

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION VII

901 NORTH 5<sup>th</sup> STREET  
KANSAS CITY, KANSAS 66101

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ENVIRONMENTAL PROTECTION  
AGENCY-REGION VII  
REGIONAL HEARING CLERK

BEFORE THE ADMINISTRATOR

IN THE MATTER OF ) Docket No. FIFRA-07-2006-0175  
)  
Paul A. Depperschmidt, and )  
Mid-State Farmers Cooperative, Inc. ) COMPLAINT AND NOTICE OF  
819 West Union Road ) OPPORTUNITY FOR HEARING  
Rush Center, Kansas 67575 )  
)  
)  
Respondents )

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 Respondents are Mid-State Farmers Cooperative, Inc., a pesticide dealer, located at 819 West Union Road, Rush Center, Kansas; and Paul A. Depperschmidt, a pesticide applicator, employed by Mid-State Farmers Cooperative, Inc. Respondents are each a "person" as defined by Section 2(s) of FIFRA, 7 U.S.C. § 136(s). Respondent, Mid-State Farmers Cooperative, Inc. (hereafter "Mid-State,") is a Kansas corporation qualified to do business in the state of Kansas.

### Section III

#### Violations

##### General Allegations

5. The Complainant hereby states and alleges that Respondents have violated FIFRA as follows:

6. Section 12(a)(2)(F) of FIFRA, 7 U.S.C. § 136(a)(2)(F), states that it shall be unlawful for any person to distribute or sell, or to make available for use, or to use, any registered pesticide classified for restricted use for some or all purposes other than in accordance with section 3(d) of FIFRA, 7 U.S.C. § 136a(d)(1)(C)(i).

7. Section 3(d)(1)(C)(i) and (ii) of FIFRA, 7 U.S.C. § 136(d)(C)(i) and (ii), state in pertinent part, that a restricted use pesticide shall be applied for any use to which the restricted classification applies only by or under the direct supervision of a certified applicator.

8. Section 2(e)(1) of FIFRA, 7 U.S.C. § 136(e)(1), defines “certified applicator” as any individual who is certified under Section 11 of FIFRA, 7 U.S.C. § 136i, to use or supervise the use of any pesticide which is classified for restricted use.

9. Section 12(a)(2)(G) of FIFRA, 7 U.S.C. § 136(a)(2)(G), states that it shall be unlawful for any person to use a registered pesticide in a manner inconsistent with its labeling.

10. WEEVIL-CIDE® PELLETS Aluminum Phosphide Fumigant is a restricted use pesticide registered to United Phosphorus, Inc., Trenton, New Jersey, under EPA Reg. No. 70506-14.

11. The manual of WEEVIL-CIDE® PELLETS Aluminum Phosphide Fumigant, EPA Reg. No. 70506-14, states, in pertinent part: “RESTRICTED USE PESTICIDE DUE TO HIGH ACUTE INHALATION TOXICITY OF PHOPHINE GAS. For retail sale to Dealers and Certified Applicators only. For use by Certified Applicators or persons under their direct supervision, and only for those uses covered by the Certified Applicator’s certification. Refer to the directions in this Applicator’s Manual for requirements of the physical presence of a Certified Applicator.”

12. The label of WEEVIL-CIDE® PELLETS Aluminum Phosphide Fumigant, EPA Reg. No. 70506-14, states, in pertinent part: “DIRECTIONS FOR USE,” “It is a violation of Federal Law to use this product in a manner inconsistent with its labeling. Refer to the Applicator’s Manual for detailed precautions, recommendations and directions for use.” The Applicator’s Manual, which is referenced on the label for WEEVIL-CIDE® PELLETS Aluminum Phosphide Fumigant, EPA Registration Number 70506-14, states in pertinent part: “APPLICATION OF FUMIGANT,” “At least two persons, a certified applicator and trained person, or two trained persons under the direct supervision of the certified applicator must be present during fumigation of structures when entry into the structure for application of the fumigant is required.”

13. The Applicator’s Manual, which is referenced on the label for WEEVIL-CIDE® PELLETS Aluminum Phosphide Fumigant, EPA Reg. No. 70506-14, states, in pertinent part:

“PLACARDING OF FUMIGATED AREAS,” “All entrances to the fumigated structure must be placarded. . . Do not remove placards until the treated commodity is aerated down to 0.3 ppm phosphine or less. To determine whether aeration is complete, each fumigated structure or vehicle must be monitored and shown to contain 0.3 ppm or less phosphine gas in air space around and, if feasible, in the mass of the commodity.”

14. The Applicator’s Manual, which is referenced on the label for WEEVIL-CIDE® PELLETS Aluminum Phosphide Fumigant, EPA Reg. No. 70506014, states, in pertinent part: “MONITORING. . . Monitoring of phosphine conditions must be conducted in areas to prevent excessive exposure. . .,” “Keep a log or manual of monitoring records for each fumigation site.”

15. The Applicator’s Manual, which is referenced on the label for WEEVIL-CIDE® PELLETS Aluminum Phosphide Fumigant, EPA Reg. No. 70506-14, states, in pertinent part: “RESPIRATORY PROTECTION. . . WHEN RESPIRATORY PROTECTION MUST BE WORN,” “National Institute for Occupational Safety and Health/Mine Safety and Health Administration (NIOSH/MSHA) approved respiratory protection must be worn . . . when concentrations are unknown. Self-contained breathing apparatus (SCBA) must be worn during entry into sites that are under fumigation if the concentration of phosphine is unknown . . .”

16. The Applicator’s Manual, which is referenced on the label for WEEVIL-CIDE® PELLETS Aluminum Phosphide Fumigant, EPA Reg. No. 70506-14, states, in pertinent part: “FUMIGATION MANAGEMENT PLAN,” “The certified applicator is responsible for working with the owners and/or responsible employees of the site to be fumigated to develop a Fumigation Management Plan (FMP). . . In addition to the plan, the applicator must read the entire label and the Applicator’s Manual and must follow its directions carefully. . . The FMP and related documentation, including monitoring records, must be maintained for a minimum of 2 years. . .”

17. The Applicator’s Manual, which is referenced on the label for WEEVIL-CIDE® PELLETS Aluminum Phosphide Fumigant, EPA Reg. No. 70506-14, states, in pertinent part: “STORAGE INSTRUCTIONS. . . LABELING OF STORAGE,” “. . . At a minimum, the storage must be marked with the following signs and should be locked:

1. Danger, Poison (with skull and cross bones)
2. Authorized Personnel Only
3. Pesticide Storage NFPA Hazard Identification Symbols . . .”

18. On December 13, 2004, a representative of the Kansas Department of Agriculture (KDA) conducted an investigation of an anonymous complaint about possible fumigation violations at Mid-State in Bison, Kansas. The KDA inspector documented that pesticide applications of a grain fumigant occurred on December 3, 2004; December 6, 2004; December 7, 2004; and December 9, 2004, by the Respondent.

Count 1

19. The facts stated in paragraphs 6 through 18 are realleged and incorporated as if fully stated herein.

20. On December 3, 6, 7, and 9, 2004, Paul A. Depperschmidt, acting in his capacity as an employee of Mid-State, made applications to two elevator bins (bins #6 and #18) using a restricted use pesticide WEEVIL-CIDE® PELLETS Aluminum Phosphide Fumigant, EPA Reg. No. 70506-14.

21. On the dates of the applications referred to in paragraph 18, Paul A. Depperschmidt was not a certified applicator as that term is defined in Section 2(e)(1) of FIFRA, 7 U.S.C. § 136(e)(1), and as set out in paragraph 11.

22. Paul A. Depperschmidt used the WEEVIL-CIDE® PELLETS Aluminum Phosphide Fumigant, EPA Reg. No. 70506-14, and was not working under the direct supervision of a certified applicator at the time as required by Section 3(d)(1)(C)(i) of FIFRA, 7 U.S.C. § 136(d)(1)(C)(i), and as set out in paragraph 7.

23. Respondents violated Section 12(a)(2)(F) of FIFRA, 7 U.S.C. § 136(a)(2)(F), by failing to apply the pesticide classified for restricted use by or under the direct supervision of a certified applicator in accordance with section 3(d) of FIFRA, 7 U.S.C. § 136a(d).

24. Pursuant to Section 14 of FIFRA, 7 U.S.C. § 136l, and based on the facts stated in paragraphs 19 through 23, it is proposed that a civil penalty of \$6,500 be assessed against Respondents.

#### Count 2

25. The facts stated in paragraphs 6 through 18 are realleged and incorporated as if fully stated herein.

26. On December 3, 6, 7, and 9, 2004, Paul A. Depperschmidt, acting in his capacity as an employee of Respondent, Mid-State, made applications to two elevator bins (bins #6 and #18) using a restricted use pesticide WEEVIL-CIDE® PELLETS Aluminum Phosphide Fumigant, EPA Reg. No. 70506-14.

27. Paul A. Depperschmidt, acting in his capacity as an employee of Respondent, Mid-State, did not glue or affix the required warning placards on or over the entrances to the elevator bins that were fumigated, as required by the label on WEEVIL-CIDE® PELLETS Aluminum Phosphide Fumigant, EPA Reg. No. 70506-14. Mr. Depperschmidt did not monitor for phosphine during or after the fumigant application, did not use any type of respiratory protection during or after the fumigant application, kept no written records of the fumigant application, was not a certified applicator, and was not working under the direct supervision of a certified applicator, as set out in paragraphs 11, 12, 13, 14, and 15.

28. Respondents did not have a fumigation management plan in place, as required by the label on WEEVIL-CIDE® PELLETS Aluminum Phosphide Fumigant, EPA Reg. No. 70506-14, as set out in paragraph 16.

29. Respondents did not store WEEVIL-CIDE® PELLETS Aluminum Phosphide Fumigant, EPA Reg. No. 70506-14 in accordance with the label directions, as set out in paragraph 17.

30. Respondents violated Section 12(a)(2)(G) of FIFRA, 7 U.S.C. § 136(a)(2)(G), by using a registered pesticide in a manner inconsistent with its labeling.

31. Pursuant to Section 14 of FIFRA, 7 U.S.C. § 136l, and based on the facts stated in paragraphs 25 through 30, it is proposed that a civil penalty of \$6,500 be assessed against Respondents.

#### Section IV

##### Total Proposed Penalty

32. Section 14 of FIFRA, 7 U.S.C. § 136l, and the Debt Collection Improvement Act of 1996, as implemented by the Civil Monetary Penalties Inflation Adjustment Rule, 40 C.F.R. Part 19, authorize the issuance of this Complaint for the assessment of a civil penalty for each violation. For any such violation occurring on or after March 15, 2004, the maximum statutory penalty per violation is Six Thousand Five Hundred Dollars (\$6,500). The EPA proposes to assess a total civil penalty of Thirteen Thousand Dollars (\$13,000) against Respondents for the above-described violations.

##### Appropriateness of Proposed Penalty

33. 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)).

34. For purposes of calculating the proposed penalty, Respondent was placed in Category I size of business (total business revenues in excess of \$1,000,000 per year) when Complainant was unable to obtain specific information as to Respondent's gross revenues. If this categorization is incorrect, the proposed penalty will be adjusted upon submittal of reliable financial information indicating another category is appropriate.

35. 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.

36. 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.

37. 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.

38. Payment of the total penalty - \$13,000 - may be made by certified or cashier's check payable to the "Treasurer, United States of America," and remitted to:

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

39. 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 5<sup>th</sup> Street  
Kansas City, Kansas 66101

and a copy to:

Denise L. Roberts  
Assistant Regional Counsel  
EPA - Region 7  
901 North 5<sup>th</sup> Street  
Kansas City, Kansas 66101

#### NOTICE OF OPPORTUNITY FOR HEARING

##### Section V

##### Answer and Request for Hearing

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

Regional Hearing Clerk  
EPA - Region 7  
901 North 5<sup>th</sup> 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.

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

42. 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.

43. 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

44. 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:

Denise L. Roberts  
Assistant Regional Counsel  
EPA Region 7  
901 North 5<sup>th</sup> Street  
Kansas City, Kansas 66101  
Telephone: (913) 551-7559

45. 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.

46. 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.

04/27/06  
Date

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

Denise L. Roberts  
Denise L. Roberts  
Assistant Regional Counsel  
Office of Regional Counsel

Enclosures:

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



CERTIFICATE OF SERVICE

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

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

Mel Cline, Manager  
Mid-State Farmers Cooperative Association, Inc.  
819 West Union Road  
Rush Center, Kansas 67575-0000

04/28/06  
Date

Julia A. Cacho  
Julia A. Cacho

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

RESPONDENT: Mid-State Farmers Cooperative Association, Inc.  
 ADDRESS: 819 West Union Road  
 Rush Center, Kansas 67575-0000

Prepared By: Elizabeth Murtagh-Yaw  
 Date: April 25, 2006

	Count 1	Count 2	Count 3	Count 4
<b>Appendix A</b>				
1. Statutory Violation	12(a)(2)(F)	12(a)(2)(G)		
2. FTTS Code	2FA	2GA		
3. Violation Level	2	2		
<b>Appendix C - Table 2 - Size of Business Category</b>				
4. Violator Category * § 14(a)(1) or § 14(a)(2)	14(a)(1)	14(a)(1)		
5. Size of Business Category	I	I		
<b>Appendix C - Table 1 - FIFRA Civil Penalty Matrix</b>				
6. BASE PENALTY	\$6,500	\$6,500		
<b>Appendix B - Gravity Adjustments</b>				
7a. Pesticide Toxicity	2	2		
7b. Human Harm	3	3		
7c. Environmental Harm	3	3		
7d. Compliance History	0	0		
7e. Culpability	4	4		
7f. Total Gravity Adjustment Value (add items 7a - 7e)	12	12		
<b>Appendix C - Table 3 - Adjustments</b>				
7g. Percent Adjustment	0	0		
7h. Dollar Adjustment	0	0		
<b>8. Final Penalty**</b> (item 7h from item 6)	<b>\$6,500</b>	<b>\$6,500</b>		
Combined Total Penalty (total of all columns for line 8, above)	<b>\$13,000</b>			

\* 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.