

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION VII
901 N. 5TH STREET
KANSAS CITY, KANSAS 66101

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ENVIRONMENTAL PROTECTION
AGENCY-REGION VII
REGIONAL HEARING CLERK

IN THE MATTER OF)
)
) Docket No. FIFRA-07-2008-0033
)
Kay Dee Feed Company)
1919 Grand Avenue) CONSENT AGREEMENT
Sioux City, IA 51106) AND
) FINAL ORDER
)
Respondent)
)

CONSENT AGREEMENT AND FINAL ORDER

The U.S. Environmental Protection Agency, Region VII (“EPA” or “Complainant”), and Kay Dee Feed Company (Respondent) have agreed to a settlement of this action before filing 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).

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” or “Act”), 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.

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 Kay Dee Feed Company, a pesticide producer, located at 1919 Grand Avenue, Sioux City, Iowa. The Respondent is and was at all times referred to in this CAFO, a “person” as defined by Section 2(s) of FIFRA, 7 U.S.C. § 136(s), and a corporation qualified to do business in the state of Iowa.

Statutory and Regulatory Background

5. 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.
6. Pursuant to FIFRA Section 2(w), 7 U.S.C. § 136(w) and 40 C.F.R. § 167.3, the term “produce” means to manufacture, prepare, propagate, compound, or process any pesticide, including any pesticide produced pursuant to Section 5 of the Act, any active ingredient or device, or to package, repackage, label, relabel, or otherwise change the container of any pesticide or device.
7. Section 12(a)(1)(B) of FIFRA, 7 U.S.C. § 136(a)(1)(B), states that it shall be unlawful for any person to distribute or sell any pesticide if any claims made for it as part of its 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.
8. 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 adulterated or misbranded.
9. Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), further states that it shall be unlawful for any person to distribute or sell any pesticide that is misbranded in that the label did not contain directions for use necessary to make the product effective and to adequately protect health and the environment.
10. Section 2(q)(1)(G) of FIFRA, 7 U.S.C. § 136(q)(1)(G) states that a pesticide is misbranded if the label did not contain a warning or caution statement adequate to protect health and the environment.
11. 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 way.
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 (as compared with other words, statements, designs, or graphic matter in the labeling) 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. Registrants may distribute or sell their registered product under another person's name and address instead of, or in addition to, their own, as allowed by regulation at 40 C.F.R. § 152.132. 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 FIFRA, and both the registrant and the distributor may be held liable for violations pertaining to the distributor product. Supplemental distribution is permitted upon notification to EPA if specific conditions, stated at 40 C.F.R. § 152.132(a) through (e), are met. As a requirement of supplemental distribution, the label of the distributor product must be the same as that of the registered product, with exceptions stated at 40 C.F.R. § 151.132(d)(1) through (5).

Factual Allegations

14. Kay Dee Feed Company, Sioux City, Iowa, is the producer of the following pesticide products:

- KENT RABON MINERAL BLOCK 10, EPA Registration Number (Reg. No.) 6552-14-7696;
- KENT RABON MINERAL BLOCK 4, EPA Reg. No. 6552-17-7696; and
- RANCHER'S CHOICE RABON BLOCK 4, EPA Reg. No. 6552-17-75648.

15. On or about October 19, 2006, a representative of the Iowa Department of Agriculture and Land Stewardship (IDALS) conducted an inspection at the Respondent's establishment, located at 1919 Grand Avenue, Sioux City, Iowa, for the purpose of determining Respondent's compliance with the requirements of FIFRA. The IDALS representative was provided copies of labels and records of sales and distribution of the products referenced in paragraph 14 above.

Violations

16. Complainant hereby incorporates the allegations contained in paragraphs 1 through 15 above, as if fully set forth herein and alleges that Respondent has violated FIFRA and the regulations promulgated thereunder as follows:

Count 1

17. Documentation collected during the inspection referenced in paragraph 15 revealed that Respondent had sold or distributed 48 blocks of the pesticide, KENT RABON MINERAL BLOCK 10, EPA Reg. No. 6552-14-7696, identified as lot number 4393, to Kent Feeds, 932 East Chestnut, Louisville, Kentucky, on September 5, 2006, as documented by purchase order 78214 and invoice number 5280.

18. The label used on the pesticide, KENT RABON MINERAL BLOCK 10, was found to be misbranded in that the label bore statements under "First Aid," "Hazard To Humans," "Environmental Hazards," and "Directions for Use," that were not encompassed within the terms of the label submitted by Respondent and approved by EPA, subject to certain specified modifications, on or about August 19, 1999, for EPA Reg. No. 6552-14, as required under Section 3 of FIFRA, 7 U.S.C. § 136a. The label also failed to bear a "Note to Physicians" statement and a "User Safety Recommendations" section which were included in the label accepted by EPA on August 19, 1999 for EPA Reg. No. 6552-14.

19. The label used on the pesticide, KENT RABON MINERAL BLOCK 10, failed to bear the following statements under the "Directions for Use" section: "Provide 1 block per 10-15 head of cattle. Add an additional block when each block has been ½ consumed. Cattle should consume an average of 6 oz. of the block per 100 pounds of body weight per month. This will supply the recommended average intake of 70 mg. [PRODUCT NAME] per 100 pounds of body weight. Animals should not be starved for mineral before initiation of the [PRODUCT NAME] program, but omit all salt from other feed after the program is started. Do not feed free choice sources of salt or mineral containing salt in any form. Place near watering and loafing areas. Protect from rain. If consumption of [PRODUCT NAME] is above 6 oz. of the block per 100 lbs. of body weight per month, reduce the number of feeding locations or relocate. If consumption is below 6 oz. of the block per 100 lbs. per month increase the number of feeding locations. Start feeding [PRODUCT NAME] early in the spring before flies begin to appear, and continue feeding throughout the summer and into fall." This statement is a required element of the label submitted by Respondent and approved by EPA, subject to certain specified modifications, on or about August 19, 1999, for EPA Reg. No. 6552-14, as required under Section 3 of FIFRA, 7 U.S.C. § 136a.

20. The label on the pesticide, KENT RABON MINERAL BLOCK 10, was further misbranded as it is missing the mandatory statement of use, "It is a violation of Federal law to use the product in a manner inconsistent with its labeling," as required by 40 C.F.R. 156.10.

21. Respondent violated Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), for the sale or distribution of the misbranded pesticide, KENT RABON MINERAL BLOCK 10, EPA Reg. No. 6552-14-7696.

Count 2

22. Complainant hereby incorporates the allegations contained in paragraphs 1 through 15 above, as if fully set forth herein.

23. Documentation collected during the inspection referenced in paragraph 15 revealed that Respondent had sold or distributed 48 blocks of the pesticide, KENT RABON MINERAL BLOCK 10, EPA Reg. No. 6552-14-7696, identified as lot number 4393, to Kent Feeds, 932

East Chestnut, Louisville, Kentucky, on September 5, 2006, as documented by purchase order 78214 and invoice number 5280.

24. The label for the pesticide, KENT RABON MINERAL BLOCK 10, bore the claim; "For control of fecal flies in the manure of treated cattle and horses. Prevents the development of horn flies, face flies, house flies and stable flies in the manure of treated cattle. Prevents the development of house flies and stable flies in the manure of treated horses." This statement was not accepted at the time of the product's registration with EPA. The label accepted by EPA on August 19, 1999, for EPA Reg. No. 6552-14, bears the statement "For control of fecal flies in the manure of treated cattle. Prevents the development of horn flies, face flies, and stable flies in the manure of treated cattle." This claim is not encompassed within the terms of the label submitted by Respondent and approved by EPA, subject to certain specified modifications, on or about August 19, 1999, for EPA Reg. No. 6552-14, as required under Section 3 of FIFRA, 7 U.S.C. § 136a.

25. EPA issued a Tolerance Reassessment and Risk Management Decision (TRED) for Tetrachlorvinphos products on December 18, 2002, which provided additional required label language for the use of Tetrachlorvinphos products on horses. The language in the December 18, 2002 TRED was not contained in the product label for KENT RABON MINERAL BLOCK 10, a Tetrachlorvinphos product, collected during the inspection referenced in paragraph 14.

26. Respondent violated Section 12(a)(1)(B) of FIFRA, 7 U.S.C. § 136j(a)(1)(B), for the sale or distribution of a pesticide which made claims on the label that differed substantially from claims contained in the label submitted by Respondent and approved by EPA, subject to certain specified modifications, on or about August 19, 1999, for EPA Reg. No. 6552-14, as required under Section 3 of FIFRA, 7 U.S.C. § 136a.

Count 3

27. Complainant hereby incorporates the allegations contained in paragraphs 1 through 15 above, as if fully set forth herein.

28. Documentation collected during the inspection referenced in paragraph 15 revealed that Respondent had sold or distributed 117 blocks of the pesticide, KENT RABON MINERAL BLOCK 4, EPA Reg. No. 6552-17-7696, identified as lot number 4392 to Kent Feeds, 932 East Chestnut, Louisville, Kentucky, on September 5, 2006, as documented by purchase order 78214 and invoice number 5280.

29. The label used on the pesticide, KENT RABON MINERAL BLOCK 4, was found to be misbranded in that the label bore statements under "Hazard to Humans" and "Environmental Hazards" that were not encompassed within the terms of the label submitted by Respondent and approved by EPA, subject to certain specified modifications, on or about August 19, 1999, for

EPA Reg. No. 6552-17, as required under Section 3 of FIFRA, 7 U.S.C. § 136a. The label did not bear "First Aid," "Note to Physicians," and "User Safety Recommendations" statements that were encompassed in the terms of the label submitted by Respondent and approved by EPA, subject to certain specified modifications, on or about August 19, 1999, for EPA Reg. No. 6552-17.

30. The label used on the pesticide, KENT RABON MINERAL BLOCK 4, bore the following statement under "Directions for Use": "In order to achieve optimum fly control, management and sanitation practices." This statement differed from the directions contained on the EPA-accepted label of August 19, 1999, which states; "In order to achieve optimum fly control, Royal Rabon Block 4 should be used in conjunction with other good management and sanitation practices."

31. Respondent violated Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), for the sale or distribution of the misbranded pesticide, KENT RABON MINERAL BLOCK 4, EPA Reg. No. 6552-17-7696.

Count 4

32. Complainant hereby incorporates the allegations contained in paragraphs 1 through 15 above, as if fully set forth herein.

33. Documentation collected during the inspection referenced in paragraph 15 revealed that Respondent had sold or distributed 117 blocks of the pesticide, KENT RABON MINERAL BLOCK 4, EPA Reg. No. 6552-17-7696, identified as lot number 4392 to Kent Feeds, 932 East Chestnut, Louisville, Kentucky, on September 5, 2006, as documented by purchase order 78214 and invoice number 5280.

34. The label for the pesticide, KENT RABON MINERAL BLOCK 4, was further misbranded in that it bore the claim; "For control of fecal flies in the manure of treated cattle and horses. Prevents the development of horn flies, face flies house flies and stable flies in the manure of treated cattle. Prevents the development of house flies and stable in the manure of treated horses." This claim was not encompassed within the label submitted by Respondent, as approved by EPA, subject to certain specified modifications, on or about August 19, 1999, for product EPA Reg. No. 6552-17, as required under Section 3 of FIFRA, 7 U.S.C. § 136a.

35. EPA issued a Tolerance Reassessment and Risk Management Decision (TRED) for Tetrachlorvinphos products on December 18, 2002, which provided additional required label language for the use of Tetrachlorvinphos products on horses. The language in the December 18, 2002 TRED was not contained in the product label for KENT RABON MINERAL BLOCK 4, a Tetrachlorvinphos product, collected during the inspection referenced in paragraph 14.

36. Respondent violated Section 12(a)(1)(B) of FIFRA, 7 U.S.C. § 136j(a)(1)(B), for the sale or distribution of a pesticide which made claims on the label that differed substantially from claims contained in the label submitted by Respondent, as approved by EPA, subject to certain specified modifications, on or about August 19, 1999, for product EPA Reg. No. 6552-17, as required under Section 3 of FIFRA, 7 U.S.C. § 136a.

Count 5

37. Complainant hereby incorporates the allegations contained in paragraphs 1 through 15 above, as if fully set forth herein.

38. Documentation collected during the inspection referenced in paragraph 15 revealed that Respondent had sold or distributed 356 blocks of the pesticide, RANCHER'S CHOICE (RC) RABON MINERAL BLOCK 4, EPA Reg. No. 6552-17-75648, identified as lot number 4385, to Consumer Supply Company, P.O. Box 956, Sioux City, Iowa, on August 8, 2006, as documented on unnumbered purchase order dated August 8, 2006 and invoice number 5163.

39. The label on the pesticide, RC RABON MINERAL BLOCK 4, was misbranded in that it bears "First Aid," and "Storage And Disposal" statements that were not encompassed within the terms of the label submitted by Respondent, as approved by EPA, subject to certain specified modifications, on or about August 19, 1999, for product EPA Reg. No. 6552-17, as required under Section 3 of FIFRA, 7 U.S.C. § 136a. The label does not bear the "Environmental Hazards" statement as required by the EPA-accepted label.

40. The product label was further misbranded in that it failed to bear a warning or caution statement, as required by Section 2(q)(1)(G) of FIFRA, 7 U.S.C. § 136(q)(1)(G). The product label failed to bear the signal word "CAUTION," and the statement "Keep Out of Reach of Children," which were encompassed within the terms of the EPA-accepted label of on August 19, 1999, for EPA Reg. No. 6552-17, as required under Section 3 of FIFRA, 7 U.S.C. § 136a.

41. Respondent violated Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), for the sale or distribution of the misbranded pesticide, RC RABON MINERAL BLOCK 4, EPA Reg. No. 6552-17-75648.

Count 6

42. Complainant hereby incorporates the allegations contained in paragraphs 1 through 15 above, as if fully set forth herein.

43. Documentation collected during the inspection referenced in paragraph 15 revealed that Respondent had sold or distributed 356 blocks of the pesticide, RANCHER'S CHOICE (RC) RABON MINERAL BLOCK 4, EPA Reg. No. 6552-17-75648, identified as lot number 4385, to

Consumer Supply Company, P.O. Box 956, Sioux City, Iowa, on August 8, 2006, as documented on unnumbered purchase order dated August 8, 2006 and invoice number 5163.

44. The label for the pesticide, RC RABON MINERAL BLOCK 4, was further misbranded in that it bore the claim: "For control of fecal flies in the manure of treated cattle and horses. Prevents the development of horn flies, face flies, house flies and stable flies in the manure of treated cattle and horses." The sample label also bears the claim under "Directions for Use," "HORSES: Fed at a daily rate of 0.07 grams of larvicide in 0.5 ounces of block per 100 pounds of body weight. Example: 5 ounces (approximately ½ pound) of block for a 1000 pound horse daily. This will supply the recommended average intake of 70 mg RABON[®] ORAL LARVICIDE per 100 pounds of body weight." These claims were not encompassed within the label submitted by Respondent, as approved by EPA, subject to certain specified modifications, on August 19, 1999, for product EPA Reg. No. 6552-17, as required under Section 3 of FIFRA, 7 U.S.C. § 136a.

45. EPA issued a Tolerance Reassessment and Risk Management Decision (TRED) for Tetrachlorvinphos products on December 18, 2002, which provided additional required label language for the use of Tetrachlorvinphos products on horses. The language in the December 18, 2002 TRED was not contained in the product label for RC RABON MINERAL BLOCK 4, a Tetrachlorvinphos product, collected during the inspection referenced in paragraph 14.

46. Respondent violated Section 12(a)(1)(B) of FIFRA, 7 U.S.C. § 136j(a)(1)(B), for the sale or distribution of a pesticide which made claims on the label that differed substantially from claims contained in the EPA-accepted label for product EPA Reg. No. 6552-17, on August 19, 1999, as required under Section 3 of FIFRA, 7 U.S.C. § 136a.

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, finds it reasonable, 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 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 EPA. 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. Failure to pay the assessed penalty may result in the referral of this matter to the United States Department of Justice 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.
8. Each party shall bear its own costs and attorneys' fees in the action resolved by this Consent Agreement and Final Order.
9. 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.
10. Respondent consents to the issuance of the Final Order hereinafter recited and consents to the payment of a civil penalty as specified in paragraph 1 of the Final Order. Payment of this civil penalty shall resolve all civil and administrative claims for all violations of FIFRA alleged in this document.
11. The effect of the settlement described in Paragraph 10 above is conditioned upon the accuracy of the Respondent's representations to EPA, as memorialized in Paragraph 5 above.

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:

1. Respondent, in settlement of the allegations set forth in the Consent Agreement, shall pay by cashier's check or certified check, a civil penalty for the violations cited herein, in the amount of Twenty-Eight Thousand and Eighty dollars (\$28,080), on or before thirty (30) days of the effective date this Final Order.

2. Payment of the penalty shall be by cashier or certified check made payable to "Treasurer, United States of America," and reference Docket Number FIFRA 07-2008-0033 and **In the Matter of Kay Dee Feed Company.** and be remitted to:

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

3. Copies of the check shall be simultaneously forwarded to:

Chris R. Dudding
Office of Regional Counsel
United States Environmental Protection Agency
Region VII
901 North 5th Street
Kansas City, Kansas 66101

and

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

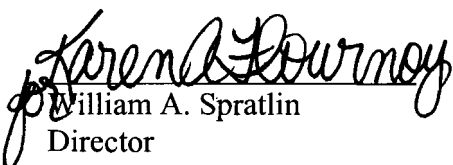
4. No portion of the civil penalty or interest paid by Respondent pursuant to the requirements of this Consent Agreement and Final Order shall be claimed by Respondent as a deduction for federal, state, or local income tax purposes.

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

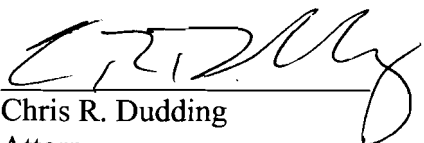
6. This executed Consent Agreement and Final Order shall be filed with the Regional Hearing Clerk, U.S. Environmental Protection Agency, Region VII, 901 North 5th Street, Kansas City, Kansas, 66101.

COMPLAINANT:

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY

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

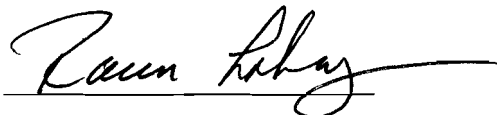
Date: Sept. 25, 2008

By: 
Chris R. Dudding
Attorney
Office of Regional Counsel

Date: 9/25/2008

RESPONDENT:

Kay Dee Feed Company

By: 
Title: Vice President
Date: 9/23/08

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



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

September 26, 2008
Date

IN THE MATTER OF Kay Dee Feed Company, Respondent
Docket No. FIFRA-07-2008-0033

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:

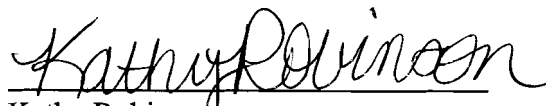
Copy hand delivered to
Attorney for Complainant:

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

Original by Certified Mail Return Receipt to:

Lorna Puntillo
Kay Dee Fed Company
1919 Grand Avenue
Sioux City, Iowa 51106

Dated: 9/26/08


Kathy Robinson
Hearing Clerk, Region 7