



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

March 5, 2014

REPLY TO THE ATTENTION OF:

LC- 8J

CERTIFIED MAIL

Receipt No.7009 1680 0000 7647 6263

Mr. James Anderson  
Corporate Legal Manger  
5101 Menard Drive  
Eau Claire, Wisconsin 54703

Consent Agreement and Final Order In the Matter of  
Menards, Inc. Docket No. FIFRA-05-2014-0009

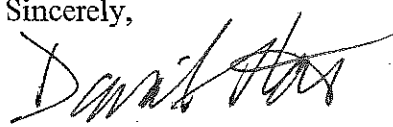
Dear Mr. Jones:

Enclosed please find a copy of a fully executed Consent Agreement and Final Order, in resolution of the above case. This document was filed on March 5, 2014 with the Regional Hearing Clerk.

The civil penalty in the amount of \$348,600 is to be paid in the manner described in paragraphs 32 and 33. Please be certain that the docket number is written on both the transmittal letter and on the check. Payment is due by April 4, 2014 (within 30 calendar days of the filing date).

Thank you for your cooperation in resolving this matter.

Sincerely,

*for*   
Terence Bonace  
Pesticides and Toxics Compliance Section

Enclosures

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 5



In the Matter of:	)	Docket No. FIFRA-05-2014-0009
	)	
Menard, Inc.	)	
Eau Claire, Wisconsin,	)	Proceeding to Assess a Civil Penalty
	)	Under Section 14(a) of the Federal
	)	Insecticide, Fungicide, and Rodenticide
Respondent	)	Act, 7 U.S.C. § 136I(a)
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**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. § 136I(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, U.S. Environmental Protection Agency, Region 5.

3. The Respondent is Menard, Inc. (Menard), a corporation doing business in the State of Wisconsin.

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 to 136y.

### **Statutory and Regulatory Background**

10. Section 3(a) of FIFRA, 7 U.S.C. § 136a(a), states no person in any State may distribute or sell to any person any pesticide that is not registered under Section 3 of FIFRA. *See also* 40 C.F.R. § 152.15.

11. Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), states that it is 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.

12. The term "person" as defined in Section 2(s) of FIFRA, 7 U.S.C. § 136(s) means "any individual, partnership, association, corporation, or any organized group of persons whether incorporated or not."

13. The term "distribute or sell" as defined in Section 2(gg) of FIFRA, 7 U.S.C. § 136(gg) 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."

14. A "pesticide" as defined in Section 2(u) of FIFRA, 7 U.S.C. § 136(u) is, among other things, "any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest."

15. A "pest" as defined in Section 2(t) of FIFRA, 7 U.S.C. § 136(t) is "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 ... which the Administrator of EPA declares to be a pest" under Section 25(c)(1) of FIFRA.

16. The Administrator of EPA may assess a civil penalty against any retailer or other distributor who violates any provision of FIFRA of not more than \$7,500 for each offense that occurred after January 12, 2009 pursuant to Section 14(a)(1) of FIFRA, 7 U.S.C. § 1361(a)(1), and 40 C.F.R. Part 19

#### EPA's General Allegations

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

18. On July 18, 2013, authorized representatives of the U.S. EPA inspected a Menard's retail facility located at 2601 North Clybourn Street, Chicago, Illinois 60614.

19. During that the July 18, 2013 inspection, the inspectors observed the following Beneke Toilet Seats on Menard's retail store shelves:

- a. **Beneke Molded Wood Toilet Seat — Sculpted Wood with Beadboard Design, SKU 6762611;**
- b. **Beneke Premium Solid Plastic Elongated Front Toilet Seat, SKU 6762525; and**
- c. **Beneke Molded Wood Toilet Seat — Sculpted Wood with Butterflies and Vines-Rounds, SKU 6762600.**

20. The label on all three brands of toilet seats (collectively referred to as "**Beneke Toilet Seats**") included the unqualified claim, "Perma-Check® Antimicrobial Agent" or "Antimicrobial Agent" in three different locations on each label.

21. From at least December 31, 2012 to present, Respondent operated and continues to operate a web site at [www.menards.com](http://www.menards.com).

22. From at least December 31, 2012 to October 17, 2013, Respondent's website at

www.menards.com included the unqualified claim that the **Beneke Toilet Seats** contained a proprietary antimicrobial agent, "Perma-Check® Antimicrobial Agent."

23. The **Beneke Toilet Seats** are pesticides as defined by Section 2(u) of FIFRA, 7 U.S.C. § 136(u) and 40 C.F.R. § 152.15, because the label and labeling claim, state or imply that the **Beneke Toilet Seats** prevent, destroy, repel or mitigate a pest.

24. The **Beneke Toilet Seats** are not registered as pesticides as required by Section 3(a) of FIFRA, 7 U.S.C. § 136a(a).

25. From on or about June 18, 2013 through on or about July 20, 2013, Respondent distributed the **Beneke Toilet Seats** from one of its distribution centers in the United States to one of its retail stores in the United State on 281 separate occasions.

Counts 1-281

26. Complainant incorporates paragraphs 1 through 25 of this CAFO, as if set forth in this paragraph.

27. From on or about June 18, 2013 through on or about July 20, 2013, Respondent distributed unregistered pesticides, **Beneke Toilet Seats**, to a number of its retail stores in the United States on 281 separate occasions.

28. Respondent's distribution of unregistered pesticides, **Beneke Toilet Seats**, on 281 separate occasions, constitutes 281 separate unlawful acts pursuant to Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A).

29. Respondent's violation of Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A) on 281 separate occasions subjects Respondent to the issuance of an Administrative Complaint assessing a civil penalty under Section 14(a) of FIFRA, 7 U.S.C. § 136I(a), for each of the 281 separate violations of FIFRA.

Civil Penalty And Other Relief

30. Section 14(a)(4) of FIFRA, 7 U.S.C. § 1361(a)(4), requires the Administrator to consider 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, when assessing an administrative civil penalty under FIFRA.

31. Based on an evaluation of the facts alleged in this CAFO, the factors in Section 14(a)(4) of FIFRA and EPA's *Enforcement Response Policy, Federal Insecticide, Fungicide, and Rodenticide Act*, dated December 2009, Complainant has determined the appropriate civil penalty to settle this action is \$348,600.

32. Within 30 days after the effective date of this CAFO, Respondent agrees to pay a \$348,600 civil penalty in order to settle and resolve the alleged FIFRA violations. Respondent agrees to pay the civil penalty by sending a cashier's or certified check, payable to the "Treasurer, United States of America," to:

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

Respondent agrees that the check will note "In the Matter of Menard, Inc.," and the docket number of this CAFO.

33. Respondent agrees that a transmittal letter, stating Respondent's name, the case title, Respondent's complete address and the case docket number will accompany the payment.

Respondent agrees that it will send a copy of the check and transmittal letter to:

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

Terence Bonace (LC-8J)  
Pesticides and Toxics Compliance Section  
U.S. EPA, Region 5  
77 West Jackson Blvd.  
Chicago, IL 60604

Nidhi K. O'Meara (C-14J)  
Office of Regional Counsel  
U.S. EPA, Region 5  
77 West Jackson Blvd.  
Chicago, IL 60604

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

35. If Respondent does not pay the civil penalty in a timely manner, 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. § 1361(a)(5). The validity, amount and appropriateness of the civil penalty are not reviewable in a collection action.

36. Pursuant to 31 C.F.R. § 901.9, Respondent agrees to 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 pursuant to applicable law. Respondent agrees to pay a \$15 handling charge each month that any portion of the civil penalty is more than 30 days past due. In addition, Respondent agrees to pay a 6 percent per year civil penalty on any principal amount 90 days past due.

#### **General Provisions**

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

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

39. This CAFO does not affect Respondent's responsibility to comply with FIFRA and

other applicable federal, state, and local laws.

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

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

42. Each person signing this CAFO 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.

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

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



In the Matter of:  
Menard, Inc.

Menard, Inc., Respondent

2/6/14  
Date

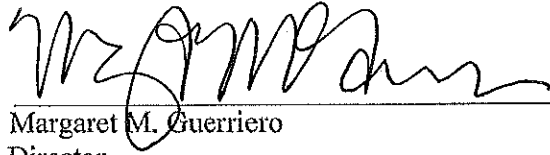
James Anderson  
James Anderson  
Corporate Legal Officer *Manager* *Dea*  
Menard, Inc.

**In the Matter of:  
Menard, Inc.**

**United States Environmental Protection Agency, Complainant**

2/24/2014

Date



Margaret M. Guerriero  
Director  
Land and Chemicals Division


In the Matter of:  
Menard, Inc.  
Docket No. FIFRA-05-2014-0009



**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.

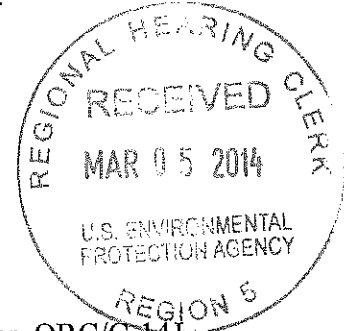
3/3/14  
Date

  
\_\_\_\_\_  
Susan Hedman  
Regional Administrator  
U.S. Environmental Protection Agency  
Region 5

**CERTIFICATE OF SERVICE**

I hereby certify that the original signed copy of the Consent Agreement and Final Order in resolution of the civil administrative action involving Menards, Inc., was filed on March 5, 2014 with the Regional Hearing Clerk (E-19J), U.S. Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois, 60604, and that I mailed by Certified Mail, Receipt No. 7009 1680 0000 7647 6263, a copy of the original to the Respondents:

Mr. James Anderson  
Corporate Legal Manger  
5101 Menard Drive  
Eau Claire, Wisconsin 54703



and forwarded copies (intra-Agency) to:

Ann Coyle, Regional Judicial Officer, ORC/C-14J  
Nidhi K. O'Meara, Regional Judicial Officer, ORC/C-14J  
Eric Volck, Cincinnati Finance/MWD



Frederick Brown  
Pesticides and Toxics Compliance Section  
U.S. EPA - Region 5  
77 West Jackson Boulevard  
Chicago, Illinois 60604

Docket No. FIFRA-05-2014-0009