UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Kirlin Enterprises, Inc.	)	Docket No. FIFRA-III-277-C
(Combustioneer Water Treatment	)	
Division),	)	
	)	
Respondent	)	

1. FIFRA - Relationship of Respondent Corporation to a corporate division with respect to assessing penalties - A corporate division has no independent status and its failure to file a production report form as required by Section 7(c)(1) for an establishment registered in its name is the act of the corporation of which it is a division.

2. FIFRA - assessment of penalties against Respondent corporation for failing to file a production report form - corporation assessed a penalty under Section 14(a)(1) as a registrant although registration was in the name of a corporate division.

3. FIFRA - evaluating the adverse effects of penalty - in assessing a penalty for failure to file a report form for a pesticide establishment registered in the name of a corporate division, it is the affect of the penalty upon the corporation's ability to continue in business that is to be considered.

Appearance for Complainant: Henry H. Sprague, Esquire
Office of Regional Counsel
U.S. EPA, Region III
841 Chestnut Building
Philadelphia, PA 19107

Appearance for Respondent: Dennis M. McHugh, Esquire
200A Monroe Street
Suite 300
Rockville, MD 20850

Initial Decision

This is a proceeding under the Federal Insecticide, Fungicide and Rodenticide Act, as amended ("FIFRA"), Section 14(a)(1), 7 U.S.C. § 136 l (a)(1), for an alleged violation of the Act. 1/

A complaint on behalf of the United States Environmental Protection Agency ("EPA") was issued by the Director, Hazardous Waste Management Division for EPA's Region III, on November 19, 1985, charging that Kirlin Enterprises, Inc. through its Combustioneer Water Treatment Division was a pesticide producer and had failed to file an annual pesticide report for the year 1984. Such annual reports are required by FIFRA, Section 7(c)(1), and for 1984, the report was due on April 15, 1985. A penalty of $3,200 was requested.

An answer was filed asserting that the 1984 annual report along with other data requested by the EPA had been mailed in a packet to the EPA on June 17, 1985, but the packet apparently was never received by the EPA. A report was submitted with the answer and it was requested that the penalty be dropped. 2/

1/ FIFRA, Section 14(a)(1), provides as follows:

> Any registrant, commercial applicator, wholesaler, dealer, retailer or other distributor who violates any provision of this Act may be assessed a civil penalty by the Administrator of not more than $5,000 for each offense.

2/ The answer was in the form of a letter dated December 17, 1985, from the Combustioneer Water Treatment Division and signed by the service manager. No specific request was made for a hearing. Under the rules of practice, 40 C.F.R. 22.16(c), however, a hearing may still be held if issues appropriate for adjudication are raised in the answer, and the parties were so advised in a prehearing letter I sent to them on January 16, 1986.

Settlement was discussed but no agreement reached. The parties then agreed to stipulate to the facts as "outlined in the complaint regarding the issue of liability." They also agreed to waive their right to a hearing and moved to submit on briefs the issue of the appropriate amount of penalty to be assessed. 3/ The motion was granted and this decision is rendered on the parties' submissions, and the pleadings and other papers filed in this proceeding. 4/

Findings of Fact

The facts stipulated to are as follows:

1. Respondent Kirlin Enterprises, Inc. ("Respondent") is a corporation doing business in Maryland.
2. During 1984, Respondent was a pesticide producer as defined in FIFRA, Section 2(w), 7 U.S.C. § 136(w), and 40 C.F.R. § 167.1. During that year Respondent maintained a pesticide-producing establishment in Rockville, Maryland, which was registered with the EPA under establishment number 46773-MD-001.
3. As a producer, Respondent was subject in 1984 to the requirements of FIFRA, Section 7, 7 U.S.C. § 136e, and the applicable regulations promulgated pursuant thereto contained in 40 C.F.R. Part 167.
4. According to FIFRA, Section 7(c)(1), 7 U.S.C. § 136e(c)(1), and the applicable regulation, 40 C.F.R. § 167.5, Respondent was required to submit an annual pesticide report on EPA Form 3540-16 on or before

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3/ Joint Motion by EPA attorney dated February 26, 1986, and Respondent's response to motion dated March 3, 1986.

4/ Complainant's motion for the admission of additional evidence, being unopposed is granted. Exhs. 2, 3 and 4 attached to that motion (hereafter Complainant's Exhs. 2, 3 and 4), are admitted into evidence as part of the record of this decision.

February 1, 1985. Because the Agency mailed the annual report forms to producers late, it extended that deadline (for that year) to April 15, 1985.

5. EPA sent the Respondent an annual pesticide report form on or about February 15, 1985. EPA advised Respondent to return the completed form by April 15, 1985, the new deadline.

6. When no report was received by the deadline, EPA sent Respondent a notice of Warning on April 26, 1985. The Notice provided a new Form 3540-16, and gave Respondent ten (10 days to complete and return the form.

7. As of the date of the complaint (November 19, 1985), EPA had not received a completed annual pesticide report on Form 3540-16 from Respondent for the production year 1984.

Discussion, Conclusions and Penalty

Respondent's principal argument is that the penalty can only be assessed against its Combustioneer Water Treatment Division, under whose name the establishment was registered, and the possible adverse effects of the penalty must be weighed against the financial condition of the Division. According to Respondent, the Water Treatment Division had a net loss of $14,053, for the annual period ending in February 1985, and a net income of $9,650, for the period from March through November 1985. 5/

Respondent rests its argument upon the wording of Section 14(a)(1), which provides for the assessment penalties against a "registrant, commercial

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5/ The figures quoted are for the Water Treatment Division. The Water Treatment Division's operation's are part of the operations of the Combustioneer Division which is also a division of Respondent. The Combustioneer Division appears to have had a net income of $44,023, for the same February period. See Complainant's Exh. 4; Respondent's answer brief at 5.

applicator, wholesaler, dealer, retailer or other distributor." The violation charged here is that of a registered pesticide-producing establishment failing to file an annual report, so the question is whether Respondent or only its Water Treatment Division is the registrant subject to civil penalties under FIFRA, Section 14(a)(1). Respondent argues that it must be the Water Treatment Division because the establishment is registered in its name. 6/

The Supreme Court has stated that in interpreting a statute, "the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute (or statutes on the same subject) and the objects and policy of the law, as indicated by its various provisions, and give to it such a construction as will carry into execution the will of the legislature." Kokoszka v. Bedford, 417 U.S. 642, 650 (1974) (quoting Brown v. Duchesne, 19 How. 183, 194 (1857).

Although Respondent attempts to draw a distinction between it and its Water Treatment Division, Respondent nevertheless admits liability for the violation. It would seem to follow logically then that if Respondent is not liable for civil penalties under Section 14(a)(1), it must necessarily be subject to the milder penalty provisions of Section 14(a)(2). That section covers the assessment of civil penalties against a private applicator or other person not included in paragraph (a)(1). The maximum penalty under Section 14(a)(2) is limited to $1,000, and can only be assessed against one

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6/ The registration in the Water Treatment Division's name is shown on the Pesticide Report for 1984, which was submitted with Respondent's letter of December 17, 1985.

who violates a provision of FIFRA subsequent to receiving a written warning or following a citation for a prior violation. 7/ The legislative history provides a key to the purpose of Section 14(a)(2). Section 14 was added by the Federal Environmental Pesticide Control Act of 1972, Pub. L. No. 92-516, 86 Stat. 973 (1972). A supplemental report from the Senate Committee on Agriculture and Forestry while the legislation was under consideration, in explaining why the Committee was opposed to increasing the maximum penalty for persons not covered by Section 14(a)(1), stated as follows:

> The amendment of the Committee on Agriculture and Forestry provided for an orderly progression of penalties based on the seriousness of the offense. Thus, starting with the ordinary householder, private applicator, farmer, or other person not in the pesticide business committing an offense not deemed suitable for criminal prosecution the Committee on Agriculture provided for a maximum civil penalty of $1,000. For an offense by such a person deemed serious enough for criminal prosecution the maximum penalty would be $1,000 plus imprisonment for 30 days. The Committee on Agriculture and Forestry felt that an offense by a registrant, commercial applicator, wholesaler, dealer, retailer, or other distributor should be treated more seriously than an offense by a householder. A registrant, for exmple, should have greater knowledge of the dangers of pesticides and greater familiarity with the law regulating their use. A violation by a registrant would be much more likely to have widespread and serious effects than a violation by a householder, home gardener, or farmer. Consequently, the amendment of the Committee on Agriculture and Forestry prescribed a civil penalty of not more than $5,000 for an offense by a person in the business of making, selling, or applying pesticides. An offense by such a person serious enough for criminal prosecution would be subject to a fine of up to $25,000 and imprisonment for up to 1 year.
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> The amendment proposed by the Commerce Committee would permit a household who misuses a roach spray in his own house to be subjected to double the civil penalty which could be imposed on a commercial applicator spraying an entire forest by airplane. The Committee on Agriculture and Forestry recommends rejection of this amendment. Supp. Rept. of Comm. on Agriculture and Forestry on H.R. 10279, S. Rep. 92-838 (Part II), 92d Cong. 2d Sess. 23 (1972).

7/ An exception is made for certain applicators, which would not pertain to Respondent. They may be assessed a civil penalty of up to $500 for a first offense.

It is plain that the concerns of penalizing non-commercial pesticide users which led to different treatment in Section 14(a)(2) for violations by private applicators and other persons not included in Section 14(a)(1), would not apply to Respondent. Respondent nevertheless argues that so far as Section 14(a)(1) is concerned, assessment of the penalty must be based solely upon what it claims are the assets and earnings of the Water Treatment Division, because that is the actual registrant. A corporate division has no separate legal existence but is the corporation itself. Western Beef, Inc. v. Compton Inv. Co., 611 F.2d 587(5th Cir. 1980). Accepting Respondent's construction of Section 14(a)(1), provides a convenient way for owners of pesticide producing establishments to reap the benefits of operating the establishment while insulating themselves from the more stringent sanctions of Section 14(a)(1). When Section 14(a)(1) is considered in light of the entire statutory scheme and the pertinent legislative history it is clear that no such result was intended.

The case of Oner II, Inc. v. United States Environmental Protection Agency, 597 F.2d 184 (9th Cir. 1979), cited by Respondent is simply not in point. The case involved the liability of a successor corporation and its president for violations of FIFRA committed by the predecessor corporation. The court set aside the order against the president because of the absence of findings and the conclusions to justify holding the president liable. Here, Respondent has admitted its liability. More to the point, the court held that a successor corporation could be held liable for violations committed by the predecessor corporation, stating that, "[t]he EPA's authority

to extend liability to successor corporations stems from the purpose of the statute it administers, which is to regulate pesticides to protect the national environment . . . . The agency may pursue the objectives of the Act by imposing successor liability where it will facilitate enforcement of the Act." 597 F.2d at 186. That same reasoning applies to not letting Respondent, by obtaining or holding a registration in the name of one of its divisions, shield itself from full liability as a registrant.

I find, accordingly, that Respondent is subject to civil penalties under Section 14(a)(1) for the reporting violation involved in this proceeding. 8/

The EPA has proposed a penalty of $3200, in accordance with the FIFRA Civil Penalty Guidelines as modified by a memorandum from the Director of the Pesticides Enforcement Division dated April 22, 1975. 9/ For size of business, the EPA has Respondent in Category V (gross sales of $1 million or more). Respondent's gross sales are not disclosed in the record but gross revenues have been furnished for the Combustioneer Division of which the Water Treatment Division is a part. In what appears to be the annual period ending February 1985, the Combustioneer Division

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8/ The EPA relies on the definition of "person" in the rules of practice, 40 C.F.R. 22.03, for authority to bring this action against Respondent, arguing that a corporate division cannot be a person within the meaning of that definition. The rules of practice being procedural, however, cannot enlarge whatever liabilities are imposed by the substantive statute being enforced. Respondent's liability in penalties as a registrant is predicated here upon the provisions of FIFRA, and not on the consolidated rules of practice.

9/ The FIFRA Civil Penalty Guidelines are published at 39 Fed. Reg. 27711 (July 31, 1974). The guidelines as well as the Enforcement Division memorandum of April 22, 1975, have also been attached as Exh. 1 to the EPA's brief.

had gross revenue of over $4.5 million. 10/ Possibly, the revenues of the Combustioneer Division are subject to offsets (although I am unaware of what they would be) that would result in smaller gross revenue for Respondent. If this is so, Respondent is in possession of the actual financial data to show this. So far as the EPA's burden is concerned, the gross revenues of the Combustioneer Division are a sufficiently reliable indication of the size of Respondent's gross revenues to justify placing Respondent in the category of gross sales of over $1 million, and to shift to Respondent the burden of coming forward with evidence to show that Combustioneer Division's figures do not accurately represent Respondent's gross revenues. If there is such evidence, Respondent has abstained from producing it.

Respondent, instead, has limited its argument to claiming that the proposed penalty is excessive when considered alongside the net income of the Water Treatment Division. What costs and income are to be allocated to a corporate division, rather than to some other branch of Respondent's operations is solely a matter of internal bookkeeping. For example, Respondent has an expense item in the figures for the Water Treatment Division of a "management fee-combustioneer" of $19,500. This same item is shown as other income on the data for the Combustioneer Division. 11/ It is also to be noted that the Combustioneer Division shows a net income over $44,000 for the period ending February 1985. The figures for the Water Treatment Division, consequently, are found to be unreliable in

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10/ Complainant's Exh. 3.

11/ Complainant's Exh. 3.

assessing the accuracy even of Respondent's claim that the proposed penalty would jeopardize continuation of the pesticide operations carried on by the Water Treatment Division. In any event, the penalty does not appear to adversely affect Respondent's ability to continue in business. It would be sheer speculation to attempt to predict whether the penalty would so affect the pesticide operations carried on by the Water Treatment Division that Respondent would now elect to terminate them.

It is found, accordingly, on the preponderance of the evidence, that a penalty of $3200 is appropriate to the size of Respondent's business and will not adversely affect Respondent's ability to continue in business. 12/

One final point should be considered. The complaint charges Respondent with not filing a report for 1984 at all. According to Respondent, however, the report was included in a packet of other forms reguested by the EPA, which was sent on June 17, 1985, to the EPA's Registration Division, Office of Pesticide Programs, at EPA's headquarters in Washington, D.C. 13/ The report should have been sent to the EPA's Region III office in Philadelphia, PA. 14/ Respondent, however, says it was told by the office to whom the packet was sent (which included the report), that the

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12/ Even though this matter is submitted on a stipulation of facts, I must still decide on the preponderance of evidence. See 40 C.F.R. 22.24. In evaluating the record, I am entitled to draw all reasonable inferences from the evidence of record. Vanity Fair Paper Mills, Inc. v. Federal Trade Comm., 311 F.2d 480, 485-86 (2d Cir. 1962).

13/ Respondent's letter of December 17, 1985, in answer to the complaint.

14/ 40 C.F.R. § 167.4(b).

form would be forwarded to the correct address. 15/ Since these allegations are not controverted, they must be accepted as true. Respondent's efforts to comply earlier then service of the complaint upon it might be grounds for some mitigation of the penalty. Here, however, not only was the 1984 form submitted late, even if it was mailed on June 17, 1985, as alleged, but it was not the first time Respondent has been late in filing its report. Respondent in sending its 1983 report had also been dilatory to the point where the EPA had found it necessary to send it a notice of warning. 16/

Accordingly, I find that the appropriate penalty to be assessed against Respondent is $3200.

ORDER 17/

Pursuant to the Federal Insecticide, Fungicide and Rodenticide Act, Section 14(a)(1), 7 U.S.C. 136 l(a)(1), a civil penalty of $3200 is assessed against Respondent Kirlin Enterprises, Inc., for violation of the Act found herein.

15/ Respondent's letter of December 17, 1985, in answer to the complaint.

16/ Complainant's Exh. 4.

17/ Unless an appeal is taken pursuant to the rules of practice, 40 C.F.R. § 22.30, or the Administrator elects to reviewv this decision on his own motion, the Initial Decision shall be come the final order of the Administrator. See 40 C.F.R. § 22.27(c).

Payment of the full amount of the civil penalty assessed shall be made within sixty (60) days of the service of the order upon Respondent forwarding to the Regional Hearing Clerk a cashier's check or certified check payable to the United States of American and mailed to:

EPA Region 3
Regional Hearing Clerk
P.O. Box 360515M
Pittsburgh, PA 15251

Gerald Harwood
Administrative Law Judge

Dated: May 30, 1986
Washington, D.C.