

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

IN THE MATTER OF:)
)

Porter Hybrids, Inc.)
Wilmington, Ohio 45177)
_____))
)

Docket No. FIFRA-05-2008-0010

RECEIVED
DEC 15 2008

REGIONAL HEARING CLERK
U.S. ENVIRONMENTAL
PROTECTION AGENCY

MOTION FOR DEFAULT ORDER

Complainant, the Director of the Land and Chemicals Division, United States Environmental Protection Agency (EPA), Region 5, by the undersigned counsel, hereby moves that a Default Order be entered against Respondent, Porter Hybrids, Inc. (Porter Hybrids), pursuant to Section 22.17 of the Consolidated Rules of Practice, 40 C.F.R. § 22.17. Complainant requests that the Presiding Officer issue a Default Order finding the Respondent liable for the violations alleged in the Amended Complaint and assessing a civil penalty in the amount of \$1,000 as proposed in the Amended Complaint. In support of this Motion, Complainant states as follows:

1. The Complaint in this matter was filed on March 3, 2008. A copy of the Complaint is attached as Exhibit A. The Complaint was served by certified mail on Respondent on March 5, 2008. A copy of the original return receipt is attached as Exhibit B.
2. Pursuant to the Section 22.15 of the Rules of Practice, 40 C.F.R. § 22.15, Respondent was required to file an Answer with the Regional Hearing Clerk within thirty (30) days after service of the Complaint (March 5, 2008) or on (or before) April 3, 2008.
3. As of the date of this filing, Respondent has not filed an Answer to the Complaint. A Declaration by the Regional Hearing Clerk is attached as Exhibit C.

4. An Amended Complaint was filed on October 6, 2008. A copy of the Amended Complaint is attached as Exhibit D. The Amended Complaint was served by certified mail on Respondent on October 8, 2008. A copy of the original return receipt is attached as Exhibit E.

5. Pursuant to the Section 22.14(c) of the Rules of Practice, 40 C.F.R. § 22.14(c), Respondent was granted 20 additional days from the date of service of the amended complaint to file its answer. Thus, the Answer to the Amended Complaint was due on (or before) October 28, 2008.

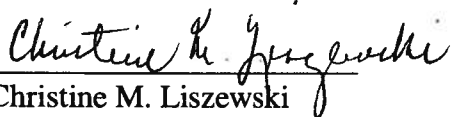
6. As of the date of this filing, Respondent has not filed an Answer to the Amended Complaint. A Declaration by the Regional Hearing Clerk is attached as Exhibit C.

7. Under Section 22.17(a) of the Consolidated Rules of Practice, failure to file a timely answer is grounds for default, and “[d]efault by respondent constitutes, for purposes of the pending proceeding only, an admission of all facts alleged in the complaint and a waiver of respondent’s right to contest such factual allegations.” 40 C.F.R. § 22.17(a). Accordingly, Respondent has waived the right to contest both the factual allegations in the Amended Complaint as well as the assessment of the civil penalty of \$1,000 as proposed in the Amended Complaint. A Declaration with a narrative explanation of how the penalty was calculated is attached as Exhibit F.

WHEREFORE, Complainant hereby moves for a Default Order finding all of the facts in the Amended Complaint admitted and assessing a civil penalty in the amount of \$1,000 as pled in the Amended Complaint and as based on the admitted facts.

Respectfully Submitted,

Date: 12/15/08


Christine M. Liszewski
Associate Regional Counsel
United States Environmental
Protection Agency
77 West Jackson Blvd.
Chicago, Illinois 60604
(312) 886-4670

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

CERTIFICATE OF SERVICE

I hereby certify that I filed the original and one copy of the foregoing Motion for Default Order with:

Regional Hearing Clerk
U.S. EPA, Region 5
Mail Code E-13J
77 West Jackson Boulevard
Chicago, Illinois 60604

I further certify that on the date specified below, I arranged for a true and correct copy to be sent via certified mail, return receipt requested, to the Respondent addressed as follows:

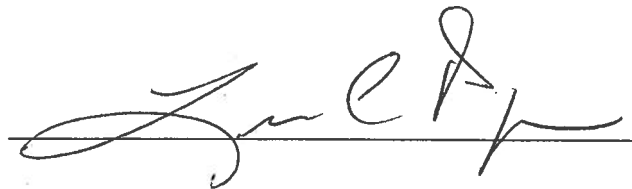
L.D. Kirk, President
Porter Hybrids, Inc.
1683 N State Route 134
Wilmington, Ohio 45177

I further certify that I hand-delivered a true and correct copy to:

Marcy Toney
Regional Judicial Officer
U.S. EPA, Region 5
Mail Code C-14J
77 West Jackson Boulevard
Chicago, Illinois 60604

RECEIVED
DEC 15 2008
REGIONAL HEARING CLERK
U.S. ENVIRONMENTAL
PROTECTION AGENCY

12-15-08
Date





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

EXHIBIT A

WAR 0 8 2008

REPLY TO THE ATTENTION OF:

LC-8J

CERTIFIED MAIL

RECEIPT NO. 7001 0320 0006 1456 1767

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

FIFRA-05-2008-0010

In the Matter of: Porter Hybrids, Inc., Docket No. _____

Dear Mr. Kirk:

I have enclosed the Complaint filed by the United States Environmental Protection Agency (U.S. EPA), 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 Complaint, if you wish 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-13J), U.S. EPA, Region 5, 77 West Jackson Blvd., Chicago, IL 60604 within 30 days of your receipt of this Complaint, a default order may be issued and the proposed civil penalty will become due 30 days later.

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 Christine Liszewski, 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

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

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

RECEIVED
REGIONAL HEARING CLERK
US EPA REGION 5
2008 MAR -3 AM 10:03

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, United States Environmental Protection Agency (U.S. EPA or the 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, repackage, 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 U.S. 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 U.S. 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. (U.S. 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 U.S. 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 U.S. 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 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 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 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 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 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 (ODA), 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 U.S. EPA, on or about November 20, 1986.

24. During the June 21 and 27, 2006 inspections, the ODA inspector also collected Invoice Nos. 30524, 30927, and 31067.

25. According to Invoice No. 30927, on or about October 14, 2005, 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 Don Young of Martinsville, Ohio.

26. According to Invoice No. 30524, on or about May 20, 2005, Respondent distributed or sold the pesticide product "Buccaneer Plus Herbicide," EPA Reg. No. 524-454-55467, to Tom Beam of Wilmington, Ohio.

27. 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.

Count 1

28. Complainant incorporates paragraphs 1 through 32 of this Complaint, as if set forth in this paragraph.

29. On or about February 7, 2006, Respondent submitted its "Pesticide Report for Pesticide-Producing and Device-Producing Establishments" (EPA Form 3540-16), for the calendar year 2005 to U.S. EPA.

30. In the report described in paragraph 29 above, Respondent checked the box which states, "Did not produce/distribute in 2005."

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 "Tenkoz Buccaneer Plus Herbicide," EPA Reg. No. 524-454-55467, during the calendar year 2005.

32. 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 2005.

33. In response to a request from the U.S. 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 2005 to U.S. EPA.

34. In the report described in paragraph 33, above, Respondent states that it produced, repackaged or relabeled and sold or distributed the pesticide products "Buccaneer Plus" and "Weedone LV 4" during 2005.

35. Respondent's failure to file a true and accurate report, by March 1, 2006, 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).

Count 2

36. Complainant incorporates paragraphs 1 through 32 of this Complaint, as if set forth in this paragraph.

37. 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 U.S. EPA.

38. In the report described in paragraph 37 above, Respondent checked the box which states, "Did not produce/distribute in 2006."

39. 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.

40. 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.

41. In response to a request from the U.S. 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 U.S. EPA.

42. In the report described in paragraph 41, above, Respondent states that it produced, repackaged or relabeled and sold or distributed the pesticide products “Buccaneer Plus” and “Weedone LV 4” during 2006.

43. 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 Complaint as follows:

Count 1

Filing a false and inaccurate report, for 2005, under Section 7 of FIFRA\$6,500

Count 2

Filing a false and inaccurate report, for 2006 under Section 7 of FIFRA.....\$6,500

Total proposed civil penalty.....\$13,000

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 U.S. EPA's *Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act*, dated July 2, 1990, 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, 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 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)
Office of Regional Counsel
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 63197-9000

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

If Respondent does not file a written answer within thirty (30) calendar days after receiving this 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 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 thirty (30) days after the order becomes the final order of the Administrator of U.S. EPA under Section 22.27(c) of the Consolidated Rules.

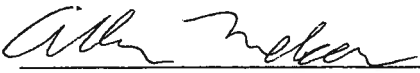
Settlement Conference

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 10.

Respondent's request for an informal settlement conference does not extend the 30 calendar day period for filing a written answer to this Complaint. Respondent may pursue simultaneously the informal settlement conference and the adjudicatory hearing process. The U.S. EPA encourages all parties facing civil penalties to pursue settlement through an informal conference. The U.S. 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 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

2/29/08

Date

RECEIVED
REGIONAL HEARING CLERK
US EPA REGION V
2008 MAR -3 AM 10:03

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

L.D. Kirk, President
 Porter Hybirds, Incorporated
 1683 N State Route 134
 Wilmington, Ohio 45177

FIFRA-05-2008-0010

2. Article number

(Transfer from service label) **7001 0320 0006 1456 1767**

COMPLETE THIS SECTION ON DELIVERY

A. Received by (Please Print Clearly)

B. Date of Delivery

3/5/08

C. Signature

X *Jan Kidd*

Agent

Addressee

D. Is delivery address different from item 1?

Yes

If YES, enter delivery address below:

No

3. Service Type

Certified Mail Express Mail

Registered Return Receipt for Merchandise

Insured Mail C.O.D.

4. Restricted Delivery? (Extra Fee)

Yes

PS Form 3811, March 2001

Domestic Return Receipt

102595-01-M-1424

EXHIBIT B

U.S. Postal Service
CERTIFIED MAIL RECEIPT
 Sonja Brooks-Woodard E-13J (provided)

FIFRA-05-2008-0010

L U S E

Postage	\$ 1.92
Certified Fee	12.35
Return Receipt Fee (Endorsement Required)	2.13
Restricted Delivery Fee (Endorsement Required)	
Total Postage & Fees	\$ 16.40

Sent To
 Street, Apt. No., or PO Box No. L.D. Kirk, President
 Porter Hybirds, Incorporated
 City, State, ZIP+4 1683 N State Route 134
 Wilmington, Ohio 45177

PS Form 3820, January 2001 See Reverse for Instructions

7001 0320 0006 1456 1767



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5**

IN THE MATTER OF:)

Porter Hybrids, Inc.)
Wilmington, Ohio 45177)

) Docket No. FIFRA-05-2008-0010
)
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DECLARATION OF TYWANNA GREENE

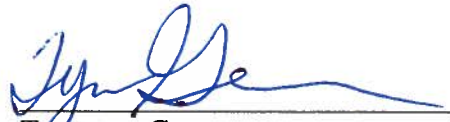
1. I am currently employed by the United States Environmental Protection Agency (EPA), Region 5, as the Acting Regional Hearing Clerk. I have served in this capacity continuously since July 2008. My responsibilities include maintaining the official files for all pleadings in administrative cases initiated by Region 5. As part of my duties, I date-stamp and file all pleadings served on the Region in administrative cases, including answers to administrative complaints.

2. On December 12, 2008, I conducted a review of the official Regional Hearing Clerk records for the pleadings filed In the Matter of Porter Hybrids, Inc., Docket No. FIFRA-05-2008-0010. I did not find a copy of an Answer to the Complaint, which was filed in this matter on March 3, 2008, and received by Respondent on March 5, 2008. I also did not find a copy of an Answer to the Amended Complaint, which was filed in this matter on October 6, 2008, and received by Respondent on October 8, 2008. Accordingly, as of today's date, it appears that no Answer was filed to either the Complaint or the Amended Complaint.

3. In my review of the official records for this matter, I also did not find any other filing by Respondent after the filing of the Complaint or Amended Complaint.

4. I declare under penalty of perjury that the foregoing is true and accurate to the best of my knowledge and belief.

Date: December 12, 2008


Tywana Greene
Acting Regional Hearing Clerk
EPA, Region 5



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

EXHIBIT D

OCT 05 2008

REPLY TO THE ATTENTION OF:

LC-8J

RECEIVED
REGIONAL HEARING CLERK
US EPA REGION 5

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 - R5M V

-2008 OCT -6 AM 10:22

In the Matter of: Porter Hybrids, Inc. Wilmington, Ohio 45177 Respondent. <hr style="border: 1px solid black;"/>)))))))))))	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)
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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, repackage, 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. § 136(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

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to: **2008 OCT 14 AM 9:26**

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

FIFRA-05-2008-0010

2. Article Number

7001 0320 0005 8921 5078

PS Form 3811, July 1999

Domestic Return Receipt

425-99-M-1789

COMPLETE THIS SECTION ON DELIVERY

A. Received by (Please Print Clearly) B. Date of Delivery

10/8/08

C. Signature

X Jan Kiddo

- Agent
- Addressee

D. Is delivery address different from Item 1? Yes
If YES, enter delivery address below No

3. Service Type

- Certified Mail Express Mail
- Registered Return Receipt for Merchandise
- Insured Mail C.O.D.

4. Restricted Delivery? (Extra Fee) Yes

UNITED STATES POSTAL SERVICE

08 OCT 2008 AM 11

First-Class Mail
 Postage & Fees Paid
 USPS
 Permit No. G-10

• Sender: Please print your name, address, and ZIP+4 in this box •

Regional Hearing Clerk (E-13J)
 U.S. EPA, Region 5
 77 West Jackson Boulevard
 Chicago, IL 60604

FIFRA-05-2008-0010



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5**

IN THE MATTER OF:)

Porter Hybrids, Inc.)
Wilmington, Ohio 45177)

) Docket No. FIFRA-05-2008-0010
)
)
)
)

DECLARATION OF JOSEPH G. LUKASCYK

1. I am currently employed as an Enforcement Officer in the Pesticides and Toxics Compliance Section, Chemicals Management Branch, Land and Chemicals Division, United States Environmental Protection Agency (EPA), Region 5, in Chicago, Illinois. I have held this position since October 1998.

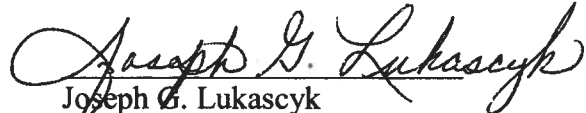
2. Among my responsibilities as an Enforcement Officer is case development. As part of case development, I conduct investigations and also analyze information from databases, the States, as well as phone-tips from members of the public. I then do follow-up evidence collection and, where appropriate, recommend and bring enforcement actions.

3. I was responsible for the development of EPA's action in this matter. I prepared the draft complaint in this matter, and I calculated the proposed penalty in this matter.

4. Attached to my Declaration is a memorandum that describes the facts that I considered and applied to the statutory penalty criteria in Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. § 1361(a), consistent with EPA's *Enforcement Response Policy for FIFRA Section 7(c) Pesticide Producing Establishment Reporting Requirement (June 2007)* (ERP). A copy of the ERP is also attached to my Declaration.

5. I declare under penalty of perjury that the foregoing is true and accurate to the best of my knowledge and belief.

Date: 12/15/08


Joseph G. Lukascyk
Life Scientist
EPA, Region 5

MEMORANDUM

Subject: Proposed Penalty for Violation of the Federal Insecticide, Fungicide, and Rodenticide Act by Porter Hybrids, Inc.

From: Joseph G. Lukascyk, Enforcement Officer
Pesticides /Toxics Compliance Section

JGL 12/15/08

To: File

Factual Background

On June 21 and 27, 2006, an inspector employed by the Ohio Department of Agriculture conducted an authorized inspection at Porter Hybrids, Inc. (Porter Hybrids), located at 1683 State Route 134 N, Wilmington, Ohio 45177. During the inspection, the inspector collected, among other things, Invoice Nos. 30524, 30927 and 31067. According to Invoice No. 30524, on or about May 20, 2005, Porter Hybrids distributed or sold the pesticide product "Buccaneer Plus Herbicide," EPA Reg. No. 524-454-55467, to Tom Beam of Wilmington, Ohio. According to Invoice No. 30927, on or about October 14, 2005, Porter Hybrids 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 Don Young of Martinsville, Ohio. According to Invoice No. 31067, on or about April 20, 2006, Porter Hybrids 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.

On or about February 7, 2006, Porter Hybrids submitted its Pesticide Report for Pesticide-Producing and Device-Producing Establishments for calendar year 2005. In this report, Porter Hybrids checked the box which states "Did not produce/distribute in 2005." On April 13,

2007, EPA, Region 5, issued a Notice of Warning (NOW) to Porter Hybrids 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. The NOW clearly states that the “term ‘produce’ is defined by statute and regulation, as to manufacture, prepare, propagate, compound, or process any pesticide, including any pesticide produced pursuant to Section 5 of the Act, any active ingredient or device, or to package, repackage, label, relabel, or otherwise change the container of any pesticide or device.” On or about April 30, 2007, Porter Hybrids submitted EPA Form 3540-16 for the calendar year 2006 to EPA. In this report, Porter Hybrids checked the box which states “Did not produce/distribute in 2006.”

On August 17, 2007, EPA, Region 5, issued a letter notifying Porter Hybrids that it was planning to file an administrative complaint for civil penalties in the amount of \$15,708 against Porter Hybrids alleging, among other things, that Porter Hybrids violated Section 12(a)(2)(L) of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) , 7 U.S.C. § 136j(a)(2)(L), by failing to file accurate reports (EPA Form 3540-16) for calendar years 2005 and 2006. The letter provided Porter Hybrids an opportunity to present any information that it believed EPA should consider prior to filing the complaint including, among other things, financial data bearing on the ability of Porter Hybrids to pay a penalty.

On September 27, 2007, Porter Hybrids submitted, among other things, an amended EPA Form 3540-16 for calendar years 2005 and 2006. The amended Pesticide Report for Pesticide-Producing and Device-Producing Establishments for calendar year 2005 states that Porter Hybrids produced, repackaged or relabeled and sold or distributed 1713 gallons of “Buccaneer Plus” and 250 gallons of “Weedone LV 4” during 2005. The amended Pesticide Report for Pesticide-Producing and Device-Producing Establishments for calendar year 2006 states that Porter Hybrids

produced, repackaged or relabeled and sold or distributed 1917 gallons of “Buccaneer Plus” and 250 gallons of “Weedone LV 4” during 2006.

In addition to submitting amended Pesticide Reports for Pesticide-Producing and Device-Producing Establishments, Porter Hybrids also submitted portions of Form 1120 tax returns for fiscal years 2004, 2005 and 2006 and stated that the company is marginally profitable. EPA subsequently requested complete tax returns. On October 15, 2007, Porter Hybrids submitted complete tax returns for the years 2004, 2005 and 2006. To assist EPA in evaluating the ability of Porter Hybrids to pay the proposed penalty, EPA hired Industrial Economics, Inc. In an ability to pay analysis dated January 25, 2008, Industrial Economics found that Porter Hybrids can afford the entire penalty of \$15,708 without causing any significant or undue financial hardship.

Application of EPA’s Enforcement Response Policy for FIFRA Section 7(c) Pesticide Producing Establishment Reporting Requirement (June 2007)

Failing to file a true and accurate Pesticide Report for Pesticide-Producing and Device-Producing Establishments report by March 1, 2007, as required by Section 7 of FIFRA, 7 U.S.C. § 136e, is a violation of Section 12(a)(2)(L) of FIFRA, 7 U.S.C. § 136j(a)(2)(L), for which Porter Hybrids is subject to civil penalties under Section 14(a) of FIFRA, 7 U.S.C. § 136l(a). Pursuant to Section 14(a)(1) of FIFRA, 7 U.S.C. § 136l(a)(1), and 40 C.F.R. Part 19, 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.

The Enforcement Response Policy for FIFRA Section 7(c) Pesticide Producing Establishment Reporting Requirement dated June 2007 (ERP) provides that “[a] report that does not contain all the required information or contains incorrect information is considered an

incomplete report.” ERP at 7. The ERP further states that incomplete reporting violations are categorized as either minor or major incomplete reporting violations, based on the seriousness or the error. “EPA considers a major reporting violation to be all other missing or incorrect information in a report that cannot be classified as a minor error. For example, a producer fails to report a pesticide that was produced in the preceding year or fails to report the amount of the pesticide that was produced in the preceding year.” *Id.* at 8.

Since Porter Hybrids failed to report that it produced, repackaged or relabeled two pesticides, i.e., Buccaneer Plus and Weedone LV 4, on the Pesticide Report for Pesticide-Producing and Device-Producing Establishments for calendar year 2006 that it submitted to EPA on or about April 30, 2007, I categorized this violation as a major incomplete reporting violation.

The ERP provides that “EPA will typically issue a NOW for a first time major incomplete reporting violation. EPA will typically issue a civil administrative penalty if the producer does not submit the corrected report within the specified time-frame and for subsequent Section 7 violations.” *Id.*

In addition to failing to report that it produced, repackaged or relabeled pesticides on its original Pesticide Report for Pesticide-Producing and Device-Producing Establishments for calendar year 2006, Porter Hybrids also failed to report that it produced, repackaged or relabeled pesticides on its original Pesticide Report for Pesticide-Producing and Device-Producing Establishments for calendar year 2005. Thus, the incomplete reporting violation in 2006 was not a first time major incomplete reporting violation.

Furthermore, on April 13, 2007, EPA issued a NOW to Porter Hybrids for failing to submit the Pesticide Report for Pesticide-Producing and Device-Producing Establishments for calendar year 2006 on or before March 1, 2007. The NOW clearly defines the term “produce.”

Since this was not a first time major incomplete reporting violation and EPA had issued a NOW for the late 2006 report which clearly defined the term “produce,” a civil administrative penalty is appropriate for this violation.

The ERP provides a civil penalty matrix that I used to determine the appropriate penalty for this violation. *See* ERP at 13. For a second time violator, the matrix provides three categories of penalties depending on the size of the business. For purposes of this penalty policy, a violator is considered a “Category III Business” if the entity has annual gross revenues of \$10 million or less. *Id.* at 12. Financial information provided by Porter Hybrids shows annual gross revenues of \$10 million or less. Thus, according to the penalty matrix, this violation is a C-III violation for which a \$1,000 penalty should be assessed.

The ERP provides for adjustment of the penalty for two factors, i.e., the violator’s ability to continue in business (ability to pay) and good faith efforts to comply with FIFRA. I considered both of these factors and determined that no adjustments were needed. Thus, I determined that a civil administrative penalty of \$1,000 is appropriate for this major incomplete reporting violation.