

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5**

In the Matter of:)	Docket No. FIFRA-05-2025-0005
)	
Tom's Food Markets, Inc.)	Proceeding to Assess a Civil Penalty
Traverse City, Michigan,)	Under Section 14(a) of the Federal
)	Insecticide, Fungicide, and Rodenticide
Respondent.)	Act, 7 U.S.C. § 136l(a)
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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 is the Director of the Enforcement and Compliance Assurance Division, United States Environmental Protection Agency (EPA), Region 5.

3. Respondent is Tom's Food Markets, Inc., a corporation doing business in the State of Michigan.

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 and alleged violations 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. §§ 136-136y, and the regulations promulgated thereunder.

Statutory and Regulatory Background

10. Section 3(a) of FIFRA, 7 U.S.C. § 136a(a), states that no person in any State may distribute or sell to any person any pesticide that is not registered under Section 3 of FIFRA.

11. 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, or whose registration has been cancelled or suspended.

12. The regulation at 40 C.F.R. § 152.15(a) provides that 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 (either by itself or in a combination with any other substance) can or should be used as a pesticide or that the substance consists of or contains an active ingredient and that it can be used to manufacture a pesticide.

13. Section 2(s) of FIFRA, 7 U.S.C. § 136(s), defines a “person” as “any individual, partnership, association, corporation, or any organized group of persons whether incorporated or not.”

14. Section 2(gg) of FIFRA, 7 U.S.C. § 136(gg), states that 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.”

15. Section 2(t) of FIFRA, 7 U.S.C. § 136(t), defines a “pest” as “(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-organism (except viruses, bacteria, or other micro-organisms on or in living man or other living animals) which the Administrator [of EPA] declares to be a pest under section [25(c)(1), 7 U.S.C. § 136w(c)(1), of FIFRA].” See also 40 C.F.R. § 152.5.

16. Section 2(u) of FIFRA, 7 U.S.C. § 136(u), defines a “pesticide,” in part, as any “substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest.”

17. Section 2(mm) of FIFRA, 7 U.S.C. § 136(mm), states that the term “antimicrobial pesticide” means “a pesticide that (A) is intended to (i) disinfect, sanitize, reduce, or mitigate growth or development of microbiological organisms; or (ii) protect inanimate objects, industrial processes or systems, surfaces, water, or other chemical substances from contamination, fouling or deterioration caused by bacteria, viruses, fungi, protozoa, algae, or slime; and (B) in the intended use is exempt from, or otherwise not subject to, a tolerance under section 346a of Title 21 or a food additive regulation under section 348 of Title 21.”

18. Section 2(p)(1) of FIFRA, 7 U.S.C. § 136(p)(1), defines a “label” as “the written, printed, or graphic matter on, or attached to, the pesticide or device of any of its containers or wrappers.”

19. The Administrator of EPA may assess a civil penalty against any registrant,

commercial applicator, wholesaler, dealer, retailer or other distributor who violates any provision of FIFRA of up to \$24,255 for each offense that occurred after November 2, 2015, and assessed on or after December 27, 2023, pursuant to Section 14(a)(1), 7 U.S.C. § 136l(a)(1), and 40 C.F.R. Part 19.

Factual Allegations and Alleged Violations

20. Respondent is a “person” as that term is defined at Section 2(s) of FIFRA, 7 U.S.C. § 136(s).

21. At all times relevant to this CAFO, Tom’s Food Markets, Inc. owned or operated a place of business located at 738 Munson Avenue, Traverse City, Michigan (the Facility).

22. On or about August 25, 2022, two inspectors employed with the Michigan Department of Agriculture and Rural Development (MDARD) conducted an inspection at the Tom’s Food Markets, Inc. Facility using federal credentials (the Inspection).

23. During the Inspection, the inspectors collected photos of Wish Ultra Sanitizing Spray in Lemon & Mint Scent, Spring Waterfall Scent, Fresh Linen & Lilac Scent, and Pomegranate & Cherry Blossoms Scent.

24. The labels photographed for Wish Ultra Sanitizing Spray for each scent appeared identical except for artwork depicting the scent.

25. The labels photographed for Wish Ultra Sanitizing Spray for each scent included the following claims:

- a. “Kills 99.9% of Most Common Germs”
- b. “Quickly Kills Germs, While Eliminating Odors”
- c. “Quick & Effective, Eliminates Odors, Fights the Spread of Germs.”
- d. “Effective in destroying (harmful) bacteria to provide antiseptic cleansing.”

- e. On the bold large text “Drug Facts” label, the “Active ingredient” is ethyl alcohol whose stated purpose is “antiseptic.”
26. The labels collected for Wish Ultra Sanitizing Spray include directions for use that advise the user to “hold can upright 6-8 inches away from surface and spray evenly.”
27. The labels photographed for Wish Ultra Sanitizing Spray advertised an active ingredient of 75% ethanol.
28. During the Inspection, the inspectors purchased one container of Wish Ultra Sanitizing Spray, Waterfall Scent for a formulation analysis, which found 69.64% ethanol in test results provided by MDARD.
29. Ethanol is listed as an active ingredient in pesticides registered under FIFRA for use as surface disinfectants.
30. Wish Ultra Sanitizing Spray could be used to destroy bacteria and viruses, and therefore is a “pesticide” as defined under FIFRA, 7 U.S.C. § 136(u), and 40 C.F.R. § 152.15(a)(1).
31. Specifically, Wish Ultra Sanitizing Spray is an “antimicrobial pesticide” as that term is defined in Section 2(mm) of FIFRA, 7 U.S.C. § 136(mm).
32. Because Wish Ultra Sanitizing Spray is a pesticide, it is required to be registered under Section 3 of FIFRA, 7 U.S.C. § 136a.
33. Wish Ultra Sanitizing Spray is not registered under Section 3 of FIFRA.
34. Respondent distributed or sold the unregistered pesticide Wish Ultra Sanitizing Spray on four occasions on August 25, 2022.

Counts 1-4 (Sale of Unregistered Pesticides)

35. Complainant incorporates Paragraphs 1 through 34 of this CAFO as though set forth in this paragraph.

36. On August 25, 2022, Respondent distributed or sold Wish Ultra Sanitizing Spray, a “pesticide” as that term is defined under FIFRA, which was not registered under Section 3 of FIFRA and as such, is an unregistered pesticide.

37. On August 25, 2022, Respondent distributed or sold Wish Ultra Sanitizing Spray on at least four separate occasions.

38. Respondent’s distribution or sale of the unregistered pesticide Wish Ultra Sanitizing Spray on a total of four separate occasions constitutes four separate alleged unlawful acts pursuant to Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A).

39. Respondent’s alleged 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

40. 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 **\$25,600**. 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 FIFRA Enforcement Response Policy, dated December 2009.

41. Respondent agrees to pay a civil penalty in the amount of **\$25,600** (“Assessed Penalty”) within thirty (30) days after the date the Final Order ratifying this Agreement is filed with the Regional Hearing Clerk (“Filing Date”).

42. Within 30 days after the effective date of this CAFO, Respondent must pay the Assessed Penalty for the alleged FIFRA violations by an on-line payment. To pay on-line, go to www.pay.gov. Use the Search Public Forms option on the tool bar and enter SFO 1.1 in the search field. Open the form and complete the required fields.

43. When making a payment, Respondent shall:

- a. Identify every payment with Respondent's name and the docket number of this Agreement, FIFRA-05-2025-0005,
- b. Concurrently with any payment or within 24 hours of any payment, Respondent shall serve proof of such payment to the following person(s):

Regional Hearing Clerk (E-19J)
U.S. EPA, Region 5
r5hearingclerk@epa.gov

Angela Bouche (ECP-17J)
Pesticides and Toxics Compliance Section
U.S. EPA, Region 5
bouche.angela@epa.gov
and
R5lecab@epa.gov

James Bridges (C-14J)
Office of Regional Counsel
U.S. EPA, Region 5
bonarbridges.james@epa.gov

and

U.S. Environmental Protection Agency
Cincinnati Finance Center
CINWD_AcctsReceivable@epa.gov

“Proof of payment” means, as applicable, a copy of the check, confirmation of credit card or debit card payment, or confirmation of wire or automated clearinghouse transfer, and any other information required to demonstrate that payment has been made according to EPA requirements, in the amount due, and identified with the appropriate docket number and Respondent's name.

44. Interest, Charges, and Penalties on Late Payments. Pursuant to 31 U.S.C. § 3717, 31 C.F.R. § 901.9, and 40 C.F.R. § 13.11, if Respondent fails to timely pay any portion of the Assessed Penalty, interest, or other charges and penalties per this Agreement, the entire unpaid balance of the Assessed Penalty and all accrued interest shall become immediately due and owing, and EPA is authorized to recover the following amounts:

- a. Interest. Interest begins to accrue from the Filing Date. If the Assessed Penalty is paid in full within thirty (30) days, interest accrued is waived. If the Assessed Penalty is not paid in full within thirty (30) days, interest will continue to accrue until any unpaid portion of the Assessed Penalty as well as any interest, penalties, and other charges are paid in full. To protect the interests of the United States the rate of interest is set at the IRS standard underpayment rate, any lower rate would fail to provide Respondent adequate incentive for timely payment.
- b. Handling Charges. Respondent will be assessed monthly a charge to cover EPA's costs of processing and handling overdue debts.
- c. Late Payment Penalty. A late payment penalty of six percent (6%) per annum, will be assessed monthly on all debts, including any portion of the Assessed Penalty, interest, penalties, and other charges, that remain delinquent more than ninety (90) days.

45. Late Penalty Actions. In addition to the amounts described in the prior Paragraph, if Respondent fails to timely pay any portion of the Assessed Penalty, interest, or other charges and penalties per this Agreement, EPA may take additional actions. Such actions EPA may take include, but are not limited to, the following:

- a. Refer the debt to a credit reporting agency or a collection agency pursuant to 40 C.F.R. §§ 13.13 and 13.14.
- b. Collect the debt by administrative offset (i.e., the withholding of money payable by the United States government to, or held by the United States government for, a person to satisfy the debt the person owes the United States government), which includes, but is not limited to, referral to the Internal Revenue Service for offset against income tax refunds, 40 C.F.R. Part 13, Subparts C and H.
- c. Suspend or revoke Respondent's licenses or other privileges, or suspend or

disqualify Respondent from doing business with EPA or engaging in programs EPA sponsors or funds, 40 C.F.R. § 13.17.

- d. Request that the Attorney General bring a civil action in the appropriate district court to recover the amount outstanding pursuant to 7 U.S.C. § 1361(a)(5).

General Provisions

46. The parties consent to service of this CAFO by e-mail at the following valid e-mail addresses: bonarbridges.james@epa.gov (for Complainant), and nancy_sands@toms-foodmarkets.com (for Respondent). Respondent understands that the CAFO will become publicly available upon filing.

47. The Respondent's full compliance with this CAFO resolves only Respondent's liability for federal civil penalties for the violations alleged in the CAFO.

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

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

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

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

52. 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.

53. Each party agrees to bear its own costs and attorneys fees, in this action.

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

Tom's Food Markets Inc., Respondent

9-26-24
Date


Nancy Deering Sands
President
Tom's Food Markets, Inc.

United States Environmental Protection Agency, Complainant

Michael D. Harris
Director
Enforcement and Compliance Assurance Division

**In the Matter of:
Tom's Food Markets Inc.
Docket No.: FIFRA-05-2025-0005**

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.

Ann L. Coyle
Regional Judicial Officer
United States Environmental Protection Agency
Region 5