

RECEIVED

17 SEP 15 AM 9: 25

HEARINGS CLERK
EPA -- REGION 10

BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:)

) DOCKET NO. FIFRA-10-2017-0178

WESTERN AG IMPROVEMENTS, INC.,)

) **CONSENT AGREEMENT**

)
) Dayton, Oregon,)

)
) 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 Western Ag Improvements, Inc. ("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 Office of Compliance and Enforcement, 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 “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.

3.7. 40 C.F.R. § 165.3 defines “containment structure” as “either a secondary containment unit or a containment pad.”

3.8. 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.”

3.9. Under 40 C.F.R. § 165.3, “produce” means, *inter alia*, “to package, repackage, label, relabel, or otherwise change the container of any pesticide or device.”

3.10. 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).”

3.11. “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.”

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

3.13. 40 C.F.R. § 165.3 defines "pesticide compatible as applied to containment" as referring to containment construction materials that are "able to withstand anticipated exposure to stored or transferred substances without losing the capability to provide the required containment of the same or other substances within the containment 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. "Refillable container" is defined by 40 C.F.R. § 165.3 as "a container that is intended to be filled with pesticide more than once for sale or distribution."

3.16. "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."

3.17. 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."

3.18. 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."

3.19. 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."

3.20. 40 C.F.R. § 165.3 defines “transport vehicle” as “a cargo-carrying vehicle such as an automobile, van, tractor, truck, semitrailer, tank car or rail car used for the transportation of cargo by any mode.”

3.21. Under 40 C.F.R. § 165.80(b)(1), owners or operators of refilling establishments who repackage 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 of the Container/Containment regulations.

3.22. 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.

3.23. Under 40 C.F.R. § 165.82(a)(3), pesticide dispensing areas are subject to and must have a containment pad that complies with the Container/Containment regulations where agricultural pesticides are dispensed from a transport vehicle for purposes of filling a refillable container.

3.24. Respondent is a “person” under Section 2(s) of FIFRA, 7 U.S.C. § 136(s).

3.25. Respondent is an owner or operator of a facility that is an establishment, located at 17780 SE Wallace Rd, Dayton, Oregon (“the Facility”).

3.26. Starting on or about February 21, 2013, and continuing through December 2015, the Facility served as a refilling establishment that repackaged the agricultural pesticide Prowl H₂O (EPA Reg. No. 241-418), and whose principal business was retail sale.

3.27. At all times relevant to this Consent Agreement, the Facility had two stationary pesticide containers with a holding capacity of 1,500 gallons that contained the agricultural pesticide Prowl H₂O.

3.28. At all times relevant to this Consent Agreement, the stationary pesticide containers at the Facility were located within a secondary containment unit (“the secondary containment unit”).

3.29. The Facility’s secondary containment unit is defined as a new containment structure under 40 C.F.R. § 165.83(a), because installation began after November 16, 2006.

3.30. At all times relevant to this Consent Agreement, the Facility had an outdoor pesticide dispensing area which required the use of a containment pad in the dispensing area. Transport vehicles pulled into the pesticide dispensing area, which was covered by a concrete parking lot or driveway, to dispense Prowl H₂O for the purpose of filling at least one of the stationary pesticide containers at the Facility.

3.31. The Facility’s containment pad (“the containment pad”) is defined as an existing containment structure under 40 C.F.R. § 165.83(b), because installation began on or before November 16, 2006.

3.32. At all times relevant to this Consent Agreement, agricultural pesticides were being stored at the secondary containment unit or dispensed at the containment pad at the Facility.

3.33. A federally credentialed inspector inspected the Facility on April 7, 2016.

COUNT 1

3.34. Under 40 C.F.R. § 165.85(a)(1), new containment structures must be constructed of steel, reinforced concrete or other rigid material capable of withstanding the full hydrostatic head, load and impact of any pesticides, precipitation, other substances, equipment and appurtenances placed within the structure, and they must be liquid-tight with cracks, seams and joints appropriately sealed

3.35. At all times relevant to this Consent Agreement, the secondary containment unit was partially constructed of unsecured concrete blocks and a heavy plastic liner, which was draped over the concrete blocks on one side of the secondary containment unit. On the other three sides of the secondary containment unit, the liner was attached to a plastic tub that formed part of the unit perimeter, and was otherwise tacked to the wooden walls of the warehouse.

3.36. At all times relevant to this Consent Agreement, there were gaps between each of the concrete blocks that form one side of the secondary containment unit, and between the concrete blocks where they meet the wooden warehouse walls.

3.37. At all times relevant to this Consent Agreement, the plastic liner in the secondary containment unit was not securely attached to the concrete blocks or the warehouse walls.

3.38. Starting on or about February 21, 2013, and continuing through December 2015, Respondent violated Section 12(a)(2)(S) of FIFRA, 7 U.S.C. § 136j(a)(2)(S) by failing to construct the secondary containment unit of steel, reinforced concrete or other rigid material capable of withstanding the full hydrostatic head, load and impact of any pesticides, precipitation, other substances, equipment and appurtenances placed within the structure, and by

failing to construct a liquid-tight secondary containment unit, with cracks, seams and joints appropriately sealed, as required by 40 C.F.R. § 165.85(a)(1).

COUNT 2

3.39. Under 40 C.F.R. § 165.90(a)(1), new and existing containment structures must be managed in a manner that prevents pesticides or materials containing pesticides from escaping from the containment structure.

3.40. At all times relevant to this Consent Agreement, Respondent operated the Facility before fixing the gaps and unsealed seams and joints in the secondary containment unit, and before replacing the construction materials with materials that would prevent pesticides from escaping from the secondary containment unit.

3.41. Starting on or about February 21, 2013, and continuing through December 2015, Respondent violated Section 12(a)(2)(S) of FIFRA, 7 U.S.C. § 136j(a)(2)(S) by failing to manage the secondary containment unit in a manner that prevents pesticides or materials containing pesticides from escaping from the containment structure.

COUNT 3

3.42. Under 40 C.F.R. § 165.87(a)(1), existing containment structures must be liquid-tight with cracks, seams and joints appropriately sealed.

3.43. At all times relevant to this Consent Agreement, the containment pad was a concrete parking lot or driveway with cracks and unsealed seams.

3.44. Starting on or about February 21, 2013, and continuing through December 2015, Respondent violated Section 12(a)(2)(S) of FIFRA, 7 U.S.C. § 136j(a)(2)(S) by failing to construct a liquid-tight containment pad, with cracks, seams and joints appropriately sealed.

COUNT 4

3.45. Under 40 C.F.R. § 165.87(b)(3), existing containment structures must be constructed with sufficient freeboard to contain precipitation and prevent water and other liquids from seeping into or flowing onto it from adjacent land or structures.

3.46. At all times relevant to this Consent Agreement, the containment pad in the Facility's pesticide dispensing area was a sloped, concrete parking lot or driveway that was unable to contain precipitation or prevent water and other liquids from seeping into or flowing onto the containment pad from adjacent land or structures.

3.47. Starting on or about February 21, 2013, and continuing through December 2015, Respondent violated Section 12(a)(2)(S) of FIFRA, 7 U.S.C. § 136j(a)(2)(S) by failing to construct the containment pad with sufficient freeboard to contain precipitation and prevent water and other liquids from seeping into or flowing onto it from adjacent land or structures.

COUNT 5

3.48. Under 40 C.F.R. § 165.87(c)(2), existing containment pads in pesticide dispensing areas which have pesticide-holding equipment with a volume of 750 gallons or greater must have a holding capacity of at least 750 gallons.

3.49. At all times relevant to this Consent Agreement, the containment pad had no holding capacity.

3.50. Starting on or about February 21, 2013, and continuing through December 2015, Respondent violated Section 12(a)(2)(S) of FIFRA, 7 U.S.C. § 136j(a)(2)(S) by failing to have a containment pad with a holding capacity of at least 750 gallons in a pesticide dispensing area that had pesticide-holding equipment with a volume of 750 gallons or greater.

COUNT 6

3.51. Under 40 C.F.R. § 165.87(e)(1), existing containment pads in pesticide dispensing areas must be designed and constructed to intercept leaks and spills of pesticides which may occur in the pesticide dispensing area.

3.52. At all times relevant to this Consent Agreement, the containment pad was a concrete parking lot or driveway that was not designed or constructed to intercept leaks and spills of pesticides.

3.53. Starting on or about February 21, 2013, and continuing through December 2015, Respondent violated Section 12(a)(2)(S) of FIFRA, 7 U.S.C. § 136j(a)(2)(S) by failing to have a containment pad that was designed and constructed to intercept leaks and spills of pesticides which may occur in the pesticide dispensing area.

COUNT 7

3.54. Under 40 C.F.R. § 165.87(e)(3), existing containment pads in pesticide dispensing areas must allow, in conjunction with its sump, for removal and recovery of spilled, leaked, or discharged material and rainfall.

3.55. At all times relevant to this Consent Agreement, the containment pad was a concrete parking lot or driveway that did not incorporate any means of removing or recovering spilled, leaked, or discharged material and rainfall.

3.56. Starting on or about February 21, 2013, and continuing through December 2015, Respondent violated Section 12(a)(2)(S) of FIFRA, 7 U.S.C. § 136j(a)(2)(S) by failing to have a containment pad that allowed for removal and recovery of spilled, leaked, or discharged material and rainfall.

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 \$19,057 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. As required by Section 14(a)(4) of FIFRA, 7 U.S.C. § 136l(a)(4), EPA has taken into account the appropriateness of such penalty to the size of Respondent's business, the effect on Respondent's ability to continue in business, and the gravity of the violations. After considering all of these factors, EPA has determined and Respondent agrees that an appropriate penalty to settle this action is \$24,000 (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, Mail Stop ORC-113
1200 Sixth Avenue, Suite 900
Seattle, Washington 98101
young.teresa@epa.gov

Andrew Landry
U.S. Environmental Protection Agency
Region 10, Mail Stop OCE-101
1200 Sixth Avenue, Suite 900
Seattle, Washington 98101
landry.andrew@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:

4.8.1. 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.

4.8.2. 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.

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

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

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

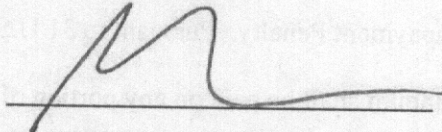
4.14. Respondent consents to any conditions specified in this consent agreement.

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

DATED:

9-12-17

FOR RESPONDENT:

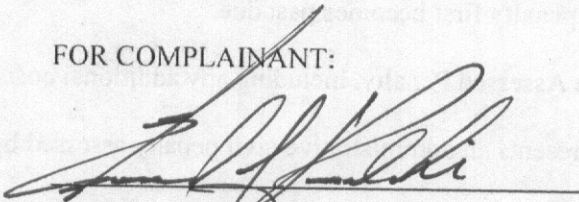


GREGORY C. HANSEN, Attorney for Respondent
GCHLAW LLC

DATED:

9/14/2017

FOR COMPLAINANT:



EDWARD J. KOWALSKI, Director
Office of Compliance and Enforcement
EPA Region 10

BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:)	DOCKET NO. FIFRA-10-2017-0178
)	
WESTERN AG IMPROVEMENTS, INC.,)	FINAL ORDER
)	
)	
Dayton, Oregon,)	
)	
Respondent.)	

- 1.1. The Administrator has delegated the authority to issue this Final Order to the Regional Administrator of EPA Region 10, who has redelegate 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 15th day of September, 2017.


M. SOCORRO RODRIGUEZ
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: Western Ag Improvements, Inc., Docket No.: FIFRA-10-2017-0178**, was filed with the Regional Hearing Clerk and served on the addressees in the following manner on the date specified below:

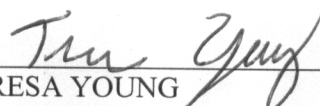
The undersigned certifies that a true and correct copy of the document was delivered to:

Danielle Meinhardt
U.S. Environmental Protection Agency
Region 10, Mail Stop ORC-113
1200 Sixth Avenue, Suite 900
Seattle, Washington 98101

Further, the undersigned certifies that a true and correct copy of the aforementioned document was placed in the United States mail certified/return receipt to:

Gregory C. Hansen
GCHLAW LLC
Civic Center Office
570 Liberty Street, S.E., Suite 100
Salem, Oregon 97301

DATED this 15 day of September, 2017.



TERESA YOUNG
Regional Hearing Clerk
EPA Region 10