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UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF:	)	DOCKET NO. I.F.&R. VII-272C
	)	Marvin E. Jones
SCHULTE PAINT & LACQUER MANUFACTURING COMPANY	)	Administrative Law Judge
	)	1735 Baltimore
	)	Kansas City, Missouri 64108

INITIAL DECISION

By Complaint filed August 24, 1977, the U.S. Environmental Protection Agency (Complainant) charged Schulte Paint and Lacquer Manufacturing Company (hereinafter Respondent) with violation of Section 12 (7 U.S.C. 136j) of the Federal Insecticide, Fungicide and Rodenticide Act, as Amended (7 U.S.C. 136) (hereinafter the "Act") in that Sample Number 141927 of Respondent's product -- Schulte Creosote White Paint -- was being held for sale at Respondent's establishment in St. Louis, Missouri, when said product was not registered under Section 3 [136(a)] in violation of and as required by Section 12(a)(1)(A) [7 U.S.C. 136j(a)(1)(A)]. It is further alleged in said Complaint that Respondent's product is a "pesticide", within the meaning of the Act and as that term is defined in Section 2(u)[7 U.S.C. 136(u)]. See Also Section 2(t), defining "pest", and 40 CFR 162.3(ff)(8)(iv), explaining the term "fungicides". It is further alleged that the terms "100% Active Economic Poison", "Cresote White Paint", "Preserves", and "Protection for Buildings" (used by Respondent on the label placed on subject product) are pesticide claims which bring said product under the purview of the Act.

Said 40 CFR 162.3(ff)(8)(iv) provides:

> " 162.3(ff)(8). The term "fungicides" includes all substances or mixtures of substances intended for preventing or inhibiting the growth of, or destroying any fungi declared to be pests under Section 162.14 ... (sic) Fungicides include, but are not limited to:"
>
> x x x
>
> "(iv) Wood preservatives intended to prevent or inhibit growth of, or destroying organisms which cause staining, decay, or rotting of wood; ..."

Said Complaint further stated that a proposed penalty of $1,980.00 was determined in accordance with applicable Guidelines (39 FR 27711; 27713).

On September 14, 1977, Respondent filed its Answer and requested a Hearing, alleging that Section 3 of the Act specifically exempts a paint from registration provided the pesticide used in the paint was claimed for protection of the paint only.

An Adjudicatory Hearing was convened in Room 1620 at 1520 Market Street, St. Louis, Missouri, on Thursday, October 27, 1977, beginning at 2:45 p.m., at which time the parties Stipulated (T. 7) that Respondent's unregistered product, as labeled at the time of the inspection[1/] by Complainant was a pesticide and thus subject to provisions

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1/ It is Stipulated that the label (Respondent's Exhibit 1) containing the claim "Creosote used in this Paint is for Protection only" was used on subject product at the time of the inspection and that the new label (Respondent's Exhibit 2) was printed and used thereafter. Respondent agreed at the Hearing that it would furnish the dates of the printing of said labels, but reported at the time of filing its Findings herein that such dates could not be by it determined. In view of the Stipulation, such determination is not essential to the decision herein, and it is unnecessary to invoke the sanction of drawing the adverse inference provided by Section 168.04(c)(4).

of the Act; that the proposed penalty was arrived at (T. 7) under pertinent regulations, supra. The parties further stipulated that the only issue to be determined was the amount of the civil penalty to properly be assessed under the facts and circumstances presented by the record (T. 9, 12).

CIVIL PENALTY

In evaluating the civil penalty properly to be assessed herein, I am subject to the provisions of Section 168.46(b) (all cited Sections are from 40 CFR), which

(1) require that I must consider the elements set forth in Section 168.60(b);

(2) authorizes me to consult and rely on the Guidelines, 39 FR 27711 (July 31, 1974); and

(3) authorizes that I may, in my discretion, increase or decrease the assessed penalty.

The elements set forth in Section 168.60(b)(1) are as follows:

(1) the gravity of the violation

(2) the size of Respondent's business

(3) the effect of such proposed penalty on Respondent's ability to continue in business.

Said Section [(168.60(b)(2)] further provides that in evaluating gravity of the violation, the following shall be considered: (1) Respondent's history of compliance with the Act and (2) any evidence of good faith or lack thereof.

Respondent has operated for 54 years, since 1923, and has never before been cited for any violation (T. 17); I do

not find that the subject violation resulted from lack of good faith. It appears that Mr. and Mrs. Frank Schulte, officers of the Corporation, who testified, turned over the operation of the company plant to their son some four or five years ago and the company, at or near that time employed a consultant, one Charles C. Yeager (T. 16), to advise them with respect to complying with applicable regulations. They were advised (the validity of which advice I do not here consider nor determine) that a statement on the label of subject product consisting of the phrase "Creosote used in this paint is for the protection of the paint only" would exempt said paint from the subject registration requirements. The label, which appeared on the container for the product sampled, which contained the phrase "Creosote used in this paint is for protection only" was a result of error or the printer's failure to strictly adhere to the instructions given him.

In the premises, I find that the gravity of the violation, when considered from the standpoint of gravity of misconduct on the part of Respondent, is moderate. From the standpoint of gravity of harm, the failure to register the product demands more weight. The Act is regulatory in nature. The requirement of registration evinces the principal that the legislation is remedial in character and has an overriding purpose of providing protection of the public health and giving assurance that products marketed serve the public with efficiency and safety. In the assessment of a civil penalty, the finding of the element of intent is not contemplated. However, lack of intent will be considered in determining good faith as bearing on the appropriateness of the penalty proposed.

The size of Respondent's business is over $1 million annual gross sales which places Respondent in the category used in promulgation of the penalty herein proposed. It is admitted by Respondent that the assessment of the proposed penalty will not affect its ability to continue in business.

On consideration of all of the elements properly to be considered in the assessment of a civil penalty and, in particular, Respondent's good record from its 54-year operation and its good faith effort to comply with applicable regulations relating to subject product, I find that an appropriate civil penalty to be assessed is $1,150.00 and I recommend the assessment of a civil penalty in that amount.

This Initial Decision and the following proposed Final Order assessing a civil penalty shall become the Final Order of the Regional Administrator unless appealed or reviewed by the Regional Administrator as provided in 40 CFR 168.46(c):

"FINAL ORDER

Pursuant to Section 14(a)(1) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended [7 U.S.C. 136l(a)(1)], a civil penalty of $1,150.00 is assessed against Respondent Schulte Paint and Lacquer Manufacturing Company, for violations of said Act which have been established on the basis of Complaint issued herein, and Respondent is ordered to pay same by Cashier's or Certified Check, payable to the United States Treasury within sixty (60) days of the receipt of this Order."

This Initial Decision is signed and filed this 20th day of December 1977, at Kansas City, Missouri.

Marvin E. Sacks

ALJ

ATTACHMENT

Parallel Citations to Sections of FIFRA
in the Statutes at Large and in Title 7, United States Code,
Supp. V (1975)

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