

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

) Docket No.: FIFRA 07-2007-0003

)

Manna Pro Corporation

) COMPLAINT AND NOTICE OF

707 Spirit 40 Park Drive

) OPPORTUNITY FOR HEARING

Suite 150

)

Chesterfield, Missouri 63005

)

)

Respondent

)

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 Manna Pro Corporation, a pesticide producer, whose corporate office is located at 707 Spirit 40 Park Drive, Suite 150, Chesterfield, Missouri. 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 Kansas corporation qualified to do business in the states of Kansas and Missouri.

Section III

Violations

General Allegations

5. The Complainant hereby states and alleges that Respondent has violated FIFRA as follows:
6. 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.
7. Pursuant to FIFRA Section 2(w), 7 U.S.C. § 136(w) and 40 C.F.R. § 167.3, the term “produce” means to manufacture, prepare, propagate, compound, or process any pesticide, including any pesticide produced pursuant to Section 5 of the Act, any active ingredient or device, or to package, repackage, label, relabel, or otherwise change the container of any pesticide or device.
8. Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), states it shall be unlawful for any person to distribute or sell any pesticide which is adulterated or misbranded.
9. 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 particular way.
10. 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 by or under authority of this Act to appear on the label or labeling is not prominently placed thereon with such conspicuousness (as compared with other words, statements, designs, or graphic matter in the labeling) and in such terms as to render it likely to be read and understood by the ordinary individual under customary conditions of purchase and use.
11. Title 40 C.F.R. § 156.10(a)(4), states the label of a pesticide product shall appear on or be securely attached to the immediate container of the pesticide product. . . . If the immediate container is enclosed within a wrapper or outside container through which the label cannot be clearly read, the label must also be securely attached to such outside wrapper or container, if it is a part of the package as customarily distributed or sold.
12. Section 2(q)(1)(F) of FIFRA, 7 U.S.C. § 136(q)(1)(F), states a pesticide is misbranded if the labeling accompanying it does not contain directions for use which are necessary for effecting the purpose for which the product is intended and if complied with, together with any requirements imposed under Section 3(d) of this Act, are adequate to protect health and the environment.
13. Title 40 C.F.R. § 156.10(i)(1)(ii)(A), states in regards to the placement of directions for use of pesticide products that the directions may appear on any portion of the label provided that they

are conspicuous enough to be easily read by the user of the pesticide product. Directions for use may appear on printed or graphic matter which accompanies the pesticide provided that . . . such printed or graphic matter is securely attached to each package of the pesticide or placed within the outside wrapper or bag.

14. Section 2(q)(1)(G) of FIFRA, 7 U.S.C. § 136(q)(1)(G), states a pesticide is misbranded if the label does not contain a warning or caution statement which may be necessary and if complied with, together with any requirements imposed under Section 3(d) of this Act, is adequate to protect health and the environment.

15. Title 40 C.F.R. § 156.60(a)(2) states, in regards to hazard and precautionary statements not required on the front panel, that they may appear on other panels, and may be required also on supplemental labeling. These include, but are not limited to, the human hazard and precautionary statements, domestic animal statements if applicable, a Note to Physician, and physical or chemical hazard statements.

16. Title 40 C.F.R. § 156.60(b), states in regards to the placement and prominence of human hazard and precautionary statements, that all required front panel warning statements shall be grouped together on the label, and shall appear with sufficient prominence relative to other front panel text and graphic material to make them unlikely to be overlooked under customary conditions of purchase and use. Title 40 C.F.R. § 156.60(b) also requires front panel label which are over 30 square inches to have the Signal Word in All Capital Letters and of an 18-point size. In addition, the Child Hazard Warning must be at a 12-point size.

17. FLY BE GONE Mineral Block for Cattle w/Rabon Larvicide is a pesticide registered under EPA Registration No. 55392-3 to Manna Pro Corporation, St. Louis, Missouri.

18. On or about December 5, 2002, a representative of the Kansas Department of Agriculture (KDA) conducted an inspection at Respondent's manufacturing plant located at 3158 7th Street Traffic Way, Kansas City, Kansas. Respondent was holding for sale or distribution ten full pallets (60 blocks/pallet) - a total of 600 blocks of the pesticide referenced in paragraph 17.

Count 1

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

20. Documentation collected during the inspection referenced in paragraph 18 revealed that Respondent was holding for sale or distribution 600 blocks of the misbranded pesticide referenced in paragraphs 17 and 18.

21. The 600 blocks of the FLY BE GONE Mineral Block for Cattle w/Rabon Larvicide, EPA Registration No. 55392-3, were misbranded in that the label could not be clearly read and the back panel of the label could not be viewed under the shrink wrap packaging. The label was also misbranded in that the precautionary statements are inadequate; the label is missing the required

Personal Protection Equipment (PPE) requirements, "User Safety Requirements," "User Safety Recommendations," and "Note to Physician" statements.

22. The pesticide described in paragraphs 17, 18, 20, and 21, were not encompassed within the terms of the product registration under EPA Registration No. 55392-3, as required under provisions of Section 3 of FIFRA.

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

24. Pursuant to Section 14 of FIFRA, 7 U.S.C. § 136l, and based upon the facts stated in paragraphs 19 through 23, it is proposed that a civil penalty of \$3,850 be assessed against Respondent.

Section IV

Total Proposed Penalty

25. 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 of up to Five Thousand Five Hundred Dollars (\$5,500) for each violation occurring prior to March 15, 2004. The EPA proposes to assess a total civil penalty of \$3,850 against Respondent for the above-described violation.

Appropriateness of Proposed Penalty

26. 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)).

27. For purposes of calculating the proposed penalty, EPA obtained financial information indicating that Respondent's total business revenues were over one 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.

28. 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.

29. 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.

30. 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.

31. Payment of the total penalty - \$3,850 - 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

32. 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

33. 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.

34. 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).

35. 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.

36. 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

37. 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

38. 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.

39. 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.

01/24/07
Date

Betty D. Berry
for 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:

The Corporation Company, Inc.
Registered Agent for Manna Pro Corporation
515 South Kansas Avenue
Topeka, Kansas 66603

1/26/07
Date

Julia A. Cacho
Julia A. Cacho

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

RESPONDENT: Manna Pro Corporation
ADDRESS: 707 Spirit 40 Park Drive
Suite 150
Chesterfield, Missouri 63005

Prepared By: Mark K. Leshner
Date: 11/14/06

	Count 1	Count 2	Count 3	Count 4
Appendix A				
1. Statutory Violation	Sec. 12(a)(1)(E)			
2. FTTS Code	1EE, 1EF, 1EG			
3. Violation Level	3 2 2			
Appendix C - Table 2 - Size of Business Category				
4. Violator Category * § 14(a)(1) or § 14(a)(2)	§ 14(a)(1)			
5. Size of Business Category	1			
Appendix C - Table 1 - FIFRA Civil Penalty Matrix				
6. BASE PENALTY	\$5,500			
Appendix B - Gravity Adjustments				
7a. Pesticide Toxicity	1			
7b. Human Harm	1			
7c. Environmental Harm	1			
7d. Compliance History	0			
7e. Culpability	2			
7f. Total Gravity Adjustment Value (add items 7a - 7e)	5			
Appendix C - Table 3 - Adjustments				
7g. Percent Adjustment	30%			
7h. Dollar Adjustment	-\$1,650			
8. Final Penalty** (item 7h from item 6)	\$3,850			
Combined Total Penalty (total of all columns for line 8, above)	\$3,850			

* 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.