

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

SEP 19 AM 11:43

In the Matter of)
)
Acro Dishwashing Service, Inc.) Docket No. FIFRA-07-2017-0350
)
Respondent.)

CONSENT AGREEMENT AND FINAL ORDER

Preliminary Statement

The U.S. Environmental Protection Agency, Region 7 (EPA or Complainant), and Acro Dishwashing Service, Inc. (Respondent) have agreed to a settlement of this action before the 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).

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 serves as notice that EPA has reason to believe that Respondent has violated Section 12 of FIFRA, 7 U.S.C. § 136j.

Parties

3. 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 a corporation in good standing under the laws of the state of Missouri and doing business in the state of Kansas as a duly registered foreign corporation.

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)(2)(B) of FIFRA, 7 U.S.C. § 136j(a)(2)(B)(i), states that it shall be unlawful for any person to refuse to prepare, maintain, or submit any records required by or under Section 8 of FIFRA, 7 U.S.C. § 136f.

7. Pursuant to Section 8(a) of FIFRA, 7 U.S.C. § 136f(a), EPA promulgated the regulations found in 40 C.F.R. Part 169, *Books and Records of Pesticide Production and Distribution*.

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. The term “produce” is defined by Section 2(w) of FIFRA, 7 U.S.C. § 136(w), and by 40 C.F.R. § 167.3 as meaning to manufacture, prepare, propagate, compound, or process any pesticide or device or active ingredient or to package, repackage, label, relabel, or otherwise change the container of any pesticide or device.

10. The term “producer” is defined by Section 2(w) of FIFRA, 7 U.S.C. § 136(w), and by 40 C.F.R. § 167.3 as any person who manufactures, prepares, compounds, propagates or processes any pesticide or device or active ingredient used in producing a pesticide (such actions include packaging, repackaging, labeling, and relabeling a pesticide).

11. Section 12(a)(2)(S) of FIFRA, 7 U.S.C. § 136j(a)(2)(S), states that it shall be unlawful for any person to violate any regulation issued under Section 19 of FIFRA, 7 U.S.C. § 136q.

12. Pursuant to Subsections 19(c) and 19(f) of FIFRA, 7 U.S.C. § 136(c) and (f), EPA promulgated the container/containment regulations found at 40 C.F.R. Part 165 and 40 C.F.R. § 156.40 through 156.159.

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.

14. 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.

15. 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.

16. 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).

17. Section 2(q)(1)(G) of FIFRA, 7 U.S.C. § 136(q)(1)(G), states a pesticide is misbranded 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 136(a)(d) of FIFRA, is adequate to protect health and the environment.

18. Section 2(q)(2)(C)(iii) of FIFRA, 7 U.S.C. § 136(q)(2)(C)(iii), states that a pesticide is misbranded if there is not affixed to its container the net weight or measure of content.

19. Section 14(a)(1) of FIFRA, 7 U.S.C. § 136l(a)(1), authorizes the EPA Administrator to assess a civil penalty of not more than \$5,000 for each violation of FIFRA. The Debt Collection Improvement Act of 2008 and the Federal Civil Penalties Inflation Adjustment Improvements Act of 2015, and implementing regulations at 40 C.F.R. Part 19, adjusted the statutory maximum so that penalties of up to \$7,500 per violation are now authorized for violations that occur from January 12, 2009, through November 2, 2015, and penalties of up to \$19,057 are authorized for violations that occur after November 2, 2015.

General Factual Allegations

20. Respondent is and, at all times referred to herein, was a “person” as defined by Section 2(s) of FIFRA, 7 U.S.C. § 136(s).

21. On or about January 28, 2016, the Kansas Department of Agriculture (KDA) conducted a neutral scheme producer establishment inspection (the inspection) of the facility owned or operated by Respondent, located at: 940 Miami Avenue, Kansas City, Kansas 66105 (the Facility). The inspection was conducted under the authority of Section 9 of FIFRA, 7 U.S.C. § 136g, to evaluate Respondent’s compliance with the requirements of FIFRA and the federal regulations promulgated thereunder. The KDA inspection was subsequently forwarded to EPA for review and forwarded to Respondent on December 15, 2016.

22. At the time of the inspection, and at all times relevant to the allegations herein, Respondent produced the pesticide ACRO-KLO, EPA Registration Number (EPA Reg. No.) 40975-20004.

23. Respondent is, and at all times referred to herein, was a “producer” as defined by Section 2(w) of FIFRA, 7 U.S.C. § 136(w) and 40 C.F.R. § 167.3.

24. At the time of the inspection, Respondent was “distributing or selling” ACRO-KLO, EPA Reg. No. 40975-2004, as that term is defined by Section 2(gg) of FIFRA, 7 U.S.C. § 136(gg), by holding for distribution or sale ACRO-KLO, EPA Reg. No. 40975-2004, at the Facility.

25. As a result of the inspection, KDA collected production records, sales invoices, a label for ACRO-KLO, EPA Reg. No. 40975-2004, that was identical to the label on the product being held for distribution or sale on the date of the inspection, and photographs of the product being held for sale or distribution.

26. As a result of the inspection and documentation collected by KDA, Complainant has determined that violations of FIFRA and the federal regulations promulgated thereunder occurred.

Allegations of Violations

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

Count 1

28. The facts stated in Paragraphs 20 through 26 above are herein incorporated.

29. Pursuant to 40 C.F.R. § 169.2(a), all producers of pesticides are required to maintain records showing the product name, EPA registration number, amounts per batch and batch identification of all pesticides produced for a period of two (2) years.

30. The production records collected as a result of the inspection for ACRO-KLO, EPA Reg. No. 40975-2004 failed to include the product name, EPA registration number, distinguishable amounts per batch and batch identification for two (2) years of records.

31. Respondent’s failure to maintain production records, as required by 40 C.F.R. § 169.2(a), is a violation of Section 12(a)(2)(B) of FIFRA, 7 U.S.C. § 136j(a)(2)(B)(i).

Count 2

32. The facts stated in Paragraphs 20 through 26 above are herein incorporated.

33. Pursuant to 40 C.F.R. § 156.140, statements, as provided in 40 C.F.R. § 156.40(a) or (b), identifying the pesticide container type as nonrefillable or refillable, must be placed on the label or the container.

34. Pursuant to 40 C.F.R. § 156.144(a), the label of each pesticide product must include the applicable instructions for removing pesticide residues from the container prior to container disposal, as specified in 40 C.F.R. §§ 156.146 (nonrefillable containers) and 156.156 (refillable containers).

35. The photographs and label collected as a result of the inspection revealed that the ACRO-KLO, EPA Reg. No. 40975-2004 product containers and labels at the facility being held for distribution or sale did not bear container identification statements and the collected label did not include applicable residue removal instructions.

36. Respondent's failure to include container identification statements, as required by 40 C.F.R. § 156.40 and residue removal instructions as required by 40 C.F.R. § 156.144(a), is a violation of Section 12(a)(2)(S) of FIFRA, 7 U.S.C. § 136j(a)(2)(S).

Count 3

37. The facts stated in Paragraphs 20 through 26 above are herein incorporated.

38. Pursuant to 40 C.F.R. § 156.10(a)(1)(vii), every pesticide product shall bear a label clearly and prominently containing the hazard and precautionary statements as prescribed in subpart D, 40 C.F.R. §§ 156.60 through 156.78, for human and domestic animal hazards, and subpart E, 40 C.F.R. §§ 156.80 through 156.85, for environmental hazards.

39. Pursuant to 40 C.F.R. § 156.10(a)(1)(iii), every pesticide product shall bear a label clearly and prominently containing the net contents.

40. The photographs and label collected as a result of the inspection revealed that the label for ACRO-KLO, EPA Reg. No. 40975-2004, being held for sale or distribution at the Facility, did not contain the required hazard and precautionary statements and net contents.

41. The ACRO-KLO, EPA Reg. No. 40975-2004, product being "distributed or sold", as that term is defined by Section 2(gg) of FIFRA, 7 U.S.C. § 136(gg), at Respondent's Facility at the time of the inspection was misbranded pursuant to Sections 2(q)(1)(G) and 2(q)(2)(C)(iii) of FIFRA, 7 U.S.C. §§ 136(q)(1)(G) and 136(q)(2)(C)(iii), because the product did not contain the warning or caution statement as required by 40 C.F.R. § 156.10(a)(1)(vii), and did not contain the net contents as required by 40 C.F.R. § 156.10(a)(1)(iii).

42. Respondent's distribution or sale of ACRO-KLO, EPA Reg. No. 40975-2004, that was misbranded is a violation of Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E).

CONSENT AGREEMENT

43. For the purpose of this proceeding, as required by 40 C.F.R. § 22.18(b)(2), Respondent:

- (a) Admits the jurisdictional allegations set forth herein;
- (b) neither admits nor denies the specific factual allegations stated herein;
- (c) consents to the assessment of a civil penalty, as stated herein;

- (d) consents to the issuance of any specified compliance or corrective action order;
- (e) consents to any conditions specified herein;
- (f) consents to any stated Permit Action;
- (g) waives any right to contest the allegations set forth herein; and
- (h) waives its rights to appeal the Final Order accompanying this Consent Agreement.

44. Respondent consents to the issuance of this Consent Agreement and Final Order and consents for the purposes of settlement to the payment of the civil penalty specified herein.

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

Penalty Payment

46. Respondent agrees that, in settlement of the claims alleged herein, Respondent shall pay a civil penalty of Nine Thousand Six Hundred Forty-Two (\$9,642) as set forth below.

47. Respondent shall pay the penalty within thirty (30) days of the effective date of the Final Order. Such payment shall identify Respondent by name and docket number and shall be by certified or cashier's check made payable to the "United States Treasury" and sent to:

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

or by alternate payment method described at <http://www.epa.gov/financial/makepayment>.

48. 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

Clarissa Howley Mills, Attorney
Office of Regional Counsel

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

49. Respondent understands that its failure to timely pay any portion of the civil penalty 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 begin to accrue on a civil or stipulated penalty from the date of delinquency until such civil or stipulated penalty and any accrued interest are paid in full. 31 C.F.R. § 901.9(b)(1). Interest will be assessed at a rate of the United States Treasury Tax and loan rates in accordance with 31 U.S.C. § 3717. Additionally, a charge will be assessed to cover the costs of debt collection including processing and handling costs, and a non-payment penalty charge of six (6) percent per year compounded annually will be assessed on any portion of the debt which remains delinquent more than ninety (90) days after payment is due. 31 U.S.C. § 3717(e)(2).

50. Respondent consents to the issuance of this Consent Agreement and Final Order and consents for the purposes of settlement to the payment of the civil penalty.

Effect of Settlement and Reservation of Rights

51. Full payment of the penalty proposed in this Consent Agreement shall only resolve Respondent's liability for federal civil penalties for the violations alleged herein. Complainant reserves the right to take any enforcement action with respect to any other violations of FIFRA or any other applicable law.

52. The effect of settlement described in the immediately preceding paragraph is conditioned upon the accuracy of Respondent's representations to EPA, as memorialized in the paragraph directly below.

53. Respondent certifies by the signing of this Consent Agreement that to the best of its knowledge, information, and belief it will be fully compliant with all the requirements of FIFRA and its implementing regulations upon receipt of EPA approval of the submitted revised label mock-up for ACRO-KLO, EPA Registration Number (EPA Reg. No.) 40975-20004.

54. Full payment of the penalty proposed in this Consent Agreement shall not in any case affect the right of the Agency or the United States to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law. This Consent Agreement and Final Order does not waive, extinguish or otherwise affect Respondent's obligation to comply with all applicable provisions of FIFRA and regulations promulgated thereunder.

55. Complainant reserves the right enforce the terms and conditions of this Consent Agreement and Final Order.

General Provisions

56. By signing this Consent Agreement, the undersigned representative of Respondent certifies that he or she is fully authorized to execute and enter into the terms and conditions of this Consent Agreement and has the legal capacity to bind the party he or she represents to this Consent Agreement.

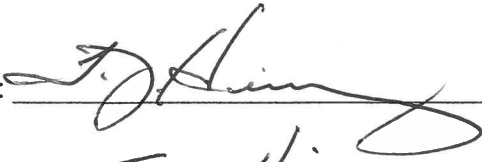
57. This Consent Agreement shall not dispose of the proceeding without a final order from the Regional Judicial Officer or Regional Administrator ratifying the terms of this Consent Agreement. This Consent Agreement and Final Order shall be effective upon the filing of the Final Order by the Regional Hearing Clerk for EPA, Region 7. Unless otherwise stated, all time periods stated herein shall be calculated in calendar days from such date.

58. The penalty specified herein shall represent civil penalties assessed by EPA and shall not be deductible for purposes of Federal, State and local taxes.

59. This Consent Agreement and Final Order shall apply to and be binding upon Respondent and Respondent's agents, successors and/or assigns. Respondent shall ensure that all contractors, employees, consultants, firms, or other persons or entities acting for with respect to matters included herein comply with the terms of this Consent Agreement and Final Order.

RESPONDENT
ACRO DISHWASHING SERVICE, INC.

Date: 8/29/17

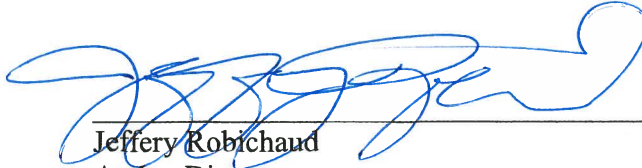
By: 

Terry Heinz
Print Name

President
Title

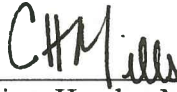
COMPLAINANT
U. S. ENVIRONMENTAL PROTECTION AGENCY

Date: 9/6/17



Jeffery Robichaud
Acting Director
Water, Wetlands and Pesticides Division

Date: 9/6/17



Clarissa Howley Mills
Office of Regional Counsel

FINAL ORDER

Pursuant to Section 14(a) of FIFRA, 72 U.S.C. § 136l(a), 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 Consent Agreement resolving this matter is hereby ratified and incorporated by reference into this Final Order.

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.

Karina Borrromeo Sept. 13, 2017
Karina Borrromeo Date
Regional Judicial Officer

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:

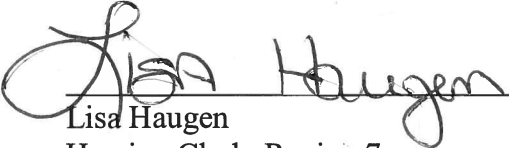
Copy emailed to Attorney for Complainant:

mills.clarissa@epa.gov

Copy emailed to Attorney for Respondent:

emangan@evelynmanganlaw.com

Dated: Sept. 19, 2017



Lisa Haugen
Hearing Clerk, Region 7