

2008 SEP 29 PM 3:07

U.S. EPA, REGION IX  
REGIONAL HEARING CLERK

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Region IX  
5 75 Hawthorne Street  
San Francisco, CA 94105  
6 (415) 972-3898

7 UNITED STATES  
8 ENVIRONMENTAL PROTECTION AGENCY  
9 REGION IX

10 In the Matter of:

) Docket No. FIFRA-09-2008-00

0025

11 Abtech Industries, Inc.,

) COMPLAINT AND NOTICE OF  
) OPPORTUNITY FOR HEARING

12 Respondent.  
13  
14

15 I. AUTHORITY AND PARTIES

16 1. This is a civil administrative action brought pursuant to Section 14(a) of the Federal  
17 Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136l(a), for the assessment of  
18 a civil administrative penalty against Abtech Industries, Inc. ("Respondent") for the sale and/or  
19 distribution of unregistered pesticides in violation of Section 12(a)(1)(A) of FIFRA, 7 U.S.C. §  
20 136j(a)(1)(A).

21 2. Complainant is the Associate Director for Agriculture of the Communities and  
22 Ecosystems Division in EPA, Region IX. The Administrator of EPA delegated to the Regional  
23 Administrator of Region IX the authority to bring this action under FIFRA by EPA Delegation  
24 Order Number 5-14, dated May 11, 1994. The Regional Administrator of Region IX further  
25 delegated the authority to bring this action under FIFRA to the Associate Director for Agriculture  
26 of the Communities and Ecosystems Division by EPA Regional Order Number 1255.08 CHG1,  
27 dated June 9, 2005.  
28

1           3. Respondent is Abtech Industries, Inc., a corporation headquartered in Scottsdale,  
2 Arizona.

3                               II. GENERAL ALLEGATIONS

4           4. Respondent is a corporation and therefore fits within the definition of "person" as that  
5 term is defined by Section 2(s) of FIFRA, 7 U.S.C. § 136(s). As such, Respondent is subject to  
6 FIFRA and the implementing regulations promulgated thereunder.

7           5. From April to November 2007, Respondent "distributed or sold" as those terms are  
8 defined by Section 2(gg) of FIFRA, 7 U.S.C. § 136(gg), products known as "Smart Sponge Plus  
9 4 Antimicrobial", "Smart Sponge Powder Blend, Super Antimicrobial", and "Smart Sponge  
10 Popcorn, Antimicrobial" to persons in the United States.

11           6. Smart Sponge Plus 4 Antimicrobial, Smart Sponge Powder Blend, Super  
12 Antimicrobial, and Smart Sponge Popcorn, Antimicrobial are products intended to prevent,  
13 destroy, repel and/or mitigate bacteria and other microorganisms that are deleterious to man or  
14 the environment.

15           7. Bacteria and microorganisms that are deleterious to man or the environment are  
16 "pests" as that term is defined in Section 2(t) of FIFRA, 7 U.S.C. § 136(t) and 40 C.F.R. §  
17 152.5(d).

18           8. A "pesticide" means "any substance or mixture of substances intended for preventing,  
19 destroying, repelling, or mitigating any pest." 7 U.S.C. § 136(u) and 40 C.F.R. § 152.3.

20           9. Smart Sponge Plus 4 Antimicrobial, Smart Sponge Powder Blend, Super  
21 Antimicrobial, and Smart Sponge Popcorn, Antimicrobial are "pesticides" as that term is defined  
22 in Section 2(u) of FIFRA, 7 U.S.C. § 136(u) and 40 C.F.R. § 152.3.

23           10. At all times relevant to this Complaint (including all the counts to follow), the  
24 pesticides Smart Sponge Plus 4 Antimicrobial, Smart Sponge Powder Blend, Super  
25 Antimicrobial, and Smart Sponge Popcorn, Antimicrobial were not registered under Section 3 of  
26 FIFRA, 7 U.S.C. § 136a.

1 11. Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), makes it unlawful for any  
2 person to distribute or sell to any person any pesticide that is not registered under Section 3 of  
3 FIFRA, 7 U.S.C. § 136a.

4 III. ALLEGED VIOLATIONS

5 COUNTS 1-9: Sale and/or distribution of an unregistered pesticide, 7 U.S.C. § 136j(a)(1)(A).

6 12. Paragraphs 1 through 11 above are hereby incorporated in these Counts 1-11 by  
7 reference as if the same were set forth herein in full.

8 13. On or about April 6, April 19, May 11, May 16 (twice), May 23 (twice), June 12, and  
9 June 14, 2007, Respondent “distributed or sold,” as those terms are defined by Section 2(gg) of  
10 FIFRA, 7 U.S.C. § 136(gg), the pesticide Smart Sponge Plus 4 Antimicrobial to customer  
11 Hydrophix in Riverside, California.

12 14. By distributing or selling the unregistered pesticide Smart Sponge Plus 4  
13 Antimicrobial on or about April 6, April 19, May 11, May 16 (twice), May 23 (twice), June 12,  
14 and June 14, 2007, Respondent violated Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A).

15 COUNT 10: Sale and/or distribution of an unregistered pesticide, 7 U.S.C. § 136j(a)(1)(A).

16 15. Paragraphs 1 through 11 above are hereby incorporated in this Count 10 by reference  
17 as if the same were set forth herein in full.

18 16. On or about August 28, 2007, Respondent “distributed or sold,” as those terms are  
19 defined by Section 2(gg) of FIFRA, 7 U.S.C. § 136(gg), the pesticide Smart Sponge Powder  
20 Blend, Super Antimicrobial to customer Fire Prevention Services in La Habre, California.

21 17. By distributing or selling the unregistered pesticide Smart Sponge Powder Blend,  
22 Super Antimicrobial on or about August 28, 2007, Respondent violated Section 12(a)(1)(A) of  
23 FIFRA, 7 U.S.C. § 136j(a)(1)(A).

24 COUNTS 11-12: Sale and/or distribution of an unregistered pesticide, 7 U.S.C. § 136j(a)(1)(A).

25 18. Paragraphs 1 through 11 above are hereby incorporated in these Counts 11-12 by  
26 reference as if the same were set forth herein in full.

27 19. On or about November 5 and November 8, 2007, Respondent “distributed or sold,”  
28 as those terms are defined by Section 2(gg) of FIFRA, 7 U.S.C. § 136(gg), the pesticide Smart

1 Sponge Popcorn, Antimicrobial to customer Hydrophix in Riverside, California.

2 20. By distributing or selling the unregistered pesticide Smart Sponge Popcorn,  
3 Antimicrobial or about November 5 and November 8, 2007, Respondent violated Section  
4 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A).

5 **IV. PROPOSED CIVIL PENALTY**

6 Section 14(a)(1) of FIFRA, 7 U.S.C. § 136l(a)(1), and the Civil Monetary Penalty  
7 Inflation Adjustment Rule, 40 C.F.R. Part 19, authorize the assessment of a civil administrative  
8 penalty of up to \$6,500 for each violation of FIFRA occurring on or after March 15, 2004. For  
9 purposes of determining the amount of the civil penalty to be assessed, FIFRA Section 14(a)(4)  
10 requires EPA to consider the size of Respondent's business, the effect on Respondent's ability to  
11 continue in business and the gravity of the violations alleged. Based on the violations alleged in  
12 this Complaint, and after consideration of the statutory factors enumerated above, EPA proposes  
13 to assess the following civil penalty pursuant to FIFRA Section 14(a) and the FIFRA  
14 Enforcement Response Policy dated July 2, 1990 (a copy of which is enclosed with this  
15 Complaint), which provides a rational, consistent and equitable calculation methodology for  
16 applying the statutory penalty factors enumerated above:

17

18 Counts 1-12 (Sale and/or distribution of an unregistered pesticide, violating Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A))	\$5,158 x 12
19 <b>TOTAL</b>	<b>\$61,900</b>

20 **V. NOTICE OF OPPORTUNITY TO REQUEST A HEARING**

21 You have the right to request a formal hearing to contest any material fact set forth in this  
22 Complaint or to contest the appropriateness of the proposed penalty. Any hearing requested will  
23 be conducted in accordance with the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*, and  
24 the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties  
25 and the Revocation or Suspension of Permits ("Consolidated Rules of Practice"), 40 C.F.R. Part  
26 22. A copy of the Consolidated Rules of Practice is enclosed with this Complaint.

27 **You must file a written Answer within thirty (30) days of receiving this Complaint to**  
28

1 **avoid being found in default, which constitutes an admission of all facts alleged in the**  
2 **Complaint and a waiver of the right to a hearing, and to avoid having the above penalty**  
3 **assessed without further proceedings.** If you choose to file an Answer, you are required by the  
4 Consolidated Rules of Practice to clearly and directly admit, deny, or explain each of the factual  
5 allegations contained in this Complaint to which you have any knowledge. If you have no  
6 knowledge of a particular fact and so state, the allegation is considered denied. Failure to deny  
7 any of the allegations in this Complaint will constitute an admission of the undenied allegation.

8 The Answer shall also state the circumstances and arguments, if any, which are alleged to  
9 constitute the grounds of defense, and shall specifically request an administrative hearing, if  
10 desired. If you deny any material fact or raise any affirmative defense, you will be considered to  
11 have requested a hearing. The Answer must be filed with:

12 Regional Hearing Clerk (ORC-1)  
13 U.S. Environmental Protection Agency, Region IX  
14 75 Hawthorne Street  
15 San Francisco, CA 94105

16 In addition, please send a copy of the Answer and all other documents that you file in this action  
17 to:

18 Edgar P. Coral  
19 Office of Regional Counsel (ORC-2)  
20 U.S. Environmental Protection Agency, Region IX  
21 75 Hawthorne Street  
22 San Francisco, CA 94105

23 You are further informed that the Consolidated Rules of Practice prohibit any *ex parte*  
24 (unilateral) discussion of the merits of any action with the Regional Administrator, Regional  
25 Judicial Officer, Administrative Law Judge, or any person likely to advise these officials in the  
26 decision of the case, after the Complaint is issued.

#### 27 VI. INFORMAL SETTLEMENT CONFERENCE

28 EPA encourages all parties against whom a civil penalty is proposed to pursue the  
possibility of settlement through informal conferences. Therefore, whether or not you request a  
hearing, you may confer informally with EPA through Mr. Coral, the EPA attorney assigned to  
this case, regarding the facts of this case, the amount of the proposed penalty, and the possibility  
of settlement. **An informal settlement conference does not, however, affect your obligation**

1 to file an Answer to this Complaint.

2 VII. ALTERNATIVE DISPUTE RESOLUTION

3 The parties also may engage in any process within the scope of the Alternative Dispute  
4 Resolution Act, 5 U.S.C. § 581 *et seq.*, which may facilitate voluntary settlement efforts.  
5 Dispute resolution using alternative means of dispute resolution does not divest the Presiding  
6 Officer of jurisdiction nor does it automatically stay the proceeding.

7 VIII. QUICK RESOLUTION

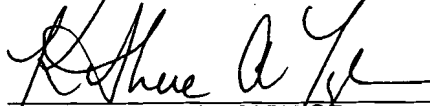
8 Instead of requesting an informal settlement conference or filing an Answer requesting a  
9 hearing, you may choose to resolve the proceeding by paying the specific penalty proposed in the  
10 Complaint and filing a copy of the check or other instrument of payment with the Regional  
11 Hearing Clerk within thirty (30) days after receiving the Complaint. If you wish to resolve the  
12 proceeding in this manner instead of filing an answer but need additional time to pay the penalty,  
13 you may file a written statement stating that you agree to pay the proposed penalty in accordance  
14 with 40 C.F.R § 22.18(a)(1) with the Regional Hearing Clerk within 30 days after receiving the  
15 Complaint. The written statement need not contain any response to, or admission of, the  
16 allegations in the Complaint. Within sixty (60) days after receiving the Complaint, the full  
17 amount of the proposed penalty must be paid. Failure to make such payment within this sixty-  
18 day period may subject you to default. Upon receipt of payment in full, the Regional Judicial  
19 Officer will issue a Final Order. Payment by a respondent shall constitute a waiver of the  
20 respondent's rights to contest the allegations and to appeal the Final Order. In addition, full  
21 payment of the proposed penalty shall only resolve Respondent's liability for Federal civil  
22 penalties for violations and facts alleged in the Complaint and does not affect the right of EPA or  
23 the United States to pursue appropriate injunctive or other equitable relief or criminal sanctions  
24 for any violations of law.

24 IX. CONSENT AGREEMENT AND FINAL ORDER

25 EPA has the authority, where appropriate, to modify the amount of the proposed penalty  
26 to reflect any settlement reached with you in an informal conference or through alternative  
27 dispute resolution. The terms of such an agreement would be embodied in a Consent Agreement  
28 and Final Order. A Consent Agreement signed by both parties would be binding as to all terms

1 and conditions specified therein when the Regional Judicial Officer signs the Final Order.  
2  
3  
4

5 Dated at San Francisco, California on this 29 day of September, 2008.

6 

7 \_\_\_\_\_  
8 KATHERINE A. TAYLOR  
9 Associate Director for Agriculture  
10 Communities and Ecosystems Division  
11 U.S. Environmental Protection Agency, Region IX  
12 75 Hawthorne Street  
13 San Francisco, California 94105  
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CERTIFICATE OF SERVICE

I certify that the original and one copy of the foregoing Complaint and Notice of Opportunity for Hearing (Docket No. FIFRA-09-2008-00 0025) was hand delivered to:

Regional Hearing Clerk  
U.S. Environmental Protection Agency, Region IX  
75 Hawthorne Street  
San Francisco, California 94105

and that a true and correct copy of the Complaint; the Consolidated Rules of Practice, 40 C.F.R. Part 22; and the FIFRA Enforcement Response Policy were placed in the United States Mail, certified mail, return receipt requested, addressed to the following:

Glenn R. Rink  
President  
Abtech Industries, Inc.  
4110 N. Scottsdale Rd., Suite 235  
Scottsdale, AZ 85251

Dated: 9/29/08

By: 

U.S. Environmental Protection Agency, Region IX





UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IX

75 Hawthorne Street

San Francisco, CA 94105-3901

CERTIFIED MAIL  
RETURN RECEIPT REQUESTED  
RECEIPT NO: 7000 0520 0025 3711 3497

Date: SEP 29 2008

Mr. Glenn Rink  
Abtech Industries, Inc.  
4110 N. Scottsdale Rd.  
Scottsdale, AZ 85251

Re: Federal Insecticide, Fungicide and Rodenticide Act  
Complaint and Notice of Opportunity for Hearing  
Docket No. FIFRA-9-2008-

Dear Mr. Rink:

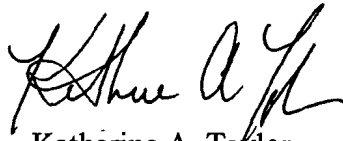
Enclosed is a Complaint and Notice of Opportunity for Hearing concerning violations of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), that occurred at Abtech Industries, Inc. ("Abtech"). Specifically, the Complaint alleges that Abtech has violated Section 12(a)(1)(A) of FIFRA by selling/distributing pesticides not registered pursuant to Section 3 of FIFRA.

You should be aware of the part of the Complaint entitled "Opportunity to Request a Hearing." You are required to respond to this Complaint within thirty (30) days of receipt of the Complaint. If you fail to file an Answer to this Complaint with the Regional Hearing Clerk within thirty (30) days of receipt, your failure shall constitute an admission of all facts alleged in the Complaint and a waiver of your right to a hearing. The proposed civil penalty shall become due and payable sixty (60) days after a final order is issued upon default.

Copies of the following rules and regulations are included for your information: 1) the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties; and 2) EPA's Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act dated July 2, 1990. Please note that the Civil Penalties Matrices in Appendix C have been modified by the Debt Collection Improvement Act of 1996, as implemented by the Civil Monetary Penalties Inflation Adjustment Rule.

If you have any questions, please have your attorney contact Edgar Coral, Assistant Regional Counsel at U.S. Environmental Protection Agency Region IX, 75 Hawthorne Street, San Francisco, California 94105. Mr. Coral can be reached by telephone at (415) 972-3898.

Sincerely,

A handwritten signature in black ink, appearing to read "Katherine A. Taylor". The signature is fluid and cursive, with the first name being the most prominent.

Katherine A. Taylor  
Associate Director for Agriculture  
Communities and Ecosystems Division

Enclosures

cc: Jack Peterson, Arizona Department of Agriculture  
Paul Nicodem, Arizona Department of Agriculture