

FILED

January 29, 2024

11:12AM

U.S. EPA REGION 7
HEARING CLERK

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

BEFORE THE ADMINISTRATOR

In the Matter of:

Emrich Aerial Spraying LLC,

Respondent.

)
)
)
)
)

Docket No. FIFRA-07-2022-0133

CONSENT AGREEMENT AND FINAL ORDER

Preliminary Statement

The U.S. Environmental Protection Agency, Region 7 (EPA or Complainant), and Emrich Aerial Spraying LLC (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. § 136*l* and in accordance with the Consolidated Rules of Practice.

Parties

2. Complainant, by delegation from the Administrator of EPA and the Regional Administrator of EPA Region 7 is the Director of the Enforcement and Compliance Assurance Division of EPA Region 7.
3. The Respondent is Emrich Aerial Spraying LLC, a limited liability company in good standing under the laws of the state of Nebraska.

Statutory and Regulatory Background

4. 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.*

5. Section 12(a)(2)(G) of FIFRA, 7 U.S.C. § 136j(a)(2)(G), states it shall be unlawful for any person to use any registered pesticide in a manner inconsistent with its labeling.
6. 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.
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(e)(3) of FIFRA, 7 U.S.C. § 136(e)(3), defines the term “commercial applicator” to mean an applicator (whether or not the applicator is a private applicator with respect to some uses) who uses or supervises the use of any pesticide which is classified for restricted use for any purpose or on any property other than as provided by paragraph (2).
9. Section 2(ee) of FIFRA, 7 U.S.C. § 136(ee), defines the term “to use any registered pesticide in a manner inconsistent with its labeling” to mean to use any registered pesticide in a manner not permitted by the labeling.

General Factual Allegations

10. Respondent is and at all times referred to herein was, a “person” within the meaning of FIFRA.
11. Herve Marchadier is a commercial applicator as defined by Section 2(e)(3) of FIFRA, 7 U.S.C. § 13(e)(3), certified by the Nebraska Department of Agriculture.
12. Delaro 325 SC Fungicide, EPA Reg. No. 264-1055 (“Delaro”) is a pesticide registered with the EPA. Its active ingredients are Prothioconazole and Trifloxystrobin.
13. Bifen 25% EC, Insecticide/Miticide, EPA Reg. No. 83520-4 (“Bifen”) is a restricted use pesticide registered with the EPA. Its active ingredient is Bifenthrin.
14. The registered label for Delaro contains the following directions:
 - a. Under “directions for use,” the label states “do not apply this product in a way that will contact workers or other persons, either directly or through drift.”
 - b. Under “application instructions,” the label states “avoid application under conditions when uniform coverage cannot be obtained or when excessive spray drift may occur.”
 - c. Under “spray drift management,” the label states “do not make applications when conditions favor drift beyond the target application area. When drift may be a problem, take measures to reduce drift, including:” (1) “do not spray if wind speeds are or become excessive. Do not spray if wind speed is 15 mph or greater. If nontarget crops are located downwind, use caution when spraying if wind is

present. Do not spray if winds are gusty.” and (2) “Use caution when conditions are favorable for drift (high temperatures, drought, low relative humidity).”

15. The registered label for Bifen contains the following directions:
 - a. Under “directions for use,” the label states “do not apply this product in a way that will contact workers or other persons, either directly or through drift.”
 - b. Under “spray drift requirements,” the label states “only apply this product if the wind direction favors on-target deposition. Do not apply when wind velocity exceeds 15 mph” and “wind speed must be measured adjacent to the application site on the upwind side, immediately prior to application.”
16. On or about July 29, 2019, Herve Marchadier, acting as an agent of Respondent, applied the pesticides Delaro and Bifen via aerial application to the following property owned by the Krueger Family Trust: 2260 W Rokeby Road, Lincoln, Nebraska 68523 (“intended area of application”).
17. At the time of the aerial applications, a person (“neighbor”) lived on property (“neighboring property”) southeast of the intended areas of application.
18. On July 30, 2019, samples were taken from the following locations and tested by South Dakota Agricultural Laboratories for Bifenthrin, Prothioconazole, and Trifloxystrobin:
 - a. Clover from a hay field south of the neighboring property;
 - b. An apple tree located on the neighboring property; and
 - c. A shirt worn by the neighbor on the neighboring property during the time of the subject aerial applications.
19. As a result of the testing described in paragraph 18(a), clover from the hay field was found to contain Bifenthrin and Trifloxystrobin.
20. As a result of the testing described in paragraph 18(b), the apple tree was found to contain Bifenthrin and Trifloxystrobin.
21. As a result of the testing described in paragraph 18(c), Mr. Sherwood’s shirt was found to contain Bifenthrin.

Allegations of Violations

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

Count 1

23. The factual allegations stated in paragraphs 10 through 21 are realleged and incorporated as if fully stated herein.

24. Pursuant to 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.
25. On or about July 29, 2019, Respondent's aerial application of Delaro on 2260 W Rokeby Road, Lincoln, Nebraska 68523 resulted in (1) drift onto the neighboring property and (2) drift onto property south of the neighboring property.
26. Because Respondent's aerial application of Delaro resulted in drift, Respondent aerially applied Delaro when excessive spray drift occurred, when conditions favored drift beyond the target application area, and/or when Respondent failed to take measures to reduce drift. Therefore, Respondent failed to follow the directions for use on the labels of each pesticide, and therefore used each pesticide in a manner inconsistent with its labeling.
27. Respondent violated Section 12(a)(2)(G) of FIFRA, 7 U.S.C. § 136j(a)(2)(G), by using the registered pesticide Delaro in a manner inconsistent with its labeling.

Count 2

28. The factual allegations stated in paragraphs 10 through 21 are realleged and incorporated as if fully stated herein.
29. Pursuant to 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.
30. On or about July 29, 2019, Respondent's aerial application of Bifen on 2260 W Rokeby Road, Lincoln, Nebraska 68523 resulted in (1) drift onto the neighboring property, (2) drift onto property south of the neighboring property, and (3) contact with a person.
31. Because Respondent's aerial application of Bifen resulted in (1) drift and (2) contact with persons, Respondent failed to follow the directions for use on the label, and therefore used the pesticide in a manner inconsistent with its labeling.
32. Respondent violated Section 12(a)(2)(G) of FIFRA, 7 U.S.C. § 136j(a)(2)(G), by using the registered pesticides Delaro 325 SC Fungicide, EPA Reg. No. 264-1055 and Bifen 25% EC, Insecticide/Miticide, EPA Reg. No. 83520-4 in manners inconsistent with their labeling.

CONSENT AGREEMENT

33. For the purpose of this proceeding, as required by 40 C.F.R. § 22.18(b)(2), Respondent:
 - a. admit 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.
34. 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.
35. Respondent and EPA agree to the terms of this Consent Agreement and Final Order and Respondent agrees to comply with the terms specified herein.
36. Respondent and EPA agree to conciliate this matter without the necessity of a formal hearing and to bear their respective costs and attorneys' fees.
37. Respondent consents to receiving the filed Consent Agreement and Final Order electronically at the following e-mail address: *tsiem@eslaw.com*.

Penalty Payment

38. Respondent agrees that, in settlement of the claims alleged herein, Respondent shall pay a civil penalty of two thousand dollars (\$2,000).
39. 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 979078
St. Louis, Missouri 63197-9000

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

40. 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

Katherine Kacsur, Attorney
Office of Regional Counsel
U.S. Environmental Protection Agency, Region 7
11201 Renner Boulevard
Lenexa, Kansas 66219.

41. Respondent understands that its 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

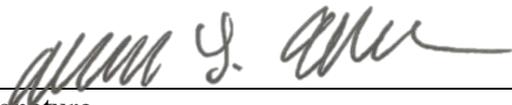
42. Full payment of the penalty proposed in this Consent Agreement shall only resolve Respondent's liability for federal civil penalties for the violations alleged herein. Complainant reserves the right to take any enforcement action with respect to any other violations of FIFRA or any other applicable law.
43. 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.
44. Respondent certifies by the signing of this Consent Agreement that it is presently in compliance with all requirements of FIFRA and its implementing regulations.
45. 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.
46. Complainant reserves the right enforce the terms and conditions of this Consent Agreement and Final Order.
47. 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

48. By signing this Consent Agreement, the undersigned representative of Respondent certifies that they are fully authorized to execute and enter into the terms and conditions of this Consent Agreement and has the legal capacity to bind the party they represent to this Consent Agreement.

49. 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.
50. The penalty specified herein shall represent civil penalties assessed by EPA and shall not be deductible for purposes of Federal, State and local taxes.
51. This Consent Agreement and Final Order shall apply to and be binding upon Respondent and Respondent's, 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
EMRICH AERIAL SPRAYING LLC



Signature

01-25-2024

Date

Angela F Emrich

Printed Name

Member

Title

COMPLAINANT
U. S. ENVIRONMENTAL PROTECTION AGENCY

David Cozad
Director
Enforcement and Compliance Assurance Division

Date

Katherine Kacsur
Office of Regional Counsel

Date

FINAL ORDER

Pursuant to Section 14(a) of FIFRA, 7 U.S.C. § 136l(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. § 22.31(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
(FOR EPA USE ONLY.)

I certify that that a true and correct copy of the foregoing Consent Agreement and Final Order in the matter of Emrich Aerial Spraying, EPA Docket No. FIFRA-07-2022-0133, was sent this day in the following manner to the addressees:

Copy via Email to Complainant:

Katherine Kacsur
Office of Regional Counsel
Kacsur.katherine@epa.gov

Mark Leshner
Enforcement and Compliance Assurance Division
Leshner.mark@epa.gov

Milady Peters
Office of Regional Counsel
Peters.milady@epa.gov

Copy via Email to Respondent:

Tiernan Siems
Attorney for Respondent
tsiem@eslaw.com

Dated this _____ day of _____, _____.

Signed