

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR**

In the Matter of:)	
)	
The Geo Group, Inc.,)	Docket No. FIFRA-09-2024-0066
)	
Respondent.)	

COMPLAINANT’S REBUTTAL PREHEARING EXCHANGE

Complainant submits the following Rebuttal Prehearing Exchange in accordance with section 22.19 of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (“Consolidated Rules”) and the Presiding Officer’s Prehearing Order issued on August 6, 2024:

A. Response to Respondent’s Prehearing Exchange

- 1) In response to Respondent’s Prehearing Exchange, Complainant supplements its Prehearing Exchange as follows:

Complainant’s Ex. 14: McKesson glove product page to show example of description of medical exam gloves.

Complainant’s Ex. 15: Uline glove product page to show example of description of chemical resistant gloves.

In addition, Complainant incorporates into its Prehearing Exchange the witnesses and exhibits listed in Respondent’s Prehearing Exchange dated October 11, 2024 as its potential witnesses and exhibits.

- 2) Response to Jarkesy Affirmative Defense

This administrative proceeding does not violate Respondent’s right to a jury trial. The case cited by Respondent, *SEC v. Jarkesy*, 144 S. Ct. 2117 (2024), involved a Seventh Amendment challenge to a Securities and Exchange Commission (“SEC”) administrative enforcement action for violations of securities fraud statutes. The Court held the SEC’s cause of action was subject to the Seventh Amendment right to a civil jury because the SEC sought a civil monetary penalty, which was a legal remedy, and the SEC’s securities fraud claim “replicated common law fraud.” *Id.* at 2127. In its Prehearing Exchange, however, Respondent does not identify any common law analogue to the EPA’s claims here. EPA’s authority to seek a civil

penalty does not in and of itself replicate a common law antecedent. *See Jarkesy*, 144 U.S. at 2129.

Even if the EPA's claims did implicate the Seventh Amendment, the Complaint does not violate Respondent's jury trial right because the claims fall within the "public rights" exception identified by the *Jarkesy* Court, which recognizes a set of claims that "Congress may assign ... for decision to an agency without a jury, consistent with the Seventh Amendment." *Id.* at 2131-32. Specifically, Section 14 of FIFRA, 7 U.S.C. § 136l, provides the exclusive authority for assessment of civil penalties for violations of FIFRA through administrative adjudication under FIFRA's self-consciously novel regulatory scheme. FIFRA does not authorize assessment of civil penalties judicially in federal court, including through opportunity for presentation of factual disputes to a jury.

3) Response to FIFRA Section 14(a)(2) Affirmative Defense

Respondent apparently misapprehends this provision of the statute. According to Section 14(a)(2) of FIFRA, 7 U.S.C. § 136l(a)(2), "any private applicator or other person not included in [14(a)(1)] who violates any provision of [FIFRA] 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..." In this case, Complainant is seeking penalties against Respondent for violations of FIFRA Section 12(a)(2)(G) subsequent to Respondent receiving a written Notice of Warning from EPA Region 9 on March 2, 2021 for prior violations of FIFRA Section 12(a)(2)(G). Complainant pled this fact in the Complaint and included the Notice of Warning in its Initial Prehearing Exchange." See CX 9.

B. Statement of Proposed Penalty

Complainant proposes a penalty of \$311,485 for the violations in this case. Complainant calculated this penalty in accordance with FIFRA and the guidelines specified in EPA's FIFRA Enforcement Response Policy ("ERP") dated December 2009 (CX 10), as amended by the Civil Monetary Penalty Inflation Adjustment Rule at 40 C.F.R. Part 19.

C. Narrative of Proposed Penalty Calculation

Pursuant to FIFRA Section 14(a)(4), 7 U.S.C. § 136l(a)(4), in assessing a penalty, the Administrator shall consider the appropriateness of the 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. The ERP implements these statutory penalty factors and provides a multi-step process to calculating FIFRA penalties in a fair, uniform and consistent manner. Complainant used the multi-step process in the ERP to calculate the proposed penalty in this case, as follows:

1) Determine Number of Independently Assessable Violations

Under the ERP, the Agency must determine the appropriate number of independently assessable violations of FIFRA at issue. A violation is considered "independent" if it results from an act (or failure to act) which is not the result of any other violation for which a civil penalty is to be assessed or if at least one of the elements of proof is different from any other violation. CX 10 at 16. Accordingly, EPA considers each application in a manner inconsistent with the registered

pesticide's labeling to be an independent violation. In this case, Respondent applied the registered pesticide, HALT, at its facility in a manner inconsistent with its labeling (i.e., without using chemical resistant gloves) 1,137 times from March 2022 to February 2023, in violation of FIFRA § 12(a)(2)(G). Thus, Complainant determined that this case involves 1,137 independently assessable violations of FIFRA § 12(a)(2)(G).

2) Determine Size of Business Category

Next, pursuant to the ERP, Complainant considered the appropriateness of the penalty to the size of the business charged with the violation. The underlying principle of this categorization is to provide equitable penalties by generally decreasing the amount of the assessed penalty as the size of the business decreases and increasing the amount of the assessed penalty as the size of the business increases, up to the statutory maximum. The size of the business is determined by a company's gross revenues from all revenue sources during the preceding calendar year. The size of business matrix for FIFRA section 14(a)(2) violators in the ERP is appropriate here since Respondent is a violator that can be characterized as a "private applicator or other person not included in [14(a)(1)]." The ERP recognizes three distinct "size of business" categories for violators under section 14(a)(2) of FIFRA: Category I – more than \$1 million per year in gross revenues; Category II - \$300,000 to 1 million per year in gross revenues; and Category III – less than \$300,000 per year in gross revenues. Based on publicly available financial information (See CX 12), Respondent's revenues exceeded \$1 million during the preceding calendar year. Thus, Complainant determined that Respondent is a company that falls in Category I.

3) Determine Gravity Level

Additionally, Complainant determined the "gravity level" of the violations in this case under the ERP. The ERP assigns each violation of FIFRA a "gravity level" ranging from 1 (gravest) to 4 (least grave). These gravity levels represent an assessment of the relative gravity of a violation, which is based on an average set of circumstances that consider the actual or potential harm to human health or the environment that could result from the violation or the importance of the requirement to achieving the goals of FIFRA. In this case, Respondent violated section 12(a)(2)(G) of FIFRA by using a registered pesticide in a manner inconsistent with its labeling, which the ERP assigns a gravity level of "2". See CX 10 at 31.

4) Calculate Base Penalty From Appropriate Matrix

After determining the gravity level of the violation and the size of business category of the violator, Complainant determined a base penalty for each violation using the ERP's FIFRA section 14(a)(2) matrix, which assigns a base penalty amount associated with the gravity level and size of business category. According to the FIFRA section 14(a)(2) matrix, the ERP base penalty amount for each violation that occurs after January 12, 2009 is \$1,100 when the assigned gravity is level 2 and the size of business category is I.

5) Apply Gravity Adjustments to Base Penalty

Next, the ERP allows for adjustments to the base penalty provided under the matrix based on the specific characteristics of the pesticide involved, the actual or potential harm to human health and/or the environment, the compliance history of the alleged violator, and the culpability of the alleged violator. To assess whether a gravity-based adjustment to the base penalty is applicable, the ERP assigns numerical values, ranging from 0 to 5, to five gravity adjustment factors: (1) the pesticide's specific characteristics (i.e., toxicity); (2) harm to human health; (3) harm to the environment; (4) the violator's compliance history; and (5) the violator's culpability. The total gravity adjustment value obtained by adding up the numerical values assigned to each factor determines whether and how much the base penalty will be increased or decreased within the statutory maximum. In this case, the numerical value of all the factors adds up to a total gravity adjustment value of "7" for the violations. The gravity adjustment value of "7" is comprised of: pesticide toxicity ("3" -due to signal word "Danger"); human harm ("1" -due to minor potential or actual harm to human health); environmental harm ("1" -due to minor potential or actual harm to the environment); compliance history ("0" -due to no prior FIFRA violations); and culpability ("2" -due to culpability unknown or violation resulting from negligence). According to the ERP, an adjustment value of "7" results in a 20% reduction to the base penalty derived under the matrix. Thus, the adjusted base penalty is \$880 (\$1,100 - \$220) for each violation.

6) Apply "Graduated" Penalty Calculation Method

Since this case involves 1,137 violations of section 12(a)(2)(G) of FIFRA, Complainant applied the "graduated" penalty calculation method set forth in the ERP to this case. In cases where there is evidence of multiple instances of the same violation that does not involve a highly culpable violator or actual serious or widespread harm to human health or the environment, the ERP provides Complainant with discretion to apply the "graduated" penalty calculation method based on the circumstances of the case. This methodology establishes three different graduated penalty tables based on the three "size of business" categories set forth earlier in the ERP.

In this case, Respondent applied the registered pesticide, HALT, in a manner inconsistent with its labeling during 1,137 applications of the pesticide. Under the graduated penalty approach for a Category I "size of business" respondent, as in this case, violation numbers 1 through 100 are calculated at 100% of the base penalty for the violation (\$880 x 100), violation numbers 101 through 400 are calculated at 25% of the base penalty for the violation (\$220 x 300), and violation numbers greater than 400 are calculated at 10% of the base penalty for the violation (\$88 x 737). Accordingly, the total penalty amount for all the violations in this case using the "graduated" penalty calculation method is \$218,856 [\$88,000 + \$66,000 + 64,856].

7) Apply Inflation Adjustment Multiplier

Finally, Complainant incorporated EPA guidance regarding amendments to EPA civil penalty policies to account for inflation in accordance with 40 C.F.R. Part 19. This guidance includes, inter alia, the use of specific multipliers to account for the inflation that occurred after EPA issued or revised the applicable penalty policy for violations below the statutory maximum. According to Agency guidance effective January 15, 2024 (CX 11), Complainant had to increase

penalties for inflation by a multiplier of 1.42324 for FIFRA violations that occurred after November 2, 2015 and are assessed on or after January 15, 2024. Accordingly, Complainant increased the graduated, adjusted gravity-based penalty above by 42.324%, resulting in a total gravity-based penalty of \$311,484.61, which we rounded up to \$311,485.

8) Consider Violator's Ability to Pay

FIFRA section 14(a)(4) requires that EPA consider the effect of the penalty on the violator's ability to continue in business when determining the amount of the civil penalty. In this case, Complainant considered that publicly available financial information indicates that the penalty will have no effect on Respondent's ability to continue in business and Respondent has not claimed that it could not pay the penalty. Thus, the proposed penalty in this case is \$311,485.

Respectfully Submitted,

10/25/24

Date

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CERTIFICATE OF SERVICE

I certify that an electronic copy of the foregoing Complainant's Rebuttal Prehearing Exchange *In the Matter of The Geo Group, Inc.*, Docket No. FIFRA-09-2024-0066, was filed and served on the Presiding Officer this day through the Office of Administrative Law Judge's E-Filing System. I certify that an electronic copy of this Rebuttal Prehearing Exchange was sent this day by e-mail to the following e-mail address for service on Respondent: Gregory M. Munson, Esq. at gmunson@gunster.com.

10/25/24

Date

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