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September 18, 2008

Via Federal Express

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

U.S. ENVIRONMENTAL  
PROTECTION AGENCY-REG. II  
REGIONAL HEARING  
CLERK  
2008 SEP 19 PM 2:25

**Re: In the Matter of Flexabar Corporation and Flexdel Corporation, Administrative Complaint pursuant to §14(a)(1) of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. § 1361(a)(1).  
Docket No. FIFRA-02-2008-5120  
Our File No.: 485.001**

Dear Sir and/or Madam:

Regarding the above-captioned matter enclosed please the original and two copies of Respondents, Flexabar Corporation and Flexdel Corporation's **Amended** Answer to the Administrative Complaint, and Certification of Service.

Please file the originals of record and return time-stamped copies to me in the enclosed envelope.

Thank you for your kind assistance in this regard.

Yours truly,

  
DAVID F. MICHELMAN

DFM/cmb

Enclosures

cc: Naomi Shapiro, Esquire [w/encl.]  
Helen Ferrara, Administrative Law Judge [w/encl.]

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 2  
290 Broadway, 25th Floor  
New York, New York 10007-1866

IN THE MATTER OF:

Flexabar Corporation  
and  
Flexdel Corporation,

Respondents.

Proceeding Under the Federal  
Insecticide, Fungicide and  
Rodenticide Act, as amended.

Docket No. FIFRA-02-2008-5120

U.S. ENVIRONMENTAL  
PROTECTION AGENCY-REG. II  
2007 SEP 19 PM 2: 21  
REGIONAL HEARING  
CLERK

**AMENDED ANSWER TO ADMINISTRATIVE COMPLAINT  
AND REQUEST FOR ADMINISTRATIVE HEARING**

**TO THE REGIONAL HEARING CLERK:**

NOW COME Respondents, Flexabar Corporation ("Flexabar") and Flexdel Corporation ("Flexdel"), (collectively, "Respondents"), through their undersigned legal representative, and state as follows for their Answer to the Administrative Complaint issued by the United States Environmental Protection Agency ("EPA") Region II, and their Request for an Administrative Hearing, and respectfully allege and pray as follows:

1. Admitted.
2. Denied. Respondents lack knowledge sufficient to form a belief as to the truth of the averments as to whether or not the Complainant has been duly delegated authority to institute this action, and therefore this averment is deemed denied. By way of further answer, the averments contained in Paragraph 2 of the Administrative Complaint constitute conclusions of law to which no response is required.
3. Admitted in part and denied in part. Flexabar and Flexdel are Respondents, and are both incorporated in New Jersey. It is expressly denied that Flexdel is a subsidiary of Flexabar; however, respondents further aver that Flexabar and Flexdel are related companies.

4. Admitted. Respondents admit that each of them is a person within the meaning of Section 2(s) of FIFRA.

5. Admitted. Respondents admit that Flexabar maintains an establishment, as defined in Section 2(dd) of FIFRA, at the stated Lakewood, New Jersey address.

6. Admitted. Respondents admit that Flexabar has properly registered its establishment (“the Lakewood facility”) with EPA in compliance with FIFRA, and received Establishment Number 009339-NJ-001 as its establishment number for that facility.

7. Admitted.

8. Admitted.

9. Admitted.

10. The averments contained in Paragraph 10 of the Administrative Complaint constitute conclusions of law to which no response is required.

11. The averments contained in Paragraph 11 of the Administrative Complaint constitute conclusions of law to which no response is required.

12. The averments contained in Paragraph 12 of the Administrative Complaint constitute conclusions of law to which no response is required.

13. The averments contained in Paragraph 13 of the Administrative Complaint constitute conclusions of law to which no response is required.

14. Admitted. Respondents admit that, at all times relevant to this Administrative Complaint, Bioshield was a registered pesticide of Nova Biogenetics. Respondents further aver that Bioshield was properly registered with EPA by Nova Biogenetics, as a pesticide under FIFRA, with an EPA approved and issued Registered Product number of 754-97.

15. Admitted in part and denied in part. Respondents expressly admit that, and/or by way of further answer state that:

(a) In compliance with 40 C.F.R. § 152.132, Respondent Flexabar properly filed a Notice of Supplemental Distribution of a Registered Product (EPA Form #8750-5) (“Notice”) to

distribute Bioshield under its own label.

(b) Flexabar requested authority to distribute "Aquagard II Solvent Base Fortified with Bioshield (provides an invisible barrier to inhibit the growth of algae)." (A true and correct copy of the Notice of Supplemental Distribution of a Registered Product is attached hereto as Exhibit 1 and incorporated by reference as though set forth herein).

(c) The Notice properly identified "Flexabar Corporation," and the Lakewood facility, as the "Distributor."

(d) The Notice properly identified the name of the Registered Product to be distributed ("Bioshield").

(e) The Notice properly identified the existing EPA Registration Number for the Product to be distributed ("754-97-6 NJ01").

(f) The Notice properly identified the name of the existing Distributor Company Number approved by EPA for Nova Biogenetics ("754-97").

Respondent denies the averment that such Notice was filed on August 28, 2003, and by way of further answer, avers that such Notice was filed on July 2, 2003.

16. Admitted. It is expressly admitted that in response to the Notice, EPA assigned Flexabar supplemental distributor number 754-97-6-9339 to distribute Bioshield. By way of further answer, on August 8, 2003, EPA advised Flexabar that it had approved the Notice of Supplemental Distribution of a Registered Product, legally authorizing Flexabar to distribute "Aquagard II Solvent Base Fortified with Bioshield (provides an invisible barrier to inhibit the growth of algae)" under the above-referenced number [which combined Nova Biogenetics' Distributor Company Number (754-97) with Flexabar's EPA Establishment Number (9339)]. This approval was communicated to Flexabar by Barbara Purcell, of EPA's Front End Processing Staff, Information Services Branch, Program Management and Support Division. (See Flexabar's August 8, 2003 letter to Barbara Purcell, from Hamdi Latif, Flexabar's Technical Director, with handwritten notes, a true and correct copy of which is attached hereto as Exhibit 2 and incorporated by reference as though set forth

herein).

17. Denied. Respondents lack knowledge sufficient to form a belief as to the truth of the averments as to whether or not the March 2006 inspection was conducted, and therefore the averments in paragraph 17 are deemed denied.

18. Respondents lack knowledge sufficient to form a belief as to the truth of the averments as to the facts averred in paragraph 18, and therefore the averments in paragraph 18 are deemed denied.

19. Respondents lack knowledge sufficient to form a belief as to the truth of the averments as to the facts averred in paragraph 19, and therefore the averments in paragraph 19 are deemed denied. By way of further answer, Flexdel did prepare a label or labels in English and French, which was or were intended for use in Canada, for Aquagard II spray paint “fortified with Bioshield.”

20. Denied. Respondents lack knowledge sufficient to form a belief as to the truth of the averments as to the facts averred in paragraph 20, and therefore the averments in paragraph 20 are deemed denied.

21. Denied. The averments contained in Paragraph 21 of the Administrative Complaint constitute conclusions of law to which no response is required.

22. Admitted in part and denied in part. Respondents lack knowledge sufficient to form a belief as to the truth of the averments as to the facts averred in paragraph 22 concerning sales of the particular product to Lockwood, and therefore the averments in paragraph 22 are deemed denied. By way of further answer, Flexdel admits that it sold product to distributors bearing the Aquagard II label, stating that it was “Fortified with Bioshield.”

23. Admitted in part and denied in part. Respondents admit that an EPA inspector conducted the April 2006 inspection. By way of further answer, Respondents lack knowledge sufficient to form a belief as to the truth of the averments as to the extent of the inspector’s authorization, so that such averments are deemed denied.

24. Admitted.

25. Admitted.

26. Denied. The averments contained in Paragraph 26 of the Administrative Complaint constitute conclusions of law to which no response is required.

27. Admitted.

28. Admitted.

29. Admitted.

#### **COUNTS 1-6**

30. Denied. The averments contained in Paragraph 30 of the Administrative Complaint constitute conclusions of law to which no response is required. The statute speaks for itself.

31. Denied. The averments contained in Paragraph 31 of the Administrative Complaint constitute conclusions of law to which no response is required. The statute speaks for itself.

32. Denied. The averments contained in Paragraph 32 of the Administrative Complaint constitute conclusions of law to which no response is required. The statute speaks for itself.

33. Denied. The averments contained in Paragraph 33 of the Administrative Complaint constitute conclusions of law to which no response is required. The statute speaks for itself.

34. Denied. The averments contained in Paragraph 34 of the Administrative Complaint constitute conclusions of law to which no response is required. The statute speaks for itself.

35. Admitted in part and denied in part. The averments contained in Paragraph 35 of the Administrative Complaint constitute conclusions of law to which no response is required. By way of further answer, the label of the Aquagard II pesticide product collected during the March 2006 inspection of Lockwood Boat Works, Inc. was not prepared for or intended for sale or distribution within the United States, and this use of this label on a product which may have been sold or distributed to Lockwood appears to have been the result of an error in using this label for a product sold or distributed within the United States. However, the label did contain a statement of ingredients and their chemical abstract numbers, and stated them in order of their concentration, but

did not contain their percentages within that formulation.

36. Admitted in part and denied in part. The label of the Aquagard II pesticide product collected during the March 2006 inspection of Lockwood Boat Works, Inc. bears the establishment registration number of the establishment that produced it. However, due to confusion over the information which Respondents received from EPA, this establishment registration number is not correct, despite Respondents' good faith efforts to state such an establishment registration number. The establishment registration number on the label inadvertently combines Flexabar's EPA-issued establishment registration number with Flexdel's EPA-issued supplemental distributor number for the product.

37. Admitted. Respondents admit that the label properly identifies Flexdel, which was the EPA-approved supplemental distributor for this product. The label further provides the address and telephone number at which to contact Flexdel about this product.

38. Denied. The averments contained in Paragraph 38 of the Administrative Complaint constitute conclusions of law to which no response is required.

39. Admitted in part and denied in part. The averments contained in Paragraph 39 of the Administrative Complaint constitute conclusions of law to which no response is required. By way of further answer, the label of the Aquagard II pesticide product collected during the April 2006 inspection of Flexabar was prepared for and intended for sale and distribution within the United States. This label did contain a statement of ingredients, and their chemical abstract numbers, and stated them in order of their concentration, but did not contain their percentages within that formulation.

40. Admitted in part and denied in part. The label of the Aquagard II pesticide product collected during the April 2006 inspection of the Lakewood facility bears the establishment registration number of the establishment that produced it. However, due to confusion over the information which Respondents received from EPA, this establishment registration number is not correct, despite Respondents' good faith efforts to state such an establishment registration number.

The establishment registration number on the label inadvertently combines Flexabar's EPA-issued establishment registration number with Flexdel's EPA-issued supplemental distributor number for the product. However, Flexabar, changed that number to "754-97-8" from "754-97-6" because of its good faith belief that this change was the correct way to reflect the fact that Nova Biogenetics' EPA registration had been changed due to a corporate change under which its new name was now Nova Specialty.

41. Admitted. By way of further answer, see Respondent's answer to paragraph 40, above.

42. Admitted. Respondents admit that the label properly identifies Flexdel, which was the EPA-approved supplemental distributor for this product. The label further provides the address and telephone number at which to contact Flexdel about this product.

43. Denied. The averments contained in Paragraph 43 of the Administrative Complaint constitute conclusions of law to which no response is required.

44. Denied. The averments contained in Paragraph 44 of the Administrative Complaint constitute conclusions of law to which no response is required.

#### **AFFIRMATIVE DEFENSES**

45. Section 141 of FIFRA authorizes the Administrator of EPA to issuing a warning in lieu of imposing a civil penalty where the violation occurred despite the exercise of due care, and did not cause significant harm to health or the environment. (**"Whenever the Administrator finds that the violation occurred despite the exercise of due care or did not cause significant harm to health or the environment, the Administrator may issue a warning in lieu of a penalty."** 7 U.S.C. §1361). (Emphasis added). The penalty imposed on Respondent violates FIFRA, and is arbitrary and capricious, because the circumstances of this case warrant issuing such a warning in lieu of imposition of any penalty at all, much less the maximum available statutory penalty. See, e.g., In the Matter of Aqua Clear Industries, Inc., Docket No. I.F.&R.-II-534-C (1996) (citing Section 1361(a)(4), and holding "Because neither the gravity of the potential for harm nor the gravity of the



misconduct appears to be significant, Complainant will be ordered to explain why the circumstances herein warrant a penalty rather than simply a warning.” *Id.*, at \*2).

46. Respondents acted in good faith, and lacked any intent to violate the law. Respondents reasonably believed that the product was properly labeled in compliance with FIFRA, and was not misbranded. The penalty assessed, which represents the maximum statutory penalty available, is arbitrary and capricious because it fails to take into consideration or give adequate weight to, reasonable, good faith efforts to comply with the law which include, but are not limited to:

(a) Flexabar’s proper registration with EPA of its Lakewood facility, in compliance with FIFRA, as Establishment Number 009339-NJ-001;

(b) Flexabar’s submission to EPA, prior to the distribution of such product of a Notice of Supplemental Distribution of a Registered Product, requesting authority to distribute “Aquagard II Solvent Base Fortified with Bioshield (provides an invisible barrier to inhibit the growth of algae)”;

(c) Flexabar and Flexdel’s prompt discontinuance of further sales of “Aquagard II Solvent Base Fortified with Bioshield,” in 2006, after they became aware of EPA’s concerns about labeling.

47. Respondents’ good faith actions set forth in paragraph 46, above, represent “substantial compliance” with the purposes and requirements of FIFRA, 7 U.S.C. § 135, *et seq.*, such that Complainant’s claims are barred by the doctrine of substantial compliance.

48. The penalty assessed fails to take into consideration that EPA had advised Flexabar that it had approved the Notice of Supplemental Distribution of a Registered Product, thus legally authorizing Flexabar to distribute “Aquagard II Solvent Base Fortified with Bioshield (provides an invisible barrier to inhibit the growth of algae)” under supplemental distributor number 754-97-6-9339, and therefore it is arbitrary and capricious.

49. Respondents qualify as a “small business” under Section 4(i)(4)(D)(iii) and 4(i)(E)(ii)

of FIFRA, 7 U.S.C. §§ 136a-1(i)(4)(D)(iii) and (i)(E)(ii), since they have fewer than 150 employees and less than \$40 million in annual sales, and under EPA's "Small Business Compliance Policy," FRL-6576-4, effective May 11, 2000, since it employs fewer than 100 individuals. **Under Section (E)(2) of the "Small Business Compliance Policy," "if a small business has otherwise made a good faith effort to comply, EPA has discretion, pursuant to applicable enforcement response or penalty policies, to waive or reduce civil penalties."** (Emphasis added). The proposed penalty is unreasonable, arbitrary and capricious because it fails to take into consideration Respondents' status as a small business by either waiving or reducing the penalty imposed.

50. EPA's "Small Business Compliance Policy," FRL-6576-4, effective May 11, 2000, also directs that civil penalties should be waived or reduced for small businesses who "make good faith efforts to correct violations." ("**EPA will waive or reduce the gravity component of civil penalties whenever a small business makes a good faith effort to comply with environmental regulations by . . . expeditiously correcting the violation within the proper time frame.**") (Emphasis added). Respondent took corrective action by promptly discontinuing sales of the product containing Bioshield after becoming aware of EPA's concerns about the labeling of this product. Complainant's failure to waive or reduce the proposed penalty is inconsistent with the Small Business Compliance Policy, and is unreasonable, arbitrary and capricious because fails to take this corrective action into consideration or give it adequate weight.

51. The proposed penalty fails to take into consideration Respondents' status as a small business, their ability to pay the proposed penalty, and the undue hardship that such a penalty would impose and thus is unreasonable, arbitrary and capricious.

52. The amount of the proposed penalty has not been reduced, pursuant to the "Final EPA Supplemental Environmental Projects Policy" of May 1998 (63 FR 24796, June 5, 1998), to take into consideration Respondents' willingness to implement a Supplemental Environmental Project (SEP) under a Settlement With Conditions (SWC).

53. Complainant's claims are barred by principles of equitable estoppel, because of

Respondents' reasonable and detrimental reliance on information from EPA, including:

(a) EPA's August 8, 2003 advice to Flexabar that it had approved the Notice of Supplemental Distribution of a Registered Product, thus legally authorizing Flexabar to distribute "Aquagard II Solvent Base Fortified with Bioshield (provides an invisible barrier to inhibit the growth of algae)" under supplemental distributor number 754-97-6-9339;

(b) EPA's instructions on its Form #8750-5 ("Notice of Supplemental Distribution of a Registered Product"), which Flexabar submitted to EPA to request authorization to distribute "Aquagard II Solvent Base Fortified with Bioshield (provides an invisible barrier to inhibit the growth of algae)." This form states: "Note: Do not submit distributor product labels." These instructions impeded Respondents from obtaining prompt review of labeling for the product which might have identified any deficiencies in the labels prior to sale or distribution of the product.

54. Complainant's claims and the assessed penalty, which represents the maximum statutory penalty available, are arbitrary, capricious, and not otherwise in accordance with law.

55. Complainant's claims are arbitrary, capricious, and not otherwise in accordance with law, because the assessed penalty, which represents the maximum statutory penalty available, is manifestly excessive under the totality of the circumstances. See, e.g., James C. Lin and Lin Cubing, Inc., FIFRA Appeal No. 94-2 (assessed penalties reduced from \$5000 per count to \$1000 per count).

56. The proposed penalty, which represents the maximum statutory penalty available, is unreasonable, arbitrary and capricious in light of the nature, circumstances, extent, number, and gravity of the alleged violations, and in light of Respondents' prior compliance history, degree of culpability, and lack of economic benefit or savings accruing to Respondents by virtue of the alleged violations.

57. The penalty assessed is arbitrary and capricious because it fails to take into consideration or give adequate weight to the fact that any violation of FIFRA by Respondents, was at most inadvertent and unintentional, and was not intentional or willful.

58. The penalty assessed is arbitrary and capricious because it fails to take into

consideration or give adequate weight to the absence of any history of FIFRA violations by Respondents.

59. The penalties assessed are arbitrary, capricious, and are unconscionably disproportionate to the offenses, since Complainant's evaluation of the "gravity of the violation" failed to take into consideration or give adequate weight to facts concerning:

(a) the "gravity of the harm," including but not limited to, that the alleged violations: (1) did not contain any substances in quantities that are highly toxic to man, and (2) did not result in any actual harm to human health or to the environment;

(b) the "gravity of the misconduct," including but not limited to, that the alleged violations did not involve: (1) any false or misleading information, and (2) did not omit any directions for use or caution or warning statements. See, e.g., In the Matter of Aqua Clear Industries, Inc., (citing Section 136I(a)(4), and holding "Because neither the gravity of the potential for harm nor the gravity of the misconduct appears to be significant, Complainant will be ordered to explain why the circumstances herein warrant a penalty rather than simply a warning." Id., at \*2); See also, In the Matter of Sav-Mart, Inc., Docket No. FIFRA-09-0819-C-92-36 (reduction of EPA's civil penalty to 25% of the statutory maximum, from 60%, was appropriate where "the severity of Respondents' violations is strikingly modest" because there was an "absence of harm to human health or the environment." \*Id., at 10-11).

60. The penalty assessed is unreasonable, arbitrary and capricious because it violates the doctrine of merger, by assessing multiple penalties for different violations that arose from a single, interrelated set of actions. See EPA's Enforcement Response Policy (at 26), which provides that "**A single event or action . . . which can be considered as two unlawful acts under FIFRA (Section 12) cannot result in a civil penalty greater than the statutory limit for one offense of FIFRA.**" (Emphasis added). See also, In the Matter of Sav-Mart, Inc., \*Id., at 5-7, requiring that violations be independent of each other). Respondents' failure to properly list the establishment registration number on more than one label of products sold or distributed on different dates must constitute no

more than one offense. Respondents' failure to properly list the ingredient statement on more than one label of products sold or distributed on different dates must constitute no more than one offense. Therefore, the maximum statutory penalties that should have been considered by EPA, before taking all other statutory and equitable factors into account, should have been no more than \$13,000, for two violations (failing to properly list the establishment registration number and failing to properly list the ingredient statement), instead of \$39,000 for six violations.

61. The penalty assessed is unreasonable, arbitrary and capricious because it fails to take into consideration or give adequate weight to Respondents' cooperation with EPA's inspection of the Lakewood facility. Accordingly, the basis for any proposed administrative penalty should be adjusted in consideration of this cooperation.

62. The penalty assessed is arbitrary and capricious because it fails to take into consideration or give adequate weight to other factors, as required in the interests of justice.

63. The penalty assessed is arbitrary and capricious because it fails to take into consideration or give adequate weight to the fact that the label of the Aquagard II pesticide product collected during the March 2006 inspection of Lockwood Boat Works, Inc. was not prepared for or intended for sale or distribution within the United States, and this use of this label on a product which may have been sold or distributed to Lockwood appears to have been the result of an error in using this label for a product sold or distributed within the United States.

64. The assessed penalty is manifestly excessive, and thus arbitrary and capricious, because Respondents no longer manufacture or distribute Aquagard II Solvent product containing Bioshield as an ingredient, and have not manufactured or distributed such product since 2006, and there is no reasonable basis for believing that any violations will occur in the future.

65. The penalty assessed is arbitrary, capricious, and represents a patent abuse of discretion since it is inconsistent with the magnitude of other penalties assessed, and/or settlements reached, by other Regions of the EPA for similar violations. See, e.g., Katzson Brothers, Inc. v. United States Environmental Protection Agency, 839 F.2d 1396 (10<sup>th</sup> Cir. 1988) ("...we question

EPA's judgment in assessing a fine that is only \$800 less than the maximum penalty amount. EPA has shown greater temperance in the past (citations omitted)" (Emphasis added).

66. FIFRA's mandates and the proposed penalties are unreasonable, excessively burdensome, and violate Respondents' rights to substantive and procedural due process pursuant to the Fifth Amendment of the United States Constitution.

67. Complainant's claims are barred by principles of elementary fairness.

68. FIFRA is a strict liability statute that violates Respondents' rights to due process pursuant to the Fifth Amendment of the United States Constitution, since any violation of FIFRA by Respondents was at most inadvertent and unintentional, and was not intentional or willful. See, e.g., Aero-Master v. EPA, 765 F.2d 746, 747 (8<sup>th</sup> Cir. 1985) (recommending reduction of the assessed penalty because the violation was "essentially technical and non-willful").

69. Complainant's claims fail to state a cause of action.

70. Complainant's claims are barred due to a lack of proper delegation of administrative authority to the Regional Administrator of the EPA.

71. Complainant's claims are barred by the doctrine of laches.

72. Complainant's claims are barred by the statute of limitations.

73. Complainant's claims are barred by a lack of subject matter jurisdiction.

74. Complainant's claims and the assessed penalty violate the Administrative Procedure Act, 40 U.S.C. §§22.01 - 22.43, et seq.

Respondents reserve the right to amend their answer prior to a hearing to assert any additional defenses of whose applicability they become aware.

### **HEARING REQUEST**

Respondents hereby respectfully request an administrative hearing pursuant to the Administrative Procedures Act and other applicable laws and regulations, so that they are afforded an opportunity to contest the findings alleged in the Administrative Complaint and the appropriateness of the proposed penalty. Respondents respectfully reserve the right prior to hearing to place in issue additional facts which they determine to be relevant or in the interests of justice.

**ALTERNATIVE DISPUTE RESOLUTION REQUEST**

Respondents hereby respectfully request an opportunity to participate in Alternative Dispute Resolution with respect to the findings alleged in the Administrative Complaint and the appropriateness of the proposed penalty.

Respectfully submitted,

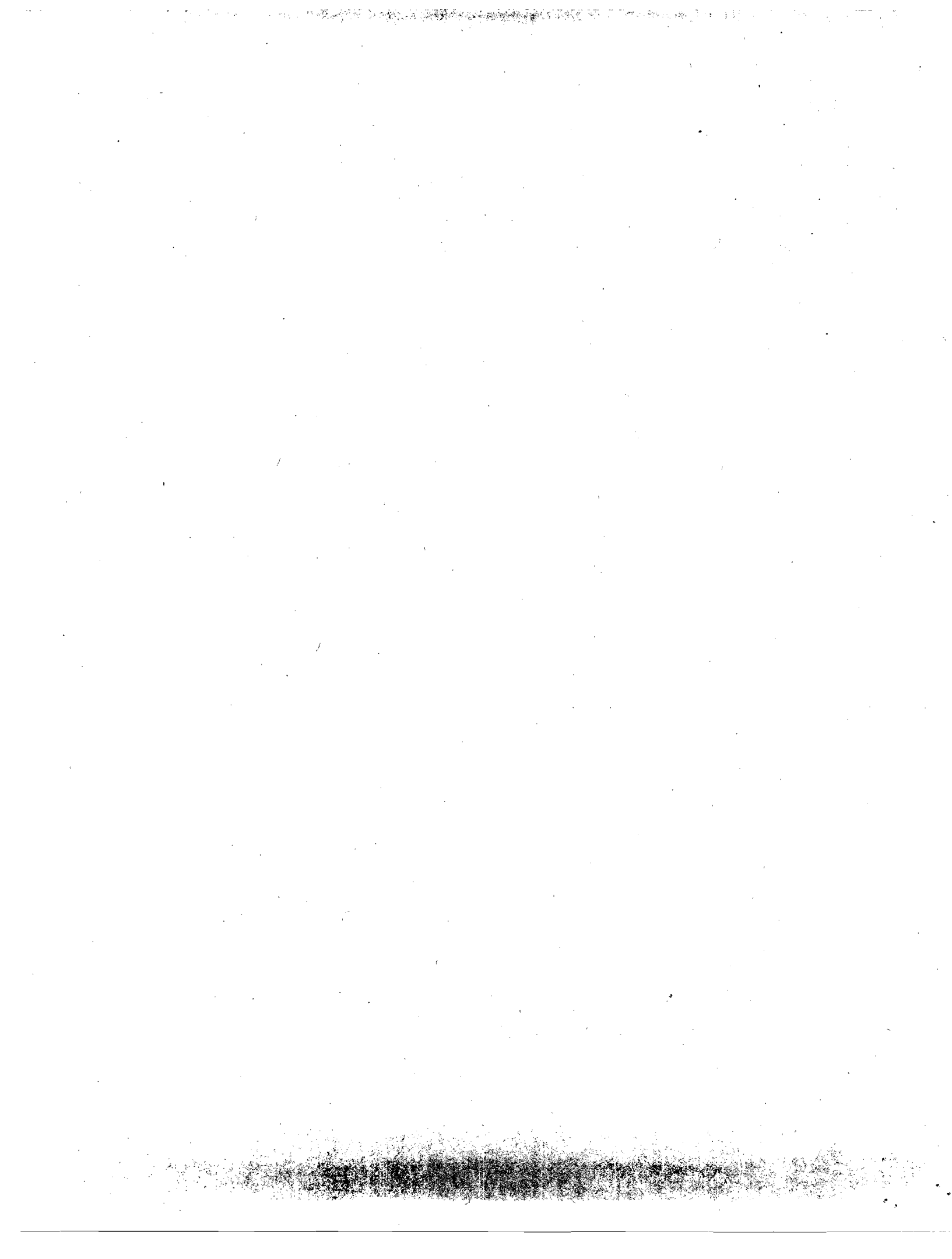
**MICHELMAN & BRICKER, P.C.**



DAVID F. MICHELMAN, Esquire  
2207 Chestnut Street  
Philadelphia, PA 19103

Dated: September 18, 2008

COUNSEL FOR RESPONDENTS  
FLEXABAR CORPORATION AND  
FLEXDEL CORPORATION





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EXHIBIT "1"

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

RECEIVED AUG 06 2003

# 75497  
DIST ↑

She gave us  
same # as  
EPA #'s

JUL 28 2003

OFFICE OF  
PREVENTION, PESTICIDES AND  
TOXIC SUBSTANCES

SUBJECT: Receipt of Notice of Supplemental Registration

Dear Distributor:

The Office of Pesticide Programs has received your Notice of Supplemental Registration of Distributor.

Attached is a copy of the EPA pinpunched form for your records.

Sincerely,

*Barbara Pinnell*

Front End Processing Staff  
Information Services Branch  
Program Management and Support Division



Recycled/Recycle  
Printed with SoyCubes ink on paper that  
contains at least 6% recycled fiber



United States  
**Environmental Protection Agency**  
 Office of Pesticide Programs (7505C)  
 Washington, DC 20460

**Notice of Supplemental Distribution of a Registered Pesticide Product**

**Instructions**

After a registrant has obtained final registration for the basic product, the registrant may then supplementally distribute his/her product. One form must be submitted for each distributor product and must be signed by the distributor involved. The basic registration number and the distributor company number must be shown.

If a registrant has a potential distributor who does not have a company number assigned, she/he should have the distributor apply, on letterhead stationery, to the Registration Division to have a number assigned prior to submitting this form to the agency.

This Notice of Supplemental Distribution must be submitted by the basic registrant. The completed form must have the concurrence and signature of both the registrant and the distributor.

EPA Registration Number of Product 754-97-6 NJ01	Distributor Company Number 754197
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**Note: Do not submit distributor product labels**

Name of Registered Product (basic product name accepted by EPA) Bioshield	Distributor Product Name Aquagard II Solvent Base Fortified with Bioshield (provides/creates an invisible
--	--

Name and Address of Distributor (Type; include ZIP code) Flexabar Corporation 1969 Rutgers University Blvd Lakewood, N. J. 08701	barrier to inhibit the growth of algae)
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**Read All Conditions Before Signing**

1. The distributor product must have the same composition as the basic product.
2. The distributor product must be manufactured and packaged by the same person who manufactures and packages the registered basic product.
3. The labeling for the distributor product must bear the same claims as the basic product, provided, however, that specific claims may be deleted if by doing so, no other changes to the label are necessary.
4. The product must remain in the manufacturer's unbroken container.
5. The label must bear the EPA registration number of the basic product, followed by a hyphen and the distributor's company number.
6. Distributor product labels must bear the name and address of the distributor qualified by such terms as "packed for...", "distributed by..."; or "sold by..." to show that the name is not that of the manufacturer.
7. All conditions of the basic registration apply equally to distributor products. It is the responsibility of the basic registrant to see that all distributor labeling is kept in compliance with requirements placed on the basic product.

**Distributor**

We intend to market our product under the Distributor Product Name specified above, subject to the conditions specified on this Notice.

Signature and Title of Distributor

Robert E. Franzetta - Vice President

Date

7-2-03

**Registrant**

I agree that the distributor named above may distribute and sell the Distributor Product specified above, subject to the conditions specified on this Notice.

Signature and Title of Registrant

CEO Nova Biochemicals

Date

7/1/03

DIRECTIONS FOR USE  
Conseils de mise en œuvre

**APPLICATION:**  
A clean dry surface free of scale, corrosion, dirt, grease, oil, marine fouling or other foreign matter will provide the optimum performance of the paint when used for either complete coating or for touch-up. Inadequate surface preparation will result in the unsatisfactory performance. Be sure to remove all dust, debris and other surface contaminations that are generated by the cleaning process prior to painting.

**Application:**  
Pour obtenir un résultat optimum de cette peinture, aussi bien pour une peinture complète ou une retouche, la surface devra être écaillée, libre de corrosion, de poussières, d'huile, de fouling ou autre matière diverse. Une préparation inadéquate de la surface entraînera un résultat insatisfaisant. Bien s'assurer d'enlever toute trace de poussières, débris et autre produits contaminant produit par le procédé de nettoyage avant peinture.

**MIX:** Shake well before using.  
**Mélange:** Bien secouer avant usage.

**PREPARATION:**  
Prepare the surface for coating by washing with high pressure water and scraping, or by sanding using coarse sandpaper. Be sure to use the proper protective equipment to prevent inhalation or ingestion of the paint dust generated. Apply two (2) coats of Aquagard 181 Primer allowing 2-4 hours drying time between coats. Let primer dry overnight and sand lightly. Closely follow these instructions. Then apply two (2) coats Aquagard II at the correct thickness of approximately 2 mils. Allow a minimum of four (4) hours drying between coats and a minimum of twenty four (24) hours before launching.

**Préparation:**  
Préparer la surface à peindre en lavant avec de l'eau sous pression et en grattant, ou bien utiliser un papier abrasif à gros grain. Utiliser des protections adéquates pour éviter l'inhalation ou l'ingestion des poussières de peinture résultant du nettoyage. Appliquer ensuite deux (2) couches d'Aquagard 181 Primer laissant 2 à 4 heures entre chaque couche. Laisser sécher le Primer jusqu'au lendemain et poncer légèrement avec le papier abrasif. Suivez soigneusement ces instructions. Ensuite appliquer deux (2) couches d'Aquagard II d'une épaisseur approximative de 2 mils. Laisser sécher au minimum quatre (4) heures entre chaque couche et un minimum de vingt quatre (24) heures avant le lancement.

**New Outdrive Units:** Lightly sand the factory finish with 60 grit sandpaper, wipe clean with water, allow to dry. Then apply two (2) coats of Aquagard II allowing 2-4 hours drying time between coats. Let second coat dry overnight. Allow 24 hours before launching.

**New Outdrive Units:** Poncer légèrement la peinture d'usine avec du papier abrasif (60 grit), nettoyer et laisser sécher. Ensuite appliquer deux (2) couches d'Aquagard II en laissant sécher pendant 2 à 4 heures entre chaque couche. Laisser sécher la seconde couche jusqu'au lendemain. Attendez 24 heures avant le lancement.

**Bare Aluminum:** Make sure surface is dry and free of grease, wax, oil and loose paint. Abrade to bright metal by sandblasting, sanding or wire brushing. Wipe clean of any residue, then apply two (2) coats of Aquagard 181 Primer, allowing four (4) hours drying time between coats. Let dry overnight and sand lightly. Closely follow these instructions. Then apply two (2) coats of Aquagard II allowing 2-4 hours drying time between coats. Let second coat dry overnight. Allow 24 hours before launching.

**Aluminium nu:** Vous assurer que la surface est sèche et libre de tout graisse, cire, huile ou de peinture. Poncer alors avec la brosse métallique ou le papier abrasif jusqu'à obtenir un métal brillant. Nettoyer tout résidu, ensuite appliquer deux (2) couches d'Aquagard 181 primer, en laissant sécher quatre (4) heures entre chaque couche. Laisser sécher jusqu'au lendemain et poncer légèrement. Suivez soigneusement ces instructions, ensuite appliquer deux (2) couches d'Aquagard II en laissant sécher 2 à 4 heures entre chaque couche. Laisser sécher la seconde couche jusqu'au lendemain. Attendez 24 heures avant le lancement.

**Previously Painted Aluminum:** Previously painted surfaces in poor condition (chipping or flaking) should be stripped to bare metal, then proceed with the bare aluminum instructions specified above. If the previous anti-fouling paint is a vinyl type, sand it thoroughly with 60 grit sand paper, wipe clean of sanding residue and apply at least two (2) coats of Aquagard II. If the old paint type is unknown, apply a small patch of Aquagard II to test compatibility with the old paint. If Aquagard II cracks or lifts off, the old paint will have to be removed. Then follow the bare aluminum instructions specified above. If nothing appears to happen when Aquagard II is applied, let the test patch dry for several hours, then scrape the Aquagard II to see if it is adhering to the old paint satisfactorily. If the adhesion looks good, sand the entire surface thoroughly with 60 grit sandpaper and apply at least two (2) coats of Aquagard II, and allow to dry 24 hours before launching.

**Aluminium déjà peint:** Si la surface déjà peinte est en mauvais état (écaillée et/ou cloquée) il faut brosser jusqu'à obtenir un aluminium nu. Suivez alors la procédure ci-dessus. Si le traitement anti-fouling est du type vinyle, poncer avec du papier abrasif (60 grit) dépolissier et appliquer au moins deux (2) couches d'Aquagard II. Si l'ancienne peinture est inconnue, appliquer l'Aquagard II sur une petite surface pour tester la compatibilité. Si l'Aquagard II craque ou se décolle, l'ancienne peinture devra être enlevée. Suivre ensuite les instructions pour l'aluminium nu ci-dessus. Si rien ne se passe sur la surface d'essai ou l'Aquagard II a été appliquée, laisser sécher plusieurs heures, ensuite gratifier l'Aquagard II pour vérifier la bonne adhérence sur l'ancienne peinture. Si l'adhérence est bonne, poncer toute la surface avec du papier abrasif (60 grit) et appliquer au moins deux (2) couches d'Aquagard II, et laisser sécher 24 heures avant le lancement.

# AQUAGARD II

## Outdrive/Outboard Spray Paint

**FOR OUTBOARD/STERN DRIVE / POUR HORS-BORD/MOTEUR FIXE**  
**Ferfied with BioShield™**  
**(Provides an invisible barrier to inhibit the growth of algae).**  
Protects aluminum and other non-ferrous materials.  
Provides corrosion protection for stern drive and out board lower unit corrosion protection.  
Provides excellent abrasion solvent resistance.

**Translucent/Translucide**  
**341g**

**DANGER: EXTREMELY FLAMMABLE. CONTENTS UNDER PRESSURE.**  
**WARNING: HARMFUL IF INHALED FOR INDUSTRIAL OR PROFESSIONAL USE.**  
**CAUTION: MAY BE HARMFUL. CANCER HAZARD RISK OF CANCER.**  
**PRECAUTION AND LEVEL OF EXPOSURE.**




**DANGER: EXTREMELY INFLAMMABLE. CONTENU SOUS PRESSION.**  
**ATTENTION: PEUT ÊTRE NUISIBLE EN CAS D'INHALATION.**  
**PRÉCAUTION: PEUT ÊTRE NUISIBLE. RISQUE DE CANCÈRE.**  
**PRÉCAUTION ET NIVEAU D'EXPOSITION.**

AP/CE

1/03

**SPRAY PAINT**  
Material Safety Data Sheet Available  
RISK: Extremely flammable. Contains xylene, methyl ethyl ketone, and toluene. Vapor harmful. Contents harmful or fatal if swallowed. Contents under pressure.  
PRECAUTIONARY MEASURES: Use in well ventilated area. Avoid prolonged breathing of vapors. Avoid contact with skin (keep out of direct sunlight). Do not puncture. Incinerate or store above 120°F. KEEP OUT OF REACH OF CHILDREN.  
FIRST AID: If swallowed, do not a induce vomiting. If contact with eyes occurs flush thoroughly with water. In all cases of accident, contact physician immediately.

**PEINTURE EN ATOMISEUR USAGE INDUSTRIEL SEULEMENT.**



Fiche signalétique disponible

**RISQUE:** Extrêmement inflammable. Contient de l'oxyde de méthyle éthyle, de la cétone et du toluène. Vapeur nocive. Il est nocif et peut être mortel si avalé.  
**MESURES PRÉVENTIVES:** Utiliser dans un espace bien aéré. Éviter l'inhalation prolongée des vapeurs. Éviter tout contact du contenu avec la peau.  
**Conservation:** Conserver à l'abri du feu, ne pas percer le contenant, ni le jeter au feu, ne conserver à des températures dépassant 48°C.  
**PREMIERS SOINS:** En cas d'ingestion, ne pas faire vomir. En cas de contact avec les yeux, bien rincer à grande eau. Dans tous les cas d'accident consulter immédiatement un médecin.



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EXHIBIT "2"

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1969 RUTGERS UNIVERSITY BOULEVARD, LAKEWOOD, NJ 08701  
TELEPHONE • 732-901-6500 FAX • 732-901-6504

Item # B1

FAXED

Date: 8-8-03

Fax #: 703-305-7670

The following facsimile transmission consists of 5 page(s) including this cover.

Attention: Barbara Purcell  
Front End Processing Staff  
Information Services Branch  
Program Mgmt and Support Division  
US EPA

Per our telephone conversation a few minutes ago:

We are trying to get a distributor number for our Aquagard product, which contains Bioshield, as stated in our distributor application.

Please note that our US EPA number is 9339 and Bioshield's EPA number is 754-97-6. So, please let us know what the NEW Distributor Number will be.

Attached please find application we received from you yesterday, which has only the Bioshield number handwritten on it. It should be followed by the Distributor assigned number.

Please let us know as soon as possible and fax it back to us.

Yours truly,

  
Hamdi Latif  
Technical Director

11/30  
8-8-03 Barbara  
754-97-6-addr 9339  
754-97-6-9339





Regional Hearing Clerk  
U.S. Environmental Protection Agency, Region 2  
290 Broadway, 16<sup>th</sup> floor  
New York, NY 10007-1866

Dated: September 18, 2008

MICHELMAN & BRICKER

BY: 

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