

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
1650 Arch Street
Philadelphia, Pennsylvania 19103**

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| In the Matter of: | : | U.S. EPA Docket No. FIFRA-03-2021-0025 |
| | : | |
| Gilmer Industries, Inc. 560 Stone Spring Rd Harrisonburg, VA 22801 | : | Proceeding under Section 14(a) of the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 136l(a) |
| | : | |
| Respondent. | : | |

CONSENT AGREEMENT

PRELIMINARY STATEMENT

1. This Consent Agreement is entered into by the Director of the Enforcement and Compliance Assurance Division, U.S. Environmental Protection Agency, Region III (“Complainant”) and Gilmer Industries, Inc. (“Respondent”) (collectively the “Parties”), pursuant to Section 14(a) of the Federal Insecticide, Fungicide and Rodenticide Act (“FIFRA”), *as amended*, 7 U.S.C. § 136l(a), and the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation, Termination or Suspension of Permits (“Consolidated Rules of Practice”), 40 C.F.R. Part 22. Section 14(a) of FIFRA, 7 U.S.C. § 136l(a), authorizes the Administrator of the U.S. Environmental Protection Agency to assess penalties and undertake other actions required by this Consent Agreement. The Administrator has delegated this authority to the Regional Administrator who, in turn, has delegated it to the Complainant. This Consent Agreement and the attached Final Order (hereinafter jointly referred to as the “Consent Agreement and Final Order”) resolve Complainant’s civil penalty claims against Respondent under FIFRA (or the “Act”) for the violations alleged herein.
2. In accordance with 40 C.F.R. §§ 22.13(b) and 22.18(b)(2) and (3) of the Consolidated Rules of Practice, Complainant hereby simultaneously commences and resolves this administrative proceeding.

JURISDICTION

3. The U.S. Environmental Protection Agency has jurisdiction over the above-captioned matter, as described in Paragraph 1, above.
4. The Consolidated Rules of Practice govern this administrative adjudicatory proceeding pursuant to 40 C.F.R. § 22.1(a).

GENERAL PROVISIONS

5. For purposes of this proceeding only, Respondent admits the jurisdictional allegations set forth in this Consent Agreement and Final Order.
6. Except as provided in Paragraph 5, above, Respondent neither admits nor denies the specific factual allegations set forth in this Consent Agreement.
7. Respondent agrees not to contest the jurisdiction of EPA with respect to the execution of this Consent Agreement, the issuance of the attached Final Order, or the enforcement of this Consent Agreement and Final Order.
8. For purposes of this proceeding only, Respondent hereby expressly waives its right to contest the allegations set forth in this Consent Agreement and Final Order and waives its right to appeal the accompanying Final Order.
9. Respondent consents to the assessment of the civil penalty stated herein, to the issuance of any specified compliance order herein, and to any conditions specified herein.
10. Respondent shall bear its own costs and attorney's fees in connection with this proceeding.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

11. In accordance with 40 C.F.R. §§ 22.13(b) and 22.18(b)(2) and (3) of the Consolidated Rules of Practice, Complainant alleges and adopts the Findings of Fact and Conclusions of Law set forth immediately below.
12. 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."
13. At all times relevant to the violations alleged herein, Respondent was a Virginia corporation with a principal place of business located at 560 Stone Spring Rd., Harrisonburg, VA 22801.
14. At all times relevant to the violations alleged herein, Respondent was a "person" as defined in Section 2(s) of FIFRA, 7 U.S.C. § 136(s).
15. 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.
16. 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; and define “producer”, in pertinent part, to mean any person who produces any pesticide (including packaging, repackaging, labeling and relabeling).
17. Section 2(dd) of FIFRA, 7 U.S.C. § 136(dd), and 40 C.F.R. §167.3, define “establishment”, in pertinent part, to mean any site where a pesticide product is produced.
 18. At all times relevant to the violations alleged herein, the product identified in Paragraph 24 below was a “pesticide” as defined in Section 2(u) of FIFRA, 7 U.S.C. § 136(u), and 40 C.F.R. § 152.3.
 19. At all times relevant to the violations alleged herein, Respondent was a “producer” of the product identified in Paragraph 24 below, as that term is defined in Section 2(w) of FIFRA, 7 U.S.C. § 136(w), and 40 C.F.R. § 167.3.
 20. At all times relevant to the violations alleged herein, Respondent’s facility located at 560 Stone Spring Rd, Harrisonburg, Virginia, was an “establishment” as defined in Section 2(dd) of FIFRA, 7U.S.C. § 1366(dd), and 40 C.F.R. § 167.3, registered as “EPA Est. No. 35156-VA-1.”
 21. At all times relevant to the violations alleged herein, Respondent was a “registrant, commercial applicator, wholesaler, dealer, retailer, or other distributor” within the meaning of Section 14(a) of FIFRA, 7 U.S.C. § 136l(a).
 22. On March 20, 2018, EPA Inspector Richard Ponak conducted a routine Pesticide Producer Establishment (PPE) inspection of Respondent’s establishment located at 560 Stone Spring Rd., Harrisonburg, VA 22801, to determine compliance with FIFRA, 7 U.S.C. §§ 136 *et seq.*, and implementing regulations set forth at 40 C.F.R. Parts 150-189.
 23. Respondent produces fifteen (15) EPA registered products. During the March 20, 2018 PPE inspection, Respondent informed Inspector Ponak that Gilmer Industries, Inc. repackages, labels, and formulates products in 1, 5, 15, 55, 275 and 330-gallon containers for sale and distribution, and that that Respondent produces all labels that are used for sale and distribution of its products. Respondent maintains batch records that coincide with lot/batch code numbers that are on the product labels.
 24. During the March 20, 2018 PPE inspection, Respondent provided true and correct labels to Inspector Ponak for Gil-O-Fact II (EPA Reg. No. 4959-15-35156) that it manufactured, packaged, repackaged, labeled, relabeled or otherwise “produced” (as that term is defined in Section 2(w) of FIFRA, 7 U.S.C. § 136(w) and 40 C.F.R. §167.3) at its establishment. Gil-O-Fact II is a “pesticide” as that term is defined in Section 2(u) of FIFRA, 7 U.S.C. § 136(u), and 40 C.F.R. § 152.3.
 25. During the March 20, 2018 PPE inspection, Respondent further agreed to send Ponak repackaging agreements and sales records for Gil-O-Fact II and other products manufactured by Respondent.

26. Upon inspection and review of Respondent's sales records and other information referred to in Paragraphs 24 and 25 above, EPA identified discrepancies between the information contained on the prior EPA-accepted label for Gil-O-Fact II provided by Respondent during the March 20, 2018 PPE inspection and the current EPA-accepted label, in that the current product label did not contain updated directions for use.
27. On November 20, 2019, EPA issued a Notice of Noncompliance and Request to Show Cause to Respondent (EPA Case No. F-19-080), for the Sale or Distribution of Misbranded Pesticides, in violation of Section 12(a)(1)(E) of FIFRA 7 U.S.C. § 136j(a)(1)(E).

Count I
(Sale or Distribution of Misbranded Pesticides)

28. The allegations in the preceding Paragraphs of this Consent Agreement are incorporated herein by reference.
29. Section 12(a)(1)(E) of FIFRA 7 U.S.C. § 136j(a)(1)(E), makes it unlawful for any person in any state to distribute or sell to any person any pesticide that is misbranded.
30. Pursuant to Section 2(gg) of FIFRA, 7, U.S.C §136(gg), to "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.
31. Pursuant to Section 2(q)(1)(E) of FIFRA, 7 U.S.C. § 136(q)(1)(E), a pesticide is "misbranded" if "any word, statement, or other information required by or under authority of this subchapter to appear on the label or labeling is not prominently placed thereon with such conspicuousness (as compared with other words, statements, designs, or graphic matter in the labeling) and in such terms as to render it likely to be read and understood by the ordinary individual under customary conditions of purchase and use."
32. Pursuant to Section 2(q)(1)(F) of FIFRA, 7 U.S.C. § 136(q)(1)(F), a pesticide is "misbranded" if the labeling accompanying the pesticide "does not contain directions for use which are necessary for effecting the purpose for which the product is intended and if complied with, together with any requirements under [Section 3(d) of FIFRA], are adequate to protect health and the environment."
33. Pursuant to Section 2(q)(1)(G) of FIFRA, 7 U.S.C. § 136(q)(1)(G), a pesticide is "misbranded" if its "label does not contain a warning or caution statement which may be necessary and if complied with, together with any requirements imposed under section [3(d) of FIFRA], is adequate to protect health and the environment."

34. Complainant alleges that sales records provided by Respondent indicate that Respondent sold the pesticide product Gil-O-Fact II (EPA Reg. No. 4959-15-35156) on the following dates: October 18, 2017, October 27, 2017, November 2, 2017, November 3, 2017, November 13, 2017, November 20, 2017, November 21, 2017, December 6, 2017, December 13, 2017, December 18, 2017, and December 22, 2017 with the prior EPA-accepted product labels that did not contain updated information required by or under the authority of FIFRA, including required precautionary statements and instructions, rendering the products misbranded under Sections 2(q)(1)(E), (F) and/or (G) of FIFRA, 7 U.S.C. § 136(q)(1)(E), (F) and/or (G).
35. Each of Respondent's sales described in Paragraph 34 above were to a "person" as defined in Section 2(s) of FIFRA, 7 U.S.C. § 136(s).
36. Complainant alleges that Respondent's acts or omissions as described in Paragraph 34 above, constitute eleven (11) separate unlawful acts under Section 12(a)(1)(E) of FIFRA 7 U.S.C. § 136j(a)(1)(E), for which penalties may be assessed pursuant to Section 14(a) of FIFRA, 7 U.S.C. § 136l(a).

CIVIL PENALTY

37. In settlement of EPA's claims for civil penalties for the violations alleged in this Consent Agreement, Respondent consents to the assessment of a civil penalty in the amount of FORTY-EIGHT THOUSAND FOUR HUNDRED AND FORTY-FOUR DOLLARS (\$48,444), which Respondent shall be liable to pay in accordance with the terms set forth below.
38. The civil penalty is based upon EPA's consideration of a number of factors, including the penalty criteria ("statutory factors") set forth in Section 14(a)(4) of FIFRA, 7 U.S.C. § 136l(a)(4), including, the following: the size of the business of the person charged, the effect on the person's ability to continue in business, and the gravity of the violation. These factors were applied to the particular facts and circumstances of this case with specific reference to EPA's *FIFRA Enforcement Response Policy* (December 2009) which reflects the statutory penalty criteria and factors set forth at Section 14(a)(4) of FIFRA, 7 U.S.C. § 136l(a)(4), the appropriate *Adjustment of Civil Monetary Penalties for Inflation*, pursuant to 40 C.F.R. Part 19, and the applicable EPA memoranda addressing EPA's civil penalty policies to account for inflation.
39. Payment of the civil penalty amount, and any associated interest, administrative fees, and late payment penalties owed, shall be made by either cashier's check, certified check or electronic wire transfer, in the following manner:
 - a. All payments by Respondent shall include reference to Respondent's name and address, and the Docket Number of this action, *i.e.*, FIFRA-03-2021-0025;
 - b. All checks shall be made payable to the "United States Treasury";

- c. All payments made by check and sent by regular mail shall be addressed and mailed to:

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

- d. For additional information concerning other acceptable methods of payment of the civil penalty amount see:

<https://www.epa.gov/financial/makepayment>

- e. A copy of Respondent's check or other documentation of payment of the penalty using the method selected by Respondent for payment shall be sent simultaneously to:

Hannah G. Leone
Assistant Regional Counsel
U.S. EPA, Region III (3RC30)
1650 Arch Street
Philadelphia, PA 19103-2029
Leone.hannah@epa.gov

40. 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 of the penalty as specified herein shall result in the assessment of late payment charges including interest, penalties and/or administrative costs of handling delinquent debts.
41. Payment of the civil penalty is due and payable upon receipt by Respondent of a true and correct copy of the fully executed and filed Consent Agreement and Final Order. Receipt by Respondent or Respondent's legal counsel of such copy of the fully executed Consent Agreement and Final Order, with a date stamp indicating the date on which the Consent Agreement and Final Order was filed with the Regional Hearing Clerk, shall constitute receipt of written initial notice that a debt is owed EPA by Respondent in accordance with 40 C.F.R. § 13.9(a).
42. INTEREST: In accordance with 40 C.F.R. § 13.11(a)(1), interest on the civil penalty assessed in this Consent Agreement and Final Order will begin to accrue on the date that a copy of the fully executed and filed Consent Agreement and Final Order is mailed or hand-delivered to Respondent. However, EPA will not seek to recover interest on any amount of the civil penalties 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).

43. ADMINISTRATIVE COSTS: The costs of the EPA's administrative handling of overdue debts will be charged and assessed monthly throughout the period a debt is overdue. 40 C.F.R. § 13.11(b). Pursuant to Appendix 2 of EPA's *Resources Management Directives – Case 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.
44. LATE PAYMENT PENALTY: A late payment penalty of six percent per year will be assessed monthly on any portion of the civil penalty that 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).
45. Respondent agrees not to deduct for federal tax purposes the civil penalty assessed in this Consent Agreement and Final Order.

GENERAL SETTLEMENT CONDITIONS

46. By signing this Consent Agreement, Respondent acknowledges that this Consent Agreement and Final Order will be available to the public and represents that, to the best of Respondent's knowledge and belief, this Consent Agreement and Final Order does not contain any confidential business information or personally identifiable information from Respondent.
47. Respondent certifies that any information or representation it has supplied or made to EPA concerning this matter was, at the time of submission true, accurate, and complete and that there has been no material change regarding the truthfulness, accuracy or completeness of such information or representation. EPA shall have the right to institute further actions to recover appropriate relief if EPA obtains evidence that any information provided and/or representations made by Respondent to the EPA regarding matters relevant to this Consent Agreement and Final Order, including information about respondent's ability to pay a penalty, are false or, in any material respect, inaccurate. This right shall be in addition to all other rights and causes of action that EPA may have, civil or criminal, under law or equity in such event. Respondent and its officers, directors and agents are aware that the submission of false or misleading information to the United States government may subject a person to separate civil and/or criminal liability.

CERTIFICATION OF COMPLIANCE

48. Respondent certifies to EPA, upon personal investigation and to the best of its knowledge and belief, that it currently is in compliance with regard to the violations alleged in this Consent Agreement.

OTHER APPLICABLE LAWS

49. Nothing in this Consent Agreement and Final Order shall relieve Respondent of its obligation to comply with all applicable federal, state, and local laws and regulations, nor shall it restrict EPA's authority to seek compliance with any applicable laws or regulations, nor shall it be construed to be a ruling on the validity of any federal, state or local permit. This Consent Agreement and Final Order does not constitute a waiver, suspension or modification of the requirements FIFRA, or any regulations promulgated thereunder.

RESERVATION OF RIGHTS

50. This Consent Agreement and Final Order resolves only EPA's claims for civil penalties for the specific violations alleged against Respondent in this Consent Agreement and Final Order. 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. 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, 40 C.F.R. § 22.18(c). EPA reserves any rights and remedies available to it under FIFRA, the regulations promulgated thereunder and any other federal law or regulation to enforce the terms of this Consent Agreement and Final Order after its effective date.

EXECUTION /PARTIES BOUND

51. This Consent Agreement and Final Order shall apply to and be binding upon the EPA, the Respondent and the officers, directors, employees, contractors, successors, agents and assigns of Respondent. By his or her signature below, the person who signs this Consent Agreement on behalf of Respondent is acknowledging that he or she is fully authorized by the Respondent to execute this Consent Agreement and to legally bind Respondent to the terms and conditions of this Consent Agreement and Final Order.

EFFECTIVE DATE

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

ENTIRE AGREEMENT

53. This Consent Agreement and Final Order constitutes the entire agreement and understanding between the Parties regarding settlement of all claims for civil penalties pertaining to the specific violations alleged herein and there are no representations,

warranties, covenants, terms, or conditions agreed upon between the Parties other than those expressed in this Consent Agreement and Final Order.

For Respondent: GILMER INDUSTRIES, INC.

Date: 11-16-2020

By: 
Robert G. Gilmer, III
President

For the Complainant:

After reviewing the Consent Agreement and other pertinent matters, I, the undersigned Director of the Enforcement & Compliance Assurance Division of the United States Environmental Protection Agency, Region III, agree to the terms and conditions of this Consent Agreement and recommend that the Regional Administrator, or his/her designee, the Regional Judicial Officer, issue the attached Final Order.

Date: 1/5/21

By: **KAREN MELVIN** Digitally signed by KAREN MELVIN
Date: 2021.01.05 14:40:57 -05'00'
Karen Melvin
Director, Enforcement & Compliance Division
U.S. EPA – Region III
Complainant

Attorney for Complainant:

Date: 11/20/20

By: **HANNAH LEONE** Digitally signed by HANNAH LEONE
Date: 2020.11.20 07:46:03 -05'00'
Hannah G. Leone
Assistant Regional Counsel
U.S. EPA – Region III

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
1650 Arch Street
Philadelphia, Pennsylvania 19103**

In the Matter of: : U.S. EPA Docket No. FIFRA-03-2021-0025
:
Gilmer Industries, Inc. : **Proceeding under Section 14(a) of the Federal**
560 Stone Spring Rd : **Insecticide, Fungicide and Rodenticide Act, 7**
Harrisonburg, VA 22801 : **U.S.C. § 136l(a)**
:
Respondent. :

FINAL ORDER

Complainant, the Director of the Enforcement and Compliance Assurance Division, U.S. Environmental Protection Agency, Region III, and Respondent, Gilmer Industries, Inc., have executed a document entitled "Consent Agreement," which I hereby ratify as a Consent Agreement in accordance with the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Consolidated Rules of Practice"), 40 C.F.R. Part 22, Sections 22.13(b) and 22.18(b)(2) and (3). The terms of the foregoing Consent Agreement are accepted by the undersigned and incorporated into this Final Order as if fully set forth at length herein.

Based upon the representations of the parties in the attached Consent Agreement, the penalty agreed to therein is based upon consideration of, *inter alia*, EPA's *FIFRA Enforcement Response Policy* (December 2009) and the statutory factors set forth in Section 14(a)(4) of FIFRA, 7 U.S.C. § 136l(a)(4).

NOW, THEREFORE, PURSUANT TO Section 14(a)(4) of FIFRA, 7 U.S.C. § 136l(a)(4), and Section 22.18(b)(3) of the Consolidated Rules of Practice, **IT IS HEREBY ORDERED** that Respondent pay a civil penalty in the amount of **FORTY-EIGHT THOUSAND FOUR HUNDRED AND FORTY-FOUR DOLLARS (\$48,444)**, in accordance with the payment provisions set forth in the Consent Agreement, and comply with the terms and conditions of the Consent Agreement.

This Final Order constitutes the final Agency action in this proceeding. This Final Order shall not in any case affect the right of the Agency or the United States to pursue appropriate injunctive or other equitable relief, or criminal sanctions for any violations of the law. This Final Order resolves only those causes of action alleged in the Consent Agreement and does not waive, extinguish or otherwise affect Respondent's obligation to comply with all applicable provisions of FIFRA and the regulations promulgated thereunder.

The effective date of the attached Consent Agreement and this Final Order is the date on which this Final Order is filed with the Regional Hearing Clerk.

In the Matter of: Gilmer Industries, Inc.

EPA Docket No. FIFRA-03-2021-0025

Date: 1/6/21

By: JOSEPH LISA Digitally signed by JOSEPH LISA
Date: 2021.01.06 09:07:18 -05'00'
Joseph J. Lisa
Regional Judicial and Presiding Officer
U.S. EPA Region III

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
1650 Arch Street
Philadelphia, Pennsylvania 19103-2029**

In the Matter of:)
Gilmer Industries, Inc.) **Docket No. FIFRA-03-2021-0025**
560 Stone Spring Rd.)
Harrisonburg, VA 22801) **Proceeding under Section 14(a) of the**
) **Federal Insecticide, Fungicide and**
RESPONDENT.) **Rodenticide Act, 7 U.S.C § 136l(a)**
)

CERTIFICATE OF SERVICE

I certify that on 1/6/21, the original and one (1) copy of foregoing **Consent Agreement and Final Order**, were filed with the EPA Region III Regional Hearing Clerk. I further certify that on the date set forth below, I served a true and correct copy of the same to each of the following persons, in the manner specified below, at the following addresses:

Copy served via **Electronic Mail** to:

Kathryn A. Larkins
Shook, Hardy & Bacon L.L.P.
2555 Grand Blvd.
Kansas City, Missouri 64108
klarkins@shb.com
(Attorney for Respondent)

Copy served via **Electronic Mail** to:

Hannah G. Leone
Assistant Regional Counsel
Office of Regional Counsel (3RC30)
U.S. EPA, Region III
1650 Arch Street
Philadelphia, PA 19103-2029
Leone.hannah@epa.gov
(Attorney for Complainant)

Dated: 1/6/21

BEVIN ESPOSITO

Digitally signed by BEVIN
ESPOSITO
Date: 2021.01.06 09:36:40 -05'00'

Regional Hearing Clerk
U.S. Environmental Protection Agency, Region III