



UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)
)
TREMONT SUPPLY, INC.,) Docket No. FIFRA-09-99-0011
)
Respondent)

INITIAL DECISION

Federal Insecticide, Fungicide, and Rodenticide Act, as amended ("FIFRA"): Pursuant to Section 14(a)(1) of FIFRA, 7 U.S.C. § 136l(a)(1), Respondent, Tremont Supply, Inc., is assessed a civil penalty of \$4,400 for its failure to timely submit to the United States Environmental Protection Agency a 1998 pesticide production report, in violation of Sections 12(a)(2)(L) and 12(a)(2)(N) of FIFRA, 7 U.S.C. §§ 136j(a)(2)(L), (N).

Issued: June 30, 2000

Barbara A. Gunning
Administrative Law Judge

Appearances:

For Respondent: Kevin Keefer
Regulatory Affairs Manager
Johnny L. Council
Vice President/Manager
Tremont Supply, Inc.
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For Complainant: Kate Nooney, Esq.
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75 Hawthorne Street
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INTRODUCTION

This civil administrative proceeding arises under Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), as amended, 7 U.S.C. § 1361(a). This proceeding is governed by the revised Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits and the Supplemental Rules Governing the Administrative Assessment of Civil Penalties Under the Federal Insecticide, Fungicide, and Rodenticide Act ("Rules of Practice"), 40 C.F.R. §§ 22.1-22.32, 22.35.

The United States Environmental Protection Agency ("EPA" or "Complainant") initiated this proceeding by filing a Complaint against Tremont Supply, Inc. ("Respondent") on September 14, 1999.¹ The Complaint charged Respondent with one (1) violation of FIFRA and the regulations promulgated thereunder. Specifically, the Complaint charged that Respondent, as a producer operating an establishment registered under Section 7(a) of FIFRA, 7 U.S.C. § 136e(a), violated Sections 12(a)(2)(L) and 12(a)(2)(N) of FIFRA, 7 U.S.C. §§ 136j(a)(2)(L), (N), for failing to submit to the EPA an annual pesticide production report for the 1998 reporting year by March 1, 1999, as required by Section 7(c)(1) of FIFRA and 40 C.F.R. § 167.85. The EPA proposed a civil administrative penalty in the amount of \$5,500 for this violation.

On May 26, 2000, the parties filed a Joint Set of Stipulated Facts, Exhibits, and Testimony ("Joint Stipulations") and a Joint Motion Requesting Cancellation of the Hearing and Requesting a Briefing Schedule.² Respondent stipulated to liability and both parties stipulated that although there are no material facts at issue in this case, there remains the disputed question of the "ultimate penalty" to be assessed. As such, the motion requesting cancellation of the scheduled hearing was granted and a briefing schedule was ordered.³

¹ A First Amended Complaint was filed on September 21, 1999.

² Supplemental Stipulated Facts, Exhibits, and Testimony ("Supplemental Joint Stipulations") were filed by the parties on June 8, 2000.

³ The Administrative Law Judge is not required to conduct a hearing if the respondent elects not to request one. See *Green*

Complainant has submitted a brief and a reply brief arguing for a reduced \$4,400 civil administrative penalty for the violation. Respondent contends in essence, however, that no penalty should be assessed.

Therefore, the issue before me is whether to impose on Respondent the penalty amount sought by Complainant.

FINDINGS OF FACT

1. Respondent is a "person" as defined by Section 2(s) of FIFRA, 7 U.S.C. § 136(s). Joint Stipulations ¶ 4.

2. Respondent owns and operates the place of business at 7235 Tremont Road, P.O. Box 549, Dixon, California 95620-0549 (hereinafter "Facility"). *Id.* at ¶ 5.

3. Respondent has registered the Facility as a pesticide producing establishment (Establishment # 0066663-CA-001) as authorized by Section 7(a) of FIFRA, 7 U.S.C. § 136e(a), and is the registrant of a pesticide product known as VAPAM H.L. (EPA Registration No. 5481-468). In 1998, Respondent repackaged 8,772 gallons of VAPAM H.L. *Id.* at ¶¶ 6-9.

4. Section 7(c)(1) of FIFRA provides that any producer operating an establishment registered under Section 7 of FIFRA shall submit annually to the EPA, as required under the applicable regulations, the types and amounts of pesticides and, if applicable, active ingredients used in producing pesticides, which the producer currently is producing, has produced during the past year, and has sold or distributed during the past year.

5. On June 16, 1998, Respondent received a Notice of Warning for failing to file a 1997 annual pesticide report. *Id.* at ¶ 16.

6. Respondent failed to file an annual pesticide report for the following year, 1998, by March 1, 1999, as required by Section 7(c)(1) of FIFRA and 40 C.F.R. § 167.85. Consequently,

Thumb Nursery, Inc., FIFRA Appeal No. 95-4a, 6 E.A.D. 782, 789-91 (EAB, Mar. 6, 1997) (hereinafter *Green Thumb Nursery Case*); see Sections 22.15 and 22.21(b) of the Rules of Practice, 40 C.F.R. §§ 22.15, 22.21(b).

Complainant issued a Show Cause letter on June 18, 1999, notifying Respondent of its failure to submit a 1998 pesticide report. On June 30, 1999, the same day Respondent received the notification, Respondent submitted the 1998 pesticide report. *Id.* at ¶¶ 18-20.

7. Section 14(a)(1) of FIFRA authorizes a civil penalty of up to \$5,000 for each violation of Section 12 FIFRA, which is adjusted to \$5,500 for inflation.⁴

8. Respondent has a gross annual revenue of approximately \$10 million and has not claimed an inability to pay the penalty. See Joint Stipulations ¶ 26; Supplemental Joint Stipulations ¶ 1.

9. The EPA, in determining the amount of the proposed penalty, considered the appropriateness of the penalty to the size of Respondent's business, the effect on Respondent's ability to continue in business, and the gravity of the above-cited violation in accordance with Section 14 (a)(4) of FIFRA. Supplemental Joint Stipulations ¶ 2.

10. The EPA, in determining the penalty, also considered the EPA's Enforcement Response Policy for FIFRA Section 7(c) Pesticide Producing Establishment Reporting Requirement (February 10, 1986) ("Section 7(c) ERP") and the Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act (July 2, 1990) ("1990 ERP").

11. In part, the EPA utilized the 1990 ERP's, five-component, penalty assessment matrix to determine the penalty amount.⁵ More specifically: (1) Using Appendix A, the gravity or

⁴ The Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Debt Collection Improvement Act of 1996, requires the EPA to adjust periodically penalties to account for inflation. 40 C.F.R. Part 19 (61 Fed Reg. 69360, Dec. 31, 1996). The EPA has issued a Civil Monetary Penalty Inflation Adjustment Rule which declares the maximum civil penalty under Section 14(a) for FIFRA violations that occur on or after January 31, 1997, is \$5,500 per offense. *Id.*

⁵ Pursuant to the 1990 ERP, the computation of the penalty amount is determined in a five-step process: (1) determination of the gravity or "level" of the violation; (2) determination of the size of business category for the violator; (3) determination of the dollar amount associated with the gravity level of violation of the size of business category for the violator; (4)

"level" of Respondent's violation was assigned a level "2" because Respondent submitted a "notably late" report; (2) Respondent was placed within the "I" size of business category as defined under Table 2 because Respondent is a Section 14(a)(1) violator type and its gross revenues for the year prior to violation were over one million dollars; (3) the base penalty of \$5,000 was computed by applying the calculated values of steps (1) and (2) above, pursuant to Table 1, and then was recalibrated to \$5,500 in accordance with the civil monetary penalty inflation rule at 40 C.F.R. §§ 19.2 and 19.4; and finally, the base penalty of \$5,500 was not modified by either (4) the potential gravity adjustment factors in Appendix B because such adjustments are not applicable for reporting violations, or (5) any potential effects of the proposed penalty amount on Respondent's ability to continue in business because Respondent does not claim inability to pay the proposed penalty. Joint Stipulations ¶ 24.

12. The EPA made a downward adjustment to the penalty and reduced the \$5,500 proposed penalty by 20 percent to \$4,400 based on the EPA's determination that Respondent had made good faith efforts to comply with FIFRA pursuant to Section 14(a) of FIFRA, the 1990 ERP, and the Section 7(c) ERP. Joint Stipulations ¶ 25.

DISCUSSION

Respondent has stipulated to liability for violating Sections 12(a)(2)(L) and 12(a)(2)(N) of FIFRA for its failure to timely submit to the EPA its pesticide production report for 1998 as required by Section 7(c)(1) and 40 C.F.R. § 167.85. The only remaining issue before me, therefore, is whether to assess a civil administrative penalty of \$4,400 as sought by Complainant.

The assessment of a civil administrative penalty for violations of the reporting requirements of Section 7(c) of FIFRA is governed by Section 14(a) of FIFRA. Section 14(a)(1) of FIFRA authorizes the assessment of civil administrative penalties of up

application of further gravity adjustments to 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; and (5) consideration of the effect that payment of the total civil penalty will have on the violator's ability to continue in business. 1990 ERP at 18.

to \$5,000 per offense.⁶ 7 U.S.C. § 1361. Section 14(a)(4) of FIFRA sets forth various criteria that the EPA and the Administrative Law Judge ("ALJ") must consider in determining the appropriate penalty for violations of FIFRA. Section 14(a)(4) of FIFRA, in pertinent part, provides:

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 on the person's ability to continue in business, and the gravity of the violation.

7 U.S.C. § 1361(a)(4).

In addition to considering any statutory penalty criteria, the ALJ also must consider any governing EPA penalty policy. Section 22.27(b) of the Rules of Practice, 40 C.F.R. § 22.27(b), concerning the ALJ's initial decision, provides:

If the Presiding Officer⁷ determines that a violation has occurred and the complaint seeks a civil penalty, the Presiding Officer shall determine the amount of the recommended civil penalty based on the evidence in the record and in accordance with any penalty criteria set forth in the Act. The Presiding Officer shall consider any civil penalty guidelines issued under the Act. The Presiding Officer shall explain in detail in the initial decision how the penalty to be assessed corresponds to any penalty criteria set forth in the Act. If the Presiding Officer decides to assess a penalty different in amount from the penalty proposed by complainant, the Presiding Officer shall set forth in the initial decision the specific reasons for the increase or decrease.

40 C.F.R. § 22.27(b).

⁶ See *supra* note 4 and accompanying text regarding readjustment of FIFRA base penalty amounts in consideration of inflation.

⁷ The term "Presiding Officer" means the Administrative Law Judge assigned by the Chief Administrative Law Judge to serve as the Presiding Officer. See Sections 22.3(a), 22.21(a) of the Rules of Practice, 40 C.F.R. §§ 22.3(a), 22.21(a).

The EPA has developed guidelines, known as the Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act (July 2, 1990)("1990 ERP"), that provide a method whereby an appropriate penalty can be calculated in accordance with the provisions of FIFRA. In addition to the 1990 ERP, the Section 7(c) Enforcement Response Policy (February 10, 1986)("Section 7(c)ERP") serves as specific guidance for Section 7(c) violations. Indeed, the 1990 ERP dictates that except for the matrix therein, Section 7(c) ERP should be used to determine the appropriate enforcement response for all FIFRA Section 7(c) violations.⁸ 1990 ERP at 1.

These penalty policies are designed to provide fair and equitable treatment of the regulated community, swift resolution of environmental problems, and deterrence of future FIFRA violations. *Id.* The goal of providing fair and equitable treatment is realized by ensuring that similar enforcement response and comparable penalty assessments will be made for comparable violations. *Id.*

A penalty policy, however, such as the 1990 ERP or the Section 7(c) ERP, is not unquestioningly applied as if the policy were a rule with "binding effect." *Employers Insurance of Wausau and Group Eight Technology, Inc.*, TSCA Appeal No. 95-6, 6 E.A.D. 735, 755-762 (EAB, Feb. 11, 1997). Nevertheless, the ALJ is required to consider civil penalty guidelines issued under the Act and to state specific reasons for deviating from the amount of the penalty recommended by Complainant. See Section 22.27(b) of the Rules of Practice, 40 C.F.R. § 22.27(b). The ALJ "has the discretion either to adopt the rationale of an applicable penalty policy where appropriate or to deviate from it where the circumstances warrant." *In re DIC Americas, Inc.*, TSCA Appeal No. 94-2, 6 E.A.D. 184, 189 (EAB, Sept. 27, 1995).

In the instant matter, the EPA proposes that Respondent be assessed a civil administrative penalty of \$4,400. In determining the proposed penalty, the EPA considered the penalty criteria listed in Section 14(a)(4) of FIFRA and the governing penalty guidelines. Specifically, the EPA calculated its proposed penalty in accordance with the 1990 ERP and Section 7(c) ERP.⁹

⁸ The 1990 ERP penalty assessment matrix is used in Section 7(c) cases. 1990 ERP at 1.

⁹ However, I note that the record indicates that the EPA, by failing to issue the complaint within 75 days after the

These penalty policy calculations as well as all other evidence are undisputed by Respondent, other than Respondent's allegation of not receiving a reminder notice to submit the 1998 pesticide production report by March 1, 1999. Each year the EPA sends the Pesticide Report for Pesticide Establishments form to every active Pesticide Establishment as a reminder to submit the annual report. Respondent was listed by EPA Region 9 to receive a reminder notice to submit a report for the 1998 year by March 1, 1999, but Respondent claims that it never received the notice. Respondent, therefore, argues that because it had become accustomed to and relied upon receiving the yearly reminder notice from EPA in order to timely submit its reports, the absence of such notice should eliminate the proposed penalty.

However, as the EPA contends, even if Respondent's allegations are assumed to be true, failure to receive a reminder notice from the EPA is no basis to mitigate the penalty amount. In fact, 40 C.F.R. 167.85(c) unambiguously states that "it is the ultimate responsibility of companies to obtain, complete, and submit the [report] each year." Moreover, the record demonstrates that in June 1998 Respondent was advised of its failure to submit a report for the previous year, 1997, and it was issued a Notice of Warning for this violation. If Respondent did not receive a reminder notice for that year as it claims, then subsequent receipt of the Notice of Warning provided Respondent with ample warning not to rely on EPA reminder notices in the future.

Respondent cites other scenarios concerning the filing of pesticide reports by its organization in an attempt to demonstrate a pattern of alleged mistakes on the EPA's part during the reporting process. The fact that Respondent's other divisions may have experienced alleged EPA reporting "problems," however, is immaterial to the disposition of the case at hand. As such, Respondent's estoppel-like defense is without merit.

Finally, Respondent argues that the penalty amount assessment is unfair because it indiscriminately assesses the same amount against all violators with gross annual revenues of one million and higher. Respondent illustrates, for example,

Respondent's annual report due date, has not completely adhered to the same policies it advocates. See Section 7 (c) ERP at 6 (The civil complaint should be issued *within 75 days . . .* after the [March 1] report due date)(emphasis added). Nevertheless, this discrepancy is immaterial to the assessment of the penalty itself and therefore the proposed penalty remains appropriate.

that under the 1990 ERP assessment matrix for 7(c) violations, the same penalty amount (maximum \$5,500) is assessed against a company with gross revenues of 10 million dollars as one with revenues of 10 billion. The lack of distinction between companies with revenues of one million dollars and those with well above one million dollars is somewhat disconcerting. Nonetheless, because Respondent's gross revenues are tenfold the categorical threshold needed to be assessed the penalty amount in question, I find that Respondent's fairness argument is unpersuasive.

It is emphasized to Respondent that the failure to timely report the production of pesticides, although seemingly innocuous, is a serious violation. Section 7(c) reporting requirements are instrumental in maximizing both the EPA's capacity to assess risks and its ability to target inspections. The EPA's ability to warn producers, dealers, users, and other community members of any "unreasonable adverse effects" to human health and the environment caused by a pesticide is directly reliant upon producers' timely reporting. *Harmack Grain Co., Inc.*, EPA Docket No. I.R. & R. VIII-150C (ALJ, May 2, 1986). Indeed, lax compliance with reporting dates creates uncertainty of a pesticide's whereabouts and quantities that could cause substantial harm to human health and the environment in the event the EPA needs to halt the pesticide's production on short notice. *See id.*

Although assessment of a penalty by the EPA is discretionary under Section 14(a)(4) of FIFRA and some courts have recognized that sometimes only a zero penalty can be justified (*see Green Thumb Nursery Case* at 800) (citing *Rollins Environmental Services, Inc. v. EPA*, 937 F.2d 649 (D.C. Cir. 1991)), this is not one of those instances. As discussed above, a penalty is warranted because the regulation relegating responsibility to submit the pesticide production report at 40 C.F.R. 167.85(c) is unambiguous, Respondent's violation is harmful to the FIFRA regulatory program, and, most compelling, Respondent's failure to timely submit its 1998 pesticide production report was its second 7(c) violation.

In conclusion, I find that the facts and circumstances surrounding the instant violation justify imposing a penalty on Respondent. The proposed penalty in the amount of \$4,400 directly corresponds to the statutory penalty criteria set forth in Section 14(a)(4) of FIFRA. In this regard, it is noted that the violation is a serious one (Level 2), that the proposed penalty is appropriate to the size of Respondent's business, and

that there is no claimed effect of payment of the penalty on Respondent's ability to continue in business.

In addition, the proposed penalty was determined in accordance with the governing penalty policies. I observe that the 1990 ERP and Section 7(c) ERP specifically contemplate all three statutory penalty factors of Section 14(a)(4) of FIFRA. Furthermore, no circumstance or persuasive argument has been set forth by Respondent that reasonably warrants deviation from the governing penalty policies.

The EPA generously reduced its proposed penalty of \$5,500 by 20% (\$1,100) to \$4,400 in consideration of Respondent's good faith attempts of promptly rectifying its omission within one day of being notified of the violation. I find this amount of \$4,400 to be reasonable and appropriate. See Section 22.27(b) of the Rules of Practice, 40 C.F.R. §22.27(b).

CONCLUSIONS OF LAW

1. Respondent, as a producer operating an establishment registered under Section 7 of FIFRA, had the ultimate responsibility to obtain, complete, and submit an annual pesticide production report for the reporting year 1998 by March 1, 1999. See Section 7(c)(1) of FIFRA; 40 C.F.R. § 167.85.

2. Respondent, as a producer operating an establishment registered under Section 7 of FIFRA, violated Sections 12(a)(2)(L) and 12(a)(2)(N) of FIFRA for failing to submit to the EPA a 1998 pesticide production report by March 1, 1999, as required by Section 7(c)(1) of FIFRA and 40 C.F.R. § 167.85.

3. The proposed civil administrative penalty of \$4,400 for Respondent's violation of Sections 12(a)(2)(L) and 12(a)(2)(N) of FIFRA is authorized, and the amount of the penalty is in accordance with the statutory penalty criteria in Section 14(a)(4) of FIFRA and the EPA penalty guidelines issued under FIFRA. See Section 14(a) of FIFRA; Section 7(c) ERP; 1990 ERP; Section 22.27(b) of the Rules of Practice, 40 C.F.R. § 22.27(b).

ORDER

1. Respondent, Tremont Supply, Inc., is assessed a civil administrative penalty in the amount of \$4,400.

2. Payment in full amount of this civil penalty shall be made within sixty (60) days of the service date of the final order by submitting a certified or cashier's check in the amount of \$4,400, payable to the Treasurer, United States of America, and mailed to:

Regional Hearing Clerk
U.S. EPA, Region IX
P.O. Box 360863M
Pittsburgh, PA 15251

3. A transmittal letter identifying the subject case and EPA docket number (Docket No. FIFRA 09-99-0011), as well as the Respondent's name and address, must accompany the check.

4. If the Respondent fails to pay the penalty within the prescribed statutory period after the entry of the Order, interest on the civil penalty may be assessed. 31 U.S.C. § 3717; 40 C.F.R. §§ 102.13(b),(c),(e).

Appeal Rights

Pursuant to 40 C.F.R. §§ 22.27(c) and 22.30, this Initial Decision shall become the Final Order of the Agency, unless an appeal is filed with the Environmental Appeals Board within thirty (30) days of service of this Order, or the Environmental Appeals Board elects to review this decision *sua sponte*, as provided in 40 C.F.R. § 22.30.

Barbara A. Gunning
Administrative Law Judge

Dated: 6/30/00
Washington, DC