



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 Hawthorne Street
San Francisco, CA 94105

**** FILED ****
19DEC2017 - 02:51PM
U.S.EPA - Region 09

In the Matter of:)
)
Syngenta Seeds, LLC,)
d/b/a/ Syngenta Hawaii, LLC,)
Respondent.)

U.S. EPA Docket No.
FIFRA-09-2017-0001

ORDER TO SHOW CAUSE

The United States Environmental Protection Agency (Agency or Complainant) and Syngenta Seeds, LLC, d/b/a/ Syngenta Hawaii, LLC (Respondent) (collectively the Parties) recent submission requests the Regional Judicial Officer (RJO) to issue a final order ratifying their agreement pursuant to 40. C.F.R. § 22.18(b)(3). After close examination of the proposed Consent Agreement and Final Order (CA/FO), the RJO questions whether the CA/FO conforms to the requirements of the Consolidated Rules of Practice at 40 C.F.R. Part 22. Similarly, the RJO questions whether the CA/FO complies with the Agency’s March 10, 2015 Supplemental Environmental Projects Policy.

I HEREBY ORDER the Parties to explain how the proposed CA/FO complies with 40 C.F.R. § 22.18, and how it complies with the Agency’s March 10, 2015 Supplemental Environmental Projects Policy. The Parties must file their written response(s) with the Regional Hearing Clerk by **5:00 p.m. (PST) on January 16, 2018.**

SPECIFIC ISSUES TO BE ADDRESSED

- 1) Whether the proposed CA/FO complies with the Agency's policy statement in 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, 64 Federal Register No. 141 (final rule July 23, 1999) (codified in 40 C.F.R. § 22.18(b) & (c))

During the Agency's public comment period for 40 C.F.R. Part 22, the Chemical Manufacturers Association and the American Petroleum Institute (CMA/API) objected to the Agency's proposed language on the scope of settlement agreements as set forth in 40 C.F.R. §§ 22.18(b) & (c), claiming the proposed language would limit the scope of relief available in settlements to violations and facts alleged in the Agency's complaint. The Agency responded by stating:

EPA agrees that it is, in many cases, desirable to resolve in a single proceeding additional violations that become apparent as a case progresses. However, such expansion of a proceeding should be accomplished through motions to amend the complaint, pursuant to § 22.14(c). Although even a joint or uncontested motion to amend the complaint is somewhat more burdensome than expanding the case through a consent agreement alone, this burden is outweighed by the interests of assuring a clear public record of the Agency's administrative enforcement proceedings. 64 Federal Register 141, 40157 (final rule July 23, 1999) (codified in 40 C.F.R. § 22.18(b) & (c)).

The Parties' seek to resolve claims set forth in Complainant's December 14, 2016 Complaint and subsequent claims that became apparent to the Parties during their administrative enforcement proceeding without amending the December 14th Complaint. As a result, the Parties

proposed CA/FO fails to establish a clear public record because it sets forth confusing and conflicting approaches to resolving the Complaint in Agency Docket No. FIFRA-09-2017-0001 and the claims the parties seek to resolve under a new docket number (FIFRA-09-2018-XXXX). For example, the Parties' request for a new docket number to process the claims they discovered during their administrative enforcement proceedings indicates the Parties seek to resolve these claims as a separate civil action under 40 C.F.R. § 22.13(b). However, the CA/FO does not state the Parties seek to resolve these additional claims under 40 C.F.R. § 22.13(b)'s legal authority. Instead, the language in Paragraphs 7 and 8 of the Consent Agreement indicates the Parties seek to resolve these matters as a consolidated proceeding. Paragraph 10 of the CA/FO further indicates the Parties seek to resolve the claims set forth in the CA/FO and the Complaint as a consolidated proceeding because the Parties agree to combined civil penalty of one hundred and fifty thousand dollars without itemizing how much of the civil penalty they attribute to each civil action. Resolving two civil actions with a singular penalty also creates confusion under the CA/FO's stipulated penalty provisions in Paragraph 19 because, in the event Respondent fails to pay a portion of the civil penalty, the public record will not clearly show to which of the two civil actions the stipulated penalties apply.

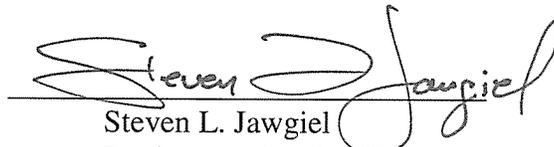
Therefore, the Parties must explain how their proposed CA/FO complies with the Agency's policy statement in the Federal Register, and why the RJO should ratify the proposed Consent Agreement without the Complainant amending the December 14, 2016 Complaint.

2) Whether the proposed CA/FO complies with the Agency's March 10, 2015 Update to the 1998 U.S. Environmental Protection Agency Supplemental Environmental Projects Policy

As set forth in the Agency's March 10, 2015 Update to the 1998 U.S. Environmental Protection Agency Supplemental Environmental Projects (SEP) Policy, all Agency SEPs must have a sufficient nexus to the civil action being settled. More specifically, the Policy states nexus is the relationship between the violation(s) being resolved and the proposed project(s). If the Parties seek to separately resolve the claims in Paragraph 6 of the CA/FO and the claims in the Complaint, the SEP in Section D of the CA/FO should clearly explain how the projects relate to the specific violations in the two separate civil actions. The SEP provisions become increasingly problematic because, as stated above, the Parties failed to itemize how the civil penalty is apportioned between the two actions. Therefore, the public record does not clearly establish how the SEP mitigates the penalties in one civil action, in the other civil action, or in both civil actions.

Therefore, the Parties must explain how their proposed CA/FO complies with the Agency's March 10, 2015 Update to the 1998 U.S. Environmental Protection Agency Supplemental Environmental Projects (SEP) Policy.

Dated: December 19, 2017


Steven L. Jawgiel
Regional Judicial Officer

In the Matter of Syngenta Seeds, LLC, d/b/a Syngenta Hawaii, LLC, Respondent
Docket No. FIFRA-09-2017-0001

CERTIFICATE OF SERVICE

I hereby certify that the attached Order to Show Cause was sent to the following parties by Certified Mail, return receipt requested, and by email on this 19th day of December, 2017, to:

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I hereby certify that the attached Order to Show Cause was sent to the following parties by email on this 19th day of December, 2017, to:

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 12/19/17

Corazon Tolentino
Acting Regional Hearing Clerk
EPA, Region 9