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- Statutes Administered by the Administrative Law Judges
- Rules of Practice & Procedure
- Environmental Appeals Board
- Employment Opportunities

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

IN THE MATTER OF)) BIO- SCIENTIFIC SPECIALTY) II - 557- C) PRODUCTS, INC. ,)) <p style="text-align: center;">Respondent</p>)	I. F. & R. Docket No.
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DEFAULT ORDER AND INITIAL DECISION

Federal Insecticide, Fungicide, and Rodenticide Act, as amended ("FIFRA"): Pursuant to 40 C.F.R. § 22.17(a), the Respondent, Bio-Scientific Specialty Products, Inc., is found to be in default because of its failure to comply with the Administrative Law Judge's Prehearing Order and such default by the Respondent constitutes an admission of all facts alleged in the Complaint. The Respondent, pursuant to Section 7(c)(1) of FIFRA, 7 U.S.C. § 136e(c)(1), violated Section 12(a)(2)(L) of FIFRA, 7 U.S.C. § 136j(a)(2)(L), for its failure to submit timely to the United States Environmental Protection Agency a pesticide production report for the year 1997. The \$5,500 civil administrative penalty proposed in the Complaint is assessed against the Respondent.

Issued: August 19, 1999

Barbara A. Gunning
Administrative Law Judge

Appearances:

For Respondent: Dr. Judah Gerstein
President
Bio-Scientific Specialty Products,
Inc.

197-199 North Main Street
P. O. Box 521
Freeport, New York 11520

For Complainant: Donna DeConstanzo, Esquire
Assistant Regional Counsel
Office of Regional Counsel
U. S. Environmental Protection
Agency, Region II

290 Broadway
New York, New York 10007-1866

INTRODUCTION

This civil administrative penalty proceeding arises under Section 14 (a)(1) of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), as amended, 7 U.S.C. § 136l (a)(1). This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits ("Rules of Practice"), 40 C.F.R. Part 22. [\(1\)](#)

The United States Environmental Protection Agency ("EPA" or "Complainant") initiated this proceeding by filing with the Regional Hearing Clerk a Complaint against Bio-Scientific Specialty Products, Inc., the Respondent ("Respondent"), on September 17, 1998. The Complaint charges the Respondent with one (1) violation of FIFRA and the regulations promulgated thereunder. Specifically, the Complaint charges that the Respondent, as a producer operating an establishment registered under Section 7 of FIFRA, 7 U.S.C. § 136e, violated Section 12(a)(2)(L) of FIFRA, 7 U.S.C. § 136j(a)(2)(L), and 40 C.F.R. § 167.85 by failing to submit to the EPA an annual report concerning its pesticidal product for the year 1997 by March 1, 1998. The EPA seeks a civil administrative penalty of \$5,500 for this alleged violation.

Because the Respondent failed to comply with the Administrative Law Judge's Prehearing Order, the Respondent is found to be in default pursuant to Section 22.17(a) of the Rules of Practice, 40 C.F.R. § 22.17(a). Such default by the Respondent constitutes an admission of all facts alleged in the Complaint and a waiver of the Respondent's right to a hearing to contest those factual allegations. 40 C.F.R. § 22.17(a). The factual allegations contained in the Complaint, deemed to be admitted, establish that the Respondent violated Section 12 (a)(2)(L) of FIFRA as charged in the Complaint. Further, an order is imposed on the Respondent that assesses a civil penalty of \$5,500.

FINDINGS OF FACT

1. The EPA initiated this matter against the Respondent by issuing a Complaint and Notice of Opportunity For Hearing pursuant to Section 14 (a)(1) of FIFRA. In the Complaint, the EPA charged that the Respondent, as a producer operating an establishment registered under Section 7 of FIFRA, violated Section 12(a)(2)(L) of FIFRA and 40 C.F.R. § 167.85 by failing to submit to the EPA an annual report concerning its pesticidal product ("Report") for the year 1997 by March 1, 1998. The EPA proposed a civil administrative penalty of \$5,500 for this alleged violation.
2. The Complaint was filed with the Regional Hearing Clerk and served on the Respondent by certified mail, return receipt requested, on September 17, 1998. The Complaint advised the Respondent that the Rules of Practice, 40 C.F.R. Part 22, govern these proceedings, and a copy of the Rules were sent to the Respondent with the Complaint.
3. On October 13, 1998, "J. Gerstein," appearing *pro se* for the Respondent, filed a letter concerning the Complaint with the Regional Hearing Clerk. The Respondent's letter was treated as an Answer to the Complaint and a Request for Hearing. [\(2\)](#)
4. On October 30, 1998, the Office of Administrative Law Judges advised the parties of the availability of participating in Alternative Dispute Resolution (ADR) to facilitate settlement. Neither the Complainant nor the Respondent responded by the November 13, 1998, deadline, which was construed as a declination of their participation in ADR.
5. On December 29, 1998, the undersigned entered a Prehearing Order directing the parties to hold a settlement conference on or before February 11, 1999, in an attempt to reach an amicable resolution of this matter and requiring the Complainant to file a status report on the progress of settlement by February 25, 1999. If there was no settlement, the parties were directed to submit their prehearing exchange; the EPA's prehearing exchange was due by April 5, 1999, and the Respondent's prehearing exchange information was due by May 5, 1999. [\(3\)](#) The parties were advised that failure to comply with the Order could result in the entry of a default judgment against the defaulting party. The December 29, 1998, Prehearing Order was sent to the Respondent by regular mail.
6. On February 25, 1999, the Complainant filed a status report indicating that the parties had not engaged in any settlement conference due to the Respondent's reluctance to do so.
7. On April 5, 1999, the Complainant filed its prehearing exchange but the Respondent did not file its prehearing exchange information as directed.
8. On May 27, 1999, the undersigned issued an Order to Show Cause ordering the Respondent to show cause on or before June 14, 1999, why it had failed to file either its prehearing exchange or a statement of election only to conduct cross-examination of the Complainant's witnesses as a manner of defense on or before May 5, 1999, as required by the Prehearing Order dated December 29, 1998, and why a default order should not be entered for failing to meet this deadline. The Order To Show Cause was served on the Respondent by certified mail, return receipt requested. The Respondent did not respond to the Order to Show Cause.
9. On July 8, 1999, the undersigned entered Reissuance of Prehearing Order directing the Respondent to file its prehearing exchange information by August 8, 1999. The Reissuance of Prehearing Order was served on the Respondent by certified mail, return receipt requested. The Respondent has not filed its prehearing

exchange information as directed in the July 8, 1999, Reissuance of Prehearing Order, or responded to the Order in any manner.

10. The Respondent is Bio-Scientific Specialty Products, Inc., a corporation organized under the laws of the State of New York.

11. The Respondent is a "registrant," "wholesaler," "dealer," or "other distributor" within the meaning of Section 14(a)(1) of FIFRA.

12. The Respondent is a "person" within the meaning of Section 2(s) of FIFRA, 7 U.S.C. § 136(s).

13. The Respondent is a "producer" of pesticides, as that term is defined by Section 2 (w) of FIFRA.

14. Through its Lamina Division, the Respondent operates an "establishment" as defined in Section 2 (dd) of FIFRA, located at 197-199 North Main Street, Freeport, New York 11520 ("Facility").

15. The Facility is registered under Section 7 of FIFRA and its assigned EPA Establishment Number is 068665-NY-001.

16. Section 7 (c)(1) of FIFRA, in part, states 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 is currently producing, has produced during the past year, and has sold or distributed during the past year.

17. The federal regulations at 40 C.F.R. § 167.85 provide that a producer operating an establishment must submit the information described above in Paragraph number 16 in an annual Report on or before March 1st of each year, even if the producer has produced no pesticidal product for that reporting year.

18. The Respondent was required to submit to the EPA a Report for the year 1997 by March 1, 1998. The Respondent failed to submit to the EPA its Report for the year 1997.

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

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

21. The EPA, in determining the penalty amount, has also considered the FIFRA 7(c) Enforcement Response Policy (February 10, 1986) and the Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act (July 2, 1990) ("FIFRA ERP"). [\(5\)](#)

CONCLUSIONS OF LAW

1. The Respondent is found to be in default because it failed to comply with the Administrative Law Judge's December 29, 1998, Prehearing Order, as reissued on July 8, 1999. 40 C.F.R. § 22.17(a).
2. The default by the Respondent constitutes, for purposes of the above-cited matter only, an admission of all facts alleged in the Complaint and a waiver of its right to a hearing on such factual matters. 40 C.F.R. § 22.17(a).
3. The Respondent, as a producer operating an establishment registered under Section 7 of FIFRA, violated Section 12(a)(2)(L) of FIFRA and 40 C.F.R. § 167.85 by failing to submit to the EPA an annual report concerning its pesticidal product for the year 1997 by March 1, 1998.
4. The proposed civil administrative penalty of \$5,500 for the Respondent's violation of Section 12(a)(2)(L) 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 penalty guidelines issued under FIFRA. Section 14(a) of FIFRA; FIFRA ERP; 40 C.F.R. § 22.27(b).

DISCUSSION

The issue before me is whether a default order should be entered against the Respondent with the assessment of a civil administrative penalty in the amount of \$5,500. This proceeding arises under the authority of Section 14 (a)(1) of FIFRA. The federal regulations governing such proceedings are found at the Rules of Practice, 40 C.F.R. Part 22.

Section 22.17(a) of the Rules of Practice, 40 C.F.R. § 22.17(a), concerning default orders states, in pertinent part:

A party may be found to be in default ... after motion or sua sponte, upon failure to comply with a prehearing or hearing order of the Presiding Officer^[6]... Default by respondent constitutes, for purposes of the pending action only, an admission of all facts alleged in the complaint and a waiver of respondent's right to a hearing on such factual allegations. If the complaint is for the assessment of a civil penalty, the penalty proposed in the complaint shall become due and payable by respondent without further proceedings sixty (60) days after a final order issued upon default.

In summary, the file before me reflects that the proceedings in this matter were initiated by the filing of a Complaint against the Respondent on September 17, 1998. The Administrative Law Judge's Prehearing Order dated December 29, 1998, directing the parties to file their prehearing exchange information, was sent to the Respondent by regular mail. The EPA timely filed its prehearing exchange but no prehearing exchange information was filed by the Respondent. The Respondent then did not respond to the May 27, 1999, Order To Show Cause, which ordered the Respondent to show cause why a default order should not be issued against it for failure to comply with the December 29, 1998, Prehearing Order.

Finally, the Prehearing Order, setting a new filing date, was reissued to the Respondent on July 8, 1999, by certified mail, return receipt requested. Again, the Respondent failed to file its prehearing exchange information as directed. The Reissued Prehearing Order reiterated to the Respondent that it could be found in default for failure to comply with the Prehearing Order.

As a preliminary matter, I examine whether there was proper service of the order upon which the default order is based. Here, Dr. Gerstein is appearing pro se for the Respondent. The file contains some information from Complainant's counsel indicating that Dr. Gerstein was reluctant to engage in a settlement conference after the issuance of the initial Prehearing Order, but since the filing of the letter Answer the Respondent has made no filing with the Administrative Law Judge. Although the initial Prehearing Order was improperly served by regular mail, this deficiency was cured by the proper service of the Reissued Prehearing Order on July 8, 1999, by certified mail, return receipt requested. See 40 C.F.R. § 22.06.

The Respondent failed to comply with the Administrative Law Judge's July 8, 1999, Prehearing Order, which was properly served on the Respondent. Such noncompliance, in itself, subjects the Respondent to a default order by direct application of Section 22.17(a) of the Rules of Practice. 40 C.F.R. § 22.17(a). As cited above, Section 22.17(a) provides, in pertinent part, that "[a] party may be found in default... after motion or sua sponte, upon failure to comply with a prehearing or hearing order of the Presiding Officer."

Although this language of Section 22.17(a) concerning the entry of a default order is discretionary in nature, the application of the regulation should be applied as a general rule in order to effectuate its intent. In other words, when the facts support a finding that there has been a failure to comply with a prehearing order or hearing order without good cause, a default order generally should follow. Such position is consistent with the regulation's later mandatory provision that "[d]efault by the complainant shall result in the dismissal of the complaint with prejudice."⁽⁷⁾ 40 C.F.R. § 22.17(a)(emphasis added). It is also noted that the entry of a default order avoids indefinitely prolonged litigation.

In conclusion, the Respondent is found to be in default for its failure to comply with the Administrative Law Judge's July 8, 1999, Prehearing Order. In making this finding of default, I note that the Respondent was repeatedly advised that its failure to comply with the Prehearing Order could result in the entry of a default judgment, and that there has been no response whatsoever to the Order.

As cited above, Section 22.17(a) of the Rules of Practice further provides that "[d]efault by respondent constitutes, for purposes of the pending action only, an admission of all facts alleged in the complaint and a waiver of respondent's right to a hearing on such factual allegations..." and that "[i]f the complaint is for the assessment of a civil penalty, the penalty proposed in the complaint shall become due and payable by respondent without further proceedings sixty (60) days after a final order issued upon default." Id. This regulatory provision, couched in mandatory language, requires that I accept as true all facts alleged in the Complaint upon the Respondent's default.

It is noted that for a finding of default on the basis of a failure to comply with a prehearing order, there is no regulatory requirement that the complainant present sufficient evidence to the Administrative Law Judge to establish a prima facie case to support the allegations of the complaint against the respondent as there is for a finding of default on the basis of a failure to appear at a hearing. See 40 C.F.R. § 22.17(a); In re Rybond, Inc., RCRA Appeal No. 95-3, at 13-14 n. 17 (EAB, Nov. 8, 1996); see also In re Matter of Detroit Plastic Molding Company, supra; In re Turner Copter Services, Inc., FIFRA Appeal No. 85-4 (CJO, Nov. 5, 1985). In this

regard, I point out that Section 22.17(a) specifies only that "[n]o finding of default on the basis of a failure to appear at a hearing shall be made against the respondent unless the complainant presents sufficient evidence to the Presiding Officer to establish a prima facie case against the respondent" and that this additional requirement is not specified for a finding of default on the basis of a failure to comply with a prehearing order. *Id.* This does not mean, however, that the complainant must not meet its burden of proof by alleging in the complaint a cause of action and sufficient facts to establish the violations. 40 C.F.R. § 22.24. It is also noted that the use of the term "evidence" presumes that a hearing has been held where evidence was admitted into the record. When there is a default for failure to comply with a prehearing order, a hearing has not been held and "evidence" has not been admitted into the record.

Thus, in the case before me where the default is based on a failure to comply with a prehearing order, I must accept as true all facts alleged in the complaint. 40 C.F.R. § 22.17(a). I find that those facts alleged in the instant Complaint establish, by a preponderance of the evidence, the violation charged in the Complaint.

Further, I find that the civil administrative penalty in the amount of \$5,500 for the violation charged in the Complaint is authorized and consistent with the statute providing for the administrative assessment of civil penalties for violations of FIFRA and its implementing regulations. Sections 14(a)(1) and (4) of FIFRA; 40 C.F.R. §§ 22.17(a), 22.27(b). The Respondent, by its default, has waived its right to contest the penalty, which shall become due and payable without further proceedings.⁽⁸⁾ Moreover, I find that the facts in the instant case justify the imposition of the civil penalty in the amount of \$5,500 sought against the Respondent for the violation charged in the Complaint. The amount of the penalty is reasonable and it was calculated in accord with Section 14(a) of FIFRA and the FIFRA ERP. See 40 C.F.R. § 22.27(b).

ORDER

1. The Respondent is found to be in default for its failure to comply with the July 8, 1999, Prehearing Order and, accordingly, is found to have violated Section 12 (a)(2)(L) of FIFRA, 7 U.S.C. § 136j (a)(2)(L), as charged in the Complaint.
2. The Respondent, Bio-Scientific Specialty Products, Inc., is assessed a civil administrative penalty of \$5,500.
3. Payment of the full amount of this civil penalty shall be made within sixty (60) days of the service date of the final order by submitting a cashier's check or certified check in the amount of \$5,500, payable to the "Treasurer, United States of America" , and mailed to:

U.S. Environmental Protection Agency
Region II
Regional Hearing Clerk
P.O. Box 360188M
Pittsburgh, PA 15251
4. A transmittal letter identifying the subject case and EPA docket number (I.F. & R. Docket No. II-557-C), as well as the Respondent's name and address, must accompany the check.

5. If the Respondent fails to pay the penalty within the prescribed statutory period after 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).

This Default Order constitutes an Initial Decision as provided in Section 22.17(b) of the Rules of Practice, 40 C.F.R. § 22.17(b). Pursuant to Sections 22.27(c) and 22.30 of the Rules of Practice, 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 twenty (20) days of service of this Order, or the Environmental Appeals Board elects, *sua sponte*, to review this decision.

Original signed by undersigned

Barbara A. Gunning
Administrative Law Judge

Dated: August 19, 1999
Washington, DC

1. The revised Rules of Practice do not apply to these proceedings as the new rules do not become effective until August 23, 1999.
2. In its letter "Answer" dated October 9, 1998, the Respondent did not explicitly request a formal hearing before an Administrative Law Judge, but the Respondent did indicate that it was denying a material fact or was raising an affirmative defense. The Complaint and Notice of Opportunity for Hearing issued against the Respondent on September 16, 1998, advised the Respondent that the denial of any material fact or the raising of an affirmative defense would be construed as a request for a hearing. See Section 554 of the Administrative Procedure Act, 5 U.S.C. § 554.
3. The December 29, 1998, Prehearing Order directed the Respondent to file a statement of election to only conduct cross-examination of the Complainant's witnesses as its manner of defense if it chose to forgo the presentation of direct and/or rebuttal evidence.
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. The EPA issued a Civil Monetary Penalty Inflation Adjustment Rule which declared the maximum civil penalty under Section 14 (a) for FIFRA violations that occur on or after January 31, 1997, is \$5,500 per offense. 40 C.F.R. Part 19 (61 Fed. Reg. 69360, Dec. 31, 1996).
5. Pursuant to the FIFRA 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 and the size of business category of the violator; (4) 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. FIFRA ERP, p.18.

6. The term "Presiding Officer" means the Administrative Law Judge designated by the Chief Administrative Law Judge to serve as the Presiding Officer. 40 C.F.R. § 22.03(a).

7. The revised Rules of Practice at Section 22.17(c), 40 C.F.R. § 22.17(c), which become effective August 23, 1999, provide that: "When the Presiding Officer finds that default has occurred, he shall issue a default order against the defaulting party as to any or all parts of the proceeding unless the record shows good cause why a default order should not be issued."

8. Section 22.17(a) of the Rules of Practice, 40 C.F.R. § 22.17(a), in pertinent part, states that "...the penalty proposed in the complaint shall become due and payable by respondent without further proceedings sixty (60) days after a final order issued upon default." Section 22.27(b) of the Rules of Practice, 40 C.F.R. § 22.27(b), concerning penalties in initial decisions, states that the Administrative Law Judge "shall not raise a penalty from that recommended to be assessed in the complaint if the respondent has defaulted." Compare Katzson Bros., Inc. v. E.P.A., 839 F.2d 1396 (10th Cir. 1988).

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Last updated on March 24, 2014