



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

NOV 09 2006

REPLY TO THE ATTENTION OF:

DT-8J

CERTIFIED MAIL

Receipt No. 7001 0320 0005 8932 9010

Mr. Kyle Bikema, President
Buikema's Ace Hardware Home Center, Inc.
1030 N. Washington St.
Naperville, Illinois 60563

Consent Agreement and Final Order, Docket No. *FIFRA-05-2007-0008*

Dear Mr. Buikema:

Enclosed please find a copy of a fully executed Consent Agreement and Final Order concerning violations of the Federal Insecticide Fungicide & Rodenticide Act (FIFRA), 7 §§ U.S.C.136 et seq., in resolution of the above case. This document was filed on November 9, 2006 with the Regional Hearing Clerk.

The civil penalty in the amount of \$7,000 is to be paid in the manner prescribed in paragraphs 32, 33 and 34. Please be certain that the number BD 2750745P010 and the docket number are written on both the transmittal letter and on the check. Payment is due by December 11, 2006 (within 30 calendar days of the filing date).

Thank you for your cooperation in resolving this matter.

Sincerely,

Terrence Bonace

Terrence Bonace
Pesticides and Toxics Branch

Enclosures

cc: Marcy Toney, Regional Judicial Officer/C-14J (w/Encl.)
Nidhi K. O'Meara, ORC/C-14J (w/Encl.)
Ray Marasigan, Finance/MF-10J (w/Encl.)

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5**

IN THE MATTER OF:

**Buikema's Ace Hardware Home Center,
Inc.
1030 N. Washington Street
Naperville, Illinois 60563**

Respondent.

) **Docket No. FIFRA-05-2007-0008**
)
) **Proceeding to Assess a Civil Penalty**
) **Under Section 14(a) of the Federal**
) **Insecticide, Fungicide, and Rodenticide**
) **Act, 7 U.S.C. § 136l(a)**
)
)
)

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EPA REGION 5
OFFICE OF GENERAL COUNSEL
JRW

Consent Agreement and Final Order Commencing and Concluding A Proceeding

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 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 (2005).

2. Complainant, the Chief of the Pesticides and Toxics Branch, Waste, Pesticides and Toxics Division, United States Environmental Protection Agency (EPA), Region 5, brings this administrative action seeking a civil penalty under Section 14(a) of FIFRA, 7 U.S.C. § 136l(a).

3. Respondent is Buikema's Ace Hardware Home Center, Inc. (Buikema), a corporation organized under the laws of the State of Illinois, with a place of business located at 1030 N. Washington Street, Naperville, Illinois 60563.

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) (2005).

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 entry of this CAFO and the assessment of the specified civil penalty and agrees to comply with the terms of the CAFO.

Jurisdiction and Waiver of Right to Hearing

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

8. Buikema waives any 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.

Statutory and Regulatory Background

9. 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, 7 U.S.C. § 136a, or whose registration has been cancelled or suspended.

10. 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.”

11. The term “distribute or sell” is defined, in Section 2(gg) of FIFRA, 7 U.S.C. § 136(gg) and 40 C.F.R. § 152.3, as “to distribute, sell, offer for sale, hold for distribution, hold for shipment, or receive and (having so received) deliver or offer to deliver.”

12. The term “pesticide” is defined at Section 2(u) of FIFRA, 7 U.S.C. § 136(u) and 40 C.F.R. § 152.3 and is generally regarded as any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest.

13. The term “pests” is defined in Section 2(t) of FIFRA, 7 U.S.C. § 136(t) and further defined in 40 C.F.R. §152.5(c)” as any insect, rodent, nematode, fungus, weed...”

14. The U.S. EPA Administrator may assess a civil penalty of up to \$5,500 for each offense of FIFRA that occurred on or after January 31, 1997 through March 15, 2004, and may assess a civil penalty of up to \$6,500 for each offense of FIFRA that occurred after March 15, 2004 under Section 14(a) of FIFRA, 7 U.S.C § 136l(a), and 40 C.F.R. Part 19 (2005).

15. The Administrator of thr EPA may assess a civil penalty of up to \$5,500 for each offense of FIFRA that occurred on or after January 31, 1997 through March 15, 2004 and may assess a civil penalty of \$6,500 for each offense of FIFRA that occurred after March 15, 2004 under Section 14(a) of FIFRA, 7 U.S.C. § 136l(a), and 40 C.F.R. Part 19 (2005).

Factual Allegations

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

17. On August 5, 2005, an inspector employed by the Illinois Department of Public Health and authorized to conduct inspections under FIFRA, conducted an inspection under Section 9 of FIFRA, 7 U.S.C. § 136g, at Buikema’s Ace Hardware Home Center, Inc., 1337 Douglas Road, Montgomery, Illinois to examine and collect samples of any pesticides packaged, labeled, and released for shipment.

18. During the August 5, 2005 inspection, the inspectors documented the sale and distribution, as defined at Section 2(gg) of FIFRA, 7 U.S.C. § 136(gg), by Respondent, of **Summerizer Plus Lawn Insect Control**, EPA Reg. No. 8660-11.

19. The product **Summerizer Plus Lawn Insect Control**, EPA Reg. No. 8660-11, is a “pesticide” as defined at Section 2(u) of FIFRA, 7 U.S.C. § 136(u).

20. The registration of **Summerizer Plus Lawn Insect Control**, EPA Reg. No. 8660-11, was cancelled on August 11, 2004.

21. On August 25, 2005, an inspector employed by the Illinois Department of Public Health and authorized to conduct inspections under FIFRA, conducted an inspection under Section 9 of FIFRA, 7 U.S.C. § 136g, at Buikema’s Ace Hardware Home Center, Inc., 1705 North Main Street, Wheaton, Illinois to examine and collect samples of any pesticides packaged, labeled, and released for shipment.

22. During the August 25, 2005 inspection, the inspectors documented the sale and distribution, as defined at Section 2(gg) of FIFRA, 7 U.S.C. § 136(gg), by Respondent, of **Scotts Insect Control Plus Lawn Fertilizer**, EPA Reg. No. 8378-12-538.

23. The product **Scotts Insect Control Plus Lawn Fertilizer**, EPA Reg. No. 8378-12-538, is a “pesticide” as defined at Section 2(u) of FIFRA, 7 U.S.C. § 136(u).

24. The registration of **Scotts Insect Control Plus Lawn Fertilizer** , EPA Reg. No. 8378-12-538, was cancelled on August 11, 2004.

Alleged Vilolations

Count 1

25. Complainant incorporates paragraphs 1 through 24 of this complaint, as if set forth in this paragraph.

26. Respondent's distribution or sale of the cancelled pesticide product **Summerizer Lawn Insect Control**, EPA Reg. No. 8660-11, constitutes a violation of Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A).

27. Respondent's violation of Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A) subjects Respondent to the issuance of an Administrative Complaint assessing a civil penalty under Section 14(a) of the FIFRA, 7 U.S.C. §136l(a).

Count 2

28. Complainant incorporates paragraphs 1 through 27 of this complaint, as if set forth in this paragraph.

29. Respondent's distribution or sale of the cancelled pesticide product **Scotts Lawn Insect Control Plus Fertilizer**, EPA Reg. No. 8378-12-538, constitutes a violation of Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A).

30. Respondent's violation of Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A) subjects Respondent to the issuance of an Administrative Complaint assessing a civil penalty under Section 14(a) of the FIFRA, 7 U.S.C. §136l(a).

Civil Penalty

31. Pursuant to Section 14(a)(4) of FIFRA, 7 U.S.C. § 136l(a)(4), the appropriateness of the size of the penalty to the size of the business, the effect on Buikema's ability to continue in business, and the gravity of the violation, EPA has determined that an appropriate civil penalty to settle this action is \$7,000.

32. Respondent must pay the \$7,000 civil penalty by cashier's or certified check payable to the "Treasurer, United States of America," within 30 days after the effective date of this CAFO.

33. Respondent must send the check to:

U.S. EPA Region 5
P.O. Box 371531
Pittsburgh, PA 15251-7531

34. A transmittal letter, stating Respondent's name, complete address, the case docket number, and the billing document number must accompany the payment. Respondent must write the case docket number and the billing document number on the face of the check. Respondent must send copies of the check and transmittal letter to:

Regional Hearing Clerk (E-13J)
U.S. EPA, Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604-3590

Terrence Bonace
Pesticides and Toxics Enforcement Section (DT-8J)
U.S. EPA, Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604-3590

Nidhi K. O'Meara
Office of Regional Counsel (C-14J)
U.S. EPA, Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604-3590

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

36. If Respondent does not timely pay 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).

37. Pursuant to 31 C.F.R. § 901.9, Respondent shall pay the following on any amount overdue under this CAFO:

(a) **Interest.** Interest will accrue on any overdue amount from the date payment was due at a rate established by the Secretary of the Treasury.

(b) **Monthly Handling Charge.** Respondent will pay a \$15 handling charge each month that any portion of the penalty is more than 30 days past due.

(c) **Non-Payment Penalty.** Respondent will pay a six percent per annum penalty on any principal amount 90 days past due. This non-payment penalty is in addition to charges that accrue under subparagraphs (a) and (b).

Final Statement

38. This CAFO resolves only Respondent's liability for federal civil penalties for the violations alleged in the Factual Allegations and Alleged Violations sections of this CAFO.

39. 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.

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

41. Respondent certifies that it is complying fully with Section 12 (a) of FIFRA, 7 U.S.C. § 136j(a) and that it returned all containers of **Summerizer Plus Lawn Insect Control** and **Scotts Insect Control Plus Lawn Fertilizer to Syngenta Corporation**, the manufacturer of the active ingredient Diazinon, on September 28, 2006, for disposal.

42. The terms of this CAFO bind Buikema, and its successors, and assigns.

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

44. Each party agrees to bear its own costs and attorneys' fees in this action.

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

CONSENT AGREEMENT AND FINAL ORDER
In the Matter of: Buikema's Ace Hardware Home Center, Inc.
Docket No. *FIFRA-05-2007-0008* *JBW*

Buikema's Ace Hardware Home Center, Inc., Respondent

10/17/06

Date

Kyle Buikema

Kyle Buikema, President
Buikema's Ace Hardware Home Center, Inc.

United States Environmental Protection Agency, Complainant

10/27/06

Date

Anthony J. Restrepo

for Mardi Klevs, Chief
Pesticides and Toxics Branch
Waste, Pesticides and Toxics Division

11/03/06

Date

Josie Guercio *for mmG*

Margaret M. Guerriero, Director
Waste, Pesticides and Toxics Division

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CONSENT AGREEMENT AND FINAL ORDER
In the Matter of: Buikema's Ace Hardware Home Center, Inc.
Docket No. *FIFRA-DS-2007-0008*

Final Order *[Signature]*

It is ordered as agreed to by the parties and as stated in the consent agreement, effective immediately upon filing of this CAFO with the Regional Hearing Clerk. This final order disposes of this proceeding pursuant to 40 C.F.R. § 22.18.

11/06/06

Date

[Signature]

Mary A. Gade
Regional Administrator
U. S. Environmental Protection Agency
Region 5

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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 Buikema's Ace Hardware Home Center, Inc., was filed on November 9, 2006, with the Regional Hearing Clerk (E-13J), United States Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604-3590, and that I mailed by Certified Mail, Receipt No. 7001 0320 0005 8932 9010, a copy of the original to the Respondents:

Kyle J. Buikema, President
Buikema's Ace Hardware Home Center, Inc.
1030 N. Washington St.
Naperville, Illinois 60563

and forwarded copies (intra-Agency) to:

Marcy Toney, Regional Judicial Officer, ORC/C-14J
Nidhi K. O'Meara, Counsel for Complainant/C-14J
Ray Marisigan, Finance/MF-10J



Elizabeth Lytle
Pesticides and Toxics Branch
U.S. EPA - Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604-3590

Docket No. *FIFRA-05-2007-0008*


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