BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

File d
JAN 10 2013
Clerk, Environmental Appeals Board
INITIALS

In re:	)	
	)	
	)	
Kemira Chemicals, Inc.	)	Docket No. FIFRA-HQ-2013-5001
	)	
	)	
	)	
	)	

FINAL ORDER

Pursuant to 40 C.F.R. § 22.18(b)-(c) of EPA's Consolidated Rules of Practice, the attached Consent Agreement resolving this matter is incorporated by reference into this Final Order and is hereby ratified.

The Respondent is ORDERED to comply with all terms of the Consent Agreement, effective immediately.

So ordered.[1]

Date: January 10, 2013

[redacted]
Kathie A. Stein
Judge, Environmental Appeals Board

[1] The two-member panel ratifying this matter is composed of Environmental Appeals Judges Catherine R. McCabe and Kathie A. Stein.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Final Order in the Matter of Kemira Chemicals, FIFRA HQ-2013-5001, were sent to the following persons in the manner indicated:

By Facsimile and EPA Pouch Mail:

Kim Wilson, Attorney-Advisor.
Waste and Chemical Enforcement Division (Mail Code 2249A)
Office of Civil Enforcement
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460
(202) 564-5607
Fax No. (202) 564-0022

By Facsimile and First Class U.S. Mail:

Carroll Wade McGuffey III
Counsel for Respondent
Troutman Sanders LLP
Bank of America Plaza, Suite 5200
600 Peachtree Street, N.E.
Atlanta, Georgia 30308-2216
(404) 885-3698
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Fax No. (404) 962-6808

[redacted]

JAN 10 2013

Annette Duncan, Secretary
Environmental Appeals Board (Mail Code 1103B)
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460-0001

BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
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IN THE MATTER OF:	)	
Kemira Chemicals, Inc.	)	**Docket No. FIFRA-HQ-2013-5001**
Respondent.	)	

CONSENT AGREEMENT AND FINAL ORDER

Complainant, United States Environmental Protection Agency (EPA) and Respondent Kemira Chemicals, Inc. (Kemira) agree to this action and consent to the entry of this Consent Agreement and Final Order (CAFO) before taking testimony and without any adjudication of any issues of law or fact herein.

I. NATURE OF ACTION

1. This is a civil administrative action instituted under Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA or the Act), as amended, 7 U.S.C. § 136*l*(a), and 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. This action imposes civil penalties pursuant to Section 14(a) of FIFRA.

2. Complainant and Respondent have conferred for the purpose of settlement pursuant to 40 C.F.R. § 22.18 and desire to settle this action. Accordingly, before any testimony has been taken, without admission of violation or adjudication of any issue of fact or law, and in accordance with 40 C.F.R. § 22.13(b), Complainant and Respondent have agreed to the execution of this CAFO. Respondent hereby agrees to comply with the terms of the CAFO.

II. THE PARTIES

3. Rosemarie A. Kelley, Director of the Waste and Chemical Enforcement Division, Office of Civil Enforcement, Office of Enforcement and Compliance Assurance, is authorized by lawful delegation to institute and settle administrative actions brought by the EPA pursuant to Section 14(a) of FIFRA.

4. The Respondent is Kemira, a corporation organized and/or existing under the laws of the State of Georgia with a primary place of business at 1000 Parkwood Circle, Suite 500, Atlanta GA, 30339.

III. PRELIMINARY STATEMENT

5. Respondent certifies that it is in compliance with the FIFRA requirements alleged to have been violated in this Consent Agreement.

6. Respondent stipulates that Complainant has jurisdiction over the subject matter of this Consent Agreement.

7. Respondent waives any defenses it might have as to venue and jurisdiction.

8. Pursuant to 40 C.F.R. § 22.18(b)(2), Respondent waives its right to contest the allegations in this Consent Agreement, its right to appeal the Final Order, and its right to request a judicial or administrative hearing on any issue of law or fact set forth in, and resolved by, this Consent Agreement.

9. Respondent neither admits nor denies the findings of fact and conclusions of law set forth in Sections IV and V of this Consent Agreement.

IV. STATUTORY AND REGULATORY BACKGROUND

10. 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.

11. Section 2(y) of FIFRA, 7 U.S.C. § 136(y), defines a "registrant" as a person who has registered any pesticide pursuant to the provisions of FIFRA.

12. Section 2(w) of FIFRA, 7 U.S.C. § 136(w), defines a "producer" as the person who manufactures, prepares, compounds, propagates, or processes any pesticide.

13. Section 2(u) of FIFRA, 7 U.S.C. § 136(u), and 40 C.F.R. § 152.3 defines a "pesticide," in part, as any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest.

14. Section 2(mm) of FIFRA, 7 U.S.C. § 136(mm), defines "antimicrobial pesticide" as a pesticide that is intended to (i) disinfect, sanitize, reduce, or mitigate growth or development of microbiological organisms; or (ii) protect inanimate objects, industrial processes or systems, surfaces, water, or other chemical substances from contamination, fouling, or deterioration caused by bacteria, viruses, fungi, protozoa, algae, or slime.

15. Section 2(p)(1) of FIFRA, 7 U.S.C. § 136(p)(1), defines a "label" as the written, printed or graphic matter on, or attached to, the pesticide or device or any of its containers or wrappers.

16. Section 2(p)(2) of FIFRA, 7 U.S.C. § 136(p)(2), defines "labeling" as all labels and all other written, printed, or graphic matter that accompanies the pesticide at any time or to which reference is made on the label.

17. Section 2(q) of FIFRA, 7 U.S.C. § 136(q), states, in part, that a pesticide is "misbranded" if its labeling bears any statement, design, or graphic representation which is false and misleading or if any word, statement, or other information required by or under authority of this Act to appear on the label or labeling is not prominently placed thereon with such conspicuousness (as compared with other words, statements, designs, or graphic matter in the labeling) and in such terms as to render it likely to be read and understood by the ordinary individual under customary conditions of purchase and use.

18. Section 2(gg) of FIFRA, 7 U.S.C. § 136(gg), and 40 C.F.R. § 152.3 state that "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.

19. Section 3(a) of FIFRA, 7 U.S.C. § 136a(a) states that no person in any State may distribute or sell to any person any pesticide that is not registered.

20. Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), states that it shall be unlawful for any person in any state to distribute or sell to any person any pesticide that is not registered under 136a of this title or whose registration has been canceled or suspended, except to the extent that distribution or sale otherwise has been authorized by the Administrator under this subchapter.

21. 40 C.F.R. § 156.10(b) states that no name, brand, or trademark may appear on the label which is false or misleading, or has not been approved by the Administrator through registration or supplemental registration as an additional name pursuant to § 152.132.

22. 40 C.F.R. § 152.132 states that registrants may distribute or sell their registered product under another person's name and address instead of, or in addition to, their own, and that such distribution and sale is termed "supplemental distribution" and the product is referred to as a "distributor product." The distributor is considered an agent of the registrant for all intents and purposes under FIFRA, and both the registrant and the distributor may be held liable for violations pertaining to the distributor product. Supplemental distribution is permitted upon notification to EPA if specific conditions, stated at 40 C.F.R. § 152.132(a) through (e), are met. As a requirement of supplemental distribution, the label of the distributor product must be the same as that of the registered product, with exceptions stated at 40 C.F.R. § 152.132(d)(1) through (5).

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

24. Section 7(c)(1) of FIFRA, 7 U.S.C. § 136e(c)(1), states, in pertinent part, that all pesticide producers must file an annual report that includes "the types and amounts of pesticides and, if applicable, active ingredients used in producing pesticides."

25. Section 12(a)(2)(L) of FIFRA, 7 U.S.C. §136j (a)(2)(L), states that it shall be unlawful for any person to violate any provision of section 136e.

26. Section 12(a)(2)(S) of FIFRA, 7 U.S.C. § 136j(a)(2)(S) states that it shall be unlawful to violate any FIFRA regulation.

27. Section 14(a)(1) of FIFRA, 7 U.S.C. § 136*l*(a)(1), authorizes the EPA Administrator to assess a civil penalty against any registrant, commercial applicator, wholesaler, dealer, retailer, or other distributor who violates any provision of FIFRA. The maximum statutory civil penalty is $6,500 for each offense that occurred after March 15, 2004 through January 12, 2009, and $7,500 for each offense that occurred after January 12, 2009.

V. EPA ALLEGATIONS AND CONCLUSIONS OF LAW

28. Respondent is a "person" as that term is defined at Section 2(s) of FIFRA, 7 U.S.C. § 136(s).

29. Respondent is a "registrant" as that term is defined at Section 2(y) of FIFRA, 7 U.S.C. § 136(y) and thus is subject to the civil penalty provisions of Section 14(a)(l) of FIFRA, 7 U.S.C. § 136*l*(a)(1).

30. Respondent is a "producer" as that term is defined at Section 2(w) of FIFRA, 7 U.S.C. § 136(w).

31. On or about June 28, 2011, the EPA inspected Respondent's registered pesticide production establishment (EPA Est. No. 9386-GA-001) located at 1525 Church Street Extension, Marietta, GA 30060.

32. On or about June 28, 2011, the EPA inspected Respondent's registered pesticide production establishment (EPA Est. No. 9386-WA-001) located at 1150 South 35th Street, Washougal, WA 98671.

33. On or about November 8, 2011, Respondent provided additional FIFRA records to the EPA in response to EPA's Information Request dated September 30, 2011.

COUNT 1

34. Paragraphs 28 through 33 are incorporated herein by reference, as if fully set forth below.

35. At all times relevant to this CAFO, Respondent distributed or sold a product called Fennosurf 583 (hereinafter "Microbiocide") comprised of ammonia and other ingredients.

36. At all times relevant to this CAFO, the Microbiocide is a "pesticide" as that term is defined at Section 2(u) of FIFRA, 7 U.S.C. § 136(u), because, when used alone or in a mixture of substances, it is intended for preventing, destroying, repelling, or mitigating pests.

37. At all times prior to December 21, 2011, the Microbiocide was not registered as a pesticide by EPA under Section 3 of FIFRA, 7 U.S.C. § 136a.

38. On or about December 21, 2011, Respondent obtained FIFRA registration for the Microbiocide (EPA Reg. No. 9386-49) for the stated purpose of controlling algal, bacterial and fungal deposits in influent water systems and all process water systems used for the manufacture of paper and paperboard products.

39. Therefore, Respondent sold or distributed the Microbiocide on numerous occasions prior to obtaining FIFRA section 3 registration on December 21, 2011, in violation of Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A) for which EPA may assess a civil penalty.

COUNT 2

40. Paragraphs 28 through 39 are incorporated herein by reference, as if fully set forth below.

41. Respondent is the registrant of AMA-24 (EPA Reg. No. 9386-3), a pesticide product comprised of 24% Dazomet and other ingredients.

42. In May 2007, Respondent notified EPA by Form 8750-5 ("Notice of Supplemental Distribution of a Registered Product") that it intended to distribute AMA-24 (EPA Reg. No. 9386-3) through Economy Mud Products Company, using the product name ECONO-B648L, and EPA Reg. No. 9386-3-84149 in accordance with the EPA's regulations regarding Supplemental Distribution at 40 C.F.R. § 152.132.

43. On or about May 30, 2007, Respondent signed EPA Form 8750-5 for its product, EPA Reg. No. 9386-3, stating that "It is the responsibility of the basic registrant to see that all distributor labeling is kept in compliance with requirements placed on the basic product."

44. On or about August 29, 2012, EPA Region 6 filed a CAFO (FIFRA-06-2012-0339) to resolve alleged violations pertaining to Economy Mud Products Company's sale and distribution of EPA Reg. No. 9386-3-84149 with a label that was "misbranded" as that term is defined in Section 2(q) of FIFRA, 7 U.S.C. § 136(q).

45. Pursuant to 40 C.F.R. § 152.132, Respondent is liable for FIFRA violations pertaining to its distributor product, EPA Reg. No. 9386-3-84149.

46. Therefore, Respondent is liable for the distribution or sale of EPA Reg. No. 9386-3 with a misbranded label in violation of Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E) for which EPA may assess a civil penalty.

COUNT 3

47. Paragraphs 28 through 46 are incorporated herein by reference, as if fully set forth below.

48. Respondent is the registrant of a pesticide product called "AMA-398" (EPA Reg. No. 9386-13) comprised of 98% Dazomet and other ingredients.

49. On or about May 24, 2012, Respondent notified EPA by Form 8750-5 ("Notice of Supplemental Distribution of a Registered Product") that it intended to distribute AMA-398 (EPA Reg. No. 9386-13) through Economy Mud Products Company, using the product name ECONO-398 and EPA Reg. No. 9386-13-84149.

50. At all times prior to May 24, 2012, Respondent allowed its product, EPA Reg. No. 9386-13, to be distributed by Economy Mud Products Company under a different name and bearing EPA Reg. No. 9386-13-84149 prior to notifying EPA as required by regulation at 40 C.F.R. § 152.132.

51. Therefore, Respondent's failure to notify EPA of the supplemental distribution of its product EPA Reg. No. 9386-13 prior to May 24, 2012 violates Part 152.132 regulations in violation of Section 12(a)(2)(S) of FIFRA, 7 U.S.C. § 136j(a)(2)(S) for which EPA may assess a civil penalty.

COUNT 4

52. Paragraphs 28 through 51 are incorporated herein by reference, as if fully set forth below.

53. At all times relevant to this CAFO, Respondent operated a registered pesticide producing establishment (EPA Est. No. 9386-GA-003) located at 1525 Church Street Extension, Marietta, GA 30060.

54. On or about February 21, 2011, Respondent filed a 2010 annual pesticide production report (EPA Form 3540-16) with the EPA Region 4 office.

55. Respondent's 2010 annual pesticide production report did not include information regarding production of pesticide products it produced in 2010, including but not limited to, EPA Reg. No. 9386-6 and EPA Reg. No. 1258-1255.

56. On or about February 6, 2012, Respondent filed a corrected 2010 pesticide production report with the EPA Region 4 office.

57. Therefore, Respondent failed to comply with the requirements of Section 7 of FIFRA and corresponding regulations at 40 C.F.R. § 167.85(d) in violation of Section 12(a)(2)(L) of FIFRA, 7 U.S.C. § 136j(a)(2)(L) for which EPA may assess a civil penalty.

COUNT 5

58. Paragraphs 28 through 57 are incorporated herein by reference, as if fully set forth below.

59. At all times relevant to this CAFO, Respondent operated a registered pesticide producing establishment (EPA Est. No. 9386-WA-001) located at 1150 South 35th Street, Washougal, WA 98671.

60. On or about February 22, 2011, Respondent filed a 2010 annual pesticide production report (EPA Form 3540-16) with the EPA Region 10 office.

61. Respondent's 2010 annual pesticide production report did not include information regarding production of several pesticide products it produced in 2010, including but not limited to, EPA Reg. No. 464-426 and EPA Reg. No. 10324-130-9386.

62. On or about February 6, 2012, Respondent filed a corrected 2010 pesticide production report with the EPA Region 10 office.

63. Therefore, Respondent failed to comply with the requirements of Section 7 of FIFRA and corresponding regulations at 40 C.F.R. § 167.85(d) in violation of Section 12(a)(2)(L) of FIFRA, 7 U.S.C. § 136j(a)(2)(L) for which EPA may assess a civil penalty.

VI. TERMS OF SETTLEMENT

64. Respondent consents to issuance of this Consent Agreement and to its terms, and consents, for the purposes of settlement, to the payment of the civil penalty set forth in Section VII.

65. Respondent's compliance with the terms of this CAFO shall fully resolve the violations and settle all civil claims or civil causes of action alleged in Section V, which are the sole claims alleged by EPA as a result of EPA's June 28, 2011 inspections and information provided to EPA in response to its September 30, 2011 Information Request. Except as provided herein, nothing in this CAFO is intended to, nor shall be construed to operate in any way to resolve any criminal liability of Respondent under FIFRA.

66. Compliance with this CAFO shall not be a defense to any subsequent action EPA may commence pursuant to federal law or regulations for violations occurring after the date of this Consent Agreement, or any violations of FIFRA not alleged in this Consent Agreement that may have occurred prior to the date that could not have been alleged

herein as a result of EPA's inspections or any information provided to EPA in response to its September 30, 2011 Information Request.

VII. CIVIL PENALTY

67. Complainant determined that an appropriate civil penalty to settle this action is $301,600. In determining the penalty amount, Complainant considered the statutory penalty factors listed in Section 14(a)(4) of FIFRA, 7 U.S.C. § 136*l*(a)(4) and EPA's "Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act," dated December 2009.

68. The penalty agreed upon by the Parties for settlement purposes is $301,600.

69. Within forty-five (45) calendar days following the execution of the Final Order by the Environmental Appeals Board, Respondent shall either:

    a. Dispatch a cashier's or certified check in the amount of $301,600, payable to the "Treasurer, United States of America" and bearing the docket number FIFRA-HQ-2013-5001, to the following address:

        U.S. Environmental Protection Agency
        Fines and Penalties
        Cincinnati Finance Center
        P.O. Box 979077
        St. Louis, MO 63197

        or

    b. Make an electronic payment by wire transfer in the amount of $301,600 with the notation, "Kemira Civil Penalty Docket No. FIFRA-HQ-2013-5001, by using the following instructions:

        Federal Reserve Bank of New York
        ABA = 02103004
        Account = 68010727
        SWIFT address = FRNYUS33
        33 Liberty Street
        New York, NY 10045

        Field Tag 4200 of the Fedwire message should read "D 68010727 Environmental Protection Agency"

70. To ensure a record of compliance with this Consent Agreement, Respondent shall forward a copy of the check or wire transfer to EPA to the attention of:

        Headquarters Hearing Clerk
        U.S. Environmental Protection Agency
        1200 Pennsylvania Avenue, N.W. (Mail Code 1900C)
        Washington, DC 20460-0001

And

Brenda Mosley
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W. (Mail Code 2249A)
Washington, DC 20460-0001

71. 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. § 1361(a)(5). The validity, amount, and appropriateness of the civil penalty are not reviewable in a collection action.

72. 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.

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

VIII. OTHER MATTERS

74. This CAFO does not relieve Respondent of the duty to comply with all applicable provisions of FIFRA and with other federal, state, tribal, and local laws and regulations.

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

76. The undersigned representative of each party to this CAFO certifies that he or she has the authority to sign this agreement for the party whom he or she represents, and to bind that party to its terms.

77. Respondent's obligations under this Consent Agreement shall terminate when Respondent has paid the civil penalty, and any applicable interest or late charges, as specified in Section VII of the Consent Agreement in accordance with the Final Order.

78. Each party agrees to bear its own costs and attorney fees in this matter.

79. This CAFO may be amended or modified only by written agreement executed by both EPA and Respondent.

FOR RESPONDENT:

[redacted]

12.5-2012
Date

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12/7/12
Date

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