

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

2014 SEP 24 PM 12: 33

BEFORE THE ADMINISTRATOR

In the Matter of

Illinois Tool Works, Inc.
d/b/a ITW Dymon
300 West Lake Avenue
Glenview, IL 60026

Respondent

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Docket No. FIFRA-07-2014-0017

CONSENT AGREEMENT AND FINAL ORDER

The U.S. Environmental Protection Agency, Region 7 (EPA or Complainant), and Illinois Tool Works, Inc., d/b/a ITW Dymon (Respondent), have agreed to a settlement of this action before filing a complaint, and thus this action is simultaneously commenced and concluded pursuant to Rules 22.13(b), 22.18(b)(2), and 22.18(b)(3) 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), 22.18(b)(2), and 22.18(b)(3).

Section I

Jurisdiction

1. This 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 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 Illinois Tool Works, Inc., d/b/a ITW Dymon, a pesticide producer and registrant located at 300 West Lake Avenue, Glenview, Illinois 60026. The Respondent is, and was at all times referred to in this CAFO, a “person” as defined by Section 2(s) of FIFRA, 7 U.S.C. § 136(s) and a corporation qualified to do business in the state of Kansas.

Section III

Statutory and Regulatory Background

5. Section 12(a)(1)(A) of FIFRA states that it shall be unlawful for any person to distribute or sell any pesticide that is not registered under Section 3 of FIFRA, 7 U.S.C. § 136a, or whose registration has been cancelled or suspended. 7 U.S.C. § 136j(a)(1)(A).

6. Section 12(a)(1)(C) of FIFRA states that it shall be unlawful for any person in any state to distribute or sell to any person any pesticide the composition of which differs at the time of its distribution or sale from its composition as described in the statement required in connection with its registration as a pesticide. 7 U.S.C. § 136j(a)(1)(C).

7. Section 12(a)(1)(E) of FIFRA states that it shall be unlawful for any person in any state to distribute or sell to any person any pesticide which is adulterated or misbranded. 7 U.S.C. § 136j(a)(1)(E).

8. The term “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. 7 U.S.C. § 136(gg).

9. 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. 7 U.S.C. § 136(q).

10. 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.” 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.

Section IV

GENERAL FACTUAL ALLEGATIONS

11. Respondent is, and was at all times, a “person” as defined by Section 2(s) of FIFRA, 7 U.S.C. § 136(s) and a corporation qualified to do business in the state of Kansas.
12. On October 21, 2010, a representative of the Kansas Department of Agriculture conducted a routine producer establishment inspection at Respondent’s facility in Olathe, Kansas.
13. On October 17, 2011, a representative of the Missouri Department of Agriculture conducted a routine producer establishment inspection at American Chemical Systems II, LLC, in Springfield, Missouri.
14. On January 12, 2012, a representative of the Kansas Department of Agriculture conducted a for-cause producer establishment inspection at American Chemical Systems II, LLC, in Wichita, Kansas.
15. On May 16, 2012, EPA issued an Information Request Letter to Respondent regarding production and distribution of several supplemental distributor products.
16. On July 2, 2012, Respondent provided its response to the EPA’s Information Request Letter dated May 16, 2012.
17. On December 5, 2012, a representative of the Kansas Department of Agriculture conducted a routine producer establishment inspection at Respondent’s facility in Olathe, Kansas.
18. The inspections and information requests were conducted to determine the compliance status of Respondent and American Chemical Systems II, LLC and any other regulated parties with the requirements of FIFRA.

VIOLATIONS

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

Count 1

20. The facts stated in Paragraphs 1 through 18 above are herein incorporated.

21. At the time of inspection referenced in Paragraph 13 above, documents showed the American Chemical Systems II, LLC, facility in Springfield, Missouri, on June 14, 2011, had made a shipment of quantities of Respondent's containers with labels bearing "ACS Insect Killer" and "EPA Registration No. 11694-107-86408".

22. Respondent's product is registered with the EPA, but a Notice of Supplemental Registration signed by American Chemical Systems II, LLC had not been filed with the EPA for the "ACS Insect Killer" distributor product at the time of the shipment.

23. On January 24, 2012, Respondent submitted a Notice of Supplemental Distribution for the "ACS Insect Killer" pesticide product in which Respondent is the pesticide registrant and American Chemical Systems II, LLC, is the supplemental distributor.

24. The "ACS Insect Killer" quantity that was shipped was misbranded inasmuch as the label on the product did not bear an EPA-registered name and bore a false and misleading EPA Registration Number.

25. Respondent violated Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A) by distributing or selling a pesticide that is not registered under section 136a of FIFRA; and violated Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), by distributing or selling a pesticide that is misbranded.

Count 2

26. The facts stated in Paragraphs 1 through 18 above are herein incorporated.

27. At the time of inspection referenced in Paragraph 14 above, the inspection showed the American Chemical Systems II, LLC, facility in Wichita, Kansas, on January 12, 2012, had a quantities of Respondent's containers with labels bearing "ACS Insect Killer" and "EPA Registration No. 11694-107-86408" that was packaged, labeled, and released for shipment.

28. Respondent's product is registered with the EPA, but a Notice of Supplemental Registration signed by American Chemical Systems II, LLC has not been filed with the EPA for the "ACS Insect Killer" distributor product at the time that the product was packaged, labeled, and released for shipment.

29. On January 24, 2012, Respondent submitted a Notice of Supplemental Distribution for the "ACS Insect Killer" pesticide product in which Respondent is the pesticide registrant and American Chemical Systems II, LLC, is the supplemental distributor.

30. The "ACS Insect Killer" quantity that was packaged, labeled, and released for shipment was misbranded inasmuch as the label on the product did not bear an EPA-registered name and bore a false and misleading EPA Registration Number.

31. Respondent violated Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A) by distributing or selling a pesticide that is not registered under section 136a of FIFRA; and violated Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), by distributing or selling a pesticide that is misbranded.

Counts 3-4

32. The facts stated in Paragraphs 1 through 18 above are herein incorporated.

33. Documents from the Information Request Letter response referenced in Paragraph 15 above showed that Respondent, on July 27, 2010, and November 1, 2010, had made two (2) separate shipments to American Chemical Systems II, LLC of Respondent's containers with labels bearing "ACS Insect Killer" and "EPA Registration No. 11694-107-86408".

34. Respondent's product is registered with the EPA, but a Notice of Supplemental Registration signed by American Chemical Systems II, LLC had not been filed with the EPA for the "ACS Insect Killer" distributor product at the time of the shipments.

35. On January 24, 2012, Respondent submitted a Notice of Supplemental Distribution for the "ACS Insect Killer" pesticide product in which Respondent is the pesticide registrant and American Chemical Systems II, LLC, is the supplemental distributor.

36. The "ACS Insect Killer" quantity that was shipped was misbranded inasmuch as the label on the product did not bear an EPA-registered name and bore a false and misleading EPA Registration Number.

37. Respondent on two (2) occasions violated Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A) by distributing or selling a pesticide that is not registered under section 136a of FIFRA; and violated Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), by distributing or selling a pesticide that is misbranded.

Count 5

38. The facts stated in Paragraphs 1 through 18 above are herein incorporated.

39. At the time of inspection referenced in Paragraph 17 above, the Respondent at its facility in Olathe, Kansas, on December 5, 2012, had a quantity containers with labels bearing "SCRUBS do-it ALL Disinfectant Cleaner Wipes," without a corresponding EPA Registration Number, and without including the statement, "Not Registered for Use in the United States of America," that was packaged, labeled, and released for shipment.

40. The "SCRUBS do-it ALL Disinfectant Cleaner Wipes" quantity that was packaged, labeled, and released for shipment was misbranded inasmuch as the label on the

product did not bear an EPA Registration Number and failed to include the statement, "Not Registered for Use in the United States of America."

41. Respondent violated Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E) by distributing or selling a pesticide that is misbranded.

Count 6

42. The facts stated in Paragraphs 1 through 18 above are herein incorporated.

43. At the time of inspection referenced in Paragraph 12 above, a sample was taken from Lot #C46201 in Respondent's inventory at its facility in Olathe, Kansas, on October 21, 2010, for analysis from a container with a label bearing "Medaphene Scrubs Disinfectant Deodorizing Wipes" and "EPA Registration No. 55195-4-11694" that was packaged, labeled, and released for shipment.

44. Analysis of the sample showed the percentage of active ingredients was, statistically, significantly lower than the percentage required in the statement of composition for the pesticide's registration.

45. Colcide, Inc., is the registrant for "Medaphene Scrubs Disinfectant Deodorizing Wipes", EPA Registration No. 55195-4-11694. Respondent is authorized to act as a supplemental distributor of "Medaphene Scrubs Disinfectant Deodorizing Wipes."

46. Respondent violated Section 12(a)(1)(C) of FIFRA, 7 U.S.C. § 136j(a)(1)(C), by distributing or selling a pesticide the composition of which differs at the time of its distribution or sale from its composition as described in the statement required in connection with its registration as a pesticide.

Counts 7-10

47. The facts stated in Paragraphs 1 through 18, and 43 through 45, above, are herein incorporated.

48. At the time of inspection referenced in Paragraph 12 above, documents showed the Respondent's facility in Olathe, Kansas, had made four (4) separate shipments; on September 29, 2010; October 1, 2010 (two shipments); and October 8, 2010; of containers from Lot #C46201 in Respondent's inventory with labels bearing "Medaphene Scrubs Disinfectant Deodorizing Wipes" and "EPA Registration No. 55195-4-11694".

49. Respondent violated Section 12(a)(1)(C) of FIFRA, 7 U.S.C. § 136j(a)(1)(C), by distributing or selling a pesticide the composition of which differs at the time of its distribution or sale from its composition as described in the statement required in connection with its registration as a pesticide.

Section V

CONSENT AGREEMENT

It is hereby agreed and accepted by the parties that:

1. Respondent and EPA agree to the terms of this Consent Agreement and Final Order and Respondent agrees to comply with the terms of the Final Order portion of this Consent Agreement and Final Order.
2. Respondent admits the jurisdictional allegations of this CAFO and agrees not to contest EPA's jurisdiction in this proceeding or any subsequent proceeding to enforce the terms of the Final Order set forth below.
3. Respondent neither admits nor denies the factual allegations and legal conclusions set forth in this CAFO.
4. Respondent waives its right to a judicial or administrative hearing on any issue of fact or law set forth above and its right to appeal the Final Order accompanying this Consent Agreement.
5. Respondent and Complainant agree to conciliate the matters set forth in this CAFO without the necessity of a formal hearing and to bear their respective costs and attorney's fees.
6. This CAFO is being entered into by the parties in full settlement of and release from all civil administrative claims for the FIFRA violations identified above. Complainant reserves the right to take any enforcement action with respect to any other violations of FIFRA or any other applicable law.
7. 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.
8. The undersigned representative of Respondent certifies that he or she is fully authorized to enter the terms and conditions of this CAFO and to execute and legally bind Respondent to it.

9. Respondent certifies by signing this CAFO that, to the best of its knowledge, it is presently in compliance with FIFRA, 7 U.S.C. § 136 *et. seq.*, and all regulations promulgated thereunder with respect to the matters alleged herein.

10. The effect of settlement described in Paragraph 6, above, is conditioned upon the accuracy of the Respondent's representations to EPA, as memorialized in Paragraph 9, above.

11. Nothing in this Consent Agreement shall be construed as a release from any other action under any law and/or regulation administered by the U.S. Environmental Protection Agency. 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.

12. Failure to pay the assessed penalty may result in the referral of this matter to the U.S. Department of Justice for collection. If payment is not received on or before the due date, interest will be assessed at the annual rate established by the Secretary of the Treasury pursuant to 31 U.S.C. § 3717. The interest will be assessed on the overdue amount from the due date through the date of payment.

FINAL ORDER

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

1. Respondent, in full settlement of the allegations set forth in the Consent Agreement, shall pay by cashier's or certified check, a mitigated civil penalty for the violations cited herein, in the amount of Thirty-three Thousand One Hundred and Sixty Dollars (\$33,160) within thirty (30) days of the effective date of this Final Order.

2. Payment of the penalty shall be by cashier's or certified check which shall reference Docket Number FIFRA-07-07-2014-0017, and made payable to "United States Treasury" and remitted to:

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

3. A copy of the check shall simultaneously be sent to the following:

Robert W. Richards
Office of Regional Counsel
U.S. Environmental Protection Agency, Region 7
11201 Renner Boulevard
Lenexa, Kansas 66219; and

Regional Hearing Clerk
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. The effective date of this Order shall be the date on which it is signed by the Regional Judicial Officer.

6. This executed Consent Agreement and Final Order shall be filed with the Regional Hearing Clerk, U.S. Environmental Protection Agency, Region 7, 11201 Renner Boulevard, Lenexa, Kansas 66219.

COMPLAINANT:
U. S. ENVIRONMENTAL PROTECTION AGENCY

By 

Robert W. Richards
Assistant Regional Counsel
Office of Regional Counsel

Date 9/19/14

By 

Karen Flournoy
Director
Water, Wetlands and Pesticides Division

Date 9/22/14

RESPONDENT:
ILLINOIS TOOL WORKS, INC.

By Paul M. Tyk

Title Vice President & General Mgr.

Date Sept 5, 2014

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

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

Date 9-24-14

IN THE MATTER OF Illinois Tool Works, Inc. D/b/a ITW Dymon, Respondent
Docket No. FIFRA-07-2014-0017

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 by email to Attorney for Complainant:

richards.robert@epa.gov

Copy by First Class Mail to:

Kathryn A. Larkins
Shook, Hardy & Bacon LLP
2555 Grand Blvd.
Kansas City, Missouri 64108-2493

Dated: 9/24/14



Kathy Robinson
Kathy Robinson
Hearing Clerk, Region 7