



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4
ATLANTA FEDERAL CENTER
61 FORSYTH STREET
ATLANTA, GEORGIA 30303-8960

JUN 03 2008

4APT-PTSB

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Cynthia A. Lewis, Esq.
Beveridge and Diamond, PC
1350 I Street, N.W.
Suite 700
Washington, D.C. 20005-3311

SUBJ: Docket No. FIFRA-04-2008-3010(b)
Home Depot U.S.A., Inc., and
AS America, Inc.

Dear Ms. Lewis:

Enclosed is a copy of the ratified Consent Agreement and Final Order (CAFO) in the above-referenced matter. The original CAFO has been filed with the Regional Hearing Clerk and served on the parties as directed in Section 22.6 of the Consolidated Rules of Practice, 40 CFR Part 22.

Please make note of the provisions in Section IV of the Final Order, with respect to payment of the assessed penalty of \$232,960, which is due within 30 days from the effective date of the CAFO. As required by paragraph 29 of this CAFO, please ensure that the face of your clients' cashier's or certified check includes the names of the companies and docket number of this case. Please also note the compliance deadline of September 6, 2008, as set forth in paragraph 22 of the CAFO.

Also enclosed is a copy of the October 2001 *Enforcement Alert* titled "U.S. EPA Notifying Defendants of Securities and Exchange Commission's Environmental Disclosure Requirements." This document notifies your client's potential duty to disclose to the Securities and Exchange Commission (SEC) any environmental enforcement actions taken by the EPA. Please note that the contact phone number on page three of the Notice has been changed to (202) 551-3115.

Tucker at (404) 562-9536.

Sincerely,

A handwritten signature in black ink, appearing to read 'Jeaneanne M. Gettle', with a stylized flourish at the end.

Jeaneanne M. Gettle
Chief
Pesticides and Toxic
Substances Branch

Enclosures (2)

cc: Tommy Gray, GDA

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
ATLANTA, GEORGIA

In the Matter of:)
)
Home Depot U.S.A., Inc., and)
AS America, Inc.,)
)
Respondents.)
_____)

Docket No. FIFRA-04-2008-3010(b)

RECEIVED
EPA REGION IV
2008 JUN -3 AM 10:21
HEARING CLERK

CONSENT AGREEMENT AND FINAL ORDER

I. Nature of the Action

1. This is a civil penalty proceeding pursuant to Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended, 7 U.S.C. § 136l(a) (hereinafter "FIFRA"), and pursuant to the Consolidated Rules of Practice Governing Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (Consolidated Rules), 40 CFR Part 22. Complainant is the Director of the Air, Pesticides, and Toxics Management Division, United States Environmental Protection Agency, Region 4 (EPA). Respondents are Home Depot U.S.A., Inc., ("Home Depot") and AS America, Inc. ("American Standard").
2. Complainant and Respondents have conferred for the purpose of settlement pursuant to 40 CFR § 22.18 and desire to resolve this matter and settle the allegations described herein without a formal hearing. Therefore, without the taking of any evidence or testimony, the making of any argument, or the adjudication of any issue in this matter, and in accordance with 40 CFR § 22.13(b), this Consent Agreement and Final Order (CAFO) will simultaneously commence and conclude this matter.

II. Preliminary Statements

3. The authority to take action under Section 14(a) of FIFRA, 7 U.S.C. § 136l(a), is vested in the Administrator of EPA. The Administrator of EPA has delegated this authority under FIFRA to EPA Region 4 by EPA Delegation 5-14, dated May 11, 1994.

4. Pursuant to 40 CFR § 22.5(c)(4) the following individual represents EPA in this matter and is authorized to receive service for EPA in this proceeding:

Molly Freeman
Pesticides Management Section
U.S. EPA - Region 4
61 Forsyth Street
Atlanta, Georgia 30303-8960
(404) 562-9684.

5. Respondents are Home Depot U.S.A, Inc., a Delaware corporation, with its principal place of business at 2455 Paces Ferry Road, Atlanta, Georgia 30339; and AS America, Inc., a Delaware corporation, located at One Centennial Avenue, Piscataway, New Jersey 08855.

6. Each Respondent is a "person" as defined by Section 2(s) of FIFRA, 7 U.S.C. § 136(s), and as such both Respondents are subject to FIFRA and the regulations promulgated thereunder.

7. On or about November 21, 2006, an authorized representative of the EPA conducted inspections at two Home Depot stores located at 650 Ponce De Leon Avenue, Atlanta, Georgia 30308; and 2034 Mt. Zion Road, Morrow, Georgia 30260.

8. During the aforementioned inspections, the products "Elite Whirlpool with Stayclean" and "Cadet 3 Toilet with EverClean Antimicrobial Glaze" were identified as being produced and distributed by the Respondents.

9. Elite Whirlpools with StayClean and Cadet 3 Toilets with EverClean Antimicrobial Glaze are pesticides as defined in Section 2(u) of FIFRA, 7 U.S.C. § 136(u), which includes any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest.
10. A pest is defined in Section 2(t) of FIFRA, 7 U.S.C. § 136(t), as 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 (except viruses, bacteria, or other microorganisms on or in living man or other living animals) which the Administrator declares to be a pest under Section 25(c)(1) of FIFRA, 7 U.S.C. § 136w(c)(1).
11. Respondents “distribute or sell” pesticides. The term “to distribute or sell” as defined by Section 2(gg) of FIFRA, 7 U.S.C. § 136(gg), includes to distribute, sell, offer for sale, hold for distribution, hold for sale, hold for shipment, ship, deliver for shipment, or release for shipment.
12. At the time of the inspections, the Elite Whirlpools with StayClean and the Cadet 3 Toilets with EverClean Antimicrobial Glaze were not registered as pesticides with EPA.
13. It is unlawful according Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), for any person to distribute or sell to any person any pesticide that is not registered under Section 3 of FIFRA, 7 U.S.C. § 136a.
14. Respondents distributed or sold the pesticides on at least sixty-four occasions.
15. Respondents violated Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), on at least sixty-four separate occasions, and are therefore subject to the assessment of civil penalties under Section 14 of FIFRA, 7 U.S.C. § 136l.

16. Section 14(a) of FIFRA, 7 U.S.C. § 136l(a), in conjunction with the Debt Collection Improvement Act of 1996, authorizes the assessment of a civil penalty.
17. Section 14(a)(4) of FIFRA, 7 U.S.C. § 136l(a)(4), requires EPA to consider the appropriateness of the assessed penalty to the size of business of each Respondent, the effect on each Respondent's ability to continue in business, and the gravity of the violation.
18. After consideration of the factors set forth in Section 14(a)(4) of FIFRA, 7 U.S.C. § 136l(a)(4), the EPA proposes to assess a total civil penalty of TWO HUNDRED THIRTY TWO THOUSAND NINE HUNDRED SIXTY DOLLARS (\$232,960) against the Respondents for the above-described violations. Civil penalties under Section 14(a) of FIFRA, 7 U.S.C. § 136l(a), may be assessed by Administrative Order.

III. Consent Agreement

19. For the purposes of this CAFO, Respondents admit the jurisdictional allegations set forth above and neither admit nor deny the factual allegations.
20. Respondents waive their right to a hearing on the allegations contained herein and their right to appeal the proposed final order accompanying the consent agreement.
21. Respondents consent to the assessment of the penalty proposed by EPA and agree to pay the civil penalty as set forth in this CAFO.
22. Respondents certify that as of September 6, 2008, they will be in compliance with all relevant requirements of FIFRA with respect to the Cadet 3 toilets and the Elite Whirlpools treated with antimicrobial pesticides.

A. Respondents will take the following steps to comply with the treated articles exemption, 40 C.F.R. § 152.25(a): (1) Relabel boxes of existing inventory of

Cadet 3 Toilets in Home Depot stores and American Standard warehouses with labels that comply with the treated articles exemption, or modify existing labels with stickers so that the labels will comply with the treated articles exemption; (2) Submit monthly progress reports to EPA with respect to relabeling in accordance with Paragraph 23, until relabeling is completed; (3) American Standard will only use promotional language for Elite Whirlpools that is in compliance with the treated articles exemption; and (4) Home Depot will not make promotional claims for Cadet 3 Toilets or Elite Whirlpools that are inconsistent with the treated articles exemption.

B. Respondents also certify that they have taken the following appropriate steps to comply with the treated articles exemption, 40 C.F.R. § 152.25(a), with respect to Cadet 3 Toilets and Elite Whirlpools treated with antimicrobial pesticides: (1) Home Depot and American Standard have ceased use of all Cadet 3 Toilet promotional materials with antimicrobial claims alleged to be not in compliance with the treated articles exemption; (2) American Standard's current marketing materials for the Cadet 3 Toilets are in compliance with the treated articles exemption; (3) Home Depot and American Standard have ceased use of all Elite Whirlpool promotional materials with antimicrobial claims alleged to be not in compliance with the treated articles exemption; and (4) All Cadet 3 toilets being manufactured by American Standard are being labeled with labels that comply with the treated articles exemption.

23. Respondents shall submit monthly progress reports to EPA every thirty (30) calendar days from the date of entry of this CAFO, until all relabeling of the Cadet 3 Toilets in the Home Depot Stores and American Standard warehouses have been completed. The reports shall include the number of Cadet 3 boxes in American Standard warehouses that

have been relabeled and the number remaining to be relabeled; and the number of Home Depot Stores at which relabeling has been completed and the number of stores at which relabeling remains to be done. Reports shall be sent to the following individual via regular mail or electronic mail:

Molly Freeman
Pesticides Management Section
U.S. EPA - Region 4
61 Forsyth Street
Atlanta, Georgia 30303-8960;
Email: freeman.molly@epa.gov.

24. Respondents acknowledge that failure to comply with the deadline set forth above in Paragraph 22, and the monthly reporting requirements set forth in Paragraph 23, will result in separately assessed stipulated penalties and interest for each non-compliance, according to the following rate schedule:

Compliance Delay	Stipulated Penalty
1-30 days	\$100 per day
31-60	\$500 per day
Over 60 days	\$1,000 per day

25. Respondents shall pay any stipulated penalties that accrue under this CAFO within fifteen (15) calendar days of the receipt by either Respondent of written demand from EPA for such penalties.
26. Compliance with this CAFO shall resolve the allegations of the violations contained herein. This CAFO shall not otherwise affect any liability of Respondents to the United States. Other than as expressed herein, neither EPA nor Complainant waives any right to bring an enforcement action against the Respondents for violation of any federal or state

statute, regulation or permit, to initiate an action for imminent and substantial endangerment, or to pursue criminal enforcement.

27. Complainant and Respondents agree to settle this matter by their execution of this CAFO. The parties agree that the settlement of this matter is in the public interest and that this CAFO is consistent with the applicable requirements of FIFRA.

IV. Final Order

28. Respondents are assessed a civil penalty of TWO HUNDRED THIRTY TWO THOUSAND NINE HUNDRED SIXTY DOLLARS (\$232,960) which shall be paid within thirty (30) days from the effective date of this CAFO.
29. Respondents shall remit the civil penalty by either a cashier's or certified check made payable to the "Treasurer, United States of America," and shall send the check via U.S. mail to the following address:

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

The check shall reference the name and the Docket Number of the CAFO [“Home Depot, Inc., and AS America, Inc., FIFRA-04-2008-3010(b)”].

30. At the time of payment of the civil penalty, Respondents shall send a separate copy of the check and a written statement that the payment is being made in accordance with this CAFO, to the following persons at the following addresses:

Regional Hearing Clerk
U.S. EPA - Region 4
61 Forsyth Street
Atlanta, Georgia 30303-8960;

Molly Freeman
Pesticides Management Section
U.S. EPA - Region 4
61 Forsyth Street
Atlanta, Georgia 30303-8960;

and

Saundi Wilson
Office of Environmental
U.S. EPA - Region 4
61 Forsyth Street
Atlanta, Georgia 30303-8960.

31. For the purposes of state and federal income taxation, Respondents shall not be entitled, and agree not to attempt, to claim a deduction for any civil penalty payment made pursuant to this CAFO. Any attempt by Respondents to deduct any such payments shall constitute a violation of this CAFO.
32. Pursuant to 31 U.S.C. § 3717, EPA is entitled to assess interest and penalties on debts owed to the United States and a charge to cover the cost of processing and handling a delinquent claim. Interest will therefore begin to accrue on the civil penalty from the date of entry of this CAFO, if the penalty is not paid by the date required. A charge will also be assessed to cover the administrative costs, both direct and indirect, of overdue debts. In addition, a late payment penalty charge shall be applied on any principal amount not paid within 90 days of the due date.
33. Complainant and Respondents shall bear their own costs and attorney fees in this matter.
34. This CAFO shall be binding upon the Respondents, their successors and assigns.

35. The undersigned representatives of the parties to this CAFO certify that they are fully authorized by the party represented to enter into this CAFO and legally binds that party to this CAFO.

V. Effective Date

36. The effective date of this CAFO shall be the date on which the CAFO is filed with the Regional Hearing Clerk.

AGREED AND CONSENTED TO:

Home Depot U.S.A, Inc.

By: Thomas E. Bohan (Signature)

Date: 4-28-08

Name: Thomas Bohan (Typed or Printed)

Title: Associate General Counsel and Vice President, Store Operations (Typed or Printed)

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Home Depot U.S.A., Inc., and AS America, Inc., FIFRA-04-2008-3010(b)

AS America, Inc.

By: Donald C. Devine (Signature)

Date: 4/20/08

Name: Donald C. Devine (Typed or Printed)

Title: President and Chief Executive Officer (Typed or Printed)

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Home Depot U.S.A., Inc., and AS America, Inc., FIFRA-04-2008-3010(b)

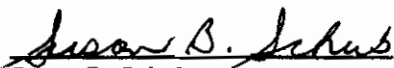
U.S. Environmental Protection Agency

By: 

Beverly H. Banister
Director
Air, Pesticides and Toxics
Management Division
61 Forsyth Street
Atlanta, Georgia 30303-8960

Date: 5-13-08

APPROVED AND SO ORDERED this 3rd day of June, 2008.



Susan B. Schub
Regional Judicial Officer

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true and correct copy of the foregoing Consent Agreement and Final Order, in the Matter of: Home Depot U.S.A., Inc., and AS America, Inc., FIFRA Docket No. 04-2008-3010(b), on the parties listed below in the manner indicated.

For Complainant:

Molly C. Freeman
Pesticides Management Section
U.S. EPA - Region 4, 4APT-PTSB
61 Forsyth Street
Atlanta, GA 30303-8960.

(Via EPA's internal mail)

Robert Caplan
Office of Environmental Accountability
U.S. EPA - Region 4
61 Forsyth Street
Atlanta, GA 30303-8960.

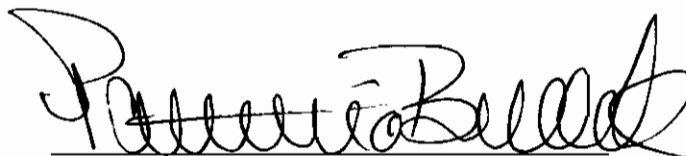
(Via EPA's internal mail)

For Respondent:

Cynthia Lewis
Beveridge and Diamond
1350 I Street, N.W.
Suite 700
Washington, D.C. 20005-3311.

(Via Certified Mail - Return Receipt
Requested)

Date: 6-3-08



Patricia A. Bullock, Regional Hearing Clerk
United States Environmental
Protection Agency, Region 4
Sam Nunn Atlanta Federal Center
61 Forsyth Street
Atlanta, GA 30303-8960
(404) 562-9511

EPA ACCOUNTS RECEIVABLE CONTROL NUMBER FORM

TO BE COMPLETED BY THE ORIGINATING OFFICE:

(Attach a copy of the final order and transmittal letter to Defendant/Respondent)

This form was originated by: Saundi J Wilson on _____
(Name) (Date)

in the OEA at (404) 562-9504
(Office) (Telephone Number)

- | | |
|--|--|
| <input type="checkbox"/> Non-SF Judicial Order/Consent Decree
USAO COLLECTS | <input checked="" type="checkbox"/> Administrative Order/Consent Agreement
FMO COLLECTS PAYMENT |
| <input type="checkbox"/> SF Judicial Order/Consent Decree
DOJ COLLECTS | <input type="checkbox"/> Oversight Billing - Cost Package required:
Sent with bill |
| <input type="checkbox"/> Other Receivable | <input type="checkbox"/> Not sent with bill |
| <input type="checkbox"/> This is an original debt | <input type="checkbox"/> Oversight Billing - Cost Package not required |
| | <input type="checkbox"/> This is a modification |

PAYEE: Home Depot USA Inc., + AS America Inc
(Name of person and/or Company/Municipality making the payment)

The Total Dollar Amount of the Receivable: \$ 232,960
(If installments, attach schedule of amounts and respective due dates. See Other side of this form.)

The Case Docket Number: FIRMA 04 2008 3016(h)

The Site Specific Superfund Account Number: _____

The Designated Regional/Headquarters Program Office: _____

TO BE COMPLETED BY LOCAL FINANCIAL MANAGEMENT OFFICE:

The IFMS Accounts Receivable Control Number is: _____ Date _____

If you have any questions, please call: _____ of the Financial Management Section at: _____

DISTRIBUTION:

- A. **JUDICIAL ORDERS:** Copies of this form with an attached copy of the front page of the **FINAL JUDICIAL ORDER** should be mailed to:
- | | |
|--|------------------------------|
| 1. Debt Tracking Officer
Environmental Enforcement Section
Department of Justice RM 1647
P.O. Box 7611, Benjamin Franklin Station
Washington, D.C. 20044 | 2. Originating Office (EAD) |
| | 3. Designated Program Office |
- B. **ADMINISTRATIVE ORDERS:** Copies of this form with an attached copy of the front page of the Administrative Order should be to:
- | | |
|---------------------------|------------------------------|
| 1. Originating Office | 3. Designated Program Office |
| 2. Regional Hearing Clerk | 4. Regional Counsel (EAD) |