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UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

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| In the Matter of | ) | |
| | ) | |
| South Coast Chemical, Inc., | ) | Docket No. FIFRA-09-0372-C-84-5 |
| | ) | |
| Respondent | ) | |

Federal Insecticide, Fungicide and Rodenticide Act. Where Respondent makes inquiry of EPA with respect to whether or not a product is a pesticide within the definition contained in FIFRA prior to an official inspection of said Respondent, the good faith efforts of Respondent should be taken into account in any decision as to the issuance of a Complaint.

Federal Insecticide, Fungicide and Rodenticide Act. Where there is a question as to whether or not a product is a pesticide within the definition contained in FIFRA and Respondent, nevertheless, registers both the product and producer establishment six months prior to the issuance of the Complaint, Complaint should not have been issued.

Federal Insecticide, Fungicide and Rodenticide Act. The civil penalty provisions of the Act are not intended to be punitive, but are intended to be preventative in nature.

Appearances:

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ORDER GRANTING RESPONDENT'S
MOTION TO DISMISS*

Complaint in this matter was issued October 17, 1983, by the Director, Toxics and Waste Management Division, Region IX, San Francisco, California (EPA). A timely Answer was filed November 9, 1983, by South Coast Chemical, Inc. (SCC). The Complaint alleges in two counts that as of January 25, 1983, the date of the inspection of Respondent's facilities, Respondent offered for sale or held for sale the unregistered pesticide SC 6009 which was produced at Respondent's unregistered establishment in Santa Ana, California in violation of Sec. 12(a)(1)(A) and Sec. 12(a)(2)(L), respectively. A penalty of $2,200 is proposed for Count I and $1,800 for Count II, or a total of $4,000.

Prior to the date of the inspection, Respondent, on January 24, 1983, sent a letter to EPA inquiring whether aqueous chlorine dioxide, a product produced by the SC 6009 chemical process, constitutes a "pesticide" within the FIFRA definition.

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*Complainant moved for an Accelerated Decision which is hereby denied.

Respondent, having become aware that a similar process and product was not considered a pesticide as used by another company and with the advent of new regulations regarding the use of these chemicals during the questioned process, sent the above inquiry.

Subsequently, the EPA channelled the SCC letter through various EPA officials, seeking an answer to the SCC inquiries. After several weeks of awaiting a response from the EPA, Respondent consulted with Dr. Reto Engler, then EPA Chief, Disinfectants Branch, Registration Division, Office of Pesticides and Toxic Substances in Washington, D. C., in whose hands the response to the letter and questions ultimately rested. Thereafter, Respondent voluntarily agreed to register its process and the affiliated establishment, and promptly did so in March and April of 1983. Respondent never received answers from the EPA to its inquiries of January 24, 1983.

Nevertheless, on October 17, 1983, EPA issued the instant Complaint against Respondent alleging that "on or about January 25, 1983" -- one day after Respondent had sent its initial inquiry to the EPA regarding registering SC 6009 and the related establishment -- Respondent had violated the FIFRA registration requirements. The Complaint focused on Respondent's production and distribution of SC 6009, a process producing the end product aqueous chlorine dioxide. This product is used for disinfecting produced water, e.g., water pumped out of the ground as a result of oil production.

The question to be decided here is not the constitutionality of FIFRA, or whether or not the subject process or product is a pesticide under FIFRA, but rather the motive behind the issuance of the Complaint in light of the facts here presented.

Prior to the inspection, Respondent, having become aware of a similar situation, made inquiry of EPA concerning its product. No definitive answer was ever received. Due to an uncertainty during this period as to the applicability of FIFRA to the product, Respondent, nevertheless, registered both the product and the establishment in March and April 1983, six months prior to the issuance of the Complaint.

Complainant alleges that the letter of January 25, 1983, was sent only after the Region had commenced its investigation into the matter. This statement is not substantiated in the record. Respondent's action could have been precipitated by its knowledge gained from a company with a similar problem or the advent of new regulations involving the product.

The sanctions permitted by FIFRA are preventive in nature and are not intended to be punitive. The good faith efforts of Respondent should have been taken into account.

The Motion To-Dismiss the Complaint against Respondent is hereby granted with prejudice.

Edward B. Finch
Chief Administrative Law Judge

Dated: November 27, 1984
Washington, D. C.