

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

Vitalix, Inc.

Respondent

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Docket No. FIFRA-07-2013-0010

CONSENT AGREEMENT AND FINAL ORDER

The U.S. Environmental Protection Agency (EPA), Region 7 and Vitalix, 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 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 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 Vitalix, Inc., a pesticide distributor with a facility located in Alliance, Nebraska.

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 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 (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).

7. 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.

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(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.

10. Section 2(q)(1)(A) of FIFRA, 7 U.S.C. § 136(q)(1)(A), states a pesticide is misbranded if its labeling bears any statement, design, or graphic representation representative thereto or to its ingredients which is false or misleading in any particular.

11. 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.

12. Section 12(a)(1)(B) of FIFRA, 7 U.S.C. § 136j(a)(1)(B), states that it shall be unlawful for any person to distribute or sell any pesticide if any claims made for it as a part of its distribution or sale substantially differ from any claims made for it as part of the statement required in connection with its registration.

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 that is adulterated or misbranded.

Section IV

General Factual Allegations

14. 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).

15. The Respondent, at all times relevant herein, operated a registered pesticide-producing establishment in Alliance, Nebraska, under EPA Establishment No. 65901-NE-001.

16. Wellmark International is the registrant for RF2025 Tub, EPA Registration No. 2724-495. Respondent is authorized to act as supplemental distributor of RF2025 Tub under the distributor product name, Vitalix No. 5 IGR Fly Tub.

17. Wellmark International is the registrant for RF2002 Block, EPA Registration No. 2724-492. Respondent is authorized to act as a supplemental distributor of RF2002 Block under the distributor product name, Mineralix Fly Tub with IGR.

Violations

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

Counts 1-8

19. The facts stated in paragraphs 14 through 17 are realleged and incorporated as if fully stated herein.

20. On eight occasions during the years 2009 and 2010, Respondent sold or distributed a quantity of the product RF2025 Tub under the product name #5 Altosid IGR Fly Tub, EPA Reg. No. 2724-495-65901.

21. The label for the pesticide product #5 Altosid IGR Fly Tub, EPA Reg. No. 2724-495-65901, distributed by Respondent, lacked a precautionary statement necessary to protect the environment.

22. The pesticide product #5 Altosid IGR Fly Tub, EPA Reg. No. 2724-495-65901, was misbranded.

23. On the occasion of each of the sales or distributions of the product #5 Altosid IGR Fly Tub, EPA Reg. No 2724-495-65901, as alleged above, Respondent violated Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), in that it sold or distributed a pesticide which was misbranded.

Counts 9-19

24. The facts stated in paragraphs 14 through 17 are realleged and incorporated as if fully stated herein.

25. On eleven occasions during the years 2009, 2010 and 2011, Respondent sold or distributed a quantity of the product RF2002 Block, under the product name Mineralix Fly Tub with Altosid IGR #11, EPA Reg. No. 2724-492-65901.

26. The label for the pesticide product Mineralix Fly Tub with Altosid IGR #11, EPA Reg. No. 2724-492-65901, distributed by Respondent, lacked a precautionary statement necessary to protect the environment.

27. The pesticide product Mineralix Fly Tub with Altosid IGR #11, EPA Reg. No. 2724-492-65901, was misbranded.

28. The pesticide product Mineralix Fly Tub with Altosid IGR #11, EPA Reg. No. 2724-492-65901, was distributed or sold by Respondent in conjunction with marketing claims that differed substantially from those on the statement required in connection with its registration.

29. On the occasion of each of the sales or distributions of the product Mineralix Fly Tub with Altosid IGR #11, EPA Reg. No. 2724-492-65901, as alleged above, Respondent violated Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), in that it sold or distributed a pesticide which was misbranded.

30. On the occasion of each of the sales or distributions of the product Mineralix Fly Tub with Altosid IGR #11, EPA Reg. No 2724-492-65901, as alleged above, Respondent violated Section 12(a)(1)(B) of FIFRA, 7 U.S.C. § 136j(a)(1)(B), in that it sold or distributed a pesticide in conjunction with claims that differed substantially than those on the statement required in connection with its registration.

Section V

Consent Agreement

31. For purposes of this proceeding, Respondent admits the jurisdictional allegations set forth above, and agrees not to contest the EPA's jurisdiction in this proceeding or any subsequent proceeding to enforce the terms of the Final Order.

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

33. 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.

34. 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.

35. 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.

36. 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.

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

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

39. Respondent agrees that, in settlement of the claims alleged in this CAFO, Respondent shall pay a penalty as set forth in Paragraph 1 of the Final Order below. 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 and/or regulation administered by the EPA.

40. 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.

41. Late Payment Provisions: Pursuant to 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 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 mitigated civil penalty, in the amount of Thirty-Nine Thousand, Six Hundred and Eighty-Three Dollars (\$39,683.00) plus interest for three months in the amount of Thirty-Three Dollars and Seven Cents (\$33.07). The civil penalty will be paid in three (3) monthly payments of Thirteen Thousand Two Hundred Thirty Eight Dollars and Sixty-Nine Cents (\$13,238.69) each. The first payment must be received at the address below on or before thirty (30) days after the effective date of the Final Order, with the two successive payments due, respectively, on or before sixty (60) and ninety (90) days after the effective date of the Final Order.

2. Payment of the penalty shall be made by cashier check, by wire transfer, or by on-line electronic payment as listed below. The payment shall reference the Docket Number on the check or wire transfer. If made by cashier or certified check, the check shall be made payable to "Treasurer of the United States and be sent to the following address:

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

If by wire transfer, payment should be directed to the Federal Reserve Bank of New York as follows:

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"

If by electronic payment, payment 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 the 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. 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

Andrew Kowalski
Toxics and Pesticides Enforcement Branch, WWPD
U.S. Environmental Protection Agency
Region 7
11201 Renner Boulevard
Lenexa, Kansas 66219.

4. 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.

5. 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 herein shall be calculated in calendar days from such date.

**RESPONDENT
VITALIX, INC.**

Date: 7/24/13


By:




Greg Olson President
Print Name Title

COMPLAINANT
U. S. ENVIRONMENTAL PROTECTION AGENCY

Date: 7/30/13


Karen Flournoy
Director
Water, Wetlands and Pesticides Division

Date: 7/29/13


Chris R. Dudding
Office of Regional Counsel

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

Date: 8-1-13

Karina Borromeo
KARINA BORROMEO
Regional Judicial Officer

IN THE MATTER OF Vitalix, Inc., Respondent
Docket No. FIFRA-07-2013-0010

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 by email to Attorney for Complainant:

dudding.chris@epa.gov

Copy by First Class Mail to Respondent:

Greg Olson
Vitalix, Inc.
2692 CR 57
Alliance, Nebraska 69301

Dated: 8/1/13



Kathy Robinson
Kathy Robinson
Hearing Clerk, Region 7