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ENVIRONMENTAL PROTECTION AGENCY
REGION IX
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UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	Docket No. IF&R 9-333C
	)	
Jones Chemicals, Inc.,	)	
Western Division,	)	
	)	
Respondent	)	

1. Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA") - Labeling, submitted by Respondent, which was accepted and approved by the Administrator of the United States Environmental Protection Agency ("EPA"), after his determination that said labeling, which included a representation by Respondent, on a specimen label submitted, that "label will be silk screened on 1 gallon jugs", was in conformity with regulatory requirements, 40 CFR 162.10, in that the text of said labeling was to prominently appear on a clear contrasting background and would be conspicuous, clearly legible and not obscured, and could be lawfully used in the sale and distribution of Respondent's product.

2. FIFRA - Labeling, which was not submitted to and approved by the Administrator of the U.S. EPA, and differed in material respects from any other labeling so submitted and approved, could not be lawfully used in the sale and distribution of Respondent's product.

3. FIFRA - Raised lettering or embossing on a single-colored plastic container, though consisting of the same text as that contained on a label approved by the Administrator of the EPA, after his determination that said label was in conformity with regulatory requirements, was another and different label required to be submitted

and approved by said Administrator where said raised lettering or embossing admittedly did not display its text prominently on a clear contrasting background, making said text conspicuous and clearly legible and otherwise conform to said labeling regulations, 40 CFR 162.10.

4. FIFRA - Intent to violate was not a factor to be considered in determining whether Respondent had violated the Act and pertinent regulations as charged (section 14(a)(1) of the Act.

Appearances

For Complainant: David M. Jones, Esquire
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U.S. EPA, Region IX
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For Respondent: Robert D. Wenzel, Esquire
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INITIAL DECISION

ON COMPLAINANT'S MOTION FOR ACCELERATED DECISION

On May 26, 1983, subject Complaint was filed, pursuant to Section 14(a) of the Federal Insecticide, Fungicide and Rodenticide Act (hereinafter "FIFRA" or the "Act"), charging Respondent, Jones Chemicals, Inc. (hereinafter "Jones" or "Respondent") with violation of Section 12 1/ of the Act, and proposing a civil penalty of $2000, for the reason that Respondent's registered pesticide "Sunny Sol - 150 - LIQUID CHLORINATING PRODUCT" - (EPA Registration No. 1744-2) was by it produced and distributed into commerce when said pesticide was misbranded in that, on March 1, 1983, the labeling on said pesticide so distributed, offered for sale, shipped and held for sale, did not conform to the labeling submitted by Respondent (Complainant [hereinafter "C"] Exhibit [hereinafter "Ex."] G and Respondent [hereinafter "R"] Ex. R-3) in support of its registration of said pesticide, pursuant to Section 3(c)(1)(C) of the Act and approved by the Administrator pursuant to Section 3(c)(5)(B) of the Act. The label so submitted bore the information required by the Act and such information required by 40 CFR 162.10(a)(1) was found by the Administrator to conform to 40 CFR 162.10(a)(2) and, in particular, 40 CFR 162.10(a)(2)(ii)(B), in that the text of the label appeared on a clear contrasting background, and represented that "label will be silk-screened on one-gallon jugs" (see 40 CFR 162.10(a)(6)(ii)).

1/ 7 USC 136j; parallel citations to 7 USC Part 136 appear hereinbelow as Attachment 1.

In contrast, it is alleged here that the labeling appearing, on or about March 1, 1983, on one-gallon bottles containing said pesticide product so produced and distributed by Respondent were "raised" lettering (embossing) 2/ with no "clear contrasting background".

Based upon the pleadings and the record herein, which includes Complainant's Motion for Accelerated Decision, Respondent's Answer thereto, and Exhibits and Arguments therewith, I make the following

Findings of Fact

1. It is admitted that Respondent's subject product is a pesticide subject to the Act and pertinent regulations promulgated pursuant thereto (Paragraph 3 of Complaint and Answer; Respondent's Answer to Motion, page 1).

2. Pursuant to 40 CFR 162.10 and Section 3(c)(1)(C) of the Act, Respondent submitted for approval by the Administrator of the EPA a photocopy of its "labeling" in support of its application for registration of subject pesticide. A copy of said label (three pages) appears in this record as C Ex. G (to Complainant's Motion for Accelerated Decision) and as R Ex. 5(b) and 6(b) (to Respondent's "Answer to Motion for Accelerated Decision"). Said label was accepted by EPA on April 1, 1981 (R Exhibit 6(a) and 6(b); C Ex. G, page 1).

It was understood, when said label was accepted, that the label, as submitted, would be "silk screened on one-gallon jugs". (See hand-written marginal note on page 2, C. Ex. G.)

2/ The yellow plastic one-gallon container received by me as as Complainant's Exhibit E is a yellow jug with raised letters (embossing) the same color as the container.

3. On May 28, 1981, in response to Respondent's Label Amendment Application, the EPA Registration Division stated (R Ex. 5(a)):

> "To expedite this amendment, we did not review the label which you submitted. It is understood that the label must comply with the most recently accepted one in all other respects."

4. The embossed lettering does not conform to the specifications of the labeling submitted to and approved by the EPA Administrator, and does not comply with 162.6(b)(2)(A) and 162.10 of applicable regulations which include, among labeling requirements, that the label text appear against a contrasting background, and that the information supplied be conspicuous and legible to persons with normal vision under customary conditions.

5. Sunny Sol 150 is a 12.5% concentration of sodium hypochlorite. (In comparison, household bleach contains 5.25% sodium hypochlorite.) The parties agree that Respondent's said product is a pesticide because of claims made on the approved label stating its pesticidal qualities (paragraph 3, Pleadings).

Conclusions

1. The acceptance of the submitted labeling for Respondent's product indicated that said labeling conformed to the regulatory requirements, i.e., that it showed clearly and prominently the information required by 40 CFR 162.10(a)(1); and that said information so required was "clearly legible"; and placed with conspicuousness thereon; and that the required text was "not obscured", and "appeared on a clear contrasting background", as required by 162.10(a)(2).

2. 40 CFR 162.10(a)(6) - FINAL PRINTED LABELING - provides that "final printed labeling" must be submitted and approved prior to registration.

3. The embossed labeling appearing on Respondent's pesticide product was not submitted to nor approved by the EPA Administrator as required by 40 CFR 162.10 and 162.6(b)(2)(A); and the use of said embossed labeling is and was "misbranding" (see 2(q) of the Act) in violation of Section 12(a)(1)(E) of the Act.

4. It is the function of the EPA Administrator, after submission of labeling in support of application for registration, and prior to its approval, to determine if the labeling then complies with the Act and regulations.

5. Remedial legislation should be broadly construed and liberally interpreted to effectuate its purposes, and to achieve Congressional intent.

Discussion

Respondent characterizes the instant Complaint as an attack on the industry-wide use of embossed bottles. On this record, there is no attack on such use; on the contrary, the use of "embossing" is contemplated, as Respondent points out (page 5, Answer to Motion), but any such labeling must be approved by the Administrator on a showing by an applicant that it conforms to regulatory requirements.

The sole question to be determined is whether if, in the use of the embossed plastic one-gallon plastic container, Respondent has complied with applicable regulations and the Act. On this record, it is clear he has not.

Section 3(c)(5) provides:

(5) Approval of registration. - The Administrator shall register a pesticide if he determines that . . .

(b) its labeling and other material require(d) to be submitted comply with the requirements . . . ; (emphasis supplied).

40 CFR 162.6(b)(2) provides that the application . . . must be accompanied by "legible copies of the proposed labeling" and the labeling submitted must be in accordance with Section 162.10. 162.6(b)(2)(D)(ii) provides that new registration "will not be granted until after acceptance of final printed labeling".

Section 162.10 provides Labeling Requirements including the provision that the text of the label must be clear and prominent. 162.10(a)(2) sets forth the specifications which are to be used in determining, after it is submitted by the applicant for registration, whether labeling conforms to the requirements of the regulations. 162.10(a)(2)(ii) provides that

"ALL REQUIRED TEXT MUST:

(B) Appear on a clear contrasting background; and

(C) Not be obscured or crowded." (Emphasis supplied.)

It must be presumed that the label submitted and approved on April 1, 1981 (C Ex. G; R Ex. 6(a) and 6(b)) was found by the Administrator to comply with and conform to regulatory requirements.

It is apparent that, had the embossed bottles been submitted to the Administrator to support Respondent's application for registration, said labeling would have been deficient in the particulars set forth in the regulation. "Single unit embossed bottles cannot be manufactured" with a background of "clear contrasting color" (R Answer to Motion, page 9). That is not, however, a determination

to be here made. Respondent has violated the Act and regulations because of its use of labeling that has not been submitted to the Administrator. It has thus not been approved and, therefore, its use is unlawful. Section 162.6(b)(2)(A) provides "the labeling must be submitted in accordance with 162.10". Section 162.10(a)(6) provides also that "final printed labeling must be submitted prior to registration."

The final printed labeling actually submitted contemplated that the label will be "silk-screened on a one-gallon jug". We must conclusively presume that the labeling submitted, having been approved, was lawful and that it was determined by the Administrator that said labeling conformed in all respects with with labeling requirements provided by the Act and regulations promulgated pursuant thereto. It needs no citation of authority that FIFRA is a regulatory act and the regulatory powers granted by the Act are vested in the Administrator of the U.S. Environmental Protection Agency. Further, regulatory or remedial legislation is broadly construed and liberally interpreted to effectuate the purposes Congress sought to achieve. Adequate protection should be provided for the public health and the environment (see Tcherepin v. Knight, 389 US 332, 88 SCt 548 (1967); Cattlemen's Inv. Co. v. Fears, 343 FS 1248, 1251 (1972)). Congress makes the law; and the administration of the law and the promulgation of regulations pursuant thereto are powers delegated to the Administrator, and him alone. Industry-wide use of embossed bottles for labeling such as that utilized by Respondent is unlawful unless and until such labeling is submitted to and

approved by the Administrator of the EPA. It is for him, not industry, to determine if the labeling adequately conforms to the said standards by the Act and regulations provided. As demonstrated in Complainant's brief in support of his said Motion, the provisions here pertinent were in full force and effect well in advance of 1981. (See C Ex. F, U.S.D.A. Regulations for the Enforcement of the Federal Insecticide, Fungicide and Rodenticide Act, as Amended August 29, 1964.) It is observed in Stearns Electric Paste Co., v. Environmental Protection Agency, 461 F.2d 293, 302 (1972) (Stearns) that FIFRA began with the Insecticide Act of 1910 which was repealed and a new Act, containing a registration requirement as an aid to enforcement, was enacted in 1947. In 1964, U.S.D.A. Regulations (see C Ex. F, cited supra) added authority to refuse (or cancel) registration if the pesticide product was found to be either adulterated or misbranded (Stearns, l.c. 303). Stearns, l.c. 302, n. 29, further observes that Congress considered that registration affords manufacturers the opportunity to eliminate many objectionable features from their labels prior to placing a product on the market. 3/

3/ For discussion of the labeling requirements and the importance of the requirement that it be determined, before its registration, that a product will be properly labeled when marketed, see also Organized Migrants in Community Action, Inc., v. Brennan, 520 F.2d 1161, 1165 (1975); Continental Chemiste Corp. v. Ruckelshaus, 461 F.2d 331, 335 (1972). See also First National Bank in Albuquerque v. U.S., 552 F.2d 370 (1977); Southern National Manufacturing Co. v. EPA, 470 F.2d 194 (1972).

It should be here apparent that the instant issue is not whether the subject labeling should be or will be approved, if and when submitted, but, rather, whether the embossed lettering as it appears on Respondent's one-gallon containers has been submitted and approved by the Administrator. It is obvious that subject embossed labeling differs in material respects from that labeling submitted and approved and its use is and must be and is hereby found to be unlawful.

Respondent's suggestion (Answer to Motion, page 3) that EPA is establishing a new rule in taking the position, without notice, that embossed bottles do not satisfy regulatory requirements, is misplaced. The charge, of which Respondent is well aware as indicated by the record, is that, while having submitted and obtained approval of one label, it persists in the use of a form of label that is materially different from that so submitted and approved. We find that the use of the subject embossed label or any label other than one submitted and approved (in advance of registration applied for) is unlawful. The fact, if so, that Respondent, and possibly other manufacturers and distributors, have a history of non-compliance by such "long established practice" in the respect complained of, does not mitigate the violation found, nor estop EPA from acting to protect the public and environment.

Respondent must recognize that the EPA Administrator makes the rules pursuant to an Act of Congress. It is not sufficient that subject labeling was by it "understood to be acceptable." Any labeling must be first submitted; evaluations of the labeling

submitted should then be furnished in support of obtaining approval of same as being in conformity with labeling regulations.

Respondent asserts that, concerning corrosiveness and toxicity, its product is not going to "generally destroy the environment." That aspect of the product is not appropriate to the issue here considered. Suffice it to repeat that Respondent's product is a pesticide and because it bears labeling that has not been submitted to and approved by the Administrator, and is therefore unlawful, it has held and offered for sale said product unlawfully.

Civil Penalty

Section 14 of the Act provides, in pertinent part, as follows:

Sec. 14. PENALTIES.

(a) Civil Penalties. -

> (1) In General. - Any registrant . . . retailer, or other distributor who violates any provision of this Act may be assessed a civil penalty . . . of not more than $5,000 for each offense. . . .
>
> * * *
>
> (4) Determination of Penalty. - In determining the amount of the penalty, the Administrator shall consider the appropriateness of such penalty to the size of the business of the person charged, the effect on the person's ability to continue in business, and the gravity of the violation. Whenever the Administrator finds that the violation occurred despite the exercise of due care or did not cause significant harm to health or the environment, the Administrator may issue a warning in lieu of assessing a penalty.

40 CFR 22.35(c) provides:

> (c) Evaluation of Proposed Civil Penalty. In determining the dollar amount of the recommended civil penalty assessed in the intial decision, the Presiding Officer shall consider, in addition to the

> criteria listed in section 14(a)(3) 4/ of the Act, (1) respondent's history of compliance with the Act, or its predecessor statute, and (2) any evidence of good faith or lack thereof. The Presiding Officer shall also consider the guidelines for the Assessment of Civil Penalties published in the FEDERAL REGISTER (39 FR 27711), and any amendments or supplements thereto.

The Complaint states that Complainant proposes the assessment of a civil penalty of $2000. "After consideration of (1) the size of Respondent's business, (2) Respondent's ability to continue in business, and (3) the gravity of Respondent's violation(s)". Said amount is allegedly proposed pursuant to said Section 14 of the Act and said Guidelines at 39 FR 27711 et seq.

Respondent contends that "no explanation of the reasoning behind the proposed penalty is given" as provided by 22.14(a)(5). I disagree with said contention. The quoted portion, supra, of the Complaint states the factors considered. In Respondent's Answer to the instant Motion, page 8 (Affirmative Defense V), he states that no facts are alleged to show that Respondent is in Classification V (referring to said Guidelines). The position of Respondent is untenable; first, because the guidelines are nothing more than what they purport to be: guidelines to aid Agency personnel in achieving uniformity in civil penalties proposed to be assessed; second, 40 CFR 22.15(b) Contents of Answer provides

> "The answer shall clearly and directly admit, deny or explain each of the factual allegations contained in the complaint with regard to which Respondent has any knowledge. Where Respondent has no knowledge of a particular factual allegation and so states the allegation is deemed denied . . ."

4/ The subsection referred to is subsection (4).

The gross annual income of Respondent, its Western Division and any and all other divisions, was and is presumed to be in excess of one million dollars, in the absence of "explanation" to the contrary. Such fact was peculiar knowledge in the possession of Respondent and was not denied nor explained as required by Section 22.15, the regulation governing the Answer to the Complaint.

As will be observed from the Act and Sections 22.27(b) and 22.35(c) of the Regulations, it is the province of the Presiding Officer or Administrator, as appropriate, to determine, from the record, the dollar amount of any civil penalty assessed.

I find no evidence that Respondent's ability to continue in business will be affected should the proposed amount be assessed as a civil penalty. Gravity of the violation should be determined by consideration of both the possible peril that might arise as a result of the violation, and the seriousness of the misconduct of the violator.

Whereas, intent to violate is not a factor 5/ to be determined in establishing the violation charged, lack of intent, if present, can be considered as a mitigating factor in determining gravity of violation from the standpoint of the misconduct of the violator. Such lack of intent, if so, would necessarily be appropriately considered in determining Respondent's good faith and history of compliance.

5/ It will be noted that Section 14(a)(1) does not include the phrase "knowingly violate" as does Section 14(b)(1) which pertains to criminal penalties.

Though the peril presented by the use of Respondent's product is not as grave as the use of many other pesticides which could be described as more caustic or more corrosive, the statute violated (by use of "unapproved labeling") is one which is remedial in nature, promulgated pursuant to the Act in order to adequately protect the public. The public is comprised of persons who come into contact with the pesticide as well as those responsible for its handling and use, and it should be recognized that there will be instances, during such contacts and use, when consulting the label directions and precautionary statements could be crucial. Any possibility that said persons will be required to "seek out" the label directions increases the probability that such directions, and precautions, will not be adequately followed or heeded. This case aptly demonstrates that any failure to apply sanctions, where the Act is violated, will invite violations in increasing numbers. If condoned, such increasing indifference to regulatory provisions will frustrate, if not defeat, the scheme of regulation which the Act contemplates. It is for the above reasons that I find the violation of a somewhat serious nature; certainly, when taken together with many other such violations, it is far from trivial. (See Wickard v. Filburn, 317 US 111, 63 SCt. 82.)

Respondent's history of "non-compliance" and apparent lack of good faith, in the respects here addressed, should be considered in view of the above. It is apparently not challenged in this record that some companies in the industries have great volumes of embossed bottles which, it would appear, would not be

approved for use under pertinent regulations. Consequently, Respondent may not be alone in its erroneous contention that the Agency to now insist on compliance with the regulations is "changing the rules."

Upon consideration of the size of Respondent's business, and whether the assessment of the penalty in the amount proposed will affect its ability to continue in business, along with the gravity of said violation as discussed, and upon consideration of said Guidelines, I find that a civil penalty in the sum of $1200 is an appropriate penalty to be assessed against Respondent for the violation found hereinabove.

FINAL ORDER 6/

1. Pursuant to Section 14(a)(1) of the Federal Insecticide, Fungicide and Rodenticide Act, as amended, a civil penalty of $1200 is assessed against Respondent, Jones Chemicals, Inc., for the violation which has been established on the basis of the Complaint.

2. Payment of $1200, the civil penalty assessed, shall be made within (60) days after receipt of the Final Order by forwarding to the Regional Hearing Clerk, U.S. Environmental Protection Agency, Region IX, a Cashier's Check or Certified Check, made payable to the Treasurer, United States of America.

DATED: June 6, 1984

Marvin E. Jones

Marvin E. Jones
Administrative Law Judge

6/ 40 CFR 22.27(c) provides that this Initial Decision shall become the Final Order of the Administrator within 45 days after its Service upon the parties unless an appeal is taken by one of the parties or the Administrator elects to review the Initial Decision. Section 22.30(a) provides for appeal herefrom within 20 days.

CERTIFICATION OF SERVICE

I hereby certify that, in accordance with 40 C.F.R. 22.27(a), I have this date forwarded to the Regional Hearing Clerk, of Region IX, U.S. Environmental Protection Agency, the Original of the foregoing Initial Decision of Marvin E. Jones, Administrative Law Judge, and have referred said Regional Hearing Clerk to said section which further provides that, after preparing and forwarding a copy of said Initial Decision to all parties, she shall forward the Original, along with the record of the proceeding, to the Hearing Clerk, EPA Headquarters, Washington, D.C., who shall forward a copy of said Intitial Decision to the Administrator.

DATED: June 6, 1984

Mary Lou Clifton

Mary Lou Clifton
Secretary to Marvin E. Jones, ADLJ

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

CERTIFICATE OF SERVICE

I hereby certify that the original of the foregoing Initial Decision of Administrative Law Judge Marvin E. Jones, together with a copy of the record, was mailed to the Hearing Clerk, U.S. Environmental Protection Agency, and that a copy of the Initial Decision was served on each of the parties, as follows:

Mrs. Bessie Hammiel Hearing Clerk (A-110) U.S. Environmental Protection Agency 401 M Street, S.W. Room 3708A, Waterside Mall Washington, DC 20460	Certified Mail No. P 290 791 261
Robert D. Wenzel, Esq. Adams, Ball, Wenzel and Kilian Attorneys at Law Suite 900, Community Bank Building 111 West St. John Street San Jose, CA 95113	Certified Mail No. P. 290 791 262
David M. Jones, Esq. Office of Regional Counsel U.S. Environmental Protection Agency Region 9 215 Fremont Street San Francisco, CA 94105	Hand Delivered

Dated at San Francisco, California, this 12th day of June 1984.

Lorraine Pearson
Regional Hearing Clerk