

FILED

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 6
DALLAS, TEXAS

2009 DEC -3 AM 9:12

REGIONAL HEARING CLERK
EPA REGION VI

IN THE MATTER OF:

Axss USA, LLC.
1100 Platte Falls Rd
Platte City, MO. 64079

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DOCKET NO. FIFRA 06-2010-0301

COMPLAINT AND
CONSENT AGREEMENT AND
FINAL ORDER

RESPONDENT

COMPLAINT AND
CONSENT AGREEMENT AND FINAL ORDER

The Director, Multimedia Planning and Permitting Division, United States Environmental Protection Agency, Region 6 (EPA) as Complainant, and Axss USA, LLC., located in Platte City, Missouri (Respondent) in the above referenced action, have consented to the terms of this Complaint and Consent Agreement and Final Order (Complaint and CAFO).

NOW THEREFORE, before the taking of any testimony, without any adjudication of any issues of law or fact herein, the parties agree to the terms of this Complaint and CAFO.

I.

PRELIMINARY STATEMENT

1. This enforcement proceeding is instituted by EPA pursuant to Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 1367(a) (FIFRA) which authorizes the Administrator to bring an administrative action to assess a penalty of up to \$7,500¹

¹The Civil Penalty Inflation Adjustment Rule (62 Fed Reg. 13514, March 20, 1997 and 69 Fed Reg. 7121, February 13, 2004) provides for increases in the statutory penalty provisions for violations which occur after the date the increases take effect. For violations after March 14, 2004, the potential maximum penalty for such violations changed from \$5,500 to \$6,500. The Agency is required to review its penalties once every four years and adjust them for inflation. The Final Rule published at 73 Fed Reg. 75340 raised the FIFRA penalty to \$7,500 for violations occurring after December 11, 2008.

for each violation of Section 12(a)(1)(B) of FIFRA, 7 U.S.C. § 136j(a)(1)(B). This proceeding was instituted by the issuance of the Complaint and Notice of Opportunity for Hearing (Complaint) incorporated herein.

2. The Complaint alleges Respondent violated regulations promulgated pursuant to the FIFRA.

3. For purposes of this proceeding, Respondent admits the jurisdictional allegations of this Complaint; however, Respondent neither admits nor denies the specific factual allegations contained in this Complaint.

4. Respondent consents to the issuance of this Complaint and CAFO hereinafter recited and consents to the assessment and payment of the stated civil penalty in the amount and by the method set out in this Complaint and CAFO.

5. By signature on this Complaint and CAFO, Respondent waives any right to an appeal of this proceeding.

6. Respondent represents that it is duly authorized to execute this Complaint and CAFO and that the party signing this Complaint and CAFO on behalf of the Respondent is duly authorized to bind the Respondent to the terms and conditions of this Complaint and CAFO.

7. Respondent agrees that the provisions of this Complaint and CAFO shall be binding on its officers, directors, employees, agents, servants, authorized representatives, successors, and assigns, including but not limited to, subsequent purchasers.

II. STATUTORY AND REGULATORY BACKGROUND

8. Section 2(s) of FIFRA defines a "person" as any individual, partnership, association, corporation, or any organized group of persons whether incorporated or not.

9. Section 2(u) of FIFRA defines the term "pesticide" as any substance or mixture of

substances intended for preventing, destroying, repelling, or mitigating any pest.

10. Section 2(gg) of FIFRA defines the term "to distribute or sell" as distribute, sell, offer for sale, hold for distribution, hold for shipment, or receive and (having so received) deliver or offer to deliver.

11. Section 2(p) of FIFRA defines "label" as the written, printed, or graphic matter on, or attached to, the pesticide or device or any of its containers or wrappers.

13. Importation procedures are outlined under Section 17(c) of FIFRA, whereby the EPA determines whether or not a pesticide is adulterated or misbranded.

14. Pursuant to Section 14(a)(1) of FIFRA, 7 U.S.C. § 136l(a)(1), any registrant, commercial applicator, wholesaler, dealer, retailer, or other distributor who violates any provision of FIFRA may be assessed a civil penalty by the Administrator of not more than \$7,500² for each offense.

III.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

15. The Respondent is Axss USA, LLC. located at 1100 Platte Falls Road Platte City, MO. 64079.

16. Respondent is a "person" as that term is defined in Section 2(s) of FIFRA.

17. Respondent is a registrant, wholesaler, dealer, retailer or other distributor subject to the civil penalty provisions of Section 14(a)(1) of FIFRA, 7 U.S.C. § 136l(a)(1).

18. Respondent's product, EPA Registration Number 83520-5, Bifenthrin Technical, is a pesticide as defined in FIFRA Section 2(u).

19. At all relevant times, the Respondent was a "distributor," as that term is defined at

²See footnote 1.

Section 2(gg) of FIFRA, of the following pesticide: EPA Registration Number 83520-5

Bifenthrin Technical.

20. The registration for the product described in paragraph 18 was originally issued April 4, 2007 and amended on March 27, 2008.

21. On or about October 8, 2009, the Respondent disclosed to EPA Region 6 that the product described in paragraph 18 had the April 2007 labels and not the current, March 2008, EPA Approved labels fixed to the drums.

22. One Notice of Arrival of Pesticides and Devices (NOA) was submitted for Axss USA, LLC. to EPA on or about October 15, 2009 (EPA Tracking Number: NOA-09-10-012).

23. The NOA presented to EPA and described in paragraph 22, notified EPA that the pesticide described in paragraphs 18 and 21 was being presented for import into the United States.

IV. VIOLATIONS

24. Complainant incorporates by reference the allegations contained in paragraphs 1-23 of this Complaint and CAFO.

25. Section 12(a)(1)(B) of FIFRA states that it shall be unlawful for any person in any State to distribute or sell to any person any pesticide, which is substantially differ from those accepted in connection with registration.

26. By shipping the pesticide for import and requesting release of the shipment by EPA through the Notice of Arrival of Pesticides and Devices forms, described in paragraph 22, the Respondent distributed the pesticide described in paragraphs 18 and 21.

27. Respondent's distribution or sale of the product, EPA Registration Number 83520-5, Bifenthrin Technical constituted an unlawful act in violation of Section 12(a)(1)(B) of FIFRA.

V.
CIVIL PENALTY AND
TERMS OF SETTLEMENT

28. For the reasons set forth above, Respondent has agreed to pay a civil penalty, which has been determined in accordance with Section 14(a)(1) of FIFRA, 7 U.S.C. § 136(a)(1), and the Civil Penalty Inflation Adjustment Rule³ which authorizes EPA to assess a civil penalty of up to **SEVEN THOUSAND FIVE HUNDRED DOLLARS (\$7,500.00)** for each violation of FIFRA.

Upon consideration of the entire record herein, including the Findings of Fact and Conclusions of Law, which are hereby adopted and made a part hereof, and upon consideration of (1) the size of the Respondent's business, (2) the effect upon Respondent's ability to continue in business, and (3) the gravity of the alleged violation, the parties agree to the terms of this settlement. To develop the proposed penalty in this Complaint, the Complainant has taken into account the particular facts and circumstances of this case with specific reference to EPA's "Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)" dated July 2, 1990, located at: <http://www.epa.gov/Compliance/resources/policies/civil/erp/index.html>, a copy of which is enclosed with this Complaint and CAFO. It is ORDERED that Respondent be assessed a civil penalty of **ONE THOUSAND NINE HUNDRED DOLLARS AND NO CENTS (\$1,900.00)**.

29. Within thirty (30) days of Respondent's receipt of this fully executed Complaint and CAFO, Respondent shall pay the assessed civil penalty by cashier's or certified check, made payable to "Treasurer, United States of America, EPA - Region 6."

Payment shall be remitted in one of the alternatives provided in the collection information section below:

³ See footnote 1.

COLLECTION INFORMATION

CHECK PAYMENTS:

US Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
PO Box 979077
St. Louis, MO 63197-9000

WIRE TRANSFERS:

Wire transfers should be directed to the Federal Reserve Bank of New York

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
St. Louis, MO 63101
Contact: Natalie Pearson
314-418-4087

ACH (also known as REX or remittance express)

Automated Clearinghouse (ACH) for receiving US currency
PNC Bank
808 17th Street, NW
Washington, DC 20074
Contact -- Jesse White 301-887-6548
ABA = 051036706
Transaction Code 22 - checking
Environmental Protection Agency
Account 310006
CTX Format

ON LINE PAYMENT:

There is now an On Line Payment Option, available through the Dept. of Treasury.
This payment option can be accessed from the information below:

WWW.PAY.GOV

Enter "sfo 1.1" in the search field;

Open form and complete required fields following directions for EPA Miscellaneous payments.

EPA Miscellaneous Payments - Cincinnati Finance Center

Form Number: **SFO Form Number 1.1**

Use this form to pay civil penalties, FOIA request, Superfund, Citations, Compliance Orders, and other miscellaneous payments

PLEASE NOTE: Docket number FIFRA-06-2010-0301 shall be clearly typed on the check to ensure proper credit. Respondent shall send a simultaneous notice of such payment, including a copy of the money order or check to the following:

Kristin Dunbar
Pesticides Section (6PD-P)
U.S. EPA, Region 6
1445 Ross Avenue, Suite 1200
Dallas, TX 75202-2733

The check shall reference the Respondent's name and address, the case name and the docket number of the administrative complaint, and the check shall be accompanied by a transmittal letter. A photocopy of each check and its accompanying transmittal letter shall be mailed to:

Region 6 Hearing Clerk
U.S. EPA, Region 6
1445 Ross Avenue, Suite 1200
Dallas, Texas 75202-2733

Respondent's adherence to this request will ensure proper credit is given when penalties are received in the Region.

30. Respondent agrees not to claim, or attempt to claim, a federal income tax deduction or credit covering all or any part of the civil penalty paid to the United States Treasurer.

31. Pursuant to 31 U.S.C. § 3717 and 40 C.F.R. § 13.11 unless otherwise prohibited by law, EPA will 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. Interest on the civil penalty assessed in this CAFO will begin to accrue thirty (30) days after the effective date of the CAFO and will be recovered by EPA on any amount of the civil penalty that is not paid by the respective due date. 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). Moreover, the costs of the Agency's administrative handling of overdue debts will be charged and assessed monthly throughout the period the debt is overdue. See 40 C.F.R. § 13.11(b).

32. The EPA will also 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) day period that the penalty remains unpaid. In addition, a penalty charge of up to six percent per year will be assessed monthly on any portion of the debt which remains delinquent more than ninety (90) days. See 40 C.F.R. § 13.11 (c). Should a penalty charge on the debt be required, it shall accrue from the first day payment is delinquent. See 31 C.F.R. § 901.9(d). Other penalties for failure to make a payment may also apply.

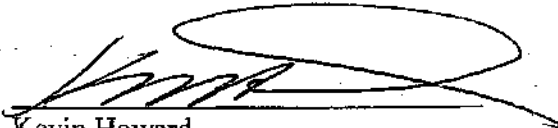
VI. **COSTS**

33. Each party shall bear its own costs and attorneys fees.

IT IS SO AGREED:

FOR THE RESPONDENT:

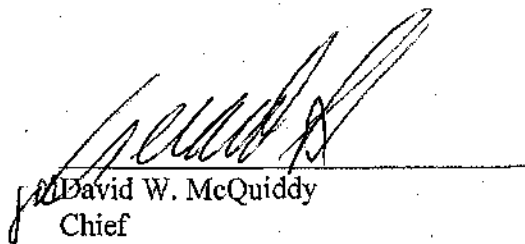
Date: 11.17.09



Kevin Howard
Axss USA, LLC.
1100 Platte Falls Road
Platte City, MO. 64079

FOR THE COMPLAINANT:

Date: 12/01/09




David W. McQuiddy
Chief
Pesticides Section

FINAL ORDER

Pursuant to Section 14(a) of FIFRA, 7 U.S.C. § 136f(a), and the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, 40 C.F.R. Part 22, the foregoing Consent Agreement is hereby ratified. This Final Order shall not in any case 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 shall resolve only those causes of action alleged in the Complaint. Nothing in this Final Order shall be construed to waive, extinguish or otherwise affect Respondent's (or its officers, agents, servants, employees, successors, or assigns) obligation to comply with all applicable federal, state, and local statutes and regulations, including the regulations that were the subject of this action. The Respondent is ordered to comply with the terms of settlement and the civil penalty payment instructions as set forth in the Consent Agreement. In accordance with 40 C.F.R. § 22.31(b), this Final Order shall become effective upon filing with the Regional Hearing Clerk.

Dated December 3, 2009



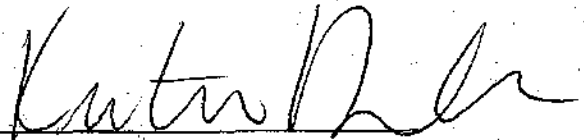
Michael C. Barra
Regional Judicial Officer

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of December, 2009, the original and one copy of the foregoing Complaint and Consent Agreement and Final Order ("Complaint and CAFO") was hand delivered to the Regional Hearing Clerk, U.S. EPA - Region 6, 1445 Ross Avenue, Dallas, Texas 75202-2733, and a true and correct copy was delivered to the following individual by method indicated below:

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Kevin Howard
Axss USA, LLC.
1100 Platte Falls Road
Platte City, MO. 64079



Kristin Dunbar
Enforcement Officer
Pesticides Section