

DECISION AND ORDER

This matter arises under Section 12(a)(2) of the Federal Insecticide, Fungicide, and Rodenticide Act as amended (FIFRA or "the Act"), 7 U.S.C. § 136j(a)(2) which makes unlawful certain acts in connection with the production, labelling, and reporting of federally regulated pesticide products.

The complaint charges that Respondent produced two pesticide products, Sani-Germ Disinfectant Pump Spray and Fikes Disinfectant Pump Spray, at an establishment that had not been registered with the U. S. Environmental Protection Agency (EPA) as required by Section 7 of FIFRA.¹ The complaint further charges that Respondent "knowingly falsified"² the date on a pesticide production reporting form which it had submitted to EPA pursuant to 40 C.F.R. §§ 167.3 and 167.85.³ Complainant seeks a civil penalty of \$4500 per count for each of the alleged violations, based upon EPA's "Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)" of July 2, 1990 ("1990 ERP"), and pursuant to section 14(a) of FIFRA, 7 U.S.C. § 1361.⁴

¹ Complaint of September 27, 1990, at 1-3, ¶¶ 1-16 (Counts I and II).

² Complaint at 4, ¶ 24.

³ Id. at 3-4, ¶¶ 17-25 (Count III).

⁴ Id. at 4-5.

Respondent denied the charges.⁵ It asserted that site registration had been assigned by the Department of Agriculture in 1962, that it markets only one disinfectant product although two different trade names are used for the product, and that the report in question had not been falsified.

For reasons set forth below, it is held that Respondent had not registered its establishment with EPA before the date of the inspection conducted by the State of Pennsylvania Department of Agriculture. Consequently, it did produce a product which meets the definition of "pesticide" in an establishment that had not been registered with EPA, although the product itself had been properly supplementally registered. It is also held that such facts as would support the third count of the complaint, which contains an element of criminal intent, have not been established by a preponderance of the evidence.

Counts I and II: Registration of Establishment.

Section 7 of the Act, *Registration of establishments*, [7 U.S.C. § 136e(a)] provides inter alia that

. . . . No person shall produce any pesticide subject to this subchapter or active ingredient used in producing a pesticide subject to this subchapter in any State unless the establishment is registered with the Administrator

Section 12(a) of FIFRA provides that "it shall be unlawful for any person . . . (L) who is a producer to violate any of the

⁵ Letter of October 3, 1990, at 1, ¶ 3; and at 2, ¶ 2.

provisions of section 136e [i. e. Section 7 of FIFRA] of this title"6

The above language requires producers of pesticides subject to "this subchapter" to register their establishments with EPA. Respondent does not dispute this, but states the registration requirement had been fulfilled because its Glenshaw, Pennsylvania, establishment was assigned a site number by the U. S. Department of Agriculture in 1962, i. e. before EPA's FIFRA enforcement authority was created.⁷ Respondent's vice-president⁸ testified that an EPA official to whom he had sent Respondent's U. S. Department of Agriculture records had referred to the four digit number "3782," which is part of the product registration number, as Respondent's "existing site number."⁹ In addition, Respondent stated that it had relied upon its chemicals supplier and that the supplier had essentially provided the label -- including the registration

⁶ 7 U.S.C. § 136j(a)(2)(L).

⁷ TR at 57-58, 218. When asked about the establishment registration, Respondent's representative showed the inspector the "Notice of Registration forms through the Onyx Company," i. e. the product registration.

⁸ Respondent's Exhibits (RX) M, N. Elsewhere, he is said to be general manager (CA A-1-A).

⁹ TR 218. The official's name appears on RX I and RX J, next to the title "Coordinator of Reg Affairs." Both RX I and J are titled "Notice of Supplemental Registration of Distributor" and are dated August 22, 1983. The number 3782 appears on both documents in a box labelled "distributor company number."

numbers.¹⁰ Respondent stipulated that it is a corporation;¹¹ and does not dispute that it is a "person" and a "producer," as defined by the Act;¹² that its production facility is an "establishment;"¹³ and that Respondent is subject to the Act. Further, Respondent is resigned to the fact that Sani-Germ and Fikes disinfectant is a "pesticide" as defined by the Act.¹⁴ Remaining to be determined, therefore, in connection with the issue of liability is whether or not Respondent had obtained a registration number for its establishment prior to July 25, 1988 -- as opposed to a

¹⁰ TR at 59, 218, 229. In answer to the question "Then how did Associated Products know to place the establishment registration number in what appears to be the correct format on the label?", Respondent's vice-president responded that "Onyx Chemical Company gave us a preformed label, told us exactly where everything should be, they told us exactly how to use every number." TR 229.

Respondent even received the "notice of supplemental registration" for the products from its chemical supplier. RX I and J.

¹¹ TR at 12.

¹² Sections 2(s) and 2(w) of the Act.

¹³ "Establishment" is defined at 40 C.F.R. § 167.3 as "any site where a pesticidal product, active ingredient or device is produced"

¹⁴ Section 2(u) of the Act, 7 U.S.C. § 136(u), defines pesticide to include ". . . any substance or mixture of substances intended for preventing destroying, repelling, or mitigating any pest" See also the definitions of "pest" at section 2(t), and "fungus" at section 2(k). At TR at 9, Respondent's representative states that he does not believe that the products are really pesticides, but realizes that they are considered pesticides by EPA.

supplemental registration number for its pesticide products.¹⁵

Complainant's evidence that the establishment was not registered is substantial. The testimony of its witnesses on the point was credible as well as essentially uncontradicted. Both the inspector and the EPA Region 3 Pesticides Management Chief testified that nothing could be found to suggest that an establishment registration number had ever been assigned by EPA to Respondent's facility,¹⁶ although it is clear that a supplemental registration number had been assigned to the product based upon the primary registration of the chemical manufacturer.¹⁷ It is noted that both the Fikes and Sani-Germ labels obtained during the inspection on March 29, 1988, bore establishment registration numbers. Interestingly, the establishment numbers on the labels were correct and were virtually the same as the number ultimately

¹⁵ Complainant's evidence shows that Respondent applied to EPA for an establishment registration number at some point after an inspection of its facility was conducted by an agent of the Pennsylvania Department of Agriculture (March 29, 1988); and that an establishment registration number was assigned to Respondent by EPA on July 25, 1988. CX 1B; TR 82, 83, 87, 89. Respondent states that it received an application for registration in June, 1988, and "immediately responded by filling it out and mailing it to the EPA." Answer to the Complaint of October 3, 1990, at 1, ¶ 3. See also TR at 21-22, and CX 1-B.

¹⁶ TR 57-58. The U. S. Department of Agriculture did not issue establishment registration numbers. These began when EPA's enforcement authority under FIFRA began. TR 207-208.

¹⁷ TR 82-83, 207-208; CX 1-B. RX I, J.

assigned to the establishment by EPA in July, 1988.¹⁸ However, each side views this fact as support for its own case.

Respondent takes the position, not unreasonably, that the presence of the correct establishment number means that the establishment had been registered. In other words, the number could not have been "gotten right" on the label if the establishment had not been registered, and Respondent contends that a "site" number, i. e. establishment registration number, was assigned in 1962 by the Department of Agriculture.¹⁹ Respondent also states that its supplier provided not just the chemicals for the Fikes and Sani-Germ disinfectants, but a "preformed" label as well, with all the numbers that Respondent was supposed to use.

Complainant views the presence of a correct establishment number on the labels before the number was actually assigned as evidence that Respondent knew it needed to register its establishment but simply did not do so, possibly in order to avoid inspections and the annual reporting responsibility which attends

¹⁸ TR 58, 90-91, 107-108, 141.

¹⁹ RX D, Notice of Registration dated May 16, 1962, registration number 3782-2, from the U. S. Department of Agriculture. The notice stated that the "The above economic poison [referring to the product Sani-Air Germicide Spray] is hereby registered under Section 4 of the Federal Insecticide, Fungicide, and Rodenticide Act . . . FIFRA." See also RX E.

establishment registration.²⁰ Complainant also argues that it would have been "very easy"²¹ to create the correct establishment number (" . . . that is what we would expect")²² based upon the four digits -- 3782 -- which the Department of Agriculture had assigned to Respondent's pesticide products. At another point Complainant suggests that Respondent must have been knowledgeable in the ways of FIFRA in order to have created the correct number.²³ However, Complainant concedes that the supplier could have given Respondent the numbers and the label format.²⁴ Complainant's witness also indicated that confusion over registration requirements has existed in the past.²⁵

The evidence from both sides demonstrates that it would be

²⁰ TR 59, 148, 165. Complainant points out that only an individual or company knowledgeable in the ways of FIFRA could have gotten the number right before the computer assigned one. Respondent testified that its chemical supplier is knowledgeable, and that because disinfectants are a very small part of Respondent's business, Respondent is not knowledgeable. Respondent's vice-president testified [at TR 225] that:

They [the supplier] have legitimate product registrations with the EPA. They had all the forms. They seemed to know what they were doing. They put it right through. They wanted to sell us product. They helped us do the registration process." TR 225.

²¹ TR 146.

²² TR 142-146.

²³ See note 20, supra.

²⁴ TR 148.

²⁵ TR 209-211.

easy to confuse the product and establishment registration requirements. Further, the four digits 3782, which were assigned to Respondent by the Department of Agriculture for one of its earlier products, was company (not product) based, and carried through under EPA's system of establishment registrations. If, in fact, an EPA official did refer to the four digits 3782 as a "site number" -- which she may well have done because in a practical sense 3782 is Respondent's site number²⁶, given the way the numbers are arrived at -- such a reference would lend itself to the interpretation that it is the establishment, or site, or company that had the registration number.²⁷ Nevertheless, because (1) there exists an absolute requirement that a producer of pesticides must register the establishment, and (2) this was not done, a violation has occurred. Whether the failure to register constitutes one violation or two in this case is discussed below. In any case, Respondent's testimony to the effect that it thought the establishment was registered, and that the supplier furnished the label information, is credible. It is held that the failure to

²⁶ TR 140-143.

²⁷ Indeed, Complainant's witness refers to 3782 as Respondent's "company number." At TR 140, he states that ". . . . 3782 is the number that has been assigned to Associated Products Company as their company number." At TR 142, he notes that "[O]nce a company has been given a number in relation to the pesticide rules and regulations, that number stays with that company forever." See also RX I and J, the notices of supplemental registration of distributor, where the number 3782 is labelled "distributor company number."

register was not deliberate.²⁸ On the evidence here, it is clear that confusion can easily occur in the registration process, despite the fact that pesticide producers and distributors are charged with knowledge of FIFRA and the implementing regulations.

Count III - Date of Pesticide Production Report.

In Count III of the complaint, it is alleged that Respondent knowingly falsified information on an annual pesticide production report to EPA by changing the date of the document in order to make it appear that it had been filed on time.²⁹

Here, intent is an element of the charge but no intent to falsify information has been shown. Respondent's vice-president testified that he had submitted the report to EPA on time,³⁰ and, when he learned that EPA insisted he had not done so, sent EPA his file copy of the completed report.³¹ He testified further that, because certain numbers, including the date, had not come through clearly on the file copy, he re-wrote them. The date on the copy, as written over, preceded the date upon which the original form sent to Respondent by EPA was received by Respondent.³²

²⁸ Since the establishment registration requirement is absolute, the lack of intent can be considered only in connection with the assessment of the penalty.

²⁹ Complaint at 3-4, ¶¶ 17-25.

³⁰ TR 224.

³¹ TR 223.

³² TR 121.

Accordingly, the record shows that the date on the file copy was changed to one upon which the original report could not have been submitted. Standing alone, however, this is not sufficient to establish that Respondent deliberately falsified the date on the copy. Moreover, Respondent's explanation is plausible in that the changes could well have occurred in just the manner described, and there is no evidence to the contrary. Under these circumstances, Count III must be dismissed.

Number of Violations.

Complainant urges that the 1990 Enforcement Response Policy ("ERP") authorizes two separate penalties for Count I and II, for producing "Fikes Disinfectant Pump Spray" and "Sani-Germ Disinfectant Pump Spray" at an unregistered establishment, in violation of Section 12(a)(2)(1) of FIFRA."³³ Complainant reasons that "the violation in each count results from the 'act' of producing a pesticide at an unregistered establishment; the violation does not result from the failure to register the establishment."³⁴

Complainant's interpretation is contradicted by the plain

³³ Complainant's Brief in Support of Findings of Fact and Conclusions of Law (July 31, 1993) at 39.

³⁴ Complainant's Brief in Support of Findings of Fact and Conclusions of Law (July 31, 1993) at 34-35.

language of FIFRA.³⁵ Section 12(a)(2)(L) provides that it shall be unlawful for any person "who is a producer to violate any of the provisions of section 136e of this title." (Section 136e is the requirement for registration of establishments). A violation of Section 12(a)(2)(L) results not from the act of producing a pesticide(s), but from the failure of a pesticide producer to comply with the provisions of Section 136e. Where only one establishment is involved, as in the instant case, only one charge of failure to register as required by Section 12(a)(2)(L) of the Act will lie.³⁶

THE APPROPRIATE PENALTY.

Section 22.27(b) of the Consolidated Rules of Practice

³⁵ See Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837 (1984); and see In re McLaughlin Gormley King Co., 5 EAD FIFRA Appeal Nos. 95-2 through 95-7, slip op. at 13 (EAB, March 12, 1996) (stating that "it is important to remember that the determination of whether an act of proscribed conduct constitutes multiple offenses under a statutory provision is not a matter of enforcement discretion; it is, rather, a matter of statutory interpretation. That the Agency has articulated its statutory interpretation within [an ERP] that is otherwise devoted to issues committed to the Agency's enforcement discretion does not alter this conclusion. As a matter of statutory interpretation, the Agency's position is only entitled to as much deference as is normally owed to Agency interpretations of statutes [under the Chevron standard].") (citation omitted).

³⁶ A review of the case law revealed no instance where more than one violation of Section 12(a)(2)(L) was found (or sought) for failure to register an establishment, even where more than one pesticide was produced at the establishment. It is noted, as well, that here only one pesticide was being produced. Respondent has only one pesticide, although it is sold under two different trade names. It has one supplemental registration number. The labels are identical except for the trade names.

provides that "the Presiding Officer shall determine the dollar amount of the recommended civil penalty to be assessed in the initial decision in accordance with any criteria set forth in the Act . . . and must consider any civil penalty guidelines issued under the Act." 40 C.F.R. § 22.27(b). Here, the civil penalty guidelines that must be considered are contained in the 1990 ERP.³⁷

The 1990 ERP is EPA's effort to translate the general guidelines of Section 14(a)(4) of FIFRA into more specific terms. Section 14(a)(4) provides that in determining the penalty amount, the EPA "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."

The 1990 ERP establishes a five-step procedure for calculating a penalty. In the first step, the "gravity level" of each violation is determined from a listing of various FIFRA violations, ranging from a value of one for the most serious to four for the least serious. Under this step, Respondent's violation was

³⁷ Respondent questioned whether the 1990 ERP should have been used to calculate the penalty for a violation which occurred over two years prior to issuance of the complaint. The finding of a zero penalty under the 1990 ERP, discussed below, essentially eliminates this issue. Had the penalty under the 1990 ERP been greater than under the 1974 policy, however, it would certainly appear to have been unreasonable and unfair to retroactively apply the 1990 policy.

properly assigned a gravity level of two.³⁸

The second step concerns the size of a respondent's business, based on gross revenues during the preceding calendar year. Respondent admitted that its business has gross revenues of over \$1 million, which places it in Category I even though only a small portion of that amount results from the same of the pesticide.

The third step produces a dollar amount for the violation using Table 1 on page C-1 of the 1990 ERP. Using this matrix, Complainant properly reached a base penalty of \$5,000.

The fourth step involves consideration of several "gravity adjustment factors." A number value is assigned to each of five factors. The more serious the violation, the higher the number value assigned. The values are then added, and the base penalty may be reduced depending on the final value. Here, Complainant properly assigned a value of one each for "pesticide toxicity," "harm to human health," and "environmental harm," and a value of zero for "compliance history." However, Complainant assigned the highest possible value of four for "culpability." As discussed supra, Respondent's failure to register was not deliberate. Accordingly, a value of zero should be assigned to this factor.

The total value for the five gravity adjustment factors is

³⁸ TR 161. Complainant's Post-Hearing Brief at 24-25 inaccurately stated that a gravity level of one was assigned to this violation.

three. According to Table 3 of Appendix C of the 1990 ERP, a value of three should result in either no action, a Notice of Warning, or a 50% reduction in the base penalty. A 50% reduction is recommended "where multiple count violations exist. Such is not the case here. Accordingly, the penalty at this stage becomes zero.

The fifth and final step in calculating a penalty under the 1990 ERP involves a consideration of the effect that payment of the total civil penalty will have on the violator's ability to continue in business. This step is of course irrelevant in light of the recommended zero penalty.

Accordingly, based upon the requirements of FIFRA and the 1990 ERP, the appropriate penalty is zero. Therefore, no penalty will be assessed against Respondent for the violation found here.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent is a "person" and a "producer" of "pesticides" as those terms are defined by the Act, and is subject to the Act. Its disinfectant product is produced at an "establishment," as the term is defined, at Glenshaw, Pennsylvania.

2. Respondent's disinfectant, sold under the names Fikes and Sani-Germ, is a "pesticide" as defined by the Act. Although the two have identical chemical formulations, and have the same EPA product registration number, they are marketed under two different labels. Both are supplementally registered, with the same number,

with EPA through the primary registration of the Onyx Chemical Company.

3. Respondent had not registered its pesticide producing establishment as required by the Act, in violation of section 12(a)(2)(L) of FIFRA, 7 U.S.C. § 136(e), at the time of the March 29, 1988, inspection. Thereafter, Respondent did apply for such registration. An establishment registration number was assigned to Respondent on July 25, 1988. Respondent is thus liable for a civil penalty for failure to register its establishment.

4. Respondent did not knowingly or willfully fail to register the establishment where it produces pesticides. Accordingly, the culpability factor as evaluated by the pesticide policy is "zero" and the penalty must be reduced accordingly, from the amount proposed by Complainant. The appropriate penalty, therefore, is "zero."

5. Respondent relied upon its chemicals supplier for the contents of the label.

6. A violation of Section 12(a)(2)(L) results not from the act of producing a pesticide(s), but from the failure of a pesticide producer to comply with the provisions of Section 136e. Where, as here, only one establishment is involved, only one failure to register in violation of Section 12(a)(2)(L) will lie.

7. Respondent did not intentionally change the date of the file copy of the annual pesticide production report which was sent to EPA.

ORDER

For the violation found herein, no civil penalty is assessed against Respondent.

And it is FURTHER ORDERED that Count III of the complaint shall be, and it is hereby, dismissed.

And it is FURTHER ORDERED that the parties shall have thirty days in which to seek reconsideration of any issue decided herein, for good cause shown.

J. F. Greene
Administrative Law Judge

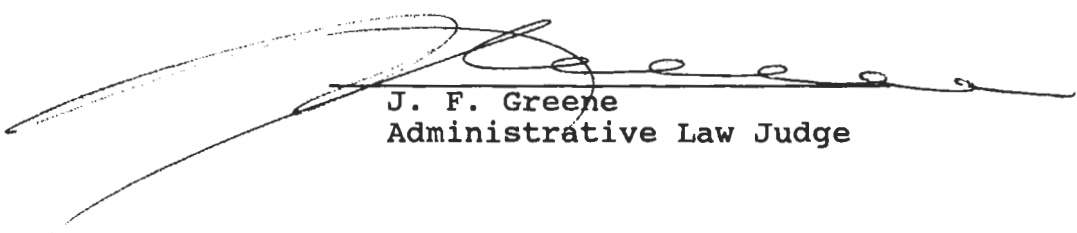
June 3, 1996
Washington, D. C.

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Administrative Law Judge

May 31, 1996
Washington, D. C.