

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 7

901 NORTH 5<sup>TH</sup> STREET

KANSAS CITY, KANSAS 66101

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ENVIRONMENTAL PROTECTION  
AGENCY-REGION VII  
REGIONAL HEARING CLERK

IN THE MATTER OF )

) Docket No. FIFRA-07-2009-0020

Pro Cooperative, Inc. )

) CONSENT AGREEMENT

) AND

Respondent )

) FINAL ORDER

)

**CONSENT AGREEMENT AND FINAL ORDER**

The U.S. Environmental Protection Agency, Region 7 (“EPA” or “Complainant”), and Pro Cooperative, Inc. (“Respondent” or “Pro Cooperative”), 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).

**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. § 136j.

**Parties**

3. The 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. The Respondent is Pro Cooperative, a pesticide dealer and distributor, and a corporation qualified to do business in the state of Iowa. The Respondent’s business address is 33333 510th Street, Gilmore City, Iowa. The facility address that is the subject of this CAFO is located at 307 North Van Gordon Avenue, Graettinger, Iowa. The Respondent is and was at all times relevant to this action a “person” as defined by Section 2(s) of FIFRA, 7 U.S.C. § 136(s).

### Statutory and Regulatory Background

5. 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 animal) which the Administrator declares to be a pest under Section 25(c)(1).

6. Section 2(u) of FIFRA, 7 U.S.C. § 136(u), defines the term “pesticide” to mean any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest.

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

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

9. 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.

10. Section 2(gg) of FIFRA, 7 U.S.C. § 136(gg) and 40 C.F.R. § 152.3, define 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.

11. In accordance with Section 14(a)(1) of FIFRA, 7 U.S.C. § 136l(a)(1), EPA may assess a civil penalty to any dealer who violates any provision of FIFRA.

### General Factual Allegations

12. Cobalt Insecticide is a restricted use pesticide that, at the time of sale, was registered to Dow AgroSciences, L.L.C., under EPA Registration No. 62719-575. The label of Cobalt Insecticide states in pertinent part, “Restricted Use Pesticide . . . 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 or about October 24, 2008, a representative of the Iowa Department of Agriculture and Land Stewardship ("IDALS") conducted a routine records inspection at Respondent's facility in Graettinger, Iowa. The purpose of the inspection was to determine Respondent's compliance with FIFRA, including review of RUP sales and application records.

### Violations

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

#### Count 1

15. The Complainant hereby incorporates the allegations contained in Paragraph 1 through 14, above, as if fully set forth herein,

16. On or about July 22, 2008, Respondent distributed or sold the RUP Cobalt Insecticide to Mr. Brian Westergard.

17. Respondent distributed or sold, and thereby made available for use to Mr. Westergard, the RUP Cobalt Insecticide.

18. On or about November 25, 2008, a representative from IDALS collected a statement from Mr. Westergard, in which he admitted to applying the RUP Cobalt Insecticide.

19. At the time of the July 22, 2008, sale and the subsequent application of Cobalt Insecticide, Mr. Westergard was not certified as an applicator as that term is defined in Paragraph 9, nor was he working under the direct supervision of a certified applicator at the time of application.

20. 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 RUP for a use other than in accordance with Section 3(d) of FIFRA, 7 U.S.C. § 136a(d).

21. Pursuant to Section 14 of FIFRA, 7 U.S.C. § 136l, and based upon the facts stated in Paragraphs 12 through 20, Respondent is assessed a civil penalty as specified in Paragraph 1 of the Final Order for its failure to comply with Section 12(a)(2)(F) of FIFRA, 7 U.S.C. § 136j(a)(2)(F).

### CONSENT AGREEMENT

It is hereby agreed and accepted by the parties, that for the purposes of this proceeding:

1. Respondent has read the Consent Agreement, finds it reasonable, consents to its issuance and will comply with the terms of the Final Order.
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 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 certifies by signing this CAFO that, to the best of its knowledge, it is presently in compliance with FIFRA, 7 U.S.C. § 136 *et. seq.*, and all regulations promulgated thereunder.
6. Nothing in this Consent Agreement shall be construed as a release from any other action under any law and/or regulation administered by 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.
7. Late Payment Provisions. Pursuant to 31 U.S.C. § 3717, EPA is entitled to assess interest and penalties on debts owed to the United States and a charge to cover the cost of processing and handling a delinquent claim. Respondent understands that its failure to timely pay any portion of the civil penalty described in Paragraph 1 of the Final Order below 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 accrue thereon at the applicable statutory rate on the unpaid balance until such civil or stipulated penalty and any accrued interest are paid in full. A late payment handling charge of \$15 will be imposed after thirty (30) days and an additional \$15 will be charge for each subsequent thirty (30) day period. Additionally, as provided by 31 U.S.C. § 3717(e)(2), a six percent (6%) per annum penalty (late charge) may be assessed on any amount not paid within ninety (90) days of the due date.
8. Respondent and EPA agree to conciliate this matter without the necessity of a formal hearing and each agrees to bear their respective costs and attorney fees.

9. Each signatory of this Agreement certifies that he or she is fully authorized to enter into the terms of this CAFO and to execute and legally bind Respondent to it.

10. Respondent consents to the issuance of the Final Order hereinafter recited and consents to the payment of a mitigated civil penalty as specified in Paragraph 1 of the Final Order. Payment of this civil penalty shall resolve all civil and administrative claims for all violations of FIFRA alleged in this document. Complainant reserves the right to take any enforcement action with respect to any other violations of FIFRA or any other applicable law.

11. The effect of the settlement described in Paragraph 10 above is conditioned upon the accuracy of the Respondent's representations to EPA, as memorialized in Paragraph 5, above.

### **FINAL ORDER**

Pursuant to Section 14 of FIFRA, as amended, 7 U.S.C. § 136~~l~~, and according to the terms of the Consent Agreement set forth above, IT IS HEREBY ORDERED THAT:

1. Respondent shall pay a civil penalty of Five Thousand Two Hundred Dollars (\$5,200.00) within thirty (30) days of the effective date of this Final Order. Such payment shall identify Respondent by name (In the Matter of Pro Cooperative, Inc.) and docket number (FIFRA 07-2009-0020) and shall be 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

Wire transfers should be directed to the Federal Reserve Bank of New York:

Federal Reserve Bank of New York  
ABA = 021030004  
Account = 68010727  
SWIFT address = FRNYUS33  
33 Liberty Street  
New York, NY 10045  
Field Tag 4200 of the Fedwire message should read  
"D 68010727 Environmental Protection Agency."

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

Regional Hearing Clerk  
U.S. Environmental Protection Agency, Region 7  
901 North 5th Street  
Kansas City, Kansas 66101

and

Demetra O. Salisbury, Attorney  
Office of Regional Counsel  
U.S. Environmental Protection Agency, Region 7  
901 North 5th Street  
Kansas City, Kansas 66101.

3. 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.

4. This CAFO shall be effective upon entry of the Final Order by the Regional Judicial Officer for EPA Region 7. Unless otherwise stated, all time periods stated herein shall be calculated in calendar days from such date.

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

COMPLAINANT:  
UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY

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

Date: 9/3/09

By: Demetra O. Salisbury  
Demetra O. Salisbury  
Attorney  
Office of Regional Counsel

Date: 9/3/09

RESPONDENT:  
Pro Cooperative

By: James Day  
Title: Agronomy Dept Manager  
Date: 8/25/09

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



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

September 11, 2009  
Date

IN THE MATTER OF Pro Cooperative, Inc., Respondent  
Docket No. FIFRA-07-2009-0020

CERTIFICATE OF SERVICE

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

Copy hand delivered to  
Attorney for Complainant:

Demetra O. Salisbury  
Assistant Regional Counsel  
Region VII  
United States Environmental Protection Agency  
901 N. 5<sup>th</sup> Street  
Kansas City, Kansas 66101

Copy by Certified Mail Return Receipt to:

James Day, Agronomy Manager  
Pro Cooperative, Inc.  
3333 510<sup>th</sup> Street  
Gilmore City, Iowa 50541

Dated: 9/11/09



Kathy Robinson  
Hearing Clerk, Region 7