

UNITED STATES
ENVIRONMENTAL PROTECTION
AGENCY-REGION 7
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U. S. ENVIRONMENTAL PROTECTION AGENCY
REGION 7
11201 RENNER BOULEVARD
LENEXA, KANSAS 66219

BEFORE THE ADMINISTRATOR

In the Matter of)
)
Brulin & Company, Inc.) Docket No. FIFRA-07-2015-0024
)
Respondent)

CONSENT AGREEMENT AND FINAL ORDER

The U.S. Environmental Protection Agency (EPA), Region 7 and Brulin & Company, 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 Renovation 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 the 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 the 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 Brulin & Company, Inc., a pesticide registrant and distributor with its principal place of business located at 2920 Dr. Andrew J. Brown Avenue, in Indianapolis, Indiana.

Section III

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 the regulation, sale, distribution, and use of pesticides in the United States. 7 U.S.C. §§ 136 *et seq.*

6. Section 2(t) of FIFRA, 7 U.S.C. § 136(t), defines the term “pest” to mean, in pertinent part, “any insect, rodent, nematode, fungus, weed” or “any other form of terrestrial or aquatic plant or animal life or virus, bacteria, or other micro-organisms” declared by EPA to be a pest under Section 25(c)(1) of FIFRA, 7 U.S.C. § 136w(c)(1).

7. Section 2(u) of FIFRA, 7 U.S.C. § 136(u), defines the term “pesticide” to include “any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest,” and “any substance or mixture of substances intended for use as a plant regulator [...].”

8. 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.

9. Section 2(y) of FIFRA, 7 U.S.C. § 136(y), defines the term “registrant” to mean a person who has registered any pesticide pursuant to the provisions of FIFRA.

10. 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.”

11. Under the FIFRA Regulations, pesticide registrants may distribute or sell a registered product under another person’s name and address instead of (or in addition to) their own. Such distribution and sale is called “supplemental distribution” and such pesticides are called “distributor products.” Furthermore, under 40 C.F.R. § 152.132, 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.”

12. Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), states that it is unlawful for any person in any state to distribute or sell to any person any pesticide that is not registered under Section 3 of FIFRA, 7 U.S.C. § 136a.

13. 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.

14. Under FIFRA Section 2(q)(1), 7 U.S.C. § 136(q)(1), a pesticide is misbranded if:
(a) its labeling bears any statement, design, or graphic representation relative thereto or to its

ingredients which is false or misleading in any particular [Sec. 2(q)(1)(A)]; (b) it is an imitation of, or is offered for sale under the name of, another pesticide [Sec. 2(q)(1)(C)]; (c) if any word, statement, or other information required by or under authority of FIFRA to appear on the label or labeling is not prominently placed thereon [Sec. 2(q)(1)(E)]; (d) 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 [Sec. 2(q)(1)(F)]; 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, are adequate to protect health and the environment [Sec. 2(q)(1)(G)]; and if the label does not bear an ingredient statement on the container subject to the conditions described in Section 2(q)(2)(A) of FIFRA, 7 U.S.C. § 136(q)(2)(A).

15. The FIFRA prohibition against the distribution or sale of misbranded pesticides is important because it helps ensure that end users and members of the public have the most accurate, up-to-date, and compliant information available about pesticides in the marketplace – including ingredients, directions for use, potential hazards and safety precautions – and about the establishments in which they are produced.

16. Section 7(a) of FIFRA, 7 U.S.C. § 136e(a), states that no person shall produce any pesticide subject to FIFRA in any State unless the establishment in which it is produced is registered with EPA under FIFRA Section 7. For any producer operating a registered establishment, Section 7(c) of FIFRA, 7 U.S.C. § 136e(c), requires that, among other things, the producer submit to EPA annual pesticide production reports detailing the amount of pesticides being produced and the amount produced, sold, and distributed during the prior year.

17. The FIFRA requirements to produce pesticides in registered establishments and for registered establishments to submit reports of pesticide production, distribution, and sales are important because they help maintain the integrity of the federal pesticide program EPA implements, a primary purpose of which is to ensure that no pesticide is produced, imported, distributed, sold, or used in a manner that may pose an unreasonable risk to human health or the environment. The requirements to properly register pesticide-producing establishments, and for registered establishments to report production and sales information, help EPA carry out compliance, risk assessment, and risk reduction functions important for protecting human health and the environment because without proper establishment registrations, EPA cannot determine where and in what manner pesticides are being produced, sold, and distributed.

18. Under Sections 8 and 9 of FIFRA, 7 U.S.C. §§ 136f and 136g, EPA and duly-designated state partners are authorized, among other things and upon presentation of credentials and written notice, to conduct inspections at producer and distributor establishments and to collect information required to be maintained by FIFRA regarding pesticide distribution or sales, including samples of pesticides that are packaged, labeled, and released for shipment.

19. Section 14(a) of FIFRA, 7 U.S.C. § 136l(a), authorizes the assessment of civil penalties of up to \$5,000 against any registrant, commercial applicator, wholesaler, dealer, retailer, or other distributor for each violation of FIFRA and the FIFRA Regulations. Under the Debt Collection Improvement Act of 1996 (“DCIA”), 31 U.S.C. § 3701, and EPA’s Civil Monetary Penalty Inflation Adjustment Rule (“Penalty Inflation Rule”) at 40 C.F.R. Part 19, this amount was increased to \$7,500 for violations occurring after January 12, 2009.

Section IV

General Factual Allegations

20. Respondent is, and at all times referred to herein was, a “person” within the meaning of FIFRA.
21. Respondent is the registrant for Maxima 128, EPA Reg. No. 106-72, Maxima 256, EPA Reg. No. 106-73, and Maxima RTU, EPA Reg. No. 106-81.
22. At times relevant to the violations alleged herein, Respondent had a supplemental distribution agreement with Kansas Correctional Industries (KCI) to distribute Maxima 128, EPA Reg. No. 106-72, under the distributor product name Sunflo Max-128, EPA Reg. No. 106-72-56148.
23. At times relevant to the violations alleged herein, Respondent had supplemental distribution agreements with Cornhusker State Industries (CSI) to distribute Maxima 256, EPA Reg. No. 106-73, under the distributor product name Tec/Cide Plus, EPA Reg. No. 106-73-47359, and Maxima RTU, EPA Reg. No. 106-81, under the distributor product name Tec/Cide Plus RTU, EPA Reg. No. 106-81-47359.
24. On or about January 17, 2013, one or more duly-authorized inspectors from the Kansas Department of Agriculture (KDA) conducted a FIFRA compliance inspection at KCI’s production facility located at Fourth & Kansas in Lansing, Kansas (“KCI Facility”).
25. On or about March 5, 2013, one or more duly-authorized inspectors from the Nebraska Department of Agriculture (NDA) conducted a FIFRA compliance inspection at CSI’s production facility located at 800 Pioneers Boulevard in Lincoln, Nebraska (“CSI Facility”).

Section V

EPA Findings

26. Based upon information collected during or as a result of the inspections conducted by the KDA and NDA representatives at the KCI and CSI Facilities, the FIFRA violations documented by EPA and alleged in this CAFO include the following: distributing or selling unregistered and misbranded pesticides in violation of Sections 12(a)(1)(A) and (E) of FIFRA, Section 12(a)(2)(L) of FIFRA, and the FIFRA Regulations at 40 C.F.R. Part 156, as further detailed below.

27. Respondent produced a product named Ultramax, which is a pesticide as that term is defined by FIFRA, and distributed the product on multiple occasions to its supplemental distributors KCI and CSI. The Ultramax product as distributed was not registered pursuant to Section 3 of FIFRA or labeled in accordance with the FIFRA Regulations at 40 C.F.R. Part 156.

28. At all times relevant to the violations alleged in Section VI of this CAFO, Respondent and/or Respondent's agents (KCI and CSI), pursuant to 40 C.F.R. § 152.132, produced, distributed, sold, offered for sale, shipped, and/or delivered for shipment one or more distributor products produced using Respondent's unregistered Ultramax product.

Section VI

Violations

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

Count 1

Distribution or Sale of Unregistered and Misbranded Pesticide “Ultramax”

30. The facts and findings stated in Paragraphs 20 through 28 are realleged and incorporated as if fully stated herein.

31. Upon information and belief, on multiple occasions between April 18, 2011 and January 17, 2013, Respondent distributed or sold the pesticide product Ultramax referenced in Paragraph 27, above, which product was not registered in accordance with Section 3 of FIFRA, and which was not labeled in accordance with the FIFRA Regulations at 40 C.F.R. Part 156.

32. Accordingly, on multiple occasions between April 18, 2011 and January 17, 2013, Respondent violated Section 12(a)(1)(A) and 12(a)(1)(E) of FIFRA and the FIFRA regulations at 40 C.F.R. Part 156, each of which is a violation for which penalties may be assessed against Respondent pursuant to Section 14(a)(1) of FIFRA, 7 U.S.C. § 136l(a)(1), and the FIFRA Regulations.

Count 2

Distribution or Sale of Misbranded and Unregistered Pesticides Produced from Ultramax

33. The facts and findings stated in Paragraphs 20 through 28 are realleged and incorporated as if fully stated herein.

34. Upon information and belief, on multiple occasions between January 9, 2012, and March 5, 2013, Respondent’s agents under 40 C.F.R. § 152.132 distributed or sold, or offered for sale, pesticide products produced from the unregistered Ultramax product referenced in Paragraph 27, above. These products were distributed by Respondent’s supplemental distributor KCI as the distributor product Sunflo Max-128, EPA Reg. No. 106-72-56148, and by

Respondent's supplemental distributor CSI as the distributor products Tec/Cide Plus, EPA Reg. No. 106-73-47359, and Tec/Cide Plus RTU, EPA Reg. No. 106-81-47359.

35. Accordingly, on multiple occasions between January 9, 2012, and March 5, 2013, Respondent's agents under 40 C.F.R. § 152.132 violated Section 12(a)(1)(A) of FIFRA by distributing or selling pesticide products that were not registered pursuant to Section 3 of FIFRA, and violated Section 12(a)(1)(E) of FIFRA by selling pesticide products that were misbranded in that they were offered for sale under the name of other pesticides, each of which is a violation for which penalties may be assessed against Respondent pursuant to Section 14(a)(1) of FIFRA, 7 U.S.C. § 136l(a)(1), and the FIFRA regulations.

Count 3

Failure to Report Production Pursuant to Section 7 of FIFRA

36. The facts and findings stated in Paragraphs 20 through 28 are realleged and incorporated as if fully stated herein.

37. In the years 2011 and 2012, Respondent produced the unregistered pesticide product Ultramax, referenced in Paragraph 27 above.

38. On or about each of the dates, February 27, 2012, and March 7, 2013, Respondent filed reports of pesticide production pursuant to Section 7 of FIFRA, 7 U.S.C. § 136e.

39. In each of the pesticide production reports referenced in the preceding paragraph, Respondent failed to identify production of the unregistered pesticide product Ultramax.

40. In each of the pesticide production reports referenced in Paragraph 39 above, Respondent failed to include the chemical formulation for the unregistered pesticide product Ultramax, as required by 40 C.F.R. § 167.3.

41. For each of the pesticide production reports referenced in Paragraph 38 above, Respondent violated Section 12(a)(2)(L) of FIFRA, 7 U.S.C. § 136j(a)(2)(L), by submitting a production report pursuant to Section 7 of FIFRA, 7 U.S.C. § 136e that contained false or incomplete information.

Section VII

Consent Agreement

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

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

44. Respondent waives its right to contest any allegations set forth above and its right to appeal the Final Order accompanying this Consent Agreement.

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

46. 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.

47. 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.

48. By signing this CAFO, Respondent certifies that it is presently in compliance with FIFRA, 7 U.S.C. § 136 *et seq.*, and all regulations promulgated thereunder, and that it is no longer selling, distributing, or offering for sale or distribution any unregistered products that are required to be registered with the EPA by the statute.

49. The effect of settlement described in the following paragraph is conditioned upon the accuracy of the Respondent's representations to the EPA, as memorialized in the preceding paragraph.

50. 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. Payment of this civil penalty in full shall resolve all civil and administrative claims for all violations of FIFRA alleged in this document.

51. Complainant reserves the right to take any enforcement action with respect to any other violations of FIFRA or any other applicable law.

Late Payment Provision

52. Under 31 U.S.C. § 3717, the 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 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 VIII

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 Sixty-Two Thousand Four Hundred Dollars (\$62,400). The payment shall identify Respondent by name and docket number and shall be by online payment, certified or cashier's check, or wire transfer, as directed below.

2. Payment of the penalty may be submitted on-line at www.pay.gov by entering "SFO 1.1" in the "Search Public Forms" field. Open the on-line form and complete required fields to complete payment. Respondent shall print a copy of the payment receipt and mail a copy of the receipt to the contacts listed below.

3. Payments by certified or cashier's check shall be made payable to the "United States Treasury" and sent to:

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

4. 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"

5. 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

Mark Leshner
WWPD/TOPE
U.S. Environmental Protection Agency
Region 7
11201 Renner Boulevard
Lenexa, Kansas 66219.

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

7. No portion of the civil penalty or interest paid by Respondent pursuant to the requirements of this CAFO shall be claimed by Respondent as a deduction for federal, state, or local income tax purposes.

8. This CAFO shall be effective upon the filing of the Final Order by the Regional Hearing Clerk for the EPA, Region 7. Unless otherwise stated, all time periods stated in this CAFO shall be calculated in calendar days from such date.

RESPONDENT
BRULIN & COMPANY, INC

Date: 5/23/16


By:



CHARLES F. POLLNOW CEO
Print Name Title

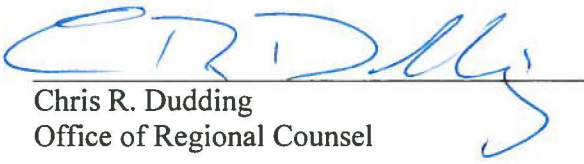
COMPLAINANT
U.S. ENVIRONMENTAL PROTECTION AGENCY

Date: 5/31/16



Karen Flournoy
Director
Water, Wetlands and Pesticides Division

Date: 5/31/16



Chris R. Dudding
Office of Regional Counsel

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

Date: June 6, 2016 Karina Borromeo
Karina Borromeo
Regional Judicial Officer

IN THE MATTER Of Brulin & Company, Inc., Respondent
Docket No. FIFRA-07-2015-0024

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 emailed to Attorney for Complainant:

lesher.mark@epa.gov
dudding.chris@epa.gov

Copy by First Class Mail to Respondent:

Brulin & Company, Inc.
c/o Michael Boucher, Partner
Dentons US LLP
1900 K Street NW
Washington, DC 20006-1102

Dated: 6/6/14



Kathy Robinson
Hearing Clerk, Region 7