

For: State and County Offices

**Marketing Assistance Loan and LDP Eligibility for Wheat
Sprayed With Fury 1.5 BC Insecticide (FURY)**

Approved by: Acting Deputy Administrator, Farm Programs



1 Overview

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Background

State regulatory officials in Mississippi and Arkansas have identified a limited number of wheat fields that received unregistered applications of FURY. Because FURY is not registered or approved for use on wheat, application of FURY to wheat is considered misuse of a pesticide and an illegal act under Section 12(a)(2)(G) of the Federal Insecticide, Fungicide and Rodenticide Act (FIRMA).

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Purpose

This notice informs State and County Offices that:

- FURY is not an approved pesticide for use on wheat or any other crop not specified in FIRMA
- producers who purchased FURY and have been identified by State Agriculture officials to have applied unregistered applications of FURY to their wheat fields are ineligible for marketing assistance loans and LDP's
- written notification of denial must be provided to producers who request marketing assistance loans and LDP's on wheat that received applications of FURY
- FMC Corporation (FMC) is notifying the affected growers of their intentions to:
 - purchase wheat which received applications of FURY
 - monitor the harvested wheat.

<p>Disposal Date</p> <p>March 1, 2002</p>	<p>Distribution</p> <p>State Offices; State Offices relay to County Offices</p>
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Notice LP-1803

2 FURY Treated Wheat

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Non-Merchantable Commodity 7 CFR 1421.5 (b)(1) provides, in part, that in order for commodities to be eligible to receive loans and LDP's, the commodities must also be merchantable for food, feed, or other uses as determined by CCC. The introduction, or delivery for introduction into interstate commerce of an adulterated food, including wheat containing FURY residue is illegal under 21 U.S.C. 331(a) and may result in legal action including seizure of the adulterated wheat.

Because it is illegal to release FURY treated wheat into interstate commerce, such wheat is considered to be a nonmerchantable crop.

B

Ineligible Loans and LDP's Producers who purchased FURY and have been identified by State Agriculture officials to have applied unregistered applications of FURY to their wheat fields are ineligible for marketing assistance loans and LDP's.

C

FMC Corporation Agreement FMC Corporation (FMC) is the chemical manufacturer of FURY. FMC, EPA, and FDA have entered into an agreement about FURY treated wheat in Mississippi and Arkansas. See Exhibit 1. FMC has agreed to notify affected growers of FMC's plans to purchase FURY treated wheat.

3 Action

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State Office Action

State Offices shall:

- notify the applicable County Offices of the identified wheat fields that received applications of FURY according to the State Department of Agriculture
 - verify that County Offices have canceled all loans and LDP's that were previously issued on FURY treated wheat.
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Notice LP-1803

3 Action (Continued)

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County Office Action

County Offices shall:

- obtain a copy of the list of producers whose wheat tested positive for FURY from their respective State Offices
- disapprove all pending marketing assistance loan and LDP requests from producers on the list, as well as any other producers known to have applied FURY to their wheat
- request repayment of all loans and LDP's that were previously issued on wheat that was treated or sprayed with FURY according to 8-LP
- immediately notify producers according to 8-LP, paragraph 402
- collect receivable repayments for loans and LDP's according to 12-PS.

Note: When a loan or LDP is canceled in APSS, a receivable will be established.

C

Appealability of Decision

The determination to deny loan and LDP requests for FURY treated wheat is based on generally applicable program provisions in 8-LP, paragraph 126, and regulations at 7 CFR §1421.5 (b)(1). State and County Offices shall follow:

- Notice APP-29 to notify participants of the decision and to provide appropriate appeal rights
 - 1-APP for further guidance on appeals.
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Mississippi and Arkansas FURY Wheat Agreement

Mississippi and Arkansas FURY Wheat Agreement FMC Corporation

State regulatory officials in the states of Mississippi and Arkansas have identified a limited number of wheat fields in their states that apparently received unregistered applications of Fury 1.5 EC Insecticide. There is concern at FDA, EPA, USDA, and among state regulatory officials about this adulterated wheat and wheat grown for seed from these fields entering interstate commerce.

Although not yet registered, in August 2000, FMC submitted a registration package for the cereal crop group, including wheat, for the active ingredient of Fury (zeta-cypermethrin) in consideration for the Fiscal Year 2002 Registration Division Work Plan. This submission also included field residue and decline studies. FMC believes that these studies show the active ingredient in Fury declines to non-detectable levels in approximately 21 days. Additionally, FMC believes that analysis of the limited samples to date show that even detected levels are below that which would be considered safe in light of the studies included in the registration package. The EPA has not reviewed these data and therefore can not confirm FMC's claims.

To ensure the wheat treated with Fury meets the appropriate public health and safety standards and before any wheat from these fields will be allowed into interstate commerce, FMC proposes the following actions for Mississippi and Arkansas:

Mississippi: The Mississippi Department of Agriculture and Commerce has initiated an investigation and a field sampling analysis program, which includes all wheat fields identified as having received Fury applications. These samples are currently being analyzed by the Mississippi State Chemical Laboratory to determine any residue levels of Fury. The Mississippi Department of Agriculture and Commerce has identified 47 growers representing 18,271 acres of wheat to which Fury was apparently misapplied.

Proposed Action: Within 48 hours of the signing of this agreement, FMC will immediately notify the affected growers of FMC's plans to purchase their wheat. FMC will immediately begin to purchase all wheat from the 47 growers identified by the Mississippi Bureau of Plant Industry that have wheat fields which received misuse applications of Fury. FMC will account for all wheat from these growers. If, for any reason, FMC is not able to account for or purchase any of this wheat, FMC will immediately notify FDA and EPA with such information. FMC will complete its offers to purchase all wheat within 5 days of the date of this agreement. This purchase will be based at the Commodity Credit Corporation marketing assistance loan rate for the county where the wheat was produced. FMC will enter into a contract with ConAgra: (i) to monitor the harvest to ensure that adulterated wheat does not enter interstate commerce; (ii) to transport the harvested wheat to storage; and, (iii) to store the wheat in segregated and secured facilities consistent with the final plan for "Isolation and Identity Preservation of Fury Wheat", at no cost to the grower. FMC will be responsible for ensuring that this adulterated wheat not be released into interstate commerce unless and until FDA, in consultation with EPA and USDA, provides written assurance to FMC that FDA intends to exercise its enforcement discretion. FMC agrees that in order for FDA to exercise its enforcement discretion, with respect to the sale of the wheat in interstate commerce, FMC must meet the conditions, as stated below under "Assurances," and no other conditions can exist that adulterate the crop.

This agreement is also bound by and hereby incorporates by reference FMC's final version, as agreed upon by FDA and EPA, of their "Isolation and Identity Preservation of Fury Wheat" plan.

Arkansas: The Arkansas State Plant Board (ASPB) has conducted an investigation and a testing program. ASPB has identified 12 growers with 6,458 acres of wheat including wheat grown for seed on which Fury was misapplied.

Proposed Action: Within 48 hours of the signing of this agreement, FMC will immediately notify the affected growers of FMC's plans to purchase their wheat. FMC will immediately begin to purchase all wheat including any wheat grown for seed from the 12 growers identified by the Arkansas State Plant Board that have wheat fields which received misuse applications of Fury. FMC will account for all wheat

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Mississippi and Arkansas FURY Wheat Agreement (Continued)

from these growers. If, for any reason, FMC is not able to account for or purchase any of this wheat, FMC will immediately notify FDA and EPA with such information. FMC will complete its offers to purchase all wheat within 5 days of the date of this agreement. This purchase will be based at the Commodity Credit Corporation marketing assistance loan rate for the county where the wheat was produced. FMC will enter into a contract with ConAgra: (i) to monitor the harvest to ensure that adulterated wheat does not enter interstate commerce; (ii) to transport the harvested wheat to storage; and, (iii) to store the wheat and wheat grown for seed in segregated and secured facilities consistent with the final plan for "Isolation and Identity Preservation of Fury Wheat", at no cost to the grower. FMC will be responsible for ensuring that this adulterated wheat and wheat grown for seed not be released into interstate commerce unless and until FDA, in consultation with EPA and USDA, provides written assurance to FMC that FDA intends to exercise its enforcement discretion. FMC agrees that in order for FDA to exercise its enforcement discretion, with respect to the sale of the wheat in interstate commerce, FMC must meet the conditions, as stated below under "Assurances," and no other conditions can exist that adulterate the crop.

This agreement is also bound by and hereby incorporates by reference FMC's final version, as agreed upon by FDA and EPA, of their "Isolation and Identity Preservation of Fury Wheat" plan.

Assurances: FMC commits to the proposed actions and recognizes that the FDA intends to exercise its enforcement discretion as to wheat and wheat grown for seed, from the identified growers in Mississippi and Arkansas, purchased, harvested, and stored by FMC to be released into interstate commerce only if (i) the wheat and wheat grown for seed is determined by FDA after review of FMC's data to have non-detectable residues of Fury (zeta-cypermethrin) following testing using FDA acceptable methods for sampling and analysis, or (ii) when a tolerance for zeta-cypermethrin on wheat is approved by EPA and the wheat is determined by FDA after review of FMC's data to have residue levels at or below the EPA approved tolerance when tested using FDA acceptable methods for sampling and analysis. FMC will bear all costs associated with the testing of the wheat. In the event that residues of zeta-cypermethrin are detectable and exceed a tolerance for zeta-cypermethrin for wheat that has been approved by EPA, FMC agrees to destroy the wheat or recondition the wheat consistent with the FDA Compliance Policy Guide 7126.20, Sec 675.200, Diversion of Adulterated Food To Acceptable Animal Feed Use.

Larry Hatfield 6/14/01
 Mr. Larry Hatfield Date
 North American Director, Development and Regulatory
 Agricultural Products Group
 FMC Corporation

L. Robert Lake 6/14/01
 Mr. L. Robert Lake Date
 Director of Regulations and Policy
 Center for Food Safety and Applied Nutrition
 U.S. Food and Drug Administration

James I. Jones 6/14/01
 Mr. James I. Jones, Director Date
 Registration Division
 Office of Pesticide Programs
 U.S. Environmental Protection Agency

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Mississippi and Arkansas FURY Wheat Agreement (Continued)

Con Agra Trade Group/FMC**Procedure and Timeline for Isolating and Identity Preserving FURY Wheat Grains**Wednesday (6/13/01)

Dedicated Logistics Team setup at CTG, Omaha, NE

Begin Grower notification

- Telephone Notification of purchase offer and compliance issues
 - Inform grower of Identity Preservation protocol
 - Fury wheat must be isolated
 - Any movement of the grains must be tracked, reported, and verified
 - Location of grain must be known at all times
 - Grains must be held and must not be reintroduced into interstate commerce
- Verify status of harvest -- date(s) harvested, location of harvested grain, yield, timeline for future harvest and expected yield
- Ask if on farm storage exists and if so determine capacity of storage
- Make initial determination of what bushels will need commercial storage
- Complete notification with 48 hours

Begin printing placards for bin labeling

Develop logistical plan for bushels for commercial warehouse

Outline map for appropriate commercial storage with goal of minimizing locations to 3-4

Begin building IP protocol for ConAgra auditors

Thursday (6/14/01)

Begin contracting commercial warehouse locations for certified storage that can handle IP protocol

Issue Overnight FedEx mailing to growers containing:

- Purchase Agreement
- Storage Agreement (if On Farm storage will be used)
- FMC Release agreement

Setup contracts with commercial warehouse

- Designate appropriate bins that can be sealed and monitored
- Set audit procedure in place with warehouse
- Set reporting requirements

Friday - Monday (6/15/01 through 6/18/01)

Begin initial audit visits of growers

- Review IP protocol with growers
- Verify storage location and quality of storage
- Verify other elements of phone interview
- Obtain grower written agreement of understanding with grower that IP protocol will be followed.
- Seal and label on farm bins
- Affix electronic time stamp to on farm bins
- Review with growers logistics of grain movement, including who will move the grain, where it will be moved to, approximately when and how it will be moved.

Begin audit visits of commercial warehouse

- Verify elements of Commercial Warehouse agreement
- Verify storage and IP compliance of bins
- Communicate which growers and which fields will be delivering to each warehouse

Begin collection of signed Purchase Agreements from Growers (completed by 6/18/01)

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Mississippi and Arkansas FURY Wheat Agreement (Continued)

As Harvest Progresses:

Obtain information from grower of status of Fury Wheat

- Any movement must be communicated to ConAgra Logistics Desk
- If grain is stored On Farm, ConAgra Logistics Desk will send auditor to farm to follow up with second audit visit on farm as grain is placed in on farm storage. On Farm sealing, labeling, and electronic time stamping buttons installed at this visit
- If grain is moved to Commercial Warehouse, grower will notify ConAgra before grain is moved of sport, identify trucks carrying Fury Wheat, and the bushels contained in such trucks
- CTG communicates to Commercial Warehouse to expect specific trucks and designate bin locations.
- Arrival of grains to Commercial Warehouse is verified
- Physically place auditor at each warehouse location to monitor incoming shipments as harvest shipments arrive. Bins sealed, labeled, and electronic time stamping buttons installed at this time.

Periodic Updates

- All locations will be periodically monitored and verified by telephone by ConAgra Logistics Desk and via direct physical audit
- All records of grain movement, warehouse reports, and audits will be kept by ConAgra Trade Group for review at any time by EPA, FDA and USDA.

Beginning Friday, June 29, 2001, FMC will provide EPA and FDA with status reports on a weekly basis which include information regarding the purchase, harvesting, transporting, storage (to include periodic ConAgra and/or FMC Fury treated wheat storage facilities security audit information) and testing of the Fury treated wheat with results, until otherwise notified by EPA and FDA. These reports should be emailed to Arnold Layne (EPA) at Layne.Arnold@epa.gov and to Robert Lake (FDA) at robert.lake@cfsan.fda.gov (Or: rlake@cfsan.fda.gov).