UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8

2010 DEC -8 PM 1:30

FILED
EPA REGION VIII
HEARING CLERK

Docket No. **FIFRA 08-2010-0017**

In the Matter of:	)	
	)	
Wendy Mealer and	)	COMPLAINANT'S RESPONSE TO
Dennis Stokebrand,	)	RESPONDENT'S MOTION TO DISMISS
	)	
Respondents	)	

COMES NOW the Complainant, by and through its attorney, Eduardo Quintana, pursuant to 40 C.F.R. parts 22.5 and 22.16, and requests the Presiding Officer to deny RESPONDENTS' MOTION TO DISMISS. As grounds for this request, EPA states and affirms as follows.

PROPER FILING & SERVICE

Respondents' Motion to Dismiss has not been properly filed and as such cannot be served upon the Presiding Officer or the Environmental Protection Agency (EPA). To file a document with the Presiding Officer, "[t]he original and one copy of each document intended to be part of the record shall be filed with the Regional Hearing Clerk when the proceeding is before the Presiding Officer." 40 C.F.R. § 22.5(a). "A document is filed when it is received by the appropriate Clerk." Id. A document is not filed when it is mailed to the EPA Enforcement Attorney assigned to the case. Further, any filed document must be served upon the Presiding Officer. 40 C.F.R. § 22.5(b). Lastly, the Presiding Officer has the discretion to exclude from the record any document not properly filed or properly served upon the Presiding Officer. 40 C.F.R. § 22.5(c)(5). Thus, if a document is not mailed to the appropriate Regional Hearing Clerk, it is not filed. When a document is not filed, it does not have to be served upon the Presiding Officer. With no service, a document unfiled can be excluded from the record.

Ensuring each party is familiar with the rules for filing and serving documents with the Presiding Officer is critical to a timely and efficient disposition to this matter. In the case at bar, Respondents' Motion to Dismiss should be denied because it was improperly filed and served as per 40 C.F.R. § 22.5. Based on Complainant's knowledge and the Certificate of Service in this case, Complainant believes Respondents have not mailed an original Motion to Dismiss to the Regional Hearing Clerk. Complainant further believes Respondents have also failed to mail a copy of the Motion to Dismiss to the Regional Hearing Clerk. As such, the Clerk has not received these documents and they have not been filed, as that term is used in 40 C.F.R. § 22.5(a). Complainant has been harmed by the Respondents' failure to properly file and serve their motions to the Court. Because Respondents' Motion to Dismiss has not been properly served, EPA has been put in a position where it has to make assumptions as to when the response to Respondents' Motion is due, whether the Presiding Officer will dismiss Respondents' Motion on procedural grounds and allow for Respondents' to re-file, or rule on substantive grounds.

Clearly, Complainant is at a disadvantage in having to present both procedural and substantive objections to Respondent's Motion to Dismiss when there is a real possibility that Respondent will have another bite at the apple. Complainant respectfully requests that the Presiding Officer consider Complainant's arguments in this Response Motion and DENY Respondents' Motion to Dismiss.

MOTION TO DISMISS - APPLICABLE STANDARD

The applicable standard of review for a motion to dismiss is governed by part 22.20(a) of the Consolidated Rules of Practice (CROP) which authorizes the Court to:

> "render an accelerated decision in favor of a party as to any or all parts of the proceeding...if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law...The Presiding Officer, upon motion of the respondent, may at any time dismiss an action without further hearing or upon such limited additional evidence as he requires, on the basis of failure to establish a prima facie case or other grounds which show no right to relief on the part of the complainant." 40 C.F.R. § 22.20(a).

FRCP 12(b)(6) is not the applicable standard under 40 C.F.R. § 22.20(a)

A motion to dismiss under part 22.20(a) is analogous to a motion to dismiss for failure to state a claim upon which relief may be granted under Rule 12(b)(6) of the Federal Rules of Civil Procedure (FRCP). However, the FRCP are not binding upon administrative agencies, but may be helpful in applying the Rules of Practice. Oak Tree Farm Dairy, Inc. v. Block, 544 F.Supp. 1351, 1356 n. 3 (E.D.N.Y. 1982); Wego Chemical & Mineral Corporation, TSCA Appeal No. 92-4, 4 E.A.D. 513 at 13 n. 10 (EAB, February 24, 1993); In the Matter of Minor Ridge, L.P., d/b/a Minor Ridge Apartments, Footnote 1, 2003 EPA ALJ LEXIS 21. Therefore, the standard announced by the United States Supreme Court in Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2009) and Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009) is not binding upon this Court, but with limitations noted below, might be helpful guidance under part 22.20(a).

The Consolidated Rules of Practice are a different procedural scheme apart from the Federal Rules of Civil Procedure. The CROP was created to handle issues in a more timely and efficient manner than in the Federal District Courts. Thus, motions in agency adjudications are much more limited compared to the district court counterpart. 2 Am. Jur. 2d Administrative Law § 273. Furthermore, agencies must be able to respond quickly. 2 Am. Jur. 2d Administrative Law § 4. Contentious litigation is an obstacle to the fast and efficient operation of agencies and their missions. 2 Am. Jur. 2d Administrative Law § 273. Therefore, the procedure for adjudication in agencies in much different than the Federal Courts counterpart. The purpose of the Consolidated Rules of Practice is for issues to be heard on the merits and in a timely manner. Requiring a heightened pleading standard for complainants frustrates this purpose because more complaints will be dismissed, rewritten, and then subsequently refilled, drawing out the litigation. This is exactly what was to be avoided in agency adjudications. Accordingly, the only standard applicable to a motion to dismiss under part 22.20(a) is that announced by the Environmental Appeals Board.

Whether the Twombly and Iqbal standard for FRCP 12(b)(6) motions announced by the Supreme Court applies in administrative adjudications following 40 C.F.R. § 22 has not been addressed. The Environmental Appeals Board (EAB) considers motions to dismiss under part 22.20(a) to be analogous to motions for dismissal under Federal Rule of Civil Procedure 12(b)(6). In the Matter of Asbestos Specialists, Inc., TSCA Appeal No. 92-3, 4 E.A.D.819, 827 (EAB, Oct. 6, 1993). However, no Environmental Appeals Board decision has addressed the issue of whether the pleading standards announced in Twombly and applied to all civil cases in Iqbal also applies to administrative adjudications. The standard announced by the Environmental Appeals Board for motions to dismiss under part 22.20(a) is "all factual allegations in the complaint should be presumed true, and all reasonable inferences therefrom should be made in favor of the complainant." In re Commercial Cartage Co., Inc., 5 E.A.D. 112 117, n.9 (EAB 1994). Once the complaint is taken as true and all reasonable inferences made, the Court must then determine whether a prima fascia case has been pled and whether there is a right to relief. In the Matter of Desarrollos Altamira I, Inc. & Cidra Excavation, S.E., 2010 EPA ALJ WL 4335182 (Oct. 13, 2010). Before the Supreme Court announced its decision in Twombly, the standard announced by the Environmental Appeals Board for motions to dismiss under part 22.20(a) and the standard under FRCP 12(b)(6) were very similar. In re Commercial Cartage Co., Inc., 5 E.A.D. 112 117, n.9 (EAB 1994). With a new standard under FRCP 12(b)(6), the two standards are markedly different and courts have been silent as to the applicability of this new FRCP 12(b)(6) standard in administrative adjudications.

Presiding Officers have not uniformly applied the Twombly standard to motions to dismiss under section 22.20(a). One Presiding Officer held that Twombly is the proper standard to determine whether the complainant had pled a prima fascia case. In the Matter of Bug Bam Product, LLC, Flash Sales, Inc., 2010 EPA ALJ WL 1816755 (Apr. 23, 2010). However, in another recent case, the Presiding Officer held that a different standard, other than that announced in Twombly, applies to administrative adjudications. In the Matter of Desarrollos Altamira I, Inc. & Cidra Excavation, S.E., 2010 EPA ALJ WL 4335182 (Oct. 13, 2010). The issue of whether the Twombly standard should apply to part 22.20(a) motions to dismiss was not addressed in either case. Each case simply announced a standard it would apply. Regardless of which standard applies, the Complaint satisfies both standards because it alleges sufficient factual allegations for a prima fascia case, and clearly shows a right to relief.

The Twombly Standard Applied to 40 C.F.R. § 22.14(a)(3) & 22.20(a)

The Twombly standard announced by the Supreme Court and confirmed in the Iqbal opinion conforms with part 22.14(a). Part 22.14(a) states "each complaint shall contain . . . 1) the section of the act authorizing the issuance of the complaint, 2) [s]pecific reference to each provision of the act, implementing regulation, permit, or order which respondent is alleged to have violated, 3) [a] concise statement of the factual basis for each violation alleged, 4) [a] description of the relief sought . . ., 5) [n]otice of respondent's right to request a hearing . . ., 7) the address of the Regional Hearing Clerk, and 8) [i]nstructions for paying penalties if applicable." 40 C.F.R. § 22.14(a). The Twombly and Iqbal standards might be helpful in determining whether the Complaint has included "[a] concise statement of factual basis for each violation alleged . . ." 40 C.F.R. § 22.14(a)(3). Respondent's motion only argues that the concise statement of facts was

not pled with enough particularity to give the defendant fair notice of the claim or the grounds upon which it rests. All other necessary components of the claim are not at issue in Respondent's motion.

The standard under FRCP 12(b)(6) is whether the complaint gave the defendant fair notice of what the claim is and the grounds upon which it rests. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2009). In Twombly, the Supreme Court overturned the denial of a motion to dismiss where the complaint cited violations of the Sherman Act, which requires an agreement between two or more persons, without ever pleading that an agreement existed. Twombly, 550 U.S. at 570. All Twombly requires is "enough facts to state a claim to relief that is plausible on its face [of the complaint]." Id. What should be dismissed are claims that are only conceivable on its face as opposed to plausible. Id. Thus, the complaint must state its factual allegation to a level that a violation plausibly occurred.

In Iqbal, the Supreme Court outlined the process for analyzing a rule 12(b)(6) motion. First, "[w]e begin our analysis by identifying the allegations in the complaint that are not entitled to the assumption of truth." Ashcroft v. Iqbal, 129 S. Ct. 1937, 1951 (2009). Formulaic recitations of the elements of the claim are conclusory, and as such, are not entitled to the assumption of truth. Id. (internal citation omitted). In fact, "[i]t is the conclusory nature of [the] allegations . . . that disentitles them to the assumption of truth." Id. The second step is to look at the complaint to determine if the factual allegations, with the assumption of truth, "plausibly suggest an entitlement to relief." Id. Inferences from the underlying facts must be viewed in the light most favorable to the party opposing the motion. Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). Thus, plaintiffs must plead their factual allegations with more specificity than simply the elements of the claim. From these well pleaded factual allegations, the Court makes all reasonable inferences and then determines whether these allegations, taken as true, "nudge the claim across the line from conceivable to plausible." Twombly, 550 U.S. at 570. Accordingly, to prevail on its Motion, Respondent must show that Complainant's allegations, with the assumption of truth, do not give a plausible claim of relief or a plausible violation.

MOTION FOR JUDGMENT ON THE PLEADINGS & SUMMARY JUDGMENT – APPLICABLE STANDARD

Complainant believes Respondents make two alternative arguments to the motion to dismiss; a Motion for Judgment on the Pleadings under FRCP 12(c), *RESPONDENTS' MOTION TO DISMISS*, 7, and a Motion for Summary Judgment. *RESPONDENTS' MOTION TO DISMISS*, 1. Respondents Motion to Dismiss on page one claims to make a motion for summary judgment but the Motion is devoid of any argument, either legal or factual, that would support such a motion. Respondents Motion to Dismiss also claims an alternative motion for judgment on the pleadings under rule 12(c) on page seven. Complainant is unclear as to whether there are two or one alternative motions in Respondents' Motion to Dismiss. As such, Complainant will treat the Motion as if two separate alternative motions have been pled. However, neither alternative motion has been pled with enough factual allegations and legal support to warrant consideration and should be DENIED.

Administrative Adjudication Applicable Standard

The standard under 40 C.F.R. § 22.20(a) is a Presiding Officer may render a judgment "if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law. . ." 40 C.F.R. § 22.20(a). This is the standard by which a Presiding Officer is to determine if an adjudication has qualified for early determination. Thus, for Respondents to prevail on the alternative motion for summary judgment, or the motion for judgment on the pleadings, Respondents must show that no genuine issue of material fact exists, and that Respondents are entitled to judgment as a matter of law.

FRCP 12(c) Standard Analogous to 40 C.F.R. § 22.20(a) Standard

The standard under FRCP 12(c) is analogous in that a court may make a judgment on the pleadings if "there are no material facts in dispute and the moving party is entitled to judgment as a matter of law." Cannon v. City of West Palm Beach, 250 F.3d 1299, 1301 (11th Cir. 2001). No Presiding Officer nor the Environmental Appeals Board have addressed whether the standard under FRCP 12(c) is the same standard under 40 C.F.R. § 22.20(a) before pre-hearing exchanges. Also, the language used as the standard under FRCP 12(c) is very similar to the language used in 40 C.F.R. § 22.20(a). For purposes of ease, timeliness and efficiency, Complainant request the language of 40 C.F.R. § 22.20(a) as the standard to determine Respondents alternative motion for judgment on the pleadings.

FRCP 56 Standard is not Analogous to 40 C.F.R. § 22.20(a) Standard

40 C.F.R. § 22.20(a) does not adopt the standard of FRCP 56, but may look to the FRCP for guidance when the Presiding Officer may need assistance in interpreting 40 C.F.R. § 22.20(a). FRCP 56 states the "court shall grant summary judgment if the movant shows there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." F.R.C.P. 56(a). Comparing this language to 40 C.F.R. § 22.20(a), the standards are absolutely different and cannot be used for guidance. Judicial utterances on FRCP 56 motions are inapplicable because there is a different scheme under administrative adjudications compared with district courts. There are different procedural safeguards in FRCP 56 than in 40 C.F.R. § 22.20(a). *See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986) (stating summary judgment is rendered when pleadings, depositions, interrogatories, and admissions on file together show there is no issue of material fact). 40 C.F.R. § 22.20(a) does not authorize depositions, interrogatories, admissions, or affidavits. Thus, the adequacy of a summary judgment motion can be measured with discovery tools in the district courts but these tools are not available in the same manner in administrative adjudications. Thus, any reliance upon judicial utterances regarding the standards set forth in FRCP 12(c) or FRCP 56 are inappropriate and should be disregarded. The standard set forth in 40 C.F.R. § 22.20(a) is the standard governing motions for summary judgment in administrative adjudications.

CLAIMS ARE SUPPORTED BY FACTS

EPA has alleged sufficient factual allegation in its complaint to give fair notice to the Respondents of the claim and the grounds upon which it rests. Under part 22.14(a)(3), a

complaint must have "[a] concise statement of the factual basis for each violation alleged." 40 C.F.R. § 22.14(a)(3). EPA has alleged one violation of the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136l(a), by each Respondent. Specifically, EPA has alleged that each Respondent violated 7 U.S.C. § 136j(a)(2)(G) by applying a pesticide in a manner inconsistent with it label. *Complaint*, ¶ 3. Respondents were seen by United States Fish and Wildlife Service (USFWS) "operat[ing] four-wheel vehicles to apply oats poisoned with Zinc Phosphide Prairie Dog Bait within the black-footed ferret reintroduction area located within the Rosebud Sioux Tribe Reservation, South Dakota." *Complaint*, ¶ 16. Zinc Phosphide Prairie Dog Bait is a registered use pesticide (RUP). EPA Reg. No. 13808-6. "The Zinc Phosphide Prairie Dog Bait label states: 'Do not apply in areas known to be inhabited by black-footed ferrets.'" *Complaint*, ¶ 13. Thus, EPA has alleged sufficient factual allegations to give Respondents fair notice of the claim against them and the grounds upon which it rests.

The Complaint Establishes Respondents Applied a Registered Use Pesticide in a Manner Inconsistent with Its Label

EPA's factual allegations establish that there was an area inhabited by black-footed ferrets and this area was known to be inhabited by black-footed ferrets pursuant to the Zinc Phosphide Prairie Dog Bait label. It is important to note that a motion to dismiss should only be granted if the *factual*, as opposed to the legal, allegations are conclusory and not afforded any weight. "The boundaries of the black-footed ferret reintroduction area where the USFWS special agent observed Respondent's applications are denoted by posted signs at its various access points." *Complaint*, ¶ 17. This factual allegation establishes that an area known to be inhabited by black-footed ferrets existed because of the posted signage. The Complaint gives more factual basis for the claim of an area known to be inhabited by black-footed ferrets when it describes the signage leading into the reintroduction area. Id. Furthermore, "[t]he Department of the Interior, Fish and Wildlife Service published a final rule to reintroduce the black-footed ferret into the Rosebud Sioux Tribe Reservation." *Complaint*, ¶ 14 (citing 68 Fed. Reg. 26498 (May 16, 2003)). The area was known to be inhabited by black-footed ferrets because of the published final rule and because of the signage leading into the area inhabited by black-footed ferrets. Thus, EPA's complaint sufficiently alleges facts that, once taken as true, show there was an area known to be inhabited by black-footed ferrets in the Rosebud Sioux Tribe Reservation.

The next issue is whether the Complaint sufficiently alleges facts, taken as true, showing a plausible claim for relief. According to the Zinc Phosphide Prairie Dog Bait label, the pesticide is not to be applied in areas known to be inhabited by black-footed ferrets. The complaint established that such an area exists; thus, if the Complaint establishes that the Respondents were applying the pesticide in the area known to be inhabited by black-footed ferrets, then a claim for relief is plausible. "On January 31, 2006, a special agent from the United States Fish and Wildlife Service (USFWS) observed Respondents operate four-wheel vehicles to apply oats poisoned with Zinc Phosphide Prairie Dog Bait (zinc phosphide) within the black-footed ferret reintroduction area located within the Rosebud Sioux Tribe Reservation, South Dakota." *Complaint*, ¶ 16. Thus, EPA has alleged an eye-witness account of the Respondents applying the pesticide in an area known to be inhabited by black-footed ferrets. This sufficiently establishes that Respondents were applying a pesticide in a manner inconsistent with its label.

Respondents' List of Factual Allegations Not Pled by EPA is Irrelevant

Respondents allege a list of factual allegations not made by EPA in the Complaint as a basis for their claim that the Complaint has failed to state a claim upon which relief may be granted. Respondents allege that EPA's failure to include these specific factual allegations makes the Complaint defective on its face. Respondents allege the Complaint fails to define where the misconduct occurred. The Complaint states that the misconduct occurred within the black-footed ferret reintroduction area within the Rose Bud Sioux Tribe Reservation, South Dakota. *Complaint*, ¶ 16. Whether the Complaint states the misconduct occurred within the Tribal Counsel designated reintroduction area is irrelevant. The Zinc Phosphide Prairie Dog Bait label does not prohibit application to areas *designated* as habitats for the black-footed ferret. The label prohibits application in areas *known* to be inhabited by the black-footed ferret. How the area was designated is irrelevant; the issue is whether Zinc Phosphide Prairie Dog Bait was applied in an area known to be inhabited by black-footed ferrets contrary to the directions on the label. Furthermore, Respondents arguments imply that any responsibility by a certified pesticide applicator to follow all of the pesticide label restrictions, or certified applicator training, or procedures in place to determine areas known to be inhabited by endangered species, can be circumvented by council resolutions.

The Complaint also sufficiently alleges that a special agent of USFWS observed Respondents applying the pesticide in the area known to be inhabited by black-footed ferrets. Whether the special agent only saw the operation of the four-wheel vehicles, or whether the special agent assumed Respondents had poisoned the area are evidentiary issues that can only be resolved after pre-hearing exchanges. EPA has included a specific factual allegation of the violation based on the eye witness report of the special agent. This is specific enough for Respondents to be given fair notice of the claim against them and the grounds upon which it rests. Respondents are free to argue at a hearing that the special agent never saw the application of the pesticide, or that the testimony and photographs taken do not prove that Zinc Phosphide Prairie Dog Bait was applied. However, for purposes of the Complaint, the special agent's observations and supporting evidence to be submitted in Complainant's pre-hearing exchange are sufficient to state a cause upon which relief may be granted.

Lastly, Respondents allege that the Complaint neglects to mention where the signs are posted. "The boundaries of the black-footed ferret reintroduction area where the USFWS special agent observed Respondent's applications, are denoted by posted signs at various access points." *Complaint*, ¶ 17. The signs are located on the roadside of roads leading to and from the reintroduction area. Further, Respondents' admittance that the signs are in dilapidated condition demonstrates that Respondents knew the signs, which specifically state "Reintroduction Zone, No Prairie Dog Poisoning" along with contact information including a phone number, existed and where they are located. See Exhibit 1. Respondents admittance of the signs also demonstrate that the applicators where on notice that there was a defined black-footed ferret reintroduction area, and as the sings state, specifically prohibited the use of "poisons." The Complaint sufficiently states where the signs are located to give the Respondents fair notice of the claim and the grounds upon which it rests. These factual allegations are not simple statements of the elements to the cause of action. These factual allegations demonstrate that a violation could very plausibly be proven.

Whether Multiple Resolutions Existed is Irrelevant; Multiple Resolutions Do Not Determine if an Area was Known to be Inhabited by a Particular Species

Respondents' primary contention throughout the Motion is that the exact boundaries of the reintroduction area cannot be known because either the Rosebud Sioux Tribe never included a map of the reintroduction area when it designated the area, or if Rosebud Sioux Tribe did include a map, it was not a map of the reintroduction area authorized by the Rosebud Sioux Tribe Counsel. These arguments have no merit. The label to Zinc Phosphide Prairie Dog Bait prohibits the application of the pesticide to areas known to be inhabited by the black-footed ferret. The label does not distinguish between whether the area was designated as a habitat for the black-footed ferret or a reintroduction area. Whether the area was "known" to be inhabited by the black footed ferret involves an analysis of not only *where* the reintroduction area was located, but an examination of a certified pesticide applicator's responsibilities in applying a pesticide the training provided to gain pesticide applicator certification, and how a certified applicator determines whether a pesticide with an endangered species restriction can be applied in a specific area.

Respondents' argument, taken to its logical conclusion, is that the Tribal Council may, by enacting a resolution, nullify any pesticide label requirement adopted pursuant to FIFRA. Even if Respondents are correct in that a map, with proper authority from the Rosebud Sioux Tribe, has never been produced, the label does not call for this level of knowledge by the community of the black-footed ferret habitation area. The label prohibits application in all areas known to be inhabited by the black-footed ferret. Whether the area is a natural habitat or a reintroduction area is irrelevant to the label. In addition to a certified applicator's responsibility to comply with the label requirements, once the Respondents knew, or once the community knew, that an area was inhabited by black-footed ferrets, then the area was a known area of black-footed ferret habitation. Respondents were on inquiry notice and as such should have never applied the pesticide in that area.

Respondents try to cloud the issue with reference to multiple maps that depict differing boundaries to the area. Respondents allege that because multiple maps exist of the boundary area then Respondents could not have "known" what area was inhabited by black-footed ferrets. As stated before, the Complaint alleges two different factual allegations that give rise to the plausibility that Respondents were applying a Zinc Phosphide Prairie Dog Bait in an area known to be inhabited by black-footed ferrets. "The Department of the Interior, Fish and Wildlife Service published a final rule to reintroduce the black-footed ferret into the Rosebud Sioux Tribe Reservation." *Complaint*, ¶ 14 (citing 68 Fed. Reg. 26498 (May 16, 2003)). Also, "[t]he boundaries of the black-footed ferret reintroduction area where the USFWS special agent observed Respondents applications, are denoted by posted signs at its various access points." *Complaint*, ¶ 17. Therefore, there were at least two independent reasons to support the fact that the area is known to be inhabited by the black-footed ferret whether that was by the community as a whole or the Respondents themselves.

GENUINE ISSUES OF MATERIAL FACT EXIST

Lastly, EPA insists that there are genuine issues of material fact that preclude a judgment on the pleadings or a motion for summary judgment. The issue of whether the area Respondents were seen applying the pesticide is known to be inhabited by black-footed ferrets is contentious for both parties. One of EPA's arguments in determining whether the area where the Zinc Phosphide Prairie Dog Bait was applied was an area known to be inhabited by the black-footed ferret is established when the Respondents or others in the community believe that such an area exists. Respondents argue that for an area to be "known" its exact boundaries can only be determined by Council Resolution. This is an issue of material fact, and arguably also of law, because the resolution of this issue turns on what the word "known" on the label means. EPA alleges that the signs are at various access points to the reintroduction area and they contain instructions and contact information. *Complaint*, ¶ 17. Respondents allege that the signs are dilapidated, difficult to read, and no longer upright. *Respondents' Motion to Dismiss*, 11. Thus, there is a genuine factual issue as to whether the signs as they existed on the day of poisoning were sufficient enough to provide additional knowledge to a certified pesticide applicator of an area that is a known habitat of black-footed ferrets.

Accordingly, Respondents' Motion to Dismiss should be denied so that the issue of whether the area was known to be inhabited by black-footed ferrets can be fully developed at the hearing.

PRAYER FOR RELIEF

Complainant respectfully requests the Presiding Officer to deny Respondents' Motion to Dismiss based on the grounds previously stated.

Respectfully submitted,

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,
REGION VIII,
Complainant

Date: 12/8/2010

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the original and one copy of COMPLAINANT'S RESPONSE TO RESPONDENT'S MOTION TO DISMISS was hand-carried to the Regional Hearing Clerk, EPA Region 8, 1595 Wynkcoop Street; Denver, Colorado 80202-1129, and that a true copy of the same was sent as follows:

A copy by pouch mail to:

Barbara A. Gunning
Administrative Law Judge
EPA Office of Administrative Law Judges
1200 Pennsylvania Avenue, NW
Mail Code 1900L
Washington, D.C. 20460

and

A copy via first class mail to:

Steven D. Sandven, Esq.
Law Office
300 North Dakota Avenue, Ste. 106
Sioux Falls, SD 57104

12/8/2010
Date

Judith M. McTernan

COMPLAINANT'S
EXHIBIT NO. 1