



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

OCT 02 2008

REPLY TO THE ATTENTION OF:

LC-8J

RECEIVED
REGIONAL HEARING CLERK
US EPA REGION V
2008 OCT -6 AM 10:42

CERTIFIED MAIL
RECEIPT NO. 7001 0320 0005 8921 5078

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

In the Matter of: Porter Hybrids, Inc., Docket No. FIFRA-05-2008-0010

Dear Mr. Kirk:

Enclosed is the Amended Complaint filed by the U.S. Environmental Protection Agency, 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 Amended Complaint, if you wish to request a hearing, you must do so in your answer to the Amended Complaint. Please note that if you do not file an answer with the Regional Hearing Clerk within 20 days of your receipt of this Amended Complaint, a default order may be issued and the proposed civil penalty will become due 30 days later. The Regional Hearing Clerk's address is on page 7 of the Complaint.

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 me, or Christine Liszewski (C-14J), Associate Regional Counsel, at (312) 886-4670.

Sincerely,

Margaret M. Guerriero
Director
Land and Chemicals Division

Enclosures

cc: James Belt, Ohio Department of Agriculture

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

RECEIVED
REGIONAL HEARING CLERK
US EPA REGION 5
2008 OCT - 6 AM 10:22

In the Matter of:)
)
Porter Hybrids, Inc.)
Wilmington, Ohio 45177)
)
Respondent.)
_____)
)

Docket No. FIFRA-05-2008-0010
Proceeding to Assess a Civil Penalty
Under Section 14(a) of the Federal
Insecticide, Fungicide, and Rodenticide
Act, 7 U.S.C. § 136l(a)

Amended 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, U.S. Environmental Protection 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 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 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. (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 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 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 Amended 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 Amended 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 Amended 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 Amended 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 Amended 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 (MDA), 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 EPA, on or about November 20, 1986.

24. During the June 21 and 27, 2006 inspections, the ODA inspector also collected, among other things, Invoice No. 31067.

25. 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.

26. On April 13, 2007, EPA, Region 5, issued a Notice of Warning to Respondent for failing to submit its "Pesticide Report for Pesticide-Producing and Device-Producing Establishments" (EPA Form 3540-16), for the calendar year 2006 to EPA on or before March 1, 2007.

Count 1

27. Complainant incorporates paragraphs 1 through 26 of this Amended Complaint, as if set forth in this paragraph.

28. 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 EPA.

29. In the report described in paragraph 28, above, Respondent checked the box which states, “Did not produce/distribute in 2006.”

30. 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.

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 “Weedone LV 4 EC,” EPA Reg. No. 228-139-71368, during the calendar year 2006.

32. In response to a request from the 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 EPA.

33. In the report described in paragraph 32, above, Respondent states that it produced, repackaged or relabeled and sold or distributed the pesticide products “Buccaneer Plus” and “Weedone LV 4” during 2006.

34. 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 Amended Complaint as follows:

Count 1

Filing an incomplete report for 2006 under Section 7 of FIFRA\$1,000

Total proposed civil penalty.....\$1,000

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 EPA's *Enforcement Response Policy for FIFRA Section 7(c) Pesticide Producing Establishment Reporting Requirement*, dated June 2007, a copy of which is enclosed with this Amended 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 Amended 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)
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

If Respondent pays the proposed penalty in full within thirty (30) days after receiving the Amended 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 Amended 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 Amended Complaint if Respondent contests any material fact of the Amended 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 Amended Complaint, it must do so within 20 calendar days after receiving the Amended Complaint. In counting the 20 day time period, the date of receipt is not counted, but Saturdays, Sundays, and federal legal holidays are counted. If the 20 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 Amended 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 Amended 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 20 calendar days after receiving this Amended 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 Amended 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 30 days after the order becomes the final order of the Administrator of 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 8.

Respondent's request for an informal settlement conference does not extend the 20 calendar day period for filing a written answer to this Amended Complaint. Respondent may

pursue simultaneously the informal settlement conference and the adjudicatory hearing process. EPA encourages all parties facing civil penalties to pursue settlement through an informal conference. 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 Amended 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.


Margaret M. Guerriero
Director
Land and Chemicals Division

10/2/08
Date

CERTIFICATE OF SERVICE

I hereby certify that the original and one copy of the Amended Complaint in the matter of Porter Hybrids, Inc., was filed on October 6, 2008, with the Regional Hearing Clerk (E-13J), U.S. Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, and that a true and correct copy was sent by Certified Mail, Receipt No. 7001 0320 0005 8921 5078, along with a copy each of the "Consolidated Rules of Practice, 40 C.F.R. Part 22," and "Enforcement Response Policy For FIFRA Section 7(c)" to:

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

and forwarded copies (intra-Agency) to:

Marcy Toney, Regional Judicial Officer, ORC/C-14J
Christine Liszewski, Counsel for Complainant/C-14J
Eric Volck, Cincinnati Finance/MWD



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

Docket No. FIFRA-05-2008-0010

RECEIVED
REGIONAL HEARING CLERK
US EPA REGION V
2008 OCT - 6 AM 10: 42