

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

**REGION VII
901 N. FIFTH STREET
KANSAS CITY, KANSAS 66101**

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ENVIRONMENTAL PROTECTION
AGENCY-REGION VII
REGIONAL HEARING CLERK

IN THE MATTER OF)
)
Utopian Trees, Inc.)
d/b/a KAT Nurseries, LLC)
30050 West 135th Street) Docket No. FIFRA-07-2007-0013
Olathe, Kansas 66061)
)
Respondent)

CONSENT AGREEMENT AND FINAL ORDER

The U.S. Environmental Protection Agency (EPA), Region VII and Utopian Trees, Inc. d/b/a KAT Nurseries, L.L.C. (Respondent) 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), 22.18(b)(2) and 22.18(b)(3) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits (Consolidated Rules), 40 C.F.R. §§ 22.13(b), 22.18(b)(2) and 22.18(b)(3).

ALLEGATIONS

Jurisdiction

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

Parties

3. The Complainant, by delegation from the Administrator of the EPA and the Regional Administrator, EPA, Region VII, is the Director of the Water, Wetlands and Pesticides Division, EPA, Region VII.
4. The Respondent is Utopian Trees, Inc. d/b/a KAT Nurseries LLC, a commercial nursery, located at 30050 West 135th Street, Olathe, Kansas 66061. The Respondent is a "person" as defined by Section 2(s) of FIFRA, 7 U.S.C. § 136(s), and a corporation qualified to do business in the state of Kansas.

Statutory and Regulatory Background

5. Section 25 of FIFRA states that the Administrator of EPA is authorized to prescribe regulations to carry out the provisions of FIFRA. 7 U.S.C. § 136w. The regulations shall take into account the difference in concept and usage between various classes of pesticides, including public health pesticides, and differences in environmental risk and the appropriate data for evaluating such risk between agricultural, nonagricultural, and public health pesticides. Id.

6. EPA promulgated the Worker Protection Standard (WPS) regulations as a result of the authorization set forth in Section 25 of FIFRA, 7 U.S.C. § 136w. 40 C.F.R. Part 170 *et. seq.*

7. The purpose of the WPS is to reduce the risks of illness or injury resulting from workers' and handlers' occupational exposures to pesticides used in the production of agricultural plants on farms or in nurseries, greenhouses, and forests and also from the accidental exposure of workers and other persons to such pesticides. 40 C.F.R. § 170.1.

8. The WPS regulations provide standards for agricultural workers. 40 C.F.R. Part 170, Subpart B. The term "worker" is defined as any person who is employed for any type of compensation and who is performing activities related to the production of agricultural plants on an agricultural establishment. 40 C.F.R. § 170.3.

9. The WPS regulations provide separate standards for agricultural handlers. 40 C.F.R. Part 170, Subpart C. The term "handler" is defined as any person who is employed for any type of compensation by an agricultural establishment and who is mixing, loading, transferring or applying pesticides or handling open containers of pesticides. 40 C.F.R. § 170.3.

10. The term "agricultural establishment" is defined as any farm, forest, nursery, or greenhouse. 40 C.F.R. § 170.3.

11. Section 12(a)(2)(G) of FIFRA states that it shall be unlawful for any person in any State to use any registered pesticide in a manner inconsistent with its labeling. 7 U.S.C. § 136j(a)(2)(G).

12. Section 3 of FIFRA sets forth the pesticide registration requirements. 7 U.S.C. § 136a.

Factual Allegations

13. Respondent, at all times relevant, operated an agricultural establishment in Olathe, Kansas. The agricultural establishment is a commercial nursery which grows and sells trees, shrubs, and flowers.

14. On or about June 15, 2005, a representative from the Kansas Department of Agriculture (KDA) conducted an inspection at Respondent's agricultural establishment. The KDA inspector

conducted an inspection of the agricultural establishment to review compliance with the WPS requirements and also conducted interviews with the owner/manager, handlers and workers.

15. On or about September 8, 2005, a representative from KDA conducted a second inspection at Respondent's agricultural establishment. The KDA inspector conducted an inspection of the agricultural establishment to review compliance with the WPS requirements and also conducted interviews with the owner/manager, handlers and workers.

16. During the inspections it was discovered that the following products were used at Respondent's agricultural establishment: Lorsban 4E, Roundup Original Max, Carbaryl 4L, and Leverage 2.7.

17. During the September 8, 2005 inspection it was discovered that after the application of pesticides at the agricultural establishment workers were allowed to enter or remain in the treated area before the restricted-entry interval specified on the pesticide label expired.

18. During the June 15, 2005 inspection it was discovered that written notifications were not provided to workers as required by the label for one pesticide.

19. During the June 15, 2005 and September 8, 2005 inspections it was discovered that the Respondent failed to display pesticide safety information such as a pesticide safety poster, or emergency medical care information.

20. During the June 15, 2005 and September 8, 2005 inspections it was discovered that the Respondent failed to display specific information about the pesticides applied on the agricultural establishment or that a restricted-entry interval had been in effect.

21. During the June 15, 2005 inspection it was discovered that decontamination supplies such as soap and single-use towels were not available to workers and handlers who perform activities in areas where a pesticide was applied or a restricted-entry interval was in effect.

22. During the June 15, 2005 and September 8, 2005 inspection it was discovered that handlers had not received training meeting the WPS requirements.

23. During the June 15, 2005 and September 8, 2005 inspections it was discovered that Respondent did not require the handlers read the product labeling or inform the handlers of all the labeling requirements related to safe use of the pesticide, such as signal words, human hazard precautions, personal protective equipment requirements, first aid instructions, environmental precautions, and any additional precautions pertaining to the handling activity to be performed.

24. During the June 15, 2005 inspection, it was discovered that personal protective equipment such as gloves or eye protection were not provided to handlers.

25. During the September 8, 2005 inspection, it was discovered that Gly Star Plus and Lorsban 4E were used in a manner inconsistent with the registered labels.

VIOLATIONS

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

Count 1

27. Complainant hereby incorporates the allegations contained in paragraphs 1 through 26 above, as if fully set forth herein.

28. During the September 8, 2005 KDA inspectors observed workers pruning in the area that was concurrently treated with Gly Star Plus.

29. The label for Gly Star Plus establishes a restricted-entry interval of four hours.

30. Respondent violated Section 25 of FIFRA and its implementing regulations by allowing a worker to enter in the area after the application of any pesticide or to remain in the treated area before the restricted-entry interval specified on the pesticide labeling has expired. 7 U.S.C. § 136w and 40 C.F.R. § 112(a)(1).

COUNT 2

31. Complainant hereby incorporates the allegations contained in paragraphs 1 through 26 above, as if fully set forth herein.

32. Lorsban 4E is a restricted use pesticide. The Lorsban 4E label explicitly requires notification to workers of the application both orally and by posting warning signs at entrances to treated areas.

33. Respondent applied Lorsban 4E at the agricultural establishment. During the June 15, 2005 and September 8, 2005 inspections workers affirmed that posted warning signs were not used to notify workers of the pesticide application.

34. Respondent violated Section 25 of FIFRA and its implementing regulations by failing to post warning signs notifying workers that Lorsban 4E had been applied at the agricultural establishment. 7 U.S.C. § 136w and 40 C.F.R. § 170.120(b) and (c).

COUNT 3

35. Complainant hereby incorporates the allegations contained in paragraphs 1 through 26

above, as if fully set forth herein.

36. During the June 15, 2005 and September 8, 2005 inspections, the KDA inspector observed that pesticide safety posters were not displayed at a central location that conveyed pesticide safety information or the emergency medical care information to workers.

37. Respondent violated Section 25 of FIFRA and its implementing regulations by failing display pesticide safety information in a central location. Specifically, when workers are on an agricultural establishment and within the last 30 days, a pesticide covered by the WPS has been applied on the establishment or a restricted-entry interval has been in effect, the agricultural employer shall display pesticide safety information including a pesticide safety poster and list emergency medical care information in a central location. 7 U.S.C. § 136w and 40 C.F.R. § 170.135.

COUNT 4

38. Complainant hereby incorporates the allegations contained in paragraphs 1 through 26 above, as if fully set forth herein.

39. During the June 15, 2005 and September 8, 2005 inspections, pesticide safety posters were not displayed at a central location that conveyed pesticide safety information or the emergency medical care information to handlers.

40. Respondent violated Section 25 of FIFRA and its implementing regulations by failing display pesticide safety information in a central location. Specifically, when handlers are on an agricultural establishment and, within the last 30 days, a pesticide covered by the WPS has been applied on the establishment or a restricted-entry interval has been in effect, the handler employer shall display pesticide safety information including a pesticide safety poster and list emergency medical care information in a central location. 7 U.S.C. § 136w and 40 C.F.R. § 170.235.

COUNT 5

41. Complainant hereby incorporates the allegations contained in paragraphs 1 through 26 above, as if fully set forth herein.

42. During the June 15, 2005 and September 8, 2005 inspections, workers affirmed that specific information regarding the pesticides applied on the agricultural establishment or that a restricted-entry interval had been in effect were not posted.

43. Respondent violated Section 25 of FIFRA and its implementing regulations by failing to provide specific information about pesticide applications. Specifically, when workers are on an agricultural establishment and, within the last 30 days, a pesticide covered by the WPS

requirements has been applied on the establishment or a restricted-entry interval has been in effect, the agricultural employer shall display specific information about the pesticide. 7 U.S.C. § 136w and 40 C.F.R. § 170.122.

COUNT 6

44. Complainant hereby incorporates the allegations contained in paragraphs 1 through 26 above, as if fully set forth herein.

45. During the June 15, 2005 September 8, 2005 inspections, handlers affirmed that specific information regarding the pesticides applied on the agricultural establishment or that a restricted-entry interval had been in effect was not posted.

46. Respondent violated Section 25 of FIFRA and its implementing regulations by failing to provide specific information about pesticide applications. Specifically, when handlers are on an agricultural establishment and, within the last 30 days, a pesticide covered the WPS requirements has been applied on the establishment or a restricted-entry interval has been in effect, the agricultural employer shall display specific information about the pesticide. 7 U.S.C. § 136w and 40 C.F.R. § 170.222.

COUNT 7

47. Complainant hereby incorporates the allegations contained in paragraphs 1 through 26 above, as if fully set forth herein.

48. During the June 15, 2005 and September 8, 2005 inspections, workers affirmed that no soap or single-use towels were available in the field.

49. Respondent violated Section 25 of FIFRA and its implementing regulations by failing to provide decontamination supplies such as soap and single-use towels for workers whenever any worker was performing an activity in the area where a pesticide was applied or a restricted-entry interval was in effect within the last 30 days. 7 U.S.C. § 136w and 40 C.F.R. § 170.150.

COUNT 8

50. Complainant hereby incorporates the allegations contained in paragraphs 1 through 26 above, as if fully set forth herein.

51. During the September 8, 2005 inspection, a handler affirmed that no soap or single-use towels were available in the field.

52. Respondent violated Section 25 of FIFRA and its implementing regulations by failing to provide decontamination supplies such as soap and single-use towels for handlers whenever any

handler was performing an activity in the area where a pesticide was applied or a restricted-entry interval was in effect within the last 30 days. 7 U.S.C. § 136w and 40 C.F.R. § 170.250.

COUNT 9

53. Complainant hereby incorporates the allegations contained in paragraphs 1 through 26 above, as if fully set forth herein.

54. During the June 15, 2005 and September 8, 2005 inspections handlers affirmed that they had not received training meeting the WPS requirements.

55. Respondent violated Section 25 of FIFRA and its implementing regulations by failing to provide pesticide safety training for handlers. Specifically, before any handler performs any handling task, the handler employer shall assure that the handler has been training in accordance the worker protection standards during the last five (5) years. 7 U.S.C. § 136w and 40 C.F.R. § 170.230(a).

COUNT 10

56. Complainant hereby incorporates the allegations contained in paragraphs 1 through 26 above, as if fully set forth herein.

57. During the June 15, 2005 and September 8, 2005 inspections, handlers affirmed that prior to performing any handling activity handlers were not required to read the product labeling nor were they informed of all the labeling requirements related to safe use of the pesticide.

58. Respondent violated Section 25 of FIFRA and its implementing regulations by failing to assure knowledge on the part of handlers of labeling information. Specifically, the handler employer shall assure that before the handler performs any handling activity, the handler either has read the product labeling or has been informed in a manner the handler can understand of all labeling requirements related to safe use of the pesticide, such as signal words, human hazard precautions, personal protective equipment requirements, first aid instructions, environmental precautions, and any additional precautions pertaining to the handling activity to be performed. 7 U.S.C. § 136w and 40 C.F.R. § 170.232(a).

COUNT 11

59. Complainant hereby incorporates the allegations contained in paragraphs 1 through 26 above, as if fully set forth herein.

60. During the June 15, 2005 inspection, a handler affirmed that personal protective equipment such as gloves and eye protection were not provided by Respondent.

61. The following products were used at the agricultural establishment: Lorsban 4E, Roundup Original Max, Carbaryl 4L, and Leverage 2.7. The label for Lorsban 4E, Roundup Original Max, Carbaryl 4L, and Leverage 2.7 all require use of chemical-resistant gloves. The label for Leverage 2.7 requires use of protective eyewear.

62. Respondent violated Section 25 of FIFRA and its implementing regulations by failing to provide personal protective equipment for any person who performs tasks as a pesticide handler as required by the labeling on the product. 7 U.S.C. § 136w and 40 C.F.R. § 170.240.

COUNT 12

63. Complainant hereby incorporates the allegations contained in paragraphs 1 through 26 above, as if fully set forth herein.

64. Respondent affirmed that the RUP Gly Star Plus was used at the agricultural establishment.

65. The label for Gly Star Plus lists the crops that the product may be used on, including but not limited to Christmas trees, tree fruits, tree nuts, and tropical crops.

66. The crops listed on the Gly Star Plus label are not grown at Respondent's agricultural establishment.

67. Respondent violated Section 12 of FIFRA by using a registered pesticide in a manner inconsistent with its labeling. 7 U.S.C. § 136j(a)(2)(G).

COUNT 13

68. Complainant hereby incorporates the allegations contained in paragraphs 1 through 26 above, as if fully set forth herein.

69. Respondent affirmed that the RUP Lorsban 4E was used at the agricultural establishment.

70. The label for Lorsban 4E lists the crops that the product may be used on, including but not limited to Christmas trees, tree fruits, tree nuts, vegetable and tropical crops.

71. The crops listed on the Lorsban 4E label are not grown at Respondent's agricultural establishment.

72. Respondent violated Section 12 of FIFRA by using a registered pesticide in a manner inconsistent with its labeling. 7 U.S.C. § 136j(a)(2)(G).

CONSENT AGREEMENT

It is hereby agreed and accepted by Respondent that:

1. Respondent and EPA agree to the terms of this Consent Agreement and Final Order and Respondent agrees to comply with the terms of the Final Order portion of this Consent Agreement and Final Order.

2. Respondent admits the jurisdictional allegations of this Consent Agreement and Final Order and agrees not to contest EPA's jurisdiction in this proceeding or any subsequent proceeding to enforce the terms of the Final Order set forth below.

3. Respondent neither admits nor denies the factual allegations and legal conclusions set forth in this Consent Agreement and Final Order.

4. Respondent waives its right to a judicial or administrative hearing on any issue of fact or law set forth above and its right to appeal the Final Order accompanying this Consent Agreement.

5. Respondent and Complainant agree to conciliate the matters set forth in this Consent Agreement and Final Order without the necessity of a formal hearing and to bear their respective costs and attorney's fees.

6. This Consent Agreement and Final Order addresses all civil administrative claims for the FIFRA violations identified above. Complainant reserves the right to take any enforcement action with respect to any other violations of FIFRA or any other applicable law.

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

8. The undersigned representative of Respondent certifies that he or she is fully authorized to enter the terms and conditions of this Consent Agreement and Final Order and to execute and legally bind Respondent to it.

9. Respondent certifies by signing this Consent Agreement and Final Order that, to its knowledge, it is presently in compliance with FIFRA, 7 U.S.C. § 136 *et. seq.* and all regulations promulgated thereunder.

10. Respondent agrees that, in settlement of the claims alleged in this Consent Agreement and Final Order, Respondent shall pay a penalty of Eight Thousand Two Hundred Seventy-Two Dollars (\$8,272.00) as set forth in Paragraph 1 of the Final Order.

11. The effect of settlement described in Paragraph 10 above is conditioned upon the accuracy of the Respondent's representations to EPA, as memorialized in paragraph 9 above.

12. Nothing in this Consent Agreement shall be construed as a release from any other action under any law and/or regulation administered by the U. S. Environmental Protection Agency. Nothing contained in the Final Order portion of this Consent Agreement and Final Order shall alter or otherwise affect Respondent's obligation to comply with all applicable federal, state and local environmental statutes and regulations and applicable permits.

13. Failure to pay the assessed penalty may result in the referral of this matter to the United States Department of Justice for collection. If payment is not received on or before the due date, interest will be assessed at the annual rate established by the Secretary of the Treasury pursuant to 31 U.S.C. § 3717. The interest will be assessed on the overdue amount from the due date through the date of payment.

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 by cashier or certified check, a civil penalty, for the violations cited herein, in the amount of Eight Thousand Two Hundred Seventy-Two Dollars (\$8,272.00), on or before thirty (30) days of the effective date this Final Order.

2. Payment of the penalty shall be by cashier or certified check which shall reference Docket Number FIFRA-07-2007-0013, and made payable to "Treasurer, United States of America" and remitted to:

Regional Hearing Clerk
United States Environmental Protection Agency
Region VII
c/o Mellon Bank
P.O. Box 371099M,
Pittsburgh, Pennsylvania 15251.

3. A copy of the check shall simultaneously be sent to the following:

Kelley Hickman
Office of Regional Counsel
United States Environmental Protection Agency
Region VII
901 North 5th Street
Kansas City, Kansas 66101

and

Kathy Robinson
Regional Hearing Clerk
Office of Regional Counsel
United States Environmental Protection Agency
Region VII
901 North 5th Street
Kansas City, Kansas 66101

4. No portion of the civil penalty or interest paid by Respondent pursuant to the requirements of this Consent Agreement and Final Order shall be claimed by Respondent as a deduction for federal, state, or local income tax purposes.


5. The effective date of this Order shall be the date on which it is signed by the Regional Judicial Officer.

6. This executed Consent Agreement and Final Order shall be filed with the Regional Hearing Clerk, U.S. Environmental Protection Agency, Region VII, 901 North 5th Street, Kansas City, Kansas, 66101.


COMPLAINANT:

U.S. ENVIRONMENTAL PROTECTION AGENCY

Date: 09/17/07

By: 
for William A. Spratlin
Director
Water, Wetlands and Pesticides Division

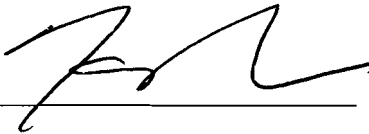
Date: 9/13/07

By: 
Kelley Hickman
Assistant Regional Counsel

RESPONDENT:

Utopian Trees, Inc.
d/b/a KAT Nurseries, LLC


Date: 9/11/07

By: 

Printed Name: Tory Schwoppe

Title: Fres

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


Region VII

IN THE MATTER OF Utopian Trees, Inc. D/b/a KAT Nurseries, LLC, Respondent
Docket No. FIFRA-07-2007-0013

CERTIFICATE OF SERVICE

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


Copy hand delivered to
Attorney for Complainant:

Kelley Hickman
Assistant Regional Counsel
Region VII
United States Environmental Protection Agency
901 N. 5th Street
Kansas City, Kansas 66101

Copy by Certified Mail Return Receipt to:

Tory Schwope, President
Utopian Trees, Inc d/b/a KAT Nurseries, LLC
30050 West 135th Street
Olathe, Kansas 66061

Dated: 9/19/07


Kathy Robinson
Hearing Clerk, Region 7