

7/2/92

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)	
)	
REVERE PRODUCTS CORPORATION,)	Docket No. IF&R-07-90
)	
Respondent)	

INITIAL DECISION

DATED: July 2, 1992

FIFRA: Pursuant to Section 14(a)(1) of the Federal Insecticide, Fungicide and Rodenticide Act (the Act), 7 U.S.C. §1361(a)(1), the Respondent Revere Products Corporation is assessed a civil penalty of \$5,000 for failure to file the calendar year 1989 Report for Pesticide-Producing Establishments (EPA Form 3540-16), by the deadline of March 1, 1990, in violation of Section 7(c)(1) of the Act, 7 U.S.C. §136e(c)(1), and in violation of the U.S. Environmental Protection Agency regulations in 40 C.F.R. Part 167 Subpart E.

APPEARANCES:

For Complainant:	John P. Steketee, Esquire Assistant Regional Counsel Region V U.S. Environmental Protection Agency
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For Respondent:	Mr. Gary M. Dover Controller Revere Products Corporation
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I. PROCEDURAL HISTORY

On July 24, 1990, the Director of the Environmental Sciences Division of Region V of the U.S. Environmental Protection Agency,¹ (Complainant) filed a complaint against Revere Products Corporation (Respondent or Revere), which complaint alleged that the Respondent violated Section 7(c)(1) of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA or the Act), 7 U.S.C. 136e(c)(1),² and the regulations promulgated pursuant to FIFRA at 40 C.F.R. Part 167, Subpart E. Revere submitted an Answer in which it admitted the material allegations in the Complaint, including admitting to the violation. However, Revere contested the amount of the proposed penalty.

On October 12, 1990, Complainant filed a Motion for Accelerated Decision, asking that the Respondent be held liable for the violation alleged in the Complaint. Revere in its response to the Motion for Accelerated Decision did not contest the material facts pleaded therein. As a result, on November 8, 1990, an Order was issued determining that the Respondent was liable for the violation set out in the Complaint. Specifically, the November 8, 1990 Order Granting Motion for Accelerated Decision held that the Respondent failed to file the calendar

¹ The U.S. Environmental Protection Agency will subsequently be referred to as the Agency or EPA.

² To facilitate reading this decision, the FIFRA sections will be cited herein using the original section numbering rather than the United States Code numbering. FIFRA is contained in the United States Code at 7 U.S.C. §§136 to 136y. The United States Code citations will not be given hereafter.

year 1989 EPA Form 3540-16, Report for Pesticide-Producing Establishments (Pesticide Report), by the deadline of March 1, 1990, and, therefore, was in violation of Section 7(c)(1) of FIFRA. The Order Granting Motion for Accelerated Decision also held that the failure to file noted above constituted a violation of the EPA regulations in 40 C.F.R. Part 167 Subpart E, which requires that any producer operating a registered establishment report the types and amounts of pesticide it is currently producing, which it produced during the past year and which it sold or distributed during the past year. The Order Granting Motion for Accelerated Decision acknowledged, however, that the Respondent had placed at issue the amount of the penalty to be assessed for the violation. Accordingly, a procedural schedule was set allowing the parties to exchange prehearing information and replies.

The parties duly exchanged the prehearing information and, on April 22, 1991, Complainant filed a second Motion for Accelerated Decision seeking to establish the amount of the penalty to be assessed. The second Motion for Accelerated Decision was opposed by the Respondent and, by Order issued April 25, 1991, was denied. In addition, the April 25, 1991 Order noted that the parties had agreed at an April 23, 1991 telephone conference that no oral evidentiary hearing was necessary since the underlying facts relating to the circumstances surrounding the violation are uncontested. Therefore, the parties agreed that the facts concerning the violation as set out in the

prehearing exchanges and replies thereto can be taken as true and that the information contained in those materials will be considered part of the decisional record in this proceeding. The April 25, 1991 Order also established a briefing schedule, pursuant to which both parties submitted both initial and reply briefs.

This initial decision will consist of a description of the positions of the parties and an analysis and resolution of the matter at issue, the proper amount of the penalty to be assessed, and an order with regard thereto. Any argument in the parties' briefs not addressed specifically herein is rejected as either unsupported by the evidence or as not sufficiently persuasive to warrant comment. Any proposed finding or conclusion accompanying the briefs not incorporated directly or inferentially into the decision, is rejected as unsupported in law or fact, or as unnecessary for rendering this decision.

II. PERTINENT FACTS

Revere, a branch wholesaler of building maintenance products, is a division of Tricor Direct Inc., which is a subsidiary of Brady W. H. Corporation (Brady), both of which companies are located in Milwaukee, Wisconsin. For the period of August 1988 to July 1989, Brady had sales in excess of \$170,000,000 (Comp. Ex. 7).³

³ The exhibits will be cited herein as Complainant's Exhibit or Respondent's Exhibit, and abbreviated as Comp. Ex. or Resp. Ex. The stipulations agreed to by the parties will be cited by number and will be abbreviated as Stip. No. The briefs will be cited by party and abbreviated appropriately.

On March 31, 1989, Complainant issued a warning letter to the Respondent for failure to file its 1988 calendar year Pesticide Report, by the due date of February 1, 1989 (Comp. Ex. 8). Revere's 1988 Pesticide Report was received by the Agency on April 14, 1989. The Act does not require the Agency to issue warning letters, but Region V follows this practice after first time violations of the reporting requirements. If, however, the violator fails to report the following year, Region V issues a complaint without a warning letter. (Comp. Init. Br. p. 3.) As a result, when Revere failed to submit its 1989 Pesticides Report by the March 1, 1990 deadline (Comp. Ex. 4), Complainant on July 24, 1990 filed the Complaint herein. Subsequently, the Agency received the 1989 Pesticides Report from Revere on August 3, 1990 (Comp. Init. Br. Attachment B).

III. POSITIONS OF THE PARTIES

A. Complainant

The Complainant takes the position that it has followed the Guidelines set forth in the July 2, 1990 Enforcement Response Policy for the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) (Penalty Policy or ERP), 55 Fed. Reg. 30032 (July 24, 1990) (Comp. Ex. 1). In this regard, Complainant avers that the violation involved in this cause is a Level II violation as described in the Penalty Policy and that the Respondent is in Business Category 1, which the Penalty Policy defines as businesses with gross revenues of over a \$1,000,000. Based on these determinations, the Complainant recommends that the

Respondent be assessed a civil penalty of \$5,000 (Comp. Ex. 3).

Complainant correctly points out that Section 14 of FIFRA authorizes the EPA Administrator to impose a civil penalty of up to \$5,000 for each offense of the Act. Penalties under FIFRA are determined pursuant to the statutory criteria set forth in Section 14(a)(4), which provides in pertinent part:

(4) Determination of Penalty -- in determining the amount of 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.

To implement the Act and to provide similar enforcement responses and comparable penalty assessments for comparable violations, the Agency developed the FIFRA Penalty Policy, which includes the guidelines involved in the present action relating to recordkeeping and reporting requirements violations. Complainant avers that the purpose of the Penalty Policy insofar as reporting violations are concerned is to insure that the regulated community submits information to EPA which will permit the Agency to regulate properly and effectively the production, sale and use of dangerous pesticides. The Complainant cites Colorado Chemical and Fertilizer, Docket No. IF&R VIII-221C, p.5 (1989), as authority relating to seriousness of reporting violations under FIFRA:

As has been often stated, the information required under the statute and regulation is sought for regulatory purposes and any non-compliance with such requirement will impact the Agency's ability to conduct accurate risk assessments and compliance inspections. As was observed in Wickard v. Filburn,

63 S.Ct. 82, 317 U.S. 111, 87 L.Ed. 122 (1942), Respondent's violation, standing alone, may appear trivial, but when said violation is taken together with many others similarly situated, it is 'far from trivial.' Without comprehensive, accurate and up-to-date pesticide production data, risk assessments and compliance inspections will not serve to adequately protect the public interest as intended by the Act. Obviously, subject violation must be viewed as serious, here and in like instances, if essential compliance with the Act will be achieved.

Specifically, the Complainant takes the position that the factors set forth in the FIFRA Penalty Policy comply with the statutory criteria cited above and, therefore, take into account the relationship of the penalty to the size of the Respondent's business, the effect on the Respondent's ability to continue in business and the gravity of the violation, Penalty Policy, p. 18.

Complainant correctly notes that the first statutory criteria, the appropriateness of the penalty to the size of the business charged, is not at issue. The parties have stipulated that the Respondent is a Business Category 1 size company, since Brady, its parent company, has gross revenues in excess of \$1,000,000 (Stip. No. 2). Similarly, there is no dispute as to the second criteria, the effect on the person's ability to continue in business, since the parties have stipulated that Revere has the ability to pay the proposed penalty (Stip. No. 3).

Complainant argues that the gravity of the violation is the only matter at issue and notes that the Penalty Policy provides that recordkeeping and reporting violations be considered Level 2 violations. As a result, Complainant asserts that the gravity of recordkeeping recording violations has been considered in the

dollar amounts presented in the matrices in the Penalty Policy. Moreover, Complainant argues that the Penalty Policy sets out that recordkeeping and reporting violations do not lend themselves to the gravity adjustments listed in Appendix B to the Penalty Policy. According to Appendix B, footnote 1, such adjustments should not be used for recordkeeping or reporting violations. Complainant avers that such adjustments would be inappropriate for recordkeeping or reporting violations since the gravamen of such violations is the failure to file appropriate information. Complainant asserts that adjustments based on the type and amount of chemicals involved or the potential for harm to the health and the environment, are not relevant to the failure to submit information required by the Act.

Complainant also argues that other adjustments to the civil penalty amount allowed by the Penalty Policy are those related to settlements and are not relevant when a case is contested and the amount of penalty is to be set at hearing.

The Complainant further contends that the Respondent should not be given any credit with regard to the amount of the penalty for the fact that it has not been named in any other civil actions instituted under FIFRA. Complainant notes that the violation history of a Respondent is addressed in the Penalty Policy, which does not allow the gravity adjustment criteria in Appendix B to be used for recordkeeping and reporting violations.

In addition, the Complainant contests the Respondent's assertion that it should receive consideration because there was

no economic benefit as a result of its failure to file the Pesticides Report on a timely basis. Complainant points out that the Respondent does recognize that economic benefit is not a statutory criteria under FIFRA. Moreover, Complainant avers that, even if economic benefit were a factor to be considered as it is under the Toxic Substances Control Act (TSCA), 15 U.S.C. §§2601 et seq., it would still not justify a reduction in the penalty. The rationale for this is that, while the compliance costs the violator might avoid by not meeting the reporting requirements of FIFRA are minimal, the costs to the Agency of not receiving required information from the regulated community are great. Complainant contends that the FIFRA program depends on the reporting of accurate information by the regulated community and that, without such information, it would be difficult for the Agency to regulate pesticides in order to protect human health and the environment. Therefore, Complainant asserts that whether the Respondent received any economic benefit from this violation has little or no relevance to the amount of the penalty that should be assessed.

Similarly, the Complainant controverts Revere's argument that the Agency's risk assessment capability was not impeded by the violation, since the violation did not present an actual or potential risk to the human health and the environment. Complainant points out that the violation did impede the Agency's risk assessment capability and, therefore, does present a potential risk of harm to the environment, because risk

assessment depends on accurate information. Complainant takes the position that inaccurate information or lack of information present a potential risk of harm to human health and the environment since the Agency may take action or withhold action based on such lack of information, which could have a negative impact on the environment.

In addition, the Complainant contests the Respondent's position with regard to application of the gravity criteria. Complainant states that there are different gravity levels for a late reporting violation and a non-compliance violation. Complainant points out that the gravity level for submitting a late report under Section 7(c)(1) of FIFRA is Level 4 under the Penalty Policy, while the gravity level for failing to submit a report at all under the same Section is Level 2. Accordingly, Complainant suggests that the Respondent's argument about inconsistent application of the gravity criteria be rejected.

Complainant further attacks the Respondent's position that it was not given sufficient notice to correct the reporting violation prior to the filing of the Complaint herein. Complainant notes that the Respondent was given sufficient notice of its requirements to report under FIFRA when it received the warning letter for its failure to file its 1988 calendar year Pesticides Report.

Finally, Complainant contests Respondent's argument that the statutory criteria of appropriateness of penalty relative to the size of the business of the person charged and the effect of the

person's ability to remain in business are not relevant standards in assessing the proposed penalty resulting from the Respondent's violation herein. Complainant points out that the statutory criteria are indeed involved since it would not be equitable to assess a multi-billion dollar corporate Respondent the same penalty as a small business. In addition, Complainant asserts that it is appropriate to take into account the Respondent's ability to continue in business, since it is not the intent of the Act to put entities out of business for violations thereof. Complainant contends, therefore, that these are appropriate criteria for determining the amount of penalty to be assessed.

B. Respondent

Respondent raises the following points in its argument that the amount of the proposed penalty is too large. First, the Respondent notes that there is no prior history of violations for non-compliance with the Act. Respondent also states that it has realized no economic benefit as a result of its failure to file the Pesticides Report on a timely basis. Revere also contends that the Agency risk assessment capability was not impeded by the late filing and that the violation does not present a potential risk of harm to humans or the environment. The Respondent further contends that there is an inconsistent application of the gravity criteria under the FIFRA Penalty Policy insofar as late reporting violations and non-compliance violations are concerned. Also, Revere asserts that it did not have sufficient notice and opportunity to correct procedural violations prior to the filing

of the Complaint in this cause. Additionally, the Respondent suggests that the statutory criteria relating to the size of the Respondent's business and the effect on the Respondent's ability to continue in business are not relevant or applicable standards in assessing the appropriateness of the proposed penalty resulting from a violation of the Act.

In its reply to the Complainant's arguments, Respondent makes the following points. Revere contends that non-compliance violations, which it defines as not reporting to the Agency under FIFRA at all, and procedural violations, defined as late reporting under FIFRA, are distinct and therefore not comparable. The Respondent asks that consideration be given as to the effect each type of violation has on the intent of the Act, which is to insure the regulated community submits information to the EPA so that the Agency may effectively regulate pesticides. In this regard, Respondent asserts that a total non-compliance violation would have greater impact on the Agency's ability to administer FIFRA than would a late reporting violation, and that this should be taken into account. Respondent further argues that it has submitted all information required under FIFRA and that it realizes the importance of supplying such information to EPA, as evidenced by its immediate action to correct the procedural violation after it learned thereof. In addition, Revere attacks the criteria for determining penalties under FIFRA. In this regard, it is asserted that the size of the business or its ability to pay do not validate arbitrarily penalizing one

violator more than another for the same violation.

IV. ANALYSIS AND RESOLUTION

On analysis, the Complainant's position with regard to the amount of the penalty to be assessed is better taken. Under Section 14(a)(4) of the Act, there are three criteria to be considered in assessing a civil penalty: the size of the Respondent's business; whether the penalty would affect the Respondent's ability to stay in business; and the gravity of the offense. Complainant correctly points out that the FIFRA Penalty Policy takes these statutory factors into account, as specifically set out on page 17 of the Policy. On page 18, the Penalty Policy sets out a five stage process for computing the penalty amount, taking into account the three Section 14(a)(4) criteria:

. . . These steps are: (1) determination of 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.

Using the five steps, the following evaluation can be made. As to step (1), the gravity level, a FIFRA Section 7 (c)(1) late reporting violation is listed as a level 2 violation on page A-5

of Appendix A to the Penalty Policy. Concerning step (2), Revere falls into Business Category I on Table 2 on page 20 of the Penalty Policy, since its parent corporation has over \$1,000,000 in gross annual sales (Stip. 2). Regarding step 3, the dollar amount of the penalty for a level 2 violation by a Business Category I company is \$5,000, as shown on page 19 of the Penalty Policy in Table 1, the Civil Penalty Matrix for FIFRA Section 14(a)(1). As a wholesaler, Revere is covered by Section 14(a)(1) of the Act, which Section gives the Agency authority to assess a civil penalty of up to \$5,000 for each violation of FIFRA. With regard to step (4), the Gravity Adjustment Criteria in Appendix B relating to pesticide characteristics, harm to health and/or the environment, compliance history and culpability, it is set out on page 22 of the Penalty Policy and in footnote 1 of Appendix B that these Gravity Adjustment Criteria should not be used for reporting violations, since such violations are already considered in the dollar amounts presented in the FIFRA Civil Penalty Matrices. Because Revere's violation is a reporting violation, the gravity adjustments listed in step (4) are not applicable. Concerning step (5), the violator's ability to stay in business, the Respondent has agreed by stipulation that it has the ability to pay the civil penalty proposed in the Complaint and that such penalty would not jeopardize Revere's ability to stay in business (Stip. 3). Given the above analysis, it is clear that the penalty called for in this case is \$5,000, if the Penalty Policy is to be followed.

However, under Section 22.27(b) of the Rules, the Presiding Judge has discretion to assess a penalty different from that recommended in the Complaint, but the Penalty Policy must be considered and the reasons for any increase or decrease must be specifically set out. The issue then is whether any of the Respondent's arguments warrant a deviation from the penalty amount calculated using the Penalty Policy. A review thereof indicates that these arguments do not justify a reduction of the penalty called for by the Penalty Policy.

First, the Respondent's reliance on its prior FIFRA compliance history is misplaced. Revere was issued a warning letter for its failure to file its 1988 Pesticides Report on time. That is a clear instance of non-compliance with FIFRA even though no formal proceeding was initiated. Moreover, as noted above, compliance history is part of the gravity adjustments which have already been considered in the penalty amounts in the ERP matrices for reporting violations. Further, reporting violations do not lend themselves to utilizing gravity adjustments. See Penalty Policy, p. 22.

Nor is the fact that the Respondent derived no economic benefit by failing to file on time a relevant factor. The purpose of the reporting requirements in the Act is to foster the gathering of information necessary for the Agency to fulfill its mission and whether the Respondent benefitted economically from its late reporting is of no consequence in meeting the statutory purpose.

Furthermore, Respondent's argument that the Agency's risk assessment capability was not impeded by the violation is not accurate. Any time that there is a late reporting of information, the Agency's risk assessment capability is diminished. It would present an impossible task to the Agency to fulfill the statutory criteria of regulating harmful pesticides if there was little or no incentive for the Respondent to file its reports on time. Such a case would result in an impossible recordkeeping arrangement for the Agency and tend to emasculate the gathering of the information needed for the Agency to fulfill its regulatory purposes in a timely manner. Similarly, the argument that no actual or potential harm to human health or the environment was caused by the particular late filing in this case is not well taken. The fact that there is a diminution of the information gathering ability of the Agency by late reporting represents a potential harm to human health and the environment by lessening the Agency's ability to regulate the production, sale and use of dangerous pesticides. If the Agency cannot rely on receiving reports required by the Act - such as the Pesticides Report - on time, EPA's ability to regulate pesticides will be adversely affected, with potential harm to humans or the environment. As the Complainant persuasively argues, Colorado Chemical and Fertilizer, Docket No. IF&R VIII-221C (1989) presents instructive reasoning with regard to the seriousness of reporting violations under FIFRA. In Colorado, id at 5, it was noted that any non-compliance with information gathering

requirements has an adverse impact on the Agency's risk assessment capability and that reporting violations which, standing alone, seem trivial, must be viewed as serious when considered with many other similar violations. This rationale makes it necessary to reject Revere's argument on risk assessment and potential harm to health and/or the environment.

Next, Revere's argument that the Penalty Policy is inconsistent in that it assesses the same gravity level to a late reporting violation as it does to a violation where the Respondent does not report at all, is not persuasive. As the Complainant correctly points out, a failure to report or a notably late report under Section 7(c)(1) of the Act is considered a level 2 violation in the Penalty Policy, Appendix A, p. A-5, whereas submission of a late report is listed as a lesser Level 4 violation in the Penalty Policy, Appendix A, p. A-6. See Comp. Reply Br. pp. 5,6. In the present case, the submission of the 1989 Pesticides Report by Revere must be considered notably late since it was not received until more than 5 months after its due date and then only after the Complainant herein had issued. Nor should Revere have the penalty reduced for acting promptly after the Complaint was issued, for showing a cooperative attitude or for instituting improved procedures to comply with reporting requirements under FIFRA. Revere had received a warning letter the year before for its failure to file the 1988 Pesticides Report and should have shown a better attitude and taken corrective measures at that time to insure compliance,

rather than repeating its failure to file in 1989, resulting in a five month delay in the Agency's receipt of the 1989 Pesticides Report.

In addition, the contention of the Respondent that it was not given sufficient notice so it could correct the late reporting violation must be rejected. Revere had been given a warning letter in connection with the late filing of the 1988 Pesticides Report and it is reasonable to conclude that this should have put the Respondent on notice that it should file its 1989 Pesticides Report on time. Further, there is no obligation under either FIFRA or the Penalty Policy for the Agency to send a warning notice giving the Respondent time to correct the late filing before the Complaint is issued. Under the circumstances of the present case, not only is there no obligation on the Agency to provide such notice but, as noted above, the warning letter associated with the late reporting for 1988 constitutes a sufficient notice to the Respondent that it should file its reports on time.

Finally, the Respondent suggests that the statutory criteria relating to the size of the Respondent's business and the effect of the Respondent's ability to continue in business are not relevant or applicable standards in assessing the appropriateness of the proposed penalty resulting from a violation of the Act. This is merely an attack on the statutory criteria that are specifically set out in Section 14(a)(4) of the Act and this is not the proper forum in which to contest the statute. Moreover,

as Complainant correctly argues, it would not be equitable to assess a multi-billion dollar corporate Respondent the same penalty as a small business, and it is appropriate to take into account the Respondent's ability to continue in business, since it is not the intent of the Act to put individuals or companies out of business for violations of FIFRA.

Therefore, given the above analysis, it must be held that the proper penalty to be assessed for the reporting violation involved in this proceeding is \$5,000.

V. ORDER⁴

Based on the above analysis and resolution, and the rulings, findings, and conclusions contained therein, **IT IS ORDERED:**

1. That, pursuant to Section 14(a)(1) of FIFRA, the Respondent Revere Products Corporation is assessed a civil penalty of \$5,000 for failure to file its calendar year 1989 Pesticide Report by the deadline of March 1, 1990, in violation of Section 7(c)(1) of the Act and in violation of EPA regulations in 40 C.F.R. Part 167 Subpart E.
2. That payment by the Respondent of the full amount of the \$5,000 civil penalty assessed shall be made within sixty days (60) of service of the final order of the EPA Administrator, by submitting a certified or cashier's check payable to Treasurer, United States of America. Said check shall be mailed to:

EPA - Region V
(Regional Hearing Clerk)
P.O. Box 70753
Chicago, IL 60673

Daniel M. Head
Administrative Law Judge

Dated:
Washington, DC

⁴ Under Section 22.30 of the EPA Rules of Practice (Rules), 40 C.F.R. §22.30, the parties may file with the Headquarters Hearing Clerk a notice of appeal of this decision and an appellate brief within 20 days of service of this initial decision. This initial decision shall become the final order of the EPA Administrator within 45 days after its service, unless an appeal is taken by the parties or unless the Administrator elects, sua sponte, to review the initial decision pursuant to Section 22.30(b) of the Rules. After any appeal or sua sponte review, the order of the EPA Administrator shall be the final order in this cause.