

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 7
11201 RENNER BOULEVARD
LENEXA, KANSAS 66219

BEFORE THE ADMINISTRATOR

IN THE MATTER OF

Dr. James Diemer

Respondent.

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COMPLAINT AND NOTICE OF
OPPORTUNITY FOR HEARING

Docket No. FIFRA-07-2013-0035

COMPLAINT

Section I

Jurisdiction

1. This Complaint and Notice of Opportunity for Hearing (Complaint) serves as notice that the United States Environmental Protection Agency (EPA), Region 7 has reason to believe that Respondent has violated Section 12 of FIFRA, 7 U.S.C. § 136j.
2. This is an administrative action for the assessment of civil penalties instituted pursuant to Section 14 of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. § 136l, and in accordance with the EPA's 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 (Consolidated Rules), 40 C.F.R. Part 22.

Section II

Parties

3. The Complainant, by delegation from the Administrator of EPA and the Regional Administrator, EPA, Region 7, is the Director of the Water, Wetlands and Pesticides Division, EPA, Region 7.
4. The Respondent is Dr. James Diemer, an individual residing in Britt, Iowa.

Section III

Statutory & Regulatory Background

5. Congress enacted FIFRA in 1947 and later amended it in 1972 and in 1996. The general purpose of FIFRA is to provide the basis for regulation, sale, distribution and use of pesticides in the United States. 7 U.S.C. 136 *et. seq.*
6. Section 2(t) of FIFRA, 7 U.S.C. § 136(t), defines the term “pest” to mean (1) any insect, rodent, nematode, fungus, weed, or (2) any other form of terrestrial or aquatic plant or animal life or virus, bacteria, or other micro-organism (except viruses, bacteria, or other micro-organism on or in living man or other living animal) which the Administrator declares to be a pest under Section 25(c)(1).
7. Section 2(u) of FIFRA, 7 U.S.C. § 136(u), defines the term “pesticide” to mean any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest.
8. Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), states that it shall be unlawful for any person to distribute or sell any pesticide that is not registered under Section 3 of FIFRA, 7 U.S.C. § 136a, or whose registration has been cancelled or suspended.
9. Section 2(gg) of FIFRA, 7 U.S.C. § 136(gg), defines the term “to distribute or sell” to mean 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.
10. Section 2(w) of FIFRA, 7 U.S.C. § 136(w), and 40 C.F.R. § 167.3 define the term “produce” to mean to manufacture, prepare, propagate, compound, or process any pesticide or device or active ingredient or to package, repackage, label, relabel, or otherwise change the container of any pesticide or device.
11. Section 2(w) of FIFRA, 7 U.S.C. § 136(w), and 40 C.F.R. § 167.3 define the term “producer” to mean any person who manufactures, prepares, compounds, propagates or processes any pesticide or device or active ingredient used in producing a pesticide (such actions include packaging, repackaging, labeling, and relabeling a pesticide).

Section IV

General Factual Allegations

12. The Respondent is and was at all times referred to in this Complaint, a “person” as defined by Section 2(s) of FIFRA, 7 U.S.C. ‘ 136(s).
13. The Powell Pig Facility is located at 1929 Stagecoach Road, Webster City, Iowa.

14. The Powell Pig Facility is managed by the property management company Prairie States Management Company (PMSC), Emmetsburg, Iowa.
15. From approximately 2001 through 2011, Respondent performed approximately fifteen to twenty fumigations a year for PMSC.
16. Respondent had an ongoing relationship with the Powell Pig Facility to disinfect the buildings to rid them of the airborne Porcine Reproductive and Respiratory Syndrome (PRRS) virus.
17. Respondent entered into an agreement with PMSC to fumigate the Powell Pig Facility to disinfect the empty buildings for the PRRS virus on December 28, 2011.
18. On December 28, 2011, Respondent placed three buckets in three rooms in one building and eight buckets in two other buildings. The buckets contained potassium permanganate powder.
19. Respondent then added formaldehyde to each bucket. The reaction of these two chemicals would form formaldehyde gas to kill the airborne PRRS virus.
20. The pesticide formulation described above was part of a routine treatment program rather than a case-by-case basis.

Violations

21. The Complainant hereby states and alleges that Respondent has violated FIFRA and federal regulations promulgated thereunder, as follows:

Count 1

22. The facts stated in Paragraphs 12 through 20 are realleged and incorporated as if fully stated herein.
23. The mixture of potassium permanganate and formaldehyde formulated a pesticide because it was intended to kill the PRRS virus.
24. On or about December 28, 2011, Respondent distributed the unregistered pesticide described in the paragraph above.
25. On the date of the sale and/or distribution of the pesticide described in Paragraph 18, the product was not registered under Section 3 of FIFRA, 7 U.S.C. § 136a.
26. Respondent did not qualify for any veterinarian exemption provided by FIFRA because the numerous fumigations of the PMSC facility indicated that he was engaged in the business of applying pesticides for hire.

27. Respondent violated Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), by selling or distributing a pesticide which is not registered under Section 3 of FIFRA, 7 U.S.C. § 136a.

28. Pursuant to Section 14 of FIFRA, 7 U.S.C. § 136l, and based on the facts stated in Paragraphs 12 through 20, it is proposed that a civil penalty of \$7,150 be assessed against Respondent.

Section V

Relief Sought

29. Section 14 of FIFRA, 7 U.S.C. § 136l, and the Debt Collection Improvement Act of 1996, as implemented by the Civil Monetary Penalties Inflation Adjustment Rule, 40 C.F.R. Part 19, authorize the issuance of this Complaint for the assessment of a civil penalty for each violation. For any such violation occurring on or after March 15, 2004, through January 12, 2009, the maximum statutory penalty per violation is Six Thousand Five Hundred Dollars (\$6,500). For any such violation occurring after January 12, 2009, the maximum statutory penalty per violation is Seven Thousand Five Hundred Dollars (\$7,500). EPA proposes to assess a total civil penalty of Seven Thousand One Hundred and Fifty Dollars (\$7,150) against Respondent for the above-described violations.

Appropriateness of Proposed Penalty

30. The penalty proposed above has been calculated after consideration of the statutory factors set forth in Section 14 of FIFRA, 7 U.S.C. § 136l. Specifically, EPA considered the size of the business of Respondent, the effect of the proposed penalty on Respondent's ability to continue in business and the gravity of the alleged violations. In its calculation of the proposed penalty, EPA has taken into account the particular facts and circumstances of the alleged violations, with specific reference to EPA guidance for the calculation of proposed penalties under FIFRA (See Enclosure, December 2009, Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)).

31. For purposes of calculating the proposed penalty, Respondent was placed in Category III size of business (total business revenues under \$1,000,000 per year) when Complainant was unable to obtain specific information as to Respondent's gross revenues. If this categorization is incorrect, the proposed penalty will be adjusted upon submittal of reliable financial information indicating another category is appropriate.

32. Respondent has the right, upon submittal of certified financial information, to consideration of Respondent's financial condition in mitigation of the proposed penalty insofar as is necessary to permit Respondent to continue in business.

33. The proposed penalty constitutes a demand *only if* Respondent fails to raise *bona fide* issues of ability to pay, or other *bona fide* affirmative defenses relevant to the determination of any final penalty.

34. Said issues of ability to pay or other affirmative defenses relevant to a final penalty may and should be brought *to the attention* of Complainant at the earliest opportunity in this proceeding.

35. Payment of the total penalty - \$7,150 - may be made by certified or cashier's check payable to the "Treasurer, United States of America," and remitted to:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, Missouri 63197-9000.

36. If Respondent does not contest the findings and assessments set forth above, payment of the penalty assessed herein may be remitted as described in the preceding paragraph, including a reference to the name and docket number of the Complaint. In addition, a copy of the check should be sent to:

Regional Hearing Clerk
EPA - Region 7
11201 Renner Boulevard
Lenexa, Kansas 66219

and a copy to:

Demetra O. Salisbury
Assistant Regional Counsel
EPA - Region 7
11201 Renner Boulevard
Lenexa, Kansas 66219.

NOTICE OF OPPORTUNITY FOR HEARING

Section VI

Answer and Request for Hearing

37. Pursuant to Section 14(a) of FIFRA, 7 U.S.C. ' 136l(a), Respondent has the right to request a hearing to contest any material fact contained in this Complaint or to contest the appropriateness of the penalty proposed herein. If Respondent wishes to avoid being found in default, Respondent must file a written answer and request for hearing with the EPA Region 7 Regional Hearing Clerk, at:

Regional Hearing Clerk
EPA - Region 7
11201 Renner Boulevard
Lenexa, Kansas 66219

within thirty (30) days of service of this Complaint and Notice of Opportunity for Hearing. Said answer shall clearly and directly admit, deny, or explain each of the factual allegations contained in the Complaint with respect to which Respondent has any knowledge, or shall clearly state that Respondent has no knowledge as to particular factual allegations in the Complaint. The answer shall also state:

- A. The circumstances or arguments that are alleged to constitute the grounds of defense;
- B. The facts that Respondent intends to place at issue; and
- C. Whether a hearing is requested.

Failure to deny any of the factual allegations in the Complaint constitutes an admission of the undenied allegations.

38. Any hearing that is requested shall be held and conducted in accordance with 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," 40 C.F.R. Part 22.

39. If Respondent fails to file a written answer and request for hearing within thirty (30) days of service of this Complaint and Notice of Opportunity for Hearing, such failure will constitute a binding admission of all of the allegations in this Complaint, and a waiver of Respondent's right to a hearing under FIFRA. A Default Order may thereafter be issued by the Regional Administrator, and the civil penalties proposed therein shall become due and payable without further proceedings.

40. Respondent is advised that, after the Complaint is issued, the Consolidated Rules of Practice prohibit any ex parte (unilateral) discussion of the merits of any action with the EPA Regional Administrator, members of the Environmental Appeals Board, the Regional Judicial Officer, Administrative Law Judge, or any person likely to advise these officials in the decision of the case.

Section VII

Settlement Conference

41. Whether or not a hearing is requested, an informal settlement conference may be arranged at Respondent's request. Respondent may confer with the EPA concerning: (1) whether or not the alleged violation occurred; or (2) the appropriateness of the proposed penalty in relation to the size of Respondent's business, the gravity of the violation, and the effect of the


proposed penalty on Respondent's ability to continue in business. Additionally, the proposed penalty may be adjusted if Respondent establishes a bona fide issue of ability to pay. To explore the possibility of settlement in this matter, contact:

Demetra O. Salisbury
Assistant Regional Counsel
EPA Region 7
11201 Renner Boulevard
Lenexa, Kansas 66219
Telephone: (913) 551-7369.

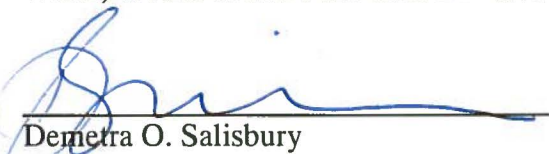
42. A request for an informal settlement conference does not extend the thirty (30) day period during which a written answer and request for a hearing must be submitted. The informal conference procedure may be pursued as an alternative to and simultaneously with the adjudicatory hearing procedure.

43. EPA encourages all parties against whom a civil penalty is proposed to pursue the possibility of settlement. However, no penalty reduction will be made simply because an informal settlement conference is held. If settlement is reached, the parties will enter into a written Consent Agreement, and a Final Order will be issued. The issuance of such a Consent Agreement and Final Order shall constitute a waiver of Respondent's right to request a hearing on any matter stipulated to therein.

9-16-13
Date


Karen Flournoy
Director
Water, Wetlands and Pesticides Division

9-17-13
Date


Demetra O. Salisbury
Assistant Regional Counsel

In the Matter of Dr. James Diemer
Docket No. FIFRA-07-2013-0035

Certificate of Service

I hereby certify that on the date noted below, I hand delivered the original and one true and correct copy of the foregoing Complaint and Notice of Opportunity for Hearing were hand delivered to the Regional Hearing Clerk, U.S. Environmental Protection Agency, Region 7, 11201 Renner Boulevard, Lenexa, KS 66219.

I further certify that on the date noted below, I sent by certified mail, return receipt requested, a true and correct copy of the signed original Complaint and Notice of Opportunity for Hearing and the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, 40 C.F.R. Part 22 to the following:

Dr. James Diemer
110 Main Avenue N
Britt, IA 50423

and

David J Siegrist
Registered Agent
94 Main Ave N
Britt, IA 50423

9/19/13

Date



Signature

Sarah A. Moreno

Printed Name