



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

SEP - 7 2012

REPLY TO THE ATTENTION OF:

LC-8J

CERTIFIED MAIL

Receipt No. 7009 1680 0000 7667 9978

Mr. David Sarvadi
Keller and Heckman LLP
1001 G Street, N. W. (Suite 500 W)
Washington, D.C. 20001

Consent Agreement and Final Order In the Matter of
The Sherwin -Williams Company, Docket No. FIFRA-05-2012-0023

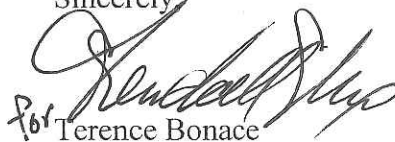
Dear Mr. Sarvadi:

Enclosed please find a copy of a fully executed Consent Agreement and Final Order, in resolution of the above case. This document was filed on September 7, 2012 with the Regional Hearing Clerk.

The civil penalty in the amount of \$62,400 is to be paid in the manner described in paragraphs 41 and 42. Please be certain that the number **BD 2751245P021** and the docket number are written on both the transmittal letter and on the check. Payment is due by October 7, 2012 (within 30 calendar days of the filing date).

Thank you for your cooperation in resolving this matter.

Sincerely


Terence Bonace

Pesticides and Toxics Compliance Section

Enclosures

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

In the Matter of:)
)
The Sherwin-Williams Company)
Cleveland, Ohio,)
)
Respondent.)

Docket No. FIFRA-05-2012-0023
Proceeding to Assess a Civil Penalty
Under Section 14(a) of the Federal
Insecticide, Fungicide, and Rodenticide
Act, 7 U.S.C. § 136/(a)

RECEIVED

SEP 07 2012

Consent Agreement and Final Order

Preliminary Statement

REGIONAL HEARING CLERK
U.S. ENVIRONMENTAL
PROTECTION AGENCY

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. § 136/(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 Director of the Land and Chemicals Division, United States Environmental Protection Agency (EPA), Region 5.

3. Respondent is The Sherwin-Williams Company, a corporation doing business in the State of Ohio.

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. Respondent asserts that the products at issue were being sold as cleaning products not as pesticides, and denies that it was in violation of FIFRA, as alleged by EPA, but consents to settlement of this matter on the terms set forth in this document.

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

9. Respondent certifies that it is complying with the requirements of FIFRA, 7 U.S.C. §§ 136-136y, set forth below, and represents that no further specific action is required for compliance with these requirements.

Statutory and Regulatory Background

10. Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), provides 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 of FIFRA, 7 U.S.C. § 136a.

11. The term “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).

12. A “pesticide” is, among other things, any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest. 7 U.S.C. § 136(u).

13. A “pest” is 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 which the Administrator of EPA declares to be a pest under Section 25(c)(1) of FIFRA. 7 U.S.C. § 136(w).

14. 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).

15. The Administrator of EPA may assess a civil penalty against any distributor who violates any provision of FIFRA, and may assess a civil penalty of up to \$6,500 for each offense that occurred after March 15, 2004 through January 12, 2009, and of up to \$7,500 for each offense that occurred after January 12, 2009, pursuant to Section 14(a)(1) of FIFRA, 7 U.S.C. § 136(a)(1), and 40 C.F.R. Part 19.

Factual Allegations and Alleged Violations

A. Complainant's General Allegations

16. Respondent is a "person" as defined at Section 2(s) of FIFRA, 7 U.S.C. § 136(s).

17. Respondent owned and/or operated a place of business located at 101 Prospect Avenue, Cleveland, Ohio during the calendar years 2008 and 2009.

18. Respondent owned and/or operated a place of business at 3281 South Higuera Street, San Luis Obispo, California during the calendar year 2011.

19. On August 11, 2009, an inspector employed by the Ohio Department of Agriculture and authorized to conduct inspections under FIFRA conducted an inspection at Respondent's place of business in Cleveland, Ohio.

20. During the August 11, 2009 inspection, the inspector collected a label for Respondent's product "Thompson's WaterSeal Concrete Care Cleaner & Degreaser."

21. Respondent's label for "Thompson's WaterSeal Concrete Care Cleaner & Degreaser" collected on August 11, 2009 states: "Removes Oil, Grease, Dirt, Mildew, Algae and Mold."

22. The statement on its label made "Thompson's WaterSeal Concrete Care Cleaner & Degreaser" a "pesticide" as defined at Section 2(u) of FIFRA, 7 U.S.C. § 136(u).

23. On September 2, 2010, EPA sent a "Request for Information Regarding Federal Insecticide, Fungicide and Rodenticide Act Pesticide Products" requesting distribution records for products, including "Thompson's WaterSeal Concrete Care Cleaner & Degreaser," and confirmation that the label collected on August 11, 2009 by the Ohio Department of Agriculture inspector is the same label on the product represented in the distribution records collected.

24. On October 26, 2010, in response to the above request, Respondent submitted to EPA distribution records for "Thompson's WaterSeal Concrete Care Cleaner & Degreaser."

25. Respondent distributed or sold "Thompson's WaterSeal Concrete Care Cleaner & Degreaser."

26. On March 15, 2011, an inspector employed by the California Department of Pesticide Regulation and authorized to conduct inspections under FIFRA conducted an inspection at Respondent's place of business in San Luis Obispo, California.

27. During the March 15, 2011 inspection, the inspector collected photographs of a container of Respondent's product "Sherwin-Williams DeckScapes Revive™ Cleaner" being offered for sale at Respondent's San Luis Obispo, California place of business.

28. Respondent's label for "Sherwin-Williams DeckScapes Revive™ Cleaner" photographed on March 15, 2011 states: "Removes mildew, dirt and tannins."

29. The statement on its label made "Sherwin-Williams DeckScapes Revive™ Cleaner"

a “pesticide” as defined at Section 2(u) of FIFRA, 7 U.S.C. § 136(u).

30. The “Sherwin-Williams DeckScapes Revive™ Cleaner” was being offered for sale nationally at the time of the March 15, 2011 inspection.

31. Respondent distributed or sold “Sherwin-Williams DeckScapes Revive™ Cleaner.”

B. Count I

32. Complainant incorporates by reference the allegations contained in paragraphs 1 through 32 of this Complaint.

33. Respondent distributed or sold “Thompson’s WaterSeal Concrete Care Cleaner & Degreaser” on at least 16 occasions between July 24, 2008 and September 16, 2009.

34. At the time of such distribution or sale, “Thompson’s WaterSeal Concrete Care Cleaner & Degreaser” was not registered as a pesticide with EPA under Section 3 of FIFRA, 7 U.S.C. § 136a.

35. Respondent’s distribution or sale of the unregistered pesticide “Thompson’s WaterSeal Concrete Care Cleaner & Degreaser” constitutes an unlawful act pursuant to Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A).

C. Count II

36. Complainant incorporates by reference the allegations contained in paragraphs 1 through 31 of this document.

37. Respondent distributed or sold the product “Sherwin-Williams DeckScapes Revive™ Cleaner” on at least March 15, 2011.

38. On the date of such distribution or sale, the product “Sherwin-Williams DeckScapes Revive™ Cleaner” was not registered as a pesticide with EPA under Section 3 of FIFRA, 7 U.S.C. § 136a.

39. Respondent's distribution or sale of the unregistered pesticide "Sherwin-Williams DeckScapes Revive™ Cleaner" constitutes an unlawful act pursuant to Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A).

Civil Penalty

40. Pursuant to Section 14(a)(4) of FIFRA, 7 U.S.C. § 136(a)(4), Complainant has determined that an appropriate civil penalty to settle this action is \$62,400. In determining the penalty amount, Complainant considered EPA's FIFRA Enforcement Response Policy, dated December 2009, and 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.

41. Within 30 days after the effective date of this CAFO, Respondent must pay \$62,400 by a cashier's or certified check, payable to "Treasurer, United States of America," via U.S. mail to:

U.S. EPA
Fines and Penalties
Cincinnati Finance Center
Post Office Box 979077
St. Louis, Missouri 63197-9000

or via express mail, or other delivery service, to:

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

The check must note The Sherwin-Williams Company, the docket number of this CAFO and the billing document number (the billing document number is set forth in the cover letter to this document).

42. Respondent must send a notice of payment that states Respondent's name, complete

address, the case docket number and the billing document number to EPA at the following addresses when it makes the payment:

Regional Hearing Clerk (E-19J)
U.S. EPA, Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604

Terence Bonace (LC-8J)
Pesticides and Toxics Compliance Section
U.S. EPA, Region 5
77 West Jackson Boulevard.
Chicago, Illinois 60604

Andre Daugavietis (C-14J)
Office of Regional Counsel
U.S. EPA, Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604

43. This payment is not deductible for federal tax purposes.

44. If Respondent does not pay timely, 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. § 136(a)(5). The validity, amount, and appropriateness of the payment are not reviewable in a collection action.

45. 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 payment 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

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

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

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

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

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

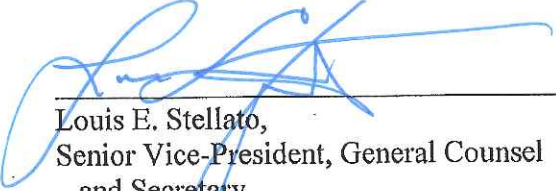
51. Each person signing this agreement certifies that he or she has the authority to sign for the party whom he or she represents and to bind that party to its terms.

52. Each party agrees to bear its own costs and attorneys fees, in this action.

This CAFO constitutes the entire agreement between the parties.

The Sherwin-Williams Company, Respondent

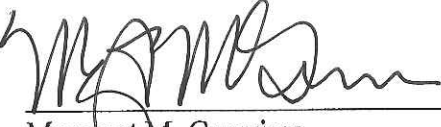
8/8/12
Date



Louis E. Stellato,
Senior Vice-President, General Counsel
and Secretary
The Sherwin-Williams Company

United States Environmental Protection Agency, Complainant

9/4/2012
Date




Margaret M. Guerriero
Director
Land and Chemicals Division

In the Matter of:
The Sherwin-Williams Company
Docket No. FIFRA-05-2012-0023

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.

9-5-12
Date



Susan Hedman
Regional Administrator
United States Environmental Protection Agency
Region 5

RECEIVED
SEP 07 2012
REGIONAL HEARING CLERK
U.S. ENVIRONMENTAL
PROTECTION AGENCY

CERTIFICATE OF SERVICE

I hereby certify that the original signed copy of the Consent Agreement and Final Order in resolution of the civil administrative action involving The Sherwin-Williams Company, was filed on September 7, 2012 with the Regional Hearing Clerk (E-19J), U.S. Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois, 60604, and that I mailed by Certified Mail, Receipt No. 7009 1680 0000 7667 9978, a copy of the original to the Respondent:

Mr. David Sarvadi
Keller and Heckman LLP
1001 G Street, N. W. (Suite 500 W)
Washington, D.C. 20001

and forwarded copies (intra-Agency) to:

Ann Coyle, Regional Judicial Officer, ORC/C-14J
Andre Daugavietis, Regional Judicial Officer, ORC/C-14J
Eric Volck, Cincinnati Finance/MWD



Frederick Brown
Pesticides and Toxics Compliance Section
U.S. EPA - Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604

Docket No. FIFRA-05-2012-0023

RECEIVED
SEP 07 2012

**REGIONAL HEARING CLERK
U.S. ENVIRONMENTAL
PROTECTION AGENCY**