



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2
290 BROADWAY
NEW YORK, NY 10007-1866

JAN - 9 2009

**CERTIFIED MAIL
RETURN RECEIPT REQUESTED**

Daniel Fogel
President
HygienicAire, Inc.
13 South Cayuga Road
Williamsville, New York 14221

Re: In the Matter of HygienicAire Inc.
Docket No. FIFRA-02-2009-5211

Dear Mr. Fogel:

Enclosed is the Complaint and Notice of Opportunity for Hearing, and supporting documents in the above-referenced proceeding. This Complaint alleges violations of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA).

You have the right to a formal hearing to contest any of the allegations in the complaint and/or to contest the penalty proposed in the Complaint.

If you wish to contest the allegations or the penalty proposed in the Complaint, you must file an Answer within **thirty (30)** days of your receipt of the enclosed Complaint to the Environmental Protection Agency's (EPA) Regional Hearing Clerk at the following address:

Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 2
290 Broadway, 16th Floor
New York, New York 10007-1866

If you do not file an Answer within thirty (30) days of receipt of this Complaint and have not obtained a formal extension for filing an Answer from the Regional Judicial Officer, a default order may be entered against you and the entire proposed penalty may be assessed without further proceedings.

U.S. ENVIRONMENTAL
PROTECTION AGENCY
REGIONAL HEARING
CLERK
JAN 14 10 11
NEW YORK, NY

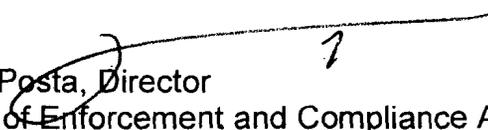
Whether or not you request a formal hearing, you may request an informal conference with EPA to discuss any issue relating to the alleged violations and the amount of the proposed penalty. EPA encourages all parties against whom it files a Complaint to pursue the possibility of settlement and to have an informal conference with EPA. However, a request for an informal conference **does not** substitute for a written Answer, affect what you may choose to say in an Answer, or extend the thirty (30) days by which you must file an Answer requesting a hearing.

Enclosed are copies of the "Consolidated Rules of Practice," which govern this proceeding. For your general information and use, I also enclose both an "Information Sheet for U.S. EPA Small Business Resources" and a "Notice of SEC Registrants' Duty to Disclose Environmental Legal Proceedings," which may or may not apply to you.

EPA encourages the use of Supplemental Environmental Projects, where appropriate, as part of any settlement. I am enclosing a brochure on "EPA's Supplemental Environmental Projects Policy." Please note that these are only available as part of a negotiated settlement and are not available if this case has to be resolved by a formal adjudication.

If you have any questions or wish to schedule an informal settlement conference, please contact the attorney whose name is listed in the Complaint.

Sincerely yours,


Dore LaPosta, Director
Division of Enforcement and Compliance Assistance

Enclosures

cc: Karen Maples, Regional Hearing Clerk
Anthony Lamanno, NYSDEC

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2**

U.S. ENVIRONMENTAL
PROTECTION AGENCY-REG-2
2009 JUN 14 PM 3:41
REGIONAL HEARING
CLERK

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In the Matter of :
 :
HygienicAire Inc. :
 :
 : COMPLAINT AND NOTICE OF
 : OPPORTUNITY FOR HEARING
 :
Respondent. :
 : Docket No. FIFRA-02-2009-5211
 :
Proceeding Under the Federal :
Insecticide, Fungicide and :
Rodenticide Act, as amended. :
-----X

Complainant, on behalf of the Administrator of the United States Environmental Protection Agency ("EPA"), by and through her attorneys, hereby alleges as and for her Complaint against Respondent:

1. This is a civil administrative proceeding instituted pursuant to Section 14(a)(1) of the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA" or "the Act"), 7 U.S.C. § 1361(a)(1), to assess a civil penalty against Respondent for having committed acts made unlawful under the provisions of Section 12(a)(1) of FIFRA, 7 U.S.C. § 136j(a)(1).
2. The Complainant, Director of the Division of Enforcement and Compliance Assistance, Region 2, United States Environmental Protection Agency ("EPA"), has been duly delegated the authority to institute this action.
3. Respondent is HygienicAire Inc., (hereinafter alternatively referred to as "HygienicAire", or "Respondent").
4. Respondent was incorporated in the State of New York in February 2004.
5. Respondent is engaged in the business of manufacturing teatree oil products.
6. Respondent has been, and continues to be, a "person" as defined by FIFRA Section 2(s), 7 U.S.C. Section 136(s), and as such, is subject to FIFRA and the regulations promulgated

thereunder.

7. Respondent owns and operates a facility located at 786 Terrace Boulevard, Suite 11, Depew, New York 14043 hereinafter "Respondent's facility".
8. Respondent's facility constitutes an "establishment", as defined in Section 2(dd) of FIFRA, 7 U.S.C. § 136(dd).
9. Respondent is a "distributor or seller" within the meaning of Section 2(gg) of FIFRA, 7 U.S.C. § 136(gg).
10. Respondent is a "wholesaler", "dealer", or "other distributor" within the meaning of Section 14(a) (1) of FIFRA, 7 U.S.C. §136(a) (1).
11. On January 3, 2008, employees of the State of New York duly designated by the Administrator of EPA inspected Respondent's facility.
12. On January 15, 2008 and February 11, 2008, the inspectors described in the aforementioned paragraph conducted an inspection of Respondent's headquarters located at 13 South Cayuga Road, Williamsville, New York 14221.
13. Each of inspections described in paragraphs 11 and 12 was conducted pursuant to and in accordance with the provisions of Section 9(a)(1) of FIFRA, 7 U.S.C. § 136g(a)(1).
14. As a direct result of the inspections described in paragraphs 11 and 12, EPA obtained evidence of the distributions and/or sales of the following pesticidal products:
 - a. HygienicAire;
 - b. HygiMist;
 - c. MPT Mold Prevent Technology;
 - d. HygiClean;
 - e. HygiMist Luggage Treatment;
 - f. CreteClean;
 - g. XtenClean;
 - h. VinylClean;
 - i. PoolClean; and
 - j. GroutClean.
15. Samples of the labels of the pesticidal products were collected and assigned the following EPA Sample numbers :
 - a. HygienicAire, EPA Sample Number 089200-1;
 - b. HygiMist, EPA Sample Number 089200-2;
 - c. MPT Mold Prevent Technology, EPA Sample Number 089200-3;

- d. HygiClean, EPA Sample Number 089200-4;
 - e. HygiMist Luggage Treatment, EPA Sample Number 089200-5;
 - f. CreteClean, EPA Sample Number 089200-6;
 - g. XtenClean, EPA Sample Number 089200-7;
 - h. VinylClean, EPA Sample Number 089200-8;
 - i. PoolClean, EPA Sample Number 089200-9; and
 - j. GroutClean, EPA Sample Number 089200-10.
16. On or about February 21, 2008, the New York State Department of Environmental Conservation issued a Notice of Violation to HygienicAire addressing violations of state law concerning the ten products listed in paragraphs 14 and 15, above.
 17. Each of the labels on the Respondent's products listed in paragraphs 14 and 15, above, does not bear an EPA product registration number or an EPA pesticide producing establishment registration number.
 18. The claims on the labels of each of the products listed in paragraphs 14 and 15, above, indicate that such product is intended for the purpose of preventing, destroying, repelling or mitigating pests.
 19. At least up to the time of the 2008 inspections, Respondent had never registered any of the pesticides listed in paragraphs 14 and 15, above, with the EPA.
 20. Section 2(u) of FIFRA, 7 U.S.C. § 136(u), defines the term "pesticide" as any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest.
 21. Section 2(t) of FIFRA, 7 U.S.C. § 136(t) defines a "pest" as any insect, rodent, nematode, fungus, weed, or any form of terrestrial or aquatic plant or animal life or virus, bacteria, or other micro-organism.
 22. Legionnaires Bacteria, germs, bacteria, dust mites, bed mites, algae, yeast, mold, mildew, fungus and/or germs, referenced on the labels of Respondent's products listed in paragraphs 14 and 15, above, are "pests," as defined by Section 2(t) of FIFRA, 7 U.S.C. § 136(t), and regulations at 40 CFR § 152.5.
 23. Title 40 C.F.R. § 152.15(a)(1) states, in part, that a substance is considered to be intended for a pesticidal purpose, and thus to be a pesticide requiring registration, if "(a) [t]he person who distributes or sells the substance claims, states or implies (by labeling or otherwise): (1) [t]hat the substance (either by itself or in combination with any other substance) can or should be used as a pesticide; . . ."
 24. Title 40 C.F.R. §152.15(c) states that a substance is considered to be intended for a pesticidal purpose, and thus to be a pesticide requiring registration, if "[t]he person who distributes or sells the substance has actual or constructive knowledge that the substance will be used, or is intended to be used, for a pesticidal purpose."

25. Therefore each of the Respondent's products listed in paragraphs 14 and 15, above, is a pesticide within the meaning of FIFRA Section 2(u), 7 U.S.C. § 136(u).
26. Pursuant to and in accordance with Section 3 of FIFRA, 7 U.S.C. § 136a, Respondent was required to register each of the pesticides listed in paragraphs 14 and 15, above, with the EPA.
27. "To distribute or sell" is defined by Section 2(gg) of FIFRA, 7 U.S.C. § 136(gg), as "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".
28. Respondent distributes or sells, within the meaning of "to distribute or sell" in FIFRA Section 2 (gg), 7 U.S.C. § 136(gg), pesticide products.
29. Any distribution or sale of a pesticide that has not previously been registered under Section 3 of FIFRA, 7 U.S.C. § 136a, is a prohibited act under 40 C.F.R. § 152.15 and constitutes a violation of Section 12(a) (1) (A) of FIFRA, 7 U.S.C. § 136j (a) (1) (A).
30. Section 14(a)(1) of FIFRA, 7 U.S.C. § 136l(a)(1), provides, in part, that "[a]ny... wholesaler, dealer, retailer, or other distributor who violates any provision of this subchapter [subchapter II of FIFRA 7 U.S.C. §§ 136 - 136y] may be assessed a civil penalty by the Administrator [of EPA] of not more than \$5,000 for each offense."
31. Under authority of the Federal Civil Penalties Inflation Adjustment Act of 1990, 104 Stat. 890, Public Law 101-410 (codified at 28 U.S.C. § 2461 note), as amended by the Debt Collection Improvement Act of 1996, 110 Stat. 1321, Public Law 104-134 (codified at 31 U.S.C. § 3701 note), EPA has promulgated regulations, codified at 40 C.F.R. Part 19, that, *inter alia*, increase the maximum penalty EPA might obtain pursuant to Section 14(a)(1) of FIFRA, 7 U.S.C. § 136l(a)(1) to \$6,500 for any violation occurring after March 15, 2004.
32. Section 14(a)(3) of FIFRA, 7 U.S.C. 136l(a)(3), provides that "[n]o civil penalty shall be assessed unless the person charged shall have been given notice and opportunity for a hearing on such charge in the county, parish, or incorporated city of the residence of the person charged."
33. This "COMPLAINT AND NOTICE OF OPPORTUNITY FOR HEARING" ("Complaint") constitutes the aforementioned (§ 32, above) written notice.

Count 1
Distribution/Sale of HygienicAire

34. Complainant realleges each allegation contained in Paragraphs 1 through 33, inclusive, as if fully stated herein.

35. At the time of the January 3, 2008 Inspection (and at other times prior and subsequent thereto), Respondent distributed and/or sold the HygienicAire product in various sized containers from its facility.
36. Respondent distributed and/or sold the HygienicAire product at least 204 times during the period between January 2005 through February 2008.
37. The HygienicAire product label for the 8 ounce container (EPA Sample Number 089200-1) bears the following pesticidal claims/statements:
 - a. "Tea Tree Oil is known as a broad spectrum fungicide/germicide/biocide...which is effective against a very wide range of bacteria, yeast, mold and fungi";
 - b. "Helps Eliminate Molds and Mildew"; and
 - c. "HygienicAire will control the germs, ..., mold, virus and different mildew growth..."
38. At all times relevant to this complaint, Respondent's HygienicAire product had a label similar or identical to EPA Sample Number 089200-1 and making similar or identical pesticidal claims to those in the above paragraph.
39. The HygienicAire product is intended for the purpose of preventing, destroying, repelling, or mitigating pests, and as such, the product is a "pesticide" as that term is defined in Section 2 (u) of FIFRA, 7 U.S.C. §136(u).
40. Each of Respondent's aforementioned distributions and/or sales of the HygienicAire product constitutes a distribution and/or sale of an unregistered pesticide.
41. Each of Respondent's aforementioned distributions and/or sales of the unregistered pesticide HygienicAire constitutes a separate and distinct violation of Section 12(a) (1) (A) of FIFRA, 7 U.S.C. § 136j(a)(1)(a), for which a penalty may be assessed pursuant to Section 14(a)(1) of FIFRA, 7 U.S.C. § 136l(a)(1).

Count 2
Distribution/Sale of HygiMist

42. Complainant realleges each allegation contained in Paragraphs 1 through 33, inclusive, as if fully stated herein.
43. At the time of the January 3, 2008 Inspection (and at other times prior and subsequent thereto), Respondent distributed and/or sold the HygiMist product in 3 ounce containers from its facility.
44. Respondent distributed and/or sold the HygiMist product numerous times during the period between January 2005 through February 2008.

45. The HygiMist product label for the 3 ounce containers (EPA Sample Number 089200-2) bears the following pesticidal claim/statement:
 - “HygiMist offers fast action against airborne allergens, Legionnaires Bacteria, germs, bacteria, dust mites, bed mites, ...mold, mildew and fungus.”
46. At all times relevant to this complaint, Respondent’s HygiMist product had a label similar or identical to EPA Sample Number 089200-2 and bearing similar or identical pesticidal claims to those in the above paragraph.
47. The HygiMist product is intended for the purpose of preventing, destroying, repelling, or mitigating pests, and as such, the product is a “pesticide” as that term is defined in Section 2 (u) of FIFRA, 7 U.S.C. §136(u).
48. Each of Respondent’s aforementioned distributions and/or sales of the HygiMist product constitutes the distribution and/or sale of an unregistered pesticide.
49. Each of Respondent’s aforementioned distributions and/or sales of the unregistered pesticide HygiMist constitutes a separate and distinct violation of Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(a), for which a penalty may be assessed pursuant to Section 14(a)(1) of FIFRA, 7 U.S.C. § 1361(a)(1).

Count 3
Distribution/Sale of Mold Prevent Technology

50. Complainant realleges each allegation contained in Paragraphs 1 through 33, inclusive, as if fully stated herein.
51. At the time of the January 3, 2008 Inspection (and at other times prior and subsequent thereto), Respondent distributed or sold the Mold Prevent Technology product in one gallon containers from its facility.
52. The Mold Prevent Technology product label for the one gallon container (EPA Sample Number 089200-3) bears the following claims/statements:
 - a. “Mold and Mildew treatment”;
 - b. “Helps eliminate and block Mold – Mildew – Fungus”;
 - c. “Coating that inhibits Mold, Mildew and Fungus Growth...”;
 - d. “Contains...Tea Tree Oil, which have been used for many decades as a fungicide/germicide/biocide, and is effective against a very wide range of bacteria, yeast, mold and fungi...”;
 - e. “This new barrier contains agents, which will inhibit growth of mold and bacteria”;
 - f. “Cleans & Prevent Mold & Bacteria Growth...”;
 - g. “As a coating...by contractor- builders who want a reasonably priced surface coating that inhibits bacteria, mold, mildew and fungus growth on its surface”;
 - h. “Is..the ideal coating ... in ... areas where a mildew, mold or fungus inhibitive finish is desired..”; and

- i. "Can clean and treat mold, mildew and block the mold and mildew from returning."
53. At all times relevant to this complaint, Respondent's Mold Prevent Technology product had a label similar or identical to EPA Sample Number 089200-3 and bearing similar or identical pesticidal claims to those in the above paragraph.
 54. The Mold Prevent Technology product is intended for preventing, destroying, repelling, or mitigating pests, and as such, the product is a "pesticide" as that term is defined in Section 2 (u) of FIFRA, 7 U.S.C. §136(u).
 55. Each of Respondent's aforementioned distributions and/or sales of the Mold Prevent Technology product constitute a distribution and/or sale of an unregistered pesticide.
 56. Each of Respondent's aforementioned distributions and/or sales of the unregistered pesticide Mold Prevent Technology constitutes a separate and distinct violation of Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(a), for which a penalty may be assessed pursuant to Section 14(a)(1) of FIFRA, 7 U.S.C. § 136l(a)(1).

Count 4
Distribution/Sale of HygiClean

57. Complainant realleges each allegation contained in Paragraphs 1 through 33, inclusive, as if fully stated herein.
58. At the time of the January 3, 2008 Inspection (and at other times prior and subsequent thereto), Respondent distributed or sold the HygiClean product in various sized containers from its facility.
59. Respondent distributed and/or sold the HygiClean product at least 37 times during the period between January 2005 through February 2008.
60. The HygiClean product label for the one gallon container (EPA Sample Number 089200-4) bears the following claims/statements:
 - a. "Easily blocks mold and mildew from returning";
 - b. "Helps Clean ▪Mold ▪ Mildew ▪Mildew Stains ▪Fungus ▪Bacteria ▪Germs ▪Legionnaires Bacteria ▪Dust Mites...";
 - c. "HygiClean cleans and treats mold and mildew, is made with a new powerful formula that removes mold and mildew and their stains and provides effective blocking prevention to help prevent the mold and mildew from returning";
 - d. "Future applications... to help build a shield against future mold and mildew";
 - e. "Helps eliminate and control airborne allergens such as bacteria, germs, mold mildew and fungus, and helps...reduces the risk of Legionnaires Disease"; and
 - f. "Cleans & treats mold-mildew and blocks mildew & mold stains from returning".

61. At all times relevant to this complaint, Respondent's HygiClean product had a label similar or identical to EPA Sample Number 089200-4 and bearing similar or identical pesticidal claims to those in the above paragraph.
62. The HygiClean product is intended for the purpose of preventing, destroying, repelling, or mitigating pests, and as such, the product is a "pesticide" as that term is defined in Section 2 (u) of FIFRA, 7 U.S.C. §136(u).
63. Each of Respondent's aforementioned distributions and/or sales of the HygiClean product constitutes a distribution and/or sale of an unregistered pesticide.
64. Each of Respondent's aforementioned distributions and/or sales of the unregistered pesticide HygiClean constitutes a separate and distinct violation of Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(a), for which a penalty may be assessed pursuant to Section 14(a)(1) of FIFRA, 7 U.S.C. § 1361(a)(1).

Count 5
Distribution/Sale of HygiMist Luggage Treatment

65. Complainant realleges each allegation contained in Paragraphs 1 through 33, inclusive, as if fully stated herein.
66. At the time of the January 3, 2008 Inspection (and at other times prior and subsequent thereto), Respondent distributed or sold the HygiMist Luggage Treatment product in 4 fluid ounce containers from its facility.
67. Respondent distributed and/or sold the HygiMist Luggage Treatment product a number of times during the period between January 2005 through February 2008.
68. The HygiMist Luggage Treatment product label for the 4 fluid ounce container (EPA Sample Number 089200-5) bears the following claims/statements:
 - a. "Spray HygiMist on and around bed to combat bed bugs and mites";
 - b. "Spray liberally into a/c unit to eliminate mold...";
 - c. "Spray luggage prior to packing to eliminate bed bugs and mites..";
 - d. "Spay liberally on emptied luggage to eliminate left over bed bugs"; and
 - e. "Helps create a friendly environment in your luggage..Bed Bugs & Dust Mites • Mold • Mildew ... •Germs •Bacteria •fungus".
69. At all times relevant to this complaint, Respondent's HygiMist Luggage Treatment product had a label similar or identical to EPA Sample Number 089200-5 and bearing similar or identical pesticidal claims to those in the above paragraph.
70. The HygiMist Luggage Treatment product is intended for preventing, destroying, repelling, or mitigating pests, and as such, the product is a "pesticide" as that term is defined in Section 2 (u) of FIFRA, 7 U.S.C. §136(u).

71. Each of Respondent's aforementioned distributions and/or sales of the HygiMist Luggage Treatment constitutes a distribution and/or sale of an unregistered pesticide.
72. Each of Respondent's aforementioned distributions and/or sales of the unregistered pesticide HygiMist Luggage Treatment constitutes a separate and distinct violation of Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(a), for which a penalty may be assessed pursuant to Section 14(a)(1) of FIFRA, 7 U.S.C. § 1361(a)(1).

Count 6
Distribution/Sale of CreteClean

73. Complainant realleges each allegation contained in Paragraphs 1 through 33, inclusive, as if fully stated herein.
74. At the time of the January 3, 2008 Inspection (and at other times prior and subsequent thereto), Respondent distributed or sold the CreteClean product in 23 fluid ounce containers from its facility.
75. Respondent distributed and/or sold the CreteClean product at least one time during the period between January 2005 through February 2008.
76. The CreteClean product label for the 23 fluid ounce container (EPA Sample Number 089200-6) bears the following claims/statements:
 - a. "Easily blocks mold and mildew from returning"; and
 - b. "Unmatched benefits which include water intrusion and chemical attack, while reducing the potential of algae growth. . . ."
77. At all times relevant to this complaint, Respondent's CreteClean product had a label similar or identical to EPA Sample Number 089200-6 and bearing similar or identical pesticidal claims to those in the above paragraph..
78. The CreteClean product is intended for preventing, destroying, repelling, or mitigating pests, and as such, the product is a "pesticide" as that term is defined in Section 2 (u) of FIFRA, 7 U.S.C. §136(u).
79. Each of Respondent's aforementioned distributions and/or sales of the CreteClean product constitutes a distribution and/or sale of an unregistered pesticide.
80. Each of Respondent's aforementioned distributions and/or sales of the unregistered pesticide CreteClean constitutes a separate and distinct violation of Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(a), for which a penalty may be assessed pursuant to Section 14(a)(1) of FIFRA, 7 U.S.C. § 1361(a)(1).

Count 7
Distribution/Sale of XtenClean

81. Complainant realleges each allegation contained in Paragraphs 1 through 33, inclusive, as if fully stated herein.

82. At the time of the January 3, 2008 Inspection (and at other times prior and subsequent thereto), Respondent distributed or sold the XtenClean product in 23 fluid ounce containers from its facility.
83. Respondent distributed and/or sold the XtenClean product at least one time during the period between January 2005 through February 2008.
84. The XtenClean product label for the 23 fluid ounce container (EPA Sample Number 089200-7) bears the following claims/statements:
 - a. "Easily blocks Mold and Mildew from Returning"; and
 - b. "Cleans and reduces the potential for algae and mildew growth on outdoor surfaces".
85. At all times relevant to this complaint, Respondent's XtenClean product had a label similar or identical to EPA Sample Number 089200-7 and bearing similar or identical pesticidal claims to those in the above paragraph.
86. The XtenClean product is intended for preventing, destroying, repelling, or mitigating pests, and as such, the product is a "pesticide" as that term is defined in Section 2 (u) of FIFRA, 7 U.S.C. §136(u).
87. Each of Respondent's aforementioned distributions and/or sales of the XtenClean product constitutes a distribution and/or sale of an unregistered pesticide.
88. Each of Respondent's aforementioned distributions and/or sales of the unregistered pesticide XtenClean constitutes a separate and distinct violation of Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(a), for which a penalty may be assessed pursuant to Section 14(a)(1) of FIFRA, 7 U.S.C. § 1361(a)(1).

Count 8
Distribution/Sale of VinylClean

89. Complainant realleges each allegation contained in Paragraphs 1 through 33, inclusive, as if fully stated herein.
90. At the time of the January 3, 2008 Inspection (and at other times prior and subsequent thereto), Respondent distributed or sold the VinylClean product in 23 fluid ounce containers from its facility.
91. Respondent distributed and/or sold the VinylClean product at least one time during the period between January 2005 through February 2008.
92. The VinylClean product label for the 23 fluid ounce container (EPA Sample Number 089200-8) bears the following claims/statements:
 - a. "Easily blocks mold and mildew from returning"; and

- b. “. . . first long-term solution to reduce the potential of algae growth on virtually any vinyl surface”.
93. At all times relevant to this complaint, Respondent’s VinylClean product had a label similar or identical to EPA Sample Number 089200-8 and bearing similar or identical pesticidal claims to those in the above paragraph.
94. The VinylClean product is intended for preventing, destroying, repelling, or mitigating pests, and as such, the product is a “pesticide” as that term is defined in Section 2 (u) of FIFRA, 7 U.S.C. §136(u).
95. Each of Respondent’s aforementioned distributions and/or sales of the VinylClean product constitutes a distribution and/or sale of an unregistered pesticide.
96. Each of Respondent’s aforementioned distributions and/or sales of the unregistered pesticide VinylClean constitutes a separate and distinct violation of Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(a), for which a penalty may be assessed pursuant to Section 14(a)(1) of FIFRA, 7 U.S.C. § 136l(a)(1).

Count 9
Distribution/Sale of PoolClean

97. Complainant realleges each allegation contained in Paragraphs 1 through 33, inclusive, as if fully stated herein.
98. At the time of the January 3, 2008 Inspection (and at other times prior and subsequent thereto), Respondent distributed or sold the PoolClean product in 23 fluid ounce containers from its facility.
99. The PoolClean product label for the 23 fluid ounce container (EPA Sample Number 089200-9) bears the following claims/statements:
- a. “Easily blocks mold and mildew from returning”;
 - b. “. . . first Product to virtually eliminate unsightly algae and mildew growth”; and
 - c. “. . . reducing the potential growth of algae growth”.
100. At all times relevant to this complaint, Respondent’s PoolClean product had a label similar or identical to EPA Sample Number 089200-9 and bearing similar or identical pesticidal claims to those in the above paragraph .
101. The PoolClean product is intended for preventing, destroying, repelling, or mitigating pests, and as such, the product is a “pesticide” as that term is defined in Section 2 (u) of FIFRA, 7 U.S.C. §136(u).
102. Each of Respondent’s aforementioned distributions and/or sales of the PoolClean product constitutes a distribution and/or sale of an unregistered pesticide.

103. Each of Respondent's aforementioned distributions and/or sales of the unregistered pesticide PoolClean constitutes a separate and distinct violation of Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(a), for which a penalty may be assessed pursuant to Section 14(a)(1) of FIFRA, 7 U.S.C. § 1361(a)(1).

Count 10
Distribution/Sale of GroutClean

104. Complainant realleges each allegation contained in Paragraphs 1 through 33, inclusive, as if fully stated herein.
105. At the time of the January 3, 2008 Inspection (and at other times prior and subsequent thereto), Respondent distributed or sold the GroutClean product in 23 fluid ounce containers from its facility.
106. Respondent distributed and/or sold the GroutClean product at least 4 times during the period between January 2005 through February 2008.
107. The GroutClean product label for the 23 fluid ounce container (EPA Sample Number 089200-10) bears the following claims/statements:
- a. "Easily blocks mold and mildew from returning"; and
 - b. "... protects against mold and mildew growth. ..."
108. At all times relevant to this complaint, Respondent's GroutClean product had a label similar or identical to EPA Sample Number 089200-10 and bearing similar or identical pesticidal claims to those in the above paragraph.
109. The GroutClean product is intended for preventing, destroying, repelling, or mitigating pests, and as such, the product is a "pesticide" as that term is defined in Section 2 (u) of FIFRA, 7 U.S.C. §136(u).
110. Each of Respondent's aforementioned distributions and/or sales of the GroutClean product constitutes a distribution and/or sale of an unregistered pesticide.
111. Each of Respondent's aforementioned distributions and/or sales of the unregistered pesticide GroutClean constitutes a separate and distinct violation of Section 12(a) (1) (A) of FIFRA, 7 U.S.C. § 136j (a) (1) (a), for which a penalty may be assessed pursuant to Section 14(a) (1) of FIFRA, 7 U.S.C. § 1361(a) (1).

PROPOSED CIVIL PENALTY

The proposed civil penalty has been determined in accordance with Section 14(a) of FIFRA, 7 U.S.C. § 136l(a), as amended, which authorizes the assessment of a civil penalty of up to \$6,500 for each violation of "any provision of" subchapter II of FIFRA, 7 U.S.C. §§ 136 - 136y.

For purposes of determining the amount of any penalty to be assessed, Section 14 of FIFRA requires that EPA “shall consider the appropriateness of such penalty to the size of the business of the person charged, the effect on the person’s ability to continue in business, and the gravity of the violation.” Section 14(a) (4) of FIFRA, 7 U.S.C. § 136l (a) (4), takes into account the nature, circumstances, extent and gravity of the violations.

To develop the proposed penalty in this Complaint, Complainant has taken into account the particular facts and circumstances of this case, to the extent known at the time of its filing, with specific reference to EPA’s “Enforcement Response Policy for The Federal Insecticide, Fungicide and Rodenticide Act (FIFRA),” dated July 2, 1990 (hereinafter referred to as the “ERP”). A copy of the ERP is available upon request or may be obtained from the Internet at this address: <http://cfpub.epa.gov/compliance/resources/policies/civil/fifra/>. This guidance policy provides rational, consistent and equitable calculation methodologies for applying the statutory penalty criteria enumerated above to particular cases.

Complainant proposes, subject to receipt and evaluation of further relevant information, that Respondent be assessed the following civil penalty for the violations alleged in the Complaint:

Distribution and/or Sales of Unregistered Pesticides Post 3/15/04	
10 Counts @ \$6,500 per violation	\$ 65,000
Total Penalty Assessment.....	\$ 65,000

PROCEDURES GOVERNING THIS ADMINISTRATIVE LITIGATION

The rules of procedure governing this civil administrative litigation have been set forth in the “CONSOLIDATED RULES OF PRACTICE GOVERNING THE ADMINISTRATIVE ASSESSMENTS OF CIVIL PENALTIES, ISSUANCE OF COMPLIANCE OR CORRECTIVE ACTION ORDERS, AND THE REVOCATION, TERMINATION OR SUSPENSION OF PERMITS,” and are codified at 40 C.F.R. Part 22 (2008). A copy of these rules accompanies this “Complaint and Notice of Opportunity for Hearing” (hereinafter referred to as the “Complaint”).

A. Answering The Complaint

Where Respondent intends to contest any material fact upon which the Complaint is based, to contend that the proposed penalty is inappropriate or to contend that Respondent is entitled to judgment as a matter of law, Respondent must file with the Regional Hearing Clerk of EPA, Region 2, both an original and one copy of a written answer to the Complaint, and such Answer must be filed within 30 days after service of the Complaint. 40 C.F.R. § 22.15(a). The address of the Regional Hearing Clerk of EPA, Region 2, is:

**Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 2
290 Broadway, 16th floor
New York, New York 10007-1866**

Respondent shall also then serve one copy of the Answer to the Complaint upon Complainant and any other party to the action. 40 C.F.R. § 22.15(a).

Respondent's Answer to the Complaint must clearly and directly admit, deny, or explain each of the factual allegations that are contained in the Complaint and with regard to which Respondent has any knowledge. 40 C.F.R. § 22.15(b). Where Respondent lacks knowledge of a particular factual allegation and so states in its Answer, the allegation is deemed denied. 40 C.F.R. § 22.15(b). The Answer shall also set forth: (1) the circumstances or arguments that are alleged to constitute the grounds of defense, (2) the facts that Respondent disputes (and thus intends to place at issue in the proceeding), and (3) whether Respondent requests a hearing. 40 C.F.R. § 22.15(b).

Respondent's failure affirmatively to raise in the Answer facts that constitute or that might constitute the grounds of its defense may preclude Respondent, at a subsequent stage in this proceeding, from raising such facts and/or from having such facts admitted into evidence at a hearing.

B. Opportunity To Request A Hearing

If requested by Respondent in its Answer, a hearing upon the issues raised by the Complaint and Answer may be held. 40 C.F.R. § 22.15(c). If, however, Respondent does not request a hearing, the Presiding Officer (as defined in 40 C.F.R. § 22.3) may hold a hearing if the Answer raises issues appropriate for adjudication. 40 C.F.R. § 22.15(c).

Any hearing in this proceeding will be held at a location determined in accordance with 40 C.F.R. § 22.35(b). A hearing of this matter will be conducted in accordance with the applicable provisions of the Administrative Procedure Act, 5 U.S.C. §§ 551-59, and the procedures set forth in Subpart D of 40 C.F.R. Part 22.

C. Failure To Answer

If Respondent fails in its Answer to admit, deny, or explain any material factual allegation contained in the Complaint, such failure constitutes an admission of the allegation. 40 C.F.R. § 22.15(d). If Respondent fails to file a timely (i.e., in accordance with the 30-day period set forth in 40 C.F.R. § 22.15(a)) Answer to the Complaint, Respondent may be found in default upon motion. 40 C.F.R. § 22.17(a). Default by Respondent constitutes, for purposes of the pending proceeding only, an admission of all facts alleged in the Complaint and a waiver of Respondent's right to contest such factual allegations. 40 C.F.R. § 22.17(a). Following a default by Respondent for a failure to timely file an Answer to the Complaint, any order issued therefore shall be issued pursuant to 40 C.F.R. § 22.17(c).

Any penalty assessed in the default order shall become due and payable by Respondent without further proceedings 30 days after the default order becomes final pursuant to 40 C.F.R. § 22.27(c). 40 C.F.R. § 22.17(d). If necessary, EPA may then seek to enforce such final order of default against Respondent, and to collect the assessed penalty amount in federal court.

D. Exhaustion Of Administrative Remedies

Where Respondent fails to appeal an adverse initial decision to the Environmental Appeals Board pursuant to 40 C.F.R. § 22.30, and that initial decision thereby becomes a final order pursuant to the terms of 40 C.F.R. § 22.27(c), Respondent waives its right to judicial review. 40 C.F.R. § 22.27(d).

In order to appeal an initial decision to the Agency's Environmental Appeals Board [EAB; see 40 C.F.R. § 1.25(e)], Respondent must do so "within thirty (30) days after the initial decision is served." 40 C.F.R. § 22.30(a). Pursuant to 40 C.F.R. § 22.7(c), where service is effected by mail, ". . . five days shall be added to the time allowed by these [rules] for the filing of a responsive document." Note that the 45-day period provided for in 40 C.F.R. § 22.27(c) (discussing when an initial decision becomes a final order) does not pertain to or extend the time period prescribed in 40 C.F.R. § 22.30(a) for a party to file an appeal to the EAB of an adverse initial decision.

INFORMAL SETTLEMENT CONFERENCE

Whether or not Respondent requests a formal hearing, EPA encourages settlement of this proceeding consistent with the provisions of the Act and its applicable regulations. 40 C.F.R. § 22.18(b). At an informal conference with a representative(s) of Complainant, Respondent may comment on the charges made in this complaint, and Respondent may also provide whatever additional information that it believes is relevant to the disposition of this matter, including: (1) actions Respondent has taken to correct any or all of the violations herein alleged, (2) any information relevant to Complainant's calculation of the proposed penalty, (3) the effect the proposed penalty would have on Respondent's ability to continue in business, and (4) any other special facts or circumstances Respondent wishes to raise.

Complainant has the authority to modify the amount of the proposed penalty, where appropriate, to reflect any settlement agreement reached with Respondent or any relevant information previously not known to Complainant, or to dismiss any or all of the charges if Respondent can demonstrate that the relevant allegations are without merit and that no cause of action as herein alleged exists. Respondent is referred to 40 C.F.R. § 22.18.

Any request for an informal conference or any questions that Respondent may have regarding this complaint should be directed to:

Jeannie M. Yu
Assistant Regional Counsel
Office of Regional Counsel
U.S. Environmental Protection Agency, Region 2
290 Broadway, 16th floor
New York, New York 10007-1866
(212) 637-3205 (telephone)
(212) 637-3199 (fax)

The parties may engage in settlement discussions irrespective of whether Respondent has requested a hearing. 40 C.F.R. § 22.18(b)(1). Respondent's requesting a formal hearing does not prevent it from also requesting an informal settlement conference; the informal conference procedure may be pursued simultaneously with the formal adjudicatory hearing procedure. A request for an informal settlement conference constitutes neither an admission nor a denial of any of the matters alleged in the Complaint. Complainant does not deem a request for an informal settlement conference as a request for a hearing as specified in 40 C.F.R. § 22.15(c).

A request for an informal settlement conference does not affect Respondent's obligation to file a timely Answer to the Complaint pursuant to 40 C.F.R. § 22.15. No penalty reduction, however, will be made simply because an informal settlement conference is held.

Any settlement that may be reached as a result of an informal settlement conference shall be embodied in a written consent agreement. 40 C.F.R. § 22.18(b)(2). In accepting the consent agreement, Respondent waives its right to contest the allegations in the Complaint and waives its right to appeal the final order that is to accompany the consent agreement. 40 C.F.R. § 22.18(b)(2). In order to conclude the proceeding, a final order ratifying the parties' agreement to settle will be executed. 40 C.F.R. § 22.18(b)(3).

Respondent's entering into a settlement through the signing of a Consent Agreement and its complying with the terms and conditions set forth in such Consent Agreement terminate this administrative litigation and the civil proceedings arising out of the allegations made in the Complaint. Respondent's entering into a settlement does not extinguish, waive, satisfy or otherwise affect its obligation and responsibility to comply with all applicable statutory and regulatory requirements, and to maintain such compliance.

RESOLUTION OF THIS PROCEEDING WITHOUT HEARING OR CONFERENCE

Instead of filing an Answer, Respondent may choose to pay the total amount of the proposed penalty within 30 days after receipt of the Complaint, provided that Respondent files with the Regional Hearing Clerk, Region 2 (at the New York address noted above), a copy of the check or other instrument of payment. 40 C.F.R. § 22.18(a). A copy of the check or other instrument of payment should be provided to the EPA Assistant Regional Counsel identified on the previous page. Payment of the penalty assessed should be made by sending a cashier's or certified check payable to the "**Treasurer, United States of America,**" in the full amount of the penalty assessed in this Complaint to the following addressee:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
PO Box 979077
St. Louis, MO 63197-9000

The check shall be identified with a notation of the name and docket number of this case as follows: **In the Matter of HygienicAire Inc., Docket No. FIFRA 02-2009-5211**

Pursuant to 40 C.F.R. Section 22.18(a)(3), if Respondent elects to pay the full amount of the penalty proposed in the Complaint within 30 days of receiving the Complaint, then, upon EPA's receipt of such payment, the Regional Administrator of EPA, Region 2 (or, if designated, the Regional Judicial Officer), shall issue a final order. Issuance of this final order terminates this administrative litigation and the civil proceedings arising out of the allegations made in the Complaint. Further, pursuant to 40 C.F.R. Section 22.18(a)(3), the making of such payment by Respondent shall constitute a waiver of Respondent's right both to contest the allegations made in the Complaint and to appeal said final order to federal court. Such payment does not extinguish, waive, satisfy or otherwise affect Respondent's obligation and responsibility to comply with all applicable regulations and requirements, and to maintain such compliance.

Dated: January 9, 2009
New York, New York

COMPLAINANT:

Dore LaPosta, Director
Division of Enforcement and
Compliance Assistance
U.S. E.P.A. - Region 2

TO: Daniel Fogel
President
HygienicAire, Inc.
13 South Cayuga Road
Williamsville, New York 14221

CERTIFICATE OF SERVICE

This is to certify that I have this day caused to be mailed a copy of the foregoing Complaint, bearing docket number **FIFRA-02-2009-5211**, and a copy of the Consolidated Rules of Practice, 40 C.F.R. Part 22 (2008), by certified mail, return receipt requested, to:

Daniel Fogel
President
HygienicAire, Inc.
13 South Cayuga Road
Williamsville, New York 14221

I hand-carried the original and a copy of the foregoing Complaint to the office of the Regional Hearing Clerk, United States Environmental Protection Agency, Region 2.

Dated: JAN 13, 2009
New York, New York

Mildred N. Bae
J