

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 1 (NEW ENGLAND)

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In the Matter of:)
)
Exergen Corporation) Docket No. FIFRA-01-2012-0066
400 Pleasant Street)
Watertown, MA 02472,) **CONSENT AGREEMENT and**
) **FINAL ORDER**
)
Respondent.)
_____)

INTRODUCTION

1. The United States Environmental Protection Agency, Region 1 (“EPA”) as Complainant, and Exergen Corporation (“Exergen” or “Respondent”), as Respondent, enter into this Consent Agreement and Final Order (“CAFO”) by mutual consent.
2. Complainant and Respondent (collectively, the “Parties”) agree that settlement of this matter is in the public interest and that entry of this CAFO without further litigation is the most appropriate means of resolving this matter.
3. Therefore, before any hearing or the taking of any testimony, without adjudication of any issue of fact or law herein, the Parties agree to comply with the terms of this CAFO.

PRELIMINARY STATEMENT

4. On September 26, 2012, EPA filed a Complaint and initiated this proceeding for the assessment of a civil penalty pursuant to Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”), as amended, 7 U.S.C. § 136l(a).
5. The Complaint alleges that Respondent distributed or sold unregistered pesticide products, namely, “Temporal Scanner” infrared thermometers treated with silver ion antimicrobial compounds incorporated into the thermometer head (the “Products”), between

September 22, 2008 and September 21, 2010, in violation of Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), and regulations promulgated pursuant to FIFRA at 40 C.F.R. Part 152 *et seq.*

6. On November 2, 2012, Exergen filed an Answer to the Complaint in which it denied the violations alleged by EPA and requested a hearing pursuant to FIFRA and the Consolidated Rules of Practice at 40 C.F.R. Part 22.

7. For purposes of this proceeding, without trial or litigation of the issues or any adjudication of the facts, Respondent: (1) admits that EPA has jurisdiction over the subject matter alleged in the Complaint, (2) neither admits nor denies the factual allegations contained in the Complaint, and (3) consents to the terms of this CAFO as a settlement of the allegations raised by EPA in the Complaint.

8. Respondent hereby waives any defenses it might have as to jurisdiction and venue, its right to request a judicial or administrative hearing on any issue of law or fact set forth in the Complaint, and its right to appeal the Final Order accompanying the Consent Agreement.

9. By signing this CAFO, Respondent certifies that it is presently operating in compliance with FIFRA and the regulations promulgated thereunder and that it has fully addressed the violations alleged by EPA in the Complaint as well as those alleged in the Stop Sale, Use, and Removal Order described in Paragraph 15, below.

TERMS OF SETTLEMENT

10. In light of the above, and taking into account the factors enumerated in Section 14(a) of FIFRA, the December 2009 “FIFRA Enforcement Response Policy” issued by the Waste and Chemical Enforcement Division, Office of Civil Enforcement, Office of Enforcement and Compliance Assurance, the Monetary Penalty Inflation Adjustment Rules at 40 C.F.R. Part

19, promulgated in accordance with the Debt Collection Improvement Act of 1996 (“DCIA”), Pub. L. No. 104-134, 110 Stat. 1321 (1996), and other factors as justice may require, EPA has determined that it is fair and appropriate that Respondent pay a civil penalty in the amount of \$185,000 in settlement of the violations alleged in the Complaint.

11. Respondent shall pay the penalty of \$185,000 within thirty (30) days of the effective date of this CAFO.

12. Respondent shall make payment by submitting a bank or certified check, to the order of the “Treasurer, United States of America” in the amount of \$185,000 to:

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

and shall provide copies of the check to:

Wanda I. Santiago
Regional Hearing Clerk
U.S. Environmental Protection Agency
Region 1 (Mail Code: ORA18-1)
5 Post Office Square, Suite 100
Boston, MA 02109-3912

and

Hugh W. Martinez, Senior Enforcement Counsel
U.S. Environmental Protection Agency
Region 1 (Mail Code: OES04-3)
5 Post Office Square, Suite 100
Boston, MA 02109-3912

Respondent shall include the case name and docket number (i.e., *In re: Exergen Corporation*, FIFRA-01-2012-0066) on the face of the check.

13. If Respondent fails to pay the civil penalty, it will be subject to an action to compel payment, plus interest, enforcement expenses and a nonpayment penalty. Pursuant to 31

U.S.C. § 3717, EPA is entitled to assess interest and penalties on debts owed to the United States, as well as a charge to cover the cost of processing and handling a delinquent claim.

Interest will therefore begin to accrue on the civil penalty (or any portion thereof) on the date it is due under this CAFO if such penalty (or portion thereof) is not paid in full by such due date.

Interest will be assessed at the rate of the United States Treasury tax and loan rate in accordance with 31 C.F.R. § 901.9(b)(2). In addition, a penalty charge of six percent (6%) per year and an amount to cover the costs of collection will be assessed on any portion of the debt that remains delinquent more than ninety (90) days after payment is due. Should assessment of the penalty charge on the debt be required, it will be assessed as of the first day payment is due, under 31 C.F.R. § 901.9(d).

14. The civil penalty due and any interest, non-payment penalties, or charges that arise pursuant to this CAFO shall represent penalties assessed by EPA within the meaning of Internal Revenue Service regulations, including 26 C.F.R. § 1.162-21, and shall not be deductible for the purposes of Federal taxes, in accordance with those regulations.

15. This CAFO constitutes a settlement by EPA of all claims for civil penalties, pursuant to Section 14(a) of FIFRA, for violations of FIFRA Section 12(a)(1)(A) which may have occurred with respect to the production, distribution or sale of the Products between September 26, 2007 and September 26, 2012, including those violations specified in the Complaint. This CAFO also resolves the violations regarding the Products that were alleged by EPA in the Stop Sale, Use, or Removal Order [Docket No. SSURO-2012-001] issued to Respondent, on April 11, 2012, and EPA will provide Respondent with written confirmation of its termination.


16. This CAFO in no way relieves Respondent of any criminal liability, and EPA

reserves all its other criminal and civil enforcement authorities, including the authority to seek injunctive relief and the authority to take any action to address imminent hazards. Compliance with this CAFO shall not be a defense to any action subsequently commenced pursuant to Federal laws and regulations administered by EPA, and it is the responsibility of Respondent to comply with said laws and regulations.

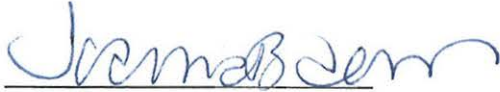
17. The Parties each shall bear its own costs and attorneys' fees in the action resolved by this CAFO, and Respondent specifically waives any right to seek attorneys' fees under the Equal Access to Justice Act, 5 U.S.C. § 504.

18. The undersigned representative of Respondent certifies that he or she is fully authorized to enter into the terms and conditions of this CAFO and to execute and legally bind Respondent to it.

For Respondent:


(Name) FRANCESCO POMPEI, Ph.D. PRESIDENT JANUARY 7, 2013
(Title) (Date)
Exergen Corporation
400 Pleasant Street
Watertown, MA 02472

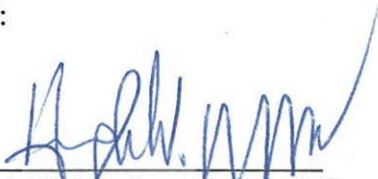
For EPA Region 1:



Joanna B. Jerison, Legal Enforcement Manager
Office of Environmental Stewardship
EPA-Region 1

1/18/13
(Date)

and:



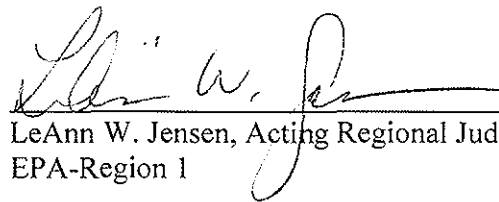
Hugh W. Martinez, Senior Enforcement Counsel
Regulatory Legal Office
Office of Environmental Stewardship
EPA-Region 1

1-15-13
(Date)

FINAL ORDER

The foregoing Consent Agreement is hereby approved and incorporated by reference into this Order. Respondent, Exergen Corporation, is hereby ordered to comply with the terms of the above Consent Agreement, which will become effective on the date it is filed with the Regional Hearing Clerk.

January 22, 2013
(Date)



LeAnn W. Jensen, Acting Regional Judicial Officer
EPA-Region 1

In The Matter of **Exergen Corporation; Respondent**
Docket No. FIFRA-01-2012-0066

CERTIFICATE OF SERVICE

I certify that the foregoing **Consent Agreement and Final Order**, dated January 25, 2013 was sent this day in following manner to the addresses listed below:



Sybil Anderson
Headquarters Hearing Clerk

Dated: **January 25, 2013**

Copy By Regular Mail and Email to

Adam Riedel
Manatt, Phelps & Phillips, LLP\
700 12th Street, NW, Suite 1100
Washington, DC 20005-4075
Email: Ariedel@Manatt.com

Hugh W. Martinez
U.S. EPA-Region I
5 Post Office Square, Suite 100
Mail Code OES-04-3
Boston, MA 02109-3912
Email: Martinez.Hugh@epa.gov