5/3/89

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
ACTON ASSOCIATES, INC.,	)	Docket No. IF&R-III-329-C
	)	
Respondent	)	

Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 136, et seq. (Act). Where respondent failed to comply with a discovery order it was found to be in default pursuant to 40 C.F.R. § 22.17, to have admitted violation charged, and assessed a penalty of $1,760.

ORDER ON DEFAULT

By: Frank W. Vanderheyden
Administrative Law Judge

Dated: May 3, 1989

Appearances:

For Complainant:

Benjamin D. Fields
Assistant Regional Counsel
U.S. Environmental Protection Agency
Region III
841 Chestnut Building
Philadelphia, Pennsylvania 19107

For Respondent:

Kevin G. Nelson
President
Acton Associates, Inc.
100 Thompson Street
Pittston, Pennsylvania 18640

Introduction:

This administrative proceeding for the assessment of a civil penalty was initiated pursuant to Section 14(a) of the Federal Insecticide, Fungicide & Rodenticide Act (FIFRA), 7 U.S.C. § 136 1(a). Complainant issued a complaint and notice of hearing on December 28, 1987, alleging a violation of Section 12 of FIFRA, 7 U.S.C. § 136j. Respondent sent a letter to counsel for complainant, dated January 20, 1988,* in effect denying the allegations. Counsel for complainant assumed that this letter was an answer to the complaint, and filed it with the Regional Hearing Clerk.

The complaint alleged that respondent was a pesticide producer, as defined in Section 2(w) of FIFRA, 7 U.S.C. § 136(w), and 40 C.F.R. § 167.1, and stated that respondent maintained a pesticide-producing establishment registered with EPA. The complaint charged respondent with failing to file an annual pesticide production report for calendar year 1986, as required by Section 7 of FIFRA, 7 U.S.C. § 136e, and 40 C.F.R. § 167.5, and sought a proposed civil penalty of $3,200 for the alleged violations.

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*Unless indicated otherwise, all dates are for the year 1988.

FINDINGS OF FACT

In order to understand the rationale for this default order, it is necessary to summarize in some detail the tangled procedural history of this case. Following the filing of the complaint and answer, with respondent appearing pro se, the case was assigned to the undersigned Administrative Law Judge (ALJ). On February 4, an order was issued ordering the parties to submit prehearing exchanges by March 21.

On March 15, the ALJ received the first of several ex parte letters from Kevin G. Nelson, president of respondent (hereinafter sometimes respondent or Mr. Nelson). This letter expressed dismay at the fact that a complaint had been issued, but did not contain the information required by the February 4 order. To assure that this communication became part of the record, the original of the letter was sent by the ALJ to the Regional Hearing Clerk, and a copy was sent to complainant.

On March 21 complainant submitted its prehearing exchange. Respondent, however, did not submit a prehearing exchange. On April 8 an order was issued directing respondent to show cause within 15 days why a default order should not be issued against it, pursuant to 40 C.F.R. § 22.17, for its failure to submit

its prehearing exchange within the time frame set forth in the February 4 order. Respondent did not respond to this order. Taking into consideration that respondent was representing himself and appearing pro se, a default order was not issued at that time. Instead a telephone prehearing conference (PHC) was held on May 5 between the ALJ, complainant, and Mr. Nelson. During the PHC, respondent agreed to submit copies of its income tax return to complainant, in order to provide a basis for a possible reduction of the proposed penalty of $3,200. Respondent also agreed to respond in writing to the April 8 order.

By letter dated May 11 respondent submitted some, but not all of the information required in the prehearing exchange. The letter was addressed to the ALJ, copy to complainant. This prehearing exchange included Mr. Nelson's declaration that the annual pesticide report in question was prepared and mailed to the U.S. Environmental Protection Agency on Saturday, January 10, 1987, and alleged that the mailing of the report was noted in the "company logbook." The prehearing exchange also contained a photocopy of one page of the "logbook," which appeared to be a desk calendar with various entries. The entry for Saturday, January 10, 1987, states as follows:

EPA PESTICIDE REPORT
1986 - NO PRODUCTION - REGULAR MAIL

This entry is in a handwriting which appears to be different from the other entries on the page.

The prehearing exchange also included copies of respondent's corporate income tax returns for fiscal year 1985 (ending on September 30, 1986), and fiscal year 1986 (ending on September 30, 1987). These returns showed gross sales of $357,295 and $384,918, respectively.

On June 17 respondent sent another ex parte letter to the ALJ, enclosing details of the ongoing settlement negotiations between the parties. Again, the ALJ sent the original of this letter to the Regional Hearing Clerk, and sent a copy to counsel for complainant. On June 23 an order was issued ordering respondent to cease making ex parte communications, and to desist from revealing any details of settlement negotiations to the ALJ.

On August 4 another telephone PHC was held at the ALJ's request. During the PHC various attempts by complainant to obtain answers to informal discovery requests were discussed. As a follow-up to the PHC, a PHC Report and Order were issued on August 8 directing respondent to provide additional documentation regarding its current annual sales volume, and to permit complainant to examine respondent's logbooks as discussed during the telephone PHC.

Complainant traveled to respondent's offices on September 7 to examine the desk calendars. In a status report of September 9 complainant related that respondent did not submit current sales information and did not answer informal interrogatories sent by complainant. In a further status report of November 7, complainant related that respondent stated he intended to make discovery as difficult as possible, saying that he was "going to make you run the meter for awhile."

Complainant's prehearing report of March 21 stated that complainant planned to call only one witness, Sally W. Block, responsible for EPA's record maintenance; that she would testify respondent is registered as a pesticide producing establishment, and so registered for the year 1986; that no annual pesticide production report was received from respondent for the 1986 production year; that respondent was late in filing its 1985 annual report; and that it filed same only after receiving a Notice of Warning letter. In addition to Ms. Block's declaration that no report was received, complainant has indicated that there are other potential reasons to doubt the credibility of Mr. Nelson's declaration. It is reasonable to believe that respondent would retain a copy or duplicate original of the report it filed, but respondent has to date failed to produce such a copy. Further, respondent has apparently given a number of conflicting explanations to complainant's counsel as to why

a copy is unavailable. Moreover, the desk calendar entry, which allegedly is a record of the report being mailed, appears to be in a different handwriting than all of the other entries on the page, and includes an unusual notation that the report was sent "Regular Mail." After complainant's examination of respondent's original desk calendars at respondent's offices, complainant included in its requests for information questions asking respondent to provide information necessary to evaluate the reliability of the desk calendar entry.

On November 18 complainant filed a motion to compel discovery. This motion enclosed several requests for information, asking that respondent: (1) provide information as to actual sales for fiscal year 1987; (2) provide information as to anticipated or projected sales for fiscal year 1988; (3) provide a copy of the duplicate original of the annual pesticide report allegedly mailed by respondent, or provide documentation to support any of the various explanations respondent has given at different times as to why the duplicate original was unavailable; (4) identify the persons who make entries into respondent's desk calendar, and explain under what circumstances and for what purpose entries are made; and (5) identify any witnesses and/or documents respondent planned to introduce at hearing. Respondent did not respond to this motion. An order was issued

on December 14 directing respondent to respond to the requests for information in a complete and clear manner within 15 days of the issuance of the order. The order stated that failure on the part of respondent to comply shall result in the ALJ entertaining a motion by complainant under 40 C.F.R. § 22.17 for a default order in the amount of civil penalty stated in the complaint.

Upon respondent's failure to respond to the order compelling discovery, complainant filed a motion for default, dated January 30, 1989. An order was issued on February 10, 1989, finding that an order on default was appropriate, and ordering complainant to submit a draft of same.

CONCLUSIONS OF LAW

Section 14 of FIFRA, 7 U.S.C. § 136 l, gives complainant the authority to institute enforcement proceedings against "any registrant, commercial applicator, wholesaler, dealer, retailer, or other distributor who violates any provision of this subchapter," including the requirement in Section 7, 7 U.S.C. § 136e, that annual production reports be submitted to EPA. Respondent's answer to the complaint, while claiming that a report was in fact sent, does not demonstrate that complainant has failed to establish a prima facie case, or justify the dismissal of the complaint. Complainant's prehearing exchange

includes the declaration of Sally Block, the EPA employee responsible for maintaining annual reports filed pursuant to Section 7, that no report was received from respondent for 1986. Respondent's prehearing exchange contains a declaration from Mr. Nelson that a report was sent, but contains nothing more to indicate that the report was received by EPA. There is a strong presumption that public officials do not lose documents submitted to them. In the Matter of Chemisphere Corporation, Docket No. II TSCA-IMP-13-86-0107. Even assuming that Mr. Nelson's declaration raises a triable issue of fact, complainant has nonetheless established a prima facie case.

Respondent's failure to respond to the order compelling discovery does not necessarily mean that Mr. Nelson's declaration is untruthful. However, complainant has been deprived of the opportunity to evaluate the reliability of the evidence offered to rebut its prima facie case, and therefore an order on default is appropriate. In view of respondent's conduct throughout this case, there is simply no reason to give respondent yet another chance to remedy its failure to cooperate in the conduct of this proceeding. Respondent's failure to respond to the order compelling discovery therefore amounts to a default, and constitutes an admission of all facts alleged in the complaint and a waiver of a hearing on the factual allegations, pursuant to 40 C.F.R. § 22.17(a).

ULTIMATE CONCLUSION

It is concluded that respondent is in violation of Section 7 of FIFRA, 7 U.S.C. § 136e, and 40 C.F.R. § 167.5.

THE PENALTY

The penalty proposed in the complaint was $3,200. Respondent, by its default, has waived the right to contest the penalty. However, recognizing the statutory direction to consider, inter alia, the size of respondent's business in determining the amount of the penalty, complainant has proposed a reduction of the penalty to $1,760. This is based upon the "Guidelines for the Assessment of Civil Penalties Under Section 14(a) of the Federal Insecticide, Fungicide and Rodenticide Act, as amended," 39 Fed. Reg. 27711 (July 31, 1974), and amendments thereto (Penalty Policy). The Penalty Policy sets penalties for different types of violations, based upon the factors set out in the statute, establishing for each type of violation a matrix of penalties which increase with the size of the business. The size of respondent's business is relevant in large part because of the need to adequately deter violations, and therefore it is appropriate to look at sales figures beyond the year of the violation. Respondent's tax returns for fiscal

years 1985 and 1986 showed sales of $357,295 and $384,918, respectively, which would place respondent in the category of between $100,000 and $400,000 in annual sales. However, the inference can be drawn from these figures that sales are rising, and the figures show sales very close to the $400,000 level, which would place respondent in the next higher category in the Penalty Policy. In that respondent has refused to supply data from any subsequent years, it is appropriate to draw the inference that respondent's sales are now above $400,000. While it is possible that respondent is now in the largest sales category--over $1,000,000 per year--it is more likely, given the past sales figures, that respondent is now in the $400,000 to $700,000 category. Complainant, therefore, has suggested that respondent be assessed only the penalty for that category. Respondent's refusal to provide current sales information has prevented complainant from documenting respondent's sales with any greater accuracy.

While complainant has the ultimate burden of demonstrating the reasonableness of the penalty, it is respondent which is in sole control of the information necessary to evaluate the size of its business. It is therefore reasonable to place upon respondent a burden of production, for example, the task of coming forward with evidence showing that its sales are not

in the highest category. While assessment of the full $3,200 penalty, the amount stated in the complaint, might well be warranted given respondent's default, complainant has endeavored to estimate the current size of respondent's business based upon the available information. Complainant's suggestion that a revised penalty of $1,760 be imposed will therefore be adopted. This amount is adequate to deter any future violations by respondent.

ORDER*

IT IS ORDERED, pursuant to Section 14(a) of FIFRA, 7 U.S.C. § 136 l(a), that respondent, Acton Associates, Inc., be assessed a civil penalty of $1,760. Payment of the full amount of the penalty shall be made by cashier's check or certified check, payable to the Treasurer, United States of America, within sixty (60) days of the entry of this decision and order and mailed to the Regional Hearing Clerk, EPA, Region III, P.O. Box 360515M, Pittsburgh, Pennsylvania 15251. A photocopy of the

*The Order on Default shall constitute the initial decision. 40 C.F.R. § 22.17(b). Unless an appeal is taken pursuant to the Rules of Practice, 40 C.F.R. § 22.30, or the Administrator elects to review this decision on his own motion, the Initial Decision shall become the final order of the Administrator. 40 C.F.R. § 22.27(c).

check shall be sent to Suzanne M. Canning, Regional Hearing Clerk, EPA, Region III, 841 Chestnut Building, Philadelphia, Pennsylvania 19107.

Failure upon part of respondent to pay the penalty within the prescribed statutory time frame after entry of the final order shall result in the assessment of interest on the civil penalty. 31 U.S.C. § 3717; 4 C.F.R. §§ 102.13(b)(c)(e).

Frank W. Vanderheyden
Administrative Law Judge

Dated: May 3, 1989