



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

March 18, 2013

REPLY TO THE ATTENTION OF
E-19J

Honorable Susan L. Biro
Office of Administrative Law Judges
U. S. Environmental Protection Agency
Ariel Rios Building, Mailcode: 1900L
1200 Pennsylvania Ave., NW
Washington, D.C. 20460

RE: In The Matter of: Mathie Energy Supply Company, Inc. (Morrice, Michigan)
Docket No.: FIFRA-05-2012-0022
Amended Complaint Date: September 28, 2012
Total Proposed Penalty: \$47,090

Dear Judge Biro:

Enclosed is a copy of the Respondent's Answer to an Amended Administrative Complaint for *Mathie Energy Supply Company, Inc.*

Please assign an Administrative Law Judge for this case. If you have questions contact me at (312) 886-3713.

Sincerely,

A handwritten signature in blue ink that reads "La Dawn Whitehead".

La Dawn Whitehead
Regional Hearing Clerk

Enclosure

cc: John A. Decker, Attorney At Law
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ATTORNEYS AT LAW

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Attorney

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March 15, 2013

VIA FEDERAL EXPRESS

Regional Hearing Clerk (E-19J)
U.S. EPA, Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604

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USEPA
REGION 5

**Re: Mathie Energy Supply Company, Inc.
Docket Number: FIFRA-05-2012-0022**

Dear Sir/Madam:

Enclosed please find an original and one copy of *Respondent's Answer to First Amended Complaint and Proof of Service* submitted on behalf of the Respondent in the above-referenced matter.

Please contact me if you have any questions or comments.

Very truly yours,

BRAUN KENDRICK FINKBEINER P.L.C.


JOHN A. DECKER

JAD/mjl
Enclosures

cc: Mark J. Koller (via email and regular mail)
Ann L. Coyle (via email and regular mail)

{S1041461.DOC.1}

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

In the Matter of:

Docket No. FIFRA-05-2012-0022

Mathie Energy Supply Company, Inc.
Morrice, Michigan,

Respondent.

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MAR 18 2013

Proceeding to Assess a Civil Penalty Under
Section 14(a) of the Federal Insecticide,
Fungicide, and Rodenticide Act, 7 U.S.C.
§136l(a)

Mark J. Koller (C-14J)
Office of Regional Counsel
U.S. EPA, Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604

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REGION 5

BRAUN KENDRICK FINKBEINER P.L.C.
By: John A. Decker (P31078)
Attorneys for Respondent,
Mathie Energy Supply Company, Inc.
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Phone: 989-498-2100
Fax: 989-799-4666

RESPONDENT'S ANSWER TO FIRST AMENDED COMPLAINT

Respondent, Mathie Energy Supply Company, Inc., by its attorneys, and for its Answer to the First Amended Complaint in the above matter, states as follows:

1. Admit that United States Environmental Protection Agency (EPA) seeks relief under the cited stated but deny that the EPA is entitled to any relief whatsoever.
2. Admit that the EPA seeks relief under the cited stated but deny that the EPA is entitled to any relief whatsoever.
3. Admitted.

Statutory and Regulatory Background

4. Paragraph 4 states a legal conclusion to which no answer is required.
5. Paragraph 5 states a legal conclusion to which no answer is required.
6. Paragraph 6 states a legal conclusion to which no answer is required.
7. Paragraph 7 states a legal conclusion to which no answer is required.
8. Paragraph 8 states a legal conclusion to which no answer is required.

9. Paragraph 9 states a legal conclusion to which no answer is required.
10. Paragraph 10 states a legal conclusion to which no answer is required.
11. Paragraph 11 states a legal conclusion to which no answer is required.
12. Paragraph 12 states a legal conclusion to which no answer is required.
13. Paragraph 13 states a legal conclusion to which no answer is required.
14. Paragraph 14 states a legal conclusion to which no answer is required.
15. Paragraph 15 states a legal conclusion to which no answer is required.
16. Paragraph 16 states a legal conclusion to which no answer is required.
17. Paragraph 17 states a legal conclusion to which no answer is required.
18. Paragraph 18 states a legal conclusion to which no answer is required.
19. Paragraph 19 states a legal conclusion to which no answer is required.

General Allegations

20. Paragraph 20 states a legal conclusion to which no answer is required.
21. Admitted.
22. Admitted.
23. Paragraph 23 states a legal conclusion to which no answer is required.
24. Paragraph 24 states a legal conclusion to which no answer is required.
25. Admitted.

26. Admitted that inspectors from the Michigan Department of Agriculture (MDA) were present at Respondent's store in Kawkawlin, Michigan, on May 14, 2009. Respondent is without information sufficient to form a belief as to the truth of the remaining allegations of paragraph 26.

27. Paragraph 27 is neither admitted nor denied as Respondent is without sufficient information to form a belief upon which to state an answer and, therefore, leaves the EPA to its proofs.

28. Respondent is without information sufficient to form a belief as to the truth of the allegations of paragraph 28.

29. Respondent is without information sufficient to form a belief as to the truth of the allegations of paragraph 29.

30. Respondent is without information sufficient to form a belief as to the truth of the allegations of paragraph 30.

31. On information and belief, admitted.

32. On information and belief, admitted.

33. On information and belief, admitted.

34. Paragraph 34 states a legal conclusion to which no answer is required.

35. On information and belief, admitted.

36. Respondent is without information sufficient to form a belief as to the truth of the allegations of paragraph 36.

37. On information and belief, admitted.

38. On information and belief, admitted.

39. Respondent is without information sufficient to form a belief as to the truth of the allegations of paragraph 39.

40. Respondent is without information sufficient to form a belief as to the truth of the allegations of paragraph 40.

41. Respondent is without information sufficient to form a belief as to the truth of the allegations of paragraph 41.

42. Respondent is without information sufficient to form a belief as to the truth of the allegations of paragraph 42.

43. Respondent is without information sufficient to form a belief as to the truth of the allegations of paragraph 43.

44. Paragraph 44 states a legal conclusion to which no answer is required.

45. Admitted that Respondent provided certain records to the MDA on or about May 21, 2009. Respondent is without information sufficient to form a belief as to the truth of the remaining allegations of paragraph 45.

46. Respondent is without information sufficient to form a belief as to the truth of the allegations of paragraph 46.

47. On information and belief, admitted.

48. Respondent is without information sufficient to form a belief as to the truth of the allegations of paragraph 48.

49. Denied.

50. On information and belief, admitted.

51. Denied.

Count I

52. Respondent incorporates by reference the answers contained in paragraphs 1 through 51 of this First Amended Complaint.

53. On information and belief, admitted.

54. Paragraph 54 states a legal conclusion to which no answer is required.

55. Paragraph 55 states a legal conclusion to which no answer is required.

Count II

56. Respondent incorporates by reference the answers contained in paragraphs 1 through 55 of this First Amended Complaint.

57. On information and belief, admitted.

58. Paragraph 58 states a legal conclusion to which no answer is required.

59. Paragraph 59 states a legal conclusion to which no answer is required.

Count III

60. Respondent incorporates by reference the answers contained in paragraphs 1 through 59 of this First Amended Complaint.

61. On information and belief, admitted.

62. Paragraph 62 states a legal conclusion to which no answer is required.

63. Paragraph 63 states a legal conclusion to which no answer is required.

Count IV

64. Respondent incorporates by reference the answers contained in paragraphs 1 through 63 of this First Amended Complaint.

65. On information and belief, admitted.

66. Paragraph 66 states a legal conclusion to which no answer is required.

67. Paragraph 67 states a legal conclusion to which no answer is required.

Count V

68. Respondent incorporates by reference the answers contained in paragraphs 1 through 67 of this First Amended Complaint.

69. On information and belief, admitted.

70. Paragraph 70 states a legal conclusion to which no answer is required.

71. Paragraph 71 states a legal conclusion to which no answer is required.

Count VI

72. Respondent incorporates by reference the answers contained in paragraphs 1 through 71 of this First Amended Complaint.

73. Respondent is without information sufficient to form a belief as to the truth of the allegations of paragraph 73.

74. Paragraph 74 states a legal conclusion to which no answer is required.

75. Paragraph 75 states a legal conclusion to which no answer is required.

Count VII

76. Respondent incorporates by reference the answers contained in paragraphs 1 through 75 of this First Amended Complaint.

77. Denied.

78. Paragraph 78 states a legal conclusion to which no answer is required.

79. Paragraph 79 states a legal conclusion to which no answer is required.

Proposed Civil Penalty

80. Respondent admits that Complainant seeks relief, but denies that it is entitled to any relief whatsoever.

Rules Governing this Proceeding

Respondent acknowledges that this matter is governed by provisions of 40 CFR Part 22. Filing a service of documents Respondent acknowledges its filing obligations in this matter. Terms of payment will be not applicable.

Answer and Opportunity to Request a Hearing

Respondent hereby requests a hearing before an Administrative Law Judge on all issues relating to the First Amended Complaint. Regarding the facts Respondent disputes and the basis for opposing the proposed penalty, attached is a redacted copy of correspondence to Complainant's counsel setting forth said information.

Settlement Conference

Respondent requested a settlement conference with Complainant and discussions have taken place, however, the matter has not been resolved.

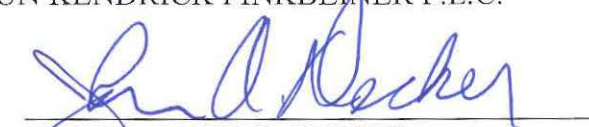
Continue and Obligation to Comply

Respondent acknowledges its obligations to comply with all applicable federal, state and local laws regarding its operations.

BRAUN KENDRICK FINKBEINER P.L.C.

Dated: March 15, 2013

By:



JOHN A. DECKER (P31078)
Attorney for Respondent



BRAUN KENDRICK

ATTORNEYS AT LAW

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Attorney

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December 13, 2012

Via Email Only

Mark J. Koller (C-14J)
Office of Regional Counsel
U.S. EPA, Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604

**Re: Mathie Energy Supply Company, Inc.
Docket Number: FIFRA-05-2012-0022**

Dear Mark:

Thanks to you and your colleagues taking the time recently to speak with me regarding the above matter. [REDACTED]

I would like to give you some background information that puts some perspective on our client's situation. Mathie Energy Supply Company, Inc. ("Mathie") is a retail business focusing primarily on feed products for horses and other animals. Mathie has a small store housed in a former grain elevator facility in Kawkawlin, Michigan, along with a web-based sales operation. The proprietors, Melissa and Michael Mathie, reside nearly 100 miles away where they have a business office located in Morrice, MI. The May 14, 2009 visit Mathie received from representatives of the Michigan Department of Agriculture ("MDA") was a routine inspection. Mathie's record of compliance with local, state and federal regulators shows no prior citations for violations of local, state, or federal environmental statutes. Mathie is a modest enterprise as reflected by its 2011 Form 1120(S) tax return [REDACTED] which shows a net income of just over \$7,000.00. Mathie is a Category III size business under the criteria set forth in the FIFRA Enforcement Response Policy ("Policy").

I will address this matter in relation to the products involved followed by Mathie's proposal to resolve this matter.

{S1015048.DOC.1}

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Copper Sulfate:

In 2007, Mathie purchased some limited amounts of copper sulfate from a supplier in Ohio, Central Farm & Garden, Inc. Some of the copper sulfate was purchased from Central Garden in five-pound "pails," but Mathie also purchased a "Big Blue Large Pond Display," manufactured by a company named Sanco, which included a 15-pound bag of copper sulfate. Due to the size of the bag, Mathie was unable to sell the copper sulfate from the display. While being stored, the 15- pound bag of copper sulfate began to deteriorate, eventually to the point where the labeling became illegible. In order to save the product for sale, Mathie unwittingly re-packaged the Sanco copper sulfate product into smaller containers. Mathie did, however, take care to include copper sulfate product information that it considered appropriate and attached it to the product.

The above material was present at Mathie's retail store in Kawkawlin, Michigan at the time of the May 2009 inspection. At the direction of the MDA inspectors, Mathie immediately removed the product from its retail area and awaited further directive from the inspectors. Approximately one week later, Mathie delivered the copper sulfate product to the MDA inspectors. Since May 2009, Mathie has not possessed for sale or distribution any copper sulfate products.

Finally, at the time of the initial inspection, the MDA inspector requested records regarding shipping and receiving of Mathie's copper sulfate products. The Mathies explained that these records were housed at the company's business office. Therefore, a portion of the records regarding the copper sulfate were delivered to MDA on May 21, 2009 and the remainder provided within a reasonable time thereafter.

Diatomaceous Earth:

In 2009, Mathie carried a naturally-occurring, non-toxic product, also supplied by Central Farm & Garden, called "Red Lake Earth Diatomaceous Earth with Calcium Bentonite." This product came in 40-pound bags that Mathie sold out of its retail store and also on its website. The diatomaceous earth was produced by Absorbent Products, Ltd., a Canadian company. In a pamphlet provided by the United States Patent Office to Absorbent Products on October 14, 2008, it is stated that "the diatomaceous earth component is effective as an insecticidal agent to reduce the number (sic) of insect larvae in the stall or barn." Consistent with the above pamphlet information, diatomaceous earth from Absorbent Products was a desiccant that could act as a naturally-occurring pesticide. Accordingly, Mathie did represent generally in literature located in the retail area of its Kawkawlin store and on its website that the Red Lake Earth Diatomaceous Earth could be used for insect control. It is important to note that the bags of product themselves made no representations concerning insect control.

A few weeks after the inspection by the MDA, in June 2009, the request for shipping and receiving records for Red Lake Earth Diatomaceous Earth with Calcium Bentonite was made to Mathie. Soon thereafter, Mathie supplied these records to the MDA.

Claims in the First Amended Complaint:

Count I

The gist of Count I alleges that Mathie “offered two 5-pound bags of Copper Sulfate for sale on May 14, 2009” and that this product was “not registered as a pesticide with EPA.” Count I alleges a violation of Section 12(a)(1)(A) of FIFRA and proposes a fine of \$7,150.00.

Mathie disagrees both with the statutory basis for the claim and with the assessment of the fine. First, the copper sulfate product in question, which Mathie had purchased from its supplier, was manufactured by a company named Sanco. It is acknowledged that FIFRA’s broad definition of “Production” includes formulation, packaging, repackaging, labeling and relabeling. Significantly, there is no allegation that the Sanco product was not registered as a pesticide with EPA by Sanco. Moreover, there is no allegation that Mathie manufactured or produced a copper sulfate product other than the Sanco product. Mathie never “produced” copper sulfate in the true sense of the word.

As discussed previously, what Mathie did was to take a single 15-pound bag of Copper Sulfate manufactured by Sanco, which was deteriorating to the point that customers were not able to read the labeling, and re-package the material into plastic bags. In connection with this re-packaging, Mathie provided appropriate labeling related to the Copper Sulfate product. The allegation in Paragraph 54 of the First Amended Complaint that Mathie violated §12(a)(1) of FIFRA is not consistent with the facts. Mathie was not manufacturing any product, but rather simply repackaged copper sulfate that was already registered by Sanco.



Count II - Count V

Counts II-V alleges that Mathie offered “Red Lake Earth Diatomaceous Earth” for sale in May 2009 and again in November 2010 and that this product was “not registered as a pesticide with EPA.” Counts II-V allege violations of Section 12(a)(1)(A) of FIFRA and propose a separate fine of \$7,150 for each count, for a total of \$28,600.

Mathie again disagrees both with the legal basis for the claim and with the assessment of the fines. EPA clearly recognizes that diatomaceous earth is a naturally-occurring substance that poses an extremely low human health risk. In both the Reregistration Eligibility Document, Silicon Dioxide and Silica Gel, List D, Case 4081 (September 1991) and the Silicon and Silicates Final Work Plan for Registration Review (August 2008), the human health risk of diatomaceous earth is found by EPA to be “low and not unreasonable.” Likewise, the environmental and ecological risks associated with silicon dioxide (diatomaceous earth) are negligible.

As was the case with the copper sulfate, Mathie purchased all of the diatomaceous earth it offered for sale at any time from a supplier. The product itself, the “Red Lake Earth Diatomaceous Earth,” was produced by a different company, Absorbent Products, Ltd. There is no allegation that Mathie produced a

diatomaceous earth product of its own. The allegations regarding violations of FIFRA pertaining to the diatomaceous earth are essentially that Mathie represented in literature present at its retail store and on its website that diatomaceous earth could act as a pesticide. The actual product sold, however, did not make such a representation. Quite frankly, Mathie's transgressions in this regard amount to a technicality. Diatomaceous earth has been registered with EPA by numerous companies for decades.

[REDACTED]

[REDACTED]

Count VI

Count VI alleges that Mathie repackaged and relabeled Copper Sulfate before May 14, 2009 and thereby "produced a pesticide in an unregistered establishment" in violation of subsection 12(a)(2)(L). For essentially the same reasons discussed previously, this is a technical violation that doesn't fairly reflect what Mathie did. Once again, alleging a separate violation in Count VI relating to the Copper Sulfate is redundant. Therefore, Count VI of the First Amended Complaint should be dismissed.

Count VII

Count VII alleges that Mathie refused to submit records as required under the applicable section of FIFRA. It is acknowledged that Mathie produced certain of its records in a timely fashion (see paragraph 45 of the First Amended Complaint). Thereafter, a dispute arose between Mathie and the MDA inspectors as to whether Mathie was compliant with MDA's request. Mathie believes that it was compliant. Therefore, Count VII of the First Amended Complaint should be dismissed.

[REDACTED]

[REDACTED]

Mark J. Koller (C-14J)
December 13, 2012
Page 5



Very truly yours,

BRAUN KENDRICK FINKBEINER P.L.C.

JOHN A. DECKER

JAD/rlo

Enclosures

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

In the Matter of:

Docket No. FIFRA-05-2012-0022

Mathie Energy Supply Company, Inc.
Morrice, Michigan,

Respondent.

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Proceeding to Assess a Civil Penalty Under
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§136l(a)

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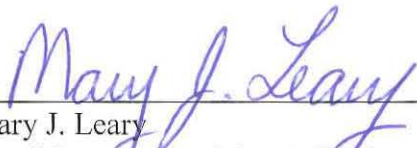
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USEPA
REGION 5


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Phone: 989-498-2100
Fax: 989-799-4666

PROOF OF SERVICE

I hereby certify that on March 15, 2013, an original *Respondent's Answer to First Amended Complaint* was filed with the Regional Hearing Clerk, U.S. EPA, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, and that a complete copy of same was served on Mark J. Koller (C-14J), Office of Regional Counsel, U.S. EPA, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, via regular mail and via email at Koller.Mark@epamail.epa.gov, as well as to Ann L. Coyle, Regional Judicial Officer, U.S. EPA, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, via regular mail and via email at Coyle.Ann@epamail.epa.gov.


Mary J. Leary
Legal Secretary to John A. Decker
Braun Kendrick Finkbeiner, P.L.C.
4301 Fashion Square Boulevard
Saginaw, Michigan 48603
(989) 498-2256, Ext. 237

Subscribed and sworn to before me
this 15th day of March, 2013.


BRIDGET A. BOENSCH, Notary Public
Saginaw County, Michigan
Acting in Saginaw County, Michigan
My Commission Expires: 11/28/2016