

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of)
)
Ridgway Industries, Inc.) Docket No. FIFRA-3-99-0011
)
Respondent)

INITIAL DECISION AND ORDER GRANTING MOTION FOR DEFAULT

INTRODUCTION

On January 4, 2000, Complainant (the Director of the Waste & Chemicals Management Division and the Associate Director for Enforcement of the Waste & Chemicals Management Division, EPA Region III) filed a pleading containing a Motion for Entry of Default (Motion). The Motion requests that the undersigned enter an order finding Respondent (Ridgway Industries, Inc.) in default and assessing the full proposed penalty of \$5,500 against Respondent. For the reasons set forth below, the Motion is granted and a \$5,500 penalty is assessed against Respondent.

The Complaint was filed against Respondent on August 23, 1999. An Answer was submitted by Respondent by letter dated September 1, 1999 (letter Answer). Following the assignment of this case to the undersigned, I issued an order dated October 29, 1999 which, among other things, established dates for the parties to submit their respective prehearing exchanges. Complainant timely submitted its prehearing exchange on November 30, 1999.

The October 29, 1999 order, pursuant to 40 C.F.R. § 22.19(a), directed Respondent on December 21, 1999, to file either: (a) its prehearing exchange or (b) a statement that it elects to conduct cross-examination of EPA witnesses and to forgo the presentation of answering evidence. Respondent made no filing. The October 29 order stated that the "failure of Respondent to file either (a) its prehearing exchange or (b) a statement that Respondent is electing to forgo the presentation of answering evidence and is electing to cross-examine EPA witnesses, shall result in a default order being issued against Respondent." The basis for this statement is 40 C.F.R. § 22.17(a) which permits a default order to be issued against a party "upon failure to comply with the information exchange requirements of § 22.19(a) or an order of the Presiding Officer."

Respondent's failure to comply with the above-cited provisions of the October 29 order and 40 C.F.R. § 22.17(a) support the issuance of this default order.

Default by a respondent "constitutes, for purposes of the pending proceeding only, an admission of all facts alleged in the complaint and a waiver of respondent's right to contest such factual allegations." 40 C.F.R. § 22.17(a). Therefore, Respondent in this proceeding is deemed to have admitted all of the facts alleged in the Complaint and has waived its right to a hearing on these facts. The findings of fact and conclusions of law are set forth below.

DISCUSSION

Liability

The August 23, 1999 Complaint concerns violations of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), as amended, 7 U.S.C. §§ 136 et seq. and the regulations promulgated thereunder set forth at 40 C.F.R. Parts 156 and 167. Respondent is a corporation which has, at all times relevant to this Complaint, been doing business in the Commonwealth of Pennsylvania. Respondent is a "person" as defined by Section 2(s) of FIFRA, 7 U.S.C. § 136(s).

40 C.F.R. § 167.20(a) provides, in pertinent part, that "[a]ny establishment where a pesticidal product is produced must be registered with the Agency." At all times relevant to this Complaint, Respondent owned and/or operated an active pesticide-producing establishment at 522 Ellis Avenue, Colwyn, Pennsylvania, which was registered with EPA under Establishment Number 64143-PA-001. Thus, Respondent is a registrant pursuant to Section 2(y) of FIFRA, 7 U.S.C. § 136(y). Respondent is also a producer pursuant to Section 2(w) of FIFRA, 7 U.S.C. § 136(w).

Section 7(c)(1) of FIFRA, 7 U.S.C. § 136e(c)(1), provides that a producer operating a registered establishment is required to submit annually a pesticide production report to EPA stating the types and amounts of pesticides "(A) which the producer is currently producing; (B) which the producer has produced during the past year; and (C) which the producer has sold or distributed during the past year." 40 C.F.R. § 167.85(d) provides, in pertinent part, that a producer operating a registered establishment must submit its pesticide production reports (EPA Form 3540-16) annually for the preceding calendar year on or before March 1 of each year, even if the producer has produced no pesticidal product for that reporting year.

EPA sent Respondent a blank annual pesticide report form and instructions for the 1998 calendar year on or about December 18, 1998. As part of the instructions, EPA advised Respondent to return the completed form by March 1, 1999.

Complainant alleges that Respondent failed to submit its pesticide production reports for calendar year 1998 on or before March 1, 1999, as required by 40 C.F.R. § 167.85(d). Complainant states the report was not filed until September 8, 1999. Respondent, along with its letter Answer to the Complaint filed on September 8, 1999, submitted a copy of its report, dated March 12, 1999, and alleges in the accompanying letter Answer that the report had originally been submitted to EPA "in early March" of 1999. However, Respondent offers nothing more than the unsubstantiated statement of its president, Bradford Daggy, to support this statement, and the copy of the report, dated eleven days after the due date. Since resolution of this question is in the context of an unopposed motion for default filed by Complainant, all facts alleged in the Complaint are deemed admitted. 40 C.F.R. § 22.17(a). Therefore, it is determined for purposes of this proceeding that the report was not submitted "in early March" of 1999, as alleged by Respondent, but rather on September 8, 1999.

Section 12(a)(2)(L) of FIFRA, 7 U.S.C. § 136j(a)(2)(L), provides that it is unlawful for any person who is a producer to violate any provisions of 136e. Respondent's failure to timely submit its pesticide production reports for calendar year 1998 on or before March 1, 1999 as required under 40 C.F.R. § 167.85(d) constitutes a violation of Section 7(c)(1) of FIFRA, 7 U.S.C. § 136e(c)(1), and therefore, an unlawful act under Section 12(a)(2)(L) of FIFRA, 7 U.S.C. § 136j(a)(2)(L).

Penalty

Section 14(a)(1) of FIFRA provides that ". . . any registrant, commercial applicator, wholesaler, dealer, retailer, or other distributor who violates any provision of . . . [FIFRA] . . . may be assessed a civil penalty of not more than \$5,000 for each offense." 7 U.S.C. § 136l(a)(1). Pursuant to 40 C.F.R. Part 19, Adjustment of Civil Monetary Penalties for Inflation, violations occurring after January 30, 1997 are subject to an increased statutory maximum penalty of \$5,500 per violation.

In considering the amount of the penalty assessed, Section 14(a)(4) of FIFRA, 42 U.S.C. § 136l(a)(4), requires that the following factors be considered: the appropriateness of such penalty to the size of Respondent's business, the effect of the

penalty on Respondent's ability to continue in business, and the gravity of the violation. Part 22 of EPA's Regulations, 40 C.F.R. Part 22, directs the Presiding Judge to consider the Agency's Penalty Policy.¹ A Presiding Judge may deviate from the applicable Penalty Policy after considering these guidelines, if the decision to do so is supported by adequate reasoning and evidence in the initial decision.² In this case, it is appropriate to use the applicable penalty policies, i.e. EPA's "Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)," dated July 2, 1990 (1990 FIFRA ERP) and EPA's "Enforcement Response Policy for FIFRA Section 7(c) Pesticide Producing Establishment Reporting Requirement," dated February 10, 1986 (1986 FIFRA ERP), and for violations occurring after January 30, 1997 only, the "Gravity Based Penalty Matrix for FIFRA Violations Which Occur After January 30, 1997" (1997 Supplement).

More specifically, the following determinations are made:

- Gravity/Level of Violation:

Violator Category: Respondent is a registrant pursuant to Section 2(y) of FIFRA, 7 U.S.C. § 136y, and is subject to the provisions of Section 14(a)(1) of FIFRA, 7 U.S.C. § 136l.

Violation Level: Respondent has been found to have violated Section 7(c)(1) of FIFRA, 7 U.S.C. § 136e(c)(1), which is a violation of 12(a)(2)(L) of FIFRA, 7 U.S.C. § 136j(a)(2)(L). As recited in the Complaint, Appendix A of the 1990 FIFRA ERP provides that a violation of FIFRA Section 7(c)(1) for failure to

¹ If the Presiding Officer determines that a violation has occurred and the complaint seeks a civil penalty, the Presiding Officer shall determine the amount of the recommended civil penalty based on the evidence in the record and in accordance with any penalty criteria set forth in the Act. The Presiding Officer shall consider any civil penalty guidelines issued under the Act. The Presiding Officer shall explain in detail in the initial decision how the penalty to be assessed corresponds to any penalty criteria set forth in the Act. If the Presiding Officer decides to assess a penalty different in amount from the penalty proposed by the complaint, the Presiding Officer shall set forth in the initial decision the specific reasons for the increase or decrease

40 C.F.R. § 22.27(b).

² In re Employers Insurance of Wausau and Group Eight Technology, Inc., TSCA Appeal No. 95-6, 6 E.A.D. 735 (EAB, Feb.11. 1997).

submit, or submitting "notably late," a pesticide report, has a "FTTS Code" of "2LB" and a Gravity Level of 2, and the 1986 FIFRA ERP defines "notably late" as greater than 30 days past the deadline for filing annual production reports.³ By its default, Respondent has waived its right to assert that it submitted the report within 30 days of the due date.

- Size of Business Category:

The Complaint asserts that Respondent has gross annual revenues over \$1 million which assertion is supported by information from Respondent's Federal Corporate Income Tax Returns (Complainant's Prehearing Exchange, Exhibit 14), showing gross annual revenues in excess of \$1,000,000 for the years 1996, 1997, and 1998. Therefore, it is determined that, for purposes of this proceeding, Respondent has a Size of Business Category I pursuant to Table 2 of the 1990 FIFRA ERP.

- Base Penalty

Based on these determinations, the Base Penalty for Respondent's violation as prescribed in Table 1 of the 1990 FIFRA ERP is \$5,000. Pursuant to the Adjustment of Civil Monetary Penalties for Inflation, 40 C.F.R. Part 19, an upward adjustment to \$5,500 was made because the violation occurred after January 30, 1997. The application of gravity adjustment criteria in Appendix B of the 1990 FIFRA ERP is not applicable for record keeping and reporting violations and therefore is not applicable to this proceeding.

- Ability to Continue in Business:

Finally, as to the Respondent's ability to continue in business, the 1990 FIFRA ERP provides that an ability to pay is presumed, absent other evidence to the contrary, if the penalty does not exceed average gross income for the current year and the prior three years. The Federal Income Tax Returns in Complainant's Exhibit 14 indicate the following gross receipt amounts for the years in question:

| | |
|------|-----------|
| 1995 | \$996,945 |
|------|-----------|

³ The 1986 FIFRA ERP refers to a February 1 annual filing date. However, the currently effective applicable regulation, 40 C.F.R. § 167.85(d), prescribes a March 1 annual filing date for the submission of the reports at issue here. The 1986 FIFRA ERP provision categorizing reports filed more than 30 days after the applicable filing date as "notably late" is reasonable in this proceeding.

| | |
|------|-------------|
| 1996 | \$1,043,526 |
| 1997 | \$1,108,104 |
| 1998 | \$1,126,016 |

The average gross receipts for these four years is \$1,068,648. When this is multiplied by 4%, the result is \$42,746. This is more than seven times the amount of the penalty. Therefore, it is determined that the penalty of \$5,500 will not adversely affect Respondent's ability to stay in business.

CONCLUSION

Respondent Ridgway Industries, Inc. will be assessed a penalty of \$ 5,500 for the violation found herein, as it is consistent with FIFRA and with the applicable penalty policies.

ORDER

1. A civil penalty in the amount of \$ 5,500 is assessed against Respondent Ridgway Industries, Inc.

2. Payment of the full amount of the civil penalty assessed shall be made within thirty (30) days after this default order becomes a final order under 40 C.F.R. § 22.27(c), as provided in Paragraph 5 below. Payment shall be submitted by a certified check or cashier's check payable to Treasurer, United States of America, and mailed to:

Mellon Bank
EPA Region 3
(Regional Hearing Clerk)
P.O. Box 360515
Pittsburgh, PA 15251

3. A transmittal letter identifying the subject case and the EPA docket number, plus Respondent's name and address, must accompany the check.

4. Failure upon the part of Respondent to pay the penalty within the prescribed statutory frame after entry of the final order may result in the assessment of interest on the civil penalties. 31 U.S.C. § 3717; 40 C.F.R. § 13.11.

5. The Consolidated Rules of Practice provide at 40 C.F.R. § 22.17(c) that a default order which resolves all outstanding issues and claims in the proceeding shall constitute an initial decision. This Order disposes of all such issues and claims, and therefore constitutes an Initial Decision. Pursuant to 40 C.F.R. § 22.27(c), this Initial Decision shall become the final order forty-five (45) days after its service upon the parties and without further proceedings unless (1) a party moves to set aside

a default order that constitutes an initial decision, pursuant to 40 C.F.R. § 22.17(c); (2) an appeal to the EAB is taken from it by a party to this proceeding, pursuant to 40 C.F.R. § 22.30(a), within thirty (30) days after the Initial Decision is served upon the parties; or (3) the EAB elects, upon its own motion, to review the Initial Decision.

Charles E. Bullock
Administrative Law Judge

Dated: June 8, 2000
Washington D.C.