



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

REPLY TO THE ATTENTION OF:

(C-14J)

September 25, 2009

Judge William B. Moran
Office of Administrative Law Judges
U.S. Environmental Protection Agency
Mail Code 1900L
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460-2001

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SEP 25 2009

REGIONAL HEARING CLERK
U.S. ENVIRONMENTAL
PROTECTION AGENCY

Re: Miami Products & Chemical Co., Dayton, Ohio.
Docket No. FIFRA- 05-2009 -0015.

Dear Judge Moran:

Attached, please find COMPLAINANT PREHEARING EXCHANGE for this civil administrative action which I filed today with the Regional Hearing Clerk, pursuant to your Prehearing Order, dated July 29, 2009.

Please be advised the parties agreed to a settlement in principle and are negotiating the terms and conditions of a Consent Agreement and Final Order to resolve this action without resort to hearing.

Sincerely,

A handwritten signature in black ink, appearing to be "JT" or similar initials, written over a white background.

Jeffery M. Trevino
Associate Regional Counsel

Attachment

cc: LaDawn Whitehead
Regional Hearing Clerk
Region 5
U.S. Environmental Protection Agency
77 West Jackson Boulevard (E-19J)
Chicago, IL 60604-3590

**Timothy D. Hoffman
Dinsmore & Shohl
1100 Courthouse Plaza, S.W
10 N. Ludlow Street
Dayton, OH 45402**

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

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BEFORE THE ADMINISTRATOR

In the Matter of)
)
Miami Products & Chemical Company,)
)
Respondent)

REGIONAL HEARING CLERK
U.S. ENVIRONMENTAL
PROTECTION AGENCY

Docket No. FIFRA-05-2009-0015.

COMPLAINANT PREHEARING EXCHANGE

On July 29, 2009, the Court ordered the parties of this civil administrative action to file Prehearing Exchanges by September 25, 2009. Therefore, Complainant hereby files its Prehearing Exchange.

I. Prospective Witnesses and Testimony

A. Timothy W. Anderson
Inspector
Pesticide and Fertilizer Section
Division of Plant Industry
Ohio Department of Agriculture
8995 East Main Street
Reynoldsburg, OH 43086-3399

Mr. Anderson will testify to his educational background, employment experience, and the following factual allegations of the complaint.

1. Miami Products & Chemical Company ("Respondent") was a company doing business in the State of Ohio.
2. Respondent was a person who had a registered pesticide pursuant to the provision of FIFRA.
3. On June 8, 2004, through January 31, 2005, Respondent manufactured or prepared "SANYGEN LIQUID SHOCK," EPA Reg. No. 278-43, at its facility at 1260 Schwerman Drive, Fairborn, Ohio, 45324.
4. However, Respondent's facility was not registered with the EPA as a pesticide producing "establishment."

5. On February 3, 1975, EPA approved Respondent's Application for Pesticidal Registration for its pesticide "SANYGEN LIQUID SHOCK," EPA Reg. No. 278-43, and Respondent's claims made for it at past of the statement required in connection with its registration uder Section 3 of FIFRA, 7 U.S.C. 136a.
6. On Feburary 14, 2005 Respondent did hold for distribution, hold for sale, and hold for shipment, at its facility, its "SANYGEN LIQUID SHOCK," EPA Reg. No. 278-43.
7. Respondent's labels did not bear an "INGREDIENT STATEMENT" on the front panel of the label, as it appears on the EPA accepted label of October 3, 2003.
8. Respondent's labels added to the section entitled "SPAS, HOT-TUBS,"the language, "IMMERSION TANKS, ETC.," which does not appear on the EPA accepted label of October 3, 2003.
9. Respondent's labels stated "SWIMMING POOL WATER DISINFECTATION, Adjust and maintain pool water pH to between 7.2 and 7.6," but states " . . . 7.2 and 7.8," on the U.S. EPA accepted label of October 3, 2003.
10. Respondent's labels stated "SPAS/HOT TUBS . . . [T]o mainatin water apply 5 oz. of product per 1,000 gallons of water over the surface to maintain a chlorine concentration of 5 ppm[.]" but states 6 oz. onn the EPA accepted label of October 3, 2003.
11. On April 19, 2004, Respondent sold to Chemical Services "SANYGEN LIQUID SHOCK," with these labels.
12. On September 16, 2004, Respondent sold to the City of Kettering "SANYGEN LIQUID SHOCK," with these labels.
13. On January 21, 2005, Respondent sold to Chemical Services "SANYGEN LIQUID SHOCK," with these labels.
14. On February 10, 2005, Respondent sold to the City of Kettering "SANYGEN LIQUID SHOCK," with these labels.
15. On February 16, 2005, Respondent sold to Chemical Services "SANYGEN LIQUID SHOCK," with these labels.

- B. Joseph Lukascyk
Life Scientist
Toxics Compliance Section
Chemical Management Branch- Pesticides
Land and Chemicals Division
Region 5
U.S. Environmental Protection Agency
Chicago, IL 60604

Mr. Lukascyk will testify to his educational background, employment experience, the factual allegations above, and the appropriateness of the proposed civil penalty of \$32,500.00.

- C. John Luksis
Financial Analyst
Section 2
RCRA Compliance Branch
Land and Chemicals Division
Region 5
U.S. Environmental Protection Agency
Chicago, IL 60604

Mr. Luksis will testify to his educational background, employment experience, and Respondent's ability to pay the proposed civil penalty of \$32,500.00.

Complainant respectfully reserves the right to amend its Witness(es) to be Called upon timely notice to the Court and Respondent.

II. Documents and Exhibits

- A. U.S. EPA Label Review Manual, Chapter 5 Ingredient Statement, Current as of August 2003. Bates Stamp Nos. 000-014. (Complainant Exhibit No. 1).
- B. U.S. EPA Letter, dated November 12, 1974, to Miami Products & Chemical Co., 520 Lonoke Street, Dayton, Ohio, 45403, Subject: "Sanygen, File Symbol 278-UG, Your application of October 7, 1974. Bates Stamp Nos. 015-016. (Complainant Exhibit No. 2).
- C. Miami Products & Chemical Co., Letter, dated January 7, 1975, to Mr. Richard F. Mountfort, Section Head, Fungicide-Herbicide Branch, U.S. Environmental Protection Agency, Washington, D.C. 20460. Bates Stamp Nos. 017-026. (Complainant Exhibit No. 3).

- D. U.S. EPA Notice of Registration, dated February 10, 1975, to Miami Products & Chemical Co., 520 Lonoke Street, Dayton, Ohio, 45403, for "Sanygen," EPA Registration No. 278-43. Bates Stamp Nos. 027-028. (Complainant Exhibit No. 4).
- E. U.S. EPA Summary Report, dated September 16, 2009, for Miami Products & Chemical Co.'s Sanygen Liquid Shock, EPA Registration No. 278-43. Bates Stamp Nos. 029-030. (Complainant Exhibit No. 5).
- F. U.S. EPA Accepted Label, dated December 13, 1988, for Miami Products & Chemical Co.'s Sanygen Liquid Shock, EPA Registration No. 278-43. Bates Stamp Nos. 031-034. (Complainant Exhibit No. 6).
- G. U.S. EPA Accepted Label, dated October 3, 2003, for Miami Products & Chemical Co.'s Sanygen Liquid Shock, EPA Registration No. 278-43. Bates Stamp Nos. 035-036. (Complainant Exhibit No. 7).
- H. U.S. EPA Application for Registration of Pesticide-Producing and Device-Producing Establishments, dated February 23, 2005, by Miami Products & Chemical Co., 520 Lonoke Street, Dayton, Ohio, 45403. Bates Stamp Nos. 037-038. (Complainant Exhibit No. 8).
- I. Report on Establishment Inspection to Determine Compliance with FIFRA and its Implementing Regulations at 40 C.F.R. Part 150-189 for Miami Products & Chemical Co., 520 Lonoke Street, Dayton, OH 45403 and 1260 Schwerman Drive, Fairborn, Ohio 45324, Dates of Inspection Feb. 14, 17 & 18, 2005, Performed by: Timothy W. Anderson, Ohio Department of Agriculture, Division of Plant Industry, Pesticide and Fertilizer Section, 8995 East Main Street, Reynoldsburg, OH 43086-3399. Bates Stamp Nos. 039-214. (Complainant Exhibit No. 9).
- J. U.S. EPA Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), dated July 2, 1990. Bates Stamp Nos. 215-268. (Complainant Exhibit No. 10).
- K. U.S. EPA FIFRA CIVIL PENALTY CALCULATION WORKSHEET for Miami Products and Chemical Company, 520 Lonoke Street, Dayton, Ohio, 45403, Docket No. FIFRA-05-2009-15, Prepared by J. Lukascyk. Bates Stamp Nos. 269-270. (Complainant Exhibit No. 11).
- L. U.S. EPA, Region 5, May 26, 2009, Financial Analysis of Miami Products and Chemical Company, by John Luksis, Financial Analyst. Bates Stamp Nos. 271-274. (Complainant Exhibit No. 12).

Complainant respectfully reserves the right to amend its list of Documents and Exhibits upon timely notice to the Court and Respondent.

III. The Proposed Civil Penalty

Please see Complainant Exhibit Nos. 10 (Bates Stamp Nos. 215-268) and 11 (Bates Stamp Nos. 269-270).

IV. The Paperwork Reduction Act

The Paperwork Reduction Act does not apply to this action since the requirements of the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136 to 136y, (“FIFRA”), are imposed by the U.S. Congress, not U.S. EPA rule making or information gathering authority.

Congress enacted the Paperwork Reduction Act (“PRA”), 44 U.S.C. §§ 3501-3520, to reduce the regulatory reporting burden on the public. In general, if an agency requires the public to collect and report information, the PRA requires the agency to: 1) first obtain review of the requirement by the Office of Management of Budget, evidenced by an eight digit control number, and, 2) display the control number upon any document associated with the request. The Public Protection provision of the PRA, 44 U.S.C. § 3512, insulates the public from penalties resulting from a failure to respond to a federal collection of information which does not bear a valid OMB control number.

The Public Protection provision of the PRA does not apply to the facts of this action. The PRA, at 44 U.S.C. § 3502(3), defines “collection of information” to mean “. . . the obtaining, causing to be obtained, soliciting, or requiring the disclosure to third parties or the public, of facts or opinions *by or for an agency* . . .” 44 U.S.C. § 3502(3)(emphasis supplied).

Complainant alleges Respondent violated the statutory provisions of FIFRA. These statutory provisions are imposed by the U.S. Congress in the enactment of FIFRA, not requirements imposed by U.S. EPA through its rule making or information gathering authority. Therefore, the Public Protection provision of the PRA, 42 U.S.C. § 3512, does not apply to collections of information under the statutory provisions of FIFRA, and cannot bar the collection of penalties for this action.

V. Desired or Required Hearing Location

Complainant prefers the Court hold the hearing in Chicago, Illinois, as provided by sections 22.21(d) and 22.19(d) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits (“the Consolidated Rules”), 40 C.F.R. §§ 22.21(d) and 22.19(d).

However, if the Court chooses to hold the hearing at a suitable location in the county where the

Respondent resides (Montgomery County, Ohio), or conducts the business which the hearing concerns (Green County, Ohio), Complainant does not object.

Complainant requests approximately four (4) hours to complete its direct-examination of its witnesses for its case-in-chief.

Respectfully submitted,



Jeffery M. Trevino

Associate Regional Counsel
Office of Regional Counsel
Region 5

U.S. Environmental Protection Agency
77 West Jackson Boulevard (C-14J)
Chicago, Illinois 60604-3590
Tel. No. (312) 886-6729
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trevino.jeffery@epa.gov

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ENVIRONMENTAL PROTECTION AGENCY

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Miami Products & Chemical Company,) Docket No. FIFRA-05-2009-0015.
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Respondent)

CERTIFICATE OF SERVICE

I hereby certify that today I filed personally with LaDawn Whitehead, Regional Hearing Clerk, Region 5, United States Environmental Protection Agency, 77 West Jackson Boulevard (E-19J), Chicago, Illinois, 60604-3590, the original document entitled COMPLAINANT PREHEARING EXCHANGE for this civil administrative action and that I issued to the Court and Respondent by first class mail a copy of the original document:

Judge William B. Moran
Office of Administrative Law Judges
U.S. Environmental Protection Agency
Mail Code 1900L
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460-2001

Timothy D. Hoffman
Dinsmore & Shohl
1100 Courthouse Plaza, S.W
10 N. Ludlow Street
Dayton, OH 45402



Jeffery M. Trevino
Associate Regional Counsel

25 September 2009
Dated