UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
P.L.C. Corporation	)	**Docket No. I.F. & R.-V-020-93**
	)	
	)	
Respondent	)	

ORDER ON DEFAULT

This proceeding for the assessment of a civil penalty was initiated on September 28, 1993, by the Director of the Environmental Services Division of the Region V Office of the U.S. Environmental Protection Agency (Complainant), pursuant to Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended (FIFRA or Act), 7 U.S.C. § 136l. The complaint charged Respondent with two counts of violating Section 12(a)(1)(E) of the Act, 7 U.S.C. § 136j(a)(1)(E). Count I alleged that Respondent sold or distributed an adulterated pesticide, known as PINE-ALL 6 DISINFECTANT DETERGENT (PINE-ALL), and that such sale or distribution constituted a violation of Section 12(a)(1)(E) of the

Act, 7 U.S.C. § 136j(a)(1)(E). Count II of the complaint alleged that Respondent sold or distributed a misbranded pesticide (PINE-ALL), and that such sale or distribution constituted a violation of Section 12(a)(1)(E) of the Act, 7 U.S.C. § 136j(a)(1)(E). The complaint, along with a copy of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits (Consolidated Rules), 40 C.F.R. Part 22, was mailed to Respondent by certified mail.

Respondent answered the complaint by letter, dated October 14, 1993, in which it requested a hearing and explained that it believed that the sample taken was from product manufactured prior to 1990. Respondent did not deny the allegations in the complaint, but explained that the difference between the actual product and the amount indicated on the label may have been due to problems that it was experiencing with its water meter. Respondent also claimed that the proposed civil penalty of $10,000 was more than it could handle, as its sales were only $630,000 annually.

On November 4, 1993, the undersigned Administrative Law Judge (ALJ) was designated to preside in this matter, pursuant to Section 22.21(a) of the Consolidated Rules. On January 13, 1994, the ALJ directed the parties to submit prehearing exchanges on or before March 25, 1994. The letter directing the parties to submit their materials also directed Complainant to file a statement on or before March 4, 1994, as to whether this matter "has been or will be settled." As part of its prehearing exchange, Respondent was directed to:

1. Submit a copy of "old label" referred to in letter-answer.

2. Submit financial statements, copies of income tax returns or other data supporting contention imposition of proposed penalty would adversely affect Respondent's ability to remain in business.

On March 4, 1994, Complainant filed a Status Report indicating that the parties were attempting to settle the matter, but that the action was not yet resolved. At the request of Complainant, the date for submission of prehearing exchanges was extended to April 25, 1994, and on that date, Complainant submitted its prehearing exchange; whereas, Respondent failed to submit any response to the ALJ's order.

Pursuant to a motion filed by Complainant, the ALJ, on July 6, 1994, issued an order to show cause why a default judgment in this matter should not be entered and gave Respondent until August 12, 1994, to respond to the order. Respondent has not responded to the order nor has it requested an extension of time to do so. Finally, on August 24, 1994, Complainant filed a Motion for Default Judgment against Respondent, pursuant to Section 22.17 of the Consolidated Rules, 40 C.F.R. § 22.17.

As indicated above, Respondent has not submitted its prehearing exchange nor has it denied the allegations in the complaint. Complainant, on the other hand, has filed its prehearing exchange and has submitted supporting exhibits,

including, *inter alia*, copies of the label, the invoice of sale of the pesticide, test results of analysis of the pesticide samples, and a record of the chain of custody of the samples. The documents submitted by Complainant clearly support the allegations in the complaint. Accordingly, I find Respondent P.L.C. Corporation to be in default and hereby grant Complainant's Motion for a Default Order[1]. Moreover, as discussed below, I find Complainant's revised proposed civil penalty of $5,600 to be reasonable and appropriate in light of Respondent's violations and the size of its business.

The following findings of fact and conclusions of law as to issues of liability and penalty are made pursuant to Section 22.17(c) of the Consolidated Rules, 40 C.F.R. Part 22.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. This is a civil administrative action instituted pursuant to Section 14(a) of FIFRA, 7 U.S.C. § 136l, for the assessment of a civil penalty.

2. Complainant is, by lawful delegation, the Director, Environmental Sciences Division, United States Environmental Protection Agency, Region 5.

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[1] Pursuant to 40 C.F.R. § 22.17, this Default Order constitutes, for purposes of the pending action only, an admission of all facts alleged in the complaint and a waiver of Respondent's right to a hearing on such factual allegations.

3. Respondent is P.L.C. Corporation, a corporation organized under the laws of the State of Illinois, which has a place of business located at 415 Harvester Court, Wheeling, Illinois, 60090.

4. Respondent is a "person," as that term is defined in Section 2(s) of FIFRA, 7 U.S.C. § 136(s).

5. On February 20, 1992, Mark M. Dixon, an inspector employed by the Ohio Department of Agriculture and duly authorized to conduct inspections under FIFRA, conducted an inspection at Superior Janitor Supply located in Cincinnati, Ohio.

6. As part of the February 20, 1992 inspection, Inspector Dixon collected a sample of Respondent's product, PINE-ALL 6 DISINFECTANT DETERGENT (PINE-ALL) (EPA Reg. No. 5185-177-39497) and a copy of a bill of lading, dated November 19, 1991, documenting the sale of PINE-ALL by Respondent to Superior Janitor Supply.

7. In that PINE-ALL was sold by Respondent to Superior Janitor Supply, Respondent's product is "distributed and sold," as that term is defined in Section 2(gg) of FIFRA, 7 U.S.C. § 136(gg).

8. Respondent's product is a pesticide as defined in Section 2(u) of FIFRA, 7 U.S.C. § 136(u), in that the product claims to kill certain pests, and is registered as a pesticide with U.S. EPA.

9. Product analysis performed by the Ohio Department of Agriculture and reported on March 26, 1992, revealed that Respondent's product contained .1207 percent chlorine.

10. Respondent's product is represented by its label to contain .1877 percent of chlorine.

11. Respondent's product is adulterated because its strength or purity falls below the professed standard of quality as expressed on its labeling under which it is sold.

12. Section 2(c)(1) of FIFRA, U.S.C. § 136(c)(1) states that a pesticide is adulterated if its strength or purity falls below the professed standard of quality as expressed on its labeling under which it is sold.

13. Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(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.

14. Respondent's sale and distribution of the adulterated product constitutes an unlawful act pursuant to Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E).

15. Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136(q)(1)(A), states that a pesticide is misbranded if its labeling bears any

statement, design, or graphic representation relative thereto or to its ingredients which is false or misleading in any particular.

16. 40 C.F.R. § 156.10(g)(2), provides that the ingredient statement is normally required on the front panel of the label, unless the size or form of the package makes it impracticable to place the ingredient statement on the front panel.

17. The label on Respondent's product has the ingredient statement positioned on the side panel.

18. Pursuant to Section 2(q)(1)(F) of FIFRA, 7 U.S.C. § 136(q)(1)(F), a pesticide is misbranded if its label does not contain directions for use which are necessary for effectuating the purpose for which the product is intended, and which are adequate to protect health and the environment.

19. 40 C.F.R. § 156.10(i)(2)(ix), provides that the directions for use on the label of a pesticide shall include specific directions concerning the storage and disposal of the pesticide and its container, grouped under the heading "Storage and Disposal."

20. Respondent's product does not include "Storage and Disposal," instructions on the label as required.

21. 40 C.F.R. § 156.10(h)(2)(ii) provides that the required warnings and precautionary statements on the pesticide label shall

include an "Environmental Hazards," statement such as, "This product is toxic to fish."

22. Respondent's product does not include an "Environmental Hazards," statement on the label as required.

23. Respondent's product is a misbranded pesticide product.

24. Respondent's sale and distribution of the misbranded product constitutes an unlawful act pursuant to Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E).

25. On September 28, 1993, Complainant issued a complaint and Notice of Opportunity for Hearing (complaint) against Respondent P.L.C. Corporation, alleging violations of Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E).

26. On October 14, 1993, Respondent filed an Answer to the complaint.

27. By letter dated January 13, 1994, the ALJ directed the parties to submit their respective prehearing exchanges on or before March 25, 1994. On subsequent motion filed by Complainant, this date was extended to April 25, 1994.

28. On April 25, 1994, Complainant filed its prehearing exchange along with supporting documents and exhibits.

29. No prehearing exchange has been filed by Respondent.

30. On June 21, 1994, Complainant filed a Motion for an Order to Show Cause why a default judgment should not be issued against Respondent.

31. On July 6, 1994, the ALJ issued an order to show cause why a default judgment against Respondent should not be entered.

32. No response to the order to show cause has been filed by Respondent.

33. On August 24, 1994, Complainant filed a Motion for Default Judgment against Respondent.

34. Respondent has failed to comply with the order to file its prehearing exchange and the order to show cause, which were issued by the presiding Administrative Law Judge, and is, therefore, in default pursuant to 40 C.F.R. § 22.17(a).

35. Pursuant to 40 C.F.R. § 22.17(a), Respondent's default constitutes an admission of all the facts alleged in the complaint and a waiver of Respondent's right to a hearing on such factual allegations.

PENALTY

Section 14(a) of FIFRA, 7 U.S.C. § 136l, authorizes a civil penalty of up to $5,000 for each violation of FIFRA. In determining the amount of the penalty, Section 14(a)(4) of FIFRA, 7 U.S.C. § 136l(a)(4), and the FIFRA Enforcement Response Policy

mandate that several factors be considered.[2] Complainant initially proposed a civil penalty of $10,000 which was the maximum penalty permitted under section 14(a) for two violations of FIFRA. Subsequent to discussions with Respondent, Complainant revised the proposed penalty to $5,600 ($2,800 for each violation). The revised penalty was based on a re-evaluation of Respondent's size and a reduction for "Gravity Adjustments," pursuant to the Final Enforcement Response Policy (ERP) for FIFRA, dated July 2, 1990. Respondent has submitted no information to challenge the proposed penalty; whereas, the record supports Complainant's calculation of the penalty. Therefore, I conclude, based on the record in this matter, that Complainant has properly considered the factors delineated in the Act and the ERP. Accordingly, I find that the appropriate civil penalty to be assessed against Respondent is $5,600.

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[2] Section 14(a)(4) of FIFRA provides, in part, that:

> In determining the amount of the penalty, the Administrator shall consider the appropriateness of such penalty to the size of the business of the person charged, the effect on the person's ability to continue in business, and the gravity of the violation.

ORDER[3]

Accordingly, IT IS ORDERED, pursuant to Section 14(a) of FIFRA, 7 U.S.C. § 136l(a), that Respondent P.L.C. Corporation be assessed a civil penalty of five thousand and six hundred dollars ($5,600).

Payment of the full amount of the penalty assessed shall be made by forwarding a cashier's or certified check, payable to the order of the "Treasurer, United States of America," to the following address within sixty (60) days after the final order is issued:

USEPA - Region V
P.O. Box 70753
Chicago, Illinois 60673

[3] Pursuant to 40 C.F.R. § 22.17(b), this Order constitutes an Initial Decision. Unless an appeal is taken pursuant to 40 C.F.R. §22.30(a) or the Environmental Appeals Board elects to review this decision, *sua sponte*, pursuant to 40 C.F.R. § 22.30(b), this Order shall become the final order of the Environmental Appeals Board in accordance with 40 C.F.R. § 22.27(c).

In addition, Respondent shall mail a copy of the check to the following persons:

Regional Hearing Clerk (MF-10J)
U.S. Environmental Protection Agency
Region V
77 West Jackson Blvd.
Chicago, Illinois 60604

and

Branch Secretary
Pesticides and Toxic Substances Branch (SP-14J)
U.S. Environmental Protection Agency
Region V
77 West Jackson Blvd.
Chicago, Illinois 60604

Dated this 13th day of April 1995.

Spencer T. Nissen
Administrative Law Judge

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

REPLY TO THE ATTENTION OF:

CERTIFICATE OF SERVICE

A copy of the Default Order on behalf of P.L.C. Corporation Docket No. IF&R-V-020-93 was sent in the manner indicated to each of the following on this 19th day of April, 1995:

Copy by InterOffice Mail to: Jeffery M. Trevino, Esq.
Assistant Regional Counsel
Region 5 (CA-29A)
U.S. Environmental Protection Agency
Chicago, IL 60604

Copy by Regular Mail to: Roger Risher
PLC Corporation
415 Harvester Court
Wheeling, IL 60090

Jodi Swanson-Wilson
Jodi L. Swanson-Wilson