

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF

AQUA CLEAR INDUSTRIES, INC.

DOCKET NO. I.F.& R.-II-534-C

RESPONDENT

ORDER ISSUING ACCELERATED
DECISION AS TO LIABILITY AND
SETTING PREHEARING EXCHANGE

The complaint in this proceeding under Section 14(a)(1) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) , 7 U.S.C. § 1361(a), filed on August 7, 1996, charged Respondent, Aqua Clear Industries, Inc. (Aqua Clear) with one count of violating FIFRA § 12(a)(1)(E), 7 U.S.C. § 136j(a)(1)(E), by distributing or selling a misbranded pesticide. For this alleged violation, it was proposed to assess Respondent a penalty of \$2,400.

The complaint alleges that, on February 28, 1995, Respondent distributed its pesticide product, "Swimway Speed-I-Tabs" (Swimway) to "Watson's", its pesticide dealer located in Indianapolis, Indiana.[Complaint, ¶ 28]. Swimway contains the active ingredient Trichloro-S-triazinetrione, EPA Registration Number 45309-7. The Swimway label incorrectly identified Trichloro-S-triazinetrione as EPA Registration Number 45309-14.^{1/}

Respondent, appearing pro se, filed a letter-answer on August 20, 1996. Respondent admitted distributing its product with the erroneous label, but explained that the mistake occurred as a result of a "computer generated mis-entry when the labels were made." [Answer, page 1]. Respondent asserts that the computer error created one roll of 500 labels exhibiting the incorrect EPA Registration Number. Upon learning of the label error from its dealer, Watson's, Respondent assertedly destroyed 300 of the labels prior to distribution, express-mailed correct labels to its customers for relabeling of inventory stocks, and implemented quality control measures to prevent future labeling errors. Approximately 87 containers of Swimway were sold with the incorrect labeling.

A pesticide is misbranded under FIFRA if "its labeling bears any statement, design, or graphic representation relative thereto or to its ingredients, which is false or misleading in any particular." FIFRA §2(q)(1)(A); 7 U.S.C. §136(q)(1)(A). Because Respondent admits that it distributed Swimway with an incorrect EPA Registration Number for Trichloro-S-triazinetrione on the label, Respondent distributed a misbranded pesticide, and violated FIFRA § 12(a)(1)(E); 7 U.S.C - § 136j(a)(1)(E). FIFRA is a strict liability statute; intent or good faith is immaterial to determine liability.^{2/} Respondent is, therefore, liable for violating the Act, despite the technical nature of the error.

The Presiding Officer (ALJ) may, sua sponte, at any time, render an accelerated decision as to all or any part of the proceeding, without further hearing, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law. 40 CFR § 22.20(a). An accelerated decision as to liability is appropriate in this case, because the factual basis of the violation is not disputed and Respondent is liable as a matter of law. An accelerated decision will, therefore, be issued as to liability. The only remaining issue is the amount of an appropriate penalty, if any.

In determining the amount of any penalty, the Administrator [or his delegatee] must 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." FIFRA § 14 (a) (4) ; 7 U.S.C. § 136~~1~~ (a) (4). "Gravity of the violation" is generally considered from two aspects: gravity of the harm or potential for harm and the gravity of the misconduct. In re James C. Lin and Lin Cubing, Inc., FIFRA Appeal No. 94-2 (EAB, December 6, 1994). The ALJ is also admonished to consider the respondent's history of compliance with the Act, any evidence of good faith or lack thereof, and EPA guidelines for the assessment of civil penalties. 40 CFR § 22.35(c) . Complainant will, therefore, be ordered to submit a prehearing exchange providing specified information to support and explain the proposed penalty.

"Whenever the [EPA] Administrator finds that the violation occurred despite the exercise of due care or did not cause significant harm to health or the environment, the Administrator may issue a warning in lieu of assessing a penalty." FIFRA § 14(a)(4); 7 U.S.C. § 136~~1~~(a)(4). Because neither the gravity of the potential for harm nor the gravity of the misconduct appear to be significant, Complainant will be ordered to explain why the circumstances herein warrant a penalty rather than simply a warning.

Respondent will be ordered to submit a prehearing exchange to support any contention that the penalty sought would adversely effect its ability to continue in business or that the penalty should be reduced for other reasons.

ORDER

1. Respondent having distributed or offered for sale a misbranded pesticide as alleged in the complaint, an accelerated decision as to liability is issued, sua sponte, in favor of Complainant.

2. Counsel for Complainant is directed to file a statement, on or before December 27, 1996, as to whether this matter has been or will be settled.

3. Absent a settlement, the parties are directed to submit the following prehearing exchanges:

By Complainant and Respondent

a. State desired or required location for the hearing (see Rules 22.19(d) and 22.21(d)).

b. Furnish the names of expected witnesses, summaries of expected testimony and copies of any documents or exhibits proposed to be offered at the hearing to the extent not covered by specific requests below.

By Complainant

a. Provide a copy of civil penalty computation worksheet and a statement, conforming to Rule 22.14 (a) (5) (40 CFR Part 22), explaining the reasoning behind the proposed penalty. State the factual basis for determining the size of Respondent's business and the consideration given, if any, to this fact in calculating the proposed penalty. Explain the manner in which the gravity of the violation, Aqua Clear's history of compliance with the Act, any evidence of good faith or lack thereof, and the EPA guidelines for the assessment of civil penalties affected the proposed penalty.

b. Submit a statement explaining why the circumstances herein warrant a penalty rather than simply a warning.

By Respondent

a. If Respondent is contending that the proposed penalty would adversely affect its ability to continue in business, submit a copy of income tax returns, financial statements, or other data to support such contention. ^{3/}

b. State any reasons for reducing the proposed penalty.

Responses to this Order will be furnished to the Regional Hearing Clerk, to the other party and to the undersigned on or before January 17, 1997.^{4/}

Upon receipt and review of the responses, a determination will be made as to whether further correspondence would serve any useful purpose or whether this matter should be set for hearing without further delay.

Dated this 14th day of November 1996.

Spencer T. Nissen
Administrative Law Judge (Mail Code 1900)
U.S. Environmental Protection Agency
401 M Street, SW
Washington, DC 20460
Telephone: 202-260-0040
Facsimile: 202-260-3720

CERTIFICATE OF SERVICE

This is to certify that the original of this **ORDER ISSUING ACCELERATED DECISION AS TO LIABILITY AND SETTING PREHEARING EXCHANGE**, dated November 14, 1996, in re: Aqua Clear Industries, Inc., Dkt. No. IF&R-II-534-C, was mailed to the Regional Hearing Clerk, Reg. II, and a copy was mailed, certified mail-return receipt requested, to Respondent and Complainant (see list of addressees).

Helen F. Handon
Legal Staff Assistant

DATE: November 14, 1996

ADDRESSEES:

Mr. David J. Hartman
Director, Safety and Regulatory
Compliance

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^{1/} EPA Registration Number 45309-14 identifies the active ingredient Sodium Dichloro-S-triazinetrione-99%, which is not found in Respondent's product.

^{2/} See, In re South Coast Chemical, Inc., FIFRA 84-8, 2 EAD 139, (CJO, March 11, 1986) ; In re Monsanto Co. & Simpson Farm Enterprises, I.F.& R.-VII-1193C-93P (Order on Motions, Dec. 6, 1995); In re Cascade Chemical, Inc., 1086-03-40-012, (Accelerated Decision, Sept. 26, 1986).

^{3/} Respondent may protect such information from public disclosure by identifying or claiming it as confidential business information. See 40 CFR § 2.201.

^{4/} In accordance with 40 CFR § 22.05(c)(4), the parties are directed to promptly notify the Regional Hearing Clerk, all parties and the undersigned of any change in name, address and telephone number.