

**U. S. 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)	
)	
Southern FS, Inc.,)	Docket No. FIFRA-07-2022-0095
- Whitewater, Missouri)	
)	
<u>Respondent.</u>)	

CONSENT AGREEMENT AND FINAL ORDER

Preliminary Statement

The U.S. Environmental Protection Agency, Region 7 (EPA or Complainant), and Southern FS, Inc. of Whitewater, Missouri (Respondent) have agreed to a settlement of this action before the filing of a Complaint, and thus this action is simultaneously commenced and concluded pursuant to Rules 22.13(b) and 22.18(b)(2) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, 40 C.F.R. §§ 22.13(b) and 22.18(b)(2).

Jurisdiction

1. This proceeding is an administrative action for the assessment of civil penalties initiated pursuant to Section 14 of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. § 136l and in accordance with the Consolidated Rules of Practice.

2. This Consent Agreement and Final Order serves as notice that EPA has reason to believe that Respondent has violated Section 12 of FIFRA, 7 U.S.C. § 136j.

Parties

3. Complainant, by delegation from the Administrator of EPA, the Regional Administrator of EPA Region 7, and the Director of the Enforcement and Compliance Assurance Division of EPA Region 7, is the Branch Chief of the Chemical Branch of EPA Region 7.

4. The Respondent is a Southern FS, Inc. of Whitewater, Missouri, a corporation in good standing under the laws of the state of Missouri.

Statutory and Regulatory Background

5. Congress enacted FIFRA in 1947 and amended it in 1972 and in 1996. 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 2(t) of FIFRA, 7 U.S.C. § 136(t), defines “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 animals) which the Administrator declares to be a pest under Section 25(c)(1).

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

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

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

10. Section 2(gg) of FIFRA, 7 U.S.C. § 136(gg), defines “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. Section 2(dd) of FIFRA, 7 U.S.C. § 136(dd), defines “establishment” to mean any place where a pesticide or device or active ingredient used in producing a pesticide is produced, or held, for distribution or sale.

12. Section 2(w) of FIFRA, 7 U.S.C. § 136(w), defines “produce” to mean to manufacture, prepare, compound, propagate, or process any pesticide or device or active ingredient used in producing a pesticide.

13. 40 C.F.R. § 165.3 further defines “produce” to mean to manufacture, prepare, propagate, compound, or process any pesticide, including any pesticide produced pursuant to section 5 of FIFRA, and any active ingredient or device, or to package, repackage, label, relabel, or otherwise change the container of any pesticide or device.

14. 40 C.F.R. § 165.3 defines “repackage” to mean to transfer a pesticide formulation from one container to another without a change in the composition of the formulation, the labeling content, or the product's EPA registration number, for sale or distribution.

15. Section 2(y) of FIFRA, 7 U.S.C. § 136(y), defines “registrant” to mean a person who has registered any pesticide pursuant to the provisions of this subchapter.
16. 40 C.F.R. § 165.3 defines “refiller” to mean a person who engages in the activity of repackaging pesticide product into refillable containers.
17. 40 C.F.R. § 152.3 defines “pesticide product” to mean a pesticide in the particular form (including composition, packaging, and labeling) in which the pesticide is, or is intended to be, distributed or sold. The term includes any physical apparatus used to deliver or apply the pesticide if distributed or sold with the pesticide.
18. Section 2(q)(1) of FIFRA, 7 U.S.C. § 136(q)(1), states, in pertinent part, a pesticide is misbranded if its labeling bears any statement, design, or graphic representation relative thereto or to its ingredients which is false or misleading in any particular; or it is an imitation of, or is offered for sale under the name of, another pesticide.
19. 40 C.F.R. § 165.70(c) states that repackaging a pesticide product for distribution or sale without either obtaining a registration or meeting all of the conditions in paragraph (b) of this section is a violation of Section 12 of FIFRA. Both the refiller and the pesticide product's registrant may be liable for violations pertaining to the repackaged product.
20. 40 C.F.R. § 165.70(b) states that a registrant may allow a refiller to repackage the registrant's pesticide product into refillable containers and to distribute or sell such repackaged product under the registrant's existing registration the following conditions are satisfied: the repackaging results in no change to the pesticide formulation; the pesticide product is repackaged only into refillable containers that meet the standards of subpart C of this part; and the pesticide product is labeled with the product's label with no changes except the addition of an appropriate net contents statement and the refiller's EPA establishment number.
21. Section 2(c) of FIFRA, 7 U.S.C. § 136(c), states a pesticide is “adulterated” if (1) its strength or purity falls below the professed standard of quality as expressed on its labeling under which it is sold; (2) any substance has been substituted wholly or in part for the pesticide; or (3) any valuable constituent of the pesticide has been wholly or in part abstracted.
22. Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), states it shall be unlawful for any person in any state to distribute or sell to any person any pesticide which is adulterated or misbranded.
23. Section 14(a)(1) of FIFRA, 7 U.S.C. § 136l(a)(1), authorizes 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 \$21,805, for violations that occur after November 2, 2015, and for which penalties are assessed on or after January 12, 2022.

General Factual Allegations

24. Respondent is, and at all times referred to herein was, a “person” within the meaning of FIFRA.

25. On or around June 11, 2021, Respondent filled containers labeled for Targa Herbicide, EPA Reg. No. 33906-9-81880, Medal II EC, EPA Reg. No. 7969-447, and FS Intention, an adjuvant that does not require an EPA Registration number, with Roundup PowerMax, EPA Reg. No. 524-549 (“Roundup”), and Liberty Herbicide, EPA Reg. No. 7969-447 (“Liberty”).

26. The containers labeled for Targa Herbicide, EPA Reg. No. 33906-9-81880, Medal II EC, EPA Reg. No. 7969-447, and FS Intention are nonrefillable containers.

27. On or around June 11, 2021, Respondent sold the containers containing Roundup and Liberty to a customer (“the customer”).

28. On or about July 12, 2021, the Missouri Department of Agriculture conducted an inspection at the home of the customer. At this inspection, two samples were taken from two containers sold to the customer by Respondent.

29. The samples taken on July 12, 2021, were tested by the University of Iowa State Hygienic Laboratory for Roundup and Liberty and were found to contain under-formulated concentrations of Roundup and Liberty.

30. At the time of the inspection, Respondent was not the registrant of either Roundup or Liberty.

Allegations of Violations

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

Count 1

32. The facts stated in Paragraphs 24 through 30 above are herein incorporated.

33. Pursuant to Section 2(q)(1) of FIFRA, 7 U.S.C. § 136(q)(1), a pesticide is misbranded if its labeling bears any statement, design, or graphic representation relative thereto or to its ingredients which is false or misleading; or it is an imitation of, or is offered for sale under the name of, another pesticide.

34. Pursuant to Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), states it shall be unlawful for any person in any state to distribute or sell to any person any pesticide which is misbranded.

35. On or around June 11, 2021, Respondent sold to the customer 15 gallons of Roundup in containers that were not labeled for Roundup.

36. The Roundup sold by Respondent on or around June 11, 2021 was misbranded because the labeling referred to separate pesticides and did not properly identify Roundup.

37. Respondent violated Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), by selling misbranded pesticides.

Count 2

38. The facts stated in Paragraphs 24 through 30 above are herein incorporated.

39. Pursuant to Section 2(q)(1) of FIFRA, 7 U.S.C. § 136(q)(1), a pesticide is misbranded if its labeling bears any statement, design, or graphic representation relative thereto or to its ingredients which is false or misleading; or it is an imitation of, or is offered for sale under the name of, another pesticide.

40. Pursuant to Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), states it shall be unlawful for any person in any state to distribute or sell to any person any pesticide which is misbranded.

41. On or around June 11, 2021, Respondent sold to the customer 15 gallons of Liberty in containers that were not labeled for Liberty.

42. The Liberty sold by Respondent on or around June 11, 2021 was misbranded because the labeling referred to separate pesticides and did not properly identify Liberty.

43. Respondent violated Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), by selling misbranded pesticides.

Count 3

44. The facts stated in Paragraphs 24 through 30 above are herein incorporated.

45. Pursuant to 40 C.F.R. § 165.70(c), repackaging a pesticide product for distribution or sale without either obtaining a registration or meeting all of the conditions in paragraph (b) of this section is a violation of Section 12 of FIFRA.

46. 40 C.F.R. § 165.70(b) states that a registrant may allow a refiller to repackage the registrant's pesticide product into refillable containers and to distribute or sell such repackaged product under the registrant's existing registration the following conditions are satisfied: the repackaging results in no change to the pesticide formulation; the pesticide product is repackaged only into refillable containers that meet the standards of subpart C of this part; and the pesticide product is labeled with the product's label with no changes except the addition of an appropriate net contents statement and the refillers EPA establishment number.

47. The containers labeled for Targa Herbicide, EPA Reg. No. 33906-9-81880, Medal II EC, EPA Reg. No. 7969-447, and FS Intention say “non-refillable” and “do not reuse or refill,” and are therefore nonrefillable containers.

48. At the time Respondent sold Roundup to the customer, Respondent was not the registrant of Roundup.

49. At the time Respondent sold Roundup to the customer, Respondent did not meet the requirements of paragraph (b) of 40 C.F.R. § 165.70 because the repackaging resulted in change to the pesticide formulation; the pesticide products were repackaged into nonrefillable containers, and the pesticide products were labeled with the incorrect labels.

50. Respondent’s repackaging of Roundup, without being the registrant of the pesticide or following the requirements of 40 C.F.R. § 165.70(b), is a violation of 40 C.F.R. § 165.70 and therefore of Section 12 of FIFRA, 7 U.S.C. § 136j.

Count 4

51. The facts stated in Paragraphs 24 through 30 above are herein incorporated.

52. Pursuant to 40 C.F.R. § 165.70(c), repackaging a pesticide product for distribution or sale without either obtaining a registration or meeting all of the conditions in paragraph (b) of this section is a violation of Section 12 of FIFRA.

53. 40 C.F.R. § 165.70(b) states that a registrant may allow a refiller to repack the registrant's pesticide product into refillable containers and to distribute or sell such repackaged product under the registrant's existing registration the following conditions are satisfied: the repackaging results in no change to the pesticide formulation; the pesticide product is repackaged only into refillable containers that meet the standards of subpart C of this part; and the pesticide product is labeled with the product's label with no changes except the addition of an appropriate net contents statement and the refillers EPA establishment number.

54. The containers labeled for Targa Herbicide, EPA Reg. No. 33906-9-81880, Medal II EC, EPA Reg. No. 7969-447, and FS Intention say “non-refillable” and “do not reuse or refill,” and are therefore nonrefillable containers.

55. At the time Respondent sold Liberty to the customer, Respondent was not the registrant of Liberty.

56. At the time Respondent sold Liberty to the customer, Respondent did not meet the requirements of paragraph (b) of 40 C.F.R. § 165.70 because the repackaging resulted in change to the pesticide formulation; the pesticide products were repackaged into nonrefillable containers, and the pesticide products were labeled with the incorrect labels.

57. Respondent's repackaging of Liberty, without being the registrant of the pesticides or following the requirements of 40 C.F.R. § 165.70(b), is a violation of 40 C.F.R. § 165.70 and therefore of Section 12 of FIFRA, 7 U.S.C. § 136j.

Count 5

58. The facts stated in Paragraphs 24 through 30 above are herein incorporated.

59. Section 2(c) of FIFRA, 7 U.S.C. § 136(c), states a pesticide is "adulterated" if (1) its strength or purity falls below the professed standard of quality as expressed on its labeling under which it is sold; (2) any substance has been substituted wholly or in part for the pesticide; or (3) any valuable constituent of the pesticide has been wholly or in part abstracted.

60. Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), states it shall be unlawful for any person in any state to distribute or sell to any person any pesticide which is adulterated.

61. On or around June 11, 2021, Respondent sold to the customer 15 gallons of Roundup.

62. On or around July 12, 2021, samples were taken from the containers sold to the customer. The samples were sent to the University of Iowa State Hygienic Laboratory for testing.

63. The sample taken from one of the containers sold by Respondent to the customer on or around June 11, 2021 contained an under-formulated concentration of Roundup and was therefore adulterated.

64. Because Respondent sold a pesticide that lacked the correct concentration of active ingredients, Respondent sold adulterated pesticides in violation of Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E).

Count 6

65. The facts stated in Paragraphs 24 through 30 above are herein incorporated.

66. Section 2(c) of FIFRA, 7 U.S.C. § 136(c), states a pesticide is "adulterated" if (1) its strength or purity falls below the professed standard of quality as expressed on its labeling under which it is sold; (2) any substance has been substituted wholly or in part for the pesticide; or (3) any valuable constituent of the pesticide has been wholly or in part abstracted.

67. Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), states it shall be unlawful for any person in any state to distribute or sell to any person any pesticide which is adulterated.

68. On or around June 11, 2021, Respondent sold to the customer 15 gallons of Liberty.

69. On or around July 12, 2021, samples were taken from the containers sold to the customer. The samples were sent to the University of Iowa State Hygienic Laboratory for testing.

70. The sample taken from one of the containers sold by Respondent to the customer contained an under-formulated concentration of Liberty and was therefore adulterated.

71. Because Respondent sold pesticides that lacked the correct concentration of active ingredients, Respondent sold an adulterated pesticide in violation of Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E).

CONSENT AGREEMENT

72. For the purpose of this proceeding, as required by 40 C.F.R. § 22.18(b)(2), Respondent:

- (a) admits the jurisdictional allegations set forth herein;
- (b) neither admits nor denies the specific factual allegations stated herein;
- (c) consents to the assessment of a civil penalty, as stated herein;
- (d) consents to the issuance of any specified compliance or corrective action order;
- (e) consents to any conditions specified herein;
- (f) consents to any stated Permit Action;
- (g) waives any right to contest the allegations set forth herein; and
- (h) waives its rights to appeal the Final Order accompanying this Consent Agreement.

73. Respondent consents to the issuance of this Consent Agreement and Final Order and consents for the purposes of settlement to the payment of the civil penalty specified herein.

74. Respondent and EPA agree to the terms of this Consent Agreement and Final Order and Respondent agrees to comply with the terms specified herein.

75. Respondent and EPA agree to conciliate this matter without the necessity of a formal hearing and to bear their respective costs and attorneys' fees.

76. Respondent consents to receiving the filed Consent Agreement and Final Order electronically at the following e-mail address: *mbarnhart@southernfs.com*.

Penalty Payment

77. Respondent agrees that, in settlement of the claims alleged herein, Respondent shall pay a civil penalty of thirty-eight thousand, one hundred and thirty-three (\$38,133), as set forth below.

78. Respondent shall pay the penalty within thirty (30) days of the effective date of the Final Order. Such payment shall identify Respondent by name and docket number 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
PO Box 979077
St. Louis, Missouri 63197-9000

or by alternate payment method described at <http://www.epa.gov/financial/makepayment>.

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

Regional Hearing Clerk
R7_Hearing_Clerk_Filings@epa.gov; and

Katherine Kacsur, Attorney
kacsur.katherine@epa.gov

80. Respondent understands that failure to timely pay any portion of the civil penalty 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 begin to accrue on a civil or stipulated penalty from the date of delinquency until such civil or stipulated penalty and any accrued interest are paid in full. 31 C.F.R. § 901.9(b)(1). Interest will be assessed at a rate of the United States Treasury Tax and loan rates in accordance with 31 U.S.C. § 3717. Additionally, a charge will be assessed to cover the costs of debt collection including processing and handling costs, and 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. 31 U.S.C. § 3717(e)(2).

Effect of Settlement and Reservation of Rights

81. Full payment of the penalty proposed in this Consent Agreement shall only resolve Respondent's liability for federal civil penalties for the violations alleged herein. Complainant reserves the right to take any enforcement action with respect to any other violations of FIFRA or any other applicable law.

82. The effect of settlement described in the immediately preceding paragraph is conditioned upon the accuracy of Respondent's representations to EPA, as memorialized in the paragraph directly below.

83. Respondent certifies by the signing of this Consent Agreement that it is presently in compliance with all requirements of FIFRA and its implementing regulations.

84. Full payment of the penalty proposed in this Consent Agreement shall not in any case affect the right of the Agency or the United States to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law. This Consent Agreement and Final Order does not waive, extinguish or otherwise affect Respondent's obligation to comply with all applicable provisions of FIFRA and regulations promulgated thereunder.

85. Complainant reserves the right enforce the terms and conditions of this Consent Agreement and Final Order.

86. Nothing contained in this Consent Agreement and Final Order shall alter or otherwise affect Respondent's obligation to comply with all applicable federal, state, and local environmental statutes and regulations and applicable permits.

General Provisions

87. By signing this Consent Agreement, the undersigned representative of Respondent certifies that he or she is fully authorized to execute and enter into the terms and conditions of this Consent Agreement and has the legal capacity to bind the party he or she represents to this Consent Agreement.

88. This Consent Agreement shall not dispose of the proceeding without a final order from the Regional Judicial Officer or Regional Administrator ratifying the terms of this Consent Agreement. This Consent Agreement and Final Order shall be effective upon filing by the Regional Hearing Clerk for EPA, Region 7. Unless otherwise stated, all time periods stated herein shall be calculated in calendar days from such date.

89. The penalty specified herein shall represent civil penalties assessed by EPA and shall not be deductible for purposes of Federal, State and local taxes.

90. This Consent Agreement and Final Order shall apply to and be binding upon Respondent and Respondent's agents, successors and/or assigns. Respondent shall ensure that all contractors, employees, consultants, firms, or other persons or entities acting for Respondent with respect to matters included herein comply with the terms of this Consent Agreement and Final Order.

RESPONDENT
SOUTHERN FS, INC.

Date: 11/29/2022

By: Doug Fox

Printed Name: Doug Fox

Title: 4... fat... A'j e"

COMPLAINANT
U.S. ENVIRONMENTAL PROTECTION AGENCY

Date: _____
Candace Bednar
Chief, Chemical Branch
Enforcement and Compliance Assurance Division

Date: _____
Katherine Kacsur
Office of Regional Counsel

FINAL ORDER

Pursuant to Section 14(a) of FIFRA, 7 U.S.C. § 136/(a), and 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, the foregoing Consent Agreement resolving this matter is hereby ratified and incorporated by reference into this Final Order.

Respondent is ORDERED to comply with all of the terms of the Consent Agreement. In accordance with 40 C.F.R. § 22.3 l(b), the effective date of the foregoing Consent Agreement and this Final Order is the date on which this Final Order is filed with the Regional Hearing Clerk.

IT IS SO ORDERED.

Karina Borromeo
Regional Judicial Officer

Date

CERTIFICATE OF SERVICE

I certify that 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 via Email to Complainant:

Katherine Kacsur, Attorney
EPA Region 7
kacsur.katherine@epa.gov

Copy via Email to Respondent:

Michael Barnhart C.C.A.
Whitewater Location Manager
mbarnhart@southernfs.com

Michael P. Murphy, Attorney for Respondent
Hepler Broom LLC
Michael.Murphy@heplerbroom.com

Dated this _____ day of _____, _____.

Signed