8/5/93

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
JOHNSON PACIFIC, INCORPORATED	)	**Docket No. FIFRA-09-0691-C-89-56**
	)	
Respondent	)	

Respondent found in violation of sections 12(a)(1)(E), 12(a)(1)(L) and 12(a)(1)(B) of the Federal Insecticide, Fungicide and Rodenticide Act. Complaint consisted of four counts, two of which charged misbranding. One of the misbranding counts dismissed because of duplicity. Since the same evidence was sufficient to establish both charges, without proof of additional facts, separate penalties may not be imposed for different modes of misbranding. There was only one offense, and separate statutory provisions were not violated. For reasons stated in the initial decision, total penalty of $14,600 sought in the complaint is reduced to $4,080.

INITIAL DECISION AND ORDER

By: Frank W. Vanderheyden
Administrative Law Judge

Dated: August 5, 1993

Appearances:

For Complainant:

David M. Jones, Esquire
Office of Regional Counsel
U. S. Environmental Protection Agency
Region IX
75 Hawthorne Street
San Francisco, California 94105

For Respondent:

Douglas T. Johnson, pro se
President
Johnson Pacific, Inc.
3727 N. Carson Street
Carson City, Nevada 89706

INTRODUCTION

This is a civil administrative proceeding instituted pursuant to section 14(a) of the Federal Insecticide, Fungicide and Rodenticide Act, as amended, (Act) 7 U.S.C. § 136 et. seq. The complaint charges that Johnson Pacific, Inc. (sometimes respondent or Johnson), a Nevada corporation, at the time of the purported violation conducted a business designated as Sierra Nevada Spas located at 5980 S. Virginia Street, Reno, Nevada (facility). It is further alleged that at the facility respondent "produces, distributes, sells, offers for sale, holds for sale, ships, delivers for shipment, receives and delivers, offers to deliver in commerce, or some combination thereof, a product named Bioguard Brominating Tablets (sometimes Bioguard or BioGuard). The complaint charges further that Bioguard is a pesticide as defined in section 2(u) of the Act, 7 U.S.C. § 136(u), in that its label makes the claim that it is "effective as a swimming pool water sanitizer and disinfectant;" and that Bioguard is an Environmental Protection Agency (EPA) registered pesticide, with EPA Registration Number 1729-131-5185. It charges further that any registrant, commercial applicator, wholesaler, dealer, retailer or other distributor who violates any provision of FIFRA may be assessed a civil penalty by EPA of up to $5,000 for each transgression, citing section 14(a) of the Act.

Count I of the complaint alleges that Bioguard requires special child-resistant packaging; that a pesticide is misbranded if it is contained in a package, container or wrapping which does not conform to the standards established by the Administrator, pursuant to section 25(c)(3) of the Act, 7 U.S.C. § 136(w)(c)(3) and section 2(q)(1)(B), 7 U.S.C. § 136(q)(1)(B); that on or about January 11, 1989, an EPA-credentialed investigator from the Nevada Department of Agriculture obtained a sample of Bioguard from the facility; that respondent had repackaged Bioguard in plastic bags which did not conform to standards established pursuant to section 25(c)(3) of the Act, 7 U.S.C. § 136(w)(c)(3); that section 12(a)(1)(E) of the Act, 7 U.S.C. § 136j(a)(1)(E), prohibits, among others, the offering for sale of a pesticide that is misbranded; and respondent's offering for sale the misbranded product Bioguard is in violation of section 12(a)(1)(E) of the Act, 7 U.S.C. § 136j(a)(1)(E). The penalty sought for Count I is $5,000.

Count II of the complaint alleges, citing section 2(q)(1)(E) of the Act, 7 U.S.C. § 136(q)(1)(E), that a pesticide is misbranded if information required by the Act to appear on the label is not placed prominently thereon with such conspicuousness and in such terms as to render it likely to be read and understood by the ordinary individual under customary conditions of purchase and use; and that a pesticide is misbranded if the labeling accompanying it does not contain directions for use which are necessary for effecting the purpose for which the product is intended. Section 2(q)(1)(F), 7 U.S.C. § 136 (q)(1)(F), relates that a pesticide is

misbranded if the label does not contain a warning or caution statement which may be necessary, and if complied with, together with any requirements imposed by section 3(d) of the Act, is adequate to protect the health and environment. The Count states further that on January 11, 1989, an EPA-credentialed inspector obtained a sample of Bioguard at the facility; that respondent had repackaged Bioguard in plastic bags which did not bear either the labeling or label required for an EPA-registered product; did not contain the required directions for use, and did not contain the required warning or caution statement; and that respondent in offering the misbranded Bioguard violated section 12(a)(1)(E) of the Act, 7 U.S.C. § 136j(a)(1)(E). The penalty sought in Count II is $5000.

In Count III of the complaint, it is stated that no person shall produce a pesticide subject to the Act unless the establishment in which it is produced is registered with EPA, section 7(a) of the Act, 7 U.S.C. § 136e(a); and it is alleged that on or about January 11, 1989, respondent produced the Bioguard at the facility which is unregistered in violation of section 12(a)(2)(L) of the Act, 7 U.S.C. § 136j(a)(2)(L). The penalty sought for the alleged violation is $1,800.

Count IV states that it is unlawful for any person to sell or distribute any registered pesticide if any claims made for it or a part of its distribution or sale substantially differ from any claims made for it as a part of the statement required in connection with its registration under section 3 of the Act, 7

U.S.C. § 136a; that Bioguard is registered for use in swimming pools; that on January 11, 1989, respondent made verbal claims in connection with the sale of Bioguard that it could be used in spas; and that respondent's conduct was in violation of section 12(a)(1)(B) of the Act, 7 U.S.C. 136j(a)(1)(B). The penalty sought for this purported violation is $2,800. The complaint seeks a total penalty of $14,600. Following its answer, extended negotiations ensued concerning settlement, but these proved fruitless. Respondent appeared pro se throughout the entire proceeding.

FINDINGS OF FACT

Charles Moses (Moses) is employed by the Nevada State Department of Agriculture (NSDA) in Reno, Nevada. He works as an Environmental Protection Agency investigator. In that capacity, he administers the EPA grant agreement and does field inspections. Moses conducted an inspection of respondent's facility on January 11, 1989, at which time he issued a Notice of Inspection to Michael Seal (Seal), an employee of respondent. The inspection was prompted by the suspicion that respondent was engaged in the production and distribution of a nonregistered pesticide product. The basis for the suspicion was a complaint from an anonymous citizen. The product involved in the investigation was Bioguard tablets which are used as sanitizers for swimming pools. During the inspection, Moses observed a 50-pound container behind the counter of the facility which had a number of packages inside it.

Moses obtained one package from Seal, the only person in the facility at the time. Seal was a young man about 18 years of age and appeared to be in charge. The package received contained 30 bromine tablets in a cellophane bag having an orange hue. Moses obtained a receipt for purchase sample, which receipt was signed by Seal. At the time, Moses delivered to Seal a purchase order, which is a document used to pay for samples obtained during inspections. Moses also obtained a receipt of sale from Seal. Moses had a conversation with Seal during the inspection. In general terms, Moses described the alleged violation of the Act, the necessity of labeling Bioguard, and the problems that may arise from selling it from unlabeled containers. Seal related to Moses that Bioguard could be used in either pools or spas and generally the bromide is preferred over chlorine because it has a longer residual effect. Bioguard is not a spa sanitizing chemical, but was being sold in the same manner as chlorine tablets. Moses did not intimidate Seal in his dealings with him. After the inspection, Moses completed his Investigation Summary. This typewritten document had errors in it which were corrected in long-hand writing. Moses forwarded his documentation concerning the investigation to Region 9 about two weeks after conducting same. (CXs 1 through 7; TR 33-35, 37-38, 40, 42-46)

Moses did not return to the store and photograph the label on the bucket from which the samples were taken because Seal had assured him that the product would no longer be sold, and Moses was then of the opinion that a photograph was unnecessary. The record

is somewhat unclear concerning what label appeared on the bucket, but appears that it read "BioGuard Brominating Tablets - Sanitizer for Swimming Pools." Moses told Seal to contact his superiors concerning disposition of the Bioguard. The next day Douglas F. Johnson (Johnson) got in touch with Moses, and the latter informed him there was a violation in the way Bioguard was being sold and its sale had to be discontinued. Moses was not aware of any purported shortage of bromide in the country at the time he conducted the investigation, but he did investigate to determine if such a shortage existed. At the request of Johnson, Moses returned to the facility in approximately June 1990, for a follow-up investigation to determine if respondent had complied with his demands to cease selling the product in an illegal manner. Moses completed another notice of inspection report at that time. Moses did not think the violation was serious enough to make a voluntary reinspection. Basically, the function of Moses was to make the investigation, forward same to EPA, where decisions are made concerning whether or not to issue a complaint. (CX 2; RX 7; TR 56-57, 59-60, 82, 85)

Moses discussed with Johnson, the sole owner of the respondent, and also with Seal, the practice of allowing customers to use their own containers into which Bioguard tablets could be placed. Johnson was of the opinion that any kind of a bromine container that says bromine could be used, whether the container was used for spa bromine or pool bromine. There is a bromine

container that is used for spas, but it has a different registration number than that for swimming pools. (TR 13, 85-88)

Walter Francis (Francis) is employed in the headquarters of EPA in Washington, D.C., in the capacity of a supervisory biologist. He has been so employed for approximately 20 years. His principal responsibility is making regulatory decisions which concern the registration under the Act of pesticide products for sale and distribution and channels of fraud. Francis testified as an expert witness in the area of child-resistant packaging and labeling. Concerning the label on a 15-pound package and one of 50 pounds, there would not generally be any difference during the registration procedure. EPA would normally approve one size container and this would pertain to all package sizes for that product. The 50-pound package is exempt from the child packaging requirement for the reasons that such a size package would not normally be expected to be found in a household. The tablets may not be used as a sanitizer for both swimming pools and spas, as the label in CX 2 is only registered for swimming pools. There are a number of statements on the CX 2 label indicating dangers associated with its use. Among such warnings are "Danger. Keep Out of Reach of Children" - "Corrosive. Causes eye and skin damage." - "May be fatal if swallowed."

Francis examined CX 8, which is complainant's exhibit titled "Technical Support Section Toxicology Review" (TSSTR). He confirmed that the document was part of an enforcement case review, and that the word "DANGER" was used in the conclusion to the TSSTR

because the product is corrosive and that it requires child-resistant packaging.

Respondent's Exhibit, RX 14, is a bottle bearing the label: "BioGuard - Bromo Brix - Spa Brominating Briquet Brominating Disinfectant." It also contained the words: "Spas and Hot Tubs." Francis would consider this exhibit a child proof container. The latter believed that it would fall into that category. Francis was of the opinion that the "active ingredient" in CX 2, "1-Bromo-3-chloro-5, 5-dimethylhydantoin" of 92.5 percent, is the same as that in RX 14, the tablets for spas and hot tubs. He refused to concede, however, that the swimming pool and spa tablets were composed of identical chemical compounds, as he did not know what composed the 7.5 percent inert ingredients in CX 2. The expert witness observed that the EPA registration number on the label of CX 2 is 1729-131-5185. Francis testified that the EPA registration number on RX 14, the spa tablets, is 1729-132-5185. This amounts to two separate registrations for the same company, each for a different use. The tablets of one can be used legally for swimming pools and the other only for spas. They are two separate products because they were registered under two separate registration numbers. (CX 2, CX 3, CX 8, RX 14; TR 133-36, 141-42, 146-48)

James G. Siebert (Siebert), a witness for respondent, is the national sales manager for BioGuard Division of BioLab, Incorporated. He is not a chemist. He has been involved with chemicals associated with swimming pools since 1962. His company entered the spa business about 1980. BioLab is the primary

manufacturer of many accessory liquid chemicals, and the repackager of most of the primary chemicals used in either swimming pools or spas. BioLab is a registered establishment. Siebert has never received any customer complaints regarding the operation of the respondent. The respondent is an authorized dealer of BioLab. As such, Johnson would attend seminars which included, among others, training in conducting water quality tests on customers' pools and spas. BioLab does not manufacture bromine. It converts a manufactured product purchased from another source into tablet form. It does so by a subregulated procedure. The bromine is packaged in bulk containers, in granular form, and compressed subsequently and placed into smaller containers. When the bulk items are compressed into tablets, and even before that, they are segregated as to a pool or spa product. Nothing is added to the bromine. BioLab merely converts the granular into tablet form. From early 1987 through late 1988, there was an interruption in the flow of bromine tablets to dealers.

The reason for two different labels, one for Bioguard for swimming pools, and another label for Bioguard used in spas is as follows: Bioguard was subregistered under another company's registered product. However, it was for marketing reasons that the product was not registered under one dual label. It was trying to protect profitability. Also, dual use would have required the label to contain more wordy instructions. For a time, however, Bioguard offered a product that was registered and had a label for both spa and pool application.

In some situations a swimming pool and spa share common equipment, where the same pump circulates both bodies of water. In that situation, if spa bromine tablets were put into the spa, and pool bromine tablets were put into the pool, the waters of each would be mixed. In that case it would be practicable for a dealer to sell a 50-pound container of Bioguard bromine tablets knowing that the chemical would also find its way to the spa. Both the pool and spa bromides are used for the same end, to control algae, bacteria and viruses in pools and spas. (TR 172, 174, 177-78, 183-85, 189, 192, 235)

Siebert was of the view that even though bromines for pools and spas had different labels and registration numbers they could be used interchangeably because they were the same chemically, and that interchange use is done regularly in "real practice." He did not recommend, however, that plain plastic bags be used. (TR 224, 227-28)

Sherie Lynn Brundage (Brundage) was first employed by respondent in 1988. She functioned as office manager at both the Carson City and Reno facilities at that time. She was trained by BioLab in order to assist properly the customers of respondent. The reason respondent had the 50-pound container behind the counter at the time of the inspection was because in 1988 there was a bromine shortage and approximately in November or December 1989 the sources of bromine had exhausted their stocks, and the only container on the floor was 50 pounds. A customer with an empty bromine container wanted the product which Brundage could not sell

him; and she advised him that the only amount she had was in the 50-pound container. The customer inquired why he could not refill his container from the 50-pound one because it was the same chemical formula. Brundage and Johnson subsequently discussed the problem. At that time, they were unaware of the Act. They thought tablets for pools and spas were interchangeable, and could perceive of no legal reason why respondent could not have a program to permit a few customers to have bromine. However, one of the requirements was that the customer would have to have a child-proof brominating container. (TR 243-246)

Respondent could get about 28 containers from the 50-pound container. About 14 of the containers were sold from the 50-pound container. The only Bioguard that left the establishment in a plastic bag was the one sold to Moses. All sales were stopped after Moses delivered the cease and desist order. Concerning the 14 sales in containers, Brundage would prepare two or three plastic bags ahead of time, consisting of about 30 tablets in the bag, in order not to have to do so in the presence of a customer. She took the plastic bag and poured its contents into empty registered bromine containers, mentioned above. She had no knowledge that such activity was in violation of the Act. Before or after the incident which gave rise to the alleged violation, respondent has never repackaged chemicals, whether or not they were different. (TR 254-256, 261)

Allen J. Demorest (Demorest), is employed by EPA in Region 9. Pertinent to this case, he is employed as a case developer. He

examined the file in this matter and the TSSTR. The purpose of submitting the TSSTR was an enforcement review request. Following review, the conclusion was "that the product induces severe eye and dermal irritation. The signal word is 'DANGER'. The product is CORROSIVE. The product will be used or is intended to be used around or in the household . . . . Child-Resistant Package is required." The views of Demorest are as follows: Counts I and II, with a proposed penalty of $5,000 each, involve misbranding; though giving the appearance of such, they are not similar violations; this is the case because the charging codes are different; the code for Count I is E41 and for Count II it is E3 and E4; that Counts I and II are distinguishably different violations because they are different acts; that where a product is registered the label is registered separately from the child-resistant packaging; that two separate efforts were required, one to get child-resistant packaging on the product and the other requirement was a product label; that the plastic bags involved were neither labeled or branded; and he opined that even though the same element of proof is produced there are two separate violations under the designation of misbranding which conform with the Penalty Guidelines stated at 39 C.F.R. 27711 (July 31, 1974). (CX 8, 9; TR 89-90, 92, 96-99, 116)

Dan Schoenholz (Schoenholz), the previous case developer, made certain assumptions which were to the benefit of respondent. For example, with code E17, respondent was assessed $2,800 on the premise that it fell within the "Adverse Effects Unknown"

classification. If the "Adverse Effects" were "Highly Probable" the penalty assessed would have been $5,000. With the charging code E33 regarding "Failure to Register Producer Establishment," Schoenholz made the assumption that respondent had "No Knowledge of the Registration Requirement" which called for a $1,800 penalty. If there were knowledge, the penalty would have been $4,200. (TR 100-02) Something appears awry in matching the charge code numbers (CX 9) with the civil penalty assessment schedule of the penalty policy. The ALJ is able to locate codes E3, E33 and E17 on the latter. However, he cannot find the code number "E41," and the record is no help concerning this apparent omission. The ALJ declines to speculate. In any event, it is unnecessary to dwell further on this apparent lacuna for reasons mentioned below in the Discussion and Conclusions of Law portion of this Initial Decision.

The matrix which sets out the penalty amounts have two axes. The vertical axis classifies the type of alleged violation. The horizontal axis has five classifications from "I" to "V". These are the gross sales categories of a respondent. Category V is the highest, reflecting a respondent with a gross sales exceeding $1,000,000. 39 Fed. Reg. 27711, 27712 (July 31, 1974). Respondent was placed in Category V. Demorest acknowledged that this was the category selected for respondent because "At that point in time when the case was developed, there was no information on the size of [respondent's] business." (TR 103-04)

Leonard M. Faike (Faike) is a certified public accountant who has done accounting for respondent since its inception in about

1978. He constructed a document which reflected business statistics for respondent from the years 1985 through 1990. Respondent's gross sales receipts for the year ending 1988 were $875,868. There was a loss of $7,440. However, because operation expenses exceeded the sales, the loss would also represent a decrease in the net worth of the business, which decrease in assets may come out of cash, inventory or other equipment owned by the business. The average revenues for three years ending 1987-1988 were $796,434, slightly less than the actual gross sales for 1987-1988. Until approximately July 1989, respondent sold its product from two locations, Carson City and Reno, Nevada. The Reno store closed, and for the year ending October 1990, the total sales came from the Carson City store; for the year ending October 1990, respondent had a loss of $64,813; for the year 1988-1989, there was a net profit of $84,007; for the year 1987-1988, there was a loss of $7,440; for the year 1986-1987, there was a profit of $45,944; and for the year 1985-1986, there was a loss of $11,420. For three years, 1985-1986 through 1987-1988, the average net profit of respondent was $9,000 before taxes. For the years 1985-1986, the salary paid to Johnson was $31,200; for 1986-1987, it was $21,400; for 1987-1988, it was $38,150; for 1988-1989, it was $25,400; and for 1989-1990, it was $31,200. The salaries are reported on the personal income tax return and treated as personal income.

Upon cross-examination, Faike conceded that one does not know whether or not the graph attached to RX 15 is based upon "generally accepted accounting principles." All the numbers on the

graph are derived from federal income tax returns for the corporation.

Using the penalty policy criteria concerning the size of business for the years 1985-1989, average sales for respondent would place it in Category IV, which are those firms whose gross sales for the prior fiscal year were between $700,000 and $1,000,000. However, for the year 1989-1990, there was a diminution of sales in the amount of $271,724 from the period 1988-1989. (RX 15; TR 152, 154-58, 161, 164, 167-70) It is found, with regard to penalty assessment, that the correct classification for respondent is Category IV, and not Category V.

DISCUSSION AND CONCLUSIONS OF LAW

Liability Issue

At the hearing, some significant statements concerning liability were made on the record by respondent. When the ALJ advised Johnson that at issue was whether he did or did not violate the Act, Johnson's response was: "If you don't know about the Act when you do something, have you violated the Act?" (TR 198) The ALJ replied, "Absolutely," followed by an explanation. Johnson's question carried with it an implied admission of liability. At another point in the hearing, Johnson conceded that respondent's actions were illegal. (TR 297-98) There was also an admission of liability in respondent's answer. In its answer there is the statement that: "I cannot and will not deny that I instructed my staff to sell sacks of Bio-Guard Brominating Tablets under the

strict guidelines mentioned earlier." However, the record will demonstrate that respondent always questioned whether or not there could be two misbranding violations. Before proceeding further with the liability issue, a fundamental question must be resolved. This is whether or not the respondent can be charged with two misbranding violations. Each count of the complaint is premised upon the single sale of Bioguard to Moses on January 11, 1989.

The ALJ rejects the rationale of Demorest, mentioned in the Findings, that the sale of Bioguard in the clear plastic bag constituted two separate violations under the designation of misbranding. Section 2(q)(1) of the Act, 7 U.S.C. § 2(q)(1), sets out ten separate types or modes of misbranding. Included are the two types of misbranding alleged in the complaint as a separate violation, for which a separate penalty is sought. It is emphasized that the Act does not declare that each type of misbranding is unlawful; it merely prohibits misbranding. Respondent's violation under section 12(a)(1)(E) was the sale of a misbranded pesticide. Where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied in determining whether there are two violations or only one, is whether each provision requires proof of an additional fact which the other does not. Under the Civil Penalty Guidelines (Guidelines), 39 Fed. Reg. 27711 (July 31, 1974), which the complaint states is applicable to this proceeding, it is stated that:

> A separate civil penalty shall be assessed for each violation of the Act which results from

> an independent act . . . of the respondent and which is substantially distinguishable from any other charge in the complaint . . . . In determining whether a given charge is independent of and substantially distinguishable from any other charge for purposes of assessing separate penalties, complainant must consider whether each provision requires an element of proof not required by the other. . . . Thus, not every charge which may appear in the complaint shall be separately assessed. Where a charge derives primarily from another charge cited in the complaint for which a penalty is proposed to be assessed, the subsequent charge may not warrant a separate assessment. The complaint will propose to assess an appropriate civil penalty for each independent and substantially distinguishable charge. (At 27711, emphasis supplied.)

In the subject matter, the same evidence, the single sale of the plastic bag of Bioguard to Moses, is sufficient to support Counts I and II, without proof of additional facts. Where distinct types of misbranding are charged, different proof may be required to establish each type of misbranding, but there is only one offense and separate statutory provisions have not been violated. The same evidence was sufficient to establish the charges under counts I and II. In the Matter of Hawk Industries, Inc., IF&R Docket No. II-120C, December 21, 1976; In Re Amvac Chemical Corporation, IF&R Docket No. II-98C, Final Decision, December 21, 1976; In the Matter of Cooperative Grain and Supply Company and David Wademan, FIFRA Appeal No. 87-5, Final Decision, July 12, 1990, at 4.

The next question is that of assessing a penalty. It has been held that if there are additional violations that occur by the one act, the gravest of the violations takes precedent. A-2 Termite and

Pest Control Corporation of Ocala, IF&R Docket No. IV-308-C, May 31, 1979, at 7. The misbranding alleged in Count I of the complaint concerns failure of child-resistant packaging (section 2(q)(1)(B)). The purported misbranding in Count II involves failure of directions for use (section 2(q)(1)(F)). Under the assumption that respondent was in Category V, the penalty sought for each count was $5,000. Which is the "gravest violation"? It is not necessary, fortunately, to engage in questionable subjectivity to make a choice. The testimony of Demorest refers to Count I being code number "E41" and Count II as "E3." However, the record is unclear concerning code number E41 in that it cannot be located on Civil Penalty Assessment Schedule. In that there is only one offense, logic commands that Count I be dismissed, and that the misbranding violation be limited to Count II.

Complainant has proved by the preponderance of the evidence, as required by 40 C.F.R. § 22.24, that respondent violated Counts II, III and IV. The single sale to Moses is sufficient to establish these three counts. With regard to Count II, it is concluded that respondent engaged in misbranding and was again in violation of section 12(a)(1)(E) of the Act, 7 U.S.C. § 136j(a)(1)(E). Complainant established by the preponderance of the evidence that respondent sold Bioguard to Moses in the plastic bag which did not have the required label which contained directions for use which are "necessary for effecting the purpose for which the product is intended . . . ."

The allegations in Count III may be disposed of quickly. Respondent admits in its post-hearing brief (at 32) that it should have obtained the status of an EPA-registered establishment before "engaging in it's [sic] repackaging activities." This admission is sufficient to establish the violations. It is concluded that with regard to Count III, respondent produced the pesticide Bioguard at its unregistered establishment in Reno, Nevada, in violation of section 2(a)(2)(L) of the Act, 7 U.S.C. § 136j(a)(2)(L).

Regarding Count IV, Seal told Moses that the bromine in the plastic packaging could be used for either pools or spas. However, the plastic package purchased did not contain any label or marking, and the oral claims or representations made by Seal were different from those statements required by respondent. The product sold in the plastic bag was only registered as a "Sanitizer for Swimming Pools." The representations that it could be used in spas was a claim foreign to its registration. Sanitizers for pools and those for spas are registered under two separate registration numbers.

Penalty Issue

The total proposed penalty stated in the complaint of $14,600 was based upon four counts and complainant's assumption that the gross sales of respondent exceeded $1 million. Under the Guidelines, this would place respondent in the highest classification, Category V.

The pertinent provision of the Act, section 14(a)(4), provides 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." These factors are echoed in the Guidelines, with amplification and explanation. The ALJ is not bound by the Guidelines, but he is enjoined to "consider" them. Should the ALJ assess a penalty different from that recommended in the complaint, he must set forth specific reasons for the increase or decrease. 40 C.F.R. § 22.27(b)

It has been found that the size of respondent's business would place it in Category IV, not V. In the former Category, and without further adjustments, the new base for penalties would be as follows: Count II, $4,250; Count III, $1,530; Count IV, $2,380, for a total penalty, at this stage, of $8,160.

Another factor to be weighed, and one of significance in this case, is "the gravity of the violation." The Guidelines provide as follows:

> (1) Factors considered in determining the proposed civil penalty. Gravity of violation. One determinant of the amount of a proposed civil penalty is the gravity of the violation. The gravity of any violation is a function of (1) the potential that the act committed has to injure man or the environment; (2) the severity of such potential injury; (3) the scale and type of use anticipated; (4) the identity of the persons exposed to a risk of injury; (5) the extent to which the applicable provisions of the Act were in fact violated; (6) the particular person's history of compliance and actual knowledge of the Act; and (7) evidence of good faith in the instant circumstance.

These considerations weigh heavily in respondent's favor. First, there is no history of respondent not complying with the Act. Second, respondent was unaware of the existence of the Act. Third, respondent demonstrated good faith. It immediately came into compliance when informed of the violation by investigator Moses. The sale to the latter of the pesticide in a plain plastic bag is, simply on the totality of facts in this matter, not as serious as portrayed by complainant. It is appropriate to mention at this juncture that there is evidence found in respondent's testimony of 14 other transactions where Brundage placed tablets from the plastic bag into child-proof containers brought into the facility by customers. The ALJ is not considering these transactions in arriving at the penalty. The primary reason for this conclusion, without going into other reasons now, is that complainant, for whatever reason, did not file a motion with its opening brief, or anytime subsequent to the hearing, to amend its complaint, if it were of the view that such transactions constituted violations under the Act. This case stands or falls on the sole sale mentioned in the complaint.

There is no pattern of violations or lack of good faith by respondent, and the penalty assessed must not be arrived at with all the understanding of a Grand Inquisitor. It is the opinion of the ALJ that the penalty of $8,160 should be reduced by 50 percent, for a total penalty of $4,080. This is the maximum amount that the facts and law, coupled with equity, can command in this case.

The Act demands, and the Guidelines urge, that an evaluation be made of how the assessed penalty will impact upon respondent's ability to continue in business. The Guidelines provide, in pertinent part, (at 277.2), that: "A determination of such adverse effects rests upon an analysis by complainant of certified financial records of all business operations by respondent. Such records shall be provided to the Agency at respondent's expense and shall conform to generally recognized accounting procedures." (at 277.2) The graph attached to Respondent's Exhibit 15, plus Faike's testimony, was sufficient to establish that the size of respondent's business would place it in Category IV and not Category V. However, Faike conceded that he did not know whether or not the graph was based upon "generally recognized accounting procedures." Reviewing the totality of the respondent's financial condition, it is concluded that the assessment of a $4,080 penalty will not have a "significant adverse effect" upon respondent's ability to remain in business.

ULTIMATE CONCLUSION

It is concluded that respondent is in violation of sections 12(a)(1)(E), 12(a)(1)(L), and 12(a)(1)(B) of the Act, 7 U.S.C. §§ 136j(a)(1)(E), 136j(a)(2)(L), and 136j(a)(1)(B).

ORDER[1]

IT IS ORDERED, pursuant to section 14(a) of the Act, 7 U.S.C. § 1361(a), that:

1. Respondent, Johnson Pacific, Incorporated, be assessed a civil penalty of $4,080;

2. Payment of the full amount of the penalty assessed shall be made by forwarding a cashier's or certified check, payable to the Treasurer of the United States, to the following address within sixty (60) days after the final order is issued:

Mellon Bank
EPA - Region IX
Regional Hearing Clerk
P.O. Box 360863M
Pittsburgh, PA 15251

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

Frank W. Vanderheyden
Administrative Law Judge

Dated: August 5, 1993

[1] Unless an appeal is taken pursuant to 40 C.F.R. § 22.30, or the Administrator elects to review this decision on his own motion, this decision shall become the final order of the Administrator. 40 C.F.R. § 22.27.(c).