

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 2

U.S. ENVIRONMENTAL PROTECTION AGENCY-REG.11
2012 APR -4 A 10:34
REGIONAL HEARING CLERK

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In the Matter of :
 :
Good Earth Horticulture, Inc. :
 :
Respondent :
 :
Proceeding under the Federal :
Insecticide, Fungicide, and :
Rodenticide Act, as amended :
-----X

COMPLAINT AND NOTICE OF OPPORTUNITY FOR HEARING

Docket No. FIFRA-02-2012-5208

COMPLAINT

Complainant, as and for her Complaint against Respondent, hereby alleges:

1. This is a civil administrative proceeding instituted pursuant to Section 14 (a)(1) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA or the Act), 7 U.S.C. 1361(a) as amended, 7 U.S.C. 136 et seq.
2. The Complainant, Dore LaPosta, Director of the Division of Enforcement and Compliance Assistance, Region 2, United States Environmental Protection Agency (EPA), has been duly delegated the authority to institute this action.
3. Respondent is Good Earth Horticulture, Inc.
4. Respondent is a Corporation organized pursuant to the laws of the State of New York.
5. Respondent is a registrant, wholesaler, dealer or other distributor within the meaning of Section 14(a)(1) of FIFRA, 7 U.S.C. 1361(a)(1).

6. Respondent is a person within the meaning of Section 2(s) of FIFRA, 7 U.S.C. 136 (s).

7. Respondent is a producer of pesticides, as that term is defined by Section 2(w) of FIFRA, 7 U.S.C. 136(w).

8. Respondent maintains an establishment, as defined in Section 2(dd) of FIFRA, 7 U.S.C. 136(dd), located at 5960 Broadway, Lancaster, New York 14086.

9. Respondent's facility is registered under Section 7 of FIFRA, 7 U.S.C. 136e. Its assigned EPA Establishment Number is 015-NY-001.

10. Subsection 7(c)(1) of FIFRA, 7 U.S.C.136e(c)(1) states in part that any producer operating an establishment registered under Section 7 shall submit annually to the EPA, as required under the applicable regulations, the types and amounts of pesticides and, if applicable, active ingredients used in producing pesticides, which the producer is currently producing, has produced during the past year, and has sold or distributed during the past year.

11. 40 C.F.R. 167.85 provides that a producer operating an establishment must submit the information mentioned in Paragraph 10, above, in an annual report (Report) on or before March 1 of each year, even if the producer has produced no pesticide products for that reporting year.

COUNT ONE

12. Complainant realleges each allegation contained in Paragraphs 1 through 11, inclusive, as if fully set forth herein.

13. Respondent was required to submit to the EPA a Report for calendar year 2010 on or before March 1, 2011.

14. Respondent did not submit to the EPA its Report for calendar year 2010 on or before March 1, 2011.

15. Respondent's failure to submit a Report as alleged in Paragraph 14, above, is a violation of Section 12(a)(2)(L) of FIFRA, 7 U.S.C. 136j(a)(2)(L), and 40 C.F.R. 167.85.

COUNT TWO

16. Complainant realleges each allegation contained in Paragraphs 1 through 11, inclusive, as if fully set forth herein.

17. Respondent was required to submit to the EPA a Report for calendar year 2011 on or

before March 1, 2012.

18. Respondent did not submit to the EPA its Report for calendar year 2011 on or before March 1, 2012.

19. Respondent's failure to submit a Report as alleged in Paragraph 18, above, is a violation of Section 12(a)(2)(L) of FIFRA, 7 U.S.C. 136j(a)(2)(L), and 40 C.F.R. 167.85.

PROPOSED CIVIL PENALTY

In view of the above-cited findings and pursuant to the authority of Section 14(a) of FIFRA, 7 U.S.C.1361(a), Complainant herein proposes the assessment of a civil penalty in the amount of Six Thousand Six Hundred Dollars (\$6,600) against Respondent.

The proposed civil penalty has been determined in accordance with Section 14(a) of FIFRA, 7 U.S.C.1361(a), which authorizes the assessment of a civil penalty of up to \$5,000 for each violation of FIFRA and the regulations promulgated pursuant thereto.

The Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Debt Collection Improvement Act of 1996, requires EPA to adjust its penalties for inflation on a periodic basis. EPA has issued the Civil Monetary Penalty Inflation Adjustment Rule under which violations that occur on January 12, 2009, or later, are subject to a new statutory maximum civil penalty. The maximum civil penalty under Section 14(a) of FIFRA for such violations is \$7,500 per offense. (40 C.F.R. Part 19 (Vol. 73, No. 239, December 11, 2008)).

For purposes of determining the amount of any penalty to be assessed, Section 14 of FIFRA requires EPA to take into account the gravity of the violations. As to the violator, Section 14 of FIFRA requires EPA to take into account the appropriateness of the penalty to the size of the business and the effect of the penalty on its ability to continue in business.

To develop the proposed penalty in this Complaint, EPA has taken into account the particular facts and circumstances of this case, to the extent known at this time, with specific reference to EPA's FIFRA 7(c) Enforcement Response Policy, enacted May 19, 2010, and its "Enforcement Response Policy For The Federal Insecticide, Fungicide, and Rodenticide Act", dated December 3, 2009, copies of which are available upon request. These policies provide rational, consistent and equitable calculation methodologies for applying the statutory penalty factors enumerated above to particular cases.

Complainant proposes, subject to receipt and evaluation of further and relevant information, that Respondent be assessed the following civil penalty for the violations alleged in the Complaint:

Count 1: Failure to Submit Section 7(c)(1) Report for 2010 \$3,300

Count 2: Failure to Submit Section 7(c)(1) Report for 2011 \$3,300

TOTAL ASSESSMENT \$6,600

PROCEDURES GOVERNING THIS ADMINISTRATIVE LITIGATION

The rules of procedure governing this civil administrative litigation have been set forth in 64 Fed. Reg. 40138 (July 23, 1999), entitled, CONSOLIDATED RULES OF PRACTICE GOVERNING THE ADMINISTRATIVE ASSESSMENTS OF CIVIL PENALTIES, ISSUANCE OF COMPLIANCE OR CORRECTIVE ACTION ORDERS, AND THE REVOCATION, TERMINATION OR SUSPENSION OF PERMITS, and which are codified at 40 C.F.R. Part 22 (2000). A copy of these rules accompanies this Complaint and Notice of Opportunity for Hearing (hereinafter referred to as the Complaint).

A. Answering the Complaint

Where Respondent intends to contest any material fact upon which the Complaint is based, to contend that the proposed penalty is inappropriate or to contend that Respondent is entitled to judgment as a matter of law, Respondent must file with the Regional Hearing Clerk of EPA, Region 2, both an original and one copy of a written Answer to the Complaint. (40 C.F.R. 22.15(a)). While that provision requires that an Answer must be filed within 30 days after service of a Complaint, EPA, Region 2, has administratively extended the deadline for such filing in this proceeding, and Respondent's Answer accordingly must be filed within 90 days of service of the Complaint. The address of the Regional Hearing Clerk of EPA, Region 2, is:

**Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 2
290 Broadway, 16th floor
New York, NY 10007-1866**

Respondent shall also then serve one copy of the Answer to the Complaint upon Complainant and any other party to the action. (40 C.F.R. 22.15(a)).

Respondent's Answer to the Complaint must clearly and directly admit, deny, or explain each of the factual allegations that are contained in the Complaint and with regard to which Respondent has any knowledge. (40 C.F.R. 22.15(b)). Where Respondent lacks knowledge of a particular factual allegation and so states in its Answer, the allegation is deemed denied.

(40 C.F.R. 22.15(b)). The Answer shall also set forth: (1) the circumstances or arguments that are alleged to constitute the grounds of defense, (2) the facts that Respondent disputes (and thus intends to place at issue in the proceeding), and (3) whether Respondent requests a hearing. (40 C.F.R. 22.15(b)).

Respondent's failure affirmatively to raise in the Answer facts that constitute or that might constitute the grounds of its defense may preclude Respondent, at a subsequent stage in this proceeding, from raising such facts and/or from having such facts admitted into evidence at a hearing.

B. Opportunity to Request a Hearing

If requested by Respondent in its Answer, a hearing upon the issues raised by the Complaint and Answer may be held. (40 C.F.R. 22.15(c)). If, however, Respondent does not request a hearing, the Presiding Officer (as defined in 40 C.F.R. 22.3) may hold a hearing if the Answer raises issues appropriate for adjudication. (40 C.F.R. 22.15(c)).

Any hearing in this proceeding will be held at a location determined in accordance with 40 C.F.R. 22.35(b). A hearing of this matter will be conducted in accordance with the applicable provisions of the Administrative Procedure Act, 5 U.S.C. 551-59, and the procedures set forth in Subpart D of 40 C.F.R. Part 22.

C. Failure to Answer

If Respondent fails in its Answer to admit, deny, or explain any material factual allegation contained in the Complaint, such failure constitutes an admission of the allegation. (40 C.F.R. 22.15(d)) If Respondent fails to file a timely (i.e., in accordance with the 30-day period set forth in 40 C.F.R. 22.15(a)) Answer to the Complaint, Respondent may be found in default upon motion. (40 C.F.R. 22.17(a); extended to 90 days for this Complaint) Default by Respondent constitutes, for purposes of the pending proceeding only, an admission of all facts alleged in the Complaint. (40 C.F.R. 22.17(a)). Following a default by Respondent for a failure to file a timely Answer to the Complaint, any order issued therefore shall be issued.

Any penalty assessed in the default order shall become due and payable by Respondent without further proceedings 30 days after the default order becomes final pursuant to 40 C.F.R. 22.27(c). (40 C.F.R. 22.17(d)). If necessary, EPA may then seek to enforce such final order of default against Respondent, and to collect the assessed penalty amount, in federal court.

D. Exhaustion of Administrative Remedies

Where Respondent fails to appeal an adverse initial decision to the Environmental Appeals Board pursuant to 40 C.F.R. 22.30, and that initial decision thereby becomes a final order pursuant to the terms of 40 C.F.R. 22.27(c), Respondent waives its right to judicial review. (40 C.F.R. 22.27(d)).

In order to appeal an initial decision to the Agency's Environmental Appeals Board [EAB; see 40 C.F.R. 1.25(e)], Respondent must do so within 30 days after the initial decision is served. (40 C.F.R. 22.30(a)). Pursuant to 40 C.F.R. 22.7(c), where service is by mail, five days shall be added to the time allowed by these rules for the filing of a responsive pleading or document. Note that the 45-day period provided for in 40 C.F.R. 22.27(c) (discussing when an initial decision becomes a final order) does not pertain to or extend the time period prescribed in 40 C.F.R. 22.30(a) for a party to file an appeal to the EAB of an adverse initial decision.

INFORMAL SETTLEMENT CONFERENCE

Whether or not Respondent requests a formal hearing, EPA encourages settlement of this proceeding consistent with the provisions of the Act and its applicable regulations (40 C.F.R.

22.18(b)). At an informal conference with representative(s) of Complainant, Respondent may comment on the charges made in this Complaint, and Respondent may also provide whatever additional information that it believes is relevant to the disposition of this matter, including: (1) actions Respondent has taken to correct any or all of the violations herein alleged, (2) any information relevant to Complainant's calculation of the proposed penalty, (3) the effect the proposed penalty would have on Respondent's ability to continue in business, and (4) any other special facts or circumstances Respondent wishes to raise.

Complainant has the authority to modify the amount of the proposed penalty, where appropriate, to reflect any settlement agreement reached with Respondent, to reflect any relevant information previously not known to Complainant or to dismiss any or all of the charges, if Respondent can demonstrate that the relevant allegations are without merit and that no cause of action as herein alleged exists. Respondent is referred to 40 C.F.R. 22.18.

Any request for an informal conference or any questions that Respondent may have regarding this Complaint should be directed to:

Mr. Michael Kramer
FIFRA Section 7 Coordinator
U.S. Environmental Protection Agency, Region 2
Pesticides Team (MS-500)
2890 Woodbridge Avenue
Edison, NJ 08837
(732) 321-6610

The parties may engage in settlement discussions irrespective of whether Respondent has requested a hearing (40 C.F.R. 22.18(b)(1)). Respondent's requesting a formal hearing does not prevent it from also requesting an informal settlement conference; the informal conference procedure may be pursued simultaneously with the formal adjudicatory hearing procedure. A request for an informal settlement conference constitutes neither an admission nor a denial of any of the matters alleged in the Complaint. Complainant does not deem a request for an informal settlement conference as a request for a hearing as specified in 40 C.F.R. 22.15(c).

A request for an informal settlement conference does not affect Respondent's obligation to file a timely Answer to the Complaint pursuant to 40 C.F.R.22.15. No penalty reduction, however, will be made simply because an informal settlement conference is held.

Any settlement that may be reached as a result of an informal settlement conference shall be embodied in a written consent agreement (40 C.F.R. 22.18(b)(2)). In accepting the Consent Agreement, Respondent waives its right to contest the allegations in the Complaint and waives its right to appeal the Final Order that is to accompany the Consent Agreement (40 C.F.R. 22.18(b)(2)). In order to conclude the proceeding, a Final Order ratifying the parties' agreement to settle will be executed (40 C.F.R. 22.18(b)(3)).

Respondent's entering into a settlement through the signing of such Consent Agreement terminates this administrative litigation and civil proceedings arising out of the allegations made in the Complaint. Respondent's entering into a settlement does not extinguish, waive, satisfy or otherwise affect its obligation and responsibility to comply with all applicable statutory and regulatory requirements, and to maintain such compliance.

RESOLUTION OF THIS PROCEEDING WITHOUT HEARING OR CONFERENCE

Instead of filing an Answer, Respondent may choose to pay the total amount of the reduced penalty within 30 days after receipt of the Complaint, provided that Respondent files with the Regional Hearing Clerk, Region 2 (at the New York address noted above), a copy of the check or other instrument of payment (40 C.F.R. 22.18(a)). Such payment shall be made by cashier's or certified check or by electronic fund transfer (EFT). If the payment is made by check, then the check shall be made payable to the Treasurer, United States of America, and shall be mailed to:

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

The check shall be identified with a notation thereon listing the following: **In the Matter of Good Earth Horticulture, Inc.** and shall bear thereon the Docket Number FIFRA-02-2012-5208.

If Respondent chooses to make the payment by EFT, then Respondent shall provide the following information to its remitter bank:

- 1) Amount of Payment
- 2) SWIFT address: FRNYUS33, 33 Liberty Street, New York, NY 10045
- 3) Account Code for Federal Reserve Bank of New York receiving payment: 68010727
- 4) Federal Reserve Bank of New York ABA routing number: 021030004
- 5) Field Tag 4200 of the Fedwire message should read D 68010727
Environmental Protection Agency
- 6) Name of Respondent: Good Earth Horticulture, Inc.
- 7) Case Number: FIFRA-02-2012-5208

Whether the payment is made by check or by EFT, the Respondent shall promptly thereafter furnish reasonable proof that such payment has been made, to both:

Michael Kramer, FIFRA Section 7 Coordinator
Environmental Protection Agency, Region 2
2890 Woodbridge Avenue (MS-500)
Edison, NJ 08837

and

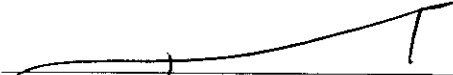
Karen Maples, Regional Hearing Clerk
Environmental Protection Agency, Region 2
290 Broadway, 16th floor
New York, NY 10007-1866

Pursuant to 40 C.F.R. Section 22.18(a)(3), if Respondent elects to pay the full amount of the penalty proposed in the Complaint within 30 days of receiving the Complaint, then, upon EPA's receipt of such payment, the Regional Administrator of EPA, Region 2 (or, if designated, the Regional Judicial Officer), shall issue a Final Order. Issuance of this Final Order terminates this administrative litigation and the civil proceedings arising out of the allegations made in the Complaint. Further, pursuant to 40 C.F.R. Section 22.18(a)(3), the making of such payment by Respondent shall constitute a waiver of Respondent's right both to contest the allegations made in the Complaint and to appeal said Final Order to federal court. Such payment does not extinguish, waive, satisfy or otherwise affect Respondent's obligation and responsibility to comply with all applicable regulations and requirements, and to maintain such compliance.

In the Matter of Good Earth Horticulture, Inc.
Docket No. FIFRA-02-2012-5208

Dated: MARCH 28, 2012
New York, New York

COMPLAINANT:



Dore LaPosta, Director
Division of Enforcement and
Compliance Assistance
U.S. EPA, Region 2

CERTIFICATE OF SERVICE

This is to certify that I have this day caused to be mailed a copy of the foregoing Complaint, bearing docket number FIFRA-02-2012-5208, and a copy of the Consolidated Rules of Practice, 40 C.F.R. Part 22 (2005), by certified mail, return receipt requested, to:

Guenther Burkhardt, President
Good Earth Horticulture, Inc.
5960 Broadway
Lancaster, NY 14086

I forwarded the foregoing Complaint to the office of the Regional Hearing Clerk, United States Environmental Protection Agency, Region 2.

Dated: April 3, 2012, 2012
New York, New York

