

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the matter of)
)
Super Chem Corporation,) Docket No. FIFRA-9-2000-0021
)
Respondent)

INITIAL DECISION

By: Carl C. Charneski
Administrative Law Judge

Issued: April 24, 2002
Washington, D.C.

Appearances

For Complainant: David H. Kim, Esq.
Thomas P. Mintz, Esq.
Region 9
U.S. Environmental Protection Agency
San Francisco, California

For Respondent: Thomas Fessler, President
John Fessler, Vice President
Super Chem Corporation
Anaheim, California

I. Statement Of The Case

This proceeding arises under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136 *et seq.* The United States Environmental Protection Agency ("EPA") has filed a complaint against Super Chem Corporation ("Super Chem") charging the respondent with 15 counts of distributing or selling an unregistered pesticide, "Quat Super," in violation of FIFRA Section 12(a)(1)(A). 7 U.S.C. §136j(a)(1)(A). EPA proposes that a civil penalty of \$62,400 be assessed for these violations.

A hearing was held in this matter on September 6, 2001, in Santa Ana, California. For the reasons that follow, Super Chem is held to have violated Section 12(a)(1)(A) of FIFRA as to each of the 15 counts alleged in the complaint. A civil penalty of \$45,000 is assessed for these violations.

II. Findings of Fact

1. Super Chem is a small, family-operated business located in Anaheim, California. It has been in operation for 25 years. Tr. 179. Thomas Fessler is the president of the company and John Fessler, his son, serves as the vice president. Tr. 7. Super Chem sells the pesticide, "Quat Super." Tr. 195, 198.

2. Quat Super is a disinfectant that is used to clean equipment and counter tops in hospitals, health care facilities, and institutional settings. Tr. 49.

3. On March 12, 1997, Manuel Gutierrez, a Senior Pesticide Use Specialist with the California Department of Pesticide Regulation, conducted a Producer Establishment Inspection of the Super Chem facility. The March 12 inspection was a follow-up to an earlier inspection of a different company, Chem Tech Chemical Corporation ("Chem Tech"). This earlier inspection of Chem Tech indicated that a reformulation pesticide, "Variquat 80ME," had been sold to Super Chem. Inspector Gutierrez, however, reviewed the 1996 EPA Establishment Book and found that Super Chem was not a registered producing establishment. Tr. 87-88, 101-102; CXs-8 & 18.¹

4. During the March 12, 1997, inspection, Thomas Fessler informed Inspector Gutierrez that Super Chem manufactured a sanitizer to disinfect surfaces. Fessler provided Gutierrez with a bin label for the sanitizer. The label read: "Quat Super EPA Reg #48720-1." Before the inspection was concluded, however, Fessler took back the bin label from Gutierrez. Tr. 103; CXs-8 & 18.

5. On June 5, 1997, Inspector Gutierrez returned to Super Chem for a second inspection. During this inspection, Thomas Fessler again provided the inspector with a copy of the label for Quat Super. This time, the inspector was not asked to return the label. Fessler also provided Inspector Gutierrez with a three-page printout documenting the sales of Quat Super. Inspector Gutierrez asked Fessler for copies of the sales invoices but was informed by Fessler that they were unavailable at the time and that they would have to be compiled. Tr. 105; CXs-11 & 18.

6. During the June 5 inspection, Thomas Fessler explained to Inspector Gutierrez that Variquat 80ME is taken from large containers, diluted, and placed into smaller containers as customers' orders are taken. Also, Fessler informed Gutierrez that neither the establishment, Super Chem, nor the product, Quat Super, were currently registered with the United States

¹ At the hearing, Inspector Gutierrez referred to the pesticide involved here as "Paraquat 80." The inspector's Investigative Summary refers to the pesticide as "Variquat 80ME." See CX-8.

Environmental Protection Agency. Fessler asked Gutierrez for contact telephone numbers in order to re-register both the establishment and the product with EPA. Tr. 106; CXs-11 & 18.²

7. Inspector Gutierrez returned to the Super Chem facility for a third time on June 11, 1997. At this time, the inspector was provided with 15 invoices relating to Super Chem's sale of Quat Super. Tr. 107-108, 110.

8. As the label for Quat Super explains, this product is a "Disinfectant-Sanitizer[,] Deodorizer for Hospital, Institutional, Industrial, School, and Other Use." CX-1.

9. Super Chem registered Quat Super as a pesticide with EPA in the 1980's. It was assigned EPA Registration Number 48720-1. Quat Super was registered as a disinfectant and as a sanitizer for use to disinfect, sanitize, reduce, or mitigate growth or development of micro-organisms or protect inanimate objects from contamination, fouling or deterioration caused by micro-organisms. Tr. 52; CXs-1 & 7.

10. Super Chem paid the maintenance registration fees to EPA for Quat Super from 1989 until 1991. Tr. 53-54.

11. On December 16, 1991, EPA mailed to Super Chem a registration maintenance fee package. This package included the fee form, instructions, and a cover letter. The maintenance fee was due to EPA by January 15, 1992.³ The instruction sheet in part stated: "Registrations for which the fee is not paid will be canceled, by order and without hearing. If you do not pay the fee to keep a registration in effect, you will be permitted until January 15, 1993, to dispose of existing stocks of the pesticide, except in special circumstances when less time may be permitted." Tr. 54; CX-2.

12. A signed return receipt for the maintenance fee package referred to in Finding No. 11 appears in CX-2. It is dated December 23, 1991.

13. EPA mailed a second maintenance fee package to Super Chem in February of 1992. Tr. 55; CX-6.

14. On February 18, 1992, EPA received a certified mail return receipt from respondent confirming the receipt of the above-referenced maintenance fee package of February, 1992. Tr. 55; CXs-2 & 6.

² This case is only about respondent's sale of an unregistered pesticide.

³ The maintenance fees were \$650 for the first registration and \$1300 for subsequent registrations. CX-2.

15. As of January 15, 1992, Super Chem had not paid the annual registration maintenance fee for Quat Super. Tr. 55; CX-6.

16. On November 30, 1992, EPA issued to Super Chem an order canceling the EPA registration for Quat Super. The EPA order in part read:

This letter is a final cancellation order, advising you that under Section 4(i)(5)(D) of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), as amended, EPA hereby cancels the registrations listed on the enclosure for non-payment of the annual registration maintenance fee due January 15, 1992. The effective date of this cancellation order is the date of this letter.

As the holder of the listed registration(s) you may legally distribute or sell existing stocks of the cancelled products until the due date for the next annual registration maintenance fee, January 15, 1993....

* * * * *

It would be a violation of FIFRA for you to distribute or sell any stocks currently in the United States which have been produced, packaged, labeled or released for shipment after the effective date of cancellation, or any stocks after the indicated disposition date....

CX-3 (*emphasis added*).

17. The enclosure referred to in EPA's November 30, 1992, cancellation letter cited Quat Super, EPA Registration Number 048720-00001, as the pesticide product being cancelled. Tr. 55-56; CX-3.

18. In addition, Amy Miller, an EPA Region 9 enforcement officer testified that EPA received the return receipt for its Quat Super registration cancellation letter on December 21, 1992. Tr. 32-33, 56; *see* CX-6.⁴

19. On December 16, 1992, EPA issued a Federal Register notice informing the general public that it was canceling the registration of a large number of pesticides for nonpayment of the 1992 registration maintenance fee. CXs-4 & 6. The notice stated that a list

⁴ A return receipt included in Complainant's Exhibit 3 indicates a delivery date of "12/16."

of the cancelled products could be obtained from EPA. Quat Super was not specifically identified in the December 16, 1992, Federal Register publication. Tr. 58-59, 62.

20. As noted earlier, Inspector Gutierrez of the California Department of Pesticide Regulation conducted three inspections of the Super Chem facility in 1997. During the June 11, 1997, inspection, Gutierrez was provided with 15 invoices documenting respondent's sale of Quat Super to various retail establishments in California. These sales of Quat Super took place from March 6, 1996, to May 20, 1997. Tr. 105-108; CXs-17 & 18.

III. Discussion

A. Liability

Section 12(a)(1)(A) of FIFRA prohibits the sale of a pesticide that is not registered with the United States Environmental Protection Agency. Section 12(a) provides:

(1) Except as provided by subsection (b) of this section, it shall be unlawful for any person in any State to distribute or sell to any person—

(A) any pesticide that is not registered under section 136a of this title or whose registration has been canceled or suspended, except to the extent that distribution or sale otherwise has been authorized by the Administrator under this subchapter;

7 U.S.C. § 136j(a)(1)(A).⁵

The threshold question is whether respondent is a “person” for purposes of Section 12(a)(1)(A). Section 2(s) of FIFRA defines the term “person” as “any individual, partnership, association, corporation, or any organized group of persons, whether incorporated or not.” Super Chem, a California corporation, clearly fits within this definition. *See* CX-25.

The next, and critical, question is whether “Quat Super” is a pesticide. The record evidence in this case overwhelmingly shows that it is. In that regard, Section 2(u) of FIFRA defines a “pesticide” in part as “any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest.” 7 U.S.C. § 136(u). In addition, Section 2(t) defines the term “pest” to include “virus, bacteria, or other micro-organism.”

⁵ The exceptions contained in Section 12(b), 7 U.S.C. § 136j(b), are not applicable to this case.

Keeping these definitions in mind, a review of the label for Quat Super shows that it holds itself out to be a pesticide. The label states that the product is a “Disinfectant-Sanitizer,” and that it is to be used for disinfection in hospitals, nursing homes, and schools, among other places. CX-1. Moreover, the Quat Super label also states that it is effective against the bacteria “Escherichia coli, Staphylococcus aureus, and Pseudomonas aeruginosa.” Finally, the label contains the heading “Pesticide Disposal,” under which are instructions for the disposal of any unused portion of the pesticide. *Id.*

EPA witness Amy Miller, an enforcement officer and team leader in Region 9's pesticide program, testified that the bacteria referenced on the Quat Super label can cause urinary tract infections, strep throat, as well as other types of respiratory ailments. Tr. 32-33, 51. Miller also testified that the term “disinfectant” means that the agent inhibits, destroys, or neutralizes bacteria. According to Miller, “EPA has always considered the term ‘disinfect’ a pesticidal claim.” Tr. 50.

In addition to the pesticidal claims made on the label itself, the fact that respondent previously had obtained an EPA pesticide registration for Quat Super further supports the fact that this product is a pesticide. The only reason for the respondent to pay a FIFRA registration fee for Quat Super is because the product is a pesticide. In fact, Dennis Edwards, Chief of Regulatory Management Branch I of the Antimicrobials Division of EPA's Office of Pesticide Programs, reviewed the registration material submitted by respondent and concluded that Quat Super was a registered pesticide. CX-7.

As noted earlier, Super Chem failed to renew its EPA registration for Quat Super for the period beginning January 15, 1992. As a result, Super Chem was instructed by EPA that it could sell off its existing stock of Quat Super, but only until January 15, 1993. After that date, respondent's sale of this pesticide would constitute a violation of FIFRA. *See* Finding No. 15 & No. 16, *supra*. Despite this warning, on 15 separate occasions Super Chem sold Quat Super after the January 15, 1993, cut-off date. These sales are documented by respondent's own invoices. The invoices show that between March 6, 1996, and May 20, 1997, Super Chem sold Quat Super to retail establishments in California. *See* Finding No. 20, *supra*. Each of these post-January 15, 1993, sales constituted a violation of Section 12(a)(1)(A) of the Federal Insecticide Fungicide and Rodenticide Act.

With respect to the issue of liability, Super Chem argues that “the signed postal receipts presented by the EPA were tainted because the typed information concerning contents of material was not proper according to the Anaheim Ca. Postmaster and could not be substantiated.” Resp. Ltr. at 2. Apparently, respondent is referring to Complainant's Exhibits

⁶ The statutory definition of “pest” excludes viruses, bacteria, or other micro-organisms “on or in living man or other living animals.” *Id.*

2 and 3 which show, respectively, the returned receipt cards for the 1992 maintenance registration fees for Quat Super and the November 30, 1992, cancellation order for this pesticide.

Super Chem's "return receipt" argument must fail. First, respondent does not claim a lack of notification by EPA as to the requirement that it pay a maintenance registration fee, and having failed to pay the fee, that it stop selling all existing Quat Super stock after January 15, 1993. Rather, respondent seems to contend that the return receipts are unreliable because in Block No. 8 on each of the cards, EPA typed in the purpose for which the accompanying letters were sent to respondent. For example, EPA made the following notations on the return receipt cards: "1992 REGISTRATION MAINTENANCE FEES," "1992 REGISTRATION MAINTENANCE FEES[,] MF 92 REMAIL," and "1993 MAINTENANCE FEE CANCELLATION [unintelligible]." Even assuming that these notations violate some United States postal regulation, as Super Chem rather generally asserts, respondent has not shown that these return receipts are unreliable.

Second, a review of the return receipts shows that in the box titled, "Article Addressed to," they properly listed respondent's business address. Indeed, Super Chem does not argue otherwise. There is no indication in this record indicating that the maintenance fee renewal packages and the registration cancellation were not delivered to the location to which they were addressed. In that regard, respondent does not challenge the authenticity of the signatures appearing on each of the return receipts.

Finally, by all indications, the maintenance registration fee renewals and the maintenance fee cancellation were mailed to respondent by EPA's Information Services Branch of the Information Resources and Services Division of the Office of Pesticide Programs in the normal course of the Agency's business. *See* CX-6. In sum, the record shows the maintenance fee renewal packages for Quat Super and the cancellation and stop sale order for Quat Super were sent by EPA to Super Chem and that they were received by the respondent.

Next, Super Chem states that a substantial amount of the Quat Super that was sold after January 15, 1993, was sold not for pesticidal purposes, but rather for odor control. *Resp. Ltr. at 2.* Despite making this claim, respondent points to no supporting evidence in the record. Moreover, even if the product were used by the purchaser for the purpose of odor control, the fact of the matter is that Quat Super is a pesticide, respondent failed to maintain the EPA registration of this pesticide, and it was sold after the registration was cancelled by EPA and, in particular, after the stop sale date set by the Agency.

Finally, Super Chem submits that it "was not even aware that our EPA registration number had been cancelled because there was no communication received from the EPA to that effect until 1997 at which time they cited us." *Resp. Ltr. at 3.* As already explained above, respondent's argument as to notification is contrary to the established facts in this case. Moreover, given that Super Chem previously had paid the maintenance registration fees for Quat Super from 1989 until 1991, and given that the first of the unlawful sales of Quat Super

didn't take place until more than four years after the stop sale date, Super Chem's notification argument is not at all persuasive.

Accordingly, for the reasons set forth above, EPA has established the 15 FIFRA violations alleged in the complaint. The next step is to determine the appropriate civil penalty.

B. Penalty

Section 14 of FIFRA authorizes the assessment of a civil penalty for a violation of this Act. 7 U.S.C. § 136l. Here, a penalty is to be assessed against Super Chem for 15 similar violations – *i.e.*, the sale of the pesticide Quat Super after the pesticide's FIFRA registration had been cancelled. Section 14(a)(4) of FIFRA provides specific guidelines for determining the appropriate penalty. It 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. § 136l(a)(4) (*emphasis added*).

As with the issue of liability, EPA bears the burden of proof as to the civil penalty to be assessed against Super Chem. EPA submits that the record evidence in this case warrants a penalty of \$62,400.⁷ This evidence is considered under the statutory penalty factors of FIFRA Section 14(a)(4).

Size Of The Business

EPA categorizes Super Chem essentially as a large business. Applying its ERP, complainant classifies respondent as a "Category I" business, the highest category, because its gross revenues exceeded \$1,000,000 for the time period surrounding the violations in this case. As support for this Category I characterization, EPA cites Super Chem's Federal income tax returns for the years 1996 through 1998, and a one-page Dun and Bradstreet report dated March 11, 1999. CXs-19, 23, 24 & 25.

⁷ In proposing this assessment, EPA relied upon an Agency document titled, "Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act," commonly referred to as the "ERP." See CX-20; see also, Compl. Br. at 13.

In response to EPA's classifying it as a Category I business, Super Chem states, "[w]e find it difficult to understand why the EPA should classify Super Chem on par with Dow Chemical and other giants of the industry." Resp. Ltr. at 2. Attempting to emphasize the difference in size between itself and other Category I businesses, Super Chem states further that it is a family-owned business with only 7 employees. *Id.*

For purposes of determining the "size" of Super Chem's business in the penalty phase, it is found that respondent is a company which generates more than \$1,000,000 in gross income. This finding is based upon respondent's Federal income tax returns for the years 1996, 1997, and 1998, as well as upon Complainant's Exhibit 27, respondent's "Income Statement For the Six Months Ending June 20, 2001."⁸

Ability To Continue In Business

In large measure, this penalty factor encompasses the heart of Super Chem's case. Respondent argues that it simply does not have the money to pay the proposed \$62,400 penalty and still remain in business. While this tribunal recognizes the importance of this issue to a business such as Super Chem, it must nonetheless rest its findings only upon the evidence produced at the hearing. That evidence, discussed below, shows that Super Chem does have the ability to pay a significant civil penalty.

With respect to the "ability to continue in business" penalty factor, EPA put on its case through Paul Jalbert, an EPA employee. Mr. Jalbert is an audit team leader within the Agency's Office of Inspector General. He was qualified as an expert witness in the area of "financial auditing." Tr. 145, 150. It is Jalbert's opinion that Super Chem can pay the penalty sought by EPA and remain in business. Tr. 157. This tribunal finds Jalbert's testimony to be supported by the record and it is accorded considerable weight.

Specifically, Jalbert based his opinion upon a review of Super Chem's Federal income tax returns for the years 1996, 1997, and 1998, financial statements of the respondent identified for the period of December 31, 2000, and respondent's income statement for the six-month period preceding June 30, 2001. CXs-23 through 27.

Jalbert testified that he performed two financial assessments on respondent. In the first assessment, he looked at respondent's balance sheets bearing the date December 31, 2000. This financial data is identified as Complainant's Exhibit 26. Jalbert noted that the retained earnings in this document were \$244,000, which represent "accumulated profits over time," or "net profit to the company over its life." Tr. 158.

⁸ Upon reviewing Complainant's Exhibit 27, EPA's financial expert noted that the company was showing gross revenues of \$579,000 for this six-month period. Tr. 161.

Next, Jalbert looked at the liquid assets of the company as of December 31, 2000, and as reported in Exhibit 26. He noted that the company reported a cash position of \$156,000, and another \$182,000 in accounts receivable. As such, the total assets of the company were \$347,000. Jalbert then identified the respondent's current liabilities as being \$122,000, the majority of which was identified as a bank line of credit, and further that the company had no long term liability. Finally, Jalbert stated that the accounts payable were "relatively small" and that accrued payroll taxes were "very small." Tr. 158-159.

Given the data set forth in the company's balance sheet, *i.e.*, Complainant's Exhibit 26, Jalbert concluded: "So I'm looking at the company's assets being able to cover their current liabilities approximately three to one, which is a financial analysis ratio called the current ratio, which would be current assets over current liabilities. *Three to one is a sound financial position ratio.*" Tr. 159 (*emphasis added*).⁹ Accordingly, Jalbert concluded that the respondent had either the assets, or the ability to attain assets, to withstand the proposed penalty of \$62,400. Tr. 160.

Jalbert's second financial analysis of Super Chem included more current financial information. The second analysis included respondent's June 30, 2001, income statement and balance sheet, which is identified as Complainant's Exhibit 27. Here, Jalbert looked at Super Chem's latest sales volume, reported year-to-date profits, current assets and current liabilities, and compared this data with the December 31, 2000, financial data discussed above. Tr. 160. Upon performing this comparison, Jalbert concluded that "the company was still representing themselves in a sound manner" and that "they should still have the ability to withstand the penalty." Tr. 160-161.

Jalbert offered the following explanation as the basis for this conclusion. Looking at Complainant's Exhibit 27, he determined that the company's first six months of sales was \$579,000. Jalbert concluded that the annual projected sales of over \$1,000,000 "was pretty representative of the prior year reported sales both on the income tax returns and on the unaudited financial statements." Tr. 161. In addition, Jalbert determined that the net income of \$27,000 for the six-month period reported on Exhibit 27, which he projected as \$54,000 for an annual figure, was "pretty comparable" to the net income reported by respondent in prior years. *Id.*

Continuing his review of Exhibit 27, Jalbert noted that as of June 30, 2001, the company's current assets were \$207,000, a "significant drop" in his view considering that sales were running approximately the same, from the \$347,000 reported six months earlier. He also noted that from December 31, 2000, to June 30, 2001, respondent's available cash dropped from \$156,000, to \$10,000, and that accounts receivable, which will normally fluctuate, dropped from \$182,000 to \$131,000. Jalbert reasoned that the drop in current

⁹ Jalbert noted that this balance sheet would be classified as "unaudited financial statements" inasmuch as it was not certified. Tr. 159.

assets was due to Super Chem's using the assets to reduce its liabilities. In that regard, current liabilities as of June 30, 2001, were \$36,000, as compared to \$122,391 on December 31, 2000. Tr. 162-163.¹⁰

Finally, Jalbert expressed concern about respondent's reported loss of \$105,000 for the month of June, 2001. Referring to the bottom of page one of Complainant's Exhibit 27, Jalbert concluded that this reported loss simply was "not substantiated, based on these reported numbers." Tr. 168. EPA's expert witness was suspect of this financial data because several of the reported expenses were either approximately the same, or were the exact number, for both the current month of June and the year-to-date. Jalbert concluded: "Tends to make me believe that the way these numbers were accumulated, either the company did not pay any of these expenses until the month of June, which is not a usual business practice, or the way the numbers were accumulated did not record them in the month they were incurred[,] but instead accumulated them into the sixth month of the fiscal year." Tr. 167-168.

Despite not having detailed knowledge of Super Chem's accounting methodologies, Jalbert again concluded on the basis of his analysis of Complainant's Exhibits 26 and 27 that respondent "has the ability to withstand the penalty." Tr. 163.

In contrast, Super Chem offered no concrete evidence to support its claim that it does not have the ability to pay the kind of penalty sought by EPA in this case. In that regard, John Fessler, the vice president of Super Chem, testified that business had turned bad the past two to three years. He talked about losing major accounts, pay cuts, lost medical benefits, and a reduced work week for the company's employees. Tr. 180, 184. Yet, John Fessler provided no specific evidence to support these general statements. In fact, he was not involved in the company's finances and, therefore, was not in a position to refute the ability-to-pay conclusion of Jalbert. Accordingly, while John Fessler disagreed with the company's financial picture as set forth in Complainant's Exhibit 27, and as testified to by Jalbert, he was unable to show that any of the data contained in that exhibit, or Jalbert's conclusions, was incorrect. Tr. 185-188.

Thomas Fessler, the company's president, also failed to offer the kind of evidence necessary to rebut EPA's case that Super Chem has the ability to pay a significant penalty. While he listed the same financial ills that John Fessler had listed, Thomas Fessler's testimony likewise lacked detail, as well as documentary corroboration, to support his assessment of the company's financial ill-health.¹¹ In addition, Thomas Fessler conceded that while the data

¹⁰ For example, the credit line to the bank for \$110,000 was not listed on June 30, 2001.

¹¹ In its post hearing brief, respondent did submit an income statement for June 30, 2001, as well as income statements and balance sheets for July 31, 2001, and August 31, 2001. Despite the fact that EPA did not move to strike the July 31, and August 31, 2001, financial

contained in Exhibit 27 just didn't seem right, he had no reason to believe that it was incorrect. Tr. 200-201. In fact, the financial information contained in Exhibit 27 was collected by respondent. Thomas Fessler testified that his accountant had worked for the company for ten years. He added, "so I have to assume that what she's doing is right." Tr. 202.

Gravity of the Violations

The sale of an unregistered pesticide is a serious violation. The Federal Insecticide, Fungicide, and Rodenticide Act regulates the manufacture, sale, and distribution of pesticides in the United States. The obvious purpose of this governmental oversight is to protect the public health and the environment from exposure to potentially harmful pesticides. It stands to reason that the sale of unregistered pesticidal products hampers EPA in its ability to carry out its mission under FIFRA. For example, EPA targets its FIFRA inspections in part on the basis of products that are registered. Tr. 139.

In addition, EPA witness, Amy Miller, provided a practical illustration as to the importance of FIFRA registration. Miller testified that at the time of the hearing in this matter, EPA was in the process of testing disinfectants that are registered in order to ensure that they adequately protect people from disease-causing microorganisms. Tr. 128-129. Thus, if such a pesticidal product were not registered, like Quat Super in this case, it is likely to evade EPA's efficacy testing program. Tr. 139-140.

Aside from the more general regulatory concerns, the potential harm to both the public and the environment resulting from the sale of Quat Super, the company's history of compliance with FIFRA, as well as the negligence of Super Chem in committing the involved violations are factors to be considered under the gravity penalty criterion. *Sultan Chemists, Inc. v. USEPA*, 281 F.3d 73, 83 (3rd Cir. 2002).

Insofar as potential harm to the public and the environment is concerned, Miller testified that the main ingredient in Quat Super is quaternary ammonium compounds. She further testified that EPA rates quaternary ammonium compounds as a Category One chemical because such compounds can cause severe skin damage and irreparable harm to the eyes. In fact, when Quat Super was registered with EPA, it had the signal word "danger" displayed on the product's label. Tr. 67, 70-71, 127.

data, the fact of the matter is that only the financial information relating to June 30, 2001, was admitted as evidence in this case. As such, EPA, and in particular its financial expert witness, did not have the opportunity to explore at hearing the data contained in the July 31 and August 31 documents. Moreover, the reliability of this new data and just exactly what it says about the financial health of respondent is not at all clear to this tribunal. Accordingly, because these documents are not a part of the record, they will not be considered.

Despite this testimony, Miller assigned only “minor harm” to the potential danger presented to the public and to the environment by respondent’s sale of Quat Super. Tr. 127-128. The reason offered by Miller for this “minor harm” rating was that the label collected by the California Department of Pesticide Regulation appeared to be “very similar” to the label of Quat Super when it was previously registered with EPA. Tr. 128. Given this minor degree of harm assessment by complainant, and given the testimony of Thomas Fessler that the chemicals in Quat Super were substantially diluted, and were thus rendered harmless, (Tr. 195), it is found that the sale of this unregistered pesticide presented only “minor harm” to the public and to the environment.

The next gravity factor considered is Super Chem’s compliance history. Noting that respondent had no prior FIFRA violations, EPA did not increase the amount of the proposed penalty. Compl. Br. at 21. This tribunal believes that compliance history is not to be viewed so narrowly. If a company has a record of past violations, those violations are invariably taken into account in determining whether this history warrants a greater civil penalty. It stands to reason, therefore, that a company’s “clean record” is also a proper consideration at the penalty assessment stage. Here, the fact that Super Chem had not previously violated FIFRA is a matter that out of fairness to the respondent cannot be ignored.

The final consideration in determining the gravity of the FIFRA violations committed by respondent is negligence. Regarding this consideration, the record shows that Super Chem was highly negligent in selling an unregistered pesticide on 15 different occasions. The degree of respondent’s negligence is the largest single reason for the penalty assessment in this case.

As set forth in the Findings of Fact, *supra*, Super Chem paid the maintenance registration fees to EPA for Quat Super from 1989 until 1991. On December 16, 1991, EPA mailed to respondent a registration maintenance fee package. There was no response. In February of 1992, EPA mailed a second registration maintenance fee package for Quat Super to Super Chem. Again, there was no response. Finally, on November 30, 1992, EPA issued to Super Chem an order cancelling the registration for Quat Super and allowing the company until January 15, 1993, fully one year after the registration fee was initially due, to sell off existing stock. *See* Findings Nos. 10-18.

Respondent has offered no reasonable explanation that would excuse its failure to keep its FIFRA registration current and its subsequent sale of an unregistered pesticide. This chronology of events rather clearly shows that EPA did as much as could be expected to inform Super Chem of its need to keep the Quat Super registration current, as well as the consequences stemming from any post-January 15, 1993, sale of this pesticide. Moreover, the 15 unlawful sales of Quat Super took place from March 6, 1996, to May 20, 1997, well after EPA’s warning to respondent not to sell an unregistered pesticide. The fact that so much time elapsed from the cancellation of Quat Super’s FIFRA registration to the time that it was sold as an unregistered pesticide, particularly in light of the notifications provided by EPA, supports a finding that Super Chem was highly negligent. Indeed, during the June 5, 1997, close-out

conference with Inspector Gutierrez of the California Department of Pesticide Regulation, Thomas Fessler conceded that Quat Super was not registered under FIFRA. Tr. 106.

IV. Order

Super Chem Corporation is held to have committed 15 violations of Section 12(a)(1)(A) of the Federal Insecticide, Fungicide, and Rodenticide Act for the sale of an unregistered pesticide. 7 U.S.C. § 136j(a)(1)(A). Accordingly, Super Chem is assessed a civil penalty of \$45,000, or \$3,000 for each violation, pursuant to Section 14 of FIFRA. 7 U.S.C. § 136l. Respondent is directed to pay this penalty within 60 days of the date of this decision.¹²

This decision shall become a final order 45 days after its service on the parties, unless any of the actions specified in 40 C.F.R. 22.27(c) occur.¹³

Carl C. Charneski
Administrative Law Judge

¹² Payment of the civil penalty may be made by mailing, or presenting, a cashier's or certified check made payable to the Treasurer of the United States, addressed to Mellon Bank, EPA Region 9 (Regional Hearing Clerk), P.O. Box 360863M, Pittsburgh, PA, 15251.

¹³ 40 C.F.R. 22.27 provides:

(c) *Effect of initial decision.* The initial decision of the Presiding Officer shall become a final order 45 days after its service upon the parties and without further proceedings unless:

- (1) A party moves to reopen the hearing;
- (2) A party appeals the initial decision to the Environmental Appeals Board;
- (3) A party moves to set aside a default order that constitutes an initial decision; or
- (4) The Environmental Appeals Board elects to review the initial decision on its own initiative.

(Emphasis in Original).