



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

MAY 10 2007

REPLY TO THE ATTENTION OF:
DT-8J

CERTIFIED MAIL

Receipt No. 7001 0320 0005 8910 5324

Kimberly Hagerty-Batalis
W. J. Hagerty & Sons, Inc.
P.O. Box 1496
South Bend, Indiana 46624

Consent Agreement and Final Order, Docket No. FIFRA-05-2007-0026


Dear Ms. Hagerty-Batalis:

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 May 10, 2007, with the Regional Hearing Clerk.

The civil penalty in the amount of \$10,920 is to be paid in the manner prescribed in paragraphs 36 and 37. Please be certain that the number **BD 2750745P028** and the docket number are written on both the transmittal letter and on the check. Payment is due by (within 30 calendar days of the filing date).

Thank you for your cooperation in resolving this matter.

Sincerely,

for 
Terry Bonace
Pesticides and Toxics Branch

Enclosures

cc: Marcy Toney, Regional Judicial Officer/C-14J (w/Encl.)
Nidhi K. O'Meara, 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-05-2007-0026
)	
W. J. Hagerty & Sons Ltd, Inc.)	Proceeding to Assess a Civil Penalty
South Bend, Indiana)	Under Section 14(a) of the Federal
)	Insecticide, Fungicide, and Rodenticide
Respondent.)	Act, 7 U.S.C. § 136l(a)
<hr/>)	

Consent Agreement and Final Order

Preliminary Statement

1. This is an administrative action commenced and concluded under Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. § 136l(a), and Sections 22.13(b) and 22.18(b)(2) and (3) of the *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits* (Consolidated Rules) as codified at 40 C.F.R. Part 22.

2. The Complainant is the Chief of the Pesticides and Toxics Branch, United States Environmental Protection Agency (U.S. EPA), Region 5. The authority to settle this matter has been delegated to the Director of the Waste, Pesticides and Toxics Division, U.S. EPA, Region 5.

3. Respondent is W. J. Hagerty & Sons, Ltd, Inc., a corporation organized under the laws of the State of Indiana, with a place of business located at 3801 Linden Avenue, South Bend, Indiana.

4. Where the parties agree to settle one or more causes of action before the filing of a complaint, the administrative action may be commenced and concluded simultaneously by the issuance of a consent agreement and final order (CAFO). 40 C.F.R. § 22.13(b).

5. The parties agree that settling this action without the filing of a complaint or the adjudication of any issue of fact or law is in their interest and in the public interest.

6. Respondent consents to the assessment of the civil penalty specified in this CAFO, and to the terms of this CAFO.

Jurisdiction and Waiver of Right to Hearing

7. Respondent admits the jurisdictional allegations in this CAFO and neither admits nor denies the factual allegations in this CAFO.

8. Respondent waives its right to request a hearing as provided at 40 C.F.R. § 22.15(c), any right to contest the allegations in this CAFO, and its right to appeal this CAFO.

9. Respondent certifies that it is complying with FIFRA, 7 U.S.C. §§ 136 to 136y.

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 Act, 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), states that it is unlawful for any person in any state to distribute or sell to any person any pesticide that is not registered under Section 3.

12. 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 can or should be used as a pesticide, 40 C.F.R. § 152.15(a)(1).

13. 40 C.F.R. § 168.22(a) states: “FIFRA Sections 12(a)(1)(A) and (B) make it unlawful for any person to ‘offer for sale’ any pesticide if it is unregistered, or if claims made for it as part of its distribution or sale differ substantially from any claim made for it as part of the statement required in connection with its registration under FIFRA Section 3. EPA interprets these provisions as extending to advertisements on any advertising medium to which pesticide users or the general public have access.”

14. The term “person” as defined in Section 2(s) of FIFRA, 7 U.S.C. § 136(s) “means any individual, partnership, association, corporation, or any organized group of persons whether incorporated or not.”

15. The term “distribute or sell” is defined, in Section 2(gg) of FIFRA, 7 U.S.C. § 136(gg) and 40 C.F.R. § 152.3, as “to distribute, sell, offer for sale, hold for distribution, hold for shipment, or receive and (having so received) deliver or offer to deliver.”

16. The term “pests” is defined in Section 2(t) of FIFRA, 7 U.S.C. § 136(t) and further defined in 40 C.F.R. §152.5(c)”as any insect, rodent, nematode, fungus, weed, or any other form of terrestrial or aquatic plant or animal life...”

17. The term “pesticide” is defined at Section 2(u) of FIFRA, 7 U.S.C. § 136(u) and 40 C.F.R. § 152.3 and is generally regarded as any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest.

18. The Administrator of U.S. EPA may assess a civil penalty against any registrant, commercial applicator, wholesaler, dealer, retailer, other distributor who violates any provision of FIFRA of up to \$5,500 for each offense that occurred from January 31, 1997 through

March 15, 2004, and may assess a civil penalty of up to \$6,500 for each offense that occurred after March 15, 2004, pursuant to Section 14(a)(1) of FIFRA, 7 U.S.C. § 136l(a)(1), and 40 C.F.R. Part 19.

Factual Allegations and Alleged Violations

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

20. On July 21, 2005, an inspector employed by the Michigan Department of Agriculture and authorized to conduct inspections under FIFRA, conducted an authorized inspection under Section 9 of FIFRA, 7 U.S.C. § 136g, at Meijer, Inc., 6200 South Pennsylvania Avenue, Lansing, Michigan.

21. During the inspection, the inspector collected, amongst others, records of shipment, by Respondent, of **Hagerty Anti-Mite**, to Meijer, Inc. and photographs of **Hagerty Anti-Mite** on Meijer, Inc. store shelves.

22. During the inspection, the inspector observed that the label of Respondent's product, **Hagerty Anti-Mite**, stated:

- "Encapsulates Mites and destroys their allergens"
- "Anti-Mite. For Mattresses, Upholstery and Textiles."
- "Mites and their excrement get encapsulated and are vacuumed away, thus reducing their presence"

23. Respondent's label claims, and the name of the product, states or implies, that **Hagerty Anti-Mite** is a pesticide by its action of eliminating mites.

24. On July 27, 2005, the same inspector conducted an authorized inspection under Section 9 of FIFRA, 7 U.S.C. § 136g, at Meijer, Inc.'s Lansing Distribution Complex, 3405 Creyts Road, Lansing, Michigan.

25. During the inspection, the inspector collected, amongst others, records of shipments, by Respondent, of **Hagerty Anti-Mite**, to Meijer, Inc.

26. The records of shipments collected by the inspector on July 27, 2005, showed that Respondent had sold or distributed the pesticide, **Hagerty Anti-Mite** to Meijer, Inc. on November 21, 2004 and July 22, 2005.

27. On September 11, 2006, an inspector employed by the Office of the Indiana State Chemist at Purdue University and authorized to conduct inspections under FIFRA, conducted an authorized inspection under Section 9 of FIFRA, 7 U.S.C. § 136g, at W.J. Hagerty & Sons Ltd., Inc., 3801 Linden Avenue, South Bend, Indiana.

28. During the inspection, the inspector collected, amongst others, records of shipments, by Respondent, of **Hagerty Anti-Mite**, and photographs of **Hagerty Anti-Mite** that were packaged, labeled and ready for shipment or sale.

29. Respondent's label claims, and the name of the product, state or imply that **Hagerty Anti-Mite** is a pesticide by its action of eliminating mites.

30. **Hagerty Anti-Mite** is a pesticide as defined by Section 2(u) of FIFRA, 7 U.S.C. § 136(u).

31. Respondent is a "distributor" of **Hagerty Anti-Mite**, a pesticide product as that term is defined at Section 2(gg) of FIFRA, 7 U.S.C. § 136(gg).

32. **Hagerty Anti-Mite** is not registered as a pesticide as required by Section 3(a) of FIFRA, 7 U.S.C. § 136a(a).

33. Respondent distributed or sold the unregistered pesticide, **Hagerty Anti-Mite**, in violation of Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A) on November 21, 2004; July 22, 2005 and September 11, 2006.

34. Respondent's violations of Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A) subjects Respondent to the issuance of an Administrative Complaint assessing a civil penalty under Section 14(a) of the FIFRA, 7 U.S.C. §136l(a).

Civil Penalty

35. Pursuant to Section 14(a)(4) of FIFRA, 7 U.S.C. § 136l(a)(4), Complainant determined that an appropriate civil penalty to settle this action is \$10,920. In determining the penalty amount, Complainant considered the appropriateness of the penalty to the size of Respondent's business, the effect on Respondent's ability to continue in business, and the gravity of the violation. Complainant also considered U.S. EPA's *Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act*, dated July 2, 1990.

36. Within 30 days after the effective date of this CAFO, Respondent must pay a \$10,920 civil penalty for the FIFRA violations. Respondent must pay the penalty by sending a cashier's or certified check, payable to the "Treasurer, United States of America," to:

U.S. EPA, Region 5
P.O. Box 371531
Pittsburgh, PA 15251 - 7531

37. A transmittal letter, stating Respondent's name, the case title, Respondent's complete address, the case docket number and the billing document number must accompany the payment. Respondent must send a copy of the check and transmittal letter to:

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

Terence Bonace (DT-8J)
Pesticides and Toxics Enforcement Section
U.S. EPA, Region 5
77 West Jackson Blvd.
Chicago, IL 60604

Nidhi K. O'Meara (C-14J)
Office of Regional Counsel
U.S. EPA, Region 5
77 West Jackson Blvd.
Chicago, IL 60604

38. This civil penalty is not deductible for federal tax purposes.

39. If Respondent does not pay the civil penalty timely, U.S. EPA may refer the matter to the Attorney General who will recover such amount by action in the appropriate United States district court under Section 14(a)(5) of FIFRA, 7 U.S.C. § 136l(a)(5). The validity, amount and appropriateness of the civil penalty are not reviewable in a collection action.

40. Pursuant to 31 C.F.R. § 901.9, Respondent must pay the following on any amount overdue under this CAFO. Interest will accrue on any amount overdue from the date payment was due at a rate established by the Secretary of the Treasury. Respondent must pay a \$15 handling charge each month that any portion of the penalty is more than 30 days past due. In addition, Respondent must pay a 6 percent per year penalty on any principal amount 90 days past due.

General Provisions

41. Respondent has agreed that it will remove the violative claims referenced in paragraph 22 above from all future product labeling of **Hagerty Anti-Mite** and shall name the product **Allerg-Eze Spray**.

42. This CAFO resolves only Respondent's liability for federal civil penalties for the violations and facts alleged in the CAFO.

43. This CAFO does not affect the right of the U.S. EPA or the United States to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law.

44. This CAFO does not affect Respondent's responsibility to comply with FIFRA and other applicable federal, state, and local laws, and regulations.

45. This CAFO is a "final order" for purposes of U.S. EPA's Enforcement Response Policy for FIFRA.

46. The terms of this CAFO bind Respondent and its successors, and assigns.

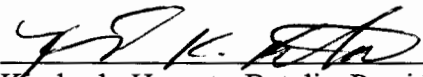
47. Each person signing this agreement certifies that he or she has the authority to sign this agreement for the party whom he or she represents and to bind that party to its terms.

48. Each party agrees to bear its own costs and attorney's fees, in this action.

49. This CAFO constitutes the entire agreement between the parties.

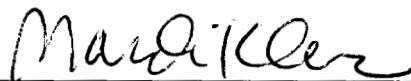
W. J. Hagerty & Sons, Ltd, Inc., Respondent

4/20/07
Date



Kimberly Hagerty-Batalis, President
W. J. Hagerty & Sons, Ltd, Inc.

United States Environmental Protection Agency, Complainant

4-26-07
Date


Mardi Klevs, Chief
Pesticides and Toxics Branch
Waste, Pesticides and Toxics Division

5/3/07
Date


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

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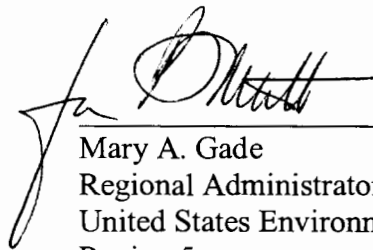
In the Matter of:
W. J. Hagerty & Sons, Ltd, Inc.
Docket No. FIFRA-05-2007-0026

Final Order

This Consent Agreement and Final Order, as agreed to by the parties, shall become effective immediately upon filing with the Regional Hearing Clerk. This Final Order concludes this proceeding pursuant to 40 C.F.R. §§ 22.18 and 22.31. IT IS SO ORDERED.

Date

5-8-07



Mary A. Gade
Regional Administrator
United States Environmental Protection Agency
Region 5

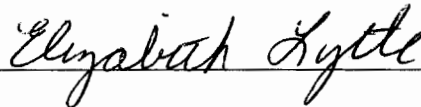
CERTIFICATE OF SERVICE

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 W. J. Hagerty & Sons, Inc., was filed on May 10, 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 0005 8910 5324 , a copy of the original to the Respondents:

Kimberly Hagerty-Batalis
W. J. Hagerty & Sons, Inc.
P.O. Box 1496
South Bend, Indiana 46624

and forwarded copies (intra-Agency) to:

Marcy Toney, Regional Judicial Officer, ORC/C-14J
Nidhi K. O'Meara, 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-05-2007-0026**

SEARCHED
SERIALIZED
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MAY 10 2007
EPA REGION 5