

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 6
DALLAS, TEXAS

IN THE MATTER OF:)
)
)

ONG CONSULTING, LLC)
HEATH, TEXAS)
)

RESPONDENT)
_____)

DOCKET NO. FIFRA-06-2019-0315

CONSENT AGREEMENT AND FINAL ORDER

The Director of the Enforcement and Compliance Assurance Division of the United States Environmental Protection Agency (EPA), Region 6 (Complainant) and ONG Consulting, LLC (Respondent) in the above-referenced proceeding, hereby agree to resolve this matter through the issuance of this Consent Agreement and Final Order (CAFO).

I. PRELIMINARY STATEMENT

1. This proceeding for the assessment of civil penalties is brought by EPA pursuant to Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended (FIFRA), 7 U.S.C. § 136l(a), and is simultaneously commenced and concluded through the issuance of this CAFO pursuant to 40 C.F.R. §§ 22.13(b), 22.18(b)(2) and (3), and 22.35.

2. For the purposes of this proceeding, the Respondent admits the jurisdictional allegations contained herein; however, the Respondent neither admits nor denies the specific factual allegations contained in this CAFO.

3. The Respondent explicitly waives any right to contest the allegations and its right to appeal the proposed Final Order set forth therein, and waives all defenses which have been raised or could have been raised to the claims set forth in the CAFO.

4. Compliance with all the terms and conditions of this CAFO shall only resolve the Respondent's liability for Federal civil penalties for those violations and facts which are set forth herein.

5. The Respondent consents to the issuance of the CAFO, to the assessment and payment of the civil penalty in the amount and by the method set forth in this CAFO, and the conditions specified in the CAFO.

6. Each undersigned representative of the parties to this agreement certifies that he or she is fully authorized by the party represented to enter into the terms and conditions of this agreement, to execute it, and to legally bind that party to it.

7. This CAFO shall apply to and be binding upon the Respondent, its officers, directors, servants, employees, agents, authorized representatives, successors and assigns.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. PRELIMINARY ALLEGATIONS

8. The Respondent is ONG Consulting, LLC, a limited liability company organized under the laws of the State of Kansas and authorized to do business in Texas.

9. "Person" is defined in Section 2(s) of FIFRA, 7 U.S.C. § 136(s), as meaning "any individual, partnership, association, corporation, or any organized group of persons whether incorporated or not."

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

11. The Respondent owns and/or operates a water treatment consulting business, which is currently located at 2513 Winners Circle, Heath, Texas 75125.

12. The Respondent distributes or sells, or has distributed and sold a product called "Fortress Mussel Control" (hereinafter FMC).

13. The Respondent's FMC product identified in Paragraphs 12 is a copper ion generating machine, which incorporates copper in the form of electrodes and passes a current through the electrodes to release copper ions into water for the purpose of preventing, destroying, repelling, or mitigating zebra mussels.

14. "Pest" is defined in Section 2(t) of FIFRA, 7 U.S.C. § 136(t), as meaning "(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-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, 7 U.S.C. § 136w(c)(1)]."

15. A zebra mussel is an aquatic animal.

16. A zebra mussel is a "pest" as that term is defined by Section 2(t) of FIFRA, 7 U.S.C. § 136(t).

17. "Pesticide" is defined in Section 2(u) of FIFRA, 7 U.S.C. § 136(u), as meaning "(1) any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest, (2) any substance or mixture of substances intended for use as a plant regulator, defoliant, or desiccant, and (3) any nitrogen stabilizer. . . ."

18. The product identified in Paragraphs 12 and 13 is intended for destroying, repelling, or mitigating the pest identified in Paragraph 15.

19. The product identified in Paragraphs 12 and 13 is a "pesticide" as that term is defined in Section 2(u) of FIFRA, 7 U.S.C. § 136(u).

20. "Pesticide product" is defined in 40 C.F.R. § 152.3 as meaning "a pesticide in the particular form (including composition, packaging, and labeling) in which the pesticide is, or is intended to be, distributed or sold. The term includes any physical apparatus used to deliver or apply the pesticide if distributed or sold with the pesticide."

21. The FMC product identified in Paragraphs 12 and 13 is a "pesticide product" as that term is defined in 40 C.F.R. § 152.3.

22. "Pesticidal product" is defined in 40 C.F.R. § 167.3 as meaning "a pesticide, active ingredient, or device."

23. The FMC product identified in Paragraphs 12 and 13 is a "pesticidal product" as that term is defined in 40 C.F.R. § 167.3.

24. On or about April 16, 2019, EPA representatives conducted an inspection at the Lewisville Water Treatment Plant in Lewisville, Texas (Lewisville Inspection).

25. On or about April 16, 2019, a written statement as to the reasons for the Lewisville Inspection was given to a representative of the Lewisville Water Treatment Plant, as required by Sections 8 and 9 of FIFRA, 7 U.S.C. §§ 136f and 136g.

26. During the Lewisville Inspection, the EPA representatives observed the FMC product identified in Paragraphs 12, 13, and 23, at the Lewisville Intake Area Station and the Lewisville/Upper Trinity Water District Shared Intake Station. The FMC uses a split stream system. The Lewisville Intake pumps about 2 million gallons per day into the treatment plant via two injection points. The FMC system takes a split stream of the water and generates colloidal copper solution, which injects it back into the system to treat the water for zebra mussels. Once the water is treated, any zebra mussels will be removed from the system at the treatment plants settling tank. The sludge from the settling tank is then disposed of as solid waste.

27. The Respondent is a registrant, commercial applicator, wholesaler, dealer, retailer, or other distributor subject to the civil penalty provisions of Section 14(a)(1) of FIFRA, 7 U.S.C. § 136l(a)(1).

B. VIOLATIONS

Distributing or Selling Unregistered Pesticides

28. Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A) provides that “except as provided by [Section 12(b) of FIFRA, 7 U.S.C. § 136j(b)], it shall be unlawful for any person in any State to distribute or sell to any person any pesticide that is not registered under [Section 3 of FIFRA, 7 U.S.C. § 136a] or whose registration has been cancelled or suspended, except to the extent that distribution or sale otherwise has been authorized by the Administrator under this subchapter.”

29. 40 C.F.R. § 152.15 provides that no person may distribute or sell any pesticide product that is not registered under the Act, except as provided in 40 C.F.R. §§ 152.20, 152.25, and 152.30. A pesticide is any substance (or mixture of substances) intended for a pesticidal purpose, *i.e.*, use for the purpose of preventing, destroying, repelling, or mitigating any pest or use as a plant regulator, defoliant, or desiccant. A substance is considered to be intended for a pesticidal purpose, and thus to be a pesticide requiring registration, if:

(a) The person who distributes or sells the substance claims, states, or implies (by labeling or otherwise):

(1) That the substance (either by itself or in combination with any other 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; or

(b) The substance consists of or contains one or more active ingredients and has no significant commercially valuable use as distributed or sold other than (1) use

for pesticidal purpose (by itself or in combination with any other substance). (2) use for manufacture of a pesticide; or

(c) 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.

30. The Respondent states or implies (by labeling or otherwise) that the product identified in Paragraphs 12, 13, and 23, can or should be used as a pesticide (i.e., prevent, destroy, repel, or mitigate zebra mussels).

31. The Respondent has actual or constructive knowledge that the product identified in Paragraphs 12, 13, and 23, will be used, or is intended to be used, for a pesticidal purpose (i.e., prevent, destroy, repel, or mitigate zebra mussels).

32. The exemptions from registration provided by 40 C.F.R. §§ 150.20, 152.25, and 152.30 are not applicable to the pesticide product identified in Paragraphs 12, 13, and 23.

33. The pesticide product identified in Paragraphs 12, 13 and 23 was required to be registered under Section 3 of FIFRA, 7 U.S.C. § 136a.

34. The pesticide product identified in Paragraphs 12, 13, and 23, was not registered with EPA under Section 3 of FIFRA, 7 U.S.C. § 136a, prior to June 19, 2019.

35. The term “distribute or sell” is defined in Section 2(gg) of FIFRA, 7 U.S.C. § 136(gg), as meaning “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.”

36. On or about February – August 2016, the Respondent distributed and/or sold two FMC products to the City of Lewisville, Texas for their Water Treatment Plant.

37. The distribution or sale of the pesticide product identified in Paragraphs 12, 13 and 23 was not authorized by the Administrator of EPA.

38. Therefore, the Respondent violated Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A) by distributing or selling the FMC product, an unregistered pesticide.

III. TERMS OF SETTLEMENT

A. CIVIL PENALTY

39. For the reasons set forth above, the Respondent has agreed to pay a civil penalty which has been determined in accordance with Section 14(a) of FIFRA, 7 U.S.C. § 136l(a), which authorizes EPA to assess a civil penalty of up to \$19,936 for each offense.¹ Upon consideration of the entire records herein, including the Findings of Fact and Conclusions of Law, which are hereby adopted and made a part hereof, and EPA's "FIFRA Enforcement Response Policy" dated December 2009 (as adjusted for inflation) which requires the Complainant to consider 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, it is **ORDERED** that Respondent be assessed a civil penalty of **THREE THOUSAND, FIVE HUNDRED DOLLARS (\$3,500)**.

40. Within thirty (30) days of the effective date of this CAFO, the Respondent shall pay the assessed civil penalty by certified check, cashier's check, or wire transfer, made payable to "Treasurer, United States of America, EPA - Region 6". Payment shall be remitted in one of three (3) ways: regular U.S. Postal mail (including certified mail), overnight mail, or wire transfer. For regular U.S. Postal mail, U.S. Postal Service certified mail, or U.S. Postal Service express mail, the check should be remitted to:

¹ The amount of penalty that can be assessed under Section 14(a)(1) of FIFRA, 7 U.S.C. § 136l(a)(1) was increased to \$19,936 by the Federal Civil Penalties Inflation Adjustment Improvements Act of 2015 for violations that occurred after November 2, 2015 and assessed on or after January 15, 2019.

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

For overnight mail (non-U.S. Postal Service, e.g. Fed Ex), the check should be remitted to:

U.S. Bank
Government Lockbox 979077
US EPA Fines & Penalties
1005 Convention Plaza
SL-MO-C2-GL
St. Louis, MO 63101
Phone No. (314) 418-1028

For wire transfer, the payment should be remitted to:

Federal Reserve Bank of New York
ABA: 021030004
Account No. 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" with a phone number of (412)
234-4381".

PLEASE NOTE: Docket Number FIFRA-06-2019-0315 shall be clearly typed on the check or other method of payment to ensure proper credit. If payment is made by check, the check shall also be accompanied by a transmittal letter and shall reference the Respondent's name and address, the case name, and docket number of the CAFO. If payment is made by wire transfer, the wire transfer instructions shall reference the Respondent's name and address, the case name, and docket number of the CAFO. The Respondent shall also send a simultaneous notice of such payment, including a copy of the check and transmittal letter, or wire transfer instructions to the following:

Gerardo Acosta
Enforcement Officer
US EPA Region 6 (ECDST)
1201 Elm Street, Suite 500
Dallas, TX 75270

Lorena Vaughn
Regional Hearing Clerk (6RC)
US EPA Region 6
1201 Elm Street, Suite 500
Dallas, TX 75270

The Respondent's adherence to this request will ensure proper credit is given when penalties are received in the Region.

41. The Respondent agrees not to claim or attempt to claim a federal income tax deduction or credit covering all or any part of the civil penalty paid to the United States Treasurer.

42. If the Respondent fails to submit payment within thirty (30) days of the effective date of this CAFO, the Respondent may be subject to a civil action to collect any unpaid portion of the assessed penalty, together with interest, handling charges, and nonpayment penalties as set forth below.

43. Pursuant to 31 U.S.C. § 3717 and 40 C.F.R. § 13.11, unless otherwise prohibited by law, EPA will assess interest 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. Interest on the civil penalty assessed in this CAFO will begin to accrue thirty (30) days after the effective date of the CAFO and will be recovered by EPA on any amount of the civil penalty that is not paid by the respective due date. 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). Moreover, the costs of the Agency's

administrative handling of overdue debts will be charged and assessed monthly throughout the period the debt is overdue. *See* 40 C.F.R. § 13.11(b).

44. EPA will also assess a \$15.00 administrative handling charge for administrative costs on unpaid penalties for the first thirty (30) day period after the payment is due and an additional \$15.00 for each subsequent thirty (30) day period that the penalty remains unpaid. In addition, a penalty charge of up to six percent per year will be assessed monthly on any portion of the debt which remains delinquent more than ninety (90) days. *See* 40 C.F.R. § 13.11(c). Should a penalty charge on the debt be required, it shall accrue from the first day payment is delinquent. *See* 31 C.F.R. § 901.9(d). Other penalties for failure to make a payment may also apply.

B. RETENTION OF ENFORCEMENT RIGHTS

45. EPA does not waive any rights or remedies available to EPA for any other violations by the Respondent of Federal or State laws, regulations, or permitting conditions.

46. Nothing in this CAFO shall relieve the Respondent of the duty to comply with FIFRA.

47. Nothing in this CAFO shall limit the power and authority of EPA or the United States to take, direct, or order all actions to protect public health, welfare, or the environment, or prevent, abate or minimize an actual or threatened release of hazardous substances, pollutants, contaminants, hazardous substances on, at or from the Respondent's distribution centers and/or stores whether related to the violations addressed in this CAFO or otherwise. Furthermore, nothing in this CAFO shall be construed or to prevent or limit EPA's civil and criminal authorities, or that of other Federal, State, or local agencies or departments to obtain penalties or injunctive relief under other Federal, State, or local laws or regulations.

48. The Complainant reserves all legal and equitable remedies available to enforce the

provisions of this CAFO. In any such action to enforce the provisions of this CAFO, the Respondent shall not assert, and may not maintain, any defense of laches, statute of limitations, or any other equitable defense based on the passage of time. This CAFO shall not be construed to limit the rights of the EPA or United States to obtain penalties or injunctive relief under FIFRA or its implementing regulations, or under other federal or state laws, regulations, or permit conditions.

49. In any subsequent administrative or judicial proceeding initiated by the Complainant or the United States for injunctive relief, civil penalties, to enforce the provisions of this CAFO, or other appropriate relief relating to the Respondent's distribution centers and/or stores, the Respondent shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the Complainant or the United States in the subsequent proceeding were or should have been brought in the instant case, except with respect to claims for civil penalties that have been specifically resolved pursuant to this CAFO.

50. The Respondent waives any right it may possess at law or in equity to challenge the authority of the EPA or the United States to bring a civil action in a United States District Court to compel compliance with this CAFO and to seek an additional penalty for such noncompliance, and agrees that federal law shall govern in any such civil action. The Respondent also consents to personal jurisdiction in any action to enforce this CAFO in the appropriate Federal District Court.

51. The Respondent also waives any and all remedies, claims for relief, and otherwise available rights to judicial or administrative review that the Respondent may have with respect to any issue of law or fact set forth in this CAFO.

52. This CAFO is not a permit, or a modification of any permit, under any federal, State, or local laws or regulations. The Respondent is responsible for achieving and maintaining complete compliance with all applicable federal, State, and local laws, regulations, and permits. The Respondent's compliance with this CAFO shall be no defense to any action commenced pursuant to any such laws, regulations, or permits, except as set forth herein. The Complainant does not warrant or aver in any manner that the Respondent's compliance with any aspect of this CAFO will result in compliance with provisions of the FIFRA or with any other provisions of federal, State, or local laws, regulations, or permits.

C. COSTS

53. Each party shall bear its own costs and attorney's fees. Furthermore, the Respondent specifically waives its right to seek reimbursement of its costs and attorney's fees under 5 U.S.C. § 504 and 40 C.F.R. Part 17.

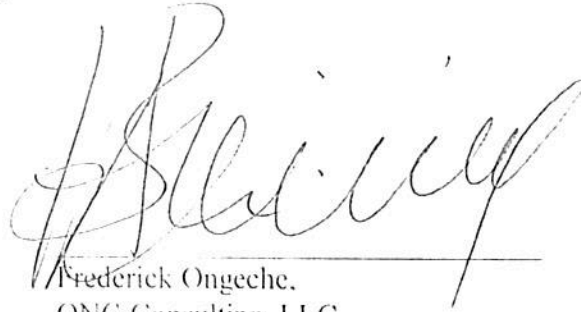
D. EFFECTIVE DATE

54. This CAFO becomes effective upon filing with the Regional Hearing Clerk.

THE UNDERSIGNED PARTIES CONSENT TO THE ENTRY OF THIS CONSENT AGREEMENT AND FINAL ORDER:

FOR THE RESPONDENT:


Date: 09-03-2019



Frederick Ongeche,
ONG Consulting, LLC

FOR THE COMPLAINANT:

Date: 9-4-19

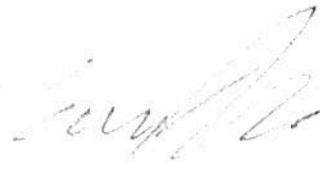


Cheryl T. Seager, Director
Enforcement and
Compliance Assurance Division

FINAL ORDER

Pursuant to the Section 113 of the CAA, 42 U.S.C. § 7413, and the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, 40 C.F.R. Part 22, the foregoing Consent Agreement is hereby ratified. This Final Order shall not in any case affect the right of EPA or the United States to pursue appropriate injunctive relief or other equitable relief for criminal sanctions for any violations of law. This Final Order shall resolve only those causes of action alleged herein. Nothing in this Final Order shall be construed to waive, extinguish or otherwise affect the Respondent's (or its officers, agents, servants, employees, successors, or assigns) obligation to comply with all applicable federal, state, and local statutes and regulations, including the regulations that were the subject of this action. The Respondent is ordered to comply with the terms of settlement as set forth in the Consent Agreement. Pursuant to 40 C.F.R. § 22.31(b), this Final Order shall become effective upon filing with the Regional Hearing Clerk.

Date: 9/5/19



Thomas Rucki
Regional Judicial Officer

CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of September, 2019, the original and one copy of the foregoing Consent Agreement and Final Order (CAFO) was hand delivered to the Regional Hearing Clerk, U.S. EPA - Region 6, 1201 Elm Street, Suite 500, Dallas, Texas 75270, and that a true and correct copy of the CAFO was sent to the following person(s) by the method indicated below:

Certified Mail – Return Receipt Requested 7016 3010 0000 4934 9156

Fredrick Ongeche
Chief Chemist
ONG Consulting, LLC
2513 Winners Circle
Heath, Texas 75126-4063

