

U. S. ENVIRONMENTAL PROTECTION AGENCY

REGION 7

11201 RENNER BOULEVARD
LENEXA, KANSAS 66219

UNITED STATES
ENVIRONMENTAL PROTECTION
AGENCY-REGION 7

2016 DEC -5 AM 10: 52

BEFORE THE ADMINISTRATOR

In the Matter of:

Dow AgroSciences LLC,

Respondent.

)
)
)
)
)
)

Docket No.: FIFRA-07-2017-0002

CONSENT AGREEMENT AND FINAL ORDER

The U.S. Environmental Protection Agency (EPA), Region 7, and Dow AgroSciences LLC (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) 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 (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 Dow AgroSciences LLC with corporate offices located at 9330 Zionsville Road, Indianapolis, Indiana.

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 2(t) of FIFRA, 7 U.S.C. § 136(t), defines the term “pest” to mean (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-organism (except viruses, bacteria, or other micro-organism on or in living man or other living animals) which the Administrator declares to be a pest under Section 25(c)(1).

7. 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.

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(q)(1)(A) of FIFRA, 7 U.S.C. § 136(q)(1)(A), states, in pertinent part, a pesticide is misbranded if its labeling bears any statement which is false or misleading in any particular.

11. Section 2(q)(1)(E) of FIFRA, 7 U.S.C. § 136(q)(1)(E), states a pesticide is misbranded if any word, statement, or other information required by or under authority of this Act to appear on the label or labeling is not prominently placed thereon with such conspicuousness and in such terms as to render it likely to be read and understood by the ordinary individual under customary conditions of purchase and use.

12. 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.

Section IV

General Factual Allegations

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

14. On or about March 13, 2014, a Nebraska Department of Agriculture (NDA) inspector conducted a production establishment inspection at Lamar Fertilizer, Inc. located at 73994 314 Avenue, Lamar Nebraska (hereinafter “Nebraska Inspection”).

15. During the Nebraska Inspection, photographs were taken of two (2) bulk storage tanks that each contained a different pesticide product registered by Respondent.

16. During the Nebraska Inspection, a representative of Lamar Fertilizer verified the contents of the following bulk tanks:

- a. One bulk tank contained Durango DMA bearing the EPA Registration Number (EPA Reg. No.) 62719-556. The label for this pesticide product was found next to the tank, not affixed to the tank.
- b. One bulk tank contained Fultime NXT bearing the EPA Reg. No. 62719-668. The label was partially covered by duct tape making part of the label illegible.

17. On or about October 7, 2014, a Missouri Department of Agriculture (MDA) inspector conducted a routine market place inspection at the St. Charles County Co-Operative Co. located at 24 Main Street, St. Charles Missouri (hereinafter "Missouri Inspection").

18. During the Missouri Inspection, photographs were taken of three (3) bulk storage tanks that each contained a different pesticide product registered by Respondent.

19. During the Missouri Inspection, a representative of St. Charles County Co-Operative Co. verified the contents of the following bulk storage tanks through statements and purchase orders:

- a. Bulk Tank 5: RUP Keystone NXT bearing the EPA Reg. No. 62719-671.
- b. Bulk Tank 6: SURESTART II Herbicide bearing the EPA Reg. No. 62719-679.

20. During the Missouri Inspection the MDA inspector took photographs of the incorrect labels attached to the bulk storage tanks listed above. The following incorrect labels were attached to the bulk tanks:

- a. Bulk Storage Tank 5: Keystone Herbicide bearing the EPA Reg. No. 62719-368.
- b. Bulk Storage Tank 6: SureStart Herbicide bearing the EPA Reg. No. 62719-570.

Violations

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

Count 1

22. The facts stated in paragraphs 13 through 20 are realleged and incorporated as if fully stated herein.

23. On or about March 13, 2014, Respondent's pesticide product, Durango DMA, was being held for sale or distribution at the Lamar Fertilizer facility.

24. The bulk tank containing Durango DMA was not properly labeled at the time of the Nebraska Inspection because the label was not physically affixed to the tank.

25. Respondent violation Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), when its registered product, being held for sale or distribution, was misbranded for failing to include words, statements, or other information required by or under the authority of FIFRA to appear on the label.

Count 2

26. The facts stated in paragraphs 13 through 20 are realleged and incorporated as is fully stated herein.

27. On or about March 13, 2014, Respondent's pesticide product, Fultime NXT, was being held for sale or distribution at the Lamar Fertilizer facility.

28. During the Nebraska Inspection, the label on the bulk tank containing Fultime NXT was partially covered with duct tape and therefore illegible.

29. Respondent violated Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), when its registered product, being held for sale or distribution, was misbranded for failing to include words, statements, or other information required by or under the authority of FIFRA to appear on the label.

Count 3

30. The facts stated in paragraphs 13 through 20 are realleged and incorporated as is fully stated herein.

31. On or about October 7, 2014, Respondent's pesticide product, RUP Keystone NXT, was being held for sale or distribution in Bulk Tank 5 at the St. Charles County Co-Operative Co.

32. The label affixed to Bulk Tank 5 at the time of the Missouri Inspection was for a different pesticide product, Keystone Herbicide.

33. Respondent violated Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), when its registered product, being held for sale or distribution, was misbranded for failing to include words, statements, or other information required by or under the authority of FIFRA to appear on the label.

Count 4

34. The facts stated in paragraphs 13 through 20 are realleged and incorporated as if fully stated herein.

35. On or about October 7, 2014, Respondent's pesticide product, SURESTART II Herbicide, was being held for sale or distribution in Bulk Tank 6 at the St. Charles County Co-Operative Co.

36. The label affixed to Bulk Tank 6 at the time of the Missouri Inspection was for a different pesticide product, SureStart Herbicide.

37. Respondent violated Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), when its registered product, being held for sale or distribution, was misbranded for failing to include words, statements, or other information required by or under the authority of FIFRA to appear on the label.

Section V

Consent Agreement

38. For purposes of this proceeding, Respondent admits the jurisdictional allegations set forth above, and agrees not to contest EPA's jurisdiction in this proceeding or any subsequent proceeding to enforce the terms of the Final Order.

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

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

41. 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.

42. 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.

43. 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.

44. 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.

45. The effect of settlement as described in Paragraph 46 below is conditioned upon the accuracy of the Respondent's representations to EPA, as memorialized in Paragraph 44 above.

46. Respondent agrees that, in settlement of the claims alleged in this CAFO, Respondent shall pay a mitigated penalty of Twenty-Two Thousand Five Hundred Thirty-Six Dollars (\$22,536) as forth in Paragraph 1 of the Final Order.

47. Full payment of the penalty proposed in this CAFO shall only resolve Respondent's liability for the violations alleged in this Consent Agreement and Final Order. Complainant reserves the right to take any enforcement action with respect to any other violations of FIFRA or any other applicable law.

48. Full payment of the penalty proposed in this CAFO shall not in any case affect the right of the Complainant or the United States to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law. This CAFO does not waive, extinguish or otherwise affect Respondent's obligation to comply with all applicable provisions of FIFRA and the regulations promulgated thereunder.

49. 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.

50. 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 below 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 Twenty-Two Thousand Five Hundred Thirty-Six Dollars (\$22,536) within thirty (30) days of the effective date of this Final Order. Such payment shall identify Respondent by name and docket number and made as follows: If by certified or cashier's check, payment should be made payable to the "United States Treasury" and sent to the following address:

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

or by alternate payment method described at <http://www.epa.gov/financial/makepayment>.

2. 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
11201 Renner Boulevard
Lenexa, Kansas 66219;

and

Kelley Catlin, Attorney
Office of Regional Counsel
U.S. Environmental Protection Agency
Region 7
11201 Renner Boulevard
Lenexa, Kansas 66219.

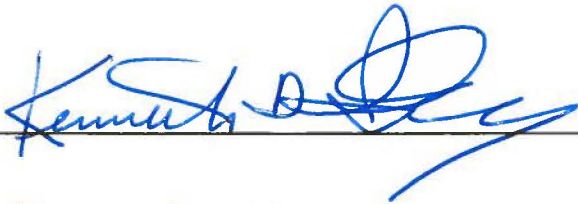
3. No portion of the civil penalty or interest paid by Respondent pursuant to the requirements of this CAFO shall be claimed by Respondent as a deduction for federal, state, or local income tax purposes.

4. 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
Dow AgroSciences LLC

Date: 11/29/16

By:





Kenneth A. Islay

Print Name

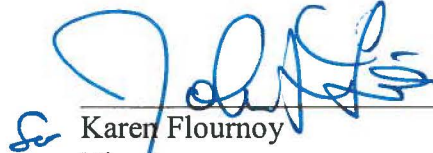
Vice President, General Counsel and Secretary

Title

COMPLAINANT

U. S. Environmental Protection Agency

Date: 11/30/2016



Sr Karen Flournoy
Director
Water, Wetlands, and Pesticides Division

Date: 11/30/16



Kelley Catlin
Office of Regional Counsel

IT IS SO ORDERED.

Date: Dec. 5, 2016

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

IN THE MATTER Of Dow AgroSciences LLC, Respondent
Docket No. FIFRA-07-2017-0002

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:


catlin.kelley@epa.gov

Copy emailed and mailed to Respondent:

ebsalathe@dow.com

Eileen B. Salathe'
Dow AgroSciences LLC
9330 Zionssville Road
Indianapolis, Indiana 46268

Dated: 12/5/16


Kathy Robinson
Hearing Clerk, Region 7