



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 5

77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

REPLY TO THE ATTENTION OF:
L-8J

CERTIFIED MAIL

Receipt No. 7009 1680 0000 7673 2833

Mr. Patrick McGinnis
President
Nestle Purina Petcare Company
801 Chouteau Avenue
St. Louis, Missouri 63102

Re: In the Matter of Nestle Purina Petcare Company, St. Louis, Missouri **FIFRA-05-2012-0002**

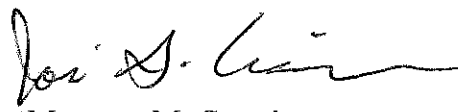
Dear Mr. McGinnis:

I have enclosed a Complaint filed against Nestle Purina Petcare Company, under Section 14 of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. § 136l. The Complaint alleges violations of Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), which prohibits the sale or distribution of unregistered pesticides, and arises from your sale or distribution of "Tidy Cats Scoop for Multiple Cats."

As provided in the Complaint, if you would like to request a hearing, you must do so in your answer to the Complaint. Please note that if you do not file an answer with the Regional Hearing Clerk (E-13J), U.S. EPA Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604 within thirty days of your receipt of this Complaint, the Presiding Officer may issue a default order and the proposed civil penalty will become due thirty days later.

In addition, whether or not you request a hearing, you may request an informal settlement conference. If you wish to request a conference, or if you have any questions about this matter, please contact Jose C. de Leon, Associate Regional Counsel (C-14J), 77 West Jackson Boulevard, Chicago, Illinois 60604, at (312) 353-7456.

Sincerely,


for Margaret M. Guerriero
Director
Land and Chemicals Division

RECEIVED

DEC 22 2011

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

REGIONAL HEARING CLERK
U.S. ENVIRONMENTAL
PROTECTION AGENCY

In the Matter of:)
)
Nestle Purina Petcare Company)
St. Louis, Missouri 63102)
)
Respondent.)
_____)

Docket No. FIFRA-05-2012-0002

Proceeding to Assess a Civil Penalty
Under Section 14(a) of the Federal
Insecticide, Fungicide, and Rodenticide
Act, 7 U.S.C. § 136l(a)

Complaint

1. This is an administrative proceeding to assess a civil penalty under Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended, 7 U.S.C. § 136l(a).

2. The Complainant is, by lawful delegation, the Director of the Land and Chemicals Division, U. S. Environmental Protection Agency, Region 5.

3. The Respondent is Nestle Purina Petcare Company, a corporation doing business in the state of Missouri.

Statutory and Regulatory Background

4. The term "person" is defined at Section 2(s) of FIFRA, 7 U.S.C. § 136(s) as "any individual, partnership, association, corporation, or any organized group of persons whether incorporated or not."

5. The term "distribute or sell" is defined at Section 2(gg) of FIFRA, 7 U.S.C. § 136(gg), as "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."

6. The term “pesticide” is defined at Section 2(u) of FIFRA, 7 U.S.C. § 136(u) as “any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest.”

7. According to Section 3(a) of FIFRA, 7 U.S.C. § 136a(a), no person in any state may distribute or sell to any person any pesticide that is not registered under FIFRA.

8. Title 40, Code of Federal Regulations, Section 152.15 provides:

No person may distribute or sell any pesticide produce that is not registered under the Act [with limited exceptions]. . . . A pesticide is any substance (or mixture of substances) intended for a pesticidal purpose. . . . A substance is considered to be intended for a pesticidal purpose, and thus to be a pesticide requiring registration, if:

- (a) The person who distributes or sells the substance claims, states or implies (by labeling or otherwise);
 - (1) That the substance (either by itself or in combination with any other substance) can or should be used as a pesticide; or
 - ...
- (c) The person who distributes or sells the substance has actual or constructive knowledge that the substance will be used, or is intended to be used, for a pesticidal purpose.

9. Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), states it shall be unlawful for any person in any state to distribute or sell to any person any pesticide that is not registered under 136(a) of the Act or whose registration has been canceled or suspended, except to the extent that distribution or sale otherwise has been authorized by the Administrator of EPA under FIFRA.

10. The Administrator of the EPA may assess a civil penalty against any registrant, commercial applicator, wholesaler, dealer, retailer, or other distributor who violates any

provision of FIFRA of up to \$7,500 for each offense, pursuant to Section 14(a)(1) of FIFRA, 7 U.S.C. § 136l(a)(1), and 40 C.F.R. Part 19.

General Allegations

11. Respondent was, at all times relevant to this Complaint, a “person” as that term is defined in Section 2(s) of FIFRA, 7 U.S.C. § 136(s).

12. At all times relevant to this Complaint, Respondent owned or operated a place of business located at 801 Chouteau Avenue, St. Louis, Missouri 63102.

13. Respondent did, at all times relevant to this Complaint, “distribute or sell” a pesticide as that term is defined in Section 2(gg) of FIFRA, 7 U.S.C. § 136(gg).

14. At all times relevant to this Complaint, the Respondent has been a registrant, commercial applicator, wholesaler, dealer, retailer and/or other distributor of pesticides within the meaning of those terms as used in Section 14(a)(1) of FIFRA, 7 U.S.C. § 136l(a)(1).

15. On or about December 26, 2007, an inspector employed by the Ohio Department of Agriculture (ODA), conducted an authorized inspection at PetSmart, Inc., located at 263 Midway Boulevard, Elyria, Ohio 44035.

16. During the December 26, 2007, inspection, the ODA inspector observed the pesticide product “**Tidy Cats Scoop for Multiple Cats**” and collected photographic evidentiary samples of the pesticide product “**Tidy Cats Scoop for Multiple Cats.**”

17. During the December 26, 2007 inspection, the ODA inspector also collected a copy of a PetSmart, Inc. “Warehouse Shipping Manifest,” dated December 14, 2007, indicating Respondent as the vendor of “**TC Scoop AOC Cat Litter 40#.**” “**Tidy Cats Scoop for**

Multiple Cats” is identified in Respondent’s sales records as **“TC Scoop AOC Cat Litter 40#”** as detailed in Attachment A (contains Confidential Business Information).

18. The product **“Tidy Cats Scoop for Multiple Cats,”** contains the following pesticidal claims on its labeling:

- **“Special Antimicrobial Odor Control.”**
- **“Antimicrobial Odor Control Formula”**
- **“...inhibits the growth of odor-causing bacteria”**
- **“...with deodorizing system and odor-causing bacteria growth inhibitor.”**

19. The claims identified in paragraph 18 indicate that the product is “antimicrobial” and intended to disinfect, sanitize, reduce, or mitigate growth or development of microbiological organisms.

20. Because Respondent stated, claimed, and/or implied that **“Tidy Cats Scoop for Multiple Cats”** can be used as a pesticide (i.e., as an antimicrobial) as alleged in paragraph 19 above, **“Tidy Cats Scoop for Multiple Cats”** is a substance intended for a pesticidal purpose, and therefore a “pesticide” requiring registration, as provided in 40 C.F.R. § 152.15(a).

21. Because each of Respondent’s statements, as alleged in paragraph 18 above, demonstrate that Respondent had actual or constructive knowledge that **“Tidy Cats Scoop for Multiple Cats”** will be used, or is intended to be used, for a pesticidal purpose (i.e., as an antimicrobial), the substance is intended for a pesticidal purpose, and therefore, a “pesticide” requiring registration as provided in 40 C.F.R. § 152.15(c).

22. The unregistered pesticide product identified in paragraph 18 above, is an “antimicrobial pesticide” as defined in Section 2(mm) of FIFRA, 7 U.S.C. § 136(mm).

23. At all times relevant to the Complaint, the pesticide product identified in

paragraph 18 was not registered under Section 3 of FIFRA, 7 U.S.C. § 136a.

24. Respondent distributed or sold the unregistered pesticide “**Tidy Cats Scoop for Multiple Cats**” on 1,054 occasions, from December 2006 through December 2007 as detailed in Attachment A (contains Confidential Business Information).

25. Respondent’s distribution or sale of an unregistered pesticide product constitutes an unlawful act under Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), and subjects Respondent to the issuance of an Administrative Complaint assessing a civil penalty under Section 14(a) of FIFRA, 7 U.S.C. § 136l(a).

Proposed Civil Penalty

26. Complainant proposes that the Administrator assess a civil penalty against Respondent for the FIFRA violations alleged in this Complaint as follows:

Count 1 Through 1054

The statements provided in paragraphs 1 through 29 are incorporated by reference as though set forth here in full. Distribution/sale of the unregistered pesticide “**Tidy Cats Scoop for Multiple Cats**” from December 2006 through December 2007 as detailed in Attachment A (contains Confidential Business Information):

| | |
|--|------------------|
| 1,054 occasions | \$721,200 |
| Total proposed civil penalty..... | \$721,200 |

Complainant determined the proposed civil penalty according to Section 14(a) of FIFRA, 7 U.S.C. § 136l(a). In determining the penalty amount, Complainant considered the size of Respondent's business, the effect on Respondent's ability to continue in business and the gravity

of the violations. Complainant also considered U.S. EPA's *Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act (ERP)*, dated December 2009, a copy of which is enclosed with this Complaint. Complainant used the "Graduated Penalty Calculation" as provide in the above ERP.

Rules Governing this Proceeding

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" (the Consolidated Rules), codified at 40 C.F.R. Part 22, govern this proceeding to assess a civil penalty. Enclosed with the Complaint served on Respondent is a copy of the Consolidated Rules.

Filing and Service of Documents

Respondent must file with the Regional Hearing Clerk the original and one copy of each document Respondent intends to be a part of the record in this proceeding. The Regional Hearing Clerk's address is:

Regional Hearing Clerk (E-19J)
U.S. EPA - Region 5
77 West Jackson Boulevard
Chicago, IL 60604

Respondent must serve a copy of each document filed in this proceeding on each party according to Section 22.5 of the Consolidated Rules. Complainant has authorized Jose C. de Leon, Associate Regional Counsel, to receive any answer and subsequent legal documents that Respondent serves in this proceeding. You may telephone Mr. de Leon at (312) 353-7456. His address is:

Jose C. de Leon (C-14J)
Office of Regional Counsel
U.S. EPA - Region 5
77 West Jackson Boulevard
Chicago, IL 60604

Terms of Payment

Respondent may resolve this proceeding at any time by paying the proposed penalty by certified or cashier's check payable to "Treasurer, the United States of America," and by delivering the check to:

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

If Respondent pays the proposed penalty in full within thirty (30) days after receiving the Complaint, no answer need be filed. A copy of the check, however, must be filed with the Regional Hearing Clerk at the address listed above. Respondent must include the case name and docket number on the check and in the letter transmitting the check. Respondent simultaneously must send copies of the check and transmittal letter to Mr. de Leon and to:

Estrella Calvo (E-9J)
Pesticides and Toxics Compliance Section
U.S. EPA - Region 5
77 West Jackson Boulevard
Chicago, IL 60604

Answer and Opportunity to Request a Hearing

The Administrator must provide an opportunity to request a hearing to any person against whom the Administrator proposes to assess a penalty under Section 16(a) of the Act, 15 U.S.C.

§ 2615(a). Respondent has the right to request a hearing on any material fact alleged in the Complaint, or on the appropriateness of the proposed penalty, or both. To request a hearing, Respondent must specifically make the request in its answer, as discussed below. Respondent must file a written answer to this Complaint if Respondent contests any material fact of the Complaint; contends that the proposed penalty is inappropriate; or contends that it is entitled to judgment as a matter of law. To file an answer, Respondent must file the original written answer and one copy with the Regional Hearing Clerk at the address specified above, and must serve copies of the written answer on the other parties.

If Respondent chooses to file a written answer to the Complaint, it must do so within 30 calendar days after receiving the Complaint. In counting the 30 day time period, the date of receipt is not counted, but Saturdays, Sundays, and Federal legal holidays are counted. If the 30 day time period expires on a Saturday, Sunday, or Federal legal holiday, the time period extends to the next business day.

Respondent's written answer must clearly and directly admit, deny, or explain each of the factual allegations in the Complaint; or must state clearly that Respondent has no knowledge of a particular factual allegation. Where Respondent states that it has no knowledge of a particular factual allegation, the allegation is deemed denied.

Respondent's failure to admit, deny, or explain any material factual allegation in the Complaint constitutes an admission of the allegation.

Respondent's answer must also state:

- a. The circumstances or arguments which Respondent alleges constitute grounds of defense;

- b. The facts that Respondent disputes;
- c. The basis for opposing the proposed penalty; and
- d. Whether Respondent requests a hearing

If Respondent does not file a written answer within thirty (30) calendar days after receiving this Complaint the Presiding Officer may issue a default order, after motion, under Section 22.17 of the Consolidated Rules. Default by Respondent constitutes an admission of all factual allegations in the Complaint and a waiver of the right to contest the factual allegations. Respondent must pay any penalty assessed in a default order without further proceedings thirty (30) days after the order becomes the final order of the Administrator of EPA under Section 22.27(c) of the Consolidated Rules.

Settlement Conference


Whether or not Respondent requests a hearing, Respondent may request an informal settlement conference to discuss the facts of this proceeding and to arrive at a settlement. To request an informal settlement conference, Respondent may contact Estrella Calvo, Enforcement Case Officer, at phone number (312) 886-8931, or the address on page 7.

Respondent's request for an informal settlement conference does not extend the 30 calendar day period for filing a written answer to this Complaint. Respondent may pursue simultaneously the informal settlement conference and the adjudicatory hearing process. The EPA encourages all parties facing civil penalties to pursue settlement through an informal conference. The EPA, however, will not reduce the penalty simply because the parties hold an informal settlement conference. Also, please be advised that Section 22.18 of the Consolidated

Rules of Practice prohibits any ex parte (unilateral) discussion of the merits of this action, after this Complaint is issued, with the Regional Judicial Officer, Administrative Law Judge, the members of the Environmental Appeals Board or any person likely to advise these officials on any decision in this case.

Continuing Obligation to Comply

Neither the assessment nor payment of a civil penalty will affect Respondent's continuing obligation to comply with the Act and any other applicable Federal, state, or local law.


for Margaret M. Guerriero
Director
Land and Chemicals Division

12/22/11
Date

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PROTECTION AGENCY

ATTACHMENT "A"

REDACTED

CONFIDENTIAL BUSINESS INFORMATION (CBI)