

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2**

U.S. Environmental
Protection Agency-Region 2
2016 SEP 23 AM 7:26
REGIONAL OPERATIONS
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In the Matter of :
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 :
Fabco Industries Inc., :
 : COMPLAINT AND NOTICE OF
 : OPPORTUNITY FOR HEARING
 :
Respondent. :
 :
 :
 : Docket No. FIFRA-02-2016-5202
 :
Proceeding Under the Federal :
Insecticide, Fungicide and :
Rodenticide Act, as amended :
 :
-----X

Complainant, as and for her Complaint against Respondent, 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. Respondent is Fabco Industries Inc., a New York corporation (hereinafter "Respondent" or "Fabco").
4. Respondent's corporate headquarters is located at 66 Central Avenue, Farmingdale, NY 11735 ("Respondent's facility").
5. Respondent has been, and continues to be, a "person" as defined by Section 2(s) of FIFRA, 7 U.S.C. § 136(s).
6. At all times relevant to the matters herein alleged, Respondent has manufactured stormwater treatment systems at its facility and distributed them to municipal and commercial clients throughout the United States.

7. Respondent's products include filters, cartridges, basins and other components of stormwater treatment systems sold under the following names: Fabguard, Pathogen Cartridges, Helix, and Stormsafe.

8. "To distribute or sell" is defined by Section 2(gg) of FIFRA, 7 U.S.C. § 136(gg), as "to distribute, sell, offer for sale, hold for distribution, hold for sale, hold for shipment, ship, deliver for shipment, release for shipment, or receive and (having so received) deliver or offer to deliver." Respondent is a "distributor" or "seller" within the meaning of Section 2(gg) of FIFRA, 7 U.S.C. § 136(gg).

9. Respondent's stormwater treatment products are distributed and/or sold, including held for sale, at Respondent's facility.

10. Respondent is a "distributor or seller" within the meaning of Section 2(gg) of FIFRA, 7 U.S.C. § 136(gg).

11. Any bacteria, fungus or other micro-organism (except for those on or in living man or other living animals) may be a "pest" as defined by Section 2(t) of FIFRA, 7 U.S.C. § 136(t), and Title 40 of the Code of Federal Regulations ("C.F.R.") § 152.5.

12. Section 2(u) of FIFRA, 7 U.S.C. § 136(u), defines the term "pesticide" as, among other things, "(1) any substance or mixture of substances intended for preventing, destroying, repelling or mitigating any pest."

13. Section 2(mm) of FIFRA, 7 U.S.C. § 136(mm), defines the term "antimicrobial pesticide" as "a pesticide that ... is intended to – (i) disinfect, sanitize, reduce, or mitigate growth or development of microbiological organisms; or (ii) protect inanimate objects, industrial processes or systems, surfaces, water ... from contamination, fouling, or deterioration caused by bacteria... ."

14. Title 40 C.F.R. § 152.15(a)(1) states, in part, that a substance is considered to be intended for a pesticidal purpose, and thus to be a pesticide requiring registration, if "(a) [t]he person who distributes or sells the substance claims, states or implies (by labeling or otherwise): (1) [t]hat the substance (either by itself or in combination with any other substance) can or should be used as a pesticide; . . ."

15. Title 40 C.F.R. § 152.15(c) states that a substance is considered to be intended for a pesticidal purpose, and thus to be a pesticide requiring registration, if . . . "(c):[t]he person who distributes or sells the substance has actual or constructive knowledge that the substance will be used or is intended to be used, for a pesticidal purpose."

16. On September 10, 2014, employees of EPA conducted an inspection of Respondent's facility (the "Inspection") for the purposes of enforcing the provisions of FIFRA, 7 U.S.C. §§ 136-136y, and the regulations promulgated pursuant thereto.

17. The Inspection was conducted under the authority, and pursuant to the provisions, of Section 9(a) of FIFRA, 7 U.S.C. § 136g(a).

Counts 1 to 16 - Sale/Distribution of an Unregistered Pesticide

18. Complainant repeats each allegation contained in Paragraphs 1 through 17, inclusive, as if fully set forth herein.

19. Prior to the inspection of Respondent's facility, the EPA inspectors reviewed Respondent's website for advertising, promotional, and specification materials related to the sale and distribution of pesticide products.

20. Materials obtained from Respondent's website contained the following statements:

a. "Stormwater filter cartridges are available in various configurations allowing you to fine tune performance by targeting specific pollutants such as: ... pathogens/bacteria."

b. "FABGUARD™: Antimicrobial Shield is a chemical technology that when applied to our foam material makes it antimicrobially active ... Microorganisms that subsequently contact the material are neutralized."

c. "The Helix™ is a new generation of stormwater filter that applies Fabco's proven FabGuard™ antimicrobial filter media in a scalable vault configuration."

d. "The Fabco filter cartridges used in the StormBasin product are designed to capture: . . . pathogens (bacteria)."

e. "Pathogens Cartridge – 2x more pathogen treatment vs. standard cartridge."

21. The antimicrobial storm water treatment systems and filters described on Respondent's website were manufactured by Respondent for a pesticidal purpose and advertised with pesticidal claims.

22. The storm water treatment systems and filters Respondent advertised on its website are intended for preventing, destroying, repelling, or mitigating "pests", bacteria, mold, and/or fungus.

23. Each of Respondent's products described in Paragraph 20, above, is a "pesticide" as that term is defined in Section 2(u) of FIFRA, 7 U.S.C. § 136(u).

24. Each of Respondent's products described in Paragraph 20, above, is an "antimicrobial pesticide" as that term is defined in Section 2(mm) of FIFRA, 7 U.S.C. § 136(mm).

25. At all times relevant to the matters alleged herein, none of the storm water treatment systems or filters advertised by Respondent on its website were registered as a pesticide under Section 3 of FIFRA, 7 U.S.C. § 136a.

26. Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A) provides that "it shall be unlawful for any person in any State to distribute or sell to any person any pesticide that is not registered under section 136a [Section 3 of FIFRA]."

27. Title 40 C.F.R. § 152.15 provides that "[n]o person may distribute or sell any pesticide product that is not registered under the Act."

28. Title 40 C.F.R. § 168.22(b)(4) further provides, in part, that it shall be unlawful for any person who distributes or sells any pesticide to advertise any unregistered pesticide for any use.

29. On December 23, 2014, and August 4, 2015 EPA's Region 2 Office solicited additional information from Respondent regarding its manufacture, sale and distribution of pesticides through Information Request Letters ("IRLs") for calendar years 2010 through 2015.

30. Respondent submitted responses to the IRLs dated January 8, 2015, February 13, 2015, September 14, 2015, and October 27, 2015.

31. EPA's IRLs requested invoices for Respondent's sales and shipments of antimicrobial stormwater treatment systems and antimicrobial filter cartridges.

32. Respondent provided invoices indicating the sales and shipment of antimicrobial products as described in the table at Paragraph 33, below.

33. Respondent distributed or sold antimicrobial storm water systems or antimicrobial components of such systems on the 16 separate occasions listed below:

Count	Ship Date	Invoice
1	11/13/13	111180
2	8/18/14	111284
3	3/30/15	111415
4	9/11/14	111294
5	1/13/14	111200
6	2/6/14	111223
7	1/15/14	111202
8	12/5/13	111191

9	8/30/13	111150
10	8/21/13	111147
11	10/18/12	111004
12	8/30/12	110977
13	6/8/12	110935
14	5/24/13	111099
15	5/14/13	111090
16	9/11/14	111293

34. Each of Respondent's distributions and/or sales of the unregistered pesticides listed in the table above constitutes an unlawful act pursuant to Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), for which a penalty may be assessed pursuant to Section 14(a)(1) of FIFRA, 7 U.S.C. § 136l(a)(1).

Count 17– Unregistered Establishment

35. Complainant repeats each allegation contained in Paragraphs 1 through 34, inclusive, as if fully set forth herein.

36. At all times relevant to the matters alleged herein, Respondent's facility constituted an "establishment," as that term is defined by Section 2(dd) of FIFRA, 7 U.S.C. § 136(dd).

37. Section 7(a) of FIFRA, 7 U.S.C. § 136e(a), provides that "no person shall produce any pesticide subject to the Act ... unless the establishment in which it is produced is registered with the Administrator."

38. Respondent's facility was first registered as a pesticide-producing establishment, and assigned establishment number 90270-NY-1, pursuant to Section 7(b) of FIFRA, 7 U.S.C. § 136e(b), on July 18, 2013.

39. On or about April 8, 2013, Respondent produced a batch of antimicrobial filters at its facility.

40. Respondent's April 8, 2013 production of a pesticide in an unregistered facility as alleged in paragraph 39, above, is a violation of Section 7 of FIFRA, 7 U.S.C. § 136e.

41. At all times relevant to the matters alleged herein, Respondent has been a "producer" as that term is defined by Section 2(w) of FIFRA, 7 U.S.C. § 136(w).

42. Section 12 (a)(2)(L), 7 U.S.C. § 136(L), provides that "it shall be unlawful for any person who is a producer to violate any of the provisions of section 136e."

43. Respondent's April 8, 2013 production of a pesticide in an unregistered facility as

alleged in paragraph 39, above, is a violation of Section 12(a)(2)(L), 7 U.S.C. § 136(L), for which a penalty may be assessed pursuant to Section 14(a)(1) of FIFRA, 7 U.S.C. Section 136l(a)(1).

PROPOSED CIVIL PENALTY

The proposed civil penalty has been determined in accordance with Section 14(a)(1) of FIFRA, 7 U.S.C. § 136l(a)(1), 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, requires EPA to adjust its penalties for inflation on a periodic basis. EPA has issued the Civil Monetary Penalty Inflation Adjustment Rule under which violations that occur on January 12, 2009, or later, are subject to a new statutory maximum civil penalty. The maximum civil penalty under Section 14(a) of FIFRA for such violations is \$7,500 per offense. (40 C.F.R. Part 19)

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

To develop the proposed penalty in this Complaint and Notice of Opportunity for Hearing (hereinafter referred to as the “Complaint”), Complainant has taken into account the particular facts and circumstances of this case, to the extent known at the time of its filing, with specific reference to EPA’s “FIFRA Enforcement Response Policy - The Federal Insecticide, Fungicide and Rodenticide Act,” dated December 2009 (hereinafter referred to as the “ERP”). A copy of the ERP is available upon request or may be obtained from the Internet at this address: <http://www2.epa.gov/enforcement/fifra-enforcement-response-policy>. This policy provides rational, consistent and equitable calculation methodologies for applying the statutory penalty criteria enumerated above to particular cases.

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

Counts 1 through 16:	Distributions and/or Sales of Unregistered Pesticides.....	\$ 91,520
Count 17:	Unregistered Establishment.....	\$ 4,536
Economic Benefit.....		\$ 10,023
TOTAL ASSESSMENT (rounded to the nearest \$100).....		\$ 106,100

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 which are codified at 40 C.F.R. Part 22. A copy of these rules accompanies this 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. 40 C.F.R. § 22.15(a). Such Answer must be filed within 30 days after service of the Complaint. 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 (Rm 1631)
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.

(Note that any documents filed after Respondent has filed an Answer in this proceeding should not be filed using the above address, but should be filed following the instructions specified in section "D", below.)

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. Filing of Documents After the Answer is Filed

Unless otherwise ordered by the Presiding Officer for this proceeding, all documents filed after Respondent has filed the Answer should be filed with the Headquarters Hearing Clerk, acting on behalf of the Regional Hearing Clerk, at one of the following addresses:

If by USPS:

Sybil Anderson
Headquarters Hearing Clerk
Office of Administrative Law Judges
U.S. Environmental Protection Agency
Mail Code 1900R
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

If by UPS, FedEx DHL, other courier or personal delivery:

Sybil Anderson
Headquarters Hearing Clerk
Office of Administrative Law Judges
U.S. Environmental Protection Agency
Ronald Reagan Building, Room M1200
1300 Pennsylvania Avenue, N.W.
Washington, DC 20460

E. 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 "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, "5 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:

Karen L. Taylor, 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) 637-3637

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 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). Such payment shall be made by cashier's or certified check or by electronic fund transfer ("EFT"). If the payment is made by check, then the check shall be made payable to the "**Treasurer, United States of America**" and shall be mailed

to:

U.S. 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 listing the name of the matter (**In the Matter of Fabco Industries Inc.**) and the Docket Number (**FIFRA-02-2016-5202**).

If Respondent chooses to make the payment by EFT, then Respondent shall provide the following information to its 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 Respondent: **Fabco Industries Inc.**
- 7) Case Number: **FIFRA-02-2016-5202**

Whether the payment is made by check or by EFT, the Respondent shall promptly thereafter furnish reasonable proof that such payment has been made, to both:

Karen L. Taylor, Esq.
Assistant Regional Counsel

Karen Maples
Regional Hearing Clerk

Environmental Protection Agency, Region 2
290 Broadway, 16th floor
New York, N.Y. 10007-1866

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. § 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.

In the Matter of Fabco Industries, Inc.
Docket No. FIFRA-02-2016-5202

COMPLAINANT:

Dated: 9/29/16
New York, New York


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

TO: Steven Chang, Chief Executive Officer
Fabco Industries Inc.
66 Central Ave.
Farmingdale, NY 11735

In the Matter of Fabco Industries, Inc.
Docket No. FIFRA-02-2016-5202

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-02-2004-5108, and a copy of the Consolidated Rules of Practice, 40 C.F.R. Part 22, by certified mail, return receipt requested, to:

Steven Chang, Chief Executive Officer
Fabco Industries Inc.
66 Central Ave.
Farmingdale, NY 11735

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: September 29, 2016
New York, New York


Yoland M. Jones