

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION IX  
75 HAWTHORNE STREET  
SAN FRANCISCO, CALIFORNIA 94105

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In the Matter of: )

Syngenta Seeds, LLC, )  
d/b/a/ Syngenta Hawaii, LLC, )

Respondent )  
\_\_\_\_\_)

U.S. EPA Docket No.:

FIFRA-09-2017-0001

**COMPLAINANT'S UNOPPOSED MOTION FOR LEAVE TO AMEND THE  
COMPLAINT**

Pursuant to 40 C.F.R. §§ 22.14(c) and 22.16(a) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits set forth at 40 C.F.R. part 22 ("Rules of Practice"), Complainant, the Director of the Enforcement Division, EPA Region IX, through undersigned counsel, moves for leave to file an amended complaint in the above-captioned proceeding.

Respondent Syngenta Seeds, LLC, has authorized Complainant to report to the Presiding Officer that Respondent: (1) has reviewed the enclosed Amended Complaint and Notice of Opportunity for Hearing ("Amended Complaint"); (2) consents to the granting of this Motion; and (3) has provided the enclosed, executed Answer to Amended Complaint and Request for Hearing ("Amended Answer") for the sake of expediency, for filing should the Presiding Officer grant this Motion and deem the Amended Complaint filed.

## I. Background

On December 14, 2016, Complainant initiated this proceeding by filing a Complaint and Notice of Opportunity for Hearing (“Complaint”) seeking the assessment of civil penalties against Respondent. The Complaint alleges 261 violations of the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136-136y (FIFRA or “the Act”). Complainant asserts therein that on January 20, 2016, on Respondent’s agricultural establishment in Kekaha, Hawaii, Respondent used a registered, restricted-use pesticide in manners inconsistent with its labeling in violation of Section 12(a)(2)(G) of FIFRA, 7 U.S.C. § 136j(a)(2)(G), by not complying with provisions of the Worker Protection Standard set forth at 40 C.F.R. part 170. Specifically, Complainant alleges that Respondent failed to comply with ten Worker Protection Standard practices concerning posting and communicating restricted-entry intervals, and providing decontamination supplies and assistance to agricultural workers following pesticide exposure. These WPS practices are set forth in the 1992 Worker Protection Standard regulations at 40 C.F.R. §§ 170.112(a)(1), 170.120(b)(1), 170.120(c)(1), 170.120(c)(4), 170.120(c)(6)(ii), 170.120(d)(1), 170.120(d)(2), 170.120(d)(3), 170.150(b)(1), 170.150(c)(1), and 170.160. *See* Final Rule, Worker Protection Standard, 57 Fed. Reg. 38,102 (Aug. 21, 1992).<sup>1</sup>

On January 12, 2017, after the Complaint was filed, but before an answer was filed, EPA and the Hawaii Department of Agriculture (HDOA) were informed of a second incident that occurred that day at the same agricultural establishment in Hawaii involving the same restricted use pesticide at issue in the 2016 misuse incident. HDOA referred the investigation to EPA Region IX on February 10, 2017.

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<sup>1</sup> The 1992 Worker Protection Standard expired on January 2, 2017, and was replaced by revisions published in 2015. Final Rule, Pesticides; Agricultural Worker Protection Standard Revisions, 80 Fed. Reg. 67,496 (Nov. 2, 2015).

Respondent filed an Answer to Complaint and Request for Hearing (“Answer”) on March 10, 2017. The parties were offered the opportunity to participate in the EPA Office of Administrative Law Judges’ Alternative Dispute Resolution program, and accepted. Since March 27, 2017, the parties have engaged in negotiations to resolve both the 2016 allegations of liability set forth in the Complaint, and allegations of liability stemming from the 2017 incident.

Having come to an agreement, and to ensure the Complaint and our agreement conform, Complainant now moves to amend the Complaint to include the 2017 allegations. Specifically, Complainant has added to the enclosed Amended Complaint an additional 127 counts that allege noncompliance with the Worker Protection Standard and FIFRA. Respondent is newly alleged to have failed to comply, on January 12, 2017, with four Worker Protection Standard practices concerning oral warnings to workers of restricted-entry intervals and posting accessible pesticide application information. These requirements are set forth in the 2015 Worker Protection Standard regulations at 40 C.F.R. §§ 170.409(a)(1), 170.409(c), 170.409(c)(1), 170.409(c)(2), 170.409(c)(3), 170.309(h), 170.311(b), and 170.311(b)(3). *See* Final Rule, Pesticides; Agricultural Worker Protection Standard Revisions, 80 Fed. Reg. 67,496 (Nov. 2, 2015).<sup>2</sup>

In addition to adding the factual allegations and conclusions of law to support the new claims described above, Complainant edited some portions of the original Complaint in the Amended Complaint to account for typographical and grammatical errors, or, in a few instances, to clarify existing imprecise language. Complainant also added references to the rule revisions in effect at the time of the 2017 violations. And finally, in the Amended Complaint, the Civil Penalty section has been edited to set forth an explanation of the statutory penalty authority

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<sup>2</sup> The requirements Complainant alleges Respondent violated on January 12, 2017 became enforceable on January 2, 2017. In substance, they are very similar to the previous requirements that existed in the 1992 Standard.

applicable for each violation, and the severity and number of violations alleged in the proceeding, instead of setting forth a specific penalty amount sought, as permitted under 40 C.F.R. § 22.14(a)(4)(ii).

## **II. Argument**

The Rules of Practice provide that when an answer has already been filed, a complainant may amend the complaint only upon motion granted by the Presiding Officer. 40 C.F.R. § 22.14(c). Respondent shall have 20 days from the date of service of the amended complaint to file its answer. *Id.*

As this Tribunal has acknowledged, “[t]he Environmental Appeals Board has ‘expressly adopted’ the liberal policy regarding pleadings and amendments found in Federal Rule of Civil Procedure 15 and described in *Foman v. Davis*, 371 U.S. 178 [ ] (1962).” *Chem-Solv, Inc.*, EPA Docket No. RCRA-03-2011-0068, 2014 EPA ALJ LEXIS 14, at \*16-17 (ALJ, June 5, 2014) (citing *Lazarus, Inc.*, 7 E.A.D. 318, 333 (EAB 1997)); *Taotao USA, Inc., et al.*, EPA Docket No. CAA-HQ-2015-8065, 2016 EPA ALJ LEXIS 81, Order on Motion for Leave to Amend the Complaint and to Extend Prehearing Deadlines (ALJ, July 5, 2016). Rule 15(a) of the Federal Rules of Civil Procedure provides that a court “should freely give leave when justice so requires.” In *Foman*, the Supreme Court interpreted this to mean that absent “any apparent or declared reason – such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of the amendment, etc. – the leave sought should, as the rules require, be ‘freely given.’” 371 U.S. at 182.

By this standard, leave to amend the Complaint in this matter should be granted. The parties to this matter have agreed to resolve all of the allegations set forth in the enclosed

Amended Complaint (claims from 2016 and 2017), and are prepared to execute a settlement. Should this Motion be granted and the enclosed amended pleadings filed, the parties intend to promptly execute a Consent Agreement and file a proposed Final Order with the Region IX Regional Judicial Officer for ratification. Therefore, this Motion is not made with a motive to delay, and the granting of this Motion will not cause undue delay; on the contrary, amending the Complaint will expedite the parties' mutually agreeable resolution of the matter by conforming the Amended Complaint and Consent Agreement. For the same reason, and as evidenced by Respondent's consent, there would be no undue prejudice to Respondent if the Motion is granted.

Nor does Complainant move in bad faith. Instead, this Motion is filed in good faith in order to fully and formally set forth in its pleading all of the claims that the Agency is asserting against Respondent and which the parties have agreed to resolve through settlement. Because of the utility achieved in amending the Complaint to reflect the full scope of liabilities asserted against Respondent, the amendments sought are not futile. Further, this is the first motion to amend the complaint filed in this proceeding, and there have been no previous motions or other opportunities missed to amend the pleading as Complainant seeks to do now.

In order to expedite the amendment process, the parties have executed their respective enclosed amended pleadings, and served each of them in accordance with the Rules of Practice. Complainant signed the enclosed Amended Complaint on January 12, 2018, and served a copy of the executed Amended Complaint on Respondent, via counsel, on January 12, 2018. *See* Certificate of Service attached to enclosed Amended Complaint. Respondent reported to Complainant that it received a copy of the executed Amended Complaint on January 12, 2018. Respondent executed the enclosed Amended Answer on January 16, 2018, and served it on

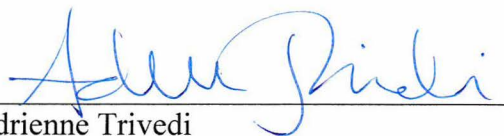
Complainant on January 16, 2018. *See* Certificate of Service attached to enclosed Amended Answer. Therefore, both parties have been served with the amended pleadings that are the subject of this Motion in accordance with the requirements set forth in 40 C.F.R. § 22.5(b).<sup>3</sup>

Additionally, this Motion and its enclosures have been served on Respondent in accordance with 40 C.F.R. §§ 22.5(b)(2) and 22.16(a). *See* attached Certificate of Service. Before the filing of this Motion, Respondent authorized Complainant to report that Respondent waives its right to respond to this Motion as provided by 40 C.F.R. § 22.16(b) and that it consents to the granting of this Motion. Should the Presiding Officer grant this Motion and deem the enclosed Amended Complaint filed, Respondent respectfully requests that the Presiding Officer deem the enclosed Amended Answer filed as well.

### **III. Relief Requested**

For the reasons stated above, Complainant requests, with Respondent's consent, that Complainant be granted leave to file the enclosed Amended Complaint, and that the enclosed amended pleadings be filed in this matter.

Respectfully submitted,

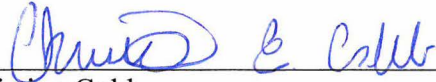


Adrienne Trivedi  
*Counsel for Complainant*  
Pesticides and Tanks Enforcement Branch  
Waste and Chemical Enforcement Division  
Office of Civil Enforcement  
Office of Enforcement and Compliance Assurance  
U.S. Environmental Protection Agency  
1200 Pennsylvania Ave NW MC 2249A

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<sup>3</sup> Should the Presiding Officer find it necessary and the order ruling on this Motion require, the parties are willing to re-serve the amended pleadings after this motion has been granted.

Washington, DC 20460  
(202) 564-7862 (phone)  
Trivedi.Adrienne@epa.gov



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Christina Cobb  
*Counsel for Complainant*  
Pesticides and Tanks Enforcement Branch  
Waste and Chemical Enforcement Division  
Office of Civil Enforcement  
Office of Enforcement and Compliance Assurance  
U.S. Environmental Protection Agency  
1200 Pennsylvania Ave NW MC 2249A  
Washington, DC 20460  
(202) 564-1798 (phone)  
Cobb.Christina@epa.gov

**CERTIFICATE OF SERVICE**

I hereby certify that in the matter of Syngenta Seeds, LLC, Docket No. FIFRA-09-2017-0001, Complainant's Unopposed Motion for Leave to Amend the Complaint, the original signed Amended Complaint and Notice of Opportunity for Hearing, the original signed Answer to Amended Complaint and Request for Hearing, and one copy of each, were filed and served on this date in person at the following address:

Headquarters Hearing Clerk  
Office of Administrative Law Judges  
U.S. Environmental Protection Agency  
1300 Pennsylvania Avenue, N.W., Ronald Reagan Building, Rm. M1200  
Washington, DC 20004


I also hereby certify that a copy of this Unopposed Motion for Leave to Amend the Complaint, a copy of the Amended Complaint and Notice of Opportunity for Hearing, and a copy of the Answer to Amended Complaint and Request for Hearing, were sent to Respondent by U.S. Certified Mail, return receipt requested, and by e-mail, on this date, to:

John D. Conner Jr.  
Peter L. Gray  
Crowell & Moring LLP  
1001 Pennsylvania Ave, N.W.  
Washington, DC 20004-2595

E-Mail: JConner@crowell.com  
PGray@crowell.com

Certified Mail No.: 7 008 3230 0000 9398 3038

1/18/18  
Date

  
Adrienne Trivedi  
*Counsel for Complainant*  
Pesticides and Tanks Enforcement Branch  
Waste and Chemical Enforcement Division  
Office of Civil Enforcement  
Office of Enforcement and Compliance Assurance  
U.S. Environmental Protection Agency  
1200 Pennsylvania Ave N.W., MC 2249A  
Washington, DC 20460  
(202) 564-7862  
Trivedi.Adrienne@epa.gov