

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8

2012 DEC -5 PM 12:44

Docket No. FIFRA-08-2013-0001

FILED
EPA REGION VIII
HEARING CLERK

In the Matter of:)
)
Brunelles Pest Control)
6209 LR1 Drive)
Wolf Point, MT 59201,)
)
Respondent.)

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

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 Respondent, Brunelles Pest Control, has violated FIFRA by applying a 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. 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 (\$3,575) 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 Brenda Morris at 1-800-227-8917; extension 6891, 303-312-6891, 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, Brunelles Pest Control, resides in Montana.
9. Respondent is a "person" within the meaning of section 2(s) of FIFRA, and subject to the requirements of the statute and/or regulations.
10. On or about December 27, 2011, Respondent was a certified commercial pesticide applicator. Respondent's certified commercial applicator's license number was 101715-12, with an expiration date of December 31, 2012. At all times relevant to the allegations in this Complaint, Respondent was a "commercial applicator" within the meaning of section 14(a)(1) of FIFRA, 7 U.S.C. § 136l(a)(1).

11. Dr. T's Nature Products Snake-A-Way Repelling Granules (Snake Away) is a restricted use pesticide (RUP), EPA Registration No. 58630-1.

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 Snake Away label states: "FOR OUTDOOR USE ONLY."

14. On December 27, 2011, Respondent applied Snake Away in the crawlspace of Ms. Vina Smith's home, causing overwhelming vapors in the home requiring Ms. Smith to have to leave her home for the night.

15. Respondent's use of Snake Away in the crawlspace of Ms. Smith's home 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


16. For commercial applicators, FIFRA authorizes the assessment of a civil penalty of up to \$7,500 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 \$3,575. 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.

17. 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.

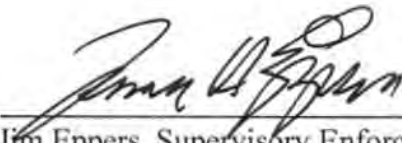
To discuss settlement or ask any questions you may have about this process, please contact Brenda Morris, Enforcement Attorney, at 1-800-227-8917; ext. 6891, or at the address below.

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: 12/5/2012

By: 
Darcy O'Connor, Acting Director
Technical Enforcement Program

Date: 12/5/2012

By: 
Jim Eppers, Supervisory 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 at the following addresses:

Mr. Pat Brunelle
Brunelles Pest Control
6209 LR1 Drive
Wolf Point, MT 59201

12-5-12
Date

Brenda Morris

**Penalty Calculation Narrative
Brunelle's Pest Control**

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 using any pesticide in a manner inconsistent with its labeling is a civil penalty. Brunelle's Pest Control is charged with one count of using a pesticide in a manner inconsistent with its labeling. Brunelle's Pest Control applied Dr. T's Snake-A-Way Snake Repelling Granules, EPA registration number 58630-1, to the crawl space inside a private residence on the Fort Peck Indian Reservation. The Snake-A-Way label specifically states "For outdoor use only."
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 violations of FIFRA section 12(a)(2)(G) [to use any pesticide in a manner inconsistent with its labeling], 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 Brunelle's Pest Control can establish that it should be considered in a smaller category. Thus, EPA has determined the size of the business category for Brunelle's Pest Control 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 3 gravity and in Business Category I are assessed a penalty of \$7,150. (The penalty amounts shown in the 2009 Civil Penalty Matrix have been changed by the Debt Collection Improvement Act of 1996, 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 associated with Count I:

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

(b) Harm to human health: a value of 1 is assigned as there was actual harm to human health.

(c) Environmental harm: a value of 1 is assigned as there was minor potential harm to the environment.

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

(e) Culpability: a value of 1 is the violation resulted from negligence, and Brunelle's Pest Control instituted steps to correct the violation immediately after the violation was recognized.

This result is a total gravity adjustment value of 4 for the violation associated with Count I.

8. Using a Gravity Adjustment Value of 5, Table 3 in Appendix C of the 2009 Policy states to reduce the matrix value by 50% for each count (-\$3,575).

9. Finally, EPA attempts to take into consideration what effect the calculated penalty would have on the ability of Brunelle's Pest Control 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 \$3,575 for the violation of FIFRA section 12(a)(2)(G) by considering all of the FIFRA Section 14(a)(4) penalty criteria through the use of the 2009 Policy.

David Golden 10.16.17

FIFRA CIVIL PENALTY CALCULATION WORKSHEET

BRUNELLE'S PEST CONTROL

Pesticide misuse	
APPENDIX A 1. Violation	§12(a)(2)(G) To use any pesticide in a manner inconsistent with its labeling.
2. FTTS Code & Violation Level	1GA / 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	1
c. Environmental Harm	1
d. Compliance History	0
e. Culpability	1
f. Total Gravity Adjustment (Add 6a – 6e)	4
TABLE 3 7. Percent & Dollar Adjustment	Reduce penalty by 50% (-\$3,575)
8. Economic Benefit	
TABLE 4 9. Graduated Penalty	Not applied
10. Final Penalty	\$3,575

David Golden 3.9.12

1st Page Only

§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.

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.