



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

SEP 19 2018

REPLY TO THE ATTENTION OF:

LC-17J

VIA EMAIL

Mr. Jared D. Peterson
Shareholder
Fafinski Mark & Johnson, P.A.
700 North Minnesota Street, Suite B
New Ulm, Minnesota 56073

jared.peterson@fmjlaw.com

Consent Agreement and Final Order In the Matter of Progressive Ag Center,
LLC, Docket Number **FIFRA-05-2018-0045**

Mr. Peterson:

Enclosed please find a copy of a fully executed Consent Agreement and Final Order in resolution of the above case. This document was filed on September 19, 2018 with the Regional Hearing Clerk.

The civil penalty in the amount of \$31,301 is to be paid in the manner described in paragraphs 51 and 52. Please be certain that the docket number is written on both the transmittal letter and on the check. Payment is due within 30 calendar days of the filing date.

Thank you for your cooperation in resolving this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Claudia Niess".

Claudia Niess
Pesticides and Toxics Compliance Section

Enclosure

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5



In the Matter of:

Progressive Ag Center, LLC
Stewartville, Minnesota,
Respondent.

Docket No. FIFRA-05-2018-0045

Proceeding to Assess a Civil Penalty
Under Section 14(a) of the Federal
Insecticide, Fungicide, and Rodenticide
Act, 7 U.S.C. § 136l(a)

Consent Agreement and Final Order

Preliminary Statement

1. This is an administrative action commenced and concluded under Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. § 136l(a), and 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) as codified at 40 C.F.R. Part 22.
2. The Complainant is the Director of the Land and Chemicals Division, United States Environmental Protection Agency (EPA), Region 5.
3. Respondent is Progressive Ag Center, LLC.
4. Respondent conducts business in the State of Minnesota.
5. Where the parties agree to settle one or more causes of action before the filing of a complaint, the administrative action may be commenced and concluded simultaneously by the issuance of a consent agreement and final order (CAFO). 40 C.F.R. § 22.13(b).
6. The parties agree that settling this action without the filing of a complaint or the adjudication of any issue of fact or law is in their interest and in the public interest.

7. Respondent consents to the assessment of the civil penalty specified in this CAFO, and to the terms of this CAFO.

Jurisdiction and Waiver of Right to Hearing

8. Respondent admits the jurisdictional allegations in this CAFO and neither admits nor denies the factual allegations in this CAFO.

9. Respondent waives its right to request a hearing as provided at 40 C.F.R. § 22.15(c), any right to contest the allegations in this CAFO and its right to appeal this CAFO.

10. Respondent certifies that it is complying with FIFRA, 7 U.S.C. §§ 136-136y.

Statutory and Regulatory Background

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

12. Section 12(a)(2)(B)(i) of FIFRA, 7 U.S.C. § 136j(a)(2)(B)(i), states that it is unlawful for any person to refuse to prepare, maintain, or submit any records required by or under Section 5, 7, 8, 11, or 19 of FIFRA.

13. The term “person” as defined in Section 2(s) of FIFRA, 7 U.S.C. § 136(s), means any individual, partnership, association, corporation, or any organized group of persons whether incorporated or not.

14. The term “establishment” means any place where a pesticide or device or active ingredient used in producing a pesticide is produced, or held, for distribution or sale. 7 U.S.C. § 136(dd).

15. The term “State” as defined in Section 2(aa) of FIFRA, 7 U.S.C. § 136(aa), means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the Trust Territory of the Pacific Islands, and American Samoa.

16. A “pesticide” is, among other things, any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest. 7 U.S.C. § 136(u).

17. A “pest” is any insect, rodent, nematode, fungus, weed, or any other form of terrestrial or aquatic plant or animal life or virus, bacteria, or other micro-organism which the Administrator of EPA declares to be a pest under Section 25(c)(1) of FIFRA. 7 U.S.C. § 136(t).

18. The term “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 receiving and (having so received) deliver or offer to deliver. 7 U.S.C. § 136(gg).

19. A pesticide is “misbranded” if its labeling bears any statement, design, or graphic representation relative thereto or its ingredients which is false or misleading in any particular. 7 U.S.C. § 136(q)(1)(A).

20. Pursuant to Section 19 of FIFRA, EPA promulgated standards for repackaging pesticide products into refillable containers at 40 C.F.R. §§ 165.60 through 165.70.

21. Each time a person repackages a pesticide product into a refillable container and distributes or sells the pesticide, the person must generate and maintain records which contain or record the EPA registration number of the pesticide product distributed or sold in the refillable container, the date of repackaging, and the serial number or other identifying code of the refillable container. 40 C.F.R. § 165.70(j)(2).

22. Section 14(a)(1), 7 U.S.C. § 136l(a)(1), provides that any registrant, commercial applicator, wholesaler, dealer, retailer or other distributor who violates any provision of FIFRA may be assessed a civil penalty by the Administrator of not more than \$5,000 for each offense.

23. After January 15, 2018, the Administrator of EPA may assess a civil penalty against any registrant, commercial applicator, wholesaler, dealer, retailer or other distributor who

violates any provision of FIFRA of up to \$19,446 for each offense that occurred after November 2, 2015, where penalties are assessed on or after January 15, 2018, pursuant to Section 14(a)(1) of FIFRA, 7 U.S.C. § 136l(a)(1), and 40 C.F.R. Part 19.

Factual Allegations and Alleged Violations

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

25. At all times relevant to this Complaint, Respondent owned or operated a place of business located at 942 Wabasha Avenue, Saint Charles, Minnesota 55972.

26. The site located at 942 Wabasha Avenue, Saint Charles, Minnesota 55972 is an “establishment” as defined at Section 2(dd) of FIFRA, 7 U.S.C. § 136(dd), at all times relevant to this CAFO.

27. On November 15, 2010, the EPA registered TripleFlex Herbicide, EPA Registration Number (Reg. No.) 62719-570-524, under Section 3(c)(5) of FIFRA.

28. TripleFlex, EPA Reg. No. 62719-570-524, is a “pesticide” as that term is defined by Section 2(u) of FIFRA.

29. On November 15, 2010, the EPA accepted a label for TripleFlex, EPA Reg. No. 62719-570-524 (the TripleFlex label).

30. TripleFlex is the alternate brand name of the pesticide.

31. Surestart Herbicide is the primary brand name of the pesticide.

32. On February 27, 2014, EPA registered TripleFlex II, EPA Reg. No. 524-614, under Section 3(c)(5) of FIFRA.

33. TripleFlex II, EPA Reg. No. 524-614, is a “pesticide” as that term is defined by Section 2(u) of FIFRA.

34. On or about February 27, 2014, EPA accepted a label for TripleFlex II, EPA Reg.

No. 524-614 (the TripleFlex II label).

35. TripleFlex II is the alternate brand name of the pesticide.

36. The primary brand name of the pesticide is ACF900 Herbicide.

37. The TripleFlex and TripleFlex II labels are not identical.

38. On or about January 24, 2017, inspectors employed by the Minnesota Department of Agriculture (MDA) and duly authorized to conduct inspections under Sections 8 and 9 of FIFRA conducted an inspection at Respondent's establishment located at 942 Wabasha Avenue, Saint Charles, Minnesota 55972.

39. During the January 24, 2017 inspection, the MDA inspectors collected a copy of records of repackaging, records of production and distribution or sale, bin labels, and a statement regarding the labeling of TripleFlex II, EPA Reg. No. 524-614.

40. During calendar year 2016, Respondent repackaged TripleFlex II, EPA Reg. No. 524-614, into refillable containers at its Saint Charles, Minnesota establishment.

41. The bin label collected during the January 24, 2017 inspection and identified by Respondent as being affixed to quantities of TripleFlex II, EPA Reg. No. 524-614, distributed or sold in calendar year 2016 did not match the TripleFlex II label including, but not limited to, the following ways:

- a. The bin label identified the product's brand name to be "TripleFlex Herbicide."
- b. The bin label identified the product's registration number to be EPA Reg. No. 62719-570-524.
- c. The bin label contained the signal word CAUTION.
- d. The bin label contained the following Precautionary Statements:

*Causes Moderate Eye irritation • Prolonged or frequently Repeated Skin Contact May Cause Allergic Reactions in Some individuals
Avoid contact with eyes or clothing.*

- e. The bin label contained the following First Aid statement:

FIRST AID

IF IN EYES • Hold eye open and rinse slowly and gently with water for 15-20 minutes. Remove contact lenses, if present after the first 5 minutes, then continue rinsing eye. Call a poison control center or doctor for treatment advice.

Have the product container or label with you when calling a poison control center or doctor, or going for treatment. You may also contact 1-800-992-5994 day or night, for emergency medical treatment information.

- f. The bin label contained the following language in the Personal Protective Equipment (PPE) section:

Applicators and other handlers must wear:

- Coveralls over short sleeved shirt and short pants*
- Chemical-resistant gloves made of any waterproof material such as polyethylene or polyvinyl chloride*
- Chemical-resistant footwear plus socks*
- Protective eyewear*
- Chemical-resistant headgear for overhead exposure*
- Chemical-resistant apron when cleaning equipment, mixing, or loading*

- g. The bin label contained the following language in the Directions for Use:

i) Information

TripleFLEX Herbicide is designed for use on herbicide tolerant field corn and silage corn, such as Roundup Ready® or Liberty Link® field and silage corn. It may be used in preplant, preemergence, or early postemergence applications in corn. It is designed to provide early season control of grass and broadleaf weeds to allow for optimal timing of the in-crop postemergence application of glyphosate or glufosinate.

TripleFLEX Herbicide is a unique combination of the herbicides acetochlor, flumetsulam, clopyralid, and the safener dichlormid.

TripleFLEX Herbicide may be applied to the surface or incorporated into the top 1 to 2 inch layer of soil. It is recommended for use alone or in tank mix combinations for control or suppression of weeds, as indicated in the Target Weeds section of these use directions. TripleFLEX Herbicide controls weeds by interfering with normal germination and seedling development. TripleFLEX Herbicide may provide postemergence activity on 1 to 2 inch broadleaf weeds present at application but will not provide postemergence activity on grass weeds present at application. If emerged grass and broadleaf weeds are present at the time of application, best results will be achieved by tank mixing a

herbicide such as glyphosate (Durango® DMA or Roundup®), glufosinate (Liberty®) or paraquat (Gramoxone) and, or 2,4-D with TripleFLEX Herbicide.

ii) Fall Application:

[...]

If a spring application is made, the total rate of the fall plus spring application must not exceed the maximum labeled rate for corn grown on that soil.

42. On January 24, 2017, Respondent's Location Manager in Saint Charles, MN made a written, signed statement to a Minnesota Department of Agriculture inspector: "[w]e received Tripleflex II in October of 2015. The bulk tank was labeled Tripleflex II. We didn't change our accounting from Tripleflex to Tripleflex II. We also didn't update our labels from Tripleflex to Tripleflex II. Product (Tripleflex II) was distributed in 2016 in Mini bulks with Tripleflex labels instead of Tripleflex II labels."

43. On April 7, 2016, Respondent distributed or sold 131.29 gallons of TripleFlex II, EPA Reg. No. 524-614 (Receipt # 913).

44. On May 6, 2016, Respondent distributed or sold 137.84 gallons of TripleFlex II, EPA Reg. No. 524-614 (Receipt # 955).

45. On May 27, 2016, Respondent distributed or sold 122.75 gallons of TripleFlex II, EPA Reg. No. 524-614 (Receipt # 978).

46. On June 3, 2016, Respondent distributed or sold 115.53 gallons of TripleFlex II, EPA Reg. No. 524-614 (Receipt # 991).

47. The records of repackaging of TripleFlex II, EPA Reg. No. 524-614, collected during the January 24, 2017 inspection did not identify the registration number of the repackaged pesticide.

48. The records of repackaging of TripleFlex II, EPA Reg. No. 524-614, during

calendar year 2016 collected during the January 24, 2017 inspection identified the product's name and registration number to be "TripleFlex Herbicide, EPA Reg. No. 62719-570-524."

49. The records of repackaging of TripleFlex II, EPA Reg. No. 524-614, during calendar year 2016 collected during the January 24, 2017 inspection did not identify the correct brand name and registration number of the pesticide.

Civil Penalty

50. Pursuant to Section 14(a)(4) of FIFRA, 7 U.S.C. § 136l(a)(4), Complainant determined that an appropriate civil penalty to settle this action is \$31,301. In determining the penalty amount, Complainant considered the appropriateness of the penalty to the size of Respondent's business, the effect on Respondent's ability to continue in business, and the gravity of the violation. Complainant also considered EPA's FIFRA Enforcement Response Policy, dated December 2009.

51. Within 30 days after the effective date of this CAFO, Respondent must pay a \$31,301 civil penalty for the FIFRA violations by ACH electronic funds transfer, payable to "Treasurer, United States of America," and sent to:

US Treasury REX/Cashlink ACH Receiver
ABA: 051036706
Account Number: 310006, Environmental Protection Agency
CTX Format Transaction Code 22 – checking

In the comment area of the electronic funds transfer, state Respondent's name and the docket number of this CAFO.

52. Respondent must send a notice of payment that states Respondent's name and the case docket number to EPA at the following addresses when it pays the penalty:

Regional Hearing Clerk (E-19J)
U.S. EPA, Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604

Claudia Niess (LC-17J)
Pesticides and Toxics Compliance Section
U.S. EPA, Region 5
77 West Jackson Boulevard.
Chicago, Illinois 60604

Mark Koller (C-14J)
Office of Regional Counsel
U.S. EPA, Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604

53. This civil penalty is not deductible for federal tax purposes.

54. If Respondent does not pay timely the civil penalty, EPA may refer the matter to the Attorney General who will recover such amount by action in the appropriate United States district court under Section 14(a)(5) of FIFRA, 7 U.S.C. § 136l(a)(5). The validity, amount and appropriateness of the civil penalty are not reviewable in a collection action.

55. Pursuant to 31 C.F.R. § 901.9, Respondent must pay the following on any amount overdue under this CAFO. Interest will accrue on any amount overdue from the date payment was due at a rate established by the Secretary of the Treasury. Respondent must pay a \$15 handling charge each month that any portion of the penalty is more than 30 days past due. In addition, Respondent must pay a 6 percent per year penalty on any principal amount 90 days past due.

General Provisions

56. Consistent with the “Standing Order Authorizing E-Mail Service of Order and Other Documents Issued by the Regional Administrator or Regional Judicial Officer Under the Consolidated Rules,” dated March 27, 2015, the parties consent to service of this CAFO by e-

mail at the following valid e-mail addresses: koller.mark@epa.gov (for Complainant), and jared.peterson@fmjlaw.com (for Respondent). The parties waive their right to service by the methods specified in 40 C.F.R. § 22.6.

57. This CAFO resolves only Respondent's liability for federal civil penalties for the violations and facts alleged in the CAFO.

58. This CAFO does not affect the rights of EPA or the United States to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law.

59. This CAFO does not affect Respondent's responsibility to comply with FIFRA and other applicable federal, state and local laws.

60. This CAFO is a "final order" for purposes of EPA's FIFRA Enforcement Response Policy.

61. The terms of this CAFO bind Respondent, its successors and assigns.

62. Each person signing this agreement certifies that he or she has the authority to sign for the party whom he or she represents and to bind that party to its terms.

63. Each party agrees to bear its own costs and attorneys fees, in this action.

64. This CAFO constitutes the entire agreement between the parties.

Progressive Ag Center, LLC, Respondent

8-31-18
Date

Glenn M. Lutteke
Glenn Lutteke
Manager
Progressive Ag Center, LLC

United States Environmental Protection Agency, Complainant

9-17-18
Date

Tinka G. Hyde
Tinka G. Hyde
Director
Land and Chemicals Division

In the Matter of:
Progressive Ag Center, LLC
Docket No. FIFRA-05-2018-0045

Final Order

This Consent Agreement and Final Order, as agreed to by the parties, shall become effective immediately upon filing with the Regional Hearing Clerk. This Final Order concludes this proceeding pursuant to 40 C.F.R. §§ 22.18 and 22.31. IT IS SO ORDERED.

September 18, 2018

Date

Ann L. Coyle

Ann L. Coyle
Regional Judicial Officer
United States Environmental Protection Agency
Region 5

Consent Agreement and Final Order
In the Matter of: Progressive Ag Center, LLC
Docket Number: FIFRA-05-2018-0045

CERTIFICATE OF SERVICE

I certify that I served a true and correct copy of the foregoing Consent Agreement and Final Order, docket number FIFRA-05-2018-0045, which was filed on September 19, 2018, in the following manner to the following addressees:

Copy by E-mail to
Attorney for Complainant: Mr. Mark J. Koller
koller.mark@epa.gov

Copy by E-mail to Respondent: Mr. Jared D. Peterson
jared.peterson@fmjlaw.com

Copy by E-mail to
Regional Judicial Officer: Ms. Ann Coyle
coyle.ann@epa.gov

Dated: September 19, 2018



LaDawn Whitehead
Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 5