

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 7
11201 RENNER BOULEVARD
LENEXA, KANSAS 66219**

Received by
EPA Region 7
Hearing Clerk

BEFORE THE ADMINISTRATOR

In the Matter of:)	
)	
Emrich Aerial Spraying LLC,)	Docket No. FIFRA-07-2022-0133
)	
Respondent.)	COMPLAINT AND NOTICE OF
_____)	OPPORTUNITY FOR HEARING

COMPLAINT

Section I

Jurisdiction

1. This Complaint and Notice of Opportunity for Hearing (Complaint) serves as notice that the United States Environmental Protection Agency (EPA), Region 7 has reason to believe that Respondent Emrich Aerial Spraying, LLC has violated Section 12 of FIFRA, 7 U.S.C. § 136j.
2. 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, and in accordance with the EPA’s 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. Part 22, a copy of which is enclosed along with this Complaint.

Section II

Parties

3. The Complainant, by delegation from the Administrator of EPA and the Regional Administrator, EPA, Region 7, is the Director of the Enforcement and Compliance Assurance Division, EPA, Region 7.
4. The Respondent is Emrich Aerial Spraying, LLC, a limited liability company in good standing under the laws of the state of Nebraska.

Section III

Statutory & Regulatory Background

5. Congress enacted FIFRA in 1947 and later amended it in 1972. 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” to mean any individual, partnership, association, corporation, or any organized group of persons whether incorporated or not.
8. 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.
9. Section 2(e)(3) of FIFRA, 7 U.S.C. § 136(e)(3), defines the term “commercial applicator” to mean an applicator (whether or not the applicator is a private applicator with respect to some uses) who uses or supervises the use of any pesticide which is classified for restricted use for any purpose or on any property other than as provided by paragraph (2).
10. 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.

Section IV

General Factual Allegations

11. The Respondent is and was at all times referred to in this Complaint, a “person” as defined by Section 2(s) of FIFRA, 7 U.S.C. § 136(s).
12. Herve Marchadier is a commercial applicator as defined by Section 2(e)(3) of FIFRA, 7 U.S.C. § 136(e)(3), certified by the Nebraska Department of Agriculture.
13. Delaro 325 SC Fungicide, EPA Reg. No. 264-1055 (“Delaro”) is a pesticide registered with the EPA. Its active ingredients are Prothioconazole and Trifloxystrobin.
14. Bifen 25% EC, Insecticide/Miticide, EPA Reg. No. 83520-4 (“Bifen”) is a restricted use pesticide registered with the EPA. Its active ingredient is Bifenthrin.

15. The registered label for Delaro contains the following directions:
 - a. Under “directions for use,” the label states “do not apply this product in a way that will contact workers or other persons, either directly or through drift.”
 - b. Under “application instructions,” the label states “avoid application under conditions when uniform coverage cannot be obtained or when excessive spray drift may occur.”
 - c. Under “spray drift management,” the label states “do not make applications when conditions favor drift beyond the target application area. When drift may be a problem, take measures to reduce drift, including:” (1) “do not spray if wind speeds are or become excessive. Do not spray if wind speed is 15 mph or greater. If nontarget crops are located downwind, use caution when spraying if wind is present. Do not spray if winds are gusty.” and (2) “Use caution when conditions are favorable for drift (high temperatures, drought, low relative humidity).”

16. The registered label for Bifen contains the following directions:
 - a. Under “directions for use,” the label states “do not apply this product in a way that will contact workers or other persons, either directly or through drift.”
 - b. Under “spray drift requirements,” the label states “only apply this product if the wind direction favors on-target deposition. Do not apply when wind velocity exceeds 15 mph” and “wind speed must be measured adjacent to the application site on the upwind side, immediately prior to application.”

17. On or about July 29, 2019, Herve Marchadier, acting as an agent of Respondent, applied the pesticides Delaro and Bifen via aerial application to the following property: 2260 W. Rokeby Road, Lincoln, Nebraska 68523 (“intended area of application”).

18. At the time of the aerial application, a person (“neighbor”) lived on property (“neighboring property”) southeast of the intended area of application.

19. On July 30, 2019, samples were taken from the following locations and tested by South Dakota Agricultural Laboratories for Bifenthrin, Prothioconazole, and Trifloxystrobin:
 - a. Clover from a hay field south of the neighboring property;
 - b. An apple tree located on the neighboring property; and
 - c. A shirt worn by the neighbor on the neighboring property during the time of the subject aerial applications.

20. As a result of the testing described in paragraph 19(a), clover from the hay field was found to contain Bifenthrin and Trifloxystrobin.

21. As a result of the testing described in paragraph 19(b), the apple tree was found to contain Bifenthrin and Trifloxystrobin.

22. As a result of the testing described in paragraph 19(c), the neighbor's shirt was found to contain Bifenthrin.

Section V

Violations

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

Count 1

24. The factual allegations stated in paragraphs 11 through 22 are realleged and incorporated as if fully stated herein.

25. Pursuant to Section 12(a)(2)(G) of FIFRA, 7 U.S.C. § 136j(a)(2)(G), it is unlawful for any person to use any registered pesticide in a manner inconsistent with its labeling.

26. On or about July 29, 2019, Respondent aerially applied Delaro to the property at 2260 W Rokeby Rd, Lincoln, Nebraska 68523.

27. At the time of the aerial application, the wind was from the northwest to northeast direction, according to Respondent's application invoice.

28. On or about July 29, 2019, Respondent's aerial application of Delaro on 2260 W Rokeby Road, Lincoln, NE 68523 resulted in (1) drift onto the neighboring property and (2) drift onto property south of the neighboring property.

29. Because Respondent's aerial application of Delaro resulted in drift, Respondent aerially applied Delaro when excessive spray drift occurred, when conditions favored drift beyond the target application area, and/or when Respondent failed to take measures to reduce drift. Therefore, Respondent failed to follow the directions for use on the Delaro label, and therefore used Delaro in a manner inconsistent with its labeling.

30. Respondent violated Section 12(a)(2)(G) of FIFRA, 7 U.S.C. § 136j(a)(2)(G), by using the registered pesticide Delaro in a manner inconsistent with its labeling.

Count 2

31. The factual allegations stated in paragraphs 11 through 22 are realleged and incorporated as if fully stated herein.

32. Pursuant to Section 12(a)(2)(G) of FIFRA, 7 U.S.C. § 136j(a)(2)(G), it is unlawful for any person to use any registered pesticide in a manner inconsistent with its labeling.

33. On or about July 29, 2019, Respondent aerially applied Bifen to the property at 2260 W Rokeby Rd, Lincoln, Nebraska 68523.
34. At the time of the aerial application, the wind was from the northwest to northeast direction, according to Respondent's application invoice.
35. On or about July 29, 2019, Respondent's aerial application of Bifen on 2260 W Rokeby Rd, Lincoln, Nebraska 68523 resulted in (1) drift onto the neighboring property, (2) drift onto property south of the neighboring property, and (3) contact with a person.
36. Because Respondent's aerial application of Bifen resulted in (1) drift and (2) contact with persons, Respondent failed to follow the directions for use on the Bifen label, and therefore used Bifen in a manner inconsistent with its labeling.
37. Respondent violated Section 12(a)(2)(G) of FIFRA, 7 U.S.C. § 136j(a)(2)(G), by using the registered pesticide Bifen in a manner inconsistent with its labeling.

Section VI

Relief Sought

38. Section 14(a)(1) of FIFRA, 7 U.S.C. § 136l(a)(1), authorizes the EPA Administrator to assess a civil penalty of not more than \$5,000 for each offense. The Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, 28 U.S.C. § 2461, and implementing regulations at 40 C.F.R. Part 19, increased these statutory maximum penalties to \$7,500 for violations that occurred before November 2, 2015, and to \$21,805 for violations that occur after November 2, 2015, and for which penalties are assessed on or after January 1, 2022. EPA proposes to assess a total civil penalty of five thousand, four hundred and thirty-eight dollars (\$5,438) against Respondent for the above-described violations.

Appropriateness of Proposed Penalty

39. The penalty proposed above has been calculated after consideration of the statutory factors set forth in Section 14 of FIFRA, 7 U.S.C. § 136l. Specifically, EPA considered the size of the business of Respondent, the effect of the proposed penalty on Respondent's ability to continue in business and the gravity of the alleged violations. In its calculation of the proposed penalty, EPA has taken into account the particular facts and circumstances of the alleged violations, with specific reference to EPA guidance for the calculation of proposed penalties under FIFRA (See Enclosure, December 2010, Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)).

40. For purposes of calculating the proposed penalty, Respondent was placed in Category III size of business (total business revenues less than \$1,000,000 per year). If this categorization is incorrect, the proposed penalty will be adjusted upon submittal of reliable financial information indicating another category is appropriate.

41. Respondent has the right, upon submittal of certified financial information, to consideration of Respondent's financial condition in mitigation of the proposed penalty insofar as is necessary to permit Respondent to continue in business.

42. The proposed penalty constitutes a demand only if Respondent fails to raise *bona fide* issues of ability to pay, or other *bona fide* affirmative defenses relevant to the determination of any final penalty.

43. Said issues of ability to pay or other affirmative defenses relevant to a final penalty may and should be brought *to the attention* of Complainant at the earliest opportunity in this proceeding.

44. Payment of the total penalty, \$5,438, may be made by certified or cashier's check payable to the "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.

45. If Respondent does not contest the findings and assessments set forth above, payment of the penalty assessed herein may be remitted as described in the preceding paragraph, including a reference to the name and docket number of the Complaint. In addition, a copy of the check should be sent to:

Regional Hearing Clerk
EPA - Region 7
R7_Hearing_Clerk_Filings@epa.gov

and a copy to:

Katherine Kacsur
Assistant Regional Counsel
kacsur.katherine@epa.gov

NOTICE OF OPPORTUNITY FOR HEARING

Section VI

Answer and Request for Hearing

46. Pursuant to Section 14(a) of FIFRA, 7 U.S.C. § 136l(a), Respondent has the right to request a hearing to contest any material fact contained in this Complaint or to contest the appropriateness of the penalty proposed herein. If Respondent wishes to avoid being found in

default, Respondent must in accordance with the June 8, 2020 memo Standing Order: Authorization of EPA Region 7 Part 22 Electronic Filing System For Electronic Filing and Service of Documents”, file a written answer and request for hearing with the EPA Region 7 Regional Hearing Clerk, at: R7_Hearing_Clerk_Filings@epa.gov within thirty (30) days of service of this Complaint and Notice of Opportunity for Hearing. Said answer shall clearly and directly admit, deny, or explain each of the factual allegations contained in the Complaint with respect to which Respondent has any knowledge, or shall clearly state that Respondent has no knowledge as to particular factual allegations in the Complaint. The answer shall also state:

- A. The circumstances or arguments that are alleged to constitute the grounds of defense;
- B. The facts that Respondent intends to place at issue; and
- C. Whether a hearing is requested.

Failure to deny any of the factual allegations in the Complaint constitutes an admission of the undenied allegations.

47. Any hearing that is requested shall be held and conducted in accordance with 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.

48. If Respondent fails to file a written answer and request for hearing within thirty (30) days of service of this Complaint and Notice of Opportunity for Hearing, such failure will constitute a binding admission of all of the allegations in this Complaint, and a waiver of Respondent’s right to a hearing under FIFRA. A Default Order may thereafter be issued by the Regional Administrator, and the civil penalties proposed therein shall become due and payable without further proceedings.

49. Respondent is advised that, after the Complaint is issued, the Consolidated Rules of Practice prohibit any ex parte (unilateral) discussion of the merits of any action with the EPA Regional Administrator, members of the Environmental Appeals Board, the Regional Judicial Officer, Administrative Law Judge, or any person likely to advise these officials in the decision of the case.

Section VII

Settlement Conference

50. Whether or not a hearing is requested, an informal settlement conference may be arranged at Respondent's request. Respondent may confer with the EPA concerning: (1) whether or not the alleged violation occurred; or (2) the appropriateness of the proposed penalty in relation to the size of Respondent’s business, the gravity of the violation, and the effect of the proposed penalty on Respondent’s ability to continue in business. Additionally, the proposed penalty may be adjusted if Respondent establishes a bona fide issue of ability to pay. To explore the possibility of settlement in this matter, contact:

Katherine Kacsur
Assistant Regional Counsel
EPA Region 7
11201 Renner Boulevard
Lenexa, Kansas 66219
kacsur.katherine@epa.gov
Telephone: (913) 551-7734

51. A request for an informal settlement conference does not extend the thirty (30) day period during which a written answer and request for a hearing must be submitted. The informal conference procedure may be pursued as an alternative to and simultaneously with the adjudicatory hearing procedure.

52. EPA encourages all parties against whom a civil penalty is proposed to pursue the possibility of settlement. However, no penalty reduction will be made simply because an informal settlement conference is held. If settlement is reached, the parties will enter into a written Consent Agreement, and a Final Order will be issued. The issuance of such a Consent Agreement and Final Order shall constitute a waiver of Respondent's right to request a hearing on any matter stipulated to therein.

Date

David Cozad, Director
Enforcement and Compliance Assurance Division

Date

Katherine Kacsur
Office of Regional Counsel