

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
BEFORE THE ADMINISTRATOR

In the Matter of:

PAN AMERICAN GROWERS  
SUPPLY, INC.

Respondent

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) Docket No. FIFRA-04-2010-3029  
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MOTION FOR DEFAULT

COMES NOW THE Complainant, Director of the Air, Pesticides, and Toxics Management Division of the Environmental Protection Agency (EPA) Region 4, and moves for a finding of default and issuance of a default order against Respondent, pursuant to 40 C.F.R. §§ 22.17(a), 22.17(b), and 22.17(c). Through this Motion, Complainant seeks resolution of all of the proceeding and requests that the Respondent be assessed a penalty of \$18,053.

According to 40 C.F.R. § 22.17(a), “[a] party may be found to be in default . . . after motion, upon failure to comply with . . . an order of the Presiding Officer . . .” In this case, Respondent failed to comply with the Presiding Judge’s order entitled “Order on Respondent’s Answer and Directing Settlement Conference,” dated August 19, 2010. The Respondent did not file a clarified Answer with the Regional Hearing Clerk, on or before September 17, 2010, which responded to the allegations in the Complaint. Respondent also did not submit a clarification with an Answer, on whether Respondent requested a hearing before an Administrative Law Judge. Respondent also did not participate in a settlement conference call, as required by the order. In addition, Respondent failed to respond to the “Order to Show Cause” from the Presiding Judge, dated September 29, 2010.

In an effort to find updated contact information for Respondent, counsel for Complainant looked up Respondent on the Florida Secretary of State website. Counsel for Complainant then learned that the Respondent had been administratively dissolved for failure to file its annual report. The date of administrative dissolution was September 24, 2010. However, the effect of dissolution is that the “dissolved corporation continues its corporate existence,” and “[d]issolution of a corporation does not . . . [a]bate or suspend a proceeding pending by or against the corporation on the effective date of dissolution . . . ” Florida Statute § 607.1405(1) and (2)(f).

Pursuant to 40 C.F.R. § 22.17(b), Complainant seeks resolution of the entire proceeding and asks the Presiding Officer to order the Respondent to pay a penalty of \$18,053 to the United States. According to 40 C.F.R. § 22.17(c), “[t]he relief proposed in the complaint or the motion for default shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act.” In this case, the relief proposed in the Complaint and requested in this Motion is assessment of a penalty of \$18,053, and this relief is not clearly inconsistent with the record of this proceeding and the underlying Act. Consequently, the Presiding Officer should issue a Default Order against Respondent which requires payment of a \$18,053 penalty.

As further support, the Complainant states the following legal and factual grounds for the relief requested, as required in 40 C.F.R. § 22.17(b).

1. Because Respondent is in default, all of the factual allegations in the Complaint are deemed admitted by the Respondent. 40 C.F.R. § 22.17(a).

2. The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) authorizes EPA to assess penalties for violations of FIFRA. 7 U.S.C. § 136l(a), or FIFRA § 14(a).
3. The statutory maximum penalty assessable for a FIFRA violation occurring after March 15, 2004 and through January 12, 2009 is \$6,500. 40 C.F.R. § 19.4.

#### **Count I**

4. Section 17(e) of FIFRA, 7 U.S.C. § 136o(c), provides that the Secretary of Treasury, in conjunction with the Administrator, shall prescribe regulations for the enforcement of subsection (c) of this section entitled Importation of Pesticides and Devices.
5. The Secretary of Treasury, through the United States Customs Service, prescribed regulations for the enforcement of Section 17(c) of FIFRA, 7 U.S.C. § 136o(c), at 40 C.F.R. §§ 12.110 through 12.117 entitled Special Classes of Merchandise – Pesticides and Devices.
6. 19 C.F.R. § 12.110 specifies that, except as otherwise provided, the terms used in Sections 12.110 through 12.117 shall have the meaning set forth for those terms in FIFRA, as amended (7 U.S.C. § 136 *et seq.*). The term Administrator shall mean the Administrator of EPA.
7. 19 C.F.R. § 12.112(a) specifies that an importer desiring to import pesticides or devices into the United States shall submit to the Administrator a Notice of Arrival of Pesticides and Devices (EPA form 3540-1), prior to the arrival of the shipment in the United States. The Administrator completes the Notice of Arrival, indicating the disposition to be made

of the shipment of pesticides, and returns the completed Notice of Arrival from to the importer or his agent.

8. The Notice of Arrival of Pesticides and Devices (hereinafter "NOA") is a report, required by FIFRA, that must be filed with the Administrator, prior to the arrival of a pesticide shipped into the United States.
9. Respondent did not submit an NOA to EPA prior to the arrival of the shipment of Daminozide 85% ordered from the manufacturer in China on or around February 25, 2005 (Purchase Order #6464). Complaint, Paragraph 22.
10. Respondent violated Section 12(a)(2)(N) of FIFRA, 7 U.S.C. § 136j(a)(2)(N), by failing to file a report required by Section 17(e) of FIFRA, 7 U.S.C. § 136o(e) and 19 C.F.R. § 12.112(a).

## **Count II**

11. The Florida Department of Agriculture and Consumer Services documented that Respondent had imported Daminozide 85% on two occasions from a foreign producing establishment in China. Complaint, Paragraph 17.
12. The second importation occurred on or around October 22, 2005. Complaint, Paragraph 27.
13. The Daminozide 85% was a pesticide that was not registered under Section 3 of FIFRA, 7 U.S.C. § 136a. Complaint, Paragraph 29.
14. At the time of importation, the foreign producing establishment in China was not registered under FIFRA Section 7, 7 U.S.C. § 136e. Complaint, Paragraph 30.

15. The Daminozide 85% was not labeled in accordance with EPA labeling requirements. Complaint, Paragraph 31.
16. Respondent repackaged some of the Daminozide 85% and exported the product to Columbia. Complaint, Paragraph 32.
17. Respondent sold or distributed a pesticide that was not registered with EPA. Complaint, Paragraph 33.
18. An unregistered pesticide, or a pesticide whose registration has been cancelled or suspended may be distributed or sold, or otherwise transferred to the extent described by the exemptions at 40 C.F.R. § 152.30.
19. EPA has published a policy which clarifies when unregistered pesticides may be imported for export. This policy is "Pesticide Registration (PR) Notice 99-1: Import of Unregistered Pesticides Intended for Export" (hereinafter "PR Notice 99-1").
20. One requirement in PR Notice 99-1 is that the foreign producing establishment must be registered under FIFRA Section 7.
21. Respondent's distribution of the unregistered pesticide was not in compliance with 40 C.F.R. § 152.3 or with PR Notice 99-1. Complaint, Paragraph 37.
22. Respondent violated Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1) when it sold or distributed an unregistered pesticide. Complaint, Paragraph 38.

### **Count III**

23. The Florida Department of Agriculture and Consumer Services documented that the Respondent had imported Daminozide 85% on two occasions from a foreign producing establishment in China. Complaint, Paragraph 41.

24. The second importation occurred on or around October 22, 2005. Complaint, Paragraph 42.
25. Respondent repackaged some of the Daminozide 85% and exported the product to Columbia. Complaint, Paragraph 44.
26. The repackaged Daminozide 85% was not labeled with the required language, "Not registered for Use in the United States of America." Complaint, Paragraph 45.
27. Pursuant to Section 2(q)(1)(H), an unregistered pesticide intended for export is misbranded when the label does not contain, in words prominently placed thereon with conspicuousness, the following: "Not Registered for Use in the United States of America."
28. Respondent violated Section 12(a)(1)(E), 7 U.S.C. § 136j(a)(1)(E) when it sold or distributed a misbranded pesticide.

#### **Count IV**

29. At the time of the inspection, there were not copies of statement(s) signed by the foreign purchaser(s) of the exported unregistered Daminozide 85% acknowledging that the purchaser understands that such pesticide is not registered for used in the United States and cannot be sold in the United States. Complaint, Paragraph 49.
30. 40 C.F.R. § 169.2(h)(3) requires for unregistered pesticides, maintenance of copies of a statement signed by the foreign purchaser of the pesticide acknowledging that the purchaser understands that such pesticide is not registered for use in the United States and cannot be sold in the United States under the Act.

31. Respondent violated Section 12(a)(2)(B)(i) of FIFRA, 7 U.S.C. § 136j(a)(2)(B)(i) when it did not prepare, maintain, or submit records required by Section 8 of FIFRA, 7 U.S.C. § 136f, and 40 C.F.R. § 169.2(h)(3).

### Penalty

32. Section 14(a)(4) of FIFRA, 7 U.S.C. § 136l(a)(4), states that the following criteria must be considered in penalty assessment: the size of the Respondent's business, the effect on the Respondent's ability to continue in business, and the gravity of the violation.
33. In consideration of the criteria listed in FIFRA § 14(a)(4), EPA uses enforcement response policies in calculating penalties. In this case, EPA used the (1) Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), published on July 2, 1990, hereinafter referred to as the "ERP" and attached hereto as Exhibit A; and (2) the "Penalty Policy Supplements Pursuant to the 2004 Civil Monetary Penalty Inflation Adjustment Rule" dated June 5, 2006, hereinafter referred to as "Supplement" and attached hereto as Exhibit B.<sup>1</sup> The ERP explains penalty calculation as follows:

Computation of the penalty amount is determined in a five stage process in consideration of the FIFRA section 14(a)(4) criteria . . . These steps are: (1) determination of gravity or 'level'

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<sup>1</sup>In December 2009, the FIFRA Enforcement Response Policy was published. This policy, as well as the 1990 ERP and the Supplement, are published on EPA's website, at <http://cfpub.epa.gov/compliance/resources/policies/civil/fifra/>. Page 4 of the 2009 FIFRA Enforcement Response Policy states that it supercedes the 1990 ERP. However, the penalties in the 2009 policy are higher than the penalties in the 1990 policy. For example, the maximum assessable penalty under the 2009 policy is \$7,500. See FIFRA Enforcement Response Policy, Federal Insecticide, Fungicide, and Rodenticide Act (December 2009), p. 19. On the other hand, the statutory maximum penalty assessable for a FIFRA violation occurring after March 15, 2004 and through January 12, 2009 is \$6,500. 40 C.F.R. § 19.4. Complainant used the 1990 ERP, along with the Supplement, to calculate the penalties in this case. Under the 2009 policy and Supplement, the total calculated penalty would be \$18,107. Rather than request the higher penalty in this Motion for Default, Complainant requests the penalty as calculated under the 1990 policy and Supplement. The penalty proposed in the Complaint was calculated using the 1990 policy and Supplement.

of the violation using Appendix A of this ERP; (2) determination of the size of business category for the violator, found in Table 2; (3) use of the FIFRA civil penalty matrices found in Table 1 to determine the dollar amount associated with the gravity level of violation and the size of business category of the violator; (4) further gravity adjustments of the base penalty in consideration of the specific characteristics of the pesticide involved, the actual or potential harm to human health and/or the environment, the compliance history of the violator, and the culpability of the violator, using the "Gravity Adjustment Criteria" found in Appendix B; and, (5) consideration of the effect that payment of the total civil penalty will have on the violator's ability to continue in business, in accordance with the criteria established in this ERP.

ERP, p. 18.

Following this five stage process, the penalty was calculated as follows for each violation.

**34. Count I**

**(1) Determination of gravity level**

Appendix A of the ERP was used to determine the gravity level. In this case, Respondent violated Section 12(a)(2)(N) of FIFRA, 7 U.S.C. § 136j(a)(2)(N) when it failed to file an NOA to EPA prior to the arrival of the shipment of Daminozide 85%, ordered on or around February 25, 2005. The gravity level for this type of violation is level 2. ERP, p. A-6.

**(2) Determination of size of business category**

Table 2 of the ERP was used to determine the size of business category. See ERP, p. 20. In this case, the size of business category is "II" because a company profile from the Internet, attached hereto as Exhibit C, states that the company's estimated



annual sales are \$650,000. This amount is greater than \$300,001 and less than \$1,000,000. Therefore, the size of business category is II.

(3) Base Penalty Dollar Amount

Table 1 of the ERP was used to determine the base penalty. See ERP, p. 19 and Supplement, p. 6 of 19. When the gravity level is 2 and the size of business is II, the dollar amount of the base penalty is \$5,158 for a violation occurring on or after March 15, 2004. Supplement, p. 6 of 19.

(4) Further Gravity Adjustments

For recordkeeping and reporting violations, reductions are not made to the base penalty using Appendix B, under the ERP. ERP, p. 22.

(5) Ability to Continue in Business

Using the criteria of the ERP, EPA can assume that the Respondent has the ability to pay the penalty. See ERP, p. 24.

35. **Count II**

(1) Determination of gravity level

Appendix A of the ERP was used to determine the gravity level. In this case, Respondent violated Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A) when it sold or distributed an unregistered pesticide. The gravity level for this type of violation is level 2. ERP, p. A-1.

(2) Determination of size of business category

Table 2 of the ERP was used to determine the size of business category. See ERP, p. 20. In this case, the size of business category is "II" because a company profile from the Internet, attached hereto as Exhibit C, states that the company's estimated annual sales are \$650,000. This amount is greater than \$300,001 and less than \$1,00,000. Therefore, the size of business category is II.

(3) Base Penalty Dollar Amount

Table 1 of the ERP was used to determine the base penalty. See ERP, p. 19 and Supplement, p. 6 of 19. When the gravity level is 2 and the size of business is II, the dollar amount of the base penalty is \$5,158 for a violation occurring or after March 15, 2004. Supplement, p. 6 of 19.

(4) Further Gravity Adjustments

Appendix B of the ERP was consulted to identify the gravity adjustment values for the listed gravity adjustment criteria. For "Pesticide" a value of 1 was chosen because the pesticide was unregistered. For "Harm to Human Health" a value of 3 was selected because the harm to human health is unknown. For "Environmental Harm" the value designated was 3 because the harm is unknown. For "Compliance History," the value selected was zero because the Respondent has no prior history of FIFRA violations. For culpability, the value chosen was 2 because the violation resulted from negligence. The values were totaled and amounted to a total gravity adjustment value of 9. According to Table 3 of the ERP, on page 22, when

the total gravity value from Appendix B is 9, the matrix value should be assessed; or the base penalty determined in Step 3, should not be increased or reduced.

**(5) Ability to Continue in Business**

Using the criteria of the ERP, EPA can assume that the Respondent has the ability to pay the penalty. See ERP, p. 24.

**36. Count III**

**(1) Determination of gravity level**

Appendix A of the ERP was used to determine the gravity level. In this case, Respondent violated Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E) when it sold or distributed a misbranded pesticide, Daminozide 85%, which was not labeled with the required language, "Not registered for use in the United States of America." The pesticide was misbranded pursuant to Section 2(q)(1)(H) of FIFRA. The gravity level for this type of violation is level 4. ERP, p. A-2.

**(2) Determination of size of business category**

Table 2 of the ERP was used to determine the size of business category. See ERP, p. 20. In this case, the size of business category is "II" because a company profile from the Internet, attached hereto as Exhibit C, states that the company's estimated annual sales are \$650,000. This amount is greater than \$300,001 and less than \$1,00,000. Therefore, the size of business category is II.

**(3) Base Penalty Dollar Amount**

Table 1 of the ERP was used to determine the base penalty. See ERP, p. 19 and

Supplement, p. 6 of 19. When the gravity level is 4 and the size of business is II, the dollar amount of the base penalty is \$2,579 for a violation occurring or after March 15, 2004. Supplement, p. 6 of 19.

(4) Further Gravity Adjustments

Appendix B of the ERP was consulted to identify the gravity adjustment values for the listed gravity adjustment criteria. For "Pesticide" a value of 1 was chosen because the pesticide was unregistered. For "Harm to Human Health" a value of 3 was selected because the harm to human health is unknown. For "Environmental Harm" the value designated was 3 because the harm is unknown. For "Compliance History," the value selected was zero because the Respondent has no prior history of FIFRA violations. For culpability, the value chosen was 2 because the violation resulted from negligence. The values were totaled and amounted to a total gravity adjustment value of 9. According to Table 3 of the ERP, on page 22, when the total gravity value from Appendix B is 9, the matrix value should be assessed; or the base penalty determined in Step 3, should not be increased or reduced.

(5) Ability to Continue in Business

Using the criteria of the ERP, EPA can assume that the Respondent has the ability to pay the penalty. See ERP, p. 24.

37. **Count IV**

(1) Determination of gravity level

Appendix A of the ERP was used to determine the gravity level. In this case,

Respondent violated Section 12(a)(2)(B)(i) of FIFRA, 7 U.S.C. § 136j(a)(2)(B)(i) when it did not prepare, maintain, or submit records required by Section 8 of FIFRA, 7 U.S.C. § 136f and 40 C.F.R. § 169.2(h)(3). The gravity level for this type of violation is level 2. ERP, p. A-3.

(2) Determination of size of business category

Table 2 of the ERP was used to determine the size of business category. See ERP, p. 20. In this case, the size of business category is "II" because a company profile from the Internet, attached hereto as Exhibit C, states that the company's estimated annual sales are \$650,000. This amount is greater than \$300,001 and less than \$1,00,000. Therefore, the size of business category is II.

(3) Base Penalty Dollar Amount

Table 1 of the ERP was used to determine the base penalty. See ERP, p. 19 and Supplement, p. 6 of 19. When the gravity level is 2 and the size of business is II, the dollar amount of the base penalty is \$5,158 for a violation occurring or after March 15, 2004. Supplement, p. 6 of 19.

(4) Further Gravity Adjustments

For recordkeeping and reporting violations, reductions are not made to the base penalty using Appendix B, under the ERP. ERP, p. 22.

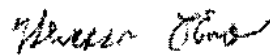
(5) Ability to Continue in Business

Using the criteria of the ERP, EPA can assume that the Respondent has the ability to pay the penalty. See ERP, p. 24.

38. The total penalty calculated for Counts I through IV is \$18,053 and is not clearly inconsistent with the record in this case.

WHEREFORE, Complainant requests issuance of a Default Order against Respondent to resolve the entire proceeding with a penalty assessment of \$18,053.

Respectfully submitted,



Michiko Kono  
Attorney for Complainant

Date: Nov. 10, 2010

Attachments: Exhibits A - C

CERTIFICATE OF SERVICE

I certify that the original Motion for Default in the Pan American Growers Supply, Inc., Docket No. FIFRA -04-2010-3029, with exhibits, and a copy were filed with the Regional Hearing Clerk, and a copy of the Motion for Default with exhibits was mailed to the addressees listed below on this 30th day of November, 2010.

Addressees:

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Nov 30, 2010  
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