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

In the Matter of)
)
Midwest Farmers Cooperative) **Docket No. FIFRA-07-2018-0260**
)
Respondent.)

CONSENT AGREEMENT AND FINAL ORDER

Preliminary Statement

The U.S. Environmental Protection Agency, Region 7 (EPA or Complainant), and Midwest Farmers Cooperative (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 Midwest Farmers Cooperative, a corporation in good standing under the laws of the state of Nebraska and doing business in the state of Nebraska.

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)(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.

7. Pursuant to Section 19 of FIFRA, 7 U.S.C. § 136q, EPA promulgated the Pesticide Management and Disposal regulations, also known as the container regulations, found at 40 C.F.R. Part 165.

8. The regulation at 40 C.F.R. § 165.3 defines “refiller” as a person who engages in the activity of repackaging pesticide product into refillable containers. This could include a registrant or a person operating under contract to a registrant.

9. 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.

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

11. Section 2(u) of FIFRA, 7 U.S.C. § 136(u), defines “pesticide” to mean any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest.

12. Section 2(t) of FIFRA, 7 U.S.C. § 136(t), defines “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).

13. Section 2(gg) of FIFRA, 7 U.S.C. § 136(gg), defines “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.

14. Section 2(q)(1)(D) of FIFRA, 7 U.S.C. § 136(q)(1)(D), states that a pesticide is misbranded if its label does not bear the registration number assigned under Section 7 of FIFRA, 7 U.S.C. § 136e, to each establishment in which it was produced.

15. Section 2(q)(2)(C)(i), 7 U.S.C. § 136(q)(2)(C)(i), states that a pesticide is misbranded if there is not affixed to its container, and to the outside container or wrapper of the

retail package, if there be one, through which the required information on the immediate container cannot be clearly read, a label bearing the net weight or measure of the content.

16. 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 offense. 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 day 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

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

18. On or about August 18, 2017, the Nebraska Department of Agriculture (NDA) conducted an inspection (the inspection), under federal credentials, at Respondent’s facility located at 400 Railway Street, Eagle, Nebraska 68347 (the Facility) and at Respondent’s headquarters office located at 10741 N. 142nd Street, Waverly, Nebraska 68462. 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 NDA inspection report was subsequently forwarded to EPA for review and forwarded to Respondent on December 5, 2017.

19. At the time of the inspection, and at all times relevant to the allegations herein, Respondent was a “refiller” as defined by 40 C.F.R. § 165.3, operating under contracts with pesticide registrants.

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

Allegations of Violations

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

Count 1

22. The facts stated in Paragraphs 17 through 20 above are herein incorporated.

23. The regulation at 40 C.F.R. § 165.70(e)(11) requires the refillers of pesticidal products that are not the registrant of the product to maintain records as required by 40 C.F.R. Part 169.

24. The regulation at 40 C.F.R. § 169.2(a) requires the maintenance of records showing the product name, EPA Registration Number, amounts per batch and batch identification numbers of all pesticides produced.

25. Information gathered as a result of the inspection revealed that Respondent failed to maintain records that included all the production information required by 40 C.F.R. § 169.2(a).

26. Respondent's failure to maintain production records as required by 40 C.F.R. § 169.2(a), pursuant to 40 C.F.R. § 165.70(e)(11), is a violation of Section 12(a)(2)(S) of FIFRA, 7 U.S.C. § 136j(a)(2)(S).

Count 2

27. The facts stated in Paragraphs 17 through 20 above are herein incorporated.

28. The regulation at 40 C.F.R. § 165.70(e)(10) requires the refillers of pesticidal products that are not the registrant of the product to maintain records in accordance with 40 C.F.R. § 165.70(j).

29. The regulation at 40 C.F.R. § 165.70(j)(2) provides that each time a pesticide product is repackaged into a refillable container and distributed or sold, the refiller must generate records and maintain the records for at least 3 years after the date of repackaging containing: (i) the EPA registration number of the pesticide product distributed or sold in the refillable container; (ii) the date of the repackaging; and (iii) the serial number of other identifying code of the refillable container.

30. Information gathered as a result of the inspection revealed that Respondent failed to maintain records that included all the repackaging information required by 40 C.F.R. § 165.70(j)(2).

31. Respondent's failure to maintain repackaging records as required by 40 C.F.R. § 165.70(j)(2), pursuant to 40 C.F.R. § 165.70(e)(10), is a violation of Section 12(a)(2)(S) of FIFRA, 7 U.S.C. § 136j(a)(2)(S).

Count 3

32. The facts stated in Paragraphs 17 through 20 above are herein incorporated.

33. The regulation at 40 C.F.R. § 165.45(d) requires that each refillable container must be marked in a durable and clearly visible manner with a serial number or other identifying code that will distinguish the individual container from all other containers.

34. The regulation at 40 C.F.R. § 165.45(e) requires that each opening on a portable refillable container designed to hold liquid pesticides must have a one-way valve, a tamper-evident device or both.

35. Information gathered as a result of the inspection revealed that portable refillable containers designed to hold liquid pesticides, maintained by Respondent at the Facility, were not marked with serial numbers or other identifying codes and did not have a one-way valve or a tamper-evident device as required by 40 C.F.R. §§ 165.45(d) and (e).

36. Respondent's failure to mark each refillable container with a serial number or other identifying code, as required by 40 C.F.R. § 165.45(d), and failure to have a one-way valve or tamper-evident device on each refillable container, as required by 40 C.F.R. § 165.45(e), is a violation of Section 12(a)(2)(S) of FIFRA, 7 U.S.C. § 136j(a)(2)(S).

Count 4

37. The facts stated in Paragraphs 17 through 20 above are herein incorporated.

38. 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.

39. Information gathered as a result of the inspection revealed that two bulk tanks containing pesticides and being held by Respondent at the Facility for sale or distribution did not have labels affixed to the tanks bearing the establishment registration number nor the net contents; thus, the pesticides were "misbranded" as that term is defined by Section 2(q)(1)(D), 7 U.S.C. § 136(q)(1)(D), and Section 2(q)(2)(C)(i) of FIFRA, 7 U.S.C. § 136(q)(2)(C)(i).

40. Respondent's sale or distribution of the misbranded pesticides, as defined by Section 2(q) of FIFRA, 7 U.S.C. § 136(q), is a violation of Section 12(a)(1)(E) of FIFRA.

CONSENT AGREEMENT

41. 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.

42. 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.

43. 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

44. Respondent agrees that, in settlement of the claims alleged herein, Respondent shall pay a civil penalty of Thirteen Thousand Two Hundred Sixty-Six Dollars (\$13,266), as set forth below.

45. 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>.

46. 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
haugen.lisa@epa.gov; and

Clarissa Howley Mills, Attorney
Office of Regional Counsel
U.S. Environmental Protection Agency, Region 7
11201 Renner Boulevard
Lenexa, Kansas 66219
mills.clarissa@epa.gov.

47. 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).

Effect of Settlement and Reservation of Rights

48. 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.

49. 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.

50. Respondent certifies by the signing of this Consent Agreement that it is presently in compliance with all requirements of FIFRA and its implementing regulations.

51. 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.

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

General Provisions

53. 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.

54. 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.

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

56. 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 Respondent with respect to matters included herein comply with the terms of this Consent Agreement and Final Order.

RESPONDENT
MIDWEST FARMERS COOPERATIVE

Date: 8/6/2018

By:  _____

Jeremy Wilhelm
Print Name

CEO
Title

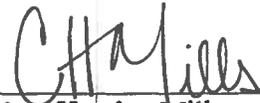
COMPLAINANT
U. S. ENVIRONMENTAL PROTECTION AGENCY

Date: 8/10/2018



Jeffery Robichaud
Director
Water, Wetlands and Pesticides Division

Date: 8/9/2018



Clarissa Howley Mills
Office of Regional Counsel

FINAL ORDER

Pursuant to Section 14(a) of FIFRA, 7 U.S.C. § 136/(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 Borromeo
Karina Borromeo
Regional Judicial Officer

8-14-18
Date

CERTIFICATE OF SERVICE

I certify that 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:

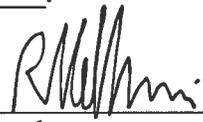
Copy via Email to Complainant:

mills.clarissa@epa.gov

Copy via Email to Respondent:

lee.paulsen@midwestfarmers.coop

Dated this 14 day of August, 2018.



Signed