

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION VII

901 NORTH 5th STREET

KANSAS CITY, KANSAS 66101

BEFORE THE ADMINISTRATOR

06 JUN -5 AM 11:58
ENVIRONMENTAL PROTECTION
AGENCY-REGION VII
REGIONAL HEARING CLERK

IN THE MATTER OF

Eldon C. Stutsman, Inc.
121 Lassie Street
Hills, Iowa 52235

Respondent

) Docket No. FIFRA-07-2006-0210

)

) COMPLAINT AND NOTICE OF

) OPPORTUNITY FOR HEARING

)

)

)

COMPLAINT

Section I

Jurisdiction

1. This is an administrative action for the assessment of civil penalties instituted pursuant to Section 14 of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. § 136l.
2. This Complaint serves as notice that the United States Environmental Protection Agency (EPA) has reason to believe that Respondent has violated Section 12 of FIFRA, 7 U.S.C. § 136j.

Section II

Parties

3. The Complainant, by delegation from the Administrator of the EPA and the Regional Administrator, EPA, Region VII, is the Director of the Water, Wetlands, and Pesticides Division, EPA, Region VII.
4. The Respondent is Eldon C. Stutsman, Inc., a pesticide dealer, located at 121 Lassie Street, Hills, Iowa 52235. The Respondent is and was at all times referred to in this Complaint, a "person" as defined by Section 2(s) of FIFRA, 7 U.S.C. § 136(s), and a corporation qualified to do business in the state of Iowa.

Section III

Violations

General Allegations

5. The Complainant hereby states and alleges that Respondent has violated FIFRA as follows:
6. Section 12(a)(2)(F) of FIFRA, 7 U.S.C. § 136j(a)(2)(F), states that it shall be unlawful for any person to distribute or sell, or to make available for use, or to use, any registered pesticide classified for restricted use other than in accordance with Section 3(d) of FIFRA.
7. Section 3(d)(1)(C)(i) and (ii) of FIFRA, 7 U.S.C. § 136a(d)(1)(C)(i) and (ii), states, in pertinent part, that a restricted use pesticide shall be applied for any use to which the restricted classification applies only by or under the direct supervision of a certified applicator.
8. Section 2(e)(1) of FIFRA, 7 U.S.C. § 136(e)(1) defines “certified applicator” as any individual who is certified under Section 11 of FIFRA, 7 U.S.C. § 136i, to use or supervise the use of any pesticide which is classified for restricted use.
9. Section 2(gg) of FIFRA, 7 U.S.C. § 136(gg), defines the term “to distribute or sell” to mean 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.
10. Guardsman Max® is a restricted use pesticide that at the time of sale was registered to BASF, Research Triangle Park, North Carolina, under EPA Registration No. 7969-192.
11. The label of Guardsman Max® herbicide, EPA Reg. No. 7969-192, states, in pertinent part: “RESTRICTED USE PESTICIDE DUE TO GROUND AND SURFACE WATER CONCERNS. For retail sale to and use only by certified applicators or persons under their direct supervision, and only for those uses covered by the certified applicator’s certification.”
12. On March 17, 2005, a representative of Iowa Department of Agriculture and Land Stewardship conducted an inspection at Respondent’s place of business in Hills, Iowa, and documented the sale of the restricted use pesticide referenced in paragraphs 10 and 11 to an uncertified person, Mr. Tom Lehman, of West Liberty, Iowa, for use by an uncertified person or persons. It was documented that Respondent made the restricted use pesticide sale to the uncertified person and failed to require proof of pesticide applicator certification prior to making the sale.
13. On March 21, 2005, a representative of Iowa Department of Agriculture and Land Stewardship interviewed Mr. Tom Lehman, of West Liberty, Iowa, and documented Mr. Lehman’s purchase of the restricted use pesticide referenced in paragraphs 10 and 11. It was documented that Mr. Tom Lehman was not a certified applicator when he purchased the restricted use pesticide. But he did apply the Guardsman Max®, EPA Reg. No. 7969-192,

and he was not directly supervised by a certified applicator at the time he applied the restricted use pesticide.

14. On April 21, 2004, Respondent distributed or sold, and thereby made available for use to Mr. Tom Lehman, a 123.345 gallon quantity of the restricted use pesticide, Guardsman Max®, as documented by Respondent's invoice number 52768.

15. At the time of the sale referred to in paragraph 14, Mr. Tom Lehman was not a certified applicator as the term is defined in Section 2(e)(1) of FIFRA, 7 U.S.C. § 136(e)(1).

16. At the time Mr. Tom Lehman used the Guardsman Max® herbicide, EPA Reg. No. 7969-192, he was not certified to use the pesticide, and was not directly supervised by a certified applicator at the time he applied the restricted use pesticide.

17. Respondent violated Section 12(a)(2)(F) of FIFRA, 7 U.S.C. 136j(a)(2)(F), by selling or making available for use a registered pesticide classified for a restricted use other than in accordance with Section 3(d) of FIFRA, 7 U.S.C. § 136a(d).

18. Pursuant to Section 14 of FIFRA, 7 U.S.C. § 136l, and based upon the facts stated in paragraphs 14 through 17, it is proposed that a civil penalty of \$5,850 be assessed against Respondent.

Section IV

Total Proposed Penalty

19. Section 14 of FIFRA, 7 U.S.C. § 136l, and the Debt Collection Improvement Act of 1996, as implemented by the Civil Monetary Penalties Inflation Adjustment Rule, 40 C.F.R. Part 19, authorize the issuance of this Complaint for the assessment of a civil penalty for each violation. For any such violation occurring on or after March 15, 2004, the maximum statutory penalty per violation is Six Thousand Five Hundred Dollars (\$6,500). The EPA proposes to assess a total civil penalty of Five Thousand Eight Hundred Fifty Dollars (\$5,850) against Respondent for the above-described violation.

Appropriateness of Proposed Penalty

20. The penalty proposed above has been calculated after consideration of the statutory factors set forth in Section 14 of FIFRA, 7 U.S.C. § 136l. Specifically, EPA considered the size of the business of Respondent, the effect of the proposed penalty on Respondent's ability to continue in business and the gravity of the alleged violations. In its calculation of the proposed penalty, EPA has taken into account the particular facts and circumstances of the alleged violations, with specific reference to EPA guidance for the calculation of proposed penalties under FIFRA (See Enclosure, July 2, 1990, Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)).

21. For purposes of calculating the proposed penalty, EPA obtained financial information indicating that Respondent's total business revenues were over \$1,000,000 per year. This information placed Respondent in Category I size of business, as set forth in the FIFRA Civil Penalty Calculation Worksheet attached hereto and incorporated herein by reference (See Enclosure). If EPA's estimate of Respondent's total business revenues is incorrect, Respondent may submit reliable financial documentation indicating another category is appropriate.

22. Respondent has the right, upon submittal of certified financial information, to consideration of Respondent's financial condition in mitigation of the proposed penalty insofar as is necessary to permit Respondent to continue in business.

23. The proposed penalty constitutes a demand *only if* Respondent fails to raise *bona fide* issues of ability to pay, or other *bona fide* affirmative defenses relevant to the determination of any final penalty.

24. Said issues of ability to pay or other affirmative defenses relevant to a final penalty may and should be brought *to the attention* of Complainant at the earliest opportunity in this proceeding.

25. Payment of the total penalty - \$5,850 - may be made by certified or cashier's check payable to the "Treasurer, United States of America," and remitted to:

Mellon Bank
EPA – Region 7
P.O. Box 371099M
Pittsburgh, Pennsylvania 15251

26. If Respondent does not contest the findings and assessments set forth above, payment of the penalty assessed herein may be remitted as described in the preceding paragraph, including a reference to the name and docket number of the Complaint. In addition, a copy of the check should be sent to:

Regional Hearing Clerk
EPA - Region 7
901 North 5th Street
Kansas City, Kansas 66101

and a copy to:

Rupert G. Thomas
Assistant Regional Counsel
EPA - Region 7
901 North 5th Street
Kansas City, Kansas 66101

NOTICE OF OPPORTUNITY FOR HEARING

Section V

Answer and Request for Hearing

27. Pursuant to Section 14(a) of FIFRA, 7 U.S.C. § 136l(a), Respondent has the right to request a hearing to contest any material fact contained in this Complaint or to contest the appropriateness of the penalty proposed herein. If Respondent wishes to avoid being found in default, Respondent must file a written answer and request for hearing with:

Regional Hearing Clerk
EPA - Region 7
901 North 5th Street
Kansas City, Kansas 66101

within thirty (30) days of service of this Complaint and Notice of Opportunity for Hearing. Said answer shall clearly and directly admit, deny, or explain each of the factual allegations contained in the Complaint with respect to which Respondent has any knowledge, or shall clearly state that Respondent has no knowledge as to particular factual allegations in the Complaint. The answer shall also state:

- A. The circumstances or arguments that are alleged to constitute the grounds of defense;
- B. The facts that Respondent intends to place at issue; and
- C. Whether a hearing is requested.

Failure to deny any of the factual allegations in the Complaint constitutes an admission of the undenied allegations.

28. Any hearing that is requested shall be held and conducted in accordance with the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits," 40 C.F.R. Part 22 (copy enclosed).

29. If Respondent fails to file a written answer and request for hearing within thirty (30) days of service of this Complaint and Notice of Opportunity for Hearing, such failure will constitute a binding admission of all of the allegations in this Complaint, and a waiver of Respondent's right to a hearing under FIFRA. A Default Order may thereafter be issued by the Regional Administrator, and the civil penalties proposed therein shall become due and payable without further proceedings.

30. Respondent is advised that, after the Complaint is issued, the Consolidated Rules of Practice prohibit any ex parte (unilateral) discussion of the merits of any action with the EPA Regional Administrator, members of the Environmental Appeals Board, the Regional Judicial Officer, Administrative Law Judge, or any person likely to advise these officials in the decision of the case.

Section VI

Settlement Conference

31. Whether or not a hearing is requested, an informal settlement conference may be arranged at Respondent's request. Respondent may confer with the EPA concerning: (1) whether or not the alleged violation occurred; or (2) the appropriateness of the proposed penalty in relation to the size of Respondent's business, the gravity of the violation, and the effect of the proposed penalty on Respondent's ability to continue in business. Additionally, the proposed penalty may be adjusted if Respondent establishes a bona fide issue of ability to pay. To explore the possibility of settlement in this matter, contact:

Rupert G. Thomas
Assistant Regional Counsel
EPA Region 7
901 North 5th Street
Kansas City, Kansas 66101
Telephone: (913) 551-7282

32. A request for an informal settlement conference does not extend the thirty (30) day period during which a written answer and request for a hearing must be submitted. The informal conference procedure may be pursued as an alternative to and simultaneously with the adjudicatory hearing procedure.

33. EPA encourages all parties against whom a civil penalty is proposed to pursue the possibility of settlement. However, no penalty reduction will be made simply because an informal settlement conference is held. If settlement is reached, the parties will enter into a written Consent Agreement, and a Final Order will be issued. The issuance of such a Consent Agreement and Final Order shall constitute a waiver of Respondent's right to request a hearing on any matter stipulated to therein.

06/02/06
Date

Betty J. Berry
Betty J. Berry
Acting Director
Water, Wetlands, and Pesticides Division

Rupert G. Thomas
Rupert G. Thomas
Assistant Regional Counsel
Office of Regional Counsel

Enclosures:

1. FIFRA Civil Penalty Calculation Worksheet
2. Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Action Orders, and the Revocation, Termination or Suspension of Permits, 40 C.F.R. Part 22
3. July 2, 1990, Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act
4. SBREFA Fact Sheet
5. Notice of Securities and Exchange Commission Registrants' Duty to Disclose Environmental Legal Proceedings

CERTIFICATE OF SERVICE

I certify that on the date noted below I hand delivered the original and one copy of this Complaint and Notice of Opportunity for Hearing to the Regional Hearing Clerk, EPA, 901 North 5th Street, Kansas City, Kansas 66101.

I further certify that on the date noted below I sent by certified mail, return receipt requested, a copy of the signed original Complaint and Notice of Opportunity for Hearing; a copy of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits, 40 C.F.R. Part 22; a copy of the July 2, 1990, Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act; a copy of the FIFRA Civil Penalty Calculation Worksheet; the SBREFA Fact Sheet; and the Notice of Securities and Exchange Commission Registrants' Duty to Disclose Environmental Legal Proceedings, to the following:

Mr. Ronald E. Stutsman
Registered Agent for Eldon C. Stutsman, Inc.
121 Lassie Street
Hills, Iowa 52235

Le-5-06

Date

Julia A. Cacho
Julia A. Cacho

FIFRA CIVIL PENALTY CALCULATION WORKSHEET
ENFORCEMENT RESPONSE POLICY for FIFRA - Reference

RESPONDENT: Eldon C. Stutsman, Inc.
 ADDRESS: 121 Lassie Street, Hills, IA 52235

Prepared By: Elizabeth Murtagh-Yaw
 Date: May 18, 2006

	Count 1	Count 2	Count 3	Count 4
Appendix A				
1. Statutory Violation	12(a)(2)(F)			
2. FTTS Code	2FA			
3. Violation Level	2			
Appendix C - Table 2 - Size of Business Category				
4. Violator Category * § 14(a)(1) or § 14(a)(2)	14(a)(1)			
5. Size of Business Category	1			
Appendix C - Table 1 - FIFRA Civil Penalty Matrix				
6. BASE PENALTY	\$6,500			
Appendix B - Gravity Adjustments				
7a. Pesticide Toxicity	1			
7b. Human Harm	1			
7c. Environmental Harm	3			
7d. Compliance History	0			
7e. Culpability	2			
7f. Total Gravity Adjustment Value (add items 7a - 7e)	7			
Appendix C - Table 3 - Adjustments				
7g. Percent Adjustment	- 10%			
7h. Dollar Adjustment	- \$650			
8. Final Penalty** (item 7h from item 6)	\$5,850			
Combined Total Penalty (total of all columns for line 8, above)	\$5,850			

* Section 14(a)(1) of FIFRA - Any registrant, commercial applicator, wholesaler, dealer, retailer, or other distributor who violates any provision of this subchapter may be assessed a civil penalty by the Administrator of not more than \$5,000 for each offense.

Section 14(a)(2) of FIFRA - Any private applicator or other person not included in paragraph (1) who violates any provision of this subchapter subsequent to receiving a written warning from the Administrator or following a citation for a prior violation, may be assessed a civil penalty by the Administrator of not more than \$1,000 for each offense, except that any applicator not included under paragraph (1) of this subsection who holds or applies registered pesticides, or use dilutions of registered pesticides, only to provide a service of controlling pests without delivering any unapplied pesticide to any person so served, and who violates any provision of this subchapter may be assessed a civil penalty by the Administrator of not more than \$500 for the first offense nor more than \$1,000 for each subsequent offense.

**The final penalty in each column of line 8 cannot exceed the statutory maximum.