ENFORCEMENT RESPONSE POLICY
FOR THE
FEDERAL INSECTICIDE, FUNGICIDE, AND RODENTICIDE ACT (FIFRA)

Office of Compliance Monitoring
Office of Pesticides and Toxic Substances
U.S. Environmental Protection Agency

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07/02/90

ENFORCEMENT RESPONSE POLICY FOR THE FEDERAL INSECTICIDE, FUNGICIDE, AND RODENTICIDE ACT (FIFRA)

INTRODUCTION

This document sets forth the procedures and criteria that will be used to determine the appropriate enforcement response for violations of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). The FIFRA Enforcement Response Policy (ERP) is designed to provide fair and equitable treatment of the regulated community by ensuring that similar enforcement responses and comparable penalty assessments will be made for comparable violations. The policy is designed to provide for swift resolution of environmental problems and to deter future violations of FIFRA by the respondent as well as other members of the regulated community.

This policy supersedes the previous FIFRA Civil Penalty Assessment Guidelines published in the Federal Register on July 31, 1974 (39 FR 27711). There have been many amendments to the statute, as well as EPA rulemaking, since the 1974 FIFRA Civil Penalty Assessment Guidelines, which are incorporated into this revised FIFRA ERP. Also superseded by this FIFRA ERP are: the 1983 Level of Action Policy published as section 2 of Chapter 5 of the FIFRA Compliance/Enforcement Guidance Manual; the June 8, 1981 Guidance for the Enforcement of the Child-Resistant Packaging Regulation; and the June 11, 1981 FIFRA Enforcement Policy - Interim Penalty Guidelines.

Except for the civil penalty assessment matrix, the February 10, 1986 FIFRA Section 7(c) Enforcement Response Policy remains in effect, and is to be used to determine the appropriate enforcement response for FIFRA section 7(c) violations. The matrix setting forth the penalties in this policy should be used instead of the matrix in the February 10, 1986 policy. Additional supplements to the FIFRA ERP will be forthcoming which will more clearly discuss the appropriate enforcement response for violations of other specific program requirements, such as the FIFRA Good Laboratory Practice (GLP) Standards and the FIFRA section 19 regulations.

OVERVIEW OF THE POLICY

This FIFRA Enforcement Response Policy (ERP) is divided into three main sections. The first section, "Determining the Level of Action," briefly describes the Agency's options for responding to violations of FIFRA. Section 2 of this ERP, "Assessing Administrative Civil Penalties," elaborates on the Agency's policy and procedures for calculating civil penalties to be assessed against persons who violate FIFRA. Section 2 also contains the Agency's policy for negotiating a "settlement with conditions" for civil penalties issued under FIFRA. The third section of this policy contains the appendices necessary for calculating civil penalties. The four appendices to this ERP are: (1) Appendix A - FIFRA Charges and Gravity Levels; (2) Appendix B - Gravity Adjustment Criteria; (3) Appendix C - The Summary of Tables; and, (4) Appendix D - The FIFRA Civil Penalty Calculation Worksheet.

Guidance on the appropriate enforcement response for violations of specific FIFRA programs, such as the FIFRA Good Laboratory Practice Standards,* FIFRA section 19 recall requests,* or FIFRA section 7(c) Pesticide Producing Establishment Reporting Requirements, should be attached as additional appendices, and used in conjunction with the overall FIFRA ERP.

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* Enforcement response policies for the Good Laboratory Practice Standards, and the FIFRA section 19 regulations will be forthcoming.

DETERMINING THE LEVEL OF ACTION

Once the documentation of a FIFRA violation is complete, the appropriate level of action called for by the severity of the violation needs to be selected. These levels of response include:

- Notices of Detention under section 17(c);
- Notices of Warning under sections 9(c)(3), 14(a)(2), and 14(a)(4);
- Stop Sale, Use, or Removal Orders under section 13(a);
- Seizures under section 13(b);
- Injunctions under section 16(c);
- Civil administrative penalties under section 14(a);
- Denials, suspensions, modifications, or revocations of applicator certifications under 40 CFR Part 171;
- Criminal referrals under section 14(b); and
- Recalls.

Notices of Detention

A shipment of a pesticide or device being imported into the United States cannot be brought into the country until EPA makes a determination of the admissibility of that shipment. However, under the U.S. Customs' regulations for the enforcement of section 17(c) of FIFRA (19 CFR Part 12.110 - 12.117), subsequent to the receipt of a Notice of Arrival completed by the Administrator, the District Director of Customs may release a shipment to the importer or the importer's agent before an EPA inspection of the shipment. Such a release occurs only upon execution of a bond in the amount of the value of the pesticide or device, plus duty. When a shipment of pesticides is released under bond, the shipment may not be used or otherwise disposed of until the Administrator has determined the admissibility of that shipment. Should the shipment subsequently be refused entry and the importer or agent fails to return the pesticide or device, the bond is forfeited.

Section 17 of FIFRA authorizes EPA to refuse admission of a pesticide or device being imported into the United States if EPA determines that such pesticide or device violates any provisions of the Act. This refusal is known as a Notice of Detention and Hearing. Upon receiving a copy of the notice, the Department of the Treasury, through the Customs Service, will refuse delivery to the consignee. If the consignee has not requested a hearing, or has not exported the pesticide or device within 90 days from the date of the notice, the Customs Service will oversee destruction of the pesticide or device.

Notices of Warning

FIFRA sections 14(a)(2), 14(a)(4), and 9(c)(3) provide EPA with the authority to respond to certain violations of FIFRA with a Notice of Warning to the violator.

Section 14(a)(2) Notices of Warning

Under section 14(a)(2) of FIFRA, a written warning for a violation of FIFRA must be issued to a private applicator or other person not covered by section 14(a)(1) prior to the assessment of a civil penalty. Applicators who apply a registered general use pesticide as a service in controlling pests but who do not deliver any unapplied pesticides ("for hire" applicators), are also included in section 14(a)(2) but are not subject to this limitation. A "for hire" applicator may be assessed a penalty up to $500 for the first offense.

Sections 9(c)(3) and 14(a)(4)

Section 14(a)(4) of FIFRA states that EPA may choose to issue a Notice of Warning in lieu of a civil penalty if EPA determines that the violation occurred despite the exercise of due care or the violation did not cause significant harm to health or the environment. Section 9(c)(3) also permits the EPA to issue a written Notice of Warning in lieu of instituting a proceeding for minor violations of FIFRA if the Administrator believes that the public interest will be adequately served through this course of action.

Generally, a violation will be considered minor, and a section 9(c)(3) notice of warning may be issued in lieu of a civil complaint if the total "gravity adjustment value", as determined from Appendix B of this ERP, is less than three (see the section of this ERP entitled "Gravity of the Violation" and Appendix B, "Gravity Adjustment Criteria"). A Notice of Warning may also be appropriate for certain first-time record keeping violations as listed in Appendix A of this ERP (e.g., late section 7 reports).

Stop Sale, Use, or Removal Orders (SSURO)

Section 13 of FIFRA provides EPA the authority to issue a Stop Sale, Use, or Removal Order (SSURO) to any person who owns, controls, or has custody of a pesticide or device, whenever EPA has reason to believe on the basis of inspection or tests that: (1) a pesticide or device is in violation of any provision of the Act; (2) a pesticide or device has been or is intended to be distributed in violation of the Act; or, (3) when a registration of a pesticide has been cancelled by a final order or has been suspended. A civil penalty should generally be assessed in addition to the SSURO when a violation of FIFRA has occurred.

A SSURO is among the most expedient and effective remedies available to EPA in its efforts to prevent illegal sale, distribution, and use of pesticides. Its advantages over other actions (such as seizures) are that: (1) it may be issued whenever EPA has reason to believe that the product is in violation of the Act; (2) it is easier to prepare and issue than a seizure; (3) the SSURO has an effect on all of the product under the ownership, custody, or control of the individual receiving the SSURO regardless of where the product is located; (4) the SSURO can be written so as to include future amounts of the product that may come into custody of the person on whom the SSURO is served; and, (5) it can easily be adapted to particular circumstances.

As per the FIFRA Compliance Program Policy Number 3.9, issued on July 6, 1987, when a SSURO is issued to a basic registrant with regard to a registered pesticide product, the terms of the SSURO are equally applicable to the supplemental registrants of the product.

Mandatory Issuance of a SSURO

A SSURO is to be issued against persons who own, control, or have custody of pesticides in the following categories:

- Pesticides for which there is reason to believe that there is a potential hazard to man or the environment because: (1) they are not registered, or are so over-formulated, underformulated, or adulterated, as to present a serious health hazard; or, (2) they are packaged in improper or damaged containers, or are so inadequately labeled, as to make safe or effective use unlikely or impossible.

- Pesticides or devices with labeling that is materially misleading or fraudulent, and if followed by a user, is likely to cause a life-endangering health hazard or serious adverse environmental effects (a pesticide lacking a restricted use label is an especially serious labeling violation). This provision includes labeling for products that: (1) are ineffective for the purposes claimed; (2) are so chemically deficient as to affect deleteriously the product's efficacy; or, (3) bear false or misleading safety claims.

- Pesticides or hazardous devices* that are in violation of the Act and are the subject of a recall, but which the responsible party refuses to remove, is recalcitrant in removing, or is unable to remove from the channels of trade.

- Pesticides or hazardous devices that are in violation of the Act and for which a civil penalty has been issued but which have not been brought into compliance.

- Pesticides which have been suspended under FIFRA section 6.

* A hazardous device is one presenting a direct threat to human health or the environment by its use (e.g., a water treatment device whose labeling makes false, misleading, or fraudulent claims to purify raw well water or other untreated water supplies). For nonhazardous devices (e.g., an electromagnetic rodent repelling device) that are misbranded, Agency policy is to complete civil penalty proceedings before issuing a SSURO. See December 19, 1979 Memorandum: "Enforcement Actions Concerning Nonhazardous Pesticide Devices."

Discretionary Issuance of a SSURO

The EPA may also issue a SSURO in cases where there is reason to believe a product either is in violation of the Act or that the product has been or is intended to be distributed or sold in violation of the Act, and the gravity of the violation is less than that required for issuance of a mandatory SSURO. The EPA may also issue a SSURO if a product has been cancelled under any section of the Act, or suspended under FIFRA sections 4 or 3(c)(2)(B), and the existing stock deadlines have occurred at that level of sale, distribution, or use.

Use of a SSURO for Minor Violations

While EPA will usually reserve the use of a SSURO for relatively serious violations, the need to issue a SSURO may arise in certain cases involving minor violations. For example, in the face of continued and repeated minor violations, or when several minor violations appear on the label, EPA may decide to issue a SSURO to ensure that the product will be distributed or sold in compliance with the Act.

Seizures

Section 13(b) of FIFRA gives EPA the authority to initiate in rem condemnation proceedings in U.S. District Court. Once a Court grants the Agency's request for authority to conduct a seizure, FIFRA section 9(b)(3) authorizes officers or employees duly designated by the Administrator to obtain and execute warrants for the purpose of seizing any pesticide or device that is in violation of the Act. Seizures may be executed with the assistance of the U.S. Marshal.

Under FIFRA section 13(b), EPA may initiate seizure actions in District Court against any pesticide or device that is being transported or, having been transported, remains unsold or in original unbroken packages, or that is sold or offered for sale in any State, or that is imported from a foreign country, if: (1) a pesticide is adulterated or misbranded; (2) a pesticide is unregistered; (3) a pesticide has labeling which does not bear the information required by the Act; (4) a pesticide is not colored or discolored as required; (5) a pesticide bears claims or directions for use that differ from those made in connection with its registration; (6) a device is misbranded; or, (7) a pesticide or device causes unreasonable adverse effects upon the environment, even when used in accordance with the requirements imposed by the Act.

The previous examples are similar to those circumstances that would lead the Agency to issue a SSURO. Because a SSURO can be issued in less time and with less preparation than that required for a seizure, the SSURO is the preferred enforcement remedy in terms of expediency. Nevertheless, the Agency should consider initiating a seizure in the following circumstances:

- The Agency has issued a SSURO, but the recipient of the order has not complied with it;
- The Agency has reason to believe that a person, if issued a SSURO, will not comply with it;
- There exists a pesticide so hazardous that it should be removed from the marketplace, place of storage, or place of use to prevent any chance of harm to human health or the environment;
- The seizure will be used to support a recall; or
- It is necessary to dispose of products being held under a SSURO for which the responsible party has taken no corrective action and has expressed an intent not to take corrective action.

Injunctive Relief

Section 16(c) of FIFRA gives EPA the authority to initiate injunctive actions before the U.S. District Court. These actions may consist of permanent injunctions, preliminary injunctions, or temporary restraining orders.

Because an injunction is an extraordinary form of relief, the Agency's arguments must be clear and compelling. In initiating a permanent injunction action, EPA must indicate to the court that: (1) the Agency's administrative or other judicial enforcement remedies would be inadequate either at restraining the violation or at preventing unreasonable risk to human health or the environment; (2) the Agency has already diligently exercised all appropriate administrative remedies (such as SSUROs and civil penalties), yet the violation or threat of a violation continues unabated; or (3) irreparable injury, loss, or damage will result if the relief sought is not granted.

In the case of a preliminary injunction or temporary restraining order, the Agency must additionally demonstrate that: (1) immediate and irreparable injury, loss, or damage will result if the requested relief is not granted; and, (2) there is a likelihood of Agency success at trial, based on the facts before the court.

Under FIFRA, there are a number of specific circumstances that may justify injunctive relief. These include but are not limited to:

- The violation of a section 6 suspension or cancellation order;
- The violation of a SSURO where a civil penalty or criminal prosecution would not provide a timely or effective remedy to deter further violations;
- There is continued production (in violation of the FIFRA section 7 requirements), shipment, sale, distribution, or use of an unregistered pesticide after the Agency has taken civil or criminal action;
- A person continues to sell, distribute, or make available for use a restricted use pesticide (RUP) other than in accordance with FIFRA section 3(d), after the Agency has already exercised an enforcement remedy;
- A person continues to violate the FIFRA section 17 import or export requirements after the Agency has already exercised an enforcement remedy; and,
- A person continues to use a pesticide in a manner inconsistent with its labeling, in a manner contrary to an experimental use permit, or repeats any violation of FIFRA, after the Agency has already exercised an enforcement remedy.

Civil Administrative Penalties

FIFRA section 14(a)(1) states that a registrant, commercial applicator, wholesaler, dealer, or other distributor may be assessed a civil penalty of up to $5,000 for each violation of FIFRA. Section 14(a)(2) allows the Administrator to assess a private applicator or other person up to $1,000 for each violation of FIFRA, subsequent to receiving a Notice of Warning or a citation for a prior violation (the prior warning or citation may have been for the same or different FIFRA violation). Additionally, section 14(a)(2) states that an applicator who applies a registered general

use or unclassified pesticide as a service in controlling pests but does not deliver any unapplied pesticide (a "for hire applicator") may be assessed a civil penalty of not more than $500 for the first offense of FIFRA, and $1,000 for each subsequent offense.*

A civil penalty is the preferred enforcement remedy for most violations. A civil penalty is appropriate where the violation: (1) presents an actual or potential risk of harm to humans or the environment (SSUROs or injunctive relief should be pursued in addition to a civil penalty if the harm is extreme or imminent), or would impede the Agency's ability to fulfill the goals of the statute; (2) was apparently committed as a result of ordinary negligence (as opposed to criminal negligence), inadvertence, or mistake; and the violation either: (a) involves a violation under the Act by any registrant, commercial applicator, "for hire" applicator, wholesaler, dealer, retailer, or other distributor (no prior warning is required by FIFRA for violators in this category); or, (b) involves a private applicator or other person not listed in above and who has received a prior warning or citation for a FIFRA violation.

Denials, Suspensions, Modifications, or Revocations of Applicator Certifications

The regulations relating to the certification of pesticide applicators (40 CFR Part 171) authorize EPA to deny, suspend, or revoke a federally issued applicator certification if the holder of the certification violates FIFRA or its regulations. The Agency views an enforcement action affecting certification status as a very strong measure, to be taken only when the "public health, interest or welfare warrants immediate action" [40 CFR Section 171.11(f)(5)(i)]. Therefore, EPA will deny, suspend, modify, or revoke a federal certification only in response to serious violations or against persons with a history of noncompliance.

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* Any applicator, including a "for hire applicator", who holds or applies an unregistered pesticide to provide a service of controlling pests without delivering any unapplied pesticide to any person so served, will be considered a distributor of pesticides and will be subject to the higher penalties set forth in sections 14(a)(1) and 14(b)(1) of FIFRA.

Any applicator, other than a private applicator, who uses or supervises the use of a restricted use pesticide (RUP), whether or not that applicator is certified, is a commercial applicator and is subject to the higher penalties set forth in sections 14(a)(1) and 14(b)(1) of FIFRA.

Any applicator, including an applicator who is certified, who holds or applies a general use pesticide (GUP) or an unclassified pesticide in violation of FIFRA for that pesticide will be subject to the lower penalties set forth in FIFRA sections 14(a)(2) and 14(b)(2).

Denial/revocations

The denial or revocation of a certification not only deprives an applicator of the authority to apply restricted use pesticides but also, as compared to suspension of a certification, forces the applicator to take additional steps to acquire or re-acquire certification. In addition, the Agency will not consider an application to acquire or re-acquire certification for at least six months following denial or revocation. Therefore, EPA will deny or revoke a certification where: (1) a violation resulted in a fatality or created an imminent danger of a fatality; (2) a violation resulted in severe damage to the environment or created an imminent danger of severe damage to the environment; (3) a misuse violation has resulted in significant contamination of food and water; (4) the violator's certification has been suspended as a result of a previous serious violation; or (5) a person has maintained or submitted fraudulent records or reports.

If EPA pursues an action to deny, revoke, or modify an applicator's certification, EPA will notify the applicant or federal certificate holder of: (1) the ground(s) upon which the denial, revocation, or modification is based; (2) the time period during which the denial, revocation, or modification is effective, whether permanent or otherwise; (3) the conditions, if any, under which the individual may become certified or recertified; and (4) any additional conditions EPA may impose. EPA must also provide the federally certified applicator an opportunity to request a hearing prior to final Agency action to deny, revoke, or modify the certificate.

Suspensions

Generally, the Agency will pursue the less severe alternative of suspending an applicator's federal certification in response to violations by applicators who have previously been issued a civil complaint for a violation of FIFRA. The Agency will suspend an applicator's certification for up to four months for the second independent violation of FIFRA.* For each additional violation, two months may be added to the term of suspension up to a limit of eight months. The exact length of the suspension (within the limits stated above) should result in an economic loss to the applicator of at least the statutory maximum civil penalty that could have been assessed.

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* For purposes of this section of the policy, EPA will not distinguish between commercial and private applicators. Consideration of applicator status is inherent in the policy in that suspensions have a more substantial impact on commercial applicators, affecting their primary business activity.

If EPA decides to suspend certification, it must notify the applicator of the grounds upon which the suspension is based, and the time period during which the suspension will be in effect. In order for the suspension to function as a deterrent, the suspension should take effect during the time when the applicator is most likely to be applying restricted use pesticides.

Generally, a suspension is pursued against an individual applicator for a subsequent offense in addition to the issuance of a civil penalty against the employer.

EPA may also suspend certifications of commercial applicators who violate restricted use pesticides recordkeeping requirements [see 40 CFR 171.11(c)(7); 40 CFR 171.11(f)(1)(iii)]. The Agency will assess suspensions of up to two months for the second independent violation resulting from the failure to maintain restricted use pesticides records. For each additional violation, two months may be added to the term of the suspension up to a limit of six months. In cases where the violation involved keeping fraudulent records (i.e., where the violator intentionally concealed or misrepresented the true circumstances and the extent of the use of restricted use pesticides), EPA may revoke the violator's certification in response to the initial infraction.

Criminal Proceedings

Section 12 of FIFRA specifically lists the unlawful acts that are subject, not only to civil and administrative enforcement, but also to criminal investigation and penalties (see Chapter 20, "FIFRA Criminal Enforcement," of the Pesticides Inspection Manual).

Section 14(b) of FIFRA (7 U.S.C 136l) provides the authority to proceed with criminal sanctions against violators of the Act, as follows:

- A registrant, applicant for a registration, or producer who knowingly violates the Act is subject, upon conviction, to a fine of not more than $50,000 or imprisonment for up to 1 year, or both.

- A commercial applicator of a restricted use pesticide, or any other person not described above who distributes or sells pesticides or devices, who knowingly violates the Act is subject, upon conviction, to a fine of not more than $25,000 or imprisonment for up to 1 year, or both.

- A private applicator or other person not included above who knowingly violates the Act is subject, upon conviction, to a fine of not more than $1,000, or imprisonment for not more than 30 days, or both.

In addition, pursuant to the Alternatives Fines Act (18 U.S.C. 3571) the FIFRA criminal fine amounts may be substantially increased if the violation results in death.

All acts of the regulated community exhibiting actual or suspected environmental criminal conduct should be discussed with EPA Regional or Headquarter's Criminal Enforcement Counsel or to the Office of Criminal Investigations for an assessment and possible investigation.

Parallel Criminal and Civil Proceedings

Civil/administrative and criminal enforcement actions may be conducted simultaneously whenever deemed necessary by the EPA Assistant Administrator for the Office of Enforcement in order to seek immediate relief to protect human health or the environment. Simultaneous civil actions and criminal proceedings may be appropriate if the environmental consequences of a violation pose a hazard requiring remedial measures by a defendant.

The State and Federal Roles in Criminal Enforcement of FIFRA

State primacy for pesticide use violations, under FIFRA sections 26 and 27, also applies to criminal FIFRA use violations. States are initially allowed 30 days to commence appropriate enforcement actions for such violations. However, criminal violations which do not constitute pesticide use violations may be investigated and prosecuted on the Federal level without waiting for State authorities to exercise their primary enforcement responsibility. The State should be informed of any criminal investigation being conducted within their State.

Violations of a cancellation or suspension order, an EPA stop sale, use, or removal order (SSURO), fraudulent labeling, advertising, or registration of a pesticide are among those types of FIFRA violations for which States do not have primary enforcement authority. Even where there is a FIFRA pesticide use violation, the States can choose to waive their primary enforcement responsibility to allow Federal criminal enforcement action to be undertaken.

FIFRA's Relationship to Other Federal Criminal Laws

Possible criminal environmental offenses should be brought promptly to the attention of EPA Criminal Enforcement Counsel, Special Agents in the Office of Criminal Investigations, or the appropriate state authorities. This is true even if the suspected criminal activity does not appear to be a violation of FIFRA. The criminal conduct may also be amenable to prosecution under one of the other environmental laws or one of the general criminal laws.

For instance, submission of false registration information may not only constitute a violation of FIFRA, but also the Federal false statement statute and conspiracy laws. The unlawful disposal of pesticides may be a criminal violation of the Resource Recovery and Conservation Act (RCRA) or, if the disposal was into a river, such conduct could be a criminal violation of the Clean Water Act. Which statute to proceed under may not be decided until the investigation is almost complete and may depend on factors such as the evidence available to establish an offense and the different penalty levels of the involved statutes.

Recalls

In general, under FIFRA sections 19(b)(3) and (4), if a registration of a pesticide has been suspended and cancelled, and EPA finds that a recall is necessary to protect public health or the environment, EPA will request that a voluntary or mandatory recall be conducted. Additionally, the EPA will continue its policy of initiating formal and informal recalls in cases where a product is either potentially hazardous when used as directed, ineffective for the purposes claimed, or violative in nature. Formal and informal recalls are not authorized under the statute. Therefore, the effectiveness of a formal or informal recall action is contingent on the cooperation of the company involved.

Voluntary and Mandatory Recalls

A voluntary recall may be appropriate if a product is suspended and cancelled and the voluntary recall will be sufficient to protect human health or the environment. If not, mandatory recall procedures issued as a regulation under FIFRA sections 19(b)(3) and (4) may require registrants, distributors, or sellers of a pesticide to recall the pesticide; to make available storage facilities to accept and store existing stocks of the suspended and cancelled pesticide; to inform the EPA of the location of the storage facility; and to inform the EPA of the progress of the recall. The parties

subject to the recall must also provide transportation of the pesticide, on request; and take reasonable steps to inform holders of the recall and transportation provisions. Persons conducting the recall must comply with transportation, storage and disposal requirements. The criteria for the recall plans will be issued under FIFRA section 19(b) through the 40 CFR Part 165.

Formal and Informal Recalls

The Agency should consider a formal or informal recall of a product when, among other things, its use as directed by the label is likely to result in: (1) injury to the user or handler of the product; (2) injury to domestic animals, fish, wildlife, or plant life; (3) physical or economic injury because of ineffectiveness or due to the presence of actionable residues; or (4) identifiable adverse effects on the environment. A product does not have to be suspended or cancelled in order for EPA to decide that requesting a formal or informal recall is appropriate.

A formal or informal recall must only be requested where the evidence clearly supports the need for such action. The initial decision that a product should be withdrawn from the market will be based on information in the sample file including laboratory analysis, staff evaluations and opinions, and such other information as may be available. All information supporting a recall decision must be included in the official file.

Formal recalls are used for more serious problems and when it is essential that EPA regional personnel follow-up the recall with a visit to the company. Formal recall involves EPA monitoring, detailed reporting by the company involved, and notification to State officials. This type of recall is normally accompanied by another enforcement action, generally a civil penalty.

An informal recall should be used in cases where a recall is necessary but the level of potential hazard is not great or when it is unlikely that significant amounts of the defective product remain in the marketplace. An informal recall is conducted entirely by the company involved with no monitoring by EPA or State officials.

Press Releases/Advisories, Etc.

Regions may, at their discretion, issue a press release/advisory to notify the public of a person's violation of FIFRA. However, the issuance of press release/advisory must not be an item of negotiation during settlement.

A press release/advisory can be a useful tool to notify the public of a person's noncompliance with FIFRA and to educate the public on the requirements of FIFRA.

ASSESSING ADMINISTRATIVE CIVIL PENALTIES

FIFRA section 14(a)(1) states that a registrant, commercial applicator, wholesaler, dealer, or other distributor may be assessed a civil penalty of up to $5,000 for each violation of FIFRA. Section 14(a)(2) allows the Administrator to assess a private applicator or other person up to $1,000 for each violation of FIFRA, subsequent to receiving a Notice of Warning or a citation for a prior violation. Additionally, section 14(a)(2) states that an applicator who applies a registered general use pesticide as a service in controlling pests but does not deliver any unapplied pesticide (a "for hire applicator") may be assessed a civil penalty of not more than $500 for the first offense of FIFRA, and $1,000 for each subsequent offense.

Additionally, as the statutory definitions of "distribute or sell" and "commercial applicator" indicate, and as the conference report for the Federal Pesticide Act of 1978 confirms (Senate Report No. 95-1188; September 12, 1978; page 44 and 45), any applicator, including a "for hire" applicator, who holds or applies an unregistered pesticide to provide a service of controlling pests without delivering any unapplied pesticide to any person so served, will be considered a distributor of pesticides and will be subject to the higher penalties set forth in sections 14(a)(1) and 14(b)(1) of FIFRA. Additionally, any applicator, other than a private applicator, who uses or supervises the use of a restricted use pesticide (RUP), whether or not that applicator is certified, is a commercial applicator and is subject to the higher penalties set forth in sections 14(a)(1) and 14(b)(1) of FIFRA. Finally, any applicator, even if that applicator is certified, who holds or applies a general use pesticide (GUP) or an unclassified pesticide in violation of FIFRA will be subject to the lower penalties set forth in FIFRA sections 14(a)(2) and 14(b)(2).

The FIFRA Civil Penalty System - Computation of the Penalty

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

Computation of the penalty amount is determined in a five stage process in consideration of the FIFRA section 14(a)(4) criteria listed above. These steps are: (1) determination of gravity or "level" of the violation using Appendix A of this ERP; (2) determination of the size of business category for the violator, found in Table 2; (3) use of the FIFRA civil penalty matrices found in Table 1 to determine the dollar amount associated with the gravity level of violation and the size of business category of the violator; (4) further gravity adjustments of the base penalty in consideration of the specific characteristics of the pesticide involved, the actual or potential harm to human health and/or the environment, the compliance history of the violator, and the culpability of the violator, using the "Gravity Adjustment Criteria" found in Appendix B; and, (5) consideration of the effect that payment of the total civil penalty will have on the violator's ability to continue in business, in accordance with the criteria established in this ERP. A proposed civil penalty may be further modified during the course of settlement negotiations in accordance with the section of this ERP entitled "Adjusting the Proposed Civil Penalty in Settlement."

Use of the FIFRA Civil Penalty Matrix

The gravity of the violation and the size of the business are considered in the FIFRA Civil Penalty Matrices shown in Table 1. 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. Since 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 section 14(a)(2) penalty matrix will only be used by the Agency for persons falling under FIFRA section 14(a)(2) who have previously been issued a notice of warning or civil complaint (FIFRA section 14(a)(2) states that private applicators are only subject to civil penalties subsequent to receiving a Notice of Warning or following a citation for a prior violation, and "for hire" applicators are only subject to a maximum $500 civil penalty for their first offense of FIFRA). The Agency has only included three levels in the section 14(a)(2) Civil Penalty Matrix, rather than the four levels provided in the section 14(a)(1) matrix. This is because the Agency does not believe that the lower base penalty figure that can be obtained from a "level 4" is appropriate for violations of the statute committed after the receipt of a notice of warning or civil complaint.

When a civil penalty is the appropriate response for a first-time violation by a "for hire applicator" who violates any provision of FIFRA while holding or applying a registered general use pesticide or a registered unclassified pesticide, that civil penalty will be the statutory maximum of $500. Subsequent violations will be assessed using the FIFRA section 14(a)(2) civil penalty matrix below.

TABLE 1

CIVIL PENALTY MATRIX FOR FIFRA SECTION 14(a)(1)

SIZE OF BUSINESS

LEVEL	I	II	III
level 1	5,000	5,000	5,000
level 2	5,000	4,000	3,000
level 3	4,000	3,000	2,000
level 4	3,000	2,000	1,000

CIVIL PENALTY MATRIX FOR FIFRA SECTION 14(a)(2) *

SIZE OF BUSINESS

LEVEL	I	II	III
level 1	1,000	1,000	1,000
level 2	1,000	800	600
level 3	800	600	500

This 14(a)(2) matrix is only for use in determining civil penalties issued subsequent to a notice of warning or following a citation for a prior violation, or in the case of a "for hire" applicator using a registered general use pesticide, subsequent to the issuance of a civil penalty of $500.

***Gravity Based Penalty Matrix For FIFRA Violations Which Occur After January 30, 1997**

FIFRA § 14(a)(1)
SIZE OF BUSINESS

LEVEL	I	II	III
LEVEL 1	$5,500	$5,500	$5,500
LEVEL 2	$5,500	$4,400	$3,300
LEVEL 3	$4,400	$3,300	$2,200
LEVEL 4	$3,300	$2,200	$1,100

FIFRA § 14(a)(2)
SIZE OF BUSINESS

LEVEL	I	II	III
LEVEL 1	$1,100	$1,100	$1,100
LEVEL 2	$1,100	$880	$660
LEVEL 3	$880	$660	$500

***Gravity Based Penalty Matrix to supplement General FIFRA Enforcement Response Policy(ERP) (7/2/90) and the FIFRA Section 7(c) ERP (2/10/86) for violations that occur after January 30, 1997. Insert behind page 19 and page C-1 in the appendix.**

Size of Business

In order to provide equitable penalties, the civil penalties that will be assessed for violations of FIFRA will generally decrease as the size of the business decreases, and vice versa. Size of business is determined from an individual's or a company's gross revenues from all revenue sources during the prior calendar year. If the revenue data for the previous year appears to be unrepresentative of the general performance of the business or the income of the individual, an average of the gross revenues for the three previous years may be used. Further, the size of business and gross revenue figures are based on the entire corporation rather than a specific subsidiary or division of the company which is involved with the violation (including all sites owned or controlled by the foreign or domestic parent company), unless the subsidiary or division is independently owned.

As shown in the FIFRA Civil Penalty Matrices in Table 1, the appropriateness of the penalty to the size of the business of the person charged is based on three distinct "size of business" categories. Further, because the gross revenues of the persons listed in FIFRA section 14(a)(1) [registrants, commercial applicators, wholesalers, dealers, retailers, or other distributors] will generally be higher than the gross incomes of the persons listed in FIFRA section 14(a)(2) [private applicators and other persons not listed in 14(a)(1)], the policy has separate "size of business" categories for FIFRA section 14(a)(1) persons and section 14(a)(2) persons. The "size of business" categories for FIFRA section 14(a)(1) and section 14(a)(2) violators are listed in Table 2.

TABLE 2

For section 14(a)(1) violators, the size of business categories are:

I	-	over $1,000,000
II	-	$300,001 - $1,000,000
III	-	$0 - $300,000

For section 14(a)(2) violators, the categories are:

I	-	over $200,000
II	-	$50,001 - $200,000
III	-	$0 - $50,000

When information concerning an alleged violator's size of business is not readily available, the penalty is to be calculated using the Category I size of business. The Category I size of business will remain the base penalty value unless the violator can establish, at their expense and to the Agency's satisfaction, that it should be considered in a smaller size of business category.

Gravity of the Violation

Determination of the gravity of the violation is a two step process: (1) determination of the appropriate "gravity level" that EPA has assigned to the violation, and (2) the adjustment of that base penalty figure, as determined from the gravity level, to consider the actual set of circumstances that are involved in the violation.

The gravity "level" established for each violation of FIFRA is listed in Appendix A of this ERP. The "levels" assigned to each violation of FIFRA represents an assessment of the relative gravity of each violation. The relative gravity of each violation is based on an average set of circumstances which considers the actual or potential harm to human health and/or the environment which could result from the violation, or 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.

As the actual circumstances of the violation differ from the "average" circumstances assumed in each gravity level of the Civil Penalty Matrices, the dollar amount derived from the matrix should be adjusted upward or downward. 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. Under the FIFRA civil penalty system, 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, within the statutory maximum ($5,000 for section 14(a)(1) persons and $1,000 for 14(a)(2) persons), based on the total gravity values in Table 3.

TABLE 3

Total Gravity Value	Enforcement Remedy
3 or below	No action, Notice of Warning, or 50% reduction of matrix value.*
4	Reduce matrix value 40%
5	Reduce matrix value 30%
6	Reduce matrix value 20%
7	Reduce matrix value 10%
8 to 12	Assess matrix value
13	Increase matrix value 10%**
14	Increase matrix value 15%**
15	Increase matrix value 20%**
16	Increase matrix value 25%**
17 or above	Increase matrix value 30%**

* 50% reduction of matrix value is recommended where multiple count violations exist.

** Matrix value can only be increased to the statutory maximum of $5,000 per offense for persons under FIFRA section 14(a)(1), and $1,000 for persons under FIFRA section 14(a)(2).

Gravity Adjustments for Recordkeeping and Reporting Violations

The gravity of recordkeeping and reporting violations are already considered in the dollar amounts presented in the FIFRA civil penalty matrices. Further, recordkeeping and reporting violations do not lend themselves to utilizing the gravity adjustments listed in Appendix B. Therefore, first-time civil penalties should be assessed at the matrix value, while subsequent penalties should be increased by an increment of 30% (up to the statutory maximum).

Ability to Continue in Business/Ability to Pay

Section 14(a)(4) of FIFRA requires the Agency to "consider" the effect of the penalty on the person's ability to continue in business when determining the amount of the civil penalty.

EPA will generally not collect a total civil penalty which exceeds a violator's ability to pay. There are three methods that EPA has chosen to determine a violator's ability to pay, depending on the specifics of the case: (1) a detailed tax, accounting, and financial analysis; (2) a guideline of four percent of average gross annual income; or, (3) ABEL (a computer model).* The latter two are described below.

Four percent of gross sales. The average gross income (from all sources of revenue) for the current year and the prior three years will be calculated. Even where the net income is negative, four percent of gross income will be used as the "ability to continue in business/ability to pay" guidance, since companies with a positive gross income will be presumed to have sufficient cash flow to pay penalties even where there have been net losses. For corporations, EPA will consider revenues from the total corporate entity in its determination of ability to pay/ability to continue in business. Total corporate entity refers to all sites owned and controlled by the foreign or domestic parent company.

ABEL. ABEL is an EPA computer model that is designed to assess a for-profit entity's ability to pay. The evaluation is based on the estimated strength of internally-generated cash flows. The program uses standard financial ratios to evaluate a violator's ability to borrow money and pay current and long-term operating expenses. ABEL also projects the probable availability of future internally-generated cash flows to evaluate some of a violator's options for paying a civil penalty. Because the program only focuses on a violator's cash flow, there are other sources of revenue that should also be considered to determine if a firm is unable to pay the full penalty. These include:

- certificates of deposit, money market funds, or other liquid assets;
- reduction in business expenses such as advertising, entertainment, or compensation of corporate officers; or,
- sale or mortgage of non-liquid assets such as company cars, aircraft, or land.

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* Other methods for determining a violator's ability to pay may be provided in future guidance.

It can be assumed that the respondent has the ability to pay at the time the complaint is issued if information concerning the alleged violator's ability to pay is not readily available. The respondent will be notified in the civil complaint of their right under the statute to have their ability to continue in business considered in the determination of the amount of the civil penalty. Any alleged violator can raise the issue of ability to pay/ability to continue in business in their answer to the civil complaint, or during the course of settlement negotiations.

If an alleged violator raises the inability to pay as a defense in their answer, or in the course of settlement negotiations, the respondent should be asked to present appropriate documentation, such as tax returns, financial statements, etc. Such records are to be provided to the Agency at the respondent's expense and must conform to generally recognized accounting principles and procedures. If the proposed penalty exceeds the ability to pay guidance, the penalty may be reduced to a level consistent with FIFRA section 14(a)(4).

There may be some cases where a respondent argues that it cannot afford to pay the proposed civil penalty even though the penalty as adjusted does not exceed the ability to pay guidance. In such cases, EPA may consider a delayed payment schedule or a "Settlement with Conditions" agreement (see the "Settlement With Conditions" section of this Enforcement Response Policy). In exceptional circumstances, EPA may also consider further adjustment below the ability to pay guidance.

Finally, it is important that the regulated community not see the violation of FIFRA as a way of aiding financially troubled businesses. Therefore, while EPA will generally not collect a civil penalty which exceeds a violator's ability to pay, EPA reserves the option, in appropriate circumstances, of seeking a penalty that might exceed the ability to pay guidelines, cause bankruptcy, or result in a violator's inability to continue in business. However, if the case is generated out of the EPA Regional Offices, the case file must contain a written explanation, signed by the Regional Program Division Director, which explains the reasons for exceeding the civil penalty "ability to pay" guidelines. If the case is generated out of EPA Headquarters, the case file must contain a written explanation signed by the Director of the Compliance Division. Additionally, to ensure full and consistent consideration of penalties that may cause bankruptcy or closure of a business, the Regions shall consult with the Office of Compliance Monitoring and obtain concurrence before the decision is made to settle the case or proceed to a hearing.

For additional information on the consideration of a violator's ability to continue in business, see the EPA General Enforcement Policy #GM-22, entitled "A Framework for Statute-Specific Approaches to Penalty Assessments," issued on February 16, 1984 as part of the Agency's General Enforcement Policy Compendium.

Independently Assessable Charges

A separate civil penalty, up to the statutory maximum, shall be assessed for each independent violation of the Act. A violation is independent if it results from an act (or failure to act) which is not the result of any other charge for which a civil penalty is to be assessed, or if the elements of proof for the violations are different. Dependent violations may be listed in the complaint, but will not result in separate civil penalties.

Consistent with the above criteria, the Agency considers violations that occur from each shipment of a product (by product registration number, not individual containers), or each sale of a product, or each individual application of a product to be independent offenses of FIFRA.* Each of these independent violations of FIFRA are subject to civil penalties up to the statutory maximum of $5,000 for section 14(a)(1) and $1,000 for section 14(a)(2). For example, when the EPA can document that a registrant has distributed a misbranded product (one single EPA product registration number) in four separate shipments (filling four orders), EPA will charge that registrant with four counts of selling or distributing a misbranded product, and assess the registrant civil penalties of up to $20,000. Similarly, when the EPA can document that a registrant has shipped four separate misbranded products (four separate EPA product registration numbers) in a single shipment, EPA will charge the registrant four counts of selling or distributing a misbranded product, and assess civil penalties of up to $20,000. A commercial applicator that misuses a restricted use product on three occasions (either three distinct applications or three separate sites) will be charged with three counts of misuse, and assessed civil penalties of up to $15,000. A dealer that sells a restricted use pesticide (RUP) to six uncertified persons, other than in accordance with FIFRA section 3(d), will be charged with six violations of FIFRA, and assessed civil penalties of up to $30,000.

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* Independent violations which can be documented as both per sale and per shipment are to be calculated only as either per sale or per shipment, whichever is more appropriate based on the supporting documentation, and whichever approach yields the highest civil penalty. For example, if Person A has a violation involving 1 sale and 2 shipments, and Person B has a violation involving 2 sales and 1 shipment, both persons would be charged for 2 violations of FIFRA (Person A is charged for 2 shipments and Person B is charged for 2 sales).

On the other hand, a single event or action (or lack of action) which can be considered as two unlawful acts of FIFRA (section 12) cannot result in a civil penalty greater than the statutory limit for one offense of FIFRA. For instance, a person can be assessed a civil penalty of up to $5,000 for selling and distributing a product in violation of a cancellation order. However, while the Agency considers a cancelled product to be no longer registered, that same person should not also be assessed an additional civil penalty of up to $5,000 for sale and distribution of the same unregistered product. In this example the violation of the cancellation order is dependent on the sale and distribution of the unregistered/cancelled product.

Another example of a dependent violation is multiple misbranding on a single product label. If a single product label is misbranded in one way or ten ways, as defined by FIFRA section 2(q), it is still misbranding on a single product label and is considered a single violation of FIFRA section 12(a)(1)(E). As a single violation of FIFRA, the maximum civil penalty that may be assessed is $5,000. However, EPA may assess a count of misbranding each time that a misbranded product is sold or distributed. For example, a registrant who sells or distributes four distinct shipments of a misbranded pesticide product may be assessed a civil penalty of up to $20,000.

Voluntary Disclosure

In order to encourage voluntary disclosure of FIFRA violations, the Agency will offer a 40% reduction of the civil penalty if the disclosure was made: (1) by the violator promptly to EPA, or States with cooperative enforcement agreements [within 30 to 60 days of discovery by the violator]; (2) before the violation was discovered by EPA or a State; (3) before an inspection was scheduled by EPA or a State; and, (4) the violator immediately takes all the steps necessary to come into compliance, and steps requested by the Agency to mitigate the violation.

The reduction for voluntary disclosure may be made prior to issuing the civil complaint. The civil complaint should state the original penalty and the reduced penalty and the reason for the reduction.

Adjusting the Proposed Civil Penalty in Settlement

Upon an answer to a civil complaint by the person charged (respondent), the following circumstances may arise which may justify adjustment of the penalty proposed in the civil complaint:

Factual Changes

Recalculation of the proposed penalty is appropriate if the respondent can demonstrate that the size of business category, culpability, or other facts used to derive the gravity adjustment values from Appendix B are inaccurate. Adjustments to the proposed civil penalty may also be appropriate if the respondent can demonstrate an "inability to pay" the civil penalty (See "Ability to Continue in Business/Ability to Pay" section of this policy). Where additional facts indicate to the Agency that the original penalty is not appropriate, a new penalty shall be calculated consistent with the new facts. The burden is on the respondent to raise those factors which may justify the recalculation of the penalty.

Negotiations Involving Only the Amount of the Penalty

In some cases the respondent may admit to all jurisdictional and factual allegations charged in the complaint and may desire a settlement conference limited to the amount of the proposed penalty. In the absence of "special circumstances," (as discussed in the "Special Circumstances" section of this ERP), a settlement conference may be conducted to consider the amount of the proposed penalty.

Good Faith Adjustments

During the course of settlement negotiations, the EPA may consider the respondent's attitude or good faith efforts to comply with FIFRA to reduce the penalty as much as 20 percent below the proposed penalty, if such a reduction would serve the public interest.

In no case is such a reduction mandated, and in no case should such a reduction occur in the absence of an appropriate showing by the respondent and finding by the Agency. Additionally, any reduction on account of the attitude or good faith efforts does not have to extend to the full 20 percent reduction. Further, the total civil penalty may not be reduced by more than 20 percent below the proposed penalty without a showing of "special circumstances" as discussed below.

Special Circumstances/Extraordinary Adjustments

Should a case arise in which EPA determines that there are no grounds for adjustment of the proposed civil penalty based on new financial information or other facts, or on a showing of inability to continue in business, and that equity would not be served by adjusting the proposed penalty by only the allowable 20 percent good faith attitude adjustment, the Regional Program Division Director may approve an extraordinary adjustment to the proposed penalty for up to an additional 20%. This adjustment is only appropriate in extraordinary circumstances and is not to be used routinely. The EPA may also consider a delayed payment schedule or a "Settlement With Conditions" agreement.

If a "special circumstances" reduction of the proposed civil penalty is granted, the case file must include substantive reasons why the extraordinary reduction of the civil penalty was appropriate, including: (1) setting forth the facts of the case; (2) why the penalty provided from the FIFRA civil penalty matrices and gravity adjustment was inequitable; (3) how all other methods for adjusting or revising the proposed penalty would not adequately resolve the inequity; and, (4) the manner in which the extraordinary adjustment of the penalty effectuated the purposes of the Act. The Regional Program Division Director's written concurrence for the extraordinary reduction must be incorporated into the case file. Additionally, a copy of the written justification for the special circumstances reduction must accompany the consent agreement and final order (CAFO), or consent agreement and consent order (CACO) which the Regions send to the Office of Compliance Monitoring.

Settlement With Conditions (SWC)

The Environmental Protection Agency (EPA) may choose to substitute part of a civil penalty assessed for a violation of FIFRA for a specific environmentally beneficial activity that would be performed by the Respondent. The Agency refers to the settlement of a case under terms which commit the respondent to perform specified acts in exchange for reduction of the penalty as "Settlement with Conditions (SWC)."

Under an SWC agreement, in exchange for a specified amount of the proposed civil penalty, the violator agrees to take extensive and specific environmentally beneficial activities, such as pollution prevention projects, risk communication, remedying ground water hazards, clean-up operations, training, etc. These actions must exceed those normally expected under the circumstances (actions in excess of those required to correct the violation for which the violator was charged, and actions in

excess of those already required by Federal/State/local laws), must be taken within a specific time period, and will be strictly monitored by the Agency. It is the responsibility of the Regional Program Office to monitor compliance with the SWC agreement. Follow-up inspections should be conducted, as appropriate. If the Agency is not satisfied that the conditions of the agreement have been met at the end of the term, the full amount of the penalty is due.

A minimum cash penalty should always be collected from the violator regardless of the value of the SWC activities. Further, steps must be taken to prevent a violator from gaining an unwarranted tax advantage through income tax deductions of the cost of the SWC activities. One method to do this is to calculate the net present after tax value of the SWC activities (the Agency's BEN computer model may be used for this purpose), and require that the violator pay a minimum cash penalty equal to that sum of money, in addition to the SWC activities.

Settlements with Conditions should be employed with restraint. The SWCs should not be used in a manner which encourages people to violate FIFRA until they are discovered and then offer to correct actions in hope of a penalty reduction. Further, a violator is not presumed to be entitled to an SWC and such relief is granted at the discretion of the Agency.

Criteria for Choosing an SWC

An SWC should be considered in the following circumstances:

- Violations have been documented which warrant a civil penalty; and,
- The violations do not evidence wanton, knowing, or willful disregard for regulatory requirements; and,
- The violator has exhibited a good-faith attitude toward solving the noncompliance and has no history of non-compliance; and,
- There are clear public benefits to use of an SWC; and
- An SWC acceptable to EPA can be negotiated.

An SWC should also be considered where the total proposed civil penalty exceeds the ability to pay guidance, or when nonprofit entities are found to be in violation of FIFRA.

Responses to Noncompliance with the SWC

Penalty Payment

If the respondent fails to adhere to the conditions of the SWC, the uncollected penalty, or the uncollected portion of the penalty is due and payable within 60 days from the date the conditions of the SWC were to be met. If the respondent refuses to pay, the Agency may refer the action to the Department of Justice which may bring a recovery action.

Reinspection and Additional Enforcement Action

Once the EPA determines that the conditions of the SWC have not been fulfilled and so notifies the respondent, the EPA should reinspect the facility to document any additional violations. When considering additional enforcement actions in response to any violations discovered upon reinspection, the Agency may give consideration to pursuing injunctive action. Clearly, in cases of serious violations where administrative enforcement action cannot be expected to achieve compliance, an injunction may be a desirable enforcement response.

Elements of an SWC

The Agency is examining the procedures for issuing SWC agreements and the necessary contents of those agreements. When final guidance is available, we will incorporate these guidelines into the FIFRA ERP. In the interim, the procedures provided below should be followed:

An SWC, like any FIFRA settlement, consists of: (1) a complaint and (2) a consent agreement and final order (CAFO), or consent agreement and consent order (CACO). It also includes: (3) a Penalty Mitigation Agreement and (4) a Penalty Mitigation Order.

A civil complaint alleging violations of FIFRA and proposing a civil penalty must be issued to establish the Agency's allegations that violations have occurred and to initiate any SWC negotiations. The complaint should be issued in the same format as in any FIFRA administrative civil penalty action.

The CAFO/CACO assesses a total civil penalty and disposes of the administrative proceeding. In the CAFO/CACO, the respondent (1) admits the jurisdictional allegations of the complaint, (2) admits the facts stipulated in the consent agreement or neither admits nor denies specific factual allegations, (3) consents to the assessment of a stated administrative civil penalty, and (4) waives its right to a hearing and consents to the issuance of a final order which requires a payment of a civil penalty.

The Penalty Mitigation Agreement sets forth the Compliance Program and Schedule (CPS). Under this agreement and CPS, the respondent agrees to perform specific remedial actions by specific dates. If the respondent successfully meets the conditions of the penalty mitigation agreement, the EPA will not collect a specified portion of the civil penalty.

The Penalty Mitigation Order formally mitigates a portion of the penalty and is executed when the Agency is satisfied that the respondent has met the conditions outlined in the CPS. If the respondent has not satisfied the conditions, the order informs him that the payment of the previously assessed penalty is due.

APPENDIX A

FIFRA CHARGES AND GRAVITY LEVELS

FIFRA CHARGES AND GRAVITY LEVELS

FIFRA SECTION	FTTS CODE	VIOLATION	LEVEL
12(a)(1)(A)	1AA	Sold or distributed a pesticide NOT REGISTERED under section 3 or was CANCELLED or SUSPENDED, which was not authorized by the Administrator.	2
12(a)(1)(A)	1AB	Registrant, wholesaler, dealer, retailer, or other distributor ADVERTISED or otherwise "offered for sale," in any medium, a pesticide that was NOT REGISTERED under section 3 or was CANCELLED or SUSPENDED, other than in accordance with Agency policy.	2
12(a)(1)(B)	1BA	CLAIMS made for a pesticide as part of sale or distribution differed substantially from those accepted in connection with registration.	2
12(a)(1)(B)	1BB	Registrant, wholesaler, dealer, retailer, or other distributor ADVERTISED, or otherwise "offered for for sale" in any medium, a REGISTERED PESTICIDE product for an UNREGISTERED USE, other than in accordance with Agency policy.	2
12(a)(1)(C)	1CA	Sold or distributed a pesticide whose COMPOSITION DIFFERED from the composition represented in the registration.	2
12(a)(1)(D)	1DA	Sold or distributed a pesticide which has not been COLORED or DISCOLORED pursuant to section 25(c)(5).	2
12(a)(1)(E) 12(a)(1)(F) 2(q)(1)(A)	1EA	Sold or distributed a pesticide or device which is MISBRANDED in that the label has a statement, design, or graphic representation which is false or misleading.	2
12(a)(1)(E) 12(a)(1)(F) 2(q)(1)(B)	1EB	Sold or distributed a pesticide or device which is MISBRANDED in that the pesticide is not contained in a package or other container or wrapping which conforms to the standards established pursuant to section 25(c)(3) (e.g., not contained in child-resistant packaging or safety containers).	2

FIFRA CHARGES AND GRAVITY LEVELS

FIFRA SECTION	FTTS CODE	VIOLATION	LEVEL
12(a)(1)(E) 12(a)(1)(F) 2(q)(1)(C)	1EC	Sold or distributed a pesticide or device which is MISBRANDED in that it is an imitation of, or is offered for sale under the name of, another pesticide.	2
12(a)(1)(E) 12(a)(1)(F) 2(q)(1)(D)	1ED	Sold or distributed a pesticide or device which is MISBRANDED in that the label did not bear the registration number assigned under section 7.	4
12(a)(1)(E) 12(a)(1)(F) 2(q)(1)(E)	1EE	Sold or distributed a pesticide or device which is MISBRANDED in that any words, statements, or other information required by the Act were not prominently placed on the label in such a way as to make it readable or understandable.	3
12(a)(1)(E) 12(a)(1)(F) 2(q)(1)(F)	1EF	Sold or distributed a pesticide or device which is MISBRANDED in that the label did not contain directions for use necessary to make the product effective and to adequately protect health and the environment.	2
12(a)(1)(E) 12(a)(1)(F) 2(q)(1)(G)	1EG	Sold or distributed a pesticide or device which is MISBRANDED in that the label did not contain a warning or caution statement adequate to protect health and the environment.	2
12(a)(1)(E) 2(q)(1)(H)	1EH	Sold or distributed a non-registered pesticide intended for export which is MISBRANDED in that the label did not have a prominently displayed, "Not Registered for Use in the United States of America."	4
12(a)(1)(E) 2(q)(2)(A)	1EI	Sold or distributed a pesticide which is MISBRANDED in that the label did not bear an ingredient statement on the immediate container which is presented or displayed under customary conditions of purchase.	4
12(a)(1)(E) 2(q)(2)(B)	1EJ	Sold or distributed a pesticide which is MISBRANDED in that the labeling does not contain a statement of the use classification for which the product was registered.	3

FIFRA CHARGES AND GRAVITY LEVELS

FIFRA SECTION	FTTS CODE	VIOLATION	LEVEL
12(a)(1)(E) 2(q)(2)(C)	1EK	Sold or distributed a pesticide which is MISBRANDED in that there is not a label affixed to the pesticide container, and to the outside wrapper of the retail package if the required information on the immediate container cannot be clearly read, a label bearing all of the following information: (i) the name and address of the producer, registrant, or person for whom produced; (ii) the name, brand, or trademark under which the pesticide is sold; (iii) the net weight or measure of the content; and, when required by regulation, (iv) the registration number assigned to the pesticide and the use classification.	4
12(a)(1)(E) 2(q)(2)(D)	1EL	Sold or distributed a pesticide which is MISBRANDED in that the pesticide is sold in quantities highly toxic to man and the label failed to bear a skull and crossbones, and the word "poison" prominently in red on a contrasting background color, and/or the label did not bear a statement of practical treatment.	1
12(a)(1)(E) 2(c)(1) - (3)	1EM	Sold or distributed a pesticide which is ADULTERATED in that: (i) the strength or purity falls below the professed standard of quality expressed on the labeling; (2) any substance has been substituted wholly or in part abstracted; or, (3) any valuable constituent of the pesticide has been wholly or in part abstracted.	2
12(a)(2)(A)	2AA	Person DETACHED, ALTERED, DEFACED, or DESTROYED, in whole or in part, any LABELING required under the Act.	2
12(a)(2)(B)(i)	2BA	Person refused to PREPARE, MAINTAIN, or SUBMIT <u>any</u> RECORDS required under sections 5, 7, 8, 11, or 19.	2
12(a)(2)(B)(ii)	2BB	Person refused to SUBMIT any REPORTS required by or under section 5, 6, 7, 8, 11 or 19.	2

FIFRA CHARGES AND GRAVITY LEVELS

FIFRA SECTION	FTTS CODE	VIOLATION	LEVEL
12(a)(2)(B)(ii)	2BC	A registrant refused to submit REPORTS under section 6(a)(2) regarding UNREASONABLE ADVERSE EFFECTS of their pesticide.	1
12(a)(2)(B)(iii)	2BD	Person refused to allow entry, INSPECTION, copying of records, or sampling authorized by this Act.	2
12(a)(2)(C)	2CA	Person gave a GUARANTY or undertaking provided for in section 12(b) which was FALSE in any particular.	2
12(a)(2)(D)	2DA	Person used to their personal advantage or revealed to persons other than those authorized by the Act any INFORMATION acquired under the Act which is CONFIDENTIAL.	3
12(a)(2)(E)	2EA	Registrant, wholesaler, dealer, retailer, or other distributor ADVERTISED a RESTRICTED USE PESTICIDE without indicating that the product was restricted.	2
12(a)(2)(F)	2FA	Person DISTRIBUTED, SOLD, MADE AVAILABLE FOR USE, or USED a RESTRICTED USE PESTICIDE for a purpose other than in accordance with section 3(d) or regulations issued.	2
12(a)(2)(F)	2FB	Person distributed, sold, or made available for use, or used, a RESTRICTED USE PESTICIDE without maintaining the RECORDS required by regulations (A Notice of Warning should be issued for first-time "partial" violations. Violations continuing subsequent to the issuance of a civil complaint are to result in a suspension - see "Denials, Suspensions, Modifications, or Revocations of Applicator Certifications" section of this ERP).	2
12(a)(2)(G)	2GA	Person USED a registered pesticide in a manner inconsistent with its labeling.	2
12(a)(2)(H)	2HA	Person USED a pesticide which was under an EXPERIMENTAL USE PERMIT contrary to the provisions of the permit.	2

FIFRA CHARGES AND GRAVITY LEVELS

FIFRA SECTION	FTTS CODE	VIOLATION	LEVEL
12(a)(2)(I)	2IA	Person violated any order issued under section 13 (e.g., STOP SALE, USE OR REMOVAL ORDER or SEIZURE).	1
12(a)(2)(J)	2JA	Person violated any SUSPENSION ORDER issued under section 6.	1
12(a)(2)(J)	2JB	Person violated any SUSPENSION ORDER issued under section 3(c)(2)(B) or 4.	2
12(a)(2)(K)	2KA	Person violated any CANCELLATION ORDER issued under the Act on the grounds of UNREASONABLE ADVERSE EFFECTS.	1
12(a)(2)(K)	2KB	Person violated any CANCELLATION ORDER issued under the Act on grounds OTHER THAN UNREASONABLE ADVERSE EFFECTS.	2
12(a)(2)(K)	2KC	Person failed to submit a SECTION 6(g) NOTICE when required.	2
12(a)(2)(K)	2KD	Person submitted a NOTABLY LATE SECTION 6(g) NOTICE.	3
12(a)(2)(K)	2KE	Person submitted an INCOMPLETE or INCORRECT SECTION 6(g) NOTICE.	3
12(a)(2)(L) 7(a)	2LA	PRODUCED a pesticide or active ingredient subject to the Act in an UNREGISTERED ESTABLISHMENT.	2
12(a)(2)(L) 7(c)(1)	2LB	Producer FAILED TO SUBMIT, or submitted NOTABLY LATE, a REPORT to the Administrator, under SECTION 7, which indicates the types and amounts of pesticides or active ingredients which they are currently producing, which they produced during the past year, and which they sold or distributed during the past year.	2

FIFRA CHARGES AND GRAVITY LEVELS

FIFRA SECTION	FTTS CODE	VIOLATION	LEVEL
12(a)(2)(L) 7(c)(1)	2LC	Producer submitted a LATE REPORT to the Administrator, under SECTION 7, which indicates the types and amounts of pesticides or active ingredients which they are currently producing, which they produced during the past year, and which they sold or distributed during the past year (civil complaint issued only if the producer does not respond to a Notice of Warning or there is a subsequent violation within a three year timeframe from the first violation).	4
12(a)(2)(L) 7(c)(1)	2LD	Producer submitted an INCOMPLETE SECTION 7 REPORT with MINOR OMISSIONS of the required information (civil complaint issued only if the producer does not respond to a Notice of Warning or there is a subsequent violation within a three year timeframe from the first violation).	3
12(a)(2)(L) 7(c)(1)	2LE	Producer submitted an INCOMPLETE or a FALSE SECTION 7 REPORT with MAJOR OMISSIONS or ERRORS of the required information.	2
12(a)(2)(L) 7(c)(2)	2LF	Upon request of the Administrator for the purposes of the issuance of section 13 Stop Sale Orders, a PRODUCER FAILED TO PROVIDE the names and addresses of the recipients of the pesticides produced in any of his registered establishments.	1
12(a)(2)(M)	2MA	Person KNOWINGLY FALSIFIED all or any part of an application for registration, application for an experimental use permit, any information submitted under section 7, <u>any</u> records required to be maintained by the Act, <u>any</u> report filed under the Act, or any information marked as confidential and submitted to the Administrator under <u>any</u> provision of the Act.	1
12(a)(2)(N)	2NA	A registrant, wholesaler, dealer, retailer, or other distributor FAILED TO FILE REPORTS required by the Act.	2

FIFRA CHARGES AND GRAVITY LEVELS

FIFRA SECTION	FTTS CODE	VIOLATION	LEVEL
12(a)(2)(O)	2OA	Person ADDED A SUBSTANCE TO, or TOOK a substance from a pesticide in a manner that may defeat the purpose of this Act.	2
12(a)(2)(P)	2PA	Person USED a pesticide in TESTS ON HUMAN BEINGS in violation of the conditions specified by the Act.	1
12(a)(2)(Q)	2QA	Person FALSIFIED INFORMATION RELATING to the TESTING of any pesticide (or any of its ingredients, metabolites, or degradation products) for which the person knows will be furnished to the Administrator, or will become a part of any records required to be maintained by this Act.	1
12(a)(2)(Q)	2QB	Person falsely represented compliance with the FIFRA Good Laboratory Practice (GLP) regulations as a result of a HIGH LEVEL GLP violation.	2
12(a)(2)(Q)	2QC	Person falsely represented compliance with the FIFRA Good Laboratory Practice (GLP) regulations as a result of a MIDDLE LEVEL GLP violation.	3
12(a)(2)(Q)	2QD	14(a)(1) person falsely represented compliance with the FIFRA Good Laboratory Practice (GLP) regulations as a result of a LOW LEVEL GLP violation.	4
12(a)(2)(Q)	2QE	14(a)(2) person falsely represented compliance with the FIFRA Good Laboratory Practice (GLP) regulations as a result of a LOW LEVEL GLP violation.	3
12(a)(2)(R)	2RA	Person submitted DATA KNOWN TO BE FALSE in support of a registration.	1
12(a)(2)(S)	2SA	Person sold, distributed, or used an UNREGISTERED pesticide in violation of a REGULATION ISSUED UNDER SECTION 3(a).	*
12(a)(2)(S)	2SB	Person violated any REGULATION ISSUED UNDER SECTION 19.	*

* Gravity levels for these violations will be assigned in subsequent ERPs.

APPENDIX B

GRAVITY ADJUSTMENT CRITERIA

APPENDIX B
GRAVITY ADJUSTMENT CRITERIA [1]

VIOLATION	VALUE	CIRCUMSTANCES
GRAVITY OF HARM		
Pesticide	2	Toxicity - Category I pesticides, Signal Word "Danger", restricted use pesticides (RUPs), pesticides with flammable or explosive characteristics (i.e., signal words "Extremely Flammable" or "Flammable"), or pesticides that are associated with chronic health effects (mutagenicity, oncogenicity, teratogenicity, etc.).
	1	Toxicity - Categories II through IV, signal word "Warning" and "Caution," no known chronic effects.
Harm to Human Health	5	Actual serious or widespread[2] harm to human health.
	3	Potential serious or widespread[2] harm to human health.
	3	Harm to human health is unknown.
	1	Minor[3] potential or actual harm to human health, neither serious nor widespread.
Environmental Harm	5	Actual serious or widespread[2] harm to the environment (e.g., crops, water, livestock, wildlife, wilderness, or other sensitive natural areas).
	3	Potential serious or widespread[2] harm to the environment.
	3	Harm to the environment is unknown.
	1	Minor[3] potential or actual harm to the environment, neither widespread nor substantial.

VIOLATION	VALUE	CIRCUMSTANCES
GRAVITY OF MISCONDUCT		
Compliance[4] History	5	If a violator is a 14(a)(1) person with more than one prior violation of FIFRA, and at least one prior violation was a level 1 violation. If a violator is a 14(a)(2) person with more than two prior FIFRA violations, and at least one prior violation was a level 1 violation.
	4	If a violator is a 14(a)(1) person with more than one prior violation of FIFRA, and no prior level 1 violations. If a violator is a 14(a)(2) person with more than two prior FIFRA violations, and no prior level 1 violations.
	2	If a 14(a)(1) person, one prior violation of FIFRA. If a 14(a)(2) person, two prior FIFRA violations.
	0	No prior FIFRA violations.
Culpability[5]	4	Knowing or willful violation of the statute.[6] Knowledge of the general hazardousness of the action.
	2	Culpability unknown.
	2	Violation resulting from negligence.
	0	Violation was neither knowing nor willful and did not result from negligence. Violator instituted steps to correct the violation immediately after discovery of the violation.

APPENDIX B FOOTNOTES

1 The gravity adjustment criteria in Appendix B should not be used for recordkeeping and reporting violations. Therefore, first-time civil penalties for recordkeeping or reporting violations should be assessed at the matrix value, while subsequent penalties should be increased by an increment of 30% (up to the statutory maximum).

2 For the purposes of this ERP, serious or widespread harm refers to actual or potential harm which does not meet the parameters of minor harm, as described below.

3 For the purposes of this ERP, minor harm refers to actual or potential harm which is, or would be of short duration, no lasting effects or permanent damage, effects are easily reversible, and harm does not, or would not result in significant monetary loss.

4 The following considerations apply when evaluating compliance history for the purposes of Appendix B:

(a) In order to constitute a prior violation, the prior violation must have resulted in: (1) a final order, either as a result of an uncontested complaint, or as a result of a contested complaint which is finally resolved against the violator; (2) a consent order, resolving a contested or uncontested complaint by the execution of a consent agreement; (3) the payment of a civil penalty by the alleged violator in response to the complaint, whether or not the violator admits to the allegations of the complaint; or (4) conviction under the FIFRA's criminal provisions.

A notice of warning (NOW) will not be considered a prior violation for the purposes of the gravity adjustment criteria, since no opportunity has been given to contest the notice. Additionally, a stop sale, use, or removal order (SSURO) issued under FIFRA section 13 will not be considered as compliance history.

(b) To be considered a compliance history for the purposes of Appendix B, the violation must have occurred within five years of the present violation. This five-year period begins on the date of a final order, consent order, or payment of a civil penalty.

(c) Generally, companies with multiple establishments are considered as one when determining compliance history. If one establishment of a company commits a FIFRA violation, it counts as history when another establishment of the same company, anywhere in the country, commits another FIFRA violation.

5 EPA enforcement officials are not required to determine culpability at the time the complaint is issued (especially if this information is not readily available). EPA enforcement officials may instead assign a weighting factor of 2 (culpability unknown), at the time of the issuance of the complaint. Culpability adjustments may be reconsidered during settlement negotiations.

6 The Agency may also consider criminal proceedings for "knowing and willful" violations. See the "Criminal Proceedings" section of this ERP.

APPENDIX C

SUMMARY OF TABLES

SUMMARY OF TABLES

TABLE 1

FIFRA CIVIL PENALTY MATRICES

FIFRA SECTION 14(a)(1)

SIZE OF BUSINESS

LEVEL	I	II	III
level 1	5,000	5,000	5,000
level 2	5,000	4,000	3,000
level 3	4,000	3,000	2,000
level 4	3,000	2,000	1,000

FIFRA SECTION 14(a)(2)*

SIZE OF BUSINESS

LEVEL	I	II	III
level 1	1,000	1,000	1,000
level 2	1,000	800	600
level 3	800	600	500

** This matrix is only for use in determining civil penalties issued subsequent to a notice of warning, or in the case of a "for hire applicator", subsequent to the issuance of a civil penalty of $500.*

TABLE 2

SIZE OF BUSINESS CATEGORIES

Section 14(a)(1) violators:

I	-	over $1,000,000
II	-	$300,001 - $1,000,000
III	-	$0 - $300,000

Section 14(a)(2) violators:

I	-	over $200,000
II	-	$50,001 - $200,000
III	-	$0 - $50,000

TABLE 3

GRAVITY ADJUSTMENT CRITERIA

Total Gravity Value*	Enforcement Remedy
3 or below	No action, Notice of Warning, or 50% reduction of matrix value.**
4	Reduce matrix value 40%
5	Reduce matrix value 30%
6	Reduce matrix value 20%
7	Reduce matrix value 10%
8 to 12	Assess matrix value
13	Increase matrix value 10%***
14	Increase matrix value 15%***
15	Increase matrix value 20%***
16	Increase matrix value 25%***
17 or above	Increase matrix value 30%***

* *Use Appendix B to determine Gravity Values.*

** *50% reduction of matrix value is recommended where multiple count violations exist.*

*** *Matrix value can only be increased to the statutory maximum.*

***Gravity Based Penalty Matrix For FIFRA Violations Which Occur After January 30, 1997**

FIFRA § 14(a)(1)
SIZE OF BUSINESS

LEVEL	I	II	III
LEVEL 1	$5,500	$5,500	$5,500
LEVEL 2	$5,500	$4,400	$3,300
LEVEL 3	$4,400	$3,300	$2,200
LEVEL 4	$3,300	$2,200	$1,100

FIFRA § 14(a)(2)
SIZE OF BUSINESS

LEVEL	I	II	III
LEVEL 1	$1,100	$1,100	$1,100
LEVEL 2	$1,100	$880	$660
LEVEL 3	$880	$660	$500

***Gravity Based Penalty Matrix to supplement General FIFRA Enforcement Response Policy(ERP) (7/2/90) and the FIFRA Section 7(c) ERP (2/10/86) for violations that occur after January 30, 1997. Insert behind page 19 and page C-1 in the appendix.**

APPENDIX D

FIFRA CIVIL PENALTY CALCULATION WORKSHEET

FIFRA CIVIL PENALTY CALCULATION WORKSHEET

RESPONDENT _____
ADDRESS _____
_____
_____

DOCKET NO. _____ **PREPARED BY** _____
DATE _____

	count 1	count 2	count 3	count 4
Appendix A				
1. Statutory Violation				
2. FTTS Code				
3. Violation Level				
Table 2				
4. Violator Category - §14(a)(1) or §14(a)(2)				
5. Size of Business Category				
Table 1				
6. Base Penalty				
Appendix B				
7. Gravity Adjustments:				
a. Pesticide Toxicity				
b. Human Harm				
c. Environmental Harm				
d. Compliance History				
e. Culpability				
f. Total Gravity Adjustment Value (add items 7a - 7e)				
Table 3				
g. Percent Adjustment				
h. Dollar Adjustment				
8. Final Penalty* (item 7h from item 6)				
9. Combined Total Penalty (total of all Columns for line 8, above)				

* NOTE: The final penalty in each column of line 8 cannot exceed the statutory maximum.

FIFRA CIVIL PENALTY CALCULATION WORKSHEET (cont.)

	count __	count __	count __	count __
Appendix A				
1. Statutory Violation				
2. FTTS Code				
3. Violation Level				
Table 2				
4. Violator Category - §14(a)(1) or §14(a)(2)				
5. Size of Business Category				
Table 1				
6. Base Penalty				
Appendix B				
7. Gravity Adjustments:				
a. Pesticide Toxicity				
b. Human Harm				
c. Environmental Harm				
d. Compliance History				
e. Culpability				
f. Total Gravity Adjustment Value (add items 7a - 7e)				
Table 3				
g. Percent Adjustment				
h. Dollar Adjustment				
8. Final Penalty* (item 7h from item 6)				

PAGE _____ OF _____.

* NOTE: The final penalty in each column of line 8 cannot exceed the statutory maximum.

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