5/31/77

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE REGIONAL ADMINISTRATOR

In the Matter of The World's Best Products, Inc., Respondent.	)	I. F. & R. Docket No. V-331C

INITIAL DECISION

Preliminary Statement

This is a proceeding under Sec. 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended (7 U.S.C. 136 l(a)), 1973 Supp., for the assessment of a civil penalty for violation of the Act.

On March 30, 1976 the Director of the Enforcement Division, United States Environmental Protection Agency, Region V (Complainant), issued a Complaint together with Notice of Opportunity for Hearing, charging The World's Best Products, Inc. (Respondent) with violations of the Act.

The Complaint alleged that Respondent failed to submit to the Administrator, as required by Sec. 7 of the Act (7 U.S.C. 136e) and regulations promulgated thereunder (40 CFR 167.5), information on the types and amounts of pesticides produced and distributed by the registered establishment. Specifically, it is alleged that Respondent failed to file the required pesticide reports for the years 1974 and 1975.

A civil penalty has been proposed by Complainant in accordance with the Civil Penalty Assessment Schedule (39 FR 27713) in the amount of $800 for failure to submit these Pesticide Reports.

It should be noted that neither the ALJ nor the Regional Administrator is bound by the amount of proposed penalty in the Complaint. See 40 CFR 168.46(b) and 168.60(b)(3).

Respondent, by its counsel, filed an Answer and Request for Hearing, in which it asserts two defenses to the allegation contained in the Complaint.

> 1. Respondent asserts that it was not required to file said reports and could not be in violation of the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. 136) in that such act requires the filing of reports only to detail the products which have been produced by the registrant or which are currently being produced by the registrant and that at no time has Respondent produced, handled, or otherwise dealt with the subject matter covered by said act and said reports.

Respondent had intended to market or handle a pesticide. It obtained an establishment number and a registration number. However, due to market conditions Respondent never produced or sold the product and has not done so to this day.[1/]

1/ In response to this point of law I instructed that briefs be filed and, pursuant thereto, issued a Partial Accelerated Decision on December 13, 1976, copy attached, which is incorporated into and made a part of this Initial Decision.

2. The 1975 Pesticide Report was filed with EPA, but was misfiled or lost by the Agency.

The proceedings were conducted pursuant to the applicable Rules of Practice, 40 CFR 168.01 et seq. At my request, the parties, pursuant to Sec. 168.36(e) of the Rules, corresponded with me for the purpose of accomplishing some of the purposes of a prehearing conference (see Sec. 168.36(a) of the Rules).

A prehearing conference and a hearing were held in LaPorte, Indiana on March 2, 1976. The Complainant was represented by James R. Morrin, Esq., of the legal staff of EPA, Region V, and the Respondent was represented by William A. Elliott, Esq.

The parties have filed additional briefs and reply briefs in support of proposed findings of facts, conclusions of law and order relative to defense No. 2 which I have carefully considered.

Findings of Fact

1. The Respondent is a corporation with its place of business located at 800 South Union Center Avenue, Union Mills, Indiana. Its gross sales are approximately $75,000.00 annually.

2. Respondent is the registered producer of the product "Chem-Gard Liquid Grain Preservative" which was accepted for registration on August 27, 1973 and was issued EPA Registration No. 13890-1 on February 7, 1974. (EPA Exhibit 2)

3. Respondent has never produced the product.

4. Respondent was notified by Complainant of requirement for filing 1974 Pesticide Report. (EPA Exhibit 3)

5. Respondent was notified by Complainant of requirement for filing 1975 Pesticide Report. (EPA Exhibit 4)

6. Respondent was notified by Complainant that there is reason to believe Respondent was in violation of the Act for failure to file 1974 and 1975 Pesticide Reports. (EPA Exhibit 5)

7. Respondent was notified by Complainant that it intended to terminate the registration of its establishment for failure to file reports. (EPA Exhibit 6)

8. Respondent did not file a pesticide report with Complainant within thirty (30) days of notification of registration.

9. Respondent did not file 1974 Pesticide Report until April 12, 1976. (Respondent's Exhibit D)

10. Respondent filed 1975 Pesticide Report on April 12, 1976. (Respondent's Exhibit E)

11. Respondent filed 1976 Pesticide Report on January 1, 1976. (Respondent's Exhibit F)

12. Respondent filed 1977 Pesticide Report on January 17, 1977. (Respondent's Exhibit G)

13. Respondent is a Category I concern with gross sales of less than $100,000.00.

14. For the above mentioned violations, Findings 9 and 10, the Respondent is subject to a civil penalty under Sec. 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended, 7 U.S.C. 136 l(a).

15. Taking into consideration the size of Respondent's business, the effect on Respondent's ability to continue in business, and the gravity of the violations, it is determined that a penalty of $200.00 is appropriate.

Discussion and Conclusions

As was found in the Partial Accelerated Decision of December 13, 1976 in this proceeding, Respondent was required to file one Pesticide Report within thirty (30) days of notification of registration and an annual Pesticide Report thereafter.

It is undisputed that Respondent did not file the initial thirty (30) day notice or the required 1974 Pesticide Report in a timely manner. In fact, it was not until April 12, 1976 that the 1974 Pesticide Report was filed and this was after approximately five certified notifications that action would or could be taken by Complainant for failure to file an annual Pesticide Report.

The last certified notification, April 8, 1976, culminated in a meeting on April 12, 1976, in the offices of Complainant, at which time the 1974 Pesticide Report was filed.

A factual dispute does exist relative to the filing of the 1975 Pesticide Report. Complainant avers that no such report was filed until EPA received a copy of that year's report at the April 12, 1976 meeting. Respondent avers the report was filed and was dated February 24, 1975. (Respondent's Exhibit E) While Respondent may have filled out the Pesticide Report for 1975 and dated it February 24, 1975, the weight of the evidence and testimony must be construed in favor of EPA. If such report had been in the files of EPA there would have been no reason for EPA to continue its series of letters to Respondent. In addition, Respondent had ample opportunity to advise EPA it had filed this report and choose not to do so.

It should be noted that all reports indicate "no production" has taken place.

In determining the appropriateness of the penalty, the statute and regulations require that the following factors be considered: size of Respondent's business; effect on Respondent's ability to continue in business; and gravity of the violation. In evaluating the gravity of the violation the regulations require that the following be considered: history of Respondent's compliance with the Act; and good faith or lack thereof.

The size of Respondent's business is in dispute. Respondent asserts that his annual sales are approximately $75,000. Complainant asserts that a Dun and Bradstreet report, not in evidence, sets this figure at $200,000.00 annually. Since the amount of the civil penalty

assessed hereby is $200.00, it is not necessary to make a finding as to the amount of gross sales. Respondent has stated on the record that even if the full proposed penalty of $800.00 were assessed, it would not affect his ability to remain in business. Tr. p. 52.

As to the gravity of the violation, the sequence of events which form the history of Respondent's compliance with the Act in this proceeding seem to indicate only that Respondent had made up his mind to ignore all communications received from EPA. This would certainly also indicate a lack of good faith. It is very difficult for me to see how Respondent could not have at least responded to these certified mail communications in some manner prior to being advised that if he did not, his registration number might and could be cancelled.

Under these facts I believe the full $800.00 civil penalty proposed should be assessed. However, for the mitigating reasons stated in my Partial Accelerated Decision and the somewhat confused set of facts concerning the unavailability of Respondent's official EPA file during the April 12, 1976 meeting the penalty should be reduced to $200.00.

The proposed Findings of Fact and Conclusions submitted by the parties have been considered. To the extent that they are consistent with Findings of Fact and Discussion and Conclusions herein, they are granted, otherwise they are denied.

Having considered the entire record and based on the Findings of Fact and Discussion and Conclusions herein, it is proposed that the following order be issued.

Final Order

Pursuant to Sec. 14(a)(1) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended (7 U.S.C. 136 l(a)(1)), a civil penalty of $200.00 is assessed against Respondent, The World's Best Products, Inc., for the violation which has been established on the basis of the Complaint issued on March 30, 1976.

Edward B. Finch
Edward B. Finch
Administrative Law Judge

May 31, 1977

Unless appeal is taken by the filing of exceptions pursuant to Sec. 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 Sec. 168.46(c).)