

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
REGION IX  
75 HAWTHORNE STREET  
SAN FRANCISCO, CA 94105

FILED

2009 SEP 21 PM 4:50

U.S. ENVIRONMENTAL PROTECTION AGENCY  
REGIONAL HEARING CLERK

In the matter of:	)	Docket No. FIFRA-09-2009- 0018
	)	CONSENT AGREEMENT
Wilbur-Ellis Company	)	and
	)	FINAL ORDER PURSUANT TO
Respondent.	)	SECTIONS 22.13 AND 22.18
_____	)	

**I. CONSENT AGREEMENT**

Complainant, the Director of the Communities and Ecosystems Division, United States Environmental Protection Agency, Region 9, ("EPA") and Respondent Wilbur-Ellis Company (hereafter "Wilbur-Ellis" or "Respondent") seek to settle this case and consent to the entry of this Consent Agreement and Final Order ("CAFO").

**A. APPLICABLE STATUTES AND REGULATIONS**

1. This administrative proceeding is initiated pursuant to Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136, *et seq.* (hereinafter referred to as "FIFRA" or the "Act"), and the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, 40 C.F.R. Part 22.

**B. AUTHORITY AND PARTIES**

2. Wilbur-Ellis is a California corporation. Wilbur-Ellis sells and distributes pesticides. Wilbur-Ellis is also a "commercial applicator", as defined by Section 2(e)(3) of FIFRA, 7 U.S.C. § 136(e)(3). Wilbur-Ellis owns, operates, or otherwise controls: (a) a registered establishment located at 7 East Washington Avenue, Yakima, Washington, with EPA Establishment Number 2395-WA-001 (the "Yakima Establishment"); (b) a registered establishment located at 1301 West Wine Country Road, Grandview, Washington, with EPA Establishment Number 2395-

WA-004 (the “Grandview Establishment”); and (c) a registered establishment located at 27038 Road R SW, Mattawa, Washington, with EPA Establishment Number 002935-WA-021 (the “Mattawa Establishment”). Wilbur-Ellis is a "person" as defined by Section 2(s) of FIFRA, 7 U.S.C. § 136(s), and as such is subject to FIFRA and the regulations promulgated thereunder.

3. The authority to take action under Section 14(a) of FIFRA, 7 U.S.C. § 136 l(a), is vested in the Administrator of EPA (“Administrator”). By EPA Delegation Order Number 5-14, dated May 11, 1994, the Administrator delegated to the Regional Administrator of EPA Region IX the authority to commence administrative proceedings under Section 14 of FIFRA and to sign consent agreements memorializing settlements in such proceedings. By EPA Regional Order Number 1255.08 dated June 9, 2005, the Regional Administrator of EPA Region IX redelegated this authority to the Director and the Associate Director of the Communities and Ecosystems Division. The Associate Director of the Communities and Ecosystems Division has the authority to commence and settle an enforcement action in this matter.

4. Section 12(a)(2)(G) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), states that it shall be unlawful for any person to use any registered pesticide in a manner inconsistent with its labeling.

5. Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), states that it shall be unlawful for any person to distribute or sell to any person any pesticide that is misbranded. Section 2(gg), of FIFRA, 7 U.S.C. § 136(gg), states that “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.”

6. Section 2(q)(1)(E) of FIFRA, 7 U.S.C. § 136(q)(1)(E), states that a pesticide is misbranded if any word, statement, or other information required by or under the authority of FIFRA to appear on the label or labeling is not prominently placed thereon with such conspicuousness (as compared with other words, statements, designs, or graphic matter in the

labeling) and in such terms as to render it likely to be read and understood by the ordinary individual under customary conditions of purchase and use.

7. Section 2(q)(1)(F) of FIFRA, 7 U.S.C. § 136(q)(1)(F), states 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, together with any requirements under Section 6, 7 U.S.C. § 136(d), are adequate to protect health and the environment.

8. Section 2(q)(1)(G) of FIFRA, 7 U.S.C. § 136(q)(1)(F), states that a pesticide is misbranded if the labeling accompanying it does not contain a warning or caution statement which may be necessary and if complied with, together with any requirements under Section 6, 7 U.S.C. § 136(d), is adequate to protect health and the environment. Section 2(q)(2)(C)(ii) of FIFRA, 7 U.S.C. § 136(q)(2)(C)(ii), states that a pesticide is misbranded if there is not affixed to its container a label bearing the net weight or measure of the contents. Section 2(q)(2)(D) of FIFRA, 7 U.S.C. § 136(q)(2)(D), states that a pesticide is misbranded if the pesticide contains any substance in quantities highly toxic to man, unless the label shall bear (i) the skull and crossbones; (ii) the word “poison” prominently in red on a background of distinctly contrasting color; and (iii) a statement of a practical treatment (first aid or otherwise) in case of poisoning by the pesticide.

9. Every pesticide product label is to show clearly and prominently the name, brand or trademark under which the product is sold; the name and address of the producer, registrant, or person for whom produced; the net contents; the product registration number; the producing establishment number; an ingredient statement; hazard and precautionary statements; and the use classification. 40 C.F.R. § 156.10(a)(1). Every pesticide product label is also to show clearly

and prominently the directions for use, including the site(s) of application, the target pest(s) associated with each site, the dosage rate associated with each site and pest, the method of application, the frequency and timing of applications necessary to obtain effective results without causing unreasonable adverse effects on the environment, and worker protection statements as required by subpart K. 40 C.F.R. § 156.10(a)(viii) and §156.10(i)(2)(i)-(viii).

10. EPA has established four Toxicity Categories for acute hazards of pesticide products. 40 C.F.R. § 156.62. Each product must bear a first aid statement if the product has systemic effects in Category I, II, or III, or skin or eye irritation effects in Toxicity Category I or II. 40 C.F.R. § 156.68. Any pesticide product meeting the criteria of Toxicity Category I for any route of exposure must bear on the front panel the signal word “DANGER.” If the product is assigned to Toxicity Category I on the basis of its oral, inhalation or dermal toxicity (as distinct from skin and eye irritation), the word “Poison” must appear in red on a background of distinctly contrasting color, and the skull and crossbones symbol must appear in immediate proximity to the word “Poison.” 40 C.F.R. § 156.64.

11. All words, statements, graphic representations, designs or other information required on the labeling must be clearly legible to a person with normal vision. 40 C.F.R. § 156.10(a)(2).

12. Supplemental distribution of a pesticide is permitted, upon notification to EPA, if all conditions specified therein are met, including the requirement of subsection 152.132(d) which states that the label of a distributor product is to be the same as that of the registered product, except that the product name of the distributor product may appear instead of that of the registrant; the name and address of the distributor may appear instead of that of the registrant; the registration number of the registered product must be followed by a dash, followed by the distributor’s company number; the establishment number must be that of the final establishment

at which the product was produced; and specific claims may be deleted, provided that no other changes are necessary. See 40 C.F.R. §152.135.

13. Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), states that it shall be unlawful for any person to distribute or sell to any person any pesticide that is not registered under section 3 of FIFRA, 7 U.S.C. § 136a, or whose registration has been cancelled or suspended, except to the extent that distribution or sale otherwise has been authorized by the Administrator. The Administrator has exempted certain minimum risk pesticides, including products containing the active ingredients of Corn Gluten Meal and Soybean Oil, from the requirements of federal registration under FIFRA, provided that all criteria of section 152.25(f) are met. 40 C.F.R. § 152.25(f). To be exempt from the requirement for federal registration, these products must bear a label identifying the name and percentage (by weight) of each active ingredient and the name of each inert ingredient. 40 C.F.R. § 152.25(f)(3)(i).

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

### **C. COMPLAINANT'S ALLEGATIONS**

15. Raptor, Touchdown Hi-Tech Herbicide ("Touchdown"), Distinct, and Velpar L are each a "pesticide," as defined by Section 2(u) of FIFRA, 7 U.S.C. § 136(u). The Raptor label requires applicators and other handlers to wear a long-sleeved shirt and chemical resistant gloves. When mixing/loading Raptor on March 8, 2007, Dennis Rutherford was wearing a short sleeved

shirt and no gloves. The Touchdown label requires applicators and other handlers to wear a long-sleeved shirt. The Distinct label requires applicators and other handlers to wear a long-sleeved shirt and chemical-resistant gloves. When applying Distinct and Touchdown at NAPI Field #2-35A on June 8, 2007, Dennis Rutherford was wearing a short sleeved shirt and no gloves. The Velpar L label requires applicators and other handlers to wear protective eyewear. When mixing and loading Velar L on March 11, 2008, Gavin Pinto was not wearing protective eyewear. Respondent violated section 12(a)(2)(G) of FIFRA, 7 U.S.C. § 136j(a)(2)(G), when Dennis Rutherford used each of Raptor, Touchdown, and Distinct in a manner inconsistent with its labeling and when Gavin Pinto used Velar L, in a manner inconsistent with its labeling.

16. Volunteer is a “pesticide” as defined by Section 2(u) of FIFRA, 7 U.S.C. § 136(u). On June 19, 2007, Respondent at 49945 Poston Highway, Ehrenberg, Arizona was holding for sale or distribution 2½ gallon jugs of Volunteer and 5 gallon pails of Volunteer. The label on the 2½ gallon Volunteer containers did not have an EPA establishment number and did not contain all required directions for use. The EPA establishment number on the label of the 5 gallon Volunteer was illegible and the label did not contain all required directions for use. Respondent violated section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), by distributing or selling misbranded Volunteer in 2½ gallon containers and 5 gallon containers.

17. Gramoxone Max is a “pesticide” as defined by Section 2(u) of FIFRA, 7 U.S.C. § 136(u). In or around August 2007, the Mattawa Establishment shipped to the Yakima Establishment a pallet containing ten 15 gallon containers of Gramoxone Max. The one page label on these 15 gallon containers of Gramoxone Max erroneously stated the net contents as 2.5 gallons and did not contain Precautionary Statements, including Personal Protective Equipment to be worn by applicators, Environmental Hazards, WPS Ag-Use Requirements, Non Ag- Use

Requirements, directions for use, including spray drift information, and directions for storage and disposal, and also did not contain the First Aid Statement required on the EPA-approved Gramoxone label. The Yakima Establishment sold or distributed mislabeled Gramoxone Max to Coombs Ranch on or about October 10, 2007; Farmland Fruit Orchards on or about May 14, 2008 and August 6, 2007; Stadelman Fruit LLC on or about August 7, 2007; Yakima Valley Orchards LLC on or about November 5, 2007; and Zirkle Fruit Company on or about August 13, 2007. On or about May 28, 2008, Respondent was holding for sale or distribution three 15 gallon containers of Gramoxone Max with misbranded labels. On each of these occasions, Respondent violated section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), by distributing or selling a pesticide which was misbranded.

18. Buccaneer is a “pesticide,” as defined by Section 2(u) of FIFRA, 7 U.S.C. § 136(u). The EPA-approved Buccaneer label includes a label attached to the pesticide container and a booklet. The Buccaneer booklet contains complete directions for use, including general information on how the product works as well as use directions, including application methods, spray drift management, application rates, maximum allowable application amounts, mixing procedures, and use sites (allowable crops). On or about May 28, 2008, Respondent, at the Yakima Establishment, was holding for sale or distribution two 15 gallon containers of Buccaneer without the booklets required by the label and the containers of Buccaneer identified the EPA Establishment number as “2935-WA-001,” which is the establishment number for the Yakima Establishment. These five 15-gallon containers of Buccaneer had been repackaged in the Grandview Establishment. Respondent violated section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), by distributing or selling a pesticide, Buccaneer, which was misbranded because it lacked required booklets and at least three containers displayed the wrong establishment number.

19. Rex Lime Sulfur Solution (“Rex Lime”) is a “pesticide,” as defined by Section 2(u) of FIFRA, 7 U.S.C. § 136(u). Respondent shipped from its Grandview Establishment Rex Lime with labels that did not indicate the net contents. On or about May 28, 2008, Respondent held for sale at its Yakima Establishment Rex Lime with labels that did not indicate the net contents. Respondent violated section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), by distributing or selling a pesticide, Rex Lime, that was misbranded because it did not state the net contents.

20. Lorsban 4E is a “pesticide,” as defined by Section 2(u) of FIFRA, 7 U.S.C. § 136(u), and a Restricted Use Pesticide. On or around March 19, 2008, Respondent distributed or sold Lorsban 4E to Hamley Hale Farms. Respondent identified Adele Hale as the person at Hamley Hale Farms licensed to apply restricted use pesticides. Adele Hale did not hold a valid applicators license at the time of sale. Respondent violated Section 12(a)(2)(F) of FIFRA, 7 U.S.C. § 136j(a)(2)(F), by distributing or selling a restricted use pesticide, Lorsban 4E, to a person who was not a certified applicator.

21. Roundup Ultra Max is a “pesticide,” as defined by Section 2(u) of FIFRA, 7 U.S.C. § 136(u). On or about May 28, 2008, Respondent was holding for distribution or sale Roundup Ultra Max at the Yakama Establishment with a label that did not identify the EPA establishment number and net contents. Respondent violated section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), by distributing or selling a pesticide, Roundup Ultra Max, that was misbranded because it did not state the EPA establishment number and net contents.

22. Vengeance Plus is a “pesticide,” as defined by Section 2(u) of FIFRA, 7 U.S.C. § 136(u). Respondent distributed or sold 30 gallons of Vengeance Plus to the Washington County Weed Control on or about July 28, 2008; Valley County Weed Control on or about March 14, 2008; and Nampa Municipal Airport on or about June 26, 2008. The approved Vengeance Plus



label includes instructions regarding the Personal Protective Equipment to be worn by applicators. The label of the Vengeance Plus Respondent distributed or sold did not include instructions regarding the Personal Protective Equipment to be worn by applicators. On each of these occasions, Respondent violated section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), by distributing or selling a pesticide, Vengeance Plus, that was misbranded.

23. Pro Natural A-Maize-N, distributed and sold with the claim that it is an all natural weed inhibitor, is a “pesticide,” as defined by Section 2(u) of FIFRA, 7 U.S.C. § 136(u). Pro Natural A-Maize-N contains the active ingredients of corn gluten meal and soybean oil. Pro Natural A-Maize-N is not a registered pesticide. On or about April 22, 2008, Respondent held for distribution or sale at Wilbur Ellis in Tempe, Arizona Pro Natural A-Maize-N with a label that failed to identify the name and percentage by weight of each active ingredient and the name of each inert ingredient. Respondent violated section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), by distributing or selling an unregistered product, Pro Natural A-Maize-N with a label that failed to meet all criteria of 40 C.F.R. § 152.25(f).

#### **D. RESPONDENT’S ADMISSIONS**

24. In accordance with 40 C.F.R. § 22.18(b)(2), and for the purpose of this proceeding, Respondent (i) admits that EPA has jurisdiction over the subject matter of this CAFO and over Respondent; (ii) **neither admits nor denies** the specific factual allegations contained in Section I.C. of this CAFO; (iii) consents to any and all conditions specified in this CAFO, (iv) agrees to pay, and consents to the assessment of, the civil administrative penalty under Section I.E of this CAFO; (v) waives any right to contest the allegations contained in Section I.C. of this CAFO; and (vi) waives the right to appeal the proposed final order contained in this CAFO.

### E. CIVIL ADMINISTRATIVE PENALTY

25. Respondent consents to the assessment of a penalty in the amount of **NINETY NINE THOUSAND SIX HUNDRED DOLLARS (\$99,600)** as final settlement and complete satisfaction of the civil claims against Respondent arising from the facts alleged in Section I.C. of the CAFO and under the Act, as alleged in Section I.C. of the CAFO.

26. Respondent shall pay the assessed penalty no later than thirty (30) days from the effective date of this CAFO.

27. The civil penalty shall be paid by certified or cashier's check, payable to "Treasurer, United States of America," and sent by certified mail, return receipt requested, to:

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

The check should note the case title and docket number, and a transmittal letter, indicating Respondent's name, and this case docket number, must accompany the payment. When payment is mailed to the above address, Respondent shall send a copy of the check and transmittal letter to:

- a) Regional Hearing Clerk  
Office of Regional Counsel (ORC-1)  
U.S. Environmental Protection Agency, Region 9  
75 Hawthorne Street  
San Francisco, California 94105
- b) Bill Lee  
Pesticides Program  
Communities and Ecosystems Division (CED-5)  
U.S. Environmental Protection Agency, Region 9  
75 Hawthorne Street  
San Francisco, California 94105

28. In the event that Respondent fails to pay the civil administrative penalty assessed above by its due date, Respondent shall pay to Complainant an additional stipulated penalty in

the amount of **FIVE HUNDRED DOLLARS (\$500)** for each day that payment is late. Upon Complainant's written demand, payable shall immediately become due and payable.

29. Respondent's failure to pay in full the civil administrative penalty by its due date also may lead to any or all of the following actions:

a. The debt being referred to a credit reporting agency, a collection agency, or to the Department of Justice for filing of a collection action in the appropriate United States District Court. 40 C.F.R. §§ 13.13, 13.14, and 13.33. In any such collection action, the validity, amount, and appropriateness of the assessed penalty and of this CAFO shall not be subject to review.

b. The debt being collected by administrative offset (i.e., the withholding of money payable by the United States to, or held by the United States for, a person to satisfy the debt the person owes the Government), which includes, but is not limited to, referral to the Internal Revenue Service for offset against income tax refunds. 40 C.F.R. Part 13, Subparts C and H.

c. EPA may (i) suspend or revoke Respondent's licenses or other privileges; (ii) suspend or disqualify Respondent from doing business with EPA or engaging in programs EPA sponsors or funds; (iii) convert the method of payment under a grant or contract from an advanced payment to a reimbursement method; or (iv) revoke a grantee's or contractor's letter-of-credit. 40 C.F.R. §§ 13.17.

#### **F. CERTIFICATION OF COMPLIANCE**

30. In executing this CAFO, Respondent certifies (1) that it has taken steps to ensure that all employees are properly trained and know the importance of following pesticide label instructions; (2) that it is no longer distributing or selling misbranded Volunteer, Gramoxone Max, Buccaneer, Rex Lime, Roundup Ultra Max, or Vengeance Plus; (3) that it has taken steps to ensure that its pesticides are properly labeled, including but not limited to revising the label of A-Maize-N to comply with all criteria of section 152.25(f) and to cite to 40 CFR 152.25(f); and *In re: Wilbur Ellis Company, FIFRA enforcement action, 2009, page 11*

(4) that it has complied with all other FIFRA requirements at all facilities under its control.

**G. RETENTION OF RIGHTS, BINDING EFFECT, ETC.**

31. Issuance of this CAFO does not constitute a waiver by EPA of its right to enforce the terms of this CAFO or to seek other civil or criminal relief for violations, if any, of any provision of federal law not specifically settled by this Consent Agreement. Nothing in this CAFO shall relieve Respondent of its duty to comply with all applicable provisions of the Act and other Federal, state or local laws or statutes.

32. The provisions of this CAFO shall be binding on Respondent and on Respondent's officers, directors, employees, agents, servants, authorized representatives, successors, and assigns.

33. Except as set forth in Paragraph 29 above, each party shall bear its own costs, fees, and disbursements in this action.

34. For the purposes of state and federal income taxation, Respondent shall not claim a deduction for any civil penalty payment made pursuant to this CAFO.


35. This Consent Agreement constitutes the entire agreement between the Respondent and EPA. This Consent Agreement and Final Order is for the purpose of fully and finally settling the civil claims against Respondent arising from the facts alleged in section I.C. of this CAFO. Full payment of the civil penalty and any applicable interest charges or late fees or penalties as set forth in this Consent Agreement and the Final Order shall constitute full settlement and satisfaction of civil penalty liability against Respondent for the violations alleged in Section I.C. of this CAFO.

36. In accordance with 40 C.F.R. §§ 22.18(b)(3) and 22.31(b), the effective date of this CAFO shall be the date on which the accompanying Final Order, having been signed by the Regional Judicial Officer, is filed.

37. The undersigned representatives of each party to this Consent Agreement certify that  
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each is duly authorized by the party whom he or she represents to enter into the terms and bind that party to it.

**WILBUR-ELLIS COMPANY:**

Date: JULY 28, 2009 By: 

Name: David P. Granoff

Title: Vice President

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY:**

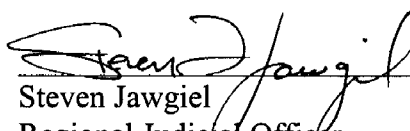
Date: 9/15/09 By: 

KATHERINE TAYLOR  
Associate Director for Agriculture  
Communities and Ecosystems Division  
U.S. Environmental Protection Agency,  
Region IX

**II. FINAL ORDER**

IT IS HEREBY ORDERED that this Consent Agreement and Final Order be entered and that Respondent shall pay a civil administrative penalty in the amount of **NINETY NINE THOUSAND SIX HUNDRED DOLLARS (\$99,600)** in accordance with the terms set forth in the Consent Agreement.

Date: 09/19/09

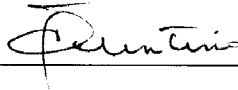
  
Steven Jawgiel  
Regional Judicial Officer  
U.S. EPA, Region IX

CERTIFICATION / CERTIFICATE OF SERVICE

I hereby certify that the original of the foregoing Consent Agreement and Final Order, Docket No FIFRA-09-2009- 0018 has been filed with the Region 9 Hearing Clerk and that a copy was sent certified mail (7005 3110 0002 8247 3326), return receipt requested, to:

Mr. David P. Granoff, VP  
Wilbur-Ellis Company  
345 California Street, 27<sup>th</sup> Floor  
San Francisco, CA 94104

9/22/09



DATE

FOR : Steve Armsey  
U.S. Environmental Protection Agency  
75 Hawthorne Street  
San Francisco, CA 94105