

**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)
)
Nutrien Ag Solutions, Inc.,) **Docket No. FIFRA-07-2021-0082**
)
Respondent.)

CONSENT AGREEMENT AND FINAL ORDER

Preliminary Statement

The U.S. Environmental Protection Agency, Region 7 (EPA or Complainant), and Nutrien Ag Solutions, Inc. (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.
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 Region 7, and the Director of the Enforcement and Compliance Assurance Division, Region 7, is the Branch Chief of the Chemical Branch, EPA, Region 7.
4. Respondent is Nutrien Ag Solutions, Inc., a corporation registered in Colorado and doing business in Kansas.

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 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, except to the extent that distribution or sale otherwise has been authorized by EPA under FIFRA.

7. Section 12(a)(2)(G) of FIFRA 7 U.S.C. § 136j(a)(2)(G), states that it shall be unlawful for any person to use any registered pesticide in a manner inconsistent with its labeling.

8. 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 the use of any registered pesticide in a manner not permitted by the labeling, with certain exceptions not relevant here.

9. Section 2(p)(1) of FIFRA, 7 U.S.C. § 136(p)(1), defines the term “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(p)(2) of FIFRA, 7 U.S.C. § 136(p)(2), defines the term “labeling” to mean all labels and all other written, printed, or graphic matter accompanying the pesticide or device at any time; or to which reference is made on the label or in literature accompanying the pesticide or device.

11. 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).

12. 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.

13. 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.

14. 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.

15. Section 2(e)(3) of FIFRA, 7 U.S.C. § 136(e)(2), defines “commercial applicator” to mean an applicator 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 the definition of “private applicator” under Section 2(e)(2) of FIFRA, 7 U.S.C. § 136(e)(2).

16. 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 Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701, as amended, and 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 to \$7,500 for violations that occurred before November 2, 2015, and to \$20,528 for violations that occur after November 2, 2015, and for which penalties are assessed on or after December 23, 2020.

General Factual Allegations

17. Respondent is a corporation and is therefore a “person” within the meaning of FIFRA.

18. Respondent is a commercial pesticide applicator with a facility located at 644 22nd Avenue, Galva, Kansas (Facility).

19. Dicamba is a pesticide used for post-emergent control of broadleaf weeds in corn, soybeans, and a variety of other food and feed crops. Misuse of products containing dicamba may cause serious damage to non-dicamba-tolerant soybeans and other sensitive crop and non-crop plants.

20. On June 8, 2020, EPA issued a cancellation order pursuant to Sections 3 and 6 FIFRA for three restricted use pesticide products containing the active ingredient dicamba: Xtendimax with Vaporgrip Technology, EPA Registration Number 524-617; Engenia, EPA Reg. No. 7969-345; and FeXapan, EPA Reg. No. 352-913. EPA issued the cancellation order after the U.S. Court of Appeals for the Ninth Circuit vacated the registrations of these three pesticide products on June 3, 2020. EPA’s cancellation order allowed commercial applicators to use existing stocks of these pesticide products until July 31, 2020, but prohibited commercial applicators from using existing stocks inconsistent in any respect with the previously-approved labeling accompanying the products. The order further provided that any distribution, sale, or use of the pesticide products in a manner inconsistent with the order will be considered a violation of Section 12(a)(2)(K) and/or 12(a)(1)(A) of FIFRA.¹

21. On July 1, 2020, the Kansas Department of Agriculture (KDA) conducted an inspection to investigate Respondent’s use of the dicamba pesticide product Strut, EPA Reg. No. 34704-1043, to a soybean field in McPherson County, Kansas on June 29, 2020. On July 21, 2020, KDA referred the matter to EPA.

22. On July 29, 2020, KDA, on behalf of EPA, conducted a follow-up inspection at the Facility pursuant to Sections 8 and 9 of FIFRA, requesting Respondent’s records for all applications involving a dicamba pesticide product from May 1, 2020 through July 29, 2020.

¹ See https://www.epa.gov/sites/production/files/2020-06/documents/final_cancellation_order_for_three_dicamba_products.pdf.

23. On August 28, 2020, Respondent submitted to EPA the requested application records for applications of dicamba pesticide products to crop fields in rural Kansas from May 1, 2020 through July 29, 2020. The records included applications of the following general use pesticide products: Rifle, EPA Reg. No. 34704-861; Strut, EPA Reg. No. 34704-1043; Diflex, EPA Reg. No. 264-1184; and Status, EPA Reg. No. 7969-242. The records also included applications of the following restricted use pesticide products: Xtendimax with Vaporgrip Technology, EPA Reg. No. 524-617; Engenia, EPA Reg. No. 7969-345; and Tavium, EPA Reg. No. 100-1623.

24. Respondent's use of the restricted use pesticide products Xtendimax with Vaporgrip Technology, EPA Reg. No. 524-617, and Engenia, EPA Reg. No. 7969-345, are subject to EPA's June 8, 2020 cancellation order.

Allegations of Violations

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

Counts 1 through 27

26. The facts stated in Paragraphs 17 through 24 above are herein incorporated.

27. 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, except to the extent that distribution or sale otherwise has been authorized by EPA under FIFRA.

28. On June 3, 2020, the registrations for the restricted use pesticide products Xtendimax with Vaporgrip Technology, EPA Reg. No. 524-617, and Engenia, EPA Reg. No. 7969-345 were vacated. EPA's June 8, 2020 cancellation order allowed applicators to use existing stocks of these restricted use pesticide products until July 31, 2020, but prohibited use inconsistent in any respect with the previously-approved labeling accompanying those products. The order further provided that any distribution, sale, or use of the pesticide products in a manner inconsistent with the order will be considered a violation of Section 12(a)(2)(K) and/or 12(a)(1)(A) of FIFRA.

29. Respondent's application records revealed that, from May 1, 2020 to July 1, 2020, Respondent distributed or sold Xtendimax with Vaporgrip Technology, EPA Reg. No. 524-617, and Engenia, EPA Reg. No. 7969-345, inconsistent with labeling requirements on at least 27 occasions. This included documentation of Respondent applying the pesticide products during periods of higher and lower wind speeds than label requirements and when there was high potential for the pesticides to drift to sensitive areas, and failure to follow label recordkeeping requirements.

30. Respondent violated EPA's June 8, 2020 cancellation order and Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), by selling or distributing a pesticide whose registration has been cancelled or which is not registered under Section 3 of FIFRA, 7 U.S.C. § 136a.

Counts 28 through 60

31. The facts stated in Paragraphs 17 through 24 above are herein incorporated.

32. Section 12(a)(2)(G) of FIFRA 7 U.S.C. § 136j(a)(2)(G), states that it shall be unlawful for any person to use any registered pesticide in a manner inconsistent with its labeling.

33. Respondent's application records revealed that from May 1, 2020 through July 1, 2020, Respondent used the general use pesticide products Rifle, EPA Reg. No. 34704-861; Strut, EPA Reg. No. 34704-861; Diflex, EPA Reg. No. 264-1184; Status, EPA Reg. No. 7969-242; and the restricted use product Tavium, EPA Reg. No. 100-1623, in a manner not permitted by the products' labeling on at least 33 occasions. This included documentation of Respondent applying the pesticide products during periods of higher wind speeds than label requirements and post-planting of crops contrary to label requirements, and failure to follow label recordkeeping requirements.

34. Respondent violated Section 12(a)(2)(G) of FIFRA 7 U.S.C. § 136j(a)(2)(G), by using registered pesticides in a manner inconsistent with their labeling.

CONSENT AGREEMENT

35. 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.

36. 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.

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

38. Respondent consents to receiving the filed Consent Agreement and Final Order electronically at the following e-mail address: *sandi.shannonschulz@nutrien.com*.

Penalty Payment

39. Respondent agrees that, in settlement of the claims alleged herein, Respondent shall pay a civil penalty of \$668,100 as set forth below.

40. 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>.

41. 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

Kasey Barton, Attorney
barton.kasey@epa.gov.

42. 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

43. 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.

44. 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.

45. Respondent certifies by the signing of this Consent Agreement that based on information and belief formed after reasonable inquiry it is presently in compliance with Sections 12(a)(1)(A) and 12(a)(2)(G) of FIFRA, 7 U.S.C. §§ 136j(a)(1)(A) and 136j(a)(2)(G), at the Facility.

46. 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.

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

General Provisions

48. 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.

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 the filing of the Final Order 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 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
NUTRIEN AG SOLUTIONS, INC.

Date: October 13, 2021

By: 

Jeff Tarsi

Print Name

Sr. V.P. North American Operations

Title

COMPLAINANT
U. S. ENVIRONMENTAL PROTECTION AGENCY

Date: _____

Candace Bednar
Chemical Branch Chief
Enforcement and Compliance Assurance Division

Kasey Barton
Office of Regional Counsel

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

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:

Kasey Barton
barton.kasey@epa.gov

Mark Lesher
lesher.mark@epa.gov

Copy via Email to Respondent:

Sandi Shannon Schultz
sandi.shannonschultz@nutrien.com

AND

Copy via email to:

Kelly Navinsky-Wenzl
kelly.navinsky-wenzl@ks.gov

Dated this _____ day of _____, _____.

Signed