UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
L.B. Chemical Co., Inc.,	)	Docket No. IF&R-04-8406-C
	)	
Respondent	)	

1. FIFRA - Civil Penalty - Producing pesticides at an unregistered establishment - While cancellation of a producer establishment registration should ordinarily be done on notice to the producer, the failure to give notice held not to be prejudicial when registration was cancelled after Respondent had written the EPA that it was no longer producing pesticides and Respondent then resumed production without informing the EPA of that fact.

2. FIFRA - Civil Penalty - Fact that five months elapsed between discovery of violation and issuance of complaint held irrelevant to determining gravity of violation for purposes of assessing proper penalty.

Appearances:

James Sargent, Esquire, United States Environmental Protection Agency, Region IV, Atlanta, GA, for Complainant.

Mr. David L. Lowi, Chairman of the Board, L.B. Chemical Company, Inc., 321 North 10th Street, Gadsden, Alabama, for Respondent.

ACCELERATED DECISION

This is a proceeding under the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), section 14(a), 7 U.S.C. 136 l(a), instituted by a complaint issued on May 28, 1984. 1/ The complaint alleged that Respondent, L.B. Chemical, Inc., produced three pesticides at an unregistered establishment in violation of FIFRA, section 12(a)(2)(L), 7 U.S.C. 136j(a)(2)(L), and that one of the pesticides was adulterated in that its strength or purity fell below the professed standard or quality expressed on its labeling, and one was misbranded in that its label bore the incorrect product registration number, both acts being in violation of FIFRA, section 12(a)(1)(E), 7 U.S.C. 136j(a)(1)(E). The complaint originally requested a penalty of $4420, but on Respondent furnishing evidence of the size of its business, the complaint was amended to request a penalty of $2860.

Respondent appearing by its Chairman of the Board contended that the violations were inadvertent and the proposed penalty is excessive.

This case is now before me on Complainant's motion for an accelerated decision pursuant to 40 CFR 22.20(a). A brief history of the prior proceedings in this case will explain the present posture of the case on this motion.

1/ FIFRA, Section 14(a)(1) provides as follows:

> 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.

By my letter dated September 25, 1984, the parties were directed to make a prehearing exchange of information on October 25, 1984, since there was no prospect for settlement. Respondent, instead of a complete response, in a letter dated October 24, 1984, stated that before proceeding with the adulteration charge in Count II of the complaint it would like to settle the charge in Count I of the complaint of producing pesticides at an unregistered establishment. To that end, Respondent enclosed certain information with respect to that charge. Complainant responded, properly treating the letter as a motion for a partial accelerated decision. On November 21, 1984, I issued an order denying a partial accelerated decision, stating that while the facts showed that Respondent had no establishment registration at the time of the alleged violation, there was an unresolved issue as to whether an establishment registration earlier held by Respondent had been properly cancelled. The parties were directed to submit their prehearing exchange by December 10, 1985. The next correspondence received from Respondent was a letter dated November 16, 1984, sent before I had issued my order and also apparently sent before receiving Complainant's response to Respondent's letter of October 24, 1984. In this letter, Respondent stated it was addressing the adulteration charge in Count II of the complaint raised certain questions about the propriety of the penalty being proposed and enclosed certain documents which it considered relevant to that charge. On receipt of my order, Respondent then requested that the time for making the prehearing exchange be extended because it had not had time to "react" to Complainant's response to Respondent's letter of October 24, 1984, and also because Respondent wanted to await an answer to its letter of November 16, 1984. The time for the

prehearing exchange, accordingly, was extended to December 17, 1984. At the request of the parties, the time was again extended to January 17, 1985, to allow the parties to renew settlement discussions. Such discussions apparently being unsuccessful, Complainant filed its motion for an accelerated decision.

In reply to Complainant's motion, Respondent by letter dated January 24, 1985, requested that I consider some items which it stated Complainant failed to acknowledge as part of Respondent's prior responses and telephone discussions with Complainant. Presumably because of this, Respondent stated that it was making no attempt to argue any of the topics presented in Complainant's motion. Respondent, however, enclosed letter from the registrant of the pesticides for my consideration, took issue with Complainant characterizing Respondent as having been intransigent in its dealings with the EPA, and pointed out the several settlement offers made by Complainant and the counter-offer made by Respondent.

I have examined the record as presently constituted, and there would be little purpose in continuing the exchange of correspondence which Respondent seems to contemplate. The papers before me demonstrate that there is no genuine issue of material fact either as to the violations or the proper penalty to be assessed, and that the matter is ripe for an accelerated decision.

Findings, Discussion and Conclusion

Respondent does not deny that at the time of the investigation on August 18, 1983, it held for sale or distribution the pesticides L.B. QUAT 900, L.B. QUAT 450, and L.B. QUAT 160, which had been produced at

Respondent's "establishment" in Gadsden, Alabama. 2/ To the EPA's contention that the establishment was not registered, Respondent replies that it did have an establishment number and if the number was incorrect or had been improperly obtained, the fault was not Respondent's. 3/ Respondent's argument, however, is based upon a misunderstanding of the distinction between a supplemental registration to distribute pesticides, and the registration of an establishment to produce them.

Respondent at the time of the investigation was not the registrant of these three pesticides but had supplemental registrations obtained through the registrant to distribute the products under Respondent's brand name. 4/ A supplemental registration permits the distribution of pesticides under the distributor's brand name, but confers no authority in itself to manufacture, package or repackage pesticides. 5/

Respondent introduced correspondence showing that after being notified of the charged violations, Respondent applied for an establishment registration and was given Establishment No. 9245-A1-01. 6/ A similar establishment

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2/ Respondent's letters of June 7, 1984, and October 24, 1984, Exhs. 1 and 2 to Complainant's motion. The EPA investigator in his memorandum of the investigation concluded that Respondent was repackaging the pesticides. Respondent was furnished with a copy of this memorandum. See Respondent's letter of November 16, 1984. Repackaging constitutes production under the EPA's regulations, 40 CFR 167.1(c).

3/ Respondent's letters of June 7 and October 24, 1984; see also Respondent's letter of August 15, 1984, to Roy P. Clark, responding to the amended complaint.

4/ See letter of Onyx Chemical Company dated January 10, 1985, enclosed with Respondent's letter of January 24, 1985.

5/ 40 CFR 162.6(b)(4).

6/ Respondent's letter of August 15, 1984, to Roy P. Clark, see also Respondent's letter of July 7, 1984, to Charles Brooks.

number had apparently been issued to Respondent in 1973, namely, No. 9245-AL-1. 7/ The EPA, however, had cancelled that establishment registration after receipt from Respondent of the following letter dated October 1, 1974:

> U.S. Environmental Protection Agency
> 1421 Peachtree St., N.E.
> Atlanta, Georgia 30309
>
> Attention: Mr. Roy P. Clark, Chief,
> Pesticides Branch
>
> Gentlemen:
>
> This is in response to your letter of September 13, 2974 [sic] calling to our attention the necessity of filing a Pesticide Report - EPA Form 3540-16.
>
> We see no need of reporting as requested since we ceased the compounding of any economic poison which would require registration with EPA.
>
> As discusssed with your Inspector, Mr. Martin J. Young on July 24, 1974, any material sold by us in the future will bear the registered labels of some reputable supplier to us.
>
> If any other response is required, please notify us at once outlining what needs to be accomplished.
>
> Yours very truly,
> L.B. Chemical Co., Inc.
>
> David L. Lowi, Vice Pres. 8/

The termination of Respondent's earlier establishment registration appears to have been done without any notice to Respondent. The regulations do provide that failure to submit an annual report of pesticide

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7/ See enclosure with Respondent's letter of October 24, 1984.

8/ Respondent's letter is attached as Exh. 3 to Complainant's motion. The facts as to cancellation of the establishment registration is set forth in Complainant's response to Respondent's motion for a partial accelerated decision.

production as required by the regulations "may result in termination of establishment registration." 9/ While this is notice that the failure to report is grounds for cancellation, it is questionable whether it is sufficient to put one on notice that cancellation is to be accomplished automatically without any notification of the action. Cancellation without notice could be unfair to one who at a later date resumes production on the good faith belief that it still has a valid registration. Indeed, the internal policy of the Agency suggests that cancellation be upon notice. 10/ In this case, however, no unfairness to Respondent is shown. First the action cancelling the establishment registration does seem consistent with the intent of Respondent's letter. Second, as Respondent's letter shows, Respondent knew it was required to file annual reports of any pesticide production. The correspondence in the file indicates that Respondent has been producing the pesticides involved in this case since it obtained the supplemental registrations from the registrant in 1979. 11/ Respondent's activities may have consisted only of repackaging the pesticides. 12/ Repackaging, however, is production under the regulations, and knowledge of the reporting requirements should

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9/ 40 CFR 167.3

10/ See memorandum of Sanford W. Harvey, Jr., Exh. 4 to Complainant's motion.

11/ See Respondent's letters of June 7, 1984, and October 24, 1984, Exhs. 1 and 2 to Complainant's motion. See also Respondent's letter of October 17, 1983, to the Alabama Department of Agriculture and Industries, Exh. 7 to Respondent's letter of November 16, 1984.

12/ See supra, p. 4, n. 2.

have put Respondent on notice of this, or at least have led Respondent to the regulations where it would have been clear that this was the case. 13/ Yet there is no evidence of Respondent having filed annual production reports with the EPA, or notifying the EPA in any way that it was resuming production. It does appear, therefore that Respondent has simply been ignoring the establishment registration requirements.

Respondent as evidence of its good faith points to a statement in a letter it received from the registrant to the effect that the EPA should not have approved a supplemental registration for Respondent in 1979, if Respondent did not have an establishment number. 14/ Since it is clear from the document filed that Respondent was obtaining a supplemental registration by a distributor, and since the EPA's regulations plainly state that a supplemental registration of a distributor does not permit the distributor to manufacture or package the distributed product, it is difficult to understand what the registrant meant by its statement.

Respondent also has not denied the allegations that its L.B. QUAT 900 was adulterated in that it contained only 7.66% quarternary ammonium chloride compounds instead of the 9.0% represented on the label, and that the L.B. QUAT 160 was misbranded in that its label failed to bear the

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13/ See 40 CFR 167.1(c). It should also be noted that a supplemental registration expressly precludes repackaging by the distributor. 40 CFR 162.6(b)(4)(i)(D).

14/ See letter from Onyx Chemical Company to Respondent dated January 10, 1985, included with Respondent's letter of January 24, 1985.

correct product registration number. In addition, there is evidence in the file substantiating the allegations. 15/

Respondent contends that since the EPA waited almost five months after receiving the analysis report for the pesticides to issue the complaint, did not communicate with Respondent in the interim, and let Respondent continue to manufacture its products, the product violations cannot be considered significant enough to justify the proposed penalty. 16/ The only product violation for which the EPA has proposed a penalty is Respondent's holding for sale or distribution of the under-strength formulation of L.B. QUAT 900. The EPA has classified this violation under the penalty assessment guidelines as one whose adverse effects are unknown, calling for a penalty of $1870, for a company with a business the size of Respondent's. 17/

The seriousness of the violation is determined by the nature of the act itself, here the distribution of a pesticide which may be ineffective because of the deficiency in its chemical compositon. Perhaps the EPA hsa

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15/ See analysis report for L.B. QUAT 900, Exh. 4 to Respondent's letter of November 16, 1984; compare also the registration number of 2311-12, shown on the approved supplemental registration for L.B. QUAT 160 (enclosed with Respondent's letter of January 24, 1985) with the registration number of 2311-14 which the EPA inspector reported he had found on the label (Exhs. to Respondent's letter of November 16, 1984).

16/ Respondent's letter of November 16, 1984.

17/ See amended complaint, and FIFRA Civil Penalty Guidelines, 39 Fed. Reg. 27711, 27715 (July 31, 1974). The violation is classified as chemical deficiency, level B, and Respondent has been placed in Category III with respect to its size of business. An incomplete copy of the Civil Penalty Guidelines is attached as Exh. 5 to Complainant's motion.

not acted with the urgency that Respondent seems to assume is appropriate to justify the proposed penalty. The fact remains that there has been a violation which must be dealt with. Respondent overlooks that the purpose of a penalty is to deter future violations, and to do this the penalty must be large enough to remove any economic incentive for noncompliance. Given the business size of Respondent, the proposed penalty would appear to be reasonable in amount.

Respondent argues that the EPA's proceeding against Respondent for product adulteration conflicts with what Respondent has been told by Alabama Department of Agriculture and Industries. The letter from the Alabama Department of Agriculture and Industries which Respondent relies upon seems entirely consistent with the EPA's position in this matter, for it merely informs Respondent that its labeling must show Respondent's distributor number. 19/

The EPA has proposed a penalty of $1870 for the adulterated product violation and a penalty of $990 for failing to register its establishment or a total penalty of $2860. These penalties are consistent with the EPA's

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18/ Respondent's letter of November 16, 1984.

19/ Letter of Alabama Department of Agriculture and Industries to Respondent dated September 29, 1981.

civil penalty guidelines. 20/ Since they are the recommended penalties before considering whether there are circumstances that would justify mitigating the penalty, it remains to be determined whether there are such circumstances here.

The file does show that Respondent has acted promptly to remedy the violations and appears to have fully cooperated with the EPA and State investigations. This is commendable but it does not appear that Respondent has done more than what it would be expected to do under the law. Complainant characterizes Respondent's answer dated June 7, 1984, as evidencing Respondent's "intransigence in the face of acknowledged violations." 21/ Respondent is correct in stating that such characterization is undeserved. The letter does reflect Respondent's honest belief that the violations have risen despite the exercise of what Respondent considers due care on its part. Weighing against mitigation of the penalty, however, is that the letter also indicates that the deficiency in formulation may well have resulted from Respondent's lack of sufficient quality control over its pesticides to insure that they meet the label specifications. The reasons why the penalty for not registering its establishment should not be reduced has already been stated above. Financial data furnished by Respondent for the years ended December 31, 1983, and 1982, indicate that while the proposed penalty is a not an insignificant amount

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20/ See supra, p. 8 for discussion of penalty for the adulterated product violation. The penalty of $990 for failing to register its pesticide producing establishment is that proposed for one with a business the size of Respondent's who had no knowledge of registration requirements.

21/ Complainant's motion at 4.

for an operation of Respondent's size, payment will not adversely affect Respondent's ability to continue in business. On consideration of the entire record, accordingly, it is concluded that $2860 is the appropriate penalty. 22/

ORDER 23/

Pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act, section 14(a)(1), 7 U.S.C. 136 l(a)(1), a civil penalty of $2860 is assessed against Respondent L.B. Chemical Company, Inc. for violations of the Act found herein.

Payment of the full amount of the civil penalty assessed shall be made within sixty (60) days of the service of the order upon Respondent by forwarding to the Regional Hearing Clerk a cashier's check or certified check payable to the Treasurer, United States of America.

Gerald Harwood
Gerald Harwood
Administrative Law Judge

DATED: Feb 8, 1985

22/ Respondent also points to its having been investigated by the State about a month after the EPA's investigation at which samples of the pesticides involved in this case were again taken (Respondent's letter of November 16, 1984). The receipt for the samples furnished on this investigation refers to samples having the same sample numbers as the samples taken in the earlier investigation on August 18, 1983. The test reports also refer to the same samples. Exhs. 1-6 to Respondent's letter of November 16, 1984. It would appear, therefore, that Respondent has been furnished with test reports of the samples taken, notwithstanding that the receipt for the samples is dated later than the date on which they were reported as having been collected.

23/ Unless an appeal is taken pursuant to the Rules of Practice, 40 CFR 22.30, or the Administrator elects to review this decision on his own motion, the Initial Decision shall become the final order of the Administrator. See 40 CFR 22.27(c).