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Regional Counsel

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
SAN FRANCISCO, CALIFORNIA

In the Matter of:)	
)	
Nufarm Americas Inc.)	Docket No. FIFRA-09-2017- <u>0007</u>
)	
)	CONSENT AGREEMENT AND FINAL
)	ORDER PURSUANT TO
)	40 C.F.R. §§ 22.13 AND 22.18
Respondent.)	
_____)	

I. CONSENT AGREEMENT

The United States Environmental Protection Agency, Region IX ("EPA"), and Nufarm Americas Inc. ("Respondent") agree to settle this matter and consent to the entry of this Consent Agreement and Final Order ("CAFO"), which simultaneously commences and concludes this matter in accordance with 40 C.F.R. §§ 22.13 and 22.18.

A. AUTHORITY AND PARTIES

1. This is a civil administrative action instituted pursuant to Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA" or the "Act"), as amended, 7 U.S.C §§ 136 et seq., for the assessment of a civil administrative penalty against Respondent for a violation of Section 12 of the Act.

2. Complainant is the Acting Assistant Director of the Water and Pesticides Branch of the Enforcement Division, EPA Region IX, who has been duly delegated the authority to bring this action and to sign a consent agreement settling this action.
3. Respondent is an Illinois corporation whose principal offices are located at 11901 South Austin Avenue, Alsip, Illinois.

B. APPLICABLE STATUTORY AND REGULATORY SECTIONS

4. Section 17(c) of FIFRA and regulations promulgated at 19 C.F.R. Part 12 pursuant to Section 17(e) of FIFRA, 7 U.S.C. § 136o(e), by the Secretary of the Treasury in consultation with the EPA Administrator govern the importation of pesticides into the United States.
5. Pesticide Registration Notice 99-1 clarifies EPA's interpretation of the scope of FIFRA Section 17 (a)(1), 7 U.S.C. § 136o(a)(1), as it relates to the import of unregistered pesticides, devices or active ingredients used in producing a pesticide when the importation is solely for the purpose of formulation or packaging for subsequent export.
6. 19 C.F.R. § 12.111 provides that “[c]ertain imported pesticides are required to be registered under the provisions of section 3 of the Act . . . before being permitted entry into the United States.”
7. 19 C.F.R. § 12.112 provides that “an importer or the importer’s agent desiring to import pesticides or devices into the United States must submit to the Administrator, prior to the arrival of the shipment in the United States, a Notice of Arrival of Pesticides and Devices. . . .”
8. Section 17(a)(1) of FIFRA, 7 U.S.C. § 136o(a)(1), states that notwithstanding any other provision of this Act, no pesticide or device or active ingredient used in producing a

pesticide intended solely for export to any foreign country shall be deemed in violation of this Act when prepared or packed according to the specifications or directions of the foreign purchaser, except that producers of such pesticides and devices and active ingredients used in producing pesticides shall be subject to sections 2(p), 2(q)(1)(A), (C), (D), (E), (G), and (H), 2(q)(2)(A), (B), (C)(i) and (iii), and (D), 7 and 8 of the Act.

9. Under Section 2(s) of FIFRA, 7 U.S.C. § 136(s), a “person” is defined as “any individual, partnership, association, corporation, or any organized group of persons whether incorporated or not.”
10. Under Section 2(t) of FIFRA, 7 U.S.C. § 136(t), a “pest” is defined as “(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-organisms on or in living man or other living animals) which the Administrator declares to be a pest under section 25(c)(1).”
11. Under Section 2(u) of FIFRA, 7 U.S.C. § 136(u), a “pesticide” is defined as “any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest. . . .”
12. Under Section 2(gg) of FIFRA, 7 U.S.C. § 136(gg), “to distribute or sell” is defined as “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.”
13. Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), provides that it shall be unlawful for any person to distribute or sell to any person a pesticide which is adulterated or misbranded.

14. Section 2(q)(1)(A) of FIFRA, 7 U.S.C. § 136(q)(1)(A), states 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.”

C. ALLEGATIONS

15. Respondent is a corporation and therefore, a "person" as defined in Section 2(s) of FIFRA, 7 U.S.C. § 136(s).
16. Jiangsu Yunfan Chemical Co. Ltd. manufactures “Clodinafop-Propargyl” at its facility in China for Respondent.
17. “Clodinafop-Propargyl” is used to control or kill weeds.
18. Weeds are “pests” as defined in Section 2(t) of FIFRA, 7 U.S.C. § 136(t).
19. “Clodinafop-Propargyl” is a “pesticide” as defined in Section 2(u) of FIFRA, 7 U.S.C. § 136(u).
20. The pesticide, “Clodinafop-Propargyl” is not registered under Section 3 of FIFRA, 7 U.S.C. § 136a.
21. On or about December 26, 2016, approximately 108 drums of “Clodinafop-Propargyl” that Respondent imported to the United States from China for purposes of reformulation and subsequent export, arrived at the Port of Los Angeles in California.
22. On or about December 26, 2016, the labeling on the 108 drums of “Clodinafop-Propargyl” that arrived at the Port of Los Angeles contained misleading net contents statement in that the labeling specified a range of contents (i.e., 50-125 kg); it also contained a misleading ingredient statement in that the labeling specified two different percentages of the active ingredient (i.e., 96.5% and 98%).

23. Therefore, the pesticide, "Clodianfop-Propargyl" that Respondent imported from China to the Port of Los Angeles on or about December 26, 2016, is a "misbranded" pesticide pursuant to FIFRA Section 2(q)(1)(A) and its shipment constitutes a violation of Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E).

D. RESPONDENT'S ADMISSIONS

24. In accordance with 40 C.F.R. § 22.18(b)(2) and for the purpose of this proceeding, Respondent (i) admits that EPA has jurisdiction over the subject matter of this CAFO and over Respondent; (ii) neither admits nor denies the specific factual allegations contained in the CAFO; (iii) consents to any and all conditions specified in this CAFO and to the assessment of the civil administrative penalty under Section I.E of this CAFO; (iv) waives any right to contest the allegations contained in Section I.C of the CAFO; and (v) waives the right to appeal the proposed final order contained in this CAFO.

E. CIVIL ADMINISTRATIVE PENALTY

25. Respondent agrees to the assessment of a penalty in the amount of NINE THOUSAND AND FOUR HUNDRED DOLLARS (\$9,400) as final settlement of the civil claims against Respondent arising under the Act as alleged in Section I.C of the CAFO.
26. Respondent shall pay the assessed penalty no later than thirty (30) days from the effective date of this CAFO. Payment shall be made by cashier's or certified check payable to the "Treasurer, United States of America," or be paid by one of the other methods listed below:

- a. Regular Mail:

U.S. Environmental Protection Agency
P.O. Box 979077
St. Louis, MO 63197-9000

b. Wire Transfers:

Wire transfers must be sent directly to the Federal Reserve Bank in New York City with the following information:

Federal Reserve Bank of New York
ABA = 021030004
Account = 68010727
SWIFT address = FRNYUS33
33 Liberty Street
New York, NY 10045
Beneficiary = US Environmental Protection Agency

c. Certified or Overnight Mail:

U.S. Environmental Protection Agency
Government Lockbox 979077
1005 Convention Plaza
SL-MO-C2-GL
St. Louis, MO 63101

d. Automated Clearinghouse (ACH) (also known as REX or Remittance Express):

Automated Clearinghouse (ACH) payments to EPA can be made through the US Treasury using the following information:

US Treasury REX/Cashlink ACH Receiver
ABA = 051036706
Account Number = 31006, Environmental Protection Agency
CTX Format Transaction Code 22 - checking

Physical location of US Treasury Facility:
5700 Rivertech Court
Riverdale, MD 20737

Remittance Express (REX) = 1-866-234-5681

e. On Line Payment:

This payment option can be accessed from the information below:

www.pay.gov
Enter "SFO1.1" in the search field

Open form and complete required fields

If any clarification regarding a particular method of payment remittance is needed, Please contact the EPA Cincinnati Finance Center at 513-487-2091. The payment shall be accompanied by a transmittal letter identifying the case name, the case docket number, and this CAFO. Concurrent with delivery of the payment of the penalty, Respondent shall send a copy of the check or notification that the payment has been made by one of the other methods listed above, including proof of the date payment was made, and transmittal letter to the following addresses:

Regional Hearing Clerk
Office of Regional Counsel (ORC-1)
U.S. Environmental Protection Agency, Region IX
75 Hawthorne Street
San Francisco, CA 94105

Allison Watanabe
SDWA/FIFRA Section (ENF-3-3)
U.S. Environmental Protection Agency, Region IX
Southern California Field Office
600 Wilshire Blvd., Suite 1460
Los Angeles, CA 90017

27. Payment of the above civil administrative penalty shall not be used by Respondent or any other person as a tax deduction from Respondent's federal, state, or local taxes.
28. If Respondent fails to pay the assessed civil administrative penalty as specified in Paragraph 26, then Respondent shall pay to EPA the stipulated penalty of FIVE HUNDRED DOLLARS (\$500.00) for each day the default continues, in addition to the assessed penalty upon written demand by EPA. In addition, failure to pay the civil administrative penalty by the deadline specified in Paragraph 26 may lead to any or all of the following actions:

- a. The debt being referred to a credit reporting agency, a collection agency, or to the Department of Justice for filing of a collection action in the appropriate United States District Court. 40 C.F.R. §§ 13.13, 13.14, and 13.33. In any such collection action, the validity, amount, and appropriateness of the assessed penalty and of this CAFO shall not be subject to review.
- b. The debt being collected by administrative offset (i.e., the withholding of money payable by the United States to, or held by the United States for, a person to satisfy the debt the person owes the Government), which includes, but is not limited to, referral to the Internal Revenue Service for offset against income tax refunds. 40 C.F.R. Part 13, Subparts C and H.
- c. EPA may (i) suspend or revoke Respondent's licenses or other privileges; or (ii) suspend or disqualify Respondent from doing business with EPA or engaging in programs EPA sponsors or funds. 40 C.F.R. § 13.17.
- d. In accordance with the Debt Collection Act of 1982 and 40 C.F.R. Part 13 interest, penalties charges, and administrative costs will be assessed against the outstanding amount that Respondent owes to EPA for Respondent's failure to pay the civil administrative penalty by the deadline specified in Paragraph 26. Interest will be assessed at an annual rate that is equal to the rate of current value of funds to the United States Treasury (i.e., the Treasury tax and loan account rate) as prescribed and published by the Secretary of the Treasury in the Federal Register and the Treasury Fiscal Requirements Manual Bulletins. 40 C.F.R. § 13.11(a)(1). Penalty charges will be assessed monthly at a rate of 6% per annum. 40 C.F.R. § 13.11(c). Administrative costs for handling and collecting Respondent's overdue debt will

be based on either actual or average cost incurred, and will include both direct and indirect costs. 40 C.F.R. § 13.11(b). In addition, if this matter is referred to another department or agency (e.g., the Department of Justice, the Internal Revenue Service), that department or agency may assess its own administrative costs, in addition to EPA's administrative costs, for handling and collecting Respondent's overdue debt.

F. RETENTION OF RIGHTS

29. In accordance with 40 C.F.R. § 22.18(c), this CAFO only resolves Respondent's liability for federal civil penalties for the violations and facts specifically alleged in Section I.C of the CAFO. Nothing in this CAFO is intended to or shall be construed to resolve (i) any civil liability for violations of any provision of any federal, state, or local law, statute, regulation, rule, ordinance, or permit not specifically alleged in Section I.C of the CAFO; or (ii) any criminal liability. EPA specifically reserves any and all authorities, rights, and remedies available to it (including, but not limited to, injunctive or other equitable relief or criminal sanctions) to address any violation of this CAFO or any violation not specifically alleged in Section I.C of the CAFO.
30. This CAFO does not exempt, relieve, modify, or affect in any way Respondent's duty to comply with all applicable federal, state, and local laws, regulations, rules, ordinances, and permits.

G. ATTORNEYS' FEES AND COSTS

31. Each party shall bear its own attorneys' fees, costs, and disbursements incurred in this proceeding.

H. EFFECTIVE DATE

32. In accordance with 40 C.F.R. §§ 22.18(b)(3) and 22.31(b), this CAFO shall be effective on the date that the final order contained in this CAFO, having been approved and issued by either the Regional Judicial Officer or Regional Administrator, is filed.

I. BINDING EFFECT

33. The undersigned representative of Complainant and the undersigned representative of Respondent each certifies that he or she is fully authorized to enter into the terms and conditions of this CAFO and to bind the party he or she represents to this CAFO.
34. The provisions of this CAFO shall apply to and be binding upon Respondent and its officers, directors, employees, agents, trustees, servants, authorized representatives, successors, and assigns.

FOR RESPONDENT, NUFARM AMERICAS INC.

2/28/17
DATE

Tom Lyons EUP Operations
NAME: TOM LYONS
TITLE: EUP OPERATIONS

FOR COMPLAINANT, EPA REGION IX:

5/5/17
DATE

Elizabeth Berg
Elizabeth Berg
Acting Assistant Director
Water and Pesticides Branch
Enforcement Division
U.S. Environmental Protection Agency, Region IX

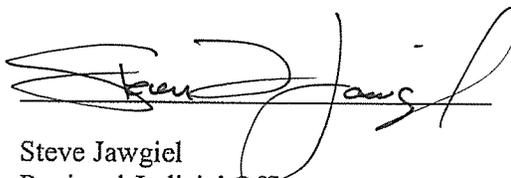
II. FINAL ORDER

Complainant and Respondent, Nufarm Americas Inc., having entered into the foregoing Consent Agreement,

IT IS HEREBY ORDERED that this CAFO (Docket No. FIFRA-09-2017-0007) be entered, and that Respondent shall pay a civil administrative penalty in the amount of NINE THOUSAND AND FOUR HUNDRED DOLLARS (\$9,400) and comply with the terms and conditions set forth in the Consent Agreement.

05/09/17

DATE

A handwritten signature in black ink, appearing to read "Steve Jawgiel", written over a horizontal line.

Steve Jawgiel
Regional Judicial Officer
U.S. Environmental Protection Agency, Region IX

CERTIFICATE OF SERVICE

I certify that the original of the fully executed Consent Agreement and Final Order (Docket No. FIFRA-09-2017-~~0007~~) was filed with the Regional Hearing Clerk, U.S. EPA, Region IX, 75 Hawthorne Street, San Francisco, CA 94105, and that a true and correct copy of the same was sent to the following parties:

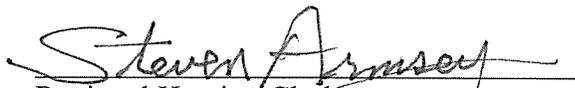
A copy was mailed via CERTIFIED MAIL to:

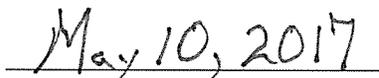
Kyle Price
FIFRA Compliance Manager
Nufarm Americas Inc.
11901 South Austin Avenue
Alsip, IL 60803

Certified Mail Number:

An additional copy was hand-delivered to the following U.S. EPA case attorney:

David Kim
Assistant Regional Counsel (ORC-2)
U.S. EPA, Region IX
75 Hawthorne Street
San Francisco, CA 94105


Regional Hearing Clerk
U.S. EPA, Region IX


Date