

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION VII

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901 NORTH 5<sup>th</sup> STREET

KANSAS CITY, KANSAS 66101

ENVIRONMENTAL PROTECTION  
AGENCY-REGION VII  
REGIONAL HEARING CLERK

BEFORE THE ADMINISTRATOR

IN THE MATTER OF

)

Docket No. FIFRA-07-2006-0280

)

Hirsch Feed and Farm Supply, Inc

)

COMPLAINT AND NOTICE OF  
OPPORTUNITY FOR HEARING

789 Worley Drive

)

West Plains, MO 65775

)

)

RESPONDENT

)

COMPLAINT

Section I

Jurisdiction

1. This is an administrative action for the assessment of civil penalties instituted pursuant to Section 14 of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. §136l.
2. This Complaint serves as notice that the United States Environmental Protection Agency (EPA) has reason to believe that Respondent has violated Section 12 of FIFRA, 7 U.S.C. §136j.

Section II

Parties

3. The Complainant, by delegation from the Administrator of the EPA and the Regional Administrator, EPA, Region VII, is the Director of the Water, Wetlands and Pesticides Division, EPA, Region VII.
4. The Respondent is Hirsch Feed and Farm Supply, Inc. of West Plains, Missouri, located at 789 Worley Drive, West Plains, 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), and a corporation qualified to do business in the state of Missouri.

### Section III

#### Violations

##### General Allegations

5. The Complainant hereby states and alleges that Respondent has violated FIFRA as follows:
6. Section 12(a)(1)(A) of FIFRA, 7 U.S.C. §136j(a)(1)(A), provides that it is unlawful for any person in any state to distribute or sell to any person any pesticide whose registration has been cancelled or suspended.
7. Section 2(gg) of FIFRA, 7 U.S.C. §136(gg), defines the term "to distribute or sell" as meaning 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.
8. Section 12(a)(1)(E) of FIFRA, 7 U.S.C. §136j(a)(1)(E), states it shall be unlawful for any person in any state to distribute or sell to any person any pesticide which is adulterated or misbranded.
9. Section 2(q)(1)(A) of FIFRA, 7 U.S.C. §136(q)(1)(A), states a pesticide is misbranded if its labeling bears any statement, design, or graphic representation relative thereto or to its ingredients which is false or misleading in any particular.
10. Section 12(a)(2)(K) of FIFRA, 7 U.S.C. §136j(a)(2)(K), states it shall be unlawful for any person to violate any cancellation order issued under this Act.
11. The pesticide, EPA Registration No. 7401-67, registered as Ferti-Lome Rose Spray Containing Diazinon and Daconil, was cancelled at the request of the registrant, Voluntary Purchasing Group, Inc., effective August 11, 2004, and published in Federal Register: August 11, 2004 (Volume 69, Number 154). The order provides that the distribution or sale of existing stock in this outdoor non-agricultural use pesticide shall be unlawful effective December 31, 2004.
12. The term "existing stocks" is defined, pursuant to EPA's existing stocks policy (56 FR 29362, June 26, 1991), as those stocks of a registered pesticide product which are currently in the United States and which have been packaged, labeled, and released for shipment prior to the effective date of the amendment or cancellation.
13. On March 20, 2006, a representative of the Missouri Department of Agriculture (MDA) conducted an inspection (Inspection No. 032006MO0601) at Hirsch Feed and Farm Supply, Inc. of West Plains, Missouri, at 789 Worley Drive, West Plains, Missouri, to assess compliance with FIFRA. The inspector collected documentation in the forms of photographs, invoice number 150938, and a signed statement from Jake Wooderson, Assistant Manager of Hirsch Feed and Farm Supply, Inc. Mr. Wooderson stated that Respondent had sold one 32-ounce container of

Ferti-Lome Rose Spray Containing Diazinon and Daconil, a/k/a Ferti-Lome Triple-Action Insecticide-Miticide-Fungicide, EPA Reg. No. 7401-67-10159 on March 13, 2006. In the course of the inspection, the MDA representative issued a Stop Sale, Use, or Removal Order (SSURO) for two (2) 32-ounce containers of Ferti-Lome Rose Spray Containing Diazinon and Daconil, a/k/a Ferti-Lome Triple-Action Insecticide-Miticide-Fungicide, EPA Reg. No. 7401-67-10159, which were being held for distribution or sale at Respondent's place of business.

Count 1

(Distribution or sale of a misbranded, cancelled pesticide – EPA Reg. No. 7401-67-10159)

14. The facts stated in paragraphs 5 through 13 are realleged and incorporated as if fully stated herein.

15. On March 20, 2006, during the inspection referenced in paragraph 13, the MDA representative collected invoice number 150938, dated March 13, 2006, documenting the sale of one 32-ounce bottle of the cancelled pesticide Ferti-Lome Rose Spray Containing Diazinon and Daconil, a/k/a Ferti-Lome Triple-Action Insecticide-Miticide-Fungicide, EPA Reg. No. 7401-67-10159.

16. The product registration of Ferti-Lome Triple-Action Insecticide-Miticide-Fungicide, EPA Reg. No. 7401-67-10159, was cancelled on August 11, 2004, and provides that distribution or sale of existing stock of this outdoor non-agricultural use pesticide shall be unlawful effective December 31, 2004.

17. The Respondent violated Sections 12(a)(1)(A) and (E) and 12(a)(2)(K) of FIFRA, 7 U.S.C. §§ 136j(a)(1)(A) and (E) and 136j(a)(2)(K), by distribution or sale of a misbranded pesticide whose registration has been cancelled.

18. Pursuant to Section 14 of FIFRA, 7 U.S.C § 136l, and based on the facts stated in paragraphs 14 through 17, it is proposed that a civil penalty of \$6,500 be assessed against the Respondent.

Count 2

(Holding for sale a misbranded, cancelled pesticide – EPA Reg. No. 7401-67-10159)

19. The facts stated in paragraphs 5 through 13 are realleged and incorporated as if fully stated herein.

20. On March 20, 2006, during the inspection referenced in paragraph 13, the MDA representative documented that Respondent was holding for distribution or sale two (2) 32-ounce bottles of the cancelled, misbranded pesticide Ferti-Lome Rose Spray Containing Diazinon and Daconil, a/k/a Ferti-Lome Triple-Action Insecticide-Miticide-Fungicide, EPA Reg. No. 7401-67-10159.

21. The product registration of Ferti-Lome Rose Spray Containing Diazinon and Daconil, a/k/a Ferti-Lome Triple-Action Insecticide-Miticide-Fungicide, EPA Reg. No. 7401-67-10159, was cancelled on August 11, 2004, and provides that distribution or sale of existing stock of this outdoor non-agricultural use pesticide shall be unlawful effective December 31, 2004.

22. The Respondent violated Sections 12(a)(1)(A) and (E) and 12(a)(2)(K) of FIFRA, 7 U.S.C. §§ 136j(a)(1)(A) and (E) and 136j(a)(2)(K), by holding for distribution or sale, a misbranded pesticide whose registration has been cancelled.

23. Pursuant to Section 14 of FIFRA, 7 U.S.C § 136l, and based on the facts stated in paragraphs 19 through 22, it is proposed that a civil penalty of \$6,500 be assessed against the Respondent.

#### Section IV

##### Total Proposed Penalty

24. Section 14 of FIFRA, 7 U.S.C. § 136l, 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, the maximum statutory penalty per violation is Six Thousand Five Hundred Dollars (\$6,500). The EPA proposes to assess a total civil penalty of Thirteen Thousand Dollars (\$13,000) against Respondent for the above-described violations.

##### Appropriateness of Proposed Penalty

25. The penalty proposed above has been calculated after consideration of the statutory factors set forth in Section 14 of FIFRA, 7 U.S.C. §136l. 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, July 2, 1990, Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)).

26. For purposes of calculating the proposed penalty, EPA obtained financial information indicating that Respondent's total business revenues were projected to be over one million dollars per year. This information placed Respondent in Category I size of business, as set forth in the FIFRA Civil Penalty Calculation Worksheet attached hereto and incorporated herein by reference (See Enclosure). If EPA's estimate of Respondent's total business revenues is incorrect, Respondent may submit reliable financial documentation indicating another category is appropriate.

27. 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.

28. 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.

29. 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.

30. Payment of the total penalty - \$13,000 - may be made by certified or cashier's check payable to the Treasurer, United States of America, and remitted to:

Mellon Bank  
EPA – Region 7  
P.O. Box 371099M  
Pittsburgh, Pennsylvania 15251

31. 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:

Regional Hearing Clerk  
EPA - Region 7  
901 North 5<sup>th</sup> Street  
Kansas City, Kansas 66101

and a copy to:

Chris R. Dudding  
Assistant Regional Counsel  
EPA - Region 7  
901 North 5<sup>th</sup> Street  
Kansas City, Kansas 66101

## NOTICE OF OPPORTUNITY FOR HEARING

### Section V

#### Answer and Request for Hearing

32. Pursuant to Section 14(a) of FIFRA, 7 U.S.C. §136l(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:

Regional Hearing Clerk  
EPA - Region 7  
901 North 5<sup>th</sup> Street  
Kansas City, Kansas 66101

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;
- B. The facts that Respondent intends to place at issue; and
- C. Whether a hearing is requested.

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

33. 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 (copy enclosed).

34. 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.

35. 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 VI

### Settlement Conference

36. 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:

Chris R. Dudding  
Assistant Regional Counsel  
EPA Region 7  
901 North 5<sup>th</sup> Street  
Kansas City, Kansas 66101  
Telephone: (913) 551-7524

37. 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.

38. 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 waiver of Respondent's right to request a hearing on any matter stipulated to therein.

09/28/06  
Date

William A. Spratlin  
Director  
Water, Wetlands and Pesticides Division

Chris R. Dudding  
Assistant Regional Counsel  
Office of Regional Counsel

Enclosures:

1. FIFRA Civil Penalty Calculation Worksheet
2. Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Action Orders, and the Revocation, Termination or Suspension of Permits, 40 C.F.R. Part 22
3. July 2, 1990, Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act
4. SBREFA Fact Sheet
5. Notice of Securities and Exchange Commission Registrants' Duty to Disclose Environmental Legal Proceedings

CERTIFICATE OF SERVICE

I certify that on the date noted below I hand delivered the original and one copy of this Complaint and Notice of Opportunity for Hearing to the Regional Hearing Clerk, EPA, 901 North 5<sup>th</sup> Street, Kansas City, Kansas 66101.

I further certify that on the date noted below I sent by certified mail, return receipt requested, a copy of the signed original Complaint and Notice of Opportunity for Hearing; a copy of 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; a copy of the July 2, 1990, Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act; a copy of the FIFRA Civil Penalty Calculation Worksheet; the SBREFA Fact Sheet; and the Notice of Securities and Exchange Commission Registrants' Duty to Disclose Environmental Legal Proceedings, to the following:

Larry Hirsch, Registered Agent for  
Hirsch Feed and Farm Supply Inc.  
of West Plains, Missouri  
Route 3, Box 3334  
Thayer, MO 65791

9/28/04  
Date

Julia A. Cacho  
Julia A. Cacho



**FIFRA CIVIL PENALTY CALCULATION WORKSHEET**  
**ENFORCEMENT RESPONSE POLICY for FIFRA - Reference**

RESPONDENT: Hirsch Feed and Farm Supply, Inc.  
 ADDRESS: 789 Worley Drive  
 West Plains, MO 65775

Prepared By: Nicholas Peak  
 Date: September 22, 2006

	Count 1	Count 2	Count 3	Count 4
<u>Appendix A</u>				
1. Statutory Violation	12(a)(1)(A) & (E) 12(a)(2)(K)	12(a)(1)(A) & (E) 12(a)(2)(K)		
2. FTTS Code	1AA, 1EA, 2KA	1AB, 1EA, 2KA		
3. Violation Level	2, 1	2, 1		
<u>Appendix C - Table 2 - Size of Business Category</u>				
4. Violator Category * § 14(a)(1) or § 14(a)(2)	14(a)(1)	14(a)(1)		
5. Size of Business Category	1	1		
<u>Appendix C - Table 1 - FIFRA Civil Penalty Matrix</u>				
6. BASE PENALTY	\$6,500	\$6,500		
<u>Appendix B - Gravity Adjustments</u>				
7a. Pesticide Toxicity	2	2		
7b. Human Harm	3	3		
7c. Environmental Harm	3	3		
7d. Compliance History	0	0		
7e. Culpability	0	0		
7f. Total Gravity Adjustment Value (add items 7a - 7e)	8	8		
<u>Appendix C - Table 3 - Adjustments</u>				
7g. Percent Adjustment	0%	0%		
7h. Dollar Adjustment	\$0	\$0		
8. Final Penalty** (item 7h from item 6)	\$6,500	\$6,500		
Combined Total Penalty (total of all columns for line 8, above)	\$13,000			

\* Section 14(a)(1) of FIFRA - Any registrant, commercial applicator, wholesaler, dealer, retailer, or other distributor who violates any provision of this subchapter may be assessed a civil penalty by the Administrator of not more than \$5,000 for each offense.

Section 14(a)(2) of FIFRA - Any private applicator or other person not included in paragraph (1) who violates any provision of this subchapter 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 of not more than \$1,000 for each offense, except that any applicator not included under paragraph (1) of this subsection who holds or applies registered pesticides, or use dilutions of registered pesticides, only to provide a service of controlling pests without delivering any unapplied pesticide to any person so served, and who violates any provision of this subchapter may be assessed a civil penalty by the Administrator of not more than \$500 for the first offense nor more than \$1,000 for each subsequent offense.

\*\*The final penalty in each column of line 8 cannot exceed the statutory maximum.