2/22/78

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE REGIONAL ADMINISTRATOR

In the matter of	)	
	)	
North Coast Chemical Company, Inc.	)	I. F. & R. Docket No. X-45c
	)	
	)	
Respondent	)	

INITIAL DECISION

This civil penalty proceeding under Section 14 of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) as amended (7 U.S.C. 136 l), was commenced by a complaint dated April 28, 1977. The complaint alleged that Respondent, North Coast Chemical Company, Inc., was a registered producer of pesticides (EPA Establishment No. 1791-WA-01), that as of February 1, 1977, Respondent had not submitted to EPA Region X the production and sales information required by 40 CFR 167.5 and had thereby violated Sections 7(c) and 12(a)(2)(L) of the Act and that Respondent's sales for the preceding fiscal year were in excess of $1,000,000. A penalty of $3,200 was proposed to be assessed against Respondent.

By letter, dated May 27, 1977, Respondent referred to a proposed consent agreement and final order which would have reduced the proposed penalty to $1,600, and admitted the allegations of the complaint. The stipulated facts in the proposed consent agreement contained an additional fact, i.e., that the required

report was filed on March 7, 1977, promptly after receipt of notice of the delinquency. Respondent requested a hearing. A hearing on this matter was held in Seattle, Washington on January 13, 1978.

FINDINGS OF FACT

Based on the entire record, including admissions in the answer and stipulations at the hearing, I find that the following facts are established:

1. Respondent, North Coast Chemical Company, Inc., was and is a registered producer of pesticides (EPA Establishment No. 1791-WA-01).
2. As of February 1, 1977, Respondent had not submitted to EPA Region X, a report containing, inter alia, current production and production and sales information for the preceding year as required by 40 CFR 167.5.
3. The report referred to in the preceding finding was submitted on March 7, 1977, promptly after Respondent's receipt from EPA of notice of the delinquency.
4. In December 1976, Respondent received from EPA a letter stating that the report was due on February 1, 1977 and a form on which the report was to be submitted.
5. Respondent's bookkeeper is responsible for preparing the report, but was busy closing the firm's books for the preceding fiscal year and preparing the annual report.

6. Respondent's gross sales for the preceding year were in excess of $1,000,000 and imposition of the penalty initially sought by Complainant would not effect Respondent's ability to continue in business.

7. The production and sales report due on February 1, 1976, was submitted after that date. However, EPA has not previously attempted to assess penalties against Respondent for violations of FIFRA and applicable regulations.

CONCLUSIONS

1. Respondent is a registered producer of pesticides under Section 7 of FIFRA (7 U.S.C. 136e) and is required by Section 7(c) (7 U.S.C. 136e(c)) to submit annually, in accordance with regulations prescribed by the Administrator, information as to the types and amounts of pesticides it is currently producing, which it has produced during the past year and which it has sold or distributed during the past year.

2. Under regulations prescribed by the Administrator (40 CFR 167.5), Respondent's report containing information mentioned in the preceding conclusion was due on or before February 1, 1977.

3. Respondent did not file the required report by February 1, 1977, and this violated the above cited sections of FIFRA and Section 12(a)(2)(L) (7 U.S.C. 136j(a)(2)(L)), which makes it unlawful for any producer to violate any of the provisions of Section 7.

4. Respondent, having violated FIFRA and implementing regulations as set forth above, is liable for a civil penalty under Section 14(a)(1) (7 U.S.C. 136 l(a)(1)) of FIFRA.

DISCUSSION

The statute (FIFRA, 7 U.S.C. 136 et seq.) provides in pertinent part:

"Sec. 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. * * * *"

"(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.

"(2) Any such producer shall, upon the request of the Administrator for the purpose of issuing a stop sale order pursuant to section 13, inform him of the name and address of any recipient of any pesticide produced in any registered establishment which he operates."

"Sec. 12. Unlawful Acts.

"(a) * * *.*

"(2) It shall be unlawful for any person--

* * * *

"(L) who is a producer to violate any of the provisions of section 7;

* * * *"

"Sec. 14. Penalties.

"(a) Civil Penalties.--

"(1) In General.--Any registrant, commercial applicator, wholesaler, dealer, retailer, or other distributor who violates any provision of this Act may be assessed a civil penalty by the Administrator of not more than $5,000 for each offense.

* * * *"

Regulations (40 CFR 167.5) promulgated by the Administrator to implement the reporting requirements of Section 7 of FIFRA, quoted above, provide as follows:

"§ 167.5 Pesticides Reports.

"(a) Information required. The pesticides report, to be submitted on the EPA Pesticides Report form, shall include the name and address of the establishment; the types of pesticides produced; the past year's amount of production and sales or distribution of each product; and the amount of current production of each product. This report does not cover those pesticide products or devices sold or distributed but not produced by the reporting establishment. Reports submitted by foreign producers shall cover those pesticide products or devices exported to the United States.

"(b) Submission of report. All reports shall be submitted by the establishment to the Regional Office having jurisdiction over the State in which the establishment is located. Reports from foreign establishments shall be submitted to the Environmental Protection Agency, Pesticides Enforcement Division, Washington, D.C. 20460, U.S.A.

"(c) When to report. Within 30 days of notification of registration of an establishment the producer of the establishment shall file with the Agency a pesticide report. Thereafter reports are required to be filed annually on or before February 1."
* * * *"

The violation having been admitted, the only issue in this proceeding is the amount of the penalty.

PENALTY

As indicated in the complaint, application of the civil penalty assessment table (39 FR 27711, July 31, 1974) to a firm of Respondent's size (sales) would result in a penalty of $3,200. However, Complainant has receded from that position and at the hearing and on brief has demanded a penalty of $1,600.

The civil penalty assessment table is, of course, not obligatory on the Administrative Law Judge (40 CFR 168.46(b)). However, in determining the proposed penalty I am required to consider the factors set forth in 40 CFR 168.60(b) which are: (a) the gravity of the violation; (b) the size of respondent's business and (c) the effect of the proposed penalty on respondent's ability to continue in business.

Gravity of the violation is usually considered from two aspects: gravity of the harm and gravity of the misconduct. Information on past and current production of pesticides is an integral part of the regulatory scheme contemplated by the statute and the requirement for timely reports of such production may not lightly be disregarded. However, the report was promptly filed when the omission was called to Respondent's attention and it is considered that the gravity of the harm is slight. In considering gravity of the misconduct, Respondent's past history of compliance and evidence of, or lack of, good faith are also considered. Although the report due from Respondent on February 1, 1976, was also filed late, Complainant has not previously attempted to assess civil penalties against Respondent for violations of FIFRA. Accordingly, Respondent's past history of compliance is considered to be good. As to good faith, I accept the explanation of Respondent's President, Mr. Roy H. Weaver, that there was no intent to disregard the requirement for filing the report, that he was not personally aware the report was due and that the matter was simply overlooked by Respondent's bookkeeper, who was very busy with auditors and in preparing the firm's annual report.

It has been found above that a penalty in the amount initially sought by Complainant would not effect Respondent's ability to continue in business.

Mr. Weaver characterized the late filing of the report as no more serious than a parking ticket and indicated that his firm had been penalyzed sufficiently by the amount of time he had been forced to spend on this matter. As indicated above, timely filing of past and current production information is an integral part of the statutory plan for controlling pesticides and such requirements are not lightly to be disregarded. Complainant has a right to expect timely compliance with the requirements of the Act and regulations and it is proper to consider inconvenience to Complainant necessitated by delinquent reports.

Under all the circumstances, a penalty of $500 is considered appropriate and is hereby proposed.

FINAL ORDER[1/]

A violation of Sections 7 and 12(a)(2)(L) of FIFRA having been found as alleged in the complaint, Respondent, North Coast Chemical Company, Inc., is liable for civil penalty in the amount of $500 and is hereby ordered to pay the same by forwarding a cashier's or certified check payable to the United States of America to the Regional Hearing Clerk within 60 days of receipt of this order.

Dated this 22nd day of February 1978.

Spencer T. Nissen
Administrative Law Judge

1/ This initial decision shall become the final order of the Regional Administrator unless appealed to or reviewed by him in accordance with 40 CFR 168.46(c).

CERTIFICATE OF SERVICE

I hereby certify that true copies of the foregoing Initial Decision in the matter of North Coast Chemical Company, I.F. & R. Docket No. X-45C were mailed, certified mail, return receipt requested to the following:

Mr. R. H. Weaver, President
North Coast Chemical Company, Inc.
6300 17th Avenue South
Seattle, Washington 98108
(Certified No. 125371)

Hearing Clerk (A-110)
Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460
(2 copies)
(Certified No. 125372)

Copies were also hand-delivered to the following:

John Bookston, Esq.
EPA, Legal Support Branch
Seattle, Washington

Mr. Donald P. Dubois
Regional Administrator
EPA, Seattle, Washington

Dated this 27th day of February, 1978.

Irene Franks

Irene Franks
Regional Hearing Clerk
Region X