

FILED

August 14, 2024

10:00AM

**U.S. EPA REGION 7
HEARING CLERK**

**U. S. ENVIRONMENTAL PROTECTION AGENCY
REGION 7
11201 RENNER BOULEVARD
LENEXA, KANSAS 66219**

BEFORE THE ADMINISTRATOR

In the Matter of

Gardens Alive!, Inc.,

Respondent.

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Docket No. FIFRA-07-2024-0102

CONSENT AGREEMENT AND FINAL ORDER

Preliminary Statement

The U.S. Environmental Protection Agency, Region 7 (EPA or Complainant), and **Gardens Alive!, Inc.** (Respondent) have agreed to a settlement of this action before the filing of a Complaint, and thus this action is simultaneously commenced and concluded pursuant to Rules 22.13(b) and 22.18(b)(2) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, 40 C.F.R. §§ 22.13(b) and 22.18(b)(2).

ALLEGATIONS

Jurisdiction

1. This proceeding is an administrative action for the assessment of civil penalties initiated pursuant to Section 14 of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. § 136l and in accordance with the Consolidated Rules of Practice.

Parties

2. Complainant, by delegation from the Administrator of EPA and the Regional Administrator of EPA Region 7 is the Director of the Enforcement and Compliance Assurance Division of EPA Region 7.

3. The Respondent is Gardens Alive!, Inc., a business incorporated in Indiana and doing business in the state of Missouri.

Statutory and Regulatory Background

4. Congress enacted FIFRA in 1947 and amended it in 1972 and in 1996. The general purpose of FIFRA is to provide the basis for regulation, sale, distribution and use of pesticides in the United States. 7 U.S.C. 136 *et. seq.*

5. Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), states it shall be unlawful for any person in any state to distribute or sell to any person any pesticide which is adulterated or misbranded.

6. Section 2(u) of FIFRA, 7 U.S.C. § 136(u), defines “pesticide” to mean any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest.

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

8. Section 2(gg) of FIFRA, 7 U.S.C. § 136(gg), defines “to distribute or sell” to mean 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.

9. Section 2(q)(1)(A) of FIFRA, 7 U.S.C. § 136(q)(1)(A), states, in pertinent part, a pesticide is misbranded if its labeling bears any statement, design, or graphic representation relative thereto or to its ingredients which is false or misleading in any particular.

10. Section 14(a)(1) of FIFRA, 7 U.S.C. § 136l(a)(1), authorizes a civil penalty of not more than \$5,000 for each offense. The Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, 28 U.S.C. § 2461, and implementing regulations at 40 C.F.R. Part 19, increased these statutory maximum penalties \$24,255, for violations that occur after November 2, 2015, and for which penalties are assessed on or after December 27, 2023.

General Factual Allegations

11. Respondent is, and at all times referred to herein was, a “person” within the meaning of FIFRA.

12. Respondent is a catalog company, which sells garden and lawn supplies under its namesake catalog and online.

13. Respondent “distributes” or “sells” a quantity of the pesticide product known as *Escar-Go! Slug and Snail Bait*, EPA Registration Number (EPA Reg. No.) 42750-20-55467, within the meaning of FIFRA.

14. Respondent contracts with RitePack, Inc. (“RitePack”) to package and label *Escar-Go! Slug and Snail Bait* in RitePack’s facility at 3800 S. 48th Terrace, St. Joseph, MO.

15. W. Neudorff GmbH KG (“Neudorff”) provides the pesticide, EPA Reg. No. 42750-20-55467, directly to RitePack to be packaged as *Escar-Go! Slug and Snail Bait* per a work order contract with Respondent.

16. Respondent supplies labels for *Escar-Go! Slug and Snail Bait* to RitePack, who packages the product, places the labels on the product and sends the finished product to Respondent to be sold.

17. RitePack’s facility is subject to regular inspections by the EPA to verify compliance with FIFRA, pursuant to Section 9 of FIFRA, 7 U.S.C. 136g.

18. On or about January 18, 2023, representatives the Missouri Department of Agriculture, acting as a representative of EPA, conducted a Neutral Scheme Producer Establishment Inspection of RitePack’s facility to determine compliance with FIFRA and related regulations in the Code of Federal Regulations.

19. At the time of inspection, inspectors selected four products produced at RitePack’s facility for sampling through photographs, labels, and records, including *Escar-Go! Slug and Snail Bait*.

Allegations of Violations

20. The Complainant hereby states and alleges that Respondent has violated FIFRA and federal regulations promulgated thereunder, as follows:

Count 1 **Selling Misbranded Pesticide**

21. The facts stated in Paragraphs 11 through 19 above are herein incorporated.

22. Pursuant to Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), it is unlawful for any person in any state to distribute or sell to any person any pesticide which is adulterated or misbranded.

23. Section 2(q)(1)(A) of FIFRA, 7 U.S.C. § 136(q)(1)(A), states, in pertinent part, a pesticide is misbranded if its labeling bears any statement, design, or graphic representation relative thereto or to its ingredients which is false or misleading in any particular.

24. The label of the sample pesticide product sold as *Escar-Go! Slug and Snail Bait*, EPA Reg. No. 42750-20-55467, collected at the January 18 inspection, listed the product’s active ingredients as follows:

- (a) Iron Phosphate: 0.97%
- (b) Spinosad (a mixture of spinosyn A and spinosyn D): 0.07%

25. The master label for the pesticide product sold as *Escar-Go! Slug and Snail Bait*, EPA Reg. No. 42750-20-55467, obtained from Neudorff, lists the product's active ingredients as follows:

- (a) Iron Phosphate: 1.0%

26. Based on a comparison of the sample label and the master label, EPA determined that sample label collected from RitePack's facility displays incorrect active ingredients and percentages thereof for *Escar-Go! Slug and Snail Bait*.

27. Because the product label for *Escar-Go! Slug and Snail Bait* bore false information about the product's active ingredients and percentages thereof, it is misbranded pursuant to Section 2(q)(1)(A) of FIFRA, 7 U.S.C. § 136(q)(1)(A).

28. Respondent "distributes" or "sells" *Escar-Go! Slug and Snail Bait*, EPA Registration Number (EPA Reg. No.) 42750-20-55467, within the meaning of FIFRA

29. Respondent violated Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), by selling or distributing a pesticide which was misbranded pursuant to Section 2(q)(1)(A) of FIFRA, 7 U.S.C. § 136(q)(1)(A).

CONSENT AGREEMENT

30. For the purpose of this proceeding, as required by 40 C.F.R. § 22.18(b)(2), Respondent:

- (a) admits the jurisdictional allegations set forth herein;
- (b) neither admits nor denies the specific factual allegations stated herein;
- (c) consents to the assessment of a civil penalty, as stated herein;
- (d) consents to the issuance of any specified compliance or corrective action order;
- (e) consents to any conditions specified herein;
- (f) consents to any stated Permit Action;
- (g) waives any right to contest the allegations set forth herein; and
- (h) waives its rights to appeal the Final Order accompanying this Consent Agreement.

31. Respondent consents to the issuance of this Consent Agreement and Final Order and consents for the purposes of settlement to the payment of the civil penalty specified herein.

32. Respondent and EPA agree to the terms of this Consent Agreement and Final Order and Respondent agrees to comply with the terms specified herein.

33. Respondent and EPA agree to conciliate this matter without the necessity of a formal hearing and to bear their respective costs and attorneys' fees.

34. Respondent consents to receiving the filed Consent Agreement and Final Order electronically at the following e-mail address: *skey@gardensalive.com*

Penalty Payment

35. Respondent agrees that, in settlement of the claims alleged herein, Respondent shall pay a civil penalty of nine thousand seven hundred sixty-nine dollars (\$9,769), as set forth below.

36. Respondent shall pay the penalty within thirty (30) days of the effective date of the Final Order. Such payment shall identify Respondent by name and docket number and shall be by certified or cashier's check made payable to the "United States Treasury" and sent to:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
PO Box 979078
St. Louis, Missouri 63197-9000

or by alternate payment method described at <http://www.epa.gov/financial/makepayment>.

37. A copy of the check or other information confirming payment shall simultaneously be emailed to the following:

Regional Hearing Clerk
R7_Hearing_Clerk_Filings@epa.gov; and

Anna Landis, Attorney
landis.anna@epa.gov.

38. Respondent understands that its failure to timely pay any portion of the civil penalty may result in the commencement of a civil action in Federal District Court to recover the full remaining balance, along with penalties and accumulated interest. In such case, interest shall begin to accrue on a civil or stipulated penalty from the date of delinquency until such civil or stipulated penalty and any accrued interest are paid in full. 31 C.F.R. § 901.9(b)(1). Interest will be assessed at a rate of the United States Treasury Tax and loan rates in accordance with 31 U.S.C. § 3717. Additionally, a charge will be assessed to cover the costs of debt collection including processing and handling costs, and a non-payment penalty charge of six (6) percent per year compounded annually will be assessed on any portion of the debt which remains delinquent more than ninety (90) days after payment is due. 31 U.S.C. § 3717(e)(2).

Effect of Settlement and Reservation of Rights

39. Full payment of the penalty proposed in this Consent Agreement shall only resolve Respondent's liability for federal civil penalties for the violations alleged herein. Complainant reserves the right to take any enforcement action with respect to any other violations of FIFRA or any other applicable law.

40. The effect of settlement described in the immediately preceding paragraph is conditioned upon the accuracy of Respondent's representations to EPA, as memorialized in the paragraph directly below.

41. Respondent certifies by the signing of this Consent Agreement that it is presently in compliance with all requirements of FIFRA and its implementing regulations.

42. Full payment of the penalty proposed in this Consent Agreement shall not in any case affect the right of the Agency or the United States to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law. This Consent Agreement and Final Order does not waive, extinguish or otherwise affect Respondent's obligation to comply with all applicable provisions of FIFRA and regulations promulgated thereunder.

43. Complainant reserves the right enforce the terms and conditions of this Consent Agreement and Final Order.

44. Nothing contained in this Consent Agreement and Final Order shall alter or otherwise affect Respondent's obligation to comply with all applicable federal, state, and local environmental statutes and regulations and applicable permits.

General Provisions

45. By signing this Consent Agreement, the undersigned representative of Respondent certifies that they are fully authorized to execute and enter into the terms and conditions of this Consent Agreement and has the legal capacity to bind the party they represent to this Consent Agreement.

46. This Consent Agreement shall not dispose of the proceeding without a final order from the Regional Judicial Officer or Regional Administrator ratifying the terms of this Consent Agreement. This Consent Agreement and Final Order shall be effective upon filing by the Regional Hearing Clerk for EPA, Region 7. Unless otherwise stated, all time periods stated herein shall be calculated in calendar days from such date.

47. The penalty specified herein shall represent civil penalties assessed by EPA and shall not be deductible for purposes of Federal, State and local taxes.

48. This Consent Agreement and Final Order shall apply to and be binding upon Respondent and Respondent's agents, successors and/or assigns. Respondent shall ensure that all

contractors, employees, consultants, firms, or other persons or entities acting for Respondent with respect to matters included herein comply with the terms of this Consent Agreement and Final Order.

RESPONDENT
GARDENS ALIVE!, INC.

Stephanie Key
Signature

7/19/2024
Date

Stephanie Key
Printed Name

Regulatory Affairs
Title

COMPLAINANT
U. S. ENVIRONMENTAL PROTECTION AGENCY

David Cozad
Director
Enforcement and Compliance Assurance Division

Date

Anna Landis
Office of Regional Counsel

Date

FINAL ORDER

Pursuant to Section 14(a) of FIFRA, 7 U.S.C. § 136l(a), and the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, 40 C.F.R. Part 22, the foregoing Consent Agreement resolving this matter is hereby ratified and incorporated by reference into this Final Order.

Respondent is ORDERED to comply with all of the terms of the Consent Agreement. In accordance with 40 C.F.R. § 22.31(b), the effective date of the foregoing Consent Agreement and this Final Order is the date on which this Final Order is filed with the Regional Hearing Clerk.

IT IS SO ORDERED.

Karina Borromeo
Regional Judicial Officer

Date

CERTIFICATE OF SERVICE
(For EPA use only.)

I certify that that a true and correct copy of the foregoing Consent Agreement and Final Order in the matter of GARDENS ALIVE!, EPA Docket No. FIFRA-07-2024-0102, was sent this day in the following manner to the addressees:

Copy via Email to Complainant:

Anna Landis
Office of Regional Counsel
landis.anna@epa.gov

Tracey Ramsey
Enforcement and Compliance Assurance Division
ramsey.tracey@epa.gov

Milady Peters
Office of Regional Counsel
peters.milady@epa.gov

Copy via Email to Respondent:

Stephanie Key
Gardens Alive!, Inc.
110 W. Elm Street
Tipp City, OH 45371
skey@gardensalive.com

Dated this _____ day of _____, _____.

Signed