

U. S. ENVIRONMENTAL PROTECTION AGENCY  
REGION 7  
11201 RENNER BOULEVARD  
LENEXA, KANSAS 66219

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BEFORE THE ADMINISTRATOR

In the Matter of

Earthworks Health, LLC

Respondent

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Docket No. FIFRA-07-2014-0009

**CONSENT AGREEMENT AND FINAL ORDER**

The U.S. Environmental Protection Agency (EPA), Region 7 and Earthworks Health, LLC, (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 Earthworks Health, LLC, a pesticide distributor incorporated in the state of Nebraska.

## 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 animals) 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. 40 C.F.R. § 152.15(a) states that a substance is considered to be intended for a pesticidal purpose, and thus to be a pesticide requiring registration, if the person who distributes or sells the substance (1) claims, states, or implies (by labeling or otherwise) that the substance

can or should be used as a pesticide; or (2) that the substance consists of or contains an active ingredient and that it can be used to manufacture a pesticide.

9. 40 C.F.R. § 152.15(c) states that a substance is considered to be intended for a pesticidal purpose, and thus to be a pesticide requiring registration, if the person who distributes or sells the substance has actual or constructive knowledge that the substance will be used, or is intended to be used, for a pesticidal purpose.

10. 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.

11. 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.

12. Section 2(q)(1)(A) of FIFRA, 7 U.S.C. § 136(q)(1)(A), states a pesticide is misbranded if its labeling bears any statement, design, or graphic representation representative thereto or to its ingredients which is false or misleading in any particular.

13. Section 2(q)(1)(E) of FIFRA, 7 U.S.C. § 136(q)(1)(E), states a pesticide is misbranded 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 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.

14. Section 2(q)(1)(F) of FIFRA, 7 U.S.C. § 136(q)(1)(F), states 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, together with any requirements imposed under section 3(d) of FIFRA, are adequate to protect health and the environment.

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

16. Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), states that it shall be unlawful for any person to distribute or sell any pesticide that is not registered under Section 3 of FIFRA, 7 U.S.C. § 136a, or whose registration has been cancelled or suspended.

#### **Section IV**

##### **General Factual Allegations**

17. 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).

18. At all times relevant to this Complaint, the Respondent engaged in the marketing and sale of diatomaceous earth and a product called Foaming DisposALL Drain Cleaner via its website, <http://www.earthworkshealth.com>.

19. At all times relevant to this Complaint, Respondent engaged in the marketing and sale of copper sulfate products via Amazon.com’s marketplace and via the website [www.eBay.com](http://www.eBay.com).

##### **Violations**

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

**Counts 1-5**

21. The facts stated in Paragraphs 17 through 19 are realleged and incorporated as if fully stated herein.

22. Diatomaceous earth products are marketed by Respondent with the following claims:

- (i) "Get Rid of Bed Bugs"
- (ii) "Organic Pest Control"
- (iii) "Flea control"
- (iv) "Organic Garden Pest Control"
- (v) "Household Pest Control"
- (vi) "natural, organic garden pest control and household insect killer"
- (vii) "Kill roaches, silverfish, KILL ANTS, fire ants, carpenter ants, bedbugs, lice, mites, spiders, earwigs, flies, fleas, box elder bugs, crabs(std), Pubic and hair Lice, scorpions, crickets, and many other insects"
- (viii) "PERMA-GUARD CRAWLING INSECT CONTROL---EPA REGISTERED AND APPROVED!"
- (ix) "KILLS aphids, white flies, beetles, loopers, mites, snails, slugs, leaf hoppers, and HARMFUL PESTS"
- (x) "for organic pest control on farms"
- (xi) "used by non-organic growers for pest control"
- (xii) "for Garden Insects"
- (xiii) "For household insects, ants, roaches, spiders, mites, fleas, flies etc."

(xiv) “DE kills spiders, roaches, silverfish, ants, fire ants, carpenter ants, bedbugs, lice, mites, earwigs, flies, fleas, box elder bugs, crabs(std), pubic and hair lice, scorpions, crickets and harmful insects.”

(xv) “We sell both the EPA approved label bag and the Non EPA approved label bag. The only difference is the label - it is exactly the same product dug out of the same mine.”

23. The diatomaceous earth products marketed by Respondent are pesticides as defined by Section 2(u) of FIFRA, 7 U.S.C. § 136(u), 40 C.F.R. §§ 152.3 and 152.15(a).

24. The diatomaceous earth products marketed by Respondent are not registered as pesticides as required by Section 3(a) of FIFRA, 7 U.S.C. § 136a(a).

25. On or about November 30, 2011, Respondent sold or distributed quantities of diatomaceous earth pesticide products in five separate transactions.

26. On the date of the sales and/or distributions of the diatomaceous earth pesticide products, the products were not registered with the EPA pursuant to Section 3 of FIFRA, 7 U.S.C. § 136a.

27. As sold or distributed by Respondent, the label for the diatomaceous earth pesticide products lacked a valid EPA registration number.

28. For each of the five transactions referenced above, Respondent violated Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), by selling or distributing a pesticide which is not registered under Section 3 of FIFRA, 7 U.S.C. § 136a.

29. For each of the five transactions referenced above Respondent violated Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), by selling or distributing a pesticide which was misbranded.

**Counts 6-15**

30. The facts stated in paragraphs 17 through 19 are realleged and incorporated as if fully stated herein.

31. Respondent markets copper sulfate products packaged in 10-pound and 3-pound containers.

32. The copper sulfate products in 10-pound and 3-pound packages marketed by Respondent as described in this Complaint were repackaged from one or more EPA-registered copper sulfate pesticide products intended for the control of algae in agricultural and non-agricultural settings, for root control in sewers, and as fungicides.

33. The copper sulfate products marketed by Respondent are pesticides as defined by Section 2(u) of FIFRA, 7 U.S.C. § 136(u), 40 C.F.R. §§ 152.3 and 152.15(a).

34. The copper sulfate products repackaged into 10-pound and 3-pound containers and marketed by Respondent are not registered as pesticides as required by Section 3(a) of FIFRA, 7 U.S.C. § 136a(a).

35. On or about August 21, 28 and 31, 2011, September 5, 2011, and November 5, 10, 17, 18, and 19, 2011, Respondent sold or distributed quantities of copper sulfate pesticide products in 10-pound and/or 3-pound containers in ten separate transactions.

36. As sold or distributed by Respondent, the labels for the copper sulfate pesticide products lacked valid EPA registration numbers, production establishment numbers, directions for use, and personal protection equipment language.

37. For each of the ten transactions referenced above, Respondent violated Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), by selling or distributing a pesticide which is not registered under Section 3 of FIFRA, 7 U.S.C. § 136a.

38. For each of the ten transactions referenced above, Respondent violated Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), by selling or distributing a pesticide which was misbranded.

**Count 16**

39. The facts stated in paragraphs 17 through 19 are realleged and incorporated as if fully stated herein.

40. On or about November 12, 2011, Respondent offered for sale on the Internet the product Foaming DisposALL Drain Cleaner with the following claims:

(i) “Added are: Gunk Eating Enzymes”

(ii) “Kills Germs & Bacteria.”

41. The product Foaming DisposALL Drain Cleaner is a pesticide as defined by Section 2(u) of FIFRA, 7 U.S.C. § 136(u), 40 C.F.R. §§ 152.3 and 152.15(a).

42. The product Foaming DisposALL Drain Cleaner is not registered as a pesticide as required by Section 3(a) of FIFRA, 7 U.S.C. § 136a(a) As sold or distributed by Respondent, the labels for the pesticide product Foaming DisposALL Drain Cleaner lacked a valid EPA registration number.

43. Respondent violated Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), by selling or distributing a pesticide which is not registered under Section 3 of FIFRA, 7 U.S.C. § 136a.

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



## Section V

### Consent Agreement

45. For purposes of this proceeding, Respondent admits the jurisdictional allegations set forth above, and agrees not to contest the EPA's jurisdiction in this proceeding or any subsequent proceeding to enforce the terms of the Final Order.

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

47. Respondent waives its right to contest any allegations set forth above and its right to appeal the Final Order accompanying this Consent Agreement.

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

49. 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.

50. 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.

51. Respondent certifies that by signing this CAFO that it is presently in compliance with FIFRA, 7 U.S.C. § 136 et. seq., and all regulations promulgated thereunder. Respondent also certifies that, for each of the years 2011, 2012, and 2013, its gross annual revenue from all sources did not exceed \$1,000,000, and that it understands that it is a violation of 18 U.S.C. § 1001 to willfully make any false statement regarding its gross annual revenue.

52. The effect of settlement as described in the following paragraph is conditioned upon the accuracy of the Respondent's representations to the EPA, as memorialized in the

preceding paragraph.

53. Respondent agrees that, in settlement of the claims alleged in this CAFO, Respondent shall pay a penalty as set forth in Paragraph 1 of the Final Order below. Payment of this civil penalty in full shall resolve all civil and administrative claims for all violations of FIFRA alleged in this document.

54. Complainant reserves the right to take any enforcement action with respect to any other violations of FIFRA not addressed in this Consent Agreement and Final Order or any other applicable law and/or regulation administered by the EPA.

55. Late Payment Provisions: Pursuant to 31 U.S.C. § 3717, the 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 mitigated civil penalty of Eighteen Thousand Seven Hundred Sixty-One Dollars and Sixty Cents (\$18,761.60) plus interest for two years of One Hundred Sixty-Four Dollars and Forty Cents (\$164.40). The civil penalty will be paid in eight (8) quarterly payments of Two Thousand Three Hundred Sixty-Five Dollars and 75Nie Cents (\$2,365.75) each. The first payment must be received at the address below on or before 30 days after the effective date of the Final Order. Each of the seven succeeding payments shall be due on or before the following dates:

December 8, 2014

March 8, 2015

June 8, 2015

September 8, 2015

December 8, 2015

March 8, 2016

June 8, 2016

Such payments shall identify Respondent by name and docket number and made as follows:

If by certified or cashier's check, payment should be made payable to the "United States Treasury" and sent to the following address:

US Environmental Protection Agency  
Fines and Penalties  
Cincinnati Finance Center  
PO Box 979077

St. Louis, Missouri 63197-9000

If by wire transfer, payment should be directed to the Federal Reserve Bank of New York as follows:

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"

If by electronic payment, payment may be submitted on-line at [www.pay.gov](http://www.pay.gov) by entering "SFO 1.1" in the "Search Public Forms" field. Open the on-line form and complete the required fields to complete payment. Respondent shall print a copy of the payment receipt and mail a copy of the receipt to the contacts listed below

2. 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  
11201 Renner Boulevard  
Lenexa, Kansas 66219;

and

Andrew Kowalski  
Toxics and Pesticides Enforcement Branch, WWPD  
U.S. Environmental Protection Agency  
Region 7  
11201 Renner Boulevard  
Lenexa, Kansas 66219.

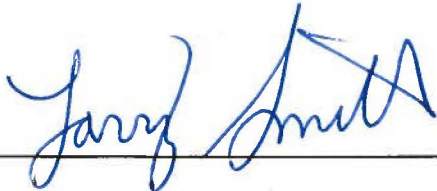
3. No portion of the civil penalty or interest paid by Respondent pursuant to the requirements of this CAFO shall be claimed by Respondent as a deduction for federal, state, or

local income tax purposes.

4. This CAFO shall be effective upon the filing of the Final Order by the Regional Hearing Clerk for the EPA, Region 7. Unless otherwise stated, all time periods stated herein shall be calculated in calendar days from such date.

**RESPONDENT  
EARTHWORKS HEALTH LLC**

Date: 8/4/14

By: 

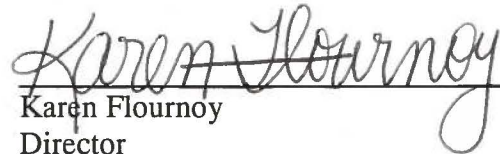
Larry Smith  
Print Name

President  
Title

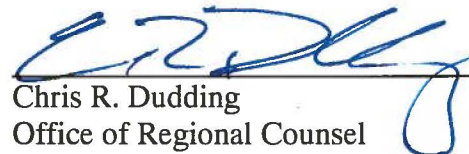
**COMPLAINANT**

**U. S. ENVIRONMENTAL PROTECTION AGENCY**

Date: 8-22-14

  
\_\_\_\_\_  
Karen Flournoy  
Director  
Water, Wetlands and Pesticides Division

Date: 8/22/14

  
\_\_\_\_\_  
Chris R. Dudding  
Office of Regional Counsel

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

Date: 8-26-14

Karina Borromeo  
Karina Borromeo  
Regional Judicial Officer



IN THE MATTER OF Earthworks Health, LLC, Respondent  
Docket No. FIFRA-07-2014-0009

CERTIFICATE OF SERVICE

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

Copy by email to Attorney for Complainant:

[dudding.chris@epa.gov](mailto:dudding.chris@epa.gov)

Copy by First Class Mail to:

Larry Smith, President  
Custom Feed Services Corporation  
Earthworks Health, LLC  
2100 North 13<sup>th</sup> Street  
Norfolk, Nebraska 68701

Dated: 8/27/14



Kathy Robinson  
Hearing Clerk, Region 7