

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 7
901 NORTH FIFTH STREET
KANSAS CITY, KANSAS 66101

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ENVIRONMENTAL PROTECTION
AGENCY-REGION VII
REGIONAL HEARING CLERK

IN THE MATTER OF)

Benoit Aerial Spraying, Inc.)

Stephen James Benoit, Registered Agent)

4250B East Exline Club Road)

Kankakee, Illinois 60901)

Respondent)

Docket No. FIFRA-07-2009-0038

CONSENT AGREEMENT AND FINAL ORDER

The U.S. Environmental Protection Agency ("EPA"), Region 7 and Benoit Aerial Spraying, Inc., 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), 22.18(b)(2) and 22.18(b)(3) 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 Code of Federal Regulations ("C.F.R.") §§ 22.13(b), 22.18(b)(2) and 22.18(b)(3).

ALLEGATIONS

Jurisdiction

1. This 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. § 136(j).

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 Benoit Aerial Spraying, Inc. ("Benoit"), an aerial pesticide applicator with a facility located at 4250B East Exline Club Road in Kankakee, Illinois. Benoit is a corporation incorporated in the state of Illinois. Respondent is, and was at all times referred to in this CAFO, a "person" as defined by Section 2(s) of FIFRA, 7 U.S.C. § 136(s).

Statutory and Regulatory Background

5. 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 desiccant; and (3) any nitrogen stabilizer.

6. 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.

7. 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.

8. 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.

9. 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.

Factual Allegations

10. On August 29, 2008, 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 at the residence of Mr. Don Harrison in Greenfield, Iowa.

11. The complaint investigation was of an aerial application of Chlorpyrifos 4E AG Insecticide, EPA Registration No. 66222-19, that was made to Brad and Mark Nelson’s soybean field, located at 2-75N-31W in Adair County, Lee Township, near Greenfield, Iowa.

12. Brad and Mark Nelson hired a firm called 21st Century Coop to spray the field in order to control aphids. 21st Century Coop supplied the Chlorpyrifos 4E AG Insecticide, EPA Registration No. 66222-19, and hired Shenandoah Flight Service, Inc. (“Shenandoah”), to apply it. Shenandoah further contracted out the application to Benoit. The aerial application was made by Mr. Dan Lundahl, a certified applicator working for Benoit.

13. Mr. Lundahl applied the Chlorpyrifos 4E AG Insecticide, EPA Registration No. 66222-19, to 62 acres of soybeans at a concentration of eight ounces per acre for a total of 7.75 gallons, using a Turbine Thrush SR2 airplane, No. N3896X, with Rotary Atomizer nozzles set at 30 psi, flying at 125 mph and using a north/south swath pattern.

14. Certified weather data from the Iowa State Climatologist confirm that weather conditions were conducive to pesticide drift on August 29, 2008, in or near Greenfield, Iowa.

15. The IDALS investigator collected Mr. Harrison's shirt and vegetation samples from Mr. Harrison's property to determine whether exposure to Chlorpyrifos 4E AG Insecticide, EPA Registration No. 66222-19, occurred by drift during aerial application. Lab results indicated that both were contaminated with residue from Chlorpyrifos 4E AG Insecticide, EPA Registration No. 66222-19.

16. The label for Chlorpyrifos 4E AG Insecticide, EPA Registration No. 66222-19, specifically prohibits application of the pesticide in a way that will result in human contact, either directly or through drift.

VIOLATION

17. Complainant hereby incorporates the allegations contained in paragraphs 5 through 16 above, as if fully set forth herein.

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

19. Under the employment of Benoit, Mr. Lundahl applied the pesticide Chlorpyrifos 4E AG Insecticide, EPA Registration No. 66222-19, in conditions favorable to drift which resulted in human exposure.

20. Mr. Lundahl's application of the pesticide Chlorpyrifos 4E AG Insecticide, EPA Registration No. 66222-19, 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.

21. Respondent violated Section 12(a)(2)(G) of FIFRA, 7 U.S.C. § 136j(a)(2)(G), by using the pesticide Chlorpyrifos 4E AG Insecticide, EPA Registration No. 66222-19, in a manner inconsistent with its labeling.

CONSENT AGREEMENT

It is hereby agreed and accepted by Respondent that:

1. Respondent and EPA agree to the terms of this CAFO and Respondent agrees to comply with the terms of the Final Order portion of this CAFO.

2. Respondent admits the jurisdictional allegations of this CAFO and agrees not to contest EPA's jurisdiction in this proceeding or any subsequent proceeding to enforce the terms of the Final Order set forth below.

3. Respondent neither admits nor denies the factual allegations and legal conclusions set forth in this CAFO.

4. Respondent waives its right to a judicial or administrative hearing on any issue of fact or law set forth above and its right to appeal the Final Order accompanying this Consent Agreement.

5. Respondent and Complainant agree to conciliate the matters set forth in this CAFO without the necessity of a formal hearing and to bear their respective costs and attorney's fees.

6. This CAFO addresses all civil administrative claims for the FIFRA violation identified above. Complainant reserves the right to take any enforcement action with respect to any other violations of FIFRA or any other applicable law.

7. 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.

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

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

10. Respondent agrees that, in settlement of the claims alleged in this CAFO, Respondent shall pay a penalty of Three Thousand One Hundred and Twenty Dollars (\$3,120.00) as set forth in Paragraph 1 of the Final Order.

11. The effect of settlement described in paragraph 10 above is conditioned upon the accuracy of the Respondent's representations to EPA, as memorialized in paragraph 9 above.

12. Nothing in this Consent Agreement shall be construed as a release from any other action under any law and/or regulation administered by the EPA. 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.

13. Failure to pay the assessed penalty may result in the referral of this matter to the U.S. Department of Justice ("DOJ") for collection. If payment is not received on or before the due date, interest will be assessed at the annual rate established by the Secretary of the Treasury pursuant to 31 U.S.C. § 3717. The interest will be assessed on the overdue amount from the due date through the date of payment.

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, in settlement of the allegations set forth above, shall pay a mitigated civil penalty for the violation cited herein, in the amount of Three Thousand One Hundred and Twenty Dollars (\$3,120.00). The payment of the civil penalty shall be made within thirty days of the effective date of this Order.

2. Payment of the penalty shall be by cashier's or certified check, which shall reference Docket Number FIFRA-07-2009-0038 and In the Matter of Benoit Aerial Spraying, Inc. Cashier or certified check shall be made payable to "Treasurer, United States of America," and be remitted to:

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

3. A copy of the check shall simultaneously be sent to the following:

Jennifer Trotter
Office of Regional Counsel
United States Environmental Protection Agency
Region 7
901 North 5th Street
Kansas City, Kansas 66101

and

Kathy Robinson
Regional Hearing Clerk
United States Environmental Protection Agency
Region 7
901 North 5th Street
Kansas City, Kansas 66101.

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. The effective date of this Order shall be the date on which it is signed by the Regional Judicial Officer.

6. This executed CAFO shall be filed with the Regional Hearing Clerk, U.S. Environmental Protection Agency, Region 7, 901 North 5th Street, Kansas City, Kansas 66101.

COMPLAINANT:

U.S. ENVIRONMENTAL PROTECTION AGENCY

Date: 9-2-09

By: Karen A. Howmoy
William A. Spratlin
Director
Water, Wetlands and Pesticides Division

Date: 9-1-2009

By: Jennifer Trotter
Jennifer Trotter
Assistant Regional Counsel

RESPONDENT:

BENOIT AERIAL SPRAYING, INC.

Date: August 24, 2009

By: Stephen Benoit

Printed Name: Stephen Benoit

Title: President

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

Date:

September 3, 2009



ROBERT L. PATRICK
Regional Judicial Officer
U.S. Environmental Protection Agency
Region 7

IN THE MATTER OF Benoit Aerial Spraying, Inc., Respondent
Docket No. FIFRA-07-2009-0038

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:

Jennifer Trotter
Assistant Regional Counsel
Region VII
United States Environmental Protection Agency
901 N. 5th Street
Kansas City, Kansas 66101

Copy by Certified Mail Return Receipt to:

Benoit Aerial Spraying, Inc.
Stephen James Benoit, Registered Agent
4250B East Exline Club Road
Kankakee, Illinois 60901

Dated: 9/3/09



Kathy Robinson
Hearing Clerk, Region 7