

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

IN THE MATTER OF:)

Norman Manufacturing Company)

RESPONDENT.)
_____)

Docket No. FIFRA-05-2007-0030

Judge Susan L. Biro

RECEIVED
REGIONAL HEARING CLERK
2007 AUG 24 PM 3:33

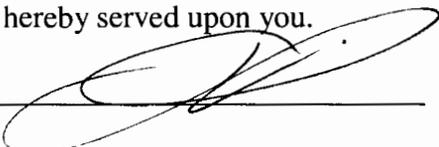
NOTICE OF RE-FILING

To: See attached Certificate of Service.

Pursuant to orders entered in this matter by the Presiding Officer on December 23, 2004 and to 40 CFR 22.19(a), Complainant submits this prehearing exchange.

Please take notice that on August 22, 2007, the undersigned caused to be filed with the Regional Hearing Clerk of the United States Environmental Protection Agency, Region 5, Prehearing information Exchange of Complainant United States Environmental Protection Agency and Accompanying Documents. Said filing was incorrectly labeled as docket number CWA-08-2004-0007. This re-filing serves to correct the docket number labeling. Copies of the corrected re-filing are attached hereto and hereby served upon you.

Dated: August 24, 2007

By: 

Luis Oviedo
One of the Attorneys for U.S. EPA

Luis A. Oviedo
Associate Regional Counsel
U.S. Environmental Protection Agency
Office of Regional Counsel, Region 5
77 W. Jackson Blvd., C-14J
Chicago, Illinois 60604
312-353-9538



CERTIFICATE OF SERVICE

I, Luis Oviedo, an attorney with the United States Environmental Protection Agency, hereby certify that a true copy of the Notice of Re-filing, Prehearing Information Exchange of Complainant United States Environmental Protection Agency and Accompanying Documents were served in the following manner to the addresses listed below:

Original and One Copy by Hand Delivery to:

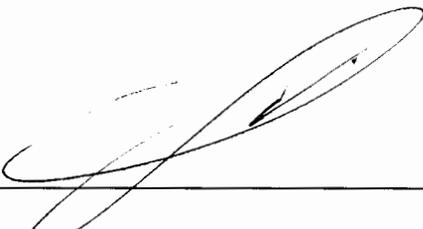
Sonja Brooks-Woodard
Regional Hearing Clerk
U.S. EPA - Region 5
77 West Jackson Blvd., E-19J
Chicago, IL 60604-3590

Copy by regular mail to:

Norman Manufacturing Co.
c/o Don Garant, President
31473 Utica Road
Fraser, MI 48026

and

Don Garant
19151 Mapleview
Detroit, MI 48205



Luis Oviedo

each of the labels referenced in paragraph 22 of the Complaint, (2F) a copy of the “letter to Mason, dated February 17, 1994 from the U.S. EPA referenced in paragraph 24 of the Complaint, (2G) a copy of each of the labels referenced I paragraph 26 of the Complaint, (2H) a copy of any documents in support of the allegations in paragraphs 29-34, 36, 52, and 56 of the Complaint, (2I) a detailed narrative statement that fully elaborates the exact factual and legal basis, and copies of all documents in support thereof, for the allegations made in the Complaint to which Respondent has not admitted the accuracy; (2J)a copy of any “penalty policy” upon which Complainant has relied upon, or intends to rely upon, in consideration of a proposed penalty assessment, including the July 2, 1990 “Enforcement Response Policy for the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA),” referenced on page 17 of the Complaint, (2K) a copy of all other documents which Complainant has used, or intends to use, in consideration of a proposed penalty in this case, and a separate Penalty Calculation Worksheet detailing exactly how the proposed penalty was calculated, and (2L) a statement regarding whether the Paperwork Reduction Act of 1980 (“RA”), 44 U.S.C. § 3501 et seq. applies to this proceeding, whether there is a current Office of Management and Budget Control number involved herein, and whether the provisions of Section 32512 of the PRA are applicable in this case. Complainant reserves the right to supplement this Prehearing Information Exchange, without the need to seek leave to do so, at any time until 30 days prior to the hearing date.

Narrative Statement (2I):

The Complaint in this case, filed on May 16, 2007, alleged that Respondent violated the Federal Insecticide, Fungicide, Rodenticide Act, 7 U.S.C. § 1361(a) (FIFRA). Nine violations

were alleged to have been committed by Respondents, in counts I through IX. These violations consist of the distribution/sale of misbranded pesticides, "ALGAE CHECK," EPA Reg. No. 10324-43-38122, "ALGAECIDE AQUA GUARD 50," EPA Reg. No. 10324-19-38122, and "ALGAE TREK," EPA Reg. No. 10324-15-38122, on nine occasions. Such violations constitute violations of Section 12(a)(1)(E) of FIFRA, U.S.C. § 136j(a)(1)(E) and renders the respondent subject to civil penalties.

A document purporting to be an answer to this pleading was sent to U.S. EPA. It is dated June 23, 2007. Since the copy sent to Complainant was not stamped, U.S. EPA does not know if the document was actually filed by Respondents. In this response, the Respondent failed to request a hearing to contest any material fact alleged in the complaint, and/or to contest the appropriateness of the proposed penalty as required by 40 CFR 22.15(b). The statements made in the document are admittedly vague and in now way refute the claims brought by Complainant. The document contains several admissions of the violations, and the Respondent assumes responsibility for these. The only response to the claims consists of excuses as to why the violations took place and statements of hardship. And the only relief requested in the document is that the penalty sought by Complainant be reduced to zero. As such, there appear to be no real factual or legal dispute as to the claims brought.

The failure to admit, deny or explain any material factual allegation contained in the complaint constitutes an admission of the allegation. 40 CFR 22.15(d). While denying the legal conclusions that they have violated Section 12(a)(1)(E) of FIFRA, U.S.C. § 136j(a)(1)(E), in their Answer the Respondents admit to the following facts upon which Complainant's claim of

Respondents' liability is based:

- Respondent admits that the Inspection of 1996 resulted in the discovery of "discrepancies" relating to incorrect labeling by Norman Manufacturing Co.
- Respondent admits to either actual sales or holding out for sale of each of the three misbranded pesticides and provides additional details as to the terms of such sales.
- Respondent admits that Don Garant (Mr. Garant) was solely responsible for record keeping, correspondence between Norman Manufacturing Co. and the pesticide registrant, Mason Chemical Co., and that he has misplaced several records relevant to this case, or such records were stolen.

Consequently, Respondent's admission to the factual allegations upon which the alleged violations are based, removes those factual allegations from issue and obviates the need for Complainant to prove those allegations by the submission of evidence at hearing.

With regard to the civil penalty proposed, Complainant has attached a Rationale for Proposed Penalties, Exhibit 6, which sets forth Complainant's rationale for the penalty amounts proposed, based upon an analysis of the facts in this case, in consideration of the penalty criteria in the applicable penalty policy, that being the Enforcement Response Policy for the Federal Insecticide Fungicide and Rodenticide Act, Exhibit 5, ("the Policy"). No factual information upon which the proposed civil penalty is based has been identified by Respondent as factual information which it contests.

Unless factual issues are identified in Respondent's Prehearing Exchange which require trial, or by any amendment to its answer, Complainant intends to file a motion for accelerated decision, under 40 CFR 22.20, within 30 days of the filing of Respondent's prehearing exchange. See the final decision of the Administrator, issued by the Environmental Appeals Board, in *In Re*

Green Thumb Nursery, Inc., FIFRA Appeal No. 95-4a, at 14-17 (March 6, 1997) (“a person is not entitled to an evidentiary hearing unless that person puts a material fact at issue”).

WITNESSES (1A):

Expert Witnesses:

(1) John Luksis, U.S. EPA Region 5, Financial Analyst. Mr. Luksis will testify as to Norman Manufacturing and Don Garant’s ability to pay the assessed penalty. Mr. Luksis’ resume is forthcoming and will be attached as a supplement to this prehearing exchange.

Fact Witnesses:

(2) Joseph Lukascyk, Case Manager, Waste Pesticides and Toxics Enforcement Division U.S. Environmental Protection Agency, Region 5. Mr. Lukascyk will testify as to the applicability of Section 12(a)(1)(E) of FIFRA, U.S.C. § 136j(a)(1)(E) and the regulations with respect to misbranding generally and Respondent’s operations specifically, in addition to regulation by local health departments and the State of Michigan Department of Agriculture. Mr. Davis will testify as to the facts relevant to the Complaint.

(3) Susan Downing, Inspector, Michigan Department of Agriculture. Ms. Downing will testify as to the applicability of Section 12(a)(1)(E) of FIFRA, U.S.C. § 136j(a)(1)(E) and the regulations with respect to misbranding generally and Respondent’s operations specifically, in addition to regulation by local health departments and the State of Michigan Department of Agriculture. Mr. Downing will testify as to the facts relevant to the Complaint and her inspection(s).

DOCUMENTS TO BE INTRODUCED AT HEARING (ATTACHED) (1B and 2A-K)

See Attachment A-Complainant’s Exhibits and Index

PAPERWORK REDUCTION ACT OF 1980 (2L)

This proceeding is not subject to the Paperwork Reduction Act, 44 U.S.C. § 3501 et seq., because it seeks collection of information by an agency from specific individuals or entities as part of an administrative action or investigation.

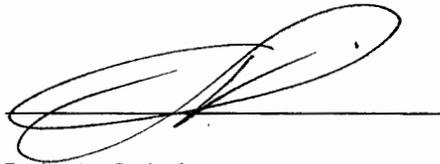
APPROPRIATE PLACE FOR PREHEARING CONFERENCE AND HEARING (1C):

Pursuant to 40 CFR 22.19(d) and 40 CFR 22.21(d), Complainant proposes that the prehearing conference and hearing be held at the Offices of U.S. EPA Region 5 at 77 W. Jackson, Chicago, Illinois, except that the prehearing conference may be held by telephone if the Presiding Officer deems it appropriate.

Respectfully submitted,

Date:

8/22/07

A handwritten signature in black ink, appearing to read 'Luis A. Oviedo', is written over a horizontal line. The signature is stylized with large loops and a long horizontal stroke.

Luis A. Oviedo
Associate Regional Counsel
U.S. Environmental Protection Agency, Region 5
77 West Jackson Boulevard
Chicago, Illinois

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5**

IN THE MATTER OF:)
)
Norman Manufacturing Company) **Docket No. CWA-08-2004-0007**
) **Judge Susan L. Biro**
)
)
RESPONDENT.)
_____)

COMPLAINANT'S PREHEARING EXCHANGE
ATTACHMENT A - COMPLAINANT'S EXHIBITS

CERTIFICATE OF SERVICE

I, Luis Oviedo, an attorney with the United States Environmental Protection Agency, hereby certify that a true copy of the Prehearing Information Exchange of Complainant United States Environmental Protection Agency and Accompanying Documents were served in the following manner to the addresses listed below:

Original and One Copy by Hand Delivery to:

Sonja Brooks-Woodard
Regional Hearing Clerk
U.S. EPA - Region 5
77 West Jackson Blvd., E-19J
Chicago, IL 60604-3590

Copy by regular mail to:

Norman Manufacturing Co.
c/o Don Garant, President
31473 Utica Road
Fraser, MI 48026

and

Don Garant
19151 Maplevue
Detroit, MI 48205



Luis Oviedo

RECEIVED
REGIONAL HEARING CLERK
U.S. ENVIRONMENTAL
PROTECTION AGENCY

2007 AUG 22 PM 4:13

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

IN THE MATTER OF:)
) Docket No. CWA-08-2004-0007
)
Norman Manufacturing Company) Judge Susan L. Biro
)
)
)
RESPONDENT.)
_____)

COMPLAINANT'S PREHEARING EXCHANGE

Complainant, United States Environmental Protection Agency, ("US EPA" or "Complainant"), by and through its attorney, and pursuant to 4 C.F.R. § 22.19(a) and Administrative Law Judge Susan L. Biro's July 20, 2007 Prehearing Order, submits its Prehearing Information Exchange. Under the Prehearing Order, Complainant is to provide: (1A) a list of expert and other witnesses with a summary of expected testimony for each and resumes for any expert witness, (1B) copies of all documents and exhibits that US EPA will rely on at hearing, and (1C) US EPA's requests with respect to location and scheduling of the hearing in this proceeding. In addition, Complainant is required to submit: (2A) a copy of the report(s), if any, and any and all documents, notes, photographs and/or other records related thereto, of the August 22, 2002 inspection of the Norman Manufacturing Company, conducted by the Michigan Department of Agriculture referenced in paragraph 15 of the Complaint, (2B) a copy of the receipt for samples referenced in paragraph 17 of the Complaint, (2C) a copy of each of the labels referenced in paragraph 18 of the Complaint, (2D) a copy of the "letter to Mason, dated July 27, 1993 from the U.S. EPA," referenced in paragraph 20 of the Complaint, (2E) a copy of

each of the labels referenced in paragraph 22 of the Complaint, (2F) a copy of the “letter to Mason, dated February 17, 1994 from the U.S. EPA referenced in paragraph 24 of the Complaint, (2G) a copy of each of the labels referenced I paragraph 26 of the Complaint, (2H) a copy of any documents in support of the allegations in paragraphs 29-34, 36, 52, and 56 of the Complaint, (2I) a detailed narrative statement that fully elaborates the exact factual and legal basis, and copies of all documents in support thereof, for the allegations made in the Complaint to which Respondent has not admitted the accuracy; (2J)a copy of any “penalty policy” upon which Complainant has relied upon, or intends to rely upon, in consideration of a proposed penalty assessment, including the July 2, 1990 “Enforcement Response Policy for the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA),” referenced on page 17 of the Complaint, (2K) a copy of all other documents which Complainant has used, or intends to use, in consideration of a proposed penalty in this case, and a separate Penalty Calculation Worksheet detailing exactly how the proposed penalty was calculated, and (2L) a statement regarding whether the Paperwork Reduction Act of 1980 (“RA”), 44 U.S.C. § 3501 et seq. applies to this proceeding, whether there is a current Office of Management and Budget Control number involved herein, and whether the provisions of Section 32512 of the PRA are applicable in this case. Complainant reserves the right to supplement this Prehearing Information Exchange, without the need to seek leave to do so, at any time until 30 days prior to the hearing date.

Narrative Statement (2I):

The Complaint in this case, filed on May 16, 2007, alleged that Respondent violated the Federal Insecticide, Fungicide, Rodenticide Act, 7 U.S.C. § 136l(a) (FIFRA). Nine violations

were alleged to have been committed by Respondents, in counts I through IX. These violations consist of the distribution/sale of misbranded pesticides, "ALGAE CHECK," EPA Reg. No. 10324-43-38122, "ALGAECIDE AQUA GUARD 50," EPA Reg. No. 10324-19-38122, and "ALGAE TREK," EPA Reg. No. 10324-15-38122, on nine occasions. Such violations constitute violations of Section 12(a)(1)(E) of FIFRA, U.S.C. § 136j(a)(1)(E) and renders the respondent subject to civil penalties.

A document purporting to be an answer to this pleading was sent to U.S. EPA. It is dated June 23, 2007. Since the copy sent to Complainant was not stamped, U.S. EPA does not know if the document was actually filed by Respondents. In this response, the Respondent failed to request a hearing to contest any material fact alleged in the complaint, and/or to contest the appropriateness of the proposed penalty as required by 40 CFR 22.15(b). The statements made in the document are admittedly vague and in now way refute the claims brought by Complainant. The document contains several admissions of the violations, and the Respondent assumes responsibility for these. The only response to the claims consists of excuses as to why the violations took place and statements of hardship. And the only relief requested in the document is that the penalty sought by Complainant be reduced to zero. As such, there appear to be no real factual or legal dispute as to the claims brought.

The failure to admit, deny or explain any material factual allegation contained in the complaint constitutes an admission of the allegation. 40 CFR 22.15(d). While denying the legal conclusions that they have violated Section 12(a)(1)(E) of FIFRA, U.S.C. § 136j(a)(1)(E), in their Answer the Respondents admit to the following facts upon which Complainant's claim of

Respondents' liability is based:

- Respondent admits that the Inspection of 1996 resulted in the discovery of "discrepancies" relating to incorrect labeling by Norman Manufacturing Co.
- Respondent admits to either actual sales or holding out for sale of each of the three misbranded pesticides and provides additional details as to the terms of such sales.
- Respondent admits that Don Garant (Mr. Garant) was solely responsible for record keeping, correspondence between Norman Manufacturing Co. and the pesticide registrant, Mason Chemical Co., and that he has misplaced several records relevant to this case, or such records were stolen.

Consequently, Respondent's admission to the factual allegations upon which the alleged violations are based, removes those factual allegations from issue and obviates the need for Complainant to prove those allegations by the submission of evidence at hearing.

With regard to the civil penalty proposed, Complainant has attached a Rationale for Proposed Penalties, Exhibit 6, which sets forth Complainant's rationale for the penalty amounts proposed, based upon an analysis of the facts in this case, in consideration of the penalty criteria in the applicable penalty policy, that being the Enforcement Response Policy for the Federal Insecticide Fungicide and Rodenticide Act, Exhibit 5, ("the Policy"). No factual information upon which the proposed civil penalty is based has been identified by Respondent as factual information which it contests.

Unless factual issues are identified in Respondent's Prehearing Exchange which require trial, or by any amendment to its answer, Complainant intends to file a motion for accelerated decision, under 40 CFR 22.20, within 30 days of the filing of Respondent's prehearing exchange. See the final decision of the Administrator, issued by the Environmental Appeals Board, in *In Re*

Green Thumb Nursery, Inc., FIFRA Appeal No. 95-4a, at 14-17 (March 6, 1997) (“a person is not entitled to an evidentiary hearing unless that person puts a material fact at issue”).

WITNESSES (1A):

Expert Witnesses:

(1) John Luksis, U.S. EPA Region 5, Financial Analyst. Mr. Luksis will testify as to Norman Manufacturing and Don Garant’s ability to pay the assessed penalty. Mr. Luksis’ resume is forthcoming and will be attached as a supplement to this prehearing exchange.

Fact Witnesses:

(2) Joseph Lukascyk, Case Manager, Waste Pesticides and Toxics Enforcement Division U.S. Environmental Protection Agency, Region 5. Mr. Lukascyk will testify as to the applicability of Section 12(a)(1)(E) of FIFRA, U.S.C. § 136j(a)(1)(E) and the regulations with respect to misbranding generally and Respondent’s operations specifically, in addition to regulation by local health departments and the State of Michigan Department of Agriculture. Mr. Davis will testify as to the facts relevant to the Complaint.

(3) Susan Downing, Inspector, Michigan Department of Agriculture. Ms. Downing will testify as to the applicability of Section 12(a)(1)(E) of FIFRA, U.S.C. § 136j(a)(1)(E) and the regulations with respect to misbranding generally and Respondent’s operations specifically, in addition to regulation by local health departments and the State of Michigan Department of Agriculture. Mr. Downing will testify as to the facts relevant to the Complaint and her inspection(s).

DOCUMENTS TO BE INTRODUCED AT HEARING (ATTACHED) (1B and 2A-K)

See Attachment A-Complainant’s Exhibits and Index

PAPERWORK REDUCTION ACT OF 1980 (2L)

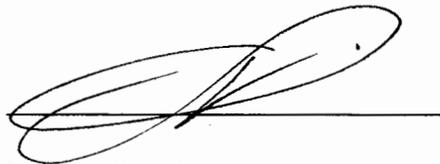
This proceeding is not subject to the Paperwork Reduction Act, 44 U.S.C. § 3501 et seq., because it seeks collection of information by an agency from specific individuals or entities as part of an administrative action or investigation.

APPROPRIATE PLACE FOR PREHEARING CONFERENCE AND HEARING (1C):

Pursuant to 40 CFR 22.19(d) and 40 CFR 22.21(d), Complainant proposes that the prehearing conference and hearing be held at the Offices of U.S. EPA Region 5 at 77 W. Jackson, Chicago, Illinois, except that the prehearing conference may be held by telephone if the Presiding Officer deems it appropriate.

Respectfully submitted,

Date: 8/22/07

A handwritten signature in black ink, appearing to read 'Luis A. Oviedo', written over a horizontal line.

Luis A. Oviedo
Associate Regional Counsel
U.S. Environmental Protection Agency, Region 5
77 West Jackson Boulevard
Chicago, Illinois

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5**

IN THE MATTER OF:)	
)	Docket No. CWA-08-2004-0007
)	
Norman Manufacturing Company)	Judge Susan L. Biro
)	
)	
RESPONDENT.)	
_____)	

COMPLAINANT'S EXHIBITS

- | <u>Ex. No.</u> | <u>Description</u> |
|-----------------------|--|
| 1. | Report on Establishment Inspection and Attachments, August 22, 2002 |
| 2. | Correspondence from U.S. EPA to Mason Chemical Co. and Attachment –Maquat label, July 27, 1993 |
| 3. | Correspondence from U.S. EPA to Mason Chemical Co. and Attachment-Maquat label, February 17, 1994. |
| 4. | Correspondence from U.S. EPA to Mason Chemical Co. and Attachment-Maquat label, March 4, 1994. |
| 5. | Enforcement Response Policy for the Federal Insecticide Fungicide and Rodenticide Act, July 2, 1990. |
| 6. | FIFRA Civil Penalty Calculation Worksheet, Norman Manufacturing, May 10, 2007. |
| 7. | Financial Analysis of Norman Manufacturing, February 6, 2007. |
| 8. | Correspondence from Norman Manufacturing to U.S. EPA and Attachments, October 4, 2006. |
| 9. | Correspondence from Norman Manufacturing to Mason Chemical Co. and Attachments, April 22, 1996. |

10. C.V. for U.S. EPA Financial Analyst John Luksis – Reserved.

