

U. S. ENVIRONMENTAL PROTECTION AGENCY

REGION 7

**901 NORTH 5th STREET
KANSAS CITY, KANSAS 66101**

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ENVIRONMENTAL PROTECTION
AGENCY-REGION VII
REGIONAL HEARING CLERK

BEFORE THE ADMINISTRATOR

In the Matter of)
)
)
Custom Air, LLC) Docket No. FIFRA-07-2010-0010
Louisville, Mississippi)
)
Respondent)

CONSENT AGREEMENT AND FINAL ORDER

The U.S. Environmental Protection Agency (EPA), Region 7, and Custom Air, LLC (Respondent) have agreed to a settlement of this action before 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, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits (Consolidated Rules), 40 C.F.R. §§ 22.13(b) and 22.18(b)(2).

Section I

Jurisdiction

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

2. This Consent Agreement and Final Order (CAFO) serves as notice that EPA has reason to believe that Respondent has violated Section 12 of FIFRA, 7 U.S.C. § 136j.

Section II

Parties

3. The Complainant, by delegation from the Administrator of EPA and the Regional Administrator, EPA, Region 7, is the Director of the Water, Wetlands and Pesticides Division, EPA, Region 7.

4. The Respondent is Custom Air, LLC, an aerial pesticide applicator with a mailing address at P.O. Box 350, in Louisville, Mississippi. The Respondent is and was at all times referred to in this Complaint, a "person" as defined by Section 2(s) of FIFRA, 7 U.S.C. § 136(s), and a Mississippi corporation qualified to do business in the state of Iowa.

Section III

Statutory and Regulatory Background

5. Section 2(t) of FIFRA, 7 U.S.C. § 136(t), defines the term "pest" to mean (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-organism on or in living man or other living animal) which the Administrator declares to be a pest under Section 25(c)(1).

6. Section 2(u) of FIFRA, 7 U.S.C. § 136(u), defines the term "pesticide" to include (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 dessicant; and (3) any nitrogen stabilizer.

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

8. Section 2(p)(2) of FIFRA, 7 U.S.C. § 136(p)(2), defines the term “labeling” as all labels and all other written, printed, or graphic matter that accompanies the pesticide at any time, or to which reference is made on the label or in literature accompanying the pesticide.

9. Section 12(a)(2)(G) of FIFRA, 7 U.S.C. § 136j(a)(2)(G), makes it unlawful for any person to use any registered pesticide in a manner inconsistent with its labeling.

10. Pursuant to Section 2(ee) of FIFRA, 7 U.S.C. § 136(ee), the term “to use any registered pesticide in a manner inconsistent with its labeling” means to use any registered pesticide in a manner not permitted by the labeling.

Section IV

General Factual Allegations

11. On or about August 13, 2009, a representative of the Iowa Department of Agriculture and Land Stewardship (IDALS), Pesticide Bureau, conducted an investigation of a complaint of a possible pesticide drift onto the Trout Run Bike Trail, a public use trail in Decorah, Iowa.

12. The complaint investigation was of an aerial application on August 12, 2009, of Quilt Fungicide, EPA Registration No. 100-1178, that was made to Jeff Sanderman’s corn field, located at N43°16.77’ W91°46.37’ in Winneshiek County, near Decorah, Iowa.

13. Jeff Sanderman contracted with Waukon Feed Ranch to spray the corn field with the fungicide. Waukon Feed Ranch supplied the Quilt Fungicide, EPA Registration No. 100-1178, and hired Custom Air, LLC to apply it. The aerial application was made by George Shields, a certified applicator working for Respondent.

14. Mr. Shields applied the Quilt Fungicide, EPA Registration No. 100-1178, to 120 acres of corn at a concentration of 14 ounces per acre for a total of 1680 ounces of Quilt Fungicide, EPA Registration No. 100-1178.

15. Weather data from the National Climatic Data Center confirms that weather conditions were conducive to pesticide drift on August 12, 2009, in or near Decorah, Iowa.

16. The IDALS investigator collected vegetation samples along the Trout Run Bike Trail adjacent to Mr. Sanderman's corn field to determine whether exposure to Quilt Fungicide, EPA Registration No. 100-1178, occurred by drift during aerial application. Lab results indicated that the samples were contaminated with residue from Quilt Fungicide, EPA Registration No. 100-1178.

17. The label for Quilt Fungicide, EPA Registration No. 100-1178, specifically prohibits application of the pesticide in a way that will result in human contact, either directly or through drift.

Violation

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

Count 1

19. The facts stated in Paragraphs 11 through 18 are realleged and incorporated as if fully stated herein.

20. Under the employment of Respondent, Mr. Shields applied the pesticide Quilt Fungicide, EPA Registration No. 100-1178, in conditions favorable to drift which resulted in human exposure.

21. Mr. Shields' application of the pesticide Quilt Fungicide, EPA Registration No. 100-1178, was inconsistent with its label which prohibits application of the pesticide in a way that will result in human contact, either directly or through drift.

22. Respondent violated Section 12(a)(2)(G) of FIFRA, 7 U.S.C. § 136j(a)(2)(G), by using the pesticide Quilt Fungicide, EPA Registration No. 100-1178, in a manner inconsistent with its labeling.

23. Pursuant to Section 14 of FIFRA, 7 U.S.C. § 136l, and based on the facts stated above, it is proposed that a civil penalty of 4,082.40 be assessed against the Respondent.

Section V

Consent Agreement and Terms of Settlement

24. For purposes of this proceeding, Respondent admits the jurisdictional allegations set forth above.

25. Respondent neither admits nor denies the factual allegations set forth above.

26. Respondent waives its right to contest any issue of fact or law set forth above and its right to appeal the Final Order accompanying this Consent Agreement.

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

28. Nothing contained in the Final Order portion of this CAFO shall alter or otherwise affect Respondent's obligation to comply with all applicable federal, state, and local environmental statutes and regulations and applicable permits.

29. The undersigned representative of Respondent certifies that he or she is fully authorized to enter into the terms and conditions of this CAFO and to execute and legally bind Respondent to it.

30. Respondent certifies that by signing this CAFO that it is currently in compliance with FIFRA, 7 U.S.C. § 136 *et. seq.*, and all regulations promulgated thereunder.

31. Respondent consents to the issuance of the Final Order hereinafter recited and consents to the payment of a civil penalty as specified in the Final Order.

32. The effect of settlement described in Paragraph 33 below is conditioned upon the accuracy of the Respondent's representations to EPA, as memorialized in Paragraph 30 above.

33. Payment of this civil penalty in full shall resolve all civil and administrative claims for all violations of FIFRA alleged in this document. Complainant reserves the right to take any enforcement action with respect to any other violations of FIFRA or any other applicable law.

34. Late Payment Provisions. 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. Respondent understands that its failure to timely pay any portion of the civil penalty described in Paragraph 1 of the Final Order below 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 accrue thereon at the applicable statutory rate on the unpaid balance until such civil or stipulated penalty and any accrued interest are paid in full. A late payment handling charge of \$15 will be imposed after thirty (30) days and an additional \$15 will be charged for each subsequent thirty (30) day period. Additionally, as provided by 31 U.S.C. § 3717(e)(2), a six percent (6%) per annum penalty (late charge) may be assessed on any amount not paid within ninety (90) days of the due date.

Section VI

Final Order

Pursuant to Section 14 of FIFRA, as amended, 7 U.S.C. §136l, and according to the terms of the Consent Agreement set forth above, **IT IS HEREBY ORDERED THAT:**

1. Respondent shall pay a civil penalty of Four Thousand Eighty-Two Dollars and Forty Cents (\$4,082.40) within thirty (30) days of the effective date of this Final Order.
2. 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:

US Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
PO Box 979077
St. Louis, Missouri 63197-9000.

Wire transfers should be directed to the Federal Reserve Bank of New York:

Federal Reserve Bank of New York
ABA = 021030004
Account = 68010727
SWIFT address = FRNYUS33
33 Liberty Street
New York, New York 10045
Field Tag 4200 of the Fedwire message should read
"D 68010727 Environmental Protection Agency."

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

Regional Hearing Clerk
U.S. Environmental Protection Agency
Region 7
901 North 5th Street
Kansas City, Kansas 66101;

and

Chris Dudding
Attorney
Office of Regional Counsel
U.S. Environmental Protection Agency
Region 7
901 North 5th Street
Kansas City, Kansas 66101.

3. Respondent and Complainant shall each bear their own costs and attorneys' fees incurred as a result of this matter.

4. No portion of the civil penalty or interest paid by Respondent pursuant to the requirements of this CAFO shall be claimed by Respondent as a deduction for federal, state, or local income tax purposes.

5. This CAFO shall be effective upon the filing of the Final Order 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.

**RESPONDENT
CUSTOM AIR, LLC**

Date: 4-27-2010

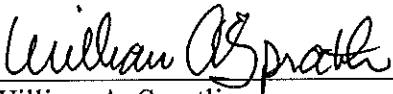
Fred Stokes
Representative of Custom Air, LLC

Fred Stokes
Printed Name

OWNER
Title

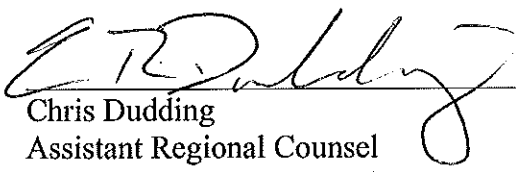
COMPLAINANT
U. S. ENVIRONMENTAL PROTECTION AGENCY

Date: 4/30/10




William A. Spratlin
Director
Water, Wetlands and Pesticides Division

Date: 4/30/10



Chris Dudding
Assistant Regional Counsel
Office of Regional Counsel

IT IS SO ORDERED. This Order shall become effective immediately.

Date: May 5, 2010 
ROBERT L. PATRICK
Regional Judicial Officer
U.S. Environmental Protection Agency, Region 7

IN THE MATTER OF Custom Air, LLC, Respondent
Docket No. FIFRA-07-2010-0010

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Consent Agreement and Final Order was sent this day in the following manner to the addressees:

Copy hand delivered to
Attorney for Complainant:

Chris Dudding
Assistant Regional Counsel
Region 7
United States Environmental Protection Agency
901 N. 5th Street
Kansas City, Kansas 66101

Copy by Certified Mail Return Receipt to:

Mr. Fred Stokes
Custom Air LLC
4588 Hwy 397
P.O. Box 563
Louisville, Mississippi 39339

Dated: 5/5/10



Kathy Robinson
Hearing Clerk, Region 7