

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 6
DALLAS, TEXAS

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REGIONAL HEARING CLERK
EPA REGION VI

IN THE MATTER OF:)
)
)
VOLUNTARY PURCHASING)
GROUPS, INC.) DOCKET NO. FIFRA-06-2010-0303
BONHAM, TEXAS)
)
RESPONDENT)
_____)

CONSENT AGREEMENT AND FINAL ORDER

The Director, Multimedia Planning and Permitting Division, United States Environmental Protection Agency (EPA), Region 6 (Complainant), and Voluntary Purchasing Groups, Inc. (Respondent) in the above-referenced proceeding, hereby agree to resolve this matter through the issuance of this Consent Agreement and Final Order (CAFO).

I. PRELIMINARY STATEMENT

1. This proceeding for the assessment of civil penalties pursuant to Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended (FIFRA), 7 U.S.C. § 136l(a), is simultaneously commenced and concluded by the issuance of this CAFO against the Respondent pursuant to 40 C.F.R. §§ 22.13(b) and 22.18(b)(2) and (3).

2. For the purposes of this proceeding, the Respondent admits the jurisdictional allegations herein; however, the Respondent neither admits nor denies the specific factual allegations contained in this CAFO.

3. The Respondent explicitly waives any right to contest the allegations and its right to appeal the proposed Final Order set forth therein, and waives all defenses which have been raised or could have been raised to the claims set forth in the CAFO.

4. Compliance with all the terms and conditions of this CAFO shall resolve only those violations which are set forth herein.

5. The Respondent consents to the issuance of this CAFO, to the assessment and payment of the stated civil penalty in the amount and by the method set forth in this CAFO.

6. The Respondent represents that it is duly authorized to execute this CAFO and that the party signing this CAFO on behalf of the Respondent is duly authorized to bind the Respondent to the terms and conditions of this CAFO.

7. The Respondent agrees that the provisions of this CAFO shall be binding on its officers, directors, employees, agents, servants, authorized representatives, successors, and assigns.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. PRELIMINARY ALLEGATIONS

8. The Respondent is Voluntary Purchasing Groups, Inc., a corporation incorporated under the laws of the State of Texas.

9. The Respondent is a "person" as that term is defined in Section 2(s) of FIFRA, 7 U.S.C. § 136(s).

10. The Respondent owns and operates a pesticide producing establishment at its facility located at Highway 56 West, Bonham, Texas, EPA Establishment No. 7401-TX-1.

11. The term "pesticide" is defined in Section 2(u) of FIFRA, 7 U.S.C. § 136(u), as meaning "(1) any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest, (2) any substance or mixture of substances intended for use as a plant regulator, defoliant, or desiccant, and (3) any nitrogen stabilizer".

12. At all times relevant to this Complaint, the Respondent was a registrant or supplemental distributor of the following pesticides:

- A. Hi-Yield 5% Malathion Dust, EPA Registration No. 7401-267;
- B. Ferti-Lome Dormant Spray and Summer Oil Spray, EPA Registration No. 7401-9;
- C. Ferti-Lome Come and Get It! Fire Ant Killer, EPA Registration No. 62719-329-7401;
- D. Hi-Yield Dusting Wettable Sulphur, EPA Registration No. 7401-188-34911; and
- E. Hi-Yield Kill-A-Bug II - EPA Registration No. 7401-457.

13. The term "producer" is defined in Section 2(w) of FIFRA, 7 U.S.C. § 136(w), as meaning "the person who manufactures, prepares, compounds, propagates, or processes any pesticide or device or active ingredient used in producing a pesticide."

14. The term "producer" is defined in 40 C.F.R. § 167.3 as meaning "any person, as defined by the Act, who produces any pesticide, active ingredient, or device (including packaging, repackaging, labeling, and relabeling)."

15. The term "produce" is defined in Section 2(w) of FIFRA, 7 U.S.C. § 136(w), as meaning "to manufacture, prepare, compound, propagate, or process any pesticide or device or active ingredient used in producing a pesticide."

16. The term "produce" is defined in 40 C.F.R. § 167.3 as meaning "to manufacture, prepare, compound, propagate, or process any pesticide, . . . any active ingredient or device, or to package, repack, label, relabel, or otherwise change the container of any pesticide or device."

17. At all times relevant to this Complaint, the Respondent produced the following pesticides at its establishment in Bonham, Texas, EPA Establishment No. 7401-TX-1:

- A. Hi-Yield 5% Malathion Dust, EPA Registration No. 7401-267;
- B. Ferti-Lome Dormant Spray and Summer Oil Spray, EPA Registration No. 7401-9;
- C. Ferti-Lome Come and Get It! Fire Ant Killer, EPA Registration No. 62719-329-7401;
- D. Hi-Yield Dusting Wettable Sulphur, EPA Registration No. 7401-188-34911; and
- E. Hi-Yield Kill-A-Bug II - EPA Registration No. 7401-457.

18. At all time relevant to this Complaint, the Respondent produced "Natural Guard Lawn, Plant & Pet Insect Spray" at its establishment in Bonham, Texas, EPA Establishment No. 7401-TX-1.

19. The term "distribute or sell" is defined in Section 2(gg) of FIFRA, 7 U.S.C. § 136(gg), as meaning "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."

20. At all times relevant to this Complaint, the Respondent distributed or sold, the following registered pesticides:

- A. Hi-Yield 5% Malathion Dust, EPA Registration No. 7401-267;
- B. Ferti-Lome Dormant Spray and Summer Oil Spray, EPA Registration No. 7401-9;
- C. Ferti-Lome Come and Get It! Fire Ant Killer, EPA Registration No. 62719-329-7401;
- D. Hi-Yield Dusting Wettable Sulphur, EPA Registration No. 7401-188-34911; and
- E. Hi-Yield Kill-A-Bug II - EPA Registration No. 7401-457.

21. At all times relevant to this Complaint, the Respondent distributed or sold "Natural Guard Lawn, Plant & Pet Insect Spray".

22. The Respondent is a registrant, commercial applicator, wholesaler, dealer, retailer, or other distributor subject to the civil penalty provisions of Section 14(a)(1) of FIFRA, 7 U.S.C. § 136l(a)(1).

B. VIOLATIONS

Count I - Distribution or Sale of a Registered Pesticide Whose Composition Differs from its Registration Statement - Hi-Yield 5% Malathion Dust

23. Section 12(a)(1)(C) of FIFRA, 7 U.S.C. § 136j(a)(1)(C) provides that it shall be unlawful for any person in any State to distribute or sell to any person any registered pesticide

the composition of which differs at the time of its distribution or sale from its composition, as described in the statement required in connection with its registration under Section 3 of FIFRA, 7 U.S.C. § 136a.

24. On or about December 18, 2007, an inspector from the Texas Department of Agriculture conducted an inspection of the Respondent's establishment.

25. On or about December 18, 2007, a written statement as to the reason for the inspection was given to a representative of the Respondent, as required by Sections 8 and 9 of FIFRA, 7 U.S.C. §§ 136f and 136g.

26. On or about December 18, 2007, a label for "Hi-Yield 5% Malathion Dust", EPA Registration No. 7401-267, was obtained by the Inspector.

27. On or about July 29, 2008, an EPA inspector conducted an inspection of the Respondent's establishment.

28. On or about July 29, 2008, a written statement as to the reason for the inspection was given to a representative of the Respondent, as required by Sections 8 and 9 of FIFRA, 7 U.S.C. §§ 136f and 136g.

29. On or about July 29, 2008, a label for "Hi-Yield 5% Malathion Dust", EPA Registration No. 7401-267, was obtained by the EPA Inspector.

30. The label for the "Hi-Yield 5% Malathion Dust", EPA Registration No. 7401-267, identified in Paragraph 26 states that it contains 5.00% of the active ingredient malathion (0,0-dimethyl dithiophosphate of diethyl mercaptosuccinate).

31. The label for the "Hi-Yield 5% Malathion Dust", EPA Registration No. 7401-267, identified in Paragraph 29 states that it contains 5.00% of the active ingredient malathion (0,0-dimethyl dithiophosphate of diethyl mercaptosuccinate).

32. The EPA accepted label for "Hi-Yield 5% Malathion Dust", EPA Registration No. 7401-267, states that it contains 5.00% of the active ingredient malathion (0,0-dimethyl dithiophosphate of diethyl mercaptosuccinate).

33. On or about July 30, 2008, the Respondent provided a chemical analysis of a batch of "Hi-Yield 5% Malathion Dust", EPA Registration No. 7401-267, dated October 31, 2007 (Lot/Batch No. 107149) to the EPA Inspector.

34. Analysis of the "Hi-Yield 5% Malathion Dust", EPA Registration No. 7401-267, provided by the Respondent for Lot/Batch No. 107149 shows that it contained 5.6% malathion.

35. Pursuant to 40 C.F.R. § 158.350(b)(2), the default upper and low limits for the active ingredient would be 5.25% and 4.75%.

36. On or about July 30, 2008, the Respondent provided sales information for a batch of "Hi-Yield 5% Malathion Dust", EPA Registration No. 7401-267, (Batch No. 107149) to the EPA Inspector.

37. From on or about October 2007 to January 2008, the Respondent made eighty-eight (88) separate distributions and/or sales of Hi-Yield 5% Malathion Dust, EPA Registration No. 7401-267, (Batch 107149) that contained 5.6% malathion.

38. Therefore, the Respondent has violated Section 12(a)(1)(C) of FIFRA, 7 U.S.C. § 136j(a)(1)(C), by distributing or selling a registered pesticide whose composition differed at the time of its distribution or sale from its composition described in connection with its registration under Section 3 of FIFRA, 7 U.S.C. § 136a.

Count II - Distribution or Sale of an Adulterated Pesticide - Hi-Yield 5% Malathion Dust

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

40. According to Section 2(c)(1) of FIFRA, 7 U.S.C. § 136(c)(1), a pesticide is “adulterated” if its strength or purity falls below the professed standard of quality as expressed on its labeling under which it was sold.

41. On or about December 18, 2007, an inspector from the Texas Department of Agriculture conducted an inspection of the Respondent’s establishment.

42. On or about December 18, 2007, a written statement as to the reason for the inspection was given to a representative of the Respondent, as required by Sections 8 and 9 of FIFRA, 7 U.S.C. §§ 136f and 136g.

43. On or about December 18, 2007, a label for “Hi-Yield 5% Malathion Dust”, EPA Registration No. 7401-267, was obtained by the Inspector.

44. On or about July 29, 2008, an EPA inspector conducted an inspection of the Respondent’s establishment.

45. On or about July 29, 2008, a written statement as to the reason for the inspection was given to a representative of the Respondent, as required by Sections 8 and 9 of FIFRA, 7 U.S.C. §§ 136f and 136g.

46. On or about July 29, 2008, a label for "Hi-Yield 5% Malathion Dust", EPA Registration No. 7401-267, was obtained by the EPA Inspector.

47. The label for the "Hi-Yield 5% Malathion Dust", EPA Registration No. 7401-267, identified in Paragraph 43 states that it contains 5.00% of the active ingredient malathion (0,0-dimethyl dithiophosphate of diethyl mercaptosuccinate).

48. The label for the "Hi-Yield 5% Malathion Dust", EPA Registration No. 7401-267, identified in Paragraph 46 states that it contains 5.00% of the active ingredient malathion (0,0-dimethyl dithiophosphate of diethyl mercaptosuccinate).

49. The EPA accepted label for "Hi-Yield 5% Malathion Dust", EPA Registration No. 7401-267 states that it contains 5.00% of the active ingredient malathion (0,0-dimethyl dithiophosphate of diethyl mercaptosuccinate).

50. On or about July 30, 2008, the Respondent provided chemical analysis of a batch of "Hi-Yield 5% Malathion Dust", EPA Registration No. 7401-267, dated September 24, 2007 (Batch No. 97260) to the EPA Inspector.

51. Analysis of the "Hi-Yield 5% Malathion Dust", EPA Registration No. 7401-267, provided by the Respondent showed that it contained 4.7% malathion (Batch No. 97260).

52. Pursuant to 40 C.F.R. § 158.350(b)(2), the default upper and low limits for the active ingredient would be 5.25% and 4.75%.

53. On or about July 30, 2008, the Respondent provided sales information for a batch of "Hi-Yield 5% Malathion Dust", EPA Registration No. 7401-267, (Batch No. 97260) to the EPA Inspector.

54. From on or about September 2007 to January 2008, the Respondent made fifty-seven (57) separate distributions and/or sales of "Hi-Yield 5% Malathion Dust", EPA Registration No. 7401-267, (Batch 97260) that contained 4.7% malathion.

55. Therefore, the Respondent has violated Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), by distributing or selling an adulterated pesticide.

Count III - Distribution or Sale of Misbranded Pesticide - Ferti-Lome Come and Get It! Fire Ant Killer

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

57. According to Section 2(q)(1)(G) of FIFRA, 7 U.S.C. § 136(q)(1)(G), a pesticide is "misbranded" if the label does not contain a warning or caution statement which may be necessary and if complied with, together with any requirement imposed under [7 U.S.C. § 136a(d)], is adequate to protect health and the environment.

58. 40 C.F.R. § 156.200(b)(1) states that the requirements of [40 C.F.R. Part 156, Subpart K - Worker Protection Statements] apply to each pesticide product that bears directions for use in the production of any agricultural plant on any agricultural establishment as defined in [40 C.F.R. § 170.3], or whose label reasonably permits such use.

59. 40 C.F.R. § 152.3 defines "pesticide product" as meaning "a pesticide in a particular form (including composition, packaging, and labeling) in which the pesticide is, or is intended to be, distributed or sold. The term includes any physical apparatus used to deliver or apply the pesticide if distributed or sold with the pesticide."

60. 40 C.F.R. § 170.3 defines "agricultural plant" as meaning "any plant grown or maintained for commercial or research purposes and includes, but is not limited to, food, feed, and fiber plants; trees; turfgrass; flowers, shrubs; ornamentals; and seedlings."

61. 40 C.F.R. § 170.3 defines "agricultural establishment" as meaning "any farm, forest, nursery, or greenhouse."

62. 40 C.F.R. § 156.200(c)(3) & (4) provide that no product to which this subpart applies shall be distributed or sold without amended labeling by any registrant after April 21, 1994, or shall be distributed or sold without amended labeling by any person after October 23, 1995.

63. On or about December 18, 2007, an inspector from the Texas Department of Agriculture conducted an inspection of the Respondent's establishment.

64. On or about December 18, 2007, a written statement as to the reason for the inspection was given to a representative of the Respondent, as required by Sections 8 and 9 of FIFRA, 7 U.S.C. §§ 136f and 136g.

65. On or about December 18, 2007, the inspector obtained a copy of the current label for "Ferti-Lome Come and Get It! Fire Ant Killer", EPA Registration No. 62719-329-7401.

66. "Ferti-Lome Come and Get It! Fire Ant Killer", EPA Registration No. 62719-329-7401, is a "pesticide product" as that term is defined by 40 C.F.R. § 152.3.

67. The label for "Ferti-Lome Come and Get It! Fire Ant Killer", EPA Registration No. 62719-329-7401, states the following:

LABELED USE SITES: This product may be applied in: • Lawns and other turf areas including sod farms • Recreational areas, including golf courses, playgrounds and playing fields • Noncrop areas such as roadsides, rights of way, industrial areas, campgrounds, parks, recreational areas, rough turf areas, farmsteads, corrals and around animal housing facilities • Ornamentals in landscapes and nurseries • Rangeland and permanent pastures • Greenhouses • Most crops, including but not limited to Tree Nuts, Citrus, Stone Fruit, Tree Fruits, Soybeans, and Vegetables.

68. The label for "Ferti-Lome Come and Get It! Fire Ant Killer", EPA Registration No. 62719-329-7401, bears directions for use in the production of agricultural plants on any agricultural establishment or its label reasonably permits such use.

69. The requirements of 40 C.F.R. Part 156, Subpart K, apply to "Ferti-Lome Come and Get It! Fire Ant Killer", EPA Registration No. 62719-329-7401.

70. 40 C.F.R. § 156.206(b)(1) provides that each product shall bear the reference statement:

Use this product only in accordance with its labeling and with the Worker Protection Standard, 40 CFR part 170." This statement shall be placed on the product label under the heading AGRICULTURAL USE REQUIREMENTS.

71. 40 C.F.R. § 156.206(b)(2) provides that each product shall bear the statement:

This standard contains requirements for the protection of agricultural workers on farms, forests, nurseries, and greenhouses, and handlers of agricultural pesticides. It contains requirements for training, decontamination, notification, and emergency assistance. It also contains specific instructions and exceptions pertaining to the statements on this label [in the labeling] about [use any of the following that are applicable] personal protective equipment, restricted-entry-interval, and notification to workers." These statements shall be placed immediately following the reference statement required by [40 C.F.R. § 156.206(b)(1)] or they shall be placed in the supplemental product labeling under the heading AGRICULTURAL USE REQUIREMENTS.

72. The EPA accepted label for EPA Registration No. 62719-329 includes the following statement:

Agricultural Use Requirements

Use this product only in accordance with its labeling and with the Worker Protection Standard, 40 CFR part 170. This Standard contains requirements for the protection of agricultural workers on farms, forests, nurseries, and greenhouses, and handlers of agricultural pesticides. It contains requirements for training, decontamination, notification, and emergency assistance. It also contains specific instructions and exceptions pertaining to the statements on this label about personal protective equipment (PPE) and restricted entry interval. The requirements in this box only apply to uses of this product that are covered by the Worker Protection Standard.

Do not enter or allow worker entry into treated areas during the restricted entry interval (REI) of 4 hours.

PPE required for early entry to treated areas that is permitted under the Worker Protection Standard and that involves contact with anything that has been treated, such as plants, soil, or water is:

- * Coveralls
- * Waterproof gloves
- * Shoes plus socks

73. The Agricultural Use Requirements identified in Paragraphs 70, 71, and 72 are not on the label obtained by the inspector.

74. The label obtained by the inspector does not contain the statements required by 40 C.F.R. § 156.206(b).

75. 40 C.F.R. § 152.132(d) requires that because the EPA accepted label for EPA Registration No. 62719-329 contains the Agricultural Use Requirements, the label used by the Respondent (as a supplemental distributor) for EPA Registration No. 62719-329-7401 must also contain the Agricultural Use Requirements.

76. On or about December 18, 2007, the inspector obtained inventory and sales records for the last six months of 2007 for "Ferti-Lome Come and Get It! Fire Ant Killer", EPA Registration No. 62719-329-7401.

77. On or about January 19, 2010, the Respondent provided sales information to EPA for "Ferti-Lome Come and Get It! Fire Ant Killer", EPA Registration No. 62719-329-7401 for July 1, 2007 - December 31, 2007.

78. From on or about July 1, 2007 to December 31, 2007, the Respondent made twenty-four (24) separate distributions and/or sales of "Ferti-Lome Come and Get It! Fire Ant Killer", EPA Registration No. 62719-329-7401.

79. Therefore, the Respondent has violated Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), by distributing or selling a misbranded pesticide.

Count IV - Distribution or Sale of a Misbranded Pesticide - Hi-Yield Dusting Wettable Sulphur

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

81. According to Section 2(q)(1)(D) of FIFRA, 7 U.S.C. § 136(q)(1)(D), a pesticide is "misbranded" if its label does not bear the registration number assigned under [7 U.S.C. § 136e] to each establishment in which it was produced.

82. According to Section 2(q)(2)(C)(iv) of FIFRA, 7 U.S.C. § 136(q)(2)(C)(iv), a pesticide is "misbranded" if there is not affixed to the container, and to the outside container or wrapper of the retail package, if there be one, through which the required information on the

immediate container cannot be clear read, a label bearing, where required by regulation of the Administrator to effectuate the purposes of this subchapter, the registration number assigned to the pesticide under this subchapter.

83. 40 C.F.R. § 156.10(a)(1)(iv) & (v) provide that every pesticide product shall bear a label containing the information required by the Act and the regulations in this part. The contents of the label must show clearly and prominently . . . (iv) the product registration number as prescribed in [40 C.F.R. § 156.10(e)], and (v) the producing establishment number as prescribed in [40 C.F.R. § 156.10(f)].

84. 40 C.F.R. § 152.3 defines “pesticide product” as meaning “a pesticide in a particular form (including composition, packaging, and labeling) in which the pesticide is, or is intended to be, distributed or sold. The term includes any physical apparatus used to deliver or apply the pesticide if distributed or sold with the pesticide.”

85. On or about November 30, 2007, an inspector from the Georgia Department of Agriculture conducted an inspection of Davis Farm & Garden, 80 E. Jefferson Street, Hazlehurst, Georgia 31539.

86. On or about November 30, 2007, a written statement as to the reason for the inspection was given to a representative of David Farm & Garden, as required by Sections 8 and 9 of FIFRA, 7 U.S.C. §§ 136f and 136g.

87. On or about November 30, 2007, the inspector photographed a label for a 4 pound bag of “Hi-Yield Dusting Wettable Sulphur”.

88. “Hi-Yield Dusting Wettable Sulphur”, EPA Registration No. 7401-188-34911, is a “pesticide product” as that term is defined by 40 C.F.R. § 152.3.

89. There was no EPA Registration Number on the label of the "Hi-Yield Dusting Wettable Sulphur" identified in Paragraph 87.

90. There was no EPA Establishment Number on the label of the "Hi-Yield Dusting Wettable Sulphur" identified in Paragraph 87.

91. "Hi-Yield Dusting Wettable Sulphur" identified in Paragraph 87 was produced by the Respondent.

92. The Respondent distributed or sold the "Hi-Yield Dusting Wettable Sulphur" identified in Paragraph 87.

93. Therefore, the Respondent has violated Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), by distributing or selling a misbranded pesticide.

Count V - Distribution or Sale of a Misbranded Pesticide - Ferti-Lome Dormant Spray and Summer Oil Spray

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

95. According to Section 2(q)(1)(D) of FIFRA, 7 U.S.C. § 136(q)(1)(D), a pesticide is "misbranded" if its label does not bear the registration number assigned under [7 U.S.C. § 136e] to each establishment in which it was produced.

96. According to Section 2(q)(2)(C)(iv) of FIFRA, 7 U.S.C. § 136(q)(2)(C)(iv), a pesticide is "misbranded" if there is not affixed to the container, and to the outside container or wrapper of the retail package, if there be one, through which the required information on the immediate container cannot be clear read, a label bearing, where required by regulation of the

Administrator to effectuate the purposes of this subchapter, the registration number assigned to the pesticide under this subchapter.

97. 40 C.F.R. § 156.10(a)(1)(iv) & (v) provide that every pesticide product shall bear a label containing the information required by the Act and the regulations in this part. The contents of the label must show clearly and prominently . . . (iv) the product registration number as prescribed in [40 C.F.R. § 156.10(e)], and (v) the producing establishment number as prescribed in [40 C.F.R. § 156.10(f)].

98. 40 C.F.R. § 152.3 defines “pesticide product” as meaning “a pesticide in a particular form (including composition, packaging, and labeling) in which the pesticide is, or is intended to be, distributed or sold. The term includes any physical apparatus used to deliver or apply the pesticide if distributed or sold with the pesticide.”

99. On or about June 20, 2007, an inspector from the Colorado Department of Agriculture conducted an inspection of Fossil Creek Nursery, 7029 S. College Avenue, Fort Collins, Colorado 80525.

100. On or about June 20, 2007, the inspector photographed a label of a bottle of “Ferti-Lome Dormant Spray and Summer Oil Spray”.

101. “Ferti-Lome Dormant Spray and Summer Oil Spray” is a “pesticide product” as that term is defined by 40 C.F.R. § 152.3.

102. The product label for Ferti-Lome Dormant Spray and Summer Oil Spray” identified in Paragraph 100 does not contain the correct EPA Registration Number or the correct EPA Establishment Number. The EPA Registration Number and EPA Establishment Number were

switched on the product label. The label lists the EPA Registration No. as "7401-TX-1" and the EPA Establishment No. as "7401-9".

103. The Respondent distributed or sold the "Ferti-Lome Dormant Spray and Summer Oil Spray" identified in Paragraph 100.

104. Therefore, the Respondent has violated Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), by distributing or selling a misbranded pesticide.

Count VI - Distribution or Sale of an Unregistered Pesticide - Natural Guard Lawn, Plant & Pet Insect Spray

105. Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A) provides that it shall be unlawful for any person in any State to distribute or sell to any person any pesticide that is not registered under [Section 3 of FIFRA, 7 U.S.C. § 136a].

106. The Respondent published a 2009 Product Catalog. The Catalog listed "Natural Guard Lawn, Plant & Pet Insect Spray".

107. The label for "Natural Guard Lawn, Plant & Pet Insect Spray" states the following: "Chemical Free Insect Control. Excellent Mosquito Repellent."

108. The label for "Natural Guard Lawn, Plant & Pet Insect Spray" states, among things, that it controls certain insects (e.g., ants, armyworms, mosquitoes, ticks) and powdery mildew.

109. The term "pest" is defined in Section 2(t) of FIFRA, 7 U.S.C. § 136(t) as meaning "(1) any insect, rodent, nematode, fungus, weed, or (2) any other form of terrestrial or aquatic plant or animal life or virus, bacteria, or other micro-organisms (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 [7 U.S.C. § 136w(c)(1)]."

110. The insects and other organisms identified on label for "Natural Guard Lawn, Plant & Pet Insect Spray" are "pests", as that term is defined by Section 2(t) of FIFRA, 7 U.S.C. § 136(t).

111. The term "pesticide" is defined in Section 2(u) of FIFRA, 7 U.S.C. § 136(u), as meaning "(1) any substances or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest, (2) any substance or mixture of substances intended for use as a plant regulator, defoliant, or desiccant, and (3) any nitrogen stabilizer".

112. "Natural Guard Lawn, Plant & Pet Insect Spray" is intended to prevent, destroy, repel or mitigate pests.

113. "Natural Guard Law, Plant & Pet Insect Spray" is a "pesticide" as that term is defined in Section 2(u) of FIFRA, 7 U.S.C. § 136(u).

114. "Natural Guard Law, Plant & Pet Insect Spray" is not a registered pesticide.

115. 40 C.F.R. § 152.15 provides that no person may distribute or sell any pesticide product which is not registered under the Act, except as provided in 40 C.F.R. §§ 152.20, 152.25, and 152.30.

116. 40 C.F.R. § 152.3 defines "pesticide product" as meaning "a pesticide in a particular form (including composition, packaging, and labeling) in which the pesticide is, or is intended to be, distributed or sold. The term includes any physical apparatus used to deliver or apply the pesticide if distributed or sold with the pesticide."

117. "Natural Guard Lawn, Plant & Pet Insect Spray" is a "pesticide product" as that term is defined by 40 C.F.R. § 152.3.

118. 40 C.F.R. § 152.25(f)(1) provides that products containing certain active ingredients are exempt from the requirements of FIFRA, provided that all of the criteria of 40 C.F.R. 152.25(f) are met. 40 C.F.R. § 152.25(f)(2) provides that a pesticide product exempt under 40 C.F.R. § 152.25(f)(1) may only include inert ingredients listed in the most current List 4A.

119. The term “inert ingredient” is defined in Section 2(m) of FIFRA, 7 U.S.C. § 136(m) as meaning “an ingredient which is not active”.

120. The label for “Natural Guard Lawn, Plant & Pet Insect Spray” states that its inactive ingredient is “Essence of Juniperus Virginiana”.

121. “Essence of Juniperus Virginiana” is not listed in the most current List 4A.

122. On or about January 19, 2010, the Respondent provided sales information to EPA for calendar year 2009 for “Natural Guard Lawn, Plant & Pet Insect Spray”.

123. During calendar year 2009, the Respondent made thirty-seven (37) separate distributions and/or sales of “Natural Guard Lawn, Plant & Pet Insect Spray”.

124. Therefore, the Respondent violated Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), by distributing and selling an unregistered pesticide.

Count VII - Distribution or Sale of a Misbranded Pesticide - Natural Guard Lawn, Plant & Pet Insect Spray

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

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

127. 40 C.F.R. § 152.25(f)(3)(iii) provides that an [exempt minimum risk pesticide] must not include any false or misleading labeling statements.

128. The label for the “Natural Guard Lawn, Plant & Pet Insect Spray” states that it is “Chemical Free”.

129. The label for the “Natural Guard Lawn, Plant & Pet Insect Spray” states it contains cedar oil and “essence of juniperus virginiana”.

130. Cedar oil is a chemical.

131. “Essence of juniperus virginiana” is a chemical.

132. “Natural Guard Lawn, Plant & Pet Insect Spray” is not chemical free.

133. The label for “Natural Guard Lawn, Plant & Pet Insect Spray” is false and/or misleading in that it incorrectly states that is “Chemical Free”.

134. On or about January 19, 2010, the Respondent provided sales information to EPA for calendar year 2009 for “Natural Guard Lawn, Plant & Pet Insect Spray”.

135. During calendar year 2009, the Respondent made thirty-seven (37) separate distributions and/or sales of “Natural Guard Lawn, Plant & Pet Insect Spray”.

136. Therefore, the Respondent violated Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E) by distributing or selling a misbranded pesticide.

Count VIII - Distribution or Sale of Adulterated Pesticide - Hi-Yield 5% Malathion Dust (New Mexico)

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

138. According to Section 2(c)(1) of FIFRA, 7 U.S.C. § 136(c)(1), a pesticide is “adulterated” if its strength or purity falls below the professed standard of quality as expressed on its labeling under which it was sold.

139. On or about October 25, 2005, an inspector from the New Mexico Department of Agriculture conducted an inspection of Sutherland Lumber Company, 841 El Paseo, Las Cruces, New Mexico 88001.

140. On or about October 25, 2005, a written statement as to the reason for the inspection was given to a representative of Sutherland Lumber Company, as required by Sections 8 and 9 of FIFRA, 7 U.S.C. §§ 136f and 136g.

141. On or about October 25, 2005, the inspector purchased a one-pound package of “Hi-Yield 5% Malathion Dust” EPA Registration No. 7401-267, from Sutherland Lumber Company.

142. Based on information and belief, the label for the “Hi-Yield 5% Malathion Dust”, EPA Registration No. 7401-267, identified in Paragraph 141 states that it contains 5% of its active ingredient malathion (O,O-dimethyl dithiophosphate of diethyl mercaptosuccinate).

143. The EPA accepted label for "Hi-Yield 5% Malathion Dust", EPA Registration No. 7401-267, states that it contains 5% of its active ingredient malathion (O,O-dimethyl dithiophosphate of diethyl mercaptosuccinate).

144. The label on the "Hi-Yield 5% Malathion Dust" purchased by the inspector shows that it was produced by the Respondent.

145. Analysis of the "Hi-Yield 5% Malathion Dust" purchased by the inspector by the State Chemist Laboratory of the New Mexico Department of Agriculture shows that the product only contained 4.5% malathion.

146. Pursuant to 40 C.F.R. § 158.350(b)(2), the default upper and low limits for the active ingredient would be 5.25% and 4.75%.

147. The Respondent distributed or sold the "Hi-Yield 5% Malathion Dust", EPA Registration No. 7401-267, identified in Paragraph 141.

148. Therefore, the Respondent has violated Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), by distributing or selling an adulterated pesticide.

Count IX - Distribution or Sale of a Misbranded Pesticide - Hi-Yield Kill-A-Bug II

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

150. According to Section 2(q)(2)(C)(iv) of FIFRA, 7 U.S.C. § 136(q)(2)(C)(iv), a pesticide is "misbranded" if there is not affixed to the container, and to the outside container or wrapper of the retail package, if there be one, through which the required information on the immediate container cannot be clear read, a label bearing, where required by regulation of the

Administrator to effectuate the purposes of this subchapter, the registration number assigned to the pesticide under this subchapter.

151. 40 C.F.R. § 156.10(a)(1)(iv) & (v) provide that every pesticide product shall bear a label containing the information required by the Act and the regulations in this part. The contents of the label must show clearly and prominently . . . (iv) the product registration number as prescribed in [40 C.F.R. § 156.10(e)], and (v) the producing establishment number as prescribed in [40 C.F.R. § 156.10(f)].

152. 40 C.F.R. § 152.3 defines “pesticide product” as meaning “a pesticide in a particular form (including composition, packaging, and labeling) in which the pesticide is, or is intended to be, distributed or sold. The term includes any physical apparatus used to deliver or apply the pesticide if distributed or sold with the pesticide.”

153. On or about March 25, 2009, an inspector from the Colorado Department of Agriculture conducted an inspection of Guard N-Wise Distribution Center, 12770 East 39th Avenuc, Denver, Colorado 80239.

154. On or about March 25, 2009, the inspector photographed labels for two bottles of “Hi-Yield Kill-A-Bug II”.

155. “Hi-Yield Kill-A-Bug II” is a “pesticide product” as that term is defined by 40 C.F.R. § 152.3.

156. The EPA Registration Number on the label identified in Paragraph 154 was EPA Registration No. 7401-451.

157. The correct EPA Registration Number for “Hi-Yield Kill-A-Bug II” is EPA Registration No. 7401-457.

158. The inspectors found 42 one-pint containers labeled with EPA Registration Number 7401-451 at Guard'N-Wise Distribution Center, 12770 East 39th Avenue, Denver, Colorado 80239.

159. On or about April 23, 2009, an inspector from the Colorado Department of Agriculture obtained invoices and bills of lading from Guard'N-Wise Distribution Center, showing that the Respondent had sold Guard'N-Wise Distribution Center one case of one-pint containers (12 containers) of "Hi-Yield Kill-A-Bug II" on or about March 3, 2008, and three cases of one-pint containers (36 containers) of "Hi-Yield Kill-A-Bug II" on or about July 10, 2008.

160. Therefore, the Respondent has violated Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), by distributing or selling a misbranded pesticide.

III. TERMS OF SETTLEMENT

A. CIVIL PENALTY

161. For the reasons set forth above, the Respondent has agreed to pay a civil penalty which has been determined in accordance with Section 14(a) of FIFRA, 7 U.S.C. § 136l(a), which authorizes EPA to assess a civil penalty of up to Seven Thousand Five Hundred Dollars (\$7,500) for each offense.¹ Upon consideration of the entire record herein, including the Findings of Fact and Conclusions of Law, which are hereby adopted and made a part hereof, and

¹ The amount of penalty that can be assessed under Section 14(a) of FIFRA was increased by the Civil Monetary Penalty Inflation Adjustment Rule codified at 40 C.F.R. Part 19 to \$5,500 for violations occurring between January 30, 1997 and March 15, 2004, to \$6,500 for violations which occurred between March 15, 2004 and January 12, 2009, and to \$7,500 for violations which occurred after January 12, 2009.

EPA's "FIFRA Enforcement Response Policy" dated December 2009 which requires the Complainant 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, it is **ORDERED** that Respondent be assessed a civil penalty of **One Hundred Twenty-Eight Thousand, Three Hundred Dollars (\$128,300)**.

162. Within thirty (30) days of the effective date of this CAFO, the Respondent shall pay the assessed civil penalty by certified check, cashier's check, or wire transfer, made payable to "Treasurer, United States of America, EPA - Region 6". Payment shall be remitted in one of three (3) ways: regular U.S. Postal mail (including certified mail), overnight mail, or wire transfer. For regular U.S. Postal mail, U.S. Postal Service certified mail, or U.S. Postal Service express mail, the check(s) should be remitted to:

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

For overnight mail (non-U.S. Postal Service, e.g. Fed Ex), the check(s) should be remitted to:

U.S. Bank
Government Lockbox 979077 US EPA Fines & Penalties
1005 Convention Plaza
SL-MO-C2-GL
St. Louis, MO 63101
Phone No. (314) 418-1028

For wire transfer, the payment should be remitted to:

Federal Reserve Bank of New York
ABA = 021030004
Account = 68010727
SWIFT address = FRNYUS33
33 Liberty Street
New York, NY 10045
Field Tag 4200 of the Fedwire message should read "D 68010727 Environmental
Protection Agency"

PLEASE NOTE: Docket number FIFRA-06-2010--0303 shall be clearly typed on the check to ensure proper credit. If payment is made by check, the check shall also be accompanied by a transmittal letter and shall reference the Respondent's name and address, the case name, and docket number of the CAFO. If payment is made by wire transfer, the wire transfer instructions shall reference the Respondent's name and address, the case name, and docket number of the CAFO. The Respondent shall also send a simultaneous notice of such payment, including a copy of the check and transmittal letter, or wire transfer instructions to the following:

Lee McMillan
Environmental Engineer
Pesticides Section (6PD-P)
U.S. EPA, Region 6
1445 Ross Avenue, Suite 1200
Dallas, TX 75202-2733

Lorena Vaughn
Regional Hearing Clerk (6RC-D)
U.S. EPA, Region 6
1445 Ross Avenue, Suite 1200
Dallas, TX 75202-2733

The Respondent's adherence to this request will ensure proper credit is given when penalties are received in the Region.

163. The Respondent agrees not to claim or attempt to claim a federal income tax deduction or credit covering all or any part of the civil penalty paid to the United States Treasurer.

164. Pursuant to 31 U.S.C. § 3717 and 40 C.F.R. § 13.11, unless otherwise prohibited by law, EPA will assess interest and late payment penalties on outstanding debts owed to the United States and a charge to cover the costs of processing and handling a delinquent claim. Interest on the civil penalty assessed in this CAFO will begin to accrue thirty (30) days after the effective date of the CAFO and will be recovered by EPA on any amount of the civil penalty that is not paid by the respective due date. Interest will be assessed at the rate of the United States Treasury tax and loan rate in accordance with 40 C.F.R. § 13.11(a). Moreover, the costs of the Agency's administrative handling of overdue debts will be charged and assessed monthly throughout the period the debt is overdue. *See* 40 C.F.R. § 13.11(b).

165. EPA will also assess a \$15.00 administrative handling charge for administrative costs on unpaid penalties for the first thirty (30) day period after the payment is due and an additional \$15.00 for each subsequent thirty (30) day period that the penalty remains unpaid. In addition, a penalty charge of up to six percent per year will be assessed monthly on any portion of the debt which remains delinquent more than ninety (90) days. *See* 40 C.F.R. § 13.11(c). Should a penalty charge on the debt be required, it shall accrue from the first day payment is delinquent. *See* 31 C.F.R. § 901.9(d). Other penalties for failure to make a payment may also apply.

B. RETENTION OF ENFORCEMENT RIGHTS

166. The EPA does not waive any rights or remedies available to EPA for any other violations by the Respondent of Federal or State laws, regulations, or permitting conditions.

167. Except as specifically provided in this CAFO, nothing herein shall limit the power and authority of EPA or the United States to take, direct, or order all actions to protect public health, welfare, or the environment, or prevent, abate or minimize an actual or threatened release of hazardous substances, pollutants, contaminants, hazardous substances on, at or from the Respondent's facility. Furthermore, nothing in this CAFO shall be construed to prevent or limit EPA's civil and criminal authorities, or that of other Federal, State, or local agencies or departments to obtain penalties or injunctive relief under other Federal, State, or local laws or regulations.

C. COSTS

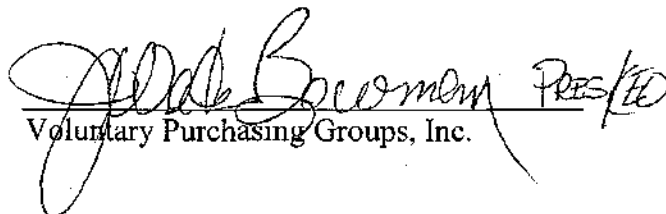
168. Each party shall bear its own costs and attorney's fees. Furthermore, the Respondent specifically waives its right to seek reimbursement of its costs and attorney's fees under 5 U.S.C. § 504 and 40 C.F.R. Part 17.

THE UNDERSIGNED PARTIES CONSENT TO THE ENTRY OF THIS CONSENT AGREEMENT AND FINAL ORDER:

FOR THE RESPONDENT:

Date:

April 7, 2010


Voluntary Purchasing Groups, Inc. PRES/EO

FOR THE COMPLAINANT:

Date: 4/7/10



Carl E. Edlund, P.E.
Director
Multimedia Planning and
Permitting Division
U.S. EPA - Region 6

IV. FINAL ORDER

Pursuant to Section 14 of FIFRA, 7 U.S.C. § 136f, and the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, 40 C.F.R. Part 22, the foregoing Consent Agreement is hereby ratified. This Final Order shall not in any case affect the right of EPA or the United States to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law. This Final Order shall resolve only those causes of action alleged in the Consent Agreement. Nothing in this Final Order shall be construed to waive, extinguish or otherwise affect Respondent's (or its officers, agents, servants, employees, successors, or assigns) obligation to comply with all applicable federal, state, and local statutes and regulations, including the regulations that were the subject of this action. The Respondent is ordered to comply with the terms of settlement and the civil penalty payment instructions as set forth in the Consent Agreement. In accordance with 40 C.F.R. § 22.31(b), this Final Order shall become effective upon filing with the Regional Hearing Clerk.

Dated

April 8, 2010



Michael C. Barra
Regional Judicial Officer

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of April, 2010, the original and one copy of the foregoing Consent Agreement and Final Order (CAFO) was hand delivered to the Regional Hearing Clerk, U.S. EPA - Region 6, 1445 Ross Avenue, Suite 1200, Dallas, Texas 75202-2733, and a true and correct copy of the CAFO was delivered to the following individual(s) by the method indicated below:

CERTIFIED MAIL - RETURN RECEIPT REQUESTED # 7007 0710 0002 1385 1699

J. Wade Bowman
President and Chief Executive Officer
Voluntary Purchasing Groups, Inc.
P.O. Box 460, 230 FM 87
Bonham, TX 75418

