

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 6
DALLAS, TEXAS

FILED
2013 MAR 14 PM 1:17
REGIONAL PUBLIC CLERK
EPA REGION VI

IN THE MATTER OF:)
)
)
UNIVERSAL BACTERIA)
SPECIALIST, INC.)
RICHMOND, TEXAS)
)
RESPONDENT)
_____)

DOCKET NO. FIFRA-06-2013-0300

CONSENT AGREEMENT AND FINAL ORDER

The Director, Multimedia Planning and Permitting Division, United States Environmental Protection Agency (EPA), Region 6 (Complainant), and Universal Bacteria Specialist, Inc. (Respondent) in the above-referenced proceeding, hereby agree to resolve this matter through the issuance of this Consent Agreement and Final Order (CAFO).

I. PRELIMINARY STATEMENT

1. This proceeding for the assessment of civil penalties pursuant to Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended (FIFRA), 7 U.S.C. § 136l(a), is simultaneously commenced and concluded by the issuance of this CAFO against the Respondent pursuant to 40 C.F.R. §§ 22.13(b) and 22.18(b)(2) and (3).

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

3. The Respondent explicitly waives any right to contest the allegations and its right to appeal the proposed Final Order set forth therein, and waives all defenses which have been raised or could have been raised to the claims set forth in the CAFO.

4. Compliance with all the terms and conditions of this CAFO shall resolve only those violations which are set forth herein.

5. The Respondent consents to the issuance of this CAFO, to the assessment and payment of the stated civil penalty in the amount and by the method set forth in this CAFO.

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

7. The Respondent agrees that the provisions of this CAFO shall be binding on its officers, directors, employees, agents, servants, authorized representatives, successors, and assigns.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. PRELIMINARY ALLEGATIONS

8. The Respondent is Universal Bacteria Specialist, Inc., a corporation incorporated under the laws of the State of Texas.

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

10. The Respondent owns and operates a pesticide producing establishment at its facility located at 1117 FM 359, Suite 140, Richmond, Texas, EPA Establishment No. 87636-TX-001.

11. The term "pesticide" is defined in Section 2(u) of FIFRA, 7 U.S.C. § 136(u), as meaning "(1) any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest, (2) any substance or mixture of substances intended for use as a plant regulator, defoliant, or desiccant, and (3) any nitrogen stabilizer".

12. On or about March 30, 2011, EPA approved the registration of Anolyte” as a pesticide, EPA Registration No. 87636-1.

13. The term “producer” is defined in Section 2(w) of FIFRA, 7 U.S.C. § 136(w), as meaning “the person who manufactures, prepares, compounds, propagates, or processes any pesticide or device or active ingredient used in producing a pesticide.”

14. The term “producer” is defined in 40 C.F.R. § 167.3 as meaning “any person, as defined by the Act, who produces any pesticide, active ingredient, or device (including packaging, repackaging, labeling, and relabeling).”

15. The term “produce” is defined in Section 2(w) of FIFRA, 7 U.S.C. § 136(w), as meaning “to manufacture, prepare, compound, propagate, or process any pesticide or device or active ingredient used in producing a pesticide.”

16. The term “produce” is defined in 40 C.F.R. § 167.3 as meaning “to manufacture, prepare, compound, propagate, or process any pesticide, . . . any active ingredient or device, or to package, repackage, label, relabel, or otherwise change the container of any pesticide or device.”

17. At all times relevant to this Complaint, the Respondent produced Anolyte at its establishment in Richmond, Texas, EPA Establishment No. 86736-TX-001.

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

B. VIOLATIONS

Distribution or Sale of an Unregistered Pesticide – Anolyte

19. Section 12(a)(1)(A) 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].

20. Prior to registration of Anolyte on March 30, 2011, the label for Anolyte stated that application of Anolyte would “mitigate and retard the growth of non-public health organisms such as anaerobic bacteria, aerobic bacteria, and sulfate reducing bacteria to protect fracturing fluids, polymers, and gels.”

21. The term “pest” is defined in Section 2(t) of FIFRA, 7 U.S.C. § 136(t) as meaning “(1) any insect, rodent, nematode, fungus, weed, or (2) any other form of terrestrial or aquatic plant or animal life or virus, bacteria, or other micro-organisms (except viruses, bacteria, or other micro-organisms on or in living man or other living animals) which the Administrator declares to be a pest under [7 U.S.C. § 136w(c)(1)].”

22. The bacteria identified in the label in Paragraph 20 are “pests”, as that term is defined by Section 2(t) of FIFRA, 7 U.S.C. § 136(t).

23. The term “pesticide” is defined in Section 2(u) of FIFRA, 7 U.S.C. § 136(u), as meaning “(1) any substances or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest, (2) any substance or mixture of substances intended for use as a plant regulator, defoliant, or desiccant, and (3) any nitrogen stabilizer”.

24. Anolyte is intended to prevent, destroy, repel or mitigate pests.

25. Anolyte is a “pesticide” as that term is defined in Section 2(u) of FIFRA, 7 U.S.C. § 136(u).

26. Anolyte was not a registered pesticide prior to March 30, 2011.

27. 40 C.F.R. § 152.15 provides that no person may distribute or sell any pesticide product which is not registered under the Act, except as provided in 40 C.F.R. §§ 152.20, 152.25, and 152.30.

28. 40 C.F.R. § 152.3 defines “pesticide product” as meaning “a pesticide in a particular form (including composition, packaging, and labeling) in which the pesticide is, or is intended to be, distributed or sold. The term includes any physical apparatus used to deliver or apply the pesticide if distributed or sold with the pesticide.”

29. Anolyte is a “pesticide product” as that term is defined by 40 C.F.R. § 152.3.

30. On or about May 23, 2011 and May 26, 2011, the Respondent provided sales information to EPA for Anolyte.

31. The term “distribute or sell” is defined in Section 2(gg) of FIFRA, 7 U.S.C. § 136(gg), as meaning “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.”

32. On or about the following dates, the Respondent distributed or sold Anolyte:

- A. August 9, 2010 (2 shipments);
- B. September 6, 2010;
- C. September 7, 2010;
- D. September 13, 2010;
- E. September 17, 2010;
- F. September 27, 2010;
- G. September 28, 2010 (3 shipments);
- H. September 30, 2010;
- I. October 13, 2010;
- J. October 15, 2010;
- K. January 17, 2011;
- L. January 27, 2011;
- M. February 7, 2011;
- N. February 22, 2011 (2 shipments);

- O. February 23, 2011;
- P. March 11, 2011; and
- Q. March 23, 2011.

33. Therefore, the Respondent violated Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), by distributing and selling an unregistered pesticide.

III. TERMS OF SETTLEMENT

A. CIVIL PENALTY

34. For the reasons set forth above, the Respondent has agreed to pay a civil penalty which has been determined in accordance with Section 14(a) of FIFRA, 7 U.S.C. § 136l(a), which authorizes EPA to assess a civil penalty of up to Seven Thousand Five Hundred Dollars (\$7,500) for each offense.¹ 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 EPA's "FIFRA Enforcement Response Policy" dated December 2009 which requires the Complainant to consider the appropriateness of such penalty to the size of the business of the person charged, the effect on the person's ability to continue in business, and the gravity of the violation, it is **ORDERED** that Respondent be assessed a civil penalty of **Fifteen Thousand, Seven Hundred Fifty Dollars (\$15,750)**.

35. Within thirty (30) days of the effective date of this CAFO, the Respondent shall pay the assessed civil penalty by certified check, cashier's check, or wire transfer, made payable to "Treasurer, United States of America, EPA - Region 6". Payment shall be remitted in one of three (3) ways: regular U.S. Postal mail (including certified mail), overnight mail, or wire

¹ The amount of penalty that can be assessed under Section 14(a) of FIFRA was increased by the Civil Monetary Penalty Inflation Adjustment Rule codified at 40 C.F.R. Part 19 to \$5,500 for violations occurring between January 30, 1997 and March 15, 2004, to \$6,500 for violations which occurred between March 15, 2004 and January 12, 2009, and to \$7,500 for violations which occurred after January 12, 2009.

transfer. For regular U.S. Postal mail, U.S. Postal Service certified mail, or U.S. Postal Service express mail, the check(s) should be remitted to:

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

For overnight mail (non-U.S. Postal Service, e.g. Fed Ex), the check(s) should be remitted to:

U.S. Bank
Government Lockbox 979077 US EPA Fines & Penalties
1005 Convention Plaza
SI-MO-C2-GL
St. Louis, MO 63101
Phone No. (314) 418-1028

For wire transfer, the payment should be remitted to:

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"

PLEASE NOTE: Docket number FIFRA-06-2013-0300 shall be clearly typed on the check to ensure proper credit. If payment is made by check, the check shall also be accompanied by a transmittal letter and shall reference the Respondent's name and address, the case name, and docket number of the CAFO. If payment is made by wire transfer, the wire transfer instructions shall reference the Respondent's name and address, the case name, and docket number of the CAFO. The Respondent shall also send a simultaneous notice of such payment, including a copy of the check and transmittal letter, or wire transfer instructions to the following:

Blake Sieminski
Life Scientist
Pesticides Section (6PD-P)
U.S. EPA, Region 6
1445 Ross Avenue, Suite 1200
Dallas, TX 75202-2733

Lorena Vaughn
Regional Hearing Clerk (6RC-D)
U.S. EPA, Region 6
1445 Ross Avenue, Suite 1200
Dallas, TX 75202-2733

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

36. The 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.

37. 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).

38. 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.

B. RETENTION OF ENFORCEMENT RIGHTS

39. The EPA does not waive any rights or remedies available to EPA for any other violations by the Respondent of Federal or State laws, regulations, or permitting conditions.

40. Nothing in this CAFO shall limit the power and authority of EPA or the United States to take, direct, or order all actions to protect public health, welfare, or the environment, or prevent, abate or minimize an actual or threatened release of hazardous substances, pollutants, contaminants, hazardous substances on, at or from the Respondent's facility. Furthermore, nothing in this CAFO shall be construed to prevent or limit EPA's civil and criminal authorities, or that of other Federal, State, or local agencies or departments to obtain penalties or injunctive relief under other Federal, State, or local laws or regulations.


C. COSTS

41. Each party shall bear its own costs and attorney's fees. Furthermore, the Respondent specifically waives its right to seek reimbursement of its costs and attorney's fees under 5 U.S.C. § 504 and 40 C.F.R. Part 17.

THE UNDERSIGNED PARTIES CONSENT TO THE ENTRY OF THIS CONSENT AGREEMENT AND FINAL ORDER:

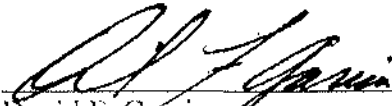
FOR THE RESPONDENT:

Date: 3/1/2013


Universal Bacteria Specialist, Inc.

FOR THE COMPLAINANT:

Date: 3/12/13

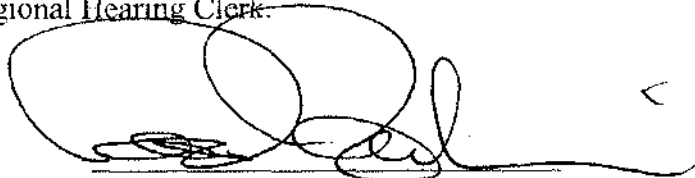


David F. Garcia
Acting Director
Multimedia Planning and
Permitting Division
U.S. EPA - Region 6

IV. FINAL ORDER

Pursuant to Section 14 of FIFRA, 7 U.S.C. § 136l, 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 Consent Agreement. 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 3-14-13



Patrick Rankin
Regional Judicial Officer

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of March, 2013, the original and one copy of the foregoing Consent Agreement and Final Order (CAFO) was hand delivered to the Regional Hearing Clerk, U.S. EPA - Region 6, 1445 Ross Avenue, Suite 1200, Dallas, Texas 75202-2733, and a true and correct copy of the CAFO was delivered to the following individual by the method indicated below:

CERTIFIED MAIL - RETURN RECEIPT REQUESTED # 7007 0710 0002 1385 1613

George H. Sanford
President
Universal Bacteria Specialist, Inc.
1117 FM 359
Suite 140
Richmond, Texas 77406