

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

IN THE MATTER OF:

Nalco Company

Respondent.

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) **Docket No. FIFRA-HQ-2013-5000**
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CONSENT AGREEMENT AND FINAL ORDER

CONSENT AGREEMENT

Complainant, United States Environmental Protection Agency (“EPA”) and Respondent Nalco Company (“Nalco”) 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 and concluded 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”) as codified at 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 purposes of settlement pursuant to 40 C.F.R. § 22.18 and desire to settle this action. Accordingly, before any testimony has been taken, 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 the CAFO.

II. THE PARTIES

3. Rosemarie A. Kelley, Director of the Waste and Chemical Enforcement Division, Office of Civil Enforcement, Office of Enforcement and Compliance Assurance, is authorized by lawful delegation to institute and settle administrative actions brought by the U. S. Environmental Protection Agency pursuant to Section 14(a) of FIFRA.

4. Respondent is Nalco Company, a wholly owned subsidiary of Ecolab, Inc organized and/or existing under the laws of the State of Delaware. Nalco's principal place of business is at 1601 West Diehl Road, Naperville, IL 60653.

III. PRELIMINARY STATEMENT

5. Respondent certifies that it is in full compliance with respect to the violations alleged in this Consent Agreement.
6. Respondent stipulates that Complainant has jurisdiction over the subject matter of this Consent Agreement.
7. Respondent waives any defenses it might have as to venue and jurisdiction.
8. 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.
9. Respondent neither admits nor denies EPA's allegations, findings of fact and conclusions of law set forth in Sections IV and V of this Consent Agreement. Respondent enters into this Consent Agreement to settle and compromise a disputed claim.

IV. STATUTORY AND REGULATORY BACKGROUND

10. 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.
11. Section 2(u) of FIFRA, 7 U.S.C. § 136(u), and 40 C.F.R. § 152.3 define a "pesticide," in part, as any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest.
12. Section 2(mm) of FIFRA, 7 U.S.C. § 136(mm), defines "antimicrobial pesticide" as a pesticide that is intended to (i) disinfect, sanitize, reduce, or mitigate growth or development of microbiological organisms; or (ii) 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.
13. Section 2(gg) of FIFRA, 7 U.S.C. § 136(gg), and 40 C.F.R. § 152.3 state that "distribute or sell" means to distribute, sell, offer for sale, hold for distribution, hold for shipment, ship, deliver for shipment, release for shipment, or receive and (having so received) deliver or offer to deliver.

14. Section 3(a) of FIFRA, 7 U.S.C. § 136(a) states that no person in any State may distribute or sell to any person any pesticide that is not registered.
15. Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), states it shall be unlawful for any person in any state to distribute or sell to any person any pesticide that is not registered under 136(a) of this title or whose registration has been canceled or suspended, except to the extent that distribution or sale otherwise has been authorized by the Administrator under this subchapter.
16. 40 C.F.R. § 152.15 states that “No person may distribute or sell any pesticide product that is not registered under the Act. . . . A substance is considered to be intended for a pesticidal purpose, and thus to be a pesticide requiring registration, 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 . . . (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.”
17. Section 14(a)(1) of FIFRA, 7 U.S.C. § 136l(a)(1), authorizes the EPA Administrator 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.

V. EPA ALLEGATIONS OF FACT AND CONCLUSIONS OF LAW¹

18. Respondent is a “person” as defined at Section 2(s) of FIFRA, 7 U.S.C. § 136(s).
19. Respondent is a registrant and other distributor subject to the civil penalty provisions of Section 14(a)(1) of FIFRA, 7 U.S.C. § 136l(a)(1).
20. At all times relevant to this Consent Agreement, Respondent distributed or sold three products: 1) Nalco 60620 (20% ammonium sulfate), 2) Nalco 60615 (15% urea), and 3) Nalco 60630 (30% urea) to pulp and paper mills.
21. At all times relevant to this Consent Agreement, Respondent owned or operated a place of business located at 1601 West Diehl Road, Naperville, IL 60653.
22. On or about December 9, 2009, EPA inspected Respondent’s facility at 1601 West Diehl Road, Naperville, IL 60653 in accordance with FIFRA sections 8 and 9, 7 U.S.C. §§ 136f; 136g.

¹ Respondent neither admits nor denies EPA’s allegations, and enters into this Consent Agreement to settle and compromise a disputed claim.

23. On or about December 23, 2009, Respondent provided EPA with sales and distribution records for Nalco 60615 and 60620 showing Respondent's sale or distribution of these products from July 2009 up to and including November 2009.
24. On December 29, 2010, EPA issued an administrative order, pursuant to Section 13 of FIFRA (FIFRA-HQ-2011-5009), which required registration of Respondent's unregistered products but allowed Respondent to continue sale of those products under certain conditions pending EPA registration.
25. On or about January 13, 2011, Respondent provided EPA with sales and distribution records for Nalco 60615, 60620, and 60630 showing Respondent's sale or distribution of its products from December 2009 up to and including December 2010.
26. At all times relevant to this Consent Agreement, Respondent's products, Nalco 60615, 60620 and 60630, were not registered under FIFRA as pesticides.
27. On or about June 29, 2011, Respondent received EPA registration for Nalco 60615, 60620, and 60630.
28. EPA alleges that at all times relevant to this Consent Agreement, Respondent's promotion of Nalco 60615, 60620, and 60630 and/or its knowledge of how those products would be used met the criteria at 40 C.F.R. § 152.15, and caused those products to be "pesticides" as that term is defined at Section 2(u) of FIFRA, 7 U.S.C. § 136(u).
29. EPA disagrees with Respondent's claims that the products were promoted and marketed for use as "adjuvants" and, therefore, were not "pesticides." EPA has determined that Respondent's products are pesticides under 40 C.F.R. § 152.15 and not "adjuvants" as claimed by Respondent.
30. Based on the foregoing, EPA alleges that prior to June 29, 2011, Respondent sold or distributed Nalco 60615, 60620 and 60630 on multiple occasions without registration in violation of Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A).

VI. TERMS OF SETTLEMENT

31. 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.
32. Respondent's compliance with the terms of this CAFO shall fully settle all civil claims or civil causes of action arising from the conduct alleged in Section V.
33. Compliance with this CAFO shall not be a defense to any subsequent action EPA may commence pursuant to federal law or regulations 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.

34. 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

35. Complainant has calculated a penalty pursuant to the statutory penalty factors listed in Section 14(a)(4) of FIFRA, 7 U.S.C. § 1361(a)(4) and EPA's "Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act," dated December 2009.

36. The penalty agreed upon by the Parties for settlement purposes is \$225,000.

37. Not more than sixty (60) calendar days following the execution of the Final Order by the Environmental Appeals Board, Respondent shall either:

- a. Dispatch a cashier's or certified check in the amount of \$225,000, made payable to the order of the "Treasurer, United States of America" and bearing the case docket number FIFRA-HQ-2013-5000, to the following address:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, MO 63197-9000

or

- b. Make an electronic payment by wire transfer in the amount of \$225,000 with the notation, "Nalco Company Civil Penalty Docket No. FIFRA-HQ-2013-5000" 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"

38. 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:

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

and

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

39. If Respondent fails to pay the civil penalty of \$225,000 within sixty (60) calendar days of the execution of the Final Order, Respondent shall pay an additional stipulated penalty of \$5,000 per calendar day, plus interest, at the statutory judgement rate provided in 31 U.S.C. § 3717, as in effect on the date of the 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.
40. If Respondent fails to remit the civil penalty, or any stipulated penalty plus interest provided herein, then EPA may refer the matter 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.
41. This civil penalty is not deductible for federal tax purposes.

VIII. OTHER MATTERS

42. Nothing in this CAFO shall relieve Respondent of the duty to comply with all applicable provisions of FIFRA and with other applicable federal, state, and tribal, and local laws and regulations.
43. 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 represents and bind the Party whom he or she represents.

44. This CAFO shall bind the Parties in full effect upon execution of the Final Order by the Environmental Appeals Board.
45. 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.
46. Each party agrees to bear its own costs and attorney fees in this matter.

WE AGREE TO THIS:

FOR COMPLAINANT:

Rosemarie A. Kelley

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

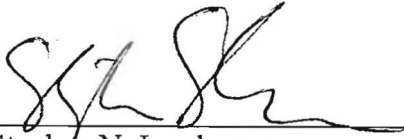
12/18/12
Date

Kim Wilson

Kim Wilson, Attorney-Advisor
Waste and Chemical Enforcement Division
Office of Civil Enforcement
Office of Enforcement and Compliance Assurance
U.S. Environmental Protection Agency

11-21-2012
Date

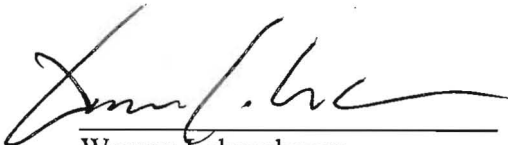
FOR RESPONDENT:



Stephen N. Landsman
Vice President and General Counsel
Nalco Company
1601 West Diehl Road
Naperville, IL 60653

11-19-2012

Date



Warren Lehrenbaum
Counsel for Nalco Company
Crowell & Moring LLP
1001 Pennsylvania Avenue, NW
Washington, DC 20004


21 November 2012

Date

CERTIFICATE OF SERVICE

I hereby certify that the original signed copy of the Consent Agreement and Final Order in the resolution of the civil administrative action, *In the Matter of Nalco Company*, FIFRA HQ-2013-5000, was filed on December 20, 2012 with the Clerk of the Environmental Appeals Board, at the address for hand-delivery: 1341 G Street, N.W., Suite 600, Washington, D.C., 20005, and that I sent by electronic mail and UPS a copy of the original to Respondent's counsel:

Warren Lehrenbaum
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