UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of

AVRIL, INC.

Respondent

Docket No. IF&R III-441-C

INITIAL DECISION

Pursuant to Section 14 (a) (4) of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. §1361(a)(4), the Respondent, Avril, Inc., is assessed a civil penalty in the amount of $14,400 for the violations of FIFRA Sections 12 (a) (1) (A) and 12 (a) (1) (E) for the distribution of an unregistered and misbranded pesticide product.

Appearances:

For Complainant:
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For Respondent:
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Proceedings

On January 16, 1992, The Region 3 Office the United States Environmental Protection Agency (the "Complainant" or "Region"), filed a Complaint against Avril, Inc. (the "Respondent" or "Avril") , a corporation currently headquartered in Odenton, Maryland. The Complaint charged Respondent with violations of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") , 7 U.S. C. §136, at Respondent's facility in Reading, Pennsylvania.

The Complaint charged Respondent with five counts of the sale and distribution of an unregistered pesticide, in violation of FIFRA Section 12 (a) (1) (A), and five counts of the sale and distribution of a misbranded pesticide in violation of Section 12(a)(1)(E).[1] The Complaint seeks a civil penalty of $3,500 for each count, for a total of $35,000, pursuant to FIFRA §14.

Respondent initially filed an Answer *pro se,* on February 7, 1992. After retaining counsel, Respondent filed an Amended Answer on March 24, 1993. In those pleadings, Respondent denied and admitted, in part, factual allegations in the Complaint, and contested the amount proposed for a civil penalty.

Complainant filed a motion for accelerated decision on liability on February 27, 1996. Respondent's filing in opposition to that motion included Respondent's own motion for accelerated decision dismissing the Complaint.

In a ruling dated April 8, 1996, the undersigned Administrative Law Judge ("ALJ") denied both motions. However, the ALJ found that the facts that established Respondent's liability for the alleged violations were not genuinely in dispute. Respondent's ultimate liability, however, remained contingent on factual findings concerning the propriety of the inspection that gave rise to this proceeding, and the possible exclusion of evidence from that inspection, under FIFRA §9(a)(2). Therefore a hearing was ordered to focus on the issues of the propriety of the inspection, and the determination of the appropriate amount for any civil penalty.

The hearing in this matter was held before ALJ Andrew S. Pearlstein on April 23, 1996 in Washington, D.C. The Complainant presented one witness, and Respondent presented two witnesses. The record of the hearing consists of a stenographic transcript of 194 pages, and 20 exhibits received into evidence. [2]

The parties submitted post-hearing briefs and reply briefs. The record closed on August 5, 1996, on the final receipt of those briefs.

Findings of Fact

1. Avril is a family-owned chemical blender specializing in the production and distribution of detergents and cleaners for use in commercial, institutional and industrial applications, such as for laundry, dishwashing, and general cleaning and disinfection. The company's current headquarters are in Odenton, Maryland. Avril serves a market area primarily in Pennsylvania, Maryland, Washington, D.C., and northern Virginia. Avril owns and operates a

manufacturing facility in Reading, Pennsylvania, listed with EPA as a pesticide producer, with the EPA Establishment No. 5734-PA-1.(Tr. 148-149; Ex. 17).

[3] **In 1990, Avril also operated a distribution facility in Columbia, Maryland. (Ex. 4).**

2. On January 6, 1987, Michael Guilday, Vice-President of Avril, signed a Notice of Supplemental Registration for Avril as a distributor of the registered pesticidal product "NP 3.2 Detergent/Disinfectant." The basic registrant was the Stepan Company of Northfield, Illinois. The Notice indicates that Avril was to distribute the product under the name "Avril AV-102 Detergent/Disinfectant." (Ex. 20; Tr. 182, 187).

3. In 1985, Avril entered into an agreement with Tri-Marketing Concepts, Inc. ("Tri-Marketing") , a Virginia corporation, to supply it with a line of cleaning products that included AV-102. The AV-102 was to be sold by Tri-Marketing under the name "E-Z Clean Disinfectant." Tri-marketing was not satisfied with Avril's labels, and elected to have its own labels printed. Tri-Marketing shipped the "EZ-Clean" labels to Avril's Reading facility, where they were affixed to the containers, which were then packed for distribution. (Tr. 151, 177-178; Ex. 8).

4. Between November 22, 1989, and March 13, 1990, Avril sent 22 separate shipments of its products to Tri-Marketing. Each shipment included up to 50 one-gallon containers of AV-102, packaged as EZ-Clean, usually included in "Kit A" as noted on the invoices. The invoices indicate that Avril shipped a total of 586 one-gallon containers of EZ-Clean to Tri-Marketing. (Exs. 13, 14). No product with the name "EZ-Clean Disinfectant was ever registered or supplementally registered with EPA as a pesticide product, either by Avril or Tri-Marketing. (Tr. 57).

5. In March 1990, Tri-Marketing was under investigation by the State of Maryland, Office of the Attorney General, Consumer Protection Division. That office requested the EPA to investigate the compliance of the EZ-Clean labeling and distribution with federal law. The EPA in turn referred the investigation to the Maryland Department of Agriculture, which conducts FIFRA inspections for EPA in that State. An inspector from that Department then visited Avril's distribution office in Columbia, Maryland, on March 30, 1990. Michael Guilday, who was there at the time, signed an affidavit stating that Avril manufactured "EZ Clean Disinfectant" for Tri-Marketing, and that all information on EZ-Clean was available at Avril's facility in Reading, Pennsylvania. EPA then referred

the investigation to the Pennsylvania Department of Agriculture ("PDA"), which also conducts FIFRA inspections for EPA in that State. (Ex. 4).

6. The PDA inspector, James Lorah,[4] already was planning a routine annual producer establishment inspection at Avril's Reading facility, and had telephoned Robert Guilday, Avril's sales manager at the time, on April 16, 1990, to arrange an appointment. Robert Guilday returned the call and gave dates when he would be available. After receiving the EPA referral to inspect Avril for EZ-Clean's compliance, Mr. Lorah again telephoned Robert Guilday on May 1, 1990, to confirm the May 9 inspection date and to inform him of the additional reason for the inspection -- the investigation of EZ-Clean's compliance with FIFRA. (Exs. 2,3; Tr. 22-24, 30-31).

7. On May 9,1990, James Lorah met with Michael Guilday, Vice President of Avril, for the scheduled inspection. Robert Guilday was not present. Mr. Lorah followed his usual procedure during the inspection. He held a pre-inspection conference during which he discussed the reason for the inspection with Michael Guilday and presented him with a copy of the PDA Notice of Inspection. The notice reflects that Mr. Lorah crossed out Robert Guilday's name and inserted that of Michael Guilday as the representative of the establishment. The Notice states the reason for the inspection was "to determine FIFRA compliance of EZ-Clean Disinfectant," as well as to conduct a routine "PEI" or producer establishment inspection. (Ex. 5, 6; Tr. 36-39, 107-108).

8. Mr. Lorah conducted the inspection with Michael Guilday's full cooperation. Mr. Lorah obtained copies of the AV-102 and E-Z Clean labels, product bulletins, the invoices showing sales to Tri-Marketing, and other information. (Exs. 9-14). He also obtained a written statement from Michael Guilday describing Avril's private labeling and distribution relationship with Tri-Marketing. (Ex. 8). Avril did not have any AV-102 or EZ-Clean in inventory at the time.

9. The EZ-Clean Disinfectant label includes one line that reads as follows: "Dilute 2 oz. per gallon of water. May be used for bathrooms, kitchens, trash cans, etc." There are first aid instructions for contact with the eyes and skin, and for ingestion. The label lists the product's hazardous ingredients, but does not include a complete list of active and inactive ingredients. The label also does not bear the producer's establishment number, or a statement of the product's use classification. (Ex. 12).

10. Avril had stopped supplying EZ-Clean to Tri-Marketing shortly before the May 9, 1990 inspection. Tri-Marketing was under investigation by the State of Maryland for consumer fraud allegations, and was in arrears in its payments to Avril. Those payments for the last few shipments of EZ-Clean were never made to Avril. (Tr. 158).

11. Avril had gross sales of approximately $1,450,000 in fiscal year 1985, and $1,680,000 in 1987. (Ex. 17).

Discussion

- Propriety of Inspection

The Rulings on Motions for Accelerated Decision have already established the liability of Respondent, subject to the determination of the propriety of the inspection of Respondent's facility on May 9, 1990. Respondent raised the issue of the propriety of the inspection under FIFRA §9(a)(2) for the first time in its motion for accelerated decision. In legal effect, this claim is treated as an affirmative defense, although Respondent's Answer was never technically amended to include it. The Respondent thus bears the burden of going forward with evidence in support of its defense, pursuant to 40 CFR §22.24.

FIFRA §9(a)(1) authorizes employees of the EPA, or of States designated by the Administrator, to conduct inspections of pesticide establishments at reasonable times to determine compliance with FIFRA. FIFRA §9(a)(2) then provides:

Before undertaking such inspection, the officers or employees must present to the owner, operator, or agent in charge of the establishment or other place where pesticides or devices are held for distribution or sale, appropriate credentials and a written statement as to the reason for the inspection, including a statement as to whether a violation of the law is suspected. If no violation is suspected, an alternate and sufficient reason shall be given in writing.

If a violation is suspected, and the EPA or its delegated inspector does not present to the establishment a written statement to that effect before undertaking the inspection, any consent given by the establishment for the inspection would be uninformed and invalid. Evidence obtained from that inspection could then be excluded. This is what occurred in *In re Rek-Chem Manufacturing Corp.,* IF&R Docket No. VI-437C (Initial Decision, May 10, 1993).

In this case, however, the preponderance of the credible evidence indicates that the inspector, Mr. Lorah, did present the PDA Notice of Inspection to Michael Guilday. Even if this presentation did not register with Michael Guilday, he consented to the inspection when he was fully aware that the purpose of the inspection was to determine whether Respondent's distribution of EZ-Clean Disinfectant was in compliance with FIFRA. This consent was fully informed. Therefore, the inspection was proper under FIFRA §9 (a) (2) , and no evidence obtained from that inspection will be excluded.

Neither Mr. Lorah nor Michael Guilday could be expected to have a clear, complete, independent recollection of the events of this inspection that took place almost six years ago. The totality of the circumstances, however, indicate that Mr. Lorah simply followed his standard inspection practice, which included presenting the notice of inspection to the establishment representative before actually undertaking the inspection. The notice clearly stated the reason for the inspection. Both Michael and Robert Guilday were made aware in the preceding weeks that the EPA was investigating the EZ-Clean labeling and distribution. Michael Guilday was present at Avril's Columbia, Maryland facility during an inspection a few weeks earlier, and had specifically referred the inspector to the Reading facility for information on EZ-Clean. (Finding of Fact, "FF," #5) . Mr. Lorah had telephoned Robert Guilday specifically to inform him that the inspection would focus on the EZ-Clean product. (FF #6).

Both Mr. Lorah and Michael Guilday recalled meeting in a small conference room before the inspection. (Tr. 36, 166). There is no dispute that Mr. Lorah showed his credentials to Mr. Guilday. Michael Guilday testified that he was not shown any documents during this conference. (Tr. 168). Mr. Lorah testified that he believed he did show the notice to Mr. Guilday during that conference. (Tr. 39, 108). The record supports Mr. Lorah's version.

There are several pieces of relatively contemporaneous evidence that support Mr. Lorah's belief that he followed his standard practice of presenting the notice, along with his credentials. The notice reflects that Mr. Lorah changed the name of the individual representing the establishment to Michael Guilday from Robert Guilday on the day of the inspection. This could only logically have taken place during the initial meeting in Avril's conference room before the inspection, when Mr. Lorah found that Michael, rather than Robert Guilday, was present that day. (Ex. 5;Tr. 37, 39) . Mr. Lorah's log book indicates he called Robert Guilday on May 1, 1990 to inform him of the EPA referral to investigate EZ-Clean. (Ex. 3). Mr. Lorah's report of the inspection, written

within a few days and finalized on May 31,1990, confirms these events. The report explicitly states that Michael Guilday stated he was aware of the EZ-Clean matter as a result of the Columbia, Maryland inspection, and wished to be fully cooperative. (Ex. 6, Tr. 52) . This evidence outweighs the Guildays' uncorroborated and implausible categorical denials that they were shown the notice or were aware that a violation was suspected.

Mr. Lorah candidly admitted that he cannot say with absolute certainty what took place during the conference before the inspection, but that he was confident he followed his standard practice. Due to the previous contacts with the Guildays concerning EZ-Clean, Mr. Lorah would have had no reason to deviate from his normal practice of presenting the notice before the inspection. This account is corroborated by the contemporaneous evidence cited above, and is more plausible than the Guildays' uncorroborated accounts of brief conferences or telephone calls that took place years ago.

For example, Michael Guilday was asked the following question by Respondent's counsel: "Prior to Mr. Lorah's appearance at our facility on May 9, 1990, did you have any idea whatsoever that Avril was going to be investigated for alleged FIFRA violations?" He responded: "No, I didn't." (Tr. 176). Yet only a few weeks earlier, on March 30, 1990, Michael Guilday was present and signed a statement referring investigators at Avril's Maryland establishment to the Reading facility specifically for information on EZ-Clean Disinfectant. (Ex. 4, Tr. 185). The notice for the Maryland inspection also states the reason as "suspected noncompliance with FIFRA, EZ-Clean Disinfectant." (Ex. 4). Although Michael Guilday testified he did not recall seeing that notice either, the Maryland inspector would have also shown it to him before that inspection, if normal procedure was followed. (Tr. 152). Michael Guilday's claim that he was unaware of the reason for the EZ-Clean inspection in Reading is not credible in view of the fact that, some five weeks earlier, he had actually referred the authorities to conduct an investigation of EZ-Clean at that facility.

In addition, Michael Guilday testified he did not remember, because "it is six years ago, " whether his brother had spoken to him about Mr. Lorah's telephone calls to arrange the inspection. (Tr.166). Yet Michael Guilday did not express any such lack of memory as to when he was first shown the notice of inspection. It is more likely that, due to the passage of time and the compressed events of the inspection on May 9, 1990, Michael Guilday does not have a completely accurate recollection of the events of that day either.

In these circumstances, I find Michael Guilday's testimony claiming he was not shown the notice, and was unaware of the reason for the inspection, evasive and not credible. The preponderance of the credible evidence indicates that Mr. Lorah showed Mr. Guilday the notice of inspection during their pre-inspection conference. The notice stated that a violation was suspected, as required by FIFRA §9(a)(2).

Even if, as is possible, the actual initial presentation of the notice was brief and did not completely register with Michael Guilday at the time, he was fully aware of the purpose of the inspection and gave his informed consent for the Avril inspection. This case is thus fully distinguishable from *Rek-Chem, supra*. In that proceeding the ALJ found that the notice of inspection was deceptive in not stating that a violation was suspected.

Here, Michael Guilday signed the notice of inspection, provided a voluntary statement, and was fully cooperative throughout the inspection. The Respondent did not raise any objection to the inspection at the time. There is no evidence that there was any duress or deception on the part of the inspector. The Guildays' equivocal statements that they would have sought counsel if they had been aware of the reason for the inspection are not credible in the circumstances described above.[5] They could charitably be characterized wishful hindsight. The Guildays did not even retain counsel in this proceeding until over a year after they filed their initial Answer *pro se* on behalf of Avril. The entire issue of the validity of the inspection was not raised until after Complainant filed a motion for accelerated decision in February 1996, more than five years after the inspection and commencement of this proceeding.

Under the Fourth Amendment's prohibition of unreasonable searches and seizures, evidence seized from such a search could be excluded in a subsequent proceeding. The ALJ in *Rek-Chem, supra,* excluded evidence from a search where the notice of inspection did not state that a violation was suspected as required by FIFRA §9(a) (2), and the respondent therefore did not give an informed consent to the inspection. However, "[i]t is well settled that a warrantless search conducted with voluntary consent does not violate the Fourth Amendment." *In re Litton Industrial Automation Systems, Inc.,* 5 EAD 671, 674 (TSCA Appeal No. 93-4, 1995), citing *Schneckloth v. Bustamonte,* 412 U.S. 218, 219 (1973). In this case, the evidence shows that Respondent gave an informed consent to the inspection, regardless of whether he saw the notice of inspection. Hence no evidence obtained during the May 9, 1990 inspection will be excluded. The inspection of Avril on May 9, 1990 fully complied with FIFRA and the Fourth Amendment to the Constitution.

The April 8, 1996 Ruling on Motions for Accelerated Decision found Respondent liable for the violations alleged in the Complaint, subject to the validity of the inspection. Having determined that issue in Complainant's favor, we now turn to the determination of an appropriate civil penalty.

Amount of Civil Penalty

FIFRA §14(a)(1) , 7 U.S.C. §1361(a)(1) , provides that dealers, retailers, and distributors of pesticides may be assessed a civil penalty of not more than $5000 for each violation. In determining the amount of such civil penalty, FIFRA §14 (a) (4) requires the Administrator to consider "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 Region calculated the civil penalty in this case by following the guidelines set forth in the Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) , dated July 2, 1990 (the "ERP, " Ex. 15) . The EPA has promulgated penalty policies such as the FIFRA ERP in order to guide the Agency's enforcement staff to assess civil penalties in a consistent and fair manner in administrative proceedings.

The EPA Rules of Practice require the ALJ to consider such civil penalty policies issued under the relevant statute, and to state specific reasons for deviating from the amount of the penalty recommended in the Complaint. 40 CFR §22.27(b). In effect, the ALJ has discretion to "either approve or reject a penalty suggested by the guidelines," and "to either adopt the rationale of a particular penalty policy where appropriate or to deviate from it where circumstances warrant." *In re DIC Americas, Inc.,* TSCA Appeal No. 94-2, p. 6 (EAB, September 27, 1995).

While the ERP represents a reasonable general approach to calculating penalties, it fails to account for several unique circumstances present in this case, and results in overstating the gravity of Avril's violations. The ERP's approach to calculating the penalty will be followed, but additional adjustments in the ERP calculations will be made, resulting in a substantial reduction in the amount of the civil penalty.

The first step in calculating a civil penalty under the ERP is to determine a base penalty using the civil penalty matrix for violations by distributors, governed by FIFRA §14 (a) (1) . The matrix lists a range of penalty amounts up to the maximum of $5000, depending on the "gravity level" of the violation and

the size of the business. (Ex. 15, p. 19). "The relative gravity of each violation is based on an average set of circumstances which considers the actual or potential harm to human health and/or the environment which could result from the violation, or the importance of the requirement to achieving the goals of the statute." (ERP, p. 21) . Complainant determined a base penalty of $5000 for all the violations here, as "level 2" violations by a category "I" size of business. (Ex. 16).

There is no dispute in this case that Avril averaged annual gross sales of over $1,000,000, placing it in size of business category I in Table 2 in the ERP. (FF #11; Ex. 15, p. 20). Although Michael Guilday testified that this proceeding has had a financial impact on the company, Respondent submitted no substantial evidence indicating that payment of the proposed civil penalty would have any effect on the Respondent's ability to continue in business. (Tr. 180-181). Thus, the statutory penalty factors of size of business and ability to continue in business were not at issue. The chief issue with regard to the amount of the penalty is therefore the remaining factor cited in FIFRA §14(a)(4) -- the gravity of the violation.

Complainant reduced the base penalty by 30% in accord with its calculation of gravity adjustment criteria, in accord with the ERP, Table 3, resulting in an adjusted penalty of $3500 per count. The Complainant assigned minimum values to these violations for the criteria of pesticide toxicity (1 point), risk of human and environmental harm (1 each), and compliance history (0). Respondent's culpability was considered "negligence" (2 points) . (Ex. 15, p. 22; Ex. 16) . The total of 5 points merits a 30% reduction from the base penalty under the ERP, resulting in an adjusted penalty of $3500 per violation. (Ex. 15, p. 22).

The Region cited Respondent for a total of ten counts of violations, based on one count of selling an unregistered pesticide, and one count of selling a misbranded pesticide, for each of five months of sales to Tri-Marketing. This resulted in a total penalty of $35,000.

-<u>Gravity Level for Selling Pesticides not Supplementally Registered</u>

The gravity of the violation is derived from a table in the ERP that lists all possible FIFRA charges and assigns them gravity levels. (Ex. 15, p. A-1) . The ERP assigns the offense of selling an unregistered pesticide, in violation of FIFRA §12(a)(1)(A), a gravity level of "2" on a scale of 1 to 4, with 1 being the most serious. However, the charge of selling or distributing an unregistered pesticide, which comprises five counts, or half the charges in the

Complaint, encompasses a broad range of possible facts and circumstances that are not adequately reflected by the gravity level or adjustment criteria.

The ERP's gravity level categories do not distinguish between the violations involving sales of a pesticide that has never been registered, one that has been canceled, and one that, like EZ-Clean, is currently basically registered, but was not supplementally registered under its new name and distributor. (Tr. 146-147). The Complainant's witness, Mr. Lorah, testified at some length about the EPA's regulatory program and its reliance on the registration of pesticide products in order to protect human and environmental health and safety. (Tr. 61-67). He made it quite clear that the most significant step in the process is the basic or initial registration of pesticide products. The violation of selling a pesticide that was not properly supplementally registered is by its nature significantly less serious than the violation of selling a pesticide that was never initially registered, or that was canceled.

In this case, the actual product that was sold, whatever its current marketing name, had been thoroughly reviewed by EPA under the registration application procedures in FIFRA §3 and 40 CFR Part 152. The registration remained currently valid. The basic registrant submitted all the required scientific data in support of its application required by Part 152. The EPA reviewed this extensive material and approved the registration. The EPA has thus already determined, pursuant to FIFRA §3 (c) (5), that EZ-Clean (aka AV-102, aka NP 3.2) is efficacious for its proposed uses, and will not cause unreasonable adverse effects on the environment.

The only deficiency with regard to EZ-Clean was the failure to complete a notice of supplemental registration as required by 40 CFR §152.132. This is a purely ministerial requirement, with no new submission of an application or supporting data required. The only purpose is to make EPA aware of a business agreement allowing another party to distribute the product. (Tr. 67) . The only possible harm stemming from the violation of selling a pesticide that was not supplementally registered is a temporary knowledge gap in the regulatory program. EPA would not be aware that a registered pesticide is also being marketed by a new distributor under a different name. Once EPA becomes aware of such an unregistered product on the market, as here, it will immediately be referred to the basic registration, precluding any risk of any environmental harm or of further damage to the regulatory program.

On the other hand, the sale of a pesticide that has never been registered could have serious adverse environmental effects, in addition to causing

significantly greater harm to the FIFRA regulatory program. EPA would have no knowledge of the effectiveness and safety of the pesticide, as well as no registration whatsoever on file for the product's formulation.

The gravity adjustment criteria are insufficient to remedy the difference in gravity between these two types of sales of an unregistered pesticide. A respondent could prove that its never-registered pesticide was completely environmentally benign, thus meriting low ratings in the ERP gravity adjustment calculations. However, the minimum gravity adjustment values would be virtually automatic for the violation of selling a pesticide that was merely not supplementally registered, since the product formulation has already been reviewed for effectiveness and safety. The potential safety and environmental risk, and the damage to the regulatory program, is much greater with respect to the violation of selling a never-registered pesticide, compared to selling one that is only not supplementally registered.

For these reasons, the gravity level assigned to the charge of selling an unregistered pesticide in this case should be reduced. In terms of the ERP, the gravity level should be changed at least to level 3. This results in a base penalty of $4000 in the civil penalty matrix for the charges of selling an unregistered pesticide. The difference in gravity seems greater than that represented by only a 20% reduction in the amount of the base penalty. However, for the purposes of working through the ERP at this point, the violation here will be considered gravity level 3. Further reductions will be addressed below in the discussion of special circumstances.

- <u>Gravity Level for Misbranding Violations</u>

The Complaint also charges Respondent with misbranding violations based on deficiencies in the EZ-Clean labels. These violations, and their gravity levels as listed in the ERP (Ex. 15,p. A-2) are as follows:

-Sold a pesticide which is MISBRANDED in that the label did not contain directions for use necessary to make the produce effective and to adequately protect health and the environment (FIFRA §2[q][1][F], level 2);

-Sold a pesticide which is MISBRANDED in that the labeling does not contain a statement of the use classification for which the product was registered (FIFRA §2 [q] [2] [B], level 3);

-Sold a pesticide which is MISBRANDED in that the label did not bear the registration number assigned under section 7 (FIFRA §2 [q] [1] [D], level 4); and

-Sold a pesticide which is MISBRANDED in that the label did not bear an ingredient statement on the immediate container which is presented or displayed under customary conditions of purchase (FIFRA §2 [q] [2] [A], level 4).

The ERP states that multiple labeling deficiencies on a single label are combined to comprise only a single misbranding violation. (Ex. 15, p. 26). Complainant's witness on the penalty calculation, James Lorah, testified that the gravity level applied where there are multiple label deficiencies is that for the most serious violation. In this case, that is the violation for not including adequate directions for use, rated as gravity level 2. (Tr. 79).

However, the Region treated this allegation only cursorily (Tr. 59-60). The EZ-Clean label does contain brief directions on dilution of the product and lists appropriate uses, as well as first aid instructions. (FF #9). Although the Region did specify some technical omissions in these directions, it did not present any substantial evidence showing that these directions are inadequate "for effecting the purpose for which the product is intended" or "to protect health and the environments as required by FIFRA §2(q)(1)(F). This product is a common surface cleaner and disinfectant, similar to "Lysol." (Tr. 128-129). Even if the label directions do not contain all the statements required by 40 CFR §156.10, the gravity of this component of the violation was not shown to be at a high level, where at least minimally sufficient directions are present. It is more appropriate to treat this particular labeling inadequacy as a gravity level 3 rather than level 2 violation.

The absence of the product's statement of use classification on the label is also a level 3 misbrand- ing violation in the ERP. These are the most serious misbranding violations. The gravity level for these violations is therefore reduced to level 3. The base penalty for the misbranding violations is thus $4000 in the matrix, rather than $5000.

- <u>Culpability of Respondent</u>

The Complainant attributed Respondent's culpability for this violation to negligence, which is assigned a rating of two points in the gravity adjustment criteria. (Ex. 16; Ex. 15, p. B-2). Complainant did not however take into account the fact that Respondent was not the party responsible for obtaining

the supplemental registration for EZ-Clean. The proper parties to execute and file the notice of supplemental registration would have been the basic registrant, Stepan, and the new distributor of EZ-Clean, Tri-Marketing. (Tr. 126-127).

While Avril is also liable as a party in the chain of distribution, its culpability should be reduced by this circumstance. There was no showing that Avril had any affirmative duty to ensure that the other two parties completed the supplemental registration of EZ-Clean. Nevertheless, Avril should at least have been aware of the supplemental registration requirements. Avril had already supplementally registered its AV-102 disinfectant product. (Ex. 20). This may be considered some negligence, but Avril's culpability for the distribution violations is not as great as if it had been responsible for obtaining the supplemental registration. (Tr. 146). An appropriate value for culpability would be one point, between the values of zero and two offered by the ERP (Ex. 15, p. B-2).

With respect to the misbranding violations, again the primary culprit is Tri-Marketing. That company was the final distributor and was responsible for preparing the labels. Stepan could also be held liable under 40 CFR §152.132. Although Avril was also at fault since it placed the labels on the containers and should have been aware of their deficiencies, its culpability for the misbranding violations should be reduced. Again, it is therefore appropriate to charge Avril with one gravity adjustment point, rather than two, for culpability under the ERP scheme.

The total number of gravity adjustment points under the ERP is thus four for each violation, rather than the five calculated by Complainant. Pursuant to Table 3, the base penalty for each count is therefore reduced by 40%, resulting in a penalty of $2400 for each violation. (Ex. 15, p. 22).

- <u>Number of Counts of Violations</u>

Under the ERP, Respondent could have been charged with a total of 44 separate violations. Avril made 22 shipments of EZ-Clean to Tri-Marketing. The violations of selling an unregistered pesticide and of selling a pesticide that is misbranded are not dependent on each other and may properly be charged separately for each shipment. (Ex. 15, p. 25-26). The Region exercised its discretion however to reduce the number of counts of violations to 10, by combining sales in each of five months into single counts, for both the registration and misbranding violations.

Complainant reduced the number of counts because the ERPderived penalty of $3500 for 44 violations would result in a total penalty of $154,000. This amount would far exceed one of the ERP's guidelines regarding the respondent's ability to pay a penalty. The penalty should not exceed four percent of the party's average gross annual income. (Tr. 80-81; Ex. 15, p. 23). Four percent of Respondent's average gross annual income is approximately $60,000.(FF #11).

The Region's reduction of the proposed penalty to $35,000, considerably below the $60,000 four percent guideline, at first glance seems quite generous. However, Mr. Lorah also testified that the Region had discretion to also consider the transactions with Tri-Marketing to comprise a single transaction and to only charge one or two violations. (Tr. 134). This indicates the degree to which the entire penalty assessment exercise is subject to discretion and can be rather arbitrary.

For pesticide distributors, the ERP defines independently assessable charges based on each shipment of a product, regardless of the number of containers involved. Each shipment is considered an independent act. (Ex. 15; p.25). This is however potentially an singularly inequitable way of quantifying the number of violations. A distributor's shipping capacities and business arrangements, completely unrelated to the gravity of the violations, can have a tremendous impact on the potential total penalty assessment. A company that shipped a total of 100 containers of an unregistered pesticide in ten shipments could be liable for a penalty of $50,000, while one that shipped 1000 containers in a single shipment would be liable for only $5000. The ERP has to follow some guideline in quantifying the number of violations, but some flexibility should be incorporated to avoid gross inequities.

In this case, no real substantive context was provided in which the quantitative magnitude of Avril's violations could be assessed. The Region's decision to consolidate charges based on months of sales seems like a reasonable compromise, but it is based more on a random calendar event than on any cognizable statutory penalty factor or policy. The nature of the violation should also be considered. The quantity of product distributed would seem less significant in the case of distributing a pesticide that is not supplementally registered, as opposed to one that was never basically registered. For the purposes of this case, the number of counts will remain undisturbed, but the arbitrariness of this factor will be considered below as a special circumstance in reducing the penalty.

- <u>Final Penalty Assessment - Special Circumstances</u>

With the adjustments described above, the civil penalty for each of Respondent's violations would be $2400, based on a $4000 base penalty reduced by 40%. For ten counts of violations, the total penalty is thus $24,000, rather than the $35,000 proposed by the Complainant.

Nevertheless, in the totality of the circumstances of this case, this penalty amount seems unduly large. As discussed above, the violation of distributing a pesticide that was only not supplementally registered should merit a substantial reduction in the amount of the penalty compared to the violation of selling a completely unregistered pesticide. The reduction should be greater than the 20% reduction effected by changing the gravity level from level 2 to level 3.

In addition, Respondent was a "middleman" in the distribution of EZ-Clean who was even one of the two parties responsible for obtaining the supplemental registration. The basic registrant, Stepan, and the final distributor, Tri-Marketing, were also responsible for the misbranding violations. Those other two parties, seemingly at least equally at fault as Avril, have not been charged with any violations relating to the EZ-Clean sales.

Also, the contract between Avril and Tri-Marketing could as well have been considered a single transaction, resulting in only two counts of violations -- one each for selling an unregistered pesticide and one for selling a misbranded pesticide. While this might be overly lenient, as the sales did continue for a period of several months, some further reduction is warranted.

Together, these considerations comprise a set of special circumstances that merit an additional 20% reduction in the total penalty, as permitted by the ERP (Ex. 15, p. 28). An element of basic fairness is also involved, worth another 20% reduction as the equivalent of a good faith reduction authorized in the ERP. (Ex. 15, p. 27). Avril should not have to pay such a large penalty while other parties seemingly at least equally at fault are not charged at all.

The total civil penalty ordered by this decision will therefore be reduced 40% from $24,000, resulting in a penalty of $14,400. This amount reflects the gravity of the violation in accord with FIFRA §14(a) (4), and is still sufficiently substantial to fulfill the basic purposes of a civil penalty of punishment and deterrence in all the circumstances of this case.

Conclusions

1. Respondent, a "person" as defined in FIFPA §2(s) , distributed an unregistered "pesticide," as defined in FIFRA §2 (u) , as alleged in the Complaint, in violation of FIFRA §12(a)(1)(A).

2. Respondent also distributed a misbranded pesticide as alleged in the Complaint, in violation of FIFRA §12(a)(10)(E).

3. The Region's inspection of Respondent's establishment on May 9, 1990 complied with the requirements of FIFRA §9(a)(2), and was conducted with Respondent's informed consent.

4. An appropriate civil penalty to be assessed against Respondent for these violations, pursuant to FIFRA §14 (a) (4) is $14,000.

Order

1. Respondent is assessed a civil penalty of $14,400.

2. Payment of the full amount of this civil penalty shall be made within 60 days of the service date of this order by submitting a certified or cashier's check in the amount of $14,400, payable to the Treasurer, United States of America, and mailed to:

EPA - Region 3
P.O. Box 360515
Pittsburgh, PA 15251-6515

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

4. If Respondent fails to pay the penalties within the prescribed statutory time period, after entry of the final order, then interest on the civil penalty may be assessed.

5. Pursuant to 40 CFR §22.27(c) this Initial Decision shall become the final order of the Agency, unless an appeal is taken pursuant to 40 CFR §22.30, or the Environmental Appeals Board elects, *sua sponte,* to review this decision.

Andrew S. Pearlstein

Administrative Law Judge

Dated: March 24, 1997

Washington, D.C.

[1] The Complaint combines invoices showing 22 separate sales on 13 days into five counts of violations, by combining sales within the same calendar month into single counts. Counts VI through X combine the same sales into five additional counts of distributing misbranded pesticides.

[2] Exhibits 18, 19, and 20 were apparently not formally received into evidence. They were referred to during the hearing by both parties without objection, however, and are admissible. They are therefore deemed received into evidence by this decision.

[3] Tr." refers to pages in the stenographic transcript of the hearing. "Ex." refers to an exhibit number. References to the record of the hearing are representative only and are not intended to be complete or exhaustive.

[4] Mr. Lorah since 1991 has been employed by EPA's Region 3 Office in its pesticides program. He was the Complainant's sole witness.

[5] When asked what he would have done if he had been notified that the May 9 inspection was in regard to suspected violations of FIFRA, Robert Guilday testified: "I would have seeked [sic] counsel, I guess." (Tr. 158). On cross-examination, he later testified he "probably" would have sought counsel. (Tr. 162).

[6] The Maryland Attorney General investigated or took some enforcement action against Tri-Marketing. Tri-Marketing has apparently gone out of business and never paid its debts due Avril under their contract. (FF #10). Stepan did not sell or distribute an unregistered pesticide, but could still be held strictly liable for violations by a distributor under 40 CFR §152.132.