

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
REGION 6  
DALLAS, TEXAS

FILED  
2019 SEP 17 AM 10:13  
REGIONAL HEARING CLERK  
EPA REGION VI

IN THE MATTER OF: )

FRUIT OF THE EARTH, INC. )  
GRAND PRAIRIE, TEXAS )

RESPONDENT )  
\_\_\_\_\_ )

DOCKET NO. FIFRA-06-2019-0300

**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 Fruit of the Earth, Inc. (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 or legal 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 and its successors and assigns.

## **II. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

### **A. PRELIMINARY ALLEGATIONS**

8. The Respondent is Fruit of the Earth, Inc. a corporation incorporated under the laws of the State of Delaware.

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 operates a production and distribution facility located at 1430 Avenue R, Grand Prairie, Texas 75050.

12. The Respondent produces, or has produced the following products at its establishment identified in Paragraph 11:

- A. Equate Broad Spectrum SPF 30 Natural Bug Defense Sunscreen, Continuous Spray, 6 fl. oz. (Equate Broad Spectrum SPF 30 Natural Bug Defense Sunscreen Spray);
- B. Equate Broad Spectrum SPF 50 Natural Bug Defense Sunscreen, Continuous Spray, 6 fl. oz. (Equate Broad Spectrum SPF 50 Natural Bug Defense Sunscreen Spray); and
- C. Ozark Trail 2-In-1 Bug Defense and Sunscreen Spray, 5 fl. oz. (Ozark Trail 2-In-1 Bug Defense and Sunscreen Spray).

13. The Respondent's sole customer for the products identified in Paragraph 12 is Wal-Mart Stores, Inc. (Wal-Mart).

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. The following are "pests" as that term is defined by Section 2(t) of FIFRA, 7 U.S.C. § 136(t):

- A. Bugs;
- B. Insects; and
- C. Mosquitoes.

16. The following products are intended to do the following:

- A. Equate Broad Spectrum SPF 30 Natural Bug Defense Sunscreen Spray – natural bug defense – effectively repels mosquitoes for hours – high performance bug protection – insect repellent;
- B. Equate Broad Spectrum SPF 50 Natural Bug Defense Sunscreen Spray – natural bug defense – effectively repels mosquitoes for hours – high performance bug protection – insect repellent; and

C. Ozark Trail 2-In-1 Bug Defense and Sunscreen Spray – bug defense – insect repellent that repels mosquitoes for hours.

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. Each of the products identified in Paragraphs 12 and 16 is intended for destroying, repelling, or mitigating one or more of the pests identified in Paragraph 15.

19. Each of the products identified in Paragraphs 12 and 16 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. Each of the products identified in Paragraphs 12 and 16 is a “pesticide product” as that term is defined in 40 C.F.R. § 152.3.

22. “Produce” is defined in Section 2(w) of FIFRA, 7 U.S.C. § 136(w), as meaning “to manufacture, prepare, compound, propagate, or process any pesticide or device or active ingredient used in producing a pesticide.”

23. “Produce” is defined in 40 C.F.R. § 167.3 as meaning “to manufacture, prepare, compound, propagate, or process any pesticide, . . . any active ingredient or device, or to package, repackage, label, relabel, or otherwise change the container of any pesticide or device.”

24. The Respondent “produces” the products identified in Paragraphs 12 and 16 as that term is defined in Section 2(w) of FIFRA, 7 U.S.C. § 136(w) and 40 C.F.R. § 167.3.

25. “Producer” is defined in Section 2(w) of FIFRA, 7 U.S.C. § 136(w), as meaning “the person who manufactures, prepares, compounds, propagates, or processes any pesticide or device or active ingredient used in producing a pesticide.”

26. “Producer” is defined in 40 C.F.R. § 167.3 as meaning “any person, as defined by the Act, who produces any pesticide, active ingredient, or device (including packaging, repackaging, labeling, and relabeling).”

26. The Respondent is a “producer” as that term is defined by Section 2(w) of FIFRA, 7 U.S.C. § 136(w), and 40 C.F.R. § 167.3.

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

28. “Establishment” is defined in 40 C.F.R. § 167.3 as meaning “any site where a pesticidal product, active ingredient, or device is produced, regardless of whether such site is independently owned or operated, and regardless of whether such site is domestic and producing a pesticidal product for export only, or whether the site is foreign and producing any pesticidal product for import into the United States.”

29. The facility identified in Paragraph 11 is an “establishment” as that term is defined by Section 2(dd) of FIFRA, 7 U.S.C. § 136(dd), and 40 C.F.R. § 167.3.

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

31. Each of the products identified in Paragraphs 12 and 16 are a “pesticidal product” as that term is defined in 40 C.F.R. § 167.3.

32. At all times relevant to this CAFO, the Respondent produced the following pesticidal products at its establishment identified in Paragraph 11 and 29:

- A. Equate Broad Spectrum SPF 30 Natural Bug Defense Sunscreen Spray;
- B. Equate Broad Spectrum SPF 50 Natural Bug Defense Sunscreen Spray; and
- C. Ozark Trail 2-In-1 Bug Defense and Sunscreen Spray.

33. On or about November 17, 2016, the Respondent registered two separate establishments, 3324 West Trinity Boulevard, Grand Prairie, Texas (Establishment No. 91673-TX-1) and 1430 Avenue R, Grand Prairie, Texas (Establishment No. 91673-TX-2) as pesticide producing establishments pursuant to Section 7 of FIFRA, 7 U.S.C. § 136e, and 40 C.F.R. Part 167.

34. On or about March 29, 2017, EPA representatives conducted an inspection at the Respondent's establishment located at 1430 Avenue R, Grand Prairie, Texas 75050.

35. On or about March 29, 2017, a written statement as to the reasons for the inspection was given to a representative of the Respondent, as required by Sections 8 and 9 of FIFRA, 7 U.S.C. §§ 136f and 136g.

36. On or about March 29, 2017, an EPA representative requested copies of all records covering the production, distribution, and sales for 1 year preceding the date of the last production, distribution, and sales of the following products:

- A. Equate Natural Bug Defense Sunscreen, 50;
- B. Equate Natural Bug Defense Screen, 30;
- C. Ozark Trail 2-in-1 Bug Defense and Sunscreen Spray; and
- D. Other insect repellent/sunscreen products produced, distributed, or sold by the Respondent.

37. On or about April 12, 2017, the Respondent provided the requested information to EPA.

38. 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. ALLEGED VIOLATIONS**

**Count One – Producing Pesticides at an Unregistered Establishment**

39. 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 provisions of [Section 7 of FIFRA, 7 U.S.C. § 136e].”

40. Section 7(a) of FIFRA, 7 U.S.C. § 136e provides 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 the establishment shall include the name and address of the establishment and of the producer who operates such establishment.”

41. 40 C.F.R. § 167.20(a)(1) provides that “any establishment where a pesticidal product is produced must be registered with the Agency.”

42. 40 C.F.R. Part 167 was promulgated pursuant to Sections 7 and 25 of FIFRA, 7 U.S.C. §§ 136e and 136w.

43. Prior to November 17, 2016, the Respondent produced the following pesticidal products at its establishment identified in Paragraphs 11 and 29:

- A. Equate Broad Spectrum SPF 30 Natural Bug Defense Sunscreen Spray;
- B. Equate Broad Spectrum SPF 50 Natural Bug Defense Sunscreen Spray; and
- C. Ozark Trail 2-In-1 Bug Defense and Sunscreen Spray.

44. Prior to November 17, 2016, the Respondent's establishment identified in Paragraphs 11 and 29 was not registered with EPA.

45. Therefore, the Respondent violated Section 12(a)(2)(L) of FIFRA, 7 U.S.C. § 136j(a)(2)(L), by producing the pesticidal products identified in Paragraphs 12, 16, and 32 at its unregistered establishment prior to November 17, 2016.

**Count Two - Distributing or Selling Unregistered Pesticides**

46. 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."

47. 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.

48. The Respondent claims, states, or implies (by labeling or otherwise) the following for the products listed below:

A. Equate Broad Spectrum SPF 30 Natural Bug Defense Sunscreen – natural bug defense – effectively repels mosquitoes for hours – high performance bug protection – insect repellent;

B. Equate Broad Spectrum SPF 50 Natural Bug Defense Sunscreen – natural bug defense – effectively repels mosquitoes for hours – high performance bug protection – insect repellent; and

C. Ozark Trail 2-In-1 Bug Defense and Sunscreen Spray – bug defense – insect repellent that repels mosquitoes for hours.

49. The Respondent claims, states, or implies (by labeling or otherwise) that the products identified in Paragraph 48 can or should be used as a pesticide.

50. The Respondent has actual or constructive knowledge that the products identified in Paragraph 48 will be used, or intended to be used, for a pesticidal purpose.

51. “Active ingredient” is defined in Section 2(a)(1) of FIFRA, 7 U.S.C. § 136(a)(1) as meaning “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.”

52. 40 C.F.R. § 152.25(f)(1) provides that products containing certain active ingredients, including geraniol, soybean oil, peppermint, rosemary, and geranium oil, are exempt from the requirements of FIFRA, provided that all of the criteria of 40 C.F.R. 152.25(f) are met.

53. The products identified in Paragraph 48 each contain the following active ingredients: geraniol, soybean oil, peppermint, rosemary, and geranium oil.

54. 40 C.F.R. § 152.25(f)(2) provides that a pesticide product exempt under 40 C.F.R. § 152.25(f)(1) may only include inert ingredients listed in 40 C.F.R. § 152.25(f)(2)(i) – (iv).

55. “Inert ingredient” is defined in Section 2(m) of FIFRA, 7 U.S.C. § 136(m) as meaning “an ingredient which is not active.”

56. “Inert ingredient” is defined in 40 C.F.R. § 152.3 as meaning “any substance (or group of structurally similar substances if designated by the Agency), other than an active ingredient, which is intentionally included in a pesticide product, except as provided by [40 C.F.R. § 174.3].”

57. The pesticide products identified in Paragraph 48 contain the inert ingredients listed below:

- A. Alcohol Denat.;
- B. Acrylates/Octylacrylamide Copolymer;
- C. Caprylic/Capric Triglyceride;
- D. Glycerin;
- E. Retinyl Palmitate (Vitamin A Palmitate);
- F. Tocopherol (Vitamin E);
- G. Avobenzone;
- H. Homosalate;
- I. Octisalate;
- J. Octocrylene; and
- K. Oxybenzone.

58. Each of the ingredients identified in Paragraph 57 do not prevent, destroy, repel, or mitigate any pests.

59. Each of the ingredients identified in Paragraph 57 is an “inert ingredient” as that term is defined by Section 2(m) of FIFRA, 7 U.S.C. § 136(m) and 40 C.F.R. § 152.3.

60. The following inert ingredients are not listed in 40 C.F.R. § 152.25(f)(2)(i) – (iv):

- A. Alcohol Denat.;
- B. Acrylates/Octylacrylamide Copolymer;
- C. Caprylic/Capric Triglyceride;
- D. Retinyl Palmitate (Vitamin A Palmitate);

- E. Tocopherol (Vitamin E);
- F. Avobenzone;
- G. Homosalate;
- H. Octisalate;
- I. Octocrylene; and
- J. Oxybenzone.

61. The exemptions from registration provided by 40 C.F.R. §§ 152.20, 152.25, and 152.30 are not applicable to the pesticide products identified in Paragraph 48.

62. The exemption from registration provided by Section 12(b) of FIFRA, 7 U.S.C. § 136j(b) is not applicable to the products identified in Paragraph 48.

63. The pesticide products identified in Paragraph 48 were required to be registered under Section 3 of FIFRA, 7 U.S.C. § 136a.

64. The pesticide products identified in Paragraph 48 were not registered with EPA under Section 3 of FIFRA, 7 U.S.C. § 136a.

65. 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.”

66. The Respondent distributed and/or sold the following pesticide products to various Wal-Mart Distribution Centers in various States at a minimum on or about the dates indicated below:

A. Equate Broad Spectrum SPF 30 Natural Bug Defense Sunscreen – On or about September 12, 2016 – March 8, 2017 (114 distributions):

B. Equate Broad Spectrum SPF 50 Natural Bug Defense Sunscreen – On or about September 15, 2016 – March 29, 2017 (130 distributions); and

C. Ozark Trail 2-In-1 Bug Defense and Sunscreen Spray – On or about September 13, 2016 – February 22, 2017 (126 distributions).

67. The distributions or sales of the pesticide products identified in Paragraph 66 were not authorized by the Administrator of EPA.

68. Therefore, the Respondent violated Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A) by distributing or selling unregistered pesticides.

## **II. TERMS OF SETTLEMENT**

### **A. CIVIL PENALTY**

69. 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.<sup>1</sup> 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 **ONE HUNDRED FIFTY THOUSAND DOLLARS (\$150,000)**. The Respondent shall pay the assessed civil penalty in nine (9) payments as follows:

Payment No. 1: \$16,666.67 within thirty (30) days of the effective date of this CAFO.

Payment No. 2: \$16,857.39 (\$16,520.35 civil penalty plus interest of \$337.04) within three (3) months days of the effective date of this CAFO.

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<sup>1</sup> 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.

Payment No. 3: \$16,857.39 (\$16,558.87 civil penalty plus interest of \$298.52) within six (6) months of the effective date of this CAFO.

Payment No. 4: \$16,857.39 (\$16,606.76 civil penalty plus interest of \$250.63) within nine (9) months of the effective date of this CAFO.

Payment No. 5: \$16,857.39 (\$16,643.63 civil penalty plus interest of \$213.76) within one year of the effective date of this CAFO.

Payment No. 6: \$16,857.39 (\$16,686.16 civil penalty plus interest of \$171.23) within fifteen (15) months of the effective date of this CAFO.

Payment No. 7: \$16,857.39 (\$16,728.80 civil penalty plus interest of \$128.59) within eighteen (18) months days of the effective date of this CAFO.

Payment No. 8: \$16,857.39 (\$16,774.35 civil penalty plus interest of \$83.04) within twenty-one (21) months of the effective date of this CAFO.

Payment No. 9: \$16,857.39 (\$16,814.42 civil penalty plus interest of \$42.97) within two years of the effective date of this CAFO.

70. 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:

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-06-2019-0300 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:

Gerarldo Acosta  
Pesticides Enforcement Coordinator (ECDST)  
Toxics Enforcement Section  
Enforcement and Compliance Assurance Division  
U.S. EPA, Region 6  
1201 Elm Street, Suite 500  
Dallas, TX 75270-2102

Lorena Vaughn  
Regional Hearing Clerk (ORCD)  
U.S. EPA, Region 6  
1201 Elm Street, Suite 500  
Dallas, TX 75270-2102

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

71. 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.

72. 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.

73. 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).

74. 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**

75. 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.

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

77. 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 establishment 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.

78. 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.

79. 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 establishment, 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.

80. 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.

81. 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.

82. 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**

83. 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**

84. 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:**

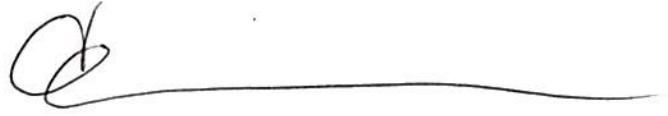
**FOR THE RESPONDENT:**

Date: 9/13/19

  
Fruit of the Earth, Inc.

**FOR THE COMPLAINANT:**

Date: 9-16-19



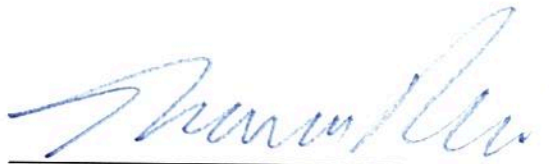
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Cheryl T. Seager  
Director  
Enforcement and Compliance Assurance Division  
EPA – Region 6

**FINAL ORDER**

Pursuant to the Section 14 of FIFRA, 7 U.S.C. § 136l, 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: 9-18-19



Thomas Rucki  
Regional Judicial Officer

**CERTIFICATE OF SERVICE**

I hereby certify that on the 18<sup>th</sup> 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 75270-2102, and that a true and correct copy of the CAFO was sent to the following by certified mail,

return receipt requested 7009 2820 0001 8284 :  
2818

Gerald D. (Jerry) Higdon  
Locke Lord LLP  
600 Travis  
Suite 2800  
2800 JP Morgan Chase Tower  
Houston, TX 77002

  
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