

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
REGION 6  
DALLAS, TEXAS

FILED  
2016 SEP 28 PM 3: 56  
REGIONAL HEARING CLERK  
EPA REGION VI

IN THE MATTER OF: )  
)  
B&Y Pest Control ) DOCKET NO. FIFRA-06-2016-0313  
Albuquerque, New Mexico, )  
)  
RESPONDENT ) CONSENT AGREEMENT  
) AND FINAL ORDER  
\_\_\_\_\_ )

**CONSENT AGREEMENT AND FINAL ORDER**

The Director, Multimedia Division, United States Environmental Protection Agency, Region 6 (EPA) as Complainant, and B&Y Pest Control (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 Respondent pursuant to 40 C.F.R. §§ 22.13(b) and 22.18(b)(2) and (3). The Complaint alleges Respondent violated regulations promulgated pursuant to the FIFRA.

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

3. 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 resolve only those violations which are set forth herein.

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

7. 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. Respondent is B&Y Pest Control, Inc., a corporation incorporated under the laws of the State of New Mexico.

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

10. Respondent owns and operates a business located at 1724 Robert Dale Drive, NE, Albuquerque, New Mexico, 87112.

11. Section 2(e)(3) of FIFRA, 7 U.S.C. § 136(e) defines the term "commercial applicator" as an "applicator (whether or not the applicator is a private applicator with respect to some uses) who uses or supervises the use of any pesticide which is classified for restricted use for any purpose..."

12. Section 2(u) of FIFRA, 7 U.S.C. § 136(u) defines the term "pesticide" as any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest.

13. At all times relevant to this CAFO, Respondent's business consists of a commercial applicator of pesticides.

14. Section 2(p) of FIFRA, 7 U.S.C. § 136(p), defines "label" as the written, printed, or graphic matter on, or attached to, the pesticide or device or any of its containers or wrappers.

15. The term "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)."

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

17. On or about December 2, 2015, representatives from the EPA conducted an inspection at Respondent's business in New Mexico (Inspection).

18. During the Inspection, EPA provided to the Respondent a reason for the inspection, as required by Sections 8 and 9 of FIFRA, 7 U.S.C. §§ 136f and 136g.

19. During the Inspection, EPA obtained copies of records from the Respondent.

20. During the Inspection, EPA observed and documented that the Respondent applied a restricted use pesticides.

21. The product in paragraphs 21 through 25 are intended to prevent, destroy, repel or mitigate pests.

22. On or about December 1, 2015, EPA representatives visited the Sky City School located in Pueblo of Acoma (School Visit).

23. During the School Visit, EPA observed and documented the product in paragraphs 21 through 25, was neither away nor out of reach of children, humans, pets, and wildlife.

24. During the Inspection, EPA observed and documented that the Respondent used the product in paragraphs 21 through 25 in a manner inconsistent with its labeling.

25. During the Inspection, EPA observed and documented that the Respondent did not have a Federal License to apply a restricted use pesticide, on Indian Reservation.

26. 40 C.F.R. § 171.11 provides that any person who uses or supervises the use of any pesticide classified as restricted use must be certified in accordance with this section.

27. Respondent used a restricted use pesticide on Indian Reservation without having been certified in accordance with 40 C.F.R. § 171.11, and obtained a Federal License from the EPA.

28. The Respondent is a registrant, commercial applicator, wholesaler, dealer, retailer, or other distributor subject to the civil penalty provisions of Section 14(a)(1) of FIFRA, 7 U.S.C. § 136l(a)(1).

## **B. VIOLATIONS**

### **Count I – Using a Pesticide in a Manner Inconsistent with Its Labeling**

29. During the Inspection, EPA representatives observed and documented that the Respondent used and applied the pesticide in paragraphs 21 through 25, in a manner inconsistent with its labeling. The label of ZP Rodent Oat Bait (EPA Reg. No. 12455-102) states that it is a restricted use pesticide.

30. The label of ZP Rodent Oat Bait (EPA Reg. No. 12455-102) states the following in the section titled PRECAUTIONARY STATEMENTS:

31. “Keep away from humans, domestic animals, and pets. Harmful if swallowed, absorbed through the skin, inhaled, or in eyes.

32. Do not breathe dust.”

33. The label of ZP Rodent Oat Bait (EPA Reg. No. 12455-102) states the following in the section titled ENVIRONMENTAL HAZARDS:

34. "This product is toxic to wildlife and fish.
35. Birds and other wildlife feeding on treated bait may be killed."
36. The label of ZP Rodent Oat Bait (EPA Reg. No. 12455-102) also states to "KEEP OUT OF REACH OF CHILDREN."
37. During the Inspection, EPA observed and documented that the Respondent applied the pesticide called ZP Rodent Oat Bait (EPA Reg. No. 12455-102) at the Sky City School located in Pueblo of Acoma, the following dates:
  - a. October 9, 2015;
  - b. October 14, 2015, and;
  - c. October 31, 2015.
38. Therefore, the Respondent has violated Section 12 (a)(2)(G) of FIFRA, 7 U.S.C. § 136j(a)(2)(G), by using a pesticide in a manner inconsistent with its labeling.

**Count II – Using a Restricted Use Pesticide without a Federal License**

39. 40 C.F.R. § 171.11 provides that any person who uses or supervises the use of any pesticide classified as restricted use must be certified in accordance with this section.
40. Section 12(a)(2)(F) of FIFRA, 7 U.S.C. § 136j(a)(2)(F) provides that it shall be unlawful for any person to use any pesticide classified for restricted use for some or all purposes other than in accordance with section 3(d) and any regulations thereunder.
41. During the Inspection, the Respondent did not have a Federal License from the EPA to apply restricted use pesticides on Tribal Lands.
42. After the Inspection, Respondent applied and received a Federal License from EPA.
43. Therefore, the Respondent has violated Section 12(a)(2)(F) of FIFRA, 7 U.S.C. § 136j(a)(2)(F), by using a restricted use pesticides on Tribal Land without having received a

Federal License from the EPA.

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

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

44. For the reasons set forth above, Respondent has agreed to pay a civil penalty, which has been determined in accordance with Section 14(a)(1) of FIFRA, 7 U.S.C. § 136l(a), which authorizes EPA to assess a civil penalty of up to Seven Thousand Five Hundred Dollars (\$7,500.00) for each offense<sup>11</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 which requires 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 business, and gravity of the violation, it is **ORDERED** that Respondent be assessed a civil penalty of **Fourteen Thousand Dollars (\$14,000)**.

45. Within thirty (30) days of the effective date of this CAFO, 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

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<sup>11</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, and to \$7,500 for violations which occurred after January 12, 2009.

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-06-2016-0313 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 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 Respondent's name and address, the case name, and docket number of the CAFO. 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:

Lee McMillan  
Pesticides and Toxics 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

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

46. 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.

47. 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).

48. 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**

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



50. Except as specifically provided in this CAFO, 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 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.

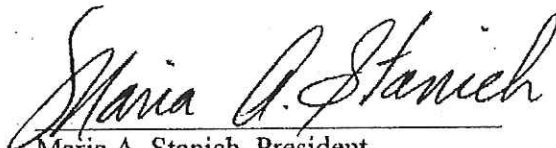
**C. COSTS**

51. Each party shall bear its own costs and attorney's fees. Furthermore, 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:**

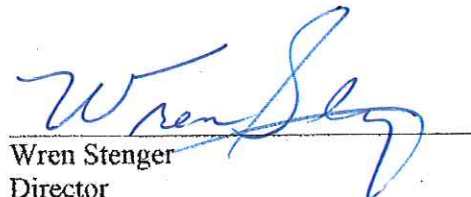
**FOR RESPONDENT:**

Date: 9/16/16

  
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Maria A. Stanich, President  
B&Y Pest Control, Inc.  
1724 Robert Dale Drive, NE  
Albuquerque, New Mexico, 87112

**FOR THE COMPLAINANT:**


Date: 9/28/16

  
\_\_\_\_\_  
Wren Stenger  
Director  
Multimedia Division

**IV. FINAL ORDER**

Pursuant to Section 14(a) 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 Complaint. 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 9/28/16

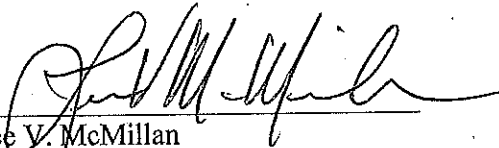
  
\_\_\_\_\_  
Thomas Rucki  
Regional Judicial Officer

**CERTIFICATE OF SERVICE**

I hereby certify that on the 28<sup>th</sup> day of September, 2016, 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 # 70041160000303521731**

B&Y Pest Control, Inc.  
1724 Robert Dale Drive, NE  
Albuquerque, New Mexico, 87112  
Attn: Jesse Stanich

  
\_\_\_\_\_  
Lee V. McMillan  
Enforcement Officer  
Pesticides and Toxics Section