

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY

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BEFORE THE ADMINISTRATOR

ENVIRONMENTAL PROTECTION  
AGENCY-REGION VII  
REGIONAL HEARING CLERK

In the Matter of )  
 )  
FRM Chem, Inc., )  
a.k.a. Industrial Specialties )  
 )  
Respondent )

Docket No. FIFRA-07-2004-0041

COMPLAINANT'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER; AND TRIAL BRIEF IN SUPPORT THEREOF

Pursuant to Rule 22.26 of the Consolidated Rules of Practice, 40 C.F.R. § 22.26, Complainant, the United States Environmental Protection Agency, Region VII (Complainant or EPA), hereby submits the following Proposed Findings of Facts, Conclusions of Law, and Order; and Trial Brief in support thereof.

At the close of the August 26, 2004 hearing in this matter, the Presiding Officer ordered the Complainant to file a written brief by October 15, 2004. Complainant's brief is timely, as it has been filed prior to the deadline.

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## PROPOSED FINDINGS OF FACT

### General Findings

1. The Complainant, by delegation from the Administrator of the United States Environmental Protection Agency (EPA), and the Regional Administrator. EPA, Region VII, is the Director of the Water, Wetlands and Pesticides Division, EPA, Region VII. Complaint at 1.
2. Respondent, FRM Chem., Inc. a.k.a. Industrial Specialties, is 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. Complaint at 1.
3. Respondent is a pesticide producer and distributor, located at Highway 47 South, 50 Hiline Drive, Washington, Missouri 63090. Complaint at 1; CX 1; CX 6.
4. In 2002, Respondent manufactured and held for sale or distribution a product called "Root Eater." Tr. 15-17, 108-110; CX 2.
5. C. Alan Uthlaut is a Pesticide Use Investigator employed by the Missouri Department of Agriculture. Tr. 10-11.
6. On May 11, 1999, Mr. Uthlaut performed an investigation of Respondent's facilities at 50 Hiline Drive, in Washington, Missouri. Tr. 14-15.
7. During the inspection of May 11, 1999, Mr. Uthlaut obtained copies of the label and sales records for a product manufactured and held for sale by Respondent called "Root Eater." Tr. 15.
8. During the inspection of May 11, 1999, Mr. Uthlaut advised Respondent's representative that the wording on the Root Eater label was questionable in that it appeared to make a pesticidal claim and that Respondent should contact the EPA for further guidance. Tr. 15, 31.
9. Respondent did not contact the EPA following Mr. Uthlaut's inspection in 1999. Tr. 110.
10. On September 12 and 13, 2002, Mr. Uthlaut performed a second inspection of Respondent's facilities at 50 Hiline Drive, in Washington, Missouri. Tr. 12; CX 1.
11. During the September 2002 inspection, Mr. Uthlaut again obtained copies of the label for the product Root Eater manufactured and held for sale by Respondent. Tr. 16; CX 2.
12. During the September 2002 inspection, Mr. Uthlaut obtained sales invoices detailing sales by Respondent in 2002 of the product Root Eater. Tr. 22-24; CX 3-5.

13. Sales invoices collected from Respondent in September 2002 show that, on or about January 10, 2002, and July 29, 2002, Respondent sold a total of eight 50 lbs. containers of Root Eater to the City of Covington, Oklahoma. Tr. 24; CX 3.
14. Sales invoices collected from Respondent in September 2002 show that, on or about June 13, 2002, and June 25, 2002, Respondent sold a total of two 50 lbs. containers of Root Eater to the City of Hoisington, Kansas. Tr. 24; CX 4.
15. Sales invoices collected from Respondent in September 2002 show that, on or about January 10, 2002, and August 6, 2002, Respondent sold a total of two 50 lbs. containers of Root Eater to the City of Lucas, Kansas. Tr. 24; CX 5.
16. Mr. Kerry Leifer, a Team Leader in the Registration Division of the EPA's Office of Pesticide Program, is an expert in the registration requirements of products marketed as pesticides. Tr. 78-79.
17. Mr. Leifer reviewed documents and samples pertaining to the Root Eater product that were collected by Mr. Uthlaut during the September 2002 inspection. Tr. 79-86.
18. The material reviewed by Mr. Leifer included a copy of the Root Eater product's label collected by Mr. Uthlaut in the September 2002 inspection. Tr. 46, 80.
19. It is illegal for any person to distribute or sell a pesticide that has not been registered with the EPA. FIFRA § 12(a)(1)(A), 7 U.S.C. § 136j(a)(1)(A).
20. Root Eater is not registered as a pesticide. Tr. 81, 86.
21. A product with a label which makes a claim that the use of the product would result in preventing, repelling, mitigating or destroying pests is being marketed as a pesticide. Tr. 80.
22. Section 2(t) of FIFRA, 7 U.S.C. § 136(t), defines the term "pest" as (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 . . . which the Administrator declares to be a pest under section 25(c)(1). Complaint at 2.
23. The label of 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 sewer 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 prompted by root obstruction." CX 2.
24. Since the statements on the Root Eater label include claims to mitigate or destroy tree

roots, slime, fungi and symbiotic organisms, they present pesticidal claims and thus identify Root Eater as a pesticide. Tr. 46, 81-82.

25. The label to Root Eater states, in part: "Caution, Contains Cupric Sulfate." CX 2.
26. Cupric Sulfate is also known as Copper Sulfate. Tr. 90-91.
27. Cupric Sulfate causes irreversible eye damage and skin corrosion. Tr. 83.
28. The label of a pesticide with the active ingredient Cupric Sulfate must include the signal word "Danger." Tr. 83.
29. Though it contained the active ingredient Cupric Sulfate, the label for Root Eater did not include the signal word "Danger." CX 2, Tr. 49-50, 83.
30. The label for the product Root Eater did not contain a first aid information statement. Tr. 45; 68.
31. It is unlawful for any person to distribute or sell any pesticide which is adulterated or misbranded. FIFRA § 12(a)(1)(E), 7 U.S.C. § 136(a)(1)(E).
32. A pesticide is misbranded if the label does not contain an adequate warning or caution statement. FIFRA § 12(q)(1)(G), 7 U.S.C. § 136(q)(1)(G); Complaint at 2; Tr. 83.
33. Mark Leshner is a Case Review Officer in the Pesticides Branch at EPA Region VII. His duties include reviewing inspection reports done by state agency inspectors and assessment of penalties in Pesticides enforcement actions. Tr. 43.

#### Findings Pertaining to the Gravity-Based Penalty Calculation of All Counts

34. The FIFRA Enforcement Response Policy ("ERP") provides a fair and equitable treatment of the regulated community by providing a penalty calculation methodology for interpreting and applying the FIFRA § 14 penalty factors to particular cases. Tr. 47; ERP at 1; CX 10.
35. Pursuant to the ERP, civil administrative penalties are determined according to a five stage process. These steps are: (1) determination of the gravity of the violation; (2) determination of the size of business category for the violator; (3) use of the FIFRA civil penalty matrices found in Table 1 of the ERP to determine the dollar amount associated with the gravity level of violation and the size of business category of the violator; (4) further gravity adjustments of the base penalty in consideration of the specific characteristics of the pesticide involved, the actual or potential harm to human health and/or the environment, the compliance history of the violator, and the culpability of the violator, using the "Gravity Adjustment Criteria" found in Appendix B of the ERP; and

(5) consideration of the effect that payment of the total civil penalty will have on the violator's ability to continue in business. Tr. 47-53; CX 10; ERP at 17-18.

#### Findings Pertaining to the Determination of the Gravity of the Violations

36. Determination of the gravity of the violation is a two step process: (1) determination of the appropriate "gravity level" that EPA has assigned to the violation, and (2) the adjustment of that base penalty figure, as determined from the gravity level, to consider the actual set of circumstances that are involved in the violation. ERP at 21.
37. Respondent was cited for violations involving the distribution or sale of an unregistered and misbranded pesticide. Respondent was cited for three counts of violation for sales of Root Eater to three different city governments on different dates. Tr. 46-47; ERP at 27.
38. The Enforcement Response Policy designates violations involving the distribution or sale of an unregistered and misbranded pesticide as "gravity level 2." ERP at 19; ERP at A-1.
39. The size of a violator's business is determined from the violator's gross revenues during the calendar year prior to the violation's occurrence. ERP at 20.
40. Review of financial data submitted by Respondent and Respondent's Dun and Bradstreet report indicates that Respondent's business exceeded \$1 million in annual gross sales, placing them in the size of business category I. Tr. 48, 101; CX 10.
41. Applying the civil penalty matrices in the ERP, violations with a gravity level 2 committed by size of business category I violators have a base penalty amount of \$5,500. ERP at 19A.
42. Respondent's three counts of violation resulted in a total proposed penalty of \$16,500. Tr. 47; ERP at 19A.

#### Findings Pertaining to the Consideration of Gravity Adjustment Criteria

##### Toxicity Level

43. Toxicity is based on two levels, category I, with a gravity adjustment value of 2, and categories II-IV, which have a gravity adjustment value of 1. Tr. 49; ERP at B-1.
44. Since Root Eater contains copper sulfate, can cause eye, skin, and respiratory damage, it warrants the use of the signal word "Danger" on the label and falls into category I in pesticide toxicity, resulting in a gravity adjustment value of 2. ERP at B-1; Tr. 49-50.

##### Harm to Human Health

45. Harm to human health is assessed on a scale of 1 to 5, with 5 being the most serious. ERP at B-1; Tr. 50.
46. A pesticide with a potential for serious or widespread harm to human health warrants a gravity adjustment value of 3. ERP at B-1; Tr. 50.
47. Since Root Eater contains Copper Sulfate, which is toxic to eyes, skin and respiratory tissue, EPA Region 7 assigned it a gravity adjustment value of 3 for its potential of harm to human health. Tr. 50-51.

#### Environmental Harm

48. Environmental Harm is assessed on a scale of 1 to 5, with 5 being the most serious. ERP at B-1; Tr. 51.
49. Since Copper Sulfate is toxic to fish, many invertebrates, including honeybees and other insects, and to other wildlife, it exhibits a potential for serious or widespread environmental harm, warranting a gravity adjustment value of 3 points. ERP at B-1; Tr. 51.

#### Compliance History

50. Compliance History is assessed on a scale of 0 to 5 points, with 0 indicating no prior FIFRA violations. ERP at B-2.
51. Since Respondent has no prior history of FIFRA violations, it was assigned a gravity adjustment value of 0 for compliance history. Tr. 51; ERP at B-2.

#### Culpability

52. Culpability is assessed on a scale of 0 to 4. A violation resulting from negligence is assessed a value of 2. ERP at B-2.
53. Since EPA determined that the violations were caused by Respondent's negligence, it was assessed a gravity adjustment value of 2 points. Tr. at 51.

#### Application of the Gravity Adjustment Criteria

54. The total gravity adjustment value, adding the gravity adjustment values from each of the five factors, results in a total value of 10. Tr. at 52.
55. Violations with a total gravity adjustment value that falls in the range from 8 to 12 result in no penalty adjustments and will be assessed the base penalty calculated from applying the gravity level of the violation to the size of the violator's business. ERP at 22; Tr. 52.

56. Since the application of the gravity adjustment criteria results in no penalty adjustments, the penalty for each of the three counts remains at \$5,500, for a total of \$16,500. Tr. 52.

Findings Pertaining to Respondent's Ability to Pay \$16,500 Penalty

57. EPA obtained a completed financial questionnaire from Respondent, as well as documents and tax returns, to obtain facts necessary to evaluate its ability to pay. Tr. 96.
58. EPA provided Respondent's financial information to Ms. Joyce Hughes, one of its accountants, who performed an individual ability to pay analysis of Respondent. Tr. 96-97.
59. Ms. Hughes is an expert in the general field of accounting. Tr. 96-97.
60. Ms. Hughes evaluated Respondent's ability to pay by analyzing the firm's equity, the firm's ability to obtain funds to finance the penalty, and the firm's solvency, based upon her review and analysis of Respondent's corporate tax returns, income statements, profit and loss statements, and the EPA Ability to Pay Claim form returned by Respondent. She also consulted the Dun and Bradstreet Report, which showed Respondent's good financial standing. Tr. 99-101.
61. Based upon Ms. Hughes' evaluation, Respondent has over \$1.5 million of gross receipts; approximately \$300,000 of accounts receivables; \$115,000 in notes receivable, and over \$230,000 in good will. Tr. 100-101.
62. Ms. Hughes testified that Respondent's mortgage rate is prime plus one, indicating that it possesses the ability to obtain credit from a bank at a reasonable rate. Tr. 99.
63. Ms. Hughes also concluded that the \$16,500 in proposed penalties against Respondent represents less than 2 percent of Respondent's \$1.5 million in gross annual receipts. Tr. 101.
64. Based upon her expertise and the facts in this matter, Ms. Hughes found that Respondent can afford to pay the penalty of \$16,500. Tr. 97.

PROPOSED CONCLUSIONS OF LAW

1. In light of all the factors in this case, I find appropriate the imposition of a civil penalty in the amount of \$16,500.00 against Respondent, FRM Chem., Inc., aka Industrial Specialties, for the distribution or sale of an unregistered and misbranded pesticide, in violation of Sections 12(a)(1)(A) and 12(a)(1)(E) of FIFRA, 7 U.S.C. §§ 136(a)(1)(A) and 136(a)(1)(E).

PROPOSED ORDER

1. Respondent is assessed a civil penalty of \$16,500.00.
2. Pursuant to 40 C.F.R. §§ 22.27(c) & 22.31(c), payment of the full amount of this civil penalty shall be made within seventy-five (75) days of the service date of this Order by submitting a certified or cashier's check in the amount of \$16,500.00, payable to the Treasurer, United States of America, and mailed to:  
  
Regional Hearing Clerk  
EPA - Region 7  
P.O. Box 371099M  
Pittsburgh, PA 15251
3. A transmittal letter identifying the subject case and the EPA Docket number, as well as Respondent's name and address, must accompany the check.
4. If Respondent fails to pay the penalties within the prescribed statutory period after entry of this Order, interest on the penalty may be assessed, and may be collected in accordance with the Debt Collection Act, 31 U.S.C. § 3717.
5. Pursuant to 40 C.F.R. § 22.27(c), this Initial Decision shall become the Final Order of the Agency forty-five (45) days after its service upon the parties and without further proceedings unless:
  - (1) a party moves to reopen the hearing within twenty (20) days after service of this Initial Decision pursuant to 40 C.F.R. § 22.28(a);
  - (2) a party appeals this Initial Decision to the Environmental Appeals Board within thirty (30) days after service of this Initial Decision pursuant to 40 C.F.R. § 22.30(a); or
  - (3) the Environmental Appeals Board elects to review this Initial Decision on its own initiative pursuant to 40 C.F.R. § 22.30(b).

TRIAL BRIEF IN SUPPORT OF COMPLAINANT'S PROPOSED FINDINGS OF FACT,  
CONCLUSIONS OF LAW, AND ORDER

I. Introduction

A. Procedural History

This proceeding was initiated by a Complaint dated December 11, 2003, issued by Complainant, Leo J. Alderman, Director of the Water, Wetlands, and Pesticides Division, United States Environmental Protection Agency, Region VII, by delegation from the Administrator of the EPA, and the Regional Administration, EPA, Region VII, pursuant to Section 14 of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C § 136l. The Complaint alleges that Respondent violated Sections 12(a)(1)(A) and 12(a)(1)(E) of FIFRA, by distributing or selling a misbranded and unregistered pesticide. The Complaint alleges that Respondent violated these sections of FIFRA when it sold, on several occasions to three different buyers a product which made pesticidal claims on the label but which was not registered as a pesticide with EPA, and which lacked the proper warning language on its label. The Complaint contains a total of three counts, and proposes a total penalty of \$16,500 for these violations.

Respondent filed an Answer on January 13, 2004. On May 3, 2004, the Court issued a Prehearing Order, establishing the schedule for the filing of the prehearing exchanges. On May 3, 2004, Complainant filed its Prehearing Exchange. Respondent did not file a prehearing exchange. On June 14, 2004 the Court issued a Notice of Hearing, establishing various deadlines for events leading up to the hearing. On July 15, 2004, Complainant filed a supplement to its Prehearing Exchange, adding an additional witness, Ms. Joyce Hughes.

An evidentiary hearing was held in East Saint Louis, Illinois, on August 26, 2004. During the hearing Complainant introduced twelve exhibits, all of which were admitted into

evidence, and presented four witnesses: the Missouri state pesticide inspector C. Alan Uthlaut, EPA case review officer Mark K. Leshner, EPA pesticide registration team leader Kerry Leifer, and EPA accountant Joyce Hughes. Respondent introduced no exhibits, and presented one witness, Raymond Kastendieck. At the close of the hearing the Presiding Officer ordered the Complainant to file a post-hearing brief by October 15, 2004.

#### B. Background of FIFRA

The Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) governs the regulation of pesticides in the United States. Under FIFRA, all pesticides must be registered by the EPA before they may be sold or distributed in commerce. FIFRA sets an overall risk/benefit standard for pesticide registration, requiring that pesticides perform their intended function, when used according to labeling directions, without posing unreasonable risks of adverse effects on human health or the environment. In making pesticide registration decisions, EPA is required by law to take into account the economic, social, and environmental costs and benefits of pesticide uses.

FIFRA requires that each manufacturer register each pesticide and its label with EPA before it can be manufactured or sold for commercial use. Prospective pesticide manufacturers are required to submit a registration application to EPA, a proposed label, a statement of all claims to be made for the pesticide, directions for its use, a confidential statement of the formula, and a description of the tests which provide the basis for the manufacturer's claims. The proposed label must be written in such a way as to be understood by the ordinary individual under customary conditions of purchase and use. The manufacturer must avoid making false or misleading statements. Distribution of any pesticide that is not registered or that is improperly labeled is prohibited.

## II. FIFRA § 14 Penalty Criteria

Section 22.27(b) of the Consolidated Rules of Practice provides in pertinent part: “. . . the Presiding Officer shall determine the amount of the recommended civil penalty based on the evidence in the record and in accordance with any penalty criteria set forth in the Act. The Presiding Officer shall consider any civil penalty guidelines issued under the Act.” 40 C.F.R. § 22.27(b).

### A. Statutory Civil Penalty Criteria

FIFRA § 14(a)(1), 7 U.S.C. § 136l(a)(1), provides that any commercial applicator, wholesaler, dealer, retailer, or other distributor who violates any provision of the act “may be assessed a civil penalty by the Administrator of not more than \$5,000 for each offense.” Pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461 note; Pub. L. 101-410; 101 Stat. 890, as amended by the Debt Collection Act of 1996, 31 U.S.C. § 3701 note; Pub. L. 104-134; 110 Stat. 1321, EPA issued a final rule adjusting this \$5,000 figure upward by 10% to \$5,500 for violations that occur after July 28, 1997, 62 Fed. Reg. 35037 (June 27, 1997), 40 C.F.R. Part 19.

Section 14(a)(4) of FIFRA directs that in determining the amount of a civil penalty for violations of FIFRA: “the Administrator shall “consider the appropriateness of such penalty to the size of the business of the person charged, the effect on the person’s ability to continue in business, and the gravity of the violation.” 7 U.S.C. § 136l(a)(4).

### B. EPA’s Civil Penalty Guidelines

In July of 1990, EPA issued an Enforcement Response Policy for violations of FIFRA (ERP). The purpose of the ERP is to provide fair and equitable treatment of the regulated

community by ensuring that similar enforcement responses and comparable penalty assessments will be made for comparable violations. ERP at 1. Furthermore, the policy aims to serve as a deterrent from future violations of FIFRA. The ERP states that a civil penalty is the preferred enforcement remedy for most violations. ERP at 10. A civil penalty is appropriate where the violation (1) presents an actual or potential risk of harm to humans or the environment; and (2) was apparently committed as a result of ordinary negligence (as opposed to criminal negligence), inadvertence, or mistake; and the violation involves a violation under the Act by any registrant, commercial applicator, “for hire” applicator, wholesaler, dealer, retailer, or other distributor (no prior warning is required by FIFRA for violators in this category). ERP at 10.

Pursuant to the ERP, civil administrative penalties are determined according to a five stage process in consideration of the FIFRA Section 14(a)(4) criteria.. These steps are as follows: (1) determination of the gravity or “level” of the violation using Appendix A of the ERP; (2) determination of the size of business category for the violator, found in Table 2 of the ERP; (3) use of the FIFRA civil penalty matrices found in Table 1 of the ERP to determine the dollar amount associated with the gravity level of violation and the size of business category of the violator; (4) further gravity adjustments of the base penalty in consideration of the specific characteristics of the pesticide involved, the actual or potential harm to human health and/or the environment, the compliance history of the violator, and the culpability of the violator, using the “Gravity Adjustment Criteria” found in Appendix B of the ERP; and (5) consideration of the effect that payment of the total civil penalty will have on the violator’s ability to continue in business. Tr. 47-53; CX 10; ERP at 17-18.

In order to provide equitable penalties, the civil penalties that will be assessed for

violations of FIFRA will generally decrease as the size of the business decreases, and vice versa. Size of business is determined from a violator's gross revenues from all revenue sources during the prior calendar year. The appropriateness of the penalty to the size of the business of the person charged is based on three distinct "size of business categories. For section 14(a)(1) violators, persons with a gross income in excess of \$1,000,000 are classified as "Category I." ERP at 20.

Determination of the gravity of the violation is a two step process: (1) determination of the appropriate "gravity level" that EPA has assigned to the violation, and (2) the adjustment of that base penalty figure, as determined from the gravity level, to consider the actual set of circumstances that are involved in the violation. The gravity level established for each violation of FIFRA is listed in Appendix A of the ERP. The level assigned to each violation of FIFRA represents an assessment of the relative gravity of each violation. As the actual circumstances of the violation differ from the average circumstances assumed in each gravity level, the dollar amount of the penalty will be adjusted upward or downward. These adjustments are assigned by EPA, based on gravity adjustment criteria listed in the ERP. ERP at 21.

### III. Argument

#### A. Standard for Initial Decision

Section 22.24(b) of the Consolidated Rules of Practice provides: "Each matter of controversy shall be decided by the Presiding Officer upon a preponderance of the evidence." 40 C.F.R. § 22.24(b). Under the Rules, the complainant has the burden of persuasion that the relief sought is appropriate, whereas the respondent has the burden of presenting any response or

evidence to establish that it is not. 40 C.F.R. § 22.24(a).

B. Violation of FIFRA

Respondent, FRM Chem., Inc. a.k.a. Industrial Specialties, is 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. In 2002, Respondent manufactured and sold a product called “Root Eater.”

Tr. 15. The label of Root Eater contained the following language:

*Root Eater Tree root remover for sewer systems. Root Eater's foaming action removes tree roots from sewer lines without damage to sewer 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 prompted by root obstruction.*

CX 2. Since the statements on the Root Eater label include claims to mitigate or destroy tree roots, slime, fungi and symbiotic organisms, they present pesticidal claims and thus identify Root Eater as a pesticide. Tr. 46, 81-82. Root Eater is not registered with the EPA. Tr. 81, 86. Respondent sold Root Eater to three different city governments on different dates in 2002. Tr. 22-24; CX 3-5. It is illegal for any person to distribute or sell a pesticide that has not been registered with the EPA. 7 U.S.C. § 136j(a)(1)(A). Respondent is therefore in violation of FIFRA Section 12(a)(1)(a), 7 U.S.C. § 136j(a)(1)(A).

Section 12(a)(1)(E) of FIFRA prohibits the sale or distribution of misbranded pesticides. Section 2(q)(1)(G) of FIFRA defines a pesticide as misbranded “if the label does not contain a warning or a caution statement which may be necessary and if complied with [...] is adequate to protect health and the environment.” The Root Eater label lists Cupric Sulfate as the active ingredient. CX 2. Cupric Sulfate causes irreversible eye damage and skin corrosion. Tr. 83. The label for the product Root Eater did not contain first aid information. Tr. 45, 68. The label

of a pesticide with the active ingredient Cupric Sulfate must include the signal word “Danger.” Tr. 83. Since the label for Root Eater does not contain an adequate warning or caution statement, it is misbranded. Accordingly, since Respondent sold Root Eater in 2002, it is in violation of Section 12(a)(1)(E) of FIFRA, 7 U.S.C. §136j(a)(1)(E).

#### C. Appropriateness of Civil Penalty

Pursuant to the ERP, a civil penalty is appropriate where the violation (1) presents an actual or potential risk of harm to humans or the environment; and (2) was apparently committed as a result of ordinary negligence (as opposed to criminal negligence), inadvertence, or mistake; and the violation involves a violation under the Act by any registrant, commercial applicator, “for hire” applicator, wholesaler, dealer, retailer, or other distributor (no prior warning is required by FIFRA for violators in this category). ERP at 10. Respondent’s multiple sales of an unregistered and misbranded pesticide containing Cupric Sulfate presents a potential risk of harm to humans and the environment.

#### D. Gravity-Based Penalty

Respondent was cited for violations involving the distribution or sale of an unregistered and misbranded pesticide, which warrants a gravity level of 2 in the ERP. Tr. 46-47; ERP at A-1. Review of financial and tax documents submitted by Respondent, as well as Respondent’s Dun and Bradstreet report indicates that Respondent’s business exceeded one million dollars in annual gross sales, placing them in the size of business category I. Tr. 48, 101; CX 10. Applying the civil penalty matrices in the ERP, violations with a gravity level 2 committed by size of business category I violators have a base penalty amount of \$5,500. ERP at 19A. Respondent’s three counts of violation therefore result in a total proposed penalty of \$16,500. Tr. 47; ERP at 19A.

#### E. Gravity Adjustment Criteria

Respondent does not challenge or refute Complainant's application of the penalty adjustment factors in the ERP, which are based upon the FIFRA § 14 penalty factors that pertain specifically to the violator. Respondent did not meet the criteria for adjustments, and therefore EPA's consideration of the adjustment factors did not result in a modification to the gravity-based penalty.

##### 1. Toxicity Level

Since Root Eater contains Cupric Sulfate, can cause eye, skin, and respiratory damage, it warrants the use of the signal word "Danger" on the label and falls into category I in pesticide toxicity, resulting in a gravity adjustment value of 2. ERP at B-1; Tr. 49-50.

##### 2. Harm to Human Health

A pesticide with a potential for serious or widespread harm to human health warrants a gravity adjustment value of 3. ERP at B-1; Tr. 50. Since Root Eater contains Cupric Sulfate, which is toxic to eyes, skin and respiratory tissue, EPA Region 7 assigned it a gravity adjustment value of 3 for its potential of harm to human health. Tr. 50-51.

##### 3. Environmental Harm

Since Cupric Sulfate is toxic to fish, many invertebrates, including honeybees and other insects, and to other wildlife, it exhibits a potential for serious or widespread environmental harm, warranting a gravity adjustment value of 3. ERP at B-1; Tr. 51.

##### 4. Compliance History

Since Respondent has no prior history of FIFRA violations, it was assigned a gravity adjustment value of 0 for compliance history. Tr. 51; ERP at B-2.

### 5. Culpability

A violation resulting from negligence is assessed a value of 2 on the Culpability scale of 0 to 4.. ERP at B-2. Since EPA determined that the violations were caused by Respondent's negligence, it was assessed a gravity adjustment value of 2. Tr. at 51.

### 6. Application of the Gravity Adjustment Criteria

The total gravity adjustment value, adding the gravity adjustment values from each of the five factors, results in a total value of 10. Tr. at 52. Violations with a total gravity adjustment value that falls in the range from 8 to 12 result in no penalty adjustments and will be assessed the base penalty calculated from applying the gravity level of the violation to the size of the violator's business. ERP at 22; Tr. 52. Since the application of the gravity adjustment criteria result in no penalty adjustments, the penalty for each of the three counts remains at \$5,500, for a total of \$16,500.

### F. Ability to Pay/Continue to do Business

Complainant's evidence presented that Respondent possesses the ability to pay the penalty sought in this case was unchallenged at hearing. An in-depth financial analysis conducted by Complainant's expert witness Ms. Hughes, which was based upon financial documentation originating from and certified to by Respondent, strongly concludes that it has substantial ability to pay a penalty of \$16,500, both from a cash flow and debt capacity standpoint. As part of her cash flow analysis, Ms. Hughes found that Respondent has over \$1.5 million of gross receipts; approximately \$300,000 of accounts receivables; and \$115,000 in notes receivable. Tr. 100-101. Additionally, the debt capacity portion of her analysis concluded that, since Respondent's mortgage rate is prime plus one, Respondent has the capability to obtain

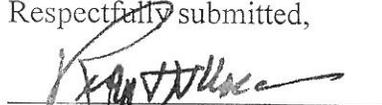
financing from a bank in order to pay the proposed penalty, if necessary.

IV. Conclusion

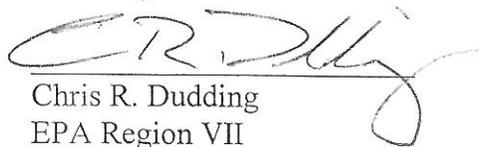
Given all of the factors of this case dealing with unregulated sales of a pesticide containing Cupric Sulfate as its active ingredient, a penalty of \$16,500 against Respondent FRM Chem., a.k.a. Industrial Specialties is appropriate. Respondent violated FIFRA Sections 12(a)(1)(A) and 12(a)(1)(E), 7 U.S.C. §§ 136j(a)(1)(A) and 136(a)(1)(E) by its multiple sales of an unregistered and misbranded pesticide.

Dated: 10/13/04

Respectfully submitted,



Rupert G. Thomas  
EPA Region VII



Chris R. Dudding  
EPA Region VII

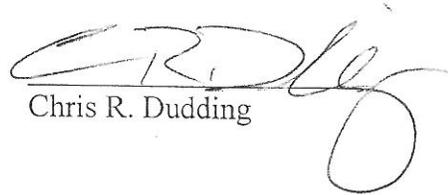
Attorneys for Complainant

CERTIFICATE OF SERVICE

I hereby certify that on the 13 day of October, 2004, I filed by hand delivery the original and one copy of the foregoing Proposed Findings of Facts, Conclusions of Law, and Order; and Trial Brief in Support Thereof, with Kathy Robinson, Regional Hearing Clerk, EPA Region VII, 901 N. 5<sup>th</sup> Street, Kansas City, Kansas 66101, and sent a copy by first class mail to the following:

The Hon. William B. Moran  
Administrative Law Judge  
U.S. Environmental Protection Agency  
Mail Code 1900L  
401 M. Street, S.W.  
Washington, D.C. 20460

Raymond E. Kastendieck  
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P.O. Box 207  
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