

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION VII
901 NORTH 5th STREET
KANSAS CITY, KANSAS 66101

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ENVIRONMENTAL PROTECTION
AGENCY-REGION VII
REGIONAL HEARING CLERK

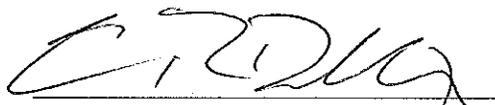
BEFORE THE ADMINISTRATOR

IN THE MATTER OF)	Docket No. FIFRA-07-2008-0036
)	
Advanced Products Technology, Inc.)	STATUS REPORT
Washington, Missouri)	
)	
Respondent)	
)	

STATUS REPORT

On October 2, 2009, Complainant filed the attached Motion for Leave to Amend the Complaint and Consolidate Matters in the Matter of FRM Chem, Inc., Washington, Missouri, Docket No. FIFRA-07-2008-0035, moving pursuant to 40 C.F.R. § 22.12 to consolidate that matter with the above-captioned matter and with two other matters. The basis of the motion are common questions of fact and law shared by the four matters, based in large part on evidence received since the Complaint in this matter was originally filed on June 26, 2009.

Moreover, the penalty for which Respondent may be liable under FIFRA is based in part on Respondent's size of business. Since the ultimate determination of Respondent's size of business may rest upon facts yet to be discovered in the context of the proposed consolidation of matters, and since the size of Respondent's business is the sole area of contention in settlement negotiations, no progress towards settlement has been made in this matter.


 Chris R. Dudding
 Assistant Regional Counsel
 Office of Regional Counsel

CERTIFICATE OF SERVICE

I certify that on the date noted below I hand delivered the original copy of this Status Report to the Regional Hearing Clerk, EPA Region 7, 901 N. 5th Street, Kansas City, Kansas 66101.

I further certify that on the date noted below I sent a copy of the Status Report, via certified mail, return receipt requested, to:

Ann P. Kastendieck
Reg. Agent for Advanced Products Technology, Inc.
P.O. Box 1656
Washington, MO 63090

and faxed a copy of the Status Report to:

Honorable Barbara A. Gunning
Fax number: (202) 565-0044

Oct 2, 2009
Date

Chris Dudding
Chris Dudding

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 7
901 NORTH 5th 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.
Washington, Missouri

Respondent

) Docket No. FIFRA-07-2008-0035
)
) COMPLAINANT'S MOTION FOR LEAVE
) TO AMEND THE COMPLAINT AND
) CONSOLIDATE MATTERS
)
)

COMPLAINANT'S MOTION FOR LEAVE TO AMEND THE COMPLAINT
AND CONSOLIDATE MATTERS

Pursuant to Rule 22.14(c) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits, Complainant, the United States Environmental Protection Agency, Region 7 (EPA) seeks leave of the Court to amend the Administrative Complaint filed by EPA on June 26, 2009. The proposed Amended Complaint is attached. In support of this Motion, Complainant avers the following:

Background

I. The Complaint in the above-captioned matter was filed June 26, 2009. The Complaint contains fifty-six counts, alleging multiple violations by Respondent, FRM Chem, Inc. (FRM), of Sections 12(a)(1)(A) and 12(A)(1)(E) of the Federal Insecticide, Fungicide,

and Rodenticide Act (FIFRA), 7 U.S.C. §§ 136j(a)(1)(A) and (E). Each of the fifty-six counts alleges that Respondent sold or distributed or held for sale or distribution one of two pesticides whose registration had been cancelled or which was misbranded. The pesticides alleged to have been sold or distributed were the products FRM CHLOR 1250 and STERI-DINE DISINFECTANT, both produced by FRM, and the registrations for each which had been cancelled in 1995. The proposed penalty in the original Complaint was \$364,000.

- II. Respondent FRM sent a document Complainant construed as an Answer and which was filed with EPA's Regional Hearing Clerk on July 27, 2009.
- III. A Complaint in the matter of Advanced Products Technology, Inc., Washington, Missouri, Docket No. FIFRA-07-2008-0036, was filed June 26, 2009. This Complaint contains four counts, alleging that the Respondent, Advanced Products Technology, Inc. (APT) violated Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A). Each of the four counts alleges that APT sold or distributed the cancelled product STERI-DINE DISINFECTANT, produced by Respondent FRM. The proposed penalty in the original Complaint against APT is \$26,000.
- IV. APT sent a document Complainant construed as an Answer and which was filed with EPA's Regional Hearing Clerk on July 27, 2009.
- V. A Complaint in the matter of Synisys, Inc., Union, Missouri, Docket No. FIFRA-07-2009-0041, was filed September 23, 2009. This Complaint contains seven counts, alleging that the Respondent, Synisys, Inc. (Synisys) violated Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A). Each of the seven counts alleges that Synisys sold

or distributed the cancelled product FRM CHLOR 1250, EPA Reg. No. 48211-20001-10366. The proposed penalty in the original Complaint against Synisys is \$45,500.

- VI. A Complaint in the matter of Custom Compounders, Inc., Union, Missouri, Docket No. FIFRA-07-2009-0042, was filed September 23, 2009. This Complaint contains five counts, alleging that the Respondent, Custom Compounders, Inc. (CCI) violated Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A). Each of the five counts alleges that CCI sold or distributed the cancelled product FRM CHLOR 1250. The proposed penalty in the original Complaint against CCI is \$32,500.

Issues for Amended Complaint and Consolidation of Matters

- VII. At least eight corporations, including FRM, APT, Synisys, and CCI, in addition to Industrial Specialties, Inc., Pool Solutions Midwest, Inc., V.L. Clark Chemical, Inc., and Chemicals, Pharmaceuticals & Intermediates, Inc. all list a facility located at 50 and/or 60 Highline Drive in Union, Missouri as their principal place of business.
- VIII. Respondent FRM is a Missouri company incorporated on October 28, 1968, and administratively dissolved by the Missouri Secretary of State July 1, 2008, for failure to file an annual report.
- IX. In a Final Decision and Order issued June 13, 2006, the EPA Environmental Appeals Board determined that Respondent FRM had annual gross receipts in excess of \$1,000,000 and assessed an administrative penalty of \$16,500 against Respondent FRM in *In the Matter of FRM Chem. Inc., a/k/a Industrial Specialties* in EAB FIFRA Appeal No. 05-01. Multiple attempts were made by EPA to collect the penalty in August, October, and November of 2006, and receipt of the certified letters by FRM's

owner and corporate President Raymond Kastendieck was documented by EPA. To date, Respondent FRM has not paid the penalty assessed in this matter.

- X. Corporate officers for FRM Chem., Inc. listed on the annual registration report filed January 30, 2007, were: President, Raymond E. Kastendieck; Vice-President, Keith G. Kastendieck; Secretary, Ann P. Kastendieck; and Treasurer, Ann P. Kastendieck. Ann P. Kastendieck is the sole listed member of the Board of Directors on the annual registration report filed January 30, 2007. Karlan Kastendieck served as the sales manager of FRM, and Keith Kastendieck served as the plant manager of FRM.
- XI. APT and Synisys, Inc., are both Missouri companies incorporated by Ann Kastendieck on December 29, 2003. Corporate officers for both corporations are: President, Raymond E. Kastendieck, and Secretary, Ann P. Kastendieck. Ann P. Kastendieck is the sole listed member of the Board of Directors on the most recent annual registration report for each company, each of which was filed with the Missouri Secretary of State on April 29, 2009.
- XII. Custom Compounds, Inc., is a Georgia company incorporated November 5, 1986. Corporate officers for Custom Compounds, Inc., are: Chief Executive Officer, Raymond Kastendieck; Chief Financial Officer, Karlan Kastendieck; and Secretary, A. P. Kastendieck.
- XIII. Keith G. Kastendieck is the manager and part owner of APT, Synisys, Inc., and Custom Compounds, Inc..
- XIV. Karlan Kastendieck is the sales manager for Respondent FRM and APT.

XV. On December 21, 2005, a representative for the Missouri Department of Agriculture (MDA) performed an inspection of Respondent FRM's facility at 50 Highline Drive in Union, Missouri, interviewing Karlan Kastendieck, the sales manager for FRM and APT and collecting shipping records and labels documenting that FRM was holding for sale or distribution the unregistered pesticides FRM CHLOR 1250 and STERI-DINE DISINFECTANT.

XVI. On or about May 20, 2008, EPA issued Request For Information Letters regarding sales, distribution, and shipments of the cancelled pesticides FRM CHLOR 1250 and STERI-DINE DISINFECTANT to multiple customers of Respondent FRM. Several customers responded to the information request and supplied documentation of multiple sales or distributions by Respondent FRM of FRM CHLOR 1250 and STERI-DINE DISINFECTANT, in addition to four sales or distributions by APT in 2007 of the FRM product STERI-DINE DISINFECTANT to L.W. Chemicals, Inc., of Mt. Olive, Illinois.

XVII. On October 8, 2008, representatives of MDA and EPA performed an inspection of FRM, APT, Industrial Specialties, Inc., Custom Compounders, Inc., and Synisys, Inc., at the facility located at 50 and 60 Highline Drive in Union, Missouri.

XVIII. On October 8, 2008, Keith G. Kastendieck, the corporate Vice President and manager for Respondent FRM, was served with an order issued pursuant to Section 13(a) of FIFRA, 7 U.S.C. § 136k(a), prohibiting the distribution, sale, use, or removal of the pesticides FRM CHLOR 1250 and STERI-DINE DISINFECTANT.

XIX. On October 8, 2008, Keith G. Kastendieck, in his capacity as Vice-President of

Respondent FRM and as owner and manager for APT, Synisys, Inc., and Custom Compounds, Inc., informed inspectors for the MDA and EPA that "we no longer produce" either of the two pesticides FRM CHLOR 1250 or STERI-DINE DISINFECTANT, and that "we do not have any inventory for STERI-DINE or FRM CHLOR 1250." He further stated that "[w]e last produced STERIDINE April '06 and we last produced FRM CHLOR 1250 Dec. '06," and that "we are not presently producing, labeling, selling, or distributing these products." He also claimed that FRM Chem, Inc. had ceased operation effective December 31, 2006.

XX. Documents collected by MDA and EPA in the October 8, 2008, inspection of FRM, APT, Industrial Specialties, Inc., Custom Compounds, Inc., and Synisys, Inc., detail sales or distributions by Custom Compounds, Inc., of FRM CHLOR 1250 to the Franklin County Humane Society in Union, Missouri, on or about December 31, 2007, May 22, 2008, June 19, 2008, July 24, 2008, and September 29, 2008.

XXI. On July 15, 2009, EPA Region 7 received documentation in the form of multiple invoices on FRM letterhead detailing sales or distributions of the unregistered pesticide product FRM CHLOR 1250 to McFleeg, Inc., in Watertown, South Dakota, on or about January 8, 2007, March 28, 2007, and January 21, 2008. At the bottom of each invoice is an instruction to "Please Make Check Payable to Synisys, Inc."

XXII. The March 28, 2007, and the January 21, 2008, sales or distributions of FRM CHLOR 1250 to McFleeg, Inc., documented by the invoices referenced in the preceding paragraph, correspond respectively to Counts 5 and 6 of the June 26, 2009, Complaint

filed against FRM, and also to Counts 2 and 3 of the September 23, 2009, Complaint filed against Synisys.

XXIII. On August 7, 2009, EPA Region 7 received documentation that containers of the FRM CHLOR 1250 product sold or distributed to McFleeg, Inc. had been manufactured on March 28, 2007, and January 17, 2008, contradicting statements by Keith G. Kastendieck to MDA and EPA on October 8, 2008, that FRM Chlor 1250 had not been manufactured since December 2006. Photographs of the product label identify the manufacturer as Respondent FRM Chem, Inc., of Washington, Missouri.

XXIV. In addition to the multiple sales of FRM CHLOR 1250, the invoices received on July 15, 2009, also document sales of the products Cir-Clean, Mech II, FRM-X Teat Dip, Udderway, FRM Dine Teat Dip, and Prevent, all of which are identified on their labels as having been produced by Respondent FRM, and also of the product Gain SVP, which is identified on its label as having been produced by APT. The most recent sales to McFleeg, Inc. (of FRM's product Cir-Clean and of APT's product Gain SVP) are documented by an FRM Chem., Inc. invoice dated February 16, 2009, which contains the instruction "Please Make Check Payable to Synisys, Inc."

XXV. On August 10, 2009, EPA Region 7 received documentation in the form of sales invoices on FRM letterhead that, on at least four occasions (on or about February 6, 2007, February 13, 2008, October 13, 2008, and November 26, 2008), sales or distributions of the unregistered pesticide product FRM Chlor 1250 were made to Graber Equipment in Odon, Indiana. The latter two sales or distributions occurred after EPA Region 7's October 8, 2008, service to Respondent FRM of the order issued

pursuant to Section 13(a) of FIFRA, 7 U.S.C. § 136k(a), prohibiting the distribution, sale, use, or removal of the product FRM CHLOR 1250, EPA Reg. No. 48211-20001-10366. At the bottom of each invoice is an instruction to "Please Make Check Payable to Synisys, Inc."

XXVI. Complainant seeks the following changes in the amended Complaint:

- A. Complainant seeks to consolidate this matter with the matters of Advanced Products Technology, Inc., Washington, Missouri, Docket No. FIFRA-07-2008-0036, Synisys, Inc., Union, Missouri, Docket No. FIFRA-07-2009-0041 and Custom Compounders, Inc., Union, Missouri, Docket No. FIFRA-07-2009-0042.
- B. Complainant seeks to add two counts to the Amended Complaint alleging that on or about October 13, 2008, and on or about November 26, 2008, Respondents sold or distributed a quantity of the product FRM CHLOR 1250, EPA Reg. No. 48211-20001-10366, to Graber Equipment in Odon, Indiana, in violation of an order issued to Respondent FRM on October 8, 2008, pursuant to Section 13(a) of FIFRA, 7 U.S.C. § 136k(a), prohibiting the distribution, sale, use, or removal of the pesticide FRM CHLOR 1250, EPA Reg. No. 48211-20001-10366.
- C. Complainant also seeks leave to amend the "Statutory & Regulatory Background" and "Factual Allegations" sections of the Complaint to incorporate law and factual allegations relevant to the proposed additional counts under XXVI.B above.
- D. Complainant also seeks leave to amend its reference in the Complaint to Respondent FRM's address as 50 Highline Drive in Washington, Missouri (the address stated in corporate filings with the Missouri Secretary of State), changing the address to 50

Highline Drive in Union, Missouri 63084, in recognition of the fact that the U.S. Post Offices in Union and Washington, Missouri have each informed Complainant that the latter address is the correct one for Respondent's facility, though Respondent FRM maintains a Post Office Box address in Washington, Missouri.

Controlling Legal Authority

- XXVII. Pursuant to 40 C.F.R. § 22.14, the Complainant may amend the Complaint after the Respondent has filed an answer only upon motion granted by the Presiding Officer.
- XXVIII. Pursuant to 40 C.F.R. § 22.12, the Presiding Officer may consolidate any or all matters at issue in two or more proceedings subject to the Consolidated Rules where: there exist common parties or common questions of fact or law; consolidation would expedite and simplify consideration of the issues; and consolidation would not adversely affect the rights of parties engaged in otherwise separate proceedings.
- XXIX. It is a general legal principle that "administrative pleadings are liberally construed and easily amended" and permission to amend will usually be freely given. Yaffe Iron & Metal Co., Inc. v. EPA, 774 F.2d 1008, 1012 (10th Cir. 1985). If leave to amend is to be denied, it must generally be shown that the amendment will result in prejudice to the opposing party and that the prejudice would constitute a serious disadvantage that goes beyond mere inconvenience. In re: Port of Oakland, MPRSA Appeal No. 91-1 (EAB, August 5, 1992).
- XXX. The facts and circumstances surrounding the violations identified as a result of information gathered in July and August of 2009 are nearly identical to those surrounding the violations already alleged in the Complaint. A denial of leave to

amend the Complaint, thus creating the need to pursue additional violations in one or more separate proceedings, will result in duplication of efforts by Complainant, Respondent, and the Court and the inefficient use of the administrative process.

XXXI. The above-captioned matter shares common questions of fact and law with the matters of Advanced Products Technology, Inc., Washington, Missouri, Docket No. FIFRA-07-2008-0036, Synisys, Inc., Union, Missouri, Docket No. FIFRA-07-2009-0041 and Custom Compounders, Inc., Union, Missouri, Docket No. FIFRA-07-2009-0042. The four corporations share common officers, directors, and supervisors, engage in substantially the same business operations; share the same principal place of business, and are charged with similar violations of selling one or both of the two FRM-produced unregistered pesticides, FRM CHLOR 1250 and STERI-DINE DISINFECTANT to several common customers. Furthermore, FIFRA 14(a)(4), 7 U.S.C. § 136(a)(4), states that a respondent's size of business shall be considered in determining the amount of a penalty for a FIFRA violation. Given this factor in calculating liability, the ultimate penalty for which the four Respondents may be liable, collectively or individually, may be contingent on whether one or more of the other three corporations is deemed a corporate successor of FRM or if evidence gathered via discovery establishes grounds for piercing of the corporate veil. This factor, along with the other facts mentioned above, militates in favor of consolidating the four matters in the interest of efficiency.

XXXII. This amendment is in the public interest and will promote the efficient and expeditious disposition of this matter.

XXXIII. The proposed amended complaint is included with this motion as an attachment.

Respectfully submitted,



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

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of October, 2009, I hand-delivered the original and one true copy of this Motion for Leave to Amend the Complaint, to the Regional Hearing Clerk, and sent one true and correct copy:

via Certified Mail, return receipt requested, to:

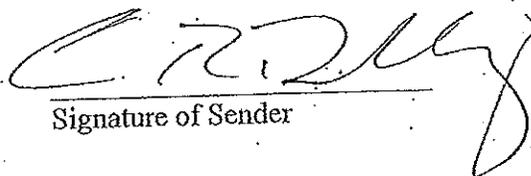
Raymond Kastendieck
Registered Agent for
FRM Chem, Inc.
3007 Brighton Lane
Washington, MO 63090

Robert Sichel
Registered Agent for Custom Compounds, Inc.
750 Hammond Drive, Bldg 9
Atlanta, Georgia 30328.

Ann P. Kastendieck
Reg. Agent for Synisys, Inc. and Advanced Products Technology, Inc.
P.O. Box 1656
Washington, MO 63090

via Federal Express, to:

Judge Barbara Gunning
U.S. Environmental Protection Agency
Office of Administrative Law Judges
1099 14th Street
Suite 350
Washington, D.C. 20005.


Signature of Sender