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Office of Regional Hearing Clerk

IN THE MATTER OF:)
)
Spectrowax Corporation,)
)
Respondent.)
_____)

Docket No. FIFRA-01-2008-0034

INITIAL DECISION AND DEFAULT ORDER

This is a civil administrative proceeding instituted under the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136 *et seq.*, (“FIFRA”), and the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits (“Consolidated Rules”) 40 C.F.R. Part 22. The proceeding was initiated by a Complaint and Notice of Opportunity to Request a Hearing (“Complaint”) filed by the Complainant, United States Environmental Protection Agency, Region 1 (“Complainant” or “EPA”) against the Respondent, Spectrowax Corporation (“Respondent”). In its Complaint, EPA alleges that the Respondent violated certain provisions of FIFRA and implementing regulations by failing to properly submit annual pesticide production reports to EPA for the years 2005, 2006, and 2007. For these violations, the Complainant proposes the assessment of a civil administrative penalty in the amount of Sixteen Thousand Dollars (\$16,000) against the Respondent.

In the currently pending Motion for Default Order, the Complainant alleges that the Respondent is in default for failure to file an Answer to the Complaint and requests that the full penalty of Sixteen Thousand Dollars (\$16,000) be assessed.

Based upon the record in this matter and the following Findings of Fact and Conclusions of Law and Penalty Calculation, the Complainant's Motion for Default Order is hereby GRANTED. The Respondent, Spectrowax Corporation, is hereby found in default and a civil penalty in the amount of (\$16,000) is assessed.

BACKGROUND

This is a proceeding under § 14(a) of FIFRA, initiated by issuing a Complaint on April 15, 2008 against Respondent. The Complaint alleges three separate violations of FIFRA §§7(c)(1) and 12(a)(2)(L), for failure to submit annual pesticide production reports to EPA for the 2005, 2006, and 2007 reporting years.

The Complaint explicitly stated on page 10, titled *Opportunity to Request a Hearing*, that:

To avoid being found in default and having the above-cited penalty assessed without further proceedings, you must file a written answer within thirty (30) days of your receipt of this Complaint. Your answer should (a) clearly and directly admit, deny, or explain each of the factual allegations contained in the Complaint, (b) briefly state all facts and circumstances, if any, which constitute grounds for a defense, and (c) specifically request an administrative hearing (if desired). The denial of any material fact or raising of any affirmative defense(s) shall be construed as a request for a hearing. Failure to deny any of the factual allegations in this Complaint will constitute an admission of the undenied allegations....

If you fail to file a written answer and request for a hearing within thirty (30) days of the service of this Complaint, a Default Order may be issued pursuant to 40 C.F.R § 22.17(a).

Respondent was served with a copy of the Complaint by certified mail, return receipt requested. Respondent signed for the Complaint on April 17, 2008 and service was complete on that date. Under 40 C.F.R. §22.15(a) of the Consolidated Rules an Answer is due within thirty days after service of the Complaint. Therefore, Respondent's written Answer to the Complaint was due by May 19, 2008. To date, Respondent has neither filed a written Answer nor requested a hearing in this matter.

On August 20, 2008, Complainant filed a Motion for Default Order. It was mailed to Respondent via certified mail, return receipt requested. To date, the Respondent has not filed a response to the Motion for Default Order.

FINDINGS OF FACT

Pursuant to 40 C.F.R. § 22.17(c) and based upon the entire record, I make the following findings:

1. Respondent is a "person" as defined in FIFRA §2(s).
2. Respondent manufactures, sells and distributes detergents, soaps, and specialty cleaning products. Respondent is a "producer" as that term is defined in § 2(w) of FIFRA, and 40 C.F.R. § 167.3, which operated an "establishment," as that term is defined in §2(dd) of FIFRA, that was registered under FIFRA since 1976.
3. The establishment was registered during 2005, 2006, and 2007, but for each of those reporting years, Respondent failed to submit, or timely submit, an annual pesticide production report to EPA by the applicable March 1 deadline.
4. Respondent settled a previous FIFRA enforcement action in 2003 by entering into a Consent Agreement and Final Order with EPA and agreeing to pay a civil

penalty of \$3,300 to resolve similar EPA allegations of violating FIFRA § 7 for the 2002 reporting year.

5. The failure to properly submit annual reports required pursuant to FIFRA § 7 is a prohibited act under § 12(a) (2) (L) of FIFRA.
6. Respondent was served with a copy of the Complaint dated April 15, 2008, by certified mail, return receipt requested.
7. Respondent signed for the Complaint on April 17, 2008.
8. Respondent has failed to answer the Complaint.
9. On August 20, 2006, Respondent was mailed, by certified mail return receipt requested, a Motion for Entry of Default.
10. To date, the Respondent has failed to respond to the Motion for Entry of Default.

CONCLUSIONS OF LAW

1. Jurisdiction is conferred by § 7(c) (1) of FIFRA, and the regulations codified at 40 C.F.R. Part 167, Subpart E.
2. Under 40 C.F.R. § 167.85(d), a producer is responsible for obtaining, completing, and reporting this information each year, even if it has not produced any pesticidal product for the reporting year. Producers must submit this information to EPA on or before March 1 of the year following the calendar year which is the subject of the report (the "reporting year").
3. The failure to properly submit annual reports required pursuant to FIFRA § 7 is a prohibited act under § 12(a) (2) (L) of FIFRA for which Respondent is subject to penalties under § 14(a) of the statute.

4. The Complaint in this action was served upon Respondent in accordance with 40 C.F.R. § 22.5(b) (1).
5. Respondent's failure to file an answer to the Complaint, or otherwise respond to the Complaint, constitutes a default by Respondent pursuant to 40 C.F.R. § 22.17(a).
6. Respondent's default constitutes an admission of the allegations set forth in the Complaint and a waiver of the Respondent's right to a hearing on such factual allegations. 40 C.F.R. §§ 22.17(a) and 22.15(d).
7. Pursuant to 40 C.F.R. § 22.17(a), Respondent's failure to file a timely Answer or otherwise respond to the Complaint is grounds for the entry of an Order on Default against the Respondent assessing a civil penalty for the aforementioned violations.
8. As described in the penalty calculation below, I find that the Complainant's proposed civil penalty of \$16,000 is properly based on the statutory factors of § 14(a) (4) of FIFRA, and with EPA's June 2007 *Enforcement Response Policy for FIFRA § 7(c) Pesticide Producing Establishment Reporting Requirement* (the "Policy").

DETERMINATION OF PENALTY

As set forth above, the failure to submit annual reports required by FIFRA §7 subjects the Respondent to penalties under §14(a) of that statute. The penalty assessment criteria in § 14(a)(4) of FIFRA require EPA to take into account the gravity of the violations, the appropriateness of the penalty to the size of Respondent's business, and

the effect of the penalty on Respondent's ability to continue in business. In this case the penalty is calculated, in light of the statutory factors, using the Policy. The proposed penalty is appropriate because it takes into account the gravity of the violations by considering that Respondent's documented noncompliance with FIFRA § 7 dates back to 2003 and that its more recent violations of FIFRA § 7 span the past three consecutive reporting years.

Consistent with the Policy and the FIFRA § 7 civil penalty matrix therein, the appropriate penalty associated with Count I—a second-time, non-reporting violation by a Category II business—for failure to submit the § 7 report for the 2005 reporting year, is \$3000. For Counts II and III, the appropriate penalty associated with each—as a third/subsequent non reporting violation by a Category II business—for failure to submit such reports for the 2006 and 2007 reporting years, is \$6,500 per violation.

The Policy underscores the importance of pesticide producers' annual reporting under FIFRA § 7, noting that EPA uses the information from the reports for compliance, risk assessment, and risk reduction activities, and that such information is "important to protecting human health and the environment and maintaining the integrity of the pesticide program." Policy, p. 4. The Policy also notes that these reports are the only source of such information available to EPA. Although § 14(a) of FIFRA provides that a penalty calculated thereunder may be adjusted based on Respondent's ability to continue in business (ability to pay) and good faith efforts to comply, after consideration of a recent Dun and Bradstreet business report on Spectrowax, no such adjustments were found to be warranted at this time.

The penalty sought in the amount of \$16,000 is fully supported by the application of the statutory factors for determining a civil penalty under § 14(a) of FIFRA, and the total penalty appropriate for the three violations alleged in the Complaint is \$16,000.

DEFAULT ORDER

Pursuant to the Consolidated Rules at 40 C.F.R. Part 22, including 40 C.F.R. § 22.17, a Default Order and Initial Decision is hereby ISSUED and Respondent is ordered to comply with all terms of this Order:

- (1) Respondent is assessed and ordered to pay a civil penalty in the amount of Sixteen Thousand Dollars (\$16,000).
- (2) Respondent shall pay the civil penalty by certified or cashier's check payable to the "Treasurer of the United States of America" within thirty (30) days after this default order has become a final order pursuant to 40 C.F.R. § 22.27(c). The check shall be identified with a notation of the name and docket number of this case, and set forth in the caption on the first page of this document. Such payment shall be remitted to

U.S. Environmental Protection Agency
Cincinnati Finance Center
P.O. Box 979077
St. Louis, MO 63197-9000

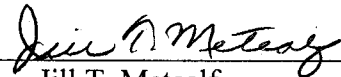
A copy of the payment shall be mailed to:

Regional Hearing Clerk
U.S. EPA
Region 1 (Mail Code RAA)
One Congress Street, Suite 1100
Boston MA 02114-2023

(3) This Default Order constitutes an Initial Decision pursuant to 40 C.F.R. § 22.17(c). Pursuant to 40 C.F.R. 22.27(c), this Initial Decision shall become a final order forty five (45) days after its service upon the parties unless (1) a party moves to reopen the hearing, (2) a party appeals the initial decision to the Environmental Appeals Board, (3) a party moves to set aside the default order, or (4) the Environmental Appeals Board chooses to review the initial decision sua sponte.

IT IS SO ORDERED.

Dated: December 23, 2008



Jill T. Metcalf
Presiding Officer

Certificate of Service

I hereby certify that the **Default Order and Initial Decision** by Regional Judicial Officer Jill Metcalf in the matter of **Spectrowax Corporation, Docket No. FIFRA-01-2008-0034**, was served on the parties as indicated

Federal Express

Spectrowax Corporation
c/o Arnold H. Rosenberg, President
95 Sagamore Road
Wellesley, MA 02481-2739

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Environmental Appeals Board
U.S. Environmental Protection Agency
Colorado Building, Suite 600
1341 G. Street, N.W.
Washington, D.C. 20005
(with copy of official file)

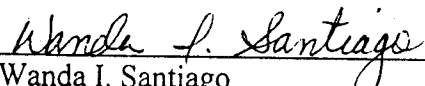
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Assistant Administrator for Enforcement and
Compliance Assurance
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Mail Code 2201A
Washington, DC 20460

Hand Delivered

Hugh Martinez
Senior Enforcement Counsel
U.S. EPA
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1 Congress Street, Suite 1100 (SEL)
Boston, MA 02114-2023

Dated: January 5, 2008


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