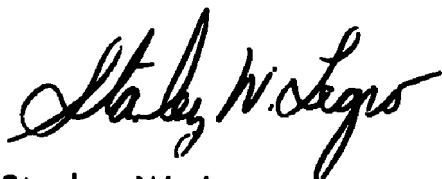


**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
OFFICE OF ENFORCEMENT
OFFICE OF GENERAL ENFORCEMENT
PESTICIDES AND TOXIC SUBSTANCES
ENFORCEMENT DIVISION**

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

Nos. 1951-2000

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.

1951. In Re: Middlebrook Lancaster, Inc., EPA Region II, April 8, 1976. (I.F. & R. No. II-42C, I.D. No. 93539.)

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 January 26, 1973, from Brooklyn, New York, to Harrisburg, Pennsylvania. The pesticide involved was **NUTRINE FORMALDEHYDE SOLUTION**; the charge was nonregistration.

The Default Order issued September 18, 1974, assessed a civil penalty of \$3,000.00. An amended Final Order on Default was issued on April 8, 1976, which did not assess a civil penalty since the firm had filed for bankruptcy.

1952. In Re: Thompson Hayward Chemical Company, EPA Region IV, April 22, 1976. (I.F. & R. No. IV-160C, I.D. No. 110977.)

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(c)(1) and 136(q)(1)(G). The action pertained to a shipment made on May 21, 1975, from Muscle Shoals, Alabama, to Nashville, Tennessee. The pesticide involved was **SODIUM HYPOCHLORITE SOLUTION**; charges included directions for use differed from the representations made in connection with its registration, adulteration and misbranding—its strength or purity fell below the professed standard of quality as expressed on its labeling and labels failed to bear required warning or caution statement.

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

1953. In Re: Thompson Hayward Chemical Company, EPA Region IV, April 22, 1976. (I.F. & R. No. IV-161C, I.D. Nos. 110259, and 110261).

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)(G) and 136(c)(1). The action pertained to products held for distribution or sale on May 13, 1975, at Thompson Hayward Chemical Company, Fayetteville, North Carolina. The pesticides involved were **FERMATE DUST** and **4% MALATHION DUST**; charges included adulteration and misbranding—its strength or purity fell below the professed standard of quality as expressed on its labeling and labels failed to bear required warning or caution statement.

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

1954. In Re: Beaver Sales and Service, EPA Region IV, May 17, 1976. (I.F. & R. No. IV-182C, I.D. No. 110218.)

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 136(c)(1). The action pertained to a product held for distribution or sale on September 4, 1975, at Beaver Sales and Service, Gadsden, Alabama. The pesticide involved was **BEAVERCIDE ODORLESS DISINFECTANT**; charges included nonregistration and adulteration—its 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 \$4,000.00.

1955. In Re: Hart Hardware Company, EPA Region IV, May 17, 1976. (I.F. & R. No. IV-175C, I.D. No. 120862.)

This was a civil action charging the respondent with violating the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 136j(a)(2)(G). The action pertained to a product used on September 11, 1975, by Hart Hardware Company, Nashville, Tennessee. The pesticide involved was **HOOKER SODIUM CHLORATE WEED KILLER**; EPA Reg. No. 935-10.

The respondent was charged with using the pesticide in a manner inconsistent with its labeling.

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

1956. In Re: McInnis Laboratories, EPA Region IV, June 1, 1976. (I.F. & R. No. IV-157C, I.D. No. 110528.)

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 September 3, 1975, at McInnis Laboratories, Meridian, Mississippi. The pesticide involved was **MCINNIS ANTI-FLY**; the charge was adulteration—54% deficient in phenothiazine.

The respondent signed a Consent Agreement. The Final Order assessed a civil penalty of \$420.00.

1957. In Re: Athea Laboratories, Inc., EPA Region V, July 2, 1975. (I.F. & R. No. V-223C, I.D. No. 112164.)

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(q)(1)(G). The action pertained to a shipment made on January 11, 1974, from Milwaukee, Wisconsin, to Columbus, Nebraska. The pesticide involved was

MARC-143 PRO-TEC; charges included nonregistration and misbranding—inadequate warning or caution statements.

The respondent signed a Consent Agreement. The Final Order assessed a civil penalty of \$3,432.00.

1958. In Re: Mid State Chemical and Supply Corp., EPA Region V, October 10, 1975. (I.F. & R. No. V-241C, I.D. No. 107078.)

This was a civil action in which the respondent was charged with violating the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 135(a)(1); 136(a)(1)(E); 136(q)(1)(G); 136(q)(2)(C) and 136(q)(2)(A). The action pertained to shipments made on August 22 and September 10, 1974, from Indianapolis, Indiana, to Louisville, Kentucky. The pesticide involved was **HY-CLOR**; charges included nonregistration and misbranding—inadequate caution statement, lack of an ingredient statement and lack of a net content statement.

The respondent signed a Consent Agreement. The Final Order assessed a civil penalty of \$726.00.

1959. In Re: Time Chemical, Inc., EPA Region V, October 16, 1975. (I.F. & R. No. V-237C, I.D. No. 114532.)

This civil penalty proceeding was settled by hearing. The following is Administrative Law Judge Bernard D. Levinson's Initial Decision.

This is a proceeding under section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended (FIFRA) for assessment of a civil penalty for alleged violations of the Act. The proceeding was initiated by Complaint issued on April 14, 1975 by the Director, Enforcement Division, Region V, EPA (Complainant) against Time Chemical, Inc., with a place of business in Chicago, Illinois (Respondent).

The Complaint alleges that on September 11, 1974, the Respondent delivered for shipment from Chicago to Kansas City, Missouri, the pesticide called Mokon Chlorinated Porcelain Cleaner (Mokon) that failed to comply with the provisions of the Act in that it (1) was not registered as required by the Act; (2) was misbranded in that the label did not bear the signal word "Caution" and the statement "Keep out of reach of children" and (3) was misbranded in that the label did not bear an ingredient statement.¹ The penalty proposed to be assessed was \$3,200 based only on the non-registration charge.

The Respondent by Jerome A. Goldman, its Vice President and General Manager, filed an answer and requested a hearing. A hearing was held in Chicago, Illinois, on August 21, 1975. The Complainant was represented by Chester V. Sawyer, Esq., attorney, Enforcement Division, EPA, Region V and Respondent was represented by Mr. Goldman.

The Respondent, in its answer and at the hearing, admitted the charges, and sole purpose of the hearing was to consider the appropriateness of the penalty. It is Respondent's position that the proposed penalty of \$3,200 is excessive in the circumstances and should be reduced to \$1,000 or less. The Complainant submitted proposed findings of fact, conclusions and a brief in support thereof. The Respondent submitted a statement to support a reduction of the proposed penalty and also a reply brief to the documents submitted by Complainant. These have been duly considered.

Findings of Fact

1. The Respondent Time Chemical, Inc., is a corporation with a plant and place of business in Chicago, Illinois. It also has a plant in Atlanta, Georgia. The company is a manufacturer of detergents and sanitation chemicals for industrial and institutional use. Its gross sales in 1974 were approximately \$8,800,000.

2. The Respondent manufactured the product called Mokon Chlorinated Porcelain Cleaner (Mokon) which was represented on the

label as a disinfectant and sanitizer. The label also made the claim that the product "Kills bacteria". The product was a pesticide within the meaning of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended (FIFRA).

3. The product Mogan was not registered as required by FIFRA.

4. On September 11, 1974, the Respondent shipped from Chicago, Illinois, to Kansas City, Missouri, fifty cases of Mogan, each case containing 18 cans of two pounds each. The label of the containers did not bear the signal word "Caution" or the statement "Keep out of reach of children" as required by the applicable regulations then in effect (40 CFR 162.9(a)). The product was misbranded within the meaning of section 2(q)(1)(G) of FIFRA.

5. The Respondent is subject to assessment of penalties under section 14(a) of FIFRA for violations of section 12(a)(1)(E) of the Act and 7 U.S.C. 135a(a)(1) as continued in effect by section 4 of Federal Environmental Pesticide Control Act of 1972, 86 Stat. 998.

Conclusions and Reasons

In determining the appropriateness of the penalty the statute and regulations require that the following factors be considered: size of respondent's business; effect on respondent's ability to continue in business; and gravity of the violation. In evaluating the gravity of the violation the regulations require that the following be considered: history of respondent's compliance with the Act; and good faith or lack thereof. The Respondent does not contend that its ability to continue in business will be affected if it is required to pay the proposed penalty.

The Respondent's gross sales in 1974 were approximately \$8,800,000. While it is not what would be considered one of the giant corporations, it is a relatively large company. As to size of company it falls into category V (annual gross sales exceeding a

million dollars) as set forth in the Guidelines for the Assessment of Civil Penalties under FIFRA. (39 F.R. 27711, July 31, 1974).

It has been held in other cases under section 14(a) that "gravity of the violation" should be considered from two aspects—gravity of harm and gravity of misconduct.

As to gravity of harm there should be considered the actual or potential harm or damage, including severity, that resulted or could result from the particular violation....

As to gravity of misconduct, matters which may be properly considered include such elements as intention 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.²

The Respondent company has been in business for about 28 years. It has 17 pesticides registered of which 11 are currently being produced. It is well aware of the requirements for registering pesticides.

The failure to register the pesticide in question was not a deliberate or intentional violation. It appears that it was the intention of Respondent to market this product as a cleanser without any pesticide claims. The preparation of the label in question with pesticide claims was due to the negligence or lack of qualifications of one of Respondent's employees for which Respondent is legally responsible. However, the distribution of an unregistered pesticide may be considered to be one of the more serious violations under the Act. It is obvious that when an unregistered pesticide is distributed the enforcement and protective purposes of registration are defeated. Where a pesticide is not registered, the regulatory officials do not have the opportunity to eliminate unwarranted claims, to require such precautionary warnings as may be necessary, and to

keep the channels of commerce free of products that may have unreasonable risks to man or the environment.

The Respondent has a history of citations and warning letters for violations of the Act.³ Between 1968 and April 1973, 55 samples of Respondent's products were collected resulting in 25 citations and 3 warning letters. Between June 10, 1968 and December 28, 1971, two warning letters and four citations were issued to Respondent for non-registration of chlorinated cleaners or chlorinated dishwashing compounds. The citation of December 28, 1971 resulted in a criminal prosecution in the U.S. District Court for the Northern District of Illinois, Eastern Division on which the Respondent, on September 9, 1974, was found guilty on four counts and was fined \$3000.

Under the Guidelines the penalty to be assessed on a firm of this size for a non-registration violation—"Knowledge/No Application Submitted"—is \$3200. The Respondent, through the individual who had ultimate responsibility for marketing the product in question, had knowledge that such a product with pesticide claims was required to be registered.

The preparation of the label with pesticide claims was not a deliberate or intentional violation. The product was of a low order of toxicity and could properly have been marketed without pesticide claims and registration as a pesticide would not have been required. Further, the Respondent upon learning of the violation acted promptly to prevent further shipments of the product by its customer and it furnished the customer with new labels and paid for relabeling. These may be considered as mitigating factors. On the other hand we have as an aggravating factor the history of warning letters and citations and the criminal conviction in September 1974 for similar violations.

I am of the view that the mitigating and aggravating factors balance each other and that the assessment of a civil penalty of \$3200 according to the schedule in the Guidelines was appropriate.

It is noted that no penalty was assessed for failure of the label to bear the signal word "Caution" or the statement "Keep out of reach of children". While such warnings are required even on the least

dangerous pesticides, the decision not to assess a penalty for this mode of misbranding was undoubtedly prompted because of the low order of toxicity of the product. I do not disturb the decision of the enforcement officials in this regard.

I conclude that a civil penalty of \$3200 is appropriate for the violations set forth in the Complaint of April 14, 1975, and recommend that a civil penalty in said amount be assessed against Respondent.

Proposed Final Order¹

1. Pursuant to section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended, a civil penalty of \$3200 is hereby assessed against Respondent, Time Chemical, Inc., for the violations of the Act set forth in the Complaint dated April 14, 1975.

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

Bernard D. Levinson
Administrative Law Judge

October 16, 1975

¹ At the hearing counsel for Complainant acknowledged that the label did bear an ingredient statement. However, he stated that the charge was inadequate and should have charged that the ingredient statement did not appear on that part of the label that is generally facing the public when the product is placed on the shelf. Because of

the deficiency in pleading the undersigned is disregarding this charge of misbranding.

² Quoted from Initial Decision of ALJ In re Amvac Chemical Corporation, I.F. & R. Docket No. IX-4C, July 11, 1974.

³ A citation was issued for a serious violation and indicated that criminal action was contemplated. A warning letter was sent for a violation not considered serious enough to warrant criminal action but required corrective action by the recipient.

⁴ 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)).

1960. In Re: Blue Grass Chemical Specialties, Inc., EPA Region V, October 22, 1975. (I.F. & R. No. V-249C I.D. Nos. 116649 and 116650.)

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; 136(a)(1)(E); 136(q)(1)(G); 136(q)(1)(F); 136(q)(2)(D) and 136(q)(2)(A). The action pertained to shipments made on August 22 and 26, 1974, from New Albany, Indiana, to Louisville, Kentucky. The pesticides involved were **BAC-C** and **BG-BT**; charges included nonregistration and misbranding—failure to bear adequate warning or caution statement, failure to bear an ingredient statement, inadequate directions for use and failure to bear required symbols or statements.

The respondent signed a Consent Agreement. The Final Order assessed a civil penalty of \$1250.00.

1961. In Re: Globe Chemicals, Inc., EPA Region V, October 22, 1975. (I.F. & R. No. V-80C, I.D. No. 94094.)

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)(2) and 136(q)(1)(A). The action pertained to a product held for distribution or sale on September 10, 1973, at Globe Chemicals, Inc., Toledo, Ohio. The pesticide involved was **UNI-CIDE 101 MALATHION-LETHANE FOGGING CONCENTRATE**; charges included adulteration and misbranding—strength or purity of the product fell below the professed standard of quality under which it was sold.

The respondent signed a Consent Agreement. The Final Order assessed a civil penalty of \$1140.00.

1962. In Re: Stan Sax Corporation, EPA Region V, November 10, 1975. (I.F. & R. No. V-215C, I.D. No. 106235.)

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)(G); 136(q)(1)(A) and 136(c)(1). The action pertained to a product held for distribution or sale on December 4, 1973, at Stan Sax Corporation, Detroit, Michigan. The pesticide involved was **SE-BAX 125 QUATERNARY AMMONIUM**; charges included adulteration and misbranding—quality of the product fell below the professed standard and lack of adequate warning or precautionary statements.

The respondent signed a Consent Agreement. The Final Order assessed a civil penalty of \$3000.00.

1963. In Re: Hawkins Chemical, Inc., EPA Region V, December 5, 1975. (I.F. & R. No. V-229C, I.D. Nos. 115266, 115293, 115294 and 115295.)

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); 136(q)(2)(A); 135a(a)(1); 135b; 136(q)(1)(G) and 136(q)(1)(A). The action pertained to shipments made on April 1 and 2 and July 17, 1974, from Minneapolis, Minnesota, to Superior, Wisconsin, and to a product held for distribution or sale on July 11, 1974, at Lynde Company, Minneapolis, Minnesota. The pesticides involved were **ALGI-BAN, ODOR FRESH, ZINGO SEWER CLEANER** and **KILO-MOSQUITO SPRAY**; charges included nonregistration, adulteration and misbranding—quality of the product fell below the professed standard, false registration number, inadequate ingredient statement and inadequate warning or caution statements.

The respondent signed a Consent Agreement. The Final Order assessed a civil penalty of \$4600.00.

1964. In Re: Amaza Laboratories, Inc., EPA Region V, February 12, 1976. (I.F. & R. No. V-243C, I.D. No. 116089.)

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 November 6, 1974, at Amaza Laboratories, Inc., Cleveland, Ohio. The pesticide involved was **AMAZA DISINFECTANT CLEANER**; charges included misbranding and adulteration—strength or purity of the product fell below professed standard of quality.

The respondent signed a Consent Agreement. The Final Order assessed a civil penalty of \$968.00.

1965. In Re: Howe Chemical, Inc., EPA Region V, February 18, 1976. (I.F. & R. No. V-91C, I.D. Nos. 93988 and 93989.)

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)(2) and 136(q)(1)(A). The action pertained to products held for distribution or sale on August 24, 1973, at Howe Chemical, Inc., Minneapolis, Minnesota. The pesticides involved were **HOWE'S AGRICULTURAL INSECTICIDE FUNGICIDE** and **HOWE'S MANZATE**; charges included adulteration and misbranding—strength or purity of the products fell below the professed standard of quality.

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

1966. In Re: Elanco Products Company, Division of Eli Lilly and Company, EPA Region V, February 24, 1976. (I.F. & R. No. V-46C, I.D. No. 102509.)

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)(2) and 136(q)(1)(A). The action pertained to a shipment made on January 9, 1973, from Minneapolis, Minnesota, to Waterloo, Iowa. The pesticide involved was **GREENFIELD EXCEL SPOT WEED KILLER**; charges included adulteration and misbranding—strength or purity of product fell below the professed standard of quality under which it was sold.

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

1967. In Re: H-O-H Chemicals, Inc., EPA Region V, February 24, 1976. (I.F. & R. No. V-235C, I.D. Nos. 115967, 115976, and 115977.)

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)(1)(G); 136(q)(2)(D) and 136(q)(2)(A). The action pertained to shipments made on July 8 and August 8, 1974, from Palatine, Illinois, to West Allis and Milwaukee, Wisconsin. The pesticides involved were **C-408-A LIQUID COOLING TOWER TREATMENT, A-120 LIQUID ALGAECIDE** and **A-200 LIQUID BIOCID**E; charges included nonregistration, misbranding and adulteration—failure to bear proper ingredient statements and strength or purity below professed standard.

The respondent signed a Consent Agreement. The Final Order assessed a civil penalty of \$3247.00.

1968. In Re: Continental Chemical Corporation, EPA Region V, March 10, 1976. (I.F. & R. No. V-248C, I.D. No. 114984.)

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)(F) and 136(c)(1). The action pertained to a shipment made on September 5, 1974, from Terre Haute, Indiana, to Chicago, Illinois. The pesticide involved was **PINEAROMA**; charges included misbranding and adulteration—inadequate directions for use and strength or purity fell below professed standard.

The respondent signed a Consent Agreement. The Final Order assessed a civil penalty of \$1750.00.

1969. In Re: Hub States Corporation, EPA Region V, March 25, 1976. (I.F. & R. No. V-231C, I.D. No. 87426.)

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(q)(1)(A). The action pertained to a product held for distribution or sale on August 19, 1973, at Hub States Corporation, Indianapolis, Indiana. The pesticide involved was **SELECTIVE WEED AND BRUSH KILLER**; charges included nonregistration and misbranding—labels bore a false and misleading registration number.

The respondent signed a Consent Agreement. The Final Order assessed a civil penalty of \$3000.00.

1970. In Re: Sanitary Supply Company, EPA Region VI, April 26, 1976. (I.F. & R. No. VI-64C, I.D. No. 107229.)

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 22, 1975, at Sanitary Supply Company, Beaumont, Texas. The pesticide involved was **SANCO MINT ODOR 7**; 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 \$550.00.

1971. In Re: Turco Products, EPA Region VI, May 4, 1976. (I.F. & R. No. VI-57C, I.D. No. 107306.)

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 product held for distribution or sale on August 6, 1975, at Turco Products,

Houston, Texas. The pesticide involved was **TURCO ZEAL**; 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 \$1450.00.

1972. In Re: Progressive Electronics Corporation, EPA Region VI, May 10, 1976. (I.F. & R. No. VI-73C, I.D. No. 111021.)

This was a civil action charging the respondent with violating the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 136j(a)(1)(F). The action pertained to a product held for distribution or sale on May 2, 1975, at Progressive Electronics Corporation, Dallas, Texas. The device involved was **ELECTRONIC MOSQUITO REPELLER**; the charge was misbranding—product was ineffective when used as directed.

The civil complaint was withdrawn since the firm was no longer in business.

1973. In Re: Poly-Chem, Inc., EPA Region VI, June 3, 1976. (I.F. & R. No. VI-66C, I.D. No. 108363.)

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). The action pertained to a product held for distribution or sale on May 7, 1975, at Poly-Chem, Inc., New Orleans, Louisiana. The pesticide involved was **PINE SCENT DISINFECTANT**; the charge was misbranding—product was ineffective when used as directed.

The respondent signed a Consent Agreement. The Final Order assessed a civil penalty of \$490.00.

1974. In Re: Sifers Chemicals, Inc., EPA Region VII, October 15, 1975. (I.F. & R. No. VII-119C)

This civil penalty proceeding was settled by hearing. The following is Administrative Law Judge Bernard D. Levinson's Initial Decision.

By Complaint dated May 12, 1975 the Chief, Pesticides Branch, Environmental Protection Agency, Region VII (hereinafter Complainant), charged Sifers Chemicals, Inc., of Kansas City, Missouri¹ (Hereinafter Respondent), with a violation of section 12(a)(2)(L) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended (FIFRA) in that it, as a pesticide producer, failed to submit to the Administrator (of EPA) the information required by section 7(c) of the Act and regulations thereunder. The Complaint, issued pursuant to section 14 of the Act, proposed to assess a civil penalty of \$3200. The Respondent filed a response to the Complaint and, in effect, objected to the assessment of the proposed penalty. This response was considered as a request for hearing. Hearing was held in Kansas City, Missouri, on August 20, 1975. The Complainant was represented by Patrick K. Monahan and Daniel J. Shiel, Legal Branch, EPA, Region VII and the Respondent was represented by Don S. Sifers, President of the Respondent Company. The Complainant filed proposed findings of fact, conclusions and order, and also a brief in support thereof. The Respondent did not file any documents of such nature. These documents filed by Complainant have been duly considered.

Section 7(a) of the Act requires that establishments producing pesticides be registered with the Administrator. Section 7(c) requires the producer operating a registered establishment to submit certain information within 30 days after it is registered and thereafter to keep the information current by submitting annual reports as the Administrator may require by regulation.

The regulation issued under this section of the Act is found in 40 CFR Part 167, section 167.5 (38 F.R. 36557, November 6, 1973). It requires information as to the types of pesticides produced, the past year's amount of production and the sales or distribution of each product, and the amount of current production of each product. (This

latter requirement is viewed as a forecast and furnishes the Agency with the producer's intended production volume). The reports are required to be filed annually on or before February 1.

The Respondent does not dispute the fact it failed to file the annual report as required by the regulation. The evidence showed that on January 28, 1975, the Regional Office of EPA (Region VII, Kansas City, Missouri) sent a notice to Respondent informing it of the requirement to file the annual report, enclosing the report form and instructions for completing the form. The notice stated that the form must be completed and returned to the Regional Office within 30 days of receipt or by February 1, whichever is later. The notice and enclosures were received at the Iola, Kansas, office of Respondent on January 30, 1975.

The report form not having been completed and filed by May 12, 1975, the Complaint that initiated this case was issued. The testimony of Mr. Sifers that the completed report was filed within a few days after the Complaint was received by Respondent is not disputed and Complainant acknowledges that the report was submitted within a few days after the Respondent received the Complaint.

The proposed penalty of \$3,200 was based on the Guidelines for Assessment of Civil Penalties as published in the Federal Register on July 31, 1974 (39 F.R. 27711) as modified by an interim deviation notice issued on April 22, 1975.

Section 14(a)(3) of FIFRA states 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 on the person's ability to continue in business, and the gravity of the violation.

Section 168.60(b)(1) of the Rules of Practice also enumerates these three criteria and section 168.60(b)(2) adds two other factors to be considered in evaluating the gravity of the violation — (1)

respondent's history of compliance with the Act and (2) good faith or lack thereof.

The Guidelines were issued to provide direction to Agency personnel assessing civil penalties and "are designed to insure to the extent practicable, that generally comparable penalties will be assessed in different regions for similar violations." The Rules of Practice (sec. 168.46(b)) provide that the ALJ may consult and may rely on the Guidelines but that he "may at his discretion increase or decrease the assessed penalty from the amount proposed to be assessed in the Complaint."

Since the size of the Respondent's business is one of the factors that must be considered, the Guidelines have utilized five size gradations based on a respondent's annual sales. The categories based on gross sales for the prior fiscal year are as follows: I – less than \$100,000; II – between \$100,000 and \$400,000; III – between \$400,000 and \$700,000; IV – between \$700,000 and \$1,000,000; V – over \$1,000,000.

The Guidelines, as published in the Federal Register, for the type of violation here involved proposes \$5,000 for a category V firm and \$1,250 for a category II firm. These amounts were reduced by a memorandum entitled "Interim Deviation from Civil Penalty Assessment Schedule" dated April 22, 1975 from the Director, Pesticides Enforcement Division to the Region Enforcement Division Directors. The reduction in the two categories mentioned was to \$3,200.00 and \$800.00 respectively.

The Guidelines provide that in negotiating for settlement the Agency may take into consideration mitigating factors and where reduction would serve the public interest, the Agency may lower the proposed penalty as much as 40%. The interim deviation memorandum of April 22, 1975 included the following:

The complaint should propose to assess the full amount of the appropriate penalty by size-of-business in accordance with the revised schedule specified herein. Should the report be filed within the pendency of a civil

proceeding, the proposed penalty may be mitigated as much as forty per cent if the region feels such action is warranted based on the facts of the case.

The proposed penalty of \$3,200 was based on Complainant's information and belief that Respondent's gross sales for 1974 were in excess of \$1,000,000 which would place it in category V. This information, at the time the civil penalty assessment was made, appeared to be reliable. However, the evidence at the hearing, which I consider credible and on which I rely, showed that Respondent's gross sales for 1974 were in the range of category II for which the proposed penalty in the interim deviation memorandum is \$800.

The Complainant in its prehearing exchange of evidence acknowledged that a review of Respondent's record of compliance with the Act revealed no past violations. The Respondent's failure to file the report was not a deliberate flouting of the law but, I find, was due to negligence. The report was filed within a few days after the Respondent was served with the Complaint.

While the Administrative Law Judge is not bound by the Guidelines or the recommendation of those charged with enforcement in the circumstances of this case, where the report was filed within a few days after the Complaint was issued and there is no history of prior violations, I am of the view that a 40% reduction from the \$800 penalty for a firm in category II as set forth in the memorandum of April 22, 1975, is an appropriate penalty and a penalty of \$480 is hereby assessed.

Although the evidence shows that the Respondent sustained a substantial operating loss in 1974, I find that payment of the penalty herein assessed will have no adverse effect on its ability to continue in business.

The foregoing includes the Administrative Law Judge's Findings of Fact, Conclusions and reasons therefor.

Proposed Final Order²

1. Pursuant to section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended, a civil penalty of \$480 is hereby assessed against Respondent, Sifers Chemicals, Inc., for the violation of the Act found herein.

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

Bernard D. Levinson
Administrative Law Judge

October 15, 1975

¹ This company has a sales and business office in Kansas City, Missouri, and a plant in Iola, Kansas.

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)).

1975. In Re: Southwest Grease and Oil Company, EPA Region VII, April 12, 1976. (I.F. & R. No. VII-168C, I.D. No. 113044.)

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 shipment made on or about July 23, 1975, from Omaha, Nebraska, to South Omaha, Nebraska. The pesticide involved was **SOS MALATHION**

BACKRUBBER OIL; 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 \$1,500.00.

1976. In Re: Cole Chemical Company, St. Louis, Missouri, EPA Region VII, April 27, 1976. (I.F. & R. No. VII-188C, I.D. No. 74996.)

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 \$300.00.

1977. In Re: Adroit Chemical Pest Control, St. Johns, Missouri, EPA Region VII, April 15, 1976. (I.F. & R. No. VII-187C, I.D. No. 74995.)

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 \$100.00.

1978. In Re: Mar-Pak Midwest, Inc., St. Louis, Missouri, EPA Region VII, April 15, 1976. (I.F. & R. No. VII-184C, I.D. No. 74992.)

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 \$100.00.

1979. In Re: J. E. Flannigan Chemical Company, Sutherland, Nebraska, EPA Region VII, April 16, 1976. (I.F. & R. No. VII-186C, I.D. No. 74994.)

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.

1980. In Re: Dow Chemical, U.S.A., EPA Region VII, April 20, 1976. (I.F. & R. No. VII-134C, I.D. No. 114379.)

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 October 17, 1974, from North Kansas City, Missouri, to McCook, Nebraska. The pesticide involved was **DOW TORDON 22K WEED KILLER**; the charge was misbranding—claims made for the product and the directions for use 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 \$1,800.00.

1981. In Re: Midland Research Laboratories, Inc., EPA Region VII, April 21, 1976. (I.F. & R. No. VII-171C, I.D. No. 148655.)

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)(G) and 136(c)(1). The action pertained to a shipment made on September 10, 1975, from Lenexa, Kansas, to Kansas City, Missouri. The pesticide involved was **CHEMI-CAL 605**; charges included adulteration and misbranding—strength or purity fell below the professed standard of quality as expressed on its labeling and lack of adequate warning or caution statement on labels.

The respondent signed a Consent Agreement. The Final Order assessed a civil penalty of \$622.00.

1982. In Re: Lite Weight Products, Inc., EPA Region VII, May 27, 1976. (I.F. & R. No. VII-178C, I.D. No. 102360.)

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) and 136(c)(1). The action pertained to a shipment made on August 19, 1975, from Kansas City, Kansas, to Kansas City, Missouri. The pesticide involved was **SUP-RO CHLORDANE 10% GRANULAR**; charges included directions for use differed in substance from the representations made in connection with its registration, 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 \$270.00.

1983. In Re: Contract Packaging, Inc., EPA Region VII, June 8, 1976. (I.F. & R. No. VII-192C, I.D. No. 125209.)

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 May 15, 1974, from Norwalk, Iowa, to Le Sueur, Minnesota. The pesticide involved was **OSBORN SW-T BOMB**; the charge was nonregistration.

The civil complaint was withdrawn after the respondent provided information demonstrating that the product in question was in fact registered at the time of shipment.

1984. In Re: Packaging Unlimited, EPA Region IX, January 6, 1976. (I.F. & R. No. IX-49C, I.D. No. 90773.)

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(q)(2)(A). The action pertained to a shipment made on November 5, 1973, from El Monte, California, to Dallas, Texas. The pesticide involved was **PLUMBER SAVER LIQUID DRAIN OPENER**; charges included nonregistration and misbranding—lack of ingredient statement on labels.

The complaint against Packaging Unlimited was dismissed since they were an agent for Days-Ease Home Products Corporation who accepted full responsibility for the violations. (See Notice of Judgment No. 1746.)

1985. In Re: The Mogul Corporation, EPA Region IX, February 6, 1976. (I.F. & R. No. IX-104C, I.D. No. 111186.)

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 January 8, 1975, at The Mogul

Corporation, Los Angeles, California. The pesticide involved was **MOGUL A-421**; the charge was misbranding—lack of adequate warning or caution statement on labels.

The complaint was dismissed after it was determined that the pesticide **MOGUL A-421** was not being held for sale by the respondent as alleged in the complaint.

1986. In Re: Colorado International Corporation, EPA Region IX, February 9, 1976. (I.F. & R. No. IX-62C, I.D. No. 113852.)

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 and 136j(a)(1)(E). The action pertained to a shipment made on or about May 31, 1973, from Long Beach, California, to Denver, Colorado. The pesticide involved was **AM-T 90%**; charges included non-registration and misbranding—lack of adequate warning or caution statement, lack of directions for use, lack of name and address of producer, registrant or person for whom manufactured and lack of ingredient statement.

The respondent signed a Consent Agreement. The Final Order assessed a civil penalty of \$1,500.

1987. In Re: Luseaux Laboratories, Inc., EPA Region IX, February 13, 1976. (I.F. & R. No. IX-105C, I.D. Nos. 111134, 111135 and 111136.)

This was a civil action charging the respondent with violating the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 136(q)(1)(G); 136(q)(1)(A); 136j(a)(1)(E) and 136(q)(1)(F). The action pertained to products held for distribution or sale on November 11, 1974, at Luseaux Laboratories, Inc., Gardena, California. The pesticides involved were **LUSEAUX LUCLOR**, **LUSEAUX SUPR-SAN** and **LUSEAUX QT-550**; the charge was misbranding—lack of directions for use, lack of warning or caution statement, labels bore

false or misleading statement regarding safety of product and product bore incorrect establishment number.

The respondent signed a Consent Agreement. The Final Order assessed a civil penalty of \$2,695.00.

1988. In Re: Chemifax Company, EPA Region IX, February 18, 1976. (I.F. & No. IX-81C, I.D. No. 113847.)

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). The action pertained to a product held for distribution or sale on July 25, 1974, at Chemifax Company, La Mirada, California. The pesticide involved was **SPEARMINT DEODORANT/DISINFECTANT ALL PURPOSE 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 \$1,800.00.

1989. In Re: Blue Cross Laboratories, EPA Region IX, March 23, 1976. (I.F. & R. No. IX-106C, I.D. No. 125377.)

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); 136q(2)(A) and 136q(1)(G). The action pertained to a shipment made on March 27, 1975, from North Hollywood, California, to Wauwatosa, Wisconsin. The pesticide involved was **DUST FIGHTER**; charges included nonregistration and misbranding—lack of adequate caution statement and adequate ingredient statement on labels.

The respondent signed a Consent Agreement. The Final Order assessed a Civil Penalty of \$2,200.00.

1990. In Re: Bonewitz Chemicals, Inc., EPA Region IX, April 14, 1976. (I.F. & R. No. IX-118C, I.D. No. 111271.)

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) and 136(q)(2)(C)(v). The action pertained to a product held for distribution or sale on July 16, 1975, at Bonewitz Chemicals, Inc., Turlock, California. The pesticide involved was **BON-A-CIDE**; the charge was misbranding—inadequate directions for use and lack of assigned registration number.

The respondent signed a Consent Agreement. The Final Order assessed a civil penalty of \$1,680.00.

1991. In Re: Gordon C. Dampier and Associates, EPA Region IX, April 14, 1976. (I.F. & R. No. IX-117C, I.D. No. 111620.)

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 June 27, 1975, from Santa Ana, California, to Phoenix, Arizona. The pesticide involved was **AQUA PURE**; the charge was nonregistration.

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

1992. In Re: Masury-Columbia Company, EPA Region IX, April 14, 1976. (I.F. & R. No. IX-115C, I.D. Nos. 111152, 111153 and 111154.)

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 products held for distribution or sale on November 14, 1974, at Masury-Columbia Company, Glendale, California. The pesticides involved were **POWERSOFT GERMICIDAL BOWL CLEANER**,

CLEANICIDE GERMICIDAL CLEANER and **SPRING-DAY GERMICIDAL CLEANER**; charges included claims and directions for use differed in substance from the representations made in connection with its registration and misbranding—lack of adequate precautionary statements on labels.

The respondent signed a Consent Agreement. The Final Order assessed a civil penalty of \$4,000.00.

1993. In Re: Gowan Company, EPA Region IX, April 29, 1976. (I.F. & R. No. IX-108C, I.D. No. 111735.)

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 September 4, 1976, from Calipatria, California, to Yuma, Arizona. The pesticide involved was **ORTHO SEVIN BAIT**; the charge was nonregistration.

The respondent signed a Consent Agreement. The Final Order assessed a civil penalty of \$2,100.00.

1994. In Re: Dexol Industries, Inc., EPA Region IX, May 18, 1976. (I.F. & R. No. IX-45C, I.D. Nos. 92855, 92856 and 90611.)

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)(2); 136(c)(1) and 136(q)(1)(A). The action pertained to a product held for distribution or sale on September 20, 1973, at Dexol Industries, Inc., Torrance, California. The pesticide involved was **DEXOL ROSE SHIELD**; charges included adulteration and misbranding—strength or purity fell below the professed standard of quality as expressed on its labeling and contaminated with an additional active ingredient.

The respondent signed a Consent Agreement. The Final Order assessed a civil penalty of \$1,670.00.

1995. In Re: Standard Oil of California, EPA Region IX, May 24, 1976. (I.F. & R. No. IX-119C, I.D. No. 111739.)

This was a civil action charging the respondent with violating the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 136(a)(1)(E); 136(q)(1)(G); 136(q)(2)(C)(v) and 136(q)(1)(F). The action pertained to a product held for distribution or sale on or about April 16, 1975, at Standard Oil of California, San Diego, California. The pesticide involved was **CHEVRON WEED KILLER 349**; the charge was misbranding—lack of adequate warning or caution statement, lack of adequate directions for use and lack of assigned registration number on labels.

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

1996. In Re: Alcor Products, EPA Region IX, June 11, 1976. (I.F. & R. No. IX-124C, I.D. Nos. 111320 and 111321.)

This was a civil action charging the respondent with violating the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 136(a)(1)(E); 136(q)(1)(A) and 136(c)(1). The action pertained to a product held for distribution or sale on or about September 8, 1975, at Alcor Products, City of Industry, California. The pesticide involved was **REPEL**; 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 \$140.00

**1997. In Re: Associated Chemists, Inc., EPA Region X,
November 10, 1975. (I.F. & R. No. X-17C.)**

This civil penalty proceeding was settled by hearing. The following is Administrative Law Judge William J. Sweeney's Initial Decision and EPA Region X Administrator's Final Order.

INITIAL DECISION

Preliminary Statement

By Complaint dated January 3, 1975, the Director of the Enforcement Division, Environmental Protection Agency, Region X, alleged that Associated Chemists, Inc., hereinafter called Associated, had violated the Federal Insecticide, Fungicide and Rodenticide Act, as amended [86 Stat. 973; 7 USC 136 et. seq.], hereinafter called FIFRA. Specifically, it was alleged that Associated held for sale the product Quill-Cleaner-Disinfectant-Deodorizer-Fungicide, hereinafter called Quill, which was misbranded and adulterated, and a civil penalty of \$2,800 was proposed to be assessed.

On July 15, 1975, an adjudicatory hearing was conducted in Portland, Oregon, at which Respondent was represented by Thomas Guilbert of Davies, Briggs, Strayer, Stoel and Boley of Portland, Oregon, and Complainant by John Y. Hohn of Seattle, Washington.

Findings of Fact

1. Pursuant to a prior written communication, Kendall N. Covert, Consumer Safety Officer in EPA, Region X, visited the establishment of Associated, Portland, Oregon, on March 26, 1974, for the purpose of conducting an establishment inspection and sample collection pursuant to Section 9(a) of FIFRA [7 USC 136g(a)].

2. Mr. Covert conferred with Mr. Nass, Vice President and Manager of Associated, about the firm's registered pesticide products to determine if there was any present desire on the part of Associated to change the registered status of any of these products (TR. 15, line 15). During this conversation Mr. Nass made no

indication of intent to change the active registered status of the product Quill (TR. 15, line 25).

3. At Mr. Covert's request, Mr. Nass took Mr. Covert into the warehouse area of the facility so that Mr. Covert could draw physical samples and inspect all products packaged, labeled and readied for shipment. Before entering the warehouse area Mr. Covert handed a Notice of Inspection form to Mr. Nass at the same time repeating that the reason for the inspection (as written on the Form) 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." (Exhibit No. 1)

4. In the warehouse area approximately 26 feet from the order desk, four cardboard shipping boxes were pointed out to Mr. Covert as containing Quill (TR. 18, line 9).

5. Under Mr. Covert's observation, either Mr. Nass or his assistant removed two one-gallon bottles (jugs) from the shipping containers (TR. 17, line 23). One of these bottles was labeled by the assistant and placed with other samples gathered for Mr. Covert into a box. The other jug of Quill was retained as a duplicate sample by Mr. Nass. Mr. Covert prepared a Receipt for Samples form, which covered six items, including Quill, and which included the following handwritten statement:

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

Mr. Nass signed this receipt (Exhibit No. 2).

6. Mr. Covert forwarded the sealed container of Quill to the EPA laboratory in San Francisco where it was tested for chemical content. The product Quill, as tested, was found to contain 0.038 mm/gm total quaternary ammonium salts (Exhibit No. 3). The label that was attached to the product (Exhibit No. 4) claimed a content of alkyl (60% C14, 30% C16, 5% C12, 5% C18) dimethyl benzyl

ammonium chlorides 1.6% and alkyl (68% C12, 32% C14) dimethyl ethylbenzyl ammonium chlorides 1.6% which is the same as 0.085 mm/gm when calculated as total quaternary ammonium salts. Therefore, the product was 55% deficient in total quaternary ammonium salts. (Exhibit No. 3).

7. A product that is lacking quaternary ammonium salts is less effective as a disinfectant and fungicide (Guilbert, April 3 letter). In some applications an ineffective disinfectant-fungicide may fail to kill organisms which contribute to disease (Guilbert, April 3 letter). The approved label claims effectiveness against staphylococcus aureus, a "very discomforting" disease (TR. 23, line 15).

8. Associated had gross sales in excess of \$1,000,000 during the calendar year 1974 (Exhibit No. 5).

DISCUSSION AND CONCLUSIONS

The defense of Associated in essence is that the product Quill was not being held for sale at the time Mr. Covert acquired the sample on March 26, 1974.

Associated and Mr. Nass, its Vice President, stated that the sample of Quill obtained by EPA was one gallon of a single, and only, 55 gallon drum of Quill manufactured by the Company. At the time of manufacture the Quill was poured into 24 one-gallon plastic jugs which were placed into shipping boxes (4) without labels as is the Company's practice with all their products. The remainder of the Quill was stored in a drum.

The four shipping boxes containing Quill were placed in an area near an area occasionally used by Associated to store products held for rework. An employee scotch-taped a handwritten note on the top shipping container which indicated that the contents were not for sale. At the time of Mr. Covert's inspection the note was not visible.

Unfortunately, the action taken by Associated did not prevent Mr. Nass from being of the opinion that Quill was being held for sale

on the 26th of March, 1974 (TR. 47, line 3). Mr. Nass knew the purpose for Mr. Covert's sample gathering inspection and delivered the gallon of Quill while under the opinion that it was at that time being held for sale. This opinion must have been implicitly shared by Ms. Cole, Associated's order clerk and only other witness, who might have been the individual who helped Mr. Nass deliver the Quill to Mr. Covert. It is therefore concluded that Respondent did hold for sale Quill and the Quill was adulterated as alleged.

The Penalty: Complainant has computed the proposed assessments by use of the Civil Penalty Assessment Schedule designed to produce comparability of penalties (39 F.R. 27711, July 31, 1974).

Complainant proposed to assess a single penalty against Associated in the amount of \$2,800. Under the heading "Analytical Test Results Formulation Violations", Section 1. Chemical Deficiencies, D. Inefficacious, for a Category V, as is Respondent, the penalty of \$2,800 is prescribed where the product is partially inefficacious. This is a proper application of the assessment schedule. However, in view of mitigating circumstances here present, this figure should be lowered by 30 percent to \$1,960, which amount is within the negotiating margin approved by the Schedule for settlement purposes. The violation is clearly the result of inexcusable carelessness rather than an intent to market a product substantially deficient in active ingredient.

ULTIMATE CONCLUSION

It is found that Respondent violated the provisions of FIFRA as charged and that a civil penalty of \$1,960 should be assessed against it.

ORDER

1. Pursuant to Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended [86 Stat. 973; 7 USC

136 1(a)], a civil penalty of \$1,960 is hereby assessed against Associated Chemists, Inc.

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.

Dated: September 2, 1975

William J. Sweeney
Administrative Law Judge

FINAL ORDER

This is an appeal by Associated Chemists, Inc. (hereafter "Associated") pursuant to 40 CFR 168.51 from an Initial Decision of Administrative Law Judge William J. Sweeney, dated September 2, 1975, in this proceeding. Associated appeals the reduced assessment of a civil penalty in the amount of \$1,960.00 and challenges the ultimate conclusion of Judge Sweeney that Associated violated the Federal Insecticide, Fungicide and Rodenticide Act, as amended [86 Stat. 973; 7 USC 136 *et. seq.*] (hereafter "FIFRA"). Judge Sweeney concluded that Associated held for sale its product "Quill" (hereafter "the product"), and that the product was adulterated as alleged by the Environmental Protection Agency (hereafter "EPA"). In accordance with EPA's regulations, 40 CFR 168.51(c), each of Associated's exceptions, is addressed separately below.

1. Associated's Exceptions to the Initial Decision

a. The Initial Decision is deficient as a matter of law in that there are inadequate findings of fact to support the

ultimate conclusion, in violation of the Administrative Procedure Act. [Initial Decision pp. 2–4.]

In this exception Associated contends that Judge Sweeney failed to make a finding of fact that the product was "held for sale." However, in the *Discussion and Conclusions* portion of the Initial Decision, p. 5, the following statement is made: "It is therefore concluded that Respondent did hold for sale Quill and the Quill was adulterated as alleged." Since the question of whether or not Associated held the product for sale was the main issue in dispute and since this is a mixed issue of law and fact, it was appropriate for Judge Sweeney's decision on this matter to be set forth as a conclusion rather than a finding of fact.

Furthermore, I find that there are adequate findings of fact to support the ultimate conclusion. Specifically, under *Findings of Fact*, Judge Sweeney set out in Finding 3 that Associated's agent was notified that the purpose of EPA's Consumer Safety Officer's visit was to obtain samples of pesticides packaged and released for shipment, in Finding 4 that the product was located near an order desk, and in Finding 5 that the product was removed from a shipping container and acknowledged by an agent of Associated, in writing, as being a sample of a product which was packaged and released for shipment or was being held for distribution or sale. It seems quite clear to me that Finding 4 or Finding 5 independently could support Judge Sweeney's conclusion that the product was held for sale. In any event, with Finding 3 describing the circumstances of the transaction, the combination of Findings 3, 4, and 5 more than adequately sets forth the recitation of facts needed under the Administrative Procedure Act to support the Judge's conclusion.

b. The Initial Decision makes assertions of fact about which there is no evidence in the record, in violation of the Administrative Procedure Act. [Initial Decision p. 5; Tr. p. 29, 45, 54–55.]

c. The Initial Decision makes assertions of fact contrary to uncontradicted testimony in the record, in violation of the Administrative Procedure Act. [Initial Decision p. 5; Tr. p.

29, lines 6–8; p. 35, lines 7–13; p. 36, line 11– p. 37, line 3; p. 40, lines 17–20; p. 45, lines 12–19; p. 48, line 18– p. 49, line 4; p. 51, lines 21–25; and pp. 51–57, line 11.]

In these exceptions Associated is challenging Judge Sweeney's conclusion that the product was held for sale as being without a basis in the record and being contrary to uncontradicted testimony in the record. The Judge's specific finding that a note attached to the product's container (indicating that the contents were not for sale) was not visible at the time of the inspection, is also challenged in this exception.

In regard to the visibility of the note, the record contains sufficient evidence to support Judge Sweeney's conclusion. Mr. Covert, the EPA inspector who stood two-to-three feet from the case containing the product, did not recall seeing a sign affixed to the case (Tr. pp. 28–29) nor did Mr. Nass, vice-president of Associated, who believed that he actually pulled the jug from the carton (Tr. p. 45, lines 23–25; p. 47). In the absence of any contradictory testimony regarding the visibility of the note, the testimony of Msrs. Covert and Nass was an adequate basis for Judge Sweeney's conclusion that the note was not visible at the time of Mr. Covert's inspection.

Associated argues that Judge Sweeney's conclusion that the product was held for sale is not supported by the evidence in the record because there was a note attached to the top of the shipping container indicating that the contents were not for sale, the opinion of Mr. Nass as to the status of the product is an insufficient basis for the conclusion, and there is no evidentiary support for extending Mr. Nass's opinion to Ms. Cole, the shipping clerk.

While the Initial Decision acknowledges that a note had been placed on the shipping container, as discussed previously, Judge Sweeney concluded that the note was not visible at the time of the inspection. To insure that the adulterated product was not sold, either deliberately or as a result of confusion on the part of an employee, Associated had a responsibility to see that the shipping container was properly marked. The mere placement on a shipping container of a note, which was not plainly visible, did not fulfill

Associated's duty to safeguard against the sale of adulterated products nor was such action sufficient to refute EPA's contention that the product was held for sale.

In regard to Associated's contention that Mr. Nass's opinion regarding the status of the product is irrelevant to the question of whether the product was held for sale, both the basis and potential impact of Mr. Nass's opinion must be considered. Mr. Nass apparently believed the product was held for sale because he did not see any note to the contrary on the container and did not check the records (Tr. p. 45, lines 23–25; p. 51, lines 21–25). Furthermore, the product was stored in shipping containers (Tr. p. 48, lines 6–15) and apparently was on a list of the firm's registered products (Tr. p. 15, lines 15–23; p. 46, lines 24–25). As a result of his opinion regarding the status of the product, Mr. Nass stated that he would have sold a gallon of the product had he been requested to do so (Tr. p. 47, line 22– p. 48, line 1). The fact that none of this product had ever been sold by Associated, the fact that retail sales from the factory are not in the normal course of business, and the fact that Mr. Nass is not generally involved with filling orders, did not prevent Mr. Nass from being of the opinion that the product was held for sale. Mr. Nass's opinion, which was reasonable under the circumstances and which could have resulted in an actual sale of the product, is relevant to the question of whether the product was held for sale and his testimony fully supports Judge Sweeney's affirmative answer to this question.

Associated argues that Judge Sweeney's conclusion that Mr. Nass's opinion as to the status of the product must have been implicitly shared by Ms. Cole is unwarranted and directly contradicted by the record. Mr. Nass recalls that Ms. Cole labeled the product on the inspection day. Such action on the part of Ms. Cole does imply that she also believed the product was held for sale. However, Ms. Cole's inability to recall the inspection, her opinion that the product was in the rework section of the plant, and her belief that she would not have filled an order for the product because she had marked the container for rework, support Associated's contention that Mr. Nass's opinion cannot be extended to Ms. Cole. But even if it is assumed that Ms. Cole did not believe the product was held for sale, Mr. Nass's contrary opinion, in conjunction with the apparent

basis for his opinion discussed previously, constituted sufficient evidence to support the conclusion that the product was held for sale.

d. The Initial Decision misconstrues as a matter of law the jurisdictional requisites of the Federal Insecticide, Fungicide and Rodenticide Act.

In setting forth this exception, Associated argues that the opinion of an officer of a corporation that a product is "held for sale" does not confer jurisdiction upon EPA to impose a civil penalty under FIFRA. According to Associated such jurisdiction only exists if the product was in fact held for sale. Associated claims that the Initial Decision failed to recognize this distinction and is, therefore, defective as a matter of law.

Assuming that Associated's interpretation of the law is correct, the Initial Decision does make the necessary jurisdictional finding that the product was, in fact, held for sale (Tr. p. 5). The opinion of Mr. Nass on the subject was clearly considered significant in the Initial Decision's finding on this issue. However, as discussed previously, the record contains other evidence which explains the basis for Mr. Nass's original opinion and this further evidence independently supports the conclusion of Judge Sweeney that the product was "held for sale" in violation of FIFRA. Since Judge Sweeney presided at the hearing and was familiar with the evidence presented, it may be presumed that he considered all the facts relevant to the central issue.

2. Findings of Fact

The Findings of Fact set forth in the Initial Decision in paragraphs 1 through 8 are accepted.

3. Discussion and Conclusion

The conclusion of the Initial Decision that Associated held an adulterated product for sale, and the reasons therefore, with the exception of the finding that Ms. Cole implicitly shared Mr. Nass's opinion regarding the status of the product, are accepted.

4. Civil Penalty

The assessment in the Initial Decision of a civil penalty in the amount of \$1,960 is accepted.

5. Ultimate Conclusion

It is found that Associated violated the provisions of Section 12(a)(1)(E) of FIFRA and that a civil penalty of \$1,960 should be assessed.

ORDER

1. Pursuant to Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended [86 Stat. 973; 7 USC 136 1(a)], a civil penalty of \$1,960 is hereby assessed against Associated Chemists, Inc.

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 Associated by forwarding to the Regional Hearing Clerk a cashier's check or certified check, payable to the United States of America in such amount.

Dated: November 10, 1975

**Clifford V. Smith, Jr., Ph.D., P.E.
Regional Administrator**

**1998. In Re: Gibson-Homans Co., EPA Region X, April 12, 1976.
(I.F. & R. No. X-15C, I.D. Nos. 93252 and 93254.)**

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(b)(1); 136j(a)(1)(e) and 136(c)(1). The action pertained to a product held for distribution or sale on February 6, 1974, at Pioneer Building Specialties Co., Portland, Oregon. The pesticide involved was **PIONEER BRAND 5% PENTON** and **PIONEER BRAND COPPER NAPHTHENATE**; the charge was adulteration—its strength or purity fell below the professed standard of quality.

Gibson-Homans, as guarantor, pled guilty as per Complaint and agreed to Order setting \$750.00 assessment.

1999. In Re: Daly's, Inc., EPA Region X, April 19, 1976. (I.F. & R. No. X-28C, I.D. Nos. 107354 and 107355

This was a civil action in which the respondent was charged with violating the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 135(a)(1) and 135b. The action pertained to a shipment made on August 26, 1974, from Seattle, Washington to Portland, Oregon. The pesticide involved was **BENITE**; the charge was nonregistration.

The respondent signed a Consent Agreement. The Final Order assessed a civil penalty of \$440.00.

2000. In Re: Pace National Corporation, EPA Region X, May 24, 1976. (I.F. & R. No. X-22C, I.D. Nos. 106680, 113160, and 113309.)

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); 136(c)(1) and 136(q)(1)(A). The action pertained to a product held for distribution or sale on March 27, 1974, at Pace National Corporation, Kirkland, Washington. The pesticides involved were **TERGICIDE G GERMICIDAL DETERGENT**, **SHIELD BRITE S-300**, and **MAGNOLIA WEEDS AND FEEDS**; 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 \$1,400.00.

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