UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
TIFA LIMITED,	)	DOCKET NO. I.F.& R.-II-547-C
	)	
	)	
RESPONDENT	)	

INITIAL DECISION

Federal Insecticide, Fungicide and Rodenticide Act. This proceeding involves a Complaint filed by the U.S. Environmental Protection Agency, for alleged violations of Section 12(a) of the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. Section 136j(a). The Amended Complaint charges Respondent with 32 Counts of violations of the Act and assesses a proposed civil penalty in the amount of $160,000. An evidentiary hearing in this matter was held in Newark, New Jersey from October 27-29, 1998. **Held:** Respondent's Motion to Dismiss Counts 1-25 is **Denied.** Counts 1-6, 9, 10, 12, 13-17, and 28-32 are **Dismissed.** Respondent is found **liable** under Counts 7, 8, 11, 18-25, 33 and 34 and is assessed a civil penalty in the total amount of **$65,000**.

Before: Stephen J. McGuire
Administrative Law Judge

Date: July 7, 1999

APPEARANCES:

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I. INTRODUCTION

This is a civil administrative proceeding instituted by issuance of a Complaint on September 30, 1997, by the United States Environmental Protection Agency, Region 2, New York, New York (Complainant/EPA). The Complainant commenced this action pursuant to Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. Section 136 et seq., and pursuant to 40 C.F.R. Part 22, of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits (Consolidated Rules).

The original Complaint alleged 34 counts of violation of Section 12(a) of FIFRA, 7 U.S.C. Section 136j(a)(Complainant's Exhibit 24).[(1)] By Orders issued August 12, 1998 and October 22, 1998, respectively, EPA's Motions to Amend its Complaint were granted as to Counts 24 and 32.

Subsequent to the filing of pre-hearing exchange materials, EPA withdrew Counts 26 and 27 of the Complaint. Accordingly, the proposed penalty was reduced to $160,000, for the 32 Counts remaining in the Amended Complaint. At the evidentiary hearing, held in Newark, New Jersey, October 27-29, 1998, EPA offered into evidence, Exhibits CX-1 through CX-29 and called seven fact witnesses and one expert witness. Respondent introduced fourteen exhibits, RX-1 through RX-14, and called two fact witnesses.

II. FINDINGS OF FACT

1. Respondent, Tifa Limited, owns a production and distribution facility located at Tifa Square, Millington, New Jersey. Respondent manufactures, repackages and re-labels industrial organic chemicals, including, but not limited to the pesticides "Chem-Sect Brand Cube Root" (EPA Reg. No. 1439-236); "Chem-Sect Brand Rotenone Resins" (EPA Reg. No. 1439-259); "Chem-Sect Brand ChemFish Regular" (EPA Reg. No. 1439-157); and "Chem-Fish Synergized" (EPA Reg. No. 1439-159) (CX-25 Joint Motion To Move Stipulated Facts and Law in Evidence, paragraph 5). Tifa also owns rental real estate property (Tr. II at 42). Its president is Carol J. Blochinger.

2. In 1987 and 1988, as mandated by Section 3(g) of FIFRA, EPA's Office of Pesticide Programs conducted a systematic reassessment and reregistration of the then-currently registered pesticides (Tr. I, 35, 37). This process resulted in new registration standards for the subject pesticides. The registration standard set forth EPA's evaluation of all available data pertaining to the subject pesticide and its registered uses, including the sufficiency of the data base for that pesticide in light of contemporary scientific standards.

3. The registration standard required the collection of additional data needed by EPA through a "Data Call-In Notice" pursuant to Section 3(c)(2)(B) of FIFRA. Under the Data Call-In Notice, the registrants were required to provide essential but missing scientific studies or any new data needed to fill gaps in knowledge and evaluate fully the safety of the pesticide (Tr. I, 36). These studies or data, including but not limited to, chemical, toxicological, environmental characteristics and fate of a pesticide, form an integral part of the data base used to reassess each pesticide during reregistration (Tr. I, 33-41; CX-9).

4. On October 7, 1988, EPA issued a new registration standard for pesticide products containing "rotenone" as an active ingredient, along with a Data Call-In Notice letter which required registrants of products using the active ingredient "rotenone" to develop and submit detailed specified data to EPA (Tr. I, 36-37).Failure to comply with the data requirements of the registration standard constituted a basis for suspension under FIFRA Section 3(c)(2)(B)(CX-9).

5. In 1988, Tifa was a rotenone registrant (Tr. I, 37). As such, it was required to submit data under the Data Call-In Notice requirements because there was certain data the EPA did not have for Tifa's pesticide rotenone products (Tr. I, 37-38). Tifa failed to submit the required data under the October 1988, Data Call-In Notice (Tr. I, 38).

6. On October 18, 1995, as a result of its failure to comply with the Data Call-In Notice, EPA issued a Notice of Intent to "Suspend the Registration of Pesticides Products Containing Rotenone for Failure to Comply with the Rotenone Data Call-In Notice, dated October 1988" ("NOITS")(CX-9; CX-25, par.7). Pursuant to Section 12(a)(2)(J) of FIFRA, 7 U.S.C. Section 136j(a)(2)(J), it is unlawful for any person to violate any Suspension Order issued under Section 3(c)(2)(B) of FIFRA, 7 U.S.C. Section 136(a)(c) (2)(B)(CX-25, par. 6).

7. The NOITS Order consisted of a product list, requirement list and explanatory appendix. The NOITS Order notified Tifa that the registration of certain of its specified pesticides would be automatically suspended within 30 days of receipt unless Tifa either requested a hearing and/or took steps to comply with the requirements of the Data Call-In Notice (CX-9).[(2)] The NOITS Order stated that the only allowable issues which could be addressed at a hearing were whether the respondent failed to take the actions required by the NOITS Order and whether EPA's decision regarding the disposition of then existing products was consistent with FIFRA(CX-9).

8. The NOITS Order further provided that any hearing must take place within 75 days after the Agency's receipt of any hearing request. To request a hearing, the respondent was required to provide three copies of the request to the EPA Hearing Clerk and a copy to Rick Colbert, the signatory of the NOITS Order. The Order further stated that a request for hearing "must be received by the Hearing Clerk by the 30th day of your receipt of this Notice in order to be legally effective"..."Failure to meet the 30 day time limit will result in automatic suspension of your registration(s) by operation of law and, under such circumstances, the suspension of the registration for your affected product(s) will be final and effective at the close of business 30 days after your receipt of this Notice and will not be subject to further administrative review"(CX-9 at 2-3).

9. Tifa received the NOITS Order on October 23, 1995 (CX-10). By its terms, the NOITS Order was to take effect as the final Suspension Order, 30 days after receipt by the Respondent or November 22, 1995. However, EPA entered the Suspension Order on November 21, 1995 (CX-24; Tr. I, 25, 44), or 29 days after Respondent's receipt

of the NOITS Order.

10. Subsequent to its receipt of the NOITS Order, Tifa alleges that it timely requested a hearing. As support for its assertion, Tifa introduced RX-8, an unsigned letter[(3)] prepared by Tifa's general manager, Mr. Arnold Livingston, dated November 5, 1995, and addressed to Rick Colbert, the signatory of the NOITS Order. Bessie Hammiel, EPA Hearing Clerk and Francesca Liem of EPA's Office of Compliance, were indicated as receiving "carbon copies" ("cc") of the alleged request for hearing. However, Mr. Colbert, Ms. Hammiel, and Ms. Liem all testified that they had no record of having ever received from Tifa either a written or verbal request for hearing (Tr. I, 33-34,43,57,62-64,81-82,102,110-11).

11. Tifa also introduced exhibits RX-5 and RX-6, two letters dated November 20, 1995, to Mr. Colbert, which Tifa asserts were sufficient to put Complainant on notice that Respondent objected to the entry of the Suspension Order. Each letter references the October 18, 1995, Rotenone Data Call-In Notice covering four of Tifa's products. Tifa advised EPA in RX-5, that the various studies requested were being undertaken and "should be completed within the next 90 to 120 days at which time it will be sent to EPA. *Therefore,* we request *that you delay this matter of suspension until April 30, 1995 [sic] to permit filing the necessary report" (Emphasis Supplied).*

12. RX-6 advised Mr. Colbert that "in view of the difficulties the laboratory had in obtaining standard samples of known impurities in or associated with rotenone and the new analytical techniques work involved, it will take approximately 6-9 months to complete this work. *We request that you grant Tifa an additional 12 months delay on this procedure 62-1(b) and hold this matter of proposed suspension in abeyance. We understand that another registrant had received a [sic] one additional year in order for them to finalize and develop similar technical data studies. We trust that this request will meet with your approval" (Emphasis supplied).*

13. Immediately prior to the submission of RX-5 and RX-6, a government-wide shutdown occurred on November 14-19, 1995. A second shutdown occurred from December 18, 1995, to January 11, 1996. The shutdowns affected EPA's operations such that the November 20, 1995, submissions (RX-5 and RX-6), were not received by Mr. Colbert until January 16, 1996(Tr. I, 81,89-90).

14. On or about April 15, 1996, June 25, 1996, September 18, 1996, and October 1, 1996, EPA conducted inspections of Tifa's facility pursuant to Sections 8 and 9 of FIFRA, 7 U.S.C. Sections 136f and 136g, to determine Tifa's compliance with the provisions and regulations of FIFRA (CX-25, par. 10). Based on information collected during these inspections, EPA filed an administrative Complaint against Tifa on September 30, 1997, seeking a civil penalty in the amount of $170,000(CX-24). Thereafter, the Complaint was amended wherein Counts 26 and 27 were withdrawn.

15. On May 11, 1998, Tifa filed its Amended Answer to the Complaint and Notice of Opportunity for Hearing. By Order dated October 22, 1998, Tifa was allowed to amend its Answer to include defenses of bias and deprivation of due process. By letter dated October 30, 1998, however, Tifa withdrew these defenses and represented that it would not seek discovery on these matters.

16. Subsequent to the evidentiary hearing, on October 27-29, 1998, Complainant filed its post-hearing brief on January 27, 1999. Respondent filed its post-hearing brief on March 23, 1999, and Complainant filed its reply brief on April 20, 1999.

III. THE AMENDED COMPLAINT

The 32 Counts contained in the Amended Complaint assert six types of alleged violations and propose a civil penalty of $160,000 as follows:

Counts 1 through 3, allege Tifa's importation of pesticide products whose registrations have been suspended in violation of FIFRA Section 12(a)(2)(J), 7

U.S.C. Section 136j(a)(2)(J); Specifically, CX-25, the Joint Stipulations, assert that on January 30, 1996 (Count 1) and February 2, 1996 (Count 2), respectively, Respondent received shipments of the pesticide "Chem-Sect Brand Cube Root" ("Root") and "Chem-Sect Brand Cube Root Rotenone Powder" ("Powder"), from Lima, Peru. The Complaint also alleges that on April 1, 1996 (Count 3), Tifa received a shipment of "Powder" from Lima, Peru.

Counts 4 through 12 allege Tifa's offering for sale, pesticide products whose registrations have been suspended in violation of Section 12(a)(1)(A) of FIFRA, 7 U.S.C. Section 136j(a)(1)(A); Specifically CX-25, the Joint Stipulations, asserts as to Counts 4,5,7,8, and 11, that Respondent offered to sell certain pesticides to various entities. The Complaint also alleges that on April 2, 1996 (Count 4), Respondent offered to sell "Chem-Sect Brand Fish Synergized" ("Synergized") and "Powder" to the Wisconsin State Department of Natural Resources (DNR); on December 21, 1995 (Count 5), offered to sell "Synergized" to the Iowa State DNR; on February 29, 1996 (Count 6), offered to sell the pesticide "Chem-Sect Brand Fish "Regular" (Regular) to the Missouri State Department of Conservation; on June 4, 1996 (Count 7), offered to sell "Powder" to the Nebraska State Game & Parks Commission; on June 18, 1996 (Count 8), offered to sell "Regular", to the Montana State Department of Fish, Wildlife and Parks; on August 29, 1996 (Count 9), offered to sell "Synergized" to the Oklahoma State Department of Wildlife Conservation; on August 16, 1996 (Count 10), offered to sell "Powder" to the U.S. Fish and Wildlife Service; on July 17, 1996 (Count 11), offered to sell "Regular" to the U.S. Fish & Wildlife Service, NWR, Alamo, Nevada; and on September 13, 1996 (Count 12), offered to sell "Powder" and "Synergized" to the Minnesota State Department of Conservation.

Counts 13 through 25 allege Tifa's distribution and sale of pesticide products whose registrations have been suspended in violation of Section 12(a)(1)(A) of FIFRA, 7 U.S.C. Section 136j(a)(1)(A); Specifically CX-25, the Joint Stipulations, assert that on March 11, 1996 (Count 13), Respondent distributed and sold the pesticide "Powder" to King Pesticides, Ontario, Canada; on February 5, 1996 (Count 14), distributed and sold the pesticide "Chem-Sect Brand Rotenone Resins" ("Resins"), to Bonide Products, Yorksville, New York; on February 22, 1996 (Count 15), distributed and sold the pesticide "Regular" to Jaffer Chambers, Karachi, Pakistan; on February 27, 1996 (Count 16), distributed and sold the pesticide "Regular" to the Kentucky State Department of Fish & Wildlife Resources; on March 18, 1996 (Count 17), distributed & sold the pesticide "Regular", to Mr. Jeff Sweet, Franksville, Wisconsin; on June 3, 1996 (Count 18), distributed and sold the pesticides "Regular" and "Powder" to the Arkansas State Game & Fish Commission; on June 3, 1996 (Count 19), distributed and sold the pesticide "Regular" to the Missouri State Department of Conservation, St. Joseph, Missouri; on June 4, 1996 (Count 20), distributed and sold the pesticide "Regular" to the Missouri State Department of Conservation, Kirksville, Missouri; on June 12, 1996 (Count 21), distributed and sold the pesticide "Regular" to the Missouri State Department of Conservation (DOC), Cape Girardeau, Missouri; on July 15, 1996 (Count 22), distributed and sold the pesticide "Regular" to the Missouri State DOC, St. Joseph, Missouri; on July 15, 1996 (Count 23), distributed and sold the pesticide "Regular" to the Missouri State DOC, Cape Girardeau, Missouri; on July 19, 1996 (Count 24), distributed and sold the pesticide "Regular" to the Missouri State DOC, Cape Girardeau, Missouri; and on July 19, 1996 (Count 25), distributed and sold the pesticide, "Regular" to the Missouri State DOC, Kirksville, Missouri.

Counts 28 through 30 allege Tifa's offering for sale of pesticide products for non-registered uses in violation of Section 12(a)(1)(B), 7 U.S.C. Section 136j(a)(1)(B); Specifically CX-25, the Joint Stipulations, asserts that "Chem-Sect Cube Root Rotenone Powder" is registered for manufacturing use only (or held as a technical grade pesticide) as reflected on its label; that on April 2, 1996 (Count 28), Respondent offered for sale "Powder" to the Wisconsin DNR; on June 4, 1996 (Count 29), offered for sale "Powder" to the Nebraska Game and Parks Commission; and on August 16, 1996 (Count 30), offered for sale "Powder" to the U.S. Fish and Wildlife Service, Umatilla Refuges Complex, Umatilla, Oregon.

Counts 31 and 32 allege Tifa's distribution and sale of registered pesticide products for non registered uses in violation of FIFRA Section 12(a)(1)(B), 7

U.S.C. Section 136j(a)(1)(B); Specifically CX-25, the Joint Stipulations, asserts that on June 3, 1996, Respondent distributed and sold "Powder" to the Arkansas Game & Fish Commission; and on September 26, 1996, distributed and sold "Powder" to the U.S. Fish & Wildlife Service, McNary NWR, Burbank, Washington.

Counts 33 and 34 allege Tifa's production of pesticides in a non-registered pesticide producing establishment in violation of FIFRA Section 12(a)(2)(L), 7 U.S.C. Section 136j(a)(2)(L).

IV. DISCUSSION

A. Liability

Complainant's basic position is that because the terms of the NOITS/Suspension Order automatically became effective upon Tifa's proven failure to comply with the Data Call-In Order or timely request of a hearing, its subsequent activities involving the stated pesticides whose registrations were suspended, constituted violations of FIFRA, as set forth in the Complaint.

Respondent sets forth several arguments in its defense. First, it asserts that because the Suspension Order was issued prematurely (i.e., before the 30 day period stated in the NOITS Order), it is *void ab initio*, and therefore invalid as a matter of law. Second, Respondent argues that it did timely request a hearing pursuant to the NOITS, as evidenced by the letter introduced as RX-8. In the alternative, even should RX-8 not be deemed a timely hearing request, Respondent asserts that RX-5 and RX-6, the letters dated November 20, 1995, should be construed as timely hearing requests, obviating issuance of the Suspension Order and Counts 1-25 of the Complaint.

Third, Respondent submits that it had a good faith belief that the Suspension Order had not been entered on November 21, 1995, and that it never learned of the issuance of the NOITS Order until April 15, 1996. Fourth, Respondent disputes, as a matter of law, that it ever made "offers for sale" with respect to Counts 6,9 and 10, or "claims" with respect to the transactions underlying Counts 28-32. Finally, Respondent asserts that Complainant is equitably estopped from prevailing on Counts 10,11,26,27,30 and 32 and states that Complainant has not met its burden of proving that Respondent's establishment number was ever de-activated.

1. Validity of the Suspension Order

Respondent's first argument is without merit. The fact that the Complaint asserted that the Suspension Order, by its terms, automatically effectuated on November 21, 1995, instead of November 22, 1995, is harmless procedural error, which resulted in no prejudice to the Respondent.

Under the rules governing this proceeding, once a party answers the Complaint, the Agency may only amend the Complaint upon motion granted by the Presiding Officer. 40 C.F.R. Section 22.14(d). This provision is modeled after Rule 15 of the Federal Rules of Civil Procedure, which governs amended pleadings. Unlike Rule 15 however, Section 22.14(d) does not specifically provide for amendments to conform to the evidence. In the Matter of Yaffe Iron & Metal Co., Inc., *TSCA Appeal No. 81-2, 1 E.A.D. 719, 721-22* (1982), aff'd, 774 F.2d 1008 (10th Cir. 1985), the Environmental Appeals Board (EAB), held that a presiding officer properly granted a motion to amend the Complaint after the hearing concluding that respondent was neither surprised nor prejudiced by such action. A[T]he purpose of the complaint is to give adequate notice of the alleged charge so that the charged party has an opportunity to prepare a defense"....a corollary to this principle is that whenever pleadings vary from the issues actually litigated, the pleadings may be amended to conform to the proof as long as there is no undue surprise. *Id*.(citing Davis, Administrative

Law Treatise Section 8.06 (1958)).

In Port of Oakland and Great Lakes Dredge and Dock Company, MPRSA Appeal No. 91-1, 4 EAD 170, 205 (EAB 1992), the EAB, citing Yaffe Iron, held that "the Board adheres to the generally accepted legal principle that administrative pleadings are liberally construed and easily amended, and that permission to amend a complaint will ordinarily be freely granted". In addition, the Court of Appeals for the Fifth Circuit has stated with regard to Rule 15(b), that pleadings may be amended to conform to the evidence unless the opposing party would actually be prejudiced thereby; and that a demonstration of actual prejudice requires evidence of "serious disadvantage". Hodgson v. Colonnades, Inc., 472 F.2d 42,48 (5th Cir. 1973). Similarly, the Ninth Circuit has held that "leave to amend [a complaint] shall be freely given when justice so requires"...and that "the crucial factor, is the resulting prejudice to the opposing party". See Howey v. United States, 481 F.2d 1187, 1190-91 (9th Cir. 1973).

In the instant proceeding, the Complainant, despite the procedural error, gave Respondent adequate notice of the alleged charges against it. In addition, Respondent never presented any evidence that it was "surprised" or "disadvantaged" by the premature issuance of the Suspension Order, although it had ample opportunity to prepare a defense. Nor has Respondent contended in its post-hearing brief that it was prejudiced, in any way, by the Suspension Order being entered on November 21, 1995.

Rather, Respondent states that Complainant has been "on notice since at least the [pre-hearing exchange], that Respondent would be making this argument" and "could easily have corrected the error at trial" by asking the presiding officer to amend the pleadings to reflect the actual effective date of the Order (Respondent's Post-Hearing Brief at 2) (Emphasis supplied). However, in denying without prejudice Respondent's Motion to Dismiss Counts 1-25 at the evidentiary hearing, the presiding officer, in his discretion,[(4)] ruled that the issue raised a question of law to be addressed in the parties' post-hearing briefs (Tr. I, 224-27; II, 3-4).

Complainant's failure to formally amend the Complaint at the time of hearing, was not because it wasn't prepared to do so (Tr. II, 3-4). Rather, the presiding officer deferred the issue for post-hearing briefing.[(5)]Under such ruling, the post-hearing argumentspresented by the Complainant support a valid judgment against Respondent which cannot be defeated by the non-conformance between the Complaint and the evidence. As stated by the Ninth Circuit in Green v. United States, 629 F.2d 581, 584 (9th Cir. 1980)(quoting *Moores Federal Practice Section 8.05 at 8-34 (2d ed. 1979)):* "[A]t the trial stage the case is to be heard on the merits and is not to be hamstrung by faulty pleadings, unless actual, not conjectural prejudice results from the faulty pleading". Here, Respondent has made no showing that it suffered such actual prejudice as a result of the procedural error contained in the Complaint.

Unlike Johnson v. United States, 990 F.2d 41 (2nd Cir. 1993), *cert denied*, 516 U.S. 880 (1995), which Respondent relies upon to support voiding the Suspension Order *ab initio,* no assessments or penalties were imposed on Respondent by the mere entering of the Suspension Order. Rather, Counts 1-25 relate to violations of the Suspension Order which occurred *after* November 1995. In fact, no penalties assessed for any of the counts contained in the Complaint relate in time to either November 21, or November 22, 1995. Johnson is thus distinguished from the facts of the instant case; the court there voided a final tax *assessment* on grounds of due process, because the plaintiff was harmed by the denial of a lengthy period of time that it was otherwise due, to file an appeal from the assessment.

Respondent here, has not shown that it was prejudiced or disadvantaged by the initial entering of the Suspension Order on November 21, 1995. Accordingly, the Complaint is deemed amended to conform to the evidence. Respondent's

reasserted Motion to Dismiss Counts 1-25, on the basis of the invalidity of the Suspension Order is therefore, **Denied.**

2. Respondent's Request For Hearing

Respondent next asserts the major issue in this proceeding: whether it timely requested a hearing in response to receiving the NOITS Order on October 23, 1995(FOF Nos. 9,10). The dispute centers on whether Respondent actually mailed RX-8, a letter dated November 5, 1995, by A.M. Livingston, Respondent's manager, to Complainant, as directed in the NOITS Order (Tr. II, 124). Complainant has no record of having received any request for hearing by Respondent and presented testimony from three witnesses that the alleged request for hearing was never received by any of the alleged recipients as required by the NOITS Order(FOF No. 10).

Proof that mail is properly addressed, stamped and deposited in an appropriate receptacle has long been accepted as establishing a [strong], but rebuttable presumption of delivery to the addressee. Legille v. Dann, 544 F.2d 1,7(D.C. Cir. 1976). "Mere assertions" that a document was mailed however, will not satisfy the evidence requirement. Alphonso Gaydon v. U.S. Postal Service, 62 M.S.P.B. 198, 202-03(March 25, 1994). However, once a party has met its burden that a document was actually mailed, if the document cannot be located thereafter, it is presumed to be lost, misdirected or misfiled after reaching its destination. In re Thoro Products Co., No. EPCRA-VIII-90-04 , 1992 EPA ALJ LEXIS 523, at *43-44 (May 19, 1992).

In seeking to meet its initial burden, Mr. Livingston testified that he wrote the letter, placed it in Tifa's mail meter, and that it was mailed on November 5, 1995 (Tr. II, 127, 132-133). Moreover, Mr. Livingston testified that the letter must have been mailed, because it was never returned by the post office (Tr. II, 128-29). Based on this evidence, Mr. Livingston stated that he had "no doubt at all" that the letter was actually mailed (Tr. II, 128).

On cross-examination, however, Mr. Livingston testified that someone other than himself typed the letter, and that a "third person", whom he did not identify and did not actually observe, "took the mail to the post office [and] would come up from the " (Tr. III, 15-17; II, 127)(Emphasis supplied). In addition, he testified that "whoever typed the letter would have had the responsibility of getting the address off, and they had the documentation. *The letter was addressed to Rick Colbert, and I assume that was the address that was on there" (Tr. III, 11) (Emphasis supplied).* Mr. Livingston previously testified in an interrogatory response that it was unknown who was responsible for making sure the letter was properly addressed (Tr. III, 13; CX-32 5B).

A review of Mr. Livingston's testimony, upon which Tifa's case largely rests, does not satisfy the Court that the document(s) in issue where in fact, mailed as contended. Notwithstanding the conclusory tenor of Mr. Livingston's testimony, there appear to be several conflicts in the evidence which preclude Respondent from being afforded the benefit of the presumption that the document(s) in question were in fact, properly mailed.

First, RX-8 reflects that in addition to Rick Colbert, to whom the November 5, 1995, letter is addressed, both Ms. Hammiel, and Ms. Liem received carbon copies ("cc")(FOF No. 10). The NOITS Order (CX-9), listed Ms. Hammiel's address at page 2, and the address of Ms. Liem of the EPA Office of Compliance at page 3. The offices of each of these individuals had different mail codes, which, if carbon copied, would presumably require separate mailings by Respondent.

Throughout Mr. Livingston's testimony and Respondent's post-hearing brief however, there is no reference of Mr. Livingston (or anyone else at Tifa), having ever mailed separate carbon copies of RX-8 to the above-stated

recipients. There is only mention of A*the letter" [*singular*]* addressed to Rick Colbert requesting a hearing(Tr. II, 126-27, 133; Tr. III, 11,15; Respondent's Posthearing Brief at 4-5, 9)(Emphasis supplied). Moreover, Mr. Livingston never testified as to how the alleged carbon copies were addressed, prepared or mailed and whom may have done so.

The record contains other evidence which further belies the conclusion that RX-8 was actually written and mailed on November 5, 1995. At the hearing, EPA requested the Court take official notice that November 5, 1995, was a Sunday (Tr. III, 17). Mr. Livingston, however, testified that he worked on Sundays(Tr. III, 15-16) and stated that the Millington Post Office drop box that Respondent uses is open and available on Sundays. Mr. Livingston also testified that someone else typed RX-8 on the same day that he drafted it and that an unidentified third person "would come up from the plant" to take the mail to the Post Office)(Tr. II, 127; Tr. III, 15-17). No explanation was provided however, as to why the two individuals involved in typing and mailing the letter would also be working at Tifa on Sunday, November 5, 1995, or why the plant might be open on that day.

Tifa's credibility on this issue is further eroded as Respondent made no attempt during the presentation of its case to identify the individuals allegedly involved in typing and mailing of RX-8. For a company whose staff was allegedly reduced to 9 people since 1991 (Respondent's Post-Hearing Brief at 27), the identification and testimony of such persons should not have been difficult to elicit. Such testimony would be essential in order to solicit first-hand information as to the actual preparation, addressing and mailing of the document. Short of such evidence, Mr. Livingston's testimony that he "knew for certain" that RX-8 was mailed (Tr. II, 127-28), is completely unfounded, and amounts to no more than "mere assertions", that RX-8 was actually mailed as alleged See Gaydon, 62 M.S.P.B. at 202-03.

Finally, there appears to be a discrepancy in how RX-8 was prepared. An examination of Tifa's other record correspondence, shows notations in the lower left corner with initials of who typed and signed the letter, and with numbers which Tifa's secretary, Dierdra Cerciello, testified represented computer codes (Tr. II, 115-19)(See CX-2(a), CX-2(b), CX-2(c), CX-4(I), CX-12(b), CX-12(c),CX-18, CX-26, CX-33: Rx-5, RX-6). No such notations exist on RX-8, which would indicate that the document was not typed, signed or prepared in the normal and ordinary course of business on Sunday, November 5, 1995.

EPA provided testimony from each individual who was allegedly a recipient of Respondent's November 5, 1999 letter, including Bessie Hammiel, Headquarters Hearing Clerk, and senior officials Steven Brozena, Rick Colbert and Francesca Liem of EPA's Office of Compliance. None of these individuals has any record, copy or recollection of having received the alleged request for hearing. Moreover, an extensive review of the agency's files reveals that no such letter has been received (FOF No. 10).

Mr. Brozena, the EPA official assigned to work on the Tifa matter, and who is responsible for handling incoming requests for hearings pursuant to suspension orders, testified that neither he, nor to the best of his knowledge, anyone in his office received a request for hearing from Tifa (Tr. I, 33-34, 43). Ms. Liem, a first line supervisor assigned to work on the Tifa case, and whose name is shown as a "cc" on the November 5, 1999, document, testified that she did not receive any correspondence or a verbal request from Tifa requesting a hearing (Tr. I, 57-58). She further testified that upon being presented with the November 5, 1995 document, "...we did a search and we did not find any of these documents in our system's files...[t]his kind of request would be entered into our computer system and we also checked the administrative record files and a copy wasn't there. We also checked with the hearing clerk. And the hearing clerk did not receive this kind of letter." (Tr. I, 62-64).

Mr. Colbert, who was the signatory to the Suspension Order, and to whom the alleged request for hearing was sent to, testified that he never received any correspondence or a verbal request from Tifa requesting a hearing (Tr. I, 81-

82). In addition, a check of his files and with his staff revealed no such request (Tr. I, 102). Finally, Ms. Hammiel, to whom the NOITS Order required all requests for hearing to be addressed and whose name is shown as a "cc" on the November 5, 1999, document as having been sent 3 copies of Tifa's hearing request, testified that she did not receive any correspondence, written or verbal, from Tifa requesting a hearing, and never spoke to any Tifa employee about a request for hearing (Tr. I, 110-11).

Given the above evidence, Tifa has not established that it "properly addressed, stamped, and deposited" RX-8 in an appropriate postal receptacle. As such, it is not entitled to the legal presumption of delivery. See Legille, 544 F.2d at 7. EPA however, has offered persuasive testimony that in fact, the November 5, 1995, correspondence was *not* delivered to EPA. Respondent's attempts to cast doubt on the veracity of this testimony is based on nothing more than gross conjecture, which does not rebut the preponderance of evidence on this issue in Complainant's favor.

3.The November 20, 1995 Letters

Respondent next asserts that RX-5 and RX-6, the November 20, 1995 letters (FOF Nos.11,12), which were mailed within the 30 day period required by the NOITS Order, contained sufficient language to put Complainant on notice that Respondent objected to the entry of a Suspension Order, and in fact, "wanted a hearing" (Respondent's Post-Hearing Brief at 10). Respondent buttresses its position by stating that the language of the NOITS Order was "difficult for a layperson to fully comprehend" and that Mr. Livingston, a non-attorney had difficulty understanding all the nuances of how one goes about requesting a hearing.

Respondent's justification for construing the November 20th letters as hearing requests is without foundation. Neither RX-5 or RX-6 can reasonably be construed as a request from Respondent for a hearing. Mr. Colbert testified that he did not interpret Respondent's requests for a "delay" or holding "in abeyance" the matter of a suspension, as a request for a hearing (Tr. I, 92-93, 96). He further stated A[r]eceiving a request for hearing would have been a big deal because we don't get that many..."(Tr. I, 102). Similarly, Ms. Liem testified that Athis kind of thing would really get my attention...because we did not receive many of this kind of request" (Tr.I, 62).

The Agency was clearly on notice however, that specific and substantive requests for relief had been submitted by Respondent [i.e., that the agency defer action on the suspension order until April 30, 1995[sic] to permit filing the necessary report (RX-5); and that Tifa be granted an additional 12 months delay to file the data requested (RX-6). As such, EPA had an affirmative obligation to timely follow-up and address such requests as it had on several other occasions in dealing with Tifa on similar matters (CX-21-23,26; RX-4,9).

For example, RX-4, a fax transmittal from Tifa's registration agent, Bob Stewart to Mr. Livingston, references a telephone call from Susan Jennings, of EPA's Special Review and Reregistration Division (SRRD), in response to Tifa's "requests for waivers of the acute fish toxicity studies. Susan said that she had sent a letter in response in March of this year"..."Susan did say that EPA will be unable to grant waivers of the acute studies"(Emphasis supplied). Similarly, RX-9, a letter from EPA's Registration Division to Carol Blochlinger dated June 18, 1990, again "pursuant to your [Tifa's] letter of March 12, 1990", advised Tifa that EPA had approved the change in name and ownership of the Blue Spruce company number.

EPA continued to "follow up" with important correspondence from Tifa during 1996. CX-22, a letter dated July 15, 1996, from an EPA product manager in the Registration Division, references "your [Tifa's] letters of June 22, 25 and

27, 1996, regarding Tifa's Application for Amended Registration". CX-23 is a similar letter dated August 1, 1996, again referencing "your [Tifa's] letters of July 17, and 26, 1996". CX-26 and CX-27 also indicate a course of dealing between the parties. A letter dated February 10, 1997, from Bob Stewart to Susan Jennings references "our recent telephone conferences" regarding the test articles for the reregistration of rotenone(CX-26). Similarly, a letter dated July 2, 1996, from Dr. Enache to Ms. Blochlinger "in follow-up to our discussion we had during the June 25, 1996, inspection" is noted (Emphasis supplied).

The NOITS Order itself lists Ms. Liem's name and telephone number and states that "**ANY QUESTIONS REGARDING THE OPERATION OF THIS ORDER SHOULD BE DIRECTED TO...."** EPA, thus anticipated and purposefully set up a mechanism to respond to procedural requests or inquiries by parties under threat of suspension. EPA was therefore remiss in not responding to the November 20th letters, if not as hearing requests, then certainly as properly submitted inquiries under the NOITS Order. Such requests were deserving of a response in much the same way EPA responded to Respondent's request for waivers in RX-4.

By ignoring such timely and pertinent requests, EPA not only left Tifa guessing as to whether its relief would be granted, but in light of the requests, it failed to affirm and/or reestablish the effective date of the Suspension Order. By taking no action on these matters, EPA contributed to Respondent's alleged good faith impression that the Suspension Order did not effectuate on November 21, 1995, and that its requests for delay in implementing the Suspension Order had not been denied. This is especially true given Respondent's understanding, correct or not, that similar relief had been granted to a previous registrant and its statement in RX-6 that "[w]e trust that this request will meet with your approval" (RX-6; FOF No.12).

EPA's inaction in not timely responding to Tifa's delay requests, resulted at least in part, from the government shutdowns (FOF No. 13). Respondent alleges that it attempted on numerous occasions to telephone EPA during the period of the shutdowns, and that its representative, Bob Stewart, was unsuccessful in contacting Rick Colbert and other EPA officials(Tr. II, 131-32).(6) Whether this occurred or not, EPA clearly sent Respondent conflicting signals as to EPA's intentions subsequent to the issuance of the NOITS Order. See Britton Construction Co., BIC Investments, Inc., and William and Mary Hammond, CWA Appeals Nos. 97-5 and 97-8 (Slip Opinion at 29-30, n. 11)(March 30, 1999) (citing In re Carsten, 211 Bankr. 719, 725B29 (D. Mont. 1997)).

As a matter of public policy, this Court is unwilling to construe adverse effects resulting from government shutdowns, against a private party doing business with a federal agency. Given EPA's failings in this case, a reassessment of the effective date of the Suspension Order is required before a determination can be made regarding the propriety of the violations alleged in the Complaint. Considering the timing and circumstance of EPA's enforcement effort in this regard, the EAB has held that it is appropriate to factor these elements into determining whether to mitigate the penalty against Respondent. See id. As such, the effective date of the Suspension Order can only be established in the context of Respondent's actual knowledge of the Order's issuance.

4. Respondent's Knowledge of the Suspension Order

It is Respondent's position, as expressed through the testimony of Mr. Livingston, that Respondent did not learn of the issuance of the Suspension Order until April 15, 1996 (Tr. II, 134). On that date, Dr. Adrian J. Enache of EPA hand-delivered to Respondent a Stop Sale, Use, and Removal Order (SSURO) for the company's violation of the Suspension Order and conducted an inspection of the facility (Tr. I, 133-136; CX-2, CX-14).(7)

EPA offers evidence that Tifa "knew that the Suspension Order had been entered prior to April 15, 1996" (Complainant's Post-Hearing Brief at 9, Reply Brief at 8). CX-2, an affidavit by Carol J. Blochlinger dated April 15, 1999, and collected by Dr. Enache during his inspection (Tr. I, 135), indicates that Tifa "sold rotenone products after November 21, 1995, the date when the Suspension Order for our rotenone products became final and effective". This document standing alone, however, does not prove EPA's argument. CX-2 does not indicate *when* Ms. Blochlinger became aware of the effective date of the Suspension Order; in addition, she did not testify at the hearing to expound on her statement.

CX-20 however, a letter dated April 8, 1996, from Tifa's consultant, Mr. Stewart, clearly imputes notice to Tifa that, as of that date, the Suspension Order was in effect, stating "[a]s you know, the subject product is currently suspended for failure to provide required data under reregistrations...Tifa is currently in the process of generating the remaining data to reinstate its registration". Similarly, CX-21, a letter dated April 9, 1996, from EPA to Mr. Stewart, clearly notified Tifa that the Suspension Order was in effect and advised that **"YOU CANNOT MARKET THESE PRODUCTS UNTIL YOU RECEIVE FORMAL NOTIFICATION FROM OUR OFFICE OF COMPLIANCE THAT THE AGENCY LIFTED THE SUSPENSION"** (CX-21 at 2).

Significantly, the content of these letters and the terms of CX-20 are consistent with the representations Tifa made to Dr. Enache during the April 15, 1996, inspection that it was aware of the Suspension Order and was in the process of providing information to EPA to have the Suspension Order lifted (Tr. I, 136-37). Based on this evidence and EPA's failure to respond to Tifa's requests to delay issuance of the Suspension Order, it is concluded that Respondent was not on actual notice of the issuance of the Suspension Order until April 8, 1996.

Accordingly, the effective date of the Suspension Order is determined to be April 8, 1996. Thus, any importation, offering for sale or distribution and sale of the suspended pesticide products by Tifa prior to that date, are found not to be in violation of Sections 12(a)(2)(J);12(a)(1)(A) of the statute. Thus, Counts 1-6 and 13-17 are considered prematurely filed and are **Dismissed**.

5.Whether Counts 9,10 and 12 Constituted "Offers For Sale"

With regard to Counts 7, 8 and 11, Respondent has stipulated to the fact that it "offered to sell" the pesticide(s) as described in each of those prospective counts (CX-25 Joint Stipulations at 2-3, pars. 15-19). Thus, as to liability, these counts are not at issue. The parties do dispute however, whether the information supplied by Tifa with respect to Counts 9,10 and 12 were "offers for sale" under the statute.

At the evidentiary hearing, Dr. Enache testified that the documentary evidence in support of Count 9 is a "bid request" and "bid response", dated August 29, 1996, from Tifa to the Oklahoma Department of Wildlife Conservation (CX-4h; Tr. I, 154-55). According to Dr. Enache, in this exhibit Tifa indicates that it has the product, AChem-Sect Brand Fish Synergized" in stock, available for shipment and lists information regarding quantity and price of its product (Tr. I, 155).

Similarly, Dr. Enache testified that Count 10 is a August 9, 1996, "bid response" and order for supplies from the U.S. Fish and Wildlife Service, Umitilla National Wildlife Refuge, Oregon (CX-4i; Tr. I, 155-56). According to Dr. Enache, Tifa indicates that it has its product, "Rotenone Powder" in stock, and available for shipment and lists information and price of the product (Tr. I, 156). Finally, Dr. Enache testified that the documentary

evidence underlying Count 12 is a "bid response" dated September 13, 1996, from Tifa to the State of Minnesota (CX-5a; Tr. I, 156-57). According to Dr. Enache, in this exhibit, Tifa lists information regarding quantity and price of "Chem-Sect Brand Cube Root Rotenone Powder", and availability of the product for shipment (Tr. I, 157).

Section 12(a)(1)(A) of FIFRA states that it shall be unlawful for any person to distribute or sell any pesticide whose registration has been suspended. The definition of to "distribute or sell" includes "offer for sale". FIFRA Section 2(gg), 7 U.S.C. Section 136(gg)(CX-25 Joint Stipulations).

Although the phrase "offer for sale" has not been specifically defined by FIFRA or the underlying regulations, the term has been recently addressed by the courts,[(8)] in instances where as here, a party provided price quotes for a product to a prospective buyer. In White Consolidated Industries, Inc., v. McGill Manufacturing Co., Inc., 165 F.3d 1185, 1190 (8th Cir. 1999), the 8th Circuit, citing Litton Microwave Cooking Products v. Leviton Manufacturing Co., 15 F.3d 790, (8th Cir. 1994), noted the general rule that "typically a price quotation is considered an invitation for an offer, rather than an offer to form a binding contract". In Litton, the Court determined that although a price quotation clearly, definitely, and explicitly manifested a willingness to become bound as required by Minnesota law, it left too many terms open for negotiation to be considered an offer. Litton, 15 F.3d at 794-95.

The Court reached a similar result in Day v. Amax, Inc., 701 F.2d 1258 (8th Cir. 1983), where a coal production consultant brought an action against a mining company for breach of contract to sell mining equipment. The Court ruled that the mining company's refusal to sell the equipment did not constitute breach of contract, reasoning "[t]he mere description of merchandise, coupled with the purchase terms, is not, in itself, sufficient to constitute a legally binding offer." Id. at 1263.

In W.H. Barber Company, Inc. v. McNamara-Vivant Contracting Company, Inc., 293 N.W.2d 351, 355 (Minn. 1979), an asphalt cement distributor brought an action for payment on materials delivered to two paving contractors. The contractors counter-claimed, asserting that the distributor's price quotation letter amounted to an offer to enter into a requirements contract to supply the contractors needs for work undertaken at a price that was not subject to increases. The Supreme Court of Minnesota found that the distributor's price quotation letter merely invited the contractors to make offers, and could not be used as a basis to prove a price protection term in the underlying contract. Id.

As stated in Litton,15 F.3d at 795, it is quite conceivable that under certain circumstances a price quote or catalog may constitute an offer. See e.g., A. Belanger & Sons, Inc. v. U.S. for Use and Benefit of National U.S. Radiator Corp., 275 F.2d 372 (1st Cir. 1960). The circumstances of the instant case however, do not remove Tifa's price quotations from the general rule that such documents are insufficient to constitute a legally valid offer. The test, as stated in White Consolidated Industries, 165 F.3d at 1190, citing Brown Machine, Division of John Brown, Inc. v. Hercules, Inc., 770 S.W. 2d 416, 419 (Mo.Ct.App. 1989), holding that a price quotation can amount to an offer creating the power of acceptance, is whether "[it] appear[s] from the price quote that assent to the quote is all that is needed to ripen the offer into a contract".

An examination of the underlying documents which support Counts 9, 10, and 12 (CX-4h, CX-4i and CX-5a, respectively), clearly do not indicate terms sufficient to constitute binding offers. CX-4h shows that the Oklahoma Department of Wildlife Conservation (ODWC) merely requests Tifa to "please quote on the attached specifications". In response, Tifa filled in a blank on the ODWC form which provided a price per gallon for its Chem Fish product. Similarly, CX-4i shows that Tifa provided a "quote" on quantities of rotenone

Powder and Chem Fish Regular. Tifa even notes that "we can reserve this material for you but cannot ship it until we receive approval on our updated label with the EPA". Thus, further negotiations between the parties would have been necessary to reach agreement on shipping dates, etc. CX-5a likewise shows Tifa merely confirmed a price quote on quantities of rotenone Powder to the State of Minnesota. Mr. Livingston testified that it is standard operating procedure for many state and federal agencies to seek pricing information "in order to determine whether they have sufficient budget to proceed with the purchase of any material." (Tr. II, 158-59).

Although the documents cited by EPA contain certain definite and explicit terms, none of them included sufficient terms to create a binding contract: such as delivery or payment terms, and shipping and insurance provisions. It would be difficult therefore, to maintain that they left "nothing for negotiation" as required in Litton. Rather, there were several unstated terms which would have to be negotiated before acceptance would ripen the quotes into contracts. See Litton, 15 F.3d at 795.

EPA has therefore not met its burden of demonstrating that the documents contained in CX-4h, CX-4i and CX-5a constituted "offers for sale" under Sections 12(a)(1)(A) and 2(gg) of FIFRA. Accordingly, Counts 9, 10 and 12 are **dismissed.**

6. Whether Tifa Made "Claims" With Respect To The Transactions Underlying Counts 28-32

Counts 18-25 generally allege that Respondent distributed and sold pesticides whose registrations were suspended during the effective period of the Suspension Order (determined to be April 8, 1996), in violation of Section 12(a)(1)(A) of FIFRA, 7 U.S.C. Section 136j(1)(A)(CX-24). Respondent stipulated that it "distributed and sold" specific pesticides from June 3, 1996 (Count 18) to July 19, 1996 (Count 25)(CX-25, Joint Stipulations, paragraphs 25-32). Thus, the transactions identified in Counts 18-25 occurred within the effective period of the Suspension Order when the registrations for "Chem-Sect Brand Cube Root", "Chem-Sect Brand Rotenone Resins", "Chem-Sect Brand Chem Fish Regular" and "Chem-Fish Synergized" were suspended. Therefore, as to liability, these counts are not at issue, given Respondent's distribution and sale of suspended pesticides, which violated Section 12(a)(1)(A) of FIFRA, 7 U.S.C. Section 136j(a)(1)(A), as alleged in Counts 18-25.

As to Counts 28-32, the issue presented is whether by selling Cube Root, a manufacturing use product, to end users, Tifa made an "implicit claim" that the product may be appropriately used for end use purposes. Such use, Complainant argues, differs from the claims asserted on the product label and required in connection with its registration, and therefore violates FIFRA Section 3, 7 U.S.C. Section 136j (a)(1)(B)(Tr. I, 211).

Section 12(a)(1)(B) provides that it shall be unlawful for any person to distribute, sell or offer for sale any registered pesticide if any claims made for it as a part of its distribution or sale substantially differ from any claims made for it as part of the statement required in connection with its registration under Section 3 of FIFRA, 7 U.S.C. Section 136a. Section 3(c) of FIFRA provides that "[e]ach applicant for registration of a pesticide shall file with the Administrator a statement which includes...(c) a complete copy of the labeling of the pesticide, a statement of all claims to be made for it, and any directions for its use...".

According to Dr. Enache, all claims that are part of the statement required in connection with the registration of a pesticide must be included on the label for that product (Tr. I, 164-65). Dr. Enache testified that he collected the label for the pesticide product, "Chem-Sect Brand Cube Root" rotenone powder during the April 15, 1996, inspection of Respondent's facility (Tr. I, 167).

In addition, RX-1, the label for Cube Root, contains the phrase, "FOR MANUFACTURING USE ONLY". Respondent stipulated that Cube Root is a registered pesticide for "manufacturing use only" and that it offered for sale and/or sold and distributed Cube Root to specific customers on the specific dates identified in Counts 28-32(CX-25 Joint Stipulations at paragraph 34-40).[(9)]

The underlying documentation in CX-2a, CX-3a, CX-4j, CX-3c and CX-5b (pertaining to Counts 28-32 respectively), indicates that Respondent offered to sell and/or sold or distributed Cube Root to the Wisconsin Department of Natural Resources; the Nebraska Game & Parks Commission; the U.S. Fish & Wildlife Service; and the Arkansas Game & Fish Commission. Dr. Enache testified that each of these governmental entities was an "end user" with regard to pesticide use(Tr. I, 170, 173, 177, 179, 182). He stated that none of the above-stated entities were registered pesticide producing establishments, and that conversations with representatives of each entity confirmed that they were not producing pesticides but were using Cube Root for end use purposes (Tr. I, 171, 177, 180, 182).

The term "claim" is not defined in the statute, regulations or legislative history. However, In the Matter of Sporicidin, No. FIFRA 88-H.02, 1988 EPA ALJ LEXIS 14, at *46 (ALJ Nov. 1, 1988), aff'd 3 E.A.D. 589 (EAB June 4, 1991), "claim" was defined in Webster's Dictionary as "an assertion, statement or implication (as to value, effectiveness, qualification, eligibility) often made or likely to be suspected of being made without adequate justification." EPA cites to an EAB concurring opinion by Judge McCallum In re: Roger Antkiewicz & Pest Elimination Products of America, Inc., FIFRA Appeal Nos. 97-11 and 97-12, 1999 EPA App. LEXIS 8, at *58 (EAB March 26, 1999), wherein the term "claim", was also found to connote "an affirmative representation, whether express, or implied as to certain attributes, results, and so on." Id. at *32.

Judge McCallum's opinion contains an excellent discussion as to Congress' intent in using the word "claim" in Section 12(a)(1)(B). He noted FIFRA's primary interest was in "protecting consumers from the purchase of ineffective products"..."to prevent false and misleading claims, and to prevent worthless articles from being marketed". Id. at *55(citing Stearns Elec. Paste Co. v. EPA, 461 F.2d 293, 302-303(7th Cir. 1972)(quoting House Report on 1947 Act)). In short, Judge McCallum noted, the "particular goals of FIFRA and its predecessors have been consistent for nearly a century: Congress wants to protect consumers from misrepresentations as to pesticides' efficacy, safety and other qualities, and thus manufacturers must prove that the "claims" they make for their products are true". Roger Antkiewicz, 1999 EPA App. LEXIS 8, at *56.

The undersigned concludes that the phrase "FOR MANUFACTURING USE ONLY", contained on Tifa's label, is an imperative sentence or warning and not a "claim" in the ordinary sense of the word. See Id. It is not a statement of fact or assertion of truth, and pursuant to Judge McCallum's rationale, the phrase "tells the reader nothing definitive, as required by FIFRA, about the product's efficacy, safety or other qualities". Id. at *58. Nor can it be said that the phrase contains any false or misleading information. Other than stating that Cube Root was "FOR MANUFACTURING USE ONLY", Tifa made no assertions or statements regarding the product's use, value or effectiveness.

Previous violations of FIFRA Section 12(a)(1)(B)have involved parties making explicit claims or representations for pesticides which differed from claims made in connection with the statement for registration, as reflected on the product label.[(10)] Here, EPA's "implicit claim" theory rests almost exclusively on the testimony of Dr. Enache, a non-attorney (Tr. I, 161-211; Complainant's Post-Hearing Brief at 29-35). Such theory however, has no basis in law. Applying the majority reasoning in Roger Antkiewicz, when viewed as a whole, Tifa's product labeling cannot reasonably be construed as making even an "implied affirmative statement" that the pesticide is appropriate for an end use purpose. See Id.

To hold otherwise, would expand the definition of the term "claim", where none exists in FIFRA, and is contrary to the clearly intended purpose of the statute. Such an interpretation would further conflict with the canons of statutory construction that where the language of a statute is plain and its meaning is clear, courts should not reach beyond the statute's express terms. See Prudential Insurance Co. of America v. Rand and Reed Powers Partnership, 972 F.Supp. 1194, 1208 (1997)(citing City of West Branch v. Miller,546 N.W.2d 598,602 (Iowa 1996). As stated by the Court in Prudential, "we are bound by what the legislature said, rather than what it should or might have said... [w]e may not, under the guise of statutory construction, enlarge or otherwise change the terms of a statute". Prudential, 972 F.Supp at 1205(citing State v. Jones, 464 N.W.2d 241-42(Iowa 1990)).

As such, the mere sale of a pesticide whose label states "FOR MANUFACTURING USE ONLY", to an end-use customer, is not a "claim", implicit or otherwise, that the product may be appropriately used for an end use purpose, as intended by FIFRA Section 12 (a)(1)(B). Nor does the sale of such product, standing alone, amount to an "affirmative representation" as to the product's "attributes, results, and so on". Roger Antkiewicz, 1999 EPA App. LEXIS 8, at *57.

Complainant's position being unfounded in law, and thus, having failed to establish that Respondent violated FIFRA Section 12(a)(1)(B), 7 U.S.C. Section 136j(a)(1)(B), as alleged, Counts 28-32 are **Dismissed.**

7. Whether Complainant is Equitably Estopped From Prevailing on Counts 10,11,26,27,30 and 32

Respondent next asserts the affirmative defense that Complainant is equitably estopped by its affirmative misconduct from prevailing on Counts 10, 11, 26, 27, 30 and 32 and that those counts should be dismissed. Based on the previous stated findings dismissing Counts 10, 30 and 32 on other grounds, and the fact that Counts 26 and 27 were withdrawn by Complainant prior to the evidentiary hearing, such arguments are moot. As to Count 11, however, the issue is addressed.

As a general rule, the defense of estoppel is rarely valid against the federal government acting in its sovereign capacity, and the circumstances where it may be invoked are few and far between. See Office of Personnel Management v. Richmond, 496 U.S. 414 (1990). In those instances where estoppel may be invoked against the government, it must be shown that the government engaged in affirmative and egregious misconduct. See United States v. Marine Shale Processors, 81 F.3d 1329, 1349 (5th Cir. 1996); In re B.J. Carney Industries, Inc., CWA Appeal No.96-2, 1997 EPA App. LEXIS 7, at *6-7(EAB June 9, 1997); Bolourchian v. I.N.S., 751 F.2d 979 (9th Cir. 1984).

Respondent argues that in the instant case, the federal government did, in fact, engage in affirmative misconduct when it had knowledge that the products at issue were suspended, yet still placed orders for the suspended product. With respect to Count 11, Respondent has stipulated that on July 17, 1996, it offered to sell the pesticide "Chem-Sect Brand Fish Regular" to the U.S. Fish & Wildlife Service, Pahrangat NWR, Alamo, Nevada (CX-25 Joint Stipulations at paragraph 19; CX-4j). Respondent submits however, since EPA had knowledge of the Suspension Order, the Fish and Wildlife Service must be deemed to have such knowledge as well (Respondent's Post Hearing Brief, 21-22).

Respondent's arguments are without merit. It is well-settled that one federal agency will not be charged with the knowledge of, or responsibility for, another merely because both are components of the same federal government. Wyler v. Korean Air Lines Co. Ltd., 928 F.2d 1167, 1171 (D.C. Cir. 1991); L'Enfant Plaza Prop., Inc. v. U.S., 645 F.2d 886,890(Ct.Cl.1981); J.A. Jones

Constr. Co. v. United States, 390 F.2d 886, 891 (Ct.Cl.1968).

Here, the Fish and Wildlife Service's placing of an order for pesticide products from Respondent, when the former was not imputed with the knowledge of EPA's issuance of the Suspension order against Respondent, fails to constitute affirmative and egregious misconduct sufficient to invoke the affirmative defense of estoppel. As such, Respondent is found **liable** under Count 11 of the Complaint for offering for sale suspended pesticides in violation of FIFRA Section 12 (a)(1)(A), 7 U.S.C. Section 136j(A)(1)(A).

8. Whether Respondent Produced Pesticides in an Unregistered Establishment (Counts 33 and 34)

Finally, Respondent asserts that Complainant has failed to offer evidence which support its allegations that Respondent produced pesticides in an unregistered establishment. Respondent does not dispute that it produced the pesticides Chem-Sect Brand Cube Root, Rotenone Powder and Rotenone Resins during the period in question, only whether its establishment was registered at the time of production.

Pursuant to Section 12(a)(2)(L) of FIFRA, 7 U.S.C. Section 136j(A)(2)(L), it shall be unlawful for any person who produces pesticides to violate any of the provisions of Section 7 of FIFRA, 7 U.S.C. Section 136(e). Section 7(a) of FIFRA, 7 U.S.C. Section 136e(a) provides that no person shall produce any pesticide unless the establishment in which it is produced is registered with EPA. An establishment is defined under Section 2(dd)of FIFRA, 7 U.S.C. Section 136(dd), as Aany place where a pesticide...is produced, or held, for distribution or sale."

All pesticide producing establishments must be registered with EPA in order to provide the Agency with information as to the types and quantities of pesticides being produced, by whom and where (Tr. I, 184-85). Failure to register an establishment deprives the Agency of this necessary information and therefore weakens the statutory scheme. In Re: Sav-Mart, Inc., FIFRA Appeal No. 94-3, 5 EAD 732, 738 n.13(EAB March 13, 1995). EPA acquires the above-described information from pesticide production reports which must be filed annually by each pesticide producing establishment pursuant to Section 7(c) of FIFRA (Tr. I, 197), and from the application for registration of pesticide producing establishments.

With regard to the violations pertaining to production of pesticides in an unregistered establishment, as alleged in Counts 33 and 34, Dr. Enache testified that he discovered the alleged violations as a result of his inspections of Tifa's establishment on April 15, 1996, and June 25, 1996, at which time he collected labels of product in stock being held for shipment by Tifa (FOF No. 14; Tr. I, 186-87). The labels on these products exhibited EPA registration No. 1439-NJ-002 [sic, 1439-NJ-001](Tr. I, 185-86). Checking Tifa's registration number with the EPA computer database[(11)] revealed that Tifa's establishment was not registered (Tr. I, 186-87).

By letter dated July 2, 1996, EPA notified Tifa that its establishment was not registered (CX-27; Tr. I, 187). In response to the July 2nd letter, Ms. Buckingham, of EPA's Office of Compliance, stated in written testimony, that in early July 1996, she received a call from Deirdre Cerciello of Tifa, informing her that the registration number for the Millington establishment was not active and that Tifa wanted to activate it (CX-19 at 3). According to Dr. Enache, Tifa wanted to activate and have assigned to it, the establishment registration number for Blue Spruce Inc., a pesticide producing entity which previously operated at the Millington facility (Tr. I, 191-92).

CX-18, a July 10, 1996, fax transmission from Ms. Cerciello to Ms. Buckingham,

requests that EPA transfer the establishment registration from Blue Spruce to Tifa (Tr. I, 195). The establishment registration of Blue Spruce had been inactivated when Blue Spruce went out of business in 1986 (Tr. I, 192). CX-18 also indicates that Tifa had not filed annual pesticide production reports for 1993 and 1994. On July 10, 1996, Tifa's establishment became registered on the SSTS database (RX-10). Thereafter, Tifa back-filed annual pesticide production reports for 1993, 1994 and 1995 (Tr. I, 196-97; and Tr. II, 113).

This evidence clearly demonstrates that Tifa produced pesticides at its Millington establishment prior to July 10, 1996, when EPA registered Tifa's establishment on the SSTS database. The inspections conducted in April and June 1996, indicate that the above-mentioned pesticides, including Cube Root Rotenone and Rotenone Resins (cited in Counts 33 and 34), were in stock, and ready for shipment and that Tifa was engaging in repackaging and relabeling those products on the premises(Tr. I, 196; CX-2, Affidavit of Carol Blochlinger). Section 2(w) of FIFRA, 7 U.S.C. Section 136(w), defines "produce" to mean "to manufacture, prepare, compound, propagate, or process any pesticide..." 40 C.F.R. Section 167.3 further defines "produce" "...to package, repackage, label, relabel, or otherwise change the container of any pesticide..."

The fact that a search of EPA's SSTS database, where such data would normally be recorded, revealed that Tifa did not have an establishment registration (prior to July 10, 1996), is reliable proof of the non-occurrence of the event. See Green Thumb Nursery, Inc., FIFRA Appeal No. 95-4a, 6 EAD 782, 795 n.26(EAB March 6, 1997). In addition, Tifa's argument that there was "conflicting information" as to whether its establishment was registered (CX-18), is unpersuasive. The evidence shows that a "company" number was previously transferred from Blue Spruce to Tifa as evidenced by the July 18, 1990 letter from EPA (RX-9). Such registration however, pertains to different information and is kept on separate EPA databases; therefore it does not meet the requirements of Section 7(a) of FIFRA, 7 U.S.C. 136e(a), that an establishment producing pesticides be registered (Tr. II, 8,13-16).

Moreover, Tifa's payment of annual management fees does not justify its belief that its establishment was registered. Such fees, pursuant to Section 4(i)(5) of FIFRA, 7 U.S.C. Section 136(a)1(i)(5), are required to keep the registration of pesticide products in effect, irrespective of whether an establishment is registered.

Accordingly, for the reasons stated above, Complainant has met its burden that Respondent produced pesticides in an unregistered establishment as alleged in Counts 33 and 34, in violation of Section 12(a)(2)(L) of FIFRA, 7 U.S.C. Section 136j(a)(2)(L).

B. PENALTY

Having established Respondent's liability for Counts 7, 8, 11, 18-25, 33 and 34, the sole remaining issue is the determination of an appropriate penalty. An appropriate penalty is one which reflects a consideration of each factor that the governing statute requires to be considered, and which is supported by a reasoned analysis utilizing those factors. B.J. Carney Industries, 1997 EPA App. LEXIS 7, at *110-111.

Section 14(a)(1) of FIFRA, 7 U.S.C. Section 136*l*(a)(1), authorizes a civil penalty of up to $5,000 for each violation of FIFRA. The statute also specifies at Section 14(a)(4), 7 U.S.C. Section 136*l* (a)(4), that in determining the amount of 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." The regulations governing the administrative assessment of civil penalties provide that the presiding officer also must "consider" any civil penalty guidelines or policies issued by the agency. 40

C.F.R. Section 22.27(b). The Agency has offered into evidence CX-1, the Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act, dated July 2, 1990 (Penalty Policy).[(12)]

Section 22.35(c) of the Supplemental Rules of Practice provides that in addition to the statutory penalty criteria discussed above (when assessing a penalty), the Judge shall consider respondent's history of compliance with the Act, and any evidence of good faith or lack thereof. 40 C.F.R. Section 22.35(c). Ultimately, however, any penalty assessed must reflect "a reasonable application of the statutory penalty criteria to the facts of the particular violations." In re Employers Insurance of Wausau, TSCA Appeal No. 95-6, 6 E.A.D. 735,758 (EAB Feb. 11, 1997).

Having been found liable for 13 counts of violation, the appropriate penalty to be assessed against Respondent is $65,000, based on the following discussion of the FIFRA penalty criteria.

1. The Size of Business Penalty Criterion

In CX-25, the parties jointly stipulated as to certain financial issues in this case. Specifically, at paragraphs 43-45, Respondent stipulated that it would not pursue at the hearing, an inability to pay the proposed civil penalty; that it would not contest the issue of Respondent's size of business in assessing the proposed civil penalty; and that it would not contest the issue of Respondent's ability to continue in business in assessing the proposed penalty, with the exception of requesting installment payments (See also Tr. II, 26-35, 100-03,168).

As set forth at the hearing, Dr. Adrian Enache, the Region II FIFRA inspector, who was responsible for preparing the Complaint and calculating the proposed penalty, testified as to the process employed to arrive at the proposed penalty. In determining the size of business category of Respondent, Dr. Enache testified that Respondent fits within the definition of a FIFRA Section 14(a)(1) violator (Tr. I, 236; CX-1 at 20, Table 2).

Under the FIFRA Penalty Policy, EPA has established three categories, or sizes of businesses based upon gross revenues. Category I businesses are those businesses whose gross revenues exceed $1,000,000. Category II covers those businesses with gross revenues between $300,001 and $1,000,000. Category III includes those businesses with gross revenues between $0 to $300,000. Dr. Enache considered Respondent to be a Category I size business, which includes businesses with gross revenues over $1,000,000 (Tr. I, 237). In addition, EPA's financial expert, Dr. Joan Meyer, testified that under the Penalty Policy, Respondent "clearly falls as a Category I business with total revenues in excess of a million dollars per year"(Tr. II, 53). Given Respondent's stipulation that "as to the size of business...EPA has met their burden of proof" (Tr. II, 31), no further discussion on this statutory factor is necessary.

2. Ability to Continue in Business Criterion

As CX-25 indicates, Respondent contests its ability to continue in business only to the extent that it be allowed to make installment payments on any penalty assessed (See also Tr. II, 31,35). As the proponent of such a request, Respondent has the burden of proof, as it controls all information pertaining to its financial condition. In the Matter of Bil-Dry Corporation, No. RCRA-III-264, 1998 EPA ALJ LEXIS 114, at *58(October 8, 1998); In the Matter of Accuventure Inc., No. FIFRA 1092-07-01-012, 1994 EPA ALJ LEXIS 78, at *31 (May 25, 1994). Respondent, however, has failed to show by sufficient evidence that it is unable to pay the entire penalty assessment upon judgment.

In its post hearing brief, Respondent reiterates that in withdrawing its

defense of ability to continue in business, it reserved at all times, the right to argue that it could not afford to pay any penalty assessed in one lump sum. However, the only documentary evidence offered at hearing to support this defense, are four tax returns for fiscal years ending March 31st of 1995, 1996 and 1997, as well as the fiscal year ending December 31, 1997 (RX-11-14). Such limited financial information was offered despite EPA's repeated requests, in the forms of two Motions For Production of Financial Documents and written interrogatories(See Complainant's Post Hearing Brief at 51, n.14). In fact, one of EPA's interrogatories explicitly asked Tifa to "provide a detailed explanation of any and all supporting information for Tifa's position that payment of the proposed penalty in whole...would cause undue financial hardship." (CX-31 at 9). However, Respondent declined to answer this or any other interrogatories pertaining to its financial status.

Respondent explains that it did not respond to EPA's request for additional financial data because it did not intend to contest its ability to pay claim. Rather, Respondent argues that EPA "never once protested the fact that Respondent would not be producing any more financial information...since it always indicated a willingness to settle the case on extended payment terms" (Respondent's Post Hearing Brief at 26-27). Moreover, Respondent states that EPA never indicated that it would oppose the limited inability to pay in one lump sum payment until the hearing began. For these reasons, Respondent argues that there was no reason to produce any other documents in support of its inability to pay in one lump payment defense. Respondent, however, uses the above reasoning to further assert the absurd position that the testimony of EPA's financial expert cannot be relied upon because she "clearly did not have enough information to form an opinion. Dr. Meyer admitted that she would have preferred more recent information from Tifa in order to analyze its ability to pay the fine in one lump sum...Dr. Meyer did not have a complete or updated picture of Tifa's finances (because Complainant never asked for it)" (Respondent's Response Brief at 28-29).

Respondent's rationale is completely specious and misplaces its evidentiary burden. Regardless of any pre-hearing understanding, Tifa, at all times, shouldered the burden of persuasion as to this or any other defense it wished to assert. As such, it was incumbent on Respondent, having sole control over its financial information, to present any evidence which might support its argument. By asserting this defense, Respondent elected to rely entirely on the above-stated tax returns and the testimony of Mr. Livingston to establish its inability to pay a lump sum penalty.

In this regard, Mr. Livingston testified that 1998 was financially substantially worse for Tifa than 1997, indicating that its professional fees were up dramatically in 1998 and will be even higher in 1999 due to potential Superfund litigation(Tr. II, 172,174). He further testified that the number of Tifa employees has decreased from 20 to 9 since 1991. More importantly, Mr. Livingston stated that Tifa lost 3 tenants in 1998, costing the company $17,000 per month in rental income and $45,000 in unpaid rents that it likely will never collect (Tr. II, 183-84). He also testified that Respondent's overall revenues were down 10-15% for 1998 and 1997 (Tr. II, 185-86). Mr. Livingston's testimony however, is not supported by any financial reports, invoices for professional services, W-2 forms, wage and salary data, operating statements, or leases. Without such support, any statements regarding Tifa's financial condition remain conclusory, at best, and do not carry Respondent's burden.

EPA's financial expert Dr. Meyer, however, testified that there was "no evidence to the contrary" that Tifa can pay in one lump sum, a penalty assessed upon judgment(Tr. II, 67). In evaluating Tifa's financial status, Dr. Meyer reviewed the tax returns herein noted, as well as publicly available information (Tr. II, 39). In conducting her analysis, Dr. Meyer considered Tifa's corporate entity, overall health of the company, operating cash flow, wages of employees and officers, and sources of discretionary expenses and assets.

With respect to the corporate entity, Dr. Meyer testified that although Tifa, Ltd. changed its name to Tifa Realty, Inc., changed its organization from a C corporation to an S corporation, and transferred its assets and liabilities to the new subsidiary, it is still the same financial entity and does not change its ability to pay the entire penalty in a lump sum (Tr. II, 44; RX-14). Moreover, Dr. Meyer stated as to the financial health of the company, that total sales had been "relatively stable" (Tr. II, 57). As for cash flow, Dr. Meyer testified that Tifa had a "significantly positive cash flow for the fiscal year ending March 31s^{t,} 1995 and 1996" (Tr. II, 58-59). Although cash flow for 1997 was negative, it became positive again for the year, ending December 31, 1997 (Tr. II, 59; CX-29). Wages earned by Tifa's employees increased for fiscal years ending March 31st 1995, 1996 and 1997(Tr. II, 57).

With regard to officers salaries, Dr. Meyer testified that the salary of Tifa's one officer, Carol Blochlinger, "more than tripled" for the year ending March 31, 1997, and for the most recent fiscal year, jumped roughly 18% (Tr. II, 58). Dr. Meyer testified that generally, companies in financial distress do not pay their officers increasingly higher salaries (Tr. II, 58). In reviewing Tifa's discretionary expenses, Mr. Livingston testified that Tifa's legal fees were expected to increase due to Tifa's on-going environmental litigation (Tr. II, 173). However, the only documents concerning such litigation were RX-14, a complaint against Tifa for its failure to respond to information request letters from EPA, and RX-16, a complaint against Tifa for recovery of costs at the Bound Brook superfund site. Mr. Livingston also testified that Tifa was named a potentially responsible party (PRP), but does not assert or estimate potential costs or liabilities for such actions. Dr. Meyer testified that she was aware of Tifa's potential environmental liability but since she had no evidence to quantify such liability, she did not consider it in rendering her opinion (Tr. II, 84-85). In addition, Dr. Meyer noted other discretionary assets which weren't necessary for the company to produce goods and services, including loans to employees, a company owned residence, miscellaneous investments and company owned automobiles (Tr. II, 63-65). In summary, Dr. Meyer testified that Tifa would have the ability to remain in business if it paid the full penalty of $160,000 (Tr. II, 39,67).

Accordingly, the Court finds that the evidence offered by Respondent does not support its position that it cannot continue in business were it required to pay a lump sum penalty of $65,000. This is particularly true given the fact that the penalty assessed is based on only 13 counts of liability rather than the 32 counts contained in the Amended Complaint.

3. <u>The Gravity of the Violation Criterion</u>

Under Appendix A of the FIFRA Penalty Policy, EPA assigns a gravity level for each type of violation on a scale of 1 to 4, with 1 being assessed for the most serious violations and 4 being assessed for the least serious (Tr. I, 235; CX-1 at Appendix A).

Dr. Enache assigned a gravity level of 2 for each count in the Complaint, indicating the serious nature of the violations committed by Tifa (Tr. I, 235-36). Counts 1-25, alleged violations of the Suspension Order, were the result of Tifa's failure to provide data and studies required by EPA as part of the re-registration standard for Rotenone (Tr. I, 247-48). Dr. Enache testified that the information required by EPA was "extremely important because without the specific knowledge of the toxicity of the material [Rotenone] to be released into the environment, you cannot allow production and the use of the product,"(Tr. I, 248), since the potential harm to human health and the environment created by such production and use is unknown.

With regard to Counts 33 and 34 (Counts 26 and 27 being withdrawn and Counts 28-32 being dismissed), involving Tifa's production of a pesticide in an unregistered establishment, Dr. Enache testified as to the harm that might

result from such a violation. Specifically, he stated that the reason EPA requires all pesticide producing establishments to be registered is to allow EPA to keep a very precise account of the types and quantities of pesticides being produced, where and by whom (Tr. I, 250). When pesticides are produced in an unregistered establishment, EPA is unable to keep track of the above information. Consequently, EPA is unable to inform surrounding communities of hazardous chemicals being produced in their area, and unable to plan in advance to address or prevent releases of pesticides in to the environment from occurring. As such, the failure to register an establishment under FIFRA deprives EPA of necessary information and therefore weakens the statutory scheme. In re Sav-Mart, 5 E.A.D. at 738 n.13.

After determining the gravity of the violation and the size of business, Dr. Enache looked at the 14(a)(1) penalty matrix under the FIFRA penalty policy, which is a function of both gravity level and size of business (Tr. I, 238; CX-1 at 19 (Table 1)). As a result, Dr. Enache assigned a gravity-based penalty of $5,000 for each count in the Complaint (Tr. I, 238-39; CX-1 at 19 Table 1(14)(a)(1) matrix). Thereafter, Dr. Enache considered the violator-specific gravity adjustment criteria factors unique for each case, which include: a)the toxicity of pesticide; b) harm to human health; c) environmental harm; d) compliance history; and e) culpability.

Dr. Enache testified the first adjustment criterion he considered was the toxicity of the pesticide (Tr. I, 240). Using Appendix B of the FIFRA Penalty Policy , CX-1, he assigned a value of 1, due to the signal word "Warning" on the label for this pesticide (Tr. I, 240-41; CX-1 at Appendix B-1; RX-1). As to the adjustment criteria of harm to human health and environmental harm, with possible values ranging from 5, for serious or widespread harm, to 1 for minor harm, Dr. Enache assigned a value of 3, because the harm for both was unknown (Tr. I 241, 242-45; CX-1 at Appendix B-1).

The last adjustment criteria considered by Dr. Enache under the penalty policy was culpability, with possible values ranging from 0 to 4, with 4 being the highest, or most culpable (Tr. I, 245; CX-1 at Appendix B-2). Dr. Enache testified that he assigned a value of 4, because Tifa "knowingly" and "willingly" violated FIFRA by offering for sale and selling products under a suspension order, despite his reminders that Tifa was in violation of the Suspension Order (Tr. I, 245-46; CX-1 at Appendix B-2). This remains true even upon the Court's finding that the Suspension Order was not effective until April 8, 1996 (Conclusion of Law No. 9). After determining adjustment values for each criterion, Dr. Enache added the values in accordance with the FIFRA penalty policy (Tr. I, 246; CX-1 at Appendix C, Table 3). He assigned a total gravity value of 11 for each count (Tr. I, 246-47). Pursuant to the FIFRA penalty policy, values between 8 and 12 require the assigning a matrix value of $5,000, which Dr. Enache assigned to each count (CX-1 at 19, Table 1 (14(a)(1) penalty matrix).

Finally, Dr. Enache considered the regulatory factors of compliance history and good faith, or lack thereof, in determining the appropriateness of the penalty. Compliance history was assessed a value of 0, given there was no evidence of Tifa committing prior violations(Tr. I at 245). With regard to good faith, or lack thereof, Dr. Enache testified that he did not recommend a reduction in the penalty (Tr. I, 247; CX-1 at 27). He based this decision on the fact that during his several inspections of the company, he informed Tifa's President, Ms. Blochlinger, and its general manager, Mr. Livingston, that Tifa was in violation of the suspension order, yet each time he went back to inspect Tifa's establishment, the violations were continuing, and he had to repeat his warnings (Tr. I, 247).

In summation, Respondent has submitted little, if any, information to challenge the calculation of the proposed penalty by Complainant; whereas the record supports Complainant's calculation and determination of penalty. Therefore, the Court concludes, based on the record in this matter, that Complainant has properly considered the factors delineated in the statute and the penalty policy in determining that Respondent be assessed a civil penalty

in the amount of $5,000 for each count where liability has been established.

Accordingly, given Respondent's liability under Counts 7,8,11,18-25,33 and 34, or a total of thirteen counts, the appropriate civil penalty to be assessed against Respondent is $65,000 ($5,000 X 13).

V. CONCLUSIONS OF LAW

1. Tifa is a "person" as defined by Section 2(s) of FIFRA, 7 U.S.C. Section 136(s). Tifa is also a "producer" of pesticides as that term is defined by Section 2(w) of FIFRA, 7 U.S.C. Section 136(w)(CX-25, par. 1-2).

2. Respondent owns a production and distribution facility (Facility) located at Tifa Square, Millington, New Jersey 07946.

3. Respondent manufactures, repackages and relabels industrial organic chemicals, including but not limited to, the pesticides "Chem-Sect Brand Cube Root" (EPA Reg. No. 1439-236, "Chem-Sect Brand Rotenone Resins" (EPA Reg. No. 1439-259), "Chem-Sect Brand Chem Fish Regular" (EPA Reg. No. 1439-157), and "Chem-Fish Synergized" (EPA Reg. No. 1439-159).

4. The products identified in paragraph 7 of the Complaint (and Conclusion of Law No. 3 above) are pesticides as defined by Section 2(u) of FIFRA, 7 U.S.C. Section 136(u), and are registered with EPA as required by Section 3 of FIFRA, 7 U.S.C. Section 136a.

5. Pursuant to Section 12(a)(2)(J) of FIFRA, 7 U.S.C. Section 136j(a)(2)(J), it shall be unlawful for any person to violate any Suspension Order issued under Sections 3(c)(2)(B) of FIFRA, 7 U.S.C. Section 136a(c)(2)(B)(CX-25, par. Par. 6).

6. Pursuant to Section 12(a)(1)(A) of FIFRA, 7 U.S.C. Section 136j(a)(1)(A), and FIFRA 2(gg), 7 U.S.C. Section 136(gg), it shall be unlawful for any person to offer for sale any pesticide whose registration has been canceled or suspended (CX-25, par. 7).

7. Pursuant to Section 12(a)(1)(A) of FIFRA, 7 U.S.C. Section 136j(a)(1)(A), it shall be unlawful for any person to distribute or sell to any person any pesticide whose registration has been canceled or suspended.

8. Section 7(a) of FIFRA, 7 U.S.C. Section 136e(a), provides that no person shall produce any pesticide unless the establishment in which it is produced is registered with EPA.

9. On April 8, 1996, the registrations of the pesticides identified in paragraph 7 of the Complaint (Conclusion of Law No. 3 above), were effectively suspended by EPA under Section 3 (c)(2)(B)of FIFRA, 7 U.S.C. Section 136a(c)(2)(B), by issuance of a Suspension Order which provided that Respondent may not legally distribute, sell, offer for sale, hold for sale, ship, deliver for shipment, or receive and (having so received) deliver or offer to deliver to any person, any of the pesticide products identified in paragraph 7 of the Complaint (Conclusion of Law No. 3 above).

10. Respondent is found not liable for Counts 1-3, Importation of Suspended Pesticide Products, as alleged, pursuant to Section 12(a)(2)(J) of FIFRA, 7 U.S.C. Section 136j(a)(2)(J); Counts 4-6,9,10 and 12, Offering For Sale Suspended Pesticides, as alleged, pursuant to Section 12(a)(1)(A) of FIFRA, 7 U.S.C. Section 136j(a)(1)(A); Counts 13-17, Distribution and Sale of Suspended Pesticides, as alleged, pursuant to Section 12(a)(1)(A) of FIFRA, 7 U.S.C. Section 136j(a)(1)(A); and Counts 28-32, Offering For Sale A Registered Pesticide For Unregistered Use, as alleged, pursuant to Section 12(a)(1)(B) of FIFRA, 7 U.S.C. Section 136j(a)(1)(B).

11. Respondent is found liable for Counts 7, 8, and 11, Offering For Sale Suspended Pesticides, in violation of Section 12(a)(1)(A) of FIFRA, 7 U.S.C. Section 136j(a)(1)(A); Counts 18-25, Distribution and Sale of Suspended Pesticides, in violation of Section 12(a)(1)(A) of FIFRA, 7 U.S.C. Section 136j(a)(1)(A); and Counts 33 and 34, Production of Pesticides in a Non-Registered Establishment, in violation of Section 12(a)(2)(L) of FIFRA, 7 U.S.C. Section 136j(a)(2)(L).

12. Given Respondent's liability for Counts 7, 8, 11, 18-25, 33 and 34 of the Complaint, the statute authorizes the assessment of a civil penalty against Respondent for its actions. Pursuant to 40 C.F.R. Section 22.24, Complainant bears the burden of proving that the proposed civil penalty is appropriate.

13. The recommended penalty of $5,000 per count is properly calculated by the Agency pursuant to the factors delineated in the statute and the 1990 FIFRA Penalty Policy and therefore appropriate in light of the nature, extent and magnitude of Respondent's violations.

14. Respondent, being in violation of thirteen counts of the Complaint, is found to be able to pay a lump-sum penalty in the amount of $65,000 ($5,000 X 13), and continue in business pursuant to Section 14(a)(4) of FIFRA, 7 U.S.C. Section 1361(a)(4).

15. The assessment of a civil penalty of $65,000 is necessary to deter future non-compliance by Respondent and other members of the regulated community an will further the goals of the Federal Insecticide, Fungicide and Rodenticide Act and the FIFRA Enforcement Response Policy of July 2, 1990.

DECISION

Accordingly, for the reasons stated above, Respondent's Motion to Dismiss Counts 1-25 of the Complaint is **Denied.** Counts 1-6, 9, 10, 12, 13-17,and 28-32 of the Complaint are **Dismissed.** Respondent is determined to be liable under Counts 7, 8, 11, 18-25, 33 and 34 of the Complaint and is assessed a civil penalty in the total amount of $65,000.

_____
Stephen J. McGuire
Administrative Law Judge

Washington, D.C.

Pursuant to 40 C.F.R. Section 22.27(c), this Initial decision shall become the final Order of the Agency, unless an appeal is taken to the Environmental Appeals Board within 20 days of service of this Order, or the Board elects to review this decision *sua sponte,* as provided in 40 C.F.R. Section 22.30.

Payment of the full amount of this civil penalty shall be made within 60 days of the service of this Initial Decision by submitting a certified or cashier's check in the amount of $65,000, payable to the Treasurer, United States of

America, and mailed to:

EPA Region II
Regional Hearing Clerk
P.O. Box 360188M
Pittsburgh, PA 15251

A transmittal letter identifying the subject case and docket number, and Respondent's name and address, must accompany the check. Respondent may be assessed interest on the civil penalty if it fails to pay the penalty within the prescribed period.

Footnotes:

1. Hereinafter, citation to the official record in this proceeding shall be as follows: Hearing Transcript, Volume I (Tuesday, October 27th; Volume II, Wednesday October 28th; and Volume III Thursday October 29th) at page 80 (Tr. I, 80); Complainant's Exhibit 24 (CX-24); Respondent's Exhibit 15 (RX-15); and Finding of Fact No. 3 (FOF No.3).

2. Once the Suspension Order became final and effective, Tifa could not "...legally distribute, sell, use, offer for sale, hold for sale, ship, deliver for shipment, or receive and (having so received) deliver or offer to deliver, to any person, the products listed in Attachment I". Those pesticides listed in Attachment I included "Chem -Sect Brand Cube Root"; "Chem-Sect Brand Rotenone Resins"; "Chem-Sect Brand Chem Fish Regular"; and "Chem-Fish Synergized". These products each contained the active ingredient rotenone (Tr. I, 40-41).

3. Mr. Livingston testified that the original of RX-8 had been signed, but that it was his practice to retain unsigned copies of documents in his office files (Tr. II, 133).

4. The EAB recognized in Port of Oakland, 4 E.A.D. at 206, n. 85(that a "Hearing Examiner has wide latitude as to all phases of the conduct of the hearing")(citing *Fairbank v. Hardin* , 429 F.2d 264, 267 (9th Cir., 1970), *cert denied 400 U.S. 943 (1970)).*

5. While no formal motion to amend the Complaint by Complainant was entertained at the hearing, in order to develop the record, the presiding officer allowed the parties to present their evidence, and treated the Complaint, for hearing purposes, as if it had been amended. As a result, the presiding officer denied Respondent's Motion to Dismiss Counts 1-25 without prejudice, pending formal presentation of the issue in post-hearing briefs (Tr. I, 226-228).

6. Mr. Livingston testified in connection with Mr. Stewart's efforts to contact the agency, that "monthly bills we get from his [Stewart's] office, ... shows he spoke to Larry [presumably an EPA official] and several other people..." However, Tifa did not introduce these bills to show when such calls were made to EPA(Tr. II, 132).

7. The SSURO ordered Tifa not to distribute, sell, offer for sale, hold for distribution, hold for sale, hold for shipment, ship, deliver for shipment, release for shipment, or receive and (having so received) deliver or offer to

deliver, use or remove any and all quantities of the suspended pesticides within the ownership, control, or custody of Tifa wherever located (CX-25 Joint Stipulations).

8. In the Matter of Willis Stores, Docket No. I.F.&R. VIII-59C, 1981 EPA ALJ LEXIS 23 at *9,(June 11, 1981) an "offer" was defined as a "proposal, presenting for acceptance, undertaking, proffer or attempt".

9. Dr. Enache testified that EPA registers two types of pesticides: "end-use products" and "manufacturing for use products" (Tr. I, 162). Specifically, Dr. Enache testified that a manufacturing use pesticide is a product for which the only registered use is in formulation, that is, as a material to further formulate other products (Tr. I, 162). In contrast, "an end use product is a ready- to- use product [that] does not require further formulation." (Tr. I, 162).

10. See, In the Matter of Johnson Pacific, Inc.,No. FIFRA 09-0691-C-89-56, 1993 EPA ALJ LEXIS 471 (Aug. 5, 1993)(verbal claims); Sporicidin, 1998 EPA ALJ LEXIS 14 (Nov. 1,1988)(promotional literature); In the Matter of Microban Products Co., No. FIFRA 98-14-01, 1998 EPA ALJ LEXIS 9 (April 3, 1988) (pesticidal claim on label which differed from label submitted in connection with registration claims); In the Matter of J.C. Ehrlich Chemical Co., No. I.F.&R. 111-171-C, 1980 EPA ALJ LEXIS 8 (Feb. 11, 1980)(claim on label); and EPA v. Stauffer Chemical Co., No. I.F.&R.VI-23C, 1975 EPA ALJ LEXIS 9 (March 13, 1975)(claim on label).

11. The computer database in question is known as the "Section Seven Tracking System" (SSTS). According to the testimony of EPA witness Carol Buckingham, this was the only database that EPA uses to determine whether or not an establishment is registered (Tr. II, 13).

12. The FIFRA penalty policy sets forth a five step approach to penalty assessment : 1) the determination of the gravity of the violation; 2) the determination of the size of the business category for the violator; 3) the determination of the dollar amount associated with the gravity level of violation and the size of the business category of the violator; 4) violator-specific "adjustments" to the gravity based penalty are made on the basis of 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 effect that payment of the civil penalty will have on the violator's ability to continue in business (CX-1 at 18).