



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4



In the Matter of)
)
Carlos Gonzalez d/b/a) Docket No. FIFRA-04-2003-3024
Water Protection, Inc.,)
)
Respondent.)
_____)

DEFAULT ORDER AS TO LIABILITY
AND
ORDER TO SUPPLEMENT RECORD AS TO THE PENALTY

This administrative proceeding for the assessment of a civil penalty was initiated by the Director of the Air, Pesticides, and Toxics Management Division of the Environmental Protection Agency (EPA) Region 4 (“Complainant”), pursuant to Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended, 7 U.S.C. §§ 136 *et seq.* (hereinafter “FIFRA”), and the Consolidated Rules of Practice governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders and the Revocation, Termination or Suspension of Permits (“Consolidated Rules”), 64 Fed. Reg. 40138 (July 23, 1999). On July 3, 2003, Complainant filed a Civil Complaint and Notice of Opportunity for Hearing (“Complaint”) seeking a penalty of \$ 4,400 against Respondent. No answer having been filed in this matter, Complainant filed a Motion for Default Order (“Motion”) on February 12, 2004, seeking the full amount of the penalty proposed in the Complaint.

Section 22.17(a) of the Consolidated Rules authorizes a finding of default “upon failure to timely answer a complaint”. 40 C.F.R. § 22.15(a) requires an answer to the Complaint within thirty (30) days after service. Default by respondent constitutes, for purposes of the pending proceeding, an admission of all facts alleged in the complaint and a waiver of respondent’s right to a hearing on such factual allegations.

On July 3, 2003, Complainant filed the Complaint with the Region 4 Regional Hearing Clerk, and served a copy sent by certified mail, return receipt requested, to Respondent (Motion Exhibit A). The return receipt card was signed by an agent of Respondent and received back by

Complainant on or about July 10, 2003. Thereafter, Complainant filed a Proof of Service of Complaint with the Regional Hearing Clerk on July 21, 2003, with a copy sent by first class mail to Respondent (Motion Exhibit B). The return receipt card was signed by Mr. Gonzales on or about July 23, 2003. Therefore, Respondent's answer was to be filed no later than August 22, 2003.

Respondent has failed to answer the complaint as evidenced by the Affidavit of Patricia Bullock, Region 4 Regional Hearing Clerk (Motion Exhibit C). Respondent's failure to answer the Complaint constitutes a default under the Consolidated Rules at 40 C.F.R. § 22.17(a), and entitles Complainant to judgment. Therefore, Respondent is hereby found in default and to have admitted all of the facts alleged in the Complaint.

The Rules state at 40 C.F.R. § 22.17(c) as follows, in pertinent part:

“ . . .When the Presiding Officer finds that a default has occurred, he shall issue a default order against the defaulting party as to any or all parts of the proceeding unless the record shows good cause why a default order should not be issued. . . .The relief proposed in the complaint or the motion for default shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act. . . .”

At this time, there is insufficient evidence of the proposed penalty assessment in the case record before me to support the proposed penalty of \$ 4,400. Along with the Motion, Complainant submitted a number of documents, including a copy of the Enforcement Response Policy for the FIFRA, dated July 2, 1990. The Motion, signed by Counsel for Complainant, contains references to that policy and discussion of the application of the policy to Respondent. However, unsupported argument contained in Complainant's Motion does not constitute evidence. Since there is no basis upon which to determine whether the proposed penalty is clearly inconsistent with the record of the proceeding or the Act, the issue of penalty is reserved for further proceedings.

IT IS ORDERED:

1. Respondent is found to be in default under 40 C.F.R. § 22.17 and is liable for the violations alleged in the Complaint.

2. On or before **May 28, 2004**, Complainant shall submit supporting documentation such as an affidavit or declaration by the person who calculated the proposed penalty, stating the legal and factual grounds supporting the written argument for the proposed penalty. Any documents relied upon should also be referenced in the affidavit and attached to the affidavit as an exhibit.

24. This Order resolves the issue of liability while leaving unresolved the issue of remedy. Therefore, in accordance with 40 C.F.R. § 22.17(c), until such time as a determination is made on the issue of penalty, this Order does not constitute an Initial Decision.

Date: _____

SIGNED _____
Susan B. Schub
Presiding Officer