

5/25/94

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

IN THE MATTER OF:)
)
ACCUVENTURE, INC.,) Docket No: FIFRA-1092-07-01-012
)
Respondent.)
_____)

Respondent found in violation of sections 12(a)(1)(A) and 12(a)(2)(L), of the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 136j(a)(1)(A) and (a)(2)(L), for the distribution of unregistered pesticides and the production of pesticides in an unregistered establishment. A penalty of \$70,000 is assessed.

ACCELERATED DECISION AND ORDER

By: Frank W. Vanderheyden Dated: May 25, 1994
Administrative Law Judge

Appearances:

For Complainant: Juliane Matthews
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Office of Regional Counsel
U.S. Environmental Protection Agency
Region 10
1200 Sixth Avenue
Seattle, Washington 98101

For Respondent: Tilman Hasche, Esquire
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INTRODUCTION

This is a civil administrative proceeding instituted pursuant to section 14(a) of the Federal Insecticide, Fungicide and Rodenticide Act, as amended, (FIFRA or Act), 7 U.S.C. § 136 et.seq. This proceeding was initiated by the issuance of an administrative complaint on October 9, 1992, by Region 10 of the U.S. Environmental Protection Agency. (complainant or EPA)

The complaint was based on information obtained during a producer establishment inspection conducted at Accuventure, Inc., in Beaverton, Oregon, on May 20, 1992, and market place inspections conducted at G.I. Joe's retail store in the aforementioned city, on June 2, 1992, a Fred Meyer retail store in Kent, Washington, on June 22, 1992, and G.I. Joe's retail store in Portland, Oregon on July 27, 1992.

The complaint charges that Accuventure Inc. (respondent or Accuventure), an Oregon corporation, produced and distributed unregistered pesticides in the form of water filters designed to eliminate microorganisms in drinking water. The complaint alleges that the water filters identified as AccuFilter Water Filtering Straw (AF-100), Replacement Filter (RF-300), AccuFilter Sport Bottle (AF-200), AccuFilter Combo Pack (AF-700), AccuFilter 5 Canteen Insert (AF-900) and AccuFilter 5 Canteen Insert (AF-800) contain silver and/or iodine for which there is no commercially valuable use in drinking water filters other than for pesticidal purposes; that the labels on the water filters make pesticidal

claims; and that these water filters are pesticides as defined in section 2(u) of the Act, 7 U.S.C § 136(u). The complaint specifically charges that none of the water filters described above was registered under section 3 of the Act at the time of the alleged distributions, in violation of section 12(a)(1)(A) of the Act, 7 U.S.C. § 136j(a)(1)(A), which makes it unlawful for any person to distribute or sell to any person any pesticide that is not registered under section 3. The complaint charges further that the water filters were produced at respondent's facility, located at 9915 S.W. Arctic Drive, Beaverton, Oregon, prior to the time the facility was registered with EPA as a pesticide-producing establishment in violation of 12(a)(2)(L) of FIFRA, 7 U.S.C. § 136j(a)(2)(L). It also charges that pursuant to section 14(a)(1) of FIFRA, respondent is subject to a maximum civil penalty of \$5,000 for each of the 14 violations. The complaint seeks a total penalty of \$70,000.

Respondent filed an answer to the complaint on November 3, 1992, and an amended answer on May 12, 1993. For reasons stated in those pleadings, respondent admitted some of the allegations but denied other allegations in the complaint, asserted affirmative defenses, and requested a hearing. Complainant and respondent filed prehearing exchanges on May 11, 1993, and May 17, 1993, respectively.

On January 14, 1994, complainant filed a motion for accelerated decision on the issue of liability and penalty pursuant to 40 C.F.R. §§ 22.16 and 22.20. Respondent did not respond to the

motion. On March 1, 1994, the undersigned Administrative Law Judge (ALJ) issued to respondent an Order to Show Cause (OSC) why it failed to respond to complainant's motion for accelerated decision. Respondent's counsel of record served a response to the OSC on March 8, 1994, which merely stated that effective January 31, 1994, Accuventure, Inc., ceased doing business, and that counsel was informed of this fact on or about March 1, 1994. On March 17, 1994, the ALJ issued an order finding respondent's March 8, 1994, pleading to be deficient and unresponsive. The order granted complainant's motion for accelerated decision with regard to both liability and penalty of \$70,000, and also granted complainant's motion to strike respondent's defenses. Complainant was ordered to submit a draft of a proposed accelerated decision for review, possible revision and signature of the ALJ.

Issues not discussed specifically below are either rejected or viewed as not being of sufficient import for the resolution of the principle issues presented.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Respondent is a corporation registered in the State of Oregon. At all times relevant to this proceeding, respondent owned and operated a facility in Beaverton, Oregon.

On June 3, 1992, complainant initiated an investigation into pesticide sales made by Accuventure, Inc., located at 9915 S.W. Arctic Drive, Beaverton, Oregon, to determine respondent's compliance with FIFRA and the regulations promulgated thereunder.

Accuventure, Inc., produces and distributes water filters

designed to eliminate microorganisms in drinking water. (Complaint (Cmpl) ¶4; Amended Answer (AAns) ¶4; Complainant's Prehearing Exchange Exhibit (CPHE 2)) Respondent's water filter, identified as AccuFilter Water Filtering Straw (AF-100), contains silver-impregnated carbon as the active ingredient. (Cmpl ¶5; AAns ¶5) The label on the AccuFilter Straw (AF-100) included the statement: "AccuFilter Straw can remove up to 98.2% of dangerous diseases, toxic chemicals, herbicides, and pesticides from water, without chemicals or boiling; will filter out chlorine, heavy metals, herbicides, organic poisons, giardia, bacteria, and viruses." The label further includes the statement "For additional water safety in highly contaminated water, use chlorine tablets, then the filter will eliminate the chlorine." (Cmpl ¶9; AAns ¶9; CPHE 12a)

The Accuventure, Inc. water filter, identified as Replacement Filter (RF-300), contains silver-impregnated carbon as the active ingredient. (Cmpl ¶6; AAns ¶6) Laboratory analysis of this filter, conducted by the EPA Region 10 laboratory, revealed that the filter media contained silver. (Cmpl ¶11; CPHE 5)

The AccuFilter Sport Bottle (AF-200) and the AccuFilter Combo Pack (AF-700) products include a filter similar to the RF-300 in the product's packages. (Cmpl ¶6; AAns ¶6) The label on the AccuFilter Sport Bottle (AF-200) includes the statement: "Can remove chlorine, giardia, bacteria, heavy metals, herbicides, organic poisons, and other sources of bad taste, odor, and color." The label further includes the statement "For additional water safety in bacteria contaminated water use chlorine tablets." (Cmpl

¶10; AAns ¶10; CPHE 12b) The label on the AccuFilter Combo Pack (AF-700) included the statement: "The AccuFilter Sport Bottle can remove up to 98.2% of dangerous diseases... toxic chemicals, herbicides, and pesticides from water without chemicals or boiling." The label further included the statement: "For additional water safety in highly contaminated water, use chlorine/iodine tablets, then the AccuFilter will eliminate the chlorine/iodine." (Cmpl ¶12; AAns ¶12; CPHE 12d)

The Accuventure, Inc. water filter, identified as AccuFilter 5 Canteen Insert (AF-900) contains iodine, PentaPure Water Purification Disinfection Resin, EPA Registration Number 35917-2 as an active ingredient. (Cmpl ¶7; AAns ¶7) AccuFilter 5 Canteen Insert (AF-900) also contains silver-impregnated carbon as an active ingredient. (CPHE 12f) The label on the AccuFilter 5 (AF-900) included the statement: "Effective against bacteria, viruses, cholera and protozoa, including giardia lamblia cysts." The label further included the statement: "Pre-filtered water enters the PentaPure chamber, a demand released disinfectant killing virtually 100% of all bacteria, viruses and protozoa; including 100% of Giardia Lamblia Cysts to eliminate diarrhea and dysentery type diseases; . . . water is then drawn through a granular activated carbon, impregnated with a silver purification process. This creates a 100% bacteriostatic media environment" (Cmpl ¶14; AAns ¶14; CPHE 12f)

AccuFilter 5 Canteen Insert (AF-800) contains iodine, PentaPure Water Purification Disinfection Resin, EPA Registration

Number 35917-2, and silver-impregnated carbon as the active ingredients. (Cmpl ¶7; AAns ¶13; CPHE 12e) The label on this filter insert includes the statement: "Kills 100% of bacteria, viruses, cholera and protozoa, including Giardia lamblia cysts." The label further included the statement: "Pre-filtered water enters the PentaPure chamber, a demand released disinfectant killing virtually 100% of all bacteria, viruses and protozoa; including 100% of Giardia Lamblia Cysts to eliminate diarrhea and dysentery type diseases; . . . water is then drawn through a granular activated carbon, impregnated with a silver purification process. This creates a 100% bacteriostatic media environment" (Cmpl ¶13; AAns ¶13; CPHE 12e)

The water filters identified as AF-100, AF-200, RF-300, AF-700, AF-800, and AF-900, produced and distributed by respondent each contain a filter media consisting of silver or iodine. Both of these substances are found as active pesticidal ingredients in EPA-registered drinking water filters. Silver and iodine have no other significant commercially valuable use in drinking water filters other than for pesticidal purposes. (Cmpl ¶8; AAns ¶8)

Respondent produced the water filters referred to above, without being registered with EPA as a producing establishment. It obtained an EPA establishment number on June 11, 1992. (Cmpl ¶15; AAns ¶15; CPHE 14)

On June 3, 1992, EPA conducted a market place inspection at G.I. Joe's, a retail store located at 3485 S.W. Cedar Hills Blvd., Beaverton, Oregon, 97005. The inspection revealed that

Accuventure, Inc., distributed AccuFilter Combo-Packs (AF-700) and Replacement Filters (RF-300) to G.I. Joe's on or about March 11, 1992. (Cmpl ¶16; CPHE 3a) At the time of distribution, neither of these products were registered as pesticides under section 3 of FIFRA, 7 U.S.C. § 136a. (CPHE 13)

A producer establishment inspection conducted at Accuventure, Inc., and follow-up investigation revealed that respondent distributed 100 AccuFilter 5 Canteen Purifier Inserts (AF-900) to the U.S. Navy in Washington, D.C., on or about May 20, 1992. (Cmpl ¶17; CPHE 2) At the time of distribution, this product was not registered as a pesticide under section 3 of FIFRA, 7 U.S.C. § 136a. (CPHE 13)

On June 22, 1992, EPA conducted a market place inspection at a Fred Meyer retail store located at 25250 Pacific Highway South, Kent, Washington, 98032. The inspection and follow-up investigation revealed that Accuventure, Inc., distributed to Fred Meyer, Inc., AccuFilter Sport Bottles (AF-200) and Replacement Filters (RF-300) on or about June 18, May 30, and July 1, 1991. The inspection also revealed that Accuventure, Inc., distributed to Fred Meyer, Inc., AccuFilter Water Filtering Straws (AF-100) on or about May 21, July 1, and July 8, 1991. (Cmpl ¶18; AAns ¶18; CPHE 4) At the time of distribution, none of these products was registered as pesticides under section 3 of FIFRA, 7 U.S.C. § 136a. (CPHE 13)

On July 27, 1992, EPA conducted a follow-up inspection at the G.I. Joe's retail store located at S.E. 82nd Avenue, Portland,

Oregon, 97206. This inspection and follow-up investigation revealed that Accuventure, Inc., distributed AccuFilter 5 Canteen Inserts (AF-800) to G.I. Joe's on or about May 15, 1992. (Cmpl ¶19; CPHEs 3 and 7) At the time of distribution, this product was not registered as a pesticide under section 3 of FIFRA, 7 U.S.C. § 136a. (CPHE 13)

The record reflects that on April 23, 1991, EPA filed an administrative complaint against Accuventure, Inc., for holding for sale an unregistered pesticide called the AccuFilter Water Purifying Straw. A Consent Order and Final Agreement was entered on July 30, 1991, assessing a civil penalty for the violation alleged in the April 23, 1991, administrative complaint. (Cmpl ¶2; AAns ¶2; CPHEs 19 and 20)

Respondent is a "person" under section 2(s) of FIFRA, 7 U.S.C. § 136(s) and is therefore subject to the requirements of sections 12(a)(1)(A) and 12(a)(2)(L) of FIFRA, 7 U.S.C. § 136j(a)(1)(A) and (a)(2)(L).

Replacement Filter (RF-300) is a pesticide as defined in section 2(u) of FIFRA, 7 U.S.C. § 136(u). Respondent distributed an unregistered pesticide, Replacement Filters (RF-300), to G.I. Joe's, Inc., on or about March 11, 1992, and to Fred Meyer, Inc., on or about June 18, 1991, May 30, 1991, and July 1, 1991, in violation of section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A) as alleged in Violations One, Five, Six and Seven of the complaint.

AccuFilter Combo-Pack (AF-700) is a pesticide as defined in section 2(u) of FIFRA, 7 U.S.C. § 136(u). Respondent distributed

AccuFilter Combo-Packs (AF-700) to G.I. Joe's, Inc., on or about March 11, 1992, in violation of section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A) as alleged in Violation Two of the complaint.

AccuFilter 5 Canteen Insert (AF-900) is a pesticide as defined by section 2(u) of FIFRA, 7 U.S.C. § 136(u). Respondent distributed AccuFilter 5 Canteen Insert (AF-900) to the U.S. Navy on or about May 20, 1992, in violation of section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A) as alleged in Violation Three of the complaint.

AccuFilter 5 Canteen Inserts (AF-800) is a pesticide as defined by section 2(u) of FIFRA, 7 U.S.C. § 136(u). Respondent distributed AccuFilter 5 Canteen Insert (AF-800) to G.I. Joe's on May 15, 1992, in violation of section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A) as alleged in Violation Four of the complaint.

AccuFilter Water Filtering Sport Bottles (AF-200) is a pesticide as defined by section 2(u) of FIFRA, 7 U.S.C. § 136(u). Respondent distributed (AF-200) to Fred Meyer, Inc., on or about June 18, 1991, May 30, 1991, and July 1, 1991, in violation of section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), as alleged in Violations Eight, Nine and Ten of the complaint.

AccuFilter Water Filtering Straw (AF-100) is a pesticide as defined by section 2(u) of FIFRA, 7 U.S.C. § 136(u). Respondent distributed this filter to Fred Meyer, Inc., on or about May 21, 1991, July 1, 1991, and July 8, 1991, in violation of section

12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), as alleged in Violations Eleven, Twelve and Thirteen of the complaint.

Respondent manufactured, prepared, compounded, propagated, or processed the pesticide products described in Violations 1-13 of the complaint at its facility in Beaverton, Oregon, and was therefore a "producer" of pesticide products as that term is defined under section 2(w) of FIFRA, 7 U.S.C. § 136(w). At the time these pesticide products were distributed, respondent's Beaverton, Oregon, facility was not registered with EPA as a pesticide-producing establishment as required by section 7 of FIFRA, 7 U.S.C. § 136e. It was not registered as a producer establishment until June 11, 1992. Therefore, respondent violated section 12(a)(2)(L) of FIFRA, 7 U.S.C. § 136j(a)(2)(L), as alleged in Violation Fourteen of the complaint.

Respondent is a producer and distributor of pesticides and as such is subject to the penalties set forth in section 14(a)(1) of FIFRA, 7 U.S.C. § 136l(a). Section 14(a)(1) of FIFRA provides for a maximum civil penalty of \$5,000 for each violation. Section 14(a)(4) of FIFRA, sets forth the factors to be considered in determining the amount of the penalty - appropriateness of such penalty to the size of business of the person charged, the effect on the person's ability to continue in business, and the gravity of the violation. The \$70,000 penalty proposed in the complaint was calculated in accordance with the criteria set forth in section 14(a)(4) of FIFRA. Respondent did not provide any documentation to

support any reduction of the proposed penalty amount based on an inability to pay the penalty and continue in business.

DISCUSSION

Whether or not the subject matter is amenable to an accelerated decision hinges upon the interpretation of the Consolidated Rules of Practice, 40 C.F.R. § 22.20 (Rule) and applicable law. The Rule provides, in pertinent part, as follows:

§ 22.20 Accelerated decision; decision to dismiss.

(a) General. The Presiding Officer, upon motion of any party or sua sponte, may at any time render an accelerated decision in favor of the complainant or respondent, as to all or any part of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law, as to all or any part of the proceeding (Emphasis added.)

(b) Effect. (1) If an accelerated decision . . . is issued as to all the issues and claims in the proceeding, the decision constitutes an initial decision of the Presiding Officer, and shall be filed with the Regional Hearing Clerk. (Emphasis added.)

As the undersigned ALJ indicated in a prior accelerated decision:

Oral hearings should be used to resolve issues of material facts. The Rule, in part, exemplifies this. (footnote omitted). An accelerated decision is similar to that of summary judgment, and not every factual issue is a bar. Minor factual disputes would not preclude an accelerated decision. Disputed issues must involve "material facts" or those which have legal probative force as to the controlling issue. A "material fact" is one that makes a difference in the litigation. (Footnote omitted.)

In the Matter of: Rohr Industries, Inc., Docket No. EPCRA 1089-04-08-325 at 5-6 (August 21, 1991).

For all of the reasons set forth below, genuine issues of material fact are absent from this proceeding.

1. The Violations

Thirteen of the fourteen counts of the complaint charge respondent with violation of section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), by distributing unregistered pesticides in the form of silver and/or iodine containing water filtering products on thirteen separate occasions. A review of the record reflects that respondent's own admissions establish liability for Counts 3 and 5-13. (See AAns ¶s 26, and 28-36) Respondent presented no information in either its prehearing exchange or in its response to complainant's motion for accelerated decision to substantiate its claim in response to Violation 3, that complainant had approved the transfer of AccuFilter 5 Canteen Insert (AF-900) to the U.S. Navy for testing and evaluation. Thus, there is no issue of material fact as to liability for Count 3. Further, respondent relies on a July 30, 1991, Consent Agreement and Consent Order (CACO) resolving a violation alleged in an April 1991, administrative complaint to support its claim that Counts 5-13 are barred by the doctrines of equitable and collateral estoppel, waiver, accord and satisfaction, and laches. However, not only are these defenses inapplicable for the reasons set forth in complainant's memorandum in support of its motion for accelerated decision, but it is clear from a reading of the 1991 complaint and CACO, (CPHEs 19 and 20), that the CACO resolved a violation which occurred at a different time than those alleged in the current action. Respondent interprets the CACO as giving it free reign to continue to violate the FIFRA registration requirements after settlement of the first action was reached, a

result which would be absurd. For these reasons, there is no issue of material fact as to liability for Counts 5-13. Finally, the record reflects that in response to Counts 1, 2, and 4, respondent merely claims that it has insufficient information to admit or deny these claims. However, complainant has provided documentation of the distribution of the products described in Counts 1, 2, and 4 in its prehearing exchange and respondent has failed to refute this. Complainant has met its burden of proving by a preponderance of the evidence Violations One through Thirteen.

Count 14 of the complaint charges respondent with violating section 12(a)(2)(L) of FIFRA, 7 U.S.C. § 136j(a)(2)(L), by producing the pesticides cited in Violations One through Thirteen in an unregistered establishment. By its own admission, respondent failed to register its Beaverton, Oregon, facility as a pesticide-producing establishment prior to its distribution of the pesticides described in Violations One through Thirteen. (AAns ¶40) Respondent argues as a defense that it applied for an EPA establishment number in July 1991, and its application was lost. (AAns ¶40) However, when given the opportunity to substantiate its claim in its prehearing exchange, and in its response to complainant's motion for accelerated decision, it failed to do so. Complainant has met its burden of proving by a preponderance of the evidence Violation 14.

2. The Civil Penalty

Complainant proposes in its complaint and in its memorandum in support of its motion for accelerated decision that a civil penalty

in the amount of \$70,000 be assessed against respondent for the 14 FIFRA violations. Section 14(a)(1) of FIFRA, 7 U.S.C. § 1361(a)(1), authorizes EPA to assess a civil penalty of up to \$5,000 for each violation of FIFRA. Guidelines for the assessment of penalties are set forth in section 14 of FIFRA and in EPA's Enforcement Response Policy for the Federal Insecticide, Fungicide and Rodenticide Act (Enforcement Response Policy or ERP) dated July 2, 1990. The regulations at 40 C.F.R. § 22.27(b) provide, in pertinent part:

(b) Amount of Civil Penalty. 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.

Thus the ALJ, in determining the penalty, is required to consider the criteria set forth in section 14(a)(4) of FIFRA and in the ERP. Those factors include considering the appropriateness of the 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. The application of those factors to the computation of the penalty in this case is set forth below.

The ERP implements a system for determining the civil penalty for the violations. Computation of the penalty amount is determined in a five-stage process in consideration of the FIFRA Section 14(a)(4) criteria listed above. These steps are: (1) determination of gravity or "level" of the violation; (2) determination of the size of business category for the violator;

(3) use of the ERP matrices to determine the amount associated with the gravity level of violation and the size of business category of the violator; (4) further gravity adjustments of the base penalty in consideration of the specific characteristics of the pesticide involved, the actual or potential harm to human health and/or the environment, the compliance history of the violator, and the culpability of the violator; and (5) consideration of the affect that payment of the total civil penalty will have on the violator's ability to pay or ability to continue in business. (ERP at 18) Complainant included a detailed analysis of its penalty calculation, articulating the consideration of each of the factors which must be considered in a penalty assessment. (CPHE 17) It also submitted a memorandum, prepared by Jed Januch, the EPA Region 10 inspector, in this matter. (Motion for Accelerated Decision, Attachment 1) Mr. Januch explained in great detail the rationale for calculating the proposed \$70,000 penalty under FIFRA and the ERP. His explanation is summarized below.

The ERP at page 19, sets out a penalty matrix which takes into account FIFRA statutory factors in determining the proposed penalty. On the left side of the matrix are Gravity Levels from 1 to 4, with Level 1 being the most serious. At the top of the matrix are Size of Business Levels I, II, and III, with Level I being the largest.

2a. Nature of the Violations

Pursuant to the ERP at 25, a separate civil penalty, up to the statutory maximum, shall be assessed for each independent violation

of FIFRA. A violation is independent if it results from an act or omission which is not the result of any other charge for which a civil penalty is to be assessed, or if the elements of proof for the violations are different. Consistent with this criteria, EPA considers violations that occur from each shipment of a product or each sale of a product to be independent offenses of FIFRA. Id. Each of these independent violations of FIFRA are subject to civil penalties up to the statutory maximum of \$5,000 for persons described in Section 14(a)(1) of FIFRA.

In this case, Accuventure distributed numerous unregistered pesticides on thirteen different occasions in violation of section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A). Additionally, Accuventure produced pesticides in its Beaverton, Oregon, facility and failed to register that facility as a pesticide-producing establishment with the EPA in violation of section 12(a)(2)(L) of FIFRA, 7 U.S.C. § 136j(a)(2)(L). Each of these fourteen violations constitutes an independent violation. Accuventure is, therefore, subject to a penalty of \$5,000 for each of the fourteen violations, or a total penalty of \$70,000 for all of the violations.

2b. Size of Business

In order to provide equitable penalties, the civil penalties that will be assessed for each violation of FIFRA will generally decrease as the size of the business decreases, and vice versa. Id. at 20. As the ERP explains, at 20, size of business is determined from a company's gross revenues from all revenue sources during the prior calendar year. Further, the size of the business

and gross revenue figures are based on the entire corporation rather than a specific subsidiary or division of the company which is involved in the violation.

As shown in the ERP Matrices in Table 1, at 19, the appropriateness of the penalty to the size of the business is based on three distinct "size of business" categories. The "size of business" categories for FIFRA Section 14(a)(1) and 14(a)(2) violators are listed in Table 2, at 20, of the ERP. In addition, when information concerning an alleged violator's size of business is not readily available, the penalty is to be calculated using the Category I size of business. Id. at 21. The Category I size of business will remain the base penalty value unless the violator can establish, at their own expense and to the EPA's satisfaction, that it should be considered in a smaller size of business category. Id.

According to Table 2 of the ERP, Accuventure is classified as a "Category I" business. This classification is based on the fact that it is a section 14(a)(1) violator and that sales reported to Dun and Bradstreet for 1992 were in excess of \$1,000,000. (CPHE 18) In particular, Accuventure reported sales of \$1,279,405. In addition, it updated its Dun and Bradstreet on June 2, 1993, reporting sales of \$2,000,000. (CPHE 19) According to Table 2 of the ERP, Section 14(a)(1) violators with gross revenues in excess of \$1,000,000 qualify as Category I businesses. Therefore, Accuventure is considered a Category I business. To date,

Accuventure has not provided any information to document that this category is incorrect.

2c. Gravity of the Violation

According to the ERP, at 21, determination of the gravity of the violation is a two-step process: (1) determination of the appropriate "gravity level" that EPA has assigned to the violation, and (2) the adjustment of that base penalty figure, as determined from the gravity level, to consider the actual set of circumstances that are involved in the violation. This second step is discussed below under the caption "Gravity Adjustments."

The "gravity level" established for each violation of FIFRA is listed in Appendix A of the ERP. The "level" assigned to each violation in FIFRA represents an assessment of the relative gravity of each violation. The relative gravity of each violation is based on an average set of circumstances which considers the actual or potential harm to human health and/or the environment which could result from the violation, or the importance of the requirement to achieving the goals of the statute. The gravity level determined from Appendix A is then used to determine a base penalty figure from the ERP Matrices. Id. at 21.

Pursuant to Appendix A of the ERP, Counts One through Thirteen, violations of section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), sale or distribution of an unregistered pesticide, are classified as Level 2 violations. Count Fourteen, a violation of Section 12(a)(2)(L) of FIFRA, 7 U.S.C. § 136j(a)(2)(L), is also classified as a Level 2 violation.

2d. Matrix Value

Based on the above analysis, Accuventure's size of business has been classified as Category I, and all fourteen violations have been classified as Level 2. Using the Civil Penalty Matrix given on page 19 of the ERP, Accuventure should be assessed a civil penalty of \$5,000 per violation. Accuventure should, therefore, be assessed a total penalty of \$70,000, based strictly on the matrix value.

2e. Gravity Adjustments

As the actual circumstances of the violation may differ from the "average" circumstances assumed in each gravity level of the ERP Matrices, the dollar amount derived from the matrix may be adjusted upward or downward as appropriate. Id. at 21. EPA has assigned gravity adjustments for each violation relative to the specific characteristics of the pesticide involved, the harm to the human health and/or harm to the environment, compliance history of the violator, and the culpability of the violator. Id.

Under Appendix B of the ERP, the first gravity adjustment criterion considered is the toxicity of the pesticide involved. Pursuant to Appendix B, one point was assessed for each violation because the violations involved a pesticide with no known chronic effects. Id. at B-1.

The next gravity adjustment criterion is the harm to human health. Id. One point was assessed for each violation because the threat to human health from the violations was originally deemed to be minor. However, there is the potential for significant harm to

human health as a result of distribution of the unregistered filters. (See CPHEs 12-14) In order to be registered, the products must do what they claim to do and must do it without unreasonable harm to health or the human environment. Microbiological pathogens, including *Giardia lamblia*, *Salmonella* species, enteropathogenic *E. coli*, and some viral agents have been associated with several waterborne disease outbreaks. If the label on the water filter makes unsubstantiated and unregistered claims to control these pathogens, a person may be given a false sense of safety and drink water that is contaminated. This could lead to serious gastrointestinal illness or possibly death. Thus, it would be appropriate to assign additional points to explicitly recognize the potential for harm to human health. However, because the total points calculated resulted in the assessment of the statutory maximum, the assignment of the additional points is not deemed necessary.

Environmental harm is the third criterion to be considered in determining the gravity adjustment. Only one point was assessed for each violation because the threat to the environment from the violations is deemed to be minor.

Compliance history is the fourth criterion to be considered. ERP, Appendix B, at footnote 4, explains that a consent order, resolving a contested or uncontested complaint by the execution of a consent agreement, constitutes a prior violation if the violation occurred within five years of the current violations. *Id.* at B-3. On July 30, 1991, a consent order was issued by the Regional

Administrator resolving a complaint filed against Accuventure on April 23, 1991, for its alleged violation of section 12(a)(1)(A) of FIFRA arising from inspections in 1990 and 1991. (CPHEs 19 and 20) The violations in the 1991 case also involved distribution of unregistered water filters. Accordingly, pursuant to the values set forth on page B-2 of the ERP, Accuventure was assessed two points for each violation because it is a section 14(a)(1) violator with one prior violation of FIFRA within five years of the present violations.

Finally, the respondent's culpability must be considered in determining any gravity adjustment. According to page B-2 of the ERP, Accuventure's culpability is determined through evaluating its knowledge of the requirements under FIFRA, the its degree of control over the violations, and its attitude. The distributions alleged in Counts Five through Thirteen occurred during the period Accuventure was negotiating resolution of the complaint filed against it in 1991 for prior distributions of a similar water filter. Counts One through Four and Count Fourteen occurred after Accuventure had paid a penalty for the prior violations. Obviously during this entire period, Accuventure was well aware that, in EPA's opinion, the filters were pesticides requiring registration prior to further distribution. Nevertheless, Accuventure continued to distribute the unregistered pesticides. Therefore, pursuant to Appendix B of the ERP, four points were assessed for each violation because Accuventure knowingly or willfully violated the statute.

2f. Proposed Penalty Calculation

Under the ERP, at 21, the gravity adjustment values from each gravity category listed in Appendix B are to be totaled for each individual violation. The dollar amount found in the matrix will then be raised or lowered, within the statutory maximum, based on the total gravity values listed in Table 3 of the ERP. Id. at 22.

The total of the gravity adjustment values for each of Accuventure's violations equals nine. Table 3 of the ERP specifies that the full matrix value should be assessed, with no adjustments, when the total gravity adjustment value is between eight and twelve. Id.

Accuventure, therefore, should be assessed a penalty of \$5,000 per violation or \$70,000 for the fourteen violations alleged in the Complaint. However, the remaining statutory factor, ability to pay and the effect on the ability to continue in business, must be considered.

2g. Ability to Pay/Continue in Business

Section 14(a)(4) of FIFRA, 7 U.S.C. § 1361(a)(4), requires EPA to consider the affect of the penalty on the person's ability to continue in business when determining the amount of the civil penalty. Accuventure had ample opportunity to have its ability to pay the proposed penalty taken into account following the issuance of the complaint. Paragraph 42 of the complaint invited the respondent to provide financial information to rebut the assumptions made regarding the respondent's financial status. Respondent denies the size of business category used. (AAns at

III) Accuventure, however, has provided absolutely no documentation to support such a claim.

As to respondent's ability to continue in business, "[R]espondent has the burden to raise and establish its inability to continue in business or inability to pay proposed penalties." In the Matter of Rek-Chem Manufacturing Corp., IF&R No. VI-437C (May 10, 1993) at 34 (citations omitted). In addition, "the ability to continue in business . . . is an affirmative defense and the respondent bears the burden of going forward with the evidence to establish it." Id. Here, respondent has provided absolutely no documentation to support its claim of an inability to pay the proposed penalty. In its prehearing exchange, respondent states that its financial reports for 1990 and 1991 are not even available. In addition, respondent's amended answer provides no information to substantiate its claim of an inability to continue in business. Complainant, on the other hand, has included a copy of the Dun & Bradstreet report which indicates that respondent is quite capable of paying the proposed penalty without threatening respondent's ability to continue in business. (CPHE 18) Thus, no adjustment is appropriate based on ability to pay considerations.

The proposed penalty takes into account each of the relevant statutory factors, and is reasonable for the alleged violations given these particular circumstances. The \$70,000 proposed penalty is supported by the preponderance of the evidence and it is therefore adopted.

ULTIMATE CONCLUSION AND ORDER

It is concluded that respondent is in violation of FIFRA section 12(a)(1)(A) on Thirteen separate Counts and FIFRA section 12(a)(2)(L) on One Count.

IT IS ORDERED¹ that:

1. A civil penalty in the amount of \$70,000 be assessed against respondent, Accuventure, Inc.

2. Payment of the full amount of the civil penalty assessed shall be made within sixty days of the service date of the final order by submitting a certified or cashier's check payable to Treasurer, United States of America, and mailed to:

US EPA
Region 10 Accounting
P.O. Box 360903M
Pittsburgh, Pennsylvania 15251

3. A transmittal letter identifying the subject case and the EPA docket Number, plus respondent's name and address must accompany the check.

¹ 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.

4. Failure upon the part of the respondent to pay the penalty within the prescribed statutory time frame after entry of the final order may result in the assessment of interest on the civil penalty. 31 U.S.C. § 3717; 4 C.F.R. § 102.13.


FRANK W. VANDERHEYDEN
Administrative Law Judge

Dated: May 25, 1994