

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION VII

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

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ENVIRONMENTAL PROTECTION  
AGENCY-REGION VII  
REGIONAL HEARING CLERK

BEFORE THE ADMINISTRATOR

IN THE MATTER OF

FRM Chem, Inc.  
a.k.a. Industrial Specialties  
P.O. Box 207  
Highway 47 South  
Washington, Missouri 63090

Respondent

) Docket No. FIFRA-07-2004-0041  
)  
) COMPLAINT AND NOTICE OF  
) OPPORTUNITY FOR HEARING  
)  
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COMPLAINT

Section I

Jurisdiction

1. This is an administrative action for the assessment of civil penalties instituted pursuant to Section 14 of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. § 136l.
2. This Complaint serves as notice that the United States Environmental Protection Agency (EPA) has reason to believe that Respondent has violated Section 12 of FIFRA, 7 U.S.C. § 136j.

Section II

Parties

3. The Complainant, by delegation from the Administrator of the EPA, and the Regional Administrator, EPA, Region VII, is the Director of the Water, Wetlands, and Pesticides Division, EPA, Region VII.
4. The Respondent is FRM Chem, Inc., a.k.a. Industrial Specialties, a pesticide producer and distributor, located at Highway 47 South, 50 Hi Line Drive, Washington, Missouri 63090. The Respondent is and was at all times referred to in this Complaint, a "person" as defined by Section 2(s) of FIFRA, 7 U.S.C. § 136(s), and a Missouri corporation qualified to do business in the state of Missouri.

### Section III

#### Violations

##### General Allegations

5. The Complainant hereby states and alleges that Respondent has violated FIFRA as follows:
6. Section 2(t) of FIFRA, 7 U.S.C. § 136(t), defines the term “pest” means (1) any insect, rodent, nematode, fungus, weed or (2) any other form of terrestrial or aquatic plant or animal life or virus, bacteria, or other micro-organism (except viruses, bacteria, or other micro-organism on or in living man or other living animals) which the Administrator declares to be a pest under section 25(c)(1).
7. Section 2(u) of FIFRA, 7 U.S.C. § 136(u), defines the term “pesticide” means any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest.
8. Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), states that it shall be unlawful for any person to distribute or sell any pesticide that is not registered under Section 3 of FIFRA, 7 U.S.C. § 136a.
9. Section 2(gg) of FIFRA, 7 U.S.C. § 136(gg), defines the term “to distribute or sell” to mean to distribute, sell, offer for sale, hold for distribution, hold for sale, hold for shipment, ship, deliver for shipment, release for shipment, or receive and (having so received) deliver or offer to deliver.
10. Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136(a)(1)(E), states that it shall be unlawful for any person to distribute or sell any pesticide which is adulterated or misbranded.
11. Section 2(q)(1)(F) of FIFRA, 7 U.S.C. § 136(q)(1)(F), states that a pesticide is misbranded if its labeling does not contain directions for use which are necessary and, if complied with, are adequate to protect health and the environment.
12. Section 2(q)(1)(G) of FIFRA, 7 U.S.C. § 136(q)(1)(G), states that a pesticide is misbranded if the label does not contain a warning or caution statement which may be necessary and, if complied with, is adequate to protect health and the environment.
13. Section 2(q)(1)(D) of FIFRA, 7 U.S.C. § 136(q)(1)(D), states that a pesticide is misbranded if its label does not bear the registration number assigned under Section 7 of FIFRA to the establishment in which it was produced.
14. Section 12(a)(2)(L) of FIFRA, 7 U.S.C. § 136j(a)(2)(L), states that it shall be unlawful for any person who is a producer to violate any of the provisions of Section 7 of FIFRA, 7 U.S.C. § 136e.

15. The term "produce" is defined at 40 C.F.R. § 167.3 as meaning "...to manufacture, prepare, propagate, compound, or process any pesticide...any active ingredient or device or to package, repackage, label, relabel, or otherwise change the container of any pesticide or device."

16. On or about September 12, 2002, a representative of the Missouri Department of Agriculture conducted an inspection at Respondent's facility in Washington, Missouri, to determine the status of Respondent's compliance with FIFRA.

Count 1

17. The facts stated in paragraphs 6 through 16 are realleged and incorporated as if fully stated herein.

18. On or about January 10, 2002, Respondent sold four 50-pound containers of ROOT EATER to the city of Covington, Oklahoma, as documented by Invoice No. 31239. On or about July 29, 2002, Respondent sold four 50-pound containers of ROOT EATER to the city of Covington, Oklahoma, as documented by Invoice No. 31871.

19. The label of the ROOT EATER product states: "ROOT EATER Tree root remover for sewer systems. ROOT EATER'S foaming action removes tree roots from sewer lines without damage to sewage systems. ROOT EATER coats the walls of the system with insoluble copper resulting in long term activity. ROOT EATER also removes undesirable slime, fungi, and symbiotic organisms whose growth is promoted by root obstruction." These statements are pesticidal claims and thus identifies ROOT EATER as a pesticide.

20. The pesticide referred to in paragraph 18 was misbranded in that the label stated, in part:

\*\*\*\*  
CAUTION  
Contains Cupric Sulfate  
\*\*\*\*

whereas the product label did not include any words, statements, or other information (EPA Registration Number, EPA Establishment Number, correct signal word: "DANGER", percentage of active ingredients) required by FIFRA were not prominently placed on the label in such a way as to make it readable or understandable.

21. Respondent violated Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), by distribution or sale of an unregistered pesticide.

22. Respondent violated Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), by distributing or selling a misbranded pesticide.

23. Pursuant to Section 14 of FIFRA, 7 U.S.C. § 136l, and based on the facts stated in paragraphs 17 through 22, it is proposed that a civil penalty of \$5,500 be assessed against Respondent.

## Count 2

24. The facts stated in paragraphs 6 through 16 are realleged and incorporated as if fully stated herein.
25. On or about June 13, 2002, Respondent sold one 50-pound container of ROOT EATER to the city of Hoisington, Kansas, as documented by Invoice No. 31737. On or about June 25, 2002, Respondent sold one 50-pound container of ROOT EATER to the city of Hoisington, Kansas, as documented by Invoice No. 31738.
26. The label of the ROOT EATER product states: "ROOT EATER Tree root remover for sewer systems. ROOT EATER'S foaming action removes tree roots from sewer lines without damage to sewage systems. ROOT EATER coats the walls of the system with insoluble copper resulting in long term activity. ROOT EATER also removes undesirable slime, fungi, and symbiotic organisms whose growth is promoted by root obstruction." These statements are pesticidal claims and thus identifies ROOT EATER as a pesticide.
27. The pesticide referred to in paragraph 25 was misbranded in that the label stated, in part:

\*\*\*\*  
CAUTION  
Contains Cupric Sulfate  
\*\*\*\*

whereas the product label did not include any words, statements, or other information (EPA Registration Number, EPA Establishment Number, correct signal word: "DANGER", percentage of active ingredients) required by FIFRA were not prominently placed on the label in such a way as to make it readable or understandable.

28. Respondent violated Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), by distribution or sale of an unregistered pesticide.
29. Respondent violated Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), by distributing or selling a misbranded pesticide.
30. Pursuant to Section 14 of FIFRA, 7 U.S.C. § 136l, and based on the facts stated in paragraphs 24 through 29, it is proposed that a civil penalty of \$5,500 be assessed against Respondent.

## Count 3

31. The facts stated in paragraphs 6 through 16 are realleged and incorporated as if fully stated herein.

32. On or about January 10, 2002, Respondent sold one 50-pound container of ROOT EATER to the city of Lucas, Kansas, as documented by Invoice No. 31248. On or about August 6, 2002, Respondent sold one 50-pound container of ROOT EATER to the city of Lucas, Kansas, as documented by Invoice No. 31910.

33. The label of the ROOT EATER product states: "ROOT EATER Tree root remover for sewer systems. ROOT EATER'S foaming action removes tree roots from sewer lines without damage to sewage systems. ROOT EATER coats the walls of the system with insoluble copper resulting in long term activity. ROOT EATER also removes undesirable slime, fungi, and symbiotic organisms whose growth is promoted by root obstruction." These statements are pesticidal claims and thus identifies ROOT EATER as a pesticide.

34. The pesticide referred to in paragraph 32 was misbranded in that the label stated, in part:

\*\*\*\*  
CAUTION  
Contains Cupric Sulfate  
\*\*\*\*

whereas the product label did not include any words, statements, or other information (EPA Registration Number, EPA Establishment Number, correct signal word: "DANGER", percentage of active ingredients) required by FIFRA were not prominently placed on the label in such a way as to make it readable or understandable.

35. Respondent violated Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), by distribution or sale of an unregistered pesticide.

36. Respondent violated Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), by distributing or selling a misbranded pesticide.

37. Pursuant to Section 14 of FIFRA, 7 U.S.C. § 136l, and based on the facts stated in paragraphs 31 through 36, it is proposed that a civil penalty of \$5,500 be assessed against Respondent.

#### Section IV

#### Total Proposed Penalty

38. Section 14 of FIFRA, 7 U.S.C. § 136l, and the Debt Collection Improvement Act of 1996, as implemented by the Civil Monetary Penalties Inflation Adjustment Rule, 40 C.F.R. Part 19, authorize the issuance of this Complaint for the assessment of a civil penalty of up to Five Thousand Five Hundred Dollars (\$5,500) for each violation. The EPA proposes to assess a total civil penalty of \$16,500 against Respondent for the above-described violations.

### Appropriateness of Proposed Penalty

39. The penalty proposed above has been calculated after consideration of the statutory factors set forth in Section 14 of FIFRA, 7 U.S.C. § 136l. Specifically, EPA considered the size of the business of Respondent, the effect of the proposed penalty on Respondent's ability to continue in business and the gravity of the alleged violations. In its calculation of the proposed penalty, EPA has taken into account the particular facts and circumstances of the alleged violations, with specific reference to EPA guidance for the calculation of proposed penalties under FIFRA (See Enclosure, July 2, 1990, Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)).

40. For purposes of calculating the proposed penalty, EPA obtained financial information indicating that Respondent's total business revenues were in excess of \$1,000,000 per year. This information placed Respondent in Category I size of business, as set forth in the FIFRA Civil Penalty Calculation Worksheet attached hereto and incorporated herein by reference (See Enclosure). If EPA's estimate of Respondent's total business revenues is incorrect, Respondent may submit reliable financial documentation indicating another category is appropriate.

41. Respondent has the right, upon submittal of certified financial information, to consideration of Respondent's financial condition in mitigation of the proposed penalty insofar as is necessary to permit Respondent to continue in business.

42. The proposed penalty constitutes a demand *only if* Respondent fails to raise bona fide issues of ability to pay, or other *bona fide* affirmative defenses relevant to the determination of any final penalty.

43. Said issues of ability to pay or other affirmative defenses relevant to a final penalty may and should be brought *to the attention* of Complainant at the earliest opportunity in this proceeding.

44. Payment of the total penalty - \$16,500 - may be made by certified or cashier's check payable to the "Treasurer, United States of America," and remitted to:

Mellon Bank  
EPA - Region VII  
Regional Hearing Clerk  
P.O. Box 360748M  
Pittsburgh, Pennsylvania 15251

45. If Respondent does not contest the findings and assessments set forth above, payment of the penalty assessed herein may be remitted as described in the preceding paragraph, including a reference to the name and docket number of the Complaint. In addition, a copy of the check should be sent to:

Regional Hearing Clerk  
EPA - Region 7  
901 North 5<sup>th</sup> Street  
Kansas City, Kansas 66101

and a copy to:

Rupert G. Thomas  
Assistant Regional Counsel  
EPA - Region 7  
901 North 5<sup>th</sup> Street  
Kansas City, Kansas 66101

NOTICE OF OPPORTUNITY FOR HEARING

Section V

Answer and Request for Hearing

46. Pursuant to Section 14(a) of FIFRA, 7 U.S.C. § 136(a), Respondent has the right to request a hearing to contest any material fact contained in this Complaint or to contest the appropriateness of the penalty proposed herein. If Respondent wishes to avoid being found in default, Respondent must file a written answer and request for hearing with:

Regional Hearing Clerk  
EPA - Region 7  
901 North 5<sup>th</sup> Street  
Kansas City, Kansas 66101

within thirty (30) days of service of this Complaint and Notice of Opportunity for Hearing. Said answer shall clearly and directly admit, deny, or explain each of the factual allegations contained in the Complaint with respect to which Respondent has any knowledge, or shall clearly state that Respondent has no knowledge as to particular factual allegations in the Complaint. The answer shall also state:

- a. The circumstances or arguments that are alleged to constitute the grounds of defense;
- b. The facts that Respondent intends to place at issue; and
- c. Whether a hearing is requested.

Failure to deny any of the factual allegations in the Complaint constitutes an admission of the undenied allegations.

47. Any hearing that is requested shall be held and conducted in accordance with the "Consolidated Rules of Practices Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits," 40 C.F.R. Part 22 (copy enclosed).

48. If Respondent fails to file a written answer and request for hearing within thirty (30) days of service of this Complaint and Notice of Opportunity for Hearing, such failure will constitute a binding admission of all of the allegations in this Complaint, and a waiver of Respondent's right to a hearing under FIFRA. A Default Order may thereafter be issued by the Regional Administrator, and the civil penalties proposed therein shall become due and payable without further proceedings.

49. Respondent is advised that, after the Complaint is issued, the Consolidated Rules of Practice prohibit any ex parte (unilateral) discussion of the merits of any action with the EPA Regional Administrator, members of the Environmental Appeals Board, the Regional Judicial Officer, Administrative Law Judge, or any person likely to advise these officials in the decision of the case.

## Section VI

### Settlement Conference

50. Whether or not a hearing is requested, an informal settlement conference may be arranged at Respondent's request. Respondent may confer with the EPA concerning (1) whether or not the alleged violation occurred or (2) the appropriateness of the proposed penalty in relation to the size of Respondent's business, the gravity of the violation, and the effect of the proposed penalty on Respondent's ability to continue in business. Additionally, the proposed penalty may be adjusted if Respondent establishes a bona fide issue of ability to pay. To explore the possibility of settlement in this matter, contact:

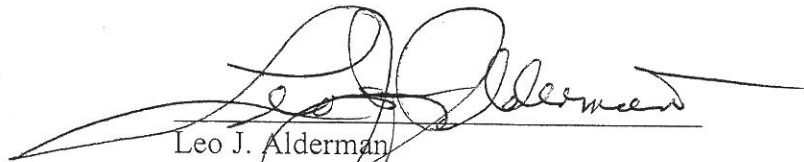
Rupert G. Thomas  
Assistant Regional Counsel  
EPA Region 7  
901 North 5<sup>th</sup> Street  
Kansas City, Kansas 66101  
Telephone: (913) 551-7282

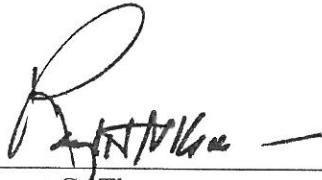
51. A request for an informal settlement conference does not extend the thirty (30) day period during which a written answer and request for a hearing must be submitted. The informal conference procedure may be pursued as an alternative to and simultaneously with the adjudicatory hearing procedure.

52. EPA encourages all parties against whom a civil penalty is proposed to pursue the possibility of settlement. However, no penalty reduction will be made simply because an informal settlement conference is held. If settlement is reached, the parties will enter into a written Consent Agreement, and a Final Order will be issued. The issuance of such a Consent Agreement and Final Order shall constitute a waiver of Respondent's right to request a hearing on any matter stipulated to therein.



12/10/03  
Date

  
Leo J. Alderman  
Director  
Water, Wetlands, and Pesticides Division

  
Rupert G. Thomas  
Assistant Regional Counsel  
Office of Regional Counsel

Enclosures:

1. FIFRA Civil Penalty Calculation Worksheet
2. Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance Action Orders, and the Revocation, Termination or Suspension of Permits, 40 C.F.R. Part 22
3. July 2, 1990, Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act
4. SBREFA Fact Sheet
5. Notice of Securities and Exchange Commission Registrants Duty to Disclose Environmental Legal Proceedings

CERTIFICATE OF SERVICE

I certify that on the date noted below I hand delivered the original and one copy of this Complaint and Notice of Opportunity for Hearing to the Regional Hearing Clerk, EPA, 901 North 5<sup>th</sup> Street, Kansas City, Kansas 66101.

I further certify that on the date noted below I sent by certified mail, return receipt requested, a copy of the signed original Complaint and Notice of Opportunity for Hearing; a copy of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits, 40 C.F.R. Part 22; a copy of the July 2, 1990, Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act; a copy of the FIFRA Civil Penalty Calculation Worksheet; the SBREFA Fact Sheet; and the Notice of Securities and Exchange Commission Registrants' Duty to Disclose Environmental Legal Proceedings, to the following:

Raymond Kastendieck  
Registered Agent  
FRM Chem, Inc.  
Highway 47 South  
P.O. Box 207  
Washington, Missouri 63090

December 11, 2003  
Date

Vitula Lungren  
Vitula Lungren

FIFRA CIVIL PENALTY CALCULATION WORKSHEET  
**ENFORCEMENT RESPONSE POLICY for FIFRA - Reference**

RESPONDENT: FRM Chem, Inc. a.k.a. Industrial Specialties  
 ADDRESS: P.O. Box 207  
 Highway 47 South  
 Washington, Missouri 63090

Prepared By: Mark K. Leshner  
 Date: 10/31/03

	Count 1	Count 2	Count 3	Count 4
<u>Appendix A</u>				
1. Statutory Violation	12(a)(1)(A)	12(a)(1)(A)	12(a)(1)(A)	
2. FTTS Code	1AA	1AA	1AA	
3. Violation Level	2	2	2	
<u>Appendix C - Table 2 - Size of Business Category</u>				
4. Violator Category * § 14(a)(1) or § 14(a)(2)	§14(a)(1)	§14(a)(1)	§14(a)(1)	
5. Size of Business Category	I	I	I	
<u>Appendix C - Table 1 - FIFRA Civil Penalty Matrix</u>				
6. BASE PENALTY	\$5,500	\$5,500	\$5,500	
<u>Appendix B - Gravity Adjustments</u>				
7a. Pesticide Toxicity	2	2	2	
7b. Human Harm	3	3	3	
7c. Environmental Harm	3	3	3	
7d. Compliance History	0	0	0	
7e. Culpability	2	2	2	
7f. Total Gravity Adjustment Value (add items 7a - 7e)	10	10	10	
<u>Appendix C - Table 3 - Adjustments</u>				
7g. Percent Adjustment	None	None	None	
7h. Dollar Adjustment	None	None	None	
8. Final Penalty** (item 7h from item 6)	\$5,500	\$5,500	\$5,500	
Combined Total Penalty (total of all columns for line 8, above)	\$16,500			

\* Section 14(a)(1) of FIFRA - Any registrant, commercial applicator, wholesaler, dealer, retailer, or other distributor who violates any provision of this subchapter may be assessed a civil penalty by the Administrator of not more than \$5,000 for each offense.

Section 14(a)(2) of FIFRA - Any private applicator or other person not included in paragraph (1) who violates any provision of this subchapter subsequent to receiving a written warning from the Administrator or following a citation for a prior violation, may be assessed a civil penalty by the Administrator of not more than \$1,000 for each offense, except that any applicator not included under paragraph (1) of this subsection who holds or applies registered pesticides, or use dilutions of registered pesticides, only to provide a service of controlling pests without delivering any unapplied pesticide to any person so served, and who violates any provision of this subchapter may be assessed a civil penalty by the Administrator of not more than \$500 for the first offense nor more than \$1,000 for each subsequent offense.

\*\*The final penalty in each column of line 8 cannot exceed the statutory maximum.