UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the matter of	)	
	)	
PACIFIC INTERNATIONAL GROUP, INC.,	)	Docket No. FIFRA-09-0890-C-98-15
	)	
	)	
Respondent	)	

INITIAL DECISION

By: Carl C. Charneski
Administrative Law Judge

Issued: June 22, 1999
Washington, D.C.

Appearances

For Complainant: David Jones, Esq.
Region IX
U.S. Environmental Protection Agency
San Francisco, California

For Respondent: Takashi Shioya
President, CEO
Pacific International Group, Inc.
San Clemente, California

I. Introduction

This civil penalty proceeding arises under the Federal Insecticide, Fungicide, and Rodenticide Act, commonly referred to as "FIFRA." 7 U.S.C. § 136 *et seq.* The U.S. Environmental Protection Agency ("EPA") filed a complaint against Pacific International Group, Inc. ("Pacific International"), charging the company with six violations of FIFRA. EPA requests that a civil penalty of $24,640 be assessed for these violations.(1)

Pacific International has admitted committing all six violations. *Jt. Ex. 1, Stip. 10.* Respondent submits, however, that under the circumstances of this case either no penalty, or a fairly low one, is warranted.

A hearing was held in this matter on April 22, 1999, in Santa Ana, California. The purpose of this hearing was to determine the penalty amount that respondent is to pay for the admitted violations.(2) Based upon the record evidence in this case, Pacific International is assessed a civil penalty totaling $7,500.

II. Facts

Pacific International is a California corporation. It is located in the city of San Clemente. *Jt. Ex. 1, Stips. 1 & 3.* Respondent ran afoul of the Federal Insecticide, Fungicide, and Rodenticide Act when it sold and distributed "Clean Cut Plus" cutting boards and "Clean Touch Plus" wash cloths. Pacific International had marketed both products for use in food preparation, representing each as being "anti-bacterial." *Compl. Ex. 3*; Tr. 97. Pacific International no longer sells or distributes these products. Tr. 103.

EPA first learned of respondent's sale and distribution of Clean Cut Plus and Clean Touch Plus as a result of the company's participation in a Chicago trade show. Tr. 22, 74. Thereafter, on February 24, 1998, a representative from the California Department of Pesticide Regulation conducted an inspection of Pacific International's facility. This inspection consisted of a document review concerning the company's sale and distribution of Clean Cut Plus and Clean Touch Plus. *Jt. Ex. 1, Stips. 3 & 6.* Based upon information collected during this inspection, EPA issued the present six-count complaint.

In Counts I through V, EPA alleged a violation of FIFRA Section 12(a)(1)(A). 7 U.S.C. § 136j(a)(1)(A). Section 12(a)(1)(A) makes it unlawful for any person to distribute or sell any pesticide that is not registered under Section 3 of FIFRA, 7 U.S.C. § 136a. Counts I through V involve the sale or distribution by respondent of Clean Cut Plus and Clean Touch Plus, neither of which was registered pursuant to FIFRA Section 3. In Count VI, EPA alleged a violation of FIFRA Section 12(a)(2)(L). 7 U.S.C. § 136j(a)(2)(L). This provision requires that persons producing pesticides register their producing "establishments" in accordance with Section 7 of FIFRA. 7 U.S.C. § 136e.

III. Discussion

Section 14(a)(1) of FIFRA, 7 U.S.C. § 136l(a)(1), provides the statutory authority for assessing a civil penalty in this case. The maximum penalty that can be assessed for each of the six violations involved here is $5,500.[(3)] Alternatively, Section 14(a)(4) of FIFRA,

7 U.S.C. § 136l(a)(4), provides that a warning may be issued in lieu of a penalty where the violation occurred despite the exercise of due care or did not cause significant harm to health or to the environment. While the violations committed by Pacific International warrant more than the issuance of a warning, as respondent had hoped would be the case, they nonetheless do not rise to the penalty level sought by EPA.

The penalty assessed in this case is $7,500. This penalty amount reflects a consideration of the record evidence in light of the statutory penalty criteria contained in FIFRA Section 14(a)(4). That section in part provides:

> In determining the amount of the penalty, the Administrator shall consider [1] the appropriateness of such penalty to the size of the business of the person charged, [2] the effect on the person's ability to continue in business, and [3] the gravity of the violation.

7 U.S.C. § 136l(a)(4).

It is well-established that "any penalty assessed must 'reflect a reasonable application of the statutory penalty criteria to the facts of the particular violations.'" *Predex Corporation,* FIFRA Appeal No. 97-8, at 8, (May 8, 1998)(EAB), *citing Employers Ins. Of Wausau,* 6 E.A.D. 735, 758 (EAB 1997). This application of the FIFRA penalty criteria to the facts of the case is the very essence of a respondent's statutorily guaranteed right to be heard on the penalty. *See* Section 14(a)(3), 7 U.S.C. § 136l(a)(3).

1. The Appropriateness of the Penalty to the Size of Respondent's Business

EPA offered only limited evidence regarding the size of Pacific International's business, and only a limited explanation as to the impact that this "size" criterion evidence should have on the assessed penalty. Steven Arbaugh, an EPA employee, performed the Agency's proposed penalty calculations in this case. Tr. 18, 20.[(4)] Arbaugh based his calculations on a 1990 EPA guidance document titled, "Enforcement Response Policy For The Federal Insecticide, Fungicide, And Rodenticide Act (FIFRA)." *See Compl. Ex. 2.* This document is also known as the "ERP."

At the hearing, EPA submitted a Declaration prepared by Arbaugh. In this Declaration, Arbaugh generally described the manner in which he calculated the proposed penalty. *See Compl. Ex. 1*. Arbaugh declared that the Agency considers the size of a respondent's business as a way of making the penalty proposal process more equitable. He explained, "[t]his means that the civil penalties assessed for violations of FIFRA will generally decrease as the size of the business decreases, and vice versa." *Compl. Ex. 1 at 2.* Arbaugh also stated in the Declaration that in determining the "size of the business," EPA looks to the respondent's gross revenues for the year prior to the date of violation. *Id.* Insofar as this case is concerned, Arbaugh concluded:

> The violations charged against Respondent occurred in the years 1997 and 1998. Pacific International's 1996 and 1997 tax returns indicated gross revenues of over $1,000,000 and over $300,000 respectively. According to table 2, ERP page 20, respondent is within size of business category level I for violations in 1997 and level II for violations observed in 1998.

Compl. Ex. 1 (fn. omitted).

Arbaugh also testified at the hearing. While reaffirming the substance of his written Declaration, Arbaugh's testimony shed no new light on the "size of the business" penalty criterion. Tr. 20.

Accordingly, inasmuch as the gross revenue figures offered by EPA are not disputed, it is found that Pacific International had a gross revenue of more than $1,000,000 in 1996, and more than $300,000 in 1997.

2. The Effect on Respondent's Ability to Continue in Business

The parties have differing views on the respondent's ability to continue in business, were a penalty to be assessed in the amount sought by EPA. Complainant states that the company could pay a significant penalty, while Pacific International states that such a penalty would put it out of business. The evidence, albeit limited, supports a finding that respondent is experiencing financial hardship. The assessment of a $7,500 penalty is consistent with this finding.

EPA bases its case on this ability-to-pay issue upon the testimony of Paul Jalbert. Jalbert works with the Agency's Office of the Inspector General. He has an accounting and auditing background, with experience in analyzing corporate finances. Tr. 78-80.

Jalbert testified that he reviewed respondent's Federal income tax returns for the years 1995, 1996, 1997, and 1998.[(5)] Jalbert averaged the company's gross sales for those four years, and then applied the 4 percent ability-to-pay formula contained in the Enforcement Response Policy.[(6)] On the basis of this calculation, Jalbert determined that Pacific International could pay a penalty ranging between $30,000 and $32,000. Tr. 80-81, 89.

Despite this ability-to-pay determination, Jalbert acknowledged that Pacific International has recently experienced a downward trend in its gross sales. Tr. 82. He testified that the company's 1995 and 1996 Federal income tax returns showed gross sales in excess of $1,000,000, while the company's Federal income tax returns for 1997 and 1998, showed that the gross sales "moved down somewhere between $500,000 and $600,000." Tr. 89. While Jalbert was unable to determine the cause for this downward trend, he did state that it was a "concern." Tr. 82-83. Not surprisingly, Jalbert acknowledged that Pacific International lost money during the years 1997 and 1998. Tr. 85.[(7)]

In sum, the evidence shows that Pacific International is not in good financial shape. With its gross sales on the decline, and with the company losing money, the

assessment of a monetary penalty greater than $7,500 would not be supported by the record. Conversely, the record also does not support the issuance of a warning in lieu of a penalty. Declining revenues and net losses do not, under the facts of this case, exempt Pacific International from being assessed a penalty for violating FIFRA. Here, Pacific International has simply not submitted specific and detailed evidence to support its assertion that a warning is the appropriate sanction. There has been no showing by respondent that the assessment of a modest penalty would adversely affect its ability to continue in business.

3. The Gravity of the Violation

The gravity criterion encompasses the negligence of the respondent in committing the violation, as well as the seriousness of the violation itself - *i.e.,* the harm presented to human health and to the environment. A company's good faith in remedying the violation and its compliance history are also appropriate considerations under this penalty criterion.(8)

The facts of the case support a finding that respondent was moderately negligent in failing to comply with FIFRA Sections 12(a)(1)(A) and 12(a)(2)(L). In that regard, the company's President, Takashi Shioya, testified that he telephoned several EPA offices regarding Clean Cut Plus and Clean Touch Plus. Shioya further testified that as a result of these conversations he was under the mistaken impression that Pacific International was in compliance with all FIFRA registration requirements. Shioya accepted responsibility for this error, explaining in part that it was the result of his having difficulty with the English language and thus his use of imprecise terminology in his discussions with EPA. Tr. 98-99.

While Shioya was a credible witness, and while his testimony that he contacted EPA about Clean Cut Plus and Clean Touch Plus is accepted as truthful, it nevertheless suffers from a lack of detail. For example, Shioya failed to identify the EPA offices that he contacted, the EPA personnel with whom he talked, when the conversations occurred, and exactly what was said. Tr. 117-18.(9) It is therefore difficult to give much weight to this explanation for respondent's not complying with the FIFRA registration requirements.

In any event, even accepting that these telephone conversations between EPA and Pacific International took place as described by Shioya, the fact remains that respondent was under a legal obligation to register its products and facility with EPA, and it failed to do so. Respondent was aware that the Federal Insecticide, Fungicide, and Rodenticide Act applied to its operation, hence its telephone calls to EPA. It should have taken more care to ensure compliance with a known applicable environmental statute. In sum, while respondent's intentions were good, it did not follow through and exercise the appropriate care necessary to ensure compliance with FIFRA.

As for the seriousness of the violations in terms of causing harm, or having the potential to cause harm, to human health and to the environment, the record again is not as complete as it could be.(10) On this issue, however, failure to comply with the FIFRA registration provisions of Section 12(a)(1)(A) and Section 12(a)(2)(L) presents a danger to the public because EPA is unable to investigate the safety of the product and determine whether the product satisfies all pesticidal claims before it is made available to the public. Tr. 68.

In that regard, with respect to both Clean Cut Plus and Clean Touch Plus, respondent represented that the product has been tested in the United States and in Japan by accredited laboratories. Respondent further represented that these products have been proven to effectively kill many life-threatening types of bacteria including E-coli, Salmonella, Staphylococcus aureus, and K. Pneumonia. *Compl. Ex. 3.* Pacific International's marketing of Clean Cut Plus and Clean Touch Plus without first registering these products with EPA, however, endangered the public by stripping away an important layer of regulatory protection. Clean Cut Plus and Clean Touch Plus were sold to the public before EPA's scientists had the opportunity to determine whether these products were safe and to assess the accuracy of their anti-bacterial claims. *See* Tr. 34, 67-68.

A final consideration with respect to gravity is the fact that respondent has cooperated with EPA's investigation in this case (*see* Tr. 23, "[Shioya]'s been excellent to work with"), and the fact that there has been no showing that the company previously violated FIFRA.

In sum, the seriousness of the violations, Pacific International's negligence, the company's subsequent good faith, and its overall FIFRA compliance history, support the assessment of a $7,500 penalty.

ORDER

For the foregoing reasons, Pacific International Group, Inc., is ordered to pay a civil penalty of $7,500 pursuant to Section 14(a)(1) of the Federal Insecticide, Fungicide, and Rodenticide Act, for five violations of Section 12(a)(1)(A) and one violation of Section 12(a)(2)(L). 7 U.S.C. §§ 136j(a)(1)(A) & (a)(2)(L).[(11)]

This decision will become a final order of the Environmental Appeals Board unless it is appealed to the Board, or unless the Board elects to review this decision *sua sponte,* as provided by 40 C.F.R. 22.27(c) & 22.30.

_____
Carl C. Charneski
Administrative Law Judge

1. In the complaint, EPA petitioned for a penalty of $33,000. The Agency subsequently lowered this penalty request to $30,800, citing the receipt of more accurate information as to the size of respondent's business. Tr. 21; *Compl. Ex. 1*

(penalty calculation worksheet). At the hearing, EPA further lowered the amount of penalty sought by 20 percent, on the basis of respondent's "good faith" and overall cooperation. This reduction brings us to the $24,640 penalty figure presently proposed by complainant. Tr. 23.

2. The parties elected not to file post-hearing briefs addressing this issue. Tr. 123.

3. This penalty amount reflects an upward adjustment as provided by the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701. *See* 40 C.F.R. 19.4.

4. Arbaugh's job title is "Environmental Protection Specialist." He is trained in FIFRA case development. Tr. 18-19.

5. Jalbert also referred to one or more Dunn & Bradstreet reports, but he does not indicate the extent, if at all, to which he relied upon this data. Tr. 87-88. In addition, while Jalbert looked at the company's "current ratio" (*i.e.,* its current assets and current liabilities), he could not recall the results of this analysis. Tr. 91-92.

6. Under the heading, "Ability to Continue in Business/Ability to Pay," the ERP explains that there are three methods used by the Agency to make an ability-to-pay determination. One of these methods, the averaging of the gross annual income, is described as follows:

> Four percent of gross sales. The average gross income (from all sources of revenue) for the current year and the prior three years will be calculated. Even where the net income is negative, four percent of gross income will be used as the "ability to continue in business/ability to pay" guidance, since companies with a positive gross income will be presumed to have sufficient cash flow to pay penalties even where there have been net losses....

Compl. Ex. 2 at 23 (emphasis in original).

7. EPA's only other witness, Steven Arbaugh, stated that Pacific International's Federal tax returns for 1997 indicated gross revenues of over $300,000. *Compl. Ex. 1 at 3.* Arbaugh's statement supports the testimony of Jalbert that the company's gross sales were in decline in 1997 and 1998. *See Respondent's Exhibit E* (letter from insurer to Pacific International explaining that insurance premium was being partially refunded because the company's gross sales for the period of May 20, 1997, to May 20, 1998, were "only around $500,000," rather than the projected gross sales of $4,000,000).

8. These are the factors essentially considered by EPA in calculating the gravity of the violation pursuant to its FIFRA Enforcement Response Policy. *See Compl. Ex. 2, Appendix B (Gravity Adjustment Criteria).*

9. Shioya testified:

> I called EPA in general places, headquarters in Washington, D.C., the regional offices. Unfortunately, I don't have a logbook or proof. It's been a while. The answer I obtained was I probably misrepresented my case because I said it is EPA registered material. I did not specifically say EPA registered product. That was my mistake.

Tr. 98.

10. For example, complainant's Exhibit 5, which discussed specific health and environmental hazards presented by "Bactekiller AC," an ingredient apparently contained in Clean Cut Plus and Clean Touch Plus, was rejected at the hearing. Exhibit 5 was rejected because: (1) it was shown to respondent for the first time at the hearing, well beyond the time prescribed in the order setting the time for the parties' prehearing exchange of such information, and EPA's explanation of a late discovery of the document was not sufficient to overcome the undue prejudice that would be suffered by respondent; (2) the exhibit contained unexplained handwritten notations and deletions of printed material; (3) respondent was prevented from studying the results of Exhibit 5 to show that the product discussed there is different from the products at issue in this case; and (4) EPA would not be prejudiced in presenting its case on the penalty issue inasmuch as it had not been aware of this exhibit when it filed its complaint seeking a $33,000 penalty and, therefore, it could not have relied upon this document in calculating that proposal. Tr. 52-65.

11. Payment of the civil penalty may be made by mailing, or presenting, a cashier's or certified check made payable to the Treasurer of the United States, addressed to Mellon Bank, EPA Region 9 (Regional Hearing Clerk), P.O. Box 360863M, Pittsburgh, PA 15251.