UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE REGIONAL ADMINISTRATOR

In the Matter of

Pur-All Paint Products Co., Inc.	)	I. F. & R. Docket No. II-144C
	)	
Respondent	)	INITIAL DECISION

Preliminary Statement

This is a proceeding under section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended[1/] (FIFRA) for assessment of a civil penalty for a violation of said Act. The proceeding was initiated by complaint dated July 8, 1976 issued by the Director, Environmental Programs Division, EPA, Region II.[2/]

The complaint alleges that on June 26, 1974 the respondent violated section 3 of FIFRA by shipping from Carlstadt, New Jersey, to East Meadow, New York, a pesticide that was not registered as required by the Act. The product as shipped was designated Wood Preservative TT-W-572 B Type 2. A penalty of $2,200 was proposed to be assessed. The respondent, by its president, Rubin Chaleff, filed an answer and admitted that the non-registered material was shipped as alleged. A hearing was requested only with regard to the appropriateness of the proposed penalty.

1/ The Act is codified in 7 U.S.C. 136 et seq. (Supp. V, 1975). A table of parallel citations showing Statutes at Large and United States Code is attached hereto.

2/ The proceedings were conducted pursuant to the Rules of Practice which were promulgated for the conduct of such hearings. 39 F.R. 27658 et seq., 40 CFR, Part 168.

A hearing was held in Newark, New Jersey, On October 19, 1976. The complainant was represented by Susan Levine, Esq., attorney for EPA, Region II, and the respondent was represented by Mr. Chaleff. The complainant has submitted proposed findings of fact and conclusions and a brief in support thereof. The respondent in its answer, in pre-hearing exchange, at the hearing, and in a letter submitted after the hearing has expressed its views for reduction or complete cancellation of the proposed penalty. The submittals of both parties have been duly considered.

Findings of Fact

1. The respondent, Pur-All Paint Products Co., Inc., is a corporation with a place of business in Carlstadt, New Jersey.
2. The respondent manufactured the product designated Wood Preservative TT-W-572 B Type 2 which is a pesticide as defined in section 2(u) of FIFRA. This product was not registered as required by provisions of FIFRA.
3. On June 26, 1974 the respondent shipped 50 containers, each containing 2 gallons, of the product in question from Carlstadt, New Jersey, to East Meadow, New York.
4. The shipment of the non-registered pesticide was in violation of section 3 of FIFRA and the respondent is subject to the imposition of a penalty under section 14(a) of the Act.

5. Considering the size of respondent's business, the effect on respondent's ability to continue in business, and the gravity of the violation, it is found that a penalty of $1,980 is appropriate.

Discussion and Conclusions

In May 1973 the respondent was the successful bidder on an invitation issued by a subdivision of the State of New York to furnish a quantity of a wood preservative. The product was to be supplied under Federal Specification TT-W-572. The product was to contain as the active ingredient either pentachlorophenol, in which case it was to be marked as Composition A, or copper naphthenate, in which case it was to be marked as Composition B. Type I was to be a concentrated product, for dilution at point of use, and Type II was to be a product ready for use.

The respondent manufactured the product with the active ingredient pentachlorophenol and labeled the product Wood Preservative TT-W-572 B Type 2. This was erroneous labeling since the "B" designated the active ingredient which should have been copper naphthenate. The product manufactured by respondent was not registered and on June 26, 1974 it shipped 50 containers, each containing 2 gallons, to Nassau County, Department of Recreation and Parks, East Meadow, New York. This was a violation of section 3 of FIFRA.

The label of the product (which was the only labeling) contained only the designation of the product as "TT-W-572 B Type 2" and the name of the respondent. The label did not contain directions for use, warning and caution statements, an ingredient statement and other information required by the Act [see section 2(q)]. If the product had been registered this information would have been required in the labeling.

In determining the amount of penalty to be assessed, section 14(a)(3) of the Act requires that there shall be considered the appropriateness of the penalty to the size of respondent's business, the effect on respondent's ability to continue in business, and the gravity of the violation. Section 168.60(b) of the Rules of Practice provides that in evaluating the gravity of the violation there shall also be considered respondent's history of compliance with the Act and any evidence of good faith or lack thereof.

In the Guidelines for Assessment of Civil Penalties, 39 F.R. 27711 et seq., July 31, 1974, there are five categories as to size of businesses [section IC(1)(b)]. Businesses of the largest size, those having gross sales in excess of $1 million, are in Category V. The respondent has gross sales in excess of $4.5 million. The proposed penalty in the Guidelines for a non-registration violation for a respondent in Category V where the violation was committed without knowledge of the registration requirements is $2,200.

The respondent urges that a penalty of $2,200 would adversely affect its cash flow. The effect that payment of a penalty has on cash

flow is not one of the elements to be considered in imposing a civil penalty unless it will adversely effect respondent's ability to continue in business. The payment of the penalty in this case will not have such an effect.

The critical area for determining the amount of the penalty in this case is the evaluation of the gravity of the violation.

The purposes of registration include the following: providing protection to the public; assisting manufacturers in complying with the provisions of the Act; bringing to the attention of enforcement officials the formula, label, and claims made with respect to pesticides before they are offered to the public; preventing false and misleading claims; preventing worthless articles from being marketed; and providing a means of obtaining speedy remedial action if such articles are marketed. A great measure of protection can be accorded directly through the registration process which, among other purposes, is designed to prevent injury, rather than having to resort solely to imposition of sanctions for violations after damage or injury has been done.[3/]

It is obvious that when an unregistered pesticide is distributed the protective and enforcement purposes of registration are defeated. The shipment of an unregistered pesticide, especially one shipped without the warning and caution statements, directions for use, and other labeling required by the Act, may be considered to be a serious violation.[4/]

3/ See Southern Mill Creek Products, Inc., Notices of Judgment under FIFRA, No. 1479, Issue of June 1975.

4/ See Amvac Chemical Corporation, Notices of Judgment under FIFRA, No. 1499, Issue of June 1975.

A witness for complainant testified in detail concerning the serious potential harm that could result from the distribution of this product without labeling containing ingredient and precautionary statements, directions for use, and first aid directions.

The respondent urges that it was under the impression that a product made according to federal specifications did not have to be registered. I do not accept this as a valid excuse. Further, the specifications required that the shipping containers of the product contain markings with specific precautions regarding handling of the product and possible hazards. The containers of the product, as shipped, contained no such markings.

As above noted, the proposed penalty of $2,200 was assessed in accordance with the Guidelines where the respondent, in the particular instance, had no knowledge that registration was required. There is no evidence which would indicate that the respondent did not act in good faith. Further, there is no evidence to indicate that the respondent had any prior violations of FIFRA. As a mitigating factor, the witness for respondent represented that the company ceased manufacturing the product when the violation was called to its attention. This is not a mitigating factor, since continued manufacturing and distribution of the unregistered product would have resulted in further violations. There was, however, very limited distribution of the product and it was not for general sale by respondent. In considering all of the factors regarding this violation, I am of the view that a reduction

of 10% from the penalty proposed in the complaint is appropriate [see Guideline section IC(2)] and a penalty of $1,980 is hereby assessed.

I have considered the entire record in the case and the arguments of the parties and based on the Findings of Fact, and Discussion and Conclusions herein it is proposed that the following order be issued.

Final Order[5/]

Pursuant to section 14(a)(1) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended, a civil penalty of $1,980 is hereby assessed against respondent, Pur-All Paint Products Co., Inc. for the violation which has been established on the basis of the complaint issued on July 8, 1976.

Bernard D. Levinson
Administrative Law Judge

December 27, 1976.

5/ Unless appeal is taken by the filing of exceptions pursuant to section 168.51 of the Rules of Practice, or the Regional Administrator elects to review this decision on his own motion, the order shall become the final order of the Regional Administrator. [see section 168.40(c).]

FEDERAL INSECTICIDE, FUNGICIDE, AND RODENTICIDE ACT, (FIFRA) AS AMENDED ON OCTOBER 21, 1972, 86 STAT. 973, PUBLIC LAW 92-516 AND NOVEMBER 28, 1975, 89 STAT. 751, PUBLIC LAW 94-140

Parallel Citations

Statutes at Large	7 U.S.C.	Statutes at Large	7 U.S.C.
Section 2	Section 136	Section 15	Section 136m
3	136a	16	136n
4	136b	17	136o
5	136c	18	136p
6	136d	19	136q
7	136e	20	136r
8	136f	21	136s
9	136g	22	136t
10	136h	23	136u
11	136i	24	136v
12	136j	25	136w
13	136k	26	136x
14	136 l	27	136y