8/31/95

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
GREEN THUMB NURSERY, INC.	)	**Docket No. IF&R-V-014-94**
	)	
Respondent	)	

INITIAL DECISION

Pursuant to Section 14(a) of the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 136l(a), respondent has been found liable for the sale or distribution of an unregistered pesticide in violation of Section 12(a)(1)(A), 7 U.S.C. § 136j(a)(1)(A).

By: Frank W. Vanderheyden
Administrative Law Judge

Dated: August 31, 1995

Appearances:

For Complainant:

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For Respondent:

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INTRODUCTION

This matter was originated in an administrative complaint filed on May 2, 1994[1], by the United States Environmental Protection Agency, Region 5 (complainant or EPA), pursuant to Section 14(a) of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. § 136l(a). The complaint charged Green Thumb Nursery, Inc., (respondent or GT) for the sale or distribution of an unregistered pesticide in violation of Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A). The proposed penalty for this alleged violation was $4,000.

On May 27, respondent filed its answer denying liability and the proposed penalty. Subsequently, complainant filed a motion for accelerated decision on the liability issue dated November 4. On November 21, respondent served its opposition to the motion.

In an order of March 2, 1995, the undersigned Administrative Law Judge (ALJ) granted complainant's motion. This order also included an order to show cause (OSC) requiring complainant to explain why a warning in lieu of a penalty would not be appropriate. Complainant served its response to the OSC on March 22, 1995. For good cause shown, on April 7, 1995, the ALJ withdrew the OSC, and directed the parties to submit written arguments on the penalty issue under FIFRA and any applicable penalty policy. For reasons stated therein, the ALJ also concluded that an oral evidentiary hearing on the penalty issue was not required.

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[1] Unless otherwise stated, all dates are for the year 1994.

The parties submitted their respective positions on what would be an apposite penalty in this matter. On May 15, 1995, respondent filed a motion to strike Exhibit B of complainant's penalty argument, the Second Supplemental Affidavit of R. Terence Bonace, on the basis that this exhibit constituted evidence outside the scope of the April 7 order. This motion was denied on May 30, 1995.

The sole issue to be resolved here is whether or not $4,000 is a proper penalty considering the relevant facts and law. In this regard, it must also be determined whether or not the penalty EPA seeks is supported by a preponderance of the evidence.[2] "Preponderance of the evidence" is the degree of relevant evidence which a reasonable mind, evaluating the record as a whole, might accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

All proposed findings of fact and conclusions of law inconsistent with this decision are rejected by the ALJ. Further, it is not required that the ALJ decide every single issue raised in this proceeding. It is sufficient that there is a resolution of only those major questions requisite for a decision.

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[2] The applicable section of the Consolidated Rules of Practice (Rules), 40 C.F.R. § 22.24, provides in pertinent part that each matter in controversy shall be determined by a preponderance of the evidence.

FINDINGS OF FACT

Respondent runs a greenhouse and retail establishment which sells chemicals for swimming pools, lawn and garden supplies in Canton, Ohio. It employs between 30 to 60 people. (Complainant's Mot. for Accelerated Decision (AD) at 1.) One of the items that GT distributes is a pesticide product for use chiefly in sanitizing swimming pools. This pesticide product was labeled as 12 percent solution of sodium hypochlorite. (Complainant's Mot. for AD, Exs. A-B.)

On January 12, 1993, an inspection occurred at respondent's business to determine compliance with FIFRA, and its implementing regulations. (Compl. ¶ 10.) A sample of sodium hypochlorite and its label were taken at the inspection. (Compl. ¶ 11.) During this time, a representative of respondent signed a pesticide collection report form, acknowledging that the sample had been packaged, released and labeled for sale. (Complainant's Mot. for AD, Ex. C., Attach 1.) For the years 1988-1993, GT sold the following amounts of sodium hypochlorite: for 1988, 6,000 gallons; for 1988 [sic], 6,300 gallons; for 1990, 5,500 gallons; for 1991, 4,420 gallons; for 1992, 1,980 gallons; and for 1993, 2,778 gallons. (Complainant's Mot. for AD, Ex. E.)[3]

The label collected at the inspection contained three warnings. First, there was a direct "warning" of the product's

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[3] It is noted that this exhibit, documenting GT's sales of sodium hypochlorite, was originally submitted by respondent as part of its prehearing exchange.

ability to cause burns and to keep out of reach of children. Second, immediately below this encapsulated warning, there was the notation "POISON," accompanied by its skull and cross bones symbol. Third, to the right of these two cautionary statements, the word "corrosive" appeared with a picture alerting the user of this capability. (Complainant's Mot. for AD, Ex. A.) GT's subsequent label incorporated the keep away from children and corrosive warnings. However, this label explicitly stated "danger" below the children warning. Additionally, instead of the blanket poison notice, this label listed precautionary statements on the hazards to humans, animals, and the environment, as well as physical and chemical hazards. (Complainant's Mot. for AD, Ex. B.)

Around June 1988, GT registered as a pesticide producing establishment. (Resp't Mot. in Opp'n to AD, Dennis Aff., ¶¶ 5-6.) On its pesticide report form for pesticide producing establishments, GT used the number 1744-2 as its registration number for sodium hypochlorite. (Resp't Mot. in Opp'n to AD, Ex. A at 2-7.) However, a search of EPA's computer database on registration and supplemental registration of pesticide products revealed that GT had not registered sodium hypochlorite at the time of the inspection on January 12, 1993. (Complainant's Mot. for AD, Ex. D., Bonace Aff., ¶ 3 [sic].) Instead, it was discovered that the registration number 1744-2 was assigned to GT's supplier, Jones Chemicals, Inc., on the inspection date. (Complainant's Reply to Resp't Opp'n Mot., Ex. A., Bonace Aff., ¶ 3.) In February 1993, GT received forms from EPA to register supplementally sodium

hypochlorite, and returned them back to EPA. In April 1993, EPA issued a supplemental product registration number to GT for sodium hypochlorite. (Resp't Mot. in Opp'n to AD, Dennis Aff., ¶ 10.)

APPROPRIATENESS OF PENALTY

Having already concluded in the March 2 order that respondent is liable for the sale of an unregistered pesticide, it now must be determined what constitutes an appropriate penalty. Section 14(a)(4) states:

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

7 U. S. C. § 1361(a)(4). Further, under the Rules, the ALJ is also required to consider any civil penalty guidelines issued under the respective Act when calculating a penalty. 40 C.F.R. § 22.27(b).

Respondent urges that the applicable penalty guidelines should not be given any weight because the statute sets forth all the factors to be considered, and EPA does not have authority to promulgate other factors by a penalty policy. Respondent misconstrues the function of EPA's penalty policies. It has been established on several occasions that the penalty policies facilitate the uniform application of the statutory factors. However, they serve as guidelines only, and do not rise to the

level of binding regulations. In re James C. Lin and Lin Cubing, Inc., FIFRA Appeal No. 94-2 at 5 (EAB, December 6, 1994); In re Great Lakes Division of National Steel Corp., EPCRA Appeal No. 93-3 at 23-24 (EAB, June 29, 1994)(citations omitted). Section 22.27(b) of the Rules requires the ALJ to consider the applicable penalty guidelines (emphasis added). Notwithstanding this obligation, once this policy is considered, the ALJ has full discretion to assess a penalty different from any calculated according to the policy provided the reason for departure is explained adequately. In re A.Y. McDonald Industries, Inc., 2 EAD 402, 413-14 (CJO, July 23, 1987).

I. Enforcement Response Policy under FIFRA[4]

Computation of the penalty amount is determined in a five-stage process taking into account the statutory criteria listed in Section 14(a)(4) of FIFRA and the ERP. These steps include the following: (1) determination of the "gravity or level" of the violation; (2) determination of the size of the business category of the violator; (3) use of a civil penalty matrix to determine the dollar amount associated with the level of the violation and the size of the business category of the violator; (4) gravity adjustments of the base penalty in light of the specific characteristics of the pesticide involved, potential or actual harm to human health and/or the environment, the compliance history of

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[4] The applicable penalty policy is the Revised FIFRA Enforcement Response Policy (ERP), issued on July 2, 1990.

the violator, and the culpability of the violator; and (5) consideration of the effect that payment of the civil penalty will have on the violator's ability to continue in business. (ERP at 18.)

A. Gravity of the Violation

Under the ERP, the determination of the appropriate "gravity" of the violation is a two-step procedure. First, each violation of FIFRA is assigned a "level" based upon an average set of circumstances which considers the harm to human health and/or the environment that could result from the violation, as well as the importance of the requirement to achieving the goals of FIFRA. These "levels" reflecting the average circumstances surrounding a violation are listed in Appendix A. Second, the "gravity" may be adjusted later to the extent that the actual circumstances differ from the average circumstances. The gravity adjustments are based upon criteria listed in Appendix B. (ERP at 21.)

Under the first step of the gravity determination, Appendix A instructs that a Section 12(a)(1)(A) violation for the sale of an unregistered pesticide should receive a level "2." (ERP, App. A at A-1.) For this violation, there is no choice of a different level.

B. Size of Respondent's Business

Respondent asserts that its gross sales of sodium hypochlorite varied from $3,000 to $8,000 for the years 1988-1993. Therefore, the size of its business is rather small. This argument is

misplaced. The size of respondent's business is not determined from the sales of the product resulting in the violation, but from the gross revenue of all sources during the previous calendar year. (ERP at 20.)[5] A review of a Dun and Bradstreet report, dated March 16, 1994, establishes that GT had total annual sales of more than $1.8 million as of 1993. (Complainant's Br., Ex. B., Bonace Aff., Attach C.) GT has not provided any documents to rebut the overall annual gross sales established by this report. Under Table 2 for Section 14(a)(1) violators, all businesses with sales in excess of one million dollars are classified in the size "I" category. (ERP at 20.) Based upon the Dun and Bradstreet report, complainant's size "I" classification for GT's business is appropriate.

C. **Base Penalty Determination**

Utilizing the penalty matrix for Section 14(a)(1), a level "2" violation in conjunction with a size "I" business yields a base penalty of $5,000. (ERP at 19.)

D. **Gravity Adjustments to the Base Penalty**

After the base penalty is calculated, this figure may be adjusted upward or downward depending upon the actual circumstances surrounding the violation. The ERP lists five gravity adjustment criteria: (1) pesticide toxicity, (2) harm to human health, (3)

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[5] This guideline comports with prior implementation of this statutory criterion. See In re Amvac Chemical Corporation, Docket No. IF&R IX-4C at 9 (Initial Decision, July 11, 1974)(applying size of business statutory factor before any penalty policy was in effect).

environmental harm, (4) compliance history of the violator, and (5) the violator's culpability. (ERP at App. B.) The first three circumstances reflect the gravity of the harm, and the last two circumstances reflect the gravity of misconduct. Under Appendix B, these adjustment elements have varying numerical values, depending on the specific facts of the case. The total value of the gravity adjustment criteria is then matched with a corresponding enforcement remedy, which recommends either a warning, penalty reduction, penalty unchanged or penalty increase. (ERP at 22, Table 3.)

1. Gravity of Harm

Respondent asserts as an initial argument that its violation only amounts to a "technical paperwork" infraction. As such, there is no gravity of harm. This argument exhibits a shortsighted view toward the potential harm from a failure to register. When an unregistered pesticide is distributed, the enforcement and protective purposes of FIFRA registration are defeated because EPA does not have "the opportunity to eliminate unwarranted claims, to require such precautionary warnings as may be necessary, and to keep the channels of commerce free of products that may have unreasonable risks to man or the environment." In re Time Chemical, Inc., Docket No. IF&R V-237-C at 5 (Initial Decision, October 16, 1975). In this regard, the Environmental Appeals Board has stated that the failure to register a pesticide deprives EPA of necessary information, and thus, weakens the statutory

scheme. In re Sav-Mart, Inc., FIFRA Appeal No. 94-3 at 8 n.13 (March 8, 1995)(citing Thornton v. Fondren Green Apartments, 788 F. Supp. 928, 932 (S.D. Tex. 1992) for the proposition that FIFRA's purpose is to regulate the registration and labeling of pesticide products such that purchasers are provided with assurances of effectiveness and safety when the product is used in accordance with its label). A finding of no harm in such instances would impermissibly reward businesses which fail to register their products by depriving EPA of information which could be used in an enforcement action. Id.

a. Pesticide Toxicity

The ERP divides pesticide toxicity into two categories, values "1 and 2." Value "2" represents the higher toxicity class, and reflects circumstances where the following are present: the signal word "danger," restricted use pesticides, pesticides with flammable characteristics or pesticides that are associated with chronic health effects. (ERP, App. B at B-1.) Using these criteria, complainant assigned a value of "2" due to the word "danger" on GT's corrected labels. (Complainant's Br., Ex. B., Bonace Aff., ¶ 8, Attach D.)

Respondent argues first that the guidelines are deficient on their face, and not in accord with FIFRA because the ERP does not list a "0" value for the gravity of harm adjustment criteria. As stated earlier, the ERP provides a uniform method of applying statutory factors in an equitable manner, but it is not a binding

regulation. Nevertheless, after evaluating the applicable part of the record, respondent's position is untenable. First, its label contains the signal word "danger," which connotes the highest level of toxicity. (Complainant's Br., Ex. D at 2.)[6] The danger warning is reserved only for those pesticides whereby a teaspoon taken by mouth could kill an average-sized adult. (Complainant's Br., Ex. E.)[7] Second, at the top of the label, in a diamond box, the word "corrosive" appears with illustrations alerting the user of the effects. Further, the label specifically states in bold "keep out of reach of children." The totality of these warnings evinces a high degree of pesticide toxicity. It is concluded that the appropriate toxicity value is "2." This conclusion is reinforced by respondent's label collected at the inspection, which contained the word "Poison" in bold type face, accompanied by its trademark--the skull and cross bones symbol.

b. Harm to Human Health and the Environment

For each of these two factors, complainant was unaware of any harm to human health or the environment from the violation. Thus, it assumed the lowest harm for both these criteria, and assigned a

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[6] This document, dated March 2, 1987, is entitled,"Pesticide Fact Sheet: Labeling," issued by the U.S. EPA,Office of Pesticides and Toxic Substances, of which the ALJ takes official notice.

[7] This exhibit is entitled, "Environmental Fact Sheet: Pesticide Labels," issued by the U.S. EPA, Office of Pesticides and Toxic Substances, of which the ALJ again takes official notice.

value of "1" for each. This level is defined as "minor"[8] potential or actual harm neither widespread nor substantial. (ERP, App. B at B-1.) Respondent argues both these elements deserve a "0" value because there was no harm or threat of harm to human health or the environment.

Respondent's proposed value is not appropriate for either of these factors. GT's pesticide presented a potential threat to both humans and the environment. Concerning the potential threat to humans, the prior label only had the warnings: "causes burns, handle with care, avoid contact with eyes, and corrosive." (Complainant's Mot. for AD, Ex. A.) In contrast, the later label contained the following detailed, precautionary statements:

> DANGER: Corrosive, may cause severe skin irritation or chemical burns to broken skin. Causes eye damage. Do not get in eyes, on skin or on clothing. Wear goggles or face shield and rubber gloves when handling this product. Wash after handling. Avoid breathing vapors. Vacate poorly ventilated areas as soon as possible. Do not return until odors have dissipated.

(Complainant's Mot. for AD, Ex. B.) The sale of GT's sodium hypochlorite under the prior label clearly presented a potential threat to the health of purchasers who were unaware of the necessary precautions that needed to be taken when using this pesticide product. Under the prior label there was certainly the

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[8] Minor harm refers to actual or potential harm which is, or would be of short duration, no lasting effects or permanent damage, effects are easily reversible, and harm does not, or would not result in significant monetary loss. (ERP, App. B at B-3 n.3.)

potential that a consumer would use this product without wearing protective gloves or goggles, washing after handling, and applying the product in a ventilated area. If GT's pesticide had been registered, then this information would have been present on its prior label.

Likewise, the former label had no precautionary statements on potential environmental harm. On the other hand, the latter label warned the user that this pesticide is toxic to fish, and also alerted the user not to dispose the product in lakes, streams or ponds (emphasis added). (Complainant's Mot. for AD, Ex. B.) Once again, the prior label's failure to alert the user of harmful environmental effects, if used or disposed of improperly, created a potential threat to both aquatic life and water resources. In light of the above, a value of "1" for harm to human health and environmental harm is accepted as clearly reasonable.

2. Gravity of Misconduct

a. Compliance History

Complainant classified the value for this factor as "0" because GT had no prior FIFRA violations. Respondent does not dispute this assessment, and it is proper.

b. Culpability

Complainant was initially unsure of respondent's culpability and as a result proposed a value of "2." The ERP suggests this value when culpability is unknown. (ERP, App. B at B-2.)

Complainant contends that subsequent information supports its original assessment. It points to respondent's admission that the latter was aware of FIFRA's applicability to its operations in 1988 by registering as a pesticide producing establishment. Thus, respondent was negligent in failing to register sodium hypochlorite. (Complainant's Br. at 6.) The ERP also classifies negligent violations with a value of "2." (ERP, App. B at B-2.)

Respondent contends that, under the circumstances, it demonstrated "due care," and a value of "0" should be assessed. Respondent shoots several arrows but none hit the due care target. Its attempts rely primarily on its alleged small company status. Respondent asserts that it does not employ anyone who is knowledgeable about FIFRA, nevertheless, it still made appropriate report filings.[9] Also, respondent contends a small company cannot be expected to be in complete technical compliance at all times in light of the voluminous regulations. These arguments consist of stray shots around the due care mark. Respondent elected by its own volition to engage in a regulated business. As a member of the regulated community, it had a duty to be aware of the regulations applicable to its business. However, respondent attempts to shirk its registration duty under the cloak of some small company exemption.

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[9] It is noted that the record does not establish any application for registration of sodium hypochlorite until February 1993. (Resp't Mot. in Opp'n to AD, Dennis Aff., ¶ 10.) The forms respondent refers to concern registration of a pesticide producing establishment, which is not at issue in this proceeding.

Even if respondent's small company status is accepted as a mitigating factor, the record does not support its contention that it exercised "due care." As complainant illustrates, since at least June 1988, when it registered as a pesticide producing establishment, GT was aware of FIFRA's applicability to its operations. (Resp't Mot. in Opp'n to AD, Dennis Aff., ¶ 5.) Nonetheless, from 1988 until April 1993, respondent sold sodium hypochlorite without any FIFRA registration. Someone in respondent's position should have made a more vigorous effort to acquaint itself with the law. See In re Johnson Pacific, Inc., FIFRA Appeal No. 93-4 at 13 (EAB, February 2, 1995)(commenting on seller, who was unaware of FIFRA requirements, and as a result, sold bromine tablets for use in spas when they were only registered for use in swimming pools). GT's lingering slumber in failing to register sodium hypochlorite, once aware of FIFRA's regulation of its business, almost five years earlier, cannot be viewed as demonstrating due care. It is concluded that respondent's culpability is properly characterized as negligent, and thus, justifies a value of "2."

E. Total Gravity Adjustment

The total value from the ERP's adjustment criteria is "6." Applying this total to table 3, the enforcement remedy calls for a reduction in the base penalty by 20 percent. (ERP at 22.) The base penalty is now $4000.

F. Ability to Continue in Business

Section 14(a)(4) requires consideration of the effect of the penalty on the violator's ability to continue in business. Respondent contends that its sale of sodium hypochlorite to the general public is jeopardized because it risks becoming the subject of a harassing enforcement action. Respondent misinterprets this statutory factor. This criterion focuses on the respondent's ability to pay the proposed penalty, and still be a viable entity. Respondent's ability to pay the proposed penalty is presumed unless it puts its financial capability at issue. See James C. Lin and Lin Cubing, Inc., at 5-6. Such an inability has never been raised by respondent. Thus, it is assumed to have the financial resources to pay.

G. Good Faith Efforts

Respondent points out that 40 C.F.R. § 22.35(c) requires the ALJ to consider additional criteria when assessing an administrative civil penalty. This section states in pertinent part that the ALJ shall consider, in addition to the criteria listed in Section 14(a)(3)[sic] of the Act, respondent's history of compliance with the Act, and any evidence of good faith or lack thereof when determining the amount of penalty. Respondent's history of compliance has already been considered under the ERP's gravity adjustment factors, and no further consideration is necessary. However, respondent's good faith efforts have yet to be

addressed. As has already been concluded in the culpability section, supra at pages 15-17, respondent's violations were not deliberate or intentional. Intent is not an element of an offense under FIFRA's penalty provisions. Nonetheless, the absence of intent certainly bears some relationship to respondent's good faith. The record establishes that once informed of the registration requirement in November 1992, GT's actions exhibited good faith efforts to correct the violation. When its supplier advised GT that it needed supplemental registration for sodium hypochlorite, GT stood ready to do what was necessary to comply. Unfortunately for GT, it relied to its own detriment on the supplier to effectuate GT's registration duty. No evidence was submitted on whether or not an application for registration was ever sent at this time or prior to the January 1993 inspection. After the compliance inspection, the record reflects that respondent submitted its registration forms within a few weeks, and received EPA approval for supplemental registration of sodium hypochlorite in April 1993. (Resp't Mot. in Opp'n to AD, Dennis Aff., ¶ 10.) Respondent was in compliance for roughly a year before the complaint was issued. On this basis of its good faith, GT is entitled to a further reduction of 25 percent. The total penalty is now $3000.

H. Warning Issue

Respondent asserts that it has met the test necessary to grant a warning, in lieu of a penalty. Under Section 14(a)(4), the

Administrator may grant a warning if it is found that the violation occurred despite the exercise of due care or did not cause significant harm to health or the environment. It has already been concluded in the culpability section, supra, that respondent did not exercise due care. As for the second factor, it has not been sufficiently established to justify a warning finding. It is unknown whether significant harm occurred. Despite this uncertainty, other considerations also weigh against a warning finding. Respondent sold its pesticide product for approximately five years without subjecting it to the EPA registration review process. By omitting this prerequisite, respondent sold a product for which it had not yet been determined that the same would perform its intended function without unreasonable adverse effects on the environment. As a result, this product had the potential to cause serious damage. This conceivable consequence was reflected in respondent's former labeling which did not inform users how to avoid unreasonable risks to both themselves and the environment. Considering the volume of unregistered sodium hypochlorite sold by respondent, some sanctions must be applied that are adequate to deter any repetition of FIFRA violations, and to send a strong message to the regulated community. To do less would undermine the purpose of FIFRA, which has as its central theme the protection of people and the environment, and would impermissibly reward the failure to register a pesticide. It is concluded that a condign penalty in this matter is $3000.

IT IS ORDERED[10] that:

1. A civil penalty in the amount of $3,000 be assessed against respondent, Green Thumb Nursery, Inc.

2. Payment of the full amount of the penalty assessed shall be made within sixty (60) 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:

EPA Region 5
Regional Hearing Clerk
P.O. Box 70753
Chicago, IL 60673

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

4. If respondent fails to pay the penalty within the prescribed statutory time period, after entry of the final order, then interest on the civil penalty may be assessed. 31 U.S.C. § 3717, 4 C.F.R. § 102.13.

Frank W. Vanderheyden
Administrative Law Judge

Dated: August 31, 1995

[10] This penalty decision, in conjunction with the order on March 2, 1995, comprise a complete initial decision under Section 22.27. Unless appealed pursuant to 40 C.F.R. § 22.30, or the EAB elects to review the same, sua sponte, as provided therein, this decision shall become the final order of the EAB in accordance with 40 C.F.R. § 22.27(c).