

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 5**



<b>In the Matter of:</b>	)	<b>Docket No. FIFRA-05-2024-0020</b>
	)	
<b>Underwater Creations, Inc.</b>	)	<b>Proceeding to Assess a Civil Penalty</b>
<b>Saint Louis Park, Minnesota</b>	)	<b>Under Section 14(a) of the Federal</b>
	)	<b>Insecticide, Fungicide, and Rodenticide</b>
<b>Respondent.</b>	)	<b>Act, 7 U.S.C. § 136/(a)</b>
_____	)	

**Consent Agreement and Final Order**

**I. 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. § 136/(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. Complainant is the Director of the Enforcement and Compliance Assurance Division, United States Environmental Protection Agency (EPA), Region 5.

3. Respondent is Underwater Creations, Inc. (Respondent), a corporation doing business in the State of Minnesota.

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.

## **II. 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. §§ 136–136y, and the regulations promulgated thereunder.

## **III. Statutory and Regulatory Background**

10. Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), states 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. 40 C.F.R. § 152.15 states that no person may distribute or sell any pesticide product that is not registered under FIFRA.

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

13. Section 2(gg) of FIFRA, 7 U.S.C. § 136(gg), defines “to distribute or sell” as 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. *See also* 40 C.F.R. § 152.3 (defining “distribute or sell” and other grammatical variations of that term).

14. Section 2(u) of FIFRA, 7 U.S.C. § 136(u), defines “pesticide” as, among other things, any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest and any substance or mixture of substances intended for use as a plant regulator, defoliant, or desiccant. *See also* 40 C.F.R. § 152.3 (defining “pesticide”).

15. 40 C.F.R. § 152.15 states that a substance is considered to be intended for a pesticidal purpose, and thus a pesticide requiring registration, if: (a) the person who distributes or sells the substance claims, states, or implies (by labeling or otherwise): (1) that the substance can or should be used as a pesticide; or (2) that the substance consists of or contains an active ingredient and that it can be used to manufacture a pesticide; or (b) the substance consists of or contains one or more active ingredients and has no significant commercially valuable use as distributed or sold other than (1) use for pesticidal purpose (by itself or in combination with any other substance); (2) use for manufacture of a pesticide; or (c) the person who distributes or sells the substance has actual or constructive knowledge that the substance will be used, or is intended to be used, for a pesticidal purpose.

16. Section 2(t) of FIFRA, 7 U.S.C. § 136(t), defines “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 the EPA declares to be a pest under Section 25(c)(1) of FIFRA, 7 U.S.C. § 136w(c)(1).

17. 40 C.F.R. § 152.5 provides that an organism is declared to be a pest if it is, among

other things, any vertebrate animal other than man; any invertebrate animal; any plant growing where not wanted, including any moss, alga, liverwort, or other plant of any higher order.

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 or any of its containers or wrappers.

19. Pursuant to Section 14(a)(1) of FIFRA, 7 U.S.C. § 136/(a)(1), and 40 C.F.R. Part 19, the Administrator of the 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 \$24,255 for each offense where penalties are assessed on or after December 27, 2023.

#### **IV. Factual Allegations and Alleged Violations**

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

21. At all times relevant to this CAFO, Respondent owned and/or operated a place of business located at 3420 Boone Avenue South, Saint Louis Park, Minnesota 55426 (the Facility).

22. On or about March 23, 2022, the Minnesota Department of Agriculture (MDA) conducted an inspection under the authorities provided by, and in accordance with, Sections 8 and 9 of FIFRA, 7 U.S.C. §§ 136f and 136g, at the Facility (the Inspection).

23. The Inspection focused on five products that Respondent produced at the Facility: (1) Vibrant Aquarium Cleaner – Reef (Vibrant Reef), (2) Vibrant Aquarium Cleaner – Saltwater (Vibrant Saltwater), (3) Vibrant Aquarium Cleaner – Freshwater (Vibrant Freshwater), (4) Coral Cleanse (Expel), and (5) Purge V2 In Tank AEFW Treatment (Purge).

24. During the Inspection, MDA collected labels, statements, distribution records,

receiving records, inventory records, and production records for Vibrant Reef, Vibrant Saltwater, Vibrant Freshwater, Expel, and Purge.

### **Vibrant Reef**

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

26. Respondent’s Chief Executive Officer, Mr. Jeff Jacobson, informed MDA during the Inspection that Vibrant Reef, is made of a combination of Aspartic Acid, Bacteria Water/Culture, GLB Algimycin 600, and Water.

27. GLB Algimycin 600 is an EPA-registered pesticide (EPA Registration Number 8959-37-7364), registered to control algae growth.

28. Algae in an aquarium tank is commonly considered deleterious to man or the environment and therefore is a “pest” as defined in Section 2(t) of FIFRA, 7 U.S.C. § 136(t). See 40 C.F.R. § 152.5(c) (defining pest to include any plant growing where not wanted, including alga).

29. Vibrant Reef is a substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest. Therefore, Vibrant Reef is a pesticide as provided in Section 2(u) of FIFRA, 7 U.S.C. § 136(u)(2).

30. During the Inspection, MDA collected bin labels for Vibrant Reef which made the following claims:

- a. “You can say goodbye to algae, cloudy water and that grungy, dirty aquarium and say hello to that sparkling, crystal clear, algae free, vibrant aquarium you have always wanted!”

- b. “Vibrant Ingredients: 95% Cultured Bacteria Blend 1% Amino Acids (Aspartic Acid) 0.5% Vinegar 3.5% Other Ingredients”

31. Respondent claimed, stated, or implied (by labeling or otherwise) that Vibrant Reef can or should be used as a pesticide. Therefore, Vibrant Reef is intended for a pesticidal purpose as provided in 40 C.F.R. § 152.15(a)(1).

32. Respondent had actual or constructive knowledge that Vibrant Reef would be used, or was intended to be used, for a pesticidal purpose. Therefore, Vibrant Reef is intended for a pesticidal purpose as provided in 40 C.F.R. § 152.15(c).

33. As a pesticide, Vibrant Reef is required to be registered under Section 3 of FIFRA, 7 U.S.C. § 136a.

34. At the time of the inspection, Vibrant Reef was not registered under Section 3 of FIFRA, 7 U.S.C. § 136a.

35. Therefore, at all times relevant to this CAFO, Vibrant Reef was an unregistered pesticide based on the intended use, active ingredients, and pesticidal claims made in relation to the product.

36. During the Inspection, MDA collected distribution and production records showing that Respondent distributed or sold Vibrant Reef on at least 169 separate occasions between February 9, 2021 and February 15, 2022.

#### **Vibrant Saltwater**

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

38. Respondent’s Chief Executive Officer, Mr. Jeff Jacobson, informed MDA during the

Inspection that Vibrant Saltwater is made of a combination of Aspartic Acid, Bacteria Water/Culture, GLB Algimycin 600, and Water.

39. GLB Algimycin 600 is an EPA-registered pesticide (EPA Registration Number 8959-37-7364).

40. Algae in an aquarium tank is commonly considered deleterious to man or the environment and therefore is a “pest” as defined in Section 2(t) of FIFRA, 7 U.S.C. § 136(t). See 40 C.F.R. § 152.5(c) (defining pest to include any plant growing where not wanted, including alga).

41. Vibrant Saltwater is a substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest. Therefore, Vibrant Saltwater is a pesticide as provided in Section 2(u) of FIFRA, 7 U.S.C. § 136(u)(2).

42. During the Inspection, MDA collected bin labels for Vibrant Saltwater which made the following claims:

- a. “You can say goodbye to algae, cloudy water and that grungy, dirty aquarium and say hello to that sparkling, crystal clear, algae free, vibrant aquarium you have always wanted!”
- b. “Vibrant Ingredients: 95% Cultured Bacteria Blend 1% Amino Acids (Aspartic Acid) 0.5% Vinegar 3.5% Other Ingredients”

43. Respondent claimed, stated, or implied (by labeling or otherwise) that Vibrant Saltwater can or should be used as a pesticide. Therefore, Vibrant Saltwater is intended for a pesticidal purpose as provided in 40 C.F.R. § 152.15(a)(1).

44. Respondent had actual or constructive knowledge that Vibrant Saltwater would be

used, or was intended to be used, for a pesticidal purpose. Therefore, Vibrant Saltwater is intended for a pesticidal purpose as provided in 40 C.F.R. § 152.15(c).

45. As a pesticide, Vibrant Saltwater is required to be registered under Section 3 of FIFRA, 7 U.S.C. § 136a.

46. At the time of the inspection, Vibrant Saltwater was not registered under Section 3 of FIFRA, 7 U.S.C. § 136a.

47. Therefore, at all times relevant to this CAFO, Vibrant Saltwater was an unregistered pesticide based on the intended use, active ingredients, and pesticidal claims made in relation to the product.

48. During the Inspection, MDA collected distribution and production records showing that Respondent distributed or sold Vibrant Saltwater on at least 65 separate occasions between February 9, 2021 and February 18, 2022.

#### **Vibrant Freshwater**

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

50. Respondent’s Chief Executive Officer, Mr. Jeff Jacobson, informed MDA during the Inspection that Vibrant Freshwater is made of a combination of Aspartic Acid, Bacteria Water/Culture, GLB Algimycin 600, and Water.

51. GLB Algimycin 600 is an EPA-registered pesticide (EPA Registration Number 8959-37-7364).

52. Algae in an aquarium tank is commonly considered deleterious to man or the environment and therefore is a “pest” as defined in Section 2(t) of FIFRA, 7 U.S.C. § 136(t). *See*



40 C.F.R. § 152.5(c) (defining pest to include any plant growing where not wanted, including alga).

53. Vibrant Freshwater is a substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest. Therefore, Vibrant Freshwater is a pesticide as provided in Section 2(u) of FIFRA, 7 U.S.C. § 136(u)(2).

54. During the Inspection, MDA collected bin labels for Vibrant Freshwater that which made the following claims:

- a. “You can say goodbye to algae, cloudy water and that grungy, dirty aquarium and say hello to that sparkling, crystal clear, algae free, vibrant aquarium you have always wanted!”
- b. “Vibrant Ingredients: 95% Cultured Bacteria Blend 1% Amino Acids (Aspartic Acid) 0.5% Vinegar 3.5% Other Ingredients”

55. Respondent claimed, stated, or implied (by labeling or otherwise) that Vibrant Freshwater can or should be used as a pesticide. Therefore, Vibrant Freshwater is intended for a pesticidal purpose as provided in 40 C.F.R. § 152.15(a)(1).

56. Respondent had actual or constructive knowledge that Vibrant Freshwater would be used, or was intended to be used, for a pesticidal purpose. Therefore, Vibrant Freshwater is intended for a pesticidal purpose as provided in 40 C.F.R. § 152.15(c).

57. As a pesticide, Vibrant Freshwater is required to be registered under Section 3 of FIFRA, 7 U.S.C. § 136a.

58. At the time of the inspection, Vibrant Freshwater was not registered under Section 3 of FIFRA, 7 U.S.C. § 136a.

59. Therefore, at all times relevant to this CAFO, Vibrant Freshwater was an unregistered pesticide based on the intended use, active ingredients, and pesticidal claims made in relation to the product.

60. During the Inspection, MDA collected distribution and production records showing that Respondent distributed or sold Vibrant Freshwater on at least 63 separate occasions between March 3, 2021 and February 18, 2022.

#### **Expel**

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

62. Expel is a substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest. Therefore, Expel is a pesticide as provided in Section 2(u) of FIFRA, 7 U.S.C. § 136(u)(2).

63. During the Inspection, MDA collected bin labels for Expel, which made the following claims:

- a. “safely removes pests from aquarium corals”
- b. “will flush your corals of those unwanted coral pests”

64. Respondent claimed, stated, or implied (by labeling or otherwise) that Expel can or should be used as a pesticide. Therefore, Expel is intended for a pesticidal purpose as provided in 40 C.F.R. § 152.15(a)(1).

65. Respondent had actual or constructive knowledge that Expel would be used, or was intended to be used, for a pesticidal purpose. Therefore, Expel is intended for a pesticidal purpose as provided in 40 C.F.R. § 152.15(c).

66. As a pesticide, Expel is required to be registered under Section 3 of FIFRA, 7 U.S.C. § 136a.

67. At the time of the Inspection, Expel was not registered under Section 3 of FIFRA, 7 U.S.C. § 136a.

68. Therefore, at all times relevant to this CAFO, Expel was an unregistered pesticide based on the intended use and pesticidal claims made in relation to the product.

69. During the Inspection, MDA collected distribution and production records showing that Respondent distributed or sold Expel on at least 22 separate occasions between January 18, 2021 and March 3, 2021.

#### **Purge**

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

71. Purge is a substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest. Therefore, Purge is a “pesticide” as that term is defined in Section 2(u)(2) of FIFRA, 7 U.S.C. § 136(u)(2).

72. During the Inspection, MDA collected bin labels for 8-ounce containers of Purge which made the following claims:

- a. “safely removes pests from aquarium corals”
- b. “will flush your corals of those unwanted coral pests”

73. During the Inspection, MDA collected bin label for 16-ounce containers of Purge, which made the following claims:

- a. “safely removes Acropora flatworms from SPS corals”
- b. “PURGE is a new revolutionary in tank acropora eating flatworm destroyer.  
PURGE will flush your system of unwanted coral pest”

74. Respondent claimed, stated, or implied (by labeling or otherwise) that Purge can or should be used as a pesticide. Therefore, Purge is intended for a pesticidal purpose as provided in 40 C.F.R. § 152.15(a)(1).

75. Respondent had actual or constructive knowledge that Purge would be used, or was intended to be used, for a pesticidal purpose. Therefore, Purge is intended for a pesticidal purpose as provided in 40 C.F.R. § 152.15(c).

76. As a pesticide, Purge is required to be registered under Section 3 of FIFRA, 7 U.S.C. § 136a.

77. At the time of the inspection, Purge was not registered under Section 3 of FIFRA, 7 U.S.C. § 136a.

78. Therefore, at all times relevant to this CAFO, Purge was an unregistered pesticide based on the intended use, active ingredients, and pesticidal claims made in relation to the product.

79. During the Inspection, MDA collected distribution and production records showing that Respondent distributed or sold Purge on at least 26 separate occasions between March 18, 2021 and December 7, 2021.

## **V. Violations**

### Counts 1 through 169: The Sale of Unregistered Pesticide Vibrant Reef

80. Paragraphs 10 through 79 of this CAFO, above, are incorporated by reference as

though fully set forth herein.

81. Between February 9, 2021 and February 15, 2022, Respondent distributed or sold Vibrant Reef on at least 169 separate occasions.

82. Vibrant Reef is a pesticide, as that term is defined in Paragraph 14, above.

83. Vibrant Reef is intended for a pesticidal purpose, as provided in Paragraph 15, above.

84. Vibrant Reef is not registered under Section 3 of FIFRA, 7 U.S.C. § 136a.

85. Therefore, Respondent distributed or sold the unregistered pesticide, Vibrant Reef, on at least 169 separate occasions.

86. Each of Respondent's distributions or sales of the unregistered pesticide Vibrant Reef constitutes a separate unlawful act, in violation of Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), and 40 C.F.R. § 152.15.

87. Therefore, Respondent committed at least 169 separate violations of Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), and 40 C.F.R. § 152.15.

88. Respondent's violations of Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), and 40 C.F.R. § 152.15 subjects Respondent to the assessment of a civil penalty under Section 14(a) of FIFRA, 7 U.S.C. § 136(a).

#### Counts 170 through 235: The Sale of Unregistered Pesticide Vibrant Saltwater

89. Paragraphs 10 through 79 of this CAFO, above, are incorporated by reference as though fully set forth herein.

90. Between February 9, 2021 and February 18, 2022, Respondent distributed or sold Vibrant Saltwater on at least 65 separate occasions.

91. Vibrant Saltwater is a pesticide, as that term is defined in Paragraph 14, above.

92. Vibrant Saltwater is intended for a pesticidal purpose, as provided in Paragraph 15, above.

93. Vibrant Saltwater is not registered under Section 3 of FIFRA, 7 U.S.C. § 136a.

94. Therefore, Respondent distributed or sold the unregistered pesticide, Vibrant Saltwater, on at least 65 separate occasions.

95. Each of Respondent's distributions or sales of the unregistered pesticide Vibrant Saltwater constitutes a separate unlawful act, in violation of Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), and 40 C.F.R. § 152.15.

96. Therefore, Respondent committed at least 65 separate violations of Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), and 40 C.F.R. § 152.15.

97. Respondent's violations of Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), and 40 C.F.R. § 152.15 subject Respondent to the assessment of a civil penalty under Section 14(a) of FIFRA, 7 U.S.C. § 136(a).

Counts 236 through 299: The Sale of Unregistered Pesticide Vibrant Freshwater

98. Paragraphs 10 through 79 of this CAFO, above, are incorporated by reference as though fully set forth herein.

99. Between March 3, 2021 and February 18, 2022, Respondent distributed or sold Vibrant Freshwater on at least 63 separate occasions.

100. Vibrant Freshwater is a pesticide, as that term is defined in Paragraph 14, above.

101. Vibrant Freshwater is intended for a pesticidal purpose, as provided in Paragraph 15, above.

102. Vibrant Freshwater is not registered under Section 3 of FIFRA, 7 U.S.C. § 136a.

103. Therefore, Respondent distributed or sold the unregistered pesticide, Vibrant Freshwater, on at least 63 separate occasions.

104. Each of Respondent's distributions or sales of the unregistered pesticide Vibrant Freshwater constitutes a separate unlawful act, in violation of Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), and 40 C.F.R. § 152.15.

105. Therefore, Respondent committed at least 63 separate violations of Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), and 40 C.F.R. § 152.15.

106. Respondent's violations of Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), and 40 C.F.R. § 152.15 subject Respondent to the assessment of a civil penalty under Section 14(a) of FIFRA, 7 U.S.C. § 136(a).

Counts 300 through 322: The Sale of Unregistered Pesticide Expel

107. Paragraphs 10 through 79 of this CAFO, above, are incorporated by reference as though fully set forth herein.

108. Between January 18, 2021 and March 3, 2021, Respondent distributed or sold Expel on at least 22 separate occasions.

109. Expel is a pesticide, as that term is defined in Paragraph 14, above.

110. Expel is intended for a pesticidal purpose, as provided in Paragraph 15, above.

111. Expel is not registered under Section 3 of FIFRA, 7 U.S.C. § 136a.

112. Therefore, Respondent distributed or sold the unregistered pesticide, Expel, on at least 22 separate occasions.

113. Each of Respondent's distributions or sales of the unregistered pesticide Expel

constitutes a separate unlawful act, in violation of Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), and 40 C.F.R. § 152.15.

114. Therefore, Respondent committed at least 22 separate violations of Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), and 40 C.F.R. § 152.15.

115. Respondent's violations of Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), and 40 C.F.R. § 152.15 subject Respondent to the assessment of a civil penalty under Section 14(a) of FIFRA, 7 U.S.C. § 136/(a).

#### Counts 323 through 349: The Sale of Unregistered Pesticide Purge

116. Paragraphs 10 through 79 of this CAFO, above, are incorporated by reference as though fully set forth herein.

117. Between March 18, 2021 and December 7, 2021, Respondent distributed or sold Purge on at least 26 separate occasions.

118. Purge is a pesticide, as that term is defined in Paragraph 14, above.

119. Purge is intended for a pesticidal purpose, as provided in Paragraph 15, above.

120. Purge is not registered under Section 3 of FIFRA, 7 U.S.C. § 136a.

121. Therefore, Respondent distributed or sold the unregistered pesticide, Purge, on at least 26 separate occasions.

122. Each of Respondent's distributions or sales of the unregistered pesticide Purge constitutes a separate unlawful act, in violation of Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), and 40 C.F.R. § 152.15.

123. Therefore, Respondent committed at least 26 separate violations of Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), and 40 C.F.R. § 152.15.



124. Respondent's violations of Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), and 40 C.F.R. § 152.15 subject Respondent to the assessment of a civil penalty under Section 14(a) of FIFRA, 7 U.S.C. § 136/(a).

### Civil Penalty

125. Pursuant to Section 14(a)(4) of FIFRA, 7 U.S.C. § 136/(a)(4), Complainant determined that an appropriate civil penalty to settle this action is \$226,652 ("Assessed Penalty"). 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 violations. Complainant also considered the EPA's FIFRA Enforcement Response Policy, dated December 2009.

126. Respondent consents to pay the Assessed Penalty within thirty (30) calendar days after the date of the Final Order ratifying this Agreement is filed with the Regional Hearing Clerk ("Filing Date").

127. Respondent shall pay the Assessed Penalty and any interest, fees, and other charges due using any method, or combination of appropriate methods, as provided on the EPA website: <https://www.epa.gov/financial/makepayment>. For additional instructions see: <https://www.epa.gov/financial/additional-instructions-making-payments-epa>.

128. When making a payment, Respondent shall:

- a. Identify every payment with Respondent's name and the docket number of this Agreement, **FIFRA-05-2024-0020**
- 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](mailto:r5hearingclerk@epa.gov)

Emma Gloekler (ECP-17J)  
Pesticides and Toxics Compliance Section  
U.S. EPA, Region 5  
[Gloekler.Emma@epa.gov](mailto:Gloekler.Emma@epa.gov)  
and  
[R5lecab@epa.gov](mailto:R5lecab@epa.gov)

Andrew Futerman (C-14J)  
Office of Regional Counsel  
U.S. EPA, Region 5  
[Futerman.Andrew@epa.gov](mailto:Futerman.Andrew@epa.gov)

Sam Horowitz (C-14J)  
Office of Regional Counsel  
U.S. EPA, Region 5  
[Horowitz.Samuel@epa.gov](mailto:Horowitz.Samuel@epa.gov)

U.S. Environmental Protection Agency  
Cincinnati Finance Center  
[CINWD\\_AcctsReceivable@epa.gov](mailto: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.

129. 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 the full amount of the Assessed Penalty per this Agreement, the EPA is authorized to recover, in addition to the amount of the unpaid Assessed Penalty, 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 the EPA's cost of processing and handling overdue debts. If Respondent fails to pay the Assessed Penalty in accordance with this Agreement, the EPA will assess a charge to cover the costs of handling any unpaid amounts for the first thirty (30) day period after the Filing Date. Additional handling charges will be assessed every thirty (30) days, or any portion thereof, until the unpaid portion of the Assessed Penalty as well as any accrued interest, penalties, and other charges are paid in full.
- c. Late Payment Penalty. A late payment penalty of six percent (6%) per annum, will be assessed monthly on all debts, including any unpaid portion of the Assessed Penalty, interest, penalties, and other charges, that remain delinquent more than ninety (90) days. Any such amounts will accrue from the Filing Date.

130. 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, the EPA may take additional actions.

Such actions the EPA may take include, but are not limited to, the following:

- a. Refer the debt to a credit reporting agency or a collection agency, per 40 C.F.R §§ 13.13 and 13.14.
- b. Collect the debt by administrative offset (i.e., 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 included, but is not limited to, referral to the Internal Revenue Service for offset against income tax refunds, per 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 the EPA or engaging in programs the EPA sponsors or funds, per 40 C.F.R. § 13.17.
- d. Refer this matter to the United States Department of Justice for litigation and collection, per 40 C.F.R. § 13.33.

131. Allocation of Payments. Pursuant to 30 C.F.R. § 901.9(f) and 40 C.F.R. § 13.11(d), a partial payment of debt will be applied first to outstanding handling charges, second to late penalty charges, third to accrued interest, and last to the principal that is the outstanding Assessed Penalty amount.

132. Tax Treatment of Penalties. Penalties, interest, and other charges paid pursuant to this Agreement shall not be deductible for purposes of federal taxes.

133. Pursuant to 26 U.S.C. § 6050X and 26 C.F.R. § 1.6050X-1, the EPA is required to send to the Internal Revenue Service (IRS) annually, a completed IRS Form 1098-F (“Fines, Penalties, and Other Amounts”) with respect to any court order or settlement agreement (including administrative settlements), that require a payor to pay an aggregate amount that the EPA reasonably believes will be equal to, or in excess of, \$50,000 for the payor’s violation of any law or the investigation or inquiry into the payor’s potential violation of any law, including amounts paid for “restitution or remediation of property” or to come “into compliance with a law.” The EPA is further required to furnish a written statement, which provides the same information provided to the IRS, to each payor (i.e., a copy of IRS Form 1098-F). Failure to comply with providing IRS Form W-9 or Tax Identification Number (TIN), as described below, may subject Respondent to a penalty, per 26 U.S.C. § 6723, 26 U.S.C. § 6724(d)(3), and 26 C.F.R. § 301.6723-1. In order to provide the EPA with sufficient information to enable it to fulfill these obligations, the EPA herein requires, and Respondent herein agrees, that:

- a. Respondent shall complete an IRS Form W-9 (“Request for Taxpayer Identification Number and Certification”), which is available at <https://www.irs.gov/pub/irs-pdf/fw9.pdf>;
- b. Respondent shall therein certify that its completed IRS Form W-9 includes Respondent’s correct TIN or that Respondent has applied and is waiting for issuance of a TIN;
- c. Respondent shall email its completed Form W-9 to Milton Wise at the EPA’s Cincinnati Finance Center at [wise.milton@epa.gov](mailto:wise.milton@epa.gov), within 30 days after the

effective date of this CAFO, and the EPA recommends encrypting IRS Form W-9 email correspondence; and

- d. In the event that that Respondent has certified in its completed IRS Form W-9 that it does not yet have a TIN but has applied for a TIN, Respondent shall provide the EPA's Cincinnati Finance Center with Respondent's TIN, via email, within five (5) days of Respondent's receipt of a TIN issued by the IRS.

### **General Provisions**

134. The parties consent to service of this CAFO by e-mail at the following valid e-mail addresses: [Futerman.Andrew@epa.gov](mailto:Futerman.Andrew@epa.gov) and [Horowitz.Samuel@epa.gov](mailto:Horowitz.Samuel@epa.gov) (for Complainant), and [jdudley@dudleyandsmith.com](mailto:jdudley@dudleyandsmith.com) (for Respondent). Respondent understands that this CAFO will become publicly available upon filing.

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

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

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

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

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

140. 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.

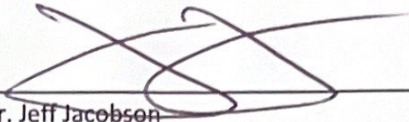
141. Each party agrees to bear its own costs and attorneys' fees in this action.

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

**Underwater Creations, Inc., Respondent**

9/17/24

Date



Mr. Jeff Jacobson  
Chief Executive Officer  
Underwater Creations, Inc.



**United States Environmental Protection Agency, Complainant**

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Michael D. Harris  
Director  
Enforcement and Compliance Assurance Division

**In the Matter of:  
Underwater Creations, Inc.  
Docket No. FIFRA-05-2024-0020**

**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.

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