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ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE REGIONAL ADMINISTRATOR

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| In re | ) | |
| | ) | |
| Industrial Chemical Laboratories, Inc. | ) | I.F.&R. Docket No. VII-181C |
| | ) | |
| Respondent | ) | |

## Initial Decision

By Complaint dated February 26, 1976, the Chief, Pesticides Branch, Environmental Protection Agency, Region VII (hereinafter Complainant), charged Industrial Chemical Laboratories, Inc., of Omaha, Nebraska (hereinafter Respondent), with a violation of Section 12(a)(2)(L) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended[1/] (FIFRA) in that it, as a pesticide producer whose pesticide producing establishment is registered with the Administrator (of EPA) pursuant to Section 7(a), failed to timely submit to said Administrator 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 its answer to the Complaint admitting that it received the annual report (form), as alleged, and further that it failed, through oversight, to complete and return the report to Complainant by February 1, 1976, but denies that its failure to file said report on time, as admitted, constitutes an independent violation of the Act and regulations, subject to the imposition of the penalty sought.

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

An Adjudicatory Hearing is requested in Respondent's said answer on the following issues:

(1) The appropriateness of the proposed civil penalty.

(2) Whether Section 7(c), when read together with Section 12(a)(2)(L), is a proper basis for assessment of a civil penalty.

Said Cause was set for hearing in Omaha, Nebraska, on May 27, 1976; however, said hearing was cancelled when, on May 21, Daniel J. Shiel, Complainant's Attorney and Alex M. Clarke, Respondent's Attorney, jointly requested an accelerated decision and filed their Stipulation herein agreeing to material facts, as hereinafter set forth.

The Stipulation so filed by the Complainant and Respondent agreed to the following:

(1) The Respondent produces pesticides at an establishment registered with the Administrator pursuant to Section 7 of the Act.

(2) Respondent's gross sales in 1975, for all business activities, exceeded one million dollars. Its financial condition is as presented in a balance sheet (Exhibit 1) attached to the Stipulation.

(3) The penalty proposed by Complainant ($3200) was developed by use of the Civil Penalty Assessment Schedule (39 FR 27713, July 31, 1974, as modified by an Enforcement Division memorandum dated April 22, 1975).

(4) The said annual pesticides report form was received by Respondent on December 16, 1975, along with instructions that it be completed and returned no later than February 1, 1976.

(5) Said report form was completed by Respondent and received by Complainant on or about March 1, 1976.

(6) Respondent had filed similar pesticide reports in 1974 and 1975.

(7) The parties agree that the facts stipulated are all of the facts material to the violation charged.

(8) Respondent agrees to waive its right to a hearing in this matter.

That the material facts are not in dispute is enunciated in Respondent's Brief. Respondent further admits that it, as a producer of pesticides, is subject to Section 7 of the Act which is, in part, as follows:

> Section 7. REGISTRATION OF ESTABLISHMENTS
> (a) Requirement. No person shall produce any pesticide subject to this Act in any state unless the establishment in which it is produced is registered with the Administrator. The application for registration of any establishment shall include the name and address of the establishment and of the producer who operates such establishment.
> (b) Registration. Whenever the Administrator receives an application under subsection (a), he shall register the establishment and assign it an establishment number.
> (c) Information Required.
> (1) Any producer operating an establishment registered under this section shall inform the Administrator within 30 days after it is registered of the types and amounts of pesticides
> (A) which he is currently producing
> (B) which he has produced during the past year; and
> (C) which he has sold or distributed during the past year.
> The information required by this paragraph shall be kept current and submitted to the Administrator annually as required under such regulations as the Administrator may prescribe. (emphasis added).

Section 12(A)(2)(L) provides as follows:

> (2) It shall be unlawful for any person
> (L) who is a producer to violate any of the provisions of Section 7;

Respondent, in its brief as well as in its answer, requests resolution of the issues[1/] above set forth, page 2. They are restated in its brief, as follows:

(1) Whether or not failure to file the annual report within the time specified by Complainant constitutes a substantive offense under the Act giving rise to imposition of penalties; and

(2) Whether or not the proposed penalties are excessive.

Respondent contends that failure to file its annual report within the time prescribed by Complainant does not constitute a substantive offense supporting the imposition of a penalty against it. While it admits that the requirement of initial information regarding production and sales of its registered product is substantive, it questions the character of the information required to be provided annually thereafter "under such regulations as the Administrator may require". It suggests that the initial production information required under the first sentence of said subsection accomplishes the registration and establishes the character of the producer for purposes of the Act; the second sentence, it characterizes as part of "a vast host of procedural or technical requirements" which "Complainant seeks to elevate to the level of substantive offenses". Porter v Nowak, 157 F.2d 824 (1st Cir. 1946), cited by Respondent, rules that resort to the policy of the law may be had to ameloriate its seeming harshness or to

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1/ The Decision herein was reached on consideration of only those arguments advanced by the Parties in their briefs. The parties did not at any time suggest or urge that Respondent's position constituted an attack on Regulations promulgated by rule making.

qualify its apparent absolutes, and that such rule is applicable to regulations as well as statutes. However, it is also clear from said case that the exercise of that principle cannot be unrestrained; courts are there called upon to exercise great caution and circumspection in order to avoid usurpation of legislative power, citing Crooks v Harrelson, 282 US 55, 60; 51 S. Ct. 49, 50; 75 L. Ed. 156. In the Crooks case the court ruled that to justify a departure from the letter of a statute because of its spirit and policy, the absurdity following from the literal application of its words must not only "be so gross as to shock the general moral or common sense", but also "there must be something to make plain the intent of Congress that the letter of the statute is not to prevail".

Respondent's argument must be rejected. I find that Section 7 is a "regulatory" as opposed to a "registration" provision. The commonly accepted definition of "regulate" is to "control or direct"; further, the term connotes adjustment necessary to ensure accuracy of operation. In this instance, not only the registration but also the reports required thereafter, are the tools or instruments used in the regulation of establishments producing pesticides. The "Requirement" of Section 7(a) is clear. "No person shall produce any pesticide--unless the establishment in which it is produced is registered--"; and Section 7(c)(1) evinces legislative intent that a registrant shall be required to furnish information, not merely to characterize the establishment registered, but to provide past, present, and future information concerning the production, sale and distribution of pesticides throughout the nation. From a regulatory point of

view, it is equally, if not more, important to be be informed, on a current basis, as to the character and volume of pesticides produced, as to know the identity of their producer. The provision concerning the updating of said information is as much a part of the plan of regulation contained in Section 7(c)(1) as is the furnishing of the initial information. That the Administrator, under the Act, shall prescribe the regulations for the furnishing of future information does not make such requirement less substantive; rather a means is there provided for making less cumbersome, to the extent practicable, a tool essential for maintaining regulatory control in an area of enterprise where the public health and welfare must be protected.

In summary, Section 7(c)(1) evidences an intention on the part of Congress that the furnishing of past, present, and future information by registrants will be required.[1/] That future updating was intended as part of the statutory scheme of regulation then promulgated is evidenced by Section 12(a)(2)(L):

> (2) It shall be unlawful for any person—
> (L) who is a producer to violate <u>any</u> of the provisions of Section 7; (emphasis supplied).

I conclude that the admitted violation of Respondent subjects it to a civil penalty as provided in FIFRA Section 14(a) which provides in pertinent part:

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1/ I find persuasive the statement of Complainant that "this information is essential for EPA to effectively perform its regulatory functions". It is apparent that a multitude of violations like the subject violation can only have a serious negative effect on the entire regulatory program. (see also <u>Wickard</u> v <u>Filburn</u>, 317 US 111 (1942).)

> 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 of 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.

Said civil penalty assessment schedule was issued to provide direction to Agency personnel assessing civil penalties. The Rules of Practice [Section 168.46(b)] provide that the Administrative Law Judge 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 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 parties have stipulated that Respondent is a Category V firm, with annual sales of 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. This amount was reduced, by a memorandum dated April 22, 1975 from the Director, Pesticides Enforcement Division to the Regional Enforcement Division Directors, to $3200, which amount is the penalty proposed in the instant complaint.

The agreed Statement of Facts (Stipulation, supra) states that Respondent did not file its annual report on February 1, 1976, as required, but filed

said report on March 1, 1976, three days following the issuance of the subject complaint. Respondent filed similar reports in 1974 and 1975. On consideration of the violation involved and of all of the factors hereinabove set forth, I find that Respondent's failure to timely file its report was not a deliberate flouting of the law, but was due to negligence. I interpret the guidelines applicable to civil penalties as an effort to arrive at an amount in each case, which, though painful, will not be crippling. I find that $1500 is an appropriate penalty and a penalty in said amount is hereby assessed.

Although the evidence (Exhibit 1) shows that the Respondent sustained a substantial operating loss in 1975, I find that 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 $1500 is hereby assessed against Respondent, Industrial Chemical Laboratories, Inc., for the violation of the Act found herein.

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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)].

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.

June 16, 1976

Marvin E. Jones
Administrative Law Judge
U.S. EPA, Region VII

ATTACHMENT A

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

## Parallel Citations

| FIFRA, 86 Stat. 973<br>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 |
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| 25 | 136w |
| 26 | 136x |
| 27 | 136x |