



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

JUN 04 2009

REPLY TO THE ATTENTION OF:

LC-8J

CERTIFIED MAIL

Receipt No 7001 0320 0006 0189 4793

Mr. Roger Kayser
Miami Products & Chemical Company
520 Lonoke Street
Dayton, Ohio 45403

In the Matter of: Miami Products & Chemical Company, Docket No. **FIFRA-05-2009-0015**

Dear Mr. Kayser:

Attached are two copies of a Complaint (with ORC concurrence) in settlement of a FIFRA action taken against Respondent for the distribution and or sale of misbranded pesticide.

As provided in the Complaint, if you wish to request a hearing, you must do so in your answer to the Complaint. Please note that if you do not file an answer with the Regional Hearing Clerk (E-13J), U.S. EPA, Region 5, 77 West Jackson Blvd., Chicago, IL 60604 within 30 days of your receipt of this Complaint, a default order may be issued and the proposed civil penalty will become due 30 days later.

In addition, whether or not you request a hearing, you may request an informal settlement conference. If you wish to request a conference, or if you have any questions about this matter, please contact Jeffery M. Trevino, Associate Regional Counsel at (312) 886-0566.

Thank you for your cooperation in resolving this matter.

Sincerely,

A handwritten signature in cursive script that reads "Joseph G. Lukascyk".

Joseph G. Lukascyk
Pesticides and Toxics Compliance Section

Enclosures

cc: Marcy Toney, Regional Judicial Officer/C-14J (w/Encl.)
Jeffery M. Trevino, ORC/C-14J (w/Encl.)
Eric Volck, Cincinnati Finance/MWD (w/Encl.)

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JUN 04 2009

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

REGIONAL HEARING CLERK
U.S. ENVIRONMENTAL
PROTECTION AGENCY

In the Matter of:)	Docket No.
)	FIFRA-05-2009-0015
Miami Products & Chemical Company)	Proceeding to Assess a Civil Penalty
Dayton, Ohio 45403)	Under Section 14(a) of the Federal
)	Insecticide, Fungicide, and Rodenticide
Respondent.)	Act, 7 U.S.C. § 136/(a)
_____)	

Complaint

1. This is an administrative proceeding to assess a civil penalty under Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended, (FIFRA), 7 U.S.C. § 136/(a).

2. The Complainant is, by lawful delegation, the Director of the Land and Chemicals Division, U.S. Environmental Protection Agency, Region 5.

3. The Respondent is Miami Products & Chemicals Company, a company doing business in the State of Ohio.

Statutory And Regulatory Background

4. The term “person” as defined in Section 2(s) of FIFRA, 7 U.S.C. § 136(s) means “any individual, partnership, association, corporation, or any organized group of persons whether incorporated or not.”

5. The term “distribute or sell” is defined in Section 2(gg) of FIFRA, 7 U.S.C. § 136(gg), as “to distribute, sell, offer for sale, hold for distribution, hold for sale, hold for shipment, or receive and (having so received) deliver or offer to deliver.”

6. The term “pesticide” is defined at Section 2(u) of FIFRA, 7 U.S.C. § 136(u) and 40 C.F.R. § 152.3 and is generally regarded as any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest.

7. Section 7(a) of FIFRA, 7 U.S.C. § 136e(a), provides in part that “[n]o person shall produce any pesticide subject to this subchapter or active ingredient used in producing a pesticide subject to this subchapter in any State unless the establishment in which it is produced is registered with the Administrator.”

8. Section 2(q)(1)(A) of FIFRA, 7 U.S.C. § 136(q)(1)(A), states that 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.

9. Section 2(q)(1)(F) of FIFRA, 7 U.S.C. § 136(q)(1)(F), further states that a pesticide is misbranded if the label 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.

10. Section 2(q)(1)(G) of FIFRA, 7 U.S.C. § 136(q)(1)(G), further states that 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, are adequate to protect and the environment.

11. Section 2(q)(2)(A) of FIFRA, 7 U.S.C. § 136(q)(2)(A), states, in relevant part, that a pesticide is misbranded if the labeling accompanying it does not bear an ingredient statement on that part of the immediate container which is presented or displayed under customary conditions of purchase.

12. According to 40 C.F.R. § 156.10(g)(2)(i), the ingredient statement is normally required on the front panel of the label.

13. According to the Label Review Manual, 3rd Edition, Chapter 5, Section III(A), the ingredient statement is normally required to appear on the front panel of the label unless the Agency determines that doing so is impractical, in such cases, permission may be granted, upon written request (as part of the application), for the ingredient statement to appear on the back or side panel of the label.

14. Section 12(a)(2)(A) of FIFRA, 7 U.S.C. § 136j(a)(2)(A), states that it is unlawful for any person to detach, alter, deface, or destroy, in whole or in part, any labeling required under FIFRA.

15. According to 40 C.F.R. § 156.64(b)(3), in no case may a product bear different signal words on different parts of the label.

16. Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), states that it is unlawful for any person in any state to distribute or sell to any person any pesticide which is misbranded.

Factual Allegations

17. Respondent is a company or association organized under the laws of the State of Ohio.

18. Therefore, Respondent is a “person” as that term is defined in Section 2(s) of FIFRA, 7 U.S.C. § 136(s).

19. Respondent is a person who has registered a pesticide pursuant to the provisions of FIFRA.

20. Therefore, Respondent is a “Registrant” as that term is defined in Section 2(y) of FIFRA, 7 U.S.C. § 136(y).

Count 1

21. Complainant realleges paragraphs 1 through 20 of this complaint as if set forth in this paragraph.

22. 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.

23. Therefore, Respondent “produced” a pesticide as that term is defined in Section 2(w) of FIFRA, 7 U.S.C. § 136(w).

24. Therefore, Respondent’s facility was a pesticide producing “establishment” as that term is defined in Section 2(dd) of FIFRA, 7 U.S.C. § 136(dd) and 40 C.F.R. § 167.3.

25. However, Respondent’s facility was not registered with the EPA as a pesticide producing “establishment.”

26. Therefore, Respondent produced a pesticide at an unregistered establishment which is unlawful pursuant to Section 12(a)(2)(L) of FIFRA, 7 U.S.C. § 136j(a)(2)(L).

Count 2

27. Complainant realleges paragraphs 1 through 26 of this complaint as if set forth in this paragraph.

28. On October 23, 2003, 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 as part of the statement required in connection with its registration under Section 3 of FIFRA, 7 U.S.C. 136a.

29. On February 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.

30. 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.

31. 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.

32. 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 EPA accepted label of October 3, 2003.

33. Respondent's labels stated "SPAS/HOT TUBS . . . [T]o maintain the water, apply 5 oz. of product per 1,000 gallons of water over the surface to maintain a chlorine concentration 5 ppm[.]," but states 6 oz. on the EPA accepted label of October 3, 2003.

34. Therefore, Respondent's labels made claims for it as a part of its distribution or sale which did substantially differ from claims made for it as a part of the statement required in connection with its registration under Section 3 of FIFRA, 7 U.S.C. § 136a.

35. Therefore, Respondent's label did not contain directions for use which are necessary for effecting the purpose for which the product is intended, and if complied with, together with the requirements of Section 3 of FIFRA, 7 U.S.C. § 136a, are adequate to protect human health and the environment.

36. Therefore, Respondent's "SANYGEN LIQUID SHOCK," was "misbranded" as that term is defined in Section 2(q) of FIFRA, 7 U.S.C. § 136(q).

37. On April 19, 2004, Respondent sold to Chemical Services "SANYGEN LIQUID SHOCK," with these labels.

38. Therefore, on April 19, 2004, Respondent did distribute and sell to a person a registered pesticide with claims made for it as a part of its distribution or sale which did substantially differ from claims made for it as a part of the statement required in connection with its registration under Section 3 of FIFRA, 7 U.S.C. § 136a, which is unlawful pursuant to Section 12(a)(1)(B) of FIFRA, 7 U.S.C. § 136a.

39. Therefore, on April 19, 2004, Respondent did distribute and sell to a person a pesticide which is misbranded, which is unlawful pursuant to Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E).

Count 3

40. Complainant realleges paragraphs 1 through 39 of this complaint as if set forth in this paragraph.

41. On September 16, 2004, Respondent sold to the City of Kettering "SANYGEN LIQUID SHOCK," with these labels.

42. Therefore, on September 16, 2004, Respondent did distribute and sell to a person a registered pesticide with claims made for it as a part of its distribution or sale which did substantially differ from claims made for it as a part of the statement required in connection with its registration under Section 3 of FIFRA, 7 U.S.C. § 136a, which is unlawful pursuant to Section 12(a)(1)(B) of FIFRA, 7 U.S.C. § 136a.

43. Therefore, on September 16, 2004, Respondent did distribute and sell to a person a pesticide which is misbranded, which is unlawful pursuant to Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E).

Count 4

44. Complainant realleges paragraphs 1 through 43 of this complaint as if set forth in this paragraph.

45. On January 21, 2005, Respondent sold to Chemical Services "SANYGEN LIQUID SHOCK," with these labels.

46. Therefore, on January 21, 2005, Respondent did distribute and sell to a person a registered pesticide with claims made for it as a part of its distribution or sale which did substantially differ from claims made for it as a part of the statement required in connection with

its registration under Section 3 of FIFRA, 7 U.S.C. § 136a, which is unlawful pursuant to Section 12(a)(1)(B) of FIFRA, 7 U.S.C. § 136a.

47. Therefore, on January 21, 2005, Respondent did distribute and sell to a person a pesticide which is misbranded, which is unlawful pursuant to Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E).

Count 5

48. Complainant realleges paragraphs 1 through 47 of this complaint as if set forth in this paragraph.

49. On February 10, 2005, Respondent sold to the City of Kettering “SANYGEN LIQUID SHOCK,” with these labels.

50. Therefore, on February 10, 2005, Respondent did distribute and sell to a person a registered pesticide with claims made for it as a part of its distribution or sale which did substantially differ from claims made for it as a part of the statement required in connection with its registration under Section 3 of FIFRA, 7 U.S.C. § 136a, which is unlawful pursuant to Section 12(a)(1)(B) of FIFRA, 7 U.S.C. § 136a.

51. Therefore, on February 10, 2005, Respondent did distribute and sell to a person a pesticide which is misbranded, which is unlawful pursuant to Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E).

Count 6

52. Complainant realleges paragraphs 1 through 51 of this complaint as if set forth in this paragraph.

53. On February 16, 2005, Respondent sold to Chemical Services “SANYGEN LIQUID SHOCK,” with these labels.

54. Therefore, on February 16, 2005, Respondent did distribute and sell to a person a registered pesticide with claims made for it as a part of its distribution or sale which did substantially differ from claims made for it as a part of the statement required in connection with its registration under Section 3 of FIFRA, 7 U.S.C. § 136a, which is unlawful pursuant to Section 12(a)(1)(B) of FIFRA, 7 U.S.C. § 136a.

55. Therefore, on February 16, 2005, Respondent did distribute and sell to a person a pesticide which is misbranded, which is unlawful pursuant to Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E).

Proposed Civil Penalty

Complainant proposes that the Administrator assess a civil penalty against Respondent for the FIFRA violations alleged in this Complaint as follows:

Count 1

Production of a pesticide in an unregistered establishment:
7 U.S.C. § 136j(a)(2)(L) \$ 6,500

Count 2

Distribution/sale of a misbranded pesticide, “SANYGEN LIQUID SHOCK,” EPA Reg. No. 278-43, on or about February 14, 2005:
7 U.S.C. § 136j(a)(1)(E) \$ 5,200

Count 3

Distribution/sale of a misbranded pesticide, "SANYGEN LIQUID SHOCK," EPA Reg. No. 278-43, on or about September 16, 2004:
7 U.S.C. § 136j(a)(1)(E). \$ 5,200

Count 4

Distribution/sale of a misbranded pesticide, "SANYGEN LIQUID SHOCK," EPA Reg. No. 278-43, on or about January 21, 2005:
7 U.S.C. § 136j(a)(1)(E). \$ 5,200

Count 5

Distribution/sale of a misbranded pesticide, "SANYGEN LIQUID SHOCK," EPA Reg. No. 278-43, on or about February 10, 2005:
7 U.S.C. § 136j(a)(1)(E). \$ 5,200

Count 6

Distribution/sale of a misbranded pesticide, "SANYGEN LIQUID SHOCK," EPA Reg. No. 278-43, on or about February 16, 2005:
7 U.S.C. § 136j(a)(1)(E). \$ 5,200

Total Proposed Civil Penalty. \$ 32,500

Rules Governing This Proceeding

The *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits* (the Consolidated Rules), at 40 C.F.R. Part 22, govern this proceeding to assess a civil penalty. Enclosed with the Complaint served on Respondent is a copy of the Consolidated Rules.

Filing And Service Of Documents

Respondent must file with the Regional Hearing Clerk the original and one copy of each document Respondent intends as part of the record in this proceeding. The Regional Hearing Clerk's address is:

Regional Hearing Clerk (E-19J)
U.S. EPA - Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604

Respondent must serve a copy of each document filed in this proceeding on each party pursuant to Section 22.5 of the Consolidated Rules. Complainant has authorized Jeffery M. Trevino, Associate Regional Counsel, to receive any answer and subsequent legal documents that Respondent serves in this proceeding. You may telephone Mr. Trevino at (312) 886-6729. His address is:

Jeffery M. Trevino (C-14J)
Office of Regional Counsel
U.S. EPA - Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604

Terms Of Payment

Respondent may resolve this proceeding at any time by paying the proposed penalty by certified or cashier's check payable to "Treasurer, the United States of America," and by delivering the check to:

U.S. EPA
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, MO 63197-9000

If Respondent pays the proposed penalty in full within thirty (30) days after receiving the Complaint, no answer need be filed. A copy of the check, however, must be filed with the Regional Hearing Clerk at the address listed on page 11.

Respondent must include the case name and docket number on the check and in the letter transmitting the check. Respondent simultaneously must send copies of the check and transmittal letter to Mr. Trevino and to:

Joseph G. Lukascyk (LC-8J)
U.S. EPA - Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604

Answer and Opportunity To Request A Hearing

The Administrator must provide an opportunity to request a hearing to any person against whom the Administrator proposes to assess a penalty under Section 16(a) of the Act, 15 U.S.C. § 2615(a). Respondent has the right to request a hearing on any material fact alleged in the Complaint, or on the appropriateness of the proposed penalty, or both. To request a hearing, Respondent must specifically make the request in its answer, as discussed below.

Respondent must file a written answer to this Complaint if Respondent contests any material fact of the Complaint; contends that the proposed penalty is inappropriate; or contends that it is entitled to judgment as a matter of law. To file an answer, Respondent must file the original written answer and one copy with the Regional Hearing Clerk at the address specified above, and must serve copies of the written answer on the other parties.

If Respondent chooses to file a written answer to the Complaint, it must do so within thirty (30) calendar days after receiving the Complaint. In counting the thirty (30) day time period, the date of receipt is not counted, but Saturdays, Sundays, and federal legal holidays are counted. If the thirty (30) day time period expires on a Saturday, Sunday, or federal legal holiday, the time period extends to the next business day.

Respondent's written answer must clearly and directly admit, deny, or explain each of the factual allegations in the Complaint; or must state clearly that Respondent has no knowledge of a particular factual allegation. Where Respondent states that it has no knowledge of a particular factual allegation, the allegation is deemed denied. Respondent's failure to admit, deny, or explain any material factual allegation in the Complaint constitutes an admission of the allegation.

Respondent's answer must also state:

- a. The circumstances or arguments which Respondent alleges constitute grounds of defense;
- b. The facts that Respondent disputes;
- c. The basis for opposing the proposed penalty; and
- d. Whether Respondent requests a hearing

If Respondent does not file a written answer within thirty (30) calendar days after receiving this Complaint the Presiding Officer may issue a default order, after motion, under Section 22.17 of the Consolidated Rules. Default by Respondent constitutes an admission of all

factual allegations in the Complaint and a waiver of the right to contest the factual allegations. Respondent must pay any penalty assessed in a default order without further proceedings thirty (30) days after the order becomes the final order of the Administrator of EPA under Section 22.27(c) of the Consolidated Rules.

Settlement Conference

Whether or not Respondent requests a hearing, Respondent may request an informal conference to discuss the facts alleged in the Complaint and to discuss settlement. To request an informal settlement conference, Respondent may contact Joseph G. Lukascyk at 312-886-6233.

Respondent's request for an informal settlement conference will not extend the 30-day period for filing a written Answer to this Complaint. Respondent may simultaneously pursue both an informal settlement conference and the adjudicatory hearing process. The Complainant encourages all parties against whom it proposes to assess a civil penalty to pursue settlement through an informal conference. However, the Complainant will not reduce the proposed penalty because the parties hold an informal settlement conference.

Continuing Obligation To Comply

Neither the assessment nor payment of a civil penalty will affect Respondent's continuing obligation to comply with the Act and any other applicable federal, state, or local law.

Margaret M. Guerriero
for Margaret M. Guerriero
Director
Land and Chemicals Division

April 24, 2009
Date

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PROTECTION AGENCY


CERTIFICATE OF SERVICE

I hereby certify that the original signed copy of the Complaint in resolution of the civil administrative action involving Miami Products & Chemical Company, was filed on June 4, 2009, with the Regional Hearing Clerk (E-13J), U.S. Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, and that I mailed by Certified Mail, Receipt No. 7001 0320 0006 0189 4793, a copy of the original to the Respondents:

Mr. Roger Kayser
President
Miami Products & Chemical Company
520 Lonoke Street
Dayton, Ohio 45403

and forwarded copies (intra-Agency) to:

Marcy Toney, Regional Judicial Officer, ORC/C-14J
Jeffery M. Trevino, Counsel for Complainant/C-14J
Eric Volck, Cincinnati Finance/MWD


Frederick Brown
Pesticides and Toxics Compliance Section
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77 West Jackson Boulevard
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Docket No. **FIFRA-05-2009-0015**

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