

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION VII

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

KANSAS CITY, KANSAS 66101

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ENVIRONMENTAL PROTECTION  
AGENCY-REGION VII  
REGIONAL HEARING CLERK

BEFORE THE ADMINISTRATOR

IN THE MATTER OF

) Docket No. FIFRA-07-2006-0231

)

Century Homes Company

) COMPLAINT AND NOTICE OF

dba D & K Products Inc.

)

1672 N.E. 54<sup>th</sup> Avenue

) OPPORTUNITY FOR HEARING

Des Moines, Iowa 50313

)

)

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 Century Homes Company doing business as (dba) D& K Products, Inc., a pesticide dealer, located at 1672 N.E. 54<sup>th</sup> Avenue, Des Moines, Iowa. 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 Iowa.

### Section III

#### Violations

##### General Allegations

5. The Complainant hereby states and alleges that Respondent has violated FIFRA as follows:
6. Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j (a)(1)(E), states that it shall be unlawful for any person to distribute or sell any pesticide which is adulterated or misbranded.
7. Section 2(q)(2)(C) of FIFRA, 7 U.S.C. § 136(q)(2)(C), states a pesticide is misbranded if there is not affixed to its container, and to the outside container or wrapper of the retail package, a label bearing the registration number assigned to the pesticide under this Act.
8. Section 2(q)(1)(D) of FIFRA, 7 U.S.C. § 136(q)(1) (D), states a pesticide is misbranded if its label does not bear the registration number as assigned under Section 7 to each establishment in which it was produced.
9. Section 12(a)(2)(F) of FIFRA, 7 U.S.C. § 136(j)(2)(F), states that it shall be unlawful for any person to distribute or sell, or to make available for use, or to use, any registered pesticide classified for restricted use other than in accordance with Section 3(d) of FIFRA.
10. Section 3(d)(1)(C)(i) and (ii) of FIFRA, 7 U.S.C. § 136a(d)(1)(C)(i) and (ii), states in pertinent part that a restricted use pesticide shall be applied for any use to which the restricted classification applies only by or under the direct supervision of a certified applicator.
11. Section 2(e)(1) of FIFRA, 7 U.S.C. § 136(e)(1) defines “certified applicator” as any individual who is certified under Section 11 of FIFRA, 7 U.S.C. § 136i, to use or supervise the use of any pesticide which is classified for restricted use.
12. Section 2(gg) of FIFRA, 7 U.S.C. § 136(gg), defines “to distribute or sell” to mean 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.
13. Catalyst is a pesticide registered under EPA Reg. No. 2724-450, to Wellmark International Schaumburg, Illinois.
14. ZP Tracking Powder pesticide is a restricted use pesticide registered under EPA Reg. No. 12455-16, to Bell Laboratories Inc., Madison, Wisconsin.
15. The label of ZP Tracking Powder pesticide states in pertinent part: “RESTRICTED USE PESTICIDE . . . For retail sale to and use only by Certified Applicators or persons under their direct supervision and only for those uses covered by the Certified Application’s certification.”

16. On or about October 6, 2004, a representative of the Iowa Department of Agriculture and Land Stewardship (IDALS) conducted an inspection of Century Homes Company dba D & K Products Inc., Des Moines, Iowa, and documented the sale and distribution of the pesticide, Catalyst, EPA Reg. No. 2724-450.

17. During the inspection referenced in paragraph 16, the IDALS representative documented the sale and distribution of the restricted use pesticide, ZP Tracking Powder, EPA Reg. No. 12455-16 to Miller Pest Control. An uncertified applicator, Jerry Miller used the pesticide and was not under the direct supervision of a certified applicator during the application.

#### Count 1

18. The facts stated in paragraphs 6, 7, 8, 12, and 13 are realleged and incorporated as if fully stated herein.

19. During the inspection reference in paragraph 16, the IDALS representative documented with photographs that the outer container or wrapper of the pesticide referenced in paragraph 16 failed to bear an EPA Registration Number and an EPA Establishment Number.

20. The label on the individual bottles inside the carton of the pesticide, Catalyst, EPA Reg. No. 2724-450, referenced in paragraph 16, bore the statement: "NOT LABELED FOR INDIVIDUAL SALE."

21. Respondent violated Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), by holding for sale or distribution a misbranded pesticide in that the label failed to bear an EPA Registration Number and an EPA Establishment Number.

#### Count 2

22. The facts stated in paragraphs 9,10,11,12,14,15, and 17 are realleged and incorporated as if fully stated herein.

23. On or about August 3, 2004, Respondent distributed or sold, and thereby made available for use the restricted use pesticide, ZP Tracking Powder, EPA Reg. No. 12455-16, to Jerry Miller of Miller Pest Control, an uncertified applicator from St. Mary's, Iowa, as documented by Invoice No. 0313370-IN.

24. At the time of the sales referred to in paragraph 23, Jerry Miller was not a certified applicator as the term is defined in Section 2(e)(1) of FIFRA, 7 U.S.C. § 136(e)(1).

25. Jerry Miller used the ZP Tracking Powder insecticide, EPA Reg. No. 12455-16. He was not certified to use the pesticide and was not under the direct supervision of a certified applicator at the time.

26. Respondent violated Section 12(a)(2)(F) of FIFRA, 7 U.S.C. § 136j(a)(2)(F), by selling or making available for use a registered pesticide classified for restricted use other than in accordance with Section 3(d) of FIFRA, 7 U.S.C. § 136a(d).

27. Pursuant to Section 14 of FIFRA, 7 U.S.C. § 136l, and based upon the facts in paragraphs 22 through 26, it is proposed that a civil penalty of \$6,500 be assessed against Respondent.

#### Section IV

##### Total Proposed Penalty

28. 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 Six Thousand Five Hundred Dollars (\$6,500) against Respondent for the above-described violations.

##### Appropriateness of Proposed Penalty

29. 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)).

30. For purposes of calculating the proposed penalty, Respondent was placed in Category I size of business (total business revenues in excess of \$1,000,000 per year) when Complainant was unable to obtain specific information as to Respondent's gross revenues. If this categorization is incorrect, the proposed penalty will be adjusted upon submittal of reliable financial information indicating another category is appropriate.

31. 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.

32. 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.

33. 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.

34. Payment of the total penalty - \$6,500 - 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

35. 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:

Rupert G. Thomas  
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

36. 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.

37. 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).

38. 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.

39. 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

40. 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:

Rupert G. Thomas  
Assistant Regional Counsel  
EPA Region 7  
901 North 5<sup>th</sup> Street  
Kansas City, Kansas 66101  
Telephone: (913) 551-7282

Agreement and Final Order shall constitute a waiver of respondent's right to request a hearing on any matter stipulated to therein.

08/18/06  
Date

*for William A. Spratlin*  
William A. Spratlin  
Director  
Water, Wetlands and Pesticides Division

*Rupert G. Thomas*  
Rupert G. Thomas  
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:

Steven Krantz  
Registered Agent for Century Homes Company  
1672 N.E. 54<sup>th</sup> Avenue  
Des Moines, Iowa 50313

8/21/04  
Date

Julia A. Cacho  
Julia A. Cacho



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

RESPONDENT: Century Homes Company  
 ADDRESS: 1672 N.E. 54<sup>th</sup> Ave., Des Moines, IA 50313

Prepared by: Fatima Ndiaye  
 Date: August 11, 2006  
 Case File: 100604FS230801

	Count 1	Count 2	Count 3	Count 4
<b>Appendix A</b>				
1. Statutory Violation	12(a)(1)(E) 2(q)(2)(C)	12(a)(2)(F)		
2. FTTS Code	1EK	2FA		
3. Violation Level	4	2		
<b>Appendix C - Table 2 - Size of Business Category</b>				
4. Violator Category * § 14(a)(1) or § 14(a)(2)	§ 14(a)(1)	§ 14(a)(1)		
5. Size of Business Category	1	1		
<b>Appendix C - Table 1 - FIFRA Civil Penalty Matrix</b>				
6. BASE PENALTY	\$0	\$6,500		
<b>Appendix B - Gravity Adjustments</b>				
7a. Pesticide Toxicity	1	2		
7b. Human Harm	3	3		
7c. Environmental Harm	3	3		
7d. Compliance History	0	0		
7e. Culpability	2	2		
7f. Total Gravity Adjustment Value (add items 7a - 7e)	9	10		
<b>Appendix C - Table 3 - Adjustments</b>				
7g. Percent Adjustment	0	0		
7h. Dollar Adjustment	0	0		
8. Final Penalty** (item 7h from item 6)	0	\$6,500		
Combined Total Penalty (total of all columns for line 8, above)	0	\$6,500		

\* 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.

ADMINISTRATIVE CIVIL PENALTY CONCURRENCE