

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8

2011 SEP 29 AM 10:27

In the Matter of:)

Chemtica USA,)

Respondent)

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

DOCKET NO.: FIFRA-08-2011-0014

INTRODUCTION (JURISDICTION)

1. This Complaint and Notice of Opportunity for Hearing ("Complaint") is authorized by Congress in section 14(a) of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. § 136l(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 Chemtica USA, Inc. has violated FIFRA by importing a misbranded pesticide and proposes the assessment of a civil penalty, as more fully explained below. FIFRA authorizes the assessment of a civil penalty for violations of the Act. 7 U.S.C. § 136l(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 30 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 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 (\$2,860) 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
PO 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 Eduardo Quintana at 1-800-227-8917; extension 6924, 303-312-6924, or the address below. ***Please note that calling the attorney or requesting a settlement conference does NOT delay the running of the 30 day period for filing an answer and requesting a hearing.***

ALLEGATIONS

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

8. Respondent, Chemtica USA is an Oklahoma limited liability company.
9. Respondent is located at 2912 Enterprise Blvd., Durant, Oklahoma.
10. Respondent is a "person" within the meaning of section 2(s) of FIFRA, and subject to the requirements of the statute and/or regulations. 7 U.S.C. § 136(s).
11. BeetleBlock-Verbenone, EPA Reg. No. 73813-2 is a "pesticide" within the meaning of section 2(u) of FIFRA, and subject to the requirements of the statute and/or regulations. 7 U.S.C. § 136(u).
12. On June 2, 2011 Respondent, through its agent Protrans International Inc., imported BeetleBlock-Verbenone, EPA Reg. No. 73813-2 from Costa Rica. On or about June 6, 2011, EPA inspector determined that the label on the imported BeetleBlock-Verbenone included

an incorrect EPA establishment number for BeetleBlock-Verbenone. The incorrect establishment number included in the imported BeetleBlock-Verbenone's label was 85992-OK-1. The correct establishment number for BeetleBlock-Verbenone is 73813-CR-1.

13. Failing to include the correct EPA establishment number in the pesticide label for Respondent's BeetleBlock-Verbenone constitutes misbranding within the meaning of section 2(q) of FIFRA, 7 U.S.C. § 136(q).

14. Section 2(gg) of FIFRA defines the term to "distribute or sell" as distribute, sell, offer for sale, hold for distribution, hold for shipment, or receive and (having so received) deliver or offer to deliver. 7 U.S.C. § 136(gg).

15. FIFRA section 12(a)(1)(E), 7 U.S.C. § 136j(a)(1)(E), prohibits the sale or distribution of any pesticide that is misbranded.

16. Respondent is a registrant, wholesaler, dealer, retailer, or other distributor subject to the civil penalty provisions of section 14(a)(1) of FIFRA, 7 U.S.C. § 136l(a)(1).

17. Respondent's importation of the misbranded pesticide BeetleBlock-Verbenone constitutes an unlawful act in violation of section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), and therefore subject to a civil penalty pursuant to section 14(a)(1) of FIFRA, 7 U.S.C. § 136l(a)(1).

PROPOSED CIVIL PENALTY

18. For a Respondent that meets the definition of section 14(a)(1) of FIFRA, 7 U.S.C. § 136l(a)(1), as is applicable in this proceeding, FIFRA authorizes the assessment of a civil penalty of up to \$7,500 for each offense of the Act as adjusted by 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 FIFRA violation alleged in this complaint, EPA proposes a penalty of \$2,860. The penalty narrative and calculation can be found in complainant's Exhibit Number 1.

19. 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 \$7,500.

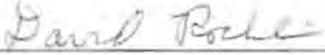
To discuss settlement or ask any questions you may have about this process, please contact Eduardo Quintana, Enforcement Attorney, at 1-800-227-8917; ext. 6924, or at the address below.

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

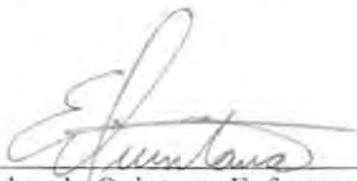
Date: 9/28/11

By: 
Sandra A. Stavnes, Director
Technical Enforcement Program

Date: September 29, 2011

By: 
Supervisory Enforcement Attorney
Legal Enforcement Program

Date: 9/29/2011

By: 
Eduardo Quintana, Enforcement Attorney
Legal Enforcement Program

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the original and one copy of the 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 to:

H. Alan Oehlschlager
Chemtica USA, Inc.
3412 Stafford Dr.
Norman, OK 73072

9/29/2011
Date

Judith M. McTernan

**Penalty Calculation Narrative
Chemtica USA**

**COMPLAINANT'S
EXHIBIT NO. 1**

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 December, 2009, Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act (2009 Policy).

2. According to the 2009 Policy, the appropriate enforcement response for the distribution of a misbranded pesticide is a civil penalty. Chemtica USA is charged with one count of distributing a misbranded pesticide. The pesticide, BeetleBlock-Verbenone, EPA registration number 73813-2, made formal entry at the Port of Salt Lake City, Utah, on June 2, 2011. The BeetleBlock-Verbenone product has EPA establishment number 85992-OK-001 on its label. The EPA establishment number is 73813-CR-001.

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 2009 Policy, EPA calculates a proposed civil penalty by first determining the gravity of the offense. The gravity of the offense is identified using Appendix A of the 2009 Policy. Appendix A identifies a violation of FIFRA section 12(a)(2)(E) [distribution of a misbranded pesticide] as gravity level 2.

5. Second, according to the 2009 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 2009 Policy directs the use of Category I size of business. This will remain the base penalty value unless Chemtica USA can establish that it should be considered in a smaller category. Thus, EPA has determined the size of the business category for Chemtica USA as Category I (gross revenues over \$10,000,000).

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 2009 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 \$7,150 for each count. (The penalty amounts shown in the 2009 Civil Penalty Matrix have been changed by the Debt Collection Improvement Act of 1996 with the most recent adjustment to \$7,150; effective after January 12, 2009.)

7. The 2009 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.

The following gravity adjustment values were used to evaluate the FIFRA violation:

(a) Pesticide: a value of 1 is assigned due to the signal word "Caution."

(b) Harm to human health: a value of 0 is assigned as negligible harm to human health is anticipated.

(c) Environmental harm: a value of 0 is assigned as negligible harm to the environment is anticipated.

(d) Compliance history: a value of 0 is assigned as there is no history of prior violations of FIFRA.

(e) Culpability: a value of 2 is assigned as culpability is unknown or resulted from negligence.

This result is a total gravity adjustment value of 3 for the violation associated with the distribution of a misbranded pesticide.

8. Using a Gravity Adjustment Value of 3, Table 3 in Appendix C of the 2009 Policy states to reduce the matrix value by 60% (-\$4,290).

9. Finally, EPA attempts to take into consideration what effect the calculated penalty would have on the ability of Chemtica USA 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 penalty of \$2,860 for Chemtica USA's violation of FIFRA section 12(a)(2)(E) by considering all of the FIFRA Section 14(a)(4) penalty criteria through the use of the 2009 Policy.

David Golden 9.23.11

FIFRA CIVIL PENALTY CALCULATION WORKSHEET
Chemtica USA

Respondent:	One count of importation without approved NOA, one
Docket No.:	count of importation of a misbranded pesticide.
APPENDIX A	
1. Violation	§12(a)(1)(E)
2. FTTS Code & Violation Level	1EA / 2
TABLE 1	
3. Violator Category & Size of Business Category	§14(a)(1) / Category I
APPENDIX A	
4. Gravity of the Violation	2
TABLE 2	
5. Base Penalty	\$7,150
APPENDIX B	
6. Gravity Adjustments	
a. Pesticide Toxicity	1
b. Harm to Human Health	0
c. Environmental Harm	0
d. Compliance History	0
e. Culpability	2
f. Total Gravity Adjustment (Add 6a – 6e)	3
TABLE 3	
7. Percent & Dollar Adjustment	Reduce penalty by 60% (-\$4,290)
8. Economic Benefit	
TABLE 4	
9. Graduated Penalty	Not applied
10. Final Penalty	\$2,860

David Golden 9.23.11

§21.13

approve or disapprove the State issued statement, in accordance with the requirements of §21.5.

(2) The Regional Administrator will periodically review State program performance. In the event of State program deficiencies the Regional Administrator will notify the State of such deficiencies.

(3) During that period that any State's program is classified as deficient, statements issued by a State shall also be sent to the Regional Administrator for review. The Regional Administrator shall notify the State, the applicant, and the SBA of any determination subsequently made, in accordance with §21.5, on any such statement.

(i) If within 60 days after notice of such deficiencies has been provided, the State has not taken corrective efforts, and if the deficiencies significantly affect the conduct of the program, the Regional Administrator, after sufficient notice has been provided to the Regional Director of SBA, shall withdraw the approval of the State program.

(ii) Any State whose program is withdrawn and whose deficiencies have been corrected may later reapply as provided in §21.12(a).

(g) Funds appropriated under section 106 of the Act may be utilized by a State agency authorized to receive such funds in conducting this program.

§21.13 Effect of certification upon authority to enforce applicable standards.

The certification by EPA or a State for SBA Loan purposes in no way constitutes a determination by EPA or the State that the facilities certified (a) will be constructed within the time specified by an applicable standard or (b) will be constructed and installed in accordance with the plans and specifications submitted in the application, will be operated and maintained properly, or will be applied to process wastes which are the same as described in the application. The certification in no way constitutes a waiver by EPA or a State of its authority to take appropriate enforcement action against the owner or operator of such facilities for violations of an applicable standard.

1ST Page only

40 CFR Ch. I (7-1-08 Edition)

PART 22—CONSOLIDATED RULES OF PRACTICE GOVERNING THE ADMINISTRATIVE ASSESSMENT OF CIVIL PENALTIES AND THE REVOCATION/TERMINATION OR SUSPENSION OF PERMITS

Subpart A—General

- Sec. 22.1 Scope of this part. 22.2 Use of number and gender. 22.3 Definitions. 22.4 Powers and duties of the Environmental Appeals Board, Regional Judicial Officer and Presiding Officer; disqualification, withdrawal, and reassignment. 22.5 Filing, service, and form of all filed documents; business confidentiality claims. 22.6 Filing and service of rulings, orders and decisions. 22.7 Computation and extension of time. 22.8 Ex parte discussion of proceeding. 22.9 Examination of documents filed.

Subpart B—Parties and Appearances

- 22.10 Appearances. 22.11 Intervention and non-party briefs. 22.12 Consolidation and severance.

Subpart C—Prehearing Procedures

- 22.13 Commencement of a proceeding. 22.14 Complaint. 22.15 Answer to the complaint. 22.16 Motions. 22.17 Default. 22.18 Quick resolution; settlement; alternative dispute resolution. 22.19 Prehearing information exchange; prehearing conference; other discovery. 22.20 Accelerated decision; decision to dismiss.

Subpart D—Hearing Procedures

- 22.21 Assignment of Presiding Officer; scheduling the hearing. 22.22 Evidence. 22.23 Objections and offers of proof. 22.24 Burden of presentation; burden of persuasion; preponderance of the evidence standard. 22.25 Filing the transcript. 22.26 Proposed findings, conclusions, and order.

Subpart E—Initial Decision and Motion to Reopen a Hearing

- 22.27 Initial decision. 22.28 Motion to reopen a hearing.