1/9/86

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN RE	)	
	)	FIFRA 1085-01-13-012P
WORLD WIDE INDUSTRIAL SUPPLY	)	
	)	ACCELERATED DECISION
Respondent	)	

By motion dated December 11, 1985, the Complainant moved for an accelerated decision pursuant to 40 C.F.R. § 22.20. The basis for the motion is that, in its Answer, the Respondent admitted the facts which provide the basis for the violations alleged in the Complaint. The Complainant argues that the Court could also rule on the amount of the penalty since the Respondent, although appearing pro se, has in a series of detailed letters filed with the Court, set forth his entire case in a very articulate manner. Consequently, Complainant argues that a hearing on the sole issue of the appropriate amount of the penalty would serve no useful purpose. This appears to be a valid observation since the Respondent has listed no witnesses except himself in his prehearing filings.

The Respondent is a sole proprietorship doing business as World Wide Industrial Supply Company. Its owner is Mr. L. J. Werner. The Company's letterhead advises that it is a wholesale distributor of name brand cleaning supplies, disinfectants, laundry supplies and other related products including swimming pool chemicals. It is this last mentioned product that forms the basis for the Complaint.

The pleadings reveal that, in order to serve some of his residential customers, the Respondent re-packaged dry pool chlorine from hundred pound containers into five pound drums and sold them to his customers. The Respondent did this with two different products manufactured by the Olin Chemical Company. These products are "Pace" and "H.T.H." They are registered products. The Respondent, in re-

packaging the products, failed to provide proper labeling for them to include the required ingredient statements, directions for use and cautionary statements.

By the act of re-packaging these products and selling them, the Respondent committed three violations. They are: selling two unregistered products for two violations; and producing them in an unregistered establishment for the third violation. The first two events violate 40 C.F.R. § 162.5(a) and the third violates 40 C.F.R. § 167.2(a). The Respondent admits that he committed the acts and I must, therefore, find that he violated the regulations as described.

Although admitting the violations, the Respondent vigorously argues that the proposed penalty is too high. The Complaint proposed a penalty of $3,200.00 for each of the first two violations, and $4,200.00 for the third--for a total of $10,600.00. This amount was calculated by assuming gross sales of more than $1,000,000.00 and using the published penalty policy (39 Fed. Reg. 27,711).

Tax returns filed by the Respondent, at the Court's request, demonstrate that the total sales were between $100,00.00 and $400,000.00. A recalculation of the penalty results in a proposed amount of $800.00 for the first two violations, and $1,050.00 for the third--making a total revised penalty of $2,650.00.

In arguing that the penalty should be substantially reduced, the Respondent makes the following points:

1. The violations were unintentional.

2. He immediately ceased the practice upon being advised of the violations.

3. No harm resulted to anyone.

4. He only sold 40 to 50 five pound drums per year.

5. He marked the drums as "chlorine, caution".

6. His profits are very low and it is a small family business.

7. He told his customers about the hazards of the products and gave them instructions as to its use.

8. Other businesses do the same thing he did.

I will address each of these defenses in turn. Since intent is not an element of violations of FIFRA, this defense is of little or no significance. His cooperation in immediately ceasing the illegal practices is a factor which may be considerd in mitigation of the penalty. The fact that no harm resulted to anyone is not a mitigative factor. The Rules contemplate the potential for harm since actual harm is infrequently encountered. Given the nature of the product involved, the potential for harm is rather high. The approved EPA label states that the product is "fatal if swallowed", "corrosive", and contains the EPA signal word "danger". The product can cause eye damage and fire or explosion if mixed with the wrong materials.

The rather small number of re-packaged products sold may be a factor, but given the extreme hazard inherent in the product involved, I find that little or no weight should be accorded this factor. The labeling the Respondent placed on the products is woefully inadequate to advise the consuming public of the nature of the hazards associated with this material.

Although it is true that the Respondent's net profits are small, he advised that the payment of the proposed fine will not adversely effect his ability to continue in business. This is the only factor which the penalty policy recognizes as a valid reason for reducing or waiving the penalty.

As to the advice he allegedly gave his customers as to the nature of the product and directions as to its use, we do not know what he told them. We also do not know if the persons he advised were the persns who actually used the product. Since swimming pools usually involve children, a high likelihood exists that they may have been the actual users. In any event, it is for those precise reasons that Congress required Agency approved labeling in the first place. Consequently, this argument must fall on deaf ears.

As to the argument that other businesses or institutions do the same thing that the Respondent did is equally without merit. First of all, the examples

cited by the Respondent do not represent the same acts which he committed. Secondly, even if they did, it would be immaterial. The fact that other people are also violating a particular law has never been a defense in this country. To merely consider the notion is to reject it immediately.

Under the facts of this case, I find that a hearing on the sole issue of the amount of the penalty would be of no value to the Respondent. This finding is based on several factors, to wit: the only person who would testify at the hearing would be the Respondent himself. He would say exactly what he has already said in the several letters he has filed. I have taken as true, all of the allegations he has presented. The problem is that even if true, they are, for the most part, irrelevant or immaterial. He does not intend to hire a lawyer, citing lack of funds, so he would gain no additional aid at the hearing. The Respondent would lose time from his business to attend the hearing. Considering all of these factors, as well as the fact that a hearing would cost the taxpayers more than the proposed penalty, leads me to the conclusion that no one's interests would be served by holding a brief hearing on the penalty question.

Accordingly, I make the following findings:

1. The Respondent violated 40 C.F.R. § 162.5(a) by selling two unregistered pesticides to the public.

2. The Respondent violated 40 C.F.R. § 167.2(a) by producing the two products at an unregistered establishment.

3. A penalty in the amount of $1,000.00 is hereby assessed for the violations found herein.

4. Since this decision resolves all of the issues in this case, it constitutes an Initial Decision.

ORDER[1]

Pursuant to § 14(a) of FIFRA, a civil penalty in the total sum of $1,000.00 is hereby assessed against Respondent, World Wide Industrial Supply Company, for the violations of the Act found herein.

Payment of the full amount[2] of the civil penalty shall be made within 60 days of the service of the final order by forwarding a cashier's check or certified check payable to the Treasurer, United States of America. The check shall be sent to:

EPA - Region 5
(Regional Hearing Clerk)
P. O. Box 70753
Chicago, IL 60673

DATED: January 9, 1986

Thomas B. Yost
Administrative Law Judge

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[1]Unless an appeal is taken prsuant to § 22.30 of the rules of practice or the Administrator elects to review this decision on his own motion, the Accelerated Decision shall become the final order of the Administrator (see 40 C.F.R. 22.27(c)).

[2]In view of the Respondent's cash flow problems, it may make arrangements with Region X officials to pay the penalty in installments.