



**UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
REGION 5**



<b>In the Matter of:</b>	)	
	)	
<b>Smith Chemical &amp; Wax, Inc.</b>	)	<b>Docket No. FIFRA-5-2000-015</b>
<b>6480 Commerce Road</b>	)	
<b>Westland, Michigan 48185</b>	)	
	)	
<b>Respondent.</b>	)	
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**INITIAL DECISION AND DEFAULT ORDER**

This is a civil administrative proceeding instituted under Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended (“FIFRA”), 7 U.S.C. 136(a), and the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits (“Consolidated Rules”), 40 C.F.R. Part 22 (2000 Edition). The proceeding was initiated by a Complaint and Notice of Opportunity for Hearing (“the Complaint”) filed by the Complainant, the Chief of the Pesticides and Toxics Division, Region 5, United States Environmental Protection Agency (“U.S. EPA”), against the Respondent, Smith Chemical & Wax, Inc. In its Complaint, U.S. EPA alleged, in three counts, that the Respondent had violated FIFRA for failure to submit a Pesticide Report for Pesticide-Producing and Device-Producing Establishments (“Annual Pesticide Production Report”) for calendar years 1997 and 1998 and for failure to include the U.S. EPA Registration Numbers of its products on its production records. For these violations, U.S. EPA proposed the assessment of a civil administrative penalty in the amount of Ten Thousand Four Hundred Thirty-Seven Dollars (\$10,437) against the Respondent.

In the currently pending Motion for Default Order, U.S. EPA alleges that the Respondent is in default for failure to file an Answer to the Complaint and requests that the full penalty of Ten Thousand Four Hundred Thirty-Seven Dollars (\$10,437) be assessed.

Based upon the record in this matter and the following Findings of Violation, Conclusions of Law and Penalty Calculation, the Complainant's Motion for Default Order is hereby GRANTED. The Respondent, Smith Chemical & Wax, Inc., is hereby found in default and a civil penalty in the amount of Ten Thousand Four Hundred Thirty-Seven Dollars (\$10,437) is assessed against it.

### **Background**

On April 19, 2001, the Complainant filed an Administrative Complaint and Notice of Opportunity for Hearing against the Respondent. The Complaint alleges in three counts that the Respondent violated FIFRA by: 1) failing to submit an Annual Pesticide Production Report for calendar year 1997 on or before March 1, 1998, in violation of Section 7(c)(1) of FIFRA, 7 U.S.C. 136e(c)(1), and 40 C.F.R. Part 167, Subpart E; 2) failing to submit an Annual Pesticide Production Report for calendar year 1998 on or before March 1, 1999, in violation of Section 7(c)(1) of FIFRA, 7 U.S.C. 136e(c)(1), and 40 C.F.R. Part 167, Subpart E; and 3) failing to include the U.S. EPA Registration Numbers, of the products it produces, in its production records in violation of Section 8(a) of FIFRA, 7 U.S.C. 136f(a), and 40 C.F.R. Part 169.

The Complaint at Paragraph 45 states:

If Respondent does not file a written answer within 30 calendar days after receiving this complaint, the Presiding Officer may issue a default order, after motion under section 22.17 of the Consolidated Rules. Default by Respondent constitutes an admission of all factual allegations in the complaint and a waiver of the right to contest the factual

allegations. Respondent must pay any penalty assessed in a default order without further proceedings 30 days after the order becomes a final order of the Administrator of the U.S. EPA under Section 22.27(c) of the Consolidated Rules.

On January 3, 2001, an employee of the Michigan Department of Agriculture personally served Cynthia A Smith, Vice President of Smith Chemical & Wax, Inc., with a copy of the Complaint and a copy of the Consolidated Rules. Prior service of the complaint had been attempted: 1) on the corporate registered agent, which was returned as undeliverable; 2) via Federal Express, without obtaining a signature from the recipient; and 3) on an attorney who has previously represented the Respondent.

On March 15, 2001, U.S. EPA sent a letter to the Respondent notifying the Respondent that it should have filed an Answer to the Complaint by February 2, 2001.

To date, the Respondent has failed to file an Answer to the Complaint.

On September 25, 2001, the Complainant filed a Motion for Default Order. It was served on the Respondent by U.S. Mail, First Class and Federal Express. It was also served on the attorney for the Respondent by Federal Express.

To date, the Respondent has failed to file a Response to the Motion for Default Order.

### **Findings of Violation**

Pursuant to 40 C.F.R. 22.17 and the entire record in this matter, I make the following findings of fact:

1. On April 19, 2001, U.S. EPA filed an administrative complaint against the Respondent Smith Chemical and Wax, Inc. alleging violation of FIFRA, 7 U.S.C. 136l(a), and the regulations promulgated thereunder.
2. The Respondent is a registered pesticide producing establishment.
3. The Respondent has U.S. EPA Establishment Number 0650566-MI-001.
4. The Respondent possessed its Establishment Number on or about May 14, 1991.
5. Per Section 7(c)(1) of FIFRA, 7 U.S.C. 136e(c)(1), and the regulations codified at 40 C.F.R. 167 Subpart E, the Respondent was required to submit an Annual Pesticide Production Report for 1997 by March 1, 1998.
6. To date, the Respondent has not submitted its Annual Pesticide Production Report for calendar year 1997 to U.S. EPA.
7. Per Section 7(c)(1) of FIFRA, 7 U.S.C. 136e(c)(1), and the regulations codified at 40 C.F.R. 167 Subpart E, the Respondent was required to submit an Annual Pesticide Production Report for calendar year 1998 by March 1, 1999.
8. To date, the Respondent has not submit its Annual Pesticide Production Report for calendar year 1998 to U.S. EPA.
9. Per 40 C.F.R. 169.2(a), producers of pesticides or active ingredients used in producing pesticides subject to FIFRA must maintain records showing the product name, U.S. EPA Registration Number, amounts per batch and batch identification of all pesticides produced.
10. A Michigan Department of Agriculture inspector authorized to conduct inspections under FIFRA conducted an inspection of the Respondent's place of business on November 4, 1997.

11. Production records obtained during this November 4, 1997, inspection do not contain the U.S. EPA Registration Numbers of the products the Respondent produced during 1997.

12. The Complaint sought a penalty of Ten Thousand Four Hundred Thirty-Seven Dollars (\$10,437) for the violations committed by the Respondent.

13. The Complaint was served by personal service on Cynthia A. Smith, Vice President of the Respondent Corporation.

14. To date, the Respondent has failed to file an Answer to the Complaint.

15. The Respondent was served with a Motion for Default Order, by Federal Express and First Class Mail. A courtesy copy of the Motion for Default was served upon the attorney for Respondent.

16. To date, the Respondent has failed to respond to the Motion for Default Order.

### **Conclusions of Law**

1. Jurisdiction for this action was conferred upon U.S. EPA by Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended (FIFRA), 7 U.S.C. 136l(a). 2.

The Respondent was properly served the Complaint.

3. The Respondent's failure to file an Answer to the Complaint, or otherwise respond to the Complaint, constitutes an admission of all facts alleged in the Complaint and a waiver of the Respondent's right to a hearing on such factual allegations. 40 C.F.R. 22.17(a) and 22.15(d).

4. By failing to submit its Annual Pesticide Production Report for 1997, the Respondent is in violation of Section 7(c)(1) of FIFRA, 7 U.S.C. 136e(c)(1), and 40 C.F.R. 167 Subpart E.

5. By failing to submit its Annual Pesticide Production Report for 1998, the Respondent is in violation of Section 7(c)(1) FIFRA, 7 U.S.C. 136e(c)(1), and 40 C.F.R. 167 Subpart E.

6. By failing to include the U.S. EPA Registration Numbers of the products it produces in its production records, the Respondent has violated Section 8(a) of FIFRA, 7. U.S.C. 136 f(a), and 40 C.F.R. Part 169.

7. The Respondent's failure to file a timely answer to the Complaint or otherwise respond to the Complaint, is grounds for the entry of a default order against the Respondent assessing a civil penalty for the violations described above. 40 C.F.R. 22.17(a).

8. As described in the "Penalty Calculation" Section below, I find the Complainant's proposed civil penalty of Ten Thousand Four Hundred Thirty-Seven Dollars (\$10,437) is properly based upon the statutory requirements of the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 136l(a)(4), and the U.S. EPA Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act, dated July 2, 1990 ("ERP").

### **Penalty Calculation**

Under Section 14(a)(4) of FIFRA, 7 U.S.C. 136l(a)(4), the statutory penalty factors include "the appropriateness of such penalty to the size of business of the person charged, the effect on the person's ability to continue in business, and the gravity of the violations." The U.S. EPA guidance document used to implement these statutory penalty factors in a consistent nationwide manner is the "*Enforcement Response Policy for the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA)*," dated July 2, 1990 ("ERP"). In five steps, it sets out the process to be used by U.S. EPA personnel when proposing penalties in FIFRA administrative actions. According to the ERP, refusing

to maintain records required under Section 8 of FIFRA is a Level 2 violation. According to the ERP, the size of Respondent's business is Level 1. Plotting these two points on the matrix of Table 1 of the ERP, results in a proposed penalty of \$4,400 per violation of Section 7 and \$5,500<sup>1</sup> per violation of Section 8. This resulted in a total proposed penalty of \$14,300. The ERP then requires consideration of gravity adjustments; U.S. EPA determined that no adjustments were appropriate. The final step requires "consideration of the effect that payment of the total civil penalty will have on the violator's ability to continue in business." In 1999, the Respondent submitted copies of its tax returns for 1997 and 1998 and unaudited income statements to support a claim of financial inability to pay. Based upon review of this information by Financial Analyst John Luksis, U.S. EPA adjusted the proposed penalty downward to \$10,437.

Reviewing U.S. EPA's penalty calculation, I find the proposed civil penalty of \$10,437 is appropriate, and is based upon Section 14(a)(4) of FIFRA and the ERP. The record supports assessment of the proposed penalty of Ten Thousand Four Hundred Thirty Seven Dollars (\$10,437).

### **Default Order**

Respondent is hereby ORDERED as follows:

A. Respondent is assessed a civil penalty in the amount of Ten Thousand Four Hundred Thirty Seven Dollars (\$10,437).

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<sup>1</sup> Section 14(a) of FIFRA, 7 U.S.C. 136l(a) authorizes a civil penalty of up to \$5,000 for a violation of FIFRA. The amount has been increased to \$5,500 by the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. 2461, as amended, and the Debt Collection Improvement Act of 1996, 31 U.S.C. 3701.

B. Payment shall be made by certified or cashier's check payable to "Treasurer of the United States of America" within thirty (30) days after the effective date of the final order. 40 C.F.R.

22.31(c). Such payment shall be remitted directly to:

U.S. Environmental Protection Agency  
Region 5  
P.O. Box 70753  
Chicago, Illinois 60673

C. A copy of the payment shall be mailed to the Regional Hearing Clerk (Mail Code R-19J) and Counsel for the Complainant (Mail Code C-14J), U.S. Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604-3590. A transmittal letter identifying the name and docket number should accompany both the remittance and the copies of the check.

D. This Default Order constitutes an Initial Decision, as provided in 40 C.F.R. 22.17(c). This Initial Decision shall become a final order unless (1) an appeal to the Environmental Appeals Board is taken by any party to the proceedings *within thirty (30) days from the date of service provided in the Certificate of Service accompanying this order*, or (2) a party moves to set aside the Default Order, or (3) the Environmental Appeals Board elects, *sua sponte*, to review the Initial Decision within forty-five (45) days after its service upon the parties.



IT IS SO ORDERED.

Dated: September 10, 2002

/s/ Barat Mathur for  
Thomas V. Skinner  
Regional Administrator

Prepared by Regina Kossek, Regional Judicial Officer