

FILED

2011 FEB -3 PM 2:10

U.S. EPA REGION IX
REGIONAL HEARING CLERK

1 NANCY J. MARVEL
Regional Counsel
2
3 EDGAR P. CORAL
Assistant Regional Counsel
U.S. Environmental Protection Agency
4 Region IX
75 Hawthorne Street
5 San Francisco, CA 94105
(415) 972-3898
6

7 UNITED STATES
8 ENVIRONMENTAL PROTECTION AGENCY
9 REGION IX

10 In the matter of:) Docket No. FIFRA-09-2011- 0010
11)
12 Bye Bye Birdie,) CONSENT AGREEMENT
AND FINAL ORDER
13 Respondent.) pursuant to 40 C.F.R. §§ 22.13(b),
22.18(b)(2), and 22.18(b)(3)
14

15 I. CONSENT AGREEMENT

16 The United States Environmental Protection Agency ("EPA"), Region IX, and Bye Bye
17 Birdie (the "Respondent") agree to settle this matter and consent to the entry of this Consent
18 Agreement and Final Order ("CAFO").

19 A. AUTHORITY AND PARTIES

20 1. This is a civil administrative action brought pursuant to Section 14(a)(2) of the Federal
21 Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136l(a)(2), for the assessment
22 of a civil administrative penalty against Respondent for the use of a registered pesticide in a
23 manner inconsistent with its labeling in violation of Section 12(a)(2)(G) of FIFRA, 7 U.S.C. §
24 136j(a)(2)(G).

25 2. Complainant is the Associate Director for Agriculture of the Communities and
26 Ecosystems Division in EPA, Region IX. The Administrator of EPA delegated to the Regional
27 Administrator of Region IX the authority to bring this action under FIFRA by EPA Delegation
28 Order Number 5-14, dated May 11, 1994. The Regional Administrator of Region IX further

1 delegated the authority to bring this action under FIFRA to the Associate Director for Agriculture
2 of the Communities and Ecosystems Division by EPA Regional Order Number 1255.08 CHG1,
3 dated June 9, 2005.

4 3. Respondent is Bye Bye Birdie, a pest control services corporation whose headquarters
5 is located in Sparks, Nevada.

6 B. STATUTORY AND REGULATORY BASIS

7 4. Section 12(a)(2)(G) of FIFRA, 7 U.S.C. § 136j(a)(2)(G), makes it unlawful for any
8 person to use any registered pesticide in a manner inconsistent with its labeling.

9 5. Section 2(ee) of FIFRA, 7 U.S.C. § 136(ee), provides that a registered pesticide is
10 used in a manner inconsistent with its labeling if the registered pesticide is used in a manner not
11 permitted by the labeling.

12 C. ALLEGED VIOLATION

13 6. Respondent is a corporation and therefore fits within the definition of “person” as that
14 term is defined by Section 2(s) of FIFRA, 7 U.S.C. § 136(s).

15 7. Rejex-it Fog Force AR Bird Repellant (EPA Reg. No. 58035-15) is a “pesticide” as
16 that term is defined in Section 2(u) of FIFRA, 7 U.S.C. § 136(u).

17 8. On or about June 3, 2010, Respondent used, “in a manner inconsistent with its
18 labeling” as that term is defined by Section 2(ee) of FIFRA, 7 U.S.C. § 136(ee), the registered
19 pesticide Rejex-it Fog Force AR Bird Repellant at the State of Nevada’s Department of Business
20 and Industry, Division of Insurance office located at 788 Fairview Drive in Carson City, Nevada.
21 Specifically, in a manner not permitted by the pesticide Rejex-it Fog Force AR Bird Repellant’s
22 labeling, Respondent applied the pesticide in a way that contacted workers or other persons
23 directly or through drift.

24 9. By using the registered pesticide Rejex-it Fog Force AR Bird Repellant in a manner
25 inconsistent with its labeling, Respondent violated Section 12(a)(2)(G) of FIFRA, 7 U.S.C. §
26 136j(a)(2)(G).

27 10. Section 14(a)(2) of FIFRA, 7 U.S.C. § 136l(a)(2), and the Civil Monetary Penalty
28 Inflation Adjustment Rule, 40 C.F.R. Part 19, provide that, for any offense occurring after

1 January 12, 2009, any applicator not included under Section 14(a)(1) who holds or applies
2 registered pesticides, or uses dilutions of registered pesticides, only to provide a service of
3 controlling pests without delivering any unapplied pesticide to any person so served, and who
4 violates any provision of FIFRA may be assessed a civil penalty by the Administrator of not
5 more than \$750 for the first offense nor more than \$1,100 for each subsequent offense. Under
6 the FIFRA Enforcement Response Policy, dated December 2009, and the Civil Monetary Penalty
7 Inflation Adjustment Rule, the violation cited above would merit a pre-adjustment civil penalty
8 of \$600, given the alleged violation's gravity level, size of business, and applicable gravity
9 adjustments.

10 D. RESPONDENT'S ADMISSIONS

11 11. In accordance with 40 C.F.R. § 22.18(b)(2) and for the purpose of this proceeding,
12 Respondent: (i) admits that EPA has jurisdiction over the subject matter of this CAFO and over
13 Respondent; (ii) neither admits nor denies the specific factual allegations contained in Section
14 I.C of this CAFO; (iii) consents to any and all conditions specified in this CAFO and to the
15 assessment of the civil administrative penalty under Section I.E of this CAFO; (iv) waives any
16 right to contest the allegations contained in this CAFO; and (v) waives the right to appeal the
17 proposed Final Order contained in this CAFO.

18 E. CIVIL ADMINISTRATIVE PENALTY

19 12. In settlement of the violation specifically alleged in Section I.C of this CAFO,
20 Respondent shall pay a civil administrative penalty of SIX HUNDRED DOLLARS (\$600).
21 Respondent shall pay this civil penalty within thirty (30) days of the effective date of this CAFO.
22 The civil penalty shall be paid by remitting a certified or cashier's check, including the name and
23 docket number of this case, for the amount, payable to "Treasurer, United States of America," (or
24 be paid by one of the other methods listed below) and sent as follows:

25 Regular Mail:
26 U.S. Environmental Protection Agency
27 Fines and Penalties
28 Cincinnati Finance Center
PO Box 979077
St. Louis, MO 63197-9000

1 Wire Transfers:

2 Wire transfers must be sent directly to the Federal Reserve Bank in New
3 York City with the following information:

4 Federal Reserve Bank of New York

5 ABA = 021030004

6 Account = 68010727

7 SWIFT address = FRNYUS33

8 33 Liberty Street

9 New York, NY 10045

10 Field Tag 4200 of the Fedwire message should read "D 68010727

11 Environmental Protection Agency"

12 Overnight Mail:

13 U.S. Bank

14 1005 Convention Plaza

15 Mail Station SL-MO-C2GL

16 ATTN Box 979077

17 St. Louis, MO 63101

18 ACH (also known as REX or remittance express):

19 Automated Clearinghouse (ACH) for receiving U.S. currency

20 PNC Bank

21 808 17th Street, NW

22 Washington, DC 20074

23 ABA = 051036706

24 Transaction Code 22 – checking

25 Environmental Protection Agency

26 Account 31006

27 CTX Format

28 On Line Payment:

29 This payment option can be accessed from the information below:

30 www.pay.gov

31 Enter "sf01.1" in the search field

32 Open form and complete required fields

33 If clarification regarding a particular method of payment remittance is
34 needed, contact the EPA's Cincinnati Finance Center at (513) 487-2091.

35 A copy of each check, or notification that the payment has been made by one of the other
36 methods listed above, including proof of the date payment was made, shall be sent with a
37 transmittal letter, indicating Respondent's name, the case title, and docket number, to the
38 following addresses:

39 Regional Hearing Clerk

40 Office of Regional Counsel (ORC-1)

41 U.S. Environmental Protection Agency, Region IX

42 75 Hawthorne Street

43 San Francisco, CA 94105

1 Nancy Yoshikawa
2 Communities and Ecosystems Division (CED-5)
3 U.S. Environmental Protection Agency, Region IX
4 75 Hawthorne Street
5 San Francisco, CA 94105

6 Edgar P. Coral
7 Office of Regional Counsel (ORC-2)
8 U.S. Environmental Protection Agency, Region IX
9 75 Hawthorne Street
10 San Francisco, CA 94105

11 13. Respondent shall not use payment of any penalty under this CAFO as a tax deduction
12 from Respondent's federal, state, or local taxes, nor shall Respondent allow any other person to
13 use such payment as a tax deduction.

14 14. If Respondent fails to pay the assessed civil administrative penalty of SIX
15 HUNDRED DOLLARS (\$600), as identified in Paragraph 12, by the deadline specified in that
16 Paragraph, then Respondent shall also pay a stipulated penalty to EPA upon EPA's written
17 request. The amount of the stipulated penalty will be THREE HUNDRED DOLLARS (\$300),
18 and will be immediately due and payable upon EPA's written request on the day following the
19 deadline specified in Paragraph 12, together with the initially assessed civil administrative
20 penalty of SIX HUNDRED DOLLARS (\$600), resulting in a total penalty due of NINE
21 HUNDRED DOLLARS (\$900). Failure to pay the civil administrative penalty specified in
22 Paragraph 12 by the deadline specified in that Paragraph may also lead to any or all of the
23 following actions:

24 (1) EPA may refer the debt to a credit reporting agency, a collection
25 agency, or to the Department of Justice for filing of a collection action in the appropriate United
26 States District Court. 40 C.F.R. §§ 13.13, 13.14 and 13.33. The validity, amount, and
27 appropriateness of the assessed penalty or of this CAFO is not subject to review in any such
28 collection proceeding.

(2) The U.S. Government may collect the debt by administrative offset
(i.e., the withholding of money payable by the United States to, or held by the United States for, a
person to satisfy the debt the person owes the U.S. Government), which includes, but is not
limited to, referral to the Internal Revenue Service for offset against income tax refunds. 40

1 C.F.R. §§ 13(C) and 13(H).

2 (3) Pursuant to 40 C.F.R. § 13.17, EPA may either: (i) suspend or revoke
3 Respondent's licenses or other privileges, or (ii) suspend or disqualify Respondent from doing
4 business with EPA or engaging in programs EPA sponsors or funds.

5 (4) Pursuant to 31 U.S.C. § 3701 *et seq.* and 40 C.F.R. Part 13, the U.S.
6 Government may assess interest, administrative handling charges, and nonpayment penalties
7 against the outstanding amount that Respondent owes to EPA for Respondent's failure to pay the
8 civil administrative penalty specified in Paragraph 12 by the deadline specified in that Paragraph.

9 (a) Interest. Pursuant to 31 U.S.C. § 3717 and 40 C.F.R. §
10 13.11(a)(1), any unpaid portion of the assessed penalty shall bear interest at the rate established
11 according to 26 U.S.C. § 6621(a)(2) from the effective date of this CAFO, provided, however,
12 that no interest shall be payable on any portion of the assessed penalty that is paid within thirty
13 (30) days of the effective date of this CAFO.

14 (b) Administrative Handling Charges. Pursuant to 31 U.S.C. §
15 3717(e)(1) and 40 C.F.R. § 13.11(b), Respondent shall pay a monthly handling charge, based on
16 either actual or average cost incurred (including both direct and indirect costs), for every month
17 in which any portion of the assessed penalty is more than thirty (30) days past due.

18 (c) Nonpayment Penalties. Pursuant to 31 U.S.C. § 3717(e)(2)
19 and 40 C.F.R. § 13.11(c), a monthly penalty charge, not to exceed six percent (6%) annually,
20 may be assessed on all debts more than ninety (90) days delinquent.

21 F. CERTIFICATION OF COMPLIANCE

22 15. In executing this CAFO, Respondent certifies that (1) it is no longer using registered
23 pesticides in violation of Section 12(a)(2)(G) of FIFRA, 7 U.S.C. § 136j(a)(2)(G), and (2) it is
24 currently in compliance with all other FIFRA requirements for all its ongoing operations.

25 G. RETENTION OF RIGHTS

26 16. In accordance with 40 C.F.R. § 22.18(c), this CAFO only resolves Respondent's
27 liabilities for federal civil penalties for the violations and facts specifically alleged in Section I.C
28 of this CAFO. Nothing in this CAFO is intended to or shall be construed to resolve: (i) any civil

1 liability for violations of any provision of any federal, state, or local law, statute, regulation, rule,
2 ordinance, or permit not specifically alleged in Section I.C of this CAFO; or (ii) any criminal
3 liability. EPA specifically reserves any and all authorities, rights, and remedies available to it
4 (including, but not limited to, injunctive or other equitable relief or criminal sanctions) to address
5 any violation of this CAFO or any violation not specifically alleged in Section I.C of this CAFO.

6 17. This CAFO does not exempt, relieve, modify, or affect in any way Respondent's
7 duties to comply with all applicable federal, state, and local laws, regulations, rules, ordinances,
8 and permits.

9 **H. ATTORNEYS' FEES AND COSTS**

10 18. Each party shall bear its own attorneys' fees, costs, and disbursements incurred in
11 this proceeding.

12 **I. EFFECTIVE DATE**

13 19. In accordance with 40 C.F.R. §§ 22.18(b)(3) and 22.31(b), this CAFO shall be
14 effective on the date that the Final Order contained in this CAFO, having been approved and
15 issued by either the Regional Judicial Officer or Regional Administrator, is filed.

16 **J. BINDING EFFECT**

17 20. The undersigned representative of Complainant and the undersigned representative of
18 Respondent each certifies that he or she is fully authorized to enter into the terms and conditions
19 of this CAFO and to bind the party he or she represents to this CAFO.

20 21. The provisions of this CAFO shall apply to and be binding upon Respondent and its
21 officers, directors, employees, agents, trustees, servants, authorized representatives, successors,
22 and assigns.

1 FOR RESPONDENT BYE BYE BIRDIE:

2 11.30.10

3 DATE



RAYE BREWER
President
Bye Bye Birdie
593 Overmyer Road
Sparks, NV 89431

6 FOR COMPLAINANT EPA:

8 2/2/11

9 DATE



KATHERINE A. TAYLOR
Associate Director for Agriculture
Communities and Ecosystems Division
U.S. Environmental Protection Agency, Region IX
75 Hawthorne Street
San Francisco, California 94105

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

II. FINAL ORDER

EPA and Bye Bye Birdie having entered into the foregoing Consent Agreement,
IT IS HEREBY ORDERED that this CAFO (Docket No. FIFRA-09-2011- 0010) be
entered, and Respondent shall pay a civil administrative penalty in the amount of SIX
HUNDRED DOLLARS (\$600), and comply with the terms and conditions set forth in the
Consent Agreement.

02/03/11
DATE


STEVEN JAWGIEL
Regional Judicial Officer
U.S. Environmental Protection Agency, Region IX

CERTIFICATION / CERTIFICATE OF SERVICE

I hereby certify that the original of the foregoing Consent Agreement and Final Order, Docket No FIFRA-09-2011- 0010 has been filed with the Region 9 Hearing Clerk and that a copy was sent, certified mail to:

Ms. Raye Brewer
President
Bye-Bye Birdie
593 Overmyer Road
Sparks, NV 89431

02/03/11



DATE

for: Steven Armsey
U.S. Environmental Protection Agency
75 Hawthorne Street
San Francisco, CA 94105



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 Hawthorne Street
San Francisco, CA 94105

CERTIFIED MAIL
RETURN RECEIPT REQUESTED
RECEIPT NO: 7010 1060 0000 5106 8757

Date: FEB 3 2011

Ms. Raye Brewer
President
Bye Bye Birdie
593 Overmyer Road
Sparks, NV 89431

Re: Consent Agreement and Final Order
Docket No.: FIFRA-09-2011- 0010

Dear Ms Brewer:

Enclosed please find a Consent Agreement and Final Order (CAFO) concerning alleged violations of the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. Sections 136 et seq., by Bye Bye Birdie. The terms of the CAFO require the payment of \$600 to be received by EPA within 30 calendar days of the effective date (stamped filing date) of this CAFO.

If you have any questions, please contact Nancy Yoshikawa at 415-972-3535.

Sincerely,

A handwritten signature in black ink that reads "Katherine A. Taylor".

Katherine A. Taylor, Associate Director of Agriculture
Communities and Ecosystems Division

cc: Charles Moses, Nevada Department of Agriculture