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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10

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In the matter of:)	
)	DOCKET NO. FIFRA-10-2004-0056
Steven Tuttle; Tuttle Tool)	
Engineering, and Tuttle Apiary)	MOTION TO AMEND
Labs)	COMPLAINT
)	
Respondents.)	
_____)	

INTRODUCTION

Pursuant to 40 C.F.R. §§ 22.14(c) and 22.16(a), Complainant, EPA Region 10, moves to amend the Complaint. The purpose of this motion is to remove Tuttle Tool Engineering and Tuttle Apiary Labs as respondents.

ARGUMENT

The Complaint names Steven Tuttle, Tuttle Tool Engineering, and Tuttle Apiary Labs as respondents in this case. The Complaint alleges that Respondents sold products called "Mite Solution Concentrate" and "Herbal Bee Calmer" in violation of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"). The Region moves to drop Tuttle Tool Engineering and Tuttle Apiary Labs as respondents on the grounds that neither is a legal entity. Neither is registered with the Washington Secretary of State as a corporation, partnership, or "d/b/a." A draft Amended Complaint is attached to this motion in which all references to Tuttle Tool Engineering and Tuttle Apiary Labs as respondents have been removed (and all references to "respondents" were changed from the plural to the singular); in all other respects, the Amended

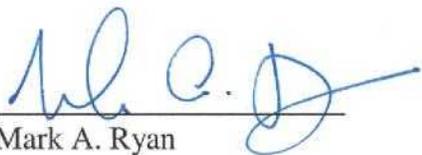
Complaint is identical to the original Complaint. Region 10 proposes no substantive changes to the allegations against Mr. Tuttle.

The Environmental Appeals Board has found that a complainant should be given leave to freely amend a complaint in accordance within the liberal policy of Rule 15(a) of the Federal Rules of Civil Procedure because it promotes accurate decisions on the merits of the case.¹ This proposed amendment serves the purpose of cleaning up the record by naming the appropriate respondent in this action. This proposed amendment should result in no prejudice to Respondent Steven Tuttle.

CONCLUSION

For the good cause shown, the Presiding Officer should grant Complainant's motion to amend the complaint.

RESPECTFULLY SUBMITTED this ^{30th} day of September, 2004.


Mark A. Ryan
Assistant Regional Counsel
Region 10

¹*In re JDN Intermountain Holdings, Inc.*, 2004 WL 1658585 (ALJ Gunning June 10, 2004) (citing *In re Asbestos Specialists, Inc.*, 4 E.A.D.819, 830 (EAB 2002), *In re Port of Oakland and Great Lakes Dredge and Dock Company*, 4 E.A.D. 170, 205 (EAB 1992)).

CERTIFICATE OF SERVICE

I certify that the "Motion to Amend Complaint," was sent to the following persons, in the manner specified, on the date below:

Original and one copy, via pouch mail:

Carol Kennedy, Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 10
1200 Sixth Avenue, Mail Stop ORC-158
Seattle, Washington 98101.

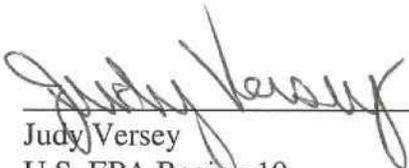
A true and correct copy by U.S. Mail to:

Honorable William B. Moran
Administrative Law Judge
EPA Office of Administrative Law Judges
Mail Code 1900L
Ariel Rios Building
Washington, D.C. 20460.

A true and correct copy, by U.S. mail to:

Steven L. Tuttle
3030 Lewis River Road
Woodland, WA 98674.

Dated: 10/1/04



Judy Versey
U.S. EPA Region 10

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of:
Steven L. Tuttle,

Respondent

DOCKET NO. FIFRA-10-2004-0056

AMENDED COMPLAINT

I. JURISDICTION

1. This administrative action for the assessment of a civil penalty is instituted pursuant to Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. § 1361(a). This proceeding is also subject to the Consolidated Rules of Practice Governing the Administrative Assessment of Penalties and Revocation or Suspension of Permits (Rules) , 40 C.F.R. Part 22.

2. Complainant is Region 10 of the United States Environmental Protection Agency (EPA). Complainant has been delegated the authority to institute this action.

3. Respondent is Steven L. Tuttle.

II. FACTS

4. Steven L. Tuttle ("Respondent") is an individual who does business as Tuttle Apiary Laboratories. Respondent's principle place of business is 3030 Lewis River Road in Woodland, Washington.

1 5. Some time prior to February 17, 1995, Respondent submitted an application to EPA for the
2 registration of a pesticide named *Mite Solution*. Nevertheless, later that same year, prior to obtaining
3 an EPA-approved registration of this product, Respondent discontinued his attempt to register *Mite*
4 *Solution* as a pesticide.

5 6. In literature produced by Respondent in 1995, *Mite Solution* was described as a miticide,
6 pesticide, and fungicide. At that time, *Mite Solution* was also offered by Respondent to kill mites
7 and destroy mite infestation in bee hives. Further, the literature included a symbol which consisted
8 of a drawing of a mite within a circle with a slash mark through the mite. *Mite Solution* was
9 advertised for sale by Respondent in *Bee Culture* magazine.

10 7. On September 20 and October 12, 1995, EPA provided Respondent with written warning
11 letters pertaining to *Mite Solution*. In these letters, Respondent were notified that they could not
12 lawfully make or imply any pesticidal claims regarding *Mite Solution*, including mentioning use of
13 this product as a miticide or fungicide, unless and until the product was registered as a pesticide with
14 EPA.

15 8. On March 22, 1996, Complainant initiated an administrative penalty proceeding against
16 Respondent pursuant to Section 14 of FIFRA, 7 U.S.C. § 136. The proceeding was designated by
17 docket number 10-96-0012-FIFRA. Respondent was found liable for two violations of Section
18 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A). These violations pertained to offering for sale and
19 selling *Mite Solution*, an unregistered pesticide. It was also determined that the written symbol of a
20 slash mark through a mite was a pesticidal claim. In a judgment rendered on September 30, 1997,
21 Respondent were assessed a civil penalty in the amount of \$ 3,780.

22 9. In an issue of "*Bee Culture*" magazine dated November 2003, Respondent advertised two
23 products, and jointly referred to these products as *Mite Solution*. The individual names of these
24 products were *Herbal Jelly* and *Concentrated Mite Solution*. The advertisement for these products
25 contained the following statements:

26 Why use poison in your beehives??? . . . Use Mite Solution . . .

27 Herbal Jelly applied through front entrance is all you need . . .

28 1 Packet treats 10 hive bodies for 1 year . . .

1 Concentrated Mite Solution capsules come ready to mix . . .
2 1 cup treats 25 hive bodies . . .

3 10. In January of 2004, Chad Schulze of EPA contacted Respondent and asked to purchase one
4 package each of *Herbal Jelly* and *Concentrated Mite Solution*. In response to this request,
5 Respondent sold and distributed a box labeled *Mite Solution* to Mr. Schulze. The return address
6 portion on the outside of this box contained a symbol which consisted of a drawing of a mite within
7 a circle with a slash mark through the mite. The internal contents of the box included one packet of
8 the product labeled *Herbal Bee Calmer Gel*, and one packet of the product labeled *Mite Solution*
9 *Concentrate*. These products were produced by Respondent at their place of business located at
10 3030 Lewis River Road in Woodland, Washington. Along with these products, Respondent also
11 provided a double-sided leaflet which contained the following statements (emphasis in original):

12 **Mite Solution ... safely treats your** hives year around . . .

13 the name change was necessary because the EPA violates the intent of
14 their own law, requiring anything to be registered that kills pests.

15 **Herbal Jelly** . . . is placed into the front entrance of the hive . . . It's the
16 fumes that do the job ...

17 **Oil Concentrate**, is the same herbal extracts as in the jell, but you mix
18 them with a light cooking oil . . . and placed into the hive where the fumes
19 will get to the whole hive.

20 **Fumes are the same, and are designed to treat the whole hive .**

21 **Mite Solution as Herbal Jelly** . . . Apply every month, or oftener . . .
22 Drones come from many miles away and can carry with them diseases,
23 & mites . . . A **natural** medication that is **safe** . . .

24 **Mite Solution in Oil Concentrate** . . . Mix the packet of herbal extracts
25 to a Cooking Oil . . . apply every month or oftener . . . The purpose is to
26 make treatment of the bees in large apiaries easier . . .

27 Mite Solution was developed . . . as a solution to a vast majority of bee
28 hive diseases . . .

Each ingredient extract was first determined to help the hive, that is
herbal extract is known as a strong antiseptic, one a strong and effective
antibiotic, another functions as a fungicide, an herbal enema, and several
are known to be miticides . . .

We then tested Mite Solution from May of 1993 to Sept. 1995 using
comprehensive 'A-B' test in conjunction with the requirements set forth
in 40 CFR under the direction of the US EPA.

1 To complete EPA registration it would cost several million dollars
2 which would have to be passed on to the beekeeper, so we took another
3 route. We changed the name to Bee Calmer and could no longer
4 advertise it as a miticide, antiseptic, antibiotic, or fungicide.

5 An EPA Judge informed me that what we call it was never the use, just
6 the lack of registration, and calling it a miticide. So while we know
7 what it does, we can't advertize it as such.

8 . . . the **Jelly is used without diluting** . . .

9 **If your hive already has mites in it you should apply once a week**
10 **until they are gone, then once a month after the mite population is**
11 **under control.** Two or three weeks in a row should see more than a
12 ninety percent reduction in mites ... In many areas it is unrealistic to
13 think that you will reduce the mite population to absolute zero, as new
14 mites come in on Drones, and drifting bees. That's one reason I like
15 treating the entrance of a hive.

16 The **active ingredients in both the jelly and the oil concentrate are**
17 **the same** ...

18 Note: I have seen hives with Nosema ingest the jelly, and within a day
19 or two the hive is cured ... We have been told that Mite Solution has
20 protected hives from the hive beatle [sic] in some South Eastern States ...

21 11. As of March 5, 2004, Respondent were projecting yearly sales of up to \$ 200,000. Further,
22 Respondent has 500 accounts, and sells his products to other businesses on a worldwide basis.
23 Respondent also regularly employs three individuals, although the number of employees may
24 fluctuate. In addition to the production and sale of *Herbal Bee Calmer Gel* and *Mite Solution*
25 *Concentrate*, Respondent's financial earnings also come from the manufacture and sale of
26 communications equipment, and from the building and repair of boats.

27 12. In June of 2003, Respondent declined to provide financial information to Dunn &
28 Bradstreet, Inc. (D&B) pertaining to the net worth of Respondent. The most recent financial
information made available by Respondent to D&B is from September of 1986. At that time,
Respondent had a net worth of \$ 647,944.

29 **III. STATUTE AND REGULATIONS**

30 13. According to Section 2(s) of FIFRA, 7 U.S.C. § 136(s), "*person*" means any individual,
31 partnership, association, corporation, or any organized group of persons whether incorporated or not.

1 14. According to Section 2(gg) of FIFRA, 7 U.S.C. § 136(gg), "*to distribute or sell*" means
2 distribute, sell, offer for sale, hold for distribution, hold for sale, hold for shipment, ship, deliver for
3 shipment, release for shipment, or receive and (having so received) deliver or offer to deliver.

4 15. According to Section 2(u) of FIFRA, 7 U.S.C. § 136(u), "*pesticide*" means any substance or
5 mixture of substances intended for preventing, destroying, repelling, or mitigating any pest.

6 16. According to Section 2(t) of FIFRA, 7 U.S.C. § 136(t), "*pest*" means any insect, as well as
7 any other form of animal life determined to be a "pest" in accordance with Section 25(c)(1) of
8 FIFRA, 7 U.S.C. § 136w(c)(1).

9 17. According to 40 C.F.R. § 152.5(b), for purposes of FIFRA, "*pest*" means any invertebrate
10 animal, including but not limited to, any insect or other arthropod.

11 18. According to 40 C.F.R. §§ 152.15(a) and (c), a substance is intended for a pesticidal
12 purpose, and thus to be a pesticide requiring registration, if the person who distributes or sells the
13 substance claims, states, or implies (by labeling or otherwise) that the substance (either by itself or in
14 combination with any other substance) can or should be used as a pesticide or the person who
15 distributes or sells the substance has actual or constructive knowledge that the substance will be
16 used, or is intended to be used for a pesticidal purpose.

17 19. According to Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), it is unlawful for any
18 person to distribute or sell any pesticide that is not registered under Section 3 of FIFRA, 7 U.S.C.
19 § 136a.

20 20. According to 40 C.F.R. § 152.3(r), "*package or packaging*" means the immediate container
21 or wrapping, including any attached closure(s), in which the pesticide is contained for distribution,
22 sale, consumption, use, or storage. The term does not include shipping or bulk containers used for
23 transporting or delivering the pesticide unless it is the only such package.

24 21. According to 40 C.F.R. Part 152, every pesticide product must bear a label which, among
25 other requirements, clearly and prominently shows: (a) the net weight or measure of contents; (b) an
26 ingredient statement which specifies the name and percentage by weight of each active ingredient,
27 and the total percentage by weight of all inert ingredients; (c) hazard and precautionary statements
28

1 for humans, including children, and for animals and the environment; and (d) directions for use
2 which include worker protection statements.

3 22. According to Section 2(p)(1) of FIFRA, 7 U.S.C. § 136(p)(1), “*label*” means the written,
4 printed, or graphic matter on, or attached to, the pesticide or any of its containers or wrappers

5 23. According to Section 2(p)(2) of FIFRA, 7 U.S.C. § 136(p)(2), “*labeling*” means all labels
6 and all other written, printed, or graphic matter accompanying the pesticide at any time, or to which
7 reference is made on the label or in literature accompanying the pesticide.

8 24. According to Section 2(q)(1)(E), of FIFRA, 7 U.S.C. § 136(q)(1) (E), a pesticide is
9 “*misbranded*” if any word, statement, or other information required by or under the authority of
10 FIFRA to appear on the label or labeling is not prominently placed thereon with such
11 conspicuousness and in such terms as to render it likely to be read and understood by the ordinary
12 individual under customary conditions of purchase and use.

13 25. According to Section 2(q)(1)(F) of FIFRA, 7 U.S.C. § 136(q)(1)(F), a pesticide is
14 “*misbranded*” if the labeling accompanying it does not contain directions for use which are
15 necessary for effecting the purpose for which the product is intended and if complied with, together
16 with any requirements imposed under Section 3(d) of FIFRA, 7 U.S.C. § 136a(d), are adequate to
17 protect health and the environment.

18 26. According to Section 2(q)(2)(A) of FIFRA, 7 U.S.C. § 136(q)(2)(A), a pesticide is
19 “*misbranded*” if the label does not bear an ingredient statement on that part of the immediate
20 container (and on the outside container or wrapper of the retail package, if there be one, through
21 which the ingredient statement on the immediate container cannot be clearly read) which is presented
22 or displayed under customary conditions of purchase.

23 27. According to 40 C.F.R. § 156.10(a), every pesticide product must bear a label containing
24 the information specified by FIFRA and the regulations at 40 C.F.R. Part 156.

25 28. According to Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), it is unlawful for any
26 person to distribute or sell any pesticide which is misbranded.

27 29. According to Section 2(w) of FIFRA, 7 U.S.C. § 136(w), “*producer*” means the person
28 who manufactures, prepares, compounds, propagates, or processes any pesticide.

1 30. According to Section 2(w) of FIFRA, 7 U.S.C. § 136(w), “*produce*” means to manufacture,
2 prepare, compound, propagate, or process any pesticide.

3 31. According to Section 2(dd) of FIFRA, 7 U.S.C. § 136(dd), “*establishment*” means any
4 place where a pesticide is produced, or held, for distribution or sale.

5 32. According to Section 7(a) of FIFRA, 7 U.S.C. § 136e(a), no person may produce any
6 pesticide subject to FIFRA unless the establishment in which the pesticide is produced is registered
7 with EPA.

8 33. According to Section 12(a)(2)(L) of FIFRA, 7 U.S.C. § 136j(a)(2)(L), it is unlawful for any
9 person who is a producer to violate any provision of Section 7 of FIFRA, 7 U.S.C. § 136e.

10 34. According to Section 14(a)(1) of FIFRA, 7 U.S.C. § 136l(a)(1), any wholesaler, retailer, or
11 other distributor who violates any provision of FIFRA may be assessed a civil penalty.

12 IV. CONCLUSIONS

13 35. Respondent sells and distributes two products which are intended to reduce the population
14 of mites that may otherwise impact bee hives. Respondent refers to one of these products by various
15 names that include, but are not necessarily limited to, *Herbal Jelly*, *Jelly*, and *Herbal Bee Calmer*
16 *Gel*. Respondent refer to the other of these products by various names that include, but are not
17 necessarily limited to, *Mite Solution Concentrate*, *Bee Calmer Concentrate*, *Concentrated Mite*
18 *Solution*, and *Oil Concentrate*. These two products are also jointly referred to by Respondent as *Mite*
19 *Solution*. Respondent produces these products at his place of business located at 3030 Lewis River
20 Road in Woodland, Washington.

21 36. Respondent has distributed written statements along with the products referenced in
22 Paragraph 35. Certain of these written statements are reflected in Paragraph 10, and include direct
23 and indirect pesticidal claims. Respondent knowingly claims that these products: (a) will eliminate
24 all or some mites from bee hives; (b) kill pests; (c) are comprised of ingredients that function as a
25 fungicide and/or as miticides; and (c) protect bee hives from the hive beetle.

26 37. Along with distribution of the products referenced in Paragraph 35, Respondent has also
27 provided a written symbol consisting of a drawing of a mite with a slash mark through it. This
28

1 symbol is intended to represent that the accompanying products will act as miticides or pesticides by
2 eliminating some or all mites.

3 38. The written statements made by Respondent that are reflected in Paragraph 10 demonstrate
4 that Respondent is aware that the products referenced in Paragraph 35 are pesticides that are required
5 to be registered as such by EPA. Respondent has created advertisements for these products which, in
6 part, are intended to create a deception regarding the actual pesticidal effect of using these products.
7 Regardless of the advertising, the primary purpose of these products is pesticidal in nature in that
8 they are to be used to prevent mites from impacting bee hives.

9 39. Respondent is a "person" within the meaning accorded by FIFRA.

10 40. Mites, nosema apis, and hive beetles are each a "pest" within the meaning accorded by
11 FIFRA.

12 41. The products referenced in Paragraph 35 are each a "pesticide" within the meaning
13 accorded by FIFRA.

14 42. The products referenced in Paragraph 35 are intended by Respondent to be used "for
15 preventing, destroying, repelling, or mitigating" mites within the meaning accorded by FIFRA.

16 43. The statements quoted in Paragraph 10 include direct and/or indirect claims that the
17 products referenced in Paragraph 35 are "intended for a pesticidal purpose" within the meaning of 40
18 C.F.R. §§ 152.15(a) and (c).

19 44. The products referenced in Paragraph 35 are pesticides which Respondent have undertaken
20 "to distribute or sell" within the meaning accorded by FIFRA.

21 45. The products referenced in Paragraph 35 are required to be registered as pesticides as
22 prescribed by Section 3 of FIFRA, 7 U.S.C. § 136a.

23 46. The products referenced in Paragraph 35 have not been registered as pesticides by
24 Respondent as prescribed by Section 3 of FIFRA, 7 U.S.C. § 136a.

25 47. It is unlawful according to Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), for
26 Respondent to have taken action to distribute or sell unregistered pesticides.

27 48. The pesticides produced by Respondent are contained in a "package or packaging", and bear
28 a "label or labeling" within the meaning accorded by FIFRA and 40 C.F.R. Part 152.

1 days after service of this Complaint. The Answer must clearly and directly admit, deny, or explain
2 each of the factual allegations contained in this Complaint with regard to which Respondent have
3 any knowledge. Where Respondent have no knowledge of a particular fact and so states, the
4 allegation is deemed denied. Failure to deny any material factual allegation constitutes an admission
5 of the allegation. The Answer must also state: (a) the circumstances or arguments which are alleged
6 to constitute the grounds of defense; (b) the facts which Respondent intend to place at issue; and, (c)
7 whether a hearing is requested. A hearing is deemed requested if Respondent contests any material
8 fact upon which the Complaint is based, raises any affirmative defense, contends the amount of the
9 penalty proposed in the Complaint is inappropriate, or claims that Respondent is entitled to judgment
10 as a matter of law. The Answer must be sent to:

11 Regional Hearing Clerk
12 U.S. Environmental Protection Agency, Region 10
13 1200 Sixth Avenue, ORC-158
Seattle, Washington 98101

14 67. A copy of the Answer and all other documents which Respondent shall file in this action
15 must be furnished to Mark Ryan, Assistant Regional Counsel, the attorney assigned to represent EPA
16 in this action, at:

17 Attn: Mark A. Ryan
18 U.S. Environmental Protection Agency, Region 10, Idaho Office
1435 N. Orchard St.
Boise, Idaho 83706

19 **VIII. INFORMAL SETTLEMENT CONFERENCE**

20 68. Whether or not a hearing is requested, Respondent may confer informally with Mr. Ryan to
21 arrange for a settlement conference to discuss the facts of this case, the amount of the proposed
22 penalty, and the possibility of settlement. An informal settlement conference does not, however,
23 relieve Respondent of the obligation to file a written Answer to the Complaint.

24 69. EPA has the authority to modify the amount of the proposed penalty, where appropriate, to
25 reflect any settlement reached with Respondent in an informal conference. The terms and conditions
26 of such an agreement would be embodied in a Consent Agreement and Final Order. A Consent
27 Agreement entered into by EPA and Respondent would be binding as to all the terms and conditions
28

1 specified therein upon signature by both parties and upon signature of a Final Order by the EPA
2 Regional Administrator.

3 70. Respondent is advised that after the Complaint is issued, the Rules prohibit any *ex*
4 *parte* (unilateral) discussion of the merits of any action with the EPA Regional Administrator,
5 Environmental Appeals Board Judges, Administrative Law Judge, or any person likely to advise
6 these officials in deciding this case.

7 **IX. PAYMENT OF PENALTY**

8 71. Instead of requesting an informal settlement conference or filing an Answer requesting a
9 hearing, Respondent may choose to pay the proposed penalty. In order to do this, Respondent must
10 first establish contact with Mr. Ryan to arrange for the preparation of a Consent Agreement and Final
11 Order.

12
13 ISSUED AT SEATTLE this ____ day of ____, 2004.

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16 _____
17 Richard B. Parkin, Acting Associate Director
18 Ecosystems and Communities Office
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