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IN THE MATTER OF:

DOCKET NO. I.F.&R. VI-138-C

MONTY'S ENVIRONMENTAL SERVICES, INC.  
Houston, Texas

-----  
Marvin E. Jones  
Administrative Law Judge  
324 East 11 Street, Room 101  
Kansas City, Missouri 64106

88 JUNE

INITIAL DECISION

By Complaint filed June 18, 1979, and subsequently amended on September 14, 1979, the U.S. Environmental Protection Agency (Complainant) charged Monty's Environmental Services, Inc. (hereinafter Monty's) with violation of the Federal Insecticide, Fungicide, and Rodenticide Act, as Amended (7 U.S.C. 136 - 136(y) (1978)) herein referred to as FIFRA, alleging that Respondent produced and, on June 13, 1979, held for sale at its place of business its product "The Eliminator", allegedly a "device" as defined by Section 2(n), 7 U.S.C. 136(h), which device was misbranded in that the label thereon bears statements which are, in fact, false. Said statements are listed in subject Complaint as follows:

- (a) controls rats and mice;
- (b) also helps control roaches and silverfish;
- (c) creates nervous disorientation in certain lower animals and thereby brings about their death;
- (d) effective control of pests;
- (e) proved effective in grain elevators, feed lots.

Said Complaint further states Respondent has thereby violated Section 12(a)(1)(F), 7 U.S.C. 136j(a)(1)(F), which provides as follows:

"Section 12. UNLAWFUL ACTS.

"(a) In general.--

"(1) Except as provided by subsection (b), 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--

"(F) any device which is misbranded."

Section 2(q)(1(A) defines "misbranded", providing:

"(1) A pesticide is misbranded if--

"(A) its labeling bears any statement, design, or graphic representation relative thereto or to its ingredients which is false or misleading in any particular;"

Section 2(p) defines LABEL and LABELING as follows:

"(1) LABEL.--The term 'label' means the written, printed, or graphic matter on, or attached to, the pesticide or device or any of its containers or wrappers.

"(2) LABELING.--The term 'labeling' means all labels and all other written, printed, or graphic matter--

"(A) accompanying the pesticide or device at any time; or

"(B) to which reference is made on the label or in literature accompanying the pesticide or device..."

Section 2(h) defining "device" states:

"(h) DEVICE.--The term 'device' means any instrument or contrivance (other than a firearm) which is intended for trapping, destroying, repelling, or mitigating any pest or other form of plant or animal life..."

On or about June 28, 1979 Respondent filed its answer to the Complaint which admits that on or about June 13, 1979, it produced and held for sale "The Eliminator" at its place of business in Houston, Texas; denies that said product is a device under said Section 2(n); and denies that "said device" is misbranded. Said answer also alleges the following:

"Based upon Monty's own examinations, testing, actual field experience, and the experience of customers of Monty's,

said device does, through the dissemination of electromagnetic radiation, ward off and repel rats from an area of 150 foot radius from the position at which the device is placed. Monty's denies that its "label on said device" bears statements that its product will kill rodents...".

Complainant, at the Hearing herein held in Houston, Texas on Wednesday, September 19, 1979, stated in the record (T. 5) as a preliminary statement, that the sole issue to be here determined is the efficacy of Monty's device "The Eliminator" in the control and killing of rodents and insects. The parties have stipulated that, if Complainant's position is sustained, an appropriate civil penalty under the civil penalties assessment guidelines is \$1,250.00. Monty's (T. 6 and 7) agreed that Complainant counsel had stated the "core issue" and that the evidence at the hearing is concerned "almost solely with the issue of the efficacy of the tool". Monty's, however, indicated that it would, in its proposed findings, conclusions, brief and argument, urge the determination herein of whether a stop sale, use and removal order, dated June 13, 1979 (Complainant Exhibit 4) was validly issued. As said Exhibit 4 recites, on its face, that it is premised on Monty's violation of Section 12(a)(1)(F), decision on the sole or core issue will be determinative of the further issue urged by Monty's.

Complainant's Exhibit 2 (pages 3 and 4) is a brochure obtained by Witness James S. Halliday, II, from one Larry Streck, a chemist with the U.S. Environmental Protection Agency in Houston, Texas. At the time he turned over the brochure to the witness, Streck stated that it had been obtained from a booth located in the Astrohall during a Livestock Show on February 25, 1979. The brochure (page 4) lists the name and address and telephone number of "Monty's" along with the following statement:

"The Eliminator, from Monty's Environmental Services, Inc., is a revolutionary electronic device to control rats, mice and many insect pests--without poisons.

"The pest does not have to come in direct contact with the instrument. Its effective range is up to 150' radius, it can be adapted for AC or battery operation, and is water-proofed for outdoor installation.

"Simply stated, the eliminator creates a mild magnetic field which is absolutely harmless to humans and domestic animals, but which creates nervous disorientation in certain lower animals and insects and thereby brings about their death.

"This means, for the first time you can have effective control of pests around your farm, business, or home without the dangers or continuing expense of poisons and traps.

"The Eliminator has been proved effective in grain elevators, feedlots, restaurants, and other places which often have difficult pest control problems.

"Eliminate poisons, and control pests. Get the Eliminator. Model 500 now available. \$500.00."

Monty's Exhibit B (T. 70) is a brochure describing "The Eliminator" and states, (front side):

"The Eliminator NOW CONTROLS RATS AND MICE WITHOUT POISONS. PERIOD."

The second paragraph states further:

"You can eliminate the problem in your area with THE ELIMINATOR by Monty, Rodent Controller...The one from Monty Environmental Services, Inc., that has been developed through documented scientific research. The one that controls rat and mice infestation, continually without poisons.

And on the back side of said Exhibit B (T. 70 and 71):

"Simply stated, the Eliminator by Monty, Rodent Controller, creates a magnetic field with totally random pulsations which is absolutely harmless to humans and domestic animals, but which creates nervous disorientation in rats and mice and thereby brings about their continual elimination in the affected area."

The brochure continues with representation that the described device can furnish effective control of rats and mice.

Monty's Exhibit A (also identified and received as Complainant's Exhibit 10) is a letter dated May 9, 1979, addressed to Michael Wood of the US EPA from Charles C. Gordon of the National Bureau of Standards (NBS) in Washington, D.C. Mr. Gordon appeared and testified at the Hearing. Said letter reports that NBS conducted a limited examination of subject pest control device (EPA Sample No. 150198). The back of the unit was removed for internal examination and its components noted. The output of the unit, powered by 115 volt, 60 Hz to 12 volt dc, "apparently drives a single coil wound on a ferrous rod of about 1/2-inch diameter and 4-inches in length." When examined with a compass, a weak electromagnetic field (EMF) was detected. The field strength decreased rapidly with distance from the unit and would vary inversely with the distance cubed ( $1/d^3$ ) from the unit. At a distance of one meter, the EMF from the unit is much less than the earth's field (0.5 gauss). These findings are not inconsistent with the Technical Report of Dr. Robert Benson who tested The Eliminator (Model 600) (Monty's Exhibit C).

It was further noted that the internal components indicate similarity to the Magna-Pulse and Nature Shield devices (both of which use three coils in a delta form) while subject unit uses a single coil as its output.

Mr. Gordon testified (T. 105) that he examined 14 pest control devices, furnished by US EPA, to investigate their electromagnetic characteristics, and the magnitude of the electromagnetic radiation (EMR). Of the units examined, eight units produced EMR of a sinusoidal format, that were driven from the normal wall plug, 115 volt, 60 cycles-- 60 Hertz source. The others were battery-operated and were controlled with digital circuitry and produced pulses and some steady-state field. The latter units were examined for pulse output only. The Eliminator

(3 models) was tested and determined to be in the latter pulse group (Group one), as were two units produced by other companies, Magna-Pulse and Nature Shield, which have the same number and type of components as The Eliminator. The components, observed in the aforementioned units, are not sophisticated but can be obtained in the market place. Gordon testified, on cross examination, that the detected output--pulses--from The Eliminator, Magna-Pulse and Nature Shield units was in the same order of magnitude; when measured at a finite distance away, they produce magnetic fields that are of a low level, in the tenth gauss (0.1 gauss) range; some variation can exist between the respective units in their pulse-field output because the components used are commonly plus or minus 20 percent in accuracy; because the Magna-Pulse and Nature Shield units were "potted" they were unable to determine whether or not a dc field existed from those units.

Witness Dr. Walter E. Howard is a professor of wildlife biology and has been employed by the University of California at Davis for 32 years in the field of rodent control. He agreed to test devices whose outputs were electromagnetic fields, with the restriction that research by him and his colleagues be devoted to testing the principle and the concept. In this regard, his testimony stated (T. 144):

"I did not want to get into testing equipment because I've been through this before. They change the name, they change the label, they change one wire and you have to go all through these expensive steps again."

US EPA sent Dr. Howard electromagnetic devices sold for rodent control which were tested biologically under extremely controlled conditions involving wild rats--as distinguished from laboratory rats-- and house mice, trapped in the wild and then bred in the laboratory to produce a population composed of a gene pool that wild animals have. The experiments conducted by the witness, in collaboration with Mr. Rex E.

Marsh resulted in the submission by them of two reports: "Report of Efficacy Studies of the Nature Shield Rodent Control Device" (Complainant Exhibit 11) and "Report of Efficacy Studies of the Magna-Pulse Rodent Control Device (Complainant Exhibit 12). Dr. Howard concluded (T. 151) that nothing on the order of abnormal behavior was observed during the course of their testing which they considered attributable to EMFs from the electronic devices. He considers all electromagnetic devices now on the market to be worthless for the control of rodents in a warehouse, house, fields or other locations (T. 152), as they have tested a broad field of magnetic devices (T. 154). There is a natural fluctuation that occurs in all rodent population and a decline at the time an EMF device is installed might influence one to improperly conclude that such decline can be attributed to said device. With the small magnetic field attributed to The Eliminator, Dr. Howard concluded that the statement contained in Monty's brochure (Complainant Exhibit 2, page 4) is "not correct". (T. 160).

Dr. Howard's Simulated Field Test, using a Nature Shield device, reported in Complainant Exhibit 11, supra, disputes the claims of the Nature Shield brochure that "Contro-clusive magnetism" provides "null effects in pest's nervous system eliminating the ability for normal response system to register a survival reaction"; and the further claim that the pest "shuts down--it stops eating, drinking, producing". In contrast, his findings were that the test animals gained weight as their food and water intake did not vary greatly; no abnormal behavior was observed; two female rats conceived after the device was "on" and bore offspring though exposed to said device for approximately 23 days.

Dr. Reiersen's report "Performance of Electromagnetic Devices Against Termites, Cockroaches and Flour Beetles" (Complainant Exhibit 13) generally voices conclusions such as those arrived at by Dr. Howard. He

biological effects under laboratory or field conditions were observed with any of the devices tested and he therefore concluded that Magna-Pulse, Nature Shield and Sigma (all electromagnetic devices) had no measurable effect on any of the insects tested and that they would have no effect on other structural or household insect pests.

Monty's witness Dr. Clifford J. Sherry is an assistant professor in the Biology Department of Texas A&M University. At the request of Monty's he performed a series of tests involving The Eliminator, which he referred to as a device similar to Complainant Exhibit 15. His study over a total period of 66 days dealt with the effect of The Eliminator on eating, drinking, aggressive behavior and general activity of Long-Evans hooded rats. He used two sets of cages. Each set of two cages was connected together by hollow tubing. Each set of cages contained three male animals. The experiment was so set up as an attempt to stress the animals by housing them so they would be required to go through a small tube just large enough to allow passage of one animal at a time. For one set of animals The Eliminator was present and turned on; for the other set The Eliminator was present and turned off. The second set was housed so as to eliminate the steady-state and pulsed magnetic field. He observed an increase in aggressive behavior in both sets of animals, but the increase "seemed to be larger in the experimental animals, the ones exposed to The Eliminator". He acknowledged (T. 79) that being confined in small spaces will, in and of itself, produce a response of heightened aggressive behavior; however, from observation, he noted a greater response in the group in the box on which the subject device was turned on. One such observation was rapid cannibalization even though food and water was available which he interpreted as the result of increased aggressiveness. No changes were noted in eating, drinking or in the level of general activity. He concluded that it was not clear that the animals attempted



to avoid the effects of The Eliminator; that the responses observed could have been attributable to some aspect of their environment of which he was unaware. Dr. Sherry did not know what caused the death of four experimental animals, three of which were found in the shielded cage and one in the unshielded cage (Complainant Exhibit 16; T.94). Dr. Sherry stated that due to the size of the sample used by him and the time length of the tests conducted by him, his findings were inconclusive (when questioned as to whether rats could be eliminated by use of subject device--The Eliminator). He further stated (T. 100) that if it were shown that The Eliminator does, in fact, increase aggressive behavior in the test animals, he believes they would tend to avoid that situation.

Monty's Exhibits D, E, F, G and H are 13 letters from purchasers of "The Eliminator" who commend its use with varying degrees of enthusiasm, but who, in each instance give it a positive endorsement.

In consideration of the foregoing, and based on the formal record made herein, I make the following

#### FINDINGS OF FACT

1. Monty's Environmental Services, Inc. (Monty's) is a Texas corporation domiciled in Houston, Harris County, Texas (T. 4).
2. Monty's engages in the business of producing and selling "The Eliminator", an electronic device manufactured by it to control rats, mice and insect pests.
3. Monty's product, "The Eliminator" is a device as that term is defined in Section 2(h), 7 U.S.C. 136(h).
4. The Federal Insecticide, Fungicide and Rodenticide Act does not require that pesticide devices be pre-market tested for efficacy or safety (T. 31).

5. Monty's claims and represents by a brochure distributed at a livestock show on February 25, 1979 that the target pests (to be controlled) do not have to come in direct contact with its device whose effective range is up to 150 feet radius (Complainant Exhibit 2) and that said device creates a magnetic field which creates nervous disorientation in certain lower animals and insects and thereby brings about their death (Complainant Exhibit 2, page 4).

6. On another brochure (Monty's Exhibit B; T. 70), dated 1979, Monty's claims and represents that said device "controls rats and mice infestation continually without poisons" and "creates nervous disorientation in rats and mice and thereby brings about their continued elimination in the affected area".

7. At the request of the US EPA, the National Bureau of Standards (NBS) Center for Consumer Product Technology, evaluated eight models of electromagnetic pest controllers to characterize any detectable electromagnetic output (as opposed to biological testing done by others).

Visual and X-ray inspection and electromagnetic measurements showed the units can be grouped into two categories based on characteristics of the output signal--the principal characteristics being either a pulse output or a 60 Hz ac output. For the pulse output device, no significant external EMF was found. The 60 Hz units were found to generate detectable magnetic fields.

NBS was also requested to determine if models have any commonality of their outputs which would allow grouping or classifying of similar units for biological testing; and determine the feasibility of developing a standard test method for classifying units based on the nature of the output. A report issued March 1979 (Complainant Exhibit 9) demonstrate that their efforts were directed to complying with US EPA's request.

8. The Eliminator pest control device (EPA Sample No. 150198) manufactured by Monty's was the subject of a limited examination by the NBS in Washington, D.C. on or about May 9, 1979, consisting of a laboratory test for any 60 Hz electromagnetic field from the unit. No such significant EMF was detected, but it was determined to be a pulse output device, hereinafter referred to as the Pulse Group, or as Group One (T. 107).

9. Said examination, above, further consisted of removal of the back of the unit for internal examination by noting visually the integrated circuit components.

10. The components noted in "The Eliminator" (EPA Sample 150198) were identified as the same number and type as those contained in the Magna-Pulse and Nature Shield pest control devices (T. 133) which, with "The Eliminator", were classified as pulse operating devices (pulse group) (T. 105 and 106) or Group One (T. 107). The Eliminator is a 9-volt unit, drawing from a converter that converts from 115 volts, 60 Hz to 9 volts. The Nature Shield and Magna-Pulse were battery operated (dc) units, 12 volt supply.

11. Though the subject Eliminator, tested by NBS, had only a single load coil, where the Magna-Pulse and Nature Shield had three load coils, all three units contained the same number of components and the detected output--pulses--was in the same order of magnitude (T. 133), i.e., each produced practically identical magnetic fields of a low level in the 1/10th gauss range, at a distance of six inches from the unit (T. 122).

12. The field strength of each of the subject devices in the pulse group decreased rapidly with distance from the unit. At a distance of six inches, the EMF is approximately 0.1 gauss, much less than the earth's field which approximates 0.5 gauss.

13. NBS visually inspected the components of The Eliminator and therefore it was not necessary to use X-ray. Components of the Magna-Pulse and Nature Shield units were X-rayed because their components were encased in metal containers and potted in potting compound; thus their visual inspection without the use of X-ray would have required destruction of the circuitry.

14. Biological testing, using the Nature Shield (Official Sample No. 131918) and two Magna-Pulse units (Official Sample No. 131919) were conducted as hereinbefore described, supra, page 6, using control (untreated or unexposed) groups and test (exposed to EMF) groups, indicated that said units and the EMF by them produced are ineffective in controlling rodents, and, particularly, that said units are:

- a. ineffective in producing mortality;
- b. ineffective in adversely altering feeding, drinking and other behavior;
- c. ineffective in preventing female rodents from conceiving and reproducing.

Further, said tests warranted the conclusion that the devices, functioning and in good working order, do not in any way live up to claims of their manufacturers and distributors of providing control of rodents or insects (Complainant Exhibits 11, 12, and 13).

15. Rodents and insects are short-lived and it is not unusual for them to die in both test and control groups for unexplainable reasons (Complainant Exhibit 11, p. 6; Exhibit 12, p. 5; and Exhibit 13, p. 18).

#### CONCLUSIONS OF LAW

1. "The Eliminator" produced by Monty's is a device as that term is defined by Section 2(h), 7 U.S.C. 136(h).

2. The biological testing done on the EMF devices, Magna-Pulse and Nature Shield, which, with "The Eliminator", were classified as devices (a) having the same number and type of components; (b) having a pulse output (EMF) of the same magnitude, and (c) which produce magnetic fields that are of a low level, in the tenth gauss (0.1 gauss) range, is determinative of the efficacy of "The Eliminator" in the control of rats, mice, roaches and silverfish; and whether it affords an effective control of pests generally.

3. On the basis of the evidence and on the facts found herein, The Eliminator is a device that is ineffective when used to trap, destroy, repel or mitigate rats, mice, roaches and other target pests.

4. Monty's product, "The Eliminator", is misbranded in that its labeling (Monty's Exhibit B) bears statements and graphic representations which are false and misleading. Complainant Exhibit 2, p. 3 and 4, a brochure distributed at a livestock show, while technically not labeling, is relevant to the salient issue herein and can properly be considered in determining the meaning of language in Monty's representation appearing on said labeling.

5. Monty's, when it distributed, sold, offered for sale, held for sale or offered to deliver "The Eliminator" violated Section 12(a)(1)(F) of the Federal Insecticide, Fungicide and Rodenticide Act, as amended, (7 U.S.C. 136j(a)(1)(F)).

6. For its violation of FIFRA, Monty's should be subject to and it is hereinbelow assessed, an appropriate civil penalty.

7. By reason of facts found and the conclusions reached herein as to the inefficacy of Monty's product "The Eliminator", it is further concluded, held and adjudged, that the Stop Sale, Use and Removal Order,

dated June 13, 1979 (Complainant Exhibit 4) was validly issued (Section 13, FIFRA) and should not be disturbed.

DISCUSSION

The parties agree that the sole or core issue to be determined is whether subject device is effective, as represented by Monty's, for the destruction or control of rodents or other pests.

Respondent insists that Complainant has failed in its proof because it has not (biologically) tested Monty's rodent control device (so as to provide direct proof of its efficacy). It characterizes the tests of NBS, testified to by Mr. Charles Gordon, as follows:

"The Government, by its own principles of classification, has determined for itself simply that "The Eliminator" fits into the category of electromagnetic control devices, and that, since two devices other than The Eliminator, and which have been similarly classified, were tested for their effects on rodents by professionals at the University of California at Davis and found wanting, The Eliminator must be found wanting also."

Respondent correctly states the basis on which the determination was made, but then seeks to make that basis suspect by suggesting that NBS indicated differences "between the electromagnetic properties and capabilities of The Eliminator" and the other devices.

With this contention I do not agree. Mr. Gordon testified that the three devices:

- (1) were tested and determined to be in the pulse group (group one) (T. 106);
- (2) have the same number and type of components (T. 107);
- (3) have an EMR output--pulses--in the same order of magnitude--that, when measured at a finite distance away (six inches) they

produce magnetic fields that are of a low level, in the tenth gauss (0.1 gauss) range (T. 122).

Mr. Gordon further testified that the components found in the three devices were not sophisticated, and could be obtained in the market place. Respondent's contention places unwarranted emphasis on the statement that some variation can exist between the respective units in their pulse-field output because the components used are commonly plus or minus 20 percent in accuracy. The testimony stresses that all are in the same order of magnitude -- "I mean if it (field-detected at six inches) is 0.1 gauss, the other won't be 0.5 or 1 gauss." It is apparent that said testimony of a "variance" in the pulse-field output of 0.1 gauss (1/5 of the EMF of the earth) is not indicative of a "difference" in the devices. Further, said testimony establishes that the field strength decreases rapidly with distance from the unit. If the distance is increased to 20 times (10 feet) the field is decreased to 1/8000 of that existing at six inches (T. 112). When the distance is increased to 150 feet (the radius within which Respondent claims efficacy for his device) it is obvious that though a variance, if present, persists, even to the extent suggested, the similarity is so substantial that no actual difference is discernable. (See *Lever Bros. v Atlas Assur. Co.*, 131 F.2d, 770 1.c. 777(11) (CA 7, 1942)).

Dr. Howard undertook the biological testing of the other pulse group devices (Magna-Pulse and Nature Shield) for US EPA. His undertaking, as outlined supra, pages 6 and 7, was with the restriction "as long as we could devote our research to testing the principle and the concept" (T. 144). He further stated:

"...we learned, in the ultrasonic devices to test the principle and the concept and then all of the new devices will fall into the same general category, and you do not have to repeat the expensive and time-consuming laboratory work..."

It then became apparent that proof of the inefficacy of other and further devices would be based on circumstantial evidence as in the instant case. Once biological testing determined the effect and capabilities of electromagnetic devices of the categories tested, the principle and concept enunciated by a biological test on one or more of the devices of a particular class or category is controlling as to the efficacy or inefficacy of all such devices so categorized. The function of NBS was to perform tests to determine only the classification category, or group, of a subject device. As evidenced by Dr. Howard's reports (Complainant Exhibits 11 and 12), his biological testing was objectively carried out under very controlled conditions with the conclusion that the two devices tested, (and any electromagnetic device) "cannot effectively control rodents in a warehouse, in a house, or in fields"; that any such device is worthless for control of rodents (T. 152).

In consideration of the biological findings presented and the further tests of NBS classifying the Eliminator (based on its emissions 1. 34) in the same grouping as the test devices, it follows that any conclusions reached as to inefficacy of the Magna-Pulse and Nature Shield are equally applicable to "The Eliminator".

"Circumstantial evidence" is evidence which, without going directly to prove the existence of a fact, give rise to a logical inference that such fact does exist. Facts in issue may be proved either by "direct" evidence or "indirect" (circumstantial) evidence. (See United Textile Workers of Amer, AFL-CIO v Newberry Mills, Inc., 238 FS 366, 1.c. 372 (WDSC 1965)).

In order to establish the existence of fact, direct evidence is not required. Circumstantial evidence is not only sufficient, but in some instances may be more certain and satisfying and more persuasive



than direct evidence. (Rogers v Mo.Pac. R. Co., 352 US 500 77 S.Ct 443, 1.c. 449, note 17 (1957); Michalic v Cleveland Tankers, Inc., 36 US 325, 81 S.Ct. 6, 1.c. 11(5) (1960)).

On this record I find Dr. Clifford Sherry's tests (described supra, pages 8 and 9) to be inconclusive as to the efficacy of the devices tested by him (T. 101 and 169). I have also considered the testimonials presented by Monty's as Monty's Exhibits D, E, F, G, and As previously observed, supra, page 9 hereof, an absence or mitigation of the target pests, without more, is there reported. Little weight can be accorded this evidence, as no explanation for such observation is presented other than the presumption arising from the presence of subject device. This presumption is amply rebutted in this record by showing of the inefficacy of subject device and like devices emitting electromagnetic radiation (EMR). Additionally, I find that the abatement noted in such testimony can possibly be attributed to many causes other than EMR, such as the seasonal population fluctuation (T. 158), the duration of the life of such pests (T. 150) and the facts present or implicit in the record that chemical pesticides were in fact previously applied in many, if not all, of the premises described.

#### CIVIL PENALTY

In determining the amount of the penalty to be assessed, Section 14(a)(3) of the Statute (7 U.S.C. 1361(a)(3)) requires that there shall be considered the appropriateness of the penalty to the size of Responder's business, the effect on Responder'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 also be considered Responder's history of compliance with the Act and any evidence of good faith or lack thereof. The Rules of Practice further provide,

Section 168.46(b), that "the Administrative Law Judge may at his discretion increase or decrease the assessed penalty from the amount proposed in the Complaint".

In the instant record, one of the preliminary matters raised prior to hearing was the announcement that a stipulation by the Complainant (who offered an amendment to the instant complaint reducing the proposed penalty sought therein from \$2,475.00 to \$1,250.00) and the Respondent to the effect that the appropriate penalty for a Category II violator (under the guidelines) is \$1,250.00.

I have considered the Statute and the Regulations pertinent hereto, and find that the penalty stipulated to, in the event the violation is found to have occurred as charged, is not inappropriate or unreasonable. Having further considered the entire record and based on the Findings of Fact and Conclusions herein, I propose that a civil penalty in the sum of \$1,250.00 be assessed against the Respondent.

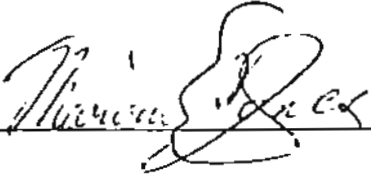
This Initial Decision and the following proposed Final Order assessing a civil penalty shall become the Final Order of the Regional Administrator unless appealed or reviewed by the Regional Administrator as provided in 40 CFR 158.46(c):

"FINAL ORDER

Pursuant to Section 14(a)(1) of the Federal Insecticide, Fungicide and Rodenticide Act, as amended (7 U.S.C. 1361(A)(1)), a civil penalty of \$1,250.00 is assessed against Respondent Monty's Environmental Services, Inc., for violations of said Act which have been established on the basis of Complaint issued herein, and Respondent is ordered to pay same by Cashier's or Certified Check, payable to the United States Treasury, within sixty (60) days of the receipt of this order; it is

further ordered that the Stop Sale, Use and Removal Order dated June 13, 1979 (Complainant Exhibit 4) shall remain in full force and effect."

This Initial Decision is signed and filed this 5<sup>th</sup> day of December, 1979, in Kansas City, Missouri.

  
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ALJ