

BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:) DOCKET NO. FIFRA-10-2021-0154
)
J.R. SIMPLOT COMPANY,) **CONSENT AGREEMENT**
)
Boise, Idaho,)
)
Respondent.)
)

I. STATUTORY AUTHORITY

1.1. This Consent Agreement is issued under the authority vested in the Administrator of the U.S. Environmental Protection Agency (“EPA”) by Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”), 7 U.S.C. § 136l(a).

1.2. Pursuant to Section 14(a) of FIFRA, 7 U.S.C. § 136l(a), and in accordance with the “Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties,” 40 C.F.R. Part 22, EPA issues, and J.R. Simplot Company (“Respondent”) agrees to issuance of, the Final Order attached to this Consent Agreement (“Final Order”).

II. PRELIMINARY STATEMENT

2.1. In accordance with 40 C.F.R. §§ 22.13(b) and 22.18(b), issuance of this Consent Agreement commences this proceeding, which will conclude when the Final Order becomes effective.

2.2. The Director of the Enforcement and Compliance Assurance Division, EPA Region 10 (“Complainant”) has been delegated the authority pursuant to Section 14(a) of FIFRA,

7 U.S.C. § 136l(a), to sign consent agreements between EPA and the party against whom an administrative penalty for violations of FIFRA is proposed to be assessed.

2.3. Part III of this Consent Agreement contains a concise statement of the factual and legal basis for the alleged violations of FIFRA together with the specific provisions of FIFRA and the implementing regulations that Respondent is alleged to have violated.

III. ALLEGATIONS

3.1. 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.”

3.2. 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.”

3.3. Under Section 12(a)(2)(S) of FIFRA, 7 U.S.C. § 136j(a)(2)(S), it is unlawful for any person to violate any regulation issued under Section 19 of FIFRA, 7 U.S.C. § 136q.

3.4. Pursuant to Section 19(e) of FIFRA, 7 U.S.C. § 136q(e), the EPA Administrator promulgated regulations pertaining to standards for pesticide containers and pesticide containment structures (“the Container/Containment regulations”), which are codified at 40 C.F.R. Part 165.

3.5. 40 C.F.R. § 165.3 defines “agricultural pesticide” as “any pesticide product labeled for use in or on a farm, forest, nursery, or greenhouse.”

3.6. 40 C.F.R. § 165.3 defines “establishment” as “any site where a pesticidal product . . . is produced, regardless of whether such site is independently owned or operated, and regardless of whether such site is domestic and producing a pesticidal product for export only, or

whether the site is foreign and producing any pesticidal product for import into the United States.”

3.7. “Refilling establishment” is defined by 40 C.F.R. § 165.3 as “an establishment where the activity of repackaging pesticide product into refillable containers occurs.”

3.8. 40 C.F.R. § 165.3 defines “repackage,” for the purposes of the Container/Containment regulations, as “to transfer a pesticide formulation from one container to another without a change in the composition of the formulation, the labeling content, or the product’s EPA registration number, for sale or distribution.”

3.9. 40 C.F.R. § 165.3 defines “facility” as “all buildings, equipment, structures, and other stationary items which are located on a single site or on contiguous or adjacent sites and which are owned or operated by the same person (or by any person who controls, who is controlled by, or who is under common control with such person).”

3.10. “Operator” is defined by 40 C.F.R. § 165.3 as “any person in control of, or having responsibility for, the daily operation of a facility at which a containment structure is located.”

3.11. “Owner” is defined by 40 C.F.R. § 165.3 as “any person who owns a facility at which a containment structure is required.”

3.12. 40 C.F.R. § 165.3 defines “containment structure” as “either a secondary containment unit or a containment pad.”

3.13. 40 C.F.R. § 165.3 defines “containment pad” as “any structure that is designed and constructed to intercept and contain pesticides, rinsates, and equipment wash water at a pesticide dispensing area.

3.14. “Pesticide dispensing area” is defined by 40 C.F.R. § 165.3 as “an area in which pesticide is transferred out of or into a container.”

3.15. 40 C.F.R. § 165.3 defines “secondary containment unit” as “any structure, including rigid diking, that is designed and constructed to intercept and contain pesticide spills and leaks and to prevent runoff and leaching from stationary pesticide containers.”

3.16. 40 C.F.R. § 165.3 defines “stationary pesticide container” as a “refillable container that is fixed at a single facility or establishment or, if not fixed, remains at the facility or establishment for at least 30 consecutive days, and that holds pesticide during the entire time.”

Subpart C—Refillable Container Standards: Container Design

3.17. Under 40 C.F.R. § 165.40(b)(2), a refiller of a pesticide product who is not the registrant of the pesticide product must comply with the regulations in §165.45(f) for stationary pesticide containers. If the pesticide product is subject to the regulations in 40 C.F.R. Part 165, Subpart C as set out in §165.43, the stationary pesticide containers used to distribute or sell the product must meet the standards of §165.45(f).

3.18. 40 C.F.R. § 165.43 exempts the following from the regulations in 40 C.F.R. Part 165, Subpart C: manufacturing use products, plant-incorporated protectants, certain antimicrobial products, transport vehicles under specified conditions, and containers that hold pesticides that are gaseous at atmospheric temperature and pressure.

3.19. Under 40 C.F.R. § 165.45(f)(1), if a stationary pesticide container designed to hold undivided quantities of pesticides equal to or greater than 500 gallons (1,890 liters) of liquid pesticide or equal to or greater than 4,000 pounds (1,818 kilograms) of dry pesticide is located at the refilling establishment of a refiller operating under written contract with the pesticide registrant, the stationary pesticide container and its appurtenances must meet both of the following standards: (i) each stationary pesticide container and its appurtenances must be resistant to extreme changes in temperature and constructed of materials that are adequately thick

to not fail and that are resistant to corrosion, puncture, or cracking, and (ii) each stationary pesticide container must be capable of withstanding all operating stresses, taking into account static heat, pressure buildup from pumps and compressors, and any other foreseeable mechanical stresses to which the container may be subjected in the course of operations.

Subpart E—Standards for Pesticide Containment Structures

3.20. Under 40 C.F.R. § 165.80(b)(1), owners or operators of refilling establishments who repackaging agricultural pesticides, whose principal business is retail sale, and who also have a stationary pesticide container or a pesticide dispensing area are subject to the secondary containment requirements in Subpart E of the Container/Containment regulations.

3.21. Under 40 C.F.R. § 165.81(b), stationary pesticide containers designed to hold undivided quantities of agricultural pesticides equal to or greater than 500 gallons of liquid pesticide are subject to and must have a secondary containment unit that complies with the Container/Containment regulations.

Respondent's Umatilla Facility

3.22. Respondent is a corporation organized under the laws of Nevada and is therefore a “person” under Section 2(s) of FIFRA, 7 U.S.C. § 136(s).

3.23. Respondent is the owner and operator of a facility that is a refilling establishment, located at 1013 Old River Road in Umatilla, Oregon (“the Umatilla Facility”).

3.24. At all times relevant to this Consent Agreement, the Umatilla Facility repackaged agricultural pesticides, its principal business was retail sale, and it had at least one stationary pesticide container designed to hold undivided quantities of agricultural pesticides greater than 500 gallons of liquid pesticide.

3.25. Respondent's Umatilla Facility is therefore subject to the secondary containment requirements in Subpart E of the Container/Containment regulations.

3.26. At all times relevant to this Consent Agreement, there were four containment structures in use at the Umatilla Facility. One structure contained two stationary pesticide containers, the largest with a capacity of 4,300 gallons. A second structure contained two stationary pesticide containers, the largest with a capacity of 4,900 gallons. A third structure contained three stationary pesticide containers, the largest with a capacity of 4,575 gallons. These three containment structures were all located within the fourth containment structure—the Umatilla Facility's warehouse, which also serves as a containment pad and as a secondary containment unit for two additional stationary pesticide containers, the largest with a capacity of 4,700 gallons.

3.27. The Umatilla Facility's warehouse is defined as an existing containment structure under 40 C.F.R. § 165.83(b), because installation began on or before November 16, 2006.

3.28. At all times relevant to this Consent Agreement, the restricted use agricultural pesticides Gramoxone SL 2.0 and Vydate were being stored in the two stationary pesticide containers within the warehouse containment structure at the Umatilla Facility.

3.29. A federally credentialed inspector inspected the Umatilla Facility on behalf of EPA on May 2, 2018.

Respondent's Moreland Facility

3.30. Respondent is owner and operator of a facility that is a refilling establishment, located at 149 N 740 W in Moreland, Idaho ("the Moreland Facility").

3.31. At all times relevant to this Consent Agreement, the Moreland Facility was a refiller of the restricted use pesticide product Vapam HL (EPA Reg. No. 541-468) and Respondent was not the registrant of Vapam HL.

3.32. Vapam HL is a pesticide product and is not a manufacturing use product, plant-incorporated protectant, or antimicrobial product as identified by 40 C.F.R. § 165.43(f).

3.33. Respondent's Moreland Facility is therefore subject to the stationary pesticide container requirements in Subpart C of the Container/Containment regulations and, specifically, the stationary pesticide containers Respondent uses to distribute or sell Vapam HL must meet the standards of 40 C.F.R. § 165.45(f).

3.34. At all times relevant to this Consent Agreement, the Moreland Facility repackaged agricultural pesticides, its principal business was retail sale, and it had at least one stationary pesticide container designed to hold undivided quantities of agricultural pesticides greater than 500 gallons of liquid pesticide.

3.35. Respondent's Moreland Facility is therefore subject to the secondary containment requirements in Subpart E of the Container/Containment regulations.

3.36. EPA inspectors inspected the Moreland Facility on September 19, 2018.

COUNT 1

3.37. Under 40 C.F.R. § 165.87(b)(2), all appurtenances, discharge outlets and gravity drains through the base or wall of existing containment structures must be sealed, except for direct interconnections between adjacent containment structures which meet the pesticide containment structure requirements of 40 C.F.R. Part 165, Subpart E.

3.38. On at least May 2, 2018, there was a 12-inch hole in the floor of the Umatilla Facility warehouse, allowing a water pipe to pass through the full depth of the floor, from above

to below the warehouse floor. The area around the pipe was not sealed, so any liquid spilled on the warehouse floor would escape to the ground underneath the warehouse.

3.39. Therefore, on at least May 2, 2018, Respondent violated Section 12(a)(2)(S) of FIFRA, 7 U.S.C. § 136j(a)(2)(S), by failing to seal all appurtenances, discharge outlets and gravity drains through the base or wall of its existing containment structure, as required by 40 C.F.R. § 165.87(b)(2).

COUNT 2

3.40. Under 40 C.F.R. § 165.45(f)(1)(i), each stationary pesticide container and its appurtenances must be resistant to extreme changes in temperature and constructed of materials that are adequately thick to not fail and that are resistant to corrosion, puncture, or cracking.

3.41. A stationary pesticide container at the Moreland Facility, identified as container “1E,” contained Vapam HL at the time of the EPA inspection on September 19, 2018.

3.42. As of the date of the inspection, EPA inspectors noticed and documented corrosion on the access hatch of container 1E.

3.43. Therefore, on at least September 19, 2018, Respondent violated Section 12(a)(2)(S) of FIFRA, 7 U.S.C. § 136j(a)(2)(S), by failing to construct a stationary pesticide container of materials that are resistant to corrosion, puncture, or cracking, as required by 40 C.F.R. § 165.45(f)(1)(i).

COUNT 3

3.44. A stationary pesticide container at the Moreland Facility, identified as container “2E,” contained Vapam HL at the time of the EPA inspection on September 19, 2018.

3.45. As of the date of the inspection, EPA inspectors noticed and documented corrosion on the access hatch of container 2E.

3.46. Therefore, on at least September 19, 2018, Respondent violated Section 12(a)(2)(S) of FIFRA, 7 U.S.C. § 136j(a)(2)(S), by failing to construct a stationary pesticide container of materials that are resistant to corrosion, puncture, or cracking, as required by 40 C.F.R. § 165.45(f)(1)(i).

COUNT 4

3.47. Under 40 C.F.R. § 165.45(f)(1)(ii), each stationary pesticide container must be capable of withstanding all operating stresses, taking into account static heat, pressure buildup from pumps and compressors, and any other foreseeable mechanical stresses to which the container may be subjected in the course of operations.

3.48. As of the inspection on September 19, 2018, Vapam HL had leaked through the access hatch on the side of container 1E at the Moreland Facility and had solidified on the access hatch and container surface and on the ground adjacent to the container.

3.49. Therefore, on at least September 19, 2018, Respondent violated Section 12(a)(2)(S) of FIFRA, 7 U.S.C. § 136j(a)(2)(S), by failing to construct a stationary pesticide container capable of withstanding all operating stresses, including foreseeable mechanical stresses to which the container may be subjected in the course of operations.

COUNT 5

3.50. As of the inspection on September 19, 2018, Vapam HL had leaked through the access hatch on the side of container 2E at the Moreland Facility and had solidified on the access hatch and container surface and on the ground adjacent to the container.

3.51. Therefore, on at least September 19, 2018, Respondent violated Section 12(a)(2)(S) of FIFRA, 7 U.S.C. § 136j(a)(2)(S), by failing to construct a stationary pesticide

container capable of withstanding all operating stresses, including foreseeable mechanical stresses to which the container may be subjected in the course of operations.

COUNT 6

3.52. Under 40 C.F.R. § 165.90(a)(2), owners and operators of new and existing pesticide containment structures must ensure that pesticide spills and leaks on or in any containment structure are collected and recovered in a manner that ensures protection of human health and the environment (including surface water and groundwater) and maximum practicable recovery of the pesticide spilled or leaked. Cleanup must occur no later than the end of the day on which pesticides have been spilled or leaked except in circumstances where a reasonable delay would significantly reduce the likelihood or severity of adverse effects to human health or the environment.

3.53. As of the inspection on September 19, 2018, Vapam HL had leaked through the access hatch on the side of container 1E at the Moreland Facility and had been leaking long enough for the pesticide to solidify on the access hatch, the container surface, and on the ground adjacent to the container within the containment structure. The leak was not cleaned up by the end of the day on the day the leak occurred.

3.54. Therefore, on at least September 19, 2018, Respondent violated Section 12(a)(2)(S) of FIFRA, 7 U.S.C. § 136j(a)(2)(S), by failing to ensure that pesticide spills and leaks on or in any containment structure are collected and recovered in a manner that ensures protection of human health and the environment, maximum practicable recovery of the pesticide spilled or leaked, and occurs no later than the end of the day on which pesticides have been spilled or leaked.

COUNT 7

3.55. As of the inspection on September 19, 2018, Vapam HL had leaked through the access hatch on the side of container 2E at the Moreland Facility and had been leaking long enough for the pesticide to solidify on the access hatch, the container surface, and on the ground adjacent to the container within the containment structure. The leak was not cleaned up by the end of the day on the day the leak occurred.

3.56. Therefore, on at least September 19, 2018, Respondent violated Section 12(a)(2)(S) of FIFRA, 7 U.S.C. § 136j(a)(2)(S), by failing to ensure that pesticide spills and leaks on or in any containment structure are collected and recovered in a manner that ensures protection of human health and the environment, maximum practicable recovery of the pesticide spilled or leaked, and occurs no later than the end of the day on which pesticides have been spilled or leaked.

ENFORCEMENT AUTHORITY

3.57. Pursuant to Section 14(a)(1) of FIFRA, 7 U.S.C. § 136l(a)(1), and 40 C.F.R. Part 19, EPA may assess a civil penalty of not more than \$20,528 for each offense.

IV. TERMS OF SETTLEMENT

4.1. Respondent admits the jurisdictional allegations of this Consent Agreement.

4.2. Respondent neither admits nor denies the specific factual allegations contained in this Consent Agreement.

4.3. In determining the amount of penalty to be assessed, EPA has taken into account the factors specified in Section 14(a)(4) of FIFRA, 7 U.S.C. § 136l(a)(4). After considering all of these factors, EPA has determined and Respondent agrees that an appropriate penalty to settle this action is \$65,248 (the “Assessed Penalty”).

4.4. Respondent agrees to pay the Assessed Penalty within 30 days of the effective date of the Final Order.

4.5. Payments under this Consent Agreement and the Final Order may be paid by check (mail or overnight delivery), wire transfer, ACH, or online payment. Payment instructions are available at: <http://www2.epa.gov/financial/makepayment>. Payments made by a cashier's check or certified check must be payable to the order of "Treasurer, United States of America" and delivered to the following address:

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

Respondent must note on the check the title and docket number of this action.

4.6. Concurrently with payment, Respondent must serve photocopies of the check, or proof of other payment method, described in Paragraph 4.5 on the Regional Hearing Clerk and EPA Region 10 at the following addresses:

Regional Hearing Clerk
U.S. Environmental Protection Agency
Region 10
R10_RHC@epa.gov

Derrick Terada
U.S. Environmental Protection Agency
Region 10
terada.derrick@epa.gov

4.7. If Respondent fails to pay any portion of the Assessed Penalty in full by its due date, the entire unpaid balance of the Assessed Penalty and accrued interest shall become immediately due and owing. If such a failure to pay occurs, Respondent may be subject to a civil action under Section 14(a)(5) of FIFRA, 7 U.S.C. § 136l(a)(5), to collect any unpaid penalties, together with interest, handling charges, and nonpayment penalties, as set forth below.

4.8. If Respondent fails to pay any portion of the Assessed Penalty in full by its due date, Respondent shall also be responsible for payment of the following amounts:

a. Interest. Pursuant to 31 U.S.C. § 3717(a)(1), any unpaid portion of the Assessed Penalty shall bear interest at the rate established by the Secretary of the Treasury from the effective date of the Final Order contained herein, provided, however, that no interest shall be payable on any portion of the Assessed Penalty that is paid within 30 days of the effective date of the Final Order contained herein.

b. Handling Charge. Pursuant to 31 U.S.C. § 3717(e)(1), a monthly handling charge of \$15 shall be paid if any portion of the Assessed Penalty is more than 30 days past due.

c. Nonpayment Penalty. Pursuant to 31 U.S.C. § 3717(e)(2), a nonpayment penalty of 6% per annum shall be paid on any portion of the Assessed Penalty that is more than 90 days past due, which nonpayment shall be calculated as of the date the underlying penalty first becomes past due.

4.9. The Assessed Penalty, including any additional costs incurred under Paragraph 4.8, represents an administrative civil penalty assessed by EPA and shall not be deductible for purposes of federal taxes.

4.10. The undersigned representative of Respondent certifies that he or she is authorized to enter into the terms and conditions of this Consent Agreement and to bind Respondent to this document.

4.11. The undersigned representative of Respondent also certifies that, as of the date of Respondent's signature of this Consent Agreement, Respondent has corrected the violation(s) alleged in Part III.

4.12. Except as described in Paragraph 4.8, each party shall bear its own costs and attorneys' fees in bringing or defending this action.

4.13. For the purposes of this proceeding, Respondent expressly waives any affirmative defenses and the right to contest the allegations contained in the Consent Agreement and to appeal the Final Order.

4.14. The provisions of this Consent Agreement and the Final Order shall bind Respondent and its agents, servants, employees, successors, and assigns.

4.15. Respondent consents to the issuance of any specified compliance or corrective action order, to any conditions specified in this consent agreement, and to any stated permit action.

4.16. The above provisions in Part IV are STIPULATED AND AGREED upon by Respondent and EPA Region 10.

DATED:

FOR RESPONDENT:

Alan L. Prouty

Digitally signed by Alan L. Prouty
Date: 2021.07.13
11:00:03 -06'00'

ALAN PROUTY, Vice President of Environmental
and Regulatory Affairs
J.R. Simplot Company

DATED:

FOR COMPLAINANT:

EDWARD
KOWALSKI

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EDWARD KOWALSKI
Date: 2021.07.13
19:05:42 -07'00'

EDWARD J. KOWALSKI, Director
Enforcement & Compliance Assurance Division
EPA Region 10

BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:)	DOCKET NO. FIFRA-10-2021-0154
)	
J.R. SIMPLOT COMPANY,)	FINAL ORDER
)	
Boise, Idaho,)	
)	
Respondent.)	
)	

1.1. The Administrator has delegated the authority to issue this Final Order to the Regional Administrator of EPA Region 10, who has redelegated this authority to the Regional Judicial Officer in EPA Region 10.

1.2. The terms of the foregoing Consent Agreement are ratified and incorporated by reference into this Final Order. Respondent is ordered to comply with the terms of settlement.

1.3. The Consent Agreement and this Final Order constitute a settlement by EPA of all claims for civil penalties under FIFRA for the violations alleged in Part III of the Consent Agreement. In accordance with 40 C.F.R. § 22.31(a), nothing in this Final Order shall affect the right of EPA or the United States to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law. This Final Order does not waive, extinguish, or otherwise affect Respondent's obligations to comply with all applicable provisions of FIFRA and regulations promulgated or permits issued thereunder.

1.4. This Final Order shall become effective upon filing with the Regional Hearing Clerk.

SO ORDERED this _____ day of _____, 2021.

**RICHARD
MEDNICK**

Digitally signed by
RICHARD MEDNICK
Date: 2021.07.14
15:01:36 -07'00'

RICHARD MEDNICK
Regional Judicial Officer
EPA Region 10

Certificate of Service

The undersigned certifies that the original of the attached **CONSENT AGREEMENT AND FINAL ORDER, In the Matter of: J.R. SIMPLOT COMPANY, Docket No.: FIFRA-10-2021-0154**, was filed with the Regional Hearing Clerk and served on the addressees in the following manner on the date specified below:

The undersigned certifies that a true and correct copy of the document was delivered to:

Danielle Meinhardt
U.S. Environmental Protection Agency, Region 10
meinhardt.danielle@epa.gov

Further, the undersigned certifies that a true and correct copy of the aforementioned document was delivered electronically to:

Alan Prouty
Vice President of Environmental and Regulatory Affairs
J.R. Simplot Company
Alan.Prouty@simplot.com

DATED this _____ day of _____, 2021.

TERESA
YOUNG

Digitally signed by
TERESA YOUNG
Date: 2021.07.15
09:12:00 -0700

TERESA YOUNG
Regional Hearing Clerk
EPA Region 10