

BEFORE THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
1650 Arch Street
Philadelphia, Pennsylvania 19103-2029

U.S. EPA-REGION 3-RHC
FILED-29JAN2019PM2:27

DEGESCH AMERICA INC.
153 TRIANGLE DRIVE
WEYERS CAVE, VA 24486

RESPONDENT.

:
:
: U.S. EPA Docket Number
: FIFRA-03-2019-0038
:
: Proceeding Under Section 14 of the
: Federal Insecticide, Fungicide and
: Rodenticide Act, as amended, 7 U.S.C.
: § 136f
:
:

CONSENT AGREEMENT

Preliminary Statement

This Consent Agreement ("CA") is entered into by the Director of the Land and Chemicals Division, U.S. Environmental Protection Agency, Region III ("EPA" or "Complainant"), and Degesch America Inc. ("Respondent") pursuant to Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), as amended, 7 U.S.C. § 136f(a), and Sections 22.13(b), 22.18(b) of the *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, and the Revocation/Termination or Suspension of Permits* ("Consolidated Rules of Practice"), 40 C.F.R §§ 22.13(b), 22.18(b). This CA and the accompanying Final Order (collectively "CAFO") resolves Complainant's civil penalty claims against the Respondent arising from the violations of FIFRA alleged within.

This CAFO simultaneously initiates and concludes this proceeding in accordance with 40 C.F.R. §§ 22.13(b), 22.18(b)(2) and (3).

JURISDICTION

1. U.S. Environmental Protection Agency, Region III has jurisdiction over the above captioned matter pursuant to Section 14 of FIFRA, 7 U.S.C. § 136f(a).

GENERAL PROVISIONS

2. For purposes of this proceeding only, Respondent admits to the jurisdictional allegations set forth in this CAFO.
3. For purposes of this proceeding, Respondent neither admits nor denies the specific factual allegations and conclusions of law set forth herein, except

- as provided in Paragraph 2, above.
4. Respondent agrees not to contest EPA's jurisdiction with respect to the execution of this CA, the issuance of the attached Final Order, or the enforcement of the CAFO.
 5. For the purposes of this proceeding only, Respondent hereby expressly waives its right to a hearing on any issue of law or fact set forth in this CA and any right to appeal the accompanying Final Order.
 6. Respondent consents to the issuance of this CAFO and agrees to comply with its terms.
 7. Respondent shall not deduct for civil taxation purposes the civil penalty specified in this CAFO.
 8. Respondent shall bear its own costs and attorney's fees.

STAUTORY AND REGULATORY BACKGROUND

9. Section 3(a) of FIFRA, 7 U.S.C. § 136a(a), and 40 C.F.R. § 152.15 state that no person in any state may distribute or sell to any person any pesticide that is not registered under this statute, except in certain circumstances which are not relevant to this case.
10. Section 12(a)(1)(E) of FIFRA 7 U.S.C. § 136j(a)(1)(E), provides that it shall be unlawful for any person in any State to sell or distribute to any person any pesticide that is misbranded.
11. Pursuant to Section 2(q)(1)(E) of FIFRA, 7 U.S.C. § 136(q)(1)(E), a pesticide is "misbranded" if any word, statement of other information required by or under the authority of FIFRA 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.
12. 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."
13. Section 2(gg) of FIFRA, 7 U.S.C. § 136(gg), defines "to distribute or sell" as "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."
14. Section 2(u) of FIFRA, 7 U.S.C. § 136(u), defines a "pesticide" to include "any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest" and "any substance or mixture of substances intended for use as a plant regulator, defoliant, or desiccant."
15. Section 2(t) of FIFRA, 7 U.S.C. § 136(t), defines a "pest" 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 micro-organisms on or in living man or other living animals) which the Administrator declares to be a pest under section [25(c)(1) of FIFRA]." *See also* 40 C.F.R. § 152.5.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

16. Respondent, Degesch America Inc., is a corporation established under the laws of the State of Delaware.
17. Respondent is, and at all times referred to herein was, a "person" as defined in 2(s) of FIFRA, 7 U.S.C. § 136(s).
18. Respondent's corporate headquarters is located at 153 Triangle Drive, Weyers Cave, VA 24486.
19. At all times relevant to the violations alleged herein, Respondent "sold" or "distributed" the pesticides Fumitoxin Tablets, Fumitoxin Pellets, and Magnesium Phosphide as these terms are defined in Section 2 of FIFRA, 7 U.S.C. § 136.
20. The Virginia Department of Agriculture and Consumer Services conducted import inspections and obtained evidence of Respondent's labels at the Hampton Roads Examination Warehouse in Chesapeake, Virginia on December 4, 2015, December 15, 2015, and May 2, 2016.
21. A representative of the EPA reviewed the evidence obtained from the import inspections for the pesticides Fumitoxin Tablets, Fumitoxin Pellets, and Magnesium Phosphide.

COUNTS

22. The allegations contained in Paragraphs 1 through 21 of this Consent Agreement are incorporated by reference herein as though fully set forth at length.
28. Respondent's products Fumitoxin Tablets, Fumitoxin Pellets, and Magnesium Phosphide are "pesticides" as this term is defined in Section 2(u) of FIFRA, 7 U.S.C. § 136(u).
29. On or after the December 2015 inspections, EPA representatives determined that Respondent's product label for Fumitoxin Tablets (EPA Reg. No. #72959-1) omitted the word "applicator" when compared with the version accepted by EPA for the primary registered product.
30. On or after the December 2015 inspections, EPA representatives determined that Respondent's product label for Fumitoxin Pellets (EPA Reg. No. #72959-2) omitted the word "applicator" when compared with the version accepted by EPA for the primary registered product.

31. On or after the May 2016 import inspection, EPA representatives determined that labels used on containers of Magnesium Phosphide, distributed or sold by Degesch, omitted the producing establishment number; the ingredient statement; hazard and precautionary statements; the directions for use; and use classifications.
32. Respondent's sales of the misbranded pesticides described in paragraphs 29 through 31 constitutes 3 violations of Sections 12(a)(1)(E) and 12(a)(2)(S) of FIFRA 7 U.S.C. § 136j(a)(1)(E) and 136j(a)(2)(S).

CIVIL PENALTY

33. In settlement of Complainant's claims for civil penalties for the violations alleged in this Consent Agreement, Respondent agrees to pay a civil penalty of Fifteen Thousand Seven Hundred and Sixty-Eight Dollars (\$15,768.00).
34. The civil penalty is due and payable immediately upon Respondent's receipt of a true and correct copy of this CAFO. If Respondent pays the entire civil penalty within 30 calendar days of the date on which this CAFO is mailed to Respondent, no interest will be assessed against Respondent pursuant to 40 C.F.R. § 13.11 (a)(1).
35. Pursuant to 31 U.S.C. § 3717 and 40 C.F.R. § 13.11, EPA is entitled to assess interest, administrative costs and late payment penalties on outstanding debts owed to the United States and a charge to cover the costs of processing and handling a delinquent claim, as more fully described below.
36. 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 Respondents. However, EPA will not seek to recover interest on any amount of such civil penalty that is paid within 30 calendar days after the date on which such interest begins to accrue. Interest will be assessed at the rate of the United States Treasury tax and loan rate in accordance with 40 C.F.R. § 13.11 (a).
37. The costs of the Agency's administrative handling of overdue debts will be charged and assessed monthly throughout the period a debt is overdue. 40 C.F.R. § 13.11 (b). Pursuant to Appendix 2 of EPA's Resources Management Directives-Cash Management, Chapter 9, EPA will assess a \$15.00 administrative handling charge for administrative costs on unpaid penalties for the first 30-day period after the payment is due and an additional \$15.00 for each subsequent 30 days the penalty remains unpaid.
38. A late payment penalty of six percent per year will be assessed monthly on any portion of a civil penalty which remains delinquent more than 90 calendar days. 40 C.F.R. § 13.11(c). Should assessment of the penalty charge on a debt be required, it shall accrue from the first day payment is delinquent. 31 C.F.R. § 901.9(d).
39. The aforesaid settlement amount was based upon Complainant's consideration of a number of factors, including, but not limited to, the statutory factors of the appropriateness of such penalty to the size of the business of the person charged, the

effect on the person's ability to continue in business, and the gravity of the violation. Complainant also took into account the particular facts and circumstances of this case with specific reference to EPA's *Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)*, dated December 2009 ("ERP"). Complainant has also considered the appropriate *Adjustment of Civil Monetary Penalties for Inflation*, pursuant to 40 C.F.R. Part 19, and the July 27, 2016 memorandum by EPA Assistant Administrator Cynthia Giles, entitled *Amendments to the US Environmental Protection Agency's Civil Penalty Policies to Account for Inflation (Effective August 1, 2016)*, including the *Transmittal of the 2017 Annual Civil Monetary Penalty Inflation Adjustment Rule* dated January 1, 2017 from Susan Shinkman, Director, Office of Civil Enforcement.

40. Respondents shall pay the EPA Civil Penalty using any method, or combination of methods, provided on the websites <https://www.epa.gov/financial/makepayment> and <http://www2.epa.gov/financial/additional-instructions-making-payments-epa>, and identifying payment with "FIFRA-03-2019-0038."
41. Within 24 hours of payment of the EPA Civil Penalty, Respondent shall send proof of payment to:

Regional Hearing Clerk (3RC00)
U.S. EPA, Region III
1650 Arch Street
Philadelphia, PA 19103-2029
R3_Hearing_Clerk@epa.gov

and

Alison M. Debes (3RC50)
Sr. Assistant Regional Counsel
U.S. EPA, Region III
1650 Arch Street
Philadelphia, PA 19103-2029
Debes.Alison@epa.gov

"Proof of payment" means, as applicable, a copy of the check, confirmation of credit card or debit card payment, confirmation of wire or automated clearinghouse transfer, and any other information required to demonstrate that payment has been made according to the EPA requirements, in the amount due, and identified with "Docket No.: FIFRA-03-2019-0038."

FULL AND FINAL SATISFACTION

42. This CAFO constitutes a settlement by EPA of its claims for civil penalties pursuant to Section 14(a)(1) of FIFRA, 7 U.S.C. § 136/(a)(1), for the violations alleged herein.

RESERVATION OF RIGHTS

43. EPA reserves the right to commence action against any person, including Respondent, in response to any condition which EPA determines may present an imminent and substantial endangerment to the public health, public welfare, or the environment. In addition, this settlement is subject to all limitations on the scope of resolution and to the reservation of rights set forth in Section 22.18(c) of the Consolidated Rules of Practice. Further, EPA reserves any rights and remedies available to it under FIFRA, the regulations promulgated thereunder, and any other federal laws or regulations for

which EPA has jurisdiction, to enforce the provisions of this CAFO, following its filing with the Regional Hearing Clerk.

OTHER APPLICABLE LAWS

44. Nothing in this CAFO relieves Respondent of any duties otherwise imposed on them by applicable federal, state or local law and/or regulations.

AUTHORITY TO BIND THE PARTIES

45. Each Respondent certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Agreement and bind themselves hereto.

ENTIRE AGREEMENT

46. This Consent Agreement and the attached Final Order constitute the entire agreement and understanding of the parties concerning settlement of the above-captioned action and there are no representations, warranties, covenants, terms or conditions agreed upon between the parties other than those expressed in this Consent Agreement and the attached Final Order.

EFFECTIVE DATE

47. This CAFO shall become effective upon filing with the Regional Hearing Clerk.

For Respondent:


Degesch America Inc.



Charles L. Wright
Vice President

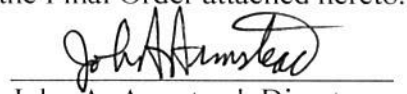
For Complainant:

U.S. Environmental Protection Agency



Alison M. Debes
Sr. Assistant Regional Counsel

After reviewing the foregoing Consent Agreement and other pertinent information, the Land and Chemicals Division, EPA Region III, recommends that the Regional Administrator or the Regional Judicial Officer issue the Final Order attached hereto.



John A. Armstead, Director
Land and Chemicals Division,
U.S. EPA, Region III

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FINAL ORDER


Complainant, the Director of the Land and Chemicals Division, U.S. Environmental Protection Agency, Region III, and Respondent, Degesch America Inc., ("Respondent") have executed a document entitled "Consent Agreement" which I ratify as a Consent Agreement in accordance with Sections 22.13(b), 22.18(b)(2) and (3) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, and the Revocation/Termination or Suspension of Permits ("Consolidated Rules"), 40 C.F.R. §§ 22.13(b), 22.18(b)(2) and (3).

Based upon the representations of the parties in the attached Consent Agreement, the penalty agreed to in the Consent Agreement is based on the consideration of, *inter alia*, the statutory factors set forth in Section 14(a)(4) of FIFRA, 7 U.S.C. § 136l(a)(4), and EPA's *Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)*, dated December 2009.

NOW, THEREFORE, PURSUANT TO Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), as amended, 7 U.S.C. § 136l(a), and Section 22.18(b)(3) of the Consolidated Rules, IT IS HEREBY ORDERED that Respondent pay a civil penalty in the amount of Fifteen Thousand Seven Hundred and Sixty-Eight Dollars (\$15,768.00), in accordance with the payment provisions set forth in the Consent Agreement, and comply with the terms and conditions of the Consent Agreement.

The effective date of the attached Consent Agreement and this Final Order is the date on which this Final Order is filed with the Regional Hearing Clerk.

Date: 1/29/19

By: 
Joseph J. Lisa
Regional Judicial and Presiding Officer
U.S. EPA Region III

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
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CERTIFICATE OF SERVICE

I certify that today the original and one (1) copy of foregoing *Consent Agreement and Final Order*, were filed with the EPA Region III Regional Hearing Clerk. I further certify that on the date set forth below, I served a true and correct copy of the same the following person(s), in the manner specified below, at the following address(es):

Copies served via **Certified Mail, Return Receipt Requested, Postage Prepaid**, to:

Susan Nichols, Environmental Affairs Program Director
Degesch America Inc.
153 Triangle Drive
Weyers Cave, VA 24486

Copy served via **Hand Delivery or Inter-Office Mail** to:

Alison M. Debes
Senior Assistant Regional Counsel
Office of Regional Counsel (3RC50)
U.S. EPA, Region III
1650 Arch Street
Philadelphia, PA 19103-2029
(Attorney for Complainant)

Dated: JAN 29 2019

Berwin Esposito
Regional Hearing Clerk
U.S. Environmental Protection Agency, Region III

TRACKING NUMBER(S): 7002 2410 0005 1405 0342