

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION VII
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)
)
Producers Cooperative Association)
of Girard) Docket Number FIFRA-07-2007-0023
164 W. 640th Avenue)
Girard, Kansas 66743)
)
Respondent)

CONSENT AGREEMENT AND FINAL ORDER

The U.S. Environmental Protection Agency (EPA), Region VII, and Producers Cooperative Association of Girard (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), 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 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 Complaint serves as notice that the EPA has reason to believe that Respondent has violated Section 12 of FIFRA, 7 U.S.C. § 136j.

Parties

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

4. The Respondent is Producers Cooperative Association of Girard, a pesticide dealer, located at 164 W. 640th Avenue, Girard, Kansas 66743. The address of its parent company, Producers Cooperative Association of Girard, is 300 E. Buffalo Street, P.O. Box 323, Girard, Kansas 66743. The Respondent is, and was at all times referred to herein, a “person” as defined by Section 2(s) of FIFRA, 7 U.S.C. § 136(s), and a corporation qualified to do business in the State of Kansas.

Statutory and Regulatory Background

5. Section 12(a)(2)(F) of FIFRA, 7 U.S.C. § 136j(a)(2)(F), states that it shall be unlawful for any person to distribute or sell, or to make available for use, or to use, any registered pesticide classified for restricted use other than in accordance with Section 3(d) of FIFRA.

6. Section 3(d)(1)(C)(i) and (ii) of FIFRA, 7 U.S.C. § 136a(d)(1)(C)(i) and (ii), states, in pertinent part, that a restricted use pesticide shall be applied for any use to which the restricted classification applies only by or under the direct supervision of a certified applicator.

7. Section 2(e)(1) of FIFRA, 7 U.S.C. § 136(e)(1) defines “certified applicator” as any individual who is certified under Section 11 of FIFRA, 7 U.S.C. § 136i, to use or supervise the use of any pesticide which is classified for restricted use.

8. Section 2(gg) of FIFRA, 7 U.S.C. § 136(gg), defines the term “to distribute or sell” to mean to distribute, sell, offer for sale, hold for distribution, hold for sale, hold for shipment, ship, deliver for shipment, release for shipment, or receive and (having so received) deliver or offer to deliver.

Factual Allegations

9. Lexar® is a restricted use pesticide that at the time of sale was registered to Syngenta Crop Protection, Inc., P.O. Box 18300, Greensboro, North Carolina, under EPA Registration No. 100-1201.

10. The label of Lexar® herbicide, EPA Reg. No. 100-1201, states, in pertinent part: “RESTRICTED USE PESTICIDE DUE TO GROUND AND SURFACE WATER CONCERNS. For retail sale to and use only by certified applicators or persons under their direct supervision, and only for those uses covered by the certified applicator’s certification.”

11. Cornbelt Atrazine 90DF® is a restricted use pesticide that at the time of sale was registered to Van Diest Supply Company, P.O. Box 610, 1434 220th Street, Webster City, Iowa, under EPA Registration No. 11773-13, and to Agriliance, LLC, P.O. Box 64089, St. Paul, Minnesota, under EPA Registration No. 9979-253.

12. The label of Cornbelt Atrazine 90DF® herbicide, EPA Reg. No. 11773-13 and EPA Reg. No. 9979-253, states in pertinent part: “RESTRICTED USE PESTICIDE DUE TO GROUND AND SURFACE WATER CONCERNS. For retail sale to and use only by certified applicators or persons under their direct supervision, and only for those uses covered by the certified applicator’s certification.”

13. On December 19, 2006, a representative of the Kansas Department of Agriculture conducted an inspection at Respondent's place of business in Girard, Kansas, and documented the sale of the restricted use pesticides referenced in paragraphs 9, 10, 11, and 12 to an uncertified person, Mr. Blaine Pope, of Walnut, Kansas, on his brother's account, Mr. Leslie Pope, for use by an uncertified person or persons. Mr. Leslie Pope is also uncertified. It was documented that Respondent made the restricted use pesticide sale to the uncertified person and failed to require proof of pesticide applicator certification prior to making the sale.

14. On January 19, 2007, a representative of the Kansas Department of Agriculture interviewed Mr. Blaine Pope, of Walnut, Kansas, and documented Mr. Pope's purchase of the restricted use pesticides referenced in paragraphs 9 through 12. It was documented that Mr. Blaine Pope was not a certified applicator when he purchased the restricted use pesticide, and neither was his brother, Mr. Leslie Pope. Mr. Blaine Pope stated that he applied the Lexar®, EPA Reg. No. 100-1201, and the Cornbelt Atrazine 90DF®, EPA Reg. No. 11773-13 and EPA Reg. No. 9779-253, and he was not directly supervised by a certified applicator at the time he applied the restricted use pesticides.

VIOLATIONS

Count 1

15. On May 19, 2006, Respondent distributed or sold, and thereby made available for use to Mr. Blaine Pope, a 19.5 gallon quantity of the restricted use pesticide, Lexar®, as documented by Respondent's invoice number 011936.

16. At the time of the sale referred to in paragraph 15, Mr. Blaine Pope was not a certified applicator as the term is defined in Section 2(e)(1) of FIFRA, 7 U.S.C. § 136(e)(1).

17. At the time Mr. Blaine Pope applied the Lexar® herbicide, EPA Reg. No. 100-1201, he was not certified to use the pesticide, and was not directly supervised by a certified applicator at the time he applied the restricted use pesticide.

18. Respondent violated Section 12(a)(2)(F) of FIFRA, 7 U.S.C. § 136j(a)(2)(F), by selling or making available for use a registered pesticide classified for a restricted use other than in accordance with Section 3(d) of FIFRA, 7 U.S.C. § 136a(d).

19. Pursuant to Section 14 of FIFRA, 7 U.S.C. § 136l, and based upon the facts stated in paragraphs 15 through 18, it is proposed that a civil penalty of \$5,850 be assessed against Respondent.

Count 2

20. On May 19, 2006, Respondent distributed or sold, and thereby made available for use to Mr. Blaine Pope, a 25 lb. quantity of the restricted use pesticide, Cornbelt Atrazine 90DF®, as documented by Respondent's invoice number 011936.

21. At the time of the sale referred to in paragraph 15, Mr. Blaine Pope was not a certified applicator as the term is defined in Section 2(e)(1) of FIFRA, 7 U.S.C. § 136(e)(1).

22. At the time Mr. Blaine Pope applied the Cornbelt Atrazine 90DF® herbicide, EPA Reg. No. 11773-13 and EPA Reg. No. 9779-253, he was not certified to use the pesticide, and was not directly supervised by a certified applicator at the time he applied the restricted use pesticide.

23. Respondent violated Section 12(a)(2)(F) of FIFRA, 7 U.S.C. § 136j(a)(2)(F), by selling or making available for use a registered pesticide classified for a restricted use other than in accordance with Section 3(d) of FIFRA, 7 U.S.C. § 136a(d).

24. Pursuant to Section 14 of FIFRA, 7 U.S.C. § 136l, and based upon the facts stated in paragraphs 20 through 23, it is proposed that a civil penalty of \$9,360 be assessed against Respondent.

CONSENT AGREEMENT

It is hereby agreed and accepted by Respondent that:

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

2. Respondent admits the jurisdictional allegations of this Consent Agreement and Final Order 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 Consent Agreement and Final Order.

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 Consent Agreement and Final Order without the necessity of a formal hearing and to bear their respective costs and attorney's fees.

6. This Consent Agreement and Final Order addresses all civil administrative claims for the FIFRA violations 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 Consent Agreement and Final Order 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 is fully authorized to enter into the terms and conditions of this Consent Agreement and Final Order and to execute and legally bind Respondent to it.

9. Respondent certifies by signing this Consent Agreement and Final Order 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 Consent Agreement and Final Order, Respondent shall pay a penalty of Nine Thousand Three Hundred Sixty Dollars (\$9,360) 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 Consent Agreement and Final Order 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 United States Department of Justice 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 shall pay by cashier's or certified check, a civil penalty for the violations cited herein, the amount of Nine Thousand Three Hundred Sixty Dollars (\$9,360), on or before thirty (30) days of the effective date of this Final Order.

2. Payment of the penalty shall be by cashier's or certified check which shall reference Docket Number FIFRA-07-2007-0023, and made payable to "Treasurer, United States of America" and remitted to:

U.S. 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:

Robert W. Richards
Office of Regional Counsel
U.S. Environmental Protection Agency
Region VII
901 North 5th Street
Kansas City, Kansas 66101, and

Regional Hearing Clerk
Office of Regional Counsel
U.S. Environmental Protection Agency
Region VII
901 North 5th Street
Kansas City, Kansas 66101.

4. No portion of the civil penalty or interest paid by Respondent pursuant to requirements of this Consent Agreement and Final Order 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 Consent Agreement and Final Order shall be filed with the Regional Hearing Clerk, U.S. Environmental Protection Agency, Region VII, 901 North 5th Street, Kansas City, Kansas 66101.

COMPLAINANT:

U.S. ENVIRONMENTAL PROTECTION AGENCY

Date: 09/26/07

By: *Betty J. Spratlin*
William A. Spratlin
Director
Water, Wetlands, and Pesticides Division

Date: _____

By: *Robert W. Richards*
Robert W. Richards
Assistant Regional Counsel
Office of Regional Counsel

RESPONDENT:

PRODUCERS COOPERATIVE ASSOCIATION OF GIRARD

Date: 1/21/07


By: J. Robert Yarborough, Jr.

Printed Name: J. Robert Yarborough, Jr.

Title: General Manager and President

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

Date: September 27, 2007



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

IN THE MATTER OF Producers Cooperative Association of Girard, Respondent
Docket No. FIFRA-07-2007-0023

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:

Robert W. Richards
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:

J. Robert Yarborough Jr.
General Manager and President
Producers Cooperative Association of Girard
164 W 640th Avenue
Girard, Kansas 66743

Dated: 9/27/07


Kathy Robinson
Hearing Clerk, Region 7