



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 4

ATLANTA FEDERAL CENTER
61 FORSYTH STREET
ATLANTA, GEORGIA 30303-8960

SEP 05 2012

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. Richard A. Wingate
Attorney at Law
Hallman & Wingate LLC
166 Anderson Street SE, Suite 210
Marietta, Georgia 30060

Re: X-M Industries, Inc.
Ratified Consent Agreement and Final Order
Docket No.: FIFRA-04-2012-3024(b)

Dear Mr. Wingate:

Enclosed is a copy of the ratified Consent Agreement and Final Order (CAFO) in the above-referenced matter. The original CAFO has been filed with the Regional Hearing Clerk and served on the parties as directed in Section 22.6 of the Consolidated Rules of Practice, 40 C.F.R. Part 22.

Please refer to Section V of the CAFO for penalty information and payment requirements. To ensure proper processing, the respondent name and docket number for this case, identified above and in the CAFO, should be noted on any cashier's or certified checks submitted in payment of the penalty.

Also enclosed is a copy of a document entitled "Notice of Securities and Exchange Commission Registrants' Duty to Disclose Environmental Legal Proceedings." This document puts you on notice of your potential duty to disclose to the Securities and Exchange Commission any environmental enforcement actions taken by the EPA. Where used in the document "SEC" refers to the Securities and Exchange Commission.

Should you have any questions about this matter or your compliance status in the future, please contact Ms. Cheryn Jones of the EPA Region 4 staff at (404) 562-9006.

Sincerely,

A handwritten signature in black ink that reads "Jean X. Skene" with a stylized flourish at the end.

Jeanne M. Gettle
Chief
Pesticides and Toxic
Substances Branch

Enclosures

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 4
ATLANTA, GEORGIA

RECEIVED
EPA REGION IV
2012 SEP -5 AM 8:19
HEARING CLERK

In the Matter of:

X-M Industries, Inc.

Respondent.

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) Docket No.: FIFRA-04-2012-3024(b)
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CONSENT AGREEMENT AND FINAL ORDER

I. Nature of the Action

1. This is a civil penalty proceeding pursuant to Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended, 7 U.S.C. § 136/(a) (FIFRA), and pursuant to the Consolidated Rules of Practice Governing Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (Consolidated Rules), 40 C.F.R. Part 22. Complainant is the Director of the Air, Pesticides and Toxics Management Division, United States Environmental Protection Agency, Region 4. Respondent is X-M Industries, Inc.
2. The authority to take action under Section 14(a) of FIFRA, 7 U.S.C. § 136/(a), is vested in the Administrator of the EPA. The Administrator of the EPA has delegated this authority under FIFRA to the EPA Region 4 by EPA Delegation 5-14, dated May 11, 1994. The Regional Administrator, Region 4, has redelegated this authority to the Director, Air, Pesticides and Toxics Management Division, by the EPA Region 4 Delegation 5-14, dated September 7, 2005. Pursuant to that delegation, the Director of the Air, Pesticides and Toxics Management Division has the authority to commence an

enforcement action as the Complainant in this matter, and has the authority to sign consent agreements memorializing settlements between the EPA and Respondents.

3. Complainant and Respondent have conferred for the purpose of settlement pursuant to 40 C.F.R. § 22.18 and desire to resolve this matter and settle the allegations described herein without a formal hearing. Therefore, without the taking of any evidence or testimony, the making of any argument, or the adjudication of any issue in this matter, and in accordance with 40 C.F.R. § 22.13(b), this Consent Agreement and Final Order (CAFO) will simultaneously commence and conclude this matter.

II. Preliminary Statements

4. Pursuant to 40 C.F.R. § 22.5(c)(4) the following individual is authorized to receive service for the EPA in this proceeding:

Cheryn L. Jones
Pesticides Section
U.S. EPA - Region 4
61 Forsyth Street
Atlanta, Georgia 30303-8960
(404) 562-9006.

5. Respondent is X-M Industries, Inc., a Georgia corporation, located at 2930 Woodbine Hill Way, Norcross, Georgia 30071.
6. Respondent is a "person" as defined by Section 2(s) of FIFRA, 7 U.S.C. § 136(s), and as such is subject to FIFRA and the regulations promulgated thereunder.

III. Specific Allegations

7. On February 23, 2011, an authorized representative of the EPA conducted an inspection at Respondent's facility located at 2930 Woodbine Hill Way, Norcross, Georgia 30071.

8. During the aforementioned inspection, Respondent was producing and distributing or selling the following three products: Structure Guard Professional Grade Wood Sealer, E-Fusion-RTU Professional Grade Wood Sealer and Protector, and X-Mold Blast Off.
9. The labels on Structure Guard Professional Grade Wood Sealer and E-Fusion-RTU Professional Grade Wood Sealer bore claims such as “wood sealer and protector,” which are considered to be pesticidal claims.
10. The label on X-Mold Blast Off bore claims such as “X-Mold” and “mold remediation,” which are considered to be pesticidal claims.
11. Because the labels for Structure Guard Professional Grade Wood Sealer, E-Fusion-RTU Professional Grade Wood Sealer and Protector, and X-Mold Blast Off made pesticidal claims, these products are pesticides as defined by Section 2(u) of FIFRA, 7 U.S.C. § 136(u), which includes any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest.
12. A pest is defined in Section 2(t) of FIFRA, 7 U.S.C. § 136(t), as any insect, rodent, nematode, fungus, weed, or any other form of terrestrial or aquatic plant or animal life or virus, bacteria, or other micro-organism (except viruses, bacteria, or other 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. § 136w(c)(1).
13. Respondent “distributes or sells” pesticides. The term “to distribute or sell” as defined by Section 2(gg) of FIFRA, 7 U.S.C. § 136(gg), includes to distribute, sell, offer for sale, hold for distribution, hold for sale, hold for shipment, ship, deliver for shipment, or release for shipment.

14. Pesticides that are sold and distributed in the United States are required to be registered with the EPA, pursuant to Section 3 of FIFRA, 7 U.S.C. § 136a.
15. At the time of the inspection, Structure Guard Professional Grade Wood Sealer, E-Fusion-RTU Professional Grade Wood Sealer and Protector, and X-Mold Blast Off were not registered as pesticides with the EPA.
16. On August 23, 2010, and February 2, 2011, Structure Guard Professional Grade Wood Sealer was offered for distribution or sale on Respondent's website at <http://www.xmindustries.com>.
17. At the aforementioned inspection, the inspector collected bills of lading showing that Respondent distributed or sold E-Fusion-RTU Professional Grade Wood Sealer and Protector a minimum of eight times from June 8, 2008 through July 9, 2010.
18. At the aforementioned inspection, the inspector collected shipping records that showed that Respondent had distributed or sold X-Mold Blast Off a minimum of seven times between January 20, 2011, and February 18, 2011.
19. Under Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), it is unlawful for any person to distribute or sell to any person any pesticide that is not registered under Section 3 of FIFRA, 7 U.S.C. § 136a.
20. Respondent violated Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), on at least 17 occasions as described above and is therefore subject to the assessment of civil penalties under Section 14 of FIFRA, 7 U.S.C. § 136l.
21. At the time of the aforementioned inspection, Respondent produced the pesticides Structure Guard Professional Grade Wood Sealer, E-Fusion-RTU Professional Grade

- Wood Sealer and Protector, and X-Mold Blast Off in an establishment that was not registered with the Administrator of the EPA as a pesticide-producing establishment.
22. "Produce" is defined in Section 2(w) of FIFRA, 7 U.S.C. § 136(w) to mean manufacture, prepare, compound, propagate, or process any pesticide or device or active ingredient used in producing a pesticide.
 23. Under Section 12(a)(2)(L) of FIFRA, 7 U.S.C. § 136j(a)(2)(L), it is unlawful to produce a pesticide in any State unless the establishment is registered with the Administrator of the EPA as set forth in Section 7 of FIFRA, 7 U.S.C. § 136e.
 24. Respondent violated Section 12(a)(2)(L) of FIFRA, 7 U.S.C. § 136j(a)(2)(L), and is therefore subject to the assessment of civil penalties under Section 14 of FIFRA, 7 U.S.C. § 136l.
 25. Subsequent to the February 23, 2011 inspection, the EPA conducted further investigation and determined that the unregistered pesticides Structure Guard Professional Grade Wood Sealer and E-Fusion-RTU Professional Grade Wood Sealer contained Kathon 886 MW LX-1.5% Industrial Microbicide, EPA Reg. No. 707-134, in concentrations exceeding the concentrations allowed in the Directions for Use on the label of Kathon 886 MW LX-1.5% Industrial Microbicide.
 26. Subsequent to the February 23, 2011 inspection, the EPA conducted further investigation and determined that the unregistered pesticide E-Fusion-RTU Professional Grade Wood Sealer contained Polyphase HS-32, EPA Reg. No. 5383-114, in concentrations exceeding the concentration allowed in the Directions for Use on the label of Polyphase HS-32.
 27. Under Section 12(a)(2)(G) of FIFRA, 7 U.S.C. § 136j(a)(2)(G), it is unlawful to use any registered pesticide in a manner inconsistent with its labeling. Respondent violated

Section 12(a)(2)(G) of FIFRA, 7 U.S.C. § 136j(a)(2)(G), on at least three occasions and is therefore subject to the assessment of civil penalties under Section 14 of FIFRA, 7 U.S.C. § 136l.

28. Section 14(a) of FIFRA, 7 U.S.C. § 136l(a), in conjunction with the Debt Collection Improvement Act of 1996, authorizes the assessment of a civil penalty.
29. Section 14(a)(4) of FIFRA, 7 U.S.C. § 136l(a)(4), requires the EPA to consider the appropriateness of the assessed penalty to the size of business of the Respondent, the effect on Respondent's ability to continue in business, and the gravity of the violation.
30. After consideration of the factors set forth in Section 14(a)(4) of FIFRA, 7 U.S.C. § 136l(a)(4), the EPA proposes to assess a total civil penalty of **SEVENTY-SIX THOUSAND NINE HUNDRED DOLLARS (\$76,900)** against the Respondent for the above-described violations. Civil penalties under Section 14(a) of FIFRA, 7 U.S.C. § 136l(a), may be assessed by Administrative Order.

IV. Consent Agreement

31. For the purposes of this CAFO, Respondent admits the jurisdictional allegations set forth above and neither admits nor denies the factual allegations set forth above.
32. Respondent waives its right to a hearing on the allegations contained herein and its right to appeal the proposed Final Order accompanying the Consent Agreement.
33. Respondent consents to the assessment of the penalty proposed by the EPA and agrees to pay the civil penalty as set forth in this CAFO.
34. Respondent certifies that as of the date of its execution of this CAFO, it is in compliance with all relevant requirements of FIFRA.

35. Compliance with this CAFO shall resolve the allegations of the violations contained herein. This CAFO shall not otherwise affect any liability of Respondent to the United States. Other than as expressed herein, neither the EPA nor Complainant waives any right to bring an enforcement action against Respondent for violation of any federal or state statute, regulation or permit, to initiate an action for imminent and substantial endangerment, or to pursue criminal enforcement.
36. Complainant and Respondent agree to settle this matter by their execution of this CAFO. The parties agree that the settlement of this matter is in the public interest and that this CAFO is consistent with the applicable requirements of FIFRA.

V. Final Order

37. Respondent is assessed a civil penalty **SEVENTY-SIX THOUSAND NINE HUNDRED DOLLARS (\$76,900)**. Six payments will be made to complete payment of the entire civil penalty including interest. The first installment is due within 30 days of the effective date of this CAFO. The subsequent five payments shall be due in six-month intervals thereafter. Including the civil penalty and interest, the total amount that will be paid upon the completion of all payments will be **SEVENTY-SEVEN THOUSAND EIGHT HUNDRED SEVENTY-FIVE DOLLARS and NINETY-FOUR CENTS (\$77,875.94)**. Respondent shall make payments in accordance with the following schedule:

<u>Payment Number</u>	<u>Payment Due Date</u>	<u>Payment Due</u>
1	within 30 days of filing of CAFO	\$12,979.34
2	within 7 months of filing of CAFO	\$12,979.32
3	within 13 months of filing of CAFO	\$12,979.32
4	within 19 months of filing of CAFO	\$12,979.32

5 within 25 months of filing of CAFO \$12,979.32
6 within 31 months of filing of CAFO \$12,979.32

38. Respondent shall remit the penalty by either a cashier's or certified check made payable to the "Treasurer, United States of America," and shall send the check via U.S. mail to the following address:

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

The check shall reference on its face the name of the Respondent and Docket Number of this CAFO.

39. At the time of payment, Respondent shall send a separate copy of the check and a written statement that the payment is being made in accordance with this CAFO, to the following persons at the following addresses:

Regional Hearing Clerk
U.S. EPA - Region 4
61 Forsyth Street
Atlanta, Georgia 30303-8960;

Cheryn L. Jones
Pesticides Section
U.S. EPA - Region 4
61 Forsyth Street
Atlanta, Georgia 30303-8960; and

Saundi J. Wilson
Office of Environmental Accountability
U.S. EPA - Region 4
61 Forsyth Street
Atlanta, Georgia 30303-8960.

40. If Respondent fails to make one of the installment payments in accordance with the schedule set forth above, and if such payment is not made within 30 days after the due date, that payment plus all subsequent payments (the entire unpaid balance) shall become

immediately due and payable on the 31st day from such due date. In addition, Respondent shall be liable for and shall pay administrative handling charges and late payment penalty charges as described below in the event of any such failure or default.

41. Further, if Respondent fails to pay the installment payments in accordance with the schedule set forth above, EPA may refer the debt to a collection agency, a credit reporting agency, or to the Department of Justice for filing of a collection action in the appropriate United States District Court. In any such collection action, the validity, amount, and appropriateness of the assessed penalty and of this CAFO shall not be subject to review.
42. Notwithstanding Respondent's agreement to pay the assessed civil penalty in accordance with the installment schedule set forth above, Respondent may pay the entire civil penalty of **SEVENTY-SIX THOUSAND NINE HUNDRED DOLLARS (\$76,900)** within 30 days of the effective date of this CAFO and, thereby, avoid the payment of interest pursuant to 40 C.F.R. § 13.11(a). In addition, Respondent may, at any time after commencement of payments under the installment schedule, elect to pay the entire principal balance remaining, together with interest accrued up to the date of such full payment.
43. Pursuant to 31 U.S.C. § 3717 and 40 C.F.R. § 13.11, 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. In accordance with 40 C.F.R. § 13.11(a), interest on any civil penalty assessed in a CAFO begins to accrue on the date that a copy of the CAFO is mailed or hand-delivered to the Respondent. However, EPA will not seek to recover interest on any amount of such civil penalty that is paid within 30 calendar days after the

CERTIFICATE OF SERVICE

I hereby certify that on the date set out below, I filed the original and one copy of the foregoing Consent Agreement and Final Order and served a true and correct copy of the foregoing Consent Agreement and Final Order, In the Matter of X-M Industries Inc., Docket Number: FIFRA-04-2012-3024(b), to the addressees listed below.

Mr. Richard A. Wingate
Attorney at Law
Hallman & Wingate LLC
166 Anderson Street, SE, Suite 210
Marietta, Georgia 30060

(via Certified Mail, Return Receipt Requested)

Ms. Cheryn Jones
Pesticides Section
U.S. EPA Region 4
61 Forsyth Street
Atlanta, Georgia 30303

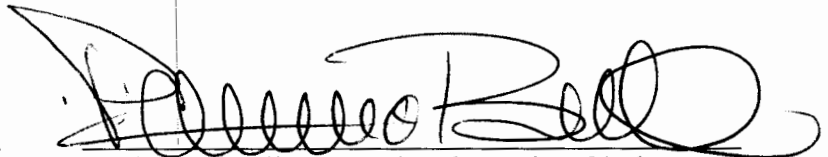
(via EPA's internal mail)

Robert Caplan, Esq.
Associate Regional Counsel
Office of Environmental Accountability
U.S. EPA Region 4
61 Forsyth Street
Atlanta, Georgia 30303

(via EPA's internal mail)

Date: _____

9-5-12



Patricia A. Bullock, Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 4
61 Forsyth Street
Atlanta, Georgia 30303
(404) 562-9511