UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

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In the Matter of	)	
	)	
First U. S. Chemical,	)	Docket No. IF&R 04-8414-C
	)	
Respondent	)	

1. Federal Insecticide, Fungicide and Rodenticide Act

Respondent, because of its admitted failure to prepare and file its annual report with the U. S. Environmental Protection Agency Regional Office on or before February 1, 1984, in accordance with 40 CFR 167.5(c), and to furnish the information required by 40 CFR 167.5(a), violated said regulation and Section 7 of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 USC 136e.

2. Federal Insecticide, Fungicide and Rodenticide Act

Section 12(a)(2)(L) of FIFRA, 7 USC 136j(a)(2)(L), provides that it is unlawful for any person who is a pesticide producer to violate any of the provisions of Section 7 of FIFRA.

Appearances:

For Complainant: Donna Matthews Post, Esquire
Office of Regional Counsel
U. S. EPA, Region IV
345 Courtland St., NE
Atlanta, GA 30365

For Respondent: Mr. Bruce Moss
Technical Director
First U. S. Chemical
289 Monroe
Memphis, TN 38103

ACCELERATED DECISION *

Complaint in this proceeding was issued by Director; Air and Waste Management Division; U. S. Environmental Protection Agency; Atlanta, Ga., on May 25, 1984, alleging that Respondent failed to submit to the Administrator on or before February 1, 1984, its annual report consisting of information on the types and amounts of pesticides produced and/or distributed by the registered establishment as required by Section 7(c)(1) of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), [7 USC §136e(c)(1)] and 40 CFR §167.5(c) which is a violation of Section 12(a)(2)(L) of FIFRA [7 USC §136j(a)(2)(L)]. And that on April 3, 1984, Respondent received via certified mail a letter from EPA Region IV constituting a "Notice of Warning for Failure to File Annual Pesticide Report" which granted Respondent an additional 20 days after April 3, 1984, within which to file its annual report. Respondent failed to respond to the letter within those 20 days.

Answer was filed timely in the form of two letters, June 11, 1984, and June 19, 1984, indicating that Respondent had experienced a serious breakdown in company's inner communication resulting in a belief on behalf of all concerned that the Respondent was in compliance. Respondent had apparently submitted previous annual reports and, therefore, had knowledge of the requirement.

* Sec. 22.20(b) provides that this decision constitutes an Initial Decision of the Presiding Officer (Administrative Law Judge) and shall be filed with the Regional Hearing Clerk.

In its Answer, Respondent also stated that the high fine ($800.00) for failure to file one yearly report is too severe since no damage was done to any phase of the environment, nor to any living thing.

Complainant filed Motion For Accelerated Decision dated August 2, 1984, pursuant to the Rules of practice, 40 CFR 22.20(a) requesting a decision in favor of Complainant in that no genuine issue of material fact exists and Complainant is entitled to judgment as a matter of law. I agree.

By Order dated August 17, 1984, Respondent was allowed until September 7, 1984, to respond to the Motion For Accelerated Decision and to address specifically the assessment and amount of the proposed civil penalty.

By letter dated August 16, 1984, Respondent made an offer of a negotiated settlement. Complainant did not respond thereto.

By Order dated December 11, 1984, the parties were advised that, "It is my intention to rule upon the Motion For Accelerated Decision without hearing within 10 days unless I hear from the parties thereto." No responses were received.

Findings of Fact

1. First U. S. Chemical, hereinafter referred to as the Respondent, is located in Memphis, Tennessee.

2. The Respondent is a "person" as defined by Section 2(s) of FIFRA [7 USC §136(s)] and as such is subject to FIFRA and the regulations promulgated thereunder.

3. Respondent is a "producer" as defined in Section 2(w) of FIFRA [7 USC §136(w)] and 40 CFR §167.1(d).

4. Respondent's plant is registered under EPA Establishment No. 22558-TN-01.

5. Respondent failed to submit to the Administrator on or before February 1, 1984, its annual report consisting of information on the types and amounts of pesticides produced and/or distributed by the registered establishment as required by Section 7(c)(1) of FIFRA [7 USC §136e (c)(1)] and 40 CFR §167.5(c) which is a violation of Section 12(a)(2)(L) of FIFRA [7 USC §136j(a)(2)(L)].

6. On April 3, 1984, Respondent received via certified mail a letter from EPA Region IV constituting a "Notice of Warning for Failure to File Annual Pesticide Report" which granted Respondent an additional 20 days after April 3, 1984, within which to file its annual report. Respondent failed to respond to the letter within those 20 days.

7. Respondent has violated Section 7(c)(1) of FIFRA which constitutes a violation of Section 12(a)(2)(L) of FIFRA.

8. Respondent's gross sales for 1983 were between $100,000.00 and $400,000.00, placing Respondent in Category II of Guidelines for the Assessment of Civil Penalties.

Discussion and Conclusion

Exhibit No. 1, the Answer to the Complaint (a letter dated June 11, 1984, from Respondent) admits the violation alleged in the Complaint. Respondent again admits the violation in Exhibit No. 2, a letter dated June 19, 1984.

The only issue that remains to be decided is the amount of the penalty.

The guidelines for the assessment of civil penalties for a violation of FIFRA, as amended, are contained in a document entitled "Civil Penalties Under the Federal Insecticide, Fungicide and Rodenticide Act, as amended [39 Fed. Reg. 27711, et seq., (July 31, 1974)]," Complainant's Exhibit No. 3. These guidelines establish a uniform system for penalty assessment for the varying violations of FIFRA. The guidelines take into account the factors required to be considered by Section 14(a)(4) of FIFRA:

> In determining the amount of the peanlty, the Administrator shall consider the appropriateness of such penalty to the size of the business of the person charged, the effect on the person's ability to continue in business, and the gravity of the violation.

The proposed penalty for the alleged violation was modified by a memo entitled "Interim Deviation from Civil Penalties Schedule" issued April 22, 1975, Exhibit No. 4.

As shown in Exhibit No. 5, Affidavit of Sharon Simons, the "size of the business" and the "gravity of the violation" were both factors in determining the penalty amount.

The "size of the business" was based on an "Establishment Inspection Report" concerning an inspection on March 3, 1983, by State Inspector James B. Martin, indicating the Respondent had Total Annual Sales of $150,000.00. Exhibit No. 6.

With respect to the effect on "the person's ability to continue in business," Complainant has asked for any financial information that might be used to mitigate the said penalty and none has been received.

Complainant contends that Respondent's reasons in EPA Exhibits Nos. 1 and 2 for failing to file the annual report offer no basis for reduction of the proposed penalty.

And further, that Complainant is not required to send any notice of failure to submit the annual report prior to filing a Complaint, other than those notices which were sent in this case.

Complainant contends that it has shown that the proposed penalty was established in accordance with the policy guidance and that the amount is fair and equitable. The penalty for this violation by a Company whose gross sales of all business operations are between $100,000.00 and $400,000.00 has remained $800.00 since April 22, 1975, when it was reduced from $1,250.00. However, Respondent has submitted information that should mitigate the penalty.

The reasons asserted by Respondent with regard to harm to man or the environment are certainly not germane to the appropriateness of a civil penalty. The requirement that the annual report be filed is a necessary and required part of the legislative scheme to enable the EPA to properly perform its function pursuant to FIFRA.

However, since the sanctions of FIFRA are preventative in nature, as opposed to punitive, and taking into consideration (1) the size or nature of the Respondent's business, (2) the Respondent's ability to continue in business in light of the penalty proposed, and (3) the gravity of the alleged violations contained herein, it is my opinion that a penalty of $400.00 would serve this purpose. Respondent, except for this one instant, has complied with the filing requirements of FIFRA.

PROPOSED FINAL ORDER [1/]

1. Pursuant to FIFRA §14(a) (7 USC 1361(a)), as amended, a civil penalty of $400.00 is assessed against Respondent, First U. S. Chemical, for violation of FIFRA §12(a)(2)(L) (7 USC 136j(a)(2)(L)), as amended.

1/ 40 CFR 22.27(c) provides that this Accelerated 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 herein or the Administrator elects to review the Accelerated Decision.

Section 22.30(a) provides for appeal herefrom within 20 days.

2. Payment of $400.00, 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. EPA, Region IV, a cashier's check or certified check, made payable to the Treasurer, United States of America.

Edward B. Finch
Chief Administrative Law Judge

Dated: February 5, 1985

Washington, D. C.