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BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:)	
)	DOCKET NO. FIFRA-10-2018-0336
WILBUR-ELLIS COMPANY, LLC,)	
)	CONSENT AGREEMENT
)	
Hood River, Oregon,)	
)	
Respondent.)	

I. STATUTORY AUTHORITY

1.1. This Consent Agreement is issued under the authority vested in the Administrator of the U.S. Environmental Protection Agency ("EPA") by Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136/(a).

1.2. Pursuant to Section 14(a) of FIFRA, 7 U.S.C. § 136/(a), and in accordance with the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties," 40 C.F.R. Part 22, EPA issues, and Wilbur-Ellis. ("Respondent") agrees to issuance of, the Final Order attached to this Consent Agreement ("Final Order").

II. PRELIMINARY STATEMENT

2.1. In accordance with 40 C.F.R. §§ 22.13(b) and 22.18(b), issuance of this Consent Agreement commences this proceeding, which will conclude when the Final Order becomes effective.

2.2. The Director of the Office of Compliance and Enforcement, EPA Region 10 ("Complainant") has been delegated the authority pursuant to Section 14(a) of FIFRA, 7 U.S.C. § 136/(a), to sign consent agreements between EPA and the party against whom an administrative penalty for violations of FIFRA is proposed to be assessed.

2.3. Part III of this Consent Agreement contains a concise statement of the factual and legal basis for the alleged violations of FIFRA together with the specific provisions of FIFRA and the implementing regulations that Respondent is alleged to have violated.

III. ALLEGATIONS

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

3.2. Section 2(u) of FIFRA, 7 U.S.C. § 136(u), defines a "pesticide," in part, as "any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest."

3.3. Under Section 12(a)(2)(S) of FIFRA, 7 U.S.C. § 136j(a)(2)(S), it is unlawful for any person to violate any regulation issued under Section 19 of FIFRA, 7 U.S.C. § 136q.

3.4. Pursuant to Section 19(e) of FIFRA, 7 U.S.C. § 136q(e), the EPA Administrator promulgated regulations pertaining to standards for pesticide containers and pesticide

containment structures (“the Container/Containment regulations”), which are codified at 40 C.F.R. Part 165.

3.5. 40 C.F.R. § 165.3 defines “agricultural pesticide” as “any pesticide product labeled for use in or on a farm, forest, nursery, or greenhouse.”

3.6. 40 C.F.R. § 165.3 defines “containment pad” as “any structure that is designed and constructed to intercept and contain pesticides, rinsates, and equipment wash water at a pesticide dispensing area.”

3.7. 40 C.F.R. § 165.3 defines “containment structure” as “either a secondary containment unit or a containment pad.”

3.8. 40 C.F.R. § 165.3 defines “establishment” as “any site where a pesticidal product [...] is produced, regardless of whether such site is independently owned or operated, and regardless of whether such site is domestic and producing a pesticidal product for export only, or whether the site is foreign and producing any pesticidal product for import into the United States.”

3.9. Under 40 C.F.R. § 165.3, “produce” means, *inter alia*, “to package, repackage, label, relabel, or otherwise change the container of any pesticide or device.”

3.10. 40 C.F.R. § 165.3 defines “facility” as “all buildings, equipment, structures, and other stationary items which are located on a single site or on contiguous or adjacent sites and which are owned or operated by the same person (or by any person who controls, who is controlled by, or who is under common control with such person).”

3.11. “Operator” is defined by 40 C.F.R. § 165.3 as “any person in control of, or having responsibility for, the daily operation of a facility at which a containment structure is located.”

3.12. "Owner" is defined by 40 C.F.R. § 165.3 as "any person who owns a facility at which a containment structure is required."

3.13. "Pesticide dispensing area" is defined by 40 C.F.R. § 165.3 as "an area in which pesticide is transferred out of or into a container."

3.14. "Refillable container" is defined by 40 C.F.R. § 165.3 as "a container that is intended to be filled with pesticide more than once for sale or distribution."

3.15. "Refilling establishment" is defined by 40 C.F.R. § 165.3 as "an establishment where the activity of repackaging pesticide product into refillable containers occurs."

3.16. 40 C.F.R. § 165.3 defines "repackage," for the purposes of the Container/Containment regulations, as "to transfer a pesticide formulation from one container to another without a change in the composition of the formulation, the labeling content, or the product's EPA registration number, for sale or distribution."

3.17. 40 C.F.R. § 165.3 defines "secondary containment unit" as "any structure, including rigid diking, that is designed and constructed to intercept and contain pesticide spills and leaks and to prevent runoff and leaching from stationary pesticide containers."

3.18. 40 C.F.R. § 165.3 defines "stationary pesticide container" as a "refillable container that is fixed at a single facility or establishment or, if not fixed, remains at the facility or establishment for at least 30 consecutive days, and that holds pesticide during the entire time."

3.19. Under 40 C.F.R. § 165.80(b)(1), owners or operators of refilling establishments who repackage agricultural pesticides, whose principal business is retail sale, and who also have a stationary pesticide container or a pesticide dispensing area are subject to the secondary containment requirements of the Container/Containment regulations.

3.20. Under 40 C.F.R. § 165.81(b), stationary pesticide containers designed to hold undivided quantities of agricultural pesticides equal to or greater than 500 gallons of liquid pesticide are subject to and must have a secondary containment unit that complies with the Container/Containment regulations.

3.21. Under 40 C.F.R. § 165.82(a)(3), pesticide dispensing areas are subject to and must have a containment pad that complies with the Container/Containment regulations where agricultural pesticides are dispensed from a 500-gallon tank.

3.22. Under 40 C.F.R. § 165.83(b), an “existing containment structure” is “one whose installation began on or before November 16, 2006.”

3.23. Under 40 C.F.R. § 165.87(b)(3), all existing containment structures “must be constructed with sufficient freeboard to contain precipitation and prevent water and other liquids from seeping into or flowing onto it from adjacent land or structures.”

3.24. Respondent is a “person” under Section 2(s) of FIFRA, 7 U.S.C. § 136(s).

3.25. Respondent is an owner or operator of a facility that is an establishment, located at 3900 Heron Drive, Hood River, Oregon (“the Facility”).

3.26. At all times relevant to this Consent Agreement, the Facility served as a refilling establishment that repackages the agricultural pesticide 440 Superior Spray Oil (EPA Reg. No. 2935-546), and whose principal business is retail sale.

3.27. At all times relevant to this Consent Agreement, the Facility had one stationary pesticide container with a holding capacity of 10,000 gallons that contained the agricultural pesticide 440 Superior Spray Oil.

3.28. At all times relevant to this Consent Agreement, the stationary pesticide container at the Facility was located within a secondary containment unit ("the secondary containment unit").

3.29. At all times relevant to this Consent Agreement, the Facility had an outdoor pesticide dispensing area ("pesticide dispensing area") where 440 Superior Spray Oil was repackaged at the Facility.

3.30. At all times relevant to this Consent Agreement, the pesticide dispensing area required the use of a containment pad.

3.31. At all times relevant to this Consent Agreement, the containment pad located in the pesticide dispensing area of the Facility consisted of a sloped, concrete slab that lacked any vertical construction features, such as a berm, wall, curb, or barrier, on the north or south ends of the containment pad.

3.32. At all times relevant to this Consent Agreement, the containment pad used in the pesticide dispensing area is an existing containment structure because it was built prior to November 16, 2006.

3.33. A federally credentialed inspector inspected the Facility on or about April 12, 2017.

COUNT 1

3.34. Under 40 C.F.R. § 165.87(b)(3), existing containment structures must be constructed with sufficient freeboard to contain precipitation and prevent water and other liquids from seeping into or flowing onto it from adjacent land or structures.

3.35. At all times relevant to this Consent Agreement, the containment pad in the Facility's pesticide dispensing area was a sloped, concrete slab that was unable to contain precipitation or prevent water and other liquids from seeping into or flowing onto the containment pad from adjacent land or structures.

3.36. On or about April 12, 2017, Respondent violated Section 12(a)(2)(S) of FIFRA, 7 U.S.C. § 136j(a)(2)(S) by failing to construct or maintain a containment pad with sufficient freeboard to contain precipitation and prevent water and other liquids from seeping into or flowing onto it from adjacent land or structures pursuant to 40 C.F.R. §165.87(b)(3), a regulation issued under Section 19 of FIFRA, 7 U.S.C. § 136q.

ENFORCEMENT AUTHORITY

3.37. Pursuant to Section 14(a)(1) of FIFRA, 7 U.S.C. § 136l(a)(1), and 40 C.F.R. Part 19, EPA may assess a civil penalty of not more than \$7,500.

IV. TERMS OF SETTLEMENT

4.1. Respondent admits the jurisdictional allegations of this Consent Agreement.

4.2. Respondent neither admits nor denies the specific factual allegations contained in this Consent Agreement.

4.3. As required by Section 14(a)(4) of FIFRA, 7 U.S.C. § 136l(a)(4), EPA has taken into account the appropriateness of such penalty to the size of Respondent's business, the effect on Respondent's ability to continue in business, and the gravity of the violations. After

considering all of these factors, EPA has determined and Respondent agrees that an appropriate penalty to settle this action is \$4,500 (the "Assessed Penalty").

4.4. Respondent agrees to pay the Assessed Penalty within 30 days of the effective date of the Final Order.

4.5. Payments under this Consent Agreement and the Final Order may be paid by check (mail or overnight delivery), wire transfer, ACH, or online payment. Payment instructions are available at: <http://www2.epa.gov/financial/makepayment>. Payments made by a cashier's check or certified check must be payable to the order of "Treasurer, United States of America" and delivered to the following address:

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

Respondent must note on the check the title and docket number of this action.

4.6. Concurrently with payment, Respondent must serve photocopies of the check, or proof of other payment method, described in Paragraph 4.5 on the Regional Hearing Clerk and EPA Region 10 at the following addresses:

Regional Hearing Clerk
U.S. Environmental Protection Agency
Region 10, Mail Stop ORC-113
1200 Sixth Avenue, Suite 155
Seattle, Washington 98101
young.teresa@epa.gov

Bethany Plewe
U.S. Environmental Protection Agency
Region 10, Mail Stop OCE-101
1200 Sixth Avenue, Suite 155
Seattle, Washington 98101
plewe.bethany@epa.gov

4.7. If Respondent fails to pay any portion of the Assessed Penalty in full by its due date, the entire unpaid balance of the Assessed Penalty and accrued interest shall become immediately due and owing. If such a failure to pay occurs, Respondent may be subject to a civil

action under Section 14(a)(5) of FIFRA, 7 U.S.C. § 136f(a)(5), to collect any unpaid penalties, together with interest, handling charges, and nonpayment penalties, as set forth below.

4.8. If Respondent fails to pay any portion of the Assessed Penalty in full by its due date. Respondent shall also be responsible for payment of the following amounts:

4.8.1. Interest. Pursuant to 31 U.S.C. § 3717(a)(1), any unpaid portion of the Assessed Penalty shall bear interest at the rate established by the Secretary of the Treasury from the effective date of the Final Order contained herein, provided, however, that no interest shall be payable on any portion of the Assessed Penalty that is paid within 30 days of the effective date of the Final Order contained herein.

4.8.2. Handling Charge. Pursuant to 31 U.S.C. § 3717(c)(1), a monthly handling charge of \$15 shall be paid if any portion of the Assessed Penalty is more than 30 days past due.

4.8.3. Nonpayment Penalty. Pursuant to 31 U.S.C. § 3717(e)(2), a nonpayment penalty of 6% per annum shall be paid on any portion of the Assessed Penalty that is more than 90 days past due, which nonpayment shall be calculated as of the date the underlying penalty first becomes past due.

4.9. The Assessed Penalty, including any additional costs incurred under Paragraph 4.8. represents an administrative civil penalty assessed by EPA and shall not be deductible for purposes of federal taxes.

4.10. The undersigned representative of Respondent certifies that he or she is authorized to enter into the terms and conditions of this Consent Agreement and to bind Respondent to this document.

4.11. The undersigned representative of Respondent also certifies that, as of the date of Respondent's signature of this Consent Agreement, Respondent has corrected the violation alleged in Part III.

4.12. Except as described in Paragraph 4.8, each party shall bear its own costs and attorneys' fees in bringing or defending this action.

4.13. For the purposes of this proceeding, Respondent expressly waives any right to contest the allegations contained in the Consent Agreement and to appeal the Final Order.

4.14. The provisions of this Consent Agreement and the Final Order shall bind Respondent and its agents, servants, employees, successors, and assigns.

4.15. Respondent consents to any conditions specified in this consent agreement.

4.16. The above provisions in Part IV are STIPULATED AND AGREED upon by Respondent and EPA Region 10.

DATED:

8/29/18

FOR RESPONDENT:

Ray Fujiura

Ray Fujiura, Territory Operations Manager
Wilbur-Ellis Company, LLC

DATED:

8/31/2018

FOR COMPLAINANT:

Edward J. Kowalski

EDWARD J. KOWALSKI, Director
Office of Compliance and Enforcement
EPA Region 10

BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:)	DOCKET NO. FIFRA-10-2018-0336
)	
WILBUR-ELLIS COMPANY, LLC,)	FINAL ORDER
)	
)	
Hood River, Oregon,)	
)	
Respondent.)	

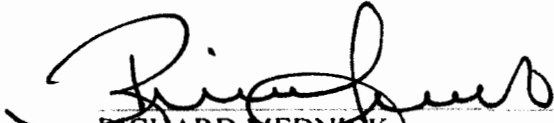
1.1. The Administrator has delegated the authority to issue this Final Order to the Regional Administrator of EPA Region 10, who has redelegated this authority to the Regional Judicial Officer in EPA Region 10.

1.2. The terms of the foregoing Consent Agreement are ratified and incorporated by reference into this Final Order. Respondent is ordered to comply with the terms of settlement.

1.3. The Consent Agreement and this Final Order constitute a settlement by EPA of all claims for civil penalties under FIFRA for the violations alleged in Part III of the Consent Agreement. In accordance with 40 C.F.R. § 22.31(a), nothing in this Final Order shall 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 does not waive, extinguish, or otherwise affect Respondent's obligations to comply with all applicable provisions of FIFRA and regulations promulgated or permits issued thereunder.

1.4. This Final Order shall become effective upon filing with the Regional Hearing Clerk.

SO ORDERED this 11th day of September, 2018.


RICHARD MEDNICK
Regional Judicial Officer
EPA Region 10

Certificate of Service

The undersigned certifies that the original of the attached **CONSENT AGREEMENT AND FINAL ORDER, In the Matter of: Wilbur-Ellis Company, LLC, Docket No.: FIFRA-10-2018-0336**, was filed with the Regional Hearing Clerk and served on the addressees in the following manner on the date specified below:


The undersigned certifies that a true and correct copy of the document was delivered to:

Bradley Roberts
U.S. Environmental Protection Agency
Region 10, Mail Stop ORC-113
1200 Sixth Avenue, Suite 155
Seattle, Washington 98101

Further, the undersigned certifies that a true and correct copy of the aforementioned document was placed in the United States mail certified/return receipt to:

Ray Fujiura
Wilbur-Ellis Company, LLC
7 E. Washington Avenue, Yakima. WA 98903

DATED this 12 day of September 2018.


TERESA YOUNG
Regional Hearing Clerk
EPA Region 10