

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ENVIRONMENTAL APPEALS BOARD
WASHINGTON, D.C.**

_____))
IN THE MATTER OF:))
))
Monsanto Company))
))
Respondent.))
_____))

Docket No. FIFRA-HQ-2010-5014

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ENVIR. APPEALS BOARD

CONSENT AGREEMENT AND FINAL ORDER

CONSENT AGREEMENT

Complainant, United States Environmental Protection Agency ("EPA") and Respondent, Monsanto Company ("Monsanto"), agree to this action and consent to the entry of this Consent Agreement and Final Order ("CAFO") before taking testimony and without any adjudication of any issues of law or fact herein.

I. NATURE OF ACTION

1. This is a civil administrative action instituted under Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA or the "Act"), as amended, 7 U.S.C. § 136l(a) and the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Consolidated Rules"), 40 C.F.R Part 22. This action imposes civil penalties pursuant to Section 14(a) of FIFRA.
2. Complainant and Respondent have conferred for the purpose of settlement pursuant to 40 C.F.R § 22.18, and desire to settle this action. Accordingly, before any testimony has been taken and without any admission of violation, or adjudication of any issue of fact or law, and in accordance with 40 C.F.R. § 22.13(b), Complainant and Respondent have agreed to the execution of this CAFO. Respondent hereby agrees to comply with the terms of this CAFO.

II. THE PARTIES

3. Rosemarie A. Kelley, Director, Waste and Chemical Enforcement Division, Office of Civil Enforcement, Office of Enforcement and Compliance Assurance, is authorized by lawful delegation to institute and settle civil administrative actions brought pursuant to Section 14(a) of FIFRA.

4. Respondent is Monsanto, a corporation organized and/or existing under the laws of the State of Delaware.

III. PRELIMINARY STATEMENT

5. Respondent certifies that it is in full compliance with respect to the violations alleged in this Consent Agreement.
6. Respondent stipulates that Complainant has jurisdiction over the subject matter of this Consent Agreement.
7. Respondent waives any defenses it might have as to venue and jurisdiction.
8. Pursuant to 40 C.F.R. § 22.18(b)(2), Respondent waives its right to contest the allegations herein, its right to appeal the Final Order, and its right to request a judicial or administrative hearing on any issue of law or fact set forth in, and resolved by, this Consent Agreement.
9. Respondent neither admits nor denies the findings of fact and conclusions of law set forth in Sections IV and V of this Consent Agreement.

IV. FIFRA LEGAL BACKGROUND

10. Under FIFRA, it is “unlawful for any person in any state to distribute or sell to any person . . . (E) any pesticide which is adulterated or misbranded[.]” 7 U.S.C. § 136j(a)(1).
11. The term “person” means “any individual, partnership, association, corporation, or any organized group of persons whether incorporated or not.” 7 U.S.C. § 136(s).
12. The term “to distribute or sell” means “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 U.S.C. § 136(gg).
13. Under FIFRA, a pesticide is misbranded if “the labeling accompanying it does not contain directions for use which are necessary for effecting the purpose for which the product is intended and if complied with, together with any requirements imposed under section 3(d) of [FIFRA], are adequate to protect health and the environment[.]” 7 U.S.C. § 136(q)(1)(F).
14. The term “labeling” means “all labels and all other written, printed, or graphic matter – (A) accompanying the pesticide or device at any time or (B) to which reference is made on the label or in the literature accompanying the pesticide or device[.]” 7 U.S.C. § 136(p)(2).

15. The term "registrant" means "a person who has registered any pesticide pursuant to the provisions of [FIFRA]." 7 U.S.C. § 136(y).
16. The term "pest" means: "(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-organisms on or in living man or other living animals) which the Administrator declares to be a pest under Section 25(c)(1) [of FIFRA]." 7 U.S.C. § 136(t).
17. The term "pesticide" means: "(1) any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest, and (2) any substance or mixture of substances intended for use as a plant regulator, defoliant or desiccant[.]" 7 U.S.C. § 136(u).

V. EPA ALLEGATIONS AND DETERMINATIONS

18. Respondent is a corporation organized and/or existing under the laws of the State of Delaware.
19. Respondent is the registrant of the following insect control protein (plant-incorporated protectant) pesticides:
 - Bollgard ® Cotton, *Bacillus thuringiensis* subsp. *kurstaki*, Insect Control Protein, EPA Reg. No. 524-478 ("Bollgard Cotton")
 - Bollgard II ® Cotton, *Bacillus thuringiensis* subsp. *kurstaki*, Insect Control Protein, EPA Reg. No. 524-522 ("Bollgard II Cotton")
20. Bollgard Cotton and Bollgard II Cotton are intended to destroy, repel, or mitigate pests.
21. Therefore, Bollgard Cotton and Bollgard II Cotton are "pesticides" as defined by FIFRA. 7 U.S.C. § 136(u).
22. On or about September 29, 2001, EPA accepted a label for Bollgard Cotton with the following language: "Transformed cotton must be accompanied by the Grower Guide which contains the following: . . . Not for commercial planting in the following counties in the Texas panhandle, which historically are not cotton-producing counties: Dallam, Sherman, Hansford, Ochiltree, Lipscomb, Hartley, Moore, Hutchison, Roberts and Carson."
23. EPA accepted this same language on labels for Bollgard Cotton in subsequent registrations in May 2005, July 2005, and February 2006.
24. On or about April 8, 2004, EPA accepted a label for Bollgard II Cotton with the following language: "Transformed cotton must be accompanied by the Grower Guide

which contains the following: . . . Not for commercial planting in the following counties in the Texas panhandle, which historically are not cotton-producing counties: Dallam, Sherman, Hansford, Ochiltree, Lipscomb, Hartley, Moore, Hutchison, Roberts and Carson.”

25. EPA accepted this same language on labels for Bollgard II Cotton in subsequent registrations in May 2005, July 2005, February 2006, September 2006, and June 2007.
26. EPA required Respondent to provide a Grower Guide to purchasers of Bollgard Cotton and Bollgard II Cotton as a condition of product registration under FIFRA for those products. Grower Guides instruct farmers how to use plant-incorporated protectant products correctly and include instructions on how to comply with insect resistance management requirements.
27. Grower Guides accompany the pesticide products at the purchaser/user level as part of the pesticide products’ sale and distribution and they are referenced in the FIFRA labels for Bollgard Cotton and Bollgard II Cotton.
28. Therefore, the Grower Guides referenced in Paragraphs 22 through 24, above, constitute labeling, as defined under section 2(p)(2) of FIFRA for Bollgard Cotton and Bollgard II Cotton. 7 U.S.C. § 136(p)(2),
29. In a letter dated April 6, 2007, Respondent informed EPA that the language in Paragraphs 22 and 24 did not appear in Respondent’s Grower Guides for Bollgard Cotton and Bollgard II Cotton prior to the 2007 growing season.
30. The language referenced in Paragraph 22, above, did not appear in Respondent’s Grower Guides for Bollgard Cotton for the years 2002, 2003, 2004, 2005, and 2006.
31. The language referenced in Paragraph 24, above, did not appear in Respondent’s Grower Guides for Bollgard II Cotton for the years 2004, 2005, and 2006.
32. Based on information provided by Respondent, EPA concluded that prior to the 2007 growing season, Respondent distributed or sold Bollgard Cotton and Bollgard II Cotton on no less than 1,782 separate occasions accompanied by the Grower Guides referenced in Paragraphs 22 and 24, above.
33. These Grower Guides did not contain the prohibition against commercial planting in Dallam, Sherman, Hansford, Ochiltree, Lipscomb, Hartley, Moore, Hutchinson, Roberts, and Carson counties in the Texas Panhandle. This prohibition was required to be in the Grower Guides as an express condition in the FIFRA labels and registrations for Bollgard Cotton and Bollgard II Cotton.
34. Therefore, Respondent’s distribution and sale of the pesticide products Bollgard and Bollgard II on at least 1,782 separate occasions constitutes distribution and sale of a

misbranded pesticide in violation of Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E).

VI. TERMS OF SETTLEMENT

35. Respondent consents to issuance of this Consent Agreement and to its terms, and consents, for the purposes of settlement, to the payment of the civil penalty set forth in Section VII.
36. Respondent's compliance with the terms of this CAFO shall fully settle all civil claims or civil causes of action alleged in Section V and disclosed to EPA by Monsanto in written information submissions dated April 6, 2007 and February 7, 2008.
37. This settlement is conditioned upon the accuracy of Respondent's submissions to EPA in this matter. EPA acknowledges that during the course of the company's investigation, Respondent provided EPA with extensive documentation detailing the results of the company's investigation. Because this information was provided to EPA as it was being developed by the Respondent, information contained in written information submissions referenced in Paragraph 36, above, may have been revised or updated in subsequent submissions to the Agency.
38. Compliance with this CAFO shall not be a defense to any subsequent action EPA may commence pursuant to federal law or regulation for violations occurring after the date of this Consent Agreement, or any violations of FIFRA not alleged in this Consent Agreement that may have occurred prior to the date that this Consent Agreement is fully executed by both Parties.
39. Nothing in this CAFO is intended to, nor shall be construed to operate in any way to, resolve any criminal liability of Respondent.

VII. CIVIL PENALTY

40. EPA has calculated a penalty pursuant to the statutory penalty factors listed in Section 14(a)(3) of FIFRA, 7 U.S.C. §136l(a)(3), and the Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act (July 2, 1990) ("FIFRA ERP").
41. Based upon Respondent's voluntary self-reporting of the violations referenced in Section V, and in accordance with the penalty adjustments allowed under the FIFRA ERP, Complainant has derived a penalty of \$2,500,000.
42. The penalty agreed upon by the Parties for settlement purposes is \$2,500,000.
43. Not more than sixty (60) calendar days following execution of the Final Order by the Environmental Appeals Board, Respondent shall either:

- a) Dispatch a cashier's or certified check in the amount of \$2,500,000, made payable to the order of the "Treasurer of the United States of America," and bearing the case docket number FIFRA HQ-2010-5014, to the following address:

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

or

- b) Make an electronic payment by wire transfer in the amount of \$2,500,000 with the notation, "Monsanto Company Civil Penalty Docket No. FIFRA HQ-2010-5014," by using the following instructions:

Federal Reserve Bank of New York
ABA = 021030004
Account = 68010727
SWIFT address = FRNYUS33
33 Liberty Street
New York, NY 10045

Field Tag 4200 of the Fedwire message should read "D 68010727
Environmental Protection Agency."

44. To ensure a record of compliance with this Consent Agreement, Respondent shall forward a copy of the check or wire transfer to EPA to the attention of:

Brian Dyer
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W. (Mail Code 2249A)
Washington, DC 20460-0001

and

Headquarters Hearing Clerk
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W. (Mail Code 1900C)
Washington, DC 20460-0001

45. If Respondent fails to pay the civil penalty of \$2,500,000 within sixty (60) calendar days of the execution of the Final Order, then Respondent shall pay an additional stipulated penalty of \$5,000 per calendar day, plus interest, at the statutory judgment rate provided for in 31 U.S.C. § 3717, as in effect on the date of execution of the Final Order, unless Complainant in writing excuses or mitigates the stipulated penalty. Complainant may

excuse or mitigate the stipulated penalty if Complainant determines in its sole discretion, that failure to comply occurred despite Respondent's exercise of good faith and due diligence. If additional stipulated penalties are due, Complainant will dispatch to Respondent a demand letter via certified mail, return receipt requested, which specifies the total amount due and owed by Respondent, including any interest allowed by law. Within fourteen (14) calendar days following Respondent's receipt of such demand letter, Respondent shall pay the stipulated penalty in the manner specified in this Section.

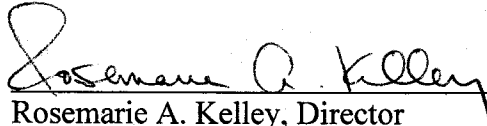
46. Failure to remit the civil penalty, or any stipulated penalty plus interest provided herein, may result in this matter being forwarded to the United States Department of Justice for collection.

VIII. OTHER MATTERS

47. Nothing in this CAFO shall relieve Respondent of the duty to comply with all applicable provisions of FIFRA and with other federal, state, tribal, and local laws and regulations.
48. This CAFO shall bind both Parties. This includes each Party's officers, directors, employees, successors, and assigns. The undersigned representative of each Party to this CAFO certifies that he or she is duly authorized to represent and bind the Party whom he or she claims to represent.
49. This Consent Agreement shall bind the Parties in full effect upon execution of the Final Order by EPA's Environmental Appeals Board.
50. Respondent's obligations under this Consent Agreement shall terminate when Respondent has paid the civil penalty, and any applicable interest or late charges, as specified in Section VII of the Consent Agreement in accordance with the Final Order.
51. Each Party agrees to bear its own costs and attorney fees in this matter.

WE AGREE TO THIS:

FOR COMPLAINANT:



Rosemarie A. Kelley, Director
Waste and Chemical Enforcement Division
Office of Civil Enforcement
Office of Enforcement and Compliance Assurance
United States Environmental Protection Agency

Date: 4/20/10



Thomas J. Charlton, Attorney
Waste and Chemical Enforcement Division
Office of Civil Enforcement
Office of Enforcement and Compliance Assurance
United States Environmental Protection Agency

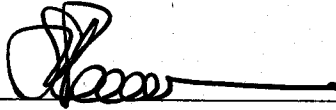
Date: 4/1/10

FOR RESPONDENT:



David F. Snively
Senior Vice President, General Counsel & Secretary
Monsanto Company

Date: 3/31/10



Stanley H. Abramson, Attorney
Counsel for Monsanto Company
Arent Fox LLP

Date: 4/1/10