N.J., I.F.R. 2051–2100 Issued June 1977

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. 2051–2100

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).

John W Rademacher

for Stanley W. Legro
Assistant Administrator for
Enforcement

Washington, D.C.

2051. In Re: Decorator Specialties Company, Inc., EPA Region I, July 19, 1976. (I.F.&R. No. I-30C, I.D. Nos. 119256 and 125065.)

This was a civil action charging the respondent with violating the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 135b; 135a(a)(1); 136j(a)(1)(E); 136j(a)(2)(L); 136(q)(1)(G) and 136q(2)(A). The action pertained to a shipment made on or about August 1, 1975, from Allston, Massachusetts, to Cleveland, Ohio, and to a product held for distribution or sale on or about July 30, 1975, at Decorator Specialties Company, Inc., Allston, Massachusetts. The pesticide involved was **SUPER-SEAL WALL PAPER SIZE ADHESIVE**; charges included nonregistration of product and establishment and misbranding—lack of adequate warning or caution statement and adequate ingredient statement.

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

2052. In Re: Troy Chemical Company, EPA Region II, June 9, 1975. (I.F.&R. No. II-51C, I.D. Nos. 117706 and 117707.)

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); 136q(1)(G); 136q(2)(A) and 136q(2)(C). The action pertained to products held for distribution or sale on April 4, 1974, at Troy Chemical Company, Newark, New Jersey. The pesticides involved were **TROYSAN 174** and **TROYSAN PMDS 10**; the charge was misbranding—lack of precautionary labeling, ingredient statement, net content statement, and name and address of producer.

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

2053. In re: Troy Chemical Company, EPA Region II, June 11, 1975. (I.F.&R. No. II-52C, I.D. Nos. 116867 and 114719.)

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 shipments made on November 29 and December 21, 1973, and March 11, 1974, from Newark, New Jersey, to Dallas, Texas, and Marietta, Georgia. The pesticide involved was **TROYSAN CMP-10-SEP**; the charge was nonregistration.

The respondent signed a Consent Agreement. The Final Order assessed a civil penalty of $4,250.00.

2054. In Re: Troy Chemical Company, EPA Region II, June 11, 1975. (I.F.&R. No. II-55C, I.D. Nos. 114720 and 116868.)

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 shipments made on November 9 and December 19, 1973, from Newark, New Jersey, to Dallas, Texas, and Atlanta, Georgia. The pesticide involved was **TROYSAN CMP ACETATE**; 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 $4,000.00.

2055. In Re: Bonide Chemical Company, EPA Region II, July 13, 1976. (I.F.&R. No. II-121C, I.D. Nos. 107635 and 107644.)

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 products held for distribution or sale on January 22, 1975, at Bonide Chemical Company, Yorkville, New York. The pesticides involved

were **BONIDE ORCHARD MOUSE BAIT** and **BONIDE FLEA-TICK-LICE-POWDER**; 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 $3,560.00.

2056. In Re: Xterminator Products Corp., EPA Region II, July 27, 1976. (I.F.&R. No. II-126C, I.D. Nos. 107751, 107752 and 107753.)

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 136e(c)(1). The action pertained to products held for distribution or sale on May 27, 1975, at Xterminator Products Corp., Jersey City, New Jersey. The pesticides involved were **VOO DOO NEW-ROACH MAGIC, VOO DOO ROACH POWDER** and **VOO DOO WHITE MAGIC BRAND INSECTICIDE**; charges included failure to file pesticides reports and misbranding—lack of registration number on labeling and labeling bore false and misleading information.

The respondent signed a Consent Agreement. The Final Order assessed a zero penalty since the firm was no longer operational and without resources.

2057. In Re: Jet-Aer Corp., EPA Region II, July 28, 1976. (I.F.&R. No. II-118C, I.D. Nos. 117720, 117721, 117756 and 117725.)

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(c)(1) and 136(q)(1)(A). The action pertained to a shipment made between April 19, 1973, and July 29, 1974, from Paterson, New Jersey, to Spencerport, New York, and to a product held for distribution or sale on May 24, 1974, at Jet-Aer

Corp., Paterson, New Jersey. The pesticides involved were **CHEW STOP, HEDDY INDOOR DOG AND CAT REPELLANT, G96 HUNTING DOG INDOOR & OUTDOOR DOG REPELLANT** and **HEDDY OUTDOOR DOG & CAT REPELLANT**; charges included nonregistration, 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 $4,780.00.

2058. In Re: Vineland Laboratories, Inc., EPA Region II, August 9, 1976. (I.F.&R. No. II-92C, I.D. No. 118125.)

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 May 15, 1974, at Vineland Laboratories, Inc., Vineland, New Jersey. The pesticide involved was **SANI-SQUAD**; the charge was misbranding—lack of required precautionary statements.

The respondent signed a Consent Agreement. The Final Order assessed a civil penalty of $3,500.00.

2059. In Re: Hawk Industries, Inc., EPA Region II, December, 21, 1976. (I.F.&R. No. II-120C.)

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

Preliminary Statement

This is a proceeding under section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended[1] (FIFRA) for assessment of civil penalties for violations of said Act. The proceeding was initiated by complaint dated January 30, 1976, issued by the Director, Environmental Programs Division, EPA, Region II, charging respondent with violations of the Act.[2]

It is alleged that on September 25, 1975, the respondent shipped the product known as Baygon Super Residual (Baygon) that was not in compliance with section 12(a)(2)(A) of the Act in that labeling required by the Act had been detached, defaced, altered, or destroyed in whole or in part. It is also alleged that the shipment of the product was in violation of section 12(a)(1)(E) of the Act in that it was misbranded. In each of three separate paragraphs a different mode of misbranding is alleged by reason of the failure of the label to bear certain required information as follows: failure to bear the required warning or caution statements required by section 2(q)(1)(G); failure to bear adequate directions for use required by section 2(q)(1)(F);[3] failure to bear an ingredient statement required by section 2(q)(2)(A).

A penalty of $1,540 was proposed to be assessed for violation of section 12(a)(2)(A) (defacing and destroying labeling). A separate penalty, each in the amount of $1,540, was proposed to be assessed for each mode of misbranding. Thus, penalties in the aggregate of $6,160 were proposed to be assessed.[4]

After usuccessful negotiations between representatives of the complainant and respondent, the respondent by its president, Jerome S. Shaw, filed an answer and requested a hearing only with respect to the amount of penalty that should be imposed. The answer did not deny any of the allegations of the complaint and failed to plead specifically to any material factual allegation contained in the complaint. Such failure constitutes a binding admission of such allegations.[5]

After issuance of the prehearing letter to the parties on June 7, 1976, the respondent retained counsel. A hearing was held in the case in Newark, New Jersey, on October 19, 1976. The complainant was represented by Susan Levine, Esq., attorney for EPA, Region II, and the respondent was represented by Harold Friedman, Esq., of Newark.

The complainant has filed proposed findings of fact and conclusions of law and a brief in support thereof. The respondent has filed a memorandum which includes some proposed findings and which deals with the amount of penalties that should be imposed and respondent's ability to pay. These have been duly considered.

Findings of Fact

1. The respondent Hawk Industries, Inc. (Hawk) is a corporation engaged in the distribution of specialty chemical products for cleaning activities by commercial and industrial users. The company has a place of business in Fairfield, New Jersey. Jerome S. Shaw is president of the company and the individual responsible for the operations and conduct of the business.

2. Shortly before September 25, 1975, respondent received from one of its suppliers a 55 gallon drum containing a pesticide called Pyragon. The only labeling of the product as received by Hawk was the label which contained the following which is required by FIFRA: (1) warning and caution statements, as required by section 2(q)(1)(G); (2) adequate directions for use, as required by section 2(q)(1)(F); (3) an ingredient statement giving the name and percentage of each active ingredient, as required by section 2(q)(2)(A). One of the active ingredients was a chemical called Baygon.

3. After respondent received the container of the pesticide it firmly superimposed on the label as received its own label which completely covered the original label and could not be removed without destroying the original label.

4. The label affixed by respondent did not contain the statements and information which appeared on the original label as set forth in Finding 2, above. The failure of the label to bear these statements and information resulted in the product being misbranded.

5. The respondent's act of affixing the label above described defaced and destroyed in substantial part labeling required by FIFRA, in violation of section 12(a)(2)(A) of FIFRA.

6. After respondent affixed the label above described, it shipped the product to one of its customers in Port Reading, New Jersey, on September 25, 1975. This resulted in a violation of section 12(a)(2)(E) of FIFRA for the shipment of a pesticide which was misbranded.

7. The respondent is subject to a civil penalty for violating section 12(a)(2)(A) of FIFRA. In the circumstances of this case an appropriate penalty for this violation is $100.

8. The act of shipping the pesticide which was misbranded in the various modes described constitutes a single offense and the respondent is subject to a civil penalty for violating section 12(a)(1)(E) of FIFRA. In the circumstances of this case an appropriate penalty for this violation is $900.

Discussion and Conclusions

The respondent does not produce any chemicals. It purchases products from other companies and maintains a stock and fills orders as they are received.

Shortly before September 25, 1975, respondent received an order from one if its customers, engaged in food production, for a product that respondent did not carry in stock. Respondent ordered and received a 55 gallon drum of the product from Utility Chemical Co. (Utility), Patterson, New Jersey. The product called Pyragon was a product that had been registered by Utility for home use in 1969

with the United States Department Of Agriculture (predecessor of EPA for registering pesticides). The principal active ingredient was a proprietary chemical called Baygon. In connection with the registration of Pyragon by Utility, a label was approved which, among other things, contained a list of and percentages of ingredients, detailed directions for use, and required warning and caution statements (Comp. Ex. 2). The approved label was required to be affixed to the packaged product.

The container received by respondent had the label that had been affixed by Utility and contained the information in the approved label, including the name of Utility. Respondent reshipped the product to its customer in the same container in which it was received. In reshipping it was the desire of respondent to withhold from its customer the name of its supplier and it superimposed its own label over the Utility label and completely covered the latter. The label it affixed was six inches square, on a white background which bore the following printed matter:

For Commercial And Industrial Use Only

Warning:
Keep Out of Reach of Children
See Side Panel for Additional Cautions

HAWK INDUSTRIES, INC.
Fairfield, New Jersey 07006

Between the first line and the word "Warning" there was a blank area of about 3–1/2 inches in which one of the respondent's employees had typed the words "BAYGON SUPER RESIDUAL". There was no side panel and this was the only label or labeling of the product as shipped.

The Hawk label was tightly affixed over the Utility label and could not be removed without destroying the Utility label. The affixing of the Hawk label over the Utility label resulted in defacing and

destroying in part labeling required by the Act in violation of section 12(a)(2)(A) of the Act.

The only warning on the label affixed by Hawk was "Keep out of reach of children". The label did not bear other warning and caution statements which were necessary and adequate to protect health and the environment.[6] This resulted in the product being misbranded as defined in section 2(q)(1)(G).

The label affixed by Hawk contained no directions for use.[7] Section 2(q)(1)(F) of the Act requires directions for use which are necessary for effecting the purposes for which the product is intended and which are adequate to protect health and the environment. The product was misbranded under this provision of the Act.

The label affixed by Hawk did not bear an ingredient statement[8] and the product was misbranded under section 2(q)(2)(A) of the Act.

The only matter of controversy in the case is the amount of penalties that should be imposed. In making this determination section 14(a)(3) of the Act requires that there shall be considered the appropriateness of the penalty to the size of respondent's business, the effect on respondent's ability to continue in business, the effect on respondent's ability to continue in business, and the gravity of the violation. Section 168.60(b) of the rules of practice provides that in evaluating the gravity of the violation there shall also be considered respondent's history of compliance with the Act and any evidence of good faith or lack thereof.

In previously decided civil penalty cases under FIFRA it has been held that gravity of the violation should be considered from two aspects – gravity of harm and gravity of misconduct.

As to gravity of misconduct, I conclude that the violations were not the result of any improper motive of respondent and were not a deliberate flouting of the requirements of the Act. They occurred as the result of negligence of one of respondent's employees. There is no evidence that respondent has a history of prior violations, nor is there

evidence that respondent did not act in good faith. The gravity of misconduct was a moderate degree.

As to the gravity of harm, a well qualified witness for complainant testified concerning the harm that could result from the failure of the label to bear the required warning and caution statements, directions for use, and list of ingredients. There is no doubt that serious consequences could result and that the gravity of harm was of a high degree.

Based on the size of respondent's business and the gravity of the violation, penalties in excess of those herein assessed would be appropriate. However, as will hereinafter appear, in assessing the penalties I have relied primarily on the effect that imposition of penalties would have on respondent's ability to continue in business and I do not consider it necessary to dwell further on the gravity of the violation.

As above noted, the complaint proposes that a penalty be assessed for the violation of section 12(a)(2)(A) of the Act (defacing and destroying labeling) and that a separate penalty be assessed for each of three modes of misbranding for violations of section 12(a)(1)(E) of the Act (shipping a misbranded pesticide).

A penalty is properly assessable for the violation of section 12(a)(2)(A). The misbrandings were the result of the defacing and destroying the Utility label. However, different evidence is necessary to support the misbranding allegations and a separate penalty may be imposed for shipping a misbranded pesticide.[9] There is a question, however, whether separat- penalties may be imposed for each mode of misbranding.[10] I am unaware of any decision, either under the criminal or civil penalty provisions of FIFRA, that discusses this question and I consider it appropriate to do so.

I am of the view that where there is a violation of section 12(a)(1)(E) of the Act by reason of a shipment of a particular pesticide that is misbranded in more than one way, there is only one offense and only a single penalty may be imposed.

Section 12(a) of the Act which is entitled "Unlawful Acts" provides in pertinent part as follows:

> (1) Except as provided by subsection (b),[11] it shall be unlawful for any person in any State to distribute, sell, offer for sale, hold for sale, ship, deliver for shipment, or receive and (having so received) deliver or offer to deliver, to any person –
>
> (E) any pesticide which is adulterated or misbranded;

Section 2 of the Act which is entitled "Definitions" in subsections (q)(1) and (q)(2) defines "misbranded". The subsections define or describe ten separate modes of misbranding. Included are the three modes of misbranding, each of which is alleged in the complaint to be a separate offense.

It is to be observed that under section 12(a)(1)(E) it is unlawful to ship a pesticide which is misbranded and section 2(q) describes the various modes in which a pesticide may be misbranded. The Act does not declare that each mode of misbranding is unlawful but simply proscribes misbranding. The offense in this case under section 12(a)(1)(E) was the shipping of a misbranded pesticide.

Section 14 of the Act is entitled "Penalties". It sets forth in separate subsections what civil and crimal penalties may be imposed for violations of the provisions of the Act. This section provides, in part, as follows:

> (a) CIVIL PENALTIES –
>
> "(1) IN GENERAL. – Any registrant, commercial applicator, wholesaler, dealer, retailer, or other distributor who violates any provision of this Act may be assessed a civil penalty by the Administrator of not more than $5,000 for each offense.
>
> (b) CRIMINAL PENALTIES –
>
> "(1) IN GENERAL. – Any registrant, commercial applicator, wholesaler, dealer, retailer, or other

> distributor who knowingly violates any provision of this Act shall be guilty of a misdemeanor and shall on conviction be fined not more than $25,000, or imprisoned for not more than one year, or both.

Aside from the element of knowledge, which is essential to support a criminal violation, the unlawful acts described in section 12 are the same whether a civil penalty or criminal penalty is sought to be imposed.

I have been unable to find any cases on the civil side to assist in my consideration of this question, but since the offenses, whether civil or criminal, are the same (except for the element of knowledge) it appears appropriate to consider the application of the criminal side of the law in the resolution of the question before me, i.e., whether each mode of misbranding is a separate violation.

In criminal cases, the question as to whether a particular act results in single or multiple offenses arises in matters relating to duplicity. In the criminal law an indictment or information is defective because of duplicity when two or more distinct offenses are charged in a single count. See, e.g. *Frankfort Distilleries, Inc.* v. *United States,* 144 F.2d 824, 832 (10th Cir. 1944). If, then, an indictment that alleges in one count several specifics of wrongdoing is held not duplicitous, it follows that there is a single offense charged, and that the wrongdoings alleged refer to the various modes of accomplishing the prohibited act. See e.g. *United States* v. *Lennon,* 246 F2d 24, 27 (2d Cir. 1957); *United States* v. *Swift,* 188 F. 92, 97 (N.D. Ill. 1911).

Misbranding cases which closely parallel the matter now under consideration have been prosecuted under the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 331(a). See *Gray* v. *United States,* 174 F.2d 919 (8th Cir. 1949), *cert. denied,* 338 U.S. 848 (1949); *Empire Oil & Gas Corp.* v. *United States,* 136 F.2d 868 (9th Cir. 1943). The pattern of FFDCA and FIFRA, as here pertinent, is similar. Both prohibit shipment of misbranded (and adulterated) articles within the purview of the respective statutes[12] and in separate sections define different modes of misbranding.[13]

In the *Gray* case the trial court ruled that a count in an information charging defendant with misbranding a drug by reason of: (1) accompanying a shipment of a drug with a letter containing false statements about the drug; (2) failing to put the true name of the drug on the label; and (3) omitting from the label directions for use, was not duplicitous. The appellate court upheld this ruling, 174 F.2d at 921. Because the offense charged in the count was the "introducing and delivering for shipment in interstate commerce of a misbranded article", the court concluded that the count alleged a single offense and that the information was not duplicitous. The several acts and omissions charged against the defendant were deemed to be specifications of the ways in which the drug was misbranded and the offense was committed.

The same result was reached in the *Empire Oil* case where it was held that a count which alleged the shipment of a drug that was misbranded in two different ways (false claims as to efficacy and inaccurate statement of contents) was not duplicitous since it did not charge more than one offense – the shipment of a misbranded drug. The court, quoting from the *Swift* case, supra, said "Duplicity may be applied only to the result charged, and not to the method of its attainment".

Since the structure of FFDCA and FIFRA are similar with regard to violations for shipping misbranded articles it is logical to conclude that the shipment of a pesticide misbranded articles it is logical to conclude that the shipment of a pesticide misbranded in more than one way is but a single offense and only one penalty may be imposed.

A similar result was reached in *United States* v. *Lennon,* 246 F.2d 24 (2d Cir. 1957). The defendant was charged with filing a fraudulent income tax return. It was alleged in a single count that the return understated income and falsified exemptions. In rejecting the claim of duplicity the court held that the act of filing a fraudulent return was a single offense, even though the return could be falsified in an unlimited number of particulars. The court said that understatement of income and fraudulent exemptions were only

different methods by which a single offense may have been affectuated.

An indictment may charge alternative modes of committing an offense and guilt may be established by proof of only one of the modes alleged. *United States* v. *Malinowski,* 347 F. Supp. 347, 351–352 (E.D. Pa. 1972), *aff'd,* 472 F.2d 850 (3rd Cir.), *cert. denied,* 411 U.S. 970 (1973). Under this principle a respondent may be charged with different modes of misbranding and proof of one mode of misbranding is sufficient to establish liability.

Applying the reasoning of the above cases, I conclude that where there is a shipment of a single pesticide that is misbranded in more than one way there is only one offense and only one penalty may be imposed. The various ways in which a product is misbranded may be considered as affecting "the gravity of the violation" [section 14(a)(3)], but in any event the penalty for a single offense may not exceed the statutory limit.

Complainant (in its memorandum, see footnote 10) cited *Pearson & Co.,* published in Notices of Judgment under FIFRA, No. 1478, issue of June 1975, to support the proposition that each mode of misbranding is a separate offense for purposes of assessing a civil penalty against the violator. The facts and holding in the Pearson case are consistent with the conclusion that shipment of a product misbranded in more than one way is a single offense under FIFRA.

In *Pearson* respondent was charged, *inter alia,* with shipping misbranded and adulterated pesticides. The product Gulf States 5% Rotenone was deficient in its active ingredient. This deficiency resulted in both adulteration (because strength fell below professed quality under which it was sold) and misbranding (because amount of rotenone present in product was less than that claimed on label). Since the same evidence was sufficient to establish both charges, without proof of additional facts, a single penalty was imposed on the authority of *Blockburger* v. *United States,* 284 U.S. 299, 304 (1932). See also *Tesciona* v. *Hunter,* 151 F.2d 589, 951 (10th Cir. 1945); *Ianelli* v. *United States,* 420 U.S. 770, 785 (1975).

Relying on the *Pearson* case, complainant suggests that with regard to the product Azalea Dust, the manner in which penalties were imposed for the violations supports its position for the imposition of separate penalties for each mode of misbranding. Analysis of the *Pearson* case supports the conclusion that separate penalties were not imposed for different modes of misbranding. Separate penalties were imposed for non-registration, adulteration, and misbranding.

The product Azalea Dust was not registered and was adulterated and misbranded. A penalty was imposed for the non-registration violation. It was also charged that the product was misbranded because the product bore a registration number. Since this misbranding charge was so closely interrelated with the non-registration charge a separate penalty was not imposed for this mode of misbranding.

This product was deficient in an active ingredient stated on the label. This resulted in misbranding because the label was false and misleading [section 2(q)(1)(A)] and also resulted in adulteration because the strength fell below the professed standard expressed on the label [section 2(c)(1)]. Since proof of the same facts would support both charges a single penalty was imposed which may be attributed to the misbranding.

The product also contained an ingredient not stated on the label. This resulted in adulteration because a substance had been substituted for the pesticide [section 2(c)(2)] and also resulted in misbranding because the label was false and misleading [section 2(q)(1)(A)]. Since proof of the same facts would support both charges a single penalty was imposed which may be attributed to the adulteration.

The proof that was necessary to support the adulteration charge (substitution of a substance) was different from the proof that was necessary to support the misbranding charge (deficiency of an ingredient). Thus, it is seen that only one penalty was imposed for misbranding and one penalty for adulteration. The imposition of two

separate penalties was appropriate because two separate offenses were committed.

The conclusion reached herein is not to be confused with the principle expressed in *Blockburger* v. *United States,* 284 U.S. 299, 304 (1932) where it was said:

> The applicable rule is that, 'where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not.

Where different modes of misbranding are charged, different proof may be required to establish each mode of misbranding but, as above concluded, there is only one offense and separate statutory provisions have not been violated. Further, as above explained, where different modes of misbranding are alleged, proof of one mode of misbranding is sufficient to establish the offense.

Turning now to the amount of penalties that should be imposed. Hawk Industries, Inc. was organized in October 1973. It was the successor of Hawk Chemical Co. that was in serious financial difficulties.

In each of the two years (ending with fiscal year September 30, 1975) that respondent has been in business it has lost money. Although the amount of gross sales have remained approximately the same, in the vicinity of $450,000 annually, the selling prices per unit have increased substantially and there has been a substantial decrease in unit sales. When respondent began operations in 1973 it had 14 employees. Because of decline in sales this has steadily been reduced to the present 3 full-time employees and a part-time shipping clerk.

There is in evidence the balance sheets of respondent for the years ending September 30, 1974, and September 30, 1975. These show that the company had losses of approximately $18,000 and

$43,000 in each of the years respectively. The 1975 loss was incurred despite the addition of $20,000 of capital in that year. The accrued loss is $62,000. The current assets of the company as of September 30, 1975, were approximately $147,000[14] and the current liabilities were approximately $153,000.[15] The stockholders investment of $40,000 has been wiped out completely by the $62,000 losses over the two year period. It appears that the company is, in a technical sense, insolvent. However, under favorable conditions with good management the company may be able to survive.

The complainant offered testimony of an accountant who compared the balance sheets of the company for the two years. He submitted a statement entitled "Source and Application of Funds". This measured the fluctuation of the assets and liabilities over the two-year period. The statement does now show the overall health of the company and whether it improved in the second year. It appears quite clear to me that the financial condition of the company deteriorated in the second year.

It was the opinion of the accountant that the company could pay the amount assessed in the complaint ($6,160) and remain in business if payments were spread out over a period of a year.[16] I do not accept this opinion. I am of the view that penalties in excess of $1,000 would adversely effect respondent's ability to continue in business.

The misbrandings resulted from the defacing and destroying of the original label of the product. I consider the misbranding violation much more serious than the defacing and destroying violation. I assess a penalty of $100 on the former and $900 on the latter.

I have considered the entire record in the case and the arguments of the parties and based on the Findings of Fact, and Discussion and Conclusions herein it is proposed that the following order be issued.

Final Order[17]

Pursuant to section 14(a)(1) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended [7 U.S.C. 136 1(a)(1)] civil penalties totaling $1,000 are hereby assessed against repondent, Hawk Industries, Inc., for the violations which have been established on the basis of the complaint issued on January 30, 1976.

Bernard D. Levinson
Administrative Law Judge

December 21, 1976

[1] The Act is codified in 7 U.S.C. 136 et seq. (Supp. V, 1975). A table of parallel citations showing Statutes at Large and United States Code is attached hereto.

[2] The proceedings were conducted pursuant to the Rules of Practice which were promulgated for the conduct of such hearings. 39 F.R. 27658 et seq., 40 CFR, Part 168.

[3] This section requires that the *labeling* contain adequate directions for use. The charge is that the *label* did not bear adequate directions for use. (See section 2(p) for definitions of "label" and "labeling".) As will hereinafter appear the only labeling of the product was the label.

[4] The complaint as filed proposed a penalty of $2,380 for each of the alleged violations for a total of $9,520. On motion of complainant, this was reduced to $1,540 for each alleged violation.

[5] Rules of Practice, section 168.33(d). The respondent was advised of this provision in the prehearing letter issued by the undersigned.

[6] The approved Utility label in addition to the warning "Keep out of reach of children" contained the following cautions:

> May be harmful if swallowed, inhaled, or absorbed through the skin. Avoid breathing of spray mist and provide adequate ventilation of area being treated. Contact with skin, eyes, or clothing should also be avoided. Wash thoroughly with soap and warm water after handling. Avoid contamination of food, utensils, and food preparation areas. Remove pets and cover fish bowls before spraying. If illness occurs, get prompt medical attention. To Physician – Atropine sulfate is antidotal. *FLAMMABLE.* Do not spray into or near open flame. Do not smoke while using. Avoid excessive wetting of plastic, rubber and asphalt surfaces such as tiles and floor covering.

[7] The approved Utility label contained detailed directions for use including general directions, directions for indoor and outdoor use, and for use to control brown dog ticks.

[8] The approved Utility label contained a list of ingredients – active and inert – with the percentage of each ingredient.

[9] See Blockburger v. United States, 284 U.S. 299, 304 (1932); Tesciona v. Hunter, 151 F. 2d 589, 591 (10th Cir. 1945).

[10] At the prehearing stage, at my request, counsel for complainant submitted a memorandum of law on this point. The memorandum supports the proposition that separate penalties may be imposed.

[11] Subsection 12(b) sets forth certain exemptions not here applicable.

[12] FFDCA, section 301(a), 21 U.S.C. 331(a); FIFRA, section 12(a)(1)(E).

[13] FFDCA, misbranding drug, section 502, 21 U.S.C. 352; FIFRA, misbranded pesticide, section 2(q).

[14] In addition, there is an asset of $32,000 for accumulated depreciation.

[15] In addition, there are long term liabilities of approximately $51,000 payable in a year or more.

[16] It is doubtful if an Administrative Law Judge can assess a penalty for installment payments beyond 60 days. See Rules of Practice, section 168.60(c).

[17] 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 168.40(c).]

FEDERAL INSECTICIDE, FUNGICIDE, AND RODENTICIDE ACT, (FIFRA) AS AMENDED

ON OCTOBER 21, 1972, 86 STAT. 973, PUBLIC LAW 92–516

AND NOVEMBER 28, 1975, 89 STAT. 751, PUBLIC LAW 94–140

Parallel Citations

Statutes at Large		*7 U.S.C.*	
Section	2	Section	136
	3		136a
	4		136b
	5		136c
	6		136d
	7		136e
	8		136f
	9		136g
	10		136h
	11		136i
	12		136j
	13		136k
	14		1361

Statutes at Large		*7 U.S.C.*	
Section	15	Section	136m
	16		136n
	17		136o
	18		136p
	19		136q
	20		136r
	21		136s
	22		136t
	23		136u
	24		136v
	25		136w
	26		136x
	27		136y

2060. In Re: Pur-All Paint Products Co., Inc., EPA Region II, December 27, 1976. (I.F. & R. No. II-144C).

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

Preliminary Statement

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 a violation of said Act. The proceeding was initiated by complaint dated July 8, 1976, issued by the Director, Environmental Programs Division, EPA, Region II.

The complaint alleges that on June 26, 1974 the respondent violated section 3 of FIFRA by shipping from Carlstadt, New Jersey, to East Meadow, New York, a pesticide that was not registred as required by the Act. The product as shipped was designated Wood Preservative TT-W-572 B Type 2. A penalty of $2,200 was proposed to be assessed. The respondent, by its president, Rubin Chaleff, filed an answer and admitted that the non-registered material was shipped as alleged. A hearing was requested only with regard to the appropriateness of the proposed penalty.

A hearing was held in Newark, New Jersey, On October 19, 1976. The complainant was represented by Susan Levine, Esq., attorney for EPA, Region II, and the respondent was represented by Mr. Chaleff. The complainant has submitted proposed findings of fact and conclusions and a brief in support thereof. The respondent in its answer, in prehearing exchange, at the hearing, and in a letter submitted after the hearing has expressed its views for reduction or complete cancellation of the proposed penalty. The submittals of both parties have been duly considered.

Findings of Fact

1. The respondent, Pur-All Paint Products Co., Inc., is a corporation with a place of business in Carlstadt, New Jersey.

2. The respondent manufactured the product designated Wood Preservative TT-W-572 B Type 2 which is a pesticide as defined in section 2(u) of FIFRA. This product was not registered as required by provisions of FIFRA.

3. On June 26, 1974, the respondent shipped 50 containers, each containing 2 gallons, of the product in question from Carlstadt, New Jersey, to East Meadow, New York.

4. The shipment of non-registered pesticide was in violation of section 3 of FIFRA and the respondent is subject to the imposition of a penalty under section 14(a) of the Act.

5. Considering the size of respondent's business, the effect on respondent's ability to continue in business, and the gravity of the violation, it is found that a penalty of $1,980 is appropriate.

Discussion and Conclusions

In May 1973 the respondent was the successful bidder on an invitation issued by a subdivision of the State of New York to furnish a quantity of a wood preservative. The product was to contain as the active ingredient either pentachlorophenol, in which case it was to be marked as Composition B. Type I was to be a concentrated product, for dilution at point of use, and Type II was to be a product ready for use.

The respondent manufactured the product with the active ingredient pentachlorophenol and labeled the product Wood Preservative TT-W-572 B Type 2. This was erroneous labeling since the "B" designated the active ingredient which should have been copper naphthenate. The product manufactured by respondent was not registered and on June 26, 1974, it shipped 50 containers, each

containing 2 gallons, to Nassau County, Department of Recreation and Parks, East Meadow, New York. This was a violation of section 3 of FIFRA.

The label of the product (which was the only labeling) contained only the designation of the product as "TT-W-572 B Type 2" and the name of the respondent. The label did not contain directions for use, warning and caution statements, an ingredient statement and other information required by the Act [see section 2(q)]. If the product had been registered this information would have been required in the labeling.

In determining the amount of penalty to be assessed, section 14(a)(3) of the Act requires that there shall be considered the appropriateness of the penalty to the size of respondent's business, the effect on respondent's ability to continue in business, and the gravity of the violation. Section 168.60(b) of the Rules of Practice provides that in evaluating the gravity of the violation there shall also be considered respondent's history of compliance with the Act and any evidence of good faith or lack thereof.

In the Guidelines for Assessment of Civil Penalties, 39 F.R. 27711 *et seq.,* July 31, 1974, there are five categories as to size of businesses [section IC(1)(b)]. Businesses of the largest size, those having gross sales in excess of $1 million, are in Category V. The respondent gross sales in excess of $4.5 million. The proposed penalty in the Guidelines for a non-registration violation for a respondent in Category V where the violation was committed without knowledge of the registration requirements is $2,200.

The respondent urges that a penalty of $2,200 would adversely affect its cash flow. The effect that payment of a penalty has on cash flow is not one of the elements to be considered in imposing a civil penalty unless it will adversely effect respondent's ability to continue in business. The payment of the penalty in this case will not have such an effect.

The critical area for determining the amount of the penalty in this case is the evaluation of the gravity of the violation.

The purposes of registration include the following: providing protection to the public; assisting manufacturers in complying with the provisions of the Act; bringing to the attention of enforcemet officials the formula, label, and claims made with respect to pesticides before they are offered to the public; preventing false and misleading claims; preventing worthless articles from being marketed; and providing a means of obtaining speedy remedial action if such articles are marketed. A great measure of protection can be accorded directly through the registration process which, among other purposes, is designed to prevent injury, rather than having to resort solely to imposition of sanctions for violations after damage or injury has been done.[2]

It is obvious that when an unregistered pesticide is distributed the protective and enforcement purposes of registration are defeated. The shipment of an unregistered pesticide, especially one shipped without the warning and caution statements, directions for use, and other labeling required by the Act, may be considered to be a serious violation.[3]

A witness for complainant testified in detail concerning the serious potential harm that could result from the distribution of this product without labeling containing ingredient and precautionary statements, directions for use, and first aid directions.

The respondent urges that it was under the impression that a product made according to federal specifications did not have to be registered. I do not accept this as a valid excuse. Further, the specifications required that the shipping containers of the product contain markings with specific precautions regarding handling of the product and possible hazards. The containers of the product, as shipped, contained no such markings.

As above noted, the proposed penalty of $2,200 was assessed in accordance with the Guidelines where the respondent, in the particular instance, had no knowledge that registration was required. There is no evidence which would indicate that the respondent did not act in good faith. Further, there is no evidence to indicate that the respondent had any prior violations of FIFRA. As a mitigating factor,

the witness for respondent represented that the company ceased manufacturing the product when the violation was called to its attention. This is not a mitigating factor, since continued manufacturing and distribution of the unregistered product would have resulted in further violations. There was, however, very limited distribution of the product and it was not for general sale by respondent. In considering all of the factors regarding this violation, I am of the view that a reduction of 10% from the penalty proposed in the complaint is appropriate [see Guideline section IC(2)] and a penalty of $1,980 is hereby assessed.

I have considered the entire record in the case and the arguments of the parties and based on the Findings of Fact, and Discussion and Conclusions herein it is proposed that the following order be issued.

Final Order[2]

Pursuant to section 14(a)(1) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended, a civil penalty of $1,980 is hereby assessed against respondent, Pur-All Paint Products Co., Inc. for the violation which has been established on the basis of the complaint issued on July 8, 1976.

Bernard D. Levinson
Administrative Law Judge

December 27, 1976

[1] The proceedings were conducted pursuant to the Rules of Practice which were promulgated for the conduct of such hearings. 39 F.R. 27658 et seq., 40 CFR, Part 168.

[2] See Southern Mill Creek Products, Inc., Notices of Judgment under FIFRA, No. 1479, Issue of June 1975.

[3] See Amvac Chemical Corporation, Notices of Judgment under FIFRA, No. 1499, Issue of June 1975.

[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 168.40(c).]

2061. In Re: Gulf Oil Corporation, EPA Region IV, June 3, 1975. (I.F. & R. No. IV-86C.)

This civil penalty proceeding was settled by hearing. The following is Administrative Law Judge Herbert L. Perlman's Initial Decision and Regional Administrator Jack E. Ravan's Final Order. Subsequent to the Regional Administrator's issuance of his Final Order *In re Gulf Oil Corp.,* respondent Gulf appealed the case to the fifth circuit court of appeals. After considering briefs and arguments by both parties, the Fifth Circuit *reversed* the Regional Administrator's Final Order. *Gulf Oil Corporation v. EPA,* Civil No. 75–4400 (March 18, 1977).

Preliminary Statement

This is a proceeding under section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended (7 U.S.C. 136 1(a), 1973 Supp.), instituted, in effect, by an amended complaint issued August 20, 1974, by the Director, Enforcement Division, Environmental Protection Ageny, Region IV, Atlanta, Georgia. The amended complaint charges that Respondent, Gulf Oil Corporation, on or about January 24, 1974, shipped the pesticide Gulf Oil Corporation, on or about January 24, 1974, shipped the pesticide Gulf Lite Patio Torch Fuel in interstate commerce in violation of the Act in that such product was not registered thereunder and was misbranded because the label borne by it did not bear an ingredient statement as required by the Act. The amended complaint proposed a

penalty of $2,700 for each violation or a total civil penalty of $5,400 for the violations charged therein.

On September 12, 1974, Respondent filed an answer to the amended complaint in which it denied that Gulf Lite Patio Torch Fuel is a pesticide or economic poison under the act and subject to registration thereunder or that the product shipped by Respondent was misbranded as alleged. Subsequently, Respondent also contested the appropriateness of the proposed penalty.

After the submission of prehearing materials pursuant to section 168.36(e) of the rules of practice (39 F.R. 27656, 27663) and a prehearing conference held January 13, 1975, an oral hearing was held in Atlanta, Georgia, January 14, 1975, before Herbert L. Perlman, Chief Administrative Law Judge, Environmental Protection Agency. At the hearing, Respondent was represented by Robert W. Ellis, Law Department, Gulf Oil Corporation, Atlanta, Georgia, and Complainant was represented by Bruce R. Granoff and James Sargent, Legal Support Branch, Environmental Protection Agency, Atlanta, Georgia. One witness testified on behalf of Complainant and Complainant introduced 2 exhibits into evidence. Two witnesses testified for Respondent and one exhibit was received into evidence on behalf of Respondent. In addition, 2 separate stipulations were entered into by the parties and were received into evidence. Subsequently, due to the deletion of a paragraph of a stipulation, the record was, in effect, reopened for the submission of limited written testimony. After the hearing, the parties filed briefs.

Findings of Fact

1. Respondent, Gulf Oil Corporation, is a corporation which, at all times material herein maintained a district office and terminal located at Jacksonville, Florida.

2. On May 9, 1972, Respondent delivered for shipment its product Gulf Lite Patio Torch Fuel in interstate commerce from Atlanta, Georgia, to Overland Park, Kansas.

3. On January 19, 1973, Complainant advised Respondent in writing that Gulf Lite Patio Torch Fuel bearing the claim "CONTAINS OIL OF CITRONELLA" implies repellency of insects, particularly mosquitoes, and is subject to, and needs to be registered under, the Act. Respondent was further advised that interstate shipments of this unregistered product violated the Act.

4. Subsequently, Respondent was orally at a March 23, 1973 conference and in writing informed by Complainant that the prominence of the statement "CONTAINS OIL OF CITRONELLA" on the label of Gulf Lite Patio Torch Fuel without qualification or clarification makes this product subject to the Act.

5. An application for the registration of Gulf Lite Patio Torch Fuel was received May 25, 1973. The application listed the amount of oil of citronella as 0.1 percent and the proposed label stated "Aids in Chasing Mosquitoes and Similar Night Flying Insects . . . Scented with Oil of Citronella." Registration was sought on the basis of the prior registration and efficacy data of Tiki Torch Fuel.

6. On October 9, 1973, Respondent sent experimental data, previously requested by Complainant, supporting its claim that Gulf Lite Patio Torch Fuel aids in repelling mosquitoes and similar night flying insects and a label change of "chasing" to "repelling" and "scented with" to "contains," as requested by Complainant.

7. By letter dated December 6, 1973, Complainant denied the revised label as not acceptable because the experimental data required clarification, demonstrated efficacy would not satisfy consumer expectancy and the language "similar night flying insects" was to be deleted.

8. On or about January 24, 1974, Respondent shipped its product Gulf Lite Patio Torch Fuel in interstate commerce from Jacksonville, Florida, to Valdosta,, Georgia. This product was apparently contained in one gallon cans which had on the label thereon in large conspicuous letters on the front and back panels the words "CONTAINS OIL OF CITRONELLA". These words were

placed on the right side of the front and back panels at the approximate center of the label next to a drawing of a lighted patio torch. The size of the lettering employed is larger than all other lettering on the label except for that of the name of the product itself and the color of the lettering is white on a dark blue background. The words are also separate from any other lettering on the front and back panels. One of the side panels contains the words "with Citronella" immediately beneath the name of the product, in smaller type than the name or the words "CONTAINS OIL OF CITRONELLA" on the front and back panels. The words "with Citronella" again appear on the second side panel of the label, in lettering similar to the lettering employed on the other side panel, below the name of the product. Beneath the words "with Citronella", in part, are the words "Pleasant Odor" in smaller lettering.

9. The Gulf Lite Patio Torch Fuel shipped in interstate commerce on or about January 24, 1974 contained 0.1 percent oil of citronella, was not registered under the Act and the label thereof did not contain an ingredient statement as required by the Act.

10. During the period 1970–1972 when Respondent surveyed and entered the torch fuel market similar products were in commerce. One unregistered product claimed on the label that it contained oil of citronella and made no further claims. A second unregistered product claimed on the label that it contained oil of citronella and that it kills pesky mosquitoes and other night flying insects. A product registered by the United States Department of Agriculture claimed on the label that it contained 100 percent mineral spirits and aids in chasing mosquitoes and similar night flying insects. Corrective action was taken by Complainant with respect to all torch fuels making pesticidal claims.

11. By letter dated September 9, 1974, Respondent's application for registration of Gulf Lite Patio Torch Fuel received May 25, 1973 and labeled as described in Finding of Facts 5 and 6, was denied by Complainant.

12. The labeling of the product Gulf Lite Patio Torch Fuel currently marketed by Respondent contains no reference to oil of

citronella. This form of label was placed on the market beginning with the 1974 marketing season.

Conclusions

The principal issue for determination in this proceeding is whether the product shipped by Respondent in interstate commerce on or about January 24, 1974 from Jacksonville, Florida to Valdosta, Georgia, that is, Gulf Lite Patio Torch Fuel, is an "economic poison" as defined in the act.[1] Admittedly, it was not registered under the act and the label thereon did not contain an ingredient statement as required by the act, as charged in the amended complaint.

The term "economic poison" is defined in the Act, in part, as "any substance or mixture of substances *intended for* preventing, destroying, repelling, or mitigating any insects . . . " (7 U.S.C. 135(a)) (Emphasis supplied). The regulations issued pursuant to the Act, in section 162.2(d) thereof (40 CFR 162.2(d)), define "economic poison" to include "all preparations intended for use as insecticides . . . Substances which have recognized commercial uses other than uses as economic poisons shall not be deemed to be economic poisons unless such substances are:

(1) Specifically prepared for use as economic poisons, or

(2) Labeled, represented, or intended for use as economic poisons, or

(3) Marketed in channels of trade where they will presumably be purchased as economic poisons."[2]

In addition, the regulations issued pursuant to the Act contain an interpretation of terms included in the definition economic poison. Section 162.101 thereof (40 CFR 162.101) reads, in part, as follows:

(a) *Definition of economic poison.* Under section 2a of the Act the term "economic poison" means any substance or

mixture of substances intended for preventing, destroying, repelling, or mitigating any insects . . .

(b) *Status of products as economic poisons.*

(1) A substance or mixture of substances is or is not an economic poison depending upon the purposes for which it is intended. Determination of intent in the marketing or distribution of these products is therefore of major importance. This determination will depend upon the facts in the particular case which tend to show the intended use of the product. In general, if a product is marketed in a manner that results in its being used as an economic pison, it is considered to be the intended result. Such intentions may be either expressed or implied. It is assumed that the distributor is aware of the purposes for which his product will be used.

(i) A product will be considered to be an economic poison if:

(a) The label or labeling of the product bears claims for use as an economic poison;

(b) Claims or recommendations for use as an economic poison are made in collateral advertising such as publications, advertising literature which does not accompany the product, or advertisements by radio or television; or

(c) Claims or recommendations for use as an economic poison are made verbally or in writing by representatives of the manufacturer, shipper, or distributor of the product.

(ii) When all or most of the uses of a product are for economic poison purposes, it will be considered to be intended for use as an economic poison unless other intentions are clearly defined.

Examples of products in this category are: pyrethrum concentrates, lead arsenate, calcium arsenate, DDT, toxaphene, pentachlorophenol, quaternary ammonium solutions, warfarin, pival, 2,4-D, and captan . . . .

(3) Economic poisons include, but are not limited to:

(ii) Products intended for use both as economic poisons and for other purposes. (Such products are subject to all provisons of the Act including section 2a(1) under which a product is misbranded if its labeling bears any statement which is false or misleading concerning any of its uses or in any other particular.)

(4) Products not considered economic poisons include:

(i) Deodorants, bleaching agents, and cleaning agents, which bear no claims for the control of any pests;

(ii) Embalming fluids;

(iii) Building materials, such as lumber, fiber boards, wallpaper paste, and paints, which have been treated to protect the material itself against any pest and which bear no claims for protection of other surfaces or objects;

(iv) Fabrics which have been treated to protect the fabric itself from insects, fungi, or any other pest, and which bear no claims for protection of other surfaces or objects;

(v) Fertilizers and other plant nutrients; and

(vi) Preparations intended only for experimental use to determine their value as economic poisons,

or their toxicity or other properties, when the user expects no benefit in pest control.

The product involved was apparently contained in one gallon cans which had on the label thereon in large conspicuous letters on the front and back panels the words "CONTAINS OIL OF CITRONELA." These words were placed on the right side of the front and back panels at the approximate center of the label next to a drawing of a lighted patio torch. The size of the lettering employed appears to be larger than all other lettering on the label except for that of the name of the product itself and the color of the lettering is white on a dark blue background which makes it prominent. The words are also separate from any other lettering on the front and back panels. One of the side panels contains the words "with Citronella" immediately beneath the name of the product, in smaller type than the name of the words referred to herein on the front and back panels. On the second side panel of the label in letters similar to that described for the other side panel, the words "with Citronella" again appear below the name of the product and immediately underneath, in part, are the words "Pleasant Odor" in smaller lettering.

It appears to us that Gulf Lite Patio Torch Fuel, labeled as described above, is, indeed, an economic poison subject to regulation under the act. We so conclude on the basis of the label contained thereon. The size and prominence of, and the placement or positioning on the label of, the words "CONTAINS OIL OF CITRONELLA" and the inference to be drawn from such language mandates this result.

Oil of citronella is recognized as an insect repellent and insectifuge. The record indicates that this is so with respect to the understanding of specialists, including Complainant, and the general and historical understanding of the utilization thereof. Respondent agrees and admits that before and during World War II citronella was probably the best known insect repellent. Research made necessary or prompted by that war resulted in the discovery of probably more efficacious insect repellents. This fact does not detract from our conclusion as we know of no evidence that the common

understanding of that period has been totally dissipated or undone. The fact that some of the purchasing public had not been born at that time, an argument advanced by Respondent, is not persuasive. Obviously, a large portion of the purchasing or consumer public was. It is true that Complainant did not conduct a consumer survey to measure the understanding of the purchasing public. Perhaps that would have been helpful. It certainly was not essential. We are here dealing, in part, with the not so distant past. Even Respondent admits that "it is not disputed that some people would consider repellent properties when o/c is mentioned." Also, the common dictionary definition of the term includes its properties as an insect repellent.[3] We believe that the record supports the conclusion that oil of citronella is recognized by the public or a large segment thereof as an insectifuge or insect repellent.

The words "CONTAINS OIL OF CITRONELLA" were prominently displayed for some purpose. *Cf. United States* v. *681 Cases, More or Less, Containing "Kitchen Klenzer,"* 63 F. Supp. 286 (E.D. Mo. 1945). To us, they presented a pesticidal claim and we are of the opinion they were intentionally meant to do so (See Part II of these Conclusions). The consuming or buying public, whether "a not unreasonable person," "the ignorant, the unthinking and the credulous" or "people of ordinary understanding and intelligence" could well believe so especially as the words and the substance were in connection with a torch fuel presumably to be utilized outdoors during the evening hours. *Cf. United States* v. *681 Cases, More or Less, Containing "Kitchen Klenzer," supra* at 288; *United States* v. *Article . . . Consisting of 216 Cartoned Bottles,* 409 F. 2d 734 (2d Cir. 1969); *United States* v. *Article of Drug, Etc.,* 331 F. Supp. 912 (D. Md. 1971); *United States* v. *Articles of Drug, Etc.,* 263 F. Supp. 212 (D. Neb. 1967). Reference on one side panel of the label in relatively small lettering to "Pleasant Odor" would not negative this belief. The much more eye catching and prominent wording on the front and back panels of the label was *not qualified* and had no similar language.[4]

It is well settled that the intended use of a product may be determined from its label. *United States* v. *Article . . . Consisting of 216 Cartoned Bottles, supra* at p. 739 and cases cited therein. Gulf

Lite Patio Torch Fuel was labeled, represented, or intended for use as an economic poison pursuant to section 2a of the Act and section 162.2(d) of the regulations issued thereunder. See also section 162.101(b)(3) and (4) of the regulations. The Court in *United States* v. *681 Cases, More or Less, Containing "Kitchen Klenzer," supra* at p. 288, stated that "the court is at a loss to know why the claimant would waste printer's ink (and some of it red) unless some inference was sought by this label over and beyond that of a pure cleaning agent." We similarly are at a loss to know why the Respondent would waste printer's ink unless some inference was sought by the label involved over and beyond that of a pure torch fuel. The inference was that the product involved also functioned as an insect repellent.

Undoubtedly, as contended by Respondent, Gulf Lite Patio Torch Fuel was basically just that, a torch fuel. However, this fact does not alter our conclusions. The label employed tended to indicate to the public or a significant portion thereof that this product had additional, added or ancillary benefits, that is, insect repellency. The pesticidal claim contained on the label by virtue of the utilization in prominent letters of the words "CONTAINS OIL OF CITRONELLA" and the placement of such words on the can, as described above, was enough to make the product an "economic poison" under the act. We find no requirement that the sole purpose of a product be for use as an economic poison. See sections 162.101(b)(3) and (4) of the regulations. Cf. also *United States* v. *Article . . . Consisting of 216 Cartoned Bottles, supra* and cases cited therein.[5] To demand that this be its major or only function is to ignore the regulations issued under the act and the many products registered thereunder where the pesticidal character of the product is in addition to its major purpose, such as, for example, paint containing an insecticide or fungicide or ceiling tile containing a bacteriocide,[6] and would unduly and without legal basis restrict the scope of the statute. Respondent's contentions herein run counter to the well accepted principle that remedial legislation such as the Federal Insecticide, Fungicide, and Rodenticide Act, as amended, is to be given a liberal construction to achieve the Congressional purpose. See *e.g., United States* v. *An Article of Drug . . . Bacto-Unidisk,* 394 U.S. 784 (1969); *United States* v. *Dotterweich,* 320 U.S. 277 (1943); *Sunshine Anthracite Coal Company* v. *Adkins,* 310 U.S. 381 (1940); *McDonald* v. *Thompson,*

305 U.S. 263 (1938); *Piedmont & Northern Railway Company* v. *Interstate Commerce Commission,* 286 U.S. 299 (1932).[7]

II

The foregoing conclusions were based upon an assessment of Respondent's objective intent as evidenced by what the product held itself out to be. Cf. *United States* v. *681 Cases, More or Less, Containing "Kitchen Klenzer," supra.* We are of the opinion that Respondent's subjective intent was similar.

The one fact that almost "leaps from the page" or record is the keen awareness and concern of Respondent's employees of the competitive products on the market when it was to merchandise Gulf Lite Patio Torch Fuel. We find no fault with such concern, but it must be given much weight in attempting to determine Respondent's intentions in connection with the product involved and its labeling. Respondent's employees had apparently surveyed the market and it was their intent to present a product which could compete on a par or advantageously and certainly not at a disadvantage with existing products. Two of the competitive products, one of which stated that it contained oil of citronella, made additional affirmative pesticidal claims. A third product, the label of which stated it contained oil of citronella, was also on the market. Respondent's employees were well aware that oil of citronella was an insectifuge and, while they were also aware that the 0.1 percent of oil of citronella to be contained in the product would not be efficacious as an insect repellent, we do not believe that it was their intent to feature its presence on the label for its scenting properties only. The composition of the label negatives any such intent and Respondent could have easily made such fact clear on the label if it so desired. In addition, the keen interest in competitive products makes any such conclusion totally lacking in credibility. In fact, Respondent attempted to register a torch fuel product containing the same insignificant amount of oil of citronella but with more affirmative pesticidal claims knowing that the oil of citronella was not effective. The conduct of Respondent's employees in response to the competitive products makes its contentions herein that its sole purpose for utilizing oil of citronella was as a perfume is

patently lacking in belief despite references to pieces of intracompany correspondence. Rather, we believe that it was Respondent's subjective intent as well as its objective intent, as determined by the label involved, to make a pesticidal claim on such label as its competitors were then doing.

III

By reason of Part I and Part II of these Conclusions, separately and collectively, it is concluded that the shipment by Respondent of the unregistered product Gulf Lite Patio Torch Fuel in interstate commerce on or about January 24, 1974, as charged, constitutes a violation by Respondent of sections 3a and 4 of the Act (7 U.S.C. 135a(a)(1) and 135(b)) and that such product was also misbranded in violation of section 12(a)(1)(E) of the Act (7 U.S.C. 136j(a)(1)(E)) in that the label thereon did not bear the ingredient statement required thereby. (See section 2(q)(2)(A) of the Act [7 U.S.C. 136(q) (2)(A)]).

We turn now to the difficult question of assessing the sanction to be imposed herein. Complainant proposes the assessment of a civil penalty pursuant to section 14(a) of the Act (7 U.S.C. 136 1(a)) of $2,700 for each violation charged and found herein or a total of $5,400. The parties have stipulated and agreed that such proposed penalty is in conformance with the Civil Penalty Assessment Schedule of July 31, 1974 (39 F.R. 27711) and is, in fact, $100 less than the maximum allowable base penalty in each instance.[8]

In considering the appropriateness of the penalty to the "gravity of the violation" (see section 14(a)(3) of the Act), the evaluation should be made on the basis of the gravity of harm and the gravity of misconduct. See *e.g., In re Amvac Chemical Corporation,* I.F. &R. Docket No. IX-4C; *In re Beaulieu Chemical Company,* I.F. & R. Docket No. IX-10C. We find no gravity of harm to the public in the sense of danger to health and the environment by reason of the violations found herein. However, we do see misrepresentation to the public to the extent that purchasers of Respondent's product expected an efficacious insect repellent.

Of great significance in connection with the sanction to be imposed herein is the gravity of Respondent's misconduct. Respondent shipped the unregistered and misbranded pesticide on January 24, 1974 with full knowledge of the requirements of the Act and the position of Complainant with respect to the use of the unqualified language employed on its label. We are not presented herein with innocent shipment of an unregistered product, but, rather, with a knowing disregard of statutory requirements. A May 9, 1972 shipment of *the same product* by Respondent was the subject of a letter of citation and a conference with Complainant.[9] As stated by counsel for Complainant, registration is at the core of the statute and persons such as Respondent have a duty to assure that products marketed by them meet the requirements of the Act, including registration and proper labeling. Respondent, in effect, marketed the unregistered product knowingly and at its peril. Under these circumstances, we believe that the civil penalty proposed by Complainant is appropriate. Penalties imposed upon a bankrupt Respondent or as the result of settlement for similar violations of the Act are not measures to be utilized or compared in a contested proceeding. Nor do we see any selective prosecution of Respondent, as apparently alleged, as all known violators of the Act shipping unregistered torch fuels containing oil of citronella with pesticidal claims were similarly proceeded against.

All contentions of the parties presented for the record have been considered and whether or not specifically mentioned herein, any suggestion, requests, etc., inconsistent with this Initial Decision are denied.

Order[10]

Pursuant to section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended (7 U.S.C. 136 1(a)(1), 1973 Supp.), civil penalties of $5,400 are hereby assessed against Respondent Gulf Oil Corporation for the violations of the Act found herein.

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.

Herbert L. Perlman
Chief Administrative Law Judge

June 3, 1975

[1] The Federal Insecticide, Fungicide, and Rodenticide Act, as amended, (7 U.S.C. 135 *et seq.*) was further amended by the Federal Environmental Pesticide Control Act of 1972 (FEPCA), 86Stat. 973, 7 U.S.C. 136 *et seq.,* 1973 Supp. Section 4 of FEPCA provides, in effect, that the provisions of the statute prior to such amendment and the regulations thereunder with respect to registration would remain in effect for a period of time which encompasses the shipment involved herein. Consequently, we must look to the Act prior to its 1972 amendment and the regulations issued thereunder to determine whether Respondent violated the registration requirements of the Act. Therefore, we must determine whether Gulf Lite Patio Torch Fuel is an "economic poison" as distinguished from a "pesticide" although, in reality, the 1972 amendment made no pertinent substantive changes in the definition of "pesticide" from its predecessor term.

[2] The term "insecticide" is defined in the Act to mean "any substance or mixture of substances *intended for* preventing, destroying, *repelling* or mitigating any insects which may be present in any environment whatsoever." (7 U.S.C. 135 (c)). (Emphasis supplied). See also section 2m of the Act for the definition of the term "insect" (7 U.S.C. 135(m)).

[3] See, *e.g.,* Webster's Third New International Dictionary (1967) which defines citronella oil, as distinguished from citronella, as an "essential oil with lemonlike odor obtained from either of two grasses and used esp. as an insect repellent."

[4] It should be noted in this connection that Complainant informed Respondent prior to the marketing of the product involved that qualifying language accompanying the words or claim involved, that is, "contains oil of citronella for pleasant odor only" or "contains oil of citronella as perfume only," would take the product out from registration under the Act.

[5] Section 162.101(b)(ii) is of no assistance to Respondent and, in fact, reenforces Complainant's contentions herein as it is clear from such section that the "product" referred to therein relates to the active chemical ingredient and not the final or end product.

[6] See section 162.101(b)(4) of the regulations and Leave to Intervene and Denial of Petition to File Appeal in In re Chapman Chemical Company et al., I.F. & R. Dockets No. 246 et al. (May 9, 1973).

[7] Respondent also argues matters not in the record and Complainant, in part, responds thereto. We have not considered matters outside the record.

[8] Respondent's gross sales exceeded $1,000,000 in 1973 and no evidence has been adduced that payment of the proposed civil penalty would affect Respondent's ability to continue in business. Nor could such evidence be adduced. (See 39 F.R. 27711, 27712).

[9] Respondent's reference to In re Beaulieu Chemical Company, *supra,* in this connection is lacking in substance as the situation here is clearly distinguishible as the prior citation involved the same product and is utilized herein not for the purpose of assessing a respondent's prior history of compliance, but to establish that Respondent knowingly violated the act.

[10] 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)).

On August 20, 1974, an amended complaint for civil penalties was issued against respondent for alleged shipment of an unregistered product and for shipping a misbranded product pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. 135a(a)(1) and 136j(a)(1)(E)) [hereafter "Act"] and said charges were sustained in an initial decision rendered by Chief Administrative Law Judge Herbert L. Perlman on June 3, 1975, following a hearing. Having entered exhaustive findings of fact and conclusions of law, Judge Perlman assessed as against respondent the total sum of Five THousand Four Hundered Dollars ($5,400.00) as penalties for the two violations, the sum of Two Thousand Seven Hundred Dollars ($2,700.00) being assessed for each of the two charges.

Repondent filed with Region IV its "exceptions to initial decision" on or about June 27, 1975, respondent claiming its product was not required to be registered and further claiming that the penalties were excessive in light of the proof on hearing before Judge Perlman.

Oral argument on respondent's petition to the Regional Administrator was held on August 20, 1975, in Atlanta, Georgia, and the respondent and the EPA complainant filed extensive briefs. Having reviewed the transcript of the initial hearing, the Administrative Law Judge's initial decision, the tape recorded oral arguments in connection with respondent's appeal to the Regional Administrator, and the briefs, it is found that the initial decision should be sustained.

In material part, the uncontradicted proof in this case reflects as follows:

(1) On May 9, 1972, respondent delivered for shipment its product Gulf Lite Patio Torch Fuel in interstate commerce from Atlanta, Georgia, to Overland Park, Kansas.

(2) On January 19, 1972, EPA complainant advised respondent in writing that Gulf Lite Patio Torch Fuel bearing the claim

"CONTAINS OIL OF CITRONELLA" implies repellency of insects, particularly mosquitoes, and is subject to, and needs to be registered under, the Act. Respondent was further advised that interstate shipments of this unregistered product violated the Act.

(3) Subsequently, respondent was informed by EPA complainant on March 23, 1973, that the prominence of the statement "CONTAINS OIL OF CITRONELLA" on the label of Gulf Lite Patio Torch Fuel without qualification or clarification makes this product subject to the Act.

(4) An application for the registration of Gulf Lite Patio Torch Fuel was received May 25, 1973.

(5) By letter dated December 6, 1973, complainant denied the revised label.

(6) On or about January 24, 1974, respondent again shipped its product Gulf Lite Patio Torch Fuel in interstate commerce from Jacksonville, Florida, to Valdosta, Georgia.

(7) The Gulf Lite Patio Torch Fuel shipped in interstate commerce on or about January 24, 1974, contained 0.1 percent oil of citronella, was not registered under the Act and the label thereof did not contain an ingredient statement as required by the Act.

With respect to respondent's first claim on appeal to the effect that the product, Gulf Lite Patio Torch Fuel, was not required to be registered under the Act, is totally without foundation or merit. The uncontradicted evidence clearly reflects that the labeling of the product clearly implies insect repellency and was therefore an insecticide subject to the Act. It should be noted in this connection that the record reflects respondent actually sought to register this product on May 25, 1973, that the application was denied by EPA on December 6, 1973, and that respondent did not subsequently seek a challenge to this denial under the remedies provided to it in the Act.

Respondent, as its second contention on appeal to the Regional Administrator, asserts that the penalties assessed were

"inappropriate". In oral argument and in its brief, respondent explains its view that the penalties were excessive, contending that such penalties are only appropriate where a manufacturer has incurred a previous proved violation of the Act. Respondent's view is erroneous.

Under the Act the level of penalty to be assessed is controlled by the "gravity of violation" as well as the appropriateness of a penalty to the size of the business of the person charged and the effect on such person's ability to continue in business. 7 U.S.C. Section 1361(a)(3). "Gravity of violation" has been interpreted to mean, in part, the gravity of the misconduct charged. *In Re Amvac Chemical Corporation,* I.F.&R., Docket No. IX-4-C, pp. 11, 13–15. These elements controlling the amount of the penalty are set forth in a "Civil Penalty Assessment Schedule" (39 Fed. Reg. No. 148, July 31, 1974, at p. 27713) and, under the circumstances and proof of this case the schedule would call for an assessment of Two Thousand Eight Hundred Dollars ($2,800.00) per violation, or total penalty of Five Thousand Six Hundred Dollars ($5,600.00).

Sub silentio the Administrative Law Judge took notice of the economic factors to be considered in assessing the penalty against the respondent Gulf Oil Company, and the Regional Administrator would conclude such economic consequences to be negligible, given the size and the known economic resources of respondent.

The undisputed facts in this case demonstrate that respondent put into interstate commerce a shipment of an unregistered product and a misbranded product with clear notice and knowledge of these violations on January 24, 1974. As noted above, gravity of violation is in no way dependent upon entry of a previous judgment of violation but may rest upon evidence of previous, knowing misconduct. Under the circumstances, respondent's second shipment of an identical product giving rise to a knowing violation could not be considered aggravating and extreme. Accordingly, while the Regional Administrator has it within his discretion to reduce the penal assessment, such a course of action is not dictated by the record in this case.

It is ordered that The Initial Decision be upheld and sustained and that respondent be assessed a penalty in the total sum of Five Thousand Four Hundred Dollars ($5,400.00).

Entered this 21st day of October, 1975.

JACK E. RAVAN
REGIONAL ADMINISTRATOR

2062. In Re: Mid-America Formulators, Inc., EPA Region IV, August 3, 1976. (I.F.&R. No. IV-156C, I.D. Nos. 110563, 110600 and 116189.)

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 shipment made on May 13, 1975, from Arlington, Tennessee, to Chicago, Illinois, and to products held for distribution or sale on January 7 and April 2, 1975, at Mid-America Formulators, Inc., Arlington, Tennessee. The pesticides involved were **VELSICOL PIVACIN CONCENTRATE RODENTICIDE** and **VELSICOL WARFARIN CONCENTRATE RODENTICIDE** 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 $280.00.

2063. In Re: Red Wing Chemical Company, Inc., EPA Region IV, August 3, 1976. (I.F.&R. No. IV-183C, I.D. No. 120875.)

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); 135a(a)(1) and 135b. The action pertained to a shipment made on April 17, 1975, from Chattanooga, Tennessee, to Chickamauga, Georgia. The pesticide involved was **RED WING INSECT SPRAY NEW WITH DIAZINON**; charges included nonregistration and misbranding—labels bore false or misleading statement.

The respondent signed a Consent Agreement. The Final Order assessed a civil penalty of $320.00.

2064. In Re: Edward Leeds, both individually and d/b/a, Cougar Chemical, Miami, Florida, EPA Region IV, August 9, 1976. (I.F.&R. No. IV-176.)

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 complaint was withdrawn, since the evidence of the company's failure to submit an initial or annual production report was inconclusive.

2065. In Re: Blue Magic Company, EPA Region IV, August 11, 1976. (I.F.&R. No. IV-179C, I.D. Nos. 110794, 110796 and 110797.)

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); 136j(a)(1)(A); 136(q)(1)(D) and 136(q)(1)(A). The action pertained to products held for distribution or sale on November 12, 1976, at Blue Magic Company, Wilson, North Carolina. The

pesticides involved were **EASY MONDAY BLEACH, MISS CAROLINA BLEACH** and **JUST DANDY BLEACH**; charges included nonregistration and misbranding—labels bore a false and misleading product registration number and product failed to bear an establishment registration number.

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

2066. In Re: Progress Chemical Company, EPA Region IV, August 20, 1976. (I.F.&R. No. IV-178C, I.D. Nos. 120773 and 120774.)

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); 136j(a)(1)(E); 136(q)(1)(D); 136(q)(1)(G); 136(q)(1)(F); 136(q)(2)(A); 136(q)(2)(C)(iii) and 136(q)(2)(C)(i). The action pertained to shipments made on September 24, November 10 and December 2, 1975, and January 22, 1976, from Canton, Georgia, to Gainesville, Georgia. The pesticides involved were **FORMALDEHYDE SOLUTION** and **FORMALDEHYDE**; charges included nonregistration and misbranding—lack of EPA establishment number, directions for use, ingredient statement, net content statement and name and address of manufacturer.

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

2067. In Re: Water Services, Inc., EPA Region IV, December 20, 1976. (I.F.&R. No. IV-167C.)

This civil penalty proceeding was settled by hearing. The following is Administrative Law Judge Thomas B. Yost's Initial Decision.

Preliminary Statement

This is a proceeding under Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended [7 U.S.C. 1361(a), 1973 Supp.], instituted by a complaint issued December 24, 1975, by the Director, Enforcement Division, Environmental Protection Agency, Region IV, Atlanta, Georgia. The complaint charges that respondent, Water Services, Inc., was holding for sale the product "BAF-100" on July 30, 1975, and that said product was a pesticide was in the meaning of 7USC136(u), and that such pesticide was adulterated in that its strength or purity fell below the professed standard or quality under which it was sold. The complaint proposed a penalty of $990 for the violation charged in the complaint. On March 30, 1976, respondent filed an answer to the complaint in which it denied that the product BAF-100 was being held for sale or that it was packaged, labeled and released for shipment.

After the submission of pre-hearing material pursuant to Section 168.36(e) of the Rules of Practice [39 F.R. 27656, 27663], and a prehearing conference held on October 28, 1976, an oral hearing was held in Knoxville, Tennessee on October 28, 1976, before Thomas B. Yost, Administrative Law Judge, Environmental Protection Agency. At the hearing, respondent was represented by William R. O'Neal, Knoxville, Tennessee, and complainant was represented by Bruce R. Granoff, Legal Support Branch, Environmental Protection Agency, Atlanta, Georgia. Two witnesses testified on behalf of complainant and complainant introduced four exhibits into evidence on behalf of complainant. Four witnesses testified for respondent and two exhibits were received into evidence on behalf of respondent. In addition, a stipulation was entered into by the parties and was received into evidence. After the hearing, the parties filed briefs.

Findings of Fact

1. The respondent, Water Services, Inc., is a corporation which maintains its home office and place of business in Knoxville, Tennessee.

2. On or about July 30, 1975, Water Services, Inc., was inspected by EPA Consumer Safety Officers, Ben Woods and William J. Pfister. A container which bore the label "BAF-100" which had previously been shipped from the warehouse in Knoxville to a customer in Virginia and then returned was sampled, along with a sample of another item which is not an issue in this case. The form with the label "BAF-100" also bore Registration No. 10867–5, dated July 31, 1973. The sample taken by the EPA Consumer Safety Officers was identified as Sample No. 110999.

3. The product BAF-100 having been analyzed by accepted procedures was found to be deficient in chloride in that the product was represented to contain .322% total chlorides, when, in fact, the test revealed the product contained only .227% total chlorides representing a deficiency of 29%.

4. The respondent had gross sales for 1974 in excess of $400,000 but less than $700,000, and where the adulteration alledged in this complaint would not result in adverse effects, the appropriate penalty assessed was $990.

Discussion

The stipulation in this matter executed between the complainant and the respondent disposes of most of the facts in this case concerning such matters as when the sample was obtained, whether the analysis was accurate, and the identificaion of the sample by product name and EPA registration number. In addition, the companies gross sales and the appropriateness of the amount of the penalty, if ultimately assessed, was also stipulated between the parties.

The only fact in dispute in this case is whether or not the product sampled and found to be deficient was, in fact, packaged, labeled, and released for shipment as alledged in the complaint, or whether the product sampled was sitting in a storage area and was not, in fact, released for shipment or distribution for sale. The testimony in this case reveals that on the date of the inspection visit to the

respondent's premises in Knoxville, Mr. Ferris, the president of the company, was not available and the inspectors, Mr. Ben Woods and Mr. William J. Pfister, were directed to Mr. Owen B. Loomis. Mr. Loomis, the record shows, had at one time been the plant superintendent, but at the time of the inspection visit was not occupying that position, but was the plant engineer. Mr. Loomis was familiar with the procedures involved with EPA inspections, in as much as he was acting as the plant superintendent on a previous inspection visit by Mr. Pfister.

Mr. Pfister testified that he advised Mr. Loomis that he was there to inspect algaecides and fungicides and that Mr. Loomis directed him to a storage area on the premises which contained numerous drums of products, only two of which had any label on them. These two products being BAF-100 and Algaecide X-20. Samples of both of these products were obtained and Mr. Loomis signed a receipt for samples which acknowledgement stated that the samples were packaged, labeled and released for shipment, or having been shipped, were being held for distribution or sale. Since these products had been returned to the respondent by a previous purchaser, both Mr. Pfister and Mr. Loomis were concerned about their status and, therefore, an additional notation was made on the receipt for samples which stated:

> "The above samples were acknowledged by Mr. Brooks Loomis as being packaged, labeled and released for shipment. However, before shipment of these pesticides to consignees, the container or drums will be further labeled with the company label with the date of shipment, including the net weight, address of the consignee and its EPA establishment number."

The testimony of the witnesses was that no other area of the respondents' premises were examined for purposes of obtaining samples and that the two samples taken and referred to in the receipt for samples were the only two products sampled on the occasion of this visit.

Both Mr. Woods and Mr. Pfister testified that they expressly advised Mr. Loomis at the time of their visit that the only products they were interested in sampling, or, in fact, could legally be concerned with, were those which were actually packaged, labeled and released for shipment. Mr. Loomis testified that he did not recall the conversation, and that if he had been so advised by the inspectors, the only place he could have taken them was the shipping-dock area of the facility which contains materials actually labeled and held for pick-up by a commercial carrier.

Mr. Ferris, the president and owner of the corporation, testified that the product, which is the subject of this hearing, was not packaged, labeled and released for shipment. He testified that it is the policy, practice and procedure of his company that whenever materials are returned from a purchaser for any reason, prior to re-shipment or re-sale of that material, it is first sent to the laboratory for analysis to see that it still conforms to the label requirements in terms of strength and purity and that if it does so conform, it is normally put in with a larger batch, and drummed and packaged for later shipment to another customer. Mr. Ferris also testified that on occasion, products having been returned from customers are found to have been diluted by water or other contaminants. In the case of this sample, which weighed substantially less than the weight indicated on the label, company policy would require that the drum be brought up to full weight before shipping, in as much as they do not ship materials in less than full-drum lots since their bookkeeping and pricing practices are based on full drums and not partially full drums. The record also indicates that the sampled material was returned to the respondent by the original purchaser on January 25, 1974, and that the inspection took place on July 30, 1975, approximately one and a half years after its return to the respondent.

Mr. Chance, the foreman of the liquid mix department of Water Services, Inc., testified that in all cases where materials are returned to the company by a former purchaser, a sample of the returned product is immediately taken to the laboratory for analysis, and if it is determined that the product is adulterated or unfit for a subsequent resale, the material is disposed of. If the material is capable of being returned to specifications, that is normally done by placing the

returned product in the next batch made of that product and brought up to specifications, re-drummed, and released for shipment along with other portions of that particular batch.

The laboratory technician who operates and supervises the laboratory analysis for Water Services, Inc., also testified that the practice of the company was to immediately test all returned products to determine whether or not they are capable of being returned to specifications and then sold or disposed of as the case may be.

None of the witnesses for the respondent were able to explain why this particular drum of returned product was not subjected to analysis and either disposed of or re-sold as is the normal practice. In this case, the material stayed in the warehouse area for some one and a half years without having been subjected to any analysis. It was pointed out that during this period, from 1974 to 1975, there had been some changes in company personnel and that at least two plant superintendents had been employed and discharged during this period of time. Mr. Chance, the liquid products foreman, testified that during the period in question between January 1974, the time of the product's return to the company, and July 1975, the date of the inspection and sample taking, dozens of batches of product BAF-100 had been formulated and sold.

Therefore, this case turns on the question of fact as to whether or not this product was packaged, labeled and released for shipment, or through over-sight or neglect had been sitting in the warehouse area unsampled and unanalyzed and, thus, not released for shipment or sale according to the policies and practices of the respondent company.

The Agency based its case upon the fact that Mr. Loomis, who signed the receipt for samples, indicated that except for further labeling and adjustments in the net weight and the placing of an address of customer or consignee label on the durm, the product sampled was packaged, labeled and released for shipment. The respondent company on the other hand, states that the product could in no way be considered as being ready for shipment or sale in as much as it had not been analyzed for purity and that in any event the

drum would not be shipped in its present condition since it did not contain a full quantity of the product, but rather was only a partially-filled drum which the company does not ship. Although the receipt for samples and the inspection notice indicates that at the time of the visit, and sample taking, Mr. Loomis was given the title of plant manager, he was not, in fact, employed by the respondent company in that capacity at the time of the inspection, but was rather the plant engineer whose duties involve the maintenance of rolling stock of the company and the assembly and construction of various mechanical pumps which the respondent corporation also markets.

The complainant, based on the record in this proceedings as of the time the complaint was issued, had, in my opinion, made out a prima facie case against the respondent company. However, that prima facie case is subject to rebuttal by the introduction of evidence on the part of the respondent, which evidence was aduced in the oral hearing had on this matter.

The complainant based its position on the fact that Mr. Brooks Loomis, who was acting on the behalf of the respondent corporation on the day of inspection, signed the receipt for samples which has printed material on it indicating that the samples obtained were packaged, labeled and released for shipment. Due to the unusual facts of this case, additional language was written into the receipt for samples by inspector Ben Woods in cooperation with Mr. Loomis which further elaborated on the status of the samples as indicated above. In support of its position, the Agency argues that the respondent has estopped from denying the authority of Mr. Loomis to sign the receipt or act on the behalf of the corporation. I am, of course, familiar with the theory of master and servant or principal and agent, and I do not believe the record in this case indicated that the respondent argued that Mr. Loomis was not properly acting on the behalf of the corporation when he showed the inspectors through the facility or directed them to the area where the samples were utimately taken. I do not believe, however, that the theory of principal and agent stands for the proposition that an agent who makes a statement which is contrary to fact binds his principal to the acceptance of that statement when all evidence points to a contrary conclusion. Although Mr. Loomis, at the hearing denied that the

inspectors advised him that they only wanted to inspect pesticides or algaecides which were labeled, packaged and released for shipment, it is more likely that such statements were made to Mr. Loomis, but that he did not perceive their importance nor understand the significance of what the inspectors were telling him. It was obvious from the testimony of Mr. Loomis at the hearing that he had no idea of the legal significance of the phrase "held for sale." In his opinion, that phrase meant only products that had actually been sold and were labeled with the shipping label to the purchaser and sitting on the loading dock of the facility. Obviously, Mr. Loomis' conception of the phrase is far narrower than that which the law and case decisions place on such phrase. Having observed Mr. Loomis' conduct on the witness stand and his general demeanor, I am of the opinion that he would have signed practically anything placed before him by two Federal inspectors and, in the instant case, did precisely that.

This conclusion is borne out by several facts. At two places on the receipt for samples, Mr. Loomis' title was described as that of plant manager, and Mr. Loomis was not plant manager at the time of the inspection, had never been plant manager, since the corporation does not use that term in describing its chief operating officer, but, rather, uses the term plant superintendent. Mr. Loomis raised no question about the fact that the receipt described him as plant manager. I'm also satisfied that it is quite likely that the inspectors did, in fact, discuss the status of the samples with Mr. Loomis, and that Mr. Loomis and inspector Ben Woods did work out the language which appears in hand-printed form on the receipt for samples, but that Mr. Loomis did not understand the importance or significance of what he was signing.

Counsel for the complainant has called the Court's attention to several pesticide decisions issued by other administrative law judges of the Environmental Protection Agency. One of the cases cited is Chemola Corporation, I. F. & R. Docket No. VI-21C. That case involved a sample of a weed killer obtained from the premises of the respondent corporation, which upon analysis showed to be substantially deficient in the active ingredient. The product in question is sold in concentrated form and, prior to use, is to be diluted approximately 4-to-1. The EPA laboratory upon receiving the sample,

diluted the material in conformance with the label instructions and found the product substantially under strength. The corporation, as a defense, argued that the sample actually taken was a saleman's sample which had already been diluted 4-to-1, and when the EPA laboratory further subjected the sample to dilution, such dilution resulted in the 16-to-1 reduction in strength, as opposed to 4-to-1. The administrative law judge in that case found that the respondent's contentions were not substantiated by the record for a variety of reasons, not the least of which is that the witness for the respondent stated that, "I fully expected to give them and did feel assured that I had given them a sample of the material that represented what was sold." Additionally, the witnesses for the respondent testified that he considered it "possible and even probable that the sample could have been a diluted sample and that it could well be the diluted variety." I feel that the *Chemola* case is distinguishable from the case at hand, in that in this case it is the undisputed testimony of all of the respondent's witnesses that it is the practice of that corporation to subject returned merchandise to additional analysis to determine if the product is still up to reported strength and, that if it is not, to attempt to return it to proper constituents prior to re-sale or to dispose of the product, as the case may be. In the *Chemola* case, the witness for the respondent could only hypothesize that the sample analyzed by EPA was one that was diluted for use of salesmen and did not, in fact, represent the product in the condition under which it is normally sold. Further, in *Chemola,* there is no indication that the batch from which the sample was taken was in any way suspect or had any distinguishing features which would have caused the respondent corporation to be on the notice that the product should not be sold in the form in which it was found or that it should have been subjected to additional treatment prior to being released for sale to customers.

In the case of, In re: Associated Chemists, Inc., I. F.&R. Docket No. X-17C, products obtained and sampled were found to be substantially deficient in certain active ingredients. Again, as in the instant case, the respondent corporation's officer signed the receipt for samples which indicated that the sample taken by the inspectors was packaged, labeled and released for shipment or being held for distribution or sale. In the *Associated Chemists* case, the respondent's

defense was that an employee had scotch-taped a hand-written note on top of the shipping container which indicated that the contents were not for sale. In the *Associated Chemists'* case, however, there was no evidence presented to support or substantiate the respondents' allegation that a hand-written note was, in fact, on top of the shipping container and that none of the EPA inspectors observed or saw the note alledgedly on top of the shipping carton, although they were in close proximity thereto and observed the respondent take the sample from the case at hand, in as much as the decision to hold the products subject to the provisions of the law and the penalties attached, thereto, was based strictly upon a question of evidence which the administrative law judge found did not support respondent's contention.

In the case of Elco Manufacturing Company, I. F. &R. Docket No. III-33C, the violation was that the products were mis-labeled. The defense of *Elco,* in that case, was that the labels on the samples taken were merely for "tagging purposes" and were not the labels placed on deliveries when sales were made, and that the proper, registered label is placed on all containers prior to sale and delivery. In the *Elco* case, however, Mr. Katz, who was the officer in charge at the time of the inspection, knew precisely what the purpose of the inspection was and was knowledgable and had a complete understanding of what the terms "held for sale" meant in that on other samples taken contemporaneously, Mr. Katz insited on writing on the receipts as to those samples the phrase "not for sale," but he did not make this notation in regard to the samples which were later found to be improperly labeled. Further the reaction of Mr. Katz to the return visit of the inspectors indicated that he fully accepted the concept that the violation alledged did occur. For that reason, the *Elco* case is not on point with the case now under discussion.

In concluding that the sampled product in this case was not, in fact, held for sale, several factors appear to me to be determinative. First, there was unanimity among the respondent witnesses as to the policy and practice of that company as it pertains to the treatment normally accorded to products returned by customers prior to the re-sale of such products. Secondly, the fact that as of the time of the inspection and for a substantial period preceding the inspection,

there had been a turnover in personnel at the facility in the position of plant superintendent. From the time the product was returned to the company until the date of the inspection, several plant superintendents had been employed and discharged, and no person occupied that position at the time of the inspection which accounts for the failure to identify this returned product and subject it to the procedures normally accomplished by the respondent company. Thirdly, the fact that the product sat in the staging or warehouse portion of respondent's facility for approximately one and a half years without having been sold during a period when large quantities of the product in question BAF-100, was formulated, drummed and sold by the company, indicating that if the product sampled were, in fact, being held for sale, it sould have been sold along with the other like products of that company in the one and a half year time period.

Although the respondent corporation is certainly guilty of negligent and, perhaps, slip-shod behavior in regard to this sampled product, I am of the opinion that such negligence cannot change the factual and legal character of a product as urged by complainant. Logic and common sense would, in my judgement, substantiate the defense offered by the respondent that the product would not be sold in the form in which it was sampled and analyzed by the complainant, but rather have been brought up to strength and mixed with the next batch of such product manufactured by the respondent and later sold in proper chemical strength.

Conclusion

Based on the record in its entirety, I am of the opinion that the product in question, BAF-100, was not, in fact, packaged, labeled and released for shipment or sale in its present condition without having first been subjected to the analysis, re-drumming and other procedures indicated by the respondent company as constituting its practices concerning returned products.

Since the product was not packaged, labeled and released for shipment, its condition and chemical make-up is immaterial for purposes of this proceeding.

Having considered the entire record, and based on the findings of fact and discussions 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, as amended [7 U.S.C. 1361(a)(1)], no violation has been established on the basis of the complaint issued on December 24, 1975. The complaint is dismissed.

Dated: December 20, 1976.

Thomas B. Yost
Administrative Law Judge

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).]

2068. In Re: National Scientific Co., Inc., EPA Region V, July 7, 1976. (I.F.&R. No. V-72C, I. D. No. 94230.)

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)(1)(G). The action pertained to a shipment made on January 31, 1974, from Cleveland, Ohio, to Deerfield, Illinois. The pesticide involved was **ALGAE INHIBITOR**; charges included nonregistration and misbranding—label of the product failed to bear a proper ingredient statement and an adequate warning or caution statement.

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

2069. In Re: Applegate's Drug, Store, Inc., EPA Region VI, July 6, 1976. (I.F.&R. No. VI-61C, I.D. No. 108482.)

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 1, 1975, from Bentonville, Arkansas, to Westville, Oklahoma. The pesticide involved was **APPLEGATE's NO-SPROUT**; the charge was nonregistration.

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

2070. In Re: March Chemical Company, Inc., EPA Region VI, July 7, 1976. (I.F.&R. No. VI-53C, I.D. No. 108370.)

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 May 19, 1976, at March Chemical Company, Inc., Denham Springs, Louisiana. The pesticide involved was **MARCIDE 10S**; 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 $450.00.

2071. In Re: Auto-Chlor System of Louisiana and Southern Mississippi, Inc., EPA Region VI, July 30, 1976. (I.F.&R. No. VI-56C, I.D. No. 107185.)

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 March 12, 1975, at Auto-Chlor System of Louisiana and Southern Mississippi, Bossier City, Louisiana. The pesticide involved was **AUTO-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 $750.00.

2072. In Re: Swift Agricultural Chemicals Corporation, EPA Region VI, July 30, 1976. (I.F.&R. No. VI-72C, I.D. No. 114466.)

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)(1)(A); 136(q)(1)(G); 136(q)(1)(F) and 136(q)(2)(C)(i). The action pertained to a shipment made on August 13, 1975, from Houston, Texas, to Maryland Heights, Missouri. The pesticide involved was **PAR EX CUSTOM FORMULATED FERTILIZER**; 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 warning or caution statement and lack of name and address of manufacturer.

The respondent signed a Consent Agreement. The Final Order assessed a civil penalty of $6,880.00.

2073. In Re: Riverside Chemical Company, EPA Region VI, August 5, 1976. (I.F.&R. No. VI-67C, I.D. Nos. 106867 and 108144.)

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 13, 1974, and August 13, 1975, at Riverside Chemical Co., Pine Bluff, Arkansas. The pesticides involved were **RIVERSIDE TOXAPHENE 6** and **RIVERSIDE ENDRIN 1.6**; charges included adulteration and misbranding—product was contaminated with an additional active ingredient not named on the label.

The respondent signed a Consent Agreement. The Final Order assessed a civil penalty of $3,528.00.

2074. In Re: Riverside Chemical Company, EPA Region VI, August 5, 1976. (I.F.&R. No. VI-70C, I.D. No. 114916.)

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 August 20, 1974, at Riverside Chemical Company, Blytheville, Arkansas. The pesticide involved was **RIVERSIDE RAIDER 33**; charges included adulteration and misbranding—product was contaminated with an additional active ingredient not named on the label.

The respondent signed a Consent Agreement. The Final Order assessed a civil penalty of $1,764.00.

2075. U.S. v. James D. Rice, U.S. District Court, Western District of Texas, July 29, 1976. (I.F.&R. No. VI-1P.)

This was a criminal action prepared by EPA Region VI in which the defendant was charged in a one count information with violating the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 136j(a)(2)(G). The pesticide involved was **PARATHION 2% DUST, EPA REG. NO. 1258–106**. The defendant was charged with the misuse of a registered pesticide—failure to insure that worker took adequate safeguards as directed on the label.

The defendant entered a plea of no contest.

A fine of $250.00 was levied.

2076. In Re: Sani-Kem Corporation, EPA Region VII, August 18, 1976. (I.F.&R. No. VII-202C, I.D. No. 148105.)

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 shipment made on October 17, 1975, from Kansas City, Missouri, to Springfield, Missouri. The pesticide involved was **BANISH INSECTICIDE**; the charge was nonregistration.

The respondent signed a Consent Agreement. The Final Order assessed a civil penalty of $3,400.00.

2077. In Re: DeMert & Dougherty, Inc., EPA Region VII, August 23, 1976. (I.F.&R. No. VII-201C, I.D. No. 113082.)

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 March 9, 1976, at DeMert and Dougherty, Inc., St. Louis, Missouri. The pesticide involved was **PENTA WOOD**

PRESERVATIVE CONCENTRATE; the charge was misbranding—label lacked adequate precautionary statement.

The respondent signed a Consent Agreement. The Final Order assessed a civil penalty of $1,960.00.

2078. In Re: Bartels and Shores Chemical Co., EPA Region VII, August 31, 1976. (I.F.&R. No. VII-205C, I.D. No. 148215.)

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 products held for distribution or sale on October 21, 1975, at Bartels and Shores Chemical Company, Kansas City, Missouri. The pesticide involved was **PIONEER BRAND DAIRY AND STOCK 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 $50.00.

2079. In Re: Tecumseh Animal Clinic, EPA Region VII, August 31, 1976. (I.F.&R. No. VII-198C, I.D. No. 142154.)

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 April 28, 1976, at Tecumseh Animal Clinic, Tecumseh, Nebraska. The pesticide involved was **CATTLE FLIES AND LICE**; the charge was nonregistration.

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

2080. In Re: Madison Bionics, Division of Chemtrust Industries Corporation, EPA Region IX, March 4, 1976. (I.F.&R. No. IX-99C, I.D. Nos. 111138, 111139 and 111137.)

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); 136j(a)(1)(E); 136(q)(1)(G); 136(q)(1)(F) and 136(q)(2)(C)(iii). The action pertained to products held for distribution or sale on November 11, 1974, at Madison Bionics, Gardena, California. The pesticides involved were **LIMINATE ALGAECIDE AND WATER CONDITIONER, PERMACIDE RESIDUAL INSECTICIDE** and **CHEMPLEX DISINFECTANT DETERGENT DEODORANT**; charges included failure to file an annual pesticides report and misbranding—lack of caution or warning statement, directions for use and net content statement.

The respondent signed a Consent Agreement. The Final Order assessed a civil penalty of $2,250.00.

2081. In Re: Cutting Division of Harvest Industries, Inc., EPA Region IX, March 18, 1975. (I.F.&R. No. IX-78C.)

This civil penalty proceeding was settled by hearing. The following is Administrative Law Judge William J. Sweeney's Initial Decision.

Initial Decision

By complaint filed on April 30, 1975, the United States Environmental Protection Agency, Region IX, alleged that the respondent had violated Section 12(a)(1)(A) and 12(a)(1)(E) of the Federal Insecticide, Fungicide, and Rodenticide Act as specified in such complaint. The respondent requested a hearing. Judge Bernard D. Levinson was designated to preside. At his direction the parties submitted written statements concerning the alleged violations. Subsequently, due to the unavailability of Judge Levinson, the undersigned was designated to preside. The hearing requested by respondent was scheduled to commence on March 24, 1976 but was

canceled upon receipt of a letter from respondent, dated March 1, 1976, stating a willingness to submit the proceeding for decision based on the written exchanges between the parties; it was noted that the facts are not in dispute.

The violations specified in the complaint are that: on or about May 2, 1974 the respondent distributed a pesticide, Mapco Neo Sheep Dip, by causing it to be shipped from Sacramento, California, to Reno, Nevada; the pesticide was not registered under the Act; the pesticide was misbranded in that the label did not bear on the front panel or the part of the label displayed under customary conditions of purchase the warning or caution statement "Keep out of reach of children" in a type size which was large enough, nor a signal word such as "Caution"; and the pesticide was misbranded in that the precautionary labeling on the front panel was not prominently placed thereon with such conspicuousness as to render it likely to be read under customary conditions of purchase. The penalty proposed for the violations is $5,200, consisting of $3,200 for the failure to register the pesticide and $2,000 for the first labeling violation specified above. These amounts are those specified for the respective violations under the Guidelines for the Assessment of Civil Penalties (39 FR 2711, July 31, 1974), for violators with annual gross sales as large as those of the respondent.

As indicated, the respondent does not dispute nor contest the occurrence of the violations alleged in the complaint. The amount of the penalty proposed is regarded as too severe and respondent's submission of facts is offered as a basis for mitigating such penalty.

Evidence submitted by complainant. – In view of the admission of violations by the respondent it is not necessary to recite in detail the data submitted by complainant. It is clearly shown that the pesticide was toxic and unregistered. With respect to the labeling violation for which a penalty is proposed, it appears that the required words "Keep out of reach of children" was type size 8 point rather than 10 point as specified in the regulations, and that no signal warning word, such as danger or caution, appeared on the same label front panel. On a side label panel are the words Caution and

Warning, each followed by instructions, and a skull and crossbones followed by the word Poison in large size capital letters.

It is contended by complainant that the penalty proposed, particularly that portion thereof proposed for the failure to register the pesticide, is warranted in view of respondent's history and the possible damage which misuse of the sheep dip could cause. The record shows that in 1972 the President of Cutting Division was the Vice President and General Manager of Harvest Branch Division of Harvest Industries, Inc. The latter division manufactures products subject to registration under the governing statute. In 1972 the Harvest Branch Division was charged with having made an interstate shipment of an unregistered product, in violation of the Act. The Vice President – General Manager replied to this charge. Also in 1972 two other failures to register products were charged and replies were made by the Assistant General Manager of Harvest Brand Division. As to possible damage due to product misuse, tests made by complainant established that the subject product is a severe ocular and dermal irritant; such tests were made subsequent to filing the complaint herein.

Facts and argument submitted by respondent. – It is respondent's ultimate contention that the facts and circumstances surrounding the admitted violations warrant a substantial mitigation of the proposed penalty. There is, however, no question as to respondent's ability to pay the penalty proposed and remain in business, nor that its annual gross sales exceed $1-million.

Mapco Neo Sheep Dip has been produced and sold by the manufacturer since 1922. The manufacturer knows of no instance of harm resulting from use of this product, and has never had a claim filed against it due to use of the product. This sheep dip has been registered in California and, at least to the time of the violations under consideration, could be and was lawfully sold and distributed within California.

Respondent received notice (in some manner which is not specified of record) during September 1974 that the interstate distribution of Mapco Neo Sheep Dip in May 1974 was a violation of

the Act; the amount distributed was six gallons valued at $17.82. Sales personnel were immediately sent to all of respondent's customers in Nevada and they recovered all of the subject pesticide in stock whether or not it had been sold by respondent. As stated earlier, the complaint was filed on April 30, 1975.

In regard to the labeling violation for which a penalty is proposed the respondent admits the deficiency but notes that the label did publish cautionary words, although not the prescribed words, nor the correct type size and location on the label.

Discussion. – The sole matter for decision is the appropriate penalty to be assessed. In evaluating the penalty the only criterion applicable to finding an amount less than proposed is the gravity of the violation. The amount proposed is not inappropriate to the size of respondent's business nor to the effect on respondent's ability to continue in business. Section 168.45 of the governing rules and regulations provides that in determining the appropriate penalty to be assessed the Administrative Law Judge may consult and rely upon the Guidelines for Assessment of Civil Penalties. Section IC(1)(a) of the guidelines provides as follows:

Gravity of violation. One determinant of the amount of a proposed civil penalty is the gravity of the violation. The gravity of any violation is a function of (1) the potential that the act committed has to injure man or the environment; (2) the severity of such potential injury; (3) the scale and type of use anticipated; (4) the identity of the persons exposed to a risk of injury; (5) the extent to which the applicable provisions of the Act were in fact violated; (6) the particular person's history of compliance and actual knowledge of the Act; and (7) evidence of good faith in the instant circumstance.

The elements quoted above will be discussed in order of presentation. (1) The failure to register the pesticide resulted in the interstate distribution of a toxic product, with potential severe skin or eye irritation to the handler, and which might have been refused registration under the Act. The fact that the California manufacturer has never had a claim made against it does not indicate a lack of potential for injury to man. A negligent user of the product would

have no grounds for such a claim. No possible injury to the environment is indicated from the facts of record. The labeling violation presented no potential for injury to man. Caution and warning notices were on the label in addition to the attention attracting skull and crossbones, and the capitalized word Poison. (2) It is not possible on this record to find that the product sold by respondent would have a greater or less potential for severe injury than some other product used for the same purposes which has been qualified for registration under the Act. The labeling violation could not have increased the severity of any potential injury. (3) The type of use of Mapco Neo Sheep Dip sent to Nevada was probably for vermin control in raising sheep. For such purpose, injury to man is not indicated in the absence of gross negligence. (4) The identity of persons exposed to risk or injury from the subject product if used in Nevada would most likely be sheep herders or handlers who normally would be experienced in using the product carefully so as to prevent personal or animal injuries. (5) The extent to which the Act was in fact violated was complete with respect to the failure to register the product. The record shows that respondent was familiar with the statute requiring registration. The failure is not indicated to be a flouting of the law, however. Rather, it appears that the respondent was complacent in the matter because it was not the manufacturer of the product. The labeling violation was technical in nature. In fact the skull and crossbones, and the large printed Poison, tends to attract attention more forcefully than a signal word on the front panel of the label. (6) As stated earlier, respondent knew of the Act. There is no history of noncompliance with the Act by the Cutting Division. However, respondent's Harvest Brand Division had not complied with the Act in three instances shown of record. (7) The respondent showed good faith in the instant circumstances not only by discontinuing interstate sales of the pesticide but by recovering stocks of the pesticide from Nevada dealers no matter whether such pesticide had been sold by respondent or by a California competitor. The violations resulted from negligence rather than a deliberate act of omission.

Findings and conclusions. – The respondent violated the Act as alleged in the complaint by distributing in interstate commerce a pesticide subject to the Act which was unregistered and improperly labeled. The failure to register the pesticide is a grave violation.

Other facts of record, as detailed hereinbefore under the heading discussion, are of a mitigating nature and warrant a reduction in the maximum penalty of $3,200 proposed for such violation. It is found that a penalty of $1,600 is adequate, fair and reasonable in the circumstances. The labeling violation is of a technical nature, and indeed the label used might be considered more forceful as a warning than one meeting statutory prescription. A nominal penalty only is warranted. It is found that the proposed penalty of $2,000 should be reduced to $100.

Based on the foregoing findings and conclusions the following order is entered.

Order

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 $1,700.00 is hereby assessed against Cutting Division of Harvest Industries, 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, Region IX, a cashier's check or certified check payable to the United States of America in such amount.

Dated: March 18, 1976.

William J. Sweeney
Administrative Law Judge

2082. In Re: Swift Chemial Company, EPA Region IX, April 23, 1976. (I.R.&R. No. 112C, I.D. Nos. 92776, 111607, 113623, 113621, 113620 and 111606.)

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)(2); 136(q)(1)(G). The action pertained to products held for distribution or sale between November 2, 1973, and February 13, 1975, at Swift Chemical Company, Los Angeles, California. The pesticides involved were **VIGARO ROSE SPRAY, VIGARO LIQUID DIAZINON** and **K-MART SNAIL AND SLUG KILLER MEAL**; charges included adulteration and misbranding—product contaminated with an additional active ingredient not listed on the label and lack of warning or caution statement on labels.

The respondent signed a Consent Agreement. The Final Order assessed a civil penalty of $11,500.00.

2083. In Re: Consan Pacific, Inc., EPA Region IX, April 28, 1976. (I.F.&R. No. IX-69C, I.D. Nos. 113807, 113808 and 113809.)

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)(E) and 136(q)(1)(F). The action pertained to a product held for distribution or sale on or about May 8, 1974, at Consan Pacific, Inc., Whittier, California. The pesticide involved was **PHYSAN 20**; the charge was misbranding—lack of adequate warning or caution statement and adequate directions for use.

The respondent signed a Consent Agreement. The Final Order assessed a civil penalty of $450.00.

2084. In Re: Consan Paicifc, Inc., EPA Region IX, April 28, 1976. (I.F.&R. No. IX-87C, I.D. No. 111173.)

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)(E) and 136(q)(1)(F). The action pertained to a product held for distribution or sale on or about December 12, 1974, at Consan Pacific, Inc., Whittier, California. The pesticide involved was **PHYSAN 20**; the charge was misbranding—lack of adequate warning or caution statement and lack of adequate directions for use.

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

2085. In Re: Zep Manufacturing Company, EPA Region IX, May 3, 1976. (I.F.&R. No. IX-122C, I.D. No. 111164.)

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)(2)(C)(i) and 136(q)(2)(c)(iii). The action pertained to a product held for distribution or sale on or about November 25, 1974, at Zep Manufacturing Company, Santa Clara, California. The pesticide involved was **FORMULA 165**; the charge was misbranding—lack of net content statement, lack of name and address of producer and labels bore a false or misleading statement.

The respondent signed a Consent Agreement. The Final Order assessed a civil penalty of $1,440.00.

2086. In Re: Chem-Tab Company, EPA Region IX, May 7, 1976. (I.F.&R. No. IX-126C, I.D. No. 125070.)

This was a civil action charging the respondent with violating the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 135a(a)(1); 136(a)(1)(E); 135b; 136(q)(2)(A) and 136(q)(1)(A). The action pertained to a shipment made on or about July 31, 1975, from

Long Beach, California, to Warren, Michigan. The pesticide involved was **MR. O'S SUPERSANITIZING TABLETS**; charges included nonregistration and misbranding—lack of ingredient statement and labels bore false or misleading statements.

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

2087. In Re: Bower Industries, Inc., Perma-Guard Division, EPA Region IX, May 12, 1976. (I.F.&R. No. IX-101C, I.D. Nos. 112564, 112565, 112566 and 112567.)

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(q)(1)(E). The action pertained to a shipment made between June 2, 1973, and June 4, 1974, from Phoenix, Arizona, to DeSoto, Kansas. The pesticides involved were **PERMA-GUARD HOUSEHOLD INSECTICIDE D-20, PERMA-GUARD GRAIN OR SEED STORAGE INSECTICIDE D-10, PERMA-GUARD GARDEN AND PLANT INSECTICIDE D-21** and **PERMA-GUARD PET INSECTICIDE D-32**; charges included claims made on labels differed in substance from those made in connection with its registration and misbranding—lack of adequate warning or caution statement on labels.

The respondent signed a Consent Agreement. The Final Order assessed a civil penalty of $2,400.00.

2088. In Re: E. W. Smith Chemical Company, EPA Region IX, May 19, 1976. (I.F.&R. No. IX-123C, I.D. No. 111336.)

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(q)(1)(F). The action pertained to a product held for distribution or sale on October 7, 1975, at E. W. Smith Chemical Company, City of Industry, California. The pesticide

involved was **EMS EMSTROL**; the charge was misbranding—lack of warning or caution statement and lack of adequate directions for use.

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

2089. In Re: Thompson-Hayward Chemical Co., EPA Region IX, June 6, 1976. (I.F.&R. No. IX-127C, I.D. No. 111282.)

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)(F). The action pertained to a product held for distribution or sale on August 21, 1975, at Thompson-Hayward Chemical Co., Fresno, California. The pesticide involved was **SUPER MERGE 3**; the charge was misbranding—lack of adequate directions for use.

The respondent signed a Consent Agreement. The Final Order assessed a civil penalty of $1,890.00.

2090. In Re: International Paint Company, EPA Region IX, June 11, 1976. (I.F.&R. No. IX-132C, I.D. No. 111615.)

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)(F). The action pertained to a product held for distribution or sale on July 1, 1975, at International Paint Company, South San Francisco, California. The pesticide invovled was **INTER-TOX 885 WOOD PRESERVATIVE**; the charge was misbranding—lack of directions for use.

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

2091. In Re: Auto Chlor Systems of Phoenix, EPA Region IX, June 14, 1976. (I.F.&R. No. IX-125C, I.D. No. 111727.)

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 March 12, 1975, at Auto Chlor Systems of Phoenix, Phoenix, Arizona. The pesticide involved was **AUTO 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 $270.00.

2092. In Re: Jac Son Company, EPA Region IX, June 15, 1976. (I.F.&R. No. IX-128C, I.D. No. 111767.)

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)(1)(D). The action pertained to a product held for distribution or sale on October 2, 1975, at Jac Son Company, Burbank, California. The pesticide involved was **BENZ-ALL GERMICIDAL CONCENTRATE**; the charge was misbranding—lack of warning or caution statement, lack of establishment registration number and labels bore a false or misleading statement.

The respondent signed a Consent Agreement. The Final Order assessed a civil penalty of $870.00.

2093. In Re: Wasco Products, Inc., EPA Region IX, June 15, 1976. (I.F.&R. No. IX-129C, I.D. Nos. 125200 and 125164.)

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)(A) and 136(c)(1). The action

pertained to shipments made on August 26 and September 25, 1975, from Anaheim, California, to Winona and Minneapolis, Minnesota. The pesticide involved was **JIFFY FORMULA 100 WATER BED CONDITIONER**; 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 $1,518.00.

2094. In Re: Edfred Chemical Company, EPA Region IX, June 21, 1976. (I.F.&R. No. IX-136C, I.D. No. 108227.)

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); 136a; 136j(a)(2)(L) and 136e. The action pertained to a shipment made on or about October 31, 1975, from San Jose, California, to Houston, Texas. The pesticide involved was **EDFRED SHOWER STALL AND TILE CLEANER**; charges included nonregistration of product and producing establishment.

The respondent signed a Consent Agreement. The Final Order assessed a civil penalty of $330.00.

2095. In Re: Engler Chemical Company, EPA Region IX, July 20, 1976. (I.F.&R. No. IX-140C, I.D. No. 111649.)

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. The action pertained to a product held for distribution or sale on March 3, 1976, at Engler Chemical Company, Los Angeles, California. The pesticide involved was **G7 CLEANER WAX REMOVER**; the charge was nonregistration.

The respondent signed a Consent Agreement. The Final Order assessed a civil penalty of $320.00.

2096. In Re: Ling Fuang Industries, EPA Region IX, July 21, 1976. (I.F.&R. No. IX-121C, I.D. Nos. 111244, 111245, 111247, 111248 and 111249.)

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)(1)(A); 136(q)(1)(F); 136(q)(1)(G); 136(q)(2)(C)(i) and 136(q)(2)(C)(iv). The action pertained to shipments made between July 12, 1974, and March 31, 1975, from Oakland, California, to Los Angeles, California. The pesticides involved were **ANGEL CITY LAWN WEED KILLER, ANGEL CITY ROSE DUST, ANGEL CITY 10% CHLORDANE DUST, ANGEL CITY ROSE SPRAY** and **ANGEL CITY GARDEN SPRAY**; charges included adulteration and misbranding—strength or purity fell below the professed standard of quality as expressed on its labeling, lack of registration number, lack of warning or caution statement, lack of directions for use, bore a false registration number and lack of name and address of producer.

By Accelerated Decision dated July 23, 1976, Administrative Law Judge William J. Sweeney dismissed, without prejudice, the civil complaint issued by Region IX.

2097. In Re: Central Garden Supply, EPA Region IX, July 22, 1976. (I.F.&R. No. IX-138C, I.D. No. 111519.)

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 January 14, 1975, from South San Francisco, California, to Reno, Nevada. The pesticide involved was **COOKE PRESSURIZED SPIDER-KILL**; the charge was nonregistration.

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

2098. In Re: Do It Yourself Insecticide Company, EPA Region IX, July 26, 1976. (I.F.&R. No. IX-137C, I.D. No. 111901.)

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); 136a; 136j(a)(1)(E); 136(q)(1)(A); 136(q)(1)(G) and 136(q)(1)(D). The action pertained to a product held for distribution or sale on February 13, 1976, at Do It Yourself Insecticide Company, Compton, California. The pesticide involved was **DO IT YOURSELF INSECTICIDE**; charges included nonregistration and misbranding—lack of warning or caution statement, lack of producing establishment number and labels fore a false or misleading statement.

The respondent signed a Consent Agreement. The Final Order assessed a civil penalty of $522.00.

2099. In Re: Pioneer Chemical Company, EPA Region IX, August 4, 1976. (I.F.&R. No. IX-141C, I.D. No. 111641.)

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)(F) and 136(q)(1)(A). The action pertained to a product held for distribution or sale on March 2, 1976, at Pioneer Chemical Company, Los Angeles, California. The pesticide involved was **PIO RINSE 75**; the charge was misbranding—lack of warning or caution statement, lack of directions for use and labels bore a false or misleading statement.

The respondent signed a Consent Agreement. The Final Order assessed a civil penalty of $630.00.

2100. U.S. V. 999 units, more or less, of a product labeled in part "Mini-Silverator Water Purifiers," an unknown quantity of a pesticide labeled in part, "Formula I Silverbooster," and an unknown quantity of a pesticide labeled in part, "Formula II Silverbooster". U.S. District

Court, Northern District of California, May 7, 1976. (I.F.&R. No. IX-IS, I.D. No. 111309.)

This was a seizure action charging the product with being in violation of the the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 136a(a); 136j(a)(2)(I) and 136k(a). The action pertained to a product held for distribution or sale on August 11, 1975, at American Water Purification, Inc., Pleasant Hill, California. Charges included nonregistration, misbranding and violation of a Stop Sale, Use or Removal Order.

The Judgment Decree ordered a release of the property subject to re-seizure if property not properly relabeled within 72 hours from time of repossession by Claimant.

	N.J. No.
Applegate's Drug Store, Inc. (Civil)	2069
Auto-Chlor System of Louisiana and Southern Mississippi, Inc. (Civil)	2071
Auto Chlor Systems of Phoenix (Civil)	2091
Bartels and Shores Chemical Co. (Civil)	2078
Blue Magic Company (Civil)	2065
Bonide Chemical Company (Civil)	2055
Bower Industries, Inc. (Civil)	2087
Central Garden Supply (Civil)	2097
Chem-Tab Company (Civil)	2086
Conson Pacific, Inc. (Civil)	2083
Conson Pacific, Inc. (Civil)	2084
Cutting Division of Harvest Industries, Inc. (Civil Hearing)	2081
Decorator Specialties Company, Inc. (Civil)	2051
DeMert & Dougherty, Inc. (Civil)	2077
Do It Yourself Insecticide Company (Civil)	2098
E. W. Smith Chemical Company (Civil)	2088
Edfred Chemical Company (Civil)	2094
Edward Leeds, both individually and d/b/a, Cougar Chemical (Civil)	2064
Engler Chemical Company (Civil)	2095
Formula I Silverbooster (Seizure)	2100
Formula II Silverbooster (Seizure)	2100
Gulf Oil Corporation (Civil Hearing)	2061
Hawk Industries, Inc. (Civil Hearing)	2059
International Paint Company (Civil)	2090
Jac Son Company (Civil)	2092
James D. Rice (Criminal)	2075
Jet-Aer Corp. (Civil)	2057
Ling Fuang Industries (Civil)	2096
Madison Bionics, Division of Chemtrust Industries Corporation (Civil)	2080
March Chemical Company, Inc. (Civil)	2070

Mid-America Formulators, Inc. (Civil) 2062
Mini-Silverator Water Purifiers (Seizure) 2100
National Scientific Co., Inc. (Civil) 2068
Pioneer Chemical Company (Civil) 2099
Progress Chemical Company (Civil) 2066
Pur-All Paint Products Co., Inc. (Civil Hearing) 2060
Red Wing Chemical Company, Inc. (Civil) 2063
Riverside Chemical Company (Civil) 2073
Riverside Chemical Company (Civil) 2074
Sani-Kem Corporation (Civil) 2076
Swift Agricultural Chemicals Corporation (Civil) 2072
Swift Chemical Company (Civil) 2082
Tecumseh Animal Clinic (Civil) 2079
Thompson-Hayward Chemical Co. (Civil) 2089
Troy Chemical Company (Civil) 2052
Troy Chemical Company (Civil) 2053
Troy Chemical Company (Civil) 2054
Vineland Laboratories, Inc. (Civil) 2058
Wasco Products, Inc. (Civil) 2093
Water Services, Inc. (Civil Hearing) 2067
Xterminator Products Corp. (Civil) 2056
Zep Manufacturing Company (Civil) 2085