

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

IN THE MATTER OF)
)
NanoHorizons Inc.)
270 Rolling Ridge Drive, Suite 100)
Bellefonte, PA 16823)
)
Respondent)
_____)

DOCKET NO: FIFRA-03-2014-0115

CONSENT AGREEMENT

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CONSENT AGREEMENT

Preliminary Statement

This Consent Agreement is entered into by the Director of the Land and Chemicals Division, U.S. Environmental Protection Agency - Region III ("EPA" or "Complainant") and by NanoHorizons, Inc. ("Respondent") pursuant to Section 14(a) of the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), *as amended*, 7 U.S.C. § 136l(a), and Sections 22.13(b) and .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) and .18(b). This Consent Agreement and the attached Final Order (hereinafter jointly referred to as the "CAFO") resolve Complainant's civil penalty claims against Respondent under FIFRA arising from the violations of FIFRA alleged herein.

General Provisions

1. For purposes of this proceeding only, Respondent admits the jurisdictional allegations set forth in this CAFO.
2. Except as provided in paragraph 1, above, Respondent **neither admits nor denies** the specific factual allegations and conclusions of law set forth in this CAFO.
3. Respondent agrees not to contest the jurisdiction of the EPA with respect to the execution of this Consent Agreement, the issuance of the attached Final Order, or the enforcement of the CAFO.

4. For the purposes of this proceeding only, Respondent hereby expressly waives any right to contest any issue of law or fact set forth in this Consent Agreement and any right to appeal the accompanying Final Order.
5. Respondent consents to the issuance of this CAFO and agrees to comply with its terms.
6. Respondent shall bear its own costs and attorney's fees.
7. Respondent agrees not to deduct for civil taxation purposes the civil penalty paid pursuant to this CAFO.

Factual and Legal Background

8. Section 2(s) of FIFRA, 7 U.S.C. § 136(s), defines "person" to mean any individual, partnership, association, corporation, or any organized group of persons whether incorporated or not.
9. NanoHorizons is a Delaware corporation, with a principal place of business located at 270 Rolling Ridge Drive in Bellefonte, Pennsylvania, that produces and sells silver additives under the brand "SmartSilver".
10. NanoHorizons is a "person" as defined in Section 2(s) of FIFRA, 7 U.S.C. § 136(s).
11. During the time period between July 2009 through June 2011, NanoHorizons distributed or sold multiple products under its SmartSilver brand, including but not limited to:
 - a. SmartSilver WS-F, NP10-SX08F; SmartSilver WS, NP10-SX08; SmartSilver WS 100, NP10-SX08; and SmartSilver WS Fine, NP10-SX08F. (Collectively, these products will be referred to as "SmartSilver WS products");
 - b. SmartSilver AS, NP10-SX10; SmartSilver AS 50 gm, NP10-SX10; SmartSilver AS-F, NP10-SX10F; SmartSilver AS 100 gm, NP10-SX10; and SmartSilver AS 20 gm, NP10-SX10. (Collectively, these products will be referred to as "SmartSilver AS products");
 - c. SmartSilver AD-5, NP10-5-DPG; SmartSilver AD-5 50 gm, NP10-5-DPG; and SmartSilver AD-5 100 gm, NP10-5-DPG. (Collectively, these products will be referred to as "SmartSilver AD products"); and
 - d. SmartSilver WB-20, NP10-20-B PW.
12. The SmartSilver WS products, SmartSilver AS products, SmartSilver AD products, and the SmartSilver WB-20, NP10-20-B PW product identified in paragraph 11, above, were each

distributed or sold with a "Technical Data Sheet" that included some or all of the following statements:

- a. *EPA Registration # 83587-3 (Active Ingredient)*
- b. *NanoHorizons represents that the materials mentioned herein are exempt from FIFRA regulations per the treated article exemption PR Notice 2000-1. No public health claims may be made without approval by the appropriate regulatory agency*
- c. *an antimicrobial powder additive comprised of silver nanoparticles stabilized by a water soluble polymer*
- d. *Applications Coatings, Paints, Deodorizing/Disinfecting sprays, Textile finishes*
- e. *a dispersible powder of polymer stabilized silver nanoparticles for use as an antimicrobial agent in a wide range of applications...contains only pure silver and a physiologically inert stabilizer*

13. NanoHorizons also employed an advertising portfolio, its website at www.smartsilver.com, and press materials to advertise, market and sell its SmartSilver brand of products, which included the products identified in paragraph 11, above.

14. Section 2(u) of FIFRA, 7 U.S.C. § 136(u), and 40 C.F.R. § 152.3 define "pesticide", in pertinent part, to mean any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest or for use as a plant regulator, defoliant or desiccant, with exceptions not relevant to this case.

15. Pursuant to 40 C.F.R. § 152.15, "[a] substance is considered to be intended for a pesticidal purpose . . . 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."

16. Based on the statements in the Technical Data Sheets identified in paragraph 12, above, and on statements, claims and implications in the advertising portfolio, website at www.smartsilver.com, and press materials associated with the marketing and sales of its SmartSilver brand of products, NanoHorizons' SmartSilver WS products, SmartSilver AS

products, SmartSilver AD products and SmartSilver WB-20 product are considered intended for pesticidal purpose under 40 C.F.R. § 152.15.

17. NanoHorizons' SmartSilver WS products, SmartSilver AS products, SmartSilver AD products, and SmartSilver WB-20 product are all "pesticide[s]" and "pesticide product[s]" as those terms are defined in Section 2(u) of FIFRA, 7 U.S.C. § 136(u), and 40 C.F.R. § 152.3.

Alleged Violations

18. Section 12(a)(1)(A) of FIFRA, 7 U.S.C § 136j(a)(1)(A), makes it 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, except to the extent that distribution or sale otherwise has been authorized.

19. Section 3(a) of FIFRA, 7 U.S.C § 136a(a), and 40 C.F.R. § 152.15 provide, in pertinent part, that no person may distribute or sell any pesticide product that is not registered under FIFRA, except as provided in 40 C.F.R. § 152.25 or in other regulations not relevant to this matter.

20. EPA regulations at 40 C.F.R. § 152.25 identify pesticides or classes of pesticides that have been determined to be of a character not requiring regulation of FIFRA, and therefore exempt from all provisions of FIFRA when intended for uses, and used, only in manners specified. Section 152.25(a) exempts articles or substances treated with, or containing, a pesticide to protect the article or substance itself (for example, paint treated with a pesticide to protect the paint coating, or wood products treated to protect the wood against insect or fungus infestation), if the pesticide is registered for such use. Articles or substances meeting the 40 C.F.R. § 152.25(a) criteria are referred to as "treated articles".

21. In a written statement provided on July 13, 2011, NanoHorizons represented that its SmartSilver products are formulated from its EPA registered pesticide product Additive SSB, EPA Reg. No. 83587-3.

22. According to the EPA approved label, Additive SSB, EPA Reg. No. 83587-3, is an antimicrobial additive that effectively inhibits the growth of stain and odor causing bacteria, mold, and mildew on the product on which it is applied, and is intended for use in the manufacture of commercial and consumer products to impart antimicrobial properties.

23. At all times relevant to violations alleged in this CAFO, the SmartSilver WS products, SmartSilver AS products, SmartSilver AD products and SmartSilver WB-20 product did not qualify as treated articles under 40 C.F.R. § 152.25 due, in part, to NanoHorizons' Technical Data Sheets and its SmartSilver advertising portfolio, website at www.smartsilver.com, and press materials which claimed, stated or implied antimicrobial properties that extended beyond the protection of the products themselves.

24. At all times relevant to violations alleged in this CAFO, NanoHorizons' SmartSilver WS products, SmartSilver AS products, SmartSilver AD products and SmartSilver WB-20 product were not registered with EPA as pesticides pursuant to Section 3 of FIFRA, 7 U.S.C. § 136a, nor have they ever been so registered.

25. Based on information provided by NanoHorizons to EPA on July 28, 2011, NanoHorizons distributed or sold one or more of its SmartSilver WS products, SmartSilver AS products, SmartSilver AD products and/or SmartSilver WB-20 product to individuals, partnerships, associations, corporations and/or organized groups of persons on approximately one hundred and twenty-two (122) separate occasions during the time period between July 2009 through June 2011, in violation of Section 3(a) of FIFRA, 7 U.S.C. § 136a(a).

26. Each occasion that NanoHorizons distributed or sold one or more of its SmartSilver WS products, SmartSilver AS products, SmartSilver AD products or SmartSilver WB-20 product constitutes a "distribution or sale" of a "pesticide" and "pesticide product" to a "person" as those terms are defined in Section 2 of FIFRA, 7 U.S.C. § 136, and 40 C.F.R. § 152.3 and constitutes a separate unlawful act under Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), for which penalties may be assessed pursuant to Section 14(a) of FIFRA, 7 U.S.C. § 136l(a).

27. NanoHorizons is a "wholesaler, dealer, retailer or other distributor" subject to the assessment of a civil penalty under Section 14(a)(1) of FIFRA, 7 U.S.C. § 136l(a)(1).

Civil Penalty

28. In settlement of the above-captioned action, Respondent consents to the assessment of a civil penalty of one thousand five hundred dollars (\$1,500), which Respondent agrees to pay in accordance with the terms set forth below. Such civil penalty amount shall become due and payable immediately upon receipt by Respondent of a true and correct copy of the fully-executed and filed CAFO. In order to avoid the assessment of interest, administrative costs, and late payment penalties in connection with such civil penalty as described in this CAFO, Respondent must pay the civil penalty no later than thirty (30) calendar days after the date on which a copy of this CAFO is mailed or hand-delivered to Respondent.

29. The aforesaid settlement amount is based upon Complainant's consideration of a number of factors, including, but not limited to, the statutory factors set forth in Section 14(a)(4) of FIFRA, 7 U.S.C. § 136l(a)(4), *i.e.*, the size of Respondent's business, the effect of the penalty on Respondent's ability to continue in business, and the gravity of the violation. These factors were applied to the particular facts and circumstances of this case with specific reference to EPA's December 2009 *FIFRA Enforcement Response Policy Federal Insecticide, Fungicide, Rodenticide Act* and 40 C.F.R. Part 19.

30. The Parties acknowledge and represent that the aforesaid settlement is based, in part, upon an analysis of Respondent's ability to pay a civil penalty. This analysis was based upon financial information submitted to Complainant by Respondent. By his signature below, Respondent's representative certifies that the information submitted to EPA regarding its ability to pay and regarding any other matter at issue in this proceeding, is accurate and not misleading. Respondent and its officers and directors are aware that the submission of false or misleading information to the United States government may subject a person to separate civil and/or criminal liability. Complainant reserves the right to seek and obtain appropriate relief if Complainant obtains evidence that the information provided and/or representations made by Respondent to Complainant regarding Respondent's claim of inability to pay, or regarding any of other matter herein at issue, are materially false, fictitious or fraudulent.

31. Payment of the civil penalty amount required under the terms of paragraph 28, above, shall be made as follows:

a. Mailing (*via first class U.S. Postal Service Mail*) a certified or cashier's check, made payable to the "United States Treasury" to the following address

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

Contact: Craig Steffen 513-487-2091
Molly Williams 513-487-2076

b. Via Overnight Delivery of a certified or cashier's check, made payable to the "United States Treasury", sent to the following address:

U.S. Environmental Protection Agency
Government Lockbox 979077
1005 Convention Plaza
SL-MO-C2-GL
St. Louis, MO 63101
314-418-1028

c. All payment made by check in any currency drawn on banks with no USA branches shall be addressed for delivery to:

Cincinnati Finance
US EPA, MS-NWD

26 W. M.L. King Drive
Cincinnati, OH 45268-0001

d. By electronic funds transfer ("EFT") to the following account:

Federal Reserve Bank of New York
ABA 021030004
Account No. 68010727
SWIFT Address FRNYUS33
33 Liberty Street
NY, NY 10045
(Field tag 4200 of Fedwire message should read "D
68010727 Environmental Protection Agency")

e. By automatic clearinghouse ("ACH") to the following account:

U.S. Treasury REX/Cashlink ACH Receiver
ABA 051036706
Account No. 310006
Environmental Protection Agency
CTX Format
Transaction Code 22 - checking

Contact: John Schmid
202-874-7026

f. Online payments can be made at WWW.PAY.GOV by entering "sfo 1.1" in the search field, and opening the form and completing the required fields.

g. Additional payment guidance is available at:

<http://www2.epa.gov/financial/makepayment>

All payments shall also reference the above case caption and docket number, DOCKET NO.: FIFRA-03-2014-0115. At the same time that any payment is made, Respondent shall mail copies of any corresponding check, or provide written notification confirming any electronic wire transfer, automated clearinghouse or online payment to Lydia A. Guy, Regional Hearing Clerk (3RC00), U.S. EPA, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103-2029 and to Christine Convery (3LC62), Land and Chemicals Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103-2029.

32. Pursuant to 31 U.S.C. § 3717 and 40 C.F.R. § 13.11, EPA is entitled to assess interest and late payment penalties on outstanding debts owed to the United States and also to assess a charge

to cover the costs of processing and handling a delinquent claim, as more fully described below. Accordingly, Respondent's failure to make timely payment or to comply with the conditions in this CAFO shall result in the assessment of late payment charges including interest, penalties, and/or administrative costs of handling delinquent debts.

Interest on the civil penalty assessed in this CAFO will begin to accrue on the date that a copy of this CAFO is mailed or hand-delivered to Respondent. However, EPA will not seek to recover interest on any amount of the civil penalty that is paid within thirty (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).

The cost of the Agency's administrative handling of overdue debts will be charged and assessed monthly throughout the period the 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 thirty (30) day period after the payment is due and an additional \$15.00 for each subsequent thirty (30) days the penalty remains unpaid.

A penalty charge of six percent per year will be assessed monthly on any portion of the civil penalty which remains delinquent more than ninety (90) calendar days. 40 C.F.R. § 13.11(c). Should assessment of the penalty charge on the debt be required, it shall accrue from the first day payment is delinquent. 31 C.F.R. § 901.9(d).

Certifications

33. Respondent represents that a corrective action plan has been submitted to EPA, and certifies that, to the best of its knowledge, all claims, statements and implications made in connection with the distribution or sale of its SmartSilver products are currently in compliance with the requirements of FIFRA, 7 U.S.C. §§ 136 *et seq.*, and with EPA's PR Notice 2000-1.

Other Applicable Laws

34. Nothing in this CAFO shall relieve Respondent of its obligation to comply with all applicable federal, state, and local laws and regulations.

Reservation of Rights

35. This CAFO resolves only EPA's civil claims for penalties for the specific violations of FIFRA alleged in this Consent Agreement. 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 there under, 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.

Full and Final Satisfaction

36. This settlement shall constitute full and final satisfaction of all civil claims for penalties which Complainant may have under Section 14(a) of FIFRA, 7 U.S.C. § 136l(a), for the specific violations alleged in this CAFO. Compliance with this CAFO shall not be a defense to any action commenced at any time for any other violation of the Federal laws and regulations administered by EPA.

Parties Bound

37. This CAFO shall apply to and be binding upon EPA, Respondent, and the successors and assigns of Respondent. By his or her signature below, the person signing this Consent Agreement on behalf of Respondent is acknowledging that he or she is fully authorized by Respondent to execute this Consent Agreement and to legally bind Respondent to the terms and conditions of this CAFO.

Effective Date

38. The effective date of this CAFO is the date on which the Final Order, signed by the Regional Administrator of EPA -- Region III, or his designee, the Regional Judicial Officer, is filed with the Regional Hearing Clerk pursuant to the Consolidated Rules of Practice.

Entire Agreement

39. This CAFO constitutes the entire agreement and understanding of the Parties concerning settlement of the action referenced in the caption above, and there are no representations, warranties, covenants, terms, or conditions agreed upon between the Parties other than those expressed herein.

For Respondent:

6/25/14
Date

David Woodle
David Woodle, President
NanoHorizons Inc.

For Complainant:

7/1/14
Date

Christine Convery
Christine Convery
U.S. EPA, Region III

Accordingly, I hereby recommend that the Regional Administrator or his designee issue the Final Order attached hereto.

7.14.14
Date

John A. Armstead
John A. Armstead, Director
Land and Chemicals Division

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

IN THE MATTER OF)
)
NanoHorizons Inc.) DOCKET NO: FIFRA-03-2014-0115
270 Rolling Ridge Drive, Suite 100)
Bellefonte, PA 16823) FINAL ORDER
)
Respondent)
_____)

FINAL ORDER

The Director, Land and Chemicals Division, U.S. Environmental Protection Agency - Region III ("Complainant") and NanoHorizons Inc. ("Respondent") have executed a document entitled "Consent Agreement" which I hereby ratify as a Consent Agreement in accordance with 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. Part 22. The terms of the foregoing Consent Agreement are accepted by the undersigned and incorporated herein as if set forth at length.

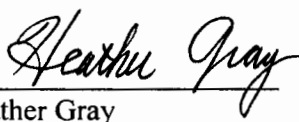
NOW THEREFORE, pursuant to Section 14(a) of the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA" or "the Act"), as amended, 7 U.S.C. § 136l(a), and based on representations in the Consent Agreement that the penalty agreed to in the Consent Agreement is based on a consideration of the factors set forth in Section 14(a)(4) of FIFRA, 7 U.S.C. § 136l(a)(4), Respondent is hereby ordered to pay a civil penalty of one thousand five hundred

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dollars (\$1,500), as set forth in the Consent Agreement, and to comply with the terms and conditions of the Consent Agreement.

The effective date of this document is the date on which it is filed with the Regional Hearing Clerk after signature by the Regional Administrator or Regional Judicial Officer.

Date: 7-24-14



Heather Gray
Regional Judicial Officer
U.S. EPA, Region III

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

IN THE MATTER OF)

NanoHorizons Inc.)
270 Rolling Ridge Drive, Suite 100)
Bellefonte, PA 16823)

Respondent)
_____)

DOCKET NO: FIFRA-03-2014-0115

CONSENT AGREEMENT

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CERTIFICATE OF SERVICE

I certify that the foregoing CONSENT AGREEMENT AND FINAL ORDER referenced matter was sent this day in the following manner to the below addressees.

Original and one copy by hand-delivery:

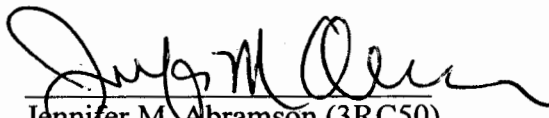
Lydia Guy, Regional Hearing Clerk

Copy by Certified Mail

Michael T. Novak, Esq.
Keller and Heckman LLC
1001 G Street NW, Suite 500 West
Washington, DC 20001

JUL 24 2014

Date


Jennifer M. Abramson (3RC50)
Senior Assistant Regional Counsel
U.S. EPA, Region III

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