

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 7

901 NORTH FIFTH STREET
KANSAS CITY, KANSAS 66101

10/11/10 11:03 AM
ENVIRONMENTAL PROTECTION
AGENCY-REGION VII
REGIONAL HEARING CLERK

IN THE MATTER OF)
)
Illinois Tool Works, Inc.)
d/b/a ITW Dymon) Docket No. FIFRA-07-2010-0008
805 East Old 56 Highway)
Olathe, Kansas 66061)
)
Respondent)

CONSENT AGREEMENT AND FINAL ORDER

The U.S. Environmental Protection Agency (EPA), Region 7 and Illinois Tool Works, Inc. d/b/a ITW Dymon (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).

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 or the Act), 7 U.S.C. § 136j.
2. This Consent Agreement and Final Order (CAFO) serves as notice that EPA alleges 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 Illinois Tool Works, Inc. d/b/a ITW Dymon, a pesticide producer and distributor of pesticide products located at 805 East Old 56 Highway, Olathe, Kansas.

Section III

Statutory and Regulatory Background

5. Congress enacted FIFRA in 1947 and later amended it in 1972. 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, bacterial, or other micro-organism on or in living man or other living animal) 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(c) of FIFRA, 7 U.S.C. § 136(c), states that the term “adulterated” applies to any pesticide if, among other things, its strength or purity falls below the professed standard of quality as expressed on its labeling under which it is sold, or any valuable constituent of the pesticide has been wholly or in part abstracted.

10. Section 2(q) of FIFRA, 7 U.S.C. § 136(q), states that a pesticide is “misbranded” if, among other things, its labeling bears any statement, design, or graphic representation relative thereto or to its ingredients which is false or misleading in any particular.

11. 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.

12. Pursuant to 40 C.F.R. § 152.132, a registrant may distribute or sell his registered product under another person’s name and address instead of (or in addition to) his own. Such distribution and sale is termed “supplemental distribution” and the product is referred to as a “distributor product.” The distributor is considered an agent of the registrant for all intents and purposes under the Act, and both the registrant and the distributor may be held liable for violations pertaining to the distributor product.

13. Section 12(a)(1)(C) of FIFRA, 7 U.S.C. § 136j(a)(1)(C) states that it shall be unlawful for any person in any state to distribute or sell to any person any registered pesticide the composition of which differs at the time of its distribution or sale from its composition as described in the statement required in connection with its registration under section 3 of FIFRA.

14. Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E) states that it shall be unlawful for any person in any state to distribute or sell to any person any pesticide which is adulterated or misbranded.

Section IV

General Factual Allegations

15. The Respondent is and was at all times referred to in this CAFO, a person and a corporation qualified to do business in the state of Kansas.

16. The Respondent's EPA Establishment Number is 11694-KS-01.

17. On November 13, 2008, the Kansas Department of Agriculture (KDA) conducted an inspection at Respondent's facility located at 805 East Old 56 Highway, Olathe, Kansas (hereinafter the "KDA inspection").

18. During the KDA inspection, it was observed that Respondent was offering for distribution or sale Medaphene Scrubs Disinfectant Deodorizing Wipes (Distributor Product), bearing the EPA Registration Number (EPA Reg. No.) 55195-4-11694, as a supplemental distributor. Samples of the Distributor Product were collected during the inspection for analysis.

19. The Distributor Product is registered to Colcide, Inc. under the name Colcide 0.25% Disinfecting Wipes, bearing the EPA Reg. No. 55195.4.

20. The nominal concentration of the active ingredient, o-Phenylphenol, in the Distributor Product is 0.01375%.

21. The nominal concentration of the active ingredient p-Tertiary Amylphenol, in the Distributor Product is 0.00275%.

22. Analytical results show that the concentration of o-Phenylphenol in the samples of the Distributor Product collected during the KDA inspection was 0.00451% and 0.00486% respectively.

23. Analytical results show that the concentration of p-Tertiary Amylphenol in the samples of Distributor Product collected during the KDA inspection was 0.00130% and 0.00144% respectively.

VIOLATION

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

Count 1

25. Complainant hereby incorporates the allegations contained in Paragraphs 5 through 23 above, as if fully set forth herein.

26. Documentation collected during the KDA inspection reveals that Respondent held for distribution or sale 910 cases of the Distributor Product.

27. Analytical results show that the active ingredients, o-Phenylphenol and p-Tertiary Amylphenol, in the samples of the Distributor Product collected during the KDA inspection were below the nominal concentration levels.

28. Pursuant to 40 C.F.R. § 152.132, both the registrant and the supplemental distributor may be held liable for violations pertaining to the Distributor Product.

29. Respondent allegedly violated Section 12(a)(1)(C) of FIFRA by holding for distribution or sale a registered pesticide, the composition of which differs at the time of its distribution or sale from its composition as described in the statement required in connection with its registration. Respondent also allegedly violated Section 12(a)(1)(E) of FIFRA by holding for distribution or sale a pesticide which is adulterated or misbranded.

Section V

CONSENT AGREEMENT

It is hereby agreed and accepted by Respondent that:

30. For purposes of this proceeding, Respondent admits the jurisdictional information 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 set forth below.

31. Respondent neither admits nor denies the factual allegations and legal conclusions set forth in this CAFO.

32. Respondent and EPA agree to the terms of this CAFO and Respondent agrees to comply with the terms of the Final Order portion of this CAFO.
33. 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.
34. Respondent and Complainant agree to conciliate the matters set forth in this CAFO without the necessity of a formal hearing and to bear their respective costs and attorney's fees.
35. This CAFO addresses all civil and administrative claims for the alleged FIFRA violations identified above. Based on Respondent's representation in Paragraph 37 below, this CAFO fully resolves and settles, and Complainant hereby agrees to release Respondent from all civil and administrative claims for the alleged FIFRA violations identified herein existing through the effective date of this CAFO. Complainant reserves the right to take any enforcement action with respect to any other violations of FIFRA or any other applicable law.
36. The undersigned representative of Respondent certifies that he or she is fully authorized to enter the terms and conditions of this CAFO and to execute and legally bind Respondent to it.
37. Respondent certifies by signing this CAFO that, to its knowledge, it is presently in compliance with FIFRA, 7 U.S.C. § 136 *et. seq.* and all regulations promulgated thereunder.
38. Respondent agrees that, in settlement of the claims alleged in this CAFO, Respondent shall pay a penalty of Four Thousand One Hundred Sixty Dollars (\$4,160.00) as set forth in Paragraph 1 of the Final Order.
39. Nothing in this Consent Agreement shall be construed as a release from any other action under any law and/or regulation administered by the EPA. 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.
40. Failure to pay the assessed penalty may result in the referral of this matter to the U.S. Department of Justice (DOJ) 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.

Section VI

FINAL ORDER

Pursuant to Section 14 of FIFRA, as amended, 7 U.S.C. § 136*l*, and according to the terms of the Consent Agreement set forth above, IT IS HEREBY ORDERED THAT:

Payment of Civil Penalty

1. Respondent shall pay a mitigated civil penalty of Four Thousand One Hundred Sixty Dollars (\$4,160.00). The payment must be received at the address below on or before thirty (30) days after the effective date of the Final Order.

2. Payment of the penalty shall be by cashier or certified check and shall reference EPA Docket Number FIFRA-07-2010-0008, and made payable to "Treasurer, United States of America" and remitted to:

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

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

Regional Hearing Clerk
United States Environmental Protection Agency
Region 7
901 North 5th Street
Kansas City, Kansas 66101; and

Kelley Catlin
Office of Regional Counsel
United States Environmental Protection Agency
Region 7
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 CAFO 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 filed.

6. This executed CAFO shall be filed with the Regional Hearing Clerk, U.S. Environmental Protection Agency, Region 7, 901 North 5th Street, Kansas City, Kansas, 66101.

COMPLAINANT:

U.S. ENVIRONMENTAL PROTECTION AGENCY

Date: 5/4/10

By: *Karen A. Flourney*
William A. Spratlin
Director
Water, Wetlands and Pesticides Division

Date: 5/4/10

By: *Kelley Catlin*
Kelley Catlin
Assistant Regional Counsel

RESPONDENT:

Illinois Tool Works, Inc. d/b/a ITW Dymon

Date: April 30, 2010

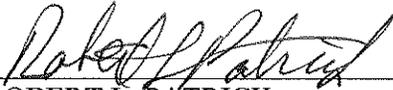
By: Paul M Taylor

Printed Name: Paul M. Taylor

Title: General Manager
ITW Dymon

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

Date: May 5, 2010



ROBERT L. PATRICK
Regional Judicial Officer

IN THE MATTER OF Illinois Tool Works, Inc d/b/a ITW Dymon, Respondent
Docket No. FIFRA-07-2010-0008

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 Catlin
Assistant Regional Counsel
Region 7
United States Environmental Protection Agency
901 N. 5th Street
Kansas City, Kansas 66101

Copy by Certified Mail Return Receipt to:

Kathryn A. Larkins
Shook, Hardy & Bacon L.L.P.
2555 Grand Boulevard
Kansas City, Missouri 64108

Dated: 5/5/10


Kathy Robinson
Hearing Clerk, Region 7