BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In re:	)	
To Your Rescue! Services	)	FIFRA Appeal No. 04-08
Docket No. FIFRA-07-2004-0085	)	

FINAL ORDER

On January 13, 2005, the Environmental Appeals Board ("Board") received a letter from Mr. Steve T. Wood, the owner of To Your Rescue! Services ("To Your Rescue") of Independence, Kansas, appealing an Initial Decision and Default Order entered against To Your Rescue on December 13, 2004, by the Regional Judicial Officer ("RJO") of Region VII, U.S. Environmental Protection Agency.[1] The RJO held that To Your Rescue violated sections 12(a)(1)(A) and 12(a)(1)(E) of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. §§ 136j(a)(1)(A), 136j(a)(1)(E), by distributing an unregistered and misbranded pesticide on three occasions on or about April 22 and May 7, 2003. The pesticide consisted of a mixture of white vinegar and cayenne pepper, and To Your Rescue applied it for weed control purposes around a Bayberry's Prescription Shop in Coffeyville, Kansas, and two Burger King restaurants in Coffeyville and Independence, Kansas. The RJO also held that To Your Rescue failed to register as a pesticide-producing establishment pursuant to section 7(a) of FIFRA, 7 U.S.C. § 136e(a), in violation of FIFRA § 12(a)(2)(L), 7 U.S.C. § 136j(a)(2)(L). The RJO assessed a penalty of $16,500 against To Your Rescue for these FIFRA violations.

[1] In our view, Mr. Wood's letter qualifies as a *pro se* appeal (i.e., an appeal without the assistance of legal counsel) of the Initial Decision and Default Order.

In his letter to the Board, Mr. Wood does not challenge the RJO's findings of liability for FIFRA violations. Mr. Wood does, however, seem to challenge the finding of default on the ground that his lawyer failed to assist him in responding to various filings sent to him by Region VII and the RJO (i.e., the administrative complaint; a subsequent motion for a default order; and then an order to show cause why default should not be entered, none of which were answered by To Your Rescue). Mr. Wood also appears to raise an inability to pay argument by claiming that his company is in bankruptcy, "is struggling to keep the doors open," and may be forced to close if compelled to pay the assessed penalty. As evidence of inability to pay the penalty, Mr. Wood submits To Your Rescue's monthly balance sheets (listing assets, liabilities, and capital), income statements, and general ledger information for January through December 2004, as well as federal income tax returns for himself and To Your Rescue for 2003. Mr. Wood concludes by asking that To Your Rescue be given a warning in lieu of the penalty, so that the company "can continue in [business] and be a contributor to the tax pool and employ a few people." Letter from Steve Wood, Owner, To Your Rescue! Services, to Eurika Durr, Clerk, Environmental Appeals Board 3 (Jan. 13, 2005).

Mr. Wood did not serve this letter on Region VII, the complainant in this case, when he mailed it to the Board in January 2005. The Clerk of the Board subsequently directed him to do so, by letter dated March 21, 2005. At this writing we have received nothing from the Region responding to Mr. Wood's letter; we have since learned that the attorney of record for Region VII received the letter but apparently elected not to file a response. Accordingly, in the absence of a response by the Region, we will decide the case on the basis of Mr. Wood's letter

alone and our review of the record below, including the RJO's Initial Decision and Default Order and the Region's motion for default filed with the RJO.

As a general matter, the Board endeavors to construe objections presented by *pro se* litigants liberally so as to fairly identify the substance of the arguments being raised. *See, e.g.*, *In re Envtl. Disposal Sys., Inc.*, UIC Appeal Nos. 04-01 & -02, slip op. at 51 n.26 (EAB Sept. 6, 2005), 12 E.A.D. ___; *In re Sutter Power Plant*, 8 E.A.D. 680, 687 (EAB 1999); *In re Jiffy Builders, Inc.*, 8 E.A.D. 315, 321 (EAB 1999). Accordingly, we read Mr. Wood's letter as an appeal seeking to set aside the default judgment on the ground that his lawyer failed to assist him in responding to the various documents and orders he received from Region VII and the RJO. Alternatively, or additionally, the letter can be understood as an appeal of the penalty, with a request to reduce or set aside the penalty on the ground that To Your Rescue is unable to pay the assessed amount, along with a suggestion that the Board issue the company a warning instead of a penalty, as provided for in FIFRA § 14(a)(4), 7 U.S.C. § 136*l*(a)(4). We address each of these issues in turn below.

First, with respect to the appeal of the default order, the Board may set aside a finding of default if a party demonstrates good cause for its failure to comply with the procedural requirements resulting in the entry of the default. *See, e.g.*, *In re Pyramid Chem. Co.*, RCRA (3008) Appeal No. 03-03, slip op. at 6-8 (EAB Sept. 16, 2004), 11 E.A.D. ___; *In re B&L Plating, Inc.*, CAA Appeal No. 02-08, slip op. at 12-13 (EAB Oct. 20, 2003), 11 E.A.D. ___; *see also* 40 C.F.R. § 124.17(c). We have made clear, however, that "under our case law governing

default determinations, the neglect of a party [by that] party's attorney does not excuse an untimely filing * * *." *Pyramid Chem.*, slip op. at 14, 11 E.A.D. ___. Instead, an attorney "stands in the shoes" of his or her client, and the client takes responsibility for the attorney's failings. *Id*. at 14-15. We explained this holding as follows:

> The Board agrees, generally, with the principle that a client voluntarily chooses its attorney as its representative in an action and thus cannot avoid the consequences of the acts or omissions of its freely selected agent: "Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney.'"

Id. at 15 (citations omitted). Thus, disputes between lawyers and clients generally provide no basis for the requisite good cause showing to reverse a default, as the administrative litigation process cannot reasonably be "held hostage" to such disputes. *See In re JHNY, Inc.*, CAA Appeal No. 04-09, slip op. at 14-15 & n.15 (EAB Sept. 29, 2005), 12 E.A.D. ___ (good cause for default not established by unsupported claim of financial difficulties affecting respondent's ability to continue to retain counsel). Accordingly, we find no basis for reversing the default order against To Your Rescue on the ground that its attorney failed to respond to EPA's pleadings, motions, and orders.

Second, with respect to the request to reduce or set aside the penalty and to issue a warning in lieu thereof, we note that To Your Rescue failed on several occasions to supply data to Region VII on the size of its business and the effect the proposed penalty might have on its ability to continue in business, despite receiving explicit invitations to provide information on

these matters in the complaint and the filings related to the motion for a default order. In cases where, as here, a respondent does not raise an ability to pay claim in its answer to the complaint and does not produce any evidence to support such a claim during the case proceedings, a presiding officer may reasonably conclude that any objection to the penalty based on ability to pay has been waived and does not warrant a penalty reduction. *In re Spitzer Great Lakes Ltd.*, 9 E.A.D. 302, 319-21 (EAB 2000); *In re Chempace Corp.*, 9 E.A.D. 119, 133 n.20 (EAB 2000); *In re Antkiewicz*, 8 E.A.D. 218, 239-40 (EAB 1999); *In re New Waterbury*, 5 E.A.D. 529, 541 (EAB 1994). Moreover, if a respondent claims to be in bankruptcy, as is the case here, a penalty may nonetheless still be assessed because the respondent may be capable of paying the penalty after the bankruptcy reorganization process concludes. *See New Waterbury*, 5 E.A.D. at 540 n.19; *see also In re Britton Constr. Co.*, 8 E.A.D. 261, 292 n.21 (EAB 1999); *In re Steeltech, Ltd.*, 8 E.A.D. 577, 587 (EAB 1999), *aff'd*, 105 F. Supp. 2d 760 (W.D. Mich. 2000), *aff'd*, 273 F.3d 652 (6th Cir. 2001); *In re Safe & Sure Prods., Inc.*, 8 E.A.D. 517, 533-34 (EAB 1999). In addition, under section 14(a)(4) of FIFRA, 7 U.S.C. § 136*l*(a)(4), Region VII has discretion to issue a warning rather than seek a financial penalty in cases where there is no significant harm to health or the environment, but it has no obligation to do so in any circumstances. *In re Green Thumb Nursery, Inc.*, 6 E.A.D. 782, 799-801 (EAB 1997).

In short, based on the information before them, it is difficult to fault either the Region's approach to To Your Rescue's violations, or the RJO's penalty decision. Ensuring that pesticide formulators and applicators submit to FIFRA's registration process is vital to the efficacy of that program, *see Chempace*, 9 E.A.D. at 142-43; *In re Arapahoe County Weed Dist.*, 8 E.A.D. 381,

391-92 & n.14 (EAB 1999); *In re Predex Corp.*, 7 E.A.D. 591, 600-02 (EAB 1998); *Green Thumb*, 6 E.A.D. at 800-01, and the Region operated well within the bounds of its prosecutorial discretion in its choice of remedial paths for reining in an operation like To Your Rescue. Likewise, the RJO, who was without benefit of all the relevant information, acted reasonably in addressing the question of penalty.

Nonetheless, based on the information before us, we are uncomfortable leaving the outcome undisturbed. Indeed, we seriously question whether the Region would have pursued, or the RJO would have assessed, a penalty of $16,500 if they had enjoyed the benefit of a more fully developed record in this case. Because of the awkward procedural posture of the case, there is no ready or efficient means of ensuring a more appropriate outcome than for the Board to assume this responsibility. At bottom, it falls to us to ensure that Agency penalty assessments brought before us accomplish their intended goal of deterrence without being unjust in their effect.

We apply a "totality of the circumstances" test when reviewing default orders. *E.g.*, *In re Pyramid Chem. Co.*, RCRA (3008) Appeal No. 03-03, slip op. at 6-8, 33-34 (EAB Sept. 16, 2004), 11 E.A.D. ___; *In re Jiffy Builders, Inc.*, 8 E.A.D. 315, 319, 320-22 (EAB 1999); *In re Rybond, Inc.*, 6 E.A.D. 614, 624, 638-41 (EAB 1996). In this case, we note that To Your Rescue is a small, privately owned business of apparently severely limited financial means. We also note that the particular pesticide that To Your Rescue deployed was a mixture of white vinegar and cayenne pepper, and that the application at issue was limited to exterior areas at three small

business establishments. Given the nature of the pesticide, and the limited scope of the application, it seems unlikely that the applications at issue presented a risk of "widespread" or "substantial" harm to human health or the environment. *See* Office of Compliance Monitoring & Office of Pesticides & Toxic Substances, U.S. EPA, *Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)* app. B (July 2, 1990) (gravity adjustment criteria).

As we noted in *In re Rybond, Inc.*, 6 E.A.D. 614 (EAB 1996), the Board has authority to decrease a penalty in an appeal of a default order pursuant to 40 C.F.R. § 22.30(f).[2] 6 E.A.D. at 638-41 (reducing penalty from $178,896 to $25,000). "Under the circumstances of a given violation, reduction of a penalty assessment may be appropriate even if the penalty has been properly calculated in accordance with the [relevant EPA penalty policy]."[3] *Id*. at 639 (citing *In re Lin*, 5 E.A.D. 595, 602 (EAB 1994)). In this case, we are exercising that authority and reducing the total penalty assessed by the RJO from $16,500 to $1,000. We find that a total penalty of $1,000 is appropriate under the totality of the circumstances of the violations in this case, including the fact that the record below does not show the environmental harm to be

[2] We cited 40 C.F.R. § 22.31(a) in *Rybond* for this proposition; amendments to the Consolidated Rules of Practice at 40 C.F.R. part 22 have since moved the position of this rule to 40 C.F.R. § 22.30(f).

[3] Our reduction of the penalty here should not encourage respondents to delay their participation before the RJO or Administrative Law Judge in the hope that the Board will provide relief at a later date. Here, we are upholding the finding of liability and assessment of a penalty but determining that a lower penalty amount is appropriate under the circumstances of this case and is adequate to deter future violations by To Your Rescue. *See Rybond,* 6 E.A.D. at 641.

"widespread" or "substantial." We also find a penalty of $1,000 to be consistent with the Agency's overall penalty assessment goals of "deterrence, fair and equitable treatment of the regulated community, and swift resolution of environmental problems." EPA General Enforcement Policy #GM-22, *A Framework for Statute-Specific Approaches to Penalty Assessments: Implementing EPA's Policy on Civil Penalties* 1 (Feb. 16, 1984).

Accordingly, a civil penalty of $1,000 is hereby assessed against To Your Rescue for violating FIFRA as alleged in the complaint. Payment of the entire amount of the civil penalty shall be made within sixty (60) days[4] of service of this final order, by cashier's check or certified check payable to the Treasurer, United States of America, and forwarded to:

U.S. Environmental Protection Agency, Region VII
Regional Hearing Clerk
Post Office Box 360748M
Pittsburgh, Pennsylvania 15251-6748

Alternatively, To Your Rescue may wish to contact Ms. Martha Steincamp in Region VII's

[4] Under the Consolidated Rules of Practice that govern this administrative proceeding, respondents are given 30 days after the effective date of a final order to pay the full amount of an assessed civil penalty, "unless otherwise ordered." 40 C.F.R. § 22.31(c). In this case, we believe an additional 30 days is warranted and therefore choose to order a 60-day payment period, combined with an option for To Your Rescue to negotiate a longer payment schedule with Region VII if it believes such a schedule is needed.

Regional Counsel's Office, at 913-551-7246, to work out a payment schedule for the $1,000 penalty by which the company may fulfill its obligations under FIFRA.

So ordered.

ENVIRONMENTAL APPEALS BOARD[5]

Dated: September 30, 2005

By: /s/
Kathie A. Stein
Environmental Appeals Judge

[5] The three-member panel deciding this matter is comprised of Environmental Appeals Judges Scott C. Fulton, Edward E. Reich, and Kathie A. Stein. *See* 40 C.F.R. § 1.25(e)(1).

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **Final Order** in the matter of To Your Rescue! Services, FIFRA Appeal No. 04-08, were sent to the following persons in the manner indicated:

By Certified Mail, Return Receipt Requested:

Steve T. Wood, Owner
To Your Rescue! Services
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Martha Steincamp, Regional Counsel
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By U.S. EPA Pouch Mail:

The Honorable Robert L. Patrick
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Kathy Robinson
Regional Hearing Clerk
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901 North 5th Street
Kansas City, Kansas 66101

Dated: September 30, 2005

/s/
Annette Duncan
Secretary