



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

JUN 18 2010

REPLY TO THE ATTENTION OF:

LC-8J

CERTIFIED MAIL

Receipt No. 7009 1680 0000 7670 5042

Mr. William Lundquist
Aeris USA, Inc.
3970 S. Decatur St. #F
Sheridan, Colorado 80110

Consent Agreement and Final Order **FIFRA-05-2010-0019**


Dear Mr. Lundquist:

Enclosed please find a copy of a fully executed Consent Agreement and Final Order, in resolution of the above case. This document was filed on June 18, 2010 with the Regional Hearing Clerk.

The civil penalty in the amount of \$500.00 is to be paid in the manner described in paragraphs 32 thru 33. Please be certain that the number **BD 2751045P018** and the docket number are written on both the transmittal letter and on the check. Payment is due by July 18, 2010 (within 30 calendar days of the filing date).

Thank you for your cooperation in resolving this matter.

Sincerely,


for Claudia Niess
Pesticides and Toxics Compliance Section

Enclosures

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

In the Matter of: **RECEIVED**) Docket No. FIFRA-05-2010-0019
 Aeris USA, Inc.,)
 Sheridan, Colorado, JUN 18 2010)
 Respondent. REGIONAL HEARING CLERK)
 U.S. ENVIRONMENTAL)
 PROTECTION AGENCY)

Consent Agreement and Final Order Commencing and Concluding the Proceeding
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 is the Director of the Land and Chemicals Division, United States Environmental Protection Agency, Region 5.
3. Respondent is Aeris USA, Inc. (Aeris) a corporation doing business in the State of Colorado.
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 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, 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 is a "person" as defined at Section 2(s) of FIFRA, 7 U.S.C. § 136(s).

17. Respondent owned or operated a place of business located at 3970 South Decatur Street #F, Sheridan, Colorado, during the calendar year 2006.

18. On January 20, 2006, an inspector employed by the Michigan Department of Agriculture and authorized to conduct inspections under FIFRA conducted an inspection at Safety King, located at 50000 Ryan Road, Utica, Michigan 48317.

19. During the January 20, 2006 inspection, the inspector observed the products "Aeris-Guard Advanced Duct and Surface Treatment" and "Aeris-Guard Total Air Care Pack" which Safety King was holding for distribution or sale.

20. During the January 20, 2006 inspection, the inspector collected a copy of a sales invoice documenting Respondent's distribution or sale of three containers of "Aeris-Guard Advanced Duct and Surface Treatment" and six containers of "Aeris-Guard Total Air Care Pack" to Safety King on July 13, 2005.

21. During the January 20, 2006 inspection, the inspector collected copies of information found online at Safety King's world wide web address, www.ductpro.com, and a Material Safety Data Sheet for "Aeris-Guard Advanced Duct and Surface Treatment" which made the following pesticidal claims:

- a. "This is a duct sanitizer that leaves a residual layer of protection against microbial growth on the interior surfaces of the air ducts."
- b. "Effective against all molds and bacteria ..."
- c. "Application: Bactericidal Duct Treatment."

22. During the January 20, 2006 inspection, the inspector collected copies of information found online at Respondent's world wide web address, www.aerisguard.com, about "Aeris-Guard Total Air Care Pack" which made the following pesticidal claims:

- a. "The air inside your home is full of potentially dangerous allergens. Circulating around your home are microfragments of toxins that affect your health."
- b. "The 'Total Air Care' pack is the first comprehensive system to protect against mold, bacterial and fungal contamination of home and office air conditioning systems."
- c. "This pack helps:
 - Remove all dangerous microorganisms from your home and small office heating and ventilation system ...

- Dramatically improve indoor air quality by first removing the biological contamination and then providing a protective coating from future colonization of the heating and ventilation system...
- ... Reduce the risk of downstream contamination of ducts by dangerous microorganisms.”

23. During the January 20, 2006 inspection, the inspector collected copies of the label for “Aeris-Guard Total Air Care Pack” which made the following pesticidal claims:

- a. Air conditioning systems provide perfect environments for the growth of mold, fungal spores and bacteria... The Aeris Guard treatment pack addresses the problem at its source by first removing the dangerous build up of micro-organisms from the air conditioning system. Aeris Guard then provides a protective barrier, inhibiting any recontamination.”
- b. “Breakthrough bioactive treatment to protect against mild, bacteria and fungal contamination in home and office air conditioning systems.”

24. On November 6, 2008, Safety King provided EPA with copies of sales invoices showing Respondent’s distribution of twelve containers of “Aeris-Guard Advanced Duct and Surface Treatment” to Safety King on June 1, 2005.

25. “Aeris-Guard Advanced Duct and Surface Treatment” and “Aeris-Guard Total Air Care Pack” are each a “pesticide” as defined at Section 2(u) of FIFRA, 7 U.S.C. § 136(u).

26. Respondent distributed or sold “Aeris-Guard Advanced Duct and Surface Treatment” on June 1, 2005.

27. Respondent distributed or sold “Aeris-Guard Advanced Duct and Surface Treatment” and “Aeris-Guard Total Air Care Pack” on July 13, 2005.

28. “Aeris-Guard Advanced Duct and Surface Treatment” and “Aeris-Guard Total Air Care Pack” were not registered as a pesticide with EPA under Section 3 of FIFRA, 7 U.S.C. § 136a, on June 1, 2005.

29. “Aeris-Guard Advanced Duct and Surface Treatment” and “Aeris-Guard Total Air Care Pack” were not registered as a pesticide with EPA under Section 3 of FIFRA, 7 U.S.C. § 136a, on July 13, 2005.

30. Respondent’s distribution or sale of the unregistered pesticides “Aeris-Guard Advanced Duct and Surface Treatment” and “Aeris-Guard Total Air Care Pack” each constitutes an unlawful act pursuant to Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A).

Civil Penalty

31. 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 \$500.00. In determining the penalty amount, Complainant considered the appropriateness of the penalty to the gravity of the violation, the size of Respondent’s business, the effect on Respondent’s ability to continue in business and the Respondent’s ability to pay the penalty. Complainant also considered EPA’s *Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act*, dated July 2, 1990.

32. Within 30 days after the effective date of this CAFO, Respondent must pay a \$500.00 civil penalty for the 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 checks sent by regular U.S. Postal Service mail)

U.S. EPA
Fines and Penalties
Cincinnati Finance Center
Post Office Box 979077
St. Louis, Missouri 63197-9000

(For checks sent by express mail)

U.S. Bank
Government Lockbox 979077 U.S. EPA Fines and Penalties
Contact: Natalie Pearson
1005 Convention Plaza
Mail Station SL-MO-C2GL
St. Louis, Missouri 63101

The check must note the case title "In the Matter of: Aeris USA, Inc., Sheridan, Colorado," the docket number of this CAFO, and the billing document number.

33. A transmittal letter, stating, Respondent's name, the case title "In the Matter of: Aeris USA, Inc., Sheridan, Colorado," Respondent's complete address, the case docket number and the billing document 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 Boulevard
Chicago, Illinois 60604

Claudia Niess (LC-8J)
Pesticides and Toxics Compliance Section
U.S. EPA, Region 5
77 West Jackson Boulevard.
Chicago, Illinois 60604

Jose C. de Leon (C-14J)
Office of Regional Counsel
U.S. EPA, Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604

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

35. 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.

36. 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

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

38. This CAFO does not 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.

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

40. This CAFO is a "final order" for purposes of EPA's Enforcement Response Policy for FIFRA.

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


42. 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.

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

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

Aeris USA, Inc., Respondent

Date




William Lundquist, ~~President~~
~~Owner~~
Aeris USA, Inc.

U.S. Environmental Protection Agency, Complainant

Date

6/15/10




Margaret M. Guerriero
Director
Land and Chemicals Division

In the Matter of:
Aeris USA, Inc.,
Docket No. FIFRA-05-2010-0019

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.

6-16-2010
Date



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

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JUN 18 2010
REGIONAL HEARING CLERK
U.S. ENVIRONMENTAL
PROTECTION AGENCY

CERTIFICATE OF SERVICE

I hereby certify that the original signed copy of the Consent Agreement and Final Order in resolution of the civil administrative action involving Aeris USA, Inc., was filed on June 18, 2010 with the Regional Hearing Clerk (E-19J), U.S. Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois, 60604, and that I mailed by Certified Mail, Receipt No. 7009 1680 0000 7670 5042, a copy of the original to the Respondent:

Mr. William Lundquist
Aeris USA, Inc.
3970 S. Decatur St. #F
Sheridan, Colorado 80110

and forwarded copies (intra-Agency) to:

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



Frederick Brown
Pesticides and Toxics Compliance Section
U.S. EPA - Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604

FIFRA-05-2010-0019

Docket No. _____

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JUN 18 2010

**REGIONAL HEARING CLERK
U.S. ENVIRONMENTAL
PROTECTION AGENCY**