

**U. S. ENVIRONMENTAL PROTECTION AGENCY
REGION 7
11201 RENNER BOULEVARD
LENEXA, KANSAS 66219**

Received by
EPA Region 7
Hearing Clerk

BEFORE THE ADMINISTRATOR

In the Matter of:

Hy-Vee, Inc.,

Respondent.

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Docket No. FIFRA-07-2022-0024

CONSENT AGREEMENT AND FINAL ORDER

Preliminary Statement

The U.S. Environmental Protection Agency, Region 7 (EPA or Complainant), and Hy-Vee, 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 initiated pursuant to Section 14 of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. § 136l and in accordance with the Consolidated Rules of Practice.

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

Parties

3. Complainant, by delegation from the Administrator of EPA, the Regional Administrator of EPA Region 7, and the Director of the Enforcement and Compliance Assurance Division of EPA Region 7, is the Branch Chief of the Chemical Branch of EPA Region 7.

4. The Respondent is Hy-Vee, Inc., a corporation in good standing under the laws of the state of Iowa and doing business in the states of Iowa, Kansas, and Missouri.

Statutory and Regulatory Background

5. Congress enacted FIFRA 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. 7 U.S.C. 136 *et. seq.*

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 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.

7. Section 13(a) of FIFRA, 7 U.S.C. § 136k(a), states that whenever any pesticide or device is found by the Administrator in any State and there is reason to believe on the basis of inspection or tests that such pesticide or device is in violation of any of the provisions of this subchapter, or that such pesticide or device has been or is intended to be distributed or sold in violation of any such provisions, or when the registration of the pesticide has been canceled by a final order or has been suspended, the Administrator may issue a written or printed “stop sale, use, or removal” order to any person who owns, controls, or has custody of such pesticide or device, and after receipt of such order no person shall sell, use, or remove the pesticide or device described in the order except in accordance with the provisions of the order.

8. Section 12(a)(2)(I) of FIFRA, 7 U.S.C. § 136j(a)(2)(I), states that it shall be unlawful for any person to violate any order issued under section 136k of this title;

9. 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).

10. 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.

11. 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.

12. 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.

13. Section 2(mm) of FIFRA, 7 U.S.C. § 136(mm), defines the term “antimicrobial pesticide” to mean a pesticide that is intended to disinfect, sanitize, reduce, or mitigate growth of microbiological organisms, or protect inanimate objects, industrial processes or systems,

surfaces, water, or other chemical substances from contamination, fouling, or deterioration caused by bacteria, viruses, fungi, protozoa, algae, or slime.

14. 40 C.F.R. § 158.2203 defines the term “disinfectant” to mean a substance, or mixture of substances, that destroys or irreversibly inactivates bacteria, fungi and viruses, but not necessarily bacterial spores, in the inanimate environment.

15. 40 C.F.R. § 158.2203 defines the term “fungicide” to mean a substance, or mixture of substances, that destroys fungi (including yeasts) and fungal spores pathogenic to man or other animals in the inanimate environment.

16. 40 C.F.R. § 158.2203 defines the term “sanitizer” to mean a substance, or mixture of substances, that reduces the bacteria population in the inanimate environment by significant numbers, but does not destroy or eliminate all bacteria.

17. 40 C.F.R. § 158.2203 defines the term “virucide” to mean a substance, or mixture of substances, that destroys or irreversibly inactivates viruses in the inanimate environment.

18. 40 C.F.R. § 152.3 defines the term “pesticide product” to mean a pesticide in the particular form (including composition, packaging, and labeling) in which the pesticide is, or is intended to be, distributed or sold.

19. Section 25(c)(1) of FIFRA, 7 U.S.C. § 136w(c)(1), authorizes the Administrator to declare a pest any form of plant or animal life (other than man and other than bacteria, virus, and other micro-organisms on or in living man or other living animals) which is injurious to health or the environment.

20. Pursuant to 40 C.F.R. § 152.5, an organism is declared to be a “pest” under circumstances that make it deleterious to man or the environment, if it is any fungus, bacterium, virus, prion, or other microorganism, except for those on or in living man or other living animals and those on or in processed food or processed animal feed, beverages, drugs and cosmetics.

21. Pursuant to 40 C.F.R. § 152.15, no person may distribute or sell any pesticide product that is not registered under the Act.

22. 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 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 \$21,805, for violations that occur after November 2, 2015, and for which penalties are assessed on or after January 12, 2022.

General Factual Allegations

23. On or about January 6, 2021, the EPA conducted an inspection of the Hy-Vee grocery store located at 8900 W. 135th Street, in Overland Park, Kansas, and found that “Outlaw

Germ Justice Disinfectant Wipes,” (“Disinfectant Wipes”) distributed by MJB Worldwide LLC, were being offered for sale at that location.

24. The ingredients in “Outlaw Germ Justice Disinfectant Wipes” observed during the January 6, 2021 inspection include dimethyl benzyl ammonium chloride – 2.5% and dimethyl ethylbenzyl ammonium chloride – 2.5%, also known as quaternary ammonium compounds.

25. “Outlaw Germ Justice Disinfectant Wipes” has printed on its label (1) the terms “disinfectant wipes,” “disinfectant-cleaner-food contact and non-food contact sanitizer-virucide-fungicide,” (2) instructions “to clean and deodorize,” and (3) that it can be used “on hands and surfaces.”

26. Labels on containers of “Outlaw Germ Justice Disinfectant Wipes” make claims to disinfect, sanitize, reduce, or mitigate growth of microbiological organisms, and the containers therefore contain an antimicrobial pesticide under 7 U.S.C. § 136(mm).

27. “Outlaw Germ Justice Disinfectant Wipes” is a pesticide product because it contains a pesticide in a package in which the pesticide is, or is intended to be, distributed or sold.

28. “Outlaw Germ Justice Disinfectant Wipes” is not a registered pesticide with the EPA as required by 7 U.S.C. §136a(a).

29. On or about January 11, 2021, Complainant issued a Stop Sale, Use, and Removal Order (SSURO) pursuant to Section 13(a) of FIFRA, 7 U.S.C. § 136k(a) to Respondent. The SSURO states: “Respondent may move or remove any ‘Outlaw Germ Justice Disinfectant Wipes’ from any facility or establishment ONLY after obtaining prior written approval from the EPA.” The SSURO was amended on February 10, 2021.

30. On or about April 14, 2021, Complainant sent to Respondent a letter requesting copies of any and all documents (e.g., receiving records, invoices, bills of lading, etc.) reflecting the distribution of “Outlaw Germ Justice Disinfectant Wipes” to and by Respondent.

31. On or about April 26, 2021, Respondent provided to Complainant forty-seven invoices reflecting purchases of “Outlaw” products by twenty-seven Hy-Vee store locations in the states of Iowa, Kansas, Missouri, and Minnesota.

32. At the time the SSURO was issued, Respondent had a total of approximately 3,838 units of “Outlaw Products” remaining at Hy-Vee stores.

33. On or about August 12, 2022, Respondent notified Complainant that twenty-five of the twenty-seven Hy-Vee locations which had purchased and offered for sale “Outlaw Products” had disposed of any remaining “Outlaw” products via trash compactors after the issuance of the SSURO but prior to vacatur of the SSURO.

34. On or about September 9, 2022, Complainant provided written approval to Respondent via email to dispose of any remaining “Outlaw” products in accordance with instructions contained therewith.

35. The SSURO was vacated on September 13, 2022.

36. On or about September 29, 2022, Complainant obtained a statement from Respondent that all remaining “Outlaw” products were disposed of in accordance with the written instructions provided by Complainant.

Allegations of Violations

37. The Complainant hereby states and alleges that Respondent has violated FIFRA and federal regulations promulgated thereunder, as follows:

Count 1

38. The facts stated in Paragraphs 23 through 36 above are herein incorporated.

39. Pursuant to Section 13(a) of FIFRA, 7 U.S.C. § 136k(a), after receipt of a SSURO, no person shall sell, use, or remove the pesticide or device described in the order except in accordance with the provisions of the order.

40. The SSURO issued to Respondent on January 11, 2021, stated “Respondent may move or remove any ‘Outlaw Germ Justice Disinfectant Wipes’ from any facility or establishment ONLY after obtaining prior written approval from the EPA.”

41. On or about September 9, 2022, Complainant provided written approval to Respondent via email to dispose of any remaining “Outlaw” products.

42. Respondent disposed of “Outlaw” products at an unknown number of Respondent’s stores prior to Complainant providing written approval on September 9, 2022 and the vacatur of the SSURO on September 13, 2022.

43. Respondent’s disposal of “Outlaw” products prior to obtaining prior written approval from Complainant and prior to the vacatur of the SSURO is a violation of the SSURO and therefore of Section 13(a) of FIFRA, 7 U.S.C. § 136k(a).

CONSENT AGREEMENT

44. 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 rights to appeal the Final Order accompanying this Consent Agreement.

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

46. Respondent and EPA agree to the terms of this Consent Agreement and Final Order and Respondent agrees to comply with the terms specified herein.

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

48. Respondent consents to receiving the filed Consent Agreement and Final Order electronically at the following e-mail address: *chris.gindorff@Hy-Vee.com*.

Penalty Payment

49. Respondent agrees that, in settlement of the claims alleged herein, Respondent shall pay a civil penalty of five thousand, three hundred and seventy-four dollars (\$5,374), as set forth below.

50. Respondent shall pay the penalty within thirty (30) days 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>.

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

Regional Hearing Clerk
R7_Hearing_Clerk_Filings@epa.gov

Katherine Kacsur, Attorney
kacsur.katherine@epa.gov

52. 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 (6) percent 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

53. 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 FIFRA or any other applicable law.

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

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

56. 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 FIFRA and regulations promulgated thereunder.

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

58. Nothing contained in this Consent Agreement and Final Order shall alter or otherwise affect Respondent's obligation to comply with all applicable federal, state, and local environmental statutes and regulations and applicable permits.

General Provisions

59. 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.

60. 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 filing by the Regional Hearing Clerk for EPA, Region 7. Unless otherwise stated, all time periods stated herein shall be calculated in calendar days from such date.

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

62. 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.

**RESPONDENT
HY-VEE, INC.**

By:  Date: 1/11/23

Printed Name: Mic Jurgens

Title: EVP, Secretary & Chief Counsel

COMPLAINANT
U. S. ENVIRONMENTAL PROTECTION AGENCY

Date: _____
Candace Bednar
Chief, Chemical Branch
Enforcement and Compliance Assurance Division

Date: _____
Katherine Kacsur
Office of Regional Counsel

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.

IT IS SO ORDERED.

Karina Borromeo
Regional Judicial Officer

Date

CERTIFICATE OF SERVICE

I certify that that a true and correct copy of the foregoing Consent Agreement and Final Order was sent this day in the following manner to the addressees:

Copy via Email to Complainant:

Katherine Kacsur, Attorney-Adviser
EPA Region 7
kacsur.katherine@epa.gov

Copy via Email to Respondent:

Chris Gindorff, GVP, Compliance and Food Protection
Hy-Vee, Inc.
chris.gindorff@Hy-Vee.com

Angela Smook, Assistant General Counsel
Hy-Vee, Inc.
asmook@Hy-Vee.com

Dated this _____ day of _____, _____.

Signed