UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

JUN 6 A8:49

IN THE MATTER OF	)	
	)	
Buerge Feed and Seed,	)	Docket No. I. F. & R.-VII-764C-88P
	)	
Respondent	)	

Federal Insecticide, Fungicide and Rodenticide Act - Unregistered Pesticides v. Violation of Cancellation of Registration

Where evidence established that Respondent held for sale containers of a pesticide bearing a USDA registration number, which registration had been canceled over 16 years ago, it was held to be proper to charge Respondent with violating § 12(a)(1)(A) of the Act, making it unlawful to, inter alia, offer for sale an unregistered pesticide, even though the charge might have been violation of cancellation of a registration pursuant to § 12(a)(2)(K).

Appearance for Complainant: Rupert G. Thomas, Esq.
Assistant Regional Counsel
U.S. EPA, Region VII
Kansas City, Kansas

No Appearance for Respondent

DEFAULT ORDER

This proceeding under § 14(a) of the Federal Insecticide, Fungicide and Rodenticide Act, as amended (7 U.S.C. § 136l(a)), was commenced on December 2, 1987, by the issuance of a complaint charging Respondent's predecessor, Belton Grain Company, with violating § 12 of the Act. Specifically, Belton was charged with holding for sale, at the time of an inspection of its establishment on April 2, 1987, seven ten-ounce containers of Gordon's Rose & Floral Dust bearing U.S.D.A. Reg. No. 2217-398, a pesticide which was allegedly packaged, labeled and released for shipment. The complaint alleged that labels on the containers of the mentioned product indicated that active ingredients included "Dichloro diphenyl trichloroethane (DDT)--5%." Registrations of products containing DDT were canceled in 1971 and Belton was charged with holding for sale an unregistered pesticide in violation of § 12(a)(1)(A) of FIFRA. For this alleged violation, it was proposed to assess Belton a penalty of $5,000.

The present Respondent, Frank E. Buerge, filed a letter answer requesting a hearing on the letterhead of Belton Grain Inc., under date of December 22, 1987. The letter stated "we" purchased Belton Grain Company from Dwight Diehl in the summer of 1986. The cans of rose dust were allegedly found toward the back of a bottom shelf with other items in front. It was further alleged that "we" had no idea the rose dust was "back there" and

that Respondent had not sold any of the product. Mr. Buerge stated Respondent's sales in the past year totaled $360,000 and opined that the rose dust may have been sitting on the same shelf for 15 years without being noticed. On January 4, 1988, Complainant filed a motion to amend the complaint to name Buerge Feed and Seed as the respondent and to reduce the proposed penalty to $1,000. The ALJ granted this motion by an order, dated January 14, 1988.

By letter, dated January 15, 1988, the ALJ invited the attention of the parties to Agency policy encouraging settlements and directed counsel for Complainant to file a statement on or before March 1, 1988, as to whether this matter had been or would be settled. Failing settlement, the parties were directed to exchange certain information in preparation for a hearing on or before March 31, 1988. Specifically, Respondent was directed to furnish the factual basis for the assertion the rose dust had been sitting on the same shelves for 15 years and to furnish copies of inventory lists involved in the purchase of the business. Respondent was also directed to furnish financial statements or other data to demonstrate that imposition of proposed penalty would be a hardship.

By letter, dated March 3, 1988, counsel for Complainant informed the ALJ that a settlement had not been effected. Under date of March 31, 1988, counsel filed Complainant's prehearing exchange. Included in the filing were a summary of expected

testimony of Mr. John Colborne, an investigator for the Bureau of Pesticide Control, Missouri Department of Agriculture, who conducted the inspection of Respondent's establishment and various documents, e.g., a Stop Sale, Use Or Removal Order issued by Mr. Colborne, a Notice of Inspection and a Receipt For Samples, a statement from Mr. Buerge, taken by Mr. Colborne,1/ copies of photographs of the containers of rose dust and a copy of the Administrator's Opinion and Order, dated June 2, 1972, (37 FR 13369, July 7, 1972) dealing with the cancellation of registrations of pesticide products containing DDT. Respondent did not file a prehearing exchange or make any response to the ALJ's order for such an exchange.

On May 12, 1988, Complainant filed a motion for entry of a default order pursuant to 40 CFR § 22.17, based on Respondent's failure to comply with the ALJ's order for a prehearing exchange. Attached to the motion is a copy of a Return Receipt, signed by Frank E. Buerge, evidencing service of the motion to amend and the amended complaint on January 6, 1988.2/ An affidavit of

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1/ The mentioned statement (Complainant's Exh 5) was taken at the time of a followup inspection by Mr. Colborne on April 9, 1987. The statement as well as all other documents issued in connection with the inspections identify the establishment as that of Belton Grain Company. Frank E. Buerge is identified as "owner." Mr. Colborne's inspection report, dated April 2, 1987 (Complainant's Exh 7) quotes Mr. Buerge as stating that approximately 16 years ago he purchased seven ten-ounce containers of "Rose and Floral Dust," USDA Reg. No. 2217-398, from the Gordon Corporation, Kansas City, Kansas. Buerge is reported to have said that he did not have any purchase orders, bills of lading, invoices or canceled checks for the product and that he could not recall whether any of the product had been sold or, if sold, to whom. These assertions are repeated in the statement taken on April 9, 1987.

2/ Although the date of delivery is written as "1-6-87," this Ts an obvious error.

Linda K. McKenzie, Regional Hearing Clerk, is to the effect that a prehearing exchange has not been received from Respondent. Respondent has not replied to the motion.

FINDINGS OF FACT

1. Respondent, Buerge Feed and Seed, 507 Walnut Street, Belton, Missouri is a corporation incorporated under the laws of Missouri. Respondent operates a retail fertilizer and seed supply business.

2. On April 2, 1987, Respondent held for sale at its establishment at the above address seven ten-ounce containers of "Gordon's Rose & Floral Dust," USDA Reg. No. 2217-398. Labels on the containers indicate active ingredients of the dust include "Dichloro diphenyl trichloroethane (DDT)--5%."

3. Gordon's Rose & Floral Dust is a pesticide as defined in § 2(u) of FIFRA.

4. On June 2, 1972, the Administrator canceled, with exceptions not pertinent here, the registrations of pesticide products containing DDT (37 FR 13369, July 7, 1972). The cancellation of all uses of DDT for crop production and nonhealth purposes become effective December 31, 1972.3/

3/ PR Notice 71-1, January 15, 1971, canceled all registrations of DDT and the resulting requests for hearings did not include uses for roses and similar ornamental plants. Accordingly, the uses involved here were canceled by operation of law 30 days after issuance of the notice. See the Administrator's findings of fact at 37 FR 13374.

5. Respondent has failed to comply with the ALJ's order, dated January 15, 1988, requiring the submission of certain information on or before March 31, 1988, and is thus in default.

CONCLUSIONS

1. Respondent's failure to comply with the ALJ's order, dated January 15, 1988, for the submission of certain prehearing information constitutes a default in accordance with Rule 22.17(a) of the Rules of Practice (40 CFR Part 22) and an admission of all facts alleged in the complaint.
2. Respondent's action in holding for sale on April 2, 1987, seven ten-ounce cans of Gordon's Rose & Floral Dust, a pesticide containing DDT, the registrations of which were canceled in 1971, constitutes a violation of § 12(a)(1)(A) of the Act, making unlawful the holding for sale of unregistered pesticides.
3. For the above violation of the Act, Respondent is liable for a penalty of $1,000.

DISCUSSION

The only matter warranting mention is whether the violation found is of § 12(a)(1)(A) of the Act, i.e., holding for sale an

unregistered pesticide, or of § 12(a)(2)(K), making it unlawful for any person "to violate any cancellation of registration of a pesticide under section 6, * *." In this regard, it is noted the penalty computation worksheet (Complainant's Exh 11) describes the violation as "of a cancellation order."4/ The guidelines for the assessment of civil penalties under FIFRA (39 FR 27711, July 31, 1974) list "violation of a cancellation order" as No. E32. This, however, is under a heading "Use Violations" and it does not seem reasonable that holding a pesticide for sale can properly be regarded as use. Moreover, as we have seen (note 3, supra) registration of the pesticide involved here appears to have been canceled by operation of law as a result of PR Notice 71-1, January 15, 1971, rather than by the Administrator's order of June 2, 1972. Fitting the instant matter within the confines of the 1972 order would present some difficulty, in any event, because the order, inter alia, canceled certain crop uses of DDT as of December 31, 1972, lifted the cancellation insofar as uses by public health officials in disease control and prescription drugs were concerned and prohibited the transportation of DDT in interstate commerce after December 31, 1972, unless the

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4/ The Stop Sale, Use Or Removal Order, issued by Mr. Colborne at the time of his April 2, 1987 inspection (Complainant's Exh 1) refers to the violation suspected as "suspended and canceled pesticide."

label bore specified language indicating uses were restricted to health and prescription drug purposes.5/

Section 12(a)(2)(K) of the Act, in contrast to § 12(a)(2)(J) dealing with suspension, does not contain the word "order." Logically, this omission is intended to cover a situation such as the instant case where cancellation is in effect accomplished by operation of law, failure to request a hearing within the period specified by § 6(b), and the only terms of any order which could be violated are that registrations of the pesticides involved are canceled.6/ Because it is reasonable to conclude that violation of cancellation of registration of a pesticide can be accomplished in the same manner as violation of § 12(a)(1)(A), e.g., selling, offering for sale or holding for sale an unregistered pesticide, and in view of the length of time since the cancellation, it is concluded that Respondent was properly charged with holding for sale an unregistered pesticide. In any

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5/ In a somewhat similar case involving sales of an insecticide containing DDT, William Meyers d/b/a Gift Sales Company, Docket No. I. F. & R.-VII-475C-83P (Initial Decision, December 23, 1983), Respondent was held to have violated § 12(a)(1)(A) of the Act in selling an unregistered pesticide. Although it was noted that the charge presumably could have been violation of a cancellation order pursuant to § 12(a)(2)(K), no parsing of that section or of the Administrator's order in that respect appears to have been performed. Moreover, that case is distinguishable, because the labels did not bear any registration or establishment numbers and indicated Respondent was the manufacturer.

6/ Cf. Jensen Grain Company, Docket No. I. F. & R.-VIII-207-C (Initial Decision, May 31, 1988) (respondent held to have violated § 12(a)(2)(K) of the Act by selling a pesticide after expiration of period for use of existing stocks specified in notice of cancellation).

event, Respondent can hardly claim prejudice because the proposed penalty is $1,000 rather than $1,250, the amount specified in the penalty guidelines for Sales Category II ($100,000 to $400,000), for violation of a cancellation order.

O R D E R

Respondent, Buerge Feed and Seed, having violated FIFRA § 12(a)(1)(A) as charged in the complaint, a penalty of $1,000 is assessed against it in accordance with § 14(a)(1) of the Act. Payment of the full amount of the penalty shall be made by sending a certified or cashier's check payable to the Treasurer of the United States to the following address within 60 days of receipt of this order:7/

Regional Hearing Clerk
U.S. EPA, Region VII
P.O. Box 360748M
Pittsburgh, Pennsylvania 15251

Dated this 3rd day of June 1988.

Spencer T. Nissen
Administrative Law Judge

7/ Unless appealed in accordance with Rule 22.30 (40 CFR Part 22) or unless the Administrator elects sua sponte to review the same as therein provided, this decision will become the final order of the Administrator as provided in Rule 22.27(c).