

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5**

In the Matter of:)	Docket No. FIFRA-05-2023-0016
)	
Jay-Mar, Inc.)	Proceeding to Assess a Civil Penalty
Plover, Wisconsin)	Under Section 14(a) of the Federal
)	Insecticide, Fungicide, and Rodenticide
Respondent.)	Act, 7 U.S.C. § 136l(a)
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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, by lawful delegation, the Director of the Enforcement and Compliance Assurance Division, United States Environmental Protection Agency (U.S. EPA), Region 5.

3. The Respondent is Jay-Mar, Inc. (Jay-Mar), a corporation doing business in the State of Wisconsin.

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.

Statutory and Regulatory Background

9. Section 3(a) of FIFRA, 7 U.S.C. § 136a(a) states that no person in any State may distribute or sell to any person any pesticide that is not registered under Section 3 of FIFRA.

10. Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), states, in pertinent part, 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.

11. 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).

12. 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).

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

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. A “pest” means 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 U.S. EPA declares to be a pest under Section 25(c)(1) of FIFRA, 7 U.S.C. § 136(t).

16. The term “released for shipment” means “the producer has packaged and labeled it in the manner in which it will be distributed or sold, or has stored it in an area where finished products are ordinarily held for shipment. . . . Once a product becomes released for shipment, the product remains in the condition of being released for shipment unless subsequent activities, such as relabeling or repackaging, constitute production.” 40 C.F.R. § 152.3.

17. The Administrator of EPA may assess a civil penalty against any registrant, commercial applicator, wholesaler, dealer, retailer, or other distributor who violates any provision of FIFRA of up to \$23,494 for each offense that occurred after November 2, 2015, pursuant to Section 14(a)(1) of FIFRA, 7 U.S.C. § 136l(a)(1), and 40 C.F.R. Part 19.

General Allegations

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

19. At all times relevant to this Complaint, Respondent owned or operated a place of business located at 2130 Jay Mar Road, Plover, Wisconsin.

20. On or about August 16 and 17, 2022, inspectors employed by the Wisconsin Department of Agriculture Trade and Consumer Protection (WDATCP) and authorized to conduct inspections under FIFRA conducted an inspection at Respondent’s Plover, Wisconsin facility.

No Moss!!

21. During the August 2022 inspection, the WDATCP inspectors collected, among other records, shipping records, bin labels and affidavits regarding “No Moss!!”
22. “No Moss!!” is a “pesticide” as that term is defined in Section 2(u) of FIFRA.
23. The bin labels for “No Moss!!” contained the following claims:
 - a. “No Moss!!”
 - b. “Liquid moss control”
 - c. “Active Ingredient Iron Sulfate”
 - d. “Spray the moss to saturation. After a few days the moss will start to die, turn black, and dry out.”
24. The bin labels collected during the inspection were true and accurate representations of “No Moss!!” and the associated labels that were released for shipment on or about May 5, 2022.
25. Customer shipping records for “No Moss!!” were collected during the inspection.
26. On or about May 5, 2022, “No Moss!!” was not registered as a pesticide under Section 3 of FIFRA, 7 U.S.C. § 136a.
27. On or about May 5, 2022, Respondent distributed or sold “No Moss!!” to Custom Lawn Care of Custer, Wisconsin.

Potato Popper Protector

28. During the August 2022 inspection, the WDATCP inspectors collected shipping records, a bin label, and affidavits for the product, “Potato Popper Protector.”
29. “Potato Popper Protector” is a “pesticide” as that term is defined in Section 2(u) of FIFRA.

30. The bin label for “Potato Popper Protector” contained the following claims:
- a. “Potato Popper is a liquid fertilizer and Colorado Beetle insecticide combination that is used in preplant application. [...] The insecticide is absorbed by the growing potato plant and protects it from Colorado Potato Beetles, Aphids, Flea Beetles, Potato Leaf Hoppers, Psyllids, and Wireworms.”
 - b. “Liquid Starter Fertilizer with Colorado Beetle Protection for Potatoes”
 - c. “It is crucial that Potato Potter (sic) is applied at the proper rate or the Colorado Potato Beetle insecticide in Potato Popper will not work.”
 - d. “Be sure to follow these steps or you risk not applying enough insecticide to kill the Colorado Potato Beetle.”

31. The bin label collected during the inspection was a true and accurate representation of “Potato Popper Protector” and the associated label that were released for shipment on or about April 9, 2020, April 20, 2020, May 30, 2020, and April 28, 2021.

32. Customer shipping records for “Potato Popper Protector” were collected during the inspection.

33. On or about April 9, 2020, April 20, 2020, May 30, 2022, and April 28, 2021, “Potato Popper Protector” was not registered as a pesticide under Section 3 of FIFRA, 7 U.S.C. § 136a.

34. On or about April 9, 2020, Respondent distributed or sold “Potato Popper Protector” to Silver Mist Gardening Center of Waupaca, Wisconsin.

35. On or about April 20, 2020, Respondent distributed or sold “Potato Popper Protector” to Silver Mist Gardening Center of Waupaca, Wisconsin.

36. On or about May 30, 2020, Respondent distributed or sold “Potato Popper Protector” to Silver Mist Gardening Center of Waupaca, Wisconsin.

37. On or about May 30, 2020, Respondent distributed or sold “Potato Popper Protector” to Jeff Barden of Amherst, Wisconsin.

38. On or about April 28, 2021, Respondent distributed or sold “Potato Popper Protector” to Chain O Lakes Home & Garden of Waupaca, Wisconsin.

Copper Sulfate

39. During the August 2022 inspection, the WDATCP inspectors collected shipping records, a bin label, and affidavits for the product “Copper Sulfate.”

40. “Copper Sulfate” is a “pesticide” as that term is defined in Section 2(u) of FIFRA.

41. The bin labels for “Copper Sulfate” contained the following claims:

- a. “For Algae Control In Ponds.”
- b. “... one should observe the following rules in using chemicals to control plant growth in ponds.”
- c. “For best results use the lowest level of copper sulfate needed to control algae.”
- d. “In cases where the whole pond is treated at once but not all weeds are destroyed, wait two weeks before treating again.”

42. The bin labels collected during the inspection were true and accurate representations of “Copper Sulfate” and the associated label that were released for shipment on or about May 26, 2022, and August 1, 2022.

43. Customer shipping records for “Copper Sulfate” were collected during the inspection.

44. On or about May 26, 2022 and August 1, 2022, “Copper Sulfate” was not registered as a pesticide under Section 3 of FIFRA, 7 U.S.C. § 136a.

45. On or about May 26, 2022, Respondent distributed or sold “Copper Sulfate” to Henry Klesmith Farms and Sons of Stevens Point, Wisconsin.

46. On or about August 1, 2022, Respondent distributed or sold “Copper Sulfate” to Chris Sobczak of Stevens Point, Wisconsin.

Foliar Phosphite

47. During the August 2022 inspection, the WDATCP inspectors collected, among other records, shipping records, a bin label, advertisements, and affidavits for the product, “Foliar Phosphite.”

48. “Foliar Phosphite” is a “pesticide” as that term is defined in Section 2(u) of FIFRA.

49. The advertisement collected during the August 2022 inspection was placed by Respondent in the August 2022 issue of the publication *Badger Common ‘Tater*.

50. The August 2022 advertisement included the following statement:

Foliar Phosphite / Many studies have examined and confirmed the efficacy of phosphite for control of pink rot, late blight, and other potato diseases including silver scurf, early blight, and Verticillium wilt.

51. On or about December 1, 2022, an inspector employed by EPA and authorized to conduct inspections under FIFRA accessed the website of the publication *Badger Common ‘Tater* at <https://wisconsinpotatoes.com/badger-commontater/> and observed the Foliar Phosphite advertisement placed by Respondent in a July 2022 issue.

52. The advertisement Respondent placed in the July 2022 issue of *Badger Common ‘Tater* included the following statement:

Foliar Phosphite / Many studies have examined and confirmed the efficacy of phosphite for control of pink rot, late blight, and other potato diseases including silver scurf, early blight, and Verticillium wilt.

53. Customer shipping records for “Foliar Phosphite” were collected during the inspection.

54. On or about July and August 2022, “Foliar Phosphite” was not registered as a pesticide under Section 3 of FIFRA, 7 U.S.C. § 136a.

55. On or about July 7, 2022, Respondent distributed or sold “Foliar Phosphite” to Pendleton Turf & Pond of Waterford, Wisconsin.

56. On or about July 14, 2022, Respondent distributed or sold “Foliar Phosphite” to Gertens of Inver Grove Heights, Minnesota.

57. On or about July 15, 2022, Respondent distributed or sold “Foliar Phosphite” to Pendleton Turf & Pond of Waterford, Wisconsin.

58. On or about July 19, 2022, Respondent distributed or sold “Foliar Phosphite” to DHD Turf Products, LLC of Juneau, Wisconsin.

59. On or about July 26, 2022, Respondent distributed or sold “Foliar Phosphite” to Clesens of Lincolnshire, Illinois.

Count 1

60. Paragraphs 1 through 28 are incorporated by reference.

61. On or about May 5, 2022, Respondent distributed or sold an unregistered pesticide, “No Moss!”, to one of its customers.

62. Respondent’s distribution or sale of an unregistered pesticide, “No Moss!”, constitutes an unlawful act pursuant to Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A).

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

Counts 2 through 6

64. Paragraphs 1 through 21 and 29 through 39 are incorporated by reference.

65. On or about April 9, 2020, April 20, 2020, May 30, 2020, and April 28, 2021, Respondent distributed or sold an unregistered pesticide, "Potato Popper Protector," on five occasions to various customers.

66. Respondent's five distributions or sales of an unregistered pesticide, "Potato Popper Protector," constitutes five unlawful acts pursuant to Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A).

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

Counts 7 through 8

68. Paragraphs 1 through 21 and 40 through 47 are incorporated by reference.

69. On or about May 26, 2022, and August 1, 2022, Respondent distributed or sold an unregistered pesticide, "Copper Sulphate," to two of its customers.

70. Respondent's two distributions or sales of an unregistered pesticide, "Copper Sulphate," constitutes two unlawful acts pursuant to Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A).

71. Respondent's violation of Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), subjects the 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).

Counts 9 through 13

72. Paragraphs 1 through 21 and 48 through 60 are incorporated by reference.

73. On or about July 7, 2022, July 14, 2022, July 15, 2022, July 19, 2022, and July 26, 2022, Respondent distributed or sold an unregistered pesticide, "Foliar Phosphite," to five of its customers.

74. Respondent's five distributions or sales of an unregistered pesticide, "Foliar Phosphite," constitutes five unlawful acts pursuant to Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A).

75. Respondent's violation of Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), subjects the 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 and Other Relief

76. 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 \$89,840. In determining the penalty amount, Complainant considered the appropriateness of the penalty to the size of Respondents' business and the effect on Respondents' ability to continue in business. Complainant also considered EPA's FIFRA Enforcement Response Policy, dated December 2009.

77. Within 30 days after the effective date of this CAFO, Respondents must pay a \$89,840 civil penalty for the FIFRA violations. Respondents must pay the penalty by

sending a cashier's or certified check, payable to "Treasurer, United States of America," to:

U.S. EPA
Fines and Penalties
Cincinnati Finance Center
Post Office Box 979078
St. Louis, Missouri 63197-9000

[for checks sent by express mail] sending a cashier's or certified check, payable to "Treasurer, United States of America," to:

U.S. Bank
Government Lockbox 979078
U.S. EPA Fines and Penalties
1005 Convention Plaza
Mail Station SL-MO-C2-GL
St. Louis, Missouri 63101

The check must note Jay-Mar's name and the docket number of this CAFO.

78. Respondents must send a notice of payment that states Respondents' name and the case docket number to EPA at the following addresses when it pays the penalty:

Regional Hearing Clerk (E-19J)
U.S. EPA, Region 5
77 W. Jackson Blvd.
Chicago, IL 60604
r5hearingclerk@epa.gov

Cynthia King (C-14J)
U.S. EPA, Region 5
77 W. Jackson Blvd.
Chicago, IL 60604
king.cynthia@epa.gov

Claudia Niess (ECP-17J)
U.S. EPA, Region 5
77 W. Jackson Blvd.
Chicago, IL 60604
niess.claudia@epa.gov

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

80. If Respondent does not pay the civil penalty in a timely manner, 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.

81. 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

82. The parties consent to service of this CAFO by e-mail at the following valid e-mail addresses: Cynthia King at king.cynthia@epa.gov (for Complainant), Tony Grapsas at tonyg@jay-mar.com (for Respondent). Respondent understands that the CAFO will become publicly available upon filing.

83. The Respondent's full compliance with this CAFO resolves only Respondent's liability for federal civil penalties for the violations alleged in the CAFO.

84. This CAFO does not 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.

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

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

87. This CAFO is a “final order” for purposes of EPA’s Enforcement Response Policy for FIFRA.

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

89. 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.

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

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

Jay-Mar, Inc., Respondent

7/24/2023
Date



Tony Graspas
President
Graspas
F.G.
7/29/23

United States Environmental Protection Agency, Complainant

Date

Michael D. Harris
Director
Enforcement and Compliance Assurance Division

**In the Matter of:
Jay-Mar, Inc.
Docket No. FIFRA-05-2023-0016**

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

Ann L. Coyle
Regional Judicial Officer
United States Environmental Protection Agency
Region 5