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IN THE MATTER OF:

ENVIRONMENTAL PROTECTION
AGENCY-REGION VII
REGIONAL HEARING CLERK

United States EPA
vs.
*FRM Chem, Inc., a.k.a. Industrial
Specialties*

Cause No. FIFRA-07-2004-0041

Transcript of Proceedings Transcript of Proceedings
8/26/2004

Gore Perry Gateway & Lipa Reporting
515 Olive Street
Suite 700
St. Louis, MO 63101

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United States Environmental Protection Agency,

Claimant,

vs. FIFRA-07-2004-0041

FRM CHEM, INC., A.K.A. INDUSTRIAL
SPECIALTIES, WASHINGTON, MISSOURI,

Respondent.

Transcript of Proceedings, held at the U.S.
District Court House, 750 Missouri Avenue, East St.
Louis, Illinois 62201, on August 26, 2004, before
Sondra D. DeVries, a Certified Shorthand Reporter
and Notary Public.

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APPEARANCES OF COUNSEL:

FOR THE CLAIMANT:

Rupert G. Thomas, Senior Assistant
Chris R. Dudding, Assistant
Regional Counsel
Office of Regional Counsel
U.S. Environmental Protection Agency
Region VII
901 North Fifth Street
Kansas City, Kansas 66101

FOR THE RESPONDENT:

Karlan C. Kastendieck, Pro Se
Raymond E. Kastendieck, Pro Se
FRM Chem, Inc. a.k.a. Industrial Specialties
P.O. Box 207
50 Hiline Drive
Washington, Missouri 63090

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1 TRANSCRIPT OF PROCEEDINGS

2 JUDGE MORAN: Good morning. My name is
3 Judge William B. Moran. We are here this morning
4 in East St. Louis, today being August 26, 2004.
5 This is the case captioned in the matter of FRM
6 Chemical, Inc., a.k.a. Industrial Specialties,
7 based in Washington, Missouri. The docket number
8 is FIFRA-07-2004-0041. FIFRA stands for The
9 Federal Insecticide, Fungicide and Rodenticide
10 Act.

11 EPA has filed a complaint against the
12 Respondents I just named, and seeking a total civil
13 penalty of \$16,500, based on three counts alleging
14 mislabeling and misbranding of certain identified
15 products in the complaint.

16 I would like counsel for EPA to stand and
17 identify themselves at this time, please.

18 MR. THOMAS: Rupert G. Thomas.

19 JUDGE MORAN: Yes, Mr. Thomas, okay. And?

20 MR. DUDDING: Chris Dudding.

21 JUDGE MORAN: Okay, Mr. Dudding.

22 And the Respondents, as I understand it, do
23 not have an attorney. You're representing
24 yourselves in this matter?

25 MR. R. KASTENDIECK: That's correct.

1 JUDGE MORAN: Would you stand and identify
2 yourself, please, sir.

3 MR. R. KASTENDIECK: Raymond Kastendieck.

4 JUDGE MORAN: What's your first name?

5 Raymond?

6 MR. R. KASTENDIECK: Raymond.

7 JUDGE MORAN: Okay.

8 MR. K. KASTENDIECK: Karlan Kastendieck.

9 JUDGE MORAN: Nice to meet both of you.
10 All right. Counsel, are you ready to begin

11 with the presentation of your case?

12 MR. THOMAS: Yes, Your Honor.

13 JUDGE MORAN: What we're going to have to do
14 is just -- What I would like the parties to do is
15 move up closer, and we'll have -- It doesn't
16 really matter. We'll have counsel occupy one of
17 these groups of tables in front of me, and the
18 Kastendiecks take the other group of tables.

19 MR. DUDDING: Did you have a preference as
20 to which table we take?

21 JUDGE MORAN: I don't.

22 MR. DUDDING: Okay.

23 JUDGE MORAN: Counsel, you may proceed and
24 make an opening statement, if you wish to. It's
25 discretionary on your part.

1 MR. THOMAS: Good morning, Your Honor.
2 Complainant, Director of the Water, Wetland and
3 Pesticide Division by Delegation from the
4 Administrator of the EPA, Region VII, initiated and
5 filed a complaint against Respondents, FRM Chem,
6 Inc., also known as Industrial Specialities,
7 alleging that Respondent violated the Federal
8 Insecticide, Fungicide and Rodenticide Act, FIFRA.
9 The complaint specifically states that the
10 Respondent violated sections 12(a)(1)(A) of FIFRA
11 and 12(a)(1)(E) of FIFRA, in three counts.
12 Respondent is charged with violating Section
13 12(a)(1)(A), due to its distribution or sale of an
14 unregistered pesticide.
15 Respondent is charged with violating Section
16 12(a)(1)(E) of FIFRA, due to its distribution or
17 sale of a misbranded pesticide.
18 The product in question is Root Eater, which
19 was sold by Respondent to the City of Covington,
20 Oklahoma, the City of Hoisington, Kansas, and the
21 City of Lucas, Kansas.
22 Complainant proposed a civil penalty of
23 \$16,500; \$5,500 for each count. Complainant will
24 demonstrate through testimony, exhibits and/or
25 other presentments, that Root Eater is a pesticide

1 that must be registered with The U.S. Environmental
2 Protection Agency, and that it was not, and that
3 the \$16,500 in civil penalties proposed against
4 Respondent in this model is appropriate.

5 JUDGE MORAN: Okay. Thank you. And that
6 was Mr. Thomas just speaking?

7 MR. THOMAS: Yes, sir.

8 JUDGE MORAN: Thank you.

9 Mr. Dudding, do you want to say something?

10 MR. DUDDING: No, Your Honor.

11 JUDGE MORAN: Okay. You had a look, and I
12 just wanted to make sure.

13 All right. Do the Kastendiecks wish to make
14 any kind of an opening statement? Again, it's up
15 to you.

16 MR. K. KASTENDIECK: Yes, Your Honor.

17 JUDGE MORAN: Yes.

18 MR. K. KASTENDIECK: First of all, it is our
19 contention that we made no pesticidal claims on the
20 label. Number two, in the figuring of the proposed
21 assessment of the penalties, we feel that incorrect
22 information was used to calculate the penalties.

23 JUDGE MORAN: Okay. And what is your first
24 name, sir?

25 MR. K. KASTENDIECK: My name is Karlan,

1 K-A-R-L-A-N.

2 JUDGE MORAN: Okay. Thank you,
3 Mr. Kastendieck.

4 All right. EPA, are you ready to begin with
5 your first witness?

6 MR. THOMAS: The EPA is ready, Your Honor.

7 JUDGE MORAN: Okay. Call your first
8 witness.

9 MR. THOMAS: I'll call Mr. Alan Uthlaut.

10 JUDGE MORAN: Raise your right hand,
11 please. Do you solemnly swear to tell the truth,
12 the whole truth, and nothing but the truth, so help
13 you God?

14 MR. UTHLAUT: I do, sir.

15 JUDGE MORAN: Okay. State your name and
16 spell it for the court reporter, please, nice and
17 clear.

18 MR. UTHLAUT: Craig Alan Uthlaut, C-R-A-I-G
19 A-L-A-N U-T-H-L-A-U-T.

20 JUDGE MORAN: Go ahead, counsel.

21 QUESTIONS BY MR. THOMAS:

22 Q: Will you please state your name.

23 A: Craig Alan Uthlaut.

24 Q: Mr. Uthlaut, are you employed?

25 A: Yes, I am.

1 Q: Where are you employed?

2 A: I'm employed by The Missouri Department of
3 Agriculture, Pesticide Bureau.

4 Q: How long have you been employed with that
5 entity?

6 A: Approximately fourteen and a half years.

7 Q: What is your present occupation?

8 A: I'm a pesticide use investigator for the
9 Bureau.

10 Q: Mr. Uthlaut, how long have you worked in
11 this position?

12 A: For the entire fourteen and a half years.

13 Q: What are some of the main functions of your
14 position?

15 A: We do inspections at commercial applicator
16 sites, marketplace inspections, and other
17 inspections as requested.

18 Q: Mr. Uthlaut, on or about September 12th,
19 13th, did you have -- did you visit the
20 Respondent's FRM, a.k.a. Industrial Specialists
21 facility at 50 Hiline Drive, Washington, Missouri?

22 A: Yes, I did.

23 Q: Did you also visit that facility in
24 September -- Well, you visited both September 12th
25 and September 13th; is that correct?

1 A: That is correct.

2 Q: During these visits, did you issue notice of
3 inspections?

4 A: Yes, I did.

5 MR. THOMAS: Your Honor, at this time, I
6 would ask for permission to show the witness what
7 is marked notice of inspection.

8 JUDGE MORAN: Yes.

9 MR. THOMAS: I'll hand a copy to Respondent,
10 Your Honor.

11 Q: (By Mr. Thomas) Mr. Uthlaut, would you take
12 a look and identify what that document states.

13 A: This is a notice of inspection form that I
14 filled out and had Mr. Kastendieck sign for me at
15 the inception of the inspection contact.

16 Q: And what's the title on it? Can you read
17 the title?

18 A: Notice of inspection, inspection report.

19 Q: And could you read what the date says?

20 A: The first one is 9/12/02 and the second one
21 is 9/13/02.

22 Q: And you stated that Mr. Kastendieck signed
23 these inspections?

24 A: Yes.

25 MR. THOMAS: At this time, Your Honor,

1 complainant will move to enter this Complainant's
2 Exhibit 1 into evidence.

3 JUDGE MORAN: Yes. You're moving for the
4 introduction of Complainant's Exhibit 1, which
5 consists of two pages. Correct?

6 MR. THOMAS: That's correct.

7 JUDGE MORAN: Any objection,
8 Mr. Kastendieck?

9 MR. KASTENDIECK: No.

10 JUDGE MORAN: Okay. EPA Exhibit 1 is
11 admitted.

12 Q: (By Mr. Thomas) Mr. Uthlaut, you stated
13 that you visited the Respondent's facility. Was
14 there a reason for these visits?

15 A: Yes, there was.

16 Q: What was the reason?

17 A: I was sent a request from my office in Jeff
18 City that was forwarded from the EPA concerning a
19 product that was manufactured by Industrial
20 Specialists, referred to as Root Eater.

21 Q: Okay. And these visits were in September
22 12th and 13th, 2002?

23 A: Correct.

24 Q: Did you on or about May 11, 1999, visit the
25 Respondent's facility?

1 A: Yes, I did.

2 Q: What was the reason for that visit?

3 A: That was the original visit that I made to
4 Industrial Specialists, FRM Chem, concerning the
5 manufacturing of the same product, Root Eater.

6 JUDGE MORAN: What was the date of this
7 original visit?

8 A: '99, May. I don't remember the --

9 MR. THOMAS: May 11th, Your Honor, 1999.

10 JUDGE MORAN: Okay. So some three years
11 earlier, you visited this property?

12 A: Correct.

13 JUDGE MORAN: Go ahead, Counsel.

14 Q: (By Mr. Thomas) During this visit, did you
15 identify yourself and explain the reason for your
16 visit?

17 A: Yes, I did.

18 Q: During this visit, Mr. Uthlaut, did you
19 speak with anyone?

20 A: Yes. I spoke with a Mr. Kastendieck,
21 again. It was not Karlan, but his brother, if I
22 remember correctly. I can't recall his name. It
23 might be -- I don't recall his first name off of
24 the top of my head.

25 Q: Could it be Mr. Keith Kastendieck?

1 A: Yes, I believe that would be correct.

2 Q: During your conversation with Mr. Keith
3 Kastendieck, Dr. Mr. Kastendieck inform you, admit
4 to you that FRM Chem manufactured and distributed
5 Root Eater?

6 A: Yes, he did.

7 Q: During this inspection of May 1999, did you
8 obtain copies of the Root Eater label?

9 A: Yes, I did.

10 Q: During this same inspection, visit, did you
11 obtain sales records?

12 A: Yes, I did.

13 Q: During the inspection of May 11, 1999, did
14 you inform Mr. Kastendieck that the wording on the
15 product label may be questionable, and that he may
16 contact the EPA for additional guidance?

17 A: Yes, I made that suggestion to him.

18 Q: During your visit or inspection of
19 Respondent's facility on September 12th and 13th,
20 2002, did you speak with anyone?

21 A: I spoke with Mr. Karlan Kastendieck.

22 Q: In your conversation with Mr. Karlan
23 Kastendieck, did Mr. Kastendieck inform or admit to
24 you that Respondent, FRM Chem, manufactured and
25 distributed Root Eater?

1 A: Yes, he did.

2 Q: During this inspection, did you collect or
3 obtain a copy of labels of Root Eater?

4 A: Yes, I did.

5 MR. THOMAS: Your Honor, Complainant would
6 like to have the label identified and showed to
7 Respondent for identification.

8 JUDGE MORAN: Yes. While you're getting
9 ready to do that, let me ask this witness -- On
10 Complainant's Exhibit 1 -- Do you have that in
11 front of you?

12 A: Yes, I do.

13 JUDGE MORAN: Where is Mr. Kastendieck's
14 signature on there?

15 A: It's over on the right-hand side, Your
16 Honor, in a box called authorization signature.

17 JUDGE MORAN: I see. And that's your
18 signature on the bottom of those pages, both of
19 those pages?

20 A: Yes, it is, sir.

21 JUDGE MORAN: Thank you.

22 Q: (By Mr. Thomas) Have you had an opportunity
23 to look at and identify the document?

24 A: Yes.

25 Q: This represents what label was collected?

1 A: Yes, it would.

2 MR. THOMAS: Your Honor, I move to have this
3 document admitted as Complainant's Exhibit 2.

4 JUDGE MORAN: Any objection?

5 MR. K. KASTENDIECK: No.

6 JUDGE MORAN: Okay. Complainant's Exhibit 2
7 is admitted.

8 Q: (By Mr. Thomas) Mr. Uthlaut, during your
9 visit or inspection of the Respondent's facility on
10 September 12th, 2002, did you obtain a signed
11 statement from Mr. Karlan Kastendieck?

12 A: Yes, I did.

13 Q: At the conclusion of your inspection of
14 September 2002, did you tender to Mr. Karlan
15 Kastendieck to receive a sample?

16 A: Yes, I did.

17 MR. THOMAS: Your Honor, documents that are
18 identified as Exhibit 3, 4, and 5, Respondents made
19 a claim for confidentiality, and this document was
20 not presented, although identified in a prehearing
21 exchange for that purpose.

22 At this moment, Your Honor, I am requesting
23 that the Respondent, if they would would waive the
24 confidentiality of this document, so it can be
25 presented or offered as Complainant's Exhibits 3,

1 4, and 5.

2 JUDGE MORAN: What do the Respondents have
3 to say? I have not seen this document, and it was
4 not provided to me as part of the prehearing
5 exchange.

6 MR. THOMAS: No. It was mentioned, and the
7 reason for it, Your Honor, was due to the CBI
8 claim.

9 JUDGE MORAN: The CBI claim?

10 MR. THOMAS: Yes.

11 JUDGE MORAN: Right.

12 MR. THOMAS: I do have copies with me
13 presently.

14 JUDGE MORAN: Okay. The way that is handled
15 -- Let me just inform the Respondents. CBI stands
16 for confidential business information. And the way
17 that that is typically handled is that the Court
18 can see these documents, and they can be part of
19 the record.

20 However, they are not viewed by anyone,
21 other than the Court and counsel, and of course,
22 the Respondents. In terms of this particular
23 witness being able to see that, there is a problem
24 with this witness being able to see these
25 confidential business information documents, unless

1 you waive that.

2 In any decision which I would issue in this
3 case -- What happens is that the decision for the
4 public's eye, when it comes to the part of the
5 decision where I'm discussing this, there's a
6 bracket, and it says CBI information deleted. In
7 other words, this would not be subject to viewing
8 by the public.

9 And then also, I have to deal with the
10 question of -- This is all before I hear from you
11 folks, from the Respondents.

12 These three individuals from the back of the
13 court room, I don't know if they're EPA officials
14 or who they are. They would be bound by any CBI
15 information disclosure, as well.

16 Are you three individuals with EPA?

17 WITNESSES: Yes.

18 JUDGE MORAN: You all have the CBI
19 training? It's an annual training requirement.
20 You have all had that? You're all clear?

21 MR. LEIFER: Yes.

22 MR. LESHER: Yes.

23 JUDGE MORAN: All clear for CBI?

24 MS. HUGHES: I haven't for quite some time.

25 JUDGE MORAN: Okay. I don't know what your

1 role is in this proceeding, but any discussion of
2 the CBI material, you have to leave the court room
3 for that, and the same would be true with
4 Mr. Uthlaut, as far as I'm concerned.

5 Before I hear from you, counsel, I want to
6 hear what Respondents have to say about this issue
7 or these exhibits.

8 MR. K. KASTENDIECK: We would be willing to
9 waive the confidentiality agreement.

10 JUDGE MORAN: Okay. For purposes of this
11 hearing.

12 MR. K. KASTENDIECK: Yes, for purposes of
13 the hearing.

14 JUDGE MORAN: All right. In terms of any
15 decision I may issue, are you requesting that my
16 decision have the CBI deletion that I referred to?

17 MR. K. KASTENDIECK: Yes. We would prefer
18 to have the CBI deletion on the public record.

19 JUDGE MORAN: Okay. And do you have any
20 objection to -- I don't know how counsel intends to
21 use these documents, but do you have any objection
22 to --

23 You're a state employee; correct?

24 A: Yes.

25 JUDGE MORAN: Yes. -- to the state employee

1 seeing this CBI material?

2 MR. KASTENDIECK: No.

3 JUDGE MORAN: You do not.

4 All right. Counsel, do you have anything
5 you want to say about this matter?

6 MR. THOMAS: Just one thing I would like to
7 draw to your attention. These documents were
8 collected by Mr. Uthlaut.

9 JUDGE MORAN: Right. But we're in an EPA
10 proceeding, and there has been a claim of
11 confidential business information, which has been
12 waived, and it's been waived as regards to this
13 witness, as well, so we don't have a problem in
14 this particular case.

15 My decision will blank out any references at
16 least -- At least -- I want you to understand that
17 if this case gets appealed, then the Environmental
18 Appeals Board, which is this body above me that
19 reviews decisions that are appealed, they get to
20 see this, but they do the same thing. When they
21 issue their decision, if there is such a decision,
22 they do the same thing I described, which is, they
23 put CBI material deleted.

24 So everyone reads it except the public, but
25 the EPA officials, the courts, review bodies, they

1 get to see it. Obviously, they have to see it, in
2 order to make an intelligent assessment of what
3 they have in front of them. Right?

4 MR. K. KASTENDIECK: Right.

5 JUDGE MORAN: So I want to ask this one lady
6 in the back of the court room to excuse herself,
7 and we'll let you back in after we have dealt with
8 this.

9 MS. HUGHES: Okay.

10 JUDGE MORAN: Okay.

11 MR. THOMAS: Your Honor, at this time, I
12 would like to present to Mr. Uthlaut what has been
13 marked as -- Well, it was not marked in the
14 original pre-hearing, because it was never stamped,
15 but this is Complainant's Exhibit 3.

16 JUDGE MORAN: You're not going to bring them
17 all up at once, three, four and five?

18 MR. THOMAS: Yes, Your Honor.

19 JUDGE MORAN: Off the record.

20 (Thereupon, an off-the-record discussion was
21 had.)

22 JUDGE MORAN: Let me just -- Now, let me
23 just speak to the Respondents about this. I assume
24 what the EPA wants to do here is, they are trying
25 to introduce invoices to show that you sold Root

1 Eater to the people described on these 3, 4, and
2 5.

3 Is that right, Mr. Thomas?

4 MR. THOMAS: That's correct, Your Honor.

5 JUDGE MORAN: And what you both can do --
6 You're not attorneys, so I'm trying just to help
7 you out on this. If you agree that these are
8 accurate copies of invoices, the term is, you can
9 stipulate that these are what they appear to be,
10 and they can be just entered into the record by
11 stipulation, without this witness being involved,
12 as Complainant's Exhibits 3, 4 and 5, unless you
13 have an issue, unless you say, no, these really
14 aren't our invoices, or this is not the right
15 company. Any questions you have like that, tell me
16 about it.

17 MR. K. KASTENDIECK: I would like to
18 stipulate that these are invoices, correct and
19 true.

20 JUDGE MORAN: All right. In other words,
21 just as one example, the first one is to the City
22 of Covington.

23 MR. K. KASTENDIECK: Correct.

24 JUDGE MORAN: Okay. So I want the parties
25 to look at this, just to speed this along, so we

1 can get to the heart of the issues in this case.
2 Complainant's Exhibit 3 is an invoice to the City
3 of Covington, and this was a date of -- What's the
4 date on here, counsel? 1/10/02?
5 Is that right, Respondent? That's when it
6 was shipped, anyway.

7 MR. THOMAS: Yes, 1/10/02.

8 JUDGE MORAN: Do you agree,
9 Mr. Kastendieck?

10 MR. K. KASTENDIECK: Yes.

11 JUDGE MORAN: Okay. And the second exhibit,
12 or EPA Exhibit 4, this is to Hoisington City, and
13 that has a shipping date of 6/13/02.

14 MR. K. KASTENDIECK: That's correct.

15 JUDGE MORAN: And the last one is to the
16 City of Lucas, shipping date 1/10/02, and you agree
17 with that, sir?

18 MR. K. KASTENDIECK: Yes.

19 JUDGE MORAN: So you're moving for the
20 introduction without objection, by stipulation for
21 Complainant's Exhibits 3, 4 and 5?

22 MR. THOMAS: Yes, Your Honor.

23 JUDGE MORAN: Those exhibits are admitted.

24 Q: (By Mr. Thomas) Mr. Uthlaut, at the
25 conclusion of your inspection in September, did you

1 tender to Mr. Kastendieck to receive samples?

2 A: Yes, I did.

3 MR. THOMAS: Your Honor, at this time, I
4 would like to show the witness what has been marked
5 as Complainant's Exhibit 6.

6 JUDGE MORAN: Okay. There is no CBI issue
7 on this one?

8 MR. THOMAS: No, Your Honor.

9 JUDGE MORAN: Okay. And just before you
10 continue, Mr. Thomas, just let me be clear with the
11 EPA, you did not give the court reporter a copy of
12 Exhibits 3, 4, and 5; correct?

13 MR. DUDDING: Right. We did not give the
14 court reporter a copy.

15 JUDGE MORAN: Okay.

16 Welcome back.

17 Q: (By Mr. Thomas) Mr. Uthlaut, you've had an
18 opportunity to review the document?

19 A: Yes, I have.

20 Q: And could you read what the top of that
21 document states? Investigation statement?

22 A: Yes, it does.

23 Q: Was this document signed?

24 A: Yes, it was.

25 Q: By whom?

1 A: By Mr. Kastendieck and myself.

2 Q: Which Kastendieck?

3 A: Karlan.

4 MR. THOMAS: Your Honor, Complainants move
5 to admit what is marked as Complainant's Exhibit 6.

6 JUDGE MORAN: Every time they do that,
7 Respondents, then you have to tell me if you have
8 an objection or not.

9 MR. K. KASTENDIECK: No objection, Your
10 Honor.

11 JUDGE MORAN: Okay. Plaintiff's Exhibit 6
12 is admitted.

13 Q: (By Mr. Thomas) Mr. Kastendieck -- Strike
14 that. I'm sorry. Mr. Uthlaut, you testified that
15 in 1999 and 2002, you visited and inspected the
16 Respondent's facility?

17 A: Yes, I did.

18 Q: For what purpose?

19 A: To conduct an investigation of the Root
20 Eater product.

21 Q: Did you prepare a statement or report of
22 your investigations?

23 A: Yes, I did.

24 MR. THOMAS: Your Honor, I would -- Let me
25 go back a bit.

1 Q: (By Mr. Thomas) Mr. Uthlaut, at the
2 conclusion of your inspection in September of 2000,
3 did you tender to Mr. Kastendieck --

4 MR. DUDDING: 2002.

5 Q: (By Mr. Thomas) 2002 . -- to receive
6 samples from him?

7 A: Yes, I did.

8 MR. THOMAS: At this time, Your Honor, I
9 would like to hand to the witness what is marked
10 Complainant's Exhibit 7 for identification.

11 JUDGE MORAN: Okay.

12 Q: (By Mr. Thomas) Have you had enough time to
13 look at that, Mr. Uthlaut?

14 A: Yes.

15 Q: Could you read what it says? It says
16 receipt for samples?

17 A: Yes, it does.

18 Q: Is this document signed?

19 A: Yes, it was, by both Mr. Karlan Kastendieck
20 and by myself.

21 MR. THOMAS: Your Honor, at this time,
22 Complainants move for the admission of the receipt
23 for samples that's been marked as Complainant's
24 Exhibit 7.

25 MR. K. KASTENDIECK: No objection, Your

1 Honor.

2 JUDGE MORAN: Okay. Complainant's Exhibit 7
3 is admitted. Let me just ask him a couple of
4 questions about this. Let's bring this down to the
5 real world. You're in their facility,
6 Mr. Uthlaut. Is that right?

7 A: Yes.

8 JUDGE MORAN: And what do they give you?
9 Just a label, or do they give you a sample of the
10 particular product, as well? What did you actually
11 get for this? What is this receipt for?

12 A: I collected a copy of the labeling and the
13 sales records.

14 JUDGE MORAN: You didn't receive the
15 product?

16 A: No.

17 JUDGE MORAN: And so the first thing here,
18 where it says, documentation, including labeling,
19 that's the first thing that it's referring to
20 there, and then the second thing you received in
21 this receipt is a sales record?

22 A: Yes.

23 JUDGE MORAN: The sales record isn't here.
24 This is just a document that you received the sales
25 record. This isn't the actual sales record, it's

1 just your --

2 A: No. This is the receipt for the samples
3 that I had collected from them.

4 JUDGE MORAN: But again, those samples
5 consisted of documents only and the label?

6 A: Yes.

7 JUDGE MORAN: All right. Thank you.
8 Go ahead, Mr. Thomas.

9 Q: (By Mr. Thomas) Mr. Uthlaut, at the
10 conclusion and termination of your inspection,
11 inspections in 1999 and 2002, did you prepare
12 reports --

13 A: Yes, I did.

14 Q: -- of your investigation?

15 A: Yes.

16 Q: Mr. Uthlaut, at this time, I would like to
17 show you what have been marked as Complainant's
18 Exhibit 8 and 9 for identification.

19 JUDGE MORAN: While the witness is reading
20 that, I just want to speak to the Respondents. Of
21 course, you saw these documents as part of the
22 prehearing exchange; right?

23 MR. K. KASTENDIECK: Yes, Your Honor.

24 JUDGE MORAN: Okay.

25 Q: (By Mr. Thomas) Mr. Uthlaut, you have

1 examined the documents marked as Exhibits 8 and 9?

2 A: Yes.

3 Q: Were these documents that you prepared after
4 the conclusion of your inspection in 1999 and the
5 year 2002?

6 A: Correct.

7 MR. THOMAS: Your Honor, at this time,
8 Complainant moves for the admission of
9 Complainant's Exhibits 8 and 9.

10 MR. K. KASTENDIECK: No objection, Your
11 Honor.

12 JUDGE MORAN: Complainant's Exhibits 8 and 9
13 are admitted.

14 Q: (By Mr. Thomas) Mr. Uthlaut, upon the
15 completion of your inspection, compilation, all of
16 the rest, did you do anything with the material
17 that you got?

18 A: After I completed my reports, I forwarded my
19 narrative and the samples I collected to my office
20 in Jefferson City.

21 MR. THOMAS: Thank you. No further
22 questions of this witness at this time, Your Honor.

23 JUDGE MORAN: All right. This is your
24 opportunity, Respondents, to ask any questions that
25 you wish of Mr. Uthlaut.

1 MR. K. KASTENDIECK: Yes, I do have some
2 questions, Your Honor.

3 QUESTIONS BY MR. K. KASTENDIECK:

4 Q: Mr. Uthlaut, on your original visit, on May
5 11, 1999, it was our understanding that it was your
6 opinion that these labels constituted a pesticidal
7 claim; is that correct?

8 A: I believe there was wording on the label
9 that would be considered a pesticidal claim, yes.

10 JUDGE MORAN: Let me just stop you there. I
11 ask questions when I need to. But the Respondent's
12 question was, was that your opinion in 1999?

13 A: Yes.

14 JUDGE MORAN: Okay.

15 Q: (By Mr. K. Kastendieck) And was that your
16 personal opinion, or was that as an EPA
17 representative, or as -- Are you an employee of
18 the Missouri Department of Natural Resources? Is
19 that correct?

20 A: No, that is not. I am employed with the
21 Missouri Department of Agriculture.

22 Q: I stand corrected. It was our understanding
23 at that time that we would receive at least from
24 your initial exclamation that it was your opinion
25 that the product made pesticidal claims, that we

1 would receive something in writing to that effect,
2 but we never did.

3 MR. THOMAS: Objection, Your Honor.

4 JUDGE MORAN: Okay. You know what you have
5 to do -- That's fine. This is an administrative
6 hearing, and we have some leeway in terms of the
7 formality here. But you have to end those thoughts
8 with a question, much like, what's that show,
9 jeopardy, where you say, you know, is that correct,
10 or you know, isn't that so.

11 So, in other words, your question right now
12 is, didn't you agree to send us something in
13 writing, relative to this claim of pesticidal
14 claims.

15 MR. K. KASTENDIECK: That's correct, Your
16 Honor.

17 JUDGE MORAN: Okay. So you say, isn't that
18 true. What about that, Mr. Uthlaut.

19 A: I personally would not have sent anything.

20 JUDGE MORAN: No, but his question was, did
21 you agree to send something in writing?

22 A: No, I did not.

23 Q: (By Mr. K. Kastendieck) On your visit
24 September 12, 2002, or the report dated September
25 12, 2002, you again reiterated to me personally

1 that it was your opinion and it was your opinion
2 from the previous visit that this product made
3 pesticidal claims; is that correct?

4 A: Correct.

5 Q: And again, I informed you that we had not
6 received anything in writing; is that correct?

7 MR. THOMAS: Objection, Your Honor. He is
8 testifying.

9 JUDGE MORAN: Excuse me?

10 MR. THOMAS: He is testifying.

11 JUDGE MORAN: No, I don't think so. He is
12 posing a question and asking whether that is
13 correct. The last question was, did you ask again
14 for something in writing; is that right?

15 MR. K. KASTENDIECK: That's correct.

16 JUDGE MORAN: Do you recall that
17 Mr. Kastendieck asked for something in writing from
18 you, sir?

19 A: I don't recall that he asked anything from
20 me in particular, personally, no.

21 JUDGE MORAN: Again, because you are pro se,
22 and you don't have an attorney here, I told you at
23 the outset on our conference call last week that
24 you have to some degree hamstrung your case,
25 because you didn't comply with the prehearing order

1 and identify the documents or witnesses you
2 intended to present in your case. Now, that's
3 still true.

4 However, there is nothing restricting you
5 after the EPA concludes its case from one of you
6 individuals in terms of rebuttal, of coming up to
7 the witness stand, if this is a point you want to
8 make, and stating your version of the facts, which
9 I assume would be that you would say something to
10 the effect that you did request something in
11 writing from this witness, and so there is nothing
12 stopping you from doing that later on. Okay?

13 MR. K. KASTENDIECK: Okay. Thank you, Your
14 Honor.

15 JUDGE MORAN: So in other words, my point
16 is, you may be dissatisfied with this witness'
17 answer, but that doesn't end the matter. You can
18 come up and say, this is my version of what
19 happened, and that's in the nature of rebuttal, and
20 that's appropriate.

21 MR. K. KASTENDIECK: Okay. Then I have no
22 further questions, Your Honor.

23 JUDGE MORAN: Okay. I have a couple of
24 questions. I can ask questions in these
25 proceedings, as well.

1 QUESTIONS BY JUDGE MORAN:

2 Q: And Mr. Uthlaut, I'm curious, when you came
3 out there in 1999, what prompted you to show up at
4 this facility? And this is the first time you
5 visited the facility?

6 A: Yes, it was.

7 Q: And what was the cause that you happened to
8 be out there on that day?

9 A: Again, this was a request forwarded from the
10 EPA through my office to conduct an inspection of
11 the Root Eater product.

12 Q: It was specifically to deal with Root Eater
13 product?

14 A: Yes, it was.

15 Q: And when you were at the Kastendieck's
16 facility, did you look at other products that this
17 company produced, if they do produce other
18 products, or was your investigation focused solely
19 on the one issue?

20 A: Solely on the one issue, sir.

21 Q: And you say you had an opinion at that time,
22 that this product, the label made pesticidal
23 claims?

24 A: Yes, Your Honor.

25 Q: And on what basis at that time, back in

1 1999, and I assume subsequently, what was the basis
2 for your opinion that there were pesticidal claims
3 in your mind at that time?

4 A: The pesticidal -- the wording on the label
5 indicating that it eliminated -- and I'm
6 generalizing or using my own words here.
7 Eliminated the roots and also had residual
8 activity.

9 Q: And in your mind, the terms eliminate or --
10 What was the other phrase you used?

11 A: Residual activity.

12 Q: Residual activity?

13 A: I'm not sure of that. I can look at the
14 labeling here, Your Honor. Removes the tree roots,
15 and the claim that it had -- that it coated the
16 walls of the system with insoluble copper,
17 resulting in long-term activity.

18 Q: And where does it say insoluble copper?

19 A: Over on the left-hand side of Exhibit 2, it
20 would be the second highlighted Root Eater.

21 Q: Oh, I see. Insoluble copper, okay. And did
22 you have any -- Was this the first time you had
23 ever dealt with cupric sulfate, sir? Had you ever
24 heard of cupric sulfate before you came out there?

25 A: I don't believe that I had, no.

1 Q: And were you advised before you went out
2 there, were you told that this was a pesticide, and
3 did that -- First of all, were you told that this
4 was a pesticide that you had to investigate, or
5 were you just told to investigate?

6 A: I don't recall the exact nature of the
7 request, but the request generally indicates that a
8 product was being manufactured that may be a
9 pesticide.

10 Q: And so is it fair to state that when you
11 went out there, you didn't know whether it was a
12 pesticide, but that upon reading the label, you
13 concluded it was a pesticide?

14 A: I didn't make any conclusions, but my
15 opinion was that the EPA would believe that those
16 were pesticidal claims.

17 Q: It wasn't your interpretation, it was your
18 anticipation of what EPA might think of these
19 claims?

20 A: Correct.

21 Q: Okay. And did you tell me -- You said this
22 was the first time you had ever dealt with cupric
23 sulfate; is that right?

24 A: I believe that would be correct. I may have
25 seen that active ingredient in other products. I

1 couldn't say one way or the other for certain.

2 Q: Do you know whether cupric sulfate is the
3 technical term for insoluble copper, or is it
4 something else?

5 A: I have no idea, Your Honor.

6 Q: And so in forming your opinion or at least
7 your tentative idea that this might be a pesticide,
8 were you influenced by the words insoluble copper
9 and not by cupric sulfate?

10 A: I believe that would be correct, Your Honor.

11 JUDGE MORAN: All right. Those are all the
12 questions I have.

13 Do you have any other questions you would
14 like to ask?

15 MR. K. KASTENDIECK: I would like to make
16 one statement. Cupric sulfate is a fancy way of
17 saying copper sulfate. It's a common name for that
18 ingredient.

19 JUDGE MORAN: That's fine. But you will
20 have to do that in a more formal sense, if you take
21 the stand later on. I can always look that up and
22 determine judicial notice of some fact like that.

23 JUDGE MORAN: Okay. Any other questions on
24 redirect, counsel?

25 MR. THOMAS: Yes, Your Honor.

1 QUESTIONS BY MR. THOMAS:

2 Q: Mr. Uthlaut, I think you stated that you
3 have been an inspector for about fourteen --

4 A: Fourteen and a half years, sir.

5 Q: Was this your first inspection?

6 A: No.

7 Q: First two inspections?

8 A: Pardon me?

9 Q: Was this your first two inspections?

10 A: No.

11 Q: How many had you inspected over the years?

12 A: Hundreds.

13 Q: Hundreds of them. When you received
14 notices, I'm assuming you did, to inspect, how did
15 you know where to go?

16 A: The request indicates the location of where
17 I'm to do the inspection and the product which I'm
18 to inspect.

19 Q: Who do you usually get those orders from?

20 A: They were forwarded to me from my
21 enforcement manager in Jeff City from EPA.

22 Q: So you get these notices, you're instructed
23 to go, and you go out and do the inspection?

24 A: Correct.

25 Q: Mr. Uthlaut, you're not an expert in the

1 area of chemistry, biology, or anything like that,
2 are you?

3 A: No, I would not say I am.

4 Q: What you have done is an inspection. Is it
5 fair to say that you gathered facts?

6 A: Yes, I did, sir.

7 Q: And is it -- Do you lend your opinion to
8 information that you gained during the course of
9 inspections?

10 A: During the course of inspection, I will
11 often inform the parties I am dealing with of areas
12 of concern that I am able to identify for their
13 benefit.

14 Q: Okay. So any suggestion or statement that
15 you make usually is from the benefit of your notice
16 of something that you may think?

17 A: Correct.

18 Q: In this situation, drawing to their
19 attention things on the label?

20 A: Yes.

21 Q: I think earlier you testified or stated that
22 you suggested that the EPA be contacted?

23 A: Correct.

24 Q: Was that based on perhaps that maybe there
25 might be a problem with the labeling?

1 A: That would be correct, sir.

2 Q: In this case, was it your tendency or
3 position that you were allowing or giving the
4 Respondents the opportunity to seek guidance from
5 the EPA?

6 A: That would be correct, yes.

7 MR. THOMAS: No further questions, Your
8 Honor.

9 JUDGE MORAN: Any other questions?

10 MR. K. KASTENDIECK: No, Your Honor.

11 JUDGE MORAN: All right. Then, you're
12 excused, Mr. Uthlaut. Thank you.

13 MR. THOMAS: Your Honor, before Complainant
14 calls its next witness, I would ask the Court's
15 permission, that the Court would take judicial
16 notice of Paragraph 6 through 15 of the complaint,
17 and these are the laws of FIFRA, definitions.

18 JUDGE MORAN: Yes, and you're referring to
19 the various sections of the Federal Insecticide,
20 Fungicide and Rodenticide Act, which the first one
21 in Paragraph 6 refers to 7 U.S.C., which of course
22 stands for United States Code, 136 -- Section
23 136(T). Is that right, counsel?

24 MR. THOMAS: That's right, Your Honor.

25 JUDGE MORAN: All right. There's no need to

1 do that, but yes, I would -- There can't be any
2 objection to that, unless you have an objection
3 that those are incorrect representations as to what
4 is found at those sections of the code.

5 MR. K. KASTENDIECK: I have no objections,
6 Your Honor.

7 JUDGE MORAN: All right, counsel, that's
8 done.

9 MR. THOMAS: I would like to call the second
10 witness. I'll call Mr. Mark Leshner.

11 JUDGE MORAN: Mark Leshner?

12 MR. THOMAS: Yes, Your Honor.

13 JUDGE MORAN: Good morning. Raise your
14 right hand, please. Do you solemnly swear to tell
15 the truth, the whole truth, and nothing but the
16 truth, so help you God?

17 MR. LESHER: Yes, I do.

18 JUDGE MORAN: You have to speak up now, and
19 state your name and spell it for the court
20 reporter, please, sir.

21 MR. LESHER: My name is Mark K. Leshner.

22 MR. DUDDING: I'm going to question the
23 witness, Your Honor.

24 JUDGE MORAN: Sure. Go ahead. This is
25 Mr. Dudding speaking. Go ahead.

1 MR. DUDDING: Thank you, Your Honor.

2 QUESTIONS BY MR. DUDDING:

3 Q: You've stated your name for the record.
4 Where are you employed, Mr. Leshner?

5 A: I'm employed with the United States
6 Environment Protection Agency, Region VII,
7 Pesticides Branch.

8 Q: How long have you been employed there?

9 A: Six years and two months.

10 Q: And what is your position?

11 A: My position is case review officer. I'm
12 also the pesticides publication contact and the
13 integrated pest management in schools contact.

14 Q: How long have you been in that -- I suppose,
15 those positions? How long have you been in the
16 position of case review officer, let me rephrase?

17 A: Six years and two months.

18 Q: Thank you. And what are your job duties as
19 case review officer?

20 A: My job as case review officer is to review
21 inspection reports from various marketplace
22 inspections, producer inspections, and other
23 inspections done by our state lead agency
24 inspectors, employed by the department of
25 agriculture.

1 Q: Were you assigned a document to review
2 regarding Mr. Uthlaut's September of 2002
3 inspection of FRM Chem, a.k.a. Industrial
4 Specialities?

5 A: Yes, I was.

6 Q: What did those documents include?

7 A: Those documents included an inspection
8 report, notice of inspections, a receipt for
9 samples, invoices, and some various inspection
10 forms relating to the inspection.

11 MR. DUDDING: At this time, Your Honor, I
12 would like to -- May the witness be handed a copy
13 of Exhibit 2?

14 JUDGE MORAN: Sure.

15 Q: (By Mr. Dudding) Mr. Leshner, can you
16 identify that? Can you identify that document?

17 A: This is the label of the product known as
18 Root Eater.

19 Q: Was that included in the documents submitted
20 to you when you were assigned to Mr. Uthlaut's
21 September 2002 inspection report?

22 A: Yes, it was.

23 Q: Upon your initial review of those documents,
24 did you make any determination or take any action?

25 A: From looking at the label, I noticed several

1 items that caught my attention to the fact that
2 this product may not be a registered pesticide and
3 it was making pesticidal claims.
4 The fact that it says it removes tree roots
5 without damage to sewage systems, that it also
6 removes undesirable fungi and symbiotic organisms
7 whose growth is promoted by root obstruction, tells
8 me that those are pesticidal claims.
9 I noticed that there was no registration
10 number, no EPA establishment number on the label.
11 There was no appropriate warning or signal word on
12 the label for this particular product, and it was
13 missing first aid statements.

14 Q: What is the active ingredient of this?

15 A: The active ingredient is known as copper
16 sulfate.

17 Q: Did that -- Did that provide a further
18 basis for raising a red flag to you?

19 A: That is a known pesticide ingredient that
20 has some toxicity.

21 Q: What actions did you take after your review?

22 A: After my review, I drafted what we call an
23 enforcement case review memo. This was sent to EPA
24 headquarters to confirm my suspicions of it being a
25 violative product.

1 Q: Did you send any supporting material along
2 with that memorandum?

3 A: Yes. I sent a copy of the entire case file,
4 that included this label.

5 Q: And did you get an assessment from
6 headquarters?

7 A: Yes, I did.

8 Q: Thank you. And what was that assessment
9 regarding this product, Root Eater?

10 A: That assessment said that this label was
11 making pesticidal claims, and it was misbranded,
12 and it should be registered as a pesticide product.

13 Q: Was the file returned to you upon
14 assessment?

15 A: Yes.

16 Q: What did you do next?

17 A: My next step was to draft an administrative
18 civil complaint.

19 Q: And how many counts were in the complaint?

20 A: Three counts.

21 Q: Did you note the statutory violations in
22 this complaint?

23 A: Yes, I did.

24 Q: And what were those?

25 A: FIFRA Section 12(a)(1)(A) for distribution

1 of an unregistered pesticide, and FIFRA Section
2 12(1)(a)(E) for distribution of a misbranded
3 pesticide.

4 Q: Did EPA assess a penalty in this complaint?

5 A: Yes.

6 Q: And was it based on three counts?

7 A: It was based on the three counts.

8 Q: And what policy, what procedure is in place
9 -- I'm sorry. Did EPA policy guide you in
10 assessing those penalty amounts?

11 A: Yes. FIFRA Section 14 of the statute of
12 criteria for figuring penalties and what we call
13 the ERP or enforcement response policy is used as a
14 guideline in determining the penalty.

15 Q: What was the amount of the penalty,
16 Mr. Leshner?

17 A: The penalty for each count was \$5,500. It
18 added up to a total of \$16,500.

19 Q: \$16,500. Does the EPA policy provide for
20 variations in the penalty amounts calculated, based
21 on the size of the business that is being
22 penalized?

23 A: Yes, it does.

24 Q: How was that assessed?

25 A: Respondents' businesses are placed in

1 different categories based on the size of their
2 business, and that is figured by examining their
3 gross annual sales.

4 This was provided to me by our regional
5 counsel, through what we call the Dun and
6 Bradstreet reports. This report indicated to me
7 that Respondent's business exceeded one million
8 dollars in annual gross sales that prior year.

9 Q: And so are there different categories that a
10 business will fall in, based on the size of
11 business?

12 A: Correct. According to that amount of money
13 made in that prior year, I placed the Respondent in
14 category number one.

15 Q: Number one out of how many categories? I
16 apologize if you already said this, but I didn't
17 quite catch it.

18 A: There are two categories. Category one, if
19 their annual sales are less than a million dollars
20 -- or category two if they are less than a million
21 dollars. Category one if they are above one
22 million dollars.

23 Q: Thank you. When you calculate the penalty
24 amount for a violation, do you consider any
25 criteria, other than the size of the company?

1 A: Yes, we do.

2 Q: Where is that process laid out?

3 A: That process is also laid out in the
4 enforcement case or enforcement response policy
5 known as the gravity levels. There are five
6 different categories. The toxicity level, the
7 affect to human health, the affect to the
8 environment, the violative history, and the
9 culpability.

10 Q: You consider these five different categories
11 as it applies to Root Eater, by FRM Chem?

12 A: Yes.

13 Q: Can you explain the ranking or rating or
14 assessment you gave in each of those categories,
15 and lead us through your thought process?

16 A: Yes. The first category, toxicity, that's
17 based on two levels, category one and category
18 two. Category one being the highest level.
19 Any pesticide that contains copper sulfate
20 has relative toxicity and should have the warning
21 label or the caution word -- Excuse me. The
22 warning danger on the label. So this puts Root
23 Eater in the category of toxicity level of a
24 category one, and thus, I assigned it the value of
25 two.

1 Q: Based on the copper sulfate?

2 A: Based on the copper sulfate ingredient.

3 Q: How is copper sulfate toxic?

4 A: Copper sulfate is toxic to humans, in the
5 fact that it can cause eye, skin, and respiratory
6 damage.

7 Q: What other criteria did you consider? You
8 said harm to human health?

9 A: Harm to human health is based on a scale of
10 five to one. I assigned a value of three, because
11 there was a potential for serious or widespread
12 danger to human health, due to the fact that copper
13 sulfate is toxic to eyes, skin and respiratory
14 tissue.

15 JUDGE MORAN: Let me just stop you here.
16 Mr. Leshar, the three refers to what category?
17 What were you evaluating when you came up with
18 three?

19 A: Harm to human health.

20 JUDGE MORAN: And how many categories of
21 harm to human health are there?

22 A: There are five levels.

23 JUDGE MORAN: So this is a middle level?

24 A: This is a middle level.

25 JUDGE MORAN: Okay. Go ahead.

1 Q: (By Mr. Dudding) The pesticide toxicity,
2 you assigned it a two?

3 A: Yes.

4 Q: And human health, three. How about
5 environmental harm?

6 A: Environmental harm, that is also based on a
7 scale of one to five. I assigned a value of three
8 because there was a potential for serious or
9 widespread environmental harm, based on the fact
10 that copper sulfate is toxic to fish, many
11 invertebrates, including honey bees, other insects,
12 and other wildlife.

13 Q: You have two more. Compliance history and
14 culpability were the remaining two. Can you tell
15 us your thought process on those?

16 A: The next category was violative history.
17 That was based on a scale of, I believe, five to
18 zero, as well. In this case, the Respondent had no
19 prior violative history, so I assigned it a value
20 of zero.

21 Q: And culpability?

22 A: Culpability, that has a scale from zero to
23 two -- or zero to four, excuse me. In this case,
24 I assigned it a value of two, based on the fact
25 that I thought the violation was caused by

1 negligence.

2 JUDGE MORAN: It could have gone up to a
3 four?

4 A: Yes.

5 MR. DUDDING: I didn't mean to interrupt
6 you, Your Honor.

7 JUDGE MORAN: I'm done with my questioning.
8 Go ahead.

9 MR. DUDDING: I was making sure.

10 Q: (By Mr. Dudding) So you have the five
11 factors and values assigned to each one. How do
12 you consider those five factors together, together
13 with the size of the business and reaching your
14 penalty amount?

15 A: Those levels are added up together. They
16 added up to a value of ten. According to the
17 statutes in the FIFRA Section 14 and the
18 enforcement response policy, that is considered to
19 add up to a ten, and then we would assess a penalty
20 with no penalty adjustments, thus I would assess
21 the penalty for each count of \$5,500, as the base
22 penalty amount. Added together, that would amount
23 to \$16,500 -- \$16,500 for the total penalty.

24 Q: Did you put the penalty calculation process
25 in writing?

1 A: Yes, I did.

2 MR. DUDDING: At this time, Your Honor, I
3 would like to show the witness a document that's
4 marked as attachment A in the prehearing exchange.

5 JUDGE MORAN: Okay. And Respondents, you
6 saw this document that he's referring to; right, in
7 part of the preparing hearing exchange?

8 MR. K. KASTENDIECK: Yes.

9 JUDGE MORAN: This is a document that's
10 dated April 15, 2004, counsel? Counsel, this is a
11 document that's dated April 15, 2004?

12 MR. DUDDING: Yes, it is.

13 Q: (By Mr. Dudding) Have you had a chance to
14 acquaint yourself with the document?

15 A: Yes.

16 Q: And can you identify this document?

17 A: Yes. This is the penalty calculation memo
18 that I drafted and sent to our attorney, Office of
19 Regional Counsel, Rupert Thomas.

20 Q: And this is -- This memorializes the
21 process that you just explained to me; correct?

22 A: Yes.

23 MR. DUDDING: At this time, Your Honor, I
24 would like to move to place this document labeled
25 Attachment A into evidence as Exhibit 10.

1 JUDGE MORAN: Any objection?

2 MR. K. KASTENDIECK: No objections, Your
3 Honor.

4 JUDGE MORAN: Okay. Attachment A, which it
5 was formerly denominated as, is now listed as
6 Complainants's Exhibit 10. It's admitted.

7 MR. DUDDING: Your Honor, I have no further
8 questions for the witness at this point.

9 JUDGE MORAN: Okay. This is your
10 opportunity to ask questions of this witness, sir.

11 MR. K. KASTENDIECK: Yes, Your Honor.

12 QUESTIONS BY MR. KASTENDIECK:

13 Q: Mr. Leshner, are you very familiar with
14 copper sulfate?

15 A: Yes, I am.

16 Q: Are you aware that it is on the Food and
17 Drug Administration's list of GRAS substances,
18 generally recognized as safe?

19 A: Yes.

20 JUDGE MORAN: Just so we are clear on the
21 record, I didn't get that first one. When you say
22 GRAS, that's an acronym that stands for?

23 MR. K. KASTENDIECK: Generally recognized as
24 safe.

25 Q: (By Mr. K. Kastendieck) And that copper

1 sulfate is used in such things as baby formula and
2 cattle feeds?

3 JUDGE MORAN: Are you aware of that?

4 A: Yes, I'm aware of that.

5 MR. K. KASTENDIECK: No further questions.

6 JUDGE MORAN: I have a couple of questions
7 to ask of this witness.

8 QUESTIONS BY JUDGE MORAN:

9 Q: Mr. Leshar, am I correct that when you came
10 up with this penalty calculation, is it not correct
11 that for each of these three counts, EPA is seeking
12 the maximum penalty?

13 A: Yes.

14 Q: So that for the total of the three counts,
15 EPA is seeking the maximum amount that they could
16 seek for these particular violations?

17 A: Yes.

18 Q: And the letter, dated April 15, 2004, the
19 memorandum which is from you to Mr. Thomas, Exhibit
20 10, you indicated, sir, that prior to that, you
21 made an inquiry, apparently in writing, to EPA,
22 asking for some guidance about your suspicions
23 about this particular product?

24 A: Yes, I did.

25 Q: And do you have the copy of that letter that

1 you sent which preceded this April 15th document?

2 **A:** I have it. I believe it's part of the case
3 file.

4 **JUDGE MORAN:** Okay. Well, that has not been
5 introduced into evidence.

6 **MR. THOMAS:** That was not introduced. The
7 Judge is talking about a letter of transmittal that
8 was sent. No, it's not been a part of --

9 **Q:** (By Judge Moran) All right. But my
10 understanding is, sir, that what preceded Exhibit
11 10 was an attempt by you to get some upper level
12 guidance as to your view of this particular label.
13 Is that fair?

14 **A:** Yes.

15 **Q:** And so would it also be fair to state that
16 by the fact that you sent such a letter, you, at a
17 minimum, wanted some reassurance from upper level
18 people, or in fact, perhaps, that you had some
19 uncertainty as to whether you were dealing with a
20 violation or not. Is that a fair
21 characterization?

22 In other words, you didn't just act and
23 begin drafting the complaint. First, you sent
24 something to higher level people to express your
25 concerns and to try and get some feedback; is that

1 right?

2 A: Yes. I wanted to confirm my suspicions of
3 it being a violative product.

4 Q: Okay. And this is part of your case file,
5 which I assume you have here today?

6 A: Yes, I believe so.

7 JUDGE MORAN: And is there any -- Does the
8 EPA have any problems with presenting -- I would
9 like to see the letter from Mr. Leshar that he sent
10 that preceded the April 15th document. Is there
11 any sort of privilege or something?

12 MR. THOMAS: No, Your Honor. If he has a
13 copy of that letter -- I don't know. Do you have a
14 copy of your letter?

15 A: Yes, I have a copy of it in the original
16 case file.

17 MR. THOMAS: That was sent --

18 JUDGE MORAN: And that would have preceded
19 the April 15th document?

20 A: Yes.

21 JUDGE MORAN: And I make no bones about it,
22 the reason for my inquiry about this is, to be fair
23 to the Respondents here -- Because part of my role
24 is to make sure there is a fair determination here,
25 is, I want to see this document to determine

1 whether, in fact, EPA entertained some or harbored
2 some questions about whether they had a violation
3 here or not.

4 It seems to me that if EPA entertained some
5 questions about it, that it wasn't an open and shut
6 crystal clear issue, that there wouldn't have been
7 any need to get reassurance from upper level
8 people.

9 If that's the case, and I won't know until I
10 see that document -- If that's the case, then it
11 also seems that if I accept that there has been
12 pesticidal violations here, it seems to be a fair
13 consideration that if EPA had some doubts, then
14 perhaps it was reasonable for the Respondents to
15 have some doubts, and that could factor into an
16 appropriate penalty.

17 That's where I am coming from. I'm not
18 playing any games about it. I just want to see
19 that document. Do you have any objections to that,
20 Respondents?

21 MR. K. KASTENDIECK: No objections, Your
22 honor.

23 JUDGE MORAN: Go ahead.

24 MR. THOMAS: The EPA has no objection to
25 submitting that letter to you.

1 JUDGE MORAN: Okay. Why don't we pause in
2 the proceedings, and why don't you get that.

3 A: All right.

4 JUDGE MORAN: And then what we'll need to do
5 is, we'll need to make copies of it for myself, for
6 yourself, and for the Respondents. So we're going
7 to go off the record while we do that.

8 (Thereupon, a recess was had.)

9 JUDGE MORAN: At my request, we now have a
10 document which is entitled memorandum. It's dated
11 July 9, 2003, from the witness on the stand.

12 Q: (By Judge Moran) Mr. Leshner, do you have
13 that document in front of you, sir?

14 A: Yes, I do.

15 Q: And for purposes of identification, I'm
16 going to -- I'm going to list this as Exhibit 11.
17 And Mr. Leshner, is this the document that you
18 referred to when you sent questions to EPA for this
19 request for enforcement case review?

20 A: Yes, it is.

21 Q: And this document appears to be simply a
22 form; is that right?

23 A: Yes.

24 Q: And it has no particular reference to this
25 case in terms of any statements by you, other than

1 you have marked an X in certain boxes; is that
2 right?

3 A: Yes. I also drafted the comments section,
4 next to where it says other.

5 Q: Oh, okay. I see. And so at the bottom of
6 that, you state, it appears that this product makes
7 pesticidal claims and is not registered with the
8 EPA. Please confirm. Is that right?

9 A: That's correct.

10 Q: And so would it be fair to state that by the
11 fact that you asked for confirmation and that you
12 state it appears -- for instance, you didn't state
13 this product makes pesticidal claims, that that
14 evidences at least some degree of uncertainty or a
15 question in your mind as to whether you had a case
16 here or not. Is that fair?

17 A: In my mind, I thought we had violations
18 here. It is standard procedure for us to confirm
19 our suspicions by sending an enforcement case
20 review to headquarters.

21 Q: Okay. Let me ask you this question. Does a
22 letter like this go out in every single instance
23 when you're faced with this?

24 In other words, let's assume that you have a
25 product that unquestionably is a pesticide. Would

1 you still send a letter like this, sir, and say --
2 For instance, help me out here. There's a
3 product that is now taken off of the market, but
4 it's used to kill bugs on lawns. It was
5 manufactured by Ortho and some others. Diazinon or
6 something? Do you want to help me out with the
7 name of that?

8 MR. K. KASTENDIECK: Dursban.

9 JUDGE MORAN: Dursban. Hello, who said
10 that?

11 MR. K. KASTENDIECK: I did.

12 JUDGE MORAN: Dursban.

13 Q: (By Judge Moran) Now, you have heard of
14 Dursban?

15 A: Yes.

16 Q: Okay. So here's my question. Assume
17 hypothetically that if you went to -- you received
18 information from the state review person, and you
19 had someone selling Dursban or whatever the proper
20 -- That's just the brand name, but the chemical
21 name, would you still have sent a letter with this
22 personal type, saying, this appears to make --
23 this appears to make pesticidal claims and is not
24 registered, or would you avoid that step and just
25 proceed on without that intermediate step?

1 A: In cases of pesticides that look like they
2 should be registered and make pesticidal claims and
3 involve registration, we would send this
4 enforcement case review on to the registration
5 division of EPA headquarters.

6 Q: Right. But my question is, if you dealt
7 with this hypothetical, with Dursban, would it have
8 been your practice to still say -- You have heard
9 of Dursban?

10 A: Yes.

11 Q: You're aware of -- Is that the product that
12 you cannot use anymore? Is that right?

13 A: Yes.

14 Q: So if you, under my hypothetical, dealt with
15 Dursban, would you still have said, it appears this
16 product makes pesticidal claims and is not
17 registered with the EPA. Please confirm. Or would
18 you have said something stronger than that?

19 A: I would have confirmed my suspicions by
20 sending an enforcement case review to headquarters.

21 Q: Would you have used the same language you're
22 using here? In other words, do you say this every
23 time, sir?

24 A: Yes.

25 Q: The same -- No matter what's involved, in

1 every case, even for Dursban, you would say the
2 same phraseology?

3 A: Yes.

4 Q: So that this particular phrase -- It appears
5 that this product makes pesticidal claims and is
6 not registered with EPA. Please confirm. -- that
7 appears in every one of your letters that you have
8 sent for a request for an enforcement case review?

9 A: I believe so, when it involves an
10 unregistered pesticide.

11 Q: Now, if I'm running an establishment, and
12 I'm producing a product, and my product contains
13 cupric sulfate, is there a place where I can go to
14 in the code of federal regulations, for example,
15 that will advise me as the owner of an
16 establishment, that cupric sulfate is something
17 that is a subject of regulation for pesticidal
18 concerns?

19 Is there a source that I can go to as an
20 owner of a business, look it up, and know what I'm
21 supposed to do? I'm trying to put myself in the
22 position of a producer of cupric sulfate, such as
23 this Root Eater product uses.

24 A: I believe that you can check the code of
25 federal regulations.

1 Q: If I go to the code of federal regulations,
2 if you know, what will I find? What will it tell
3 me as an owner of an establishment about cupric
4 sulfate?

5 A: I'd have to see that before I can comment on
6 it.

7 Q: Can you state with any assurance that I
8 would find cupric sulfate listed in the code of
9 federal regulations, under the FIFRA regulations?

10 A: Under FIFRA, I'm not sure.

11 Q: It may not be there?

12 A: I would have to look. I cannot comment if I
13 have never been able -- haven't seen it there.

14 Q: Okay. When you talk about the signal word,
15 you noted that the label here says caution, and it
16 was your view that the label should have said
17 danger, instead of caution?

18 A: Yes.

19 Q: Okay. And explain to me the reason why the
20 label should have said danger instead of caution.
21 You alluded to it, but explain to me why one is
22 more appropriate than the other, in this case.

23 A: In this case, copper sulfate is in a lot of
24 other registered pesticides, and according to the
25 toxicologists in headquarters that have determined

1 the toxicology levels, have determined that the
2 active ingredient copper sulfate is a toxic
3 material, because it can damage eyes, irritate
4 skin, and cause respiratory damage.

5 It's indicated that it was placed in the
6 toxicity level, the highest toxicity level, along
7 with what we call restricted use pesticides,
8 pesticides that are flammable or combustible, or
9 ones that have chronic health effects.

10 Q: Okay. But I'm still not clear as to --
11 other than the word danger, in place of the word
12 caution, what else does that convey, that is not
13 conveyed by caution? In other words, what in your
14 mind -- How is it that caution is insufficient as a
15 warning word, as opposed to -- is insufficient as
16 opposed to saying danger? I'm trying to appreciate
17 the difference here.

18 A: Right. Well, to me, the word danger
19 signifies that the substance is very harmful, and
20 if it's not used properly, danger can occur, and
21 people in the environment could be harmed. The
22 word caution, it states to me that it is still
23 somewhat dangerous, but not as dangerous. You
24 still have to use it carefully.

25 Q: Do you know, sir, whether the FIFRA Act --

1 in other words, FIFRA, does FIFRA itself -- I don't
2 know. Does FIFRA itself define danger versus
3 caution?

4 A: I'm not sure.

5 Q: Do the regulations define danger versus
6 caution?

7 A: I'm not sure. I would think that the people
8 in the registration division could explain that
9 question better, since they're the ones who
10 determine the levels and the definitions of those
11 orders.

12 Q: Now, do you have an opinion, looking at the
13 label, which is Complainant's Exhibit 2 -- I would
14 like you to assume that there is -- Assume for the
15 sake of argument that this product had to be
16 registered. Let's assume for the sake of this
17 question that it's a pesticide.

18 Mr. Leshar, if this label said danger on it,
19 and assume further that it had an EPA registration
20 number on it, would you have had any other issues
21 related to this label, or would it have passed
22 muster with the EPA?

23 A: I would still have some concerns since it
24 doesn't give the amount of the active ingredient.
25 We have no idea how concentrated the product is,

1 and also, there is no first aid instructions in
2 case there is an accident or a problem.

3 Q: Okay. But in drafting the complaint, you
4 did not identify those as problems, did you?

5 A: I believe I did in the general allegations.

6 Q: But in terms of count one, count two and
7 count three?

8 A: Well, those are incorporated into each
9 count.

10 Q: Okay. In terms of the remedy to deal with
11 the -- In terms of the precautions, in case of eye
12 contact, you see at the bottom of the label, would
13 EPA have required any other precautions to be added
14 to the -- to that phrase at the end of the label
15 that I'm referring to?

16 A: I would believe so. The first aid
17 instructions for most pesticides are much more
18 detailed than what's shown here.

19 Q: Are such first aid instructions a part of
20 the label?

21 A: Yes, they are.

22 Q: And do you know whether, if one produces
23 cupric sulfate, is there a source that an
24 individual or an enterprise can go to and determine
25 with certainty what should be included on that

1 label?

2 **A:** Each chemical has what we call a material
3 safety data sheet that contains all of the chemical
4 information, all of the safety information, and
5 from those set of information, can determine what
6 should be on your label.

7 **Q:** Right. But is there advice when you go to
8 that material data status sheets or safety sheets?

9 **A:** Material safety data sheet.

10 **Q:** Material safety data sheet. I have heard of
11 that actually. When you go to the material safety
12 data sheet, does it provide clear-cut information
13 as to what is to be on the label in terms of
14 precautions?

15 **A:** Yes.

16 **Q:** And so you feel that that information should
17 have been included with the use of cupric sulfite?

18 **A:** Yes.

19 **JUDGE MORAN:** I have no further questions.
20 Do you have any questions you want to ask,
21 Mr. Kastendieck?

22 **MR. K. KASTENDIECK:** Yes. First of all, in
23 response to his answering the question regarding
24 the first aid instructions, EPA just recently,
25 vastly upgraded first aid instructions on

1 registered labels.

2 JUDGE MORAN: Is that correct, you have to
3 ask him.

4 MR. K. KASTENDIECK: Within the last six
5 months, we received new label text copy masters
6 from the EPA with improved first aid instructions,
7 but prior to that, this was pretty typical of --

8 JUDGE MORAN: See, you're making an
9 assertion. You're not asking a question. You can
10 make that a part of your closing statement.

11 MR. K. KASTENDIECK: Okay.

12 JUDGE MORAN: Do you have any questions to
13 ask?

14 MR. K. KASTENDIECK: No, I have no
15 questions.

16 JUDGE MORAN: You could ask him, for
17 example, do you know whether EPA has recently
18 issued new instructions regarding labeling.

19 QUESTIONS BY MR. KASTENDIECK:

20 Q: Are you aware that EPA has issued new
21 regulations regarding first aid labeling?

22 A: Yes.

23 Q: And about what time frame did those new
24 regulations become effective?

25 A: I cannot tell you the exact date. I know it

1 was probably several years ago. I mean, within the
2 last two years.

3 Q: Is it your experience with EPA, that when it
4 becomes effective at the EPA level that the EPA
5 gives formulators a certain period of time in which
6 to comply with the new regulations?

7 A: Yes.

8 MR. K. KASTENDIECK: No further questions,
9 Your Honor.

10 JUDGE MORAN: Any questions on redirect?

11 MR. THOMAS: Yes, Your Honor.

12 QUESTIONS BY MR. THOMAS:

13 Q: Mr. Leshar, earlier Mr. Kastendieck made a
14 statement about copper sulfate or cupric sulfate is
15 probably found in GRAS, and cattle, and so on. Was
16 it your contention that copper sulfate or cupric
17 sulfate doesn't exist within the food chain?

18 A: I believe it's in the food chain in small
19 quantities as a nutrient.

20 Q: So small quantities, perhaps it's allowed in
21 the food chain?

22 A: Yes.

23 MR. K. KASTENDIECK: Objection, Your Honor.
24 By the term GRAS, I meant the acronym G-R-A-S,
25 which stands for generally recognized as safe. Not

1 as grass in the green stuff on the lawn.

2 MR. THOMAS: All right.

3 JUDGE MORAN: Yes, that objection is
4 sustained.

5 Q: (By Mr. Thomas) Now, what was charged --
6 Is there a difference in requirements between an
7 FDA regulation and an EPA regulation?

8 A: I believe so.

9 Q: And in this situation, were you looking at
10 EPA regulations?

11 A: I was looking at EPA regulations.

12 Q: Earlier, also, there was testimony that came
13 out in regards to your submission of reports to
14 headquarters for review?

15 A: Yes.

16 Q: Do you remember that?

17 A: Yes.

18 Q: Is it customary for you to submit a
19 transmittal to EPA headquarters for confirmation?

20 A: Yes.

21 Q: When you made a submission, is it based on
22 because you have a suspicion that there may be a
23 violation, or is it because of confirmation of what
24 you believe to be violation?

25 A: For confirmation of what I believe.

1 Q: Is this the first case that you made such a
2 submission?

3 A: No.

4 Q: Earlier, the judge asked you about products
5 that probably were canceled, off the list,
6 prohibited not to be sold, and products that may
7 not be registered. If a product is barred from the
8 list, taken off the list, not to be registered,
9 wouldn't that be automatic that you would know that
10 that's a violation anyway?

11 A: Yes.

12 Q: Because it's no longer a registered product?

13 A: Exactly.

14 Q: If there is some concern or to get some
15 confirmation about a product being registered, it
16 is customary before an action is filed for you to
17 submit something to headquarters, just to be sure?

18 A: Yes.

19 Q: Is that part of the purpose, because you
20 don't want to go forward with a complaint that may
21 not be a violation?

22 A: Yes.

23 MR. THOMAS: No further questions, Your
24 Honor.

25 JUDGE MORAN: Okay. And so follow-up

1 questions from me.

2 QUESTIONS BY JUDGE MORAN:

3 Q: When you said you were looking, you said
4 Mr. Leshner, that you're relying upon EPA
5 regulations, but my understanding is that if I go
6 to the vast EPA regulations, that I would not be
7 able to find a particular regulation addressing
8 cupric sulfate. Is that true?

9 A: I'm not sure on that, if you could find a
10 specific regulation in FIFRA on each specific
11 chemical. That would be a question I believe for
12 someone in the registration division that's more
13 familiar with their requirements.

14 JUDGE MORAN: Any further questions,
15 Mr. Kastendieck?

16 MR. K. KASTENDIECK: No further questions,
17 Your Honor, but as an aside, I do have a copy of
18 the Food and Drug Administration CFR regarding
19 copper sulfate.

20 JUDGE MORAN: I will consider that. I'm not
21 sure what weight I'll give it, but if you want to
22 cite for me -- This is from the regulations or from
23 the statute?

24 MR. K. KASTENDIECK: From the CFR.

25 JUDGE MORAN: Okay. The Code of Federal

1 Regulations.

2 MR. K. KASTENDIECK: Yes.

3 JUDGE MORAN: What I want you to do is, cite
4 it for me, and I'll take notice of that particular
5 section. Do you have the citation?

6 MR. K. KASTENDIECK: It's FDA HHS 184.1271 C
7 through D.

8 JUDGE MORAN: Right, but you say this is
9 from a CFR. Typically, the way CFR works, there
10 will be something in front of that, that will say
11 like 37 or some number in front, and then --

12 MR. K. KASTENDIECK: Yes, it is -- I don't
13 have the preceding page which lists the CFR book
14 number. I don't have the -- It does not make
15 reference on this page as to the exact book.

16 JUDGE MORAN: But the number you listed was
17 -- this is again from the Department of
18 Agriculture, did you say?

19 MR. K. KASTENDIECK: Food and Drug
20 Administration.

21 JUDGE MORAN: Food and Drug, I'm sorry. And
22 it's 184.1271, Subparagraphs C and D.

23 MR. K. KASTENDIECK: Correct.

24 JUDGE MORAN: And you don't have extra
25 copies of that, I take it?

1 MR. K. KASTENDIECK: No, I do not.

2 JUDGE MORAN: All right. What I would like
3 you to do is, let's say within a week from today's
4 hearing, I would like you to send me the full
5 citation, which would be -- It will say something,
6 some number, and then CFR, and the number you just
7 referred to, and then you have to tell EPA counsel
8 about that too. All right?

9 MR. K. KASTENDIECK: Yes, Your Honor.

10 JUDGE MORAN: And then I can take notice of
11 that particular position. Again, I don't know what
12 weight it will have. I understand your point about
13 it. I don't know what weight I can afford it in
14 this proceeding, but I certainly can take notice of
15 its existence. All right?

16 MR. K. KASTENDIECK: Yes.

17 JUDGE MORAN: Any further questions?

18 MR. K. KASTENDIECK: No, Your Honor.

19 MR. THOMAS: No further questions, Your
20 Honor.

21 JUDGE MORAN: All right. Thank you,
22 Mr. Leshar, you're excused. Is everyone okay to
23 keep going here?

24 MR. THOMAS: That's okay with us, Your
25 Honor.

1 MR. K. KASTENDIECK: Yes.

2 JUDGE MORAN: Okay. Let's move on.

3 MR. THOMAS: We're ready, Your Honor. I'll
4 call my next witness. The next witness is Kerry
5 Leifer.

6 JUDGE MORAN: Mr. Leifer; right?

7 MR. LEIFER: Yes.

8 JUDGE MORAN: Raise your right hand,
9 please. Do you solemnly swear to tell the truth,
10 the whole truth, and nothing but the truth, so help
11 you God?

12 MR. LEIFER: Yes, I do.

13 JUDGE MORAN: Do as the other witnesses did,
14 sir. State your name and spell it for the court
15 reporter.

16 MR. LEIFER: My name is Kerry Brian Leifer,
17 K-E-R-R-Y B-R-I-A-N L-E-I-F-E-R.

18 JUDGE MORAN: Okay, counsel.

19 QUESTIONS BY MR. THOMAS:

20 Q: Mr. Leifer, are you employed?

21 A: Yes, I am.

22 Q: Who is your employer?

23 A: I'm employed with the United States
24 Environmental Protection Agency.

25 Q: How long have you been employed with the

1 EPA?

2 A: About eighteen years.

3 Q: What is your title?

4 A: Currently, I'm a team leader in the
5 emergency response branch of the registration
6 division of the EPA's office of pesticide program.
7 Prior to that, I was the acting chief of the
8 fungicide branch of the registration division.

9 Q: Mr. Leifer, what are some of the things that
10 your job entails?

11 A: Our job in the EPA registration division is
12 concerned primarily, as the name suggests, with the
13 registration of pesticide products. We evaluate
14 products for registrability, issue registrations.
15 Certainly as part of that, we evaluate the label
16 for consistency with the applicable regulations,
17 etc. We also are involved in the evaluation of the
18 data that's required to support the registration of
19 a product.

20 Q: Mr. Leifer, do you have any formal education
21 beyond high school?

22 A: Yes, I do.

23 Q: Can you state that for us?

24 A: Formal education beyond high school would
25 include a degree in Chemistry from the University

1 of Maryland, a bachelors degree in chemistry, as
2 well as other advanced graduate training, and my
3 experience within the EPA's pesticide program,
4 which is seventeen plus years.

5 JUDGE MORAN: Did you say you have a masters
6 degree in chemistry?

7 A: Bachelors.

8 JUDGE MORAN: Did you say a masters degree
9 in anything?

10 A: No, I did not.

11 JUDGE MORAN: I'm sorry. I misheard you.

12 Q: (By Mr. Thomas) Do you have any additional
13 training dealing with the registration of
14 pesticide?

15 A: Yes. For the past seventeen years, I have
16 worked for the registration division of the EPA,
17 office of pesticide programs, and have been
18 involved intimately with the registration of
19 pesticides.

20 MR. THOMAS: Your Honor, I would move and
21 ask the court to certify this witness as an expert
22 witness.

23 JUDGE MORAN: For what purpose?

24 MR. THOMAS: Mr. Leifer, he was listed in
25 the prehearing exchange as such, and he is the

1 person that made the review that may confirm that
2 the Root Eater is, in fact, a pesticide, and
3 therefore, it warrants a registration.

4 JUDGE MORAN: Do you have any objection?

5 MR. K. KASTENDIECK: No objection.

6 JUDGE MORAN: He's going to be an expert for
7 this limited subject, based upon his experience and
8 background. He is so denominated. Go ahead,
9 counsel.

10 Q: (By Mr. Thomas) Mr. Leifer, did you have an
11 occasion to review -- You've been in court, and you
12 heard Mr. Leshar testify that he had submitted
13 documents, samples, for review by EPA
14 headquarters. Were you involved or have any
15 knowledge of the review of that submission?

16 A: Yes.

17 Q: Did you review or concur with that
18 determination?

19 A: Yes, I did.

20 Q: Can you tell the Court what was the
21 determination?

22 A: The determination we made was that the
23 product by virtue of the pesticidal claims and
24 other information was indeed a pesticide and
25 subject to EPA registration. Furthermore, that

1 there was not currently a registration for that
2 particular product, according to our records.

3 Q: Was this the first such review that you have
4 been involved with?

5 A: No, it was not.

6 Q: I take it then -- How many have you been
7 involved with?

8 A: In terms of evaluating products for
9 registrability, hundreds, if not thousands.

10 Q: Mr. Leifer, how did EPA headquarters or you
11 arrive to meet that determination, that this
12 product warranted the registration?

13 A: We went through a number of steps in the
14 process. First and foremost, when we look at a
15 product to determine whether or not it meets the
16 definition of a pesticide, is to consider the
17 actual label claim, and what we're looking to see
18 is whether or not the claim is made that would
19 involve preventing, repelling, mitigating, or
20 destroying any pests. So, first, we look at the
21 types of claims that are made regarding the prevent
22 repel, mitigate, or destroy aspect, and then we
23 consider whether or not there is a pest involved.
24 That's the primary focus.

25 We also consider the product composition, in

1 terms of components that are in the product, but
2 are not recognized, if they are pesticides, whether
3 there is an understanding that a substance may have
4 pesticide use, and those are the primary
5 determinants that we consider.

6 Q: Mr. Leifer, is there some form of a database
7 that exists in the EPA for registered products?

8 A: Yes, there is.

9 Q: You made a check of such database to see if
10 the product was registered?

11 A: Yes, I did.

12 Q: What were the results?

13 A: According to those records, I was unable to
14 find any registration for this particular product,
15 EPA registration.

16 Q: From your experience or knowledge, are there
17 products that make similar claims of Root Eater
18 that are registered?

19 A: Yes, there are.

20 Q: You made a check and determined that?

21 A: Yes, I did.

22 Q: Are these products recent products?

23 A: Well, I checked the database. There are a
24 number of products. What I looked at actually was
25 not just products that made claims to eliminate

1 roots, but also had forms of copper sulfate in
2 them. So a combination of a label claim and an
3 active ingredient.

4 There are a number of currently registered
5 products, some of which have been registered since,
6 I think, 1963, that are on the market today and are
7 currently registered with the EPA.

8 Q: Mr. Leifer, the Complainant alleged -- The
9 Complainant, EPA, filed against Respondents,
10 alleging three counts of distribution or sale of an
11 unregistered pesticide, distribution or sale of an
12 misbranded pesticide. Is it your determination
13 that the product Root Eater should be registered?

14 A: Yes, it should.

15 Q: Is it also your determination that the
16 product is misbranded?

17 A: Yes, it is.

18 Q: Can you explain why the product needs to be
19 registered? Why in your determination was the
20 product misbranded?

21 A: The misbranding aspect, as was discussed in
22 some of the earlier testimony, one of the
23 requirements for an EPA registration is a
24 submission or citation of data on what's known as
25 the acute toxicity of the product to be

1 registered.

2 There is a battery of tests that are
3 performed to look at effects if you ingest
4 something and the effects to the eyes and the skin,
5 and skin sensations, inhalation, exposures.

6 Based upon on information that we have,
7 clearly, copper sulfate causes irreversible eye
8 damage and skin corrosion, and as such, under our
9 regulations, where it is specified in terms of the
10 appropriate signal word for a product, would merit
11 danger as a signal word.

12 In addition, if I may, above and beyond
13 simply the signal word, there would be on the label
14 itself, an indication of that, the fact that the
15 product is corrosive to eyes and is an irritant to
16 skin.

17 Q: In the courtroom when you heard Mr. Lesher
18 testify that other than the caution statement,
19 there should be a danger statement. Are you in
20 agreement with that --

21 A: Yes, I am.

22 Q: -- confirmation?

23 A: Yes.

24 Q: Mr. Leifer, after your review, did you put
25 your determination in writing?

1 A: Yes, I signed a memo with the determination
2 that was made.

3 MR. THOMAS: Your Honor, I ask for
4 permission to tender to Mr. Leifer a copy of a
5 document for his examination.

6 JUDGE MORAN: Yes. Is this one of the
7 documents that was part of the prehearing
8 exchange?

9 MR. THOMAS: That's correct, Your Honor.

10 JUDGE MORAN: Okay. So this is EPA exhibit
11 -- For purposes of identification, EPA Exhibit
12 11? I think the last one submitted was marked as
13 Exhibit 10.

14 Let's go off the record.

15 (Thereupon, a recess was had.)

16 JUDGE MORAN: We'll go back on the record.
17 I don't know if it's 12, but the record will be
18 clear. This one is listed as Exhibit 10. Had I
19 not had this other one intervening, it seems like
20 this one would have been 11, but that's fine.
21 Whatever.

22 MR. THOMAS: We're comfortable making it 12,
23 so long as we're consistent.

24 JUDGE MORAN: Okay. Go ahead.

25 Q: (By Mr. Thomas) Mr. Leifer, you have had an

1 opportunity to examine this document?

2 A: Yes, I have.

3 Q: This was the document that you authored?
4 You wrote this document?

5 A: I concurred with it and signed off on it.

6 Q: Giving your determination, based on your
7 request from the EPA, Region VII, regarding this
8 product?

9 A: The request came through our toxic and
10 pesticides enforcement division.

11 Q: Yes. This was created as a result of a
12 review?

13 A: A review on the request from the toxic and
14 pest enforcement division.

15 Q: Dealing with the issue at hand, the label of
16 Root Eater?

17 A: Yes.

18 MR. THOMAS: At this time, Your Honor,
19 Complainant moves to have this document admitted
20 into evidence as Complainant's Exhibit 12.

21 MR. K. KASTENDIECK: No objection.

22 JUDGE MORAN: Okay. Complainant's Exhibit
23 12, which just so we don't have any mix-up here,
24 this is a letter from Mr. Leifer. Is it Leifer?

25 A: Yes.

1 JUDGE MORAN: Mr. Leifer, September 30,
2 2003, and it has on the top, under memorandum,
3 subject, ECRFY03-VII-013; Root Eater. Is that
4 correct?

5 A: That's correct.

6 JUDGE MORAN: That exhibit is admitted.

7 Q: (By Mr. Thomas) Mr. Leifer, in dealing with
8 product registration, is this a requirement that
9 for product label and registration that a company
10 or manufacturer should submit documents to the EPA
11 for approval?

12 A: Yes.

13 Q: In this case, I think you testified that the
14 record revealed that no such request was made or
15 action was made on this registration?

16 A: I'm not aware that a request was made.
17 Certainly there is no registration. Whether or not
18 it was ever made, I don't know.

19 Q: There was no approval, nothing showing an
20 approval within the system?

21 A: That's correct.

22 MR. THOMAS: No further questions, Your
23 Honor.

24 JUDGE MORAN: Questions, Mr. Kastendieck.

25 MR. K. KASTENDIECK: No questions, Your

1 Honor.

2 JUDGE KASTENDIECK: No questions?

3 I have a few questions.

4 QUESTIONS BY JUDGE MORAN:

5 Q: Mr. Leifer, this document that is Exhibit
6 12, you indicated in the first paragraph, this ECR
7 is a request for determination. What does ECR
8 stand for?

9 A: Enforcement case review.

10 Q: And now, my question to you is, do you in
11 every instance send such a letter to the HQ
12 regional coordinator?

13 A: I believe that that is practice, any time an
14 enforcement case review is forwarded to us for some
15 sort of determination, a response is drafted to our
16 enforcement division, yes.

17 Q: Right. But I mean, my question is -- I want
18 to be sure you understand what I'm asking. In
19 every instance when you get one of these issues, do
20 you always request a determination of the pesticide
21 status of every product, or do you sometimes
22 short-circuit that and feel there is no need to
23 request a determination of a pesticide status of a
24 particular product?

25 A: Well, again, it would obviously depend upon

1 the nature of the request. Typically, when it
2 involves the registration division, it is some sort
3 of labeling issue at hand, and often times, the
4 question is, is this product a pesticide. That's
5 what we're being asked to determine.
6 There are other aspects as well. Certainly,
7 any aspect of the label comes within our purview.
8 So it has to do with appropriate and precautionary
9 labeling, an appropriate indication of the active
10 ingredients, appropriate use directions, the whole
11 pan of labeling requirements would be something
12 that we would potentially be asked to weigh in on,
13 as basically, the program office that has the lead
14 on registration.

15 Q: My question is -- And maybe I don't
16 understand your answer fully. But my question is a
17 little more simple and basic. Do you always
18 request a determination of a pesticide status of
19 every product that comes through?
20 Is it routine and unvarying that you need to
21 get this determination of the pesticide status of
22 any product in all instances, or is it only in
23 certain cases that you have to get this
24 determination?

25 A: Well, this is an enforcement action.

1 Normally, we would see registration type
2 activities, so we're not -- I mean, this was a
3 result of a specific case. Yes, we certainly make
4 a determination as to whether or not a product
5 merits registration, in the course of EPA
6 registering a product, and certainly, we have
7 occasion to render determinations that a product
8 does not require EPA registration.

9 Q: My understanding from what you have told me
10 would be that you really can't go forward until you
11 have a determination of a pesticide status of a
12 particular product. You need that determination.

13 A: Again, this was a specific request related
14 to a potential enforcement action. This is not --
15 We don't have enforcement cases pending on every
16 product that we evaluate. It really depends upon
17 -- This was in response to a particular request.

18 Q: But in every enforcement proceeding, do you
19 need to have a determination of a pesticide status?

20 A: I would believe if the case involves a
21 misbranding, if the allegation is that the product
22 is a pesticide, then, yes, we would be asked the
23 very same question.

24 Q: So in other words, you can't make the
25 determination of a pesticide status without having

1 it checked by someone above you?

2 A: No, I made this determination.

3 Q: This is from you, I'm sorry. That's right.
4 Okay. Now, you first became involved in this
5 when?

6 A: In this particular case, sometime prior to
7 this September 30th date. I'm not sure exactly
8 when the actual enforcement case review came across
9 my desk.

10 Q: In your testimony on direct, you indicated
11 that we made a determination that this was a
12 pesticide. Who is the we that made that
13 determination?

14 A: Some of the staff within the fungicide
15 branch assisted me in the preparation of this
16 memorandum.

17 Q: And so correctively, you made a
18 determination?

19 A: No. Ultimately, it was my determination.
20 They just provided me with information.

21 Q: Can you tell me, is cupric sulfate
22 indistinguishable from copper sulfate? Are they
23 the same thing?

24 A: Cupric sulfate is a synonym to copper
25 sulfate, yes.

1 Q: Actually the same thing?

2 A: Well, we're getting into a bit of different
3 forms of copper sulfate. Cupric sulfate is, I
4 think, generally considered to be copper sulfate.
5 There's no question that cupric sulfate is copper
6 sulfate.

7 Q: Okay. And have you dealt specifically with
8 cupric sulfate before in your years of experience
9 with the EPA?

10 A: Yes, I have.

11 Q: And have you dealt specifically with the use
12 of cupric sulfate being used by other manufacturers
13 for dealing with roots?

14 A: Yes. As I mentioned in my earlier
15 testimony, we have a number of products that have
16 been registered with the EPA for root removal that
17 contain copper sulfate and anhydrate is the active
18 ingredient, and additionally, we have other
19 products that make root removal claims that may
20 have other active ingredients.

21 Q: Now, let me ask the question I asked of
22 Mr. Leshar before. If I'm producing copper sulfate
23 or cupric sulfate, is there a particular regulation
24 that I can go to as an enterprise and determine
25 what my obligations are? Is there a citation in

1 your regulations? I thought you referred to the
2 regulations.

3 A: A citation -- Well, the regulations don't
4 have the prescriptive forms for EPA registration.
5 They talk about registration in general. There
6 certainly are a number of sources of information,
7 both in the EPA pesticide program that are publicly
8 available and at other locations that would
9 indicate the regulatory status of copper sulfate as
10 a pesticide.

11 Q: And am I correct that assuming that this
12 particular respondent had registered this product,
13 and assuming further that they received a
14 registration number and the signal word danger was
15 on there, EPA has no outright ban on using this
16 product for this purpose; is that correct?

17 A: There is no -- No, there is no outright ban
18 on it.

19 Q: So had they followed the correct procedures,
20 at least from the EPA's perspective, there wouldn't
21 be any problem with them selling this product for
22 its exact use; correct?

23 A: Not with the label. We wouldn't have
24 accepted the product with the current label.

25 Q: Yes, I understand. In terms of the use of

1 the product.

2 A: The general use, we do have registration for
3 general uses.

4 Q: And in terms of the medical use, would you
5 have had any other instructions on here in terms of
6 eye contact?

7 A: Yes. We clearly indicate it would have been
8 a requirement of the labeling, that it causes
9 irreversible eye damage and skin irritation, which
10 doesn't appear on the label.

11 Q: And in terms of these other products that
12 use cupric sulfate for the same purpose, their
13 labels have such information on it?

14 A: I haven't checked every label. I know at
15 least one of the products certainly does.

16 JUDGE MORAN: I have no other questions to
17 ask of this witness. Do you have any questions to
18 ask Mr. Kastendieck?

19 MR. K. KASTENDIECK: No other questions at
20 this time.

21 JUDGE MORAN: Any redirect, counsel?

22 MR. THOMAS: No further questions, Your
23 Honor.

24 JUDGE MORAN: All right. Thank you,
25 Mr. Leifer. You're excused.

1 MR. THOMAS: Complainant will call Ms. Joyce
2 Hughes.

3 JUDGE MORAN: Now, you indicated, counsel,
4 that this witness is listed on an addendum to the
5 prehearing exchange?

6 MR. THOMAS: Ms. Hughes, yes.

7 JUDGE MORAN: Let me see if I can get that
8 in front of me.

9 You can come up though.

10 Did you receive, Mr. Kastendieck, an
11 addendum that identified this witness?

12 MR. K. KASTENDIECK: I do have a copy of the
13 addendum, Your Honor.

14 MR. THOMAS: It was mailed, Your Honor.

15 JUDGE MORAN: I can't get my hands on it,
16 but the Respondents have indicated that you have
17 been noted, so I'll swear you in.

18 Would you raise your right hand, please. Do
19 you solemnly swear to tell the truth, the whole
20 truth, and nothing but the truth, so help you God?

21 MS. HUGHES: I do.

22 JUDGE MORAN: Have a seat, and do as the
23 other witnesses did for me.

24 MS. HUGHES: My name is Joyce Hughes,
25 H-U-G-H-E-S.

1 JUDGE MORAN: Would you spell that one more
2 time for me.

3 MS. HUGHES: H-U-G-H-E-S.

4 JUDGE MORAN: Thank you.

5 MR. THOMAS: Your Honor, before I proceed, I
6 would like to present to you a copy of the
7 supplement.

8 JUDGE MORAN: Okay. Fine. Thank you.
9 Again, I'm not saying that I didn't receive it. I
10 just can't get my hands on it here. Thank you. Is
11 this a copy that I can keep?

12 MR. THOMAS: Yes, Your Honor.

13 JUDGE MORAN: Thank you.

14 QUESTIONS BY MR. THOMAS:

15 Q: Ms. Hughes, are you employed?

16 A: Yes, I am.

17 Q: Where are you employed?

18 A: U.S. Environmental Protection Agency.

19 Q: How long have you been employed with the
20 EPA?

21 A: With the agency, about nineteen years.

22 Q: What do you do at the EPA?

23 A: My position is an accountant. I work in the
24 resource financial management branch.

25 Q: Ms. Hughes, do you have any formal schooling

1 beyond high school?

2 A: Yes, I do.

3 Q: Would you state that for the Court.

4 A: I have a bachelors of science degree in
5 business administration with an accounting major.

6 Q: Have you had any further courses or training
7 in accounting or financial analysis?

8 A: Yes. Financial analysis, I have had some
9 formal courses since I have -- in the last, say,
10 five or six years, and also, I have had on-the-job
11 training.

12 Q: Ms. Hughes, did you have occasion to review
13 some tax returns and financial documents regarding
14 FRM Chem, a.k.a. Industrial Specialties?

15 A: Yes, I did.

16 JUDGE MORAN: Do you intend to qualify her
17 as an expert?

18 MR. THOMAS: Yes.

19 JUDGE MORAN: Go ahead.

20 MR. THOMAS: Your Honor, I would like to
21 move to qualify Ms. Hughes as an expert.

22 JUDGE MORAN: You move to have her as an
23 expert for this purpose?

24 MR. THOMAS: Yes, Your Honor.

25 JUDGE MORAN: Any objection?

1 MR. KASTENDIECK: No objection, Your Honor.

2 JUDGE MORAN: Let's go off the record for a
3 minute.

4 (Thereupon, an off-the-record discussion was
5 had.)

6 JUDGE MORAN: We're back on the record.

7 Q: (By Mr. Thomas) Ms. Hughes, the documents
8 that you reviewed, did you review these documents
9 as a result of your official function with EPA,
10 Region VII?

11 A: Yes.

12 Q: What was the purpose for your review of
13 Respondent's financial documents?

14 A: The purpose was to make a determination as
15 to the ability to pay the FIFRA penalty in the
16 amount of \$16,500.

17 Q: Ms. Hughes, upon your completion of the
18 financial document review, have you formulated an
19 opinion or come to a conclusion, pertaining to
20 Respondent's ability to pay \$16,500?

21 A: Yes.

22 Q: What is your opinion and what was that
23 conclusion or determination?

24 A: My opinion is that FRM Chem, Inc. has the
25 financial ability to pay \$16,500 in the FIFRA

1 penalty.

2 Q: Ms. Hughes, could you explain for the Court
3 how you arrived at that determination?

4 A: Yes.

5 Q: That Respondent, FRM Chem, can pay \$16,500.

6 A: When I make that determination, I look at
7 three areas. One, equity; two, the firm's ability
8 to obtain funds to finance the penalty; and three,
9 solvency of the company.

10 After reviewing the documentation that was
11 presented to me, I have determined that FRM Chem,
12 Inc. has shown that they are a viable, ongoing
13 corporation, and they are a family owned
14 corporation.

15 I based that determination on several
16 things. I look at the company's ability to make
17 their payments. The company has shown that they
18 have made their tax payments, approximately
19 \$122,000 yearly. They have had their -- I'm
20 sorry. I take that back. Their interest payments,
21 not tax payments. They have made their interest
22 payments yearly, and that is about \$122,000.
23 The company also has made their property and
24 personal property taxes, so they are current with
25 their taxes. They also are reducing their mortgage

1 on a yearly basis of approximately about \$11,000.
2 Also, the mortgage interest rate is prime plus one
3 percent. Banks usually give their best customers
4 that type of interest rate. So that's telling me
5 that they are -- they are in a position to go
6 ahead and get financing with a bank.

7 The other thing I looked at was, the company
8 making their payroll. Over the five years of the
9 tax returns and financials that I looked at, the
10 company was able to make salary payments on the
11 average of \$440,000 a year.

12 Also, they made commissions, gave
13 commissions on an annual basis of about \$190,000 a
14 year. The company also has other income. Not
15 much, but they do have rental income of about
16 \$120,000 a year.

17 JUDGE MORAN: Ms. Hughes, will you back up
18 and tick off for me the information sources that
19 you have relied upon to make those conclusions?
20 Where did you go to again?

21 A: Okay. I received copies of the firm's
22 corporate tax returns for the years 1998 through
23 2002.

24 JUDGE MORAN: This was delivered from the
25 Respondents?

1 A: Yes.

2 JUDGE MORAN: Okay.

3 A: And also, income statements and profit and
4 loss statements.

5 JUDGE MORAN: From the Respondents, as well?

6 A: From the Respondents. And also, there is an
7 EPA form, the ability to pay claim form, which is
8 completed by the Respondents and signed by Raymond
9 Kastendieck.

10 JUDGE MORAN: Those are the sources of the
11 information that you relied upon to reach the
12 conclusions that you just testified to?

13 A: Yes.

14 JUDGE MORAN: Anything else?

15 A: Yes. I also did check the Dun and
16 Bradstreet report. That report also stated that
17 the company is in good standing. Beyond that, I
18 also looked to see what assets and liabilities the
19 company has. Asset wise, on the average, they have
20 accounts receivables, in the amount of like
21 \$300,000.

22 JUDGE MORAN: What was the source of that
23 information?

24 A: Again, it was the financial. All three. I
25 looked at all three documents.

1 JUDGE MORAN: But I mean the source was
2 provided by the Respondents?

3 A: Yes. Information I am giving you was all
4 gleaned from the information that the Respondents
5 provided. Also, besides the accounts receivable,
6 they have a notes receivable of \$115,000. They
7 also have a good will that's worth over about
8 \$280,000, \$230,000. When I look at their
9 liabilities, they have a mortgage of, I'm not sure,
10 I think it's about \$138,000. They have accounts
11 -- They listed accounts receivable to A.L. Clark
12 Chemical of about \$80,000. They are indebted to
13 the employee savings or savings fund -- employee
14 savings plan for, I think, \$80,000, and there is
15 \$1.5 million in loans to the four family board
16 members or stockholders.

17 JUDGE MORAN: How many employees are listed?

18 A: I think it was about eleven or twelve
19 employees. And also, I would like to add, when you
20 look at their gross receipts, it's \$1.5 million
21 annually, average, and \$16,500 is less than 2
22 percent of that \$1.5 million in gross receipts, so
23 I looked at that also.

24 JUDGE MORAN: Okay. Counsel, any further
25 questions?

1 MR. THOMAS: No further questions, Your
2 Honor.

3 JUDGE MORAN: Do you have any questions to
4 ask of this witness?

5 MR. K. KASTENDIECK: No questions, Your
6 Honor.

7 JUDGE MORAN: Thank you for your testimony.
8 You're excused.

9 MR. THOMAS: No more witnesses to call, Your
10 Honor. That's our final witness.

11 JUDGE MORAN: So you're saying the EPA
12 rests?

13 MR. THOMAS: The EPA rests.

14 JUDGE MORAN: Mr. Kastendieck, this is your
15 opportunity within the limits that I described
16 during our phone conversation, in terms of
17 rebuttal, or any of the testimony that you heard
18 here today, if you or -- Is this your father who is
19 next to you? Is it your father?

20 MR. K. KASTENDIECK: Yes, sir.

21 JUDGE MORAN: This is optional on your
22 part. It's your opportunity within the limits that
23 I have already explained to you, to put on evidence
24 if you care to.

25 MR. R. KASTENDIECK: Your Honor, we're

1 looking at this, and always have from the very
2 beginning, as a cleaning compound and not a
3 sanitizer, or a pesticide, or any type of a --

4 JUDGE MORAN: Let me just stop you, sir.
5 Are you attempting to testify right now, or are you
6 --

7 MR. R. KASTENDIECK: I don't know what I'm
8 doing right now.

9 JUDGE MORAN: That's fine. It sounds like
10 -- I'll give you a chance to huddle with your
11 son. But what you're doing now is, it sounds more
12 like you making a closing.

13 MR. R. KASTENDIECK: I thought that's where
14 we were at.

15 JUDGE MORAN: Well, not if you wanted to
16 have any testimony. If you disagreed with it --
17 Remember, at the beginning, your son raised an
18 issue -- I can't remember what it is now, but I
19 told him he would have to wait until later on.
20 If there's anything that either of you want
21 to testify to, to deal with the fact of the
22 violation, that's one category, or with the
23 appropriateness of the penalty, then the way we
24 have to work that is, one of you come up here and
25 be sworn in, and the other one asks the questions.

1 Other than that, if you don't want to do
2 that, and that again is fine, it's your choice, not
3 mine, then we'll allow you to take the floor and to
4 make your closing statement that you just started,
5 and I interrupted you on.

6 Why don't you just discuss what you want to
7 do.

8 MR. R. KASTENDIECK: We have no questions,
9 Your Honor.

10 JUDGE MORAN: So now, after having
11 interrupted you, just back up, and you can make
12 your closing statement to me, and then I'm going to
13 allow the EPA to make a closing statement, if they
14 want, and then there are some other administrative
15 things we'll have to deal with after that.

16 So go ahead and start from the beginning
17 again. And you know, Mr. Kastendieck, it's fine
18 that you stand, but you don't have to stand. You
19 can do whatever is most comfortable.

20 MR. R. KASTENDIECK: I need to stand up a
21 little bit to rest. The seat gets kind of hard
22 after a while.

23 JUDGE MORAN: That's fine. You do whatever
24 you feel comfortable doing.

25 MR. R. KASTENDIECK: There are several

1 things that we took exception to. As soon as the
2 EPA notified us that they thought this product was
3 regulated, we ceased production. We've produced a
4 total of 650 pounds in a five year period. So it
5 hadn't been a very big deal.

6 The other thing, of course, as mentioned
7 before, we understood that when it was first
8 inspected in '99 that we would be getting some word
9 from the EPA to the extent of whether the product
10 required registration or whether it did not. We
11 never heard anything until September of 2003, which
12 is a little over three years later.

13 MR. THOMAS: Your honor, with your
14 permission, I'm object to Mr. Kastendieck -- he's
15 testifying, rather than making a closing statement.

16 JUDGE MORAN: What you're really going to
17 have to do, and I have no problem with this, is to
18 come up here and to be sworn in, and to testify.
19 For example, Mr. Kastendieck, you would
20 testify -- And I'll let you do a free-form
21 statement here. You would testify, I assume, when
22 you come up here and I swear you in, that you have
23 ceased production of this product, and that as soon
24 as you received -- or sometime after you received
25 the notice of a problem from the EPA, you stopped

1 making it and you haven't made it since.

2 You might also tell me, for example, you
3 were trying to work with the EPA to straighten out
4 the label.

5 But the things that you're talking about
6 right now, they do require -- For example, another
7 thing is, when you come up here, you might state,
8 as you stated and your son stated, that you
9 requested EPA to provide you some guidance in
10 writing and that they never did.

11 So those are the kinds of things that I need
12 you to come up here and to testify about under
13 oath, and then EPA counsel will have an opportunity
14 after you have done that, to ask you some questions
15 about your statements.

16 Now, I'm not making you come up here and
17 testify under oath, but counsel for EPA is correct
18 that you veered off the line of summing up
19 positions, and you're into the category of
20 testifying.

21 See, you're asserting facts. So you have to
22 tell me what you want to do. You either have to
23 back away from those assertions or come up here and
24 state them under oath.

25 MR. R. KASTENDIECK: I'll come up and

1 testify.

2 JUDGE MORAN: What's that?

3 MR. R. KASTENDIECK: I'll testify under
4 oath.

5 JUDGE MORAN: Good. Come on up here. Watch
6 your step and don't trip.

7 MR. THOMAS: Your Honor, with your
8 permission, I object to any testimony of this
9 witness, based on the ruling. Respondent did not
10 submit a prehearing exchange, did not submit a list
11 of exhibits.

12 JUDGE MORAN: I overruled your objection.
13 I'm going to tell you why. I overruled it because
14 in my view, what Mr. Kastendieck wants to testify
15 to is in the nature of rebuttal. Rebuttal is
16 appropriate, as opposed to presenting their own
17 side of the case. This is in the nature of
18 rebuttal for that type of testimony which EPA
19 received, therefore, it's appropriate to hear it.

20 MR. THOMAS: That's fine. I wanted my
21 objection noted.

22 JUDGE MORAN: That's fine.
23 Raise your right hand, please, sir. Do you
24 solemnly swear to tell the truth, the whole truth,
25 and nothing but the truth, so help you God?

1 MR. R. KASTENDIECK: Yes, sir.

2 JUDGE MORAN: Okay. Do you remember how the
3 other witnesses did it? You're going to have to
4 state your name and spell it for the court
5 reporter.

6 MR. R. KASTENDIECK: My name is Raymond
7 Kastendieck, R-A-Y-M-O-N-D K-A-S-T-E-N-D-I-E-C-K.

8 JUDGE MORAN: And now, under oath, go ahead
9 and tell us. Even though you're going to be
10 repeating yourself, we're in a different status
11 here now. Tell me again what you want to state
12 here, Mr. Kastendieck. Go ahead.

13 MR. R. KASTENDIECK: We have been under the
14 impression all along, and in fact, we thought we
15 were going out of our way to wording a label that
16 would not fall under the registration purviews on a
17 pesticide, something that kills or whatnot, and
18 remove is to us a cleaning term.
19 We're primarily in the business of cleaning
20 compounds for a number, a variety of industries,
21 and that was our intention that we were selling a
22 sewer cleaner and not a pesticide as a root remover
23 -- cleaning the roots, and not using it as a
24 pesticide. Cleaning is what we were attempting to
25 do.

1 QUESTIONS BY JUDGE MORAN:

2 Q: Mr. Kastendieck, did you ever meet
3 Mr. Uthlaut?

4 A: No, I never did.

5 Q: You never met him?

6 A: I was always gone.

7 Q: Was it your understanding that you or some
8 member of your family requested from EPA, or from
9 Mr. Uthlaut, or both, something in writing
10 regarding the subject of this product?

11 A: That's what I was told when he left, that we
12 would be getting an opinion from the EPA as to
13 whether the product required registration or not.

14 Q: And did you request something in writing
15 from EPA or from Mr. Uthlaut on more than one
16 occasion?

17 A: We did not.

18 Q: You did not request anything in writing?

19 A: Well, we --

20 MR. K. KASTENDIECK: Your Honor, if I may, I
21 did request something in writing from Mr. Uthlaut.

22 JUDGE MORAN: You'll have to come up and
23 testify to that.

24 A: Since I wasn't there, I don't know, because
25 I was travelling at that time.

1 Q: (By Judge Moran) You didn't actually
2 request anything in writing from EPA?

3 A: I did not personally, no.

4 Q: Do you still make this product now, sir?

5 A: No.

6 Q: Did you stop making the product as soon as
7 EPA told you there was a problem with it?

8 A: As far as I know, we did, yes. I'm not that
9 close to production.

10 Q: Are you selling the product now?

11 A: No, not this product.

12 Q: Are you working with EPA to try to develop a
13 label so you can sell the product?

14 A: No.

15 Q: You're not selling this cupric sulfate at
16 all now; is that right?

17 A: We're selling it in some instances, labeled
18 with the regular raw materials. It comes from a
19 manufacturer with the label registered on it. We
20 don't repackage it, we just sell it. We buy it in
21 a bag and we sell it in the bag, as far as I know.

22 Q: Okay. Go ahead. Do you have anything else
23 you want to make in terms of your statement, sir?

24 A: I forget where I was.

25 JUDGE MORAN: Maybe your son can help you

1 out.

2 MR. K. KASTENDIECK: You were talking about
3 the lack of a written response or a written opinion
4 from EPA?

5 MR. R. KASTENDIECK: Well, for one thing,
6 with our volume of business and in particular with
7 a product like this, there is no way that we could
8 sustain the cost of a registration plus the cost of
9 the yearly maintenance. It would be completely out
10 of the question. \$500 a package of what we sold to
11 try to maintain and get EPA registration and
12 maintain one. We do everything we can to avoid
13 wording on a label that will cause or sustain a
14 product to be registered, because of the cost. The
15 cost would be prohibitive. All of the products
16 that we sell are under registered label or
17 subregistered under some other larger company,
18 producer, or something like that, to be
19 subregistered.

20 JUDGE MORAN: I see. Do you have any other
21 statement you want to make, or does your son have
22 any other questions to ask you?

23 MR. K. KASTENDIECK: I don't think so, no.

24 MR. R. KASTENDIECK: We were marketing a
25 cleaning product since we did cleaning products

1 primarily and not as an EPA registered sanitizer.

2 MR. K. KASTENDIECK: Pesticide.

3 JUDGE MORAN: You believed it was a cleaning
4 product?

5 A: That's what we meant. That's the way we
6 worded it, a cleaning product, but not a product
7 that required a registration as a pesticide. It
8 comes down to, I guess, what does the word remove
9 mean. When we're in cleaning, we remove the soil,
10 and so it was a sewer cleaner that we would remove
11 the roots. That was our version of it, the way we
12 looked at the product.

13 JUDGE MORAN: Do you have any questions,
14 counsel, to ask?

15 MR. THOMAS: No questions, Your Honor.

16 JUDGE MORAN: Thank you, Mr. Kastendieck.

17 MR. R. KASTENDIECK: Thank you.

18 JUDGE MORAN: Watch your step there.

19 What about the younger Mr. Kastendieck, do
20 you want to make any sort of a statement under
21 oath, sir, or not?

22 MR. K. KASTENDIECK: No, I don't need to.
23 He said it all. He stated our position.

24 JUDGE MORAN: Okay. Is there anything in
25 terms of rebuttal from the EPA?

1 MR. THOMAS: Just the final statement, Your
2 Honor, that Mr. Uthlaut testified that
3 Mr. Kastendieck did not make any request of him, as
4 Mr. Kastendieck stated.

5 JUDGE MORAN: All you're doing is pointing
6 out something?

7 MR. THOMAS: Yes.

8 JUDGE MORAN: All right. So you don't have
9 anything in terms of rebuttal?

10 MR. THOMAS: No. EPA rests.

11 JUDGE MORAN: Let me tell you the way the
12 process works at this point. We're about to come
13 to a close in this hearing.
14 You have nothing else to present, sir?

15 MR. K. KASTENDIECK: The only thing, I did
16 find, Your Honor, regarding the CFR --

17 JUDGE MORAN: The site?

18 MR. K. KASTENDIECK: I did find the CFR
19 number.

20 JUDGE MORAN: Okay.

21 MR. K. KASTENDIECK: 21 CFR.

22 JUDGE MORAN: Thank you.

23 MR. K. KASTENDIECK: Chapter one, which it
24 is from the 4103 edition, and then it is 184.1271.

25 JUDGE MORAN: Okay.

1 JUDGE MORAN: Is there anything further you
2 wanted to bring up in front of me today?

3 MR. K. KASTENDIECK: No, Your Honor.

4 JUDGE MORAN: All right. EPA has concluded
5 their case. Let me tell you what happens next.

6 This is optional. You can submit what's called
7 post hearing briefs. That requires that you have
8 to, you know, get a copy of the transcript, which
9 if you want it, I would direct EPA to provide you
10 with a copy at no cost. But then what it involves
11 is marshalling the testimony, and expressing your
12 view as to A, if this is your view point. A, there
13 was no violation, and B, if there was a violation,
14 we feel the penalty is inappropriate. And that's
15 called a post hearing brief.

16 You could, in place of that, since you're
17 not lawyers, if you want to, you could submit a
18 letter of summation, summarizing your company's
19 perspective about this case, and ultimately,
20 recommending either A, there is no violation,
21 and/or B, that the penalties are inappropriate.
22 You could do that.

23 Or you can just leave it in my hands and let
24 me decide the case, based upon my own independent
25 review of what was said during this hearing and

1 what was admitted in terms of documents in this
2 case.

3 Now, having said that, EPA still has the
4 opportunity, if they want to, and they typically
5 do, even when it is a pro se respondent, they may
6 wait and submit a post hearing brief. And if they
7 do that, then you have an opportunity to, within a
8 few weeks after that, which I would set a date for,
9 you can submit a reply, a response to that brief,
10 where you take issues with things that they state
11 in their brief.

12 So what we have to do now is figure out
13 whether post hearing briefs are going to be
14 submitted by one or both sides, and if that's the
15 case, I'll leave it open for you, for the
16 opportunity to submit a response. Do you intend to
17 submit any sort of a brief or a letter about this
18 case, Mr. Kastendieck?

19 MR. K. KASTENDIECK: I think we want to
20 leave it in your hands, Your Honor. I believe so.

21 JUDGE MORAN: Does the EPA intend to submit
22 a post hearing brief?

23 MR. THOMAS: Yes, Your Honor.

24 JUDGE MORAN: All right. Then let's
25 establish when this post hearing brief will be

1 due. Normally, it takes ten days, ten working
2 days, today being the 26th. Then certainly, you
3 would have the transcript in hand by September 9th
4 -- well before that. I'm sorry. We'll make it
5 the -- Yes, you would have it by the 9th, and so
6 I'm going to require that the EPA brief be
7 submitted by October 15th. Is that doable,
8 counsel?

9 MR. THOMAS: Yes, Your Honor.

10 JUDGE MORAN: Okay. And so they'll send you
11 a copy of that brief, and then they'll send one to
12 me, and then within two weeks after that brief,
13 then if you want to submit something to me, and
14 please do submit something, where you say -- For
15 instance, you might say, we have no further comment
16 to make regarding the brief, or you might say, we
17 have the following points to raise regarding the
18 EPA brief. But don't just leave it out there with
19 no response. I want to know one way or another
20 what your position is.

21 So I would like that delivered to me, filed,
22 which means put in the mail. I would like that
23 mailed -- put in the mail by November 2nd. In
24 other words, the postage date of November 2nd on
25 it. If you have any questions about my office

1 address, you should just check with the EPA
2 counsel. If you send something U.S. Mail, it goes
3 to one address, because of security reasons in
4 Washington. If you send your letter by FedEx or
5 some other private courier, it's another address.
6 I don't know how you're going to send it. You
7 check with Ms. Tories. That's my office. You have
8 seen my number listed, and she'll tell you the
9 correct address, depending on how you are going to
10 send something to me.

11 Anything further?

12 MR. THOMAS: Nothing further, Your Honor.

13 JUDGE MORAN: You know, you have to postmark
14 a response by November 2nd.

15 MR. K. KASTENDIECK: Yes, Your Honor.

16 JUDGE MORAN: Unless there is something
17 further, I'm going to call the hearing to a close.
18 Anything further from EPA?

19 MR. THOMAS: Nothing further, Your Honor.

20 JUDGE MORAN: Thank you for your
21 presentation.

22 And from the Respondents?

23 MR. K. KASTENDIECK: No, Your Honor.

24 JUDGE MORAN: Thank you all. This hearing
25 will come to a close.

1 State of Missouri

2 SS.

3 City of St. Louis

4

5 I, Sondra D. DeVries, a Certified Shorthand
6 Reporter (CCR No. 576 & CSR No. 084-003981) and a
7 Notary Public in and for the State of Missouri,
8 hereby certify that I was attended at the United
9 States District Court, 750 Missouri Avenue, East
10 St. Louis, Illinois 62201, by the aforesaid
11 attorneys; on the 26th day of August, 2004.

12 I further certify said proceedings were by
13 me reported in shorthand and caused to be
14 transcribed into typewriting, and that the
15 foregoing pages correctly set forth the
16 proceedings, and is in all respects a full, true,
17 correct and complete transcript.

18 Witness my hand and notarial seal at
19 St. Louis, Missouri, this 4th day of September,
20 2004.

21 My Commission expires August 2, 2005.

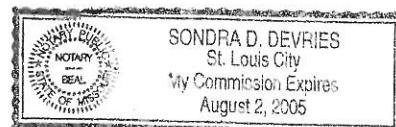
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Sondra D. DeVries

23 Sondra D. DeVries

24 Notary Public in and for the

25 State of Missouri



Gore Perry Gateway & Lipa St. Louis, MO
(314) 241-6750 621-4790 621-2571 621-8883