

U. S. ENVIRONMENTAL PROTECTION AGENCY
REGION 7
901 NORTH 5th STREET
KANSAS CITY, KANSAS 66101

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ENVIRONMENTAL PROTECTION
AGENCY-REGION VII
REGIONAL HEARING CLERK

BEFORE THE ADMINISTRATOR

In the Matter of)
)
Agri-Producers, Inc.) Docket No. FIFRA-07-2010-0006
Tampa, Kansas)
)
Respondent)

CONSENT AGREEMENT AND FINAL ORDER

The U.S. Environmental Protection Agency (EPA), Region 7, and Agri-Producers, 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, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits (Consolidated Rules), 40 C.F.R. §§ 22.13(b) and 22.18(b)(2).

Section I

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

Section II

Parties

3. The 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 Agri-Producers, Inc., a pesticide dealer and producer, located at 205 Main Street, in Tampa, Kansas, with a branch facility located at 515 East 6th Street in Gypsum, Kansas (the "facility"). 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), and a Kansas corporation qualified to do business in the state of Kansas.

Section III

Statutory and Regulatory Background

5. 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 animal) which the Administrator declares to be a pest under Section 25(c)(1).

6. 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.

7. 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.

8. Section 2(w) of FIFRA, 7 U.S.C. § 136(w), and 40 C.F.R. § 167.3 define the term “produce” to mean to manufacture, prepare, propagate, compound, or process any pesticide or device or active ingredient used in producing a pesticide.

9. Section 2(w) of FIFRA, 7 U.S.C. § 136(w), and 40 C.F.R. § 167.3 define the term “producer” to mean any person who manufactures, prepares, compounds, propagates, or processes any pesticide or device or active ingredient used in producing a pesticide (such actions include packaging, repackaging, labeling, and relabeling a pesticide).

10. Section 2(q)(1)(F) of FIFRA, 7 U.S.C. § 136(q)(1)(F), states that 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.

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

12. 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.

13. 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 a restricted use other than in accordance with Section 3(d) of FIFRA.

14. Section 3(d) of FIFRA, 7 U.S.C. § 136a(d), states that a restricted use pesticide shall be applied only by or under the direct supervision of a certified applicator.

Section IV

General Factual Allegations

15. On January 21, 2009, and on February 6, 2009, a representative of the Kansas Department of Agriculture (KDA) conducted inspections at the Agri-Producers, Inc. facility in Gypsum, Kansas.

16. During the inspections referenced in the preceding paragraph, the KDA inspector documented the sale by Respondent of a quantity of the restricted use pesticide FUMITOXIN, EPA Reg. No. 72959-2-5857 on or about September 20, 2007, to Norman Tarn of Gypsum, Kansas.

Violations

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

Count 1

18. The facts stated in Paragraphs 15 through 17 are realleged and incorporated as if fully stated herein.

19. At the time of the sale referenced in Paragraph 16 above, Respondent failed to supply the purchaser with the complete labeling for the product FUMITOXIN, EPA Reg. No. 72959-2-5857.

20. The pesticide referenced in Paragraph 16 was misbranded in that it was sold or distributed by Respondent without the required complete labeling for the product.

21. Respondent violated Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), in that it distributed or sold a misbranded pesticide.

22. Pursuant to Section 14 of FIFRA, 7 U.S.C. § 136l, and based on the facts stated above, it is proposed that a civil penalty of \$5,200.00 be assessed against the Respondent.

Count 2

23. The facts stated in Paragraphs 15 through 22 are realleged and incorporated as if fully stated herein.

24. At the time of the sale referenced in Paragraph 16 above, Norman Tarn, the purchaser of the restricted use pesticide FUMITOXIN, EPA Reg. No. 72959-2-5857, was not certified to apply a restricted use pesticide, nor was he acting under the supervision of an individual so certified at the time of the RUP application.

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

26. Pursuant to Section 14 of FIFRA, 7 U.S.C. § 136l, and based on the facts stated above, it is proposed that a civil penalty of \$5,200.00 be assessed against the Respondent.

Section V

Consent Agreement and Terms of Settlement

27. For purposes of this proceeding, Respondent admits the jurisdictional allegations set forth above.

28. Respondent neither admits nor denies the factual allegations set forth above.

29. Respondent waives its right to contest any issue of fact or law set forth above and its right to appeal the Final Order accompanying this Consent Agreement.

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

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

32. The undersigned representative of Respondent certifies that he or she is fully authorized to enter into the terms and conditions of this CAFO and to execute and legally bind Respondent to it.

33. Respondent certifies that by signing this CAFO that it is in compliance with FIFRA, 7 U.S.C. § 136 *et. seq.*, and all regulations promulgated thereunder.

34. Respondent consents to the issuance of the Final Order hereinafter recited and consents to the payment of a civil penalty as specified in the Final Order.

35. The effect of settlement described in Paragraph 36 below is conditioned upon the accuracy of the Respondent's representations to EPA, as memorialized in Paragraph 33 above.

36. Payment of this civil penalty in full shall resolve all civil and administrative claims for all violations of FIFRA alleged in this document. Complainant reserves the right to

take any enforcement action with respect to any other violations of FIFRA or any other applicable law.

37. Late Payment Provisions. Pursuant to 31 U.S.C. § 3717, EPA is entitled to assess interest and penalties on debts owed to the United States and a charge to cover the cost of processing and handling a delinquent claim. Respondent understands that its failure to timely pay any portion of the civil penalty described in Paragraph 1 of the Final Order below 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 accrue thereon at the applicable statutory rate on the unpaid balance until such civil or stipulated 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. 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.

Section VI

Final Order

Pursuant to Section 14 of FIFRA, as amended, 7 U.S.C. §136l, and according to the terms of the Consent Agreement set forth above, **IT IS HEREBY ORDERED THAT:**

1. Respondent shall pay a civil penalty of Ten Thousand Four Hundred Dollars (\$10,400) within thirty (30) days of the effective date of this Final Order.
2. 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:

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

Wire transfers should be directed to the Federal Reserve Bank of New York:

Federal Reserve Bank of New York
ABA = 021030004
Account = 68010727
SWIFT address = FRNYUS33
33 Liberty Street
New York, New York 10045
Field Tag 4200 of the Fedwire message should read
"D 68010727 Environmental Protection Agency."

A copy of the check or other information confirming payment shall

simultaneously be sent to the following:

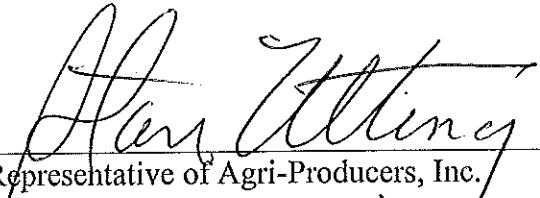
Regional Hearing Clerk
U.S. Environmental Protection Agency
Region 7
901 North 5th Street
Kansas City, Kansas 66101; and

Chris Dudding
Attorney
Office of Regional Counsel
U.S. Environmental Protection Agency
Region 7
901 North 5th Street
Kansas City, Kansas 66101.

3. Respondent and Complainant shall each bear their own costs and attorneys' fees incurred as a result of this matter.

RESPONDENT
AGRI-PRODUCERS, INC.

Date: 3-10-10



Representative of Agri-Producers, Inc.

STAN UTTING
Printed Name

MANAGER
Title

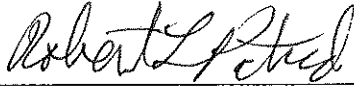
COMPLAINANT
U. S. ENVIRONMENTAL PROTECTION AGENCY

Date: 3-16-10 *for Karen A. Flourney*
William A. Spratlin
Director
Water, Wetlands and Pesticides Division

Date: 3/16/10
Chris Dudding
Assistant Regional Counsel
Office of Regional Counsel

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

Date: Mar. 17, 2010



ROBERT L. PATRICK
Regional Judicial Officer
U.S. Environmental Protection Agency, Region 7

IN THE MATTER OF Agri-Producers, Inc., Respondent
Docket No. FIFRA-07-2010-0006

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:

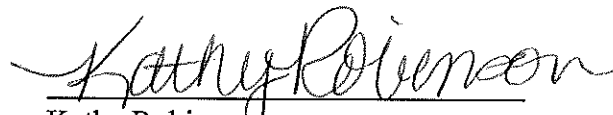
Copy hand delivered to
Attorney for Complainant:

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

Copy by Certified Mail Return Receipt to:

Mr. Stan Utting
Agri-Producers, Inc.
P.O. Box 25, 205 Main
Tampa, Kansas 67483

Dated: 3/17/10


Kathy Robinson
Hearing Clerk, Region 7