

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8**IN THE MATTER OF:****BLACK GULCH AVIATION, LLC,**
33627 Marion Lane
Polson, Montana 59860

Respondent.

Docket No. FIFRA-08-2024-0023

CONSENT AGREEMENT**I. INTRODUCTION**

1. This is an administrative penalty assessment proceeding pursuant to sections 22.13(b) and 22.18(b)(2) and (3) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (Consolidated Rules of Practice), as codified at 40 C.F.R. part 22.
2. The parties to this proceeding are the authorized representative of the U.S. Environmental Protection Agency, Complainant, and Black Gulch Aviation, LLC, Respondent.
3. Respondent is a limited liability company organized under the laws of the state of Montana.
4. The parties, having agreed settlement of this action is in the public interest, consent to the entry of this consent agreement (Agreement) without adjudication of any issues of law or fact herein, and Respondent agrees to comply with the terms of this Agreement.

II. JURISDICTION

5. This Agreement is issued under the authority vested in the Administrator of EPA by section 14(a)(1) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. § 136l(a)(1). The undersigned EPA official has been duly authorized to institute this action.
6. This proceeding is subject to the Consolidated Rules of Practice, under which this proceeding may be resolved by a final order from a Regional Judicial Officer or Regional Administrator ratifying this Agreement. The final order will simultaneously commence and conclude this proceeding. 40 C.F.R. § 22.13(b).

III. GOVERNING LAW

7. 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.
8. 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.”
9. 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.”
10. 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.
11. Under section 2(p)(1) of FIFRA, 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.”
12. 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.”
13. The Administrator of the EPA may assess a civil penalty of up to \$24,255 against any registrant, commercial applicator, wholesaler, dealer, retailer, or other distributor who violates any provision of FIFRA for each offense that the EPA asserts to have occurred after November 2, 2015, where penalties are assessed on or after December 27, 2023. *See* section 14(a)(1) of FIFRA, 7 U.S.C. § 136l(a)(1); 40 C.F.R. part 19; and the Civil Monetary Penalty Inflation Adjustment Rule at 88 Fed. Reg. 89309, 89312 (December 27, 2023).

IV. ALLEGATIONS OF FACTS AND LAW

14. ESCORT XP (EPA Reg. No. 432-1549) (Escort) is a “pesticide” as defined by section 2(u) of FIFRA, 7 U.S.C. § 136(u). Escort is a general use or unclassified pesticide under section 3 of FIFRA, 7 U.S.C. § 136(a).

15. The labeling for Escort states in part:
 - a. “CAUTION! Causes eye irritation. Avoid contact with skin, eyes, or clothing. Avoid breathing dust or spray mist.”
 - b. “It is a violation of Federal law to use this product in a manner inconsistent with its labeling.”
 - c. “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.”
 - d. “THE APPLICATOR IS RESPONSIBLE FOR AVOIDING OFF-SITE SPRAY DRIFT.”
16. The active ingredient in Escort is Metsulfuron-methyl.
17. GRAZON NEXT HL (EPA Reg. No. 62719-628) (Grazon) is a “pesticide” as defined by section 2(u) of FIFRA, 7 U.S.C. § 136(u). Grazon is a general use or unclassified pesticide under section 3 of FIFRA, 7 U.S.C. § 136(a).
18. The labeling for Grazon states in part:
 - a. “DANGER Corrosive • Causes Irreversible Eye Damage • Harmful If Swallowed • Do not get in eyes or on clothing.”
 - b. “It is a violation of Federal law to use this product in a manner inconsistent with its labeling.”
 - c. “Do not apply this product in a way that will contact workers or other persons, either directly or through drift.”
 - d. “Only protected handlers may be in the area during application.”
19. The active ingredients in Grazon include Dimethyl amine salt of (2,4-dichlorophenoxy) acetic acid (also known as 2,4-D), and Triisopropanolammonium salt of 2-pyridine carboxylic acid, 4-amino-3, 6-dichloro.
20. Respondent, Black Gulch Aviation, LLC, is a “person” as that term is defined by section 2(s) of FIFRA, 7 U.S.C. § 136(s), and is subject to FIFRA and the implementing regulations promulgated thereunder.
21. Respondent is a “commercial applicator” as that term is defined in section 2(e)(3) of FIFRA, 7 U.S.C. § 136(3), certified by Montana Department of Agriculture (identification no. 104691-12) and the EPA (identification no. 08000099).

22. On May 10, 2022, Wacey Cathey, agent and principal for Respondent, applied a mixture of two pesticides, namely Escort and Grazon, to a field located at the Hartung-Sam Rickter farm, Latitude: 47 27 13.2, Longitude: -114 17 40.76 in Ronan, Montana (referred to hereinafter as the intended area of application). The intended area of application is within the exterior boundaries of the Flathead Indian Reservation.
23. Mr. Cathey applied the Escort/Grazon mixture through aerial application, using an aircraft.
24. At the time of the pesticide application, over 400 unprotected persons were attending the Confederated Salish and Kootenai Tribe (CSKT) River Honoring Ceremony (Ceremony) on a neighboring piece of property located approximately 0.426 miles northeast of the intended area of application.
25. During Respondent's application of the Escort/Grazon mixture, attendees, including CSKT Natural Resource Division employees, allegedly observed a mist from the spray application from Respondent's passing aircraft over the Ceremony.
26. In response, on May 13, 2022, Jasmine Brown, a federally credentialed CSKT inspector conducted a for cause inspection of Black Gulch Aviation, LLC (Inspection).
27. As part of the inspection, federally credentialed CSKT inspectors collected three samples from the Ceremony site (collectively, the Samples).
28. The Samples were submitted to the Montana Department of Agriculture and were analyzed on or about May 25, 2022.
29. At least one of the Samples showed the presence of Metsufuran methyl and 2,4-D, which are the active ingredients in Escort and Grazon.
30. Respondent's application resulted in the Escort/Grazon mixture possibly coming into contact with unprotected persons through drift from the intended area of application.

V. ALLEGED VIOLATION OF LAW

31. Based on the facts set forth above, the EPA asserts that Respondent violated FIFRA section 12(a)(2)(G), 7 U.S.C.

§ 136j(a)(2)(G), by applying a registered pesticide in a manner inconsistent with its labeling.

VI. TERMS OF CONSENT AGREEMENT

32. For the purposes of this proceeding, Respondent:
- a. admits the facts set forth in paragraph 3 of this Agreement;
 - b. admits the jurisdictional allegations in section II of this Agreement;
 - c. neither admits nor denies the alleged factual allegations in section IV of this Agreement;
 - d. consents to the assessment of a civil penalty as stated below;
 - e. acknowledges this Agreement constitutes an enforcement action for purposes of considering Respondent's compliance history in any subsequent enforcement action; and
 - f. waives any right to contest the allegations in this Agreement and to appeal any final order approving this Agreement.
33. Section 14(a) of FIFRA, 7 U.S.C. § 136l(a), authorizes EPA to assess a civil penalty in this matter.
34. Based on the allegations in section IV above and having considered the appropriateness of the assessed penalty to Respondent's size of businesses, the effect on Respondent's ability to continue in business, and the gravity of the violation, as required by section 14(a)(4) of FIFRA, 7 U.S.C. § 136l(a)(4), the Complainant has determined the civil administrative penalty amount agreed upon below is appropriate to settle this matter.
35. Penalty Payment. Respondent agrees to:
- a. pay a civil penalty of **\$4,665** within 30 calendar days after issuance of the final order;
 - b. pay the civil penalty using any method provided on the website <https://www.epa.gov/financial/makepayment>;
 - c. indicate the payment is payable to the "Environmental Protection Agency" and include a reference to the docket number that appears on the final order approving this Agreement; within 24 hours of the payment, email proof of payment to Sherrie Kinard, EPA Region 8, at kinard.sherrie@epa.gov (whom

the Complainant designates for service of proof of payment) and the Regional Hearing Clerk for EPA Region 8 at R8_Hearing_Clerk@epa.gov. “Proof of payment” means, as applicable, a copy of the check, confirmation of credit card or debit card payment confirmation of wire or automated clearinghouse transfer, and any other information required to demonstrate payment has been made according to EPA requirements, in the amount due, and identified with the docket number that appears on the final order.

36. If Respondent fails to timely pay the penalty assessed under this Agreement, the EPA may:
- a. request the Attorney General to bring a civil action in an appropriate district court to recover the amount assessed, plus interest at currently prevailing rates from the date of the final order pursuant to 26 U.S.C. § 6621(a)(2), attorney’s fees and costs for collection proceedings;
 - b. refer the debt to a credit reporting agency or a collection agency under 40 C.F.R. §§ 13.13, 13.14, and 13.33;
 - c. collect the debt by administrative offset (i.e., the withholding of money payable by the United States to, or held by the United States for, a person to satisfy the debt the person owes the government), which includes, but is not limited to, referral to the Internal Revenue Service for offset against income tax refunds, 40 C.F.R. part 13, subparts C and H; and
 - d. suspend or revoke Respondent’s licenses or other privileges or suspend or disqualify Respondent from doing business with EPA or engaging in programs EPA sponsors or funds, 40 C.F.R. § 13.17.
37. Consistent with section 162(f)(1) of the Internal Revenue Code, 26 U.S.C. § 162(f)(1), Respondent will not deduct penalties paid under this Agreement for federal tax purposes.
38. This Agreement applies to Respondent and its officers, directors, employees, agents, trustees, authorized representatives, successors, and assigns. Any change in ownership or corporate control of Respondent, including but not limited to, any

transfer of assets or real or personal property, shall not alter Respondent's responsibilities under this Agreement.

39. The undersigned representative of Respondent certifies he or she has authority to bind Respondent to this Agreement.
40. Except as qualified by paragraph 36 above, each party shall bear its own attorneys' fees, costs, and disbursements incurred in this proceeding.
41. The parties consent to service of this Agreement and any Final Order approving it by email at the following valid email addresses: Jim Kiser, jkiser@andersonriddle.com (for Respondent), and Sherrie Kinard, kinard.sherrie@epa.gov and Laurianne Jackson, jackson.laurianne@epag.gov (for Complainant).

VII. EFFECT OF CONSENT AGREEMENT

42. In accordance with 40 C.F.R. § 22.18(c), compliance with the final order approving this Agreement resolves Respondent's liability only for federal civil penalties for the violations specifically alleged above.
43. Nothing in this Agreement shall relieve Respondent of the duty to comply with all applicable provisions of the Act, any regulation, order, or permit issued pursuant to the Act, and any other federal, state, or local laws, nor shall it restrict the EPA's authority to seek compliance with any applicable laws or regulations, nor shall it be construed to be a ruling on, or determination of, any issue related to any federal, state, or local permit.
44. Nothing herein shall be construed to limit the power of the EPA to pursue injunctive or other equitable relief, or criminal sanctions, for any violations of law or to undertake any action against Respondent or any person in response to conditions that may present an imminent and substantial endangerment to the public health, welfare, or the environment.

If and to the extent the EPA finds, after signing this Agreement, that any information provided by Respondent was materially false or inaccurate at the time such information was provided to the EPA, the EPA reserves any and all of its legal and equitable rights.

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8**

Date: _____

By: _____

David Cobb, Section Supervisor
Toxics and Pesticides Enforcement Section
Enforcement and Compliance Assurance Division
For the Complainant

**Black Gulch Aviation, LLC
Respondent**

Date: 4-12-2024

By: Wacey Cathey, Member

Wacey Cathey, Member