

7/28/92

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
BEFORE THE ADMINISTRATOR

IN THE MATTER OF )  
 )  
BIO-REGIONAL ENERGY ASSOCIATES, ) IF&R Docket No. III-423-C  
LTD., )  
 )  
Respondent )

ORDER ON DEFAULT

I. Preliminary Statement

This civil administrative proceeding for the assessment of a civil penalty was initiated by the issuance of a complaint by the United States Environmental Protection Agency (EPA or Complainant) pursuant to Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136 et seq., (FIFRA) and regulations promulgated thereunder. The complaint charges, in two counts, that Bio-Regional Energy Associates, Ltd. (Bio-Regional or Respondent) has violated Section 12(a)(2)(L) of FIFRA, 7 U.S.C. §§ 136j(a)(2)(L) and the applicable regulation, 40 C.F.R. § 167.85.

II. Initial Findings of Fact

1. On September 28, 1990, EPA issued a Complaint and Notice of Opportunity for Hearing (complaint) against Respondent, alleging the failure to file timely the required annual pesticide production report for the 1988 and 1989 production years, as required by Section 7 of the Act, 7 U.S.C. § 136e, and the regulations promulgated thereunder. The complaint was served by certified

mail, return receipt requested, on Mr. Luke Staengl, President, Bio-Regional Energy Associates, Ltd., Floyd Industrial Park Road, Floyd, VA 24091. Receipt of the complaint is evidenced by the signed return receipt and by acknowledgement of such receipt in Respondent's answer, both of which are part of the record of this matter.

2. The complaint in this action proposed the assessment of a civil penalty of \$10,000.00 against the Respondent. The penalty was calculated in accordance with EPA's Enforcement Response Policy for the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), dated July 2, 1990 and the EPA's Enforcement Response Policy for FIFRA Section 7(c) Pesticide-Producing Establishment Reporting Requirement, dated February 10, 1986 (Enforcement Response Policies). For the purpose of this penalty calculation, Complainant referenced a Dun & Bradstreet report dated August 8, 1990, indicating that Respondent's 1989 gross annual sales were four million dollars (\$4,000,000). Therefore, Respondent was considered to be in the largest business size (sales exceeding \$1,000,000) for the purposes of penalty calculation, lacking any evidence to the contrary. According to the Enforcement Response Policies, the appropriate penalty for a Category I business is \$5,000 per count for each violation alleged in the complaint.

3. The complaint advised Respondent that this administrative proceeding would be conducted in accordance with the provisions of the Administrative Procedure Act, 5 U.S.C. §§ 551 et seq., and the Consolidated Rules of Practice (CROP), 40 C.F.R. Part 22, 45 Fed.

Reg. 24360 (April 9, 1980). Furthermore, a copy of the CROP was enclosed with the complaint.

4. On or about October 23, 1991, Respondent filed an answer to the complaint conceding that both Count I and Count II of the complaint were "accurate." Enclosed with the answer were Respondent's annual pesticide production reports for 1988 and 1989.

5. On February 12, 1991, the undersigned presiding Chief Administrative Law Judge issued a directive requiring the parties to submit their respective prehearing exchanges on April 24, 1992, if a settlement had not been reached by that date. Both parties were served via certified mail, return receipt requested. The return receipt from Respondent shows that this directive was received on February 19, 1991.

6. At the request of Complainant the parties were granted an extension of time to June 24, 1991, to file a consent agreement and final order or, in lieu thereof, the prehearing exchange. On subsequent motions filed by the Complainant, this date was extended to August 26, 1991 and then to December 26, 1991.

7. On December 23, 1991, Complainant filed its prehearing exchange.

8. On January 28, 1992, the presiding Chief Administrative Law Judge issued an order to show cause directing the Respondent to show cause why the prehearing exchange, or a motion for extension of time in which to file the prehearing exchange, had not been filed. The order directed Respondent's attention to 40 C.F.R. § 22.17(a) which provides, in pertinent part: "A party may be found

to be in default . . . after motion or sua sponte, upon failure to comply with a prehearing or hearing order of the Presiding Officer . . . ." The order was served on the parties by certified mail. No response from Respondent was forthcoming.

9. On February 4, 1992, one Dale Profitt, Esq. served upon the presiding Chief Administrative Law Judge a copy of a letter directed to Complainant. That letter stated, in pertinent part, that Mr. Profitt "used to represent" Respondent and that "Bio-Regional Energy Associates, Ltd., is no longer in business nor in existence." On February 5, 1992, Mr. Profitt served upon the presiding Chief Administrative Law Judge a copy of a second letter directed to Complainant. That letter transmitted a copy of a January 27, 1992, letter to "Bio-Regional Shareholder" informing said shareholders that "Bio-Regional Energy Associates, Limited has ceased to exist, as of December 31, 1991."

10. No prehearing exchange has been filed by Respondent.

### III. Conclusions of Law

1. Respondent has failed to comply with the order of the presiding Chief Administrative Law Judge to file its prehearing exchange, and has failed to comply with the presiding Chief Administrative Law Judge's Order to Show Cause, or in any other way to show good cause as to why its prehearing exchange has not been filed, and is therefore in default pursuant to 40 C.F.R. § 22.17(a). Respondent's claim that it "ceased to exist" some days after the prehearing exchange was due does not constitute good cause.

2. Pursuant to 40 C.F.R. § 22.17, said default constitutes an admission by Respondent of all the facts alleged in the Complaint and a waiver of Respondent's right to a hearing on such factual allegations.

Therefore, I make the following:

IV. Additional Findings of Fact and Conclusions of Law as Alleged by Complainant

1. Respondent is a corporation which has, at all times relevant to this complaint, been doing business in the Commonwealth of Virginia.

2. During 1988 and 1989, Respondent was a pesticide producer as defined in Section 2(w) of FIFRA, 7 U.S.C. § 136(w), and 40 C.F.R. § 167.3. During those years, Respondent maintained a pesticide-producing establishment in Floyd, Virginia, which was registered with EPA under Establishment Number 60169-VA-001.

3. As a producer, Respondent was subject to the requirements of Section 7 of FIFRA, 7 U.S.C. § 136e, and the applicable regulations promulgated pursuant thereto contained in 40 C.F.R. Part 167.

4. According to Section 7(c)(1) of FIFRA, 7 U.S.C. § 136e(c)(1) and the applicable regulations, 40 C.F.R. §§ 167.3 and 167.85, Respondent is required to submit a pesticide-production report to EPA within thirty (30) days of its initial registration and then on or before March 1, annually. This report must cover the production of Respondent's pesticide(s) for the previous calendar year and the anticipated production for the subsequent year.

5. EPA sent Respondent a blank initial pesticide report form on or about November 18, 1988. EPA advised Respondent to return the completed form within thirty (30) days of its receipt.

6. EPA did not receive a completed thirty (30) day pesticide report for the 1988 production year. Although Respondent received a copy of the FIFRA regulations, indicating the thirty (30) day report must be returned even if Respondent had no production, the report was not returned to EPA.

7. Respondent's failure to complete and submit an initial report within thirty (30) days as required by Section 7(c)(1) of FIFRA, 7 U.S.C. § 136e(c)(1) and the applicable regulation, 40 C.F.R. § 167.85, constitutes a violation of Section 12(a)(2)(L) of FIFRA, 7 U.S.C. § 136j(a)(2)(L).

8. EPA sent Respondent a blank annual pesticide report form for the 1989 calendar year on or about January 12, 1990. EPA advised Respondent to return the completed form by March 1, 1990.

9. EPA has not received a completed annual pesticide report from Respondent for the 1989 production year.

10. Respondent's failure to complete and submit an annual pesticide production report for 1989 as required by Section 7(c)(1) of FIFRA, 7 U.S.C. § 136e(c)(1), and the applicable regulation, 40 C.F.R. § 167.85, constitutes a violation of Section 12(a)(2)(L) of FIFRA, 7 U.S.C. § 136j(a)(2)(L).

#### V. Discussion and Ultimate Conclusion

Respondent's answer to the complaint does not raise any matter which could support a decision that Complainant has failed to

establish a prima facie case or could justify the dismissal of the complaint. An examination of the prehearing exchange documents submitted by Complainant buttresses the allegations in the complaint that Respondent violated Section 12(a)(2)(L) of FIFRA, 7 U.S.C. §§ 136j(a)(2)(L), as alleged. I therefore find that Respondent has violated the Act by failing to file pesticide production reports for the years 1988 and 1989 as required by Section 7(c)(1) of the Act, 7 U.S.C. § 136e(c)(1), and the applicable regulations, 40 C.F.R. §§ 167.3 and 167.85, which constitutes a violation of Section 12(a)(2)(L) of the Act, 7 U.S.C. § 136j(a)(2)(L).

#### VI. The Penalty

Section 14(a)(4) of FIFRA, 7 U.S.C. § 1361(a)(4), states that "[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." Section 14(a)(1), 7 U.S.C. § 1361(a)(1) limits the civil penalty for any "dealer, retailer or other distributor" to \$5,000 for each offense.

Section 22.27(b) of the Consolidated Rules of Practice (40 C.F.R. § 22.27(b)) states, in pertinent part:

If the Presiding Officer determines that a violation has occurred, the Presiding Officer shall determine the dollar amount of the recommended civil penalty to be assessed in the initial decision in accordance with any criteria set forth in the Act relating to the proper amount of a civil penalty, and must

consider any civil penalty guidelines issued under the Act. If the Presiding Officer decides to assess a penalty different in amount from the penalty recommended to be assessed in the complaint, the Presiding Officer shall set forth in the initial decision the specific reasons for the increase or decrease.

In view of the above violations and pursuant to Section 14(a) of FIFRA, 7 U.S.C. § 1361(a), a civil penalty of \$10,000 is hereby assessed against Respondent as follows:

Count I

Failure to submit an initial production report no later than 30 days after registration	\$ 5,000
---	----------

Count II

Failure to submit an annual production report for the 1989 reporting year	<u>5,000</u>
---	--------------

Total Proposed Penalty	\$10,000
------------------------	----------

The proposed civil penalty has been determined in accordance with EPA's Enforcement Response Policies (supra p. 2). Section 14 of FIFRA, 7 U.S.C. § 1361, requires that the penalty amount be based upon the size of Respondent's business, the effect of the penalty on Respondent's ability to continue in business, and the gravity of the violation. The amount of the penalty was determined pursuant thereto and in consideration of the guidance set forth in the Enforcement Response Policies.

DEFAULT ORDER AND FINAL ORDER

Under the authority of the FIFRA and the CROP, 40 C.F.R. Part 22, Respondent is found to be in default.

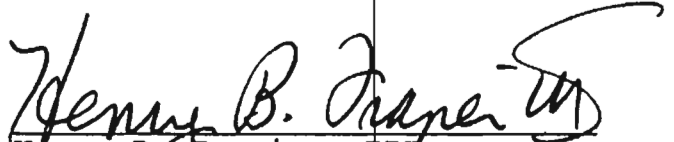
NOW THEREFORE, pursuant to 40 C.F.R. § 22.17, Respondent is hereby ordered to pay a civil penalty of ten thousand dollars (\$10,000.00). Payment of the full amount of this penalty shall be made within sixty (60) days of receipt of this order by Respondent, by forwarding a cashier's or certified check, payable to the United States of America, to EPA Region III, Regional Hearing Clerk, P.O. Box 360515M, Pittsburgh, Pennsylvania 15251. At the same time payment is made, a copy of the check shall be mailed to the Regional Hearing Clerk, U.S. EPA, Region III, 841 Chestnut Building, Philadelphia, Pennsylvania 19107.

The following notice concerns interest and late payment penalty charges that will accrue if the civil penalty set forth above is not paid within sixty (60) days of Respondent's receipt of this Default Order:

Pursuant to 31 U.S.C. § 3717, an executive agency is entitled to assess interest and penalties on debts owed to the United States. Interest will begin to accrue on this civil penalty if it is not paid within 60 days of Respondent's receipt of this Default Order. 4 C.F.R. § 102.13(b). Interest will be assessed at the rate of the United States Treasury tax and loan rate. 4 C.F.R. § 102.13(c). In addition, a penalty charge of six percent per year will be assessed on any portion of the debt which remains delinquent more than 90 days after payment is due. However, should assessment of the penalty charge on the debt be required, it will be assessed as of the first day payment is due. 4 C.F.R. § 102.13(e).

Thus, to avoid the assessment of interest, Respondent must pay the civil penalty within sixty (60) days of receipt of this Default Order. To avoid the assessment of penalty charges on the debt, Respondent must pay the civil penalty within one hundred and fifty (150) days of receipt of this Default Order.

SO ORDERED.

  
Henry B. Frazier, III  
Chief Administrative Law Judge

Dated: July 28, 1992  
Washington, DC

RE  
EPA  
HEA

Certificate of Service 1992 AUG -4 3: 53

I hereby certify that copies of the Order on Default in the matter of Bio-Regional Energy Associates LTD, Docket No. I.F.& R.-III-423-C, was served to all parties. The original of the Default Order along with the record of the proceedings has been delivered to the Headquarters Hearing Clerk.

Certified Mail To:

Dale Profitt, Attorney, P.C.  
P.O. Box 436  
Floyd, VA 24091

Certified Mail To:

Ms. Bessie Hammiel  
Headquarters Hearing Clerk (A-110)  
U.S. Environmental Protection Agency  
401 M Street, S.W.  
Washington, D.C. 20460

Hand Delivered To:

Donald J. Lott, Chief  
Pesticides Management Section (3AT32)  
US EPA - Region III  
841 Chestnut Building  
Philadelphia, PA 19107

Hand Delivered To:

Douglas J. Snyder,  
Assistant Regional Counsel  
US EPA - Region III  
841 Chestnut Building  
Philadelphia, PA 19107

Date: JUL 31 1992

*Lydia A. Guy*  
Lydia A. Guy  
Regional Hearing Clerk