

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of)
)
Hillsborough Chemical Corporation,) Docket No. IF&R-04-093F060-C
)
Respondent)

ORDER DENYING COMPLAINANT'S MOTION FOR ACCELERATED DECISION
AND ORDER SCHEDULING HEARING

A. Accelerated Decision

Complainant, United States Environmental Protection Agency ("EPA"), moves for accelerated decision against Respondent, Hillsborough Chemical Corporation ("Hillsborough"), for a violation of Section 12(a)(2)(G) of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136j (a)(2)(G).¹ EPA alleges that Hillsborough violated FIFRA when it dispensed Chlorine Liquified Gas ("chlorine gas") into a residential swimming pool in a manner inconsistent with that product's labeling. For the reasons set forth below, EPA's motion for accelerated decision is denied and this case is scheduled for hearing.

The background facts are essentially undisputed. Hillsborough services residential swimming pools. As part of its service, Hillsborough applies chlorine gas to the pool water. Answer ¶ 7. This chlorine gas is a pesticide within the meaning of Section 2(u) of FIFRA. Answer ¶ 8. It is applied to the pool water by means of a portable cylinder. Answer ¶ 7.

On March 25, 1992, an EPA inspector observed a Hillsborough pool service technician applying chlorine gas to a residential swimming pool. Answer ¶¶ 9-11. EPA subsequently issued a complaint to Hillsborough for violating FIFRA based upon the manner in which the pool service technician applied the chlorine gas to the pool water.

¹ Section 12(a) of FIFRA in part provides:

- (2) It shall be unlawful for any person-
- (G) to use any registered pesticide in a manner inconsistent with its labeling;

7 U.S.C. § 136j (a) (2) (G).

In the complaint, EPA cited two grounds for the alleged Section 12(a)(2)(G) violation. The first ground was the pool service technician's failure to weigh the chlorine gas being applied to the pool water. Amended Compl. ¶ 15. The second ground was the pool service technician's failure to apply the chlorine gas in a manner that would have limited the chlorine flow rate to a maximum rate of one-half pound per minute. Amended Compl. ¶ 19.

Subsequent to filing the administrative complaint, EPA filed the present motion for accelerated decision. In seeking accelerated decision, however, EPA does not raise the flow rate argument referenced in the amended complaint. It seeks accelerated decision solely on the ground that the pool service technician failed to weigh the chlorine gas at poolside. Accordingly, the only issue before the Court is whether EPA is entitled to accelerated decision on the ground that a failure by Hillsborough to weigh the chlorine gas at poolside constituted a violation of FIFRA.

With respect to this issue, EPA argues that the weight of the chlorine gas should have been determined either by direct scale reading of the cylinder, or by comparing the weight of the cylinder after release of the chlorine into the pool with the latest stamped tare weight.² Amended Compl. ¶ 17. In response, Hillsborough admits that its pool service technician did not weigh the portable cylinder at poolside. It argues, however, that there is no requirement that the pool service technician do so. Answer ¶ 20.

Whether the pool service technician's failure to weigh the chlorine gas at poolside violated Section 12(a)(2)(G) of FIFRA rests upon the specific handling requirements for that pesticide. In that regard, the EPA label affixed to the portable cylinder containing the chlorine gas states:

DIRECTIONS FOR USE
GENERAL CLASSIFICATION

It is a violation of Federal law to use this product in a manner inconsistent with the labeling.... Handle and use only in accordance with practice recommended in the Chlorine Manual published by the Chlorine Institute, Inc.,

² "Tare weight" refers to the weight of the cylinder and valve. It does not include the weight of the valve protective housing. Compl. Proposed Ex. 9 ("The Chlorine Manual"), 2.1.2, at 7.

Compl. Proposed Ex. 8.³

EPA argues that a plain reading of the Chlorine Manual, referenced by the chlorine gas label, supports its position. In that regard, EPA cites to the following passage from the Chlorine Manual:

2.8.4 Weighing

Because chlorine in a container is a compressed, liquefied gas, the pressure in a container depends on the temperature of the chlorine.... The pressure does not indicate the amount of chlorine in the container. Container contents can be determined accurately only by weight. The use of scales that continuously indicate the weight of the container as the contents are being withdrawn is recommended. The amount of chlorine remaining is determined either by direct scale reading or by comparing the present weight with the latest stamped tare weight.

Compl. Proposed Ex. 9, at 11 (EPA emphasis). See EPA Mem. and Pts. of Auth. at 7-9. In short, EPA essentially contends that chlorine gas containers are to be weighed whenever chlorine gas is released and the fact that the release might occur at poolside is of no consequence.

EPA is correct in stating that the Chlorine Manual speaks "in general terms about the withdrawal of chlorine from containers." EPA Mem. and Pts. of Auth. at 8 (EPA emphasis). For purposes of accelerated decision in this case, however, the provisions of the Chlorine Manual relied upon by the complainant are far too general upon which to base a finding of a violation of FIFRA. This is particularly so in light of the arguments raised by Hillsborough.

Hillsborough "readily agrees that it must follow the practice recommended in the Chlorine Manual published by the Chlorine Institute, Inc., as set forth on its EPA label." Opp. to Compl. Mot. for Acc. Dec. at 14. It contends, however, that the Chlorine Manual requires the use of scales whenever chlorine gas is withdrawn from a container at the "fill site", and not at "poolside". Ibid. Like EPA, Hillsborough asserts that its interpretation is supported by the Chlorine Institute, the author of the Chlorine Manual.

³ The label also set forth the name and address of Hillsborough, as well as the EPA registration number for the chlorine gas.

In addition, Hillsborough argues that the EPA has based its finding of the FIFRA violation not on the provisions of the Chlorine Manual, but rather on the provisions of Pamphlet 81, another document published by the Chlorine Institute. Opp. to Compl. Mot. for Acc. Dec. at 15. Pamphlet 81 is titled, "Safety Guidelines For Residential Swimming Pool Chlorination."

While the Chlorine Manual might be general in discussing the weighing of chlorine gas containers, Pamphlet 81 is quite specific. Under the heading, "Application Of Chlorine", Pamphlet 81 in part states, "[a]ccurate scales are required to measure the calculated amount of chlorine withdrawn from cylinders at pool-side." ¶ 8.2.⁴

Nonetheless, the significance of Pamphlet 81, if any, to this case is unclear. For example, this document was attached by EPA in its prehearing exchange to Proposed Exhibit 9, the Chlorine Manual. Yet, in seeking accelerated decision, EPA does not even reference this document.⁵ Moreover, Hillsborough argues that Pamphlet 81 proposes unsafe practices, is no longer followed by the Chlorine Institute, and will be replaced by an updated safety pamphlet, Pamphlet 97. Opp. to Compl. Mot. for Acc. Dec. at 15-17; Resp. Pre. Exch. at 4.

In sum, given the unresolved issues discussed above, accelerated decision is not appropriate. Accordingly, EPA's motion for accelerated decision is denied.

B. Order Scheduling Hearing

This case will be heard at 9:00 a.m. on March 7, 1996, in Odessa, Florida. The Regional Hearing Clerk is directed to make arrangements for reporting services and for a suitable hearing room and to inform the parties and the undersigned of its location.

Carl C. Charneski

Carl C. Charneski
Administrative Law Judge

⁴ Pamphlet 81 also states that the system for applying chlorine to the pool water should be designed to limit the chlorine flow rate from the cylinder to a maximum of one-half pound per minute. Ibid.

⁵ In its Prehearing Exchange, EPA indicates that this document "will be offered to show the recommendations of The Chlorine Institute, Inc. regarding procedures applicable to this case." Pre. Exch. at 4.

Date Issued: December 4, 1995
Washington, D.C.

In the Matter of Hillsborough Chemical Corporation, Respondent
Docket No. IF&R-04-93F060-C

Certificate of Service

I certify that the foregoing **Order Granting Complainant's Motion For Accelerated Decision and Order Scheduling Hearing**, dated December 4, 1995, was sent in the following manner to the addressees listed below.

Original by Regular Mail to:

Julia P. Mooney
Regional Hearing Clerk
U.S. EPA
345 Courtland Street, N.E.
Atlanta, GA 30365

Copy by Regular Mail to:

Attorney for Complainant:

Lynda C. Crum, Esquire
Assistant Regional Counsel
U.S. EPA
345 Courtland Street, N.E.
Atlanta, GA 30365

Attorney for Respondent:

Karen Lowell, Esquire
Attorney at Law
10709 Cleary Boulevard
Suite 308
Plantation, FL 33324


Maria Whiting
Legal Staff Assistant

Dated: December 4, 1995