UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
Four Star Feed and Chemical,	)	
	)	Docket No. FIFRA 06-2003-0318
	)	
Respondent	)	

Federal Insecticide, Fungicide and Rodenticide Act - Report for Pesticide Producing Establishments - Determination of Penalty - Enforcement Response Policy
Where Respondent submitted pesticide report required by FIFRA § 7(c) and 40 C.F.R. § 167.85(d) more than 30 days after the March 1 due date, which under the Enforcement Response Policy is regarded as reporting "notably late", and Complainant sought to assess the maximum penalty of $5,500 for a single violation under FIFRA § 14(a)(1) and ERP, penalty so determined was held to overstate the gravity of the violation and ERP was disregarded to the extent its application would result in maximum penalty.

INITIAL DECISION

This proceeding under Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA" or "Act"), 7 U.S.C. § 136 *et seq*., was commenced on May 15, 2003, by the filing of a complaint by the Acting Chief, Pesticides Section, Multimedia Planning and Permitting Division, United States Environmental Protection Agency, Region 6 ("EPA" or "Complainant"), charging Respondent, Four Star Feed & Chemical ("Four Star"), with failure to file a pesticide production report, EPA Form 3540-16, for the calender year 2002, on or before March 1, 2003, in violation of Section 7(c) of the Act and 40 C.F.R. § 167.85(d). For this alleged violation, Complainant seeks a penalty of $5,500 based upon the statutory factors and the Enforcement Response Penalty Policy for the Federal Insecticide, Fungicide, and Rodenticide Act, July 2, 1990 ("ERP").[1] This is the maximum permitted for a single offense occurring after

[1] Complainant's Prehearing Exchange includes Exhibits 1 through 17, all of which are admitted into evidence. Exhibit 4 is the Enforcement Response Policy For FIFRA Section 7(c) Pesticide Producing Establishment Reporting Requirement ("1986 ERP"), and Exhibit 5 is the Enforcement Response Policy For The Federal Insecticide, Fungicide and Rodenticide Act (July 2, 1990) ("ERP").

January 30, 1997, and on or before March 15, 2004.[2]

On August 25, 2003, the Regional Judicial Officer granted Four Star a second extension to file an answer. Four Star requested a "hearing with the Regional Hearing Clerk concerning our bulk pesticide report," by letter, dated August 24, 2003, signed by Tony Nauert, Owner.[3] The letter further stated that "Four Star's Bulk pesticide report is and has been on file with the EPA."[4] This letter was considered as an answer under Rule 22.15 of 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.[5]

By an order, dated December 16, 2003, the ALJ directed the parties to exchange prehearing information in accordance with Rule 22.19(a) of the Consolidated Rules. The order instructed the parties to serve their respective prehearing exchanges on the Regional Hearing Clerk, the opposing party, and the ALJ on or before January 9, 2004.

Complainant filed its Initial Prehearing Exchange on January 9, 2004 ("PHE").[6] Respondent failed to comply with the order to file a prehearing exchange by January 9, 2004. In

---

[2] For violations occurring after March 15, 2004, the maximum penalty per offense is $6,500 (69 Fed. Reg. 7125, February 13, 2004).

[3] The Certificate of Service attached to the complaint reflects that it was served on Four Star's registered agent, "Leland Nauert, Owner-Manager" by certified mail, return receipt requested (Id). The Receipt for Certified Mail, signed by Becky Nauert, shows that the complaint was received by Four Star on May 17, 2003 (C's Exh 2).

[4] It appears that the report signed by Leland P. Nauert, owner-manager, was forwarded to EPA by an undated letter, signed by John Pike, position with Four Star not stated. (C's Exh 10). The letter apologizes for being late with the report and states that "[i]t was truly an oversight on our part." The letter was apparently postmarked June 4, 2003, and is stamped as being received by EPA Region 6 on June 6, 2003.

[5] Under paragraph (d) of Rule 22.15, "[f]ailure of respondent to admit, deny, or explain any material factual allegation contained in the complaint constitutes an admission of the allegation." 40 C.F.R. § 22.15(d). Respondent's brief answer includes a general denial of the allegation that it failed to file the pesticide report. However, Respondent does not specifically deny that it failed to file the report by March 1, 2003. Later, as described below, Respondent admits that it filed the report late, argues that a reminder or warning would have been sufficient, and contests the penalty as excessive and on ability to pay grounds. Accordingly, all of the factual allegations in the complaint are accepted as true. However, it is still Complainant's burden to prove, by a preponderance of the evidence, that the proposed penalty is appropriate.

[6] Exhibits 1 through 17 of Complainant's prehearing exchange were not received in the ALJ's Office until May 21, 2004.

a teleconference with the parties on January 21, 2004, Mr. Nauert indicated that he desired to have the matter decided on the documentary record and arguments of the parties in lieu of a hearing. The parties agreed that, if Mr. Nauert wished to retain counsel or wished to proceed without a hearing, then Four Star would inform Complainant of its decision on or before February 6, 2004. The ALJ issued an order on January 22, 2004, directing Respondent to submit certain documents if it elected to waive its right to an oral hearing and to explain why the penalty is considered to be excessive. The order allowed Complainant 30 days after receipt of Four Star's submittal to file any countervailing documents or arguments, at which time the matter would be ready for a decision.

Four Star did not notify Complainant or the ALJ that it desired an oral hearing. By letter, dated March 3, 2004, and received in the ALJ's office on March 17, 2004, Four Star provided an explanation for the late filing of its 2002 annual pesticides report; enclosed Exhibits 1 through 8, 1 through 5 of which are copies of invoices representing accounts payable by Four Star, Exhibit 6 is a copy of a Four Star bank statement for the month ending February 29, 2004, and Exhibits 7 and 8 are copies of pesticide reports for the calendar years 2002 and 2003. The letter alleged, inter alia, that "we", Four Star Feed and Chemical, are a small family owned business in Stamford, Texas, which has been in business since 1983; that since 1989 "we" have continually timely filed our "Annual [Pesticide] Production Report" and that on May 17, 2003, we received the EPA complaint alleging failure to file the report for 2002, and imposing a fine of $5,500. For all that appears, receipt of the complaint was the first notification from the Agency that Four Star had failed to submit its pesticide report for the calendar year 2002. Respondent alleged that the report was completed, mailed and received by EPA on June 6, 2003, as evidenced by a receipt for certified mail.[7] The letter stated that during the time we would normally be preparing the annual production report, we were in the process of training a new employee to assume the bookkeeping responsibilities pending the retirement of Mr. Nauert's Mother. The letter asserted that the requirement to file the report was accidentally overlooked during this time.

Four Star pointed out that at EPA's request, it had furnished its income tax returns for the years 2000, 2001, and 2002, and, regarding EPA's determination that paying the penalty would not be a financial hardship, asserted that we have been in business for 20 years and know that "cash flow" is how a business is kept in operation (letter, dated March 3, supra). Four Star stated that there are accounts payable and accounts receivable and that cash does not always come in when it is due. Four Star asserted that any penalty, especially $5,500, is " excessive, unexpected, and disruptive to our daily business" (Id 2), citing Exhibits 1-6. Four Star argued that a penalty was [un]necessary when a reminder [or warning] would have been sufficient for a first- time violation.

Complainant's Motion to Strike and Reply to Four Star Feed and Chemical's Submittal

[7] Exhibit 8. The report for the calendar year 2002 is undated, but bears a handwritten notation that it was mailed on "6-3-03." The report for the calendar year 2003 is dated January 14, 2004, and was received by EPA on January 20, 2004 (Exh 7).

By motion, filed May 18, 2004, Complainant moved to strike Respondent's Submittal as untimely, immaterial, irrelevant and potentially prejudicial. Firstly, Complainant argues that even though the Submittal is dated March 3, 2004, it is untimely because it was not received in the ALJ's office until March 17, 2004.[8]

Secondly, Complainant argues that language in the letter and Respondent's Exhibits 1 through 6 are immaterial, irrelevant and/or inaccurate. Regarding the letter, Complainant contends that Respondent's explanation is baseless and without merit, given the lack of evidentiary or legal support. Furthermore, Respondent's Exhibits 1 through 5 are invoices, by far the largest in the amount of $78,845 is dated January 31, 2004 (Exh 5), Exhibits 2, 3, and 4, are dated in late February 2004, and Exhibit 1 is dated March 1, 2004, representing accounts payable by Four Star. Exhibit 6 is a Four Star bank statement for the period February 1, 2004 through February 29, 2004. Complainant argues that these documents do not represent an accurate financial picture of Respondent's ability to pay given the brief time frame that they cover. Therefore, Complainant contends that the documents are incomplete and inaccurate and preclude an accurate evaluation by Complainant's expert.

Finally, Complainant argues that because of the inaccuracy of Respondent's exhibits one through six and the incomplete financial picture thereby presented, admission of the documents without an opportunity to "fully question and inquire into the Respondent's recent financial transactions and current financial standing" would be prejudicial. Complainant, however, has not moved for discovery or for a hearing. While to date, Four Star has not responded to the Motion, Complainant's argument that consideration of the exhibits in Respondent's Submittal would be prejudicial is considered and rejected infra.

The Consolidated Rules do not expressly authorize motions to strike. Rule 22.16, however, addresses the general subject of filing motions and has been held to encompass motions to strike. *County of Bergen, Betal Environmental Corp., Inc.*, 2002 EPA ALJ LEXIS 13, *6-7 (ALJ March 7, 2002); *Century Aluminum of West Virginia, Inc. & Ohio Valley Insulating Co., Inc.*, 1999 EPA ALJ LEXIS 26, *1-2 (ALJ June 25, 1999). Accordingly, in the context of an administrative proceeding it has been the practice to look to the Federal Rules of Civil Procedure for guidance. While these rules are not binding on administrative agencies, they are instructive. Federal Rule 12(f) governs the filing of motions to strike. The Rule states that:

---

[8] Four Star apparently failed to comply with the Consolidated Rules and did not serve its Submittal on either the Regional Hearing Clerk or Complainant's counsel. Complainant correctly points out that the ALJ informed counsel he would allow the Submittal into evidence notwithstanding that it was not submitted by March 5, 2004, the date specified in the January 22 Order and that he would not entertain a motion for default. It is, of course, well settled that defaults are reserved for the most egregious behavior and that a marginal failure to meet time requirements will not support a default judgment. See, e.g., *Agronics, Inc.* CWA 06-99-1631, Order Denying Complainant's Motion for Default, etc., 2003 EPA RJO LEXIS 11 (RJO, May 7, 2003), and cases cited. This is especially true for a pro se litigant.

> "Upon motion made by a party before responding to a pleading, or, if no responsive pleading is permitted by these rule, upon motion made by party within 20 days after the service of the pleading upon the party or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter."

Fed.R.Civ.P. 12 (f).

Even though a motion to strike under Fed.R.Civ.P. 12(f) is "the appropriate remedy for the elimination of redundant, immaterial, impertinent, or scandalous matter in any pleading, and is the primary procedure for objecting to an insufficient defense, such motions are viewed with disfavor and are infrequently granted." 5A Charles A. Wright & Arthur Miller, Federal Practice and Procedure: Civil 2d § 1380 (1990); *Stabilisierungsfonds Fur Wein v. Kaiser Stuhl Wine Distribution Pty. Ltd.*, 647 F.2d 200, 201 (D.C. Cir. 1981) ("[M]otions to strike, as a general rule, are disfavored"). Additionally, both federal courts and the Agency have adopted a more lenient standard of competence and compliance when evaluating the submissions of a pro se litigant. *In re Rybond, Inc.*, 6 E.A.D. 614, 627 (EAB 1996); *cf., e.g.*, *Haines v. Kerner*, 404 U.S. 519, 520 (1972) (The pro se complaint is held "to less stringent standards than formal pleadings drafted by lawyers."); *Shaffer v. Saffle*, 148 F.3d 1180, 1181 (10th Cir. 1998) ("A pro se litigant's pleadings are to be construed liberally and held to a less stringent standard than formal pleadings.") (quoting *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991)); *Maduaklam v. Columbia University*, 866 F.2d 53, 56 (2nd Cir. 1989) ("While it is true that Rule 11 [is] applied both to represented and pro se litigants, the court may consider the special circumstances of litigants who are untutored in the law.").

Nonetheless, a pro se litigant is responsible for complying with the procedural rules and failure to do so may have negative consequences. *Rybond*, 6 E.A.D. at 627. Indeed, the EAB declined to overturn a default order issued by an ALJ merely because respondent was pro se. *Id*.

However, unlike *Rybond*, where respondent failed to submit any information in response to a prehearing order, Respondent herein complied with the January 22 Order, although in a tardy fashion. It follows that the Motion to Strike is lacking in merit and is *DENIED.*

Based on the entire record, including the prehearing exchange submitted by Complainant and Respondent's Submittal, I make the following:

Findings of Fact

1. Respondent, Four Star Feed and Chemical, maintains an establishment and place of business at 414 West McHarg Street, Stamford, Texas, 79553. Four Star is a partnership and thus a person as defined in Section 2(s) of the Act.

2. Four Star's establishment is registered, EPA Establishment Number 062136-TX-001. FIFRA § 2(dd) and 40 C.F.R. § 167.3 define "establishment" in part as meaning any site where a

pesticide product, active ingredient or device is produced.

3. FIFRA § 2(w) defines "produce" as meaning to manufacture, prepare, compound, propagate, or process any pesticide, or device or active ingredient used in producing a pesticide. The regulation, 40 C.F.R. § 167.3, expands the definition of produce by adding the language "to package, repackage, label, re-label, or to otherwise change the container of any pesticide or device."

4. FIFRA § 7(c) prohibits the production of a pesticide in any state unless the establishment in which it is produced is registered with the EPA and FIFRA § 7(c) requires:

> Any producer operating an establishment registered under that section to inform the Administrator within 30 days after it is registered of the types and amounts of pesticides and, if applicable, active ingredients used in producing pesticides - (A) which the producer is currently producing; (B) which the producer has produced during the past year; and (C) which the producer has sold or distributed during the past year.

This information is to be kept current and submitted to the Administrator annually under such regulations as the Administrator may prescribe. 7 U.S.C. § 136e(c)(1).

5. The regulation, 40 C.F.R. §§ 167.85(c) and (d), requires that reports be made on forms [EPA Form 3540-16, Pesticide Report for Pesticide-Producing and Device-Producing Establishments] supplied by the Agency and that reports be submitted by March 1 of the succeeding year even if no pesticides were produced for the reporting year. Four Star was required to submit an annual Pesticide Report for the calender year 2002 by March 1, 2003.

6. The record reflects that EPA mailed Pesticide Report forms and instructions for completing the forms to registered establishments by letter, dated December 2, 2002 (C's Exh 11). There is no issue but that Four Star received the form. Four Star submitted (postmarked) its annual Pesticide Report for calender year 2002 on June 4, 2003 (R's Exh 8). Four Star received the Agency's complaint on May 17, 2003 (C's Exh 2), and for all that appears, the complaint was the first notification that Four Star had failed to submit its Pesticide Report for the calendar year 2002. The Report shows that in 2002, Four Star repackaged less than 4,500 gallons of a herbicide known as "Prowl", less than 450 gallons of the well-known herbicide "Round-Up Ultra Max" and 58 gallons of "BOG", a defoliant, desiccant (Id). Four Star states that the requirement to submit the Report was overlooked during the process of training a new bookkeeper to replace Mr. Nauert's Mother who was retiring. There is no reason to question Four Star's assertion in this regard and it is found as a fact that the failure to timely file the Pesticide Report for the calendar year 2002 was simply inadvertent.

7. Complainant acknowledges that within the last five years Respondent has timely filed its annual Pesticide Reports, including the Report for calender year 2003, which Complainant received on January 20, 2004 (C's PHE at ¶ 1; R's Exh 7).

8. A narrative ("Narrative"), prepared by Marie Conroy, Life Scientist, USEPA, Region 6, who calculated the proposed penalty, is in the record (C's Exh 7). Ms. Conroy determined the penalty in accordance with the civil penalty matrix in the ERP.[9] The ERP provides that "[e]xcept for the civil penalty assessment matrix, the February 10, 1986 FIFRA ERP ("1986 ERP") is to be used to determine the appropriate enforcement response for FIFRA § 7(c) violations (ERP at 1). The 1986 ERP in turn provides that, if a pesticide production report is not submitted within 30 days of the due date, it will be considered "notably late" for which the remedy is an appropriate civil penalty [as distinguished from a warning under FIFRA § 14(a)(4)] (Id. 4)

9. The gravity of the violation was determined by using Appendix A of the 1990 ERP. Appendix A identifies a violation of FIFRA §7(c)(1) (FIFRA § 12(a)(2)(L)) as "Level 2." Ms. Conroy described the gravity determination in the context of the "FIFRA Civil Penalty Calculation Worksheet." She relates that the "ERP defines gravity levels as representing an assessment of the relative gravity, which is based on an average set of circumstances that considers the actual or potential harm to human health and/or the environment that could result from the violation, or the importance of the requirement to achieving the goals of the statute." (C's Exh 7 at 2).

10. Ms. Conroy explained that Four Star was determined to be within FIFRA § 14(a)(1) for penalty determination purposes, because it is a "wholesaler, dealer, retailer, or other distributor" who violated the statute by failing to report (Id., quoting 7 U.S.C. § 136*l*(a)(1)).

11. Regarding the "size of business," Table 2 of the 1990 ERP lists three "size of business" categories for section FIFRA § 14(a)(1) violations. According to the table, a business with over $1,000,000 in gross sales is a Category I business. Based on the information in a Dun & Bradstreet Report (C's Exh 8), which shows that Four Star had gross sales of over $1,000,000, Ms. Conroy determined that Four Star is a Category I business (C's Exh 7 at 3, 8). The Dun &

---

[9] Id. The ERP details a five step process by which a penalty amount may be de6termined. These steps are:

> (1) determination of the gravity or "level" of the violation using Appendix A of this ERP; (2) determination of the size of business category for the violator, found in Table 2; (3) use of the FIFRA civil penalty matrices found in Table 1 to determine the dollar amount associated with the gravity level of violation and the size of business category of the violator; (4) further gravity adjustments of the base penalty in consideration of the specific characteristics of the pesticide involved, the actual or potential harm to human health and/or the environment, the compliance history of the violator, and the culpability of the violator, using the "Gravity Adjustment Criteria" found in Appendix B; and, (5) consideration of the effect that payment of the total civil penalty will have on the violator's ability to continue in business, in accordance with the criteria established in this ERP. (ERP at 18).

Bradstreet Report, although printed on January 7, 2004, reflects data as of December 31, 2001, and states that a rating change occurred on October 15, 2003, because the company has not submitted a current financial statement. The determination that Four Star's gross sales exceed $1,000,000 is confirmed by Four Star's partnership income tax returns for the years 2000, 2001, and 2002 (Exh 16).

12. Under the ERP, a gravity Level 2 violation applied to a Category I size of business results in a penalty of $5,000, the maximum for a single violation in 1990 (ERP at Table 1). Ms. Conroy explained, however, the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701, increased the base penalty by ten (10) percent (ERP at 3). Consequently, the base penalty for the violation at issue here is $5,500.

13. As noted by Ms. Conroy and stated in the ERP, the FIFRA civil penalty matrices already consider the gravity of a reporting violation. Additionally, according to the 1990 ERP, gravity adjustments are not easily applicable to reporting violations. "Therefore, first-time civil penalties should be assessed at the matrix-value, while subsequent penalties should be increased by an increment of 30% (up to the statutory maximum)" (ERP at 22). The ERP provides that a record of no prior FIFRA violations is to be given a gravity adjustment value of 0 (Id. Appendix B-2), that is, it neither increases or decreases the proposed penalty.

14. Complainant asserts that Respondent "can afford to pay the proposed penalty." This assertion is based on the results of an ability to pay analysis, dated November 17, 2003, performed in accordance with the ABEL User's Manual (December 2001) (ABEL), by EPA financial analyst, Loretta Scott (Exh 17). The analysis is based upon Four Star's partnership tax returns (Form 1065) for the years 2000, 2001, and 2002 (Exh 16). The returns bear the signature of Tony Nauert and were signed on the same day, November 10, 2003. The returns show gross income of over $1,100,000 in 2000, over $1,340,000 in 2001, and over $1,650,000 in 2002. [10] The returns show ordinary income from trade or business (net) in the low to medium five figures for the years 2000 and 2001, respectively, but only four figures for 2002.

15. Ms. Scott's analysis states that there is an 80% probability that Four Star can afford a $5,500 penalty after meeting pollution control expenditures of $0 (Exh 17). Her analysis also states that EPA typically employs a 70% probability level for determining ability to pay and further states that there is a 70% probability that Four Star could afford to pay a penalty of $313,481 after meeting pollution control expenditures of $0 (Id). While the latter determination appears to be unrealistic in the extreme in that it represents approximately 91% of Four Star's net assets as reflected in the Balance Sheet for 2002, the analysis indicates that it is based on funds the firm is projected to generate during the next five years. ABEL recognizes that the five-year rule is not immutable and that there may be sound reasons for deceasing the number of years over which

[10] The ABEL analysis contains a typographical error reflecting gross sales of just over $165,000 for the year 2002, rather than over $1,650,000 shown on the partnership tax return for that year (Exh 16).

cash flows are projected (Id. 3-16). ABEL explains that decreasing the number of years considered available decreases the firm's ability to pay a penalty or contribution, because the model [would then] calculate the lump sum of less than five years of future cash flows. Moreover, the analysis recognizes that the most recent cash flow is significantly worse than the historic average,[11] and that this could mean that ABEL's future cash flow projections are overstated.

16. Balance Sheets in the ABEL analysis, presumably as of December 31 of the years at issue, reflect cash and accounts payable in the low to medium five figures for the years 2000, 2001, and 2002. These figures are comparable to the ending balance shown in the Four Star bank statement as of February 29, 2004 (R's Exh 6). Accounts payable, however, have ballooned to the low six figure range (Invoices, R's Exhs 1-5), although the largest invoice in the amount of $78,945 states that it is [was] due on June 1, 2004 (Exh 5).

Conclusions

1. Respondent, Four Star Feed and Chemical is the owner/operator of a pesticide producing establishment as defined in FIFRA § 2(dd) and thus a pesticide producer as defined in FIFRA § 2(w) and 40 C.F.R. § 167.3.

2. As a pesticide producer, Four Star was obligated by FIFRA § 7(c) and 40 C.F.R. § 167.85(c) and (d) to submit a pesticide report on forms supplied by the Environmental Protection Agency on or before March 1, covering pesticide activities at the establishment during the prior calendar year. The requirement to submit the report exists irrespective of whether pesticides are produced at the establishment and continues as long as the establishment is registered.

3. Four Star submitted its Pesticide Report for the calender year 2002 on June 4, 2003, or 95 days late. Four Star's failure to timely submit the Report was inadvertent and it promptly submitted the Report after becoming aware of the omission. Under the 1986 Enforcement Response Policy for FIFRA Section 7(c), Pesticide Producing Establishment Reporting Requirement (Exh 4), reporting more than 30 days past the due date is "notably late" for which the remedy is an appropriate civil penalty (Id. 4).

4. Complainant used the 1990 ERP to calculate the proposed penalty of $5,500, which is the maximum for a single FIFRA violation occurring on or before March 15, 2004. The penalty so calculated does not recognize Four Star's exemplary record in timely submitting pesticide reports other than the report at issue and does not consider the 20% good faith reduction in the penalty permitted by the ERP (Id. 27). Although the 20% reduction for good faith is indicated to be applicable only to settlement negotiations, the Agency has frequently applied this reduction in cases where the pesticide report was promptly submitted after the violation was called to the

[11] Page 2 of the ABEL analysis "Financial Profile: Financial Statements" shows cash flow (depreciation) of $524,166 in 2000, $184,580 in 2001, and only $71,578 in 2002.

respondent's attention. See, e.g., *Hoven Co-Op Service Company*, Docket No. FIFRA-8-99-31, Initial Decision, 2001 EPA LEXIS 18 (ALJ, 2001) and cases cited.

5. As indicated supra, FIFRA § 14(a)(4) provides in pertinent part that: In determining the amount of the penalty, the Administrator shall consider the appropriateness of the 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." The first two factors, "appropriateness of the penalty to the size of the business of the person charged" and "effect [of the penalty] on the person's ability to continue in business" are sometimes regarded as one factor and treated under the rubric of "ability to pay." The ABEL analysis concludes that Four Star can afford to pay the penalty. Although it appears that Four Star's gross sales have continued to increase at least through the calendar year 2002, there is a suggestion, recognized by the ABEL analysis and Complainant's Motion, that its financial condition in terms of cash flow [and net income] is deteriorating. This conclusion is derived from partnership income tax returns in the record and finds support in invoices submitted by Four Star showing accounts payable in early 2004 in the low six figure range, as compared to accounts payable in the low to medium five-figure range shown on Balance Sheets for the years 2000-2002. Although it is concluded that Complainant has made a prima facie case that Four Star has the ability to pay the proposed penalty and that Four Star has not successfully rebutted that showing, doubts in this regard further support the reduction in the proposed penalty herein determined.

6. "Gravity of the violation" in FIFRA § 14(a)(4) is treated from two aspects in determining the amount of an appropriate penalty: gravity of the harm and gravity of the misconduct (ERP, Appendix B). It is concluded that the penalty proposed by Complainant overstates both the gravity of the harm and the gravity of the misconduct and that an appropriate penalty is the sum of $2,000.

Discussion

The violation alleged in the complaint, failure to [timely] file a pesticide report, is amply supported by the record and is not disputed by Four Star. Therefore, the only issue warranting discussion is the amount of an appropriate penalty.

As indicated supra, FIFRA § 14(a)(4) provides in pertinent part that: In determining the amount of the penalty, the Administrator shall consider the appropriateness of such penalty to the size of the business of the person charged, the effect [of the penalty] on the person's ability to continue in business, and the gravity of the violation.

Complainant determined the proposed penalty in accordance with the Enforcement Response Policy for FIFRA (July 2, 1990) (ERP). The ERP provides at 1 that the appropriate response for Section 7(c) violations will be determined in accordance with the 1986 ERP, which, in turn, provides that the remedy for the submission of a pesticide report more than 30 days past the due date is a penalty rather than a warning (1986 ERP at 4). The 1986 ERP explains that EPA considers violations of the Section 7(c) reporting requirement to be serious, because it

"impacts the Agency's risk assessment capability as well as its ability to effectively target inspections." (Id. 1). Additionally, pesticide reporting "is the major mechanism by which EPA can determine what pesticides an establishment is producing." (Id.). While the assertion that [late reporting] impacts the Agency's risk assessment capability is indeed questionable (*Hoven Co-Op Service Company*, supra) , the reporting mechanism is a statutory and regulatory requirement, allegedly useful in enabling the Agency to effectively target inspection and enforcement activities. It is concluded that the ERP is reasonable and will be followed to the extent it provides that a monetary penalty, rather than a warning, is an appropriate sanction under the circumstances present here.

As indicated supra, Complainant determined that Four Star could afford to pay the proposed penalty. This determination was based on a Dun & Bradstreet Report which reflects data as of December 31, 2001, and an ABEL analysis performed on Four Star's partnership tax returns for the years 2000, 2001 and 2002. Respondent has sought to counter this determination with invoices reflecting accounts payable in the first quarter of 2004 and a bank statement for the month of February 2004. There is no data in the record concerning Four Star's financial condition or transactions in the calendar year 2003. Complainant argues that the invoices and bank statement submitted by Four Star are inaccurate and incomplete and do not accurately portray its ability to pay the proposed penalty (Motion at 5). Additionally, Complainant argues that consideration of the exhibits by the ALJ would be prejudicial in that Complainant is deprived of an opportunity to cross-examine the persons who generated or who are custodians of the documentation and to inquire into Four Star's current financial condition.

Complainant's argument is rejected. Firstly, Consolidated Rule 22.22 admonishes the ALJ to admit all evidence "which is not irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value" and the fact that the documents may not be complete, e.g., accounts receivable data have not been submitted and that a bank statement for one month may not be representative of financial transactions or cash on hand for other months, afford no support for an argument that the exhibits are irrelevant. Moreover, Complainant can hardly maintain that the exhibits are of little probative value and at the same time prejudicial. Secondly, Complainant did not move for a hearing or for discovery, and is free to argue, as it has, that the exhibits do not represent a complete portrayal of Four Star's current financial condition and do not rebut Complainant's prima facie case of ability to pay. Although both the ABEL analysis and Complainant's Motion recognize that Four Star may be having cash flow problems, it is concluded that Four Star has not successfully rebutted Complainant's showing that Four Star has the ability to pay the proposed penalty. Doubts in this regard, however, provide further generalized support for the reduction in the proposed penalty determined herein.

As noted supra,"gravity of the violation" as used in FIFRA § 14(a)(4) is viewed from two aspects and it has been concluded above that the penalty proposed by Complainant overstates both the gravity of the harm and the gravity of the misconduct. In *Hoven Co-Op Services Company*, supra, the Agency's proposal to assess the maximum penalty allowed by FIFRA § 14(a)(4), less the 20% good faith reduction permitted by the ERP, for the submission of a " notably late" pesticide report was rejected based in part on the determination that the gravity of

the harm was overstated. This holding was in turn based in part upon the conclusion that the assertion in the 1986 ERP that [late submission] of pesticide reports impacts the Agency's risk assessment capability could have no application to decisions to register pesticides and that, if the primary use of pesticide reports was in targeting inspections, it followed that the importance of such data and gravity of the late submission or non-production of such reports were overstated. This holding is applicable here.

The conclusion that the penalty for the non-or noticeably late submission of a pesticide report calculated in accordance with the ERP overstates the gravity of the harm seemingly follows from a simple analysis of the ERP. Under the ERP, the penalty for the noticeably late submission of a pesticide report is always assessed at the maximum and no adjustments are permitted based upon the assertion that "record keeping and reporting violations do not lend themselves to utilizing the gravity adjustments listed in Appendix B." (ERP at 22). This elevates reporting violations over what on their face are more serious violations, but for which gravity adjustments are nevertheless provided (ERP, Appendix B). Penalties computed in accordance with the ERP have been held to overstate the gravity of the violation. See, e.g., *James C. Lin and Lin Cubing, Inc.*, FIFRA Appeal No. 94-2, 5 E.A.D. 595 (EAB, 1994), where penalty for each of seven counts of applications of restricted use pesticides by an applicator who was not certified was reduced from $4,000 to $1,000, even though prima facie these were serious violations and the penalty was computed in accordance with the ERP, based on the EAB's conclusion that the gravity (harm or potential for harm) of the violation was overstated.

Turning to the "gravity of the misconduct" it has been found above that the failure to timely submit the pesticide report for the calendar year 2002 was simply inadvertent. This finding is amply supported by the fact that reports for at least the previous five years had been timely submitted and that the report for the calendar year 2003 was submitted in January 2004. Moreover, the 2002 report was promptly submitted once the failure to submit the report was called to Four Star's attention. For all that appears, Four Star was notified of the violation when it received the complaint. Under the ERP, such a stellar record neither increases or decreases the penalty otherwise calculated (Appendix B-2). This is apparently based on the premise that compliance with the law is expected and is not to be rewarded. See, however, *Catalina Yachts, Inc.*, EPCRA Appeal Nos.98-2 & 98-5, 8 E.A.D.199 (EAB, 1999) at note 15, fact that Catalina was a good corporate citizen and had no prior violations tipped the scales in favor of a reduction for compliance.

In view of the foregoing, it is concluded that the penalty computed in accordance with the ERP proposed by Complainant overstates both the gravity of the harm (or potential for harm) resulting from the violation and the gravity of the misconduct. The ERP will, therefore be disregarded in determining an appropriate penalty as I am permitted to do by Consolidated Rule 22.27(b). It is further concluded that a penalty of $2,000 will amply compensate for any damage to the regulatory program and deter Four Star and others pesticide producers similarly situated from future violations. Under these circumstances, assessment of a penalty in accordance with the ERP is punitive rather than remedial. See, e.g., *Pacific Refining Company,* EPCRA Appeal No. 94-1, 5 E.A.D. 607 (EAB,1994), dissenting opinion.

A penalty of $2,000 is appropriate and will be assessed.

Order

The violation of FIFRA § 7(c) alleged in the complaint having been established, Four Star Feed & Chemical is assessed a civil penalty of $2,000 for the single violation, pursuant to Section 14 of FIFRA, 7 U.S.C. § 1361.[12] Payment of the full amount of the penalty shall be made by sending or delivering a cashier's or certified check payable to the Treasurer of the United States to the following address within 60 days of the date of this order :

EPA Region 6
(Regional Hearing Clerk)
P.O. Box 360582M
Pittsburgh, PA 15251

Dated this _____21st_____day of July, 2004.

_____
Spencer T. Nissen
Administrative Law Judge

[12]Unless appealed to the Environmental Appeals Board (EAB) in accordance with Rule 22.30 (40 C.F.R. Part 22), or unless the EAB elects to review this decisions sua sponte as therein provided, this decision will become a final order of the EAB and of the Agency in accordance with Rule 22.27(c).