UNITED STATES
ENVIRONMENTAL PROTECTION
AGENCY-REGION 7

U. S. ENVIRONMENTAL PROTECTION AGENCY 2019 JUL 10 AM 9: 19
REGION 7
11201 RENNER BOULEVARD
LENEXA, KANSAS 66219
BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Dow AgroSciences, LLC	)	**Docket No. FIFRA-07-2019-0199**
	)	
Respondent.	)	

CONSENT AGREEMENT AND FINAL ORDER

Preliminary Statement

The U.S. Environmental Protection Agency, Region 7 (EPA or Complainant), and Dow AgroSciences, LLC (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) 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. § 136*l*.

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 Enforcement and Compliance Assurance Division, EPA, Region 7.

4. The Respondent is a corporation in good standing under the laws of Indiana and doing business in the state of Missouri.

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)(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.

7. Section 2(t) of FIFRA, 7 U.S.C. § 136(t), defines "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).

8. Section 2(u) of FIFRA, 7 U.S.C. § 136(u), defines "pesticide" to mean any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest.

9. Section 2(s) of FIFRA, 7 U.S.C. § 136(s), defines "person" to mean any individual, partnership, association, corporation, or any organized group of persons whether incorporated or not.

10. Section 2(gg) of FIFRA, 7 U.S.C. § 136(gg), defines "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.

11. Section 2(q)(1)(G) of FIFRA, 7 U.S.C. § 136(q)(1)(G), states a pesticide is misbranded if the label does not contain a warning or caution statement which may be necessary if compiled with, together with any requirements imposed under Section 3(d) of FIFRA, 7 U.S.C. § 136a(d), is adequate to protect health and the environment.

12. Pursuant to 40 C.F.R. § 156.60(a)(1), the signal word and child hazard warning statements are required to appear on the front panel of the label.

13. Section 2(q)(2)(A) of FIFRA, 7 U.S.C. § 136(q)(2)(A), states a pesticide is misbranded if the label does not bear an ingredient statement on that part of the immediate container (and on the outside container or wrapper of the retail package, if there be one, through which the ingredient statement on the immediate container cannot be clearly read) which is presented or displayed under customary conditions of purchase.

14. Pursuant to 40 C.F.R. § 156(g)(2), the ingredient statement is required on the front panel of the label.

15. 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.

16. Section 2(y) of FIFRA, 7 U.S.C. § 136(y), defines "registrant" as a person who has registered any pesticide pursuant to the provisions of FIFRA.

17. The regulation at 40 C.F.R. § 152.132 allows that the registrant of a pesticidal product may distribute or sell his registered product under another person's name and address instead of (or in addition to) his own. 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 the Act, and both the registrant and the distributor may be held liable for violations pertaining to the distributor product.

18. Section 14(a)(1) of FIFRA, 7 U.S.C. § 136*l*(a)(1), authorizes a civil penalty of not more than $5,000 for each offense. The Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701, as amended, and the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, 28 U.S.C. § 2461, and implementing regulations at 40 C.F.R. Part 19, increased these statutory maximum penalties to $7,500 for violations that occurred before November 2, 2015, and to $19,936 446 for violations that occur after November 2, 2015, and are assessed after February 6, 2019.

General Factual Allegations

19. Respondent is, and at all times referred to herein was, a "person" within the meaning of FIFRA.

20. Respondent is, and at all times referred to herein was, the registrant of the pesticidal product Eagle 0.39 Specialty Fungicide, EPA Registration Number (EPA Reg. No.) 62719-461-32802 (Eagle).

21. On or about January 18, 2017, Respondent entered into a supplemental distributor agreement with Howard Johnson's Enterprises, Inc. to distribute and sell Eagle pursuant to 40 C.F.R. § 152.132.

22. On May 24, 2018, and May 30, 2018, the EPA conducted an inspection at the Howard Johnson's Enterprises, Inc. facility in Neosho, Missouri, pursuant to the authority set forth in Section 9 of FIFRA, 7 U.S.C. § 136g, to evaluate compliance with the requirements of FIFRA and the federal regulations promulgated thereunder (the Inspection). As part of the Inspection, the EPA collected documentation concerning the supplemental distribution of Eagle, including representative labeling and distribution records.

Allegations of Violations

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

Count 1

24. The facts stated in Paragraphs 19 through 22 above are herein incorporated.

25. Pursuant to Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), it is unlawful for any person to distribute or sell any pesticide that is adulterated or misbranded. Pursuant to 40 C.F.R. § 152.132, both the registrant and the distributor may be held liable for violations pertaining to a distributor product.

26. Information gathered as a result of the Inspection, including but not limited to, representative labeling and distribution records revealed that on January 26, 2018, Howard Johnson's Enterprises, Inc., distributed 600 bags of misbranded Eagle distributor product. The distributor product was misbranded pursuant to: (a) Section 2(q)(2)(A) of FIFRA, 7 U.S.C. § 136(q)(2)(A), and 40 C.F.R. § 156(g)(2), because the ingredient statement was not located on the front panel of the label; and (b) Section 2(q)(1)(G) of FIFRA, 7 U.S.C. § 136(q)(1)(G), and 40 C.F.R. § 156.60(a)(1), because the signal word and the child hazard warning statement were not located on the front panel of the label.

27. Respondent violated Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), when Howard Johnson's Enterprises, Inc. distributed the misbranded Eagle distributor product pursuant to 40 C.F.R. § 152.132.

CONSENT AGREEMENT

28. 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.

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 specified herein.

30. 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

31. Respondent agrees that, in settlement of the claims alleged herein, Respondent shall pay a civil penalty of Four Thousand Two Hundred Seventy-Nine Dollars ($4,279), as set forth below.

32. 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*.

33. 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.

34. 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).

Effect of Settlement and Reservation of Rights

35. 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.

36. 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.

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

38. 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.

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

General Provisions

40. 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.

41. 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.

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

43. 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
DOW AGROSCIENCES, LLC

Date: 6-25-19

By: _____ GBS

Erik Hobson
Print Name

Associate General Counsel
Title

COMPLAINANT
U. S. ENVIRONMENTAL PROTECTION AGENCY

Date: 7-03-19

DeAndre Singletary
Acting Director
Enforcement and Compliance Assurance Division

Clarissa Howley Mills
Office of Regional Counsel

FINAL ORDER

Pursuant to Section 14(a) of FIFRA, 7 U.S.C. § 136*l*(a), 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 — July 9, 2019

Karina Borromeo
Regional Judicial Officer

Date

CERTIFICATE OF SERVICE

I certify that 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 via Email to Complainant:

mills.clarissa@epa.gov

Copy via Email to Respondent:

ebsalathe@dow.com

Dated this 10th day of July, 2019.

Signed
for Lisa Hanger
Region 7 Hearing Clerk