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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION VII ENVIR. APPEALS BOARD
901 NORTH 5th STREET
KANSAS CITY, KANSAS 66101
ENVIRONMENTAL PROTECTION AGENCY-REGION VII
REGIONAL HEARING CLERK

BEFORE THE ADMINISTRATOR

IN THE MATTER OF

) Docket No. FIFRA-07-2003-0055

Hoops Agri Sales Company
West Highway 30
Box 420
North Bend, Nebraska 69649

) COMPLAINT AND NOTICE OF
) OPPORTUNITY FOR HEARING
)
)
)
)

Respondent

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 Hoops Agri Sales Company, a pesticide producing establishment, located at West Highway 30, North Bend, Nebraska. 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 person doing business in the state of Nebraska.

Violations

General Allegations

5. The Complainant hereby states and alleges that Respondent has violated FIFRA as follows:

Count 1

6. Respondent's facility at North Bend, Nebraska is a registered pesticide producing establishment, having been so registered with the EPA pursuant to Section 7 of FIFRA, 7 U.S.C. § 136e, since April 25, 1995. Respondent's establishment number for said facility is EPA Est 069056-NE-001.

7. Section 7(c) of FIFRA, 7 U.S.C. § 136e(c), requires any producer operating a registered pesticide-producing establishment to inform EPA of the types and amounts of pesticides and, if applicable, active ingredients used in producing pesticides, which the establishment is currently producing, which it has produced during the past year, and which it has sold or distributed during the past year. The regulations found at 40 C.F.R. § 167.85(d) require the pesticides production report to be filed annually on or before March 1, even if the producer has produced no pesticide products for that reporting year.

8. In December 1998, EPA mailed an annual pesticide report form to Respondent with instructions that the form was to be completed and filed with EPA Region 7 on or before March 1, 1999.

9. Respondent failed to comply with Section 7(c) of FIFRA, 7 U.S.C. § 136e(c), and with regulations found at 40 C.F.R. § 167.85(d), in that it did not file its 1998 pesticide production report by March 1, 1999, as required.

10. It is a violation of Section 12(a)(2)(L) of FIFRA, 7 U.S.C. § 136j(a)(2)(L), for any person who is a pesticide producer to violate any of the provisions of Section 7 of FIFRA, 7 U.S.C. § 136e.

11. Pursuant to Section 14 of FIFRA, 7 U.S.C. § 136l, and based upon the facts stated in paragraphs 6 through 10, it is proposed that a civil penalty of \$4,400 be assessed against Respondent.

Count 2

12. The facts stated in paragraphs 6 and 7 are realleged and incorporated as if fully stated herein.

13. In December 2000, EPA mailed an annual pesticide report form to Respondent with instructions that the form was to be completed and filed with EPA Region 7 on or before March 1, 2001.

14. Respondent failed to comply with Section 7(c) of FIFRA, 7 U.S.C. § 136e(c), and with regulations found at 40 C.F.R. § 167.85(d), in that it did not file its 2000 pesticide production report by March 1, 2001, as required.

15. It is a violation of Section 12(a)(2)(L) of FIFRA, 7 U.S.C. § 136j(a)(2)(L), for any person who is a pesticide producer to violate any of the provisions of Section 7 of FIFRA, 7 U.S.C. § 136e.

16. Pursuant to Section 14 of FIFRA, 7 U.S.C. § 136l, and based upon the facts stated in paragraphs 12 through 15, it is proposed that a civil penalty of \$4,400 be assessed against Respondent

Section IV

Total Proposed Penalty

17. 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 of up to \$5,500 for each violation. The EPA proposes to assess a total civil penalty of \$8,800 against Respondent for the above-described violations.

Appropriateness of Proposed Penalty

18. 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)).

19. For purposes of calculating the proposed penalty, EPA obtained financial information indicating that Respondent's total business revenues were \$900,000 per year. This information placed Respondent in Category II 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.

20. 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.

21. 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.

22. 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.

23. Payment of the total penalty - \$8,800 - may be made by certified or cashier's check payable to the "Treasurer, United States of America," and remitted to:

Mellon Bank
EPA - Region VII
Regional Hearing Clerk
P.O. Box 360748M
Pittsburgh, Pennsylvania 15251

24. 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

25. Pursuant to Section 14(a) of FIFRA, 7 U.S.C. § 136(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.

26. Any hearing that is requested shall be held and conducted in accordance with the "Consolidated Rules of Practices Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits," 64 Fed. Reg. 40138 (July 23, 1999) (copy enclosed).

27. 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.

28. 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

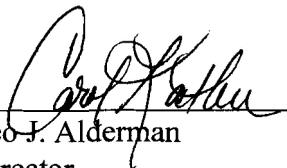
29. Whether or not a hearing is requested, an informal settlement conference may be arranged at Respondent's request. Respondent may confer with the EPA concerning (1) whether or not the alleged violation occurred, or (2) the appropriateness of the proposed penalty in relation to the size of Respondent's 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

30. 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.

31. 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.

1/15/03
Date


Leo J. Alderman
Director
Water, Wetlands, and Pesticides Division


Rupert G. Thomas
Assistant Regional Counsel
Office of Regional Counsel

Enclosures:

1. Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance Action Orders, and the Revocation, Termination or Suspension of Permits, 64 Fed. Reg. 40138
2. July 2, 1990, Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act
3. FIFRA Civil Penalty Calculation Worksheet
4. SBREFA Fact Sheet

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, 64 Fed. Reg. 40138; a copy of the July 2, 1990, Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act; and a copy of the FIFRA Civil Penalty Calculation Worksheet to Don Kemper, Pesticide Use Investigator, Pesticide Program, Nebraska Department of Agriculture, P.O. Box 94756, Lincoln, Nebraska 68509 for personal service upon Robert N. Hoops, owner, Hoops Agri Sales Company, West Highway 30, North Bend, Nebraska.

January 15, 2003
Date

Vitula Lungren
Vitula Lungren

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

RESPONDENT: Hoops Agri Sales Company
 ADDRESS: West Highway 30
 Box 420
 North Bend, Nebraska 69649

Date Prepared: January 7, 2003

	Count 1	Count 2	Count 3	Count 4
Appendix A				
1. Statutory Violation	§ 12(a)(2)(L)	§ 12(a)(2)(L)		
2. FTTS Code				
3. Violation Level	2	2		
Appendix C - Table 2 - Size of Business Category				
4. Violator Category * § 14(a)(1) or § 14(a)(2)	§ 14(a)(1)	§ 14(a)(1)		
5. Size of Business Category	II	II		
Appendix C - Table 1 - FIFRA Civil Penalty Matrix				
6. BASE PENALTY	\$4,400	\$4,400		
Appendix B - Gravity Adjustments				
7a. Pesticide Toxicity				
7b. Human Harm				
7c. Environmental Harm				
7d. Compliance History				
7e. Culpability				
7f. Total Gravity Adjustment Value (add items 7a - 7e)				
Appendix C - Table 3 - Adjustments				
7g. Percent Adjustment	0	0		
7h. Dollar Adjustment	0	0		
8. Final Penalty** (item 7h from item 6)	\$4,400	\$4,400		
Combined Total Penalty (total of all columns for line 8, above)	\$8,800			

* 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.

1. Complaint and Notice of Opportunity for Hearing, Docket No. FIFRA-7-2003- 0055
2. 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, 64 Fed. Reg. 40138
3. A copy of the July 2, 1990, Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act, and
4. A copy of the FIFRA Civil Penalty Calculation Worksheet.

Name

AFFIDAVIT

State of Nebraska)
)SS
County of Lancaster)

On this _____ day of _____, 2003, _____
appears before me, a Notary Public, and swear to the truth and veracity of the contents of the
above Certification. In testament of this fact, said _____, affixed
his signature to this affidavit in my presence.

Name

My Commission Expires:

Notary Public

