6/1/77

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE REGIONAL ADMINISTRATOR

In the Matter Of	)	
	)	
Delta Chemical Manufacturing Company,	)	I.F. & R. Docket No. III-101C
	)	
Respondent	)	INITIAL DECISION

Preliminary Statement

1. This proceeding under the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. Sections 136-136y (Supp. V, 1975) ("FIFRA") is a civil proceeding for the assessment of civil penalties pursuant to Section 14(a) of the Act, 7 U.S.C., Section 136(1)(a).[1/] The action was instituted by the filing of a Complaint and Notice of Opportunity for Hearing, which was received by the Respondent, Delta Chemical Manufacturing Company ("Delta") on May 6, 1976. The Complaint was thereafter amended on June 9, 1976, to reduce the proposed civil penalty from five thousand dollars ($5,000.000) to three thousand two hundred dollars ($3,200.00).

2. The Complaint alleged Delta failed to submit an Annual Pesticide Report by February 1, 1976, as required by Section 7 of FIFRA, 7 U.S.C., Section 136(e), and Section 167.5 of the regulations, 40 C.F.R. 167.5.

3. Delta filed an Answer which was received by the Complainant on June 21, 1976. In that Answer, Delta admitted that it had not filed the Annual Pesticide Report on February 1, 1976. However,

1/ All references to Title 7 of the United States Code are to Supp. V, 1975.

Delta alleged that the Report was not filed on February 1, 1976, "by virtue of the inability of the Respondent to obtain the information, because Respondent had been and is in the process of moving its entire operation because of the condemnation of its plant facilities by the Federal Highway Department."

4. A prehearing conference was held on December 28, 1976, and a written summary of the actions taken by the parties was prepared by the Administrative Law Judge and has been made a part of the record.

5. A hearing was held on February 23, 1977, after proper notice to the parties and their counsel.

6. The parties have submitted proposed findings of fact and conclusions of law and a brief in support thereof. These have been considered, and all proposed findings which are not herein specifically adopted are rejected.

Findings of Fact

1. Delta repackages and sells chlorine and sodium hypochlorite at its facilities in Baltimore, Maryland.

2. Delta is a producer as defined by Section 2(w) of FIFRA, 7 U.S.C., Section 136(w), and 40 C.F.R. 167.1, of products registered as pesticides with the United States Environmental Protection Agency ("EPA").

3. As a producer, Delta is subject to the requirements of Section 7 of FIFRA, 7 U.S.C., Section 136e, and the regulations promulgated thereunder.

4. Pursuant to said Section 7 of FIFRA and 40 C.F.R. 167.5, Delta is required to submit an annual pesticide report on or before February 1 of each year. Delta was thus required to submit an annual report by February 1, 1976, which would include information about its production and sales and distribution of pesticide products in 1975.

5. Delta was notified of the requirement for submission of an annual report regarding pesticide products by EPA Region III and was sent a copy of a Pesticides Report form on or about November 20, 1975, via certified mail, return receipt requested. The return receipt signed by an employee of Delta acknowledged receipt of these papers in December 1975.

6. Delta's report not having been received by the due date, February 1, 1976, a "Notice of Warning" was sent to Delta on or about February 12, 1976, via certified mail, return receipt requested. The notice advised Delta to complete and submit the report within ten (10) days or be subject to the penalty provisions of FIFRA. The return receipt, signed by an employee of Delta, acknowledged receipt of this notice in February 1976.

7. Delta's annual report due on February 1, 1976, was not filed until May 1976, subsequent to the filing of the complaint in this matter.

8. Delta had also been required to submit an annual report on or before February 1, 1975, which would include information about its production and sales and distribution of pesticide products for 1974.

9. On February 1, 1975, no report having been submitted, Delta was sent a Pesticides Report form, by certified mail, return receipt requested. The return receipt, signed by an employee of Delta, acknowledged receipt of this Pesticides Report form on February 13, 1975.

10. On or about April 17, 1975, the report still not having been received, Delta was sent a "Notice of Warning" with respect to its failure to file the report. The notice advised Delta to complete and submit the pesticide report within ten (10) days or be subject to the penalty provisions of FIFRA. The return receipt, signed by an employee of Delta, acknowledged receipt of this Notice on April 21, 1975.

11. Delta filed the annual report on May 5, 1975.

12. Delta has gross annual sales in excess of one million dollars.

13. During the period from November 1975 through June 1976, Delta was faced with unusual business conditions. Its operating facilities at 2101 Washington Boulevard had been condemned due to construction of Interstate I-95. The company had originally been ordered to vacate the premises by October 15, 1975, but eventually succeeded in getting the time extended to September 1976. A site had been selected in Anne Arundel County for its new plant, but had to be given up because of local opposition. Delta then found another site in Baltimore County in November 1975, which required extensive work in order to be converted into an operating facility. It was necessary for Delta's existing

plant to remain open and keep operating until the new plant was also in operation, because the company could not build inventory, and had to continue to supply its customers with whom it had contracts without interruption or risk losing their business. Consequently, in addition to keeping the existing plant in operation, the officers of Delta had to take care of the details and the large amount of paperwork required to prepare the new plant, and to either relocate the machinery and equipment or provide for their substitution. Richard H. Koumjian, the Vice President, Secretary and Treasurer of Delta, and his father, President of the Company and with Richard owner of all the stock in Delta, spent almost all their time on work required to set up the new plant. The actual operation of the business during this period was left largely to the comptroller, who as a result had to take on duties that he otherwise would not have had.

Discussion and Conclusions

Delta admittedly violated Section 7 of FIFRA by failing to submit a pesticide report on or before February 1, 1976, as required by the Act and the regulations. The only disputed issue in this proceeding is the size of the penalty to be assessed. EPA recommends a penalty of $3,200.[2/] Delta contends that only a nominal penalty of $100 should be assessed because of mitigating circumstances.

2/ The proposed penalty of $3,200 was derived from the Guidelines for the Assessment of Civil Penalties, 39 Fed. Reg. 27711 (1974), as modified by a memorandum from the Director of the EPA Pesticides Enforcement Division, dated April 22, 1975 (Complainant's Exhibit F).

In determining the appropriate penalty, I must consider the gravity of the violation, the size of respondent's business and the effect of the proposed penalty on respondent's ability to continue in business, 40 C.F.R. 168.60. Delta has conceded that the proposed penalty would not effect its ability to continue in business (Transcript at 3-D), and its annual gross sales in excess of one million dollars meet the requirements for the proposed penalty under the Guidelines for the Assessment of Civil Penalties, which Guidelines I am authorized to consult and rely on. See 40 C.F.R. 168.46. Thus, the issue is narrowed to whether the proposed penalty is justified by the gravity of the violation.

The gravity of the violation has two aspects to it, the gravity of harm, and gravity of misconduct. See Amvac Chemical Corporation, EPA Notice of Judgment (June 1975) No. 1499 at 986. The regulations provide that in evaluating the gravity of the violation, I am to consider evidence of Delta's good faith or lack thereof (which bears upon the gravity of misconduct), and I am also to consider Delta's history of compliance with FIFRA, or its predecessor statute. See 40 C.F.R. 168.60.

As to the gravity of harm, there is no question but that the timely filing of these pesticide reports can be important to the enforcement of FIFRA.

There has been no showing here that enforcement of FIFRA has actually been impeded by the delayed filing of the report. But this in itself would not be determinative of the seriousness of the harm that could be caused by the violation. For if deliberate disregard of the reporting requirements was tolerated, the effectiveness of the reports as enforcement tools would be greatly weakened if not altogether destroyed. Consequently, the gravity of misconduct is really the important consideration in this instance.

As to gravity of misconduct, the evidence does establish that Delta's business was disrupted by unusual circumstances, namely, the pressing need to find a new plant because the existing plant had been condemned. Richard Koumjian and his father, who are the sole stockholders and the two principal officers, had to spend most of their time on relocating the plant, with the consequent interference with their regular duties in running Delta.

EPA argues that a respondent's ability to manage its business affairs should be irrelevant to the question of the appropriateness of a particular penalty. Generally this is so. But here the company was confronted with an emergency with which it would not usually have to deal. Under the circumstances, the claim of Mr. Richard Koumjian that the failure to file the report on time was due to an oversight caused by the disruption of the business, that it would not have happened otherwise, and that it will not happen again seems persuasive.

It is true that Delta also failed to file the report for the previous year on time. But this was the first time such a report was required, and the report was filed fourteen days after the "Notice of Warning" was received. And although the company has been in business for several years, this appears to be the first time that it has been cited for a violation of FIFRA.

The delay in filing the first report coupled with the delay in filing the second report does indicate, however, some disposition on the part of Delta to neglect its reporting obligations under FIFRA. Accordingly, more than the nominal penalty proposed by respondent seems warranted, to insure that Delta will comply in the future. I find that an appropriate penalty will be $600.00.

Final Order[3/]

Pursuant to Section 14(a)(1) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended, 7 U.S.C. Section 136 1(a)(1) (Supp V, 1975), civil penalties totaling $600 are hereby assessed against respondent Delta Chemical Manufacturing Company, for the violation which has been established on the basis of the amended complaint issued herein.

Gerald Harwood

Gerald Harwood
Administrative Law Judge

June 1, 1977

3/ Unless an appeal is taken as provided in 40 C.F.R. 168.51 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 40 C.F.R. 168.51(c).