

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

**IN THE MATTER OF** )

Mitchell Diviney )  
 588 700<sup>th</sup> Road )  
 New Oxford, PA 17350 )

Respondent. )

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DOCKET NO: FIFRA-03-2009-0155

CONSENT AGREEMENT

CONSENT AGREEMENT

Preliminary Statement

This Consent Agreement is entered into by the Director, Land and Chemicals Division, U.S. Environmental Protection Agency - Region III ("EPA" or "Complainant") and by Mitchell Diviney ("Respondent") pursuant to Section 14(a) of the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), *as amended*, 7 U.S.C. § 136l(a), and Sections 22.13(b) and .18(b) of 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. §§ 22.13(b) and .18(b). This Consent Agreement and the attached Final Order (hereinafter jointly referred to as the "CAFO") resolve Complainant's civil penalty claims against Respondent under FIFRA arising from the violations of FIFRA alleged herein.

Findings of Fact and Conclusions of Law

1. For purposes of this proceeding, Respondent admits the jurisdictional allegations set forth herein.
2. Except as provided in paragraph 1, above, Respondent neither admits nor denies the specific factual allegations and conclusions of law set forth in this Consent Agreement.
3. Respondent agrees not to contest the jurisdiction of the EPA with respect to the execution of this Consent Agreement, the issuance of the attached Final Order, or the enforcement of the CAFO.
4. For the purposes of this proceeding only, Respondent hereby expressly waives any right to contest any issue of law or fact set forth in this Consent Agreement and any right to appeal the accompanying Final Order.

5. Respondent consents to the issuance of this CAFO and agrees to comply with its terms.
6. Respondent shall bear its own costs and attorney's fees.

EPA's Findings of Fact and Conclusions of Law

7. 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:
8. 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.
9. Respondent owns and operates a business known as Diviney Pool Supply, located at 4254 York Road in New Oxford, Pennsylvania, that sells swimming pool services and supplies.
10. Respondent is a "person" as defined in Section 2(s) of FIFRA, 7 U.S.C. § 136(s).
11. 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 or for use as a plant regulator, defoliant or desiccant, with exceptions not relevant to this case.
12. 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.
13. 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: (a) The person who distributes or sells the substance claims, states, or implies (by labeling or otherwise): (1) That the substance . . . can or should be used as a pesticide, . . . (b) The substance consists of or contains one or more active ingredients and has no significant commercially valuable use as distributed or sold other than (1) use for pesticidal purpose (by itself or in combination with any other substance), . . . or (c) The person who distributes or sells the substance has actual or constructive knowledge that the substance will be used, or is intended to be used, for a pesticidal purpose."
14. 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).

15. In August 2007, Respondent sold a product with labels that identified it as "Hypochlorite Solution" and that included directions for its use for "disinfection" and for "sanitizing" ("Diviney's Hypochlorite Solution").
16. By stating that it can be used for "disinfection" and for "sanitizing", Diviney's Hypochlorite Solution label made pesticidal claims.
17. Diviney's Hypochlorite Solution is a "pesticide" and a "pesticide product" as those terms are defined by Section 2(u) of FIFRA, 7 U.S.C. § 136(u), and 40 C.F.R. § 152.3.
18. 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.
19. In August 2007, Respondent sold containers of Diviney's Hypochlorite Solution to various individuals, partnerships, associations, corporations and/or organized groups of persons on at least five (5) different occasions.
20. Each occasion on which Respondent distributed or sold containers of Diviney's Hypochlorite Solution constitutes a "distribution or sale" of a "pesticide" and "pesticide product" to a "person" as those terms are defined in Section 2 of FIFRA, 7 U.S.C. § 136, and 40 C.F.R. § 152.3.
21. 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 § 136e, or whose registration has been canceled or suspended.
22. Diviney's Hypochlorite Solution labels included the statements "E.P.A. REG. NO. 09488-20002-053880", and "ACTIVE INGREDIENT SODIUM HYPOCHLORITE; 10% BY WT".
23. In or about October 1996, EPA registered a 10% sodium hypochlorite Diviney Pool Supply product as a 'distributor product', "Sodium Hypochlorite" EPA Reg. No. 9488-20002-053880, pursuant to 40 C.F.R. § 152.132.
24. In or about July 2002, the pesticide registration for Diviney Pool Supply's 10% sodium hypochlorite product, "Sodium Hypochlorite", EPA Reg. No. 9488-20002-053880, was canceled due to the primary registrant's failure to pay required product registration maintenance fees. The cancellation order specified that existing stocks could not be distributed later than January 15, 2003.
25. Each sale and/or distribution of Diviney Pool Supply's canceled 10% sodium hypochlorite product, "Sodium Hypochlorite", EPA Reg. No. 9488-20002-053880, constitutes a separate

unlawful act 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).

26. Pursuant to Section 12(a)(1)(E) of FIFRA, 7 U.S.C § 136j(a)(1)(E), it shall be unlawful for any person in any State to distribute or sell to any person any pesticide that is adulterated or misbranded.

27. Pursuant to Section 2(q)(1) of FIFRA, 7 U.S.C § 136(q)(1), a pesticide is "misbranded" if *inter alia* its labeling bears any statement, design, or graphic representation relative thereto or to its ingredients which is false or misleading in any particular.

28. Respondent produced Diviney's Hypochlorite Solution by repackaging "Sodium Hypochlorite Solution", EPA Reg. No. 35317-20001, purchased in bulk from Kuehne Chemical Company.

29. The concentration of the active ingredient sodium hypochlorite in Kuehne Chemical Company's EPA registered product "Sodium Hypochlorite Solution", EPA Reg. No. 35317-20001, is 12.5%.

30. As the statements on Diviney's Hypochlorite Solution labels described in paragraph 22, above, are false or misleading as to the identity of the product, and as to the concentration of the active ingredient, Diviney's Hypochlorite Solution is misbranded as defined by Section 2(q)(1) of FIFRA, 7 U.S.C. § 136(q)(1).

31. Each occasion on which Respondent distributed or sold containers of misbranded Diviney's Hypochlorite Solution constitutes a separate unlawful act 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).

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

#### Civil Penalty

33. In settlement of the action referenced in the caption above, Respondent consents to the assessment of a civil penalty of three thousand seven hundred dollars (\$3,700) and agrees to pay such penalty in accordance with the terms set forth below. Such civil penalty amount shall become due and payable immediately upon Respondent's receipt of a true and correct copy of this CAFO. In order to avoid the assessment of interest, administrative costs, and late payment penalties in connection with such civil penalty as described in this CAFO, Respondent must pay the civil penalty no later than thirty (30) calendar days after the date on which a copy of this executed CAFO is mailed or hand-delivered to the Respondent.

34. The aforesaid settlement amount is based upon Complainant's 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. § 1361(a)(4), i.e., the size of Respondent's business, the effect of the penalty on Respondent's ability to continue in business, and the gravity of the violations. These factors were applied to the particular facts and circumstances of this case with specific reference to the *FIFRA Enforcement Response Policy* ("ERP"), dated July 2, 1990, and the *Amendments to EPA's Civil Penalty Policies to Implement the 2008 Civil Monetary Penalty Inflation Adjustment Rule (Effective January 12, 2009)*, dated December 29, 2008.

35. Payment of the civil penalty amount required under the terms of paragraph 33, above, shall be made as follows:

a. Mailing (*via first class U.S. Postal Service Mail*) a certified or cashier's check, made payable to the "United States Treasury" to the following address:

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

Contact: Craig Steffen 513-487-2091  
Eric Volck 513-487-2105

b. Via Overnight Delivery of a certified or cashier's check, made payable to the "United States Treasury", sent to the following address:

U.S. Bank  
Government Lockbox 979077  
US EPA Fines & Penalties  
1005 Convention Plaza  
SL-MO-C2-GL  
St. Louis, MO 63101

314-418-1028

c. By electronic funds transfer ("EFT") to the following account:

Federal Reserve Bank of New York  
ABA 021030004  
Account No. 68010727  
SWIFT Address FRNYUS33  
33 Liberty Street  
NY, NY 10045

(Field tag 4200 of Fedwire message should read "D  
68010727 Environmental Protection Agency")

d. By automatic clearinghouse ("ACH") to the following account:

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

Contact: Jesse White  
301-887-6548

e. Online payments can be made at [WWW.PAY.GOV](http://WWW.PAY.GOV) by entering "sfo 1.1" in the search field, and opening the form and completing the required fields.

All payments shall also reference the above case caption and docket number, DOCKET NO.: FIFRA-03-2009-0155. At the same time that any payment is made, Respondent shall mail copies of any corresponding check, or provide written notification confirming any electronic wire transfer, automated clearinghouse or online payment to Lydia A. Guy, Regional Hearing Clerk (3RC00), U.S. EPA, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103-2029 and to Stephen Forostiak (3LC62), Land and Chemicals Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103-2029.

36. 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 or to comply with the conditions in this CAFO shall result in the assessment of late payment charges including interest, penalties, and/or administrative costs of handling delinquent debts.

Interest on the civil penalty assessed in this CAFO will begin to accrue on the date that a copy of this executed 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).

The cost of EPA'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.

A penalty charge of six percent per year will be assessed monthly on any portion of the civil penalty which remains delinquent for 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).

37. Respondent agrees not to deduct for civil taxation purposes the civil penalty paid pursuant to this CAFO.

#### Certifications

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

#### Other Applicable Laws

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

#### Reservation of Rights

40. 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

41. 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. § 136/(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

42. This CAFO shall apply to and be binding upon EPA, Respondent, and the officers, directors, successors, and assigns of Respondent. By his or her signature below, the person signing this Consent Agreement on behalf of Respondent is acknowledging that he or she is fully authorized by Respondent to execute this Consent Agreement and to legally bind Respondent to the terms and conditions of this CAFO.

Effective Date

43. 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.

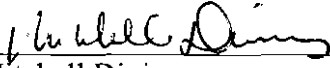
Entire Agreement

44. 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.



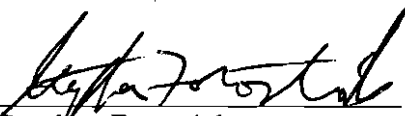
For Respondent:

5-10-09  
Date

  
Mitchell Diviney

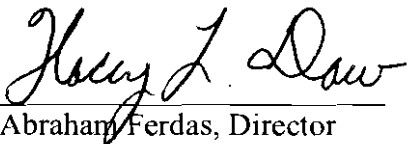
For Complainant:

5-19-09  
Date

  
Stephen Forostiak  
U.S. EPA, Region III

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

6/5/2009  
Date

 for AF  
Abraham Ferdas, Director  
Land and Chemicals Division

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

<b>IN THE MATTER OF</b>	)	
	)	
Mitchell Diviney	)	DOCKET NO: FIFRA-03-2009-0155
588 700 <sup>th</sup> Road	)	
New Oxford, PA 17350	)	FINAL ORDER
	)	
Respondent.	)	
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**FINAL ORDER**

The Director, Land and Chemicals Division, U.S. Environmental Protection Agency Region III, and Respondent, Mitchell Diviney, 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, 40 C.F.R. Part 22 ("Consolidated Rules of Practice"). 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.

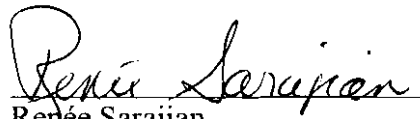
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NOW, THEREFORE, PURSUANT TO Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act, *as amended*, 7 U.S.C. § 136l(a) ("FIFRA"), and the Consolidated Rules of Practice, and having determined, based on the parties' representation in the Consent Agreement, that the penalty agreed to in the Consent Agreement is based on a consideration of the factors set forth in Section 14(a)(4) of FIFRA, 7 U.S.C. § 136l(a)(4), IT IS HEREBY ORDERED that Respondent pay a penalty of three thousand seven hundred dollars

(\$3,700), and comply with the terms and conditions of the Consent Agreement.

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

6/9/09  
Date



Renée Sarajian  
Regional Judicial Officer  
U.S. Environmental Protection Agency, Region III

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

**IN THE MATTER OF**

Mitchell Diviney  
588 700<sup>th</sup> Road  
New Oxford, PA 17350

Respondent.

DOCKET NO: FIFRA-03-2009-0155

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:**

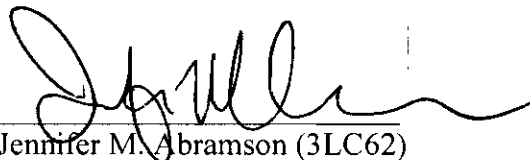
Lydia Guy, Regional Hearing Clerk

**Copy by Certified Mail**

Mitchell Diviney  
588 700<sup>th</sup> Road  
New Oxford, PA 17350

**JUN 09 2009**

Date



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

