

UNITED STATES
ENVIRONMENTAL PROTECTION
AGENCY-REGION 7

2013 AUG -1 AM 10:12

HPI Products, Inc.
222 Sylvania
St Joseph, MO 64501

Regional Hearing Clerk

EPA -Region 7
11201 Renner Boulevard
Lenexa, Kansas 66219

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 7

11201 RENNER BOULEVARD

LENEXA, KANSAS 66219

UNITED STATES
ENVIRONMENTAL PROTECTION
AGENCY-REGION 7

2013 AUG -1 AM 10: 12

BEFORE THE ADMINISTRATOR

IN THE MATTER OF

Docket No. FIFRA-07-2013-0015

**HPI Products, Inc.
222 Sylvania Street
St. Joseph, Missouri**

**ANSWER AND REQUEST FOR
HEARING**

Respondent

ANSWER

Section I

Jurisdiction

1. This Complaint and Notice of Opportunity for Hearing (Complaint) serves as notice that the United States Environmental Protection Agency (EPA), Region 7 has reason to believe that Respondent has violated Section 12 of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. § 136j.

2. This is an administrative action for the assessment of civil penalties instituted pursuant to Section 14 of the FIFRA, 7 U.S.C. § 1361, and in accordance with the EPA's 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 (Consolidated Rules), 40 C.F.R. Part 22, a copy of which is enclosed along with this Complaint.

Section II

Parties

3. The Complainant, by delegation from the Administrator of EPA and the Regional Administrator, EPA, Region 7, is the Director of the Water, Wetlands and Pesticides Division, EPA, Region 7.

4. The Respondent is a formulator and packager of agrochemical products at 317 West Florence Road, St. Joseph, Missouri. The Respondent is and was at all times referred to in this Complaint, a "person" as defined by Section 2(s) of FIFRA, 7 U.S.C. § 136(s).

Answer: Respondent is a formulator and packager of a wide variety of liquid and dry chemical products and a variety on non-chemical products.

Section III

Statutory and Regulatory Background

5. Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), states that it shall be unlawful for any person to distribute or sell any pesticide that is not registered under Section 3 of FIFRA, 7 U.S.C. § 136a.

Answer: we deny that we distributed or sold any pesticide not registered.

6. Section 2(gg) of FIFRA, 7 U.S.C. § 136(gg) states that "to distribute or sell" 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.

Answer: we deny that we distributed or sold Warthog.

7. Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), states it shall be unlawful for any person to distribute or sell any pesticide which is adulterated or misbranded.

Answer: we deny that Warthog was adulterated or misbranded.

8. Section 2(w) of FIFRA, 7 U.S.C. § 136(w) states that the term "producer" means the person who manufactures, prepares, propagates, compounds, or processes any pesticide or device or active ingredient used in producing a pesticide.

Answer: we deny that we were the producer Warthog.

9. Title 40 C.F.R. § 167.3 states that the term "produce" to manufacture, prepare, propagate, compound, or process any pesticide, including any pesticide produced pursuant to Section 5 of the Act, any active ingredient or device, or to package, repackage, label, relabel, or otherwise change the container of any pesticide or device.

Answer: we did repackage Warthog.

Section IV

General Factual Allegations

10. Respondent at all times related to the violations cited below was registered with the EPA as a pesticide producer and was assigned company no. 44616.

11. Respondent at all times related to the violations cited below produced pesticides at its establishment located at 317 West Florence Road, St. Joseph, Missouri, EPA Est. No. 44616-MO-002.

12. On July 20, 2010, a representative of the Missouri Department of Agriculture (MDA) at the request of EPA conducted a For Cause Producer Inspection of the Respondent's 317 West Florence Road establishment, related to the production and distribution of a pesticide product marketed under the name "Warthog". The Respondent used Clethodim 2EC, EPA Registration No. 83222-30 ("Clethodim 2EC") to produce the Warthog product.

13. The MDA representative collected production, distribution, supply, sample analysis, current inventory and tank cleaning records as well as obtained an explanation of the production of Warthog. Physical samples were taken from the bulk tank used for production and salable inventory of Warthog, as well as samples from 2.5 "gallon containers of Warthog that had been repackaged by the Respondent and released for shipment or sale by Respondent.

14. The explanation of the production of Warthog showed that under an agreement with J. Oliver Industries, Respondent repackaged bulk Clethodim 2EC into smaller containers labeled as Warthog. In June, 2010 a shipment of Clethodim 2EC was delivered by tanker truck to

Respondent's bulk tanks, and in that same month Respondent repackaged it into the smaller Warthog containers.

15. Prior to June, 2010, Respondent's bulk tank had been used to hold a pesticide product with dicamba as an active ingredient. Dicamba (3,6-dichloro-2-methoxybenzoic acid) is an herbicide.

16. The Confidential Statement of Formula for Clethodim 2EC, EPA Registration No. 83222-30, does not include dicamba as an ingredient.

17. Analysis showed the repackaged Warthog product was contaminated with dicamba.

Answer: Respondent denies that it was contaminated beyond what was understood to be a cross-contamination level.

VIOLATIONS

18. The Complainant hereby states and alleges that Respondent has violated FIFRA and federal regulations promulgated thereunder, as follows:

Count 1

19. Complainant hereby incorporates the allegations contained in paragraphs 10 through 17, above, as fully set forth herein.

20. On or about June 17, 2010, Respondent packaged, labeled, and released for shipment 2.5 gallon containers of Clethodim 2EC that contained dicamba to Cascio Warehouse, as documented by Bill of Lading # JOP.65.17.10.02 (57476).

Answer: we deny that we released for shipment 2.5 gallon containers of Warthog. The shipment was arranged for and released by the the registrant J. Oliver.

21. Respondent violated Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), by holding for sale or distribution an adulterated pesticide.

Answer: we deny that we held for sale or distributed Warthog. The sale and distribution were done by the registrant J. Oliver.

Count 2

22. Complainant hereby incorporates the allegations contained in paragraphs 10 through 17, above, as fully set forth herein.

23. On or about June 11 and June 16, 2010, Respondent packaged, labeled, and

released for shipment 2.5 gallon containers of Clethodim 2EC that contained dicamba to Frontier Chemical, Beattie, Kansas, as documented by Bill of Lading #57440.

Answer: we deny that we released for shipment 2.5 gallon containers of Warthog. The shipment was arranged for and released by the the registrant J. Oliver.

24. Respondent violated Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), by holding for sale or distribution an adulterated pesticide.

Answer: we deny that we held for sale or distributed Warthog. The sale and distribution were done by the registrant J. Oliver.

Count 3

25. Complainant hereby incorporates the allegations contained in paragraphs 10 through 17, above, as fully set forth herein.

26. On or about June 16, 2010, Respondent packaged, labeled, and released for shipment 2.5 gallon containers of Clethodim 2EC that contained dicamba to Frontier Chemical, Beattie, Kansas, as documented by Bill of Lading # 57457.

Answer: we deny that we released for shipment 2.5 gallon containers of Warthog. The shipment was arranged for and released by the the registrant J. Oliver.

27. Respondent violated Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), by holding for sale or distribution an adulterated pesticide.

Answer: we deny that we held for sale or distributed Warthog. The sale and distribution were done by the registrant J. Oliver.

Count 4

28. Complainant hereby incorporates the allegations contained in paragraphs 10 through 17, above, as fully set forth herein.

29. On or about June 14, 2010, Respondent packaged, labeled, and released for shipment 2.5 gallon containers of Clethodim 2EC that contained dicamba to Fry Brothers' Fertilizer, Ewing, Nebraska, as documented by Bill of Lading # JOP.6.14.10.05, and Purchase Order # 1298.

Answer: we deny that we released for shipment 2.5 gallon containers of Warthog. The shipment was arranged for and released by the the registrant J. Oliver.

30. Respondent violated Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), by holding for sale or distribution an adulterated pesticide.

Answer: we deny that we held for sale or distributed Warthog. The sale and distribution were done by the registrant J. Oliver.

Count 5,

31. Complainant hereby incorporates the allegations contained in paragraphs 10 through 17, above, as fully set forth herein.

32. On or about June 15, 2010, Respondent packaged, labeled, and released for shipment 2.5 gallon containers of Clethodim 2EC that contained dicamba to Ottawa Plant Food, Ottawa, Illinois, as documented by Bill of Lading # JOP.6.15.10.02, and Customer Order No. 45838-00.

Answer: we deny that we released for shipment 2.5 gallon containers of Warthog. The shipment was arranged for and released by the the registrant J. Oliver.

33. Respondent violated Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), by holding for sale or distribution an adulterated pesticide.

Answer: we deny that we held for sale or distributed Warthog. The sale and distribution were done by the registrant J. Oliver.

Count 6

34. Complainant hereby incorporates the allegations contained in paragraphs 10 through 17, above, as fully set forth herein.

35. On or about June 16, 2010, Respondent packaged, labeled, and released for shipment 2.5 gallon containers of Clethodim 2EC that contained dicamba to J. Oliver Products, c/o Pony Express Warehouse, St. Joseph, MO, as documented by Bill of Lading #57526.

Answer: we deny that we released for shipment 2.5 gallon containers of Warthog. The shipment was arranged for and released by the the registrant J. Oliver.

36. Respondent violated Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), by holding for sale or distribution an adulterated pesticide.

Answer: we deny that we held for sale or distributed Warthog. The sale and distribution were done by the registrant J. Oliver.

Count 7

37. Complainant hereby incorporates the allegations contained in paragraphs 10 through 17, above, as fully set forth herein.

38. On or about June 21, 2010, Respondent packaged, labeled, and released for shipment 2.5 gallon containers of Clethodim 2EC that contained dicamba to J. Oliver Products, c/o Pony Express Warehouse, St. Joseph, MO, as documented by Bill of Lading # 57488.

Answer: we deny that we released for shipment 2.5 gallon containers of Warthog. The shipment was arranged for and released by the the registrant J. Oliver.

39. Respondent violated Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), by holding for sale or distribution an adulterated pesticide.

Answer: we deny that we held for sale or distributed Warthog. The sale and distribution were done by the registrant J. Oliver

Count 8

40. Complainant hereby' incorporates the allegations contained in paragraphs 10 through 17, above, as fully set forth herein.

41. On or about July 7, 2010, Respondent packaged, labeled, and released for shipment 2.5 gallon containers of Clethodim 2EC that contained dicamba to Roepke Farms, Altamont, IL, as documented by Bill of Lading # 34347863.

Answer: we deny that we released for shipment 2.5 gallon containers of Warthog. The shipment was arranged for and released by the the registrant J. Oliver.

42. Respondent violated Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), by holding for sale or distribution an adulterated pesticide.

Answer: we deny that we held for sale or distributed Warthog. The sale and distribution were done by the registrant J. Oliver.

Section V

Relief Sought

43. Section 14 of FIFRA, 7 U.S.C. § 1361, 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, through January 12, 2009, the maximum statutory penalty per violation is Six Thousand Five Hundred Dollars (\$6,500). For any such violation occurring after January 12, 2009, the maximum penalty per violation is Seven Thousand Five Hundred Dollars (\$7,500). EPA proposes to assess a total civil penalty of Forty Thousand Eight Hundred Dollars (\$40,800) against Respondent for the above-described violations.

Answer: respondent's actions were of a one time nature and the multiple counts created by shipping documents that had nothing to do with respondent actions are unduly punitive.

Appropriateness of Proposed Penalty

44. The penalty proposed above has been calculated after consideration of the ' statutory factors set forth in Section 14 of FIFRA, 7 U.S.C. § 1361. 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, December, 2009, Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)).

45. For purposes of calculating the proposed penalty, Respondent was placed in Category III size of business (total business revenues under \$1,000,000 a,year). If this categorization is incorrect, the proposed penalty will be adjusted upon submittal of reliable financial information indicating another category is appropriate.

46. 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.

47. 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.

Answer: respondent's actions were of a one time nature and the multiple counts created by shipping documents that had nothing to do with respondent actions are unduly punitive.

48. 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.

49. Payment of the total penalty - \$40,800 - may be made by certified or cashier's check payable to the "Treasurer, United States of America," and remitted to:

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

50. 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:

Answer: Respondent does contest the finding and assessments.

Regional Hearing Clerk EPA -Region 7
11201 Renner Boulevard
Lenexa, Kansas 66219

and a copy to:

Robert W. Richards
Attorney
EPA - Region 7
11201 Renner Boulevard
Lenexa, Kansas 66219.

NOTICE OF OPPORTUNITY FOR HEARING

Section VI

Answer and Request for Hearing

51. Pursuant to Section 14(a) of FIFRA, 7 U.S.C. § 1361(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 the EPA Region 7 Regional Hearing Clerk, at:

Regional Hearing Clerk
EPA - Region 7
11201 Renner Boulevard
Lenexa, Kansas 66219

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;

Answer: This document provides answers that constitute the grounds of a defence.

B. The facts that Respondent intends to place at issue; and

Answer: This document provides the facts that respondent intends to place at issue.

C. Whether a hearing is requested.

Answer: A hearing is requested but as shown an informal conference and settlement has been and continues to be requested.

Failure to deny any of the factual allegations in the Complaint constitutes an admission of the undenied allegations.

52. 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.

53. 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.

54. 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 VII

Settlement Conference

55. 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:

Robert W. Richards
Attorney
EPA Region 7
11201 Renner Boulevard
Lenexa, Kansas 66219
Telephone: (913) 551-7502
richards.robert@epa.gov.

Answer: A letter was sent by mail and email requesting an informal settlement

conference, copy attached, and no answer was received. Calls were made on July 23rd and 24th and no answer was received.

56. 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.

Answer: This is the written answer.

57. 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 waive of Respondent's right to request a hearing on any matter stipulated to therein.

Answer: We don't believe we had the opportunity to settle. This is our answer.

Dated: 7.25-13



William E. Garvey

President, HPI Products, Inc.