9/26/86

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Cascade Chemical, Inc.,	)	Docket No. 1086-03-40-012
	)	
Respondent	)	

Federal Insecticide, Fungicide and Rodenticide Act. The filing of required annual reports constitutes an essential part of the enforcement and compliance tools of the Environmental Protection Agency.

Appearances:

Mr. A. D. B. Lambie
Cascade Chemicals Inc.
16081 S.E. Evelyn Street
P. O. Box 403
Clackamas, OR 97015

For Respondent

Richard Mednick, Esquire
Office of Regional Counsel
U. S. EPA, Region X
1200 Sixth Avenue
Seattle, WA 98101

Counsel for Complainant

ACCELERATED DECISION [1/]

By
Honorable Edward B. Finch
Administrative Law Judge

This is a proceeding under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), as amended, Section 14(a)(1), 7 U.S.C. §136 l(a)(1) for assessment of a civil penalty for alleged violations of the Act.[2/]

Complaint was issued against Respondent Cascade Chemical, Inc. on December 21, 1984, charging Respondent with failure to submit to the Administrator an Annual Pesticide Report for the year 1985 within the time allowed as required by Section 7(c)(1) of FIFRA (7 U.S.C. §136e(c)(1)) and 40 CFR 167.5(c) which constitutes a violation of Section 12(a)(2)(L) of FIFRA (7 U.S.C. §136j(a)(2)(L)). A penalty of $3,200.00 was proposed.

Complaint alleges that Respondent is a "producer" of pesticides within the meaning of 40 CFR 167.1(c) and (d). The site where Respondent produces such pesticides is located in Clackamas, Oregon, and is a "producer establishment" within the meaning of 40 CFR 167.1(b).

1/ An Accelerated Decision constitutes the Initial Decision in this proceeding. 40 CFR 22.20(b).

2/ 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.

Respondent filed a timely Answer in which it admits to having received documents for the filing of its annual report on December 10, 1985. Respondent admits to "failing to fill in the necessary production forms before February 1, 1986." Respondent also admits in its letter/Answer dated May 6, 1986, that annual pesticide production reports have been submitted to EPA late for the past several years. Respondent attributes these late submittals to the failure of EPA in providing blank forms, and to the necessity of having to file a second report each year because the first report was not received by EPA.

Findings of Fact

1. Respondent is a corporation with its principal place of business located in Clackamas, Oregon.
2. Respondent is a person as defined in Section 2(s) of FIFRA (7 U.S.C. 136(s)).
3. Respondent received the Annual Report Forms on December 10, 1985.
4. EPA did not receive the Annual Report until May 9, 1986, three months past the due date of February 1, 1986.
5. Respondent's failure to file a timely Annual Report is a violation of FIFRA which subjects Respondent to the assessment of a civil penalty.
6. Respondent, in the year 1985, had a gross income of less than $1,000,000.00, i.e., $181,828.00.

Discussion

According to available information, Respondent manufactures and distributes a product called "Yippee Pet Shampoo." Respondent places pesticides into the "Yippee Pet Shampoo" during the manufacturing process, and so effectively "produces" a pesticide, and is a "producer" of pesticides within the meaning of 40 CFR §167.1(c) and (d).

Respondent submitted an application for the registration of its pesticide-producing establishment, which EPA received on December 12, 1982. See EPA Exhibit No. 1. As the operator of a pesticide-producing establishment, Respondent is required by Sections 12(a)(2)(L) and 7(c)(1) of FIFRA, 7 U.S.C. §§136j(a)(2)(L) and 136e(c)(1), and 40 CFR §167.5(a), to file an annual pesticide production report with EPA by February 1 of each year. As a reminder and guide to registered establishments, EPA distributes a production report blank form each year, together with filing instructions, to all registered establishments prior to the February 1 due date. A return receipt, signed and accepted by Jane Lambie, indicates that Respondent received the blank form and filing instructions for the 1985 report on December 10, 1985. See EPA Exhibit No. 2. In addition, in the letter/Answer of June 10, 1986, Respondent admits to having received these documents on December 10, 1985. Accordingly, Respondent had approximately 53 days, or almost eight (8) weeks, to fill out and submit the report to EPA. EPA did not receive the annual report until May 9, 1986, which was subsequent to issuance of the Complaint in this matter, and over three (3) months past the due date. See EPA Exhibits Nos. 3 and 4.

In the letter/Answer of June 10, 1986, Respondent admits to "failing to fill in the necessary production forms before February 1, 1986." By admitting to having failed to fill out the report in a timely manner, it is apparent that Respondent is also admitting to having failed to file a timely report, since a report must be filled out before it can be properly filed. Also, in the letter/Answer of May 6, 1986, Respondent admits that annual pesticide production reports have been submitted late to EPA for the past several years.

In the letter/Answer of May 6, 1986, Respondent attributes these late submittals to the failure of EPA in providing blank forms, and to the necessity of having to file a second report each year because the first report was not received by EPA. These contentions are without merit. As Respondent admitted in the letter/Answer of June 10, 1986, and as evidenced by the return receipt signed by Jane Lambie, see EPA Exhibit No. 2, Respondent received the blank form well before the February 1 due date. In addition, Respondent submitted an annual report in 1985 to the correct EPA address. This report was also received by EPA three (3) months late. See EPA Exhibit No. 5. The EPA address has not changed, and unless Respondent is prepared to prove the inefficiency of the U. S. mail service which it has not attempted to do, the old adage is still true that if mail is delivered to the Postal Service, the presumption is that it was delivered.

In the letter/Answer of May 6, 1986, Respondent confuses an establishment registration with a product registration. Respondent operates an establishment that is registered under EPA No. 48963-OR-01, and so is required

to file an annual production report. Product registration is a separate issue involving labeling requirements, which is not addressed in this matter, and is irrelevant to the present proceeding. See EPA Exhibit No. 4.

The remaining arguments of Respondent concern the proposed civil penalty. Since Respondent admits to having failed to file a timely annual pesticide production report, as required by Sections 12(a)(2)(L) and 7(c)(1) of FIFRA, 7 U.S.C. §§136j(a)(2)(L) and 136e(c)(1), and 40 CFR §167.5(a), and has offered insufficient justification for this failure to file, Respondent is subject to liability and a penalty pursuant to Section 14(a) of FIFRA, 7 U.S.C. §136 l(a).

EPA also seeks a ruling on the civil penalty in this matter. EPA has proposed that a civil penalty in the amount of $3,200 be assessed against Respondent for the reporting violation. This amount was calculated by assuming annual gross income sales of more than $1,000,000, and by using the published penalty policy and guidance for FIFRA set forth in the "Guidelines for Assessment of Section 14(a); Citation Charges for Violations," 39 Fed. Reg. 27711-27722 (Wednesday, July 31, 1974).

Respondent contends that gross revenues for 1983, 1984, and 1985, were respectively $147,159; $159,349; and $181,828. Respondent has substantiated these figures with proper documentation (i.e., IRS tax returns), and EPA has requested a reduced civil penalty payment of $800 based upon the FIFRA penalty policy.

Respondent argues that the amount of pesticide actually produced at the establishment, and the gross return and profit from the sale of the "Yippee Pet Shampoo" are both so small as to make the proposed EPA penalty unfair.

Neither of these factors is recognized by the FIFRA penalty policy as a valid reason for reducing the penalty. The policy considers the gross returns for Respondent's entire business as the proper factor for penalty calculation, and since this concerns a reporting violation, the amount of pesticide involved is not a factor.

Respondent also contends that there was no deliberate attempt to withhold information from EPA. The intent of Respondent is immaterial since this is a strict liability violation. Respondent attempts to frame a good faith argument for mitigation of the penalty, but it must be remembered that Respondent submitted an annual report over three (3) months late for two years in a row, and finally submitted these reports only after having been notified by EPA.

Respondent alleges that even an $800 penalty would severely affect the "cash flow" of Respondent's business. While an effect on ability to continue in business is a proper mitigating factor, Respondent offers no information to support the contention of an affected "cash flow," and a mere assertion is not a basis for reducing the proposed penalty.

Respondent has a history of FIFRA violations for failure to submit annual pesticide production reports. On April 29, 1985, EPA sent a warning letter to Respondent regarding the failure to submit a 1984 production report by February 1, 1985. See EPA Exhibit No. 6. While it is true that the previous violation did not result in an admission or adjudication of liability, nevertheless, the warning letter constituted the EPA response to a significant violation. By again failing to submit a timely production report for 1985, Respondent failed to heed this EPA warning. After two continuous years of failing to submit timely

production reports, Respondent should be assessed the maximum penalty possible in order to deter future noncompliance.

While the gravity of the violation may at first glance seem minor, it should be noted that the Federal Insecticide, Fungicide and Rodenticide Act is primarily a recordkeeping and reporting statute. EPA must keep track of chemicals which are placed on the market solely because of their toxicity to target species.

Accurate and timely reporting is necessary so that EPA may alert producers, dealers, and users of any "unreasonable adverse effects" to human health and the environment which a pesticide may be discovered to cause. Lax compliance with reporting dates creates uncertainty as to what pesticides are being produced, sold, and used by whom. This could cause substantial harm to human health and the environment should EPA need to stop the sale of a given pesticide on short notice.

Requiring producers and dealers specifically to give notice that they are selling restricted use pesticides is necessary so that EPA can conduct an efficient dealer inspection program and thereby determine whether hazardous pesticides are being made available only to competent users. Unless it can pinpoint the subject pesticide dealers, EPA cannot effectively regulate the sale and use of these toxic substances.

Conclusion

Respondent has violated 40 CFR §167.5(a), and Sections 12(a)(2)(L) and 7(c)(1) of FIFRA, 7 U.S.C. §§136j(a)(2)(L) and 136e(c)(1), by failing to submit an annual pesticide production report to EPA by February 1, 1986. Respondent has a history of FIFRA violations for failure to submit annual reports, and with the exception of annual gross revenues, Respondent has offered no factors to be considered for mitigation of the proposed penalty.

A hearing on this matter is unnecessary. There are no material issues of fact, and liability of Respondent having been alleged and admitted, EPA is entitled to judgment as a matter of law. A penalty in the amount of $800.00 is hereby assessed against Respondent for this violation of FIFRA.

O R D E R [3/]

Pursuant to Section 14(a)(1) of the Federal Insecticide, Fungicide and Rodenticide Act, as amended, a civil penalty of $800.00 is assessed against Respondent Cascade Chemical, Inc. for the violation which has been established on the basis of the Complaint herein.

3/ 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 Accelerated Decision shall become the final order of the Administrator. See 40 CFR 22.20(b).

Payment shall be made within sixty (60) days after receipt of the Final Order by forwarding a cashier's check or certified check made payable to the Treasurer, United States of America, to:

U. S. EPA, Region X
(Regional Hearing Clerk)
P. O. Box 360903M
Pittsburgh, PA 15251

It is so ordered.

Edward B. Finch
Administrative Law Judge

Dated: Sept. 26, 1986
Washington, D. C.

CERTIFICATE OF SERVICE

I hereby certify that the original of this Accelerated Decision and the Judicial file were hand-delivered to the Hearing Clerk, U. S. EPA, Headquarters, and three copies were mailed by certified mail, return receipt requested, to the Regional Hearing Clerk, U. S. EPA, Region X, for distribution pursuant to 40 CFR 22.27(a).

Leanne B. Boisvert
Leanne B. Boisvert
Legal Staff Assistant

Dated: Sept. 26, 1986