



EPA's Findings of Fact and Conclusions of Law

8. In accordance with the Consolidated Rules of Practice at Sections 22.13(b) and .18(b)(2) and (3), Complainant alleges the following findings of fact and conclusions of law:
9. Section 2(s) of FIFRA, 7 U.S.C. § 136(s), defines “person” to mean any individual, partnership, association, corporation, or any organized group of persons whether incorporated or not.
10. Respondent is an individual who resides at 3817 5<sup>th</sup> Avenue in Altoona, Pennsylvania.
11. Respondent is a “person” as defined in Section 2(s) of FIFRA, 7 U.S.C. § 136(s).
12. Section 2(u) of FIFRA, 7 U.S.C. § 136(u), and 40 C.F.R. § 152.3 define “pesticide”, in pertinent part, to mean any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest.
13. 40 C.F.R. § 152.3 defines “pesticide product”, in pertinent part, to mean a pesticide in the particular form (including composition, packaging, and labeling) in which the pesticide is, or is intended to be, distributed or sold.
14. Pursuant to 40 C.F.R. § 152.15, 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, or has actual or constructive knowledge that the substance will be used, or is intended to be used, for a pesticidal purpose.
15. Section 2(t) of FIFRA, 7 U.S.C. § 136(t), defines “pest” to mean 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 (except viruses, bacteria, or other micro-organisms on or in living man or other living animals) which the Administrator declares to be a pest under Section 25(c)(1) of FIFRA, 7 U.S.C. § 136w(c)(1).
16. From January 2008 through the summer 2009, Respondent offered for sale kits by the name of *Advantage Flea Killer* and *Flea Eliminator* from his residence in Altoona, Pennsylvania.
17. The statements “Flea Killer” and “Flea Eliminator” on the respective kit labeling are pesticidal claims.
18. Respondent’s *Advantage Flea Killer/Flea Eliminator* kits are “pesticide[s]” and “pesticide product[s]” as those terms are defined by Section 2(u) of FIFRA, 7 U.S.C. § 136(u), and 40 C.F.R. § 152.3.

19. Section 2(w) of FIFRA, 7 U.S.C. § 136(w), and 40 C.F.R. §167.3, define “produce”, in pertinent part, to mean to manufacture, prepare, propagate, compound, or process any pesticide, or to package, repackage, label, relabel or otherwise change the container of any pesticide.

20. Section 2(w) of FIFRA, 7 U.S.C. § 136(w), and 40 C.F.R. §167.3, define “producer”, in pertinent part, to mean any person who produces any pesticide (including packaging, repackaging, labeling and relabeling).

21. 40 C.F.R. §167.3 defines “establishment”, in pertinent part, to mean any site where a pesticide product is produced.

22. Respondent made his *Advantage Flea Killer/Flea Eliminator* kits by purchasing foreign produced Bayer Advantage pesticide products through an international website distributor, and repackaging them and relabeling them from his home in Altoona, Pennsylvania.

23. By repackaging and relabeling foreign produced Bayer Advantage pesticide products, and subsequently offering to sell them as *Advantage Flea Killer/Flea Eliminator* kits, Respondent “produced”, and is a “producer” of, a pesticide, as those terms are defined by Section 2(w) of FIFRA, 7 U.S.C. § 136(w), and 40 C.F.R. §167.3.

24. With respect to the production *Advantage Flea Killer/Flea Eliminator* kits, Respondent’s residence located at 3817 5<sup>th</sup> Avenue in Altoona, Pennsylvania was an “establishment” as that term is defined by 40 C.F.R 167.3.

25. Pursuant to Section 12(a)(2)(L) of FIFRA, 7 U.S.C § 136j(a)(2)(L), it shall be unlawful for any person who is a producer to violate any of the provisions of Section 7 of FIFRA, 7 U.S.C § 136e.

26. Pursuant to Section 7(a) of FIFRA, 7 U.S.C § 136e(a), “[n]o person shall produce any pesticide. . . in any State unless the establishment in which it is produced is registered with [EPA].”

27. At all times relevant to the violations alleged herein, Respondent’s residence located at 3817 5<sup>th</sup> Avenue in Altoona, Pennsylvania was not registered with EPA as a pesticide producing establishment.

28. By producing a pesticide at an establishment not registered pursuant to Section 7(a) of FIFRA, 7 U.S.C § 136e(a), Respondent violated that section, constituting an unlawful act under Section 12(a)(2)(L) of FIFRA, 7 U.S.C § 136j(a)(2)(L).

29. Pursuant to Section 12(a)(1)(A) of FIFRA, 7 U.S.C § 136j(a)(1)(A), it shall be 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.

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

31. At all times relevant to the violations alleged herein, Respondent's *Advantage Flea Killer/Flea Eliminator* kits were not registered with EPA, pursuant to Section 3 of FIFRA, 7 U.S.C. § 136a, and had never been so registered.

32. Section 2(gg) of FIFRA, 7 U.S.C § 136(gg), provides, in pertinent part, that 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.

33. From January 2008 through the summer 2009, Respondent offered to sell its *Advantage Flea Killer/Flea Eliminator* kits through eBay®.

34. Respondent's "distributions or sales" of the unregistered *Advantage Flea Killer/Flea Eliminator* kits constitute unlawful acts under Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), for which penalties may be assessed pursuant to Section 14(a) of FIFRA, 7 U.S.C. § 136l(a).

35. Respondent is a "distributor" or "retailer" subject to the assessment of a civil penalty under Section 14(a)(1) of FIFRA, 7 U.S.C. § 136l(a)(1).

#### Civil Penalty

36. Respondent consents to the assessment of a civil penalty in the amount of ONE THOUSAND THREE HUNDRED AND SIXTY DOLLARS (\$1,360.00) which Respondent agrees to pay in accordance with the terms set forth below. Such civil penalty amount shall become due and payable immediately upon the mailing or hand-delivery to Respondent of a true and correct copy of this CAFO fully executed by all parties, subject to Paragraph 38 below.

37. Complainant finds the aforesaid settlement amount is reasonable based on consideration of a number of factors, including, but not limited to, the statutory factors set forth in Section 14(a)(4) of FIFRA, 7 U.S.C. § 136l(a)(4), which include 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, and is consistent with EPA's December 2009 *Enforcement Response Policy Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)* ("FIFRA ERP").

38. The civil penalty of one thousand three hundred and sixty dollars (\$1,360.00) set forth in Paragraph 36, above, may be paid in twelve (12) installments with interest at the rate of one percent (1%) per annum on the outstanding principal balance in accordance with the following schedule:

- a. 1<sup>st</sup> Payment: The first payment in the amount of one hundred and thirteen dollars and thirty-three cents (\$113.33), consisting of a principal

- payment of \$113.33 and an interest payment of \$0.00, shall be paid within thirty (30) days of the date on which this CAFO is mailed or hand-delivered to Respondent;
- b. 2<sup>nd</sup> Payment: The second payment in the amount of one hundred and fourteen dollars and thirty-five cents (\$114.35), consisting of a principal payment of \$113.33 and an interest payment of \$1.02, shall be paid within sixty (60) days of the date on which this CAFO is mailed or hand-delivered to Respondent;
- c. 3<sup>rd</sup> Payment: The third payment in the amount of one hundred and fourteen dollars and twenty-six cents (\$114.26), consisting of a principal payment of \$113.33 and an interest payment of \$0.93, shall be paid within ninety (90) days of the date on which this CAFO is mailed or hand-delivered to Respondent;
- d. 4<sup>th</sup> Payment: The fourth payment in the amount of one hundred and fourteen dollars and seventeen cents (\$114.17), consisting of a principal payment of \$113.33 and an interest payment of \$0.84, shall be paid within one hundred and twenty (120) days of the date on which this CAFO is mailed or hand-delivered to Respondent;
- e. 5<sup>th</sup> Payment: The fifth payment in the amount of one hundred and fourteen dollars and eight cents (\$114.08), consisting of a principal payment of \$113.33 and an interest payment of \$0.75, shall be paid within one hundred and fifty (150) days of the date on which this CAFO is mailed or hand-delivered to Respondent;
- f. 6<sup>th</sup> Payment: The sixth payment in the amount of one hundred and thirteen dollars and ninety-eight cents (\$113.98), consisting of a principal payment of \$113.33 and an interest payment of \$0.65, shall be paid within one hundred and eighty (180) days of the date on which this CAFO is mailed or hand-delivered to Respondent;
- g. 7<sup>th</sup> Payment: The seventh payment in the amount of one hundred and thirteen dollars and eighty-nine cents (\$113.89), consisting of a principal payment of \$113.33 and an interest payment of \$0.56, shall be paid within two hundred and ten (210) days of the date on which this CAFO is mailed or hand-delivered to Respondent;
- h. 8<sup>th</sup> Payment: The eighth payment in the amount of one hundred and thirteen dollars and eighty cents (\$113.80), consisting of a principal payment of \$113.33 and an interest payment of \$0.47, shall be paid within two hundred and forty (240) days of the date on which this CAFO is mailed or hand-delivered to Respondent;
- i. 9<sup>th</sup> Payment: The ninth payment in the amount of one hundred and thirteen dollars and seventy cents (\$113.70), consisting of a principal payment of \$113.33 and an interest payment of \$0.37, shall be paid within two hundred and seventy (270) days of the date on which this CAFO is mailed or hand-delivered to Respondent;
- j. 10<sup>th</sup> Payment: The tenth payment in the amount of one hundred and thirteen dollars and sixty-one cents (\$113.61), consisting of a principal

payment of \$113.33 and an interest payment of \$0.28, shall be paid within three hundred (300) days of the date on which this CAFO is mailed or hand-delivered to Respondent;

- k. 11<sup>th</sup> Payment: The eleventh payment in the amount of one hundred and thirteen dollars and fifty-two cents (\$113.52), consisting of a principal payment of \$113.33 and an interest payment of \$0.19, shall be paid within three hundred and thirty (330) days of the date on which this CAFO is mailed or hand-delivered to Respondent;
- l. 12<sup>th</sup> Payment: The twelfth payment in the amount of one hundred and thirteen dollars and forty-six cents (\$113.46), consisting of a principal payment of \$113.37 and an interest payment of \$0.09, shall be paid within three hundred and sixty (360) days of the date on which this CAFO is mailed or hand-delivered to Respondent.

Pursuant to the above schedule, Respondent will remit total principal payments for the civil penalty in the amount of one thousand three hundred and sixty dollars (\$1,360.00) and total interest payments in the amount of one six dollars and fifteen cents (\$6.15).

39. If Respondent fails to make one of the installment payments in accordance with the schedule set forth in Paragraph 38, above, the entire unpaid balance of the penalty and all accrued interest shall become due immediately upon such failure, and Respondent shall *immediately* pay the entire remaining principal balance of the civil penalty along with any interest that has accrued up to the time of such payment. In addition, Respondent shall be liable for and shall pay administrative handling charges and late payment penalty charges as described in Paragraphs 44, 45 and 46, below, in the event of any such failure or default.

40. Notwithstanding Respondent's agreement to pay the assessed civil penalty in accordance with the installment schedule set forth in Paragraph 38, above, Respondent may pay the entire civil penalty of one thousand three hundred and sixty dollars (\$1,360.00) within thirty (30) calendar days after the date on which a copy of this Consent Agreement and Final Order is mailed or hand-delivered to Respondent and, thereby, avoid the payment of interest pursuant to 40 C.F.R. § 13.11(a) as described in Paragraph 44, below. In addition, Respondent may, at any time after commencement of payments under the installment schedule, elect to pay the entire principal balance, together with accrued interest to the date of such full payment.

41. Respondent shall remit each installment payment for the civil penalty and interest, pursuant to Paragraph 38, above, and/or the full penalty, pursuant to Paragraphs 39 or 40, above, and/or any administrative fees and late payment penalties, in accordance with Paragraphs 44, 45, and 46, below, by either cashier's check, certified check, or electronic wire transfer, in the following manner:

- a. All payments by the Respondent shall include Respondent's full name and address and the EPA Docket Number of this Consent Agreement, Docket No.: FIFRA-03-2010-0317.

- b. All checks shall be made payable to **“United States Treasury”**;
- c. All payments made by check and sent by regular mail shall be addressed to:  
U.S. Environmental Protection Agency  
Fines and Penalties  
Cincinnati Finance Center  
PO Box 979077  
St. Louis, MO 63197-9000  
  
Contact: Eric Volck 513-487-2105
- d. All payments made by check and sent by overnight delivery service shall be addressed for delivery to:  
  
U.S. Bank  
Government Lockbox 979077  
U.S. EPA Fines & Penalties  
1005 Convention Plaza  
Mail Station SL-MO-C2GL  
St. Louis, MO 63101  
  
Contact 314-418-1028
- e. All payments made by check in any currency drawn on banks with no USA branches shall be addressed for delivery to:  
  
Cincinnati Finance  
U.S. EPA, MS-NWD  
26 W. M.L. King Drive  
Cincinnati, OH 45268-0001
- f. All payments by electronic funds transfer (“EFT”) shall be directed to:  
Federal Reserve Bank of New York  
ABA No. 021030004  
Account No. 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”

- g. All payments made through the automatic clearinghouse ("ACH"), also known as Remittance Express ("REX"), shall be directed to:

U.S. Treasury REX/Cashlink ACH Receiver  
ABA No. 051036706  
Account 310006, Environmental Protection Agency  
CTX Format Transaction Code 22 – checking

Physical Location of U.S. Treasury facility:  
5700 Rivertech Court  
Riverdale, MD 20737

*Contact, Jesse White, 301-887-6548 or REX, 1-866-234-5681*

- h. On-line Payment Option:  
[WWW.PAY.GOV/PAYGOV](http://WWW.PAY.GOV/PAYGOV)  
Enter "sfo 1.1" in the search field. Open and complete the form.
- i. Additional payment guidance is available at:  
[http://www.epa.gov/ocfo/finservices/make\\_a\\_payment.htm](http://www.epa.gov/ocfo/finservices/make_a_payment.htm)

42. At the time of payment, Respondent shall send notices of such payment, including a copy of the check, EFT authorization or ACH authorization, as appropriate to each of the following:

Lydia Guy  
Regional Hearing Clerk  
U.S. Environmental Protection Agency  
Region III (Mail Code 3RC00)  
1650 Arch Street  
Philadelphia, PA 19103-2029

and

Ralph Brogdon  
U.S. Environmental Protection Agency  
Region III (Mail Code 3LC62)  
1650 Arch Street  
Philadelphia, PA 19103-2029

43. Pursuant to 31 U.S.C. § 3717 and 40 C.F.R. § 13.11, EPA is entitled to assess interest and late payment penalties on outstanding debts owed to the United States and a charge to cover the costs of processing and handling a delinquent claim, as more fully described below. Accordingly, Respondent's failure to make timely payment as specified in this Consent Agreement and Final

Order shall result in the assessment of late payment charges including interest, penalties, and/or administrative costs of handling delinquent debts.

44. Interest on the civil penalty assessed in this CAFO will begin to accrue on the date that a copy of this CAFO is mailed or hand-delivered to Respondent. However, EPA will not seek to recover interest on any amount of the civil penalty that is paid within thirty (30) calendar days after the date on which such interest begins to accrue. Interest will be assessed at the rate of the United States Treasury tax and loan rate in accordance with 40 C.F.R. § 13.11(a).

45. The costs of the Agency's administrative handling of overdue debts will be charged and assessed monthly throughout the period the debt is overdue. 40 C.F.R. § 13.11(b). Pursuant to Appendix 2 of EPA's *Resources Management Directives - Cash Management*, Chapter 9, EPA will assess a \$15.00 administrative handling charge for administrative costs on unpaid penalties for the first thirty (30) day period after the payment is due and an additional \$15.00 for each subsequent thirty (30) days the penalty remains unpaid.

46. A late payment penalty charge of six percent per year will be assessed monthly on any portion of the civil penalty which remains delinquent more than ninety (90) calendar days. 40 C.F.R. § 13.11(c). Should assessment of the penalty charge on the debt be required, it shall accrue from the first day payment is delinquent. 31 C.F.R. § 901.9(d).

#### Certifications

47. Respondent certifies that he is currently in compliance with all applicable requirements of FIFRA, 7 U.S.C. §§ 136 *et seq.*

#### Other Applicable Laws

48. Nothing in this CAFO shall relieve Respondent of his obligation to comply with all applicable federal, state, and local laws and regulations.

#### Reservation of Rights

49. This CAFO resolves only EPA's civil claims for penalties for the specific violations of FIFRA alleged in this Consent Agreement. EPA reserves the right to commence action against any person, including Respondent, in response to any condition which EPA determines may present an imminent and substantial endangerment to the public health, public welfare, or the environment. In addition, this settlement is subject to all limitations on the scope of resolution and to the reservation of rights set forth in Section 22.18(c) of the Consolidated Rules of Practice. Further, EPA reserves any rights and remedies available to it under FIFRA, the regulations promulgated there under, and any other Federal laws or regulations for which EPA has jurisdiction, to enforce the provisions of this CAFO, following its filing with the Regional Hearing Clerk.

Full and Final Satisfaction

50. This settlement shall constitute full and final satisfaction of all civil claims for penalties which Complainant may have under Section 14(a) of FIFRA, 7 U.S.C. § 136l(a), for the specific violations alleged in this CAFO. Compliance with this CAFO shall not be a defense to any action commenced at any time for any other violation of the Federal laws and regulations administered by EPA.

Parties Bound

51. This CAFO shall apply to and be binding upon EPA, Respondent, and the successors and assigns of Respondent.

Effective Date

52. The effective date of this CAFO is the date on which the Final Order, signed by the Regional Administrator of EPA -- Region III, or his designee, the Regional Judicial Officer, is filed with the Regional Hearing Clerk pursuant to the Consolidated Rules of Practice.

Entire Agreement

53. This CAFO constitutes the entire agreement and understanding of the Parties concerning settlement of the action referenced in the caption above, and there are no representations, warranties, covenants, terms, or conditions agreed upon between the Parties other than those expressed herein.

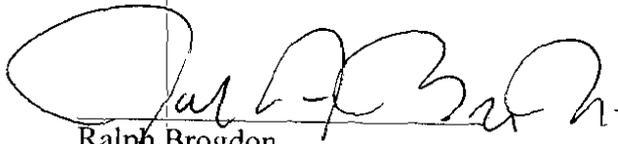
For Respondent:

June 21 2010  
Date

  
Michael Dively

For Complainant:

6/29/2010  
Date

  
Ralph Brogdon  
U.S. EPA, Region III

Accordingly, I hereby recommend that the Regional Administrator or his designee issue the Final Order attached hereto.

6/29/10  
Date

  
Abraham Ferdas, Director  
Land and Chemicals Division



Hundred and Sixty Dollars (\$1,360.00), as set forth in the Consent Agreement, and to comply with the terms and conditions of the Consent Agreement.

The effective date of this document is the date on which it is filed with the Regional Hearing Clerk after signature by the Regional Administrator or Regional Judicial Officer.

Date: 6/29/10

  
Renée Sarajian  
Regional Judicial Officer  
U.S. EPA, Region III

BEFORE THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
Region III  
1650 Arch Street  
Philadelphia, Pennsylvania 19103-2029

IN THE MATTER OF: )

Michael Dively )  
3817 5<sup>th</sup> Avenue )  
Altoona, PA 16602 )  
Respondent. )

DOCKET NO: FIFRA-03-2010-0317

CERTIFICATE OF SERVICE

I certify that the foregoing CONSENT AGREEMENT AND FINAL ORDER in the above referenced matter was sent this day in the following manner to the below addressees.

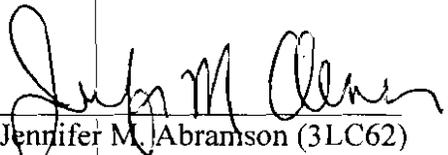
**Original and one copy by hand-delivery:**

Lydia Guy, Regional Hearing Clerk

**Copy by Certified Mail**

Mr. Michael Dively  
3817 5<sup>th</sup> Avenue  
Altoona, PA 16602

6/29/10  
Date

  
Jennifer M. Abramson (3LC62)  
Senior Assistant Regional Counsel  
U.S. EPA, Region III

