



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

MAY 31 2007

REPLY TO THE ATTENTION OF:
DT-8J

CERTIFIED MAIL

Receipt No. 7001 0320 0005 8910 5164

Henry W. Peabody & Co., Inc.
200 Broadway
Lynnfield, MA 01940

Consent Agreement and Final Order, Docket No. FIFRA-05-2007-0031

Dear Mr. Magoon:

Enclosed please find a copy of a fully executed Consent Agreement and Final Order concerning violations of the Federal Insecticide Fungicide & Rodenticide Act (FIFRA), 7 §§ U.S.C.136 et seq., in resolution of the above case. This document was filed on May 31, 2007 with the Regional Hearing Clerk.

The civil penalty in the amount of \$52,500 is to be paid in the manner prescribed in paragraphs 36, 37 and 38. Please be certain that the number **BD 2750745P031** and the docket number are written on both the transmittal letter and on the check. Payment is due by July 2, 2007 (within 30 calendar days of the filing date).

Thank you for your cooperation in resolving this matter.

Sincerely,

Claudia Niess
Pesticides and Toxics Branch

Enclosures

cc: Marcy Toney, Regional Judicial Officer/C-14J (w/Encl.)
Joseph Williams, ORC/C-14J (w/Encl.)
Eric Volck, Cincinnati Finance/MWD (w/Encl.)

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 West Jackson Boulevard
Chicago, Illinois 60604**

_____)	Consent Agreement and Final Order
In the Matter of:)	
)	
Henry W. Peabody & Co., Inc.)	Proceeding to Assess a Civil Penalty
200 Broadway)	under Section 14(a) of the Federal
Lynnfield, MA 01940)	Insecticide, Fungicide, and Rodenticide
)	Act, 7 U.S.C. § 136l(a)
Respondent.)	
	Docket No. <u>FIFRA-05-2007-0031</u>

CONSENT AGREEMENT AND FINAL ORDER

1. This is a civil administrative action commenced and concluded pursuant to Section 14(a)(1) of the Federal Insecticide, Fungicide and Rodenticide Act, as amended (“FIFRA”), 7 U.S.C. § 136l(a)(1), (“the Act”) and Sections 22.1(a)(1), 22.13, 22.18, and 22.35 of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (“Consolidated Rules”) as codified at 40 C.F.R. Part 22 (2006).

I. PARTIES

2. The Complainant is, by lawful delegation, the Chief, Pesticides and Toxics Branch, Waste, Pesticides and Toxics Division, United States Environmental Protection Agency (“U.S. EPA”), Region 5.

3. The Respondent is Henry W. Peabody & Company, Inc., (“Peabody”) a corporation organized under the laws of the State of Massachusetts.

4. At all times relevant to this Consent Agreement and Final Order (“CAFO”), Peabody had a place of business at 200 Broadway, Lynnfield, Massachusetts 01940.

5. Where the parties agree to settle one or more causes of action before the filing of a complaint, the administrative action may be commenced and concluded simultaneously by the issuance of a CAFO. (See 40 C.F.R. § 22.13(b)).

6. The parties agree that settling this action without the filing of a complaint or the adjudication of any issue of fact or law is in their interest and in the public interest.

7. Peabody consents to entry of this CAFO, to the assessment of the specified civil penalty, and agrees to comply with the terms of the CAFO.

II. JURISDICTION AND WAIVER OF RIGHT TO HEARING

8. Peabody admits to the jurisdictional allegations in this CAFO and neither admits nor denies the factual allegations in this CAFO.

9. Peabody waives any right to request a hearing as provided at 40 C.F.R. §22.15(c), any right to contest the allegations in this CAFO, and any right to appeal this CAFO.

III. STATUTORY AND REGULATORY BACKGROUND

10. Section 2(u) of FIFRA, 7 U.S.C. § 136(u), defines a pesticide to include any substance or mixture of substances intended to prevent, destroy, repel, or mitigate any pest.

11. Section 2(t) of FIFRA, 7 U.S.C. § 136(t), defines a pest as “any insect, rodent, nematode, fungus, weed, or . . . any other form of terrestrial or aquatic plant or animal life or virus, bacteria, or micro-organism . . . which the Administrator declares to be a pest . . .” under section 25(c)(1) of FIFRA, 7 U.S.C. § 136w(c)(1).

12. Insects, bacteria, and fungi are pests, pursuant to section 2(t) of FIFRA, 7 U.S.C. § 136(t).

13. 40 C.F.R. § 152.15 (a) (1) provides that if a person distributes or sells a substance and claims, states, or implies (by labeling or otherwise) that the substance (either by itself or in combination with any other substance) can or should be used as a pesticide, then the substance is considered to have a pesticidal purpose and requires registration as a pesticide under the Act.

14. When copper ammonium sulfate or copper sulfate is used for a pesticidal purpose, it is required to be registered as a pesticide under the Act.

15. According to U.S. EPA records, there are no current registrations for the use of copper ammonium sulfate or copper sulfate as a pesticide.

16. 40 C.F.R § 152.25 further provides that if a chemical that has a pesticidal purpose is used to treat an article, (e.g., wood products treated to protect the wood against insect or fungus infestation) and is not registered as a pesticide, then the treated article containing the chemical must itself be registered as a pesticide under the Act.

17. If copper ammonium sulfate or copper sulfate (which are not currently registered as pesticides) are used to treat burlap, jute, or Hessian cloth for the purpose of preserving those articles against degradation as a result of infestation by or attacks of a pest, then the burlap, jute, or Hessian cloth must be registered as a pesticide under the Act and 40 C.F.R § 152.25.

18. According to U.S. EPA records, there are no current registrations as a pesticide of burlap, jute, or Hessian cloth that has been treated with copper ammonium sulfate or copper sulfate to preserve those articles against degradation as a result of infestation by or attacks of a pest.

19. Burlap, jute, or Hessian cloth that has been treated with copper ammonium sulfate or copper sulfate to preserve the treated article against degradation as a result of infestation by or

attacks of a pest is a pesticide that has not been registered, as required under the Act and 40 C.F.R § 152.25.

20. Pursuant to § 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), and under 40 C.F.R. § 152.15 it is unlawful for any person to distribute or sell any pesticide that is not registered as a pesticide under FIFRA.

21. The distribution or sale of copper ammonium sulfate or copper sulfate treated burlap, jute, or Hessian cloth is the distribution or sale of an unregistered pesticide, a violation of § 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), and under 40 C.F.R. § 152.15.

22. The Administrator of U.S. EPA may assess a civil penalty of up to \$5,500 for each offense of FIFRA that occurred on or after January 31, 1997 through March 15, 2004 and may assess a civil penalty of up to \$6,500 for each offense of FIFRA that occurred after March 15, 2004 under § 14(a) of FIFRA, 7 U.S.C. § 136l(a), and 40 C.F.R. Part 19.

IV. FACTUAL ALLEGATIONS AND VIOLATIONS

23. Peabody is a "person" as that term is defined at Section 2(s) of FIFRA, 7 U.S.C. §136(s).

24. After receiving a trade complaint about Peabody, Region 5 requested on April 8, 2005 and on May 12, 2005 that an authorized inspector with Region 2 of the U.S. EPA conduct inspections at NYP Corp., an establishment located at 805 East Grand Street, Elizabeth, New Jersey 07201.

25. During these inspections, the inspector collected invoices dated Dec. 27, 2004, Jan. 28, 2005, March 8, 2005, and March 14, 2005 recording the distribution and sale of "New Treated Hessian" squares from Peabody to NYP Corp.

26. On May 12, 2005, the inspector collected a sample of burlap labeled "New Treated Hessian" and obtained an affidavit from Gerald LaBelle, Vice President of NYP Corp., stating that the sample of imported "New Treated Hessian" burlap collected during that inspection was labeled as Sample Number 0512052349401201 Sub C.

27. Region 5 requested that the inspector send the sample to the Office of Indiana State Chemist ("OISC"), where Region 5 has a standing agreement to analyze samples for chemical content. The OISC tested Sample Number 0512052349401201 Sub C using Ion-Chromatography with Electron Conductivity Detection and determined that the sample had been treated with copper ammonium sulfate or copper sulfate.

28. Region 2 deferred the case to Region 5 on or about December 7, 2005. Immediately thereafter, Region 5 issued a Stop Sale, Use or Removal Order in accordance with its authorities provided in Section 13(a) of FIFRA, 7 U.S.C. § 136k(a), against Peabody for the distribution or sale of an unregistered pesticide, copper sulfate treated burlap, jute, or Hessian cloth.

29. In the Order, U.S. EPA alleged Peabody to be a broker for the distribution and sale of imported burlap, jute, or Hessian materials that had been treated with copper sulfate to prevent micro-organisms, such as bacteria and fungi, from degrading the natural fabric when it is used to ball the roots of trees, shrubs, and other horticultural plants for packaging, handling and distribution in commerce.

30. Peabody arranged to broker the distribution and sale of copper ammonium sulfate or copper sulfate treated burlap, jute, or Hessian materials labeled as "New Treated Hessian" or "No Rot Burlap."

31. Peabody's distribution or sale of an unregistered pesticide is an unlawful act as stated at Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A).

V. CIVIL PENALTY

32. Pursuant to Section 14(a)(4) of FIFRA, 7 U.S.C. § 136l(a)(4), and the "Enforcement Response Policy for FIFRA (July 2, 1990)," U.S. EPA has determined that a civil penalty of \$52,500 is an appropriate penalty. The penalty resolves alleged violations of FIFRA for 17 shipments by Peabody of burlap, jute, or Hessian cloth determined to be treated with copper ammonium sulfate or copper sulfate, the distribution or sales of which by Peabody were unlawful acts as stated at Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E).

33. Peabody certifies that it has ceased any distribution or sale of burlap, jute, or Hessian cloth treated with copper ammonium sulfate or copper sulfate that makes pesticidal claims.

34. Peabody also certifies that it will not distribute or sell any burlap, jute, or Hessian cloth with any claims, stated or implied (by labeling or otherwise), that the substance (either by itself or in combination with any other substance) can or should be used as a pesticide.

35. Peabody agrees to pay a civil penalty in the amount of \$52,500 to settle this matter.

36. Peabody must pay the \$52,500 civil penalty by cashier's or certified check payable to the "Treasurer, United States of America," within 30 days after the effective date of this CAFO.

37. Peabody must send the payment to:

U.S. EPA,
P.O. Box 371531
Pittsburgh, PA 15251-7531

38. A transmittal letter, stating Peabody's name, complete address, the case docket number, and the billing document number, must accompany the payment. Peabody must write the case docket number and the billing document number on the face of the check. Peabody must send copies of the check and transmittal letter to:

Regional Hearing Clerk (E-13J)
U.S. EPA Region 5
77 West Jackson Boulevard
Chicago, IL 60604-3590

Joseph Williams (C-14J)
Office of Regional Counsel
U.S. EPA Region 5
77 West Jackson Boulevard
Chicago, IL 60604-3590

Claudia Niess (DT-8J)
Pesticides and Toxics Enforcement Section
U.S. EPA Region 5
77 West Jackson Boulevard
Chicago, IL 60604-3590

39. This civil penalty is not deductible for federal tax purposes.

40. If Peabody does not timely pay the civil penalty, U.S. EPA may refer the matter to the Attorney General, who will recover such amount by action in the appropriate United States district court, under § 14(a)(5) of FIFRA, 7 U.S.C. § 136l(a)(5).

41. Pursuant to 31 C.F.R. § 901.9, Respondent shall pay the following on any amount overdue under this CAFO whether referred for collection or not:

(a) **Interest.** Interest will accrue on any overdue amount from the date payment was due at a rate established by the Secretary of the Treasury.

(b) **Monthly Handling Charge.** Respondent will pay a \$15 handling charge each month that any portion of the penalty is more than 30 days past due.

(c) Non-Payment Penalty. Respondent will pay a 6 percent per annum penalty on any principal amount 90 days past due. This non-payment penalty is in addition to charges that accrue under subparagraphs (a) and (b).

VI. FINAL STATEMENT

42. This CAFO resolves only Peabody's liability for federal civil penalties for the violations alleged in the Factual Allegations and Violations section of this CAFO.

43. Peabody consents to all of the conditions in this CAFO.

44. This CAFO does not affect the right of U.S. EPA or the United States to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law.

45. This CAFO does not affect Peabody's responsibility to comply with FIFRA and other applicable federal, state and local laws, and regulations. Peabody certifies that it is complying fully with FIFRA, 7 U.S.C. §§ 136-136y.

46. The terms of this CAFO bind Peabody, its successors, and assigns.

47. Each person signing this consent agreement certifies that he or she has the authority to sign this consent agreement for the party whom he or she represents and to bind that party to its terms.

48. Each party agrees to bear its own costs and attorneys' fees in this action.

49. This CAFO constitutes the entire agreement between the parties.

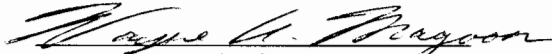
CONSENT AGREEMENT AND FINAL ORDER

In the Matter of: Henry W. Peabody & Co., Inc.

Docket No. FIFRA-05-2007-0031

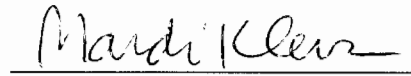
Henry W. Peabody & Co., Inc., Respondent

Date: MAY 09 2007



Henry W. Peabody & Co., Inc.
Company representative

United States Environmental Protection Agency, Complainant

Date: May 18, 2007


Mardi Klevs, Chief
Pesticides and Toxics Branch
Waste, Pesticides, and Toxics Division

Date: May 22, 2007


Margaret M. Guerriero, Director
Waste, Pesticides, and Toxics Division

CONSENT AGREEMENT AND FINAL ORDER

In the Matter of: Henry W. Peabody & Co., Inc.

Docket No. FIFRA-05-2007-0031

FINAL ORDER

It is ordered as agreed to by the parties and as stated in the consent agreement, effective immediately upon filing of this Consent Agreement and Final Order with the Regional Hearing Clerk. This final order disposes of this proceeding pursuant to 40 C.F.R. § 22.18.

Date: _____

5/29/07

Walter W. Kovalich Jr.
for

Mary A. Gade
Regional Administrator
United States Environmental Protection Agency
Region 5

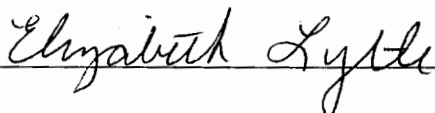
CERTIFICATE OF SERVICE

I hereby certify that the original signed copy of the Consent Agreement and Final Order in resolution of the civil administrative action involving Henry W. Peabody & Co., was filed on May 31, 2007 with the Regional Hearing Clerk (E-13J), United States Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, and that I mailed by Certified Mail, Receipt No. 7001 0320 0005 8910 5164, a copy of the original to the Respondents:

Henry W. Peabody & Co., Inc.
200 Broadway
Lynnfield, MA 01940

and forwarded copies (intra-Agency) to:

Marcy Toney, Regional Judicial Officer, ORC/C-14J
Joseph Williams, Counsel for Complainant/C-14J
Eric Volck, Cincinnati Finance/MWD (w/Encl.)



Elizabeth Lytle
Pesticides and Toxics Branch
U.S. EPA - Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604-3590

Docket No. **FIFRA-05-2007-0031**