

BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:) DOCKET NO. FIFRA-10-2021-0107
)
ESPERER WEB STORES, LLC) **CONSENT AGREEMENT**
d/b/a)
DIATOMACEOUSEARTH.COM,)
)
Sigurd, Utah,)
)
Respondent.

I. STATUTORY AUTHORITY

1.1. This Consent Agreement is issued under the authority vested in the Administrator of the U.S. Environmental Protection Agency (“EPA”) by Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”), 7 U.S.C. § 136l(a).

1.2. Pursuant to Section 14(a) of FIFRA, 7 U.S.C. § 136l(a), and in accordance with the “Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties,” 40 C.F.R. Part 22, EPA issues, and DiatomaceousEarth.Com (“Respondent”) agrees to issuance of, the Final Order attached to this Consent Agreement (“Final Order”).

II. PRELIMINARY STATEMENT

2.1. In accordance with 40 C.F.R. §§ 22.13(b) and 22.18(b), issuance of this Consent Agreement commences this proceeding, which will conclude when the Final Order becomes effective.

2.2. The Director of Enforcement and Compliance Assurance Division, EPA Region 10 (“Complainant”) has been delegated the authority pursuant to Section 14(a) of FIFRA,

7 U.S.C. § 136l(a), to sign consent agreements between EPA and the party against whom an administrative penalty for violations of FIFRA is proposed to be assessed.

2.3. Part III of this Consent Agreement contains a concise statement of the factual and legal basis for the alleged violations of FIFRA together with the specific provisions of FIFRA and the implementing regulations that Respondent is alleged to have violated.

III. ALLEGATIONS

3.1. Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), provides that “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. § 136a.]”

3.2. Section 12(a)(1)(i) of FIFRA, 7 U.S.C. § 136j(a)(1)(i), provides that “it shall be unlawful for any person . . . to violate any order issued under section [13 of FIFRA, 7 U.S.C. § 136k.]”

3.3. Section 2(s) of FIFRA, 7 U.S.C. § 136(s), defines a “person” as, “any individual, partnership, association, corporation, or any organized group of persons whether incorporated or not.”

3.4. Section 2(u) of FIFRA, 7 U.S.C. § 136(u), defines a “pesticide,” in part, as, “any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest.”

3.5. Section 2(t) of FIFRA, 7 U.S.C. § 136(t), defines a “pest” as “any insect, rodent, nematode, [or] fungus.”

3.6. The regulation at 40 C.F.R. § 152.15 states that “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). . . that the substance . . . can or should be used as a pesticide”

3.7. Section 2(gg) of FIFRA, 7 U.S.C § 136(gg), defines “to distribute or sell” as “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.”

3.8. The regulation at 40 C.F.R. § 152.3 further defines “distribute or sell and other grammatical variations of the term” as “the acts of distributing, selling, offering for sale, holding for sale, shipping, holding for shipment, delivering for shipment, or receiving and (having so received) delivering or offering to deliver, or releasing for shipment to any person in any State.”

3.9. The regulation at 40 C.F.R. § 168.22(a) interprets the offer for sale provisions of the above cited definition “as extending to advertisements.” The regulation at 40 C.F.R. § 168.22(b) provides that “EPA regards it as unlawful for any person who distributes, sells, offers for sale, holds for sale, ships, delivers for shipment, or receives and (having so received) delivers or offers to deliver any pesticide, to place or sponsor advertisements which recommend or suggest the purchase or use of: . . . (4) Any unregistered pesticide for any use”

3.10. Respondent is a limited liability corporation, incorporated in Utah, and thus a person, as that term is defined in Section 2(s) of FIFRA, 7 U.S.C. § 136(s). At all times relevant to this Consent Agreement, Respondent owned and operated the website “DiatomaceousEarth.Com,” through which it offered for sale and sold the product “Food Grade Diatomaceous Earth.”

3.11. At all times relevant to this Consent Agreement, Respondent owned and operated a warehouse in Sigurd, Utah. Respondent distributed the product “Food Grade Diatomaceous Earth” from that warehouse to EPA Region 10 staff in Seattle, Washington.

3.12. At all times relevant to this Consent Agreement, on at least seven different DiatomaceousEarth.Com webpages, Respondent made pesticidal claims about Food Grade Diatomaceous Earth.

- a. On the webpage entitled “How to Apply Diatomaceous Earth for Cockroaches” Respondent makes the pesticidal claim “[Diatomaceous Earth] works incredibly well for killing roaches and it takes significantly less work, it’s less invasive, cheaper, and achieves results quicker.”
- b. On the webpage entitled “Natural Indoor Ant Treatment” Respondent makes the pesticidal claim “Ants are one of the most common insects that invade the home . . . Natural products like diatomaceous earth will be safe to use around your kids and pets [and] will continue to work long after any chemical products’ effect have dissipated, providing a natural ant repellent as long as the powder remains.”
- c. On the webpage entitled “Diatomaceous Earth: Natural Bed Bug Control” Respondent makes the pesticidal claim “Treat Bed Bugs With A Natural Pesticide. Diatomaceous earth is an effective bed bug powder Diatomaceous earth (DE) kills bed bugs by absorbing the oily, protective layer that covers their exoskeletons. Without this protective coating, bed bugs will dehydrate and die within a few hours.”

- d. On the webpage “Diatomaceous Earth: Wet vs Dry Application” Respondent makes the pesticidal claim “Do you struggle with pesky household insects? Diatomaceous Earth can help.”
- e. On the webpage “How to Apply Diatomaceous Earth: 3 Application Methods” Respondent makes the pesticidal claim “DE is most effective when dry because the diatoms will vigorously absorb unwanted spills and smells or dehydrate insects.”
- f. On the webpage “What is Diatomaceous Earth” Respondent has imbedded a video, which makes the pesticidal claim that Diatomaceous Earth is a good health supplement, filtration aid, pesticide, and more.
- g. On the webpage “Frequently Asked Questions” Respondent answers the question “What is DE used for?” with “Food grade DE is used for a great many things, almost all of which fall into two main . . . categories: health benefits and pest control. It is . . . used as a natural solution to treat all kinds of insects.”

3.13. Respondent’s product Food Grade Diatomaceous Earth is a substance intended for preventing, destroying, repelling, or mitigating any pest, and is, therefore, a pesticide, as that term is defined in Section 2(u) of FIFRA, 7 U.S.C. § 136(u) and 40 C.F.R. § 152.15

3.14. At all times relevant to this Consent Agreement, the DiatomaceousEarth.Com website included links that directed browsers to a webpage to purchase several products, including Respondent’s product “Food Grade Diatomaceous Earth.” The aforementioned links read either “Try Diatomaceous Earth” or “Shop Food Grade Diatomaceous Earth.”

3.15. On or around March 18, 2019, EPA Inspectors purchased Respondent's product Food Grade Diatomaceous Earth from DiatomaceousEarth.Com by clicking on the links referenced in paragraph 3.14, above. Responded fulfilled this purchase and shipped Respondent's product Food Grade Diatomaceous Earth to the EPA Region 10 Inspectors in Seattle, Washington.

3.16. Food Grade Diatomaceous Earth is not a registered pesticide under Section 3 of FIFRA, 7 U.S.C. § 136a.

3.17. On September 19, 2014, EPA issued a Stop Sale, Use, or Removal Order (Docket No. FIFRA-10-2014-0174) pursuant to Section 13 of FIFRA, 7 U.S.C. § 136k, to the Respondent, in which EPA ordered the Respondent not to offer for sale, sell, or distribute the product "Diatomaceous Earth Food Grade" ("SSURO"). At the time EPA issued the SSURO, Respondent was operating out of a warehouse in Lewisville, Idaho.

VIOLATIONS

Count 1: Offering to sell an Unregistered Pesticide

3.18. Between at least February 1, 2019 and January 31, 2020, Respondent offered for sale the unregistered pesticide Food Grade Diatomaceous Earth on at least one occasion.

3.19. Therefore, between February 1, 2019 and January 31, 2020, Respondent violated Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), on at least one occasion.

Count 2: Selling and Distributing an Unregistered Pesticide

3.20. On at least March 18, 2019, Respondent distributed and sold the unregistered pesticide Food Grade Diatomaceous Earth on at least one occasion.

3.21. Therefore, on at least March 18, 2019, Respondent violated Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), on at least one occasion.

Count 3: Violating an Order

3.22. As alleged in paragraph 3.17, the SSURO prohibited Respondent from offering for sale, selling, or distributing the unregistered pesticide Food Grade Diatomaceous Earth.

3.23. As alleged in paragraph 3.18, between at least February 1, 2019 and January 31, 2020, Respondent offered for sale the unregistered pesticide Food Grade Diatomaceous Earth on at least one occasion.

3.24. As alleged in paragraph 3.20, on at least March 18, 2019, Respondent distributed and sold the unregistered pesticide Food Grade Diatomaceous Earth on at least one occasion.

3.25. Therefore, between February 1, 2019 and January 31, 2020, Respondent violated the SSURO on at least one occasion, in violation of Section 12(a)(2)(i) of FIFRA, 7 U.S.C. § 136j(a)(2)(i).

Enforcement Authority

3.26. Pursuant to Section 14(a)(1) of FIFRA, 7 U.S.C. § 136l(a)(1), and 40 C.F.R. Part 19, EPA may assess a civil penalty of not more than \$20,528 for each offense.

IV. TERMS OF SETTLEMENT

4.1. Respondent admits the jurisdictional allegations of this Consent Agreement.

4.2. Respondent neither admits nor denies the specific factual allegations contained in this Consent Agreement.

4.3. In determining the amount of penalty to be assessed, EPA has taken into account the factors specified in Section 14(a)(4) of FIFRA, 7 U.S.C. § 136l(a)(4). After considering all

of these factors, EPA has determined and Respondent agrees that an appropriate penalty to settle this action is \$7,600 (the “Assessed Penalty”).

4.4. Respondent agrees to pay the Assessed Penalty within 30 days of the effective date of the Final Order.

4.5. Payments under this Consent Agreement and the Final Order may be paid by check (mail or overnight delivery), wire transfer, ACH, or online payment. Payment instructions are available at: <http://www2.epa.gov/financial/makepayment>. Payments made by a cashier’s check or certified check must be payable to the order of “Treasurer, United States of America” and delivered to the following address:

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

Respondent must note on the check the title and docket number of this action.

4.6. Concurrently with payment, Respondent must serve photocopies of the check, or proof of other payment method, described in Paragraph 4.5 on the Regional Hearing Clerk and EPA Region 10 at the following addresses:

Regional Hearing Clerk
U.S. Environmental Protection Agency
Region 10,
R10_RHC@epa.gov

Nicholas Hurwit
U.S. Environmental Protection Agency
Region 10
Hurwit.Nicholas@epa.gov

4.7. If Respondent fails to pay any portion of the Assessed Penalty in full by its due date, the entire unpaid balance of the Assessed Penalty and accrued interest shall become immediately due and owing. If such a failure to pay occurs, Respondent may be subject to a civil

action under Section 14(a)(5) of FIFRA, 7 U.S.C. § 136l(a)(5), to collect any unpaid penalties, together with interest, handling charges, and nonpayment penalties, as set forth below.

4.8. If Respondent fails to pay any portion of the Assessed Penalty in full by its due date, Respondent shall also be responsible for payment of the following amounts:

a. Interest. Pursuant to 31 U.S.C. § 3717(a)(1), any unpaid portion of the Assessed Penalty shall bear interest at the rate established by the Secretary of the Treasury from the effective date of the Final Order contained herein, provided, however, that no interest shall be payable on any portion of the Assessed Penalty that is paid within 30 days of the effective date of the Final Order contained herein.

b. Handling Charge. Pursuant to 31 U.S.C. § 3717(e)(1), a monthly handling charge of \$15 shall be paid if any portion of the Assessed Penalty is more than 30 days past due.

c. Nonpayment Penalty. Pursuant to 31 U.S.C. § 3717(e)(2), a nonpayment penalty of 6% per annum shall be paid on any portion of the Assessed Penalty that is more than 90 days past due, which nonpayment shall be calculated as of the date the underlying penalty first becomes past due.

4.9. The Assessed Penalty, including any additional costs incurred under Paragraph 4.8, represents an administrative civil penalty assessed by EPA and shall not be deductible for purposes of federal taxes.

4.10. The undersigned representative of Respondent certifies that he or she is authorized to enter into the terms and conditions of this Consent Agreement and to bind Respondent to this document.

4.11. Except as described in Paragraph 4.8, each party shall bear its own costs and attorneys' fees in bringing or defending this action.

4.12. For the purposes of this proceeding, Respondent expressly waives any affirmative defenses and the right to contest the allegations contained in the Consent Agreement and to appeal the Final Order.

4.13. The provisions of this Consent Agreement and the Final Order shall bind Respondent and its agents, servants, employees, successors, and assigns.

4.14. Respondent consents to the issuance of any specified compliance or corrective action order, to any conditions specified in this consent agreement, and to any stated permit action.

4.15. The above provisions in Part IV are STIPULATED AND AGREED upon by Respondent and EPA Region 10.

DATED:

07-07-2021

FOR RESPONDENT:



LYNSEY MARRINAN, General Manager
Esperer Web Stores, LLC
d/b/a DiatomaceousEarth.com

DATED:

FOR COMPLAINANT:

EDWARD
KOWALSKI Digitally signed by
EDWARD KOWALSKI
Date: 2021.07.13
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EDWARD J. KOWALSKI, Director
Enforcement & Compliance Assurance Division
EPA Region 10

BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:)	DOCKET NO. FIFRA-10-2021-0107
)	
ESPERER WEB STORES, LLC)	FINAL ORDER
d/b/a)	
DIATOMACEOUSEARTH.COM,)	
)	
Sigurd, Utah,)	
)	
_____ Respondent.)	

1.1. The Administrator has delegated the authority to issue this Final Order to the Regional Administrator of EPA Region 10, who has re delegated this authority to the Regional Judicial Officer in EPA Region 10.

1.2. The terms of the foregoing Consent Agreement are ratified and incorporated by reference into this Final Order. Respondent is ordered to comply with the terms of settlement.

1.3. The Consent Agreement and this Final Order constitute a settlement by EPA of all claims for civil penalties under FIFRA for the violations alleged in Part III of the Consent Agreement. In accordance with 40 C.F.R. § 22.31(a), nothing in this Final Order shall affect the right of EPA or the United States to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law. This Final Order does not waive, extinguish, or otherwise affect Respondent’s obligations to comply with all applicable provisions of FIFRA and regulations promulgated or permits issued thereunder.

1.4. This Final Order shall become effective upon filing with the Regional Hearing Clerk.

SO ORDERED this _____ day of _____, 2021.

**RICHARD
MEDNICK**

Digitally signed by
RICHARD MEDNICK
Date: 2021.07.15
13:21:30 -07'00'

RICHARD MEDNICK
Regional Judicial Officer
EPA Region 10

Certificate of Service

The undersigned certifies that the original of the attached **CONSENT AGREEMENT AND FINAL ORDER, In the Matter of: DIATOMACEOUSEARTH.COM, Docket No.: FIFRA-10-2021-0107**, was filed with the Regional Hearing Clerk and served on the addressees in the following manner on the date specified below:

The undersigned certifies that a true and correct copy of the document was delivered electronically to:

Rachel Aramburu
U.S. Environmental Protection Agency
Region 10
aramburu.rachel@epa.gov

Further, the undersigned certifies that a true and correct copy of the aforementioned document was delivered electronically to:

Lynsey Marrinan
General Manager
Esperer Web Stores, LLC d/b/a DiatomaceousEarth.com
LMarrinan@diatomaceousearth.com

DATED this _____ day of _____, 2021.

TERESA
YOUNG

Digitally signed by
TERESA YOUNG
Date: 2021.07.16
09:51:44 -07'00'

TERESA YOUNG
Regional Hearing Clerk
EPA Region 10