

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION VII

901 N. 5TH STREET
KANSAS CITY, KANSAS 66101
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ENVIRONMENTAL PROTECTION
AGENCY-REGION VII
REGIONAL HEARING CLERK

IN THE MATTER OF)
)
Vitalix, Inc.)
2692 County Road 57) Docket No. FIFRA- 07-2007-0006
Alliance, Nebraska 69301)
)
Respondent)

CONSENT AGREEMENT AND FINAL ORDER

The U.S. Environmental Protection Agency (EPA), Region VII and Vitalix, Inc. (Respondent) have agreed to a settlement of this action before filing of a complaint, and thus this action is simultaneously commenced and concluded pursuant to Rules 22.13(b), 22.18(b)(2) and 22.18(b)(3) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits (Consolidated Rules), 40 C.F.R. §§ 22.13(b), 22.18(b)(2) and 22.18(b)(3).

ALLEGATIONS

Jurisdiction

1. This 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. § 136j.
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. The Complainant, by delegation from the Administrator of the EPA and the Regional Administrator, EPA, Region VII, is the Director of the Water, Wetlands, and Pesticides Division, EPA, Region VII.
4. The Respondent is Vitalix, Inc., a supplemental distributor and pesticide manufacturer, located at 2692 County Road 57, Alliance, Nebraska 69301. The Respondent is and was at all times referred to in this Complaint, as a "person" as defined by Section 2(s) of FIFRA, 7 U.S.C. § 136(s), and a corporation qualified to do business in the state of Nebraska.

Statutory and Regulatory Background

5. Section 12(a)(1)(C) of FIFRA states that it shall be unlawful for any person in any State to distribute or sell to any person any registered pesticide the composition of which differs at the time of its distribution or sale from its composition as described in the statement required in connection with its registration. 7 U.S.C. § 136j(a)(1)(C). Pesticide registration requirements are set forth in Section 3 of FIFRA. 7 U.S.C. § 136a.

6. Section 12(a)(1)(E) of FIFRA states that it shall be unlawful for any person to distribute or sell to any person any pesticide which is adulterated or misbranded. 7 U.S.C. § 136j(a)(1)(E).

7. Pesticide registrants may distribute or sell a registered product under another person's name and address instead of (or in addition to) their owner. Such distribution and sale is termed "supplemental distribution." 40 C.F.R. § 152.132.

8. The term "to distribute or sell" means to distribute, sell, offer for sale, hold for distribution, hold for sale, hold for shipment, ship, deliver for shipment, release for shipment, or receive and (having so received) deliver or offer to deliver. 7 U.S.C. § 136(gg).

9. A pesticide is "misbranded" if its labeling bears any statement, design, or graphic representation relative thereto or to its ingredients which is false or misleading in any particular. 7 U.S.C. § 136(q).

Factual Allegations

10. Respondent, at all times relevant to this Complaint, operated a registered pesticide-producing establishment in Des Moines, Iowa, under EPA Establishment No. 65901-NE-1.

11. Respondent applied for and received authorization to act as a supplemental distributor for two products registered to Wellmark International.

12. Wellmark International is the registrant for RF2025 Tub, EPA Registration No. 2724-495. Respondent is authorized to act as supplemental distributor of RF2025 Tub under the distributor product name, Vitalix No. 5 IRG Fly Tub. The active ingredient of RF2025 Tub is S-methoprene with a label claim of 0.050 percent concentration.

13. Wellmark International is the registrant for RF2002 Block, EPA Registration No. 2724-492. Respondent is authorized to act as a supplemental distributor of RF2002 Block under the distributor product name, Mineralix Fly Tub with IGR. The active ingredient of RF2002 Block is S-methoprene with a label claim of 0.100 percent concentration.

14. On August 3, 2005, a representative of the Nebraska Department of Agriculture (NDA) inspected the Respondent's Alliance, Nebraska facility. The NDA representative collected

copies of labels and products produced by the facility, documentary shipping records, and records of sales of products. The representative collected samples of Vitalix No. 5 "IRG" Fly Tub and Mineralix Fly Tub with IGR.

15. On September 9, 2005, a NDA representative returned to Respondent's facility to collect a voluntary statement and supplemental distributor agreements.

VIOLATIONS

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

Count 1

17. Complainant hereby incorporates the allegations contained in paragraphs 1 through 15 above, as if fully set forth herein.

18. Analytical results of samples collected during the August 2005 inspection determined the composition of Vitalix No. 5 IRG Fly Tub. The sample contained 0.003 percent of the active ingredient, S-methoprene.

19. The label collected at the August 2005 inspection for Vitalix No. 5 IRG Fly Tub indicates the concentration of the active ingredient of S-methoprene is 0.05 percent.

20. Respondent acknowledged that the sample products were packaged, labeled, and released for shipment to customers.

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

22. Respondent violated Section 12(a)(1)(E) of FIFRA by holding for sale or distribution a misbranded pesticide. 7 U.S.C. § 136j(a)(1)(E).

COUNT 2

23. Complainant hereby incorporates the allegations contained in paragraphs 1 through 15 above, as if fully set forth herein.

24. Analytical results of samples collected during the August 2005 inspection determined the composition of Mineralix Fly Tub with IGR. The sample contained 0.002 percent of the active ingredient, S-methoprene.

25. The label collected at the August 2005 inspection for Mineralix Fly Tub with IGR indicates the concentration of the active ingredient of S-methoprene is 0.10 percent.

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

27. Respondent violated Section 12(a)(1)(E) of FIFRA by holding for sale or distribution a misbranded pesticide. 7 U.S.C. § 136j(a)(1)(E).

CONSENT AGREEMENT

It is hereby agreed and accepted by Respondent that:

1. Respondent and EPA agree to the terms of this Consent Agreement and Final Order and Respondent agrees to comply with the terms of the Final Order portion of this Consent Agreement and Final Order.

2. Respondent admits the jurisdictional allegations of this Consent Agreement and Final Order and agrees not to contest EPA's jurisdiction in this proceeding or any subsequent proceeding to enforce the terms of the Final Order set forth below.

3. Respondent neither admits nor denies the factual allegations and legal conclusions set forth in this Consent Agreement and Final Order.

4. Respondent waives its right to a judicial or administrative hearing on any issue of fact or law set forth above and its right to appeal the Final Order accompanying this Consent Agreement.

5. Respondent and Complainant agree to conciliate the matters set forth in this Consent Agreement and Final Order without the necessity of a formal hearing and to bear their respective costs and attorney's fees.

6. This Consent Agreement and Final Order addresses all civil administrative claims for the FIFRA violations identified above. Complainant reserves the right to take any enforcement action with respect to any other violations of FIFRA or any other applicable law.

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

8. The undersigned representative of Respondent certifies that he or she is fully authorized to enter the terms and conditions of this Consent Agreement and Final Order and to execute and legally bind Respondent to it.

9. Respondent certifies by signing this Consent Agreement and Final Order that, to its knowledge, it is presently in compliance with FIFRA, 7 U.S.C. § 136 et. seq. and all regulations promulgated thereunder.

10. Respondent agrees that, in settlement of the claims alleged in this Consent Agreement and Final Order, Respondent shall pay a penalty of \$ 7,280.00 as set forth in Paragraph 1 of the Final Order.

11. The effect of settlement described in paragraph 10 above is conditioned upon the accuracy of the Respondent's representations to EPA, as memorialized in paragraph 9 above.

12. Nothing in this Consent Agreement shall be construed as a release from any other action under any law and/or regulation administered by the U. S. Environmental Protection Agency. Nothing contained in the Final Order portion of this Consent Agreement and Final Order shall alter or otherwise affect Respondent's obligation to comply with all applicable federal, state and local environmental statutes and regulations and applicable permits.

13. Failure to pay the assessed penalty may result in the referral of this matter to the United States Department of Justice for collection. If payment is not received on or before the due date, interest will be assessed at the annual rate established by the Secretary of the Treasury pursuant to 31 U.S.C. § 3717. The interest will be assessed on the overdue amount from the due date through the date of payment.

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, in settlement of the allegations set forth in the Complaint, shall pay by cashier's or certified checks, a civil penalty, for the violations cited herein, in the amount of Seven Thousand Two Hundred and Eighty Dollars (\$ 7,280.00), on or before thirty (30) days of the effective date this Final Order.

2. Payment of the penalty shall be by cashier or certified check which shall reference Docket Number FIFRA- 07-2007-0006, and made payable to "Treasurer, United States of America" and remitted to:

Regional Hearing Clerk
United States Environmental Protection Agency
Region VII
c/o Mellon Bank
P.O. Box 371099M,
Pittsburgh, Pennsylvania 15251.

3. A copy of the check shall simultaneously be sent to the following:

Kelley Hickman
Office of Regional Counsel
United States Environmental Protection Agency
Region VII
901 North 5th Street
Kansas City, Kansas 66101

and

Kathy Robinson
Regional Hearing Clerk
Office of Regional Counsel
United States Environmental Protection Agency
Region VII
901 North 5th Street
Kansas City, Kansas 66101

4. No portion of the civil penalty or interest paid by Respondent pursuant to the requirements of this Consent Agreement and Final Order shall be claimed by Respondent as a deduction for federal, state, or local income tax purposes.

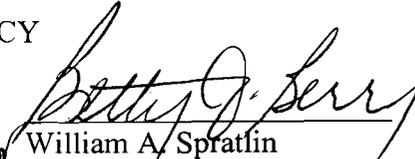
5. The effective date of this Order shall be the date on which it is signed by the Regional Judicial Officer.

6. This executed Consent Agreement and Final Order shall be filed with the Regional Hearing Clerk, U.S. Environmental Protection Agency, Region VII, 901 North 5th Street, Kansas City, Kansas, 66101.

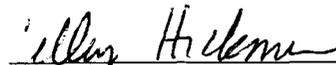
COMPLAINANT:

U.S. ENVIRONMENTAL PROTECTION AGENCY

Date: 04/10/07

By: 
for William A. Spratlin
Director
Water, Wetlands, and Pesticides Division

Date: 4/9/07

By: 
Kelley Hickman
Assistant Regional Counsel

RESPONDENT:

Vitalix, Inc.

Date:

4/4/07

By:



Printed Name:

Greg Olson

Title:

President

IT IS SO ORDERED. This Order shall become effective immediately.

Date: April 12, 2007



ROBERT L. PATRICK
Regional Judicial Officer
U.S. Environmental Protection Agency
Region VII

IN THE MATTER OF Vitalix, Inc., Respondent
Docket No. FIFRA-07-2007-0006

CERTIFICATE OF SERVICE

I certify 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 hand delivered to
Attorney for Complainant:

Kelley Hickman
Assistant Regional Counsel
Region VII
United States Environmental Protection Agency
901 N. 5th Street
Kansas City, Kansas 66101

Copy by Certified Mail Return Receipt to:

Greg Olson, President
Vitalix, Inc.
2692 County Road 57
Alliance, Nebraska 69301

Dated: 4/12/07


Kathy Robinson
Hearing Clerk, Region 7