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UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Electronics For Industry, Inc.,	)	Docket No. IF&R-IV-577C
	)	
Respondent	)	

1. Federal Insecticide, Fungicide and Rodenticide Act. Violation for failure to register a producer establishment is substantiated if not accomplished at the time the product is offered for sale.

2. Federal Insecticide, Fungicide and Rodenticide Act. When determining the size or category of a business for civil penalty purposes, the gross sales (total business revenues from all business operations) must be used.

3. Federal Insecticide, Fungicide and Rodenticide Act. Notice in Federal Register of requirement to register producer establishment is sufficient notice required by law.

4. Federal Insecticide, Fungicide and Rodenticide Act. Device to repel rodents, "RAT-I-CATOR" is a pesticidal device within the meaning of Section 2(h).

Appearances:

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INITIAL DECISION

Complaint in this proceeding was issued under date of June 9, 1983, by the Director, Air & Waste Management Division, Region IV, Environmental Protection Agency (Complainant). Electronics For Industry, Inc. (Respondent), Miami, Florida is charged with violation of Sec. 12(a)(2)(L) of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) in that the establishment where the pesticidal device was produced was not registered in accordance with Sec. 7 of FIFRA.

Complainant has proposed a civil penalty of $4,200 for this violation.

Respondent has contended in its Answer, throughout the hearing, and in its final brief that the device known as "RAT-I-CATOR" does not fall within the purview of the Act. That the intent of the Act was to protect the environment against unregulated infusion of chemicals into the atmosphere. And further, that this device is an ultrasound device that repels rodents and has absolutely no influence on the atmosphere. Based upon these contentions, Respondent, in its Answer, moved for an accelerated decision on the grounds that there is no general issue of material fact. Subsequently, a Motion To Dismiss was filed by Respondent in which the position was asserted that since prior to the effective date of the Federal Register notice requiring registration of establishments producing ultrasonic pest control

devices, it was advised by Complainant that there was no requirement for establishment registration, it was the obligation of Complainant to notify Respondent when such regulation was issued.

Complainant responds in opposition to said Motion To Dismiss asserting that Complainant gave notice to the public through regulations found at 41 Fed. Reg. 51065 et seq. (Friday, November 19, 1976) that establishments producing ultrasonic pest control devices must register with EPA.

This is the only notice to the public required by law. Even though previous contact, as here, may have appeared to reduce the burden upon Respondent to search out in the Federal Register a change in the rules as related to its product, the law required that it do so. Therefore, the Motion To Dismiss was denied.

The Motion For Accelerated Decision was dismissed on other grounds. The two questions posed were:

1. Is the Respondent's "RAT-I-CATOR" a pesticidal device within the meaning of FIFRA Section 2(h), 40 C.F.R. §162.15? and

2. Assuming the "RAT-I-CATOR" is a pesticidal device, was Respondent/Producer a registered establishment as required by FIFRA Section 12(a)(2)(L)?

Both are answered in the affirmative.

FIFRA, Section 2(h) defines a device to include any "instrument or contrivance. . .which is intended for. . .repelling, or mitigating any pest. . . ." Respondent's "RAT-I-CATOR" product clearly fits this

definition. The product is described on the label as an "electronic device that fills an area with ultrasound and creates an environment so uncomfortable that any rodent will leave that area and not return. That it is intended for repelling rodents cannot be seriously disputed. Rodents come within the definition of "pests" in Complainant's regulations for the enforcement of FIFRA, 40 C.F.R. 162.14.

Since these denials in effect were legal rulings on the issues raised, the only other issue to be heard at the hearing was the amount of any penalty which might be imposed.

An adjudicatory hearing was held on April 4, 1984, in Courtroom 3, United States District Court, 299 E. Broward Boulevard, Ft. Lauderdale, Florida.

Findings of Fact

1. Electronics For Industry, Inc. (EFI) is a business located in Miami, Florida.
2. One of the products manufactured by EFI is a device known as "RAT-I-CATOR" which is a pesticidal device within the meaning of Section 2(h) of FIFRA.
3. On or about September 17, 1982, EFI held for sale or distribution the pesticidal device known as "RAT-I-CATOR."
4. At that time, the establishment where the pesticidal device was produced was not registered in accordance with Sec. 7 of FIFRA.

5. Gross sales of Respondent for the year 1982 were $500,984.84. Gross domestic sales for "RAT-I-CATOR" for 1982 were $19,343.50.

Discussion

Since the questions raised by Respondent relating to whether or not the device "RAT-I-CATOR" is a pesticide and whether or not proper notice was given were decided in the affirmative prior to the hearing, the only issue addressed at the hearing related to the appropriateness of assessing a civil penalty and, if so, the amount thereof.

The amount of the civil penalty proposed in the Complaint is $4,200. (See Civil Penalty Guidelines, 39 FR 27711.) The person responsible for making this determination was William J. Pfister, Consumer Safety Officer, Environmental Protection Agency, Pesticide and Toxic Substances Branch, Atlanta, Georgia. Mr. Pfister was the first witness for Complainant at the hearing. The case worksheet prepared by Mr. Pfister, EPA-19, indicates that his assessment was based upon Charge Code E33 in the Guidelines for Assessment of Civil Penalties, as follows:

4. Failure to Register Producer Establishment

		I	II	III	IV	V
A.	Knowledge of Registration Requirement	420	1050	2310	3570	4200
B.	No Knowledge of the Registration Requirement	180	450	990	1530	1800

The computation of $4,200 is derived from placing Respondent in "A. Knowledge of Registration Requirement" and then Category V after a determination by Mr. Pfister that the gross sales of Respondent exceeded $1,000,000 annually in 1982.

The rationale stated by Mr. Pfister for these conclusions are:

1. The firm had been in business in the Miami, Florida area since at least 1976 with 12 or 13 employees. Source -- Florida Directory of Manufacturers. Tr. p. 9.

2. The Respondent's price list indicates that the items which were produced were expensive electronic equipment. Tr. p. 10, EPA - 12.

The Court queried:

"THE COURT: Is there anything in that Florida Directory of Manufacturers that gives a specific figure such as in excess of 1,000,000 sales?

"THE WITNESS: No, Sir. Not to my recollection. It was based on the number of employees and the types of products they were producing.

"THE COURT: So the 1,000,000 figure is something you derived by looking at the directory?

"THE WITNESS: It's a subjective determination, that's correct.

"Q (By Mr. Zimmerman) In other words, Mr. Pfister, is that based on your many years experience in this area, that if a company sells a product that costs as much as the products this company sells,

and it has and can afford to keep this many employees on the payroll, then it was your conclusion that the company had to have in excess of $1,000,000 total gross sales?" (Response was in the affirmative.)

A Dun and Bradstreet report was referred to but did not indicate gross sales. EPA - 17.

Upon cross-examination by counsel for Respondent, Mr. Pfister admitted that except for the informational sources mentioned above he had "no direct knowledge of what my client's [Respondent's] gross sales were in any year." Tr. p. 35. More specifically, Mr. Pfister testified that he had no knowledge of the source of information or accuracy of the Florida Directory of Manufacturers. Tr. p. 34. And further, he had no knowledge of how many of these devices were sold in any year.

In view of these facts, if a penalty is to be assessed, we must look to the only other evidence in the record concerning the gross sales of Respondent for the year 1982. This evidence is the testimony of George Allen Harris, President of Respondent and the exhibits submitted through that witness.

Mr. Harris testified that the gross sales of Respondent in 1982 were $500,984.84 with domestic sales of the "RAT-I-CATOR" amounting to $19,343.50 for that same year. Tr. p. 57, Resp. Exh. 1. Gross sales for the year 1981 were $518, 999.00. Resp. Exh. 6. */ In addition, Mr. Harris testified that Respondent employs seven persons.

*/ Resp. Exh. 1 indicates gross sales for 1981 as $519,999.00.

Therefore, based upon the record, we must reject the computation of gross sales by Mr. Pfister and accept the figures presented by Respondent which would place Respondent in Category III -- gross sales between $400,000 and $700,000. This category is appropriate since the Civil Penalty Guidelines make it clear that in determining the size of the business, the total sales (total business revenues from all business operations) must be used.

Complainant's methods here of computing gross sales are merely guesswork. The actual figures elicited at the hearing should have been determined at the investigational stage.

The record here shows a clear indication that Respondent and Complainant had been in contact regarding Respondent's responsibilities under FIFRA. While there is no question that notice in the Federal Register constitutes the notice required to place a duty upon Respondent to register its establishment, it is the belief of this Court that the contact between the parties many years before the issuance of the Complaint serves to mitigate the "knowledge" aspect of the computation of the civil penalty.

It is therefore my conclusion that the Charge Code used in this case should be "B. No Knowledge of the Registration Requirement, Category III" which sets $990.00 as the civil penalty.

FINAL ORDER */

1. Pursuant to Section 14(a)(1) of the Federal Insecticide, Fungicide and Rodenticide Act, as amended, a civil penalty of $990.00 is assessed against Respondent, Electronics For Industry, Inc., for the violations which have been established on the basis of the Complaint.

2. Payment of $990.00, the civil penalty assessed, shall be made within sixty (60) days after receipt of the Final Order by forwarding to the Regional Hearing Clerk; U. S. Environmental Protection Agency; Region IV; 345 Courtland Street, NE; Atlanta, Georgia 30365, a Cashier's Check or Certified Check, made payable to the Treasurer, United States of America.

Edward B. Finch
Chief Administrative Law Judge

Dated: 8/15/84
Washington, D. C.

*/ 40 CFR 22.27(c) provides that this Initial Decision shall become the Final Order of the Administrator within 45 days after its Service upon the parties unless an appeal is taken by one of the parties or the Administrator elects to review the Initial Decision. Section 22.30(a) provides for appeal herefrom within 20 days.