

6. Respondent shall bear its own costs and attorney's fees.

EPA's Findings of Fact and Conclusions of Law

7. In accordance with the Consolidated Rules of Practice at Sections 22.13(b) and .18(b)(2) and (3), Complainant alleges the following findings of fact and conclusions of law:

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. At all times relevant to the violations alleged herein, Respondent owned and operated a business, located at 494 Lilac Hill Lane, Volant, PA 16156, that retailed fuel additives.

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

11. 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.

12. 40 C.F.R. § 152.3 defines "pesticide product," in pertinent part, to mean a pesticide in the particular form (including composition, packaging, and labeling) in which the pesticide is, or is intended to be, distributed or sold.

13. Pursuant to 40 C.F.R. § 152.15, "[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 . . . can or should be used as 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."

14. Section 2(t) of FIFRA, 7 U.S.C. § 136(t), defines "pest" to mean 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, 7 U.S.C. § 136w(c)(1).

15. On two occasions in 2007, Respondent sold a product with a label that identified it as "ACES II FP."

16. At the time of the 2007 sales, Respondent's web site advertised the ACES II FP as follows: "This ACES product keeps fuel systems free of bacteria, fungus and yeast contamination through the use of a biocide (fungicide) resulting in trouble free operation of equipment."
17. By using the language in Paragraph 16, above, the ACES II FP advertising language made a pesticidal claim.
18. At the time of the 2007 sales, ACES II FP was a "pesticide" and a "pesticide product" as those terms are defined by Section 2(u) of FIFRA, 7 U.S.C. § 136(u), and 40 C.F.R. § 152.3.
19. At the time of the 2007 sales, Respondent was a "distributor" subject to the assessment of a civil penalty under Section 14(a)(1) of FIFRA, 7 U.S.C. § 136l(a)(1).

COUNT I

Sale or Distribution of an Unregistered Pesticide

20. The allegations in Paragraphs 1 through 19 of this Consent Agreement are incorporated herein by reference.
21. Pursuant to Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), 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 canceled or suspended, with exceptions not relevant to this matter.
22. Section 3(a) of FIFRA, 7 U.S.C § 136a(a), provides, in pertinent part, that no person in any State may distribute or sell to any person any pesticide that is not registered under FIFRA.
23. Section 2(gg) of FIFRA, 7 U.S.C § 136(gg), provides, in pertinent part, that the term "distribute or sell" means 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.
24. On two occasions during 2007, Respondent sold and/or distributed containers of ACES II FP to various individuals, partnerships, associations, corporations and/or organized groups of persons.
25. Each occasion on which Respondent sold and/or distributed containers of ACES II FP 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.

26. At all times relevant to this CAFO, ACES II FP was not registered with EPA as a pesticide pursuant to Section 3 of FIFRA, 7 U.S.C. § 136a.
27. By selling and/or distributing the unregistered pesticide product, ACES II FP, Respondent violated Section 3(a) of FIFRA, 7 U.S.C. § 136a(a).
28. Each of the two sales and/or distributions of the unregistered pesticide product ACES II FP during 2007 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).

COUNT II
Sale or Distribution of a Misbranded Pesticide

29. The allegations in Paragraphs 1 through 28 of this Consent Agreement are incorporated herein by reference.
30. Pursuant to Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), it shall be unlawful for any person in any State to distribute or sell to any person any pesticide that is adulterated or misbranded.
31. Pursuant to Section 2(q)(1) of FIFRA, 7 U.S.C. § 136(q)(1), and its implementing regulations published at 40 C.F.R. § 156.10(a), (f) and (g), a pesticide is "misbranded" if, *inter alia*, its label does not bear (1) the registration number of the establishment in which it was produced, (2) the name and percentage by weight of each active ingredient, and (3) the total percentage by weight of all inert ingredients.
32. At the time of the sales and/or distributions described above, the ACES II FP label did not bear a registration number for the establishment in which it was produced, and therefore was misbranded as defined by Section 2(q)(1) of FIFRA, 7 U.S.C. § 136(q)(1), and 40 C.F.R. § 156.10(a) and (f).
33. At the time of the sales and/or distributions described above, the ACES II FP label did not bear the name and percentage by weight of each active ingredient, or the total percentage by weight of all inert ingredients, and therefore was misbranded as defined by Section 2(q)(1) of FIFRA, 7 U.S.C. § 136(q)(1), and 40 C.F.R. § 156.10(a) and (g).
34. Each of the two occasions on which Respondent distributed or sold containers of misbranded ACES II FP during 2007 constitutes a separate unlawful act under Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), for which penalties may be assessed pursuant to Section 14(a) of FIFRA, 7 U.S.C. § 136l(a).

Civil Penalty

35. In settlement of this proceeding, Respondent consents to the assessment of a civil penalty of sixteen thousand dollars (\$16,000) and agrees to pay such penalty in accordance with the terms set forth below. Such civil penalty amount shall become due and payable immediately upon Respondent's receipt of a true and correct copy of this 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 executed CAFO is mailed or hand-delivered to the Respondent.

36. 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 violations. These factors were applied to the particular facts and circumstances of this case with specific reference to the *FIFRA Enforcement Response Policy* ("ERP"), dated July 2, 1990, and the *Modifications to EPA Penalty Policies to Implement the Civil Monetary Penalty Inflation Adjustment Rule (Pursuant to the Debt Collection Improvement Act of 1996, Effective October 1, 2004)*, dated September 21, 2004.

37. Payment of the civil penalty amount required under the terms of Paragraph 35, 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
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, MO, 63197-9000.

Contact: Natalie Pearson
314-418-4087

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. Bank
1005 Convention Plaza
Mail Station SL-MO-C2GL
St. Louis, MO 63101

Contact: Natalie Pearson
314-418-4087

c. 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")

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

PNC Bank
808 17th Street, NW
Washington, DC 20074
ABA = 051036706
Transaction Code 22 - checking
Environmental Protection Agency
Account 310006
CTX Format

Contact: Jesse White
301-887-6548

e. 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.

All payments shall also reference the above case caption and docket number, DOCKET NO.: FIFRA-03-2009-0032. 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 (3RC00)
Regional Hearing Clerk
U.S. EPA, Region III
1650 Arch Street
Philadelphia, PA 19103-2029

and to

Natalie L. Katz (3RC30)
Senior Assistant Regional Counsel
U.S. EPA, Region III
1650 Arch Street
Philadelphia, PA 19103-2029.

38. 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 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 executed 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 EPA'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 for 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).

39. Respondent agrees not to deduct for civil taxation purposes the civil penalty paid pursuant to this CAFO.

Compliance Certification

40. Respondent agrees that it will remove all pesticidal claims on the labels and advertising for ACES II FP.

41. Within 30 days of the effective date of this CAFO, Respondent shall submit to EPA documentation demonstrating that it has removed all pesticidal claims on the labels and advertising for ACES II FP, including specifically and without limitation of the foregoing, the claims described in Paragraph 16 of this Consent Agreement. The documentation shall be accompanied by the following certification:

I certify that the foregoing information submitted was prepared under my direction or supervision, and that I have personal knowledge of all matters set forth in the accompanying information. I certify that the information is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fines and imprisonment.

Signature: _____
Name (print): _____
Title: _____

42. Respondent shall submit the required compliance documentation and certification to:

Carolyn Bernota (3LC62)
Enforcement Officer
U.S. EPA, Region III
1650 Arch Street
Philadelphia, PA 19103

Other Applicable Laws

43. 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

44. 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

45. This settlement shall constitute full and final satisfaction of all civil claims for penalties which Complainant has 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

46. This CAFO shall apply to and be binding upon EPA, Respondent, and the officers, directors, 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

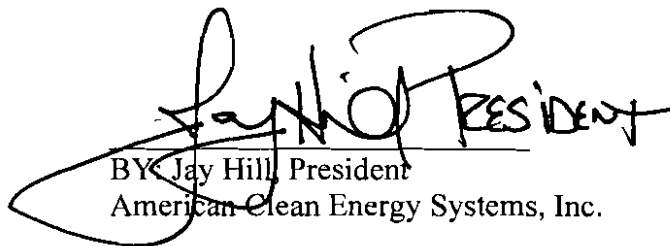
47. The effective date of this CAFO is the date on which the Final Order, signed by the Regional Administrator of EPA, Region III, or his designee, the Regional Judicial Officer, is filed with the Regional Hearing Clerk pursuant to the Consolidated Rules of Practice.

Entire Agreement

48. 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.

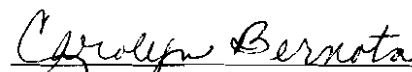
For Respondent:

10/21/08
Date


BY: Jay Hill, President
American Clean Energy Systems, Inc.

For Complainant:

10/29/2008
Date


BY: Carolyn Bernota
Compliance Officer
U.S. EPA, Region III

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

11/7/2008
Date

Henry J. Shaw for AF
Abraham Ferdas, Director
Land and Chemicals Division

Corrected Copy

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

IN THE MATTER OF

American Clean Energy Systems Inc.
494 Lilac Hill Lane
Volant, PA 16156

Respondent.

DOCKET NO: FIFRA-03-2009-0032

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CERTIFICATE OF SERVICE

I hereby certify that on November 13, 2008 I filed and served copies of the attached Consent Agreement and Final Order, as follows:

Original and One Copy filed: (via hand delivery) Lydia Guy (3RC00)
Regional Hearing Clerk
U.S. Environmental Protection Agency
Region III
1650 Arch Street
Philadelphia, PA 19103

Copy to: (via Overnight Mail) Jay Hill
American Clean Energy Systems Inc
494 Lilac Hill Lane
Volant, PA 16156

Date: November 17, 2008

Carolyn Bernota
Carolyn Bernota
Compliance Officer
EPA, Region III