

5/19/92

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

FILED

BEFORE THE ADMINISTRATOR

MAY 26 1992

ENVIRONMENTAL PROTECTION AGENCY
REGION IX
HEARING CLERK

IN THE MATTER OF)	
)	
GENERAL CONTROL COMPANY)	Docket No. FIFRA-09-0757-C-91-02
INCORPORATED,)	
)	
Respondent)	

ORDER ON DEFAULT

I. Preliminary Statement

This civil administrative proceeding for the assessment of a civil penalty was initiated by the issuance of a complaint by the United States Environmental Protection Agency (EPA or Complainant) pursuant to Section 14 (a) of the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136 et seq., (FIFRA). The complaint charges, in two counts, that General Control Company, Incorporated (General Control or Respondent) has violated Sections 12(a)(2)(G) and 3(c)(2)(D) of FIFRA, 7 U.S.C. §§ 136j(a)(2)(G) and 136a(c)(2)(D). More specifically, in Count I Respondent is charged with using a pesticide in a manner inconsistent with its labeling in violation of Section 12(a)(2)(G) of FIFRA. In Count II Respondent is charged with violating the Section 3(c)(2)(D) registration exemption allowed under FIFRA by failing to submit or cite data pertaining to a purchased herbicide or offer to pay reasonable compensation for the use of any such data.

On July 2, 1989, an inspector from the Arizona Office of State Chemist conducted a "for cause" producer establishment inspection at Respondent's facility located in Tuscon, Arizona. The inspection was in response to a claim made by a representative of Monsanto Company that Respondent was purchasing drums of Monsanto's end-use Roundup and reformulating that pesticide into their products, Doomsday Ready-To-Use and Doomsday Concentrate, registered for manufacture from the Monsanto Company's product known as Shackle C and not from Roundup. As a result of that inspection the complaint herein was issued by EPA.

II. Initial Findings of Fact

1. On October 2, 1990, the Director, Air and Toxics Division, EPA, Region 9 issued a Complaint and Notice of Opportunity for Hearing (Complaint) to Respondent pursuant to Section 14(a) of FIFRA alleging that Respondent had violated Sections 3(c)(2)(D) and 12(a)(2)(G) of FIFRA [7 U.S.C. §§ 136a(c)(2)(D) and 136j(a)(2)(G)] by its use of the end-use product, Roundup, in the formulation and reformulation of the Respondent's Doomsday Ready-To-Use and Doomsday Concentrate products. The complaint was served by certified mail, return receipt requested, on Jeanette O'Malley, General Control Company, Inc., 3334 E. Pennsylvania Avenue, Tuscon, AZ 85714.

2. The complaint proposed the assessment of a civil penalty of \$7,380.00 that was calculated in accordance with Section 14(a) of FIFRA [7 U.S.C. § 1361(a)] and the Guidelines for the Assessment of Civil Penalties, 39 Fed. Reg. 27711 (July 31, 1974).

3. On October 25, 1990, counsel for Respondent filed an answer to the charges in the Complaint, in which Respondent admitted that the Roundup had been used in the formulation and reformulation of the Doomsday products as alleged, but alleged that Respondent did not know that such use of the Roundup was a violation of FIFRA.

4. On March 25, 1991, the Presiding Chief Administrative Law Judge issued a directive requiring the parties to submit their respective prehearing exchanges on June 4, 1991, if a settlement had not been reached by that date. Both parties were served via certified mail, return receipt requested.

5. At the request of Complainant the parties were granted an extension of time to June 28, 1991 to file a consent agreement and final order or, in lieu thereof, the prehearing exchange.

6. On June 28, 1991, Complainant filed a motion to amend the complaint to reflect a recalculation of the proposed penalty in the matter. The new proposed penalty was set at \$9,000 pursuant to FIFRA Section 14(a) and the FIFRA Enforcement Response Policy of July 2, 1990, which had superseded the Guidelines for the Assessment of Civil Penalties, 39 Fed. Reg. 27711 (July 31, 1974).

7. On July 2, 1991, counsel for Respondent filed a notice of withdrawal as counsel for General Control because General Control "will not communicate with counsel and give counsel authority to proceed in this case."

8. On July 10, 1991, counsel for Complainant submitted a status report stating that a telephone conversation with

Ms. Jeanette M. O'Malley had revealed that she had "sold her interest in Respondent corporation to Gregory Allen Harrington of Phoenix or Scottsdale, Arizona."

9. On July 19, 1991, the Presiding Chief Administrative Law Judge issued an order directing Complainant to serve copies of all documents which had been filed in the case, including, but not limited to, the initial complaint, the motion to amend the complaint and the amended complaint as well as Complainant's prehearing exchange, upon Mr. Harrington. Complainant complied with this order on August 7, 1991.

10. On August 14, 1991, the Presiding Chief Administrative Law Judge issued an order granting Mr. Harrington, on behalf of Respondent to file a response to Complainant's motion to amend the complaint no later than August 30, 1991.

11. No response was received from Respondent General Control Company or from Mr. Harrington on behalf of Respondent. Therefore, on September 25, 1991, the Presiding Chief Administrative Law Judge issued an order granting the motion to amend the complaint and establishing new prehearing exchange dates of October 21, 1991, for the prehearing exchange and October 31, 1991, for replies thereto.

12. On October 10, 1991, Complainant filed a status report stating that it had "reason to believe that the Respondent corporation is in the process of disposing of certain of its assets including the right to either manufacture, distribute or sell certain products registered with the United States Environmental Protection Agency. There is every reason to believe too, that the

corporate shell continues to exist with Mr. Harrington as President thereof. Mr. Harrington has only acknowledged his relationship to the corporation by telephone."

13. On December 12, 1991, the Presiding Chief Administrative Law Judge issued an order to show cause directing the Respondent to show cause why the prehearing exchange, or a motion for extension of time in which to file the prehearing exchange, had not been filed. The order directed Respondent's attention to 40 C.F.R. § 22.17(a) which provides, in pertinent part: "A party may be found to be in default. . . sua sponte, upon failure to comply with a prehearing or hearing order of the Presiding Officer" The order was served on the parties by both regular first-class mail and certified mail, return receipt requested. The signed return receipt was received from Respondent. No response from Respondent was forthcoming.

14. On January 28, 1992, the Presiding Chief Administrative Law Judge issued an order directing Complainant to draft and submit a proposed default order. The order was served on the parties by both regular first-class mail and certified mail, return receipt requested. The order which had been sent by certified mail to Respondent at 3250 South Dodge, Unit No. 5, Tuscon, AZ 85711 was returned, marked "REFUSED" and with a postal service label showing a new address for General Control Co: 7493 E. Timberlane Ct., Scottsdale, AZ 85258-2006. The order which had been sent by regular first-class mail was not returned.

15. On February 20, 1992, the order of January 28, 1992, was once again sent to Respondent by both regular first-class mail and certified mail, return receipt requested. On this occasion it was sent to the Scottsdale address. The copy which had been sent by certified mail was once again returned with the envelope marked "REFUSED". The order which had been sent by regular first-class mail was not returned.

III. Conclusions of Law

1. Respondent has failed to comply with the order of the Presiding Chief Administrative Law Judge to file its prehearing exchange, and has failed to comply with the Presiding Chief Administrative Law Judge's Order to Show Cause, or in any other way to show good cause as to why its prehearing exchange has not been filed, and is therefore in default pursuant to 40 C.F.R. § 22.17(a).

2. Pursuant to 40 C.F.R. § 22.17, said default constitutes an admission by Respondent of all the facts alleged in the Complaint and a waiver of Respondent's right to a hearing on such factual allegations.

Therefore, I make the following:

IV. Additional Findings of Fact and Conclusions of Law as Alleged by Complainant

1. Respondent is incorporated and registered to do business in Arizona and is a "person" as that term is defined in Section 2(s) of FIFRA [7 U.S.C. § 136(s)]. Respondent conducts its

business as General Control Company, Incorporated, at 3334 E. Pennsylvania St., Tucson, AZ 85714 (hereinafter "Facility").

2. At the Facility, Respondent produces, distributes, sells, offers for sale, holds for sale, ships, delivers for shipment, receives and delivers, offers to deliver in commerce or some combination thereof the products Doomsday Ready-to-Use (EPA Reg. No. 10583-14) and Doomsday Concentrate (EPA Reg. No. 10583-15).

3. Doomsday Ready-to-Use and Doomsday Concentrate are pesticides as defined in Section 2(u) of FIFRA [7 U.S.C. § 136(u)] in that both product labels make the claim that the products will "kill . . . Nutsedge and unwanted Bermudagrass." Doomsday Ready-to-Use and Doomsday Concentrate have been registered with EPA as pesticides and assigned the EPA Registration Number 10583-14 and EPA Registration Number 10583-15, respectively.

4. Roundup is a pesticide as defined in Section 2(u) of FIFRA [7 U.S.C. § 136(u)] in that its label makes the claim that the product is "for the control or destruction of most herbaceous plants." Roundup has been registered with the EPA as a pesticide (EPA Reg. No. 524-308).

5. Any registrant, commercial applicator, wholesaler, dealer, retailer or other distributor who violates any provision of FIFRA (7 U.S.C. § 136 et seq.) may be assessed a civil penalty by the Administrator of the EPA of up to \$5000 for each offense. Section 14 of FIFRA (7 U.S.C. § 136l). The EPA Administrator's authority has been delegated to the Regional Administrator, EPA Region 9, and redelegated to the Director of the Air and Toxics

Division, EPA Region IX (EPA Order 1280-4; EPA Regional Order R1260.27).

6. Section 12(a)(2)(G) of FIFRA states that it shall be unlawful for any person "to use any registered pesticide in a manner inconsistent with its labeling" as that term is defined in Section 2(ee) of FIFRA.

7. The Respondent purchased Roundup, including but not limited to purchases on May 3 and July 10, 1989, for formulation and reformulation of same as Doomsday Ready-to-Use and Doomsday Concentrate.

8. Monsanto's Roundup herbicide (EPA Reg. No. 524-308) is an end-use product in that its label does not bear instructions for reformulation and does not allow reformulation of the product.

9. On July 20, 1989, an inspector from the State of Arizona, duly designated by the U.S. EPA Administrator, conducted an inspection of the Facility which revealed that Respondent had purchased Roundup, including but not limited to purchases on May 3 and July 10, 1989, for formulation and reformulation of same as Doomsday Ready-to-Use and Doomsday Concentrate, in violation of FIFRA Section 12(a)(2)(G).

10. "[Any] applicant for registration of a pesticide [under Section 3 of FIFRA] who proposes to purchase a registered pesticide from . . . [a] producer [of that pesticide] in order to formulate such purchased product into the pesticide that is the subject of the application [for registration] shall be required to --(1)

submit or cite data pertaining to such purchased product" FIFRA Section 3(c)(2)(D).

11. Respondent's Doomsday Ready-to-Use and Doomsday Concentrate product registration numbers were issued pursuant to the authority of FIFRA Section 3(c)(2)(D). [7 U.S.C. § 136j(c)(2)(D)].

12. Respondent bought Shackle C (EPA Reg. No. 524-339) herbicide from, and under contract with, Monsanto for use in the production of their Doomsday Ready-to-Use and Doomsday Concentrate products.

13. The contract for Respondent to purchase Shackle C herbicide from Monsanto was terminated on December 31, 1986.

14. On July 20, 1989, an inspector from the State of Arizona conducted an inspection of the Facility and found that the Respondent purchased Roundup from a nonproducer on several occasions after December 31, 1986 for reformulation into its Doomsday Ready-To-Use and Doomsday Concentrate products.

15. The Respondent failed to submit or cite data pertaining to such purchased product or offer to pay reasonable compensation for the use of any such data, in violation of 3(c)(2)(D) of FIFRA.

V. Discussion and Ultimate Conclusion

Respondent's answer to the Complaint does not raise any matter which could support a decision that Complainant has failed to establish a prima facie case or could justify the dismissal of the Complaint. An examination of the prehearing exchange documents submitted by Complainant buttresses the allegations in the

Complaint that Respondent violated Sections 12(a)(2)(G) and 3(c)(2)(D) of FIFRA, 7 U.S.C. §§ 136j(a)(2)(G) and 136a(c)(2)(D), as alleged. I therefore find that Respondent violated Sections 12(a)(2)(G) and 3(c)(2)(D) of FIFRA, 7 U.S.C. §§ 136j(a)(2)(G) and 136a(c)(2)(D).

VI. The Penalty

Section 14(a)(4) of FIFRA, 7 U.S.C. § 1361(a)(4), states that "[i]n determining the amount of the penalty, the Administrator shall consider the appropriateness of such penalty to the size of the business of the person charged, the effect on the person's ability to continue in business, and the gravity of the violation." Section 14(a)(1), 7 U.S.C. § 1361(a)(1) limits the civil penalty for any "dealer, retailer or other distributor" to \$5,000 for each offense.

Section 22.27(b) of the Consolidated Rules of Practice (40 C.F.R. § 22.27(b)) states, in pertinent part:

If the Presiding Officer determines that a violation has occurred, the Presiding Officer shall determine the dollar amount of the recommended civil penalty to be assessed in the initial decision in accordance with any criteria set forth in the Act relating to the proper amount of a civil penalty, and must consider any civil penalty guidelines issued under the Act. If the Presiding Officer decides to assess a penalty different in amount from the penalty recommended to be assessed in the complaint, the Presiding Officer shall set forth in the initial decision the specific reasons for the increase or decrease.

The Agency has published civil penalty guidelines in the Enforcement Response Policy (ERP) for FIFRA (July 2, 1990).

Computation of the penalty amount under the ERP is determined in a five stage process. These stages are: (1) determination of gravity or "level" of the violation; (2) determination of the size of business category for the violator; (3) use of civil penalty matrices to determine the dollar amount associated with the gravity level of violation and the size of business category of the violator; (4) further gravity adjustments of the base penalty in potential harm to human health and/or the environment, the compliance history of the violator, and the culpability of the violator; and (5) consideration of the effect that payment of the total civil penalty will have on the violator's ability to continue in business.

Utilizing these guidelines and the five stage process involved, EPA calculated the proposed penalty for each violation. I turn now to the five stage process in the ERP.

(1) Gravity or level of the violation: The level for the violation of Section 12(a)(2)(G) was determined to be 2; the level for the violation of Section 3(c)(2)(D) was not indicated on EPA's penalty calculation worksheet.

(2) Size of Respondent's business: The size of the business is determined from Respondent's gross revenues from all revenue sources during the prior calendar year. EPA set the size of the business at II or with gross revenues between \$300,001 and \$1,000,000 per year. The size of Respondent's business was determined by obtaining a copy of a Dunn Report printed June 28, 1990 which shows that Respondent's gross sales were between

\$500,000 to \$800,000. A copy of Respondent's Federal tax return for the fiscal period ending September 30, 1988, shows gross sales of \$516,666.

(3) Base Penalty Determination: Utilizing the Civil Penalty Matrix for FIFRA Section 14(a)(1), a Gravity Level 2 and a Category I Business Size produce a base penalty figure of \$4,000; the base penalty for the Section 3(c)(2)(D) was set at \$5,000.

(4) Gravity Adjustments: The ERP lists five gravity adjustment factors: (a) pesticide toxicity; (b) harm to human health; (c) environmental harm; (d) compliance history of the violator; and (e) culpability of the violator. EPA assigned the following values to these factors:

a.	Pesticide Toxicity	1
b.	Human Harm	3
c.	Environmental Harm	3
d.	Compliance history	0
e.	Culpability	4
f.	Total Gravity	11
	Adjustment Value	
	(add items 7a - 7e)	

With the total falling in the range of 8 to 12 points, no adjustment (increase or decrease) in the matrix penalty amount was appropriate.


(5) Ability to Continue in Business: No adjustment was made for this factor.

Pursuant to 40 C.F.R. § 22.17, the penalty of \$9,000 proposed in the Complaint shall become due and payable by Respondent without further proceedings sixty (60) days after the issuance of this Default Order.

ORDER

Under the authority of FIFRA and the Consolidated Rules of Practice, 40 C.F.R. Part 22, I hereby issue a Default Order in this matter. Within sixty (60) days of the date of this Order, Respondent shall submit by cashier's or certified check, payable to Treasurer, United States of America, payment in the amount of nine thousand dollars (\$9,000) addressed to:

EPA - Region 9
(Regional Hearing Clerk)
P.O. Box 360863M
Pittsburgh, PA 15251


Henry B. Frazier, III
Chief Administrative Law Judge

Dated:

May 19, 1992
Washington, DC

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CERTIFICATE OF SERVICE

I hereby certify that the original of the foregoing INITIAL DECISION AND DEFAULT ORDER, in the matter of General Control Company, Inc. (FIFRA-09-0757-C-91-02), issued by Chief Administrative Law Judge Henry B. Frazier III, has been filed with the Regional Hearing Clerk, and a copy was served on each of the parties, addressed as follows, by mailing first class, or by hand delivering, as indicated below:

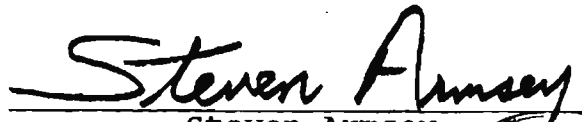
Gregory Allen Harrington
GENERAL CONTROL CO., INC.
3250 South Dodge, Unit #5
Tucson, Arizona 85711

First Class Mail
P 879 024 574

David M. Jones, Esq.
Office of Regional Counsel
U.S. EPA, REGION 9
75 Hawthorne Street
San Francisco, CA. 94105

Hand Delivered

Dated at San Francisco, California, this 15th day of June, 1992.


Steven Armsey
Regional Hearing Clerk
EPA, Region 9