

UNITED STATES FILED
ENVIRONMENTAL PROTECTION AGENCY
REGION 6 2009 SEP -3 AM 8: 29
DALLAS, TEXAS REGIONAL HEARING CLERK
EPA REGION VI

IN THE MATTER OF:

Phillips Company, LLC.
311 NW Chickasaw Street
Millerton, Oklahoma 74750

RESPONDENT

§
§
§
§
§
§
§

COMPLAINT AND
CONSENT AGREEMENT AND
FINAL ORDER

DOCKET NO. FIFRA 06-2009-0304

**COMPLAINT AND
CONSENT AGREEMENT AND FINAL ORDER**

The Director, Multimedia Planning and Permitting Division, United States Environmental Protection Agency, Region 6 (EPA) as Complainant, and Phillips Company, LLC, located in Millerton, Oklahoma (Respondent) in the above referenced action, have consented to the terms of this Complaint and Consent Agreement and Final Order (Complaint and CAFO).

NOW THEREFORE, before the taking of any testimony, without any adjudication of any issues of law or fact herein, the parties agree to the terms of this Complaint and CAFO

**I.
PRELIMINARY STATEMENT**

1. This enforcement proceeding is instituted by EPA pursuant to Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) 7 U.S.C. § 136l(a), which authorizes the Administrator to bring an administrative action to assess a penalty of up to \$6,500¹ for each violation of Section 12(a) of FIFRA, 7 U.S.C. § 136j(a). This proceeding was instituted by the issuance of a Complaint and Notice of Opportunity for Hearing (Complaint) incorporated

¹ The Civil Penalty Inflation Adjustment Rule (62 Fed Reg. 13514, March 20, 1997 and 69 Fed Reg. 7121, February 13, 2004) provides for increases in the statutory penalty provisions for violations which occur after the date the increases take effect. For violations after March 14, 2004, the potential maximum penalty for such violations changed from \$5,500 to \$6,500. The Agency is required to review its penalties once every four years and adjust them for inflation. The Final Rule published at 73 Fed Reg. 75340 raised the FIFRA penalty to \$7,500 for violations occurring after December 11, 2008.

herein. This proceeding is simultaneously commenced and concluded by the filing of this CAFO pursuant to 40 CFR 22.13(b).

2. The Complainant alleges Respondent violated regulations promulgated pursuant to the FIFRA.

3. The Respondent admits that EPA has jurisdiction in this matter; however, the Respondent neither admits nor denies the specific factual allegations and conclusions of law contained in the Findings of Fact and Conclusions of Law in this CAFO.

4. Respondent consents to the issuance of this CAFO hereinafter recited and consents to the assessment and payment of the stated civil penalty in the amount and by the method set out in Section V of this CAFO.

5. By signature on this CAFO, Respondent waives any right to an appeal of this proceeding.

6. Respondent represents that it is duly authorized to execute this CAFO and that the party signing this CAFO on behalf of the Respondent is duly authorized to bind the Respondent to the terms and conditions of this CAFO.

7. Respondent agrees that the provisions of this CAFO shall be binding on its officers, directors, employees, agents, servants, authorized representatives, successors, and assigns, including but not limited to, subsequent purchasers.

II.
STATUTORY AND REGULATORY BACKGROUND

8. Pursuant to Section 2(s) of FIFRA a "person" is any individual, partnership, association, corporation, or any organized group of persons whether incorporated or not.

9. Pursuant to Section 2(u) of FIFRA a "pesticide" is any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest.

10. Pursuant to Section 2(l) of FIFRA a "pest" is any insect, rodent, nematode, fungus, weed, or any other form of terrestrial or aquatic plant or animal life or virus, bacteria, or other micro-organisms.

11. Pursuant to Section 2(gg) of FIFRA "to distribute or sell" is to distribute, sell, offer for sale, hold for distribution, hold for shipment, or receive and (having so received) deliver or offer to deliver.

12. Pursuant to Section 2(p) of FIFRA a "label" is the written, printed, or graphic matter on, or attached to, the pesticide or device or any of its containers or wrappers.

13. Section 2(w) of FIFRA defines "producer" as the person who manufactures, prepares, compounds, propagates, or processes any pesticide or device or active ingredient used in producing a pesticide.

14. Pursuant to Section 12(a) of FIFRA "...it shall be unlawful for any person in any State to distribute or sell to any person any pesticide that is not registered..."

15. Pursuant to Section 12(a) of FIFRA "... it shall be unlawful for any person in any State to produce a pesticide or active ingredient subject to the Act in an unregistered establishment."

16. Pursuant to Section 14(a)(1) of FIFRA, 7 U.S.C. § 136l(a)(1), any registrant, commercial applicator, wholesaler, dealer, retailer, or other distributor who violates any provision of FIFRA may be assessed a civil penalty by the Administrator of not more than \$6,500² for each offense.

III.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

17. The Respondent is Phillips Company, LLC., located at:

²See footnote 1.

311 NW Chickasaw Street, Millerton, Oklahoma 74750.

18. Respondent is a "person" as that term is defined in Section 2(s) of FIFRA.
19. Respondent is a registrant, 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).
20. Respondent is a "producer" of the products, StaphWash Room Shield and Strivector-H, as defined in Section 2(w) of FIFRA.
21. The Respondent's products, identified in paragraph 20, contain the following active ingredient and are not registered pesticides with the EPA: sodium dodecylbenzene sulfonate.
22. The Respondent's products, identified in paragraph 20, meet the definition of a pesticide and are therefore a "pesticide" as defined in FIFRA Section 2(u).
23. The Respondent's products, identified in paragraph 20, have the following pesticidal claims on the labels: "Formulated to kill antibiotic-resistant bacteria," "Hospitals, Nursing Homes," and "Kills 100% of these bacteria on contact: Staph, MRSA, E. Coli, Acinetobacter, Pseudomonis, and Klebsiella."
24. At all relevant times, Respondent "distributed or sold," as that term is defined at Section 2(gg) of FIFRA, the pesticides identified in paragraph 20.
25. On or about December 14, 2007, an inspection was conducted by the Oklahoma Department of Agriculture, Food and Forestry (ODAFF) at the Respondent's facility identified in paragraph 17 above.
26. During the inspection, a review of Respondent's records was conducted to verify compliance under FIFRA.
27. Respondent's sales and/or distribution documents, obtained during the inspection, indicate that the pesticides described in paragraph 20 above were sold and/or distributed without being registered under FIFRA by the EPA.

28. On or about December 21, 2007, ODAFF issued a Stop Sale Order to the Respondent for the following products: Strivector-HI and StaphWash Room Shield.

IV.
VIOLATIONS

29. Complainant incorporates by reference the allegations contained in paragraphs 1 through 28 of this CAFO.

30. Section 12(a)(1)(A) of FIFRA 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 FIFRA.

31. Respondent's sale and distribution of the unregistered pesticide products, identified in paragraph 20, constituted an unlawful act in violation of Section 12(a)(1)(A) of FIFRA.

32. Section 12(a)(2)(L) of FIFRA states that it shall be unlawful for any person in any State to produce a pesticide or active ingredient subject to the Act in an unregistered establishment.

33. Respondent's production of the unregistered pesticide products, identified in paragraph 20, in an unregistered establishment constituted an unlawful act in violation of Section 12(a)(2)(L) of FIFRA.

V.
CIVIL PENALTY AND
TERMS OF SETTLEMENT

34. For the reasons set forth above, Respondent has agreed to pay a civil penalty, which has been determined in accordance with Section 14(a)(1) of FIFRA, 7 U.S.C. § 136(a)(1), and the Civil Penalty Inflation Adjustment Rule³ which authorizes EPA to assess a civil penalty of up to SIX THOUSAND FIVE HUNDRED DOLLARS (\$6,500.00) for each violation of FIFRA.

Upon consideration of the entire record herein, including the Findings of Fact and Conclusions of

³ See footnote 1.

Law, which are hereby adopted and made a part hereof, and upon consideration of (1) the size of the Respondent's business, (2) the effect upon Respondent's ability to continue in business, and (3) the gravity of the alleged violation, the parties agree to the terms of this settlement. The Complainant has also taken 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 July 2, 1990, located at: <http://www.epa.gov/Compliance/resources/policies/civil/erp/index.html>, a copy of which is enclosed with this Complaint and CAFO. It is ORDERED that Respondent be assessed a civil penalty of **THREE THOUSAND FIVE HUNDRED DOLLARS AND NO CENTS (\$3,500.00)**.

35. Within thirty (30) days of Respondent's receipt of this fully executed Complaint and CAFO, Respondent shall pay the assessed civil penalty by cashier's or certified check, made payable to "Treasurer, United States of America, EPA - Region 6."

Payment shall be remitted in one of the alternatives provided in the collection information section below:

COLLECTION INFORMATION

CHECK PAYMENTS:

US Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
PO Box 979077
St. Louis, MO 63197-9000

WIRE TRANSFERS:

Wire transfers should be directed to the Federal Reserve Bank of New York

Federal Reserve Bank of New York
ABA = 021030004
Account = 68010727

copy of the money order or check to the following:

Kristin Dunbar
Pesticides Section (6PD-P)
U.S. EPA, Region 6
1445 Ross Avenue, Suite 1200
Dallas, TX 75202-2733

The check shall reference the Respondent's name and address, the case name and the docket number of the administrative complaint, and the check shall be accompanied by a transmittal letter. A photocopy of each check and its accompanying transmittal letter shall be mailed to:

Region 6 Hearing Clerk
U.S. EPA, Region 6
1445 Ross Avenue, Suite 1200
Dallas, Texas 75202-2733

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

36. 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.

37. 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).

38. The 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.


VI.
COSTS

39. Each party shall bear its own costs and attorneys fees.

IT IS SO AGREED:

FOR THE RESPONDENT:

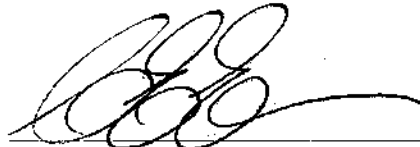
Date: 8/27/2009



Dr. Howard Phillips
General Manager
Phillips Company, LLC.

FOR THE COMPLAINANT:

Date: 09/01/09




Carl E. Edlund, P.E.
Director
Multimedia Planning and
Permitting Division

FINAL ORDER

Pursuant to Section 14(a) of FIFRA, 7 U.S.C. § 136/(a), 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 or other equitable relief or criminal sanctions for any violations of law. This Final Order shall resolve only those causes of action alleged in the Complaint. Nothing in this Final Order shall be construed to waive, extinguish or otherwise affect 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 and the civil penalty payment instructions as set forth in the Consent Agreement. In accordance with 40 C.F.R. § 22.31(b), this Final Order shall become effective upon filing with the Regional Hearing Clerk.

Dated September 2, 2009



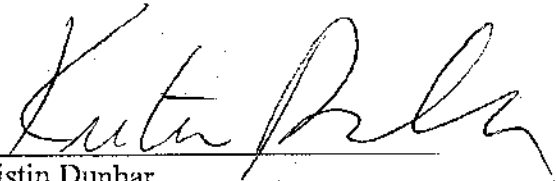
Michael C. Barra
Regional Judicial Officer

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of September, 2009, the original and one copy of the foregoing Complaint and Consent Agreement and Final Order were hand delivered to the Regional Hearing Clerk, U.S. EPA - Region 6, 1445 Ross Avenue, Dallas, Texas 75202, and a true and correct copy was delivered to the following individual by method indicated below:

CERTIFIED MAIL - RETURN RECEIPT REQUESTED -

Dr. Howard Phillips
Phillips Company, I.I.C.
311 NW Chickasaw Street
Millerton, Oklahoma 74750



Kristin Dunbar
Enforcement Officer
Pesticides Section