

UNITED STATES
 ENVIRONMENTAL PROTECTION AGENCY
 REGION 4
 ATLANTA, GEORGIA

IN THE MATTER OF:

Guaranteed Pool and Spa, Inc.

Respondent.

)
)
) CIVIL COMPLAINT
) and
) NOTICE OF OPPORTUNITY
) FOR HEARING

) Docket No. FIFRA-04-2009-3015
)
)
)
)
)

RECEIVED
 ENVIRONMENTAL
 2009 FEB -4 PM 3:59
 REGIONAL OFFICE IV
 ATLANTA, GEORGIA

I. CIVIL COMPLAINT

A. Jurisdiction

1. This is a civil administrative complaint issued under the authority of Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended, 7 U.S.C. § 136l(a) (hereinafter "FIFRA").
2. The Complainant, the Director of the Air, Pesticides and Toxics Management Division, EPA Region 4, is authorized by the EPA Administrator and the EPA Regional Administrator for Region 4 to issue a complaint on behalf of the Agency to persons alleged to be in violation of FIFRA. The Administrator of EPA delegated this authority under FIFRA to the Region 4 Administrator by EPA Delegation 5-14, dated May 11, 1994. The Region 4 Administrator delegated this authority to the Director, Air, Pesticides and Toxics Management Division by EPA Region 4 Delegation 5-14, dated September 7, 2005.

3. The Respondent is Guaranteed Pool and Spa, Inc., a Florida corporation with its corporate office located at 2350 N. Volusia Avenue, Orange City, Florida 32763.
4. This Complaint serves as notice that the United States Environmental Protection Agency (hereinafter "EPA") has reason to believe that Respondent has violated Section 12 of FIFRA, 7 U.S.C. § 136j.

B. Statement of Facts

5. Complainant incorporates the provisions described in paragraphs 1 through 4 by reference.
6. On or about October 4, 2005, an inspector with the Florida Department of Agriculture and Consumer Services, duly authorized by EPA, conducted an inspection at Guaranteed Pool and Spa, Inc.'s facility located at 1127 Ridgewood Avenue, Holly Hill, Florida 32117, EPA Est. No. 69570-FL-001.
7. At the time of the inspection, Respondent produced Sodium Hypochlorite Solution 10.5%, a registered pesticide product (EPA Reg. No. 53257-6) by repackaging the product into 2.5 gallon containers. The product was intended for use in swimming pools.
8. At the time of the inspection, the repackaged Sodium Hypochlorite Solution 10.5% product was being offered for sale by Respondent. The inspector observed approximately twenty-nine (29) 2.5 gallon containers of the product being displayed for sale on shelves located outside of Respondent's store at 1127 Ridgewood Avenue, Holly Hill, Florida. At least 12 of the 29 containers of the Sodium Hypochlorite Solution 10.5% were being offered for sale without any labels or with labels that had been partially defaced, detached or destroyed.

9. The inspector obtained photographs of the containers of the Sodium Hypochlorite Solution 10.5% being offered for sale without any labels and with partially defaced, detached or destroyed labels.
10. The Sodium Hypochlorite Solution 10.5% produced and offered for sale by Respondent is a pesticide as defined in Section 2(u) of FIFRA, 7 U.S.C. § 136(u), in that it is a substance or mixtures of substances intended for preventing, destroying, repelling, or mitigating a pest.
11. Respondent is a “person” as defined by Section 2(s) of FIFRA, 7 U.S.C. § 136(s), and as such is subject to FIFRA and the regulations promulgated thereunder.
12. At the time of the inspection, Respondent was a “producer” as defined by Section 2(w) of FIFRA, 7 U.S.C. § 136(w), and 40 C.F.R. § 167.3 and 40 C.F.R. § 169.1.
13. At the time of the inspection, Respondent was “distributing or selling” pesticides as defined by Section 2(gg) of FIFRA, 7 U.S.C. § 136(gg).

C. Violations

COUNT 1

14. Complainant incorporates by reference herein paragraphs 1 through 13.
15. Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), states that it shall be unlawful for any person in any State to distribute or sell to any person any pesticide which is adulterated or misbranded.
16. Pursuant to Section 2(q) of FIFRA, 7 U.S.C. 136(2)(q), a pesticide is misbranded if there is not affixed to its container, and to the outside container or wrapper of the retail package, a label bearing the name and address of the producer, registrant, or person for whom produced; the name, brand, or trademark under which the pesticide is sold; the

net weight or measure of the content; the registration number assigned to the pesticide; the registration number of the establishment in which the product was produced; directions for use, a warning or cautionary statement adequate to protect health and the environment, and an ingredient statement, among other requirements.

17. Respondent distributed, sold and offered for sale the pesticide Sodium Hypochlorite Solution 10.5% in containers that had no labels and did not display any of the information that is required to be included in a label pursuant to Section 2(q) of FIFRA. Therefore, Respondent violated Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), by distributing, selling and offering for sale a misbranded pesticide.

COUNT 2

18. Complainant incorporates by reference herein paragraphs 1 through 17.
19. Section 12(a)(2)(A) of FIFRA, 7 U.S.C. § 136j(a)(2)(A), states that it shall be unlawful for any person in any state to detach, alter, deface, or destroy, in whole or in part, any labeling required under this Act.
20. Respondent violated Section 12(a)(2)(A) of FIFRA, 7 U.S.C. § 136j(a)(2)(A), by detaching, defacing or destroying the labels on some, or all, of the twelve (12) containers of Sodium Hypochlorite Solution 10.5% that were distributed or sold or offered for sale by Respondent without labels or with partial labels as set forth in paragraph 8 above.

D. Proposed Penalty

21. Section 14 of FIFRA, 7 U.S.C. § 136l, in conjunction with the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701, and the regulations promulgated at 40 C.F.R. Part 19, authorizes the issuance of this Complaint for the assessment of a

civil penalty. EPA proposes to assess a civil penalty against the Respondent for the violation as set forth in Count 1 in the amount of \$6,500, and for the violation set forth in Count 2 in the amount of \$6,500, for a total proposed civil penalty of \$13,000.

E. Appropriateness of Proposed Penalty

22. The proposed penalty has been derived in accordance with the July 2, 1990, Enforcement Response Policy (ERP) for the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) for the violations cited for a Category I Respondent and in accordance with the Debt Collection Improvement Act of 1996, and the subsequent Civil Monetary Inflation Adjustment Rule, 61 Fed. Reg. 69,360 (December 31, 1996), which provide for a 10% increase in the statutory maximum for violations of federal statutes after January 31, 1997, and a subsequent increase of 10% for violations occurring after March 15, 2004, 69 Fed. Reg. 7121 (February 13, 2004).
23. As set forth in the ERP and Section 14(a)(4) of FIFRA, 7 U.S.C. § 136l(a)(4), in determining the amount of the penalty, Complainant must take into consideration the size of Respondent's business, the effect on the Respondent's ability to continue in business, and the gravity of the violation. Complainant has considered Respondent's financial condition in calculating the proposed penalty, insofar as is necessary to permit Respondent to continue in business.
24. Based on the financial information Respondent submitted to EPA, EPA has designated Respondent's size of business as "Category I" (total business revenues of greater than \$1,000,000 per year) pursuant to the Penalty Policy. If this categorization is incorrect, the proposed penalty will be adjusted upon submittal of additional reliable financial information indicating that another category is appropriate.

II. NOTICE OF OPPORTUNITY FOR HEARING

A. Answer and Request for Hearing

25. The “Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits, as amended,” 40 C.F.R. Part 22 (Consolidated Rules) govern the procedures of the hearing. A copy of the Consolidated Rules accompanies this Complaint. Under these rules, you have the right to request a formal hearing to contest any material fact set forth in this Complaint and/or to contest the appropriateness of proposed penalty.
26. You must file a written Answer within 30 days of your receipt of this Complaint (unless a Consent Agreement and Final Order resolving this matter is filed within the 30 days) to avoid being found in default. Default constitutes an admission by you of all facts alleged in the Complaint, waives your right to a hearing, and results in having the above-cited penalty assessed without further proceedings.
27. Your Answer must clearly and directly admit, deny, or explain each of the factual allegations contained in this Complaint with regard to which you have knowledge. If you have no knowledge of a particular fact and so state, the allegation is considered denied. Failures to admit, deny, or explain any material factual allegation contained in the complaint constitutes an admission of allegation. Your Answer must also briefly state all facts and circumstances, if any, which constitute grounds for a defense and specifically request an administrative hearing (if desired). If you deny any material fact or raise any affirmative defense, you will be considered to have requested a hearing.

Your written Answer to the Complaint should be sent to:

Regional Hearing Clerk
U.S. EPA, Region 4
61 Forsyth Street, SW
Atlanta, Georgia 30303
Telephone: (404) 562-9511.

A copy of the Answer should also be sent to:

Robert Caplan
Senior Attorney
Office of Environmental Accountability
U.S. EPA, Region 4
61 Forsyth Street, SW
Atlanta, Georgia 30303
Telephone: (404) 562-9520.

B. Informal Settlement Conference

28. Whether or not you request a hearing, you may confer informally with Robert Caplan at (404) 562-9520 or Molly Freeman at (404) 562-9684 to discuss the facts of this case, the amount of the proposed penalty, or the possibility of a settlement. An informal settlement conference does not, however, affect your obligation to file a written Answer to the Complaint.
29. EPA has the authority to modify the amount of the proposed penalty, where appropriate, to reflect any settlement reached with you in an informal settlement conference. The terms of such an agreement would be embodied in a Consent Agreement and Final Order (CAFO). A CAFO signed by EPA and the Respondent would be binding as to all terms and conditions specified therein upon signature by the EPA Regional Administrator.
30. Please be advised that after the Complaint is issued, pursuant to Section 22.8 of the Consolidated Rules, any *ex parte* discussion of the merits of any action with the

the other party.

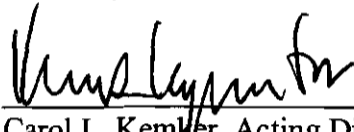
C. Payment of Penalty

31. If Respondent chooses not to contest any of the allegations set forth in this Complaint by filing a written Answer within 30 days of receipt of the Complaint, an authorized official should sign and submit an Affidavit of Compliance (in lieu of an Answer) that the violations have been corrected and pay the proposed penalty via cashier's or certified check. The Affidavit of Compliance should be sent to the Regional Hearing Clerk, EPA, Region 4, 61 Forsyth Street, Atlanta, Georgia 30303-8960. The check must be payable to the "Treasurer, United States of America" and sent to the following banking address:

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

The check shall reference on its face the Docket Number (FIFRA-04-2009-3015).

2/2/09
Date


Carol L. Kemler, Acting Director
Air, Pesticides and Toxics
Management Division
U.S. EPA, Region 4
61 Forsyth Street, SW
Atlanta, Georgia 30303

CERTIFICATE OF SERVICE

I hereby certify that I have this day served to the Region 4, Regional Hearing Clerk the original and one copy of the foregoing Complaint and Notice of Opportunity for Hearing, In the Matter of: Guaranteed Pool and Spa, Inc., FIFRA-04-2009-3015. I also certify that I have served a true and correct copy of same on the parties listed below in the manner indicated.

Molly Freeman Miller
Air, Pesticides, and Toxics
Management Division
U.S. EPA, Region 4
61 Forsyth St., SW
Atlanta, GA 30303

(Via EPA's internal mail)

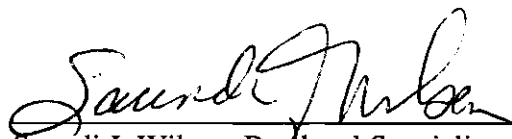
Robert W. Caplan
Office of Environmental Accountability
U.S. EPA, Region 4
61 Forsyth St., SW
Atlanta, GA 30303

(Via EPA's internal mail)

Timothy R. Fiedler, Esquire
Fogle & Fiedler
505 East New York Ave.
Suite 2
Deland, Florida 32724

(Via Certified Mail, Return Receipt Requested)

Date: 2/4/09


Saundi J. Wilson, Paralegal Specialist
Office of Air, Toxics, and General Law, OEA
U.S. EPA, Region 4
61 Forsyth Street, S.W.
Atlanta, GA 30303