

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
REGION 8

2010 SEP 30 AM 9:06

Docket No. FIFRA-08-2010-0018

FILED  
EPA REGION VIII  
HEARING CLERK

In the Matter of: )  
)  
Midwest Fertilizer Inc., )  
)  
Respondent )  
**PENALTY COMPLAINT AND NOTICE OF  
OPPORTUNITY FOR HEARING**

**INTRODUCTION (JURISDICTION)**

1. This civil administrative enforcement action is authorized by Congress in section 14(a) of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. § 136(a). The rules for this proceeding are 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 (Rules of Practice)," 40 C.F.R. part 22, a copy of which is enclosed.

2. The undersigned EPA officials have been properly delegated the authority to issue this action.

3. EPA alleges that Respondent Midwest Fertilizer, Inc. has violated FIFRA by storing a restricted use pesticide in a manner inconsistent with its label, by keeping incomplete and sometimes incorrect pesticide sales records, and proposes the assessment of a civil penalty, as more fully explained below. FIFRA authorizes the assessment of a civil penalty for violations of the Act. 7 U.S.C. § 136(a).

**NOTICE OF OPPORTUNITY FOR A HEARING**

4. Respondent has the right to a public hearing before an administrative law judge (ALJ) to disagree with (1) any fact stated (alleged) by EPA in the complaint, or (2) the appropriateness of the proposed penalty.

5. To disagree with the complaint and assert your right to a hearing, Respondent must file a written answer (and one copy) with the Regional Hearing Clerk (1595 Wynkoop Street; Denver, Colorado 80202-1129) within 30 days of receiving this complaint. The answer must clearly admit, deny or explain the factual allegations of the complaint, the grounds for any defense, the facts you may dispute, and your specific request for a public hearing. Please see section 22.15 of the Rules of Practice for a complete description of what must be in your answer. **FAILURE TO FILE AN ANSWER AND REQUEST FOR HEARING WITHIN 30 DAYS MAY WAIVE RESPONDENT'S RIGHT TO DISAGREE WITH THE ALLEGATIONS**

**OR PROPOSED PENALTY, AND RESULT IN A DEFAULT JUDGMENT AND ASSESSMENT OF THE PENALTY PROPOSED IN THE COMPLAINT.**

**QUICK RESOLUTION**

6. Respondent may resolve this proceeding at any time by paying the specific penalty (\$7,500) proposed in the complaint. Such payment need not contain any response to, or admission of, the allegations in the complaint. Such payment constitutes a waiver of Respondent's right to contest the allegations and to appeal the final order. See section 22.18 of the Rules of Practice for a full explanation of the quick resolution process. This payment shall be made by remitting a cashier's or certified check for that amount, payable to "Treasurer, United States of America," to:

U. S. Environmental Protection Agency  
Fines and Penalties  
Cincinnati Finance Center  
PO Box 979077  
St. Louis, MO 63197-9000

**SETTLEMENT NEGOTIATIONS**

7. EPA encourages discussing whether cases can be settled through informal settlement conferences. If you want to pursue the possibility of settling this matter, or have any other questions, contact Eduardo Quintana at 1-800-227-8917; extension 6924, 303-312-6924, or the address below. ***Please note that calling the attorney or requesting a settlement conference does NOT delay the running of the 30 day period for filing an answer and requesting a hearing.***

**GENERAL ALLEGATIONS**

At all times pertinent to the complaint, the following general allegations apply:

8. Respondent, Midwest Fertilizer, Inc. is incorporated in South Dakota.
9. Respondent is a "person" within the meaning of section 2(s) of FIFRA, and subject to the requirements of the statute and/or regulations. 7 U.S.C. § 136(s).
10. Respondent operates a pesticide dealership located in the Rosebud Reservation, Todd County, South Dakota (the "Facility"). Respondent's business address is in Kilgore, Nebraska. 40 C.F.R. §171.2(b)(3).
11. Respondent is a "dealer" within the meaning of section 14(a)(1) of FIFRA, 7 U.S.C. § 136l(a)(1).

12. PhosFume is a restricted use pesticide (RUP), EPA Reg. No. 70506.

13. On April 13 and 14, 2010 an EPA inspector conducted an inspection of Respondent's Facility. During the inspection, the EPA inspector observed the area where Respondent stored its PhosFume. The EPA inspector obtained RUP sales records for Rozol Prairie Dog Bait (EPA Reg. No. 7173-244), Rozol Prairie Dog (uncertain EPA registration number), Tordon 22k (EPA Reg. No. 67619-6), Zinc Phosphide Oat Bait (EPA Reg. No. 61282-14), Atrazine 90DF (EPA Reg. No. 19713-76), and Fumitoxin (EPA Reg. No. 5857-1). The RUP sales records include sales made in 2009 and 2010.

### **Count 1**

14. Paragraphs 8 through 13 are realleged and incorporated herein by reference.

15. The PhosFume label contains storage directions. According to the label's storage directions, the PhosFume pesticide must be stored under "lock and key" in a posted pesticide storage area. The storage area must be marked with signs stating and depicting "Danger, Poison (with skull and cross bones), Authorized Personnel Only, Pesticide Storage NFPA [National Fire Protection Association] Hazard Identification Symbols."

16. FIFRA section 12(a)(2)(G), 7 U.S.C. § 136j(a)(2)(G), prohibits the use of registered pesticides in a manner inconsistent with its labeling.

17. During the inspection of Respondent's Facility, the EPA inspector observed that PhosFume was stored in an unlocked storage room. The inspector observed that there were no signs, as required by the label, on door to the storage room or around the door to the storage area.

18. Respondent's storage of PhosFume in a manner contrary to the label's storage directions constitutes the use of a registered pesticide in a manner inconsistent with its labeling and therefore a violation of FIFRA § 12(a)(2)(G), 7 U.S.C. § 136j(a)(2)(G).

19. Respondent is liable for this violation of FIFRA.

### **Count 2**

20. Paragraphs 8 through 13 are realleged and incorporated herein by reference.

21. RUP dealers are required by regulation to maintain sales records that include the name and address of the person to whom the RUP was made available for use. 40 C.F.R. § 171.11(g)(2)(i)(A).

22. RUP dealers are required by regulation to maintain sales records that include the EPA pesticide registration number for each of the RUPs sold. 40 C.F.R. § 171.11(g)(2)(i)(C).

23. During the inspection, the EPA inspector obtained sales records for various RUPs which in some instances did not contain the full address of the person to whom the RUP was made available for use. The sales records also incorrectly included the EPA registration number for Tordon 22K as EPA Reg. No. 6761-6. The correct EPA registration number for Tordon 22K is EPA Reg. No. 62719-6. Some sales records for the “Rozol Prairie Dog” did not include any EPA registration number.

24. Respondent’s failure to maintain records in accordance with the RUP record keeping requirements codified in 40 C.F.R. § 171.11 constitutes the sale of RUPs in a manner contrary to regulations promulgated pursuant to FIFRA § 3(d), 7 U.S.C. § 136a(d) and therefore a violation of FIFRA § 12(a)(2)(F), 7 U.S.C. § 136j(a)(2)(F).

25. Respondent is liable for this violation of FIFRA.

#### **PROPOSED CIVIL PENALTY**

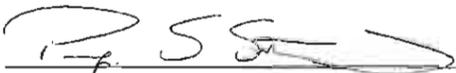
26. For pesticide dealers, FIFRA authorizes the assessment of a civil penalty of up to \$7,500 for each offense of the Act and the Debt Collection Improvement Act of 1996. FIFRA requires EPA to consider the appropriateness of the penalty to the size of the business, the effect on the person’s ability to continue in business, and the gravity of the violation. EPA has established policies that provide a rational and consistent method for applying statutory factors to the circumstances of specific cases. A narrative description of the reasoning behind the penalty proposed in this case is attached to this complaint, along with copies of the EPA policies. For the FIFRA violations alleged in this complaint, EPA proposes a penalty of \$7,500 for Count 1 and a Notice of Warning for Count 2. The penalty narrative and calculation can be found in complainant’s Exhibit Number 1.

27. The ALJ is not bound by EPA’s penalty policy or the penalty proposed by Complainant, and may assess a penalty above the proposed amount, up to the maximum amount authorized in the statute. In this case, the maximum would be \$15,000.

To discuss settlement or ask any questions you may have about this process, please contact Eduardo Quintana, Enforcement Attorney, at 1-800-227-8917; ext. 6924, or at the address below.

United States Environmental Protection Agency  
Region 8, Office of Enforcement, Compliance and  
Environmental Justice, Complainant  
1595 Wynkoop Street (ENF-L)  
Denver, CO 80202-1129

Date: 9/29/2010

By:   
Philip S. Strobel, Acting Director  
Technical Enforcement Program

Date: 9/29/10

By:   
David Rochlin, Supervisory Enforcement Attorney  
Legal Enforcement Program

Date: 9/29/2010

By:   
Eduardo Quintana, Senior Enforcement Attorney  
Legal Enforcement Program

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that the original and one copy of the COMPLAINT, AND NOTICE OF OPPORTUNITY FOR HEARING with Exhibits were hand-carried to the Regional Hearing Clerk, EPA Region 8, 1595 Wyncoop Street; Denver, Colorado 80202-1129, and that a true copy of the same was sent via Certified Mail to:

Richard E. Schneider  
Midwest Fertilizer, Inc.  
26237 302nd St  
Kilgore , NE 69216-7500

9/30/2010

Date

Judith M. Mc Ternan

**Penalty Calculation Narrative  
Midwest Fertilizer**

1. To ensure a uniform and consistent enforcement response and application of the statutory penalty criteria in the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), the U.S. Environmental Protection Agency (EPA) developed the December, 2009, Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act (2009 Policy).

2. According to the 2009 Policy, the appropriate enforcement response for the use of a registered pesticide in a manner inconsistent with its labeling is a civil penalty. Midwest Fertilizer is charged with one count of use of a registered pesticide in a manner inconsistent with its labeling. The restricted use pesticide, PhosFume, EPA registration number 70506-12-1015, is not stored under lock and key, as required by the label. Also, the PhosFume storage area must be marked with signs stating "Danger, Poison (with skull and cross bones), Authorized Personnel Only," and have the pesticide storage National Fire Protection Association hazard identification symbol. There were no signs on the storage door, as required by the label (Section 18, Storage Instructions, in the Applicator's Manual).

3. FIFRA Section 14(a)(4) requires EPA to "consider the appropriateness of (a civil penalty) to the size of the business of the person charged, the effect on the person's ability to continue in business, and the gravity of the violation."

4. Following the guidance in the 2009 Policy, EPA calculates a proposed civil penalty by first determining the gravity of the offense. The gravity of the offense is identified using Appendix A of the 2009 Policy. Appendix A identifies violations of using a registered pesticide in a manner inconsistent with its labeling as a gravity level 2 violation. Appendix A identifies a violation of FIFRA section 12(a)(2)(G) [to use any registered pesticide in a manner inconsistent with its labeling] as gravity level 2.

5. Second, according to the 2009 policy, the size of business is taken into account. The size of business is determined from the company's gross revenues from all revenue sources during the prior calendar year. When information concerning the size of business is not readily available, the 2009 Policy directs the use of Category I size of business. This will remain the base penalty value unless Midwest Fertilizer can establish that it should be considered in a smaller category. Thus, EPA has determined the size of the business category for Midwest Fertilizer as Category I (gross revenues over \$10,000,000).

6. Third, EPA used the above gravity and size of business components and the Civil Penalty Matrix for FIFRA Section 14(a)(1) violations on page 19 of the 2009 Policy to determine the dollar amount of the proposed penalty. Violations with level 2 gravity and in Business Category I are assessed a penalty of \$7,500 for each count. (The penalty amounts shown in the 2009 Civil Penalty Matrix have been changed by the Debt

Collection Improvement Act of 1996 with the most recent adjustment to \$7,500; effective after January 12, 2009.)

7. The 2009 Penalty Policy then directs that the actual circumstances of the violations be considered using gravity adjustment criteria listed in Appendix B of that document. The penalty amounts determined from the matrix can be adjusted either upward or downward depending on the specifics of the case known to EPA at the time of the penalty calculation.

The following gravity adjustment values were used to evaluate the FIFRA violation associated with the use of a registered pesticide in a manner inconsistent with its labeling:

- (a) Pesticide: a value of 3 is assigned as PhosFume is a restricted use pesticide.
- (b) Harm to human health: a value of 3 is assigned as there is unknown or potential serious or widespread harm to human health.
- (c) Environmental harm: a value of 1 is assigned as there is unknown or potential serious or widespread harm to the environment.
- (d) Compliance history: a value of 0 is assigned as the US EPA had no record of prior FIFRA violations by Midwest Fertilizer during the last five years.
- (e) Culpability: a value of 2 is assigned as culpability is unknown or the violation resulted from negligence.

This result is a total gravity adjustment value of 9 for the violation associated with the use of a registered pesticide in a manner inconsistent with its labeling.

8. Using a Gravity Adjustment Value of 9, Table 3 in Appendix C of the 2009 Policy states to assess the matrix value. Therefore, the penalty amount of \$7,500 per count is not changed.

9. Finally, EPA attempts to take into consideration what effect the calculated penalty would have on the ability of Midwest Fertilizer to pay based on limited information available to EPA. Adjustments of the proposed penalty can be made at a later date should information warranting such a change become available. No adjustments were made at this time.

10. In sum, EPA arrived at a total penalty of \$7,500 for Midwest Fertilizer's violation of FIFRA section 12(a)(2)(G) by considering all of the FIFRA Section 14(a)(4) penalty criteria through the use of the 2009 Policy.

*David Golden*

9.28.10

**FIFRA CIVIL PENALTY CALCULATION WORKSHEET  
MIDWEST FERTILIZER**

<b>Respondent:</b>	
<b>Docket No.:</b>	
<b>APPENDIX A</b>	
1. Violation	§12(a)(2)(G)
2. FTTS Code & Violation Level	1GA / 2
<b>TABLE 1</b>	
3. Violator Category & Size of Business Category	§14(a)(1) / Category I
<b>APPENDIX A</b>	
4. Gravity of the Violation	2
<b>TABLE 2</b>	
5. Base Penalty	\$7,500
<b>APPENDIX B</b>	
6. Gravity Adjustments	
a. Pesticide Toxicity	3
b. Harm to Human Health	3
c. Environmental Harm	1
d. Compliance History	0
e. Culpability	2
f. Total Gravity Adjustment (Add 6a – 6e)	9
<b>TABLE 3</b>	
7. Percent & Dollar Adjustment	Assess matrix value
8. Economic Benefit	
<b>TABLE 4</b>	
9. Graduated Penalty	\$7,500
<b>10. Final Penalty</b>	<b>\$7,500</b>

*David Golden*  
9.28.10



Office of Enforcement and Compliance Assurance  
**INFORMATION SHEET**

## U. S. EPA Small Business Resources

If you own a small business, the United States Environmental Protection Agency (EPA) offers a variety of compliance assistance resources such as workshops, training sessions, hotlines, websites, and guides to assist you in complying with federal and state environmental laws. These resources can help you understand your environmental obligations, improve compliance, and find cost-effective ways to comply through the use of pollution prevention and other innovative technologies.

### Compliance Assistance Centers

([www.assistancecenters.net](http://www.assistancecenters.net))

In partnership with industry, universities, and other federal and state agencies, EPA has established Compliance Assistance Centers that provide information targeted to industries with many small businesses.

#### Agriculture

([www.epa.gov/agriculture](http://www.epa.gov/agriculture) or 1-888-663-2155)

#### Automotive Recycling Industry

([www.ecarcenter.org](http://www.ecarcenter.org))

#### Automotive Service and Repair

([www.ccar-greenlink.org](http://www.ccar-greenlink.org) or 1-888-GRN-LINK)

#### Chemical Industry

([www.chemalliance.org](http://www.chemalliance.org))

#### Construction Industry

([www.cicacenter.org](http://www.cicacenter.org) or 1-734-995-4911)

#### Education

([www.campuserc.org](http://www.campuserc.org))

#### Healthcare Industry

([www.hercenter.org](http://www.hercenter.org) or 1-734-995-4911)

#### Metal Finishing

([www.nmfrc.org](http://www.nmfrc.org) or 1-734-995-4911)

#### Paints and Coatings

([www.paintcenter.org](http://www.paintcenter.org) or 1-734-995-4911)

#### Printed Wiring Board Manufacturing

([www.pwbrc.org](http://www.pwbrc.org) or 1-734-995-4911)

#### Printing

([www.pneac.org](http://www.pneac.org) or 1-888-USPNEAC)

#### Transportation Industry

([www.transource.org](http://www.transource.org))

#### Tribal Governments and Indian Country

([www.epa.gov/tribal/compliance](http://www.epa.gov/tribal/compliance) or 202-564-2516)

#### US Border Environmental Issues

([www.bordercenter.org](http://www.bordercenter.org) or 1-734-995-4911)

The Centers also provide State Resource Locators ([www.envcap.org/statetools/index.cfm](http://www.envcap.org/statetools/index.cfm)) for a wide range of topics to help you find important environmental compliance information specific to your state.

### EPA Websites

EPA has several Internet sites that provide useful compliance assistance information and materials for small businesses. If you don't have access to the Internet at your business, many public libraries provide access to the Internet at minimal or no cost.

#### EPA's Home Page

[www.epa.gov](http://www.epa.gov)

#### Small Business Gateway

[www.epa.gov/smallbusiness](http://www.epa.gov/smallbusiness)

#### Compliance Assistance Home Page

[www.epa.gov/compliance/assistance](http://www.epa.gov/compliance/assistance)

#### Office of Enforcement and Compliance Assurance

[www.epa.gov/compliance](http://www.epa.gov/compliance)

#### Voluntary Partnership Programs

[www.epa.gov/partners](http://www.epa.gov/partners)



## Hotlines, Helplines & Clearinghouses

([www.epa.gov/epahome/hotline.htm](http://www.epa.gov/epahome/hotline.htm))

EPA sponsors many free hotlines and clearinghouses that provide convenient assistance regarding environmental requirements. A few examples are listed below:

### Clean Air Technology Center

([www.epa.gov/ttn/catc](http://www.epa.gov/ttn/catc) or 1-919-541-0800)

### Emergency Planning and Community Right-To-Know Act

([www.epa.gov/superfund/resources/infocenter/epcra.htm](http://www.epa.gov/superfund/resources/infocenter/epcra.htm) or 1-800-424-9346)

EPA's Small Business Ombudsman Hotline provides

regulatory and technical assistance information.

([www.epa.gov/sbo](http://www.epa.gov/sbo) or 1-800-368-5888)

**The National Environmental Compliance Assistance Clearinghouse** provides quick access to compliance assistance tools, contacts, and planned activities from the U.S.

EPA, states, and other compliance assistance providers

([www.epa.gov/clearinghouse](http://www.epa.gov/clearinghouse))

National Response Center to report oil and hazardous substance spills.

([www.nrc.uscg.mil](http://www.nrc.uscg.mil) or 1-800-424-8802)

### Pollution Prevention Information Clearinghouse

([www.epa.gov/opptintr/ppic](http://www.epa.gov/opptintr/ppic) or 1-202-566-0799)

### Safe Drinking Water Hotline

([www.epa.gov/safewater/hotline/index.html](http://www.epa.gov/safewater/hotline/index.html) or 1-800-426-4791)

### Stratospheric Ozone Refrigerants Information

([www.epa.gov/ozone](http://www.epa.gov/ozone) or 1-800-296-1996)

Toxics Assistance Information Service also includes asbestos inquiries.

(1-202-554-1404)

### Wetlands Helpline

([www.epa.gov/owow/wetlands/wetline.html](http://www.epa.gov/owow/wetlands/wetline.html) or 1-800-832-7828)

## State Agencies

Many state agencies have established compliance assistance programs that provide on-site and other types of assistance. Contact your local state environmental agency for more information or the following two resources:

### EPA's Small Business Ombudsman

([www.epa.gov/sbo](http://www.epa.gov/sbo) or 1-800-368-5888)

### Small Business Environmental Homepage

([www.smallbiz-enviroweb.org](http://www.smallbiz-enviroweb.org) or 1-724-452-4722)

## Compliance Incentives

EPA provides incentives for environmental compliance. By participating in compliance assistance programs or voluntarily disclosing and promptly correcting violations before an enforcement action has been initiated,

businesses may be eligible for penalty waivers or reductions. EPA has two policies that potentially apply to small businesses:

### The Small Business Compliance Policy

([www.epa.gov/compliance/incentives/smallbusiness](http://www.epa.gov/compliance/incentives/smallbusiness))

### Audit Policy

([www.epa.gov/compliance/incentives/auditing](http://www.epa.gov/compliance/incentives/auditing))

## Commenting on Federal Enforcement Actions and Compliance Activities

The Small Business Regulatory Enforcement Fairness Act (SBREFA) established an SBA Ombudsman and 10 Regional Fairness Boards to receive comments from small businesses about federal agency enforcement actions. If you believe that you fall within the Small Business Administration's definition of a small business (based on your North American Industry Classification System (NAICS) designation, number of employees, or annual receipts, defined at 13 C.F.R. 121.201; in most cases, this means a business with 500 or fewer employees), and wish to comment on federal enforcement and compliance activities, call the SBREFA Ombudsman's toll-free number at 1-888-REG-FAIR (1-888-734-3247).

Every small business that is the subject of an enforcement or compliance action is entitled to comment on the Agency's actions without fear of retaliation. EPA employees are prohibited from using enforcement or any other means of retaliation against any member of the regulated community in response to comments made under SBREFA.

## Your Duty to Comply

If you receive compliance assistance or submit comments to the SBREFA Ombudsman or Regional Fairness Boards, you still have the duty to comply with the law, including providing timely responses to EPA information requests, administrative or civil complaints, other enforcement actions or communications. The assistance information and comment processes do not give you any new rights or defenses in any enforcement action. These processes also do not affect EPA's obligation to protect public health or the environment under any of the environmental statutes it enforces, including the right to take emergency remedial or emergency response actions when appropriate. Those decisions will be based on the facts in each situation. The SBREFA Ombudsman and Fairness Boards do not participate in resolving EPA's enforcement actions. Also, remember that to preserve your rights, you need to comply with all rules governing the enforcement process.

*EPA is disseminating this information to you without making a determination that your business or organization is a small business as defined by Section 222 of the Small Business Regulatory Enforcement Fairness Act or related provisions.*