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October 21, 2014

Juliane Matthews, Assistant Regional Counsel
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Regional Hearing Clerk
U.S. Environmental Protection Agency Region 10
1200 Sixth Avenue, Suite 900
Mail Stop: ORC-158
Seattle, WA 98101

Re: *In the Matter of: Pacific Air Research, Inc.*
Docket No: FIFRA-10-2014-0141
Our File No. 528.1

Dear Clerk,

Please find enclosed *Pacific Air Research, Inc., Answer, Affirmative Defenses, and Request for Hearing.*

Sincerely,

Angela B. Clayton
Paralegal

Encl

Cc: Client

BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

| | | |
|---|---|---|
| In the Matter of: | ) | Docket No. FIFRA-10-2014-0141 |
| PACIFIC AIR RESEARCH, INC., | ) | ANSWER, AFFIRMATIVE DEFENSES, AND REQUEST FOR HEARING |
| Respondent | ) | |

Respondent Pacific Air Research, Inc., ("PAR"), Answer's the Administrator's Complaint and Notice of Opportunity for Hearing ("Complaint") as follows, and requests a hearing in this matter:

1.1 Paragraph 1.1 of the Administrator's Complaint contains a legal conclusion to which no Answer is required. To the extent an Answer is required, PAR denies the allegations in paragraph 1.1 of the Administrator's Complaint.

1.2 Paragraph 1.2 of the Administrator's Complaint contains a legal conclusion to which no Answer is required. To the extent an Answer is required, PAR denies the allegations in paragraph 1.2 of the Administrator's Complaint.

1.3 Paragraph 1.3 of the Administrator's Complaint contains no factual allegations to which an Answer is required. To the extent an Answer is required, PAR denies the allegations in paragraph 1.3 of the Administrator's Complaint, and denies any wrongdoing or violation.

2.1 Paragraph 2.1 of the Administrator's Complaint contains a legal conclusion to which no Answer is required. To the extent an Answer is required PAR denies



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the allegations in paragraph 2.1 of the Administrator's Complaint.

2.2 Paragraph 2.2 of the Administrator's Complaint contains a legal conclusion to which no Answer is required. To the extent an Answer is required PAR denies the allegations in paragraph 2.2 of the Administrator's Complaint.

2.3 Paragraph 2.3 of the Administrator's Complaint contains a legal conclusion to which no Answer is required. To the extent an Answer is required PAR denies the allegations in paragraph 2.3 of the Administrator's Complaint and denies using any registered pesticide in a manner inconsistent with its labeling.

2.4 Paragraph 2.4 of the Administrator's Complaint contains a legal conclusion to which no Answer is required. To the extent an Answer is required PAR denies the allegations in paragraph 2.4 of the Administrator's Complaint, and denies any wrongdoing or violation that would subject it to a civil penalty.

3.1 PAR admits the allegations in paragraph 3.1 of the Administrator's Complaint.

3.2 PAR admits the allegations in paragraph 3.2 of the Administrator's Complaint.

3.3 PAR admits the allegations in paragraph 3.3 of the Administrator's Complaint.

3.4 Paragraph 3.4 of the Administrator's Complaint contains a legal conclusion to which no Answer is required. To the extent an Answer is required PAR denies the allegations in paragraph 3.4 of the Administrator's Complaint.

3.5 Paragraph 3.5 of the Administrator's Complaint contains a legal conclusion to which no Answer is required. To the extent an Answer is required PAR denies the allegations in paragraph 3.5 of the Administrator's Complaint.

3.6 PAR admits the allegations in paragraph 3.6 of the Administrator's Complaint.

3.7 PAR admits the allegations in paragraph 3.6 of the Administrator's Complaint



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with the following exception. PAR denies it applied Accord XRT II to the Crook Timberland Unit called "Squaw 08," located in Curry County, Oregon on October 16, 2013. PAR admits that it applied Element 4 to the Crook Timberland Unit called "Squaw 08," located in Curry County, Oregon on October 16, 2013.

3.8 PAR admits the allegations in paragraph 3.8 of the Administrator's Complaint.

3.9 PAR admits the allegations in paragraph 3.9 of the Administrator's Complaint.

3.10 PAR admits the allegations in paragraph 3.10 of the Administrator's Complaint with the exception that PAR denies that it made "numerous" trips over the Cedar Valley while transporting pesticides.

3.11 PAR denies the allegations in paragraph 3.11 of the Administrator's Complaint because the word "vicinity" is vague and not defined.

3.12 PAR admits the allegations in paragraph 3.12 of the Administrator's Complaint.

3.13 PAR admits the allegations in paragraph 3.13 of the Administrator's Complaint.

3.14 PAR admits the allegations in paragraph 3.14 of the Administrator's Complaint.

3.15 PAR is without knowledge or information sufficient to form a belief as to when or why the ODA began an investigation into PAR's October 16, 2013 applications. PAR admits that residents of the Cedar Valley complained to the ODA both before and after PAR's application.

3.16 PAR admits that the ODA has represented that it took the samples alleged in paragraph 3.16 of the Administrator's Complaint, but has no personal knowledge of the samples, collection methods, handling, storage, processing or analysis other than that provided by the ODA.

3.17 PAR admits the allegations in paragraph 3.17 of the Administrator's Complaint



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based solely on representations made by the ODA.

3.18 PAR admits the allegations in paragraph 3.18 of the Administrator's Complaint, but denies that the ODA Laboratory Service's analysis or results were accurate, complete or valid.

3.19 PAR admits the allegations in paragraph 3.19 of the Administrator's Complaint, but denies that the ODA Laboratory Service's analysis or results were accurate, complete or valid.

3.20 PAR is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 3.20 of the Administrator's Complaint. To the extent an Answer is required, PAR denies the allegations in paragraph 3.20 of the Administrator's Complaint.

3.21 PAR is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 3.21 of the Administrator's Complaint. To the extent an Answer is required, PAR denies the allegations in paragraph 3.20 of the Administrator's Complaint. According to the ODA,

3.22 PAR is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 3.22 of the Administrator's Complaint. To the extent an Answer is required, PAR denies the allegations in paragraph 3.22 of the Administrator's Complaint. In addition, this individual's story "changed several times throughout the course of the conversation" with an ODA inspector.

3.23 PAR admits that paragraph 3.23 of the Administrator's Complaint accurately recites a limited portion of the label for Element 4. The application areas were greater than one half mile from the location where the Oregon Department of



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Agriculture collected samples. The Oregon Department of Agriculture found no damage to any plants outside of the treatment area. PAR specifically denies violating the Element 4 label.

3.24 PAR admits that paragraph 3.24 of the Administrator's Complaint accurately recites a limited portion of the label for Weedone LV6. The application areas were greater than one-half mile from the location where the Oregon Department of Agriculture collected samples. The Oregon Department of Agriculture found no damage to any plants outside of the treatment area. PAR specifically denies violating the Weedone LV6 label.

3.25 PAR denies the allegations in paragraph 3.25 of the Administrator's Complaint.

3.26 PAR denies the allegations in paragraph 3.26 of the Administrator's Complaint.

3.27 PAR denies the allegations in paragraph 3.27 of the Administrator's Complaint.

3.28 PAR denies the allegations in paragraph 3.28 of the Administrator's Complaint.

3.29 Paragraph 3.29 contains a legal conclusion to which no response is required. To the extent an answer is required, PAR denies the allegations in paragraph 3.29 of the Administrator's Complaint.

3.30 Paragraph 3.30 contains a legal conclusion to which no response is required. To the extent an answer is required, PAR denies the allegations in paragraph 3.30 of the Administrator's Complaint.

4.1 PAR denies the allegations in paragraph 4.1 of the Administrator's Complaint.

4.2 PAR denies the allegations in paragraph 4.2 of the Administrator's Complaint.

4.3 PAR denies the allegations in paragraph 4.3 of the Administrator's Complaint.

4.4 PAR denies the allegations in paragraph 4.4 of the Administrator's Complaint.



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5.1 Paragraph 5.1 contains a legal conclusion to which no response is required. To the extent an answer is required, PAR denies the allegations in paragraph 5.1 of the Administrator's Complaint.

5.2 No response is required to paragraph 5.2 of the Administrator's Complaint. To the extent a response is required, PAR denies the allegations in paragraph 5.2 of the Administrator's Complaint.

5.3 No response is required to paragraph 5.3 of the Administrator's Complaint. To the extent a response is required, PAR denies the allegations in paragraph 5.3 of the Administrator's Complaint.

6.1 PAR requests a hearing in this matter on all material facts alleged in the Administrator's Complaint and the appropriateness of the penalty proposed.

6.2 No response is required to paragraph 6.2 of the Administrator's Complaint. To the extent a response is required, PAR denies the allegations in paragraph 6.2 of the Administrator's Complaint.

7.1 Paragraph 7.1 contains a legal conclusion to which no response is required. To the extent an answer is required, PAR denies the allegations in paragraph 7.1 of the Administrator's Complaint.

7.2 Paragraph 7.2 contains a legal conclusion to which no response is required. To the extent an answer is required, PAR denies the allegations in paragraph 7.2 of the Administrator's Complaint.

8.1 Paragraph 8.1 contains a legal conclusion to which no response is required. To the extent an answer is required, PAR denies the allegations in paragraph 8.1 of the Administrator's Complaint.



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8.2 Paragraph 8.2 contains a legal conclusion to which no response is required. To the extent an answer is required, PAR denies the allegations in paragraph 8.2 of the Administrator's Complaint.

8.3 Paragraph 8.3 contains a legal conclusion to which no response is required. To the extent an answer is required, PAR denies the allegations in paragraph 8.3 of the Administrator's Complaint.

9.1 Paragraph 9.1 contains a legal conclusion to which no response is required. To the extent an answer is required, PAR denies the allegations in paragraph 9.1 of the Administrator's Complaint.

**RESPONDENT'S REQUEST FOR HEARING**

10.1 Respondent requests a hearing in this matter.

**ADDITIONAL DEFENSES**

PAR reserves the right to assert additional affirmative defenses as this matter proceeds, particularly with respect to those defenses presently unknown to PAR.

**RESPONDENT'S FIRST AFFIRMATIVE DEFENSE**

(Failure to State a Claim)

11.1 The Administrator's Complaint fails to state a claim for which relief can be granted.

**RESPONDENT'S SECOND AFFIRMATIVE DEFENSE**

(Compounds Detected Below Tolerances)

11.2 The Administrator's Complaint relies on samples allegedly collected by the Oregon Department of Agriculture and allegedly tested by ODA Laboratory Services. All of the allegedly reported detections were below the tolerances



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published by the EPA for the same compounds found in food and are therefore safe. *See* 40 C.F.R. §§ 180.1, 180.142, 180.417.

**RESPONDENT'S THIRD AFFIRMATIVE DEFENSE**

(Detections Below EPA Standards)

11.3 The Administrator alleges a detection of Triclopyr in sample 140147-3B, yet the ODA Laboratory Services Report states "<.010 ppm" as the results were below the minimum detection limit.

**RESPONDENT'S FOURTH AFFIRMATIVE DEFENSE**

(Double Jeopardy)

11.4 The State of Oregon has primary enforcement responsibility and has already instituted an enforcement case against PAR. 7. U.S.C. § 136w-1. The Administrator's action is therefore prohibited.

**RESPONDENT'S FIFTH AFFIRMATIVE DEFENSE**

(Fault of Others)

11.5 The compounds allegedly detected by the Oregon Department of Agriculture were the result of acts of others not within the control of PAR and for whom PAR has no responsibility or authority. PAR cannot be held liable for the acts of third parties.

**RESPONDENT'S SIXTH AFFIRMATIVE DEFENSE**

(No Reasonable Basis for Requested Relief)

11.6 The EPA's requested relief is not reasonable in relation to the lack of harm, the minute quantities of 2,4-D and triclopyr allegedly found, and the lack of evidence that the compounds found were the result of any action or inaction by PAR. PAR



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has demonstrated over its history that it takes affirmative steps to prevent all pesticide label violations.

**RESPONDENT'S SEVENTH AFFIRMATIVE DEFENSE**

(Arbitrary and Capricious)

11.7 The EPA's enforcement action against PAR is arbitrary and capricious. No set standards exist for a minimum detection level to establish a violation, or to permit an agency to conclude that a product was found when the amount is below the laboratory's minimum detection limit. The EPA has no reasonable basis to believe that the compounds found were the result of any application, transportation or other activity by PAR. The compounds are widely available to the general public at every home improvement and hardware store in the country. Further, the EPA has no reasonable basis to conclude that the term "inconsistent," as that word is used in 7 U.S.C. 136j(a)(2)(G) applies to this case. The EPA has identified no specific procedures, methods or acts performed by PAR that are "inconsistent" with the product labels, only that the Oregon Department of Agriculture allegedly found minute amounts of two of the products applied by PAR a considerable distance from the application site.

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**WHEREFORE**, Respondent respectfully prays for dismissal of the Administrator's Complaint in its entirety with prejudice, an award to PAR of its costs and attorney fees as allowed by law, and such other and further relief as the Administrative Law Judge may deem just and proper.

DATED this 21st day of October, 2014.

MILLER & ASSOCIATES

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**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served the foregoing **ANSWER** on the following:

Juliane Matthews, Assistant Regional Counsel
U.S. Environmental Protection Agency Region 10
1200 Sixth Avenue, Suite 900
Mail Stop: ORC-158
Seattle, WA 98101
By email to Matthews.Juliane@epa.gov and First Class Mail

Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 10
1200 Sixth Avenue
Suite 900 (Mail Stop ORC-158)
Seattle, WA 98101
By Federal Express (Original and one copy)

DATED this 21st day of October, 2014.

MILLER & ASSOCIATES

By Stuart W. Smith, OSB No. 044209
Of Attorneys for Respondent



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