

BEFORE THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Region III
1650 Arch Street
Philadelphia, Pennsylvania 19103-2029

FMC Corporation
1735 Market Street
Philadelphia, PA 19103

Respondent

) DOCKET NO: FIFRA-03-2015-0248
)
) ADMINISTRATIVE COMPLAINT
) AND NOTICE OF
) OPPORTUNITY FOR HEARING
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I. INTRODUCTION

This Complaint and Notice of Opportunity for Hearing (“Complaint”) is issued to FMC Corporation (“Respondent”) under the authority vested in the Administrator of the United States Environmental Protection Agency (“Complainant”) by Section 14(a) of the Federal Insecticide, Fungicide and Rodenticide Act (“FIFRA” or “the Act”), as amended, 7 U.S.C. § 136l(a), for violations of Section 12 of FIFRA, 7 U.S.C. § 136j, and associated regulations promulgated at 40 C.F.R. Parts 150-189, in accordance with the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (“Consolidated Rules of Practice”), 40 C.F.R. Part 22, a copy of which is attached hereto as Attachment A. The Administrator has delegated this authority under FIFRA to the Regional Administrators by EPA Delegation No. 5-14 dated May 11, 1994, and this authority was further delegated to the Director of the Land and Chemicals Division and to the Associate Director of the Office of Toxics and Pesticides in the Land and Chemicals Division, EPA Region III, on November 9, 1998.

II. DEFINITIONS

1. Section 2(e)(1) of FIFRA, 7 U.S.C. § 136(e)(1), defines “certified applicator” to mean any individual who is certified under Section 11 of FIFRA, 7 U.S.C. § 136i, as authorized to use

or supervise the use of any pesticide which is classified for restricted use.

2. Section 2(s) of FIFRA, 7 U.S.C. § 136(s), defines “person” to mean any individual, partnership, association, corporation, or any organized group of persons whether incorporated or not.

3. Section 2(t) of FIFRA, 7 U.S.C. § 136(t), defines “pest”, in part, to mean any insect, rodent, nematode, fungus, weed, or any other form of terrestrial or aquatic plant or animal life or virus, bacteria, or other micro-organism (except viruses, bacteria, or other micro-organisms on or in living man or other living animals) which the Administrator declares to be a pest under Section 25(c)(1) of FIFRA, 7 U.S.C. § 136w(c)(1).

4. Section 2(u) of FIFRA, 7 U.S.C. § 136(u), and 40 C.F.R. § 152.3 define “pesticide”, in part, to mean any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest.

5. Pursuant to 40 C.F.R. § 152.3, the term “pesticide product” means, in pertinent part, a pesticide in the particular form (including composition, packaging, and labeling) in which the pesticide is, or is intended to be distributed or sold.

6. Section 2(y) of FIFRA, 7 U.S.C. § 136(y), defines “registrant” to mean a person who has registered any pesticide pursuant to the provisions of FIFRA.

7. Section 2(gg) of FIFRA, 7 U.S.C. § 136(gg), and 40 C.F.R. § 152.3, define 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.

III. GENERAL ALLEGATIONS

8. Respondent is a Delaware corporation, headquartered at 1735 Market Street in Philadelphia, Pennsylvania, that operates as a diversified chemical company that provides products for agricultural, consumer and industrial markets.
9. Respondent is a “person” as defined in Section 2(s) of FIFRA, 7 U.S.C. § 136(s).
10. On January 21, 2011, EPA registered Respondent’s *F9047-2 EC Insecticide* as a pesticide and assigned such product the registration number EPA Reg. No. 279-9545 (“*F9047-2 EC Insecticide*, EPA Reg. No. 279-9545”).
11. On or about January 24, 2011, Respondent submitted a request to EPA that the name *Stallion Insecticide* be added as an alternate brand name for *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545.
12. On or after January 24, 2011, Respondent began referring to *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545 as *Stallion™ Insecticide*, *Stallion® Insecticide*, *Stallion Insecticide* and/or *Stallion* in advertising.
13. At all times relevant to the violations alleged in the Complaint, *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545 was a “pesticide” and a “pesticide product” as those terms are defined by Section 2(u) of FIFRA, 7 U.S.C. § 136(u), and 40 C.F.R. § 152.3.
14. At all times relevant to the violations alleged in the Complaint, Respondent was the “registrant” as defined in Section 2(y) of FIFRA, 7 U.S.C. § 136(y), for *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545.
15. At all times relevant to the violations alleged in the Complaint, Respondent was a “registrant, commercial applicator, wholesaler, dealer, retailer, or other distributor” under Section 14(a)(1) of FIFRA, 7 U.S.C. § 136l(a)(1).

IV. VIOLATIONS

FAILURE TO GIVE USE CLASSIFICATION IN ADVERTISING

16. The allegations contained in paragraphs 1-15 of this Complaint are incorporated by reference herein as though fully set forth at length.

17. Section 3(d)(1)(C) of FIFRA, 7 U.S.C § 136a(d)(1)(C), provides that if it is determined that a pesticide, when applied in accordance with its directions for use, warnings and cautions and for the uses for which it is registered, or for one or more of such uses, or in accordance with a widespread and commonly recognized practice, may generally cause, without additional regulatory restrictions, unreasonable adverse effects on the environment, including injury to the applicator, EPA shall classify the pesticide, or the particular uses to which the determination applies, for restricted use.

18. As of the date of its registration with EPA as a pesticide on January 21, 2011, and at all times relevant to this Complaint, *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545 was classified as a restricted used pesticide (“RUP”) under Section 3(d)(1)(C) of FIFRA, 7 U.S.C § 136a(d)(1)(C).

19. As a result of its classification as an RUP, *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545 is for retail sale to and use only by certified applicators, or persons under their direct supervision and only for those uses covered by the certified applicator’s certification. See Section 3(d)(1)(C) of FIFRA, 7 U.S.C. § 136a(d)(1)(C), and 40 C.F.R. § 156.10(j)(2).

20. Section 12(a)(2)(E) of FIFRA, 7 U.S.C. § 136j(a)(2)(E), makes it unlawful for any person who is a registrant, wholesaler, dealer, retailer, or other distributor to advertise a product registered under FIFRA for restricted use without giving the classification of the product assigned to it under Section 3 of FIFRA, 7 U.S.C. § 136a.

21. EPA regulations at 40 C.F.R. § 152.168 state in pertinent part:
- (a) Any product classified for restricted use shall not be advertised unless the advertisement contains a statement of its restricted use classification.
 - (b) The requirement in paragraph (a) applies to all advertisements of the product, including, but not limited, to:
 - (1) Brochures, pamphlets, circulars and similar material offered to purchasers at the point of sale or by direct mail.
 - (2) Newspapers, magazines, newsletters and other material in circulation or available to the public.
 - (3) Broadcast media such as radio and television.
 - (4) Telephone advertising.
 - (5) Billboards and posters.
 - (c) The requirement may be satisfied for printed material by inclusion of the statement "Restricted Use Pesticide" or the terms of restriction, prominently in the advertisement. The requirement may be satisfied with respect to broadcast or telephone advertising by inclusion in the broadcast of the spoken words "Restricted use pesticide" or a statement of the terms of restriction.

VIOLATIONS 1-9,645 - Direct Mailer Advertisements (Farms/Growers)

22. In March 2012, Respondent caused direct mailers about *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545 to be sent to individuals associated with various agricultural farms ("farm/grower consumers").
23. The direct mailers about *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545 that were sent to farm/grower consumers in March 2012 constituted "advertisements" under 40 C.F.R. § 152.168.
24. Respondent's conduct described in paragraph 22 above constituted "advertis[ing]" under Section 12(a)(2)(E) of FIFRA, 7 U.S.C. § 136j(a)(2)(E).
25. The direct mailers about *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545 that were sent to farm/grower consumers in March 2012 did not include the statement "Restricted Use Pesticide."

26. The direct mailers about *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545 that were sent to farm/grower consumers in March 2012 did not include any statement of the terms of restrictions of *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545.

27. By failing to include the statement "Restricted Use Pesticide" or a statement of the terms of restrictions of *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545, Respondent's direct mailer advertisements about *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545 that were sent to farm/grower consumers in March 2012 violated 40 C.F.R. § 152.168.

28. Respondent caused approximately 9,645 separate direct mailers about *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545 to be sent to farm/grower consumers in March 2012.

29. The direct mailers about *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545 were sent without regard as to whether or not the farm/grower consumers were certified applicators.

30. Each direct mailer advertisement about *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545 sent to a farm/grower consumer in March 2012 constituted an individual separate act of advertising under Section 12(a)(2)(E) of FIFRA, 7 U.S.C. § 136j(a)(2)(E), by Respondent.

31. Based on the allegations in paragraphs 16-30 above, Respondent committed 9,645 unlawful acts under Section 12(a)(2)(E) of FIFRA, 7 U.S.C. § 136j(a)(2)(E), for which penalties may be assessed pursuant to Section 14(a) of FIFRA, 7 U.S.C. § 136l(a).

VIOLATIONS 9,646–12,267 - Direct Mailer Advertisements (Retailers)

32. In March 2012, Respondent caused direct mailers about *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545 to be sent to individuals associated with retailers in Respondent's product distribution chain ("retail purchasers").

33. The direct mailers about *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545 that were sent to retail purchasers in March 2012 constituted "advertisements" under 40 C.F.R. § 152.168.

34. Respondent's conduct described in paragraph 32 above constituted "advertis[ing]" under Section 12(a)(2)(E) of FIFRA, 7 U.S.C. § 136j(a)(2)(E).
35. The direct mailers about *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545 that were sent to retail purchasers in March 2012 did not include the statement "Restricted Use Pesticide."
36. The direct mailers about *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545 that were sent to retail purchasers in March 2012 did not include any statement of the terms of restrictions of *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545.
37. By failing to include the statement "Restricted Use Pesticide" or a statement of the terms of restrictions of *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545, Respondent's direct mailer advertisements about *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545 that were sent to retail purchasers in March 2012 violated 40 C.F.R. § 152.168.
38. Respondent caused approximately 2,622 separate direct mailers about *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545 to be sent to retail purchasers in March 2012.
39. Each direct mailer advertisement about *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545 sent to a retail purchaser in March 2012 constituted an individual separate act of advertising under Section 12(a)(2)(E) of FIFRA, 7 U.S.C. § 136j(a)(2)(E), by Respondent.
40. Based on the allegations in paragraphs 16-21 and 32-39 above, Respondent committed 2,622 unlawful acts under Section 12(a)(2)(E) of FIFRA, 7 U.S.C. § 136j(a)(2)(E), for which penalties may be assessed pursuant to Section 14(a) of FIFRA, 7 U.S.C. § 136l(a).

VIOLATIONS 12,268-12,270 - Progressive Forage Grower Magazine Advertisements

41. Respondent caused ads about *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545 to be printed in the April, May and July 2012 issues of the *Progressive Forage Grower* magazine.

42. The ads about *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545 that were printed in the April, May and July 2012 issues of the *Progressive Forage Grower* magazine constituted “advertisements” under 40 C.F.R. § 152.168.
43. Respondent’s conduct described in paragraph 41 above constituted “advertis[ing]” under Section 12(a)(2)(E) of FIFRA, 7 U.S.C. § 136j(a)(2)(E).
44. Respondent’s ads about *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545 that were printed in the April, May and July 2012 issues of the *Progressive Forage Grower* magazine did not include the statement “Restricted Use Pesticide.”
45. Respondent’s ads about *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545 that were printed in the April, May and July 2012 issues of the *Progressive Forage Grower* magazine did not include any statement of the terms of restriction of *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545.
46. By failing to include the statement “Restricted Use Pesticide” or a statement of the terms of restrictions of *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545, Respondent’s advertisements about *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545 that were printed in the April, May and July 2012 issues of the *Progressive Forage Grower* magazine violated 40 C.F.R. § 152.168.
47. Causing the advertisements about *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545 to be printed in the April, May and July 2012 issues of the *Progressive Forage Grower* magazine constituted at least three (3) individual separate acts of advertising under Section 12(a)(2)(E) of FIFRA, 7 U.S.C. § 136j(a)(2)(E), by Respondent.
48. Based on the allegations in paragraphs 16-21 and 41-47 above, Respondent committed at least three (3) unlawful acts under Section 12(a)(2)(E) of FIFRA, 7 U.S.C. § 136j(a)(2)(E), for which penalties may be assessed pursuant to Section 14(a) of FIFRA, 7 U.S.C. § 136l(a).

VIOLATION 12,271 - *The Sunflower Magazine Advertisement*

49. Respondent caused an advertisement about *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545 to be printed in the March/April 2012 issue of *The Sunflower* magazine.

50. The advertisement about *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545 that was printed in the March/April 2012 issue of *The Sunflower* magazine constituted an “advertisement” under 40 C.F.R. § 152.168.

51. Respondent’s conduct described in paragraph 49 above constituted “advertis[ing]” under Section 12(a)(2)(E) of FIFRA, 7 U.S.C. § 136j(a)(2)(E).

52. Respondent’s advertisement about *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545 that was printed in the March/April 2012 issue of *The Sunflower* magazine did not include the statement “Restricted Use Pesticide.”

53. Respondent’s advertisement about *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545 that was printed in the March/April 2012 issue of *The Sunflower* magazine did not include any statement of the terms of restriction of *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545.

54. By failing to include the statement “Restricted Use Pesticide” or a statement of the terms of restrictions of *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545, Respondent’s advertisement about *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545 that was printed in the March/April 2012 issue of *The Sunflower* magazine violated 40 C.F.R. § 152.168.

55. Causing the advertisement about *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545 to be printed in the March/April 2012 issue of *The Sunflower* magazine constituted at least one act of advertising under Section 12(a)(2)(E) of FIFRA, 7 U.S.C. § 136j(a)(2)(E), by Respondent.

56. Based on the allegations in paragraphs 16-21 and 49-55 above, Respondent committed at least one unlawful act under Section 12(a)(2)(E) of FIFRA, 7 U.S.C. § 136j(a)(2)(E), for which penalties may be assessed pursuant to Section 14(a) of FIFRA, 7 U.S.C. § 136l(a).

VIOLATION 12,272 - FMC Website Advertisement

57. In January 2012, Respondent caused a testimonial sell sheet about *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545 to be posted on Respondent's website on the product's webpage.

58. The testimonial sell sheet about *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545 that was posted on product's webpage in January 2012 constituted an "advertisement" under 40 C.F.R. § 152.168.

59. Respondent's conduct described in paragraph 57 above constituted "advertis[ing]" under Section 12(a)(2)(E) of FIFRA, 7 U.S.C. § 136j(a)(2)(E).

60. Respondent's testimonial sell sheet about *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545 that was posted on the product's webpage in January 2012 did not include the statement "Restricted Use Pesticide."

61. Respondent's testimonial sell sheet about *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545 that was posted on the product's webpage in January 2012 did not include any statement of the terms of restriction of *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545.

62. By failing to include the statement "Restricted Use Pesticide" or a statement of the terms of restrictions of *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545, Respondent's testimonial advertisement about *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545 that was posted on the product's webpage January 2012 violated 40 C.F.R. § 152.168.

63. Causing the testimonial advertisement about *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545 to be posted on product's webpage in January 2012 constituted at least one act of advertising under Section 12(a)(2)(E) of FIFRA, 7 U.S.C. § 136j(a)(2)(E), by Respondent.

64. Based on the allegations in paragraphs 16-21 and 57-63 above, Respondent committed at least one unlawful act under Section 12(a)(2)(E) of FIFRA, 7 U.S.C. § 136j(a)(2)(E), for which penalties may be assessed pursuant to Section 14(a) of FIFRA, 7 U.S.C. § 136l(a).

VIOLATION 12,273 - PRWeb Website Advertisement

65. Respondent caused an article about *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545 entitled "FMC Announces Stallion™ Insecticide for Multi-Crop Use", dated February 10, 2011, to be posted on the *PRWeb* online news distribution and publicity website.

66. The article about *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545, dated February 10, 2011, that was posted on the *PRWeb* website constituted an "advertisement" under 40 C.F.R. § 152.168.

67. Respondent's conduct described in paragraph 65 above constituted "advertis[ing]" under Section 12(a)(2)(E) of FIFRA, 7 U.S.C. § 136j(a)(2)(E).

68. Respondent's article about *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545, dated February 10, 2011, that was posted on the *PRWeb* website did not include the statement "Restricted Use Pesticide."

69. Respondent's article about *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545, dated February 10, 2011, that was posted on the *PRWeb* website did not include any statement of the terms of restrictions of *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545.

70. By failing to include the statement "Restricted Use Pesticide" or a statement of the terms of restrictions of *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545, Respondent's advertisement

about *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545, dated February 10, 2011, that was posted on the *PRWeb* website violated 40 C.F.R. § 152.168.

71. Causing the advertisement about *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545, entitled “FMC Announces Stallion™ Insecticide for Multi-Crop Use”, dated February 10, 2011, to be posted on the *PRWeb* website constituted at least one act of advertising under Section 12(a)(2)(E) of FIFRA, 7 U.S.C. § 136j(a)(2)(E), by Respondent.

72. Based on the allegations in paragraphs 16-21 and 65-71 above, Respondent committed at least one unlawful act under Section 12(a)(2)(E) of FIFRA, 7 U.S.C. § 136j(a)(2)(E), for which penalties may be assessed pursuant to Section 14(a) of FIFRA, 7 U.S.C. § 136l(a).

DISTRIBUTION OR SALE OF MISBRANDED PESTICIDES

VIOLATIONS 12,274-12,379 – Distribution or Sale of Misbranded Pesticides

73. The allegations contained in paragraphs 1-72 of this Complaint are incorporated by reference herein as though fully set forth at length.

74. Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), makes it unlawful for any person in any State to distribute or sell to any person any pesticide which is misbranded.

75. Section 2(q)(1)(A) of FIFRA, 7 U.S.C. § 136(q)(1)(A), defines a pesticide as being “misbranded” if its labeling bears any statement, design, or graphic representation relative thereto or to its ingredients which is false or misleading in any particular.

76. EPA regulations at 40 C.F.R. § 156.10(b) state in pertinent part:

- (1) The name, brand, or trademark under which the pesticide product is sold shall appear on the front panel of the label.
- (2) No name, brand, or trademark may appear on the label which:
 - (i) Is false or misleading, or

- (ii) Has not been approved by EPA through registration or supplemental registration as an additional name pursuant to § 152.132.

77. On or about January 24, 2011, Respondent submitted a notification to EPA under EPA's October 22, 1998 *Pesticide Registration Notice (PR) 98-10: Notifications, Non-Notifications and Minor Formulation Amendments* ("PRN 98-10") requesting that the name *Stallion Insecticide* be added as an alternate brand name for *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545.

78. EPA issued PRN 98-10 pursuant to authority of 40 C.F.R. § 152.46. PRN 98-10 permits a registrant to add an alternate brand name by notification (i.e., instead of by amendment) and to begin using the alternate brand name upon EPA's receipt of the notification so long as the alternate brand name is consistent with both PRN 98-10 and 40 C.F.R. § 152.46 and is not disapproved. Pursuant to 40 CFR 152.46(c), EPA may initiate regulatory or enforcement action without first providing the registrant with an opportunity to submit an application for amended registration if it determines that a product has been modified through notification in a manner inconsistent with PRN 98-10 or 40 C.F.R. § 152.46.

79. On or about March 11, 2011, Respondent began distributing or selling *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545 with a label that identifies the brand name of the product as *Stallion Insecticide*.

80. On April 28, 2011, EPA sent Respondent a letter finding Respondent's January 24, 2011 notification to fall outside of the scope of PRN 98-10, and notifying Respondent that, even if the request was processed as an amendment, *Stallion Insecticide* would be denied as an alternate brand name for *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545 on the basis that it is considered to be false or misleading since the product is not for use on horses.

81. On March 2, 2012, Respondent submitted a notification to EPA under PRN 98-10 requesting that *Stallion Insecticide (Not for use on horses)* be added as an alternate brand name for *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545.

82. On March 19, 2012, EPA sent Respondent a letter finding Respondent's March 2, 2012 submission to require further review, determining that the request needed to be processed as an amendment (i.e., Respondent's submission did not qualify under PRN 98-10 for notification), and clarifying that the proposed label accompanying Respondent's March 2, 2012 submission is being considered as a "proposed draft".

83. On April 2, 2012, EPA sent Respondent a letter stating *inter alia* that *Stallion Insecticide (Not for use on horses)* is an acceptable alternate brand name for *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545.

84. On April 13, 2012, Respondent submitted an amendment to EPA which included revised labeling to add *Stallion Insecticide (Not for use on horses)* as an alternate brand name for *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545, and to address other label deficiencies identified in EPA's April 2, 2012 letter.

85. On April 23, 2012, EPA sent Respondent a letter stating *inter alia* that the amended label Respondent submitted on April 13, 2012 is acceptable.

86. By using the brand name *Stallion Insecticide* for *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545, Respondent caused *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545 to be in violation of 40 C.F.R. §§ 156.10(b)(2)(i) and (ii), and to be misbranded as defined by Section 2(q)(1)(A) of FIFRA, 7 U.S.C § 136(q)(1)(A).

87. From April 29, 2011 through April 2, 2012, on at least 106 separate occasions, Respondent sold one or more units of *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545 with

labels that identified the brand name of the product as *Stallion Insecticide* to various individuals, partnerships, associations, corporations, or any organized groups of persons whether incorporated or not.

88. Each sale of *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545 described in paragraph 87 above was a “distribution or sale” of a “pesticide” and “pesticide product” that was “misbranded” to a “person” as these terms are defined in Section 2 of FIFRA, 7 U.S.C. § 136, and 40 C.F.R. § 152.3.

89. Based on the allegations in paragraphs 73-88 above, Respondent committed at least 106 separate unlawful acts under Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), for which penalties may be assessed pursuant to Section 14(a) of FIFRA, 7 U.S.C. § 136l(a).

V. PROPOSED CIVIL PENALTY

Section 14(a)(1) of FIFRA, 7 U.S.C. § 136l(a)(1), provides that any registrant, commercial applicator, wholesaler, dealer, retailer, or other distributor who violates any provision of FIFRA may be assessed a civil penalty of not more than \$5,000 for each offense. Pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Debt Collection Improvement Act of 1996 (“DCIA”), and the subsequent Civil Monetary Penalty Inflation Adjustment Rule, 40 C.F.R. Part 19 (“Penalty Inflation Rule”), violations of FIFRA which occur subsequent to January 12, 2009 are subject to a statutory maximum penalty of \$7,500 per violation. 78 *Fed. Reg.* 66643, 66647 (November 6, 2013).

On the basis of the violations of FIFRA alleged above, Complainant has determined that Respondent is subject to penalties under Section 14(a)(1) of FIFRA. Pursuant to 40 C.F.R. § 22.14(a)(4)(ii), Complainant is not proposing a specific penalty at this time, but will do so at a later date after an exchange of information has occurred. See 40 C.F.R. § 22.19(a)(4).

For purposes of determining the amount of any penalty to be assessed, Section 14(a)(4) of FIFRA, 7 U.S.C. § 136l(a)(4), requires EPA to 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. Complainant will also take into account the particular facts and circumstances of this case with specific reference to EPA's December 2009 *FIFRA Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act* ("FIFRA ERP"), and EPA's December 6, 2013 *Amendments to the U.S. Environmental Protection Agency's Civil Penalty Policies to Account for Inflation (Effective December 6, 2013)*, copies of which are attached hereto. Together, these policies seek to provide a rational, consistent and equitable methodology for applying to particular cases the statutory penalty factors set forth above.

As its basis for calculating a specific penalty after an exchange of information has occurred pursuant to 40 C.F.R. § 22.19(a)(4), Complainant will consider, among other factors, facts or circumstances unknown to Complainant at the time of issuance of the Complaint that become known after the Complaint is issued. The proposed penalty may be adjusted further if the Respondent produces information and/or documentation to demonstrate a *bona fide* issue of ability to pay or to establish other defenses relevant to the appropriate amount of the proposed penalty. It is the Respondent's responsibility to come forward with specific evidence regarding any claimed inability to pay a penalty.

Pursuant to Section 14(a)(1) and (4) of FIFRA, 7 U.S.C. § 136l(a)(1) and (4), the DCIA and Penalty Inflation Rule, Complainant may propose the assessment of a civil penalty of up to \$7,500 against Respondent for each of the violations alleged in this Complaint. The penalty to be proposed does not constitute a "demand" as that term is defined in the Equal Access to Justice

Act, 28 U.S.C. § 2412. Pursuant to 40 C.F.R. § 22.14(a)(4)(ii), an explanation of the number of and severity of violations is provided below.

Complainant alleges that Respondent's size of business is "Category I" under the FIFRA ERP because it is a Section 14(a)(1) violator with gross revenues over \$10,000,000 a year. Complainant also alleges 12,273 independent separate acts of advertising by Respondent in which Respondent failed to give the restricted use classification for *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545. Each act of advertising was primarily intended to induce distributors, retailers and other consumers to purchase *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545 from Respondent. Distributors, retailers and other consumers were deprived of basic information about the risks and restrictions associated with *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545 necessary to make informed decisions about its appropriate sale, purchase and use due to Respondent's failure to give the restricted use classification in its advertisements. For the reasons above and given the inherent potential for unreasonable adverse effects on the environment, including injury to the applicator, associated with pesticides classified as RUPs, EPA views Respondent's alleged violations of the regulatory restrictions governing the advertisement of RUPs to be very serious. According to the FIFRA ERP, violations of Section 12(a)(2)(E) of FIFRA, 7 U.S.C. § 136j(a)(2)(E), are considered to be gravity "Level 2" which, together with Respondent's size of business, translates to a base penalty of \$7,150 for each of the 12,273 advertising violations alleged in the Complaint. In proposing a penalty for the advertising violations, however, EPA will also consider the case specific factors discussed in the FIFRA ERP and make appropriate adjustments to the base penalty based on the pesticide's characteristics, potential harm to human health and/or the environment, and Respondent's compliance history and culpability.

Additionally, Complainant alleges at least 106 distribution or sales of *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545 that were misbranded as *Stallion Insecticide* by Respondent between April 29, 2011 and April 2, 2012. Such distributions or sales took place after Respondent was specifically informed by EPA that the proposed alternate brand name *Stallion Insecticide* was denied, and was considered to be false or misleading because the name contains an actual use site, i.e., horses, for which the product is not registered. Respondent's conduct not only caused potential harm to the FIFRA registration program but also potential harm to retailers, distributors and other consumers who could have been misled as to the product's appropriate use. For the reasons above, EPA considers Respondent's alleged misbranding violations also to be very serious. According to the FIFRA ERP, violations of Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), are considered to be gravity "Level 2" which, together with Respondent's size of business, translates to a base penalty of \$7,150 for each of the 106 misbranding violations alleged in the Complaint. In proposing a penalty for the misbranding violations, however, EPA will also consider the case specific factors discussed in the FIFRA ERP and make appropriate adjustments to the base penalty based on the pesticide's characteristics, potential harm to human health and/or the environment, and Respondent's compliance history and culpability.

VI. NOTICE AND OPPORTUNITY TO REQUEST A HEARING

Respondent has the right to request a hearing to contest any matter of law or material fact in this Complaint. To request a hearing, Respondent must file a written Answer to the Complaint, within thirty (30) days of receipt of this Complaint, with:

Lydia A. Guy, Regional Hearing Clerk (3RC00)
U.S. EPA, Region III
1650 Arch Street
Philadelphia, PA 19103-2029

The Answer should clearly and directly admit, deny, or explain each of the factual allegations contained in this Complaint of which the Respondent has any knowledge. Where Respondent has no knowledge of the facts contained in an allegation, the Answer should so state. The Answer should contain: (1) the circumstances or arguments which are alleged to constitute the grounds of any defense, (2) the facts which the Respondent disputes, (3) the basis for opposing any proposed relief, and (4) a statement of whether a hearing is requested. All material facts not denied in the Answer will be considered admitted.

If Respondent fails to file a written Answer within thirty (30) days of receipt of this Complaint, such failure shall constitute an admission of all facts alleged against Respondent in this Complaint and a waiver of Respondent's right to a hearing on the factual allegations.
Failure to file a written Answer may result in the filing of a Motion for a Default Order and the possible issuance of a Default Order without further proceedings.

Any hearing requested by Respondent will be held at a location to be determined at a later date pursuant to the Consolidated Rules of Practice at 40 C.F.R. § 22.21(d). The hearing will be conducted in accordance with the provisions of the Consolidated Rules of Practice. A copy of Respondent's Answer and all other documents that the Respondent files in this action should be sent to the attorney assigned to represent Complainant in this case, at:

Jennifer M. Abramson (3RC50)
U.S. EPA Region III
1650 Arch Street
Philadelphia, PA 19103-2029.

VII. SETTLEMENT CONFERENCE

Complainant encourages settlement of this proceeding at any time after issuance of the Complaint if the settlement is consistent with the provisions and objectives of FIFRA. Whether or not a hearing is requested, Respondent may request a settlement conference with the

Complainant to discuss the allegations of the Complaint, and an appropriate civil penalty.

However, a request for a settlement conference does not relieve Respondent of its responsibility to file a timely Answer to the Complaint.

The procedures in the Consolidated Rules of Practice for quick resolution of a proceeding do not apply at this time because a specific penalty has not yet been proposed. *See* 40 C.F.R. § 22.18(a).

In the event settlement is reached, its terms shall be expressed in a written Consent Agreement prepared by Complainant, signed by the parties, and incorporated into a Final Order signed by the Regional Administrator or his designee. The filing of a Consent Agreement shall constitute a waiver of Respondent's right to contest the allegations of the Complaint and to appeal the Final Order accompanying the Consent Agreement.

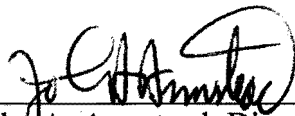
If Respondent wishes to arrange a settlement conference, Respondent's legal counsel should contact Ms. Abramson at (215) 814-2066 prior to the expiration of the thirty (30) day period following the receipt of this Complaint. Once again, however, such a request for a settlement conference does not relieve Respondent of its responsibility to file an Answer within thirty (30) days following Respondent's receipt of this Complaint.

VIII. SEPARATION OF FUNCTIONS AND EX PARTE COMMUNICATIONS

The staff of the following offices are designated as the trial staff to represent the Agency as a party in this case: the Region III Office of Regional Counsel, the Region III Land and Chemicals Division, the Office of the EPA Assistant Administrator for Pesticides and Toxic Substances, and the EPA Assistant Administrator for Enforcement and Compliance Assurance. Commencing from the date of the issuance of this Complaint until issuance of a final Agency decision in this case, neither the Administrator, members of the Environmental Appeals Board, the Presiding Officer, the Regional Administrator, nor the Regional Judicial Officer, may have

an *ex parte* (unilateral) communication with the trial staff on the merits of any issue involved in this proceeding. Please be advised that the Consolidated Rules of Practice prohibit any *ex parte* discussion of the merits of a case between either party to this proceeding and the Administrator, members of the Environmental Appeals Board, the Presiding Officer, the Judicial Officer, the Regional Administrator, Regional Judicial Officer, Administrative Law Judge, or any person likely to advise these officials in the decision of the case, after the Complaint is issued.

9.23.15
Date



John A. Armstead, Director
Land and Chemicals Division

BEFORE THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Region III
1650 Arch Street
Philadelphia, Pennsylvania 19103-2029

FMC Corporation
1735 Market Street
Philadelphia, PA 19103

Respondent

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DOCKET NO: FIFRA-03-2015-0248

CERTIFICATE OF SERVICE

I certify that the foregoing ADMINISTRATIVE COMPLAINT AND NOTICE OF OPPORTUNITY FOR HEARING in the above referenced matter was sent this day in the following manner to the below addressees.

Original and one copy by hand-delivery:

Lydia Guy, Regional Hearing Clerk

Copy by Certified Mail


Pierre R. Brondeau, President
FMC Corporation
1735 Market Street
Philadelphia, PA 19103

Kathryn E. Szmuszkovicz, Esq.
Beveridge & Diamond PC
1350 I Street, NW - Suite 700
Washington, DC 20005-3311

RECEIVED
2015 SEP 24 AM 10:49
REGIONAL HEARING CLERK
EPA REGION III, PHILA. PA

SEP 24 2015

Date


Jennifer M. Abramson (3RC50)
Senior Assistant Regional Counsel
U.S. EPA, Region III

