

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY 2010 SEP 29 AM 11:42
REGION 8
Docket No. FIFRA-08-2010-0017

FILED
EPA REGION VIII
HEARING CLERK

In the Matter of:)
)
Wendy Mealer and) **PENALTY COMPLAINT AND NOTICE OF**
Dennis Stokebrand,) **OPPORTUNITY FOR HEARING**
)
Respondents)

INTRODUCTION (JURISDICTION)

1. This civil administrative enforcement action is authorized by Congress in section 14(a) of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. § 136(a). The rules for this proceeding are the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders and the Revocation, Termination or Suspension of Permits (Rules of Practice)," 40 C.F.R. part 22, a copy of which is enclosed.

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

3. EPA alleges that Respondents Wendy Mealer and Dennis Stokebrand have violated FIFRA by using a restricted use pesticide in a manner inconsistent with its label, 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. § 136(a).

NOTICE OF OPPORTUNITY FOR A HEARING

4. Respondents have 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, Respondents 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. Respondents may resolve this proceeding at any time by paying the specific penalty (\$3,900) 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 Respondents' 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. Respondents, Wendy Mealer and Dennis Stokebrand, reside in South Dakota.
9. Respondents are "persons" within the meaning of section 2(s) of FIFRA, and subject to the requirements of the statute and/or regulations.
10. On or about January 31, 2006, Respondents were certified commercial pesticide applicators. Wendy Mealer's certified commercial applicator's license number was 7445. Dennis Stokebrand's certified commercial applicator's license number was 5877. Respondents are "commercial applicators" within the meaning of section 14(a)(1) of FIFRA, 7 U.S.C. § 136l(a)(1).

11. Zinc Phosphide Prairie Dog Bait is a restricted use pesticide (RUP), EPA Reg. No. 13808-6.
12. FIFRA section 12(a)(2)(G), 7 U.S.C. § 136j(a)(2)(G), prohibits the use of registered pesticides in a manner inconsistent with its labeling.
13. The Zinc Phosphide Prairie Dog Bait label states: “Do not apply in areas known to be inhabited by black-footed ferrets.”
14. The Department of the Interior, Fish and Wildlife Service published a final rule to reintroduce the black-footed ferret into the Rosebud Sioux Tribe Reservation. 68 Fed. Reg. 26498 (May 16, 2003).
15. On or about March 18, 2003, the Rosebud Sioux Tribal Council passed Resolution No. 2003-81 adopting a request to reintroduce the black-footed ferret within its boundaries.
16. On January 31, 2006, a special agent from the United States Fish and Wildlife Service (USFWS) observed Respondents operate four-wheel vehicles to apply oats poisoned with Zinc Phosphide Prairie Dog Bait (zinc phosphide) within the black-footed ferret reintroduction area located within the Rosebud Sioux Tribe Reservation, South Dakota.
17. The boundaries of the black-footed ferret reintroduction area where the USFWS special agent observed Respondent’s applications, are denoted by posted signs at its various access points. The signs denoting the black-footed ferret reintroduction area state “NO PRAIRIE DOG POISONING” and contact information.
18. Respondents use of zinc phosphide in an area known to be inhabited by black-footed ferrets constitutes the use of a registered pesticide in a manner inconsistent with its labeling and therefore a violation of FIFRA § 12(a)(2)(G), 7 U.S.C. § 136j(a)(2)(G).

PROPOSED CIVIL PENALTY

19. For commercial applicators, FIFRA authorizes the assessment of a civil penalty of up to \$6,500 for each offense of the Act and the Debt Collection Improvement Act of 1996. FIFRA requires EPA to consider the appropriateness of the penalty to the size of the business, the effect on the person’s ability to continue in business, and the gravity of the violation. EPA has established policies that provide a rational and consistent method for applying statutory factors to the circumstances of specific cases. A narrative description of the reasoning behind the penalty proposed in this case is attached to this complaint, along with copies of the EPA policies. For the FIFRA violation alleged in this complaint, EPA proposes a penalty of \$3,900. This complaint includes only one violation based on the facts alleged herein, the United States


explicitly reserves its right to pursue any other violations that may arise in the pursuit of enforcing this Complaint. The penalty narrative and calculation can be found in complainant's Exhibit Number 1.

20. 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 \$6,500.

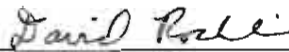
To discuss settlement or ask any questions you may have about this process, please contact Eduardo Quintana, Enforcement Attorney, at 1-800-227-8917; ext. 6924, or at the address below.

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

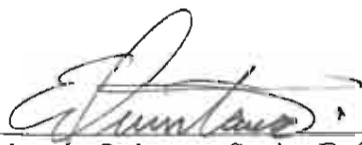
Date: 9/21/2010

By: 
Philip S. Strobel, Acting Director
Technical Enforcement Program

Date: Sept. 24, 2010

By: 
David Rochlin, Supervisory Enforcement Attorney
Legal Enforcement Program

Date: 9/29/2010

By: 
Eduardo Quintana, Senior 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 Wyncoop Street; Denver, Colorado 80202-1129, and that a true copy of the same was sent via Certified Mail to:

To Wendy Mealer at the following addresses:

1308 Bluehorse Flats
U.S. Highway 18
Mission, SD 57555

and

P.O. Box 324
Mission, SD 57555

To Dennis Stokebrand at the following addresses:

1308 Bluehorse Flats
U.S. Highway 18
Mission, SD 57555

and

P.O. Box 324
Mission, SD 57555

9/29/2010
Date

Judith M. McTernan

FIFRA ENFORCEMENT RESPONSE POLICY
FEDERAL INSECTICIDE, FUNGICIDE, AND RODENTICIDE ACT

**Waste and Chemical Enforcement Division
Office of Civil Enforcement
Office of Enforcement and Compliance Assurance
United States Environmental Protection Agency**

December 2009

1st Page Only

Penalty Calculation Narrative
Wendy Mealer and Dennis Stokebrand

1. To ensure uniform and consistent enforcement response and application of the statutory penalty criteria in the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), EPA developed the December 3, 2009 Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act (2009 Policy).
2. Wendy Mealer and Dennis Stokebrand are covered under FIFRA section 14(a)(1), i.e., a commercial applicator, dealer, retailer or other distributor or others not included in FIFRA section 14(a)(2) [e.g., private applicators].
3. According to the policies identified in paragraph 1, the appropriate enforcement response for a violation of FIFRA section 12(a)(2)(G), using a registered pesticide in a manner inconsistent with its labeling, is a civil penalty.
4. Special Agent Robert Prieksat of the US Fish and Wildlife Service documented that Wendy Mealer and Dennis Stokebrand applied Zinc Phosphide Prairie Dog Bait (EPA Reg. 13808-6) in manner inconsistent with the label.
5. The US Fish and Wildlife Service investigation report indicates Mealer and Stokebrand applied Zinc Phosphide in a known habitat of the black-footed ferret, which is specifically prohibited in the label directions.
6. 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.
7. Following the guidance in the 2009 Policy, EPA calculates a proposed civil penalty using the following process. First, the gravity of the offense is identified using Appendix A which identifies violations of FIFRA section 12(a)(2)(G) as gravity level 2.
8. Second, according to the 2009 Policy, EPA determined the size of the business category for the respondent. The penalty for Wendy Mealer and Dennis Stokebrand has been calculated using the Category III size of business (gross revenues less than \$1,000,000) with the understanding that the proposed penalty would be recalculated if information becomes available that shows this assumption to be incorrect.
9. 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 III are assessed a penalty of \$3,900 for each violation (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 \$6,500; effective between March 15, 2004 and January 12, 2009).
10. The 2009 Policy then directs that the actual circumstances of the violation 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 Wendy Mealer and Dennis Stokebrand's violations of FIFRA section 12(a)(2)(G):


- (a) The pesticide applied by Wendy Mealer and Dennis Stokebrand was assigned a value of 3 for toxicity using the criteria in the 2009 Policy since Zinc Phosphide Prairie Dog Bait; EPA Reg. No. 1308-6 is a Restricted Use Pesticide.
- (b) The harm to human health adjustment was assigned a value of 1 because it was assumed the applicators were wearing the appropriate personal protective equipment.
- (c) The environmental harm adjustment was assigned a value of 3 since there was a loss of the black footed ferret's essential food source and prey, the prairie dog.
- (d) Region 8 has no record of previous FIFRA violations in which a Civil Complaint was issued to Wendy Mealer or Dennis Stokebrand during the past 5 years and, therefore, assigned a value of 0 for this adjustment.
- (e) These violations by Wendy Mealer and Dennis Stokebrand were considered by EPA to have been the result of negligence since the re-introduction area was clearly posted with signs and the location of the re-introduction area was delineated in maps that could have easily been obtained. Culpability was, therefore, assigned a value of 2.

The above factors resulted in a total gravity adjustment value of 9.

11. Using a Gravity Adjustment Value of 9, Table 3 in Appendix C of the 2009 Policy sets the penalty adjustment at 0% resulting in a penalty of \$3,900 to Wendy Mealer and Dennis Stokebrand

12. Finally, EPA attempts to take into consideration what effect the total calculated penalty of \$ 3,900 would have on Wendy Mealer and Dennis Stokebrand ability to continue in business and ability to pay the proposed penalty. However, based on the limited financial data available, no adjustment to the proposed penalty was considered warranted at this time. Adjustments of the proposed penalty can be made at a later date should information warranting such a change become available.

13. In summary, EPA arrived at a penalty of \$ 3,900 to Wendy Mealer and Dennis Stokebrand for one (1) count of violating FIFRA section 12(a) (2)(G) for applying Zinc Phosphide Prairie Dog Bait in a manner inconsistent with the label direction, by applying in an area known to be inhabited by the black footed ferret.

 7/16/10
Prepared by: Dennis Jaramillo Date: 7/16/2010

