

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

BEFORE THE ADMINISTRATOR

10 JUL -1 AM 8:55
ENVIRONMENTAL PROTECTION
AGENCY-REGION VII
REGIONAL HEARING CLERK

IN THE MATTER OF) Docket No. FIFRA 07-2010-0030
)
Thomas County Noxious Weed Department) CONSENT AGREEMENT
300 N. Court) AND
Colby, KS) FINAL ORDER
)
Respondent)

CONSENT AGREEMENT AND FINAL ORDER

The U.S. Environmental Protection Agency, Region VII (“EPA” or “Complainant”), and Thomas County Noxious Weed Department (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).

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 Consent Agreement and Final Order 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 Thomas County Noxious Weed Department, a pesticide dealer, located at 300 N. Court, Colby, Kansas. 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).

Violations

General Allegations

5. The Complainant hereby states and alleges that Respondent has violated FIFRA as follows:

6. 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.

7. Section 12(a)(2)(F) of FIFRA, 7 U.S.C. § 136j(a)(2)(F), states that it shall be unlawful for any person to distribute or sell, or make available for use, or to use, any registered pesticide classified for restricted use other than in accordance with Section 3(d) of FIFRA.

8. Sections 3(d)(1)(C)(i) and (ii) of FIFRA, 7 U.S.C. §§ 136a(d)(1)(C)(i) and (ii), state in pertinent part that a restricted use pesticide shall be applied for any use to which the restricted classification applies only by or under the direct supervision of a certified applicator.

9. Section 2(e)(1) of FIFRA, 7 U.S.C. § 136(e)(1), defines "certified applicator" as any individual who is certified under Section 11 of FIFRA, 7 U.S.C. § 136i, as authorized to use or supervise the use of any pesticide which is classified for restricted use.

10. Rozol Pocket Gopher Bait Burrow Builder Formula is a restricted use pesticide registered to Liphatech, Inc. under EPA Registration Number 7173-244 (EPA Reg. No. 7173-244). The label of the product states in pertinent part, "RESTRICTED USE PESTICIDE Due to Oncogenicity. For retail sale to and use only by Certified Applicators or persons under their direct supervision and only for those uses covered by the certified applicator's certification."

11. On April 4, 2008, and February 16, 2010, a representative of the Kansas Department of Agriculture (KDA) conducted inspections at Respondent's facility in Colby, Kansas, for the purpose of determining Respondent's compliance with the FIFRA, including review of restricted use pesticide (RUP) sales and application records.

Count 1

12. The facts stated in paragraphs 6 through 11 are realleged and incorporated as if fully stated herein.

13. During the inspections referenced in paragraph 11, a representative of KDA collected a copy of invoice number 8019 from Respondent. The invoice documents Respondent's distribution and sale of six thirty-pound pails of the restricted use pesticide Liphatech Rozol Pocket Gopher Bait Burrow Builder Formula, EPA Reg. No. 7173-244, to Mr. Gary Withers on March 12, 2008.

14. On April 21, 2008, the KDA representative obtained from Mr. Gary Withers an affidavit in which Mr. Withers acknowledged purchasing and applying the restricted use pesticide, Liphatech Rozol Pocket Gopher Bait Burrow Builder Formula, without supervision by a certified applicator.

15. At the time of the sale referred to in paragraphs 13 and 14, Mr. Gary Withers was not a certified applicator as that term is defined in Section 2(e)(1) of FIFRA, 7 U.S.C. § 136(e)(1).

16. Respondent violated Section 12(a)(2)(F) of FIFRA, 7 U.S.C. § 136j(a)(2)(F), by selling or making available for use a registered pesticide classified for a restricted use other than in accordance with Section 3(d) of FIFRA, 7 U.S.C. § 136a(d).

CONSENT AGREEMENT

It is hereby agreed and accepted by the parties, that:

1. This Consent Agreement and Final Order is being entered into by the parties in full settlement of and release from all FIFRA civil penalties that might have attached as a result of allegations made above. Respondent has read the Consent Agreement, consents to its issuance and will comply with the terms of the Final Order.

2. Respondent admits the jurisdictional allegations of this Consent Agreement and Final Order 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.

3. Respondent neither admits nor denies the factual allegations and legal conclusions set forth in this Consent Agreement and Final Order.

4. 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.

5. Respondent certifies by signing this Consent Agreement and Final Order 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.

6. Nothing in this Consent Agreement shall be construed as a release from any other action under any law and/or regulation administered by the U. S. Environmental Protection

Agency. Nothing contained in the Final Order portion of this Consent Agreement and Final Order shall alter or otherwise affect Respondent's obligation to comply with all applicable federal, state and local environmental statutes and regulations and applicable permits.

7. Each party shall bear its own costs and attorneys' fees in the action resolved by this Consent Agreement and Final Order.

8. Each signatory of this Agreement certifies that he or she is fully authorized to enter into the terms of this Consent Agreement and Final Order.

9. Respondent consents to the issuance of the Final Order hereinafter recited and consents to the payment of a mitigated civil penalty. Respondent understands that its failure to timely pay any portion of the mitigated civil may result in the commencement of a civil action in Federal District Court to recover the full remaining balance, along with penalties, late payment handling charges, and accumulated interest. In such case, interest shall accrue thereon at the applicable statutory rate on the unpaid balance until such civil 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. Interest shall accrue thereon at the rate determined by the Secretary of the Treasury (currently five percent (5%) per annum for the period January 1, 2008, through December 31, 2008) on the unpaid balance until such civil penalty and accrued interest are both paid in full. 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.

10. Respondent, in settlement of the allegations set forth in the Consent Agreement, shall pay a civil penalty by cashiers or certified check for the violations cited herein, in the amount of Five Thousand Seven Hundred and Twenty Dollars (\$5,720). Payment will be made within thirty (30) days of the effective date of this Order. The payment shall reference Docket Number FIFRA 07-2010-0030 and In the Matter of Thomas County Noxious Weed Department

11. 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

12. Copies of the check shall be forwarded to:

Thomas County Noxious Weed Department
Docket No. FIFRA 07-2010-0030

Kent Johnson
Office of Regional Counsel
United States Environmental Protection Agency
Region VII
901 North 5th Street
Kansas City, Kansas 66101

and

Kathy Robinson
Regional Hearing Clerk
Office of Regional Counsel
United States Environmental Protection Agency
Region VII
901 North 5th Street
Kansas City, Kansas 66101

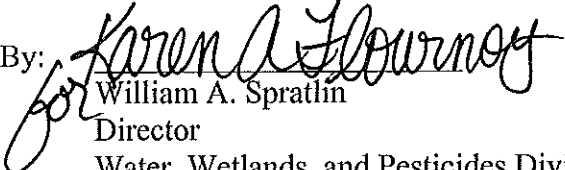
13. No portion of the civil penalty or interest paid by Respondent pursuant to the requirements of this Consent Agreement and Final Order shall be claimed by Respondent as a deduction for federal, state, or local income tax purposes.

14. The effective date of this Order shall be the date on which it is signed by the Regional Judicial Officer.

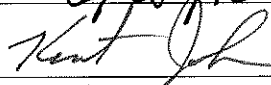
15. This executed Consent Agreement and Final Order shall be filed with the Regional Hearing Clerk, U.S. Environmental Protection Agency, Region VII, 901 North 5th Street, Kansas City, Kansas, 66101.

COMPLAINANT:

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY

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

Date: 6/29/10

By: 
Kent Johnson
Attorney
Office of Regional Counsel

Date: 6/28/10

Thomas County Noxious Weed Department
Docket No. FIFRA 07-2010-0030

RESPONDENT:

THOMAS COUNTY NOXIOUS WEED DEPARTMENT


By: Jan F. Schreck

Title: Noxious Weed Director

Date: 6-23-2010

CONSENT ORDER

The foregoing Consent Agreement is hereby approved and incorporated by reference into this Order. The Respondent is ordered to comply with the terms of the above Consent Agreement, effective immediately.



ROBERT L. PATRICK
Regional Judicial Officer
U.S. Environmental Protection Agency
Region VII

Date: July 1, 2010

IN THE MATTER OF Thomas County Noxious Weed Department, Respondent
Docket No. FIFRA-07-2010-0030

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:

Kent Johnson
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:

Bruce Flipse
Thomas County Attorney
P.O. Box 586
Colby, Kansas 67701

Dated: 7/1/10


Kathy Robinson
Hearing Clerk, Region 7