

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8
Docket No. FIFRA-08-2008-0006

In the Matter of:)
)
Crystal Packaging, Inc.)
5185 National Western Drive)
Denver, CO 80239)
)
Respondent)
)

**PENALTY COMPLAINT AND NOTICE OF
OPPORTUNITY FOR HEARING**

INTRODUCTION (JURISDICTION)

1. This civil administrative enforcement action is authorized by Congress in section 14(a) of the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), 7 U.S.C. section 136l(a). The rules for this proceeding are the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders and the Revocation, Termination or Suspension of Permits ("*Rules of Practice*")," 40 C.F.R. part 22, a copy of which is enclosed.

2. The undersigned EPA officials have been properly delegated the authority to issue this action.

3. EPA alleges that Respondent has violated FIFRA by selling a misbranded pesticide on two occasions and by selling unregistered pesticides on six occasions and proposes the assessment of a civil penalty, as more fully explained below. FIFRA authorizes the assessment of a civil penalty for violations of FIFRA, 7 U.S.C. section 136l(a).

NOTICE OF OPPORTUNITY FOR A HEARING

4. Respondent has the right to a public hearing before an administrative law judge ("ALJ") to disagree with (1) any fact stated (alleged) by EPA in the complaint, or (2) the appropriateness of the proposed penalty.

5. To disagree with the complaint and assert your right to a hearing, Respondent must file a written answer (and one copy) with the Regional Hearing Clerk (1595 Wynkoop Street; Denver, Colorado 80202-1129) within 30 days of receiving this complaint. The answer must clearly admit, deny or explain the factual allegations of the complaint, the grounds for any defense, the facts you may dispute, and your specific request for a public hearing. Please see section 22.15 of the *Rules of Practice* for a complete description of what must be in your answer.

FAILURE TO FILE AN ANSWER AND REQUEST FOR HEARING WITHIN 30 DAYS MAY WAIVE RESPONDENT'S RIGHT TO DISAGREE WITH THE ALLEGATIONS OR PROPOSED PENALTY, AND RESULT IN A DEFAULT JUDGMENT AND ASSESSMENT OF THE PENALTY PROPOSED IN THE COMPLAINT.

QUICK RESOLUTION

6. Respondent may resolve this proceeding at any time by paying the specific penalty of \$33,150 proposed in the complaint. Such payment need not contain any response to, or admission of, the allegations in the complaint. Such payment constitutes a waiver of respondent's right to contest the allegations and to appeal the final order. See section 22.18 of the *Rules of Practice* for a full explanation of the quick resolution process. This payment shall be made by remitting a cashier's or certified check for that amount, payable to "Treasurer, United States of America," to:

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

SETTLEMENT NEGOTIATIONS

7. EPA encourages discussing whether cases can be settled through informal settlement conferences. If you want to pursue the possibility of settling this matter, or have any other questions, contact Dana J. Stotsky, Esq., at 1-800-227-8917; extension 6905, or 303-312-6905, or the address below. *Please note that calling the attorney or requesting a settlement conference does NOT delay the running of the 30 day period for filing an answer and requesting a hearing.*

DEFINITIONS

- I. ***Pesticide*** is defined by 40 C.F.R. § 152.3(s) as "any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest, or intended for use as a plant regulator, defoliant, or desiccant...."
- II. ***Misbranded*** is defined by FIFRA as "Misbranded...(1) [a] pesticide is misbranded if--

(A) its labeling bears any statement, design, or graphic representation relative thereto or to its ingredients which is false or misleading in any particular;....
(E) any word, statement, or other information required by or under authority of this subchapter to appear on the label or labeling is not prominently placed thereon with such conspicuousness (as compared with other words, statements, designs, or graphic matter in the labeling) and in such terms as to render it likely

to be read and understood by the ordinary individual under customary conditions of purchase and use....” 7 U.S.C. sections 136(q)(1)(A) and (E).

- III. ***Producer and produce*** are defined by FIFRA as... “The term “producer” means the person who manufactures, prepares, compounds, propagates, or processes any pesticide or device or active ingredient used in producing a pesticide. The term “produce” means to manufacture, prepare, compound, propagate, or process any pesticide or device or active ingredient used in producing a pesticide. The dilution by individuals of formulated pesticides for their own use and according to the directions on registered labels shall not of itself result in such individuals being included in the definition of “producer” for the purposes of this subchapter.” 7 U.S.C. section 136(w).
- IV. ***Requirement of Registration*** is defined by FIFRA as “(a) Requirement of registration Except as provided by this subchapter, no person in any State may distribute or sell to any person any pesticide that is not registered under this subchapter. To the extent necessary to prevent unreasonable adverse effects on the environment, the Administrator may by regulation limit the distribution, sale, or use in any State of any pesticide that is not registered under this subchapter and that is not the subject of an experimental use permit under section 136c of this title or an emergency exemption under section 136p of this title.” 7 U.S.C. section 136a(a).
- IV. ***Establishment*** is defined by FIFRA as... “The term “establishment” means any place where a pesticide or device or active ingredient used in producing a pesticide is produced, or held, for distribution or sale.” 7 U.S.C. section 136(dd).
- V. ***To distribute or sell*** is defined by FIFRA as ... “The term 'to distribute or sell' means to distribute, sell, offer for sale, hold for distribution, hold for sale, hold for shipment, ship, deliver for shipment, release for shipment, or receive and (having so received) deliver or offer to deliver. The term does not include the holding or application of registered pesticides or use dilutions thereof by any applicator who provides a service of controlling pests without delivering any unapplied pesticide to any person so served.” 7 U.S.C. section 136(gg).
- VI. ***Section 136j. Unlawful acts*** .
 - (a) In general
 - (1) Except as provided by subsection (b) of this section, it shall be unlawful for any person in any state to distribute or sell to any person (A) any pesticide that is not registered under section 136a of this title or whose registration has been canceled or suspended, except to the extent that distribution or sale otherwise has been authorized by the Administrator under this subchapter

VII. *40 C.F.R. § 152.132 Supplemental distribution.*

The registrant may distribute or sell his registered product under another person's name and address instead of (or in addition to) his own. Such distribution and sale is termed "supplemental distribution" and the product is referred to as a "distributor product." The distributor is considered an agent of the registrant for all intents and purposes under the Act, and both the registrant and the distributor may be held liable for violations pertaining to the distributor product. Supplemental distribution is permitted upon notification to the Agency if all the following conditions are met:

(a) The registrant has submitted to the Agency for each distributor product a statement signed by both the registrant and the distributor listing the names and addresses of the registrant and the distributor, the distributor's company number, the additional brand name(s) to be used, and the registration number of the registered product.

(b) The distributor product is produced, packaged and labeled in a registered establishment operated by the same producer (or under contract in accordance with §152.30) who produces, packages, and labels the registered product.

(c) The distributor product is not repackaged (remains in the producer's unopened container).

(d) The label of the distributor product is the same as that of the registered product, except that:

(1) The product name of the distributor product may be different (but may not be misleading);

(2) The name and address of the distributor may appear instead of that of the registrant;

(3) The registration number of the registered product must be followed by a dash, followed by the distributor's company number (obtainable from the Agency upon request);

(4) The establishment number must be that of the final establishment at which the product was produced; and

(5) Specific claims may be deleted, provided that no other changes are necessary.

(e) Voluntary cancellation of a product applies to the registered product and all distributor products distributed or sold under that registration number. The registrant is responsible for ensuring that distributors under his cancelled registration are notified and comply with the terms of the cancellation.

[53 FR 15975, May 4, 1988, as amended at 60 FR 32096, June 19, 1995]

VIII. **Labeling** is defined by FIFRA as “(1) Label.

The term “label” means the written, printed, or graphic matter on, or attached to, the pesticide or device or any of its containers or wrappers.

(2) Labeling

The term “labeling” means all labels and all other written, printed, or graphic matter—

(A) accompanying the pesticide or device at any time; or

(B) to which reference is made on the label or in literature accompanying the pesticide or device, except to current official publications of the Environmental Protection Agency, the United States Departments of Agriculture and Interior, the Department of Health and Human Services, State experiment stations, State agricultural colleges, and other similar Federal or State institutions or agencies authorized by law to conduct research in the field of pesticides.

7 U.S.C. section 136(p).

GENERAL ALLEGATIONS

At all times pertinent to this complaint, the following general allegations apply:

8. EPA has jurisdiction of this matter under section 14(a)(1) of FIFRA, 7 U.S.C. section 136/(a)(1).

9. Respondent, Crystal Packaging, Inc., located at 5185 National Western Drive, Denver, Colorado 84116, is a “person” within the meaning of Section 2(s) of FIFRA, 7 U.S.C. Section 136(s), and is therefore subject to regulation.

10. On or about May 18, 2007 (“the inspection”), Ms. Amy Hambrick, an authorized EPA inspector, (“the Inspector”), conducted an inspection of Respondent’s facility, with the consent of Respondent, to determine compliance with FIFRA and its implementing regulations.

Count 1

(Sale of a Misbranded Pesticide, or in the alternative, Sale of an Unregistered Pesticide)

COUNT 1: PLEADING ALTERNATIVE ONE-

11. During the inspection, the Inspector observed that Respondent offered for sale the pesticide “Wintergreen II / Lemeen,” with the EPA Registration Number 47371-36-56149.

12. The registration for the pesticide identified in the preceding paragraph specified as a condition of registration that statements appear on subject labeling:

Precautionary Statements Hazards to Humans and Domestic Animals: “Causes substantial but temporary eye injury. Harmful if absorbed through the skin. Do not get in eyes or on clothing. Wear protective eyewear (goggles, face shield or safety glasses.) Remove contaminated clothing and wash before reuse. Avoid contact with skin. Wash thoroughly with soap and water after handling.”

First Aid: “If in Eyes: Hold eye open and rinse slowly and gently with water for 15-20 minutes. Remove contact lenses, if present, after first 5 minutes, then continue rinsing eye. If on Skin: Take off contaminated clothing. Rinse skin immediately with plenty of water for 15-20 minutes. If Swallowed: Call a poison control center or doctor immediately for treatment advice. Have person sip a glass of water if able to swallow. Do not induce vomiting unless told to do so by a poison control center or doctor. Do not give anything by mouth to an unconscious person. Call a poison control center or doctor for treatment advice. Have the product container or label with you when calling poison control center or doctor or going for treatment.”

13. During the inspection, the Inspector observed that the label on the pesticide identified in Paragraph 11 above offered for sale by Respondent contained the following language:

Precautionary Statements Hazards to Humans and Domestic Animals: “Causes eye and skin irritation. Avoid contact with eyes, skin, and clothing. Wash thoroughly with soap and water after handling.”

Statement of Practical Treatment: “In case of contact, immediately flush eyes or skin with plenty of water for at least 15 minutes. If irritation persists, call a physician. If swallowed, immediately drink a large quantity of water. Get medical attention.”

14. Respondent, by selling its pesticide “Wintergreen II / Lemeen” as described in Paragraphs 11-13 above, without required statements on its labeling, has sold a misbranded pesticide, in violation of FIFRA section 12(a)(1)(E), 7 U.S.C. section 136j(a)(1)(E).

COUNT 1: PLEADING ALTERNATIVE TWO-

15. A person other than a registrant may sell a pesticide only by complying with the requirements of 40 C.F.R. § 152.132 for supplemental distributors.

16. During the inspection, the Inspector observed Respondent was selling the pesticide “Wintergreen II/ Lemeen,” EPA Registration Number 47371-36-56149.

17. Subsequent review by the Inspector of required information for supplemental distributors of pesticides established that Respondent has not met the requirements to be either

the registrant of or a supplemental distributor of "Wintergreen II/ Lemeen."

18. Respondent, by selling the pesticide "Wintergreen II/ Lemeen" as described in Paragraphs 15-17 above, without meeting requirements to be a supplemental distributor for said pesticide, has sold an unregistered pesticide, in violation of FIFRA section 12(a)(1)(A). 7 U.S.C. section 136j(a)(1)(A).

Count 2

(Sale of a Misbranded Pesticide, or, in the alternative, Sale of an Unregistered Pesticide)

COUNT 2: PLEADING ALTERNATIVE ONE-

19. During the inspection, the Inspector observed that Respondent offered for sale the pesticide "Correct," with the EPA Registration Number 47371-131-56149.

20. The registration for the pesticide identified in the preceding paragraph requires the cautionary statement term "DANGER" to appear on all subject labeling.

21. During the inspection, the Inspector observed that the labeling on the pesticide "Correct" offered for sale by Respondent failed have the term "DANGER" appear on all subject labeling, and instead had the term "Caution" appear on all subject labeling.

22. During the inspection, the Inspector observed that the label on the pesticide identified in Paragraph 19 above offered for sale by Respondent contained the following language:

Active Ingredients:	Didecyl dimethyl ammonium chloride...	2.43%
	n-Alkyl (C ₁₄ 50%, C ₁₂ 40%, C ₁₆ 10%)....	
	dimethyl benzyl ammonium chloride.....	1.62%
	Other ingredients.....	95.95%
	Total.....	100.00%

23. The registration for the pesticide identified in the Paragraph 19 above specified as a condition of registration that the following formulation statement appear on subject labeling:

Active Ingredients:	Didecyl dimethyl ammonium chloride...	2.54%
	n-Alkyl (C ₁₄ 50%, C ₁₂ 40%, C ₁₆ 10%)....	
	dimethyl benzyl ammonium chloride.....	1.69%
	Other ingredients.....	95.77%
	Total.....	100.00%

24. Respondent, by selling its pesticide "Correct" as described in Paragraphs 19-23 above, without required cautionary and formulary statements on its labeling, has sold a

misbranded pesticide, in violation of FIFRA section 12(a)(1)(E). 7 U.S.C. section 136j(a)(1)(E).

COUNT 2: PLEADING ALTERNATIVE TWO-

25. A person other than a registrant may sell a pesticide only by complying with the requirements of 40 C.F.R. § 152.132 for supplemental distributors.

26. During the inspection, the Inspector observed Respondent was selling the pesticide “Correct,” EPA Registration Number 47371-131-56149.

27. Subsequent review by the Inspector of required information for supplemental distributors of pesticides established that Respondent has not met the requirements to be either the registrant of or a supplemental distributor of “Correct.”

28. Respondent, by selling the pesticide “Correct” as described in Paragraphs 25-27 above, without meeting requirements to be a supplemental distributor for said pesticide, has sold an unregistered pesticide, in violation of FIFRA section 12(a)(1)(A). 7 U.S.C. section 136j(a)(1)(A).

Count 3

(Sale of an Unregistered Pesticide: “Pine-All 6”)

29. A person other than a registrant may sell a pesticide only by complying with the requirements of 40 C.F.R. § 152.132 for supplemental distributors.

30. During the inspection, the Inspector observed Respondent was selling the pesticide “Pine-All 6,” EPA Registration Number 6836-169-56149.

31. Subsequent review by the Inspector of required information for supplemental distributors of pesticides established that Respondent has not met the requirements to be either the registrant of or a supplemental distributor of “Pine-All 6.”

32. Respondent, by selling the pesticide “Pine-All 6” as described in Paragraphs 29-31 above, without meeting requirements to be a supplemental distributor for said pesticide, has sold an unregistered pesticide, in violation of FIFRA section 12(a)(1)(A). 7 U.S.C. section 136j(a)(1)(A).

Count 4
(Sale of an Unregistered Pesticide: "Quat-Amo")

33. A person other than a registrant may sell a pesticide only by complying with the requirements of 40 C.F.R. § 152.132 for supplemental distributors.

34. During the inspection, the Inspector observed Respondent was selling the pesticide "Quat-Amo," EPA Registration Number 6836-70-56149.

35. Subsequent review by the Inspector of required information for supplemental distributors of pesticides established that Respondent has not met the requirements to be either the registrant of or a supplemental distributor of "Quat-Amo."

36. Respondent, by selling the pesticide "Quat-Amo" as described in Paragraphs 33-35 above, without meeting requirements to be a supplemental distributor for said pesticide, has sold an unregistered pesticide, in violation of FIFRA section 12(a)(1)(A). 7 U.S.C. section 136j(a)(1)(A).

Count 5
(Sale of an Unregistered Pesticide: "Mountain Meadow")

37. A person other than a registrant may sell a pesticide only by complying with the requirements of 40 C.F.R. § 152.132 for supplemental distributors.

38. During the inspection, the Inspector observed Respondent was selling the pesticide "Mountain Meadow," EPA Registration Number 1839-95-56149.

39. Subsequent review by the Inspector of required information for supplemental distributors of pesticides established that Respondent has not met the requirements to be either the registrant of or a supplemental distributor of "Mountain Meadow."

40. Respondent, by selling the pesticide "Mountain Meadow" as described in Paragraphs 37-39 above, without meeting requirements to be a supplemental distributor for said pesticide, has sold an unregistered pesticide, in violation of FIFRA section 12(a)(1)(A). 7 U.S.C. section 136j(a)(1)(A).

Count 6
(Sale of an Unregistered Pesticide: "Confidence")

41. A person other than a registrant may sell a pesticide only by complying with the requirements of 40 C.F.R. § 152.132 for supplemental distributors.

42. During the inspection, the Inspector observed Respondent was selling the pesticide "Confidence," EPA Registration Number 1839-83-56149.

43. Subsequent review by the Inspector of required information for supplemental distributors of pesticides established that Respondent has not met the requirements to be either the registrant of or a supplemental distributor of "Confidence."

44. Respondent, by selling the pesticide "Confidence" as described in Paragraphs 41-43 above, without meeting requirements to be a supplemental distributor for said pesticide, has sold an unregistered pesticide, in violation of FIFRA section 12(a)(1)(A). 7 U.S.C. section 136j(a)(1)(A).

PROPOSED CIVIL PENALTY

45. For pesticide registrants and producers, FIFRA authorizes the assessment of a civil penalty of up to \$6,500 for each offense of the Act and the Debt Collection Improvement Act of 1996. FIFRA requires EPA to consider the appropriateness of the penalty to the size of the business, the effect on the person's ability to continue in business, and the gravity of the violation. EPA has established policies that provide a rational and consistent method for applying statutory factors to the circumstances of specific cases. A narrative description of the reasoning behind the penalty proposed in this case is attached to this complaint, along with copies of the EPA policies. **For the six FIFRA violations alleged in this complaint, EPA proposes a penalty assessment of \$33,150 (as shown in the table below.)** The penalty narrative and calculation can be found in Complainant's Exhibit Number 1. A summary of the proposed penalties per count in table form:


	ALTERNATIVE ONE	ALTERNATIVE TWO
Count 1	\$6,500.00	\$6,500.00
Count 2	\$6,500.00	\$6,500.00
Count 3	\$5,200.00	\$5,200.00
Count 4	\$5,200.00	\$5,200.00
Count 5	\$5,200.00	\$5,200.00
Count 6	\$4,550.00	\$4,550.00
TOTAL	\$33,150.00	\$33,150.00

46. The ALJ is not bound by EPA's penalty policy or the penalty proposed by Complainant, and may assess a penalty above the proposed amount, up to the maximum amount authorized in the statute. In this case, the maximum would be \$39,000.

To discuss settlement or ask any questions you may have about this process, please contact Dana J. Stotsky, Senior Enforcement Attorney, at 1-800-227-8917; ext. 312-6905, or at the address below.

United States Environmental Protection Agency
Region 8, Office of Enforcement, Compliance and
Environmental Justice, Complainant
1595 Wynkoop Street (ENF-L)
Denver, CO 80202-1129

Date: 3/18/2008

By: 
Mark Chalfant, Director
Technical Enforcement Program

Date: 3/20/2008

By: 
David J. Janik, Director
Legal Enforcement Program

Date: March 12, 2008

By: 
Dana J. Stotsky, Senior Enforcement Attorney
Legal Enforcement Program
U.S. EPA Region 8
1595 Wynkoop Street
Mail Code: 8ENF-L
Denver, Colorado 80202-1146
Colorado Bar # 14717
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the original and one copy of the PENALTY COMPLAINT AND NOTICE OF OPPORTUNITY FOR HEARING with Exhibits were hand-carried to the Regional Hearing Clerk, EPA Region 8, 1595 Wynkoop Street; Denver, Colorado 80202-1129, and that a true copy of the same was sent via Certified Mail, Postage Pre-Paid, to:

Mr. Scott Vincent, President
5185 National Western Drive
Denver, Colorado 80239

March 24, 2008
Date

Judith McTernan
Judith McTernan