

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 7
11201 RENNER BOULEVARD
LENEXA, KANSAS

UNITED STATES
ENVIRONMENTAL PROTECTION
AGENCY-REGION 7
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BEFORE THE ADMINISTRATOR

In the Matter of:)
)
The Offerle Cooperative) Docket No. FIFRA-07-2016-0017
Grain and Supply Company,)
)
Respondent.)

COMPLAINT AND CONSENT AGREEMENT/FINAL ORDER

The U.S. Environmental Protection Agency, Region 7 (“EPA”), and The Offerle Cooperative Grain and Supply Company (“Respondent”) have agreed to a settlement of this action before the filing of a Complaint, therefore 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).

COMPLAINT

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 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.

Parties

3. The Complainant, by delegation from the Administrator of the EPA and redelegation from the Regional Administrator, EPA Region 7, is Director of the Water, Wetlands and Pesticides Division, EPA Region 7.
4. Respondent is The Offerle Cooperative Grain and Supply Company, a distributor of pesticides with its principal place of business at 222 East Santa Fe, Offerle, Kansas 67563.

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. In accordance with 40 C.F.R. § 165.70, a refiller may repackage a registrant's pesticide product into refillable containers and distribute and sell such repackaged product under the registrant's existing registration, provided that the conditions under 40 C.F.R. § 165.70(b) are satisfied. The regulation at 40 C.F.R. § 165.70(c) provides that both a refiller and a pesticide product registrant may be held liable for violations pertaining to a repackaged product.

7. The regulation at 40 C.F.R. § 165.3 defines "refiller" as a person who engages in the activity of repackaging pesticide product into refillable container, including a registrant or a person operating under contract to a registrant.

8. Section 2(s) of FIFRA, 7 U.S.C. § 136(s), defines the term "person" as any individual, partnership, association, corporation, or any organized group of persons whether incorporated or not.

9. Section 2(u) of FIFRA, 7 U.S.C. § 136(u), defines the term "pesticide" as, *inter alia*, any substance or mixture of substances intended for use as a plant regulator, defoliant, or desiccant.

10. Section 14 of FIFRA, 7 U.S.C. § 136l, provides that any registrant, commercial applicator, wholesaler, dealer, retailer, or other distributor who violates any provision of 7 U.S.C. Chapter 6, Subchapter II, *Environmental Pesticide Control*, may be assessed a civil penalty by the Administrator of not more than \$5,000 for each offense. The Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, as amended by the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701, and the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, 28 U.S.C. § 2461, and implementing regulations at 40 C.F.R. Part 19 increased these statutory maximum penalties to \$7,500 for violations that occurred after December 6, 2013, and before November 2, 2015.

General Factual Allegations

11. On or about May 7, 2014, representatives of the Kansas Department of Agriculture ("KDA") conducted a neutral scheme producer establishment inspection of a facility owned and/or operated by Respondent at 314 East Railroad Street in Bucklin, Kansas, EPA Establishment Number 073892-KS-002 ("the Facility"). The KDA inspection was conducted under the authority of Section 9 of FIFRA, 7 U.S.C. § 136g, to evaluate the Facility's compliance with the requirements of FIFRA. The KDA inspection report was subsequently forwarded to the EPA for review and a copy was mailed to Respondent.

12. At the time of the KDA inspection, and at all times relevant to the allegations herein, certain bulk pesticide storage containers at the Facility contained and held for sale pesticides registered to Monsanto Company, including RT3, EPA Registration Number (“EPA Reg. No.”) 524-544.

13. At all times relevant to the allegations herein, Monsanto Company allowed Respondent to repackage Monsanto Company’s pesticide products, including RT3, EPA Reg. No. 524-544, into refillable containers and to distribute and/or sell such repackaged products under Monsanto Company’s registration.

14. Respondent is, and at all times referred to herein was, a “refiller” and a “person” within the meaning of FIFRA.

Allegations of Violation

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

Count 1

16. The facts stated in paragraphs 11 through 14 are re-alleged and incorporated as if fully stated herein.

17. Pursuant to Section 12(a)(2)(S) of FIFRA, 7 U.S.C. § 136j(a)(2)(S), it is unlawful for any person to violate any regulation issued under 7 U.S.C. § 136a(a) or 136q. On August 16, 2006, the EPA promulgated regulations under authority given the Administrator in Sections 3, 8, 19, and 25 of FIFRA, 7 U.S.C. § 136a, 136f, 136q, and 136w, including the addition of Part 165 to Title 40 of the Code of Federal Regulations. *See* Pesticide Management and Disposal; Standards for Pesticide Containers and Containment, 71 Fed. Reg. 47,330, 47,422 (Aug. 16, 2008). Pursuant to 40 C.F.R. § 165.70(e)(5)(iii), a refiller must have the registrant’s written refilling residue removal procedure for the pesticide product at the establishment before repackaging a pesticide into any refillable container for distribution or sale. The regulation at 40 C.F.R. § 165.70(j)(1)(ii) further requires that a refiller maintain the written refilling residue removal procedure for each pesticide product distributed or sold in refillable containers for the current operating year and for three years after. Additionally, each time a refiller repackages a pesticide product into a refillable container and distributes or sells the product, the regulation at 40 C.F.R. § 165.70(j)(2)(i) requires the refiller to generate and maintain the EPA registration number of the pesticide product distributed or sold in the refillable container for at least three years after the date of repackaging.

18. The KDA inspection revealed that Respondent did not have at the Facility Monsanto Company’s written refilling residue removal procedures for RT3, EPA Reg. No. 524-544, in violation of 40 C.F.R. § 165.70(e)(5)(iii) and 40 C.F.R. § 165.70(j)(1)(ii). Additionally, Respondent failed to document the EPA registration number of RT3, EPA Reg. No. 524-544, in records generated at the time of repackaging, distribution, and sale of the

product, in violation of 40 C.F.R. § 165.70(j)(2)(i). Therefore, Respondent's failure to maintain such records is a violation of Section 12(a)(2)(S) of FIFRA, 7 U.S.C. § 136j(a)(2)(S).

Count 2

19. The facts stated in paragraphs 11 through 14 are re-alleged and incorporated as if fully stated herein.

20. Pursuant to Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), it shall be unlawful for any person to distribute or sell any pesticide that is adulterated or misbranded. Section 2(q)(1)(F) of FIFRA, 7 U.S.C. § 136(q)(1)(F), provides 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 are adequate to protect health and the environment. Additionally, Section 2(q)(1)(G) of FIFRA, 7 U.S.C. § 136(q)(1)(G), provides that a pesticide is misbranded if the label does not contain a warning or caution statement which may be necessary and if complied with is adequate to protect health and the environment. Pursuant to Section 2(gg) of FIFRA, 7 U.S.C. § 136(gg), "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."

21. The KDA inspection revealed that the label affixed to a bulk storage container containing RT3, EPA Reg. No. 524-544, was badly weathered with portions missing, including the establishment number and the informational booklet containing the "Directions for Use" and "Environmental Hazards" sections. As such, the pesticide was misbranded pursuant to Section 2(q)(1)(F) of FIFRA, 7 U.S.C. § 136(q)(1)(F), and Section 2(q)(1)(G) of FIFRA, 7 U.S.C. § 136(q)(1)(G). Respondent, therefore, violated Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), by offering for sale and/or holding for distribution a misbranded pesticide.

Count 3

22. The facts stated in paragraphs 11 through 14 are re-alleged and incorporated as if fully stated herein.

23. Pursuant to Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), it shall be unlawful for any person to distribute or sell any pesticide that is adulterated or misbranded. Section 2(q)(1)(F) of FIFRA, 7 U.S.C. § 136(q)(1)(F), provides 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 are adequate to protect health and the environment. Pursuant to Section 2(gg) of FIFRA, 7 U.S.C. § 136(gg), "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."

24. The KDA inspection revealed that a label for RT3, EPA Reg. No. 524-544, affixed to a shuttle container at the Facility did not provide information under the "Storage and Disposal" heading as accepted by the EPA. Specifically, the label was missing certain pesticide storage directions and did not include directions for use on Conservation Resource Program land. As such, the pesticide was misbranded pursuant to Section 2(q)(1)(F) of FIFRA, 7 U.S.C. § 136(q)(1)(F). Respondent, therefore, violated Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), by offering for sale and/or holding for distribution a misbranded pesticide.

CONSENT AGREEMENT

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

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

27. 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.

28. 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 incurred as a result of this action.

29. 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.

30. 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.

31. By signing this CA/FO Respondent certifies that Respondent is presently in compliance with FIFRA, 7 U.S.C. § 136 *et seq.*, and all regulations promulgated thereunder.

Effect of Settlement

32. Respondent consents to the payment of a civil penalty as specified in paragraph 35 and to the issuance of the Final Order hereinafter recited. Payment of this civil penalty in full shall resolve all civil and administrative claims for all violations of FIFRA alleged in this document.

33. The effect of settlement described in paragraph 32 is conditioned upon the accuracy of the Respondent's representations to the EPA, as memorialized in paragraph 31.

Reservation of Rights

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

Payment of Penalty

35. Respondent agrees that in settlement of the claims alleged in this CA/FO, Respondent shall pay a civil penalty of Eleven Thousand Three Hundred Dollars (\$11,300) within thirty (30) days of the effective date of this CA/FO and as directed in paragraphs 36 and 37 below.

36. Respondent shall pay the penalty by cashier's or certified check, by wire transfer, or online. The payment shall reference the Docket Number on the check or wire transfer. If made by cashier's or certified check, the check shall be made payable to "United States Treasury" and remitted to:

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

Wire transfers shall 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"

On-line payments are available through the Department of Treasury:

www.pay.gov
Enter "sfo 1.1" in the search field.
Open the form and complete required files.

37. A copy of the check, transfer, or online payment confirmation shall be sent simultaneously to the following:

Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 7
11201 Renner Boulevard
Lenexa, Kansas 66219;

and to:

Jared Pessetto
Office of Regional Counsel
U.S. Environmental Protection Agency, Region 7
11201 Renner Boulevard
Lenexa, Kansas 66219.

Late Payment Provision

38. 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 35 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.

General Provisions

39. 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.

40. This CA/FO shall apply to and be binding upon Respondent, its agents, successors, and assigns. Respondent shall ensure that any directors, officers, employees, contractors, consultants, firms or other persons or entities acting under or for him with respect to matters included herein, comply with the terms of this CA/FO.

41. The effective date of this CA/FO shall be the date on which it is filed by the Regional Hearing Clerk for EPA Region 7.

**RESPONDENT:
THE OFFERLE COOPERATIVE GRAIN AND SUPPLY COMPANY**

Date: 9-2-16


Signature

Donnie Boyd
Name

CEO - President - GM
Title

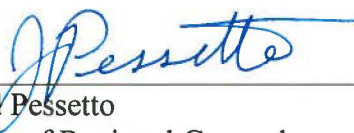
**COMPLAINANT:
U.S. ENVIRONMENTAL PROTECTION AGENCY**

Date: 9-13-16



Karen A. Flournoy
Director
Water, Wetlands and Pesticides Division
U.S. Environmental Protection Agency, Region 7

Date: 9/13/2016



Jared Pessetto
Office of Regional Counsel
U.S. Environmental Protection Agency, Region 7
11201 Renner Boulevard
Lenexa, Kansas 66219
Office: (913) 551-7793
pessetto.jared@epa.gov

FINAL ORDER

Pursuant to Section 14 of FIFRA, 7 U.S.C. § 136l, and the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, 40 C.F.R. Part 22, the foregoing Complaint and Consent Agreement resolving this matter is hereby ratified and incorporated by reference into this Final Order.

The Respondent is ORDERED to comply with all of the terms of the Consent Agreement. In accordance with 40 C.F.R. § 22.31(b), the effective date of the foregoing Consent Agreement and this Final Order is the date on which this Final Order is filed with the Regional Hearing Clerk.

IT IS SO ORDERED.

Date: Sept. 14, 2016

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

IN THE MATTER Of The Offerle Cooperative Grain and Supply Company, Respondent
Docket No. FIFRA-07-2016-0017

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:

Mr. John Lightcap
Offerle Cooperative Grain & Supply Co.
222 East Santa Fe
Offerle, Kansas 67563

Dated: 9/14/16



Kathy Robinson
Hearing Clerk, Region 7