

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 7  
901 NORTH 5<sup>th</sup> STREET  
KANSAS CITY, KANSAS 66101

10 11 2009 -2 PM 3:07

ENVIRONMENTAL PROTECTION  
AGENCY-REGION VII  
REGIONAL HEARING CLERK

BEFORE THE ADMINISTRATOR

IN THE MATTER OF ) Docket No. FIFRA-07-2009-0041  
)  
Synisys, Inc., FRM Chem, Inc., ) MEMORANDUM IN SUPPORT  
Keith G. Kastendieck, and Karlan C. ) OF COMPLAINANT'S  
Kastendieck ) MOTION FOR DEFAULT  
) AS TO LIABILITY  
)  
Respondents )

**I. INTRODUCTION**

This memorandum is filed in support of a motion for default filed by the United States Environmental Protection Agency (EPA). As set forth below, Respondent FRM Chem, Inc. (FRM Chem) has failed to answer the First Amended Complaint and Notice of Opportunity for a Hearing (the First Amended Complaint) that EPA filed on June 3, 2010.

For the reasons presented below, EPA requests a ruling that FRM Chem is liable under Counts 1-7 of the First Amended Complaint for violating Section 12(a)(1)(A) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. § 12(a)(1)(A).

**II. BACKGROUND**

On September 23, 2009, Complainant filed a Complaint and Notice of Opportunity for Hearing against Respondent Synisys, Inc., alleging seven violations of Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), for sale or distribution of an unregistered pesticide. In its answer, dated November 20, 2009, Respondent Synisys, Inc., denied the violations alleged in the

Complaint, stating for each count that it “believes and states this product was sold and distributed by FRM Chem, Inc.”

Respondent Synisys, Inc. shares a place of business and common officers and corporate shareholders with multiple other corporate entities, including FRM Chem, Inc., Custom Compounders, Inc. and Advanced Products Technology, Inc. Complainant filed complaints against FRM Chem, Inc. and Advanced Products Technology, Inc. on June 6, 2009, and against Custom Compounders, Inc. and Synisys, Inc. on September 23, 2009, in each matter alleging multiple sales of one or both of two unregistered pesticides, FRM Chlor 1250 and STERI-DINE DISINFECTANT.<sup>1</sup>

On November 30, 2009, Complainant moved for consolidation of the four matters pursuant to Rule 22.12 of the Consolidated Rules of Practice (CROP), 40 C.F.R. § 22.12, noting that four named corporate Respondents share common officers, directors, and supervisors, engage in substantially the same business operations, share the same principal place of business, and are charged with similar violations of selling one or both of the two FRM-produced unregistered pesticides, FRM CHLOR 1250 and STERI-DINE DISINFECTANT to several common customers. By Order of the Presiding Officer issued December 2, 2009, the four matters were consolidated and a common prehearing schedule was issued.

On January 15, 2010, Complainant filed its consolidated prehearing exchange for the four matters. The four Respondents filed a joint prehearing exchange on or about February 15, 2010.

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<sup>1</sup> In the Matter of FRM Chem, Inc., Docket No. FIFRA-07-2008-0035; In the Matter of Advanced Products Technology, Inc., Docket No. FIFRA-07-2008-0036; and In the Matter of Custom Compounders, Inc., Docket No. FIFRA-07-2009-0042.

On March 15, 2010, Complainant filed a motion to file amended complaints in the four matters and for discovery pursuant to Section 22.19(e) of the CROP, which was granted by Order issued May 27, 2010. On June 3, 2010, Complainant filed a First Amended Complaint in the above-captioned matter, adding FRM Chem and two individuals as respondents. On June 7, 2010, service of the First Amended Complaint was accepted by Jenkins & Kling, PC, counsel for both FRM Chem and Synisys, Inc.<sup>2</sup>

As of July 15, 2010, neither Respondent FRM Chem nor Respondent Synisys, Inc. had filed an answer to the First Amended Complaint, nor had the Respondents complied with the terms of the discovery order issued by the Court on May 27, 2010. Complainant, via email, contacted counsel for the Respondents on July 15, 2010, regarding the discovery submittals, and also noted that no answer to the First Amended Complaint in this matter nor to the three amended complaints in the other consolidated matters had been filed by the Respondents. On July 16, 2010, Respondents' counsel replied via email, stating that he was "aware of the deadlines for discovery and pleadings," and citing an obligation to attend a funeral the morning of July 19, 2010. In a telephone conversation on July 21, 2010, Respondents' counsel informed Complainant that he would have discovery materials and answers to the amended complaints filed by July 28, 2010. On July 28, 2010, Respondents' counsel informed Complainant by email that he would need a further extension in which to file answers, citing medical issues. As of

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<sup>2</sup> The UPS "Proof of Delivery" downloaded from the UPS.com website, showing that the First Amended Complaint was delivered to Jenkins & Kling, PC at 12:06 P.M. on June 7, 2010, is included with this filing.

August 2, 2010, no Answer has been filed to the First Amended Complaint in the above-captioned matter by Respondent FRM Chem.

### III. STANDARD FOR FINDING DEFAULT

A respondent may be found in default upon failure to file a timely answer to an administrative complaint. A respondent's default constitutes, for purposes of the pending proceeding only, an admission of all facts alleged in the complaint and a waiver of the respondent's right to contest such factual allegations. 40 C.F.R. § 22.17(a).

A motion for default may seek resolution of all or part of the proceeding. 40 C.F.R. § 22.17(b). In promulgating 40 C.F.R. § 22.17, EPA intended to allow parties to move for a determination of default, without necessarily requesting a ruling on a penalty amount. 64 Fed. Reg. 40138, 40155 (July 23, 1999).

When a Presiding Officer finds that a default has occurred, s/he shall issue a default order against the defaulting party as to any or all parts of the proceeding unless the record shows good cause why a default order should not be issued. 40 C.F.R. § 22.17(c).

### IV. ARGUMENT

#### A. Respondent Has Failed to File an Answer

According to 40 C.F.R. § 22.15(a), a respondent must file an answer to a complaint with the Regional Hearing Clerk within 30 days after service of the complaint.

EPA sent a copy of the Complaint via UPS to Jenkins & Kling, PC, counsel for Respondent FRM Chem, on June 3, 2010. Respondent's counsel received his copy of this mailing on June 7, 2010, according to the UPS online tracking receipt.

As noted above, EPA has contacted Respondent's counsel on multiple occasions regarding the filing of an answer to the First Amended Complaint in this matter.

EPA has yet to receive an answer from FRM Chem.

**B. Prima Facie Case of Liability**

A respondent's default constitutes, for purposes of the pending proceeding only, an admission of all facts alleged in the complaint and a waiver of that respondent's right to contest the complaint's factual allegations. 40 C.F.R. § 22.17(a); In the Matter of: Alvin Raber, Jr., and Water Enterprises Northwest, Inc., 2004 EPA RJO LEXIS 188 (July 22, 2004, RJO Alfred C. Smith).

Counts 1-7 of the First Amended Complaint allege that the Respondents, on seven separate occasions, sold or distributed a quantity of a pesticide whose registration has been cancelled or which is not registered under Section 3 of FIFRA, 7 U.S.C. § 136a, a violation of Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A).

Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), provides that no person may distribute, sell, offer for sale, or hold for sale to any person any pesticide that is not registered with the Administrator of EPA. Accordingly, to establish Respondent's liability for seven violations of this provision, Complainant must establish that: (1) Respondent is a "person"; (2) the products at issue are "pesticides"; (3) Respondent "distributed or sold" the pesticides at issue in seven transactions; and (4) the pesticides at issue were "unregistered" at the time of each transaction.

The First Amended Complaint alleges each of these elements. The facts alleged in the First Amended Complaint establish liability under Section 12(a)(1)(A). By failing to answer the First Amended Complaint, FRM Chem has admitted all factual allegations in the First Amended Complaint, including but not limited to the following, as of all times relevant to the First Amended Complaint:

1. FRM Chem is a Missouri business corporation. (Par. 4, First Amended Complaint.)
2. The product at issue, FRM Chlor 1250, is a pesticide. (Par. 12, First Amended Complaint)
3. Respondent distributed or sold the pesticides at issue in seven transactions. (Paras. 27, 34, 41, 48, 55, 62, and 69 of the First Amended Complaint)
4. On the date of the sale and/or distribution in each transaction serving as the basis for each of the seven counts, the product at issue was not registered under Section 3 of FIFRA, 7 U.S.C. § 136a. (Paras. 12, 28, 37, 44, 49, 56, 63, and 70 of the First Amended Complaint.)

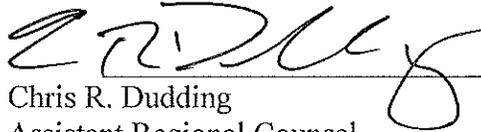
The admission that FRM Chem is a corporation establishes that FRM Chem is a “person” as defined by Section 2(s) of FIFRA, 7 U.S.C. § 136(s). The admission that the product at issue, FRM Chlor 1250, is a pesticide, establishes that it is subject to registration pursuant to Section 3 of FIFRA, 7 U.S.C. § 136a. The admission that the product at issue, FRM Chlor 1250, was not registered at the time of each of the sales transactions, establishes that each transaction was in violation of Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A).

FRM Chem therefore has admitted all elements of a violation of Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A).

V. CONCLUSION

FRM Chem has failed to answer EPA's First Amended Complaint. For the reasons set forth above, EPA requests that the Presiding Officer find FRM Chem liable as a matter of law under Counts 1 through 7 of the First Amended Complaint for violating Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A).

Respectfully submitted,



Chris R. Dudding  
Assistant Regional Counsel  
U.S. Environmental Protection Agency  
Region 7  
901 North 5<sup>th</sup> Street  
Kansas City, Kansas 66101  
(913) 551-7524



**Shipment Receipt**

(Keep this for your records.)

Transaction Date 03 Jun 2010

**Address Information**

**Ship To:**  
 Jenkins & Kling, PC  
 Ronald E. Jenkins  
 314-721-2525  
 10 S. Brentwood Blvd  
 STE 200  
 Saint Louis MO 63105

**Shipper:**  
 ENVIRONMENTAL PROTECTION  
 Kim Gifford  
 913-551-7457  
 901 N 5TH ST  
 KANSAS CITY KS 66101

**Ship From:**  
 ENVIRONMENTAL PROTECTION  
 Kim Gifford  
 913-551-7457  
 901 N 5TH ST  
 KANSAS CITY KS 66101

**Shipment Information**

<b>Service:</b>	UPS Next Day Air Saver		
<b>*Guaranteed By:</b>	3:00 P.M., Fri. 4 Jun. 2010		
<b>Quantum View Notify <sup>SM</sup> 1:</b>	salisbury.demetra@epa.gov		
Ship; Delivery; Exception			
<b>Quantum View Notify <sup>SM</sup> 2:</b>	dudding.chris@epa.gov		
Ship; Delivery; Exception			
<b>Quantum View Notify <sup>SM</sup> 3:</b>	gifford.kimberly@epa.gov		
Delivery; Exception			
<b>E-mail Failure Notification:</b>	gifford.kimberly@epa.gov	.....	No Charge
<b>Quantum View Notify <sup>SM</sup></b>	<b>Total:</b>	.....	No Charge

<b>Fuel Surcharge:</b>	.....	**1.95
<b>Shipping:</b>	.....	**22.90

**Package Information**

<b>Package 1 of 1</b>			
<b>Tracking Number:</b>	1Z6952072993931860		
<b>Package Type:</b>	UPS Express Box		
<b>Dimensions:</b>	13 x 11 x 2 in.		
<b>Actual Weight:</b>	2.0 lbs		
<b>Billable Weight:</b>	2.0 lbs		
<b>Delivery Confirmation:</b>	Signature Required	.....	3.00

**Billing Information**

**Bill Shipping Charges to:** Shipper's Account 695207

**Total:** All Shipping Charges in USD **\*\*27.85**

**Note:** Your invoice may vary from the displayed reference rates.

\* For delivery and guarantee information, see the UPS Service Guide. To speak to a customer service representative, call 1-800-PICK-UPS for domestic services and 1-800-782-7892 for international services.

\*\* Detailed information on fuel surcharges is also available.



## Proof of Delivery

Dear Customer,

This notice serves as proof of delivery for the shipment listed below.

**Tracking Number:** 1Z6952072993931860  
**Service:** NEXT DAY AIR SAVER  
**Special Instructions:** SIGNATURE REQUIRED  
**Weight:** 2.00 Lbs  
**Shipped/Billed On:** 06/03/2010  
**Delivered On:** 06/07/2010 12:06 P.M.  
**Delivered To:** SAINT LOUIS, MO, US  
**Signed By:** LENGERER

**Location:** OFFICE

Thank you for giving us this opportunity to serve you.

Sincerely,

UPS

Tracking results provided by UPS: 07/15/2010 12:40 P.M. ET