

**UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY**

**BEFORE THE ADMINISTRATOR**

<b>In the matter of</b>	)	
	)	
<b>William E. Comley, Inc.,</b>	)	
<b>a/k/a WECCO</b>	)	
	)	
<b>and</b>	)	<b>Docket No. FIFRA-04-2000-0060</b>
	)	
<b>Bleach TEK, Inc.,</b>	)	
<b>d/b/a TEK</b>	)	
	)	
<b>Respondents</b>	)	

**INITIAL DECISION**

By: Carl C. Charneski  
Administrative Law Judge

Issued: January 31, 2003  
Washington, D.C.

**Appearances**

For Complainant: Alan E. Dion, Esq.  
Elizabeth E. Davis, Esq.  
Region 4  
U.S. Environmental Protection Agency  
Atlanta, Georgia

For Respondents: William E. Comley, Sr.  
Aurora, Indiana

**I. Statement of the Case**

This case arises under the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”). 7 U.S.C. § 136 *et seq.* It is a civil penalty enforcement proceeding brought pursuant to Section 14 of this Act. 7 U.S.C. § 136l. The United States Environmental Protection Agency (“EPA”) has filed a complaint charging William E. Comley, Inc., a/k/a WECCO (“WECCO”), with four violations of FIFRA. EPA additionally charges that Bleach Tek, Inc., d/b/a TEK

(“TEK”), is also liable for the FIFRA violations as WECCO’s successor-in-interest.<sup>1</sup> EPA seeks a civil penalty of \$22,000 for the four violations.

In Count I of the complaint, EPA alleges that WECCO violated Section 12(a)(2)(L) by producing a pesticide without having an EPA establishment registration number. 7 U.S.C. § 136j(a)(2)(L). In Count II, EPA alleges that WECCO violated Section 12(a)(2)(M) by falsifying an application for EPA registration. 7 U.S.C. § 136j(a)(2)(M). Counts III and IV allege that WECCO sold or distributed a misbranded pesticide in violation of Section 12(a)(1)(E). 7 U.S.C. § 136j(a)(1)(E).

WECCO filed an answer to the complaint denying the violations. Thereafter, a hearing was held in this matter on September 11, 2001, and continued on October 17-18, 2001, in Cincinnati, Ohio.<sup>2</sup>

For the reasons that follow, it is held that WECCO violated FIFRA as alleged in Counts I through IV. It is further held that TEK, as WECCO’s successor-in-interest, is also liable for each of the violations. Accordingly, a civil penalty totaling \$22,000, the amount requested by EPA, is assessed against both WECCO and TEK for these violations. 7 U.S.C. § 136l.

## **II. TEK is a Successor-In-Interest to WECCO**

WECCO was incorporated under the laws of the Commonwealth of Kentucky. CX 24. It operated a facility in Erlanger, Kentucky, where it sold or distributed the product sodium hypochlorite. When the events leading to the EPA enforcement action in this case occurred, WECCO was located in Erlanger. CXs 1 & 2. Thereafter, the company relocated to Aurora, Indiana. CXs 13 & 15. After its relocation to Indiana, WECCO was dissolved as a corporation.

After WECCO was dissolved, TEK was incorporated. TEK is incorporated under the laws of the State of Indiana. CX 23. TEK owns and operates the same facility in Aurora, Indiana, that WECCO had owned and operated. *Id.* Like WECCO, TEK sells the product sodium hypochlorite. CXs 7, 20 & 21.

Prior to the hearing in this matter, and after TEK was added as a party, EPA filed a motion requesting discovery from both WECCO and TEK. EPA was seeking to show that WECCO and TEK were the same entity. On June 28, 2001, the motion was granted, in part, and WECCO and TEK were directed to turn over to the government certain specified company records. On July 13, 2001, respondents filed a document informing this Tribunal that they were declining to produce the documents as ordered. Thereafter, at the start of the hearing in this case, WECCO and TEK confirmed their refusal to comply with the discovery order. Tr. 30.

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<sup>1</sup> TEK was added as a respondent in EPA’s amended complaint.

<sup>2</sup> At the hearing, William E. Comley, Sr., represented both WECCO and TEK. Tr. 23.

Accordingly, as a sanction for this non-compliance, it was held that TEK is a successor-in-interest to WECCO. Tr. 38-39.<sup>3</sup>

### **III. Facts**

Calvin Crupper is an inspector with the Kentucky Department of Agriculture, Division of Pesticides. He inspects facilities that use, distribute, or resell pesticides. Tr. 54-55. On August 5, 1997, Inspector Crupper went to the Public Works Department for the City of Covington, Kentucky. The purpose of this call was to identify the supplier of the pesticidal products that the City used in its public swimming pools.

During this August 5 visit, Inspector Crupper learned that WECCO had provided the City of Covington with “sodium hypochlorite solution.” Sodium hypochlorite is a product that is used as a disinfectant to kill bacteria in swimming pools. Tr. 57, 68, 278; CX-9. Specifically, Inspector Crupper was given an invoice by the City of Covington’s Public Works Department showing that on July 2, 1997, WECCO delivered 285 gallons of hypochlorite solution (designated as “less than 16%”) to the City’s Randolph Pool. Tr. 63, 88; CX-1.<sup>4</sup>

Thereafter, on September 16, 1997, Kentucky State Inspector Crupper, accompanied by United States EPA Inspector James West, conducted a Producer Establishment Inspection of the WECCO facility in Erlanger, Kentucky.<sup>5</sup> The purpose of the inspection was to determine whether WECCO was producing and distributing an unregistered pesticide, a violation of FIFRA. Tr. 65.

During the September 16 inspection of the WECCO facility, Inspectors Crupper and West met with William E. Comley, Sr., the Chairman of WECCO. Tr. 64-65. Comley provided a written statement to the inspectors indicating that for 12 years the company did have several EPA pesticide registrations for sodium hypochlorite, but that the registrations were dropped by WECCO in 1990 in order to avoid paying the EPA registration maintenance fees. In this statement, Comley also stated that at one time the company was a registered producing establishment, but that was no longer the case.

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<sup>3</sup> Even absent this sanction for non-compliance with the discovery order, there is considerable evidence in the record establishing that TEK is the successor-in-interest to WECCO. *See, e.g.*, Tr. 248-249, 385-386, 465-466; CXs 6, 7, 20, 21 & 26.

<sup>4</sup> Apparently, some time later, EPA also learned that on or about August 6, 1997, WECCO sold 250 gallons of sodium hypochlorite solution to the City of Covington’s Goebel Park Pool. CX 2.

<sup>5</sup> At the time, Inspector West was the EPA project officer for the Commonwealth of Kentucky. Tr. 150.

Despite these admissions, Comley was of the opinion that the company's sodium hypochlorite product was not a pesticide, so long as WECCO did not make any pesticidal claims on the product's label. Tr. 152. *See* CX 2.<sup>6</sup> In fact, during the September 16 inspection of the WECCO facility, Inspectors Crupper and West observed a generic-type label that was used by respondent for its hypochlorite solution. This label appeared to be a Department of Transportation ("DOT") placarding label used for shipping. Unlike Comely, however, the inspectors did not believe that this product label satisfied the FIFRA labeling requirements. Tr. 65-66, 156. *See* CX 2.<sup>7</sup>

A "Stop Sale" order was not issued by EPA during the September 16, 1997, inspection. Tr. 161. Inspector West stated that a Stop Sale order should have been issued to WECCO and the fact that one was not was a mistake. Tr. 161-162.

Thereafter, on May 4, 2001, Inspector Crupper returned to the City of Covington's Public Works Department. Tr. 89; CX 4. This May 4 visit included an inspection of the City's Randolph Pool. There, Crupper took photographs and a videotape of two sodium hypochlorite tanks located in the pool's storage area. Tr. 90.<sup>8</sup> According to the inspector, the label on each of the two 250- to 300-gallon tanks observed was a DOT placarding label representing that the tank contained a sodium hypochlorite solution. This was the same label observed by Inspector Crupper in his September, 1997, inspection of the WECCO facility. As noted, in the inspector's opinion, this label was not an EPA-approved registered pesticide label. *Id.* Tr. 90-91.<sup>9</sup>

The inspections of August 5, 1997, and September 16, 1997, resulted in a four-count complaint being filed by EPA against WECCO. The complaint was subsequently amended to add TEK as a respondent. These counts are addressed below.

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<sup>6</sup> Throughout the hearing, WECCO reiterated this defense. As discussed, *infra*, it is held that the sodium hypochlorite product involved in this case is a pesticide.

<sup>7</sup> Inspector Crupper described the placard as "the same type of placard that you see on every type truck going down the road just about, that same type information, basic information." He added, "[i]t's got a UN number, usually a four-digit number that characterizes it as a hazardous material." Tr. 95.

<sup>8</sup> The photographs are included in Complainant's Exhibit 4. The videotape was not offered into evidence.

<sup>9</sup> Inspector Crupper again visited the Randolph Pool in September of 2001, and the storage conditions involving the sodium hypochlorite solution were unchanged. Tr. 91.

## **IV. Discussion**

### **A. Liability**

#### **Count I**

This count involves the production of a pesticide by an unregistered establishment. Section 7(a) of FIFRA requires that establishments which produce pesticides are to be registered with EPA. 7 U.S.C. § 136e(a). Non-compliance with Section 7(a) constitutes a violation of Section 12(a)(2)(L) of FIFRA. 7 U.S.C. § 136j(a)(2)(L).

In Count I of the complaint, EPA alleges such a violation of Section 12(a)(2)(L). It charges that sodium hypochlorite is a pesticide, that WECCO produced sodium hypochlorite at its facility in Erlanger, Kentucky, and that WECCO was not a registered establishment with EPA at the time of production, as is required by Section 7(a). As explained below, EPA has proven these allegations and has established a violation of FIFRA Section 12(a)(2)(L).

We begin with an examination of whether the product “sodium hypochlorite solution” is a pesticide. Section 2(u) of FIFRA in part defines the term “pesticide” as “(1) any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest.” 7 U.S.C. § 136(u). As provided in Section 2(t) of FIFRA, a “pest” includes a “virus, bacteria, or other micro-organism.” 7 U.S.C. § 136(t). In addition, Section 2(mm) defines the term “[a]ntimicrobial pesticide” in part as a “pesticide” that is “intended to disinfect, sanitize, reduce, or mitigate growth or development of microbiological organisms.” 7 U.S.C. § 136(mm).

We next look to the facts of this case and find that WECCO’s sodium hypochlorite product clearly falls within the above statutory definition of a pesticide. In that regard, the record shows that the intended purpose of the sodium hypochlorite solution provided by WECCO to the City of Covington was to kill the bacteria in the City’s public swimming pools. The sodium hypochlorite was sold to WECCO by a company, then known as HVC. HVC considered this product to be a pesticide and registered it as such, pursuant to Section 7(a) of FIFRA. Tr. 154, 466.<sup>10</sup> In fact, HVC had entered into a supplemental registration agreement with WECCO in which the respondent was to sell HVC’s Hi-Test Sodium Hypochlorite solution under the name of “Aqua Pure 16 Sodium Hypochlorite.” Tr. 484.<sup>11</sup>

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<sup>10</sup> The name of the pesticidal product registered by HVC is “Hi-Test Sodium Hypochlorite.” The EPA Registration Number for this pesticide is 8176-20001. Tr. 466; CX 2.

<sup>11</sup> The purpose of supplemental registration is to allow a company, like WECCO, to distribute a pesticide under its own name, without having to go through a separate FIFRA product registration process, when the product is already properly registered by another company. Tr. 154. This supplemental registration agreement between HVC and the respondents will be discussed more under Count II.

Furthermore, during the government's September 16, 1997, inspection of the WECCO facility, William E. Comley, Sr., provided a written statement to the government inspectors admitting that "[f]or approximately 12 years [WECCO] held several EPA pesticide registrations for our sodium hypochlorite." CX 2. During this inspection, Comley also admitted to Inspectors Crupper and West that one of the uses of the sodium hypochlorite was antimicrobial. Tr. 151, 156. Finally, consistent with this admission, sodium hypochlorite historically has been used as a disinfectant for swimming pool water. Tr. 96-97, 160, 278-279. Indeed, there is no suggestion in the record that the bulk amounts of sodium hypochlorite sold by WECCO to the City of Covington, and stored at the City's Randolph and Goebel Park swimming pools, were there for any reason other than to be used as an antimicrobial; nor does WECCO advance any such argument. In sum, this sodium hypochlorite solution, sold by WECCO to the City of Covington, is a pesticide.

WECCO obtained this pesticidal product from HVC in a bulk tanker truck. Respondent then repackaged the Hi-Test Sodium Hypochlorite solution in 5-gallon plastic containers, as well as delivering the product to its customers in bulk by using its own tanker truck. CX 2. This activity by WECCO rendered it a "producer" as that term is defined in Section 2(w) of FIFRA. 7 U.S.C. § 136(w). There, the term "producer" is defined as "the person who manufactures, prepares, compounds, propagates, or processes any pesticide." *Id.* In addition, 40 C.F.R. 167.3 defines the term "[p]roduce" to include the "package, repackage, label, relabel, or otherwise change the container of any pesticide."

Thus, as a producer of a pesticide, WECCO was required to have an EPA establishment registration number pursuant to Section 7(a) of FIFRA. 7 U.S.C. § 136(e).<sup>12</sup> WECCO, however, was not such a registered producing establishment when it repackaged this pesticidal product, sodium hypochlorite solution, for resale to the City of Covington.

The fact that respondent was not a registered producing establishment during this time period was admitted by William E. Comley, Sr. In that regard, during the EPA inspection of September 16, 1997, Comley supplied an affidavit to the government inspectors which stated:

We dropped the registrations for our pesticides and the establishment around 1990 due to pesticide maintenance fees.

CX 2. Respondent's rather stark admission is supported by the testimony of Cheryn Lyn Jones, the senior case development officer for EPA Region 4. Tr. 343. Jones testified that EPA's records showed that WECCO's producing establishment number had indeed been inactivated by respondent in 1993. Tr. 351.

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<sup>12</sup> Section 7(a) provides that "[n]o person shall produce any pesticide subject to this subchapter ... unless the establishment in which it is produced is registered with the Administrator."

Despite not having an EPA establishment registration number, WECCO argues that no FIFRA violation has been committed. In its defense, respondents state that the sodium hypochlorite solution sold by WECCO was not a pesticide because the product's label did not contain any pesticidal claims. For example, in the statement provided to the EPA inspectors on September 16, 1997, William E. Comley, Sr., stated, "EPA told us we could remove the pesticide label claims and would no longer be regulated as a pesticide ... producer or distributor." CX 2.

In support of this defense, WECCO produced the cover page of a letter, dated April 16, 1990, sent to it by EPA which addresses the subject of registration. RX 1. The portion of the letter produced states that it is in response to WECCO's letter concerning the registration of its sodium hypochlorite pesticidal products. The letter, however, does not contain the signature page, nor does it indicate from whom in EPA it was sent. Nonetheless, respondent focuses on the letter's statement that "[i]f a product is represented in any manner that results in it being used as a pesticide, it shall be deemed to be a pesticide for the purpose of the FIFRA." *Id.* Respondent appears to argue that if a "generic" label is used, and no pesticidal claims are made, then consistent with this EPA letter of April 16, 1990, the product can not be considered to be a pesticide and, therefore, no EPA registration is required.

Respondent's argument is rejected. First, it is based upon an incomplete letter from an unknown author within EPA. Second, respondent's reading of this one-page document is not in context. If anything, the letter supports the position advanced by EPA, and not WECCO. In that respect, the letter states that "[t]he status of a product as a pesticide is determined by the intended use of the product." *Id.* This statement seems to best summarize the intent of this admittedly incomplete letter. Thus, in this case, the only intended use of the sodium hypochlorite solution delivered by WECCO to the City of Covington's public swimming pools was pesticidal -- *i.e.*, to kill the bacteria in the pool. Respondent's reading of the EPA letter is too great a stretch and is contrary to the overwhelming weight of the evidence showing that its sodium hypochlorite solution is a pesticide. Respondent, therefore, should have registered with EPA as a producing establishment. Its failure to do so constitutes a violation of Section 12(a)(2)(L) of FIFRA.

## **Count II**

In Count II, EPA charges that WECCO violated Section 12(a)(2)(M) of FIFRA. 7 U.S.C. § 136j(a)(2)(M). The pertinent statutory text provides:

(2) It shall be unlawful for any person –

(M) to knowingly falsify all or part of any application for registration, application for experimental use permit, any information submitted to the Administrator pursuant to section 136e of this title....

7 U.S.C. § 136j(a)(2)(M).

EPA bases this charge upon a Supplemental Distribution Agreement between HVC and WECCO regarding HVC's 12.5% sodium hypochlorite product known as "Hi-Test Sodium Hypochlorite." Specifically, on January 2, 1997, William E. Comley, Jr., signed a "Notice of Supplemental Distribution of a Registered Pesticide Product" (*i.e.*, EPA Form 8570-5) with HVC. CX 5; RX 2. In this supplemental distribution agreement, WECCO agreed, among other things, that the label would bear the EPA registration number of the basic product, followed by the distributor's company number. *Id.*

While WECCO failed to comply with this supplemental distribution agreement in several respects, what is significant here is its inability to provide the distributor's company number on the label.<sup>13</sup> In that regard, WECCO committed to this requirement in 1997, when it entered into the agreement with HVC. Tr. 466-470. The record, however, shows that respondent had cancelled its establishment number as early as 1993. CXs 2 & 14. Indeed, William E. Comley, Sr., informed Inspectors Crupper and West of this establishment number cancellation when they inspected the WECCO facility in 1997.

Therefore, WECCO was unable to comply with the supplemental distribution agreement at the very time that it entered into the agreement with HVC.<sup>14</sup> WECCO has offered no explanation to clear up this matter. Accordingly, given this time line, it is held that EPA has established a violation of FIFRA Section 12(a)(2)(M).

### **Count III**

Here, EPA charges that WECCO violated Section 12(a)(1)(E) of FIFRA by selling a misbranded pesticide. 7 U.S.C. § 136j(a)(1)(E). Specifically, the complainant asserts that on or about July 2, 1997, WECCO sold the misbranded antimicrobial pesticide "sodium hypochlorite" to the City of Covington. This sodium hypochlorite was shipped by respondent to the City's Randolph Pool. EPA maintains that the label on the sodium hypochlorite was misbranded because it failed to include the EPA establishment number, directions for use, the product's net contents, an ingredient statement, the name under which the pesticide was sold, the EPA registration number, and a statement of practical treatment. Compl. ¶¶ 34-41. As explained below, EPA has proven these allegations and thus has established a violation of Section 12(a)(1)(E).

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<sup>13</sup> For example, Inspector West testified that WECCO did not comply with No. 6 of the supplemental distribution agreement because the label did not show that WECCO was not the manufacturer. Tr. 156. *See* CX 3.

<sup>14</sup> As EPA points out in their Reply Brief, 40 C.F.R. 152.132 addresses "Supplemental distribution" and at paragraph (a)(4) it states, "[t]he establishment number must be that of the final establishment at which the product was produced." In this case, the establishment number to which Section 152.132(a)(4) is referring is WECCO. *See* Compl. R.Br. at 2.



It already has been shown that the sodium hypochlorite sold by WECCO to the City of Covington is a pesticide. Accordingly, the pesticide's label was required to satisfy the branding requirements of Section 2(q) of FIFRA. 7 U.S.C. § 136(q). The label used by WECCO on its sodium hypochlorite product is set forth in Complainant's Exhibit 2 and Respondent's Exhibit 4. A review of this pesticidal product label shows that respondent failed to meet the branding requirements of Section 2(q) in a number of respects.

Both Kentucky State Inspector Crupper and USEPA Inspector West found that respondent's sodium hypochlorite solution label did not meet FIFRA standards. Tr. 65, 181. For example, Inspector Crupper testified that the WECCO sodium hypochlorite solution label that he observed at the Randolph Pool appeared to be a Department of Transportation placarding label that it used during shipment. Tr. 65, 90. According to the inspector, this label was not an EPA-approved registered pesticide label. Tr. 90. Crupper stated that the label did not satisfy the FIFRA requirements because it did not have the concentration or the amount of active ingredients present. The label also did not contain directions for use or provide an adequate warning to the public as to its contents. Tr. 65-66, 90.<sup>15</sup> The label on the tanks containing the sodium hypochlorite solution at the Randolph Pool was the same label that Inspector Crupper had observed during the September 16, 1997, inspection of the WECCO facility. Tr. 91.<sup>16</sup>

Inspector West testified that the label was deficient because it did not include an active ingredient statement and that it did not have directions for use, storage, or disposal. According to West, the label also lacked the appropriate "warning" signals, as well as a registration number and an establishment number. Tr. 156-157. Inspector West discussed this pesticidal labeling problem with William E. Comley, Sr., during the government's pesticide establishment inspection of September 16, 1997. Tr. 157.

A review of WECCO's sodium hypochlorite solution label (CX 2) supports the testimony of Inspectors Crupper and West that it did not meet the requirements of FIFRA Section 2(q). WECCO has offered no evidence to show that the inspectors' observations are not reliable. Accordingly, it is held that as alleged in Count III, WECCO sold a misbranded pesticide to the City of Covington in violation of Section 12(a)(1)(E) of FIFRA.

#### **Count IV**

As in the previous count, this count charges that WECCO sold a misbranded pesticide in violation of FIFRA Section 12(a)(1)(E). 7 U.S.C. § 136j(a)(1)(E). This sale was to the City of Covington on or about August 6, 1997, and it was shipped to the City's Goebel Park Pool. Complainant's Exhibit 2 contains a bill of lading showing that WECCO sold 250 gallons of

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<sup>15</sup> In that regard, while the label contained the warning "Danger," it lacked a "skull and crossbones" and the statement, "Keep Out of Reach of Children." Tr. 65-66.

<sup>16</sup> The Inspection Report of EPA Inspector Cheryn Jones similarly depicted the conditions at the Randolph Pool. CX 19.

sodium hypochlorite solution to the City of Covington for shipment to its Goebel Park Pool. *See* Tr. 158-159.

There is no evidence in the record showing that either Inspector Crupper or Inspector West personally observed the sodium hypochlorite solution label at the Goebel Park Pool. Nonetheless, the circumstantial evidence in this case establishes that the label on the sodium hypochlorite product at the Goebel Park Pool was the same label of the sodium hypochlorite product observed by the inspectors at the Randolph Pool, and the same label observed by the government inspectors at the WECCO facility on September 16, 1997. Indeed, respondent does not even argue that its sodium hypochlorite solution at the Goebel Park Pool was different, or that it was labeled differently. Accordingly, for the reasons set forth in the discussion of Count III, *supra*, it is held that WECCO sold a misbranded pesticide to the City of Covington in violation of Section 12(a)(1)(E) of FIFRA, as alleged in Count IV.

## **B. Civil Penalty**

Section 14 of the Federal Insecticide Fungicide and Rodenticide Act provides for the assessment of a civil penalty of up to \$5,000 for each violation of this Act. 7 U.S.C. § 136l. The maximum penalty amount for a FIFRA violation has been increased to \$5,500 pursuant to the Debt Collection Improvement Act of 1966, 31 U.S.C. § 3701, and 40 C.F.R. Part 19. The facts of this case support the assessment of the maximum penalty for each of the four violations.

Penalty amounts are decided on the basis of the record evidence. In assessing a penalty, Section 14(a)(3) of FIFRA provides that this evidence is to be taken into account as follows:

In determining the amount of the penalty, the Administrator shall consider the *appropriateness of such penalty to the size of the business of the person charged, the effect on the person's ability to continue in business, and the gravity of the violation*. Whenever the Administrator finds that the violation occurred despite the exercise of due care or did not cause significant harm to health or the environment, the Administrator may issue a warning in lieu of assessing a penalty.

7 U.S.C. § 136l (*emphasis added*). These penalty criteria are considered below along with the particular facts of this case.

### **1. Size of the Business**

There is relatively little evidence on the size of the business penalty criterion. EPA submitted into the record information, dated October 2000, from the American Business Directory showing that the Aquatic World of WECCO, a division of respondent WECCO, had

five employees and annual sales of \$3,075,000. Tr. 362, 422; CXs 16 & 18(invoices from Aquatic World submitted to City of Covington).<sup>17</sup>

Respondent disputes this monetary figure and has attached to its post-hearing brief a statement from the company's accountant to the effect that over the past 10 years WECCO's average sales were less than what EPA contends is the case here.<sup>18</sup> EPA subsequently moved to strike the accountant's statement on the ground that this post-hearing document is not in evidence. EPA is correct. Accordingly, its motion is granted and respondents' attachment is stricken. The information contained in Complainant's Exhibit 15, therefore, is accepted as establishing the size of respondents' business.<sup>19</sup>

## **2. Ability to Continue in Business**

While WECCO has since dissolved and TEK has taken its place, respondent TEK does not argue that the penalty sought by EPA in this case would adversely affect its ability to continue in business. *See* Tr. 358-359. Moreover, the evidence relating to the size of respondents' business, limited though it may be, is sufficient to establish that respondents can pay the assessed penalty. *See James C. Lin and Lin Cubing, Inc.*, 5 E.A.D. 595, 599 (1994); *New Waterbury, Ltd.*, 5 E.A.D. 529, 541-542 (1994).

## **3. Gravity of the Violation**

### **a. Count I**

Here, WECCO violated Section 12(a)(2)(L) of FIFRA by producing a pesticide without having an EPA pesticide-producing establishment number. The pesticide production occurred as WECCO repackaged the sodium hypochlorite product obtained from HVC, pursuant to their supplemental distribution agreement, for sale to the City of Covington.

In committing this violation, respondent was highly negligent. In that regard, William E. Comley Sr., admitted to the government inspectors during their September 16, 1997, inspection

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<sup>17</sup> EPA also submitted Dun & Bradstreet reports dated April 6, 2000, and January 25, 2001. These reports, however, offer little useful information. CX 15; *see* Tr. 396-397.

<sup>18</sup> The statement containing the WECCO accountant's sales figures bears the label "Confidential." While it is not clear whether respondents are requesting Confidential Business Information protection, out of precaution the precise sales figures cited by the accountant will not be divulged.

<sup>19</sup> Even if the sales figures offered by WECCO's accountant were accepted, the penalty assessed in this case would be unchanged. Nor would the penalty change if William E. Comley, Sr.'s, statement that the company had three employees, and not five, were accepted. *See* Tr. 151; CX 2.

that WECCO once had an establishment number, but canceled it in order to avoid paying the attendant maintenance fees. Tr. 69; CX 2. WECCO made this cancellation request to EPA as early as June 28, 1993, approximately four years before the inspection. CX 14. Accordingly, the record shows that respondent WECCO, having been in the chemical business for 42 years, was quite familiar with the EPA registration process for FIFRA and it should have known that a producer establishment number was required under these circumstances. *Id.*

**b. Count II**

Count II involves the Section 12(a)(2)(M) violation where WECCO entered into a supplemental distribution agreement with HVC regarding HVC's Hi-Test Sodium Hypochlorite. Specifically, WECCO agreed to include on the pesticide product label the distributor company's number (*i.e.*, WECCO's). Because WECCO had canceled its EPA establishment number a few years earlier, it made a commitment to HVC that it could not keep. This fact alone warrants the assessment of the maximum penalty.

**c. Counts III and IV**

These counts involve WECCO's sale of a misbranded pesticide. The sales were to the City of Covington's Randolph Pool and Goebel Park Pool, respectively. The pesticide sold was sodium hypochlorite solution, which was to be used to kill the bacteria in the public swimming pools. As discussed earlier, the sodium hypochlorite product labels were deficient in a number of respects, including failure to contain directions for use, failure to specify the concentration or amount of active ingredients, and the failure to provide the proper warnings signaling "Danger."

Robert Bennis testified on behalf of EPA as an expert in swimming pool disinfectants. Tr. 277.<sup>20</sup> He testified that directions are particularly important for swimming pool disinfection. Bennis considered swimming pool water as presenting probably the highest level of human exposure to a registered pesticide, "primarily because you're bathing in the pesticide." Tr. 283. In addition, citing the acute toxicity of sodium hypochlorite ("12 and a half percent is the highest level of sodium chlorite allowable"), Bennis cited the potential for serious skin burns and irreversible eye damage, if too much of the pesticide were placed in the pool water. Tr. 283, 285-286. Indeed, from 1995 to the time of the hearing, the witness stated that there were approximately 1,100 reported incidents involving sodium hypochlorite. Tr. 283. In addition, if too little of the pesticide is placed into the pool, there is a danger from pathogens such as *E. coli* and *cryptosporidium*. Tr. 284.

Inspector West likewise spelled out the hazards presented by mislabeling. He testified that without directions for use, there could be an over-application of the pesticide, resulting in the burning of eyes and skin irritation. Also, the under-application of sodium hypochlorite to the pool water could result in high levels of viruses and bacteria. Tr. 159.

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<sup>20</sup> Bennis served as a Project Manager in EPA's Antimicrobial Division, Office of Pesticide Programs. Tr. 272.

Accordingly, the mislabeled pesticides in this case presented a significant hazard to the public.

#### **IV. Order**

It is held that William E. Comely, Inc., a/k/a WECCO, committed four violations of the Federal Insecticide Fungicide and Rodenticide Act, 7 U.S.C. § 136 *et seq.*, as alleged in the amended complaint. Specifically, WECCO committed one violation of FIFRA Section 12(a)(2)(L), one violation of Section 12(a)(2)(M), and two violations of Section 12(a)(1)(E). For these violations, WECCO is assessed a civil penalty of \$22,000. 7 U.S.C. § 136*l*. In addition, it is held that Bleach TEK, Inc., d/b/a TEK, is jointly and severally liable for the above-mentioned FIFRA violations and civil penalty, as WECCO's successor-in-interest. Respondents are directed to pay this civil penalty within 60 days of the date of this order.<sup>21</sup>

Unless an appeal is taken to the Environmental Appeals Board pursuant to 40 C.F.R. 22.30, or unless a party acts pursuant to 40 C.F.R. 22.27(c), this decision shall become a Final Order as provided in 40 C.F.R. 22.27(c).

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Carl C. Charneski  
Administrative Law Judge

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<sup>21</sup> Payment of the civil penalty may be made by mailing, or presenting, a cashier's or certified check made payable to the Treasurer of the United States and addressed to Nations Bank, EPA Region 4 (Regional Hearing Clerk), P.O. Box 100142, Atlanta, Georgia, 30384.