UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
OFFICE OF ENFORCEMENT
OFFICE OF GENERAL ENFORCEMENT
PESTICIDES AND TOXIC SUBSTANCES
ENFORCEMENT DIVISION

NOTICES OF JUDGMENT UNDER THE FEDERAL INSECTICIDE, FUNGICIDE, AND RODENTICIDE ACT

Nos. 1901–1950

Notices of Judgment report cases involving seizure actions taken against products alleged to be in violation, and criminal and civil actions taken against firms or individuals charged to be responsible for violations. The following Notices of Judgment are approved for publication as provided in Section 16(d) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended (7 U.S.C. 136n).

Stanley W. Legro
Assistant Administrator for
Enforcement

Washington, D.C.

1901. In Re: Connecticut Aerosols, Inc., EPA Region I, March 31, 1976. (I. F. & R. No. I-26C, I.D. No. 106726.)

This was a civil action charging the respondent with violating the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 136j(a)(1)(E) and 136(q)(1)(c). The action pertained to a shipment made on August 26, 1974, from Milford, Connecticut, to Clinton, Connecticut. The pesticide involved was **NEW ERA AFRICAN VIOLET AND HOUSE PLANT INSECT SPRAY**; the charge was misbranding—the pesticide was an imitation of, or was sold under the name of, another pesticide.

The respondent signed a Consent Agreement. The Final Order assessed a civil penalty of $4,500.00.

1902. In Re: Hooker Chemicals & Plastics Corp., EPA Region II, February 19, 1976. (I. F. & R. No. II-77C, I.D. No. 110177.)

This was a civil action charging the respondent with violating the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 135a(a)(1); 136j(a)(1)(E); 136(q)(1)(G); 136(q)(1)(E) and 136(q)(2)(C)(i). The action pertained to a shipment made on October 14, 1974, from Niagara Falls, New York, to Prairie, Mississippi. The pesticide involved was **TECHNICAL MIREX**; charges included nonregistration and misbranding in that the label lacked caution or warning statement, signal word, directions for use and name and address of producer.

The respondent signed a Consent Agreement. The Final Order assessed a civil penalty of $9,300.00.

1903. In Re: L & A Juice Co., EPA Region II, February 19, 1976. (I. F. & R. No. II-52C, I.D. No. 118120.)

This was a civil action charging the respondent with violating the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 136j(a)(1)(E) and 136(q)(1)(A). The action pertained to a shipment

made on December 1, 1973, from L & A Juice Co., Brooklyn, New York, to Greenbrugh Natural Food, New York, New York. The pesticide involved was **NATURE-PLUS NATURAL INSECTICIDE INSECT KILLER**; the charge was misbranding—labeling for product made false or misleading safety claims.

The respondent signed a Consent Agreement. The Final Order assessed a civil penalty of $850.00.

1904. In Re: Nationwide Chemical, EPA Region II, February 19, 1976. (I. F. & R. No. 103C, I.D. No. 107723.)

This was a civil action charging the respondent with violating the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 135a(a)(1); 136j(a)(1)(E) and 136(q)(1)(G). The action pertained to a shipment made on February 6, 1975, from Brooklyn, New York, to Edison, New Jersey. The pesticide involved was **DORECIDAL**; charges included composition differed in substance from the representations made in connection with its registration and misbranding—lack of adequate precautionary labeling.

The respondent signed a Consent Agreement. The Final Order assessed a civil penalty of $3,700.00.

1905. In Re: F & W Bearing Service, Inc., EPA Region II, March 2, 1976. (I. F. & R. No. II-44C, I.D. No. 119113.)

This was a civil action charging the respondent with violating the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 136j(a)(1)(E); 136(q)(1)(A) and 136(c)(1). The action pertained to a shipment made on November 2, 1973, from Middletown, New York, to Danbury, Connecticut. The pesticide involved was **TAS ORA-VAC SANITIZER**; chargers included adulteration and misbranding—strength or purity fell below the professed standard of quality as expressed on its labeling.

The respondent signed a Consent Agreement. The Final Order assessed a civil penalty of $350.00.

1906. In Re: Chem Power, Inc., EPA Region II, March 10, 1976. (I. F. & R. No. II-36C, I.D. No. 104622.)

This was a civil action charging the respondent with violating the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 135a(a)(1); 136j(a)(1)(E) and 136(q)(1)(A). The action pertained to a shipment made on March 21, 1973, from Cedar Knolls, New Jersey, to Gretna, Louisiana. The pesticide involved was **TREE & SHRUB SPRAY**; charges included nonregistration and misbranding—labeling bore false or misleading statement.

The respondent signed a Consent Agreement. The Final Order assessed a civil penalty of $3,000.00.

1907. In Re: Chem Power, Inc., EPA Region II, March 10, 1976. (I. F. & R. No. II-37C, I.D. No. 104611.)

This was a civil action charging the respondent with violating the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 135a(a)(1); 136j(a)(1)(E) and 136(q)(1)(A). The action pertained to a shipment made on July 30, 1973, from Cedar Knolls, New Jersey, to Harvey, Louisiana. The pesticide involved was **CHEM-POWER WEED & GRASS KILLER**; charges included nonregistration and misbranding—labels bore false and misleading claims.

The respondent signed a Consent Agreement. The Final Order assessed a civil penalty of $2,500.00.

1908. In Re: Chem Power, Inc., EPA Region II, March 10, 1976. (I. F. & R. No. II-38C, I.D. Nos. 104613 and 104614.)

This was a civil action charging the respondent with violating the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 135a(a)(1); 136j(a)(1)(E); 136(q)(1)(A) and 136(c)(1). The action pertained to shipments made on July 11 and 30, 1973, from Cedar Knolls, New Jersey, to Gretna, Louisiana. The pesticide involved was **FORMULA NO. 19–10 ROOM FRESHNER**; charges included nonregistration, misbranding and adulteration—strength or purity fell below the professed standard of quality as expressed on its labeling.

The respondent signed a Consent Agreement. The Final Order assessed a civil penalty of $2,500.00.

1909. In Re: Elco Manufacturing Company, EPA Region III, June 4, 1975. (I. F. & R. No. III-33C.)

This civil penalty proceeding was settled by hearing. The following is Administrative Law Judge Frederick W. Denniston's Initial Decision.

By Complaint dated February 26, 1974, as amended by Motion approved November 8, 1974, the Director of the Enforcement Division, Environmental Protection Agency, Region III, alleged that Elco Manufacturing Company had violated the Federal Insecticide, Fungicide, and Rodenticide Act, as amended (86 Stat. 973; 7 U.S.C. 136 *et seq.*) (FIFRA herein). Specifically, it was alleged that Elco held for sale the products Dursban Insecticide 1E and Dursban Insecticide 2E which had improper labels, and a civil penalty of $5,000 was proposed to be assessed.

Following a prehearing exchange of proposed evidence, hearing was held in Pittsburgh, Pennsylvania, on November 26, 1974. Proposed Findings and Briefs were filed on March 3, 1975, and replies on March 17, 1975.

With its Proposed Findings, Respondent submitted an Errata proposing corrections of the transcript, to which no objections have been filed. Those proposed changes should be granted, except as to Item 14, which should be Page 226, line 23 – Change "remunerazation" to "a summarization."

Pursuant to permission granted at the hearing (Tr. p. 215), Respondent also tendered with its Proposed Findings, a statement of gallons of Dursban 1E and 2E sold from 1969 through 1974. This statement is received as a late-filed exhibit and Respondent's Exhibit No. 12 is assigned thereto.

Respondent has been represented by Eugene B. Strassburger III, of Strassburger & McKenna, of Pittsburgh, Pennsylvania, and Complainant by Peter J. Smith of Philadelphia, Pennsylvania.

Findings of Fact

1. Pursuant to a prior telephonic communication, Sherman Latchaw, Consumer Safety Officer in EPA, Region III, visited the establishment of Elco Manufacturing Company, Sharpsburg, Pennsylvania, on August 21, 1973, for the purpose of conducting an establishment inspection pursuant to Section 9(a) of FIFRA [7 U.S.C. 136g(a)].

2. Mr. Latchaw conferred with Mr. Harry Katz, President of Elco, who supplied copies of 20 to 30 existing product labels which Latchaw compared with copies of the EPA approved labels. This took about 2 to 3 hours. There were no discrepancies between the approved labels for Dursban 1E and Dursban 2E, and those supplied by Mr. Katz.

3. At Latchaw's request, Katz then took the former into the warehouse area so that he could draw physical samples and inspect all products packaged, labeled and readied for shipment. A Notice of Inspection form was given to Katz at the same time stating the reason for the inspection was to obtain "samples of any pesticides or

devices, packaged, labeled, and released for shipment and samples of any containers or labeling for such pesticides or devices."

4. Latchaw was then taken, by his request, to the warehouse area to obtain the physical samples, by Katz or one of his employees. Within 25 to 50 feet of the office approximately six stacked cartons were pointed out to Latchaw as containing Elco Dursban 1E and 2E. Samples were also taken of other products which are no longer here in issue.

5. After opening the cartons, Latchaw removed two one-gallon bottles each of Elco Dursban 1E and 2E. One of each was bagged and sealed for submission to the EPA Chemical Laboratory; a duplicate of each was also bagged and sealed and given to Mr. Katz as a duplicate sample. Latchaw prepared a Receipt for Samples covering ten items, including the Elco Dursban 1E and 2E, which included the following statement which was called to the attention of Mr. Katz:

> The undersigned acknowledges that the following samples were obtained from pesticides or devices that were packaged, labeled, and released for shipment; or having been shipped, are being held for distribution for sale.

Mr. Katz indicated there would be no charge for the samples taken. He insisted, however, that one of the products listed was not held for sale and at his request Latchaw noted on the receipt as to that item, "Not for sale." Mr. Katz then signed the receipt.

6. Later the same day, Latchaw compared the labels on the two Dursban samples and found they did not agree with the accepted registered labels. Each of the labels on the samples omitted portions of the precautionary instructions and failed to include portions of the directions for use contained on the approved labels.

7. On the next day, August 22, 1973, Mr. Latchaw returned to Elco's establishment and informed Mr. Katz of the different labels, who, after inspecting a jug of the Elco Dursban, obtained a correct label and placed it on that jug, explaining that it was not on the jug

because it was a larger label and looked too awkward. Mr. Katz, although expressing concern over the prospect of a possible fine for a violation, did not contend the labels on the bottles were merely for identification purposes, or that the two products were not offered for sale, shipment, or delivery. Neither Mr. Katz nor any Elco employees indicated the labels on the samples were for training purposes or that they were not the correct labels for those products.

8. The approved labels of both Dursban products contained the following precautionary statements, which are wholly lacking on the sample labels:

WARNING

May be fatal if swallowed. May be absorbed through skin. May be injurious to eyes and skin.

Do not get on skin or in eyes. Wash thoroughly after handling. Do not wear contaminated clothing. Avoid breathing vapors or spray mist. Keep away from food, feedstuffs and water supplies. Keep container closed. Keep away from heat and open flame.

Flush contaminated eyes with plenty of water and get medical attention.

Note to physician: Active ingredient is a cholinesterase inhibitor. Treat symptomatically. Atropine is an antidote.

Keep Out of Reach of Children and Animals Combustible Liquid.

9. Dursban is in EPA's toxicity category II, because of its acute oral toxicity (LD50) of 50 to 500 milligrams. The LD50 is the amount of a single dose of the chemical necessary to kill 50% of any test animal population. This is determined from toxicity data submitted by the company submitting the chemical for evaluation by

EPA. In the case of Dursban, the data was submitted by the Dow Chemical Company.

10. The toxicity of Dursban is the result of its physiological effect. Specifically, Dursban is an organic phosphate compound that acts on the nervous system as a cholinesterase inhibitor. Cholinesterase is an enzyme in the nervous system. It is responsible for the breakdown of acetylcheline, another enzyme which is necessary in the transmission of impulses through the nervous system. Inhibition of cholinesterase causes a buildup of acetylcholine. The symtoms of such a buildup include convulsions, respiratory inhibition and cardiac arrest.

11. The absence of precautionary statements relating to the toxicity of these products would probably leave the user unable to determine the toxicity category of these products. Furthermore, it is the policy of EPA to require such precautionary labeling even if the products are intended for use by pest control operators only. This is because EPA does not assume that operators would necessarily have more knowledge concerning a particular product's toxicity than the general public.

12. For the foregoing reasons, the labels on the samples did not sufficiently provide for the protection of human health.

13. The approved labels also contain "Directions for use" of both products on lawns and turf for the control of chinch bugs and web worms, together with application rates and dilution tables, which directions and uses are not contained on the sample labels. The dilution rates for Dursban 1E and 2E are different due to their different degrees of concentration. Improper dilution or use of an improper rate of application could result in the products being ineffective and in the possibility of unnecessary environmental contamination from repeated efforts by the user to obtain desired results.

Discussion and Conclusions

The defense of Elco in essence, is that the labels on the samples taken were merely for "tagging" purposes and were not the labels placed on deliveries when sales are made; that the samples taken were not being held for sale; and that the registered label is placed on all containers prior to sale and delivery.

Elco and Mr. Katz, its President, have exercized leadership in organizing a training program for the Western Pennsylvania Pest Control Association. Mr. Katz and other Elco employees have conducted training courses for the Association, instructing in correct labeling of products, among other things. According to Katz, the labels on the samples were printed for use in the training sessions, and to reduce the size, certain portions of the approved labels were omitted. As difficulty was experienced in identifying bottles of the Dursban product, because markings rubbed off, and because the training labels were available, the latter were utilized as "tags" or identification, according to Katz. Such use was further justified by Katz as being due to the fact that the approved label was so large it protruded freestanding 1 1/2 inches above the body of the jug,[1] and became messy if the contents were poured in or out, as was sometimes done.

Partial corroboration of Katz' testimony is found in the testimony of four pest control operators in the area who obtained their supplies by purchase of Elco Dursban 1E or 2E, and represented a substantial portion of Elco's total sales of these products. In a general way they confirmed the use of the constructed label at training sessions but insisted the registered label was on the deliveries they received. None, however, was in a position to account for all their receipts of deliveries. Other Elco employees testified the correct registered label was on shipments when they went out; but again, they were unable to speak as to all shipments.

Finally, Katz justified the delivery of the samples to Latchaw and the signing of the receipt for samples, as having been done with the "understanding" that Latchaw knew the correct labels were to be affixed to the products before sale and delivery because Latchaw

had reviewed the labels as part of his initial review during the inspection.

Unfortunately, these explanations do not agree with what occurred contemporaneously with the events and must be rejected. While the language of the Receipt for Samples is ambiguous it reproduces Section 9(a) of FIFRA which uses the words "held for ... sale" as does Section 12(a)(1). In any event, the purpose of the samples taken was clearly obvious to Katz who insisted on a write-in on the receipt of "Not for Sale" with respect to another unrelated product covered by the receipt. Moreover, the reaction of Katz to the return visit of Latchaw fully accepted the concept that a violation had occurred.

Accordingly, Respondent's proposed finding No. 28, that Dursban was never held for sale without the proper label attached is unsupported by the record and must be rejected.

It is concluded, therefore, that Respondent did hold for sale Elco Dursban 1E and 2E, as alleged.

The Penalty: Complainant has computed proposed assessments by use of the Civil Penalty Assessment Schedule designed to produce comparability of penalties (39 F.R. 27711).

Complainant proposes to assess two separate amounts against each of the two products, of $1,250 each, for a total of $5,000. Respondent contends generally that this is excessive and proposes in the alternative $500, in the event it is found to have violated the Act.

Under the heading of Labeling Violations, Section One (2) Deficient Precautionary Statements: Lacks Required Precautionary Labeling – for a Category II concern as is Respondent, the penalty of $1,250 is prescribed where (A) Adverse Effects are Highly Probable. This would properly apply to each of the two products and would amount to $2,500. As to the second charge, resulting from the elimination of the Lawn and Turf usages and accompanying dilution and use directions, Complainant proposes application of Section Three of the Labeling Use Violations – 1. Inadequate Directions for

Use, A. Likely to Result in Mishandling or Misuse, for which Category 2 specified $1,250. In this instance, however, the use itself was not specified on the incorrect label, and it is not perceived how this could lead to a likelihood of mishandling or misuse. It would therefore appear more appropriate to apply "C. Not likely to result in mishandling or misuse" for which a penalty of $300 is prescribed, or $600 for the two products.

The resulting figure accordingly is $3,100 but in view of mitigating circumstances here present, in the judgment of the Presiding Officer, this figure should be lowered by the 40% negotiating margin approved by the Schedule for settlement purposes. Here, the violations are clearly the result of carelessness rather than by venality or intent to deceive or defraud and Respondent's past record and immediate correction when advised of the violations, indicate examplary conduct on its part. Moreover, Respondent has shown leadership in instructing other users in the pesticide field.

Ultimate Conclusion

It is found that Respondent violated the provisions of FIFRA as charged and that a civil penalty of $1,860 should be assessed against it.

ORDER[2]

1. Pursuant to Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended (86 Stat. 973; 7 U.S.C. 1361(a)), a civil penalty of $1,860 is hereby assessed against Respondent Elco Manufacturing Company.

2. Payment of the full amount of the civil penalty assessed shall be made within sixty (60) days of the service of the final order upon Respondent by forwarding to the Regional Hearing Clerk a cashier's check or certified check payable to the United States of America in such amount.

3. The corrections proposed by Respondent of the transcript of the November 26, 1974, hearing are approved and the transcript is CORRECTED accordingly, except that at page 226, line 23, "remunerazation" should be changed to "a summarization".

4. The late-filed exhibit of Dursban sales, is identified as Respondent's Exhibit No. 12, and is received in evidence.

Frederick W. Denniston
Administrative Law Judge

June 4, 1975

[1] An attempt by Complainant to show that such a label would not be approved was ruled irrelevant; in any event, the question is mooted by the fact that Respondent has ceased formulation of the two products.

[2] Unless appeal is taken by the filing of exceptions pursuant to section 168.51 of the rules of practice, or the Regional Administrator elects to review this decision on his own motion, the order shall become the final order of the Regional Administrator. (See section 168.46(c)).

1910. In Re: Lebanon Chemical Corp., EPA Region III, February 24, 1976. (I. F. & R. No. III-60C, I.D. No. 117304.)

This was a civil action charging the respondent with violating the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 136j(a)(1)(E); 136(c)(1) and 136(q)(1)(A). The action pertained to a product held for distribution or sale on July 12, 1974, at Lebanon Chemical Corp., Lebanon, Pennsylvania. The pesticides involved were **LEBANON ROSE** and **FLORAL SPRAY**; charges included adulteration and misbranding—strength or purity fell below the professed standard of quality as expressed on its labeling.

The respondent signed a Consent Agreement. The Final Order assessed a civil penalty of $2,700.00.

1911. In Re: Miller-Morton Co., EPA Region III, March 15, 1976. (I. F. & R. No. III-89C, I.D. No. 109124.)

This was a civil action charging the respondent with violating the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 136j(a)(1)(E), 136(c)(1) and 136(q)(1)(A). The action pertained to a product held for distribution or sale on April 15, 1975, at Miller-Morton Co., Richmond, Virginia. The pesticide involved was **SERGENT'S SKIP-BATH QUICK DOG CLEANER**; charges included adulteration and misbranding—strength or purity fell below the professed standard of quality as expressed on its labeling.

The respondent signed a Consent Agreement. The Final Order assessed a civil penalty of $1,700.00.

1912. In Re: Chapman Chemical Company, EPA Region IV, July 29, 1975. (I. F. & R. No. IV-67C, I.D. No. 104559.)

This civil penalty proceeding was settled by hearing. The following is Administrative Law Judge Martin E. Jones' Initial Decision and EPA Region IV Administrator's Final Order and Amended Final Order.

Initial Decision

This proceeding was initiated upon the issuance of a complaint dated February 5, 1974, by the Director, Enforcement Division, Environmental Protection Agency, Region IV, which charged the above respondent with violations of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended, 7 U.S.C. 136 *et seq.* (FIFRA) and sought the assessment of a civil penalty of $5,000 under Section 14(a) of the Act, U.S.C. 136 1(a). The respondent filed a timely answer on February 7, 1974, and requested a hearing which was held in Memphis, Tennessee, on November 22, 1974.

The complaint alleges that respondent violated the Act in that on or about July 2, 1973, it shipped in interstate commerce from Jackson, Mississippi, to Monroe, Louisiana, the pesticide "BHC-1" that was misbranded. Misbranding is alleged under 7 U.S.C. 136j(a)(1)(E); 136(q)(1)(G); 136(q)(1)(F); and 136(q)(2)(C)(iv) in that the label did not bear any warning or caution statements, directions for use, ingredient statement or registration number assigned. None of said assignments are independently assessable because no one assignment requires an element of proof not required by the other. The drum was stenciled with the product name, "BHC-1", the Lot Number "669743"; and the weight "461 net". The Act requires that the drum containing said pesticide should have borne the label accepted in connection with its registration on April 28, 1966, under Reg. No. 1022–144.

Pursuant to Section 168.36, subsections (a) and (e), of the Rules of Practice, the parties were requested on April 11, 1974, to correspond with the Honorable Frederick W. Denniston, Administrative Law Judge, for the purpose of accomplishing some of the objectives of a prehearing conference. Said correspondence appears in the record.

The purpose of the hearing was to resolve the single factual issue of whether Chapman Chemical Company shipped in interstate commerce a pesticide in a container which did not bear a proper label and thus was misbranded within the meaning of 7 U.S.C. 136j(a) and 40 CFR 162.108.

On the basis of the entire record, including the briefs of the parties, I hereby make the following:

Findings of Fact

1. Respondent, Chapman Chemical Company, at all times pertinent to this action, maintained a manufacturing plant and office located at Memphis, Tennessee, and was at said location engaged in the interstate marketing of pesticides, including the pesticide "BHC-1 EMULSIFIABLE CONCENTRATE".

2. The product "BHC-1 EMULSIFIABLE CONCENTRATE", hereinafter "BHC-1", manufactured by respondent, is a registered pesticide whose label was accepted on April 28, 1966, under EPA Reg. No. 1022–144.

3. It is stipulated by the parties that gross sales of Chapman Chemical Company were in excess of $1,000,000 for the year 1973.

4. In manufacturing BHC-1 to be shipped in a 55-gallon drum container the procedure adopted by Chapman, since 1968, or earlier, is:

A. To affix the approved label early in the manufacturing process, using an adhesive manufactured by H. B. Fuller Company and recommended for use on drums, to be stored outside.

B. When the drums are selected for shipment, the order picker normally identifies the product through its label.

C. Upon shipment, it is the duty of the warehouse foreman to check the labels thereon to insure proper labeling, even though periodic inspections of merchandise to be shipped, including checking for proper labeling, is made by the plant superintendent.

5. At some time prior to July 1, 1973, the 55-gallon drum in question was shipped to Jackson, Mississippi, for storage there in the warehouse of Superior Transfer and Storage Company (Superior).

6. On or about July 2, 1973, Superior, pursuant to an understanding with respondent, shipped in interstate commerce from its warehouse to respondent's customer in Monroe, Louisiana, the pesticide BHC-1, in a 55-gallon drum which, on inspection by EPA on August 14, 1973, was found not to have a registered label affixed to the container.

7. The 55-gallon drum of BHC-1, which was the first drum that had been ordered by the customer, Reed and Sons Hardwood, Inc. (Reed), since 1972, was delivered by Red Ball Motor Freight, Inc., of Jackson, Mississippi, on July 5, 1973, and was stored lying on its

side on the open ground for about five weeks of the period following delivery and prior to the time of said inspection.

8. The aforesaid drum containing BHC-1, at the time of said inspection, was located on a wood rack (or "cradle") lying on its side, in close proximity to the ground and had been on said rack for approximately seven to ten days.

9. At the time of inspection it was determined that said 55-gallon drum of BHC-1 contained no glue particles or vestige of an approved registered label; and nowhere on the ground in the general area was anything observed which looked like a pesticide label. The drum did, however, contain stenciling on the top of the drum which read, "669743 461 net BHC-1", and the inked-in address label which read, "Reed & Sons, Monroe, La. From: Chapman Chemical, 500 Ford, Jackson, Ms".

10. In the same general area as the aforementioned drum at Reed's yard, also lying on its side in the open and exposed to the elements, was another 55-gallon drum of BHC-1 bearing what appeared to be a proper paper label of respondent. This drum had been at the Reed premises since at least 1972 (when Reed bought out Walter Kellogg Lumber Company who purchased said other drum of BHC-1) and most likely had the same adhesive applied to its label.

11. Subsequent to the issuance of the Complaint of February 5, 1974, respondent stated that it immediately checked all drums, over which they had direct control, not only to verify that they were labeled, but also to insure that the adhesive had created a durable bond between the label and the drum. Respondent's Material Control Manager confirmed said procedure and further stated that every drum label was covered with a second coat of adhesive to prolong the label's resistance to severe weather conditions, and that the second coat was applied merely as a precaution.

12. Tests comparing the weathering characteristics of the polyvinyl acetate emulsion adhesive previously used with other adhesive formulations show that under continued and intense weather conditions neophrene latex adhesives maintain a secure

bond longer than the other materials tested. Respondent's Material Control Manager testified that he never observed an instance where a label had been totally removed from a drum as a result of mishandling. Chapman subsequently switched to H. B. Fuller's #813 neophrene latex adhesive in early March 1974, and has been using this material since that date.

13. No evidence was introduced that anyone personally observed whether or not the 55-gallon drum of BHC-1 bore a registered label while in the Superior warehouse prior to shipment, at the time of shipment, or later.

14. Superior, a public warehouse used by respondent since 1971, was, prior to its shipment to Reed, entrusted with the storage and shipment of the 55-gallon drum of BHC-1 in question.

15. On this record, the carrier, Red Ball Motor Freight, Inc., could have identified the drum of BHC-1 as containing an insecticide from the stenciling appearing on the top of the drum; the bill of lading prepared by Superior described what it had requested the carrier to ship, namely, insecticide.

16. The Manager of Reed testified that his Company and its predecessor had used BHC-1 for many years and its employees were familiar with its use.

17. The Manager, further testified that the drum, on the date inspected by EPA, was "neither real clean nor real dirty or covered with a bunch of stuff. There was some dust on it, of course."

18. By letter dated February 7, 1974 (Respondent's Exhibit B) the office manager of Superior advised respondent that: "...let me assure you that we never ship any item from our warehouse unlabeled. The shipment of BHC-1 going to Reed and Sons Hardwood Company in Monroe, Louisiana, was most assuredly labeled. This is the only way our workers know what item they are pulling from stock...".

19. Chapman Chemical Company has never received a complaint that any drum of BHC-1 shipped by it was unlabeled when it was received by the user.

20. On June 22, 1973, the U.S. District Court for the Western District of Tennessee, accepted respondent's plea of "nolo contendere" to counts of a criminal information charging respondent with four violations of FIFRA in 1970 and two violations in 1972, which consisted of non-registration of product shipped in four instances and misrepresentation as to the composition of the product shipped in the remaining counts, for which respondent was penalized a total of $500.

Conclusions

At the hearing conducted on November 22, 1974, in Memphis, Tennessee, the factual issue to be resolved was, as now, whether Chapman Chemical Company shipped, in interstate commerce, a pesticide in a container without a proper registered label affixed thereon, and which was thus misbranded within the meaning of 7 U.S.C. 136j(a) and 40 CFR 162.108. As proof of the same facts will establish all of the violations charged, respondent is subject to the imposition of but one penalty should such determination be in the affirmative [Blockburger vs. U.S., 284, U.S. 299, 304 (1932); 39 FR 27711, Section I(B)(2)].

The complainant proposed to assess and now urges assessment of a civil penalty of $5,000. This was based on the civil penalty schedule for violations of Section 14(a) of FIFRA, 7 U.S.C. 136 1.

Thus it must be here determined, first, whether or not respondent shipped BHC-1 in interstate commerce in violation of the Act, and, second, if such finding is in the affirmative, what, if any, penalty is appropriate.

Respondent stresses that, on this record, it is shown that the 55-gallon drum of BHC-1 was shipped by Chapman with a label—and with a label which had been properly affixed. However, respondent

seeks to rely strongly on the weakness of complainant's case. There was no direct evidence that the drum was shipped by Chapman without a label either when shipped from Memphis to Superior or by Superior to Reed. There was no testimony as to whether or not a proper label appeared on said drum when it was delivered to Reed. Lacking also was any direct evidence that a label had at any time been removed or that the handling of the drum, after delivery, was of such severity that a label properly affixed on the drum would have become removed.

We conclude that complainant made a prima facie showing that respondent shipped, in interstate commerce, from Jackson, Mississippi, to Monroe, Louisiana, a 55-gallon drum of its product, BHC-1, without a proper label thereon. It is admitted that the drum, when officially inspected by EPA on the premises of customer, Reed, on August 14, 1973, did not bear a registered label. The evidence further shows that the drum showed no evidence of glue particles or any vestige of the approved registered label. Nowhere on the ground, in the general area, were any particicles sighted which looked like remmants of said label. It should be here mentioned that certain markings did appear on the top of the drum. Stenciled thereon was "669743 461 Net BHC-1". The inked-in address label was also on the drum which read: "Reed and Sons, Monroe, La. From: Chapman Chemical, 500 Ford, Jackson, Ms.".

To rebut the presumption raised, respondent presented evidence, first, that the drum of respondent's product was shipped from a warehouse in Jackson, Mississippi.

The evidence clearly shows that Superior has been entrusted by Chapman with the storage and shipment of Chapman products for a period of many years. Superior's new warehouse was constructed in 1971 after a fire destroyed the structure utilized by it prior to that time. The evidence definitely established an arrangement (of which customers are advised) whereby orders can be placed with and shipment obtained from Superior. Under the arrangement, product (e.g., the 55-gallon drum of BHC-1 here in question) is shipped to and sotred in Superior's warehouse prior to sale to customers. We are not here concerned with whether any failure to affix the proper label

required by the Act occurred at Memphis or at Jackson because the distinction is inconsequential. It is clear that the law contemplates that shipment from Jackson was as much the responsibility of respondent as was the shipment from its Memphis plant. And it matters not whether Superior be categorized as an agent or as an independent contractor (United States vs. Parfait Power Puff Co., 163 F 2d 1008, 1010(3), citing United States vs. Dotterweich, 320 U.S. 277, 64 S.Ct.134, 88 L. Ed. 48).

In the interest of procuring distribution of its product in interstate commerce, respondent chose to use the facilities of, and entrusted Superior to act in its behalf. The acts of the instrumentality thus created are controlled, in the interest of public policy, by imputing any of its acts, which contravene the law, to its creator and imposing a penalty upon the latter. This principle is applicable though respondent may not be conscious of any wrongdoing. Rather than to subject an innocent and wholly helpless public to such hazard, it is more equitable to hold responsible the respondent who, at least, has the opportunity of informing itself (U.S. vs. Dotterweich, supra).

The following statement in Parfait, supra, l.c. 1010(3) is appropriate in the instant case:

> "Defendant may not put into operation forces effectuating a placement in commerce of a prohibited commodity in its behalf and then claim immunity because the instrumentality it has voluntarily selected has failed to live up to the standards of the law."

Nor is Superior's letter of February 7, 1974 (Respondent's Exhibit B) determinative of the issue presented. Obviously, it was responsive to correspondence from, and possibly contact by, respondent on or about the date stated. While it is not here suggested that duplicity was practiced, it is readily apparent that the same statement is subject to more than one interpretation, and therefore little weight can be accorded it. If it's writer was capable of giving testimony under oath to the effect that the drum when shipped, had a registered label affixed, then such testimony should, and likely would, have been elicited at the hearing and there subjected to cross-

examination. The more reasonable interpretation to be accorded said exhibit is that the drum contained markings sufficient to advise their workers as to what item they were pulling from stock. It is unquestioned that the net weight and "BHC-1" were stenciled on top of the drum. This was sufficient for the preparation of the bill of lading showing the product shipped-insecticide. This information could be considered labeling, as would the inked-in address "label" but the presence of a registered label is not thereby established.

Considerable testimony was devoted to proof of on-site conditions at the Reed premises, with the suggestion of the possibility that a label affixed to the drum prior to and at the time of delivery was subsequently removed and obliterated. The general area where the drum remained on the ground for some five weeks was unpaved and can be typified generally as a varying mixture of dirt, sawdust, ashes, and bark, with the presence also of cinders, blowing sawdust, and steam. It is suggested that extremely rough (if not abusive) treatment to the drum is indicated in testimony of Mr. Terrell, Reed's Manager. Mr. Terrell indicated he had not observed the drum prior to its inspection by EPA on August 14, 1973, and therefore could not state whether the drum contained a label or not. He stated that on the date of inspection the drum had been transferred to a rack or cradle (either by two or more men rolling it to and lifting it onto the rack, or with a forklift). He did not know if the drum was otherwise rolled around, or if it stayed in one position. The condition of the drum was; by him, described as "neither real clean nor real dirty or covered with a bunch of stuff. There was some dust on it, of course". Mr. Terrell further testified that rainfall was far above average during the six weeks preceeding the EPA inspection. The drum likely was subjected to blowing chip dust (and sawdust) but not to wood chips which would not blow that far. Steam was emitted from a steam line estimated at not more than 30-feet away from where the drum in question was stored.

The foregoing evidence creates an inference that the drum in question could possibly have been subjected to rough handling and treatment. However, when considered with other evidence hereinbelow outlined, the record as a whole shows that the absence of a proper label is not attributable to its handling after delivery, but

to the fact that a proper registered label was not affixed to the drum when said commodity was shipped in interstate commerce.

It is not disputed that:

1. On the top of said drum, in addition to the stenciled markings, heretofore mentioned, was an inked-in address label which at the time of said inspection was intact and the inspector was able to observe therefrom the complete names and addresses of both the shipper and customer. While the type or quality of adhesive used to affix said address label to the drum is not developed in this record, the effect of steam, emitted on the premises, and the unseasonably heavy rainfall experienced during the weeks preceeding inspection, would be aptly demonstrated by the condition of the address label.

2. The label affixed by respondent to another 55-gallon drum which was subjected to the same handling and exposure (but over a much longer period) still bore what appeared to be a proper paper label of respondent on the said date of inspection, and no degree of removal or obliteration was noted.

3. The evidence presented by respondent, hereinafter more fully set forth, is persuasive that their approved registered labels are affixed to their shipping containers with top quality adhesive recommended by its manufacturer for use on drums to be stored outside. From respondent's own evidence, I conclude that, if a proper label had been affixed to said drum at any time prior to shipment, the label or some vestige thereof would have thereafter appeared on said drum. Its Material Control Manager has never observed an instance where a label has been totally removed from a drum as a result of mishandling.

Respondent points out that, under the procedure adopted by it, the registered label is affixed to the drum container prior to filling the drum. On page 6 of its brief is outlined nine (9) inspections which a Chapman drum container must pass from time of manufacture until it comes to rest on the premises of the customer. The testimony offered by respondent described normal procedures and the witnesses were adamant in their belief that the drum in question could not have been

shipped without a registered label affixed. However, no direct testimony was elicited from any witness who personally observed or inspected the container here in question for the presence of a registered label thereon.

The procedures adopted and practiced by respondent are admirable and commendable as is their continuing effort to use highest quality adhesive and alert their personnel in Memphis and elsewhere as to the importance of proper labeling in accordance with the Act. The evidence of respondent's good faith in this regard is persuasive and convincing. However, it does not necessarily follow from the fact that respondent ordinarily exercises great care, that departures from the usual practice were never made. [Tingey vs. E. F. Houghton, 30 CAL 2d 97, 179 P.2d 807; Gall vs. Union Ice Co., 239 p.2d 48 (1951)].

From the foregoing we find, and here hold, that the evidence of respondent falls short of effectively rebutting complainant's prima facie case, and that respondent is subject to assessment of an appropriate civil penalty against it for commission of the violation so charged.

Civil Penalty

Section 14(a)(3) [7 U.S.C. 136 1(a)(3)] provides in pertinent part:

> In determining the amount of the penalty the Administrator shall consider the appropriateness of such penalty to the size of the business of the person charged, the effect of the person's ability to continue in business, and the gravity of the violation.

Thus, Congress intended that the penalty should fit the offender as well as the offense.

Since, on this record, it is found that respondent is subject to the assessment of a civil penalty for the violation charged ("misbranding"), the Administrative Law Judge must make an

independent judgement as to the appropriateness of the penalty to be assessed. [IN THE MATTER OF AMVAC CHEMICAL CORPORATION, I.F.&R. No. IX-4C, Docket No. 141.7(P)].

The first factor required by the statute to be considered in determining the amount of the penalty is the size of respondent's business. It is stipulated by the parties that in 1973 respondent's sales exceeded $1,000,000. For the purpose of considering this factor and the second, hereinbelow, it is noted that the President of respondent, in correspondence forwarded in the course of the Prehearing procedure, pursuant to Section 168.36(e) (39 FR page 27663), stated that said gross sales for 1973 were, in fact, $3,456,563 and that 70 people were employed by it.

The second factor to be considered is respondent's ability to continue in business. No testimony was elicited relative to this consideration during the course of the November 22, 1974, hearing. However, again taking notice of said correspondence of respondent's President, he stated in his letter of March 6, 1974, that his company, though having sales of over $3 million, experienced a loss in 1973 of approximately $225,000 and that their bank credit at writing exceeded $300,000. In his letter of April 25, 1974, he again confirmed the amount of their sales in 1973, and that the net loss, after various credits arising out of the acquisition and consolidation of the two companies, was expected to be $78,000. He was of the opinion that an assessment of the magnitude proposed would have a real and detrimental effect on respondent's ability to continue in business.

The facts mentioned, particularly the reported loss are not meaningful unless the reason for same is also considered and it is determined whether losses are to be contemplated from future operation of the company. With reference to the loss of 1973, respondent's President included in his letter of February 7, 1974, (page 2 thereof) the following statement:

> "I believe it is also pertinent to advise you that a key program of the new management has been to reduce the mammalian toxicity of the company's products. One

reason for our *large losses in 1973* was the research expenditure made in order to develop these products. The new products should be commercialized this Spring."

The above statement is indicative that respondent is optimistic and forward-looking. The loss can be typified as one of a nonrecurring nature. In the premises, though temporary inconvenience may result, we are unable to find that payment of the penalty herein assessed will affect the respondent's ability to continue in business.

The third factor to be considered in determining the amount of the penalty, is the gravity of the violation. In our view, the penalty should fit both the violation and the respondent; that is, we should consider the gravity of harm possibly attendant to members of the public because of said violation and the seriousness of the misconduct of respondent in so violating the Act.

As stated in the AMVAC Chemical case, supra:

> "As illustrative of the degree of gravity of harm, it is apparent that a violation involving the marketing of a highly toxic pesticide that is not registered is much more serious than a violation in which the label of a registered pesticide fails to bear the registration number."

In the instant case, shipment of BHC-1 without the applicable warnings and precautionary statements poses a definite hazard to those who might come in contact with it. The gravity of harm is referrable not only to those persons who, under the evidence, are actually and obviously affected by the absence of cautionary language resulting from the "misbranding" charged, but to those persons who conceivably can be, or might have been, so affected by such omission. Before its delivery to Reed, said drum of BHC-1 was under the control of respondent, Superior's employees and the driver of the carrier who transported said product. On arriving at Reed, said drum remained on their premises which suggests that most of the persons to be affected were Reed employees (knowledgeable concerning the character of and the hazards inherent in the product)

with the possibility that patrons and other persons might on occasion frequent said premises. There is no evidence in the record concerning the accessibility of said area to members of the public but the presence of equipment such as a debarker, a boiler room, steam lines and water trough suggest that few members of the public would have occasion to frequent the location. However, further evidence revealed that the "other drum" had possibly been on the premises since 1970, and therefore, we can reasonably contemplate that the drum here in question might remain there for a comparable period. The hazard to persons unfamiliar with the properties of BHC-1 is amplified as the time within which the product remains on said premises is increased. In like manner, the gravity of respondent's violation becomes more apparent.

As stated, we must consider gravity of misconduct in addition to considering gravity of harm.

The AMVAC case, supra, states:

> "As to gravity of misconduct, matters which may be properly considered include such elements as intent (to violate) and attitude of respondent; knowledge of statutory and regulatory requirements; whether there was negligence and, if so, the degree thereof; position and degree of responsibility of those who performed the offending acts; mitigating and aggravating circumstances; history of compliance with the Act; and good faith or lack thereof. It is observed that the Rules of Practice specify these last two elements as those that may be considered in evaluating the penalty." [Section 168.53(b) there cited is now 168.60(b)(2)].

While, under the law, respondent is responsible for the violation charged, we find its attitude and that of its well-informed management to be excellent. The record makes a positive showing that respondent has devised an excellent procedure to prevent future violations such as that here considered. On the whole, consideration of the conduct of respondent's operation is most favorable. The

violation, while of a serious nature, was not intentional, and we find the likelihood of recurrence of such violations to be minimal.

Complainant cites respondent's history of compliance with reference, particularly, to the information filed by the U.S. Attorney, in six counts, charging respondent with the sale of a non-registered product in four instances (twice in 1970 and twice in 1972) and with sale of product whose composition was different from that represented in connection with the registration of its label, (two charges in 1970). In June 1973, a plea of nolo contendere was tendered to and paid by the respondent. It is noted not only that the nature and character of the charges there differ materially from those here considered, but that the date of said occurrences are somewhat remote. Consequently, particularly in view of the honest and forthright manner in which respondent's president exhibits a good faith attempt to foreclose any possibility of like violation in the future, we conclude that little weight should be accorded the unfavorable aspects suggested by its compliance history.

On consideration of all facts contained in this record and pursuant to Rule 168.46(b), 39 FR 27664, we have determined that the sum of $1,800 is an appropriate penalty to be assessed against respondent for its violation of the Act, in the particulars charged.

The proposed Finding of Fact and Conclusions, Briefs and Arguments submitted by the parties have been considered. To the extent that they are consistent with Findings of Fact and Conclusions herein, they are granted, otherwise they are denied.

Having considered the entire record and briefs of counsel and based on the Findings of Fact and Conclusions herein, it is proposed that the following Order be issued.

Final Order

Pursuant to Section 14(a) of the Federal Insecticide, Fungicide and Rodenticide Act, a civil penalty of $1,800 is assessed against the respondent, Chapman Chemical Company, for violations of said Act as set forth in the complaint dated February 5, 1974.

Marvin E. Jones
Administrative Law Judge

February 21, 1975

FINAL ORDER

This proceeding was initiated upon the issuance of a Complaint dated February 5, 1974, by the Director, Enforcement Division, Environmental Protection Agency, Region IV, which charged the above Respondent with violations of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended, 7 U.S.C. 136 *et seq.* (FIFRA) and sought the assessment of a civil penalty of $5,000 under Section 14(a) of the Act, U.S.C. 136 1(a). The Respondent filed a timely answer on February 7, 1974, and requested a hearing which was held in Memphis, Tennessee, on November 22, 1974.

After thorough consideration of the issues of fact and law raised at the hearing. The Honorable Marvin E. Jones, Administrative Law Judge, issued an Initial Decision on February 21, 1975, containing assessment of $1,800. On April 1, 1975, timely Exceptions to the Initial Decision were filed by the Respondent, and, on May 7, 1975, the Complaintant, pursuant to an extension of time granted on March 14, 1975, timely filed a Reply Brief responding to the Exceptions of Respondent to the Initial Decision.

This Final Order, pursuant to the provisions of 40 CFR 168.51 and 168.60, is based on a thorough review of the hearing transcript, the Initial Decision, the Respondent's Exceptions and Brief in Support of Respondent's Exception, and the Complainant's Reply Brief to the Respondent's Exceptions.

The Respondent's request for oral argument is hereby denied because its Exceptions raised no substantially different issues than those raised prior to the Initial Decision. The Findings of Fact and Conclusions contained in the Initial Decision, dated February 21, 1975, are adopted with the following exceptions:

1. Finding of Fact No. 20 was not relied upon or given consideration in this determination; and

2. Respondent's Exception No. V is sustained, and the conclusion contained in the second sentence of numbered paragraph on page 9 of the Initial Decision is omitted and was not given further consideration.

This decision is based on specific disagreement with Respondent's Exceptions to the Findings of Fact No. 6, No. 7, No. 15 and No. 17, and Respondent's Exceptions to Concusions No. I, No. II, No III, No. IV, No. VI, No. VII, and No. VIII.

Final Order

Pursuant to Section 14(a) of the Federal Insecticide, Fungicide and Rodenticide Act, a civil penalty of $1,500.00 is assessed against the Respondent, Chapman Chemical Company, for violations of said Act as set forth in the Complaint dated February 5, 1974.

Dated this 19th day of May, 1975.

Jack E. Ravan
Regional Administrator

AMENDED FINAL ORDER

Upon reconsideration of the Final Order, as requested by the Complainant on May 22, 1975, the Final Order is amended as follows:

The determination contained in the first paragraph of the Conclusions on page 5 of the Initial Decision is found to be invalid and inconsistent with the provisions of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended, 7 U.S.C., *et seq.*

Discussion

Exception is taken to the conclusion that the separate allegations of misbranding contained in the Complaint could not be individually penalized with separate assessments because of the language in section B(2) of EPA's "Guidelines for the Assessment of Civil Penalties Under Section 14(A) of the Federal Insecticide, Fungicide, and Rodenticide Act, As Amended," at 39 FR 27711, July 31, 1974.

An exception is being taken to the conclusion in the Initial Decision in the first paragraph of the Conclusions on page 5, because of a material difference in the characterization of EPA's Guidelines as stated in the Initial Decision: "As proof of the same facts will establish all of the violations charged, respondent is subject to the imposition of but one penalty should such determination be in the affirmative [Blockburger vs. U.S., 284, U.S. 299, 304(1932); 39 FR 27711, Section I(B)(2)]." The material difference is that the Initial Decision characterizes the single assessment test as whether the same facts will prove both assessments, whereas the Guidelines establish the test as whether "each provision requires an element of proof not required by the other."

A review of the parallel criminal doctrine of double jeopardy indicates that a similar test is used to determine the legality of separate criminal penalties when those penalties are alleged based on one criminal act. The explanation of the test of whether there can

be two separate charges is clearly set forth in *Robbins vs. U.S.*, 476 F. 2d 26 (10 Cir. 1973) as follows: "The well-settled rule is, that for the double jeopardy provision to apply, the offense charged and tried in the first count and the offense charged in the second count must be identical in law and fact. The test for determination whether the offenses charged are identical is whether the facts alleged in one, if offered in support of the other, would sustain a conviction. Where one count requires proof of a fact which the other count does not, the separate offenses charged are not identical, even though the charges arise out of the same acts." Citations included *Pereira vs. United States*, 347 U.S. 1, 74 S. Ct. 358, 98 L. Ed. 435 (1954).

The proper interpretation of EPA's Guidelines, which are only guidelines and not binding upon the Administrative Law Judge or the Regional Administrator, is that multiple civil assessments arising out of the same set of facts would be improper only in the event all offenses for which assessments are to be made required identical elements of proof as distinguished from situatons where the same set of facts would prove separate offenses which, in fact, include some elements of proof different in each offense charged.

Amended Final Order

Pursuant to the provisions of the Act, the Final Order dated February 21, 1975, is hereby amended, this the 29th day of July, 1975.

Jack E. Ravan
Regional Administrator

1913. In Re: Atlantic Fertilizer and Chemical Company, EPA Region IV, October 22, 1975. (I. F. & R. No. IV-134C, I.D. No. 110656.)

This was a civil action charging the respondent with violating the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 136j(a)(2)(L). This action pertained to the firm's failure to submit a pesticides annual report.

The respondent signed a Consent Agreement. The Final Order assessed a civil penalty of $500.00.

1914. In Re: Time Chemical, Inc., EPA Region IV, February 17, 1976. (I. F. & R. No. IV-158C, I.D. No. 110201.)

This was a civil action charging the respondent with violating the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 135a(a)(1); 135b; 136j(a)(1)(E); 136(q)(2)(A) and 136(q)(D). The action pertained to a shipment made on May 22, 1975, from Atlanta, Georgia, to Montgomery, Alabama. The pesticide involved was **S & K BRAND SANACLOR CHLORINATED CLEANER**; charges included nonregistration and misbranding—lack of adequate ingredient statement and lack of EPA establishment number.

The respondent signed a Consent Agreement. The Final Order assessed a civil penalty of $2,240.00.

1915. In Re: Wilson Aerosol Company, EPA Region IV, February 17, 1976. (I. F. & R. No. IV-148C, I.D. No. 117089.)

This was a civil action charging the respondent with violating the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 136j(a)(1)(E) and 136(c)(1). The action pertained to a product held for distribution or sale on March 19, 1975, at Wilson Aerosol Company, Spring Hope, North Carolina. The pesticide involved was **LIGHTNING HOUSEHOLD INSECT SPRAY**; the charge was

adulteration—strength or purity fell below the professed standard of quality as expressed on its labeling.

The respondent signed a Consent Agreement. The Final Order assessed a civil penalty of $510.00.

1916. In Re: Aero Mist, Inc., EPA Region IV, March 3, 1976. (I. F. & R. No. IV-121C, I.D. No. 116981.)

This was a civil action in which the respondent was charged with violating the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 136j(a)(1)(E) and 136(q)(1)(A). The action pertained to a shipment made on November 27, 1974, from Marietta, Georgia, to Moncks Corner, South Carolina. The pesticide involved was **VAPASEPTIC AIR SURFACE DISINFECTANT**; the charge was misbranding—product ineffective when used as directed.

The firm signed a Consent Agreement merging this action with the action taken under I.F.&R. No. IV-118C, I.D. No. 116981, N.J. No. 1776. No further civil penalty was assessed.

1917. In Re: Carolina Chemicals, Inc., EPA Region IV, March 8, 1976. (I. F. & R. No. IV-163C, I.D. No. 111065.)

This was a civil action charging the respondent with violating the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 136j(a)(1)(E) and 136(c)(1). The action pertained to a product held for distribution or sale on May 6, 1975, at Carolina Chemicals, Inc., West Columbia, South Carolina. The pesticide involved was **FLIGHT BRAND 5% ROTENONE(CUBE)**; the charge was adulteration—strength or purity fell below the professed standard of quality as expressed on its labeling.

The respondent signed a Consent Agreement. The Final Order assessed a civil penalty of $1,260.00.

1918. In Re: Parramore and Griffin Seed Co., Inc., EPA Region IV, March 16, 1976. (I.F. & R. No. IV-108-C, I.D. Nos. 116480, 116481, 116482, and 116489.)

This was a civil action charging the respondent with violating the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 136(q)(1)(F); 136j(a)(1)(E); 136(c)(1) and 136(q)(1)(G). The action pertained to products held for distribution or sale on July 24 and 25, 1975, at Parramore and Griffin Seed Co., Inc., Valdosta, Georgia. The pesticides involved were **PEAS & VEGETABLE DUST, 5% MALATHION DUST, 10% CHLORDANE DUST** and **DOWFUME W-40**; charges included adulteration and misbranding—strength or purity fell below the professed standard of quality as expressed on its labeling, lack of adequate directions for use, lack of adequate caution statements and failed to bear the assigned registration number.

The respondent signed a Consent Agreement. The Final Order assessed a civil penalty of $6,960.00.

1919. In Re: Coastal Chemical Corporation, EPA Region IV, April 1, 1976. (I.F. &R. No. IV-171-C, I.D. No. 116704.)

This was a cvil action charging the respondent with violating the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 136j(a)(1)(E); 136(c)(2) and 136(q)(1)(D). The action pertained to a product held for distribution or sale on November 26, 1974, at Coastal Chemical Corporation, Greenville, North Carolina. The pesticide involved was **CYTHION 5-EC INSECTICIDE THE PREMIUM GRADE MALATHION**; charges included adulteration and misbranding—product was contaminated and lack of EPA establishment number.

The respondent signed a Consent Agreement. The Final Order assessed a civil penalty of $3,000.00.

1920. In Re: Cumberland Manufacturing Company, EPA Region IV, April 1, 1976. (I.F. & R. No. IV-168-C, I.D. No. 110976).

This was a civil action charging the respondent with violating the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 136j(a)(1)(E) and 136(c)(1). The action pertained to a product sold on May 5, 1975, to Crowell and Harris Company, Nashville, Tennessee. The pesticide involved was **CMC CONCENTRATED CHLORINE BLEACH**; the charge was adulteration—strength or purity fell below the professed standard of quality as expressed on its labeling.

The respondent signed a Consent Agreement. The Final Order assessed a civil penalty of $1100.00.

1921. In Re: Sheff Chemical & Supply Company, EPA Region IV, April 1, 1976. (I.F. & R. No. IV-154-C, I.D. No. 116424.)

This was a civil action charging the respondent with violating the Federal Insecticide, Fungicide , and Rodenticide Act, 7 U.S.C. 136j(a)(2)(A); 136j(a)(1)(E) and 136(q)(D). The action pertained to a product held for distribution or sale on January 20, 1975, at Sheff Chemical & Supply Company, Bradenton, Florida. The pesticide involved was **NO-GRO LIQUID CONCENTRATE**; charges included altering the required labeling of the product and misbranding—lack of EPA establishment number, lack of adequate directions for use and labels bore unaccepted claims.

The respondent signed a Consent Agreement. The Final Order assessed a civil penalty of $365.00.

1922. In Re: Chemscope Corporation, EPA Region VI, June 20, 1975. (I.F. & R. No. VI-13C, I.D. No. 88612.)

This civil penalty proceeding was settled by hearing. The following is Administrative Law Judge Frederick W. Denniston's Initial Decision.

By complaint, dated November 26, 1973, the Director, Enforcement Division, Environmental Protection Agency, Region VI (Complainant), alleged that Chemscope Corporation (Chemscope) violated the Federal Insecticide, Fungicide, and Rodenticide Act, as amended (86 Stat. 973, 7 U.S.C. 135) (FIFRA), by shipping the product "Garbage Can Spray & Deodorizer", an unregistered pesticide, from Dallas, Texas, to Fayetteville, N.C., on or about July 6, 1973. By answer, dated December 15, 1973, Chemscope contended the product in question was properly registered but that it had been improperly labeled through error.

Hearing was held on October 8 and 11, 1974, in Dallas, Texas. Chemscope was represented by William Woodburn of Dallas, Texas and Complainant by Harless Benthul and Stan Curry, also of Dallas.

Findings of Fact

1. Respondent, Chemscope Corporation (Chemscope), of Dallas, Texas, is engaged in the manufacture, sale and distribution of chemical products, including pesticides, and has 45 products registered with EPA under FIFRA. It, or a preceding partnership, has been in business for over 9 years.

2. On March 7, 1973, Cape Fear Janitorial Supplies Company of Fayetteville, North Carolina, by its Order No. 2984, ordered several products including, so far as here pertinent, "Private Label – 6/1 gal. Garb Spray."

3. An employee of Chemscope thereafter prepared an order form for truck shipment of the Cape Fear order, including "6-gal-347OL – Garbage Can Spray & Deodorizer – Chemscope." The shipment was made on July 6, 1973, on an invoice No. 12654, covering "6 gal. – Garbage Can Spray & Deordorizer."

4. On July 12, 1974, one day after the arrival of the shipment to Cape Fear, an EPA Inspector surveyed the Cape Fear establishment and obtained a one-gallon container from the shipment, herein called "sample", which bore an unregistered label.

A Collection Report No. 88612 was prepared and ultimately this proceeding was instituted.

5. The sample label designated the product as "Garbage Can Spray & Deodorizer," with an ingredients statement as follows:

> "0,0-diethyl 0 -(2-isoprophyl-4-methyl-6- pyrimidinyl) phosphorothioate* .500% Pyrethrins .050%. Technical Piperonyl Butoxide** .100% N-octyl Bicycloheptene Dicarboximide .167%. Petroleum Distillate 99.183% *Known as Diazinon **Equivalent to .080% (Butylcarbityl) (6-Propylpiperonyl) Ether and .020% of related compounds."

The labeling also stated "This product is a blend of deodorizing compounds and insecticides designed for the complete maintenance and cleaning of garbage cans and refuse storage areas. . ." In the directions for use it was stated, in part, "For insect infested areas, daily application may be necessary." Cautionary statements were included, but there was no identification of the manufacturer or distributor and no EPA registration number.

6. The record is undisputed that Respondent made the shipment in question with unregistered labels containing insecticide claims and directions for use, in violation of Section 3(a)(1) of FIFRA[7 U.S.C. 135a(a)(1)].[1] The record does not disclose the exact nature of the contents of the sample and shipment, although Respondent's witness, Alan B. Hesker, assumed it was Chemscope's "Diazinon 500," a registered insecticide, hereinafter discussed, and Respondent so contended in its answer to the complaint.

7. Respondent contends the shipment in question was the result of mistake and has not been repeated. The mistake, in fact a series of mistakes, involved Chemscope's "Diazinon 500" a registered insecticide,[2] and its "Garbage Can Spray & Deodorizer", an unregistered product.[3]

8. Respondent had no copy of the original order by Cape Fear but a copy of the order in the files of the latter discloses the

order of March 7, 1973 was for "6/1 gal. Garb Spray" as well as for items not here in issue; also included was a notation "Private Label." An employee of Chemscope trascribed this onto the order form previously noted as "6/1 GAL. Garbage Can Spray & Deodorizer" and added as "formula number –3470L." In addition, under "Label Design & Color" was noted "Chemscope."

9. In its card file of formulas, Respondent maintained two bearing the designation 3470L, for unexplained reasons, and apparently this was due to error. One was for its product "Garbage Can Spray & Deodorizer" a product which Respondent states is not required to be registered, and which according to the formula, contains oil of lemongrass, and IPA, among its active ingredients. The other is for "ATCO Garb Spray" which contains "Diazinon 4-S and Concentrate # 1" and is registered as a supplementary registration under Chemscope Diazinon 500, EPA Registration No. 9143–22, with Atco Manufacturing Co. as the distributor.

10. A Chemscope employee, Alan B. Hesker, with the Company since February 1972, and now in charge of all labeling or graphic arts section, was a trainee in the labeling function under supervision of its then head of labeling, in the Spring of 1973, when the Cape Fear order was received. Working from the transcription of the order referred to in Paragraph 8 above, Hesker prepared a new "private" label for the Cape Fear shipment. His reason for doing so was not explained of record, since the order he worked from specified "Chemscope" label, which was already in existence and no identification of either Cape Fear or Chemscope was placed on the new label.

11. In constructing the new label, Hesker combined parts of the registered label of Chemscope's "Diazinon 500" and of the unregistered label of its "Chemscope Garbage Can Spray & Deodorizer." Thus, he used essentially the label of the latter product; added the ingredient statement of "Diazinon 500" (but not its EPA registration number); changed the description of the Garbage Can Spray from "This product is a blend of deodorizing compounds and cleaners. . ." to "This product is a blend of deodorizing compounds and *insecticides"* (underscoring supplied) and added a caution from

the "Diazinon 500" label: "Residual Type – Do not use as a space spray for effective control repeat as necessary." The name and address of Chemscope, which appeared on both the unregistered "Garbage Can Spray Deodorizer" and on "Diazinon 500", were removed, but, as noted, Cape Fear was not substituted in its place.

12. Hesker explained his actions as being because the customer specified the product Diazinon which he wanted as a Garbage Can Spray & Deodorizer even though the Cape Fear order did not confirm this assertion. The transcribed order had the addition of formula 3470L added to it. But the formula of that number for Garbage Can Spray & Deodorizer was for a wholly different product containing no diazinon and the inexplicable duplicating number which did contain diazinon was a supplementary registration only for ATCO, and on its face was only for 55 gallon drums which were not involved in the Cape Fear order.

13. Chemscope labeling activities at the time of the Cape Fear order were under the supervision of Joseph Hutchinson, a partner and co-owner of Respondent, and continued until nearly the time of shipment 4 months later when Clifford Duke, the principal owner, exercized a buy-out agreement.

Conclusions

That a shipment was made in violation of the registration provisions of FIFRA is beyond question. The only question is whether the "mistake" claimed by Respondent should operate in bar of a penalty, and, if not, the appropriate amount of the penalty.

While the "mistake" in some circumstances might be accepted, here is an exceptional series of mistakes and unjustified assumptions by an employee just learning his duties, and apparently devoid of any supervision by responsible management of the company. It is self evident that to accept such as justification would be virtually to destroy the possibility of effective enforcement. In this case Respondent has approximately 45 registered products and had made a number of supplementary registrations. There has been

correspondence between Chemscope and EPA or its predecessor USDA, since at least August 1970 on various aspects of registration. Respondent is fully knowledgeable as to FIFRA and EPA procedures for registrations and supplemental regisrations. The attempts to put the blame on an unsupervised, inexperienced employee therefcre merits neither condonation nor mitigation; nor does it exemplify "good faith" as contended by Chemscope.

Proposed Penalty: Chemscope contends the assessment proposed by the complaint of $2,800.00 is grossly out of proportion and that its payment would have an adverse effect on its business, which it contends is insolvent.

Dealing with the latter issue first, the claim is unfounded. Its claimed insolvency is based on its accountant's statement indicating a net worth deficit of $2,761.35 as of June 30, 1973. This resulted from a "one-shot" transaction by which Clifford R. Duke exercised the right to buy out the other corporate owner Joseph Hutchinson, but instead of himself purchasing it, had the corporation do so as treasury stock, utilizing the corporate funds. The accounting report contained a note with respect to this transaction that included the statement: "In the opinion of management net income at the date of issue of report has increased retained earnings in an amount in excess of the impairment [of stated capital caused by the stock purchase] at statement date [September 18, 1973]." More significantly, while the 1974 annual report had been completed it was not offered in evidence nor were the results disclosed. Hence, the claim that Chemscope is insolvent must be rejected.

The next question is as to the amount of gross sales per year, as this is a factor in the determination under the guidelines adopted for purposes of uniformity. Sales of $1,000,000.00 or more are classified as Category III under those guidelines. Based on a Dun & Bradstreet report, which was its only specific information available to complainant. Chemscope had reported sales well beyond the $1,000,000.00 mark. Respondent took violent exception to such use of a Dun & Bradstreet report, even though Chemscope itself obtains such reports on its own customers. Such reports are commonly used for such purposes and, lacking better data, would be acceptable

evidence of financial information. Where, as here however, independently audited data is supplied, a more reliale source is provided and should take precedence.

The Certified Public Accountant who audits Chemscope supplied a letter dated December 6, 1973, stating that sales for the twelve months ending June 30, 1973, were $995,027.56, even though the audited annual statement that period indicated sales of $1,017,407.82. According to the CPA, the larger figure included freight charges billed to customers in the amount of $17,012.70, which in his opinion should be excluded from the sales figure; he also removed an amount of $5,377.56 from the sales figure as representing inter-company sales to Container Supply Incorporated, of which Clifford R. Duke is President and Jimmy Burns is Vice-President. Both are also employees of Chesmscope. Container Supply, however, does not distribute any Chemscope products, and it does not appear in either the assets and liabilities or operating statements of Chemscope, nor does the record indicate any legitimate basis for excluding sales to Container Supply from the Chemscope statement. As the expenses associated with the sales of $5,377.56, amounted to $7,580.00, they are made at a substantial loss. Absent better justification, no valid reason appears to justify the exclusion of the Container Supply sales from Chemscope revenues. It is important to note moreover, that the CPA, while recommending the exclusion of the freight charges and Container Supply sales from the 1973 sales figures, was unable to state whether this had been done for the 1974 figures which had already been audited. But even the exclusion of the so-called "inter company" sales reduces the figure only marginally below the $1,000,000.00 figure for Category III; nevertheless, as noted below, Respondent will be treated as in Category II.

The financial data fails to demonstrate that the payment of an assessment as much as $2,800.00 would affect Chemscope's ability to continue in business, even based on the 1973 data, but especially in the absence of the 1974 data which was available but was undisclosed. Its effect would, of course, be adverse but would not threaten continued operation.

Complainant determined the proposed penalty by classifying the offense as a Registration Violation, for nonregistration with "Knowledge/no application submitted" which the schedule proposes for a Category III company, an amount of $2,800–3,200. Complainant selected the minimum of this range. For a Category II company, this amount would have been $1,900–2,300.

Merged into the construction of the schedule of penalties and reflected therein are the statutory elements of Section 14 of the Act, i.e., size of business, the ability to continue in business, and the gravity of the violation. Gravity consists of two elements, that of harm and of misconduct. Compare Amvac Chemical Corporation, I.F. & R. Docket No. IX-4C.[4] The potential harm to the public in this instance is nonexistent, as the incorrect label reproduced not only the precautionary statements of the registered label for Diazinon 500, but an additional one.

As to gravity of misconduct, a different situation is presented. The distribution of products containing hazardous substances with improper or unregistered labels possesses the potential for great harm. Respondent's misconduct here must be gauged against the fact that it is a substantial organization, long experienced and knowledgeable in registration procedures. Yet it placed full responsibility for ensuring proper labeling in the hands of an inexperienced employee, without supervision. While Respondent acknowledges it cannot disclaim responsibility for its employees' actions, it in effect urges that the incident be considered "Mr. Hesker's unauthorized actions." The ultimate argument that the incident is of a "relatively minor nature" bespeaks a callous attitude toward the Act and justifies a substantial penalty.

In order to avoid further contention as to the measurement of the sales of Respondent for purposes of applying the penalty schedule, in spite of the considerations stated above, Respondent will be considered to be in Category II, but rather than selecting the bottom of the range specified, the facts here justify imposition of the maximum. Therefore, in the exercise of the discretion vested by 40 CFR 168.46 (b) of the Rules, the penalty will be fixed at $2,300.00.

Proposed Final Order[5]

1. Pursuant to Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended [86 Stat. 973; 7 U.S.C. 136 1(a)], a civil penalty of $2,300.00 is hereby assessed against Respondent Chemscope Corporation.

2. Payment of the full amount of the civil penalty assessed shall be made within sixty (60) days of the service of the final order upon Respondent by forwarding to the Regional Hearing Clerk a cashier's check or certified check payable to the United States of America in such amount.

Frederick W. Denniston
Administrative Law Judge

June 20, 1975

[1] Pursuant to Section 4 of the Federal Environmental Pesticide Control Act of 1972 (86 Stat. 973), the registration provisions of the prior Act are still in effect.

[2] Diazinon is O.O-diethyl 0-(2-isopropyl-4-methyl-6-pyimidinyl) phosphorothioate.

[3] For purposes of this decision, it is assumed but not decided that Respondent's assertion that the product does not require registration, is correct.

[4] Initial Decision July 11, 1974; adopted by Final Order of October 31, 1974.

[5] Unless appeal is taken by the filing of exceptions pursuant to section 168.51 of the Rules (40 CFR 168.51), or the Regional Administrator elects to review this decision on his own motion, the order may

become the final order of the Regional Administrator [See 40 CFR 168.46(c)].

1923. In Re: Calgon Corporation, EPA Region VII, September 26, 1975. (I.F. & R. No. VII-102C.)

This civil penalty proceeding was settled by hearing. The following is *Administrative Law Judge Frederick W. Denniston's Accelerated* Initial Decision.

By Complaint, dated April 1, 1975, the Chief of the Pesticides Branch, EPA Region, VII, alleges that Calgon Corporation has violated the provisions of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended, (86 Stat. 973; 7 U.S.C. 136) (FIFRA herein), in connection with a shipment of SYN-SOL CLEANER-SANITIZER, from St. Louis, Mo., to Newark, N.J., on August 8, 1974.

Following a denial of the allegations by Calgon Corporation, and a prehearing exchange of evidence, a hearing was held in St. Louis, Mo., on September 9, 1975.

At the hearing, Calgon Corporation was represented by Jack R. Mennis, Senior Attorney, of Pittsburgh, Pa., and the Complainant, by James Vieregg and Daniel J. Shiel, of Kansas City, Missouri.

By letter dated August 12, 1975, the Presiding Officer requested Complainant to file a brief on the question of whether a Technical Bulletin must physically accompany a shipping container. Such a brief was filed on September 2, 1975 and Calgon replied on September 9, 1975.

At the hearing, Calgon moved for the issuance of an Accelerated Decision under 40 CFR 168.37 of the Rules. The Motion, which was taken under advisement, is hereby granted pursuant to 168.37(a)(2).

A brief date of October 13, 1975, was specified with replies due on October 23, 1975. In view of the issuance of this Accelerated

Decision such need not be filed but the parties may file exceptions pursuant to 40 CFR 168.51(a).

Findings of Fact

The following facts were stipulated:

1. Respondent had gross sales (total business revenues from all business operations) for the prior fiscal year which exceeded $1,000,000.00.

2. Respondent is the registrant for the pesticide, SYN-SOL CLEANER-SANITIZER, which bears EPA Registration No. 2914–33.

3. The approved registered label affixed to the pesticide, SYN-SOL CLEANER-SANITIZER, contains the language "SEE TECHNICAL BULLETIN FOR USE DIRECTIONS."

4. The Technical Bulletin referred to on the approved registered label was accepted on April 30, 1969, under FIFRA.

5. Respondent on August 8, 1974, shipped (one) three hundred fifty pound drum of the pesticide, SYN-SOL CLEANER-SANITIZER, from St. Louis, Missouri, to American Bakeries Company, Newark, New Jersey.

6. The above referenced pesticide did not have affixed to it a Technical Bulletin bearing directions for use, during shipment on the above-referenced shipment.

7. A Technical Bulletin accepted in accordance with registration, bearing use directions for the above-referenced pesticide, was received by American Bakeries Company, Newark, N.J., on or about August 27, 1974.

Additional facts disclosed of record are:

8. American Bakeries received the shipment of the drum on August 14, 1974. Its representative, John Taylor, testified that on or about August 6, 1974, he requested a copy of the Technical Bulletin from the sales representative, but did not receive it until August 27, 1974. While first contending a portion of the August 14 shipment was used prior to receipt of the Bulletin, Taylor later expressed uncertainty.

9. The sales representative of Calgon, Doug Parks, testified that the Technical Bulletin for SYN-SOL, had been supplied to Taylor in connection with previous orders which had been placed in July 1972 and May 1973 and positively identified July 18, 1972, as the date the first one had been given and another in July 1974. Taylor, while uncertain as to whether he previously had a Technical Bulletin and acknowledging it is possible, stated he did not have one in his possession in August 1974. From the standpoint of the demeanor of the witnesses, each appeared sincere in their beliefs and Taylor conceded Parks may have previously supplied the Technical Bulletin prior to August 27, 1974, and he may have been unable to find it.

10. In view of the certainty of Parks' testimony and of the uncertainty of Taylor's, it must be concluded that Taylor had received a Technical Bulletin at least once prior to August 27, 1974.

Conclusions

The record is silent as to why EPA approved a separate document containing directions for use, herein for convenience referred to as a Technical Bulletin, although not so designated on its face. The so-called Technical Bulletin is a single page 8 1/2" x 11", the same size as the label itself. Being used on a large drum containing in excess of 300 lbs. of dry powder, there is ample space for adhering the Bulletin as well as the label to the surface. Moreover, in approving the Bulletin, EPA specified no conditions as to its display or use and no regulation has been cited which does so.

It is understandable that a Technical Bulletin in the form of a pamphlet or consisting of many pages, could not readily be affixed to

a large drum with any certainty of its safe arrival after shipment. But no justifiable reason appears for the separation of label and use instructions in this case. It is noted that in February 1975, Respondent submitted a revision of the label to combine them into a single document, and this was approved by EPA.

The label in question prominently displayed in large letters, the statement "See Technical Bulletin for use Directions." While there is conflicting testimony as to whether John Taylor of American Bakeries, the receiver of the shipment, had received a Technical Bulletin in connection with earlier purchases of SYN-SOL in 1972 and 1973, it is clear that upon receiving the shipment here in question on August 14, 1974, Taylor was aware of the need for the Technical Bulletin, requested it of the manufacturer, and at least partially withheld use of the product until he received it 13 days later. While this may be poor customer relations, the question here is whether any statute or regulations were violated.

In its Special Hearing Brief on the subject, Complainant contends that "If a product's label incorporates use directions by reference to another document and the consumer has not been provided such document prior to or concurrent with receipt of such product, the product is also misbranded." (Brief, p. 10). But the EPA regulations do not so state and no source for this contention is offered.

The only pronouncements of EPA on this subject appear to be the interpretations embraced in 40 CFR Part 162. Section 162.105(d) specifies that directions for use shall appear on the labeling, which "includes the label which is affixed to the product plus all printed or graphic matter which accompanies the product at any time. Directions for use may appear on the label or on accompanying leaflets or circulars." The precise meaning of "accompanies" or "accompanying" is not stated. It is noted however, that the same regulation provides an exception with respect to "well known economic poisons which are sold in containers of . . . 50 pounds or more of a solid intended primarily for use after dilution" provided "there is readily available general knowledge of the composition, methods of use, and effectiveness of the product." Moreover, Section

162.108(d), an interpretation with respect to labels for large containers, such as the drum here involved, provides an almost identical exemption from the directions for use requirement on "well known economic poisons which are sold in containers of . . . 50 pounds or more of a solid intended primarily for use after dilution." Witness Taylor described SYN-SOL as a chlorine type sanitizer and that these have been well known for many years.

Complainant's testimony did not direct itself to whether Sec. 162.105 (c)(1), 162.105(c)(2), or 167.108(d)(2) applied in this case, but there is nothing in the testimony to indicate the product here is not a "well-known" economic poison. Even if it be assumed those exemptions do not apply, however, there is no provision in the regulations or in the specific approval as to how the Technical Bulletin which EPA has approved for a separated use, should "accompany" the shipment of the product. A 300 pound or larger drum must be shipped by freight or its equivalent, whereas the single-page, letter-sized bulletin would necessarily move by mail or other means and could not, in its separated form, physically accompany the drum.

The absence of articulation of the meaning of "accompanying" in the EPA regulations is particularly significant in the ligt of Kordel v. United States, 335 U.S. 345 (1948), and United States v. Urbuteit, 335 U.S. 355 (1948), which hold, in effect, that it is immaterial whether the description of uses directly follows a shipment. It is true, no doubt, that EPA could by general regulation, or in the approval of a separate document, as here, specify precise conditions as to the display or availability of the document. But EPA has not done so, and by approving a separate Technical Bulletin without specifying how it should be brought to the attention of users, itself created an anomaly as to the meaning of "accompanying" since it could not mean a physical accompaniment. To attempt to create a requirement incapable of fulfillment, by retroactive adoption of an interpretation not heretofore announced and in a punitive action would be Draconian in the extreme.

Parenthetically, it should be noted that Complainant offered testimony indicating the economic damage or potential dangers to a user inherent in the absence of adequate directions for use of SYN-

SOL. But a number of these dangers are not dealt with in the directions for use approved by EPA and, at best, can only be inferred.

For the foregoing reasons, the Complaint is DISMISSED.

Frederick W. Denniston
Administrative Law Judge

September 26, 1975

1924. In Re: Thoms-Proestler Company, EPA Region VII, January 28, 1976. (I.F. & R. No. VII-145C, I.D. No. 114293.)

This was a civil action charging the respondent with violating the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 135a(a)(1) and 135b. The action pertained to a shipment made on or about April 22, 1975, from Davenport, Iowa, to Rock Island, Illinois. The pesticide involved was **STUARTS BLEACH**; the charge was nonregistration.

The respondent signed a Consent Agreement. The Final Order assessed a civil penalty of $1,188.00.

1925. In Re: Chem-Fab-Co Company, EPA Region VII, January 30, 1976. (I.F. & R. No. VII-158C, I.D. No. 102375.)

This was a civil action charging the respondent with violating the Federal Insecticide, Fungicide, and Rodenticide Act, U.S.C. 135a(a)(1) and 135b. The action pertained to a shipment made on April 24, 1975, from Mission, Kansas, to Kansas City, Missouri. The pesticide involved was **KLEEN-BRITE BATHROOM CLEANER WITH AMMONIA**; the charge was nonregistration.

The respondent signed a Consent Agreement. The Final Order assessed a civil penalty of $118.00.

1926. In Re: Nova Products, Inc., EPA Region VII, February 2, 1976. (I.F. & R. No. VII-130C, I.D. No. 112571.)

This was a civil action charging the respondent with violating the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 136j(a)(1)(E) and 136(q)(1)(G). The action pertained to a product held for distribution or sale on October 16, 1974, at Nova Products, Inc., Kansas City, Kansas. The pesticide involved was **MALATHION 57-WE**; the charge was misbranding-lack of adequate warning or precautionary statements.

The respondent signed a Consent Agreement. The Final Order assessed a civil penalty of $400.00.

1927. In Re: Biotechnics, Inc., EPA Region VII, February 19, 1976. (I.F. & R. No. VII-169C, I.D. No. 114370.)

This was a civil action charging the respondent with violating the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 135a(a)(1) and 135b. The action pertained to a shipment made on March 5, 1975, from Omaha, Nebraska, to Rockport, Missouri. The pesticide involved was **COMPOUND RLB-2 SPECIAL**; the charge was nonregistration.

The respondent signed a Consent Agreement. The Final Order assessed a civil penalty of $297.00.

1928. In Re: Chevron Chemical Company, EPA Region VII, February 19, 1976. (I.F. & R. No. VII-147C, I.D. Nos. 110706 and 113215.)

This was a civil action charging the respondent with violating the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C.,

136j(a)(2)(J); 135a(a)(1) and 135b. The action pertained to shipments made on October 21, November 21 and December 2, 1974, and March 10, 1975, from Maryland Heights, Missouri, to Caldwell, Idaho, and Memphis, Tennessee. The pesticides involved were **ORTHOCIDE DIELDRIN 60–75 SEED PROTECTANT**, and a product labeled in part **"MALATHION TECHNICAL", "TECHNICAL MALATHION 95"** and **"MALATHION TECHNICAL 95%"**. The charges included nonregistration and the shipment of a product in violation of a suspension order.

The respondent signed a Consent Agreement. The Final Order assessed a civil penalty of $3,200.00.

1929. In Re: Dr. MacDonald's Vitamized Feed Company, EPA Region VII, February 19, 1976. (I.F. & R. No. VII-164C, I.D. No. 148601.)

This was a civil action charging the respondent with violating the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 136j(a)(1)(E) and 136(q)(1)(C). The action pertained to a product held for distribution or sale on October 9, 1975, at Dr. MacDonald's Vitamized Feed Company, Fort Dodge, Iowa. The pesticide involved was **DR. MACDONALD'S LARV-X SUPER BEEF VY-O-LATOR MINERAL FEED MEDICATED**; the charge was misbranding—lack of warning or caution statement on labels.

The respondent signed a Consent Agreement. The Final Order assessed a civil penalty of $648.00.

1930. In Re: St. Louis Paint Manufacturing Company, St. Louis, Missouri, EPA Region VII, March 11, 1976. (I.F. & R. No. VII-175C, I.D. No. 74984.)

This was a civil action charging the respondent with violating the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 136j(a)(2)(L); 136e(c)(1)(A); 136e(c)(1)(B) and 136e(c)(1)(C). The action

pertained to the firm's failure to submit a pesticides annual report in a timely manner.

The civil complaint was withdrawn after the respondent proved the report was lost in the mail.

1931. In Re: Midwest Chemical Company, Harlan, Iowa, EPA Region VII, March 12, 1976. (I.F. & R. No. VII-179C, I.D. No. 74981.)

This was a civil action charging the respondent with violating the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 136j(a)(2)(L); 136e(c)(1)(A); 136e(c)(1)(B) and 136e(c)(1)(C). The action pertained to the firm's failure to submit a pesticides annual report in a timely manner.

The civil complaint was withdrawn after learning that the respondent had ceased operations at their establishment in Harlan, Iowa.

1932. In Re: General Drug and Chemical Corporation, Kansas City, Kansas, EPA Region VII, March 15, 1976. (I.F. & R. No. VII-176C, I.D. No. 74982.)

This was a civil action charging the respondent with violating the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 136j(a)(2)(L); 136e(c)(1)(A); 136e(c)(1)(B) and 136e(c)(1)(C). The action pertained to the firm's failure to submit a pesticides annual report in a timely manner.

The civil complaint was withdrawn after the respondent provided evidence that the report had been mailed prior to the February 1, 1976, deadline.

1933. In Re: Zing Products, Inc., EPA Region VII, March 15, 1976. (I.F. & R. No. VII-172C, I.D. No. 125529.)

This was a civil action charging the respondent with violating the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 135a(a)(1). The action pertained to a shipment made on August 20, 1975, from St. Louis, Missouri, to Chicago, Illinois. The pesticide involved was **ZING ALGAE STRIPPER**; the charge was nonregistration.

The respondent signed a Consent Agreement. The Final Order assessed a civil penalty of $118.00.

1934. In Re; Shepard Labs, Div. of Nebraska, Omaha, Nebraska, EPA Region VII, March 22, 1976. (I.F. & R. No. VII-182C, I.D. No. 74988.)

This was a civil action charging the respondent with violating the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 136j(a)(2)(c); 136e(c)(1)(A); 136e(c)(1)(B) and 136e(c)(1)(C). The action pertained to the firm's failure to submit a pesticides annual report in a timely manner.

The respondent signed a Consent Agreement. The Final Order assessed a civil penalty of $432.00.

1935. In Re: Derrick Soap Products, St. Louis, Missouri, EPA Region VII, March 23, 1976. (I.F. & R. No. VII-180C, I.D. No. 74985.)

This was a civil action charging the respondent with violating the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 136j(a)(2)(L); 136e(c)(1)(A); 136e(c)(1)(B) and 136e(c)(1)(C). The action pertained to the firm's failure to submit a pesticides annual report in a timely manner.

The respondent signed a Consent Agreement. The Final Order assessed a civil penalty of $172.00.

1936. In Re: Midland Laboratories, EPA Region VII, March 24, 1976. (I.F. & R. No. VII-163C, I.D. No. 125488.)

This was a civil action charging the respondent with violating the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 135a(a)(1) and 135b. The action pertained to a shipment made on September 19, 1975, from Dubuque, Iowa, to Elkhart Lake, Wisconsin. The pesticide involved was **MIDLAND FLUSH TABS TOILET BOWL CLEANER**; the charge was nonregistration.

Respondent provided evidence that product was registered by Allied Block Chemical Company, but had not secured supplemental registration for respondent. In view of this, the Civil Complaint was withdrawn and a Warning Letter issued in its place.

1937. In Re: Tax Corporation of America, d/b/a American Dish Co., EPA Region VII, March 24, 1976. (I.F. & R. No. VII-165C, I.D. No. 148101.)

This was a civil action charging the respondent with violating the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 136j(a)(1)(A) and 136a(a). The action pertained to a product held for distribution or sale on October 15, 1975, at Tax Corporation of America, d/b/a American Dish Service Company, Kansas City, Missouri. The pesticide involved was **SANITIZER 5% AVAILABLE CHLORINE FOR INDUSTRIAL DISHWASHING ONLY**; the charge was nonregistration.

The respondent signed a Consent Agreement. The Final Order assessed a civil penalty of $653.00.

1938. In Re: Levenson Chemical Company, Omaha, Nebraska, EPA Region VII, March 25, 1976. (I. F. & R. No. VII-177C. I.D. No. 74989.)

This was a civil action charging the respondent with violating the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 136j(a)(2)(L); 136e(c)(1)(A); 136e(c)(1)(B) and 136e(c)(1)(C). The action pertained to the firm's failure to submit a pesticides annual report in a timely manner.

The respondent signed a Consent Agreement. The Final Order assessed a civil penalty of $588.00.

1939. In Re: American Salt Company, Lyons, Kansas, EPA Region VII, March 26, 1976. (I. F. & R. No. VII-173C, I. D. No. 74991.)

This was a civil action charging the respondent with violating the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 136j(a)(2)(L); 136e(c)(1)(A); 136e(c)(1)(B) and 136e(c)(1)(C). The action pertained to the firm's failure to submit a pesticides annual report in a timely manner.

The respondent signed a Consent Agreement. The Final Order assessed a civil penalty of $1,728.00.

1940. In Re: Techne Corporation, EPA Region VII, March 30, 1976. (I. F. & R. No. VII-170C, I. D. Nos. 114638, 114642 and 114650.)

This was a civil action charging the respondent with violating the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 136j(a)(1)(E); 136(q)(1)(A); 136(c)(1) and 136q(1)(F). The action pertained to products held for distribution or sale on June 2, 1975, at Techne Corporation, St. Joseph, Missouri. The pesticides involved were **LOUSE-X, TECHNE RAT AND MOUSE KILLER** and **TECHNE MALATHION EMULSIFIABLE**; charges included adulteration and

misbranding—strength or purity fell below the professed standard of quality as expressed on its labeling and label lacked adequate directions for use.

The respondent signed a Consent Agreement. The Final Order assessed a civil peantly of $3,720.00.

1941. In Re: Ragland Mills, Inc., Neosho, Missouri, EPA Region VII, April 12, 1976. (I. F. & R. No. VII-174C, I. D. No. 74986.)

This was a civil action charging the respondent with violating the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 136j(a)(2)(L); 136e(c)(1)(A); 136e(c)(1)(B) and 136e(c)(1)(C). The action pertained to the firm's failure to submit a pesticides annual report in a timely manner.

The respondent signed a Consent Agreement. The Final Order assessed a civil penalty of $500.00.

1942. In Re: Nicolet Products, EPA Region IX, January 23, 1976. (I. F. & R. No. IX-114C, I. D. No. 125412.)

This was a civil action charging the respondent with violating the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 135a(a)(1) and 135(b). The action pertained to a shipment made on or about July 17, 1975, from Phoenix, Arizona, to Wilmot, Wisconsin. The pesticide involved was **HALAZON WATER PURIFICATION TABLETS**; the charge was nonregistration.

The respondent signed a Consent Agreement. The Final Order assessed a civil penalty of $132.00.

1943. In Re: Ben A. Milner, d/b/a Fields of California, EPA Region IX, February 2, 1976. (I. F. & R. No. IX-80C, I. D. No. 113835.)

This was a civil action charging the respondent with violating the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 135a(a)(1). The action pertained to a product held for distribution or sale on July 9, 1974, at Ben A. Milner, d/b/a Fields of California, Long Beach, California. The pesticide involved was **SEPTICAL GERMICIDE, DISINFECTANT, SANITIZER AND DEODORANT**: the charge was claims for product differed in substance from the representations made in connection with its registration.

The respondent signed a Consent Agreement. The Final Order assessed a civil penalty of $250.00.

1944. In Re: Moyer Chemical Company, Inc., EPA Region IX, February 4, 1976. (I. F. & R. No. IX-79C, I. D. No. 113615.)

This was a civil action charging the respondent with violating the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 136j(a)(1)(E); 136(c)(1) and 136(q)(1)(A). The action pertained to a product held for distribution or sale on or about August 8, 1974, at Moyer Chemical Company, San Jose, California. The pesticide involved was **DIBROM 4 DUST**; the charges included adulteration and misbranding—strength or purity fell below the professed standard of quality as expressed on its labeling.

The respondent signed a Consent Agreement. The Final Order assessed a civil penalty of $1,000.00.

1945. In Re: Valley Chemical Company, Inc., EPA Region IX, February 6, 1976. (I. F. & R. No. IX-83C, I. D. No. 113619.)

This was a civil action charging the respondent with violating the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. 136j(a)(1)(E); 136(q)(2)(A); 136(q)(2)(C)(i) and 136(q)(2)(C)(ii). The

action pertained to a shipment made on May 3, 1974, from Imperial, California, to Yuma, Arizona. The pesticide involved was **VALLEY BRAND .2% GRAIN BAIT FOR POCKET GOPHERS**; the charge was misbranding—lack of an adequate ingredient statement; name and address of producer, registrant or person for whom produced and name, brand or trademark on labels.

The respondent signed a Consent Agreement. The Final Order assessed a civil penalty of $300.00.

1946. In Re: Skasol, Inc., EPA Region IX, February 27, 1976. (I. F. & R. No. IX-113C, I. D. Nos. 111218 and 111219.)

This was a civil action charging the respondent with violating the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 136j(a)(1)(E); 136(q)(1)(A); 136(q)(1)(G) and 136(q)(2)(C)(iii). The action pertained to products held for distribution or sale on January 21, 1975, at Skasol, Inc., San Francisco, California. The pesticides involved were **MICROBIOCIDE NO. 8** and **MICROBIOCIDE NO. 2**; the charge was misbranding—lack of adequate precautionary statement, lack of net content statement and labels bore a false or misleading statement, since the product was overformulated.

The respondent signed a Consent Agreement. The Final Order assessed a civil penalty of $480.00.

1947. In Re: Laboratory Automated Chemicals Company, Gardena, California. EPA Region IX, March 4, 1976. (I. F. & R. No. IX-91C.)

This was a civil action charging the respondent with violating the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 136j(a)(2)(L). The action pertained to the firm's failure to submit a pesticides annual report.

The respondent signed a Consent Agreement. The Final Order assessed a civil penalty of $250.00.

1948. In Re: Puregro Company, EPA Region IX, March 18, 1976. (I. F. & R. No. IX-110C, I. D. Nos. 111736 and 111737.)

This was a civil action charging the respondent with violating the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 135a(a)(1); 135b; 136j(a)(1)(E) and 136(c)(1). The action pertained to shipments made on January 20 and October 4, 1974, from Casa Grande and Tolleson, Arizona, to Blythe, California. The pesticides involved were **TOXAPHENE 8 LIQUID** and **PERTHANE 4EC**; the charges included nonregistration, misbranding and adulteration—strength or purity fell below the professed standard of quality as expressed on its labeling.

The respondent signed a Consent Agreement. The Final Order assessed a civil penalty of $6,318.00.

1949. In Re: Chem Mark of King County, Inc., EPA Region X, February 11, 1976. (I. F. & R. No. X-33C, I. D. No. 107361.)

This was a civil action charging the respondent with violating the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 136j(a)(1)(E); 136(q)(1)(A) and 136(c)(1). The action pertained to a product held for distribution or sale on July 9, 1975, at Chem Mark of King County, Inc., Seattle, Washington. The pesticide involved was **CHLOR**; charges included adulteration and misbranding—strength or purity fell below the professed standard of quality as expressed on its labeling.

The respondent signed a Consent Agreement. The Final Order assessed a civil penalty of $180.00.

1950. In Re: Red Star Poison Co., EPA Region X, February 27, 1976. (I. F. & R. No. X-24C, I. D. No. 113469.)

This was a civil action charging respondent with violating the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 136j(a)(1)(E) and 136q(1)(A). The action pertained to a product held for

distribution or sale on June 15, 1974, at Red Star Poison Co., Woodburn, Oregon. The pesticide involved was **RED STAR POISONED GRAIN FOR GROUND SQUIRRELS AND MICE**; the charge was misbranding—product not effective in killing mice when used as directed.

The respondent signed a Consent Agreement. The Final Order assessed a civil peanlty of $168.00.

Midland Laboratories (Civil)	1936
Midwest Chemical Company (Civil)	1931
Miller-Morton Co. (Civil)	1911
Moyer Chemical Company, Inc. (Civil)	1944
Nationwide Chemical (Civil)	1904
Nicolet Products (Civil)	1942
Nova Products, Inc. (Civil)	1926
Parramore and Griffin Seed Co., Inc. (Civil)	1918
Puregro Company (Civil)	1948
Ragland Mills, Inc. (Civil)	1941
Red Star Poison Co. (Civil)	1950
St. Louis Paint Manufacturing Company (Civil)	1930
Sheff Chemical & Supply Company (Civil)	1921
Shepard Labs, Div. of Nebraska (Civil)	1934
Skasol, Inc. (Civil)	1946
Tax Corporation of America, d/b/a American Dish Co. (Civil)	1937
Techne Corporation (Civil)	1940
Thoms-Proestler Company (Civil)	1924
Time Chemical, Inc. (Civil)	1914
Valley Chemical Company, Inc. (Civil)	1945
Wilson Aerosol Company (Civil)	1915
Zing Products, Inc. (Civil)	1933