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HEARING CLERK

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Fremont Farmers Union	)	IF&R Docket No. VII-671C-86P
Cooperative Association,	)	
	)	
Respondent	)	

1. Federal Insecticide, Fungicide and Rodenticide Act, Section 7.

   Fact that registered pesticide establishment produced no pesticides and was willing to have its registration revoked is no defense to the assessment of a penalty for failure to file a report under Section 7.

2. Federal Insecticide, Fungicide and Rodenticide Act, Section 7.

   Because of the importance of the reports of registered pesticide establishments to the regulation of pesticides, including reports of no production, penalty of $3200 assessed for failure to file an initial report.

Appearances:

For Complainant:

Rupert G. Thomas, Esquire
U.S. Environmental Protection Agency
Region VII
726 Minnesota Avenue
Kansas City, Kansas 66101

For Respondent:

Bernard T. Schafersman, Esquire
Yost, Schafersman, Yost, Lamme
& Hillis, P.C.
81 West 5th
Fremont, Nebraska 68025

INITIAL DECISION

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

A complaint was issued against Respondent Fremont Farmers Union Cooperative Association alleging that in 1985 Respondent operated a registered pesticide producing establishment and that it failed to file the initial pesticide report required of such an establishment. A penalty of $3200 was requested. Respondent answered admitting that it had not filed the report on time but contending that the violation was unintentional and that the proposed penalty was excessive.

The case has been submitted on stipulated facts and both parties have filed post hearing briefs with proposed findings, etc.

Discussion, Conclusions and Penalty

The stipulated facts show that Respondent in March 1985, applied to register its facility at 209 East Jackson, Fremont, Nebraska as a pesticide producing establishment, specifically for the purpose of

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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.

repackaging pesticides from bulk purchases. 2/ The establishment was registered and assigned an establishment number EPA EST 43174-NB-01. Respondent was then sent an initial pesticides report form with instructions to complete and return it within 30 days of receipt. Since the form was received on May 5, 1985, it had to be submitted by June 4, 1985. No report was received and the EPA on July 15, 1985, sent Respondent a warning letter that if the report was not filed within 20 days after receipt of the letter Respondent would be subject to a civil penalty and the establishment registration will be terminated. The report was still not submitted and on May 29, 1986, the EPA sent Respondent a third commnication, this time a notice that its establishment registration would be terminated unless the report were received within 20 days. Compliance with the reporting requirements was finally achieved on June 11, 1986, after the complaint in this matter had been issued and one year after the report was originally due. 3/

Respondent has not offered any good reason why it failed to submit its initial pesticide report on time. All that is indicated by the facts

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2/ Registration of pesticide-producing establishments is required by FIFRA, Section 7, 7 U.S.C. 136e. The applicable regulations are found at 40 CFR Part 167.

3/ Paragraph 11 of the stipulation reads that Respondent "states" that it prepared and filed a pesticide production form showing "no production" on December 27, 1985. The address to which the report was sent is not given and there is no evidence of delivery to the recipient. On its face this is not a stipulation of fact but of a statement by Respondent. This statement is inconsistent with the wording of the notice of intent to terminate registration sent on May 29, 1986, which indicates that the notice was sent because no report had been received from Respondent. Because of the ambiguity of this particular stipulation and its omission of facts with respect to the actual mailing and receipt of the form, it will be disregarded. Cf. Vanity Fair Paper Mills v. Federal Trade Comission, 311 F.2 480-86 (2d Cir. 1962)(an inference may be drawn not only from what a stipulation says but from what it fails to say).

is Respondent's almost total lack of attention to the reporting requirements. 4/ The report itself is a one page form which Respondent could have easily and quickly filled out by simply showing no production, sales or distribution of pesticides.

Respondent's defense really is that because no pesticides have ever been produced at the establishment, the failure to report was a harmless error and the penalty of $3200 excessive.

The FIFRA civil penalty guidelines, 39 Fed. Reg. 27711 (July 21, 1974) elaborate upon the statutory directive that the penalty must take into account the size of a persons business, the effect on the person's ability to continue in business and the gravity of the violation. FIFRA, Section 14(a)(4), 7 U.S.C. 136 l(a)(4). The gravity of the violation is said to be a function of the potential for injury, the extent to which the applicable

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4/ The first communication from the EPA enclosing the report form with instructions to submit it within 30 days was received by Respondent, but it's Agronomy Manager, whose duty apparently was to submit the report, claimed that he could not recall ever seeing it. Letter of John W. Benson dated June 3, 1986, attached to the stipulation of facts. Since the documents were delivered to the correct address, Respondent was charged with notice of their contents whether the Agronomy Manager read them or not. In fact, however, the duty to report was imposed by the regulations and not by sending the form. See 40 CFR 167.5. The form and instructions were sent solely as a reminder. Respondent's Agronomy Manager did see the warning notice sent on July 15, 1985, but he misread it as requesting information about Respondent's registration for restricted use pesticides. Benson letter of June 3, 1986. It seems clear that his reading of the warning letter was most perfunctory, for the letter expressly refers to the regulation for submitting reports of pesticide production. In any event, Respondent's reply was sent to the wrong address. Nor is the reply itself evidence of any good faith effort by Respondent to comply with the reporting requirements, for the only information shown in it is Respondent's name and address. Respondent says that the Agronomy Manager in the letter gave the EPA information "indicating Respondent's position of no production or repackaging," but the letter itself lends no support to this claim. See additional stipulation of facts.

provisions of the Act were violated, the person's history of compliance and evidence of good faith in the instant circumstances.

The reporting requirements of Section 7 serve a useful purpose in the enforcement of FIFRA. They provide information about the production, shipments and sale of pesticides which can be used to determine the magnitude of harm and what response is needed if a problem arises with a particular pesticide.

The potential for harm lies not in whether Repondent produced any pesticides but in the importance of the reports to the regulation of pesticides. It seems self-evident that if the information on pesticide production and distribution is to serve its purpose it must be complete, and cover all registered establishments. The EPA should not have to speculate on what the facts are with respect to registered establishments that have neglected to report their production, sales and distribution of pesticides.

In short, contrary to what Respondent argues, its violation is not one simply of "procedure", which can be settled by revoking Respondent's registration. Respondent's failure to report has required the EPA to expend its limited money and resources, including bringing this lawsuit, in order to obtain information necessary to the EPA's regulatory duties. 5/

Accordingly, I find that the appropriate penalty for the violation found herein is $3200. Respondent says that the financial stress that

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5/ Respondent points to its willingness to stipulate to the facts as evidencing its desire to avoid unnecessary expense to the EPA. Efforts to avoid unnecessary litigation expenses are always commendable, but this matter would never have reached the litigating stage if Respondent had submitted its report on time.

exists on agriculture and specifically Respondent calls for placing this complaint "in its proper perspective." There is no evidence in this record to show that Respondent is unable to pay the penalty of $3200 or that payment will have an adverse affect upon Respondent's ability to continue in business. Nevertheless, the order will provide for payment of the penalty in installments if the Regional Administator so approves.

FINAL ORDER 6/

Pursuant to the Federal Insecticide, Fungicide and Rodenticide Act, Section 14(a)(1), U.S.C. 136 l(a)(1), a civil penalty of $3200 is assessed against Respondent Fremont Farmers Union Cooperative Association for violation of the Act found herein.

Payment of the civil penalty shall be made by submitting a certify or cashier's check payable to the United States of America and mailed to:

EPA - Region 7
(Regional Hearing Clerk)
P.O. Box 360748M
Pittsburgh, PA 15251

6/ 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).

Payment of the full amount shall be made within 60 days of the service of the final order unless prior thereto, upon application by Respondent, the Regional Administrator approves in writing a delayed payment schedule or an installment plan with interest, in which case payment shall be made according to said schedule or plan.

Gerald Harwood
Chief Administrative Law Judge

Dated: February 10, 1987
Washington, D.C.