

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
BEFORE THE ENVIRONMENTAL APPEALS BOARD  
WASHINGTON, D.C.**

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ENVIR. APPEALS BOARD

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IN THE MATTER OF: ) )  
 ) )  
Wellmark International ) )  
 ) )  
Respondent. ) )  
\_\_\_\_\_) )

Docket No. FIFRA-HQ-2013-5002

**CONSENT AGREEMENT AND FINAL ORDER**

**CONSENT AGREEMENT**

Complainant, United States Environmental Protection Agency ("EPA") and Respondent, Wellmark International ("Wellmark"), agree to this action and consent to the entry of this Consent Agreement and Final Order ("CAFO") before taking testimony and without any adjudication of any issues of law or fact herein.

**I. NATURE OF ACTION**

1. This is a civil administrative action commenced under section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA" or the "Act"), as amended, 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 ("Consolidated Rules"), 40 C.F.R part 22. This action imposes civil penalties pursuant to section 14(a) of FIFRA.
2. Complainant and Respondent have conferred for the purpose of settlement pursuant to 40 C.F.R § 22.18, and desire to settle this action. Accordingly, before any testimony has been taken and without any admission of violation, or adjudication of any issue of fact or law, and in accordance with 40 C.F.R. § 22.13(b), Complainant and Respondent have agreed to the execution of this CAFO. Respondent hereby agrees to comply with the terms of this CAFO.

**II. THE PARTIES**

3. Rosemarie A. Kelley, Director, Waste and Chemical Enforcement Division, Office of Civil Enforcement, Office of Enforcement and Compliance Assurance, is authorized by lawful delegation to institute and settle civil administrative actions brought pursuant to section 14(a) of FIFRA.

4. Respondent, Wellmark, is a corporation doing business in Dallas, Texas, with revenues in excess of \$10,000,000 in calendar year 2011.

### **III. PRELIMINARY STATEMENT**

5. Respondent stipulates that Complainant has jurisdiction over the subject matter of this Consent Agreement.
6. Respondent waives any defenses it might have as to venue and jurisdiction.
7. Pursuant to 40 C.F.R. § 22.18(b)(2), Respondent waives its right to contest the allegations herein, its right to appeal the Final Order, and its right to request a judicial or administrative hearing on any issue of law or fact set forth in, and resolved by, this Consent Agreement.
8. Respondent neither admits nor denies the allegations and determinations set forth in Section V of this Consent Agreement.

### **IV. STATUTORY AND REGULATORY BACKGROUND**

9. It shall be unlawful for any person to refuse to maintain or submit any records required by or under FIFRA. 7 U.S.C. §§ 136f and 136j(a)(2)(B).
10. The Administrator may prescribe regulations requiring producers, registrants, and applicants for registration to maintain such records ... as the Administrator determines to be necessary for the effective enforcement of this Act....” 7 U.S.C. § 136f(a).
11. 40 C.F.R. § 169.2(k) requires that producers of pesticide products retain records containing research data relating to registered pesticides, including all underlying raw data, as long as the registration is valid and the producer is in business.
12. The Administrator is authorized to assess a civil penalty against any registrant, commercial applicator, wholesaler, dealer, retailer or other distributor who violates any provision of FIFRA. The maximum statutory civil penalty is \$6,500 for each offense that occurred after March 15, 2004 through January 12, 2009, and \$7,500 for each offense occurring after January 12, 2009. 7 U.S.C. § 136l(a)(1).
13. The term “person” means “any individual, partnership, association, corporation, or any organized group of persons whether incorporated or not.” 7 U.S.C. § 136(s).
14. The term “to distribute or sell” means “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.” 7 U.S.C. § 136(gg).

15. The term “producer” means “the person who manufactures, prepares, compounds, propagates, or processes any pesticide or device or active ingredient, used in producing a pesticide.” 7 U.S.C. § 136(w).
16. The term “sponsor” means “(1) A person who initiates and supports, by provision of financial or other resources, a study; (2) A person who submits a study to the EPA in support of an application for a research or marketing permit; or (3) A testing facility, if it both initiates and actually conducts the study.” 40 C.F.R. § 160.3.
17. The term “study” means “any experiment at one or more test sites, in which a test substance is studied in a test system under laboratory conditions or in the environment to determine or help predict its effects, metabolism, product performance (efficacy studies only as required by 40 C.F.R. §§ 158.400 or 161.640 as applicable), environmental and chemical fate, persistence and residue, or other characteristics in humans, other living organisms, or media.” 40 C.F.R. § 160.3.
18. The term “registrant” means “a person who has registered any pesticide pursuant to the provisions of [FIFRA].” 7 U.S.C. § 136(y).
19. The term “pesticide” means, in part: “any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest.” 7 U.S.C. § 136(u).

#### **V. EPA ALLEGATIONS AND DETERMINATIONS**

20. Respondent is a “person” as that term is defined by FIFRA. 7 U.S.C. § 136(s).
21. Respondent is a “registrant” as that term is defined by FIFRA. 7 U.S.C. § 136(y).
22. Respondent is a “sponsor” as that term is defined by 40 C.F.R. § 160.3, of the following studies: EPA MRID No. 473206-01, EPA MRID No. 473206-02, EPA MRID No. 473206-03, EPA MRID No. 473206-04.
23. Respondent is the registrant of the following pesticides: Flying Insect Killer II, EPA Reg. No. 2724-668; Crawling Insect Killer II, EPA Reg. No. 2724-699; Etofenprox IGR Home & Carpet Spray II, EPA Reg. No. 2724-702; and Etofenprox IGR Fogger II, EPA Reg. No. 2724-705.
24. Respondent is a “producer” of Flying Insect Killer II, EPA Reg. No. 2724-668; Crawling Insect Killer II, EPA Reg. No. 2724-699; Etofenprox IGR Home & Carpet Spray II, EPA Reg. No. 2724-702; and Etofenprox IGR Fogger II, EPA Reg. No. 2724-705, as that term is defined by FIFRA. 7 U.S.C. § 136(w).
25. Flying Insect Killer II, EPA Reg. No. 2724-668, Crawling Insect Killer II, EPA Reg. No. 2724-699; Etofenprox IGR Home & Carpet Spray II, EPA Reg. No. 2724-702; and Etofenprox IGR Fogger II, EPA Reg. No. 2724-705, are intended to destroy, repel, or mitigate pests.

26. Therefore, Flying Insect Killer II, EPA Reg. No. 2724-668; Crawling Insect Killer II, EPA Reg. No. 2724-699; Etofenprox IGR Home & Carpet Spray II, EPA Reg. No. 2724-702; and Etofenprox IGR Fogger II, EPA Reg. No. 2724-705, are “pesticides” as defined by FIFRA. 7 U.S.C. § 136(u).
27. On or about January 11, 2008, Respondent submitted the study entitled: “Efficacy Evaluation of SPI-9160B Flying Insect Killer Aerosol,” MRID No. 473206-01, to EPA in support of the registration of Flying Insect Killer II, EPA Reg. No. 2724-668.
28. On or about January 11, 2008, Respondent submitted the study entitled: “Efficacy Evaluation of SPI-9162H Crawling Insect Killer Aerosol,” MRID No. 473206-02, to EPA in support of the registration of Crawling Insect Killer II, EPA Reg. No. 2724-699.
29. On or about January 11, 2008, Respondent submitted the study entitled: “Efficacy Evaluation of SPI-9177A IGR Home and Carpet Spray,” MRID No. 473206-03, to EPA in support of the registration of Etofenprox IGR Home & Carpet Spray II, EPA Reg. No. 2724-702.
30. On or about January 11, 2008, Respondent submitted the study entitled: “Efficacy of SPI-9176B Fogger,” MRID No. 473206-04, to EPA in support of the registration of Etofenprox IGR Fogger II, EPA Reg. No. 2724-705.
31. On or about December 11, 2008, a duly authorized representative of the EPA conducted an inspection of a test facility operated by ALLtech Research and Development, Inc., and located at 10550 State Route 4, Sparta, Illinois, 62286. The inspection was conducted to determine the facility’s compliance with the FIFRA Good Laboratory Practice Standards regulations at 40 C.F.R. part 160 and the Books and Records of Pesticide Production and Distribution regulations at 40 C.F.R. part 169.
32. The inspection conducted on or about December 11, 2008, of a test facility operated by ALLtech Research and Development, Inc., and located at 10550 State Route 4, Sparta, Illinois, 62286, revealed that no raw data was available from the laboratory facility, the registrant, or the producer of Flying Insect Killer II, EPA Reg. No. 2724-668; Crawling Insect Killer II, EPA Reg. No. 2724-699; Etofenprox IGR Home & Carpet Spray II, EPA Reg. No. 2724-702; and Etofenprox IGR Fogger II, EPA Reg. No. 2724-705, to support the conclusions of the final report for the studies listed in Paragraphs 27-30 above.
33. Therefore, Respondent’s conduct described in Paragraph 32 above reveals that each failure to maintain records as required under FIFRA, 7 U.S.C. § 136f is a separate violation under FIFRA, 7 U.S.C. § 136j(a)(2)(B), as detailed in the chart below.

Count	Study	Violation
1	MRID No. 473206-01	7 U.S.C. § 136j(a)(2)(B)
2	MRID No. 473206-02	7 U.S.C. § 136j(a)(2)(B)
3	MRID No. 473206-03	7 U.S.C. § 136j(a)(2)(B)

## VI. TERMS OF SETTLEMENT

34. Respondent consents to issuance of this Consent Agreement and to its terms, and consents, for the purposes of settlement, to the payment of the civil penalty set forth in Section VII.
35. Respondent's compliance with the terms of this CAFO shall fully settle all civil claims or civil causes of action alleged in Section V.
36. Compliance with this CAFO shall not be a defense to any subsequent action EPA may commence pursuant to federal law or regulation for violations occurring after the date of this Consent Agreement, or any violations of FIFRA not alleged in this Consent Agreement that may have occurred prior to the date that this Consent Agreement is fully executed by both Parties.
37. Nothing in this CAFO is intended to, nor shall be construed to operate in any way to, resolve any criminal liability of Respondent.

## VII. CIVIL PENALTY

38. Complainant has calculated a penalty pursuant to the statutory penalty factors listed in section 14(a)(3) of FIFRA, 7 U.S.C. §136l(a)(3), the Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act (December 2009) and the Enforcement Response Policy for FIFRA Good Laboratory Practice Regulations (September 1991), Appendix G of the FIFRA ERP.
39. Based upon the information in Complainant's inspection of December 11, 2008, referenced in Section V, and in accordance with the penalty adjustments allowed under the FIFRA ERP, Complainant has derived a penalty of \$28,600.
40. The penalty agreed upon by the Parties for settlement purposes is \$28,600.
41. Not more than sixty (60) calendar days following execution of the Final Order by the Environmental Appeals Board, Respondent shall either:
  - a) Dispatch a cashier's or certified check payable to the order of the "Treasurer of the United States of America" in the amount of \$28,600 and bearing the notation, "Wellmark International, Civil Penalty Docket No. FIFRA HQ-2013-5002" to the following address:

U.S. Environmental Protection Agency  
Fines and Penalties  
Docket No. FIFRA-HQ-2013-5002  
Cincinnati Finance Center

PO Box 979077  
St. Louis, MO 63197-9000

or

- b) Make an electronic payment by wire transfer in the amount of \$28,600 with the notation, "Wellmark International, Civil Penalty Docket No. FIFRA HQ-2013-5002," by using the following instructions:

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."

42. To ensure a record of compliance with this Consent Agreement, Respondent shall forward a copy of the check or wire transfer to EPA to the attention of:

Brian Dyer  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, N.W. (Mail Code 2249A)  
Washington, DC 20460-0001

and

Headquarters Hearing Clerk  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, N.W. (Mail Code 1900C)  
Washington, DC 20460-0001

43. If Respondent fails to pay the civil penalty of \$28,600 within sixty (60) calendar days of the execution of the Final Order, then Respondent shall pay an additional stipulated penalty of \$5,000 per calendar day, plus interest, at the statutory judgment rate provided for in 31 U.S.C. § 3717, as in effect on the date of execution of the Final Order, unless Complainant in writing excuses or mitigates the stipulated penalty. Complainant may excuse or mitigate the stipulated penalty if Complainant determines in its sole discretion, that failure to comply occurred despite Respondent's exercise of good faith and due diligence. If additional stipulated penalties are due, Complainant will dispatch to Respondent a demand letter via certified mail, return receipt requested, which specifies the total amount due and owed by Respondent, including any interest allowed by law. Within fourteen (14) calendar days following Respondent's receipt of such demand letter, Respondent shall pay the stipulated penalty in the manner specified in this Section.

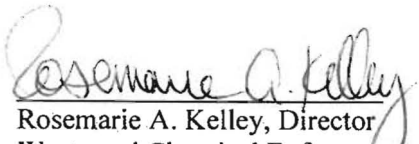
44. Failure to remit the civil penalty, or any stipulated penalty plus interest provided herein, may result in this matter being forwarded to the United States Department of Justice to recover such amount by action in federal court under section 14(a)(5) of FIFRA. 7 U.S.C. § 1361(a)(5). The validity, amount and appropriateness of the civil penalty are not reviewable in a collection action.
45. This civil penalty is not deductible for federal tax purposes.

#### **VIII. OTHER MATTERS**

46. Nothing in this CAFO shall relieve Respondent of the duty to comply with all applicable provisions of FIFRA and with other federal, state, tribal, and local laws and regulations.
47. This CAFO shall bind both Parties. This includes each Party's officers, directors, employees, successors, and assigns. The undersigned representative of each Party to this CAFO certifies that he or she is duly authorized to represent and bind the Party whom he or she claims to represent.
48. This CAFO shall bind the Parties in full effect upon execution of the Final Order by EPA's Environmental Appeals Board.
49. Respondent's obligations under this CAFO shall terminate when Respondent has paid the civil penalty, and any applicable interest or late charges, as specified in Section VII of the Consent Agreement in accordance with the Final Order.
50. Each Party agrees to bear its own costs and attorney fees in this matter.

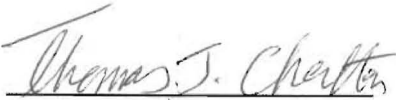
WE AGREE TO THIS:

FOR COMPLAINANT:



Rosemarie A. Kelley, Director  
Waste and Chemical Enforcement Division  
Office of Civil Enforcement  
Office of Enforcement and Compliance Assurance  
United States Environmental Protection Agency

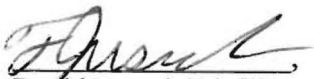
Feb. 1, 2013  
Date:



Thomas Charlton, Attorney  
Waste and Chemical Enforcement Division  
Office of Civil Enforcement  
Office of Enforcement and Compliance Assurance  
United States Environmental Protection Agency

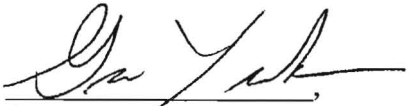
Nov. 13, 2012  
Date:

FOR RESPONDENT:



President and ~~Chief Executive Officer~~  
Wellmark International *Chief operating officer*

Nov 2, 2012  
Date:



Attorney  
Counsel for Wellmark International  
George Yuhas

Nov 2, 2012  
Date: