

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

ENTREPRENEURS
ENVIRONMENTAL PROTECTION
AGENCY REGION 7

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BEFORE THE ADMINISTRATOR

In the Matter of

Pender Grain, Inc.

Respondent

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Docket No. FIFRA-07-2017-0009

CONSENT AGREEMENT AND FINAL ORDER

Preliminary Statement

The U.S. Environmental Protection Agency (EPA), Region 7 and Pender Grain, 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).

COMPLAINT

Jurisdiction

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

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.

Parties

3. 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. Respondent is a corporation in good standing under the laws of the State of Nebraska located at: 112 North Fourth Street, Pender, Nebraska 68047.

Statutory and Regulatory Background

5. 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.*
6. Section 12(a)(2)(G) of FIFRA, 7 U.S.C. § 136j(a)(2)(G), states that it shall be unlawful for any person to use any registered pesticide in a manner inconsistent with its labeling.
7. Section 2(s) of FIFRA, 7 U.S.C. § 136(s), defines the term “person” as any individual, partnership, association, corporation, or any organized group of persons whether incorporated or not.
8. Section 2(ee) of FIFRA, 7 U.S.C. § 136(ee) defines the term “to use any registered pesticide in a manner inconsistent with its labeling” to mean to use any registered pesticide in a manner not permitted by the labeling.
9. Section 2(u) of FIFRA, 7 U.S.C. § 136(u), defines the term “pesticide” as, *inter alia*, 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.
10. 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 animals) which the Administrator declares to be a pest under Section 25(c)(1).
11. Section 14(a)(1) of FIFRA, 7 U.S.C. § 1361(a)(1), authorizes the EPA Administrator to assess a civil penalty of up to \$5,000 for each violation of FIFRA. The EPA has adjusted this figure upward for inflation pursuant to the 2008 Civil Monetary Penalty Inflation Adjustment Rule and the Federal Civil Penalties Inflation Adjustments Improvements Act of 2015, which amended 40 C.F.R. Part 19 so that penalties of up to \$18,750 per day are authorized for violations that occur after November 2, 2015.

General Factual Allegations

12. Respondent is, and at all times referred to herein, was a corporation doing business in the State of Nebraska.
13. Respondent is, and at all times referred to herein, was a “person” as defined by Section 2(s) of FIFRA, 7 U.S.C. § 136(s).
14. On or about May 31, 2016 the Nebraska Department of Agriculture (NDA) conducted a pesticide exposure inspection (the “inspection”) within the reservation boundaries of the Winnebago Tribe of Nebraska. The inspection was conducted under the authority of Section

8 of FIFRA, 7 U.S.C. § 136f, and Section 26 of FIFRA, 7 U.S.C. § 136w-1(c) to evaluate Respondent's compliance with FIFRA and the federal regulations promulgated thereunder. The NDA inspection was subsequently forwarded to EPA for review.

15. At the time of the NDA inspection, photographic documentation and witness statements were collected.

16. As a result of the inspection and documentation obtained by the EPA, Complainant has determined that violations of FIFRA and the federal regulations promulgated thereunder have occurred.

Allegations of Violations

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

Count 1

18. The facts stated in paragraphs 12 through 16 are re-alleged and incorporated as if fully stated herein.

19. At the time of the NDA inspection, a certified pesticide applicator of Respondent stated that that he made an application of 2,4-D, LV6, EPA Registration Number (EPA Reg. No.) 66222-220, beginning at 8:00 a.m. on May 18, 2016 to the target site when the wind was blowing from the southeast. The High Plains Regional Climate Center station in Concord, Nebraska documented winds from the southeast at 8:00 a.m. on May 18, 2016.

20. At the time of the NDA inspection, and at all times relevant to the allegations herein, the label for 2,4-D LV6, EPA Reg. No. 66222-220, stated to "[o]nly apply this product if wind direction favors on-target deposition and [there] are not sensitive areas (including, but not limited to, residential areas, bodies of water, known habitat for nontarget species, nontarget crops) within 250 feet downwind."

21. At the time of the NDA inspection, and at all times relevant to the allegations herein, a residential area was located within 250 feet northwest of the target site.

22. Residue analysis results from swab samples collected at the time of the NDA inspection from the east side of the residential area revealed residue of 2,4-D located on the residence.

23. Respondent violated Section 12(a)(2)(G) of FIFRA, 7 U.S.C. § 136j(a)(2)(G), when Respondent's certified pesticide applicator applied 2,4-D LV6, EPA Reg. No. 66222-220, in a manner inconsistent with its labeling by applying the pesticide at a time that did not favor on-target deposition and when a residential area was located within 250 feet downwind of the target site.

CONSENT AGREEMENT

24. For the purpose of this proceeding, a 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.

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

26. 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.

Penalty Payment

27. Respondent agrees that, in settlement of the claims alleged herein, Respondent shall pay a mitigated civil penalty of Four Thousand Four Hundred Ninety-Two Dollars (\$4,492.00) as set forth below.

28. 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 submitted 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
P.O. Box 979077
St. Louis, Missouri 63197-9000

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

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

Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 7
11201 Renner Boulevard

Lenexa, Kansas 66219; and

Clarissa Howley Mills, Attorney
Office of Regional Counsel
U.S. Environmental Protection Agency, Region 7
11201 Renner Boulevard
Lenexa, Kansas 66219.

30. Respondent understands that its failure to timely pay any portion of the mitigated civil penalty as stated in Paragraph 27 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

31. 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 enforcement action with respect to any other violations of FIFRA or other applicable law.

32. 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.

33. The effect of settlement described in Paragraph 31 is conditioned upon the accuracy of Respondent's representations to EPA, as memorialized in Paragraph 34 herein.

34. Respondent certifies by the signing of this Consent Agreement that it is presently in compliance with all requirements of FIFRA, 7 U.S.C. § 136 *et. seq.* and all regulations promulgated thereunder.

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

General Provisions

36. By signing this Consent Agreement, the undersigned representative of Respondent certifies that he or she is fully authorized to execute and enter into the terms and conditions of this Consent Agreement and has the legal capacity to bind the party he or she represents to this Consent Agreement.

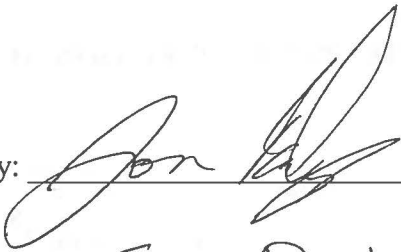
37. This Consent Agreement shall not dispose of the proceeding without a final order from the Regional Judicial Officer or Regional Administrator ratifying the terms of this Consent Agreement. This Consent Agreement and Final Order shall be effective upon the filing of the Final Order by the Regional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

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

39. The Final Order portion of this Consent Agreement and Final Order shall apply and be binding upon Respondent, 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
PENDER GRAIN, INC.**

Date: 2-10-17

By:  _____

Jon Darling
Print Name

Member
Title

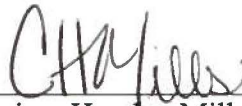
COMPLAINANT
U. S. ENVIRONMENTAL PROTECTION AGENCY

Date: 2/16/17



Jeffery Robichaud
Director
Water, Wetlands, and Pesticides Division

Date: 2/16/2017



Clarissa Howley Mills
Office of Regional Counsel

FINAL ORDER

Pursuant to the provisions of FIFRA, 7 U.S.C. § 136 *et. seq.* 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
Karina Borromeo
Regional Judicial Officer

Feb. 21, 2017
Date

IN THE MATTER Of Pender Grain, Inc., Respondent
Docket No. FIFRA-07-2017-0009

CERTIFICATE OF SERVICE

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

Copy via Email to Attorney for Complainant:

mills.clarissa@epa.gov

Copy via Email and First Class Mail to Respondent:

jondarling@live.com

John Darling
Pender Grain, Inc.
P.O. Box 28
Pender, Nebraska 68047

Dated: 2/21/17



Kathy Robinson
Hearing Clerk, Region 7

