

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 6
DALLAS, TEXAS

FILED
2015 NOV -5 PM 2:17
RENEE L. HARRIS, CLERK
EPA REGION VI

IN THE MATTER OF:)

NOVA MUD, INC.)
HOBBS, NEW MEXICO)

RESPONDENT)
_____)

DOCKET NO. FIFRA-06-2015-0301

COMPLAINT AND NOTICE OF OPPORTUNITY FOR HEARING

This Complaint and Notice of Opportunity for Hearing (Complaint) is issued pursuant to Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended (FIFRA), 7 U.S.C. § 136f(a), and 40 C.F.R. §§ 22.13 and 22.35. The Complainant in this action is the Director, Multimedia Planning and Permitting Division, United States Environmental Protection Agency (EPA), Region 6, Dallas, Texas. The Complainant alleges that Nova Mud, Inc. has violated various provisions of Section 12 of FIFRA, 7 U.S.C. § 136j.

I. PRELIMINARY ALLEGATIONS

1. The Respondent is Nova Mud, Inc., a corporation incorporated under the laws of the State of New Mexico.
2. The Respondent is a "person" as that term is defined in Section 2(s) of FIFRA, 7 U.S.C. § 136(s).
3. The Respondent owns and operates a pesticide producing establishment at its facility located at 5800 Nova Drive, Hobbs, New Mexico.
4. The term "pesticide" is defined in Section 2(u) of FIFRA, 7 U.S.C. § 136(u), as meaning "(1) any substance or mixture of substances intended for preventing, destroying,

repelling, or mitigating any pest, (2) any substance or mixture of substances intended for use as a plant regulator, defoliant, or desiccant, and (3) any nitrogen stabilizer.”

5. The term “pest” is defined in Section 2(t) of FIFRA, 7 U.S.C. § 136(t), as meaning “(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-organism (except viruses, bacteria, or other micro-organisms on or in living man or other living animals) which the Administrator declares to be a pest under section 136(c)(1) of [FIFRA].”

6. The term “producer” is defined in Section 2(w) of FIFRA as “the person who manufactures, prepares, compounds, propagates, or processes any pesticide or device or active ingredient used in producing a pesticide.”

7. The term “produce” is defined in Section 2(w) of FIFRA as “to manufacture, prepare, compound, propagate, or process any pesticide or device or active ingredient used in producing a pesticide.

8. The term “distribute or sell” is defined in Section 2(gg) of FIFRA, 7 U.S.C. § 136(gg), as meaning “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.”

9. The Respondent is a registrant, commercial applicator, wholesaler, dealer, retailer, or other distributor subject to the civil penalty provisions of Section 14(a)(1) of FIFRA, 7 U.S.C. § 136(a)(1).

10. On or about May 30, 2013, New Mexico Department of Agriculture inspector Stephen D. Baca (“the inspector”) conducted an inspection to determine Complainant’s operations as they relate to applicable pesticides laws and regulations.

11. During the inspection, Respondent informed the inspector that Respondent purchased 55 gallon drums of glutaraldehyde, repackaged the glutaraldehyde into five gallon containers labeled with the new product name “R-Treat B-100”, and sold the repackaged products to business entities in the oil industry for use as a microbiocide.

12. During the inspection, the inspector collected from Respondent five invoices for the sale of glutaraldehyde, sold as “R-Treat B-100.”

13. During the inspection, the Complainant provided a signed statement that Complainant would no longer sell unregistered glutaraldehyde, that Complainant would make a determination regarding the need to register pesticides in the future, and that Complainant would send back to the supplier current stocks of glutaraldehyde.

14. The statement was signed and dated by Ray D. Hardin on May 30, 2013.

II. VIOLATIONS

Counts 1-5: Five Counts of Distribution or Sale of an Unregistered Pesticide

15. The allegations in paragraphs 1-14 are realleged and incorporated herein.

16. Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A) provides that it shall be unlawful for any person in any State to distribute or sell to any person any pesticide that is not registered under [Section 3 of FIFRA, 7 U.S.C. § 136a].

17. The term “pest” is defined in Section 2(t) of FIFRA, 7 U.S.C. § 136(t) as meaning “(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 (except viruses, bacteria, or other micro-organisms on or in living man or other living animals) which the Administrator declares to be a pest under [7 U.S.C. § 136w(c)(1)].”

18. The term “pesticide” is defined in Section 2(u) of FIFRA, 7 U.S.C. § 136(u), as meaning “(1) any substances or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest, (2) any substance or mixture of substances intended for use as a plant regulator, defoliant, or desiccant, and (3) any nitrogen stabilizer....”

19. Glutaraldehyde, which was sold as “R-Treat B-100,” is intended to prevent, destroy, repel, or mitigate pests.

20. “Glutaraldehyde” is a “pesticide” as that term is defined in Section 2(u) of FIFRA, 7 U.S.C. § 136(u).

21. “R-Treat B-100” is not a registered pesticide.

22. 40 C.F.R. § 152.15 provides that no person may distribute or sell any pesticide product which is not registered under the Act, except as provided in 40 C.F.R. §§ 152.20, 152.25, and 152.30.

23. 40 C.F.R. § 152.3 defines “pesticide product” as meaning “a pesticide in a particular form (including composition, packaging, and labeling) in which the pesticide is, or is intended to be, distributed or sold. The term includes any physical apparatus used to deliver or apply the pesticide if distributed or sold with the pesticide.”

24. "R-Treat B-100" is a "pesticide product" as that term is defined by 40 C.F.R. § 152.3.

25. On or about May 30, 2013, the Respondent provided invoices to the inspector showing five separate sales or distributions of "R-Treat B-100."

26. Therefore, the Respondent violated Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), by distributing and selling an unregistered pesticide.

Count 6: One Count of Failure to Register a Pesticide Establishment

27. The allegations in paragraphs 1-26 are realleged and incorporated herein.

28. Section 12(a)(2)(L) of FIFRA, 7 U.S.C. § 136j(a)(2)(L) provides that it is unlawful for any producer to violate any provisions of Section 7 of FIFRA, 7 U.S.C. § 136e.

29. Section 7 of FIFRA, 7 U.S.C. § 136e, requires that no person may produce a pesticide unless the establishment in which it is produced is registered with the Administrator.

30. Section 2 of FIFRA, 7 U.S.C. § 136, defines "producer" as "the person who manufactures, prepares, compounds, propagates, or processes any pesticide or device or active ingredient in producing a pesticide."

31. Section 2 of FIFRA, 7 U.S.C. § 136, defines "produce" as "to manufacture, prepare, compound, propagate, or process any pesticide or device or active ingredient used in producing a pesticide."

32. Respondent purchased 55 gallon drums of glutaraldehyde and repackaged for sale the glutaraldehyde into five gallon containers labeled with the new product name "R-Treat B-100."

33. By repackaging the glutaraldehyde, by creating a new product name for the glutaraldehyde, and by labeling the repackaged glutaraldehyde with the product name, Respondent prepared a pesticide within the meaning of Section 2 of FIFRA, 7 U.S.C. § 136.

34. Respondent has not registered with the Administrator the establishment where Respondent prepared glutaraldehyde within the meaning of Section 2 of FIFRA, 7 U.S.C. § 136.

35. Therefore, the Respondent violated Section 12(a)(2)(L) of FIFRA, 7 U.S.C. § 136j(a)(2)(L), by failing to register the establishment where a pesticide was produced.

III. PROPOSED CIVIL PENALTY

36. The proposed civil penalty has been determined in accordance with Section 14(a) of FIFRA, 7 U.S.C. § 136l, which authorizes EPA to assess a civil penalty of up to Seven Thousand, Five Hundred Dollars (\$7,500)¹ for each offense. This penalty was calculated using the facts presented above, and EPA's "FIFRA Enforcement Response Policy" (ERP) dated December 2009 (a copy of which is enclosed with this Complaint, and is available at the following link: <http://www2.epa.gov/sites/production/files/documents/fifra-erp1209.pdf>). The ERP requires the Complainant to 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. Based on these facts the Complainant proposed that the Respondent be

¹ The amount of penalty that can be assessed under Section 14(a) of FIFRA was increased by the Civil Monetary Penalty Inflation Adjustment Rule codified at 40 C.F.R. Part 19 to \$5,500 for violations occurring between January 30, 1997 and March 15, 2004, to \$6,500 for violations which occurred between March 15, 2004 and January 12, 2009, and to \$7,500 for violations which occurred after January 12, 2009.

assessed a civil penalty of Forty Thousand and Three Hundred Dollars (**\$40,300**). Attached to this Complaint is a penalty calculation worksheet, which describes the proposed penalty, as required by 40 C.F.R. § 22.14(a)(4)(i).

IV. OPPORTUNITY TO REQUEST A HEARING

37. The Respondent has the right to request a hearing. Any request for a hearing must be in writing and must be filed with the following within thirty (30) days of receipt of this Complaint:

Ms. Lorena Vaughn
Regional Hearing Clerk (6RC-D)
U.S. EPA - Region 6
1445 Ross Avenue, Suite 1200
Dallas, Texas 75202-2733

38. If the Respondent wishes to contest any material fact set forth in the Complaint, contends that the proposed penalty is inappropriate, or contends that it is entitled to a judgment as a matter of law, the original and one copy of the Answer to this Complaint must be filed with the Regional Hearing Clerk at the above address within thirty (30) days after service of said Complaint pursuant to 40 C.F.R. § 22.15. A copy of the Answer shall also be sent to:

Jay Przyborski
Assistant Regional Counsel (6RC-ER)
U.S. EPA - Region 6
1445 Ross Avenue, Suite 1200
Dallas, Texas 75202-2733

39. The Answer should clearly and directly admit, deny, or explain each factual allegation contained in this Complaint with regard to which Respondent has knowledge. Where the Respondent has no knowledge of a particular factual allegation and so states, the allegation is

deemed denied. The Answer should state: (1) the circumstances or arguments which are alleged to constitute the grounds of defense; (2) the facts which Respondent disputes; (3) the basis for opposing any proposed relief; and (4) whether a hearing is requested. Hearings held on the assessment of the civil penalties will be conducted in accordance with the provisions of the Administrative Procedures Act, 5 U.S.C. § 551 *et seq.*, and the Consolidated Rules of Practice, codified at 40 C.F.R. Part 22. A copy of 40 C.F.R. Part 22 is enclosed with this Complaint.

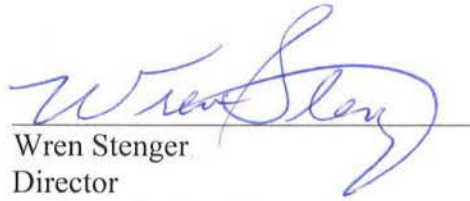
40. If an Answer to this Complaint is not filed with the Regional Hearing Clerk within thirty (30) days of receipt, such failure shall constitute an admission of all facts alleged in the Complaint and a waiver of Respondent's right to a hearing under Section 14(a)(3) of FIFRA, 7 U.S.C. § 136/(a)(3). The proposed penalty shall become due and payable without further proceedings thirty (30) days after the default order becomes final under 40 C.F.R. § 22.27(c).

V. SETTLEMENT CONFERENCE

41. EPA encourages all parties against whom civil penalties are proposed to pursue the possibility of settlement through informal meetings with EPA. Therefore, whether or not a formal hearing is requested, the Respondent may confer informally with the EPA about the alleged violations or the amount of the proposed penalty. The Respondent may wish to have a representative appear at the conference, to be represented by counsel, or both. If a settlement is reached, it shall be finalized by the issuance of a written Consent Agreement and Final Order by a Regional Judicial Officer. The issuance of such Final Order shall constitute a waiver of Respondent's right to request a hearing on any matter stipulated to therein.

42. To explore the possibility of settlement in this matter, please address correspondence to Jay Przyborski, at the address listed above or by telephone call at (214) 665-6605.

Dated at Dallas, Texas on this 4th day of November, 2014.



Wren Stenger
Director
Multimedia Planning and
Permitting Division
U.S. EPA - Region 6

PENALTY CALCULATION WORKSHEET

Respondent: Nova Mud
Address: 5600 Nova Dr., Hobbs, NM 88240
Docket No.: FIFRA-06-2015-0301
Date: 10/30/2014
Prepared by: Gerardo Acosta

Appendix A	Counts 1-5	Count 6	
1. Statutory Violation (Section 12)	12(a)(1)(A)	12(a)(2)(L)	
2. FTTS Code	1AA	2LA	
3. Violation Level	1	2	
Table 2			
4. Violator Category (14(a)(1) or 14(a)(2))	14(a)(1)	14(a)(1)	
5. Size of Business Category (I, II, or III)	II	II	
Table 1			
6. Base Penalty	\$7,150	\$5,870	
Appendix B			
7. Gravity Adjustments:			
a. Pesticide Toxicity	3	3	
b. Human Harm	3	1	
c. Environmental Harm	3	1	
d. Compliance History	0	0	
e. Culpability	2	2	
f. Total Gravity Adjustment Value (added items 7a. - 7e)	11	7	
Table 3			
7. Gravity Adjustments (Cont.):			
g. Percent Adjustment (+ or -)	0%	-20%	
h. Dollar Adjustment	\$0	-\$1,134	
i. Subtotal	\$7,150	\$4,536	
7. Adjustments (e.g., Good faith in %)			
j. Dollar Adjustment	\$0	\$0	
k. Subtotal	\$7,150	\$4,536	
l. Other Adjustments (litigation)	0%	0%	
m. Dollar Adjustment	\$0	\$0	
8. Gravity Based Penalty	\$7,150	\$4,536	
9. Economic Benefit	\$0	\$0	
10. Final Penalty	\$7,150	\$4,536	
Multiple counts? (# or 1)	5	1	
10. Total Graduated Penalty	35,750	4,536	\$40,286
Combined Total Penalty (total of #8)			\$40,286
TOTAL PENALTY (Rounded to the nearest 100)			\$40,300

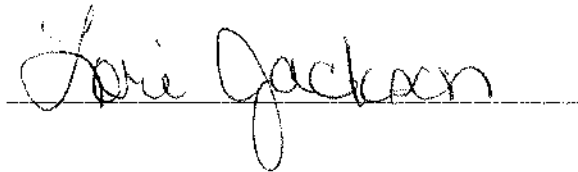
Statutory Maximum	
\$	7,500

CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of November, 2014, the original and one copy of the foregoing Complaint and Notice of Opportunity for Hearing was hand-delivered to the Regional Hearing Clerk, U.S. EPA Region 6, 1445 Ross Avenue, Dallas, Texas 75202-2733, and that a true and correct copy of the Complaint, together with a copy of the December 2009 "FIFRA Enforcement Response Policy" and the Consolidated Rules of Practice (40 C.F.R. Part 22) were placed in the United States Mail, Certified mail, return receipt requested, 7001 0360 0003 6674 4126, addressed to the following:

Ray Hardin
Owner
Nova Mud, Inc.
5800 Nova Drive
Hobbs, New Mexico 88240

Ken Bromley
419 W. Cain St.
Hobbs, New Mexico 88240

A handwritten signature in cursive script, reading "Lorie Jackson", is written over a horizontal line.