

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 7

UNITED STATES
ENVIRONMENTAL PROTECTION
AGENCY-REGION 7

2016 SEP 29 PM 2:39

IN THE MATTER OF)

Albaugh, LLC)

) Docket No. FIFRA-07-2016-0020
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ORDER

Pursuant to 40 C.F.R. § 22.5(a)(1), facsimile/electronic filing of page 11 of the Complaint, Consent Agreement/Final Order is authorized in this proceeding.

Dated: Sept. 29, 2016

Karina Borromeo

Karina Borromeo
Regional Judicial Officer

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 7
11201 RENNER BOULEVARD
LENEXA, KANSAS

2016 SEP 29 PM 2:39

BEFORE THE ADMINISTRATOR

In the Matter of:

Albaugh, LLC

Respondent.

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Docket No. FIFRA-07-2016-0020

COMPLAINT AND CONSENT AGREEMENT/FINAL ORDER

The U.S. Environmental Protection Agency, Region 7 (“EPA”), and Albaugh, LLC (f/k/a Albaugh, Inc.) (“Respondent”) have agreed to a settlement of this action before the filing of a Complaint, therefore 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).

Section I

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 Complaint and Consent Agreement/Final Order (“CA/FO”) serves as notice that the 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 redelegation from the Regional Administrator, EPA Region 7, is Director of the Water, Wetlands and Pesticides Division, EPA Region 7.

4. Respondent is Albaugh, LLC, with its principal place of business at 1525 NE 36th Street, Ankeny, Iowa 50021.

Section III

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 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).

7. Section 2(u) of FIFRA, 7 U.S.C. § 136(u), defines the term “pesticide” as, *inter alia*, any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest.

8. Section 2(s) of FIFRA, 7 U.S.C. § 136(s), defines the term “person” as any individual, partnership, association, corporation, or any organized group of persons whether incorporated or not.

9. 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.

10. 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, repack, label, relabel, or otherwise change the container of any pesticide or device.

11. 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).

12. Section 2(q)(1)(A) of FIFRA, 7 U.S.C. § 136(q)(1)(A), states, in pertinent part, a pesticide is misbranded if its labeling bears any statement which is false or misleading in any particular.

13. 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 imposed under Section 3(d) of FIFRA, 7 U.S.C. § 136a(d), are adequate to protect health and the environment.

14. Section 2(q)(1)(G) of FIFRA, 7 U.S.C. § 136(q)(1)(G), states that 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 3(d) of FIFRA, 7 U.S.C. § 136a(d), are adequate to protect health and the environment.

15. 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.

16. Section 19(a)(1)(B) of FIFRA, 7 U.S.C. § 136q(1)(B), states that the labeling of a pesticide contain requirements and procedures for the transportation, storage, and disposal of the pesticide, any container of the pesticide, any rinsate containing the pesticide, or any other material used to contain or collect excess of spilled quantities of the pesticide.

17. Section 12(a)(1)(C) of FIFRA, 7 U.S.C. § 136j(a)(1)(C), states that it shall be unlawful for any person to distribute or sell to any person any registered pesticide the composition of which differs at the time of its distribution or sales from its composition as described in the statement required with its registration under Section 3 of FIFRA, 7 U.S.C. § 136a.

18. Every pesticide product shall bear a label containing the information specified by FIFRA and the regulations in 40 C.F.R Part 156. 40 C.F.R. § 156.10(a)(1).

19. Every pesticide product is required to bear hazard and precautionary statements for environmental hazards, including hazards to non-target organisms, as prescribed in the regulations in 40 C.F.R Part 156. 40 C.F.R. § 156.80(a).

20. Upper and lower certified limits become legally binding upon approval and apply from the date of production to date of use for each active ingredient of a pesticide product. 40 C.F.R. § 158.350(a)(1).

21. All required label text must not be obscured or crowded. 40 C.F.R. § 156.10(a)(2)(ii)(C).

22. Section 14 of FIFRA, 7 U.S.C. § 136l, provides that any registrant, commercial applicator, wholesaler, dealer, retailer, or other distributor who violates any provision of 7 U.S.C. Chapter 6, Subchapter II, Environmental Pesticide Control, may be assessed a civil penalty by the Administrator of not more than \$5,000 for each offense. The Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, as amended by the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701, and the Federal Civil Penalties Inflation

Adjustment Act Improvements Act of 2015, 28 U.S.C. § 2461, and implementing regulations at 40 C.F.R. Part 19 increased these statutory maximum penalties to \$7,500 for violations that occurred after January 13, 2009 and before December 6, 2013.

Section IV

General Factual Allegations

23. Respondent is, and at all times referred to herein was, a “person” within the meaning of FIFRA.

24. On April 2 and 3, 2013, a representative of the Missouri Department of Agriculture (“MDA”) conducted a neutral scheme producer establishment inspection of a facility owned and/or operated by Respondent at 4900 Packers Avenue, St. Joseph, Missouri, EPA Establishment Number 42750-MO-001 (“the Facility”). The MDA inspection was conducted under the authority of Section 9 of FIFRA, 7 U.S.C. § 136g, to evaluate the Facility’s compliance with the requirements of FIFRA. The MDA inspection report was subsequently forwarded to the EPA for review and a copy was mailed to Respondent.

25. At the time of the MDA inspection, and at all times relevant to the allegations herein, certain pesticide products at the Facility were registered to Respondent and were stored and held by Respondent for sale and distribution, including: Aqua Star, EPA Registration Number (“EPA Reg. No.”) 42750-59; Brox 2EC, EPA Reg. No. 72750-48; Sonoma 20 EW AG, EPA Reg. No. 42750-165; Propi-Star EC, EPA Reg. No. 42750-211; and Spur, EPA Reg. No. 42750-89.

26. At the time of the MDA inspection, for the pesticide products identified in the previous paragraph, the MDA inspector photographed product labels, collected certified copies of product labels, took samples of product for analysis, and reviewed and copied invoices for the sale and shipment of products.

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 23 through 26 are re-alleged and incorporated as if fully stated herein.

29. At the time of inspection, Respondent at its facility had a quantity of containers of the pesticide product Aqua Star, EPA Reg. No. 42750-59, that was packaged, labeled, and released for shipment.

30. The Aqua Star pesticide product that was packaged, labeled, and released for shipment was misbranded inasmuch as the label on the product containers omitted the required labeling of "NOTE: Use under Aquatic and Other Noncrop Site uses."

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

Counts 2-5

32. The facts stated in paragraphs 23 through 26 are re-alleged and incorporated as if fully stated herein.

33. Respondent had invoices showing it had made four (4) separate shipments of quantities of containers of the pesticide product Aqua Star, EPA Reg. No. 472750-59.

34. The Aqua Star pesticide product that was shipped was misbranded inasmuch as the label on the product containers omitted the required labeling of "NOTE: Use under Aquatic and Other Noncrop Site uses."

35. Respondent on four (4) occasions violated Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), by distributing or selling a misbranded pesticide.

Count 6

36. The facts stated in paragraphs 23 through 26 are re-alleged and incorporated as if fully stated herein.

37. At the time of inspection, Respondent at its facility had a quantity of containers of the pesticide product Brox 2EC, EPA Reg. No. 472750-48, that was packaged, labeled, and released for shipment.

38. The Brox 2EC pesticide product that was packaged, labeled, and released for shipment was misbranded inasmuch as the label on the product containers incorrectly stated the tank mixture for non-residential turfgrass was "0.125-0.25".

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

Counts 7-10

40. The facts stated in paragraphs 23 through 26 are re-alleged and incorporated as if fully stated herein.

41. Respondent had invoices showing it had made four (4) separate shipments of quantities of containers of the pesticide product Brox 2EC, EPA Reg. No. 472750-48.

42. The Brox 2EC pesticide product that was shipped was misbranded inasmuch as the label on the product containers incorrectly stated the tank mixture for non-residential turfgrass was "0.125-0.25".

43. Respondent on four (4) occasions violated Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), by distributing or selling a misbranded pesticide.

Count 11

44. The facts stated in paragraphs 23 through 26 are re-alleged and incorporated as if fully stated herein.

45. At the time of inspection, Respondent at its facility had a quantity of containers of the pesticide product Sonoma 20EW AG, EPA Reg. No. 472750-165, that was packaged, labeled, and released for shipment.

46. The Sonoma 20EW AG pesticide product that was packaged, labeled, and released for shipment was misbranded inasmuch as the label omitted the "NOTICE: Agricultural Chemical" section.

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

Counts 12-13

48. The facts stated in paragraphs 23 through 26 are re-alleged and incorporated as if fully stated herein.

49. Respondent had invoices showing it had made two (2) separate shipments of quantities of containers of the pesticide product Sonoma 20EW AG, EPA Reg. No. 472750-165.

50. The Sonoma 20EW AG pesticide product that was shipped was misbranded inasmuch as the label on the product containers omitted the "NOTICE" and "Agricultural Chemical" section.

51. Respondent on two (2) occasions violated Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), by distributing or selling a misbranded pesticide.

Count 14

52. The facts stated in paragraphs 23 through 26 are re-alleged and incorporated as if fully stated herein.

53. At the time of inspection, Respondent at its facility had a quantity of containers of the pesticide product Propi-Star EC, EPA Reg. No. 472750-211, that was packaged, labeled, and released for shipment.

54. The Propi-Star EC pesticide product that was packaged, labeled, and released for shipment was misbranded inasmuch as the label had a sticker on the front panel that obscured the phrase "Keep out of Reach of Children" and/or other portions of the approved label language.

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

Counts 15-16

56. The facts stated in paragraphs 23 through 26 are re-alleged and incorporated as if fully stated herein.

57. Respondent had invoices showing it had made two (2) separate shipments of quantities of containers of the pesticide product Propi-Star EC, EPA Reg. No. 472750-211.

58. The Propi-Star EC pesticide product that was shipped was misbranded inasmuch as the label had a sticker on the front panel that obscured the phrase "Keep out of Reach of Children" and/or other portions of the approved label language.

59. Respondent on two (2) occasions violated Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), by distributing or selling a misbranded pesticide.

Count 17

60. The facts stated in paragraphs 23 through 26 are re-alleged and incorporated as if fully stated herein.

61. At the time of inspection, Respondent at its facility had a quantity of containers of the pesticide product Spur, EPA Reg. No. 472750-89, that was packaged, labeled, and released for shipment.

62. The Spur pesticide product that was packaged, labeled, and released for shipment on analysis exceeded 125% of the label claim for the active ingredient Clopyralid.

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

Counts 18-21

64. The facts stated in paragraphs 23 through 26 are re-alleged and incorporated as if fully stated herein.

65. Respondent had invoices showing it had made four (4) separate shipments of quantities of containers of the pesticide product Spur, EPA Reg. No. 472750-89.

66. The Spur pesticide product that was shipped on analysis exceeded 125% of the label claim for the active ingredient Clopyralid.

67. Respondent on four (4) occasions violated Section 12(a)(1)(C) of FIFRA, 7 U.S.C. § 136j(a)(1)(C), by distributing or selling a registered pesticide the composition of which differs at the time of its distribution or sales from its composition as described in the statement required with its registration.

Section V

CONSENT AGREEMENT

68. For purposes of this proceeding, Respondent admits the jurisdictional allegations set forth above, and agrees to not contest EPA's jurisdiction in this proceeding or any subsequent proceeding to enforce the terms of the Final Order.

69. Respondent neither admits nor denies the factual allegations set forth above.

70. Respondent waives the right to contest any issue of fact or law set forth above and its right to appeal the Final Order accompanying this Consent Agreement.

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

72. Nothing contained in the Final Order portion of this Consent Agreement shall alter or otherwise affect Respondent's obligation to comply with all applicable federal, state, and local environmental statutes and regulations and applicable permits.

73. The undersigned representative of Respondent certifies that he or she is fully authorized to enter into the terms and conditions of this CA/FO and to execute and legally bind Respondent to it.

74. Respondent certifies that by signing this CA/FO 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.

75. The effect of settlement described in paragraph 76 below is conditioned upon the accuracy of the Respondent's representations to the EPA, as memorialized in paragraph 74 above.

76. Respondent agrees that in settlement of the claims alleged in this CA/FO, Respondent shall pay a mitigated penalty of One Hundred Twelve Thousand, Six Hundred and Eighty-Four Dollars (\$112,684) as set forth in Paragraph 1 of the Final Order. Payment of this civil penalty in full shall resolve all civil and administrative claims for all violations of FIFRA alleged in this document. Complainant reserves the right to take any enforcement action with respect to any other violations of FIFRA or any other applicable law and/or regulation administered by the EPA.

77. Respondent consents to the issuance of the Final Order hereinafter recited and consents to the payment of a civil penalty as specified in the Final Order.

78. 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. Respondent understands that its failure to timely pay any portion of the civil penalty described in Paragraph 1 of the Final Order below 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 accrue thereon at the applicable statutory rate on the unpaid balance until such civil or stipulated penalty and any accrued interest are paid in full. A late payment handling charge of \$15 will be imposed after thirty (30) days and an additional \$15 will be charged for each subsequent thirty (30) day period. Additionally, as provided by 31 U.S.C. § 3717(e)(2), a six percent (6%) per annum penalty (late charge) may be assessed on any amount not paid within ninety (90) days of the due date.

Section VI

FINAL ORDER

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

1. Respondent shall pay a civil penalty of One Hundred Twelve Thousand, Six Hundred and Eighty-Four Dollars (\$112,684) within thirty (30) days of the effective date of this Final Order.
2. Respondent shall pay the penalty by cashier's or certified check, by wire transfer, or online. The payment shall reference the Docket Number on the check or wire transfer. If made by cashier's or certified check, the check shall be made payable to "United States Treasury" and remitted to:

U.S. Environmental Protection Agency
Fines and Penalties
Combined Finance Center

Post Office Box 979077
St. Louis, Missouri 63197-9000.

Wire transfers shall be directed to the Federal Reserve Bank of New York as follows:

Federal Reserve Bank of New York
ABA = 021030004
Account = 68010727
SWIFT address = FRNYUS33
33 Liberty Street
New York, New York 10045
Field Tag 4200 of the Fedwire message should read
“D 68010727 Environmental Protection Agency”

On-line payments are available through the Department of Treasury:

www.pay.gov
Enter “sfo 1.1” in the search field.
Open the form and complete required files.

3. A copy of the check, transfer, or online payment confirmation shall be sent simultaneously to the following:

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

and to:

Robert Richards
Office of Regional Counsel
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 CA/FO shall be claimed by Respondent as a deduction for federal, state, or local income tax purposes.

5. This CA/FO 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.

**RESPONDENT:
ALBAUGH, LLC**

Date: 9/28/14



Signature

Stuart I. Feldstein
Name

Executive Vice President
Title

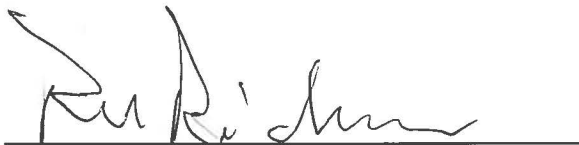
**COMPLAINANT:
U.S. ENVIRONMENTAL PROTECTION AGENCY**

Date: 9/28/16



Karen A. Flourney
Director
Water, Wetlands and Pesticides Division
U.S. Environmental Protection Agency, Region 7

Date: 9/28/16



Robert W. Richards
Office of Regional Counsel
U.S. Environmental Protection Agency, Region 7
11201 Renner Boulevard
Lenexa, Kansas 66219
Office: (913) 551-7502
richards.robert@epa.gov

IT IS SO ORDERED.

Date: Sept. 29, 2016

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

IN THE MATTER Of Albaugh, LLC, Respondent
Docket No. FIFRA-07-2016-0020

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:

richards.robert@epa.gov

Copy by First Class Mail to Respondent:

Stuart I. Feldstein
Executive Vice President
ALBAUGH, LLC
1525 NE 36th Street
Ankeny, Iowa 50021

Dated: 9/29/14


Kathy Robinson
Hearing Clerk, Region 7