

U. S. ENVIRONMENTAL PROTECTION AGENCY

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY-REGION 7

REGION 7

11201 RENNER BOULEVARD
LENEXA, KANSAS

2016 MAY 31 AM 8:04

BEFORE THE ADMINISTRATOR

In the Matter of:

Kunkel Enterprises, Inc.,
d.b.a. C K Enterprises, Inc.

Respondent.

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Docket No. FIFRA-07-2016-0004

COMPLAINT AND CONSENT AGREEMENT/FINAL ORDER

The U.S. Environmental Protection Agency, Region 7 (“EPA”), and Kunkel Enterprises, Inc., d.b.a. C K Enterprises, 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 Revocation/Termination or Suspension of Permits, 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 initiated pursuant to Section 14 of the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”), 7 U.S.C. § 136l.

2. This Complaint and Consent Agreement/Final Order (“CA/FO”) 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 Kunkel Enterprises, Inc., d.b.a. C K Enterprises, Inc. (“C K Enterprises”), a pesticide producer and distributor located at 1204 Southwest Jefferson Street, in Lee’s Summit, Missouri.

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 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(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.

8. 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.”

9. 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.

10. 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) of FIFRA, 7 U.S.C. § 136w(c)(1).

11. The regulation at 40 C.F.R. §152.5(d) states that any fungus, bacterium, virus, prion, or other microorganism is declared to be a pest under circumstances that make it deleterious to man or the environment, except for those living on or in living man or other living animals or those on or in processed food or processed animal feed, beverages, drugs, and cosmetics.

12. Section 2(c)(1) of FIFRA, 7 U.S.C. § 136(c)(1), states that a pesticide is adulterated if its strength or purity falls below the professed standard of quality as expressed on its labeling under which it is sold.

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

14. The regulation at 40 C.F.R. § 156.10(a)(5) provides that the labeling for a pesticide or device is false or misleading if it contains, *inter alia*:

- (i) A false or misleading statement concerning the composition of the product;

(ii) A false or misleading statement concerning the effectiveness of the product as a pesticide or device.

15. Pursuant to 40 C.F.R. § 152.132, 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 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 FIFRA, and both the registrant and the distributor may be held liable for violations pertaining to the distributor product. Supplemental distribution is permitted upon notification to the EPA if specific conditions, stated at 40 C.F.R. § 152.132(a) through (e), are met. As a requirement of supplemental distribution, the label of the distributor product must be the same as that of the registered product, with exceptions stated at 40 C.F.R. § 152.132(d)(1) through (5).

Section IV

General Factual Allegations

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

17. At all times relevant to the allegations herein, Respondent owned or operated a registered pesticide producing establishment ("C K Enterprises Facility") located at 1204 Southwest Jefferson Street, in Lee's Summit, Missouri, under EPA Establishment Number 49641-MO-001.

18. West Agro, Inc., d.b.a. DeLaval Manufacturing ("West Agro"), is the registrant of LFI Sanitizer, EPA Registration Number ("EPA Reg. No.") 4959-18. West Agro has submitted to EPA the required notification form and information indicating they have a supplemental

distributor agreement with C K Enterprises. Respondent is authorized to act as supplemental distributor of LFI Sanitizer under the distributor product name DI-SAN DF, EPA Reg. No. 4959-18-49614.

19. On or about March 6, 2013, a representative of the Missouri Department of Agriculture (“MDA”) conducted an inspection at the C K Enterprises Facility. During this inspection MDA documented that Respondent was producing and distributing the supplemental distributor product DI-SAN DF, referenced in paragraph 18, under EPA Reg. No. 4959-18-49614. Two one-gallon physical samples of DI-SAN DF and its labels were collected during the inspection from inventory that was packaged, labeled, and released for sale or shipment at the C K Enterprises Facility. Samples were transferred to the University of Iowa State Hygienic Laboratory (“UHL”), in Iowa City, Iowa, for analysis. Subsequently, MDA forwarded information from its investigation to EPA, including copies of product labels, order summaries, and photographs.

Violations

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

Count 1

21. The facts stated in paragraphs 16 through 19 are re-alleged and incorporated as if fully stated herein.

22. Documentation collected during the inspection referenced in paragraph 19 revealed that C K Enterprises was producing, distributing, and holding for sale or distribution the supplemental distributor product DI-SAN DF, referenced in paragraph 18, under EPA Reg. No. 4959-18-49614.

23. The distributor product DI-SAN DF, EPA Reg. No. 4959-18-49614, was misbranded in that the label stated in part:

“ * * *

ACTIVE INGREDIENTS

Iodine.....	1.6%
INERT INGREDIENTS.....	98.4%
TOTAL.....	100.0%

* * *”

24. Whereas, when analyzed, the distributor product DI-SAN DF, EPA Reg. No. 4959-18-49614, contained less than 1.6% Iodine.

25. The UHL report of analysis found that the distributor product DI-SAN DF, EPA Reg. No. 4959-18-49614, contained only 1.3% to 1.32% of Iodine. Due to this deficiency, the pesticide product would not be fully effective in controlling microorganisms and bacteria.

26. The distributor product DI-SAN DF, EPA Reg. No. 4959-18-49614, was adulterated in that its strength or purity fell below the professed standard or quality expressed on the labeling under which it was being offered for sale or held for distribution.

27. The distributor product DI-SAN DF, EPA Reg. No. 4959-18-49614, was misbranded in that its labeling bore a statement relative thereto or to its ingredients that was false or misleading.

28. Respondent violated Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), in that it held for sale or distribution a pesticide that was adulterated and misbranded.

29. 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 \$3,861 be assessed against Respondent.

Section V

Consent Agreement

30. For purposes of this proceeding, Respondent admits the jurisdictional allegations set forth above.
31. Respondent neither admits nor denies the factual allegations set forth above.
32. 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.
33. Respondent and the EPA agree to conciliate this matter without the necessity of a formal hearing and to bear their respective costs and attorneys' fees.
34. Nothing contained in the Final Order accompanying this Consent Agreement shall alter or otherwise affect Respondent's obligation to comply with all applicable federal, state, and local environmental statutes and regulations and applicable permits.
35. The undersigned representative of Respondent certifies that he or she is fully authorized to enter into the terms and conditions of this CA/FO and to execute and legally bind Respondent to it.
36. By signing this CA/FO, Respondent certifies that it is presently in compliance with FIFRA, 7 U.S.C. § 136 *et seq.*, and all regulations promulgated thereunder.
37. 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.
38. The effect of settlement described in paragraph 37 is conditioned upon the accuracy of the Respondent's representations to the EPA, as memorialized in paragraph 36.

39. 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

40. 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 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 Three Thousand Eight Hundred and Sixty-One (\$3,861.00). 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 online at *www.pay.gov* by entering "SFO 1.1" in the "Find Forms" search field. Open the online form, entitled "EPA Miscellaneous

Payments – Cincinnati Finance Center,” and fill in 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 in paragraph 5 of this Final Order.

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 K. Leshner
U.S. Environmental Protection Agency
Region 7
11201 Renner Boulevard
Lenexa, Kansas 66219.

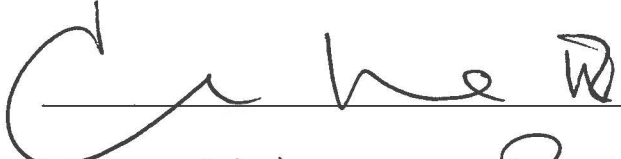
6. Respondent and Complainant shall each bear their own costs and attorneys' fees incurred as a result of this matter.

7. No portion of the civil penalty or interest paid by Respondent pursuant to the requirements of this CA/FO shall be claimed by Respondent as a deduction for Federal, State, or local income tax purposes.

8. This CA/FO 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 in this CA/FO shall be calculated in calendar days from such date.


RESPONDENT
KUNKEL ENTERPRISES, INC., D.B.A. C K ENTERPRISES, INC.

Date: 5-16-16

By: 
Charles Kunkel President
Print Name Title


COMPLAINANT
U. S. ENVIRONMENTAL PROTECTION AGENCY

Date: 5-24-16



Karen Flournoy
Director
Water, Wetlands and Pesticides Division

Date: 5/23/16



Jared Pessetto
Assistant Regional Counsel
Office of Regional Counsel

IT IS SO ORDERED. This Order shall become effective upon filing.

Date: May 26, 2016

Karina Borromeo
KARINA BORROMEO
Regional Judicial Officer
U.S. Environmental Protection Agency, Region 7

IN THE MATTER Of Kunkel Enterprises, Inc. d.b.a. C K Enterprises, Inc., Respondent
Docket No. FIFRA-07-2016-0004

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:

pessetto.jared@epa.gov

Copy by First Class Mail to Respondent:

Charles Kunkel
Kunkel Enterprises, Inc. d.b.a. C K Enterprises, Inc.
1204 Southwest Jefferson Street
Lee's Summit, Missouri 64041

Dated: 5/31/16



Kathy Robinson
Kathy Robinson
Hearing Clerk, Region 7