

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2**

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In the Matter of	:	
Everyday Group, LLC,	:	Honorable Susan L. Biro,
	:	<u>Presiding Officer</u>
Respondent.	:	
	:	Docket No.
Proceeding under the Federal	:	<u>FIFRA-02-2012-5201</u>
Insecticide, Fungicide and	:	
Rodenticide Act, as amended.	:	
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COMPLAINANT'S INITIAL PREHEARING EXCHANGE

Complainant, the Director of the Division of Enforcement and Compliance Assistance ("DECA") of the United States Environmental Protection Agency ("EPA" or "Agency"), Region 2, herewith submits the following initial prehearing exchange as directed by the "Prehearing Order," dated January 4, 2013, as such order was modified by the Court's "Order on Motion for Extension of Time," dated January 31, 2013, and in accordance with the provisions of 40 C.F.R. § 22.19(a).

I. Preliminary Statement

Complainant commenced the prosecution of this administrative proceeding pursuant to Section 14(a)(1) of the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136l(a)(1) to assess a civil penalty against Respondent for having allegedly committed acts made unlawful under the provisions of Section 12(a)(1) of FIFRA, 7 U.S.C. § 136j(a)(1). The complaint, dated September 26, 2012, was served on October 9, 2012. It alleges three counts against Respondent Everyday Group, LLC, a limited liability company organized under New York State Law. Maintaining its headquarters in New York City (Kings County [Brooklyn]), Respondent is engaged in the commercial importation of a number of products and substances that are intended for sale, *inter alia*, to household consumers, and such products include health, beauty and personal hygiene items. As part of its business operations, Respondent also commercially distributes and sells to retail establishments in New York City those products and substances that

it commercially imports. The complaint asserts Respondent, on a number of specified occasions, distributed and/or sold quantities of three pesticides to various retail establishments in the New York City area; these pesticides were further identified as “Dettol Laundry Sanitiser,” “Fuji Lavender Moth Tablets” and “Dettol Disinfectant Multi-Action Cleaner.” Each of the three was then subsequently made available for sale to the public. After alleging that Respondent intended these products to be used to prevent the spread of, destroy, repel or mitigate pests (germs or insects), the complaint further alleges that, because Respondent had not registered any of these three products with the EPA pursuant to Section 3 of FIFRA, 7 U.S.C. § 136a, the distribution or sale of any such product was unlawful under Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), and constituted a prohibited act pursuant to and under 40 C.F.R. § 152.15.

For count 1, the complaint seeks to assess a penalty of \$60,000; for count 2, a penalty of \$82,500; and for count 3, a penalty of \$97,500. These amounts were determined based upon information EPA had available prior to issuance of the complaint and were developed using the guidance of the applicable FIFRA penalty policy; they are consistent with the FIFRA criteria set forth in Section 14(a)(4), 7 U.S.C. § 136l(a)(4). The complaint seeks a total penalty of \$240,000.¹

Respondent timely filed its answer on or about November 9, 2012. The answer admits some of the underlying predicate allegations; it either denies or does not admit the allegations pertinent to a finding of liability. The answer sets forth seven separately enumerated affirmative defenses, including that the complaint “fails to state a claim upon which relief can be granted,” that the “alleged violations were caused by the intervening acts and/or omissions of third parties not subject to control by Respondent” and that “the proposed civil penalties set forth in the Complaint grossly exceed that which might be justified under the law in light of the applicable facts and law.” Respondent further “formally requests a hearing to contest the material fact [sic] set forth in the Complaint and[/]or to contest the appropriateness of the penalty proposed therein.”

¹ As discussed below in the section on the penalty determination, at hearing EPA will be seeking a lesser amount, \$162,500.

The answer lists five separately denominated “Facts Placed In Issue By Respondent,” including whether Respondent “is governed by the provisions of FIFRA set forth in the Complaint” and “[w]hether the alleged conduct of Respondent...as set forth in the Complaint is violative of any of the provisions of FIFRA as set forth therein.” Respondent seeks, *inter alia*, dismissal with prejudice of all claims against it.

The parties held an informal settlement conference in early December 2012 and have been engaged in ongoing settlement negotiations since. While they have to date been unable to reach a negotiated settlement, each side has continued to express the desire that they indeed reach such a conclusion.

II. Complainant's Witnesses

The following is a list of potential EPA witnesses:

1. Michael Kramer, environmental scientist in the Pesticides and Toxic Substances Branch of DECA, EPA, Region 2, at EPA’s offices in Edison, New Jersey. The expected testimony of Mr. Kramer likely will include the following matters, specifically embracing his personal involvement and participation in each of the following: the inspections of November 9, 2010, July 19, 2011 and August 4, 2011 (including efforts and events leading up to the inspections; what he observed during the inspections; what he was told during the inspections [including by Respondent’s representatives]; his activities during the inspections; and his preparation of any writings or reports in connection with these inspections, his activities during these inspections; and what he learned concerning Respondent, its operations and the circumstances underlying the violations set forth in the complaint); Mr. Kramer’s review and analysis of documents Respondent provided to him pursuant to requests made and/or in furtherance of matters discussed with representatives of Respondent; his review of any other documents pertaining to Respondent and its operations; his background knowledge of Respondent’s commercial operations; the factual

allegations of the complaint and the basis(es) therefor; the calculation of the penalty amounts EPA will be seeking (including the use of the December 2009 FIFRA penalty policy² in developing the penalty amounts sought) and reasons justifying the amounts sought; and otherwise his overall role and responsibilities in EPA's investigation of Respondent and its commercial operations and the development of the case, the issuance of the complaint and the determination of the penalty set forth in it.

2. Aarti Reddy, Environmental Engineer, in the Pesticides and Toxic Substances Branch of DECA, EPA, Region 2, at EPA's offices in Edison, New Jersey. The expected testimony of Ms. Reddy likely will include the following matters, specifically embracing her personal involvement and participation in each of the following: the inspections of July 19, 2011 and August 4, 2011, including efforts and events leading up to the inspections; what she observed during the inspections; what she was told during the inspections; her activities during these inspections; and her preparation of any writings or reports in connection with these inspections, her activities during these inspections and what she learned concerning Respondent, its operations and the circumstances underlying the violations set forth in the complaint.

3. Victor Tu, Environmental Engineer, with the Air Compliance Branch of DECA, EPA, Region 2, at EPA's 290 Broadway office in New York City. The expected testimony of Mr. Tu likely will include the following matters: that he accompanied Mr. Kramer and Ms. Reddy during their July 2011 inspection of Respondent's facility in case his services as a translator between English and Chinese were needed; that his services were not needed; that the persons representing or otherwise acting on behalf of Respondent and/or its interests were, to the best of his knowledge and belief, able to comprehend the English spoken and were equally able to respond in English;

² The complaint lists the 1990 FIFRA penalty policy, but this was an error. See Exhibit 1 in the list of exhibits, below, and the penalty discussion in Section IV.

that the persons representing or otherwise acting on behalf of Respondent and/or its interests never requested and never sought the use of his translation services; and that accordingly there was no need for him at any time to have provided translation services.

4. Dr. Adrian Enache, team leader within the Pesticides and Toxic Substances Branch of DECA, EPA, Region 2, at EPA's offices in Edison, New Jersey. Dr. Enache is expected to testify as to his supervisory role in the development of the complaint and its proposed assessment of the penalty, including reliance upon the 2009 FIFRA penalty policy, and how EPA utilizes/utilized the provisions of that policy as guidance as a general matter and in its determination of an appropriate penalty for the violations alleged in this complaint. He is also expected to testify as to the appropriateness of the penalty EPA seeks in this proceeding, such appropriateness weighed and evaluated pursuant to the requirements of the FIFRA statute and pursuant to the guidance provided by the FIFRA penalty policy.

To the extent not prohibited by the rules of procedure of this proceeding, 40 C.F.R. Part 22, EPA reserves the right to call or not to call any of the aforementioned potential witnesses. The listing of the expected scope of the testimony of each witness is not intended to limit EPA's right to modify or otherwise expand upon the scope and extent of the testimony of each such witness, where appropriate (such as in response to evidence Respondent might present or testimony its witnesses might proffer). EPA might list additional witnesses in any rebuttal prehearing exchange(s) the Agency might file.

III. Complainant's Exhibits

EPA anticipates offering into evidence the following documents and records, copies of which are annexed hereto (unless otherwise specifically noted below) and will be identified as "Complainant's Exhibit," with each exhibit numbered with the following Arabic numerals:

1. "FIFRA ENFORCEMENT RESPONSE POLICY[:] FEDERAL INSECTICIDE, FUNGICIDE, AND RODENTICIDE ACT," issued by the Waste and Chemical Enforcement Division, Office of Civil Enforcement, Office of Enforcement and Compliance Assurance of the United States Environmental Protection Agency, dated December 2009 (39 pages). This document is publicly available on the Internet at :

<http://www.epa.gov/enforcement/waste/documents/policies/fifra-erp1209>³

2. "FIFRA CIVIL PENALTY CALCULATION WORKSHEET," dated 9/7/12 and prepared by "Kramer"

3. "FIFRA CIVIL PENALTY CALCULATION WORKSHEET," dated 2/26/13 and prepared by "Kramer"

4. One page sheet, dated November 29, 2012, titled "Everyday Group"

5. Inspection report, dated November 4, 2010 (inspector Mike Kramer)

6. Inspection report, dated July 19, 2011 (inspectors Aarti Reddy, Michael Kramer)

7. Inspection report, dated August 4, 2011 (inspectors Aarti Reddy, Michael Kramer)

³ In order to save the paper required to make multiple copies of the FIFRA penalty policy, copies of it will not be physically included as part of this initial prehearing exchange. This document will be provided if so ordered by the Court or if Respondent requests a copy. At the time of hearing, Complainant will provide copies of this document (unless instructed [or requested by Respondent] to do so sooner). As this document is publicly available on the Internet, it is readily accessible. Further, pursuant to 40 C.F.R. § 22.27(b), this Court is required to "consider any civil penalty guidelines issued under [FIFRA]." The FIFRA civil penalty policy constitutes a "civil penalty guideline[]" issued under [FIFRA]."

8. Dun & Bradstreet report for Everyday Goods, printed November 18, 2011
 9. Two New York State Department of State, Division of Corporations, "Entity Information" sheets, printed February 29, 2012, for Everyday Import and Export, Inc.
 10. Front page of the website of Respondent, retrieved March 1, 2012
 11. U.S. Environmental Protection Agency forms: a) Notice of Inspection naming Louis Verbout, dated November 4, 2010, and b) Receipt of Samples, naming Louis Verbout, dated November 4, 2010
 12. Affidavit of Louis Verbout, dated November 4, 2010
 13. U.S. Environmental Protection Agency forms: a) Notice of Inspection naming Isaac Lam, dated November 9, 2010, and b) Receipt of Samples, naming Isaac Lam, dated November 9, 2010
 14. Affidavit of Isaac Lam, dated November 9, 2010 (two version of the affidavit, one consisting of two hand-written paragraphs, the other consisting of three hand-written paragraphs)
 15. Affidavit of Isaac Lam, dated July 19, 2011
 16. Affidavit of Lisa Xiu Qing Su, August 4, 2011
 17. Dettol Products Inventory (July 2011)
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18. United States Environmental Protection Agency, "Notice of Arrival of Pesticides and Devices," indicating broker as "Ted. T. Kim d/b/a/ Express Customhouse Broker," indicating importer or consignee as "Everyday Group LLC" and indicating shipper as Reckitt Benckiser Household"; corrected entry date listed as October 23, 2010

19. U.S. Department of Homeland Security, Bureau of Customs and Border Protection, "Entry/Immediate Delivery," indicating ultimate consignee name as "Everyday Group LLC," indicating importer of record name as "Everyday Group LLC" and indicating certification by "Terry Kwak as Atty in Fact," certification dated October 26, 2010

20. Asia Shipping International Transport (SZ) Ltd stationery "Bill of Lading," number SHKHKGUSNYC52874, indicating shipper as "Noah Trading Co." and consignee as "Everyday Group LLC," and dated in the lower right "14-Sep-10"

21. Invoices for the sale/distribution of Dettol Laundry Sanitiser, dated: a) December 10, 2009; b) June 18, 2010; c) July 16, 2010; d) July 23, 2010; e) September 4, 2010; f) September 15, 2010; g) October 29, 2010; and h) April 12, 2011

22. Invoices for the sale/distribution of Fuji Lavender Moth Tablets: a) November 6, 2009; b) March 24, 2010; c) June 7, 2010; d) June 10, 2010; e) June 12, 2010; f) June 16, 2010; g) June 17, 2010; h) June 18, 2010 (four separate invoices for this date); i) June 22, 2010; and j) September 14, 2010 (three documents for this date)

23. Invoices for the sale/distribution of Dettol Disinfectant Multi-Action Cleaner: a) December 10, 2009; b) December 29, 2009; c) February 2, 2010; d) April 22, 2010; e) May 1, 2010; f) June 23, 2010; g) June 25, 2010 (two separate invoices for this date); h) July 13, 2010; i)

July 23, 2010; j) July 28, 2010; k) September 15, 2010; l) October 16, 2010; and m) October 29, 2010

24. Printout of color photograph of front label from container of Dettol Laundry Sanitiser
25. Printout of color photograph of the back label from container of Dettol Laundry Sanitiser
26. Printout of color photograph of the front of the packaging for Fuji Lavender Moth Tablets
27. Printout of color photograph of the back of the packaging for Fuji Lavender Moth Tablets
28. Printout of color photograph of the front of several packages of Fuji Lavender Moth Tablets
29. Printout of color photograph of front label from container of Dettol Disinfectant Multi-Action Cleaner
30. Printout of color photograph of back label from container of Dettol Disinfectant Multi-Action Cleaner
31. Printout of color photograph of boxes of Fuji Lavender Moth Tablets at H&M bonded warehouse

32. Printout of color photograph of boxes of Dettol Laundry Sanitiser at H&M bonded warehouse

33. Printout of color photograph of boxes of Dettol Multi-Action Cleaner at H&M bonded warehouse

Complainant may request this Court to take judicial notice of appropriate matters in accordance with 40 C.F.R. § 22.22(f).

IV. Proposed Penalty Amount Determination

A copy of EPA's 2009 FIFRA penalty policy has been listed above as part of Complainant's exhibits; as noted above, it is readily available on the Internet and EPA will provide it to all parties at the time of hearing or as otherwise directed prior to any such date.⁴ For the reasons set forth below, EPA will be seeking in this proceeding a total penalty of **\$162,500**, and **not** the \$240,000 listed in the complaint.

Pages 9 of the complaint indicates the general framework by which the proposed penalty was determined:

The proposed civil penalty has been determined in accordance with Section 14(a) of FIFRA, 7 U.S.C. § 136l(a), as amended, which authorizes the assessment of a civil penalty of up to \$7,500 for each violation of 'any provision of subchapter II of FIFRA, 7 U.S.C. §§ 136 - 136y.

For purposes of determining the amount of any penalty to be assessed, Section 14 of FIFRA requires that EPA 'shall consider the appropriateness of such 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.' Section 14(a)(4) of FIFRA, 7 U.S.C. § 136l(a)(4).

⁴ The discussion in this section is provided in response to item 2.(B) of the January 4th Prehearing Order requiring EPA to provide "[a] narrative statement...explaining in detail how the proposed penalty was calculated...." Documentation in support of the statement are listed in the section dealing with Complainant's exhibits.

To develop the proposed penalty in this Complaint, Complainant has taken into account the particular facts and circumstances of this case, to the extent known at the time of its filing, with specific reference to EPA's 'Enforcement Response Policy for The Federal Insecticide, Fungicide and Rodenticide Act (FIFRA)' dated July 2, 1990 (hereinafter referred to as the 'ERP'). *** This guidance policy provides rational, consistent and equitable calculation methodologies for applying the statutory penalty criteria enumerated above to particular cases.

The complaint on page 9, as indicated in the quoted provision above, erroneously listed the 1990 penalty policy, but the policy used to develop the proposed penalty assessment of the complaint was actually the 2009 FIFRA policy, which, as noted above in the exhibit listings, is entitled, "FIFRA Enforcement Response Policy[:] Federal Insecticide, Fungicide, and Rodenticide Act," and dated December 2009. That document's introduction states (page 2):

This document sets forth guidance for the [EPA] to use in determining the appropriate response and penalty amount for violations of [FIFRA]. The goal of this Enforcement Response Policy (ERP) is to provide fair and equitable treatment of the regulated community, predictable enforcement responses, and comparable penalty assessments for comparable violations. The policy is designed to allow swift resolution of environmental problems and to deter future violations of FIFRA by respondents, as well as other members of the regulated community.^[5]

On page 9, the complaint sets forth that \$7,500 was sought for each instance of alleged illegal distribution in each of the counts (eight instances listed in count 1; 11 instances in count 2; and 13 instances in count 3). For count 2, the number should properly read 10 instances. *See* the discussion below, in "Calculation of the Penalty Sought Against Respondent." As noted in paragraph 17 of the complaint, Congress has authorized EPA to increase the maximum penalty for a FIFRA violation to \$7,500 for any violation occurring on or after January 12, 2009.

Section 14(a)(4) of FIFRA, 7 U.S.C. § 136l(a)(4), requires that, when EPA seeks to assess a civil penalty against a respondent, it must "consider the appropriateness of such 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." The guidance in the 2009 FIFRA penalty policy reflects this requirement, and in using this guidance, EPA is implementing the evaluation of those

⁵ The introductory statement notes that, relevant to the instant proceeding, the 2009 FIFRA penalty policy supersedes the 1990 FIFRA penalty policy.

factors as mandated by the statute; the guidance provides a concrete framework by which EPA can consider what FIFRA says must be considered in determining an appropriate penalty amount. As stated on pages 15 and 16 of the 2009 FIFRA penalty policy:

In determining the amount of a civil penalty, FIFRA § 14(a)(4) requires EPA to consider the appropriateness of the penalty to the size of respondent's business, the effect of the penalty on respondent's ability to continue in business, and the gravity of the violation.

For each type of violation associated with a particular product, the penalty amount is determined in a seven-step process considering the Section 14(a)(4) criteria listed above. These steps are:

- (1) determine the number of independently assessable violations...;
- (2) determine the size of business category for the violator...;
- (3) determine the gravity of the violation for each independently assessable violation...;
- (4) determine the 'base' penalty amount associated with the size of business...and the gravity of violation...for each independently assessable violation...;
- (5) determine the 'adjusted' penalty amount based on case-specific factors...;
- (6) calculate the economic benefit of noncompliance...; and
- (7) consider the effect that payment of the total penalty amount plus economic benefit of noncompliance derived from the above calculation will have on the violator's ability to continue in business.

Accordingly, the penalty was developed using the guidance criteria set forth in the 2009 FIFRA penalty policy.

Independently Assessable Violations

First, the number of independently assessable violations was determined. Page 16 of the 2009 FIFRA penalty policy explains:

A separate civil penalty, up to the statutory maximum, will be assessed for each independent violation of [FIFRA]. A violation is considered independent if it results from an act (or failure to act) which is not the result of any other violation for which a civil penalty is to be assessed or if at least one of the elements of proof is different from any other violation.

Consistent with the above criteria, the Agency considers violations that occur from each sale or shipment of a product...or each sale of a product to be independent violations

Based on the information EPA obtained during the inspections, *i.e.* invoices of sales and distributions, EPA determined that: for count 1, there were eight separate violations; for count 2, 10 separate violations (although the complaint incorrectly notes 11 separate violations, *i.e.* on separate dates); and for count 3, 13 separate violations. Where a sale or distribution occurred on a given day for a given pesticide, that was considered a separate violation; the precise number was determined by EPA using invoices of sales and distributions.

Size of Business

The next step is to determine the size of the business. Page 17 of the 2009 FIFRA penalty policy states:

In order to provide equitable penalties, civil penalties that will be assessed for violations of FIFRA will generally decrease as the size of the business decreases. Size of business is determined on...a company's gross revenues from all revenue sources during the prior calendar year.

The 2009 FIFRA penalty policy provides a table (Table 1) on page 18 for determining size of business. While EPA initially classified Respondent as size I (gross revenues over \$10,000,000 a year), information Respondent subsequently provided to EPA resulted in a re-classification to size II (gross revenues between \$1,000,000 and \$10,000,000 per year).

Determination of Gravity-Based Penalty

The next step was to determine the gravity-based penalty. As explained on page 18 of the 2009 FIFRA penalty policy:

The 'gravity level' established for each violation of FIFRA is listed in Appendix A of this ERP. The level assigned to each violation of FIFRA represents an assessment of the relative severity of each violation. The relative severity of each violation considers the actual or potential harm to human health and the environment which could result from the violation and the importance of the requirement to achieving the goals of the statute. The gravity level, which is

determined from the chart in Appendix A, is then used to determine a base penalty figure from the FIFRA Civil Penalty Matrices in Step 4 below. In Step 5, the dollar amount derived from the matrix can be adjusted upward or downward depending on the actual circumstances of each violation.

Appendix A is found on pages 29 through 33 of the 2009 FIFRA penalty policy. Each of the violations in this proceeding was of Section 12(a)(1)(A) of FIFRA, where Respondent “[s]old or distributed a pesticide NOT REGISTERED under section 3....” First line of Appendix A, page 29 of the 2009 FIFRA penalty policy. This type of violation is classified as Level 1. Thus, each of the violations at issue in this proceeding — all 31 separate violations — is classified as a Level 1 violation under the 2009 FIFRA penalty policy.

Determination of the Base Penalty

The base penalty represents the determination of the amount EPA seeks for a given violation based upon the level of violation and the size of business. This is explained on page 18 of the 2009 FIFRA penalty policy, where it states:

The size of business categories and gravity levels are broken out in the FIFRA Civil Penalty Matrices shown in Table 2. Each cell of the matrix represents the Agency’s assessment of the appropriate civil penalty, within the statutory maximum, for each gravity level of a violation and for each size of business category. Because FIFRA imposes different statutory ceilings on the maximum civil penalty that may be assessed against persons listed in FIFRA Section 14(a)(1) and persons listed in Section 14(a)(2), this policy has separate penalty matrices for Section 14(a)(1) violators and Section 14(a)(2) violators.

The violations at issue involve Section 14(a)(1) violations. *See* paragraphs 39, 51 and 63 of the complaint. By reference to Table 2 on page 19 of the 2009 FIFRA penalty policy, the base penalty for each of the violations at issue in this proceeding is \$7,500 (Level 1 violation; size II business); this amount represent the intersection of this type of violation and this size of business in the first Table 2.

Adjustment for Case Specific Factors

Once the base penalty amount for a violation is determined, the next step in determining an appropriate penalty amount for such violation(s) entails EPA making any relevant adjustments for factors specific to the specific violation. Pages 19 and 20 explain such adjustments:

The Agency has assigned adjustments, based on the gravity adjustment criteria listed in Appendix B, for each violation relative to the specific characteristics of the pesticide involved, the harm to human health and/or harm to the environment, compliance history of the violator, and the culpability of the violator. Then the gravity adjustment values from each gravity category listed in Appendix B are to be totaled. The dollar amount found in the matrix will be raised or lowered, not to exceed the statutory maximum, based on the total gravity values in Table 3. Once this base penalty amount is calculated, it should be rounded to the nearest \$100....

Appendix B is found on page 34 of the 2009 FIFRA penalty policy, and additional adjustments (if any) based on the total gravity value are set forth in Table 3 (on page 20).

Using the criteria found in Appendix B, as can be seen from Exhibits 2 and 3, it was determined that the total gravity adjustments for each count was 10, and, as indicated in Table 3, a total gravity value adjustment between nine and 11 entails the violation being "assess[ed] [at] matrix value," *i.e.* no change was made in the values determined through reference to Table 2 on page 19.

Economic Benefit of Noncompliance

The 2009 FIFRA penalty policy next addresses the question of whether a violator derived an economic benefit from its violation. On page 20 it states:

The Agency's Policy on Civil Penalties (EPA General Enforcement Policy #GM-21), dated February 16, 1984, mandates the recapture of any significant economic benefit of noncompliance (EBN) that accrues to a violator from noncompliance with the law. Economic benefit can result from a violator delaying or avoiding compliance costs or when the violator realizes illegal profits through its noncompliance. A fundamental premise of the 1984 Policy is that economic incentives for noncompliance are to be eliminated. If, after the penalty is paid, violators still profit by violating the law, there is little incentive to comply. Therefore, enforcement professionals should always evaluate the economic benefit of noncompliance in calculating penalties. Note that economic benefit can only be added to the proposed penalty up to the statutory maximum penalty.

An economic benefit component should be calculated and added to the gravity-based penalty component when a violation results in “significant” economic benefit to the violator.

The specifics of the various economic benefit components are addressed on pages 21 through 23 of the 2009 FIFRA penalty policy, with the discussion of “Economic Benefit from Delayed Costs and Avoided Costs” found on page 21, the discussion of “Calculation of Economic Benefit from Delayed and Avoided Costs” found on pages 21 through 23, and the discussion of “Economic Benefit Gained from Illegal Sales of Unregistered Pesticides” found on page 23. EPA did not adjust the penalty amount because of any economic benefit consideration.

Ability to Continue in Business/Ability to Pay

The 2009 FIFRA penalty policy addresses this consideration on pages 23 and 24. The policy notes that “FIFRA § 14(a)(4) requires the Agency to consider the effect of the penalty on the respondent’s ability to continue in business when determining the amount of the civil penalty.” Page 23. Further (at 24):

Any respondent may raise the issue of ability to pay/ability to continue in business in its answer to the complaint or during the course of settlement negotiations. If a respondent raises the inability to pay as a defense in its answer or in the course of settlement negotiations, the Agency should ask the respondent to present appropriate documentation, such as tax returns and financial statements. The respondent must provide records that conform to generally accepted accounting principles and procedures at its expense. If the proposed penalty exceeds the respondent’s ability to pay, the penalty may be reduced to a level consistent with FIFRA § 14(a)(4). If a respondent does not provide sufficient information to substantiate its claim of inability to pay the calculated penalty, then EPA may draw an inference from available information that the respondent has the ability to pay the calculated penalty [footnote omitted].

As a general matter, EPA “will...not collect a civil penalty that exceeds a violator’s ability to pay as evidenced by a detailed tax, accounting, and financial analysis.” Page 23.⁶

⁶ Because, however, of EPA’s concern that “the regulated community not choose noncompliance as a way of aiding financially troubled businesses,” the 2009 penalty policy underscores that “EPA reserves the option, in appropriate circumstances, of seeking a penalty that might exceed the respondent’s ability to pay, cause bankruptcy, or result in a respondent’s inability to continue in business.” Page 23.

In the instant matter, Respondent has not in its answer raised an inability to pay/financial hardship claim. Nor has Respondent to date sought formally to introduce into this litigation documentation that might support any such claim.

Additional Modification: Graduated Penalty Calculation

Page 25 of the FIFRA penalty policy lists an additional factor that might serve to modify a penalty. Under the heading “Graduated Penalty Calculations,” the policy states:

In instances where inspectors or case developers obtain records which evidence multiple sales or distributions for the same violations, the Region may apply a “graduated” penalty calculation. The graduated method should only be applied after a consideration of the actual or potential serious or widespread harm caused by the violations, the toxicity of the pesticides involved, and the culpability of the violator. The graduated penalty method should not be used in cases involving highly culpable violators or violations that caused an actual serious or widespread harm to human health or the environment. In cases involving violations that present *potential* serious or widespread harm to human health or the environment, the Region should decide whether application of the graduated penalty method is appropriate based on the circumstances of the individual case.

In no case is the graduated penalty method mandated and the Agency maintains its statutory right to assess penalties of up to the statutory maximum for each violation, when appropriate [emphasis in original].

This section provides a three-part table, called “Graduated Penalty Tables” (Table 4), indicating the extent of the appropriate reduction. There are three such schemes, each based on the classification of business size. For example, as in the instant matter, where the respondent is classified as size II business, for the first 20 unlawful distributions, there is no reduction; for 21st through the 40th unlawful distribution, the penalty amount is 25% of what it otherwise would have been; for unlawful distributions greater than 40, the penalty amount is 10% of what it would have been. Thus, for example, if the penalty amount were \$1,000 for a given violation, for the first 20 unlawful distributions, the appropriate penalty for each one would be \$1,000, but for the 21st unlawful distribution, the appropriate penalty for that one (and each subsequent one up to 40) would be \$250. See page 25.

As discussed below, EPA applied the Graduated Penalty Table in the penalty calculation.

Calculation of the Penalty Sought Against Respondent

As noted above, EPA will seek to obtain a penalty of \$162,500 and not the \$240,000 listed in the complaint. This change reflects information EPA obtained from Respondent in the course of discussions aimed at achieving a negotiated settlement.

Based on the information EPA obtained during or as a consequence of the inspections, EPA determined that there were 31 independently assessable violations, *i.e.* EPA has records indicating that 31 distributions/sales of the three pesticides in question occurred (as noted in paragraphs 30, 42 and 54 of the complaint). Based on information Respondent provided to EPA for settlement purposes, EPA determined that Respondent's business should be classified as size II. As per Appendix A of the 2009 FIFRA penalty policy (page 29, top row), each of the violations at issue should be classified as Level 1. As per Table 1 (for Section 14(a)(1) violations), the gravity-based penalty for each violation is \$7,150.⁷ As for adjustments for case specific factors, these are set forth in Exhibits 2 and 3, and they total 10 for each count; thus, in accordance with Table 3, the appropriate penalty is the "[a]ssess[ed] matrix value," *i.e.* the amounts prescribed through reference to Table 2. As noted in those exhibits, EPA has not made any upward adjustments in the penalty amounts sought for any economic benefit Respondent might have gained through its violations. Further, EPA has made no adjustments relating to the ability to continue in business/financial hardship factor — Respondent has not raised the issue and has not formally introduced into this proceeding any documentation that might support a downward reduction based on these factors. For 11 of the 31 violations,⁸ EPA has applied the "Graduated Penalty Calculation" set forth in Table 4 of the FIFRA penalty policy (page 25, for category II businesses).

⁷ All dates of the alleged unlawful sales/distributions of each of the pesticides occurred subsequent to January 2009.

⁸ Because of what appears to be a typographical error in EPA having recorded a date in a sales invoice, the number of violations in count 2 is actually 10, not 11. EPA at present does not possess a record of a distribution or sale of Fuji Lavender Moth Tablets on June 28, 2010.

Thus, for 20 violations, the amount sought for each is \$7,150, which totals \$143,000. For the remaining 11 violations, the amount sought is 25% of \$7,150, which totals (when rounded off) \$19,500. Adding these two figures yields a total penalty of **\$162,500**.

V. Paperwork Reduction Act

The Paperwork Reduction Act of 1980, as amended, 44 U.S.C. § 3501 *et seq.* (the “PRA”), does not bar EPA’s prosecution of this action; the PRA is not applicable to this proceeding. The complaint cites a violation of the FIFRA statute as the basis for liability, and, as an additional basis, the complaint cites a FIFRA regulatory provision that essentially is identical to the cited statutory provision. Thus, because these acts were expressly prohibited by the FIFRA statute, *i.e.* because the statute prohibits any person from distributing or selling any pesticide that has not been registered,⁹ the PRA is not a bar to EPA’s seeking a penalty for these counts as the public protection provision of 44 U.S.C. § 3512 does not apply to a requirement Congress has directly imposed. 5 C.F.R. § 1320.6(e).

VI. Time and Place for Hearing

Complainant notes that Section 14(a)(3) of FIFRA, 7 U.S.C. § 136l(a)(3), states that “[n]o civil penalty shall be assessed unless the person charged shall have been given notice and opportunity for a hearing on such charge in the county, parish, or incorporated city of the residence of the person charged.” The “residence” of Respondent — Respondent’s facility — is located in Brooklyn, New York, which is in Kings County, a county that is a constituent borough of the City of New York. While footnote 1 of the January 4, 2013 Prehearing Order, referencing

⁹ Section 3(a) of FIFRA, 7 U.S.C. § 136a, states, in part, that “no person in any State may distribute or sell to any person any pesticide that is not registered under this subchapter.” Further, Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), reinforces the statutory proscription in Section 3(a) by making it “unlawful for any person in any State to distribute or sell to any person any pesticide that is not registered under section 136a of this title....”

40 C.F.R. § 22.35(b),¹⁰ directs that the hearing be held in Kings County (a venue to which Complainant does not object), EPA alternatively submits that a hearing in another part of New York City (in Manhattan) would equally satisfy the statutory (and the 40 C.F.R. Part 22) requirement, as Respondent's residence is located, jurisdictionally speaking, within the City of New York. Complainant would prefer that the hearing be held in New York County because of greater convenience (*e.g.*, counsel for both parties have their offices in Manhattan, while Respondent's facility is just across the river from Manhattan).

Complainant anticipates that EPA should be able to present its direct case in approximately two to three days.

VI. Complainant's Responses to This Court's Directives in Item 2 of the January 4th Order

(A): *See* above, Section III, the items referenced in paragraphs 5, 6, 7, 11 through 13, and 16 through 25 in that section, with regard to the allegations made in paragraphs 25 and 26 of the complaint.

(B): Respondent has admitted (in whole or in part) paragraphs 21 through 23 of the complaint. For paragraphs 25 through 27 of the complaint, see Section III, above, exhibits 5, 6 and 7; for paragraphs 29 through 34 of the complaint, see Section III, above, exhibits 16, 19 and 20; for paragraphs 41 through 46 of the complaint, see Section III, above, exhibits 17, 21, 22 and 23; for paragraphs 53 through 58 of the complaint, see Section III, above, exhibits 18, 24 and 25. Re paragraph 61 of the complaint, this will be established through Complainant's direct testimony.

¹⁰ Footnote 1 states, in relevant part: "In accordance with the Supplemental Rules Governing the Administrative Assessment of Civil Penalties Under the Federal Insecticide, Fungicide, and Rodenticide Act, 40 C.F.R. § 22.35(b), the hearing shall be held in the county, parish, or incorporated city of the residence of the respondent, unless otherwise agreed in writing by all parties. Thus, the hearing shall be held in Brooklyn (Kings County), New York, unless the parties designate a different location as the place of hearing in this matter."

(C): Re the labels referenced in paragraphs 33, 34, 45, 46, 57 and 58 of the complaint, see Section III, above, exhibits 19 through 25.

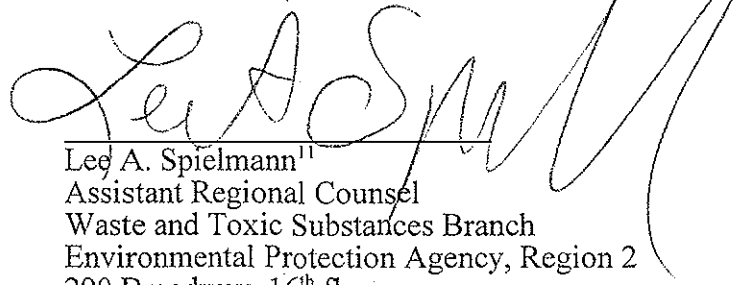
(D): Re the allegations Respondent made in paragraph 4 of its affirmative defenses (seventh page of the answer) that “the EPA official expressly advised respondent that the importation and sale of ‘Dettol Laundry Sanitiser’ was not in violation of any of the purportedly applicable FIFRA statutes or regulations set forth in the EPA’s Complaint”: both inspector Kramer and inspector Reddy deny having made such a statement. Moreover, even assuming the assertion in paragraph 4 of the affirmative defenses is true (Complainant assumes this for argument’s sake only), any such statement would not bind the United States or an agency of the United States (as EPA); any such statement would not be a legal defense against liability for a violation of a FIFRA statutory proscription. At most, such a statement would constitute an equitable consideration for a court to weigh and balance against other factors, all of which would have to be evaluated in the context of the entirety of all relevant circumstances.

(E): *See* the discussion in Section IV, above.

(F): None. The guidance upon which EPA has relied is the 2009 FIFRA penalty policy, as discussed above.

Dated: March 20, 2013
New York, New York

Respectfully submitted,



Lee A. Spielmann¹¹
Assistant Regional Counsel
Waste and Toxic Substances Branch
Environmental Protection Agency, Region 2
290 Broadway, 16th floor
New York, New York 10007-1866
212-637-3222
Fax: 212-637-3199

TO:

Sybil Anderson
Headquarters Hearing Clerk
U.S. Environmental Protection Agency
Washington, DC

Honorable Susan L. Biro
Presiding Officer
U.S. Environmental Protection Agency
Washington, DC

Cowan, Liebowitz & Latman, P.C.
(C.J. Erickson, Esq.)
Counsel for Respondent
New York, New York

¹¹ The undersigned expects to be out of the office on March 25th and March 26th, and will be out of the office from April 2nd until April 8th.

In re Everyday Group, LLC.
Docket No. FIFRA-02-2012-5201

CERTIFICATE OF SERVICE

I certify that I have this day caused to be sent the foregoing "COMPLAINANT'S INITIAL PREHEARING EXCHANGE," dated March 20, 2013, together with the exhibits attached thereto, in the above-referenced proceeding in the following manner to the respective addressees listed below:

Original and one copy¹ by
Pouch Mail:

Sybil Anderson
Headquarters Hearing Clerk
Office of Administrative Law Judges
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Mail Code 1900L
Washington, DC 20460-2001

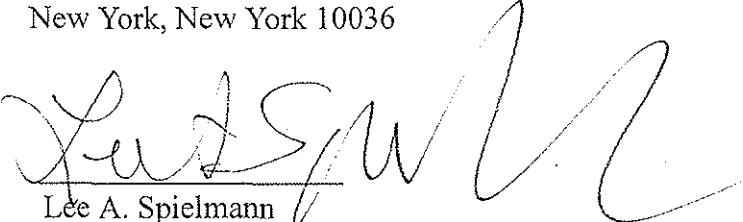
Copy by Pouch Mail:

Honorable Susan L. Biro
Chief Administrative Law Judge
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Mail Code 1900 L
Washington, DC 20460

Copy by Certified Mail,
Return Receipt Requested:

Clarence J. Erickson, Esq.
Cowan, Liebowitz & Latman, P.C.
1133 Avenue of the Americas
New York, New York 10036

Dated: March 20, 2013
New York, New York


Lee A. Spielmann

¹ In accordance with the March 18, 2013 e-mail communications with the Headquarters Hearing Clerk (HHC), only one copy of the exhibits is being provided to the HHC.