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12 UNITED STATES
13 ENVIRONMENTAL PROTECTION AGENCY
14 REGION IX
15 75 HAWTHORNE STREET
16 SAN FRANCISCO, CA 94105
17

18 In the matter of:) Docket No. FIFRA-09-2014- 0002
19) CONSENT AGREEMENT
20 Wilbur-Ellis Company) and
21) FINAL ORDER PURSUANT TO
22 Respondent.) SECTIONS 22.13 AND 22.18
23)
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27 **I. CONSENT AGREEMENT**

28 Complainant, the Assistant Director, Water and Pesticide Branch, of the Enforcement
29 Division, United States Environmental Protection Agency, Region 9, ("EPA") and Respondent
30 Wilbur-Ellis Company (hereafter "Respondent") seek to settle this case and consent to the entry
31 of this Consent Agreement and Final Order ("CAFO").

32 **A. AUTHORITY AND PARTIES**

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

1 2. Complainant is the Assistant Director of the Water and Pesticide Branch, Enforcement
2 Division, who has been duly delegated to commence and settle an enforcement action in this
3 matter.

4 3. Respondent is Wilbur-Ellis Company, a California corporation that owns, operates, or
5 otherwise controls facilities located at 3168 County Road 33, Glenn, California, 6800 East
6 Whitmore Avenue, Hughson, California, and 6415 S. Rainbow Road, Buckeye, Arizona.

7 **B. APPLICABLE STATUTES AND REGULATIONS**

8 4. Pursuant to sections 3, 8, 19 and 25 of FIFRA, 7 U.S.C. 136a, 136f, 136q and 136w,
9 the EPA Administrator promulgated Container/Containment regulations which are codified at 40
10 C.F.R. Part 165, including regulations that govern standards for container design for refillable
11 containers which are codified at 40 C.F.R. Part 165, Subpart C (hereinafter referred to as the
12 “Container Regulations”) and regulations that govern standards for pesticide containment
13 structures which are codified at 40 C.F.R. Part 165, Subpart E (hereinafter referred to as the
14 “Containment Regulations”).

15 5. Pursuant to FIFRA, 7 U.S.C. 136-136y, the EPA Administrator also promulgated
16 regulations governing the labeling requirements for pesticides and devices, codified at 40 C.F.R.
17 Part 156 (hereinafter referred to as “Part 156” or the “Labeling Regulations”).

18 6. Section 2(u) of FIFRA, 7 U.S.C. §136(u), states that the term “pesticide” means any
19 substance or mixture of substances intended for preventing, destroying, repelling, or mitigating
20 any pest.

21 7. *Agricultural pesticide* means any pesticide product labeled for use in or on a farm,
22 forest, nursery, or greenhouse. 40 C.F.R. § 165.3.

23 8. *Appurtenance* means any equipment or device which is used for the purpose of

1 transferring a pesticide from a stationary pesticide container or to any refillable container,
2 including but not limited to, hoses, fittings, plumbing, valves, gauges, pumps and metering
3 devices. 40 C.F.R. § 165.3.

4 9. *Containment pad* means any structure that is designed and constructed to intercept and
5 contain pesticides, rinsates, and equipment wash water at a pesticide dispensing area. 40 C.F.R. §
6 165.3.

7 10. *Containment structure* means either a secondary containment unit or a containment
8 pad. 40 C.F.R. § 165.3.

9 11. *Facility* means all buildings, equipment, structures, and other stationary items which
10 are located on a single site or on contiguous or adjacent sites and which are owned or operated by
11 the same person (or by any person who controls, who is controlled by, or who is under common
12 control with such person). 40 C.F.R. § 165.3.

13 12. *Establishment* means any site where a pesticidal product, active ingredient, or device
14 is produced, regardless of whether such site is independently owned or operated, and regardless
15 of whether such site is domestic and producing a pesticidal product for export only, or whether
16 the site is foreign and producing any pesticidal product for import into the United States. 40
17 C.F.R. § 165.3.

18 13. *Operator* means any person in control of, or having responsibility for, the daily
19 operation of a facility at which a containment structure is located. *Owner* means any person who
20 owns a facility at which a containment structure is required. 40 C.F.R. § 165.3.

21 14. *Pesticide dispensing area* means an area in which pesticide is transferred out of or
22 into a container. 40 C.F.R. § 165.3.

23 15. *Produce* means to manufacture, prepare, propagate, compound, or process any

1 pesticide, including any pesticide produced pursuant to section 5 of the Act, and any active
2 ingredient or device, or to package, repackage, label, relabel, or otherwise change the container
3 of any pesticide or device. 40 C.F.R. § 165.3.

4 16. *Refilling establishment* means an establishment where the activity of repackaging
5 pesticide product into refillable containers occurs. *Refillable container* means a container that is
6 intended to be filled with pesticide more than once for sale or distribution. *Refiller* means a
7 person who engages in the activity of repackaging pesticide product into refillable containers. 40
8 C.F.R. § 165.3.

9 17. *Repackage* means, for the purposes of this part, to transfer a pesticide formulation
10 from one container to another without a change in the composition of the formulation, the
11 labeling content, or the product's EPA registration number, for sale or distribution. 40 C.F.R. §
12 165.3.

13 18. *Secondary containment unit* means any structure, including rigid diking, that is
14 designed and constructed to intercept and contain pesticide spills and leaks and to prevent runoff
15 and leaching from stationary pesticide containers. 40 C.F.R. § 165.3.

16 19. *Stationary pesticide container* means a refillable container that is fixed at a single
17 facility or establishment or, if not fixed, remains at the facility or establishment for at least 30
18 consecutive days, and that holds pesticide during the entire time. 40 C.F.R. § 165.3.

19 *Applicable Containment Regulations*

20 20. Owners or operators of refilling establishments who repackage agricultural pesticides
21 and whose principal business is retail sale (i.e., more than 50% of total annual revenue comes
22 from retail operations) that have a stationary pesticide container or a pesticide dispensing
23 (including container refilling) area must comply with the Containment Regulations. 40 C.F.R. §

1 165.80(b)(1).

2 21. Stationary pesticide containers designed to hold undivided quantities of agricultural
3 pesticides equal to or greater than 500 gallons (1,890 liters) of liquid pesticide are subject to the
4 Container Regulations and must have a secondary containment unit that complies with the
5 Container Regulations (unless the container is empty; holds only pesticide rinsates or wash
6 waters, and is labeled accordingly; holds only pesticides which would be gaseous when released
7 at atmospheric temperature and pressure; or is dedicated to non-pesticide use, and is labeled
8 accordingly). 40 C.F.R. § 165.81 (b).

9 22. Pesticide dispensing areas are subject to the Containment Regulations if agricultural
10 pesticides are dispensed from a stationary pesticide container designed to hold undivided
11 quantities of agricultural pesticides equal to or greater than 500 gallons (1,890 liters) of liquid
12 pesticide for any purpose, including refilling or emptying for cleaning. 40 C.F.R. § 165.82(a)(1).

13 23. Pesticide dispensing areas are subject to the Containment Regulations and must have
14 a containment pad that complies with the requirements of the Containment Regulations if
15 Agricultural pesticides are dispensed from a transport vehicle for purposes of filling a refillable
16 container. 40 C.F.R. § 165.82(a)(3).

17 24. An existing containment structure is one whose installation began on or before
18 November 16, 2006. 40 C.F.R. § 165.83(b).

19 25. Existing secondary containment units for stationary containers of liquid pesticides
20 must have a capacity of at least 100 percent of the volume of the largest stationary pesticide
21 container plus the volume displaced by other containers and appurtenances within the unit. 40
22 C.F.R. § 165.87(c)(1).

23 26. Existing containment pads in pesticide dispensing areas which have a pesticide



1 container or pesticide-holding equipment with a volume of 750 gallons or greater must have a
2 holding capacity of at least 750 gallons. 40 C.F.R. § 165.87(c)(2). Thus, the minimum pad
3 holding capacity must be 750 gallons when large (greater than 750 gallon) containers or
4 pesticide-holding equipment will be on the pad. See 71 FR 47330 (Aug. 16, 2006) at 47397-
5 47398.

6 27. Existing containment structures must be liquid-tight with cracks, seams and joints
7 appropriately sealed. 40 C.F.R. § 165.87(a)(1).

8 28. One of the general design requirements for an existing containment structure is that
9 the owner or operator must protect appurtenances and pesticide containers against damage from
10 operating personnel and moving equipment. Means of protection include, but are not limited to,
11 supports to prevent sagging, flexible connections, the use of guard rails, barriers, and protective
12 cages. 40 C.F.R. § 165.87(b)(1).

13 29. Records of inspection and maintenance for each containment structure and for each
14 stationary pesticide container and its appurtenances, must be kept by the owner or operator for
15 three years and must include the following information: (1) name of the person conducting the
16 inspection or maintenance; (2) date the inspection or maintenance was conducted; (3) conditions
17 noted; and (4) specific maintenance performed. 40 C.F.R. § 165.95(a).

18 30. The deadline for compliance with all applicable containment regulations for new and
19 existing structures was August 17, 2009. 40 C.F.R. § 165.80(c).

20 31. Section 12(a)(2)(S) of FIFRA, 7 U.S.C. § 136j(a)(1)(S), states that it shall be
21 unlawful for any person to violate any regulation issued under Sections 3 or 19 of FIFRA, 7
22 U.S.C. § 136a(a) and 136q.
23

Applicable Container Regulations

32. In the Container Regulations, the term “pesticide product” or “pesticide” refers only to a pesticide product or a pesticide that is subject to the Container Regulations as described in 40 CFR 165.43 paragraphs (a) through (f). 40 C.F.R. §165.43 (g).

33. The Container Regulations apply to all pesticide products other than manufacturing use products, plant-incorporated protectants, and exempt antimicrobial products. 40 C.F.R. §165.43(f).

34. Registrants who distribute or sell a pesticide product in refillable containers must comply with the Container Regulations. 40 C.F.R. § 165.40 (b)(1).

35. Any pesticide product packaged in a refillable container and released for shipment after August 16, 2011 must be packaged in a refillable container that complies with the Container Regulations. 40 C.F.R. § 165.40 (c).

36. External sight gauges, which are pesticide-containing hoses or tubes that run vertically along the exterior of the container from the top to the bottom, are prohibited on stationary containers of liquid pesticides designed to hold undivided quantities of pesticides equal to or greater than 500 gallons (1,890 liters) of liquid pesticide. 40 C.F.R. § 165.45(f)(2)(ii).

37. Refillers of a pesticide product who are not the registrant of the pesticide product are subject to section 165.70 of the Container Regulations, and must maintain records in accordance with paragraph (j) of section 165.70 of the Container Regulations. 40 C.F.R § 165.70(a) and (e)(10). Each time a refiller repackages a pesticide product into a refillable container and distributes or sells the product, the refiller must generate and maintain the following records for at least three years after the date of repackaging: (i) The EPA registration number of the pesticide

1 product distributed or sold in the refillable container. (ii) The date of the repackaging. (iii) The
2 serial number or other identifying code of the refillable container. 40 C.F.R § 165.70(J)(2).

3 38. Section 12(a)(2)(S) of FIFRA, 7 U.S.C. § 136j(a)(1)(S), states that it shall be
4 unlawful for any person to violate any regulation issued under Sections 3 or 19 of FIFRA, 7
5 U.S.C. § 136a(a) and 136q.

6 *Applicable Labeling Regulations*

7 39. Section 156.10(a)(4)(ii)(B) of the Labeling Regulations, 40 C.F.R.
8 §156.10(a)(4)(ii)(B), states that when pesticide products are stored in bulk containers, whether
9 mobile or stationary, which remain in the custody of the user, a copy of the label of labeling,
10 including all appropriate directions for use, shall be securely attached to the container in the
11 immediate vicinity of the discharge control valve.

12 40. Section 156.10(f) of the **Labeling Regulations**, 40 C.F.R. §156.10(f), states that the
13 producing establishment registration number preceded by the phrase "EPA Est.", of the final
14 establishment at which the product was produced may appear in any suitable location on the label
15 or immediate container. It must appear on the wrapper or outside container of the package if the
16 EPA establishment registration number on the immediate container cannot be clearly read
17 through such wrapper or container. For a pesticide product packaged in a refillable container, an
18 appropriately sized area on the label may be left blank after the phrase "EPA Est." to allow the
19 EPA establishment registration number to be marked in by the refiller according to 40 C.F.R.
20 §165.65(h) or §165.70(i) prior to distribution or sale of the pesticide.

21 41. 40 C.F.R. §165.65(h) and §165.70(i) state that before distributing or selling a
22 pesticide product in a refillable container, a refiller must ensure that the label of the pesticide
23 product is securely attached to the refillable container such that the label can be reasonably

1 expected to remain affixed during the foreseeable conditions and period of use, that the label and
2 labeling must comply in all respects with the requirements of part 156, and in particular that the
3 refiller must ensure that the net contents statement and EPA establishment appear on the label.

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

7 43. Section 2(gg) of FIFRA, 7 U.S.C. § 136(gg), states that the term “to distribute or
8 sell” means to distribute, sell, offer for sale, hold for distribution, hold for sale, hold for
9 shipment, ship, deliver for shipment, release for shipment, or receive and (having so received)
10 deliver or offer to deliver.

11 44. Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), states that it is an unlawful
12 for any person in any state to distribute or sell to any person any pesticide which is adulterated or
13 misbranded.

14 C. COMPLAINANT’S ALLEGATIONS

15 *General Allegations*

16 Complainant alleges:

17 45. Respondent is a “person” as that term is defined by Section 2(s) of FIFRA, 7 U.S.C.
18 § 136(s), and as such is subject to FIFRA and the regulations promulgated thereunder.

19 46. Respondent is an *owner* and *operator* of three *facilities* which are each an
20 *establishment*, as those terms are defined by 40 C.F.R. § 165.3, located at 3168 County Road 33,
21 Glenn, California (the “**Glenn Establishment**”), 6800 East Whitmore Avenue, Hughson,
22 California (the “**Hughson Establishment**”), and 6415 S. Rainbow Road, Buckeye, Arizona (the
23 “**Buckeye Establishment**”).

1 47. The **Glenn Establishment** has EPA Establishment Number 2935-CA-27.

2 48. At all times relevant to this CAFO, the **Glenn Establishment** *repackages* (as that
3 term is defined by 40 C.F.R. § 165.3) Superior 440 Spray Oil, EPA Reg. No. 2935-542
4 (“Superior 440”).

5 49. The **Hughson Establishment** has EPA Establishment Number 2935-CA-035.

6 50. At all times relevant to this CAFO, the **Hughson Establishment** *repackages* (as that
7 term is defined by 40 C.F.R. § 165.3) 440 Superior Spray Oil, EPA Reg. No. 2935-546 (“440
8 Superior”), Touchdown Total, EPA Reg. No. 100-1169 (“Touchdown”), and Roundup
9 Powermax Herbicide, EPA Reg. No. 524-549 (“Roundup”).

10 51. The **Buckeye Establishment** has EPA Establishment Number 2935-AZ-001.

11 52. At all times relevant to this CAFO, the **Buckeye Establishment** *repackages* (as that
12 term is defined by 40 C.F.R. § 165.3) Roundup and Acumen, EPA Reg. No. 241-337-55467
13 (“Acumen”).

14 53. Superior 440, 440 Superior, Touchdown, Roundup, and Acumen are each an
15 *agricultural pesticide*, as that term is defined by 40 C.F.R. § 165.3.

16 54. The **Glenn Establishment**, the **Hughson Establishment**, and the **Buckeye**
17 **Establishment** are each a *refilling establishment*, as that term is defined by 40 C.F.R. § 165.3,
18 that *repackages* agricultural pesticides and conducts pesticide dispensing.

19 55. Each of the **Glenn Establishment’s**, **Hughson Establishment’s**, and **Buckeye**
20 **Establishment’s** principal business is retail sale.

21 *Glenn Establishment*

22 56. At all times relevant to this CAFO, the facility at Glenn Establishment included a
23 stationary pesticide container (the “Glenn Pesticide Tank”) which is a *stationary pesticide*

1 container located within a *secondary containment unit* (the “Glenn Secondary Containment
2 Area”), as those terms are defined by 40 C.F.R. § 165.3.

3 57. At all times relevant to this CAFO, the Glenn Pesticide Tank held Superior 440. The
4 Glenn Pesticide Tank has a holding capacity of approximately **8,455** gallons. The Glenn
5 Pesticide Tank is designed to hold undivided quantities of agricultural pesticides equal to or
6 greater than 500 gallons of liquid pesticide.

7 58. In addition to the Glenn Pesticide Tank, and the Glenn Secondary Containment Area,
8 the Glenn Establishment includes a *pesticide dispensing area* with a concrete *containment pad*,
9 as those terms are defined by 40 C.F.R. § 165.3 (the “Glenn Containment Pad”).

10 59. The containment structures at the Glenn Establishment were constructed on or before
11 November 16, 2006.

12 60. The containment structures at the Glenn Establishment are each existing containment
13 structures, as that term is defined by 40 C.F.R. § 165.83(b).

14 **Count I: Insufficient Capacity of Glenn Secondary Containment Area**

15 61. Paragraphs 1 through 60 are incorporated herein by reference.

16 62. The volume displaced by **8,455** gallons (100 percent of the volume of the largest
17 stationary pesticide container, the Glenn Pesticide Tank, within the Glenn Secondary
18 Containment Area) plus 1,925 gallons (the volume displaced by other containers and
19 appurtenances within the the Glenn Secondary Containment Area) equals approximately **10,380**
20 **gallons.**

21 63. The Glenn Secondary Containment Area is required to have a holding capacity of
22 approximately **10,380 gallons.**

23 64. The Glenn Secondary Containment Area has a holding capacity of approximately

1 **8,474 gallons.**

2 65. Respondent failed to have the required capacity for the Glenn Secondary
3 Containment Area, in violation of 40 C.F.R. § 165.87(c)(1).

4 66. Respondent violated section 12(a)(2)(S) of FIFRA, 7 U.S.C. § 136j(a)(2)(S), by
5 failing to comply with 40 C.F.R. § 165.87(c)(1).

6 **Count II: Failure to Protect Appurtenances (Glenn Establishment)**

7 67. Paragraphs 1 through 66 are incorporated herein by reference.

8 68. On or about April 27, 2011, equipment used to transfer pesticide from the Glenn
9 Pesticide Tank, including hoses, overhung the containment wall and were unprotected from
10 damage operating personnel and moving equipment. These hoses and equipment are
11 *appurtenances* as that term is defined by 40 C.F.R. § 165.3.

12 69. On or about April 27, 2011, Respondent failed to protect appurtenances against
13 damage from operating personnel and moving equipment, in violation of 40 C.F.R. §
14 165.87(b)(1).

15 70. On or about April 27, 2011, Respondent violated section 12(a)(2)(S) of FIFRA, 7
16 U.S.C. § 136j(a)(2)(S), by failing to comply with 40 C.F.R. § 165.87(b)(1).

17 **Count III: Failure to Keep Containment Structures Liquid-Tight (Glenn Establishment)**

18 71. Paragraphs 1 through 70 are incorporated herein by reference.

19 72. On April 27, 2011, the containment pad and containment wall at the Glenn
20 Establishment had unsealed cracks.

21 73. On or about April 27, 2011, at the Glenn Establishment, Respondent failed to keep
22 containment structures liquid-tight with cracks, seams and joints appropriately sealed. 40 C.F.R.
23 § 165.87(a)(1).

1 74. On or about April 27, 2011, at the Glenn Establishment, Respondent violated section
2 12(a)(2)(S) of FIFRA, 7 U.S.C. § 136j(a)(2)(S), by failing to keep containment structures liquid-
3 tight with cracks, seams and joints appropriately sealed, in violation of 40 C.F.R. § 165.87(a)(1).

4 *Hughson Establishment*

5 75. The Hughson Establishment includes bulk pesticide tanks which are *stationary*
6 *pesticide containers* located within a *secondary containment unit* (the “secondary containment
7 structure”), as those terms are defined by 40 C.F.R. § 165.3.

8 76. At all times relevant to this CAFO, at the Hughson Establishment Tank 13 contained
9 Roundup, Tank 14 contained Touchdown, and Tank 15 contained 440 Superior.

10 77. At the Hughson Establishment, Tank 13 holds 4,400 gallons, Tank 14 holds 4,500
11 gallons, and Tank 15 holds 20,000 gallons. Each of Tanks 13, Tank 14, and Tank 15 at the
12 Hughson Establishment were designed to hold undivided quantities of agricultural pesticides
13 equal to or greater than 500 gallons of liquid pesticide.

14 78. Adjacent to Tanks 13, Tank 14, and Tank 15, the Hughson Establishment contains a
15 *pesticide dispensing area* with a concrete *containment pad*, as those terms are defined by 40
16 C.F.R. § 165.3 (the “Hughson Containment Pad”).

17 79. The containment structures at the **Hughson** Establishment were constructed on or
18 before November 16, 2006.

19 80. The containment structures at the **Hughson** Establishment are *existing containment*
20 *structures*, as that term is defined by 40 C.F.R. § 165.83(b).

21 **Count IV: Failure to Protect Appurtenances (Hughson Establishment)**

22 81. Paragraphs 1 through 80 are incorporated herein by reference.

23 82. On or about January 18, 2012, equipment used to transfer pesticide, including hoses,



1 located on the east wall of the Hughson tank farm were protruding onto the Hughson
2 Containment Pad and unprotected from damage operating personnel and moving equipment.
3 These hoses and equipment are *appurtenances* as that term is defined by 40 C.F.R. § 165.3.

4 83. On or about January 18, 2012, Respondent failed to protect appurtenances against
5 damage from operating personnel and moving equipment, in violation of 40 C.F.R. §
6 165.87(b)(1).

7 84. On or about January 18, 2012, Respondent violated section 12(a)(2)(S) of FIFRA, 7
8 U.S.C. § 136j(a)(2)(S), by failing to comply with 40 C.F.R. § 165.87(b)(1).

9 **Count V: Failure to Failure to Keep Containment Structures Liquid-Tight (Hughson)**

10 85. Paragraphs 1 through 84 are incorporated herein by reference.

11 86. On January 18, 2012, the Hughson Establishment secondary containment structure
12 had unsealed cracks. On January 18, 2012, the Hughson Containment Pad had unsealed cracks.

13 87. On or about January 18, 2012, at the Hughson Establishment, Respondent failed to
14 keep containment structures liquid-tight with cracks, seams and joints appropriately sealed. 40
15 C.F.R. § 165.87(a)(1).

16 88. On or about January 18, 2012, at the Hughson Establishment, Respondent violated
17 section 12(a)(2)(S) of FIFRA, 7 U.S.C. § 136j(a)(2)(S), by failing to keep containment structures
18 liquid-tight with cracks, seams and joints appropriately sealed, in violation of 40 C.F.R. §
19 165.87(a)(1).

20 **Count VI: Distribution or Sale of Misbranded Pesticide (Hughson)**

21 89. Paragraphs 1 through 88 are incorporated herein by reference.

22 90. Respondent was “distributing or selling”, as that term is defined by Section 2(gg) of
23 FIFRA, 7 U.S.C. § 136(gg), 440 Superior in Tank 15 at the Hughson Establishment.

1 91. On or about January 18, 2012, the label of 440 Superior in Tank 15 at the Hughson
2 Establishment failed to mark or identify the EPA Establishment Number of the manufacturing
3 point where the pesticide product was last produced.

4 92. By failing to mark the EPA Establishment Number of the manufacturing point where
5 the pesticide product was last produced on the label of 440 Superior in Tank 15 at the Hughson
6 Establishment, as required by 40 C.F.R. §156.10(a)(4)(ii)(B) and 156.10(f), Respondent
7 misbranded 440 Superior in Tank 15.

8 93. On or about January 18, 2012, Respondent violated Section 12(a)(1)(E) of FIFRA, 7
9 U.S.C. § 136j(a)(1)(E), by distributing or selling misbranded 440 Superior in Tank 15 at the
10 Hughson Establishment.

11 **Count VII: Use of External Sight Gage (Tank 15, Hughson)**

12 94. Paragraphs 1 through 93 are incorporated herein by reference.

13 95. Tank 15 at Hughson Establishment is a *stationary pesticide container*, as that term is
14 defined by 40 C.F.R. §165.3. Tank 15 is designed to hold undivided quantities of pesticides equal
15 to or greater than 500 gallons of liquid pesticide.

16 96. On or about January 18, 2012, Tank 15 contained 440 Superior.

17 97. 440 Superior is a "pesticide product" as that term is defined by 40 C.F.R. 165.43(g),
18 subject to the Container Regulations.

19 98. Wilbur-Ellis is the registrant of 440 Superior. Wilbur-Ellis distributes or sells 440
20 Superior in refillable containers. Wilbur-Ellis has released 440 Superior for shipment after
21 August 16, 2011.

22 99. On or about January 18, 2012, Tank 15 had an external sight gauge, specifically a
23 pesticide-containing hose or tube that run vertically along the exterior of the container from the

1 top to the bottom.

2 100. On or about January 18, 2012, at the Hughson Establishment, Respondent violated
3 section 12(a)(2)(S) of FIFRA, 7 U.S.C. § 136j(a)(2)(S), by using an external sight gage on Tank
4 15, in violation of 40 C.F.R. § 165.45(f)(2)(ii).

5 *Buckeye Establishment*

6 101. The Buckeye Establishment includes bulk pesticide tanks which are *stationary*
7 *pesticide containers* located within a *secondary containment unit* (the “secondary containment
8 structure”), as those terms are defined by 40 C.F.R. § 165.3.

9 102. At all times relevant to this CAFO, at the Buckeye Establishment Tank 1 contained
10 Roundup, and Tank 2 contained Acumen.

11 103. At the Buckeye Establishment, Tank 1 holds 4500 gallons, and Tank 2 holds 5100
12 gallons. Each of Tanks 1 and 2 at the Buckeye Establishment were designed to hold undivided
13 quantities of agricultural pesticides equal to or greater than 500 gallons of liquid pesticide.

14 104. Adjacent to Tanks 1 and 2, the Buckeye Establishment contains a *pesticide*
15 *dispensing area* with a concrete *containment pad*, as those terms are defined by 40 C.F.R. §
16 165.3 (the “Buckeye Containment Pad”).

17 105. The containment structures at the Buckeye Establishment were constructed on or
18 before November 16, 2006.

19 106. The containment structures at the Buckeye Establishment are existing containment
20 structures, as that term is defined by 40 C.F.R. § 165.83(b).

21 **Count IIX: Failure to Failure to Keep Containment Structures Liquid-Tight (Buckeye)**

22 107. Paragraphs 1 through 106 are incorporated herein by reference.

23 108. On January 11, 2013, the Buckeye Containment Pad had unsealed cracks.
24



1 109. On or about January 11, 2013, at the Buckeye Establishment, Respondent failed to
2 keep containment structures liquid-tight with cracks, seams and joints appropriately sealed. 40
3 C.F.R. § 165.87(a)(1).

4 110. On or about January 18, 2012, at the Buckeye Establishment, Respondent violated
5 section 12(a)(2)(S) of FIFRA, 7 U.S.C. § 136j(a)(2)(S), by failing to keep containment structures
6 liquid-tight with cracks, seams and joints appropriately sealed, in violation of 40 C.F.R. §
7 165.87(a)(1).

8 **Count IX: Distribution or Sale of Misbranded Pesticide (Buckeye, Roundup)**

9 111. Paragraphs 1 through 110 are incorporated herein by reference.

10 112. Respondent was “distributing or selling”, as that term is defined by Section 2(gg) of
11 FIFRA, 7 U.S.C. § 136(gg), Roundup in Tank 1 at the Buckeye Establishment.

12 113. On or about January 11, 2013, the label of Roundup in Tank 1 at the Buckeye
13 Establishment failed to mark or identify the EPA Establishment Number of the manufacturing
14 point where the pesticide product was last produced.

15 114. By failing to mark the EPA Establishment Number of the manufacturing point
16 where the pesticide product was last produced on the label of Roundup in Tank 1 at the Buckeye
17 Establishment, as required by 40 C.F.R. §156.10(a)(4)(ii)(B) and 156.10(f), Respondent
18 misbranded Roundup in Tank 1.

19 115. On or about January 11, 2013, Respondent violated Section 12(a)(1)(E) of FIFRA, 7
20 U.S.C. § 136j(a)(1)(E), by distributing or selling misbranded Roundup in Tank 1 at the Buckeye
21 Establishment.

22 **Count X: Distribution or Sale of Misbranded Pesticide (Buckeye, Acumen)**

23 116. Paragraphs 1 through 115 are incorporated herein by reference.

1 117. Respondent was “distributing or selling”, as that term is defined by Section 2(gg) of
2 FIFRA, 7 U.S.C. § 136(gg), Acumen in Tank 2 at the Buckeye Establishment.

3 118. On or about January 11, 2013, the label of Acumen in Tank 2 at the Buckeye
4 Establishment failed to mark or identify the EPA Establishment Number of the manufacturing
5 point where the pesticide product was last produced.

6 119. By failing to mark the EPA Establishment Number of the manufacturing point
7 where the pesticide product was last produced on the label of Acumen in Tank 2 at the Buckeye
8 Establishment, as required by 40 C.F.R. §156.10(a)(4)(ii)(B) and 156.10(f), Respondent
9 misbranded Acumen in Tank 2.

10 120. On or about January 11, 2013, Respondent violated Section 12(a)(1)(E) of FIFRA, 7
11 U.S.C. § 136j(a)(1)(E), by distributing or selling misbranded Acumen in Tank 2 at the Buckeye
12 Establishment.

13 **Count XI: Failure to Keep Records of Inspection and Maintenance (Buckeye)**

14 121. Paragraphs 1 through 120 are incorporated herein by reference.

15 122. Respondent’s records of inspection and maintenance at the Buckeye Establishment
16 between June, 2011 and December, 2012 were labeled “Pesticide Tank Farm Inspection” and
17 conditions noted and specific maintenance performed were to be recorded in a section under
18 “problems found.”
19

20 123. The record of inspection and maintenance signed by Respondent’s inspector on
21 December 22, 2012 states “hose leaking replaced hose on no longer leaking” followed by the
22 signature of the inspector and the signature of a reviewer.

23 124. The record of inspection and maintenance signed by Respondent’s inspector on
24 December 17, 2011, states “Replace bad labels. Labels replaced 12-17-11”.

1 125. The record of inspection and maintenance signed by Respondent's inspector on
2 June 27, 2011, states "4 – Roundup Tank leaking at elbow on the bottom of the tank. Tank was
3 repaired and is no longer leaking" with the notation below all signatures of "we will fix as soon as
4 tank is at a lower capacity."

5 126. The record signed by Respondent's inspector on December 22, 2012 does not
6 identify the stationary pesticide container or appurtenance involved. The record signed by
7 Respondent's inspector on December 17, 2011 does not identify the stationary pesticide container
8 involved. The record signed by Respondent's inspector on June 27, 2011, does not indicate the
9 date the maintenance was conducted. Records of inspection and maintenance at the Buckeye
10 Establishment between June, 2011 and December, 2012 generically labeled "Pesticide Tank
11 Farm Inspection" with no conditions noted and no specific maintenance performed do not record
12 inspection of each containment structure and each stationary pesticide container and its
13 appurtenances.

14 127. Between June, 2011, and December, 2012, at the Buckeye Establishment,
15 Respondent failed to keep records of inspection and maintenance for each containment structure
16 and for each stationary pesticide container and its appurtenances that include the name of the
17 person conducting the inspection or maintenance; date the inspection or maintenance was
18 conducted; conditions noted; and specific maintenance performed. 40 C.F.R. § 165.95(a).

19 128. Between June, 2011, and December, 2012, at the Buckeye Establishment,
20 Respondent violated section 12(a)(2)(S) of FIFRA, 7 U.S.C. § 136j(a)(2)(S), by failing to keep
21 records of inspection and maintenance for each containment structure and for each stationary
22 pesticide container and its appurtenances including the name of the person conducting the
23 inspection or maintenance; date the inspection or maintenance was conducted; conditions noted;



1 and specific maintenance performed, in violation of 40 C.F.R. § 165.95(a).

2 **Count XII: Failure to Keep Refiller Records (Buckeye)**

3 129. Paragraphs 1 through 128 are incorporated herein by reference.

4 130. At the Buckeye Establishment, Respondent is a refiller that is not a registrant of
5 Roundup and Acumen.

6 131. Respondent's record of distribution and sale of Roundup in a refillable container on
7 July 13, 2012 does not include the EPA registration number of the pesticide product distributed
8 or sold in the refillable container, or the serial number or other identifying code of the refillable
9 container.

10 132. Respondent's record of distribution and sale of Acumen in a refillable container on
11 or after January 7, does not include the EPA registration number of the pesticide product
12 distributed or sold in the refillable container, the date of repackaging, or the serial number or
13 other identifying code of the refillable container.

14 133. Each time Respondent repackaged a pesticide product into a refillable container and
15 distributed or sold the product, including but not limited to July 13, 2012, Respondent failed to
16 generate and maintain a record including: (i) The EPA registration number of the pesticide
17 product distributed or sold in the refillable container. (ii) The date of the repackaging. (iii) The
18 serial number or other identifying code of the refillable container, as required by 40 C.F.R §
19 165.70(e)(10) and (j)(2).

20 134. Respondent violated section 12(a)(2)(S) of FIFRA, 7 U.S.C. § 136j(a)(2)(S), by
21 failing to generate and maintain a complete record as required by 40 C.F.R § 165.70(j)(2) each
22 time (including but not limited to July 13, 2012) Respondent repackaged a pesticide product into
23 a refillable container and distributed or sold the product, as required by 40 C.F.R § 165.70(e)(10).



1 **D. RESPONDENT'S ADMISSIONS**

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

9 **E. CIVIL ADMINISTRATIVE PENALTY**

10 136. Respondent consents to the assessment of a penalty in the amount of **SIXTY TWO**
11 **THOUSAND EIGHTY DOLLARS (\$62,080)** as final settlement and complete satisfaction of
12 the civil claims against Respondent arising from the facts alleged in Section I.C. of the CAFO
13 and under the Act, as alleged in Section I.C. of the CAFO. Respondent shall pay this civil penalty
14 within thirty (30) days of the effective date of this CAFO. The civil penalty shall be paid by
15 remitting a certified or cashier's check, including the name and docket number of this case, for
16 the amount, payable to "Treasurer, United States of America," (or be paid by one of the other
17 methods listed below) and sent as follows:

18 **Regular Mail:**

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

24 **Wire Transfers:**

25 Wire transfers must be sent directly to the Federal Reserve Bank in New
26 York City with the following information:
27 Federal Reserve Bank of New York
28

1 ABA = 021030004
2 Account = 68010727
3 SWIFT address = FRNYUS33
4 33 Liberty Street
5 New York, NY 10045
6 Field Tag 4200 of the Fedwire message should read "D 68010727
7 Environmental Protection Agency"
8

9 Overnight Mail:

10 U.S. Bank
11 1005 Convention Plaza
12 Mail Station SL-MO-C2GL
13 ATTN Box 979077
14 St. Louis, MO 63101
15

16 ACH (also known as REX or remittance express):

17 Automated Clearinghouse (ACH) for receiving U.S. currency
18 PNC Bank
19 808 17th Street, NW
20 Washington, DC 20074
21 ABA = 051036706
22 Transaction Code 22 – checking
23 Environmental Protection Agency
24 Account 31006
25 CTX Format
26

27 On Line Payment:

28 This payment option can be accessed from the information below:
29 www.pay.gov
30 Enter "sfo1.1" in the search field
31 Open form and complete required fields
32

33 If clarification regarding a particular method of payment remittance is
34 needed, contact the EPA's Cincinnati Finance Center at (513) 487-2091.
35
36

37 A copy of each check, or notification that the payment has been made by one of the other
38 methods listed above, including proof of the date payment was made, shall be sent with a
39 transmittal letter, indicating Respondent's name, the case title, and docket number, to the
40 following addresses:
41

1 Regional Hearing Clerk
2 Office of Regional Counsel (ORC-1)
3 U.S. Environmental Protection Agency, Region IX
4 75 Hawthorne Street
5 San Francisco, CA 94105

6
7 Bill Lee
8 Enforcement Division (ENF 3-3)
9 U.S. Environmental Protection Agency, Region IX
10 75 Hawthorne Street
11 San Francisco, CA 94105

12
13 Margaret Alkon
14 Office of Regional Counsel (ORC-2)
15 U.S. Environmental Protection Agency, Region IX
16 75 Hawthorne Street
17 San Francisco, CA 94105
18

19 137. In the event that Respondent fails to pay the civil administrative penalty assessed
20 above by its due date, Respondent shall pay to Complainant an additional stipulated penalty in
21 the amount of **FIVE HUNDRED DOLLARS (\$500)** for each day that payment is late. Upon
22 Complainant's written demand, payable shall immediately become due and payable.

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

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

29 b. The debt being collected by administrative offset (i.e., the withholding of
30 money payable by the United States to, or held by the United States for, a person to satisfy the
31 debt the person owes the Government), which includes, but is not limited to, referral to the

1 Internal Revenue Service for offset against income tax refunds. 40 C.F.R. Part 13, Subparts C
2 and H.

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

8 **F. CERTIFICATION OF COMPLIANCE**

9 139. In executing this CAFO, Respondent certifies that it is not violating FIFRA,
10 including the Container/Containment Regulations, at its Glenn Establishment, Hughson
11 Establishment, or Buckeye Establishment.

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

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

19 141. In accordance with 40 C.F.R. § 22.18(c), this CAFO only resolves Respondent's
20 liabilities for federal civil penalties for the violation and facts specifically alleged in Section I.C
21 of this CAFO. Nothing in this CAFO is intended to or shall be construed to resolve: (i) any civil
22 liability for violations of any provision of any federal, state, or local law, statute, regulation, rule,
23 ordinance, or permit not specifically alleged in Section I.C of this CAFO; or (ii) any criminal

1 liability. EPA specifically reserves any and all authorities, rights, and remedies available to it
2 (including, but not limited to, injunctive or other equitable relief or criminal sanctions) to address
3 any violation of this CAFO or any violation not specifically alleged in Section I.C of this CAFO.
4 This CAFO does not exempt, relieve, modify, or affect in any way Respondent's duties to
5 comply with all applicable federal, state, and local laws, regulations, rules, ordinances, and
6 permits.

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

10 143. Except as set forth in Paragraph 138 above, each party shall bear its own fees, costs,
11 and disbursements in this action.

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

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

17 146. The undersigned representatives of each party to this Consent Agreement certify
18 that each is duly authorized by the party whom he or she represents to enter into the terms and
19



1 conditions of this Consent Agreement and Final Order and bind that party to it.

2
3
4 **WILBUR-ELLIS COMPANY:**

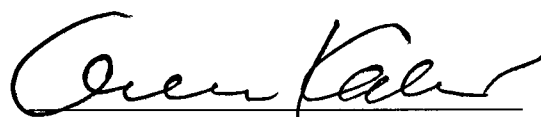
5
6
7 Date: 10/21/13 By: _____

8
9
10 Name: DAVID GRANOFF

11
12
13 Title: VICE-PRESIDENT

14
15
16
17
18
19 **UNITED STATES ENVIRONMENTAL PROTECTION AGENCY:**

20
21
22
23 Date: 12/5/2013 By: _____

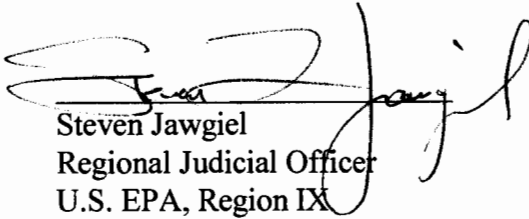


24 ARLENE KABEI
25 Assistant Director
26 Water and Pesticide Branch, Enforcement Division
27 U.S. Environmental Protection Agency,
28 Region IX
29
30

1 **II. FINAL ORDER**

2
3 IT IS HEREBY ORDERED that this Consent Agreement and Final Order be entered and
4 that Respondent shall pay a civil administrative penalty in the amount of **SIXTY TWO**
5 **THOUSAND EIGHTY DOLLARS (\$62,080)** in accordance with the terms set forth in the
6 Consent Agreement.

7
8
9
10 Date: 12/16/13

11 
12 Steven Jawgiel
13 Regional Judicial Officer
14 U.S. EPA, Region IX

CERTIFICATE OF SERVICE

I certify that the original of the fully executed Consent Agreement and Final Order, (Docket No FIFRA-09-2014-00 07) was filed with the Regional Hearing Clerk, U.S. EPA, Region IX, 75 Hawthorne Street, San Francisco, CA 91405, and that a true and correct copy of the same was sent to the following parties:

A copy was mailed via CERTIFIED MAIL to:

Mr. David Granoff, Vice President
Wilbur-Ellis Company
345 California Street, 27th Floor
San Francisco, CA 94104

CERTIFIED MAIL NUMBER: 7010-2780-0000-8388-6910

An additional copy was hand-delivered to the following U.S. EPA case attorney:

Margaret Alkon, Esq
Office of Regional Counsel
U.S. EPA, Region IX
75 Hawthorne Street
San Francisco, CA 94105

Perkins

FOR: STEVEN ARMSEY
ACTING Regional Hearing Clerk
U.S. EPA, Region IX

12/17/2013

Date