



UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

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In the Matter of:)
)
Everyday Group, LLC,) Docket No. FIFRA-02-2012-5201
)
Respondent.)

PREHEARING ORDER

This proceeding arises under the authority of Section 14(a)(1) of the Federal Insecticide, Fungicide and Rodenticide Act (“FIFRA”), 7 U.S.C. § 136l(a)(1), and is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, 40 C.F.R. §§ 22.1–22.45 (“Rules of Practice”). Several resources, including the Rules of Practice, an informal Practice Manual, a Citizen’s Guide, and significant orders and decisions issued by the office of the undersigned, may be found at the office’s website at <http://www.epa.gov/oalj>. The parties are strongly advised to familiarize themselves with these materials and the applicable statute(s).

The United States Environmental Protection Agency (“EPA” or “Agency”), Region 2 (“Complainant”), initiated this proceeding on October 11, 2012, by filing a Complaint and Notice of Opportunity for Hearing (“Complaint”) against Everyday Group, LLC (“Respondent”). The Complaint alleges in three counts that Respondent violated Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), and 40 C.F.R. § 152.15 by engaging in the distribution or sale of unregistered pesticides. Through counsel, Respondent filed an Answer on November 9, 2012.

Agency policy strongly supports settlement of a proceeding without the necessity of a formal hearing, and the procedures governing the documentation of settlement agreements are set forth in Section 22.18 of the Rules of Practice, 40 C.F.R. § 22.18. If settlement discussions have already been undertaken, the parties are commended for taking the initiative to resolve this matter informally and expeditiously. If settlement discussions have not yet commenced or have stalled, the parties are reminded that the pursuit of this matter through a formal hearing will require the expenditure of significant amounts of time and financial resources. Each party should consider the risk of not prevailing in the proceeding despite such expenditures. Moreover, while a negotiated settlement allows the parties to control the outcome of the proceeding, a judicial decision eliminates that control. In view of these considerations, the parties are directed to engage in a settlement conference on or before **January 25, 2013**, to attempt to reach an amicable resolution of this matter. Complainant shall file a status report regarding this conference and the status of settlement on or before **February 1, 2013**. If the case is settled, the

fully-executed Consent Agreement and Final Order shall be filed no later than **February 22, 2013**, with a copy contemporaneously sent to the undersigned.

Should a Consent Agreement and Final Order not be finalized on or before the deadline set forth above, the parties shall prepare for a formal hearing and shall strictly comply with the prehearing requirements of this Order, as follows.

Prehearing Exchange. Pursuant to Section 22.19(a) of the Rules of Practice, 40 C.F.R. § 22.19(a), each party is directed to prepare and submit a “prehearing exchange” of information. The parties’ prehearing exchanges shall contain the information identified below.

1. Each party shall submit the following as part of its Initial Prehearing Exchange:

(A) A list of names of all witnesses the party intends to call at the hearing. The list of witnesses shall identify each witness as a fact witness or an expert witness, provide a brief narrative summary of each witness’s expected testimony, and include a curriculum vitae or resume for each expert witness. The list must also state whether translation services are necessary for the testimony of any witness and the language to be translated. If the party does not intend to call any witnesses at the hearing, the party shall submit a statement that no witnesses will be called.

(B) Copies of all documents and other exhibits the party intends to introduce into evidence. Each item must be identified as Complainant’s or Respondent’s exhibit, as appropriate, and numbered with Arabic numerals (*e.g.*, “CX 1” or “RX 1”).

(C) A statement explaining the party’s views as to the appropriate location for the hearing and an estimate of the time needed to present its direct case.¹ See 40 C.F.R. §§ 22.19(d), 22.21(d).

2. In addition, Complainant shall submit the following as part of its Initial Prehearing Exchange:

(A) A copy of any reports, notes, or other pertinent documentation produced as a result of the inspections referenced in Paragraphs 25 and 26 of the Complaint.

¹ Complainant alleges in the Complaint, and Respondent admits in its Answer, that Respondent maintains its headquarters in Brooklyn (Kings County), New York. Compl. ¶ 22; Answer ¶ 22. In accordance with the Supplemental Rules Governing the Administrative Assessment of Civil Penalties Under the Federal Insecticide, Fungicide, and Rodenticide Act, 40 C.F.R. § 22.35(b), the hearing shall be held in the county, parish, or incorporated city of the residence of the respondent, unless otherwise agreed in writing by all parties. Thus, the hearing shall be held in Brooklyn (Kings County), New York, unless the parties designate a different location as the place of hearing in this matter.

(B) A copy of any documents in support of those factual allegations in the Complaint that Respondent has denied or otherwise not admitted in its Answer, including but not limited to the factual allegations in Paragraphs 23-27, 29-34, 41-46, 53-58, and 61 of the Complaint.

(C) A copy of the labels referenced in Paragraphs 33, 34, 45, 46, 57, and 58 of the Complaint.

(D) A narrative statement and a copy of any supporting documents in response to the allegations in Paragraph 4 of the Affirmative and Other Defenses section of Respondent's Answer.

(E) A narrative statement, and a copy of any documents in support, explaining in detail how the proposed penalty was calculated, including a discussion of each penalty assessment factor set forth in Section 14(a)(4) of FIFRA, 7 U.S.C. § 136l(a)(4).

(F) A copy, or a statement of the internet address (URL), of any policy or guidance document relied upon by Complainant in calculating the proposed penalty, or intended to be relied upon if that penalty is adjusted, other than the "Enforcement Response Policy for The Federal Insecticide, Fungicide and Rodenticide Act (FIFRA)" referenced on page 9 of the Complaint.

3. In addition, Respondent shall submit the following as part of its Prehearing Exchange:

(A) For each paragraph of the Complaint as to which Respondent denies the accuracy of the factual allegations contained therein, provide a narrative statement explaining in detail the factual and/or legal bases for the denial and demonstrating that such denial was made in good faith. Respondent shall also identify with specificity any documents, other exhibits, and/or testimony upon which Respondent intends to rely to support its denial of the truth of each such allegation.

(B) A narrative statement, and a copy of any documents in support, explaining in detail the allegations in Paragraphs 2-5 of the Affirmative and Other Defenses section of Respondent's Answer.

(C) If Respondent takes the position that the proposed penalty should be reduced or eliminated on any grounds, such as an inability to pay the proposed penalty or the adverse effect that payment of the proposed penalty would have on Respondent's ability to continue to do business, provide a narrative statement explaining in detail the factual and/or legal bases for its position. Respondent shall also submit a copy of any documents or other exhibits upon which it intends to rely to support its position regarding the reduction or elimination of the proposed penalty, such as certified copies of recent

financial statements or tax returns.

4. Finally, Complainant shall submit as part of its Rebuttal Prehearing Exchange:

(A) A statement and/or any documents in response to Respondent's Prehearing Exchange as to provisions 3(A) through 3(C) above.

The prehearing exchanges described above shall be filed pursuant to the following schedule:

February 22, 2013	Complainant's Initial Prehearing Exchange
March 15, 2013	Respondent's Prehearing Exchange
March 29, 2013	Complainant's Rebuttal Prehearing Exchange

The purpose of the prehearing exchange is to ensure that the parties have adequate notice of the contested issues in the case and ample opportunity to prepare to address those issues at the hearing. Section 22.19(a) of the Rules of Practice, 40 C.F.R. § 22.19(a), provides that except in accordance with Section 22.22(a), any document not included in the prehearing exchange shall not be admitted into evidence, and any witness whose name and testimony summary are not included in the prehearing exchange shall not be allowed to testify. Therefore, each party should thoughtfully prepare its prehearing exchange.

Supplement to Prehearing Exchange. Any addition of a proposed witness or exhibit to the prehearing exchange shall be filed with an accompanying motion to supplement the prehearing exchange.

Opportunity for a Hearing and Default. In its Answer, Respondent exercised its rights under Section 554 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 554, to request a hearing in this matter. Section 554(c)(2) of the APA requires that a hearing be conducted in accordance with Section 556 of the APA, 5 U.S.C. § 556. Section 556(d) provides that a party is entitled to present its case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. Thus, Respondent has the right to defend against Complainant's charges by way of direct evidence, rebuttal evidence, or cross-examination of Complainant's witnesses. Respondent is entitled to elect any or all three means to pursue its defense. If Respondent intends only to conduct cross-examination of Complainant's witnesses and to forgo the presentation of direct and/or rebuttal evidence, Respondent shall serve a statement to that effect on or before the date for filing its Prehearing Exchange. Information concerning the time and location of hearing will be provided after the parties have filed their prehearing exchanges.

Respondent is hereby notified that its failure to comply with the prehearing exchange requirements set forth herein can result in the entry of a default judgment

against it. Complainant is hereby notified that its failure to file its prehearing exchange in a timely manner can result in a dismissal of the case with prejudice.

The mere pendency of settlement negotiations, or even the existence of a settlement in principle, does not constitute a basis for failing to strictly comply with the prehearing exchange requirements. Only the filing of a fully-executed Consent Agreement and Final Order, or an order of the undersigned, excuses noncompliance with filing deadlines.

Filing. Pursuant to the Headquarters Hearing Clerk Pilot Project, rather than filing all documents with the Regional Hearing Clerk as specified in Section 22.5(a) of the Rules of Practice, 40 C.F.R. § 22.5(a), **the ORIGINAL and one copy of each document filed in this proceeding shall be filed with the Headquarters Hearing Clerk by mail, courier, or personal delivery at the addresses provided below.** A document is “filed” when the Headquarters Hearing Clerk receives it. All documents submitted for filing must be signed in accordance with Section 22.5(c)(3) of the Rules of Practice, 40 C.F.R. § 22.5(c)(3).

If filing by United States Postal Service (USPS), address your document(s) to:

Sybil Anderson
Headquarters Hearing Clerk
EPA Office of Administrative Law Judges
1200 Pennsylvania Avenue, NW
Mail Code 1900L
Washington, DC 20460-2001

If filing by UPS/FedEx/DHL or other courier, or by personal delivery, address your document(s) to:

Sybil Anderson
Headquarters Hearing Clerk
EPA Office of Administrative Law Judges
1099 14th Street, NW
Suite 350W, Franklin Court
Washington, DC 20005

The parties are encouraged to send a courtesy copy of each filed document to the Office of Administrative Law Judges by facsimile or e-mail, because physical delivery is often subject to significant delay. The facsimile number for the Office of Administrative Law Judges is (202) 565-0044, and the e-mail address is oaljfiling@epa.gov.

Service. Copies of each document filed with the Headquarters Hearing Clerk must be served on the undersigned and on each party, or if a party is represented (*e.g.*, by an attorney), on that party’s representative. Service may be made by mail, courier, or personal delivery. A document

is “served” upon mailing or placement in the custody of a reliable commercial delivery service. Documents served on the undersigned should be directed to The Honorable Susan L. Biro, Chief Administrative Law Judge, and addressed in the same manner as documents submitted for filing.

Every document that is filed and served must be accompanied by a Certificate of Service showing the time and manner in which the document was submitted for filing, and the time and manner in which the document was served on the undersigned and each party.

The parties are advised NOT to include, attach, or refer to any terms of settlement offers or agreements in any document submitted to the undersigned, and no copies of Consent Agreements and Final Orders shall be submitted, or attached to any document submitted, to the undersigned except those that are fully executed and filed with the Headquarters Hearing Clerk.

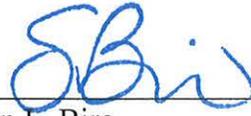
Contact Information. Telephone contact may be made with my legal assistant, Maria Whiting-Beale at (202) 564-6259 to ask whether a document has been received or issued. E-mail or telephone contact may be made with my staff attorney, Jennifer Wolff, Esq., at wolff.jennifer@epa.gov or (202) 564-1170 for procedural questions.

Motions. Prior to filing any motion, the moving party shall contact the non-moving party to determine whether the non-moving party objects to the granting of the relief sought in the motion, and the motion shall state the position of the non-moving party. The mere consent of the non-moving party to the relief sought does not assure that the motion will be granted. Furthermore, all motions must be filed in sufficient time to permit the filing of a response by the non-moving party and the issuance of a ruling on the motion before any relevant deadline set by this or any subsequent order. Sections 22.16(b) and 22.7(c) of the Rules of Practice, 40 C.F.R. §§ 22.16(b), 22.17(c), allow a 15-day response period for motions, with an additional five days added thereto if the motion “is served by first class mail or commercial delivery service, but not by overnight or same-day delivery” 40 C.F.R. § 22.6(c). Motions not filed in a timely manner may not be considered.

If either party intends to file any dispositive motion regarding liability, such as a motion for accelerated decision or motion to dismiss pursuant to Section 22.20(a) of the Rules of Practice, 40 C.F.R. § 22.20(a), it shall file such motion within 30 days after the due date for Complainant’s Rebuttal Prehearing Exchange.

Pursuant to Section 22.16(d) of the Rules of Practice, 40 C.F.R. § 22.16(d), a party may submit a written request for oral argument upon filing a motion, a response to a motion, or a reply. The requesting party shall propose an appropriate location for the argument. The office of the undersigned has access to videoconferencing technology and strongly encourages the parties to consider utilizing such technology for oral arguments on motions so as to minimize the expenditure of time and monetary resources in connection with such arguments. A request for oral argument may be granted, in the undersigned’s discretion, where further clarification and elaboration of arguments would be of assistance in ruling on the motion.

SO ORDERED.



Susan L. Biro
Chief Administrative Law Judge

Dated: January 4, 2013
Washington, D.C.

In the Matter of Everyday Group, LLC, Respondent
Docket No. FIFRA-02-2012-5201

CERTIFICATE OF SERVICE

I certify that the foregoing **Prehearing Order**, dated January 4, 2013 was sent this day in the following manner to the addressees listed below.



Maria Whiting-Beale
Staff Assistant

Dated: January 4, 2013

Original And One Copy To:

Sybil Anderson
Headquarters Hearing Clerk
U.S. EPA
Mail Code 1900L
1200 Pennsylvania Avenue, NW
Washington, DC 20460-2001

Copy By Regular Mail To:

Lee Spielmann, Esquire
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