7/28/75

ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE REGIONAL ADMINISTRATOR

In re	)	
	)	
Waltham Chemical Company,	)	I.F.&R. Docket No. I-14C
	)	
Respondent	)	

INITIAL DECISION
of
Frederick W. Denniston
Administrative Law Judge

Preliminary Statement

By Complaint, dated June 28, 1974, the Director, Enforcement Division, Environmental Protection Agency, Region I (herein EPA or Complainant) contends that Waltham Chemical Company, of Waltham, Massachusetts, (herein Waltham or Respondent), violated provisions of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended (86 Stat. 973; 7 U.S.C. 136) with respect to "Martins Votol Residual Spray", samples of which were obtained on or about November 26, 1973 and February 19, 1974.

Hearing was held in Waltham, Massachusetts, on February 6, 1975, at which Respondent was represented by Richard L. Keenan and EPA by Wesley J. Marshall, Esq. Briefs and Proposed Findings were filed by each and replies were filed on May 12, 1975.

The basic facts are not in dispute and Respondent agrees with many of the Proposed Findings of Fact submitted by Complainant. Accordingly, those Findings are in the main adopted with some revisions as deemed required.

Stipulation of the Parties

There was presented at the outset of the hearing a "Stipulation Between Parties", in which the factual allegations of the Complaint were accepted, but to which was appended the following:

> 4. The only issues in dispute between the parties in this matter are:
>
> A. Whether or not the Respondent committed an act which caused (or potentially caused) unreasonable adverse effects on man and the environment, as defined at 7 U.S.C. 136(bb).
>
> B. Whether the proposed civil penalty is appropriate.

Unfortunately, Respondent and Counsel for Complainant place differing interpretations on the intendment of Paragraph 4. On the one hand, Respondent urges the view that the showing of unreasonable adverse effects is a prerequisite to a civil penalty proceeding under Section 14 of the Act, whereas Complainant considers this to be a factor which is included in the factors embraced in determining the gravity of the violation.

The use of stipulations by the parties is encouraged. Section 168.36 (a)(ii) of the Rules for example, suggests simplification of the issues and stipulations of facts as an item for consideration at prehearing conferences. But efforts to restrict or limit issues is not encouraged. Here the portion of the so-called Stipulation discussed would limit, rather than simplify issues, and that portion is unacceptable. At the hearing, Respondent was afforded the opportunity to withdraw from the Stipulation in view of the conflicting opinions as to the effect of Paragraph 4, but its representative elected to adhere to Paragraphs 1 through 3.

Waltham Exhibit No. 5

Waltham submitted in evidence a bound booklet of material as its Exhibit No. 5 to which Complainant objected due to its containment of argument and ruling on its admissibility was reserved. On brief, Complainant renews its objections.

The exhibit is largely argument but does contain some factual allegations. As it is not possible to separate argument from fact in the manner presented, the exhibit will be received, but only matters of fact have been considered in this decision; the remainder has been considered as part of Respondent's brief.

Findings of Fact

1. The Respondent, Waltham Chemical Company, located in Waltham, Massachusetts, is in the business of pest control. Respondent was engaged in the manufacture and sale of Martin's Votol Residual Spray, a "pesticide" within the meaning of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended (FIFRA). It has discontinued this activity since the filing of this Complaint.

2. Respondent has been in the exterminating business, including the manufacture, sale and application of pesticides, for many years, and is active in various related trade organizations. Richard L. Keenan has been its principal stockholder since 1963.

3. Respondent offered for sale at Waltham, Massachusetts, on or about November 26, 1973 and February 19, 1974 the pesticide MARTIN'S VOTOL RESIDUAL SPRAY, registered under EPA Reg. No. 1326-2.

4. The product is a substance or mixture of substances intended for preventing, destroying, repelling or mitigating insects. Prominently displayed on its label is the description: MARTIN'S VOTOL RESIDUAL SPRAY Kills Roaches, Ants, Silverfish, Carpet Beetles in Premises, When Applied to Surfaces. Included in the directions for use are instructions as to treatment for roaches, silverfish, and carpet beetles in premises, are to "Repeat as needed" and as to ants "Repeat as often as necessary".

5. A Consumer Safety Officer (inspector) of the Environmental Protection Agency (EPA) collected samples of the product being offered for sale from Respondent's facility in Waltham, Massachusetts, on November 26, 1973 and again on February 19, 1974.

6. The product's strength or purity fell below the professed standard of quality under which it was sold and was registered. The sample collected on November 26, 1973 (I.D. No. 88954) bore a label which stated, in part, that the product contained 2% technical chlordane. (Equivalent to 1.2% Octochloro - 4,7-methane-tetrahydroindane and 0.8% related compounds).

7. When tested, the sample (I.D. No. 88954) was found to contain .93% technical chlordane or less than half the claimed amount of active ingredients.

8. The sample label (I.D. No. 88954) did not bear a statement of net weight or measure of content as is required by FIFRA [7 U.S.C. 136(q)(2)(C)(vii)].

9. The samples of the same product collected on February 19, 1974 (I.D. No. 119116) also bore labeling claiming 2% technical chlordane whereas, when tested, the 4 one-quart containers were found to contain 3.7%, 1.89%, 2.08%, and 1.65% technical chlordane.

10. No adverse effects would have resulted from the use of the samples numbered 119116, although the residual effectiveness of chlordane products varies with its strength and purity within a particular product.

11. Tests have shown that the residual killing effect of chlordane on roaches declines with the percentage of chlordane in the solution. For example, where treated test panels were tested, 4 weeks after treatment, 100% kill was achieved after 48 hours with a 2% solution; but at .5%, only 17% was achieved; and at .25%, only 7%. Accordingly, the .93% solution of sample I.D. No. 88954, was reduced below its level of residual effectiveness.

12. The facts alleged in the Complaint as to samples I.D. Nos. 88954 and 119116 have been established and are undisputed by Respondent.

13. Respondent's gross annual sales have been in excess of $1,000,000, although Complainant has classified it as Category II, having revenues between $200,000 and $1,000,000 annually for purposes of determining the proposed penalty. Payment of the proposed penalty would not effect its ability to continue in business.

14. Complainant determined from the Civil Penalty Assessment Schedule that the proposed penalties should be determined as follows: I.D. Sample No. 88954, under the heading "Analytical Test Results: Formulation Violations"-- Chemical Deficiences - B. Partially ineffective for which a range of $1500-$1900 is specified for a Category II company. Taking into account the fact that Respondent's principal officer is very knowledgable in the pesticides field, and that prior minor violations that had been called to the attention of the company had not been corrected, Complainant proposed the maximum of that range.

15. The proposed penalty for I.D. Sample No. 119116 was determined by the same method described above, but subclassified as "C. No adverse effects" for which a penalty range of $500-$900 is provided. Giving account to the cooperation and good faith exhibited in connection with the taking of this sample, the minimum, or $500 has been proposed.

CONCLUSIONS

Respondent, while acknowledging the violations requests cancellation of any penalty, primarily on the grounds that it has not been shown that these violations had an unreasonable adverse effect on man or the environment, and secondarily because of adverse effects upon the company and of its principal officer. It makes the primary argument because of the reference to adverse effects in Section 6 (7 U.S.C. 136d) of FIFRA, and the definition of that term in Section 2(bb) (7 U.S.C. 136). Such argument is wholly irrelevant.

Respondent further contends that no harm has been documented by the less than 1% basic ingredient claimed by the label to be 2%, because for some purposes 1% is considered adequate and that, in any event, the label contained the instruction "Repeat as necessary", thereby putting the judgment as to timing and quantity of dosages in the user. Such argument is mere cavil. The product here was clearly adulterated, whether intentionally or not, and by its definition of that term in Section 2(c) of the Act [7 U.S.C. 136(c)], any reduction of the professed standard of quality as expressed on the label, is prohibited by Section 12(a)(1)(E). The remainder of Respondent's argument are addressed primarily to contending that EPA personnel are "belligerent" and have unreasonably spent taxpayers' money by having enforced the statute against it.

Section 12 of FIFRA (7 U.S.C. 136j) enumerates those acts which are unlawful and those found herein clearly fall within this section. Moreover, Section 14 (7 U.S.C. 136l) spells out those factors which shall be considered in determining the amount of penalties and the adverse effects on personal or company reputation, health or convenience is not included.

While clear support for the proposed penalty is indicated under the Assessment Schedule, the Presiding Officer is of the view that under the circumstances of this case, the minimum of the range of penalty in each instance would be appropriate, and will therefore fix the amount at $2,000.

PROPOSED FINAL ORDER[1/]

1. Pursuant to Section 14(a)(1) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended (86 Stat. 973; 7 U.S.C. 136l(a)(1)), a civil penalty of $2,000 is assessed against Waltham Chemical Company, for violations of the said Act which have been established on the basis of the Complaint herein dated June 28, 1974.

2. Payment of the full amount of the civil penalty assessed shall be made within sixty (60) days of the service of the final order upon Respondent by forwarding to the Regional Hearing Clerk a cashier's check or certified check payable to the United States of America.

Frederick W. Denniston
Frederick W. Denniston
Administrative Law Judge

July 28, 1975

1/ Unless appeal is taken by the filing of exceptions pursuant to 40 CFR 168.51, or the Regional Administrator elects to review this initial decision on his own motion, the order may become the final order of the Regional Administrator.