

ENVIRONMENTAL PROTECTION AGENCY-REGION 7

U. S. ENVIRONMENTAL PROTECTION AGENCY

REGION 7

2017 FEB 28 AM 9:22

**11201 RENNER BOULEVARD
LENEXA, KANSAS 66219
BEFORE THE ADMINISTRATOR**

In the Matter of

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Docket No. FIFRA-07-2017-0011

OHP, Inc.,

Respondent

CONSENT AGREEMENT AND FINAL ORDER

Preliminary Statement

The U.S. Environmental Protection Agency (EPA), Region 7 and OHP, Inc. (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 and the Revocation/Termination or Suspension of Permits, 40 C.F.R. §§ 22.13(b) and 22.18(b)(2).

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 serves as notice that EPA has reason to believe that Respondent has violated Section 12 of FIFRA, 7 U.S.C. § 136j.

Parties

3. 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 corporation in good standing under the laws of the state of Pennsylvania and doing business in the state of Nebraska.

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 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 to any person any pesticide that is not registered under Section 3 of FIFRA, 7 U.S.C. § 136a, of this title or whose registration has been canceled or suspended.

7. 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.

8. 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.

9. 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.

10. 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).

11. Section 14(a)(1) of FIFRA, 7 U.S.C. § 136l(a)(1), authorizes the EPA Administrator to assess a civil penalty of not more than \$5,000 for each violation of FIFRA. The EPA has adjusted this figure upward for inflation pursuant to the 2008 Civil Monetary Penalty Inflation Adjustment Rule and the Federal Civil Penalties Inflation Adjustment Improvements Act of 2015, which amend 40 C.F.R. Part 19, so that penalties of up to \$7,500 per day are now authorized for violations that occur from January 12, 2009, through November 2, 2015, penalties of up to \$18,750 are now authorized for violations that occur from November 2, 2015 to January 15, 2017, and penalties of up to \$19,057 are now authorized for violations that occur after January 15, 2017.

General Factual Allegations

12. Respondent is and, at all times referred to herein was, a “person” as defined by Section 2(s) of FIFRA, 7 U.S.C. § 136(s).

13. On or about January 23, 2015, a representative of the Nebraska Department of Agriculture (NDA) conducted a neutral scheme producer establishment inspection (the inspection) of a facility owned and or operated by ArborSystems, Inc. located at: 10168 L Street, Omaha, Nebraska 68127 (the Facility). The inspection was conducted under the authority of Section 9 of FIFRA, 7 U.S.C. § 136g, to evaluate ArborSystems, Inc.'s and ArborSystems, Inc.'s affiliated registrant's compliance with the requirements of FIFRA and the federal regulations promulgated thereunder. The NDA inspection was subsequently forwarded to EPA for review.

14. At the time of the NDA inspection, and at all times relevant to the allegations herein, Respondent had an agreement with ArborSystems, Inc. to repackage and distribute the pesticide product Kontos, EPA Registration Number (EPA Reg. No.) 432-1518-59807, on behalf of Respondent.

15. Respondent has a supplemental distribution agreement for the pesticide product Kontos, EPA Reg. No. 432-1518-59807, with Bayer Environmental Science.

16. As a result of the inspection and documentation obtained by the EPA, Complainant has determined that violations of FIFRA and the federal regulations promulgated thereunder have occurred.

Allegations of Violations

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

Counts 1-5

18. The facts stated in Paragraphs 12 through 16 above are herein incorporated.

19. Electronic mail and purchase order documentation collected as a result of the NDA inspection revealed that Respondent had distributed the pesticide product Kontos, EPA Reg. No. 432-1518-59807, on at least five (5) separate occasions in the calendar year 2014.

20. The supplemental distributor product registration for Kontos, EPA Reg. No. 432-1518-59807, was cancelled on April 5, 2010 and re-registered on October 3, 2016.

21. Respondent violated Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), by distributing, as that term is defined by Section 2(gg) of FIFRA, 7 U.S.C. § 136(gg), the pesticide product Kontos, EPA Reg. No. 432-1518-59807, at a time when the pesticide product was not registered under FIFRA.

CONSENT AGREEMENT

22. For the purpose of this proceeding, as required by 40 C.F.R. § 22.18(b)(2), Respondent:

- (a) admits the jurisdictional allegations set forth herein;
- (b) neither admits nor denies the specific factual allegations stated herein;
- (c) consents to the assessment of a civil penalty, as stated herein;
- (d) consents to the issuance of any specified compliance or corrective action order;
- (e) consents to any conditions specified herein;
- (f) consents to any stated Permit Action;
- (g) waives any right to contest the allegations set forth herein; and
- (h) waives its rights to appeal the Final Order accompanying this Consent Agreement.

23. Respondent consents to the issuance of this Consent Agreement and Final Order and consents for the purposes of settlement to the payment of the civil penalty specified herein.

24. Respondent and EPA agree to conciliate this matter without the necessity of a formal hearing and to bear their respective costs and attorneys' fees.

Penalty Payment

25. Respondent agrees that, in settlement of the claims alleged herein, Respondent shall pay a mitigated civil penalty of Eleven Thousand Nine Hundred Ninety-Seven Dollars (\$11,997.00), as set forth below.

26. Respondent shall pay the penalty within thirty (30) days of the effective date of the Final Order. Such payment shall identify Respondent by name and docket number and shall be by certified or cashier's check made payable to the "United States Treasury" and sent to:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
PO Box 979077
St. Louis, Missouri 63197-9000

or by alternate payment method described at <http://www.epa.gov/financial/makepayment>.

27. 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
11201 Renner Boulevard
Lenexa, Kansas 66219; and

Clarissa Howley, Mills, Attorney
Office of Regional Counsel
U.S. Environmental Protection Agency, Region 7
11201 Renner Boulevard
Lenexa, Kansas 66219.

28. Respondent understands that its failure to timely pay any portion of the civil penalty 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 begin to accrue on a civil or stipulated penalty from the date of delinquency until such civil or stipulated penalty and any accrued interest are paid in full. 31 C.F.R. § 901.9(b)(1). Interest will be assessed at a rate of the United States Treasury Tax and loan rates in accordance with 31 U.S.C. § 3717. Additionally, a charge will be assessed to cover the costs of debt collection including processing and handling costs, and a non-payment penalty charge of six (6) percent per year compounded annually will be assessed on any portion of the debt which remains delinquent more than ninety (90) days after payment is due. 31 U.S.C. § 3717(e)(2).

29. Respondent consents to the issuance of this Consent Agreement and Final Order and consents for the purposes of settlement to the payment of the civil penalty.

Effect of Settlement and Reservation of Rights

30. Full payment of the penalty proposed in this Consent Agreement shall only resolve Respondent's liability for federal civil penalties for the violations alleged herein. Complainant reserves the right to take any enforcement action with respect to any other violations of FIFRA or any other applicable law.

31. The effect of settlement described in the immediately preceding paragraph is conditioned upon the accuracy of Respondent's representations to EPA, as memorialized in the paragraph directly below.

32. Respondent certifies by the signing of this Consent Agreement that it is presently in compliance with all requirements of FIFRA and its implementing regulations.

33. Full payment of the penalty proposed in this Consent Agreement shall not in any case affect the right of the Agency or the United States to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law. This Consent Agreement and Final Order does not waive, extinguish or otherwise affect Respondent's obligation to comply with all applicable provisions of FIFRA and regulations promulgated thereunder.

34. Complainant reserves the right enforce the terms and conditions of this Consent Agreement and Final Order.

General Provisions

35. By signing this Consent Agreement, the undersigned representative of Respondent certifies that he or she is fully authorized to execute and enter into the terms and conditions of this Consent Agreement and has the legal capacity to bind the party he or she represents to this Consent Agreement.

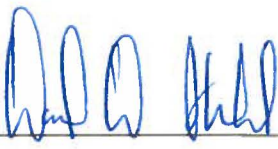
36. This Consent Agreement shall not dispose of the proceeding without a final order from the Regional Judicial Officer or Regional Administrator ratifying the terms of this Consent Agreement. This Consent Agreement and Final Order shall be effective upon the filing of the Final Order by the Regional Hearing Clerk for EPA, Region 7. Unless otherwise stated, all time periods stated herein shall be calculated in calendar days from such date.

37. The penalty specified herein shall represent civil penalties assessed by EPA and shall not be deductible for purposes of Federal, State and local taxes.

38. This Consent Agreement and Final Order shall apply to and be binding upon Respondent and Respondent's agents, successors and/or assigns. Respondent shall ensure that all contractors, employees, consultants, firms, or other persons or entities acting for Respondent with respect to matters included herein comply with the terms of this Consent Agreement and Final Order.

**RESPONDENT
OHP, INC.**

Date: 1/30/17

By: 

DANIEL D. STAHL

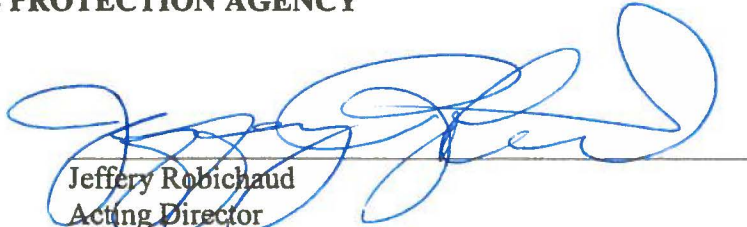
Print Name

VICE PRESIDENT / GENERAL MANAGER

Title


COMPLAINANT
U. S. ENVIRONMENTAL PROTECTION AGENCY

Date: 2/23/17



Jeffery Robichaud
Acting Director
Water, Wetlands, and Pesticides Division

Date: 2/23/2017



Clarissa Howley Mills
Office of Regional Counsel

FINAL ORDER

Pursuant to the provisions of FIFRA, 7 U.S.C. § 136 et. seq. and the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation, Termination or Suspension of Permits, 40 C.F.R. Part 22, the foregoing Consent Agreement resolving this matter is hereby ratified and incorporated by reference into this Final Order.

Respondent is ORDERED to comply with all of the terms of the Consent Agreement. In accordance with 40 C.F.R. § 22.31(b), the effective date of the foregoing Consent Agreement and this Final Order is the date on which this Final Order is filed with the Regional Hearing Clerk.

IT IS SO ORDERED.

Karina Borromeo
Karina Borromeo
Regional Judicial Officer

Feb. 28, 2017
Date

IN THE MATTER Of OHP, Inc., Respondent
Docket No. FIFRA-07-2017-0011

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 via Email to Attorney for Complainant:


mills.clarissa@epa.gov

Copy via Email and First Class Mail to Respondent:

dstahl@ohp.com

Ronald Soldo
P.O. Box 51230
Mainland, Pennsylvania 19451

Dated: 2/28/17


Kathy Robinson
Hearing Clerk, Region 7