

**BEFORE THE
DEPARTMENT OF FOOD AND AGRICULTURE STATE OF
CALIFORNIA**

In the Matter of the Accusation against:

AGRO RESEARCH INTERNATIONAL LLC, Respondent

Case No. FERTAP-21-LC01

OAH No. 2023030094

DECISION

The attached Proposed Decision of the Administrative Law Judge is hereby adopted by the Department of Food and Agriculture as the Decision in the above-entitled matter.

This Decision shall become effective on March 22, 2024.

IT IS SO ORDERED this 22nd day of March 2024.

By: Karen Ross

**BEFORE THE
SECRETARY OF THE
DEPARTMENT OF FOOD AND AGRICULTURE STATE OF
CALIFORNIA**

In the Matter of the Accusation Against:

AGRO RESEARCH INTERNATIONAL, LLC, Respondent.

Agency Case No. FERTAP-21-LC01 OAH

No. 2023030094

PROPOSED DECISION

Administrative Law Judge Carl D. Corbin, State of California, Office of Administrative Hearings, heard this matter on December 11 through 14, 2023, by videoconference.

Supervising Deputy Attorney General Michael T. Zarro and Deputy Attorneys General Lindsay N. Walter and Sarae T. Snyder represented complainant Natalie Krout-Greenberg, Director of the Division of Inspection Services of the California Department of Food and Agriculture.

Marc Lajeunesse, President/Chief Executive Officer, appeared on behalf of respondent Agro Research International, LLC.

The record was held open for the parties to submit written closing arguments. The arguments were timely submitted and marked for identification as follows:

complainant's post-hearing argument is Exhibit 508, respondent's post-hearing arguments are Exhibit E and F¹, and complainant's reply argument is Exhibit 509. The record closed and the matter was submitted for decision on February 16, 2024.

FACTUAL FINDINGS

Jurisdictional and Background Matters

1. The Division of Inspection Services (Division) of the California Department of Food and Agriculture (Department) is responsible for enforcing the Fertilizing Materials Act, Food and Agricultural Code sections 14501 through 14682,² through the Fertilizing Materials Inspection Program (Fertilizer Program). The Division is also responsible for enforcing the California Organic Food and Farming Act, sections 46000 through 46029 and Health and Safety Code sections 110810 through 110959, which assumes the authority of the Federal Organic Foods Production Act of 1990 (National Organic Program) to ensure products sold in California meet state and federal organic standards. The Division is comprised of three primary branches: the Inspection and Compliance Branch; the Feed, Fertilizer, and Livestock Drug Branch; and the Center for Analytical Chemistry (CAC). The Feed, Fertilizer, and Livestock Drug Branch includes the Fertilizer Program.

¹ Respondent submitted two arguments that appear identical. Both were considered.

² Statutory references are to the Food and Agricultural Code unless otherwise noted.

2. The Fertilizing Materials Act and the California Organic Food and Farming Act govern the conduct of manufacturers and distributors of fertilizing materials and organic products in California. Every person who manufactures or distributes fertilizing materials shall, before engaging in the activity, obtain a license from the Secretary of the Department for each plant and business location that they operate. In addition, each differing label for a fertilizing material must be registered with the Department. (§ 14591, subd. (a).) Fertilizing materials are materials that benefit plants, soils, or their growing environment and are categorized based on type, such as organic input material and auxiliary soil and plant substances. The Division does not regulate pesticides or herbicides because they are not fertilizing materials. The California Department of Pesticide Regulation regulates pesticides and herbicides.

3. In May 2018, respondent Agro Research International, LLC (Agro Research) held Department Fertilizing Materials License No. 458335 (License) when it submitted an application to the Fertilizer Program for registration of Agro Gold WS as organic input material. An organic input material includes "any bulk or packaged fertilizer...auxiliary soil and plant substance...to be used in organic crop and food production" that complies with the National Organic Program standards. (§ 14550.5.) Based on the documentation received from respondent, the Fertilizer Program classified Agro Gold WS as an auxiliary soil and plant substance. An auxiliary soil and plant substance is a:

chemical or biological substance or mixture of substances or device distributed in this state to be applied to soil, plants, or seeds for soil corrective purposes; or that is intended to improve germination, growth, yield, product quality, reproduction, flavor, or other desirable

characteristics of plants; or that is intended to produce any chemical, biochemical, biological, or physical change in soil...

(§ 14513.)

4. On June 19, 2019, based on the documentation received from respondent, the Fertilizer Program authorized respondent to sell Agro Gold WS as organic input material. The final approved label described the liquid product as a "biological amendment" used to "improve soil" through the application of the beneficial bacteria *Baal/us megaterium*. The June 10, 2019, formula sheet listed only two ingredients: water (65 percent of the final product) and *Bacillus megaterium* (35 percent of the final product). Sentinel Biologics was listed in respondent's documentation as the supplier of *Bacillus megaterium*. However, respondent, as the manufacturer of Agro Gold WS, was the "label guarantor" of the final product.

(§ 14541.) The label and formula sheet did not list diquat or glyphosate.

5. On or about January 7, 2021, respondent applied to the Department for renewal of its License. On February 23, 2021, the Department served respondent with a Notice of Intent to Refuse to Renew respondent's License. Respondent elected not to challenge the Department's decision and respondent's License has not been renewed.

6. On May 23, 2022, the Department served respondent with a Notice of Penalty and Adverse Determination. On June 16, 2022, respondent requested a hearing.

7. On June 25, 2022, complainant Natalie Krout-Greenberg issued an accusation in her official capacity as Director of the Division of the Department, alleging three causes for discipline against respondent associated with its product

Agro Gold WS: false or misleading labeling, distribution of fertilizing materials that threaten public safety, and non-compliance with state and national organic programs. Complainant, based on these allegations, is seeking: a determination that respondent violated various statutes, an imposition of administrative penalties in the total amount of \$1,890,000, costs for investigation, and "reasonable attorney fees." Respondent filed a notice of defense and this proceeding followed.

Complaint and Investigation

8. On August 14, 2020, the Fertilizer Program received a complaint through its online database that Agro Gold WS contained the synthetic herbicide diquat. The National Organic Program prohibits the use of diquat in organic production.

9. Between March 19, 2019, and December 20, 2020, Andaman Ag (Andaman) was the sole distributor of Agro Gold WS for sale in California.

10. The Division began an investigation into the composition of Agro Gold WS. Between August 24, 2020, and December 21, 2020, Special Investigators and Environmental Scientists from the Fertilizer Program collected 17 samples of Agro Gold WS from six agricultural retailers or distributors located in different cities in California. The collection of samples was taken under the supervision of Nicholas Young, Environmental Program Manager.³ The 17 samples were sealed unopened containers of liquid Agro Gold WS taken from the channels of trade in California. The six agricultural retailers or distributors received Agro Gold WS from Andaman and sold the product to consumers or other retailers (who would then sell the

³ At the time of the investigation, Young was a Senior Environmental Scientist Supervisor.

product to end-users). The evidence establishes that all the Special Investigators and Environmental Scientists who collected the 17 samples complied with the Department's laws and regulations in following chain of custody protocol in obtaining each of the samples and providing the samples to be tested by the CAC Food and Safety Lab.

11. Through its investigation, the Division discovered that Agro Gold WS was sold in a co-package with an organic herbicide, Weed Slayer. As set forth in Factual Finding 2, the Division does not regulate herbicides.

12. CAC Environmental Program Manager Poonam Chandra⁴ testified at hearing. Chandra has a Bachelor of Science degree in Chemistry and an Executive Master of Business Administration degree. She has worked for 17 years for the CAC in various capacities focusing on enforcement and regulatory requirements related to agricultural chemicals as they relate to environmental and public safety. Chandra's testimony is given great weight as she testified in a credible, persuasive manner consistent with the evidence. Chandra oversaw the testing and ensured quality control and quality assurance in the analysis of the 17 samples using liquid chromatography with triple quadrupole mass spectrometry {LC MS/MS}.

13. In November 2020, the CAC Food and Safety Lab completed an analysis of the first 10 of 17 collected samples of Agro Gold WS and detected diquat in each sample.

⁴ At the time of the investigation, Chandra was a Residue and Food Safety Laboratory Supervisor, for the CAC.

14. On November 12, 2020, following a new lead, Young requested Chandra test the first 10 of 17 collected samples for glyphosate. Glyphosate is an herbicide, and the National Organic Program prohibits its use in organic production. Gloves and protective eye gear are recommended when using products with diquat and glyphosate to prevent irritation. On December 1, 2020, the CAC Food and Safety Lab reported the presence of glyphosate in the 10 samples. In December 2020, the CAC Food and Safety Lab analyzed the remaining seven samples and reported the presence of diquat and glyphosate in each sample.

15. CAC Food and Safety Lab analysis of the 17 samples through LC MS/MS found median levels of diquat at 2,000 ppm (2.0 mg/ml) and glyphosate at 80,000 to 90,000 ppm (80 to 90 mg/ml). Chandra persuasively testified the results of these 17 samples were consistent despite respondent's arguments otherwise. Furthermore, Chandra persuasively testified that the CAC Food and Safety Lab results were consistent with the results from the regulatory agencies in four other states (Washington, Oregon, Idaho, and Florida). Between December 8, 2020, and January 27, 2021, these four states completed an analysis of samples of Agro Gold WS and found the presence of diquat and glyphosate in each of the samples. Chandra testified that the amount of diquat detected in Agro Gold WS in these collective test results would be sufficient to act as an herbicide and that she would not have expected diquat to be in a fertilizing material.

TESTING RESULTS FROM RESPONDENT

16. As part of the registration process referenced in Factual Finding 3, respondent agreed to facilitate the investigation of complaints and evaluation of Agro Gold WS.

17. In October 2020, respondent had Agro Technologies test a sample of Agro Gold WS. The evidence did not establish whether or not the Division provided this sample as a sub-sample tested by the CAC Food and Safety Lab. Agro Technologies used a "chlorine water" protocol to test the sample for bromide. The test results stated, "while not entirely conclusive...gives us direction to think that the [] sample contains no bromide ions in it." Chandra persuasively testified that a competent professional analyzing agricultural products would not use a chlorine water protocol to detect the presence of diquat or glyphosate in liquids.

18. At the request of respondent, the Division provided five sub-samples, from its samples, of Agro Gold WS to Apical Crop Science LLC (Apical), a company associated with David Knaus, who testified at hearing on behalf of respondent. Knaus has a Bachelor of Science degree in Business Administration. He was a professional organic grower from 2003 until 2011 at which time he worked as a full-time professor teaching sustainable and organic agriculture for various colleges in addition to performing services as a consultant. Knaus founded Apical in 2016 as a consulting firm dedicated to the implementation and proliferation of organic and regenerative agriculture techniques. Knaus admitted to having limited knowledge regarding agricultural chemicals related to laboratory testing, methodologies, and analysis.

19. In November 2020, Apical tested the five sub-samples (referenced in Factual Finding 18) using a method called the "4500-Br-" test. Apical also tested two samples of Agro Gold WS from a lot not sampled by the Division. Apical's testing did not detect the presence of bromide.⁵

⁵ Bromine is a chemical element in the periodic table. The term bromide is used when bromine is combined with another element.

Respondent argued, and Knaus testified at hearing, that bromine is often used to stabilize diquat in a solution, and because Apical's testing did not detect bromide in the Agro Gold WS samples and sub-samples; there must have been no diquat present.

Chandra testified that in addition to bromide, chlorine can also be used to stabilize diquat. Chandra further persuasively testified that it is the industry standard to directly analyze for diquat as that is the active part of the herbicide and "nobody tests for the chloride or the bromide ion. [t]he diquat is what is tested." Chandra persuasively opined that Apical's test results for bromine and bromide do not address the presence of diquat or glyphosate in the tested Agro Gold WS samples and sub-samples.

20. In November 2020, respondent had Avomeen, a testing company, conduct testing on a dry powder that was represented to be the product supplied by Sentinel Biologics to respondent prior to respondent adding water in the production of Agro Gold WS. The 17 samples tested by the CAC Food and Safety Lab were in a liquid form taken directly from a sealed Agro Gold WS product from the channels of trade in California. Respondent requested Avomeen test the dry powder to detect the presence of diquat and glyphosate. Avomeen conducted the testing using the LC MS/MS and HILIC (Hydrophilic Interaction Liquid Chromatography) methods. Avomeen's testing concluded that diquat and glyphosate were not found in the dry powder sample above the limit of detection. Avomeen's testing report quality statement stated the "work reported herein was conducted non-GMP [good manufacturing practices] and was not reviewed by Quality Assurance." Chandra persuasively testified that Avomeen's testing results were not reliable for multiple reasons: lack of chain of custody, lack of good manufacturing practices, lack of

quality assurance, failure to use the proper vials and filters, failure to use multiple precursor ions to avoid false peak readings, and the use of HILIC, a "very problematic method."

21. In December 2020, respondent had Agro Technologies test the five sub-samples of Agro Gold WS provided by the Division (referenced in Factual Finding 18) using a "potassium permanganate protocol" to detect the presence of bromide. The test results found four of the samples "to be free of bromide" and the remaining sample had "weird behavior," so no significant conclusion was reached on that sample. Chandra persuasively testified that a competent professional analyzing agricultural products would not use a potassium permanganate protocol to detect the presence of diquat or glyphosate in liquids.

22. As part of its investigation, the Division considered the testing results conducted on behalf of respondent set forth in Factual Findings 17 through 21. In his testimony at hearing, Lajeunesse admitted that none of the lab results respondent submitted to the Division directly tested Agro Gold WS, as it was distributed in California, for diquat or glyphosate.

STATEWIDE QUARANTINE AND STOP USE NOTICE

23. On December 4, 2020, the Fertilizer Program issued a Statewide Quarantine and Removal From Sale Order that, in part, stated Agro Gold WS was found to contain diquat and glyphosate despite being registered as an organic fertilizing material; diquat and glyphosate are prohibited substances that do not comply with the National Organic Program; and the product posed a health risk because the two synthetic herbicides were not disclosed on the label; and ordered anyone in possession of the product to hold the product until further notice and not engage in

any further sales or distribution subject to criminal and/or civil penalties.

24. On December 4, 2020, the Department State Organic Program issued a Stop Use Notice with information similar to that set forth in Factual Finding 23.

25. On December 4, 2020, complainant notified the National Organic Program regarding the Stop Use Notice set forth in Factual Finding 24. The letter, in part, requested assistance from the National Organic Program to notify all accredited organic certifiers to direct them to immediately inform their clients that Agro Gold WS cannot be used in organic production.

INVOICES OF AGRO GOLD WS

26. There were 126 invoices of Agro Gold WS from May 30, 2019, through October 8, 2020, associated with the lot numbers of the 17 samples of Agro Gold WS tested by the CAC Food and Safety Lab. Each invoice documents the distribution into California of Agro Gold WS from respondent through Andaman to various buyers, including to agricultural retailers, some of whom further distributed the product to other retailers or end-users. The 126 invoices represent 23,600 gallons of Agro Gold WS that were sold into California. Young testified that it would have been "an extreme challenge due to limited resources" to track all additional sales of the product from retailers to all end-users so the 126 invoices represent a conservative number of sales of Agro Gold WS into California and likely significantly underestimate the total number of individuals and entities affected.

ADMINISTRATIVE PENALTY CALCULATION

27. Complainant testified at hearing in a knowledgeable, credible, and persuasive manner.

28. Complainant opined consumers were harmed in this matter because: they may have applied the product without using appropriate protective gear, the organic label "is everything," consumers may have paid a premium for an organic product that was not actually organic, and use of the product may have affected organic growers' certification status. Complainant further testified that California is the only state in the nation with its own organic program and the Department takes *very* seriously its mission of public protection.

29. Complainant opined that the maximum administrative penalty of \$5,000 for each violation was appropriate because:

just their sheer nature, false and misleading, the adulteration of the product, and that it did have serious consequences to public health. Furthermore, in our penalty matrix that sits under our code of regulations all three of these particular instances were serious in nature, and cause for the maximum penalty of \$5,000 each.

Complainant further opined she considered the three statutory factors in determining the amount of the administrative penalty assessed for each violation: the nature of the violation, the seriousness of the effect of the violation upon effectuation of the purpose of the Fertilizer Program and the State Organic Program, and the impact of the penalty on the violator, including the deterrent effect on future violations. (§§ 14651.5, subd. (a), 46017, subd. (a).)

30. In explaining the basis for the total administrative penalty, Complainant explained that based on 126 invoices, with the inclusion of diquat or glyphosate, this allows for a maximum administrative penalty of 252 (126 for inclusion of diquat and

126 for inclusion of glyphosate) violations of seven statutory sections, which could result in a total of 1,764 violations at a maximum administrative penalty of \$5,000 per violation. However, the seven statutory sections involve only three categories of prohibited behavior: mislabeling fertilizing and organic material (§§ 14681, subd. (a), 14682, subds. (a) & (b), 46024, subd. (c)); distribution of fertilizing material that threatens public safety (§ 14682, subd. (d)); and non-compliance with State and National Organic Program standards (§§ 14682, subd. (e), 46024, subd. (a).) Therefore, complainant used her discretion to proceed with imposing the maximum penalty of \$5,000 for each of the 126 invoices under the above-described three categories of behavior for a total of 378 violations with a total administrative penalty of \$1,890,000.

Respondent's Additional Evidence

31. In defense, respondent makes three main contentions: (1) Agro Gold WS did not contain diquat or glyphosate; (2) if Agro Gold WS contained diquat or glyphosate respondent did not add it to the product; and (3) there was no economic or physical harm caused by Agro Gold WS.

RESPONDENT'S CONTENTION THAT AGRO GOLD WS DID NOT CONTAIN DIQUAT OR GLVPHOSATE

32. At hearing Lajeunesse testified that respondent, in creating Agro Gold WS, only added water from a well located at respondent's facility in Florida to the dry product supplied by Sentinel Biologics and denied anyone associated with respondent added diquat or glyphosate to Agro Gold WS. Lajeunesse's testimony was not corroborated by any credible evidence.

33. Lajeunesse testified as to his opinion that testing respondent had conducted on Agro Gold WS, set forth in Factual Findings 17 through 21, proved the product did not contain diquat or glyphosate.

34. Respondent argued that because Andaman advertised the co-packaged Agro Gold WS and Weed Slayer as a "systematic herbicide," that diquat must have not been in Agro Gold WS because diquat is a "burn down" herbicide that quickly kills a plant. However, even if one could infer Andaman's knowledge from the advertising, one would not expect Andaman to know that a prohibited, undisclosed ingredient was in Agro Gold WS.

Respondent's witness Jerry Schwindt testified to his experience, outside the State of California, using an Agro Gold WS and Weed Slayer product (which was not established to be the same Agro Gold WS product used in California) to kill weeds that had become resistant to glyphosate and that the product killed glyphosate-ready corn seeds. Based on Schwindt's testimony, respondent argued Agro Gold WS could not have contained glyphosate. Schwindt's testimony and respondent's argument do not address the effect of a diquat and glyphosate combination such as in the present matter. Furthermore, the product and product use testified to by Schwindt is not comparable to the use of Agro Gold WS in California in the present matter. On this basis, Schwindt's testimony is given no weight.

**RESPONDENT'S CONTENTION THAT RESPONDENT DID NOT ADD
DIQUAT OR GLYPHOSATE TO AGRO GOLD WS**

35. In addition to Lajeunesse's testimony set forth in Factual Finding 32, respondent seems to argue that the dry product supplied by Sentinel Biologics should have been tested by the Division and some penalties imposed against that

entity because of the presence of diquat and glyphosate. However, as set forth in Factual Finding 3, and as Lajeunesse admitted in his testimony, he, on behalf of respondent, was ultimately responsible for the quality control and quality assurance of Agro Gold ws.

36. Respondent also argues that:

If the [Division] lab encountered any trace of these substances [diquat and glyphosate], it is in our and many others' opinion that it is probably caused by an exudate produced by the micro-organism inside the Agro Gold WS and this exudate or metabolite might look like these molecules and the [Division's] lab equipment cannot decipher the difference where the more advanced lab equipment and HILIC technique from Avomeen can actually see, detect and explain the difference.

Respondent's argument on this point is not supported by any credible evidence and it is contradicted by the more persuasive testimony of Chandra.

RESPONDENT'S CONTENTION THAT THERE WAS NO ECONOMIC OR PHYSICAL HARM CAUSED BY AGRO GOLD WS

37. Respondent argues that:

[i]t is important to note that no grower lost any money or income in the process, no grower lost its organic certification, and no grower or retailer was sued or had any damage to their crops or more importantly, no one got hurt or suffered any injury using the product Agro Gold WS.

However, the record, including Young's and complainant's testimony set forth in Factual Findings 14 and 28, contains substantial evidence of harm and threat to public safety caused by Agro Gold WS. There is no credible evidence to the contrary.

Ultimate Factual Finding Regarding Presence of Diquat and Glyphosate in Agro Gold WS

38. Section 14648 provides, in part, that a laboratory report from the Secretary of the Division, which states the results of any analysis pursuant to the Fertilizing Materials Act, shall be prima facie evidence:

- (a) That the sample which is described in the laboratory report was properly analyzed.
- (b) That the sample was taken pursuant to [the Fertilizing Materials Act].
- (c) That the substances analyzed contained the component parts which are stated in the laboratory report.
- (d) That the sample was taken from the lots, parcels, or packages which are described in the laboratory report.

The evidence, including the testimony of Chandra, supports the application of section 14648 in this matter. Moreover, respondent did not present credible or persuasive evidence to rebut the presumptions in section 14648. The evidence establishes that the 17 samples of Agro Gold WS analyzed by the CAC Food and Safety Lab, as set forth in Factual Findings 10 and 12 through 15, contained the herbicides diquat and glyphosate.

Costs

39. Section 14661 provides:

The department shall be entitled to receive reimbursement from any person who is found in violation of [the Fertilizing Materials Act] for any reasonable attorney's fees and other related costs, including, but not limited to, investigative costs, involved in enforcement of [the Fertilizing Materials Act].

40. The Fertilizing Materials Act and the California Organic Food and Farming Act gives a person against whom an administrative penalty is levied, or civil penalty proposed, the opportunity for a hearing and the Department shall schedule formal hearings consistent with the provisions of Chapter 5 (commencing with Section 11500), Part 1, Division 3, Title 2, of the Government Code, and any applicable regulations enacted pursuant to those provisions. (Cal. Code Regs., tit. 3, § 2322.2, subd. (b); see also § 46016.4.) An agency shall allege in its pleading any requests for costs, citing the applicable cost recovery statute or regulation. (Cal. Code Regs., tit. 1, § 1042, subd. (a).) Except as otherwise provided by law, proof of costs at the hearing may be made by declarations that contain specific and sufficient facts to support findings regarding actual costs. (*Id.*, subd. (b).)

41. Associated with the investigation of this matter, complainant is seeking costs in the amount of \$93,312.13. The costs are supported by documentation that describe the tasks performed, time spent on each task, and method for calculating the cost in accordance with California Code of Regulations, title 1, section 1042. In the absence of evidence to the contrary, these costs are found to be reasonable. Complainant is also seeking "reasonable attorney fees," however, no evidence was

provided to substantiate the actual amount of reasonable attorney fees being requested. Based on the lack of evidence supporting the fees claim, complainant's request for reasonable attorney fees is denied.

LEGAL CONCLUSIONS

1. Complainant has the burden of proving, by a preponderance of the evidence, all facts necessary to support the allegations in the accusation and the remedies requested. (*Owen v. Sands* (2009) 176 Cal.App.4th 985, 992.; Cal. Code Regs., tit. 3, § 2322.3, subd. (b).) It is respondent's burden to show mitigation and rehabilitation by a preponderance of the evidence. (Evid. Code, §§ 115, 500.)

2. The purpose and intent of the Fertilizing and Materials Act is to:

(a) To promote the distribution of effective and safe fertilizing materials essential for the production of food and fiber.

(b) To provide assurance to the consumer of commercial fertilizers, agricultural minerals, packaged soil amendments, and auxiliary soil and plant substances that the product purchased is properly identified, and to provide assurance of the validity of the quality and quantity represented by the manufacturer of these products.

(§ 14501.)

3. The purpose of the California Organic Food and Farming Act is to:

- (1) Promote coordination of federal, state, and local agencies in implementing the National Organic Program.
- (2) Support organic agriculture through education, outreach, and other programmatic activities.

(§ 46002, subd. (c).)

4. The Department shall levy an administrative penalty against a person who violates the Fertilizing Materials Act in an amount not more than \$5,000 per violation except the Secretary of the Department (Secretary) may issue a notice of warning in lieu of an administrative penalty upon a finding that the violation is minor or unintentional. (§ 14651.5, subds. (a)-(b).) The Secretary may level a civil penalty against any person who violates the California Organic Food and Farming Act in an amount not more than \$5,000. (§ 46017, subd. (a).) Under both Acts, the amount of the penalty assessed "shall be based upon the nature of the violation, the seriousness of the effect of the violation upon the effectuation of the purposes and provisions of the Acts, and the impact of the penalty on the violator, including the deterrent effect on future violations." (§§ 14651.5, subd. (a), 46017, subd. (a).) Under the Fertilizing Materials Act, violations are designated as serious, moderate, or minor. (Cal. Code Regs., tit. 3, § 2322, subd. (a).) Serious violations include those "that cause significant false, misleading, or deceptive business practices that involve misbranding, or adulteration of fertilizing material products." (*Id.*, subd. (a)(1).) The alleged violations in this matter are all serious and punishable by an administrative penalty of up to \$5,000 for each violation.

Causes for Administrative Penalty

FIRST CAUSE FOR ADMINISTRATIVE PENALTY: FALSE OR MISLEADING LABELING

5. Distribution of misbranded fertilizing material, which includes a product with false or misleading labeling, is a violation of the Fertilizing Materials Act. (§ 14681.) Distribution of adulterated fertilizing material is a violation of the Fertilizing Materials Act.(§ 14682.) Fertilizing material is deemed to be adulterated:

(a) If it contains any deleterious or harmful ingredient in sufficient amounts to render it injurious to beneficial plant life when applied in accordance with directions for use on the label, or if adequate warning statements or directions for use that may be necessary to protect plant life are not indicated on the label.

(b) If its composition falls below or differs from that which it is purported to possess by its labeling.

(Ibid) It is a violation of the California Organic Food and Farming Act to mislabel any organic product. (§ 46024, subd. (c).)

Respondent distributed fertilizing material, Agro Gold WS, registered as an organic input material, which contained diquat and glyphosate. Neither herbicide was listed on the Agro Gold WS label. Diquat and glyphosates are herbicides, are not organic products, and were present in the product in sufficient amounts to render Agro Gold WS injurious to beneficial plant life. (Factual Findings 3-4, 9-15, 26, 28, 35, 37-38.) Cause for administrative penalty exists under sections 14681, 14682, subdivisions (a) and (b), and 46024, subdivision (c).

SECOND CAUSE FOR ADMINISTRATIVE PENALTY: DISTRIBUTION OF FERTILIZING MATERIALS THAT THREATEN PUBLIC SAFETY

6. Another basis for fertilizing material to be deemed adulterated is if it is a threat to public safety.(§ 14682, subd. (d).) Respondent distributed an adulterated fertilizing material, Agro Gold WS, that was a threat to public safety. (Factual Findings 13-15, 23-26, 28, 35, 37.) Cause for administrative penalty exists under section 14682, subdivision (d).

THIRD CAUSE FOR ADMINISTRATIVE PENALTY: NON-COMPLIANCE WITH STATE AND NATIONAL ORGANIC PROGRAMS

7. Another basis for fertilizing material to be deemed adulterated is if an organic input material contains ingredients that, in type or amount, do not comply with the National Organic Program standards. (§ 14682, subd. (e).) It is also a violation of the California Organic Food and Farming Act for a person to "advertise, label, or otherwise represent that any fertilizer or pesticide chemical may be used in connection with the production, processing, or distribution of products sold as organic if that fertilizer or pesticide chemical contains a prohibited material." (§ 46024, subd. (a).) Respondent advertised, labeled, and represented Agro Gold WS as being an organic fertilizer that complied with the National Organic Program when it contained the non-organic herbicides diquat and glyphosate. (Factual Findings 3-4, 9-15, 26, 34-35, 38.) Cause for administrative penalty exists under sections 14682, subdivision (e), and 46024, subdivision (a).

Determination of Administrative Penalty

8. Having found in Legal Conclusions 5 through 7 that there are three causes for administrative penalty, there must be a determination on the number of violations and the amount of administrative penalty for each of the violations. Complainant argued there were a total of 378 violations committed by respondent based on the 126 invoices of Agro Gold WS sold, and that each invoice violated three categories of prohibited behavior. (Factual Finding 30.) Complainant's reasoning is persuasive, and it is determined there were 378 violations. (*Sweeney v. San Francisco Bay Conservation and Development Com.* (2021) 62 Cal.App.5th 1, 17 [what penalty is appropriate is considered to be particularly within the agency's discretion, dependent on the agency's expert knowledge].)

Turning to the amount of each penalty, the violations involved the adulteration of fertilizer material represented to be organic when in fact Agro Gold WS contained two different non-organic herbicides. These violations go to the central purpose of the Fertilizing Materials Act and the California Organic Food and Farming Act and the duty of the Department to promote effective and safe fertilizing materials for the production of food and ensure that the product purchased by a consumer is properly identified to provide assurance to the consumer regarding the validity of the quality of the product. Lastly, the impact of the penalty upon respondent, including the deterrent effect on future violations, must be considered. While respondent argued in its closing brief that due to the present matter it has been "bleeding money to the point of bankruptcy," respondent provided no evidence of its present financial state. Moreover, respondent has consistently denied that the Agro Gold WS sold in California contained either diquat or glyphosate, in disregard of the substantial evidence establishing otherwise. Protection of the public requires the maximum administrative penalty of \$5,000 for each of the 378 violations be imposed, for a total administrative penalty of

\$1,890,000.

Costs

9. As set forth in Legal Conclusions 5 through 7, respondent violated the Fertilizing Materials Act and the Department is entitled to receive reimbursement for reasonable attorney's fees and related costs, including investigative costs pursuant to section 14661. As set forth in Factual Finding 41, complainant incurred \$93,312.13 in reasonable costs for investigation of this matter. However, complainant did not provide evidence to establish the amount of attorney's fees incurred in the prosecution of this matter. (Factual Findings 40-41.) Accordingly, no attorney's fees will be assessed.

10. In *Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, 45, the California Supreme Court set forth standards for determining whether costs should be assessed in the particular circumstances of a person requesting an administrative hearing to challenge an agency decision so that individuals with potentially meritorious claims are not deterred from exercising their right to an administrative hearing. Those standards include whether the individual has been successful at hearing in getting the charges dismissed or reduced, the individual's good faith belief in the merits of their position, whether the individual has raised a colorable challenge to the proposed discipline, the financial ability of the individual to pay, and whether the scope of the investigation was appropriate to the alleged misconduct. None of these considerations support a reduction in cost recovery in this matter. Respondent shall be ordered to pay the Department \$93,312.13 for the investigative costs incurred in this matter.

ORDER

1. Respondent Agro Research International, LLC, shall pay the California Department of Food and Agriculture a total administrative penalty of \$1,890,000.

2. Respondent Agro Research International, LLC, shall pay the California Department of Food and Agriculture its investigative costs incurred in this matter in the amount of \$93,312.13.

DATE: 03/05/2024

Carl D. Corbin

CARL D. CORBIN

Administrative Law Judge

Office of Administrative Hearings