



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 Hawthorne Street
San Francisco, CA 94105

Electronic Mail

Mr. Rik Jacobs
CEO
Mercer Foods, LLC
1836 Lapham Drive
Modesto, California 95354-3900
rjacobs@mercerfoods.com

Re: Consent Agreement and Final Order – Mercer Foods, LLC

Docket No.: FIFRA-09-2020-0053

Dear Mr. Jacobs:

Enclosed please find a Consent Agreement and Final Order (CAFO) concerning alleged violations of the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. Sections 136 et seq., by Mercer Foods, LLC. The terms of the CAFO require the total payment of \$51,905 to be received by U.S. Environmental Protection Agency within 30 calendar days of the effective date (stamped filing date) of this CAFO. Your completion of all actions laid out in the CAFO will close this case.

Sincerely,

**MATTHEW
SALAZAR** Digitally signed by
MATTHEW SALAZAR
Date: 2020.07.30
14:12:40 -07'00'

Matt Salazar, PE
Manager, Toxics Branch
Enforcement & Compliance Assurance Division

Enclosure

cc: California Department of Pesticide Regulation, Parissa.Naef@cdpr.ca.gov.
Lisa R. Burchi, Bergeson & Campbell, P.C., LBurchi@lawbc.com.
Abbi Cohen, Dechert LLP, Abbi.Cohen@dechert.com.

Sylvia Quast
Regional Counsel

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Assistant Regional Counsel (ORC-2-1)
United States Environmental Protection Agency, Region IX
75 Hawthorne Street
San Francisco, CA 94105
(415) 972-3409

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 HAWTHORNE STREET
SAN FRANCISCO, CALIFORNIA 94105**

In the Matter of:)	
)	
Mercer Foods, LLC,)	Docket No. FIFRA-09-2020-0053
)	
Respondent.)	CONSENT AGREEMENT AND
)	FINAL ORDER PURSUANT TO
)	40 C.F.R. §§ 22.13 AND 22.18

I. CONSENT AGREEMENT

The United States Environmental Protection Agency, Region IX ("EPA"), and Mercer Foods, LLC ("Respondent") agree to settle this matter and consent to the entry of this Consent Agreement and Final Order ("CAFO"), which simultaneously commences and concludes this matter in accordance with 40 C.F.R. §§ 22.13 and 22.18.

A. AUTHORITY AND PARTIES

1. This is a civil administrative action brought pursuant to Section 14(a)(1) of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136/(a)(1), for the assessment

of a civil administrative penalty against Respondent for (1) the production of a pesticide in an unregistered establishment in violation of Section 12(a)(2)(L) of FIFRA, 7 U.S.C.

§ 136j(a)(2)(L) and (2) the sale and/ or distribution of an unregistered pesticide in violation of Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A).

2. Complainant is the Manager of the Toxics Branch of the Enforcement and Compliance Assurance Division, EPA Region IX, who has been duly delegated the authority to bring this action and to sign a consent agreement settling this action.

3. Respondent Mercer Foods, LLC is a California limited liability corporation headquartered at 1836 Lapham Drive in Modesto, California.

B. STATUTORY AND REGULATORY BACKGROUND

4. Section 2(s) of FIFRA, 7 U.S.C. § 136(s), defines the term "person" as "any individual, partnership, association, corporation, or any organized group of persons whether incorporated or not."

5. Section 2(a) of FIFRA, 7 U.S.C. § 136(a), defines the term "active ingredient" as "in the case of a pesticide other than a plant regulator, defoliant, desiccant, or nitrogen stabilizer, an ingredient which will prevent, destroy, repel or mitigate any pest."

6. Section 2(b) of FIFRA, 7 U.S.C. § 136(b), defines the term "Administrator" as " the Administrator of the Environmental Protection Agency."

7. Section 2(u) of FIFRA, 7 U.S.C. § 136(u), defines the term "pesticide" in relevant part as "any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest."

8. Section 2(w) of FIFRA, 7 U.S.C. § 136(w), defines the term "producer" as "the person who manufactures, prepares, compounds, propagates, or processes any pesticide or device or

active ingredient used in producing a pesticide. The term “produce” means to manufacture, prepare, compound, propagate, or process any pesticide or device or active ingredient used in producing a pesticide. The dilution by individuals of formulated pesticides for their own use and according to the directions on registered labels shall not of itself result in such individuals being included in the definition of “producer” for the purposes of this subchapter.

9. Section 2(y) of FIFRA, 7 U.S.C. § 136(y), defines the term "registrant" as "a person who has registered any pesticide pursuant to the provisions of [the] Act."

10. Section 2(aa) of FIFRA, 7 U.S.C. § 136(aa), defines the term "state" as "a state, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the Trust Territory of the Pacific Islands, and American Samoa.

11. Section 2(dd) of FIFRA, 7 U.S.C. § 136(dd), defines the term “establishment” as “any place where a pesticide or device or active ingredient used in producing a pesticide is produced, or held, for distribution or sale.

12. Section 2(gg) of FIFRA, 7 U.S.C. § 136(gg), defines the phrase "to distribute or sell" to mean "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. The term does not include the holding or application of registered pesticides or use dilutions thereof by any applicator who provides a service of controlling pests without delivering any unapplied pesticide to any person so served.

13. Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), provides 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 section 136a of this title or whose registration has been cancelled or suspending,

except to the extent that distribution or sale otherwise has been authorized by the Administrator under this subchapter.

14. Section 12(a)(2)(L) of FIFRA, 7 U.S.C. § 136j(a)(2)(L), provides that it shall be unlawful for any person who is a producer to violate any of the provisions in section 136e of this title.

15. Section 7(a) of FIFRA, 7 U.S.C. § 136e(a) requires that no person shall produce any pesticide subject to this subchapter or active ingredient used in producing a pesticide subject to this subchapter in any State unless the establishment in which it is produced is registered with the Administrator. The application for registration of any establishment shall include the name and address of the establishment and of the producer who operates such establishment.

C. ALLEGED VIOLATIONS

16. Respondent is a "person," as that term is defined by Section 2(s) of FIFRA, 7 U.S.C. § 136(s). As such, Respondent is subject to FIFRA and the implementing regulations promulgated thereunder.

17. At all times relevant to the CAFO, Respondent owned, operated or otherwise controlled a facility located at 1836 Lapham Drive in Modesto, California (the "Facility").

18. At all times relevant to the CAFO, "pseudomonas chlororaphis" is an "active ingredient" as defined by Section 2(a) of FIFRA, 7 U.S.C. § 136(a).

20. At all times relevant to the CAFO, Howler (EPA Reg. #91197-3) is a "pesticide" as defined by Section 2(u) of FIFRA, 7 U.S.C. § 136(u), that contained the active ingredient "pseudomonas chlororaphis."

19. From on or about September 14, 2018 to on or about October 15, 2019, Respondent processed the Howler active ingredient, "pseudomonas chlororaphis," at the Facility.

20. From on or about September 14, 2018 to on or about October 15, 2019, Respondent was a “producer” of the active ingredient, “pseudomonas chlororaphis,” within the meaning of Section 2(w) of FIFRA, 7 U.S.C. § 136(w)

21. From on or September 14, 2018 to on or about October 15, 2019, the Facility was an “establishment” as defined by Section 2(dd) of FIFRA, 7 U.S.C. § 136(dd).

22. At all times relevant to this CAFO, the active ingredient, “pseudomonas chlororaphis” that Respondent produced at the Facility was not registered with the Administrator under Section 3 of FIFRA, 7 U.S.C. § 136a.

23. At all times relevant to this CAFO, Respondent failed to register the Facility, where it produced the active ingredient, “pseudomonas chlororaphis,” with the Administrator, as required by Section 7(a) of FIFRA, 7 U.S.C. § 136e(a).

24. Respondent’s failure to register the Facility with the Administrator as required by Section 7(a) of FIFRA, 7 U.S.C. § 136e(a), constitutes a violation of Section 12(a)(2)(L) of FIFRA, 7 U.S.C. § 136j(a)(2)(L).

25. On or about November 2, 2018, January 23, 2019, and March 4, 2019, Respondent sold or distributed the active ingredient, “pseudomonas chlororaphis” that it produced at the Facility in four (4) separate transactions to AgBiome in Durham, North Carolina.

26. On or about February 21, 2019, March 11, 2019, March 26, 2019 and October 15, 2019, Respondent sold or distributed the active ingredient, “pseudomonas chlororaphis” that it produced at the Facility in four (4) separate transactions to CJB Applied Technologies in Valdosta, Georgia.

27. Respondent’s selling or distributing of an active ingredient that was not registered with the Administrator under Section 3 of FIFRA, 7 U.S.C. § 136a, in eight (8) separate transactions

constitutes eight (8) separate violations of Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A).

D. RESPONDENT'S ADMISSIONS

28. In accordance with 40 C.F.R. § 22.18(b)(2) and for the purpose of this proceeding, Respondent (i) admits that EPA has jurisdiction over the subject matter of this CAFO and over Respondent; (ii) neither admits nor denies the specific factual allegations contained in Section I.C of the CAFO; (iii) consents to any and all conditions specified in this CAFO and to the assessment of the civil administrative penalty under Section I.E of the CAFO; (iv) waives any right to contest the allegations contained in Section I.C of the CAFO; and (v) waives the right to appeal the proposed final order contained in the CAFO.

E. CIVIL PENALTY

28. Respondent agrees to the assessment of a penalty in the amount of FIFTY-ONE THOUSAND NINE HUNDRED AND FIVE DOLLARS (\$51,905) as final settlement of the civil claims against Respondent arising under the Act as alleged in Section I.C of the CAFO.

29. Respondent shall pay the assessed penalty no later than thirty (30) days from the effective date of this CAFO. Payment shall be made by cashier's or certified check payable to the "Treasurer, United States of America," or be paid by one of the other methods listed below:

a. Regular:

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

b. Wire Transfers:

Wire transfers must be sent directly to the Federal Reserve Bank in New York City with the following information:

Federal Reserve Bank of New York ABA = 021030004
Account = 680 1 0727
SWIFT address = FRNYUS33
33 Liberty Street
New York, NY 10045

Beneficiary: U.S. Environmental Protection Agency

c. Certified Mail or Overnight Mail:

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

d. ACH (also known as REX or remittance express):

Automated Clearinghouse (ACH) payments to EPA can be made through the U.S. Treasury using the following information:

U.S. Treasury REX/Cashlink ACH Receiver
ABA = 051036706
Account= 310006, Environmental Protection Agency
CTX Format Transaction Code 22- checking

Physical Location of U.S. Treasury facility:
5700 Rivertech Court
Riverdale, MD 20737
Remittance Express (**REX**) = (866) 234-5681

e. Online Payment:

This payment option can be accessed from the information below:
www.pay.gov
Enter "sfo 1.1" in the search field
Open form and complete required fields

30. If any clarification regarding a particular method of payment remittance is needed, please contact the EPA Cincinnati Finance Center at 513-487-2091. The payment shall be accompanied by a transmittal letter identifying the case name, the case docket number, and this CAFO. Concurrent with delivery of the payment of the penalty, Respondent shall send a copy of the check or notification that the payment has been made by one of

the other methods listed above, including proof of the date payment was made, and transmittal letter to the following addresses:

Regional Hearing Clerk
Office of Regional Counsel (ORC-1)
U.S. Environmental Protection Agency, Region IX
75 Hawthorne Street
San Francisco, CA 94105
[or via email to: r9HearingClerk@epa.gov]

Scott McWhorter
Enforcement and Compliance Assurance Division (ENF-4-1)
U.S. Environmental Protection Agency, Region IX
75 Hawthorne Street
San Francisco, CA 94105
[or via email to: Mcwhorter.Scott@epa.gov]

31. Payment of the above civil administrative penalty shall not be used by Respondent or any other person as a tax deduction from Respondent's federal, state, or local taxes.

32. If Respondent fails to pay the assessed civil administrative penalty as specified in Paragraph 28, then Respondent shall pay to EPA the stipulated penalty of ONE THOUSAND DOLLARS (\$1,000.00) for each day the default continues, in addition to the assessed penalty upon written demand by EPA. In addition, failure to pay the civil administrative penalty by the deadline specified in Paragraph 28 may lead to any or all of the following actions:

- a. The debt being referred to a credit reporting agency, a collection agency, or to the Department of Justice for filing of a collection action in the appropriate United States District Court. 40 C.F.R. §§ 13.13, 13.14, and 13.33. In any such collection action, the validity, amount, and appropriateness of the assessed penalty and of this CAFO shall not be subject to review.
- b. The debt being collected by administrative offset (i.e., the withholding of money payable by the United States to, or held by the United States for, a person to satisfy

the debt the person owes the Government), which includes, but is not limited to, referral to the Internal Revenue Service for offset against income tax refunds.

40 C.F.R. Part 13, Subparts C and H.

- c. EPA may (i) suspend or revoke Respondent's licenses or other privileges; or (ii) suspend or disqualify Respondent from doing business with EPA or engaging in programs EPA sponsors or funds. 40 C.F.R. § 13.17.
- d. In accordance with the Debt Collection Act of 1982 and 40 C.F.R. Part 13 interest, penalties charges, and administrative costs will be assessed against the outstanding amount that Respondent owes to EPA for Respondent's failure to pay the civil administrative penalty by the deadline specified in Paragraph 28. Interest will be assessed at an annual rate that is equal to the rate of current value of funds to the United States Treasury (i.e., the Treasury tax and loan account rate) as prescribed and published by the Secretary of the Treasury in the Federal Register and the Treasury Fiscal Requirements Manual Bulletins. 40 C.F.R. § 13.11(a)(1). Penalty charges will be assessed monthly at a rate of 6% per annum. 40 C.F.R. § 13.11(c). Administrative costs for handling and collecting Respondent's overdue debt will be based on either actual or average cost incurred, and will include both direct and indirect costs. 40 C.F.R. § 13.11(b). In addition, if this matter is referred to another department or agency (e.g., the Department of Justice, the Internal Revenue Service), that department or agency may assess its own administrative costs, in addition to EPA's administrative costs, for handling and collecting Respondent's overdue debt.

F. CERTIFICATION OF COMPLIANCE

33. In executing this CAFO, Respondent certifies that, to its knowledge, it is currently in compliance with any FIFRA requirements that may apply to its ongoing operations.

G. RETENTION OF RIGHTS

34. In accordance with 40 C.F.R. § 22.18(c), this CAFO only resolves Respondent's liability for federal civil penalties for the violations and facts specifically alleged in Section I.C of the CAFO. Nothing in this CAFO is intended to or shall be construed to resolve (i) any civil liability for violations of any provision of any federal, state, or local law, statute, regulation, rule, ordinance, or permit not specifically alleged in Section I.C of the CAFO; or (ii) any criminal liability. EPA specifically reserves any and all authorities, rights, and remedies available to it (including, but not limited to, injunctive or other equitable relief or criminal sanctions) to address any violation of this CAFO or any violation not specifically alleged in Section I.C of the CAFO.

35. This CAFO does not exempt, relieve, modify, or affect in any way Respondent's duty to comply with all applicable federal, state, and local laws, regulations, rules, ordinances, and permits.

H. ATTORNEY'S FEES AND COSTS

36. Each party shall bear its own attorneys' fees, costs, and disbursements incurred in this Proceeding.

I. EFFECTIVE DATE

37. In accordance with 40 C.F.R. §§ 22.18(b)(3) and 22.31(b), this CAFO shall be effective on the date that the final order contained in this CAFO, having been approved and issued by either the Regional Judicial Officer or Regional Administrator, is filed.

J. BINDING EFFECT

38. The undersigned representative of Complainant and the undersigned representative of Respondent each certifies that he or she is fully authorized to enter into the terms and conditions of this CAFO and to bind the party he or she represents to this CAFO.

39. The provisions of this CAFO shall apply to and be binding upon Respondent and its officers, directors, employees, agents, trustees, servants, authorized representatives, successors, and assigns.

FOR RESPONDENT, MERCER FOODS, LLC.

7/20/20

DATE



NAME: Rik Jacobs

TITLE: CEO

FOR COMPLAINANT, EPA REGION IX:

7/30/2020

DATE

**MATTHEW
SALAZAR**

Digitally signed by
MATTHEW SALAZAR
Date: 2020.07.30 14:03:20
-07'00'

Matt Salazar, PE
Manager, Toxics Branch
Enforcement and Compliance Assurance Division
U.S. Environmental Protection Agency, Region IX

II. FINAL ORDER

Complainant and Respondent, Mercer Foods, LLC, having entered into the foregoing Consent Agreement,

IT IS HEREBY ORDERED that this CAFO (Docket No. FIFRA-09-2020- 0053) be entered, and that Respondent shall pay a civil administrative penalty in the amount of FIFTY-ONE THOUSAND NINE HUNDRED AND FIVE DOLLARS (\$51,905) and comply with the terms and conditions set forth in the Consent Agreement.

**STEVEN
JAWGIEL**

Digitally signed by STEVEN
JAWGIEL
Date: 2020.08.07 09:55:16
-07'00'

DATE

Steven Jawgiel
Regional Judicial Officer
U.S. Environmental Protection Agency, Region IX

CERTIFICATE OF SERVICE

This is to certify that the original of the fully executed Consent Agreement and Final Order, **(Docket No FIFRA-09-2020-0053)** was filed with the Regional Hearing Clerk, U.S. EPA, Region IX, and that a true and correct copy of the same was sent to the following parties:

A copy was sent via ELECTRONIC MAIL to:

RESPONDENT -

Mr. Rik Jacobs, CEO
Mercer Foods, LLC
rjacobs@mercerfoods.com

COMPLAINANT -

Denise Leong
Assistant Regional Counsel
U.S. EPA, Region IX
Leong.Denise@epa.gov

Regional Hearing Clerk
U.S. EPA, Region IX

Date