



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

JUN 30 2008

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. Richard Guglielmo
President
Flexabar Corporation and Flexdel Corporation
1969 Rutgers University Blvd.
Lakewood, NJ 08701

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

Dear Mr. Guglielmo:

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-REG. II
2008 JUL -9 AM 10:51
REGIONAL HEARING
CLERK

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 (w/o enclosures)

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2**

U.S. ENVIRONMENTAL
PROTECTION AGENCY-REG. II
2008 JUL -9 AM 10:51
REGIONAL HEARING
CLERK

----- x
In the Matter of :
:
Flexabar Corporation :
and :
Flexdel Corporation, :
:
Respondents. :
:
Proceeding Under the Federal :
Insecticide, Fungicide and :
Rodenticide Act, as amended. :
----- x

COMPLAINT AND NOTICE OF
OPPORTUNITY FOR HEARING

Docket No. FIFRA-02-2008-5120

Complainant, as and for her Complaint against Respondents, hereby alleges:

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).
2. The Complainant, Dore LaPosta, 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. Respondents are Flexabar Corporation and its subsidiary Flexdel Corporation, (hereinafter referred to as "Respondents"). Respondents are both incorporated in New Jersey.
4. Each Respondent is 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.
5. Respondent Flexabar maintains an "establishment", as defined in Section 2(dd) of FIFRA, 7 U.S.C. § 136(dd), located at 1969 Rutgers University Boulevard, Lakewood, New Jersey 08701.
6. Respondent Flexabar has registered its establishment (hereinafter "the Lakewood Facility") with EPA and received establishment number 009339-NJ-001.
7. Respondent Flexabar produces marine coatings, including "Aquagard," at the Lakewood Facility.
8. Respondent Flexabar sells marine paint products, including "Aquagard," to Respondent Flexdel for distribution to others.

9. Respondent Flexdel distributes marine paint products purchased from Respondent Flexabar, including “Aquagard” products, from the Lakewood Facility.

10. “To distribute or sell” a pesticide product 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.”

11. Section 2(t) of FIFRA, 7 U.S.C. § 136(t) and 40 C.F.R. §152.5(c) defines a “pest” *inter alia* as “any plant growing where not wanted, including any ... alga... .”

12. 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.

13. Both Respondents are “distributor[s] or seller[s]” within the meaning of Section 2(gg) of FIFRA, 7 U.S.C. § 136(gg).

14. At times relevant to this Complaint, **Bioshield** was a registered pesticide of Nova BioGenetics.

15. On August 8, 2003, pursuant to 40 C.F.R. § 152.132, Respondent Flexabar filed a Notice of Supplemental Distribution of a Registered Product (EPA Form # 8570-5) to distribute **Bioshield** under its own label.

16. In response to receipt of the signed Notice described in paragraph 15, above, EPA assigned Flexabar supplemental distributor number 754-97-6-9339 to distribute **Bioshield**.

17. On March 13, 2006, an authorized inspector from EPA's Region 2 Office conducted a marketplace inspection at Lockwood Boat Works, Inc. located in South Amboy, NJ (hereinafter “the March 2006 inspection”).

18. Lockwood Boat Works, Inc. purchases and resells Respondents' products.

19. During the March 2006 inspection, the EPA inspector collected a sample of an English and French label for “Aquagard II Alumi Koat” spray paint “Fortified with Bioshield.”

20. The label collected during the March 2006 inspection makes the following claim: “provides/creates an invisible barrier to inhibit the growth of algae.”

21. The product bearing the “Aquagard II Alumi Koat” spray paint “Fortified with Bioshield” label collected during the March 2006 inspection is a pesticide.

22. The product bearing the “Aquagard II Alumi Koat” spray paint “Fortified with Bioshield” label collected during the March 2006 inspection was sold by Respondent Flexdel to a distributor who in turn sold it to Lockwood Boatworks, Inc.

23. On April 4, 2006, an authorized inspector from EPA’s Region 2 Office conducted a follow-up inspection at the Lakewood Facility (hereinafter “the April 2006 Inspection”).

24. During the April 2006 inspection, the EPA inspector collected a sample of an English-language label of “Aquagard II Alumi Koat” “Clear Colorless” spray paint “Fortified with Bioshield.”

25. The label collected during the April 2006 inspection makes the following claim: “provides/creates an invisible barrier to inhibit the growth of algae.”

26. The product bearing the “Aquagard II Alumi Koat” “Clear Colorless” spray paint “Fortified with Bioshield” label collected during the April 2006 inspection is a pesticide.

27. During the April 2006 inspection, the EPA inspector collected a sales invoice showing the sale of “Aquagard II Clear Colorless” spray paint from Respondent Flexabar to Respondent Flexdel in November 2005.

28. During the April 2006 inspection, the EPA inspector collected three (3) sales invoices showing sales of “Clear Colorless Alumi Koat” spray paint from Respondent Flexdel to various parties between January 2006 and March 2006.

29. By letter dated April 28, 2006, Robert Franzetti, Vice-President of Respondent Flexabar, provided EPA staff with an additional sales invoice showing a sale of “Clear Colorless Alumi Koat” spray paint by Respondent Flexdel in March 2006.

COUNTS 1 - 6

Paragraphs 1 through 29 are realleged and incorporated herein.

30. Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), states that it shall be unlawful for any person in any state to distribute or sell to any person a pesticide that is adulterated or misbranded.

31. Section 2(q)(1)(E) of FIFRA, 7 U.S.C. § 136(q)(1)(E), states that a pesticide is misbranded if its label does not bear any word, statement, or any information required by or under authority of this Act to appear on the label or labeling.

32. Pursuant to Sections 2(n) and (q)(2)(A) of FIFRA, 7 U.S.C. §§ 136(n) and

(q)(2)(A), and 40 C.F.R. § 156.10(g)(1), a pesticide product is misbranded if its label does not bear “an ingredient statement which contains the name and percentage by weight of each active ingredient, and the total percentage by weight of all inert ingredients... .”

33. Pursuant to Section 2(q)(1)(D) of FIFRA, 7 U.S.C. § 136(q)(1)(D), and 40 C.F.R. §§ 152.132(d)(4) and 156.10(f), a product is misbranded if its label does not bear the registration number assigned to the establishment in which it was produced.

34. Pursuant to 40 C.F.R. § 152.132(d)(3), the supplemental distributor number must appear on the label of a registered product distributed by a supplemental registrant under its own name.

35. The label of the “Aquagard II” pesticide product collected during the March 2006 inspection does not bear the required ingredient statement.

36. The label of the “Aquagard II” pesticide product collected during the March 2006 inspection does not bear the establishment registration number of the establishment in which it was produced.

37. The label of the “Aquagard II” pesticide product collected during the March 2006 inspection bears the words “manufactured for Flexdel.”

38. The “Aquagard II” pesticide product collected during the March 2006 inspection is therefore misbranded.

39. The label of the “Aquagard II” pesticide product collected during the April 2006 inspection does not bear the required ingredient statement.

40. The label of the “Aquagard II” pesticide product collected during the April 2006 inspection does not bear the establishment registration number of the establishment in which it was produced.

41. The label of the “Aquagard II” pesticide product collected during the April 2006 inspection bears EPA No. 754-97-8-9339-NJ01.

42. The label of the “Aquagard II” pesticide product collected during the April 2006 inspection bears the words “manufactured for Flexdel.”

43. The “Aquagard II” pesticide product collected during the April 2006 inspection is therefore misbranded.

44. Respondents’ sales of “Aquagard II” described in paragraphs 22, 27, 28, and 29

above are sales of a misbranded pesticide product in violation of FIFRA § 12(a)(1)(E), 7 U.S.C. § 136j(a)(1)(E).

PROPOSED CIVIL PENALTY

The proposed civil penalty has been determined in accordance with Section 14(a) of FIFRA, 7 U.S.C. § 136l (a), which authorizes the assessment of a civil penalty of up to \$5,000 for each violation of FIFRA and the regulations promulgated pursuant thereto.

The Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Debt Collection Improvement Act of 1996, required EPA to adjust its penalties for inflation on a periodic basis. EPA issued a Civil Monetary Inflation Adjustment Rule on December 31, 1996, see 61 Fed. Reg. 69360 (1996), and on February 13, 2004, see 69 Fed. Reg. 7121(2004). Under Table I of the Civil Monetary Penalty Inflation Adjustment Rules, the maximum civil penalty under Section 14(a)(1) of FIFRA for violations occurring between January 31, 1997, and March 14, 2004, is \$5,500. The maximum civil penalty under Section 14(a)(1) of FIFRA for violations occurring on or after March 15, 2004 is \$6,500.

For purposes of determining the amount of any penalty to be assessed, Section 14 of FIFRA requires EPA to take into account the gravity of the violations. As to the violator, Section 14 of FIFRA requires EPA to take into account the appropriateness of the penalty to the size of the business of the person charged, and the effect of the penalty on the person's ability to continue in business.

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 the filing of the Complaint, with specific reference to EPA's "Enforcement Response Policy For The Federal Insecticide, Fungicide and Rodenticide Act (FIFRA)," dated July 2, 1990 (the "ERP"), a copy of which is available upon request. This policy provides rational, consistent and equitable calculation methodologies for applying the statutory penalty factors 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 Misbranded Pesticide	
6 Counts @ \$6,500/violation	\$ 39,000
Total Penalty Assessment	\$ 39,000

PROCEDURES GOVERNING THIS ADMINISTRATIVE LITIGATION

The rules of procedure governing this civil administrative litigation have been set forth in 64 Fed. Reg. 40138 (July 23, 1999), entitled, "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 (2005). 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 therefor 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:

Naomi Shapiro, 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) 637-3221 (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:

**United States Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
P.O. 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 Flexabar Corporation and Flexdel Corporation,
Docket No. FIFRA-02-2008-5120**

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: June 30, 2008
New York, New York

COMPLAINANT:



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

TO: Richard Guglielmo, President
Flexabar Corporation and Flexdel Corporation
1969 Rutgers University Blvd.
Lakewood, NJ 08701

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-02-2008-5120, and a copy of the Consolidated Rules of Practice, 40 C.F.R. Part 22 (2008), by certified mail, return receipt requested, to:

Mr. Richard Guglielmo
President
Flexabar Corporation and Flexdel Corporation
1969 Rutgers University Blvd.
Lakewood, NJ 08701

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: JUL - 9, 2008
New York, New York

Mildred N. Bay