

U. S. ENVIRONMENTAL PROTECTION AGENCY
REGION 7

901 NORTH 5th STREET
KANSAS CITY, KANSAS 66101

UNITED STATES
ENVIRONMENTAL
PROTECTION AGENCY - *HK*
REGION 7
2012 SEP 28 AM/PM 12:37

BEFORE THE ADMINISTRATOR

In the Matter of)

Bayer CropScience LP)

Respondent)

) Docket No. FIFRA-07-2012-0012
)
)
)

CONSENT AGREEMENT AND FINAL ORDER

The U.S. Environmental Protection Agency (EPA), Region 7, and Bayer CropScience LP (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) and 22.18(b)(2) 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) and 22.18(b)(2).

Section I

Jurisdiction

1. This proceeding 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. § 136l.

2. This Consent Agreement and Final Order (CAFO) serves as notice that the EPA has reason to believe that Respondent has violated Section 12 of FIFRA, 7 U.S.C. § 136j.

Section II

Parties

3. The Complainant, by delegation from the Administrator of the EPA and the Regional Administrator, EPA, Region 7, is the Director of the Water, Wetlands and Pesticides Division, EPA, Region 7.

4. The Respondent is Bayer CropScience LP, a pesticide producer and importer with a facility located at 8400 Hawthorne Road in Kansas City, Missouri (the "facility"). The Respondent is and was at all times referred to in this Complaint, a "person" as defined by Section 2(s) of FIFRA, 7 U.S.C. § 136(s), and a Delaware corporation qualified to do business in the state of Missouri.

Section III

Statutory and Regulatory Background

5. Congress enacted FIFRA in 1947 and amended it in 1972 and in 1996. The general purpose of FIFRA is to provide the basis for regulation, sale, distribution and use of pesticides in the United States. 7 U.S.C. 136 *et. seq.*

6. Section 2(t) of FIFRA, 7 U.S.C. § 136(t), defines the term "pest" to mean (1) any insect, rodent, nematode, fungus, weed, or (2) any other form of terrestrial or aquatic plant or animal life or virus, bacteria, or other micro-organism (except viruses, bacteria, or other micro-organism on or in living man or other living animal) which the Administrator declares to be a pest under Section 25(c)(1).

7. Section 2(u) of FIFRA, 7 U.S.C. § 136(u), defines the term "pesticide" to mean any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest.

8. The regulation at 40 C.F.R. § 152.15 states that a substance is a pesticide, and thus subject to FIFRA requirements, if it is intended for a pesticidal purpose. A substance is considered to be intended for a pesticidal purpose if the person who distributes or sells the substance claims, states, or implies that the substance consists of or contains an active ingredient and that it can be used to manufacture a pesticide; or the substance consists of or contains one or more active ingredients and has no significant commercially valuable use as distributed or sold other than use for a pesticidal purpose, by itself or in combination with any other substance, or use for manufacture of a pesticide.

9. The regulation at 40 C.F.R. § 152.30 states that an unregistered pesticide may be transferred between registered establishments not operated by the same producer if, *inter alia*, transfer is solely for the purpose of further formulation, packaging, or labeling into a product that is registered; each active ingredient in the pesticide, at the time of transfer, is present as a result of incorporation into the pesticide of either a registered product or a pesticide that is produced by the registrant of the final product, and the product as transferred is labeled in accordance with 40 C.F.R. Part 156.

10. The regulation at 40 C.F.R. § 156.10 states that the contents of a pesticide product's label must show, *inter alia*, the directions for the product's use, the product's EPA registration number, the producing establishment number, and required hazard or precautionary statements.

11. 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.

12. Section 2(gg) of FIFRA, 7 U.S.C. § 136(gg), defines the term “to 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.

13. Section 2(q)(1)(A) of FIFRA, 7 U.S.C. § 136(q)(1)(A), states that a pesticide or a device is “misbranded” if its labeling is false or misleading in any particular.

14. Section 2(q)(1)(F) of FIFRA, 7 U.S.C. § 136(q)(1)(F), states that a pesticide is “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.

15. Section 2(q)(2)(C) of FIFRA, 7 U.S.C. § 136(q)(2)(C), defines a pesticide as “misbranded” if there is not affixed to its container, and to the outside container or wrapper of the retail package, if there be one, through which the required information on the immediate container cannot be clearly read, a label bearing (i) the name and address of the producer, registrant, or person for whom produced; (ii) the name, brand or trademark under which the pesticide is sold; (iii) the net weight or measure of the content, and (iv) the registration number assigned to the pesticide under FIFRA, and the use classification.

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

17. The Administrator of the EPA may assess a civil penalty against any registrant or other distributor 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. § 136l(a)(1), and 40 C.F.R. Part 19.

Section IV

General Factual Allegations

18. Respondent is and, at all times referenced herein, was a person as defined by Section 2(s) of FIFRA, 7 U.S.C. § 136(s).

19. On November 29, 2011, a representative of the Missouri Department of Agriculture (MDA) conducted an inspection at a Bayer CropScience facility located in Kansas City, Missouri.

20. During the inspection referenced in the preceding paragraph, the MDA inspector documented that Respondent had shipped a quantity of the pesticide Ethofumesate, EPA Reg. No. 264-611, on or about November 28, 2011.

21. The shipment of Ethofumesate consisted of fifteen plastic-wrapped pallets containing a total of 120 drums of pesticide product.

22. The drums of pesticide product and the outside wrapping of the pallets lacked product labels for the Ethofumesate product.

23. The drums of pesticide product and the outside wrapping of the pallets lacked an EPA registration number or EPA producing establishment number for the Ethofumesate product.

24. On or about December 1, 2011, the EPA Region 7 Toxics and Pesticides Branch received two Notices of Arrival from Respondent for the importation of two separate shipments on or about, respectively, December 20, 2011, and December 27, 2011, of quantities of unregistered Methomyl insecticide for the purpose of processing the product into the registered product Larvin Technical, EPA Reg. No. 264-343, a product that is manufactured for use in the formulation of other insecticide products only, and which is not to be applied as an end use pesticide.

25. The two shipments of unregistered Methomyl arrived at Respondent's facility, respectively, on or about December 27, 2011, and December 30, 2011.

26. The label supplied by Respondent for the two shipments of the unregistered Methomyl product contained the false or misleading statement in its "Directions for Use" section, "only for formulation into end use insecticide products"

Violations

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

Count 1

28. The facts stated in Paragraphs 18 through 26 are realleged and incorporated as if fully stated herein.

29. At the time of the distribution referenced in Paragraph 20 above, the pesticide Ethofumesate was misbranded in that it lacked labeling containing directions for use.

30. At the time of the distribution referenced in Paragraph 20 above, the pesticide Ethofumesate was misbranded in that it lacked a label bearing (i) the name and address of the producer, registrant, or person for whom produced; (ii) the name, brand or trademark under which the pesticide is sold; (iii) the net weight or measure of the content, and (iv) the registration number assigned to the pesticide under FIFRA, and the use classification.

31. Respondent violated Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), by distributing or selling a pesticide which is misbranded.

Counts 2 and 3

32. The facts stated in Paragraphs 18 through 26 are realleged and incorporated as if fully stated herein.

33. At the time of the distributions of unregistered Methomyl product referenced in Paragraphs 24 and 25 above, the product was misbranded in that the labeling for the shipments contained a false or misleading statement.

34. For each of the two distributions of unregistered Methomyl product, Respondent violated Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), by distributing or selling a pesticide which is misbranded.

Penalty

35. Pursuant to Section 14 of FIFRA, 7 U.S.C. § 136l, and based on the facts stated above, a civil penalty of \$13,900.00 shall be assessed against Respondent for Counts 1 through 3.

Section V

Consent Agreement and Terms of Settlement

36. For purposes of this proceeding, Respondent admits the jurisdictional allegations set forth above.

37. Respondent neither admits nor denies the factual allegations set forth above.

38. Respondent waives its right to contest any issue of fact or law set forth above and its right to appeal the Final Order accompanying this Consent Agreement.

39. Respondent and EPA agree to conciliate this matter without the necessity of a formal hearing and to bear their respective costs and attorney's fees.

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

41. The undersigned representative of Respondent certifies that he or she is fully authorized to enter into the terms and conditions of this CAFO and to execute and legally bind Respondent to it.

42. Respondent certifies that by signing this CAFO that it is in compliance with FIFRA, 7 U.S.C. § 136 *et. seq.*, and all regulations promulgated thereunder.

43. Respondent consents to the issuance of the Final Order hereinafter recited and consents to the payment of a civil penalty as specified in the Final Order.

44. The effect of settlement described in Paragraph 45 below is conditioned upon the accuracy of the Respondent's representations to EPA, as memorialized in Paragraph 42 above.

45. Payment of this civil penalty in full shall resolve all civil and administrative claims for all violations of FIFRA alleged in this document. Complainant reserves the right to take any enforcement action with respect to any other violations of FIFRA or any other applicable law.

46. Late Payment Provisions. Pursuant to 31 U.S.C. § 3717, EPA is entitled to assess interest and penalties on debts owed to the United States and a charge to cover the cost of processing and handling a delinquent claim. Respondent understands that its failure to timely pay any portion of the civil penalty described in Paragraph 1 of the Final Order below may result in the commencement of a civil action in Federal District Court to recover the full remaining balance, along with penalties and accumulated interest. In such case, interest shall accrue thereon at the applicable statutory rate on the unpaid balance until such civil or stipulated penalty and any accrued interest are paid in full. A late payment handling charge of \$15 will be imposed after thirty (30) days and an additional \$15 will be charged for each subsequent thirty (30) day period. Additionally, as provided by 31 U.S.C. § 3717(e)(2), a six percent (6%) per annum

penalty (late charge) may be assessed on any amount not paid within ninety (90) days of the due date.

Section VI

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 shall pay a civil penalty of Thirteen Thousand and Nine Hundred Dollars (\$13,900.00) within thirty (30) days of the effective date of this Final Order.
2. Such payment shall identify Respondent by name and docket number and shall be by certified or cashier's check made payable to the "United States Treasury" and sent to:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
PO Box 979077
St. Louis, Missouri 63197-9000.

Wire transfers should be directed to the Federal Reserve Bank of New York:

Federal Reserve Bank of New York
ABA = 021030004
Account = 68010727
SWIFT address = FRNYUS33
33 Liberty Street
New York, New York 10045
Field Tag 4200 of the Fedwire message should read
"D 68010727 Environmental Protection Agency."

A copy of the check or other information confirming payment shall simultaneously be sent to the following:

Regional Hearing Clerk
U.S. Environmental Protection Agency
Region 7
901 North 5th Street
Kansas City, Kansas 66101; and

Chris Dudding
Attorney
Office of Regional Counsel
U.S. Environmental Protection Agency
Region 7
901 North 5th Street
Kansas City, Kansas 66101.

3. Respondent and Complainant shall each bear their own costs and attorneys' fees incurred as a result of this matter.

**RESPONDENT
BAYER CROPSCIENCE LP**

Date: Sept. 20, 2012

MA Cochell
Representative of Bayer CropScience LP

Michael A. Cochell
Printed Name

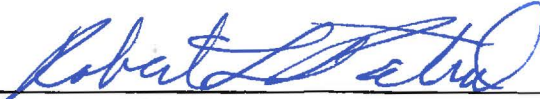
v.p. Supply Chain
Title

COMPLAINANT
U. S. ENVIRONMENTAL PROTECTION AGENCY

Date: 9-26-12 
Karen A. Flournoy
Director
Water, Wetlands and Pesticides Division

Date: 9/26/12 
Chris Dudding
Assistant Regional Counsel
Office of Regional Counsel

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

Date: Sept. 28, 2012 
ROBERT L. PATRICK
Regional Judicial Officer
U.S. Environmental Protection Agency, Region 7

IN THE MATTER OF Bayer CropScience LP, Respondent
Docket No. FIFRA-07-2012-0012

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Orders were sent this day in the following manner to the addressees:

Copy hand delivered to
Attorney for Complainant:

Chris Dudding
Assistant Regional Counsel
Region 7
United States Environmental Protection Agency
901 N. 5th Street
Kansas City, Kansas 66101

Copy by First Class Certified Mail to:

Michael A. Cockrill
VP Supply Chain
Bayer CropScience LP
8400 Hawthorne Road
Kansas City, Missouri

Dated: 9/28/12



Kathy Robinson
Kathy Robinson
Hearing Clerk, Region 7