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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 6

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1201 Elm Street, Suite 500
Dallas, Texas 75270

REGIONAL HEARING CLERK
EPA REGION VI

In the Matter of

Walmart Inc.,

Respondent.

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Docket No. FIFRA-06-2020-0303

CONSENT AGREEMENT AND FINAL ORDER

Preliminary Statement

The U.S. Environmental Protection Agency, Region 6 (EPA or Complainant), and Walmart Inc. (Respondent) have agreed to a settlement of this action before the filing of a complaint, and thus this action is simultaneously commenced and concluded pursuant to Rules 22.13(b) and 22.18(b)(2) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, 40 C.F.R. §§ 22.13(b) and 22.18(b)(2).

Jurisdiction

1. This proceeding is an administrative action for the assessment of civil penalties instituted pursuant to Section 14 of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. § 136l.

2. This Consent Agreement and Final Order serves as notice that the EPA has reason to believe that Respondent has violated Section 12 of FIFRA, 7 U.S.C. § 136j.

Parties

3. Complainant is the Director of Enforcement and Compliance Assurance Division of the EPA, Region 6, as duly delegated by the Administrator of the EPA and the Regional Administrator, EPA, Region 6.

4. Respondent is Walmart Inc., a Delaware corporation conducting business and headquartered in the state of Arkansas.

Statutory and Regulatory Background

5. Congress enacted FIFRA, 7 U.S.C. 136 et. seq., in 1947 and amended it in 1972 and in 1996. The general purpose of FIFRA is to provide the basis for regulation, sale, distribution and use of pesticides in the United States.

6. Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), states that it shall be unlawful for any person to distribute or sell any pesticide that is not registered under Section 3 of FIFRA, 7 U.S.C. § 136a, or whose registration has been cancelled or suspended.

7. Pursuant to the regulation at 40 C.F.R. § 152.15, in relevant part, 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 the person who distributes or sells the substance claims, states, or implies (by labeling or otherwise) that the substance (either by itself or in combination with any other substance) can or should be used as a pesticide.

8. Pursuant to the regulation at 40 C.F.R. § 152.25(f)(1) – Minimum risk pesticides – products containing certain active ingredients listed in table 1, alone or in combination with other substances listed in table 1, are exempt from the requirements of FIFRA provided that all of the criteria of this section are met. Pursuant to the regulation at 40 C.F.R. § 152.25(f)(2), a pesticide product exempt under 40 C.F.R. § 152.25(f)(1) may only include the inert ingredients listed in paragraphs 40 C.F.R. § 152.25(f)(2) through (iv) of the section.

9. Section 14(a)(1) of FIFRA, 7 U.S.C. § 136l(a)(1), authorizes a civil penalty of not more than \$5,000 for each offense. The Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701, as amended, and the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, 28 U.S.C. § 2461, and implementing regulations at 40 C.F.R. Part 19, increased these statutory maximum penalties to \$20,288 for violations that occur after November 2, 2015, and for which penalties are assessed on or after January 13, 2020.

Definitions

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

11. Section 2(u) of FIFRA, 7 U.S.C. § 136(u), defines “pesticide” to mean any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest.

12. Section 2(t) of FIFRA, 7 U.S.C. § 136(t), defines “pest” to mean (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-organism on

or in living man or other living animals) which the Administrator declares to be a pest under Section 25(c)(1).

13. Section 2(a)(1) of FIFRA, 7 U.S.C. § 136(a)(1), defines “active ingredient” to mean 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.

14. Section 2(m) of FIFRA, 7 U.S.C. § 136(m), defines “inert ingredient” to mean an ingredient which is not active. The regulation at 40 C.F.R. § 152.3 further defines “inert ingredient” to mean 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.

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

EPA General Factual Allegations

16. Respondent is, and at all times referred to herein was, a “person” as defined by Section 2(s) of FIFRA, 7 U.S.C. § 136(s).

17. Respondent owns and operates a nationwide distribution and retail store chain, with its corporate headquarters located at 702 S.W. 8th Street, Bentonville, Arkansas 72716 (Respondent’s Headquarters).

18. On or about April 4, 2017, representatives of the EPA conducted an inspection at Respondent’s Headquarters to evaluate Respondent’s compliance with FIFRA and the federal regulations promulgated thereunder (the Inspection).

19. At the time of the Inspection, the EPA requested the sale and distribution records for the following products (the Products):

- 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.

20. On or about May 2, 2017, Respondent provided the sale and distribution records, as requested, for the Products.

21. Respondent sold and/or distributed the Products from Walmart Distribution Centers to Walmart Stores.

22. At the time that Respondent distributed the Products, Respondent claimed, stated or implied (by labeling or otherwise) that the Products could or should be used as a pesticide. Specifically, Respondent claimed on the label as follows:

- a. Equate Broad Spectrum SPF 30 Natural Bug Defense Sunscreen Spray:
Natural Bug Defense – Repels mosquitoes for hours – high performance bug . . . protection – insect repellent – effectively repel mosquitos for hours.
- b. Equate Broad Spectrum SPF 50 Natural Bug Defense Sunscreen Spray:
Natural Bug Defense – Repels mosquitoes for hours – high performance bug . . . protection – insect repellent – effectively repel mosquitos for hours.
- c. Ozark Trail 2-In-1 Bug Defense and Sunscreen Spray:
Bug Defense – Repellent – Repels mosquitoes for hours – insect repellent that repels mosquitoes for hours.

23. Because Respondent claimed, stated or implied that the Products can or should be used as a pesticide, the Products were considered to be intended for a pesticidal purpose pursuant

to 40 C.F.R. § 152.15, and required registration pursuant to Section 3 of FIFRA, 7 U.S.C. § 136a, unless otherwise exempt.

24. The exemptions from registration provided by 40 C.F.R. §§ 152.20, 152.25, and 152.30 were not applicable to the Products, as distributed by Respondent. Specifically, the Products contained certain active ingredients exempt from the requirements of FIFRA pursuant to 40 C.F.R. § 152.25(f)(1), including geraniol, soybean oil, peppermint, rosemary, and geranium oil, but also contained the following inert ingredients 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. Glycerin;
- e. Retinyl Palmitate (Vitamin A Palmitate);
- f. Tocopherol (Vitamin E);
- g. Avobenzene;
- h. Homosalate;
- i. Octisalate;
- j. Octocrylene; and
- k. Oxybenzone.

25. At the time of Respondent's distribution of the Products, the Products were not registered pursuant to Section 3 of FIFRA, 7 U.S.C. § 136a.

EPA Allegations of Violation

26. The facts stated in the EPA General Factual Allegations above are herein incorporated.

27. Each distribution or sale of the unregistered Products by Respondent was a violation of Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A).

CONSENT AGREEMENT

28. For the purpose of this proceeding, as required by 40 C.F.R. § 22.18(b)(2), Respondent:

- a. admits the jurisdictional allegations set forth herein;
- b. neither admits nor denies the specific factual allegations stated herein;
- c. consents to the assessment of a civil penalty, as stated herein;
- d. consents to the issuance of any specified compliance or corrective action order;
- e. consents to any conditions specified herein;
- f. consents to any stated Permit Action;
- g. waives any right to contest the allegations set forth herein; and
- h. waives its right to appeal the Final Order accompanying this Consent Agreement.

29. Respondent consents to the issuance of this Consent Agreement and Final Order and consent for the purposes of settlement to the payment of the civil penalty specified herein.

30. Respondent and EPA agree to conciliate this matter without the necessity of a formal hearing and to bear their respective costs and attorneys' fees.

Penalty Payment

31. Respondent agrees that, in settlement of the claims alleged herein, Respondent shall pay a civil penalty of Three Hundred Fifty Thousand Dollars (\$350,000), as set forth below.

32. Respondent shall pay the penalty within thirty (30) days of receiving notice of the effective date of the Final Order. Such payment shall identify Respondent by name and docket number and shall be by certified or cashier's check made payable to the "United States Treasury" and sent to:

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

or by alternate payment method described at <http://www.epa.gov/financial/makepayment>.

33. A copy of the check or other information confirming payment shall simultaneously be sent to the following:

Lorena S. Vaughn
Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 6
1201 Elm Street, Suite 500 (ORC)
Dallas, Texas 75270-2102
vaughn.lorena@epa.gov; and

Kenneth R. McPherson
Land, Chemicals, and Redevelopment Division
UST, Pollution Prevention, Pesticides, and Lead Branch
Pesticides and Lead Section
U.S. Environmental Protection Agency, Region 6
1201 Elm Street, Suite 500 (LCRPT)
Dallas, Texas 75270-2101
mcperson.kenneth@epa.gov

34. Respondent understands that its failure to timely pay any portion of the civil penalty may result in the commencement of a civil action in Federal District Court to recover the full remaining balance, along with penalties and accumulated interest. In such case, interest shall begin to accrue on a civil or stipulated penalty from the date of delinquency until such civil or stipulated penalty and any accrued interest are paid in full. 31 C.F.R. § 901.9(b)(1). Interest will

be assessed at a rate of the United States Treasury Tax and loan rates in accordance with 31 U.S.C. § 3717. Additionally, a charge will be assessed to cover the costs of debt collection including processing and handling costs, and a non-payment penalty charge of six percent (6%) per year compounded annually will be assessed on any portion of the debt which remains delinquent more than ninety (90) days after payment is due. 31 U.S.C. § 3717(e)(2).

Effect of Settlement and Reservation of Rights

35. Full payment of the penalty proposed in this Consent Agreement shall only resolve Respondent's liability for federal civil penalties for the violations alleged herein. Complainant reserves the right to take any enforcement action with respect to any other violations of the FIFRA or any other applicable law.

36. The effect of settlement described in the immediately preceding paragraph is conditioned upon the accuracy of Respondent's representations to the EPA, as memorialized in paragraph directly below.

37. Respondent certifies by the signing of this Consent Agreement that to the best of its knowledge it is presently in compliance with all requirements of FIFRA and its implementing regulations.

38. Full payment of the penalty proposed in this Consent Agreement shall not in any case affect the right of the Agency or the United States to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law. This Consent Agreement and Final Order does not waive, extinguish or otherwise affect Respondent's obligation to comply with all applicable provisions of the FIFRA and regulations promulgated thereunder.

39. Complainant reserves the right to enforce the terms and conditions of this Consent Agreement and Final Order.

General Provisions

40. By signing this Consent Agreement, the undersigned representative of Respondent certifies that he or she is fully authorized to execute and enter into the terms and conditions of this Consent Agreement and has the legal capacity to bind the party he or she represents to this Consent Agreement.

41. This Consent Agreement shall not dispose of the proceeding without a final order from the Regional Judicial Officer or Regional Administrator ratifying the terms of this Consent Agreement. This Consent Agreement and Final Order shall be effective upon the Agreement filing of the Final Order by the Regional Hearing Clerk for EPA, Region 6. Unless otherwise stated, all time periods stated herein shall be calculated in calendar days from such date.

42. The penalty specified herein shall represent civil penalties assessed by EPA and shall not be deductible for purposes of Federal, State and local taxes.

43. This Consent Agreement and Final Order shall apply to and be binding upon Respondent and Respondent's agents, successors and/or assigns. Respondent shall ensure that all contractors, employees, consultants, firms, or other persons or entities acting for Respondent with respect to matters included herein comply with the terms of this Consent Agreement and Final Order.

44. The EPA and Respondent agree to the use of electronic signatures for this matter pursuant to 40 C.F.R. § 22.6. The EPA and Respondent further agree to electronic service of this Consent Agreement and Final Order by email to the following:

To EPA: *mills.clarissa@epa.gov*

To Respondent: *asachs@bdlaw.com*

RESPONDENT:
WALMART INC.

Date: October 5, 2020

John Scudder
Signature

John Scudder
Name

SUP, U.S. Chief Ethics &
Title Compliance officer

COMPLAINANT:
U.S. ENVIRONMENTAL PROTECTION AGENCY

Date: _____

Cheryl T. Seager

Digitally signed by CHERYL SEAGER
DN: c=US, o=U.S. Government, ou=Environmental
Protection Agency, cn=CHERYL SEAGER,
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Date: 2020.10.07 15:06:29 -05'00'

Cheryl T. Seager
Director
Enforcement and
Compliance Assurance Division
U.S. EPA, Region 6

FINAL ORDER

Pursuant to Section 14(a) of 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, 40 C.F.R. Part 22, the foregoing Consent Agreement resolving this matter is hereby ratified and incorporated by reference into this Final Order.

Respondent is ORDERED to comply with all of the terms of the Consent Agreement. In accordance with 40 C.F.R. § 22.31(b), the effective date of the foregoing Consent Agreement and this Final Order is the date on which this Final Order is filed with the Regional Hearing Clerk.

This Final Order shall resolve only those causes of action alleged in the Consent Agreement. Nothing in this Final Order shall be construed to waive, extinguish, or otherwise affect 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.

IT IS SO ORDERED.

Rucki, Thomas

Digitally signed by Rucki, Thomas
DN: cn=Rucki, Thomas,
email=Rucki.Thomas@epa.gov
Date: 2020.10.07 16:52:40 -05'00'

Thomas Rucki
Regional Judicial Officer

10/7/2020

Date

CERTIFICATE OF SERVICE

I certify that that a true and correct copy of the foregoing Consent Agreement and Final Order was delivered to the Regional Hearing Clerk, U.S. EPA, Region 6, 1201 Elm Street, Dallas, Texas 75270-2102, and that a true and correct copy was sent this day in the following manner to the addressees:

Copy via Email to Complainant:

mills.clarissa@epa.gov

Copy via Email to Respondent:

asachs@bdlaw.com

Dated this 8th day of October, 2020.

Signed
Office of Regional Counsel
U.S. EPA, Region 6