

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of)
)
CHEMPACE CORPORATION) Docket No. 5-IEFRA-96-017
)
Respondent)

ORDER GRANTING PARTIAL ACCELERATED DECISION
and
ALLOWING AN AMENDED ANSWER

Proceedings

On September 26, 1996, the Region 5 Office of the United States Environmental Protection Agency (the "Complainant" or "Region") filed a Complaint against the Chempace Corporation, of Toledo, Ohio (the "Respondent" or "Chempace"). The Complaint charges the Respondent with a series of violations of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"). The Respondent filed its initial Answer on October 18, 1996.

The Complaint charges Chempace with 99 counts of violations of FIFRA, as follows:

- selling or distributing the unregistered and canceled pesticide "Trigger" on 26 occasions, in violation of FIFRA §12(a)(1)(A), 7 U.S.C. §136j(a)(1)(A), as well as violating a cancellation order in connection with such sales, in violation of FIFRA §12(a)(2)(K), 7 U.S.C. §136j(a)(2)(K); [\(1\)](#)

- selling or distributing the unregistered and canceled pesticide "Uni-Rooter" on 3 occasions; [\(2\)](#)

- selling or distributing the unregistered pesticide "GLY" on 26 occasions; [\(3\)](#)

- selling or distributing the misbranded pesticide "Uni-Quat 14" on 15 occasions, in violation of FIFRA §12(a)(1)(E), 7 U.S.C. §136j(a)(1)(E); [\(4\)](#)
- selling or distributing the misbranded pesticide "Complete" on 20 occasions; [\(5\)](#)
- selling or distributing the misbranded pesticide "Eradicate" on 8 occasions; and
- producing all the above pesticides in an establishment not registered as a producer with EPA, in violation of FIFRA §7(a), 7 U.S.C. §136e(a). [\(6\)](#)

The Complaint proposes that Respondent pay a civil penalty of \$200,000 for these alleged violations.

In its original Answer, Respondent pleaded "no contest" to most of the material allegations of the Complaint. In its Amended Answer, Respondent denies, or denies knowledge of, most of the material allegations in the Complaint, and raises several defenses. The specific responses to the charges, and the defenses, will be addressed in the discussion below on the motion for partial accelerated decision.

The Region filed a Motion for Partial Accelerated Decision on June 6, 1997, seeking a determination that Chempace violated FIFRA as alleged in the 99 counts in the Complaint. On July 23, 1997, Chempace filed a Memorandum in Opposition to the motion for accelerated decision, as well as a motion for leave to file its Amended Answer. On August 5, 1997, Complainant filed a memorandum in opposition to Respondent's motion to amend its Answer.

The parties have also filed prehearing exchanges of evidence intended to be introduced in the hearing in this matter. The Complainant filed its exchange on July 18, 1997. Respondent filed its exchange on August 5, 1997.

Respondent's Motion to Amend its Answer

Respondent seeks to file an Amended Answer that replaces the numerous responses of "no contest" in the original Answer, in order to better conform with the rules of pleading required by the EPA Rules of Practice, specifically 40 CFR §22.15(b). That section requires the Answer to clearly and directly admit, deny, or explain each of the allegations in the Complaint. Respondent

also asserts that the Amended Answer will better reflect new information. Respondent retained new "special environmental counsel" after filing the original Answer. The new counsel filed the motion for leave to file an Amended Answer on behalf of Chempace.

Under Rule 15(e) of the Federal Rules of Civil Procedure, leave to amend a pleading "shall be freely given when justice so requires." Respondent has not truly substantively supported its claim that new information has become available. However, some leeway will be given due to Respondent's having retained new "special environmental" counsel. The Amended Answer is more precise in its responses than the original Answer, which contained many responses of "no contest." Therefore, Respondent's motion for leave to file an Amended Answer will be granted.

Complainant will not be unfairly prejudiced by allowing Respondent leave to file its Amended Answer, as will be seen in the following decision on the motion for accelerated decision. The Amended Answer cannot substitute for evidence or evidentiary materials to be filed in opposition to that motion. Close analysis of the responses to factual allegations in the Amended Answer reveals that they are not necessarily inconsistent with many of those in the original Answer, anyway. Those specific facts that establish Respondent's liability for the alleged violations will be discussed below in relation to the motion for partial accelerated decision. Respondent's motion is granted, and the Amended Answer will be considered Respondent's operative pleading in this matter.

Motion for Partial Accelerated Decision

The EPA Rules of Practice, at 40 CFR §22.20(a), empower the Administrative Law Judge to render an accelerated decision on all or part of the issues in a proceeding, "if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law." The motion for accelerated decision is essentially equivalent to the motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure.

On May 4 and May 9, 1994, inspectors employed by the Ohio Department of Agriculture ("ODA") conducted inspections of the Chempace facility in Toledo, Ohio. The lead inspector, Matthew C. Hofelich, submitted an affidavit in support of the motion, as well as copies of his contemporaneous inspection report and documents collected during the inspection of Respondent's

facility.⁽⁷⁾ ODA conducted the inspection under a cooperative agreement with EPA, for the purposes set forth at FIFRA §§8 and 9, 7 U.S.C. §§136f and 136g.

Respondent submitted an affidavit by its President, Ralph Wooddell, in opposition to the Complainant's motion for partial accelerated decision. Respondent does not dispute that it is a dealer or distributor of pesticides, and subject to FIFRA enforcement proceedings. The decision below relies upon the pleadings, motions and responses, and evidentiary materials submitted by both parties in support of their respective positions.

- Sales of Unregistered Trigger

Counts I-XXVI of the Complaint charge Respondent with selling the unregistered and canceled pesticide Trigger on 26 occasions, comprising 26 violations of FIFRA §12(a)(1)(A), 7 U.S.C. §136j(a)(1)(A), and of FIFRA §12(a)(2)(K), 7 U.S.C. §136j(a)(2)(K). FIFRA §12(a)(1)(A) renders it unlawful to sell or distribute a pesticide that is not registered or whose registration has been canceled. FIFRA §12(a)(2)(K) renders it unlawful to violate any cancellation order issued under the statute.

There is no dispute concerning the underlying facts that establish Respondent's liability for the violations of selling the unregistered and canceled pesticide Trigger. Respondent has admitted in its Amended Answer that the EPA canceled the registration for the pesticide Trigger in a Cancellation Order dated and effective on October 10, 1989.⁽⁸⁾ Chempace further asserts that the Cancellation Order and the sales invoices of Trigger "speak for themselves."⁽⁹⁾ So they do. The Cancellation Order also prohibited the sale or distribution of existing stocks of Trigger after March 1, 1990. The invoices establish that Chempace sold Trigger on 26 occasions in 1992 and 1993, after cancellation of the pesticide's registration.⁽¹⁰⁾

In its Amended Answer, Respondent denied the allegations that Counts I through XXVI constitute separate violations of FIFRA, and of the cancellation order.⁽¹¹⁾ Those denials are accorded no weight whatsoever. Those are legal, rather than factual, allegations. But Respondent has provided no legal defense to those charges, and has not raised any facts that could contradict its liability. In order to prevail against a properly supported motion for accelerated decision, a party may not rest on mere allegations or denials, but must set forth specific

facts showing that there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). Respondent has not done so in response to the allegations concerning its sales of the unregistered and canceled pesticide Trigger.

Accelerated decision will therefore be granted finding Respondent liable for Counts I through XXVI of the Complaint. Respondent's sales of Trigger on 26 occasions after cancellation of that pesticide's registration, constitute 26 violations of FIFRA §§12(a)(1)(a) and 12(a)(2)(K).⁽¹²⁾

- Sales of Unregistered Uni-Rooter

Counts XXVII-XXIX of the Complaint charge Chempace with selling or distributing the unregistered and canceled pesticide Uni-Rooter on three occasions. The facts supporting these violations are undisputed and parallel to those supporting the violations of the sale of Trigger, discussed above. The registration for Uni-Rooter was canceled in the same Cancellation Order that applied to Trigger. The order prohibited production of that pesticide after October 10, 1989, and prohibited sales of existing stocks after March 1, 1990.⁽¹³⁾ In its Amended Answer, Respondent again asserts that the Cancellation Order and invoices speak for themselves. The invoices establish that Chempace sold Uni-Rooter on three occasions in 1992 and 1993, after cancellation of that pesticide's registration.⁽¹⁴⁾

Respondent's President, Ralph Wooddell, in his affidavit attached to Respondent's memorandum in opposition to the motion for accelerated decision, states that he is aware of products similar to Uni-Rooter that are sold as drain cleaners, and are not registered under FIFRA.⁽¹⁵⁾ However, in its Amended Answer, Respondent admitted that "Uni-Rooter was intended for the preventing, destroying, repelling, or mitigating of pests."⁽¹⁶⁾ The label for Uni-Rooter states that it is a "vegetation killer" that destroys annual and perennial weeds, grasses, and roots.⁽¹⁷⁾ "The term 'pesticide' means any substance . . . intended for preventing, destroying, repelling, or mitigating any pest, and any substance . . . intended for use as a plant regulator, defoliant, or desiccant . . ." FIFRA §2(u), 7 U.S.C. §136(u). The term "pest" is defined to include weeds. FIFRA §2(t), 7 U.S.C. §136(t). Thus, there is no question that Uni-Rooter is a pesticide as defined in FIFRA, and subject to FIFRA's registration requirements.

Respondent has not raised any legal defense or issue of fact that could refute its liability for these violations.

Accelerated decision is therefore granted on Counts XXVI-XXIX of the Complaint, finding that Respondent committed three violations of FIFRA §§12(a)(1)(A) and 12(a)(2)(K) by selling the unregistered and canceled pesticide Uni-Rooter.

- Sales of Unregistered GLY

Counts XXX to LV of the Complaint charge Respondent with selling the unregistered and canceled pesticide GLY on 26 occasions. It is not disputed that a pesticide named "GLY" was subject to an EPA Cancellation Order dated December 18, 1990, and that such pesticide was not registered after that date.⁽¹⁸⁾ It is also not disputed that invoices show the sale of "GLY" or "GLY Cherry" on 26 occasions in 1992 and 1993.⁽¹⁹⁾ Respondent, however, contends that the product sold under those names was actually a deodorant, and not the pesticide GLY. Respondent further asserts that the pesticide labels were placed on the deodorant GLY containers by mistake.⁽²⁰⁾

The ODA inspector, Mr. Hofelich, copied the GLY label in use at the Chempace facility at the time of his inspection.⁽²¹⁾ The label describes GLY as "the GLYCOL air sanitizer and surface disinfectant." The directions for use include two sections -- one for surface disinfection and one for destroying disagreeable odors. The directions for surface disinfection state that the product will "aid in destroying many bacteria." A pesticide is defined in FIFRA §2(u) as a "substance intended for preventing, destroying, repelling, or mitigating any pest." The term "pest" includes "bacteria." FIFRA §2(t). Mr. Hofelich also obtained copies of Chempace's production records for the period of the invoices indicating sales of GLY -- 1992 and 1993.⁽²²⁾ Those records uniformly refer to GLY or GLYCHERRY as a "disinfectant/deodorant." Thus, according to the label found in the Chempace facility, GLY is a pesticide as well as a deodorant.

Respondent, through Mr. Wooddell's affidavit, says nothing more than that he told Mr. Hofelich that the pesticide that was being produced "was a deodorant product named GLY, not the pesticidal product named GLY."⁽²³⁾ Mr. Hofelich denies having heard that statement.⁽²⁴⁾ But, regardless of their conversation, Mr. Wooddell provides no further explanation or evidence to support his assertion that the GLY referred to in the invoices was not a pesticide. He does not specify any particular differences in the chemical formulations or claims of the products, or offer to prove that they were in fact different products. Again, in order to prevail against a properly supported motion for summary

judgment or accelerated decision, a party may not rest on mere allegations or denials, but must set forth specific facts showing that there is a genuine issue for trial. *Anderson, supra*. Chempace has failed to do so here in response to the evidence that it sold the pesticide GLY.

In light of the documentary evidence which indicates that GLY is both a pesticide and a deodorant, Mr. Wooddell's mere denial is accorded no weight. GLY Cherry and GLY evidently have a deodorant as well as a disinfectant use. The GLY label and production records prove that it is also a pesticide subject to FIFRA. EPA canceled the FIFRA registration for GLY on December 18, 1990. The invoices show that Respondent sold GLY on 26 occasions after it was canceled, while it was unregistered. Accelerated decision will therefore be granted on Counts XXX-LV of the Complaint, finding Chempace liable for 26 violations of FIFRA §12(a)(1)(A).⁽²⁵⁾

- Sales of Misbranded Uni-Quat 14, Complete, and Eradicate

Counts LVI-LXX of the Complaint charge Respondent with selling misbranded containers of the pesticide Uni-Quat 14 ("Uni-Quat") on 15 occasions from June 1992 to June 1993. Uni-Quat was a registered pesticide at the time of the sales. These counts allege that the Uni-Quat labels contained false information, however, in their declaration that Chempace was a registered producing establishment, with the EPA Establishment No. 4170-OH-1. The Complaint alleges that these sales constitute sales of a misbranded pesticide, in violation of FIFRA §12(a)(1)(E), 7 U.S.C. §136j(a)(1)(E). That section renders it unlawful to distribute or sell any pesticide which is misbranded. Respondent admitted it sold the pesticide Uni-Quat, but denied knowledge of most of the material allegations of the misbranding elements underlying these counts.⁽²⁶⁾

Respondent did, however, admit that its facility was never registered with the EPA under Establishment No. 4170-OH-1.⁽²⁷⁾ The copy of the Uni-Quat label taken by Mr. Hofelich's during his inspection shows the EPA Est. No. 4170-OH-1.⁽²⁸⁾ The sales invoices obtained by the inspector show that Uni-Quat was sold on the fifteen occasions alleged by Counts LVI-LXX.⁽²⁹⁾ Chempace has also admitted it did not have any current establishment registration in effect at the time of the sales. Its former EPA establishment number, 10155-OH-1, had been canceled by EPA on March 13, 1992.⁽³⁰⁾

Under FIFRA §2(q) (1) (A), a pesticide is "misbranded" if "its labeling bears any statement . . . which is false or misleading in any particular." Under §2(q) (1) (D), a pesticide is also "misbranded" if "its label does not bear the registration number assigned under section 136e of this title to each establishment in which it was produced." Here it is evident that the Uni-Quat labels bore a false registration number for Chempace, and were therefore misbranded. The Respondent sold these misbranded containers on 15 occasions as alleged. Respondent has raised no facts to challenge the Complainant's evidence in support of these charges. Accelerated decision will therefore be granted on Counts LVI-LXX, finding Chempace liable for selling a misbranded pesticide on those 15 occasions, comprising 15 violations of FIFRA §12(a) (1) (E), 7 U.S.C. 136j(a) (1) (E).

The Complaint also charges the Respondent with similar violations of selling two other misbranded pesticides -- Complete and Eradicate. The facts in support of these are essentially the same as those in support of the Uni-Quat counts. Chempace sold the pesticide Complete on some 20 occasions, as alleged in Counts LXXI-XC in the Complaint. The labels on the Complete containers bore a false EPA establishment registration number for Chempace, which had no registration number at the time.⁽³¹⁾ Chempace also sold the pesticide Eradicate with a false establishment registration number on some eight occasions, as alleged in Counts XCI-XCVIII in the Complaint.⁽³²⁾ Respondent has raised no facts to challenge the evidence showing that Chempace sold these misbranded pesticides as alleged. Therefore, accelerated decision will be granted with respect to Counts LXXI-XCVIII, finding Respondent liable for selling the misbranded pesticides Complete and Eradicate on a total of 28 occasions, comprising 28 violations of FIFRA §12(a) (1) (E).

- Production in an Unregistered Establishment

Count XCIX of the Complaint charges Respondent with producing various quantities of several pesticides while its facility was not registered as a producing establishment with the EPA, in violation of FIFRA §7(a), 7 U.S.C. §136e(a).⁽³³⁾ That section prohibits the production of any pesticide unless the establishment in which it is produced is registered with the Administrator. Respondent has admitted that its establishment registration was terminated by the EPA on March 13, 1992.⁽³⁴⁾ Chempace agreed to that cancellation as part of a Consent Order in a prior EPA proceeding in 1991.⁽³⁵⁾ In its Amended Answer, Respondent generally denies knowledge of the material

allegations underlying these charges, and denies the legal conclusions that it produced these pesticides.⁽³⁶⁾

Again, however, Respondent has failed to raise any facts in contradiction of the Complainant's evidence in support of the motion for accelerated decision on this count. The Complainant's evidence amply demonstrates that Chempace was producing pesticides at the time of the ODA inspection. FIFRA §136(w), 7 U.S.C. §136(w), defines the term "produce" as "to manufacture, prepare, compound, propagate, or process any pesticide or device or active ingredient used in producing a pesticide." The definition in the regulations includes the above terms, and adds "or to package, repackage, label, relabel, or otherwise change the container of any pesticide or device." The ODA inspector, Mr. Hofelich, documented his own observations, and obtained records that show Chempace was producing these pesticides.

A comparison of purchase orders and sales invoices shows that Chempace repackaged Complete and Eradicate before selling those pesticides.⁽³⁷⁾ Mr. Hofelich obtained Respondent's records showing that it manufactured Trigger, Uni-Rooter, GLY, and Uni-Quat 14 in 1992.⁽³⁸⁾ Mr. Hofelich also states in his affidavit that Mr. Wooddell told him during the inspection that Chempace was producing these pesticides.⁽³⁹⁾ Mr. Wooddell now states he does not recall having made any statements concerning production of pesticides.⁽⁴⁰⁾ However, Respondent provides no facts or evidence that could show it was not producing pesticides. Respondent has thus not raised any issue of fact that could preclude a finding of liability on Count XCIX of the Complaint. Accelerated decision is therefore granted on this count, finding that Respondent produced pesticides while not registered as a producer with the EPA, in violation of FIFRA §7(a), 7 U.S.C. §136e(a).

Amount of Civil Penalty

The Complainant's motion is for partial accelerated decision, on Respondent's liability for the alleged violations only. The issue of the appropriate amount of the civil penalty remains open. However, that issue is already narrowed considerably by the uncontested evidence in this proceeding.

The Region calculated its proposed penalty by following the FIFRA Enforcement Response Policy (the "ERP").⁽⁴¹⁾ The FIFRA ERP is designed to foster uniform assessments of civil penalties in FIFRA cases consistent with the statutory mandates. Under FIFRA §14(a)(1), 7 U.S.C. §1361(a)(1), a dealer or distributor who

violates any provision of FIFRA may be assessed a civil penalty of up to \$5000 for each offense. "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." FIFRA §14(a)(4). In this case the Region calculated a penalty of \$495,000 based on \$5000 for each of the 99 violations. The Region then reduced that amount by \$295,000, of nearly 60%, to \$200,000, based on its assessment of Respondent's ability to pay a penalty.⁽⁴²⁾

In these circumstances, the magnitude of the reduction for Respondent's ability to pay virtually supersedes the other penalty factors related to the gravity of the violations. In addition, Respondent addressed the penalty issue in its prehearing exchange and memorandum in opposition to the motion for accelerated decision. While Chempace seems to indicate it should not be considered highly culpable for these violations, the main substantive offer of evidence that could have a significant effect on the penalty concerns the company's financial condition.⁽⁴³⁾ Therefore, the hearing, and, presumably, settlement negotiations, should focus on Respondent's ability to pay a penalty as the primary issue.

Further Proceedings

Under separate cover, the parties will shortly be notified of the date and place for hearing in this matter. Due to the narrowing of the issues, the parties will be given an opportunity to supplement their prehearing exchanges. The hearing will be scheduled sufficiently in advance to allow ample time for settlement negotiations that could resolve this proceeding.

Summary of Decision

This decision grants Complainant's motion for partial accelerated decision in full. Respondent is found liable for all 99 violations alleged in the Complaint. These encompass violations for selling unregistered pesticides, selling misbranded pesticides, and producing pesticides in an unregistered establishment, as described more particularly above.

Andrew S. Pearlstein

Administrative Law Judge

Dated: October 15, 1997

Washington, D.C.

1. Counts I-XXVI of the Complaint. The individual counts are based on sales transactions represented by invoices. One violation is alleged for each such transaction, although the Complaint alleges that two sections of FIFRA were violated -- §§12(a)(1)(A) and 12(a)(2)(K).
2. Counts XXVII-XXIX in the Complaint.
3. Counts XXX-LV in the Complaint.
4. Counts LVI-LXX of the Complaint.
5. Counts LXXI-XC of the Complaint.
6. Count XCIX. This comprises a single count in the Complaint, alleging the unlawful production of five pesticides at Chempace's unregistered establishment.
7. The Affidavit of Matthew G. Hofelich, dated May 30, 1997, will be referred to in this decision as the "Hofelich Affidavit." The attachments, including his inspection report and other documents will be referred to by their stamped page numbers (1-166).
8. Complaint and Amended Answer, ¶¶10-14. Complainant's Prehearing Exchange, Exhibit 2.
9. Amended Answer, ¶¶45 and 46.
10. Attachments to Hofelich Affidavit, pp. 50-56, 58, 60-74, 77, 162, and 164. Respondent's Amended Answer, ¶46, raises possible discrepancies concerning five of these transactions. Respondent asserts three transactions are not supported by attached invoices. However the invoices for Counts VII, XIII, and XXV (##76158, 76805, and 79508), are found at pages 77, 162, and 164, respectively, in the attachments to the Hofelich Affidavit. Respondent also raises possible discrepancies concerning Counts III and IV (invoices ##75966 and 75993). Here, the Complaint, ¶46, apparently switched the amounts of Trigger sold according to those two invoices. This error does not affect Respondent's

liability for either count, as the invoices speak for themselves.

11. Complaint and Amended Answer, ¶¶48-50.

12. The number of violations is consistent with the Enforcement Response Policy for FIFRA (the "ERP"), Exhibit 10 in Complainant's prehearing exchange. Each shipment of an unregistered product constitutes a separate violation. However, although two separate sections of FIFRA, §§12(a)(1)(A) (selling an unregistered pesticide), and 12(a)(2)(K) (violating a cancellation order), were violated by these sales, each sale comprises a single transaction, and a single violation. (ERP, pp. 25-26).

13. Complaint and Amended Answer, ¶¶15-20; Complainant's Prehearing Exchange, Exhibit 2.

14. Attachments to Hofelich Affidavit, pp. 77-79.

15. Wooddell Affidavit, ¶6.

16. Complaint and Amended Answer, ¶16.

17. Attachments to Hofelich Affidavit, p. 25.

18. Complaint and Amended Answer, ¶¶24-26.

19. Complaint and Amended Answer, ¶62; Attachments to Hofelich Affidavit, pp. 101-127. One invoice cited by Respondent as missing, #75997 representing Count XXXII, is found at page 115 of the attachments.

20. Complaint and Amended Answer, ¶¶21-26, 63; Wooddell Affidavit, ¶¶4-5.

21. Attachments to Hofelich Affidavit, p. 26.

22. Attachments to Hofelich Affidavit, pp. 97-100.

23. Wooddell Affidavit, ¶¶4.

24. Hofelich Affidavit, ¶¶13-15.

25. The Complaint does not also allege that Respondent violated a cancellation order, in violation of FIFRA §12(a)(2)(K), with respect to the sales of GLY.

26. Complaint and Amended Answer, ¶¶27-30, 65-75.
27. Complaint and Amended Answer, ¶72.
28. Attachments to Hofelich Affidavit, p. 26.
29. Attachments to Hofelich Affidavit, pp. 84-96, 159-161.
30. Complaint and Amended Answer, ¶¶40-41; Attachments to Hofelich Affidavit, p. 42.
31. See Complaint and Amended Answer, ¶¶31-34, 76-88; the Complete label in the Hofelich Attachments, p. 28; and the invoices in the Attachments, pp. 128, 130-161.
32. See Complaint and Amended Answer, ¶¶35-38, 89-101; the Eradicate label in the Hofelich Attachments, p. 28; and the invoices in the Attachments, pp. 128, 157-164.
33. It would appear that Respondent could have been charged with five such violations, one for each pesticide produced in its unregistered establishment. See the FIFRA ERP, pp. 25-26.
34. Complaint and Amended Answer, ¶¶40-41; Hofelich Attachments, p. 42.
35. Hofelich Attachments, pp. 31-42; Complainant's Prehearing Exchange, Exhibits 21-24.
36. Complaint and Amended Answer, ¶¶102-121.
37. Hofelich Inspection Report, Attachments p. 6.
38. Hofelich Attachments, pp. 43-46, 75-76, 80-83, 97-100.
39. Hofelich Affidavit, ¶7.
40. Wooddell Affidavit, ¶3.
41. Complainant's Prehearing Exchange, Exhibit 10, and calculation worksheet, Exhibit 11.
42. Complaint, p. 24.
43. In its prehearing exchange, Chempace proposes the testimony of Mr. Wooddell; the company's Chairman of the Board, Robert Shall; and an officer of the Key Bank in Toledo, all of whom

would address the company's financial condition. It is not clear how the other proposed testimony, concerning such matters as a comparison of Chempace's products to others on the market, and Respondent's post-inspection compliance, could affect the civil penalty assessment. See Respondent's Prehearing Exchange, pp. 2-3.