



UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)
)
Pan American Growers) DOCKET NO. FIFRA-04-2010-3029
Supply, Inc.,)
)
RESPONDENT)

DEFAULT ORDER

Respondent Pan American Growers Supply, Inc., ("Respondent") is hereby found in default for failure to file an answer in conformity with 40 C.F.R. § 22.15 and failure to participate in a settlement conference, as required by Orders of the undersigned. In addition, Respondent has failed to respond the undersigned's Order to Show Cause, dated September 29, 2010.^{1/}

On March 12, 2010, Complainant, the United States Environmental Protection Agency ("EPA"), filed a Complaint against Respondent Pan American Growers Supply, Inc. ("Respondent"), charging four separate violations of Section 12(a) of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136j(a), in connection with the importation of pesticides. This Complaint was then reserved on April 13, 2010.^{2/} In its Complaint, the EPA seeks a civil administrative penalty of \$18,053 against Respondent.

^{1/} The Order to Show Cause was returned as mail that was "unclaimed and unable to forward."

^{2/} Both copies of the Complaint were addressed to Rosa Giatan, Pan American Growers Supply, Inc., in Miami. The first copy was sent to Ms. Giatan by certified mail, return receipt requested, and the second copy was sent to her by first class mail. The proof of service for the first copy of the Complaint (return receipt) provided by the EPA is illegible and the recipient, if any, cannot be identified. However, there was a response to the Complaint. See *Katzon Bros. v. United States Env'tl. Prot. Agency*, 839 F.2d 1396 (10th Cir. 1988).

On July 16, 2010, a one-page letter was filed by Ines Dominguez, who identified herself as "Authorized Agent" for Pan American Growers Supply, Inc. See *Letter From Ines Dominguez Addressed to Hearing Clerk*, July 9, 2010 ("the Letter"). The Letter was not signed by Rosa Giatan, the party to whom the Complaint was mailed.^{3/} The Letter from Ines Dominguez requested a possible settlement, claimed the violations were unintentional, identified a third-party brokerage firm as the liable party, and claimed an inability to pay the proposed penalty. The Letter was construed as an answer and was referred to the Office of Administrative Law Judges.

On August 19, 2010, the undersigned issued an Order on Respondent's Answer and Directing Settlement Conference advising Respondent that its letter from Ines Dominguez was insufficient to satisfy the requirements of an answer and to file a clarified answer by September 17, 2010.^{4/} The parties were directed to hold a settlement conference by September 24, 2010. The Order also directed the Respondent to provide some proof that Ines Dominguez had authority to enter an appearance on Respondent's behalf. The Complainant was ordered to file a status report regarding the settlement conference by October 1, 2010.

On September 27, 2010, Complainant filed a Status Report Regarding Settlement in which it states that no settlement conference call had occurred. In the Status Report, Complainant states that it left a telephone message with Respondent's representative on September 8, 2010, followed by a letter to Respondent's representative on September 17, 2010. Both communications explained the need to hold a settlement

^{3/} Although Rule 22.10 of the Rules of Practice allows Respondent to be represented by any "other representative," there must be adequate proof that Respondent has authorized such individual to represent it in matters before the EPA (i.e., an affidavit from a corporate officer appointing an agent to act on its behalf in a civil administrative enforcement action against the corporation). 42 C.F.R. § 22.10.

^{4/} The Letter did not admit or deny any of the factual allegations contained in the Complaint nor did it delineate any grounds of defense. The Order informed Respondent that the Rules of Practice require that an answer clearly and directly admit, deny, or deny knowledge of each of the factual allegations contained in the complaint. The Order also directed Respondent to state whether or not a hearing is requested.

conference call. Complainant states that on September 21, 2010, a second telephone call was placed to Respondent's representative, but the call could no longer be completed as dialed.

On September 29, 2010, the undersigned issued an Order to Show Cause advising Respondent that it may be found in default for failing to comply with an order of the Administrative Law Judge for failing to file a clarified Answer, as ordered, by September 17, 2010. The Ordered directed the Respondent to show cause, by October 15, 2010, why it failed to meet the deadline. Respondent has not responded to the Order to Show Cause issued to it.

Section 22.17 of the Rules of Practice applicable to this proceeding, 40 C.F.R. § 22.17, provides, in pertinent part:

(a) *Default.* A party may be found in default: after motion, upon failure to file a timely answer to the complaint ... or an order of the Presiding Officer; or upon failure to appear at a conference or hearing. Default by the 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.

* * *

(c) *Default order.* When the Presiding Officer finds that a 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. If the order resolves all outstanding issues and claims in the proceeding, it shall constitute the initial decision under these Consolidated Rules of Practice. The relief proposed in the complaint ... shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act.

* * *

(d) *Payment of penalty; effective date of compliance...* Any penalty assessed in the default order shall become due and payable by respondent without further proceedings 30 days after the default order becomes final under § 22.27(c).

The Complaint in this case seeks \$18,053 against the Respondent, which is less than the amount allowed pursuant to the governing statute.^{5/} Complainant stated in the Complaint that the penalty amount was derived in accordance with the July 2, 1990, Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act for the violations cited for a Category I Respondent. Respondent considered the size of Respondent's business, the effect on the Respondent's ability to continue in business, and the gravity of the violation.

Respondent's initial Letter stated that "it is doing very poorly and is not in a position to pay such fines." Respondent referenced its "yearly reports" in support of its assertion but did not provide any documentation. With respect to the appropriateness of the penalty,

the Complainant has the initial burden of production to establish that the penalty is appropriate and as part of that burden, that a respondent generally has the ability to pay the proposed penalty. The burden of production then shifts to the respondent to establish with specific information that the proposed penalty assessment is excessive or incorrect. If a respondent satisfies its burden of production, the Complainant must rebut respondent's contentions through rigorous cross-examination or through the introduction of additional information.

Chempace Corporation, 9 E.A.D. 119, 133 (EAB 2000) (footnotes omitted).

Here, Respondent has furnished no such supporting documentation. Thus, Respondent is deemed to have waived any objection to the penalty based upon the factor of ability pay. See *In the Matter of New Waterbury, Ltd.*, 5 E.A.D. 529, 542. (EAB 1994). Moreover, the Rules of Practice at Section 22.17(c), 40 C.F.R. § 22.17(c), provide that when the Administrative Law Judge finds that default has occurred, the relief proposed in the complaint shall be ordered unless the

^{5/} Pursuant to Section 14 of FIFRA, 7 U.S.C. § 1361, in conjunction with the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701, and 40 C.F.R. § 19.4, Respondent may have been liable for civil penalties of up to \$6,500 per violation. The proposed penalty is based on four alleged violations.

penalty requested is "clearly inconsistent" with the record of the proceeding or the Act.

In conclusion, I find Respondent to be in default for its failure to file a clarified Answer and its failure to participate in a settlement conference, as ordered in the August 19, 2010 Order on Respondent's Answer and Directing Settlement Conference. Further, Respondent failed to respond to the undersigned's Order to Show Cause.

Default by Respondent constitutes admissions of all facts alleged in the Complaint and waivers of Respondent's rights to contest such factual allegations. See 40 C.F.R. § 22.17(a). The facts alleged in the instant Complaint establish Respondent's violations of FIFRA as charged. Upon review, I find that the penalty requested by Complainant is not "clearly inconsistent" with the record of the proceeding or the Act. See 40 C.F.R. § 22.17(c). Therefore, the proposed penalty, \$18,053, is assessed against Respondent.

ORDER

- I. Respondent is found in default for its failure to file a clarified Answer and to participate in a settlement conference, as ordered by the undersigned Administrative Law Judge in the August 19, 2010 Order on Respondent's Answer and Directing Settlement Conference, and for its failure to respond to the September 29, 2010 Order to Show Cause. No good cause is shown why a default order should not be issued.
- II. Respondent Pan American Growers Supply, Inc. is assessed a civil administrative penalty in the amount of \$18,053.
- III. Payment of the full amount of this civil penalty shall be made within thirty (30) days of the effective date of the final order by submitting a cashier's check or a certified check in the amount of \$18,053, payable to "Treasurer, United States of America," and mailed to:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, MO 63197-9000

Contacts: Craig Steffen (513-487-2091),

Eric Volck (513-487-2105)^{6/}

^{6/} Alternatively, Respondent may make payment of the penalty as follows:

WIRE TRANSFERS:

Wire transfers should be directed to the Federal Reserve Bank of New York

Federal Reserve Bank of New York
ABA = 021030004
Account = 68010727
SWIFT address = FRNYUS33
33 Liberty Street
New York, NY 10045
(Field Tag 4200 of the Fedwire message should read
"D 68010727 Environmental Protection Agency")

OVERNIGHT MAIL:

U.S. Bank
Government Lockbox 979077
US EPA Fines & Penalties
1005 Convention Plaza
SL-MO-C2-GL
St. Louis, MO 63101

Contact: (314-418-1028)

ACH (also known as REX or remittance express):

Automated Clearinghouse (ACH) for receiving US currency

U.S. Treasury REX/Cashlink ACH Receiver
ABA = 051036706
Account No. 310006
Environmental Protection Agency
CTX Format

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- IV. A transmittal letter identifying the subject case and EPA docket number (FIFRA-04-2010-3029), as well as Respondent's name and address, must accompany the check.
- V. If Respondent fails to pay the penalty within the prescribed statutory period after the entry of the Order, interest on the civil penalty may be assessed. 31 U.S.C. § 3717; 40 C.F.R. § 13.11.

APPEAL RIGHTS

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 Default Order, which constitutes an Initial Decision pursuant to 40 C.F.R. § 22.17(c), shall become the Final Order of the Agency unless an appeal is filed with the Environmental Appeals Board ("EAB") within thirty (30) days after service of this Order, or the EAB elects, *sua sponte*, to review this decision.

Barbara A. Gunning
Administrative Law Judge

Dated: November 30, 2010
Washington, DC

6/ (...continued)
Transaction Code 22 - checking
Contact: Jesse White (301-887-6548)

ON LINE PAYMENT:

This payment option can be accessed from the information below:

Visit <http://www.pay.gov>
Enter "sfo 1.1" in the search field.
Open form and complete required fields.