

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 7

901 NORTH 5TH STREET
KANSAS CITY, KANSAS 66101

BEFORE THE ADMINISTRATOR

09 DEC 17 AM 10:34
ENVIRONMENTAL PROTECTION
AGENCY-REGION VII
REGIONAL HEARING CLERK

IN THE MATTER OF)
) FIFRA-07-2008-0035
FRM Chem, Inc.,)
) ANSWER
Respondent.)

ANSWER OF RESPONDENT FRM CHEM, INC.

COMES NOW Respondent FRM Chem, Inc. ("FRM"), by and through its undersigned counsel, and for its Answer to the Amended Complaint filed by United States Environmental Protection Agency ("EPA"), states the following:

Section I

Jurisdiction

1. FRM admits the allegations contained in Paragraph 1.
2. FRM is without sufficient knowledge, information or belief to admit or deny the allegations contained in Paragraph 2 and, therefore, denies same.

Section II

Parties

3. FRM admits the allegations contained in Paragraph 3.
4. FRM admits the allegations contained in Paragraph 4.

Section III

Statutory & Regulatory Background

5-18. Subsections of Title 7, U.S.C. § 136, subsections of 40 C.F.R. § 152 and subsections of 40 C.F.R. § 167 quoted in Paragraphs 5 through 18 speak for themselves.

Section IV

Factual Allegations

19. FRM admits the first two (2) full sentences of Paragraph 19.

Respondent denies any knowledge whatsoever that the registration of Steri-Dine was cancelled or that supplemental distribution agreements were cancelled by the EPA on July 19, 1995.

Respondent denies any knowledge whatsoever that sales of existing stock of Steri-Dine were prohibited after January 15, 1996.

Respondent admits it became aware of these cancellations and prohibitions when a Stop Sale Order was served on Respondent on or about October 8, 2008.

20. FRM admits the first two (2) full sentences of Paragraph 20. FRM denies the remaining allegations contained in Paragraph 20 for the reasons stated in the previous paragraph.

21. Respondent FRM admits that a Missouri Department of Agriculture ("MDA") representative conducted a PEI at Respondent's facility on December 21 and December 28, 2005. At that time, the MDA representative found in his inspection "No violations suspected". Respondent FRM admits an MDA representative inspected Respondent's facility on October 8, 2008 and issued Stop Sale Orders as a result of this inspection. This is the first date Respondent was ever told of any FIFRA compliance problems.

22. Respondent denies the allegation contained in Paragraph 22 as it pertains to the December 21 and 28, 2005 inspections. Respondent admits the allegation contained in Paragraph 22 as it pertains to the October 8, 2008 inspection.

23. As and for its answer to Paragraph 23, Respondent realleges its answer to Paragraph 22.

24. Respondent admits the entirety of Paragraph 24 other than the allegation that Respondent knew it was selling cancelled pesticides.

25. On October 8, 2008, Keith G. Kastendieck was served with two "Stop, Sale, Use, or Removal Orders" on behalf of FRM Chem, Inc. and Advanced Products Technology, Inc.

No representative of FRM Chem, Inc. or Advanced Products Technology, Inc. had ever been served with any similar "Stop Sale Order" for FRM CHLOR 1250 prior to October 8, 2008.

26. FRM denies the allegations contained in Paragraph 26.

27. FRM denies the allegations contained in Paragraph 27.

Violations

28. FRM denies the allegations contained in Paragraph 28.

Count 1

29. As and for its Answer to Paragraph 29 of Count 1 of EPA's Amended Complaint, Respondent FRM restates, realleges and incorporates by reference its answers to Paragraphs 19 through 28 above as if more fully stated herein.

30. FRM admits the allegations contained in Paragraph 30.

31. FRM denies the allegations contained in Paragraph 31. Respondent was not advised that Steri-Dine was not registered by the EPA or any other person, entity or agency until October 8, 2008.

Yearly, Respondent would fill out EPA forms and notify the EPA by its registration number that it was holding for sale and/or distributing Steri-Dine.

At no time prior to October 8, 2008 did the EPA notify Respondent that the product was unregistered.

- 32. FRM denies the allegations contained in Paragraph 32.
- 33. FRM denies the allegations contained in Paragraph 33.
- 34. FRM denies the allegations contained in Paragraph 34.
- 35. FRM denies the allegations contained in Paragraph 35.

Count 2

36. As and for its Answer to Paragraph 29 of Count 1 of EPA's Amended Complaint, Respondent FRM restates, realleges and incorporates by reference its answers to Paragraphs 19 through 35 above as if more fully stated herein.

- 37. FRM admits the allegations contained in Paragraph 37.
- 38. FRM denies the allegations contained in Paragraph 38.
- 39. FRM denies the allegations contained in Paragraph 39.
- 40. FRM denies the allegations contained in Paragraph 40.
- 41. FRM denies the allegations contained in Paragraph 41.
- 42. FRM denies the allegations contained in Paragraph 42.

Counts 3 - 6 - Sales/Distributions to McFleeg, Inc.

43-62. As and for its Answer to Paragraphs 43-47 of Count 3 of EPA's Amended Complaint, Respondent FRM restates, realleges and incorporates by reference its answers to Paragraphs 19 through 42 above as if more fully stated herein.

Respondent admits that it sold or distributed FRM CHLOR 1250 to McFleeg, Inc. of Watertown, South Dakota as alleged in Counts 3 through 6.

Respondent answers that it did not know the product was not registered at the time of the sale and Respondent believed it was selling and distributing a registered pesticide lawfully.

Respondent denies the balance of the allegations in Paragraphs 43 through 62.

Counts 7 - 56

63-312. As and for its Answer to Counts 7 - 56 of EPA's Amended Complaint, Respondent FRM restates, realleges and incorporates by reference its answers to Paragraphs 19 through 62 above as if more fully stated herein.

Respondent admits that it sold or distributed FRM CHLOR 1250 to Allen's Sales & Service, Ottawa, Kansas; to Funk Sales & Service, Ottawa, Kansas; to Dairy Concepts, Lesueur, Minnesota; to L W Chemicals, Mt. Olive, Illinois; to Preston Dairy Supply, Monticello, Iowa; to Tony Howell Equity Group, East Gadsden, Alabama; to Charles Rademacher, Owensville, Missouri; to Riegel Farms, South Solon, Ohio; to Billy Palmer Equity Group, East Gadsden, Alabama; and to Weir Farm Supply, La Veta, Colorado as set forth in the Amended Complaint.

Respondent states that all of these sales and distributions took place in 2005, 2006, 2007 and in 2008 prior to Respondent receiving any notice from EPA that the product/pesticide was no longer registered.

Therefore, Respondent believed it was selling and/or distributing a registered pesticide at the time of the sale.

Respondent's premises received a PEI inspection on two occasions in December 2005 by a MDA representative. The MDA representative noted that FRM CHLOR 1250 was being held in stock for sale and distribution along with Steri-Dine.

On both occasions, the inspection reports state "No Violations Suspected".

No Stop Sale Order was issued by EPA to Respondent after either of these inspections.

Respondent filled out EPA forms with its registration number each of these years (2005, 2006, 2007) notifying EPA that it held for sale in inventory FRM CHLOR 1250 and Steri-Dine.

Respondent was never notified by EPA during this period it was selling unregistered pesticides.

Respondent FRM denies the balance of the allegations in Counts 7 through 56.

Counts 57 - 58 - Violations of a Stop Sale, Use, or Removal Order

Count 57

313. As and for its Answer to Paragraph 313 of EPA's Amended Complaint, Respondent FRM restates, realleges and incorporates by reference its answers to Paragraphs 19 through 312 above as if more fully stated herein.

314. FRM admits the allegations contained in Paragraph 314.

315. FRM denies the allegations contained in Paragraph 315. Respondent specifically disputes the date of this transaction. The date of this transaction was October 7, 2008 – one day before the Stop Sale Order was served upon Respondent.

316. FRM denies the allegations contained in Paragraph 316.

317. FRM denies the allegations contained in Paragraph 317.

Count 58

318. As and for its Answer to Paragraph 318 of EPA's Amended Complaint, Respondent FRM restates, realleges and incorporates by reference its answers to Paragraphs 19 through 317 above as if more fully stated herein.

319. FRM admits the allegations contained in Paragraph 319.

320. FRM denies the allegations contained in Paragraph 320. Sodium Hypochloride was sold and distributed to Graber Equipment on October 26, 2008 as Invoice 35782 will prove.

321. FRM denies the allegations contained in Paragraph 321.

322. FRM denies the allegations contained in Paragraph 322.

Section V

Total Proposed Penalty

323. Respondent FRM disputes the proposed penalty.

Appropriateness of Proposed Penalty

324. Respondent FRM disputes the method of calculation of penalties, including the size of business, and the gravity of the alleged violation.

325. Respondent FRM disputes the business revenue calculation used in calculating the proposed penalty.

326. No response to Paragraph 326 is necessary.

327. No response to Paragraph 327 is necessary.

328. No response to Paragraph 328 is necessary.

329. No response to Paragraph 329 is necessary.

Section VI

Answer and Request for Hearing

331-334. Respondent FRM requests a hearing to contest material facts set forth in the Amended Complaint and the appropriateness of the proposed penalty. FRM requests this hearing to be held in St. Louis, Missouri.

Section VII

Settlement Conference

335.-337. Respondent FRM suggests an informal settlement conference may be of benefit to the parties to this litigation.

Respectfully submitted,

JENKINS & KLING, P.C.

By: _____

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Attorneys for Respondent FRM Chem, Inc.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the original and one (1) copy of the foregoing were served via U.S. Mail, postage prepaid, upon:

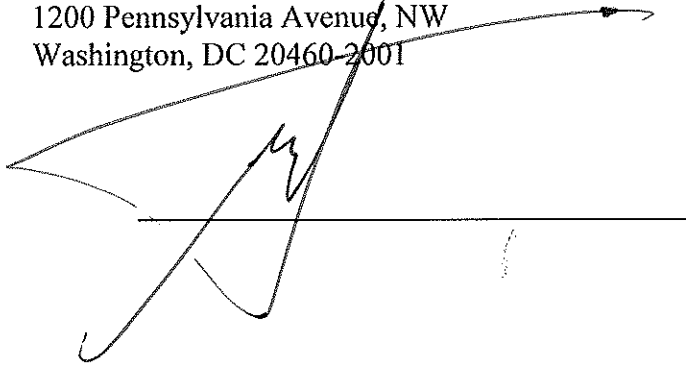
Kathy Robinson
Regional Hearing Clerk
EPA - Region 7
901 North 5th Street
Kansas City, KS 66101

and a copy was served via U.S. Mail, postage prepaid, upon:

Chris R. Dudding
Assistant Regional Counsel
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United States Environmental Protection Agency
Office of Administrative Law Judges
Attn: Honorable Barbara A. Gunning
Mail Code 1900L
1200 Pennsylvania Avenue, NW
Washington, DC 20460-2001

this 16th day of December, 2009.

A handwritten signature in black ink is written over a horizontal line. The signature is stylized and appears to be 'C. Dudding'. The horizontal line is a solid black line.