5/10/93

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
REK-CHEM MANUFACTURING CORP.,	)	IF&R Docket No. VI-437C
	)	
Respondent	)	

1. Section 9(a)(2) of FIFRA, 7 U.S.C. § 136g(a)(2): Respondent's consent to the inspection was not informed consent because of the inspectors' failure to notify Respondent that a violation of law was suspected at the time of the inspection. Evidence collected directly from Respondent during the inspection is inadmissible and therefore excluded.

2. Section 9(a)(2) of FIFRA, 7 U.S.C. § 136g(1)(2): Evidence collected from other sources which is not derivative of the evidence gathered during the inspection of Respondent's facility is admissible.

3. Section 12(a) of FIFRA, 7 U.S.C. § 136j(a): Each of the counts in the complaint requires an element of proof not required by the others and therefore each is an independent and substantially distinguishable charge.

4. Section 14(a)(4) of FIFRA, 7 U.S.C. § 136l(a)(4); 40 C.F.R. § 22.27(b): The Presiding Officer is not required to give "great deference and considerable weight" to civil penalty guidelines issued by the agency; such agency policies must be considered by the Presiding Officer and are entitled to such weight as by their nature seems appropriate.

Appearances:

For Complainant:

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For Respondent:

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Before: Henry B. Frazier, III
Chief Administrative Law Judge

INITIAL DECISION

I. Complaint and Answer

This is a proceeding under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended, 7 U.S.C. § 136 et seq. An administrative complaint was issued on March 22, 1989, by the United States Environmental Protection Agency (EPA, Complainant or Agency) alleging that Rek-Chem Manufacturing Corporation (Respondent or Rek-Chem) had violated Section 12 of FIFRA, 7 U.S.C. § 136j.

More specifically, the complaint alleged in Count I that Respondent had violated Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A) by distributing an unregistered pesticide, "Rek-Chem Sanitizing Solution CL." In Count II it was alleged that Respondent had violated Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E) by distributing a pesticide, "Rek-Chem Sanitizing Solution CL," that was misbranded because no producing establishment number for Rek-Chem was on the label. In Count III it was alleged that Respondent had violated Section 12(a)(2)(M) of FIFRA, 7 U.S.C. § 136j(a)(2)(M) of FIFRA, by failing to maintain and/or make available to EPA required records and by failing to comply with established reporting requirements. Finally, in Count IV it was alleged that Respondent had violated Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E) by distributing a pesticide that was misbranded by using the registration number of another pesticide called Auto-Chlor "Sanitizing Solution CL" on the Rek-Chem label.

The Complainant proposes to assess a total civil penalty in the amount of $14,400.00 against Respondent for the alleged violations. The individual penalties proposed for each count are:

Count I	$ 3,200.00
Count II	$ 1,200.00
Count III	$ 5,000.00
Count IV	$ 5,000.00
Total	$14,400.00

In an amended answer Respondent denied the violations alleged in each of the four counts in the complaint.

A hearing was held in this matter on October 14 and 15, 1992, in Albuquerque, New Mexico. Thereafter, Respondent submitted its proposed findings of fact, conclusions of law and legal memorandum in support thereof bearing a date of February 27, 1993. Complainant submitted its proposed findings of fact, conclusions of law and brief in support thereof on March 1, 1993. Thereafter, Complainant and Respondent submitted reply briefs on April 15, 1993, and on April 14, 1993, respectively.

II. Findings of Fact/Conclusions of Law

On the basis of the entire record, including the testimony elicited at the hearing, the affidavits and exhibits received in evidence and the submissions of the parties, and giving such weight as may be appropriate to all relevant and material evidence which is not otherwise unreliable, I make the findings of fact and conclusions of law which follow. Each matter of controversy has been determined upon a preponderance of the evidence. All

contentions and proposed findings and conclusions submitted by the parties have been considered, and whether or not specifically discussed herein, those which are inconsistent with this decision are rejected.

1. On or about October 15, 1987, Mr. Mark Meyer, an inspector with the New Mexico Department of Agriculture (NMDA) received a telephone call from Mr. Robert Merrifield of Auto-Chlor Systems complaining that Rek-Chem was producing a sodium hypochlorite product for use in dishwashing machines which product carried a label with an EPA registration number assigned to Auto-Chlor. (Tr. 35-36, 43, 108.)

2. On or about October 15 or 16, 1987, Mr. Meyer examined the Auto-Chlor Sanitizing Solution CL label which was in the official files of the Albuquerque office of the NMDA. That label carried the EPA registration number of 6243-2. The active ingredient in the Auto-Chlor Sanitizing Solution CL was sodium hypochlorite. (Tr. 78, 106-07, 112-18; Complainant's Exhibit (Compl. Exh.) 12A.)

3. On October 15, 1987, Mr. Meyer met with Mr. Merrifield of Auto-Chlor Systems to collect information concerning the alleged sale of a sodium hypochlorite solution by Rek-Chem. (Tr. 35-40, 145; Compl. Exh. 2.)

4. On October 15, 1987, Mr. Merrifield told Mr. Meyer that the Fajita Factory, a restaurant on Central Avenue in Albuquerque, was using "Rek-Chem Sanitizing Solution CL," a 5% sodium

hypochlorite solution with EPA registration number 6243-2-ZA on the label. (Tr. 35-40; Compl. Exh. 2.)

5. On October 15, 1987, Mr. Merrifield gave Mr. Meyer a five-gallon drum of sodium hypochlorite solution with a label "Rek-Chem Sanitizing Solution CL," showing the Rek-Chem logo and an EPA registration number, (readable through a black mark) which had been assigned to Auto-Chlor. Mr. Merrifield claimed to have received the drum from a former employee of Rek-Chem. (Tr. 35-40, 234-36; Compl. Exhs. 2 and 22.)

6. On October 15, 1987, Mr. Merrifield told Mr. Meyer that he thought the sodium hypochlorite solution was being supplied to Rek-Chem by Dixie Petro-Chem in Albuquerque. Subsequently, Mr. Meyer visited Dixie Petro-Chem because he had received this information. (Tr. 55; Compl. Exh. 2.)

7. On November 17, 1987, Mr. Meyer met with the District Manager of Dixie Petro-Chem, Inc. of Albuquerque where he secured copies of two invoices, two delivery tickets and two certificates of analysis forms which show the sale and delivery by Dixie Petro-Chem and the receipt by Rek-Chem of two batches of sodium hypochlorite solution in October 1987. The delivery tickets stated that the product "is not for repackaging or resale without an EPA registration number." (Tr. 55-61, 70; Compl. Exhs. 9 and 10.)

8. Rek-Chem purchased three 55-gallon drums of 12.5% sodium hypochlorite from Dixie Petro-Chem on or about October 22, 1987. (Tr. 57; Exh. 10.)

9. Rek-Chem purchased ten 55-gallon drums of 10% sodium hypochlorite from Dixie Petro-Chem on or about October 27, 1987. (Tr. 59; Exh. 10.)

10. Rek-Chem returned three empty 55-gallon drums to Dixie Petro-Chem on or about October 27, 1987. (Tr. 59; Exh. 10.)

11. On October 22, 1987, two locations of the Fajita Factory Restaurant (407 Central N.W. and 2004 Central S.E., Albuquerque, New Mexico) were inspected by Mr. Mark Meyer and Mr. Doug Henson, inspectors from the NMDA. (Tr. 81-83, 88, 114, 158; Compl. Exh. 3.)

12. On October 22, 1987, the Fajita Factory had a dishwasher service contract with Rek-Chem for the purchase of a sanitizing solution ("Rek-Chem Sanitizing Solution CL") for use in its dishwashers at both of its restaurant locations. (Tr. 89-90; Compl. Exh. 5.)

13. On October 22, 1987, a five-gallon container of "Rek-Chem Sanitizing Solution CL" was in use at the 2004 Central S.E. location of the Fajita Factory. (Tr. 82, 115, 157-58; Compl. Exhs. 4 and 5.)

14. On October 22, 1987, the five-gallon container of "Rek-Chem Sanitizing Solution CL" contained a label bearing the EPA product registration number 6243-2-ZA.

15. The Rek-Chem label bore no EPA establishment number. (Tr. 82, 147, 158-60; Compl. Exhs. 4 and 12A.)

16. As of October 22, 1987, Rek-Chem had been servicing the Fajita Factory account since June 1987, on a monthly basis, by

distributing the pesticide "Rek-Chem Sanitizing Solution CL" to both locations of the Fajita Factory. (Tr. 90; Compl. Exh. 5.)

17. Following the inspection of the Fajita Factory Restaurants, Mr. Henson reviewed the NMDA main record files for Rek-Chem which files were in Las Cruces. He examined the certificate of product registration which shows all the products which Rek-Chem had registered with the State of New Mexico as produced in 1987, together with their EPA registration numbers. Mr. Henson made a handwritten list of these products. "Rek-Chem Sanitizing Solution CL" was not registered, nor was any product that contained the active ingredient sodium hypochlorite. (Tr. 161-64, 166; Compl. Exh. 6, p. MM63.)

18. The NMDA performs inspections for EPA pursuant to a cooperative agreement between EPA and the State of New Mexico. (Tr. 34, 283-84.)

19. The NMDA conducts inspections of producer establishments in the state periodically on a routine basis, about once each calendar year, sometime during the year. (Tr. 124-27, 175.)

20. On October 30, 1987, Mr. Meyer and Mr. Henson, the NMDA inspectors, conducted an inspection at the Rek-Chem facility located at 108 Dale Street, S.E., Albuquerque, New Mexico. (Tr. 48, 148-49, 174, 181-82; Compl. Exh. 6.)

21. The NMDA representatives initially identified themselves to a receptionist who denied them access to the Rek-Chem facility. When the NMDA representatives returned to the facility later in the day, on October 30, 1987, Ralph Krolik, President of Rek-Chem, was

present and voluntarily consented to the inspection by signing the consent section on the Notice of Inspection presented to him by Mr. Meyer. That notice stated that the inspection was a "routine producer establishment inspection" and that no violations were suspected. (Tr. 49, 172-73, 182-83; Compl. Exh. 6.)

22. During the inspection, Mr. Krolik supplied the following: photocopies of labels of pesticides produced by Rek-Chem, a pesticide product production report for the period 5-1-87 through 9-9-87 and a physical sample of Mill-Fog #3, which was in stock and ready for distribution. (Tr. 50-54, 204-05; Compl. Exh. 6.)

23. During the inspection on October 30, 1987, Mr. Krolik indicated that the 1987 production records which he provided to the inspectors constituted Rek-Chem's total production for 1987 up to that time. (Tr. 204-05.)

24. On November 18, 1987, Mr. Mark Meyer and Mr. Lonnie Matthews of the NMDA returned to Rek-Chem to inquire of Mr. Krolik if there were any additional products which were being produced by Rek-Chem. Mr. Krolik responded affirmatively and supplied the NMDA representatives five additional photocopies of labels of pesticides produced by Respondent that had not been supplied during the earlier inspection. (Tr. 68-69, 77; Compl. Exh. 7.)

25. Mr. Krolik signed the receipt for samples for the five additional labels which he provided to the NMDA inspectors. (Tr. 77; Compl. Exh. 7.)

26. None of the labels obtained from Mr. Krolik, nor the production records supplied by him, contained a product identified

as "Rek-Chem Sanitizing Solution CL" or a product containing the active ingredient sodium hypochlorite. (Tr. 52-53, 70, 176-77, 301-02; Compl. Exhs. 6 and 7.)

27. After the matter was submitted to EPA by NMDA, Ms. Linda Myers, an Environmental Protection Specialist with EPA, conducted a separate search of EPA records to review the production reports which had been submitted by Rek-Chem. This search revealed that Rek-Chem had failed to report the production of "Sanitizing Solution CL" or any product containing the active ingredient sodium hypochlorite on its annual production reports submitted to EPA from 1987 through 1991. (Tr. 311-12.)

28. On August 11, 1987, Rek-Chem submitted to EPA an application for pesticide registration for "Rek Sun Fresh Liquid Bleach 5.25%" to be distributed in 1 gallon, 5 gallon, 15 gallon and 55 gallon containers. On June 7, 1988, EPA issued a registration number (43196-17) and a notice of pesticide registration for Rek Sun Fresh Liquid Bleach. (Respondent's Exhibits (Resp. Exhs.) G and B.)

29. Respondent is a corporation incorporated under the laws of the State of New Mexico and is therefore a "person" as that term is defined in Section 2(s) of FIFRA, 7 U.S.C. § 136(s). (Complaint, ¶¶ 1 and 2; First Amended Answer, ¶¶ 1 and 2.)

30. Respondent is a producer as that term is defined in Section 2(w) of FIFRA, 7 U.S.C. § 136(w), and as such is subject to Section 7 of FIFRA. (Complaint, ¶ 19; First Amended Answer, ¶ 12.)

31. Section 2(u) of FIFRA, 7 U.S.C. § 136(u), defines a pesticide as any substance intended for preventing, destroying, repelling or mitigating any pest. (Complaint, ¶ 4; First Amended Answer, ¶ 3.)

32. A sanitizer is classified as an antimicrobial agent, which is a pesticide as defined by Section 2(u) of FIFRA, 7 U.S.C. § 136(u). (Complaint, ¶ 5; First Amended Answer, ¶ 3; Tr. 295.)

33. Respondent's product "Rek-Chem Sanitizing Solution CL" is a pesticide. (Complaint, ¶ 6; First Amended Answer, ¶ 3; Tr. 295.)

34. The active ingredient contained in "Rek-Chem Sanitizing Solution CL" is sodium hypochlorite. (Tr. 41-42, 109.)

III. Contentions of the Parties

Respondent contends that the complaint should be dismissed in its entirety because the inspection conducted at Rek-Chem by NMDA violated the statutory requirement that Respondent receive written notice that a violation of law was suspected prior to the inspection. Under the "fruit of the poisonous tree" doctrine, all evidence, both direct and derivative, obtained as a result of the illegal search should be excluded and, consequently, the complaint should be dismissed, according to Respondent.

Respondent also maintains that if the entire matter is not dismissed, a "merger doctrine" should be invoked to limit the maximum penalties, if any are applied, to a single charge based upon the FIFRA Civil Penalty Assessment Guidelines.[1] Finally,

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[1] 39 Fed. Reg. 27711-27722 (July 31, 1974).

Respondent submits that if some portion of the claim survives the motion to dismiss, EPA has failed to provide credible, substantial evidence of an actual violation because the only possible viable charges against Rek-Chem would relate to a barrel of sanitizing solution which was not introduced into evidence but was represented only in photographs.

Respondent claims that it had permission of Auto-Chlor and of EPA to use Auto-Chlor labels. In his affidavit, Mr. Krolik stated that Ms. Barbara Pringle of EPA indicated that Rek-Chem could use the label of the manufacturer [Dixie Petro-Chem] of the bleach solutions which Rek-Chem was distributing; that the manufacturer [Dixie Petro-Chem] initially gave him verbal permission to use their label and registration number on the 10% bleach solution which Rek-Chem was distributing; that Mr. Robert Merrifield of Auto-Chlor gave him permission to use Auto-Chlor's labels and registration numbers on Rek-Chem's 5 1/4% bleach solution; and that Ms. Pringle indicated that it was acceptable for Rek-Chem to use the Auto-Chlor labels and registrations while Rek-Chem pursued obtaining EPA registration and approval of its labels.

Complainant contends that the inspection of Rek-Chem was a valid inspection because the inspectors did not suspect a violation of the law at the time; they gave Mr. Ralph Krolik, President of Rek-Chem, sufficient written notice of the alternative reason for the inspection, i.e., a routine producer establishment inspection; and Mr. Krolik did not object to the inspection but freely consented to it by voluntarily signing the notice of the

inspection. EPA equates the evidence which had been gathered prior to the inspection to nothing more than a rumor and argues that at the time of the inspection the inspectors "had a complaint (rumor) which they investigated in accordance with FIFRA regulations."

Complainant also maintains that Respondent's assertion that the four counts in the complaint should be merged into a single count is erroneous. Since each count requires an element of proof separate and distinct from the elements required to prove the other counts, Complainant argues that each of the four counts is independent of the others.

Complainant asserts that Respondent must be found liable for each of the violations alleged because Complainant has established a prima facie case and Respondent failed to introduce sufficient evidence to rebut or outweigh the evidence presented by Complainant.

Complainant avers that even assuming that Respondent may have relied upon erroneous advice from EPA employees, such reliance is no defense to liability for an alleged violation of Federal law and that the doctrine of estoppel has no applicability against the United States government in these circumstances. Complainant also emphasizes that only EPA may grant registration numbers and approve labels for pesticides and, consequently, a manufacturer cannot authorize another company to use its labels or registration number where EPA approval is required.

IV. Discussion and Analysis of Liability

A. Respondent's Motion to Dismiss Complaint

Section 9(a)(2) of FIFRA, 7 U.S.C. § 136g(a)(2), provides, in pertinent part:

> Before undertaking such inspection, the officers or employees must present to the owner, operator, or agent in charge of the establishment or other place where pesticides or devices are held for distribution or sale, appropriate credentials and a written statement as to the reason for the inspection, including a statement as to whether a violation of the law is suspected. If no violation is suspected, an alternate and sufficient reason shall be given in writing.

Respondent contends that EPA suspected a violation of the law before it undertook the inspection of Rek-Chem and failed to so inform Respondent. Instead, when the inspector, Mr. Meyer, arrived at Rek-Chem's facility to conduct the inspection he presented Mr. Krolik with a consent form which specifically stated:

> "VIOLATION SUSPECTED: None, routine producer establishment inspection."

Mr. Krolik signed the form, checking the block which indicated that he voluntarily consented to the inspection and that he understood that he had the right to refuse consent to the entry of the inspector.[2] Respondent contends that the failure of the NMDA to inform Mr. Krolik that it suspected a violation when it sought his permission to conduct the inspection was a fatal mistake and therefore all evidence, direct and derivative, obtained as a result

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[2]Compl. Exh. 6, Tr. 49.

of the illegal search should be excluded and the complaint, consequently, should be dismissed.

Complainant contends, inter alia, that the inspection was a routine producer establishment inspection just as Mr. Meyer indicated on the consent form and that Mr. Krolik consented to the inspection.

Thus, the initial question is whether a violation of FIFRA by Respondent was suspected before the inspection of Rek-Chem was conducted.

I must reject Complainant's contention that at the time of the Rek-Chem inspection on October 30, 1987, the NMDA had nothing more than a complaint (rumor) as the basis for a possible violation of FIFRA. By October 15, 1987, Mr. Meyer of the NMDA had received from Auto-Chlor a container with a Rek-Chem logo and which had an EPA registration number that was identical to that found on Auto-Chlor Sanitizing Solution CL label in the NMDA official files. Thereafter, Mr. Meyer and Mr. Henson had visited the Fajita Factory Restaurants (on October 22, 1987) where they observed a sanitizing solution product with a Rek-Chem logo and the Auto-Chlor registration number and learned that the "Rek-Chem Sanitizing Solution CL" which the restaurants were using was supplied by Rek-Chem.

On cross-examination, Mr. Meyer admitted that by that time there was a suspected violation of law:

Q. And so you were involved in the suspected violation of EPA law by Rek-Chem --

A. Yes.

Q. -- at that point --

A. Yes.

Q. -- beginning at least on October 22nd, 1987?

A. Yes.

Q. And then shortly thereafter you visited Rek-Chem because of your concern about an alleged suspected violation of EPA law, correct?

A. Yes.

Q. And you entered the premises of Rek-Chem and you took samples, because you were investigating a suspicion of a violation of EPA law, correct?

A. Yes.

Q. And at that point you took a number of samples at Rek-Chem?

A. Yes.

Q. And you spoke with people at Rek-Chem?

A. Yes.

Q. And you, in fact, I believe, viewed physical samples at Rek-Chem, even though you didn't take any?

A. We drew some -- We drew one physical sample, yes.

Q. Okay, and all of this was part of a suspected violation of EPA law?

A. Yes.

Q. That's what you were doing at Rek-Chem?

A. Yes.

Q. Now, drawing your attention to both FIFRA, I believe --

A. Yes.

Q. -- which asks you to inform people who you are inspecting of certain allegations --

A. Yes.

Q. -- and Exhibit 6 --

A. Yes.

Q. -- would you please read the handwritten portion in the big block "Violation Suspected" in the first page of Claimant's Exhibit 6?

A. "None, routine producer establishment inspection."

Q. And that just wasn't true, was it? You were there because you suspected a violation of federal law, correct?

A. Yes.

On October 22, 1987, Mr. Douglas Henson, Assistant Chief of Pesticide Management Bureau, concluded "that the particular container here [at the Fajita Factory] possibly had a violative label" because it "was misbranded in the fact that the EPA registration number was issued to another producing establishment."[3] At the time of the inspection of Rek-Chem on October 30, 1987, Mr. Henson said that NMDA "had a possible violative product but really no firm evidence that it came from Rek-Chem" and for that reason decided to conduct a routine producer establishment inspection which was to be conducted "annually,

[3]Tr. 161.

although that was not always the case."[4] Mr. Henson went on to insist that the "purpose of the inspection was routine."[5] However, in later questioning by the Presiding Officer he conceded that NMDA did have a "suspicion" at the time of the inspection:

> A. Well, we didn't have a firm source. We didn't have an official sample of a documentary or a physical nature. We had a container that had been passed to Mr. Meyer, but that was not an official sample, and we couldn't count that for anything.
>
> Q. Couldn't count it for anything in terms of suspicion? Is that what you're saying?
>
> A. Oh no, we had our suspicion.
>
> Q. Well, turning back to the statute which has been discussed several times, in Section 9-A-2, "Before undertaking such inspection the officers or employees must present to the owner, operator or agent in charge of the establishment or other place where pesticides or devices are held for distribution or sale, appropriate credentials and a written statement as to the reason for the inspection, including a statement as to whether a violation of the law is suspected."
> Now what is the difference between a suspicion and a violation of the law being suspected?
>
> A. Very little, I would say, sir.

Mr. Henson said that the second inquiry at Rek-Chem on November 18, 1987 was not a follow-up of the inspection but as far as he was concerned, the second inquiry was "when the investigation really began."[6] At the second questioning of Mr. Krolik by NMDA

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[4]Tr. 174.

[5]Tr. 182.

[6]Tr. 187.

inspectors, on November 18, 1987, Mr. Krolik was not provided with a Notice of Inspection form, nor was he asked to sign a consent to an inspection, nor was he advised that a violation was suspected.[7]

I conclude that a violation of the law was suspected by Mr. Meyer at the time of the initial inspection of Rek-Chem and that Mr. Henson had a "suspicion" of a violation of the law at that time. By the time of the return visit to Rek-Chem an investigation of a possible violation had truly begun. Therefore, I find that the failure to inform Mr. Krolik that a violation of FIFRA was suspected was contrary to the requirements of Section 9(a)(2) of FIFRA, 7 U.S.C. § 136g(a)(2). Any consent that Mr. Krolik may have given was not informed consent because of the absence of notice to him by NMDA of the suspected violation.

Had Mr. Krolik properly been informed that access to the facility was being sought because a violation was suspected, he could have sought the advice of legal counsel prior to deciding whether to grant or deny permission for the inspection. Had permission for the inspection been denied, a warrant could have been sought pursuant to Section 9(b) of FIFRA, 7 U.S.C. § 136g(b).[8]

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[7]Tr. 70-75.

[8]Section 9(b) provides:

> Warrants.-For purposes of enforcing the provisions of this subchapter and upon a showing to an officer or court of competent jurisdiction that there is reason to believe that the provisions of this subchapter have been violated, officers or employees duly designated by the Administrator are empowered to obtain and to execute warrants authorizing-

The NMDA cannot put itself above the law and ignore this mandate in Section 9(a)(2), even given the importance of its mission to enforce FIFRA and thereby protect the environment. As Mr. Justice Brandeis wrote in the context of a case involving the application of Fourth Amendment but which teaching is equally applicable in the context of the present case involving the application of the statutory requirement of notice in Section 9(a)(2):

> Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent. . . . The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.[9]

And he went on to add:

> Decency, security and liberty alike demand that government officials shall be

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> (1) entry, inspection, and copying of records for purposes of this section or section 136f of this title;
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> (2) inspection and reproduction of all records showing the quantity, date of shipment, and the name of consignor and consignee of any pesticide or device found in the establishment which is adulterated, misbranded, not registered (in the case of a pesticide) or otherwise in violation of this subchapter and in the event of the inability of any person to produce records containing such information, all other records and information relating to such delivery, movement, or holding of the pesticide or device; and
>
> (3) the seizure of any pesticide or device which is in violation of this subchapter.

See also, Marshall v. Barlow's Inc., 436 U.S. 703 (1973).

[9]Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

> subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.[10]

Having concluded that the Notice of Inspection was faulty because of the failure to comply with the statute, I conclude that any evidence which was collected by the inspectors during their two visits to Rek-Chem is thereby rendered inadmissible and should be excluded. Therefore, I will not consider the photocopies of labels of pesticides produced by Rek-Chem or the pesticide product production report for the period 5-1-87 through 9-9-87 which Mr. Krolik provided to the NMDA inspectors during their two visits to Rek-Chem.

I cannot conclude, however, that this direct evidence provided by Mr. Krolik led to the other evidence upon which the remaining alleged violations are based; hence, the remaining evidence is not derivative of that gathered at Rek-Chem. The evidence which was available in the NMDA files, the evidence and the information secured during the visit of the NMDA inspectors to Auto-Chlor and the evidence secured during the inspection of the Fajita Factory were gathered prior to the inspection of Rek-Chem and as a result of the informal complaint filed by Mr. Merrifield of Auto-Chlor. The evidence collected at Dixie Petro-Chem did not derive from the

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[10] Id. at 485.

inspection of Rek-Chem but from the earlier visit to Auto-Chlor where Mr. Merrifield told Mr. Meyer that Dixie Petro-Chem was the likely supplier of sodium hypochlorite to Rek-Chem. Finally, the product registration records and the production reports in the EPA files were available for examination and would have been subject to routine review by Ms. Myers as a part of developing the case against Rek-Chem.[11] Therefore, the "fruit of the poisonous tree" doctrine has no applicability in the context of this case. Respondent's motion to exclude evidence, other than that gathered directly from Mr. Krolik during the inspections of Rek-Chem, is denied. Consequently, the motion to dismiss the complaint is denied. However, with the exclusion of the evidence gathered at Rek-Chem, the portion of Count III which alleges a failure to maintain and/or make available to EPA required records is dismissed as a consequence of the failure of the NMDA inspectors to comply with Section 9(a)(2) of FIFRA, 7 U.S.C. § 136g(a)(2).

B. Merger of Derivative Counts vs. Separate Counts for Independent and Substantially Distinguishable Charges

Respondent urges that the four counts in the complaint be "merged" into a single charge based upon the FIFRA Civil Penalty Assessment Guidelines.

The "Guidelines for the Assessment of Civil Penalties Under Section 14(a) of FIFRA"[12] (Penalty Policy) which Complainant has

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[11] See, e.g., Tr. 322, 329, 335, 341.

[12] 39 Fed. Reg. 27711 (July 31, 1974).

used to calculate the proposed penalty in this case provides, in pertinent part:

> (2) What constitutes an independently assessable charge. A separate civil penalty shall be assessed for each violation of the Act which results from an independent act (or failure to act) of the respondent and which is substantially distinguishable from any other charge in the complaint for which a civil penalty is to be assessed. In determining whether a given charge is independent of and substantially distinguishable from any other charge for purposes of assessing separate penalties, complainant must consider whether each provision requires an element of proof not required by the other. Thus, not every charge which may appear in the complaint shall be separately assessed. Where a charge derives primarily from another charge cited in the complaint for which a penalty is proposed to be assessed, the subsequent charge may not warrant a separate assessment. The complaint will propose to assess an appropriate civil penalty for each independent and substantially distinguishable charge.[13]

The basic question is whether each of the counts in the complaint requires an element of proof not required by the others and, hence, is an "independent and substantially distinguishable charge." Count I alleges the distribution of an unregistered pesticide in violation of Section 12(a)(1)(A) of FIFRA. Count II, which alleges the distribution of a misbranded pesticide in violation of Section 12(a)(1)(E) of FIFRA, requires an element of proof not required of Count I, namely, the absence of a producing establishment number. Count III, which alleges the failure to comply with established reporting requirements in violation of Section 12(a)(2)(M) of FIFRA, requires an element of proof not

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[13] Id.

required of Counts I or II, namely, the failure to file a required production report with EPA. Finally Count IV, which alleges the distribution of a misbranded pesticide in violation of Section 12(a)(1)(E) of FIFRA (just as Count II alleges a violation of the same provision) requires an element of proof not required of Counts I, II or III, namely, the use of the product registration number of another pesticide. Therefore, I conclude that each count in the complaint is an "independent and substantially distinguishable charge."

This conclusion is further confirmed by the review of "Section II: Civil Penalty Assessment Schedule in the Penalty Policy" where each of the Counts in the complaint is treated as a separate violation. Thus, Count I is a registration violation classified as charge code E1. Count II is a separate registration violation classified as charge code E15. (These two counts allege the violation of separate provisions of FIFRA.) Count III is a miscellaneous violation classified as charge code E37 and Count IV is a minor violation classified as charge code E9.

The conclusion that each count is independent and distinguishable is also supported by a review of the document "Citation Charges for Violations of FIFRA"[14] wherein charge codes E1, E15, E37 and E9 are separately categorized and described.

I therefore conclude that the complaint properly reflects four separate counts for the violations alleged and that Respondent's

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[14] Id. at 27721.

motion to "merge" the four counts into a single count should be denied.

C. Liability for Alleged Violations

An analysis of the evidence presented at the hearing demonstrates that Complainant has met its burden of establishing a prima facie case with respect to the violations alleged. Further, based upon a preponderance of the evidence, the Respondent must be found liable for the violations alleged in the complaint.[15]

In his affidavit Mr. Krolik stated that Rek-Chem variously had the permission of the manufacturer [Dixie Petro-Chem] and/or Ms. Barbara Pringle of EPA to use a label and registration number of Dixie Petro-Chem for a 10% bleach solution, and of Mr. Merrifield of Auto-Chlor and Ms. Pringle to use the Auto-Chlor label and registration for a 5 1/4% bleach solution. Both Ms. Pringle and Mr. Merrifield denied that they gave Mr. Krolik such permission.[16] Even assuming that Mr. Krolik received such advice and/or permission from Ms. Pringle, or such permission from Mr. Merrifield, that would not relieve Rek-Chem of its liability for failure to comply with FIFRA in this matter. Any reliance by Mr. Krolik upon what he understood to be Ms. Pringle's advice must be dismissed as a defense to Rek-Chem's liability in this matter

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[15]The violation alleged in Count III was dismissed in part (supra, at 20).

[16]Defendant's [sic] Written Interrogatories to Barbara Pringle (October 2, 1992) Interrogatory Nos. 6 and 7; Barbara Pringle's Response to Respondent's Written Interrogatories (October 7, 1992); Tr. 262, 267.

for the reasons set forth in my order of September 30, 1992.[17] As for Mr. Merrifield's alleged permission to use the Auto-Chlor's label and registration number, no private citizen, such as Mr. Merrifield, could relieve Respondent of its obligation to comply with FIFRA and regulations issued thereunder. Further, Respondent offers no legal support for such a defense to its failure to comply with its statutory obligations.

Count I: Based upon Findings of Fact/Conclusions of Law 11, 12, 13, 14, 16, 17, 30, 31, 32, 33, 34 and 35 (supra) it is concluded that Respondent distributed "Rek-Chem Sanitizing Solution CL," an unregistered pesticide, to the Fajita Factory Restaurants. Section 3 of FIFRA, 7 U.S.C. § 136a, requires the registration of pesticides intended for distribution or sale and establishes the procedure for such registration. Under Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), it is unlawful for any person in any State to distribute, sell, ship or deliver any pesticide which is not registered under Section 3 of FIFRA, 7 U.S.C. § 136a. The failure or refusal to comply with the requirements of Section 3 of FIFRA, 7 U.S.C. § 136a, constitutes an unlawful act under Section 12(a)(1)(A), 7 U.S.C. § 136j(a)(1)(A). Therefore, Respondent violated Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), by distributing an unregistered pesticide.

Count II: Based upon Findings of Fact/Conclusions of Law 11, 12, 13, 15, 16, 30, 31, 32, 33, 34 and 35 (supra) it is concluded that the Respondent distributed "Rek-Chem Sanitizing Solution CL"

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[17]At pp. 3-4.

without a producing establishing number on the label. Section 2(q)(1)(D) of FIFRA, 7 U.S.C. § 136(q)(1)(D), states that a pesticide is misbranded if its label does not bear the registration number assigned under Section 7 to each establishment in which it was produced. Section 12(a)(1)(E), 7 U.S.C. § 136j(a)(1)(E) makes it an unlawful act for any person to distribute, sell or offer for sale any pesticide which is misbranded. Therefore, Respondent has violated Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), by distributing a pesticide that was misbranded.

Count III: Based upon Findings of Fact/Conclusions of Law 7, 8, 9, 10, 11, 12, 13, 16, 17, 29, 30, 31, 32, 33, 34 and 35, it is concluded that Respondent failed to report the production of the pesticide, "Rek-Chem Sanitizing Solution CL," or the active ingredient, sodium hypochlorite, to the Administrator during 1987. Section 7 of FIFRA, 7 U.S.C. § 136e, requires the producer to report annually to the Administrator the types and amounts of pesticides which the producer is currently producing and which the producer has produced and has sold or distributed during the past year. Section 12(a)(2)(M) of FIFRA, 7 U.S.C. § 136j(a)(2)(M) makes it unlawful for any person to knowingly falsify all or part of any information submitted to the Administrator pursuant to Section 7, any report filed under FIFRA, or any information marked as confidential and submitted to the Administrator under any provision of FIFRA. Therefore, the Respondent violated Section 12(a)(2)(M) of FIFRA, 7 U.S.C. § 136j(a)(2)(M) by knowingly failing to submit

information required under Section 7 of FIFRA, 7 U.S.C. § 136(e) and the regulations promulgated thereunder.

Count IV: Based upon Findings of Fact/Conclusions of Law 2, 11, 12, 13, 14, 16, 30, 31, 32, 33, 34 and 35 (supra) it is concluded that Respondent distributed "Rek-Chem Sanitizing Solution CL" to the Fajita Factory Restaurants as an imitation of Auto-Chlor's "Sanitizing Solution CL" by using Auto-Chlor's registration number (6243-2-ZA) on Rek-Chem's label. Section 2(q)(1)(C) of FIFRA, 7 U.S.C. § 136(q)(1)(C) states that a pesticide is misbranded if it is an imitation of another pesticide. Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E) states that it is an unlawful act for any person to distribute, sell or offer for sale any pesticide which is misbranded. Therefore, Respondent has violated Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), by distributing a pesticide that was misbranded pursuant to Section 2(q)(1)(C) of FIFRA, 7 U.S.C. § 136(q)(1)(C).

V. The Penalty

A. Introduction

Section 22.27(b) of the Consolidated Rules of Practice (40 C.F.R. § 22.27(b)) states, in pertinent part:

> If the Presiding Officer determines that a violation has occurred, the Presiding Officer shall determine the dollar amount of the recommended civil penalty to be assessed in the initial decision in accordance with any criteria set forth in the Act relating to the proper amount of a civil penalty, and must consider any civil penalty guidelines issued under the Act. If the Presiding Officer decides to assess a penalty different in amount from the penalty recommended to be

> assessed in the complaint, the Presiding Officer shall set forth in the initial decision the specific reasons for the increase or decrease.

Section 14(a)(4) of FIFRA, 7 U.S.C. § 136l(a)(4), states that "[i]n determining the amount of the penalty, the Administrator shall consider the appropriateness of such penalty to the size of the business of the person charged, the effect on the person's ability to continue in business, and the gravity of the violation." Section 14(a)(1), 7 U.S.C. § 136l(a)(1) limits the civil penalty for any "dealer, retailer or other distributor" to $5,000.00 for each offense.

In 1974 the Agency published the Penalty Policy[18] which provides guidelines for the assessment of civil penalties under Section 14(a) of FIFRA. (Although the Agency published a new civil penalty policy on July 2, 1990,[19] the 1974 policy is considered because the complaint herein was issued prior to July 1990.) The Penalty Policy incorporates the statutory factors in calculating the penalty, namely: (a) the gravity of the violation; (b) the size of the business; and (c) inability of Respondent to continue in business. The Penalty Policy contains a civil penalty assessment schedule which includes a vertical axis and a horizontal axis. Violations, ordered according to their gravity, are listed along the vertical axis (with their corresponding charge codes) and size of the business gradations run along the horizontal axis. The

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[18]Supra, n. 12.

[19]Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) (July 2, 1990).

dollar penalty assessment for a charge may be found in a cell in the assessment schedule which corresponds to the gravity level for the violation and to the size of Respondent's business.

The Penalty Policy authorizes a deviation of as much as 10% above or below the penalty assessment amount found in the appropriate cell within the matrix. To guide one in determining whether such an adjustment should be made, the Penalty Policy provides the following criteria:

> (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.

Complainant contends that I should accord great deference and considerable weight "to the Agency's interpretations of Section 14(a)(4) of FIFRA in both the 1974 FIFRA Penalty Policy and Complainant's application of the Penalty Policy to the facts of this case." To the extent that Complainant is suggesting any deviation from the requirements of 40 C.F.R. § 22.27(b), I must reject Complainant's contentions. Section 22.27(b) does not require the Presiding Officer to give great deference and considerable weight to any civil penalty guidelines issued under the Act; it only requires the Presiding Officer to "consider any civil penalty guidelines issued under the Act." Moreover, Section 22.27(b) does not require the Presiding Officer to give great

deference and considerable weight to the application of the penalty policy to the facts of a given case, i.e., to the penalty recommended to be assessed in the complaint; it only requires the Presiding Officer to set forth in the initial decision the specific reasons for any deviation from the Agency's recommended penalty.

The Complainant cites two decisions of the Supreme Court in support of its position;[20] however, neither requires a deviation from the instruction in Section 22.27(b) of the Consolidated Rules of Practice. Each cited decision of the Court simply restates the proposition that a court may accord great weight or considerable weight to the consistent and longstanding interpretation placed on a statute by an agency charged with its administration, although such interpretation is not controlling.

Where an agency engages in the exercise of delegated authority to promulgate rules or regulations to implement a statute or engages in the exercise of adjudicative authority to establish and maintain a "consistent and longstanding" interpretation of a statute, the Court has recognized the applicability of the cited proposition. However, the Court does not accord the same weight or deference to "interpretive rules" or "agency enforcement guidelines" or "administrative guidelines" as it does to norms which derive from the "delegated lawmaking powers" of the agency head. Such informal interpretations are "entitled to some

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[20]NLRB v. Bell Aerospace Co., 416 U.S. 267, 274 (1974); U.S. v. National Ass'n. of Securities Dealers, 422 U.S. 694, 719 (1975).

weight"[21] and offer "guidance."[22] As the Court of Appeals for the D.C. Circuit has so aptly stated:

> An administrative agency has available two methods for formulating policy that will have the force of law. An agency may establish binding policy through rulemaking procedures by which it promulgates substantive rules, or through adjudications which constitute binding precedents.
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> * * * * * * *
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> A properly adopted substantive rule establishes a standard of conduct which has the force of law. In subsequent administrative proceedings involving a substantive rule, the issues are whether the adjudicated facts conform to the rule and whether the rule should be waived or applied in that particular instance. The underlying policy embodied in the rule is not generally subject to challenge before the agency.
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> * * * * * * *
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> A general statement of policy, on the other hand, does not establish a 'binding norm.' It is not finally determinative of the issues or rights to which it is addressed. . . . When the agency applies the policy in a particular situation, it must be prepared to support the policy just as if the policy statement had never been issued. An agency cannot escape its responsibility to present evidence and reasoning supporting its substantive rules by announcing binding precedent in the form of a general statement of policy.
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[21] Martin v. OSHRC, 499 U.S. ___, 113 L.Ed.2d 117, 111 S. Ct. ___ (1991).

[22] General Electric Co. v. Gilbert, 429 U.S. 125, 50 L.Ed.2d 343, 97 S. Ct. 401, reh den. 429 U.S. 1079 (1976).

> Consequently, a policy judgment expressed as a general statement of policy is entitled to less deference than a decision expressed as a rule or an adjudicative order.[23]

Finally, the Chief Judicial Officer acknowledged that "the requirement to give the guidelines consideration is 'entirely in accordance with the settled rule that agency policy statements interpreting a statute are entitled to be given such weight as by their nature seems appropriate.'"[24] I therefore will consider the Penalty Policy and accord it such weight as seems appropriate in the circumstances.

B. Size of Business

In determining the appropriate penalty for each of the violations found, the size of the business must be considered. Once that factor has been determined it will remain the same for each of the four penalty calculations and, hence, will be the first factor to be ascertained in my penalty calculation.

The size of the business is based upon the total business revenues from all business operations (gross sales) for the prior fiscal year. The Complainant contends that Rek-Chem's gross sales for the relevant period were approximately $2,000,000.00 based upon a Dun and Bradstreet report on the firm. Respondent objects to any reliance upon the figure in this report because the amount was a

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[23]Pacific Gas & Electric Co. v. Federal Power Comm'n, 506 F.2d 33, 38-40 (1974) (footnotes omitted).

[24]Bell and Howell Company, (TSCA-V-C-033, 034, 035) (Final Decision, December 2, 1983), slip op. at 10, n. 6, quoting the Presiding Officer's Initial Decision.

projected figure. It is not necessary to rely upon the Dun and Bradstreet report to ascertain the gross revenues of Rek-Chem. Respondent has introduced Rek-Chem's Federal tax returns for 1985, 1986, 1987 and 1988.[25] Each shows gross receipts or sales in excess of $1,000,000.00. Therefore, gross revenues in excess of $1,000,000.00 are demonstrably representative of the general performance of Rek-Chem over the relevant period being considered. Under the Penalty Policy all firms whose gross sales exceeded $1,000,000.00 fall into "Category V." Therefore, Rek-Chem is classified as a "Category V" business.

C. Gravity and Initial Penalty Calculation

Count I: It has been found that Respondent violated Section 12(a)(1)(A) of FIFRA by distributing an unregistered pesticide. Rek-Chem clearly possessed knowledge of the requirement to register pesticides because it has previously registered other pesticides[26] and on August 11, 1987, had submitted an application to register a pesticide, Rek Sun Fresh Liquid Bleach 5.25%, which product was similar to the Rek-Chem Sanitizing Solution CL.[27] Therefore, the gravity of this Count which carries the charge code of E1, must be classified as a registration violation: "non-registered" and as "knowledge/no application submitted" or 1.B. in the registration violation category. Given this classification of

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[25]Resp. Exhs. I, J, K and L.

[26]Tr. 367.

[27]Resp. Exh. G.

the gravity of the violation and the size of the business, the appropriate penalty on the penalty matrix is $3,200.00.

Count II: It has been found that Respondent violated Section 12(a)(1)(E) of FIFRA by distributing a pesticide that is misbranded, namely, without a producing establishment number on the label. It should be noted that Rek-Chem possessed an EPA establishment number, 43196-NM-01.[28] Under the Penalty Policy this violation, which carries a charge code of E9, is classified as a minor violation for which "the Agency may determine not to assess a civil penalty." However, where this charge "appears in combination with any two of the other above charges" the Penalty Policy Prescribes a $1,200.00 penalty for a Respondent in a Category V business.[29] I interpret "other above charges" to apply to violations, other than minor violations, listed in the civil penalty assessment schedule of the Penalty Policy and, therefore, conclude that an initial penalty assessment of $1,200.00 is appropriate.

Count III: It has been found that Respondent violated Section 12(a)(2)(M) of FIFRA by failing to include in its annual production report to EPA the production of the pesticide "Rek-Chem Sanitizing Solution CL" or any product containing the active ingredient "sodium hypochlorite." Under the Penalty Policy this violation carries a charge code of E37 - "failure to submit required reports of production or distribution data required under section 7(c)."

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[28]Resp. Exh. G (letter of August 11, 1987).

[29]39 Fed. Reg. at 27718.

Given the size of Respondent's business, the appropriate penalty under the penalty matrix is $5,000.00.

Count IV: It has been found that Respondent violated Section 12(a)(1)(E) of FIFRA by distributing a misbranded pesticide in that it was an imitation of Auto-Chlor's "Sanitizing Solution CL" by using Auto-Chlor's registration number. The gravity of such a violation carries a charge code of E15 and the penalty matrix for a Category V business offering for sale a product which is an imitation of another pesticide produces a penalty of $5,000.00.

In summary, the initial penalty assessment results in the following:

Count I	$ 3,200.00
Count II	$ 1,200.00
Count III	$ 5,000.00
Count IV	$ 5,000.00
Total	$14,400.00

D. Inability to Continue in Business

Respondent has the burden to raise and establish its inability to continue in business or inability to pay proposed penalties.[30] Thus, the inability to continue in business or to pay a penalty is an affirmative defense and the Respondent bears the burden of going forward with the evidence to establish it.[31] While

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[30] In re Edward Pivirotto and Josephine Pivirotto d/b/a E&J Used Tool Co., TSCA Appeal No. 88-1 (February 15, 1990) at 9.

[31] In re Helena Chemical Company, FIFRA Appeal No. 87-3 (November 16, 1989).

Respondent has raised the defense here, Respondent has failed to meet its burden to establish either that Respondent is unable to pay the proposed penalty or that Respondent would be unable to continue in business if the proposed penalty were imposed. The current status of Rek-Chem is unclear. Complainant alleges that it was sold by Mr. Krolik but also alleges the existence of Rek Industries Corporation (a.k.a. Rek-Chem Industries formerly doing business as Rek-Chem Manufacturing Corporation) continues to exist. Respondent offered no witnesses to substantiate its assertions regarding ability to pay. The only evidence which was offered and admitted was the Rek-Chem tax returns for 1985, 1986, 1987 and 1988. Standing alone, without more, those returns do not establish a current inability to pay or that the proposed penalty would have an adverse effect upon the current ability of Rek-Chem or its successor to continue in business.

E. Consideration of Adjustment Criteria

The remaining question in setting the final penalty to be assessed for the violations found herein is whether an adjustment should be made. As noted previously, the Penalty Policy provides seven criteria to be considered in answering this question (supra, at 28).

Respondent violated the law because the labels on the containers which it distributed did not include Rek-Chem's producing establishment number; because the labels included the product registration number which a competitor used for its brand of the same product, i.e., common household chlorine bleach;

because Rek-Chem had not secured a product registration number for its brand name of this household bleach; and because Rek-Chem had failed to file production reports with EPA for the bleach which it diluted and repackaged prior to distribution.

The essence of the violations committed by Rek-Chem resulted from its distribution of some containers of ordinary household chlorine bleach to restaurants for use in dishwashing machines. While the product at issue which Rek-Chem distributed is a pesticide required to be registered with EPA, it is available for purchase without restriction in supermarkets throughout the United States. It is used everyday by ordinary citizens throughout the country in doing their household laundry. I cannot conclude that the violations committed by Rek-Chem would have a great potential "to injure man or the environment." Further, if whatever potential for injury that exists were realized, I cannot conclude that the "severity of such potential injury" would be great.

The "scale and type of use" established by the facts in this case involved the sale of the bleach to two restaurants in a single metropolitan area of New Mexico. As for the "identity of the persons exposed to a risk of injury," it is conceivable that a restaurant employee may have been exposed to a risk of injury through the improper use of the product distributed by Rek-Chem. However, such exposure would have resulted only from the act of distribution and not from the acts which per se constituted Respondent's violations. Neither the absence of proper product or establishment registration numbers on a label, nor the failure to

file production reports, in and of themselves, will produce an exposure to injury within the facts found in this case. There is no contention that the labels failed to contain appropriate warnings to the users.

The "extent to which the applicable provisions of the Act were in fact violated" has been established. Respondent clearly possessed actual knowledge of FIFRA because it had registered products and filed production reports in the past and was attempting, before and after the inspection, to register some sodium hypochlorite solutions with EPA. The establishment itself was registered with EPA and had been assigned Establishment Number 43196-NM-01.[32] One complaint had been issued previously against Rek-Chem for failure to file a timely production report and that matter was subsequently settled through a consent agreement and final order.[33]

The evidence of good faith by Rek-Chem is mixed. On the one hand, Respondent used improper labels and failed to file production reports for the sodium hypochlorite products it distributed. On the other hand, Rek-Chem was seeking to register a 5.25% chlorine bleach product (Rek Sun Fresh Liquid Bleach) before, during and after the inspection which led to the complaint herein.

On balance, giving full consideration to each of the seven adjustment criteria set forth in the Penalty Policy, I conclude that a 10% downward adjustment should be made in the initial

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[32]Compl. Exh. 19 at 2.

[33]Tr. 312.

penalty determination herein. Therefore, the penalty is hereby reduced from $14,440.00 to $12,996.00.

ORDER[34]

Pursuant to Section 14 of FIFRA, 7 U.S.C. § 136l, a civil penalty in the amount of $12,996.00 is assessed against Respondent, Rek-Chem Manufacturing Corporation, for the violations of Section 12 of FIFRA, 7 U.S.C. § 136j found herein.

IT IS ORDERED that Respondent, Rek-Chem Manufacturing Corporation, pay a civil penalty to the United States in the sum of $12,996.00. Payment shall be made by cashier's or certified check payable to "Treasurer, United States of America." The check shall be sent to:

EPA - Region 6
(Regional Hearing Clerk)
P.O. Box 360582M
Pittsburgh, PA 15251

Respondent shall note on the check the docket number specified on the first page of this initial decision. At that time of payment, Respondent shall send a notice of such payment and a copy of the check to:

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[34]Pursuant to 40 C.F.R. § 22.27(c), this initial decision shall become the final order of the Environmental Appeals Board within forty-five (45) days after the service upon the parties unless an appeal to the Environmental Appeals Board is taken by a party or the Environmental Appeals Board elects to review the initial decision upon its own motion. 40 C.F.R. § 22.30 sets forth the procedures for appeal from this initial decision.

Regional Hearing Clerk
U.S. Environmental Protection Agency
Region VI
1445 Ross Avenue
Dallas, Texas 75202-2733

Attn: Lorena Vaughn

Henry B. Frazier, III
Chief Administrative Law Judge

Dated: May 10, 1993
Washington, DC

CERTIFICATE OF SERVICE

I, Lorena S. Vaughn, the Regional Hearing Clerk, do hereby certify that a true and correct copy of the foregoing order for a status report on the case Docket No. IF&R VI-437C was provided the following persons on the date and in the manner stated below:

Ms. Jan Gerro, Esq. — **HAND-DELIVERED**
Assistant Regional Counsel
U.S. Environmental Protection Agency
1445 Ross Avenue
Dallas, Texas 75202

Mr. Peter V. Domenici, Jr. — **CERTIFIED MAIL**
August Jonas Rane
Dolan & Domenici
5801 Osuna N.E., Suite 107
Albuquerque, New Mexico 87102

Lorena S. Vaughn
Regional Hearing Clerk

May 21, 1993
Date