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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE REGIONAL ADMINISTRATOR

In the Matter of:

Ferd Staffel Co.,
a corporation.

Respondent

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I. F. & R. Docket No. VI-117C

INITIAL DECISION

This is a proceeding under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), Section 14(a)(1), 7 U.S.C. 136 1(a)(1) (Supp V, 1975), for assessment of a civil penalty for alleged violations of the Act. It was instituted by a complaint issued on March 10, 1978, by the United States Environmental Protection Agency (Complainant) charging Ferd Staffel Co., a corporation, (Respondent) with the following violations: ^{1/}

I.D. No. 149106

1. On or about June 28, 1977, Respondent held for sale at its place of business in San Antonio, Texas, the product LIVESTOCK SPRAY.
2. Said product is a pesticide within the meaning of Section 2(u) of FIFRA [7 U.S.C. 136(u)].
3. The label on said pesticide stated that the product contained

^{1/} A list of the pertinent sections of FIFRA with parallel citations to Title 7 of the United States Code, Supp V, 1975, is appended hereto.

1.0% technical methoxychlor, whereas, the pesticide actually contained 0.70% technical methoxychlor.

4. The pesticide was adulterated under Section 2(c)(1) of FIFRA in that its strength or purity fell below the professed standard of quality as expressed on its labeling [7 U.S.C. 136(c)(1)].

5. The pesticide was misbranded under Section 2(q)(1)(A) of FIFRA in that its label bore a statement relative to its ingredients which is false or misleading [7 U.S.C. 136(q)(1)(A)].

6. The Respondent therefore violated Section 12(a)(1)(E) of FIFRA by holding for sale the adulterated or misbranded pesticide LIVESTOCK SPRAY [7 U.S.C. 136j(a)(1)(E)].

I.D. No. 149107

7. On or about June 28, 1977, Respondent held for sale at its place of business in San Antonio, Texas, the product TREE DRESSING.

8. Said product is a pesticide within the meaning of Section 2(u) of FIFRA [7 U.S.C. 136(u)].

9. The label on said pesticide stated that the product contained 0.27% copper, whereas, the pesticide actually contained 0.55% copper.

10. Said pesticide is misbranded under Section 2(q)(1)(A) of FIFRA in that the label bore a statement relative to its ingredients which is false or misleading [7 U.S.C. 136(q)(1)(A)].

11. The label on said pesticide bore the same ingredient listing and percentages as the statement submitted with the pesticide's registration.

12. Respondent therefore violated Section 12(a)(1)(C) of FIFRA by holding for sale the pesticide TREE DRESSING with a composition different from the composition described in the registration statement [7 U.S.C. 136j(a)(1)(C)].

I.D. No. 149109

13. On or about June 28, 1977, Respondent held for sale at its place of business in San Antonio, Texas, the product ROACH SPRAY.

14. Said product is a pesticide within the meaning of Section 2(u) of FIFRA [7 U.S.C. 136(u)].

15. The label on said pesticide stated that the product contained .50% diazinon (0,0-diethyl 0-(2-isopropyl-4-methyl-6-pyrimidinyl) phosphorothioate), whereas, the product actually contained .91% diazinon.

16. The pesticide was misbranded under Section 2(q)(1)(A) of FIFRA in that its label bore a statement relative to its ingredients which is false or misleading [7 U.S.C. 136(q)(1)(A)].

17. The label attached to the pesticide bore the same ingredient listing and percentages as the information submitted with the pesticide's registration.

18. Respondent therefore violated Section 12(a)(1)(C) of FIFRA by holding for sale the pesticide ROACH SPRAY, the composition of which differs from its composition as described in the statement in connection with registration [7 U.S.C. 136j(a)(1)(C)].

I.D. No. 149120

19. On or about June 28, 1977, Respondent held for sale at its place of business in San Antonio, Texas, the product FIRE ANT GRANULES.

20. Said product is a pesticide within the meaning of Section 2(u) of FIFRA [7 U.S.C. 136(u)].

21. The label on said pesticide stated the product contained 25% technical chlordane, whereas, the pesticide actually contained 6.95% technical chlordane.

22. The pesticide was adulterated under Section 2(c)(1) of FIFRA in that its strength or purity fell below the standard of quality expressed on its labeling [7 U.S.C. 136 (c)(1)].

23. The pesticide was misbranded under Section 2(q)(1)(A) of FIFRA in that its label bore a statement relative to its ingredients which was false or misleading [7 U.S.C. 136j(q)(1)(A)].

24. Respondent therefore violated Section 12(a)(1)(E) by holding for sale the misbranded or adulterated pesticide FIRE ANT GRANULES [7 U.S.C. 136j(a)(1)(E)].

I.D. No. 149126

25. On or about June 28, 1977, Respondent held for sale at its place of business in San Antonio, Texas, the product COMMERCIAL SULPHUR.

26. Said product is a pesticide within the meaning of Section 2(u) of FIFRA [7 U.S.C. 136(u)].

27. Said pesticide is not registered as required under Section 3(a) of FIFRA [7 U.S.C. 136a(a)].

28. Respondent therefore violated Section 12(a)(1)(A) of FIFRA by holding for sale the nonregistered pesticide COMMERCIAL SULPHUR [7 U.S.C. 136j(a)(1)(A)].

I.D. No. 149127

29. On or about June 28, 1977, Respondent held for sale at its place of business in San Antonio, Texas, the product SEVIN 10 DUST INSECTICIDE.

30. Said product is a pesticide within the meaning of Section 2(u) of FIFRA [7 U.S.C. 136(u)].

31. The label on said pesticide stated that the product contained 10% carbaryl, whereas, the pesticide actually contained 7.70% carbaryl.

32. The pesticide was adulterated under Section 2(c)(1) of FIFRA in that its strength or purity fell below the professed standard of quality as expressed on its labeling [7 U.S.C. 136(c)(1)].

33. The pesticide was misbranded under Section 2(q)(1)(A) of FIFRA in that it bore a statement relative to its ingredients which was false or misleading [7 U.S.C. 136(q)(1)(A)].

34. Respondent therefore violated Section 12(a)(1)(E) of FIFRA by holding for sale the adulterated or misbranded pesticide SEVIN 10 DUST INSECTICIDE [7 U.S.C. 136j(a)(1)(E)].

I.D. No. 149128

35. On or about June 28, 1977, Respondent held for sale at its place of business in San Antonio, Texas, the product NEMA MIX SOIL

FUMIGANT GRANULES. [7 U.S.C. 136j(a)(1)(E)].

36. Said product is a pesticide within the meaning of Section 2(u) of FIFRA [7 U.S.C. 136(u)].

37. The label on said pesticide stated that the product contained 8.6% nemagon (1, 2-Dibromo-3-Chloropropane and other halogenated C₃ compounds), whereas, the pesticide actually contained 5.03% nemagon.

38. Said pesticide is adulterated under Section 2(c)(1) of FIFRA in that its strength or purity fell below the professed standard of quality as expressed on its label [7 U.S.C. 136(c)(1)].

39. Said pesticide is misbranded under Section 2 (q)(1)(A) of FIFRA in that it bore a statement relative to its ingredients which was false or misleading [7 U.S.C. 136(q)(1)(A)].

40. Respondent therefore violated Section 12(a)(1)(E) of FIFRA by holding for sale the adulterated or misbranded pesticide NEMA MIX SOIL FUMIGANT GRANULES [7 U.S.C. 136j(a)(1)(E)].

I.D. No. 149129

41. On or about June 28, 1977, Respondent held for sale at its place of business in San Antonio, Texas, the product VEGETABLE DUST.

42. Said product is a pesticide within the meaning of Section 2(u) of FIFRA [7 U.S.C. 136(u)].

43. The label on said pesticide stated that the product contained 7.5% carbaryl (1-naphthyl N-methylcarbamate), whereas, the pesticide actually contained 22.1% carbaryl.

44. The label on said pesticide bore the same ingredient listing and percentages as the statement submitted with the pesticide's registration.

45. The pesticide was misbranded under Section 2(q)(1)(A) of FIFRA in that it bore a statement relative to its ingredients which was false or misleading [7 U.S.C. 136(q)(1)(A)].

46. Respondent therefore violated Section 12(a)(1)(C) of FIFRA by holding for sale the pesticide VEGETABLE DUST the composition of which differs from its composition as described in the statement required in connection with its registration [7 U.S.C. 136j(a)(1)(C)].

I.D. No. 149130

47. On or about June 28, 1977, Respondent held for sale the product ZINC SULPHATE at its place of business in San Antonio, Texas.

48. Said product is a pesticide within the meaning of Section 2(u) of FIFRA [7 U.S.C. 136(u)].

49. The pesticide is not registered as required under Section 3(a) of FIFRA [7 U.S.C. 136a(a)].

50. Respondent therefore violated Section 12(a)(1)(A) of FIFRA by holding for sale the nonregistered pesticide ZINC SULPHATE [7 U.S.C. 136j(a)(1)(A)].

The total penalty proposed to be assessed by Complainant is \$21,140.00 allocated to specific products as follows:

Livestock Spray	\$1,980.00
Tree Dressing	\$1,320.00
Roach Spray	\$1,320.00
Fire Ant Granules	\$3,080.00
Commercial Sulphur	\$3,200.00
Sevin 10 Dust Insecticide	\$1,980.00
Nema Mix Soil Fumigant	\$1,980.00
Vegetable Dust	\$3,080.00
Zinc Sulphate	\$3,200.00

Respondent filed an answer in which it contested the imposition of a civil penalty and a hearing was requested.

A hearing was then held in San Antonio, Texas, on August 22, 1978. Following the hearing the parties submitted proposed findings of fact, conclusions of law and briefs on the legal issues. These submissions have been considered, and all proposed findings not specifically adopted herein are rejected.

Complainant and Respondent entered into a Stipulation of Fact, which stipulation was offered into evidence as EPA Exhibit 1 and without objection by Respondent was admitted. ^{2/} Said stipulation is hereby adopted as partial Findings of Fact as follows:

^{2/} Respondent in its brief has made much of the fact that some evidence was not presented to support the facts which are the subject of the stipulation. The stipulation was entered into on August 8, 1978; the hearing was held on August 22, 1978, at which time said stipulation of facts was admitted into evidence as EPA Exhibit 1 without objection. Respondent cannot and will not be permitted to complain in its brief filed on October 13, 1978, that said stipulation is not binding and valid.

1. On June 28, 1977, Mr. James S. Halliday, a Consumer Safety Officer employed by the U. S. Environmental Protection Agency, Region VI, conducted a routine establishment inspection at Respondent's place of business in San Antonio, Texas. The inspection was conducted under the authority of and consistent with the prescribed procedure of Section 9 of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), as amended [7 U.S.C. 136g].

2. During the above inspection, Mr. Halliday collected samples of the following products which were identified at the time of collection by Mr. Ray Rodriguez, Respondent's Chemical Supervisor, as being held for sale: Commercial Sulphur, Zinc Sulphate, Livestock Spray, Fire Ant Granules, Sevin 10 Dust Insecticide, Nema Mix Soil Fumigant Granules, Tree Dressing, Roach Spray, and Vegetable Dust.

3. The above-named products are pesticides as defined in Section 2(u) of FIFRA, 7 U.S.C. 136(u).

4. At the time of the above inspection, the pesticides Commercial Sulphur and Zinc Sulphate were not registered with the U. S. Environmental Protection Agency as required by Section 3 of FIFRA.

5. Upon analysis of the above-collected sample of Livestock Spray by the Environmental Protection Agency Chemistry Lab in Bay St. Louis, Mississippi, it was determined that the pesticide was deficient in the amount of active ingredient, methoxychlor, contained therein. The label on said pesticide indicated a methoxychlor content of 1.0%, whereas, analysis indicated a methoxychlor content of 0.70%.

6. Upon analysis of the above-collected sample of Fire Ant Granules by the Environmental Protection Agency Chemistry Lab in Bay St. Louis, Mississippi, it was determined that the pesticide was deficient in the amount of active ingredient, chlordane, contained therein. The label on said pesticide indicated a chlordane content of 25%, whereas, analysis indicated a chlordane content of 6.95% to 7.20%.

7. Upon analysis of the above-collected sample of Sevin 10 Oust Insecticide by the Environmental Protection Agency Chemistry Lab in Bay St. Louis, Mississippi, it was determined that the pesticide was deficient in the amount of active ingredient, carbaryl, contained therein. The label on said pesticide indicated a carbaryl content of 10%, whereas, analysis indicated a carbaryl content of 7.70% to 7.83%.

8. Upon analysis of the above-collected sample of Nema Mix Soil Fumigant Granules by the Environmental Protection Agency Chemistry Lab in Bay St. Louis, Mississippi, it was determined that the pesticide was deficient in the amount of active ingredient, nemagon, contained therein. The label on said pesticide indicated a nemagon content of 8.60%, whereas, analysis indicated a nemagon content of 5.03% to 5.17%.

9. Upon analysis of the above-collected sample of Tree Dressing by the Environmental Protection Agency Chemistry Lab in Bay St. Louis, Mississippi, it was determined that the pesticide was overformulated in the amount of active ingredient, copper, contained therein. The composition of the pesticide as described in connection with its registration, indicated a copper content of 0.27%.

10. Upon analysis of the above-collected sample of Roach Spray by the Environmental Protection Agency Chemistry Lab in Bay St. Louis, Mississippi, it was determined that the pesticide was overformulated in the amount of active ingredient, diazinon, contained therein. The composition of the pesticide as described in connection with its registration indicated a diazinon content of 0.50%, whereas, analysis indicated a diazinon content of 0.90% to 0.91%.

11. Upon analysis of the above-collected sample of Vegetable Dust by the Environmental Protection Agency Chemistry Lab in Bay St. Louis, Mississippi, it was determined that the pesticide was overformulated in the amount of active ingredient, carbaryl, contained therein. The composition of the pesticide as described in connection with its registration indicated a carbaryl content of 7.5%, whereas, analysis indicated a carbaryl content of 21.6% to 22.1%.

12. Respondent's gross sales for the year 1976 were greater than \$1,000,000.00.

In addition, it is found that:

13. The proposed penalty in the Complaint and Notice of Opportunity for Hearing was calculated according to the Guidelines for the Assessment of Civil Penalties as published at 39 FR 27711 (July 31, 1974).

14. Respondent is financially capable of remaining in business after payment of the civil penalty assessed herein.

CONCLUSIONS OF LAW

1. The Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), as amended [7 U.S.C. 136-136y Supp V, 1975] and 40 CFR Parts 162 and 168 are the applicable laws.

2. Respondent violated Section 12(a)(1)(A) of FIFRA by holding for sale the nonregistered pesticides COMMERCIAL SULPHUR and ZINC SULPHATE [7 U.S.C. 136j(a)(1)(A)].

3. Respondent violated Section 12(a)(1)(E) of FIFRA by holding for sale the misbranded or adulterated pesticides LIVESTOCK SPRAY, FIRE ANT GRANULES, SEVIN 10 DUST INSECTICIDE, and NEMA MIX SOIL FUMIGANT GRANULES [7 U.S.C. 136j(a)(1)(E)].

4. Respondent violated Section 12(a)(1)(C) of FIFRA by holding for sale the pesticides TREE DRESSING, ROACH SPRAY, and VEGETABLE DUST which compositions differed from the compositions as described in the statement required in connection with registration [7 U.S.C. 136j(a)(1)(C)].

5. For the above mentioned violations, the Respondent is subject to a civil penalty under Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended, 7 U.S.C. 136 l(a).

6. Taking into consideration the size of Respondent's business, the effect on Respondent's ability to continue in business, and the gravity of the violation it is determined that a penalty of \$15,244 is appropriate.

The sole issue in this proceeding is the amount of the civil penalty. Respondent admitted in the Stipulation of Fact, EPA Exhibit 1, all of the violations alleged in the Complaint and Notice of Opportunity for Hearing and also stipulated to the size of business category of the company the year prior to the time of violation. Complainant followed the

Guidelines for the Assessment of Civil Penalties in proposing the civil penalty in the Complaint and Respondent has not challenged the use of said Guidelines. Respondent seeks, however, to reduce the proposed penalty on two bases; 1) the company has suffered a financial loss for fiscal year 1977-78, and 2) the company has shown good faith by purchasing and installing a liquid chromatograph for use in quality control during the manufacturing process. Complainant asserts these bases are insufficient under the regulations and previous administrative decisions under FIFRA to mitigate the proposed penalty.

Subpart (b) of 40 CFR 168.46 requires that the following factors be considered in assessing a civil penalty:

1. The gravity of the violation, including (a) Respondent's history of compliance and (b) evidence of good faith or lack thereof;
2. The size of Respondent's business; and
3. The effect of the proposed penalty on Respondent's ability to continue in business.

In addition, administrative decisions have also required that the gravity of violation consideration be divided into a consideration of the gravity of misconduct and gravity of harm (In Re Amvac Chemical Corporation, IX-98C, Notices of Judgment under FIFRA, No. 1499, June 1975).

Assessing the gravity of the violations committed by Respondent clearly shows that some penalty is in order. The violations charged, non-registration of two products, deficiency and overformulation for seven products, are serious violations which FIFRA is designed to prevent. In addition, not only is this Respondent's second violation concerning formulation errors, but Respondent admitted having knowledge of possible violations of FIFRA yet marketing and manufacturing the products

nevertheless. (T. 5, 8)

This is strong evidence of bad faith which cannot be overcome by Respondent's purchase of a liquid chromatograph for quality control.

"The installation of quality controls by a company producing toxic materials was long overdue, and in view of Respondent's history of compliance it has little or no weight as a mitigating factor." Amivac Chemical Corporation, supra.

In fact, the liquid chromatograph is not merely a quality control, but will be used to generate additional income by providing chemical analyses for other companies. (T. 18) Other types of mitigation, such as recall of products already sold, were not attempted. (T. 11) Ceasing to hold for distribution and sale products for which Respondent has received a complaint is hardly mitigation; such action merely avoids further violations and penalties.

The gravity of harm has been considered in determining the amount proposed for civil penalty. Most considerations are "adverse effects not probable or unknown."

It is clear from the record that Respondent is contending the proposed civil penalty is too high. Respondent has requested that the "fine [be] reduced by the amount of money paid for the chromatograph machine" since this gives Respondent a quality control it did not previously have. (T. 9) No mention of any financial hardship was made until Respondent was asked if payment of the civil penalty would put Respondent out of business. Respondent initially answered "No," payment would not put them out of business. (T. 11) Apparently considering the impact this response would have, Respondent went on to elaborate that on the basis of an unaudited

financial statements, payment would "heavily cripple" the company. (T. 12) Payment of a \$21,140 civil penalty as proposed would certainly have an impact on the company's finances. Complainant does not deny that. But whether payment would seriously jeopardize Respondent's ability to remain in business is a factor which Respondent has failed to prove. The un-audited financial statement, which is Respondent's entire basis for the financial hardship claim, indicates at the close of the 1978 fiscal year inventories of products were valued at \$953,761. Respondent also has stipulated that its annual gross sales are in excess of \$1,000,000. Respondent indicated that the projected losses of 1978 were temporary, that new marketing areas which they are opening next year should increase the business. (T. 21) Respondent would not be forced to discontinue its business by payment of the proposed civil penalty. Difficulty in payment is not a basis for mitigation.

CONCLUSION

Two pertinent considerations which influence the amount of the civil penalty assessed herein are, first, the fact that nine products manufactured by Respondent are in question in this proceeding out of a total of nineteen or twenty being manufactured or on hand at the time of the inspection (T. 25) and, second, the fact that Respondent had knowledge of its obligations under FIFRA and either chose not to proceed with required changes more expeditiously or, at the least, chose not to stop sales and then make more expeditious changes before resuming sales.

It is accordingly concluded that Respondent has violated FIFRA as alleged and found herein. Taking into account the gravity of the violations

and the size of Respondent's business, I conclude that an appropriate penalty is \$15,244 allocated as follows:

Livestock Spray	\$1,188
Tree Dressing	792
Roach Spray	792
Sevin 10 Dust Insecticide	1,188
Nema Mix Soil Fumigant Granules	1,188
Vegetable Dust	1,848
Fire Ant Granules	1,848
Commercial Sulphur	3,200
Zinc Sulphate	<u>3,200</u>
	\$15,244

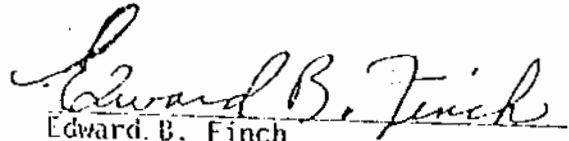
FINAL ORDER ^{3/}

Pursuant to Section 14(a)(1) of the Federal Insecticide, Fungicide and Rodenticide Act as amended (7 U.S.C. 136 1(a)(1)), a civil penalty of \$15,244 is hereby assessed against Respondent, Ferd Staffel Co., for the violations of Sec. 12(a)(1)(A) of the Act (7 U.S.C. 136j(a)(1)(A)); Sec. 12(a)(1)(C), (7 U.S.C. 136j(a)(1)(C)) and Sec. 12 (a)(1)(E), (7 U.S.C. 136j(a)(1)(E)) which have been established as charged in the complaint.

^{3/} In accordance with Sec. 168.45(c) of the Rules of Practice governing the assessment of civil penalties under the Act (40 CFR 168.45(c)), this initial decision shall become the final order of the Regional Administrator unless appealed to, or reviewed by him on his own motion, within the time therein specified.

Respondent Ferd Staffel Co. is ordered to pay the aforesaid sum by forwarding a cashier's or certified check payable to the United States of America in the amount of \$15,244 to the Regional Hearing Clerk, Dallas, Texas, within 60 days after receipt of this order.

Dated this 8th day of January 1979.


Edward B. Finch
Administrative Law Judge

Parallel Citations to Sections of FIFRA
 in the Statutes at Large and in Title 7, United States Code,
 Supp. V (1975)

<u>Statutes at Large</u>	<u>7 U.S.C.</u>	<u>Statutes at Large</u>	<u>7 U.S.C.</u>
Section 2	Section 136	Section 15	Section 136m
3	136a	16	136n
4	136b	17	136o
5	136c	18	136p
6	136d	19	136q
7	136e	20	136r
8	136f	21	136s
9	136g	22	136t
10	136h	23	136u
11	136i	24	136v
12	136j	25	136w
13	136k	26	136x
14	136 <u>l</u>	27	136y

CERTIFICATE OF SERVICE

7th JAN 16 P 1: 53

I hereby certify that a copy of the initial decision in the matter of Ford Staffel Company, Docket VI-1170, was mailed this date to Deborah Chausourne, Esq. Environmental Protection Agency, Enforcement Legal Branch, 1201 Elm Street, Dallas, Texas 75279, and by certified mail - r.m. to Mr. Jon Poulsen, President, Ford Staffel Company, P.O. Box 2500, San Antonio, Texas 78296.

January 16, 1979

Linda Murphree
Linda Murphree
Regional Hearing Clerk
Region VI