



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

JUL 21 2015

REPLY TO THE ATTENTION OF:

LC- 8J

CERTIFIED MAIL: No.7011 1150 0000 2643 8562
RETURN RECEIPT REQUESTED

Mr. David Morgan
President
DEM Technology
755 Albany St.
Dayton, Ohio 45417

Consent Agreement and Final Order In the Matter of
DEM Technology, LLC. Docket No. FIFRA-05-2015-0043


Mr. Morgan:

Enclosed please find a copy of a fully executed Consent Agreement and Final Order (CAFO) in resolution of the above case. This document was filed on July 21, 2015 with the Regional Hearing Clerk.

The civil penalty in the amount of \$1,500 is to be paid in the manner described in paragraphs 43 through 44. Please be certain that the docket number is written on both the transmittal letter and on the check.

Thank you for your cooperation in resolving this matter.

Sincerely,


for Claudia Niess
Pesticides and Toxics Compliance Section

Enclosure

cc: Sarah Gable

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

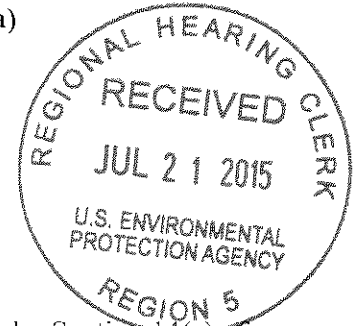
In the Matter of:)
)
DEM Technology, LLC)
Dayton, Ohio,)
)
Respondent.)
_____)

Docket No. **FIFRA-05-2015-0043**

Proceeding to Assess a Civil Penalty
Under Section 14(a) of the Federal
Insecticide, Fungicide, and Rodenticide
Act, 7 U.S.C. § 136l(a)

Consent Agreement and Final Order

Preliminary Statement



1. This is an administrative action commenced and concluded under Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. § 136l(a), and Sections 22.13(b) and 22.18(b)(2) and (3) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (Consolidated Rules) as codified at 40 C.F.R. Part 22.
2. The Complainant is the Director of the Land and Chemicals Division, United States Environmental Protection Agency (EPA), Region 5.
3. Respondent is DEM Technology, LLC, a corporation doing business in the State of Ohio.
4. Where the parties agree to settle one or more causes of action before the filing of a complaint, the administrative action may be commenced and concluded simultaneously by the issuance of a consent agreement and final order (CAFO). 40 C.F.R. § 22.13(b).
5. The parties agree that settling this action without the filing of a complaint or the adjudication of any issue of fact or law is in their interest and in the public interest.

6. Respondent consents to the assessment of the civil penalty specified in this CAFO, and to the terms of this CAFO.

Jurisdiction and Waiver of Right to Hearing

7. Respondent admits the jurisdictional allegations in this CAFO and neither admits nor denies the factual allegations in this CAFO.

8. Respondent waives its right to request a hearing as provided at 40 C.F.R. § 22.15(c), any right to contest the allegations in this CAFO and its right to appeal this CAFO.

9. Respondent certifies that it is complying with FIFRA, 7 U.S.C. §§ 136-136y.

Statutory and Regulatory Background

10. Section 12(a)(1)(B) of FIFRA, 7 U.S.C. § 136j(a)(1)(B), states that it is unlawful for any person in any state to distribute or sell to any person any registered pesticide if any claims made for it as part of its distribution or sale substantially differ from any claims made for it as a part of the statement required in connection with its registration under Section 3 of FIFRA, 7 U.S.C. § 136a.

11. Section 2(gg) of FIFRA, 7 U.S.C. § 136(gg), defines 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.”

12. Section 2(u) of FIFRA, 7 U.S.C. § 136(u), defines a “pesticide” as, among other things, any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest.

13. 40 C.F.R. § 168.22(a) states, in part, that EPA interprets Section 12(a)(1)(B), 7 U.S.C. § 136j(a)(1)(B), to extend to advertisements in any advertising medium to which pesticide users or the general public have access.

14. 40 C.F.R. § 168.22(b)(5) states, in part, that EPA regards it as unlawful for any person who distributes or sells, as that term is defined in FIFRA, any pesticide, to place or sponsor advertisements which recommend or suggest the purchase or use of a registered pesticide for an unregistered use.

15. Section 2(s) of FIFRA, 7 U.S.C. § 136(s), defines a “person” as any individual, partnership, association, corporation, or any organized group of persons whether incorporated or not.

16. Section 2(y) of FIFRA, 7 U.S.C. § 136(y), defines a “registrant” as a person who has registered any pesticide pursuant to the provisions of FIFRA.

17. The Administrator of EPA may assess a civil penalty against any registrant who violates any provision of FIFRA of up to \$7,500 for each offense that occurred after January 12, 2009, pursuant to Section 14(a)(1) of FIFRA, 7 U.S.C. § 136l(a)(1), and 40 C.F.R. Part 19.

Factual Allegations and Alleged Violations

18. Respondent is a “person” as defined at Section 2(s) of FIFRA, 7 U.S.C. § 136(s).

19. At all times relevant to this CAFO, Respondent owned or operated a place of business located at 755 Albany Street, Dayton, Ohio 45408.

20. Respondent is the registrant of “SaniGuard,” EPA Registration Number (EPA Reg. No.) 69403-1, as that term is defined at Section 2(y) of FIFRA, 7 U.S.C. § 136(y).

21. In letters dated July 27, 2004, March 9, 2005, and June 20, 2007, sent to an agent acting on behalf of the Respondent, the Office of Pesticide Programs, EPA Headquarters,

directed Respondent to remove the directions for use as a fogger from the label of "SaniGuard," EPA Reg. No. 69403-1.

22. At all times relevant to this CAFO, "SaniGuard," EPA Reg. No. 69403-1, was not approved by EPA for use as a fogger.

23. On February 29, 2012, an inspector with EPA observed the offer for distribution or sale of "SaniGuard," EPA Reg. No. 69403-1, at www.saniguard.com.

24. The website www.saniguard.com is owned or operated by Respondent.

25. The following claims were made at www.saniguard.com on February 29, 2012 for "SaniGuard," EPA Reg. No. 69403-1:

- a) "Below are just a few of the diseases that could be prevented by using SaniGuard®: Colds, Influenza, Respiratory syncytial virus (RSV) (the most common cause of bronchiolitis and pneumonia), Sore throats, Chicken pox, Measles, Mumps, Rubella, Small pox, Scarlet Fever, Group A Streptococcal (GAS) Disease (strep throat), Staph Infections and MRSA, Meningitis, Norovirus"
- b) "Now with SaniGuard, sanitizing these 'hot zone' areas is easy and instantaneous, with two methods, direct spray or room foggers."
- c) "SaniGuard® Total Release Fogger / Sanitize an entire room in 15 minutes! The World's first patented & extensively tested product that enables you to sanitize entire rooms in just minutes with the same kill-on-contact power of the conventional SaniGuard sprays."
- d) "One 8 oz. fogger treats up to 625 sq. ft."
- e) "One 3 oz. fogger treats up to 155 sq. ft."

- f) “SaniGuard® sanitizing products are EPA registered, patented, and have been proven to kill 99.99% of Influenza and 39 various other germs, bacteria, fungus, and viruses in mere seconds; including: MRSA, Ringworm, HIV, E-Coli, Salmonella, & Herpes. Safe for food contact surfaces (no potable rinse required)...”
- g) “The 10 oz. spray is great for facility cleaning! Use this spray in bathrooms, offices, schools, and hotels. Ideal for treating hard to clean HOT SPOTS such as phones, faxes, shared office equipment, light switches, faucets, toilet seats, door knobs, drinking fountains, keyboards and computer mouse, break room tables, etc.”
- h) “SaniGuard meets current EPA Regulatory Standards (FDA CFR 178.101) for Food Contact Surfaces and is an approved sanitizer on Food Contact Surfaces no potable rinse required.”

26. The claims for “SaniGuard,” EPA Reg. No. 69403-1, listed above in Paragraph 25 and identified on Respondent’s website on February 29, 2012, were not approved by EPA as part of “SaniGuard’s” registration under Section 3 of FIFRA.

27. On May 9, 2012, two inspectors with the Ohio Department of Agriculture (ODA) authorized to conduct inspections under the authorities of Sections 8 and 9 of FIFRA, 7 U.S.C. §§ 136f and 136g, conducted an inspection at Respondent’s facility located at 755 Albany Street, Dayton, Ohio 45408.

28. During the inspection, the ODA inspectors collected photographs of the labels and records showing the distribution and sale of “SaniGuard,” EPA Reg. No. 69403-1.

29. The labels of “SaniGuard,” EPA Reg. No. 69403-1, observed and documented by ODA, identified the product as either a “Total Release Fogger” or a “Dry Sanitizing Surface Spray.”

30. The label of “SaniGuard,” EPA Reg. No. 69403-1, labeled for use as a “Total Release Fogger” and photographed by the ODA inspectors during the inspection, bore the following claims:

- a) “Total Release Fogger”
- b) “For Use In: Homes, Hotels/Motels, Day Care Centers, Schools, Clinics, Nursing Homes, Health Clubs...”
- c) “General Sanitizing Directions: Use SaniGuard Fogger...”
- d) “Fogging Directions: Close all outside windows and doors. Use one container for each 625 sq. ft. (25’ x 25’ with 8’ ceiling). Elevate fogger by placing on a stand or table if possible (maximum 2’ off ground). Tilt away from face before activating (product sprays straight up from container). Press down firmly on the edge of the actuator tab until it locks into place, and then set the fogger on floor, stand or table. Leave the area immediately after activating fogger. Keep treated area closed for at least 15-20 minutes before returning.”

31. The label of “SaniGuard,” EPA Reg. No. 69403-1, labeled for use as a “Dry Sanitizing Surface Spray” and photographed by the ODA inspectors during the inspection, bore the following claims:

- a) “For Use In: Homes, Hotels/Motels, Day Care Centers, Schools, Clinics, Nursing Homes, Health Clubs...”
- b) “EPA REGISTERED”

c) "Approved for food contact surfaces, no potable rinse required."

32. The distribution records collected by ODA during the May 9, 2012 inspection identified 116 occasions on which Respondent distributed or sold "SaniGuard," EPA Reg. No. 69403-1, labeled as a "Dry Sanitizing Surface Spray" after June 1, 2010.

33. The distribution records collected by ODA during the May 9, 2012 inspection identified 248 occasions on which Respondent distributed or sold "SaniGuard," EPA Reg. No. 69403-1, labeled as a "Total Release Fogger" after June 1, 2010.

34. The claims made in Respondent's website and on Respondent's labels for "SaniGuard," EPA Reg. No. 69403-1, substantially differ from the claims made for "SaniGuard," EPA Reg. No. 69403-1, as part of the statement required in connection with the registration of that product under Section 3 of FIFRA.

35. The claims made on Respondent's website and in advertising literature and on Respondent's label for "SaniGuard," EPA Reg. No. 69403-1, are in violation of 40 C.F.R. § 168.22(b)(5).

36. Respondent's distribution or sale of "SaniGuard," EPA Reg. No. 69403-1, is a violation of Section 12(a)(1)(B) of FIFRA, 7 U.S.C. § 136j(a)(1)(B).

37. After June 1, 2010, Respondent distributed or sold "SaniGuard," EPA Reg. No. 69403-1, upon approximately 364 occasions, each of which constitutes a separate unlawful act pursuant to Section 12(a)(1)(B) of FIFRA, 7 U.S.C. § 136j(a)(1)(B).

38. On July 23, 2012, based on ODA's May 9, 2012 inspection and EPA's own investigation into the Respondent's compliance with FIFRA, EPA issued a Stop Sale, Use, or Removal Order (SSURO or Order) to the Respondent ordering it to immediately stop the distribution or sale of "SaniGuard," EPA Reg. No. 69403-1.

39. On November 26, 2013, EPA notified the Respondent that it intended to file a civil complaint alleging that Respondent distributed or sold “SaniGuard,” EPA Reg. No. 69403-1, as either a “Total Release Fogger” or a “Dry Sanitizing Surface Spray” with claims as part of that distribution or sale which substantially differed from the claims approved by EPA as part of its FIFRA registration in violation of FIFRA Section 12(a)(1)(B), 7 U.S.C. § 136j(a)(1)(B).

40. Respondent submitted a new label to EPA for approval, and on August 5, 2014, the EPA accepted Respondent’s proposed label for “SaniGuard,” EPA Reg. No. 69403-1.

41. On April 29, 2015, EPA issued an Amended SSURO to the Respondent, allowing the movement of illegal Saniguard products, labeled prior to August 5, 2014, to the Respondent for replacement and/or proper disposal.

Civil Penalty

42. Pursuant to Section 14(a)(4) of FIFRA, 7 U.S.C. § 136f(a)(4), Complainant determined that an appropriate civil penalty to settle this action is \$1,500. Complainant also considered EPA’s FIFRA Enforcement Response Policy, dated December 2009. In determining the penalty amount, Complainant considered the appropriateness of the penalty to the size of Respondent’s business, the effect on Respondent’s ability to continue in business, and the gravity of the violation.

43. Within 30 days after the effective date of this CAFO, Respondent must pay a \$1,500 civil penalty for the FIFRA violations by sending a cashier’s or certified check, payable to “Treasurer, United States of America,” to:

U.S. EPA
Fines and Penalties
Cincinnati Finance Center
Post Office Box 979077
St. Louis, Missouri 63197-9000

The check must note Respondent's name and the docket number of this CAFO.

44. Respondent must send a notice of payment that states Respondent's name and the case docket number to EPA at the following addresses when it pays the penalty:

Regional Hearing Clerk (E-19J)
U.S. EPA, Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604

Claudia Niess (I.C-8J)
Pesticides and Toxics Compliance Section
U.S. EPA, Region 5
77 West Jackson Boulevard.
Chicago, Illinois 60604

Kimberly Portnoy (C-14J)
Office of Regional Counsel
U.S. EPA, Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604

45. This civil penalty is not deductible for federal tax purposes.

46. If Respondent does not pay timely the civil penalty, EPA may refer the matter to the Attorney General who will recover such amount by action in the appropriate United States district court under Section 14(a)(5) of FIFRA, 7 U.S.C. § 136l(a)(5). The validity, amount and appropriateness of the civil penalty are not reviewable in a collection action.

47. Pursuant to 31 C.F.R. § 901.9, Respondent must pay the following on any amount overdue under this CAFO. Interest will accrue on any amount overdue from the date payment was due at a rate established by the Secretary of the Treasury. Respondent must pay a \$15 handling charge each month that any portion of the penalty is more than 30 days past due. In addition, Respondent must pay a 6 percent per year penalty on any principal amount 90 days past due.

General Provisions

48. This CAFO resolves only Respondent's liability for federal civil penalties for the violations and facts alleged in the CAFO.

49. This CAFO does not affect the rights of EPA or the United States to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law.

50. This CAFO does not affect Respondent's responsibility to comply with FIFRA and other applicable federal, state and local laws.

51. This CAFO is a "final order" for purposes of EPA's FIFRA Enforcement Response Policy.

52. The terms of this CAFO bind Respondent, its successors and assigns.

53. Each person signing this agreement certifies that he or she has the authority to sign for the party whom he or she represents and to bind that party to its terms.

54. Each party agrees to bear its own costs and attorney's fees, in this action.

55. This CAFO constitutes the entire agreement between the parties.

DEM Technology, LLC, Respondent


6/29/15
Date



David Morgan
President
DEM Technology, LLC

United States Environmental Protection Agency, Complainant

7/14/2015
Date



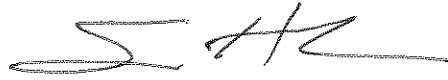
Margaret M. Guerriero
Director
Land and Chemicals Division

In the Matter of:
DEM Technology, LLC
Docket No. FIFRA-05-2015-0043

Final Order

This Consent Agreement and Final Order, as agreed to by the parties, shall become effective immediately upon filing with the Regional Hearing Clerk. This Final Order concludes this proceeding pursuant to 40 C.F.R. §§ 22.18 and 22.31. IT IS SO ORDERED.

17 July 2015
Date



Susan Hedman
Regional Administrator
United States Environmental Protection Agency
Region 5

In the matter of: DEM Technology Inc.
Docket Number! FIFRA-05-2015-0043

CERTIFICATE OF SERVICE

I certify that I served a true and correct copy of the foregoing *Consent Agreement and Final Order*, which was filed on July 21, 2015, in the following manner to the addressees:

Copy by Certified Mail
Return-receipt:

Mr. David Morgan
President
DEM Technology
755 Albany St.
Dayton, Ohio 45417


Copy by E-mail to
Attorney for Complainant:

Kimberly Portnoy
Portnoy.Kimberly@epa.gov

Copy by E-mail to
Regional Judicial Officer:

Ann Coyle
coyle.ann@epa.gov

Dated:

July 21, 2015 

LaDawn Whitehead
Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 5

CERTIFIED MAIL RECEIPT NUMBER(S): 7011 1150 0000 2643 8562