

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION VII

901 NORTH 5th STREET
KANSAS CITY, KANSAS 66101

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ENVIRONMENTAL PROTECTION
AGENCY-REGION VII
REGIONAL HEARING CLERK

BEFORE THE ADMINISTRATOR

IN THE MATTER OF

T and N, Inc.
815 Hwy T
Foristell, Missouri 63348

Respondent

) Docket No.: FIFRA-07-2007-0001
)
) COMPLAINT AND NOTICE OF
) OPPORTUNITY FOR HEARING
)
)
)
)

COMPLAINT

Section I

Jurisdiction

1. This is an administrative action for the assessment of civil penalties instituted pursuant to Section 14 of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. § 136l.
2. This Complaint serves as notice that the United States Environmental Protection Agency (EPA) has reason to believe that Respondent has violated Section 12 of FIFRA, 7 U.S.C. § 136j.

Section II

Parties

3. The Complainant, by delegation from the Administrator of the EPA and the Regional Administrator, EPA, Region VII, is the Director of the Water, Wetlands and Pesticides Division, EPA, Region VII.
4. The Respondent is T and N, Inc., a pesticide producing establishment, located at 815 Hwy T, Foristell, Missouri 63348. The Respondent is and was at all times referred to in this Complaint, a "person" as defined by Section 2(s) of FIFRA, 7 U.S.C. § 136(s), and a business incorporated under the laws of Missouri and authorized to conduct business in the State of Missouri.

Section III

Violations

General Allegations

5. The Complainant hereby states and alleges that Respondent has violated FIFRA as follows:
6. Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), states it shall be unlawful for any person in any state to distribute or sell to any person any pesticide which is adulterated or misbranded.
7. Section 2(q)(1)(A) of FIFRA, 7 U.S.C. § 136(q)(1)(A), states 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 way.
8. Section 2(q)(1)(D) of FIFRA, 7 U.S.C. § 136(q)(1)(D), states a pesticide is misbranded if its label does not bear the registration number assigned under Section 7 to each establishment in which it was produced.
9. Title 40 of the Code of Federal Regulations, Part 156.10(f) states, “The producing establishment registration number . . . of the final establishment at which the product was produced may appear in any suitable location on the label”
10. The EPA Label Review Manual, 3rd Edition, August 2003, states, “If a producer lists multiple establishment numbers, the establishment number for the actual production site must be very obviously marked or highlighted, for example, with an arrow, a notch, a bullet, etc.”
11. Section 2(q)(1)(E) of FIFRA, 7 U.S.C. § 136(q)(1)(E), states a pesticide is misbranded if any word, statement, or other information required to appear on the label is not prominently placed thereon with conspicuousness so as to render it likely to be read and understood by the ordinary individual under customary conditions of purchase and use.
12. Title 40 C.F.R. § 152.132 states, in part, “Supplemental distribution is permitted upon notification to the Agency if all the following conditions are met: (a) The registrant has submitted to the Agency for each distributor product a statement signed by both the registrant and the distributor [producer] listing the names and addresses of the registrant and the distributor . . . (b) The distributor product is produced, packaged and labeled in a registered establishment operated by the same producer (or under contract in accordance with § 152.30) who produces, packages, and labels the registered product.” At the time of the inspection, T and N, Inc., had not entered into a supplemental distributor agreement with the basic registrant, PBI Gordon Corporation, to produce or distribute Greenskeeper’s Secret Weed and Feed, 10-6-4.
13. Section 2(gg) of FIFRA, 7 U.S.C. § 136(gg), defines the term “to distribute or sell” to mean to distribute, sell, offer for sale, hold for distribution, hold for sale, hold for shipment, ship,

deliver for shipment, release for shipment, or receive and (having so received) deliver or offer to deliver.

14. On or about May 10, 2005, a representative of the Illinois Department of Agriculture (IDA) conducted an inspection at the Rural King store at 1301 Enterprise Way, Marion, Illinois. The representative documented inventory of 18-pound bags of Greenskeeper's Secret Weed and Feed, 10-6-4, Dimethylamine salt 2,4-D (acid) 1.14%, which contained the EPA Est. No. 66840-MO-001(C) and bore no EPA registration number.

15. At the time of the May 10, 2005, inspection, a photographic sample of the product labeled Greenskeeper's Secret Weed and Feed, 10-6-4, EPA Est. No. 66840-MO-001(C), was collected by the IDA representative. Active ingredients printed on the label were the same as those of Gordon's 2,4-D Weed & Feed, EPA Reg. No. 2217-697, which is registered to PBI Gordon Corporation. Analysis of the sample taken verified the active ingredients were those of Gordon's 2,4-D Weed & Feed, EPA Registration No. 2217-697.

16. On or about May 10, 2005, the IDA representative collected copies of two sales orders which documented sales by T and N, Inc. to Marion Rural King #16 in Marion, Illinois.

- Sales Order 30370, dated February 4, 2005
 - 360 bags of Greenskeeper's Secret 10-06-04, 18 pounds each
 - 120 bags of Greenskeeper's Secret 10-06-04, 36 pounds each
- Sales Order 31118, dated March 9, 2005
 - 120 bags of Greenskeeper's Secret 10-06-04, 18 pounds each
 - 60 bags of Greenskeeper's Secret 10-06-04, 36 pounds each

17. At all times relevant to this Complaint, Respondent operated a registered pesticide producing establishment, assigned EPA Est. No. 66840-MO-001, in Foristell, Missouri. Respondent was the producer and distributor of the pesticide product Greenskeeper's Secret 10-06-04, EPA Reg. No. 2217-697-66840.

18. On August 16, 2005, a representative of the Missouri Department of Agriculture (MDA) conducted an inspection of Respondent's facility at 815 Hwy T, Foristell, Missouri. The representative collected documentary samples of labels for 18- and 36-pound bags of Greenskeeper's Secret Weed and Feed, 10-6-4, EPA Reg. No. 2217-697-066840. Respondent was holding for distribution and sale inventory of 18- and 36-pound bags of Greenskeeper's Secret Weed and Feed, 10-6-4, EPA Reg. No. 2217-697-066840, which was packaged, labeled, and released for shipment. All labels contained multiple establishment numbers; however, the actual producing establishment was not identified.

Count 1

19. The facts stated in paragraphs 5 through 18 are realleged and incorporated as if fully stated herein.

20. On or about May 10, 2005, during the inspection referenced in paragraph 14, a representative of IDA collected a photographic sample of the label on the inventory of Greenskeeper's Secret Weed and Feed, 10-6-4, EPA Est. No. 66840-MO-001(C). The representative also collected a copy of Sales Order 30370, dated February 4, 2005, referenced in paragraph 16, documenting Respondent's distribution and sale of 360, 18-pound bags and 120, 36-pound bags of Greenskeeper's Secret Weed and Feed, 10-6-4 to Rural King.

21. At the time Respondent distributed and sold Greenskeeper's Secret Weed and Feed, 10-6-4, to Rural King on February 4, 2005, the label stated, in pertinent part:

"GREENSKEEPER'S
SECRET
WEED AND FEED

* * *

ACTIVE INGREDIENTES:

*Dimethylamine Salt of 2,4-dichlorophenoxyacetic acid . . . 1.14%

INERT INGREDIENTS: 98.86%

* * *

559/ APO70103

EPA EST. NO. 66840-MO-001(C)

Distributed By: T and N, Inc. * P.O. Box 240 * Foristell, MO 63348"

22. At the time Respondent distributed or sold the Greenskeeper's Secret Weed and Feed, 10-6-4, it was misbranded in that the label did not bear the EPA registration number assigned to it at the time of its registration; neither did Respondent hold an active agreement with the Registrant, PBI Gordon Corporation, to supplementally distribute the pesticide.

23. Respondent violated Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), by distribution and sales of a misbranded pesticide.

24. Pursuant to Section 14 of FIFRA, 7 U.S.C. § 136l, and based on the facts stated in paragraphs 19 through 23, it is proposed that a civil penalty of \$3,611 be assessed against Respondent.

Count 2

25. The facts stated in paragraphs 5 through 18 are realleged and incorporated as if fully stated herein.

26. On or about May 10, 2005, during the inspection referenced in paragraph 14, a representative of IDA collected a photographic sample of the label on the inventory of Greenskeeper's Secret Weed and Feed, 10-6-4, EPA Est. No. 66840-MO-001(C). The

representative also collected a copy of Sales Order 31118, dated March 9, 2005, referenced in paragraph 16, documenting Respondent's distribution and sale of 120, 18-pound bags and 60, 36-pound bags of Greenskeeper's Secret Weed and Feed, 10-6-4 to Rural King.

27. At the time Respondent distributed and sold Greenskeeper's Secret Weed and Feed, 10-6-4, to Rural King on March 9, 2005, the label stated, in pertinent part:

"GREENSKEEPER'S
SECRET
WEED AND FEED

* * *

ACTIVE INGREDIENTES:

*Dimethylamine Salt of 2,4-dichlorophenoxyacetic acid . . . 1.14%

INERT INGREDIENTS: 98.86%

* * *

559/ APO70103

EPA EST. NO. 66840-MO-001(C)

Distributed By: T and N, Inc. * P.O. Box 240 * Foristell, MO 63348"

28. At the time Respondent distributed or sold the Greenskeeper's Secret Weed and Feed, 10-6-4, it was misbranded in that the label did not bear the EPA registration number assigned to it at the time of its registration; neither did Respondent hold an active agreement with the Registrant, PBI Gordon Corporation, to supplementally distribute the pesticide.

29. Respondent violated Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), by distribution and sales of a misbranded pesticide.

30. Pursuant to Section 14 of FIFRA, 7 U.S.C. § 136l, and based on the facts stated in paragraphs 25 through 29, it is proposed that a civil penalty of \$3,611 be assessed against Respondent.

Count 3

31. The facts stated in paragraphs 5 through 18 are realleged and incorporated as if fully stated herein.

32. On or about August 16, 2005, during the inspection referenced in paragraph 18, a representative of MDA collected two documentary samples of the labels on the inventory of Greenskeeper's Secret Weed and Feed, 10-6-4, EPA Reg. No. 2217-697-066840. The labels each contained three establishment numbers; however, the actual producing establishment was not identified. Respondent held in inventory 18- and 36-pound bags of Greenskeeper's Secret

Weed and Feed, 10-6-4, EPA Reg. No. 2217-697-066840, which were packaged, labeled, and released for shipment.

33. At the time Respondent was holding for distribution or sale Greenskeeper's Secret Weed and Feed, 10-6-4, EPA Reg. No. 2217-697-066840, the label stated, in pertinent part:

"GREENSKEEPER'S
SECRET
WEED AND FEED

* * *

ACTIVE INGREDIENTES:

*Dimethylamine Salt of 2,4-dichlorophenoxyacetic acid . . . 1.14%

INERT INGREDIENTS: 98.86%

* * *

559/ APO70103	32801-MO-1 (A)
EPA Reg. NO. 2217-697-066840	32802-WI-1 (B)
EPA EST. NO. 66840-MO-001(C)	
First Letter of Lot Code Indicates Manufacturing Location	

Distributed By: T and N, Inc. * P.O. Box 240 * Foristell, MO 63348"

34. At the time Respondent was holding for distribution or sale Greenskeeper's Secret Weed and Feed, 10-6-4, it was misbranded in that Respondent did not hold an active agreement with the Registrant, PBI Gordon Corporation, to supplementally distribute the pesticide.

35. The pesticide, Greenskeeper's Secret Weed and Feed, 10-6-4, was misbranded in that the label contained multiple establishment numbers; however, the actual producing establishment was not identified.

36. Respondent violated Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), by holding for distribution or sale a misbranded pesticide.

37. Pursuant to Section 14 of FIFRA, 7 U.S.C. § 136l, and based on the facts stated in paragraphs 31 through 36 it is proposed that a civil penalty of \$4,550 be assessed against Respondent.

Section IV

Total Proposed Penalty

38. Section 14 of FIFRA, 7 U.S.C. § 136l, and the Debt Collection Improvement Act of 1996, as implemented by the Civil Monetary Penalties Inflation Adjustment Rule, 40 C.F.R. Part 19, authorize the issuance of this Complaint for the assessment of a civil penalty for each violation.

For any such violation occurring on or after March 15, 2004, the maximum statutory penalty per violation is Six Thousand Five Hundred Dollars (\$6,500). The EPA proposes to assess a total civil penalty of Eleven Thousand Seven Hundred Dollars (\$11,700) against Respondent for the above-described violations.

Appropriateness of Proposed Penalty

39. The penalty proposed above has been calculated after consideration of the statutory factors set forth in Section 14 of FIFRA, 7 U.S.C. § 136l. Specifically, EPA considered the size of the business of Respondent, the effect of the proposed penalty on Respondent's ability to continue in business and the gravity of the alleged violations. In its calculation of the proposed penalty, EPA has taken into account the particular facts and circumstances of the alleged violations, with specific reference to EPA guidance for the calculation of proposed penalties under FIFRA (See Enclosure, July 2, 1990, Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)).

40. For purposes of calculating the proposed penalty, EPA obtained financial information indicating that Respondent's total business revenues were over \$1 million per year. This information placed Respondent in Category I size of business, as set forth in the FIFRA Civil Penalty Calculation Worksheet attached hereto and incorporated herein by reference (See Enclosure). If EPA's estimate of Respondent's total business revenues is incorrect, Respondent may submit reliable financial documentation indicating another category is appropriate.

41. Respondent has the right, upon submittal of certified financial information, to consideration of Respondent's financial condition in mitigation of the proposed penalty insofar as is necessary to permit Respondent to continue in business.

42. The proposed penalty constitutes a demand *only if* Respondent fails to raise *bona fide* issues of ability to pay, or other *bona fide* affirmative defenses relevant to the determination of any final penalty.

43. Said issues of ability to pay or other affirmative defenses relevant to a final penalty may and should be brought to the attention of Complainant at the earliest opportunity in this proceeding.

44. Payment of the total penalty - \$11,700 - may be made by certified or cashier's check payable to the "Treasurer, United States of America," and remitted to:

Mellon Bank
EPA – Region 7
P.O. Box 371099M
Pittsburgh, Pennsylvania 15251

45. If Respondent does not contest the findings and assessments set forth above, payment of the penalty assessed herein may be remitted as described in the preceding paragraph, including a reference to the name and docket number of the Complaint. In addition, a copy of the check should be sent to:

Regional Hearing Clerk
EPA - Region 7
901 North 5th Street
Kansas City, Kansas 66101

and a copy to:

Rupert G. Thomas
Assistant Regional Counsel
EPA - Region 7
901 North 5th Street
Kansas City, Kansas 66101

NOTICE OF OPPORTUNITY FOR HEARING

Section V

Answer and Request for Hearing

46. Pursuant to Section 14(a) of FIFRA, 7 U.S.C. § 136l(a), Respondent has the right to request a hearing to contest any material fact contained in this Complaint or to contest the appropriateness of the penalty proposed herein. If Respondent wishes to avoid being found in default, Respondent must file a written answer and request for hearing with:

Regional Hearing Clerk
EPA - Region 7
901 North 5th Street
Kansas City, Kansas 66101

within thirty (30) days of service of this Complaint and Notice of Opportunity for Hearing. Said answer shall clearly and directly admit, deny, or explain each of the factual allegations contained in the Complaint with respect to which Respondent has any knowledge, or shall clearly state that Respondent has no knowledge as to particular factual allegations in the Complaint. The answer shall also state:

- A. The circumstances or arguments that are alleged to constitute the grounds of defense;
- B. The facts that Respondent intends to place at issue; and
- C. Whether a hearing is requested.

Failure to deny any of the factual allegations in the Complaint constitutes an admission of the undenied allegations.

47. Any hearing that is requested shall be held and conducted in accordance with 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," 40 C.F.R. Part 22 (copy enclosed).

48. If Respondent fails to file a written answer and request for hearing within thirty (30) days of service of this Complaint and Notice of Opportunity for Hearing, such failure will constitute a binding admission of all of the allegations in this Complaint, and a waiver of Respondent's right to a hearing under FIFRA. A Default Order may thereafter be issued by the Regional Administrator, and the civil penalties proposed therein shall become due and payable without further proceedings.

49. Respondent is advised that, after the Complaint is issued, the Consolidated Rules of Practice prohibit any ex parte (unilateral) discussion of the merits of any action with the EPA Regional Administrator, members of the Environmental Appeals Board, the Regional Judicial Officer, Administrative Law Judge, or any person likely to advise these officials in the decision of the case.

Section VI

Settlement Conference

50. Whether or not a hearing is requested, an informal settlement conference may be arranged at Respondent's request. Respondent may confer with the EPA concerning: (1) whether or not the alleged violation occurred; or (2) the appropriateness of the proposed penalty in relation to the size of Respondent's business, the gravity of the violation, and the effect of the proposed penalty on Respondent's ability to continue in business. Additionally, the proposed penalty may be adjusted if Respondent establishes a bona fide issue of ability to pay. To explore the possibility of settlement in this matter, contact:

Rupert G. Thomas
Assistant Regional Counsel
EPA Region 7
901 North 5th Street
Kansas City, Kansas 66101
Telephone: (913) 551-7282

51. A request for an informal settlement conference does not extend the thirty (30) day period during which a written answer and request for a hearing must be submitted. The informal conference procedure may be pursued as an alternative to and simultaneously with the adjudicatory hearing procedure.

52. EPA encourages all parties against whom a civil penalty is proposed to pursue the possibility of settlement. However, no penalty reduction will be made simply because an informal settlement conference is held. If settlement is reached, the parties will enter into a written Consent Agreement, and a Final Order will be issued. The issuance of such a Consent Agreement and Final Order shall constitute a waiver of Respondent's right to request a hearing on any matter stipulated to therein.

10/12/06

Date

for Betty J. Berry
William A. Spratlin
Director
Water, Wetlands, and Pesticides Division

Rupert G. Thomas
Rupert G. Thomas
Assistant Regional Counsel
Office of Regional Counsel

Enclosures:

1. FIFRA Civil Penalty Calculation Worksheet
2. Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Action Orders, and the Revocation, Termination or Suspension of Permits, 40 C.F.R. Part 22
3. July 2, 1990, Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act
4. SBREFA Fact Sheet
5. Notice of Securities and Exchange Commission Registrants' Duty to Disclose Environmental Legal Proceedings

CERTIFICATE OF SERVICE

I certify that on the date noted below I hand delivered the original and one copy of this Complaint and Notice of Opportunity for Hearing to the Regional Hearing Clerk, EPA, 901 North 5th Street, Kansas City, Kansas 66101.

I further certify that on the date noted below I sent by certified mail, return receipt requested, a copy of the signed original Complaint and Notice of Opportunity for Hearing; a copy of 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, 40 C.F.R. Part 22; a copy of the July 2, 1990, Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act; a copy of the FIFRA Civil Penalty Calculation Worksheet; the SBREFA Fact Sheet; and the Notice of Securities and Exchange Commission Registrants' Duty to Disclose Environmental Legal Proceedings, to the following:

Mark Stephens
Registered Agent for
T and N, Inc.
815 Hwy T
P.O. Box 240
Foristell, MO 63348

10/13/04
Date

Julia A. Cacho
Julia A. Cacho

FIFRA CIVIL PENALTY CALCULATION WORKSHEET
ENFORCEMENT RESPONSE POLICY for FIFRA - Reference

RESPONDENT: T and N, Inc.
 ADDRESS: 815 Hwy T
 Foristell, Missouri 63348

Prepared By: Christena Windmeyer
 Date: October 4, 2006

	Count 1	Count 2	Count 3	Count 4
Appendix A				
1. Statutory Violation	§ 12(a)(1)(E)	§ 12(a)(1)(E)	§ 12(a)(1)(E)	
2. FTTS Code	1EE	1EE	1EA, 1ED	
3. Violation Level	3	3	2 4	
Appendix C - Table 2 - Size of Business Category				
4. Violator Category * § 14(a)(1) or § 14(a)(2)	§ 14(a)(1)	§ 14(a)(1)	§ 14(a)(1)	
5. Size of Business Category	I	I	I	
Appendix C - Table 1 - FIFRA Civil Penalty Matrix				
6. BASE PENALTY	\$5,158	\$5,158	\$6,500	
Appendix B - Gravity Adjustments				
7a. Pesticide Toxicity	1	1	1	
7b. Human Harm	1	1	1	
7c. Environmental Harm	1	1	1	
7d. Compliance History	0	0	0	
7e. Culpability	2	2	2	
7f. Total Gravity Adjustment Value (add items 7a - 7e)	5	5	5	
Appendix C - Table 3 - Adjustments				
7g. Percent Adjustment	30%	30%	30%	
7h. Dollar Adjustment	\$1,547	\$1,547	\$1,950	
8. Final Penalty** (item 7h from item 6)	\$3,611	\$3,611	\$4,550	
Combined Total Penalty (total of all columns for line 8, above)	\$11,700			

* Section 14(a)(1) of FIFRA - Any registrant, commercial applicator, wholesaler, dealer, retailer, or other distributor who violates any provision of this subchapter may be assessed a civil penalty by the Administrator of not more than \$5,000 for each offense.

Section 14(a)(2) of FIFRA - Any private applicator or other person not included in paragraph (1) who violates any provision of this subchapter subsequent to receiving a written warning from the Administrator or following a citation for a prior violation, may be assessed a civil penalty by the Administrator of not more than \$1,000 for each offense, except that any applicator not included under paragraph (1) of this subsection who holds or applies registered pesticides, or use dilutions of registered pesticides, only to provide a service of controlling pests without delivering any unapplied pesticide to any person so served, and who violates any provision of this subchapter may be assessed a civil penalty by the Administrator of not more than \$500 for the first offense nor more than \$1,000 for each subsequent offense.

**The final penalty in each column of line 8 cannot exceed the statutory maximum.