

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**REGION 4**

In the Matter of:

PetSmart Home Office, Inc.

Respondent.

Docket No. **FIFRA-04-2023-0706(b)**

CONSENT AGREEMENT**I. NATURE OF ACTION**

1. This is an administrative penalty assessment proceeding brought 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 Sections 22.13(b) and 22.18 of the *Consolidated Rules of Practice Governing Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits* (Consolidated Rules), as codified at Title 40 of the Code of Federal Regulations (C.F.R.) Part 22.
2. This Consent Agreement and the attached Final Order shall collectively be referred to as the CAFO.
3. Having found that settlement is consistent with the provisions of FIFRA and applicable regulations, the Parties have agreed to settle this action pursuant to 40 C.F.R. § 22.18 and consent to the entry of this CAFO without adjudication of any issues of law or fact herein.

II. PARTIES

4. Complainant is the Director of the Enforcement and Compliance Assurance Division, who has been delegated the authority on behalf of the Administrator of the United States Environmental Protection Agency (EPA) to enter into this CAFO pursuant to 40 C.F.R. Part 22 and Section 14(a) of FIFRA, 7 U.S.C. § 136l(a).
5. Respondent is PetSmart Home Office, Inc. (PetSmart), a corporation organized under the laws of Delaware with its principal place of business in Arizona. This proceeding pertains to Respondent's importation of pesticide products through the Port of Savannah, Georgia.

III. GOVERNING LAW

6. The term “person” is defined in Section 2(s) of FIFRA, 7 U.S.C. § 136(s), to mean any individual, partnership, association, corporation, or any organized group of persons whether incorporated or not.
7. Pursuant to Section 12(a)(1)(F) of FIFRA, 7 U.S.C. § 136j(a)(1)(F), it is unlawful for any person to distribute or sell to any person any device that is misbranded.
8. Pursuant to Section 12(a)(2)(N) of FIFRA, 7 U.S.C. § 136j(a)(2)(N), it is unlawful for any person who is a registrant, wholesaler, dealer, retailer, or other distributor to fail to file reports required by FIFRA.
9. The term “pest” is defined in Section 2(t) of FIFRA, 7 U.S.C. § 136(t), as 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 microorganisms 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).
10. The term “device” is defined in Section 2(h) of FIFRA, 7 U.S.C. § 136(h), as “any instrument or contrivance (other than a firearm) which is intended for trapping, destroying, repelling, or mitigating any pest or any other form of plant or animal life (other than man and other than bacteria, virus, or other microorganism on or in living man or other living animals); but not including equipment used for the application of pesticides when sold separately therefrom.”
11. Pursuant to 40 C.F.R. § 152.500(b)(1), a device is subject to the requirements set forth in Section 2(q)(1) of FIFRA, 7 U.S.C. § 136(q)(1), and 40 C.F.R. Part 156, with respect to labeling.
12. Pursuant to Section 2(q)(1)(A) of FIFRA, 7 U.S.C. § 136(q)(1)(A), and 40 C.F.R. § 156.10(a)(5), devices declared subject to the Act pursuant to 40 C.F.R. § 152.500 are considered misbranded if their labeling is false or misleading in any particular, including both pesticidal and non-pesticidal claims.
13. The term “label” is defined in Section 2(p) of FIFRA, 7 U.S.C. § 136(p), to mean “the written, printed, or graphic matter on, or attached to, the pesticide or device or any of its containers or wrappers;” and defines “labeling” as “all labels and all other written, printed, or graphic matter (a) accompanying the pesticide or device at any time; or (b) to which reference is made on the label or in literature accompanying the pesticide or device”.
14. The term “to distribute or sell” is defined in Section 2(gg) of FIFRA, 7 U.S.C. § 136(gg), to mean to distribute, sell, offer for sale, hold for distribution, hold for sale, hold for shipment, ship, deliver for shipment, or to release for shipment.
15. Pursuant to Section 17(c) FIFRA, 7 U.S.C. § 136o(c), and 19 C.F.R. § 12.112, an importer (or its agent) desiring to import pesticides or pesticide devices into the United States is required to submit to the EPA Administrator a Notice of Arrival of Pesticides and Devices (NOA) [EPA Form 3540-1] prior to the arrival of the shipment(s) into the United States. In the alternative, the importer (or its agent) may file an electronic alternative to the NOA, with the filing of the entry documentation, via any U.S. Customs and Border Protection (CBP) – authorized electronic data interchange system. CBP utilizes the Automated Commercial Environment Data Processing System (ACE) for

tracking imports of materials, merchandise, goods, and products into the United States.

16. Civil penalties under Section 14(a) of FIFRA, 7 U.S.C. § 136l(a), may be assessed by administrative order.

IV. FINDINGS OF FACTS

17. Respondent is a “person” as defined in Section 2(s) of FIFRA, 7 U.S.C. § 136(s), and as such is subject to FIFRA and the regulations promulgated thereunder.
18. On October 24, 2020 and December 14, 2020, FedEx Trade Networks Transportation and Brokerage (hereinafter, “FedEx”), the licensed customs broker for PetSmart, filed entry numbers 799-93975505 and 799-01118462, respectively, in ACE on behalf of PetSmart for the importation of the following products: 2,076 units of Green Killing Machine 9W (“GKM-9W”); 432 replacement UV-C bulbs for the GKM-9W; 672 units of Green Killing Machine 24W (“GKM-24W”); and 48 replacement UV-C bulbs for the GKM-24W.
19. The products made entry through the Port of Savannah, Georgia. After which the products were further transported and distributed to PetSmart’s distribution center, located at 570 International Park, Newnan, Georgia, where they were held for sale and further distribution.
20. On October 26, 2020, the EPA reviewed the ACE entries and noticed the products appeared to be pesticide devices.
21. On October 26, 2020, the EPA sent FedEx an email notifying FedEx that the products appeared to be potentially regulated as pesticide devices and requested copies of the labels affixed to the devices for EPA’s review.
22. On October 28, 2020, PetSmart submitted to the EPA copies of labels and labeling for the GKM-9W, GKM-24W, replacement UV-C bulbs for the GKM-9W, and replacement UV-C bulbs for the GKM-24W.
23. Based on the pesticidal claims appearing on the labels and in labeling for the products, the EPA confirmed that the products were pesticide devices subject to regulation under FIFRA.
24. Neither FedEx nor Respondent submitted NOAs to the EPA prior to the arrival of the shipments, or filed an electronic equivalent in ACE, in connection with the imported devices as required by Section 17(c) of FIFRA and 19 C.F.R. § 12.112.
25. The EPA further determined that the GKM-9W and GKM-24W devices were misbranded due to false or misleading claims found on the retail boxes and in the product manuals. More specifically, packaging for the devices included claims such as “Internal UV sterilizer,” “eliminates bacteria,” and “without any chemicals.” The EPA considers claims of sterilization to mean that the subject devices will destroy or eliminate all forms of microbial life in the inanimate environment, including all forms of vegetative bacteria, bacterial spores, fungi, fungal spores, and viruses.
26. In the GKM-9W and GKM-24W device manuals, written in French, the following claim appeared: “Pour les grands aquariums (plus de 200 L pour le dispositif de 9W et plus de 450 L pour le dispositif de 24W) un seul stérilisateur peut être insuffisant.” English translation: “For large aquariums (more than 200 L for the 9W device and more than 450 L for the 24W device) a single sterilizer may be insufficient.” In a “Device Determination” issued by the EPA on January 30,

2020, to AA Aquariums, the manufacturer of the GKM-9W and GKM-24W devices, the EPA stated that “[t]he Agency does not believe that sterilization is achievable, or even desirable, in an occupied aquarium” as a fish aquarium must have microbial life to sustain the life of the fish. As such, in accordance with 40 C.F.R. § 156.10(a)(5)(ii), the claim that the GKM-9W and GKM-24W sterilize aquariums is a false or misleading claim regarding the efficacy of the GKM-9W and GKM-24W.

27. The claim on the packaging and in the manuals for the GKM-9W and GKM-24W devices that they operate “without any chemicals” is considered false and misleading under 40 C.F.R. § 156.10(a)(5)(vii) because although it may be true that the devices do not contain chemicals, it is presented in such a way as to give a false or misleading impression to the purchaser that the product is less risky, better or more desirable than a product containing a chemical ingredient.

V. ALLEGED VIOLATIONS

28. The EPA alleges that Respondent violated Section 12(a)(1)(F) of FIFRA, 7 U.S.C. § 136j(a)(1)(F), by distributing and selling (by holding for sale) misbranded pesticide devices as described in paragraphs 23-25.
29. The EPA alleges that Respondent violated Section 12(a)(2)(N) of FIFRA, 7 U.S.C. § 136j(a)(2)(N), by failing to submit completed NOAs prior to the arrival of the shipments of devices in the United States or filing electronic alternatives to the NOAs in ACE with the filing of entry documentation, in violation of 19 C.F.R. § 12.112 and Section 17(c) of FIFRA.
30. Section 14(a) of FIFRA, 7 U.S.C. § 136l(a), in conjunction with 40 C.F.R. Part 19, Adjustments of Civil Monetary Penalties for Inflation, authorizes the assessment of a civil penalty for the violations alleged above.

VI. STIPULATIONS

31. The issuance of this CAFO simultaneously commences and concludes this proceeding. 40 C.F.R. § 22.13(b).
32. For the purpose of this proceeding, as required by 40 C.F.R. § 22.18(b)(2), Respondent:
- (a) admits that the EPA has jurisdiction over the subject matter alleged in this CAFO;
 - (b) neither admits nor denies the factual allegations set forth in Section IV (Findings of Facts) of this CAFO;
 - (c) consents to the assessment of a civil penalty as stated below;
 - (d) consents to the conditions specified in this CAFO;
 - (e) waives any right to contest the alleged violations of law set forth in Section V (Alleged Violations) of this CAFO; and
 - (f) waives its rights to appeal the Final Order accompanying this CAFO.
33. For the purpose of this proceeding, Respondent:

- (a) agrees that this CAFO states a claim upon which relief may be granted against Respondent;
- (b) acknowledges that this CAFO constitutes an enforcement action for purposes of considering Respondent's compliance history in any subsequent enforcement actions;
- (c) waives any right it may possess at law or in equity to challenge the authority of the EPA to bring a civil action in a United States District Court to compel compliance with the CAFO, and to seek an additional penalty for such noncompliance, and agrees that federal law shall govern in any such civil action;
- (d) by executing this CAFO, certifies to the best of its knowledge that Respondent is currently in compliance with all relevant requirements of FIFRA and its implementing regulations, and that all violations alleged herein, which are neither admitted nor denied, have been corrected;
- (e) waives any right it may have pursuant to 40 C.F.R. § 22.8 to be present during any discussions with, or to be served with and reply to, any memorandum or communication addressed to EPA officials where the purpose of such discussion, memorandum, or communication is to persuade such official to accept or issue this CAFO; and
- (f) agrees to comply with the terms of this CAFO.

34. In accordance with 40 C.F.R. § 22.5, the individuals named in the certificate of service are authorized to receive service related to this proceeding and the Parties agree to receive service by electronic means.

VII. TERMS OF PAYMENT

35. Respondent consents to the payment of a civil penalty, which was calculated in accordance with the Act, in the amount of **THIRTY THOUSAND DOLLARS (\$30,000)**, which is to be paid within thirty (30) days of the Effective Date of this CAFO.
36. Payment(s) shall be made by cashier's check, certified check, by electronic funds transfer (EFT), or by Automated Clearing House (ACH) (also known as REX or remittance express). If paying by check, the check shall be payable to: Treasurer, United States of America, and the Facility name and docket number for this matter shall be referenced on the face of the check. If Respondent sends payment by the U.S. Postal Service, the payment shall be addressed to:

United States Environmental Protection Agency
P.O. Box 979078
St. Louis, Missouri 63197-9000

If Respondent sends payment by non-U.S. Postal express mail delivery, the payment shall be sent to:

United States Environmental Protection Agency
Government Lockbox 979078
1005 Convention Plaza
SL-MO-C2-GL
St. Louis, Missouri 63101

If paying by EFT, Respondent shall transfer the payment to:

Federal Reserve Bank of New York
ABA: 021030004
Account Number: 68010727
SWIFT address: FRNYUS33
33 Liberty Street
New York, New York 10045
Beneficiary: Environmental Protection Agency”

If paying by ACH, Respondent shall remit payment to:

US Treasury REX / Cashlink ACH Receiver
ABA: 051036706
Account Number: 310006, Environmental Protection Agency
CTX Format Transaction Code 22 – checking
Physical location of US Treasury facility:
5700 Rivertech Court
Riverdale, Maryland 20737
REX (Remittance Express): 1-866-234-5681

37. Respondent shall send proof of payment, within twenty-four (24) hours of payment of the civil penalty, to:

Regional Hearing Clerk
R4_Regional_Hearing_Clerk@epa.gov

and

Andrea Lopez
Enforcement and Compliance Assurance Division
Chemical Safety and Land Enforcement Branch
lopez.andrea@epa.gov

38. “Proof of payment” means, as applicable, a copy of the check, confirmation of credit card or debit card payment, confirmation of wire or automated clearinghouse transfer, and any other information required to demonstrate that payment has been made according to the EPA requirements, in the amount due, and identified with the Respondent’s name and Docket No. **FIFRA-04-2023-0706(b)**.
39. Pursuant to 31 U.S.C. § 3717, 31 C.F.R. § 901.9, and 40 C.F.R. § 13.11, if Respondent fails to remit the civil penalty as agreed to herein, the EPA is entitled to assess interest and penalties on debts owed to the United States and a charge to cover the costs of processing and handling the delinquent claim. Accordingly, the EPA may require Respondent to pay the following amounts on any amount overdue:
- (a) **Interest.** Interest will begin to accrue on the civil penalty from the Effective Date of this CAFO. If the civil penalty is paid within thirty (30) days of the Effective Date of this CAFO, interest is waived. However, if the civil penalty is not paid in full within thirty (30) days of the Effective Date of this CAFO, interest will continue to accrue on

any unpaid portion until the unpaid portion of the penalty and accrued interest is paid. Interest will be assessed at the rate of the United States Treasury tax and loan rate, as established by the Secretary of the Treasury, in accordance with 31 U.S.C. § 3717(a)(1), 31 C.F.R. § 901.9(b), and 40 C.F.R. § 13.11(a).

- (b) **Non-Payment Penalty.** On any portion of a civil penalty more than ninety (90) days past due, Respondent must pay a non-payment penalty of not more than six percent (6%) per annum, which will accrue from the date the penalty payment became due and is not paid, as provided in 31 U.S.C. § 3717(e)(2) and 31 C.F.R. § 901.9(d). This non-payment penalty is in addition to charges which accrue or may accrue under subparagraphs (a) and (c) and will be assessed monthly. 40 C.F.R. § 13.11(c).
- (c) **Monthly Handling Charge.** Respondent must pay a late payment handling charge to cover the administrative costs of processing and handling the delinquent claim, based on either actual or average cost incurred. 31 C.F.R. § 901.9(c) and 40 C.F.R. § 13.11(b). Administrative costs will be assessed monthly throughout the period the debt is overdue except as provided by 40 C.F.R. § 13.12.

40. If Respondent fails to timely pay any portion of the penalty assessed under this CAFO, pursuant to Section 14(a)(5) of FIFRA 7 U.S.C. § 136l(a)(5), the EPA may:

- (a) refer the debt to a credit reporting agency or a collection agency pursuant to Section 14(a) of FIFRA, 7 U.S.C. § 136l(a) (*see* 40 C.F.R. §§ 13.13 and 13.14);
- (b) collect the debt by administrative offset (i.e., the withholding of money payable by the United States to, or held by the United States for, a person to satisfy the debt the person owes the Government), which includes, but is not limited to, referral to the Internal Revenue Service for offset against income tax refunds (*see* 40 C.F.R. Part 13, Subparts C and H);
- (c) suspend or revoke Respondent's licenses or other privileges, or suspend or disqualify Respondent from doing business with the EPA or engaging in programs the EPA sponsors or funds (*see* 40 C.F.R. § 13.17); and/or
- (d) request that the Attorney General bring a civil action in the appropriate district court to recover the amount assessed pursuant to Section 14(a)(5) of FIFRA, 7 U.S.C. § 136l(a)(5).

41. Penalties paid pursuant to this CAFO shall not be deductible for purposes of federal taxes.

VIII. EFFECT OF CAFO

- 42. In accordance with 40 C.F.R. § 22.18(c), Respondent's full compliance with this CAFO shall only resolve Respondent's liability for federal civil penalties for the violations and facts specifically alleged above.
- 43. In accordance with 40 C.F.R. § 22.18(c), full payment of the civil penalty, as provided in Section VII (Terms of Payment) shall satisfy the requirements of this CAFO; but shall not in any case affect the right of the EPA or the United States to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law.

44. Any violation of this CAFO may result in a civil judicial action for civil penalties as provided in Section 14(a) of the Act, 42 U.S.C. § 136l(a), as well as criminal sanctions as provided in Section 14(b) of the Act, 42 U.S.C. § 136l(b). The EPA may use any information submitted under this CAFO in an administrative, civil judicial, or criminal action.
45. Nothing in this CAFO shall relieve Respondent of the duty to comply with all applicable provisions of FIFRA and other federal, state, or local laws or statutes, nor shall it restrict the EPA's authority to seek compliance with any applicable laws or regulations, nor shall it be construed to be a ruling on, or determination of, any issue related to any federal, state, or local permit, except as expressly provided herein.
46. Nothing herein shall be construed to limit the power of the EPA to undertake any action against Respondent or any person in response to conditions that may present an imminent hazard as provided under the Act.
47. The terms, conditions, and compliance requirements of this CAFO may not be modified or amended except upon the written agreement of both Parties, and approval of the Regional Judicial Officer.
48. The provisions of this CAFO shall apply to and be binding upon Respondent and its successors and assigns. Respondent shall direct its officers, directors, employees, agents, trustees, and authorized representatives to comply with the provisions of this CAFO.
49. Any change in the legal status of Respondent, or change in ownership, partnership, corporate or legal status relating to the Respondent, will not in any way alter Respondent's obligations and responsibilities under this CAFO.
50. By signing this Consent Agreement, Respondent acknowledges that this CAFO will be available to the public and agrees that this CAFO does not contain any confidential business information or personally identifiable information.
51. By signing this Consent Agreement, the Complainant and the undersigned representative of Respondent each certify that he or she is fully authorized to execute and enter into the terms and conditions of this CAFO and has the legal capacity to bind the party he or she represents to this CAFO.
52. By signing this Consent Agreement, both Parties agree that each party's obligations under this CAFO constitute sufficient consideration for the other party's obligations.
53. By signing this Consent Agreement, Respondent certifies that the information it has supplied concerning this matter was at the time of submission, and continues to be, true, accurate, and complete for each such submission, response, and statement. Respondent acknowledges that there are significant penalties for submitting false or misleading information, including the possibility of fines and imprisonment for knowing submission of such information, under 18 U.S.C. § 1001.
54. The EPA also reserves the right to revoke this CAFO and settlement penalty if and to the extent that the EPA finds, after signing this CAFO, that any information provided by Respondent was materially false or inaccurate at the time such information was provided to the EPA. If such false or inaccurate material was provided, the EPA reserves the right to

assess and collect any and all civil penalties for any violation described herein. The EPA shall give Respondent notice of its intent to revoke, which shall not be effective until received by Respondent in writing.

55. It is the intent of the Parties that the provisions of this CAFO are severable. If any provision or authority of this CAFO or the application of this CAFO to any party or circumstances is held by any judicial or administrative authority to be invalid or unenforceable, the application of such provisions to other parties or circumstances and the remainder of the CAFO shall remain in force and shall not be affected thereby.
56. Unless specifically stated otherwise in this CAFO, each party shall bear its own attorney's fees, costs, and disbursements incurred in this proceeding.

IX. EFFECTIVE DATE

57. This CAFO shall become effective upon execution of the Final Order by the Regional Judicial Officer on the date of filing with the Regional Hearing Clerk.

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Complainant and Respondent will Each Sign on Separate Pages]

The foregoing Consent Agreement In the Matter of PetSmart Home Office, Inc., Docket Number FIFRA-04-2023-0706(b), Is Hereby Stipulated, Agreed, and Approved for Entry.

FOR RESPONDENT:

Signature  _____ Date 6/26/2023 _____

Printed Name: S. GARY SHULLAW _____

Title: DEPUTY GENERAL COUNSEL _____

Address: 19601 N 27th AVE _____
PHOENIX, AZ 85027 _____

The foregoing Consent Agreement In the Matter of **PetSmart Home Office, Inc.**, Docket Number **FIFRA-04-2023-0706(b)**, Is Hereby Stipulated, Agreed, and Approved for Entry.

FOR COMPLAINANT:

Larry L. Lamberth
Acting Director
Enforcement and Compliance Assurance Division
U.S. Environmental Protection Agency, Region 4

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 4

In the Matter of:

PetSmart Home Office, Inc.

Respondent.

Docket No. **FIFRA-04-2023-0706(b)**

FINAL ORDER

The Regional Judicial Officer is authorized to ratify this Consent Agreement which memorializes a settlement between Complainant and Respondent. 40 C.F.R. §§ 22.4(b) and 22.18(b)(3). The foregoing Consent Agreement is, therefore, hereby approved, ratified, and incorporated by reference into this Final Order in accordance with the *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits*, 40 C.F.R. Part 22.

The Respondent is hereby ORDERED to comply with all of the terms of the foregoing Consent Agreement effective immediately upon filing of this Consent Agreement and Final Order with the Regional Hearing Clerk. This Final Order disposes of this matter pursuant to 40 C.F.R. §§ 22.18 and 22.31.

BEING AGREED, IT IS SO ORDERED.

Tanya Floyd
Regional Judicial Officer

CERTIFICATE OF SERVICE

I certify that the foregoing Consent Agreement and Final Order, in the Matter of **PetSmart Home Office, Inc.**, Docket No. **FIFRA-04-2023-0706(b)**, were filed and copies of the same were emailed to the Parties as indicated below.

Via email to all Parties at the following email addresses:

To Respondent: Chris Bell
 Greenberg Traurig, LLP
 713-374-3556
 bellc@gtlaw.com

To EPA: Andrea Lopez
 Physical Scientist
 lopez.andrea@epa.gov

 Robert Caplan
 Senior Attorney
 caplan.robert@epa.gov

Shannon L. Richardson, Regional Hearing Clerk
r4_regional_hearing_clerk@epa.gov