UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Before the Regional Administrator

In the Matter of	)	
	)	
Selco Supply Company, Inc.	)	I. F. & R. Docket No. VIII-32C
	)	
Respondent	)	

Initial Decision

This proceeding under Section 14(a)(1) of the Federal Insecticide, Fungicide and Rodenticide Act, as amended (7 U.S.C. 136 et seq. (1976)) was commenced by a complaint, dated May 5, 1977, issued by the Director, Enforcement Division, Region VIII. The complaint alleged in substance that Respondent was the producer or formulator of certain pesticide products, to wit: Chlordane Emulsifiable 73%, EPA Registration No. 1348-58; Chlordane 4E, EPA Registration No. 1348-50 and Chlordane W-40, EPA Registration No. 1348-215, that during the period July 30 through December 31, 1975 and after January 1, 1976, Respondent sold quantities of the listed pesticides which had been formulated after July 29, 1975, in violation of an Order issued by the Administrator on December 24, 1975, suspending the registration of products containing heptachlor and chlordane, which Order was allegedly effective as of July 29, 1975, and prohibited the sale of products, subject to the Order, that were formulated after July 29, 1975. For these alleged violations of Section 12(a)(2)(J) of the Act (7 U.S.C. 136j(a)(2)(J)), civil penalties totaling $30,000 were proposed to be assessed against Respondent.

Counsel for Respondent entered an appearance and requested a hearing. After its motion for production of documents and its request that Complainant answer interrogatories were denied by the Regional Administrator, Respondent filed an answer denying the allegations of the complaint save its corporate existence under the laws of Colorado, raising a series of constitutional, legal and factual defenses and moved that the complaint be dismissed. Central to its defense is the contention that it did not receive notice of the suspension for Chlordane 4E, Registration No. 1348-50, and Chlordane Emulsifiable 73%, Registration 1348-58 until after February 11, 1976 and notice of the suspension for Chlordane W-40 Wettable Powder, Registration No. 1348-215 until after February 24, 1976.

Under date of June 16, 1978, the parties filed a stipulation of facts, obviating the necessity for hearing. Counsel for Complainant has moved for an accelerated decision and has withdrawn the allegations of the complaint concerning sales of the mentioned pesticides during the period July 30 through December 31, 1975 (Paragraphs 5, 6, 7, 12, 13, 14, 19, 20 and 21).

Findings of Fact

Based on the entire record, including the stipulation of the parties, exhibits attached hereto, certain matters published in the

Federal Register of which official notice is taken[1/] and the briefs of the parties, I find that the following facts are established:

1. Respondent, Selco Supply Company, Inc., is a corporation organized under the laws of Colorado, whose address is Eaton, Colorado.

2. At all times pertinent to this proceeding, Respondent held registrations for the following pesticide products:

   a. Selco Chlordane Emulsifiable 73%, EPA Registration No. 1348-58;

   b. Selco Chlordane 4E Emulsifiable, EPA Registration No. 1348-50; and

   c. Selco Chlordane W-40 Wettable Powder, EPA Registration No. 1348-215.

3. On November 18, 1974, the Administrator issued a Notice of Intent to cancel registrations of pesticide products containing heptachlor and chlordane (the notice was phrased in terms of registered uses of heptachlor and chlordane) pursuant to Section 6 of FIFRA (7 U.S.C. 136d), with the exception of the use of heptachlor and chlordane through subsurface ground insertion for termite control and the dipping of roots or tops of nonfood plants. This notice was published 39 F.R. No. 229, November 26, 1974, at 41298-300.

1/ Because filing with and publication in the Federal Register is sufficient to give notice of the contents of the document to persons effected by it and courts are required to judicially notice the contents of the Federal Register (44 U.S.C. 1507 (1970)), the Administrative Procedure Act provision (5 U.S.C. 556(e)) concerning official notice is not applicable.

Respondent was served with a copy of the mentioned notice by registered mail and Respondent admits receiving a copy of such notice.

4. Respondent objected to the proposed cancellation and by letter, dated December 9, 1974, authorized the law firm of Sellers, Conner & Cuneo, Washington, D.C. to represent Respondent in the cancellation proceeding. Respondent admits being a party to the cancellation proceeding and that it was represented by counsel in such proceeding.

5. Respondent filed reports of its production and sales of pesticides, including those listed in finding 2, for the years 1974, 1975 and 1976 as required by Section 7 of the Act and regulations thereunder, 40 CFR Part 167.

6. On July 29, 1976, the Administrator issued a Notice of Intent to Suspend Registration of Pesticides Containing Heptachlor and Chlordane. This notice was published (40 F.R. 34456, August 15, 1975) and applied to all pesticides containing heptachlor and chlordane except those registrations exempted in the notice of intent to cancel. The notice of intent to suspend provided that it would be effective within five days of receipt by effected registrants unless the registrants requested an expedited hearing pursuant to Section 6(c)(2) of the Act. Respondent was served with a copy of the notice of intent to suspend by letter dated, July 31, 1975. Respondent has acknowledged receipt of the mentioned letter and a copy of the notice of intent to suspend.

7. By telegram, dated August 1, 1975, Respondent requested a hearing on the notice of intent to suspend and adopted the objections to the notice filed by Velsicol Chemical Corporation.

8. By letter, dated August 4, 1975, the law firm of Sellers, Conner & Cuneo, on behalf of registrants named on an enclosed list, requested a hearing on the notice of intent to suspend registrations of pesticides containing heptachlor and chlordane and stated that the registrants adopted the objections to the suspension filed on that date by Velsicol Chemical Corporation. The mentioned list was entitled "Inactive Party Registrants Represented by Sellers, Conner & Cuneo." The firm listed as No. 154 on the list is Respondent, Selco Supply Co., Eaton, Colorado.

9. On December 12, 1975, Chief Administrative Law Judge Herbert L. Perlman issued his recommended decision, Velsicol Chemical Corporation, et al., FIFRA Docket No. 384, in the suspension proceeding. Paragraph one of the findings of fact made by Judge Perlman includes the following: "Velsicol Chemical Corporation and over approximately 400 other registrants filed objections and are parties to this proceeding although Velsicol is the only fully active registrant herein."

10. The Administrator issued his decision suspending some, but not all uses of products containing heptachlor and chlordane on December 24, 1975, Velsicol Chemical Corporation, et al., FIFRA Docket No. 384. He specifically accepted the 88 findings of fact made by Judge Perlman in his Judge Perlman's recommended decision.

Although the labels for the pesticide products referred to in finding 2 have not been made part of the record, the record is such as to permit a finding that uses of the mentioned pesticides included uses suspended by the Administrator's Order.

11. On December 24, 1975, Robert B. Barnett, Esq. of the Washington, D.C. law firm of Williams, Connelley and Califano was handed by the Hearing Clerk and signed a receipt acknowledging receipt of four copies of the Administrator's Decision and Order. Two copies of the Decision and Order were for the law firm of Sellers, Conner and Cuneo. Although there is no evidence in the record of when copies of the decision were actually received by Sellers, Conner and Cuneo, the parties have stipulated that two copies of the decision were served on counsel of record. Sellers, Conner and Cuneo were among counsel of record.

12. A copy of the Administrator's Decision and Order was mailed by regular mail to Respondent on December 24, 1975. Selco has no record of receiving the Decision and Order.

13. On January 19, 1976, the Administrator issued a Clarification of Order of December 24, 1975, Velsicol Chemical Corporation, et al., FIFRA Docket No. 384. The Clarification includes a finding by the Administrator " * * that proper administration of the Decision and Order by the Agency and explicit understanding thereof by all parties require a clear statement of the uses of products containing heptachlor and chlordane for which registrations have not been suspended." Robert L. Ackerly, Esq. and Charles A. O'Conner, III, Esq. of the law firm of Sellers, Conner and Cuneo

were hand delivered a copy of the Clarification by the Judicial Officer on January 19, 1976.

14. Respondent sold the following quantities of the listed pesticides on the dates appearing below, all of which products were formulated after July 29, 1975:

    a. 60 gallons of Chlordane 73% on February 6, 1976:

    b. 125 gallons of Chlordane 4E on January 23, 1976:

    c. 52 gallons of Chlordane 4E on January 30, 1976;

    d. 192 pounds of Chlordane 40-W on January 24, 1976;

    e. 326 pounds of Chlordane 40-W on January 29, 1976; and

    f. 756 pounds of Chlordane 40-W on February 6, 1976.

15. The Notice of Intent to Suspend Registrations of Pesticides Containing Heptachlor or Chlordane, the Recommended Decision issued by Judge Perlman, the Administrator's Final Decision and Order, Velsicol Chemical Corporation et al., FIFRA Docket No. 384 and the Clarification of Order of December 24, 1975, were published in the Federal Register (41 F.R. No. 34, February 19, 1976, at 7552 et seq.).

16. By letter, dated February 11, 1976, the Director, Registration Division, EPA notified Respondent that the registration of Selco Chlordane 46% (4E) Emulsifiable, EPA Registration No. 1348-5D, contained a use suspended by the Administrator's Decision and Order of December 24, 1975 and that such registration had been suspended effective December 24, 1975. Respondent was informed that if it wished to continue to formulate and/or sell heptachlor and/or chlordane for uses not suspended, it would be necessary to apply

for a provisional amendment of registration. On the same date, an identical letter was sent to Respondent concerning its product Selco Chlordane 73% Emulsifiable, EPA Registration No. 1348-58. An identifical letter concerning Selco Chlordane W-40 Wettable Powder was sent to Respondent by the Director, Registration Division, EPA on February 24, 1976. Respondent has acknowledged receiving these letters.

17 By separate letters, dated February 19, 1976, Respondent applied for amended registrations or labelling of the products referred to in finding 2 and enclosed labels upon which all reference to suspended uses and claims referring to suspended uses had been deleted. Under date of June 4, 1976, EPA approved the revised labels permitting Respondent to formulate and sell the mentioned products for uses which had not been suspended.

18. On April 13, 1976, Mr. Charles F. Stogsdill, an EPA consumer safety officer, conducted an establishment inspection of Respondent's premises pursuant to Sec. 9(a) of the Act. As a result of the inspection, Mr. Stogsdill on the same date, issued to Respondent a Stop, Sale, Use or Removal Order, ordering Respondent to refrain from the sale, use or removal, including distribution or transfer to another person, of any amount of pesticide products containing heptachlor and/or chlordane, the uses of which are suspended which are under your control or custody. The Order was specifically applicable to the following products and quantities:

"40% WP 4, 108#, EPA Reg. No. 1348-215

4EC 337 gallons, EPA Reg. No. 1348-50

73% 150 gallons, EPA Reg. No. 1348-58."

19. Mr. Stogsdill's report of the inspection referred to in the preceding finding includes a summary of a conversation with Mr. Donald Leafgren, Respondent's office manager. Mr. Leafgren is reported to have stated that Respondent was not aware of the suspension of heptachlor and chlordane until receipt of a letter from Mr. Conroy's office in February of 1976 and that upon receipt of the mentioned letter Respondent stopped the sale of all chlordane products in its warehouse. Official notice is taken of the fact that Mr. A. E. Conroy II is Director of EPA's Pesticides Enforcement Division. Accordingly, the letter or letters referred to are probably those from the Registration Division referred to in finding 16.

20. Under date of April 21, 1976, the Director, Pesticides Enforcement Division, EPA, referred to letters sent to Respondent on February 12 and February 24, 1976, notifying Respondent that registrations [Selco Chlordane 46% Emulsifiable, EPA Reg. No. 1348-50; Selco Chlordane 73% Emulsifiable, EPA Reg. No. 1348-58 and Selco Chlordane W-40 Wettable Powder, EPA Reg. No. 1348-215] had been suspended and that stocks of the listed products formulated after July 29, 1975, could not legally be sold, distributed or used. Respondent was requested to determine the location of the products, to recall such products which were formulated after July 29, 1975, or to take action so that the

products were held at their present location until amended labels were approved and the products were relabeled.

21. Between July 29, 1975 and February 12, 1976, Respondent formulated the following quantities of the products in question;

    a. Chlordane 4E 1,122 gallons

    b. Chlordane W-40 6,950 pounds

    c. Chlordane 73% 1,122 gallons

22. After February 12, 1976, Respondent ceased formulating the products listed in the preceding finding.

23. On March 2, 1977, Willie J. Chavez, an EPA consumer safety officer, conducted an establishment inspection of Respondent's premises. Respondent was issued a revised Stop Sale, Use or Removal Order applicable to certain quantities of the products listed in finding 21 which were in stock and which allegedly were formulated after July 29, 1975.

24. EPA did not issue any notice prior to filing of the complaint that civil proceedings against Respondent were contemplated.

25. Respondent's sales for the fiscal year ending March 31, 1976, were in excess of one million dollars.

26. In a letter, dated September 24, 1975, EPA's General Counsel informed Congressman Gilbert Gude that during the 40 days allotted to the suspension hearing until a final suspension decision was reached, Velsicol Chemical Corporation and the formulators are permitted the manufacture and sale of these chemicals [containing heptachlor and chlordane.] By letter, dated May 28, 1976, the Assistant Administrator for Enforcement

advised Senator Buckley that the sale and use of products containing heptachlor and chlordane intended for uses later suspended were indeed permitted by the Agency up to the time of the final order of suspension. However, it was pointed out that any such activity after July 29, 1975, was at the risk of the manufacturer or distributor.

27. On March 6, 1978, the Administrator signed an Order effectuating a settlement of the cancellation proceeding involving pesticides containing heptachlor/chlordane, Velsicol Chemical Corporation, FIFRA Docket No. 336 et al. The Order, included the following: "End-use pesticide products which were in existence on the date of this Order, whose registrations are cancelled or denied effective on the date of this Order may be distributed, sold or otherwise moved in commerce, and used: provided, that the pesticide shall not be used inconsistent with its labeling." This Order was published, 43 F.R. No. 58, March 24, 1978 at 12372 et seq.

Conclusions

1. The sales of products formulated after July 29, 1975, which are alleged to have been made in violation of the suspension order and for which EPA is proposing to assess a civil penalty, having been made after issuance of the suspension order, the crucial issue is whether the sales were made after Respondent is legally chargable with notice of the order.
2. A copy of the Administrator's Decision and Order of Suspension, dated December 24, 1975, was mailed to Respondent on the date of

the Decision and Order and there is a well established presumption that a duly addressed letter or other mailable matter which has been deposited in the mails was delivered. Respondent has failed to rebut this presumption.

3. Respondent was a party to the suspension proceeding and was represented therein by counsel, the law firm of Sellers, Conner and Cuneo.

4. Service of copies of the decision and order on Sellers, Conner and Cuneo, counsel of record for Respondent, is in law sufficient to charge Respondent with notice of the order.

5. Respondent is legally chargable with notice of the suspension order at a date no later than December 31, 1975.

6. Sales of products formulated after July 29, 1975 and which were subject to the suspension order having been made after the date Respondent is legally chargable with notice of the order, the sales constituted violations of Sec. 12(a)(2)(J) of FIFRA (7 U.S.C. 136 j(a)(2)(J)).

7. Respondent is liable for a civil penalty in accordance with Sec. 14(a)(1) of the Act (7 U.S.C. 136 l(a)(1)).

Discussion

Respondent argues that FIFRA is vague as to when an order of suspension becomes effective, that because the order in the instant case did not suspend all uses of products containing heptachlor/chlordane it was necessary for Respondent to be furnished a copy of the order or for the order to be published in the Federal Register before the order

was effective as to Respondent and that the first actual notice of the suspension order by Respondent shown by this record is the letters from the Registration Division which were mailed and received after the last sale of products subject to the order was made. Respondent also argues that the order was improper insofar as it retroactively prohibited the sale of products subject to the order, formulated subsequent to July 29, 1975, the date of the notice of intent to suspend, that the order was not issued within the seven-day period allowed by Sec. 6(c)(2) of the Act and is therefore void, that Respondent was not given notice of contemplated proceedings as required by Sec. 9(c)(1) of the Act, that Complainant delayed an unreasonable time in issuing the complaint and should be estopped to prosecute this proceeding, that the information upon which this proceeding is based was obtained in violation of Respondent's constitutional rights and that the manner in which the proceeding is conducted violates certain of Respondent's rights under the 5th and 14th Amendments to the U. S. Constitution.

Because Complainant has withdrawn counts of the complaint relating to sales between July 29, 1975 and December 31, 1975, of products subject to the suspension order which were produced after July 29, 1975, difficult questions raised by the contention the suspension order when issued was effective from the date of the notice of intent

to suspend are not present.[2/] The facts in the instant case (findings 14 and 21) are that the sales which are the basis of remaining counts of the complaint were made subsequent to the issuance of the suspension order and were of products formulated after July 29, 1975. From all that appears, the products in question could have been formulated after the issuance of the suspension order.

As indicated (Conclusion 1), the crucial issue is whether the sales of products subject to the suspension order were made after the date Respondent is legally chargable with notice of the order. Complainant has not relied on the presumption of delivery of duly mailed matter perhaps because the stipulated facts (finding 12) do not expressly state that the envelope containing the decision and suspension order was properly addressed and that the appropriate postage was prepaid or affixed thereto--facts ordinarily necessary for the presumption to be applicable. See 31A C.J.S. Evidence Sec. 136.

2/ While Sec. 6(c)(1) of FIFRA provides that upon a determination that such action is necessary to prevent an imminent hazard the registration of a pesticide may be suspended immediately, in the absence of an emergency determination under Sec. 6(c)(3) notice of intent to suspend must be given the registrant. A registrant has five days from receipt of the notice in which to request an expedited hearing under Sec. 6(c)(2). If an emergency determination under Sec. 6(c)(3) is made, a suspension order may be issued without advance notice and the order would be in effect pending the completion of an expedited hearing, if one was requested pursuant to Sec. 6(c)(2). Even if an expedited hearing is not requested, a suspension order must be issued to make the suspension effective. The described statutory structure strongly implies that unless an emergency determination is made a suspension order is not effective pending an expedited hearing under Sec. 6(c)(2). At the very least, retroactive effect given to a suspension order might require an indemnity payment to a registrant pursuant to Sec. 15 of the Act for losses suffered because of the suspension order.

However, there is authority for the proposition that in order for a letter to be properly mailed it must be addressed, stamped and placed in the proper receptacle for the receipt of mail and that evidence that a letter was mailed implies the doing of all acts necessary for proper mailing. 26 Words and Phrases Mailed. Accordingly, it is concluded that the presumption of delivery of duly mailed matter is applicable. The fact that Respondent has no record of receipt of the decision and order is insufficient to rebut the presumption of delivery.

Because Respondent filed a telegram requesting a hearing on the notice of intent to suspend registrations of products containing heptachlor and chlordane, it can hardly deny that it was a party to the suspension proceeding.[3/] Respondent does deny that it was represented by counsel in such proceeding. However, the letter, dated August 4, 1975, from Sellers, Conner and Cuneo, which had enclosed a list of inactive party registrants represented by said firm and which list included Respondent, is strong evidence to the contrary. Moreover, the similar language in Respondent's telegram and in the mentioned letter to the effect that the objections filed by Velsicol Chemical Corporation were being adopted as objections to

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3/ Indeed if Respondent was not a party to the suspension proceeding the notice of intent to suspend by its terms was effective within five days of its receipt by affected registrants. It is noted, however, that Sec. 6(b) of the Act contemplates that the suspension order will be a separate document.

the notice of intent to suspend is unlikely to be the result of coincidence. It is concluded that on this record clear and convincing evidence supports the finding that Respondent was represented by Sellers, Conner and Cuneo in the suspension proceeding.

While an attorney of record ordinarily has authority to receive and accept all papers and notices required to be served during the subsequent progress of an action or proceeding, service, in order to bind the client, must be on the client's attorney of record. 7 C.J.S. Attorney & Client Sec. 83. It is noted that under Rule 5(b) of the Federal Rules of Civil Procedure, service upon a party represented by an attorney is required to be made upon the attorney unless otherwise ordered by the court. Such service has been held sufficient in law to support a contempt order. S.E.C. v. Naftalin, 460 F. 2d 471 (8th Cir., 1972). However, the rule must be strictly followed. Under this view of the matter, delivery on December 24, 1975 of copies of the Administrator's Decision and Order to a representative of another law firm of record in the proceeding would not constitute notice in law to Respondent until the copies intended for Sellers, Conner and Cuneo were actually delivered to or received by that firm. As noted (finding 11), there is no evidence in the record of when copies of the decision and order were received by that firm. Nevertheless, the parties have stipulated that two copies of the suspension order were served on counsel of record and Sellers, Conner and Cuneo were counsel of record for parties including Respondent.

It is concluded that by virtue of either or both the presumption of delivery in the ordinary course of the mails or the rule that

service on counsel of record is in law notice to the client Respondent is legally chargable with notice of the suspension order no later than December 31, 1975. The sales charged in the complaint as violations of the order having been made after that date, Respondent is liable for a civil penalty unless it is freed of liability for some other reason.

Although the Administrator found it desirable to issue a Clarification of Suspension Order on January 19, 1976, the clarification relates to uses not suspended and the suspension order may not be considered so ambiguous so as to make enforcement thereof improper. With respect to Respondent's contention that the suspension order is void because not issued within the seven-day period mandated by Sec. 6(c)(2) of the Act, no convincing arguments have been advanced as to why this failure should void the order. In any event, the suspension order was upheld in all respects pertinent herein by the Court of Appeals, and is not subject to collateral attack. Environmental Defense Fund v. EPA, 548 F. 2d 998, 9 ERC 1433 (D.C. Cir., 1976), petition for rehearing denied, 9 ERC 1575 (1977), cert. denied 97 S. Ct. 2199, 10 ERC 1176 (1977).

Respondent's argument that notice of contemplated proceedings was not given as required by Sec. 9(c)(1) of the Act is more troublesome. However, the notice requirement appears to relate primarily to contemplated civil or criminal proceedings resulting from examinations or tests of pesticides or devices which are determined not to comply with the Act. Under such circumstances, it is more likely that a notice of

contemplated proceedings would be of benefit to the firm or individual against whom proceedings are contemplated in that errors or deficiencies in the manner of conducting the tests or examinations might be discovered or other mitigating circumstances advanced thus the institution of any proceedings could be avoided. Moreover, the final section of the complaint herein informed Respondent that it could confer informally with EPA concerning whether the alleged violation in fact occurred and the appropriateness of the proposed penalty. Although this notice is simultaneous with the institution of proceedings, it would appear that the notice serves the same purpose as the notice referred to in the Act and constitutes substantial compliance therewith. Judge Harwood, after an indepth analysis of legislative history, concluded that the notice of contemplated proceedings mentioned in Sec. 9(c)(1) of the Act was not mandatory. Pueblo Chemical and Supply, d/b/a Growers Ag Service, I. F. & R. Docket No. VI-98C (Initial Decision, dated January 6, 1978).[4/] I agree with Judge Harwood, that it is extremely doubtful that Congress intended such a notice to be jurisdictional. For these reasons, Respondent's contention that the failure to issue a notice of contemplated proceedings as specified in Sec. 9(c)(1) of the Act constitutes a bar to the instant proceeding is rejected.

It does appear that Complainant was in possession of the facts alleged in the complaint for at least a year before the complaint was issued. While this delay is substantial there is no evidence that it prejudiced Respondent's defense in any manner. Accordingly, this delay does not constitute a defense to the instant proceeding.

4/ It is understood that this decision has been appealed.

Respondent's remaining defenses are based on constitutional grounds. Respondent contends that it was forced to give evidence against itself in violation of the 5th and 14th Amendments to the U. S. Constitution in that the violations charged are based on production and sales information it was required to furnish Complainant pursuant to the Act and regulations. This contention is without merit because the privilege against self-incrimination is not applicable to corporations and because this is a civil and not a criminal proceeding. See U.S. v. Allied Towing Corporation, _____ F.2d _____ (4th Cir., 1978).

Respondent also contends that it is denied equal protection of the law in that the penalty system as applied by EPA is based on wealth and use of sales as a standard for determining financial strength is arbitrary and capricious. Respondent's argument appears to be based in part on the fact that under the Civil Penalty Assessment Schedule (39 F.R. 27711, July 31, 1974) the maximum penalty of $5,000 for violation of a suspension order with knowledge of the order is assessed irrespective of the category of the firm charged. Because Respondent is in Category V (sales over $1,000,000), it is at least doubtful that Respondent has standing to raise this argument. Moreover, while the Supreme Court has held that classifications (eligibility for privileges, benefits, etc.) based on wealth insofar as they effect fundamental rights (e.g., liberty and voting eligibility) are violative of equal protection of the laws, no case has been cited or found to support the proposition that ability to pay may not be considered in determining an appropriate penalty for

violation of a statute. Section 14(a)(3) of the Act requires that in determining the amount of the penalty the size of the business of the person charged and the effect of the penalty on that person's ability to continue in business are among factors to be considered. Sales are prima facie a reasonable measure of financial ability. In any event, Respondent was free to produce evidence that sales in this instance were not a proper means of determining its financial capability and that the proposed penalty would adversely effect its ability to continue in business, but has failed to do so. It is concluded that Respondent's constitutional defenses based on alleged denial of equal protection of the laws are lacking in merit.

For all that appears both production and sales of the pesticides mentioned in the complaint could have occurred after the issuance of the suspension order and constitutional questions raised by the so-called retroactive nature of the suspension order have been mooted by withdrawal of the counts relating to production and sales between July 29 and December 31, 1975.

Respondent has raised other constitutional issues based on the alleged unconstitutionality of FIFRA in whole or in part and on EPA's alleged arbitrary conduct at the time the proceeding was instituted, including the denial of its discovery requests. Respondent's attack on the constitutionality of FIFRA is beyond the scope of this proceeding, arbitrary or improper conduct in issuing the complaint has not been shown and no showing of present prejudice to its defense from the initial denial of its discovery requests has been made. Under these

circumstances, Respondent's constitutional arguments must be rejected and further discussion of its arguments in this regard is considered unwarranted.

Penalty

The Act (7 U.S.C. 136 l(a)(3)) and the regulation (40 CFR 168.60(b)(1)) require that in considering the appropriate penalty consideration is to be given to (i) the gravity of the violation, (ii) the size of respondent's business, and (iii) the effect of the proposed penalty on respondent's ability to continue in business. I am authorized to rely upon but am not bound by the Guidelines for the Assessment of Civil Penalties (39 F.R. 27711, July 31, 1974). See 40 CFR 168.46(b).

Gravity of the violation is usually considered from two aspects: gravity of harm and gravity of misconduct. The Administrator considered it necessary to take action in accordance with Sec. 6(c) of FIFRA to suspend the registrations of pesticides containing heptachlor and chlordane in order to prevent an imminent hazard during the time required for the cancellation proceedings. A suspension order was issued and this order has been upheld by the courts. It is axiomatic that if a suspension order, which is based on findings as to the existence of an immiment hazard, is to accomplish its intended purpose, it must be obeyed. Accordingly, gravity of the harm, which includes possible injury to man and the environment, is considered to be serious.

Gravity of misconduct includes Respondent's history of compliance with the Act and evidence of good faith or the lack thereof. See 40 CFR 168.60(b)(2). There is no evidence in the record of past violations of the Act by Respondent or of charges of such violations. Respondent's history of compliance with the Act must be considered to be good. As to good faith, Respondent has been charged with notice of the suspension order based on its failure to rebut the presumption of delivery in the ordinary course of the mails and based upon the rule that service upon counsel of record in a proceeding is in law notice to a party represented by counsel. It is nevertheless possible that Respondent did not receive actual notice of the suspension order until receipt of the letters from the Registration Division (finding 16). This was after the last sales which are charged as violations of the order. Respondent ceased formulating the products at issue after February 12, 1976 and, insofar as the record discloses, sales of such products were also discontinued. These discontinuances are mitigating factors.

Respondent's sales for the year ending March 31, 1976, were in excess of one million dollars and Respondent has not contended that imposition of the proposed penalty would adversely effect its ability to continue in business. Under the Civil Penalty Assessment Schedule (39 F.R. 27711, July 31, 1974), the penalty for violation of a suspension order with knowledge of the order is $5,000, the maximum penalty for each offense permitted by Sec. 14(a)(1) of the Act, irrespective of the category by virtue of amount of sales in which the violator is placed. In this connection, six separate sales

of the three products involved in this proceeding have been established (finding 14) and it would appear that each sale constitutes a separate offense. Complainant has, however, regarded sales of the three products, even though more than one sale of a product may have been made, as three violations in computing the proposed penalty of $15,000. This constitutes consideration of the mitigating factors--Respondent's cessation of production and sales of the pesticides involved in February of 1976 and the fact that the Administrator's final order in the cancellation proceeding permitted the sale of and use of existing products subject to the order.[5/]

Under all the circumstances, $15,000, the amount proposed in the complaint, is considered appropriate and is hereby proposed for sales in violation of the suspension order.

Final Order[6/]

Pursuant to Section 14(a)(1) of the Federal Insecticide, Fungicide and Rodenticide Act as amended (7 U.S.C. 136 l(a)(i)) a civil penalty of $15,000 is hereby assessed against Respondent, Selco Supply Company,

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5/ I am permitted to increase as well as decrease the proposed penalty from that sought in the complaint. See 40 CFR 168.46(b).

6/ 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 (30 days after transmission by the Regional Hearing Clerk) therein specified.

Inc., for the violations of Section 12(a)(2)(J) (7 U.S.C. 136 j(a)(2)-(J)), which have been established as charged in the complaint. Respondent is ordered to pay the above sum by forwarding or delivering to the Regional Hearing Clerk a cashier's or certified check in the amount of $15,000 within 60 days of the receipt of this order.

Dated this 8th day of September 1978.

Spencer T. Nissen
Administrative Law Judge