

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY REGION IX

US EPA - REGION IX HEARING CLERK

In the matter of:) Docket No. FIFRA-09-2013-01
Pittsburg Wholesale Grocers, Inc.)
(dba Pitco Foods),) CONSENT AGREEMENT
Respondent.) AND FINAL ORDER
) pursuant to 40 C.F.R. §§ 22.13
) and 22.18
)

I. CONSENT AGREEMENT

The United States Environmental Protection Agency, Region IX ("EPA" or "Complainant") and Pittsburg Wholesale Grocers, Inc. ("Respondent") agree to settle this matter and consent to the entry of this Consent Agreement and Final Order ("CAFO"). This CAFO simultaneously commences and concludes this proceeding in accordance with 40 C.F.R. 22.13(b) and 22.18(b).

A. AUTHORITY AND PARTIES

This is a civil administrative action brought pursuant to Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136l(a), for the assessment of a civil administrative penalty against Respondent for the sale and distribution of an unregistered pesticide in violation of Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A).

Complainant is the Associate Director for Agriculture of the Communities and Ecosystems Division, EPA Region IX, who has been duly delegated the authority to initiate administrative proceedings under Section 14 of FIFRA and to sign consent agreements settling such proceedings.

Respondent is a California corporation whose principle place of business is located at 567 Cinnabar Street, San Jose, California 95110.

B. APPLICABLE STATUTES AND REGULATIONS

1. The term "person" means "any individual, partnership, association, corporation, or any organized group of persons whether incorporated or not." Section 2(s) of FIFRA, 7 U.S.C. § 136(s).
2. The term "pesticide" means "any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest. . . ." Section 2(u) of FIFRA, 7 U.S.C. § 136(u).
3. The term "pest" means "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. . . ." Section 2(t) of FIFRA, 7 U.S.C. § 136(t).
4. 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." Section 2(gg) of FIFRA, 7 U.S.C. § 136(gg).
5. Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), makes it 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.

C. ALLEGED VIOLATIONS

6. Respondent is a "person" as that term is defined in Section 2(s) of FIFRA, 7 U.S.C. § 136(s).

7. Respondent owns and/or operates a wholesale grocery facility located at 567 Cinnabar Street, San Jose, California, 95110 (the "Facility").
8. At all times relevant to this CAFO, Respondent "distributed or sold" the Fabuloso products, Fresco Lavanda Fabuloso, Fresco Amenecer Fabuloso and Mar Fresco Fabuloso, as that term is defined at Section 2(gg) of FIFRA, 7 U.S.C. § 136(gg), at the Facility.
9. At all times relevant to this CAFO, each of these Fabuloso products contained a label in Spanish with the claims "Antibacterial" and that the product would "eliminate" 99.99% of several types of bacteria.
10. Bacteria are "pests," as that term is defined in Section 2(t) of FIFRA, 7 U.S.C. § 136(t).
11. Consequently, at all times relevant to this CAFO, each of these Fabuloso products is a "pesticide," as this term is defined in Section 2(u) of FIFRA, 7 U.S.C. § 136(u).
12. At all times relevant to this CAFO, none of these Fabuloso products was registered under Section 3 of FIFRA.
13. On or around April 4, 2011, Respondent distributed or sold the Fabuloso products, Fresco Lavanda Fabuloso, Fresco Amenecer Fabuloso, and Mar Fresco Fabuloso to discount retailer, BkG, Inc., dba "Bargain King Discount Store".
14. On April 28, 2011, Respondent "distributed or sold" Fresco Lavanda Fabuloso, as that term is defined in Section 2(gg) of FIFRA, 7 U.S.C. § 136(gg), in that Respondent was holding the product for sale at the Facility.
15. Respondent's distribution or sale of Fresco Lavanda Fabuloso, Fresco Amenecer Fabuloso and Mar Fresco Fabuloso on or around April 4, 2011 and Fresco Lavanda Fabuloso on April 28, 2011 constitute 4 violations of Section 12(a)(1)(A) of FIFRA, 7 U.S.C. §

136j(a)(1)(A).

16. The Enforcement Response Policy for FIFRA dated December 2009 provides for a penalty of \$27,000 for these violations.

D. RESPONDENT'S ADMISSIONS

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

E. CIVIL ADMINISTRATIVE PENALTY

18. In final settlement of the FIFRA violations specifically alleged in Section I.C of this CAFO, Respondent agrees to pay a civil administrative penalty of TWENTY-ONE THOUSAND, SIX HUNDRED DOLLARS (\$21,600).
19. Respondent shall pay the assessed penalty no later than thirty (30) days from the effective date of this CAFO. Payment shall be made by cashier's or certified check payable to the "Treasurer, United States of America," and shall be sent by certified mail, return receipt requested (or be paid by one of the other methods listed below) and sent as follows:

Regular Mail:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
PO Box 979077

In the Matter of Pittsburg Wholesale Grocers, Inc.
FIFRA Consent Agreement and Final Order

St. Louis, MO 63197-9000

Wire Transfers:

Wire transfers must be sent directly to the Federal Reserve Bank in New York City with the following information:

Federal Reserve Bank of New York

ABA = 021030004

Account = 68010727

SWIFT address = FRNYUS33

33 Liberty Street

New York, NY 10045

Field Tag 4200 of the Fedwire message should read "D 68010727 Environmental Protection Agency"

Overnight Mail:

U.S. Bank

1005 Convention Plaza

Mail Station SL-MO-C2GL

ATTN Box 979077

St. Louis, MO 63101

ACH (also known as REX or remittance express):

Automated Clearinghouse (ACH) for receiving US currency

PNC Bank

808 17th Street, NW

Washington, DC 20074

ABA = 051036706

Transaction Code 22 – checking

Environmental Protection Agency

Account 31006

CTX Format

On Line Payment:

This payment option can be accessed from the information below:

www.pay.gov

Enter "sf01.1" in the search field

Open form and complete required fields

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

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

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

AND

Julie Jordan
Pesticides Office (CED-5)
U.S. Environmental Protection Agency, Region IX
75 Hawthorne Street
San Francisco, CA 94105

20. Payment of the above civil administrative penalty shall not be used by Respondent or any other person as a tax deduction from Respondent's federal, state, or local taxes.
21. If Respondent fails to pay in full the civil administrative penalty assessed in Paragraph 18 by its due date specified in Paragraph 19, then Respondent shall pay a stipulated penalty of \$27,000, instead of the assessed penalty, immediately upon EPA's written request. In addition, failure to pay in full the assessed civil administrative penalty by its due date may lead to any or all of the following actions:
 - a. The debt being referred 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. In any such

collection action, the validity, amount, and appropriateness of the assessed penalty and of this CAFO shall not be subject to review.

- b. The debt being collected by administrative offset (i.e., the withholding of money payable by the United States to, or held by the United States for, a person to satisfy the debt the person owes the Government), which includes, but is not limited to, referral to the Internal Revenue Service for offset against income tax refunds. 40 C.F.R. Part 13, Subparts C and H.
- c. EPA may (i) suspend or revoke Respondent's licenses or other privileges; (ii) suspend or disqualify Respondent from doing business with EPA or engaging in programs EPA sponsors or funds; (iii) convert the method of payment under a grant or contract from an advanced payment to a reimbursement method; or (iv) revoke a grantee's or contractor's letter-of-credit. 40 C.F.R. § 13.17.

22. In accordance with the Debt Collection Act of 1982 and 40 C.F.R. Part 13, interest, penalty charges, and administrative costs will be assessed against the outstanding amount that Respondent owes to EPA for Respondent's failure to pay in full the civil administrative penalty by its due date. Interest will be assessed at an annual rate that is equal to the rate of current value of funds to the United States Treasury (i.e., the Treasury tax and loan account rate) as prescribed and published by the Secretary of the Treasury in the Federal Register and the Treasury Fiscal Requirements Manual Bulletins, 40 C.F.R. § 13.11(a)(1). Penalty charges will be assessed monthly at a rate of 6% per annum, 40 C.F.R. § 13.11(c). Administrative costs for handling and collecting Respondent's overdue debt will be based on either actual or average cost incurred, and will include both

direct and indirect costs, 40 C.F.R. § 13.11(b). In addition, if this matter is referred to another department or agency (e.g., the Department of Justice, the Internal Revenue Service), that department or agency may assess its own administrative costs, in addition to EPA's administrative costs, for handling and collecting Respondent's overdue debt.

F. CERTIFICATION AND COMPLIANCE

23. In executing this CAFO, Respondent certifies that (1) it is no longer selling or distributing any pesticide that is unregistered in violation of Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A); and (2) it has complied with all other FIFRA requirements at all facilities that it owns or operates.

G. RETENTION OF RIGHTS

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

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

H. ATTORNEYS' FEES AND COSTS

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

I. EFFECTIVE DATE

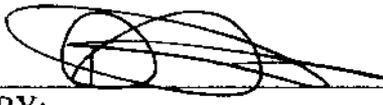
27. In accordance with 40 C.F.R. §§ 22.18(b)(3) and 22.31(b), this CAFO shall be effective on the date that the Final Order contained in this CAFO, having been approved and issued by either the Regional Judicial Officer or Regional Administrator, is filed with the Regional Hearing Clerk.

J. BINDING EFFECT

28. The undersigned representative of Complainant and the undersigned representative of Respondent each certifies that he or she is fully authorized to enter into the terms and conditions of this CAFO and to bind the party he or she represents to this CAFO.
29. The provisions of this CAFO shall apply to and be binding upon Respondent and its officers, directors, employees, agents, trustees, servants, authorized representatives, successors, and assigns.

FOR RESPONDENT, PITTSBURG WHOLESALE GROCERS, INC.

1/15/13
DATE:


BY:

TITLE: VP SEC

Pittsburg Wholesale Grocers, Inc.

FOR COMPLAINANT, EPA REGION IX:

2/7/13
DATE

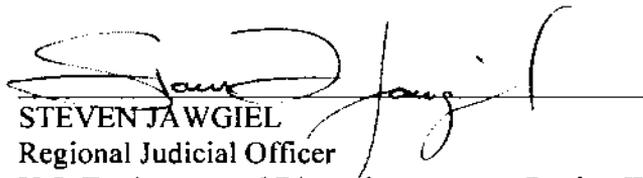
BY: 

Katherine A. Taylor
Associate Director for Agriculture
Communities and Ecosystems Division
U.S. Environmental Protection Agency, Region IX

II. FINAL ORDER

EPA and Pittsburg Wholesale Grocers, Inc. having entered into the foregoing Consent Agreement, IT IS HEREBY ORDERED that this CAFO (Docket No. FIFRA-09-2013-01) be entered and that Respondent shall pay a civil administrative penalty in the amount TWENTY-ONE THOUSAND, SIX HUNDRED DOLLARS (\$21,600), and comply with the terms and conditions set forth in the Consent Agreement. This CAFO shall become effective upon filing.

02/08/13
DATE


STEVEN J. WGIEL
Regional Judicial Officer
U.S. Environmental Protection Agency, Region IX

CERTIFICATION / CERTIFICATE OF SERVICE

I certify that the original of the foregoing Consent Agreement and Final Order Pursuant to 40 C.F.R. §§ 22.13 and 22.18, Docket No. FIFRA-9-2013-0001, was hand delivered to the Regional Hearing Clerk, United States Environmental Protection Agency - Region IX, 75 Hawthorne Street, San Francisco, California 94105, and that a true and correct copy thereof was placed in the United States Mail, certified mail (7010 2780 0000 8388 6729), return receipt requested, addressed to the following address:

Mr. David Luttway
Vice President
Pitco Foods
567 Cinnabar St.
San Jose, CA 95110

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

Alexa Engelman, 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

2/8/13

Date



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

CERTIFIED MAIL
RETURN RECEIPT REQUESTED 7010 2780 0000 8388 6729

Date: FEB 09 2013

Mr. David Luttway
Vice President
Pitco Foods
567 Cinnabar St.
San Jose, CA 95110

Subject: Pittsburg Wholesale Grocers, Inc. (dba Pitco Foods)
Consent Agreement and Final Order
Docket No. FIFRA-09-2013-0001

Dear Mr. Luttway:

Enclosed please find a 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 Julie Jordan, Enforcement Officer (CED-5), telephone number 415- 947-4207 at the U.S. Environmental Protection Agency, Region 9, 75 Hawthorne Street, San Francisco, CA 94105.

Sincerely,

A handwritten signature in black ink, appearing to read "Katherine A. Taylor".

for Katherine A. Taylor
Associate Director for Agriculture
Communities and Ecosystems Division

Enclosure

ecc: Pat Thalken, California Department of Pesticide Regulation
Jim Phillips, Pitco Foods