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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 7
901 NORTH FIFTH STREET
KANSAS CITY, KANSAS 66101
ENVIRONMENTAL PROTECTION AGENCY REGION VII
REGIONAL HEARING CLERK

IN THE MATTER OF:)

Farmers Cooperative Elevator)
Company)
12543 190th Street)
Arcadia, Iowa 51430)

Respondent.)

) Docket No. FIFRA 07-2009-0007

CONSENT AGREEMENT AND FINAL ORDER

The U.S. Environmental Protection Agency (EPA), Region 7, and Farmers Cooperative Elevator Company (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), 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).

ALLEGATIONS

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.

Parties

3. The Complainant, by delegation from the Administrator of EPA and the Regional Administrator, EPA, Region 7, is the Director of Water, Wetlands and Pesticides Division (WWPD), EPA, Region 7.

4. Respondent is Farmers Cooperative Elevator Company, a pesticide dealer located at 12543 190th Street, Arcadia, Iowa 51430. 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 is a company authorized to do business in the State of Iowa.

Statutory and Regulatory Background

5. Section 12(a)(2)(F) of FIFRA states that it shall be unlawful for any person to distribute or sell, or to make available for use, or to use any registered pesticide classified for restricted use for some or all purposes other than those in accordance with Section 136a(d) of this title and any regulations thereunder, except that it shall not be unlawful to sell, under regulations issued by the Administrator, a restricted use pesticide (RUP) to a person who is not a certified applicator for application by a certified applicator. 7 U.S.C. § 136j(a)(2)(F).

6. Section 2(gg) of FIFRA states 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).

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. Section 2(q)(1)(A) of FIFRA, 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. 7 U.S.C. § 136(q)(1)(A).

9. Section 2(q)(1)(F) of FIFRA, states that a pesticide is misbranded if the labeling does not contain directions for use which are necessary and if complied with are adequate to protect health and the environment. 7 U.S.C. § 136(q)(1)(F).

10. Section 2(q)(1)(G) of FIFRA, states that a pesticide is misbranded if the label does not contain a warning or caution statement which is necessary and if complied with together with any requirements imposed under Section 3(d) of FIFRA, is adequate to protect health and the environment. 7 U.S.C. § 136(q)(1)(G).

11. Sections 3(d)(1)(C)(i) and (ii) of FIFRA, state in pertinent part, that a RUP shall be applied for any use to which the restricted classification applies only by or under the direct supervision of a certified applicator. 7 U.S.C. §§ 136a(d)(1)(C)(i) and (ii).

12. Section 2(e)(1) of FIFRA, defines "certified applicator" as any individual who is certified under Section 11 of FIFRA, 7 U.S.C. § 136(i), as authorized to use or supervise the use of any pesticide which is classified for restricted use.

13. Section 12(a)(2)(O) of FIFRA, states that it shall be unlawful for any person to add any substance to, or take any substance from, any pesticide in a manner that may defeat the purpose of the FIFRA. 7 U.S.C. § 136j(a)(2)(O).

14. Section 2(w) of FIFRA states that the term "produce" means to manufacture, prepare, compound, propagate or process any pesticide or devise or active ingredient used in producing a pesticide. 7 U.S.C. § 136(w).

15. 40 C.F.R. § 152.44 states that any modification in the composition, labeling or packaging of a registered product must be submitted by application to, and approved by, the Agency before the product as modified, may be distributed or sold.

Factual Allegations

16. Respondent, at all times relevant, operated as a wholesale distributor of agricultural chemical, pesticide, insecticide, and fertilizer in Schleswig, Iowa.

17. On January 11, 2008, a representative of the Iowa Department of Agriculture and Land Stewardship (IDALS) conducted a routine inspection at Respondent's facility in Schleswig, Iowa, for the purpose of determining Respondent's compliance with FIFRA, including review of RUP sales and application records.

18. During the inspection, a representative of IDALS collected a copy of invoice number SCHOO3688 from Respondent. The invoice documents Respondent's distribution and sale of 15 gallons of RUP GRAZON ® P+D, EPA Reg. No. 62719-182, to Mr. Jerald Segebart, Deloit, Iowa on May 30, 2007.

19. GRAZON ® P+D is a RUP registered to Dow AgroSciences LLC, Indianapolis, Indiana under EPA Reg. No. 62719-182.

20. On April 10, 2008, the IDALS representative obtained from Mr. Jerald Segebart a statement in which Mr. Segebart acknowledged purchasing and applying the RUP GRAZON ® P+D, without supervision by a certified applicator.

21. At the time of the sale as referenced in Paragraph 19, Mr. Jerald Segebart was not a certified applicator as defined in Section 2(e)(1) of FIFRA, 7 U.S.C. § 136(e)(1).

22. During the inspection, a representative of IDALS collected a copy of invoice number SCHOO3560 from Respondent. The invoice documents Respondent's distribution and sale of 1 gallon of the RUP CORNBELT ® ATRAZINE 4L, EPA Reg. No. 100-497-11773, packaged in a labeled 2.5 gallon container to Mr. Leon Gosch, Schleswig, Iowa on June 5, 2007. Mr. Gosch had the proper pesticide applicator certification at the time he purchased the CORNBELT ® ATRAZINE 4L.

23. On April 9, 2008, the IDALS representative obtained from Mr. Gosch a statement in which Mr. Gosch said that he received 1 gallon of the RUP CORNBELT ® ATRAZINE 4L EPA Reg. No. 100-497-11773, in a 2.5 gallon labeled container.

24. CORNBELT® ATRAZINE 4L is a RUP registered to Syngenta Crop Protection Inc., Greensboro, North Carolina under EPA Reg. No. 100-497-11773.

25. The repackaged pesticide CORNBELT® ATRAZINE 4L was not properly packaged within the terms of the product registration under EPA Reg. No. 100-497-11773 and required separate product registration under Section 3 of FIFRA, 7 U.S.C. § 136a.

26. Because the 2.5 gallon container contained only 1 gallon of CORNBELT® ATRAZINE 4L, the product was misbranded because its labeling bore a statement, design or graphic representation relative thereto or to its ingredients, which was false and misleading.

27. During the inspection, a representative of IDALS collected a copy of invoice number SCH003810 from the Respondent. The invoice documents Respondent's distribution and sale of 15 ounces of the pesticide CALLISTO, EPA Reg. No. 100-1131, packaged in a 1 gallon container to Mr. Bryce Meyer, Charter Oak, Iowa on June 23, 2007.

28. On April 9, 2008, the IDALS representative obtained from Mr. Meyer a statement in which Mr. Meyer stated that he received 15 ounces of the pesticide CALLISTO, EPA Reg. No 100-1131, in a 1 gallon labeled container.

29. The repackaged pesticide CALLISTO, was not properly packaged within the terms of the product registration under EPA Reg. No. 100-1134 and required separate product registration under Section 3 of FIFRA, 7 U.S.C. § 136a.

30. Because the 1 gallon container contained only 15 ounces of CALLISTO, the product was misbranded because its labeling bore a statement, design or graphic representation relative thereto or to its ingredients, which was false and misleading.

31. During the inspection, a representative of IDALS collected a copy of invoice number SCH0003894 from Respondent. The invoice documents Respondent's distribution and sale of 6 ounces of the RUP BAYTHYROID® 2, EPA, Reg. No. 264-765, packaged in a ½ gallon container to Mr. Gaylen Bahnsen, Schleswig, Iowa, on July 11, 2007.

32. On April 10, 2008, the IDALS representative obtained from Mr. Bahnsen a statement in which Mr. Bahnsen stated that he received from Respondent 6 ounces of RUP BAYTHYROID® 2, EPA Reg. No. 264-765, in a ½ gallon labeled container.

33. BAYTHYROID® 2, is a pesticide registered to Bayer CropScience LP, Research Triangle Park, North Carolina under EPA Reg. No. 264-765.

34. The repackaged pesticide, BAYTHYROID® 2 was not properly packaged within the terms of the product registration under EPA Reg. No. 264-765 and required separate product registration under Section 3 of FIFRA, 7 U.S.C. § 136a.

35. Because the ½ gallon container contained only 6 ounces of BAYTHYROID® 2, the product was misbranded because its labeling bore a statement, design or graphic representation relative thereto or to its ingredients, which was false and misleading.

VIOLATIONS

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

Count I

37. Complainant hereby incorporates the allegations contained in Paragraphs 1-21 as if fully set forth herein.

38. Respondent violated Section 12(a)(2) of FIFRA, 7 U.S.C. §136j(a)(2)(F), by selling or making available for use a registered pesticide classified for a restricted use other than in accordance with Section 3(d) of FIFRA, 7 U.S.C. § 136a(d).

Count II

39. Complainant hereby incorporates the allegations contained in Paragraphs 1-17 and 22-26 as if fully set forth herein.

40. Respondent violated Sections 12 (a)(1)(A) and (E) of FIFRA 7 U.S.C. §§ 136j(a)(1)(A) and (E) by distribution or sale of a misbranded pesticide whose contents had been manipulated and did not meet the requirements of registration under Section 3 of FIFRA.

41. Respondent violated Section 12(a)(2)(O) of FIFRA, 7 U.S.C. § 136j(a)(2)(O) by taking any substance from any pesticide in a manner that defeated the purpose of FIFRA.

Count III

42. Complainant incorporates the allegations contained in Paragraphs 1-17 and 27-30 as if fully set forth herein.

43. Respondent violated Sections 12(a)(1)(A) and (E) of FIFRA, 7 U.S.C. §§ 136j(a)(1)(A) and (E) by distribution or sale of a misbranded pesticide whose contents had been manipulated and did not meet the requirements of registration under Section 3 of FIFRA, 7 U.S.C. § 136a.

44. Respondent violated Section 12(a)(2)(O) of FIFRA, 7 U.S.C. § 136j(a)(2)(O) by taking any substance from any pesticide in a manner that defeated the purpose of the FIFRA.

Count IV

45. Complainant incorporates the allegations contained in Paragraphs 1-17 and 31-35 as if fully set forth herein.

46. Respondent violated Sections 12(a)(1)(A) and (E) of FIFRA, 7 U.S.C. §§ 136j(a)(1)(A) and (E) by distribution or sale of a misbranded pesticide whose contents had been manipulated and did not meet the requirements of registration under Section 3 of FIFRA, 7 U.S.C. § 136a.

47. Respondent violated Section 12(a)(2)(O) of FIFRA, 7 U.S.C. § 136j(a)(2)(O) by taking any substance from any pesticide in a manner that defeated the purpose of FIFRA.

CONSENT AGREEMENT

It is hereby AGREED and ACCEPTED by Respondent that:

48. Respondent and EPA agree to the terms of this CAFO, and Respondent agrees to comply with the terms of the Final Order portion of this CAFO.

49. 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.

50. Respondent neither admits nor denies the factual allegations and legal conclusions set forth in this CAFO.

51. 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.

52. 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 attorneys' fees.

53. This CAFO addresses 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.

54. 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.

55. 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.

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

57. The effect of settlement described in Paragraph 53 above is conditioned upon the accuracy of the Respondent's representations to EPA, as memorialized in Paragraph 56.

58. Respondent agrees that in settlement of the claims alleged in this CAFO, Respondent shall pay a penalty of Four Thousand Two Hundred and Ninety Dollars (\$4,290.00) as set forth in Paragraph 1 of the Final Order. Respondent additionally agrees to complete the following Supplemental Environmental Project (SEP).

59. In response to the violations of FIFRA alleged in this CAFO and in settlement of this matter, although not required by FIFRA or any other federal, state or local law, Respondent shall complete the SEP described in Paragraph 60 of the Consent Agreement portion of this CAFO, which the parties agree is intended to secure significant environmental or public health protection and improvement.

60. Within sixty (60) calendar days of this effective date of this CAFO, Respondent shall provide 8 gallons of the pesticide SONAR to the Crawford County Conservation District to assist the District's efforts to control the invasion of the aquatic weed, brittle naiad, in Yellow Smoke Lake and Nelson Park Lake. The application of SONAR will help control the brittle naiad, which, if left uncontrolled, will fill the lake with a thick mat of weeds that will affect the aquatic life of the lake and the recreational use of the lake. The application shall be completed by a certified applicator and in accordance with the SONAR package labeling. The value of the SONAR provided shall not be less than Thirteen Thousand Five Hundred and Six Dollars and Sixteen Cents (\$13,506.16) based upon the wholesale cost of the SONAR.

61. Within sixty-one (61) days of the effective date of this CAFO, Respondent shall submit an Interim SEP Report to EPA. The Interim SEP Report shall confirm distribution of the SONAR pursuant to Paragraph 60. The Interim SEP report shall identify the name, complete address, and telephone number of the recipient of the SONAR and the wholesale value of the SONAR.

62. Respondent shall ensure that the SONAR is applied by a certified applicator and that such application is completed in accordance with the SONAR

labeling, within six (6) months of the effective date of this CAFO.

63. Within seven (7) months of the effective date of this CAFO, Respondent shall submit a SEP Completion Report to EPA. The SEP Completion Report shall contain the following information:

- a) A detailed description of the SEP as implemented;
- b) A description of any problems encountered in implementation of the project and the solution thereto;
- c) A signed and notarized affidavit from Crawford County Conservation District, stating the quantity of SONAR received from the Respondent and the quantity of the SONAR used by the organization within the six month time period as described in this Paragraph. The affidavit shall be signed by the director or an officer of the Crawford County Conservation Board;
- d) A description of the specific environmental and/or public health benefits resulting from implementation of the SEP; and
- e) Certification that the SEP has been fully implemented pursuant to the provisions of this CAFO.

64. In itemizing its costs in the Interim SEP Report and the SEP Completion Report, Respondent shall clearly identify and provide acceptable documentation for all eligible SEP costs. Where the report includes costs not eligible for SEP credit, those costs must be clearly identified as such. For purposes of this Paragraph, "acceptable documentation" includes invoices, purchase orders or other documentation that specifically identifies and itemizes the individual costs of the goods and/or services for which payment is being made. Canceled drafts do not constitute acceptable documentation unless such drafts specifically identify and itemize the individual costs of the goods and/or services for which payment is being made.

65. The Interim SEP Report and the SEP Completion Report shall include the statement of Respondent, through an officer, signed and certifying under penalty of law the following:

I certify under penalty of law that I have examined and am familiar with the information submitted in this document and all attachments, and that, based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the information is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fines and imprisonment.

66. The Interim SEP Report and the SEP Completion Report shall be

submitted on or before the due date to:

Elizabeth Murtagh-Yaw, WWPD
Environmental Protection Agency, Region 7
901 North 5th Street
Kansas City, Kansas 66101.

67. Any public statement, oral or written, in print, film, internet, or other media, made by Respondent making reference to the SEP shall include the following language:

This project was undertaken in connection with the settlement of an enforcement action taken by the U.S. Environmental Protection Agency for violations of FIFRA § 12(a)(2)(F).

68. Respondent agrees not to claim any funds expended in the performance of the SEP as a deductible business expense for the purpose of federal, state, or local taxes.

69. Respondent agrees to the payment of stipulated penalties as follows:

a) In the event the Respondent fails to comply with any of the terms or provisions of this Consent Agreement relating to the performance of the SEP as set forth in Paragraph 60 of this CAFO and/or to the extent that the actual expenditures of the SEP does not equal or exceed the cost of the SEP described in Paragraph 60 of this CAFO, Respondent shall be liable for stipulated penalties according to the provisions set forth below:

i) Except as provided in subparagraph (ii) and (iii) of this Paragraph, if the SEP is not completed satisfactorily and timely pursuant to the agreement set forth in Paragraph 60 of this CAFO, Respondent shall be liable for and shall pay a stipulated penalty to the United States in the amount of Twelve Thousand Eight Hundred and Seventy Dollars (\$12,870.00).

ii) If Respondent fails to timely and complete submit the Interim SEP Report or the SEP Completion Report required by Paragraphs 61 and 63, Respondent shall be liable and shall pay a stipulated penalty in the amount of Three Thousand Three Hundred Dollars (\$3,300.00).

iii) If The SEP is not completed in accordance with Paragraph 60 of this CAFO, but EPA determines that the Respondent: (a) made good faith and timely efforts to complete the project; and (b) certifies, with supporting documentation, that at least 90 percent of the amount of money which was required to be spent was expended on the SEP, Respondent shall not be liable for any

stipulated penalty.

b) The determination of whether the SEP has been satisfactorily completed and whether the Respondent made a good faith, timely effort to implement the SEP shall be in the sole discretion of EPA.

c) Respondent shall pay stipulated penalties not more than fifteen (15) days after receipt of written demand by EPA for such penalties. Method of payment shall be in accordance with the provisions of Paragraph 1 of the Final Order portion of this CAFO.

70. Late Payment Provisions. Pursuant to 31 U.S.C. § 3717, 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. Interest will therefore begin to accrue on a civil or stipulated penalty if it is not paid by the date required. Interest will be assessed at a rate of the United States Treasury tax and loan rate in accordance with 31 C.F.R. § 901.9(b). A charge will be assessed to cover the costs of the debt collection including processing and handling costs and attorneys' fees. In addition, 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. Any such non-payment penalty charge on the debt will accrue from the date the penalty payment becomes due and is not paid. 31 C.F.R. §§ 901.9(c) and (d).

71. Nothing in this CAFO shall be construed as a release from any other action under any law and/or regulation administered by EPA. 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.

72. Failure to pay the assessed penalty may result in the referral of this matter to the United States 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. §136f, and according to the terms of the Consent Agreement set forth above, IT IS HEREBY ORDERED THAT:

1. Respondent, in settlement of the allegations set forth above, shall pay by cashier or certified check, a civil penalty for the violations cited herein, in the amount of Four Thousand Two Hundred and Ninety Dollars and No Cents (\$4,290.00), on or before thirty (30) days of the effective date of this Final Order.

2. Payment of the penalty shall be by cashier or certified check which shall

reference Docket Number FIFRA 07-2009-0007, and made payable to "Treasurer, United States of America" and remitted to:

United States 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:

Sara Hertz
Office of Regional Counsel
United States Environmental Protection Agency
Region 7
901 North 5th Street
Kansas City, Kansas 66101

and

Kathy Robinson
Regional Hearing Clerk
United States Environmental Protection Agency
Region 7
901 North 5th Street
Kansas City, Kansas 66101.

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. Respondent shall complete the SEP in accordance with the Consent Agreement and shall be liable for any stipulated penalties for failure to complete the project as specified in the Consent Agreement, above.

6. This CAFO shall not relieve the Respondent of its obligation to comply with all applicable provisions of federal, state or local law, nor shall it be construed to be a ruling on, or determination of, any issue related to any federal, state or local permit, nor shall it be construed to constitute EPA approval or endorsement of the

product purchased by the Respondent and provided to the recipient in connection with the SEP undertaken pursuant to this Consent Agreement.

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

COMPLAINANT:

U.S. ENVIRONMENTAL PROTECTION AGENCY

Date: 3-17-09

By:



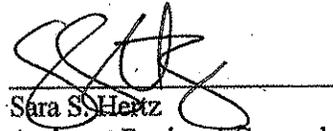
for William A. Spratlin

Director

Water, Wetlands and Pesticides Division

Date: 3-9-09

By:



Sara S. Hertz

Assistant Regional Counsel

RESPONDENT:

Farmers Cooperative Elevator Company

Date: 3-9-2009

By: Randy Petersen

Printed Name: RANDY PETERSEN

Title: Agonomy Manager

In the Matter of
Farmers Cooperative Elevator Company
Docket No. FIFRA-07-2009-0007

IT IS SO ORDERED. This Order shall become effective immediately

Karina Borromeo

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

March 31, 2009
Date

IN THE MATTER OF Farmers Cooperative Elevator Company, Respondent
Docket No. FIFRA-07-2009-0007

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Consent Agreement and Final Order was sent this day in the following manner to the addressees:

Copy hand delivered to
Attorney for Complainant:

Sara S. Hertz
Assistant Regional Counsel
Region VII
United States Environmental Protection Agency
901 N. 5th Street
Kansas City, Kansas 66101

Copy by Certified Mail Return Receipt to:

Randy Peterson, Agronomy Manager
Farmers Cooperative Elevator Company
12543 190th Street
Arcadia, Iowa 51430

Dated: 3/31/09


Kathy Robinson
Hearing Clerk, Region 7