5/19/78

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE REGIONAL ADMINISTRATOR

In the Matter of	)	78 MAY 19 P 1: 16
Blue Spruce Company	)	I.F. & R. Docket No. II-180C & 181C
Respondent	)	

INITIAL DECISION

This is a proceeding under the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA").[1/] It is for the assessment of civil penalties pursuant to 7 U.S.C. Section 136 l(a)(1) for alleged violations of FIFRA, and is a consolidation of two proceedings by the complainant United States Environmental Protection Agency ("EPA"), against respondent Blue Spruce Co. One proceeding (I.F. & R. Docket No. II-181C) involves Blue Spruce's shipment of the product CHEM-SECT ALDRIN RICE SEED TREATER ("Aldrin product") and was instituted by a complaint issued on July 15, 1977. The other (I.F. & R. Docket No. II-180C) involves Blue Spruce's shipment of the products MALATHION CONC., and PYRIX 10 FOG and was instituted by a complaint issued on July 18, 1977.

1/ 7 U.S.C. Sections 135-135k, 136-136y (1970 and Supp V, 1975). FIFRA was substantially amended by the Federal Environmental Pesticide Control Act of 1972, Pub. L. No. 92-516, 86 Stat 973. The effective dates of the amendments are set out in Section 4 of the Act, 86 Stat. 998-99. The amended FIFRA is found in 7 U.S.C. Sections 136-136y (Supp V, 1975).

The violations charged were that these products were not registered at the time they were shipped by Blue Spruce Co., and that they were also misbranded.[2/] A combined penalty of $33,600 was initially proposed but was later reduced to $31,680.[3/]

Blue Spruce answered and denied the violations, contended that the penalties requested were excessive, raised certain "affirmative defenses", and demanded that all documents in the possession of the EPA which in any way relate to the allegations of the complaint, be made available to respondent in accordance with the EPA's rules of practice, 40 C.F.R. 168.09. A hearing was also demanded.

Upon filing the answers, I was assigned to conduct the proceedings in accordance with the rules of practice, 40 C.F.R. 168.40. I then corresponded with the parties concerning the issues as permitted by 40 C.F.R. 168.36(e), and directed them to exchange witness lists and proposed documentary evidence in advance of the hearing, which each side did.

2/ Shipments of unregistered pesticides are made unlawful by 7 U.S.C. Secs. 135a (a)(1) and 136j (a)(1)(A). The Aldrin product was alleged to have had on its label a false registration number. The other two products were alleged to have omitted required information on their labels. Misbranding is defined in 7 U.S.C. 136(q), and the shipment of misbranded products is made unlawful by 7 U.S.C. Section 136j(a)(1)(E).

3/ $13,600 was initially proposed for the Aldrin product violation but was later reduced to $11,680, and $20,000 was proposed for the other two products.

Pursuant to notice, a hearing was held on March 2, 1978, in Morristown, New Jersey. Blue Spruce's attorney, Mr. Joseph Seidel, appeared but said he was appearing specially to object to the conduct of the hearing since respondent had not been given access to certain documents which were claimed to be relevant to respondent's case. One document involved was the in camera portion of a district court action brought against the EPA by customers who had purchased the Aldrin product.[4/] The other documents were described generally as files of the EPA in Washington, D. C., "concerning the subject matter of the complaints."[5/] For reasons stated below, respondent's objection was overruled and the Administrative Law Judge proceeded with the hearing. Respondent's attorney refused to participate and he left the hearing. Complainant then presented its evidence in support of the allegations of the complaint.

The transcript of the hearing was filed and copies were served on complainant and on Blue Spruce on March 20, 1978. Complainant

---

4/ Alexandria Seed Company, Inc. v. EPA, No. 751361 (W.D. La. 1976), hereafter referred to as "Alexandria Seed." A copy of the transcript of district court proceedings held on January 19, 1976, from which was omitted fourteen pages (pp. 237-251) of proceedings held in chambers and ordered sealed by the court, was given by complainant to Blue Spruce, and a similar copy is included in the file in this case. Blue Spruce, on February 15, 1978, moved the court for an order to release the in camera transcript but at the time of hearing was unable to say when the transcript could be obtained. See Transcript of the hearing (hereafter "Tr.") 13.

5/ Tr. 14. Blue Spruce never identified what documents, if any, from the EPA's files had not been made available, but rather was seeking the right to search the entire registration files. See Tr. 14, 16. An EPA employee who was familiar with the files was available at the hearing for cross-examination. See Tr. 83-133. Blue Spruce chose not to take advantage of the opportunity.

has filed proposed findings of fact, conclusions of law, and proposed order in accordance with 40 C.F.R. 168.45. Blue Spruce, apparently adhering to its decision not to participate further, has filed nothing. 6/

FINDINGS OF FACT

1. Respondent Blue Spruce Company ("Blue Spruce") is a corporation with places of business located at 1390 Valley Road, Sterling, New Jersey, and 519 South Maple Avenue, Basking Ridge, New Jersey.

2. The product known as MALATHION CONC. was shipped by Blue Spruce from Basking Ridge, New Jersey to Radford, Virginia, on or about September 24, 1974. Said product is an "economic poison" within the meaning of 7 U.S.C. Sec 135(a) and a "pesticide" within the meaning of 7 U.S.C. Sec. 136(u).

3. The product known as PYRIX 10 FOG was shipped by Blue Spruce from Sterling, New Jersey, to Radford, Virginia, on or about August 21, 1975. Said product is an "economic poison" within the meaning of 7 U.S.C. Sec. 135(a) and a "pesticide" within the meaning of 7 U.S.C. Sec 136(u).

6/ It is provided in the rules, 40 C.F.R. 168.45, that the posthearing brief containing proposed findings, conclusions and order is to be submitted within 20 days after service of the transcript. On April 21, 1978, I wrote to the parties that they would have until May 8, 1978, to file their posthearing briefs, but that if the briefs had not been received by that date, and the time had not been extended by an appropriate request made before then, I would render my initial decision without waiting further for the posthearing brief. No response was received from Blue Spruce.

4. The product known as CHEM-SECT ALDRIN RICE SEED TREATER was shipped by Blue Spruce from Basking Ridge or Sterling, New Jersey, to Booth, Texas on or about November 25, 1974, and to Welsh, Louisiana, on or about June 23, 1975. Said product is an "economic poison" within the meaning of 7 U.S.C. Sec 135(a) and a "pesticide" within the meaning of 7 U.S.C. Sec. 136(u).

5. The product MALATHION CONC. was not registered pursuant to the applicable provisions of FIFRA at the time it was shipped. The registration for the product (registered under the name CHEMATHON) was cancelled by the United States Environmental Protection Agency ("EPA"), effective October 1, 1966.

6. The product PYRIX 10 FOG was not registered pursuant to the applicable provisions of FIFRA at the time it was shipped. The registration for the product was cancelled by the EPA effective September 18, 1970.

7. The product CHEM-SECT ALDRIN RICE SEED TREATER was not registered pursuant to the applicable provisions of FIFRA at the time it was shipped. An application for registration was pending before the EPA at the time.

8. The CHEM-SECT ALDRIN RICE SEED TREATER bore a false EPA registration number, 11449-23.

9. The label on or attached to the product MALATHION CONC. and the label on or attached to the product PYRIX 10 FOG were both

deficient in the following respects: they did not contain a warning or caution statement as required by 7 U.S.C. Sec. 136(q)(1)(G), and the applicable regulations, Sec. 162.9, 36 Fed. Reg. 22499 (Nov. 25, 1971); they did not bear an ingredient statement as required by 7 U.S.C. Sec. 136(q)(2)(A); they did not bear the name and address of the producer, registrant or person for whom produced, as required by 7 U.S.C. Sec 136(q)(2)(C)(i); they did not bear the name, brand, or trademark under which the pesticide is sold, as required by 7 U.S.C. Sec. 136(q)(2)(C)(ii); and they did not bear the net weight or measure of the content as required by 7 U.S.C. Sec. 136(q)(2)(C)(iii). The labeling accompanying these products did not contain the directions for use as required by 7 U.S.C. Sec. 136(q)(1)(F).

10. The products CHEM-SECT ALDRIN RICE SEED TREATER, MALATHION CONC. and PYRIX 10 FOG were misbranded within the meaning of FIFRA, 7 U.S.C. Sec. 136(q).

11. Blue Spruce violated 7 U.S.C. Sec. 135a (a)(1) and 7 U.S.C. Sec. 136j (a)(1)(A),[7/] by shipping in interstate commerce the pesticides (economic poisons) MALATHION CONC., PYRIX 10 FOG and CHEM-SECT ALDRIN RICE SEED TREATER which were not registered as required by FIFRA.

12. Blue Spruce violated 7 U.S.C. Sec. 136j (a)(1)(E) by shipping pesticides (economic poisons) which were misbranded.

7/ See Southern Mill Creek Products, Inc., No. 1479, EPA Notices of Judgment under the Federal Insecticide, Fungicide and Rodenticide Act (June 1975).

13. Taking into account the size of Blue Spruce's business, the effect on Blue Spruce's ability to continue in business and the gravity of the violations, it is determined that a civil penalty of $8,030 for the violations found is appropriate.

Discussion and Conclusions

Since Blue Spruce elected not to participate in this case, complainant was required only to put in a prima facie case. 40 C.F.R. 168.20(b). The violations herein found of shipping products which were not registered and which were misbranded are amply supported by the record made at the hearing, and no extended discussion is necessary.[8/] Consideration therefore will be given only to Blue Spruce's demand for documents which was the basis for its refusal to participate and to the size of the penalty.

8/ Complainant proposed findings to the effect that the samples relied on were properly collected and that proper chain-of-custody was maintained over them. These findings are also supported by the evidence but were not adopted because no issue was raised in Blue Spruce's answers with respect to the propriety of the collection of the samples or the custody of the samples.

In its answer Blue Spruce also contended that the registration provisions of FIFRA did not apply to its shipments of MALATHION CONC. and PYRIX 10 FOG to Radford, Virginia because they were made to an agency of the United States Dept. of Defense. FIFRA does not exclude Blue Spruce's shipments to Federal agencies from the registration requirements. Indeed, Federal agencies, themselves, are subject to FIFRA unless they are expressly exempted by the Administrator of the EPA. See 7 U.S.C. Sec. 136p.

Blue Spruce's Claim that the Hearing be Deferred Until It Obtained Access to Certain Documents

Blue Spruce refused to participate in the hearing because it had not obtained access to the in camera transcript of the district court action, and to documents claimed to be in the files of the EPA.

The in camera transcript was sought for use in attempting to impeach the EPA's conduct in not registering the Aldrin product. On January 31, 1978, a telephonic prehearing conference was held to consider Mr. Seidel's request that the hearing, which had been scheduled for February 9, 1978, be adjourned because the transcript had not yet been made available. Postponement to March 2, 1978, was granted but the parties were told that I would not delay the hearing beyond that date irrespective of whether the transcript had been obtained by then because I questioned whether the information was relevant and material. This was all set out in my report, a copy of which was served on the parties.[9/]

9/ Report dated Feb. 1, 1978, of telephonic prehearing conference held on January 31, 1978.

The alleged denial of access to documents in the EPA files was first mentioned in Blue Spruce's request for a postponement in a telegram sent on February 27, 1978, just two days before the March 2 hearing, in which Blue Spruce protested holding the hearing and said it would not participate in it.[10/] The relevancy of these files was never specifically stated. Presumably, the documents were also sought in connection with Blue Spruce's claim of bad faith by the EPA.

A telephonic conference was held on February 27, 1978, to consider this last-minute request for a postponement. I again told Blue Spruce that I questioned the relevancy and materiality of the in camera transcript, and that I had the same problem with the files claimed to be withheld. I said that I intended to go ahead with the hearing, and that if Blue Spruce refused to participate, I would treat it as a failure to appear, and, in accordance with 40 C.F.R. 168.20(b), have complainant present its case.[11/] I further said that the question of the relevancy and materiality of the in camera transcript and the agency's files could be considered at the hearing in connection with the specific offer of evidence, and if Blue Spruce did convince me that any of the documents were relevant or material, I could always continue the hearing or make some other appropriate disposition.[12/]

10/ The telegram followed my denial of Blue Spruce's request by letter dated February 21, 1978, to postpone the March 2d hearing because it had not yet obtained the in camera transcript.

11/ A copy of 40 C.F.R. 168.20(b) is appended to this decision.

12/ Report of telephonic prehearing conference held on February 27, 1978.

At the hearing Blue Spruce still refused to participate. Mr. Seidel appeared at the hearing only to object to holding the hearing. He would not discuss the issues or give any explanation for Blue Spruce's not participating other than to assert that the documents were sought by Blue Spruce as "matters of discovery." Tr. 17-22. There are no provisions for discovery in FIFRA or in the rules governing the conduct of FIFRA civil penalty proceedings.[13/] Nevertheless, the hearing could have been continued to enable Blue Spruce to obtain evidence, if it had shown that the evidence was relevant and material. I refused to delay the hearing further because whether a registration had been improperly refused or denied, the question to which the evidence related, did not appear to be an issue which ought to be considered in a civil penalty suit. There are sound reasons for such a rule, and if there are circumstances where it should not be followed, they have not been shown to be present in this case.

13/ 40 C.F.R. Part 168. 40 C.F.R. 168.04(c)(4) authorizes the Administrative Law Judge on motion or sua sponte to order the production of person, documents or other non-privileged evidence, failing which adverse inferences may be drawn. Blue Spruce never sought to invoke that rule, but instead simply insisted on its claimed right not to participate. 40 C.F.R. 168.09 allows any person to inspect any public information in the agency's files. Blue Spruce was granted access to all files pertaining to the products at the Regional Office. Whether or not these were all the papers was a matter Blue Spruce could have explored at the hearing, but it elected not to do so.

FIFRA has specific administrative remedies for persons who have been refused a registration or whose registrations have been cancelled. With respect to the cancellation of the registrations of CHEMATHON and PYRIX 10 FOG which occurred prior to the 1972 amendment of FIFRA, these provisions were contained in 7 U.S.C. Sec. 135b (1970).[14/] In the case of the non-registration of the Aldrin product, the remedies are found in the amended FIFRA, 7 U.S.C. Secs. 136a and 136d (Supp V, 1975).[15/] The procedures differ in details but they have in common certain features. Both authorize the Administrator to deny or cancel a registration when he finds that the product or its labeling do not comply with the requirements of FIFRA. Both provide that a person objecting to the cancellation or denial of registration can obtain an adjudicative administrative hearing on his objections by filing a request for a hearing within 30 days after being notified of the cancellation or denial of registration. If a hearing is held,

---

14/ Prior to December 2, 1970, FIFRA was administered by the Dept. of Agriculture. Pursuant to Reorg. Plan No. 3 of 1970, 35 Fed. Reg. 15623, effective Dec. 2, 1970, EPA was substituted for the Dept. of Agriculture and the Administrator of EPA was substituted for the Secretary of Agriculture. See footnote to 7 U.S.C. Sec 135. Reference to the Administrator and the EPA will also include the Dept. of Agriculture and the Sec'y. of Agriculture where appropriate.

15/ 7 U.S.C. Sec. 136a and 136d were also amended in certain respects not material here in 1975, Pub. L. 94-140, 86 Stat. 973 (Nov. 28, 1975).

the agency decision as to cancellation or registration issued after completion of the hearing shall be final.[16/] Both also provide that judicial review of any final agency order following a hearing may be obtained by filing a petition for review in the appropriate court of appeals within 60 days after entry of the order.[17/]

These specific statutory procedures should be the exclusive procedures for determining objections to the registration process. A civil penalty action is an entirely separate proceeding, and unless there are compelling reasons to the contrary, should not be used as the forum for determining objections to the registration process, for the following reasons:

First, the specified statutory administrative procedures and the judicial review provided do appear to be adequate to remedy any objection that may be raised with respect to the registration process. In such a case, considerations of orderly administration require that a party follow those procedures. This would appear to be true with respect to foreclosing other means for obtaining judicial review. Cf. McGee v. United States, 402 U.S. 479, 489-491 (1971). By analogy the

---

16/ 7 U.S.C. Secs. 135b(c) and 7 U.S.C. Secs. 136a(c)(6) and 136d(b). 7 U.S.C. Sec 135b(c) also provided that in lieu of requesting a hearing the registrant or applicant for registration could request that the matter be referred to an advisory committee. The Administrator would then issue his decision after considering the report of the committee, and the applicant for registration or registrant could then request a hearing within 60 days from the date of the order.

17/ 7 U.S.C. Secs. 135b(c), 136m.

same reasoning should apply to preclude review in a collateral civil penalty proceeding. The rule of exhaustion requires both that the objection be made before the appropriate forum, and that it be raised at the appropriate time in the administrative process which has been specifically designed to marshall the relevant facts and resolve the issues. See United States v. L.A. Tucker Truck Lines, Inc., 344 U.S. 33, 36-37 (1952); McGee v. United States, 402 U.S. at 484-91; A. Duda & Sons Cooperative Association v. United States, 495 F. 2d 193 (5th Cir. 1974). Here the registration process is the administrative process which has been specifically designed for marshalling the relevant facts and resolving the issues with respect to registration.

Second, to allow objections to the denial or cancellation of a registration to be heard in a civil penalty action would nullify the specific time periods prescribed in the statute for making such objections and for requesting a hearing on them. It would also provide a means for circumventing the clear-cut statutory scheme that a person make every effort to have questions about registration resolved during the registration process. A statute should be construed so as to give effect to all its parts. Weinberger v. Hynson, Westcott and Dunning, Inc., 412 U.S. 609, 633 (1973).

Finally, to allow a respondent to ship an unregistered product and wait until it was caught before it need raise objections to the non-registration would undermine Congress' purpose in prohibiting the shipment of unregistered products. Prior to the enactment of Pub. L. 88-305, 78 Stat 190 (1964), FIFRA did allow for registration of a product under protest and the agency had to bring a suit for penalty or seizure to stop the marketing of the product which did not comply with the Act. FIFRA was specifically amended to stop this procedure. As stated in H.R. Rep. No. 1125, 88th Cong., 2d Sess., reprinted in [1964] U.S. Code Cong. & Ad. News 2166:

> The purpose of this bill is to end the practice of product registration whereby the manufacturer of a pesticide can market a product despite Department of Agriculture doubts as to its effectiveness or safety. It also provides a complete appeal system whereby the applicant for registration can appeal the decision of the Department of Agriculture.

Thus, FIFRA as amended, and as it still reads today, is designed to keep pesticides off the market until they had been found in compliance with FIFRA and registered. Obviously, this purpose would be subverted if a person were free to market an unregistered pesticide and wait until a civil penalty action was brought before having to show that his product met FIFRA's requirements.

The record in this case discloses that the CHEMATHON and PYRIX 10 FOG registrations had been cancelled at the time they were shipped by Blue Spruce. For the reasons stated above, it is not open to Blue Spruce in this proceeding to go behind these cancellations and question their propriety. See also A. Duda & Sons Cooperative Association v. United States, 495 F. 2d at 198.

In the case of the Aldrin product there was an application for registration pending which had been filed in January 1974.[18/] Even if, as Blue Spruce claims, it could be shown that the EPA has been arbitrary in not granting the registration, I seriously doubt that respondent could simply go ahead and ship its unregistered product and have the agency's arbitrary action considered in a civil penalty suit as a defense to the levying of a penalty.[19/] It is not necessary, however, to go that far in deciding this case for there is no indication in the record that the EPA has been arbitrary. According to the transcript of the hearing and the exhibits, which comprise the evidentiary record in this case, the Aldrin product has not been registered for the following reasons:

18/ Complainant's Ex. 50.

19/ If the EPA arbitarily refused to register a product that complied with FIFRA and the pertinent regulations, presumably relief could be obtained in the district court under FIFRA, 7 U.S.C. 136n(c), which vests in the United States District Court jurisdiction to enforce the Act.

Registration of a pesticide is conditioned upon proof that it is safe and effective for its intended uses. The amendments to FIFRA in 1972, added the requirement that an applicant for registration must either submit its own supporting data, or if it is relying on the data of another registrant, it must either have obtained permission of the owner of the data to use the data, or have offered to pay reasonable compensation for the use of the data, except that if the data are trade secrets or other confidential information, the applicant can not use the data without the consent of the owner.[20/] The EPA informed Blue Spruce that in order to obtain a registration it must take the necessary steps to comply with this requirement. Blue Spruce refused to do so and apparently has not complied to this date.[21/] The EPA was fully justified, therefore, in not registering the Aldrin product for any use until Blue Spruce had either supplied its own data or met the requirements for using another's data.[22/]

20/ FIFRA, Section 3(c)(1)(D), 86 Stat. 979-80 (1972) (current version at 7 U.S.C. 136a(c)(1)(D) (Supp V, 1975). The EPA established interim procedures for complying with Section 3(c)(1)(D) in November 1973. 38 Fed. Reg. 31862 (Nov. 19, 1973); modified, 41 Fed. Reg. 46020 (Oct. 19, 1976).

21/ Complainant's Ex. 51-53; Tr. 123.

22/ The provision that an applicant for registration cannot rely on data owned by another to support its application without either the consent of the owner of the data or an offer to pay reasonable compensation, is not a mere technicality, as Blue Spruce seemed to regard it. Complainant's Ex. 52. It is a substantive requirement which must be complied with in order to obtain a registration. See e.g., Mobay Chemical Corp., Chemagro Agricultural Div. v. Train, 394 F. Supp. 1342 (W.D. Mo. 1975) (order granting preliminary injunction), final order, No. 75 CV 238-W-4 (filed Mar. 14, 1978); Dow Chemical Co. v. Train, 423 F. Supp. 1359 (E.D. Mich. 1976) (order granting preliminary injunction), final order, No. 76-100B7 (filed Apr. 4, 1978).

The registerability of the Aldrin product was also affected by contemporaneous cancellation proceedings against registered products containing aldrin or dieldrin. On October 1, 1974, following an administrative hearing, the Administrator of the EPA issued an order suspending, with certain exceptions, the registration and prohibiting the sale and use of all pesticides containing aldrin or dieldrin pending the completion of cancellation proceedings against the registrations. Excepted were the continued sale and use of existing stocks of registered products which were formulated prior to August 2, 1974. Also excepted were restricted termite use, the dipping of roots and tops of non-food plants, and the use in a total effluent-free mothproofing system, and registrations could still be obtained for these three limited uses.[23/]

Blue Spruce's Aldrin product was not registered on October 1, 1974, so the exception permitting the sale and use of existing stocks of registered products did not apply. Further, Blue Spruce's application for registration was for use in treating rice seed.[26/] This was a

---

23/ Shell Chemical Co., I.F. & R. Docket No. 145, Complainant's Ex. 55. The order was published in the Federal Register, 39 Fed. Reg. 37272 (Oct. 18, 1974). Judicial review was sought of the suspension order and the order was affirmed except that the case was remanded for further consideration with respect to permitting the continued sale and use of existing stocks of registered products. EDF v. EPA, 510 F. 2d 1929 (D.C. Cir. 1975). The proceedings ultimately resulted in an accelerated decision by the Administrative Law Judge on May 27, 1975, cancelling the registrations, which became the final decision of the Administrator when no appeal was filed and the Administrator on June 30, 1975, issued an order declining review. The decision of the Administrative Law Judge and the order of the Administrator declining review are in the public files of the proceeding and official notice is taken of them. 5 U.S.C. Sec 556(a).

24/ Complainant's Ex. 50.

use which was prohibited after October 1, 1974, and one for which registration could not be obtained. In order for Blue Spruce to obtain a registration after October 1, 1974, it had to be for one of the excepted uses, i.e., restricted termite use, the dipping of roots and tops of non-food plants, and the use in a total effluent-free mothproofing system, or use for manufacturing only. Blue Spruce had not taken the necessary steps to perfect an application for a revised registration at the time the products were shipped and indeed had not even done so at the time of the hearing.[25/]

In sum, there are no facts in the record to indicate that Blue Spruce's claim of arbitrary action by the EPA had any merit to it. To the contrary, the evidence shows that the EPA acted fairly and in accordance with law in dealing with Blue Spruce. It was, of course, open to Blue Spruce at the hearing through cross-examination and by presentation of its own evidence to make a record with respect to its claim of bad faith. This would by no means have been requiring Blue Spruce to go through a meaningless exercise. Since what was involved was its dealings with the EPA, Blue Spruce could have had its own knowledgeable employees testify to such dealings. Also to

---

25/ Complainant's Exs. 54, 56; Tr. 125-27.

the extent that Blue Spruce believed that there were relevant documents in the EPA's files to which it had not been given access, a witness from the EPA with knowledge of those files was available for cross-examination. The evidence so adduced would have aided in determining precisely how meritorious Blue Spruce's claim was, and whether or not the hearing should be continued in order to allow Blue Spruce to obtain the documents it was demanding. Blue Spruce voluntarily chose not to participate, however, and according to the record as constituted, its claim of arbitrary action is totally without substance.

It is entirely proper that Blue Spruce be bound by the record made in the proceeding. Its only reason for not participating in the hearing was that it disagreed with the Administrative Law Judge's ruling on how the case should proceed. No authority has been cited to support the extreme stand Blue Spruce has taken and I know of none. If respondents could walk out and bring proceedings to a standstill whenever they disagreed with a ruling, they would have it in their power to delay proceedings interminably. Such a situation should not be tolerated.[26/] By voluntarily electing not to participate,

---

26/ The courts will not stop agency proceedings in midstream to allow intermediate review of agency procedural rulings. Instead parties have been required to proceed with the case and have procedural objections considered on review of any final order that may be issued. FPC v. Metropolitan Edison Co., 304 U.S. 375, 383-84 (1938); Continental Research v. Train, 426 F. Supp. 713 (E.D. Mo. 1976). The danger of unduly delaying the administrative proceedings is one of the principal reasons for this policy. FPC v. Metropolitan Edison Co., 304 U.S. at 383-84. It is readily apparent that there is the same if not greater danger of delay if a respondent can withdraw with impunity from the proceedings until it obtains the ruling to which it thinks it is entitled.

Blue Spruce has placed itself in the same position as one who deliberately and without good cause fails to appear at hearing, and has made itself subject to the same procedures. Blue Spruce was warned that if it adhered to its decision not to participate this was how the case would be handled.[27] Thus, in accordance with the rules of procedure, Blue Spruce's non-participation has been considered as a waiver of its right to present evidence, and complainant has presented sufficient evidence to make a prima facie case.[28]

Finally, copies of the transcript of the Alexandria Seed case, except for the fifteen pages which were sealed by order of the court, were furnished by complainant both to me and to Blue Spruce. The contents were sufficient to indicate that it was most unlikely that the in camera part would have produced any information of substance in support of Blue Spruce's claim that the EPA had been arbitrary in its dealings with Blue Spruce. Alexandria Seed was a case brought against the EPA by two purchasers of the unregistered Aldrin product. One of the plaintiffs was the American Rice Growers Coop Ass'n., who received the shipment made on June 23, 1975, which is the subject of this complaint.[29]

27/ Report of telephonic prehearing conference held on February 27, 1978; Tr. 22.

28/ 40 C.F.R. 168.20(b).

29/ Complainant's Ex. 22.

These persons had purchased the Aldrin product for use in treating rice seed for commercial sale, a use which had been banned by the Administrator's suspension order of October 1, 1974.[30/] Plaintiffs did not question the fact of non-registration but were seeking relief against a "stop sale, use, or removal" order which the EPA had served on them, claiming that if they could not use the product it would affect the salability of their rice seed. That the EPA strongly opposed having the product used for treating rice seed as the plaintiffs requested is understandable, and is certainly no indication that the EPA was being abitrary with regard to not registering the product.

The Appropriate Penalty

FIFRA, 7 U.S.C. Sec. 136 l(a)(3) provides that in determining the amount of the penalty the Administrator shall consider the appropriateness of the 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. This standard is incorporated in the rules, 40 C.F.R. 168.60(b), which in addition provides that in evaluating the gravity of the violation, the Administrator shall also consider respondent's history of compliance with FIFRA and any evidence of good faith or lack thereof.

30/ See supra at 17.

Pursuant to the rules, 168.46, I am to consider the same elements in determining the penalty. I may also consult and rely on the Guidelines for the Assessment of Civil Penalties, 39 Fed. Reg. 27711 (July 31, 1974), and will do so here, since their purpose is to insure, so far as practicable, comparable penalties in the different regions for similar violations.

In the course of its prehearing submission of information, Blue Spruce submitted information showing that its average sales for the fiscal years 1974 and 1975 were about $275,000. This would put it in size Category II in the Guidelines (gross sales between $100,000 and $400,000). 39 Fed. Reg. at 27712. Complainant calculates Blue Spruce's gross sales, as averaging $490,000, but apparently arrived at this amount by adding cost of goods sold to the "net sales" shown in the financial statements. Tr. 140. Determining gross sales in this fashion would not be in accordance with usual accounting practice, which the financial statements appear to follow, and I do not believe is justified by the Guidelines. "Net sales" normally refer to sales net of returns and allowances and there is no reason to give them a different meaning in Blue Spruce's statements.[31/]

31/ Blue Spruce also in its prehearing submission furnished one page from its 1976 tax returns purporting to show a loss. The data, however, was incomplete and cannot be considered as reliable proof of Blue Spruce's actual financial condition. See Tr. 139.

Under the Guidelines, the penalty for shipping a non-registered product where the registration has been cancelled for a business in size Category II is $1,250 for each violation. Guidelines, Section 1 of the registration violations, 39 Fed. Reg. at 27713. The penalty for shipping a non-registered product where there is an application pending is $700 for each violation.

The penalty proposed by complainant under the Guidelines for the misbranding violation found with respect to MALATHION CONC. and PYRIX 10 FOG is the one to be assessed where the product lacks required precautionary labeling and the adverse effects are highly probable.[32/] For a business in size Category II the penalty is $1,250 for each violation. Guidelines, Section 1 of the labeling violations, 39 Fed. Reg. at 27713. I find that the penalty is appropriately assessed on the basis of this category of violation. MALATHION CONC. is a highly toxic chemical which should not be swallowed, or inhaled, or absorbed through the skin.[33/] Precautionary statements are needed, accordingly, to alert the user to these dangers and tell him what to do if he is poisoned, or if he spills the chemical on his skin or clothing or inhales it. PYRIX 10 FOG is not as toxic as MALATHION CONC. but is still harmful if swallowed, should be

32/ No separate penalty has been assessed for the other misbranding violations since all result from the same act; namely, the failure to affix a label which meets FIFRA's requirements. See Amvac Chemical Corp., I.F. & R. Docket No. IX-98C (EPA, filed Dec. 21, 1976).

33/ Complainant's Ex. 39.

kept out of the reach of children, and should not be used near or towards an open flame.[34/] Again, the precautionary statements are necessary to warn the user of these dangers. In the case of both pesticides the likelihood of injury to health is highly probable if persons are not informed of the care which must be taken in handling the product.

The penalty proposed by complainant for the false registration number on the CHEM-SECT ALDRIN RICE SEED TREATER is that assessable for false or misleading safety claims and the adverse effects are not probable. Guidelines, Section 1 of the labeling violations, 39 Fed. Reg. at 27714. In a business in size Category II, the penalty is $450 for each violation. By assigning a false EPA registration number to the product, Blue Spruce has represented that the product has been registered. Registration is granted only where a product has been determined by the EPA to meet the requirements of FIFRA. Consequently, there is an implied representation that the product can be marketed and used without creating an unreasonable risk to man or the environment, since this is a requirement for obtaining approval of the registration.[35/] The danger of misleading customers as to the safety of the product, however, is not the only harm that can be caused by using a false registration number. By assigning

---

34/ Complainant's Ex. 45.

35/ See 7 U.S.C. Sec. 136a (c)(5)(C) and (D).

a false registration number, Blue Spruce has also misrepresented to prospective purchasers that the pesticide can be legally marketed, when, in fact, it cannot, and thereby has aided in the distribution of a product which has not yet been determined to be environmentally acceptable. This consequence of its actions may also be considered in determining a penalty since I am not required to follow the guidelines.

According to the Guidelines, then, a total penalty of $7,300 computed as follows would be appropriate:

As to the MALATHION CONC.:	
Shipping the unregistered product	$1,250
Misbranding	1,250
As to the PYRIX 10 FOG:	
Shipping the unregistered product	1,250
Misbranding	1,250
As to the CHEM-SECT ALDRIN RICE SEED TREATER:	
Shipping the unregistered product (two violations)	1,400
Misbranding (two violations)	900
	$ 7,300

It remains then to determine whether any adjustment in this $7,300 penalty is justified by reason of the gravity of the violation, or Blue Spruce's financial condition, or its history of compliance, or evidence of its good faith or lack thereof. See supra, at 21-22, Guidelines, 39 Fed. Reg. at 27712.

What the record shows is a persistent disregard of FIFRA by Blue Spruce which, if it does not actually constitute bad faith, certainly borders on it. These are not the only violations with which Blue Spruce has been charged. Complainant points out that Blue Spruce has also been the subject of a criminal action for shipping a pesticide which was unregistered and misbranded. United States v. Blue Spruce Co., Cr. No. 74-387 (D.N.J.) N.J. No. 1807, p. 1211, EPA Region II, October 15, 1975. There is consequently a definite pattern of shipping unregistered products. In the case of the Aldrin product, there was also the deliberate use of a false registration number. In the case of MALATHION CONC. and PYRIX 10 FOG, the products were shipped without any precautionary labeling, which if not done deliberately, certainly evidences complete indifference towards FIFRA's requirements. Two of the pesticides involved, the Aldrin product, and the MALATHION CONC. are highly toxic pesticides.[36/] On consideration of the

---

36/ See the proposed label for the Aldrin product, complainant's Ex. 50, and the label for the cancelled registration for CHEMATHON (MALATHION CONC.), complainant's Ex. 39. Both pesticides are in the highest category of toxicity. Tr. 101.

violations involved in this case, and Blue Spruce's history of non-compliance, accordingly, I find that the penalty of $7,300 should be increased by 10% and that a total penalty of $8,030 should be assessed. I further find that such penalty is within Blue Spruce's financial capabilities, and will not adversely affect its ability to continue in business. Although payment of the penalty will undoubtedly impose some inconvenience on Blue Spruce, it is necessary that the price of non-compliance be sufficiently great to discourage any further violations.

FINAL ORDER[37/]

Pursuant to Section 14(a)(1) of the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. Sec. 136 l(a)(1) (Supp. V, 1975), a civil penalty of $8,030 is assessed against respondent, Blue Spruce Company, for the violations which have been established on the complaints issued on July 15, 1977, and July 18, 1977.

Gerald Harwood
Administrative Law Judge

May 19, 1978

37/ Unless an appeal is taken by the filing of exceptions pursuant to Section 168.51 of the rules of practice, 40 C.F.R. 168.51, or the Regional Administrator elects to review this decision on his own motion, the order shall become the final order of the Administrator. See 40 C.F.R. 168.46(c).

APPENDIX

40 C.F.R. 168.20 Appearances.

* * * * * * * * * * * * * *

(b) *Failure to appear.* Any party to the proceeding, who after being duly notified and without good cause being shown, fails to appear at any prehearing conference shall be subject to whatever orders or determinations the Administrative Law Judge may make in his discretion. The failure of a party to appear at a hearing shall constitute a waiver of the right to present evidence at such hearing. Where respondent fails to appear at a hearing, the Administrative Law Judge shall require the presentation by complainant of such evidence as the Administrative Law Judge deems necessary to develop a prima facie case against respondent. Upon conclusion of the hearing, the Administrative Law Judge shall cause a copy of the initial decision to be served upon respondent.