



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 5

77 WEST JACKSON BOULEVARD

CHICAGO, IL 60604-3590

SEP 06 2012

REPLY TO THE ATTENTION OF:

L-8J

CERTIFIED MAIL

Receipt No. 7009 1680 0000 7673 3106

William C. Brown, Esq.
Brown & Stewart, P.C.
114 East Main Street, Suite 218
Owosso, Michigan 48867

Re: In the matter of: Mathie Energy Supply Company, Inc., Docket number: **FIFRA-05-2012-0022**

Dear Mr. Brown:

I have enclosed the Complaint filed by the U.S. Environmental Protection Agency against Mathie Energy Supply Company, Inc. under Section 7 of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. § 136l(a), a copy of EPA's FIFRA Enforcement Response Policy, dated December 2009, and a copy of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (Consolidated Rules), 40 C.F.R. Part 22.

As provided in the Complaint, if you would like 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-19J), U.S. EPA, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604 within thirty (30) days of your receipt of this Complaint, a default order may be issued and the proposed civil penalty will become due thirty (30) days later. If you choose to file an answer, you also must mail a copy of it to Mark Koller, Associate Regional Counsel (C-14J), U.S. EPA, 77 West Jackson Boulevard, Chicago, Illinois 60604.

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 Mark Koller, Associate Regional Counsel, at (312) 353-2591.

Sincerely,

Margaret M. Guerriero
Director

Land and Chemicals Division

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.” 7 U.S.C. § 136(gg).

8. A “pesticide” is, among other things, any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest. 7 U.S.C. § 136(u).

9. A “pest” is any insect; rodent, nematode, fungus, weed, or any other form of terrestrial or aquatic plant or animal life or virus, bacteria, or other micro-organism which the Administrator of EPA declares to be a pest under Section 25(c)(1) of FIFRA. 7 U.S.C. § 136(t).

10. An organism is declared to be a pest under circumstances that make it deleterious to man or the environment if it is any plant growing where not wanted, including any alga. 40 C.F.R. § 152.5(c).

11. A substance is considered to be intended for a pesticidal purpose, and thus to be a pesticide requiring registration, if the person who distributes or sells the substance claims, states, or implies (by labeling or otherwise) that the substance can or should be used as a pesticide. 40 C.F.R. § 152.15(a)(1).

12. Section 12(a)(2)(B)(i) of FIFRA, 7 U.S.C. § 136j(a)(2)(B)(i), states that it is unlawful for any person to refuse to prepare, maintain, or submit any records required by or under 7 U.S.C. §§ 136c, 136e, 136f, 136i, or 136q.

13. Section 8(b) of FIFRA, 7 U.S.C. § 136f(b), provides that for the purposes of enforcing FIFRA, any producer, distributor, carrier, dealer, or any other person who sells or offers for sale, delivers or offers for delivery any pesticide or device subject to FIFRA, shall, upon request of any officer or employee of the EPA or of any State or political subdivision, duly designated by the Administrator, furnish or permit such person at all reasonable times to have access to and to copy all records showing the delivery, movement, or holding of such pesticide or

device, including the quantity, the date of shipment and receipt, and the name of the consignor and consignee.

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

15. The term “producer” means the person who manufactures, prepares, compounds, propagates, or processes any pesticide or device or active ingredient used in producing a pesticide. 7 U.S.C. § 136(w).

16. A person is considered a producer if the person produces any pesticide, active ingredient, or device (including packaging, repackaging, labeling, and relabeling). 40 C.F.R. § 167.3.

17. The term “establishment” means any place where a pesticide or device or active ingredient used in producing a pesticide is produced, or held, for distribution or sale. 7 U.S.C. § 136(dd).

18. Section 14(a)(1), 7 U.S.C. § 136l(a)(1), provides that any registrant, commercial applicator, wholesaler, dealer, retailer or other distributor who violates any provision of FIFRA may be assessed a civil penalty by the Administrator of not more than \$5,000 for each offense.

19. Pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461 note, as amended by the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701 note, and 40 C.F.R. Part 19, the Administrator of EPA may assess a civil penalty against any retailer who violates any provision of FIFRA of up to \$7,500 for each offense that occurred after January 12, 2009.

General Allegations

20. Respondent is a “person” as defined at Section 2(s) of FIFRA, 7 U.S.C. § 136(s).

21. Respondent is a retailer.
22. Respondent owned or operated a place of business during calendar year 2009 located at 100 East Grove Street, Kawkawlin, Michigan 48613 (Kawkawlin store).
23. Michigan is a "State" as defined at Section 2(aa) of FIFRA, 7 U.S.C. § 136(aa).
24. The Kawkawlin store is an "establishment" as defined at Section 2(dd) of FIFRA, 7 U.S.C. § 136(dd).
25. Respondent also had a website (www.mathieenergy.com) during calendar year 2010, which allowed consumers to shop online (<https://www.mathieenergy.com/index.php/Our-Online-Shop.html>).
26. On May 14, 2009, inspectors employed by the Michigan Department of Agriculture (MDA) and authorized to conduct inspections under FIFRA conducted an inspection at Respondent's Kawkawlin store.
27. During the May 14, 2009 establishment inspection at the Kawkawlin store, the MDA inspectors observed "Copper Sulfate" in two five-pound bags in the retail area.
28. During the May 14, 2009 establishment inspection at the Kawkawlin store, the MDA inspectors observed "Red Lake Earth Diatomaceous Earth with Calcium Bentonite" in the retail area.
29. The five-pound bags had a small white label that says, "Copper Sulfate" and includes the Respondent's name, the address for the Kawkawlin store, and an active ingredients list (99% copper sulfate pentahydrate).
30. The "Copper Sulfate" in five-pound bags was also labeled with labeling that states, "Update: Use of Bluestone (Copper Sulfate) for Algae Control."
31. On May 14, 2009, an MDA inspector acquired from the Respondent a copy of the

label “Update: Use of Bluestone (Copper Sulfate) for Algae Control.”

32. The labeling “Update: Use of Bluestone (Copper Sulfate) for Algae Control” is a two-page article written by William Wurts, State Specialist for Aquaculture with the Kentucky State University Cooperative Extension Program.

33. The article states: “If a dense bloom of algae has covered most of the pond, copper treatment is not advisable. The treatment will likely cause a sudden, algal die off. An oxygen depletion could result as dead algae decay and the fish will suffocate.” Also, “[s]pot treatments can help limit algae problems, particularly in low alkalinity waters, as long as the amount of copper sulfate applied...is small.”

34. “Copper Sulfate” is a “pesticide” as defined at Section 2(u) of FIFRA, 7 U.S.C. § 136(u).

35. On May 14, 2009, an MDA inspector acquired a copy of a Mathie pamphlet entitled: “WHAT IS DIATOMACEOUS EARTH?”

36. The pamphlet was available on a shelf near the “Red Lake Earth Diatomaceous Earth with Calcium Bentonite.”

37. The pamphlet makes a number of claims, including but not limited to: “Diatomaceous earth is EPA approved against indoor and outdoor crawling insects,” “Small ants may require a few applications to completely eliminate them...,” “Sprinkled around the house foundation keeps new crawling insects from coming inside,” and “Outdoor bugs affected by diatomaceous earth: Ants, fire ants, caterpillars, cut worms, army worms, fleas, ticks, cockroaches, snails, spiders, termites, scorpions, silver fish, lice, mites, flies, centipedes, earwigs, slugs, aphids, Japanese Beetles (grub stage), fruit flies, corn earworm, cucumber beetles, corn borer, sting bugs, squash vine borers, thrips, loopers, etc., etc.”

38. Consumers were also able to shop for and purchase “Red Lake Earth Diatomaceous Earth” through Respondent’s website.

39. On November 1, 2010, an EPA representative viewed the Respondent’s online shop.

40. The “pest control” products included “Red Lake Earth Diatomaceous Earth.”

41. The description of “Red Lake Earth Diatomaceous Earth” stated: “Diatomaceous Earth is a natural internal parasite controller fed to a multitude of animals, external animal parasite control, as well as barns, coops, kennels and litter boxes! Use to control insects in the yard, garden and landscape! Read More! Product Details...”

42. EPA’s representative clicked “Product Details...” for a description of “Red Lake Earth Diatomaceous Earth,” which brought her to a portion of the Respondent’s website where claims similar to those in the pamphlet (see Paragraph 37 above) were made.

43. Three sizes of “Red Lake Earth Diatomaceous Earth” were offered for sale: one-half of one pound, one-and-one-quarter pounds, and fifty pounds.

44. “Red Lake Earth Diatomaceous Earth” is a “pesticide” as defined at Section 2(u) of FIFRA, 7 U.S.C. § 136(u).

45. On May 21, 2009, an MDA inspector acquired a copy of a May 3, 2007 invoice from the Respondent identifying Central Farm and Garden, Inc. of Wooster, Ohio as the distributor or seller of four “copper sulfate pails” weighing fifteen pounds apiece and eight “copper sulfate pails” weighing five pounds apiece to the Respondent.

46. The “Copper Sulfate” in five-pound bags was repackaged and relabeled by the Respondent.

47. On May 27, 2009, an MDA inspector telephoned Melissa Mathie of Mathie Energy Supply Company, Inc. and requested copies of sales/shipping records for “Copper Sulfate” and

“Red Lake Earth Diatomaceous Earth” and the receiving records for “Red Lake Earth Diatomaceous Earth.”

48. Ms. Mathie refused to provide the requested sales/shipping records.

49. On June 9, 2009, an MDA inspector telephoned Mike Mathie of Mathie Energy Supply Company, Inc. and requested shipping and receiving documents for “Red Lake Earth Diatomaceous Earth.”

50. Mr. Mathie refused to provide the requested records.

Count I

51. Complainant incorporates by reference the allegations contained in paragraphs 1 through 50 of this Complaint.

52. Respondent offered two five-pound bags of Copper Sulfate for sale on May 14, 2009.

53. The Copper Sulfate offered for sale by Mathie Energy Supply Co., Inc. was not registered as a pesticide with EPA under Section 3 of FIFRA, 7 U.S.C. § 136a, on May 14, 2009.

54. Respondent’s distribution or sale of the unregistered pesticide Copper Sulfate constitutes an unlawful act pursuant to Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A).

Count II

55. Complainant incorporates by reference the allegations contained in paragraphs 1 through 50 of this Complaint.

56. Respondent offered a forty-pound bag of “Red Lake Earth Diatomaceous Earth” for sale on May 14, 2009.

57. The “Red Lake Earth Diatomaceous Earth” offered for sale by Mathie Energy Supply Co., Inc. was not registered as a pesticide with EPA under Section 3 of FIFRA, 7 U.S.C.

§ 136a, on May 14, 2009.

58. Respondent's distribution or sale of the unregistered pesticide "Red Lake Earth Diatomaceous Earth" constitutes an unlawful act pursuant to Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A).

Count III

59. Complainant incorporates by reference the allegations contained in paragraphs 1 through 50 of this Complaint.

60. Respondent offered a one-half of one pound bag of "Red Lake Earth Diatomaceous Earth" for sale on November 1, 2010.

61. The "Red Lake Earth Diatomaceous Earth" offered for sale by Mathie Energy Supply Co., Inc. was not registered as a pesticide with EPA under Section 3 of FIFRA, 7 U.S.C. § 136a, on November 1, 2010.

62. Respondent's distribution or sale of the unregistered pesticide "Red Lake Earth Diatomaceous Earth" constitutes an unlawful act pursuant to Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A).

Count IV

63. Complainant incorporates by reference the allegations contained in paragraphs 1 through 50 of this Complaint.

64. Respondent offered a one-and-one-quarter pound bag of "Red Lake Earth Diatomaceous Earth" for sale on November 1, 2010.

65. The "Red Lake Earth Diatomaceous Earth" offered for sale by Mathie Energy Supply Co., Inc. was not registered as a pesticide with EPA under Section 3 of FIFRA, 7 U.S.C. § 136a, on November 1, 2010.

66. Respondent's distribution or sale of the unregistered pesticide "Red Lake Earth Diatomaceous Earth" constitutes an unlawful act pursuant to Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A).

Count V

67. Complainant incorporates by reference the allegations contained in paragraphs 1 through 50 of this Complaint.

68. Respondent offered a fifty-pound bag of "Red Lake Earth Diatomaceous Earth" for sale on November 1, 2010.

69. The "Red Lake Earth Diatomaceous Earth" offered for sale by Mathie Energy Supply Co., Inc. was not registered as a pesticide with EPA under Section 3 of FIFRA, 7 U.S.C. § 136a, on November 1, 2010.

70. Respondent's distribution or sale of the unregistered pesticide "Red Lake Earth Diatomaceous Earth" constitutes an unlawful act pursuant to Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A).

Count VI

71. Complainant incorporates by reference the allegations contained in paragraphs 1 through 50 of this Complaint.

72. Respondent repackaged and relabeled "Copper Sulfate" on or before May 14, 2009.

73. Respondent produced a pesticide in an unregistered establishment in violation of Section 7(a) of FIFRA, 7 U.S.C. § 136e.

74. Producing a pesticide in an unregistered establishment constitutes an unlawful act pursuant to Section 12(a)(2)(L) of FIFRA, 7 U.S.C. § 136j(a)(2)(L).

Count VII

75. Complainant incorporates by reference the allegations contained in paragraphs 1 through 50 of this Complaint.

76. Representatives of Respondent, Mike and Melissa Mathie, refused the requests of an MDA inspector for records showing the movement and delivery of the pesticides “Copper Sulfate” and “Red Lake Earth Diatomaceous Earth.”

77. Respondent’s refusal to furnish the requested records to the MDA inspector is a violation of Section 8(b) of FIFRA, 7 U.S.C. § 136f.

78. Refusing to submit any records required by or under Section 8(b) of FIFRA constitutes an unlawful act pursuant to Section 12(a)(2)(B)(i) of FIFRA, 7 U.S.C. § 136j(a)(2)(B)(i).

Proposed Civil Penalty

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

Count I

Distribution or sale of Copper Sulfate\$7,150

Count II

Distribution or sale of Red Lake Earth Diatomaceous Earth.....\$7,150

Count III

Distribution or sale of Red Lake Earth Diatomaceous Earth.....\$7,150

Count IV

Distribution or sale of Red Lake Earth Diatomaceous Earth.....\$7,150

Count V

Distribution or sale of Red Lake Earth Diatomaceous Earth.....\$7,150

Count VI

Producing a pesticide in an unregistered establishment\$5,670

Count VII

Refusing to submit any records required by or under Section 8(b) of FIFRA\$5,670

Total proposed civil penalty\$47,090

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 EPA's FIFRA Enforcement Response Policy, dated December 2009, 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 and the Revocation/Termination or Suspension of Permits (the Consolidated Rules), at 40 C.F.R. Part 22, govern this proceeding to assess a civil penalty. Enclosed with the Complaint served on Respondent is a copy of the Consolidated Rules.

Filing and Service of Documents

Respondent must file with the EPA 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-19J)
U.S. EPA, Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604

Respondent must serve a copy of each document filed in this proceeding on each party pursuant to Section 22.5 of the Consolidated Rules. Complainant has authorized Mark Koller to

receive any answer and subsequent legal documents that Respondent serves in this proceeding.

You may telephone Mark Koller at (312) 353-2591. His address is:

Mark J. Koller (C-14J)
Office of Regional Counsel
U.S. EPA, Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604

Terms of Payment

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

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

Respondent must include the case name, docket number and billing document number on the check and in the letter transmitting the check. Respondent must simultaneously send copies of the check and transmittal letter to the Regional Hearing Clerk and Mark Koller at the addresses given above, and to:

Estrella Calvo (LC-8J)
Pesticides and Toxics Compliance Section
U.S. EPA, Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604

Answer and Opportunity to Request a Hearing

If Respondent contests any material fact upon which this Complaint is based, contends that the proposed penalty is inappropriate, or contends that it is entitled to judgment as a matter of law, Respondent may request a hearing before an Administrative Law Judge. To request a hearing, Respondent must file a written Answer within 30 days of receiving this Complaint and

must include in that written Answer a request for a hearing. Any hearing will be conducted according to the Consolidated Rules.

In counting the 30-day period, the date of receipt is not counted, but Saturdays, Sundays, and federal legal holidays are counted. If the 30-day period expires on a Saturday, Sunday, or federal legal holiday, the time period extends to the next business day.

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 Answer on the other parties.

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.

Settlement Conference

Whether or not Respondent requests a hearing, Respondent may request an informal conference to discuss the facts alleged in the Complaint and to discuss settlement. To request an informal settlement conference, Respondent may contact Estrella Calvo at (312) 353-8931.

Respondent's request for an informal settlement conference will not extend the 30-day period for filing a written Answer to this Complaint. Respondent may simultaneously pursue both an informal settlement conference and the adjudicatory hearing process. The Complainant encourages all parties against whom it proposes to assess a civil penalty to pursue settlement through an informal conference. Complainant, however, will not reduce the proposed penalty because the parties hold an informal settlement conference.

Continuing Obligation to Comply

Payment of a civil penalty will not affect Respondent's continuing obligation to comply with FIFRA and any other applicable federal, state or local law.

9/4/2012

Date



Margaret M. Guerriero
Director
Land and Chemicals Division

RECEIVED

SEP 06 2012

REGIONAL HEARING CLERK
U.S. ENVIRONMENTAL
PROTECTION AGENCY

CERTIFICATE OF SERVICE

I hereby certify that the original signed copy of the Complaint in resolution of the civil administrative action involving Mathie Energy Supply Company, Inc., was filed on September 6, 2012 with the Regional Hearing Clerk (E-19J), U.S. Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, and that I mailed by Certified Mail, Receipt No. 7009 1680 0000 7673 3106, a copy of the original to the Respondent:

William C. Brown, Esq
Brown & Stewart, P.C.
114 East Main Street, Suite 218
Owosso, Michigan 48867

and forwarded copies (intra-Agency) to:

Ann Coyle, Regional Judicial Officer, ORC/C-14J
Mark J. Koller, Counsel for Complainant/C-14J
Eric Volck, Cincinnati Finance/MWD



Frederick Brown
Pesticides and Toxics Compliance Section
U.S. EPA - Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604-3590

Docket No. FIFRA -05-2012-2022

