UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	I.F. & R. Docket No. VIII-59C
	)	
Willis Stores,	)	
	)	
Respondent	)	

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Accelerated Decision Dismissing Complaint and Denying Motion to Amend

Under date of January 15, 1981, the Director of the Enforcement Division, Region VIII, U.S. Environmental Protection Agency (Complainant), issued a complaint charging Willis Stores (Respondent) with violating Section 12(a)(2)(J) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended (7 U.S.C. 136j(a)(2)(J)). The complaint alleged that on February 28, 1979, the Administrator issued an order suspending the registration of all pesticide products containing 2-(2,4,5-trichlorophenoxy) Propionis Acid (Silvex) for uses including home and garden uses and prohibiting the sale, distribution, or other movement in commerce of such pesticide products (See 44 F.R. No. 52, March 15, 1979, at 15917). The complaint further alleged that on or about February 28, 1980, two EPA inspectors visited West Colfax Feed and Supply, 7601 West Colfax Avenue, Lakewood, Colorado, for the purpose of conducting a routine dealer inspection and during the course of that inspection, found eight 32 ounce bottles of Purina Lawn Weed Killer (EPA Registration No. 602-180-AA) being offered for sale. It is alleged that Willis Stores is a partnership, that West Colfax Feed and Supply is owned by Willis Stores, that Purina Lawn Weed

Killer contains Silvex and that Respondent's action in offering Purina Lawn Weed Killer for sale constituted a violation of the suspension order and thus of Section 12(a)(2)(J) of the Act. Complainant sought a penalty of $5,000 for the asserted violation.

Respondent did not immediately file an answer, but through counsel requested a hearing and filed a motion, dated February 4, 1981, to dismiss, contending that Complainant did not give proper notice of the inspection as required by Section 9(a) of the Act and that the resulting inspection was an unreasonable search and seizure in violation of the Fourth Amendment to the U.S. Constitution. Complainant's response to the motion to dismiss, dated February 17, 1981, made it clear that Complainant was not relying on the sale effected when one of the EPA inspectors purchased a bottle of Purina Lawn Weed Killer from Respondent for sampling purposes, but on the fact that the mentioned pesticide was being offered for sale. The Regional Administrator denied the motion to dismiss on March 2, 1981. He also denied Complainant's subsequent motion for a default order which was based on the contention Respondent had failed to file a timely answer to the complaint.

Respondent's answer, filed March 12, 1981, admitted that it was a partnership, but denied all other allegations of the complaint. In an order, dated April 8, 1981, the presiding ALJ pointed out that the suspension order issued by the Administrator did not prohibit the offering for sale of pesticide products containing Silvex and directed Complainant to show cause, if any be, why the complaint should not be dismissed. Complainant has responded to the order and Respondent has filed a reply thereto. For the purposes of this decision, the factual allegations of the complaint are accepted as true.

Although Complainant's response to the order to show cause includes a lengthy discussion of the purposes of FIFRA and of the Administrator's power to suspend the registration of pesticides in accordance with Section 6(c)(1) of the Act in order to prevent an imminent hazard during the time required for cancellation, the crux of its argument is that the language of the suspension order which prohibits the "sale, distribution, or other movement in commerce" of pesticides, whose registrations were suspended by the order, plainly prohibits the offering for sale of such pesticides. It is argued that the terms "distribution or other movement in commerce" are very broad and encompass all commercial activities in the flow of pesticides from the manufacturer/registrant to the ultimate consumer of the products. Support for this position is found in the dictionary definition of "distribution" as meaning "a spreading out or scattering over an area or space" and of "movement" as "a progression in a particular direction or toward a particular objective" (Webster's Third New International Dictionary, 1969). Complainant asserts that the action of a retailer in offering a pesticide product for sale is clearly part of the movement or flow in commerce.

Complainant also finds support for its position in the language of the Toxic Substances Control Act (15 U.S.C. 2601 et seq.), Section 3(4) of which defines the terms "distribute in commerce" and "distribution in commerce" as meaning "* * to sell, or the sale of, the substance, mixture, or article in commerce; to introduce or deliver for introduction into commerce, or the introduction or delivery for introduction into commerce of, the substance, mixture, or article; or to hold, or the holding of, the substance, mixture, or article after its introduction into commerce." (Emphasis supplied).

Although recognizing that the term "distribute in commerce" is not specifically defined in FIFRA, Complainant asserts that the term should be read in the light of the quoted definition from TSCA and argues that the offering for sale of a pesticide product by a retailer is equivalent to holding that product after its introduction into commerce.

Complainant cites the general proposition that remedial statutes such as FIFRA which are designed to protect the public health and safety should be broadly construed so as to accomplish the purposes of the statute, contends that Congress intended that suspension orders under Section 6(c) of the Act prohibit the offering for sale of suspended pesticides, states that an unduly narrow or literal interpretation of the order would inhibit EPA's ability to enforce the order and argues that the Administrator intended that the suspension order prohibit the offering for sale of Silvex for suspended uses.

Respondent, replying to these arguments, asserts that the issue is whether the acts charged in the complaint were prohibited by the order, that Respondent has a right to rely on the plain language of the order and that the Administrator could easily have included the words "offering for sale" among the conduct proscribed by the order but failed to do so, and that it is unfair and inequitable to impose a penalty on Respondent for violation of a regulation [order] which is unclear on its face.

Discussion

Because the Administrator may, inter alia, permit certain uses of pesticides while prohibiting other uses in a suspension order and may permit the sale and use of existing stocks of pesticide products whose

registrations have been suspended, and has in fact done so[1/], the crucial question is not interpretation of the statute or the Administrator's intent in issuing the order, but rather whether the conduct charged in the complaint may fairly be regarded as proscribed by the order. This conclusion also follows from the fact that it is publication of the order in the Federal Register that is regarded as giving notice to the public of the proscriptions of the order (See. 44 U.S.C. 307 and 5 U.S.C. 552(a)(1)).

Section 3(a) of the Act provides in pertinent part: "* * no person in any State may distribute, sell, offer for sale, hold for sale * * any pesticide which is not registered with the Administrator" and Section 12, dealing with unlawful acts provides in part: "* * it shall be unlawful for any person in any state to distribute, sell, offer for sale, hold for sale * * (A) any pesticide which is not registered * * *." The phrase "offered for sale" appears in Section 13(b) of the Act authorizing the seizure and confiscation of inter alia, unregistered, misbranded or adulterated pesticides. Accordingly, the language of the suspension order prohibiting the "sale, distribution or other movement in commerce" of the suspended pesticides does not expressly track the language of the statute and its origin is unclear. While identical language has been used in other suspension orders[2/], it is probable that omission of the phrase "offer for sale" from the order was simply inadvertent.

1/ See the order suspending the registrations for certain uses of pesticide products containing heptachlor/chlordane, dated December 24, 1975, and the clarification thereof, dated January 19, 1976 (41 F.R. No. 34, February 19, 1976, at 7584-85).

2/ See, e.g., the suspension orders concerning pesticide products containing dibromochloropropane (DBCP) (42 F.R. 57543, November 3, 1977, 44 F.R. 65169, November 9, 1969).

A sale in the ordinary sense of the word is a transfer of property for a fixed price in money or its equivalent. See Grinnel Corp. v. United States, 590 F.2d 932 (Ct. Cl., 1968), and authority therein cited. See also 38 Words and Phrases, Sale. While "distribution" broadly means apportionment or allotment, a spreading out or scattering over an area or throughout space, (Webster's 3rd New International Dictionary, 1967), legally it implies or imports transfer or delivery. 13 Words and Phrases, Distribution. Cf. Haviland v. Butz, 543 F.2d 169 (D.C. Cir., 1976) ("distribution" as used in Animal Welfare Act (7 U.S.C. 2131 et seq.) held synonymous with "transportation"). The dictionary defines movement as the action or process of moving, change of place or position, action or activity. An offer is a proposal, presenting for acceptance, undertaking, proffer or attempt (Webster's Third New International Dictionary, supra). See also 29 Words and Phrases, Offer.

While it may well be that in the normal case it is unlikely that there could be a voluntary sale absent an offer for sale, application of the above definitions and common experience make it clear that there can be, and frequently is, an offer for sale without a sale being accomplished, and an offer for sale without a distribution or other movement in commerce. A familiar example of the latter is where the goods or articles have to be manufactured or otherwise procured before an actual sale can take place.[3/] It is concluded that the language of the order as commonly understood does not prohibit the offer for sale of suspended pesticide products. There can, of course, be no question, but that offering suspended products for sale could or is likely

3/ In the instant case, it is clear that the sale, distribution or other movement in commerce by which the Purina Lawn Weed Killer had been delivered to Respondent's establishment had occurred prior to Respondent's action in offering such product for sale. This case does not, of course, concern the question of whether those activities violated the suspension order.

to lead to a sale of such products and thus a violation of the order. The simple and inescapable fact is that the acts charged in the complaint did not lead to or constitute a sale, distribution, or other movement in commerce and thus did not violate the order.

It is, of course, true as Complainant argues, that FIFRA is a remedial statute designed to protect the public and the environment from unreasonable risks attributable to hazardous pesticides and as such should be liberally construed so as to accomplish its intended purpose. That doctrine, however, affords little aid in the disposition of the instant case because, as noted above, there is no question but that the statute authorizes the Administrator to prohibit the offer for sale of pesticides, whose registrations have been suspended, the only question being whether the suspension order may reasonably be construed as prohibiting such offer. While it is true that agency orders are not to be read in a vacuum, but are to be interpreted in the context in which they arise, it is also true that agencies have the responsibility to articulate their orders in clear and precise terms so as to avoid reasonable doubts as to their precise meaning. Bell Telephone Company of Pennsylvania v. FCC, 503 F.2d 1250 (3rd Cir., 1974). Here the suspension order is considered to be unambiguous, it simply does not prohibit the conduct charged in the complaint.[4/] Although the rule that penal provisions must be narrowly construed, is not applicable, it is still the rule that the law must be clear

4/ Complainant's contention that the word "distribution" in the suspension order should be read in accordance with the definition of "distribute or distribution in commerce" in Section 3.(4) of the Toxic Substances Control Act (15 U.S.C. 2601 et seq.), as meaning the holding of a substance or article after its introduction into commerce, is rejected because as noted in the text it does not accord with either the common dictionary or the legal definition of distribution.

in order to exact a penalty. See Anuchick et al. v. Transamerican Freight Lines, Inc., 46 F. Supp. 861 (D.C. Mich., 1942) and Hatfield v. C.I.R., 162 F.2d 628 (3rd Cir. 1947). See also Top Value Meats, Inc. v. FTC, 586 F.2d 1275 (8th Cir., 1978) (statutes imposing penalties should be construed with some strictness). In Mourning v. Family Publications, Inc., 411 U.S. 356, 36 L.Ed 2d 318 (1973), the Supreme Court, while holding that the Truth in Lending Act was not to be narrowly construed, nevertheless, alluded to the rule assuring that no individual be convicted unless a fair warning has first been given in language the common world will understand, of what the law intends to do if a certain line is passed. The Court held that risk was not present in the case before it, because the language of the challenged rule was explicit, thus indicating that the result would have been otherwise, if the rule had been considered unclear in its application to the activities at issue. Cf. Amoco Oil Company v. United States, 450 F. Supp. 185 (D.C. Mo., 1978) (where plain meaning of word "leases" as used in regulation applicable to motor fuels could include lessors as well as lessees, definition limiting scope of regulation to lessees would be adopted and penalty assessed based on plain meaning was held to be improper).

The elaborate arguments used by Complainant to justify its interpretation of the suspension order serve to emphasize that it does not clearly prohibit the conduct charged in the complaint. It is concluded that the activities of Respondent charged in the complaint did not constitute a violation of the suspension order.

Motion to Amend

With its brief in response to the order to show cause, Complainant submitted a motion to amend the complaint, asserting that since the date of the complaint, it has come to the attention of Complainant that the registration of Purina Lawn Weed Killer (EPA Registration No. 602-180-AA) was cancelled for all uses as a result of an agreement between EPA and the Registrant, Ralston Purina Company, on or about August 7, 1979. The motion asserts that Respondent's action in offering the Purina Lawn Weed Killer for sale constituted a violation of Section 12(a)(1)(A) of the Act, making it unlawful for any person to, inter alia, distribute, sell or offer for sale any pesticide which is not registered and of Section 12(a)(2)(K) of the Act, making it unlawful to violate any cancellation of registration of pesticide under Section 6 of the Act. The motion asks that the amount of the proposed penalty be increased from $5,000 to $7,750. Respondent opposes the motion.

Complainant has not alleged and the undersigned has been unable to find that the agreement of August 7, 1979, with Ralston Purina Company whereby all uses of Purina Lawn Weed Killer were cancelled was published in the Federal Register. Indeed, the only publication provided for in the order itself was that a copy of the agreement be filed in the pending cancellation proceedings (In re The Dow Chemical Company, et al., FIFRA Docket Nos. 415, 438, 464 et al.). There being no allegation or contention that Respondent had actual notice of the cancellation agreement, Respondent may not be adversely effected by the agreement in the absence of publication in the Federal Register (5 U.S.C. 552(a)(1)). Moreover, as Respondent points out,

the agreement provides that it is intended to be binding only upon the Agency and Registrant and it is at least doubtful that Respondent could properly be charged with violation of a cancellation of registration even if the agreement had been published in the Federal Register.

Complainant's action in seeking to increase the amount of the penalty from $5,000 to $7,750 is clearly improper and cannot be permitted. The maximum penalty for each offense provided by Section 14(a)(1) of the Act is $5,000 and the mere fact that the acts charged in the complaint might constitute a violation of more than one section of the Act does not mean that the same acts constitute multiple offenses so as to authorize imposition of more than the statutory maximum for a single offense.

Conclusion 5/

1. The motion to amend the complaint is denied.
2. The complaint is dismissed.

Dated this 11th day of June 1981.

Spencer T. Nissen
Administrative Law Judge

5/ In accordance with Section 22.20 of the Rules of Practice (40 CFR 22.20) this decision constitutes an initial decision and shall become the final decision of the Administrator, unless an appeal to the Administrator is taken in accordance with Section 22.30 of the Rules or the Administrator elects, sua sponte, to review the decision as therein provided.