

FILED

APR 24 AM 11:33

FEDERAL BUREAU OF INVESTIGATION

1 NANCY J. MARVEL
Regional Counsel
2
3 EDGAR P. CORAL
Assistant Regional Counsel
U.S. Environmental Protection Agency
4 Region IX
75 Hawthorne Street
5 San Francisco, CA 94105
(415) 972-3898
6

7 UNITED STATES
8 ENVIRONMENTAL PROTECTION AGENCY
9 REGION IX

10 In the Matter of:) Docket No. FIFRA-09-2011-00 11
11)
12 Kama'aina Termite and Pest Control, Inc.,) COMPLAINT AND NOTICE OF
13) OPPORTUNITY FOR HEARING
14 Respondent.)
_____)

15 I. AUTHORITY AND PARTIES

16 1. This is a civil administrative action brought pursuant to Section 14(a) of the Federal
17 Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136l(a), for the assessment of
18 a civil administrative penalty against Kama'aina Termite and Pest Control, Inc. ("Respondent")
19 for the use of a registered pesticide in manners inconsistent with its labeling in violation of
20 Section 12(a)(2)(G) of FIFRA, 7 U.S.C. § 136j(a)(2)(G).

21 2. Complainant is the Associate Director for Agriculture of the Communities and
22 Ecosystems Division in EPA, Region IX. The Administrator of EPA delegated to the Regional
23 Administrator of Region IX the authority to bring this action under FIFRA by EPA Delegation
24 Order Number 5-14, dated May 11, 1994. The Regional Administrator of Region IX further
25 delegated the authority to bring this action under FIFRA to the Associate Director for Agriculture
26 of the Communities and Ecosystems Division by EPA Regional Order Number 1255.08 CHG1,
27 dated June 9, 2005.
28

1 12. On February 26, 2007, Respondent applied 14 pounds of Vikane inside a residential
2 structure located at 94-231 Emoloa Place in Mililani, Hawai'i for the purpose of fumigation.

3 13. As part of the fumigation process, Respondent enclosed the structure in a tarp to
4 internally retain the Vikane until the completion of fumigation several days later.

5 14. On February 26, 2007, a pesticide specialist with the Hawai'i Department of
6 Agriculture observed that the tented residential structure located at 94-231 Emoloa Place in
7 Mililani, Hawai'i did not have any warning signs posted on the exterior of the tarp.

8 15. On February 27, 2007, an inspector with the Hawai'i Department of Agriculture
9 confirmed that the tented residential structure located at 94-231 Emoloa Place in Mililani,
10 Hawai'i did not have any warning signs posted at the residence.

11 16. By failing to follow labeling instructions requiring the posting of warning signs in
12 fumigated areas during use of the pesticide Vikane at 94-231 Emoloa Place on February 26-27,
13 2007, Respondent violated Section 12(a)(2)(G) of FIFRA, 7 U.S.C. § 136j(a)(2)(G).

14 COUNT 2: Use of a registered pesticide in a manner inconsistent with its labeling (use of
15 pesticide without posting of warning signs in fumigated areas), 7 U.S.C. § 136j(a)(2)(G).

16 17. Paragraphs 4 through 8 above are hereby incorporated in this Count 2 by reference as
17 if the same were set forth herein in full.

18 18. In the section entitled "Posting of Fumigated Areas," the Vikane Specimen Label
19 (June 12, 2007 version) states, "the applicator must post all entrances to the fumigated areas with
20 signs bearing" specific warnings and detailed information regarding the applicator and the
21 fumigation process.

22 19. In the section entitled "PREPARATION FOR FUMIGATION," the Vikane Gas
23 Fumigant Structural Fumigation Manual (November 2004 version) states, "the label for Vikane
24 requires that the structure be posted with specific warning signs on all entrances during the
25 exposure and aeration periods."

26 20. On November 19, 2007, Respondent applied 22 pounds of Vikane inside two
27 residential structures located at 2638 Kuahine Drive in Honolulu, Hawai'i for the purpose of
28 fumigation.

1 21. As part of the fumigation process, Respondent enclosed the structures in two separate
2 tarps to internally retain the Vikane until the completion of fumigation several days later.

3 22. On November 20, 2007, two pesticide specialists with the Hawai'i Department of
4 Agriculture observed that the two tented residential structures located at 2638 Kuahine Drive in
5 Honolulu, Hawai'i did not have any warning signs posted on the exterior of the tarp for either
6 structure.

7 23. By failing to follow labeling instructions requiring the posting of warning signs in
8 fumigated areas during use of the pesticide Vikane at 2638 Kuahine Drive on November 19-20,
9 2007, Respondent violated Section 12(a)(2)(G) of FIFRA, 7 U.S.C. § 136j(a)(2)(G).

10 COUNT 3: Use of a registered pesticide in a manner inconsistent with its labeling (application
11 of pesticide without prior extinguishing of all flames), 7 U.S.C. § 136j(a)(2)(G).

12 24. Paragraphs 4 through 8 above are hereby incorporated in this Count 3 by reference as
13 if the same were set forth herein in full.

14 25. In the section entitled "Preparation for Fumigation," the Vikane Specimen Label
15 (June 12, 2007 version) states, "**Note: Extinguish all flames, including pilot lights of water**
16 **heaters, gas refrigerators, ranges, ovens, broilers, dryers, gas fireplaces, etc.**" (Emphasis in
17 original.)

18 26. In the section entitled "PREPARATION FOR FUMIGATION," the Vikane Gas
19 Fumigant Structural Fumigation Manual (November 2004 version) states, "extinguish all flames
20 including pilot lights of furnaces, hot water heaters, gas refrigerators, ranges, ovens, broilers,
21 etc."

22 27. This Manual also includes additional language, highlighted in a prominent box, that
23 states the following: "**Before fumigating, pilot lights must be turned off.**" (Emphasis in
24 original.)

25 28. On March 24, 2008, Respondent applied 18 pounds of Vikane inside a residential
26 structure located at 1737 Beckley Street in Honolulu, Hawai'i for the purpose of fumigation.

27 29. On March 24, 2008, Respondent failed to extinguish the water heater pilot light prior
28 to its application of Vikane inside the residential structure located at 1737 Beckley Street in

1 Honolulu, Hawai'i.

2 30. On March 27, 2008, a complaint was filed with the Hawai'i Department of
3 Agriculture for Respondent's failure to extinguish the water heater pilot light and range pilot
4 light prior to its application of Vikane inside the residential structure located at 1737 Beckley
5 Street in Honolulu, Hawai'i.

6 31. On March 28, 2008, two pesticide specialists with the Hawai'i Department of
7 Agriculture confirmed that Respondent had failed to extinguish the water heater pilot light and
8 range pilot light prior to its application of Vikane inside the residential structure located at 1737
9 Beckley Street in Honolulu, Hawai'i.

10 32. By failing to follow labeling instructions requiring the extinguishing of all flames
11 (including pilot lights) in fumigated areas prior to application of the pesticide Vikane at 1737
12 Beckley Street on March 24, 2008, Respondent violated Section 12(a)(2)(G) of FIFRA, 7
13 U.S.C. § 136j(a)(2)(G).

14 COUNT 4: Use of a registered pesticide in a manner inconsistent with its labeling (failure to
15 remove non-airtight-sealed food prior to fumigation), 7 U.S.C. § 136j(a)(2)(G).

16 33. Paragraphs 4 through 8 above are hereby incorporated in this Count 4 by reference as
17 if the same were set forth herein in full.

18 34. In the section entitled "Preparation for Fumigation," the Vikane Specimen Label
19 (April 15, 2010 version) states, "Food, feed, drugs (including tobacco products), and medicinals
20 (including those items in refrigerators and freezers) not in plastic, glass, or metal bottles, cans, or
21 jars with the original manufacturer's air-tight seal intact, need to be removed from the fumigation
22 site, or double-bagged in Nylofume* bags, which are available from distributors of Vikane."

23 35. In the section entitled "WHAT TO REMOVE PRIOR TO FUMIGATION," the
24 Vikane Gas Fumigant Structural Fumigation Manual (April 2010 version) states, "Food, feed,
25 drugs (including tobacco products), and medicine (including those items in refrigerators and
26 freezers) not in plastic, glass, or metal bottles, cans, or jars with the original manufacturer's air-
27 tight seal intact, need to be removed from the fumigation site, or double-bagged in Nylofume®
28 bags, which are available from distributors of Vikane."

1 36. On September 13-16, 2010, Respondent applied approximately 3,225 pounds of
2 Vikane inside a 44-story building complex located at 600 Queen Street in Honolulu, Hawai'i (the
3 "Keola La'i Condominium") for the purpose of fumigation.

4 37. On September 16, 2010, immediately after completion of the fumigation, a pesticide
5 specialist with the Hawai'i Department of Agriculture observed that at least 28 residential units
6 at the Keola La'i Condominium contained food items that were neither in plastic, glass, or metal
7 bottles, cans, or jars with the original manufacturer's air-tight seal intact, nor double-bagged in
8 Nylofume® bags.

9 38. This pesticide specialist documented that the following 28 residential units contained
10 non-airtight-sealed, non-double-bagged food items that were not removed prior to fumigation:
11 3307, 3202, 3102, 2905, 2602, 2606, 2505, 2502, 2305, 2205, 2204, 2203, 2202, 1901, 1905,
12 1909, 1808, 1704, 1707, 1709, 1711, 1608, 1401, 1211, 1108, 1105, 1102, and 912.

13 39. On September 16, 2010, Michael Miske, the President of Respondent, signed an
14 attestation confirming that opened food items in residential units 3307, 3202, 3102, 2905, 2602,
15 2606, 2505, 2502, 2305, 2205, 2204, 2203, 2202, 1901, 1905, 1909, 1808, 1704, 1707, 1709,
16 1711, 1608, 1401, 1211, 1108, 1105, 1102, and 912 were not removed prior to fumigation.

17 40. By failing to follow labeling instructions requiring the removal of non-airtight-sealed
18 food prior to fumigation with the pesticide Vikane at the Keola La'i Condominium on September
19 13-16, 2010, Respondent violated Section 12(a)(2)(G) of FIFRA, 7 U.S.C. § 136j(a)(2)(G).

20 COUNT 5: Use of a registered pesticide in a manner inconsistent with its labeling (failure to
21 open operable internal doors prior to fumigation), 7 U.S.C. § 136j(a)(2)(G).

22 41. Paragraphs 4 through 8 above are hereby incorporated in this Count 5 by reference as
23 if the same were set forth herein in full.

24 42. In the section entitled "Preparation for Fumigation," the Vikane Specimen Label
25 (April 15, 2010 version) states, "Open operable internal doors, internal openings to attics and sub
26 areas, storage chests, cabinets, drawers, closets, and appliances (such as washers, dishwashers,
27 dryers, microwave or conventional ovens, etc.)."

28 43. In the section entitled "GAS DISTRIBUTION," the Vikane Gas Fumigant Structural

1 Fumigation Manual (April 2010 version) states, “Open operable internal doors, internal openings
2 to attics and sub areas, storage chests, cabinets, drawers, closets, and appliances (such as
3 washers, dishwashers, dryers, microwave or conventional ovens, etc.). This will aid in
4 fumigation distribution and aeration.”

5 44. On September 13-16, 2010, Respondent applied approximately 3,225 pounds of
6 Vikane inside the Keola La’i Condominium located at 600 Queen Street in Honolulu, Hawai’i
7 for the purpose of fumigation.

8 45. On September 16, 2010, immediately after completion of the fumigation, a pesticide
9 specialist with the Hawai’i Department of Agriculture observed that at least 342 of the 352
10 residential units at the Keola La’i Condominium had operable internal doors (*e.g.*, washer/dryer
11 doors, kitchen cabinet doors, dishwasher doors) that were not opened prior to fumigation.

12 46. On September 16, 2010, Michael Miske, the President of Respondent, signed an
13 attestation confirming that the vast majority of the 352 residential units at the Keola La’i
14 Condominium had operable internal doors that were not opened prior to fumigation.

15 47. By failing to follow labeling instructions requiring the opening of operable internal
16 doors prior to fumigation with the pesticide Vikane at the Keola La’i Condominium on
17 September 13-16, 2010, Respondent violated Section 12(a)(2)(G) of FIFRA, 7 U.S.C. §
18 136j(a)(2)(G).

19 IV. PROPOSED CIVIL PENALTY

20 Section 14(a)(1) of FIFRA, 7 U.S.C. § 136l(a)(1), and the Civil Monetary Penalty
21 Inflation Adjustment Rule, 40 C.F.R. Part 19, authorize the assessment of a civil administrative
22 penalty of up to \$6,500 for each violation of FIFRA occurring after March 15, 2004, but on or
23 before January 12, 2009, and up to \$7,500 for each violation of FIFRA occurring after January
24 12, 2009. For purposes of determining the amount of the civil penalty to be assessed, FIFRA
25 Section 14(a)(4) requires EPA to consider the size of Respondent’s business, the effect on
26 Respondent’s ability to continue in business and the gravity of the violations alleged. Based on
27 the violations alleged in this Complaint, and after consideration of the statutory factors
28 enumerated above, EPA proposes to assess the following civil penalty pursuant to FIFRA Section

1 14(a)(1) and the FIFRA Enforcement Response Policy dated December 2009 (a copy of which is
2 enclosed with this Complaint), which provides a rational, consistent and equitable calculation
3 methodology for applying the statutory penalty factors enumerated above:

4	Counts 1-3 (Use of a registered pesticide in a manner inconsistent with its labeling, violating Section 12(a)(2)(G) of FIFRA, 7 U.S.C. § 136j(a)(2)(G))	\$3,869 x 3
5	Counts 4-5 (Use of a registered pesticide in a manner inconsistent with its labeling, violating Section 12(a)(2)(G) of FIFRA, 7 U.S.C. § 136j(a)(2)(G))	\$4,250 x 2
6	TOTAL	\$20,100

7
8
9 **V. NOTICE OF OPPORTUNITY TO REQUEST A HEARING**

10 You have the right to request a formal hearing to contest any material fact set forth in this
11 Complaint or to contest the appropriateness of the proposed penalty. Any hearing requested will
12 be conducted in accordance with the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*, and
13 the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties
14 and the Revocation or Suspension of Permits (the “Consolidated Rules of Practice”), 40 C.F.R.
15 Part 22. A copy of the Consolidated Rules of Practice is enclosed with this Complaint.

16 **You must file a written Answer within thirty (30) days of receiving this Complaint to**
17 **avoid being found in default, which constitutes an admission of all facts alleged in the**
18 **Complaint and a waiver of the right to a hearing, and to avoid having the above penalty**
19 **assessed without further proceedings.** If you choose to file an Answer, you are required by the
20 Consolidated Rules of Practice to clearly and directly admit, deny, or explain each of the factual
21 allegations contained in this Complaint to which you have any knowledge. If you have no
22 knowledge of a particular fact and so state, the allegation is considered denied. Failure to deny
23 any of the allegations in this Complaint will constitute an admission of the undenied allegation.

24 The Answer shall also state the circumstances and arguments, if any, which are alleged to
25 constitute the grounds of defense, and shall specifically request an administrative hearing, if
26 desired. If you deny any material fact or raise any affirmative defense, you will be considered to
27 have requested a hearing. The Answer must be filed with:

1 Regional Hearing Clerk (ORC-1)
2 U.S. Environmental Protection Agency, Region IX
3 75 Hawthorne Street
4 San Francisco, CA 94105

5 In addition, please send a copy of the Answer and all other documents that you file in this action
6 to:

7 Edgar P. Coral
8 Office of Regional Counsel (ORC-2)
9 U.S. Environmental Protection Agency, Region IX
10 75 Hawthorne Street
11 San Francisco, CA 94105

12 You are further informed that the Consolidated Rules of Practice prohibit any *ex parte*
13 (unilateral) discussion of the merits of any action with the Regional Administrator, Regional
14 Judicial Officer, Administrative Law Judge, or any person likely to advise these officials in the
15 decision of the case, after the Complaint is issued.

16 VI. INFORMAL SETTLEMENT CONFERENCE

17 EPA encourages all parties against whom a civil penalty is proposed to pursue the
18 possibility of settlement through informal conferences. Therefore, whether or not you request a
19 hearing, you may confer informally with EPA through Mr. Coral, the EPA attorney assigned to
20 this case, regarding the facts of this case, the amount of the proposed penalty, and the possibility
21 of settlement. **An informal settlement conference does not, however, affect your obligation
22 to file an Answer to this Complaint.**

23 VII. ALTERNATIVE DISPUTE RESOLUTION

24 The parties also may engage in any process within the scope of the Alternative Dispute
25 Resolution Act, 5 U.S.C. § 581 *et seq.*, which may facilitate voluntary settlement efforts.
26 Dispute resolution using alternative means of dispute resolution does not divest the Presiding
27 Officer of jurisdiction nor does it automatically stay the proceeding.

28 VIII. QUICK RESOLUTION

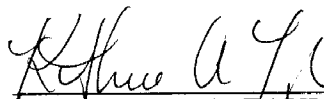
Instead of requesting an informal settlement conference or filing an Answer requesting a
hearing, you may choose to resolve the proceeding by paying the specific penalty proposed in the
Complaint and filing a copy of the check or other instrument of payment with the Regional
Hearing Clerk within thirty (30) days after receiving the Complaint. If you wish to resolve the
proceeding in this manner instead of filing an answer but need additional time to pay the penalty,

1 you may file a written statement stating that you agree to pay the proposed penalty in accordance
2 with 40 C.F.R § 22.18(a)(1) with the Regional Hearing Clerk within 30 days after receiving the
3 Complaint. The written statement need not contain any response to, or admission of, the
4 allegations in the Complaint. Within sixty (60) days after receiving the Complaint, the full
5 amount of the proposed penalty must be paid. Failure to make such payment within this sixty-
6 day period may subject you to default. Upon receipt of payment in full, the Regional Judicial
7 Officer will issue a Final Order. Payment by a respondent shall constitute a waiver of the
8 respondent's rights to contest the allegations and to appeal the Final Order. In addition, full
9 payment of the proposed penalty shall only resolve Respondent's liability for Federal civil
10 penalties for violations and facts alleged in the Complaint and does not affect the right of EPA or
11 the United States to pursue appropriate injunctive or other equitable relief or criminal sanctions
12 for any violations of law.

12 IX. CONSENT AGREEMENT AND FINAL ORDER

13 EPA has the authority, where appropriate, to modify the amount of the proposed penalty
14 to reflect any settlement reached with you in an informal conference or through alternative
15 dispute resolution. The terms of such an agreement would be embodied in a Consent Agreement
16 and Final Order. A Consent Agreement signed by both parties would be binding as to all terms
17 and conditions specified therein when the Regional Judicial Officer signs the Final Order.

18
19
20 Dated at San Francisco, California on this 17 day of February, 2011.

21 

22 _____
23 KATHERINE A. TAYLOR
24 Associate Director for Agriculture
25 Communities and Ecosystems Division
26 U.S. Environmental Protection Agency, Region IX
27 75 Hawthorne Street
28 San Francisco, California 94105

1 CERTIFICATE OF SERVICE

2 I certify that the original and one copy of the foregoing Complaint and Notice of
3 Opportunity for Hearing (Docket No. FIFRA-09-2011-00 11) was hand delivered to:

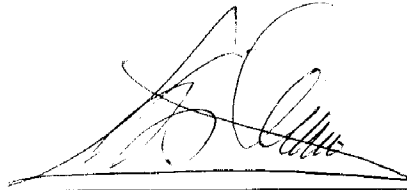
4 Regional Hearing Clerk
5 U.S. Environmental Protection Agency, Region IX
6 75 Hawthorne Street
7 San Francisco, California 94105

8 and that a true and correct copy of the Complaint; the Consolidated Rules of Practice, 40 C.F.R.
9 Part 22; and the FIFRA Enforcement Response Policy were placed in the United States Mail,
10 certified mail, return receipt requested, addressed to the following:

11 Michael Miske
12 President
13 Kama'aina Termite and Pest Control, Inc.
14 940 Queen Street, Suite B
15 Honolulu, HI 96814

16 Dated: FEB 24 2011

17 By:

18 
19 _____
20 U.S. Environmental Protection Agency, Region IX
21
22
23
24
25
26
27
28