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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

In the Matter of:)
)
Porter Hybrids, Inc.) Docket No. FIFRA-05-2008-0010
)
)
)
Respondent.)
_____)

INITIAL DECISION AND DEFAULT ORDER

This is an administrative action brought pursuant to Section 14(a) of the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136(a), and governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Consolidated Rules"), 40 C.F.R. Part 22.

Complainant, the Director of the Land and Chemicals Division, United States Environmental Protection Agency ("EPA") Region 5, filed a Complaint on March 3, 2008, against Porter Hybrids, Inc., alleging that Respondent violated section 12(a)(2)(L) of FIFRA, 7 U.S.C. § 136j(a)(2)(L), by failing to file a true and accurate "Pesticide Report for Pesticide-Producing and Device-Producing Establishments" (EPA Form 3540-16) for calendar years 2005 and 2006. On October 6, 2008, Complainant filed an Amended Complaint alleging only one count, failure to file a true and accurate Form 3540-16 for calendar year 2006. Complainant proposes a civil penalty be assessed against Respondent in the amount of \$1,000.

Complainant has filed a Motion for Default Order requesting that the Presiding Officer find the Respondent liable for the violation alleged in the Amended Complaint and assess the \$1,000 penalty as proposed in the Complaint. Section 22.17 of the Consolidated Rules provides in part:

(a) *Default.* A party may be found to be in default: after motion, upon failure to file a timely answer to the complaint. . . . Default by 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....

(b) *Motion for Default.* A motion for default may seek resolution of all or part of the proceeding. Where the motion requests the assessment of a penalty or the imposition of other relief against a defaulting party, the movant must specify the penalty or other relief sought and state the legal and factual grounds for the relief requested.

(c) *Default Order.* When the Presiding Officer finds that a default has occurred, he shall issue a default order against the defaulting party as to any or all parts of the proceeding unless the record shows a good cause why a default order should not be issued. If the order resolves all outstanding issues and claims in the proceeding, it shall constitute the initial decision under these Consolidated Rules of Practice. The relief proposed in the complaint or the motion for default shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act. . . .

Discussion

A. Statutory Background

Section 7(c)(1) of FIFRA, 7 U.S.C. § 136e(c)(1), requires any producer operating an establishment registered with the EPA under Section 7 of FIFRA to inform the Administrator within 30 days after it is registered, and annually thereafter, of the types and amounts of pesticides and, if applicable, active ingredients used in producing pesticides which: (A) the producer is currently producing; (B) the producer has produced during the past year, and; (C) the producer has sold or distributed during the past year. The report required by Section 7(c)(1) of FIFRA must be made on a form supplied by EPA known as the “Pesticides Report for Pesticide-Producing Establishments” form, or EPA Form 3540-16. See 40 C.F.R. § 167.85(c). Producers are required to submit the report for the preceding year to EPA on or before March 1 of each year even if the producer has produced no pesticidal product for that reporting year. 40 C.F.R. § 167.85(d). Section 12(a)(2)(L) of FIFRA provides that it shall be unlawful for any person who is a producer to violate any of the provisions of Section 7 of FIFRA. Finally, FIFRA authorizes the Administrator of EPA to assess a civil penalty against any “registrant, commercial applicator, wholesaler, dealer, retailer, or other distributor” who violates any provision of FIFRA of up to \$5000 (now adjusted to \$6500)¹ for each offense that occurred after March 15, 2004, pursuant to Section 14(a)(1) of FIFRA, 7 U.S.C. § 136l(a)(1).

B. Service of Process

As a preliminary matter, I must determine whether the Complaint was properly served on Respondent. Service is proper if it meets both the requirements of the Consolidated Rules and principles of due process. *Katzson Bros., Inc., v. United States Environmental Protection Agency*, 839 F.2d 1397, 1400 (10th Cir. 1988). Section 22.5(b)(1) of the Consolidated Rules sets forth the requirements for service of a complaint:

(i) Complainant shall serve on respondent, or a representative authorized to receive service on respondent’s behalf, a copy of the signed original of the complaint, together with a copy of these Consolidated Rules of Practice. Service shall be made personally,

¹ Pursuant to the Federal Civil Penalty Inflation Adjustment Act of 1990, 28 U.S.C. 2461 note, as amended by the Debt Collection Improvement Act of 1996, 31 U.S.C. 3701 note, each federal agency is required to issue regulations adjusting for inflation the maximum civil monetary penalties that can be imposed under the agency’s statutes in order to maintain the deterrent effect of the civil monetary penalty. EPA has issued such a regulation at 40 C.F.R. Part 19.

by certified mail with return receipt requested, or by any reliable commercial delivery service that provides written verification of delivery.

(ii)(A) Where respondent is a domestic or foreign corporation, a partnership, or an unincorporated association which is subject to suit under a common name, complainant shall serve an officer, partner, a managing or general agent or any other person authorized by appointment or by Federal or State law to receive service of process. . . .

In this case, Complainant served the Amended Complaint by certified mail, return receipt requested, on October 6, 2008, addressed to "Mr. L.D. Kirk, President, Porter Hybrids, Inc." at the address where Respondent is known to own or operate a business. The return receipt was signed by "Jan Kidd" and dated on October 8, 2008, and returned to the Region 5 Regional Hearing Clerk on October 14, 2008. While the record does not identify the person who signed the return receipt, it is clear that the Complaint was properly directed to a "representative authorized to receive service on respondent's behalf," that being Mr. L.D. Kirk, an officer of the corporation at the corporation's known place of business. Complainant thus has employed "a procedure reasonably calculated to achieve notice" to the Respondent of the commencement of this action. *See Katzson Bros, Inc., v. U.S. Environmental Protection Agency*, 839 F.2d 1397, 1400 (10th Cir. 1988). I thus conclude that service of process in this matter complies with the Consolidated Rules and satisfies principles of due process.

Pursuant to the Consolidated Rules and based upon the record in this matter and the following Findings of Fact, Conclusions of Law and Recommended Civil Penalty Assessment, Complainant's Motion for Default Order is hereby GRANTED.

Findings of Fact

Pursuant to sections 22.17(c) and 22.27(a) of the Consolidated Rules, 40 C.F.R. §§ 22.17(c) and 22.27(a), and based on the entire record in this case, I make the following findings of fact:

1. Section 7(c)(1) of FIFRA, 7 U.S.C. § 136e(c)(1), and 40 C.F.R. § 167.85 require any producer operating an establishment registered with the U.S. EPA under Section 7 of FIFRA to inform the Administrator within 30 days after it is registered, and annually thereafter, of the types and amounts of pesticides and, if applicable, active ingredients used in producing pesticides which: (A) the producer is currently producing; (B) the producer has produced during the past year; and (C) the producer has sold or distributed during the past year.
2. The term "produce" is defined by Section 2 (w) of FIFRA, 7 U.S.C. § 136(w), to mean "manufacture, prepare, propagate, compound, or process any pesticide or device...." In addition, when used in Part 167 of title 40 C.F.R, the term "produce" includes "to package, repack, label, relabel, or otherwise change the container of any pesticide or device."
3. Section 2(dd) of FIFRA, 7 U.S.C. § 136(dd), defines "establishment" as any place where a pesticide is produced, or held, for distribution or sale.

4. The report required by Section 7(c)(1) of FIFRA, 7 U.S.C. § 136e(c)(1), must be made on forms supplied by U.S. EPA. It is the ultimate responsibility of companies to obtain, complete and submit the form each year. 40 C.F.R. §167.85(c). U.S. EPA's form is known as the "Pesticides Report for Pesticide-Producing Establishments" form, or EPA Form 3540-16.
5. Producers must submit the Annual Pesticide Production Report for the preceding year to U.S. EPA on or before March 1 of each year even if the producer has produced no pesticidal product for that reporting year. 40 C.F.R. § 167.85(d).
6. Section 12(a)(2)(L) of FIFRA, 7 U.S.C. § 136j(a)(2)(L), states that it shall be unlawful for any person who is a producer to violate any of the provisions of Section 7 of FIFRA.
7. At all times relevant to the Amended Complaint, Respondent owned or operated a place of business located at 1683 State Route 134 N, Wilmington, Ohio 45177.
8. On June 21 and 27, 2006, an inspector employed by the Ohio Department of Agriculture (ODA), conducted an authorized inspection of Porter Hybrids, Inc., located at 1683 State Route 134 N., Wilmington, Ohio 45177.
9. During the June 21, 2006, inspection, the ODA inspector reviewed and collected documentary samples, including photographs of the label of the pesticide product "Tenkoz Buccaneer Plus Herbicide," EPA Reg. No. 524-454-55467, appearing on a mini bulk container.
10. Respondent's EPA Establishment number is 056945-OH-001, which was assigned to Respondent by EPA on or about November 20, 1986.
11. During the June 21 and 27, 2006, inspections, the ODA inspector also collected, among other things, Invoice No. 31067.
12. According to Invoice No. 31067, on or about April 20, 2006, Respondent distributed or sold the pesticide products "Buccaneer Plus Herbicide," EPA Reg. No. 524-454-55467, and "Weedone LV 4 EC," EPA Reg. No. 228-139-71368 (registered as "Riverdale 2,4-D LV 4 Ester," EPA Reg. No. 228-139) to Tom Beam of Wilmington, Ohio.
13. Respondent failed to submit its EPA Form 3540-16 for calendar year 2006 to EPA on or before March 1, 2007.
14. On April 13, 2007, EPA issued a Notice of Warning to Respondent for failing to submit its EPA Form 3540-16 for the calendar year 2006 to EPA on or before March 1, 2007.
15. On or about April 30, 2007, Respondent submitted its "Pesticide Report for Pesticide-Producing and Device-Producing Establishments" (EPA Form 3540-16) for the calendar year 2006 to EPA.
16. In its EPA Form 3540-16 for calendar year 2006, Respondent checked the box which states "Did not produce/distribute in 2006."

17. In response to a request from EPA to submit a corrected EPA Form 3540-16, on or about September 27, 2007, Respondent submitted an amended "Pesticide Report for Pesticide-Producing and Device-Producing Establishments" (EPA Form 3540-16), for the calendar year 2006 to EPA.
18. In the corrected EPA Form 3540-16 Respondent submitted on or about September 27, 2007, Respondent states that it produced, repackaged or relabeled and sold or distributed the pesticide products "Buccaneer Plus" and "Weedone LV 4" during 2006.
19. Complainant filed the Amended Complaint in this matter on October 6, 2008. The Amended Complaint was sent by certified mail, return receipt requested, directed to "Mr. L.D. Kirk, President, Porter Hybrids, Inc., 1683 N State Route 134, Wilmington, Ohio 45177."
20. The return receipt ("green card") was returned to the Regional Hearing Clerk on October 14, 2008.
21. Respondent did not file an answer to the Amended Complaint within 20 days of receipt as required by the Consolidated Rules. *See* Complainant's Exhibit C.
22. On February 17, 2009, the Presiding Officer issued an Order to Show Cause which was sent by certified mail, return receipt requested, to Respondent on that date.
23. As of this date, Respondent has not responded to the Presiding Officer's Order of February 17, 2009.

Conclusions of Law

1. Respondent was, at all times relevant to the Amended Complaint, a "person" as that term is defined in Section 2(s) of FIFRA, 7 U.S.C. § 136(s).
2. Respondent was, at all times relevant to the Amended Complaint, a "producer" as that term is defined at Section 2(w) of FIFRA, 7 U.S.C. § 136(w).
3. At all times relevant to the Amended Complaint, Respondent operated an establishment registered with the EPA under Section 7 of FIFRA.
4. Respondent did, at all times relevant to the Amended Complaint, "distribute or sell" as that terms is defined in Section 2(gg) of FIFRA, 7 U.S.C. § 136(gg).
5. At all times relevant to the Amended Complaint, Respondent was a registrant, commercial applicator, wholesaler, dealer, retailer and/or other distributor of pesticides within the meaning of those terms as used in Section 14(a)(1) of FIFRA, 7 U.S.C. § 136l(a)(1).

6. Respondent “produced,” as that term is defined at Section 2(w) of FIFRA, 7 U.S.C. § 136(w) and 40 C.F.R. § 167.3, the pesticide product “Buccaneer Plus Herbicide,” EPA Reg. No. 524-454-55467, during the calendar year 2006.

7. Respondent “produced,” as that term is defined at Section 2(w) of FIFRA, 7 U.S.C. § 136(w) and 40 C.F.R. § 167.3, the pesticide product “Weedone LV 4 EC,” EPA Reg. No. 228-139-71368, during the calendar year 2006.

8. Respondent failed to file a true and accurate Form 3540-16 by March 1, 2007, as required by Section 7 of FIFRA, 7 U.S.C. § 136e.

9. Respondent’s failure to file a true and accurate Form 3540-16 by March 1, 2007, as required by Section 7 of FIFRA, 7 U.S.C. § 136e, violates Section 12(a)(2)(L) of FIFRA, 7 U.S.C. § 136j(a)(2)(L), and subjects Respondent to civil penalties under Section 14(a) of FIFRA, 7 U.S.C. § 136l(a).

10. The Amended Complaint in this proceeding was lawfully and properly served upon Respondent in accordance with 40 C.F.R. § 22.5(b)(1).

11. Respondent was required by section 22.15(a) of the Consolidated Rules, 40 C.F.R. § 22.15(a), to file an answer to the Amended Complaint within twenty days from the date of service of the Amended Complaint.

12. Respondent’s failure to file an answer to the Amended Complaint constitutes an admission of all facts alleged in the Amended Complaint and a waiver of Respondent’s right to a hearing on such factual allegations. 40 C.F.R. § 22.17(a).

13. Respondent is in default in this proceeding and has waived its right to contest the factual allegations in the Amended Complaint.

14. The record in this matter shows no good cause why a default order should not be issued.

Recommended Civil Penalty Assessment

The Federal Insecticide, Fungicide and Rodenticide Act enumerates specific factors that the Agency shall consider when assessing a penalty for a violation of Section 7(c) of the Act. Those factors are: 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. 7 U.S.C. § 136l(a)(4). The Consolidated Rules provide in part:

(b) *Amount of civil penalty.* 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 complainant, the Presiding Officer shall set forth in the initial decision the specific reasons for the increase or decrease. If the respondent has defaulted, the Presiding Officer shall not assess a penalty greater than that proposed by complainant in the complaint, the prehearing information exchange or the motion for default, whichever is less.

In this regard, the Agency has issued the *Enforcement Response Policy for FIFRA Section 7(c): Pesticide Producing Establishment Reporting Requirement* (June 2007) (“ERP”). The ERP sets forth guidelines for the Agency to use in determining the appropriate enforcement response and penalty amount for violations of FIFRA Section 7(c). In addition, Complainant has submitted the Declaration of Joseph G. Lukascyk, an Enforcement Officer in the Pesticides and Toxics Compliance Section, Land and Chemicals Division of U.S. EPA Region 5. Mr. Lukascyk was responsible for the development of this administrative enforcement action and calculated the proposed penalty. Attached to his Declaration is a memorandum that describes the facts that he considered and applied to the statutory penalty criteria in conjunction with the ERP.

The Enforcement Response Policy provides that a Form 3540-16 “that does not contain all the required information or contains incorrect information is considered an incomplete report.” ERP at 7. The policy further provides that a major reporting violation is one that cannot be classified as a minor error such as failure to include a date or telephone number on the report or an incorrect product type. In this case, Respondent failed to report that it had produced, repackaged or relabeled two pesticides during on its report submitted for calendar year 2006. It stated instead that it did not produce or distribute pesticides in 2006. This constitutes a major incomplete reporting violation under the Enforcement Response Policy.

The record further establishes that this was not Respondent’s first reporting violation. Respondent had failed to submit its report for the year 2006 on time, and EPA responded with a Notice of Warning. In response to the Notice of Warning, Respondent submitted the inaccurate report. The record also establishes that Respondent’s business is a “Category III Business” under the Enforcement Response Policy as it has annual gross revenues of \$10 million or less. The ERP Civil Penalty Matrix provides that a \$1000 penalty is appropriate for a second time Category III violator who submits an incomplete annual report. The record demonstrates that Respondent is able to pay a penalty of \$1000.² Finally, the record establishes that the Agency considered Respondent’s good faith efforts to comply with FIFRA, but made no adjustment for this factor.³

I conclude that a penalty of \$1000 is consistent with the evidence in the record and in accord with the penalty criteria set forth in FIFRA and the Enforcement Response Policy.

² See Memorandum to File from Joseph G. Lukascyk attached to Complainant’s Exhibit F at 3.

³ *Id.* at 5.

DEFAULT ORDER

It is hereby ORDERED as follows:

1. Respondent is assessed a civil penalty in the amount of one thousand dollars (\$1000);
2. Respondent shall, within thirty calendar days after this Default Order has become final, forward a cashier's or certified check payable to "Treasurer, United States of America," and shall deliver the check to:

U.S. EPA Region 5
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, MO 63197

In addition, Respondent shall mail a copy of the check to:

Regional Hearing Clerk (E-19J)
U.S. EPA Region 5
77 West Jackson Boulevard (E-19J)
Chicago, IL 60604

and to:

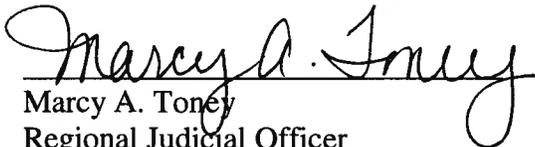
Joseph G. Lukascyk (LC-8J)
U.S. EPA Region 5
77 West Jackson Boulevard
Chicago, IL 60604

A transmittal letter identifying the case name and docket number should accompany both the remittance and copies of the check.

3. 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.

Date: March 26, 2009


Marcy A. Toney
Regional Judicial Officer
U.S. EPA Region 5

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MAR 26 2009

In the Matter of Porter Hybrids, Inc.
Docket No. FIFRA-05-2008-0010

REGIONAL HEARING CLERK
U.S. ENVIRONMENTAL
PROTECTION AGENCY

CERTIFICATE OF SERVICE

I certify that the foregoing **Initial Decision and Default Order**, dated March 26, 2009, was sent this day in the following manner:

Original hand delivered to:

Regional Hearing Clerk
U.S. Environmental Protection
Agency, Region 5
77 West Jackson Boulevard
Chicago, IL 60604-3590

Copy hand delivered to
Attorney for Complainant:

Christine M. Liszewski
U. S. Environmental Protection
Agency, Region 5
Office of Regional Counsel
77 West Jackson Boulevard
Chicago, IL 60604-3590

Copy by U.S. Certified Mail
Return Receipt Requested to:

L.D. Kirk, President
Porter Hybrids, Inc.
1683 N. State Route 134
Wilmington, OH 45177

Dated: 3/26/09

By: 
Darlene Weatherspoon
Administrative Assistant