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**Robert D. Brook,**

*Assistant Chief, Environmental Enforcement Section, Environment and Natural Resources Division.*

[FR Doc. 05-2550 Filed 2-9-05; 8:45 am]

BILLING CODE 4410-15-M

## DEPARTMENT OF JUSTICE

### Notice of Lodging of Consent Decree Under the Clean Air Act

Under 28 CFR 50.7, notice is hereby given that on January 27, 2005, a Consent Decree in *United States, et al. v. ConocoPhillips Company*, Civil Action No. H-05-0258, was lodged with the United States District Court for the Southern District of Texas.

In a complaint that was filed simultaneously with the Consent Decree, the United States, the State of Illinois, the State of Louisiana, the State of New Jersey, the Commonwealth of Pennsylvania, and the Northwest Clean Air Agency in the State of Washington sought injunctive relief and penalties against ConocoPhillips Company ("COPC"), pursuant to sections 113(b) and 304(a) of the Clean Air Act ("CAA"), 42 U.S.C. 7413(b), 7604(a), for alleged CAA violations and violations of the corollary provisions in State laws occurring at the following refineries owned and operated by COPC: Roxanna/Hartford, Illinois; Belle Chasse, Louisiana; Linden, New Jersey; Trainer, Pennsylvania; Ferndale, Washington; Carson/Wilmington, California; Rodeo/Santa Maria, California; Borger, Texas; and Sweeny, Texas.

Under the settlement, COPC will implement innovative pollution control technologies to reduce emissions of nitrogen oxides, sulfur dioxide, and particulate matter from refinery process units. COPC also will adopt facility-wide enhanced benzene waste monitoring and fugitive emission controls programs. In addition, COPC will pay a civil penalty of \$4.525 million for settlement of the claims in the complaint. Finally, COPC will undertake both Federal and State environmentally-beneficial projects worth more than \$10 million including covering and oil/water separator at its New Jersey refinery; purchasing a foam aerial apparatus for mutual, emergency

response aid in and around its Illinois refinery; donating \$400,000 to a local emergency planning committee to fund radio systems and an emergency broadcast radio system in the area of COPC's Pennsylvania refinery; donating \$400,000 to the Louisiana Department of Environmental Quality to support collection and recycling of household hazardous waste; purchasing a fire truck for mutual aid response in and around COPC's Washington refinery; replacing old fireplaces and wood stoves with new clean-burning fireplaces or certified wood stoves for low income households in the vicinity of the Washington refinery; and developing emissions inventories and targets for air pollution reduction by participating cities and towns in the vicinity of the Washington refinery.

The Department of Justice will receive for a period of thirty (30) days from the date of this publication comments relating to the Consent Decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044-7611, and should refer to *United States, et al. v. ConocoPhillips Company*, D.J. Ref. No. 90-5-2-1-06722/1.

The Consent Decree may be examined at the Office of the United States Attorney, 910 Travis St., Suite 1500, Houston, Texas 77208, and at U.S. EPA Region 6, 1445 Ross Avenue, Dallas, Texas 75202-2733. During the public comment period, the Consent Decree may also be examined on the following Department of Justice Web site, <http://www.usdoj.gov/enrd/open.html>. A copy of the Consent Decree may also be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044-7611 or by faxing or e-mailing a request to Tonia Fleetwood ([tonia.fleetwood@usdoj.gov](mailto:tonia.fleetwood@usdoj.gov)), fax number (202) 514-0097, phone confirmation number (202) 514-1547. In requesting a copy from the Consent Decree Library, please enclose a check in the amount of \$73.25 (25 cents per page reproduction cost) payable to the U.S. Treasury.

**Robert D. Brook,**

*Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.*

[FR Doc. 05-2551 Filed 2-9-05; 8:45 am]

BILLING CODE 4410-15-M

## DEPARTMENT OF JUSTICE

### Antitrust Division

#### Proposed Final Judgment and Competitive Impact Statement; *United States v. Eastern Mushroom Marketing Cooperative, Inc.*

Notice is hereby given pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)-(h), that a Complaint, proposed Final Judgment, Stipulation, and Competitive Impact Statement have been filed with the United States District Court for the Eastern District of Pennsylvania in *United States v. Eastern Mushroom Marketing Cooperative, Inc.*, Civil Case No. 04 CV 5829. The proposed Final Judgment is subject to approval by the Court after compliance with the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)-(h), including expiration of the statutory 60-day public comment period.

On December 16, 2004, The United States filed a Complaint alleging that the Eastern Mushroom Marketing Cooperative, Inc., in order to support its price increases, acquired certain mushroom farms, then filed deed restrictions on the properties as part of an agreement among the cooperative members to restrict, forestall, and exclude competition from nonmember farmers in an unreasonable restraint of trade in violation of Section 1 of the Sherman Act. The Eastern Mushroom Marketing Cooperative, whose members grow, sell, and ship mushrooms to retail and food service outlets, is the largest mushroom cooperative in the United States. During the 2001-2002 growing season, the cooperative had approximately 19 members with control of more than 500 million pounds of mushrooms valued in excess of \$425 million. The cooperative controlled over 60 percent of all agaricus mushrooms grown in the United States during the 2001-2002 growing season and approximately 90 percent of all agaricus mushrooms grown in the eastern United States during the same growing season.

To restore competition, the proposed Final Judgment filed with the Complaint will require the cooperative to remove the deed restrictions already filed and will enjoin and restrain the cooperative from creating, filing, or enforcing any mushroom deed restrictions with respect to any real property in which the cooperative has an ownership or leasehold interest of any kind. A Competitive Impact Statement, filed by the United States, describes the Complaint, the proposed Final Judgment, and the remedies available to

private litigants. Copies of the Complaint, proposed Final Judgment, and Competitive Impact Statement are available for inspection at the Department of Justice in Washington, DC in Room 215, 325 Seventh Street, NW. 20530 (telephone: 202-514-2692) and at the Office of the Clerk of the United States District Court for the Eastern District of Pennsylvania, 601 Market Street, Room 2609, Philadelphia, Pennsylvania 19106-1797.

Public comment is invited within 60 days of the date of this notice. Such comments, and responses thereto, will be published in the **Federal Register** and filed with the Court. Comments should be directed to Roger Fones, Chief, Transportation, Energy, and Agriculture Section, Antitrust Division, U.S. Department of Justice, 325 7th Street, NW., Suite 500, Washington, DC 20530 (Telephone (202) 307-6351).

**Dorothy B. Fountain,**

*Deputy Director of Operations, Antitrust Division.*

#### **United States District Court for the Eastern District of Pennsylvania**

*United States of America, Plaintiff, v. Eastern Mushroom Marketing Cooperative, Inc., Defendant; Competitive Impact Statement*

Civil Case No.: 2:04-CV-5829.

Judge: Thomas N. O'Neill, Jr.

Date Stamp: 12/16/2004.

The United States of America, pursuant to section 2(b) of the Antitrust Procedures and Penalties Act, ("APPA"), 15 U.S.C. 16(b)-(h), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

#### **I. Nature and Purpose of the Proceeding**

On December 16, 2004, the United States filed a civil antitrust Complaint alleging that the Eastern Mushroom Marketing Cooperative, Inc. ("EMMC") had violated section 1 of the Sherman Act, 15 U.S.C. 1. The EMMC is made up of entities that grow, buy, package, and ship mushrooms to retail and food service outlets across the United States. EMMC began operations in January 2001 and presently has 15 members. EMMC sets the minimum prices at which its members sell their mushrooms to customers in various geographic regions throughout the United States and publishes those prices regularly.

The Complaint alleges that, in order to support its price increases, the EMMC collectively purchased or entered lease options on mushroom farms and thereafter shut them down, adding deed

restrictions that permanently removed significant production capacity from the market. With the Complaint, the United States and the EMMC filed an agreed-upon proposed Final Judgment that requires the EMMC to eliminate the deed restrictions from all the properties it shut down.

Under the proposed Final Judgment, the EMMC is required to file nullifying documents in each jurisdiction where it has filed any "Mushroom Deed Restrictions," as defined in the Final Judgment and discussed below in section III(A). The EMMC is also prohibited from creating, filing, or enforcing any Mushroom Deed Restrictions with respect to any real property in which the cooperative has an ownership or leasehold interest of any kind.

The United States and the EMMC have agreed that the proposed Final Judgment may be entered after compliance with the APPA, provided that the United States has not withdrawn its consent. Entry of the Final Judgment would terminate the action, except that the Court would retain jurisdiction to construe, modify, or enforce the Final Judgment's provisions and to punish violations thereof.

#### **II. Description of Practices Giving Rise to the Alleged Violations of the Antitrust Laws**

##### *A. Description of the Defendant and its Activities*

The EMMC is organized pursuant to the Capper-Volstead Act, 7 U.S.C. 291 *et seq.*, which gives its members a limited immunity under the antitrust laws to act together voluntarily in "collectively processing, preparing for market, handling, and marketing" their products, and allows them to "make the necessary contracts and agreements to effect such purposes." The Capper-Volstead Act does not give farmers the right to engage in exclusionary practices, monopolize trade, or suppress competition with the cooperative. The Supreme Court has stated that the legislative history of the Act shows a congressional intent:

\* \* \* to make it possible for farmer-producers to organize together, set association policy, fix prices at which their cooperative will sell their produce \* \* \*. It does not suggest a congressional desire to vest cooperatives with unrestricted power to restrain trade or to achieve monopoly by preying on independent producers \* \* \* or dealers intent on carrying on their own businesses in their own legitimate way.<sup>1</sup>

<sup>1</sup> *Maryland and Va. Milk Producers Assn. v. United States*, 362 U.S. 458, 466-467 (1960).

The EMMC, headquartered in Kennett Square, Pennsylvania, began operations in January 2001 and now is the largest mushroom cooperative in the United States. With control over combined production of more than 500 million pounds of mushrooms, the EMMC accounted for over 60 percent of agaricus mushroom sales during 2001-2002. EMMC also sets the minimum prices at which its members can sell their mushrooms to customers in various geographic regions and publishes those prices regularly.

##### *B. Effects of the Cooperative's Activities*

One of the first acts of EMMC members after forming the cooperative was to agree to increase prices in each of the geographic regions where its members sell mushrooms. The agreed-upon price increases averaged about 8 percent nationwide.

Less than four months after instituting the price increases, the EMMC began acquiring mushroom farms through a "Supply Control" campaign. Through membership dues and a so-called "Supply Control Assessment," the EMMC collected approximately six million dollars from its members between 2001 and 2003. Approximately four million dollars of that money was used in its plan to control the supply of mushrooms grown by nonmembers of the cooperative. Between May 2001 and March 2002, the EMMC acquired one mushroom farm in Dublin, Georgia, and three in Pennsylvania. All four farms had mushroom-growing equipment and together had the capacity to grow approximately 29 million pounds of fresh mushrooms annually in competition with EMMC members' farms. The EMMC sold these properties, all at a loss, almost immediately after purchasing them. The net loss for the four properties combined was more than \$1.2 million. The EMMC placed the deed restrictions prohibiting the conduct of any business related to mushroom growing on all the properties at the time of each resale. For example, one of the deed restrictions reads:

This property shall never be used for the cultivation, growing, marketing, sale or distribution of fresh mushrooms, canned and/or processed mushrooms or related endeavors.

In addition to the farm purchases and sales, the EMMC entered into lease option agreements during 2002 for two more mushroom farms, one in Ohio and the other in Pennsylvania, at a total cost of another \$1.2 million. The EMMC never actually entered into leases for these properties, but the agreements gave it the right to file deed restrictions

prohibiting the production of mushrooms on the properties for ten years, and the EMMC exercised that right.

The purpose of these real estate transactions was to prevent nonmember mushroom farmers from competing with EMMC and its members.

As a result of the deed restrictions filed by the EMMC upon the resale or lease of these mushroom growing properties in the eastern United States, the EMMC was able to boast to its members that it had “[a]nnually taken over 50 million pounds out of production from facilities which could have easily been purchased and remained in production.” EMMC’s actions artificially reduced the acreage and facilities available to produce mushrooms for American consumers, and consumers were deprived of the benefits of competition.

### III. Explanation of the Proposed Final Judgment

#### A. Prohibited Conduct

Pursuant to the Final Judgment, EMMC will be enjoined and restrained from creating, filing, or enforcing any Mushroom Deed Restrictions with respect to any real property in which the cooperative has an ownership or leasehold interest of any kind. As defined in the proposed Final Judgment, Mushroom Deed Restrictions means any restriction or limitation contained in any document filed in the land records of any jurisdiction that, with respect to any real property, limits the (1) commercial growing or cultivation of any types, varieties or species of mushrooms, mushroom spawn or other fungi; (2) packaging, processing, freezing, storing, handling, selling, or marketing of any types, varieties or species of mushrooms, mushrooms spawn or other fungi; (3) production of Phase I, Phase II or Phase III mushroom compost for on-site or off-site use; or (4) any other activity related to the production, processing or sale of mushrooms, mushroom spawn or other fungi, whether such production, processing or sales shall occur on or off such real property.

#### B. Effect of the Final Judgment

The EMMC is required, within thirty (30) calendar days after the filing of the Complaint in this matter or five (5) days after notice of the entry of the Final Judgment by the Court, whichever is later, to file Nullifying Documents in each jurisdiction where the Defendant has filed any Mushroom Deed Restrictions. Nullifying Documents are defined in the proposed Final Judgment

as documents that are necessary to nullify the legal effect of any Mushroom Deed Restrictions filed by the EMMC previously on (1) the properties the Defendant purchased in the name of the EMMC and thereafter resold; or (2) properties in which the EMMC purchased a leasehold interest. The Final Judgment requires the Defendant to use its best efforts to file the required Nullifying Documents as expeditiously as possible. Accordingly, the restrictions on competition caused by the deed restrictions will be eliminated.

### IV. Remedies Available to Potential Private Litigants

Section 4 of the Clayton Act, 15 U.S.C. 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring in Federal court to recover three times the damages suffered, as well as costs and reasonable attorneys’ fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of such actions. Under the provisions of section 5(a) of the Clayton Act, 15 U.S.C. 16(a), the Final Judgment has no *prima facie* effect in any subsequent lawsuits that may be brought against the Defendant.

### V. Procedures Available for Modifications of the Proposed Final Judgment

The United States and the Defendant have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry upon the Court’s determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least sixty days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within 60 days of the date of publication of this Competitive Impact Statement in the Federal Register. All comments received during this period will be considered by the Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to the Court’s entry of judgment. The comments and the response of the United States will be filed with the Court and published in the **Federal Register**.

Written comments should be submitted to: Roger W. Fones, Chief, Transportation, Energy & Agriculture Section, Antitrust Division, United

States Department of Justice, 325 7th Street, NW.; Suite 500, Washington, DC 20530.

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

### VI. Alternatives to the Proposed Final Judgment

The United States considered, as an alternative to the proposed Final Judgment, a full trial on the merits against the Defendant. The United States could have entered into litigation and sought an injunction forcing the Defendant to void the deed restrictions. The United States is satisfied, however, that the Defendant’s agreement to void the restrictions described in the proposed Final Judgment will preserve competition for the growth of agaricus mushrooms in the United States.

### VII. Standard of Review Under the APPA for the Proposed Final Judgment

The APPA requires that proposed consent judgments in antitrust cases brought by the United States be subject to a 60-day comment period, after which the Court shall determine whether entry of the proposed Final Judgment “is in the public interest.” 15 U.S.C. 16(e)(1). In making that determination, the Court shall consider:

(A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and

(B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. 16(e)(1)(A) and (B). As the United States Court of Appeals for the District of Columbia Circuit has held, the APPA permits a court to consider, among other things, the relationship between the remedy secured and the specific allegations set forth in the government’s complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See United States v.*

*Microsoft Corp.*, 56 F.3d 1448, 1458–62 (D.C. Cir. 1995).

“Nothing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene.” 15 U.S.C. 16(e)(2). Thus, in conducting this inquiry, “[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process.” 119 Cong. Rec. 24,598 (1973) (statement of Senator Tunney).<sup>2</sup> Rather:

[a]bsent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should \* \* \* carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances.

*United States v. Mid-America Dairymen, Inc.*, 1977–1 Trade Cas. (CCH) ¶ 61,508, at 71,980 (W.D. Mo. 1977).

Accordingly, with respect to the adequacy of the relief secured by the decree, a court may not “engage in an unrestricted evaluation of what relief would best serve the public.” *United States v. BNS, Inc.*, 858 F.2d 456, 462 (9th Cir. 1988) (citing *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981)); see also *Microsoft*, 56 F.3d at 1460–62. Courts have held that:

[t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court’s role in protecting the public interest is one of ensuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is “within the reaches of the public interest.” More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.

<sup>2</sup> See *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975) (recognizing it was not the court’s duty to settle; rather, the court must only answer “whether the settlement achieved [was] within the reaches of the public interest”). A “public interest” determination can be made properly on the basis of the Competitive Impact Statement and Response to Comments filed by the Department of Justice pursuant to the APPA. Although the APPA authorizes the use of additional procedures, 15 U.S.C. 16(f), those procedures are discretionary. A court need not invoke any of them unless it believes that the comments have raised significant issues and that further proceedings would aid the court in resolving those issues. See H.R. Rep. No. 93–1463, 93rd Cong., 2d Sess. 8–9 (1974), reprinted in 1974 U.S.C.C.A.N. 6535, 6538.

*Bechtel*, 648 F.2d at 666 (emphasis added) (citation omitted).<sup>3</sup>

The proposed Final Judgment, therefore, should not be reviewed under a standard of whether it is certain to eliminate every anticompetitive effect of a particular practice or whether it mandates certainty of free competition in the future. Court approval of a final judgment requires a standard more flexible and less strict than the standard required for a finding of liability. “[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is ‘within the reaches of public interest.’” *United States v. AT&T*, 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting *Gillette*, 406 F. Supp. at 716), *aff’d sub nom. Maryland v. United States*, 460 U.S. 1001 (1983); see also *United States v. Alcan Aluminum Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would have imposed a greater remedy).

Moreover, the Court’s role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its Complaint; the APPA does not authorize the Court to “construct [its] own hypothetical case and then evaluate the decree against that case.” *Microsoft*, 56 F.3d at 1459. Because the “court’s authority to review the decree depends entirely on the government’s exercising its prosecutorial discretion by bringing a case in the first place,” it follows that “the court is only authorized to review the decree itself,” and not to “effectively redraft the complaint” to inquire into other matters that the United States did not pursue. *Id.* at 1459–60.

## VIII. Determinative Documents

There are no determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment.

Dated: December 16, 2004.

Respectfully submitted,

C. Alexander Hewes, Tracey D. Chambers,  
David McDowell,  
*Trial Attorneys, U.S. Department of Justice,*  
*Antitrust Division, Transportation, Energy*  
*& Agriculture Section.*

<sup>3</sup> *Cf. BNS*, 858 F.2d at 464 (holding that the court’s “ultimate authority under the [APPA] is limited to approving or disapproving the consent decree”); *Gillette*, 406 F. Supp. at 716 (noting that, in this way, the court is constrained to “look at the overall picture not hypercritically, nor with a microscope, but with an artist’s reducing glass”). See generally *Microsoft*, 56 F.3d at 1461 (discussing whether “the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the ‘reaches of the public interest’”).

325 7th Street, NW., Suite 500, Washington, DC 20530, Telephone: (202) 305–8519.

Laura Heiser, Anne Spiegelman,  
*Trial Attorneys, Antitrust Division,*  
*Philadelphia Field Office.*

## United States District Court for the Eastern District of Pennsylvania

*United States of America, Plaintiff, v. Eastern Mushroom Marketing Cooperative, Inc., Defendant; Final Judgment*

Civil Case No.: 2:04–CV–5829.

Judge: Thomas N. O’Neill, Jr.

Date Stamp: 12/16/2004.

*Whereas*, Plaintiff, United States of America, filed its Complaint on December 16, 2004, the Plaintiff and the Defendant, by their respective attorneys, have consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law, and without this Final Judgment constituting any evidence against or admission by any party regarding any issue of fact or law; *And Whereas*, the Defendant agrees to be bound by the provisions of this Final Judgment pending its approval by the Court;

*And Whereas*, the essence of this Final Judgment is the prompt and certain nullification of certain deed restrictions that limit mushroom production;

*And Whereas*, Plaintiff requires the Defendant to nullify the deed restrictions for the purpose of remedying the loss of competition alleged in the Complaint;

*And Whereas*, the Defendant has represented to the United States that it will file expeditiously the documents necessary to nullify the legal effect of the deed restrictions in each jurisdiction where the Defendant has filed any such deed restrictions previously and that the Defendant will later raise no claim of hardship or difficulty as grounds for asking the Court to modify any of the requirements set forth below;

*Now Therefore*, before any testimony is taken, without trial or adjudication of any issue of fact or law, and upon consent of the parties, it is *ordered, adjudged and decreed*:

## I. Jurisdiction

This Court has jurisdiction over the subject matter of and each of the parties to this action. The Complaint states a claim upon which relief may be granted against the Defendant under section 1 of the Sherman Act, as amended (15 U.S.C. 1).

## II. Definitions

As used in this Final Judgment:

A “EMMC” means the Eastern Mushroom Marketing Cooperative, Inc.,

the Defendant in this case, a Pennsylvania corporation with its headquarters in Kennett Square, Pennsylvania, its successors and assigns, and its subsidiaries, affiliates, members, divisions, groups, partnerships and joint ventures, and their directors, officers, managers, agents, and employees.

B. "Mushroom Deed Restrictions" means any restriction or limitation contained in any document filed in the land records of any jurisdiction that, with respect to any real property, limits the (1) commercial growing or cultivation of any types, varieties or species of mushrooms, mushroom spawn or other fungi; (2) packaging, processing, freezing, storing, handling, selling, or marketing of any types, varieties or species of mushrooms, mushroom spawn or other fungi; (3) production of Phase I, Phase II or Phase III mushroom compost for on-site or off-site, use; or (4) any other activity related to the production, processing or sale of mushrooms, mushroom spawn or other fungi, whether such production, processing or sales shall occur on or off such real property.

C. "Nullifying Documents" means such documents as are necessary to nullify the legal effect of any Mushroom Deed Restrictions filed by the EMMC previously on (1) the properties the Defendant purchased in the name of the EMMC and thereafter resold; or (2) properties in which the EMMC purchased a leasehold interest.

### III. Applicability

This Final Judgment applies to the EMMC, as defined above, and all other persons in active concert or participation with the EMMC who receive actual notice of this Final Judgment by personal service or otherwise.

### IV. Nullification of Mushroom Deed Restrictions

A. The Defendant is ordered and directed, within thirty (30) calendar days after the filing of the Complaint in this matter, or five (5) days after notice of the entry of this Final Judgment by the Court, whichever is later, to file Nullifying Documents in each jurisdiction where the Defendant has filed any Mushroom Deed Restrictions. The Defendant shall use its best efforts to file the required Nullifying Documents as expeditiously as possible.

### V. Prohibited Activity

The Defendant is enjoined and restrained from creating, filing, or enforcing any Mushroom Deed Restrictions with respect to any real

property in which the Defendant has an ownership or leasehold interest of any kind.

### VI. Affidavit and Copies

A. Within ten (10) calendar days of the filing of all Nullifying Documents required by this Final Judgment, the Defendant shall provide to the United States and the Court, an Affidavit providing affirmative notice that all the required Nullifying Documents have been filed in all required jurisdictions in full compliance with the terms of this Final Judgment.

B. Within ten (10) calendar days after any Nullifying Documents have been filed in each jurisdiction, the Defendant shall provide to the United States a copy of all Nullifying Documents filed in such jurisdiction.

### VII. Compliance Inspection

A. For purposes of determining or securing compliance with this Final Judgment, or of determining whether the Final Judgment should be modified or vacated, and subject to any legally recognized privilege, from time to time duly authorized representatives of the United States Department of Justice, including consultants and other persons retained by the United States, shall, upon written request of a duly authorized representative of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to the Defendant, be permitted:

1. Access during the defendant's office hours to inspect and copy, or at the United States' option, to require the Defendant to provide copies of all books, ledgers, accounts, records, and documents in the possession, custody, or control of the Defendant, relating to any matters contained in this Final Judgment; and

2. To interview, either informally or on the record, the Defendant's officers, employees, or agents, who may have their individual counsel present, regarding such matters. The interviews shall be subject to the reasonable convenience of the interviewee and without restraint or interference by the Defendant.

B. Upon written request of a duly authorized representative of the Assistant Attorney General in charge of the Antitrust Division, the Defendant shall submit written reports or interrogatory responses, under oath if requested, relating to any of the matters contained in this Final Judgment as may be requested.

C. No information or documents obtained by the means provided in this section shall be divulged by the United

States to any person other than an authorized representative of the executive branch of the United States, except in the course of legal proceedings to which the United States is a party (including grand jury proceedings), or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

D. If at the time information or documents are furnished by the Defendant to the United States, the Defendant represents and identifies in writing the material in any such information nor documents to which a claim of protection may be asserted under Rule 26(c)(7) of the Federal Rules of Civil Procedure, and the Defendant marks each pertinent page of such material, "Subject to claim of protection under Rule 26(c)(7) of the Federal Rules of Civil Procedure," then the United States shall give the Defendant ten (10) calendar days notice prior to divulging such material in any legal proceeding (other than a grand jury proceeding).

### VIII. Retention of Jurisdiction

This Court retains jurisdiction to enable any party to this Final Judgment to apply to this Court at any time for further orders and directions as may be necessary or appropriate to carry out or construe this Final Judgment, to modify any of its provisions, to enforce compliance, and to punish violations of its provisions.

### IX. Public Interest Determination

Entry of this Final Judgment is in the public interest.

This Final Judgment shall expire ten years from the date of its entry.

Dated: \_\_\_\_\_

Court approval subject to procedures of Antitrust Procedures and Penalties Act, 15 U.S.C. 16.

*United States District Judge.*

### United States District Court for the Eastern District of Pennsylvania

*United States of America, Department of Justice, Antitrust Division, 325 7th Street, NW., Washington, DC 20530, Plaintiff, v. Eastern Mushroom Marketing Cooperative, Inc., 649 West South Street, Kennett Square, Pennsylvania 19348, Defendant; Complaint*

Civil Case No.: 2:04-CV-5829.

Judge: Thomas N. O'Neill, Jr.

Date Stamp: 12/16/2004.

The United States of America, acting under the direction of the Attorney General, brings this antitrust action against Eastern Mushroom Marketing Cooperative, Inc. ("EMMC"), the

nation's largest mushroom cooperative, to enjoin it and its members from purchasing or leasing mushroom farms and shutting them down.

### I. Summary of Claims

1. Each year, American consumers spend over \$800 million on mushrooms. EMMC members accounted for over 60 percent of those sales during the 2001–2002 growing season.

2. The EMMC is organized pursuant to the Capper-Volstead Act (“Capper-Volstead”), 7 U.S.C. 29] *et seq.* Under Capper-Volstead, farmers have a limited immunity from the antitrust laws to act together voluntarily in “collectively processing, preparing for market, handling, and marketing” their products, and “may make the necessary contracts and agreements to effect such purposes.” Capper-Volstead provides no immunity, however, for cooperative members to conspire to prevent independent, nonmember farmers from competing with the cooperative or its members.

3. Between May 2001 and August 2002, the EMMC conducted a “Supply Control” campaign to prevent nonmember farmers from buying or leasing certain of the very few available mushroom farms. The purpose of this campaign was to prevent nonmember farmers from competing with EMMC and its members.

4. Starting in May 2001, the EMMC bought four mushroom farms in the eastern United States with annual combined growing capacity of approximately 29 million pounds. The EMMC then resold the four properties at a combined total loss of over \$1.2 million and placed permanent deed restrictions on the properties at the time of each resale. The deed restrictions all prohibited the conduct of any business related to the growing of mushrooms. For example, one deed restriction reads:

This property shall never be used for the cultivation, growing, marketing, sale or distribution of fresh mushrooms, canned and/or processed mushrooms or related endeavors.

No mushrooms have been grown on these properties since they were resold by the EMMC.

5. In February and August 2002, the EMMC purchased lease options, at a cost of over one million dollars, on two additional mushroom farms with a combined annual growing capacity of approximately 14 million pounds. The lease options allowed the EMMC to file deed restrictions on the two properties prohibiting the use of the properties for any business related to growing mushrooms for a period of ten years.

The EMMC never entered into leases on these farms, but did file the deed restrictions. No mushrooms have been grown on these properties since the deed restrictions were filed by the EMMC.

6. The EMMC touted the success of the Supply Control campaign to its membership, claiming it had “[a]nnually taken over 50 million pounds out of production from facilities which could have easily been purchased and remained in production.”

7. The agreement among the EMMC members to restrict, forestall, and exclude competition from nonmember farmers is an unreasonable restraint of trade in violation of section 1 of the Sherman Act. As a result of the EMMC's violations, the acreage and facilities available to produce mushrooms for American consumers was artificially reduced, and consumers were deprived of the benefits of competition.

### II. Jurisdiction and Venue

8. This Complaint is filed and this action is instituted under section 15 of the Clayton Act, 15 U.S.C. 25, in order to prevent and restrain the defendant from violating section 1 of the Sherman Act, 15 U.S.C. 1.

9. The Defendant is an agricultural cooperative whose members are engaged in the production and sale of fresh market mushrooms in interstate commerce. The Defendant's members' activities in the production and sale of mushrooms substantially affect interstate commerce. The Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. 1331, 1337(a) and 1345.

10. The Defendant has consented to personal jurisdiction and venue in this judicial district.

### III. The Defendant

11. The EMMC began operations in January 2001, and is the largest mushroom cooperative in the United States. The EMMC is incorporated in the Commonwealth of Pennsylvania and is headquartered in Kennett Square, Pennsylvania. The members of the EMMC grow, sell, and ship mushrooms to retail and food service outlets across the United States. During the 2001–2002 growing season, the EMMC had approximately 19 members with control of more than 500 million pounds of mushrooms valued in excess of \$425 million.

### IV. Trade and Commerce

12. Agaricus mushrooms are the common table variety, accounting for the vast majority of mushrooms grown and sold in the United States. In 2002,

domestic sales of all mushrooms were over \$800 million.

13. Mushrooms are grown on farms, usually in one-story windowless cinder block buildings called “doubles.” Doubles are kept cool and dark at an optimum ground temperature of 64 degrees year round. Mushrooms are grown in stacks of beds, usually six beds to a stack and 24 beds to a double. The growing process takes approximately eight weeks to harvest from the introduction of mushroom seed, or “spawn” into the growing medium, usually compost. Once harvested, mushrooms are usually kept in refrigerated storage on the farms until packaged and shipped in refrigerated trucks to customers.

14. Agaricus mushrooms of better quality are sold to fresh market retailers such as grocery store chains and food distributors. Lesser quality agaricus mushrooms are often sold to canneries. The majority of the agaricus mushrooms grown by EMMC members are sold to the fresh market.

15. According to the U.S. Department of Agriculture, approximately 66 percent of the domestic agaricus mushrooms grown in the United States are grown in the eastern United States, with 55 percent grown in Pennsylvania. Fresh market mushroom prices historically have been lowest in the east, and some fresh mushrooms grown in the eastern United States are shipped west.

### V. Anticompetitive Effects

16. In January 2001, shortly after its formation, the EMMC and its members agreed to set increased minimum prices at which they would sell fresh mushrooms in six different geographic regions, covering the entire continental United States. The minimum prices they agreed to were higher, on average, than the prices prevailing in those regions prior to the EMMC's formation. The price increases averaged about 8 percent nationwide.

17. The EMMC controlled over 60 percent of all agaricus mushrooms grown in the United States during the 2001–2002 growing season and approximately 90 percent of all agaricus mushrooms grown in the eastern United States during the same growing season.

18. Within three months of instituting its price increases, the EMMC launched a campaign to control the mushroom supply by acquiring and subsequently dismantling non-EMMC mushroom growing operations in the eastern United States. The campaign was planned to include the purchase of mushroom farms in other regions of the country as well. The EMMC's objective

was to reduce overall mushroom supply as a means to support its price increases of early 2001.

19. Through membership dues and a "Supply Control Assessment" the EMMC collected approximately six million dollars from its members during 2001–2002. EMMC then spent approximately three million dollars to purchase four mushroom farms and to acquire lease options on two additional mushroom farms in the eastern United States for the purpose of shutting them down and reducing the mushroom production capacity available for nonmembers to grow mushrooms in competition with the EMMC.

20. In May 2001, the EMMC purchased a farm in Dublin, Georgia at a bankruptcy auction. The Dublin farm had an annual mushroom production capacity of approximately eight million pounds. At the auction, the EMMC outbid a nonmember mushroom grower based in Colorado that was attempting to enter mushroom farming in the eastern United States in competition with EMMC. Three months later, the EMMC entered into a land exchange with a land developer not connected to the mushroom industry, in which the EMMC exchanged the Dublin farm for another mushroom farm consisting of two parcels in Evansville, Pennsylvania, plus cash. As part of the exchange, the EMMC placed a permanent deed restriction on the Dublin farm prohibiting the conduct of any business related to the growing of mushrooms. The EMMC lost approximately \$525,000 on the Dublin farm purchase and exchange transactions.

21. Within three months of the Dublin farm/Evansville land exchange, the EMMC sold the largest parcel of the Evansville, Pennsylvania farm to a third party, with a permanent deed restriction prohibiting the conduct of any business related to the growing of mushrooms. Less than a year later, the EMMC sold the second parcel with the same permanent deed restriction. The two parcels making up the Evansville, Pennsylvania farm, with an annual mushroom growing capacity of 15 million pounds, were sold at a collective loss of \$137,000.

22. In January 2002, the EMMC purchased Gallo's Mushroom Farm ("Gallo's"), in Berks County, Pennsylvania. Gallos' had an annual mushroom growing capacity of two million pounds. Less than four months later, the EMMC sold Gallos' at a loss of \$77,500 with a permanent deed restriction prohibiting the conduct of any business related to the growing of mushrooms.

23. In February 2002, the EMMC agreed to pay one million dollars to the owners of Ohio Valley Mushroom Farms for, among other things, a non-complete agreement, a right of first refusal to lease the mushroom growing operations, a right of first refusal to purchase the properties, and the right to record a deed restriction prohibiting the conduct of any business related to mushroom growing on the property for ten years. The EMMC did not lease or purchase the property, but filed the deed restriction on the Ohio Valley Farm, which had recently been operated as a mushroom growing concern with annual capacity of nine million pounds.

24. In March, 2002, the EMMC purchased the La Conca D'Oro mushroom farm in Berks County, Pennsylvania. The La Conca D'Oro farm had an annual production capacity of approximately five million pounds. The EMMC sold the farm and the mushroom-growing equipment on the farm approximately three months later at a loss of \$500,000. Like the other EMMC-acquired properties, this land was sold with a deed restriction prohibiting anyone from conducting any business related to the growing of mushrooms on the property.

25. In August 2002, the EMMC purchased a ten-year lease option on the Amadio Farm in Berks County, Pennsylvania for \$230,000. The Amadio Farm had an annual mushroom production capacity of approximately five million pounds. The owner of the property agreed with the EMMC to the filing of a deed restriction on the property prohibiting anyone other than the EMMC from conducting any business related to the growing of mushrooms for ten years. EMMC never entered into a lease on the property.

26. As a result of the deed restrictions placed by the EMMC on these six mushroom farms in the eastern United States, the EMMC removed more than 42 million pounds of annual growing capacity from that region, or approximately 8 percent of the total capacity in the eastern United States.

27. The EMMC purpose in entering into the purchase and lease transactions was to reduce or eliminate the agaricus mushroom growing capacity available to potential independent competitors in the eastern United States, thereby improving the ability of its members to maintain the price increases to which they had agreed.

28. Depending on the size and location, building a new mushroom growing and production facility costs millions of dollars and generally requires zoning approval. Building a new facility takes much longer to

generate any revenue than purchasing or leasing an existing growing operation. By eliminating the existing available productive capacity, the EMMC effectively forestalled competitive entry by at least 18 months.

## VI. Capper-Volstead

29. The EMMC was formed pursuant to the Capper-Volstead Act. Congress enacted the Capper-Volstead Act to improve the bargaining power of individual farmers when dealing with the corporate purchasers of their products by allowing farmers to act collectively without violating the antitrust laws. Under the Capper-Volstead Act, farmers, in a cooperative may collectively market their crops, including jointly setting prices, but they may not engage in exclusionary practices, monopolize trade or suppress competition with the cooperative.

## VII. Violations Alleged

30. Fresh agaricus mushrooms is a relevant product market within the meaning of Section 1 of the Sherman Act, 15 U.S.C. 1. The eastern United States is a relevant geographic market within the meaning of section 1 of the Sherman Act.

31. The Supply Control campaign adopted and implemented by the EMMC constitutes a conspiracy in unreasonable restraint of trade to prevent, forestall and restrict competition from independent mushroom producers of section 1 of the Sherman Act, 15 U.S.C. 1.

32. To form and effectuate this conspiracy, EMMC and its members did the following things, among others:

- a. Collectively funded the Supply Control campaign;
- b. Sold four properties with permanent deed restrictions forbidding the conduct of any business related to the production of mushrooms;
- c. Entered agreements with nonmembers to place deed restrictions on two properties for which the cooperative purchased lease options; and
- d. Filed deed restrictions on the two lease-optional properties prohibiting the conduct of any business related to the production of mushrooms for ten years.

33. The Supply Control campaign is not a joint activity protected by the exemption from the antitrust laws created by the Capper Volstead Act, 7 U.S.C. 291, *et seq.*

34. Unless the deed restrictions are voided and similar transactions are restrained in the future, the EMMC's violations likely will have the following effects, among others:



a. Competition generally in fresh market agaricus mushrooms in the eastern United States will be restrained.

b. Actual and potential competition between the cooperative's members and other mushroom farmers will be prevented, forestalled and restricted;

c. Acreage and facilities available to produce mushrooms in the eastern United States will be artificially reduced; and

d. Consumers will be deprived of the benefits of competition.

### VIII. Requested Relief

Wherefore, Plaintiff requests:

1. That the deed restrictions the EMMC placed on the six properties identified above be adjudged and decreed to be unlawful and in violation of section 1 of the Sherman Act, 15 U.S.C. 1.

2. That the Defendant and all persons acting on its behalf be permanently enjoined and restrained from enforcing the deed restrictions on the above-mentioned properties and from entering into or carrying out any contract, agreement, understanding, or plan, the effect of which would be to limit, forestall or prohibit the conduct of any business related to the growing of mushrooms on any property in the United States;

3. That the Defendant be ordered to file appropriate documents in the land records of each jurisdiction in Georgia, Pennsylvania and Ohio where the EMMC previously filed deed restrictions, to nullify the recorded deed restrictions that had the effect of prohibiting the conduct of business related to the cultivation, growing, production or marketing of mushrooms; and

4. That Plaintiff have such other relief as the Court may deem just and proper.

Respectfully submitted,

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Deputy Assistant Attorney General.

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Laura Heiser.

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December 16, 2004.

### United States District Court for the Eastern District of Pennsylvania

*United States of America, Plaintiff, v. Eastern Mushroom Marketing Cooperative, Inc., Defendant; Stipulation*

Civil Case No.: 2:04-CV-5829.

Judge Thomas N. O'Neill, Jr.

Date Stamp: 12/16/2004.

It is stipulated by and between the undersigned parties by their respective attorneys that:

1. The Court has jurisdiction over the subject matter of this action and over each of the parties hereto, and venue of this action is proper in the Eastern District of Pennsylvania.

2. The parties consent that a Final Judgment in the form hereto attached may be filed and entered by the Court, upon the motion of any party or upon the Court's own motion, at any time after compliance with the requirements of the Antitrust Procedures and Penalties Act (15 U.S.C. 16), and without further notice to any party or other proceedings, provided that the United States has not withdrawn its consent.

3. The Defendant shall abide by and comply with the provisions of the proposed Final Judgment pending entry of the Final Judgment, and shall, from the date of the filing of this Stipulation, comply with all the terms and provisions thereof as though the same were in full force and effect as an order of the Court.

4. In the event the proposed Final Judgment is not entered pursuant to this Stipulation, this Stipulation shall be of no effect whatever, and the making of this Stipulation shall be without prejudice to any party in this or any other proceeding.

Dated: December 16, 2004.

### Eastern Mushroom Marketing Cooperative

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[FR Doc. 05-2495 Filed 2-9-05; 8:45 am]

BILLING CODE 4410-11-M

### NUCLEAR REGULATORY COMMISSION

[Docket No. 40-8968-ML; ASLBP No. 95-706-01-ML]

### Hydro Resources, Inc.; Notice of Reconstitution

Pursuant to 10 CFR 2.1207, in the above captioned *Hydro Resources, Inc.* proceeding, Administrative Judge E. Roy Hawkens is hereby appointed to serve as Presiding Officer in place of Administrative Judge Thomas S. Moore.

In accordance with 10 CFR 2.1203, all correspondence, documents, and other material relating to any matter in this proceeding should be served on Administrative Judge Hawkens as follows: Administrative Judge E. Roy Hawkens, Atomic Safety and Licensing Board Panel, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001.

Issued at Rockville, Maryland this, 4th day of February 2005.

G. Paul Bollwerk, III,

Chief Administrative Judge, Atomic Safety and Licensing Board Panel.

[FR Doc. 05-2565 Filed 2-9-05; 8:45 am]

BILLING CODE 7590-01-P

### SECURITIES AND EXCHANGE COMMISSION

### Submission for OMB Review; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Filings and Information Services, Washington, DC 20549.

Extension: Rule 17a-4; SEC File No. 270-198; OMB Control No. 3235-0279.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission ("Commission") has submitted to the Office of Management and Budget a request for extension of the previously