

3. Respondent agrees not to contest EPA's jurisdiction with respect to the execution of this CA, the issuance of the attached Final Order, or the enforcement of the CA/FO.
4. For the purposes of this proceeding only, Respondent hereby expressly waives its right to a hearing on any issue of law or fact set forth in this CA and any right to appeal the accompanying Final Order.
5. Respondent consents to the issuance of this CA/FO and agrees to comply with its terms.
6. Respondent is aware that the submission of false or misleading information to the United States government may subject it to separate civil and/or criminal liability. Complainant reserves the right to seek and obtain appropriate relief if Complainant obtains evidence that the information provided and/or representations made by Respondent to Complainant are false or, in any material respect, inaccurate.
7. Respondent shall not deduct for civil taxation purposes the civil penalty specified in this CA/FO.
8. Respondent shall bear its own costs and attorney's fees.
9. Respondent certifies to EPA by their signatures herein that they are presently in compliance with the provisions of FIFRA referenced herein.

Statutory and Regulatory Background

10. Section 3(a) of FIFRA, 7 U.S.C. § 136a(a), and 40 C.F.R. § 152.15 state that no person in any state may distribute or sell to any person any pesticide that is not registered under this statute, except in certain circumstances which are not relevant to this case.
11. Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), provides that it shall be unlawful for any person in any State to sell or distribute to any person any pesticide that is not registered under Section 3(a) of FIFRA, 7 U.S.C. § 136a(a).
12. Section 12(a)(2)(I) of FIFRA, 7 U.S.C. § 136j(a)(2)(I), provides that it shall be unlawful for any person to violate any order issued under Section 13 of FIFRA.
13. Section 2(s) of FIFRA, 7 U.S.C. § 136(s), defines a "person" as "any individual, partnership, association, corporation, or any organized group of persons whether incorporated or not."
14. Section 2(gg) of FIFRA, 7 U.S.C. § 136(gg), defines "to distribute or sell" as "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."

15. Section 2(h) of FIFRA, 7 U.S.C. § 136(h), defines “device,” in part, as “any instrument or contrivance (other than a firearm) which is intended for trapping, destroying, repelling, or mitigating any pest or any other form of plant or animal life (other than man and other 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.”
16. Section 2(u) of FIFRA, 7 U.S.C. § 136(u), defines a “pesticide,” to include “any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest,” and “any substance or mixture of substances intended for use as a plant regulator, defoliant, or desiccant.”
17. Section 2(t) of FIFRA, 7 U.S.C. § 136(t), defines a “pest” as “any insect, rodent, nematode, fungus, weed, or 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].” *See also* 40 C.F.R. § 152.5.
18. The term “plant regulator” is defined, in pertinent part, under Section 2(v) of FIFRA, 7 U.S.C. § 136(v), as “any substance or mixture of substances intended, through physiological action, for accelerating or retarding the growth or rate of maturation, or for otherwise altering the behavior of plants or the produce thereof..”
19. Pursuant to 40 C.F.R. § 152.15(a), a substance is considered to be intended for a pesticidal purpose . . . if: (a) The person who distributes or sells the substance claims, states, or implies (by labeling or otherwise): (1) That the substance (either by itself or in combination with any other substance) can or should be used as a pesticide; or (2) That the substance consists of or contains an active ingredient and that it can be used to manufacture a pesticide; or (b) The substance consists of or contains one or more active ingredients and has no significant commercially valuable use as distributed or sold other than (1) use for pesticidal purpose (by itself or in combination with any other substance), (2) use for manufacture of a pesticide; or (c) The person who distributes or sells the substance has actual or constructive knowledge that the substance will be used, or is intended to be used, for a pesticidal purpose.
20. 40 C.F.R. § 152.25(f) lists the conditions under which certain products may be exempt for the requirements of FIFRA as minimum risk pesticides.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

21. Respondent, D&L Distribution LLC., doing business as PowerAg, is a limited liability company established under the laws of the Commonwealth of Pennsylvania.
22. Respondent is, and at all times referred to herein was, a “person” within the meaning of FIFRA.
23. At all times, Respondent owned and operated a place of business located at 2213 Leabrook Road, Lancaster, Pennsylvania.
24. On May 16, 2012, the US. EPA, Region 3, received a referral memorandum from U.S. EPA, Region 7, concerning alleged sales and distribution of unregistered pesticides by Respondent such as plant growth regulators and an animal repellent.
25. On December 17, 2012, U.S. EPA, Region 3, representatives sent Respondent a request for information to produce the labels and advertisements for the alleged unregistered plant growth regulators and an animal repellent.
26. On January 10, 2013, in response to EPA’s December 17, 2012 information request letter, Respondent mailed to EPA copies of the labels and advertisement for the products BorPower, CalPower, GrainPower Xtra, HarvestPower 4-0-15, MicroPower, NutriPower Xtra 8-8-8, popUPPower 8-3-8, SulPower, M-Power, and Pepper Spray.
27. Respondent’s labels for its products “CalPower”, ”HarvestPower 4-0-15”, “NutriPower Xtra 8-8-8”, “BorPower”, “GrainPower Xtra”, “MicroPower”, “popUPPower 8-3-8,” and “SulPower” lists “*Ascophyllum Nodosum* (sea plant extract)” as an active ingredient.
28. Respondent’s website advertisement for Respondent’s products, “CalPower,” “HarvestPower 4-0-15”, “NutriPower Xtra 8-8-8”, “BorPower”, “GrainPower Xtra”, “MicroPower”, “popUPPower 8-3-8”, and “SulPower”, states that one of the active ingredients, “*Ascophyllum Nodosum* (sea plant extract),” in such products provides “auxin-like gibberellins, betaines, and hosts cytokinins.”
29. Respondent’s label for its product “M-Power” states that one of the active ingredients for such product is “auxins (growth hormones).”
30. Cytokinins, auxins, gibberellins, and betaines are substances that have no other purpose or use except as a “plant growth regulators.”
31. Respondent’s label for its product “Pepper Spray” states that such product “will help deter deer, groundhogs, and other animals from eating your crops.”

COUNTS I-IX

32. The findings of fact stated in paragraphs 21-31 are realleged and incorporated as if fully stated herein.
33. Respondent's products "CalPower", "HarvestPower 4-0-15", "NutriPower Xtra 8-8-8", "BorPower", "GrainPower Xtra", "MicroPower", "popUPPower 8-3-8", M-Power, and "SulPower" are "plant growth regulators" as this term is defined in Section 2(v) of FIFRA, 7 U.S.C. § 136(v).
34. Respondent's products "CalPower", "HarvestPower 4-0-15", "NutriPower Xtra 8-8-8", "BorPower", "GrainPower Xtra", "MicroPower", "popUPPower 8-3-8", M-Power, and "SulPower" are "pesticides" as this term is defined in Section 2(u) of FIFRA, 7 U.S.C. § 136(u).
35. "CalPower", "HarvestPower 4-0-15", "NutriPower Xtra 8-8-8", "BorPower", "GrainPower Xtra", "MicroPower", "popUPPower 8-3-8", M-Power, and "SulPower" are not registered pesticides as required by Section 3(a) of FIFRA, 7 U.S.C. § 136a(a).
36. On at least January 10, 2013, Respondent distributed or sold, held for distribution or sale, or offered for sale or distribution the unregistered pesticides "CalPower", "HarvestPower 4-0-15", "NutriPower Xtra 8-8-8", "BorPower", "GrainPower Xtra", "MicroPower", "popUPPower 8-3-8", M-Power, and "SulPower."
37. Respondent's distribution or sale, or offering for sale or distribution of the unregistered pesticides described in paragraphs 33-36 constitutes 9 violations of Section 3(a) of FIFRA, 7 U.S.C. § 136a(a), and Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A).

COUNT X

38. The findings of fact stated in paragraphs 21-37 are realleged and incorporated as if fully stated herein.
39. Respondent's product "Pepper Spray" is a "pesticide" as this term is defined in Section 2(u) of FIFRA, 7 U.S.C. § 136(u).
40. Respondent's "Pepper Spray" product is not a registered pesticide as required by Section 3(a) of FIFRA, 7 U.S.C. § 136a(a).
41. On at least January 10, 2013, Respondent distributed or sold, held for distribution or sale, or offered for sale or distribution the unregistered pesticide "Pepper Spray."

42. Respondent's distribution or sale, or offering for sale or distribution of the unregistered pesticide described in paragraph 31, and paragraphs 39-41 constitutes a violation of Section 3(a) of FIFRA, 7 U.S.C. § 136a(a), and Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A).

CIVIL PENALTY

43. In settlement of Complainant's claims for civil penalties for the violations alleged in the Complaint, Respondent agrees to pay a civil penalty of Thirty Thousand Dollars (\$30,000). The civil penalty is due and payable immediately upon Respondent's receipt of a true and correct copy of this CA/FO. If Respondent pays the entire civil penalty within 30 calendar days of the date on which this CA/FO is mailed to Respondent, no interest will be assessed against Respondent pursuant to 40 C.F.R. § 13.11(a)(1).
44. Pursuant to 31 U.S.C. § 3717 and 40 C.F.R. § 13.11, EPA is entitled to assess interest, administrative costs 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, as more fully described below.
45. In accordance with 40 C.F.R. § 13.11(a), interest on any civil penalty assessed in a CA/FO begins to accrue on the date that a copy of the CA/FO is mailed or hand-delivered to the Respondents. However, EPA will not seek to recover interest on any amount of such civil penalty that is paid within 30 calendar days after the date on which such interest begins to accrue. 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).
46. The costs of the Agency's administrative handling of overdue debts will be charged and assessed monthly throughout the period a debt is overdue. 40 C.F.R. § 13.11(b). Pursuant to Appendix 2 of EPA's Resources Management Directives—Cash Management, Chapter 9, EPA will assess a \$15.00 administrative handling charge for administrative costs on unpaid penalties for the first 30 day period after the payment is due and an additional \$15.00 for each subsequent 30 days the penalty remains unpaid.
47. A late payment penalty of six percent per year will be assessed monthly on any portion of a civil penalty which remains delinquent more than 90 calendar days. 40 C.F.R. § 13.11(c). Should assessment of the penalty charge on a debt be required, it shall accrue from the first day payment is delinquent. 31 C.F.R. § 901.9(d).
48. The aforesaid settlement amount was based upon Complainant's consideration of a number of factors, including, but not limited to, the statutory factors of 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. Complainant also took into account the particular facts and circumstances of this case

with specific reference to EPA's *Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)*, dated December 2009 (“ERP”).

49. Respondent shall pay the civil penalty set forth in Paragraph 43, above, by electronic funds transfer (“EFT”), as described below, or by sending a cashier’s check or certified check, made payable to the order of “**United States Treasury.**”

a. Checks sent by regular US Postal Service mail delivery must be addressed to:

U.S. EPA, Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, MO 63197-9000
Contact: Eric Volck 513-487-2105

b. Checks sent by private commercial overnight delivery service must be sent to:

U.S. EPA, Fines and Penalties
U.S. Bank, Government Lockbox 979077
1005 Convention Plaza
Mail Station SL-MO-C2-GL
St. Louis, MO 63101

c. Any EFT shall be transmitted to:

Wire Transfer

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 wire transfer message should read:
“D 68010727 Environmental Protection Agency”)

Automated Clearing House (ACH) Transfer for receiving U.S. currency (also known as REX or Remittance Express)

U.S Treasury REX / Cashlink
ACH Receiver, ABA = 051036706
Account No. 310006
Environmental Protection Agency
CTX Format Transaction Code 22 - checking

Physical location of U.S. Treasury facility:
5700 Rivertech Court
Riverdale, MD 20737

There is now an On Line Debit and Credit Card Payment Option, available through the Department of Treasury. This payment option can be accessed from the information below:

WWW.PAY.GOV/PAYGOV

Enter sfo 1.1 in the search field. Open the form and complete required fields.

50. All payments by Respondent shall reference its name and address and the Docket Number of this case (FIFRA-03-2015-0019). At the time of payment, Respondent shall send a notice of such payment, including a copy of any check or EFT authorization form and EFT transaction record, as appropriate, to:

Regional Hearing Clerk (3RC00)
EPA Region III
1650 Arch Street
Philadelphia, Pennsylvania 19103-2029

and

Louis F. Ramalho (3RC30)
Sr. Assistant Regional Counsel
U.S. Environmental Protection Agency - Region III
1650 Arch Street
Philadelphia, PA 19103-2029.

FULL AND FINAL SATISFACTION

51. This CA/FO constitutes a settlement by EPA of its claims for civil penalties pursuant to Section 14(a)(1) of FIFRA, 7 U.S.C. § 136l(a)(1), for the violations alleged herein.

RESERVATION OF RIGHTS

52. EPA reserves the right to commence action against any person, including Respondent, in response to any condition which EPA determines may present an imminent and substantial endangerment to the public health, public welfare, or the environment. In addition, this settlement is subject to all limitations on the scope of resolution and to the reservation of rights set forth in Section 22.18(c) of the Consolidated Rules of Practice. Further, EPA reserves any rights and remedies available to it under FIFRA, the regulations promulgated thereunder, and any other federal laws or regulations for which EPA has jurisdiction, to enforce the provisions of this CA/FO, following its filing with the Regional Hearing Clerk.

OTHER APPLICABLE LAWS

53. Nothing in this CA/FO relieves Respondent of any duties otherwise imposed on them by applicable federal, state or local law and/or regulations.

AUTHORITY TO BIND THE PARTIES

54. Each Respondent certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Agreement and bind themselves hereto.

ENTIRE AGREEMENT

55. This Consent Agreement and the attached Final Order constitute the entire agreement and understanding of the parties concerning settlement of the above-captioned action and there are no representations, warranties, covenants, terms or conditions agreed upon between the parties other than those expressed in this Consent Agreement and the attached Final Order.

EFFECTIVE DATE

56. This CA/FO shall become effective upon filing with the Regional Hearing Clerk.

For Respondent:

D&L Distribution, LLC.

Date: 11-17-14



Linford Weaver, Managing Member

For Complainant:

U.S. Environmental Protection Agency

Date:

11/24/14

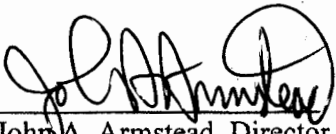


Louis F. Ramalho
Sr. Assistant Regional Counsel

After reviewing the Findings of Fact and Conclusions of Law and other pertinent matters, I recommend that the Regional Administrator or the Regional Judicial Officer issue the Final Order attached hereto.

Date

12.19.14



John A. Armstead, Director
Land and Chemicals Division


CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on the date listed below, the original of the foregoing Consent Agreement and Final Order, **Docket No. FIFRA-03-2015-0019**, was filed with the Regional Hearing Clerk, U.S. EPA - Region III, 1650 Arch Street, Philadelphia, Pennsylvania, 19103-2029, and that a true and correct copy was sent to the following party:

Kenneth D. Morris, Esq. L.L.C.
Law Offices
1320 Vale Dr.
West Chester, PA 19382

Date

12/23/2014



Louis F. Ramalho
Sr. Assistant Regional Counsel
U.S. EPA - Region III
1650 Arch Street
Philadelphia, PA 19103-2029

REGIONAL HEARING CLERK
EPA REGION III, PHILA. PA

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