12/28/78

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE REGIONAL ADMINISTRATOR

IN THE MATTER OF	)	
	)	
AGGIE CHEMICAL INDUSTRIES, INC.	)	I. F. & R. DOCKET NO. VI-115C
	)	
RESPONDENT	)	

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HEARINGS CLERK

INITIAL DECISION

This is a civil penalty proceeding under Sec. 14(a)(1) of the Federal Insecticide, Fungicide and Rodenticide Act, as amended (7 U.S.C. 136 et seq. (1976)).[1/] The proceeding was commenced by a complaint, dated January 16, 1978, containing 70 paragraphs (10 counts) and alleging 16 separate violations of the Act. A civil penalty totaling $26,180 was proposed to be assessed against Respondent. Respondent denied liability and requested a hearing.

Under date of June 23, 1978, Complainant moved to amend the complaint so as to demand $5,000, the maximum penalty for a single violation permitted by the Act, for each of the alleged violations or a total of $80,000. This motion was granted on July 31, 1978.

1/ The Act has been further amended in particulars not pertinent here by Public Law 95-396 (September 30, 1978), 92 Stat. 819.

A hearing on this matter was held in San Antonio, Texas October 17 - 19, 1978. On October 19, 1978, the parties announced that a settlement had been reached whereby Complainant withdrew paragraphs 8, 38 and 45 of the complaint relating to production of heptachlor and/or chlordane in violation of the Administrator's Suspension Order of December 24, 1975,[2/] Respondent conceded the remaining alleged violations and the parties agreed to negotiate the amount of the penalty. Officers of Respondent testified as to Respondent's current production and procedures for production of pesticides and as to Respondent's financial condition in the event the parties were unable to reach an agreement as to the penalty. By letter, dated October 27, 1978, counsel for Complainant stated that the parties were unable to agree as to the amount of the penalty. Consequently, the appropriate penalty for the admitted violations is the sole remaining issue in this proceeding.

2/ The withdrawal of the listed paragraphs was well advised. Although the Suspension Order (41 FR 7584, February 19, 1976) states in part that "* * the production of all such pesticide products [containing heptachlor or chlordane] for the foregoing [suspended] uses is prohibited * * *", it simply is not a violation of the Act to produce an unregistered pesticide in a registered establishment (Secs. 3 and 7 of the Act; 7 U.S.C. 136a and 136e). Moreover, the Suspension Order did not prohibit all uses of heptachlor or chlordane and the Final Order issued in the cancellation proceeding (43 FR 12372 et seq., March 24, 1978) permitted the distribution, sale and use of end use pesticide products which were in existence on the date of the Order and whose registrations were suspended by the Order.

Findings of Fact

Based on the entire record including the proposed findings and conclusions and brief submitted by Complainant (Respondent having declined to make a posthearing submission), I find that the following facts are established:

1. Respondent, Aggie Chemical Industries, Inc., whose address is 802 Seguin Street, San Antonio, Texas, was at all times pertinent herein a registered producer of pesticides, holding EPA Establishment No. 008127TX01.
2. On or about November 16 and December 21, 1976, Respondent shipped from its place of business in San Antonio, Texas to dealers in San Antonio, Texas, the product SBP E.C. With Additive.
3. The product referred to in the preceding finding is a pesticide within the meaning of the Federal Insecticide, Fungicide and Rodenticide Act and was not registered as required by the Act.
4. On or about November 20, 1976, Respondent shipped from its place of business in San Antonio, Texas to dealers in Waco and Temple, Texas, the pesticide product 1068 Chlordane 10% Dust.
5. The pesticide mentioned in finding 4 was not registered as required by the Act and regulations issued thereunder, was produced after December 29, 1975 and the labels on said product included uses which were suspended by the Administrator's Order of December 24, 1975; suspending the registrations for certain uses of products containing heptachlor and/or chlordane.

6. On or about March 10, 1977, Respondent shipped from its place of business in San Antonio, Texas to a dealer in San Antonio, Texas the product Miracle Roach Killer. Miracle Roach Killer was held for sale by Respondent at its place of business in San Antonio, Texas on or about May 13, 1977.

7. The product referred to in the preceding finding is a pesticide within the meaning of the Act and was not registered as required by the Act.

8. The label on the product mentioned in finding 6 represented that the pesticide contained 40.4% sodium fluoride, whereas the product actually contained 68.2% sodium fluoride.

9. On or about May 13, 1977, Respondent held for sale at its place of business in San Antonio, Texas, the product Root Stimulator and Starter Solution.

10. Root Stimulator and Starter Solution is a pesticide within the meaning of the Act and was not registered as required by the Act.

11. On or about May 13, 1977, Respondent held for sale at its place of business in San Antonio, Texas, the product Toxaphene 6-E.

12. Toxaphene 6-E is a pesticide within the meaning of the Act.

13. The label for the product referred to in findings 12 and 13 represented that the only active ingredient was 58.31% toxaphene (technical chlorinated camphene), whereas the product actually contained 0.20% methyl parathion and 0.20% parathion. Neither parathion or methyl parathion was listed on the label.

14. On or about May 13, 1977, Respondent held for sale at its place of business in San Antonio, Texas, the product Rat and Mouse Killer.

15. Rat and Mouse Killer is a pesticide within the meaning of the Act.

16. The label on Rat and Mouse Killer represented that the product contained 0.025% fumarin whereas it actually contained 0.016% fumarin.

17. On or about August 24, 1976, Respondent shipped from its place of business in San Antonio, Texas, to a dealer in Corpus Christi, Texas, the product 5% Chlordane Dust.

18. The product 5% Chlordane Dust is a pesticide within the meaning of the Act, was not registered as required by the Act and regulations issued thereunder, and was produced after December 29, 1975.

19. The label on the pesticide mentioned in findings 17 and 18 included uses which were suspended by the Administrator's Order of December 24, 1975, suspending the registrations of certain uses of pesticide products containing heptachlor and/or chlordane.

20. On or about August 9, August 24 and October 13, 1976, Respondent shipped from its place of business in San Antonio, Texas, to Beeville, Corpus Christi and San Antonio, Texas, the product H-2.5% G. Granules.

21. H-2.5% G. Granules is a pesticide within the meaning of the Act, was not registered as required by the Act and regulations issued thereunder, and was produced after December 29, 1975.

22. The product mentioned in finding 21 contained heptachlor and the label contained uses which were suspended by the Administrator's

Order of December 24, 1975, suspending the registrations of certain uses of pesticide products containing heptachlor and/or chlordane.

23. The label on H-2.5% G. Granules stated that the product contained 2.5% heptachlor, whereas it actually contained 0.74% heptachlor.

24. On or about May 5, 1977, Respondent shipped from its place of business in San Antonio, Texas, to Beeville, Texas, the product Dennison's Insecticides, Fungicides.

25. Dennison's Insecticides, Fungicides is a pesticide within the meaning of the act and was not registered as required by the Act.

26. The containers in which the pesticide referred in finding 25 was shipped did not bear any labels containing ingredient statements, directions for use and warning or cautionary statements as required by the Act and regulations issued pursuant thereto (40 CFR 162.10).

27. On or about May 10, 1977, Respondent shipped from its place of business in San Antonio, Texas to San Antonio, Texas, one five-gallon unlabeled can containing Methoxychlor 25% E.C.

28. Methoxychlor 25% E.C. is a pesticide within the meaning of the Act and was not registered as required by the Act.

29. The container of Methoxychlor 25% E.C. did not bear a label containing an ingredient statement, directions for use and warning or cautionary statements as required by the Act and regulations issued pursuant thereto (40 CFR 162.10).

30. At the time of the hearing, Respondent had a total of seven employees, including its general manager. The general manager is Respondent's only salaried officer.

31. Respondent produced two pesticides, 5% Sevin Dust and Aggie Rat and Mouse Bait, at the time of the hearing.

32. Respondent's total sales for the month of September 1978 were $25,392.34 and sales for the year ending September 30, 1978, totaled $288,669.82. Respondent's net loss for the month of September 1978 totaled $3,734.75 and its net loss for the year ending September 30, 1978, totaled $20,405.26.

33. Stockholders of Respondent have advanced it approximately $220,000, of which $164,000 is represented by promissory notes.

34. Mr. W. R. Stevens, Respondent's Treasurer, who has loaned Respondent at least $39,000, testified that they (the officers) couldn't continue this type of thing (making loans to Respondent) indefinitely and that he wouldn't recommend that the officers advance any more money to Respondent unless there was a reasonably good chance of bringing the firm to a profitable operation.

35. Respondent's balance sheet for the year ending September 30, 1978, shows a cumulative operating deficit of $181,884.67 and total assets of approximately $155,550.

Conclusions

1. The shipments of the unregistered pesticide SBP E.C. With Additive referred to in findings 2 and 3 constituted violations of Sec. 12(a)(1)(A) of the Act (7 U.S.C. 136j(a)(1)(A)).

2. Shipment of the unregistered pesticide product 1068 Chlordane 10% Dust on November 20, 1976, constituted a violation of Sec. 12(a)-(1)(A) of the Act (7 U.S.C. 136j(a)(1)(A)). See 40 CFR 162.17(e).

3. Shipment of, and holding for sale, the unregistered pesticide Miracle Roach Killer referred to in findings 6 and 7 constituted violations of Sec. 12(a)(1)(A) of the Act (7 U.S.C. 136j(a)(1)(A)).

4. The label on the pesticide Miracle Roach Killer represented that the product contained 40.4% sodium fluoride, whereas the product actually contained 68.2% sodium fluoride and thus was misbranded as defined by Sec. 2(q) of the Act and was a violation of Sec. 12(a)-(1)(E) of the Act (7 U.S.C. 136j(a)(1)(E)).

5. Holding for sale the unregistered pesticide product Root Stimulator and Starter Solution as found in findings 9 and 10 constituted a violation of Sec. 12(a)(1)(A) of the Act (7 U.S.C. 136j(a)(1)(A)).

6. Holding for sale the pesticide product Toxaphene 6-E, the label of which represented that the only active ingredient was 58.31% toxaphene (technical chlorinated camphene), whereas the pesticide actually contained 0.20% methyl parathion and 0.20% parathion, constituted a violation of Sec. 12(a)(1)(E) of the Act (7 U.S.C. 136j(a)(1)(E), in that the pesticide was adulterated and misbranded as defined in Secs. 2(c)(2) and 2(q)(1)(A) of the Act (7 U.S.C. 136(c)(2) and 136(q)(1)(A)).

7. Holding for sale the pesticide product Rat and Mouse Killer as found in findings 13 through 16, upon which the label represented that the product contained 0.025% fumarin (it actually contained

only 0.016% fumarin), constituted a violation of Sec. 12(a)(1)(E) of the Act (7 U.S.C. 136j(a)(1)(E)) in that the product was adulterated as defined in Sec. 2(c)(2) of the Act (7 U.S.C. 136(c)-(1)).

8. Respondent's action in shipping from its place of business on or about August 24, 1976, the pesticide product 5% Chlordane Dust which was not registered as required by the Act and regulations issued thereunder, constituted a violation of Sec. 12(a)(1)(A) of the Act (7 U.S.C. 136j(a)(1)(A)). 40 CFR 162.17(e).

9. Respondent's action in shipping from its place of business on or about August 9, August 24 and October 13, 1976, the pesticide product H-2.5% G. Granules, which was not registered as required by the Act and regulations issued thereunder, constituted violations of Sec. 12(a)(1)(A) of the Act (7 U.S.C. 136j(a)(1)(A)). 40 CFR 162.17(e).

10. Because the label on the pesticide referred to in the preceding finding represented that the product contained 2.5% heptachlor, whereas it actually contained 0.74% heptachlor, the product was adulterated as defined in Sec. 2(c)(1) of the Act (7 U.S.C. 136 (c)(1) and thus was a violation of Sec. 12(a)(1)(E) of the Act (7 U.S.C. 136j(a)(1)(E)).

11. Respondent's action on or about May 5, 1977, in shipping the unregistered pesticide Dennison's Insecticides, Fungicides from its place of business in San Antonio to Beeville, Texas, constituted a violation of Sec. 12(a)(1)(A) of the Act (7 U.S.C. 136j(a)(1)(A)).

12. At the time Dennison's Insecticides, Fungicides was shipped, the containers holding said pesticide did not bear labels containing ingredient statements, directions for use and warning statements as required by Sec. 2(q)(1)(F) and (G) and 2(q)(2)(A) of the Act (7 U.S.C. 136(q)(1)(F) and (G) and (q)(2)(A)) and regulations thereunder (40 CFR 162.10). Said pesticide was therefore misbranded and in violation of Sec. 12(a)(1)(E) of the Act (7 U.S.C. 136j(a)(1)(E)).[3/]

13. Respondent's action in shipping on or about May 10, 1977 a five-gallon can containing an unregistered pesticide, Methoxychlor 25% E.C., constituted a violation of Sec. 12(a)(1)(A) of the Act (7 U.S.C. 136j(a)(1)(A)).

14. The can containing Methoxychlor 25% E.C. mentioned in the preceding conclusion was unlabeled and thus Respondent violated Sec. 12(A)-(2)(A) of the Act (7 U.S.C. 136j(a)(2)(A)) in shipping a pesticide on which the labeling had been detached, altered, defaced or destroyed.[4/]

3/ Because there is no evidence that the containers ever bore labels containing ingredient statements, directions for use and warning statements, the appropriate charge is considered to be as determined above rather than shipping a pesticide on which package the labeling had been detached, altered, defaced or destroyed in whole or in part as charged in the complaint.

4/ The evidence reflects that there was no label on the can and on the assumption that it would be unlikely that an unlabeled product would be produced, the charge in the complaint is considered to be proper.

15. For the listed violations of the Act,[5/] Respondent is liable for a civil penalty in accordance with Sec. 14(a)(1) of the Act (7 U.S.C. 136 l(a)(1).

Penalty

Under Sec. 14(a)(3) of the Act (7 U.S.C. 136 l(a)(3)) and in accordance with Sec. 168.60(b) of the Rules of Practice (40 CFR 168.60-(b)) factors to be considered in determining an appropriate penalty are: (i) the gravity of the violation, (ii) the size of Respondent's business, and (iii) the effect of the proposed penalty on Respondent's ability to continue in business.

Gravity of the violation is usually considered from two aspects: gravity of the harm and gravity of misconduct. There is no evidence in the record of the harm or potential harm resulting from the violations of the Act which have been determined above. However, it may be assumed that at least some harm or potential harm to man or the environment, or both, will result from the distribution or shipment of unregistered

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5/ Because there is no evidence that notice of applications for Federal registration of products registered solely under state law had been submitted for the pesticides 1068 Chlordane 10% Dust, 5% Chlordane Dust and H-2.5% G. Granules, it is concluded that the complaint appropriately charges that shipments of these products were violations of Sec. 12(a)(1)(A) of the Act (unregistered pesticides) rather than violations of the Administrator's Order of December 24, 1975, suspending the registrations of certain uses of pesticides containing heptachlor and/or chlordane. See note 6, infra.

pesticides (especially those whose registrations were suspended by the Administrator's Order of December 24, 1975, suspending the registrations of certain uses of pesticides containing heptachlor and/or chlordane) the holding for sale, shipment or distribution of misbranded and/or adulterated pesticides and upon which the label or labels had been detached, altered, defaced or destroyed in whole or in part.

Gravity of misconduct is considered to encompass Respondent's history of compliance with the Act and evidence of good faith or the lack thereof. See 40 CFR 168.60(b) mandating that the mentioned factors be considered. Because there is no evidence in the record of violations or charges thereof, other than those found herein, Respondent's history of compliance with the Act must be considered good. The several violations found tend to demonstrate a careless or reckless regard toward Respondent's responsibilities under the Act, and it must be concluded that evidence of good faith is lacking. A possible exception is the product Miracle Roach Killer for which violations charged include that it was not registered. However, it was registered with the Texas Department of Agriculture (Resp.'s Exhs. 5, 6 and 7) and a product "Miracle Roach Killer - New Label -Roach Killer" is listed on a xerox copy of a microfiche listing, dated 10/07/77, of pesticide products registered by Respondent (Resp.'s Exh. 4). This listing was forwarded to Respondent from EPA Region VI on February 27, 1978. A handwritten notation on the microfiche states that products with TX notation, which includes the

roach killer mentioned above, may be distributed in Texas only.[6/] Consumer Safety Officer Halliday testified that there was confusion concerning the status of this product because there were two other products bearing similar names for which a notice of application for Federal registration of an intrastate product had been accepted by the Registration Division.[7/] It is at least understandable that similar confusion could have existed among Respondent's employees. This, of course, does not excuse the admitted violation, but is merely evidence indicating that the violation may have been inadvertent. Mitigating factors include Respondent's employment of a general manager other than the one employed when the majority of the violations took place and its promise to abide by the law and EPA regulations in the future.

6/ Intrastate distribution and sales of pesticides were brought under Federal regulation by amendments to FIFRA effected by the Federal Environmental Pesticide Control Act of 1972 (Public Law 92-516). While Sec. 24 provides that a state may provide registration for pesticides formulated for distribution and use within the state to meet local needs if the state is certified by the Administrator as capable of exercising adequate controls to assure that registration will be in accord with the purposes of the Act, regulations promulgated by the Administrator on July 3, 1975 (40 FR 28268, 40 CFR Part 162), effective August 4, 1975 (40 CFR 162.23) provide in pertinent part "* * Within sixty (60) days of the effective date of this Part, each registrant of a product registered solely under state law must submit a notice of application for Federal registration. * *" (40 CFR 162.17(a)). Failure to file a notice of application for Federal registration for such products within the 60-day period is a violation of Sec. 12(a)(1)(A) of the Act (40 CFR 162.17(e)). The 60-day period expired on October 3, 1975.

7/ Mr. Halliday resolved the confusion when he discovered ingredient statements on labels of the products were different.

Because the amount of the penalty determined herein is dependent primarily on Respondent's financial condition little or no consideration has been given to the Civil Penalty Assessment Schedule (39 FR 27711 et seq., July 31, 1974). It is noted, however, that an unlimited adjustment or reduction from the Schedule is authorized in instances where the proposed penalty will have a significant adverse effect on Respondent's ability to continue in business (Sec. I D.(2)(c), 39 FR 27712). The findings make it obvious that Respondent is in straitened financial circumstances and that its continued existence as a going concern is dependent upon the support or at least forbearance of its officers and stockholders. While it is true that Respondent's stock is closely held and its operations such that for some of the loans from officers and stockholders no notes were executed, it is evident that any substantial penalty would cause Respondent to cease operations.[8/]

8/ Although Complainant attempts to cast doubt upon the picture of Respondent's financial condition depicted by the financial statements in the record and asserts that a $65,000 penalty is appropriate, it can hardly be seriously contended that a firm having total yearly sales of approximately $290,000 would generate income sufficient to pay a penalty of such a magnitude. Moreover, Complainant's arguments as to whether the facts herein are sufficient to enable the corporate veil to be pierced, in effect concede the essential point, i.e., that payment of the penalty sought is beyond Respondent's capability. The effect of the proposed penalty on Respondent's ability to continue in business is the statutory factor which must be considered and on this record, I am convinced that a penalty of more than a small fraction of the amount sought would eliminate any chance of Respondent remaining in business, which, it might be added, does not appear to be particularly bright in any event. The financial condition of Respondent's officers and stockholders is neither in issue nor in evidence and to contend that they, assuming their ability to do so, would assist Respondent in paying the proposed penalty is to engage in sheer speculation.

Under all the circumstances a penalty of $1,000 is considered appropriate and is hereby proposed.

Final Order[9/]

Pursuant to Section 14(a)(1) of the Federal Insecticide, Fungicide and Rodenticide Act, as amended (7 U.S.C. 136 l(a)(1)), a civil penalty of $1,000 is hereby assessed against Respondent, Aggie Chemical Industries, Inc., for the violations of the Act listed above which have been established as charged in the complaint. Respondent is ordered to pay the aforesaid sum by forwarding a cashier's or certified check payable to the United States of America in the amount of $1,000 within 60 days after receipt of this Order.

Dated this 28th day of December 1978.

Spencer T. Nissen
Administrative Law Judge

9/ In accordance with Sec. 168.45(c) of the Rules of Practice governing the assessment of civil penalties under the Act (40 CFR 168.45-(c)) this initial decision shall become the final order of the Regional Administrator unless appealed to or reviewed by him on his own motion within the time therein specified (but see 40 CFR 168.51).