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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

| | | |
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| In the matter of |) | |
| |) | |
| The Bullen Companies, Inc., |) | IF&R Docket Nos. |
| III-470-C, |) | |
| |) | III-471-C, III-472-C |
| & III-473-C |) | |
| Respondent |) | |

INITIAL DECISION

By: Carl C. Charneski
Administrative Law Judge

Issued: November 29, 1999
Washington, D. C.

Appearances

For Complainant: Benjamin D. Fields, Esq.
Janet Sharke, Esq.
Region III
U. S. Environmental Protection Agency
Philadelphia, PA

For Respondent: Richards H. Jarden
Chairman
The Bullen Companies, Inc.
Folcroft, PA

I. Statement of the Case

These consolidated cases arise under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"). 7 U.S.C. § 136 *et seq.* The complainant is the U.S. Environmental Protection Agency ("EPA"). The respondent in each case is The Bullen Companies, Inc. ("Bullen"), a Pennsylvania corporation.⁽¹⁾ EPA alleges that Bullen committed 12 violations of the Federal Insecticide, Fungicide, and Rodenticide Act.⁽²⁾ The alleged violations involve, in one way or another, the sale or distribution of pesticides. The agency seeks civil penalties totaling \$38,900 for these FIFRA violations.⁽³⁾

In an order dated July 27, 1999, EPA was awarded accelerated decision, *i.e.*, summary judgment, with respect to six of the twelve counts. See 40 C.F.R. 22.20. EPA was awarded judgment as to liability only. The civil penalty to be assessed for these six violations was left to be determined at hearing, along with the remaining six counts as to which EPA was not awarded accelerated decision. This hearing was held on August 11, 1999, in Philadelphia, Pennsylvania.

As discussed below, with respect to Counts IV, V, VI, VII, VIII and IX of Docket Number III-472-C, EPA has failed to prove a violation of FIFRA. Accordingly, these counts are *dismissed*. As for the six counts as to which EPA was awarded accelerated decision, a civil penalty totaling \$17,900 is assessed against Bullen.

II. Discussion

A. Liability: A Review Of The Six Counts As To Which EPA Was Awarded Accelerated Decision

Docket No. III-470-C

This docket number involves only one count. Bullen was held to have violated Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), for selling an adulterated pesticide. Specifically, Bullen is the registrant for the pesticide "Residual Insect Spray II Contains Pyrenone and Diazinon." Clausen Marketing Associates, Inc., is the supplemental distributor of this product under the brand name "CMA Insect Eliminator Carpet Water-Based Insect Spray and Deodorant." The label for this pesticide states that the product contains 0.5% Diazinon. Ans. ¶¶ 6, 7 & 13.

In November of 1993, an Indiana state inspector conducted an inspection of the American Sanitary Supply Company. During the inspection, the inspector collected samples of the pesticide, CMA Insect Eliminator. These samples were sent to the state laboratory for analysis. The inspector also obtained invoices establishing that Clausen Marketing Associates, Inc., was the distributor of the CMA Insect Eliminator. (Neal Declaration.)

The results of the laboratory analysis showed "no detectable levels of Diazinon." (Lu Declaration.) Thus, because the product did not contain the 0.5% Diazinon as represented on the product label, a violation of Section 12(a)(1)(E) was established. As the registrant of the pesticide, Bullen is liable for this violation. 40 C.F.R. 152.132.

Docket No. III-471-C

This docket number also involves only one count, another violation of FIFRA Section

12(a)(1)(E), for sale of an adulterated pesticide. Again, Bullen is the registrant for the pesticide product "Water Base Residual Insect Spray II Contains Pyrenone and Diazinon." Airex Laboratories, a name used by Bullen, is the supplemental distributor of this pesticide under the brand name "AIRX 55 Residual Insect Spray." Ans. ¶¶ 4, 7 & 8.

In September of 1995, a California state inspector conducted an inspection of the Sierra Janitorial Supply facility. The inspector collected a sample of the AIRX 55 pesticide and, as in the previous case, forwarded it to the state laboratory for analysis. (Miller Declaration.)

Two separate analyses were performed on the AIRX 55 sample. The results of one analysis showed that the sample contained 0.012% Diazinon, or approximately 98% less than the level of 0.5% listed on the product label. (Lim Declaration.) The other laboratory analysis showed that the sample contained 0.013% Diazinon, or approximately 97% less than the level of 0.5% listed on the product label. (Chuek Declaration.) Based upon these laboratory results, a violation of Section 12(a)(1)(E) was established. As the registrant of the involved pesticide, Bullen is liable for the violation. 40 C.F.R 152.132.

Docket No. III-472-C

Only two of the eight counts arising under this docket number were resolved by way of accelerated decision. Both counts alleged violations of FIFRA Section 12(a)(1)(E). (The six counts not so resolved are discussed, *infra*.)

Count I involves the sale of a misbranded pesticide. Bullen violated Section 12(a)(1)(E) because the label of the pesticide, "Solar System Day-Lite," did not include the name and address of the producer, registrant, or the person for whom the product was produced. (Catton Declaration.) Section 2(q)(2)(C)(i) of FIFRA provides that a pesticide is misbranded if its label does not contain this information. 7 U.S.C. § 136(q)(2)(C)(i). This violation was discovered in November, 1993, by California state inspectors.

Count III also involves the sale of a misbranded pesticide. In August of 1995, a Pennsylvania state inspector conducted an inspection of the Bullen facility. The inspector obtained a sample of a product bearing EPA Registration Number 1459-74-44089. This product did not contain the name that was registered with EPA. The label of this product read, "AIRX 80 Sanitizing/Deodorizing Carpet Cleaner for Extraction and Bonnet Cleaning." The EPA registered name, however, is "AIRX 80 Sanitizing/Extraction Type Carpet Shampoo With Airicide Odor Counteractant." Thus, according to Section 2(q)(2)(C)(ii) of FIFRA, this product was misbranded. By selling or distributing a misbranded pesticide, Bullen violated Section 12(a)(1)(E). See Hudson Declaration.

Docket No. III-473-C

The two counts at issue in this docket number stem from a California state inspection of Mission Kleensweep Products, Inc., in September of 1993. In Count I, EPA alleged a violation of FIFRA Sections 12(a)(1)(C) & (E). It asserted that the pesticide "Sani-Brite Sanitizer" was adulterated, and that it had a composition which differed from its registered composition. Through product sampling and laboratory analysis, EPA showed that the level of total quaternary ammonium compounds in Sani-Brite Sanitizer was between 93.5% to 94.5% less than the level stated on the product label. (Leal, Altemero & Lim Declarations.) Accordingly, EPA established that Bullen violated Sections 12(a)(1)(C) and (E) as alleged in the complaint. See Ans. ¶ 20.

In Count II, EPA charged that Bullen violated Section 12(a)(1)(E) of FIFRA on the ground that the pesticide "Sani-Brite" was misbranded. EPA proved the violation by showing that the name appearing on the label was different from the product's approved registration name. In that regard, the label read: "Cleaner Sanitizer Deodorizer." The EPA-approved name for the product is "Sani-Brite Carpet Extraction Concentrate." Accordingly, EPA established a Section 12(a)(1)(E) violation.

B. Liability: Analysis Of The Remaining Six Counts

The six counts as to which EPA was not granted summary judgment are contained in Docket Number III-472-C. Counts IV, V, and VI involve the product "AIRX 22," while Counts VII, VIII, and IX involve the product "AIRX 60." In each of the six counts, EPA alleges a violation of FIFRA Section 12(a)(1)(A). This statutory provision makes it unlawful for a person to distribute or sell a pesticide that is not registered with the EPA.

Here, it is undisputed that Bullen distributed or sold the products AIRX 22 and AIRX 60. It is also undisputed that Bullen did not register these products as pesticides with EPA. The key inquiry, therefore, is whether AIRX 22 and AIRX 60 are pesticides, thereby triggering the registration provisions of FIFRA. EPA claims that these products are pesticides and that respondent violated FIFRA in not registering them. Bullen claims that the products are not pesticides and that, therefore, they needn't be registered. EPA has the burden of proof on this issue.

Surprisingly, EPA called no witnesses to explain just how Bullen violated the Federal Insecticide, Fungicide, and Rodenticide Act through its distribution and sale of AIRX 22 and AIRX 60. In fact, EPA called only one witness at the hearing. The testimony of that witness was limited to the agency's views concerning the civil penalty to be assessed against respondent. See Tr. 48.⁽⁴⁾ Instead, EPA essentially rested its case with respect to the six counts involving AIRX 22 and 60 upon a stipulated record. See Jt. Ex. 1 & Jt. Ex. 2. These stipulations primarily involve the admission of certain exhibits and declarations into evidence. Tr. 48, 51-52.

EPA believes that the stipulated exhibits, for the most part consisting of product labels and product literature, and the related declarations establish that AIRX 22 and AIRX 60 are pesticides. EPA's reliance upon this stipulated record is misplaced. As discussed below, the subject labels and literature, upon which the complainant almost exclusively relies, do not show that AIRX 22 and AIRX 60 are pesticides.⁽⁵⁾

Analysis of the liability issue begins with the definitions contained in the Federal Insecticide, Fungicide, and Rodenticide Act. Section 2(u) defines the term "pesticide" as "any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest." 7 U.S.C. § 136(u). Section 2(t) defines the term "pest" as "(1) any insect, rodent, nematode, fungus, weed, or (2) any other form of terrestrial or aquatic plant or animal life, or virus, bacteria, or other micro-organisms ... which the Administrator declares to be a pest." 7 U.S.C. § 136(t). In addition to these statutory definitions, 40 C.F.R. 152.15 ("Pesticide products required to be registered") provides, "[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."

EPA submits that AIRX 22 and AIRX 60 are pesticides because Bullen made "pesticidal claims" in marketing these products. In that regard, EPA cites to the product

labels of AIRX 22 and AIRX 60, as well as to product literature known as "product sheets."⁽⁶⁾ According to complainant, it is through these product labels and product sheets that Bullen "claimed, stated, or implied" that AIRX 22 and AIRX 60 "could or should be used as pesticides." EPA Br. at 7.⁽⁷⁾

The starting point in EPA's analysis is Complainant's Exhibit 33, respondent's general product sheet for its AIRX product line. In EPA's view, the "crucial paragraph" of this general product sheet reads as follows:

The treatment for relief of a foul odor can differ depending upon its cause. So although every Airex product contains the unique Airex odor counteractant, that is part of the "round peg in the square hole" concept, [⁽⁸⁾] each product counteracts malodors in other ways as well. For instance, it is obvious that wherever possible, the first step in eliminating a foul odor is to remove the source of the smell. Airex products do just that. Some are absorbent materials, others contain powerful germicides to kill putrefactive bacteria that will continue to radiate foul odors until completely eliminated.

Compl. Ex. 33.

While conceding that this general product sheet does not specifically mention either AIRX 22, or AIRX 60, EPA argues that it makes pesticidal claims on behalf of all the AIRX products. EPA Br. at 15. Unable to sustain this argument on the basis of a plain reading of Exhibit 33, EPA takes a sentence-by-sentence approach in arguing that this general product sheet implies and infers that AIRX 22 and AIRX 60 are pesticides.

First, EPA cites to the statement that "each product counteracts malodors in other ways as well." (EPA's emphasis.) EPA asserts that this language means that in addition to the non-pesticidal "round peg in the square hole" approach, every AIRX product combats odors in at least one other way. In EPA's view, this opens the door to show that the additional way in which AIRX 22 and AIRX 60 combats odors is in their role as pesticides.

Second, EPA cites to the phrase that "it is obvious that wherever possible, the first step in eliminating a foul odor is to remove the source of the smell[,] Airex products do just that." (EPA's emphasis). EPA argues that "the language cannot be more clear: Airex products remove the source of the smell." EPA further argues that because there is no limiting language of any kind, it is reasonable to conclude that all AIRX products remove the source of the smell.

Third, EPA cites to the manner in which the AIRX products attack this source. In that regard, "[s]ome are absorbent materials, others contain powerful germicides to kill putrefactive bacteria that will continue to radiate foul odors until completely eliminated." With respect to this point, EPA believes it noteworthy that Bullen's chairman testified that AIRX 22 and AIRX 60 do not remove the source of the smell by cleaning (Tr. 251), and that nothing on the product labels or in related product literature claim that they contain absorbents.

Finally, EPA focuses upon the general product sheet's language that "putrefactive bacteria ... will continue to radiate foul odors until completely eliminated." EPA concludes: "If any particular AIRX product is claimed to eliminate foul odors from putrefactive bacteria, and if it is claimed that such odors will continue unless the bacteria is 'completely eliminated,' then elementary logic would lead to the inference that such product must 'completely eliminate' the bacteria. The General Product Sheet is very clear as to how this is done in the AIRX product line: such product would 'contain powerful germicides to kill putrefactive bacteria.'" EPA Br.

at 15-16.

EPA's strained interpretation of Exhibit 33 is not persuasive. Complainant reads too much into what is nothing more than a "general product sheet." At best, a plain reading of the critical passage cited by EPA supports the proposition that *some*, but not all, of Bullen's AIRX product line are pesticides. Indeed, respondent does not even dispute this point.⁽⁹⁾ The fact of the matter is that Exhibit 33 does not attribute pesticidal characteristics either to AIRX 22 or to AIRX 60; nor does it imply that to be the case. In fact, Exhibit 33 is silent on the matter. It doesn't rule in these two products as pesticides, and it doesn't rule them out. It states only that all AIRX products combat odors, and that some of the AIRX products combating odors are pesticides.

Moreover, the testimony of Bullen's chairman also does not, as EPA claims, support the proposition that AIRX 22 and 60 are pesticides. In that regard, EPA cites to the testimony of Richards Jarden at transcript pages 249 and 251. A reading of this testimony, however, shows it to be inconclusive.

Next, EPA argues that the labels and product sheets for AIRX 22 and AIRX 60 contain language showing that each is a pesticide. As for AIRX 22, EPA notes that Complainant's Exhibits 31 and 32, the labels for this product's gallon size and quart size containers, state that the product will "eliminate airborne odors" and "eliminate odors at their source." EPA Br. at 16 (EPA's emphasis). Complainant further notes that the gallon size label also states that AIRX 22 "removes odors from bacterial growth [and] decay." *Ibid.*

EPA also believes it significant that language contained in the gallon size label tracks language from the AIRX general product sheet. Specifically, EPA focuses upon the gallon size label's description of AIRX 22 as "a high intensity concentration of glycols, quaternary ammonium compounds and exclusive *Airicide*® odor counteractants that erase malodors and prevents their return." EPA Br. at 16, citing to Compl. Ex. 31. Of this trio, EPA recognizes that glycols and *Airicide* odor counteractants may have non-pesticidal functions. As for the quaternary ammonium compounds, however, it concludes, "[b]y stating that these quaternary ammonium compounds are designed to control odors from bacterial growth, in some manner *other* than the 'square peg in the round hole' effect, the clear implication is that these compounds are designed to control the bacterial growth itself." EPA Br. at 17-18 (EPA's emphasis & fn. omitted.)

EPA takes the same approach with respect to AIRX 60. It cites to Complainant's Exhibits 36 and 37, labels for the product's gallon size and pint size containers, respectively, for the claims that AIRX 60 is a "foul odor eliminator" and that it "eliminates odors at their source." In addition, as was the case with AIRX 22, EPA notes that the AIRX 60 product sheet, Complainant's Exhibit 38, states that the product has been "fortified with quaternary ammonium compounds to *kill* those odors that originate with fungus, putrefactive matter and other microbial growth." EPA Br. at 18 (EPA's emphasis).⁽¹⁰⁾

Complainant's Exhibits 31 and 32, as well as Exhibits 36, 37 and 38, are not the case breaking documents that EPA believes they are. For example, Exhibit 31 states that "[A]IRX 22 searches out and eliminates the most remote sources of foul odors." It also states that AIRX 22 "removes odors from bacterial growth, decay, [and] mildew." Similarly, Exhibit 32 states that the product contains an "*Airicide* odor counteractant" and that it "eliminates airborne odors at their source."

Exhibits 36, 37 and 38 echo the same theme with respect to AIRX 60. In that regard, AIRX 60 is described as "a multi-purpose, broad spectrum odor counteractant in

water soluble form." It "erases malodors from sickness, human incontinence, animals, pets and pet accidents, sewage, garbage, fats, oils, fermentation, decay, mildew, cooking, fire, smoke, cigars, cigarettes, liquor, beer, paint [and] chemicals." *Ibid.*

As Bullen explains, the AIRX 22 and AIRX 60 labels, as well as the AIRX 22 and 60 product sheets, do no more than advertise the fact that these products eliminate "odors." In Bullen's view, eliminating odors and eliminating bacterial growth are two different things. Whether or not that is the case shall remain a mystery. Neither EPA, nor Bullen, called a witness to testify on this key issue.

Still, the fact of the matter is that it is EPA who bears the burden of establishing a violation. Here, that burden involves showing that AIRX 22 and AIRX 60 are pesticides. The labels alone do not support this proposition. While the reading of the labels offered by EPA may be tantalizingly suggestive that the products are pesticides, the reading offered by Bullen is sufficient to raise doubt as to the pesticidal status of AIRX 22 and AIRX 60. In that regard, it may well be that EPA could have provided a witness to testify that one cannot eliminate odor caused by bacteria without eliminating the bacteria itself, or that the language appearing on the products' labels is considered within the pesticide industry as making pesticidal claims. Given the state of the record in this case, EPA needed that witness. EPA, however, called no one to testify on the merits of the AIRX 22 and AIRX 60 counts. In fact, the only witness to testify on this issue was called by Bullen. Richards Jarden, the company chairman, testified that one can eliminate an odor without eliminating the bacterial source of the odor. Tr. 226. Thus, EPA's failure to call a witness on this issue was critical and the resulting meager record played to the advantage of the respondent.

In addition, EPA's quaternary ammonium compound argument must fail. First, complainant concedes that quaternary ammonium compounds could have non-pesticidal uses. EPA Br. at 18. Second, despite this concession, EPA cites to no concrete evidence that the quaternary ammonium compounds contained in AIRX 22 and AIRX 60 were for pesticidal purposes, as opposed to non-pesticidal purposes.

Likewise, EPA's assertion (relegated to a footnote) that Bullen intended "the same quaternary ammonium compounds found in AIRX 22 as active pesticidal ingredients in other registered products on the AIRX line," such as AIRX 80 which is the subject of Count III of Docket Number III-472-C, is unpersuasive. See EPA Br. at 18 n.1. In that regard, EPA does not cite to any specific record evidence to support this assertion. Moreover, the issue presented in Count III involved the name of the product as it appeared on the product label. No finding was made with respect to any of that product's active pesticidal ingredients.

Finally, EPA resurrects the argument, first raised in its motion for accelerated decision, that the use of the term "Airicide" serves "to further bolster the implication that the product kills living organisms." EPA Br. at 18. ⁽¹¹⁾ With respect to this assertion, complainant refers to its memorandum in support of its motion for accelerated decision. There, it argued that the term "Airicide," when used in conjunction with respondent's product labels and product literature, "implies that the product has a killing effect on pests which cause foul odors in the air." EPA Mem. at 22. Once again, EPA's suggested reading is unpersuasive. Respondent's use of the term "Airicide" does not make AIRX 22 or AIRX 60 pesticides. Nor is the use of this term in combination with product labels and product literature proof of a pesticidal claim. EPA's argument to the contrary is rejected.

Accordingly, for the reasons mentioned above, EPA failed to carry its burden of proof with respect to Counts IV, V, VI, VII, VIII, and IX of Docket Number III-472-

C. Therefore, those counts are dismissed.

C. Civil Penalty Assessment

As discussed above, while six counts of the complaint may have been dismissed, six counts nonetheless were upheld. A civil penalty totaling \$17,900 is assessed for the counts that were upheld. This is the full penalty sought by EPA for the six violations.

The authority to assess a penalty against Bullen is contained in Section 14(a)(1) of FIFRA, 7 U.S.C. § 1361(a)(1). The maximum penalty amount that may be assessed for each violation is \$5,500.⁽¹²⁾ FIFRA Section 14(a)(4) sets forth the factors that are to be considered in the assessment of a penalty. Those factors are as follows:

In determining the amount of the penalty, the Administrator shall consider [1] the appropriateness of such penalty to the size of the business of the person charged, [2] the effect on the person's ability to continue in business, and [3] the gravity of the violation.

7 U.S.C. § 1361(a)(4). The application of these criteria to the facts of the case is discussed below.

(i). Penalty Considerations Applicable to All Violations

1. Size of the Business

There isn't a lot of evidence regarding this penalty criterion. What is noteworthy, however, is the parties' stipulation that over the past several years Bullen had an average annual gross sales of \$10,000,000. Jt. Ex. 1, Stip. 16. While Bullen might describe itself as a small company within its industry, respondent's annual gross sales are substantial by any measure. Accordingly, in light of this evidence, it is found that the assessment of a \$17,900 civil penalty is appropriate.

2. Ability to Continue in Business

There is no evidence that the assessment of a \$17,900 civil penalty will have an adverse effect upon Bullen's ability to continue in business. First, respondent makes no such claim. Second, respondent's stipulation that its average annual gross sales are \$10,000,000 is sufficient to dispel any such notion. Accordingly, it is found that the penalty assessed here will not affect Bullen's ability to continue in business.

3. Gravity of the Violation

Three of the violations found in this case involve "adulterated" pesticides. The pesticides were adulterated because their active ingredients were actually less than what was represented on the pesticides' labels. The other three violations involve "misbranded" pesticides. The pesticides were misbranded because certain language used in the pesticides' labels was different from the specific language approved by EPA in the FIFRA registration process, or the product label did not contain the requisite information.

Because the violations can be grouped into "adulterated" or "misbranded" categories, much of the evidence as to their gravity can be summarized for each group. EPA witness Lisa Donahue provided key testimony as to the gravity of these violations. Donahue holds the title of "Environmental Scientist and Enforcement Officer" with EPA's Region 3 Pesticides and Asbestos Programs and Enforcement Branch. Overall, she explained how adulterated and misbranded pesticides endanger

human health and the environment. Tr. 82.

First, we address the adulterated pesticides violations. As to their gravity, Donahue testified:

One of the things that seems to be common in users is, that if a little works, a lot will work better. And if it doesn't work the first time, I'll just keep spraying, so there is a potential for overuse of a product, and therefore, more product being released into the environment and more exposure to the user of the ... rest of what's in that container, other active ingredients, in this case there were other ingredients in the container.

Tr. 105-06; see also, Tr. 109-10. In other words, the purchaser will continue to apply the pesticide until the job gets done, and the greater the pesticidal application, the greater the risk to human health and to the environment.

Donahue added that an additional danger is presented with the subsequent application of properly formulated pesticides at the same rate as the underformulated pesticides. In that scenario, a person determines how much pesticide it takes to do the job while unknowingly applying the underformulated product. Having already made a rate of application determination, the person may subsequently apply a properly formulated, or full-strength, product at this incorrect higher rate. Tr. 115.

The nature of the hazard presented here is further illustrated by the toxicity of the adulterated pesticides. In that regard, labels of two of the pesticides bore the signal word "caution," a Toxicity Category III pesticide, and the third label bore the signal word "danger," a Toxicity Category I pesticide. Tr. 109, 114, 137; see 40 C.F.R. 156.10(h). Of these two categories, Toxicity Category I is the more serious. Tr. 97.

EPA also identified the hazards common to the three misbranded pesticides violations. Donahue stated that the requirement that the label contain the name and address of the pesticide's producer is intended to protect the user of the product, as well as the integrity of the FIFRA enforcement program. Tr. 117. She explained that in the event of a spill, there may be a need to contact the producer in order to protect the health of an exposed individual or to properly clean up the spill to prevent further damage to the environment. Tr. 117-18.

With respect to the labeling of pesticides, EPA properly takes the position that it is important to the FIFRA enforcement program that the agency (and the public) be able to rely upon the accuracy of the pesticide's name appearing on the label. As referenced above, failure to include the EPA-approved name on the product label could lead to confusion or delay in identifying the product. This failure could have serious health and environmental consequences in the event that a problem arises with the pesticide. See Tr. 123-24.

In addition to the potential hazards posed by the adulterated and misbranded pesticides, the matter of respondent's negligence is an appropriate consideration under the gravity criterion. Here, EPA established that each of the violations was the result of negligence. See *Green Thumb Nursery, Inc.* 6 E.A.D. 782,796 (1997) (FIFRA is a strict liability statute). As registrant of the involved pesticides, this negligence is properly assigned to Bullen.

With respect to the adulterated pesticides violations, Bullen offered no adequate explanation for the noncompliance. Moreover, it is not as if the three violations were a close call; each of the three pesticides was significantly underformulated.

Finally, the fact that these violations occurred in California, Indiana, and Pennsylvania evidences the broad scope of this FIFRA noncompliance.

With respect to the misbranded pesticides, the requirements as to the information that must appear on the product label is clear. What also is clear is that in the three instances cited in this case, these requirements were not met. Again, Bullen offered no adequate explanation that might lessen its negligence.

(ii). Specific Penalty Considerations and Assessments

Count I of Docket Number III-470-C involves an adulterated pesticide violation. A civil penalty of \$3,500 is assessed for this violation. This penalty is appropriate given the fact that no Diazinon was detected in the sampled pesticide. Diazinon is a Toxicity Category III pesticide.

Count I of Docket Number III-471-C also involves an adulterated pesticide. A civil penalty of \$3,500 is assessed for this violation. This count involved the substantial underformulation of the pesticide AIRX 55. This residual insect spray also is a Toxicity Category III pesticide.

Count I of Docket Number III-472-C involves a misbranded pesticide violation. The civil penalty assessment of \$2,100 for this violation takes into account EPA's view that the violation posed a "minor" risk of harm to human health and to the environment. EPA Br. at 31.

Count III of Docket Number III-472-C also involves a misbranded pesticide. The name on the product label was different from the name registered with EPA. This is not an insignificant difference. Therefore, a \$2,400 penalty is assessed for this violation.

Count I of Docket Number III-473-C involves an adulterated pesticide. A \$4,000 penalty is assessed for this violation. First, this pesticide was substantially underformulated. Second, the label contained the signal word, "Danger," identifying this product as a Toxicity Category I pesticide. Nonetheless, an EPA letter indicating that this pesticide may not be related to human health is sufficient to support the reduced penalty sought by the agency. See Resp. Ex. 5. [\(13\)](#)

Count II of Docket Number III-473-C involves a misbranded pesticide. A \$2,400 penalty is assessed for this violation. As explained above, there is a danger to human health and to the environment when the name on a pesticide's label is different from the EPA-registered name.

(iii). Respondent's Argument as to Size of Penalty

While arguing that the evidence does not support a substantial civil penalty, Bullen also argues that the penalty sought by EPA was too high because it was greater than the monetary amount accepted in settlement by EPA from the other named respondents. See n. 1, *supra*. The company also asserts that the penalty proposed by the agency was excessive given the fact that in three of the four docket numbers involved it took complainant several years to inform respondent of the violations.

As set forth above, the penalty assessed in this case is based upon a consideration of the record evidence and the statutory penalty criteria. Because of this fact, Bullen's argument that EPA sought too great a penalty for the established violations is rejected. Also rejected is respondent's argument that it cannot be assessed a penalty amount higher than that accepted by EPA from co-respondents in settlement. Bullen has offered no authority for this proposition. Moreover, the

specific settlement amounts referred to by Bullen in its post-hearing brief are not a part of the record in this case.

Finally, respondent has failed to show why the delay in violation notification should result in a lower penalty. The fact of the matter is that all respondents (i.e., Clausen Marketing Associates, Inc., Blue Coral, Inc., Mission Kleensweep Products, Inc., and Bullen itself) were timely notified of the involved violations. See Jt. Ex. 1. Bullen has not shown why the fact that it received later notice of the violations in three of the four docket numbers should have an impact on the penalty assessed.

III. ORDER

For the reasons set forth above, it is held that The Bullen Companies, Inc., have violated the Federal Insecticide, Fungicide, and Rodenticide Act as alleged in Count I of Docket Number III-470-C, Count I of Docket Number III-471-C, Counts I and III of Docket Number III-472-C, and Counts I and II of Docket Number III-473-C. It is further held that The Bullen Companies, Inc., did not violate FIFRA as alleged in Counts IV, V, VI, VII, VIII, and IX of Docket Number III-472-C. Accordingly, those counts are dismissed.

A civil penalty totaling \$17,900 is assessed against respondent for the violations found. Of this amount, \$3,500 is assessed for Count I of Docket Number III-470-C, \$3,500 is assessed for Count I of Docket Number III-471-C, \$2,100 is assessed for Count I and \$2,400 is assessed for Count III of Docket Number III-472-C, and \$4,000 is assessed for Count I and \$2,400 is assessed for Count II of Docket Number III-473-C. Respondent is ordered to pay this civil penalty pursuant to FIFRA Section 14. 7 U.S.C. § 1361. [\(14\)](#)

This decision will become a final order of the Environmental Appeals Board unless it is appealed to the Board, or unless the Board elects to review this decision *sua sponte*, as provided by 40 C.F.R. 22.27(c) & 22.30.

Carl C. Charneski
Administrative Law Judge

1. In three of the four cases, EPA also named a co-respondent in the complaint. The co-respondents were Clausen Marketing Associates, Inc., Blue Coral, Inc., and Mission Kleensweep Products, Inc. These co-respondents entered into settlement agreements with EPA prior to the hearing in this case. Only Bullen did not settle.
2. Initially, EPA charged 13 violations. In its Amendment to Complainant's Proposed Penalty, the agency stated that it was declining to proceed on Count II of Docket Number III-472-C. Accordingly, this count was dismissed.

3. In its post hearing brief, EPA reduced the amount of the penalty sought from \$39,900 to \$38,900.
4. The only witness to testify as to the merits of the case was called by Bullen.
5. This is not to say that in a proper case product labels and product literature alone could not support a finding that the product is a pesticide. Rather, the holding here is limited to the inconclusive product labels and product literature relied upon by EPA in this case.
6. The product sheets, also referred to as "sell sheets," contain information about the particular product. Richards Jarden, Bullen's chairman, described them as a marketing tool intended to get the attention of independent salespersons who might be selling as many as 2,000 other products. Tr. 224. These product sheets are also given by Bullen to dealers who purchase AIRX products. Jt. Ex. 1, Stips. 5, 8 & 9. In some instances, Bullen even made the AIRX sell sheets available to retail customers. See Stoelting Declaration, ¶¶ 4 & 5.
7. To the extent that the relevance of the AIRX labels and product sheets is an issue in this case, EPA is correct in asserting that they may be considered in determining whether AIRX 22 and AIRX 60 are pesticides.
8. The "round peg in the square hole" concept is explained by Bullen in its AIRX general product sheet. See Compl. Ex. 33. In this document, Bullen states that "it is presumed that a specific odor molecule fits into a specific receptor, just as a round peg fits into a round hole." Bullen further states that the basic concept in its odor control strategy is to employ "exclusive Airex components" to change the size or shape of the odorous molecules. Thus, the altered molecules are no longer perceived in the olfactory membrane as a bad odor. In other words, "when the altered molecules reach[] the cilia, it becomes like trying to place a round peg in a square hole. The molecule then is not perceived as the bad odor that it was originally." *Ibid.* EPA concedes that this approach "does not appear to be pesticidal in nature." EPA Br. at 14.
9. Consistent with the representations in Exhibit 33, Bullen's chairman testified that the company has approximately 40 AIRX products, 11 of which are disinfectants registered with EPA. Tr. 220. Respondent pays a \$38,500 annual fee to EPA for the registration of these 11 pesticides. Jt. Ex. 1, Stip. 17.
10. EPA also points out that the AIRX 60 product sheet states that the product is "fortified with quaternary ammonium compounds to kill foul odors from bacteria and fungus." *Ibid.* (EPA's emphasis).
11. EPA makes this argument even though it stipulated that "[b]ased solely upon its etymological structure, the word 'Aircicide,' taken by itself, would mean 'something which kills the air.'" Jt. Ex. 1, Stip. 10.
12. The FIFRA statute sets a \$5,000 per violation cap on any penalty assessed. The Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701, allows for the upward adjustment of this FIFRA penalty from \$5,000 to \$5,500. See 40 C.F.R. 19.4.
13. At the hearing EPA sought a \$5,000 civil penalty for this violation. EPA's post-hearing request for a \$4,000 penalty is based upon a consideration of Respondent's Exhibit 5. EPA Br. at 37.
14. Payment of the civil penalty may be made by mailing, or presenting, a cashier's or certified check made payable to the Treasurer of the United States, addressed to Mellon Bank, EPA Region 3 (Regional Hearing Clerk), P.O. Box 360515, Pittsburgh, PA 15251.



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