

1/9-19

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of:	)
COLORADO CHEMICAL & FERTILIZER,	)
Respondent	)

DOCKET NO. IF&R VIII-221C

FEDERAL INSECTICIDE, FUNGICIDE AND RODENTICIDE ACT ("FIFRA")

1. Comprehensive, accurate and up-to-date pesticide production data, required under the applicable statute and regulations, is sought for regulatory purposes and non-compliance with such requirement will impact the United States Environmental Protection Agency's ("EPA" or "the Agency") ability to conduct risk assessments and compliance inspections to provide adequate protection to the public interest as intended by the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA" or "the Act").

FEDERAL INSECTICIDE, FUNGICIDE AND RODENTICIDE ACT ("FIFRA")

2. Where Respondent's Annual Production Report, due February 1, 1988, was filed on May 9, 1988, such filing, while violative of the Act and regulations, was not filed "notably late" within the meaning of an internal EPA policy guidance memorandum.

FEDERAL INSECTICIDE, FUNGICIDE AND RODENTICIDE ACT ("FIFRA")

3. Assessment of a civil penalty in the amount of \$2,250 was appropriate for the late filing of Respondent's Annual Production Report.

APPEARANCES:

For Complainant: Dana J. Stotsky, Esquire  
Assistant Regional Counsel  
Office of Regional Counsel  
U.S. Environmental Protection Agency  
Region VIII  
999 18th Street - Suite 500  
Denver, Colorado 80202-2405.

For Respondent: Mr. Michael H. Hurtt  
Colorado Chemical & Fertilizer  
4747 Ivy Street  
Denver, Colorado 80216.

INITIAL DECISION

By Complaint filed April 14, 1988, Complainant, United States Environmental Protection Agency (hereinafter "EPA"), Region VIII, charged the Respondent, Colorado Chemical & Fertilizer (hereinafter "CCF" or "Respondent") with violation of FIFRA, Section 7(c), 7 USC Section 136e(c) and 40 CFR 167.5, which require that CCF submit an annual report, on or before February 1 of each year, to inform EPA of the types and amounts of pesticides and active ingredients used in producing pesticides

- (A) which CCF is currently producing;
- (B) which CCF has produced during the past year; and
- (C) which CCF has sold or distributed during the past year.

in that CCF failed to file its 1987 Annual Report on or before February 1, 1988.

By a Stipulation of Facts and Supplemental Stipulation of Facts, executed by the parties on or about August 25, 1988, and October 17, 1988, respectively, the parties agree that CCF is a "producer" of pesticides and a "registered pesticide producer", as those terms are defined in FIFRA, Section 2(w); that CCF failed to file its Annual Production Report ("APR") for calendar year 1987 on or before February 1, 1988, in violation of FIFRA Section 7(c) and 40 CFR 167.5; that CCF filed said 1987 APR on May 9, 1988; that CCF did produce pesticides during calendar year 1987; that CCF is a firm with gross annual sales exceeding one million dollars, and that imposition of the penalty proposed in subject Complaint, to wit: \$5,000, will not affect CCF's ability to continue in business.

It is, thus, clear that the parties agree that CCF violated the Act and regulation as alleged and that the only issue remaining to be decided is the propriety of the penalty proposed which EPA has revised downward to \$3200,

which reduction is based on an internal EPA policy guidance memorandum, dated April 22, 1975, which specifies, for firms with annual revenues from all business activities in excess of \$1,000,000 and which file their APRs notably late, the penalty should be \$3,200 1/, in the absence of any mitigating factors. EPA submits that CCF's APR, filed May 9, 1988, should be considered "notably late." However, said guidance memorandum, while providing for the filing of subject Complaint following failure, by Respondent, to so file, by February 1, further provides that "should (subject) report be filed within the pendency of a civil proceeding, the proposed penalty may be mitigated as much as forty per cent if the region feels such action is warranted based on the facts of the case" (emphasis supplied). This provision is tempered by the further statement in the memorandum that "the more experience a producer has demonstrated with Section 7 requirements, the less available any mitigation should be in cases of violation."

Complainant aptly cites Katzson Bros., Inc. v United States Environmental Protection Agency, 839 F.2d 1396 (10th Cir. 1988), which sets forth the criteria to be considered in the determination of a proper penalty, to wit:

- (1) Gravity of the violation;
- (2) Respondent's ability to pay the penalty proposed;
- (3) Respondent's prior compliance with the filing requirements;
- (4) Whether the violation affected the environment or the health of anyone;
- (5) Respondent's ability to continue in business, and
- (6) Whether Respondent produced pesticides during the subject year.

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1/ Said memorandum states that, from a review of the Civil Penalty Assessment Schedule, as published July 31, 1974 (39 F.R. 27656), (the Agency) determined that the penalty amounts there proposed for a violation involving failure to submit required reports under Section 7(c) of the Act are excessive when considered within the context of the gravity of harm and misconduct reasonably to be associated with the violation.

Said criteria have been here considered.

With respect to Criteria (2), (5) and (6), I find that it is stipulated that CCF has the ability to pay the penalty proposed; that such payment will not affect its ability to continue in business and that CCF did produce pesticides in the calendar year 1987 (Supplementary Stipulation of Facts, executed by the parties on or about October 17, 1987).

As to Criterion (3), Complainant filed with its brief, Complainant's Exhibit (hereinafter "C EX") "A" a warning letter, reflecting that Respondent was late in filing its annual report for the year 1985, to refute Respondent's claim, in its letter, dated August 29, 1988, which states: "Since 1974 we have submitted our production report on a timely basis."

Criteria (1) and (4), supra, gravity of the violation and whether subject violation has the potential for harm to the public health and the environment, can be considered together. As has been often stated, the information required under the statute and regulation is sought for regulatory purposes and any non-compliance with such requirement will impact the Agency's ability to conduct accurate risk assessments and compliance inspections. As was observed in Wickard v Filburn, 63 S.Ct. 82, 317 US 111, 87 L.Ed. 122 (1942), Respondent's violation, standing alone, may appear trivial, but when said violation is taken together with many others similarly situated, it is "far from trivial." Without comprehensive, accurate and up-to-date pesticide production data, risk assessments and compliance inspections will not serve to adequately protect the public interest as intended by the Act. Obviously, subject violation must be viewed as serious, here and in like instances, if essential compliance with the Act will be achieved.

In the premises, I find that an appropriate penalty to be assessed for subject violation of Respondent is \$2,250, as indicated in the proposed Order

hereinbelow appearing. I find that said Report, filed on May 9, 1988, while filed late, was not filed "notably late" as contended by Complainant; said report was filed within 30 days following the filing of and during the pendency of the subject Complaint. Mitigation of the penalty to the maximum amount provided is not warranted, as Respondent has been filing like production reports for 13 years and, in at least two instances, said report was not timely filed. After this length of time, Respondent should recognize the seriousness of its duty to timely render such reports of its production activities so that the United States Environmental Protection Agency will be enabled to act in the public interest as contemplated by the Act.

Upon consideration of the record, including the pleadings, stipulations and Supplemental Stipulations of Fact, along with briefs and arguments submitted by the parties, I propose entry of the following

FINAL ORDER 2/

1. Pursuant to Section 14(a)(1) of the Federal Insecticide, Fungicide and Rodenticide Act, as amended, a civil penalty in the sum of \$2,250 is hereby assessed against the Respondent, Colorado Chemical and Fertilizer of Denver, Colorado, for the violation established by the evidence appearing in the record.

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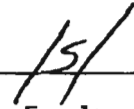
2/ 40 CFR 22.27(c) provides that this Initial Decision shall become the Final Order of the Administrator within 45 days after its Service upon the parties unless an appeal is taken or the Administrator elects to review sua sponte. Section 22.30(a) provides for appeal herefrom within 20 days.

2. Payment of \$2,250, the civil penalty assessed, shall be made within sixty (60) days after receipt of this Final Order by providing a Cashier's or Certified Check, made payable to the Treasurer, United States of America, to:

EPA - Region 8  
(Regional Hearing Clerk)  
P.O. Box 360859M  
Pittsburgh, PA 15251.

SO ORDERED.

DATED: January 9, 1989

  
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Marvin E. Jones  
Administrative Law Judge