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ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE REGIONAL ADMINISTRATOR: 18

In re)	
)	
I. D. Russell Company)	I.F.&R Docket No. VII-189C
Laboratories, Inc.)	
)	
Respondent)	

Initial Decision

By Complaint dated March 4, 1976, the Chief, Pesticides Branch, Enforcement Division, US Environmental Protection Agency Region VII (hereinafter Complainant) charged I. D. Russell Company Laboratories, Inc. of 2463 Harrison, Kansas City, Missouri (hereinafter Respondent), with a violation of Section 12(a)(2)(L) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended ^{1/} (FIFRA) in that it, as a pesticide producer, failed to submit to the Administrator (of EPA) the information required by Section 7(c) of the Act and regulations thereunder. The Complaint, issued pursuant to Section 14 of the Act, proposed to assess a civil penalty of \$3200. The Respondent filed an answer to the Complaint and, in effect, objected to the assessment of the proposed penalty. In its said Answer, Respondent requested a hearing. It admitted the allegation of the Complaint that Respondent filed its report on March 8, 1976, thus failing to file same on or before February 1, 1976; but denied the authority of EPA to assess the

^{1/} For parallel citations of FIFRA (86 Stat. 973) and United States Code see Attachment A.

proposed penalty of \$3200. On May 4, in its answer to questions submitted to the parties by the Administrative Law Judge, and its Oral Argument heard on June 18, 1976, Respondent openly admits its failure, as charged, to file the report. On June 4, 1976, Complainant filed its Motion for an Accelerated Decision on the stated ground that there is no genuine issue of any material fact; pointing out Respondent's admissions that it did receive an annual pesticides report form; that Respondent's annual report was not filed by February 1, 1976, but on March 8, 1976; and that Respondent's gross sales for 1975 were in the amount of \$1,744,127.54. Respondent filed its Motion to Dismiss and a Motion for Oral Argument on June 15. Oral Argument was set and heard on June 18. Said Motion to Dismiss is hereby denied.

At said Oral Argument, Respondent withdrew its request for an Adjudicatory Hearing and argued that the assessment schedule was inequitable in that, while Respondent's gross sales in 1975 were over \$1,700,000, its manufactured products, (of which approximately \$47,000 were pesticides) totaled but \$460,000. Respondent joined with Complainant in requesting an "Accelerated Decision", stating that its only argument is as to the amount of the penalty assessed. Both parties declined to file written briefs and arguments. Said case was thereby submitted on the record which includes the transcription made of the Oral Argument.

In Summary, Parties have agreed to the following material facts, which I adopt as my Findings of Fact herein:

1. The Respondent was and is a registered producer establishment at all times pertinent to this action and actively produced pesticides during the calendar year 1975.

2. John P. Russell, Secretary of Respondent, received the annual pesticide report form and cover memorandum from the US EPA on or about December 15, 1975.

3. Respondent did not submit the annual pesticide report by February 1, 1976, the date required by regulation promulgated pursuant to Section 7(c) of the Act, nor by March 4, 1976, the date on which the instant Complaint was filed, but did file its annual report on March 8, 1976.

4. Respondent's gross sales for the calendar year 1975 exceeded \$1,700,000, of which \$460,000 represents products manufactured by Respondent, of which latter amount \$47,000 were pesticides by it manufactured and registered with the Agency.

5. The penalty of \$3200 proposed in the Complaint was determined from the Civil Penalty Assessment Schedule (39 F.R. 27711) as modified by memorandum dated April 22, 1975 and forwarded to US EPA Regional Enforcement Directors.

6. The information contained in annual reports is used by Complainant on a routine basis for the purpose of scheduling producer establishment inspections and sample collections.

7. The Respondent has a prior history of violation consisting, in particular, of a guilty plea on four criminal counts for two separate

shipments in 1972 of unregistered and misbranded products, and an admission in a civil proceeding of two shipments in 1974 of unregistered and misbranded pesticides (FIFRA violations).

Thus, this decision must resolve the only issue now in question-- what, if any, civil penalty is appropriate after consideration of all factors concerning the admitted violation?

Section 14(a)(3) of FIFRA states, in pertinent part:

In determining the amount of 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.

Section 168.60(b)(1) of the Rules of Practice also enumerates these three criteria and Section 168.60(b)(2) adds two other factors to be considered in evaluating the gravity of the violation--(1) respondent's history of compliance with the Act, and (2) good faith or lack thereof.

The Guidelines were issued to provide direction to Agency personnel assessing civil penalties to ensure to the extent practicable that comparable penalties will be assessed in different regions for similar violations. The Rules of Practice (Section 168.46(b)) provide that the Administrative Law Judge may consult and may rely on the Guidelines but that he "may at his discretion increase or decrease the assessed penalty from the amount proposed to be assessed in the Complaint."

The Guidelines utilize five "size-of-business" gradations based on a respondent's annual sales; the categories are as follows: I - less than \$100,000; II - between \$100,000 and \$400,000; III - between \$400,000 and

\$700,000; IV - between \$700,000 and \$1 million; V - over \$1 million.

The penalty amount for each category was reduced (by 36 percent) on April 22, 1975 by memorandum from the Director, Pesticides Enforcement Division to the Regional Directors, resulting in proposed civil penalties as follows: Category I - \$320; II - \$800; III - \$1760; IV - \$2720; and V - \$3200. The memorandum further provides:

The Complainant should propose to assess the full amount of the appropriate penalty by size of business in accordance with the revised schedule specified herein. Should the report be filed within the pendency of a civil proceeding, the proposed penalty may be mitigated as much as 40 percent if the region feels such action is warranted based on the facts of the case.

Respondent urges that its failure to timely file its annual report was a "mere oversight" and, in effect, makes the point that its violation, from the standpoint of misconduct, was mitigated by the fact that its annual report was filed as soon as Respondent was "reminded" by the Complaint filed on March 4, 1976. Although intent is not an element of an offense in a civil penalty assessment case, (cf. U.S. v Dotterweich, 320 U.S. 77) the lack of intent coupled with Respondent's effort to remedy his oversight will be here weighted as a mitigating factor. Certainly a failure for so long a period as to amount to a refusal to file would be much more serious and would have a greater tendency toward frustrating the regulatory scheme here sought to be vindicated. It is apparent that the annual report was here forwarded on or near the date that Respondent received the Complaint; that the failure to file in this instance was not a deliberate flouting of the law, but due to negligence.

Respondent also urges that the fact that pesticides manufactured by it in 1975 totaling \$47,000 compared to the \$468,000 total of manufactured product and annual sales totaling over \$1,700,000 should be here considered. It is clearly mandated that the size of the business and its ability to continue in business in the face of the assessment of a civil penalty are factors to be considered in determining an appropriate penalty. However, the gravity of harm inherent in the violation here established will be diminished, at least to some degree, when the amount of pesticides manufactured and sold by Respondent is shown to be small in comparison to the size of the business determined on the basis of total sales. It is also undisputed that Respondent's history of compliance is not good in that separate instances of nonregistration and misbranding as early as 1972 and as recent as 1974 are cited in this record. I will be quick to observe, however, that those previous violations, serious though they were, have slight relevance either in principal or in fact to the violation here charged. The record here reflects no instances, other than the one here charged, where Respondent has failed to timely file its reports as required.

Respondent's contention that the Act and Regulations promulgated pursuant thereto are arbitrary and unconstitutional is rejected, for the reasons hereinafter and hereinabove set out.

Section 7 of FIFRA formulates a scheme of regulation which, when properly implemented, provides the tools for protection against products

whose harmful effects, if uncontrolled, will seriously affect the public health and environment. Reports, such as those required of Respondent and other registered producer establishments, supply a necessary tool for maintaining control and supervision over products which can be characterized as inherently dangerous. Any failure to apply adequate sanctions where the Act is violated will, in effect, invite violations in increasing numbers which could ultimately frustrate and defeat the scheme of regulation contemplated by the Act. Respondent's violation taken together with that of many others is far from trivial (cf. Wickard v Filburn, 317 US 111, 63 S Ct. 82) and I find the provisions complained of to be necessary and reasonable.

Having considered the size of Respondent's business, the effect of the penalty hereinafter assessed on Respondent's ability to continue in business, and the gravity of the violation here examined, it is determined that a civil penalty in the amount of \$1250 is appropriate and said amount is hereby assessed.

The contentions made by the Parties during the Oral Argument held on June 18, 1976, have been duly considered.


The foregoing includes the Administrative Law Judge's Finding of Fact, Conclusions and reasons therefor.

Proposed Final Order 1/

1. Pursuant to Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended, a civil penalty of \$1250 is hereby assessed against Respondent, I. D. Russell Company Laboratories, Inc., for the violation of the Act found herein.

2. Payment of the full amount of the civil penalty assessed shall be made within 60 days of the service of the final order upon Respondent by forwarding to the Regional Hearing Clerk a cashier's or certified check payable to the United States of America.

June 25, 1976



Marvin E. Jones
Administrative Law Judge
US EPA, Region VII

1/ Unless appeal is taken by the filing of exceptions pursuant to Section 168.51 of the Rules of Practice, or the Regional Administrator elects to review this decision on his own motion, the order shall become the final order of the Regional Administrator [See Section 168.46(e)].

ATTACHMENT A

FEDERAL INSECTICIDE, FUNGICIDE, AND RODENTICIDE ACT,
AS AMENDED (FIFRA)

Parallel Citations

<u>FIFRA, 86 Stat. 973</u> <u>P.L. 92-516</u>	<u>7 U.S.C.</u>	<u>FIFRA, 86 Stat. 973</u> <u>P.L. 92-516</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