



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 5  
77 WEST JACKSON BOULEVARD  
CHICAGO, IL 60604-3590  
AUG 10 2010

AUG 10 2010

REPLY TO THE ATTENTION OF:

LC-8J

CERTIFIED MAIL

Receipt No. 7001 0320 0005 8933 0610

Mr. Ben L. Pfefferle III  
Baker & Hostetler LP  
Capitol Square, Suite 2100  
65 East State Street  
Columbus, Ohio 43215-4260

Kaivac Inc., Docket No. **FIFRA-05-2010-0022**

Dear Mr. Pfefferle:

Enclosed is a copy of a fully executed Consent Agreement and Final Order, in resolution of the above case. This document was filed on August 10, 2010 with the Regional Hearing Clerk.

The civil penalty in the amount of \$32,175 is to be paid in the manner described in paragraphs 45, 46 and 47. Please be certain that the number BD 2751045P02i and the docket number are written on both the transmittal letter and on the check. Payment is due by September 9, 2010 (within 30 calendar days of the filing date).

Thank you for your cooperation in resolving this matter.

Sincerely,

Estrella Calvo  
Pesticides and Toxics Compliance Section  
Chemicals Management Branch

Enclosures

cc: Erick Volck, Cincinnati Finance/MWD (w/Encl.)  
Nidhi O'Meara, Counsel for Complainant/C-14J

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AUG 10 2010

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 5

REGIONAL HEARING CLERK  
U.S. ENVIRONMENTAL  
PROTECTION AGENCY

In the Matter of:	)	Docket No. FIFRA-05-2010-0022
	)	
Kaivac, Inc.	)	Proceeding to Assess a Civil Penalty
Hamilton, Ohio,	)	Under Section 14(a) of the Federal
	)	Insecticide, Fungicide, and Rodenticide
Respondent.	)	Act, 7 U.S.C. § 136l(a)
_____		

Consent Agreement and Final Order  
Preliminary Statement

1. This is an administrative action commenced and concluded under Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. § 136l(a), and Sections 22.13(b) and 22.18(b)(2) and (3) of the *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits* (Consolidated Rules) as codified at 40 C.F.R. Part 22.

2. The Complainant, the Director of the Land and Chemicals Division, U.S. Environmental Protection Agency, Region 5 (EPA), has been delegated the authority to settle this matter.

3. The Respondent is Kaivac, Inc. (Kaivac), a corporation doing business in the State of Ohio.

4. Where the parties agree to settle one or more causes of action before the filing of a complaint, the administrative action may be commenced and concluded simultaneously by the issuance of a consent agreement and final order (CAFO). 40 C.F.R. § 22.13(b).

5. The parties agree that settling this action without the filing of a complaint or the adjudication of any issue of fact or law is in their interest and in the public interest.

6. Respondent consents to the assessment of the civil penalty specified in this CAFO,

and to the terms of this CAFO.

### **Jurisdiction and Waiver of Right to Hearing**

7. Respondent admits the jurisdictional allegations in this CAFO and neither admits nor denies the factual allegations in this CAFO.

8. Respondent waives its right to request a hearing as provided at 40 C.F.R. § 22.15(c), any right to contest the allegations in this CAFO, and its right to appeal this CAFO.

9. Respondent certifies that it is complying with FIFRA, 7 U.S.C. §§ 136 to 136y.

### **Statutory and Regulatory Background**

10. Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), states that it is 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.

11. 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.” 7 U.S.C. § 136(gg).

12. A “pesticide” is, among other things, any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest. 7 U.S.C. § 136(u).

13. A “pest” is 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 which the Administrator of EPA declares to be a pest under Section 25(c)(1) of FIFRA. 7 U.S.C. § 136(t).

14. A substance is considered to be intended for a pesticidal purpose, and thus to be a pesticide requiring registration, if 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. 40 C.F.R. § 152.15(a)(1).

15. The Administrator of EPA may assess a civil penalty against any registrant, commercial applicator, wholesaler, dealer, retailer, other distributor who violates any provision of FIFRA of up to \$6,500 for each offense that occurred after March 15, 2004 through January 12, 2009 and up to \$7,500 for each offense that occurred after January 12, 2009, pursuant to Section 14(a)(1) of FIFRA, 7 U.S.C. § 136l(a)(1), and 40 C.F.R. Part 19.

**Factual Allegations and Alleged Violations**

16. Respondent, Kaivac, Inc., is a "person" as defined at Section 2(s) of FIFRA, 7 U.S.C. § 136(s).

17. At all times relevant to the Complaint, Respondent owned or operated a place of business located at 401 S. 3<sup>rd</sup> Street, Hamilton, Ohio.

18. On July 10, 2008, an inspector employed by Ohio Department of Agriculture and authorized to conduct inspections under FIFRA conducted an inspection at Respondent's place of business in Hamilton, Ohio.

19. During the July 10, 2008 inspection, the inspector collected a physical sample, a label, advertising materials and sales invoices for the product "KaiWipes" which Respondent was holding for distribution or sale.

20. Respondent's label for "KaiWipes" collected on July 10, 2008 bears the statements, including but not limited to, "...to kill MRSA, Bird Flu, Norovirus & more!," "Plus, eliminate the risk of cross-contamination...", "Extra-strength disinfectant compatible fibers," and "Perfect for daily cleaning, spot cleaning, touch points, and on-the-go disinfection."

21. Respondent's advertising for "KaiWipes" collected on July 10, 2008 bears the statements, including but not limited to, "The biggest culprits in the spread of infectious disease...", "Complete your hygienic cleaning program with the ability to quickly and easily

sanitize common touch points....” “Plus, eliminate the risk of cross-contamination....” “Extra-strength disinfectant compatible fibers.” and “Perfect for daily cleaning, spot cleaning, touch points, and on-the-go disinfection.”

22. “KaiWipes” is a “pesticide” as defined at Section 2(u) of FIFRA, 7 U.S.C. § 136(u).

23. On or about March 4, 2008, Respondent distributed or sold “KaiWipes” to Valley Janitor Supply in Hamilton, Ohio.

24. “KaiWipes” is not registered as a pesticide as required by Section 3(a) of FIFRA, 7 U.S.C. § 136a(a).

25. On or about March 25, 2008, Respondent distributed or sold “KaiWipes” to Brady Industries Utah in Salt Lake City, Utah.

26. On or about March 27, 2008, Respondent distributed or sold “KaiWipes” to Maintex-San Diego in Poway, California.

27. On or about May 22, 2008, Respondent distributed or sold “KaiWipes” to Southeast Link in Atlanta, Georgia.

28. On or about June 19, 2008, Respondent distributed or sold “KaiWipes” to Pur O Zone, Inc., in Lawrence, Kansas.

### Count 1

29. Complainant incorporates by reference the allegations contained in paragraphs 1 through 28 of this CAFO.

30. Respondent distributed or sold “KaiWipes” on or about March 4, 2008, in violation of Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A).

31. Respondent’s violation of Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), subjects Respondent to the issuance of an Administrative Complaint assessing a civil penalty

under Section 14(a) of FIFRA, 7 U.S.C. §136l(a).

**Count 2**

32. Complainant incorporates by reference the allegations contained in paragraphs 1 through 28 of this CAFO.

33. Respondent distributed or sale “KaiWipes” on or about March 25, 2008, in violation of Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A).

34. Respondent’s violation of Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), subjects Respondent to the issuance of an Administrative Complaint assessing a civil penalty under Section 14(a) of FIFRA, 7 U.S.C. §136l(a).

**Count 3**

35. Complainant incorporates by reference the allegations contained in paragraphs 1 through 28 of this CAFO.

36. Respondent distributed or sale “KaiWipes” on or about March 27, 2008, in violation of Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A).

37. Respondent’s violation of Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), subjects Respondent to the issuance of an Administrative Complaint assessing a civil penalty under Section 14(a) of FIFRA, 7 U.S.C. §136l(a).

**Count 4**

38. Complainant incorporates by reference the allegations contained in paragraphs 1 through 28 of this CAFO.

39. Respondent distributed or sale “KaiWipes” on or about May 22, 2008, in violation of Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A).

40. Respondent’s violation of Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A),

subjects Respondent to the issuance of an Administrative Complaint assessing a civil penalty under Section 14(a) of FIFRA, 7 U.S.C. §136l(a).

#### **Count 5**

41. Complainant incorporates by reference the allegations contained in paragraphs 1 through 28 of this CAFO.

42. Respondent distributed or sale “KaiWipes” on or about June 19, 2008, in violation of Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A).

43. Respondent’s violation of Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), subjects Respondent to the issuance of an Administrative Complaint assessing a civil penalty under Section 14(a) of FIFRA, 7 U.S.C. §136l(a).

#### **Civil Penalty**

44. Pursuant to Section 14(a)(4) of FIFRA, 7 U.S.C. § 136l(a)(4), Complainant determined that an appropriate civil penalty to settle this action is \$32,175. In determining the penalty amount, Complainant considered the appropriateness of the penalty to the size of Respondent’s business, the effect on Respondent’s ability to continue in business, and the gravity of the violation. Complainant also considered EPA’s *Enforcement Response Policy for FIFRA* (ERP), dated July 2, 1990.

45. Within 30 days after the effective date of this CAFO, Respondent must pay a \$32,175 civil penalty for the alleged FIFRA violations. Respondent must pay the penalty by sending a cashier’s or certified check, payable to the “Treasurer, United States of America,” to:

[for a check sent by regular U.S. Postal Service mail:]

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

[for a check sent by overnight mail:]

U.S. Bank  
1005 Convention Plaza  
Mail Station SL-MO-C2GL  
St. Louis, MO 63101

46. The check must note the case title, the docket number of this CAFO and the billing document (BD) number.

47. A transmittal letter, stating, Respondent's name, the case title, Respondent's complete address, the case docket number and the BD number must accompany the payment.

Respondent must send a copy of the check and transmittal letter to:

Regional Hearing Clerk (E-19J)  
U.S. EPA, Region 5  
77 West Jackson Blvd.  
Chicago, IL 60604

Ms. Estrella Calvo (LC-8J)  
Pesticides and Toxics Compliance Section  
U.S. EPA, Region 5  
77 West Jackson Blvd.  
Chicago, IL 60604

Mrs. Nidhi O'Meara (C-14J)  
Office of Regional Counsel  
U.S. EPA, Region 5  
77 West Jackson Blvd.  
Chicago, IL 60604

48. This civil penalty is not deductible for federal tax purposes.

49. If Respondent does not pay the civil penalty timely, EPA may refer the matter to the Attorney General who will recover such amount by action in the appropriate United States



district court under Section 14(a)(5) of FIFRA, 7 U.S.C. § 136l(a)(5). The validity, amount and appropriateness of the civil penalty are not reviewable in a collection action.

50. Pursuant to 31 C.F.R. § 901.9, Respondent must pay the following on any amount overdue under this CAFO. Interest will accrue on any amount overdue from the date payment was due at a rate established by the Secretary of the Treasury. Respondent must pay a \$15 handling charge each month that any portion of the penalty is more than 30 days past due. In addition, Respondent must pay a 6 percent per year penalty on any principal amount 90 days past due.

### **General Provisions**

51. This CAFO resolves only Respondent's liability for federal civil penalties for the violation and facts alleged in the CAFO.

52. This CAFO does not affect the right of the EPA or the United States to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law.

53. This CAFO does not affect Respondent's responsibility to comply with FIFRA and other applicable federal, state, and local laws.

54. This CAFO is a "final order" for purposes of EPA's ERP for FIFRA.

55. The terms of this CAFO bind Respondent, its successors, and assigns.


56. Each person signing this agreement certifies that he or she has the authority to sign for the party whom he or she represents and to bind that party to its terms.

57. Each party agrees to bear its own costs and attorney's fees in this action.

58. This CAFO constitutes the entire agreement between the parties.

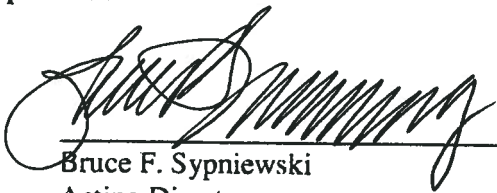
**Kaivac Inc., Respondent**

7/19/10  
Date

  
\_\_\_\_\_  
Robert Robinson  
CEO and President  
Kaivac, Inc.

**U.S. Environmental Protection Agency, Complainant**

8/3/10  
Date

  
\_\_\_\_\_  
Bruce F. Sypniewski  
Acting Director  
Land and Chemicals Division

**In the Matter of:**  
**Kaivac, Inc.**  
**Docket No. FIFRA-05-2010-0022**

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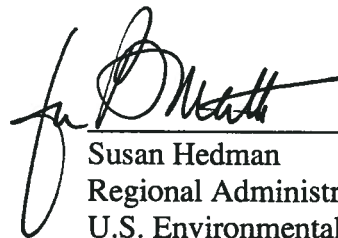
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PROTECTION AGENCY

**Final Order**

This Consent Agreement and Final Order, as agreed to by the parties, shall become effective immediately upon filing with the Regional Hearing Clerk. This Final Order concludes this proceeding pursuant to 40 C.F.R. §§ 22.18 and 22.31. IT IS SO ORDERED.

8-5-10  
Date

  
\_\_\_\_\_  
Susan Hedman  
Regional Administrator  
U.S. Environmental Protection Agency  
Region 5


**CERTIFICATE OF SERVICE**

This is to certify that the original and one copy of this Consent Agreement and Final Order in the resolution of the civil administrative action involving Kaivac, Inc. was filed on August 10, 2010, with the Regional Hearing Clerk (E-19J), U.S. Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois, 60604, and that a true and correct copy was sent by Certified Mail, Receipt No. 7001 0320 0005 8933 0610 to:

Mr. Ben L. Pfefferle III  
Baker & Hostetler LP  
Capitol Square, Suite 2100  
65 East State Street  
Columbus, Ohio 43215-4260

and forwarded intra-Agency copies to:

Marcy Toney, Regional Judicial Officer, ORC/C-14J  
Nidhi O'Meara, Counsel for Complainant/C-14J  
Eric Volck, Cincinnati Finance/MWD

  
Frederick Brown, PTCS (LC-8J)  
U.S. EPA - Region 5  
77 West Jackson Boulevard  
Chicago, Illinois 60604

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