UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION VII

IN THE MATTER OF	)	
	)	
RANDY ROLING,	)	Docket No. FIFRA-07-2002-0147
	)	
Respondent	)	

INITIAL DECISION AND DEFAULT ORDER

This initial decision is upon motion for issuance of a default order in this proceeding. The proceeding was initiated when Complainant, Director of the Water, Wetlands, and Pesticides Division, Region VII, filed a complaint against Respondent on June 3, 2002. The motion seeks an order assessing a civil penalty in the amount of five thousand five hundred dollars ($5,500) against Respondent, Randy Roling. Pursuant to the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties ("Consolidated Rules"), 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.

BACKGROUND

Complainant filed an administrative complaint initiating this proceeding on June 3, 2002. The complaint alleged two counts of violation of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") and proposed a total penalty of $5,500 for the alleged violations. Section V of the complaint, entitled "Answer and Request for Hearing", provides information concerning Respondent's

obligations with respect to responding to the complaint. Paragraph 30 states that "if Respondent wishes to avoid being found in default, " Respondent is required to file an answer with the Regional Hearing Clerk within 30 days of service of the complaint. Paragraph 30 also provides as follows:

> Said answer shall clearly and directly admit, deny, or explain each of the factual allegations contained in the Complaint with respect to which Respondent has any knowledge, or shall clearly state that Respondent has no knowledge as to particular factual allegations in the Complaint.

On June 8, 2002, without responding to the complaint, Respondent sent a letter, addressed to the Complainant, stating that his name is "trademarked and copyrighted by common law." The letter was directed to Leo Alderman, Director, Water, Wetlands and Pesticide Division, and was not filed with the Regional Hearing Clerk. Counsel for Complainant responded to the June 8 correspondence with a letter to Respondent dated June 27, 2002, stating that Respondent's letter was not an answer to the complaint, quoting from Rule 22.15(b) of the Consolidated Rules of Practice relating to the required contents of an answer, and explaining that if Respondent did not submit an answer by July 8, 2002, Complainant "will file a Motion for Default" and request an order for the payment of the proposed penalty.

Respondent sent a letter dated July 6, 2002, to Complainant, asking a series of questions, but not addressing any of the allegations in the Complaint specifically or generally. The July 6 letter was again directed to Mr. Alderman, and was not filed with the Regional Hearing Clerk.

Complainant subsequently filed a motion for default order, and, pursuant to my order, filed supplements to the record on November 8, 2002, and January 29, 2003. To date, Respondent has not

filed a response to any of these later filings, and has not submitted any document which could be construed as an answer to the complaint.

I. FINDINGS OF FACT

Pursuant to 40 C.F.R. §§ 22.17(c) and 22.27(a), and based on the entire record, I make the following findings of fact:

1. The Respondent is Randy Roling, located, during all times relevant, at 17126 Twelve Mile Road, Bernard, Iowa.

2. Section 3(d)(1) of FIFRA, 7 U.S.C. § 136a(d)(1) states, in relevant part, that a pesticide classified by the Administrator for restricted uses shall be applied for those uses only by a certified applicator or a person under the direct supervision of a certified applicator.

3. Section 2(e)(1) of FIFRA, 7 U.S.C. § 136(e)(1) states, in relevant part, that a "certified applicator" is any individual who is certified under section 11 of FIFRA, 7 U.S.C. § 136i to use or supervise the use of any pesticide which is classified for restricted use.

4. Section 2(s) of FIFRA, 7 U.S.C. § 136(s) states that a "person" is any individual, partnership, association, corporation, or any organized group of persons.

5. Section 12(a)(2)(F) of FIFRA, 7 U.S.C. § 136j(a)(2)(F) states, in relevant part, that it shall be unlawful for any person to use any registered pesticide classified for restricted use other than in accordance with section 3(d) of FIFRA.

6. Section 12(a)(2)(G) of FIFRA, 7 U.S.C. § 136j(a)(2)(G) states that it shall be unlawful for any person to use a registered pesticide in a manner inconsistent with its labeling.

7. Section 14(a)(1) of FIFRA, 7 U.S.C. § 136l(a)(1), as amended by the Debt Collection Improvement Act of 1996, states, in relevant part, that a commercial applicator who violates any provision of FIFRA is subject to a civil penalty of not more than $5,500 for each offense.

8. Section 2(e)(3) of FIFRA, 7 U.S.C. § 136(e)(3) states, in relevant part, that a commercial applicator is an applicator who uses a restricted use pesticide other than as provided in section 2(e)(2) of FIFRA.

9. Section 2(e)(2) of FIFRA, 7 U.S.C. § 136(e)(2) states, in relevant part, that a private applicator is a certified applicator.

10. "WARRIOR T" is an insecticide registered to Zenaca Ag Products, Inc., Wilmington, Delaware under EPA Registration No. 10182-434.

11. The label for "WARRIOR T" states, in relevant part, that it is a restricted use pesticide for use only by certified applicators (or persons under their direct supervision) and only for uses covered by the certified applicator's certification.

12. On or about June 29, 1999, Respondent purchased, and subsequently applied WARRIOR T.

13. At the time of Respondent's application of WARRIOR T, Respondent was not certified to use that pesticide, and was not working under the direct supervision of a certified applicator.

14. Complainant initiated a civil administrative proceeding for the assessment of a civil penalty pursuant to section 14 of FIFRA, 7 U.S.C. § 136(l), by issuance of a Complaint and Notice of Opportunity for Hearing against Respondent. The complaint and other documents were sent to Respondent by certified mail, return receipt requested, on June 4, 2002.

15. Respondent signed the return receipt for the documents identified in paragraph 14 on June 6, 2002.

16. The complaint alleged that Respondent had violated section 12(a)(2)(F) of FIFRA by using a registered pesticide classified for restricted use other than in accordance with the requirements of section 3(d) of FIFRA. The complaint further alleged that Respondent had violated section 12(a)(2)(G) of FIFRA by using a registered pesticide in a manner inconsistent with its labeling. The complaint stated that Complainant proposed to assess a total civil penalty of $5,500 for the violations alleged. The complaint also stated that failure to timely answer the complaint would constitute a binding admission of all allegations in the complaint, and could result in the issuance of a default order requiring payment of a civil penalty without further proceedings.

17. Respondent did not respond to the complaint within 30 days after June 6, 2002, and has not responded to date.

18. Rule 22.15(d) of the Consolidated Rules, 40 C.F.R. § 22.15(d), states that failure to admit, deny, or explain any material allegation of fact in a complaint is deemed an admission of the allegation.

19. A motion for default order and supporting documents were filed on August 14, 2002, and were delivered to Respondent by the Dubuque County Sheriff's Office on August 22, 2002. The filing included a request for the assessment of a civil penalty of $5,500 for the violations alleged in the complaint.

20. Rule 22.16(b) of the Consolidated Rules, 40 C.F.R. § 22.16(b), states that a response to a motion must be filed within 15 days after service of the motion.

21. Respondent did not file a response to Complainant's motion for default order within 15 days after August 22, 2002, and has not filed a response to date. Respondent has not filed responses to Complainant's supplements filed November 8, 2002, and January 29, 2003.

22. Rule 22.16(b) of the Consolidated Rules states that a party who fails to timely respond to a motion waives any objection to the granting of the motion.

23. Rule 22.17(c) states, in relevant part, that the relief proposed or requested in a complaint or default motion shall be ordered unless clearly inconsistent with the record or the Act (FIFRA).

II. CONCLUSIONS OF LAW

Pursuant to 40 C.F.R. §§ 22.17(c) and 22.27(a), and based on the entire record, I make the following conclusions of law:

1. The complaint in this proceeding was lawfully and properly served upon Respondent, in accordance with 40 C.F.R. § 22.5(b)(1).

2. Respondent was required to file an answer to the Complaint within thirty (30) days of service of the Complaint. 40 C.F.R. § 22.15(a).

3. Respondent's failure to file an answer to the Complaint constitutes an admission of all facts alleged in the Complaint and a waiver of Respondent's right to a hearing on such factual allegations. 40 C.F.R. § 22.17(a).

4. Complainant's Motion for Default Order was lawfully and properly served on Respondent. 40 C.F.R. § 22.5(b)(2).

5. Respondent was required to file any response to the motion within 15 days of service. 40 C.F.R. §22.16(b).

6. Respondent's failure to respond to the motion is deemed to be a waiver of any objection to the granting of the motion. 40 C.F.R. § 22.16(b).

7. Respondent is a "person" as that term is defined in section 2(s) of FIFRA, 7 U.S.C. § 1366(s), and is a "commercial applicator" as that phrase is defined in section 2(e)(3) of FIFRA, 7 U.S.C. § 136(e)(3).

8. Respondent's use of WARRIOR T was in violation of section 12(a)(2)(F) of FIFRA, 7 U.S.C. § 136j(a)(2)(F).

9. Respondent's use of WARRIOR T was in a manner inconsistent with its labeling in violation of section 12(a)(2)(G) of FIFRA.

10. Pursuant to section 14(a)(1) of FIFRA, 7 U.S.C. § 136l(a)(1), and 40 C.F.R. § 19.4, Table 1, Respondent is liable for a civil penalty of not more than $5,500 per violation for the violations described in paragraphs 8 and 9 above.

11. Respondent's failure to file a timely answer to the complaint is deemed an admission of the factual allegations in the complaint, and is grounds for the entry of this default order against the Respondent assessing a civil penalty for the violations described above.

12. Respondent's failure to file a response to Complainant's Motion for Default Order, is deemed a waiver of Respondent's right to object to the issuance of this order.

13. The civil penalty of $5,500 proposed in the complaint and requested in the motion for default order is not inconsistent with FIFRA and the record in this proceeding.

III. 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 a civil penalty, the Administrator must consider the following factors: (1) the appropriateness of the penalty in relation 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. This section also provides that the Administrator may issue a warning rather than assessing a penalty if the violation occurred despite Respondent's exercise of due care, or if the violation did not cause significant harm to health or the environment. The EPA has also issued a policy, entitled "Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), July 2, 1990," ("Penalty Policy") which it uses as guidance to determine appropriate penalties under section 14(a)(4). Pursuant to 40 C.F.R. § 22.27(b), any penalty assessment is to be based on the statutory factors outlined above, in consideration of the penalty guidance cited above.

Although not addressed initially in support of its motion, Complainant submitted supplements to the record on November 8, 2002 and January 29, 2003 in which it set forth the basis for its proposed penalty of $5,500 for the violations found above. Complainant based its proposed penalty on calculations it performed under the Penalty Policy. Based on my review of the record, I have determined that the penalty sought by Complainant is appropriate, for the reasons discussed below.

In calculating its proposed penalty, Complainant first determined the "gravity level" to be assigned to the violation, consistent with the statutory directive that the gravity of the violation must be considered in assessing a penalty. The Penalty Policy explains that this level is a relative value for each type of violation listed under section 12 of FIFRA, based on an "average set of circumstances" for the

type of violation, as it relates to actual or potential harm to health or the environment which might result from the violation, or the importance of the requirement violated to the regulatory scheme of the statute. This level is used to determine the base penalty amount, which is then adjusted, as appropriate, to account for the specific circumstances of the case. (See, Penalty Policy at p. 21.)

The gravity level in this proceeding under the Penalty Policy is level 2 for each of the violations at issue. Complainant seeks a penalty only for the section 12(a)(2)(F) violation (use of a restricted use pesticide by an uncertified person) and not for the section 12(a)(2)(G) violation (use in a manner inconsistent with labeling). Complainant calculated its requested penalty on that basis.[1] The assessment by Complainant of the section 12(a)(2)(F) violation as level 2 is consistent with Appendix A of the Penalty Policy.

Complainant next categorized the size of the violator's business, based on gross revenues, with Category I being the largest and Category III the smallest. Because the available information concerning the size of Respondent's business was "inconclusive" (Attachment 2 of Complainant's November 8, 2002, supplement at p. 3), Complainant placed Respondent in Category I (for commercial applicators, annual revenues over $1,000,000). The penalty policy provides for initial calculation of the size of business using Category I where information on the actual size is not "readily available," (Penalty Policy at p. 21), pending a showing by the respondent that a different category is appropriate. Complainant's estimate of Respondent's size of business has been made available to

[1]Although the record does not indicate the basis for the decision to calculate the penalty based on one statutory provision over the other, the consideration of the statutory factors (size of business, impact of a penalty on the business, and gravity) is similar, in this case, for each of the violations.

Respondent on numerous occasions, first as an attachment to the initial complaint, and then in the filings relating to the motion for default order. Respondent has not provided any response to Complainant's assertion. I therefore find it reasonable to use the estimated size of business.[2]

Complainant then determined the base penalty figure, which is derived from the gravity level and the size of business through a matrix. (Penalty Policy, Appendix C, Table 1.) The base penalty may then be adjusted after considering several factors relating to the gravity of the violation. This yields a penalty amount which may then be adjusted based on the effect of the penalty on a respondent's ability to continue in business.

Complainant calculated a $5,500 penalty based on the matrix.[3] Complainant then considered the various factors under the Penalty Policy to determine whether adjustments should be made. These factors included the toxicity of the pesticide used, the harm to public health or the environment attributable to the violation, history of prior violations, and culpability of Respondent. Complainant assessed numerical values for each of these factors and determined the sum of the values. The total was within a range in which the Penalty Policy does not call for an adjustment to the base amount. (See, Complainant's November 8, 2002 supplement, at pp. 4-5, and references cited therein.)

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[2]See, Sporicidin International, 1988 WL 236319 (E.P.A.) (Initial Decision, November 1, 1988).

[3]The Penalty Policy, written prior to the Debt Collection Improvement Act of 1996, states that the appropriate penalty should be $5,000. However, the EPA penalty policies were amended in a May 9, 1997 memorandum from the Assistant Administrator, Office of Enforcement and Compliance Assurance, to include a 10% upward adjustment in penalty policy calculations consistent with the 10% upward adjustment to the statutory maximum penalties in the 1996 statute. The figure calculated by Complainant also represents the adjusted statutory maximum for one violation by a commercial applicator under FIFRA.

Complainant's calculation of the gravity component is consistent with the record in this proceeding and is consistent with FIFRA.

Complainant's last consideration, and the final statutory factor, was the effect of the proposed $5,500 penalty on Respondent's ability to continue in business. Complainant assumed, based on lack of contrary information, that the proposed penalty would not impact Respondent's ability to continue in business. When it proposed the $5,500 penalty in the complaint, Complainant gave Respondent notice that it could present information concerning the impact of the proposal on Respondent's ability to continue in business (Id. at 5; complaint, ¶s 25-27). The record contains no information indicating that the penalty might adversely impact Respondent's ability to continue in business. I find Complainant's assumption, in the absence of contrary information, consistent with FIFRA.[4]

Complainant did not directly address the additional provision in section 14(a)(4) of FIFRA, 7 U.S.C. § 136l(a)(4), which provides that the Administrator "may" issue a notice of warning instead of a penalty if the Administrator "finds that the violation occurred despite the exercise of due care or did not cause significant harm to health or the environment... ." However the record contains sufficient information to justify assessment of a penalty. For example, with respect to "exercise of due care," the record contains evidence that Respondent knew of the certification requirements for restricted use pesticides and that he knew that he was not certified for use of the pesticide applied (November 8, 2002 supplement, attachment 3). Therefore, the record does not support a conclusion that the violations occurred despite the exercise of due care. With respect to harm to health or environment,

[4]See, Sporicidin International, 3 E.A.D. 589, 606, n. 41 (CJO 1991).

the Penalty Policy provides that if the total "gravity adjustment value," discussed previously, is less than three, a notice of warning may be issued. In this proceeding, the adjustment value was twelve. (See, Att. 2 to Complainant's November 8, 2002, Supplement at p. 4) Based on the discretionary nature of the notice of warning option,[5] and in consideration of the factors described above, I conclude that an assessment of a penalty in this proceeding is warranted.

Based on my consideration of the relevant statutory factors in light of the record in this proceeding, I have determined that the proposed penalty of $5,500 should be assessed.

DEFAULT ORDER

Respondent is hereby ORDERED, as follows:

A. Respondent is assessed a civil penalty in the amount of five thousand five hundred dollars ($5,500).

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 five thousand five hundred dollars ($5,500), payable to the order of the "Treasurer, United States of America." Respondent shall mail the check to the following address:

Mellon Bank
EPA - Region 7
Regional Hearing Clerk
P.O. Box 360748M
Pittsburgh, Pennsylvania 15251

[5]See, Green Thumb Nursery, Inc., 6 E.A.D. 782, 799-801 (EAB 1997).

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) and 22.27(a). 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.

Dated: February 27, 2003

/s/
Robert L. Patrick
Regional Judicial Officer
Region VII