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U. S. ENVIRONMENTAL PROTECTION AGENCY
REGION 7
901 NORTH 5th STREET
KANSAS CITY, KANSAS 66101
BEFORE THE ADMINISTRATOR

In the Matter of

Mayberry Seed Co.

Respondent

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Docket No. FIFRA-07-2012-0015

CONSENT AGREEMENT AND FINAL ORDER

The U.S. Environmental Protection Agency (EPA), Region 7 and Mayberry Seed Co. have agreed to a settlement of this action before filing of a Complaint, and thus this action is simultaneously commenced and concluded pursuant to Rules 22.13(b) and 22.18(b)(2) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Renovation, Termination or Suspension of Permits (Consolidated Rules), 40 C.F.R. §§ 22.13(b) and 22.18(b)(2).

Section I

Jurisdiction

1. This proceeding is an administrative action for the assessment of civil penalties instituted pursuant to Section 14 of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. § 136l.

2. This Consent Agreement and Final Order (CAFO) serves as notice that EPA has reason to believe that Respondent has violated Section 12 of FIFRA, 7 U.S.C. § 136j.

Section II

Parties

3. The Complainant, by delegation from the Administrator of EPA and the Regional Administrator, EPA, Region 7, is the Director of the Water, Wetlands and Pesticides Division, EPA, Region 7.

4. The Respondent is Mayberry Seed Company, a pesticide distributor with a facility located at 22985 State Highway D, in Essex, Missouri 63846.

Section III

Statutory and Regulatory Background

5. Congress enacted FIFRA in 1947 and amended it in 1972 and in 1996. The general purpose of FIFRA is to provide the basis for regulation, sale, distribution and use of pesticides in the United States. 7 U.S.C. 136 *et. seq.*

6. Section 3(a) of FIFRA, 7 U.S.C. § 136a(a), and 40 C.F.R. §152.15 state that no person in any state may distribute or sell to any person any pesticide that is not registered under this Act, except in certain circumstances which are not relevant to this case.

7. Section 12(a)(1)(A) of FIFRA, 7 U.S.C. 136j(a)(1)(A), states that it is unlawful for any person in any state to distribute or sell to any person any pesticide that is not registered under Section 3.

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

9. Section 2(gg) of FIFRA, 7 U.S.C. § 136(gg), defines the term “to distribute or sell” to mean to distribute, sell, offer for sale, hold for distribution, hold for sale, hold for shipment, ship, deliver for shipment, release for shipment, or receive and (having so received) deliver or offer to deliver.

10. Section 2(u) of FIFRA, 7 U.S.C. § 136(u), defines the term “pesticide” to mean any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest and as any substance or mixture of substances intended for use as a plant regulator, defoliant or desiccant.

11. The term “plant regulator” is defined, in pertinent part, at Section 2(v) of FIFRA, 7 U.S.C. § 136(v), as “any substance or mixture of substances intended, through physiological action, for accelerating or retarding the rate of growth or rate of maturation, or for otherwise altering the behavior of plants or the produce thereof....”.

12. 40 C.F.R. § 152.15(a) states that a substance is considered to be intended for a pesticidal purpose, and thus to be a pesticide requiring registration, if the person who distributes or sells the substance (1) claims, states, or implies (by labeling or otherwise) that the substance can or should be used as a pesticide; or (2) that the substance consists of or contains an active ingredient and that it can be used to manufacture a pesticide.

13. 40 C.F.R. § 152.15(c) states that a substance is considered to be intended for a pesticidal purpose, and thus to be a pesticide requiring registration, if the person who distributes or sells the substance has actual or constructive knowledge that the substance will be used, or is intended to be used, for a pesticidal purpose.

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

15. Section 2(q)(D) of FIFRA, 7 U.S.C. § 136(q)(D), states that a pesticide is misbranded if its label does not bear the registration number assigned under section 7 to each establishment in which it was produced.

16. Section 2(q)(E) of FIFRA, 7 U.S.C. § 136(q)(E), states that a pesticide is misbranded if any word, statement, or other information required by or under authority of FIFRA to appear on the label or labeling is not prominently placed thereon.

Section IV

General Factual Allegations

17. Respondent is, and at all times referred to herein was, a “person” within the meaning of FIFRA.

18. At all times relevant, Respondent owned or operated a place of business located at 22985 State Highway D, in Essex, Missouri 63846.

19. On or about March 10, 2011, a representative of the Missouri Department of Agriculture (MDA) authorized to conduct inspections under FIFRA at the Southeast Cooperative facility in Advance, Missouri, and collected evidence that Southeast Cooperative had distributed on multiple occasions Gromax+, an unregistered fungicide/plant regulator pesticide, pursuant to a consignment agreement with Respondent.

20. On or about August 25, 2011, a representative of the MDA authorized to conduct inspections under FIFRA met with Respondent’s president, Mr. Larry Mayberry, and Respondent’s vice-president, Mr. Matt Mayberry, at Respondent’s place of business.

21. During that meeting, the MDA inspector documented that Respondent held for sale or distribution 76 containers of the product Gromax+, collected sales receipts documenting

multiple sales or distribution of Gromax+ to various customers in 2009-2011, and photographed the labeling attached to the containers of Gromax+ being held for distribution or sale.

22. The product Gromax+ is not a registered pesticide.

23. The label for the product Gromax+ states, in part:

- (i) "Fungicide Activity"
- (ii) "Enhances Root Growth"
- (iii) "A Plant Growth Stimulant"
- (iv) "Active ingredients: Cytokins [sic]; Gibberellic; Indolebutyric Acid"
- (v) "In-Furrow application improves seed environment for germination, root growth & development"
- (vi) "Foliar application promotes reproductive activity of the plant, along with further stimulating root growth and water infiltration"

24. Gromax+ is a pesticide as defined by Section 2(u) of FIFRA, 7 U.S.C.

§ 136(u), 40 C.F.R. §§ 152.3 and 152.15(a).

25. Gromax+ is not registered as a pesticide as required by Section 3(a) of FIFRA, 7 U.S.C. § 136a(a).

26. The label for the product Gromax+ does not bear an EPA-assigned registration number for the establishment in which it was produced.

Violations

27. The Complainant hereby states and alleges that Respondent has violated FIFRA and federal regulations promulgated thereunder, as follows:

Count 1

28. The facts stated in paragraphs 17 through 26 are realleged and incorporated as if fully stated herein.

29. On or about August 25, 2011, Respondent held for distribution or sale a quantity of Gromax+.

30. Respondent's holding distribution or sale of the unregistered pesticide Gromax+ is a violation of Sections 3(a) and 12(a)(1)(A) and (E) of FIFRA, 7 U.S.C. §§ 136a(a) and 136j(a)(1)(A) and (E).

Counts 2-15

31. The facts stated in paragraphs 17 through 26 are realleged and incorporated as if fully stated herein.

32. On fourteen (14) occasions between April 1, 2010 and August 25, 2011, Respondent distributed or sold a quantity of the unregistered pesticide Gromax+.

33. Each occasion of Respondent's distribution or sale of the unregistered pesticide Gromax+ constitutes a violation of Sections 3(a) and 12(a)(1)(A) and (E) of FIFRA, 7 U.S.C. §§ 136a(a) and 136j(a)(1)(A) and (E).

Section V

Consent Agreement

34. For purposes of this proceeding, Respondent admits the jurisdictional allegations set forth above.

35. Respondent neither admits nor denies the factual allegations set forth above.

36. Respondent waives its right to contest any issue of fact or law set forth above and its/their right to appeal the Final Order accompanying this Consent Agreement.

37. Respondent and EPA agree to conciliate this matter without the necessity of a formal hearing and to bear their respective costs and attorney's fees.

38. Nothing contained in the Final Order portion of this CAFO shall alter or otherwise affect Respondent's obligation to comply with all applicable federal, state, and local environmental statutes and regulations and applicable permits.

39. The undersigned representative of Respondent certifies that he or she is fully authorized to enter into the terms and conditions of this CAFO and to execute and legally bind Respondent to it.

40. Respondent certifies that by signing this CAFO that it is presently in compliance with FIFRA, 7 U.S.C. § 136 et. seq., and all regulations promulgated thereunder.

41. The effect of settlement described in Paragraph 42 below is conditioned upon the accuracy of the Respondent's representations to EPA, as memorialized in Paragraph 40 above.

42. Payment of this civil penalty in full shall resolve all civil and administrative claims for all violations of FIFRA alleged in this document.

43. Complainant reserves the right to take any enforcement action with respect to any other violations of FIFRA or of any other applicable law that are not alleged in this document.

44. Respondent consents to the issuance of the Final Order hereinafter recited and consents to the payment of a civil penalty as specified in the Final Order.

45. Late Payment Provisions. Pursuant to 31 U.S.C. § 3717, EPA is entitled to assess interest and penalties on debts owed to the United States and a charge to cover the cost of processing and handling a delinquent claim. Respondent understands that its failure to timely pay any portion of the civil penalty described in Paragraph 1 of the Final Order may result in the commencement of a civil action in Federal District Court to recover the full remaining balance,

along with penalties and accumulated interest. In such case, interest shall accrue thereon at the applicable statutory rate on the unpaid balance until such civil or stipulated penalty and any accrued interest are paid in full. A late payment handling charge of \$15 will be imposed after thirty (30) days and an additional \$15 will be charged for each subsequent thirty (30) day period. Additionally, as provided by 31 U.S.C. § 3717(e)(2), a six percent (6%) per annum penalty (late charge) may be assessed on any amount not paid within ninety (90) days of the due date.

Section VI

Final Order

Pursuant to Section 14 of FIFRA, as amended, 7 U.S.C. §136l, and according to the terms of the Consent Agreement set forth above, **IT IS HEREBY ORDERED THAT:**

1. Respondent shall pay a civil penalty of Seventeen Thousand One Hundred and Sixty Dollars (\$17,160.00) within thirty (30) days of the effective date of this Final Order. Such payment shall identify Respondent by name and docket number and shall be by certified or cashier's check made payable to the "United States Treasury" and sent to:

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

2. Wire transfers should be directed to the Federal Reserve Bank of New York:

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

3. A copy of the check or other information confirming payment shall simultaneously be sent to the following:

Regional Hearing Clerk
U.S. Environmental Protection Agency
Region 7
901 North 5th Street
Kansas City, Kansas 66101;

and

Chris R. Dudding, Attorney
Office of Regional Counsel
U.S. Environmental Protection Agency
Region 7
901 North 5th Street
Kansas City, Kansas 66101.

4. Respondent and Complainant shall each bear their own costs and attorneys' fees incurred as a result of this matter.

5. No portion of the civil penalty or interest paid by Respondent pursuant to the requirements of this CAFO shall be claimed by Respondent as a deduction for federal, state, or local income tax purposes.

6. This CAFO shall be effective upon the filing of the Final Order by the Regional Hearing Clerk for EPA, Region 7. Unless otherwise stated, all time periods stated herein shall be calculated in calendar days from such date.

**RESPONDENT
MAYBERRY SEED COMPANY**

Date: 6-11-12

By:



Larry E. Mayberry
Print Name

President
Title

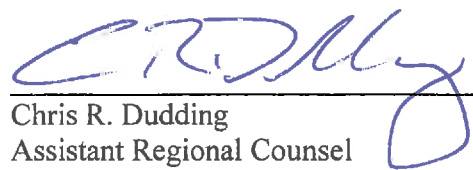
COMPLAINANT
U. S. ENVIRONMENTAL PROTECTION AGENCY

Date: 6/14/12




Karen Fluornoy
Director
Water, Wetlands and Pesticides Division

Date: 6/14/12



Chris R. Dudding
Assistant Regional Counsel
Office of Regional Counsel

IT IS SO ORDERED. This Order shall become effective immediately.

Date: June 14, 2012 
ROBERT L. PATRICK
Regional Judicial Officer

IN THE MATTER OF Mayberry Seed Co., Respondent
Docket No. FIFRA-07-2012-0015

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Order was sent this day in the following manner to the addressees:

Copy hand delivered to
Attorney for Complainant:

Chris R. Dudding
Assistant Regional Counsel
Region 7
United States Environmental Protection Agency
901 N. 5th Street
Kansas City, Kansas 66101

Copy by Certified Mail Return Receipt to:

Shannon Morgan
Pelts McMullan Edgington & Morgan, LLP
Attorneys at Law
217 College Avenue
P.O. Box 68
Kennett, Missouri 63857

Dated: 10/15/12



Kathy Robinson
Hearing Clerk, Region 7