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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 10

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In the matter of: )  
)  
)  
Steven Tuttle; Tuttle Tool )  
Engineering, and Tuttle Apiary )  
Labs )  
)  
Respondents. )  
\_\_\_\_\_ )

DOCKET NO. FIFRA-10-2004-0056

MOTION FOR DEFAULT  
FOR FAILURE TO SUBMIT  
PREHEARING EXCHANGE

**TABLE OF CONTENTS**

INTRODUCTION ..... 1

STATEMENT OF FACTS ..... 1

ARGUMENT ..... 2

I. Default is Appropriate Where Respondent Has Failed to Submit a Prehearing Exchange  
..... 2

II. The Complaint Establishes the Prima Facie Elements of the Alleged Violations ..... 3

III. The Proposed Penalty is Supported by the Facts ..... 4

CONCLUSION ..... 7

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Administrative</u>	
<i>In re Asbestex, Environmental Group Co.</i> , Docket No. CAA 3-2001-004 (ALJ Gunning April 24, 2002) .....	n.6
<i>In re Lawrence County Agricultural Society</i> , 2000 WL 1770502 (ALJ Gunning, October 26, 2000) .....	n.6
<i>In re Ridgway Industries</i> , 2000 WL 1222215 (ALJ Bullock, June 8, 2000) .....	n.6
<i>In re Ronald C. Palimere</i> , 2000 WL 33126605 (ALJ Moran, December 13, 2000)	n.6
<i>In re Steven Tuttle et al.</i> , Docket No. FIFRA 10-96-0012, Initial Decision (ALJ McGuire September 30, 1997) .....	n.27
 <u>Statutes</u>	
7 U.S.C. §§ 136-136y .....	n.1
7 U.S.C. § 136(q) .....	n.14, n.16
7 U.S.C. § 136la .....	n.13, n.15
7 U.S.C. § 136e .....	n.17
7 U.S.C. § 136j(a)(1)(A) .....	n.13
7 U.S.C. § 136j(a)(1)(E) .....	n.14, n.16
7 U.S.C. § 136j(a)(2)(L) .....	n.17
7 U.S.C. § 136l(a)(1) .....	n.18
7 U.S.C. § 136l(a)(4) .....	n.20

Regulations

40 C.F.R. Part 19. . . . . n.18

40 C.F.R. § 22.16(a) . . . . . 1

40 C.F.R. § 22.17 . . . . . 1, n.6

40 C.F.R. § 22.17(a) . . . . . n.4, n.5, n.7,  
n.24

40 C.F.R. § 22.19(a) . . . . . n.3

40 C.F.R. § 22.19(g) . . . . . n.4

Other Authorities

“Enforcement Response Policy for the Federal Insecticide, Fungicide,  
and Rodenticide Act (FIFRA),” (July 2, 1990) . . . . . n.21, n. 22

## INTRODUCTION

Complainant EPA Region 10 moves for default under 40 C.F.R. §§ 22.16(a), 22.17 and 22.19(g)(3). Because Respondent has failed to file a prehearing exchange, and for good cause shown, he should be held liable for the violations alleged in the Complaint and the proposed penalty should be assessed against him. Complainant has also filed a motion to amend the complaint to remove two of the named respondents. Throughout this brief, Respondent will be used in the singular to refer to Steven Tuttle, and to conform with that requested amendment to the Complaint.

## STATEMENT OF FACTS

Region 10 filed the Complaint in this case on March 18, 2004, alleging five violations of the FIFRA.<sup>1</sup> In the prehearing Order dated June 4, 2004, the Presiding Officer ordered the parties to file their prehearing exchanges no later than August 4, 2004. Complainant filed its prehearing exchange on August 3, 2004. As of the date of filing of this motion, Respondent has neither filed his prehearing exchange with the Regional Hearing Clerk nor served it on Complainant. On September 1, 2004, EPA counsel telephoned Mr. Tuttle to inquire whether he intended to file his prehearing exchange. During that phone call, Mr. Ryan informed Mr. Tuttle of the consequences of failing to file a prehearing exchange and asked whether he intended to file one. Mr. Tuttle made an obscene remark to Mr. Ryan in response, and the phone call ended.<sup>2</sup>

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<sup>1</sup>Federal insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. §§ 136 - 136y.

<sup>2</sup>Declaration of Mark A. Ryan in Support of Motion for Default.

## ARGUMENT

### I. **Default is Appropriate Where Respondent Has Failed to Submit a Prehearing Exchange.**

Respondent failed to file his prehearing exchange on August 4 as required by the Presiding Officer's Order dated June 4, 2004. The Consolidated Rules of Practice Governing the Administrative Assessment of Penalties and Revocation or Suspension of Permits ("Rules") require that all parties to an action comply with a Presiding Officer's order for a prehearing information exchange.<sup>3</sup> The Rules further provide that "[a] party may be found to be in default: after motion, . . . upon failure to comply with information exchange requirements of § 22.19(a)."<sup>4</sup> Respondent's default constitutes an admission of all facts alleged in the Complaint and a waiver of Respondent's right to contest such factual allegations.<sup>5</sup>

Here, Respondent failed to file his prehearing exchange. Therefore, Respondent should be deemed to have admitted all of the facts alleged in the Complaint, waived his right to a hearing on these facts, held liable for all violations alleged in the Complaint, and assessed the penalty proposed in the Complaint.<sup>6</sup>

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<sup>3</sup>40 C.F.R. § 22.19(a).

<sup>4</sup>40 C.F.R. §§ 22.17(a), 22.19(g).

<sup>5</sup>40 C.F.R. § 22.17(a).

<sup>6</sup>40 C.F.R. § 22.17(a)-(b); *See In re Ridgway Industries*, 2000 WL 1222215 (ALJ Bullock, June 8, 2000) (Respondent's failure to comply with a prehearing information exchange order in a FIFRA proceeding supported a default order with penalties); *see also In re Asbestex, Environmental Group Co.*, Docket No. CAA 3-2001-004 (ALJ Gunning April 24, 2002); *In re Ronald C. Palimere*, 2000 WL 33126605 (ALJ Moran, December 13, 2000); *In re Lawrence County Agricultrue Society*, 2000 WL 1770502 (ALJ Gunning, October 26, 2000).

## II. The Complaint Establishes the Prima Facie Elements of the Alleged Violations.

Because Respondent is in default, the facts alleged in the Complaint are deemed admitted by Respondent.<sup>7</sup> Thus, in order to prevail in the instant matter, all Complainant must show is that it has met its prima facie burden of establishing the elements of the FIFRA violations alleged.<sup>8</sup> Complainant has made this showing. The Complaint alleges the prima facie elements of EPA's case against Respondent: (1) Respondent is a person<sup>9</sup> who (2) sought to sell and distribute two pesticidal products intended to reduce the population of pest mites that impact bee hives,<sup>10</sup> (3) produced these pesticidal products at his place of business without registering either the product or the production facility with the EPA,<sup>11</sup> and (4) failed to meet the FIFRA requirements for packaging and labeling.<sup>12</sup>

More specifically, the Complaint alleges that Respondent committed the following five violations of FIFRA: (1) Respondent violated Section 12(a)(1)(A) by selling or distributing a pesticide named "Mite Solution Concentrate," a pesticidal product not registered in accordance with Section 3<sup>13</sup>; (2) Respondent violated Section 12(a)(1)(E) by selling and distributing "Mite Solution Concentrate," which was misbranded with labels that did not contain the information required by Section 2(q)<sup>14</sup>; (3) Respondent violated Section 12(a)(1)(A) by selling and

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<sup>7</sup>40 C.F.R. § 22.17(a).

<sup>8</sup>See *e.g.*, *In re Ridgway Industries*, 2000 WL 1222215.

<sup>9</sup>Complaint ¶¶ 4, 13, 39.

<sup>10</sup>*Id.* ¶¶ 9-10, 14-17, 37-38, 40-44.

<sup>11</sup>*Id.* ¶¶ 10, 29-34, 45-47, 52-56, 57, 59, 61.

<sup>12</sup>*Id.* ¶¶ 9-10, 20-28, 48-51, 58, 60.

<sup>13</sup>*Id.* ¶ 57; 7 U.S.C. §§ 136a, 136j(a)(1)(A).

<sup>14</sup>*Id.* ¶ 58; 7 U.S.C. §§ 136j(a)(1)(E), 136(q).

distributing a pesticide named “Herbal Bee Calmer,” a pesticidal product not registered in accordance with Section 3<sup>15</sup>; (4) Respondent violated Section 12(a)(1)(E) by selling and distributing “Herbal Bee Calmer,” which was misbranded with labels that did not contain the information required by Section 2(q)<sup>16</sup>; and (5) Respondent is a producer who violated Section 12(a)(2)(L) by failing to register the establishment where he produced “Mite Solution Concentrate” and “Herbal Bee Calmer” in accordance with Section (7)(a).<sup>17</sup>

### **III. The Proposed Penalty is Supported by the Facts.**

FIFRA and the Civil Monetary Inflation Adjustment Rule provide for penalties up to \$5,500 per violation.<sup>18</sup> The statutory maximum penalty available for the five violations alleged in the Complainant is \$27,500. Complainant seeks a penalty of \$14,850.<sup>19</sup>

Penalty amounts are determined under FIFRA Section 14(a)(4)<sup>20</sup> and the applicable EPA penalty policy.<sup>21</sup> The statutory penalty factors are (a) appropriateness of the proposed penalty to the size of Respondent’s business; (b) effect on Respondent’s ability to continue operating; and (c) gravity of the violations. EPA calculates penalties under the FIFRA Penalty Policy, which requires: (1) determination of gravity or “level” of the violation; (2) determination of the size of business category for the violator; (3) use of the FIFRA civil penalty matrices to determine the dollar amount associated with the gravity level of the violation and the size of business category

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<sup>15</sup>*Id.* ¶ 59; 7 U.S.C. §§ 136a, 136j(a)(1)(A).

<sup>16</sup>*Id.* ¶ 60; 7 U.S.C. §§ 136j(a)(1)(E), 136(q).

<sup>17</sup>*Id.* ¶ 61; 7 U.S.C. §§ 136e, 136j(a)(2)(L).

<sup>18</sup>7 U.S.C. § 1361(a)(1), 40 C.F.R. part 19.

<sup>19</sup>*See* Complaint ¶¶ 62-65.

<sup>20</sup>7 U.S.C. § 1361(a)(4).

<sup>21</sup>“Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA),” (July 2, 1990) (“Penalty Policy”).



of the violator; (4) further gravity adjustments of the base penalty, if appropriate given the specific characteristics of the pesticide involved, the actual or potential harm to human health and/or the environment, the compliance history of the violator, and the culpability of the violator, using the "Gravity Adjustment Criteria"; and, (5) consideration of the effect that payment of the total civil penalty will have on the violator's ability to continue in business.<sup>22</sup>

The Penalty Memorandum EPA prepared in this case describes how EPA calculated the proposed penalty.<sup>23</sup> The Penalty Memorandum is attached to the Complaint and referenced in paragraph 63. Because Respondent's failure to comply with the Presiding Officer's information exchange order constitutes an admission of all facts alleged in the complaint, the facts set forth in the penalty memorandum are deemed admitted.<sup>24</sup>

Each of the three statutory penalty factors is dealt with in Penalty Memorandum. With respect to the first two factors, the Memorandum concludes that the penalty EPA seeks is appropriate with respect to the size of Respondent's business and the gravity of the violations. Also, as alleged in the Complaint, Respondent has 500 accounts and sells to businesses on a worldwide basis. Respondent was projecting yearly sales of up to \$200,000 in March 5, 2004.<sup>25</sup> These figures demonstrate that the penalty sought is appropriate given the size of business and the gravity of the violations and that the penalty would not effect Respondent's ability to continuing to operate his business.<sup>26</sup>

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<sup>22</sup> FIFRA Policy at 19.

<sup>23</sup> Complainant's Exhibit 7 ("Penalty Memorandum"), attached to Complainant's Amended Prehearing Exchange. This Memorandum was also provided to Mr. Tuttle when he was served with the Complaint.

<sup>24</sup> 40 C.F.R. § 22.17(a).

<sup>25</sup> Complaint, ¶ 11.

<sup>26</sup> See *Id.* ¶¶ 11, 12, 63.

The Penalty Memorandum also deals with the third statutory penalty factor - gravity of the violation. In applying this factor, Complainant assigned low values to pesticide toxicity, human harm, and environmental harm. Compliance history was assigned a value of zero because the previous enforcement action against Respondent was more than five years ago.

The final factor Complainant considered under the statutory "gravity" factor was culpability. Complainant assigned a high value of four to this factor. In an Initial Decision dated September 30, 1997, an administrative law judge found Mr. Tuttle liable for FIFRA violations similar to the ones at issue in the present case.<sup>27</sup> Respondent was found liable for selling "Might Solution" despite warnings from EPA to stop make pesticidal claims for his product.<sup>28</sup> Although Respondent has modified the names of his products and his sales pitches, he is conducting the same business which resulted in the 1997 liability finding.

In 2003, Respondent advertised two products, "Herbal Jelly" and "Concentrated Mite Solution," which were jointly referred to as "Mite Solution." In January 2004, an EPA employee contacted Respondent and asked to purchase one package each of "Herbal Jelly" and "Concentrated Mite Solution." In response to this request Respondent sold and distributed a box labeled "Concentrated Mite Solution" and "Herbal Bee Calmer Gel." Included with these products was literature on the use, application, and effectiveness of the product, as well as statements such as

"Mite Solution . . . safely treats your hives year round . . .",

"the name change was necessary because the EPA violates the intent of their own law, requiring anything to be registered that kills pests", and

"To complete EPA registration it would cost several million dollars which would have to

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<sup>27</sup>*In re Steven Tuttle et al.*, Docket No. FIFRA 10-96-0012, Initial Decision (ALJ McGuire September 30, 1997), included in Prehearing Exchange as Complainant's Exhibit 1.

<sup>28</sup>See Complaint, ¶¶ 5, 6, 7, 8, 65

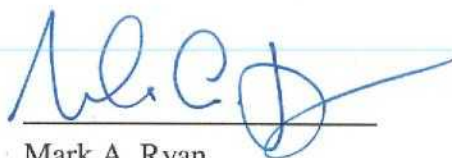
be passes [sic] on to the beekeeper, so we took another route. We changed the name to Bee Calmer and could no longer advertise it as a miticide, antiseptic, antibiotic, or fungicide."<sup>29</sup>

This history of activity demonstrates that Respondent has been aware for almost ten years that his products are unregistered pesticides, and he is selling them in violation of FIFRA. Despite this knowledge, Respondent continues to manufacture, sell, and distribute these products. Furthermore, Respondent's efforts to evade regulation by changing the name of his product and limiting the claims of product effectiveness are disingenuous. These facts justify the high culpability finding in the Penalty Memorandum. The proposed penalty, which is based on facts alleged in the Complaint - - which are deemed admitted - - is reasonable and consistent with the FIFRA penalty policy.

#### CONCLUSION

Respondent has failed to submit a prehearing exchange despite an express order from the Presiding Officer and a subsequent request from EPA counsel. Consequently, he should be held in default, and all facts alleged in the Complaint should be deemed admitted. Because the Complaint and the Penalty Memorandum establish the requisite elements of liability and penalty, the Presiding Officer should enter a Order finding Respondent in default, and assess the penalty proposed in the Complaint.

RESPECTFULLY SUBMITTED this 30<sup>th</sup> day of September, 2004.



Mark A. Ryan  
Assistant Regional Counsel  
Region 10

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<sup>29</sup>*Id.* ¶¶ 9-10.

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the United States that the following statement are true and correct.

The original of the **Motion For Default For Failure To Submit Prehearing Exchange** to ALJ William B. Moran, dated October 04, 2004, in this action, In the Matter of: Steven Tuttle Tool Engineering, and Tuttle Apiary Labs, Docket No. FIFRA-10-2004-0056, was sent to the Administrative Law Judge as indicated below and copies sent to the following addresses by the methods indicated.

By Pouch Mail:                      Honorable William B. Moran  
   Administrative Law Judge  
   U.S. Environmental Protection Agency  
   1200 Pennsylvania Avenue  
   Mail Code 1900L  
   Washington, D.C. 20460

By Certified Mail  
Return Receipt                      Steven Tuttle, Owner  
   3030 Lewis River Road  
   Woodland, Washington 98674

By Hand Delivery:                      Mark Ryan  
   U.S. Environmental Protection Agency  
   1435 North Orchard Street  
   Boise, Idaho 83706

By Hand Delivery:                      Carol D. Kennedy  
   Regional Hearing Clerk  
   1200 Sixth Avenue, ORC-158  
   Seattle, Washington 98101

Dated: 10/04/2004

  
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Sara Bent  
U.S. Environmental Protection Agency