

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

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BEFORE THE ADMINISTRATOR

ENVIRONMENTAL PROTECTION
AGENCY REGION VII
REGIONAL HEARING CLERK

In the Matter of:)

HUNTE KENNEL SYSTEMS AND)
ANIMAL CARE, INC.)

Docket No. FIFRA-07-2009-0003

Respondent)

COMPLAINANT'S PREHEARING EXCHANGE

The United States Environmental Protection Agency, Region VII ("EPA" or "Complainant") respectfully submits the following Prehearing Exchange pursuant to the May 19, 2009 Prehearing Order issued by the Presiding Officer, Chief Administrative Law Judge Susan L. Biro.

I. EXPECTED WITNESSES

1. Joy Haff: Ms. Haff is a Compliance Review Officer with the Toxics and Pesticides Branch, Water, Wetlands, and Pesticides Division, EPA, Region VII. Her duties include, *inter alia*, review and assessment of inspections conducted pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"). She has been with EPA for 28 years and has been in her current position for over two years. Ms. Haff will testify as an expert witness as to her review of the evidence compiled as a result of the October 2006 inspection of Hunte Kennel Systems and Animal Care, Inc.'s ("Respondent") facilities by the Missouri Department of Agriculture and EPA's regulatory oversight of Respondent's facilities. Based on this evidence, Ms. Haff will testify to the factual basis for her determination that Respondent is in violation of FIFRA and the regulations

promulgated thereunder. She will also testify regarding how the penalty proposed in the referenced Complaint was calculated applying the statutory penalty factors set forth within the FIFRA Enforcement Response Policy ("ERP"). She will offer her opinion regarding the appropriateness of the penalty proposed in the Complaint, considering the potential for harm to human health and the environment due to Respondent's violations, the size of Respondent's business, and Respondent's culpability and history of noncompliance. Ms. Haff may testify further as to the requirements to bring the facility into compliance with FIFRA regulations.

2. Richard Gebken: Mr. Gebken is a Product Manager in the Insecticide Branch in the Office of Pesticide Program's Registration Division. Mr. Gebken has been a Product Manager for approximately five years. Mr. Gebken's responsibilities include, *inter alia*, performing all regulatory activities for specific insecticidal products associated with assigned chemicals, which includes the review of new chemicals, new uses of existing chemicals, label amendments, and special local needs and re-registration eligibility decisions. In addition, Mr. Gebken is responsible for the review and resolution of risk management issues involving pyrethroid compounds, insect repellents, some growth regulators, and other specific insecticides. He also evaluates and interprets reports, policies, and outreach initiatives that require response to inquiries from private citizens, trade associations, press, and local and foreign governments. Mr. Gebken will testify as an expert witness as to the registration status and Cancellation Order of products containing Phosmet, as well as the human health risks posed as a result of exposure to Phosmet.

3. Yvonne Barr: Ms. Barr is a Pesticide Use Investigator with the Bureau of Pesticide Control, Missouri Department of Agriculture ("MDA"). Her duties include, *inter alia*, the investigation of pesticide producers, dealers and applicators with respect to compliance with state and federal pesticide regulations. She has been with MDA for over five years. Ms. Barr received her Masters degree in Plant Pathology from the University of Arkansas in 1985. She has co-authored three published articles about plant pathology and is licensed as a private and public pesticide applicator. Ms. Barr will testify as an expert witness as to her observations and findings during her inspections of Respondent's facilities on October 3, 17, and 23, 2006.

II. DOCUMENTS AND EXHIBITS

Copies of documents and exhibits that Complainant intends to introduce into evidence at the hearing are numbered and attached hereto as Complainant's Exhibits, and are numbered sequentially with the prefix "CX":

CX 1: Ms. Joy Haff's résumé, pursuant to Paragraph 1.A. of the Prehearing Order.

CX 2: Mr. Richard Gebken's résumé, pursuant to Paragraph 1.A. of the Prehearing Order.

CX 3: Ms. Yvonne Barr's résumé, pursuant to Paragraph 1.A. of the Prehearing Order.

CX 4: EPA's FIFRA ERP, dated July 2, 1990, pursuant to Paragraphs 1.B. and 2.F. of the Prehearing Order.

CX 5: EPA's "FIFRA Civil Penalty Calculation Worksheet" for Hunte Kennel Systems, prepared by Joy Haff, dated November 11, 2008, pursuant to Paragraphs 1.B. and 2.G. of the Prehearing Order.

CX 6: EPA's Invitation for Pre-filing Negotiations letter to Mr. Paul Bartholomew, Manager, Hunte Kennel Systems, dated May 21, 2008, pursuant to Paragraph 1.B. of the Prehearing Order.

CX 7: EPA's Complaint and Notice of Opportunity for Hearing, dated March 20, 2009, pursuant to Paragraph 1.B. of the Prehearing Order.

CX 8: EPA's Enforcement Case Review ("ECR") Request Response No. FY09-VII-001, dated February 23, 2009, prepared by Richard Gebken, pursuant to Paragraph 1.B. of the Prehearing Order.

CX 9: EPA's registration for the pesticide given EPA Registration No. 2724-262, sold as "Prolate/Lintox-HD Insecticidal Spray and Backrubber for Livestock," pursuant to Paragraphs 1.B. and 2.A. of the Prehearing Order.

CX 10: Label for "Prolate/Lintox-HD Insecticidal Spray and Backrubber for Livestock," as accepted by EPA on April 16, 2002, pursuant to Paragraphs 1.B. and 2.A. of the Prehearing Order.

CX 11: EPA's registration for the pesticide given EPA Registration No. 2724-169, sold as "Vet-Kem Kemolate Emulsifiable Liquid" and "Paramite," pursuant to Paragraphs 1.B., 2.B., and 2.E. of the Prehearing Order.

CX 12: Label for "Vet-Kem Kemolate Emulsifiable Liquid," (also sold under distributor product name "Paramite") as accepted by EPA on March 31, 1998, pursuant to Paragraphs 1.B., 2.B., and 2.E. of the Prehearing Order.

CX 13: EPA's Cancellation Order for "Vet-Kem Kemolate Emulsifiable Liquid," 69 Fed. Reg. 207, 62666-62678 (Oct. 27, 2004), pursuant to Paragraphs 1.B., 2.B., and 2.E. of the Prehearing Order.

CX 14: 40 C.F.R. § 152.132, titled "Supplemental distribution," pursuant to Paragraph 2.C. of the Prehearing Order.

CX 15: EPA's "Distributor Information" for EPA Registration No. 2724-262, showing all distributors and distributor product names approved by EPA to distribute this product, pursuant to Paragraphs 1.B. and 2.C. of the Prehearing Order.

CX 16: EPA's "Distributor Information" for EPA Registration No. 2724-169, showing all distributors and distributor product names approved by EPA to distribute this product, pursuant to Paragraphs 1.B. and 2.C. of the Prehearing Order.

CX 17: Missouri Marketplace Investigation Report Narrative, MKT100306MO0602, with attachments, for a FIFRA compliance inspection conducted at Respondent's facility located at 1323 South Ash, Buffalo, Missouri, on October 3, 2006; and Respondent's facility located at 121 North Royhill Blvd., Goodman, Missouri, on October 17 and 23, 2006 by Yvonne Barr, pursuant to Paragraphs 1.B., 2.C., 2.D., and 2.E. of the Prehearing Order.

CX 18: Missouri Department of Agriculture, Division of Plant Industries, Bureau of Pesticide Control's "Notice of Inspection/Inspection Report" for Respondent's Buffalo facility, dated October 3, 2006, pursuant to Paragraphs 1.B., 2.D., and 2.E. of the Prehearing Order.

CX 19: Missouri Department of Agriculture, Division of Plant Industries, Bureau of Pesticide Control's "Notice of Inspection/Inspection Report" for Respondent's

Goodman facility, dated October 17, 2006, pursuant to Paragraphs 1.B., 2.D., and 2.E. of the Prehearing Order.

CX 20: Missouri Department of Agriculture, Division of Plant Industries, Bureau of Pesticide Control's "Notice of Inspection/Inspection Report" for Respondent's Goodman facility, dated October 23, 2006, pursuant to Paragraphs 1.B., 2.D., and 2.E. of the Prehearing Order.

CX 21: Missouri Department of Agriculture, Division of Plant Industries, Bureau of Pesticide Control's "Inspection Report" for Respondent's Buffalo facility, dated October 3, 2006, pursuant to Paragraphs 1.B., 2.D., and 2.E. of the Prehearing Order.

CX 22: Missouri Department of Agriculture, Division of Plant Industries, Bureau of Pesticide Control's "Inspection Report" for Respondent's Goodman facility, dated October 17 and 23, 2006, pursuant to Paragraphs 1.B., 2.D., and 2.E. of the Prehearing Order.

CX 23: Missouri Department of Agriculture, Division of Plant Industries, Bureau of Pesticide Control's "Collection Report" for Investigation No. MKT100306MO0602, dated October 24, 2006, pursuant to Paragraphs 1.B., 2.D., and 2.E. of the Prehearing Order.

CX 24: Missouri Department of Agriculture, Division of Plant Industries, Bureau of Pesticide Control's "History of Official Sample (Chain of Custody)" for Sample Nos. MKT100306MO0602-02, -03, -04, and -05, pursuant to Paragraphs 1.B., 2.D., and 2.E. of the Prehearing Order.

CX 25: Missouri Department of Agriculture, Division of Plant Industries, Bureau of Pesticide Control's Stop Sale, Use, or Removal Order for Prolate/Lintox-HD

Insecticidal Spray and Backrubber for Livestock for Respondent's Buffalo facility, dated October 3, 2006, pursuant to Paragraphs 1.B., 2.D., and 2.E. of the Prehearing Order.

CX 26: Missouri Department of Agriculture, Division of Plant Industries, Bureau of Pesticide Control's Stop Sale, Use, or Removal Order for Paramite for Respondent's Buffalo facility, dated October 3, 2006, pursuant to Paragraphs 1.B., 2.D., and 2.E. of the Prehearing Order.

CX 27: Missouri Department of Agriculture, Division of Plant Industries, Bureau of Pesticide Control's Stop Sale, Use, or Removal Order for Paramite for Respondent's Goodman facility, dated October 23, 2006, pursuant to Paragraphs 1.B., 2.D., and 2.E. of the Prehearing Order.

CX 28: Missouri Department of Agriculture, Division of Plant Industries, Bureau of Pesticide Control's Stop Sale, Use, or Removal Order for Prolate/Lintox-HD for Respondent's Goodman facility, dated October 23, 2006, pursuant to Paragraphs 1.B., 2.D., and 2.E. of the Prehearing Order.

CX 29: Compact disc of photographs taken during the October 3, 17, and 23, 2006 inspections at each of Respondent's facilities, with corresponding Digital Photograph Description Sheet, pursuant to Paragraphs 1.B., 2.D., and 2.E. of the Prehearing Order.

CX 30: Missouri Department of Agriculture, Division of Plant Industries, Bureau of Pesticide Control's "Investigation Statement" of Pam Walz, Store Manager for Respondent's Buffalo facility, dated October 3, 2006, pursuant to Paragraphs 1.B., 2.D., and 2.E. of the Prehearing Order.

CX 31: Missouri Department of Agriculture, Division of Plant Industries, Bureau of Pesticide Control's "Investigation Statement" of Paul Bartholomew, Manager for Respondent's Buffalo and Goodman facilities, dated October 17, 2006, pursuant to Paragraphs 1.B., 2.C., 2.D., and 2.E. of the Prehearing Order.

CX 32: Missouri Department of Agriculture, Division of Plant Industries, Bureau of Pesticide Control's "Investigation Statement" of Paul Bartholomew, Manager for Respondent's Buffalo and Goodman facilities, dated October 23, 2006, pursuant to Paragraphs 1.B., 2.D., and 2.E. of the Prehearing Order.

CX 33: Missouri Department of Agriculture, Division of Plant Industries, Bureau of Pesticide Control's Sample No. MKT100306MO0602-02, a copy of a Paramite Dip label provided by Respondent with sales of Paramite, pursuant to Paragraphs 1.B., 2.D., and 2.E. of the Prehearing Order.

CX 34: Missouri Department of Agriculture, Division of Plant Industries, Bureau of Pesticide Control's Sample No. MKT100306MO0602-03, a copy of an email from Elaine Kroll, an employee of Respondent's, to Pam Walz, Store Manager for Respondent's Buffalo facility, transmitting the label Respondent put on Paramite Dip bottles, pursuant to Paragraphs 1.B., 2.D., and 2.E. of the Prehearing Order.

CX 35: Missouri Department of Agriculture, Division of Plant Industries, Bureau of Pesticide Control's Sample No. MKT100306MO0602-04, Respondent's Invoices for the purchase of Prolate/Lintox from Direct Pet Superstore, orders 4947849-1 and 5103174-1, pursuant to Paragraphs 1.B., 2.D., and 2.E. of the Prehearing Order.

CX 36: Missouri Department of Agriculture, Division of Plant Industries, Bureau of Pesticide Control's Sample No. MKT100306MO0602-05, Respondent's ledger of

Paramite Dip sales, spanning January 6, 2006 to October 8, 2006, pursuant to Paragraphs 1.B., 2.D., and 2.E. of the Prehearing Order.

CX 37: A computer screen capture of Respondent's website on April 15, 2008, showing Paramite Dip offered for sale, pursuant to Paragraphs 1.B., 2.D., and 2.E. of the Prehearing Order.

III. JUDICIAL NOTICE OF DOCUMENTS

Complainant hereby requests the Presiding Officer to take judicial notice of the following:

1. The Federal Insecticide, Fungicide, and Rodenticide Act, 72 United States Code ("U.S.C.") Section 136 *et. seq.*, and the governing regulations promulgated thereunder.

2. The Consolidated Rules of Practice Governing the Administrative Assessment of Penalties, 40 Code of Federal Regulations ("C.F.R.") Part 22.

IV. DETERMINATION OF THE PROPOSED PENALTY AMOUNT

Pursuant to Paragraph 2.G. of the Prehearing Order, follows is a narrative statement explaining the calculation of the proposed penalty.

Section 14(a)(1) of FIFRA provides for the assessment of a civil penalty of not more than \$6,500 for each violation against any pesticide "dealer, retailer, or other distributor" who violates any provisions of said Act for violations occurring after March 15, 2004. The Civil Monetary Penalties Inflation Adjustment Rule, 40 C.F.R. Part 19, has allowed civil monetary penalties under FIFRA to be increased by ten percent (10%) for all violations which take place after January 30, 1997. In determining the amount of the civil penalty, Section 14(a)(4) of FIFRA requires the Agency to 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.

The FIFRA ERP is designed 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. 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. A civil penalty is appropriate where the violation (1) presents an actual or potential risk of harm to humans or the environment; (2) was apparently committed as a result of ordinary negligence (as opposed to criminal negligence), inadvertence, or mistake; and (3) the violation involves a violation under the Act by any registrant, producer, commercial applicator, "for hire" applicator, wholesaler, dealer, retailer, or other distributor (no prior warning is required by FIFRA for violators in this category).

The ERP states that the determination of the penalty amount is made according to a five stage process in consideration of the FIFRA Section 14(a)(4) criteria. These steps are:

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 the 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.
5. Consideration of the effect that payment of the total civil penalty will have on the violator's ability to continue in business.

1. Gravity Level

The gravity of the violation and the size of the business are considered in the FIFRA Civil Penalty Matrices shown in Table 1 of the ERP. Each cell of the matrix represents the Agency's assessment of the appropriate civil penalty, within the statutory maximum, for each gravity level of a violation and for each size of business category.

2. Size of Business

In order to provide equitable penalties, the civil penalties generally decrease as the size of the business decreases, and vice versa. Size of business is determined from a company's gross revenues from all sources during the prior calendar year. If the revenue data for the previous year appears to be unrepresentative of the general performance of the business, an average of the gross revenues for the three previous years may be used. Further, the size of business and gross revenue figures are based on the entire corporation rather than a specific subsidiary or division of the company which is involved with the violation. According to the 2005 Dun & Bradstreet Report and Reference USA Information, Respondent's annual sales were reported to be between \$5,000,000 and

\$9,999,999. According to the ERP, the Respondent's size of business places Respondent in Category I.

3. Determination of Dollar Amount Associated with Gravity Level and Size of Business

Counts 1 and 2

Statutory Violation – Respondent violated Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), and Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), by offering for sale or distribution an unregistered and misbranded pesticide from both of Respondent's facilities.

Level of Violation - Level 2 (From ERP – Offered for sale or distribution a pesticide not registered under Section 3 or was canceled or suspended, which was not authorized by the Administrator, and which was adulterated or misbranded with multiple misbranding violations).

Violator Category - Section 14(a)(1) - Respondent is a dealer of pesticides.

Size of Business- Category I - (Company gross revenues are Business Category 1).

Base Penalty - \$6,500 (based on above criteria, the Civil Penalty Matrix and the Civil Monetary Inflation Adjustment Rule.)

Counts 3 through 7

Statutory Violation – Respondent violated Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), and Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), by selling or distributing an unregistered and misbranded pesticide from both of Respondent's facilities.

Level of Violation - Level 2 (From ERP – Sold or distributed a pesticide not registered under Section 3 or was canceled or suspended, which was not authorized by the

Administrator, and which was adulterated or misbranded with multiple misbranding violations).

Violator Category - Section 14(a)(1) - Respondent is a dealer of pesticides.

Size of Business - Category I - (Company gross revenues are Business Category 1).

Base Penalty - \$6,500 (based on above criteria, the Civil Penalty Matrix and the Civil Monetary Inflation Adjustment Rule).

Counts 8 and 9

Statutory Violation – Respondent violated Section 12(a)(2)(L) of FIFRA, 7 U.S.C. § 136j(a)(2)(L), by producing a pesticide in both of Respondent’s facilities.

Level of Violation – Level 2 (From ERP – Produced a pesticide or active ingredient subject to the Act in an unregistered establishment).

Violator Category - Section 14(a)(1) - Respondent is a dealer of pesticides.

Size of Business - Category I - (Company gross revenues are Business Category 1).

Base Penalty - \$6,500 (based on above criteria, the Civil Penalty Matrix and the Civil Monetary Inflation Adjustment Rule).

4. Gravity Adjustments (For all counts)

Pesticide Toxicity - Value is 2. The product sold as Paramite contained Prolate/Lintox-HD, EPA Reg. No. 2724-262. This pesticide was registered as Category 1 with the signal word “Danger,” indicating that it is associated with chronic health effects.

Harm to Human Health - Value is 3. For the product sold as Paramite, containing Prolate/Lintox-HD with active ingredient Phosmet, there is a potential for serious or widespread harm to human health. (Reference: Interim Reregistration Eligibility Decision (IRED) for Phosmet, dated October 31, 2001, and Federal Register Notice OPP-

2002-0354; FRL-7287-1, dated March 19, 2003, which announced the voluntary cancellation of products containing Phosmet for use on domestic pets to eliminate Phosmet exposure in residential settings and to reduce risks to consumers).

Environmental Harm - Value is 1. The potential for or any actual harm for serious or widespread harm to the environment is minor.

Violative History - Value is 0. Respondent has no prior FIFRA violations.

Culpability - Value is 2. Violation resulted from negligence.

5. Ability to Continue in Business/Ability to Pay

Section 14(a)(4) of FIFRA requires the Agency to consider the effect of the penalty on Respondent's ability to continue in business when determining the amount of the civil penalty. The ERP states that it can be assumed that the Respondent has the ability to pay at the time the complaint is issued if information concerning the alleged violator's ability to pay is not readily available. The Respondent has been notified in the civil complaint of its right under the statute to have its ability to continue in business considered in the issue of ability to pay/ability to continue in business in its answer to the civil complaint, or during the course of settlement negotiations. On June 4, 2009, counsel for Respondent indicated that Respondent may make an inability to pay claim. However, to date, EPA has not received financial documents from Respondent to substantiate such a claim.

Summary

The base penalty for the administrative Complaint is \$6,500 per count and the total gravity points add up to eight. Following the Gravity Adjustment Criteria in the ERP, a value of eight results in no adjustment to the base penalty. With a total of nine counts,

Respondent was assessed a proposed penalty of \$58,500 in the Administrative Civil Complaint.

V. APPLICATION OF THE PAPERWORK REDUCTION ACT OF 1980

Pursuant to Paragraph 2.H. of the Prehearing Order, the Presiding Officer requested Complainant's position regarding the applicability of the Paperwork Reduction Act ("PRA"), 44 U.S.C. § 3501 *et. seq.*, to this proceeding, including whether there is a current Office of Management and Budget ("OMB") control number involved and whether the provisions of Section 3512 of the PRA may apply to this case.

Complainant states that there are no PRA requirements for Counts 1 through 9, which include the following violations: offering for sale a misbranded and unregistered pesticide; sale of a misbranded and unregistered product; and production of a pesticide in an unregistered establishment. Section 12(a) of FIFRA establishes the "unlawful acts" pursuant to FIFRA, including the above referenced violations. Complainant asserts that the PRA does not apply to such statutory requirements and, therefore, is inapplicable to Counts 1 through 9 identified in the Complaint. In the alternative, Complainant states that if the PRA were adjudged to apply to Counts 1 through 9, there are valid OMB control numbers assigned to FIFRA regulations with respect to the registering, labeling, and production of pesticides.

VI. RESERVATION OF RIGHTS

Complainant respectfully reserves the right to call all witnesses called by the Respondent; to recall any of its witnesses in rebuttal; and to modify or supplement the names of witnesses and exhibits prior to the Adjudicatory Hearing, pursuant to 40 C.F.R. Part 22, and upon adequate notice to the Respondent and the Presiding Officer.

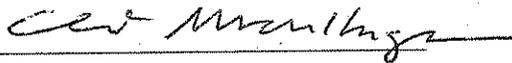
VII. LOCATION AND LENGTH OF HEARING

Pursuant to Paragraph 1.C. of the Prehearing Order, Complainant requests the hearing in this matter be held in or near Kansas City, Kansas. In the alternative, Complainant would not object to conducting the hearing at a suitable location in the county where Respondent resides or conducts the business which the hearing concerns.

Complainant anticipates needing approximately eight (8) hours to present its direct case.

Respectfully submitted,

U.S. ENVIRONMENTAL PROTECTION AGENCY

BY: 

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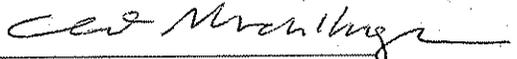
ATTORNEY FOR COMPLAINANT

CERTIFICATE OF SERVICE

I hereby certify that on the 30 day of June, 2009, I filed the Original of this Prehearing Exchange and its attachments with the Regional Hearing Clerk, EPA Region VII, 901 North 5th Street, Kansas City, Kansas 66101, and mailed a copy by certified mail to the following:

The Hon. Susan L. Biro
Chief Administrative Law Judge
U.S. Environmental Protection Agency
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