

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION VII  
901 NORTH 5<sup>th</sup> STREET  
KANSAS CITY, KANSAS 66101

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	Docket No. FIFRA 07-2012-0038
	)	
Albaugh, Incorporated	)	
1525 NE 36 <sup>th</sup> Street	)	CONSENT AGREEMENT
Ankeny, IA 50021	)	AND
	)	FINAL ORDER
	)	
Respondent	)	

**CONSENT AGREEMENT AND FINAL ORDER**

The U.S. Environmental Protection Agency, Region VII (“EPA” or “Complainant”), and Albaugh, Incorporated (Respondent) have agreed to a settlement of this action before the 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).

**FACTUAL ALLEGATIONS**

**Jurisdiction and Statutory Requirements**

1. This 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 Complaint serves as notice that the United States Environmental Protection Agency (EPA) has reason to believe that Respondent has violated Section 12 of FIFRA, 7 U.S.C.

§ 136j.

### **Parties**

3. The Complainant, by delegation from the Administrator of the EPA and the Regional Administrator, EPA, Region VII, is the Director of the Water, Wetlands and Pesticides Division, EPA, Region VII.

4. The Respondent is Albaugh, Incorporated, a formulator and packager of agrochemical products located at 1525 NE 36<sup>th</sup> Street, Ankeny, Iowa. 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).

### **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 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(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), 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.

11. Section 12(a)(1)(B) of FIFRA, 7 U.S.C. § 136j(a)(1)(B), states it shall be unlawful for any person to distribute or sell any pesticide if any claims made for it as a part of distribution or sale substantially differ from any claims made for it as a part of the statement required in connection with its registration under Section 3 of FIFRA, 7 U.S.C. § 136a.

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 which is misbranded.

13. Under the regulation at 40 C.F.R. § 152.132, a supplemental distributor is considered an agent of the registrant for all intents and purposes under FIFRA, and both the registrant and the distributor may be held liable for violations pertaining to the distributor product.

#### **General Factual Allegations**

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

15. On June 15, 2010, EPA was informed of Respondent's intent to supplementally distribute its registered product, Imidacloprid 2FL T&O, containing imidacloprid, EPA Registration No. 42750-115, through Rainbow Tree Scientific Advancements, Inc. d/b/a Plant Care Sciences using the name "Optrol Insecticide."

16. Optrol Insecticide, a supplemental distributor product, is a registered pesticide, EPA Registration No. 42750-115-87660.

17. On or about September 28, 2011, an inspection was conducted by the Minnesota Department of Agriculture of Highland Nursery in St. Paul, Minnesota.

18. During the inspection referenced in paragraphs 17, above, the inspector documented the presence of a display placard and a sales brochure distributed for Optrol Insecticide which included pesticidal and nonpesticidal claims for the product.

19. The website for Optrol Insecticide also included content which made pesticidal and nonpesticidal claims for the product.

### **Violations**

#### **Count 1**

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

21. As documented during the inspection reference in paragraph 17, above, the insecticide "Optrol Insecticide" bearing EPA Registration Number 42750-115-87660 was distributed to a retailer by Respondent's supplemental distributor with a sales brochure and placard contained false or misleading claims differing from those contained in the accepted EPA label.

22. The pesticide referenced in Paragraph 19 was misbranded in that it was sold or distributed by Respondent's supplemental distributor with materials containing differing, false or misleading claims.

23. Respondent violated Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), in that its supplemental distributor distributed or sold a misbranded pesticide.

24. Respondent violated Section 12(a)(1)(B) of FIFRA, 7 U.S.C. § 136j(a)(1)(B), in that its supplemental distributor distributed or sold a pesticide with claims that were substantially different from any claims made for it as a part of the statement required in connection with its registration under Section 3 of FIFRA, 7 U.S.C. § 136a.

**Count 2**

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

26. Respondent's supplemental distributor's website for the insecticide "Optrol Insecticide" bearing EPA Registration Number 42750-115-87660, advertising and offering the product for sale, contained false or misleading claims differing from those contained in the accepted EPA label.

27. The pesticide referenced in Paragraph 19 was misbranded in that it was offered for sale or distributed by Respondent's supplemental distributor with materials containing differing, false or misleading claims.

28. Respondent violated Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), in that its supplemental distributor distributed or sold a misbranded pesticide.

29. Respondent violated Section 12(a)(1)(B) of FIFRA, 7 U.S.C. § 136j(a)(1)(B), in that

its supplemental distributor distributed or sold a pesticide with claims that were substantially different from any claims made for it as a part of the statement required in connection with its registration under Section 3 of FIFRA, 7 U.S.C. § 136a.

### **CONSENT AGREEMENT**

1. 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.

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

3. 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.

4. 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.

5. 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.

6. 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.

7. Respondent certifies that by signing this CAFO that to the best of its knowledge it is presently in compliance with FIFRA, 7 U.S.C. § 136 et. seq., and all regulations promulgated thereunder.

8. The effect of settlement as described in Paragraph 9 below is conditioned upon the accuracy of the Respondent's representations to EPA, as memorialized in Paragraph 7, above.

9. Respondent agrees that, in settlement of the claims alleged in this CAFO, Respondent shall pay a mitigated penalty of Nine Thousand Six Hundred Dollars (\$9,600.00) 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

10. Respondent, in settlement of this matter, 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.

11. 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.

**FINAL ORDER**

1. Respondent, in settlement of the allegations set forth in the Consent Agreement, shall pay by cashiers or certified check, a civil penalty, for the violations cited herein, in the amount of Nine Thousand Six Hundred Dollars (\$9,600). Payment will be made within thirty (30) days of the effective date of this Order.

2. Payment of the penalty shall be by cashier or certified check made payable to “Treasurer, United States of America” and remitted to:

US Environmental Protection Agency  
Fines and Penalties  
Cincinnati Finance Center  
PO Box 979077  
St. Louis, MO 63197-9000

3. The payment shall reference Docket Number, FIFRA 07-2010-0011 and In the Matter of Albaugh, Inc... Copies of the check shall be forwarded to:

Kent Johnson  
Office of Regional Counsel  
United States Environmental Protection Agency  
Region VII  
11201 Renner Boulevard  
Lenexa, KS 66219  
and

Kathy Robinson  
Regional Hearing Clerk  
Office of Regional Counsel  
United States Environmental Protection Agency  
Region VII  
11201 Renner Boulevard  
Lenexa, KS 66219



4. No portion of the civil penalty or interest paid by Respondent pursuant to the requirements of this Consent Agreement and Final Order 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 signed by the Regional Judicial Officer.

6. This executed Consent Agreement and Final Order shall be filed with the Regional Hearing Clerk, U.S. Environmental Protection Agency, Region VII1201 Renner Boulevard, Lenexa, Kansas, 66219.

COMPLAINANT:

UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY

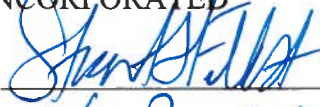
By: Karen Flournoy  
Karen Flournoy  
Director  
Water, Wetlands, and Pesticides Division

Date: 11-23-12

By: Kent Johnson  
Kent Johnson  
Attorney  
Office of Regional Counsel

Date: 11/20/12

RESPONDENT:  
ALBAUGH, INCORPORATED

By:   
Title: Vice President  
Date: 11/19/12

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

Karina Borrromeo

Karina Borrromeo  
Regional Judicial Officer  
U.S. Environmental Protection Agency  
Region VII

Date: Nov. 28, 2012

IN THE MATTER OF Albaugh, Incorporated, Respondent  
Docket No. FIFRA-07-2012-0038

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:

Kent Johnson  
Assistant Regional Counsel  
Region 7  
United States Environmental Protection Agency  
11201 Renner Blvd.  
Lenexa, Kansas 66219

Copy by First Class Mail to:

Stuart I. Feldstein  
Vice President  
Albaugh, Inc.  
1525 NE 36th Street  
Ankeny, Iowa 50021

Dated: 11/28/12



Kathy Robinson  
Hearing Clerk, Region 7