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BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:	)	
D.L. Matthews Pools, Inc.	)	I.F. & R. No. 04-8727-C
Respondent.	)	

Federal Insecticide, Fungicide and
Rodenticide Act (hereinafter FIFRA):

FIFRA:

1. Accelerated Decision - Where the Respondent in Answer admits the FACTS which support the allegations in the Complaint, an Accelerated Decision in favor of the Complainant is appropriate.

FIFRA:

2. Penalty - Where the proposed penalty was properly calculated in conformance with the penalty policy and no extenuating circumstances exist which would change the result, the proposed penalty is accepted.

FIFRA:

3. Burden of Proof - The Respondent always has the burden of proving that it is financially unable to pay the proposed penalty. Absent such proof, no reduction in the penalty should be made on that basis.

APPEARANCES:

For Complainant: Edwin Schwartz
Office of Regional Counsel
U.S. Environmental Protection Agency
Region IV
345 Courtland Street, N.E.
Atlanta, Georgia 30365

For Respondent: Dana Lee Matthews
262 N. State Road 7
Margate, Florida 33063

ACCELERATED DECISION*

Complaint in this proceeding was issued by the Director, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Atlanta, Ga. 30365 on June 7, 1987, alleging the Respondent's failure to submit to the Administrator on or before February 1, 1987, its annual report consisting of information on the types and amounts of pesticides produced and/or distributed by a 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)].

Answer was filed timely in the form of a letter dated June 12, 1987 enclosing a copy of the report and indicating that Respondent had sent the report on March 12, 1987. Respondent's representative had submitted annual reports for previous years and had signed an affidavit dated June 11, 1984 attesting to her obligation to submit said annual report. Therefore, she had knowledge of the requirement.

In its response to Complainant's Motion for an Accelerated Decision, Respondent also stated that the fine ($800.00) for failure to file one yearly report is too severe since the

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* Section 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.

chemical was used to sanitize swimming pools. Respondent indicated $800.00 would hamper her ability to pay her rent and insurance, but she offered no substantiating evidence.

Complainant contends, and supports by affidavit, that Respondent's report was not received until Respondent's June 12, 1987 letter, which enclosed a copy of its 1986 pesticide production report, was filed. Regardless of whether Respondent mailed the report on March 12 or June 12, 1987, said report was late in that it was not filed on or before February 1, 1987.

Complainant filed a Motion for Accelerated Decision dated August 18, 1987, pursuant to the Consolidated Rules of Practice, 40 CFR 22.20(a) requesting a judgment 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.

FINDINGS OF FACT

1. D. L. Matthews Pools, Inc., hereinafter referred to as the Respondent, is located in Margate, Florida.

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. 40044-FL-001.

5. Respondent failed to submit to the Administrator on or before February 1, 1987, 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. Respondent has violated Section 7(c)(1) of FIFRA which constitutes a violation of Section 12(a)(2)(L) of FIFRA.

7. Respondent's gross sales for 1986 were between $100,000.00 and $400,000.00, placing Respondent in Category II of the Guidelines for the Assessment of Civil Penalties.

DISCUSSION AND CONCLUSION

Exhibit No. 1, the Answer to the Complaint (a letter dated June 12, 1987, from Respondent) admits the violation alleged in the Complaint, Respondent again admits the violation in Exhibit No. 2, a letter dated August 24, 1987, responding to Complainant's Motion for an Accelerated Decision.

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)]," 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 penalty, 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 Karen A. Wilson, "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 a telephone conversation with an employee of the Florida Department of Agriculture.

In her letter of August 24, 1987, Exhibit No. 2, Respondent's representative indicated to the Court that payment of an $800 penalty would pose a hardship in respect to "ability to continue in business."

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

Complainant contends and shows by supporting affidavit, Exhibit No. 6, affidavit of Milo Otey dated August 16, 1987, that Respondent did not send the annual report until June 12, 1987 when it was attached to the Answer to the Complaint. Respondent contends it was sent on March 12, 1987.

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.

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 $400,00.00 has remained $800.00 since April 22, 1975, when it was reduced from $12,250.00.

Therefore, it is my opinion that a penalty of $800.00 is appropriate. Respondent, has not complied with the filing requirements of FIFRA for the years 1983, 1984, 1985 and 1986. Further, Respondent's representative signed an affidavit attesting to her knowledge of this obligation on June 11, 1984.

PROPOSED FINAL ORDER[1]

1. Pursuant to FIFRA §14(a) (7 USC 1361(a)), as amended, a civil penalty of $800.00 is assessed against Respondent, D.L. Matthews Pools, Inc., for violation of FIFRA §12(a)(2)(L), as amended.

2. Payment of $800.00, the civil penalty assessed, shall be made within sixty (60) days after receipt of the Final Order by forwarding to the Regional Hearing Clerk, a cashier's check

or certified check, made payable to the Treasurer, United States of America at her banking address:

EPA-Region IV
Regional Hearing Clerk
P.O. Box 100142
Atlanta, Georgia 30364

Dated: 12/3/87

Thomas B. Yost
Administrative Law Judge

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[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.

CERTIFICATION OF SERVICE

I hereby certify that the original of the foregoing Accelerated Decision was received by me as Regional Hearing Clerk, USEPA Region IV, a true and correct copy has hand-delivered to counsel for Complainant, and true and correct copies were served on counsel for Respondent and on the Hearing Clerk by certified mail return reciept requested. Dated in Atlanta, Georgia this 4th day of December, 1987.

Marsha P. Dryden
Regional Hearing Clerk