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U.S. Environmental Protection Agency
4 Region IX
75 Hawthorne Street
5 San Francisco, CA 94105
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7 UNITED STATES
8 ENVIRONMENTAL PROTECTION AGENCY
9 REGION IX

10 In the matter of:) Docket No. FIFRA-09-2011-1017
11)
12 U.S. Borax Inc.,) CONSENT AGREEMENT
AND FINAL ORDER
13 Respondent.) pursuant to 40 C.F.R. §§ 22.13(b),
22.18(b)(2), and 22.18(b)(3)
14

15 I. CONSENT AGREEMENT

16 The United States Environmental Protection Agency ("EPA"), Region IX, and U.S.
17 Borax Inc. (the "Respondent") agree to settle this matter and consent to the entry of this Consent
18 Agreement and Final Order ("CAFO").
19

20 A. AUTHORITY AND PARTIES

21 1. This is a civil administrative action brought pursuant to Section 14(a)(2) of the Federal
22 Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136l(a)(2), for the assessment
23 of a civil administrative penalty against Respondent for the sale and/or distribution of a
24 misbranded pesticide in violation of Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E).

25 2. Complainant is the Associate Director for Agriculture of the Communities and
26 Ecosystems Division in EPA, Region IX. The Administrator of EPA delegated to the Regional
27 Administrator of Region IX the authority to bring this action under FIFRA by EPA Delegation
28 Order Number 5-14, dated May 11, 1994. The Regional Administrator of Region IX further
delegated the authority to bring this action under FIFRA to the Associate Director for Agriculture

1 of the Communities and Ecosystems Division by EPA Regional Order Number 1255.08 CHG1,
2 dated June 9, 2005.

3 3. Respondent is U.S. Borax Inc., an active corporation whose headquarters is located in
4 Greenwood Village, Colorado.

5 **B. STATUTORY AND REGULATORY BASIS**

6 4. Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), makes it unlawful for any
7 person to distribute or sell to any person any pesticide that is adulterated or misbranded.

8 5. Section 2(q)(1)(G) of FIFRA, 7 U.S.C. § 136(q)(1)(G), provides that a pesticide is
9 misbranded if the label does not contain a warning or caution statement which may be necessary
10 and if complied with, together with any requirements imposed under Section 3(d) of this Act, are
11 adequate to protect health and the environment.

12 **C. ALLEGED VIOLATIONS**

13 6. Respondent is a corporation and therefore fits within the definition of “person” as that
14 term is defined by Section 2(s) of FIFRA, 7 U.S.C. § 136(s).

15 7. Tim-bor Industrial Wood Preservative (EPA Registration No. 1624-39) is a substance
16 intended for preventing, destroying, repelling, or mitigating any pest and is therefore a
17 “pesticide” as that term is defined in Section 2(u) of FIFRA, 7 U.S.C. § 136(u).

18 8. On or about October 21, 2008, and September 1, 2009, Respondent “distributed or
19 sold,” as those terms are defined by Section 2(gg) of FIFRA, 7 U.S.C. § 136(gg), the pesticide
20 Tim-bor Industrial Wood Preservative in a 55.1 lb container to the same customer.

21 9. The labeling accompanying the pesticide Tim-bor Industrial Wood Preservative (55.1
22 lb container) that Respondent distributed or sold on or about October 21, 2008, and September 1,
23 2009 failed to include a warning or caution statement adequate to protect health and the
24 environment. Specifically, on both occasions the label failed to include the signal word
25 “Caution” as required pursuant to 40 C.F.R. § 156.64.

26 10. The absence of the required warning or caution statement on the labeling resulted in
27 the pesticide Tim-bor Industrial Wood Preservative (55.1 lb container) being “misbranded” as
28 that term is defined at Section 2(q)(1)(G) of FIFRA, 7 U.S.C. § 136(q)(1)(G).

1 11. By distributing or selling the misbranded pesticide Tim-bor Industrial Wood
2 Preservative (55.1 lb container) on or about October 21, 2008, and September 1, 2009,
3 Respondent violated Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E).

4 12. Section 14(a)(1) of FIFRA, 7 U.S.C. § 136l(a), and the Civil Monetary Penalty
5 Inflation Adjustment Rule, 40 C.F.R. Part 19, provide that any registrant, commercial applicator,
6 wholesaler, dealer, retailer or other distributor who violates any provision of FIFRA may be
7 assessed a civil penalty by the EPA Administrator in an amount not to exceed \$6,500 for each
8 offense occurring after March 15, 2004, but on or before January 12, 2009, and \$7,500 for each
9 offense occurring after January 12, 2009. Under the FIFRA Enforcement Response Policy, dated
10 December 2009, and the Civil Monetary Penalty Inflation Adjustment Rule, the two violations
11 cited above would merit a civil penalty of \$8,200, given the alleged violations' gravity level, size
12 of business, and applicable gravity adjustments.

13 D. RESPONDENT'S ADMISSIONS

14 13. In accordance with 40 C.F.R. § 22.18(b)(2) and for the purpose of this proceeding,
15 Respondent: (i) admits that EPA has jurisdiction over the subject matter of this CAFO and over
16 Respondent; (ii) neither admits nor denies the specific factual allegations contained in Section
17 I.C of this CAFO; (iii) consents to any and all conditions specified in this CAFO and to the
18 assessment of the civil administrative penalty under Section I.E of this CAFO; (iv) waives any
19 right to contest the allegations contained in this CAFO; and (v) waives the right to appeal the
20 proposed Final Order contained in this CAFO.

21 E. CIVIL ADMINISTRATIVE PENALTY

22 14. In settlement of the violations specifically alleged in Section I.C of this CAFO,
23 Respondent shall pay a civil administrative penalty of EIGHT THOUSAND, TWO HUNDRED
24 DOLLARS (\$8,200). Respondent shall pay this civil penalty within thirty (30) days of the
25 effective date of this CAFO. The civil penalty shall be paid by remitting a certified or cashier's
26 check, including the name and docket number of this case, for the amount, payable to "Treasurer,
27 United States of America," (or be paid by one of the other methods listed below) and sent as
28

1 follows:

2 Regular Mail:

3 U.S. Environmental Protection Agency
4 Fines and Penalties
5 Cincinnati Finance Center
6 PO Box 979077
7 St. Louis, MO 63197-9000

8 Wire Transfers:

9 Wire transfers must be sent directly to the Federal Reserve Bank in New
10 York City with the following information:
11 Federal Reserve Bank of New York
12 ABA = 021030004
13 Account = 68010727
14 SWIFT address = FRNYUS33
15 33 Liberty Street
16 New York, NY 10045
17 Field Tag 4200 of the Fedwire message should read "D 68010727
18 Environmental Protection Agency"

19 Overnight Mail:

20 U.S. Bank
21 1005 Convention Plaza
22 Mail Station SL-MO-C2GL
23 ATTN Box 979077
24 St. Louis, MO 63101

25 ACH (also known as REX or remittance express):

26 Automated Clearinghouse (ACH) for receiving U.S. currency
27 PNC Bank
28 808 17th Street, NW
Washington, DC 20074
ABA = 051036706
Transaction Code 22 – checking
Environmental Protection Agency
Account 31006
CTX Format

29 On Line Payment:

30 This payment option can be accessed from the information below:
31 www.pay.gov
32 Enter "sfol.1" in the search field
33 Open form and complete required fields

34 If clarification regarding a particular method of payment remittance is
35 needed, contact the EPA's Cincinnati Finance Center at (513) 487-2091.

36 A copy of each check, or notification that the payment has been made by one of the other
37 methods listed above, including proof of the date payment was made, shall be sent with a
38 transmittal letter, indicating Respondent's name, the case title, and docket number, to the
39 following addresses:

1
2 Regional Hearing Clerk
3 Office of Regional Counsel (ORC-1)
4 U.S. Environmental Protection Agency, Region IX
5 75 Hawthorne Street
6 San Francisco, CA 94105

7
8 Glenda Dugan
9 Communities and Ecosystems Division (CED-5)
10 U.S. Environmental Protection Agency, Region IX
11 75 Hawthorne Street
12 San Francisco, CA 94105

13
14 Edgar P. Coral
15 Office of Regional Counsel (ORC-2)
16 U.S. Environmental Protection Agency, Region IX
17 75 Hawthorne Street
18 San Francisco, CA 94105

19
20 15. Respondent shall not use payment of any penalty under this CAFO as a tax deduction
21 from Respondent's federal, state, or local taxes, nor shall Respondent allow any other person to
22 use such payment as a tax deduction.

23
24 16. If Respondent fails to pay the assessed civil administrative penalty of EIGHT
25 THOUSAND, TWO HUNDRED DOLLARS (\$8,200), as identified in Paragraph 14, by the
26 deadline specified in that Paragraph, then Respondent shall also pay a stipulated penalty to EPA
27 upon EPA's written request. The amount of the stipulated penalty will be FIVE THOUSAND,
28 EIGHT HUNDRED DOLLARS (\$5,800), and will be immediately due and payable upon EPA's
written request on the day following the deadline specified in Paragraph 14, together with the
initially assessed civil administrative penalty of EIGHT THOUSAND, TWO HUNDRED
DOLLARS (\$8,200), resulting in a total penalty due of FOURTEEN THOUSAND DOLLARS
(\$14,000). Failure to pay the civil administrative penalty specified in Paragraph 14 by the
deadline specified in that Paragraph may also lead to any or all of the following actions:

(1) EPA may refer the debt to a credit reporting agency, a collection
agency, or to the Department of Justice for filing of a collection action in the appropriate United
States District Court. 40 C.F.R. §§ 13.13, 13.14 and 13.33. The validity, amount, and
appropriateness of the assessed penalty or of this CAFO is not subject to review in any such
collection proceeding.

1 (2) The U.S. Government may collect the debt by administrative offset
2 (*i.e.*, the withholding of money payable by the United States to, or held by the United States for, a
3 person to satisfy the debt the person owes the U.S. Government), which includes, but is not
4 limited to, referral to the Internal Revenue Service for offset against income tax refunds. 40
5 C.F.R. §§ 13(C) and 13(H).

6 (3) Pursuant to 40 C.F.R. § 13.17, EPA may either: (i) suspend or revoke
7 Respondent's licenses or other privileges, or (ii) suspend or disqualify Respondent from doing
8 business with EPA or engaging in programs EPA sponsors or funds.

9 (4) Pursuant to 31 U.S.C. § 3701 *et seq.* and 40 C.F.R. Part 13, the U.S.
10 Government may assess interest, administrative handling charges, and nonpayment penalties
11 against the outstanding amount that Respondent owes to EPA for Respondent's failure to pay the
12 civil administrative penalty specified in Paragraph 14 by the deadline specified in that Paragraph.

13 (a) Interest. Pursuant to 31 U.S.C. § 3717 and 40 C.F.R. §
14 13.11(a)(1), any unpaid portion of the assessed penalty shall bear interest at the rate established
15 according to 26 U.S.C. § 6621(a)(2) from the effective date of this CAFO, provided, however,
16 that no interest shall be payable on any portion of the assessed penalty that is paid within thirty
17 (30) days of the effective date of this CAFO.

18 (b) Administrative Handling Charges. Pursuant to 31 U.S.C. §
19 3717(e)(1) and 40 C.F.R. § 13.11(b), Respondent shall pay a monthly handling charge, based on
20 either actual or average cost incurred (including both direct and indirect costs), for every month
21 in which any portion of the assessed penalty is more than thirty (30) days past due.

22 (c) Nonpayment Penalties. Pursuant to 31 U.S.C. § 3717(e)(2)
23 and 40 C.F.R. § 13.11(c), a monthly penalty charge, not to exceed six percent (6%) annually,
24 may be assessed on all debts more than ninety (90) days delinquent.

25 F. CERTIFICATION OF COMPLIANCE

26 17. In executing this CAFO, Respondent certifies that (1) it is no longer selling or
27 distributing any pesticide that is misbranded in violation of Section 12(a)(1)(E) of FIFRA, 7
28 U.S.C. § 136j(a)(1)(E), and (2) it is currently in compliance with all other FIFRA requirements

1 for all its ongoing operations.

2 G. RETENTION OF RIGHTS

3 18. In accordance with 40 C.F.R. § 22.18(c), this CAFO only resolves Respondent's
4 liabilities for federal civil penalties for the violations and facts specifically alleged in Section I.C
5 of this CAFO. Nothing in this CAFO is intended to or shall be construed to resolve: (i) any civil
6 liability for violations of any provision of any federal, state, or local law, statute, regulation, rule,
7 ordinance, or permit not specifically alleged in Section I.C of this CAFO; or (ii) any criminal
8 liability. EPA specifically reserves any and all authorities, rights, and remedies available to it
9 (including, but not limited to, injunctive or other equitable relief or criminal sanctions) to address
10 any violation of this CAFO or any violation not specifically alleged in Section I.C of this CAFO.

11 19. This CAFO does not exempt, relieve, modify, or affect in any way Respondent's
12 duties to comply with all applicable federal, state, and local laws, regulations, rules, ordinances,
13 and permits.

14 H. ATTORNEYS' FEES AND COSTS

15 20. Each party shall bear its own attorneys' fees, costs, and disbursements incurred in
16 this proceeding.

17 I. EFFECTIVE DATE

18 21. In accordance with 40 C.F.R. §§ 22.18(b)(3) and 22.31(b), this CAFO shall be
19 effective on the date that the Final Order contained in this CAFO, having been approved and
20 issued by either the Regional Judicial Officer or Regional Administrator, is filed.

21 J. BINDING EFFECT

22 22. The undersigned representative of Complainant and the undersigned representative of
23 Respondent each certifies that he or she is fully authorized to enter into the terms and conditions
24 of this CAFO and to bind the party he or she represents to this CAFO.

25 23. The provisions of this CAFO shall apply to and be binding upon Respondent and its
26 officers, directors, employees, agents, trustees, servants, authorized representatives, successors,
27 and assigns.

1 FOR RESPONDENT U.S. BORAX INC.:

2 5/10/2011
3 DATE



RICHARD PIERCE
Vice President - Legal and General Counsel
U.S. Borax Inc.
8051 E. Maplewood Ave.
Building 4
Greenwood Village, CO 80111

7 FOR COMPLAINANT EPA:

8 8/01/11
9 DATE



KATHERINE A. TAYLOR
Associate Director for Agriculture
Communities and Ecosystems Division
U.S. Environmental Protection Agency, Region IX
75 Hawthorne Street
San Francisco, California 94105

CERTIFICATE OF SERVICE

I certify that the original of the fully executed Consent Agreement and Final Order (Docket No. FIFRA-09-2011-0017) against U.S. Borax, was filed with the Regional Hearing Clerk, U.S. EPA, Region IX, 75 Hawthorne Street, San Francisco, CA 94105, and that a true and correct copy of the same was sent to the following parties:

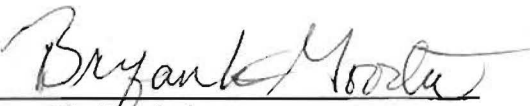
A copy was mailed via CERTIFIED MAIL to:

Mr. Richard Pierce
Vice President -- Legal and General Counsel
U.S. Borax Inc.
8051 E. Maplewood Avenue, Bldg 4
Greenwood Village, CO 80111

CERTIFIED MAIL NUMBER: 7010-2780-0000-8388-5708

An additional copy was hand-delivered to the following U.S. EPA case attorney:

Edgar Coral, Esq
Office of Regional Counsel
U.S. EPA, Region IX
75 Hawthorne Street
San Francisco, CA 94105



Bryan K. Goodwin
Regional Hearing Clerk
U.S. EPA, Region IX



Date



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 Hawthorne Street
San Francisco, CA 94105-3901

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Date: AUG 10 2011

Richard Pierce
Vice President - Legal and General Counsel
U.S. Borax Inc.
8051 E. Maplewood Ave., Building 4
Greenwood Village, CO 80111

Subject: U.S. Borax, Inc.
Consent Agreement and Final Order
Docket No. FIFRA-09-2011-0017

Dear Mr. Pierce:

Enclosed please find the Consent Agreement and Final Order (CAFO) concerning violations of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. Sections 136 et seq. for the above referenced case. The terms of the CAFO require the payment to be received by EPA within 30 days of the effective date of the CAFO.

If you have any questions please contact Edgar Coral, Assistant Regional Counsel, telephone number 415-972-3898 or Glenda Dugan, Enforcement Officer, telephone number 415- 947-4204, at the U.S. Environmental Protection Agency, Region 9, 75 Hawthorne Street, San Francisco, CA 94105.

Sincerely,

A handwritten signature in cursive script, appearing to read "Katherine Taylor".

Katherine Taylor
Associate Director
Communities and Ecosystems Division

Cc: Edgar Coral, Office of Regional Counsel