

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 1 – NEW ENGLAND
1 Congress Street, Suite 1100 (SEL)
Boston, MA 02114-2023

2008 AUG 20 P 2:49
OFFICE OF
ENVIRONMENTAL STEWARDSHIP

HUGH W. MARTINEZ
direct: (617) 918-1867

CLERK

BY HAND

August 20, 2008

Wanda I. Santiago, Regional Hearing Clerk
EPA Region 1 (New England)
One Congress St., Suite 1100 (RAA)
Boston, MA 02114-2023

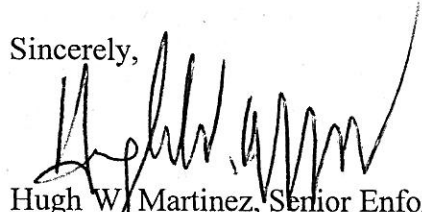
Re: *In the Matter of Spectrowax Corporation*, Docket No. FIFRA-01-2008-0034
Complainant's Motion for Default Order

Dear Ms. Santiago:

Please find enclosed for filing in the above-entitled case, the original and one copy of Complainant's Motion for Default Order and accompanying Memorandum in Support of Complainant's Motion for Default Order. As indicated by the motion and memorandum, for the reasons indicated, EPA is seeking in part from the Regional Judicial Officer a default order assessing the full \$16,000 penalty proposed in the Complaint. Also enclosed is the original and one copy of a certificate of service documenting that, on this date, a copy of the motion and supporting memorandum was mailed to Respondent in the manner indicated.

Thank you for your assistance in this matter.

Sincerely,



Hugh W. Martinez, Senior Enforcement Counsel
Regulatory Legal Office
EPA Region 1

Enclosures

cc: Arnold H. Rosenberg, President, Spectrowax Corporation
Douglas Andler, Spectrowax Agent for Service
Kan S. Tham, EPA Region 1 (by LAN)

In re: Spectrowax Corporation
Docket No. FIFRA-01-2008-0034

CERTIFICATE OF SERVICE

I hereby certify that true and accurate copies of the foregoing cover letter to the Regional Hearing Clerk, Complainant's Motion for Default Order, Memorandum in Support of Complainant's Motion for Default Order, and this Certificate of Service were provided to Respondent, Spectrowax Corporation, at the addresses and in the manner indicated below:

One copy each by Certified Mail,
Return Receipt Requested to:

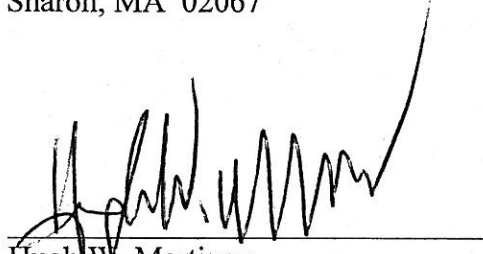
Spectrowax Corporation
% Arnold H. Rosenberg, President
95 Sagamore Road
Wellesley, MA 02481-2739

and

Spectrowax Corporation
% Douglas Andler, Agent for Service
10 Tiot Street
Sharon, MA 02067

Dated: _____

8/20/08



Hugh W. Martinez
Senior Enforcement Counsel
U.S. EPA, Region 1
One Congress Street, Suite 1100 (SEL)
Boston, MA 02114-2023
Phone (dir.): 617-918-1867
Fax: 617-918-0867
E-mail: martinez.hugh@epa.gov

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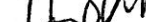
2008-0034 P 2: 49

CLERK

Complainant, the United States Environmental Protection Agency, Region 1

The legal and factual grounds in support of this Motion for Default Order are

Respectfully submitted,



Hugh W. Martinez, Counsel for

8/20/08

Hugh W. Martinez, Counsel for Complainant
U.S. EPA – Region 1

In the Matter of:)
Spectrowax Corporation,) Docket No. FIFRA-01-2008-0034
Respondent.)
_____))

Complainant, the United States Environmental Protection Agency, Region 1 (“EPA”), has moved for issuance of a default order under 40 C.F.R. § 22.17 of the Consolidated Rules of Practice at 40 C.F.R. Part 22 (“Consolidated Rules”) finding that Respondent, Spectrowax Corporation, is in default under Section 22.17(a), that Respondent violated the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”), 7 U.S.C. §§ 136 *et seq.*, and the implementing regulations thereunder, and that a default order is appropriate to conclude the above-captioned proceeding by assessing the \$16,000 penalty proposed in the Complaint.

EPA filed the Complaint in this action on April 15, 2008. *See* Exhibit 1 (Complaint). The Complaint alleges three separate violations of FIFRA Section 12(a)(2)(L), 7 U.S.C. § 136j(a)(2)(L), for failure to submit annual pesticide production reports to EPA for the 2005, 2006, and 2007 reporting years. Under Section 7(c)(1) of FIFRA, 7 U.S.C. § 136e(c)(1), any pesticide producer operating a registered pesticide-producing establishment must submit annual reports to EPA disclosing the types and

amounts of pesticides produced in the prior calendar year, the types and amounts sold or distributed during the same time period (regardless of when they were produced), and the estimated amount of pesticides expected to be produced in the current year. Under FIFRA Section 7 and its implementing regulations at 40 C.F.R. Part 167, producers must submit the annual reports to EPA by March 1 and must submit them even if no pesticides were produced, sold or distributed by the establishment during the prior calendar year (the "reporting year"). *See* 40 C.F.R. § 167.85(d).

EPA mailed the Complaint to Respondent by certified mail, return receipt requested, using the 70 Hichborn Street address listed in the caption of the Complaint. Respondent signed for the Complaint on April 17, 2008 and, accordingly, service was complete on that date. *See* Exhibit 2 (signed receipt). Under the Consolidated Rules at 40 C.F.R. § 22.15(a), an Answer is due within thirty (30) days after service of the Complaint. In this action, Respondent's written Answer to the Complaint was due by May 19, 2008.¹ To date, Respondent has neither filed a written Answer nor requested a hearing in this matter. Accordingly, under the Consolidated Rules, Respondent is properly subject to default which, for Respondent, would constitute an admission of all facts alleged in the Complaint and a waiver of Respondent's right to contest such factual allegations. *See* 40 C.F.R. § 22.17(a).

II. Respondent Violated FIFRA and is Properly Subject to Civil Penalties

Section 22.17(b) of the Consolidated Rules requires that a party moving for default and seeking assessment of a penalty state the legal and factual grounds for the relief requested. In this case, such legal and factual grounds are specified in the

¹ Although 30 days from April 17 is May 17, since the latter date is on a Saturday, under the Consolidated Rules, the deadline for filing the Answer would be extended to the next business day, namely, Monday May 19, 2008.

Complaint and incorporated by reference herein. *See* Exhibit 1. In further support of such legal and factual grounds, including Complainant's establishment of three separate FIFRA Section 7 violations by Respondent, EPA attaches hereto the Declaration of Kan S. Tham. *See* Exhibit 3 (declaration). Mr. Tham is the FIFRA Enforcement Coordinator for EPA Region 1 and the EPA technical contact assigned to this case. He is also the EPA employee who has had the most recent direct contact with Respondent.

The Complaint alleges all of the necessary elements for establishing a *prima facie* case for three separate violations of FIFRA Section 7 and the underlying regulations at 40 C.F.R. Part 167. Among other things, the Complaint alleges that Respondent, Spectrowax Corporation, is a "person" under FIFRA and a pesticide "producer" which operated an "establishment" that was registered under FIFRA since 1976. *See Complaint* pp. 2-3. The Complaint alleges that such pesticide-producing establishment was a registered establishment during 2005, 2006, and 2007 but that, for each of those reporting years, Respondent failed to submit, or timely submit, an annual pesticide report to EPA by the applicable March 1 deadline. *Complaint* pp. 4-6. The Complaint further alleges that, in 2003, Respondent settled a previous FIFRA enforcement action by entering into a Consent Agreement and Final Order with EPA and agreeing to pay a civil penalty of \$3,300 as a way of resolving similar EPA allegations of violating FIFRA Section 7 for the 2002 reporting year. *Complaint* p. 3. Finally, the Complaint alleges that the failure to properly submit annual reports required pursuant to FIFRA Section 7 is a prohibited act under Section 12(a)(2)(L) of FIFRA for which Respondent is subject to penalties under Section 14(a) of the statute, 7 U.S.C. § 136l(a). *Complaint* pp. 4-7.

III. The \$16,000 Penalty Should be Assessed

The Complaint proposes the assessment of a \$16,000 civil penalty against Respondent. Complaint pp. 7-8. In support of assessing that penalty against Spectrowax pursuant to a default order under Section 22.17(b) of the Consolidated Rules, Complainant cites the legal and factual grounds for such relief that are specified in the Complaint and incorporated by reference herein. Such grounds support a finding that the proposed penalty is appropriate under the circumstances of this case and, further, that it is consistent with the statutory factors in Section 14(a)(4) of FIFRA, 7 U.S.C. § 136l(a)(4), and with EPA's June 2007 *Enforcement Response Policy for FIFRA Section 7(c) Pesticide Producing Establishment Reporting Requirement* (the "Policy"), attached hereto as Exhibit 4. The Policy underscores the importance of pesticide producers' annual reporting under FIFRA Section 7, noting that EPA uses the information from the reports for compliance, risk assessment, and risk reduction activities and that such information is "important to protecting human health and the environment and maintaining the integrity of the pesticide program." Policy, p. 4. The Policy also notes that Section 7 pesticide production reports are the only source of such information available to EPA. Id.

The penalty assessment criteria in Section 14(a)(4) of FIFRA require EPA to take into account the gravity of the violations, the appropriateness of the penalty to the size of Respondent's business, and the effect of the penalty on Respondent's ability to continue in business. In this case the penalty is calculated, in light of the statutory factors, using the Policy. Under the Policy, gravity-based penalties for each violation are determined

by the seriousness of the violation, taking into account Respondent's prior compliance history, the length of the violation, and the size of Respondent's business. Policy, pp.11-12.

The Policy characterizes a producer's failure to submit the required Section 7 production report within thirty (30) days after the March 1 due date as a "non-reporting" violation while the failure to submit the report within 30 or fewer days is considered "late reporting." Policy, pp. 8-9. The allegations in the Complaint show that each of Respondent's three violations is considered a non-reporting violation and that Respondent is a "Category II" business² with a previous history of noncompliance with FIFRA Section 7. The proposed penalty is appropriate because it takes into account the gravity of the violations by considering, for example, that Respondent's documented noncompliance with Section 7 dates back to 2003 and that its more recent violations of FIFRA Section 7 span the past three consecutive reporting years.

Consistent with the Policy and the Section 7 civil penalty matrix therein, the appropriate penalty associated with Count I—a second-time, non-reporting violation by a Category II business—for failure to submit the Section 7 report for the 2005 reporting year, is \$3,000. Policy, p. 13. For Counts II and III, the appropriate penalty associated with each—as a third/subsequent non-reporting violation by a Category II business—for failure to submit such reports for the 2006 and 2007 reporting years, is \$6,500 per violation. *Id.* In addition, consistent with Section 14(a) of FIFRA, the Policy provides that a penalty calculated thereunder may be adjusted based on Respondent's ability to continue in business (ability to pay) and good faith efforts to comply. Policy,

² Under the Policy, a Category II business is one with annual gross revenues of more than \$10 million but not more than \$60 million. Policy, p. 12. As set forth in the attached declaration (Exhibit 3), available information indicates that Respondent's gross revenues satisfied those criteria.

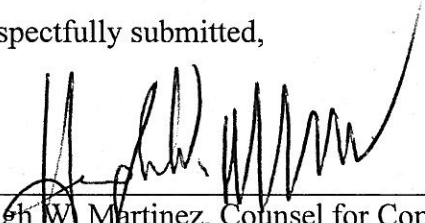
pp. 13-15. However, in light of the facts and circumstances underlying these violations and upon consideration of a recent Dun & Bradstreet business report on Spectrowax, no such adjustments were found to be warranted at this time. *See* Exhibit 3, par. 8. Of course, if Respondent were to establish *bona fide* issues relating to its ability to continue in business or ability to pay the penalty amount, Complainant could further consider such adjustments, as appropriate, based on those issues.

Therefore, consistent with the Policy and the civil penalty matrix therein and in light of the facts alleged, the gravity of violations, Respondent's size and ability to continue in business and the authority of Section 14(a) of FIFRA and the Consolidated Rules, the total penalty appropriate for the three violations alleged in the Complaint is \$16,000.

IV. Conclusion

Based on the above, Complainant has moved for issuance of a default order under Section 22.17 of the Consolidated Rules finding that Respondent, Spectrowax Corporation, is in default under Section 22.17(a), that Respondent violated FIFRA and implementing regulations thereunder, and that a default order is appropriate to conclude this matter by assessing the full \$16,000 penalty proposed in the Complaint.

Respectfully submitted,



Hugh W. Martinez, Counsel for Complainant
U.S. EPA - Region 1

Date: 8/20/08

Exhibit 1

In the Matter of Spectrowax Corporation

FIFRA-01-2008-0034

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 1**

IN THE MATTER OF:

Spectrowax Corporation
70 Hichborn Street
Brighton, MA 02135

Respondent.

Proceedings under Section
14(a) of the Federal
Insecticide, Fungicide, and
Rodenticide Act, as Amended,
7 U.S.C. § 136l(a).

EPA Docket No.
FIFRA-01-2008-0034

**COMPLAINT and NOTICE OF
OPPORTUNITY FOR HEARING**

COMPLAINT

This Complaint and Notice of Opportunity for Hearing ("Complaint") is being issued under Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended ("FIFRA"), 7 U.S.C. § 136l(a). This Complaint alleges that Spectrowax Corporation ("Spectrowax" or "Respondent"), has violated FIFRA Section 12(a)(2)(L), 7 U.S.C. § 136j(a)(2)(L), and provides written notice of the United States Environmental Protection Agency's proposal to assess administrative penalties. The Complainant is, by lawful delegation, Manager of the Enforcement Office, Office of Environmental Stewardship, United States Environmental Protection Agency - Region 1 ("Complainant" or "EPA Region 1").

Statutory and Regulatory Authority

1. Section 7(c)(1) of FIFRA, 7 U.S.C. § 136e(c)(1), and the regulations codified at 40 C.F.R. Part 167, Subpart E require any producer operating a registered establishment to report to EPA the types and amounts of each pesticide product that it is currently producing, which it

produced during the past year, and which it sold or distributed during the past year.

2. Under 40 C.F.R. § 167.85(d), a producer is responsible for obtaining, completing, and reporting this information each year, even if it has not produced any pesticidal product for the reporting year. Producers must submit this information to EPA on or before March 1 of the year following the calendar year which is the subject of the report (the “reporting year”).

3. Section 12(a)(2)(L) of FIFRA provides that it is unlawful and a violation of FIFRA for any person who is a pesticide producer to fail to submit the pesticide production report, as required by Section 7 of FIFRA, 7 U.S.C. § 136e.

4. Section 14(a) of FIFRA, 7 U.S.C. § 136l(a), authorizes a civil penalty of up to \$5,000 against any registrant, commercial applicator, wholesaler, dealer, retailer, or other distributor for each violation of FIFRA. Pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, as amended by the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701, and regulations promulgated at 40 C.F.R. Parts 19, this amount was increased to \$6,500 for violations occurring after March 15, 2004. *See* 69 Fed. Reg. 7121-7127 (February 13, 2004).

General Allegations

5. Respondent is a corporation organized under the laws of Massachusetts and, therefore, is a “person” within the meaning of Section 2(s) of FIFRA, 7 U.S.C. § 136(s). Respondent maintains its principal place of business at 70 Hichborn Street in Brighton, Massachusetts.

6. Respondent manufactures, sells and distributes detergents, soaps, and specialty cleaning products. Respondent is a "producer" as that term is defined in Section 2(w) of FIFRA, 7 U.S.C. § 136(w), and 40 C.F.R. § 167.3.

7. Respondent's facility at 70 Hichborn Street in Brighton, Massachusetts (the "Brighton Establishment") is an "establishment" as that term is defined in Section 2(dd) of FIFRA, 7 U.S.C. § 136(dd), and 40 C.F.R. § 167.3.

8. Pursuant to Section 7(a) of FIFRA, 7 U.S.C. § 136e(a), and 40 C.F.R. § 167.20, Respondent registered the Brighton Establishment as a pesticide-producing establishment, on or about May 13, 1976. EPA subsequently assigned EPA Establishment Number 017217-MA-001 to the Brighton Establishment.

9. On or about July 10, 2003, pursuant to Sections 12(c)(2)(L) and 14(a) of FIFRA, EPA Region 1 issued a civil administrative complaint for penalties against Respondent (the "2003 Complaint") for failure to submit a Section 7 pesticide production report for reporting year 2002 on or before the due date of March 1, 2003. EPA and Spectrowax resolved that administrative proceeding, entitled *In re: Spectrowax Corp.*, Docket No. FIFRA-01-2003-0031, through a mutually agreed-upon settlement set forth in a Consent Agreement and Final Order that was signed on August 13, 2003 by Respondent's President, Arnold H. Rosenberg, and became effective on September 8, 2003. Under that settlement Spectrowax agreed, among other things, to pay a civil penalty of \$3,300 and neither admitted nor denied liability for the violation alleged in the 2003 Complaint.

Violations

Count I: Non-Reporting Violation (Reporting Year 2005)

10. Paragraphs 1 through 9 are realleged and incorporated herein by reference.
11. On or about November 29, 2005, EPA Headquarters mailed EPA Form No. 3540-16, entitled *Pesticide Report for Pesticide-Producing and Device-Producing Establishments* ("Form 3540-16"), to Respondent using the Brighton Establishment address and in the manner described at 40 C.F.R. § 167.85(c).
12. During calendar year 2005, the Brighton Establishment was registered with EPA as a pesticide-producing establishment under Section 7 of FIFRA and 40 C.F.R. Part 167.
13. Notwithstanding the March 1 due date, the notice from EPA Headquarters mailed to Respondent as described in paragraph 11, and Respondent's previous noncompliance with Section 7 of FIFRA described in paragraph 9 herein, Respondent did not submit its pesticide production report for the 2005 reporting year until on or about June 6, 2006.
14. Respondent's failure to submit the required information to EPA for the reporting year 2005 on or before March 1, 2006 constitutes a violation of Section 7(c)(1) of FIFRA and 40 C.F.R. Part 167, Subpart E. Such failure is unlawful pursuant to Section 12(a)(2)(L) of FIFRA and is a violation for which penalties may be assessed pursuant to Section 14(a) of FIFRA.

Count II: Non-Reporting Violation (Reporting Year 2006)

15. Paragraphs 1 through 14 are realleged and incorporated herein by reference.
16. On or about December 4, 2006, EPA Headquarters mailed Form 3540-16 to

Respondent using the Brighton Establishment address and in the manner described at 40 C.F.R. § 167.85(c).

17. During calendar year 2006, the Brighton Establishment was registered with EPA as a pesticide-producing establishment under Section 7 of FIFRA and 40 C.F.R. Part 167.

18. On or about June 15, 2006, EPA Region 1 contacted Spectrowax President, Arnold Rosenberg, in writing, about a meeting EPA Region 1 had requested to discuss, among other things, the status of Respondent's compliance with the annual pesticide production reporting requirements under Section 7 of FIFRA and the regulations at 40 C.F.R. Part 167.

19. On or about June 21, 2006, EPA Region 1 representatives met with Mr. Rosenberg and discussed, *inter alia*, FIFRA Section 7 reporting requirements, generally, and Respondent's own pesticide production reporting, in particular.

20. Notwithstanding the March 1, 2007 reporting deadline, the notice to Respondent from EPA Headquarters described in paragraph 16 herein, the June 21, 2006 meeting between EPA Region 1 and Respondent, and Respondent's previous noncompliance with Section 7 of FIFRA described in paragraph 9 herein, Respondent failed to submit its pesticide production report for the 2006 reporting year by the March 1, 2007 due date. As of the date of filing this Complaint, EPA Region 1 has not received Respondent's pesticide production report for reporting year 2006.

21. Respondent's failure to submit the required information to EPA Region 1 for the reporting year 2006, on or before March 1, 2007, constitutes a violation of Section 7(c)(1) of

FIFRA and 40 C.F.R. Part 167, Subpart E. Such failure is unlawful pursuant to Section 12(a)(2)(L) of FIFRA and is a violation for which penalties may be assessed pursuant to FIFRA Section 14(a) of FIFRA.

Count III: Non-Reporting Violation (Reporting Year 2007)

22. Paragraphs 1 through 21 are realleged and incorporated herein by reference.
23. On or about December 3, 2007, EPA Headquarters mailed Form 3540-16 to Respondent using the Brighton Establishment address and in the manner described at 40 C.F.R. § 167.85(c).
24. During calendar year 2007, the Brighton Establishment was registered with EPA as a pesticide-producing establishment under Section 7 of FIFRA and 40 C.F.R. Part 167.
25. Notwithstanding the March 1, 2008 reporting deadline, the notice to Respondent from EPA Headquarters described in paragraph 23 herein, the June 21, 2006 meeting described in paragraph 19 herein, and Respondent's previous noncompliance with Section 7 of FIFRA described in paragraph 9 herein, Respondent failed to submit its pesticide production report for the 2007 reporting year by the March 1, 2008 due date. As of the date of filing this Complaint, EPA Region 1 has not received Respondent's pesticide production report for reporting year 2007.
26. Respondent's failure to submit the required information to EPA Region 1 for the reporting year 2007, on or before March 1, 2008 constitutes a violation of Section 7(c)(1) of FIFRA and 40 C.F.R. Part 167, Subpart E. Such failure is unlawful pursuant to Section 12(a)(2)(L) of FIFRA and is a violation for which penalties may be assessed pursuant to FIFRA

Section 14(a) of FIFRA.

Proposed Civil Penalty

27. For purposes of determining the amount of any civil penalty to be assessed, Section 14(a)(4) of FIFRA, 7 U.S.C. § 136l(a)(4), requires EPA to take into account the gravity of the violations. As to the violator, Section 14(a)(4) requires EPA to take into account the appropriateness of the penalty to the size of the business of the person charged and the effect of the penalty on the person's ability to continue in business.

28. The proposed penalty takes into account the statutory factors listed in the preceding paragraph and is calculated using EPA's June 2007 *Enforcement Response Policy for FIFRA Section 7(c) Pesticide Producing Establishment Reporting Requirement* (the "Policy"), a copy of which accompanies this Complaint. Under the Policy, a producer's failure to submit the required Section 7 production report within thirty (30) days after the March 1 due date is considered a "non-reporting" violation whereas a failure to submit such report within 30 or fewer days is considered a "late reporting" violation. *See Policy*, at 8-9. The Policy states that EPA uses the information from FIFRA Section 7 reports for compliance, risk assessment, and risk reduction activities and that the information is "important to protecting human health and the environment and maintaining the integrity of the pesticide program." *See Policy*, at 4.

29. Under the Policy, the gravity-based penalty is determined by the seriousness of the violation and takes into account prior compliance history, length of the violation, and the size of the Respondent's business. *See Policy*, at 11-12. Once the penalty has been calculated, further

adjustments may be made based on the violator's ability to continue in business (ability to pay) and good faith efforts to comply with FIFRA. *See Policy*, at 13-15.

30. Based on information available to EPA concerning Respondent's size of business, EPA has determined that Spectrowax is a Category II Business. *See Policy*, at 12.

31. Consistent with the Policy and the penalty matrix found on page 13 thereof, the appropriate penalty for the FIFRA violations alleged in this Complaint is \$16,000. Specifically, and subject to EPA's receipt and evaluation of further relevant information, Complainant proposes to assess a civil penalty of \$3,000 for the violation set forth in Count I and a civil penalty of \$6,500 for each of the violations set forth in Counts II and III, all in view of the facts presented, the gravity of violations alleged, the size of the Respondent's business, Respondent's ability to continue in business, and the authority of Section 14(a) of FIFRA and the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, 40 C.F.R. Part 22 (the "Consolidated Rules"). A copy of the Consolidated Rules is enclosed with this Complaint.

32. Under 40 C.F.R. § 22.18(a) of the Consolidated Rules governing proceedings such as that initiated by the filing of this Complaint, Respondent has the option of resolving this matter at any time by paying the full \$16,000 penalty proposed in this Complaint. Respondent may pay this penalty by certified or cashier's check payable to the "Treasurer of the United States of America", and remit the check to:

U.S. Environmental Protection Agency
Cincinnati Finance Center
P.O. Box 979077
St. Louis, MO 63197-9000

Copies of the check must be sent to:

Regional Hearing Clerk
U.S. Environmental Protection Agency
Region 1 (Mail Code RAA)
One Congress Street, Suite 1100
Boston, MA 02114-2023

and

Kan S. Tham, FIFRA Enforcement Coordinator
U.S. Environmental Protection Agency
Region 1 (Mail Code SEP)
One Congress Street, Suite 1100
Boston, MA 02114-2023

33. A transmittal letter identifying the name of this proceeding and the docket number (*In the Matter of Spectrowax Corporation*, FIFRA-01-2008-0034) should accompany both the remittance and the copy of the check. If Respondent remits full payment of the penalty proposed in this Complaint within 30 days after receiving this Complaint, then no answer need be filed. See 40 C.F.R. § 22.18(a).

OPPORTUNITY TO REQUEST A HEARING

34. As provided in Section 14(a)(3) of FIFRA, 7 U.S.C. 136l(a)(3), and in accordance with the Administrative Procedures Act at 5 U.S.C. § 554, you have the right to request a formal hearing to contest any material fact set forth in this Complaint or to contest the appropriateness

In The Matter Of Spectrowax Corporation, FIFRA-01-2008-0034
Complaint and Notice of Opportunity for Hearing

of the proposed penalty. To avoid being found in default and having the above-cited penalty assessed without further proceedings, you must file a written answer **within thirty (30) days** of your receipt of this Complaint. Your answer should (a) clearly and directly admit, deny, or explain each of the factual allegations contained in the Complaint, (b) briefly state all facts and circumstances, if any, which constitute grounds for a defense, and (c) specifically request an administrative hearing (if desired). The denial of any material fact or raising of any affirmative defense(s) shall be construed as a request for a hearing. Failure to deny any of the factual allegations in this Complaint will constitute an admission of the undenied allegations. The answer must be forwarded to:

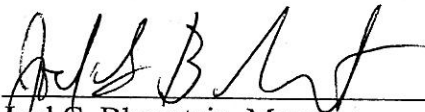
Regional Hearing Clerk
U.S. Environmental Protection Agency
Region 1 (Mail Code RAA)
One Congress Street, Suite 1100
Boston, MA 02114-2023

The hearing which will be held upon your request will be conducted in accordance with the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*, and the Consolidated Rules at 40 C.F.R. Part 22. If you fail to file a written answer and request for hearing within thirty (30) days of the service of this Complaint, a Default Order may be issued pursuant to 40 C.F.R. § 22.17(a).

Informal Settlement Conference

35. Whether or not Respondent requests a hearing, it may confer informally with EPA concerning the alleged violations or the amount of the proposed penalty. Respondent may wish to be represented by counsel at the informal conference. If a settlement is reached, it will be

finalized by the issuance of a written Consent Agreement and Final Order. To explore the possibility of settlement in this matter, contact Hugh W. Martinez, EPA Region 1 Senior Enforcement Counsel, at (617) 918-1867. Mr. Martinez is the attorney assigned to represent EPA in this matter and designated to receive service on behalf of Complainant. Please note that a request for an informal settlement conference does not extend the thirty (30) day period for the submission of a written answer.


Joel G. Blumstein, Manager
Enforcement Office
Office of Environmental Stewardship
EPA Region 1

4/15/08
Date

Exhibit 2

In the Matter of Spectrowax Corporation

FIFRA-01-2008-0034

Exhibit 3

In the Matter of Spectrowax Corporation

FIFRA-01-2008-0034

**U.S. ENVIRONMENTAL PROTECTION AGENCY
REGION 1**

In the Matter of:

Spectrowax Corporation,

Respondent.

Docket No. FIFRA-01-2008-0034

DECLARATION OF KAN S. THAM

1. My name is Kan S. Tham.
2. I am employed as an environmental engineer in the Office of Environmental Stewardship, Toxics and Pesticides Unit, at the United States Environmental Protection Agency Region 1, in Boston, Massachusetts. I have been employed by EPA Region 1 since 1991.
3. Among other things, as part of my official EPA duties, I am responsible for monitoring compliance with the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") by members of the regulated community and for coordinating enforcement activities within my office relating to FIFRA. My duties also include processing and tracking all records received by EPA Region 1 pursuant to the requirement, under Section 7 of FIFRA, that pesticide producers provide EPA with annual reports of pesticide production and sales.
4. As part of my official duties at EPA, I am the lead program/technical staff person for Region 1 in the above-captioned enforcement case alleging FIFRA Section 7 reporting violations. During the development of the above-captioned enforcement action, in my official capacity as an EPA Region 1 environmental engineer and the regional staff person responsible for tracking and maintaining all records relating to Region 1 pesticide producers' compliance with Section 7 reporting requirements under FIFRA, I documented the facts underlying the three (3) violations alleged in the Complaint. Such documentation included information—from Dun & Bradstreet, Standard & Poor's, and other available sources—indicating that the size of Respondent's business met the criteria for a "Category

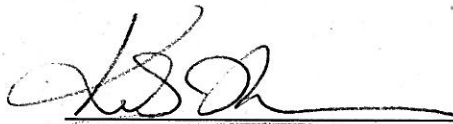
II business” as defined under applicable EPA penalty guidance. Specifically, under EPA’s June 2007 Enforcement Response Policy for FIFRA Section 7(c) Pesticide Producing Establishment Reporting Requirement (p.12), a Category II business is defined as having gross sales of greater than \$10 million, but not greater than \$60 million.

5. As the EPA Region 1 technical staff person assigned to this matter, and in accordance with standard Region 1 practice, on April 17, 2008, I contacted Respondent by telephone (using phone number 617-254-2800) about the filing of EPA’s Complaint. I made this call at about 10:15 a.m. and spoke with an individual who identified himself as Mr. Norman Allen, Project Manager for Spectrowax. Mr. Allen told me that Spectrowax President, Arnold Rosenberg, was out of the office on business but that Mr. Allen would inform Mr. Rosenberg right away regarding the Complaint. The purpose of my phone call to Spectrowax was to provide Respondent, as a courtesy only, with informal notice that the Complaint was being filed and mailed to the company.
6. At some point after the Complaint had been filed, I discovered that both of the telephone numbers that I had previously associated with Respondent’s business, namely, 617-254-2800 and 800-544-5444, appeared to be out of service.
7. To obtain further information about Respondent’s status, on May 23, 2008, I visited the 70 Hichborn Street location in Brighton, MA where Respondent previously had been doing business. During that visit, I observed that Spectrowax appeared to have vacated the premises and that the space formerly housing the establishment now seemed unoccupied. Upon talking with Mr. Robert Mikelus, a person identifying himself as a neighbor, I was informed that Mr. Mikelus had recently observed Spectrowax vacating the 70 Hichborn Street location approximately two weeks prior to my visit.
8. On August 6, 2008, I obtained a Dun & Bradstreet business report, dated August 5, 2008, to

help identify any issues related to Respondent's ability to pay or ability to continue in business. Based on a review of that information, it was determined that no penalty adjustment was warranted at this time.

9. Based on publicly available data sources, EPA Region 1 identified a residential address for Mr. Rosenberg for purposes of service of process.
10. At this time, I have no further information concerning the status of Respondent's business operations.

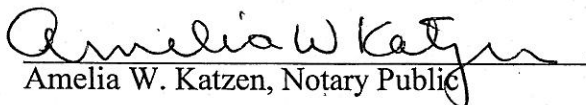
I declare under the pains and penalties of perjury that the foregoing is true and correct, to the best of my knowledge.



KAN S. THAM, Environmental Engineer
U.S. Environmental Protection Agency, Region 1
Boston, Massachusetts

Commonwealth of Massachusetts
Suffolk County

On this 20th day of August, 2008, before me, the undersigned notary public, personally appeared KAN S. THAM, proved to me through satisfactory evidence of identification, which was U.S. EPA I.D., to be the person whose name is signed on the preceding document and who swore or affirmed to me that the contents of the document are truthful and accurate to the best of his knowledge and belief.



Amelia W. Katzen, Notary Public

My commission expires: 4/5/13



United States
Environmental Protection Agency
June 2007

Office of Enforcement and Compliance Assurance
Office of Civil Enforcement
Waste and Chemical Enforcement Division

**ENFORCEMENT RESPONSE POLICY
FOR FIFRA SECTION 7(c)**

**PESTICIDE PRODUCING ESTABLISHMENT
REPORTING REQUIREMENT
June 2007**

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I. Introduction

A. Summary. The revised *Enforcement Response Policy for FIFRA Section 7(c) Pesticide Producing Establishment Reporting Requirement*¹, dated June 2007, supersedes the *Enforcement Response Policy for FIFRA Section 7(c) Pesticide Producing Establishment Reporting Requirement*, dated February 10, 1986. It sets forth guidelines for the Environmental Protection Agency (EPA or the Agency) to use in determining the appropriate enforcement response and penalty amount for violations of Section 7(c) of the Federal Insecticide, Fungicide and Rodenticide Act, as amended (FIFRA or the Act). The revisions in this policy take into account an increase in the maximum statutory penalty required by the Debt Collection Improvement Act of 1996, changes to the Consolidated Rules of Practice (40 CFR Part 22), recent case law developments and other relevant EPA policies that impact enforcement actions.

The purpose of this Enforcement Response Policy (ERP) is to provide predictable and consistent enforcement responses and penalty amounts for violations of FIFRA Section 7(c), yet retain flexibility to allow for individual facts and circumstances of a particular case. This policy is not binding on the Agency.

B. Effective Date. This policy is immediately applicable and should be used to determine enforcement responses and to calculate penalties for all administrative actions concerning FIFRA Section 7(c) initiated after the issuance date of this policy.

C. Disclaimer: The procedures set out in this document are intended solely for the guidance of government personnel. They are not intended and cannot be relied on to create rights, substantive or procedural, enforceable by any party in litigation with the United States. The Agency reserves the right to act at variance with the Policy and to change it at any time without public notice.

II. Background

A. Pesticide Production Establishment Registration. FIFRA Section 7(a) requires producers of pesticides or active ingredients to register the establishment in which the pesticide is produced with the Agency prior to production. EPA Form 3540-8, "Application for Registration of Pesticide-Producing Establishments," is used to submit the information required by this section. EPA assigns a unique establishment number for

¹ Pesticides as referred to in this ERP also include devices as defined in FIFRA Section 2(h).

each registered establishment as a facility identifier.

B. Pesticide Production Reports. FIFRA Section 7(c) and the implementing regulations at 40 CFR Part 167, require producers of pesticide-producing establishments to report their annual pesticide production. EPA Form 3540-16, the "Pesticide Report for Pesticide-Producing or Device Producing Establishments" ("pesticide production report" or "the report") is used to submit the information required by this section. This information provides an overview of establishments in the U.S. engaged in pesticide production and pesticides imported from foreign countries.

C. Uses of Production Information. Annual pesticide production reports are the only mechanism available for obtaining information on type and quantity of pesticide products produced at each establishment for all pesticide-producing establishments in the U.S. and in foreign countries for U.S. importation. The information reported includes the types and amounts of pesticides currently being produced; produced during the past year; and sold or distributed in the past year. EPA uses the information to effectively prioritize and target inspections for compliance purposes and to aid in a variety of risk assessment and risk reduction activities. For example, production information is used to notify producers of required label changes and for compliance purposes to verify that the changes have been made. It is also used to locate and contact producers of specific pesticides in critical situations, such as adulteration of a pesticide or cancellation of a pesticide due to human health or environmental harm impacts, and permits EPA to trace ineffective, contaminated, or otherwise violative products to their source, minimizing any adverse environmental impact that might arise from their production or distribution. The information has been used to notify pesticide producers in preparation for and in clean-up of natural disasters. Pesticide production reports are the only source of this type of information available to EPA and the information collected is important to protecting human health and the environment and maintaining the integrity of the pesticide program.

D. Pesticide Production Reporting Requirements.

1. Who must report? Any person who produces a pesticidal product, active pesticide ingredient or pesticide device is subject to FIFRA Section 7 and is required to register the establishment with EPA. In addition, EPA requires all persons who operate registered establishments to submit an annual production report to the Agency. The regulations at 40 CFR § 167.85(a) define which producers must report. Those producers who must comply with the reporting provisions include:

- Producers of end-use pesticides, including re-packagers;
- Producers of technical grade active ingredients and other manufacturing use pesticides;
- Producers of devices (see 40 CFR § 152.500(b));

- Producers of pesticides in bulk form;
- Foreign producers who export any pesticide to the United States;
- Producers of pesticides under a FIFRA Section 5 Experimental Use Permit or an exemption from an Experimental Use Permit;
- Producers of pesticides under a FIFRA Section 18 Exemption;
- Producers of pesticides under a FIFRA Section 24(b) state local needs registration; and
- Producers of pesticides/devices under contract.

2. Can reports be combined? Producers must submit a separate report for each registered establishment and must not combine reports, even if a company has several establishments. The company headquarters may complete the report forms for each of its producing establishments.

3. When is the initial report due? For newly registered establishments, the initial report must be submitted within 30 days after notification of the registration of their establishment.

4. When is the annual report due? After submitting the initial report, producers are required to submit reports on an annual basis. The due date, as set forth in 40 CFR § 167.85(d), is on or before March 1st, for the prior calendar year. EPA will consider the postmark date or equivalent dispatch information (such as a date stamp) on the report or mailing envelope as the date of submission for reports.

5. What is the appropriate EPA office to send the pesticide reports to? The producer must submit the initial application for establishment registration and the annual Section 7 reports to the region having jurisdiction over the state in which the company's headquarters is located. The application and reports for establishments not found at the same location as their company headquarters should also be submitted by the company headquarters to the regional office having jurisdiction over the state in which the company headquarters is located. Foreign producers must submit their reports to the Office of Compliance, Agriculture Division.

6. How do producers request an extension? A producer may request that EPA extend the March 1st due date for the annual production report. EPA may grant an extension if the request is made before the due date and the producer can present just cause for the extension. The request must be in writing and must be sent to the appropriate EPA office. The decision to grant an extension is at the sole discretion of the Regional Office where the establishment is located, or, for foreign producers, the Office of Compliance, Agriculture Division.

7. What information must be reported? The producer must report information on those products that were produced at the registered establishment. This includes products distributed or sold from the registered establishment and any pesticide, active ingredient, or device packaged, repackaged, labeled or re-labeled at the establishment. Products distributed or sold from, but not produced at, the registered establishment should not be reported. If no production occurred at the registered establishment, the report must be filed indicating zero production. The producer must report the following information:

- Name and address of the establishment
- Amounts and types of pesticides produced during the previous calendar year
- Amount of each pesticide sold or distributed during the previous calendar year
- The estimated amount of each pesticide to be produced in the current year
- The establishment number

III. ENFORCEMENT RESPONSES

A. Level of Action. EPA is authorized under FIFRA to use a range of enforcement actions to address violations of FIFRA Section 7(c) including the initial report (due 30 days after receiving an establishment registration) and the annual production reports (due March 1st). These actions include: Notices of Warning, Civil Administrative Penalties, Termination of Establishment Registrations, and Criminal Sanctions. Each action is briefly described below.

1. Notices of Warning (NOW): FIFRA § 9(c)(3) and FIFRA §14(a)(4). A NOW should generally be issued for FIFRA Section 7(c) violations when the violation occurred despite the exercise of due care and the violation did not cause harm to human health or the environment. NOWs may not be used to assess penalties against the violator.

2. Civil Administrative Penalties: FIFRA § 14(a)(1). An administrative penalty action (pursuant to 40 CFR Part 22) should generally be issued for violations of FIFRA Section 7(c), as described in this policy. Under FIFRA, the maximum penalty EPA is authorized to assess is \$5,000 per violation. However, the Federal Civil Monetary Penalty Inflation Adjustment Act of 1990, as amended by the Debt Improvement Collection Act of 1996 (collectively referred to as the “Adjustment Act”), requires federal agencies to periodically adjust the maximum penalty for inflation. Pursuant to the Adjustment Act, EPA increased its maximum penalty amount for FIFRA violations. For violations that occurred on or after March 15, 2004, a registrant, commercial applicator, wholesaler, dealer or distributor may be

assessed a civil penalty up to \$6,500 for each FIFRA violation. Violations prior to that date may be assessed up to \$5,500 penalty per count. In determining the amount of a civil penalty, EPA must consider three factors: the appropriateness of the penalty to the size of the business; the effect on the ability to continue in business; and the gravity of the violation. Each of these factors should be considered in accordance with guidelines and procedures established in this policy.

3. Criminal Penalties: FIFRA § 14(b)(1). EPA may choose to seek criminal penalties when a producer knowingly violates any provision of FIFRA. In addition, it may be considered a criminal violation to knowingly or willfully falsify information provided to the Agency. This penalty policy does not address criminal violations of FIFRA. EPA regions should work with their respective Criminal Investigation Division office prior to initiating any criminal enforcement actions.

4. Termination of Establishment Registration: 40 CFR § 167.20(f). If the producer fails to submit a report, EPA may terminate the establishment registration alone or in addition to civil and/or criminal penalties.

B. Determining the Appropriate Enforcement Response. The enforcement responses discussed in this ERP are intended to provide national consistency in FIFRA Section 7(c) enforcement actions. This ERP is a guide. The facts and circumstances of each case, including the company's compliance history, should be carefully considered, and documented by the case officer in accordance with this policy to ensure that the response is appropriate for the violation. There are four general types of FIFRA Section 7(c) violations discussed in this penalty policy: Incomplete Reporting; Late Reporting; Non-Reporting; and False Reporting. Incomplete, Late and Non-Reporting violations are unlawful acts under FIFRA Section 12(a)(2)(L). To knowingly falsify any information submitted pursuant to FIFRA Section 7 is an unlawful act under Section 12(a)(2)(M). The appropriate enforcement response for each type of violation is discussed below.

1. INCOMPLETE REPORTING VIOLATION

A report that does not contain all the required information or contains incorrect information is considered an incomplete report. Incomplete reporting violations are categorized as either minor or major incomplete reporting violations, based on the seriousness of the error, and treated accordingly.

Minor Incomplete Reporting Violation: EPA considers a minor reporting violation to be missing or incorrect information in a report that is non-substantive and easily corrected by

the producer. Examples of minor errors are: no date on the signature line, no telephone number, incorrect market code, incorrect product type, and typographical errors.

Major Incomplete Reporting Violation: EPA considers a major reporting violation to be all other missing or incorrect information in a report that cannot be classified as a minor error. For example, a producer fails to report a pesticide that was produced in the preceding year or fails to report the amount of the pesticide that was produced in the preceding year. Other examples of major errors are: no EPA establishment number, no product registration number, no signature on the signature line, and incorrect use classification.

ENFORCEMENT RESPONSE

Minor Incomplete Reporting Violation: EPA will notify the producer of the error and request a corrected report or the missing information, usually via telephone. Typically, the producer will be given 30 calendar days to submit a corrected report or the missing information. A NOW may be issued in cases where the producer consistently submits reports with minor errors or does not submit the corrected report within the time-frame specified by the Agency.

Major Incomplete Reporting Violation: EPA will typically issue a NOW for a first time major incomplete reporting violation. EPA will typically issue a civil administrative penalty if the producer does not submit the corrected report within the specified time-frame and for subsequent Section 7 violations.

2. LATE REPORTING VIOLATION

If a company official submits the report 30 or fewer days after the March 1st due date or 30 or fewer days after the due date of the initial report (without an approved extension), it is a late report. Reports not postmarked but received via mail by March 5th are considered to have been postmarked by March 1st.

ENFORCEMENT RESPONSE

EPA will typically issue a NOW for a first time late reporting violation, unless due to the specific facts and circumstances of the case an alternate enforcement response would be more appropriate. If the case team determines that factors in a specific case warrant an enforcement response other than a NOW, these factors and the reasoning must be documented in the case file. EPA will issue a civil administrative penalty for subsequent Section 7 violations.

3. NON-REPORTING VIOLATION

If a company official fails to submit the report within 30 days after the March 1st due date, or within 60 days after the initial report is due, the establishment will be considered non-reporting. (Note that establishments where no production occurred during the year are also required to submit a report indicating no production within the 30 day time-frame or it is considered a non-reporting violation.)

ENFORCEMENT RESPONSE

EPA will typically issue a NOW for a first time non-reporting violation and specify in the NOW a date for the report to be submitted. If the producer does not submit the completed report by the date specified in the NOW, EPA will usually then issue a civil administrative complaint. However, if case-specific facts demonstrate a producer had direct notification from EPA of reporting requirements prior to the due date, the violation may warrant a civil administrative penalty, even for first time violations. EPA will issue a civil administrative penalty for subsequent Section 7 violations.

Non-producing establishments are treated essentially the same as producing establishments. However, if the non-producing establishment requests termination of its establishment registration within 20 calendar days after written notification of the violation by EPA, the civil penalty generally will be reduced to zero unless there are serious factors making such a reduction inappropriate. If the establishment is re-registered during the five year statute of limitation time period, any subsequent non-reporting violations are subject to a civil penalty without the option of the zero penalty reduction.

EPA may also initiate procedures to terminate the establishment's registration for non-reporting. Termination of establishment registration will be independent of any other enforcement action. See paragraph C below for procedures for terminating an establishment's registration.

4. FALSIFICATION OF INFORMATION IN REPORT VIOLATION

EPA considers submitting false information in the report to occur when the producer knowingly reported fraudulent information.

ENFORCEMENT RESPONSE

EPA considers falsification of information to be a serious violation which, under the

appropriate facts and circumstances, may subject the producer to criminal proceedings. For example, a criminal referral may be appropriate in circumstances where the violator has a previous history of falsifying information in its Section 7 report. EPA will issue a civil administrative penalty for falsification of information in a report unless EPA makes a criminal referral.

C. Terminating Establishment Registrations

1. Domestic Producer - For Cause: EPA regulations at 40 CFR 167.20(f) state that establishment registrations are subject to termination if an annual report is not submitted. If a producer fails to submit a report and EPA decides to terminate its establishment registration, EPA will attempt to notify the producer by issuing a Notice of Intent to Terminate Establishment Registration (NOIT). The NOIT provides notice to the producer that their establishment registration will be terminated unless EPA receives the report within 30 calendar days. If the report is not received within the specified time frame, EPA will issue a Notice of Termination (NOT). If the NOIT is returned to EPA because the addressee moved, was unknown, or could not be located, EPA may immediately issue a NOT. The case file should document what attempts were made to contact the company and why they were unsuccessful.
2. Foreign Producer - For Cause. The EPA Office of Compliance, Agriculture Division, will issue a NOIT to any foreign producers for failure to submit a report. The NOIT will provide notice to the foreign producer that its establishment registration will be terminated if the report is not received within 30 calendar days from receipt of the NOIT. If the foreign producer does not submit the annual report within the specified time frame, EPA will issue a NOT. Foreign producers whose establishment registrations have been terminated may not export pesticide products to the United States. This action is independent of any other EPA enforcement response.
3. Requested Termination. A pesticide-producing establishment or parent company may request to have their establishment registration terminated. Typically this occurs when the establishment: (1) goes out of business; (2) no longer produces pesticides; or (3) no longer falls under the purview of FIFRA Section 7. Requested termination of an establishment registration is a voluntary action by the producer.
4. Notification of Establishments that Cannot be Located. When an establishment did not receive a NOIT because the Agency was not able to locate it at the establishment's last address of record, the Agency may attempt to notify the

facility through public notice. Public notice may be accomplished through a notice in the Federal Register containing the name and number of the establishment or other appropriate means.

5. Registration After Termination for Cause. Producers requesting re-registration of their establishment after termination for cause must resolve the issues that triggered the termination for cause and re-apply for establishment registration pursuant to the requirements of 40 CFR § 167.20.

IV. Assessing a Civil Administrative Penalty

A. Penalty Policy Authority. FIFRA Section 14(a)(4) requires EPA to consider the appropriateness of the penalty to the size of the business of the person charged, the effect of the penalty on the person's ability to continue in business, and the gravity of the violation when calculating the civil penalty amount. The gravity-based portion of the penalty is determined by the seriousness of the violation. Thus, the more serious violations should receive a higher dollar penalty than the less serious violations.

B. Penalty Policy Guidelines. This policy establishes guidelines for gravity-based penalty amounts based on the harm that could result from the violation and the importance of the requirement in achieving the goals and maintaining the integrity of the statute. It also provides guidelines for further penalty adjustments to take into account the respondent's compliance history and the size of the respondent's business. This penalty policy is intended for use as a guideline to promote consistency in the Agency's enforcement responses to FIFRA Section 7(c) violations. Individual circumstances of each case must be considered together with this policy to determine the appropriate penalty amount. EPA should document the individual circumstances relied on when calculating the penalty.

C. Gravity-Based Penalty. The FIFRA Section 7(c) Civil Penalty Matrix in Table 1 below contains the gravity-based penalty for FIFRA Section 7(c) violations. The gravity-based penalties in the matrix below takes into consideration the length of the violation, the respondent's prior compliance history, and the size of respondent's business. The FIFRA Section 7(c) Civil Penalty Matrix is a framework for making penalty determinations that are consistent with FIFRA Section 14(a)(4). While this policy cannot cover all cases, most cases should fit within this policy.

1. Prior compliance history. In assessing the gravity of a violation, EPA evaluates the compliance history of the violator. If similar enforcement action was recently taken against the same violator with no corresponding improvement in behavior, it

is reasonable to conclude that a higher penalty is necessary to gain compliant behavior. Prior enforcement actions include: NOWs, administrative orders, complaints, consent decrees, and consent agreements involving any violation of the Section 7 requirements by a particular company, regardless of where the violation occurred. Because this ERP is applicable only to FIFRA Section 7(c) violations and FIFRA Section 7 is a federally-implemented program, prior state violations are not relevant. For purposes of calculating the gravity penalty, the Agency's issuance of the prior violation must have occurred within three years of the present violation. This three-year period begins on the date of a final order, consent order, NOW, or payment of a civil penalty.

2. Size of business. Under FIFRA Section 14(a)(4), EPA bears the burden of proof in establishing that the penalty assessed takes into account the size of the business of the violator. Thus, it is important to document how the size of the business was determined. For purposes of this penalty policy a violator will be considered a "Category I Business" if the entity has annual gross revenues of more than \$60 million, a "Category II Business" if the entity has annual gross revenues of \$60 million or less, but greater than \$10 million and a "Category III Business" if the entity has annual gross revenues of \$10 million or less. Revenue includes all revenue from an entity and all of the entity's affiliates.

3. Unknown size of business. When there is no information concerning an establishment's size of business, the penalty should be calculated as if the entity were a Category III Business. Because of the availability of business information from the internet and other public databases, EPA assumes that a business with revenues exceeding \$10 million dollars will have financial information available to EPA.

D. Incorporating a Section 7 Count in a Civil Complaint. When a Section 7 count is not the sole count in a civil complaint and a NOW is the appropriate enforcement response for the Section 7 violation, it should be included as a "lesser included count with no penalty." When the Section 7 violation requires a penalty assessment, that amount should be included in the overall penalty calculation.

E. FIFRA Section 7(c) Civil Penalty Matrix²

Type of Violation	First Time Violator	Second Time Violator*	Third and Subsequent*
Late Reporting	NOW	C-I - \$3,000 C-II - \$1,500 C-III - \$1,000	\$6,500
Non-Reporting	NOW If no response C-I - \$3,000 C-II - \$1,500 C-III - \$1,000	C-I - \$4,500 C-II - \$3,000 C-III - \$1,500	\$6,500
Incomplete Report- Minor	Informal Response/NOW	NOW	NOW or C-I- \$3,000 C-II - \$1,500 C-III-\$1,000
Incomplete Report- Major	NOW	C-I - \$3,000 C-II - \$1,500 C-III - \$1,000	\$6,500
False Reporting	\$6,500	\$6,500	\$6,500

* repeat violations refer to violations that occurred within a three year span.

F. Adjustment for Specific Penalty Factors. The following factors are particularly relevant to adjusting the penalty for violations of FIFRA 7(c) reporting requirements for: (1) the violator's ability to continue in business (ability to pay) and (2) good faith efforts to

²The penalties in this chart reflect the current maximum penalty allowed under FIFRA of \$6,500 per violation based on increases to the original statutory penalty pursuant to the Debt Collection Improvement Act of 1996 (DCIA), Pub.L. No. 104-134.

comply with FIFRA. Penalty adjustments for each of these factors are described below.

1. Ability to Pay: Section 14(a)(4) of FIFRA requires the Agency to consider the effect of the civil penalty on the person's ability to continue in business when determining the amount of the civil penalty. EPA will generally not assess penalties that are clearly beyond the means of the violator's ability to pay. At the same time, it is important that the regulated community not see the violation of environmental requirements as a way of aiding a financially-troubled business. Therefore, EPA reserves the option, in appropriate circumstances, of seeking a penalty that might exceed the ability to pay guidelines. It can be assumed that the respondent has the ability to pay until the respondent puts it in issue. The respondent can raise the issue of ability to pay/ability to continue in business in their answer to the civil complaint or during the course of settlement negotiations. The Agency notifies the respondent in the civil complaint of their right to have their ability to continue in business considered in the determination of the amount of the civil penalty. If an alleged violator raises the inability to pay as a defense in their answer or in the course of settlement negotiations, the Agency should request sufficient documentation to conduct an ability to pay analysis. Although the specific documentation will vary depending on the type of analysis conducted, documents such as tax returns, financial statements, asset information, and liability information are relevant to determining the respondent's ability to pay. Such documents are to be provided to the Agency at the respondent's expense and must conform to generally accepted accounting principles and procedures. If the proposed penalty exceeds the ability to pay guidance, the penalty may be reduced to a level consistent with FIFRA section 14(a)(4).

Currently, EPA uses three methods to determine a violator's ability to pay, depending on the specifics of the case: (1) a detailed tax, accounting and financial analysis; (2) a guideline of four percent of average gross annual income, or (3) ABEL, a computer model based on estimating the strength of internally generated cash flows. The latter two of these methods are discussed below.

a) Four percent of gross sales: For cases resolved through a settlement agreement only, EPA may assume that the respondent is able to afford 4% of their gross revenue. The average gross income (from all sources of revenue) for the current year and the prior three years will be calculated. Even where the net income is negative, four percent of gross income will be used as the "ability to continue in business/ability to pay" guidance, since companies with a positive gross income will be presumed to have sufficient cash flow to pay penalties even where there have been net losses. For corporations, EPA will consider revenues from the total corporate entity in its determination of ability to pay/ability to continue in business. Total corporate entity refers to all sites owned and controlled by the foreign or domestic parent company.

b) **ABEL:** ABEL is an EPA computer model that is designed to assess a for-profit entity's ability to pay. The evaluation is based on the estimated strength of internally-generated cash flows. The program uses standard financial ratios to evaluate a violator's ability to borrow money and pay current and long-term operating expenses. ABEL also projects the probable availability of future internally-generated cash flows to evaluate some of a violator's options for paying a civil penalty. Because the program only focuses on a violator's cash flow, there are other sources of revenue that should also be considered to determine if a firm is unable to pay the full penalty. These include:

- certificates of deposit, money market funds, or other liquid assets;
- reduction in business expenses such as advertising, entertainment, or compensation of corporate officers; or
- sale or mortgage of assets such as company cars, aircrafts, or real-estate.

There may be some cases where a respondent argues that it cannot afford to pay the proposed civil penalty even though the penalty as adjusted does not exceed the ability to pay guidance. In such cases, EPA may consider a delayed payment schedule. In exceptional circumstances, EPA may also consider reductions that are greater than those necessary to adjust for ability to pay. If a special circumstance reduction of the proposed civil penalty is warranted, the case file must include substantive reasons why the extraordinary reduction was appropriate, including: (1) setting forth the facts of the case; (2) why the penalty provided from the civil penalty matrix was inequitable; (3) how all other methods for adjusting or revising the proposed penalty would not adequately resolve the inequity; and (4) the manner in which the extraordinary adjustment of the penalty effectuated the purposes of the Act.

While EPA will generally not collect a civil penalty which exceeds a violator's ability to pay, EPA reserves the option, in appropriate circumstances, of seeking a penalty that might exceed the ability to pay guidelines, cause bankruptcy, or result in a violator's inability to continue in business. Under these circumstances the case file must contain a written explanation, describing the reasons for exceeding the civil penalty "ability to pay" guidelines. For additional information on the consideration of a violator's ability to continue in business, see the EPA General Enforcement Policy #GM-22, entitled "A Framework for Statute-Specific Approaches to Penalty Assessments," issued on February 16, 1984 as part of the Agency's General Enforcement Policy Compendium.

2. Good Faith Adjustments. During the course of settlement negotiations, the EPA may consider the respondent's attitude or good faith efforts to comply with FIFRA to reduce the penalty as much as 20 percent below the proposed penalty, if such a reduction would serve the public interest.

G. Supplemental Environmental Projects. Under certain circumstances, as part of an enforcement settlement, the Agency may consider adjusting the penalty amount downward in return for an agreement by the violator to undertake an appropriate environmentally beneficial project known as a supplemental environmental project (SEP). SEPs have certain legal requirements that must be met and the project cannot include activities that the violator must undertake to return to compliance with the law. All proposals for such projects should be evaluated in accordance with EPA's May 1, 1998, Supplemental Environmental Projects Policy and any subsequent amendments to the SEP Policy.³ The information is used for a variety of other compliance activities to ensure that pesticide manufacturers are complying with FIFRA.

V. Appendices

- A. Model Notices
- B. Model Civil Complaint

³This Policy and additional information on SEPs can be found on the EPA web site at: www.epa.gov/compliance/civil/seps.

Appendix A1

Model Notice of Warning

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

EPA Est. 000-00

Establishment's Address

Gentlemen:

NOTICE OF WARNING

FOR FAILING TO FILE INITIAL PESTICIDE ESTABLISHMENT REPORT

This letter constitutes a warning pursuant to section 9(c)(3) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended, (hereafter FIFRA), 7 USC section 136g(c)(3). The Environmental Protection Agency is hereby advising you that you are in violation of section 12(a)(2)(L) of FIFRA, 7 USC §136j(a)(2)(L), by failing to file the initial pesticide production report within thirty (30) calendar days after the receipt of notification of registration for your establishment which included the EPA Production Report Form. The aforementioned information was sent via certified mail to (ESTABLISHMENT'S NAME, ADDRESS) and was received on (DATE OF RETURN RECEIPT).

You are hereby advised to file the initial report with this Regional Office, within twenty (20) calendar days. If you have not filed the initial pesticide production report within the twenty (20) calendar days, you shall be subject to the remedy set forth in Part 40 Code of Federal Regulations §167.5, whereby the registration of this producing establishment shall be terminated.

All necessary measures are taken by the Agency to preclude the issuance of a notice of termination of registration. However, if the report is not received within the given timeframe of this notice, proceedings to terminate your establishment's registration will be pursued.

Please note that according to FIFRA, no person shall produce any pesticide subject to FIFRA in any State unless the establishment in which it is produced is registered with the Administrator.

If you have any questions concerning this matter, please contact (NAME AND PHONE NUMBER).

Sincerely yours,

Signature
(Name and Title)

Model Notice of Warning

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

EPA EST. 000-00

Establishment's Address

Gentlemen:

NOTICE OF WARNING

FOR FILING A LATE ANNUAL PESTICIDE ESTABLISHMENT REPORT

This letter constitutes a warning pursuant to section 9(c)(3) of the Federal Insecticide Fungicide and Rodenticide Act, as amended (FIFRA), 7 USC section 136j(c)(3). The Environmental Protection Agency is hereby advising you that you are in violation of section 12(a)(2)(L) of FIFRA, 7 USC §136j(a)(2)(L), by not filing the annual pesticide report required by FIFRA §7(c), on or before the February 1 due date. The report filed by your producing establishment located at (address) was received by this Office on (DATE).

You are hereby advised to comply with the regulations promulgated at 40 CFR §167.5(c) which states the due date for annual reports as being February 1 of each year. Noncompliance with this reporting requirement in the future may subject your producing establishment to an administrative civil penalty.

If you have any questions concerning this notice of warning, please contact (NAME) at (PHONE NUMBER).

Sincerely yours,

(Signature
Name and Title)

Model Notice of Warning for Failing to File a
Complete Pesticide Report

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

EPA EST. 000-00

Establishment's Address

Gentlemen:

NOTICE OF WARNING

FOR FAILING TO SUBMIT A COMPLETE PESTICIDE REPORT

This letter constitutes a warning pursuant to section 9(c)(3), 7 USC section 136j(c)(3) of the Federal Insecticide, Fungicide and Rodenticide Act, as amended, (FIFRA). The Environmental Protection Agency is hereby advising you that you are in violation of section 12(a)(2)(L) of FIFRA, 7 USC section 136(a)(2)(L), by failing to submit the information which was missing from the annual pesticide report received on (DATE). This Office contacted you on (DATE) via (letter or telephone) to request the missing information whereby your establishment was allocated ten (10) days to submit the information to this Office. The information required in the pesticide report may be found at 40 CFR 167.5(a).

You are hereby advised to submit the information requested within twenty (20) calendar days from the receipt of this Notice of Warning. Failure to do so may subject your producing establishment to an administrative civil penalty.

If you have any questions concerning this matter, please contact (NAME) at (PHONE #).

Sincerely yours,

Signature
(Name and Title)

Model Notice of Intent to Terminate Establishment Registration

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

EPA Est. 000-00

Establishment's Address

Gentlemen:

NOTICE OF INTENT TO TERMINATE ESTABLISHMENT REGISTRATION

You are hereby advised of the Environmental Protection Agency intention to terminate the registration of your pesticide producing establishment located in (city and state) pursuant to 40 CFR §167.3 and section 7 of the Federal Insecticide, Fungicide and Rodenticide Act, (FIFRA), as amended, 7 USC §6136, in response to your failure to submit the production report required by section 7(c) of FIFRA and 40 CFR §167.3.

Your failure to file the required report by February 1, 19 — has already subjected you to the (NOTICE OF WARNING, CIVIL OR CRIMINAL PENALTY) provision of the Act. Failure to submit the required reports within twenty (20) calendar days from the date of this notice will result in the termination of your establishment registration, which shall be effective upon the issuance of a Notice of Termination of Establishment Registration. Submission of the required report within the twenty (20) day time period shall not affect your liability under the provisions of FIFRA, whereby the enforcement action which had previously been initiated against your establishment is still in effect. However, termination of your establishment registration is an enforcement action, independent of any other.

In the event you do not respond to this notice, you should assure yourself that all necessary measures will be taken to preclude any production not in compliance with FIFRA or the regulations.

Sincerely yours, —

Signature
(Name and Title)

Model Notice of Termination of
Establishment Registration

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

EPA Est. 000-00

(Company name)
(Address)

Subject: (Establishment registration number)

NOTICE OF TERMINATION OF ESTABLISHMENT REGISTRATION

Gentlemen:

The Environmental Protection Agency hereby informs you that the Agency has terminated the registration of your establishment located in (city and state), pursuant to Section 7 of the Federal Insecticide, Fungicide, and Rodenticide Act, (FIFRA) as amended, 7 U.S.C. §136 and 40 C.F.R. §167.3. The Agency has taken this action based on your failure to submit reports required by Section 7(c) of the Act and by 40 C.F.R. §167.5.

You may apply for reinstatement of your establishment registration at any time subsequent to the termination of your establishment registration. However, the reinstatement of your establishment registration will be expressly conditional upon the Agency's receipt of your delinquent pesticide establishment report(s) together with an application for establishment registration (EPA Form 3540-16).

Please be assured that all necessary measures shall be taken to preclude any action at your establishment which is not in compliance with the Act. Production of pesticides, active ingredients, or devices in an unregistered establishment or in an establishment whose registration has been terminated is an unlawful action subject to the civil and criminal penalty provisions of the Act.

Sincerely yours,

Signature
(Name, and Title)

Appendix B1

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

(Est. name and address)

Dear ():

Enclosed is an administrative Civil Complaint alleging violations documented under the Federal Insecticide, Fungicide, and Rodenticide Act, as amended (FIFRA).

In determining the amount of the penalty, the Agency is required to consider 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 violations. The Guidelines for the Assessment of Civil Penalties (39 FR 27712) set forth the following size-of-business gradations, based on gross annual sales:

Category I	Less than \$100,000
Category II	\$100,000 - \$400,000
Category III	\$400,000 - \$700,000
Category IV	\$700,000 - \$1,000,000
Category V	In excess of \$1,000,000

In the absence of specific information on your firm's size of business, as determined by gross annual sales, it has been assumed for purposes of this Complaint that your firm is a Category V size of business.

Please be assured that if your firm has been placed in Category V incorrectly, the proposed penalty will be adjusted upon submittal of reliable financial information indicating another category is appropriate. If you have any questions concerning this matter, please contact (name) at (phone #).

Sincerely yours,

Signature
(Name and Title)

Enclosure