

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2**

U.S. ENVIRONMENTAL
PROTECTION AGENCY-REG. II
2010 APR -7 PM 3:31
REGIONAL HEARING
CLERK

In the Matter of	:	
Lanco Manufacturing Corporation,	:	Hon. William B. Moran,
	:	<u>Presiding Officer</u>
Respondent.	:	
Proceeding under The Federal	:	Docket No.
Insecticide, Fungicide and	:	<u>FIFRA-02-2009-5302</u>
Rodenticide Act, as amended.	:	

COMPLAINANT'S INITIAL PREHEARING EXCHANGE

Complainant, the Director of the Division of Enforcement and Compliance Assistance (“DECA”) of the United States Environmental Protection Agency (“EPA” or “Agency”), Region 2, herewith submits the following initial prehearing exchange pursuant to the “Prehearing Order,” dated January 27, 2010, as modified pursuant to this Court’s “Order Denying Request for Extension of Prehearing Exchange and Denial of Request to Remand Matter to Alternative Dispute Resolution,” dated March 29, 2010, and pursuant to 40 C.F.R. § 22.19(a).

I. Preliminary Statement

Complainant commenced this administrative proceeding pursuant to Section 14(a)(1) of the Federal Insecticide, Fungicide and Rodenticide Act (“FIFRA”), 7 U.S.C. § 136l(a)(1). The complaint was served on September 25, 2009 and alleges two counts against Respondent Lanco Manufacturing Corporation, a Puerto Rico corporation that maintains its headquarters in San Lorenzo, Puerto Rico. Respondent is engaged in the commercial manufacture of adhesives and paints, lacquers, enamels and allied products, specializing in paints or paint additives, and its product line encompasses a wide array of applications, including architectural coatings, wood finishes, industrial adhesives and sealants; Respondent commercially distributes or sells such paints and other products. The complaint asserts Respondent sold to retail establishments in

Puerto Rico and the United States Virgin Islands two products (Lanco Master Gloss Latex Enamel and Lanco Eterna Gloss Latex Enamel) that were then made available for sale to the public. After alleging that Respondent intended these products to be used to prevent, destroy, repel or mitigate pests (mildew and fungus), the complaint further alleges that, because Respondent had not registered either product with the EPA pursuant to Section 3 of FIFRA, 7 U.S.C. § 136a, its distribution or sale of each product was unlawful under Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A). Each such act is alleged to constitute a prohibited act pursuant to and under 40 C.F.R. § 152.15.

For count 1, EPA seeks to assess a penalty of \$78,000; for count 2, a penalty of \$71,500 is sought. The complaint seeks a total penalty of \$149,500.

Respondent filed its answer on or about January 11, 2010. The answer admits some of the underlying predicate allegations; it either denies or does not admit the allegations pertinent to a finding of liability. The answer asserts two affirmative defenses (though neither is denominated as such): the penalty proposed is “excessive and unwarranted, based on the facts and circumstances alleged in this case” and that “[t]he claims made in the labeling of the products meet the ‘treated article exemption’ under FIFRA.” Page 2 of the answer. Respondent further requests a hearing “to dispute the allegations of the Complaint as well as the proposed penalty assessment.” *Id.*

The parties held an informal settlement conference in mid November 2009 and have been engaged in ongoing settlement negotiations since. To date, they have been unable to reach a negotiated settlement, but efforts to reach one continue.

II. Complainant's Witnesses

EPA anticipates that it will call both (or either of) the following witnesses:

1. Michael Kramer, environmental scientist in the Pesticides and Toxic Substances Branch of DECA, EPA, Region 2, at EPA's offices in Edison, New Jersey. The expected

testimony of Mr. Kramer should include the following matters, specifically embracing his personal involvement and participation in each of the following: the October 2008 inspection of the Home Depot retail establishment in St. Thomas, the United States Virgin Islands (including efforts and events leading up to the inspection, what he observed during the inspection and what he was told during the inspection); Mr. Kramer's review and analysis of documents Respondent provided to him pursuant to requests made and/or in furtherance of matters discussed; his review of any other documents pertaining to Respondent and its operations; his background knowledge of Respondent's commercial operations; the factual allegations of the complaint and the basis(es) therefor; the calculation of the penalty amounts set forth in the complaint (including the use of the July 1990 FIFRA penalty policy in developing the penalty amounts sought) and reasons justifying the amounts sought; and otherwise his overall role and responsibilities in EPA's investigation of Respondent and its commercial operations and the development of the case, the issuance of the complaint and the determination of the penalty set forth in it.

2. Dr. Adrian Enache, team leader within the Pesticides and Toxic Substances Branch of DECA, EPA, Region 2, at EPA's offices in Edison, New Jersey. Dr. Enache is expected to testify as to this supervisory role in the development of the complaint and its proposed assessment of the penalty, including reliance upon the FIFRA penalty policy, and how EPA utilizes/utilized the provisions of that policy as guidance as a general matter and in its determination of an appropriate penalty for the violations alleged in this complaint. He is also expected to testify as to the appropriateness of the penalty EPA seeks in this proceeding, such appropriateness weighed and evaluated pursuant to the requirements of the FIFRA statute and pursuant to the guidance provided by the FIFRA penalty policy.

To the extent not prohibited by the rules of procedure of this proceeding, 40 C.F.R. Part 22, EPA reserves the right to call or not to call any of the aforementioned potential witnesses

The listing of the expected scope of the testimony of each witness is not intended to limit EPA's right to modify or otherwise expand upon the scope and extent of the testimony of each such witness, where appropriate (such as in response to evidence Respondent might present or testimony its witnesses might proffer). EPA might list additional witnesses in any rebuttal prehearing exchange(s) the Agency might file

III. Complainant's Exhibits

EPA anticipates offering into evidence the following documents and records, copies of which are annexed hereto (unless otherwise specifically noted below) and will be identified as "Complainant's Exhibit," with each exhibit numbered with the following Arabic numerals:

1. "ENFORCEMENT RESPONSE POLICY FOR THE FEDERAL INSECTICIDE, FUNGICIDE, AND RODENTICIDE ACT (FIFRA)," produced by the Office of Compliance Monitoring, Office of Pesticides and Toxic Substances of the U.S. EPA, dated July 2, 1990 (35 pages [including a cover sheet and two pages with a table of contents], with four appendices).

This document is publicly available on the Internet at :

<http://cfpub.epa.gov/compliance/resources/policies/civil/fifra/>.¹

2. "FIFRA CIVIL PENALTY CALCULATION WORKSHEET," dated 9/23/09 and prepared by "Kramer."

¹ In order to save the paper required to make multiple copies of the FIFRA penalty policy, copies of it will not be physically included as part of this initial prehearing exchange. This document will be provided if so ordered by the Court or if Respondent requests a copy. At the time of hearing, Complainant will provide copies of this document (unless instructed [or requested by Respondent] to do so sooner). As this document is publicly available on the Internet, it is readily accessible. Further, pursuant to 40 C.F.R. § 22.27(b), this Court is required to "consider any civil penalty guidelines issued under [FIFRA]." The FIFRA civil penalty policy constitutes a "civil penalty guideline[] issued under [FIFRA]."

3. "STOP SALE ORDER," issued by the Government of the United States Virgin Islands, Department of Planning and Natural Resources, Division of Environmental Protection, to The Home Depot in St. Thomas, the United States Virgin Islands, dated October 9, 2008.

4. Dun & Bradstreet report for Respondent, printed September 4, 2009.

5. Dun & Bradstreet report for Lanco & Harris Corp., printed September 4, 2009.

6. Dun & Bradstreet report for Harris Paints Corporation, printed September 4, 2009.

7. Dun & Bradstreet report for Lanco Manufacturing Corp/Harris Paint, printed September 4, 2009.

8. Dun & Bradstreet report for Lanco Manufacturing Corp/Harris Paints, printed September 4, 2009.

9. Dun & Bradstreet report for Lanco & Harris Corp., printed August 26, 2009.

10. "PESTICIDE REGISTRATION (PR) NOTICE, 2000 - 1*," "NOTICE TO MANUFACTURERS, FORMULATORS, PRODUCERS AND REGISTRANTS OF PESTICIDE PRODUCTS," dated March 6, 2000.

11. "PESTICIDE REGISTRATION (PR) NOTICE, 2000 - 10," "NOTICE TO MANUFACTURERS, FORMULATORS, PRODUCERS AND REGISTRANTS OF PESTICIDE PRODUCTS," dated 12/20/2000.

12. "Notice of Inspection" of Home Depot in St. Thomas, United States Virgin Islands, dated 10/9/08, with various attached photographs taken at the time of the inspection.²

13. E-mail correspondences from Jose Cepeda Rodriguez (Respondent's counsel) to Michael Kramer (EPA inspector, listed above), dated October 14, 2008: a) 3:35 PM; b) 4:00 PM; and c) 5:38 PM.

14. E-mail correspondence from Mr. Cepeda Rodriguez to Mr. Kramer, dated October 20, 2008, 6:01 PM, with attached PDF letter to Mr. Kramer from Mr. Cepeda Rodriguez, said letter including seven attachments of varying lengths.

15. E-mail correspondences between Mr. Cepeda Rodriguez and Mr. Kramer, dated October 21, 2008: a) 12:42 PM (with one-page attachment); b) 2:56 PM; and c) 2:57 PM (with two-page attachment).

16. E-mail from Mike Dalton, attorney with The Home Depot, to Mr. Kramer, dated October 21, 2008, 11:05 AM.

17. E-mail correspondences from Mr. Cepeda Rodriguez to Mr. Kramer, dated October 23, 2008: a) 5:32 PM; and b) 8:30 AM (with nine-page attachment).

18. E-mail correspondences between Mr. Dalton and Nadine Noorhasan of the government of the United States Virgin Islands, Department of Planning and Natural Resources, dated October 24, 2008: a) 9:30 AM; and b) 9:36 AM.

² Color photographs will be provided prior to hearing.

19. E-mail correspondence from Mr. Cepeda Rodriguez to Mr. Kramer, dated October 28, 2008, 11:39 AM, with attached PDF letter to Mr. Kramer from Mr. Cepeda Rodriguez, said letter including a four-page attachment.

20. Letter from Mr. Cepeda Rodriguez to Mr. Kramer, dated December 4, 2008, with five-page attachment.

Complainant may request this Court to take judicial notice of appropriate matters in accordance with 40 C.F.R. § 22.22(f).

IV. Proposed Penalty Amount Determination

A copy of EPA's FIFRA penalty policy has been listed above as part of Complainant's exhibits; as noted above, it is readily available on the Internet and EPA will provide it to all parties once a hearing date has been established or if otherwise directed prior to any such date. Pages 7-8 of the complaint indicates the general framework by which the proposed penalty was determined:

The proposed civil penalty has been determined in accordance with Section 14(a) of FIFRA, 7 U.S.C. § 136l(a), as amended, which authorizes the assessment of a civil penalty of up to \$6,500 for each violation of 'any provision of' subchapter II of FIFRA, 7 U.S.C. §§ 136 - 136y.

For purposes of determining the amount of any penalty to be assessed, Section 14 of FIFRA requires that EPA 'shall consider the appropriateness of such penalty to the size of the business of the person charged, the effect on the person's ability to continue in business, and the gravity of the violation.' Section 14(a)(4) of FIFRA, 7 U.S.C. § 136l(a)(4).

To develop the proposed penalty in this Complaint, Complainant has taken into account the particular facts and circumstances of this case, to the extent known at the time of its filing, with specific reference to EPA's 'Enforcement Response Policy for The Federal Insecticide, Fungicide and Rodenticide Act (FIFRA)' dated July 2, 1990 (hereinafter referred to as the 'ERP'). *** This guidance policy provides rational, consistent and equitable calculation methodologies for applying the statutory penalty criteria enumerated above to particular cases.

On page 8, the complaint sets forth that \$6,500 was sought for each instance of alleged illegal distribution in each of the counts (12 instances in count 1, 11 in count 2). As noted in paragraph 16 of the complaint, Congress has authorized EPA to increase the maximum penalty for a FIFRA violation to \$6,500.

Section 14(a)(4) of FIFRA, 7 U.S.C. § 136l(a)(4), requires that, when EPA seeks to assess a civil penalty against a respondent, it must “consider the appropriateness of such penalty to the size of the business of the person charged, the effect on the person’s ability to continue in business, and the gravity of the violation.” This requirement is reflected on page 17 of the FIFRA penalty policy (“In determining the amount of the civil penalty, section 14(a)(4) of FIFRA requires the Agency to consider the appropriateness of such penalty to the size of the business of the person charged, the effect of the penalty on the person’s ability to continue in business, and the gravity of the violation”). Under the policy, EPA is instructed to determine the gravity or level of the violation(s) at issue, to determine the size of the business category and then to use the matrices provided in the policy to determine an appropriate penalty. Once that amount is determined, EPA is to consider adjustments to the penalty based on particular factors germane to a respondent and its operations, as well as other circumstances surrounding the violation (such as the characteristics of the pesticide at issue, how a penalty payment might impact a respondent’s ability to continue in business). Page 18 of the FIFRA penalty policy.

The gravity of the violation is evaluated based on what is set forth in Appendix A. Page 18 of the FIFRA penalty policy. That appendix (page A-1) provides that the distribution or sale of an unregistered pesticides (the violations in issue in this proceeding) are Level 2 violations. The amounts for Level 2 violations are set forth in Table 1, pages 19 and 19-A.³ The amount of the gravity-based penalty is calculated based on the size of the business of respondent (gross

³ Page 19-A contains the adjusted inflation figures for the period after January 30, 1997. As paragraph 16 of the complaint notes, the maximum amount, \$5,500 on page 19-A, was further increased to \$6,500 for the period between (after) March 15, 2004 but before January 12, 2009.

revenues of the prior calendar year; page 20 of the FIFRA penalty policy). Table 2 on page 20 indicates the three categories into which a respondent's size of business is divided. The two figures (level of violation and size of business) are combined in the matrices on pages 19 and 19-A. Thus, for a level 2 violation (as in this proceeding) with a category I size of business, the maximum amount of allowable penalty is sought. If, however, "information concerning an alleged violator's size of business is not readily available, the penalty is to be calculated using the Category I size of business." Page 21. Further, "[t]he Category I size of business will remain the base penalty value unless the violator can establish, at their [sic] expense and to the Agency's satisfaction, that it should be considered in a smaller size of business category." *Id.*

Such was the case at the time of the issuance of the complaint. Hence, the \$6,500 amount per each individual violation was the amount of penalty sought (the adjusted amount that corresponds to the \$5,000 figure for a level 2 violation in the Section 14(a)(1) matrix on page 19, and that corresponds to the \$5,500 figure for a level 2 violation in the Section 14(a)(1) matrix on page 19-A).

As for additional adjustments (only downward, as the \$6,500 amount represents the statutory maximum for each individual unlawful or prohibited act), this would be contingent upon EPA receiving additional information from Respondent justifying any such reduction (this normally occurs during the settlement process), or, if this matter were to proceed to resolution through an adjudication, the Court would then determine whether any downward adjustment is warranted.

V. Paperwork Reduction Act

The Paperwork Reduction Act of 1980, as amended, 44 U.S.C. § 3501 *et seq.* (the "PRA"), does not bar EPA's prosecution of this action. The two counts of the complaint do not charge Respondent with failure to comply with information collection requirements or otherwise implicate concerns of the PRA. Instead these counts allege distributions and sales of

unregistered pesticides, which are substantive activities. Thus the PRA is not applicable to this proceeding. Further, because the unlawful acts were barred by the FIFRA statute, *i.e.* because the statute prohibits any person from distributing or selling any pesticide that had not been registered,⁴ the PRA is not a bar to EPA's seeking a penalty for these counts as the public protection provision of 44 U.S.C. § 3512 does not apply to a requirement Congress has directly imposed. 5 C.F.R. § 1320.6(e).

VI. Time and Place for Hearing

Complainant requests that the hearing be held in either New York City (New York County) where the main offices of EPA, Region 2, are located (EPA's witnesses are based in a satellite office within commuting distance from New York City).⁵ As to availability, EPA submits it would be available sometime in July.⁶ Complainant anticipates that EPA should be able to present its direct case in approximately two to three days.

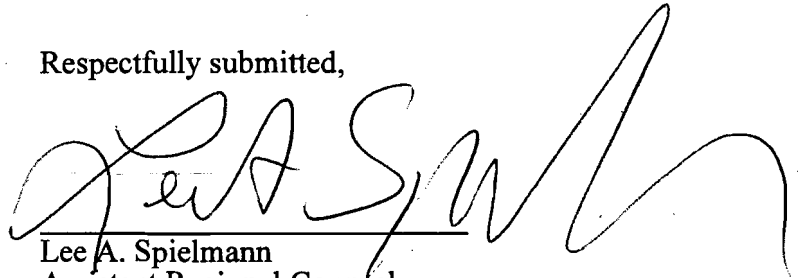
⁴ Section 3(a) of FIFRA, 7 U.S.C. § 136a, states, in part, that "no person in any State may distribute or sell to any person any pesticide that is not registered under this subchapter."

⁵ Section 14(a)(3) of FIFRA, 7 U.S.C. § 136l(a)(3), provides that "[n]o civil penalty shall be assessed unless the person charged shall have been given notice and opportunity for a hearing on such charge in the county, parish or incorporated city of the residence of the person charged." In 40 C.F.R. § 22.35(b), it states, in part, "The...hearing shall be held in the county, parish, or incorporated city of the residence of the person charged, unless otherwise agreed to in writing by all parties." EPA makes its request for the hearing location to the extent that the Presiding Officer is invested with discretion to allow a hearing to be held in other than Respondent's "county, parish or incorporated city" and/or the parties can agree to hold the hearing in New York City.

⁶ The undersigned expects to be unavailable from approximately July 22nd to July 28th.

Dated: April 6, 2010
New York, New York

Respectfully submitted,

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

Lee A. Spielmann
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TO:

Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 2

Honorable William B. Moran
Presiding Officer

Jose Cepeda Rodriguez
Counsel for Respondent

In re Lanco Manufacturing Corporation
Docket No. FIFRA-02-2009-5302

CERTIFICATE OF SERVICE

I certify that I have this day caused to be sent the foregoing "COMPLAINANT'S INITIAL PREHEARING EXCHANGE," dated April 6, 2010, together with the exhibits attached thereto, in the following manner to the respective addressees listed below:

Original and One Copy
By Inter-Office Mail:

Office of Regional Hearing Clerk
U.S. Environmental Protection
Agency - Region 2
290 Broadway, 16th floor
New York, New York 10007-1866

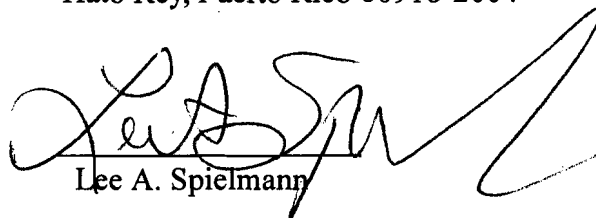
Copy by UPS:

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Dated: April 6, 2010
New York, New York


Lee A. Spielmann