UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10
1200 Sixth Avenue, Suite 900
Seattle, Washington 98101-3140

OFFICE OF
REGIONAL COUNSEL

SEP 23 2014

CERTIFIED MAIL -RETURN RECEIPT REQUESTED

Mr. Stuart Smith
Miller & Associates
5005 SW Meadows Road
Suite 405
Lake Oswego, Oregon 97035

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

Dear Mr. Smith:

Enclosed is an administrative Complaint that has been filed against Pacific Air Research, Inc., ("Respondent"), by the U.S. Environmental Protection Agency ("EPA") for the assessment of civil penalties. Copies of the proposed Consolidated Rules of Practice that apply to this Complaint are also enclosed. The Complaint alleges that Respondent violated Section 12(a)(2)(G) of FIFRA, 7 U.S.C. § 136j(a)(2(G), by applying the registered pesticide Element 4 (EPA Reg. Number 62719-40) and the registered pesticide Weedone LV5 (EPA Reg. Number 71368-11) in a manner inconsistent with their labels.

As explained in the Complaint, you have 30 days to file a written Answer to the Complaint and request a hearing with an administrative law judge. The specific procedure for doing this is explained in the Complaint. Also, as explained in the Complaint, if Respondent fails to file an Answer within 30 days, a default order could be entered against it. After entry of an order of default, penalties may be assessed against Respondent without further notice.

We are available to continue our prior discussions regarding the violations alleged in the Complaint and the proposed penalty. Please contact me at (206) 553-1169 or matthews.juliane@epa.gov should you wish to continue settlement discussions. Please note that I will be out of the office and not able to check voice mail or emails until October 6.

Sincerely,

Juliane Matthews

Juliane Matthews
Assistant Regional Counsel

Enclosures

cc: Brian Joffe
Office of Enforcement and Compliance Assurance

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14 SEP 23 AM 9:07
HEARINGS CLERK
EPA--REGION 10

BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:	)	Docket No. FIFRA-10-2014-0141
PACIFIC AIR RESEARCH, INC.,	)	
	)	**COMPLAINT AND NOTICE OF OPPORTUNITY FOR HEARING**
Respondent.	)	

I. AUTHORITIES

1.1. This civil administrative complaint ("Complaint") is issued under the authority vested in the Administrator of the U.S. Environmental Protection Agency ("EPA" or "Complainant") by Section 14 of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA" or "Act"), 7 U.S.C. § 136*l* and the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, the Revocation, Termination, or Suspension of Permits, 40 C.F.R. Part 22.

1.2. The Administrator has delegated the authority to issue complaints under Section 14 of FIFRA, 7 U.S.C. § 136l, to the Regional Administrator of EPA Region 10, who has redelegated this authority to the Director of the Office of Compliance and Enforcement in Region 10.

1.3. Pacific Air Research, Inc. ("PAR" or "Respondent") is hereby notified that Complainant alleges Respondent violated the provisions identified herein and seeks the assessment of a civil administrative penalty against Respondent, for alleged violations of Section 12(a)(2)(G) of FIFRA, 7 U.S.C. § 136j(a)(2)(G). This Complaint also provides notice of Respondent's opportunity to request a hearing.

II. STATUTORY AND REGULATORY FRAMEWORK

2.1. Under Section 2(s) of FIFRA, 7 U.S.C. § 136(s), the term "person" means "any individual, partnership, association, corporation, or any organized group of persons whether incorporated or not."

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

2.3. Under FIFRA Section 12(a)(2)(G), 7 U.S.C. § 136j(a)(2)(G), it is unlawful for any person to use any registered pesticide in a manner inconsistent with its labeling.

2.4. Pursuant to FIFRA Section 14(a)(2), 7 U.S.C. § 136*l*(a)(2), and 40 C.F.R. Part 19, EPA may assess a civil penalty of not more than $750 for a first-time violation and $1,100 for subsequent violations, per product, for pesticides that are non-classified or classified as general use.

III. GENERAL AND FACTUAL ALLEGATIONS

3.1. Respondent, located at 660 Avenue C, White City, Oregon 97503, is a corporation organized and/or existing under the laws of the state of Oregon.

3.2. Respondent is a "person" as that term is defined in Section 2(s) of FIFRA, 7 U.S.C. § 136(s).

3.3. Respondent's business includes the application of pesticides to provide pest control services to the public.

3.4. Respondent is an applicator not included in Section 14(a)(1) of FIFRA, 7 U.S.C. § 136*l*(a)(1), who holds or applies registered pesticides, or uses dilutions of registered pesticides, only to provide a service of controlling pests without delivering any unapplied pesticide to any person so served as described in Section 14(a)(2) of FIFRA, 7 U.S.C. § 136*l*(a)(2), as defined in Section 2(e)(1) of FIFRA, 7 U.S.C. § 136(e)(1).

3.5. Respondent is an "applicator" within the meaning of FIFRA section 14(a)(2), 7 U.S.C. § 136*l*(a)(2).

3.6. On October 16, 2013, Respondent applied the pesticides Accord XRT II (EPA Reg. No. 62719-556), Element 4 (EPA Reg. No. 62719-40), Oust XP (EPA Reg. No. 352-601), Polaris AC (EPA Reg. No. 228-570), and Induce (EPA Reg. No. 5905-50091) by aerial application to a forestry unit owned by Crook Timberlands, LLC ("Crook") called "Squaw 2013," located in Curry County, Oregon.

3.7. On October 16, 2013, Respondent applied the pesticides Accord XRT II and Weedone LV6 (EPA Reg. No. 71368-11) along with an adjuvant, Forest Crop Oil, by aerial application to a forestry unit owned by Crook called "Squaw 08," located in Curry County, Oregon.

3.8. On October 16, 2013, Respondent applied the pesticides Element 4 and Weedone LV6 along with an adjuvant, Forest Crop Oil, by aerial application to a forestry unit owned by Mr. Kaufman, herein referred to as the "Kaufman" site, located in Curry County, Oregon.

3.9. On October 16, 2013, Respondent loaded its helicopter stationed at the Squaw 2013 site with the pesticides Element 4 and Weedone LV6 along with an adjuvant, Forest Crop Oil, for the aerial application to the Kaufman site.

3.10. According to the aircraft Global Positioning System ("GPS") flight track data collected by the Oregon Department of Agriculture ("ODA"), the Respondent flew numerous trips over the Cedar Valley while transporting pesticides from the mix load site at Squaw 2013, on the western side of Cedar Valley, to the aerial application on the Kaufman site on the eastern side of Cedar Valley.

3.11. The aircraft GPS flight track data indicates the flight path between Squaw 2013 and the Kaufman site was in the vicinity of the Cedar Valley residents.

3.12. The active ingredient in Element 4 is triclopyr.

3.13. The active ingredient in Weedone LV6 is 2,4-D.

3.14. Element 4 and Weedone LV6 are each non-classified or classified as general use pesticides.

3.15. On October 23, 2013, an inspector with the ODA began an investigation into the Respondent's October 16, 2013, applications. ODA initiated the investigation in response to numerous complaints from Cedar Valley residents stating that they observed an odor during the October 16, 2013 application or were experiencing adverse health effects just after the application.

3.16. The ODA inspector collected a total of 11 foliage samples, including one sample from each treated site and seven samples (Sample Numbers: 140147-1B through 140147-7B) from four private properties in the Cedar Valley which are located between the forestry units Squaw 2013, Squaw 08 and the Kaufman site.

3.17. The vegetation samples were analyzed by the ODA Laboratory Services.

3.18. ODA Laboratory Service analysis showed residues of triclopyr and 2,4-D in Sample Number 140147-2B.

3.19. ODA Laboratory Service analysis showed residues of 2,4-D in Sample Number 140147-3B.

3.20. On January 13, 2014, the ODA inspector requested ODA Laboratory Services relook at the sample analyses for Quality Assurance/Quality Control purposes and determine whether analysis of the residential samples found quantifiable amounts below the minimum detection limit ("MDL"). ODA Laboratory Services reported that they found quantifiable

results for triclopyr below the MDL on Sample Number 140147-3B. Therefore, both Sample Numbers 140147-2B and 140147-3B had residues of triclopyr and 2,4-D.

3.21. Sample Number 140147-2B was collected from an apple tree in the yard of a Cedar Valley resident who reported smelling an odor near the time of the application and feeling ill later that evening.

3.22. Sample Number 140147-3B was collected from an ornamental tree in the yard of a Cedar Valley resident who reported a "heavy smell of chemical" which affected his breathing and made his eyes burn near the time of the application. This individual also continued to experience symptoms for several days after the application.

3.23. The EPA approved label for Element 4 states in part:

***

Do not apply this product in a way that will contact workers or other persons either directly or through drift. Only protected handlers may be in the area during application.

***

Do not apply Element 4 directly to, or otherwise permit it to come into direct contact with, cotton, grapes, peanuts, soybeans, tobacco, vegetable crops, flowers, citrus, or other desirable broadleaf plants. Do not permit spray mists containing Element 4 to drift onto such plants.

3.24. The EPA approved label for Weedone LV6 states in part:

***

Do not apply this product in a way that will contact workers or other persons either directly or through drift. Only protected handlers may be in the area during application.

***

Do not apply this product directly to, or permit spray mist to drift onto cotton, okra, grapes, tomatoes, fruit trees, vegetables, flowers or other desirable crop or ornamental plants which are susceptible to 2,4-D herbicide. Do not apply near susceptible plants since very small quantities of the 2,4-D will cause severe injury during the growing or dormant periods.

3.25. Respondent applied or used Element 4 in such a way that it contacted other persons either directly or through drift and applied the product directly to, or otherwise permitted it to come into direct contact with, cotton, grapes, peanuts, soybeans, tobacco, vegetable crops, flowers, citrus, or other desirable broadleaf plants.

3.26. Respondent applied or used Weedone LV6 in such a way that it contacted other persons either directly or through drift and applied the product directly to, or permitted spray mist to drift onto, cotton, okra, grapes, tomatoes, fruit trees, vegetables, flowers or other desirable crop or ornamental plants which are susceptible to 2,4-D herbicide.

3.27. The application of Element 4 by Respondent on October 16, 2013, as described above constitutes "use of a registered pesticide in a manner inconsistent with its labeling" as that phrase and those terms are defined in Sections 2(p), (u), and (ee) of FIFRA, 7 U.S.C. §§ 136(p), (u), and (ee).

3.28. The application of Weedone LV6 by Respondent on October 16, 2013, as described above, constitutes "use of a registered pesticide in a manner inconsistent with its

labeling" as that phrase and those terms are defined in Sections 2(p), (u), and (ee) of FIFRA, 7 U.S.C. §§ 136(p), (u), and (ee).

3.29. Pursuant to Section 12(a)(2)(G) of FIFRA, 7 U.S.C. § 136j(a)(2)(G), it is unlawful for Respondent to use a registered pesticide in a manner inconsistent with its labeling.

3.30. Pursuant to Section 14(a)(2) of FIFRA, 7 U.S.C. § 136l(a)(1), Respondent is subject to a civil penalty for having committed violations of Section 12(a)(2)(G) of FIFRA, 7 U.S.C. § 136j(a)(2)(G).

IV. VIOLATIONS

Violation 1

4.1. October 16, 2013, the Respondent applied the registered pesticide Element 4, EPA Reg. No. 62719-40, to forest cropland in Curry County, Oregon in a way that it came in direct contact with, or drifted onto, other persons or cotton, grapes, peanuts, soybeans, tobacco, vegetable crops, flowers, citrus, or other desirable broadleaf plants.

4.2. Respondent used the registered pesticide Element 4, EPA Reg. No. 62719-40, on October 16, 2013, in a manner inconsistent with its labeling in violation of Section 12(a)(2)(G) of FIFRA, 7 U.S.C. § 136j(a)(2)(G).

Violation 2

4.3. On October 16, 2013, the Respondent applied the registered pesticide Weedone LV6, EPA Reg. No.71368-11, to forest cropland in Curry County, Oregon in a way that it came in direct contact with, or drifted onto, people and cotton, okra, grapes, tomatoes,

fruit trees, vegetables, flowers or other desirable crop or ornamental plants which are susceptible to 2,4-D herbicide.

4.4. Respondent used the registered pesticide Weedone LV6, EPA Reg. No. EPA Reg. No. 71368-11, on October 16, 2013, in a manner inconsistent with its labeling in violation of Section 12(a)(2)(G) of FIFRA, 7 U.S.C. § 136j(a)(2)(G).

V. PROPOSED PENALTY ORDER

5.1. Pursuant Section 14(a)(2) of FIFRA, 7 U.S.C. § 136*l*(a)(2), and 40 C.F.R Part 19, Respondent is subject to a civil penalty of up to $750 for a first time violation, per pesticide, involving pesticides that are non-classified or classified as general use.

5.2. Based on the violations cited in this Complaint, and after consideration of (a) the appropriateness of the proposed penalty to the size of the Respondent's business, (b) the effect on Respondent's ability to continue in business, and (c) the gravity of the alleged violations, and in accordance with Section 14(a)(4) of FIFRA, 7 U.S.C. § 136l(a)(4), and the "Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act," as amended, dated December 3, 2009, Complainant proposes the assessment of a civil penalty in the amount of $1,500.

5.3. Complainant requests an assessment of penalties for the violations cited in Section IV. of this Complaint, as provided by FIFRA Section 14(a)(2), 7 U.S.C. § 136*l*(a)(2), in an amount of $ 1,500.

VI. OPPORTUNITY TO REQUEST A HEARING AND FILE AN ANSWER

6.1. As provided in Section 14(a)(3) of FIFRA, 7 U.S.C. § 136*l*(a)(3), and 40 C.F.R. § 22.14, Respondent has the right to request a hearing on any material fact alleged in this Complaint or the appropriateness of the penalty proposed herein. Any hearing requested will be conducted in accordance with the Consolidated Rules of Practice, 40 C.F.R. Part 22. A copy of the Consolidated Rules of Practice is enclosed with this Complaint.

6.2. Respondent's Answer, including any request for hearing, must be in writing and must be filed with:

Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 10
1200 Sixth Avenue
Suite 900 (Mail Stop ORC-158)
Seattle, WA 98101

VII. FAILURE TO FILE AN ANSWER

7.1. To avoid a default order being entered pursuant to 40 C.F.R. § 22.17, Respondent must file a written Answer to this Complaint with the Regional Hearing Clerk within 30 days after service of this Complaint.

7.2. In accordance with 40 C.F.R. § 22.15, Respondent's Answer must clearly and directly admit, deny, or explain each of the factual allegations contained in this Complaint with regard to which the Respondent has any knowledge. Where Respondent has no knowledge of a particular factual allegation and so states, the allegation is deemed denied. Respondent's Answer must also state: (1) the circumstances or arguments which are alleged to constitute the

grounds of any defense; (2) the facts which the Respondent disputes; (3) the basis for opposing any proposed relief; and (4) whether a hearing is requested. Failure to admit, deny, or explain any material factual allegation contained herein constitutes an admission of the allegation.

VIII. INFORMAL SETTLEMENT CONFERENCE

8.1. Whether or not Respondent requests a hearing, Respondent may request an informal settlement conference to discuss the facts of this case, the proposed penalty, and the possibility of settling this matter. To request such a settlement conference, Respondent should contact:

Juliane Matthews, Assistant Regional Counsel
U.S. Environmental Protection Agency, Region 10
1200 Sixth Avenue
Suite 900 (Mail Stop ORC-158)
Seattle, WA 98101
(206) 553-1169
Matthews.juliane@epa.gov

8.2. Note that a request for an informal settlement conference does not extend the 30 day period for filing a written Answer to this Complaint, nor does it waive Respondent's right to request a hearing.

8.3. Respondent is advised that pursuant to 40 C.F.R. §22.8, after the Complaint is issued, the Consolidated Rules of Practice prohibit any *ex parte* (unilateral) discussion of the merits of these or any other factually related proceedings with the Administrator, the Environmental Appeals Board or its members, the Regional Judicial Officer, the Presiding Officer, or any other person who is likely to advise these officials in the decision on this case.

IX. PAYMENT OF PENALTY

9.1. As provided in 40 C.F.R. §22.18(a)(1), Respondent may resolve the proceeding at any time by paying the specific penalty proposed in the Complaint and by filing with the Regional Hearing Clerk a copy of the check or other instrument of payment (at the address noted in Section VI of the Complaint). If the Respondent pays the proposed penalty in full within 30 days after receiving the Complaint, no Answer need be filed. Respondent can obtain a 30 day extension to pay the proposed penalty in full without filing an Answer by complying with the requirements of 40 C.F.R. § 22.18(a)(2). Payment of the proposed penalty must be made by sending a cashier's or certified check payable to the "Treasurer, United States of America", in the full amount of the proposed penalty in this Complaint to the following address:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
PO Box 979077
St. Louis, MO 63197-9000

A transmittal letter indicating Respondent's name, complete address, and this case docket number must accompany the payment. A copy of the check should also be provided to Ms. Matthews.

FOR COMPLAINANT U.S. ENVIRONMENTAL PROTECTION AGENCY:

Edward J. Kowalski, Director
Office of Compliance and Enforcement
EPA Region 10

Dated: 9/18/2014

PARTY DESIGNATED TO RECEIVE SERVICE ON BEHALF OF THE COMPLAINANT:

Juliane Matthews, Assistant Regional Counsel
EPA Region 10
1200 Sixth Ave., Suite 900
Mail Stop: ORC-158
Seattle, WA 98101
Tel: 206-553-1169

Certificate of Service

The undersigned certifies that the original of the attached **COMPLAINT AND NOTICE OF OPPORTUNITY FOR HEARING, In the Matter of: Pacific Air Research, Inc. Docket No.: FIFRA-10-2014-0141**, was filed with the Regional Hearing Clerk and served on the addressees in the following manner on the date specified below:

The undersigned certifies that a true and correct copy of the document was delivered to:

Juliane Matthews, Esquire
U.S. Environmental Protection Agency
1200 Sixth Avenue, ORC-158
Suite 900
Seattle, Washington 98101

Further, the undersigned certifies that a true and correct copy of the aforementioned document was placed in the United States mail certified/return receipt to:

Stuart Smith
Miller & Associates
5005 SW Meadows Road
Suite 405
Lake Oswego, Oregon 97035

DATED this 23rd day of Sept, 2014

Sharon Eng
Signature
EPA Region 10