

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Region 2**

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In the Matter of	:	
	:	
Clarke Environmental Mosquito	:	
Management, Inc.,	:	<u>COMPLAINT AND NOTICE OF</u>
	:	<u>OPPORTUNITY FOR HEARING</u>
Respondent	:	
	:	Docket No. FIFRA-02-2005-5203
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. § 1367(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 Clarke Environmental Mosquito Management, Inc. (hereinafter "Clarke"), an Illinois corporation.
4. Respondent's corporate headquarters is located at 159 North Garden Avenue, Roselle, Illinois 60172.
5. Respondent is a "person" as defined by section 2(s) of FIFRA, 7 U.S.C. § 136(s), and as such, is subject to FIFRA and the regulations promulgated thereunder.
6. Respondent applies pesticides that are classified as "restricted use pesticides" in accordance with section 3(d)(1) of FIFRA, 7 U.S.C. § 136a(d)(1) and 40 C.F.R. § 152.160.
7. Respondent is a "commercial applicator" within the meaning of section 2(e)(3) of FIFRA, 7 U.S.C. § 136(e)(3).

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."
9. Respondent is a "distributor or seller" in that it distributes or sells as defined by section 2(gg) of FIFRA, 7 U.S.C. § 136(gg).
10. In 2000, Respondent was awarded a contract by the New York City Department of Health (NYCDOH) to conduct pesticide applications throughout the five boroughs for controlling vector-carrying mosquitoes to reduce the risk of the West Nile Virus. This contract was effective from May 1, 2000 to November 1, 2000.
11. During the year 2000, Respondent employed three people, Mr. Kent Smith, Mr. Leslie Rouff, and Mr. Samuel Gowrie, as pesticide applicators to conduct pesticide applications throughout the boroughs of New York City.
12. Section 14(b)(4) of FIFRA, 7 U.S.C. § 136(b)(4), states that "the act, omission, or failure of any officer, agent or other person acting for or employed by any person shall in every case be also deemed to be the act, omission, or failure of such person as well as that of the person employed." Thus, FIFRA deems the acts, omissions, or failures of each individual as the acts, omissions, or failures of Respondent.
13. Section 2(t) of FIFRA, 7 U.S.C. § 136(t), and 40 C.F.R. section 152.5, define, in part, a "pest" as any insect.
14. A mosquito is an insect.
15. Therefore, a mosquito is a pest as defined by section 2(t) of FIFRA, 7 U.S.C. § 136(t), and 40 C.F.R. section 152.5.
16. 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."
17. The pesticide Multicide Mosquito Adulticiding Concentrate 2705 (EPA Registration No. 1021-1688) is registered as a mosquito adulticide by McLaughlin Gormley King Co. The Multicide Mosquito Adulticiding Concentrate 2705 product contains 10 percent Sumithrin and 10 percent piperonyl butoxide as active ingredients.
18. Pursuant to 40 C.F.R. section 152.132, the pesticide Multicide Mosquito Adulticiding Concentrate 2705 was distributed under the name Anvil 10 + 10 ULV (EPA Registration No. 1021-1688-8329). The Anvil distributor product contains 10 percent piperonyl

butoxide and 10 percent Sumithrin as active ingredients.

19. The pesticide Anvil 10 + 10 ULV (EPA Registration No. 8329-62) is registered as a mosquito adulticide by Clarke Mosquito Control Products, Inc. The Anvil product contains 10 percent Sumithrin and 10 percent piperonyl butoxide technical as active ingredients.
20. The pesticide Vectolex CG Biological Larvicide (EPA Registration No. 275-77) containing 7.5 percent Bacillus sphaericus as the active ingredient was registered as a mosquito larvicide by Abbott Laboratories.
21. On April 29, 2000, the registration of Vectolex CG Biological Larvicide was transferred to Valent Biosciences Corporation and assigned the new registration number, EPA Reg. No. 73049-20.
22. Respondent applied the pesticides Anvil 10+10 ULV (hereinafter "Anvil") and Vectolex CG Biological Larvicide (hereinafter "Vectolex") in New York City during the year 2000.
23. A "label" is defined by section 2(p)(1) of FIFRA, 7 U.S.C. § 136(p)(1), as the "written, printed or graphic matter on, or attached to, the pesticide or device or any of its containers or wrappers." The term "labeling" is defined by section 2(p)(2) of FIFRA, 7 U.S.C. § 136(p)(2), as "all labels and all other written, printed or graphic matter . . . (A) accompanying the pesticide or device at any time; or (B) to which reference is made on the label or in literature accompanying the pesticide."
24. "To use any registered pesticide in a manner inconsistent with its labeling" is defined by section 2(ee) of FIFRA, 7 U.S.C. § 136(ee), as "to use any registered pesticide in a manner not permitted by the labeling."
25. Section 12(a)(2)(G) of FIFRA, 7 U.S.C. § 136j(a)(2)(G) states it shall be unlawful for any person "to use any registered pesticide in a manner inconsistent with its labeling."
26. During all times relevant to the Complaint, the Anvil label on the product applied by Respondent pursuant to its contract with NYCDOH contained the following statements: "Harmful if absorbed through the skin" and "Avoid contact with skin, eyes or clothing."
27. During all times relevant to the Complaint, the Vectolex label on the product applied by Respondent pursuant to its contract with NYCDOH contained the following statements: "harmful if absorbed through the skin" and "Avoid contact with skin, eyes, or clothing."

COUNTS 1 - 53

28. Paragraphs 1 through 27 are realleged and incorporated herein.

29. From July 28, 2000, until October 10, 2000, Mr. Kent Smith worked approximately 53 days for Respondent applying mosquito control pesticides.
30. From July 28, 2000, until October 10, 2000, Mr. Smith was exposed on about 53 days to the pesticides Anvil and Vectolex during the course of mosquito control applications.
31. Records indicate that Mr. Smith was exposed to the Anvil and Vectolex pesticides daily while employed by the Respondent, and was adversely affected by daily exposure to these pesticides.
32. The Respondent failed to avoid having the pesticides come in contact with Mr. Smith's skin, eyes, or clothing.
33. Respondent used the pesticides Anvil and Vectolex in a manner inconsistent with their labeling by failing to avoid contact with skin, eyes, or clothing.
34. Respondent's application methods constituted a violation of section 12(a)(2)(G) of FIFRA, 7 U.S.C. § 136j(a)(2)(G), for which a penalty may be assessed pursuant to FIFRA section 14(a), 7 U.S.C. § 136l(a).

COUNTS 54 - 102

35. Paragraphs 1 through 27 are realleged and incorporated herein.
36. From August 7, 2000, until October 10, 2000, Mr. Leslie Rouff worked approximately 49 days for Respondent applying mosquito control pesticides.
37. From August 7, 2000, until October 10, 2000, Mr. Rouff was exposed on about 49 days to the pesticides Anvil and Vectolex during the course of mosquito control applications.
38. Records indicate that Mr. Rouff was exposed to the Anvil and Vectolex pesticides daily while employed by the Respondent, and was adversely affected by daily exposure to these pesticides.
39. Respondent failed to avoid having the pesticides come in contact with Mr. Rouff's skin, eyes, or clothing.
40. Respondent used the pesticides Anvil and Vectolex in a manner inconsistent with their labeling by failing to avoid contact with skin, eyes, or clothing.
41. Respondent's application methods constituted a violation of section 12(a)(2)(G) of FIFRA, 7 U.S.C. § 136j(a)(2)(G), for which a penalty may be assessed pursuant to FIFRA

section 14(a), 7 U.S.C. § 136l(a).

COUNTS 103 - 135

- 42. Paragraphs 1 through 27 are realleged and incorporated herein.
- 43. From August 23, 2000, until October 10, 2000, Mr. Samuel Gowrie worked approximately 33 days for Respondent applying mosquito control pesticides.
- 44. From August 23, 2000, until October 10, 2000, Mr. Gowrie was exposed on about 33 days to the pesticides Anvil and Vectolex during the course of mosquito control applications.
- 45. Records indicate that Mr. Gowrie was exposed to the Anvil and Vectolex pesticides daily while employed by the Respondent, and was adversely affected by daily exposure to these pesticides.
- 46. Respondent failed to avoid having the pesticides come in contact with Mr. Gowrie's skin, eyes, or clothing.
- 47. Respondent used the pesticides Anvil and Vectolex in a manner inconsistent with their labeling by failing to avoid contact with skin, eyes, or clothing.
- 48. Respondent's application methods constituted a violation of section 12(a)(2)(G) of FIFRA, 7 U.S.C. § 136j(a)(2)(G), for which a penalty may be assessed pursuant to FIFRA section 14(a), 7 U.S.C. § 136l(a).

PROPOSED CIVIL PENALTY

In view of the above-cited findings and pursuant to the authority of section 14(a) of FIFRA, 7 U.S.C. § 136l (a), Complainant herein 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:

Counts 1 through 135: Misuse of Pesticides	
135 Violations @ \$5,500 per violation	\$742,500
TOTAL ASSESSMENT.....	\$742,500

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. As per the Civil Monetary Penalty Inflation Adjustment Final Rule, which was mandated by the Debt Collection

Improvement Act of 1996 to adjust civil monetary penalties for inflation on a periodic basis, any violation on or after January 30, 1997, may be assessed a civil penalty up to \$5,500 for each violation.

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, 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.

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 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 EPA'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, "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 affect 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, Esq.
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 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 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:

**Regional Hearing Clerk
E.P.A., Region 2
P.O. Box 360188M
Pittsburgh, Pennsylvania 15251**

The check shall be identified with a notation of the name and docket number of this case as follows:

In the Matter of Clarke Environmental Mosquito Management, Inc., Docket No. FIFRA-02-2005-5203

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: December 16, 2004
New York, New York

COMPLAINANT:



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

TO: Mr. J. Lyell Clarke, III, President
Clarke Environmental Mosquito
Management, Inc.
159 North Garden Avenue
Roselle, IL 60172

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-02-2005-5203, and a copy of the Consolidated Rules of Practice, 40 C.F.R. Part 22 (July 1, 2003), by certified mail, return receipt requested, to:

Mr. J. Lyell Clarke, III, President
Clarke Environmental Mosquito
Management, Inc.
159 North Garden Avenue
Roselle, IL 60172

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: DEC 21, 2004
New York, New York

