



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

U.S. ENVIRONMENTAL
PROTECTION AGENCY-REGION
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2009 APR 15 AM 11:51
REGIONAL HEARING
OFFICE

APR 15 2009

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

David Michelman, Esq.
Michelman & Bricker
2207 Chestnut Street
Philadelphia, PA 19103

Re: *In the Matter of Flexabar Corporation and Flexdel Corporation*
Docket No. FIFRA-02-2008-5120

Dear Mr. Michelman:

Enclosed is a copy of the Consent Agreement and Final Order in the above-referenced proceeding, signed by the Regional Administrator of the U.S. Environmental Protection Agency - Region 2.

Please note the payment provisions of the Agreement. Please arrange for payment of the penalty according to the instructions given in the Final Order.

Sincerely,

Naomi P. Shapiro
Assistant Regional Counsel

cc: Susan L. Biro, Chief Administrative Law Judge
Director, Pesticides Control Program, NJDEPE

Enclosures

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2

U.S. ENVIRONMENTAL
PROTECTION AGENCY-REG. II
2009 APR 15 AM 11:52
REGIONAL HEARING
CLERK

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In the Matter of :
Flexabar Corporation and : CONSENT AGREEMENT AND
Flexdel Corporation, : FINAL ORDER
Respondents. :
Proceeding Under the Federal : Docket No. FIFRA-02-2008-5120
Insecticide, Fungicide and :
Rodenticide Act, as amended. :
----- x

PRELIMINARY STATEMENT

This administrative proceeding for the assessment of a civil penalty was initiated pursuant to 7 U.S.C. § 1361(a), of the Federal Insecticide, Fungicide and Rodenticide Act, as amended, 7 U.S.C. § 136 et seq. (“FIFRA” or “the Act”). On July 9, 2008, Complainant in this proceeding, the Director of the Division of Enforcement and Compliance Assistance, United States Environmental Protection Agency, (“EPA”), Region 2, issued a Complaint and Notice of Opportunity for Hearing, Docket No. FIFRA-02-2008-5120, to Respondents Flexabar Corporation and Flexdel Corporation. The Complaint alleges six violations of Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), distribution or sale of a misbranded pesticide. The Complaint further seeks a total civil penalty of \$39,000.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondents are Flexabar Corporation and Flexdel Corporation, both located at 1969 Rutgers University Boulevard, Lakewood, New Jersey 08701 (hereinafter, “Respondents”).

2. Respondents are both incorporated in the State of New Jersey.
3. Each Respondent is a “person” as defined by FIFRA Section 2(s), 7 U.S.C. § 136(s), and as such, is subject to FIFRA and the regulations promulgated thereunder.
4. Each Respondent is a “distributor or seller” within the meaning of Section 2(gg) of FIFRA, 7 U.S.C. § 136(gg).
5. Each Respondent is a “wholesaler,” “dealer,” or “other distributor” within the meaning of Section 14(a)(1) of FIFRA, 7 U.S.C. § 1361(a)(1).
6. Respondent Flexabar Corporation operates a facility located at 1969 Rutgers University Boulevard, Lakewood, New Jersey 08701 (the “facility”) which produces paint products, including marine paints and coatings, some of which are regulated as pesticides. Said facility is an “establishment,” as defined by Section 2(dd) of FIFRA, 7 U.S.C. § 136(dd).
7. On March 13, 2006, authorized inspectors from EPA’s Region 2 Office conducted an inspection at Lockwood Boat Works, a retail outlet carrying Respondents’ products. On April 4, 2006, authorized inspectors from EPA’s Region 2 Office conducted an inspection at the facility (hereinafter “R2 Inspections”).
8. In the Complaint, EPA alleged that, during the R2 inspections, inspectors obtained copies of shipping records demonstrating that misbranded pesticide products produced at the facility were shipped by Respondents for distribution.
9. Based on the R2 inspections, EPA alleged in the Complaint a total of six instances of distribution or sale of misbranded pesticides within the meaning of Section 12(a)(1)(E)

of FIFRA, 7 U.S.C. § 136j(a)(1)(E).

CONSENT AGREEMENT

Based upon the foregoing, and pursuant to Section 22.18 of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits, 40 C.F.R. § 22.18, it is hereby agreed as follows:

1. Respondents shall, immediately upon the effective date of this Consent Agreement and Final Order, comply with the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”), 7 U.S.C. § 136 et seq., and its implementing regulations. Respondents certify to the best of their knowledge that they are now in compliance with the requirements of FIFRA and its implementing regulations.
2. Respondents agree to pay, by cashier’s checks, certified checks, or Electronic Fund Transfer (“EFT”), a civil penalty in the amount of **four thousand, eight hundred dollars (\$4,800)**. Payment shall be made in four equal installments of twelve hundred dollars (\$1200). Payment must be received at the address below on or before the following dates: May 1, 2009 (“1st due date”); August 1, 2009 (“2nd due date”); November 1, 2009 (“3rd due date”); and February 1, 2010 (“4th due date”).

If payment is made by check(s), such check(s) shall be payable to the “Treasurer of the United States of America,” and mailed to U.S. Environmental Protection Agency, Fines and Penalties, Cincinnati Finance Center, P.O. Box 979077, St. Louis, MO 63197-9000. Each check shall be annotated: *In the Matter of Flexabar Corporation and Flexdel Corporation.*, Docket No. FIFRA-02-2008-5120. If Respondents choose to make payment by EFT, then

they shall provide the following information to the remitter bank:

- 1) Amount of Payment.
 - 2) SWIFT address: FRNYUS33, 33 Liberty Street, New York, NY 10045.
 - 3) Account Code for Federal Reserve Bank of New York receiving payment: 68010727.
 - 4) Federal Reserve Bank of New York ABA routing number: 021030004.
 - 5) Field Tag 4200 of the Fedwire message should read "D 68010727 Environmental Protection Agency."
 - 6) Name of Respondents: FLEXABAR CORPORATION AND FLEXDEL CORPORATION.
 - 7) Case Number: FIFRA-02-2008-5120.
- a. The civil penalty constitutes a penalty within the meaning of 26 U.S.C. § 162(f).
 - b. If Respondents fail to pay any of the installments required above, by its due date, Respondents shall also be liable to EPA for an additional stipulated penalty of five hundred dollars (\$500) for each such failure. All stipulated penalties for failure to pay a penalty installment on time are due and payable within thirty (30) calendar days of Respondents' receipt from EPA of a written demand for payment of the penalties. All stipulated penalty payments shall be made in accordance with the payment instructions above. Stipulated penalties shall accrue as provided above, regardless of whether EPA has notified Respondents of the violation or has made a demand for payment, but need only be paid upon demand.
 - c. Failure to pay the full amount of the penalty, or any stipulated penalty demanded by EPA according to the above provisions, may result in the referral of this matter to the United States Department of Justice or the United States Department of the Treasury for collection or other appropriate action.
 - d. If a payment is not received on or before its due date, interest will be assessed, at the

annual rate established by the Secretary of the Treasury pursuant to 31 U.S.C. § 3717, on the overdue amount from the due date through the date of payment. In addition, a late payment handling charge of \$15.00 will be assessed for each thirty (30) calendar day period, or any portion thereof, following the due date in which the balance remains unpaid. A 6% per annum penalty will also be applied to any principal amount not paid within 90 days of the due date.

- e. Respondents shall also send a copy of each payment to each of the following:

Naomi P. Shapiro, Esq.
Assistant Regional Counsel

Karen Maples
Regional Hearing Clerk

U.S. Environmental Protection Agency
Region 2
290 Broadway, 16th floor
New York, NY 10007-1866

3. Respondents will perform a supplemental environmental project (the "Project") for the restoration of shellfish in Barnegat Bay in accordance with the terms laid out in Appendix A to this Consent Agreement ("Scope of Work").
4. Respondents have proposed expenditures of ***Fourteen Thousand, Three Hundred Dollars (\$14,300)*** for the project and submitted to EPA a written Scope of Work for the implementation of the Project. As described in the Scope of Work, Respondents shall pay the sum of ***Fourteen Thousand, Three Hundred Dollars (\$14,300)*** to ReClam the Bay, a third-party not-for-profit organization, to implement the Project. Payment shall be made in two installments: a) an initial payment of ten thousand, eight hundred dollars (\$10,800) for the purchase of clam seed to be made within sixty days of the date of signature of the Final Order

herein; and a final payment of three thousand, five hundred dollars (\$3,500) to be made on or before November 15, 2009. Within ten (10) days of making each such payment, Respondents shall supply to EPA documentation confirming that these expenditures have been made.

5. No later than January 31, 2011, Respondents shall supply to EPA a written report on completion (“the final report”) documenting the completion of the Project in accordance with the terms of the Scope of Work. The final report will include confirmation that all monies were expended on the Project, a general description of the sums spent on implementing the Project, and a summary in calendar form of the execution of the elements of the Project described in Section III (Schedule and Plan for Implementation of the SEP) of the Scope of Work. The final report will further be signed by a responsible corporate official of Respondents and contain a certification of the completion of the Project in accordance with Paragraph 6, below.

6. All submissions required under this Consent Agreement shall contain a certified statement, signed by a corporate officer of the Respondents, which will contain the following language:

“I certify that the information contained in or accompanying this statement is true, accurate and complete. As to the identified portion(s) of this statement the truth or accuracy of which I cannot personally verify, as the supervising company official, I certify that person(s) under my supervision has/have verified that this information is true, accurate and complete.”

7. Respondents further hereby certify that as of the date of their execution of this Consent Agreement, Respondents are not required by virtue of any local, state, or federal statute, regulation, ordinance, order, consent decree, or other law or legal instrument, to perform the Project specified in the Scope of Work and Paragraph 3, above. Respondents further certify

that neither has already received, nor is currently negotiating to receive, credit in any other enforcement action for any of these same tasks.

8. For federal income tax purposes, Respondent agree that they will neither capitalize into inventory or basis nor deduct any costs or expenditures incurred in the performance of the Project.

9. Except as otherwise specified herein, all submissions required under this Consent Agreement shall be sent to:

Chief, Pesticides and Toxic Substances Branch
U.S. Environmental Protection Agency
Region II
2890 Woodbridge Avenue
Edison, N.J. 08837-3679

10. If Respondents fail to pay any of the amounts described or to submit any of the reports or certifications required in Paragraphs 2, 4, and 5 of this Consent Agreement, Complainant shall notify Respondents in writing, Certified Mail, Return Receipt Requested, of her finding as to which of the agreed-to tasks were not performed by Respondents. Respondents shall have twenty (20) days in which to provide Complainant with such explanation as Respondents deem appropriate. If Complainant then determines that Respondents have failed to comply with such provisions of this Consent Agreement, Respondents shall pay stipulated penalties, as set forth in Paragraph 11, below, within thirty (30) calendar days of the Respondents' receipt of such determination (the "due date"). If such payment is not made on or before the stipulated penalty due date, interest and a late payment charge will be assessed in the same manner and in the same amounts as specified in Paragraph 2, above.

11. Respondents agree to pay stipulated penalties for the failure to comply with the terms of Paragraphs 3 through 5 of this Consent Agreement, in the same manner as specified in Paragraph 2 and in the following amounts:
- a. If EPA determines that Respondents failed to make expenditures of at least \$14,300 on the Project, then, within thirty (30) days of receipt of EPA's determination, Respondents shall pay by cashier's or certified check a penalty of **Nineteen Thousand, Seven Hundred and Sixty Dollars** (\$19,760), less any amount actually spent on the Project.
 - b. If after receiving a certification made pursuant to Paragraphs 5 through 7, above, EPA believes that any information was willfully inaccurately certified, EPA shall promptly advise Respondents of its belief and the basis for its belief and shall afford Respondents an opportunity to respond to EPA within twenty (20) days of EPA's notification. If, after considering Respondents' reply, EPA determines that the certification was substantially inaccurate, in that an item (or items) certified as implemented was not or that costs certified differed significantly from costs actually incurred, then within thirty (30) days of receipt of EPA's determination, Respondents shall pay by cashier's or certified check a penalty of **Ten Thousand Dollars** (\$10,000) for such false certification. Any such payment shall be *in addition* to those payments, if any, required under Subparagraphs (a) and (c) of this paragraph. Any payments made under this Subparagraph shall not preclude EPA from initiating a separate criminal investigation pursuant to 18 U.S.C. § 1001 et seq., or any other applicable

law.

- c. If at any time, EPA believes that the information in Paragraph 7, above, was inaccurately certified, EPA shall promptly advise Respondents of its belief and the basis for its belief and shall afford Respondents an opportunity to respond to EPA within twenty (20) days of EPA's notification. If, after considering Respondents' reply, EPA determines that the certification was substantially inaccurate, then within thirty (30) days of receipt of EPA's determination, Respondents shall pay by cashier's or certified check a penalty of **Nineteen Thousand, Seven Hundred and Sixty Dollars (\$19,760)**.

12. **Force Majeure.**

- a. "*Force majeure*," for purposes of this Consent Agreement, is defined as any event arising entirely from causes beyond the control of the Respondents that delays or prevents the performance of any obligation under this Consent Agreement despite Respondents' best efforts to fulfill such obligation, including but not limited to acts of God, floods, hurricanes, other weather conditions, water pollution and water quality conditions, depredation by predators, mortality, and the inability of ReClam the Bay to perform any material portion of the Scope of Work due to insolvency, bankruptcy, or economic hardship. If Respondents have fully complied with and satisfied their payment obligations under Paragraphs 2 and 4, above, and the notice provision of subparagraph b, herein, and a *force majeure* event prevents it from performing their other obligations under the Consent Agreement, then Respondents shall be discharged from

any further obligation under this Consent Agreement, including any obligations to pay stipulated penalties or interest.

- b. The requirement that the Respondents' exercise "best efforts to fulfill such obligation" includes using best efforts to anticipate any potential force majeure event and best efforts to address the effects of any potential *force majeure* event (1) as it is occurring and (2) following the potential *force majeure* event, such that the delay is minimized to the greatest extent possible. If any event occurs or has occurred that may delay or render impossible the performance of any obligation under this Consent Agreement, whether or not caused by a *force majeure* event, the Respondents shall notify EPA Region 2 in writing, within thirty (30) days of when Respondents first knew or should have known of such event, providing: an explanation and description of the event and Respondents' rationale for contending that it constitutes a *force majeure* event; a statement of whether such event will delay or discharge performance; the anticipated duration of any delay, a description of actions taken or to be taken to prevent or minimize it, and a revised schedule for performance; and an explanation of why the event makes further performance impracticable and discharges further performance. The Respondents shall include with any notice all available documentation supporting their claim that the event constituted a *force majeure* event and caused delay or inability to perform. Failure to provide timely notice of an event that may delay or render impossible the execution of the performance of any obligation under this Consent Agreement, whether or not caused by a force majeure event, may preclude

Respondents from seeking discharge of their obligations or associated stipulated penalties pursuant to this paragraph.

- c. If EPA agrees that the delay or non-performance is attributable to a *force majeure* event, the time for performance of the obligations under this Consent Agreement that are affected by the *force majeure* event will be extended by EPA for such time as is necessary to complete those obligations, or will be discharged, as appropriate. If EPA does not agree that the delay or non-performance has been or will be caused by a *force majeure* event, EPA will notify the Respondents in writing of its decision. If EPA agrees that the delay or non-performance is attributable to a *force majeure* event, EPA will notify the Respondents in writing of the length of the extension, if any, for performance of the obligations affected by the *force majeure* event, or that the obligations for further performance have been discharged.

13. Respondents (a) admit the jurisdictional allegations of the Complaint, (b) neither admit nor deny the specific factual allegations contained in the Complaint, and (c) consent to the assessment of the civil penalties as specified in Paragraphs 2 and 11 of this Consent Agreement.

14. This Consent Agreement is being voluntarily and knowingly entered into by the parties to resolve (conditional upon full payment of the civil penalty herein and upon the accuracy of Respondents' certifications in this proceeding) the civil and administrative claims alleged in the Complaint in this matter. Nothing herein shall be read to preclude EPA or the United


States, however, from pursuing appropriate injunctive or other equitable relief or criminal sanctions for any violation of law.

15. Respondents have read the Consent Agreement, understands its terms, find it to be reasonable and consent to its issuance and its terms. Respondents consent to the issuance of the accompanying Final Order. Respondents agree that all terms of settlement are set forth herein and in Appendix A.
16. Respondents waive their right to request a hearing on the Complaint, this Agreement, or the Final Order included herein, including any right to contest any allegations contained within those documents.
17. Respondents waive any right they may have pursuant to 40 C.F.R. § 22.8 to be present during discussion with or to be served with and to reply to any memorandum or communication addressed to the Regional Administrator, the Deputy Regional Administrator, or the Regional Judicial Officer for Region 2 where the purpose of such discussion, memorandum, or communication is to recommend that such official accept this Consent Agreement and issue the attached Final Order.
18. This Consent Agreement and Final Order shall not relieve Respondents of their obligation to comply with all applicable provisions of federal, state, or local law, nor shall it be construed to be a ruling on, or determination of, any issue related to any federal, state, or local permit. This Consent Agreement and Final Order does not waive, extinguish, or otherwise affect Respondents' obligation to comply with all applicable provisions of FIFRA and the regulations promulgated thereunder.

19. Respondents consent to service of a copy of this Consent Agreement and Final Order upon them by an EPA employee other than the Regional Hearing Clerk.
20. Each party shall bear its own costs and attorneys' fees in the action resolved by this Consent Agreement and Final Order.
21. Each signatory of this Consent Agreement certifies that he or she is duly and fully authorized to enter into the terms of this Consent Agreement and to legally bind the party on behalf of which he or she signs this Consent Agreement.

RESPONDENTS:

BY:

on 

FLEXABAR CORPORATION

ROBERT FRANLETTI

Name (Please Print)

Gen Mgr

Title

DATE:

4/10/09

BY:

on 

FLEXDEL CORPORATION

ROBERT FRANLETTI

Name (Please Print)

Gen Mgr

Title

DATE:

4/10/09

COMPLAINANT:

D LaPosta


Dore LaPosta, Director
Division of Enforcement and
Compliance Assistance
U.S. Environmental Protection Agency, Region 2

DATE:

4/13/09

FINAL ORDER

The Regional Administrator of the U.S. Environmental Protection Agency, Region 2, ratifies the foregoing Consent Agreement. The Agreement entered into by the parties is hereby approved, incorporated herein, and issued as an Order. The effective date of this Order shall be the date of filing with the Regional Hearing Clerk, U.S. EPA Region 2, New York, New York.



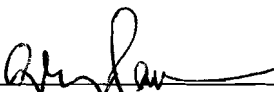
GEORGE PAVLOU
Acting Regional Administrator
U.S. Environmental Protection
Agency – Region 2
290 Broadway
New York, New York 10007

DATE:

4/14/09

FINAL ORDER

The Regional Administrator of the U.S. Environmental Protection Agency, Region 2, ratifies the foregoing Consent Agreement. The Agreement entered into by the parties is hereby approved, incorporated herein, and issued as an Order. The effective date of this Order shall be the date of filing with the Regional Hearing Clerk, U.S. EPA Region 2, New York, New York.



GEORGE PAVLOU
Acting Regional Administrator
U.S. Environmental Protection
Agency – Region 2
290 Broadway
New York, New York 10007

DATE:

4/14/09

ATTACHMENT A

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2
290 Broadway, 16th Floor
New York, New York 10007-1866**

IN THE MATTER OF:	:	Docket No. FIFRA-02-2008-5120
	:	
Flexabar Corporation	:	
and	:	
Flexdel Corporation,	:	
	:	
Respondents.	:	
	:	
Proceeding Under the Federal	:	
Insecticide, Fungicide and	:	
Rodenticide Act, as amended.	:	

**SCOPE OF WORK
FOR FIFRA SETTLEMENT WITH CONDITIONS
BY FLEXABAR CORPORATION AND FLEXDEL CORPORATION**

Flexabar Corporation and Flexdel Corporation (collectively, "Flexabar") propose to undertake the settlement with conditions ("SWC") contained in this Scope of Work ("SOW") for a Supplemental Environmental Project ("SEP"), in connection with a settlement of the outstanding FIFRA administrative complaint against them, under terms embodied in a Consent Agreement and Final Order ("CA/FO)." The SEP would restore and enhance natural resources within the Bay. Flexabar will fund, support, and monitor activities of ReClam the Bay ("ReClam") [a non-profit organization], to plant and maintain approximately 2.5 million seed clams to restore and replenish the shellfish population of Barnegat Bay ("the Bay"). Additionally, according to well-established scientific principles of marine biology discussed below, the work outlined in this SEP may also ultimately result in the removal of up to 3,125 pounds of nitrogen from a body of water that is presently severely overloaded with nutrients. The SEP will also indirectly contribute toward controlling non-point sources of pollution of the Bay, because ReClam the Bay can use the SEP's clam restocking activities to promote its existing outreach program directed at increasing public awareness of the need to control sources of nitrogen runoff. ReClam considers grassroots prevention efforts to be "crucial" to the long-term health of the Bay. Under the SEP, Flexabar will donate fourteen thousand, three hundred dollars (\$14,300) to ReClam for its work to replenish the shellfish population of Barnegat Bay, and ReClam will agree to perform this SEP according to this Scope of Work.¹

¹ A copy of the Scope of Work performance agreement between Flexabar and ReClam the Bay is attached hereto. The exact number of clams which will be seeded and the exact amount of nitrogen which will be removed are projected goals, rather than requirements of the SEP, since achievement of those goals will be dependent on numerous factors which are not within the control of either Flexabar or ReClam the Bay, including but not limited to, the price of the seed clams (which will determine how many clams can be purchased with the fixed amount of funding provided under the SEP), mortality rate, and habitat conditions.

I. **APPLICABLE STANDARDS FOR UNDERTAKING A SETTLEMENT WITH CONDITIONS**

A. **Eligibility of the SEP as a Basis for a Settlement With Conditions Under EPA's Enforcement Response Policy**

EPA's Enforcement Response Policy² (hereinafter the "ERP") provides for the development and implementation of "environmentally beneficial activities" in lieu of a portion of the cash penalty, pursuant to settlements with conditions. The proposed "environmentally beneficial activities" can be classified as a "pollution reduction" project with "environmental restoration and protection" benefits and/or as a "natural resource enhancement" project and/or under the examples of appropriate SEP's explicitly identified in the ERP. These "extensive and specific environmentally beneficial activities" must meet the three criteria below (ERP, pp. 28-29):

1. The actions "must exceed those normally expected under the circumstances (actions in excess of those required to correct the violation for which the violator was charged, and actions in excess of those already required by Federal/State/local laws)."
2. The actions "must be taken within a specific time period."
3. The actions "will be strictly monitored by the Agency."

The SEP meets all of these criteria. First, as Flexabar is under no legal obligation to undertake these environmentally beneficial activities, such actions necessarily extend beyond the scope of those actions required to correct the violations at issue. Second, the project's primary activities will be implemented within a specific time period of approximately 18 months (although additional environmental benefits are expected to continue to occur over a longer period of time). Third, the actions will be monitored by EPA, which will receive a Final Report confirming performance and completion of the project; additional monitoring will be conducted through participation in the SEP by other government agencies, including the New Jersey Department of Environmental Protection ("NJDEP").

B. **Eligibility of Flexabar for a SEP Under the ERP**

In order to be eligible to participate in a SEP, an enterprise found to be in violation of FIFRA must additionally be in a situation to satisfy the "Criteria for Choosing an SWC" set forth in the ERP. (ERP, p. 29): These criteria include:

1. Violations have been documented which warrant a civil penalty; and
2. The violations do not evidence wanton, knowing, or willful disregard for regulatory requirements; and
3. The violator has exhibited a good-faith attitude toward solving the noncompliance and has no history of non-compliance; and

² The Enforcement Response Policy is set forth in EPA's "Enforcement Response Policy for the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA)," dated July 2, 1990.

4. There are clear public benefits to use of a SEP; and
5. A SEP acceptable to EPA can be negotiated.

Flexabar's actions, and the proposed scope of work for the SEP, meet all of these conditions. First, under the terms of the settlement, EPA and Flexabar have documented misbranding violations of FIFRA, and have agreed that civil penalties should be assessed for them. Second, the violations by Flexabar do not evidence wanton, knowing or willful disregard for the requirements of FIFRA. Third, Flexabar has exhibited a good-faith attitude toward correcting the noncompliance and has proactively sought a productive resolution of these violations through an innovative SEP proposal. Fourth, the natural resource restoration characteristics of the SEP constitute clear public benefits from this project. Finally, the SEP meets the criteria for a successful SEP set out in applicable EPA policy and guidance documents.

II. NATURE AND PURPOSE OF THE SEP ACTIVITIES: RESTORE AND REPLENISH THE SHELLFISH POPULATION OF THE BAY AND REDUCE POLLUTION AND IMPROVE WATER QUALITY IN BARNEGAT BAY, NJ

A. Background: The Problem of Nutrient Loading in Barnegat Bay

The addition of any nutrient into an environment in which its absence is a limiting factor in the growth of a particular organism can create an overabundance of that organism. Nitrogen functions this way for algae, phytoplankton, and other organisms in marine ecosystems. The addition of nitrogen leads to blooms of the algae³ and phytoplankton, that feed on it, and which would normally be limited in their growth by the amount of nitrogen available to them in the water. [See Dr. Robert Rheault, "Clean the Bay with Shellfish," (*East Coast Shellfish Growers Association*, 2004)] The life cycles of these overabundant blooms, particularly at death, can cause hypoxic and anoxic conditions in the water, the most severe of which constitute "dead zones" in which much of the native marine life cannot survive. [See, Achenbach, Joel. "A 'Dead Zone' in the Gulf of Mexico." *The Washington Post*, July 31, 2008]. Dr. Rheault advocates a partial solution to this problem of excess nitrogen through the use of shellfish aquaculture. Dr. Rheault's study helped inspire the formation of ReClam the Bay to address this problem.

Dr. Rheault's recommendations for restoration of shellfish populations to reduce marine nitrogen levels grew out of his research into a phytoplankton and algae-induced anoxia that caused a massive fish kill in Narragansett Bay, RI in 2003. Nutrient loading conditions are harming Barnegat Bay in the same way. According to a new global study by the Virginia Institute of Marine Science (VIMS), Barnegat Inlet has been a seasonal dead zone characterized by "mass mortality with annual recolonization" since 1990. [See, World Dead Zone Maps, , Malmquist, David. "Study Shows Continued Spread of 'Dead Zones.'" *Virginia Institute of Marine Science, News and Media*. August 14, 2008; <http://www.vims.edu/deadzone/>. See also: Diaz, Robert and Rutger Rosenberg. "Spreading Dead Zones and Consequences for Marine Ecosystems." *Science*. August 15, 2008.

<http://www.sciencemag.org/cgi/content/abstract/sci;321/5891/926?maxtoshow=&HITS=10&hits=10&RESULTFORMAT=&fulltext=diaz+rosenberg&searchid=1&FIRSTINDEX=0&resourcetype=HWCIT>]. The authors of the VIMS study have stated that dead zones have become "the

³ The subject products in this enforcement action are marine paints fortified with an algicide.

key stressor on marine ecosystems.” [See Malmquist, 2008]. As described by Douglas O’Malley of Environment New Jersey, “We’re making Barnegat Bay the state’s largest detention basin.” [See Henry, Cynthia. “N.J. beach closures increased in 2007.” *The Philadelphia Inquirer*. July 30, 2008

http://www.philly.com/philly/news/20080730_N_J_beach_closures_increased_in_2007.html.

The chief ocean scientist for the Environmental Defense Fund has further warned that, “The next big challenge, after global warming, is going to be addressing the massive upset of the world’s nitrogen cycle.” [See Achenbach article, 2008].

Nitrogen is one of the most significant contaminants of concern in Barnegat Bay. [See Urgo, Jacqueline L. “Bringing Back Bivalves in Barnegat Bay.” *The Philadelphia Inquirer* July 27, 2008), which states: “One of the problems that most concerns environmentalists is the accumulation of nitrogen in the bay.”]. The worst sources of nitrogen input are stormwater, disposal of treated sewage wastewater, and runoff from nitrogen-rich lawn fertilizers. According to Dr. Rheault, “The average person releases about 12 pounds of nitrogen a year,” each pound of which costs approximately \$40 to remove at the sewage treatment plant. Because of the high costs of removal, many municipalities dump the treated sewage directly into the Bay. Poorly maintained septic systems also contribute to nitrogen runoff. Fertilizers, often rich in nitrogen and other chemicals, are carried by rainwater from the lawns on which they are spread through storm drains or watersheds and eventually discharged into the Bay as well.

These nutrient inputs cause serious problems for the Bay’s ecosystem and public health. As the Natural Resources Defense Council (NRDC) reported in its 18th annual “Beach Report” (Testing the Waters: A Guide to Water Quality at Vacation Beaches, 2008), the beaches in and around Barnegat Bay in Ocean County, New Jersey are the most contaminated in the State. [NRDC Beach Report]. Worst among them last year was the Hancock Avenue beach in Seaside Heights, which exceeded contamination levels during 56% of the summer of 2007. All eleven of New Jersey’s “beaches with the highest percent exceedances in 2007” were in Ocean County, [See NRDC Beach Report, at 294 *et seq.*] as well as New Jersey’s worst “Repeat Offender,” Beachwood Beach West, which had contamination exceedances during 25% of the summers of 2005, 2006 and 2007. [See NRDC Beach Report, at 12]. According to NRDC, almost three quarters of the contamination of New Jersey beaches results from storm water (72%), with 1% contributions from sewage and “other,” and 26% coming from unknown sources. [See NRDC Beach Report, at 294 *et seq.*]. Having such large percentages of nitrogen input come from either storm water or unknown sources highlights the difficulty of preventing its entrance into the Bay, and increases the importance of having a method to remove the nitrogen once it enters.

According to information provided to ReClam the Bay’s President, Rick Bushnell, the nitrogen loading rate for the Bay is 25-30 kgN/ha/yr. This level is in excess of levels at which significant degradation of the aquatic habitat has been shown to occur (at levels above 20kgN/ha/yr). Rutgers University’s research has observed such damage within Barnegat Bay, citing for example, a 50-88% decline in seagrass biomass in the Bay between 2004 and 2006. After prevention, restocking shellfish is one of the best ways to combat this problem on the local scale. As William C. Baker, the President of the Chesapeake Bay Foundation, has recently stated, “Science has demonstrated that [when strategies to reduce nitrogen] are put in place, pollution is reduced, the dead zones (waters with little or no dissolved oxygen) get smaller, the water becomes clearer and critical underwater bay grasses increase.” [Baker, William C. “Averting a Chesapeake Disaster” *Washington Post*, November 2, 2008]. Furthermore, although there are a few methods of removing nitrogen from watersheds before it reaches Barnegat Bay, there is no other feasible method of removal once nitrogen has actually entered the Bay. [See

Bushnell, Richard. "Water Quality Problems: Shellfish Can Be Part of a Solution." ReClam the Bay. June 12, 2007].

B. The Nature of the Work Presently Performed by ReClam the Bay

ReClam the Bay is a registered Section 501(c) (3) nonprofit organization which is already conducting a program to restore and replenish the shellfish population of Barnegat Bay, New Jersey, and, through these shellfish, to remove excess nitrogen from the Bay. ReClam's program is implemented in cooperation with the Barnegat Bay Shellfish Restoration Program (which is part of the Rutgers University Cooperative Extension) ("BBSRP"), and the New Jersey Department of Environmental Protection's Bureau of Shellfisheries (which is part of its Division of Fish, Game and Wildlife). A substantial portion of ReClam's activities are performed by interested citizens, working as volunteers.

ReClam's shellfish replenishment and restoration program currently raises and then broadcasts approximately 1.2 million *Mercenaria mercenaria* clams annually, at sites around the bay chosen by the NJDEP Division of Fish and Wildlife. [See www.reclamthebay.org/explore]. The clams are purchased as "seeds," or larvae around which the shell has just begun to form. ReClam has installed protected systems, called "upwellers," in which the clams can safely grow and mature to a size of approximately 12mm, at which point they winter in beds protected by "predator nets" before being broadcast into locations throughout the bay the following spring. ReClam has now installed upwellers at nine locations within Ocean County, at a cost of between \$4,000 and \$8,000 per upweller. ReClam the Bay currently lists nine upweller locations on their website, at <http://www.reclamthebay.org/upweller.html#upweller>).

C. Flexabar's Proposed Funding for the Scope of Work Will be Implemented by ReClam the Bay Under the SEP

Despite governmental and public support, the size of ReClam's environmental programs and their actual impact on the environment is severely constrained by the organization's limited financial resources. This SEP would significantly expand the size of that environmental program and its actual impact on the environment. Under the SEP, Flexabar would donate fourteen thousand three hundred dollars (\$14,300) to ReClam for its work to replenish the shellfish population of Barnegat Bay. This payment would be made in two installments, the first paid within sixty (60) days of entry of a CA/FO settling EPA's administrative complaint against Flexabar, and the second paid on or before November 15, 2009.

1. Restocking the Clam Population and Measuring Growth in the Clam Population to Demonstrate Nitrogen Removal through Biomass Accumulation

ReClam anticipates that the funds provided by Flexabar will be sufficient to support purchase and restocking activities totaling approximately 2.5 million clams in 2009. Since clams only spawn once water temperature has reached 68 degrees Fahrenheit, clam seed typically becomes available in June of a given year. ReClam purchases the year's seed in June, at which point each one is the approximate size of a fleck of black pepper (the hatchery quotes them at 1-2mm; they must be greater than 0.7mm or they would fall through the wire mesh in ReClam's upwellers). At this size, the clams are far too small to count individually, so ReClam must rely on the hatchery from which it purchases the seed to estimate their approximate number, based on volume.

ReClam verifies the number purchased after approximately one month of raising the seed in an upweller, by which time the clams are large enough that ReClam can perform a standard industry calculation to determine their number (using a technique developed by Rutgers). By measuring the volume of 100 seed and comparing this figure to the total volume found in an upweller, ReClam can produce a good estimate of the total seed clam population. ReClam will report this initial estimate to Flexabar, so that Flexabar can include this information in its final report to EPA.

In the fall of 2010, ReClam will measure these clams again, when they are broadcast in selected locations in the wild, just prior to their second winter. ReClam will rake them up after they have spent almost a year and a half under its care, from their first summer growing in an upweller through the full year they spend in selected locations under predator nets afterwards. This progression from the first summer in an upweller, to a juvenile year under predator nets, to finally being broadcast in the wild, follows ReClam's customary system for raising and restocking clams. [Id.]. ReClam always performs the second broadcast of a crop of clams, releasing them into the wild, after November 1 (for permitting reasons), at a date subsequently determined by weather and other variable conditions. According to this schedule, in the fall of 2010, ReClam would measure the growth of these clams for the last time, so that it can compare their size with the size they had been when they were purchased in the spring of 2009. Once the clams are large enough, measurements are made both in centimeters and by volume. This information will be included within Flexabar's Final Report to EPA, so that Flexabar can report to EPA on the amount of nitrogen which has been removed through the clams' growth. Flexabar's Final Report may also contain data concerning interim growth measurements. An example of a growth chart created by ReClam at the end of the 2008 growing season is available on the group's website and is attached hereto. [See <http://www.reclamthebay.org/explore.html>].

Through natural reproduction, the clams introduced into the Bay under this project should also contribute to increasing the total shellfish population over time. This increased presence is not only important to the general health of the ecosystem, but is also important for assisting ReClam and NJDEP in shellfish and wildlife management research necessary for proper management of shellfish in the wild. According to Mr. Bushnell, there are not yet enough shellfish in the Bay for NJDEP to have anything to manage. This SEP will provide an important head start toward this ultimate goal.

2. Locations of Clam Restocking Efforts

NJDEP selects the locations at which ReClam's juvenile clams are laid under predator nets, and the locations at which the adult clams are broadcast after emerging from the predator nets, in order to select conditions which are conducive to growth and survival. NJDEP makes its determinations in consultation with both ReClam and the Rutgers Cooperative Extension, its partners in the effort to restock Barnegat Bay's shellfish population. These organizations meet in August of each year to discuss broadcasting locations. At each such meeting, ReClam reports to NJDEP on the success of the previous year's locations, and the organizations combine that information with the available aquaculture leases to select the most fertile and beneficial broadcasting areas available. Additional selection criteria may include such factors as the growth of eelgrass and other Submerged Aquatic Vegetation (SAV), the relative abundance of crabs and other predators, and channel flow rates. ReClam will maintain records of the selection criteria used in making the decision on broadcasting locations, and provide this information to Flexabar for inclusion in its Final Report to EPA. The 2009 crop of clams will be broadcast in

Barnegat Bay somewhere between Holgate and Mantoloking, but the exact location will depend on the above-cited factors (many of which will be subject to change during the summer of 2009).

3. Clam Mortality Which Reduces Clam Restocking Efforts

During the upweller stage, clam mortality does not present a major concern, since growth occurs in a sheltered and controlled environment. Once the juveniles are planted at the end of their first summer, however, it is necessary to cover them with predator nets, which drastically reduce the losses that would otherwise occur from predation. In order to measure the mortality that occurs from this and other causes over the course of the clams' first year, ReClam takes a core sample from different areas under the net and filters out the mud in which clams thrive. ReClam then records the number of individual clams contained in the sample, including how many of those are alive. Subsequent investigations of clam mortality in the wild operate similarly, whereby ReClam will return to an area in which clams have been broadcast and measure the concentration of live adults in a given sample size, compared to the number originally planted. These methods work because clams do not move laterally to any considerable degree during their lives (although they move vertically in accord with the tides). Since ReClam measures mortality as described above each time it measures their growth, it will be able to provide Flexabar with mortality data to include in its Final Report to EPA. Mortality typically claims 30% of a clam crop.

Flexabar's \$14,300 contribution will permit ReClam to purchase and broadcast approximately 2.5 million clams. ReClam's infrastructure can handle the additional clams without purchasing new equipment to create capacity for them, and in fact, ReClam currently has an unused floating upweller system (a "FLUPSY") itself capable of rearing one million clams. According to ReClam's President, there is great scientific and productive benefit reaped from each additional upweller that ReClam is able to add, so that filling this additional upweller with clams would increase the volume and variety of underlying data supporting ReClam's existing scientific research. In order to extrapolate and predict the clams' ultimate effect in terms of nitrogen removal, the mortality rate discussed above must be taken into account. If 2,500,000 clams are seeded, survival of 70% of them would leave approximately 1.75 million at the end of three years. As the result of this SEP, the remaining 1.75 million clams can ultimately cause the removal of up to 3,125 pounds of from the water of Barnegat Bay over a three year period.

4. Activities to Maintain and Support the Clam Restocking Effort

In addition to purchasing clam seed, SEP funds will also be used for maintenance activities to support the restocking effort. The maintenance is centered on the upweller nurseries and the predator nets that cover juvenile clam beds during the winter between their release from upwellers and their placement in permanent beds. These nets become fertile ground for algae once the bay's water has warmed in the summer months, which according to Mr. Bushnell is worst in July and August. Excessive algae buildup prevents the juvenile clams from filtering, effectively starving them and reducing the number that can ultimately be restocked in the wild. Volunteers therefore use stainless steel "squeegees" to remove algae from the predator nets (which are constructed of inexpensive nylon mesh and PVC piping at a cost of approximately \$100 each). This work requires supervision of the volunteers by a knowledgeable biologist or student present to monitor their efforts, particularly the cleaning and maintenance of the clams' protective predator nets). ReClam intends to use SEP funds to hire a Rutgers University student on a stipend for the summer of 2009 to assist in monitoring these volunteers in their algae

cleaning efforts and other maintenance activities. The SEP's increase in the number of clams currently being managed by ReClam will impose an increased burden on its existing equipment and infrastructure, and the SEP's funds may also be used for additional maintenance and cleaning of upwellers and their submersible saltwater pumps, and replacement of equipment. SEP funds will also be used to increase the number of nets ReClam can use to cover juvenile clam beds. A greater number of nets will directly increase its capacity to raise clams, through the greater area that can be covered. In addition, it is known that clam survival rates are to some degree inversely proportional to their density under the nets. (The full extent of this relationship is unknown, and it in fact forms part of the research ReClam would like to conduct). With sixteen nets, present concentrations are at approximately 100,000 clams per net. ReClam estimates that the ideal concentration is lower, and would like to reduce the number of clams per net to 75,000 in the future, which may increase overall survivorship.

III. SCHEDULE AND PLAN FOR IMPLEMENTATION OF THE SEP

A. Initial Investment in Work of ReClam the Bay

The schedule and plan for implementation of the SEP will follow the sequence of steps set forth below. During the course of the SEP, and after the initial payment of the funds necessary to implement the SEP, Flexabar will continue to consult with ReClam the Bay regarding performance by ReClam of the steps set forth below. The payment and the submission of the Final Report on Completion of the SEP, which are identified in subparagraphs (1) and (6), respectively, below, represent enforceable interim and final milestones under the CA/FO; all other steps identified below are provided for illustrative purposes only, and do not represent enforceable milestones under the CA/FO:

(1) 60 Days After Entry of the CA/FO:

Within sixty (60) days after the date of signature of the Final Order in this enforcement action, Flexabar will provide a copy of the SOW to ReClam the Bay, and make payment to ReClam the Bay in the amount of ten thousand eight hundred dollars (\$10,800) for the purchase of clam seed and other activities necessary to implement the SEP. Within ten (10) days of making such payment, Flexabar will provide EPA with written documentation confirming that it has tendered a copy of the SOW to ReClam the Bay and has made a ten thousand, eight hundred dollar (\$10,800) payment to ReClam the Bay.

(2) Spring - Summer 2009:

In the Spring of 2009, ReClam will purchase approximately 2.5 million clam seeds necessary for the clam restocking efforts described in the SOW, and will begin efforts to secure sufficient volunteers for the additional work necessary to clean nets, maintain upwellers (including deploying its unused FLUPSY), and broadcast the clams.

(3) Summer 2009:

In the Summer of 2009, ReClam will purchase or construct additional predator nets, as required, to decrease the concentration of clams in each bed from previous years' levels. ReClam will meet with NJDEP to select locations to plant

the clams in the Bay. ReClam will hire an intern to assist it with supervising the summer 2009 volunteer effort, and will purchase additional equipment and materials, as necessary to support these activities.

(4) Fall 2009:

In the Fall of 2009, after the new 2009 clam seeds have reached the juvenile size of approximately 12mm, they will be placed in predator net-protected beds or at controlled habitat locations determined by the NJDEP.

(5) November 15, 2009

On or before November 15, 2009, Flexabar will make payment to ReClam in the amount of three thousand five hundred dollars (\$3,500), thereby completing payment of the full amount of its \$14,300 obligation. Within ten (10) days of making such payment, Flexabar will provide EPA with written documentation confirming that it and has made a three thousand five hundred dollar (\$3,500) payment to ReClam the Bay.

(6) Fall 2010:

The clams grown during the summer of 2009 will be permitted to grow and mature for a period of one year in their protected or controlled habitat beds. At the end of this period, in the Fall of 2010, ReClam will dig the clams up and, after taking various measurements for research, recordkeeping, and reporting purposes, will rebroadcast them into parts of Barnegat Bay determined in conjunction with advice from the NJDEP.

(7) November-December 2010:

In November-December 2010, ReClam will provide to Flexabar the data it has collected concerning the 2009 crop of clams for inclusion in Flexabar's **final** written report to EPA.

(8) January 31, 2011:

No later than January 31, 2011, Flexabar will submit a final written report documenting the completion of the SEP in accordance with the terms of this Scope of Work.

IV. CONCLUSION

This Supplemental Environmental Project supports our marine estuaries, which are seriously threatened by nutrients discharged from thousands of point and non-point sources, and will also raise public awareness about water quality issues and the value of individual participation in pollution prevention and reduction efforts. It will promote community involvement in environmental protection activities, as hundreds of volunteers donate their time to helping ReClam the Bay restock approximately 2.5 million clams in Barnegat Bay, with the support of other government agencies and educational organizations. The project's environmental benefits accrue to the general public, whose enjoyment of Barnegat Bay will increase with the quality of its water, the health of its ecosystem, and the number of shellfish it holds.

**In the Matter of Flexabar Corporation and Flexdel Corporation
Docket No. FIFRA-02-2008-5120**

CERTIFICATE OF SERVICE

I certify that I have this day caused to be sent the foregoing fully executed CONSENT AGREEMENT and FINAL ORDER, bearing the above-referenced docket number, in the following manner to the respective addressees below:

Original and Copy by Hand:

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

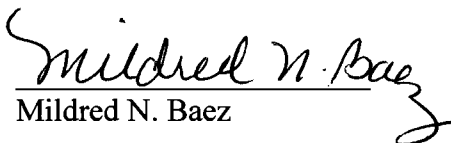
Copy by Certified Mail,
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Michelman and Bricker
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Copy by Pouch Mail:

Honorable Susan L. Biro
Chief, Administrative Law Judge
Office of Administrative Law Judges
U.S. Environmental Protection Agency
Mail Code 1900 L
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Dated: APR 15 2009


Mildred N. Baez