

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 7  
11201 RENNER BOULEVARD  
LENEXA, KANSAS

2016 AUG -5 AM 10: 31

**BEFORE THE ADMINISTRATOR**

IN THE MATTER OF:	)	Docket. No. FIFRA-07-2016-0016
	)	
MIDWAY CO-OP ASSOCIATION,	)	COMPLAINT AND
	)	CONSENT AGREEMENT
Respondent.	)	AND FINAL ORDER
_____	)	

**PRELIMINARY STATEMENT**

The U.S. Environmental Protection Agency, Region 7, (“EPA”) and Midway Co-op Association (“Respondent”) have agreed to a settlement of this action before filing of a Complaint, therefore 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 and the Revocation/Termination or Suspension of Permits, 40 C.F.R. §§ 22.13(b) and 22.18(b)(2).

**COMPLAINT**

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 Complaint and Consent Agreement/Final Order (“CA/FO”) serves as notice that the 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 redelegation from the Regional Administrator, EPA, Region 7, is the Director of the Water, Wetlands and Pesticides Division, EPA, Region 7.

4. The Respondent is Midway Co-op Association, a distributor of pesticides with its principal place of business at 210 Harrison Street, Osborne, Kansas 67473.

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 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 that is adulterated or misbranded.

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

8. 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.”

9. Section 2(u) of FIFRA, 7 U.S.C. § 136(u), defines the term “pesticide” as, *inter alia*, any substance or mixture of substances intended for use as a plant regulator, defoliant, or desiccant.

10. Section 2(q) of FIFRA, 7 U.S.C. § 136(q), defines the circumstances and conditions under which a pesticide is misbranded under Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E).

11. In accordance with 40 C.F.R. § 165.70, a registrant may allow a refiller to repack the registrant’s pesticide product into refillable containers and to distribute and sell such repackaged product under the registrant’s existing registration, provided that the conditions under 40 C.F.R. § 165.70(b) are satisfied. Pursuant to 40 C.F.R. § 165.70(c), both a refiller and a pesticide product’s registrant may be held liable for violations pertaining to the repackaged product.

12. Section 14 of FIFRA, 7 U.S.C. § 136l, provides that any registrant, commercial applicator, wholesaler, dealer, retailer, or other distributor who violates any provision of 7 U.S.C. Chapter 6, Subchapter II, *Environmental Pesticide Control*, may be assessed a civil penalty by the Administrator of not more than \$5,000 for each offense. The Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, as amended by the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701, and the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, 28 U.S.C. § 2461, and implementing regulations at 40 C.F.R. Part 19 increased these statutory maximum penalties to \$7,500 for violations that occurred after December 6, 2013, and before November 2, 2015.

General Factual Allegations

13. On or about March 31, 2014, representatives of the Kansas Department of Agriculture (“KDA”) conducted a neutral scheme producer establishment inspection of a facility owned and/or operated by Midway Co-op Association at 101 West Ohio Street in Luray, Kansas, EPA Establishment Number 041200-KS-006 (“Midway Co-op Facility”). The inspection was conducted under the authority of Section 9 of FIFRA, 7 U.S.C. § 136g, to evaluate the Midway Co-op Facility’s compliance with the requirements of FIFRA. The KDA inspection report was subsequently forwarded to the EPA for review, and a copy was mailed to Respondent.

14. At all times relevant to the allegations herein, Winfield Solutions, LLC, owned stationary bulk pesticide storage containers at the Midway Co-op Facility. At the time of the KDA inspection, and at all time relevant to the allegations herein, at least two such bulk pesticide storage containers at the Midway Co-op Facility contained and held for sale pesticides registered to Winfield Solutions, LLC, including Shredder 2,4-D LV6, EPA Registration Number (“EPA Reg. No.”) 1381-250, and 2,4-D Amine 4, EPA Reg. No. 1381-103.

15. At all times relevant to the allegations herein, Winfield Solutions, LLC, allowed Respondent to repackage Winfield Solutions, LLC’s pesticide products—including Shredder 2,4-D LV6, EPA Reg. No. 1381-250, and 2,4-D Amine 4, EPA Reg. No. 1381-103—into refillable containers and to distribute and/or sell such repackaged products under Respondent’s registration.

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

Allegations of Violation

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

COUNT I

18. The facts stated in paragraphs 13 through 16 are re-alleged and incorporated as if fully stated herein.

19. Section 2(q)(1)(A) of FIFRA, 7 U.S.C. § 136(q)(1)(A), states that a pesticide is misbranded if its labeling bears any statement, design, or graphic representation relative thereto or to its ingredients which is false or misleading in any particular. Section 2(q)(1)(C) of FIFRA, 7 U.S.C. § 136(q)(1)(C), states that a pesticide is misbranded if it is an imitation of, or is offered for sale under the name of, another pesticide. Section 2(q)(2)(C) of FIFRA, 7 U.S.C. § 136(q)(2)(C), states that a pesticide is misbranded if there is not affixed to its container a label bearing, *inter alia*, the name, brand, or trademark under which the pesticide is sold and the registration number assigned to the pesticide. The regulation at 40 C.F.R. § 156.10(a)(1) provides that every pesticide product shall bear a label containing the information specified by

the Act and the regulations in 40 C.F.R. Part 156, *Labeling Requirements for Pesticides and Devices*. Pursuant to 40 C.F.R. § 156.10(b), the name, brand, or trademark under which the pesticide product is sold shall appear on the front panel of the label, and no name, brand, or trademark may appear on the label which is false or misleading. Pursuant to 40 C.F.R. § 156.10(e), the registration number assigned to the pesticide product at the time of registration shall appear on the label.

20. Documentation collected during the KDA inspection revealed that a label for Agrisolutions 2,4-D LV6, EPA Reg. No. 1381-101, was affixed to a bulk storage tank containing Shredder 2,4-D LV6, EPA Reg. No. 1381-250, held for sale at the Midway Co-op Facility. Additionally, the KDA inspection revealed that Midway Co-op Association sold 60 gallons of Shredder 2,4-D LV6, EPA Reg. No. 1381-250, on September 20, 2013, Invoice No. 742098.

21. The bulk pesticide storage container holding Shredder 2,4-D LV6, EPA Reg. No. 1381-250, was misbranded pursuant to Section 2(q)(1)(C) of FIFRA, 7 U.S.C. § 136(q)(1)(C), because it was offered for sale under the name of another pesticide, namely Agrisolutions 2,4-D LV6, EPA Reg. No. 1381-101. Additionally, the pesticide was misbranded pursuant to Section 2(q)(1)(A) of FIFRA, 7 U.S.C. § 136(q)(1)(A), because its labeling bore statements and graphic representations relative thereto that were false or misleading. Finally, the pesticide was misbranded pursuant to Section 2(q)(2)(C) of FIFRA, 7 U.S.C. § 136(q)(2)(C), because the name, brand, or trademark under which the pesticide was sold, and the registration number assigned to such pesticide, did not appear on the label affixed to the tank.

22. Respondent's sale of a misbranded pesticide is a violation of Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E).

### **CONSENT AGREEMENT**

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

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

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

26. Respondent and the EPA agree to conciliate this matter without the necessity of a formal hearing and to bear their respective costs and attorneys' fees incurred as a result of this action.

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

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

29. By signing this CA/FO Respondent certifies that Respondent is presently in compliance with FIFRA, 7 U.S.C. § 136 *et seq.*, and all regulations promulgated thereunder.

#### Effect of Settlement

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

31. The effect of settlement described in paragraph 30 is conditioned upon the accuracy of the Respondent's representations to the EPA, as memorialized in paragraph 29.

#### Reservation of Rights

32. Complainant reserves the right to take any enforcement action with respect to any other violations of FIFRA or any other applicable law.

#### Payment of Penalty

33. Respondent agrees that in settlement of the claims alleged in this CA/FO, Respondent shall pay a civil penalty of Three Thousand Dollars (\$3,000) within thirty (30) days of the effective date of this CA/FO and as directed in paragraphs 34 and 35 below.

34. Respondent shall pay the penalty by cashier's or certified check, by wire transfer, or online. The payment shall reference the Docket Number on the check or wire transfer. If made by cashier's or certified check, the check shall be made payable to "United States Treasury" and remitted to:

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

Wire transfers shall be directed to the Federal Reserve Bank of New York as follows:

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”

On-line payments are available through the Department of Treasury:

*www.pay.gov*  
Enter “sfo 1.1” in the search field.  
Open the form and complete required files.

35. A copy of the check, transfer, or online payment confirmation shall be sent simultaneously to the following:

Regional Hearing Clerk  
U.S. Environmental Protection Agency, Region 7  
11201 Renner Boulevard  
Lenexa, Kansas 66219;

and to:

Mark K. Leshner  
WWPD/TOPE  
U.S. Environmental Protection Agency, Region 7  
11201 Renner Boulevard  
Lenexa, Kansas 66219.

Late Payment Provision

36. Pursuant to 31 U.S.C. § 3717, the 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 33 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.

General Provisions

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

38. Respondent consents to the issuance of the Final Order hereinafter recited.

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

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

41. This CA/FO shall apply to and be binding upon Respondent, its agents, successors, and assigns. Respondent shall ensure that any directors, officers, employees, contractors, consultants, firms or other persons or entities acting under or for him with respect to matters included herein, comply with the terms of this CA/FO.

42. The effective date of this CA/FO shall be the date on which it is filed by the Regional Hearing Clerk for EPA, Region 7.

**RESPONDENT:  
MIDWAY CO-OP ASSOCIATION**

Date: 7-26-16

Ron Reneberg  
Signature

Ron Reneberg  
Name

Agronomy Manager  
Title



**COMPLAINANT:  
U.S. ENVIRONMENTAL PROTECTION AGENCY**

Date:

8-2-16



Karen A. Flournoy

Director

Water, Wetlands and Pesticides Division

U.S. Environmental Protection Agency, Region 7

Date:

Aug. 1, 2016



Jared Pessetto

Office of Regional Counsel

U.S. Environmental Protection Agency, Region 7

11201 Renner Boulevard

Lenexa, Kansas 66219

Office: (913) 551-7793

pessetto.jared@epa.gov

**FINAL ORDER**

Pursuant to Section 14 of FIFRA, 7 U.S.C. § 136l, and the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, 40 C.F.R. Part 22, the foregoing Complaint and Consent Agreement resolving this matter is hereby ratified and incorporated by reference into this Final Order.

The Respondent is ORDERED to comply with all of the terms of the Consent Agreement. In accordance with 40 C.F.R. § 22.31(b), the effective date of the foregoing Consent Agreement and this Final Order is the date on which this Final Order is filed with the Regional Hearing Clerk.

IT IS SO ORDERED.

Date: Aug. 4, 2016

Karina Borromeo  
Karina Borromeo  
Regional Judicial Officer  
U.S. Environmental Protection Agency, Region 7

IN THE MATTER Of Midway Co-op Association, Respondent  
Docket No. FIFRA-07-2016-0016

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 emailed to Attorney for Complainant:

pessetto.jared@epa.gov

Copy by First Class Mail to Respondent:


Randy Massey

Midway Co-op Association

P.O. Box 40

Osborne, Kansas 67473-0040

Dated: 8/5/16

  
Kathy Robinson  
Hearing Clerk, Region 7