

3/12/92

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of
BESTECH, INC.
Respondent

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*
* Docket No. IF&R-04-91-7073-C
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*

1. FIFRA - Penalty Assessment - where a previous order found the Respondent liable for the counts in the Complaint, it is proper to assess the penalty proposed therein without a hearing upon motion by the Complainant which includes affidavits and other documentation showing that said penalty was calculated in a manner consistent with the mandates of the Act and the relevant penalty policy.

2. FIFRA - Right to a Hearing - neither the law nor the applicable Rules of Practice guarantee a Respondent an absolute right to a hearing.

Appearances:

For Complainant: Craig A. Higgason, Esquire
U.S. Environmental Protection Agency - Region IV
345 Courtland Street, N.E.
Atlanta, Georgia 30365

For Respondent: Richard W. Epstein, Esquire
GREENSPOON, MARDER, HIRSCHFELD
Trade Centre South, Suite 700
100 West Cypress Creek Road
Fort Lauderdale, Florida 33309

Before: Thomas B. Yost
Administrative Law Judge

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HEAR...RK

ORDER ON MOTION FOR ACCELERATED DECISION ON PENALTY

By motion dated November 26, 1991, the Complainant seeks the issuance of an order assessing the penalty proposed in the Complaint in the amount of \$4,000.00. By Order dated July 31, 1991, the Court issued an order finding the Respondent liable for the violation alleged in the Complaint. The Respondent essentially admitted the violation leaving only the amount of the penalty to be determined. The instant motion seeks a determination of that issue. After being granted an extension of time, the Respondent filed its reply to this motion on January 7, 1992.

As was noted in my July 31, 1991 Order, the Respondent's reply to the first motion addressed primarily matters related to the penalty issue, which the Court ruled was irrelevant since the motion only went to the liability question. In its January 7, 1992 reply the Respondent makes several arguments which, as far as I can tell, have no validity. It first argues that there is something suspicious about the Agency's conduct in bringing this action. It argues that the offense took place in 1989 and yet the Complaint wasn't filed until 1990, an alleged ploy to allow the Agency to utilize a new penalty policy which allows for the assessment of higher penalty amounts. In support thereof, the Respondent points to the Agency's Enforcement Response Policy ("ERP") which states that a Complaint "should" be issued within seventy-five (75) days of the violation. I discussed and dismissed this argument in my July 31, 1991 Order. The Respondent makes additional specious arguments such as the fact that the state inspector who visited the

Respondent's facility after the inspection which gave rise to the present action, didn't advise the Respondent that it had failed to file its annual production report (the violation alleged in the Complaint). First of all, the state inspector had no duty to advise the Respondent, and secondly, it appears from an affidavit filed by the Complainant that the state inspector had no knowledge of this failure. He was inspecting the facility for compliance with Section 3 of the Act and not Section 7.

The Respondent reiterates its original argument that the Complainant used the wrong penalty policy in calculating the proposed penalty set out in the Complaint. It says the penalty should be \$1,760.00 rather than \$4,000.00. The original Complaint was filed on November 13, 1990. An amended Complaint was filed on January 17, 1991. The ERP upon which the penalty was calculated was issued on July 2, 1990. It was effective upon issuance and is, thus, the proper document to use in this case. The Respondent's arguments as to this defense are **REJECTED**.

The Respondent next argues that the rules provide it with an absolute right to a hearing on the penalty issue. It first argues that the Complaint states that the Respondent has a right to request a hearing to contest any material facts as well as the appropriateness of the proposed penalty. In this assertion the Respondent is correct. It has the right to request a hearing and if it fails to make such a request, it is not entitled to one except upon sua sponte order of the Court (20 CFR § 22.15(c)). The fact that a hearing is requested does not ipso facto assure a

Respondent that it will get one. To rule otherwise would render 40 CFR § 22.20 meaningless. That section authorizes the issuance of an accelerated decision on all or part of the proceeding without a hearing. It is upon this authority that the original and current motions were brought. This argument is **REJECTED**.

The Respondent also argues that 40 CFR § 20.35 of the rules entitles it to a hearing. This argument is patently absurd. All that section does is to make the Rules of Practice applicable to FIFRA cases and requires the Court to consider any penalty policies adopted by the Agency in determining the penalty to be assessed. I fully intend to do so. This argument is obviously **REJECTED**.

The Respondent further argues that the Court is "obliged" to hold a hearing to consider live testimony and view the demeanor of witnesses concerning the Respondent's history of compliance and evidence of its good faith. The Respondent also wants to present the Court with samples of the product it produces in which the "pesticide" is incorporated. I respectfully decline the offer of the samples. They would provide me with no useful information and might make me sick. As to the "live" witnesses and the topics upon which they would expound, the Complainant's motion addresses those two aspects of the case in some detail. The exhibits attached to the motion, show that the Respondent signed a Consent Agreement in 1984 involving nonregistration of establishment and product and paid a penalty of \$1,250.00 in 1985. EPA records also reflect that production reports were submitted late for the calendar years 1985 and 1986. The Respondent filed no exhibits to refute these

allegations. So much for the Respondent's history of compliance and good faith. The Respondent's arguments as to my need to hear and see "live" witnesses are REJECTED.

Having rejected all of the arguments concerning procedural issues, I will now turn to the appropriateness of the penalty proposed by the Complaint. The Complainant's motion as well as the affidavits attached thereto clearly indicate that the penalty was correctly calculated. The affidavit of Mr. Clark, the Agency unit chief who calculated the penalty, shows that based upon all information available to him and unrefuted by the Respondent, the Respondent's gross sales for the year in question were from \$300,001.00 to \$1,000,000.00, thus placing it in the "Level II" Size of Business Category. The violation was "failure to submit" a required report which is a Level 2 violation (see Table A-5 of the ERP). Using these two factors in conjunction with the penalty matrix (see Table 1, p. 19 of the ERP) one arrives at a base penalty of \$4,000.00. No further adjustments were made considering the other factors mandated by the Act, such as the effect of the penalty on the person's ability to continue in business, since the Respondent had provided no data on that subject. The other statutory factors set out in the Act are built into the ERP and were, thus, properly considered.

I am, therefore, of the opinion that the penalty proposed in the Complaint was calculated in accordance with the requirements of the Act and the provisions of the pertinent ERP.

Order¹

1. Pursuant to FIFRA § 14(a), 7 U.S.C. § 1361(a), as amended, a civil penalty of \$4,000.00 is assessed against Respondent Bestech, Inc., for violation of FIFRA as found in my Order of July 31, 1991.
2. Payment of \$4,000.00, the civil penalty assessed, shall be made within sixty (60) days after receipt of the Final Order by forwarding to Regional Hearing Clerk, U.S. EPA, Region IV, a cashiers or certified check payable to the Treasurer, United States of America at the following address:

EPA - Region 4
(Regional Hearing Clerk)
P.O. Box 100142
Atlanta, GA 30384

Dated: 3/12/92


Thomas B. Yost
Administrative Law Judge

¹ Since this decision in conjunction with the Court's previous order disposes of all matters in this proceeding, it constitutes an Initial Decision and will become the Final Order of the Administrator within forty-five (45) days after its service upon the parties unless (1) an appeal is taken by a party to the proceedings, or (2) the Administrator elects, sua sponte, to review the Initial Decision. 40 CFR § 22.30(a) provides that such appeal may be taken by filing a Notice of Appeal within twenty (20) days after service of this decision.

CERTIFICATION OF SERVICE

I hereby certify that, in accordance with 40 CFR § 22.27(a), I have this date forwarded via ^{hand-delivery JPM} ~~certified mail, return receipt requested~~, the Original of the foregoing ORDER ON MOTION FOR ACCELERATED DECISION ON PENALTY of Honorable Thomas B. Yost, Administrative Law Judge, to Ms. Julia P. Mooney, Regional Hearing Clerk, United States Environmental Protection Agency, Region IV, 345 Courtland Street, N.E., Atlanta, Georgia 30365, and have referred said Regional Hearing Clerk to said Section which further provides that, after preparing and forwarding a copy of said ORDER ON MOTION FOR ACCELERATED DECISION ON PENALTY to all parties, she shall forward the original, along with the record of the proceeding to:

Hearing Clerk (A-110)
EPA Headquarters
Washington, D.C. 20460

who shall forward a copy of said ORDER ON MOTION FOR ACCELERATED DECISION ON PENALTY to the Administrator.

Dated: 3/12/92

Jo Ann Brown
Jo Ann Brown
Secretary, Hon. Thomas B. Yost

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true and correct copy of the foregoing ORDER ON MOTION FOR ACCELERATED DECISION ON PENALTY in the matter of BESTECH, INC., Docket No. IF&R-04-91-7073-C, on each of the parties listed below in the manner indicated:

Craig A. Higgason, Esquire
Assistant Regional Counsel
U.S. Environmental Protection
Agency, Region IV
345 Courtland Street, N.E.
Atlanta, Georgia 30365

(via Hand-Delivery)

Richard W. Epstein, Esquire
GREENSPOON, MARDER, HIRSCHFELD
& RAFKIN, P.A.
Trade Centre South, Suite 700
100 West Cypress Creek Road
Fort Lauderdale, Florida 33309

(via Certified Mail - Return
Receipt Requested)

I hereby further certify that I have this day caused the original of the foregoing ORDER ON MOTION FOR ACCELERATED DECISION ON PENALTY together with the record of the proceeding in the matter of BESTECH, INC., Docket No. IF&R-04-91-7073-C, to be delivered to the Headquarters Hearing Clerk addressed as follows:

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

(via inter-agency pouch mail)

Date: March 13, 1992

Julia P. Mooney
Julia P. Mooney
Regional Hearing Clerk
U.S. Environmental Protection
Agency, Region IV
345 Courtland Street, N.E.
Atlanta, Georgia 30365
(404) 347-1565
FTS 257-1565

1992 MAR 13 AM 9:32

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Atlanta, Georgia 30365
(404) 347-1565
FTS 257-1565

P 303 242 752
 Bestech, Inc. ~~FFRDY-91-7073-C~~
 RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
 NOT FOR INTERNATIONAL MAIL
 (See Reverse)

Sent to Richard W. Epstein, Esq.
 Greenspoon, Marder, Hirschfeld
 Street and No.
 Trade Centre South, Suite 700
 P.O. State and ZIP Code
 Ft. Lauderdale, FL 33309

U.S.G.P.O. : 989-234-555

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P 303 242 752

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Bestech, Inc. I.F.R. 04-91-7073-C

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- Complete items 1 and/or 2 for additional services.
- Complete items 3, and 4a & b.
- Print your name and address on the reverse of this form so that we can return this card to you.
- Attach this form to the front of the mailpiece, or on the back if space does not permit.
- Write "Return Receipt Requested" on the mailpiece below the article number.
- The Return Receipt Fee will provide you the signature of the person delivered to and the date of delivery.

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3. Article Addressed to:
 Richard W. Epstein, Esquire
 GREENSPOON, MARDER, HIRSCHFELD
 + RAFFIN, P.A.
 Trade Centre South, Suite 700
 100 West Cypress Creek Road
 Fort Lauderdale, FL 33309

4a. Article Number
 P 303 242 752

- 4b. Service Type
- Registered Insured
 - Certified COD
 - Express Mail Return Receipt for Merchandise

7. Date of Delivery

5. Signature (Addressee)

8. Addressee's Address (Only if requested and fee is paid)

6. Signature (Agent)

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