

12/2/94

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
BEFORE THE ADMINISTRATOR

In the Matter of )  
 )  
Colorado Chem-Pak, Inc., ) Docket No. I.F. & R. -VIII-314C  
 )  
Respondent )

ORDER ON DEFAULT

On August 18, 1993, the Complainant moved for a Default Order against the Respondent, Colorado Chem-Pak, Inc. (Chem-Pak), pursuant to the Consolidated Rules of Practice for failing to file a pre-hearing exchange as ordered by the Presiding Officer. 40 CFR § 22.17.<sup>1/</sup> If granted, the Default Order will constitute an admission of all facts alleged in the complaint and may result in the assessment of the full amount of the penalty demanded in the complaint. Id. The complaint, as amended, alleges the Respondent Chem-Pak failed to file the 1990 Annual Report required by 7(c)(1) of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA),

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<sup>1/</sup> Default: A party may be found to be in default. . . after a motion or sua sponte, upon failure to comply with a prehearing or hearing order of the Presiding Officer . . . . Default by respondent constitutes, for the 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. 40 CFR § 22.17(a).

7 U.S.C. § 136e(c)(1),<sup>2/</sup> by the March 1, 1991, deadline established by regulation. 40 CFR § 167.85(d).<sup>3/</sup> Failure to file an Annual Report is a violation of FIFRA, 7 U.S.C. § 136j(a)(2)(L), and can result in a penalty of up to \$5,000. 7 U.S.C. § 136l(a)(1). For this alleged violation, the Complainant proposes to assess Chem-Pak a penalty of \$4,000. Complainant contends that this penalty properly considers factors required by the Act. 7 U.S.C. § 136l(a)(4).<sup>4/</sup>

The initial complaint, filed on June 22, 1992, charged Colorado Chem-Pak with two violations of 7(c)(1) of FIFRA, 7 U.S.C. § 136e(c)(1) and 40 CFR § 167.85(d), i.e., failing to file Annual Reports for the years 1990 and 1991. The maximum penalty of \$5,000 per violation was demanded. A copy of this complaint was served on Respondent by certified mail. Colorado Chem-Pak responded to the complaint by a letter, dated July 24, 1992, signed by its

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<sup>2/</sup> Any producer operating an establishment registered under this section shall inform the Administrator within 30 days after it is registered of the types and amounts of pesticides and, if applicable, active ingredients used in producing pesticides. . . .

The information required by this paragraph shall be kept current and submitted to the Administrator annually as required under such regulations as the Administrator shall prescribe. 7 U.S.C. § 136e(c)(1). (emphasis added).

<sup>3/</sup> [T]he producer must submit an annual report on or before March 1 of each year, even if no pesticidal product has been produced for that reporting year. 40 CFR § 167.85(d).

<sup>4/</sup> 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. § 136l(a)(4).

President, Clifford Pettee, which disputed all allegations of the complaint and requested an informal settlement conference.

By a letter, dated November 10, 1992, the ALJ directed the parties to exchange specified pre-hearing information on or before January 29, 1993.

On January 8, 1993, Complainant filed a motion to amend the complaint. Apparently the Complainant discovered the Annual Report for 1991, which had been filed in a timely fashion. Complainant also moved to reduce the penalty for the remaining count from \$5,000 to \$4,000. According to Complainant, this reduction reflected a reassessment of Chem-Pak's business size based on the company's tax returns.<sup>5/</sup> The motion to amend was granted by an order, dated January 26, 1993.

Upon learning that Respondent had filed a petition for reorganization under Chapter 11 of the Bankruptcy Code,<sup>6/</sup> Complainant moved for and the parties were granted extensions of time in which to file pre-hearing exchanges, the last such extension being to July 16, 1993. Complainant served its pre-hearing exchange information on July 14, 1993. Colorado Chem-Pak

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<sup>5/</sup> Income tax returns for the years 1988 and 1989 submitted in Complainant's pre-hearing exchange are in the name of Colorado Aerosols, Inc., which was apparently Colorado Chem-Pak's former name.

<sup>6/</sup> In re Colorado Chem-Pak, Inc., d/b/a Colorado Aerosols, Inc., Bankruptcy No. 92-1380 PAC (D. Colorado). Upon the debtor's motion, the proceeding was dismissed by an order, dated August 24, 1993.

has not responded in any manner to the requirement for a pre-hearing exchange.

Noting Respondent's failure to file a pre-hearing exchange and that this failure prejudiced EPA's ability to proceed with the case, Complainant's counsel, by letter, dated August 3, 1993, informed Respondent that unless Respondent's pre-hearing exchange was received by August 16, 1993, Complainant would file a motion for default. There is no evidence of any response to this letter. Complainant filed a motion for default on August 19, 1993, which was served on Respondent by first class mail, and which recites, inter alia, that according to the Regional Hearing Clerk, Respondent had not filed a pre-hearing exchange as of August 17, 1993.<sup>7/</sup> Colorado Chem-Pak has not responded to the motion.

Among items of information Colorado Chem-Pak was directed to file in its pre-hearing exchange, was a statement of when pesticide production reports for the years in question were mailed, if that was a fact, together with evidence of mailing such as a copy of cover letters or a file copy of completed reports.<sup>8/</sup> Respondent was also directed to furnish a statement of its gross sales for the years 1990 and 1991 and data, such as financial statements or copies of income tax returns, if it was contending that imposition

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<sup>7/</sup> This assertion should be supported by an affidavit from the RHC, rather than counsel reporting what he was told by the RHC.

<sup>8/</sup> Complainant having located the pesticide production report for the calendar year 1991 only the report for the calendar year 1990 remains at issue.

of the proposed penalty would adversely affect its ability to continue in business.

D I S C U S S I O N

Colorado Chem-Pak has complied with the ALJ's order for the production of financial information by furnishing copies of income tax returns for it and its predecessor corporation, Colorado Aerosols, Inc., for the years 1988 through 1991. These documents were apparently supplied to the Complainant in the course of settlement negotiations and were included in Complainant's pre-hearing exchange. The other item of information Respondent was directed to furnish was a statement of when the production report for the calendar year 1990 was mailed to EPA, if it had in fact been mailed, together with any evidence of mailing, such as a copy of a cover letter or a file copy of the completed report. This information is, of course, central to the failure to file the report alleged in the complaint and Respondent's defense, if any, thereto. The information is therefore significant and Colorado Chem-Pak's failure to respond in any manner to the ALJ's pre-hearing order warrants a finding of default.

The remaining question is whether the proposed penalty of \$4,000 is appropriate. Although Rule 22.17 (40 CFR Part 22) provides in part that "[upon a finding of default] the full amount of the penalty proposed in the complaint shall become due and payable without further proceedings. . . .", courts have, nevertheless, held that the factors in FIFRA § 14(a)(4) must be

considered. Katzson Brothers, Inc. v. U.S. EPA, 839 F.2d 1396 (10th Cir. 1988). Among factors required to be considered by the cited section of the Act is the gravity of the violation. The FIFRA Enforcement Response Policy (ERP) (July 2, 1990), provides that the gravity "level" for each violation of FIFRA is listed in Appendix A of this ERP (Id. 21). The "levels" assigned to each violation of FIFRA represent an assessment of the relative gravity of each violation. Failure to submit pesticide production reports required by FIFRA § 7 is regarded as a Level 2 violation (ERP A-5). The ERP provides that the gravity of record keeping and reporting violations are already considered in the dollar amounts in the FIFRA civil penalty matrices and that these violations do not lend themselves to utilizing the adjustments listed in Appendix B (Id. 22). Therefore, first-time penalties should be assessed at the matrix value. The Level 2 matrix value is \$3,000, \$4,000 or \$5,000 depending on the size of the business. As indicated previously, Colorado Chem-Pak has been placed in Category 2 as to size of business and it is proposed to assess a penalty of \$4,000. It is concluded that this appropriately considers the gravity of the violation.

Remaining for consideration, is the affect of the proposed penalty on Respondent's ability to continue in business. In this regard, the motion to dismiss filed by Colorado Chem-Pak in the bankruptcy proceeding provided in pertinent part that "(r)ecently, issues have arisen which, in the judgment of management, significantly impair its ability to reorganize under Chapter 11."

The motion further recited that conversion of this case under Chapter 7 is not in the best interest of creditors of the estate, because virtually all of the Debtor's assets are subject to liens securing indebtedness in excess of the liquidation value of the property. While these representations make Respondent's ability to pay any penalty problematic, its income tax return for the year 1991 shows gross income of \$381,168. This is sufficient to invoke a presumption of ability to pay a penalty of \$4,000 in accordance with the ERP (Id. at 23, 24).

It is concluded that the penalty proposed in the complaint is appropriate and will be assessed.

#### FINDINGS OF FACT

1. Respondent is Colorado Chem-Pak, Inc., a Colorado corporation located in Commerce City, Colorado. Income tax return for Respondent and its predecessor, Colorado Aerosols, Inc., indicate that gross income for the years 1988 through 1991 ranged from \$156,603 to \$595,633.
2. Respondent is a person as defined in FIFRA, 7 U.S.C. § 136(s) which makes the Respondent subject to FIFRA regulations.
3. Respondent is also a producer as defined by FIFRA, 7 U.S.C. § 136(w). As such, the Respondent is required to file Annual Reports with the EPA containing the types and amounts of pesticides as well as any active ingredients used in producing any pesticides. 7 U.S.C. § 136e(c)(1).

4. The regulation, 40 CFR § 167.85(d), provides that all producers must file an Annual Report by March 1 of the following year, even if no pesticides were produced for the reporting year.
5. Respondent Chem-Pak did not file an Annual Report with the EPA for 1990 by the March 1, 1991, deadline.

#### C O N C L U S I O N S

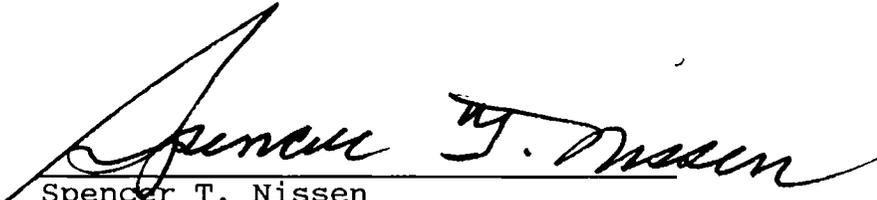
1. Respondent is in default for failing to participate in the pre-hearing exchange ordered by the ALJ by letter, dated November 10, 1992. As a consequence, the Respondent has waived the right to a hearing to contest the factual allegations of the complaint. 40 CFR § 22.17(a).
2. Respondent is in violation of FIFRA, 7 U.S.C. § 136e(c)(1), for failure to file an Annual Report for 1990 as required under FIFRA by the March 1, 1991, deadline imposed by EPA regulation. 40 CFR § 167.85(d).
3. Any violation of section 136e of Title 7 is deemed unlawful. 7 U.S.C. § 136j(a)(2)(L). The penalty of \$4,000 proposed for this violation is appropriate and will be assessed.

ORDER<sup>2/</sup>

It having been determined that Colorado Chem-Pak, Inc. violated FIFRA § 7 as alleged in the complaint, a penalty of \$4,000 is assessed against it in accordance with Section 14 of the Act (7 U.S.C. § 1361(a)(4)). Payment of the full amount of the penalty shall be made within 60 days of the date of this order by sending a cashier's or certified check in the amount of \$4,000 payable to the Treasurer of the United States to the following address:

Regional Hearing Clerk  
U.S. EPA, Region VIII  
P.O. Box 360859M  
Pittsburgh, PA 15251

Dated this 6<sup>th</sup> day of December 1994.

  
Spencer T. Nissen  
Administrative Law Judge

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<sup>2/</sup> In accordance with Rule 22.17(b) (40 CFR Part 22), this default order constitutes an initial decision, which, unless appealed to the EAB in accordance with Rule 22.30, or unless the EAB elects to review the same sua sponte as therein provided, will become the final order of the EAB in accordance with Rule 22.27(c).