UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	**)**	
	)	
Lerro Products, Inc.,	**)**	**Docket No. FIFRA 03-2002-0241**
Respondent	**)**	

Federal Insecticide, Rodenticide and Fungicide Act-Pesticide Production Reports-Default-Determination of Penalty- Clearly Inconsistent With Record

Where Agency, in accordance with FIFRA Enforcement Response Policy, sought to impose maximum penalty permitted by the statute for delayed submission of pesticide production report required by FIFRA § 7(c)(1), and proposed penalty was calculated in part based on presumption, permitted by ERP in the absence of actual data, that Respondent was in size of business Category I (gross sales or revenue in excess of $1 million), there being no evidence of Respondent's gross sales or revenues, and record evidence indicated that Respondent was in straitened financial circumstances, proposed penalty was rejected as "clearly inconsistent with the record" within the meaning of the "Default" provision, Rule 22.17(c) of the Consolidated Rules of Practice (40 C.F.R. Part 22), after Respondent was found to be in default for failing to comply with an order of the ALJ requiring the submission of a prehearing exchange. A much reduced penalty was assessed based on the conclusion that penalty as calculated by Complainant greatly overstated gravity of violation.

ORDER GRANTING MOTION FOR DEFAULT JUDGMENT

This proceeding under Section 14 (a)(1) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended (7 U.S.C. § 1361), was commenced on December 12, 2002, by the issuance of a complaint by the Associate Director for Enforcement, Waste and Chemical Management Division, U.S. EPA, Region 3 (Complainant) charging Respondent, Lerro Products, Inc., with failure to submit a pesticide production report for the calendar year 2001 on or before March 1, 2002, as required by FIFRA § 7(c)(1) and 40 C.F.R. § 167.85(d). The complaint alleged that the report was filed on April 23, 2002, or 53 days late. For this alleged violation, it was proposed to assess Respondent a penalty of $5,500, the maximum permitted for a single offense occurring after January 30, 1997, and prior to August 19, 2002[1].

By a letter, dated January 7, 2003, J.B. Ruck & Associates, Ltd., which described itself as a regulatory affairs service, stated that it had been retained by Lerro Products, Inc. to handle all

[1].For violations occurring after August 19, 2002, the maximum penalty per offense is $6,200 (67 FR 41343, June 18, 2002).

regulatory matters, and that it had a limited power of attorney to represent Lerro in the instant proceeding. The letter stated that Lerro did not stipulate to any of the issues in the complaint and desired an informal hearing to resolve this matter. Should the informal hearing not yield a mutually acceptable agreement, Ruck, on behalf of Lerro, requested a formal hearing.

By a letter-order, dated May 6, 2003, the ALJ directed the parties to exchange prehearing information, including responses to specific requests, on or before June 13, 2003. Specific information Respondent was requested to provide included whether it had received a blank pesticide reporting form (EPA Form 3540-16) from EPA in December 2001, a description of Respondent's usual procedures in completing and filing such reports and, if Respondent was contending that assessment of the proposed penalty would jeopardize its ability to continue in business, financial statements, copies of income tax returns or other data to support such contention. Thereafter, on motion of Complainant, the time for the parties to file prehearing exchanges was extended to and including June 27, 2003.

Complainant filed its prehearing exchange under date of June 24, 2003. Lerro did not respond in any manner to the order to file prehearing information. In a teleconference with counsel for Complainant and Respondent's representative on July 29, 2003, Mr. Ruck described his efforts to settle this matter which were rebuffed by Complainant..The ALJ orally granted Respondent an extension to and including August 8, 2003, in which to file its prehearing exchange. This extension was confirmed by an order, dated July 29, 2003. Lerro has not responded to the order in any manner.

Noting Respondent's failure to file its prehearing exchange, Complainant filed a Motion for Default Judgment pursuant to Consolidated Rule 22.17 on August 15, 2003. The motion cites Rule 22.17(a), which provides that a party may be found in default for, inter alia, "...failure to comply with....an order of the Presiding Officer [ALJ]....." Rule 22.17)(a) further provides that default by respondent constitutes, for the purpose of the pending proceeding only, an admission of all facts alleged in the complaint and a waiver of respondent's right to contest such factual allegations. Complainant points out that the complaint alleges that Respondent, though obligated to do so, failed to file a timely pesticide production report for the calendar year 2001 as required by FIFRA § 7 and 40 C.F.R. § 167.85(d) and asserts that, by failing to file a prehearing exchange, Respondent has failed to comply with an order of the ALJ. Accordingly, Complainant says that a default order finding Respondent liable for the violation alleged in the complaint is an appropriate sanction. Regarding the penalty, Complainant claims to have considered the factors set forth in FIFRA § 14(a)(1)(4) and to have considered the facts and circumstances of this case with specific reference to the Enforcement Response Policy (ERP) for FIFRA (July 2, 1990). Therefore, Complainant contends that the proposed penalty of $5,500 is proper.

Findings of Fact

1. Respondent, Lerro Products, Inc.,is a corporation and thus a person as defined in FIFRA § 2(s), having a place of business at 1727 Carpenter Road, Philadelphia, PA.

2. At all times relevant to the complaint, Respondent operated a pesticide producing establishment at the address referred to in finding 1, which has been registered as EPA Establishment No. 010098-PA-001 since 1975.

3. At all times relevant to the complaint, Respondent manufactured and/or prepared the pesticides *Pine Oil Disinfectant, Lerro Bleach* and Ler-Chlor at the registered establishment identified above.

4. At all times relevant to the complaint, Respondent was a pesticide producer as defined in FIFRA § 2(w) and 40 C.F.R. § 167.3

5. As a pesticide producer, Respondent was obligated to file a pesticide production report on forms supplied by the Agency concerning pesticides produced at its establishment during the calendar year on or before March 1 of the succeeding calendar year (40 C.F.R.§ 167.85). The requirement to submit the report or reports is not dependent upon whether pesticides were actually produced, but continues as long as the establishment is registered.

6. Respondent received the pesticide reporting form (EPA Form 3540-16) from the Agency sometime in December 2001, but failed to submit the completed report to EPA by the March 1, 2002 deadline. The report was actually submitted (postmarked) on April 23, 2002, or 53 says late.

7. The Pesticide Report referred to in the preceding finding and the Report submitted for the calendar year 2000 did not reflect any pesticide production. The Report for the calendar year 2000 was postmarked June 1, 2001, for which delayed filing Respondent agreed to pay a penalty of $3,498, payable in four equal installments of $874.50 each. The CAFO expressly recited that the civil penalty was based on, inter alia, the size of Lerro's business, the effect of the penalty on Lerro's ability to continue in business, and its ability to pay. Respondent also submitted its Pesticide Reports for the calendar years 1988 and 1997 more than 30 days late.

8. There is no evidence in the record of Respondent's size of business, i.e., its gross revenues. A Dun & Bradstreet report in the record as of April 14, 2003, does not contain any sales or revenue information The D & B indicates that Lerro Products, Inc. also operates Lerro Swimming Pool Service, that it manufactures soaps & detergents and liquid bleaches and that it has 20 to 25 employees. Additionally, the D & B reflects numerous unsatisfied judgments and indicates that Lerro has a Rating Classification of "IR 4". The report explains that the "IR" portion of the Rating indicates 10 or more employees, while the "4" indicates a limited credit appraisal based on the company's slowness in meeting trade obligations and the open suits, liens or judgments on file.

9. The Memorandum of Law submitted by Complainant in support of its Motion indicates that the proposed penalty of $5,500 was calculated in accordance with the

Enforcement Response Policy for FIFRA (ERP) (July 2, 1990) (Id.7). The 1990 ERP provides that, except for the penalty matrix, the 1986 ERP for FIFRA § 7(c) is to be used to determine the appropriate enforcement response for FIFRA § 7 (c) violations (Id 1). The 1986 ERP in turn provides that a production report submitted more than 30 days after the due date is treated as non-reporting (Id.4). Non-reporting or "notably late" reporting carries a Gravity Level of 2 (1990 ERP at Appendix A-5). A Gravity Level of 2 applied to a Category I size of business (sales or revenue over $1 million) results in a maximum penalty for a single violation of $5,500 (ERP at 19-A).While acknowledging that it has no information on Lerro's gross revenues and that the D & B contains no information on that subject, Complainant, nevertheless, placed Lerro in a size of business Category I, relying on the ERP provision (at 21) that when information as to an alleged violator's size of business is not readily available, the penalty will be calculated using the Category I size of business.(Memorandum at 8).

10. Lerro Products, having failed to comply with an order of the ALJ requiring the submission of a prehearing exchange, is in default without showing good cause therefor and has waived its right to contest any of the foregoing and within findings of fact (¶ (a) of Consolidated Rule 22.17 entitled "Default").The Default provision further provides in part at ¶ (c) ".....The relief proposed in the complaint or the motion for default shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act....."

Conclusions

1. Respondent, Lerro Products, Inc. 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, Lerro 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 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. Lerro submitted its Pesticide Report for the calendar year 2001 on April 23, 2002, or 53 days late This Report, in common with the report for the calendar year 2000, which was submitted 90 days late (June 1, 2002), did not show any pesticide production.

4. Complainant used the ERP for FIFRA (July 2, 1990) to calculate the proposed penalty of $5,500, which is the maximum for a single FIFRA violation occurring prior to August 19, 2002.

5. Although Respondent is in default for having failed without good cause to comply with an order of the ALJ requiring the submission of a prehearing exchange, the penalty of

$5,500 proposed by Complainant is inconsistent with the record and will not be assessed.

6. A penalty of $1,000 is consistent with the record and will be assessed.

Discussion

FIFRA § 14(a)(4) provides in pertinent part: "(i)n 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." The fact that a respondent may be in default does not alter the requirement that the listed factors must be considered in assessing a penalty for violations of FIFRA. See, e.g., Katszon Bros, Inc. v. U.S. EPA, 839 F. 2d 1396 (10th Cir.1988), which was decided under the former version of Consolidated Rule 22.17 entitled "Default". Rule 22.17(a) then provided in pertinent part:" ...If the complaint is for the assessment of a civil penalty, the penalty proposed in the complaint shall be due and payable by respondent without further proceedings sixty (60) days after a final order issued upon default...."(40 C.F.R. § 22..17(a), July 1, 1999). Katzson Brothers, Inc.. was found to be in default for failing to file an answer to the complaint and for failing to respond to EPA's motion for default. Notwithstanding the quoted language of the Rule and EPA's argument that the proposed penalty of $4,200 was computed in accordance with its [penalty] guidelines, the court reversed and remanded for redetermination of the penalty where it appeared that neither the Regional Administrator nor the Chief [Judicial Officer} considered the factual basis for the penalty or the language of the statute.

Like the instant proceeding, Katzson Bros involved the failure to file a pesticide production report as required by FIFRA § 7(c). While (unlike Respondent herein) the court found Katzson Bros.' prior record in timely submitting production reports to be "spotless", this was not the primary factor involved in the remand. Instead, the court emphasized that the statute required the Administrator, in determining the penalty, to consider the effect of the [proposed] penalty on the person's ability to continue in business, sometimes characterized as " ability to pay", and the gravity of the violation. There was apparently no evidence in the record as to Katzson Bros.' "ability to pay" and the court was unimpressed with EPA's arguments concerning the gravity of the violation, pointing out that the report when belatedly filed did not show any pesticide production and that, therefore, the failure did not affect the environment or anyone's health.

It is unnecessary to decide whether the instant proceeding is on "all fours" with and controlled by Katzson Bros., because as noted previously the language of the default article of the Consolidated Rules of Practice has been changed, perhaps in response to Katzson Bros. and similar cases. The Rule now provides in pertinent part that: [upon issuance of a default order] "(t)he relief requested in the complaint or in the motion for default shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act."(Rule 22.17(c)).Here, there is no evidence of Lerro's gross sales or revenue in the record and the D & B shows numerous unsatisfied judgments and liens. Additionally, there is no evidence that the quarterly installment payments of $874.50 called for by the CAFO for the delayed filing of the

pesticide report for the calendar year 2000 have been made. It will be recalled that the CAFO expressly recited that the amount of the penalty was based on the size of Lerro's business, the effect of the penalty on Lerro's ability to continue in business and its ability to pay. It is therefore concluded that on economic grounds alone the proposed penalty of $5,500 is clearly inconsistent with the record and will not be assessed..

Section 14(a)(4) of the Act also requires the Administrator to consider "the gravity of the violation" in determining the amount of the penalty. "Gravity of the violation" is considered from two aspects: gravity of the harm and gravity of the misconduct. Although Complainant insists that the delayed or non-filing of a pesticide production report is a serious violation, it is difficult to escape the conclusion that the gravity of the harm from the late submission of a pesticide production report showing no pesticides produced is vastly overstated. As the court pointed out in Katzson Bros., supra, late filing of a pesticide report showing no pesticides produced could not have effected the environment or anyone's health. Cf. Hoven Co-op Services Co, Docket No. FIFRA 8-99-31 (ALJ, February 20, 2001) questioning claim in 1986 ERP that data gathered from pesticide production reports are or can be used in risk assessments, but accepting assertion that such data may be used to target inspections. It should go without saying that, if targeting inspections is the primary use of pesticide production data, the importance of such data and the gravity of its non-production is overstated.

Concerning gravity of the misconduct, it does appear that neither Respondent nor its consultant regarded the filing of pesticide production reports as a matter warranting a high priority. Perhaps, this is because no pesticides were being produced in either 2000 or 2001. Be that as it may, it is concluded that a penalty of $1,000 adequately considers the gravity of the violation and is consistent with Lerro's ability to pay as shown by this record.

A penalty of $1,000 is appropriate and will be assessed for the violation of FIFRA §§ 7(c) (1) and 12(a)(2)(L) herein shown.

Order

Respondent, Lerro Products, Inc. is in default and in accordance with FIFRA § 14(a)(1) is assessed a penalty of $1,000 for the violation of FIFRA §§ 7(c)(1) and 12(a)(2)(L) found herein.[2] The penalty herein assessed is due and payable without further proceedings 30 days after the order becomes final in accordance with Rule 22.27(c) and will be made by sending or delivering a certified or cashier's check in the amount of $1,000 payable to the Treasurer of the United States to the following address:

Regional Hearing Clerk
U.S. EPA Reg III
P.O. Box 360859
Pittsburgh, PA 15251-6859

Dated this _____8th_____day of October 2003.

_____
Spencer T. Nissen
Administrative Law Judge

[2]. Because this order resolves all issues in the proceeding , it constitutes an initial decision in accordance with Rule 22.17(c) (40 C.F.R. Part 22), which, unless appealed to the Environmental Appeals Board in accordance with Rule 22.30 or unless the EAB elects to review the same *sua sponte* as provided therein will become the final decision of the EAB and of the Agency in accordance with Rule 22.27(c).

In the Matter of Lerro Products, Inc., Respondent
Docket No. FIFRA 03-2002-0241

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Order Granting Motion for Default Judgment,** dated October 8, 2003, was sent this day in the following manner to the addressees listed below:

Original + 1 copy by Pouch Mail to:

Lydia A. Guy
Regional Hearing Clerk
U.S. EPA - Region III
1650 Arch Street
Philadelphia, PA 19103-2029

Copy by Pouch Mail to:

Russell S. Swan
Assistant Regional Counsel (ERC10)
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Copy by Certified Mail and Regular Mail to:

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