



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION VII



IN THE MATTER OF	)	
	)	
Napoleon Elevator Co.	)	Docket No. FIFRA-07-2003-0027
	)	
	)	
Respondent	)	
_____	)	

INITIAL DECISION AND DEFAULT ORDER

Background

Complainant seeks a default order in this proceeding, based on a motion filed by Complainant, Director of the Water, Wetlands and Pesticides Division, Region 7, on March 30, 2004. The motion was supplemented by Complainant, at my direction, on July 6, 2004. The motion seeks an order assessing a civil penalty in the amount of five thousand five hundred dollars (\$5,500) against Respondent, Napoleon Elevator Co., Napoleon, Missouri. 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 December 2, 2002, and the complaint was received by Respondent on December 31, 2002.

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 March 30, 2004, which was sent to Respondent on that date by first class mail. Complainant filed a supplement on July 6, 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 Napoleon, Missouri. The establishment had been registered with EPA since 1999.

16. In December 2001, 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, 2002.

17. Respondent did not file its annual pesticide production report for 2001 with EPA by March 1, 2002.

#### 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 2001 is a violation of section 12(a)(2)(L) of FIFRA.

6. Respondent's violation of FIFRA described in paragraph 5 above subjects it to the assessment of a civil penalty 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. § 1361(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 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, 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].”

The record in this proceeding includes a penalty calculation worksheet (a form contained in the FIFRA policy cited above and completed by Complainant for 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. Finally, the record includes a memorandum from a Region 7 Environmental Scientist/Case Review Officer describing the statutory and penalty policy criteria and how they were applied in this case, filed as an attachment to Complainant’s Supplement to the Record.

In calculating the penalty, Complainant first considered the size of Respondent’s business in relation to the penalty and the gravity of the violation (statutory factors 1 and 3 described above). 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 (from the penalty policy matrix value) were made, since reporting violations do not lend themselves to adjustment (at least for a “first time” violation, such as that presented in



this proceeding), and the application of the penalty policy matrix (which considers 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 I", which denotes gross revenues over \$1,000,000 for the prior year. Complainant determined this category based on Dun & Bradstreet reports for the relevant years, indicating gross revenues in excess of \$1,000,000. Applying the level 2 violations and the category I size of business to the penalty policy matrix, Complainant determined a penalty of \$5,500, which is the statutory maximum for the violation. (Because this amount is the statutory maximum, an upward gravity adjustment would not have been appropriate for this proceeding in any event.)

After calculating the base penalty, Complainant considered the effect of the penalty on Respondent's ability to continue in business (statutory factor 2 discussed above). Complainant considered information indicating that Respondent had experienced annual sales in excess of \$1,000,000, and 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 with respect to the reporting violation under FIFRA, and is consistent with the guidance provided by the penalty policy. Complainant's consideration of Respondent's financial situation is also reasonable. 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 described in the motion for default order and in Complainant's supplement to the record. Respondent is presumably in the best position to know its financial condition, and has elected not to dispute Complainant's characterization of it.

Therefore, it is reasonable to use this characterization as a basis for the assessment of the penalty, along with the other bases described above.

In consideration of 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 \$5,500 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 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:

US EPA-Region 7  
PO Box 371099M  
Pittsburg, PA 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 5<sup>th</sup> 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 3rd day of August, 2004

//S//Robert L. Patrick

Robert L. Patrick  
Regional Judicial Officer  
Region 7