10/15/75

ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE REGIONAL ADMINISTRATOR

In re	)	
	)	
Sifers Chemicals, Inc.,	)	I.F.&R. Docket No. VII-119C
	)	
Respondent	)	

Initial Decision

By Complaint dated May 12, 1975 the Chief, Pesticides Branch, Environmental Protection Agency, Region VII (hereinafter Complainant), charged Sifers Chemicals, Inc. of Kansas City, Missouri[1/] (hereinafter Respondent), with a violation of section 12(a)(2)(L) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended[2/] (FIFRA) in that it, as a pesticide producer, failed to submit to the Administrator (of EPA) the information required by section 7(c) of the Act and regulations thereunder. The Complaint, issued pursuant to section 14 of the Act, proposed to assess a civil penalty of $3200. The Respondent filed a response to the Complaint and, in effect, objected to the assessment of the proposed penalty. This response was considered as a request for hearing. Hearing was held in Kansas City, Missouri, on August 20, 1975. The Complainant was represented by Patrick K. Monahan and Daniel J. Shiel, Legal Branch, EPA, Region VII and the Respondent was represented by Don S. Sifers, President of the Respondent company. The Complainant filed

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1/ This company has a sales and business office in Kansas City, Missouri, and a plant in Iola, Kansas.

2/ For parallel citations of FIFRA (86 Stat. 973) and United States Code see Attachment A.

proposed findings of fact, conclusions and order, and also a brief in support thereof. The Respondent did not file any documents of such nature. These documents filed by Complainant have been duly considered.

Section 7(a) of the Act requires that establishments producing pesticides be registered with the Administrator. Section 7(c) requires the producer operating a registered establishment to submit certain information within 30 days after it is registered and thereafter to keep the information current by submitting annual reports as the Administrator may require by regulation.

The regulation issued under this section of the Act is found in 40 CFR Part 167, section 167.5 (38 F.R. 36557, November 6, 1973). It requires information as to the types of pesticides produced, the past year's amount of production and the sales or distribution of each product, and the amount of current production of each product. (This latter requirement is viewed as a forecast and furnishes the Agency with the producer's intended production volume). The reports are required to be filed annually on or before February 1.

The Respondent does not dispute the fact that it failed to file the annual report as required by the regulation. The evidence showed that on January 28, 1975, the Regional Office of EPA (Region VII, Kansas City, Missouri) sent a notice to Respondent informing it of the requirement to file the annual report, enclosing the report form and instructions for completing the form. The notice stated that the form must be completed

and returned to the Regional Office within 30 days of receipt or by February 1, whichever is later. The notice and enclosures were received at the Iola, Kansas, office of Respondent on January 30, 1975.

The report form not having been completed and filed by May 12, 1975, the Complaint that initiated this case was issued. The testimony of Mr. Sifers that the completed report was filed within a few days after the Complaint was received by Respondent is not disputed and Complainant acknowledges that the report was submitted within a few days after the Respondent received the Complaint.

The proposed penalty of $3200 was based on the Guidelines for Assessment of Civil Penalties as published in the Federal Register on July 31, 1974 (39 F.R. 27711) as modified by an interim deviation notice issued on April 22, 1975.

Section 14(a)(3) of FIFRA states in pertinent part:

> 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.

Section 168.60(b)(1) of the Rules of Practice also enumerates these three criteria and section 168.60(b)(2) adds two other factors to be considered in evaluating the gravity of the violation -- (1) respondent's history of compliance with the Act and (2) good faith or lack thereof.

The Guidelines were issued to provide direction to Agency personnel assessing civil penalties and "are designed to insure to the extent practicable, that generally comparable penalties will be assessed in different regions for similar violations." The Rules of Practice

(sec. 168.46(b)) provide that the ALJ may consult and may rely on the Guidelines but that he "may at his discretion increase or decrease the assessed penalty from the amount proposed to be assessed in the Complaint."

Since the size of the Respondent's business is one of the factors that must be considered, the Guidelines have utilized five size gradations based on a respondent's annual sales. The categories based on gross sales for the prior fiscal year are as follows: I - less than $100,000; II - between $100,000 and $400,000; III - between $400,000 and $700,000; IV - between $700,000 and $1,000,000; V - over $1,000,000.

The Guidelines, as published in the Federal Register, for the type of violation here involved proposes $5000 for a category V firm and $1250 for a category II firm. These amounts were reduced by a memorandum entitled "Interim Deviation from Civil Penalty Assessment Schedule" dated April 22, 1975 from the Director, Pesticides Enforcement Division to the Region Enforcement Division Directors (Ex. 5). The reduction in the two categories mentioned was to $3200 and $800, respectively.

The Guidelines provide that in negotiating for settlement the Agency may take into consideration mitigating factors and where reduction would serve the public interest, the Agency may lower the proposed penalty as much as 40%. The interim deviation memorandum of April 22, 1975 included the following:

> The complaint should propose to assess the full amount of the appropriate penalty by size-of-business in accordance with the revised schedule specified herein. Should the report be filed within the pendency of a civil proceeding, the proposed penalty may be mitigated as much as forty per cent if the region feels such action is warranted based on the facts of the case.

The proposed penalty of $3200 was based on Complainant's information and belief that Respondent's gross sales for 1974 were in excess of $1,000,000 which would place it in category V. This information, at the time the civil penalty assessment was made, appeared to be reliable. However, the evidence at the hearing, which I consider credible and on which I rely, showed that Respondent's gross sales for 1974 were in the range of category II for which the proposed penalty in the interim deviation memorandum is $800.

The Complainant in its prehearing exchange of evidence acknowledged that a review of Respondent's record of compliance with the Act revealed no past violations. The Respondent's failure to file the report was not a deliberate flouting of the law but, I find, was due to negligence. The report was filed within a few days after the Respondent was served with the Complaint.

While the Administrative Law Judge is not bound by the Guidelines or the recommendation of those charged with enforcement in the circumstances of this case, where the report was filed within a few days after the Complaint was issued and there is no history of prior violations, I am of the view that a 40% reduction from the $800 penalty for a firm in category II as set forth in the memorandum of April 22, 1975, is an appropriate penalty and a penalty of $480 is hereby assessed.

Although the evidence shows that the Respondent sustained a substantial operating loss in 1974, I find that payment of the penalty herein assessed will have no adverse effect on its ability to continue in business.

The foregoing includes the Administrative Law Judge's Findings of Fact, Conclusions and reasons therefor.

Proposed Final Order[1/]

1. Pursuant to section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended, a civil penalty of $480 is hereby assessed against Respondent, Sifers Chemicals, Inc., for the violation of the Act found herein.

2. Payment of the full amount of the civil penalty assessed shall be made within 60 days of the service of the final order upon Respondent by forwarding to the Regional Hearing Clerk a cashier's or certified check payable to the United States of America.

Bernard D. Levinson
Administrative Law Judge

October 15, 1975

1/ Unless appeal is taken by the filing of exceptions pursuant to section 168.51 of the Rules of Practice, or the Regional Administrator elects to review this decision on his own motion, the order shall become the final order of the Regional Administrator. (See section 168.46(c)).

ATTACHMENT A

FEDERAL INSECTICIDE, FUNGICIDE, AND RODENTICIDE ACT, AS AMENDED (FIFRA)

Parallel Citations

FIFRA, 86 Stat. 973 P.L. 92-516	7 U.S.C.
Section 2	Section 136
3	136a
4	136b
5	136c
6	136d
7	136e
8	136f
9	136g
10	136h
11	136i
12	136j
13	136k
14	136l
15	136m
16	136n
17	136o
18	136p
19	136q
20	136r
21	136s
22	136t
23	136u
24	136v
25	136w
26	136x
27	136y