(b) of Federal Environmental Pesticide Control Act of 1972.

2. Alco Systemic Fungicide (Fungicide); shipment from Los Angeles to Phoenix on April 4, 1973; not registered as required. (Same charge as in Nemagon). Also misbranded (section 12(a)(1)(E)) in that the label did not bear the warning "Keep out of reach of children" and the signal word "Caution" (section 2(q)(1)(G), 7 U.S.C. 136(q)(1)(G)).

3. Alco Copper Bordeaux 125 (Bordeaux); shipment from Artesia, California, to Phoenix on October 30, 1972; not registered as required. (Same Charge as in Nemagon).

The civil penalties proposed to be assessed totaled $15,000 allocated as follows: non-registration of Bordeaux $3,500; non-registration of Nemagon and Fungicide $4,000 each; misbranding of Fungicide $3,500.[3/]

The proceedings were conducted pursuant to the Interim Rules of Practice governing hearings of this type, 38 F.R. 26360 et seq.

The respondent filed an answer and did not contest any of the charges in the complaint relating to the violations and requested a hearing only on the amount of the penalties proposed to be assessed.

3/ This allocation is in a letter from complainant's attorney dated December 21, 1973.

Pursuant to section 168.36(d) of the Rules of Practice, the Administrative Law Judge corresponded with the parties for the purpose of accomplishing some of the objectives of a prehearing conference. The correspondence is in the record.[4/]

A hearing in the case as to the appropriateness of the penalties was held in Los Angeles, California, on May 23, 1974. The complainant was represented by Matthew S. Walker, Esq. and James L. Jaffe, Esq. of the legal staff of EPA, Region IX and respondent was represented by Gerald Levie, Esq., of the law firm of Levie & Burkow, Los Angeles.

Proposed findings and briefs were filed by the parties and have been duly considered by the Administrative Law Judge. After considering the entire record, the Administrative Law Judge makes the following

Findings of Fact

1. The respondent, Amvac Chemical Corporation, with a place of business in Los Angeles, California, is a wholly-owned subsidiary of American Vanguard Corporation which has principal executive offices in Burbank, California.

4/ The letter mentioned in footnote 3 is part of the correspondence.

2. The corporate historical background of Amvac Chemical is as follows: Durham Chemical Company, a California corporation which had been in business since 1946, was a manufacturer of pesticides. Glenn Wintemute owned all the shares of stock of Durham. In October 1970 Durham acquired all the shares of Alco Chemical Company, a California corporation located in Artesia, California, which had been in the pesticide manufacturing business since 1956. In October 1971 American Vanguard acquired all the shares of Durham. In December 1972 Alco was merged with Durham and simultaneously the name of the corporation that resulted was changed to Amvac Chemical Corporation. Mr. Wintemute is president of Amvac Chemical and a director and stockholder in American Vanguard.

3. The respondent manufactures and distributes pesticides. Distribution is in California and interstate. Approximately 200 of its products are registered or pending registration under federal law and with state boards. The three products in question were manufactured or distributed by Alco at the time Alco was taken over by Durham. The respondent continued to distribute them using Alco in the name of the products.

4. On March 22, 1973, and April 4, 1973, the respondent shipped from Los Angeles, California, to Phoenix, Arizona, quantities of the pesticide called Alco Nemagon Soil Fumigant Emulsible

Concentrate. Said pesticide was not registered as required by the Federal Insecticide, Fungicide, and Rodenticide Act, as amended.

5. On April 4, 1973, the respondent shipped from Los Angeles, California, to Phoenix, Arizona, quantities of the pesticide called Alco Systemic Fungicide. Said pesticide was not registered as required by the Federal Insecticide, Fungicide, and Rodenticide Act, as amended.

6. The pesticide referred to in the previous finding was misbranded in that the label did not bear on the front panel or on the part of the label displayed under customary conditions of purchase the signal word "Caution" and the warning statement "Keep out of reach of children."

7. On October 30, 1972, the respondent shipped from Artesia, California, to Phoenix, Arizona, quantities of the pesticide called Alco Copper Bordeaux 125. Said pesticide was not registered as required by the Federal Insecticide, Fungicide, and Rodenticide Act, as amended.

8. The respondent has approximately 65 employees. Its net sales in 1973 were approximately $5,150,000 and its business has been increasing. The imposition of the penalties hereinafter assessed will not effect respondent's ability to continue in business.

Conclusions

The respondent violated section 12(a)(1)(A) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended, by shipping in interstate commerce three pesticides, namely, Alco Nemagon Soil Fumigant Emulsible Concentrate, Alco Systemic Fungicide, and Alco Copper Bordeaux 125, which were not registered as required by 7 U.S.C. 135(b), as continued in effect by section 4(b) of Federal Environmental Pesticide Control Act of 1972.

In the shipment of Alco Systemic Fungicide, the respondent also violated section 12(a)(1)(E) of FIFRA, as amended, in that the pesticide was misbranded because its label did not bear warning and caution statements that were required.

Having considered the size of the respondent's business, the effect on respondent's ability to continue in business, and the gravity of the violations, it is determined that the following penalties are appropriate:

Non-registration Alco Nemagon Soil Fumigant	-	$4,000
Non-registration Alco Systemic Fungicide	-	$2,500
Non-registration Alco Copper Bordeaux 125	-	$2,500
Misbranded Alco Systemic Fungicide	-	$2,500

Since respondent did not contest the charges, the sole purpose of the hearing was to determine the amount of penalties that should be assessed.

Section 14(a) of FIFRA, as amended (the provision authorizing imposition of civil penalties) was a new provision in the 1972 amendments and became effective on enactment on October 21, 1972. Section 14(a)(3) (7 U.S.C. 136l(a)(3)) provides in pertinent part:

> In determining the amount of the penalty the 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.

It is apparent that Congress intended that the penalty should fit the offender as well as the offense.

The assessment of civil penalties is a decentralized operation of EPA and is handled in the ten regional offices throughout the country. When a complaint charging violations is issued, the amount of penalties proposed to be assessed is set forth. The Rules of Practice encourage settlement (section 168.35(a)) and if the case is not settled the respondent may request a hearing. Where, as in this case, the charges are not contested the Administrative Law Judge must make an independent judgment as to the appropriateness of the penalty to be assessed.

The first factor that the statute requires to be considered in determining the amount of the penalty is the size of respondent's business. This respondent is a subsidiary of American Vanguard Corporation, a company that does not engage in any independent

business activities on its own behalf, but is merely a holding company for seven subsidiaries.

The record includes certain financial reports, prepared by a well known firm of certified public accountants, and submitted by American Vanguard Corporation to the Securities and Exchange Commission on March 29, 1974. These are consolidated reports of American Vanguard and its subsidiaries, including the respondent. The total net sales of all companies for the year 1973 is shown as $13,911,500. The report shows that 37%, which is approximately $5,150,000 was derived from manufacturing and distribution of pesticides, other agricultural chemicals and fertilizers.[5/] Mr. Wintemute, president of respondent, testified that the gross sales of respondent for 1973 were about $5,200,000 and attributed the 37% figure of total gross sales to respondent.[6/] Thirty-five to forty percent of respondent's business is the interstate shipment of pesticides. The respondent has approximately 200 of its products registered or pending registration under federal or state laws. Considering each package size in which a pesticide is distributed as a separate product, it handles more than a thousand pesticides.

[5/] Complainant's brief claims net sales of respondent for 1973 were approximately $5,572,000 and respondent's brief gives this figure as $3,287,800. No explanation is given for either of these figures.

[6/] Total net sales for 1972 were $11,683,800 of which 33% ($3,855,654) was from pesticides, etc.

With respect to respondent and certain of the other subsidiaries, the report states that they continue to show encouraging earnings and management is anticipating continued growth in these areas. In January 1973 the respondent had 40 employees; its business increased thereafter and at the time of the hearing it had 65 employees.

Without attempting to characterize the size of respondent's business as large or small(which are only relative terms) the fact remains that its sales in 1973 were over 5 million dollars, and this, by any measure, must be regarded as very substantial.

As to respondent's ability to continue in business (the second factor to be considered in determining the appropriateness of the penalty) we first look to the reports filed with SEC. The consolidated balance sheets for 1973 show assets and liabilities of $5,656,500. The stockholders equity is shown as $1,365,500, including retained earnings of $114,300. The consolidated net earnings for the year were $5,500 which is included in the retained earnings. Cash in the amount of $33,200 is shown as of December 31, 1973.

According to the testimony of the respondent's president, the assessment of civil penalties up to $15,000 (the amount proposed in the complaint) for the violations in question would not effect respondent's ability to continue in business.

It may well be that payment of the penalties herein assessed will adversely affect respondent's cash flow and inconvenience it temporarily but we are unable to find that it will effect its ability to continue in business.

The respondent has proposed a finding to the effect that the total annual volume of all of the products, the sale and distribution of which resulted in violations, were less than $5,000 for the year 1973. We have been unable to find the evidence in the record to support this finding. In any event, it is not the volume of sale of individual products that is to be used as the measuring stick, but rather it is the size of respondent's business.

The third factor to be considered in determining the amount of the penalty is the gravity of the violation. Aside from the general purposes of the Act there is nothing therein that would assist in interpreting what Congress intended in the term "gravity of the violation."[7/] So far as we can determine there is nothing in the legislative history to shed light on this subject.

We are of the view that the same basic principles by which courts are guided in imposing sanctions in criminal cases are

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7/ "Gravity" is defined in Webster's Third New International Dictionary to include "importance, significance, dignity, especially seriousness (the gravity of the offense)."

applicable in assessing civil penalties in cases of this type.

> In determining the punishment to be imposed, within the limits prescribed by the statute, the court may and should weigh and consider all pertinent matters, including mitigating or aggravating circumstances . . . . The court should give due regard to the nature of the offense and the attending circumstances and it should impose such punishment as tends to prevent a repetition of crime. However, justice generally requires consideration of more than the particular act by which the crime was committed, and that there be taken into account the circumstances of the offense together with the character and propensities of the offender . . . ."

24B C.J.S. section 1980b. See also Commonwealth of Pennsylvania v. Ashe, 302 U.S. 51 (1937).

It is our view that in considering appropriateness of the penalty to the "gravity of the violation" the evaluation should be made from two aspects -- gravity of harm and gravity of misconduct. As to gravity of harm there should be considered the actual or potential harm or damage, including severity, that resulted or could result from the particular violation. This must be viewed in the light of the purposes of the Act which includes protecting the public health and environment and affording to users the protection and benfits of the Act. Further, the Act provides enforcement officials with the means for preventing the marketing of violative products and also the means for obtaining speedy remedial action when necessary.

As illustrative of the degrees of gravity of harm, it is apparent that a violation involving the marketing of a highly toxic pesticide that is not registered is much more serious than a violation in which the label of a registered pesticide fails to bear the registration number.

As to gravity of misconduct, matters which may be properly considered include such elements as intention [8/] and attitude of respondent; knowledge of statutory and regulatory requirements; whether there was negligence and if so the degree thereof; position and degree of responsibility of those who performed the offending acts; mitigating and aggravating circumstances; history of compliance with the Act; and good faith or lack thereof. It is observed that the Rules of Practice specify these last two elements as those that may be considered in evaluating the penalty (section 168.53(b)).

In grading the gravity of the various violations enumerated in the Act, shipment of an unregistered pesticide may be considered to be a serious violation. It is obvious that when an unregistered pesticide is distributed the protective and enforcement purposes of registration are defeated.

In the present case the only evidence from complainant as to potential harm or damage relates to the Nemagon product. It is indicated that this product is of a relatively high degree of toxicity and also that it may have corrosive action on equipment with which it is applied.[9/] The respondent merely states that the

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8/ Although intent is not an element of an offense in a civil penalty assessment case (cf. U.S. v. Dotterweich, 320 U.S. 277), intent to violate may be an aggravating factor.

9/ This is in complainant's letter of December 21, 1973, in which it is stated that this product "which contains 70% active ingredients (not identified) is corrosive to aluminum and may therefore affect the equipment with which it is applied. The estimated fatal dose of this active ingredient according to the Handbook of Poisoning, is 2 grams at 100% strength. Since there are 28 grams per ounce, 2 grams is a rather small quantity." By letter of December 24, 1973, respondent answered the letter of December 21 but raised no question on these points. No evidence was introduced at the hearing on these subjects.

material itself is not in question and that the products were properly registered in California. 10/

As to the misbranding charge of the fungicide product, the only portion of the record touching on harm or damage is a paragraph in complainant's letter of December 21, 1973.11/ The potential harm that is mentioned is generally applicable to most, if not all, pesticides and the regulation requires warning and caution statements on every pesticide (40 CFR 162.9). While failure of the label to bear these statements may be considered as a serious violation, no particular or unusual hazard has been demonstrated with regard to this product.

As to the gravity of misconduct in this case there are both mitigating and aggravating factors. The pesticides in question were registered in California. 12/ at the time and could properly

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10/ Respondent's letter of December 11, 1973.

11/ The paragraph is as follows:

> As to the misbranding violation against the Alco Systemic Fungicide, the lack of a warning statement such as "Keep out of the reach of children" and the absence of a signal word, such as "Caution", is considered a serious violation. Most pesticides are dangerous products, and in order to protect the public it is necessary that they have adequate warnings on the labels. Warning statements are one of the more important notations on a pesticide lable in that they alert the user to be careful. But where there are no warnings on the label, there is no reminder to be cautious. For these reasons, we consider the misbranding violation serious enough to warrant a substantial penalty.

12/ Respondent's brief claims that they were also registered in Arizona. We find nothing in the record to support this claim.

have been shipped within the state. The violations took place at a time when there were some disruptions in respondent's operations due to changing of location of operations from one city to two locations (one for offices and production and the other for warehousing) in another city.

As a mitigating factor, the respondent urges that a key employee who had supervised registration activities for 10 years (first with Alco and subsequently with Durham and respondent) left the company in September 1972 having had a leg amputated and that prior thereto he had taken considerable time off because of impaired health. It is to be noted that after the key employee left, another employee, who also had other duties, took over the registration responsibilities. It was not until May 1973 that respondent hired an employee to handle the registration and related matters on a full time basis. This hiring was subsequent to the violations in question and after the citation for another violation was issued. This latter violation resulted in a criminal prosecution. Having in mind the magnitude of respondent's annual sales, the delay in obtaining adequate help for these purposes must be considered as a negative factor. The president of respondent has had considerable experience in the distribution of pesticides and at least as early as 1963 knew that pesticides had to be registered.

Also on the negative side, we have the criminal prosecution above mentioned. The respondent shipped an unregistered pesticide

and was prosecuted criminally. It pleaded nolo-contendere and on August 13, 1973, was fined $500 of which $250 was suspended and it was placed on probation for one year.[13/]

In addition, EPA sent two warning letters to respondent in May and June 1973 in which minor violations were brought to its attention.

As part of the history of non-compliance with the Act, the complainant set forth seven violations between November 1967 and September 1969. These were violations by Alco Chemical Company prior to the time it was taken over by Durham (see Finding 2). In the circumstances of this case, we consider these violations to be too remote from respondent's operations and find that it is inappropriate to charge this history of non-compliance to this respondent. For the purposes of this case these violations have been disregarded.

The violations in question resulted from negligence of respondent. We consider the non-registration charge of the fungicide product and Bordeaux to be of a moderate degree of gravity and have assessed penalties of $2,500 on each of these charges. The evidence shows that the potential harm from use and distribution of Nemagon is of

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13/ The evidence at the hearing was that the violation occurred on March 16, 1973. Complainant's brief states that a review of the file discloses that the violation occurred on March 21, 1972, and a citation was mailed on March 16, 1973. Irrespective of the date of violation, the fact remains that there was a violation which was disposed of as stated.

a relatively high degree and we have assessed a civil penalty of $4,000 for this non-registration violation. We consider the misbranding charge of the fungicide product to be of a moderate degree and have assessed a penalty of $2,500 for this violation.

The proposed Findings of Fact and Conclusions submitted by the parties have been considered. To the extent that they are consistent with Findings of Fact and Conclusions herein, they are granted, otherwise they are denied.

Having considered the entire record and based on the Findings of Fact and Conclusions herein, it is proposed that the following order be issued.

Final Order

Pursuant to section 14(a)(1) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended (7 U.S.C. 136 l(a)(1)), civil penalties totalling $11,500 are assessed against respondent Amvac Chemical Corporation, Los Angeles, California, for violations of said Act which have been established on the basis of complaint issued on September 7, 1973.

Bernard D. Levinson
Administrative Law Judge

July 11, 1974