



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590
February 28, 2013

REPLY TO THE ATTENTION OF:
LC-8J

CERTIFIED MAIL

Receipt No. 7009 1680 0000 7641 3640

Mr. Gregory J. Bradley
Dow Microbial Control
1650 Joseph Dr.
100 Larkin Center, Office 117
Midland, Michigan 48674

Consent Agreement and Final Order in the Matter of
The Dow Chemical Company. Docket No. FIFRA-05-2013-0004

Dear Mr. Bradley:

Enclosed please find a copy of a fully executed Consent Agreement and Final Order, in resolution of the above case. This document was filed on February 28, 2013, with the Regional Hearing Clerk.

The civil penalty in the amount of \$232,500 is to be paid in the manner described in paragraphs 41 through 43. Please be certain that the docket number is written on both the transmittal letter and on the check. Payment is due by April 1, 2013, (within 30 calendar days of the filing date).

Thank you for your cooperation in resolving this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "E. Calvo".

Estrella Calvo
Pesticides and Toxics Compliance Section

Enclosures

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

In the Matter of:)
)
The Dow Chemical Company)
2030 Dow Center)
Midland, Michigan)
)
Respondent.)
_____)

Docket No. FIFRA-05-2013-0004

Proceeding to Assess a Civil Penalty
Under Section 14(a) of the Federal
Insecticide, Fungicide, and Rodenticide
Act, 7 U.S.C. § 136l(a)

RECEIVED
FEB 28 2013

REGIONAL HEARING CLERK
USEPA
REGION 5

Consent Agreement and Final Order
Commencing and Concluding a Proceeding

1. This is an administrative action commenced and concluded under Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. § 136l(a), and Sections 22.13(b) and 22.18(b)(2) and (3) of the *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits* (Consolidated Rules) as codified at 40 C.F.R. Part 22.

2. The Complainant is the Director of the Land and Chemicals Division, United States Environmental Protection Agency (EPA), Region 5.

3. Respondent is The Dow Chemical Company (Dow), a corporation doing business in Midland, Michigan.

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

5. Respondent consents to the assessment of the civil penalty specified in this Consent Agreement and Final Order (CAFO), and to the terms of this CAFO.

Jurisdiction and Waiver of Right to Hearing

6. Respondent admits the jurisdictional allegations in this CAFO and neither admits nor denies the factual allegations in this CAFO.

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

8. Respondent certifies that the pesticidal products that are the subject of this CAFO shall, upon completion of the agreed to corrective actions, be in compliance with FIFRA, 7 U.S.C. §§ 136 to 136y.

Statutory and Regulatory Background

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

10. Section 2(q)(1)(A) of FIFRA, 7 U.S.C. § 136(q)(1)(A), defines a pesticide as “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.

11. Section 2(q)(1)(F) of FIFRA, 7 U.S.C. § 136(q)(1)(F), defines a pesticide as “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, are adequate to protect health and the environment.

12. 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), is adequate to protect health and the environment.

13. Section 2(gg) of FIFRA, 7 U.S.C. § 136(gg), defines the term “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(t) of FIFRA, 7 U.S.C. § 136(t), defines a “pest” as any insect, rodent, nematode, fungus, weed, or any other form of terrestrial or aquatic plant or animal life or virus, bacteria, or other microorganism (except viruses, bacteria, or other living microorganisms on or in living man or other living animals) which the Administrator declares to be a pest under Section 25(c)(1) of FIFRA, 7 U.S.C. § 136 w(c)(1).

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

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

17. The Administrator of EPA may assess a civil penalty against any registrant who violates any provision of FIFRA of up to \$7,500 for each offense that occurred after January 12, 2009 pursuant to Section 14(a)(1) of FIFRA, 7 U.S.C. § 136(a)(1), and 40 C.F.R. Part 19.

Factual Allegations and Alleged Violations

18. Respondent is, and was at all times relevant to this CAFO, a Company and therefore, a “person” as that term is defined at Section 2(s) of FIFRA, 7 U.S.C. § 136(s).

Bioban™ BP-Plus Preservative, EPA Reg. No. 464-675

19. Between March 26, 2012 and May 21, 2012, UPS Custom Brokerage or UPS Supply

Chain Solutions (UPS), located at 1201 C Street, NW Auburn, Washington 98001 was a broker/agent for Respondent.

20. Between March 26, 2012 and May 21, 2012, UPS submitted 29 Notices of Arrival of Pesticide and Devices (NOAs) to EPA for import shipments of the pesticide “Bioban™ BP-Plus Preservative,” EPA Registration Number (EPA Reg. No.) 464-675, from China under the following entry numbers:

UPS-5536733-1	UPS-5543111-1	UPS-5539638-9	UPS-5539639-7
UPS-5536734-9	UPS-5543112-9	UPS-5539645-4	UPS-5539641-3
UPS-5536739-8	UPS-5538551-5	UPS-5539653-8	UPS-5539642-1
UPS-5536737-2	UPS-5538555-6	UPS-5539644-7	UPS-5541246-7
UPS-5543110-3	UPS-5538548-1	UPS-5539640-5	UPS-5541244-2
UPS-5543113-7	UPS-5538542-4	UPS-5539648-8	UPS-5539646-2
UPS-5539637-1	UPS-5539647-0	UPS-5543853-8	UPS-5543852-0
UPS-5543854-6			

21. Each NOA identified Dow Chemical Company c/o of North American Warehousing in Bedford, Illinois and/or Dow Chemical Company in Midland, Michigan as the importer of record for the shipments of “Bioban™ BP-Plus Preservative.”

22. Respondent, as importer of “Bioban™ BP-Plus Preservative” and by doing business in the United States, is subject to the requirements of FIFRA and the regulations promulgated thereunder.

23. “Bioban™ BP-Plus Preservative” is a registered pesticide, as defined in Section 2(u) of FIFRA, 7 U.S.C. § 136(u).

24. On February 24, 2009, the Office of Pesticide Programs, Antimicrobials Division accepted a label containing the following statement in the “Direction For Use” section (under Raw Materials), which was then required to be found on labels securely attached to the drums of “Bioban™ BP-Plus Preservative” in the shipments associated with the entry numbers identified in paragraph 20, above:

“Frequency and Dose: this product should be dosed at 100 to 500 ppm based on the final formulation volume (0.84 - 4.2 lb/1000 gallons).”

25. The label affixed to the drums of “Bioban™ BP-Plus Preservative” imported between March 26, 2012 and May 21, 2012 did not bear the statement identified in paragraph 24, above.

26. Between March 26, 2012 and May 21, 2012, Respondent “distributed or sold” the pesticide product “Bioban™ BP-Plus Preservative,” as that term is defined in 2(gg) of FIFRA, 7 U.S.C. § 136(gg).

Bioban™ BP-M Preservative, EPA Reg. No. 464-687

27. On March 22, 2012 and April 23, 2012, UPS Custom Brokerage or UPS Supply Chain Solutions (UPS) located at 1201 C Street, NW Auburn, Washington 98001 was a broker/agent for Respondent.

28. On March 22, 2012 and April 23, 2012, UPS submitted two NOAs to EPA for import shipments of the pesticide “Bioban™ BP-M Preservative,” EPA Reg. No. 464-687, from China under the entry numbers UPS-5541242-6 and UPS-5537199-4.

29. The NOAs identified Dow Chemical Company c/o of North American Warehousing in Bedford, Illinois and/or Dow Chemical Company in Midland, Michigan as the importer of record for the shipments of “Bioban™ BP-M Preservative.”

30. Respondent, as importer of “Bioban™ BP-M Preservative” and by doing business in the United States, is subject to the requirements of FIFRA and the regulations promulgated thereunder.

31. “Bioban™ BP-M Preservative” is a registered pesticide, as defined in Section 2(u) of FIFRA, 7 U.S.C. § 136(u).

32. On March 18, 2009, the Office of Pesticide Programs, Antimicrobial Division accepted a label containing the following statements which were then required to be found on labels securely attached to drums of "Bioban™ BP-M Preservative" in the shipments associated with the entry numbers identified in paragraph 28, above:

- a) "Corrosive. Causes irreversible eye damage...Causes skin irritation..."
- b) "Container Disposal: Nonrefillable container: Do not reuse or refill this container. Completely empty liner by shaking and tapping sides and bottom to loosen clinging particles. Empty residue into application equipment. Then, offer for recycling if available, or dispose of liner in a sanitary landfill, or by incineration, if allowed by state and local authorities. If burned, stay out of smoke. If drum is contaminated and cannot be reused, dispose of it in the manner required for its liner."

33. In addition to the March 18, 2009 accepted label described in paragraph 32, above, the drums of "Bioban™ BP-M Preservative" that were brought into the United States under the entry numbers referenced in paragraph 28, above, also had affixed a second label containing the following statements:

- a) "Corrosive. May cause irreversible eye damage...May cause skin irritation..."
- b) "Container Disposal: Completely empty liner by shaking and tapping sides and bottom to loosen clinging particles. Empty residue into application equipment. Dispose of liner in a sanitary landfill, or by incineration, if allowed by state and local authorities. If burned, stay out of smoke."

34. On March 22, 2012 and April 23, 2012, Respondent "distributed or sold" the pesticide product "Bioban™ BP-M Preservative," as that term is defined in 2(gg) of FIFRA, 7

U.S.C. § 136(gg).

Alleged Violations

35. Complainant incorporates by reference the allegations contained in paragraphs 2, 3 and 18-34.

Counts 1-29

Bioban™BP-Plus Preservative, EPA Reg. No. 464-675

36. Between March 26, 2012 and May 21, 2012, Respondent distributed or sold the 29 shipments of the misbranded pesticide product “Bioban™BP-Plus Preservative,” identified in paragraph 20, above, with a label that did not contain directions for use which are necessary for effecting the purpose for which the product is intended and if complied with is adequate to protect health and the environment.

37. Respondent’s distribution or sale of the misbranded pesticide product referenced in paragraph 36, above, constitutes 29 unlawful acts under Section 12(a)(1)(E), 7 U.S.C. § 136j(a)(1)(E), and subjects Respondent to the issuance of an Administrative Complaint assessing a civil penalty under Section 14 (a) of FIFRA, 7 U.S.C. § 136l(a).

Counts 30 and 31

Bioban™BP-M Preservative, EPA Reg. No. 464-687

38. On March 22, 2012 and April 23, 2012, Respondent distributed or sold two shipments of the misbranded pesticide product “Bioban™BP-Plus Preservative,” identified in paragraph 28, above, with a label A) bearing a statement, design or graphic representation relative thereto or to its ingredients that was false or misleading in any particular and B) that did not contain a warning or caution statement which may be necessary and if complied with is adequate to protect health and the environment.

39. Respondent's distribution or sale of the misbranded pesticide product referenced in paragraph 38, above, constitutes 2 unlawful acts under Section 12(a)(1)(E), 7 U.S.C. § 136j(a)(1)(E), and subjects Respondent to the issuance of an Administrative Complaint assessing a civil penalty under Section 14 (a) of FIFRA, 7 U.S.C. § 136l(a).

Civil Penalty

40. Pursuant to Section 14(a)(4) of FIFRA, 7 U.S.C. § 136l(a)(4), Complainant determined that an appropriate civil penalty to settle this action is \$232,500. In determining the penalty amount, Complainant considered the appropriateness of the penalty to the size of Respondent's business, the effect on Respondent's ability to continue in business and the gravity of the violation. Complainant also considered EPA's *Enforcement Response Policy for the Federal Insecticide, Fungicide and Rodenticide Act*, dated December 2009.

41. Within 30 days of the effective date of this CAFO, Respondent must pay a \$232,500 civil penalty for the FIFRA violation. Respondent must pay the penalty by sending a cashier's or certified check, payable to the "Treasurer, United States of America," to:

U.S. EPA
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, MO 63197-9000

42. The check must note "In the Matter of The Dow Chemical Company," the docket number of this CAFO.

43. A transmittal letter stating Respondent's name, complete address, the case title, the case docket number, and the billing document number must accompany the payment.

Respondent must send a copy of the transmittal letter to:

Regional Hearing Clerk (E-19J)
U.S. EPA, Region 5
77 West Jackson Blvd.
Chicago, IL 60604

Estrella Calvo (LC-8J)
Pesticides and Toxics Compliance Section
U.S. EPA, Region 5
77 West Jackson Blvd.
Chicago, IL 60604

Susan Perdomo (C-14J)
Office of Regional Counsel
U.S. EPA, Region 5
77 West Jackson Blvd.
Chicago, IL 60604

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

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

46. Pursuant to 31 C.F.R. § 901.9, Respondent must pay the following on any amount overdue under this CAFO. Interest will accrue on any amount overdue from the date payment was due at a rate established by the Secretary of the Treasury. Respondent must pay a \$15 handling charge each month that any portion of the penalty is more than 30 days past due. In addition, Respondent must pay a 6 percent per year penalty on any principal amount 90 days past due.

47. Respondent shall provide to Complainant a Compliance Plan, no later than February 8, 2013, intended to prevent or eliminate all future violations of Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E) and Respondent certifies that this Plan incorporates actions that will address the violations alleged in this CAFO.

General Provisions

48. This CAFO resolves only Respondent's liability for federal civil penalties for the violations and facts alleged in the CAFO.

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

50. This CAFO does not affect Respondent's responsibilities to comply with FIFRA and other applicable federal, state, and local laws.

51. This CAFO is a "final order" for purposes of EPA's Enforcement Response Policy for FIFRA.

52. The terms of this CAFO bind Respondent, its successors, and assigns.

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

54. Each party agrees to bear its own costs and attorney fees in this action.

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

**In the Matter of:
The Dow Chemical Company**

The Dow Chemical Company, Respondent


6 February 2013
Date

Greg Bradley
Greg Bradley, Associate Director
Global Regulatory Sciences and Product
Sustainability
The Dow Chemical Company

**In the Matter of:
The Dow Chemical Company**

United States Environmental Protection Agency, Complainant

2/20/2013
Date



Margaret M. Guerriero
Director
Land and Chemicals Division

**In the Matter of:
The Dow Chemical Company
Docket No. FIFRA-05-2013-0004**

Final Order

This Consent Agreement and Final Order, as agreed to by the parties, shall become effective immediately upon filing with the Regional Hearing Clerk. This Final Order concludes this proceeding pursuant to 40 C.F.R. §§ 22.18 and 22.31. IT IS SO ORDERED.

2-22-13

Date



Susan Hedman
Regional Administrator
United States Environmental Protection Agency
Region 5

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REGIONAL HEARING CLERK
USEPA
REGION 5

CERTIFICATE OF SERVICE

I hereby certify that the original signed copy of the Consent Agreement and Final Order in resolution of the civil administrative action involving The Dow Chemical Company, was filed on February 28, 2013, with the Regional Hearing Clerk (E-19J), U.S. Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois, 60604, and that I mailed by Certified Mail, Receipt No. 7009 1680 0000 7641 3640, a copy of the original to the Respondent:

Mr. Gregory J. Bradley
Dow Microbial Control
1650 Joseph Dr.
100 Larkin Center, Office 117
Midland, Michigan 48674

and forwarded copies (intra-Agency) to:

Ann Coyle, Regional Judicial Officer, ORC/C-14J
Susan Perdomo, Regional Judicial Officer, ORC/C-14J
Eric Volck, Cincinnati Finance/MWD



Frederick Brown
Pesticides and Toxics Compliance Section
U.S. EPA - Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604

Docket No. FIFRA-05-2013-0004

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