

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8
Docket No. FIFRA-08-2008-0024

2008 AUG -8 PM 1:51

STATE COURT
HEARD BY EPA

In the Matter of:)
)
Chemical Specialists, LLC)
d/b/a ChemStation of)
Northern Colorado)
3309 Empire Street)
Evans, CO 80620)
)
Respondent)

**PENALTY COMPLAINT AND NOTICE OF
OPPORTUNITY FOR HEARING**

INTRODUCTION (JURISDICTION)

1. This civil administrative enforcement action is authorized by Congress in section 14(a) of the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), 7 U.S.C. section 136/(a). The rules for this proceeding are 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 (*Rules of Practice*)," 40 C.F.R. part 22, a copy of which is enclosed.

2. The undersigned EPA officials have been properly delegated the authority to issue this action.

3. EPA alleges that Respondent has violated FIFRA by selling a pesticide the composition of which differs from the composition represented in the pesticide registration and proposes the assessment of a civil penalty, as more fully explained below. FIFRA authorizes the assessment of a civil penalty for violations of FIFRA. 7 U.S.C. section 136/(a).

NOTICE OF OPPORTUNITY FOR A HEARING

4. Respondent has the right to a public hearing before an administrative law judge ("ALJ") to disagree with (1) any fact stated (alleged) by EPA in the complaint, or (2) the appropriateness of the proposed penalty.

5. To disagree with the complaint and assert your right to a hearing, Respondent must file a written answer (and one copy) with the Regional Hearing Clerk (1595 Wynkoop Street; Denver, Colorado 80202-1129) within thirty days of receiving this complaint. The answer must clearly admit, deny or explain the factual allegations of the complaint, the grounds for any defense, the facts you may dispute, and your specific request for a public hearing. Please see section 22.15 of the *Rules of Practice* for a complete description of what must be in your answer.

FAILURE TO FILE AN ANSWER AND REQUEST FOR HEARING WITHIN THIRTY (30) DAYS MAY WAIVE RESPONDENT'S RIGHT TO DISAGREE WITH THE ALLEGATIONS OR PROPOSED PENALTY, AND RESULT IN A DEFAULT JUDGMENT AND ASSESSMENT OF THE PENALTY PROPOSED IN THE COMPLAINT.

QUICK RESOLUTION

6. Respondent may resolve this proceeding at any time by paying the specific penalty of \$78,000 proposed in the complaint. Such payment need not contain any response to, or admission of, the allegations in the complaint. Such payment constitutes a waiver of Respondent's right to contest the allegations and to appeal the final order. See section 22.18 of the *Rules of Practice* for a full explanation of the quick resolution process. This payment shall be made by remitting a cashier's or certified check for that amount, payable to "Treasurer, United States of America," to:

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

SETTLEMENT NEGOTIATIONS

7. EPA encourages discussing whether cases can be settled through informal settlement conferences. If you want to pursue the possibility of settling this matter, or have any other questions, contact Dana J. Stotsky, Esq., at 1-800-227-8917; extension 6905, or 303-312-6905, or the address below. *Please note that calling the attorney or requesting a settlement conference does NOT delay the running of the thirty (30) day period for filing an answer and requesting a hearing.*

DEFINITIONS

- I. ***Pesticide*** is defined by 40 C.F.R. § 152.3(s) as "any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest, or intended for use as a plant regulator, defoliant, or desiccant...."
- II. ***Adulterated*** is defined by FIFRA as "The term 'adulterated' applies to any pesticide if—
 - (1) its strength or purity falls below the professed standard of quality as expressed on its labeling under which it is sold;
 - (2) any substance has been substituted wholly or in part for the pesticide; or
 - (3) any valuable constituent of the pesticide has been wholly or in part abstracted."

- III. **Producer and produce** are defined by FIFRA as “The term ‘produce’ means to manufacture, prepare, compound, propagate, or process any pesticide or device or active ingredient used in producing a pesticide. The dilution by individuals of formulated pesticides for their own use and according to the directions on registered labels shall not of itself result in such individuals being included in the definition of ‘producer’ for the purposes of this subchapter.” 7 U.S.C. section 136(w).
- IV. **Requirement of Registration** is defined by FIFRA as “(a) Requirement of registration Except as provided by this subchapter, no person in any State may distribute or sell to any person any pesticide that is not registered under this subchapter. To the extent necessary to prevent unreasonable adverse effects on the environment, the Administrator may by regulation limit the distribution, sale, or use in any State of any pesticide that is not registered under this subchapter and that is not the subject of an experimental use permit under section 136c of this title or an emergency exemption under section 136p of this title.” 7 U.S.C. section 136a(a).
- V. **Establishment** is defined by FIFRA as “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. section 136(dd).
- VI. **To distribute or sell** is defined by FIFRA as “The term ‘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. The term does not include the holding or application of registered pesticides or use dilutions thereof by any applicator who provides a service of controlling pests without delivering any unapplied pesticide to any person so served.” 7 U.S.C. section 136(gg).
- VII. **Labeling** is defined by FIFRA as “(1) Label. The term ‘label’ means the written, printed, or graphic matter on, or attached to, the pesticide or device or any of its containers or wrappers. (2) Labeling. The term ‘labeling’ means all labels and all other written, printed, or graphic matter—
(A) accompanying the pesticide or device at any time; or
(B) to which reference is made on the label or in literature accompanying the pesticide or device, except to current official publications of the Environmental Protection Agency, the United States Departments of Agriculture and Interior, the Department of Health and Human Services, State experiment stations, State agricultural colleges, and other similar Federal or State institutions or agencies authorized by law to conduct research in the field of pesticides.” 7 U.S.C. section 136(pp).

VIII. *Section 136j. Unlawful acts .*

(a) IN GENERAL.

(1) Except as provided by subsection (b), it shall be unlawful for any person in any State to distribute or sell to any person—

(C) any registered pesticide the composition of which differs at the time of its distribution or sale from its composition as described in the statement required in connection with its registration under section 3....

GENERAL ALLEGATIONS

At all times pertinent to this complaint, the following general allegations apply:

8. EPA has jurisdiction of this matter under section 14(a)(1) of FIFRA, 7 U.S.C. section 136(a)(1).

9. Respondent, Chemical Specialists, LLC d/b/a ChemStation of Northern Colorado (hereafter "ChemStation Evans"), located at 3309 Empire Street, Evans, Colorado 80260, is a "person" within the meaning of Section 2(s) of FIFRA, 7 U.S.C. Section 136(s), and is therefore subject to regulation.

10. On or about September 7, 2007 ("the inspection"), Ms. Amy Hambrick, an authorized EPA inspector, ("the Inspector"), conducted an inspection of Respondent's facility, with the consent of Respondent, to determine compliance with FIFRA and its implementing regulations.

11. During the inspection, the Inspector observed Respondent was selling the pesticide "3030," EPA Registration Number 65072-20001-75617.

12. The pesticide "3030" is used for sanitizing food contact surfaces, farm premises (such as barns, pens, stalls, shoots, and troughs), pulp and paper mill water processes, agricultural uses (such as post-harvest protection- leaf cutting and bee cells), food egg sanitization, porous food contact surfaces, non-porous non-food contact surfaces, porous non-food contact surfaces, laundry sanitizer, aquacultural uses (fish ponds, fish pond equipment, Maine lobster ponds, conditioning live oysters, and control of scavengers in fish hatchery ponds).

13. The approved registration for "3030," EPA Registration Number 65072-20001-75617, specifies one vendor for the production of "3030," specifically, Van Waters and Rogers, Inc.

14. The approved registration for "3030," EPA Registration Number 65072-20001-75617, specifies use of a 12.5% sodium hypochlorite solution for the production of "3030."

15. On or about September 14, 2007, Respondent provided to the Inspector 17 Bills of Lading of a 10% sodium hypochlorite solution received by Respondent.

16. On or about September 14, 2007, Respondent provided to the Inspector 20 sales invoices for some sales of the pesticide "3030" made by Respondent during 2006 and 2007.

17. During the inspection Mr. Adams, President or Mr. High, General Manager, or Mr. Kniss, Operations Manager of Respondent, or all three, stated to the Inspector how the Respondent's production process for producing "3030" occurs: production is on an as-needed basis, Respondent's vendor, DPC Industries, Inc. in Hudson, Colorado, supplies Respondent with bulk containers of sodium hypochlorite which the Respondent then repackages as customer orders are received. At no time does Respondent store significant quantities of sodium hypochlorite. Respondent is directed by ChemStation International on what vendor and sodium hypochlorite to use in the production of '3030.'

Counts 1-18

(Multiple Sales of a Pesticide the Composition of Which Differs from the Composition Represented in the Pesticide Registration: "3030")

18. During 2006 and 2007, the Respondent sold the pesticide "3030," EPA Registration Number 65072-20001-75617.

19. The pesticide "3030," EPA Registration Number 65072-20001-75617, contains specifications in its EPA-approved registration that its production shall be composed of a formulation made from a 12.5% sodium hypochlorite solution; and that such 12.5% sodium hypochlorite solution shall be solely supplied to Respondent by Van Waters and Rogers, Inc.

20. During the inspection and subsequent file review, the Inspector observed that Respondent on eighteen (18) occasions during 2006 and 2007 (and as set out in Paragraphs 21-38 below) sold the pesticide "3030" that was adulterated, since it was formulated with a 10.0% sodium hypochlorite solution and from an unauthorized supplier, which is production of a pesticide the composition of which differs from the composition as described in the statement required in connection with its registration. These eighteen (18) sales are identified as follows.

Paragraph Number	Count Number	Sales Invoice Number	Date of Sale
21	1	2508	4/5/2006
22	2	2831	8/9/2006
23	3	2898	8/30/2006
24	4	2923	9/6/2006
25	5	2986	9/27/2006
26	6	3006	10/3/2006

27	7	3033	10/11/2006
28	8	3144	11/15/2006
29	9	3174	11/29/2006
30	10	3248	12/27/2006
31	11	3337	2/7/2007
32	12	3422	3/8/2007
33	13	3698	6/26/2007
34	14	3736	7/11/2007
35	15	3763	7/24/2007
36	16	3807	8/1/2007
37	17	3806	8/1/2007
38	18	3830	8/8/2007

39. Respondent, by selling the pesticide "3030" as described in Paragraphs 8-38 above, where the composition of the pesticide sold differed from the composition accepted in the applicable pesticide registration, has violated FIFRA section 12(a)(1)(C). 7 U.S.C. section 136j(a)(1)(C).

Counts 19-20

(Multiple Sales of a Pesticide the Composition of Which Differs from the Composition Represented in the Pesticide Registration: "3030")

40. During 2007, the Respondent sold the pesticide "3030," EPA Registration Number 65072-20001-75617.

41. The pesticide "3030," EPA Registration Number 65072-20001-75617, contains a specification in its EPA-approved registration that its production shall be composed of a formulation made from a 12.5% sodium hypochlorite solution, and that such solution shall be solely supplied by Van Waters and Rogers, Inc.

42. During the inspection and subsequent file review, the Inspector observed that Respondent on two occasions during 2007 (and as set out in Paragraphs 43-44 below) sold the pesticide "3030" that was adulterated, since it was formulated with a 12.5% sodium hypochlorite solution and from an unauthorized supplier, which is production of a pesticide the composition of which differs from the composition as described in the statement required in connection with its registration. These two sales are identified as follows.

Paragraph Number	Count Number	Sales Invoice Number	Date of Sale
43	19	3892	8/30/2007
44	20	3902	8/30/2007

45. Respondent, by selling the pesticide “3030” as described in Paragraphs 40-44 above, where the composition of the pesticide sold differed from the composition accepted in the applicable pesticide registration, has violated FIFRA section 12(a)(1)(C). 7 U.S.C. section 136j(a)(1)(C).

PROPOSED CIVIL PENALTY

46. For pesticide registrants and producers, FIFRA authorizes the assessment of a civil penalty of up to \$6,500 for each offense of the Act and the Debt Collection Improvement Act of 1996. FIFRA requires EPA to consider the appropriateness of the penalty to the size of the business, the effect on the person’s ability to continue in business, and the gravity of the violation. EPA has established policies that provide a rational and consistent method for applying statutory factors to the circumstances of specific cases. A narrative description of the reasoning behind the penalty proposed in this case is attached to this complaint, along with copies of the EPA policies. **For the twenty (20) FIFRA violations alleged in this complaint, EPA proposes a penalty assessment of \$78,000 (as shown in the table below.)** The penalty narrative and calculation can be found in Complainant’s Exhibit Number 1. A summary of the proposed penalties per count in table form:

Count 1	\$3,900
Count 2	\$3,900
Count 3	\$3,900
Count 4	\$3,900
Count 5	\$3,900
Count 6	\$3,900
Count 7	\$3,900
Count 8	\$3,900
Count 9	\$3,900
Count 10	\$3,900
Count 11	\$3,900
Count 12	\$3,900
Count 13	\$3,900
Count 14	\$3,900
Count 15	\$3,900
Count 16	\$3,900
Count 17	\$3,900
Count 18	\$3,900
Count 19	\$3,900
Count 20	\$3,900
TOTAL	\$78,000

The ALJ is not bound by EPA’s penalty policy or the penalty proposed by Complainant, and may assess a penalty above the proposed amount, up to the maximum amount authorized in the statute. In this case, the maximum would be \$130,000.

To discuss settlement or ask any questions you may have about this process, please contact Dana J. Stotsky, Senior Enforcement Attorney, at 1-800-227-8917; ext. 312-6905, or at the address below.

ATTACHMENTS:

1. Memorandum on Penalty Calculation Worksheet, dated August 6, 2008.
2. Consolidated Rules of Practice ("CROP.") 40 C.F.R. part 22
3. EPA FIFRA Penalty Policy dated 1990.

United States Environmental Protection Agency
Region 8, Office of Enforcement, Compliance and
Environmental Justice, Complainant
1595 Wynkoop Street (ENF-L)
Denver, CO 80202-1129

Date: August 6, 2008 By: Mark Chalfant
Mark Chalfant, Director
Technical Enforcement Program

Date: 8/2/08 By: David J. Janik
David J. Janik, Director
Legal Enforcement Program

Date: July 21, 2008 By: Dana J. Stotsky
Dana J. Stotsky, Senior Enforcement Attorney
Legal Enforcement Program
U.S. EPA Region 8
1595 Wynkoop Street
Mail Code: 81NF-L
Denver, Colorado 80202-1146
Colorado Bar # 14717
Phone: (303)-312-6905
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stotsky.dana@epa.gov

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the original and one copy of the PENALTY COMPLAINT AND NOTICE OF OPPORTUNITY FOR HEARING with Exhibits were hand-carried to the Regional Hearing Clerk, EPA Region 8, 1595 Wynkoop Street; Denver, Colorado 80202-1129, and that a true copy of the same was sent via Certified Mail, Postage Pre-Paid, to:

Mr. John Adams, President
Chemical Specialists, LLC
d/b/a ChemStation of Northern Colorado
3309 Empire Street
Evans, Colorado 80620

8-8-08
Date


Judith McTernan

FIFRA PENALTY CALCULATION WORKSHEET

Respondent: **Chemical Specialists, LLC D.B.A. Chemstation of Northern Colorado**
3309 Empire Street
Evans, CO 80620

	Counts 1-20
Appendix A	
Statutory violation FIFRA section:	§12(a)(1)(C) Composition Differed
2. FTTS code	ICA
3. Violation level	2
Table 2	
4. Violation category: §14(a)(1) or §14(a)(2)	§14(a)(1)
5. Size of business category	1
Table 1	
6. Base penalty (Base penalty includes a 10% increase in accordance with the Civil Monetary penalty Inflation Adjustment Rule.)	\$6,500 per count
Appendix B	
7. Gravity adjustments	
a. pesticide toxicity	2 (Danger)
b. human harm	0
c. environmental harm	0
d. compliance history	0
e. culpability	2
f. total gravity adjustment value (add items 7a-7e)	4
Table 3	
g. percent adjustment	-40%
h. dollar adjustment	-\$2,600 per count
8. Final penalty (item 7h from item 6)	\$3,900 x 20 counts = \$78,000
Total Penalty	\$78,000

Prepared by: Amy Hambrick
 EPA Region 8 Technical Enforcement Program

A. Hambrick 8/6/2008

Penalty Calculation Narrative

Chemical Specialists, LLC D.B.A. Chemstation of Northern Colorado

1. To ensure a uniform and consistent enforcement response and application of the statutory penalty criteria in the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), the U.S. Environmental Protection Agency (EPA) developed the July 2, 1990 Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act (1990 Policy).

2. According to the 1990 Policy, the appropriate enforcement response for selling or distributing a pesticide whose composition differed (specifically, whose composition differed from the composition accepted in the pesticide registration), is a civil penalty. Chemical Specialists, LLC D.B.A. Chemstation of Northern Colorado is charged with twenty (20) counts of selling or distributing a pesticide whose composition differed from the pesticide registration.

3. FIFRA Section 14(a)(4) requires EPA to "consider the appropriateness of (a civil penalty) to the size of the business of the person charged, the effect on the person's ability to continue in business, and the gravity of the violation."

4. Following the guidance in the 1990 Policy, EPA calculates a proposed civil penalty using the following process. First, the gravity of the offense is identified using Appendix A of the 1990 Policy. Appendix A identifies a violation of FIFRA section 12(a)(1)(C), selling or distributing a pesticide whose composition differed, as gravity level 2.

5. Second, according to the 1990 policy, the size of business is taken into account. The size of business is determined from the company's gross revenues from all revenue sources during the prior calendar year. When information concerning the size of business is not readily available, the 1990 Policy directs the use of Category I size of business. This will remain the base penalty value unless Chemical Specialists, LLC D.B.A Chemstation of Northern Colorado can establish that it should be considered in a smaller category. Thus, EPA has determined the size of the business category for Chemical Specialists, LLC D.B.A Chemstation of Northern Colorado as Category I (gross revenues over \$1,000,000).

6. Third, EPA used the above gravity and size of business components and the Civil Penalty Matrix for FIFRA Section 14(a)(1) violations on page 19 of the 1990 Policy to determine the dollar amount of the proposed penalty. Violations with level 2 gravity and in Business Category I are assessed a penalty of \$6,500 for each count. Thus, counts 1 through 20 of FIFRA section 12(a)(1)(C) have a total base penalty of \$130,000. The base penalty includes a 10% increase in accordance with the Civil Monetary Penalty Inflation Adjustment Rule.

7. The 1990 Penalty Policy then directs that the actual circumstances of the violations be considered using gravity adjustment criteria listed in Appendix B of that document. The penalty amounts determined from the matrix can be adjusted either upward or downward depending on

the specifics of the case known to EPA at the time of the penalty calculation. According to page 22 of the ERP, "The gravity of record keeping and reporting violations are already considered in the dollar amounts presented in the FIFRA civil penalty matrices. Further, record keeping and reporting violations do not lend themselves to utilizing the gravity adjustments listed in Appendix B. Therefore, first-time civil penalties should be assessed at the matrix value."

The following gravity adjustment values were used to evaluate the FIFRA violations associated with selling or distributing a pesticide whose composition differed from the pesticide registration:

- (a) Pesticide: a value of 2 is assigned due to the signal word "Danger" on the label.
 - (b) Harm to human health: a value of 0 is assigned based on consideration of efficacy information comparing strengths of the active ingredient.
 - (c) Environmental harm: a value of 0 is assigned based on consideration of efficacy information comparing strengths of the active ingredient.
 - (d) Compliance history: a value of 0 is assigned as the EPA has no record that Chemical Specialists, LLC D.B.A. Chemstation of Northern Colorado has prior FIFRA violations.
 - (e) Culpability: a value of 2 is assigned as the culpability is unknown. Chemical Specialists, LLC D.B.A. Chemstation of Northern Colorado has acknowledged the following during the inspection on September 7, 2007:
 - Chemstation of Northern Colorado follows purchase protocols from Chemstation International.
 - Chemstation of Northern Colorado was instructed by Chemstation International to purchase Sodium Hypochlorite 10% EPA Reg. # 813-16 from DPC Industries, Inc.
- DPC Industries, Inc. tested for Quality Assurance and Quality control and communicated that information with Chemstation International before shipping the product to the franchise, Chemstation of Northern Colorado.

This results in a total gravity adjustment value of 4 for the violations associated with distributing and selling a pesticide whose composition differed from the composition represented in the registration.

8. Using a Gravity Adjustment Value of 4, Table 3 in Appendix C of the 1990 Policy states to decrease the matrix value by 40%. Therefore, the penalty for Counts 1-20 is **decreased** by \$52,000, resulting in a final penalty amount of \$78,000.

9. Finally, EPA attempts to take into consideration what effect the calculated penalty would have on the ability of Chemstation of Denver to pay based on limited information

available to EPA. Adjustments of the proposed penalty can be made at a later date should information warranting such a change become available. No adjustments were made at this time.

10. In sum, EPA arrived at a total penalty of \$78,000 for Chemical Specialists, LLC D.B.A. Chemstation of Northern Colorado's violations of FIFRA sections 12(a)(1)(C) by considering all of the FIFRA Section 14(a)(4) penalty criteria through the use of the 1990 Policy.

 8/6/2008

Prepared by: Amy Hambrick
EPA Region 8 Technical Enforcement Program