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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION VII

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ENVIR. APPEALS BOARD)
IN THE MATTER OF)
HOOPS AGRI SALES COMPANY)
Respondent)

ENVIRONMENTAL PROTECTION
AGENCY-REGION VII
REGIONAL HEARING CLERK

Docket No. FIFRA-07-2003-0055

INITIAL DECISION AND DEFAULT ORDER

Background

This initial decision is upon motion for issuance of a default order in this proceeding, filed by Complainant, Director of the Water, Wetlands and Pesticides Division, Region 7, on April 15, 2004. The motion seeks an order assessing a civil penalty in the amount of eight thousand eight hundred dollars (\$8,800) against Respondent, Hoops Agri Sales Company, North Bend, Nebraska. Pursuant to the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties ("CROP"), 40 C.F.R. Part 22, and based upon the record in this matter and the following Findings of Fact, Conclusions of Law, and Determination of Civil Penalty Amount, Complainant's Motion for Default Order is hereby GRANTED.

Findings of Fact

Based on review of the record in this proceeding and pursuant to section 22.27(a) of the CROP, I make the following findings of fact:

1. Section 7(c) of the Federal Insecticide Fungicide and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136e(c) states that any producer operating an establishment registered under FIFRA

shall provide information annually to the Administrator of EPA regarding pesticides produced at the establishment.

2. Section 2(dd) of FIFRA, 7 U.S.C. § 136(dd) states that the term “establishment” means, in part, any place where a pesticide is produced for distribution or sale.

3. Section 2(s) of FIFRA, 7 U.S.C. § 136(s), states that the term “person” means an individual, partnership, association, corporation, or any organized group of persons.

4. Section 167.85(d) of Title 40 C.F.R., implementing section 7(c) of FIFRA, states that annual reports must be submitted on or before March 1 of each year.

5. Section 12(a)(2)(L) of FIFRA, 7 U.S.C. § 136j(a)(2)(L) states that it shall be unlawful for a producer to violate any provision of section 7 of FIFRA.

6. Section 14(a)(1) of FIFRA, 7 U.S.C. § 136l(a)(1), as amended by the Debt Collection Improvement Act of 1996, implemented by 40 C.F.R. Part 19, in effect as of December 31, 1996, states that the Administrator may assess a penalty of not more than \$5,500 for each violation of FIFRA, against a person identified in section 14(a)(1).

7. Section 22.1(a)(1) of the CROP states that the CROP applies to the assessment of administrative civil penalties under section 14(a) of FIFRA.

8. Section 22.13(a) of the CROP states that a proceeding under the CROP is initiated by the filing of a complaint conforming to section 22.14, and section 22.15(a) states that an answer to the complaint must be filed within 30 days after service of the complaint.

9. Section 22.17(a) of the CROP states, in part, that a party may be found in default for failure to file an answer to a complaint, and that default by a respondent constitutes an admission of the facts alleged in a complaint and a waiver of its right to contest the factual allegations.

10. Section 22.16(b) of the CROP states that a party who fails to respond to a motion, including a motion for a default order, within 15 days of service, waives its objection to granting of the motion.

11. Complainant filed a complaint in this proceeding on January 15, 2003, and the complaint was delivered personally to Respondent on January 22, 2003.

12. Respondent did not file an answer to the complaint within 30 days of service, and has not filed an answer to the complaint as of this date.

13. Complainant filed a Motion for Default Order on April 15, 2004, which was sent to Respondent on that date by first class mail.

14. Respondent did not file a response to the motion within 15 days and has not filed a response as of this date.

15. At all times relevant to this proceeding Respondent operated a pesticide production establishment in North Bend, Nebraska. The establishment had been registered with EPA since April 25, 1995.

16. In December 1998, EPA mailed an annual pesticide production form to Respondent with instructions to complete and file the form with EPA, Region 7, no later than March 1, 1999.

17. Respondent did not file its annual pesticide production report for 1998 with EPA by March 1, 1999.

18. In December 2000, EPA mailed an annual pesticide production form to Respondent with instructions to complete and file the form with EPA, Region 7, no later than March 1, 2001.

19. Respondent did not file its annual pesticide production report for 2000 with EPA by March 1, 2001.

Conclusions of Law

Based on my review of the record and the foregoing findings of fact, and pursuant to section 22.27(a), I make the following conclusions of law:

1. Respondent is a person as that term is defined in section 2(s) of FIFRA.
2. Respondent operates an establishment as that term is defined in section 2(dd) of FIFRA.
3. Respondent is a producer as that term is used in section 12(a)(2)(L) of FIFRA.
4. Respondent is a “dealer, retailer, or other distributor” as those terms are used in section 14(a)(1) of FIFRA.
5. Respondent’s failure to file an annual pesticide production report for the reporting year 1998 is a violation of section 12(a)(2)(L) of FIFRA.
6. Respondent’s failure to file an annual pesticide production report for the reporting year 2000 is a violation of section 12(a)(2)(L) of FIFRA.
7. Respondent’s violations of FIFRA described in paragraphs 5 and 6 above subject it to the assessment of civil penalties as described in section 14(a)(1) of FIFRA, as amended by the Debt Collection Improvement Act of 1996.
8. This proceeding was commenced in accordance with section 22.13(a) of the CROP by service of a complaint on Respondent in accordance with section 22.5(b)(1), and Respondent was required by section 22.15(a) of the CROP to file an answer to the complaint in this proceeding within 30 days of service of the complaint.

9. Respondent's failure to file an answer to the complaint subjects it to a finding of default pursuant to section 22.17(a).

10. Complainant served a copy of its Motion for Default Order on Respondent in accordance with section 22.5(b)(2) of the CROP. Respondent's failure to file a response to Complainant's motion for default order is deemed a waiver, pursuant to section 22.16(b) of the CROP, of any objection to the granting of the motion.

11. Respondent is in default in this proceeding and has waived its right to contest the factual allegations in the complaint.

12. Respondent is liable for a civil penalty as set forth below.

Determination of Civil Penalty Amount

Section 14(a)(4) of FIFRA, 7 U.S.C. § 136l(a)(4) provides that, in determining the amount of any civil penalty to be assessed pursuant to section 14(a)(1), the following factors must be considered: (1) the appropriateness of the penalty to the size of the respondent's business; (2) the effect on the respondent's ability to continue in business; and (3) the gravity of the violation. The EPA has issued a policy, entitled "Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)," dated July 2, 1990, which provides guidance for determining the appropriate penalty under section 14(a) of FIFRA. Pursuant to section 22.27(b) of the CROP, any penalty assessment is to be based on the statutory factors outlined above, and in consideration of the penalty guidance cited above. That section also provides that, in the case of a default, the presiding officer shall not assess a penalty greater than the amount proposed in the complaint or requested in the motion for default order, whichever is

less. In addition, section 22.17(c) of the CROP provides that the presiding officer shall order the relief sought in the complaint or motion for default order “unless the requested relief is clearly inconsistent with the record of the proceeding or the Act [FIFRA].”

With respect to penalty, the record in this proceeding includes a penalty calculation worksheet (a form included in the penalty policy cited above and completed by complainant in this case) which was served on Respondent with the complaint. The record also includes a brief statement in the complaint and motion for default order of the basis for the requested penalty and a more detailed memorandum by a Region 7 Environmental Protection Specialist describing the statutory and penalty policy criteria and how they were applied in this case.

In calculating the penalty, Complainant first considered statutory factors 1 and 3 described above, the size of Respondent’s business in relation to the penalty and the gravity of the violation. With respect to gravity, Complainant identified the reporting violations as a “level 2” (the policy calls for violations to be identified as levels 1 through 4, with level 1 considered the most serious, depending on the section of the statute violated, and the circumstances of the violation as described in the policy). Complainant explained that no gravity adjustments were made, since reporting violations do not lend themselves to adjustment, and the application of the penalty policy matrix (considering gravity and size of business) accounts for the appropriate gravity penalty component for reporting and recordkeeping violations.

With respect to the size of business, Complainant placed Respondent in “Category II”, which denotes gross revenues between \$300,000 and \$1,000,000, the middle range of categories I through III (category I denotes gross revenues over \$1,000,000 for the prior year, and category

III gross revenues under \$300,000). Complainant determined this category based on Dun & Bradstreet reports for the relevant years, indicating gross revenues of \$900,000.

Applying the level 2 violations and the category II size of business to the penalty policy matrix, Complainant determined a penalty of \$4,400 for each violation. Thus, the total penalty sought in the complaint and motion for default order was \$8,800. The statutory maximum for two violations under section 14(a)(1) of FIFRA is \$11,000.

After calculating the base penalty, Complainant considered the second statutory factor, the effect of the penalty on Respondent's ability to continue in business. Complainant considered two factors in this regard. Complainant noted the information indicating that Respondent had experienced gross sales of \$900,000. Complainant also explained that Respondent had not raised an inability to pay claim, or a claim that the penalty would adversely affect Respondent's ability to continue in business.

Based on my review of the record, I have determined that the penalty amount sought is supported by the record and is not inconsistent with the statutory factors for assessment of a penalty. Complainant's consideration of the gravity component of the penalty is a reasonable application of the facts available with respect to the reporting violations under FIFRA, and is consistent with the guidance provided by the penalty policy. Complainant's consideration of Respondent's financial situation is also reasonable. While the accuracy and import of financial reports could be subject to dispute, and Respondent may have other relevant information relating to its financial situation, Respondent, having been given adequate notice and opportunity to do so, did not challenge Complainant's conclusions with respect to the available financial information. Respondent was on notice of Complainant's position regarding the size of business

when it received the complaint, and had an additional opportunity to challenge Complainant's position as detailed in the motion for default order.

Based on the foregoing, including application of the relevant statutory factors and in consideration of the applicable penalty policy, I have determined that the proposed penalty of \$8,800 should be assessed in this proceeding.

DEFAULT ORDER

Respondent is hereby ORDERED, as follows:

A. Respondent is assessed a civil penalty in the amount of eight thousand eight hundred Dollars (\$8,800).

B. Respondent shall, within thirty calendar days after this Default Order has become final, forward a cashier's or certified check, in the amount of eight thousand eight hundred dollars (\$8,800), payable to the order of the "Treasurer, United States of America." Respondent shall mail the check to the following address:

US EPA-Region 7
PO Box 371099M
Pittsburgh, Pennsylvania 15251

In addition, Respondent shall mail a copy of the check to the following address:

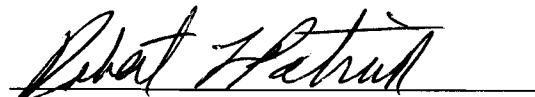
Regional Hearing Clerk
U.S. Environmental Protection Agency
Region VII
901 North 5th Street
Kansas City, Kansas 66101

C. 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 from it by any party to the proceedings *within thirty (30) days from the date of service provided in the certificate of service accompanying this order*; (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,

this 29th day of June, 2004



Robert L. Patrick
Regional Judicial Officer
Region 7

IN THE MATTER OF HOOPS AGRI SALE S COMPANY, Respondent
Docket No. FIFRA-07-2003-0055

CERTIFICATE OF SERVICE

I certify that the foregoing Initial Decision and Default Order was sent this day in the following manner to the addressees:

Copy hand delivered to
Attorney for Complainant:

Rupert G. Thomas
Senior Assistant Regional Counsel
Region VII
United States Environmental Protection Agency
901 N. 5th Street
Kansas City, Kansas 66101

Copy by U.S. Certified Mail,
Return Receipt Requested, and
First Class Mail to:

Robert W. Hoops
Hoops Agri Sales Company
West Highway 30
Box 420
North Bend, Nebraska 69649

Copy by First Class Pouch Mail to:


Assistant Administrator
Office of Enforcement and Compliance Assurance
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., NW (2261A)
Washington, DC 20460-0001

and

Copy by Federal Express Mail to:

Eurika Durr
Environmental Appeals Board
Clerk of the Board
Colorado Building
1341 G Street, NW Suite 600
Washington, DC 20005

Dated: 6/30/04


Kathy Robinson
Regional Hearing Clerk