

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
REGION 6  
DALLAS, TEXAS

FILED  
2017 MAY 25 AM 9:13  
REGIONAL HEARING CLERK  
EPA REGION VI

IN THE MATTER OF: )  
)  
)  
FLAME ENGINEERING, INC. ) DOCKET NO. FIFRA-06-2017-0300  
LA CROSSE, KANSAS )  
)  
RESPONDENT )  
\_\_\_\_\_ )

**CONSENT AGREEMENT AND FINAL ORDER**

The Chief, Pesticides Section, Multimedia Division, United States Environmental Protection Agency (EPA), Region 6 (Complainant), and Flame Engineering, Inc. (Respondent) in the above-referenced proceeding, hereby agree to resolve this matter through the issuance of this Consent Agreement and Final Order (CAFO).

**I. PRELIMINARY STATEMENT**

1. This proceeding for the assessment of civil penalties pursuant to Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended (FIFRA), 7 U.S.C. § 136l(a), is simultaneously commenced and concluded by the issuance of this CAFO against the Respondent pursuant to 40 C.F.R. §§ 22.13(b) and 22.18(b)(2) and (3).

2. For the purposes of this proceeding, the Respondent admits the jurisdictional allegations herein; however, the Respondent neither admits nor denies the specific factual allegations or the conclusions of law contained in this CAFO.

3. The Respondent explicitly waives any right to contest the allegations and its right to appeal the proposed Final Order set forth therein, and waives all defenses which have been raised or could have been raised to the claims set forth in the CAFO.

4. Compliance with all the terms and conditions of this CAFO shall only resolve the Respondent's liability for Federal civil penalties for those violations which are set forth herein.

5. The Respondent consents to the issuance of this CAFO, to the assessment and payment of the stated civil penalty in the amount and by the method set forth in this CAFO.

6. The Respondent represents that it is duly authorized to execute this CAFO and that the party signing this CAFO on behalf of the Respondent is duly authorized to bind the Respondent to the terms and conditions of this CAFO.

7. The Respondent agrees that the provisions of this CAFO shall be binding on its officers, directors, employees, agents, servants, authorized representatives, successors, and assigns.

## **II. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

### **A. PRELIMINARY ALLEGATIONS**

8. The Respondent is Flame Engineering, Inc., a corporation incorporated under the laws of the State of Kansas.

9. "Person" is defined in Section 2(s) of FIFRA, 7 U.S.C. § 136(s) as meaning "any individual, partnership, association, corporation, or any organized group of persons whether incorporated or not."

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

11. The Respondent owns and operates a manufacturing facility located at 230 West Highway 4, La Crosse, Kansas 67548.

12. The Respondent manufactures the following products at the facility identified in Paragraph 11:

- A. Heavy Duty Torch Kits (12 different models);
- B. Weed Dragon<sup>®</sup> Torch Kits (4 different models);
- C. Mini Dragon<sup>™</sup> Torch Kit;
- D. Back Pack Vapor Torch Kits (4 different models);
- E. Jet Torch Kits (2 different models); and
- F. Red Dragon<sup>®</sup> Agricultural Flamers

- 1. Red Dragon<sup>®</sup> Alfalfa Flamer;
- 2. Red Dragon<sup>®</sup> Blueberry Flamers;
- 3. Red Dragon<sup>®</sup> Multipurpose Flamer;
- 4. Red Dragon<sup>®</sup> Potato Vine Flamers;
- 5. Red Dragon<sup>®</sup> Poultry House Flame Sanitizer;
- 6. Red Dragon<sup>®</sup> Row Crop Flamers;
- 7. Red Dragon<sup>®</sup> Vegetable Bed Flamers, and;
- 8. Red Dragon<sup>®</sup> Vineyard & Orchard Flamers.

13. "Pest" is defined in Section 2(t) of FIFRA, 7 U.S.C. § 136(t), as meaning "(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-organisms on or in living man or other living animals) which the Administrator declares to be a pest under [Section 25(c)(1) of FIFRA, 7 U.S.C. § 136w(c)(1)]."

14. Each of the products identified in Paragraph 12 is intended to do the following:

- A. Heavy Duty Torch Kits – kill weeds;
- B. Weed Dragon<sup>®</sup> Torch Kits – kill weeds;
- C. Mini Dragon<sup>™</sup> Torch Kit – kill weeds;
- D. Back Pack Vapor Torch Kits – kill weeds;
- E. Jet Torch Kits – kill weeds and brush; and
- F. Red Dragon<sup>®</sup> Agricultural Flamers
  - 1. Red Dragon<sup>®</sup> Alfalfa Flamer – kill weeds, grasses, and weevils;
  - 2. Red Dragon<sup>®</sup> Blueberry – eliminates foliage, weeds, grasses, insects, insect habitat, blights, mold and mildew;
  - 3. Red Dragon<sup>®</sup> Multipurpose Flamer – kills weeds and prevents weeds from growing;
  - 4. Red Dragon<sup>®</sup> Potato Vine Flamer – desiccates potato vines, prevents weeds from growing, kills insects and insect habitat, controls blight spores;
  - 5. Red Dragon<sup>®</sup> Poultry House Flame Sanitizer – kills pathogens;
  - 6. Red Dragon<sup>®</sup> Row Crop Flamers – kills weeds, grasses, destroys insect habitat;

7. Red Dragon® Vegetable Bed Flamers –kills weeds, grasses, insects, and insect habitat; and
8. Red Dragon® Vineyard & Orchard Flamers – kills weeds, grasses, and destroys insect habitat.

15. The following are “pests” as that term is defined by Section 2(t) of FIFRA, 7 U.S.C.

§ 136(t):

- A. Weeds;
- B. Weevils;
- C. Insects;
- D. Blight spores;
- E. Pathogens;
- F. Potato vines;
- G. Grasses;
- H. Brush;
- I. Foliage;
- J. Blights;
- K. Mold;
- L. Mildew; and
- M. Insect habitat.

16. “Device” is defined in Section 2(h) of FIFRA, 7 U.S.C. § 136(u) and 40 C.F.R.

§ 152.500, as meaning “any instrument or contrivance (other than firearm) which is intended for trapping, destroying, repelling, or mitigating any pest or any form of plant or animal life (other than man and other than bacteria, virus, or other microorganism on or in living man or other living animals); but not including equipment used for the application of pesticides when sold separately therefrom.”

17. Each of the items identified in Paragraphs 12 and 14 are intended for destroying, repelling, or mitigating one or more of the pests or forms of plant life or animal life identified in Paragraphs 14 and 15.

18. Each of the products identified in Paragraphs 12 and 14 is a “device” as that term is defined in Section 2(h) of FIFRA, 7 U.S.C. § 136(u) and 40 C.F.R. § 152.500.

19. "Produce" is defined in Section 2(w) of FIFRA, 7 U.S.C. § 136(w) as meaning "to manufacture, prepare, compound, propagate, or process any pesticide or device or active ingredient used in producing a pesticide."

20. "Producer" is defined in Section 2(w) of FIFRA, 7 U.S.C. § 136(w) as meaning "the person who manufactures, prepares, compounds, propagates, or processes any pesticide or device or active ingredient in producing a pesticide."

21. "Establishment" is defined in 40 C.F.R. § 167.3 as meaning "any site where a pesticidal product, active ingredient, or device is produced, regardless of whether such site is independently owned or operated, and regardless of whether such site is domestic and producing a pesticidal product for export only, or whether the site is foreign and producing any pesticidal product for import into the United States."

22. The Respondent produces the devices identified in Paragraphs 12 and 14 at its establishment identified in Paragraph 11.

23. The Respondent is a "producer" as that term is defined in Section 2(w) of FIFRA, 7 U.S.C. § 136(w).

24. "Pesticidal product" is defined in 40 C.F.R. § 167.3 as meaning "a pesticide, active ingredient, or device."

25. The devices identified in Paragraphs 12 and 14 are "pesticidal products" as that term is defined in 40 C.F.R. § 167.3.

26. 40 C.F.R. § 152.500(b) provides that a device is not required to be registered under FIFRA sec. 3. The Agency has issued a policy statement concerning its authority and activities with respect to devices, which was published in the *Federal Register* of November 19, 1976 (41 FR 51065). A device is subject to the requirements set forth in:

- (1) FIFRA sec. 2(q)(1) and part 156 of this chapter, with respect to labeling;
- (2) FIFRA sec. 7 and part 167 of this chapter, with respect to establishment registration and reporting;
- (3) FIFRA sec. 8 and part 169 of this chapter, with respect to books and records;
- (4) FIFRA sec. 9, with respect to inspection of establishments;
- (5) FIFRA sec. 12, 13, and 14, with respect to violations, enforcement activities, and penalties;
- (6) FIFRA sec. 17, with respect to import and export of devices;
- (7) FIFRA sec. 25(c)(3), with respect to child-resistant packaging; and
- (8) FIFRA sec. 25(c)(4), with respect to the Agency's authority to declare devices subject to certain provisions of the Act.

## **B. VIOLATIONS**

### **Count One – Producing Devices at an Unregistered Establishment**

27. Section 12(a)(2)(L) of FIFRA, 7 U.S.C. § 136j(a)(2)(L) provides that “it shall be unlawful for any person who is a producer to violate any provisions of section 136e of this title [Section 7 of FIFRA, 7 U.S.C. § 136e].”

28. 40 C.F.R. § 167.20(a)(1) provides that “any establishment where a pesticidal product is produced must be registered with the Agency.”

29. 40 C.F.R. Part 167 was promulgated pursuant to Sections 7 and 25 of FIFRA, 7 U.S.C. §§ 136e and 136w.

30. Prior to August 26, 2016, the Respondent’s establishment identified in Paragraphs 11 and 22 was not registered with EPA.

31. Therefore, the Respondent violated Section 12(a)(2)(L) of FIFRA, 7 U.S.C. § 136j(a)(2)(L) by producing the devices identified in Paragraph 4 at its unregistered establishment identified in Paragraphs 11 and 22.

**Count Two – Distributing or Selling Misbranded Devices**

32. Section 12(a)(1)(F) of FIFRA, 7 U.S.C. § 136j(a)(1)(F) provides that it is unlawful for any person in any State to distribute or sell to any person any device which is misbranded.

33. Section 2(q)(1)(D) of FIFRA, 7 U.S.C. § 136(q)(1)(D) provides that a pesticide is misbranded if its label does not bear the registration number assigned under [Section 7 of FIFRA, 7 U.S.C. § 136e] to each establishment in which it was produced.

34. 40 C.F.R. § 152.500(b) provides that devices are subject to Section 2(q)(1) of FIFRA, 7 U.S.C. § 136j(a)(1) and 40 C.F.R. Part 156, with respect to labeling.

35. “Label” is defined in Section 2(p)(1) of FIFRA, 7 U.S.C. § 136(p)(1) as meaning “the written, printed, or graphic matter on, or attached to, the pesticide or device or any of its containers or wrappers.”

36. “Labeling” is defined in Section 2(p)(2) of FIFRA, 7 U.S.C. § 136(p)(1) as meaning “all labels and all other written or graphic material –

- (A) accompanying the pesticide or device at any time; or
- (B) to which reference is made on the label or in literature accompany the pesticide or device . . . .”

37. Since the Respondent has not registered its establishment in accordance with Section 7 of FIFRA, 7 U.S.C. § 136e and 40 C.F.R. Part 167, the labels and labeling of the devices identified in Paragraph 4 do not bear the registration number of the establishment in which they were produced.

38. “Distribute or sell” is defined in Section 2(gg) of FIFRA, 7 U.S.C. § 136(gg), as meaning “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.”

39. The Respondent distributes or sells the devices identified in Paragraphs 12 and 14 from its establishment identified in Paragraphs 11 and 22, including distributing or selling the devices via its internet website, <http://flameengineering.com>.

40. Therefore, the Respondent violated Section 12(a)(1)(F) of FIFRA, 7 U.S.C. § 136j(a)(1)(F) by distributing or selling misbranded devices.

**Count Three – Distributing or Selling a Misbranded Device – Mini Dragon™ Propane Torch Kit**

41. Section 12(a)(1)(F) of FIFRA, 7 U.S.C. § 136j(a)(1)(F) provides that it is unlawful for any person in any State to distribute or sell to any person any device which is misbranded.

42. Section 2(q)(1)(D) of FIFRA, 7 U.S.C. § 136(q)(1)(D) provides that a pesticide is misbranded if its label does not bear the registration number assigned under [Section 7 of FIFRA, 7 U.S.C. § 136e] to each establishment in which it was produced.

43. 40 C.F.R. § 152.500(b) provides that devices are subject to Section 2(q)(1) of FIFRA, 7 U.S.C. § 136j(a)(1) and 40 C.F.R. Part 156, with respect to labeling.

44. “Label” is defined in Section 2(p)(1) of FIFRA, 7 U.S.C. § 136(p)(1) as meaning “the written, printed, or graphic matter on, or attached to, the pesticide or device or any of its containers or wrappers.”

45. “Labeling” is defined in Section 2(p)(2) of FIFRA, 7 U.S.C. § 136(p)(1) as meaning “all labels and all other written or graphic material –

- (A) accompanying the pesticide or device at any time; or
- (B) to which reference is made on the label or in literature accompany the pesticide or device . . . .”



46. On or about June 2, 2016, an inspector from the Oklahoma Department of Agriculture, Food and Forestry conducted an inspection of Wall's Bargain Center, 1515 Cimarron Plaza, Stillwater, Oklahoma 74075.

47. The inspector observed that one of the Respondent's devices, a Mini Dragon™ Propane Torch Kit was being offered for sale.

48. The labeling on the Mini Dragon™ Propane Torch Kit being offered for sale was missing an EPA establishment number, as required by 40 C.F.R. § 167.20(a)(1).

49. Therefore, the Respondent distributed or sold a misbranded device, in violation of Section 12(a)(1)(F) of FIFRA, 7 U.S.C. § 136j(a)(1)(F).

### **III. TERMS OF SETTLEMENT**

#### **A. CIVIL PENALTY**

50. For the reasons set forth above, the Respondent has agreed to pay a civil penalty which has been determined in accordance with Section 14(a) of FIFRA, 7 U.S.C. § 136l(a), which authorizes EPA to assess a civil penalty of up to Nineteen Thousand Fifty-Seven Dollars (\$19,057) for each offense.<sup>1</sup> Upon consideration of the entire record herein, including the Findings of Fact and Conclusions of Law, which are hereby adopted and made a part hereof, and EPA's "FIFRA Enforcement Response Policy" dated December 2009 (as adjusted for inflation)

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<sup>1</sup>The amount of penalty that can be assessed under Section 14(a) of FIFRA was increased by the Civil Monetary Penalty Inflation Adjustment Rule codified at 40 C.F.R. Part 19 to \$5,500 for violations occurring between January 30, 1997 and March 15, 2004, to \$6,500 for violations which occurred between March 15, 2004 and January 12, 2009, to \$7,500 for violations which occurred between January 12, 2009 and December 6, 2013, to \$7,500 for violations which occurred between after December 6, 2013 and November 2, 2015, where penalties are assessed before August 1, 2016, to \$18,750 for violations which occur after November 2, 2015, and assessed on or after August 1, 2016, but before January 15, 2017, and to \$19,057 for violations which occurred after November 2, 2015, and assessed on or after January 15, 2017.

which requires the Complainant to consider the appropriateness of such penalty to 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, it is **ORDERED** that Respondent be assessed a civil penalty of **FOUR THOUSAND DOLLARS (\$4,000)**.

51. Within thirty (30) days of the effective date of this CAFO, the Respondent shall pay the assessed civil penalty by certified check, cashier's check, or wire transfer, made payable to "Treasurer, United States of America, EPA - Region 6". Payment shall be remitted in one of three (3) ways: regular U.S. Postal mail (including certified mail), overnight mail, or wire transfer. For regular U.S. Postal mail, U.S. Postal Service certified mail, or U.S. Postal Service express mail, the check(s) should be remitted to:

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

For overnight mail (non-U.S. Postal Service, e.g. Fed Ex), the check(s) should be remitted to:  
U.S. Bank

Government Lockbox 979077 US EPA Fines & Penalties  
1005 Convention Plaza  
SL-MO-C2-GL  
St. Louis, MO 63101  
Phone No. (314) 418-1028

For wire transfer, the payment should be remitted to:

Federal Reserve Bank of New York  
ABA = 021030004  
Account = 68010727  
SWIFT address = FRNYUS33  
33 Liberty Street  
New York, NY 10045  
Field Tag 4200 of the Fedwire message should read "D 68010727 Environmental Protection Agency"

**PLEASE NOTE: Docket Number FIFRA-06-2017-0300 shall be clearly typed on the check to ensure proper credit.** If payment is made by check, the check shall also be accompanied by a transmittal letter and shall reference the Respondent's name and address, the case name, and docket number of the CAFO. If payment is made by wire transfer, the wire transfer instructions shall reference the Respondent's name and address, the case name, and docket number of the CAFO. The Respondent shall also send a simultaneous notice of such payment, including a copy of the check and transmittal letter, or wire transfer instructions to the following:

Sidrah Khan  
Enforcement Officer  
Pesticides Section (6MM-XP)  
U.S. EPA, Region 6  
1445 Ross Avenue, Suite 1200  
Dallas, TX 75202-2733

Lorena Vaughn  
Regional Hearing Clerk (6RC-D)  
U.S. EPA, Region 6  
1445 Ross Avenue, Suite 1200  
Dallas, TX 75202-2733

The Respondent's adherence to this request will ensure proper credit is given when penalties are received in the Region.

52. The Respondent agrees not to claim or attempt to claim a federal income tax deduction or credit covering all or any part of the civil penalty paid to the United States Treasurer.

53. Pursuant to 31 U.S.C. § 3717 and 40 C.F.R. § 13.11, unless otherwise prohibited by law, EPA will assess interest and late payment penalties on outstanding debts owed to the United States and a charge to cover the costs of processing and handling a delinquent claim. Interest on the civil penalty assessed in this CAFO will begin to accrue thirty (30) days after the effective

date of the CAFO and will be recovered by EPA on any amount of the civil penalty that is not paid by the respective due date. Interest will be assessed at the rate of the United States Treasury tax and loan rate in accordance with 40 C.F.R. § 13.11(a). Moreover, the costs of the Agency's administrative handling of overdue debts will be charged and assessed monthly throughout the period the debt is overdue. *See* 40 C.F.R. § 13.11(b).

54. EPA will also assess a \$15.00 administrative handling charge for administrative costs on unpaid penalties for the first thirty (30) day period after the payment is due and an additional \$15.00 for each subsequent thirty (30) day period that the penalty remains unpaid. In addition, a penalty charge of up to six percent per year will be assessed monthly on any portion of the debt which remains delinquent more than ninety (90) days. *See* 40 C.F.R. § 13.11(c). Should a penalty charge on the debt be required, it shall accrue from the first day payment is delinquent. *See* 31 C.F.R. § 901.9(d). Other penalties for failure to make a payment may also apply.

**B. RETENTION OF ENFORCEMENT RIGHTS**

55. The EPA does not waive any rights or remedies available to EPA for any other violations by the Respondent of Federal or State laws, regulations, or permitting conditions.

56. Nothing herein shall limit the power and authority of EPA or the United States to take, direct, or order all actions to protect public health, welfare, or the environment, or prevent, abate or minimize an actual or threatened release of hazardous substances, pollutants, contaminants, hazardous substances on, at or from the Respondent's facility. Furthermore, nothing in this CAFO shall be construed to prevent or limit EPA's civil and criminal authorities, or that of other Federal, State, or local agencies or departments to obtain penalties or injunctive relief under other Federal, State, or local laws or regulations.

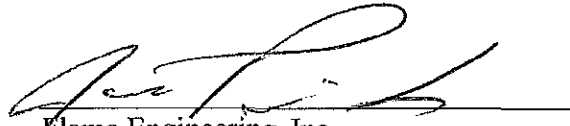
**C. COSTS**

57. Each party shall bear its own costs and attorney's fees. Furthermore, the Respondent specifically waives its right to seek reimbursement of its costs and attorney's fees under 5 U.S.C. § 504 and 40 C.F.R. Part 17.

**THE UNDERSIGNED PARTIES CONSENT TO THE ENTRY OF THIS CONSENT AGREEMENT AND FINAL ORDER:**

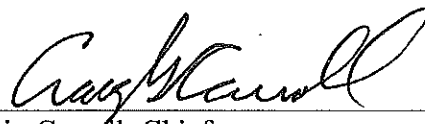
**FOR THE RESPONDENT:**

Date: 17 May, 2017

  
Flame Engineering, Inc.

**FOR THE COMPLAINANT:**

Date: 05/23/17



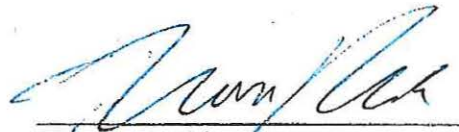
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Craig Carroll, Chief  
Pesticides Section  
Multimedia Division  
EPA – Region 6

**IV. FINAL ORDER**

Pursuant to Section 14 of FIFRA, 7 U.S.C. § 136l, and the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, 40 C.F.R. Part 22, the foregoing Consent Agreement is hereby ratified. This Final Order shall not in any case 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. 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. The Respondent is ordered to comply with the terms of settlement and the civil penalty payment instructions as set forth in the Consent Agreement. In accordance with 40 C.F.R. § 22.31(b), this Final Order shall become effective upon filing with the Regional Hearing Clerk.

Dated 5-24-17

  
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Thomas Rucki  
Regional Judicial Officer

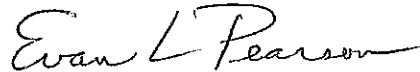


**CERTIFICATE OF SERVICE**

I hereby certify that on the 25<sup>th</sup> day of May, 2017, the original and one copy of the foregoing Consent Agreement and Final Order (CAFO) was hand delivered to the Regional Hearing Clerk, U.S. EPA - Region 6, 1445 Ross Avenue, Suite 1200, Dallas, Texas 75202-2733, and a true and correct copy of the CAFO was delivered to the following individual(s) by the method indicated below:

**CERTIFIED MAIL - RETURN RECEIPT REQUESTED 7006 0810 0005 9535 9196**

Karen Aldridge Crawford  
Nelson Mullins Riley & Scarborough LLP  
Meridian, 17<sup>th</sup> Floor  
1320 Main Street  
Columbia, SC 29201

  
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