

BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:)	DOCKET NO. FIFRA-10-2023-0138
)	
BARNETT AIR LLC,)	CONSENT AGREEMENT
)	
Nezperce, Idaho,)	
)	
Respondent.)	
)	

I. STATUTORY AUTHORITY

1.1. This Consent Agreement is issued under the authority vested in the Administrator of the U.S. Environmental Protection Agency (“EPA”) by Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”), 7 U.S.C. § 136l(a).

1.2. Pursuant to Section 14(a) of FIFRA, 7 U.S.C. § 136l(a), and in accordance with the “Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties,” 40 C.F.R. Part 22, EPA issues, and Barnett Air LLC (“Respondent”) agrees to issuance of, the Final Order attached to this Consent Agreement (“Final Order”).

II. PRELIMINARY STATEMENT

2.1. In accordance with 40 C.F.R. §§ 22.13(b) and 22.18(b), issuance of this Consent Agreement commences this proceeding, which will conclude when the Final Order becomes effective.

2.2. The Director of Enforcement and Compliance Assurance Division, EPA Region 10 (“Complainant”) has been delegated the authority pursuant to Section 14(a) of FIFRA,

7 U.S.C. § 136l(a), to sign consent agreements between EPA and the party against whom an administrative penalty for violations of FIFRA is proposed to be assessed.

2.3. Part III of this Consent Agreement contains a concise statement of the factual and legal basis for the alleged violation of FIFRA together with the specific provisions of FIFRA and the implementing regulations that Respondent is alleged to have violated.

III. ALLEGATIONS

3.1. Under 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.

3.2. Under Section 2(s) of FIFRA, 7 U.S.C. § 136(s), “person” means “any individual, partnership, association, corporation, or any organized group of persons whether incorporated or not.”

3.3. Under Section 2(u) of FIFRA, 7 U.S.C. § 136(u), “pesticide” includes, *inter alia*, “any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest.”

3.4. Under 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,” subject to limited exceptions.

3.5. Under Section 2(p)(2) of FIFRA, 7 U.S.C. § 136(p)(2), “labeling” includes, *inter alia*, “all labels and all other written, printed, or graphic matter [] accompanying the pesticide or device at any time.”

3.6. Under Section 2(p)(1), 7 U.S.C. § 136(p)(1), “label” means “the written, printed, or graphic matter on, or attached to, the pesticide or device or any of its containers or wrappers.”

3.7. Nexicor Xemium Brand Fungicide (EPA Registration No. 7969-380) (“Nexicor”) is a “pesticide” as defined by Section 2(u) of FIFRA, 7 U.S.C. § 136(u). Nexicor is a general use or unclassified pesticide under Section 3 of FIFRA, 7 U.S.C. § 136a.

3.8. The labeling for Nexicor states in part:

- “CAUTION. Harmful if swallowed. Harmful if inhaled. Avoid contact with skin or clothing. Avoid breathing spray mist. Remove and wash contaminated clothing before reuse. Wash thoroughly with soap and water after handling and before eating, drinking, chewing gum, using tobacco or using the toilet.”
- “It is a violation of Federal law to use this product in a manner inconsistent with its labeling.”
- “DO NOT apply this product in a way that will contact workers or other persons, either directly or through drift. Only protected handlers may be in the area during application.”
- “DO NOT apply under circumstances where possible drift to unprotected persons, to food, forage, or other plantings that might be damaged, or crops thereof rendered unfit for sale, use or consumption can occur.”
- “DO NOT spray when conditions favor drift beyond area intended for application. . . . All aerial and ground application equipment must be properly maintained and calibrated using appropriate carriers. Avoiding spray drift at the application site is the responsibility of the applicator.”

3.9. The active ingredients in Nexicor are fluxapyroxad, pyraclostrobin, and propiconazole.

3.10. Respondent is a “person” as defined in Section 2(s) of FIFRA, 7 U.S.C. § 136(s).

3.11. On May 21, 2022, James Barnett, owner and commercial applicator for Respondent, applied Nexicor to a winter wheat field known as Allotment #314 located near the junction of Sweetwater Creek and Lapwai Creek, in Sweetwater, Idaho.

3.12. The pesticide was applied through aerial application, using an aircraft.

3.13. At the time of the pesticide application, at least 41 unprotected persons were attending a burial service at Jonah Hayes Cemetery located immediately adjacent to Allotment #314.

3.14. During Respondent’s application of Nexicor, burial service attendees observed and felt a mist from the spray application from Respondent’s passing aircraft over Allotment #314.

3.15. On May 31, 2022, the Coeur d’ Alene Pesticide Enforcement Circuit Rider Program (“Circuit Rider Program”) received a complaint from a private individual regarding drift from the pesticide application on Allotment #314 on May 21, 2022, coming into contact with persons attending the burial service at Jonah Hayes Cemetery.

3.16. In response to the complaint, a federally credentialed inspector with the Circuit Rider Program collected one vegetation sample from Allotment #314 approximately 100 feet north of the cemetery fenceline on June 2, 2022, and three vegetation samples from the northeast corner of the Jonah Hayes Cemetery on June 3, 2022 (collectively, the “Samples”).

3.17. The Samples were frozen until submitted to the Idaho Food Quality Assurance Laboratory and were analyzed on June 28, 2022. All Samples, including those collected outside

the treated area, showed the presence of fluxapyroxad, propiconazole, and pyraclostrobin which are the active ingredients in Nexicor.

3.18. Between May 21, 2022, and June 3, 2022, other than application by Respondent, there were no known instances of application of fluxapyroxad, propiconazole, or pyraclostrobin in or around Allotment #314 or Jonah Hayes Cemetery.

3.19. Respondent applied Nexicor under circumstances of possible drift to 41 unprotected persons in the immediately adjacent Jonah Hayes Cemetery.

3.20. Respondent's application resulted in Nexicor coming into contact with unprotected persons through drift from the target site.

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

3.22. Pursuant to Section 14(a)(2) of FIFRA, 7 U.S.C. § 136l(a)(2), and 40 C.F.R. Part 19, any private applicator or other person not included in Section 14(a)(1) of FIFRA, who holds or applies registered pesticides, only to provide a service of controlling pests without delivering any unapplied pesticides to any person so served, and who violates any provision of FIFRA, may be assessed a civil penalty of not more than \$2,221 for the first offense and \$3,446 for each subsequent offense.

IV. TERMS OF SETTLEMENT

4.1. Respondent admits the jurisdictional allegations of this Consent Agreement.

4.2. Respondent neither admits nor denies the specific factual allegations contained in this Consent Agreement.

4.3. In determining the amount of penalty to be assessed, EPA has taken into account the factors specified in Section 14(a)(4) of FIFRA, 7 U.S.C. § 136l(a)(4). After considering all

of these factors, EPA has determined and Respondent agrees that an appropriate penalty to settle this action is \$2,221 (the “Assessed Penalty”).

4.4. Respondent agrees to pay the Assessed Penalty within 30 days of the effective date of the Final Order.

4.5. Payments under this Consent Agreement and the Final Order may be paid by check (mail or overnight delivery), wire transfer, ACH, or online payment. Payment instructions are available at: <http://www2.epa.gov/financial/makepayment>. Payments made by a cashier’s check or certified check must be payable to the order of “Treasurer, United States of America” and delivered to the following address:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979078
St. Louis, Missouri 63197-9000

Respondent must note on the check the title and docket number of this action.

4.6. Concurrently with payment, Respondent must serve photocopies of the check, or proof of other payment method, described in Paragraph 4.5 on the Regional Hearing Clerk and EPA Region 10 at the following addresses:

Regional Hearing Clerk
U.S. Environmental Protection Agency
Region 10, Mail Stop 11-C07
1200 Sixth Avenue, Suite 155
Seattle, Washington 98101
R10_RHC@epa.gov

Bethany Plewe
U.S. Environmental Protection Agency
Region 10, Mail Stop 20-C04
1200 Sixth Avenue, Suite 155
Seattle, Washington 98101
Plewe.Bethany@epa.gov

4.7. If Respondent fails to pay any portion of the Assessed Penalty in full by its due date, the entire unpaid balance of the Assessed Penalty and accrued interest shall become immediately due and owing. If such a failure to pay occurs, Respondent may be subject to a civil

action under Section 14(a)(5) of FIFRA, 7 U.S.C. § 136l(a)(5), to collect any unpaid penalties, together with interest, handling charges, and nonpayment penalties, as set forth below.

4.8. If Respondent fails to pay any portion of the Assessed Penalty in full by its due date, Respondent shall also be responsible for payment of the following amounts:

a. Interest. Pursuant to 31 U.S.C. § 3717(a)(1), any unpaid portion of the Assessed Penalty shall bear interest at the rate established by the Secretary of the Treasury from the effective date of the Final Order contained herein, provided, however, that no interest shall be payable on any portion of the Assessed Penalty that is paid within 30 days of the effective date of the Final Order contained herein.

b. Handling Charge. Pursuant to 31 U.S.C. § 3717(e)(1), a monthly handling charge of \$15 shall be paid if any portion of the Assessed Penalty is more than 30 days past due.

c. Nonpayment Penalty. Pursuant to 31 U.S.C. § 3717(e)(2), a nonpayment penalty of 6% per annum shall be paid on any portion of the Assessed Penalty that is more than 90 days past due, which nonpayment shall be calculated as of the date the underlying penalty first becomes past due.

4.9. The Assessed Penalty, including any additional costs incurred under Paragraph 4.8, represents an administrative civil penalty assessed by EPA and shall not be deductible for purposes of federal taxes.

4.10. The undersigned representative of Respondent certifies that he or she is authorized to enter into the terms and conditions of this Consent Agreement and to bind Respondent to this document.

4.11. Except as described in Paragraph 4.8, each party shall bear its own costs and attorneys' fees in bringing or defending this action.

4.12. For the purposes of this proceeding, Respondent expressly waives any affirmative defenses and the right to contest the allegations contained in the Consent Agreement and to appeal the Final Order.

4.13. The provisions of this Consent Agreement and the Final Order shall bind Respondent and its agents, servants, employees, successors, and assigns.

4.14. Respondent consents to the issuance of any specified compliance or corrective action order, to any conditions specified in this consent agreement, and to any stated permit action.

4.15. The above provisions in Part IV are STIPULATED AND AGREED upon by Respondent and EPA Region 10.

DATED:

8-30-2023

FOR RESPONDENT:

James P. Barnett
James P. Barnett, Owner
Barnett Air LLC

DATED:

FOR COMPLAINANT:

EDWARD J. KOWALSKI, Director
Enforcement & Compliance Assurance Division
EPA Region 10

BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:)	DOCKET NO. FIFRA-10-2023-0138
)	
BARNETT AIR LLC,)	FINAL ORDER
)	
Nezperce, Idaho,)	
)	
Respondent.)	
)	

1.1. The Administrator has delegated the authority to issue this Final Order to the Regional Administrator of EPA Region 10, who has re delegated this authority to the Regional Judicial Officer in EPA Region 10.

1.2. The terms of the foregoing Consent Agreement are ratified and incorporated by reference into this Final Order. Respondent is ordered to comply with the terms of settlement.

1.3. The Consent Agreement and this Final Order constitute a settlement by EPA of all claims for civil penalties under FIFRA for the violation alleged in Part III of the Consent Agreement. In accordance with 40 C.F.R. § 22.31(a), nothing in this Final Order shall affect the right of EPA or the United States to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law. This Final Order does not waive, extinguish, or otherwise affect Respondent’s obligations to comply with all applicable provisions of FIFRA and regulations promulgated or permits issued thereunder.

1.4. This Final Order shall become effective upon filing with the Regional Hearing Clerk.

SO ORDERED this _____ day of _____, 2023.

RICHARD MEDNICK
Regional Judicial Officer
EPA Region 10

Certificate of Service

The undersigned certifies that the original of the attached **CONSENT AGREEMENT AND FINAL ORDER, In the Matter of: Barnett Air LLC, Docket No.: FIFRA-10-2023-0138**, was filed with the Regional Hearing Clerk and served on the addressees in the following manner on the date specified below:

The undersigned certifies that a true and correct copy of the document was delivered via electronic mail to:

Erin Tanimura
U.S. Environmental Protection Agency
Region 10, Mail Stop 11-C07
1200 Sixth Avenue, Suite 155
Seattle, Washington 98101
tanimura.erin@epa.gov

Mr. James P. Barnett
Barnett Air LLC
P.O. Box 54
Nezperce, Idaho 83543
jim@barnettairllc.com

DATED this _____ day of _____, 2023.

DANIEL MAUL
Regional Hearing Clerk
EPA Region 10