1/24/96

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of Century Products, Inc., a/k/a Clean Earth Products, and Dana L. Turner, a/k/a Organic Technologies, Unlimited, and DLT Laboratories, Respondents	Docket No. IF&R-IV-94F007-C

SECOND ORDER ON MOTIONS

In this proceeding under Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended (7 U.S.C. § 136l(a)), the ALJ issued an order, which, inter alia, granted Complainant's motion for an accelerated decision as to liability, finding that Respondent Dana L. Turner, a/k/a Organic Technologies, Unlimited, and DLT Laboratories (Turner),[1] was liable as a matter of law for the violation alleged in the complaint, i.e., production

[1] Century Products, Inc., a/k/a Clean Earth Products, is no longer a party to the action pursuant to a Consent Agreement and Consent Order, approved on July 20, 1994.

of a pesticide in an unregistered establishment.[2] The amount of an appropriate penalty remains at issue.

Respondent filed an "appeal" of the September Order, on October 10, 1995, pursuant to 40 CFR § 164.102. On October 31, 1995, Complainant filed a motion to find hearing on penalty unnecessary, to which Respondent responded on November 6, 1995. As will be explained, these motions will be denied.

Respondent's "Appeal"

Turner may not raise an appeal pursuant to Rule 164.102. Part 164 provides rules of practice governing hearings under FIFRA section 6, 7 U.S.C. § 136d, arising from refusals to register pesticides, cancellations of registrations, and suspensions. This civil penalty action is brought under FIFRA section 14(a), 7 U.S.C. § 136l(a). The rules of procedure that apply to a section 14(a)

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[2] Order on Motions, September 22, 1995 (September Order). The facts and procedural history of this proceeding were fully set forth in the September Order and will not be repeated here. Findings in the mentioned order included a determination that Respondent's product, Organic Soil and Turf Conditioner, was intended for use, and was used to mitigate, repel, prevent, and/or kill fire ants.

proceeding are published at 40 CFR Part 22. Ordinarily, Respondent's "appeal" would be denied as inapplicable to this proceeding. Turner, appearing pro se, however, has demonstrated good faith in responding to motions, raising legal defenses, and attempting to comply with administrative procedures, and he will not be penalized for administrative errors.[3] Because Turner clearly intended to appeal the decision, I will consider his "appeal" as a motion for reconsideration pursuant to 40 CFR § 22.16(a).[4] The motion will be denied, because it provides no justification for modifying the previous order.

"Exceptions" 1, 2, and 4 in Respondent's "appeal" allege that the ALJ does not have jurisdiction over this civil penalty proceeding because FIFRA § 14(a) authorizes the Administrator to assess a penalty on a "registrant, commercial applicator, wholesaler, dealer, retailer, or other distributor" and the complaint alleged only that Respondent was a "producer". FIFRA § 14(b), entitled "Criminal penalties", is applicable to any "registrant, applicant for registration, or producer" and Turner argues that as a "producer", he may only be subject to sanctions

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[3] See, e.g., Haines v. Kerner, 404 U.S. 519, 520 (1972)(pro se pleadings held to "less stringent standards than formal pleadings drafted by lawyers").

[4] Alternatively, Respondent's "appeal" might be considered as a motion for certification of interlocutory appeal pursuant to Rule 22.29. Because the "appeal" was not filed within the six-day period specified by Rule 22.29(a) and does not otherwise meet the criteria for certification of an interlocutory appeal, this alternative is not adopted.

under that section.[5] Complainant has, however, provided sufficient evidence to establish that Respondent was a "wholesaler, dealer, retailer, or other distributor." Respondent has not presented any evidence to the contrary. Indeed, Respondent freely admitted that he "did manufacture this product with the intent that it be ... used by consumers ... to level fire ant mounds ...."[6] While a sua sponte amendment to a complaint has been held to be proper under Fed.R.Civ.P.15(b) where the amendment merely adds an alternate legal theory and does not alter the essential factual allegations and no prejudice has been shown,[7] the better practice is for Complainant to file a motion to amend the complaint pursuant to 40 CFR 22.14(d) to specifically allege that Respondent was a "wholesaler, dealer, retailer, or other distributor." It is a generally accepted principle that "administrative pleadings are to

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[5] While Turner says he agrees with the conclusion in the September Order that nothing precludes him from being simultaneously a producer and a distributor, he emphasizes that the complaint does not allege that he was a distributor. Turner's argument that a ruling cannot issue on that for which no ruling is sought, overlooks provisions of the rules authorizing sua sponte orders. See, e.g., Rule 22.20, authorizing sua sponte issuance of an accelerated decision.

[6] Respondent's Response to Civil Complaint, General Denial, Specific Denial to Statements Contained in Complaint; and Notice, dated Jan. 4, 1994, at I(G).

[7] See, e.g., Secretary of Labor v. A. L. Baumgartner Construction Co., 8 AdL 3d 425 (OSHRC, September 15, 1994).

be liberally construed and easily amended" and that "permission to amend a complaint will ordinarily be freely granted."[8]

"Exception" 3 of Respondent's "appeal" expresses concern that the complaint was brought pursuant to "FIFRA" but the ALJ cited to "7 U.S.C." FIFRA was first enacted by Congress in 1947 to replace the Insecticide Act of 1910, 36 Stat. 331.[9] The statute has been

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[8] Port of Oakland and Great Lakes Dredge and Dock Co., MPRSA Appeal No. 91-1, (EAB, Aug. 5, 1992), citing Yaffe Iron & Metal Co., Inc. v. U.S. EPA, 774 F.2d 1008, 1012 (10th Cir. 1985).

[9] The 1947 version of the statute (Public Law 47-104) is printed in the U.S. Code Congressional and Administrative News (U.S.C.C.A.N.), 1947, 80th Congress, 1st session, at page 170, and in volume 61 of U.S. Statutes at Large (Stat.), at page 163. Legislative History is published in the 1947 volume of U.S.C.C.A.N., at page 1200.

amended several times.[10] The 12th edition of Title 7 of The United States Code (7 U.S.C.), chapter 6, published in 1994, contains the most current published version of FIFRA. Subsequent amendments are published in the U.S. Code supplements. The U.S. Code version is

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[10] Some of the amendments appear in U.S.C.C.A.N. in 1972, 92d Congress, 2d session 1139 (86 Stat. 973; Public Law 92-516), 1972 Legislative History 3993; and 1988, 100th Congress, 2d session 102 Stat. 2654 (Public Law 100-532), 1988 Legislative History 3474. The U.S. Supreme Court explained:

> Like its predecessor, FIFRA as originally adopted "was primarily a licensing and labeling statute." Ruckelshaus v. Monsanto Co., 467 U.S. 986, 991 (1994). In 1972, growing environmental and safety concerns led Congress to undertake a comprehensive revision of FIFRA through the Federal Environmental Pesticide Control Act. 86 Stat. 973. The 1972 amendments significantly strengthened FIFRA's registration and labeling standards. 7 U.S.C. § 136a. To help make certain that pesticides would be applied in accordance with these standards, the revisions further insured that FIFRA "regulated the use, as well as the sale and labeling, of pesticides; regulated pesticides produced and sold in both intrastate and interstate commerce [and] provided for review, cancellation, and suspension of registration." Ruckelshaus, supra, at 991-992. An additional change was the grant of increased enforcement authority to the Environmental Protection Agency (EPA), which had been charged with federal oversight of pesticides since 1970. See Reorganization Plan No. 3 of 1970, 35 Fed. Reg. 15623 (1970). In this fashion, the 1972 amendments "transformed FIFRA from a labeling law into a comprehensive regulatory statute." 467 U.S. at 991.

Wisconsin Public Intervenor v. Mortier, 501 U.S. 597, 600 (1991) (parallel citations omitted).

prima facie evidence of the laws.[11] A pro se litigant remains responsible for knowledge of the applicable law and proper support, documentation, and citation for his legal conclusions. The parties are urged to refer to U.S. Statutes at Large (Stat.) or the U.S. Code (U.S.C. - also found in U.S.C.A. or U.S.C.S.) for the most current statutory requirements.[12]

"Exception" 5 in Respondent's "appeal" addresses the September Order's discussion of the preclusive effect of court findings in Texas and Mississippi. The September Order did not rely upon preclusive effect of the prior court rulings on identical issues in this proceeding (collateral estoppel), but was based upon an independent review.[13]

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[11] The Preface to the U.S. Code explains: "[T]he Office of the Law Revision Counsel of the House of Representatives has been engaged in a continuing, comprehensive project authorized by law to revise and codify, for enactment into positive law, each title of the Code. When this project is completed, all the titles of the Code will be legal evidence of the general and permanent laws and recourse to the numerous volumes of the United States Statutes at Large for this purpose will no longer be necessary." Because Title 7 has not yet been revised and enacted into positive law, it is not yet "legal evidence of the laws therein," but is "prima facie evidence of the laws." Proof of discrepancies that appear in U.S. Statutes at Large would overcome the presumption that the U.S. Code is accurate. "The U.S. Statutes at Large shall be legal evidence of laws, concurrent resolutions ..." 1 U.S.C. 112.

[12] EPA FIFRA regulations are also periodically revised and updated. The parties should verify that they are using the most recent version of the Code of Federal Regulations (CFR), printed annually. Amendments enacted between publications of the CFR are published in the Federal Register.

[13] Contrary to Respondent's implication, res judicata was not an aspect of the September Order.

"Exceptions" 6, 7, 8, and 9 of Respondent's "appeal" pose arguments previously raised by Respondent and addressed in the orders of July 6, 1994, and September 22, 1995. These arguments were adequately addressed in the previous orders and will not be reconsidered.[14]

For the reasons stated, the September Order remains in effect. The sole outstanding issue is the amount of penalty to assess.

Complainant's Motion to Find Hearing on Penalty Unnecessary

On October 31, 1995, Complainant filed a motion to Find Hearing on Penalty Unnecessary and requested that a penalty of $4,900.00 be assessed against Respondent. Complainant asserted that the ALJ could assess an appropriate penalty based upon the facts and evidence already in the record. As will be explained, however, there is insufficient evidence currently in the record to determine an appropriate penalty and Complainant's motion will be denied.

FIFRA section 14(a)(4) states that determination of the penalty amount must consider "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 ALJ must also consider the respondent's history of compliance with the Act and any

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[14] As explained in the September Order at page 5, "motions that redress issues previously resolved by this Order and the order of July 6, 1994, will not be considered."

evidence of good faith or lack thereof. 40 CFR § 22.35(c). Although not bound by penalty guidelines, the ALJ must consider any guidelines issued by the Agency concerning the assessment of civil penalties. 40 CFR § 22.27(b).[15] The guidelines, appearing in the July 1990 Enforcement Response Policy for FIFRA (FIFRA Penalty Guidelines), establish a five stage process for determining a penalty: 1) determining the gravity level of the violation, 2) determining the size of the violator's business, 3) determining the base dollar amount of the violation using the table of gravity and business levels, 4) adjusting the level of base penalty in consideration of the pesticide's characteristics, potential harm to human health and/or the environment, and the violator's compliance history and culpability, and 5) considering the effect of payment on the violator's ability to continue in business.

Complainant has the burden of justifying the proposed penalty.[16] The burden then shifts to Respondent, who must present

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[15] See, In re Employers Insurance Co. of Wausau, TSCA-V-C-62-90 (ALJ, Sept. 29, 1995); U.S. Telephone Ass'n v. Federal Communications Commission, 28 F.3d 1232 (D.C.Cir. 1994); In re Theochem Labs., Inc., I.F.& R. No. IV-318-C (ALJ, Nov. 15, 1979); In re Pen-Kote Paint Co., Inc., I.D. No. 88455 (ALJ, March 26, 1974).

[16] 40 CFR § 22.24 states that "the complainant has the burden of going forward with and of proving that ... the proposed civil penalty ... is appropriate." See also, In re New Waterbury, Ltd., TSCA Appeal No. 93-2 (EAB, Oct. 20, 1994) (Complainant must provide "evidence to show that it considered each [statutory] element and that its recommended penalty is supported by an analysis of those factors"); In re Employers Insurance Co. of Wausau, TSCA-V-C-62-90 (ALJ, Sept. 29, 1995) ("EPA must provide evidentiary support for the underpinnings of the matrix-based penalty"); In re Kay Dee Veterinary Division of Kay Dee Feed Co.,

(continued...)

evidence to mitigate the penalty, including evidence of inability to pay, in order for that evidence to be considered.[17] Complainant calculated the proposed $4,900 penalty using the Penalty Guidelines described, supra. Complainant has not, however, satisfactorily provided an independent explanation for its penalty assessment.[18]

First, Complainant proposes to assign Business Category I - over $1,000,000 of gross revenues, because it was unable to obtain information regarding the size of Respondent's business.[19] According to the FIFRA Penalty Guidelines, page 21, "When information concerning an alleged violator's size of business is not readily available, the penalty is to be calculated using the Category I size of business ... [which] will remain the base penalty value unless the violator can establish ... that it should be considered in a smaller size of business category." This provision does not, however, absolve the Agency of any attempt to

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[16] (...continued)
FIFRA Appeal No. 86-1 (CJO, Oct. 27, 1988) (The Agency bears the burden of proving that the proposed penalty is appropriate in light of the FIFRA statutory factors).

[17] "Following the establishment of a prima facie case, respondent shall have the burden of presenting and of going forward with any defenses to the allegations set forth in the complaint." 40 CFR § 22.24; In re Helena Chemical Co., FIFRA Appeal 87-3 (CJO, Nov. 16, 1989).

[18] In re Employers Insurance Co. of Wausau, TSCA-V-C-62-90 (ALJ, Sept. 29, 1995) ("[The Agency] must, through its evidence, support the findings, assumptions and determinations on which th[e] policy rests").

[19] Complainant's ("C's") prehearing exch. at 9.

consider and assess the level of Respondent's business and Respondent's ability to pay.[20] Complainant has not provided any explanation regarding its attempts to obtain information on Respondent's business from either general business sources, such as Dunn and Bradstreet, or interrogatories to Respondent, nor has it explained why the information was not "readily available." Although Respondent has not, to date, provided any financial information, this may be because he has continued to maintain that he is not liable for any penalty and such information is not relevant. Because Respondent has been found liable for the violation, evidence of the size of his business and ability to pay the penalty are clearly relevant. Turner will, therefore, be permitted an opportunity to provide information regarding the size of his business, his ability to pay the penalty, and the effect payment would have on his ability to remain in business.

Second, Complainant proposes to increase the gravity of harm value by 6 because harm to human health and to the environment are "unknown."[21] Respondent maintains that his product is harmless to human health and the environment; however, he has not provided

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[20] In re New Waterbury, Ltd., TSCA Appeal No. 93-2 (EAB, Nov. 20, 1994).

[21] C's prehearing exch. at 10. The FIFRA Penalty Guidelines, at A-5, assign a base gravity level of 2 to Respondent's violation. Complainant also proposed a culpability factor of 4 and a compliance history factor of 0. Complainant's calculations assess the gravity level at 11 under the guidelines which calls for assessment of the "matrix value". C's prehearing exch. at 11.

scientific data to support this claim. Evidence in the record suggests that Complainant has information in its possession regarding the effects of Respondent's product on human health and the environment. On May 2, 1990, Respondent submitted to EPA an application to register his pesticide product, aaNKILL 44, which is similar, if not identical, to Organic Soil and Turf Conditioner (application 63709-R).[22/] The product was registered by EPA on July 25, 1994.[23/] Pursuant to the registration review, Respondent submitted data on March 1, 1991, and submitted data waiver requests on June 7, 1991.[24/] Submissions included a USDA study.[25/] Data submissions and public literature were reviewed by EPA's Environmental Fate and Effects Division and EPA's Health Effects Division.[26/] None of this data or the reviews thereof have been included in Complainant's prehearing exchange. The record, however, clearly demonstrates that the effects on human health and the environment are not, or should not, be "unknown" to Complainant. Although the risks engendered by a particular

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[22/] Respondent's "Amicus Curiae" exhibit E.

[23/] Respondent's Motion to Dismiss, Appendix B - Notice of Pesticide Registration.

[24/] Respondent's "Amicus Curiae" exhibit E.

[25/] Affidavit of Phil Hutton, EPA Registration Division, Complainant's Prehearing Exchange, exhibit 27.

[26/] Respondent's "Amicus Curiae", exhibit G.

pesticide are normally determined from label information, under these circumstances, a penalty calculation purportedly considering harm to human health and environment is inappropriate without a review of data submitted in support of pesticide registration and the analysis of such data.[27]

Third, Complainant alleges that Respondent's ability to pay and the effect on his remaining in business are not before the ALJ, because Respondent has failed to raise or contest these issues.[28] Complainant must consider each statutory factor irrespective of whether these issues are expressly raised by Respondent. The statute requires Complainant to consider the appropriateness of the penalty to "the effect on the person's ability to continue in business." 7 U.S.C. § 136l(a)(4). The Complainant must provide "evidence to show that it considered each [statutory] element and that its recommended penalty is supported by an analysis of those factors".[29] Although Respondent's ability to pay may be presumed early in the proceeding, Complainant must attempt to obtain and consider business information prior to a hearing or final penalty

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[27] Such information may, of course, be entitled to protection from disclosure as trade secrets or confidential business information pursuant to FIFRA § 10.

[28] C's Motion to Find Hearing Unnecessary at 3.

[29] In re New Waterbury, Ltd., TSCA Appeal No. 93-2 (EAB, Oct. 20, 1994) ("The depth of consideration will vary in each case, but so long as each factor is touched upon and the penalty is supported by the analysis a prima facie case can be made. Once this is accomplished, the burden of going forward shifts to the respondent").

calculation.[30] As a part of the Complainant's prima facie case at a penalty hearing, it must present "some evidence regarding [R]espondent's general financial status from which it can be inferred that [R]espondent's ability to pay should not affect the penalty amount".[31] If Respondent then does not provide contrary evidence, the record will demonstrate that Complainant considered Respondent's ability to pay in assessing the penalty.[32] To date, Respondent has not submitted, nor is there any evidence that Complainant has formally requested any financial statements, copies of income tax returns or other data to address the ability to pay component. Because such evidence is clearly relevant, Respondent will be ordered to provide such information if he wishes to contest the penalty assessment upon the ground of inability to pay. Likewise, Complainant must obtain information regarding Respondent's ability to pay from alternative sources, or file a formal document production request through discovery.[33] Respondent

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[30] In re James C. Lin & Lin Cubing, Inc., FIFRA Appeal No. 94-2 (EAB, Dec. 6, 1994) (Respondent's ability to pay may be presumed early in the proceeding); In re New Waterbury, Ltd., TSCA Appeal No. 93-2 (EAB, Oct. 20, 1994)(Region must be given access to Respondent's financial records before the start of a hearing; Penalty may be appropriate even if Respondent demonstrates an inability to pay).

[31] In re New Waterbury, Ltd., TSCA Appeal No. 93-2 (EAB, Oct. 20, 1994).

[32] Id.

[33] See, 40 CFR § 22.19(f).

is informed that if he cannot, or will not, provide financial statements and other information regarding his ability to pay or the effect of the penalty on his business, inferences may be drawn in Complainant's favor, and these issues may not be raised in a subsequent appeal.[34]

Fourth, Complainant stated that Century Products, a former Respondent, settled the complaint against it for $100.00. Complainant has not explained why a $100.00 penalty was appropriate as to Century Products, but a $4,900.00 penalty for the same occurrence is appropriate as to Mr. Turner. Because the gravity of harm would appear to be equal, it is unclear how Complainant arrived at such a vastly different penalty amount. Complainant must explain the effect of settlement with Century Products and how a significantly higher penalty against Mr. Turner is justified.[35]

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[34] See, 40 CFR § 22.19(f)(4), which states, "When the information sought to be obtained is within the control of one of the parties, failure to comply ... may lead to (i) the inference that the information to be discovered would be adverse to the party from whom the information was sought, or (ii) the issuance of a default order under § 22.17(a)". See also, In re James C. Lin & Lin Cubing, Inc., FIFRA Appeal No. 94-2 (EAB, Dec. 6, 1994) ("Respondent may not raise on appeal any issue not raised at any stage in the proceedings below...The scope of an appeal under Part 22 is limited to issues that were raised by the parties below").

[35] See, e.g. In re Cypress Aviation, Inc. and City of Lakeland, RCRA 89-04-R (ALJ, Sept. 24, 1991) (a penalty cannot be jointly and severally assessed against an owner and an operator of a facility because the ALJ must consider the good faith of each when assessing the penalty); In re Arthur Leeson, (CAA & NESHAP) No. 1091-03-113 (RJO-10, Mar. 29, 1993)(applying contribution laws to those who are adjudged jointly liable for federal statutory civil penalties).

In some circumstances, for example, when a Respondent, actively or constructively, waives his right to a hearing, a penalty may be assessed without an oral hearing.[36] This is not the case here. Respondent has cooperated and fully participated in all aspects of this proceeding. He has not flatly refused to provide financial information nor has he indicated that such information is not available. Respondent will be given an opportunity to provide copies of tax returns, financial statements, and other business information relevant to a penalty calculation.

The statute explicitly states that "no civil penalty shall be assessed unless the person charged shall have been given notice and opportunity for a hearing..." 7 U.S.C. § 136l(a)(3). Respondent, therefore, has a right to an oral evidentiary hearing before the ALJ regarding the penalty calculation. Respondent, however, has not requested a hearing and has intimated that he believes a hearing is unnecessary. If Respondent waives his right to a hearing, by either responding negatively or not responding to this order, then the penalty calculation will be determined on the

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36/ See, e.g., In re Jenny Rose, Inc., I.F.&R.-III-395-C (ALJ, Feb. 22, 1993) (No oral evidentiary hearing required where Respondent consistently refused to provide credible evidence of inability to pay, refused to return phone calls from counsel for Complainant, and Respondent exhibited a "contempt of law and an abuse of process" and "no good faith effort to cooperate" and "resisted efforts intended to assist him in producing credible evidence").

written record. For the reasons stated, Complainant's motion to find a hearing on penalty unnecessary will be denied.[37]

O R D E R

1. Respondent's "appeal" is reviewed as a motion for reconsideration pursuant to 40 CFR § 22.16(a), and is denied.

2. Complainant's Motion to Find a Hearing on Penalty Unnecessary is denied.

On or Before March 1, 1996, Complainant is ordered to:

1. Clarify its consideration and assessment of Respondent's business as "Category I" by explaining what attempts it made to obtain general business information regarding the size of Respondent's business.

2. Review existing data on the effects of Respondent's product on human health and the environment and reassess the penalty adjustment accordingly. In particular, Complainant should provide the data and reviews conducted pursuant to EPA registration of aaNKILL 44, Registration No. 63709-R, subject to trade secret and confidential business information provisions of FIFRA § 10.

3. Explain the vast difference in the penalty it obtained from Century Products and the penalty it proposes to assess Mr. Turner for the same occurrence. What factors mitigated the penalty against Century Products that do not exist as to Turner.

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[37] Turner filed an "Answer to Complainant's Motion to Find Hearing on Penalty Unnecessary," dated November 6, 1995, which did not address the calculation or appropriateness of the penalty, or the desire or necessity for a hearing, but reiterated his contention that Complainant is without authority to seek, and the ALJ is without authority to assess, a penalty. This argument has previously been considered and determined to be without merit.

On or Before March 1, 1996, Respondent is ordered to:

1. Provide information regarding the size of his business, including financial statements, copies of tax returns or any other information to demonstrate the size of his business and ability to pay a penalty.

2. Provide data to support his allegation that Organic Soil and Turf Conditioner is not harmful to human health or the environment.

3. Respond in writing regarding whether or not he desires an oral evidentiary hearing, and, if the answer is in the affirmative, to state what evidence he proposes to present and where he would prefer a hearing to take place.

Dated this 24th day of January 1996.

Spencer T. Nissen
Administrative Law Judge