



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGIONS 5  
77 WEST JACKSON BOULEVARD  
CHICAGO, IL 60604-3590

MAR 03 2008

REPLY TO THE ATTENTION OF:

LC-8J

CERTIFIED MAIL  
RECEIPT NO. 7001 0320 0006 1456 1767

L. D. Kirk, President  
Porter Hybrids, Incorporated  
1683 N State Route 134  
Wilmington, Ohio 45177

**FIFRA-05-2008-0010**

In the Matter of: Porter Hybrids, Inc., Docket No. \_\_\_\_\_


Dear Mr. Kirk:

I have enclosed the Complaint filed by the United States Environmental Protection Agency (U.S. EPA), Region 5, against Porter Hybrids, Inc. under Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136l(a).

As provided in the Complaint, if you wish to request a hearing, you must do so in your answer to the Complaint. Please note that if you do not file an answer with the Regional Hearing Clerk (E-13J), U.S. EPA, Region 5, 77 West Jackson Blvd., Chicago, IL 60604 within 30 days of your receipt of this Complaint, a default order may be issued and the proposed civil penalty will become due 30 days later.

In addition, whether or not you request a hearing, you may request an informal settlement conference. If you wish to request a conference, or if you have any questions about this matter, please contact Christine Liszewski, Associate Regional Counsel at (312) 886-4670.

Sincerely,

  
for Margaret M. Guerriero, Director  
Land and Chemicals Division

Enclosures

cc: James Belt, Ohio Department of Agriculture

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 5

In the Matter of: )  
) FIFRA-05-2008-0010  
) Docket No. \_\_\_\_\_  
)  
) Porter Hybrids, Incorporated )  
) )  
) Wilmington, Ohio 45177 )  
)  
)  
)  
) Respondent. )  
)  
\_\_\_\_\_ )

2008 MAR -3 AM 10:03  
RECEIVED  
REGIONAL HEARING CLERK  
US EPA REGION V

**Complaint**

1. This is an administrative proceeding to assess a civil penalty under Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended, (FIFRA), 7 U.S.C. § 136l(a).

2. The Complainant is, by lawful delegation, the Director of the Land and Chemicals Division, United States Environmental Protection Agency (U.S. EPA or the Agency), Region 5.

3. The Respondent is Porter Hybrids, Inc., a corporation doing business in the State of Ohio.

**Statutory and Regulatory Background**

4. The term "person" is defined as "any individual, partnership, association, corporation, or any organized group of persons whether incorporated or not." Section 2(s) of FIFRA, 7 U.S.C. § 136(s).

5. The term "producer" is defined at Section 2(w) of FIFRA, 7 U.S.C. § 136(w), as the person who manufactures, prepares, compounds, propagates, or processes any pesticide.

6. The term "produce" is defined at Section 2(w) of FIFRA, 7 U.S.C. § 136(w) and 40 C.F.R. § 167.3, to mean to manufacture, prepare, propagate, compound, or process any

pesticide or device or active ingredient used in producing a pesticide, or to package, repack, label, relabel, or otherwise change the container of any pesticide or device.

7. The term “establishment” is defined at Section 2(dd) of FIFRA, 7 U.S.C. § 136(dd), as any place where a pesticide or device or active ingredient used in producing a pesticide is produced, or held, for distribution or sale.

8. The term “distribute or sell” is defined at Section 2(gg) of FIFRA, 7 U.S.C. § 136(gg), and means “to distribute, sell, offer for sale, hold for distribution, hold for sale, hold for shipment, ship, deliver for shipment, release for shipment, or receive and (having so received) deliver or offer to deliver.”

9. The term “pesticide” is defined as any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest. Section 2(u) of FIFRA, 7 U.S.C. § 136(u); 40 C.F.R. § 152.3.

10. Section 7(c)(1) of FIFRA, 7 U.S.C. § 136e(c)(1), and 40 C.F.R. § 167.85, requires any producer operating an establishment registered with the U.S. EPA under Section 7 of FIFRA, 7 U.S.C. § 136e, and 40 C.F.R. Part 167 to inform the Administrator within 30 days after it is registered, and annually thereafter, of the types and amounts of pesticides and, if applicable, active ingredients used in producing pesticides which:

- (A) the producer is currently producing;
- (B) the producer has produced during the past year, and;
- (C) the producer has sold or distributed during the past year.

11. 40 C.F.R. § 167.85(c), provides that the report required by Section 7(c)(1) of

FIFRA, 7 U.S.C. § 136e(c)(1), and 40 C.F.R. § 167.85 (a/k/a the “Annual Pesticide Production Report”) must be made on forms supplied by the U.S. EPA.

12. 40 C.F.R. § 167.85(c), further specifies that it is the ultimate responsibility of companies to obtain, complete, and submit the forms each year. (U.S. EPA’s form is known as the “Pesticides Report for Pesticide-Producing Establishments” form, or EPA Form 3540-16.)

13. 40 C.F.R. § 167.85(d), requires producers to submit the Annual Pesticide Production Report for the preceding year to the U.S. EPA on or before March 1 of each year, even if the producer has produced no pesticidal product for that reporting year.

14. Section 12(a)(2)(L) of FIFRA, 7 U.S.C. § 136j(a)(2)(L), states that it shall be unlawful for any person who is a producer to violate any of the provisions of Section 7 of FIFRA.

15. The Administrator of the U.S. EPA may assess a civil penalty against any registrant, commercial applicator, wholesaler, dealer, retailer, or other distributor who violates any provision of FIFRA of up to \$6,500 for each offense that occurred after March 15, 2004 pursuant to Section 14(a)(1) of FIFRA, 7 U.S.C. § 136l(a)(1), and 40 C.F.R. Part 19.

### **General Allegations**

16. Respondent was, at all times relevant to this Complaint, a “person” as that term is defined in Section 2(s) of FIFRA, 7 U.S.C. § 136(s).

17. At all times relevant to this Complaint, Respondent owned or operated a place of business located at 1683 State Route 134 N, Wilmington, Ohio 45177.

18. Respondent was, at all times relevant to this Complaint, a “producer” as that term is defined at Section 2(w) of FIFRA, 7 U.S.C. § 136(w).

19. Respondent did, at all times relevant to this Complaint, “distribute or sell” as that term is defined in Section 2(gg) of FIFRA, 7 U.S.C. § 136(gg).

20. At all times relevant to this Complaint, the Respondent has been a registrant, commercial applicator, wholesaler, dealer, retailer and/or other distributor of pesticides within the meaning of those terms as used in Section 14(a)(1) of FIFRA, 7 U.S.C. § 136l(a)(1).

21. On June 21 and 27, 2006, an inspector employed by the Ohio Department of Agriculture (ODA), conducted an authorized inspection at Porter Hybrids, Inc., located at 1683 State Route 134 N., Wilmington, Ohio 45177.

22. During the June 21, 2006 inspection, the ODA inspector reviewed and collected documentary samples, including photographs of the label of the pesticide product “Tenkoz Buccaneer Plus Herbicide,” EPA Reg. No. 524-454-55467, appearing on a mini bulk container.

23. Respondent’s EPA Est. number is 056945-OH-001, which was assigned to Respondent, by the U.S. EPA, on or about November 20, 1986.

24. During the June 21 and 27, 2006 inspections, the ODA inspector also collected Invoice Nos. 30524, 30927, and 31067.

25. According to Invoice No. 30927, on or about October 14, 2005, Respondent distributed or sold the pesticide products “Buccaneer Plus Herbicide,” EPA Reg. No. 524-454-55467, and “Weedone LV 4 EC,” EPA Reg. No. 228-139-71368 (registered as “Riverdale 2,4-D L.V. 4 Ester,” EPA Reg. No. 228-139), to Don Young of Martinsville, Ohio.

26. According to Invoice No. 30524, on or about May 20, 2005, Respondent distributed or sold the pesticide product "Buccaneer Plus Herbicide," EPA Reg. No. 524-454-55467, to Tom Beam of Wilmington, Ohio.

27. According to Invoice No. 31067, on or about April 20, 2006, Respondent distributed or sold the pesticide products "Buccaneer Plus Herbicide," EPA Reg. No. 524-454-55467, and "Weedone LV 4 EC," EPA Reg. No. 228-139-71368 (registered as "Riverdale 2,4-D L.V. 4 Ester," EPA Reg. No. 228-139), to Tom Beam of Wilmington, Ohio.

### Count 1

28. Complainant incorporates paragraphs 1 through 32 of this Complaint, as if set forth in this paragraph.

29. On or about February 7, 2006, Respondent submitted its "Pesticide Report for Pesticide-Producing and Device-Producing Establishments" (EPA Form 3540-16), for the calendar year 2005 to U.S. EPA.

30. In the report described in paragraph 29 above, Respondent checked the box which states, "Did not produce/distribute in 2005."

31. Respondent "produced," as that term is defined at Section 2(w) of FIFRA, 7 U.S.C. § 136(w) and 40 C.F.R. § 167.3, the pesticide product "Tenkoz Buccaneer Plus Herbicide," EPA Reg. No. 524-454-55467, during the calendar year 2005.

32. Respondent "produced," as that term is defined at Section 2(w) of FIFRA, 7 U.S.C. § 136(w) and 40 C.F.R. § 167.3, the pesticide product "Weedone LV 4 EC," EPA Reg. No. 228-139-71368, during the calendar year 2005.

33. In response to a request from the U.S. EPA to submit a corrected EPA Form 3540-16, on or about September 27, 2007, Respondent submitted an amended "Pesticide Report for Pesticide-Producing and Device-Producing Establishments" (EPA Form 3540-16), for the calendar year 2005 to U.S. EPA.

34. In the report described in paragraph 33, above, Respondent states that it produced, repackaged or relabeled and sold or distributed the pesticide products "Buccaneer Plus" and "Weedone LV 4" during 2005.

35. Respondent's failure to file a true and accurate report, by March 1, 2006, as required by Section 7 of FIFRA, 7 U.S.C. § 136e, violates Section 12(a)(2)(L) of FIFRA, 7 U.S.C. § 136j(a)(2)(L), and subjects Respondent to civil penalties under Section 14(a) of FIFRA, 7 U.S.C. § 136l(a).

### **Count 2**

36. Complainant incorporates paragraphs 1 through 32 of this Complaint, as if set forth in this paragraph.

37. On or about April 30, 2007, Respondent submitted its "Pesticide Report for Pesticide-Producing and Device-Producing Establishments" (EPA Form 3540-16), for the calendar year 2006 to U.S. EPA.

38. In the report described in paragraph 37 above, Respondent checked the box which states, "Did not produce/distribute in 2006."

39. Respondent “produced,” as that term is defined at Section 2(w) of FIFRA, 7 U.S.C. § 136(w) and 40 C.F.R. § 167.3, the pesticide product “Buccaneer Plus Herbicide,” EPA Reg. No. 524-454-55467, during the calendar year 2006.

40. Respondent “produced,” as that term is defined at Section 2(w) of FIFRA, 7 U.S.C. § 136(w) and 40 C.F.R. § 167.3, the pesticide product “Weedone LV 4 EC,” EPA Reg. No. 228-139-71368, during the calendar year 2006.

41. In response to a request from the U.S. EPA to submit a corrected EPA Form 3540-16, on or about September 27, 2007, Respondent submitted an amended “Pesticide Report for Pesticide-Producing and Device-Producing Establishments” (EPA Form 3540-16), for the calendar year 2006 to U.S. EPA.

42. In the report described in paragraph 41, above, Respondent states that it produced, repackaged or relabeled and sold or distributed the pesticide products “Buccaneer Plus” and “Weedone LV 4” during 2006.

43. Respondent’s failure to file a true and accurate report, by March 1, 2007, as required by Section 7 of FIFRA, 7 U.S.C. § 136e, violates Section 12(a)(2)(L) of FIFRA, 7 U.S.C. § 136j(a)(2)(L), and subjects Respondent to civil penalties under Section 14(a) of FIFRA, 7 U.S.C. § 136l(a).

#### **Proposed Civil Penalty**

Complainant proposes that the Administrator assess a civil penalty against Respondent for the FIFRA violations alleged in this Complaint as follows:



**Count 1**

Filing a false and inaccurate report, for 2005, under Section 7 of FIFRA .....\$6,500

**Count 2**

Filing a false and inaccurate report, for 2006 under Section 7 of FIFRA.....\$6,500

**Total proposed civil penalty.....\$13,000**

Complainant determined the proposed civil penalty according to Section 14(a) of FIFRA, 7 U.S.C. § 136l(a). In determining the penalty amount, Complainant considered the size of Respondent's business, the effect on Respondent's ability to continue in business and the gravity of the violations. Complainant also considered U.S. EPA's *Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act*, dated July 2, 1990, a copy of which is enclosed with this Complaint.

**Rules Governing this Proceeding**

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" (the Consolidated Rules), codified at 40 C.F.R. Part 22, govern this proceeding to assess a civil penalty. Enclosed with the Complaint served on Respondents is a copy of the Consolidated Rules.

**Filing and Service of Documents**

Respondent must file with the Regional Hearing Clerk the original and one copy of each document Respondent intends as part of the record in this proceeding. The Regional Hearing Clerk's address is:

Regional Hearing Clerk (E-13J)  
U.S. EPA - Region 5  
77 West Jackson Boulevard  
Chicago, IL 60604

Respondent must serve a copy of each document filed in this proceeding on each party according to Section 22.5 of the Consolidated Rules. Complainant has authorized Christine Liszewski, Associate Regional Counsel, to receive any answer and subsequent legal documents that Respondent serves in this proceeding. You may telephone Ms. Liszewski at (312) 886-4670. Her address is:

Christine Liszewski (C-14J)  
Office of Regional Counsel  
U.S. EPA - Region 5  
77 West Jackson Boulevard  
Chicago, IL 60604

#### **Terms of Payment**

Respondent may resolve this proceeding at any time by paying the proposed penalty by certified or cashier's check payable to "Treasurer, the United States of America," and by delivering the check to:

U.S. EPA  
Fines and Penalties  
Cincinnati Finance Center  
P.O. Box 979077  
St. Louis, MO 63197-9000

If Respondent pays the proposed penalty in full within thirty (30) days after receiving the Complaint, no answer need be filed. A copy of the check, however, must be filed with the

Regional Hearing Clerk at the address listed above. Respondent must include the case name and docket number on the check and in the letter transmitting the check. Respondent simultaneously must send copies of the check and transmittal letter to Ms. Liszewski and to:

Joseph G. Lukascyk (LC-8J)  
U.S. EPA - Region 5  
77 West Jackson Boulevard  
Chicago, IL 60604

**Answer and Opportunity to Request a Hearing**

The Administrator must provide an opportunity to request a hearing to any person against whom the Administrator proposes to assess a penalty under Section 16(a) of the Act, 15 U.S.C. § 2615(a). Respondent has the right to request a hearing on any material fact alleged in the Complaint, or on the appropriateness of the proposed penalty, or both. To request a hearing, Respondent must specifically make the request in its answer, as discussed below.

Respondent must file a written answer to this Complaint if Respondent contests any material fact of the Complaint; contends that the proposed penalty is inappropriate; or contends that it is entitled to judgment as a matter of law. To file an answer, Respondent must file the original written answer and one copy with the Regional Hearing Clerk at the address specified above, and must serve copies of the written answer on the other parties.

If Respondent chooses to file a written answer to the Complaint, it must do so within 30 calendar days after receiving the Complaint. In counting the 30 day time period, the date of receipt is not counted, but Saturdays, Sundays, and Federal legal holidays are counted. If the 30 day time period expires on a Saturday, Sunday, or Federal legal holiday, the time period extends to the next business day.

Respondent's written answer must clearly and directly admit, deny, or explain each of the factual allegations in the Complaint; or must state clearly that Respondent has no knowledge of a particular factual allegation. Where Respondent states that it has no knowledge of a particular factual allegation, the allegation is deemed denied.

Respondent's failure to admit, deny, or explain any material factual allegation in the Complaint constitutes an admission of the allegation.

Respondent's answer must also state:

- a. The circumstances or arguments which Respondent alleges constitute grounds of defense;
- b. The facts that Respondent disputes;
- c. The basis for opposing the proposed penalty; and
- d. Whether Respondent requests a hearing

If Respondent does not file a written answer within thirty (30) calendar days after receiving this Complaint the Presiding Officer may issue a default order, after motion, under Section 22.17 of the Consolidated Rules. Default by Respondent constitutes an admission of all factual allegations in the Complaint and a waiver of the right to contest the factual allegations. Respondent must pay any penalty assessed in a default order without further proceedings thirty (30) days after the order becomes the final order of the Administrator of U.S. EPA under Section 22.27(c) of the Consolidated Rules.

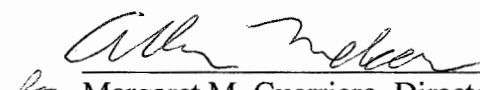
**Settlement Conference**

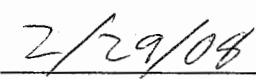
Whether or not Respondent requests a hearing, Respondent may request an informal settlement conference to discuss the facts of this proceeding and to arrive at a settlement. To request an informal settlement conference, Respondent may contact Joseph G. Lukascyk, Enforcement Case Officer, at phone number (312) 886-6233, or the address on page 10.

Respondent's request for an informal settlement conference does not extend the 30 calendar day period for filing a written answer to this Complaint. Respondent may pursue simultaneously the informal settlement conference and the adjudicatory hearing process. The U.S. EPA encourages all parties facing civil penalties to pursue settlement through an informal conference. The U.S. EPA, however, will not reduce the penalty simply because the parties hold an informal settlement conference. Also, please be advised that Section 22.08 of the Consolidated Rules of Practice prohibits any ex parte (unilateral) discussion of the merits of this action, after this Complaint was issued, with the Regional Judicial Officer, Administrative Law Judge, or any person likely to advise these officials in a decision on this case.

**Continuing Obligation to Comply**

Neither the assessment nor payment of a civil penalty will affect Respondent's continuing obligation to comply with the Act and any other applicable Federal, state, or local law.

  
\_\_\_\_\_  
for Margaret M. Guerriero, Director  
Land and Chemicals Division

  
\_\_\_\_\_  
Date

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