

IN RE THE BULLEN COMPANIES, INC.

FIFRA Appeal No. 99-14

FINAL DECISION

Decided February 1, 2001

Syllabus

The United States Environmental Protection Agency Region III (“the Region”) appeals an Initial Decision, in which the Presiding Officer, *inter alia*, dismissed six counts of a complaint alleging violations of the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA” or the “Act”), 7 U.S.C. §§ 136-136y. The case arises out of four consolidated administrative enforcement actions against the Bullen Companies, Inc. (“Bullen” or “Respondent”) for twelve alleged violations of section 12 of FIFRA, 7 U.S.C. § 136j. The four complaints alleged that Bullen violated section 12 of FIFRA by misbranding pesticides, selling adulterated pesticides, distributing or selling a pesticide which differed from that of the registered composition, and selling or distributing unregistered pesticide products. The Region asked the Presiding Officer to assess a civil penalty of \$38,900 against Bullen for these violations.

Prior to the evidentiary hearing, the Presiding Officer granted, for purposes of liability, the Region’s motion for accelerated decision on six of the twelve counts alleged against Bullen. At issue during the hearing was whether Bullen had violated section 12(a)(1)(A) of FIFRA by selling or distributing two unregistered pesticide products, and what the appropriate civil penalty should be for all counts.

The Presiding Officer held in the Initial Decision that (1) the Region had not met its burden of proving the remaining six counts alleging that Bullen sold or distributed unregistered pesticides; and (2) the assessment of \$17,900 in civil penalties was appropriate for the six counts for which the Presiding Officer had found Bullen liable in his earlier accelerated decision.

The Region argues on appeal that the Presiding Officer erred when he held that the Region did not establish that two of Bullen’s products are pesticides within the meaning of FIFRA and further argues that the Presiding Officer erred by failing to assess a civil penalty for those counts.

Held: The Presiding Officer’s holding in the Initial Decision is affirmed. The Board finds, as did the Presiding Officer, that the Region has failed to meet its burden of proof in establishing that Bullen made a pesticidal claim regarding either of its products, AIRX 22 or AIRX 60. Based on a review of the Region’s arguments and the relevant portions of the record for both products, the Board concludes that the record does not establish a pesticidal claim for either product. The Board is not persuaded that the general product sheet for the AIRX product line, analyzed together with products’ labeling, creates an express or implied

pesticidal claim. Accordingly, the Board affirms the Presiding Officer's findings and further affirms the assessment of \$17,900 in civil penalties for the six counts for which the Presiding Officer had found Bullen liable in the accelerated decision.

Before Environmental Appeals Judges Ronald L. McCallum, Edward E. Reich and Kathie A. Stein.

Opinion of the Board by Judge Stein:

I. INTRODUCTION

This is an appeal by the United States Environmental Protection Agency ("EPA") Region III ("the Region") from an initial decision arising out of four consolidated administrative enforcement actions against the Bullen Companies, Inc. ("Bullen" or "Respondent") for thirteen alleged violations of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA" or the "Act"), 7 U.S.C. §§ 136-136y. In an earlier order, the Presiding Officer granted in part the Region's motion for accelerated decision, finding that the Region was entitled to accelerated decision on liability for six of the alleged violations. The Presiding Officer held an evidentiary hearing regarding Bullen's liability on the remaining counts and the amount of civil penalty to be assessed.

Subsequent to the hearing, on November 29, 1999, the Presiding Officer issued his Initial Decision. He found that the Region had not met its burden of establishing liability for the remaining six counts,¹ in which the Region alleged that Bullen had distributed or sold an unregistered pesticide in violation of FIFRA section 12(a)(1)(A), 7 U.S.C. § 136j(a)(1)(A). The Presiding Officer, however, adopted the Region's proposed civil penalty on the six violations for which he had previously found Bullen liable in his accelerated decision, and he assessed a civil penalty of \$17,900 against Bullen for those violations.²

The Region has filed an appeal objecting to the Presiding Officer's dismissal of the six counts alleging distribution or sale of an unregistered pesticide and further objecting to the Presiding Officer's failure to assess a civil penalty for those counts. Bullen has filed its brief opposing the Region's appeal.

¹ The Region dropped one of the 13 counts initially alleged against Bullen. *See infra*, note 5.

² The six counts for which the Presiding Officer granted the Region's motion for accelerated decision involved violations of section 12(a)(1)(E) and section 12(a)(1)(C) of FIFRA. The counts included allegations of misbranding, sale of adulterated pesticides, and distribution or sale of a pesticide which at the time of distribution or sale differed in its composition from that of the pesticide's registered composition. *See* Initial Decision at 2-4.

The Region disputes the Presiding Officer's finding that the Region did not establish that two of Bullen's products are pesticides within the meaning of FIFRA. The parties stipulated that Bullen, a person as defined under FIFRA, distributed or sold the products, AIRX 22 and AIRX 60, throughout the period in question. *See* Initial Decision at 4. Further, Bullen does not dispute that it did not register these products as pesticides with EPA pursuant to FIFRA. *Id.* As the Presiding Officer found, "[t]he key inquiry, therefore, is whether AIRX 22 and AIR 60 are pesticides * * *." *Id.*

We begin by summarizing the relevant statutory and regulatory background, the procedural history of this case, and the Initial Decision. Thereafter, in our discussion section, we more fully describe the arguments of the parties. For the reasons stated below, we affirm the Presiding Officer's dismissal of six counts alleging violations of FIFRA section 12(a)(1)(A).

II. BACKGROUND

A. Statutory and Regulatory Background

FIFRA regulates the manufacture, sale or distribution, and use of pesticides in the United States using a national registration system. The instant matter involves alleged violations of FIFRA section 12(a)(1)(A), 7 U.S.C. § 136j(a)(1)(A). Pursuant to this provision, it is unlawful to sell or distribute unregistered pesticides, with limited exceptions not relevant here.³ In order to prove a violation of this section, the complainant must establish several elements: 1) respondent is a person; 2) who has distributed or sold; 3) a pesticide; 4) that is not registered under FIFRA section 3, 7 U.S.C. § 136a.

The statute defines the term "pesticide" to include "any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest." 7 U.S.C. § 136(u). FIFRA defines "pest," in relevant part, to mean "(1) any * * * fungus, weed, or (2) any other form of * * * virus, bacteria, or other micro-organism * * *." 7 U.S.C. § 136(t). The regulations implementing FIFRA further clarify when a product is considered to be a "pesticide" for purposes of the Act. In relevant part, the regulation states that

³ Section 12(a)(1)(A) states: "Except as provided by subsection (b) of this section, it shall be unlawful for any person in any State to distribute or sell to any person — (A) any pesticide that is not registered under section 136a of this title or whose registration has been canceled or suspended, except to the extent that distribution or sale otherwise has been authorized by the Administrator under this subchapter." 7 U.S.C. § 136j(a)(1)(A).

[a] substance is considered to be intended for a pesticidal purpose, and thus to be a pesticide requiring registration if: (a) The person who distributes or sells the substance claims, states, or implies (by labeling or otherwise): (1) That the substance (either by itself or in combination with any other substance) can or should be used as a pesticide; or (2) That the substance consists of or contains an active ingredient and that it can be used to manufacture a pesticide.

40 C.F.R. § 152.15(a).

B. *Procedural Background*

This matter involves four consolidated complaints filed by the Region. In these complaints the Region has alleged that Respondent violated various provisions of section 12(a) of FIFRA. The four complaints filed against Bullen, as well as other respondents,⁴ are identified using the following docket numbers: III-470-C (one count), III-471-C (one count), III-472-C (nine counts⁵), and III-473-C (two counts). As noted above, prior to the evidentiary hearing, the Presiding Officer granted, for the purpose of liability, the Region's motion for accelerated decision on six of the counts against Bullen.⁶ *See* Order Denying Respondent's Motion to Dismiss and Granting in Part, Complainant's Motion for Accelerated Decision (ALJ, July 27, 1999).

The six remaining counts for which liability was not resolved by the Presiding Officer's accelerated decision are Counts IV — IX of the Region's Complaint III-472-C, which allege the sale or distribution of the products, AIRX 22 or AIRX 60. Count IV alleges that Bullen's sale or distribution of the unregistered pesticide AIRX 22 on August 30, 1995, constitutes a violation of section 12(a)(1)(A) of FIFRA. Count V alleges that Bullen's sale or distribution of the same product from January 1, 1995, to August 16, 1995, constitutes a violation of the same provision of FIFRA, and Count VI alleges that Bullen's sale or distribution of AIRX 22 in 1994 similarly constitutes a violation of section 12(a)(1)(A) of FIFRA. Count VII alleges that Bullen's sale or distribution of its product AIRX 60 on August 30, 1995, constitutes a violation of section 12(a)(1)(A) of FIFRA. Count VIII alleges that Bullen's sale or distribution of AIRX 60 from January 1, 1995, to August 16, 1995, constitutes a violation of the same provision of FIFRA.

⁴ The Region named other persons in these four complaints. However, the other matters have apparently settled and are not before us. *See* Bullen's Response to Region's Appeal at 1; Region's Notice of Appeal at 1.

⁵ The Presiding Officer dismissed Count II of this Complaint at the request of the Region. *See* Presiding Officer's Order (ALJ, June 30, 1999).

⁶ *See supra*, note 2.

Lastly, Count IX alleges that Bullen's sale or distribution of AIRX 60 in 1994 similarly constitutes a violation of section 12(a)(1)(A) of FIFRA.

The Presiding Officer held a hearing on August 11, 1999, to address the liability for Counts IV — IX of Complaint III-472-C and the assessment of a civil penalty for all twelve counts alleged against Bullen. Each party had an opportunity to present its case. The Region called one witness for penalty purposes, but did not call any witnesses for purposes of establishing liability. Additionally, the Region placed a number of exhibits into the record — most of which were previously stipulated to by Bullen — for liability and penalty purposes. Bullen called one witness who testified regarding the AIRX product line and the nature of Bullen's business. Bullen also placed exhibits into the record.

C. Initial Decision

On November 29, 1999, the Presiding Officer issued his Initial Decision in this case. Incorporating his earlier accelerated decision into the Initial Decision, the Presiding Officer found Bullen liable on six counts and assessed the Region's proposed civil penalty on those six counts, \$17,900. However, the Presiding Officer found the Region failed to establish liability on the remaining six alleged violations and, accordingly, assessed no penalty for these counts.

In the Initial Decision, the Presiding Officer analyzed the exhibits relied on by the Region in its attempt to establish that two of Bullen's products, AIRX 22 and AIRX 60, were pesticides, and thus required FIFRA registration. After reviewing the evidence in the record, the Presiding Officer held that the Region failed to show by a preponderance of the evidence that AIRX 22 and AIRX 60 were pesticides within the meaning of FIFRA and its implementing regulations.⁷ In finding that the Region failed to carry its burden of proof in this matter, the Presiding Officer held that the product labels did not support the Region's allegation that Bullen made claims that the products killed bacteria and thus were pesticides. According to the Region, Bullen, through its products' labels and other literature, claimed that the products — odor counteractants — removed odors by killing bacteria. Bullen maintained, on the other hand, that the products' labels merely claimed to eliminate odors, and did not claim to kill bacteria. As the Presiding Officer pointed out: "In Bullen's view, eliminating odors and eliminating bacterial growth are two different things. Whether or not that is the case shall

⁷ Pursuant to the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits regulations, 40 C.F.R. part 22 ("Part 22 rules"), the Presiding Officer must decide each matter by a preponderance of the evidence. 40 C.F.R. § 22.24(b); see *In re Rogers Corp.*, 9 E.A.D. 534, 544 (EAB 2000); *In re Swing-A-Way Manufacturing Co.*, 5 E.A.D. 742, 748 (EAB 1995).

remain a mystery. Neither EPA, nor Bullen, called a witness to testify on this key issue.” Initial Decision at 9.

More fundamentally, the Presiding Officer was not persuaded that either the AIRX General Product Sheet (“general product sheet”) — a document used by Bullen to describe its AIRX product line to purchasers⁸ — or the labeling information in the record made the pesticidal claims ascribed to it by the Region. Although the Presiding Officer suggested that additional evidence may have allowed the Region to prevail, he found:

[T]he fact of the matter is that it is EPA who bears the burden of establishing a violation. Here, that burden involves showing that AIRX 22 and AIRX 60 are pesticides. The labels alone do not support this proposition. While reading the labels offered by EPA may be tantalizingly suggestive that the products are pesticides, the reading offered by Bullen is sufficient to raise doubt as to the pesticidal status of AIRX 22 and AIRX 60. In that regard, it may well be that EPA could have provided a witness to testify that one cannot eliminate odor caused by bacteria without eliminating the bacteria itself, or that the language appearing on the products’ labels is considered within the pesticide industry as making pesticidal claims. Given the state of the record in this case, EPA needed that witness.

Id.

D. *The Appeals*

The Region timely filed its notice of appeal of the Initial Decision, with the Environmental Appeals Board (“the Board”) on January 3, 2000.⁹ In its appeal, the Region raises two primary issues: 1) whether it established that AIRX 22 and AIRX 60 are pesticides under FIFRA and its regulations; and 2) whether Bullen should be assessed an additional \$21,000 civil penalty for the remaining six counts of alleged distribution of unregistered pesticides.

On February 28, 2000, the Board received Bullen’s brief, which responded to the Region’s arguments in its appeal brief. In addition, Bullen’s brief requests that the Board reconsider the cases in their entirety, including those claims de-

⁸ See Joint Stipulations, ¶ 20 (Aug. 3, 1999) (“[t]ypically at least one copy of this piece of literature was given to each dealer who purchased the product from Respondent, and additional copies were made available upon request”).

⁹ Pursuant to the Part 22 rules, any party may appeal an initial decision within 30 days after the decision is served. 40 C.F.R. § 22.30 (1999). In this matter, the Regional Hearing Clerk served the Initial Decision on December 6, 1999. See Certificate of Service for the Initial Decision.

cided against Bullen by reason of the Accelerated Decision. Bullen's Response to Region's Appeal at 1. To the extent that Bullen's request to consider the portions of the Initial Decision decided against it is an effort to file a cross-appeal, the request is not timely. Indeed, in an order issued January 11, 2000, the Board advised Bullen that the procedural deadline for filing a cross-appeal was January 19, 2000.¹⁰ The Board received no cross-appeal from Bullen on or before this filing deadline.¹¹ While the Board will not consider a cross-appeal, it has, however, considered the arguments in Bullen's brief that are responsive to the Region's appeal.

III. DISCUSSION

A. *Whether the Region Established that the AIRX 22 and AIRX 60 Products Are Pesticides under FIFRA and Its Regulations*

1. *The Definition of Pesticide*

The sole question regarding liability on the six disputed counts for sale or distribution of an unregistered pesticide is whether AIRX 22 and/or AIRX 60 are pesticides under FIFRA. As described above, the statute defines the term "pesticide" to include any substance or mixture intended for "preventing, destroying, repelling, or mitigating any pest." 7 U.S.C. § 136(u). In this case, the two products at issue claim to eliminate odors. Although the Region did not focus on defining the source of the odor, the record indicates that many of the odors are caused by bacteria. *See, e.g.*, Complainant Exs. 31 ("[r]emoves odors from bacterial growth * * *"), 38 ("[c]ontains * * * compounds to kill odors that originate with fungus, putrefactive matter and other microbial growth"); *see also* 7 U.S.C. § 136(t) (defining pest to include fungus and other forms of bacteria); 7 U.S.C. § 136(k) (defining fungus to include bacteria).

¹⁰ In a motion opposing the Region's request for an extension of time dated January 6, 2000, Bullen asked for a new hearing on all counts. The Board stated that the request was not sufficient to create a valid appeal. *See* Order Denying Opposition to Extension of Time at 3 (EAB, January 11, 2000). However, the Board did advise Bullen that it could still cross-appeal by filing a notice of appeal that conformed to the requirements of 40 C.F.R. § 22.30(a)(1) by January 19, 2000. *Id.* at 3-4.

¹¹ Although Bullen has chosen to represent itself, this does not relieve it from compliance with the procedural rules. While we are generally more lenient regarding procedural compliance with a *pro se* litigant than those represented by counsel, Bullen is not entitled to ignore the deadline for filing a cross-appeal.

Moreover, as discussed above, our January 11, 2000 order clearly states that if Bullen wishes to cross-appeal, its appeal must be filed by January 19, 2000. Even without legal counsel, Bullen should have been able to understand what was required of it to comply procedurally. *See In re Woodcrest Mfg., Inc.*, 7 E.A.D. 757, 770 (EAB 1998).

As noted previously, 40 C.F.R. § 152.15(a) states that,

[a] substance is considered to be * * * a pesticide requiring registration if: (a) The person who distributes or sells the substance claims, states, or implies (by labeling or otherwise): (1) That the substance (either by itself or in combination with any other substance) can or should be used as a pesticide; or (2) That the substance consists of or contains an active ingredient and that it can be used to manufacture a pesticide[.]

The courts have held that in order for a product to be deemed a pesticide pursuant to FIFRA, the product need not have the actual effect of preventing, destroying or mitigating pests. Rather, a product is deemed a pesticide if the product's labeling or other literature represents it to be a pesticide. *See In re N. Jonas & Co., Inc.*, FIFRA III-121C (ALJ, July 27, 1978), *aff'd*, 666 F. 2d 829 (3rd Cir. 1981); *see also In re Chemco Industries, Inc.*, FIFRA VII-501C-83P (ALJ, January 24, 1984) (finding that the manufacturer's representations to the product purchaser must be evaluated in order to determine if that product is a pesticide requiring registration).¹² Thus, when a person who distributes or sells a product explicitly or implicitly claims that the product is a pesticide, FIFRA requires that product to be registered as a pesticide.

2. *The Region's Arguments and Evidence that Bullen's Products, AIRX 22 and AIRX 60, are Pesticides*

The Region cites to a number of different exhibits in the record to support its argument that it did carry its burden of establishing that AIRX 22 and AIRX 60 (also referred to as "RX 22" and "RX 60" respectively) are pesticides. Specifically, the Region points to the products' labels and literature to support its principal contention that Bullen has made claims that AIRX 22 and AIRX 60 "could be used to prevent, destroy or mitigate bacteria or other microorganisms." Complainant's Appeal Brief at 14 (Feb. 4, 2000). Thus, the Region argues that Bullen makes pesticidal claims, which in turn triggers FIFRA regulation.

a. *AIRX 22*

With both products, the Region begins its analysis of Bullen's alleged pesticidal claims by focusing on the general product sheet (Complainant Ex. 33). This document was created by Bullen to describe the AIRX line to Bullen's cus-

¹² *Cf. U.S. v. 681 Cases, More or Less, Containing 'Kitchen Klenzer'*, 63 F. Supp. 286 (E.D. Mo. 1945)(a product represented by its labeling as being a fungicide was such for purposes of Insecticide Act of 1910 irrespective of whether it was in fact a fungicide).

tomers. *See supra*, note 8. Critical to the Region's case is its reading of a particular paragraph included in the general product sheet, which states:

The treatment for relief of a foul odor can differ depending on its cause. So although every Airex product contains the unique Airex Odor counteractant, that is part of the "round peg in a square hole" concept,¹³ each product counteracts malodors in other ways as well. For instance, it is obvious that wherever possible, the first step in eliminating a foul odor is to remove the source of the smell. Airex products do just that. Some are absorbent materials, *others contain powerful germicides to kill putrefactive bacteria that will continue to radiate foul odors until completely eliminated.*

Complainant Ex. 33 (emphasis added). The Region admits that the general product sheet does not explicitly identify AIRX 22 and AIRX 60 as among the products in the AIRX line that contain these "powerful germicides." Rather the Region argues that this information sheet, together with the individual product labels, imply that the products at issue can be used to eliminate bacteria. Complainant's Appeal Brief at 15. Specifically, the Region focuses on the last sentence of the paragraph cited above and concludes that "[t]his language appears to say that all Airex [also referred to as AIRX] products are either absorbent materials or contain germicides, and that germicides are the approach used to remove putrefactive bacteria." *Id.* at 17.

The Region appears to be arguing that Bullen has made a pesticidal claim by implying that the products in question are germicides. As proof, the Region points to several facts which it suggests collectively establish that Bullen has claimed the product to be a germicide.¹⁴

¹³ Bullen's "round peg in a square hole" concept begins with the theory that hair-like cilia, which are anchored in thousands of closely packed cells in the nose, have specialized receptors for smell scattered between them. Specific odor molecules fit into specific receptors — like a round peg fits into a round hole — and depending upon which receptor is in contact with the molecule, a specific odor is perceived. Bullen contends that Airex products operate using this theory, essentially stating that its Airex products counteract odor by combining and changing the size or shape of the odor molecule. When the altered molecule comes into contact with the cilia, the molecule does not fit into the specific receptor which would perceive that molecule as a foul odor — thus the concept name "round peg in a square hole." *See Complainant Ex. 33.*

¹⁴ First, the Region notes the product label for AIRX 22 instructs the user to spray the product "wherever foul odors originate," *Complainant Ex. 32*, but does not direct the user to remove the product after application. *See Complainant Exs. 32 and 34.* From this the Region concludes, "[s]ince the use instructions allow the product to be sprayed and left in place, it is clear to the reader that the claims of eliminating bacteria do not refer to merely absorbing and physically removing bacteria which is still living. Thus, since all AIRX products remove the source of the smell, AIRX 22 must remove the bacteria in some other manner." *Complainant's Appeal Brief at 19.* To tie its argument together, the

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In addition, the Region cites to the AIRX 22 gallon size label that states:

A high intensity concentration of glycols, quaternary ammonium compounds and exclusive *Airicide* odor counteractants that *erase malodors and prevents [sic]their return*. RX 22 searches out and eliminates the most remote sources of foul odors so quickly that sprayed areas can be reopened to the public immediately. Removes odors from bacterial growth, decay, mildew, smoke, fire, cooking, cigars, cigarettes, beer, liquor, paints, chemicals, etc.

Complainant Ex. 31 (emphasis added). The Region argues that Bullen's claim that AIRX 22 "eliminates malodors" and "prevents their return" is, by itself, a pesticidal claim. Complainant's Appeal Brief at 20. The Region appears to be asserting that when Bullen states in its product literature and labeling that the product erases odors, Bullen has implicitly claimed that the product kills the bacteria that cause the odor.

To further support its case, the Region cites Bullen's use of the term "Airicide." While the Region has stipulated that the word means "something which kills air," see Joint Stipulation, ¶ 10 (Aug. 3, 1999), the Region argues that the use of this term implies that the product kills living organisms found in the air and is thus an implied pesticidal claim. Complainant's Appeal Brief at 23.

Finally, the Region points to its cross-examination of Bullen's Chairman, Richards H. Jarden, to bolster its case. It maintains that Mr. Jarden confirmed (1) that one of the active ingredients identified on the gallon size label of AIRX 22, "quaternary ammonium compounds," was not involved in the molecule receptor effect, or the "square peg in a round whole" concept, and (2) that these compounds can kill bacteria. Tr. at 249, 260. The Region appears to assert that since these compounds are not part of the "molecule receptor" concept or absorbents, they therefore must act as germicides. The Region further asserts that because these compounds are active ingredients in other pesticide products, they can be used as pesticides.

Based on this record the Region argues that it has established by a preponderance of the evidence that AIRX 22 is a pesticide pursuant to FIFRA. Specifically, the Region believes the evidence in the record reveals that Bullen made pesticidal claims by implying through its product literature and labeling that AIRX 22 kills bacteria. Therefore, according to the Region, Bullen was required

(continued)

Region then refers back to the general product sheet to show that Bullen has allegedly claimed that when a product does not absorb the bacteria, but eliminates the odor, it is a germicide that kills the bacteria. *Id.*

to register AIRX 22 as a pesticide before its distribution or sale of the product pursuant to the Act and 40 C.F.R. § 152.15.

b. *AIRX 60*

The Region goes through a similar analysis for Bullen's product, AIRX 60. Beginning with the general product sheet, the Region uses the same language discussed above to create, as it states, "a simple logical syllogism:"

- Odors emanating from bacteria can only be eliminated if the bacteria are eliminated (AIRX General Product Sheet, Complainant Ex. 33); and
- AIRX 60 eliminates odors from bacteria (AIRX labels and literature, Complainant Exs. 36-38); thus
- AIRX 60 eliminates or kills bacteria.

See Complainant's Appeal Brief at 21.

The product literature admitted into the record at hearing describes AIRX 60 as "a multi-purpose, broad-spectrum odor counteractant in water soluble form. * * * [AIRX 60 is] an exclusive Airex Odor counteractant that in this case has been fortified with quaternary ammonium compounds to kill those odors that originate with fungus, putrefactive matter and other microbial growth." Complainant Ex. 38. As discussed above, the Region argues that because the product-specific literature claims to eliminate odors from bacteria, etc., it, therefore, also claims to kill the bacteria which cause the odor. The Region looks to the general product sheet to argue that no other interpretation is possible.

Furthermore, the Region again highlights the identification of quaternary ammonium compounds as a separate active ingredient listed in AIRX 60's literature. The Region reasons that since these compounds are neither part of the "molecule receptor" concept nor are they absorbent, they must counteract odors by acting as a "powerful germicide." Again, the Region uses the general product sheet to explain that the only logical conclusion is that Bullen implied that these compounds were used to kill the bacteria. "[T]he General Product Sheet states that all AIRX products 'remove the source of the smell,' either with 'absorbent materials' or with 'powerful germicides to kill putrefactive bacteria.'" Complainant's Appeal Brief at 25; *see also* Complainant Ex. 33 ("[s]ome [Airex] products are absorbent materials, others contain powerful germicides to kill putrefactive bacteria that will continue to radiate foul odors until completely eliminated").

Lastly, the Region points to Bullen's use of the term "Airicide" in its literature and labels for AIRX 60. Like AIRX 22, the Region argues in its brief that Bullen's use of the term implies that the product can be used as a pesticide.

3. Bullen's Response to the Region's Appeal

Bullen disagrees with the Region's interpretation of Bullen's product information. Firstly, Bullen responds to the Region's contention that the general product sheet implies that AIRX 22 and AIRX 60 are pesticides when reviewed in conjunction with the specific product labels and literature. Bullen argues that the language used on the general product sheet cannot fairly be read in this way. "Note that the statement is that some products contain germicides. This cannot be interpreted that all AIRX products contain germicide [sic]." Bullen's Response to Region's Appeal at 3. Moreover, Bullen explains that the analysis relied upon by the Region to create its criteria for determining whether a pesticidal claim has been implied is flawed.

The general product sheet [Complainant's Ex. 33] supports our position that each product is different and works in a different way. Some work by killing putrefactive bacteria and are registered with EPA.¹⁵ Some adsorb or absorb odors, some mask, etc.

Id. Thus, Bullen interprets the language which identifies various ways AIRX products counteract odors as not being exhaustive. Therefore, it would not set up the "either or" scenario argued by the Region, i.e., either the product counteracts odors as an absorbent material or as a germicide.

Additionally, Bullen states that its labels and literature specific to AIRX 22 only claim to eliminate odors. Bullen takes issue with the Region's contention, which Bullen asserts is unsupported in the record, that in order to eliminate odors the product must also eliminate the pest or bacteria causing the odors. Bullen rebuts this argument by explaining the theory behind its Airicide concept, also referred to as the "round peg in a square hole" concept, in the AIRX product line.¹⁶ It explains that foul odors are molecules which float in the air. These molecules can be changed in size or shape, to eliminate the perception of a foul odor. Thus, Bullen argues its products can counteract odors without killing the source of the odors, i.e., the bacteria. *See id.* at 3; *see also* Tr. at 222-23, 226, 250.

Bullen also disputes the Region's contention that the quaternary ammonium compounds act as pesticides. Again, Bullen takes issue with the Region's argument that when Bullen's product literature states those compounds kill odors, it has implied a pesticidal claim. Bullen reiterates that its literature only states that AIRX 22 and AIRX 60 kill odors, not pests. *See* Bullen's Response to Region's Appeal at 7.

¹⁵ The record shows that Bullen has registered several of the products in the AIRX product line as pesticides under FIFRA. *See* Tr. at 76.

¹⁶ *See supra*, note 13.

4. *The Merits*

The issue before us for review is essentially one of proof — whether the Region has met its burden of proving AIRX 22 and AIRX 60 are pesticides. The Region must prove each allegation by a preponderance of the evidence. *See supra*, note 7. The phrase “preponderance of the evidence” means “the greater weight of the evidence; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.” Black’s Law Dictionary 1201 (7th ed. 1999). Similarly, the Board has noted on several occasions that “the preponderance of the evidence standard means that a fact finder should believe that his factual conclusion is more likely than not.” *In re Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 522, 530 (EAB 1998) (citing *In re Great Lakes Div. of Nat’l Steel Corp.*, 5 E.A.D. 355, 363 n.20 (EAB 1994)). Thus, the Region must prove that these Bullen products are more likely than not pesticides.

While it is clear that a violation may be proven exclusively with the product’s literature and labeling, *see* 40 C.F.R. § 152.15(a), we remain unconvinced that the general product sheet sets up the syllogism that the Region uses to attempt to show AIRX 22 and AIRX 60 are pesticides. As the Presiding Officer held in his Initial Decision, an examination of the use of labels and literature is appropriate in a case such as this, but the language relied upon here is inconclusive and does not, without more, support a finding of liability.¹⁷ *See* Initial Decision at 5, n. 5.

The language in the general product sheet on which the Region focuses its analysis does not, as the Region argues, set up a clear test to determine when an AIRX product is a pesticide. Indeed, the language merely states that “[s]ome are absorbent materials, others contain powerful germicides to kill putrefactive bacteria that will continue to radiate foul odors until completely eliminated.” Complainant Ex. 33. Bullen does not suggest in its general product sheet that any product which does not absorb, will, therefore, employ a germicide to counteract the odor. Rather, it gives examples of how some of the products in its AIRX product line

¹⁷ We do note, however, that at least one label comes quite close to making such a pesticidal claim. Specifically, Bullen’s label for the one gallon container of AIRX 22 (Complainant’s Ex. 31) states that, “RX 22 searches out and eliminates the most remote sources of foul odors * * *.” Ultimately, we are not persuaded that the record developed by the Region in this case is sufficient to establish a pesticidal claim. The Region has not shown to our satisfaction that the labeling or literature necessarily attributes pesticidal purposes to the products, for example, by showing that all sources of odors are bacterial or by showing that only pesticides remove the sources of the odors. Thus, we cannot conclude that by claiming to eliminate the source of the odor, Bullen has claimed to eliminate a pest under FIFRA. Significantly, we do not hold that product literature or labeling which claims to eliminate sources of odors can never establish a pesticidal claim; here, however, more compelling evidence was necessary.

work. We do not interpret this language to say that some are absorbent material, and all others contain germicides.

Furthermore, we do not agree that the Presiding Officer committed error, as the Region argues, in his analysis of the general product information. The Initial Decision does not review the general product sheet in isolation from the other evidence, specifically, the AIRX 22 and AIRX 60 labels and literature. Rather, the Presiding Officer rejects, as we do, the Region's starting point for establishing a pesticidal claim.

At best, a plain reading of the critical passage cited by EPA supports the proposition that *some*, but not all, of Bullen's AIRX product line are pesticides. Indeed, respondent does not even dispute this point. (footnote omitted). The fact of the matter is that Exhibit 33 does not attribute pesticidal characteristics either to AIRX 22 or to AIRX 60; nor does it imply that to be the case. In fact, Exhibit 33 is silent on the matter. It doesn't rule in these two products as pesticides, and it doesn't rule them out. It states only that all AIRX products combat odors, and that some of the AIRX products combating odors are pesticides.

Initial Decision at 7-8. In rejecting the Region's argument using the general product sheet, we do not hold that as a general matter similar documents cannot be used to establish pesticidal claims in other cases. But in the instant case, this document, when examined with the other evidence in the record, does not support a pesticidal claim for either AIRX 22 or AIRX 60.

Further, the Region has not established by a preponderance of the evidence that Bullen made a pesticidal claim, express or implied, when it listed quaternary ammonium compounds as an active ingredient in each of these two products. In its appeal, as noted above, the Region explains that since these compounds are not involved in Bullen's "molecule receptor" concept, *see supra*, note 13, and are not absorbent material, they must eliminate the bacteria, i.e., act as a germicide. *See supra*, note 14. The Region supports this analysis by referring back to the general product sheet and by citing the testimony of Mr. Jarden that these compounds do not play a part in the molecule receptor concept. In addition, the Region argues that Mr. Jarden testified that these compounds can kill bacteria, *see Tr.* at 260. This testimony, in the Region's view, provides added support for the Region's pesticidal claim argument.

As discussed above, we do not interpret Bullen's general product sheet to support the inferences or syllogism urged by the Region, i.e., that all products in the AIRX line are either absorbent or contain germicides. Accordingly, we are not persuaded that Bullen has implied a pesticidal claim for AIRX 22 and AIRX 60 through inclusion of the quaternary ammonium compounds as active ingredients

in its product labeling. Moreover, simply because the active ingredients may be found in other pesticide products, does not show that Bullen has claimed these compounds act as a pesticide *in the products at issue here*. As the Presiding Officer held, the Region did not introduce *evidence* to support its claim that the quaternary ammonium compounds found in AIRX 80¹⁸, either by themselves or in conjunction with the labeling and product literature, demonstrate that Bullen has represented that the compounds in AIRX 22 and AIRX 60 act as pesticides. *See* Initial Decision at 9-10. Likewise, Mr. Jarden's testimony that these compounds can kill bacteria is not compelling. The Region has not established that Bullen *represented*, explicitly or implicitly, to its customers — through its labeling or otherwise — that these compounds as used in AIRX 22 or AIRX 60 kill bacteria, thereby making a pesticidal claim. *See e.g.*, 40 C.F.R. § 152.15 (a) (“[a] substance is considered to be intended for a pesticidal purpose, and thus to be a pesticide required registration, if: The person who distributes or sells the substance claims, states, or implies * * * (2) * * * that it [the active ingredient] can be used to manufacture a pesticide”).¹⁹

Moreover, we are perplexed by the Region's reliance on the term “Airicide” to show a pesticidal claim since the Region stipulated that the term means only “to kill the air.” *See* Joint Stipulations, ¶ 10 (Aug. 3, 1999). The air is not a pest as defined by FIFRA section 2(t), 7 U.S.C. § 136(t). Without more in the record to support its argument that this term implies a pesticidal claim, the Region has not proven by a preponderance of the evidence that these products are pesticides.²⁰

We have reviewed the Region's arguments and the relevant portions of the record for AIRX 60 and have found that, like AIRX 22, the record does not estab-

¹⁸ A pesticide product sold by Bullen.

¹⁹ *See* 53 Fed. Reg. 15,954 (May 4, 1988) (The principal test in the regulations is “whether advertising or product labeling, implicitly or explicitly, claims that the product is a pesticide.”); 49 Fed. Reg. 37,917 (Sept. 26, 1984) (The preamble to the proposed rules for pesticide registration and classification procedures further states: “Section 152.15 would describe the circumstances under which the Agency will presume that a substance is being distributed and sold with the intent that it be used as a pesticide. Clearly, either express or implied claims or representations by the seller, such as labeling or advertising, would be evidence of intent.”).

²⁰ In *In re Contact Industries*, the Presiding Officer found a product to be a pesticide based on labels, literature and expert testimony. According to the Presiding Officer, “[s]anicide’ implies both a sanitizing and a killing action or, at the least, a killing action. Sanitize means free from dirt, germs, etc., as by cleaning or sterilizing. * * * A consumer would, we believe, recognize the meaning of the suffix -cide as is evidenced by the common usage of words such as homicide, pesticide, and insecticide.” *In re Contact Indus.*, 1978 EPA ALJ Lexis 11, *6.

However, based on the record we have before us, we find the Region has failed to establish a pesticidal claim using this argument. Notably, the parties stipulated that the term “Airicide” only means to kill the air, thereby undermining the Region's argued position. *See* Joint Stipulations, ¶ 10 (Aug. 3, 1999).

lish a pesticidal claim for Bullen's AIRX 60. In the exhibits entered in the record, Bullen's labels and literature for AIRX 60 only claim to eliminate odors. As discussed in more detail above, we find that the Region has failed to carry its burden of proof for these violations, and we remain unconvinced that the general product sheet analyzed together with the product specific documents creates a pesticidal claim — express or implied.

Accordingly, we affirm the Presiding Officer's holding that the Region has failed to meet its burden in establishing that Bullen made a pesticidal claim regarding either AIRX 22 or AIRX 60.

IV. CONCLUSION

For the reasons discussed above, we affirm the findings and conclusions of the Initial Decision, including the dismissal of six counts alleging violations of FIFRA section 12(a)(1)(A). Thus, pursuant to FIFRA section 14(a)(1), 7 U.S.C. § 136l(a)(1), a total civil penalty of \$17,900 is hereby assessed against the Respondent. Bullen shall pay the full amount of the civil penalty within thirty (30) days of the date of service of this decision. Payment shall be made by forwarding a cashier's check, or certified check in the full amount payable to the Treasurer, United States of America, at the following address:

EPA — Region III
Regional Hearing Clerk
United States Environmental Protection Agency
P.O. Box 360515
Pittsburgh, PA 15251-6515

So ordered.