

RECEIVED
REGIONAL HEARING
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

'97 FEB 11 P3:28

IN THE MATTER OF)
)
JAHRAUS OIL COMPANY, INC.)
FARINA, ILLINOIS,)
)
)
Respondent.)

ENVIRONMENTAL
PROTECTION AGENCY
Docket No. 5-IFRA-95-018
REGION V

152

AMENDED RECOMMENDATION OF DEFAULT

PRELIMINARY STATEMENT

This is a civil administrative proceeding instituted under Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. §§ 136-136y, and the United States Environmental Protection Agency's Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits, 40 C.F.R. Part 22. This proceeding was initiated by a Complaint and Notice of Opportunity for Hearing ("Complaint") filed on August 1, 1995, by the acting Director of the Environmental Sciences Division, Region 5, United States Environmental Protection Agency (U.S. EPA), against the Respondent, Jahraus Oil Company, Inc., located at 201 East Jefferson Street, Farina, Illinois. In its Complaint, Complainant proposed that a civil penalty in the amount of Five Thousand Dollars (\$5,000) be assessed against the Respondent for failure to inform the U.S. EPA, by submitting a completed EPA Form 3540-16, of the information required pursuant to Section 7(c)(1) of FIFRA, 7 U.S.C. § 136e(c)(1), 40 C.F.R. § 167.85(b), for calendar year 1994.

The Complaint issued to Respondent, Jahraus Oil Company, Inc., states, beginning on page 5, in the section headed OPPORTUNITY TO REQUEST A HEARING, as follows: "If you wish to avoid being found in default, you must file a written answer to this Complaint and Notice of

Opportunity for Hearing with the Regional Hearing Clerk . . . within twenty (20) days of service of this Complaint. . . . If you fail to file a written Answer, with or without a Request for Hearing, within twenty (20) days of your receipt of this Complaint, the Regional Administrator or Presiding Officer may issue a Default Order. Issuance of this Default Order will constitute a binding admission of all facts alleged in the Complaint and a waiver of your right to a hearing under FIFRA. The civil penalty proposed in this Complaint shall then become due and payable without further proceedings sixty (60) days after a Final Order of Default is issued pursuant to 40 C.F.R. § 22.17(a). Refusal to remit such penalty may result in the referral of this matter for collection to the United States Attorney."

Complainant mailed a copy of the Complaint to Respondent at Respondent's place of business on August 1, 1995, via certified mail, return receipt requested. According to the receipt card, Respondent received the Complaint and Notice of Opportunity for Hearing on August 3, 1995. Respondent therefore had until August 23, 1995, to file an Answer. On August 30, 1995, Complainant mailed to Respondent a letter notifying Respondent that an Answer to the Complaint was overdue and that Respondent's failure to file an Answer to the Complaint may result in a Default Order. To date, Respondent has failed to file an Answer to the Complaint.

On August 23, 1996, Complainant filed a Motion for Default Order and a Memorandum in Support thereof.¹ Through the Complaint and documents and exhibits submitted together with the Motion for Default Order, Complainant has established a prima facie case against Respondent; Complainant has established that the Respondent has violated Section 7(c)(1) of FIFRA, 7 U.S.C. § 136e(c)(1), 40 C.F.R. § 167.85(b).

It is this motion that is granted by this Order.

JURISDICTION

Jurisdiction for this action is conferred upon U.S. EPA by Sections 12 and 14 of FIFRA, 7

¹In response to an Order to Supplement, Complainant submitted further legal argument in Complainant's Response to Order to Supplement, filed November 1, 1996.

U.S.C. §§ 136j and 136l, respectively.

FINDINGS OF VIOLATION

Pursuant to 40 C.F.R. Section 22.17(a), the following facts are deemed admitted:

1. The Complainant is, by lawful delegation, the Director, Waste, Pesticides & Toxics Division, United States Environmental Protection Agency, Region 5, (U.S. EPA).
2. Respondent is Jahraus Oil Company ("Respondent"), a corporation organized under the laws of the State of Illinois, with a place of business at 201 E. Jefferson Street, Farina, Illinois.
3. Respondent is a "person" as that term is defined in Section 2(s) of FIFRA, 7 U.S.C. § 136(s).
4. Respondent, during the calendar years 1990 and 1991, manufactured, prepared, propagated, compounded, or processed "Bullet" (EPA Reg. No. 524-418), "Squadron" (EPA Reg. No. 241-297), and "Bicep" (EPA Reg. No. 100-645), all of which are known pesticides.
5. Respondent is a "producer" as that term is defined in Section 2(w) of FIFRA, 7 U.S.C. § 136(w), and 40 C.F.R. § 167.3.
6. Respondent has a production facility at a site located at 201 East Jefferson Street, Farina, Illinois.
7. Respondent operates an "establishment," as that term is defined at Section 2(dd) of FIFRA, 7 U.S.C. § 136(dd), and 40 C.F.R. § 167.3.
8. Respondent sold and distributed the pesticides referenced in Paragraph 4.
9. Respondent is a "distributor" as that term is used in Section 14 of FIFRA, 7 U.S.C. § 136l(a).
10. Pursuant to Section 7(a) of FIFRA, 7 U.S.C. § 136e(a), and 40 C.F.R. § 167.20,

Respondent registered its establishment, located at 201 East Jefferson Street, Farina, Illinois, on January 18, 1991.

11. Respondent's EPA Establishment Number is 64664-IL-01.

12. Pursuant to Section 7(c)(1) of FIFRA, 7 U.S.C. § 136e(c)(1) and 40 C.F.R. § 167.85(b), any producer operating a registered establishment shall inform the U.S. EPA, within 30 days after it is registered, and annually as required under U.S. EPA's regulations set forth at 40 C.F.R. Subpart E, of the types and amounts of pesticides, and, if applicable, active ingredients used in producing pesticides, which the producer is currently producing; produced during the past year; and sold or distributed during the past year.

13. Pursuant to 40 C.F.R. § 167.85(c), the information required by Section 7(c)(1) of FIFRA, 7 U.S.C. § 136e(c)(1), and 40 C.F.R. § 167.85(b), must be submitted to U.S. EPA on the "Pesticides Report for Pesticide-Producing Establishments" (hereafter referred to as "EPA Form 3540-16" or "the form").

14. Pursuant to 40 C.F.R. § 167.85(d), a producer must submit the form, as referenced in Paragraph 13, to U.S. EPA within 30 days after it is registered, and annually on or before March 1 of each year, even if the producer has produced no pesticidal product for that reporting year.

15. On or about February 10, 1995, Respondent received a copy of EPA Form 3540-16.

16. Respondent was required to submit a completed EPA Form 3540-16 for the 1994 calendar year on or before March 1, 1995, or within 30 days of receipt of the form.

17. As of the date of issuance of the Complaint, U.S. EPA had not received a completed EPA Form 3540-16 for calendar year 1994 from Respondent.

18. Respondent has failed to inform the U.S. EPA, by submitting a completed EPA Form

3540-16, of the information required pursuant to Section 7(c)(1) of FIFRA, 7 U.S.C. § 136e(c)(1), and 40 C.F.R. § 167.85(b) for calendar year 1994.

Respondent's failure to inform the U.S. EPA, by failing to submit to U.S. EPA a completed EPA Form 3540-16 for the 1994 calendar year on or before March 1, 1995, or within 30 days of receipt of the 1994 form, constitutes a violation of Section 7(c)(1) of FIFRA, 7 U.S.C. § 136e(c)(1), and 40 C.F.R. § 167, Subpart E. Such failure is unlawful pursuant to Section 12(a)(2)(L) of FIFRA, 7 U.S.C. § 136j(a)(2)(L).

PENALTY DETERMINATION

The remaining issue is the assessment of an appropriate civil penalty. Section 22.17(a) of EPA's Consolidated Rules states that "the proposed civil penalty shall become due and payable by respondent without further proceedings sixty (60) days after a final order issued upon default." However, Section 22.27(b), as it relates to penalties in initial decisions, states that "the Presiding Officer shall not raise a penalty from that recommended to be assessed in the complaint if the respondent has defaulted." This sentence suggests a responsibility on the part of the Presiding Officer to review the amount of the civil penalty in a default case. This responsibility to review the amount of the civil penalty in a default proceeding is also suggested by the decision in Katzson Bros., Inc. v. U.S. EPA., 839 F.2d 1396 (10th Cir. 1988).

Criteria for Assessing Penalty

40 C.F.R. Section 22.35(b) states:

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) 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 Pre-

siding Officer must also consider the guidelines for the Assessment of Civil Penalties published in the Federal Register (39 FR 27711), and any amendments or supplements thereto.

1. Statutory Criteria - 7 U.S.C. Section 136f

Section 14(a)(4) of the Act, 7 U.S.C. Section 136f (a)(4) requires that the Administrator "consider 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) of FIFRA authorizes a civil penalty of not more than \$5,000 for each violation of FIFRA.

The Dun and Bradstreet report submitted in support of the Motion for Default shows Respondent's self-reported sales for 1992 as \$2,672,722. Respondent did not submit any information, nor does the record contain any information, which would show that assessment of the proposed \$5,000 civil penalty would have an adverse impact on the Respondent's ability to continue in business. The Agency argues that the notice requirement is an important element of the regulatory program. Failure to submit these reports seriously affects EPA's ability to enforce the law and protect human health and the environment. Therefore, one can characterize the violation as grave.

2. Evidence of Good Faith/History of Compliance

The record does not reveal any prior violations of FIFRA. The record contains no information regarding Respondent's good faith or lack thereof. In assessing its proposed penalty EPA made no adjustments for these factors.

3. Enforcement Response Policy

The Enforcement Response Policy ("ERP") for FIFRA, (39 FR 27711), dated July 2, 1990, is the Agency's effort to set forth a comprehensive framework for calculating penalties in a fair and

nationally uniform manner, taking into account the statutorily-mandated factors. Under the ERP, the penalty determination is a five step process. It specifically takes into account the FIFRA Section 14(a)(4) statutory criteria: 1) "gravity" of the violation; 2) the size of the business; and 3) consideration of the effect that payment of the total civil penalty will have on the violator's ability to continue in business. "Gravity based adjustments" are then made to the base penalty in consideration of the specific characteristics of the pesticide involved, the actual for potential harm to human health and/or the environment and the compliance history of the violator.

Complainant justifies the proposed penalty in this case as follows:

Gravity - The ERP states that the gravity component for failure to submit information required pursuant to Section 7(c)(1) of FIFRA constitutes a gravity level of two, the second highest in the matrix, with no gravity adjustments. The Agency rationale for this classification is that reporting requirements are an integral part of a comprehensive regulatory scheme to ensure the safe production, distribution and use of pesticides. Without this information, the Agency cannot fulfill its regulatory purpose, compromising the Agency's ability to protect human health and the environment.

Complainant found no case specific factors that would warrant an adjustment to the gravity determination.

Size- A Dun and Bradstreet report dated December 21, 1992, revealed that the Respondent reported sales of \$2,672,722 in 1992. The ERP classifies this size business as Level 1 and considers a \$5,000 penalty as appropriate. The record contains no information which conflicts with the self-reported information contained in the Dun and Bradstreet report .

Ability to Continue in Business - This criterion focuses on the Respondent's ability to pay

the proposed penalty and remain a viable entity. Under the ERP, Respondent's ability to pay is presumed unless it raises its financial capability as an issue. James C. Lin and Lin Cubing, Inc., TSCA Appeal No 94-2, at 6-9 (EAB September 27, 1995). Respondent did not raise an issue of ability to pay; nor did EPA consider an adjustment for this factor.

Based upon the above considerations, EPA proposes a penalty of \$5,000. This calculation represents a reasonable application of the ERP guidelines to the facts in this case.

Penalty Assessment

Based upon consideration of the statutory requirements, the ERP and the criteria set forth at 40 C.F.R. Section 22.35, as it relates to the facts in this matter, Complainant's proposed civil penalty of \$5,000 is appropriate.

CONCLUSIONS

Respondent is found to be in default pursuant to the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation and Suspension of Permits, 40 C.F.R. § 22.17. Such default constitutes an admission of all facts alleged in the Complaint and a waiver of hearing by the Respondent. By reason of the facts set forth in the Findings of Violation Section, above, the Respondent has violated Section 7(c)(1) of FIFRA, 7 U.S.C. § 136e(c)(1), and 40 C.F.R. § 167.85(b). The penalty proposed in the Complaint, Five Thousand Dollars (\$5,000), is appropriate and is assessed.

ORDER

Due to Respondent's failure to file an Answer, and upon application and affidavit of the Complainant, default judgment is entered against Respondent. Based upon the foregoing and pursuant to Section 14(a) of FIFRA, 7 U.S.C. Section 136(l), it is hereby ORDERED that:

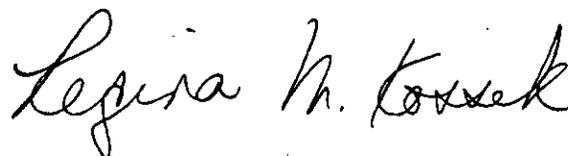
Pursuant to Section 14 of FIFRA, 42 U.S.C. § 1361(a), a civil penalty of Five Thousand Dollars (\$5,000) is assessed against the Respondent, Jahraus Oil Company, Inc., for the violation of FIFRA set forth herein.

Pursuant to 40 C.F.R. Section 22.27(c), this Default Order shall become final within forty-five (45) days after service upon the parties unless it is appealed to the Environmental Appeals Board or the Environmental Appeals Board elects, sua sponte, to review it.

Pursuant to 40 C.F.R. Section 17(a), the full amount of the civil penalty shall become due and payable by Respondent, Jahraus Oil Company, Inc., without further proceedings sixty (60) days after a final order issued upon default. Payment shall be made by certified or cashier's check payable to the Treasurer of the United States of America and shall be mailed to U.S. EPA, Region 5, P.O. Box 70753, Chicago, Illinois 60673. Copies of the transmittal of the payment should be sent to the Regional Hearing Clerk, Planning and Management Division (5MFA-14), and Nina M. Zippay, Assistant Regional Counsel, Office of Regional Counsel (C-29A), U.S. EPA, 77 West Jackson Boulevard, Chicago, Illinois 60604-3590.

SO ORDERED.

Dated: February 6, 1997



Regina M. Kossek
Regional Judicial Officer
U.S. Environmental Protection Agency
Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604