

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY**

In the Matter of)	
)	
Albaugh, Inc.)	Docket No. FIFRA-98-H-02
)	
Respondent)	

ORDER DENYING INTERVENTION

In this proceeding, the U.S. Environmental Protection Agency, Toxics and Pesticides Enforcement Division, Office of Regulatory Enforcement (the "Complainant" or "Division"), filed a Complaint dated December 19, 1997, against Albaugh, Inc. ("Albaugh" or "Respondent"), a company located in Ankeny, Iowa. The Complaint charges Albaugh with seven violations of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"). The Complaint alleges that Respondent, on seven occasions, distributed a registered pesticide with a composition different from its composition as described in its registration statement filed with EPA, constituting seven violations of FIFRA §12(a)(1)(C), 7 U.S.C. §136j(a)(1)(C). Pursuant to FIFRA §14(a), 7 U.S.C. §136l(a), the Complaint seeks assessment of a civil penalty against Albaugh of \$5000 for each violation, for a total penalty of \$35,000.

Albaugh filed its Answer to the Complaint on January 16, 1998, in which it denied the material allegations of the Complaint. Albaugh also asserted facts contrary to those alleged in the Complaint, as affirmative defenses to the charges. The Answer indicates that the composition of the subject pesticides did not differ when distributed, and that Albaugh did not sell the pesticides until after the Confidential Statement of Formula was amended by EPA.

On January 28, 1998, the undersigned Administrative Law Judge issued a Prehearing Order establishing a schedule for the parties' submittal of proposed evidence. The Order set due dates of April 9 and April 30, 1998, for the filing of Complainant's and Respondent's respective prehearing exchanges.

On March 13, 1998, a third party, Luxembourg Industries (Pamol), Ltd. ("Luxembourg"), filed a motion to intervene in this proceeding. The Complainant and Respondent then filed

responses opposing such intervention. Luxembourg filed a reply on April 14, 1998.

In the interim, on April 2, 1998, the Complainant and Respondent had also filed a joint motion for an extension of time to file their prehearing exchanges, on the basis that they had reached a settlement in principle of the charges in this proceeding. The ALJ granted that extension in an order dated April 9, 1998. The order required the parties to submit monthly status reports on the progress of the final settlement, which requires approval by the Environmental Appeals Board. The executed consent order, or the prehearing exchanges are now due, under the order, on July 16, 1998.

Luxembourg was notified of the settlement in principle and has not further responded. It is therefore assumed that its motion to intervene is still extant. For the reasons given below, that motion is denied.

In its motion, Luxembourg cited the intervention standards in 40 CFR §164.31. However, that rule only applies to administrative hearings under FIFRA arising from cancellations or suspensions of registrations, changes in classifications, and other hearings arising under Section 6 of FIFRA. (See title of 40 CFR Part 164 and 40 CFR §164.3). This enforcement proceeding arises under FIFRA §§12 and 14, not §6. Hence, Part 164 and the intervention standards in §164.31 do not apply in this proceeding.

The relevant intervention standards for this proceeding are found in the EPA's Consolidated Rules of Practice at 40 CFR §22.11. The standards for granting such intervention are set forth as follows in §22.11(c):

Leave to intervene may be granted only if the movant demonstrates that (1) his presence in the proceeding would not unduly prolong or otherwise prejudice the adjudication of the rights of the original parties; (2) the movant will be adversely affected by a final order; and (3) the interests of the movant are not being adequately represented by the original parties.

Although Luxembourg cited the intervention standards in §164.31, its motion will be judged by these standards in §22.11(c).

Luxembourg has not shown that it will or could be adversely affected by any final order issued as a result of this proceeding. Luxembourg does state that it "retains

several private claims against Albaugh which may be affected by the outcome of this proceeding" concerning data compensation and unfair competition. (Luxembourg Motion, p. 3). Luxembourg is apparently a business competitor of Albaugh in the distribution of pesticides containing the active ingredient monosodium acid methanearsonate ("MSMA"). Luxembourg does not, however, specify how its interests could actually be adversely affected by the results of this proceeding.

The final order in this proceeding, whether as a result of a settlement or an adjudication, cannot be binding on Luxembourg or have any effect on its private claims. Luxembourg is not a party to this proceeding and is not mentioned at all in either the Complaint or Answer. Luxembourg would be free to pursue its private claims in whatever forum it intends, regardless of the outcome of this enforcement proceeding.

The mere desire to see an order finding that a competitor committed certain violations is not a substantial interest that could properly support intervention. At most, the wording of a final order in this proceeding could conceivably help buttress Luxembourg's claims. But Luxembourg has not specifically shown how that could ensue. And even it had, that is not sufficient reason to allow intervention. Such buttressing could only amount to a possible easing of Luxembourg's burden of producing evidence in its private litigation. This would not amount to an actual effect on its legal interests. Luxembourg's private claims (whatever they specifically are) must ultimately be resolved on their own merits.

In addition, Luxembourg's intervention at this point in the proceeding would be likely to prolong it. The Complainant and Respondent have reached a settlement in principle and are awaiting final approval of the Consent Agreement and Consent Order. As indicated above, Luxembourg has not shown that its interest could be adversely affected by the content of the final order. There is no reason to allow its intervention in the negotiations or adjudication. At this point, such intervention would be likely to delay resolution of this proceeding.

Luxembourg also states that it has information or is uniquely situated to assure that all relevant facts are presented. As indicated in response by the Complainant, Luxembourg is encouraged to share any information it has with the Complainant to aid in its prosecution of this proceeding. The factual responses concerning Albaugh's defenses cited by Luxembourg (Luxembourg Motion, p. 5), for example, to the extent they are relevant to the charges, can best be addressed by the Complainant through the normal litigation process.

Luxembourg has failed to show that it has interests that can adversely be affected by the final order in this proceeding. Its intervention would also likely unduly prolong this proceeding. Finally, whatever evidence or valid interests it may have can be adequately represented by the original parties. For these reasons, under the standards of 40 CFR §22.11(c), Luxembourg's motion to intervene in this proceeding will be denied.

Order

The motion of Luxembourg Industries (Pamol), Ltd., to intervene in this proceeding is DENIED.

Andrew S. Pearlstein
Administrative Law Judge

Dated: June 29, 1998
Washington, D.C.