



**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR**

In the Matter of:)	
)	
Timothy Wilson, d/b/a)	Docket No. FIFRA-07-2023-0135
Wilson's Pest Control,)	
)	
Respondent.)	

ORDER ON COMPLAINANT'S MOTION FOR ACCELERATED DECISION AS TO LIABILITY

I. Procedural History

This matter commenced on February 8, 2024, when Complainant, the Director of the Enforcement and Compliance Assurance Division of the U.S. Environmental Protection Agency ("EPA"), Region 7, filed a Complaint and Notice of Opportunity for Hearing ("Complaint") under Section 14 of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA" or "Act"), 7 U.S.C. § 136f, against Timothy Wilson, d/b/a Wilson's Pest Control ("Respondent"). The Complaint alleged 21 separate counts of violation. The first 10 counts alleged that Respondent violated Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), by selling or distributing 10 different pesticides that were not registered under the Act. Compl. ¶ 52. Counts 11 through 20 alleged that Respondent violated Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), by selling or distributing those same 10 pesticides that were misbranded under the Act. Compl. ¶ 63. Count 21 alleged that Respondent violated Section 12(a)(2)(B)(iii) of FIFRA, 7 U.S.C. § 136j(a)(2)(B)(iii), by refusing EPA employees access to one of his company's facilities for the purpose of carrying out an inspection. Compl. ¶ 69. Complainant seeks to assess a civil penalty of \$149,659 against Respondent for the alleged violations. Compl. ¶ 70.

On March 9, 2024, Respondent, through counsel, filed an Answer of Respondent to Complaint and Request for Hearing ("Answer"). The Regional Hearing Clerk then transmitted the case file to this Tribunal for adjudication on March 12, 2024. Upon transmission of the case, on March 20, 2024, I was designated to preside over this proceeding.¹ That same day, I

¹ This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties ("Rules of Practice") as set forth at 40 C.F.R. Part 22.

ordered the parties to engage in an exchange of information pursuant to 40 C.F.R. § 22.19. *See* Prehr’g Order at 2-4. The parties timely filed their respective Prehearing Exchanges.²

On June 21, 2024, Complainant filed a Motion for Additional Discovery, or in the Alternative, Motion in Limine, asking this Tribunal to compel Respondent to produce certain documents relevant to his ability to pay the proposed penalty and to bar Respondent from raising an inability to pay should he fail to comply. On August 9, 2024, Complainant then moved to amend its Complaint to make numerous corrections and additions, while not substantively changing the general charges or relief sought. *Compare* Compl. ¶¶ 52, 63, 69, 70 *with* Am. Compl. ¶¶ 51, 61, 67, 68. This was followed on August 27, 2024, by Complainant’s Motion to Supplement Complainant’s Prehearing Exchange, seeking to add three new proposed exhibits to its Prehearing Exchange and revise a previously filed proposed exhibit. I granted all three of these Motions. *See* Order on Complainant’s Mots. for Additional Disc. and Extension of Time (July 10, 2024); Order on Complainant’s Mots. (Sept. 5, 2024); Order Barring Resp’t from Presenting Certain Evid. at Hr’g (Nov. 8, 2024). The Amended Complaint and Notice of Opportunity for Hearing (“Amended Complaint”) was deemed to have been filed and served on September 5, 2024. Respondent did not file an answer to the Amended Complaint.

Now pending before this Tribunal is Complainant’s Motion for Accelerated Decision as to Liability (“Motion”) filed and served on October 21, 2024, pursuant to the Rules of Practice. *See* 40 C.F.R. §§ 22.16(a), 22.20. Accompanying the Motion is a Memorandum in Support of Motion for Accelerated Decision as to Liability (“Memorandum”). To date, Respondent has not filed a response to the Motion. Because Respondent did not file a timely response, the Motion is ripe for consideration, and Respondent has waived any objection to the granting of the Motion. *See* 40 C.F.R. § 22.16(b) (“A party’s response to any written motion must be filed within 15 days after service of such motion. . . . Any party who fails to respond within the designated period waives any objection to the granting of the motion.”). However, this does not mean the Motion must be granted without review; rather, it is proper to still assess the merits of the Motion. *Waterer*, 2004 EPA ALJ LEXIS 2, *32 (Jan. 28, 2004) (“Section 22.16(b) operates only to waive any objection *by the party* who fails to respond to the motion. The court must still independently assess the merits of the motion.”) (emphasis in original). For the reasons that follow, Complainant’s Motion is **GRANTED in part** and **DENIED in part**.

II. Legal Background

FIFRA, first enacted in 1947 and periodically amended thereafter, requires that all pesticides distributed or sold in the United States be registered with the EPA Administrator, who may regulate their distribution and sale “[t]o the extent necessary to prevent unreasonable adverse effects on the environment.” 7 U.S.C. § 136a(a). Section 3 of the Act

² The proposed exhibits submitted with the parties’ Prehearing Exchanges are designated in the following manner: Complainant’s proposed exhibits are labeled “CX,” and Respondent’s proposed exhibits are labeled “RX.”

establishes the detailed procedures that registrants³ must follow to register a pesticide. 7 U.S.C. § 136a(c). In turn, Section 12 of FIFRA provides, in pertinent part:

(1) Except as provided by subsection (b), it shall be unlawful for any person in any State to distribute or sell to any person—

(A) any pesticide that is not registered under section 3 or whose registration has been canceled or suspended, except to the extent that distribution or sale otherwise has been authorized by the Administrator under this Act;

* * * * *

(E) any pesticide which is adulterated or misbranded.

7 U.S.C. § 136j(a)(1)(A), (a)(1)(E).

Section 2 of FIFRA defines the operative terms contained in Section 12. Specifically, a “person” is defined as “any individual, partnership, association, corporation, or any organized group of persons whether incorporated or not.” *Id.* § 136(s). Meanwhile, the phrase “to distribute or sell” means 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.” *Id.* § 136(gg). The term “pesticide” is defined, in pertinent part, as “any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest.” *Id.* § 136(u)(1). Finally, in pertinent part, the term “pest” is defined to include “any insect [or] rodent.” *Id.* § 136(t).

A. Repackaging Registered Pesticides

The EPA Administrator has enacted regulations, the purpose of which are to “establish requirements for repackaging some pesticide products into refillable containers for distribution or sale.” 40 C.F.R. § 165.60(a). The regulations apply to, among others, “refiller[s] of a pesticide product and [who] are not the registrant of the pesticide product.” 40 C.F.R. § 165.60(b). Further, the regulations “apply to all pesticide products other than manufacturing use products, plant-incorporated protectants, and antimicrobial products that are exempt.” 40 C.F.R. § 165.63(f).

According to those regulations, a registrant may allow others (refillers) to repack the registrant’s pesticide for distribution or sale under the registrant’s existing registration if all of the following conditions are met:

(1) The repackaging results in no change to the pesticide formulation.

³ A “registrant” is defined simply as “a person who has registered any pesticide pursuant to provisions of [FIFRA].” 7 U.S.C. § 136(y).

- (2) One of the following conditions regarding a registered refilling establishment is satisfied:
 - (i) The pesticide product is repackaged at a refilling establishment registered with EPA as required by § 167.20 of this chapter.
 - (ii) The pesticide product is repackaged by a refilling establishment registered with EPA as required by § 167.20 of this chapter at the site of a user who intends to use or apply the product.
- (3) The registrant has entered into a written contract with [the refiller] to repackage the pesticide product and to use the label of the registrant's pesticide product.
- (4) The pesticide product is repackaged only into refillable containers that meet the standards of subpart C of this part.
- (5) The pesticide product is labeled with the product's label with no changes except the addition of an appropriate net contents statement and the refiller[']s EPA establishment number.

40 C.F.R. § 165.70(b). Repackaging a pesticide for distribution or sale without meeting these requirements or otherwise obtaining a registration constitutes a violation of 7 U.S.C. § 136j(a)(1)(A)'s prohibition against selling unregistered pesticides. 40 C.F.R. § 165.70(c).

B. Misbranded Pesticides

Having made unlawful the act of selling "any pesticide which is adulterated or misbranded," FIFRA specifically deems when a pesticide is "misbranded." In pertinent part, FIFRA declares that:

- (1) A pesticide is misbranded if—

* * * * *

- (D) its label does not bear the registration number assigned under section 7 to each establishment in which it was produced;

* * * * *

- (F) 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;

- (G) 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;

* * * * *

- (2) A pesticide is misbranded if—

(A) the label does not bear an ingredient statement;

(B) the labeling does not contain a statement of the use classification under which the product is registered⁴;

(C) there is not affixed to its container . . . a label bearing—

(i) the name and address of the producer, registrant, or person for whom produced;

* * * * *

(iii) the net weight or measure of the content, except that the Administrator may permit reasonable variations

7 U.S.C. § 136(q)(1)(D), (q)(1)(F)-(G), (q)(2)(A)-(C); *see also* 40 C.F.R. §§ 156.10, 156.60-156.85 (EPA regulations imposing labeling requirements). The terms “label” and “labeling” are defined by FIFRA as follows:

(1) Label. The term “label” means the written, printed, or graphic matter on, or attached to, the pesticide or device or any of its containers or wrappers.

(2) Labeling. The term “labeling” means all labels and all other written, printed, or graphic matter—

(A) accompanying the pesticide or device at any time; or

(B) to which reference is made on the label or in literature accompanying the pesticide or device, except to current

⁴ EPA classifies pesticides as either restricted use pesticides or general use pesticides, with restricted use pesticides not being available for purchase or use by the general public due to “the potential to cause unreasonable adverse effects to the environment and injury to applicators or bystanders.” *Restricted Use Products (RUP) Report*, U.S. ENV’T PROT. AGENCY, <https://www.epa.gov/pesticide-worker-safety/restricted-use-products-rup-report>.

official publications of the Environmental Protection Agency, the United States Departments of Agriculture and Interior, the Department of Health and Human Services, State experiment stations, State agricultural colleges, and other similar Federal or State institutions or agencies authorized by law to conduct research in the field of pesticides.

7 U.S.C. § 136(p).

C. Inspection Authority

To aid in enforcement, FIFRA authorizes EPA to conduct inspections to ensure that those subject to the Act's requirements are in compliance. The Act allows that:

For purposes of enforcing the provisions of this Act, officers or employees of the Environmental Protection Agency . . . are authorized to enter at reasonable times . . . any establishment or other place where pesticides or devices are held for distribution or sale for the purpose of inspecting and obtaining samples of any pesticides or devices, packaged, labeled, and released for shipment, and samples of any containers or labeling for such pesticides or devices

7 U.S.C. § 136g(a)(1). However, the Act imposes certain procedures that EPA officers and employees must adhere to while conducting an inspection. Specifically, "[b]efore undertaking such inspection, the officers or employees must present to the owner, operator, or agent in charge of the establishment . . . appropriate credentials and a written statement as to the reason for the inspection, including a statement as to whether a violation of the law is suspected." *Id.* § 136g(a)(2). The Act makes it unlawful for anybody to refuse to allow EPA employees or officers to conduct an authorized inspection. *Id.* § 136j(a)(2)(B)(iii).

III. Factual Background⁵

On June 15, 2022, pursuant to the authority granted in 7 U.S.C. § 136g, two EPA officers inspected one of Respondent's business locations at 2400 North Grand Boulevard in St. Louis,

⁵ The factual background is drawn from the Amended Complaint, Answer, and the proposed exhibits submitted by the parties as part of their Prehearing Exchanges. Pertaining to Respondent's Answer, this Tribunal acknowledges that he filed one in response to the original Complaint but not the Amended Complaint. As such, Respondent's factual admissions are associated to a complaint that is no longer operative. Order on Complainant's Mots. at 2 (Sept. 5, 2024) ("Because Respondent and this Tribunal already received a signed copy of the proposed Amended Complaint and Notice of Opportunity for Hearing, it is hereby deemed to have been filed and served as of the date of this Order, and it is now the governing complaint in this matter."). Respondent was provided with 20 days to file any answer to the Amended Complaint but did not do so. Order on Complainant's Mots. at 2-3; see 40 C.F.R. § 22.14(c).

Missouri (“Grand Facility”). Answer ¶ 7; *compare* Compl. ¶ 32 with Am. Compl. ¶ 31. Complainant’s proposed exhibits contain a written report (“Inspection Report”) compiled by one of the inspectors, which documents the inspectors’ observations, and photographs taken by the inspectors during the course of the inspection. *See generally* CX1 (Inspection Report); CX2 (photographs). According to the Inspection Report, Respondent, through his business Wilson’s Pest Control, “offers for sale many different types of pesticide products that control and kill unwanted pests such as mice, rats, roaches, and ants.” CX1 at 2. Respondent’s Grand Facility is registered with EPA as a pesticide-producing establishment, assigned an establishment number of 69040-MO-1. CX1 at 2; CX14; RX2. The Inspection Report indicates that the inspectors observed the following 10 substances:

1. Professional Pest Control Concentrate: The inspectors reported observing a substance packaged in 16-ounce and 32-ounce containers branded with the name “Professional Pest Control Concentrate.” CX1 at 4; *see* CX2 at 4-15, 27. The containers were affixed with labels lacking directions for use and statements of use classification, and the labels listed a different EPA establishment number than that assigned to the Grand Facility. CX1 at 4; *see* CX2 at 4-15, 27. Further, the labels included the registration number “70506-7-72693,” which corresponds to the pesticide registered with EPA as “Termite Kill III.”⁶ CX1 at 4; *see* CX2 at 4-15, 27; *see also* *Details for Termite Kill III*, U.S. ENV’T PROT. AGENCY, <https://ordspub.epa.gov/ords/pesticides/f?p=PPLS:8:10121820424039::NO::P8>

Where respondent: Contests any material fact upon which the complaint is based; contends that the proposed penalty, compliance or corrective action order, or Permit Action, as the case may be, is inappropriate; or contends that it is entitled to judgment as a matter of law, it shall file . . . a written answer to the complaint . . . and shall serve copies of the answer on all other parties.

40 C.F.R. § 22.15(a). “The answer shall clearly admit, deny or explain each of the factual allegations contained in the complaint with regard to which respondent has any knowledge.” *Id.* § 22.15(b). Respondent’s failure “to admit, deny, or explain any material factual allegation contained in the complaint constitutes an admission of the allegation.” *Id.* § 22.15(d).

But there is no need to impose such a draconian result here where Respondent did provide answers to a set of allegations, even if not the ones in the operative complaint. I therefore do not consider Respondent’s election not to file an answer to the Amended Complaint to constitute an admission of all factual allegations found therein. Rather, I consider it appropriate to treat Respondent’s Answer to the original Complaint as an answer to the Amended Complaint, and I will consider Respondent’s answers informative as to any shared alleged facts that were not substantively changed between the original Complaint and the Amended Complaint.

⁶ Although the Inspection Report describes Mr. Wilson as referring to this product as “Termite Kill III,” Complainant refers to it as “Tengard HG Termiticide/Insecticide” throughout his filings. He explains, “According to the registration number on the bottles, Pest Control Concentrate is a repackage of a registered pesticide product called ‘Tengard HG Termiticide/Insecticide.’” Memorandum at 17. However, a search of EPA’s online database of registered pesticide products for the registration number found on the bottles of “Professional Pest Control Concentrate” (EPA Reg. No. 70506-7-72693) returns a result for “Termite Kill III.” *Details for Termite Kill III*, U.S. ENV’T PROT. AGENCY, https://ordspub.epa.gov/ords/pesticides/f?p=PPLS:8:8975845673244::NO::P8_PUID,P8_RINUM:245920,70506-7-72693. On that page, “Tengard HG Termiticide/Insecticide” is listed as a “Related Registered Product,” with an EPA Registration Number of 70506-7. *Id.* As such, this Order will refer to this substance as “Termite Kill III” rather than “Tengard HG Termiticide/Insecticide.”

[PUID,P8 RINUM:245920,70506-7-72693](#). Respondent confirmed to the inspectors that the substance in the containers was “Termite Kill III” and that he purchased 55-gallon containers of this product and repackaged it at the Grand Facility into the 16-ounce and 32-ounce containers found there. CX1 at 4.

2. Wilson’s Termite & Carpenter Ant Control: The inspectors reported observing a substance packaged in 16-ounce containers branded with the name “Wilson’s Termite & Carpenter Ant Control.” CX 1 at 5; see CX2 at 20-26. The containers were affixed with a label displaying an EPA establishment number that differed from that assigned to the Grand Facility, and the label did not include directions for use or a statement of use classification. CX1 at 5; see CX2 at 20-26. Further, the label listed the registration number “228-459-54705,” which corresponds to an unnamed pesticide registered to Lawn and Garden Products, Inc., a company based in Fresno, California.⁷ CX1 at 5; see CX2 at 20-26; see also *Details for 228-459-54705*, U.S. ENV’T PROT. AGENCY, https://ordspub.epa.gov/ords/pesticides/f?p=PPLS:8:::::P8_PUID,P8_RINUM:496806,228-459-54705_5. Respondent did not confirm at the time of inspection what the substance was or describe its original container. He did, however, confirm to the inspectors that he was responsible for repackaging the substance into the 16-ounce containers found at the Grand Facility. CX 1 at 5.
3. Final Rodenticide Ready-To-Use Place Pacs [Final Rodenticide]: The inspectors reported observing 0.88-ounce throw packs branded with the name “Final Rodenticide Ready-To-Use Place Pacs” and marked “individual sale is prohibited by law.” CX1 at 6; see CX2 at 33-35. The labeling included first aid instructions but otherwise lacked complete cautionary statements and directions for use. CX1 at 6; see CX2 at 34 (instructing users to consult “outer packaging” for additional full precautionary statement and directions for use). The labeling also included a registration number—“12455-91”—which indeed corresponds to a pesticide registered with EPA as “Final Rodenticide Ready-To-Use Place Pacs.” CX1 at 6; see CX2 at 33, 35; see also *Details for Final Rodenticide Ready-To-Use Place Pacs*, U.S. ENV’T PROT. AGENCY, https://ordspub.epa.gov/ords/pesticides/f?p=PPLS:8:7180913218700::NO::P8_PUID,P8_RINUM:35038,12455-91. The throw packs were stored in zip-top resealable, plastic bags containing six throw packs per bag without additional labeling. CX1 at 6; see CX2 at 30-32, 44, 46, 48, 51, 86.
4. Talon G Rodenticide Bait Pack Mini-Pellets [Talon G Rodenticide]: The inspectors reported observing 0.88-ounce throw packs branded with the name “Talon G Rodenticide Bait Pack Mini-Pellets” and marked “individual sale prohibited by law.” CX1

⁷ In the Amended Complaint, Complainant alleges that the registration number appearing on the containers of Wilson’s Termite & Carpenter Ant Control—“228-459-54705”—corresponds to a pesticide registered with EPA as “Monterey Termite and Carpenter Ant Control,” Am. Compl. ¶ 32(j); and both parties use that name elsewhere in filings, see, e.g., CX1 at 9; RX2 at 2. However, a search of EPA’s online database of registered pesticide products for that registration number returns a result for a product with “No Product Name Found” and “Monterey Termite & Carpenter Ant Control” listed as one of several inactive alternate brand names. *Details for 228-459-54705*, U.S. Env’t Prot. Agency, https://ordspub.epa.gov/ords/pesticides/f?p=PPLS:8:::::P8_PUID,P8_RINUM:496806,228-459-54705_5.

at 6; see CX2 at 38. The product had “partial labeling that included registration numbers, first aid, and directions for use.” CX1 at 6. For complete directions, the packs instructed users to “[r]ead the entire Directions for Use . . . on the outer package before buying or using this product.” CX2 at 38. Also included on the label was the registration number “100-1050,” which corresponds to a pesticide registered with EPA as “Talon G Rodenticide Bait Pack Mini-Pellets with Bitrex.” CX1 at 6; see CX2 at 38; see also *Details for Talon G Rodenticide Bait Pack Mini-Pellets with Bitrex*, U.S. ENV’T PROT. AGENCY, https://ordspub.epa.gov/ords/pesticides/f?p=PPLS:8:10121820424039::NO::P8_PUID,P8_RINUM:4812,100-1050. The throw packs were stored in zip-top resealable, plastic bags containing six throw packs per bag without additional labeling. CX1 at 6; see CX2 at 36-37, 44, 46, 49-50.

5. **Contrac Rodenticide Ready-To-Use Place Pacs [Contrac Rodenticide]:** The inspectors reported observing 1.5-ounce throw packs marked “individual sale is prohibited” and bearing the name “Contrac Rodenticide Ready-To-Use Place Pacs.” CX1 at 6; see CX2 at 42-43. The product had “partial labeling that included registration numbers, first aid, and directions for use.” CX1 at 6. But the labeling lacked complete directions for use, instructing users to “[s]ee outer package label for complete directions for use” and advising that “[i]t is illegal to sell this product unless it is accompanied by a complete set of its accepted labeling.” CX2 at 43. The registration number listed on the labeling was “12455-76,”⁸ which indeed corresponds to a pesticide registered with EPA as “Contrac Rodenticide Ready-To-Use Place Pacs.” CX1 at 6; see CX2 at 42; see also *Details for Contrac Rodenticide Ready to Use Place Pacs*, U.S. ENV’T PROT. AGENCY, https://ordspub.epa.gov/ords/pesticides/f?p=PPLS:8:10121820424039::NO::P8_PUID,P8_RINUM:21588,12455-76. The throw packs were stored in zip-top resealable, plastic bags containing six throw packs per bag without additional labeling. CX1 at 6; see CX2 at 40-41, 44, 46-47, 52, 87.
6. **Green Rodenticide Mini-Blocks:** The inspectors reported observing unidentified green blocks packaged into zip-top resealable, plastic bags lacking any labeling or product information. CX 1 at 7; see CX2 at 46-47, 52, 88. Respondent claimed to the inspectors that the blocks were Contrac Rodenticide in block form. CX1 at 7.
7. **Red Rodenticide Mini-Blocks:** The inspectors reported observing unidentified red blocks packaged into zip-top resealable, plastic bags lacking any labeling or product information. CX1 at 7; see CX2 at 46, 48, 51, 89. Respondent claimed to the inspectors that the blocks were Final Rodenticide in block form. CX1 at 7.

⁸ The EPA registration number for this product was listed as “12455-17” in CX1. However, this appears to be in error. Instead, in the photographs taken by the inspectors, the label of the product bears an EPA registration number of “12455-76.” CX2 at 42. A search of EPA’s online database of registered pesticide products confirms that the correct registration number for “Contrac Rodenticide Ready-To-Use Place Pacs” is “12455-76.” *Details for Contrac Rodenticide Ready to Use Place Pacs*, U.S. ENV’T PROT. AGENCY, https://ordspub.epa.gov/ords/pesticides/f?p=PPLS:8:8975845673244::NO::P8_PUID,P8_RINUM:21588,12455-76.

8. Blue Rodenticide Mini-Blocks: The inspectors reported observing unidentified blue blocks packaged into zip-top resealable, plastic bags lacking any labeling or product information. CX1 at 7; see CX2 at 46, 49-50, 90. Respondent claimed to the inspectors that the blocks were Talon G Rodenticide in block form. CX1 at 7.
9. Brown Rodenticide Mini-Blocks: The inspectors reported observing unidentified brown blocks packaged into zip-top resealable, plastic bags lacking any labeling or product information. CX1 at 7; see CX2 at 53-54, 90. For this product, Respondent produced a printout of a partial label for “Maki Mini Blocks,” which listed “7173-202” as the product’s registration number. CX1 at 7. That registration number indeed corresponds to a pesticide registered with EPA as “Maki Mini Blocks.” *See Details for Maki Mini Blocks*, U.S. ENV’T PROT. AGENCY, https://ordspub.epa.gov/ords/pesticides/f?p=PPLS:8:11304080451081::NO::P8_PUID,P8_RINUM:29873,7173-202.
10. Wilson’s Pest Control Professional Growth Regulator: The inspectors reported that Respondent brought out another substance in “tiny little white bottles” bearing the name “Wilson’s Pest Control Professional Growth Regulator.” CX1 at 8; CX2 56-57, 63-69. The label included only the name of Respondent’s business, Respondent’s name for the product (“Wilson’s Pest Control Professional Growth Regulator”), a telephone number purportedly for poison control, and a skull-and-cross-bone image. CX1 at 8; CX2 at 64. When the inspectors pointed out deficiencies with the label, Respondent “brought out a registered pesticide alongside the growth regulator, ‘Tekko Pro Insect Growth Regulator Concentrate,’” with a registration number of “53883-335.” CX1 at 8. That registration number corresponds to a pesticide registered with EPA for which “Tekko Pro” is listed as an alternate brand name. *See Details for [Tekko Pro]*, U.S. ENV’T PROT. AGENCY, https://ordspub.epa.gov/ords/pesticides/f?p=PPLS:8:13875226175538::NO::P8_PUID,P8_RINUM:510280,53883-335. Respondent then described to the inspectors how he “repackages the Tekko product into these small bottlers and puts his labeling on them.” CX1 at 8; see CX2 at 56-62.

The Inspection Report indicates that when the inspectors expressed concerns about the labels potentially lacking required information, Respondent replied that customers were sometimes provided safety data sheets, but that he often advised them to search the Internet for product information as it would, according to Respondent, provide better and more up-to-date information on the product. CX1 at 5-8. The inspectors noted that, at the conclusion of the inspection, Respondent conveyed to the inspectors that he had not entered into repacking agreements with any of the companies that held the original registrations for the substances. CX1 at 8.

On July 5, 2023, pursuant to Section 13(a) of FIFRA, 7 U.S.C. § 136k(a), EPA issued a Stop Sale, Use, or Removal Order (“Stop Sale Order”), concluding that EPA had reason to believe Respondent committed multiple FIFRA violations based on the observations made during the June 15, 2022 inspection. CX13 ¶ 64. Based on this finding, EPA ordered “Respondent immediately not to distribute, sell, offer for sale, hold for sale, deliver for shipment, receive, or having so received, deliver, offer for delivery, move or remove from any present location, or

use any repackaged” pesticides, insecticides, or rodenticides identified above or that were otherwise “unregistered, illegally repackaged, and/or misbranded.” CX13 ¶ 65.

On July 27, 2023, around 2:15 p.m., EPA inspectors arrived at another of Respondent’s business locations at 2616 Woodson Road in Overland, Missouri (“Woodson Facility”), attempting to perform an inspection to ensure compliance with the Stop Sale Order. CX17 at 1; CX28 at 1. With an “open” sign posted on the propped open entry door, the inspectors entered and introduced themselves to a woman working behind the counter. CX17 at 1; CX28 at 1. The woman told the inspectors that she could not do the inspection because she was in the middle of an all-day training. CX17 at 1; CX28 at 1. The inspectors informed the woman that the inspection was necessary, and refusing an inspection could be a violation of FIFRA. CX17 at 1. The woman asked the inspectors to step outside while she contacted her attorney. CX17 at 1; CX28 at 1. The inspectors complied, and shortly thereafter Respondent arrived. CX17 at 1; CX28 at 1. The inspectors were told the attorney was not available that day and Respondent would not permit an inspection without an attorney present. CX17 at 2; CX28 at 1. With that, the inspectors left the store. CX17 at 2; CX28 at 1.

IV. Accelerated Decision Standard

The Rules of Practice dictate that:

The Presiding Officer may at any time render an accelerated decision in favor of a party as to any or all parts of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if *no genuine issue of material fact exists* and a party is entitled to judgment as a matter of law.

40 C.F.R. § 22.20(a) (emphasis added). Because this standard is analogous to that governing motions for summary judgment as prescribed by Rule 56 of the Federal Rules of Civil Procedure, the Environmental Appeals Board (“EAB”) has deemed it proper to refer to Rule 56 and the related jurisprudence developed by Federal Courts for guidance. *See Consumers Scrap Recycling, Inc.*, 11 E.A.D. 269, 285 (EAB 2004) (“As we have said in previous decisions, although the Federal Rules of Civil Procedure do not apply to the proceedings before us, we look to the Federal Rules, including the summary judgment standard in Rule 56, for guidance.”).

Similar to 40 C.F.R. § 22.20(a), Rule 56, in pertinent part, states:

The court shall grant summary judgment if the movant shows there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.

FED. R. CIV. P. 56(a). Under this Rule, the party moving for summary judgment bears the burden of showing the absence of a genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). That is to say a summary judgment motion should be denied if there remains “disputes over facts that might affect the outcome” and “the evidence is such that a reasonable [factfinder] could return a [decision] for the nonmoving party.” *Id.* at 248, 258.

Importantly, this requires more than a “mere existence of *some* alleged factual dispute.” *Id.* at 247-48; *see also BWX Techs., Inc.*, 9 E.A.D. 61, 76 (EAB 2000) (requiring nonmoving party to provide “more than a *scintilla* of evidence on a disputed factual issue” to justify an evidentiary hearing) (emphasis in original). It is the substantive law that guides whether a particular factual dispute is material. *Anderson*, 477 U.S. at 248. When conducting this inquiry, the judge must view the evidence, and draw all legitimate inferences, in the light most favorable to the nonmoving party. *Id.* at 255.

The moving party may satisfy its burden of “showing the *absence* of any genuine issue of fact” through citations to “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits[.]” *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 153 (1970) (emphasis added); *id.* at 175 (Black, J., concurring); FED. R. CIV. P. 56(c)(1); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986) (interpreting this standard to mean that a movant must show “that there is an absence of evidence to support the nonmoving party’s case”). If the moving party successfully meets its burden of production, then the burden of production shifts to the nonmoving party, although the burden of persuasion remains with the moving party. *Catrett*, 477 U.S. at 330 (Brennan, J., dissenting). The nonmoving party can then defeat the properly supported motion for summary judgment only if it offers “significant probative evidence tending to support” its position. *Anderson*, 477 U.S. at 249 (quoting *First Nat’l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 290 (1968)). At this point, the nonmoving party “may not rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial.” *Id.* at 248.

As the EAB has observed, determining whether the standard described above has been met “implicates the substantive evidentiary standard of proof in a particular proceeding.” *Mayaguez Reg’l Sewage Treatment Plant*, 4 E.A.D. 772, 781 (EAB 1993) (citing *Anderson*, 477 U.S. at 252). Accordingly, “the judge must consider whether the quantum and quality [of] evidence is such that a finder of fact could reasonably find for the party producing that evidence under the applicable standard of proof.” *Id.* The evidentiary standard of proof for this matter is a preponderance of the evidence. 40 C.F.R. § 22.24(b). Under this standard, Complainant bears the burdens of presentation and persuasion that the violation occurred as purported and that the relief sought is appropriate. *Id.* § 22.24(a). Meanwhile, Respondent bears the burdens of presentation and persuasion as to any affirmative defenses. *Id.*

V. Discussion

A. Sale of Unregistered and/or Illegally Packaged Pesticides

For Complainant to be entitled to an accelerated decision on Counts 1-10⁹ as to Respondent’s liability under 7 U.S.C. § 136j(a)(1)(A) for selling unregistered pesticides, there

⁹ The Amended Complaint alleges that the sale of each of the 10 pesticides identified in Section III above constitutes a separate FIFRA violation but does not specify which pesticide corresponds to which count. Complainant’s Prehearing Exchange clarifies the matter. In the section of the Prehearing Exchange discussing the proposed penalty, Complainant states, “Counts 1-4 are for the sale of the following unregistered pesticides: Green Block Rodenticide, Red Block Rodenticide, Blue Block Rodenticide, and Brown Block Rodenticide Counts 5-7

must be no genuine issue as to the following: (1) Respondent is a “person” within the meaning of FIFRA; (2) Respondent “distributed or sold” the products at issue; (3) the products at issue were “pesticides” within the meaning of the Act; and (4) the products at issue were “not registered” at the time of distribution or sale. *See* 7 U.S.C. § 136j(a)(1)(A); *see also Everyday Group, LLC*, 2013 EPA ALJ LEXIS 12, at *17 (Aug. 21, 2013) (citing *The Bullen Cos.*, 9 E.A.D. 620, 622 (EAB 2001)).

In his Answer, Respondent admitted to being a “person” as defined by Section 2(s) of FIFRA. *See* Answer ¶ 6; *compare* Compl. ¶ 31 with Am. Compl. ¶ 30; *see also* 7 U.S.C. § 136(s). The proposed evidence further supports that Respondent is an individual and owner of the incorporated business, Wilson’s Pest Control, Inc., where the alleged violations occurred. *See* CX27 (EPA’s internal pesticide establishment and pesticide production tracking webpage for Wilson’s Pest Control, Inc.).

The next element to prove is that each substance that forms the basis of Counts 1-10 was sold by Respondent. In addition to selling unregistered pesticides, the Act makes it unlawful to “offer for sale” or “hold for sale” unregistered pesticides. *See* 7 U.S.C. § 136(gg). With regard to Wilson’s Pest Control Professional Growth Regulator and Professional Pest Control Concentrate, the Inspection Report states that the inspectors directly observed a sale of the substances to a customer who walked into the Grand Facility during the inspection. CX1 at 8. Although the report does not indicate that the inspectors directly observed the sale of the other substances, it does indicate that during the inspection of the Grand Facility, Respondent made statements to the inspectors about recommending the use of Google to search for more information on the substances to his customers, implying that the products were held for sale to others. CX1 at 5-7. Indeed, with the exception of Professional Pest Control Concentrate and Wilson’s Termite & Carpenter Ant Control, Respondent’s Answer admits that Respondent held the substances in question for sale, stating, “[A]t the time of each and every sale, Respondent delivers to each customer a safety data sheet from the manufacturer of the product.” Answer ¶ 8 (emphasis added); *compare* Compl. ¶ 33 with Am. Compl. ¶ 32.

Respondent’s own proposed evidence in the record further confirms that he held the substances in question for sale. In 2021, Respondent submitted EPA Form 3540-16 entitled “Pesticide Report for Pesticide-Producing and Device-Producing Establishments.” RX2; *see also* CX14. On that form, Respondent stated that “Termite Kill III” and “Monterey Termite &

[are] for the unregistered sale of Contrac Pellet Rodenticide, FINAL Pellet Rodenticide, and Talon G Pellet Rodenticide Counts 8-10 are for the unregistered sale of Professional Growth Regulator, Pest Control Concentrate, and Termite & Ant Control.” Complainant’s Initial Prehearing Exchange at 21-22. This Order will follow Complainant’s lead. Consequently, Counts 1-10 are organized as such: Count 1 is for the alleged repackaging and sale of Green Rodenticide Mini-Blocks; Count 2 is for the alleged repackaging and sale of Red Rodenticide Mini-Blocks; Count 3 is for the alleged repackaging and sale of Blue Rodenticide Mini-Blocks; Count 4 is for the alleged repackaging and sale of Brown Rodenticide Mini-Blocks; Count 5 is for the alleged repackaging and sale of Contrac Rodenticide Ready-To-Use Place Pacs; Count 6 is for the alleged repackaging and sale of Final Rodenticide Ready-To-Use Place Pacs; Count 7 is for the alleged repackaging and sale of Talon G Rodenticide Bait Pack Mini-Pellets; Count 8 is for the alleged repackaging and sale of Wilson’s Pest Control Professional Growth Regulator; Count 9 is for the alleged repackaging and sale of Professional Pest Control Concentrate; Count 10 is for the alleged repackaging and sale of Wilson’s Termite & Carpenter Ant Control.

Carpenter Ant Control” were “produced” at the Grand Facility for sale within the United States. RX2 at 2; *see also* CX14 at 2. Then, in 2024, after having been issued the Stop Sale Order prohibiting the sale of the substances in question, Respondent sent a facsimile to EPA stating that he “look[ed] forward to being able to sell them again.” RX1. Having not responded to the Motion, Respondent does not point to any evidence that would contradict this proposed evidence, the inspection report, or the admissions in his Answer.

I now turn to the third element: whether the 10 products, the sale or distribution of which constitutes the basis for the first 10 counts, were pesticides. If the answer to this inquiry is that they were not, then there can be no violation of 7 U.S.C. § 136j(a)(1)(A). The Act defines a “pesticide” as “any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest.” 7 U.S.C. 136(u). Regulations promulgated by EPA go on to further define a “pesticide” as “any substance . . . intended for a pesticidal purpose, i.e., use for the purpose of preventing, destroying, repelling, or mitigating any pest or use as a plant regulator, defoliant, or desiccant.” 40 C.F.R. § 152.15. The regulations clarify, “A substance is considered to be intended for a pesticidal purpose, and thus to be a pesticide requiring registration, if [t]he person who distributes or sells the substance claims, states, or implies (by labeling or otherwise) [t]hat the substance . . . can or should be used as a pesticide.” *Id.* § 152.15(a)(1). Respondent’s Answer again admits that the 10 substances in question are pesticides within the definitions of 7 U.S.C. 136(u) and 40 C.F.R. § 152.15(a)(1). *See* Answer ¶¶ 9-10; *compare* Compl. ¶¶ 34-35 with Am. Compl. ¶¶ 33-34.

This admission is substantiated by the proposed evidence. Respondent’s statements to EPA’s inspectors, as represented by the Inspection Report, and the pictures that the inspectors captured, suggest that the products listed in the Amended Complaint consist of the following substances, along with their EPA pesticide registration numbers: Termite Kill III (EPA Reg. No. 70506-7-72693), Final Rodenticide Ready-To-Use Place Pacs (EPA Reg. No. 12455-91), Talon G Rodenticide Bait Pack Mini-Pellets (EPA Reg. No. 100-1050), Contrac Rodenticide Ready-To-Use Place Pacs (EPA Reg. No. 12455-76), Maki Mini Blocks (EPA Reg. No. 7173-202), and Tekko Pro Insect Growth Regulator (EPA Reg. No. 53883-335). CX1 at 4, 6-8; CX2 at 7, 12, 33, 38, 42, 55, 57; *see also* *Details for Termite Kill III*, U.S. ENV’T PROT. AGENCY, https://ordspub.epa.gov/ords/pesticides/f?p=PPLS:8:10121820424039::NO::P8_PUID,P8_RINUM:245920,70506-7-72693; *Details for Final Rodenticide Ready-To-Use Place Pacs*, U.S. ENV’T PROT. AGENCY, https://ordspub.epa.gov/ords/pesticides/f?p=PPLS:8:7180913218700::NO::P8_PUID,P8_RINUM:35038,12455-91; *Details for Talon G Rodenticide Bait Pack Mini-Pellets*, U.S. ENV’T PROT. AGENCY, https://ordspub.epa.gov/ords/pesticides/f?p=PPLS:8:10121820424039::NO::P8_PUID,P8_RINUM:4812,100-1050; *Details for Contrac Rodenticide Ready to Use Place Pacs*, U.S. ENV’T PROT. AGENCY, https://ordspub.epa.gov/ords/pesticides/f?p=PPLS:8:10121820424039::NO::P8_PUID,P8_RINUM:21588,12455-76; *Details for Maki Mini Blocks*, U.S. ENV’T PROT. AGENCY, https://ordspub.epa.gov/ords/pesticides/f?p=PPLS:8:11304080451081::NO::P8_PUID,P8_RINUM:29873,7173-202, *Details for [Tekko Pro]*, U.S. ENV’T PROT. AGENCY, https://ordspub.epa.gov/ords/pesticides/f?p=PPLS:8:13875226175538::NO::P8_PUID,P8_RINUM:510280,53883-335. Although the proposed evidence does not clarify the exact substance composing Wilson’s Termite & Carpenter Ant Control, the label for the product fashioned by Respondent includes the registration number attributed to a pesticide registered to a different company. CX1 at 5; CX2 at 21; *see also* *Details for 228-459-54705*, U.S.

ENV'T PROT. AGENCY, https://ordspub.epa.gov/ords/pesticides/f?p=PPLS:8::::P8_PUID,P8_RINUM:496806,228-459-54705. Further, the labels of the 10 products all indicate that they are intended to control or kill insects or rodents. CX2 at 5, 9, 14, 20, 22, 33, 38, 42, 57, 61; *see also* 7 U.S.C. § 136(t) (defining “pest” to include “any insect [or] rodent”).

The final element that must be proven is that the 10 pesticides in question were “not registered.” Complainant does not assert that the pesticides in question were never properly registered by anyone. But Complainant does argue that the products’ packaging was changed sufficiently to require new registrations. Pursuant to EPA regulations, “[r]epackaging a pesticide product for distribution or sale without either obtaining a registration or meeting [certain] conditions . . . is a violation of section 12 of the Act.” 40 C.F.R. § 165.70(c). According to the regulations, repackaging occurs when someone who is not the registrant “transfer[s] a pesticide formulation from one container to another without a change in the composition of the formulation, the labeling content, or the product’s EPA registration number, for sale or distribution.” 40 C.F.R. § 165.3. In essence, a registered pesticide that is transferred from its original container to another loses its registration and must be granted a new registration unless the pesticide is transferred in adherence with certain conditions. The regulation at 40 C.F.R. § 165.70 details those conditions, which include “enter[ing] into a written contract” with the registrant and labeling the repackaged product “with the product’s label with no changes except the addition of an appropriate net contents statement and the refiller[']s EPA establishment number.” 40 C.F.R. § 165.70(b). There is no dispute that Respondent did not himself hold registrations for the subject pesticide products. Therefore, he will be liable for selling unregistered pesticides if the pesticides in question were repackaged without the conditions in 40 C.F.R. § 165.70(b) having been met.

There is substantial, uncontested evidence that certain pesticides were repackaged by being transferred from their original containers into other containers that did not utilize the products’ original labels, with only the addition of the net contents and Respondent’s EPA establishment number. The Inspection Report states that Respondent acknowledged transferring two pesticide products—Termite Kill III and Tekko Pro Insect Growth Regulator—from their original containers (55-gallon containers for Termite Kill III and a large bottle for Tekko Pro Insect Growth Regulator) into smaller containers sold as Professional Pest Control Concentrate and Wilson’s Pest Control Professional Growth Regulator. CX1 at 4-5, 8; *see also* CX2 at 56. The photographs taken by the inspectors show the labels that were affixed to the containers were not the products’ original labels but ones that Respondent created that utilized his own branding and omitted required information, such as the Grand Facility’s EPA establishment number. CX2 at 7, 12, 21, 64. With regard to Wilson’s Termite & Carpenter Ant Control, the proposed evidence is slightly less detailed: it does not include the original name of the pesticide or a description of the container in which it was originally packaged. However, the label for Wilson’s Termite & Carpenter Ant Control includes a registration number attributed to a pesticide registered to a different company. And although the container that this company used to originally package the pesticide is unclear, Respondent confirmed to the inspectors that he transferred it into a different container, saying that “he does repackage this product at his store and uses a third-party printing company to make the labeling,” which, again, utilized his own branding and omitted required information. CX1 at 5; *see* CX2 at 20-26.

Complainant has failed to present at this time any such evidence that Respondent repackaged, as defined by 40 C.F.R. § 165.3, the four rodenticide blocks or the three pesticides in 1.5-ounce and 0.88-ounce throw packs—Final Rodenticide Ready-To-Use Place Pacs, Talon G Rodenticide Bait Pack Mini-Pellets, and Contrac Rodenticide Ready-To-Use Place Pacs—such that he triggered 40 C.F.R. § 165.70(c)’s requirement to obtain new registrations or otherwise comply with the requirements of 40 C.F.R. § 165.70(b).

Regarding the rodenticide blocks, the Amended Complaint alleges that Respondent told the EPA inspectors that the blocks “were . . . repackaged by Respondent into unlabeled clear resealable bags.” Am. Compl. ¶ 32(b), (d), (f), (g). If there was proposed evidence that Respondent made such statements, granting Complainant’s request for an accelerated decision on counts 1-4 might have been proper. Complainant, however, has not pointed to any such evidence. While Respondent admitted to EPA inspectors that he repackaged certain substances, the Inspection Report does not indicate that he made an admission to repackaging any of the four rodenticide blocks himself. It seems reasonable to believe that Respondent did repackage the rodenticide blocks as it is unlikely the original registrant would have packaged the blocks as they were found by the inspectors; the blocks were in plastic, zip-lock bags with no labeling of any kind. At this juncture, though, Complainant needs to identify evidence to advance its claims beyond mere conjecture, such that I could conclude that these material facts are undisputed. Without pointing to proposed evidence showing how the blocks were originally packaged or that Respondent ever acknowledged repackaging the blocks into the plastic bags himself, granting an accelerated decision in Complainant’s favor on Counts 1-4 is inappropriate at this time.

Regarding the pesticides in the throw packs, according to the Amended Complaint, EPA inspectors observed the following:

1. Contrac Ready-To-Use Place Pacs Meal repackaged by Respondent into 1.5 ounce net weight insufficiently labelled bags;
2. FINAL Ready-To-Use Place Pack Pellets repackaged by Respondent into 0.88 ounce net weight insufficiently labeled bags; [and]
3. Talon G Bait Pack Mini-Pellets repackaged by Respondent into 0.88 ounce net weight insufficiently labeled bags.

Am. Compl. ¶ 32(a), (c), (e). Complainant seems to allege that Respondent placed these three products into the throw packs himself. However, Complainant does not point to any proposed evidence that tends to substantiate these allegations. Unlike with some of the other pesticide products, the Inspection Report does not indicate that Respondent stated to the inspectors that he packaged the pesticides into the throw packs, and Complainant does not identify any other proposed evidence reflecting that Respondent did so. See *generally* CX1 at 6. Photographs

from the inspection of the Grand Facility show that Respondent stored throw packs in plastic, zip-top bags for individual resale. CX2 at 30-44. But the Amended Complaint does not specifically allege that Respondent repackaged these three pesticides by transferring the throw packs from their original container into a zip-top bags.¹⁰ Given the absence of any evidence in support of the allegations in the Amended Complaint as written, I am unable to say at this time that it is undisputed that Respondent repackaged the pesticides into the throw packs as alleged in the Amended Complaint.

Respondent, in his Answer, averred that “as a licensed pest control vendor and distributor, [he] was authorized to distribute and/or sell pesticides and does not need a written contract from any registrant to distribute and sell” any pesticides in question. Answer ¶ 14. The regulations, however, clearly indicate that once repackaging occurs, Respondent is obligated to abide by the requirements of 40 C.F.R. § 165.70(b) or obtain new registrations for the repackaged pesticide products. As previously noted, there is no dispute that Respondent did not obtain a registration for the repackaged pesticide products. So, any repackaged products needed to comply with the specific requirements of 40 C.F.R. § 165.70(b). Respondent went on to assert in his Answer that EPA never informed him of, and he had no knowledge of those requirements, Answer ¶¶ 13-14; but ignorance of FIFRA’s requirements is not a defense, *Venquest Trading, Inc.*, 2008 EPA ALJ LEXIS 44, *8 (Nov. 21, 2008) (“FIFRA is a strict liability statute and therefore arguments based upon lack of knowledge or intent to violate do not provide a defense to liability for violations of Section 12(a)(1)(A).”).

Considering the proposed evidence, there is no genuine factual dispute as to whether Respondent, being subject to FIFRA’s requirements, violated 40 C.F.R. § 165.70(c), and in turn Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), by repackaging pesticides to offer for sale as Wilson’s Pest Control Professional Growth Regulator, Professional Pest Control Concentrate, and Wilson’s Termite & Carpenter Ant Control without obtaining a new registration for those products or adhering to 40 C.F.R. § 165.70(b)’s requirements. Consequently, Complainant’s request for an accelerated decision on Counts 8-10 is **GRANTED**. However, because there remains a factual dispute as to whether Respondent repackaged the Green, Red, Blue, and Brown Rodenticide Blocks into the plastic, resealable bags in which they were found and as to whether Respondent repackaged Final Rodenticide Ready-To-Use Place Pacs, Talon G

¹⁰ Complainant may indeed have intended to make such an allegation, but the Amended Complaint does not read as such. Even if the Amended Complaint had clearly made such an allegation, it is not obvious that the granting of an accelerated decision would be any more proper. According to the regulations, repackaging occurs when a refiller “transfer[s] a pesticide formulation from one container to another without a change in the composition of the formulation, the labeling content, or the product’s EPA registration number, for sale or distribution.” 40 C.F.R. § 165.3. The term “transfer” is left undefined, but a dictionary definition is “to cause to pass from one to another.” *Transfer*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/transfer>. Therefore, 40 C.F.R. § 165.3’s definition of “repackaging” can be rewritten as “causing a pesticide formulation to pass from one container to another without a change in the composition of the formulation, the labeling content, or the product’s EPA registration number, for sale or distribution.” Respondent clearly would have repackaged the pesticides by opening the throw packs and transferring the contents into the plastic bags. It is less clear whether the same result holds because Respondent transferred the throw packs, along with the pesticides within them, from their original container into another. That might require a more expansive reading of the definition of transfer, and Complainant has not provided an argument for adopting such a definition as of yet.

Rodenticide Bait Pack Mini-Pellets, and Contrac Rodenticide Ready-To-Use Place Pacs into the throw packs in violation of 40 C.F.R. § 165.70(c), Complainant's request for an accelerated decision on Counts 1-7 is **DENIED**.

B. Sale of Misbranded Pesticides

For Complainant to be entitled to an accelerated decision on Counts 11-20 as to Respondent's liability under 7 U.S.C. § 136j(a)(1)(E) for selling misbranded pesticides, there must be no genuine issue as to the first three elements of Counts 1 through 10 discussed above, in addition to the products at issue being "misbranded" at the time of distribution or sale. See 7 U.S.C. § 136j(a)(1)(E); *United Glob. Trading, Inc.*, 2014 EPA ALJ LEXIS 9, at *20, *25 (Feb. 28, 2014).

For the same reasons provided above, Respondent's admissions and the proposed evidence are sufficient to demonstrate that no genuine issue exists as to the first three elements, and so I turn to whether the pesticides at issue were "misbranded." As explained previously, a pesticide is misbranded if it is deficient in any of the ways identified in 7 U.S.C. § 136(q)(1) and (q)(2). The evidence proposed by Complainant reflects that the containers for Wilson's Pest Control Professional Growth Regulator, Professional Pest Control Concentrate, and Wilson's Termite & Carpenter Ant Control were affixed with labels that he designed. CX2 at 5-9, 11-14, 20-24, 63-69. These labels all lacked directions for use and statements of use classification in violation of 7 U.S.C. § 136(q)(1)(F) and (q)(2)(B). CX2 at 5-9, 11-14, 20-24, 63-69. Additionally, the label on the bottles of Wilson's Pest Control Professional Growth Regulator lacked an establishment registration number; an ingredients statement; an address of the producer, registrant, or person for whom produced; the net weight or measure of the content; and complete warning or caution statements, all in violation of 7 U.S.C. § 136(q)(1)(D), (q)(1)(G), (q)(2)(A), and (q)(2)(C). CX2 at 63-69.

Photographs of the three types of throw packs—Final Rodenticide Ready-To-Use Place Pacs, Talon G Rodenticide Bait Pack Mini-Pellets, and Contrac Rodenticide Ready-To-Use Place Pacs—that Respondent sold show that they were marked by their manufacturers with some variation of "individual sale is prohibited by law." CX2 at 34, 38, 43. Each of the three throw packs, not intended for individual resale, lacked complete directions for use printed on the label and necessary warning or cautionary statements in violation of 7 U.S.C. § 136(q)(1)(F) and (q)(1)(G). CX2 at 33-34, 38-39, 42-43.

The photographs further show that the plastic, zip-top bags containing the four types of rodenticide blocks lacked any sort of labels. CX2 at 46-54. Without any labels affixed to them, these products were not compliant with any of FIFRA's labeling requirements as prescribed by 7 U.S.C. § 136(q).

Respondent averred in his Answer that "each label on the pesticides identified in paragraph 33 of the Complaint listed all active ingredients of the product and complete warnings (precautionary statements as to hazards to humans and animals), which fully complied with applicable EPA statutes and regulations." Answer ¶ 15. However, as previously

noted, at this stage of the proceeding, Respondent cannot simply rest on the denials made in his pleadings. *Anderson*, 477 U.S. at 248. Having not responded to Complainant's Motion, Respondent points to no evidence that would refute the photographs showing labels missing necessary information. Further, even assuming all of the labels did include a list of ingredients and complete warning statements, Complainant's proposed evidence shows that all of the products were missing other required information, such as complete directions for use, which Respondent has not disputed or otherwise addressed.

Respondent went on to claim that he delivers to each customer, at least for some products, a safety data sheet and if that sheet is lost or misplaced, he informs customers that they can search the Internet for the complete product information. Answer ¶ 8. Even if this is so, such actions are no substitute for FIFRA's explicit requirement that certain information be included on a label affixed to the product. *See* 7 U.S.C. § 136(p)(1) ("The term 'label' means the written, printed, or graphic matter on, or attached to, the pesticide or device or any of its containers or wrappers."). While it is true that some of the requirements of 7 U.S.C. § 136(q) simply require the inclusion of information on any labeling, whether or not affixed to the container, Respondent told the inspectors during the inspection of the Grand Facility that he only sometimes provides data sheets to customers. *See, e.g.*, CX1 at 6 ("Mr. Wilson said he *sometimes* provides the safety data sheet but recommends his customers Google the product for more information about the rodenticide." (emphasis added)); *see also* 7 U.S.C. § 136(p)(2) ("The term 'labeling' means all labels and all other written, printed, or graphic matter accompanying the pesticide or device at any time; or to which reference is made on the label or in literature accompanying the pesticide device."). Regardless, Respondent points to no significant or probative proposed evidence that would support his position that the data sheets he claimed to distribute to customers included the missing information. *See Anderson*, 477 U.S. at 249 (noting "significant probative evidence tending to support" nonmovant's position necessary to defeat properly supported summary judgment motion).

In defense against the allegations that he unlawfully sold both unregistered and misbranded pesticides, Respondent also makes the affirmative argument that he has, "since he has been doing business for the past 31 years, submitted each year to the EPA headquarters in Washington, D.C. . . . EPA Form 3540-16," which "lists all products distributed, sold or offered for sale and/or held for distribution and/or repackaged and/or relabeled by Respondent," and that "EPA has approved each and every Form 3540-16 submitted by Respondent." Answer ¶ 8. But, as Complainant notes, Respondent's Form 3560-14 simply informs EPA of the pesticides that a production establishment may produce and does not ensure that the establishment's sale of any and all pesticides is in compliance with all statutory and regulatory requirements under FIFRA. Memorandum at 49; *see also* CX14 (Wilson's Pest Control, Inc.'s 2021 Form 3540-16); RX2 (same).

Therefore, there is no genuine factual dispute as to whether Respondent, being subject to FIFRA's requirements, violated Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), by selling misbranded pesticide products when he offered for sale Green Rodenticide Mini-Blocks, Blue Rodenticide Mini-Blocks, Red Rodenticide Mini-Blocks, Brown Rodenticide Mini-Blocks, Contrac Rodenticide Ready-To-Use Place Pacs, Final Rodenticide Ready-To-Use Place Pacs, Talon G

Rodenticide Bait Pack Mini-Pellets, Wilson's Pest Control Professional Growth Regulator, Professional Pest Control Concentrate, and Wilson's Termite & Carpenter Ant Control without including some or all of the labeling information required by FIFRA. Consequently, Complainant's request for an accelerated decision on Counts 11-20 is **GRANTED**.

C. Refusal to Allow Inspection

As noted above, FIFRA makes it unlawful for "any person to refuse to allow any entry, inspection, copying of records, or sampling authorized by this Act." 7 U.S.C. § 136j(a)(2)(B)(iii). The Act goes on to state:

For purposes of enforcing the provisions of this Act, officers or employees of the Environmental Protection Agency . . . are authorized to enter at reasonable times (A) any establishment or other place where pesticides or devices are held for distribution or sale for the purpose of inspecting and obtaining samples of any pesticides or devices

7 U.S.C. § 136g(a)(1). Therefore, for Complainant to be entitled to an accelerated decision on Count 21 as to Respondent's liability for refusing to allow EPA officials to inspect the Woodson Facility, there must be no genuine issue as to the following: (1) the Woodson Facility held pesticides or devices for distribution or sale; (2) EPA officers or employees entered the Woodson Facility at a reasonable time for the purpose of inspecting and obtaining samples of those pesticides or devices; and (3) Respondent refused to allow the inspection.

Complainant has gone a long way to meeting its initial burden here. The proposed evidence shows that the inspectors entered the Woodson Facility at approximately 2:15 p.m. on a Thursday afternoon, at which time "[t]he exterior entry door for the store was propped open with an 'Open' sign indicating that the store was open for business." CX17 at 1; *see also* CX28 at 1. Upon entering the facility, an inspector showed her credentials¹¹ and explained to the woman working behind the counter that they were there to conduct an inspection under Section 12 of FIFRA. CX17 at 1; CX28 at 1. These facts seem to be undisputed, and there is nothing in the proposed evidence to suggest that the timing of the inspectors' entry at the Woodson Facility was unreasonable.

¹¹ FIFRA requires EPA officers and employees to "present . . . appropriate credentials and a written statement as to the reason for the inspection" before undertaking an inspection. 7 U.S.C. § 136g(a)(2). The proposed evidence in this case includes a copy of a "Notice of Inspection" identifying the Woodson Facility as the target of a "for cause" inspection to search for violations of 7 U.S.C. § 136j(a)(1)(A) or 7 U.S.C. § 136j(a)(1)(E). CX29. However, there is no proposed evidence yet in the record that this notice was ever presented by the inspector along with her credentials. I am unaware of any legal precedent addressing whether adhering to 7 U.S.C. § 136g(a)(2)'s requirements is a necessary element for a finding of liability under 7 U.S.C. § 136j(a)(2)(B)(iii) for refusing an inspection. But I need not consider the question further at this time inasmuch as I find below that Complainant is not otherwise entitled to an accelerated decision on the question of Respondent's liability under 7 U.S.C. § 136j(a)(2)(B)(iii).

The proposed evidence also shows that Respondent refused to allow the inspectors to carry out their intended inspection of the premises. After stating their intention to inspect the Woodson Facility, the inspectors were asked to step outside and told multiple times that an inspection would not be permitted without Respondent's attorney present. CX17 at 1; CX28 at 1. The inspectors attempted to satisfy Respondent's demands, going so far as asking if they could come back another time to conduct an inspection with the attorney present. CX17 at 2; CX28 at 1. Rather than scheduling a time for the inspectors to return when Respondent's attorney would be available, Respondent simply continued to insist that he would not permit an inspection without his attorney present.¹² CX17 at 2; CX28 at 1. Faced with Respondent's uncooperative demeanor, the inspectors left without carrying out an inspection. CX17 at 2; CX28 at 1. The fact that Respondent refused to allow the inspection to proceed as intended also seems to be undisputed.

Complainant, however, has not shown that there is no genuine issue as to whether the Woodson Facility held pesticides for distribution or sale. True, the inspectors both indicated in their reports of the attempted inspection that they observed what appeared to be bins full of pesticides marked with a label indicating the names of the pesticides and their prices. CX17 at 1; CX28 at 1-2. This suggests that pesticides were held for sale. But there is also proposed evidence readily apparent in the record that prevents such a conclusion from being reached at this stage of the proceedings. In particular, the inspectors documented in their reports that the woman working at the Woodson Facility advised that the pesticides on display were not for sale but "for her technicians to come into the store when they are in the area to pick up to apply." CX17 at 2. FIFRA, for its part, exempts "the holding or application of registered pesticides or use dilutions thereof by any applicator who provides a service of controlling pests without delivering any unapplied pesticide to any person so served" from the definition of "to distribute or sell." 7 U.S.C. § 136(gg). This is more than the scintilla of evidence necessary to justify an evidentiary hearing. See *BWX Techs., Inc.*, 9 E.A.D. at 76.

To be sure, there is other proposed evidence suggesting that the Woodson Facility held pesticides for sale. Specifically, the proposed evidence includes an investigation report detailing a May 2, 2022 inspection of the Woodson Facility by a pesticide use investigator employed by the Missouri Department of Agriculture. CX10 at 1-2. The state investigator entered the facility to make an undercover purchase of pesticides and was provided with several products meant to address a purported problem with ants and mice in her home. CX10 at 1. This state inspection, however, occurred over a year before the EPA inspectors attempted

¹² Respondent reiterated in his Answer that he had a right to have counsel present during the inspection of the Woodson Facility, and therefore, he did not refuse an inspection by attempting to exercise that right. Answer ¶¶ 16-17. Respondent cites no statutory or regulatory provision that establishes such a right during EPA's execution of an administrative inspection. Nor can Respondent rely on any constitutional right to an attorney. Such rights apply in the criminal context, and even then, they do not attach simply during the execution of a lawful search. See *McNeil v. Wisconsin*, 501 U.S. 171, 177-78 (1991) (explaining 6th Amendment right to counsel attaches upon commencement of criminal prosecution, while 5th Amendment right to counsel attaches during custodial interrogation). Thus, it does not appear that the inspectors had any obligation to wait for Respondent's attorney to be available for an inspection, such that Respondent could lawfully refuse an authorized inspection on the basis that his attorney was not available.

to inspect the Woodson Facility. In the absence of conclusive evidence to the contrary, I must draw the reasonable inference that Respondent changed his practices and no longer sold pesticides at the Woodson Facility when the EPA inspectors arrived on July 27, 2023. See *Anderson*, 477 U.S. at 248. Consequently, because the proposed evidence creates a genuine issue of material fact as to an element of liability under 7 U.S.C. § 136j(a)(2)(B)(iii) for refusing an inspection, Complainant's request for an accelerated decision on Count 21 is **DENIED**.

ORDER

Complainant's Motion for Accelerated Decision as to Liability is hereby **GRANTED IN PART**, and **DENIED IN PART**, as follows:

Complainant's Motion for Accelerated Decision as to Liability is **GRANTED** as to Respondent's liability for Counts 8-20, as discussed above, and Respondent is hereby found liable for those violations of 7 U.S.C. § 136j(a)(1)(A) and (a)(1)(E).

Complainant's Motion for Accelerated Decision as to Liability is **DENIED** as to Respondent's liability for Counts 1-7 and 21, as discussed above.

SO ORDERED.



Susan L. Biro
Chief Administrative Law Judge

Dated: January 17, 2025
Washington, D.C.

In the Matter of Timothy Wilson, d/b/a Wilson's Pest Control, Respondent
Docket No. FIFRA-07-2023-0135

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Order on Complainant's Motion for Accelerated Decision as to Liability**, dated January 17, 2025, and issued by Chief Administrative Law Judge Susan L. Biro, was sent this day to the following parties in the manner indicated below.



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Dated: January 17, 2025
Washington, D.C.