

U. S. ENVIRONMENTAL PROTECTION AGENCY
REGION 7
11201 RENNER BOULEVARD
LENEXA, KS 66219

2013 OCT 22 PM 1:58

BEFORE THE ADMINISTRATOR

In the Matter of)	
)	Docket No. FIFRA-07-2013-0013
Progressive Nutrition)	
)	
Respondent)	

CONSENT AGREEMENT AND FINAL ORDER

The U.S. Environmental Protection Agency (EPA), Region 7 and Progressive Nutrition, (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) and 22.18(b)(2) 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) and 22.18(b)(2).

Section I

Jurisdiction

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

Section II

Parties

3. The Complainant, by delegation from the Administrator of the EPA and the Regional Administrator, EPA, Region 7, is the Director of the Water, Wetlands and Pesticides Division, EPA, Region 7.

4. The Respondent is Progressive Nutrition, a joint venture of Battle Creek Farmers Co-op and Cenex/Harvest States, and a pesticide producer and distributor with a facility located in Norfolk, Nebraska.

Section III

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 the term “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 the term “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 the term “person” to mean any individual, partnership, association, corporation, or any organized group of persons whether

incorporated or not.

9. Section 2(gg) of FIFRA, 7 U.S.C. § 136(gg), defines the term “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.

10. The term “produce” is defined by Section 2(w) of FIFRA, 7 U.S.C. § 136(w), and by 40 C.F.R. § 167.3 as meaning to manufacture, prepare, propagate, compound, or process any pesticide or device or active ingredient or to package, repackage, label, relabel, or otherwise change the container of any pesticide or device.

11. The term “producer” is defined by Section 2(w) of FIFRA, 7 U.S.C. § 136(w), and by 40 C.F.R. § 167.3 as any person who manufactures, prepares, compounds, propagates or processes any pesticide or device or active ingredient used in producing a pesticide (such actions include packaging, repackaging, labeling, and relabeling a pesticide).

12. Section 2(q)(1)(A) of FIFRA, 7 U.S.C. § 136(q)(1)(A), states a pesticide is misbranded if its labeling bears any statement, design, or graphic representation representative thereto or to its ingredients which is false or misleading in any particular.

13. Section 2(q)(1)(E) of FIFRA, 7 U.S.C. § 136(q)(1)(E), states a pesticide is misbranded if any word, statement, or other information required by or under authority of this Act to appear on the label or labeling is not prominently placed thereon with such conspicuousness and in such terms as to render it likely to be read and understood by the ordinary individual under customary conditions of purchase and use.

14. Section 2(q)(1)(F) of FIFRA, 7 U.S.C. § 136(q)(1)(F), states a pesticide is misbranded if the labeling accompanying it does not contain directions for use which are

necessary for effecting the purpose for which the product is intended and if complied with, together with any requirements imposed under section 3(d) of FIFRA, are adequate to protect health and the environment.

15. Section 7(a) of FIFRA, 7 U.S.C. § 136e(a), states that no person shall produce any pesticide subject to FIFRA or active ingredient used in producing a pesticide subject to FIFRA unless the establishment in which it is produced is registered with the EPA Administrator.

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

17. Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), states that it shall be unlawful for any person to distribute or sell any pesticide that is not registered under Section 3 of FIFRA, 7 U.S.C. § 136a, or whose registration has been cancelled or suspended.

18. Section 12(a)(2)(L) of FIFRA, 7 U.S.C. § 136j(a)(2)(L), states that it shall be unlawful for any person who is a producer to violate any of the provisions of Section 7 of FIFRA.

Section IV

General Factual Allegations

19. 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).

20. The Respondent, at all times relevant herein, operated a pesticide-producing establishment in Norfolk, Nebraska.

Violations

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

Counts 1-2

22. The facts stated in paragraphs 19 through 20 are realleged and incorporated as if fully stated herein.

23. On or about April 6, 2010, and again on or about May 6, 2011, Respondent sold or distributed a quantity of the pesticide product PN 12-12-4 Mineral Altosid.

24. On the dates of the sale and/or distribution of the pesticide product PN 12-12-4 Mineral Altosid, the product was not registered under Section 3 of FIFRA, 7 U.S.C. § 136a.

25. As sold or distributed by Respondent, the label for the pesticide product PN 12-12-4 Mineral Altosid lacked a valid EPA registration number.

26. Respondent violated Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), by selling or distributing a pesticide which is not registered under Section 3 of FIFRA, 7 U.S.C. § 136a.

27. Respondent violated Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), by selling or distributing a pesticide which was misbranded.

Count 3

28. The facts stated in paragraphs 19 through 20 are realleged and incorporated as if fully stated herein.

29. On or about March 31, 2011, Respondent sold or distributed a quantity of the pesticide product Randy Hunter Se Mineral Altosid.

30. On the date of the sale and/or distribution of the pesticide product Randy Hunter Se Mineral Altosid, the product was not registered under Section 3 of FIFRA, 7 U.S.C. § 136a.

31. As sold or distributed by Respondent, the label for the pesticide product Randy Hunter Se Mineral Altosid lacked a valid EPA registration number.

32. Respondent violated Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), by selling or distributing a pesticide which is not registered under Section 3 of FIFRA, 7 U.S.C. § 136a.

33. Respondent violated Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), by selling or distributing a pesticide which was misbranded.

Counts 4-26

34. The facts stated in paragraphs 19 through 20 are realleged and incorporated as if fully stated herein.

35. On twenty-three occasions during the years 2010 and 2011, Respondent sold or distributed a quantity of the pesticide product Vitalix #11 Commercial Mineral Altosid Tub Base.

36. On the dates of the sale and/or distribution of the pesticide product Vitalix #11 Commercial Mineral Altosid Tub Base the product was not registered under Section 3 of FIFRA, 7 U.S.C. § 136a.

37. As sold or distributed by Respondent, the label for the pesticide product Vitalix #11 Commercial Mineral Altosid Tub Base lacked a valid EPA registration number.

38. Respondent violated Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), by selling or distributing a pesticide which is not registered under Section 3 of FIFRA, 7 U.S.C. § 136a.

39. Respondent violated Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), by selling or distributing a pesticide which was misbranded.

Counts 27-51

40. The facts stated in paragraphs 19 through 20 are realleged and incorporated as if

fully stated herein.

41. On twenty-five occasions during the years 2010 and 2011, Respondent sold or distributed a quantity of the pesticide product Vitalix #5 Altosid Tub Base.

42. On the dates of the sale and/or distribution of the pesticide product Vitalix #5 Altosid Tub Base the product was not registered under Section 3 of FIFRA, 7 U.S.C. § 136a.

43. As sold or distributed by Respondent, the label for the pesticide product Vitalix #5 Altosid Tub Base lacked a valid EPA registration number.

44. Respondent violated Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), by selling or distributing a pesticide which is not registered under Section 3 of FIFRA, 7 U.S.C. § 136a.

45. Respondent violated Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), by selling or distributing a pesticide which was misbranded.

Counts 52-58

46. The facts stated in paragraphs 19 through 20 are realleged and incorporated as if fully stated herein.

47. On seven occasions during the years 2010 and 2011, Respondent sold or distributed a quantity of the pesticide product Vitalix #10 Breed Back Altosid Base.

48. On the dates of the sale and/or distribution of the pesticide product Vitalix #10 Breed Back Altosid Base the product was not registered under Section 3 of FIFRA, 7 U.S.C. § 136a.

49. As sold or distributed by Respondent, the label for the pesticide product Vitalix #10 Breed Back Altosid Base lacked a valid EPA registration number.

50. Respondent violated Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), by

selling or distributing a pesticide which is not registered under Section 3 of FIFRA, 7 U.S.C.

§ 136a.

51. Respondent violated Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), by selling or distributing a pesticide which was misbranded.

Count 59

52. The facts stated in paragraphs 19 through 20 are realleged and incorporated as if fully stated herein.

53. On or about June 9, 2010, Respondent sold or distributed a quantity of the pesticide product Vitalix Fescuelix Altosid.

54. On the date of the sale and/or distribution of the pesticide product Vitalix Fescuelix Altosid the product was not registered under Section 3 of FIFRA, 7 U.S.C. § 136a.

55. As sold or distributed by Respondent, the label for the pesticide product Vitalix Fescuelix Altosid lacked a valid EPA registration number.

56. Respondent violated Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), by selling or distributing a pesticide which is not registered under Section 3 of FIFRA, 7 U.S.C.

§ 136a.

57. Respondent violated Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), by selling or distributing a pesticide which was misbranded.

Count 60

58. The facts stated in paragraphs 19 through 20 are realleged and incorporated as if fully stated herein.

59. On or about April 29, 2011, Respondent sold or distributed a quantity of the pesticide product Vitalix #77 Stocker Mineral SQM Altosid Tub.

60. On the date of the sale and/or distribution of the pesticide product Vitalix #77 Stocker Mineral SQM Altosid Tub the product was not registered under Section 3 of FIFRA, 7 U.S.C. § 136a.

61. As sold or distributed by Respondent, the label for the pesticide product Vitalix #77 Stocker Mineral SQM Altosid Tub lacked a valid EPA registration number.

62. Respondent violated Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), by selling or distributing a pesticide which is not registered under Section 3 of FIFRA, 7 U.S.C. § 136a.

63. Respondent violated Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), by selling or distributing a pesticide which was misbranded.

Count 61

64. The facts stated in paragraphs 19 through 20 are realleged and incorporated as if fully stated herein.

65. On or about May 18, 2011, Respondent sold or distributed a quantity of the pesticide product Vitalix Hi-Fat Altosid Base.

66. On the date of the sale and/or distribution of the pesticide product Vitalix Hi-Fat Altosid Base the product was not registered under Section 3 of FIFRA, 7 U.S.C. § 136a.

67. As sold or distributed by Respondent, the label for the pesticide product Vitalix Hi-Fat Altosid Base lacked a valid EPA registration number.

68. Respondent violated Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), by selling or distributing a pesticide which is not registered under Section 3 of FIFRA, 7 U.S.C. § 136a.

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

selling or distributing a pesticide which was misbranded.

Count 62

70. The facts stated in paragraphs 19 through 20 are realleged and incorporated as if fully stated herein.

71. On or about May 25, 2011, Respondent sold or distributed a quantity of the pesticide product Vitalix #11 Commercial Mineral NO Se Altocid [sic] Tub Base.

72. On the date of the sale and/or distribution of the pesticide product Vitalix #11 Commercial Mineral NO Se Altocid Tub Base the product was not registered under Section 3 of FIFRA, 7 U.S.C. § 136a.

73. As sold or distributed by Respondent, the label for the pesticide product Vitalix #11 Commercial Mineral NO Se Altocid Tub Base lacked a valid EPA registration number.

74. Respondent violated Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), by selling or distributing a pesticide which is not registered under Section 3 of FIFRA, 7 U.S.C. § 136a.

75. Respondent violated Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), by selling or distributing a pesticide which was misbranded.

Count 63

76. The facts stated in paragraphs 19 through 20 are realleged and incorporated as if fully stated herein.

77. On or about May 25, 2011, Respondent sold or distributed a quantity of the pesticide product Vitalix Lo-Cal #11 Commercial Mineral Altosid Tub Base.

78. On the date of the sale and/or distribution of the pesticide product Vitalix Lo-Cal #11 Commercial Mineral Altosid Tub Base the product was not registered under Section 3 of

FIFRA, 7 U.S.C. § 136a.

79. As sold or distributed by Respondent, the label for the pesticide product Vitalix Lo-Cal #11 Commercial Mineral Altosid Tub Base lacked a valid EPA registration number.

80. Respondent violated Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), by selling or distributing a pesticide which is not registered under Section 3 of FIFRA, 7 U.S.C. § 136a.

81. Respondent violated Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), by selling or distributing a pesticide which was misbranded.

Counts 64-73

82. The facts stated in paragraphs 19 through 20 are realleged and incorporated as if fully stated herein.

83. In 2010 and/or 2011, Respondent engaged in the production of the following ten pesticide products at its facility in Norfolk, Nebraska:

- PN 12-12-4 Mineral Altosid
- Randy Hunter Se Mineral Altosid
- Vitalix #11 Commercial Mineral Altosid Tub Base
- Vitalix #5 Altosid Tub Base
- Vitalix #10 Breed Back Altosid Base
- Vitalix Fescuelix Altosid
- Vitalix #77 Stocker Mineral SQM Altosid Tub
- Vitalix Hi-Fat Altosid Base
- Vitalix #11 Commercial Mineral NO Se Altocid [sic] Tub Base
- Vitalix Lo-Cal #11 Commercial Mineral Altosid Tub Base

84. At the time of production of the ten products listed in the preceding paragraph, Respondent's Norfolk, Nebraska facility was not registered as a pesticide producing establishment pursuant to Section 7 of FIFRA, 7 U.S.C. § 136e.

85. For each of the ten products produced, Respondent violated Section 12(a)(2)(L) of FIFRA, 7 U.S.C. § 136j(a)(2)(L), by engaging in production of a pesticide product without

registration of its facility as a pesticide-producing establishment pursuant to Section 7 of FIFRA, 7 U.S.C. § 136e.

Section V

Consent Agreement

86. For purposes of this proceeding, Respondent admits the jurisdictional allegations set forth above, and agrees not to contest the EPA's jurisdiction in this proceeding or any subsequent proceeding to enforce the terms of the Final Order.

87. Respondent neither admits nor denies the factual allegations set forth above.

88. Respondent waives its right to contest any allegations set forth above and its right to appeal the Final Order accompanying this Consent Agreement.

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

90. 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.

91. The undersigned representative of Respondent certifies that he or she is fully authorized to enter into the terms and conditions of this CAFO and to execute and legally bind Respondent to it.

92. Respondent certifies that by signing this CAFO that it is presently in compliance with FIFRA, 7 U.S.C. § 136 et. seq., and all regulations promulgated thereunder.

93. The effect of settlement as described in the following paragraph is conditioned upon the accuracy of the Respondent's representations to the EPA, as memorialized in the preceding paragraph.

94. Respondent agrees that, in settlement of the claims alleged in this CAFO, Respondent shall pay a penalty as set forth in Paragraph 1 of the Final Order below. Payment of this civil penalty in full shall resolve all civil and administrative claims for all violations of FIFRA alleged in this document. Complainant reserves the right to take any enforcement action with respect to any other violations of FIFRA or any other applicable law and/or regulation administered by the EPA.

95. Respondent consents to the issuance of the Final Order hereinafter recited and consents to the payment of a civil penalty as specified in the Final Order.

96. Late Payment Provisions: Pursuant to 31 U.S.C. § 3717, the 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. Respondent understands that its failure to timely pay any portion of the civil penalty described in Paragraph 1 of the Final Order below 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 accrue thereon at the applicable statutory rate on the unpaid balance until such civil or stipulated penalty and any accrued interest are paid in full. A late payment handling charge of \$15 will be imposed after thirty (30) days and an additional \$15 will be charged for each subsequent thirty (30) day period. Additionally, as provided by 31 U.S.C. § 3717(e)(2), a six percent (6%) per annum penalty (late charge) may be assessed on any amount not paid within ninety (90) days of the due date.

Section VI

Final Order

Pursuant to Section 14 of FIFRA, as amended, 7 U.S.C. §136l, and according to the terms of the Consent Agreement set forth above, **IT IS HEREBY ORDERED THAT:**

1. Respondent shall pay a mitigated civil penalty of One Hundred Twenty-Five Thousand Dollars (\$125,000.00) within thirty (30) days of the effective date of this Final Order. Such payment shall identify Respondent by name and docket number and made as follows:

If by certified or cashier's check, payment should be made payable to the "United States Treasury" and sent to the following address:

US Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
PO Box 979077
St. Louis, Missouri 63197-9000

If by wire transfer, payment should be directed to the Federal Reserve Bank of New York as follows:

Federal Reserve Bank of New York
ABA = 021030004
Account = 68010727
SWIFT address = FRNYUS33
33 Liberty Street
New York, New York 10045
Field Tag 4200 of the Fedwire message should read
"D 68010727 Environmental Protection Agency"

If by electronic payment, payment may be submitted on-line at www.pay.gov by entering "SFO 1.1" in the "Search Public Forms" field. Open the on-line form and complete the required fields to complete payment. Respondent shall print a copy of the payment receipt and mail a copy of the receipt to the contacts listed below

2. A copy of the check or other information confirming payment shall

simultaneously be sent to the following:

Regional Hearing Clerk
U.S. Environmental Protection Agency
Region 7
11201 Renner Boulevard
Lenexa, Kansas 66219;

and

Andrew Kowalski
Toxics and Pesticides Enforcement Branch, WWPD
U.S. Environmental Protection Agency
Region 7
11201 Renner Boulevard
Lenexa, Kansas 66219.

3. 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.

4. This CAFO shall be effective upon the filing of the Final Order by the Regional Hearing Clerk for the EPA, Region 7. Unless otherwise stated, all time periods stated herein shall be calculated in calendar days from such date.

**RESPONDENT
PROGRESSIVE NUTRITION**

Date: 10/01/13

By: 

Merlin L. Schlote
Print Name

General Manager
Title

COMPLAINANT

U. S. ENVIRONMENTAL PROTECTION AGENCY

Date: 10/21/13

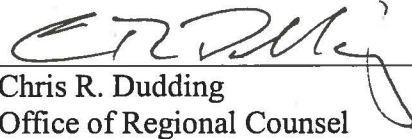


Karen Flournoy

Director

Water, Wetlands and Pesticides Division

Date: 10/21/2013



Chris R. Dudding

Office of Regional Counsel

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

Date: 10/22/13

Karina Borromeo
KARINA BORROMEO
Regional Judicial Officer

IN THE MATTER OF Progressive Nutrition, Respondent
Docket No. FIFRA-07-2013-0013

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Order was sent this day in the following manner to the addressees:

Copy by email to Attorney for Complainant:

dudding.chris@epa.gov

Copy by First Class Mail to Respondent:

Merlin Schlote
Chief Executive Officer
Progressive Nutrition
1500 E. Omaha Ave., Box 56
Norfolk, NE 68702

Dated: 10/22/13



Kathy Robinson
Hearing Clerk, Region 7