

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

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ENVIRONMENTAL PROTECTION
AGENCY-REGION VII
REGIONAL HEARING CLERK

IN THE MATTER OF)

McCune Farmers Union)
Cooperative Association)
8th and Main)
McCune, Kansas 66753)

Docket No. FIFRA-07-2008-0019

Respondent)

CONSENT AGREEMENT AND FINAL ORDER

The U.S. Environmental Protection Agency (EPA), Region VII and McCune Farmers Union Cooperative Association (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. § 136j.

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 VII, is the Director of the Water, Wetlands and Pesticides Division (WWPD), EPA, Region VII.

4. The Respondent is McCune Farmers Union Cooperative Association, a farmers cooperative and pesticide dealer located at 8th and Main, McCune, Kansas. The 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), and a non-profit organization qualified to do business in the state of Kansas.

Statutory and Regulatory Background

5. Section 12(a)(1)(A) of FIFRA states that it shall be unlawful for any person to distribute or sell to any person any pesticide that is not registered under section 136a of this title or whose registration has been canceled or suspended, except to the extent that distribution or sale otherwise has been authorized by the Administrator under this subchapter. 7 U.S.C. § 136j(a)(1)(A).

6. Section 12(a)(2)(F) of FIFRA 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 for some or all purposes other than in accordance with section 136a(d) of this title and any regulations thereunder, except that it shall not be unlawful to sell, under regulations issued by the Administrator, a restricted use pesticide to a person who is not a certified applicator for application by a certified applicator. 7 U.S.C. § 136j(a)(2)(F).

7. The term “to distribute or sell” means 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. 7 U.S.C. § 136(gg).

Factual Allegations

8. Respondent, at all times relevant, operated a pesticide dealership in McCune, Kansas.

9. On January 18, 2007, a representative of the Kansas Department of Agriculture (KDA) conducted an inspection of the Respondent’s McCune, Kansas facility.

10. During the inspection, the KDA representative observed that Respondent offered for sale or distribution Tordon 22K, bearing EPA Registration Number 62719-6. The Tordon 22K label bears the statement that the product is a Restricted Use Pesticide (RUP).

11. During the inspection, the KDA representative observed that Respondent offered for sale or distribution Boothill Paraffinized Pellets, bearing EPA Registration Number 7173-188. The label on this product bears the statement that, “It is illegal to sell these placepacks individually.”

12. During the inspection, the KDA representative observed that Respondent offered for sale or distribution Hombro Mini Blocks, bearing EPA Registration Number 7173-218. The individual blocks of this product are not labeled for individual sale.

13. The KDA representative reviewed the sales receipts and certification records of individuals who purchased RUP from Respondent. The documentation revealed that an individual purchased 1.0 gallon of Tordon 22K on May 12, 2006, whose certification expired on August 3, 2003.

14. On May 10, 2007, the KDA representative obtained a statement from the individual who purchased the Tordon 22K. The individual stated that the product was not purchased for a certified applicator, and that the individual applied the product without proper private applicator certification.

15. During the January 18, 2007, inspection, the KDA representative collected photographic evidence of the Boothill Paraffinized Pellets and Hombre Mini Blocks being offered for sale as individual packets or blocks. The KDA representative additionally collected sales receipts of the Boothill Paraffinized Pellets and Hombre Mini Blocks.

VIOLATIONS

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

Count 1

17. Complainant hereby incorporates the allegations contained in Paragraphs 1 through 15 above, as if fully set forth herein.

18. Documentation collected during the January 18, 2007 inspection reveals that the RUP, Tordon 22K, was sold to an uncertified applicator. The individual who purchased the Tordon 22K applied the product without proper certification and did not purchase the Tordon 22K for use by a certified applicator.

19. Respondent violated Section 12(a)(2)(F) of FIFRA by distributing or selling a registered pesticide classified for restricted use for some or all purposes other than in accordance with section 136a(d) of this title and any regulations thereunder. 7 U.S.C. § 136j(a)(2)(F).

Count 2

20. Complainant hereby incorporates the allegations contained in Paragraphs 1 through 15 above, as if fully set forth herein.

21. Photographic evidence collected during the inspection revealed that Respondent offered for sale or distribution Boothill Paraffinized Pellets in individual packets. The label on this product bears the statement that, "It is illegal to sell these placepacks individually." A sales receipt collected during the inspection shows that twenty-six (26) individual packets of Boothill Paraffinized Pellets were sold on December 9, 2006.

22. Individual packets of Boothill Paraffinized Pellets are not registered pesticides.

23. Respondent violated Section 12(a)(1)(A) of FIFRA by distributing or selling a pesticide that is not registered under Section 136a of this title. 7 U.S.C. § 136j(a)(1)(A).

Count 3

24. Complainant hereby incorporates the allegations contained in Paragraphs 1 through 15 above, as if fully set forth herein.

25. Photographic evidence collected during the inspection revealed that Respondent offered for sale or distribution Hombre Mini Blocks in individual blocks. The individual blocks are not individually packaged or label for individual sale. A sales receipt collected during the inspection shows that fifty (50) individual blocks of Hombre Mini Blocks were sold on December 11, 2006.

26. Individual blocks of Hombre Mini Blocks are not registered pesticides.

27. Respondent violated Section 12(a)(1)(A) of FIFRA by distributing or selling a pesticide that is not registered under Section 136a of this title. 7 U.S.C. § 136j(a)(1)(A).

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 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 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 Nine Hundred Dollars (\$ 3,900.00) as set forth in Paragraph 14 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 CAFO 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.

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. § 136~~l~~, and according to the terms of the Consent Agreement set forth above, IT IS HEREBY ORDERED THAT:

A. Payment of Civil Penalty

14. Respondent, in settlement of the allegations set forth above, shall pay by cashier or certified check, a civil penalty, for the violations cited herein, in the amount of Three Thousand Nine Hundred Dollars (\$ 3,900.00), on or before thirty (30) days of the effective date this Final Order.

15. Payment of the penalty shall be by cashier or certified check which shall reference Docket Number FIFRA-07-2008-0019, and made payable to "Treasurer, United States of America" and remitted to:

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

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

Kelley Catlin
Office of Regional Counsel
United States Environmental Protection Agency
Region VII
901 North 5th Street
Kansas City, Kansas 66101

and

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

17. 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.

B. Supplemental Environmental Project

18. In response to the violations of FIFRA alleged in this CAFO and in settlement of this matter, although not required by FIFRA or any other federal, state or local law, Respondent shall complete the Supplemental Environmental Project (SEP) described in Paragraphs 19-23 of the Final Order, which the parties agree is intended to secure significant environmental or public health protection and improvement.

19. Within sixty (60) calendar days of the effective date of this CAFO, Respondent shall provide two hundred and fifty (250) gallons of generic round up to the Crawford County

Noxious Weed Department to assist that department in its efforts to control Johnson grass in Crawford County. The value of the product provided shall not be less than Seven Thousand Five Hundred Dollars (\$ 7,500.00) based upon the Respondent's wholesale cost of the product.

20. Within sixty (60) calendar days of the effective date of this CAFO, Respondent shall provide a multi-gas detector capable of detecting oxygen, carbon dioxide, flammables, and phosphine to the Osage Township Fire Department located in McCune, Kansas, to assist that department in its efforts to detect dangerous conditions of low oxygen levels and excessive amounts of dangerous gases in the air when responding to pesticide related emergencies. Respondent shall additionally provide Bunker Gear for the Osage Township Fire Department consisting of one (1) jacket, one (1) pair of pants, one (1) pair of boots, one (1) helmet, one (1) hood, and one (1) pair of gloves. Respondent shall provide eleven (11) pair of Protec 8 gloves. The value of the equipment provided shall not be less than Four Thousand Three Hundred and Fifty Nine Dollars (\$ 4,359.00).

21. Within sixty-one (61) calendar days of the effective date of this CAFO Respondent shall submit an Interim SEP Report to EPA. The Interim SEP Report shall confirm distribution of the product pursuant to Paragraph 19 of the Final Order, and distribution of the equipment described in Paragraph 20 of the Final Order. The Interim SEP Report shall identify the name, complete address, and telephone number of the recipient of the product, and the wholesale value of the product. The Interim SEP Report shall identify the name, complete address, and telephone number of the recipient of the equipment described in Paragraph 20 of the Final Order, and the total cost of that equipment.

22. Respondent shall ensure and oversee the use of all of such product described in Paragraph 19 of the Final Order within six (6) months of the effective date of this CAFO.

23. Within seven (7) months of the effective date of this CAFO, Respondent shall submit a Final SEP Report to EPA. The SEP Completion Report shall contain the following information:

- a) A detailed description of the SEP as implemented;
- b) A description of any problems encountered in implementation of the project and the solution thereto;
- c) A signed affidavit from the Crawford County Noxious Weed Department, on department letterhead, stating the quantity and type of product received from Respondent, and the quantity of product used by the department within the six month time period described above. The affidavit shall be signed by the director or an officer of the department;

d) A signed affidavit from the Osage Township Fire Department, on department letterhead, stating the quantity and type of equipment received from Respondent. The affidavit shall be signed by the chief or an officer of the department

e) A description of the specific environmental and/or public health benefits resulting from implementation of the SEP; and

f) Certification that the SEP has been fully implemented pursuant to the provisions of the CAFO.

24. In itemizing its costs in the Interim SEP Report and the SEP Completion Report, Respondent shall clearly identify and provide acceptable documentation for all eligible SEP costs. Where the report includes costs not eligible for SEP credit, those costs must be clearly identified as such. For purposes of this Paragraph, "acceptable documentation" includes invoices, purchase orders, or other documentation that specifically identifies and itemizes the individual costs of the goods and /or services for which payment is being made. Canceled drafts do not constitute acceptable documentation unless such drafts specifically identify and itemize the individual costs of the goods and/or services for which payment is being made.

25. The Interim SEP Report and the SEP Completion Report shall include the statement of Respondent, through an officer, signed and certifying under penalty of law the following:

I certify under penalty of law that I have examined and am familiar with the information submitted in this document and all attachments and that, based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the information is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fines and imprisonment.

26. The Interim SEP Report and the SEP Completion Report shall be submitted on or before the due date to:

Akilah Nicks, WWPD
Environmental Protection Agency
901 North 5th Street
Kansas City, Kansas 66101.

27. Any public statement, oral or written, in print, film, internet, or other media, made by Respondent making reference to the SEP shall include the following language:

This project was undertaken in connection with the settlement of an enforcement action taken by the U.S. Environmental Protection Agency for violations for FIFRA §§ 12(a)(1)(A) and 12 (a)(2)(F).

28. Respondent hereby certifies that, as of the date of this CAFO, Respondent is not required to perform or develop the SEP by any federal, state or local law or regulation; nor is Respondent required to perform or develop the SEP by any other agreement, grant or as injunctive relief in this or any other case. Respondent further certifies that it has not received, and is not presently negotiating to receive credit in any other enforcement action for the SEP.

29. Respondent agrees not to claim any funds expended in the performance of the SEPs as a deductible business expense for the purpose of federal, state, or local taxes.

30. Respondent agrees to the payment of stipulated penalties as follows:

a) In the event Respondent fails to comply with any of the terms or provisions of this Consent Agreement relating to the performance of the SEPs as set forth in Paragraphs 19-23 above and/or to the extent that the actual expenditures for the SEPs do not equal or exceed the cost of the SEPs described in Paragraphs 19 and/or 20, Respondent shall be liable for stipulated penalties according to the provisions set forth below:

i) Except as provided in subparagraph (ii) and (iii) immediately below, if the SEPs are not completed satisfactorily and timely pursuant to the agreement set forth in Paragraphs 19-23, Respondent shall be liable for and shall pay a stipulated penalty to the United States in the amount of Eleven Thousand Seven Hundred Dollars (\$11,700);

ii) If Respondent fails to timely and completely submit the Interim SEP Report or the SEP Completion Report required by Paragraphs 21 and 23, Respondent shall be liable for and shall pay a stipulated penalty in the amount of \$100.00 for each day after the due date until a complete report is submitted; and

iii) If the SEPs are not completed in accordance with Paragraph 19-23, but EPA determines that the Respondent: (a) made good faith and timely efforts to complete the project; and (b) certifies, with supporting documentation, that at least 90 percent of the amount of money which was required to be spent was expended on the SEP, Respondent shall not be liable for any stipulated penalty.

b) The determination of whether the SEPs have been satisfactorily completed and whether the Respondent has made a good faith, timely effort to implement the SEPs shall be in the sole discretion of EPA.

c) Stipulated penalties shall begin to accrue on the day after performance is due, and shall continue to accrue through the final day of the completion of the activity.

d) Respondent shall pay stipulated penalties not more than fifteen (15) days after receipt of written demand by EPA for such penalties. Method of payment shall be in accordance with the provisions of Paragraph 14 above.

31. 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. Interest will therefore begin to accrue on a civil or stipulated penalty if it is not paid by the date required. Interest will be assessed at a rate of the United States Treasury tax and loan rate in accordance with 4 C.F.R. § 102.13(c). A charge will be assessed to cover the costs of debt collection including processing and handling costs and attorneys fees. In addition, 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. Any such non-payment penalty charge on the debt will accrue from the date the penalty payment becomes due and is not paid. 4 C.F.R. §§ 102.13(d) and (e).

32. This CAFO shall not relieve the Respondent of its obligation to comply with all applicable provisions of federal, state or local law, nor shall it be construed to be a ruling on, or determination of, any issue related to any federal, state or local permit, nor shall it be construed to constitute EPA approval or endorsement of the product purchased by the Respondent and provided to the recipient departments in connection with the SEPs undertaken pursuant to this Consent Agreement.

33. Each undersigned representative of the parties to this CAFO that he or she is fully authorized by the party represented to enter into the terms and conditions of this CAFO and to execute and legally bind that party to it.

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

35. This executed CAFO 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: 05/07/08

By: *William A. Sprafkin*
for William A. Sprafkin
Director
Water, Wetlands, and Pesticides Division

Date: 5/5/08

By: *Kelley Catlin*
Kelley Catlin
Assistant Regional Counsel

RESPONDENT:

McCune Farmers Union Cooperative Association

Date: 05-01-08

By: *Gary D. McGowan*

Printed Name: Gary D. McGowan

Title: MANAGER

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

Date:

May 13, 2008



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

IN THE MATTER OF McCune Farmers Union Cooperative Association, Respondent
Docket No. FIFRA-07-2008-0019

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:

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

Original by Certified Mail Return Receipt to:

Gary D. McGown
McCune Farmers Union
Cooperative Association
8th and Main
McCune, Kansas 66753

Dated: 5/13/08



Kathy Robinson
Hearing Clerk, Region 7