

5/4/93

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

IN THE MATTER OF)
)
WORLD INDUSTRIES) Docket No. FIFRA-09-0775-C-91-20
INTERNATIONAL, INC.,)
)
Respondent)

FIFRA: Section 14: Pursuant to Section 14 of FIFRA, 7 U.S.C. § 136l, a civil penalty in the amount of \$2,560.00 is assessed for the violation of Section 12 of FIFRA, 7 U.S.C. § 136j, previously found herein.

Appearances:

For Complainant: David M. Jones, Esquire
Assistant Regional Counsel
U.S. Environmental Protection Agency
Region IX
75 Hawthorne Street
San Francisco, CA 94105

For Respondent: Sam Nazaryan
(appearing pro se) President
World Industries International, Inc.
17955 Arenth Avenue
City of Industry, CA 91748

Before: Henry B. Frazier, III
Chief Administrative Law Judge

INITIAL DECISION

I. Background - Interlocutory Order for Partial Accelerated Decision

On May 27, 1992, an Interlocutory Order for Partial Accelerated Decision (Partial Accelerated Decision) was issued in this case. That Order, issued sua sponte, after a motion for a default order filed by the U.S. Environmental Protection Agency (EPA, Complainant, or the Agency) was denied, found that World Industries International, Inc. (Respondent, World Industries), had violated Section 12(a) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended, 7 U.S.C. § 136 et seq. More particularly, it was found that Respondent failed to submit to EPA, by March 1, 1990, the Pesticides Report for the calendar year 1989.

II. Background - Processing of the Case and Hearing

On November 18, 1992, a hearing, which had been requested by Respondent, was held in Pasadena, California, for the purpose of deciding the sole remaining issue of the amount, if any, of the civil penalty which appropriately should be assessed for the violation previously found.

In the complaint, EPA had proposed an administrative penalty of \$3,200.00 for the violation. At the hearing, Complainant contended that the proposed penalty was appropriate; Respondent contended that the proposed penalty was unfair and unreasonable and should be abated or reduced to a nominal amount.

Following the hearing, Complainant submitted proposed findings of fact and conclusions of law together with a supporting brief on March 14, 1993, and Respondent, appearing pro se, filed a document

variously denominated as status report or post-hearing brief, on March 25, 1993. A reply brief was filed by Complainant on April 15, 1993.

III. Findings of Fact

In addition to the findings of fact previously made in my Partial Accelerated Decision, and incorporated by reference to the extent not otherwise inconsistent with the findings of fact herein, on the basis of the entire record, including the testimony elicited at the hearing, the exhibits received in evidence and the submissions of the parties, and giving such weight as may be appropriate to all relevant and material evidence which is not otherwise unreliable, I make the findings of fact which follow. Each matter of controversy has been determined upon a preponderance of the evidence. All contentions and proposed findings and conclusions submitted by the parties have been considered, and whether or not specifically discussed herein, those which are inconsistent with this decision are rejected.

1. The 1989 Pesticides Report which Respondent was required to file was due on March 1, 1990. (Tr. 60.)

2. After the complaint was issued on November 20, 1990, World Industries submitted its Pesticides Report on December 5, 1990, which was considered by EPA to be evidence of good faith to warrant a reduction of the proposed penalty of \$3,200.00. (Tr. 36, 76-77; Respondent's Exhibit (Resp. Exh.) 1.)

3. The EPA case development officer in this case received the 1990 Enforcement Response Policy for the Federal Insecticide, Fungicide and Rodenticide Act (1990 ERP) sometime during or after August 1991 - after the proposed penalty was calculated and after the complaint was issued. (Tr. 56-57.)

4. World Industries had committed no prior violations of FIFRA. (Tr. 33, 73.)

5. Respondent's gross receipts or sales for 1990 were \$2,937,349.00. (Resp. Exh. 3.)

IV. Contentions of the Parties

In its post-hearing submission, Complainant contends that the penalty should be calculated using the 1986 Enforcement Response Policy for Section 7(c) Pesticide Producing Establishment Reporting Requirement (1986 ERP) except for the penalty matrix therein. Complainant asserts that the penalty matrix in the 1990 ERP should be applied in lieu of the penalty matrix in the 1986 ERP. As a result, Complainant would now impose a penalty of \$5,000.00 for the violation previously found in this case. Complainant also maintains that the adjustment factors in the 1986 ERP are inapplicable because they refer to the FIFRA Civil Penalty Assessment Guidelines published in the Federal Register on July 31, 1974,¹ which have been superseded.

¹39 Fed. Reg. 27711.

Respondent argues that the delay in filing the report was unintentional and caused no damage to EPA nor any delay in the compiling of data by EPA. Respondent avers that it filed the required report as soon as it was notified of its failure to have filed a timely report. Respondent argues that it "feels a notice of warning should be given for the first time late filing or the maximum should be a probation period set so the Defendant [sic] can set-up ways and methods of preparing such report without delays in the future." Respondent also contends that in the past 10 years it never failed to file a timely report.

Finally, Respondent states that it "feels overwhelmed with Federal, State and local regulations and cost of compliance with regulations are an extra unnecessary burden which placed American industry at a disadvantage with Foreign competitors."

V. The Penalty

A. Introduction

Section 22.27(b) of the Consolidated Rules of Practice (CROP) (40 C.F.R. § 22.27(b)) states, in pertinent part:

If the Presiding Officer determines that a violation has occurred, the Presiding Officer shall determine the dollar amount of the recommended civil penalty to be assessed in the initial decision in accordance with any criteria set forth in the Act relating to the proper amount of a civil penalty, and must consider any civil penalty guidelines issued under the Act. If the Presiding Officer decides to assess a penalty different in amount from the penalty recommended to be assessed in the complaint, the Presiding Officer shall set forth in the initial decision the specific reasons for the increase or decrease.

Section 22.35(c) of the CROP provides:

In determining the dollar amount of the recommended civil penalty assessed in the initial decision, the Presiding Officer shall consider, in addition to the criteria listed in section 14(a)(3) [sic] of the Act, (1) respondent's history of compliance with the Act or its predecessor statute and (2) any evidence of good faith or lack thereof. The Presiding Officer must also consider the guidelines for the Assessment of Civil Penalties published in the Federal Register (39 FR 27111), and any amendments or supplements thereto.

Section 14(a)(4) of FIFRA, 7 U.S.C. § 1361(a)(4), states that "[i]n determining the amount of the penalty, the Administrator shall consider the appropriateness of such penalty to the size of the business of the person charged, the effect on the person's ability to continue in business, and the gravity of the violation." Section 14(a)(1), 7 U.S.C. § 1361(a)(1) limits the civil penalty for any "dealer, retailer or other distributor" to \$5,000.00 for each offense.

On July 2, 1990, EPA issued the 1990 ERP which stated that "[e]xcept for the civil penalty assessment matrix, the February 10, 1986 FIFRA Section 7(c) Enforcement Response Policy remains in effect, and is to be used to determine the appropriate enforcement response for FIFRA section 7(c) violations. The matrix setting forth the penalties in this policy should be used instead of the matrix in the February 10, 1986 policy."²

The complaint proposed a penalty of \$3,200.00. At the hearing counsel for EPA acknowledged that had EPA "used the appropriate

²1990 ERP at 1.

penalty policy, the penalty would have been \$5,000.00 according to that policy, not \$3,200.00 as was called for in the complaint." He went on to say that "given the factors that we've been asked to consider by Section 14 of FIFRA and also by Part 22 and also by the various FIFRA penalty policies, we believe that \$3,200.00 is the appropriate penalty to assess in this case."³

The calculation of the proposed penalty was based upon the matrix in the 1986 ERP because the 1990 ERP was not available to the EPA case development officer at the time the calculation was made.⁴ At the hearing Complainant's counsel waived the application of the penalty policy reflected in the 1990 ERP "because of our [EPA's] error"⁵ and emphasized that EPA was "only asking the court in this case for the penalty assessed in the complaint, which is \$3,200.00."⁶

Complainant, in its post-hearing submission contended, for the first time, that the matrix in the 1990 ERP should be applied in this case and that the appropriate penalty to be assessed is \$5,000.00. I agree that the 1990 ERP requires that the matrix therein be considered in this matter and were it not for the position which Complainant previously took, I would apply it herein. However, EPA explicitly waived the application of the 1990 ERP at the hearing. The Complainant's post-hearing submission

³Tr. 12.

⁴Tr. 11.

⁵Tr. 43.

⁶Id.

seeks to reverse the position which the Agency took in the initial complaint, in the prehearing exchange and at the hearing.

Complainant's attempt, at this stage of the proceedings, to seek a larger penalty on the basis of the 1990 ERP amounts, in effect, to a motion to amend the complaint. Whether such amendment should be permitted lies within my discretion as Presiding Officer.⁷ While the Federal Rules of Civil Procedure (Fed. R. Civ. P.) do not govern the procedure of administrative agencies, consideration of those rules and the federal court precedent addressing them is often useful as guidance in deciding issues raised in administrative proceedings. Rules 15(a) and (b) of the Fed. R. Civ. P. govern the amendment of pleadings. The import of Rules 15(a) and (b) combined is, inter alia, that a motion to amend the pleadings to conform them to the evidence may be made at any time and if the motion is made after trial, and the issues have not been tried with the express or implied consent of the parties, the motion may be granted if the party against whom the amendment is offered will not be prejudiced by the amendment and should be granted in the absence of such prejudice if the interests of justice so require.⁸

Prejudice or surprise may be found if the opposing party did not have an opportunity to present additional evidence on the issue, such as when a new and different prayer for relief is

⁷40 C.F.R. § 22.14(d).

⁸Hillburn v. Maher, 795 F.2d 252, 264 (2nd Cir. 1986), cert. denied 479 U.S. 1046.

allowed at the very end of the case.⁹ Thus, Courts will find undue prejudice where a post-trial motion comes after discovery has been completed and after all evidence has been presented at trial, and the motion does not involve issues completely tried at the hearing and does not seek to conform the pleadings to the proof.¹⁰

I conclude that it would be unfair and substantially prejudicial to permit the injection of a new and different penalty and a new and different penalty policy at this stage of the proceedings where, up until this point, Complainant explicitly and consistently has waived the application of that penalty policy and the larger penalty calculated thereunder. Therefore, I shall consider the 1986 ERP, including the penalty matrix therein, in calculating the penalty in this matter.

The 1986 ERP describes five types of reporting violations, two of which are notably late reporting and nonreporting. If a producing establishment, such as Respondent, does not submit the annual pesticide report within 30 days after the due date, the establishment is considered as nonreporting. If a report is submitted after the 30th day past the due date, but prior to the issuance of the civil complaint for nonreporting, the establishment is considered as filing a notably late report and is assessed the same civil penalty as a nonreporting violation.

⁹United States v. 47 Bottles, Jenasol Rj Formula '60', 320 F.2d 564, 573-574 (3rd Cir. 1963), cert. denied 375 U.S. 953, 11 L.Ed.2d 313, 84 S.Ct. 444.

¹⁰Cranberg v. Consumers Union of U.S., Inc., 756 F.2d 382, 392 (5th Cir. 1985).

Since World Industries submitted its report more than 30 days after the report was due and after the administrative complaint was issued, the violation would be classified as nonreporting. With gross sales in excess of \$1 million, the matrix in the 1986 ERP yields a \$3,200.00 gravity-based penalty.

The 1986 ERP goes on to provide for the application of the adjustment factors described in the 1974 FIFRA Civil Penalty Assessment Guidelines¹¹ emphasizing three factors which are especially applicable to violations of Section 7(c):

- History of prior such violation;
- Effect on Respondent's ability to continue in business; and
- Good faith attitude (for which a reduction of up to 20% is appropriate).

Given Respondent's complete and speedy compliance within 15 days after the issuance of the complaint, a reduction of 20% for attitude is appropriate. This would result in the following:

$$\$3,200.00 - .20 (\$3,200.00) = \$2,560.00$$

I must reject Respondent's claim that the penalty should be mitigated because the delay had no adverse impact on EPA's mission. Section 7(c) of FIFRA permits the Administrator to require any producer operating an establishment registered under Section 7 to submit a production report within 30 days after notification of registration of his establishment and thereafter on an annual basis. The failure to comply with this reporting requirement is a serious violation. Violations of the Section 7 reporting

¹¹39 Fed. Reg. 27711. Section 22.35(c) requires consideration of these guidelines (supra at 5).

requirement have an adverse impact on the Agency's risk assessment capability as well as its ability to target inspections effectively. The annual reporting requirement is the major mechanism by which EPA can determine what pesticides an establishment is producing.

Respondent's claim that it feels overwhelmed by government regulations and the cost of complying with such regulations must be addressed in a forum other than this adjudicatory forum under the Administrative Procedure Act.¹²

Since there was no record of prior violations of FIFRA and since Respondent did not claim an inability to pay a penalty, those adjustment factors do not apply. I find no basis to apply any additional adjustment factors.

Therefore, a civil penalty in the amount of \$2,560.00 shall be assessed against Respondent.

¹²See, In the Matter of Apex Microtechnology, Inc., Docket No. EPCRA-09-92-00-07 (Initial Decision, May 7, 1993) at 14.

ORDER¹³

Pursuant to Section 14 of FIFRA, 7 U.S.C. § 136l, a civil penalty in the amount of \$2,560.00 is assessed against Respondent, World Industries International, Inc., for the violations of Section 12 of FIFRA, 7 U.S.C. § 136j, found herein.

IT IS ORDERED that Respondent, World Industries International, Inc., pay a civil penalty to the United States in the sum of \$2,560.00. Payment shall be made by cashier's or certified check payable to "Treasurer, United States of America." The check shall be sent to:

EPA - Region 9
(Regional Hearing Clerk)
P.O. Box 360863M
Pittsburgh, PA 15251

Respondent shall note on the check the docket number specified on the first page of this initial decision. At the time of payment, Respondent shall send a notice of such payment and a copy of the check to:

¹³Pursuant to 40 C.F.R. § 22.27(c), this initial decision shall become the final order of the Environmental Appeals Board within forty-five (45) days after the service upon the parties unless an appeal to the Environmental Appeals Board is taken by a party or the Environmental Appeals Board elects to review the initial decision upon its own motion. 40 C.F.R. § 22.30 sets forth the procedures for appeal from this initial decision.

Regional Hearing Clerk
U.S. Environmental Protection Agency
Region IX
75 Hawthorne Street
San Francisco, California 94105

Attn: Steven Armsey


Henry B. Frazier, III
Chief Administrative Law Judge

Dated: May 14, 1993
Washington, DC

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 9

In the Matter of) Docket No. E1FRA-09-0775-C-91-20
World Industries)
International, Inc.) CERTIFICATE OF SERVICE
Respondent)

To: Sam Nazaryan
President
World Industries International, Inc.
17955 Arenth Avenue
City of Industry, CA 91748

CERTIFIED MAIL
P 104 938 326

David M. Jones, Esq.
U. S. Environmental Protection Agency
75 Hawthorne Street, RC-2-1
San Francisco, CA 94105

HAND DELIVERED

PLEASE TAKE NOTICE that, on behalf of the U.S. Environmental Protection Agency, I have this day filed with the Regional Hearing Clerk of the U.S. Environmental Protection Agency, Region 9, Initial Decision, a copy of which is attached hereto and hereby served upon you by mail.

May 17 1993
Date

Danielle E. Carr
Danielle E. Carr,
Administrative Clerk