



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

JAN 19 2007

REPLY TO THE ATTENTION OF:  
DT-8J

CERTIFIED MAIL

Receipt No. 7001 0320 0006 0198 4388

Mr. Mark Henning  
The Dow Chemical Company  
2030 Dow Center  
Midland, Michigan 48674

Consent Agreement and Final Order, Docket No. *FIFRA-05-2007-0016*

Dear Mr. Henning:

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 January 19, 2007 with the Regional Hearing Clerk.

The civil penalty in the amount of \$7,928 is to be paid in the manner prescribed in paragraphs 46, 47, 48 and 49. Please be certain that the number **BD** 2750745P018 and the docket number are written on both the transmittal letter and on the check. Payment is due by February 20, 2007 (within 30 calendar days of the filing date).

Thank you for your cooperation in resolving this matter.

Sincerely,

Joseph Lukascyk  
Pesticides and Toxics Branch

Enclosures

cc: Marcy Toney, Regional Judicial Officer/C-14J (w/Encl.)  
Jeffery Trevino, ORC/C-14J (w/Encl.)  
Eric Volck, Cincinnati Finance/MWD (w/Encl.)

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 5**

**IN THE MATTER OF:**

) DOCKET NO. *FIFRA-05-2007-0016* *Blu*

**THE DOW CHEMICAL COMPANY,  
MIDLAND, MICHIGAN**

)  
) **CONSENT AGREEMENT**  
) **AND**  
) **FINAL ORDER**

**RESPONDENT**

)

**CONSENT AGREEMENT AND FINAL ORDER**

**CONSENT AGREEMENT**

The parties agree the settlement of this action without further delay is in their interest and the public interest. Having consented to the entry of this Consent Agreement and Final Order (CAFO) before taking testimony and without any adjudication of any issues of law or fact herein Respondent agrees to comply with the terms of this Consent Agreement and Final Order.

2007 JAN 19 PM 2:07  
REGIONAL ADMINISTRATIVE CENTER

**I. Preliminary Statement**

1. This is a civil administrative action instituted under Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended (FIFRA), 7 U.S.C. § 136l(a), for the assessment of a civil penalty.
2. The Complainant is, by lawful delegation, the Chief of the Pesticides and Toxics Branch, Waste, Pesticides and Toxics Division, Region 5, United States Environmental Protection Agency, (U.S. EPA), and is authorized to institute and resolve civil administrative actions brought pursuant to Section 14(a) of FIFRA, 7 U.S.C. § 136l(a).
3. The Respondent is The Dow Chemical Company, 2030 Dow Center, Midland, Michigan, a corporation organized under the laws of the State of Delaware, with headquarters located at 2030 Dow Center, Midland, Michigan.
4. The Parties enter into this Consent Agreement and 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, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits," 40 C.F.R. Part 22, (Consolidated Rules).
5. Where the parties agree to settlement of one or more causes of action before the filing of a complaint, a proceeding may be simultaneously commenced and concluded by the issuance of a CAFO. 40 C.F.R. § 22.13(b).

6. The Parties agree to resolve the alleged causes of action and violations specified in this CAFO before the filing of a complaint pursuant to 40 C.F.R. § 22.13(b). This CAFO includes a written Consent Agreement of the parties or their representatives, and a Final Order ratifying the Parties' agreement for purposes of 40 C.F.R. § 22.18(b).

7. This CAFO shall apply to and be binding upon the Respondent, its officers, directors, servants, employees, agents, successors and assigns, including, but not limited to subsequent purchasers.

8. This CAFO constitutes a settlement by U.S. EPA for all claims for civil penalties pursuant to Section 14(a) of FIFRA, 7 U.S.C. § 136l(a), for the alleged violations of FIFRA as specified in this CAFO. The issuance of this CAFO does not constitute a waiver by U.S. EPA of its remedies, either judicial or administrative, under FIFRA or any other federal environmental law, to address any other matters or unlawful acts not specified in this CAFO. Nothing in this CAFO is intended to or shall be construed to operate in any way to resolve any criminal liability of the Respondent. Full payment of the civil penalty shall only resolve the Respondent's liability for Federal civil penalties for the facts and violations alleged in this CAFO and shall not affect the right of the U.S. EPA or the United States to pursue appropriate equitable relief or criminal sanctions for any violations of law.

9. Compliance with this CAFO shall not be a defense to any actions subsequently commenced pursuant to federal laws and regulations administered by Complainant except as provided in paragraph 8 above, and it is the responsibility of Respondent to comply with such laws and regulations. This CAFO shall not relieve Respondent of its obligation to comply with all applicable provisions of federal, state, county, and municipal statute, law, regulation, or ordinances, nor shall it be construed by Complainant or Respondent to be a ruling on, or determination of, any issue related to any federal, state, or local permit.

10. Respondent certifies that, with respect to the matters alleged in this CAFO, it is now in compliance with FIFRA, 7 U.S.C. § 136 et seq., and all regulations promulgated thereunder.

11. The Parties to this Consent Agreement shall bear their own costs and attorneys' fees for the action resolved by this CAFO.

12. 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.

13. This CAFO constitutes the entire agreement between the Parties.

14. This CAFO constitutes a Final Order.

15. The effective date of this CAFO shall be the day it is filed with the Regional Hearing Clerk, as required by 40 C.F.R. § 22.18(b)(3).

16. This CAFO shall terminate when Respondent has satisfied all terms and conditions of this CAFO. Upon Respondent's request, Complainant shall provide written confirmation of the termination of this CAFO.

17. Respondent's failure to comply with any provision of this CAFO shall result in the referral of this matter to the United States Department of Justice.

## **II. Jurisdiction and Waiver of Right to Hearing**

18. Respondent admits it is within the jurisdiction of FIFRA and the Administrator of U.S. EPA, as required by 40 C.F.R. § 22.18(b)(2).

19. Respondent neither admits nor denies the factual allegations and conclusions of law in this CAFO, as required by 40 C.F.R. § 22.18(b)(2), and nothing herein shall be construed as an admission of liability by Respondent.

20. Respondent consents to the assessment of the stated civil penalty below, as required by 40 C.F.R. § 22.18(b)(2).

21. Respondent waives any right to contest the allegations of this CAFO and its right to appeal the proposed Final Order accompanying this Consent Agreement, as required by 40 C.F.R. § 22.18(b)(2).

## **III. Statutory and Regulatory Background**

22. FIFRA provides that, "Except as provided by subsection (b) of this section, it shall be unlawful for any person in any State to distribute or sell to any person any registered pesticide the composition of which differs at the time of its distribution or sale from its composition as described in the statement required in connection with its registration under section 136a of this title." 7 U.S.C. § 136j(a)(1)(C).

23. The term "person" means any individual, partnership, association, corporation, or any organized group of persons whether incorporated or not. 7 U.S.C. § 136(s).

24. The term "distribute or sell" means to distribute, sell, offer for sale, hold for distribution, hold for shipment, or receive and (having so received) deliver or offer to deliver. 7 U.S.C. § 136(gg).

25. A person seeking to register a pesticide must submit an application to U.S. EPA. 7 U.S.C. § 136a.

26. Each applicant for registration of a pesticide shall file with the Administrator a statement which includes— (A) the name and address of the applicant and of any other person whose name will appear on the labeling, (B) the name of the pesticide, (C) a complete copy of the labeling of the pesticide, (D) the complete formula of the pesticide, (E) a request that the pesticide be classified for general use or for restricted use, or for both, and (F) a full description of the tests made and the results thereof upon which the claims are based. 7 U.S.C. 136a(c)(1).

27. The term “pesticide” means any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest. 7 U.S.C. § 136(u) and 40 C.F.R. § 152.3.

28. The term “pest” includes, among other things, any fungus, bacterium, virus, or other microorganisms. 40 C.F.R. § 152.5(d).

29. 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. 40 C.F.R. § 152.15(a)(1).

30. The Administrator of U.S. EPA is authorized to assess a civil penalty of up to \$5,000.00 for each offense of FIFRA. 7 U.S.C. §136l(a). The Debt Collection Improvement Act of 1996, 31 U.S.C. §3701, and its implementing regulations at 40 C.F.R. Part 19, increased the statutory maximum penalty to \$5,500.00 for each violation of FIFRA that occurs on or after January 31, 1997.

#### **IV. Alleged Facts and Conclusions of Law**

31. Respondent was a corporation in 2004.

32. Therefore, Respondent was a “person” in 2004 as that term is defined in Section 2(s) of FIFRA, 7 U.S.C. § 136(s).

33. Respondent distributed, sold, offered for sale, held for distribution, or held for shipment, to other persons, thirty-one (31) shipments of its product “DOWICIDE A Antimicrobial,” EPA Reg. No. 464-78, in 2004.

34. Therefore, Respondent did “distribute or sell” to other persons “DOWICIDE A Antimicrobial,” EPA Reg. No. 464-78, during 2004 as that term is defined in Section 2(gg) of FIFRA, 7 U.S.C. § 136(gg).

35. Respondent’s DOWICIDE A Antimicrobial,” EPA Reg. No. 464-78, was an antimicrobial pesticide registered with E.P.A, and had a label which stated it was “for the control

of fungi and bacteria . . .,” and “[T]his pesticide is toxic to fish and aquatic organisms.”

36. Therefore, “DOWICIDE A Antimicrobial,” EPA Reg. No. 464-78, in 2004, was a “pesticide” as that term is defined in 7 U.S.C. § 136(u) and 40 C.F.R. § 152.3.

37. Respondent’s “DOWICIDE A Antimicrobial,” EPA Reg. No. 464-78, ingredients include a specific range of water, and a specific range of active ingredient, as documented in the Confidential Statement of Formula required for its registration, pursuant to Section 3(c)(1) of FIFRA, 7 U.S.C. § 136a(c)(1).

38. However, during 2004, five (5) batches representing thirty (30) shipments of Respondent’s “DOWICIDE A Antimicrobial,” EPA Reg. No. 464-78, included water in an amount above the specific range of water documented in the Confidential Statement of Formula required for its registration, pursuant to Section 3(c)(1) of FIFRA, 7 U.S.C. § 136a(c)(1).

39. Furthermore, during 2004, one (1) batch representing one (1) shipment of Respondent’s “DOWICIDE A Antimicrobial,” EPA Reg. No. 464-78, included active ingredient in an amount above the specific range of active ingredient documented in the Confidential Statement of Formula required for its Registration of Pesticide, pursuant to Section 3(c)(1) of FIFRA, 7 U.S.C. § 136a(c)(1).

40. Therefore, in 2004, Respondent did distribute or sell to persons, six (6) batches representing thirty-one (31) shipments, of a registered pesticide, whose compositions differed from the product as described in the statement required in connection with its registration under Section 3(c)(1) of FIFRA, 7 U.S.C. § 136a(c)(1), which constituted unlawful acts pursuant to Section 12(a)(1)(C) of FIFRA, 7 U.S.C. § 136j(a)(1)(C).

## **V. Civil Penalty**

41. Section 14(a) of FIFRA, 7 U.S.C. § 136l(a), authorizes a civil penalty of up to \$5,000.00 for each violation of FIFRA. Pursuant to the Civil Monetary Penalty Inflation Adjustment Rule published at 40 C.F.R. Part 19, for violations occurring or continuing after January 30, 1997, U.S. EPA may assess a civil penalty of up to \$5,500.00.

42. Complainant assesses a civil penalty of \$188,500.00 against Respondent for its violations of Section 12(a)(1)(C) of FIFRA, 7 U.S.C. § 136j(a)(1)(C), alleged in this CAFO, pursuant to Section 14(a)(4) of FIFRA, 7 U.S.C. § 136l(a)(4), and Complainant’s “Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act, July 2, 1990.”

43. On September 15, 2004, Respondent voluntarily disclosed to U.S. EPA the alleged violations of Section 12(a)(1)(C) of FIFRA, 7 U.S.C. § 136j(a)(1)(C).

44. Upon review, Complainant found Respondent complied with all nine (9) of the criteria

established in the U.S. EPA “Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations,” 65 Fed. Reg. 19618, (Apr. 11, 2000), and qualifies for a one-hundred percent (100%) reduction in the assessed civil penalty of \$188,500.00.

45. However, Complainant also found Respondent’s alleged violations of Section 12(a)(1)(C) of FIFRA, 7 U.S.C. § 136j(a)(1)(C), provided Respondent an economic benefit of \$7,928.00. alleged in this CAFO.

46. Therefore, Complainant assesses, and Respondent agrees to pay, a civil penalty of \$7,928.00.

47. Respondent shall pay this civil penalty, within 30 days of the effective date of this CAFO, by certified or cashier's check payable to the “Treasurer of the United States of America,” and remit the check to:

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

48. The Respondent shall provide a transmittal letter, stating the Respondent’s name, complete address, the case docket number, and the billing document number, with the payment. The Respondent must write the case docket number, and the billing document number, on the face of the check.

49. The Respondent must also provide copies of the check and transmittal letter to:

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

Joseph G. Lukascyk (DT-8J)  
U.S. EPA, Region 5  
77 West Jackson Boulevard  
Chicago, IL 60604-3590

Jeffery M. Trevino (C-14J)  
U.S. EPA, Region 5  
77 West Jackson Boulevard  
Chicago, IL 60604-3590

50. Alternatively, Respondent may pay by wire transfer to Federal Reserve Bank of New York, Routing/ABA No. 021030004, for Account No. 68010727, U.S. EPA. Respondent’s wire

transfer payment must have the Billing Document No. \_\_\_\_\_.  
Respondent must provide written evidence of its wire payment to the persons listed in paragraph 49.

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

(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 pursuant to 31 U.S.C. § 3717(a)(1).

(b) Monthly Handling Charge. Respondent will pay a \$15.00 handling charge each month that any portion of the penalty is more than thirty (30) days past due.

(c) Non-Payment Penalty. Respondent will pay a six percent (6%) per annum penalty on any principal amount ninety (90) days past due. This non-payment penalty is in addition to charges that accrue under subparagraphs (a) and (b).

52. Respondent shall not deduct from any federal, state, or local tax laws, any of the civil penalty paid pursuant to the provisions of this CAFO.



**IN THE MATTER OF: THE DOW CHEMICAL COMPANY, MIDLAND, MICHIGAN**  
**DOCKET NO. FIFRA-05-2007-0016**  
**CONSENT AGREEMENT AND FINAL ORDER** *[Signature]*

**FINAL ORDER**

The foregoing Consent Agreement is hereby approved and incorporated by reference into this Final Order. The Respondent is hereby ORDERED to comply with all the terms of the Consent Agreement upon the filing of this Consent Agreement and Final Order with the Regional Hearing Clerk.

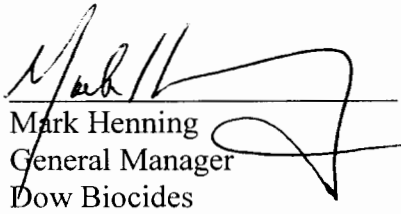
*[Signature]*  
\_\_\_\_\_  
Mary A. Gade  
Regional Administrator  
Region 5

1/18/07  
Date

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**IN THE MATTER OF: THE DOW CHEMICAL COMPANY, MIDLAND, MICHIGAN.  
DOCKET NO. FIFRA-05-2007-0016  
CONSENT AGREEMENT AND FINAL ORDER.**

THE DOW CHEMICAL COMPANY.  
MIDLAND, MICHIGAN.  
RESPONDENT.

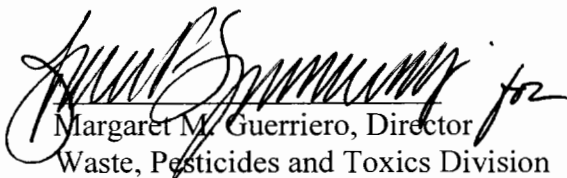
  
Mark Henning  
General Manager  
Dow Biocides

December 19, 2006  
Date

REGION 5  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
COMPLAINANT

Tony Martey, acting for M.K. Klevs  
Mardi Klevs, Chief  
Pesticides and Toxics Branch  
Waste, Pesticides and Toxics Division

1/4/07  
Date

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

1/11/07  
Date

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REGIONAL OFFICE  
CLEMSON UNIVERSITY  
RECEIVED

**CERTIFICATE OF SERVICE**

I hereby certify that the original signed copy of the Joint Complaint and Consent Agreement and Final Order in resolution of the civil administrative action involving The Dow Chemical Company, was filed on January 19, 2007 with the Regional Hearing Clerk (E-13J), United States Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, and that I mailed by Certified Mail, Receipt No. 7001 0320 0006 0198 4388, a copy of the original to the Respondents:

Mr. Mark Henning  
The Dow Chemical Company  
2030 Dow Center  
Midland, Michigan 48674

and forwarded copies (intra-Agency) to:

Marcy Toney, Regional Judicial Officer, ORC/C-14J  
Jeffery Trevino, Counsel for Complainant/C-14J  
Eric Volck, Cincinnati Finance/MWD (w/Encl.)

  
\_\_\_\_\_

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

Docket No. *FIFRA-05-2007-0016*

*ELW*

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CHICAGO, ILLINOIS