UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 4

IN THE MATTER OF:	)	DOCKET NO.: FIFRA-04-2009-3015
	)	
Guaranteed Pool and Spa, Inc.	)	PROCEEDING UNDER SECTION
	)	14(a) OF THE FEDERAL
	)	INSECTICIDE, FUNGICIDE, AND
	)	RODENTICIDE ACT, 7 U.S.C.
	)	136*l*(a)
	)	
Respondent.	)	
	)	

COMPLAINANT'S MOTION FOR DEFAULT

COMES NOW the Complainant and moves for a finding of default and issuance of a Default Order against Respondent, pursuant to 40 C.F.R. § 22.17(a)-(c). Through this Motion, Complainant seeks resolution of the entire proceeding and requests that the Respondent be assessed a penalty of $13,000. As grounds therefore, Complainant shows as follows:

I. BACKGROUND

On February 4, 2009, Complainant filed a Civil Complaint and Notice of Opportunity for Hearing (Complaint) with the Region 4 Regional Hearing Clerk, and served a copy sent by Certified Mail, Return Receipt requested, to Mr. Timothy R. Fiedler, attorney for Respondent. Prior to service being mailed, Mr. Fiedler advised Complainant that he would accept service of the Complaint. (See Complaint and Cover Letter, **Exhibit A**).

The return receipt green card was signed by Amanda Smallwood in Mr. Fiedler's office on February 9, 2009, and received back by Complainant on or about February 24, 2009. Pursuant to 40 C.F.R. 22.15(a), an answer was required to be filed within 30 days after service, which would have been March 11, 2009. As of March 13, 2009, an answer had not been filed. As a courtesy, the undersigned attorney for Complainant tried unsuccessfully on several occasions to reach Mr. Fiedler by phone and email to inquire whether an answer had been filed or would be filed.

On March 18, 2009, the undersigned received an email from Mr. Fiedler's email address advising that Mr. Fiedler's law practice had been closed down as of February 27, 2009, due to Mr. Fiedler's hospitalization, and that prior to closing the law practice, Mr. Fiedler's office sent a letter and a copy of the Complaint to Respondent and encouraged it to promptly obtain new counsel (See email, **Exhibit B**).

On March 18, 2009, Complainant filed a Proof of Service explaining what had happened with Mr. Fiedler (See **Exhibit C**). The Proof of Service was served on Respondent's owner, Mr. Wesley Haigh.

On March 19, 2009, Molly Freeman, a representative of EPA- Region 4's pesticide program spoke with Mr. Haigh and advised him that EPA had not received an Answer to the Complaint and that EPA had learned that Mr. Fiedler had closed his law practice. Mr. Haigh said that he was attempting to get records from Mr. Fiedler's office and that he intended to file something with EPA by Monday, March 23, 2009, and that he would be representing himself.

Ms. Freeman faxed a copy of the Complaint to Mr. Haigh and followed up with another call to explain that by faxing him the Complaint, EPA was not providing him an extension of time to file an Answer and was not waiving its right to seek a default judgment. Ms. Freeman also advised him that an extension of time to file an Answer could only be granted by the Court and pointed out that the address of the Regional Hearing Clerk was in the Complaint. (See email from Ms. Freeman to Robert Caplan, **Exhibit D.** Ms. Freeman also faxed this email to Mr. Haigh). The foregoing information was provided to the Court in Complainant's Status Report, filed on March 19, 2009 (See **Exhibit E**).

On March 23, 2009, Mr. Haigh faxed to Ms. Freeman what purported to be a copy of a motion for extension that was addressed to the Regional Hearing Clerk, but no proof of service was attached. Ms. Freeman is not authorized to receive or file a motion for extension on behalf of Respondent, nor is she obligated to give the fax copy of Mr. Haigh's letter to the Regional Hearing Clerk. Mr. Haigh's motion was not served on the Regional Hearing Clerk.

On or about April 3, 2009, Respondent filed an Answer to the Complaint, which was 23 days past the due date of March 11, 2009. On April 20, 2009, Complainant received a letter from Susan L. Biro, Chief Administrative Law, dated April 16, 2009, which requested Complainant to advise the Court as to whether it would agree to Alternative Dispute Resolution (ADR).[1]

As of the date of the filing of this Motion for Default (April 21, 2009), Respondent has not filed with the Court or served on Complainant, nor has the Court granted a motion for an extension of time to file an Answer. (See Affidavit of Patricia A. Bullock, Regional Hearing Clerk - **Exhibit F**). Therefore, Respondent is in default pursuant to 40 C.F.R. § 22.15.

An extension of time may be granted pursuant to 40 C.F.R. § 22.7(b) upon timely motion for good cause shown, and any such motion is required to be filed sufficiently in advance of the due date. Mr. Fiedler's office advised EPA that it sent the Complaint to Mr. Haigh on February 27, 2009. Mr. Haigh has submitted no proof showing that he did not receive the letter and Complaint from Mr. Fiedler's office. Mr. Haigh did not properly file or serve a motion for an extension of time to file an answer sufficiently in advance of the due date of March 11, 2009, and has not shown good cause for an extension. Therefore, the Answer he filed on April 3, 2009, should be rejected, and it does not cure the default. Under 40 C.F.R § 22.5(c)(5), the Presiding Officer may exclude from the record any document which does not comply with this section, which would include failure to properly file and serve a motion for extension.

II. LEGAL BASIS FOR DEFAULT JUDGMENT

40 C.F.R. § 22.15 requires that an Answer to a Complaint be filed with the Regional Hearing Clerk within thirty (30) days after service of the Complaint. Pursuant to 40 C.F.R. § 22.17(a), "[a] party may be found to be in default . . . after motion, upon failure to file a timely Answer to the Complaint". In this case, service of the Complaint was made on February 9,

[1] In the event that the Court does not grant this Motion for Default, Complainant would be willing to participate in ADR. Complainant's attorney will be emailing and/or calling Ms. Whiting-Beale as directed in Judge Biro's letter.

2009, and an Answer was required to have been filed by March 11, 2009. The Respondent failed to file a motion to extend the time to file an Answer. Therefore, the Answer that was filed on April 3, 2009, was beyond the 30-day period for filing an Answer and must be dismissed. Respondent is in default and default judgment may be entered.

Pursuant to 40 C.F.R. § 22.17(b), a motion for default may seek resolution of all or part of the proceeding including the assessment of a penalty. Under 40 C.F.R. § 22.17 (c), "[w]hen the Presiding Officer finds that default has occurred he shall issue a default order against the defaulting party as to any or all parts of the proceeding unless the record shows good cause why a default order should not be issued." This section further provides that, "[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 underlying "Act" is FIFRA).

Complainant seeks resolution of the entire proceeding and the entry of a default judgment against Respondent assessing the full penalty proposed in the Complaint - $13,000. Complainant believes that the requested relief is consistent with the record and FIFRA, and therefore moves for the assessment of the full proposed penalty of $13,000. The basis for assessing a penalty is discussed in the following section.

III. DISCUSSION OF PENALTY

40 C.F.R. § 22.17(b) provides that if a motion for default requests the assessment of a penalty against a defaulting party, the Complainant is required to specify the penalty and to state the legal and factual grounds supporting the penalty. 40 C.F.R. § 22.27(b) requires that the amount of the civil penalty be determined "based upon the evidence in the record and in accordance with any penalty criteria set forth in the Act. The Presiding Officer shall consider any civil penalty guidelines issued under the Act."

Pursuant to Section 14(a)(4) of FIFRA, 7 U.S.C. § 136*l*(a)(4), in determining the amount of a penalty, EPA is required to consider "the appropriateness of such penalty to the size of the

business of the person charged, the effect on the person's ability to remain in business, and the gravity of the violation." In order to assess the penalty criteria set forth in Section 14(a)(4) of FIFRA, Complainant uses its Enforcement Response Policy (ERP) for the Federal Insecticide, Fungicide and Rodenticide Act, dated July 2, 1990 (See **Exhibit G**). In accordance with the ERP, EPA prepared a penalty calculation worksheet, attached as **Exhibit H.**

The Complaint alleges that Respondent committed two violations of FIFRA: (1) offering for sale containers of registered pesticides that were misbranded because they had no labels; and (2) detaching, defacing, or destroying labels from containers of pesticides.

Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136*j*(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. Section 2(q) of FIFRA, 7 U.S.C. § 136*j*(2)(q), provides that 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.

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 FIFRA.

The ERP (**Exhibit G**) provides that computation of the penalty entails a five-step process: (1) determination of the gravity of the violation using the gravity levels found in Appendix A of the ERP; (2) determination of the size of business of the violator; (3) use of matrices in Table 1 to determine dollar amount associated with the gravity level of violation and size of business; (4) further gravity adjustments in consideration of characteristics of the pesticide, actual or potential harm to human health and environment, compliance history of violator, and culpability of

violator, using the gravity adjustment criteria in Appendix B of the ERP; and (5) determination of the effect the penalty will have on the violator's ability to remain in business.

(1) Gravity of the Violation. Calculating the gravity of a violation is a two step process that involves determining the appropriate gravity level that EPA has assigned to the violation, and adjusting the gravity penalty figure to consider the circumstances involved in the violation. The "levels" assigned to each violation in Appendix A represent an assessment of the relative gravity (seriousness) of each violation. These levels are used to determine the base penalty figures that are found in the Table I matrices in the ERP.

The "level of violation" that may be assigned for selling or distributing a misbranded pesticide fall into a range of values from level 1 to level 4, with level 1 being considered the most serious. The level that will be assigned depends on the nature of the misbranding that occurs. For example, if the pesticide container label did not contain directions for use necessary to make the product effective and to adequately protect health and the environment, or the pesticide container label did not contain adequate warnings, or the pesticide container does not have a label affixed to it with the required information, the level of violation assigned under the ERP is Level 2. If a misbranded pesticide is highly toxic to man and the label doesn't bear a skull and crossbones and the word "poison," the level of violation assigned is Level 1.

In this case, Respondent offered for sale 2.5-gallon containers of a registered pesticide (sodium hypochlorite for use in swimming pools) that had no labels. This creates the potential danger that purchasers would have no basis for knowing what was in the container, or how to properly use the product, or what precautions were necessary, and purchasers would be more likely to misuse the product or possibly create a situation where children might mistakenly assume that the container has a benign product in it leading to possible ingestion and poisoning. Based on the total absence of labels on some of the containers, Complainant assigned the misbranding violation (section 12(a)(1)(E) of FIFRA) as a Level 2 violation.

The ERP considers detaching, altering, defacing or destroying labels to be a Level 2 violation. Several of the 2.5-gallon pesticide containers had partial labels which had been ripped or torn, and for the other containers, the labels had been detached. Consistent with the ERP, Complainant also assigned this violation (section 12(a)(2)(A) of FIFRA) as a Level 2 violation.

The civil penalty matrix on page 19-B of the ERP lists the penalties for each level. For Level 2 violations, the base penalty is $6,500.

(2) Determination of Size of Business. The ERP also takes into account the size of business which affects the category of violation. Respondent was placed in Category I of the ERP (see pg. 20 of ERP) because Respondent's income tax returns show total revenues exceeding $1,000,000.

(3) Use of Matrices to Determine Gravity Amount. To find the appropriate penalties for the violations alleged in the Complaint, Complainant reviewed the matrix on page 19-B of the ERP for Level 2 violations by a Category I size of business. The appropriate gravity-based penalty for each of the two counts alleged in the Complaint (misbranding; detaching, destroying and defacing labels) is $6,500. The total gravity-based penalty for both counts is $13,000.

(4) Adjustment to Gravity. Adjustments to the gravity are factored in under the "Gravity Adjustment Criteria," listed in Appendix B of the ERP. Factors that are normally considered include pesticide toxicity, harm to human health, environmental harm, compliance history, and culpability. Each of these factors is assigned a numerical value. For purposes of determining adjustments to the gravity-based level of violation, the values assigned to each factor are added up and Table 3 of the ERP specifies the type of adjustment that may be applied depending on the numerical value of the factors added together. For example, if adjustment factors total 17 or above, the penalty matrix value is increased by 30%. If the factors total between 8-12, the ERP requires that the matrix value be assigned.

In this case, Complainant has assigned the following values to the adjustment factors for both violations: pesticide toxicity = 2 (signal word "danger"); human harm = 3 (harm to human

health is unknown); environmental harm = 3 (harm to the environment is unknown); compliance history = 0 (no prior violations; culpability = 2 (violation resulted from negligence). The numbers assigned to these factors total up to 10. Under Table 3 of the ERP, the appropriate penalty is the matrix value, and no further adjustment is warranted. Therefore, the gravity-based penalty for each violation alleged in the Complaint is $6,500, as set forth in the matrix found on page 19-B of the ERP.

(5) Effect of Penalty on Ability of Respondent to Remain in Business

Respondent submitted federal income tax returns for the years 2005, 2006, and 2007, in support of its claim that it was unable to pay a penalty. EPA's Financial Analyst reviewed the tax returns and determined that Respondent has the ability to pay the proposed penalty of $13,000. Complainant has seen no evidence indicating that payment of the penalty would affect Respondent's ability to remain in business.

WHEREFORE, due to Respondent's failure to timely answer the Complaint, and its failure to properly file and serve a motion for an extension of time to answer the Complaint, Complainant requests that this Motion for Default be granted, that judgment be entered against Respondent, and that Respondent be ordered to pay the full amount of the penalty proposed in the Complaint of $13,000. A draft Order on Default is attached.

Respectfully submitted,

4-23-09
Date

Robert W. Caplan
Attorney for Complainant
U.S. Environmental Protection Agency
Sam Nunn Federal Building - 13th Fl.
61 Forsyth Street, SW
Atlanta, GA 30303
404-562-9520

Attachments: Draft Default Order
Exhibits A - H

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 4

IN THE MATTER OF:	)	DOCKET NO.:FIFRA-04-2009-3015
	)	
Guaranteed Pool and Spa, Inc.	)	PROCEEDING UNDER SECTION 14(a) OF THE FEDERAL INSECTICIDE, FUNGICIDE AND RODENTICIDE ACT, 7 U.S.C. § 136*l*(a)
	)	
Respondent.	)	

DEFAULT ORDER

Pursuant to 40 C.F.R. § 22.17(a), I find that the Respondent's Answer to the Complaint was not timely filed in the above-styled action and that Respondent has not properly filed or served a request for an extension of time to Answer. Therefore, the Answer that was filed is hereby dismissed, and I find Respondent to be in default. This Default Order is issued pursuant to 40 C.F.R. § 22.17(c), and the Respondent is hereby ordered: (1) to pay the United States a penalty of $13,000.

Respondent shall pay the penalty in the following manner:

1. Within thirty (30) days after this Default Order is issued, payment shall be made by cashier's or certified check payable to "Treasurer, United States of America," and mailed to:

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

The check shall reference "Docket No. FIFRA-04-2009-3015."

2. At the time the check is sent, Respondent shall mail a copy of it to:

Regional Hearing Clerk
U.S. EPA, Region 4
61 Forsyth St.
Atlanta, Georgia 30303

and to:

Jeaneanne M. Gettle
Chief
Pesticides and Toxic Substances Branch
U.S. EPA, Region 4
61 Forsyth St.
Atlanta, Georgia 30303

3. For purpose of state and federal income taxation, Respondent shall not claim a deduction for any part of this penalty payment.

_____
Date

_____
Susan L. Biro
Chief Administrative Law Judge

CERTIFICATE OF SERVICE

I certify that the original and one copy of the Motion for Default In the Matter of: Guaranteed Pool and Spa, Inc., Docket No. FIFRA 04-2009-3015 with draft order and exhibits were filed with the Regional Hearing Clerk, and a copy of the Motion for Default with draft order and exhibits was mailed to the addresses listed below on this 24th day of April 2009.

Addressees:

Mr. Wesley Haigh (via Certified Mail)
Guaranteed Pool and Spa, Inc.
2350 N. Volusia Avenue
Orange City, Florida 32763-0000

and

1112 S. Nova Road (via Certified Mail)
Ormond Beach, Florida 32174-7339

Honorable Susan L. Biro (via Certified Mail)
Chief Administrative Law Judge
Office of Administrative Law Judges
U.S. EPA, Mail Code 1900L
1200 Pennsylvania Avenue, NW
Washington, DC 20460-2001

Molly Freeman Miller (via EPA's internal mail)
Air, Pesticides and Toxics
Management Division
U.S. EPA, Region 4
61 Forsyth Street, SW
Atlanta, Georgia 30303

4/24/09
Date

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