

U. S. ENVIRONMENTAL PROTECTION AGENCY
REGION 7
901 NORTH 5th STREET
KANSAS CITY, KANSAS 66101
BEFORE THE ADMINISTRATOR

UNITED STATES
ENVIRONMENTAL PROTECTION
AGENCY-REGION 7
2012 AUG 29 PM 12:36

In the Matter of

Moss Buster LLC

Respondent

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Docket No. FIFRA-07-2012-0018

CONSENT AGREEMENT AND FINAL ORDER

The U.S. Environmental Protection Agency (EPA), Region 7 and Moss Buster 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, Issuance of Compliance or Corrective Action Orders, 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 Moss Buster LLC, a pesticide producer and distributor with a facility located at 2101 2nd Avenue in Clear Lake, Iowa.

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. The term “produce” is defined by Section 2(w) of FIFRA, 7 U.S.C. § 136(w), and by 40 C.F.R. § 167.3 as meaning to manufacture, prepare, propagate, compound, or process any pesticide or device or active ingredient or to package, repack, label, relabel, or otherwise change the container of any pesticide or device.

11. The term “producer” is defined by Section 2(w) of FIFRA, 7 U.S.C. § 136(w), and by 40 C.F.R. § 167.3 as any person who manufactures, prepares, compounds, propagates or processes any pesticide or device or active ingredient used in producing a pesticide (such actions include packaging, repackaging, labeling, and relabeling a pesticide).

12. 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.

13. Section 7(a) of FIFRA, 7 U.S.C. § 136e(a), states that no person shall produce any pesticide subject to FIFRA or active ingredient used in producing a pesticide subject to FIFRA unless the establishment in which it is produced is registered with the EPA Administrator.

14. Section 8(b) of FIFRA, 7 U.S.C. § 136f(b), states that any person who sells or offers for sale any pesticide subject to FIFRA shall, upon request of any officer or employee of

the EPA or of a State, duly designated by the EPA Administrator, furnish or permit such person at all reasonable times to have access to, and to copy, all records showing the delivery, movement, or holding of such pesticide or device; or, in the event of the inability of any person to produce records containing such information, all other records and information relating to the delivery, movement, or holding of the pesticide or device.

15. Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), states that it shall be unlawful for any person to distribute or sell any pesticide that is not registered under Section 3 of FIFRA, 7 U.S.C. § 136a, or whose registration has been cancelled or suspended.

16. 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.

17. Section 12(a)(2)(B) of FIFRA, 7 U.S.C. § 136j(a)(2)(B), states that it shall be unlawful for any person to refuse to prepare, maintain, or submit any records required by or under Sections 5, 7, 8, 11, or 19 of FIFRA, and also for any person to refuse to allow any entry, inspection, copying of records, or sampling authorized by FIFRA.

18. Section 12(a)(2)(L) of FIFRA, 7 U.S.C. § 136j(a)(2)(L), states that it shall be unlawful for any person who is a producer to violate any of the provisions of Section 7 of FIFRA.

Section IV

General Factual Allegations

19. The Respondent is and was at all times referred to in this Complaint, a “person” as defined by Section 2(s) of FIFRA, 7 U.S.C. § 136(s), and a Iowa corporation qualified to do business in the state of Iowa.

20. On or about December 7, 2009, an article was published in the Globe Gazette newspaper documenting that Respondent is, “a biotech company which manufactures and distributes a product which desiccates moss and liverwort,” called Moss Buster.

21. On or about December 14, 2009, the website for Moss Buster LLC, www.mossbuster.com, offered for sale or distribution the product Moss Buster.

22. On or about December 14, 2009, a representative of the Iowa Department of Agriculture and Land Stewardship (IDALS) conducted an inspection at Respondent’s facility at 2102 2nd Avenue, S., in Clear Lake, Iowa (the facility).

23. During the inspection referenced in the preceding paragraph, the IDALS representative requested records of sales of Respondent’s product, Moss Buster from Respondent’s representative, Paul Strayer, Chief Operating Officer of Moss Buster LLC.

24. Respondent’s Chief Operating Officer failed upon request to make any sales records available to the IDALS representative during the inspection on or about December 14, 2009.

25. Respondent’s Chief Operating Officer, when asked by the IDALS representative during the inspection on or about December 14, 2009, if there had been any Iowa sales of the Moss Buster product, stated there had been no sales in Iowa by Respondent.

26. A label for the Moss Buster product was collected by the IDALS representative during the inspection of Respondent’s facility on or about December 14, 2009.

27. The Moss Buster product label collected from Respondent by the IDALS representative had the following claims:

- “Moss Remover”
- “For use on all types of Moss!”

28. The Moss Buster product website December 2009 contained the following claims:
- “The moss on the asphalt shingles is desiccated”
 - “Moss Buster is composed of distilled plant extracts that desiccate (dry out) the moss in hours.”
 - “Moss Buster desiccates and dries out moss leaving you with a safer walkway!”
 - “At the cellular level it quickly falls apart, decomposes and normal wind and rain remove the desiccated moss.”
 - “Moss and lichen’s [sic] cell walls desiccate and decompose and Mother Nature takes it off.”
 - “Pending [EPA] registration”
29. On or about March 14, 2011, the product Moss Buster was approved for registration as a pesticide, with the EPA Registration Number 84316-1.
30. The Moss Buster product is a pesticide as defined by FIFRA.
31. On or about January 28, 2010, an IDALS representative conducted an inspection at Doyle Golf in Cedar Falls, Iowa.
32. At the Doyle Golf inspection, the IDALS representative documented that Respondent had sold or distributed a quantity of the Moss Buster product to Doyle Golf on or about March 16, 2009.

Violations

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

Count 1

34. The facts stated in paragraphs 19 through 32 are realleged and incorporated as if fully stated herein.

35. On or about March 16, 2009, Respondent sold or distributed a quantity of the pesticide product Moss Buster to Doyle Golf in Cedar Falls, Iowa.

36. On the date of the sale and/or distribution of the pesticide product Moss Buster to Doyle Golf the product was not registered under Section 3 of FIFRA, 7 U.S.C. § 136a.

37. Respondent violated Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), by selling or distributing a pesticide which is not registered under Section 3 of FIFRA, 7 U.S.C. § 136a.

Count 2

38. The facts stated in paragraphs 19 through 32 are realleged and incorporated as if fully stated herein.

39. During all or part of 2009, 2010, and 2011, Respondent offered for sale or distribution the pesticide product Moss Buster.

40. Prior to March 14, 2011, the pesticide product Moss Buster was not registered for domestic sale or distribution by the EPA pursuant to Section 3 of FIFRA, 7 U.S.C. § 136a.

41. Respondent violated Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), by offering for sale or distribution a pesticide whose registration has been cancelled or which is not registered under Section 3 of FIFRA, 7 U.S.C. § 136a.

Count 3

42. The facts stated in paragraphs 19 through 32 are realleged and incorporated as if fully stated herein.

43. Prior to April 11, 2011, Respondent Moss Buster LLC engaged in the production of the pesticide product Moss Buster.

44. Prior to April 11, 2011, Respondent Moss Buster LLC was not registered as a pesticide producing establishment pursuant to Section 7 of FIFRA, 7 U.S.C. § 136e.

45. Respondent violated Section 12(a)(2)(L) of FIFRA, 7 U.S.C. § 136j(a)(2)(L), by engaging in production of the pesticide product Moss Buster without registration as a pesticide-producing establishment pursuant to Section 7 of FIFRA, 7 U.S.C. § 136e.

Count 4

46. The facts stated in paragraphs 19 through 32 are realleged and incorporated as if fully stated herein.

47. At the time of the inspection conducted at its facility by a representative of IDALS on or about December 14, 2009, Respondent failed to provide to the IDALS representative records of sales or distribution of its product Moss Buster.

48. At the time of the IDALS inspection of its facility on or about December 14, 2009, Respondent denied that there had been any sales of its Moss Buster product in Iowa.

49. Respondent had distributed or sold a quantity of Moss Buster to Doyle Golf in Cedar Falls, Iowa, on or about March 16, 2009.

50. Respondent violated Section 12(a)(2)(B) of FIFRA, 7 U.S.C. § 136j(a)(2)(B), by refusing to provide to an authorized representative of a State information regarding distribution of the product Moss Buster by as required by FIFRA.

Section V

Consent Agreement

51. 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.

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

53. 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.

54. 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.

55. 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.

56. 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.

57. 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.

58. The effect of settlement as described in Paragraph 59 below is conditioned upon the accuracy of the Respondent's representations to EPA, as memorialized in Paragraph 57 above.

59. Respondent agrees that, in settlement of the claims alleged in this CAFO, Respondent shall pay a penalty as set forth in Paragraph 1 of 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. Complainant reserves the right to take any enforcement action with respect to any other violations of FIFRA or any other applicable law and/or regulation administered by the EPA.

60. 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.

61. 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 mitigated civil penalty, in the amount of Twelve Thousand Six Hundred and Eighty-Eight Dollars (\$12,688.00) plus interest for one year in the amount of Fifty-Eight Dollars and Sixteen Cents (\$58.16). The civil penalty will be paid in twelve (12) monthly payments of One Thousand Sixty-two Dollars and Eighteen Cents (\$1,062.18) each. The first payment must be received at the address below on or before 30 days after the effective date of the Final Order. Each of the eleven succeeding payments shall be due on or before the following dates:

October 20, 2012
November 20, 2012
December 20, 2012
January 20, 2013
February 20, 2013
March 20, 2013
April 20, 2013
May 20, 2013
June 20, 2013
July 20, 2013
August 20, 2013

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
Cincinnati Finance Center
PO Box 979077
St. Louis, Missouri 63197-9000

If by wire transfer, payment should 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, NY 10045
Field Tag 4200 of the Fedwire message should read
"D 68010727 Environmental Protection Agency"

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
901 North 5th Street
Kansas City, Kansas 66101;

and

Chris R. Dudding, Attorney
Office of Regional Counsel
U.S. Environmental Protection Agency
Region 7
901 North 5th Street
Kansas City, Kansas 66101.


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.

COMPLAINANT

U. S. ENVIRONMENTAL PROTECTION AGENCY

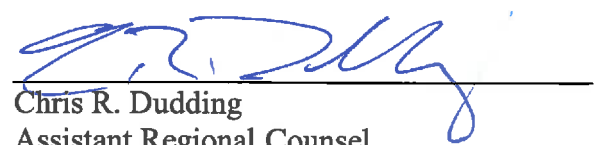
Date: 8/28/12



Karen Fluornoy

Director
Water, Wetlands and Pesticides Division

Date: 8/28/12



Chris R. Dudding

Assistant Regional Counsel
Office of Regional Counsel

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

Date:

Aug 29, 2012



ROBERT L. PATRICK

Regional Judicial Officer

U.S. Environmental Protection Agency, Region 7

IN THE MATTER OF Moss Buster LLC, Respondent
Docket No. FIFRA-07-2012-0018

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 hand delivered to
Attorney for Complainant:

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

Copy by First Class Mail to:

William G Rohlfen
President
2101 2nd Avenue
Clear Lake, Iowa 50428

Dated: 8/29/12


Kathy Robinson
Hearing Clerk, Region 7