

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY**

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:)	DOCKET NO. FIFRA-9-2000-0007
)	
)	
Chem Lab Products, Inc.,)	
)	
Respondent)	

Order Denying Motion To Exclude

In this proceeding under Section 14(a) of the Federal Insecticide, Fungicide and Rodenticide Act, as amended (7 U.S.C. § 136 et seq.), Respondent, Chem Lab Products, Inc. (Chem Lab), is charged in 24 counts with the sale and distribution of an unregistered pesticide, "Shock Quick". Complainant proposes to assess Chem Lab the maximum penalty for a single violation of \$5,500 for each count for a total of \$132,000. Chem Lab's answer admitted the sales alleged in the complaint and that "Shock Quick" is a pesticide, but contested the amount of the penalty as inappropriate and requested a hearing. By an order, dated January 26, 2001, Complainant's motion for an accelerated decision as to liability was granted. The order expressly stated that the amount of the penalty remained at issue.

By a motion, dated March 1, 2001, Complainant seeks to exclude Exhibits A, B, C, D, E and F as well as all testimony and references regarding whether Respondent's product, "Shock Quick," is a pesticide and EPA's enforcement activities against another firm, Bio-Lab, Inc., as contained in Chem Lab's prehearing exchange. Complainant argues that the proposed testimony and exhibits are not

remotely relevant to the only remaining issue herein, that is, the assessment of an [appropriate] penalty.

Chem Lab's prehearing exchange notes that it has not contested the fact that "Shock Quick" is regarded by EPA as a pesticide nor has it contested its liability for the counts alleged in the complaint. It asserts, however, that Chem Lab is of the good faith belief that "Shock Quick" was not in fact distributed as a pesticide when used for the purpose intended and in the manner provided on its label. It points out that "Shock Quick" contains an active ingredient commonly used in many products which are not registered, such as those which contain sodium hypochlorite, which is also a chlorine-based ingredient. Chem Lab says that when these products are sold as a common household bleach without pesticidal claims, an EPA registration is unnecessary.

Apropos the foregoing, Chem Lab has offered the testimony of its President and CEO, Mr. Randy Hitchins, and its Chief Chemist, Mr. Dana Wm. Somesla. The summary of Mr. Hitchins's testimony indicates that he became President and CEO in March of 1997 and that he was concerned about the lack of a response to a Chem Lab letter signed by his predecessor, dated November 18, 1996, addressed to EPA, Region 4, concerning an unregistered product "Shock Plus" distributed by its competitor, Bio-Lab, Inc., (R's Pxx A). A MSDS for "Shock Plus" states, among other things, that it is not a registered pesticide. After numerous telephone calls failed to elicit a response, Chem Lab withdrew its complaint by a letter, dated March 3, 1998 (R's Pxx B). Mr. Hitchins states that the apparent lack of enforcement activity with respect to Bio-Lab, Inc., which had been distributing its product to the great competitive disadvantage of Chem Lab, confirmed Chem Lab management's belief that products that only shock and remove waste from swimming pool water, and do not super chlorinate and sanitize water, can be distributed as non-pesticides not requiring registration. Whether "Shock

Quick” was subject to registration or not, Mr. Hitchins says that Chem Lab merely wanted a level playing field and thus began distributing its similar product “Shock Quick” [apparently in March of 1998]. Mr. Hitchens acknowledges receiving from EPA a copy of two “Stop Sale, Use and Removal Orders”, dated April 27, 1998, issued to Bio-Lab, Inc., with respect to “Shock Plus” and an additional product, “Bio Guard Lite Oxidizing Clarifier”(R’s Pxx C) as products “...intended to disinfect, sanitize, reduce, or mitigate growth or development of microbiological organisms or protect water from contamination caused by bacteria, viruses, fungi, protozoa, algae, or slime...” Although Mr. Hitchins asserts that Chem Lab was not then, nor is it currently, of the belief that its similar product, “Shock Quick”, is a pesticide under the Act, he states that it protectively filed for registration in May of 1998, during a period of great legal uncertainty for Chem Lab.

Referring to the settlement with Bio-Lab, Inc., announced by EPA on September 16, 1998, wherein Bio-Lab, Inc., agreed to pay a civil penalty of \$319,000 and to seek registration of its products (Press Release, R’s Pxx E), Mr. Hitchins points out that this included a total of seven products, including “Shock Plus” and “Bio Guard Lite”, and that pending registration, Bio Lab, Inc. was permitted to continue distribution of such products being only required to use labels and to place placards at retail outlets stating that “(This product) has not been accepted by EPA for use as a disinfectant, sanitizer or algaecide.”^{1/} He further points out that this allowed Bio-Lab to continue competing with Chem Lab with a full array of unregistered products and that it continued to do so as of the commencement of this

^{1/} This may have due at least in part to the fact that the U.S. District Court for the District of Columbia issued a TRO prohibiting enforcement of the “Stop Sale, Use, and Removal Orders”at Bio-Lab, Inc.’s behest on May 6, 1998 (R’s Pxx C).

action, which he alleges was in February 2000. Mr. Hitchins says that this placed Chem Lab in “desperate competition” with Bio-Lab resulting in a significant loss of market share and he readily admits the sales alleged in the complaint. He states, however, that most of these sales occurred prior to the announced settlement with Bio-Lab, Inc., on September 16, 1998, that Chem Lab sold only to its existing customer base, that it sought no additional retail outlets pending registration, that it made no “kill” claims on its label and that Chem Lab sold a product which, in fact, does no more than generate a three ppm level of free chlorine in the pool, which is not “superchlorination” that kills algae. On this basis, Chem Lab disputes EPA’s determining the penalty herein by assigning a “Gravity Value 3” regarding “Harm to Human Health”, that is, “Potential serious or widespread harm to human health” or “Harm to Human Health is unknown”, in the Enforcement Response Policy. Mr. Hitchins asserts that the circumstances of this case simply do not warrant such a value. “Shock Quick” was registered in May of 1999. Mr. Hitchins argues that, although the \$319,000 penalty against Bio-Lab, Inc. for the sale of seven unregistered products may seem significant, it is proportionately much smaller both in terms of financial impact, because of Bio Lab’s Inc., far greater size, and culpability, because of the number of unregistered products sold. He asks that Chem Lab be treated equitably without rigid adherence to the penalty policy.

Mr. Dana Wm. Somesla states that during the period relevant to EPA’s complaint he was and currently is Chem Lab’s Chief Chemist. He further states that during the period 1996 to April 1998, before EPA finally issued “Stop Sale, Use and Removal Orders” to Bio-Lab, Inc. with respect to “Shock Plus” and “Bio Guard Lite Oxidizing Clarifier”, it appeared to Chem Lab that EPA agreed with the view that these products did not require registration. Therefore, Chem Lab believed it could

distribute its own similar product, “Shock Quick”, which did not have any “kill” claims on the label and which does no more than generate a three ppm chlorine level in the pool, which is not superchlorination that kills algae. According to Mr. Somesla, this belief was furthered by the abundance of unregistered products [on the market] that claimed to shock swimming pools without resulting in superchlorination. He points out that “Shock Quick” contains an active ingredient which on contact with water releases chemicals similar to those found in common household bleach products, which [when] sold in retail outlets without pesticidal claims do not require registration. He notes that bleach products which contain sodium hypochlorite, an ingredient similar to the active ingredient in “Shock Quick”, when sold with sanitizing or disinfectant instructions, are subject to registration. Thus, he says that it is not the active ingredient that determines whether these products are pesticides subject to registration, but that other criteria [such as the claims made for the product] are considered. Mr. Somesla asserts that Chem Lab believed that “Shock Quick”, which is designed primarily to keep water clean without interfering with use of the pool and can be quite safely handled in accordance with the label, does not meet that other criteria. He argues that, because of the small size of the individual packages, and the fact that the product is sold in retail stores to home owners for care of their personal pools, the chances of measurable harm to the public or the environment are remote at best.

Chem Lab has opposed the motion to exclude, asserting, inter alia, that Complainant’s motion misses the point of Chem Lab’s proffered testimony and exhibits (Response to Motion to Exclude, dated March 21, 2001). Acknowledging that its answer to the complaint admitted that “Shock Quick” was a pesticide and that it was not registered at the time of the sales identified in the complaint and that the ALJ found that such sales violated FIFRA § 12(a)(1)(A), Chem Lab says that the proposed testimony and

exhibits are relevant to its good faith belief concerning the pesticidal effects of “Shock Quick”, a belief assertedly fostered by Complainant’s enforcement actions, or lack thereof, with respect to Chem Lab’s competitor, Bio-Lab, *Inc.* Chem Lab argues that the proffered testimony and exhibits are indeed relevant to what it characterizes as its “corporate state of mind” regarding its sales of “Shock Quick” and the continued unregistered sales by Bio-Lab, Inc., and to the “gravity value” assigned by Complainant for alleged harm to human health under its Penalty Policy. Additionally, Chem Lab states that the evidence is relevant as to whether the proposed penalty is appropriate when compared with the sanctions and penalty ultimately imposed against a far larger competitor, Bio-Lab, Inc. Chem Lab says that without the proffered testimony and exhibits, its ability to present a defense to the proposed penalty would be severely limited and requests that the motion to exclude be denied.

Discussion

It is axiomatic that a penalty cannot be determined apart from the facts and circumstances of the violation. See, e.g., the penalty provision of the Toxic Substances Control Act, 15 U.S.C. § 2615(a)(2)(B), which provides in part “(i)n determining the amount of a civil penalty, the Administrator shall take into account the nature, circumstances, extent, and gravity of the violation or violations.....” See also the identical language in Section 309(g)(3), 33 U.S.C. § 1319(g)(3), an administrative penalty provision in the Clean Water Act. While it is true that the quoted language does not appear in FIFRA § 14(a)(4), that section does require the Administrator, in determining the amount of the penalty, to consider, inter alia, “the gravity of the violation.” It is well settled that “gravity of the violation” is considered from two aspects: the gravity of the harm or potential for harm and the gravity of the misconduct. See, e.g., James C. Lin and Lin Cubing, Inc., FIFRA Appeal No. 94-2, 5 E.A.D. 595

(EAB, December 6, 1994). The summaries of the proposed testimony of Messrs. Randy Hitchins and Dana Wm Somesla indicate that their testimony concerns both gravity of the harm or potential for harm and the gravity of Chem Lab's misconduct. Testimony as to the intended use and effects of "Shock Quick" is obviously relevant to the harm or potential for harm and Chem Lab's understanding as to whether its product is a pesticide and the basis for such understanding is clearly relevant to any alleged misconduct. It follows that the motion to exclude the testimony of these witnesses will be denied.

Chem Lab makes the point that most, if not all, of the sales alleged in the complaint were made prior to the Agency's announcement on September 16, 1998, of the settlement with Bio-Lab, Inc. involving the sale and distribution of unregistered products used in swimming pools similar to "Shock Quick". The sales of "Shock Quick" by Chem Lab identified in the complaint, however, appear to have been made after Chem Lab received a copy of "Stop Sale, Use or Removal Orders" issued to Bio-Lab, Inc. concerning its products "Shock Plus 4-in-1 Pool Shock" and "BioGuard Lite Oxidizing Clarifier" and Chem Lab's knowledge of these orders affords a basis for questioning its claimed good faith belief that "Shock Quick" is not a pesticide. Under this view, the orders are relevant to Complainant's case which may be strengthened if the orders are in evidence. Complainant, however, may not pick and choose documents relating to the Bio-Lab, Inc. settlement which tend to support its case, while excluding as irrelevant other documents which may have a contrary effect.

Regarding the settlement with Bio-Lab, Inc., there is substantial authority to the effect that, because of the myriad factors which lead to or are involved in settlements, amounts by which seemingly comparable cases are settled are not relevant to determining a penalty in a particular case. See, e.g., Chautauqua Hardware Corporation, EPCRA Appeal No. 91-1, 3 E.A.D. 616, 1991 WL 310028

(CJO, 1991). See also Titan Wheel Corporation of Iowa, Docket No. RCRA VII 98-H-003, Order Granting Complainant's Motion to Strike, 2000 EPA ALJ LEXIS 91 (December 13, 2000). These holdings were made notwithstanding the fact that several of the Agency's penalty policies cite uniformity of penalties as one of the reasons for the policy;^{2/} and that other EPA penalty policies state that among their goals is to ensure that "... civil penalties are assessed in a fair and consistent manner."^{3/} The effect of this language is very similar to that in the FIFRA Enforcement Response Policy (July 1990) at issue here which provides that "...the ERP is designed to provide fair and equitable treatment of the regulated community by ensuring that similar enforcement responses and comparable penalty assessments will be made for comparable violations" (Id. 1). It therefore seems anomalous to hold that penalties purportedly determined in accordance with an applicable penalty policy for similar violations in other cases are not relevant to the penalty in the case at bar. It should also be noted that the courts have little difficulty with the concept that penalties in other cases are indeed relevant to the penalty or sanction in the case at issue.^{4/} Moreover, a respondent who seeks to show that a proposed penalty assessment is arbitrary has little or no chance of success unless he can compare the proposed penalty with penalties assessed in other cases. Be that as it may, it is recognized that allowing penalties assessed in other cases to be a controlling or significant factor in penalty determinations risks burdening trial of the pending

^{2/} See, e.g., Polychlorinated Biphenyls (PCB) Penalty Policy (U.S. EPA, April 9, 1990) at 1; Enforcement Response Policy for Section 313 of the Emergency Planning and Community-Right-To-Know Act (1986) and Section 6607 of The Pollution Prevention Act (1990) (U.S. EPA, August 10, 1992) at 1.

^{3/} RCRA Civil Penalty Policy (October 1990) at 5.

^{4/} See, e.g., United States v. Ecko Housewares, Inc., 62 F.3rd 806 (6th Cir.1995) and Monieson v. Commodity Futures Trading Commission, 996 F.2d 852 (7th Circ. 1993).

matter with collateral issues such as the size of the other company's business, degree of culpability, etc.

Here, although Chem Lab has asserted that the proposed penalty assessed against it is disproportionate to the amount for which the proceeding against Bio-Lab, Inc. was settled in view of Bio-Lab's far greater size and the number of products involved, its primary reason for proffering documents concerning the settlement with Bio-Lab, Inc. appears to be to document the fact that Bio-Lab was permitted to continue the sale and distribution of its products by placing certain statements on placards in retail outlets where its products were sold and on its labels. These statements are to the effect that the product had not been accepted by EPA for use as a disinfectant, sanitizer or algacide. This evidence is obviously relevant to the harm or potential for harm resulting from the Chem Lab's distribution and sale of "Shock Quick" to the extent that the products distributed and sold by Bio-Lab, Inc. involved in the settlement are similar. Under these circumstances, Complainant's motion to exclude Exhibits A through F is lacking in merit and will be denied.

Order

Complainant's motion to exclude is denied.

Dated this _____ day of April 2001.

Spencer T. Nissen
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that the original and one copy of this **ORDER DENYING MOTION TO EXCLUDE**, dated April 12, 2001, **IN RE: CHEM LAB PRODUCTS, INC., Docket No. FIFRA-9-2000-0007**, were mailed to the Regional Hearing Clerk, Reg. 9, and a copy was mailed to Respondent and Complainant, via certified mail, return receipt requested.

Rachele D. Jackson
Legal Staff Assistant

Date: April 12, 2001

ADDRESSEES:

CERTIFIED MAIL-RETURN RECEIPT REQUESTED

Danielle Carr
Regional Hearing Clerk
U.S. EPA - Region 9
75 Hawthorne Street, ORC-1
San Francisco, CA 94105

David H. Kim, Esq.,
Assistant Regional Counsel
U.S. EPA - Reg. 9
75 Hawthorne Street
San Francisco, CA 94105

James E. Good, Esq.,
Gresham, Savage, Nolan & Tilden, LLP
600 N. Arrowhead Avenue, Suite 300
San Bernandino, CA 92401-1148