UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE REGIONAL ADMINISTRATOR

IN THE MATTER OF	)	
	)	I. F. & R. Docket No. IV-308-C
A-2-Z TERMITE AND PEST CONTROL CORPORATION OF OCALA	)	
	)	INITIAL DECISION
Respondent	)	

Preliminary Statement

This is a proceeding under Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended[1/], 7 U.S.C. 136 l(a), for assessment of civil penalties for violations of said Act. The proceeding was initiated by complaint issued on May 4, 1978 by the Director, Enforcement Division, EPA, charging Respondent with several violations of the Act. It is alleged, in substance, that Respondent violated the pesticide act by not registering the pesticide as required by 7 U.S.C. 136(a), and that the pesticide was misbranded in that the label stated, in part, "USDA Registration No. 100-463", whereas this number was used incorrectly as representing a valid EPA registration number, and, thirdly, that the pesticide was misbranded in that the label stated, in part, "EPA No. 35487", whereas the establishment registration number should be printed "EPA Est. Reg. 35487-FL-01" as required in 40 C.F.R. 167.4 pursuant to §7 of the Act.

1/ The Federal Insecticide, Fungicide, and Rodenticide Act, originally enacted in 1947, was extensively amended on October 21, 1972. The legislative mechanism used to amend F.I.F.R.A. 1947 was designated Federal Environmental Pesticide Control Act of 1972, 86 Stat. 973, Public Law 92-516, referred to as FEPCA. Section 2 of FEPCA contains the entire Act as amended and appears in 7 U.S.C. 136 et. seq., and will hereinafter be referred to as F.I.F.R.A.

In assessing the penalty in this case, the Environmental Protection Agency charged for the non-registration violation, a penalty of $550.00, and for the two misbranding violations, no separate penalty was assessed. The Respondent challenges the proposed penalty in his answer by denying all allegations as to the alleged violations, both as to non-registration and misbranding, and, further, took the position that the amount of penalty proposed was inappropriate in that the Respondent has sold no more than one dozen containers of the product totaling no more than $100.00, and that upon service of the complaint, the Respondent has ceased to market the product and will refrain and continue to refrain from said marketing until such time that the Respondent fully complies with the registration requirements, and that the violation, if any, was of a minor nature. The Respondent further requested the Hearing.

Pursuant to §168.36 of the Rules of Practice, the parties were requested on June 20, 1978 to correspond with the Presiding Judge for the purpose of accomplishing some of the objectives of the pre-hearing conference.

At the Hearing held on December 6, 1978 in Ocala, Florida, the Complainant was represented by Bruce Granoff, Attorney, EPA Region IV, and the Respondent was represented by Charles Ruse, Jr., Attorney of Ocala, Florida. The purpose of the Hearing was to determine whether A-2-Z Termite and Pest Control Corporation of Ocala held for sale a misbranded pesticide which was not registered as required by 7 U.S.C. 136(a)(a) and 40 C.F.R. 162.5.

Findings of Fact

1. The Respondent, A-2-Z Termite and Pest Control Corporation of Ocala, on or about August 9, 1977 and for a period of at least three and a half (3 1/2) to five (5) years prior thereto, has been engaged in the manufacture and sale

of pesticides, including A-2-Z VAPONA DIAZINON INSECTICIDE. (EPA Exhibits 1-4, H.T. 136.]

2. Among the pesticides that it sells, Respondent manufactured and held for sale on August 9, 1977, the pesticide A-2-Z VAPONA DIAZINON INSECTICIDE which label carried the USDA Reg. No. 100-463. [EPA Exhibits 1-4; H.T. 32, 136-137, 139-143, 152-155.]

3. On August 9, 1977, EPA Consumer Safety Officer, Carlton R. Layne (CSO Layne) went to the Respondent's establishment located at 1931 Magnolia Avenue in Ocala, Florida to conduct an establishment inspection in accordance with Section 9(a) of the F.I.F.R.A. [7 U.S.C. 136g(a)]. [EPA Exhibits 12, H.T. 27-31.]

4. During the inspection of Respondent's establishment and as part of his official duties, on August 9, 1977, CSO Layne purchased, on behalf of EPA, one 1/2-gallon plastic jug of A-2-Z VAPONA DIAZINON INSECTICIDE (A-2-Z VAPONA DIAZINON), and received from Respondent's representative a signed Receipt for Samples. [EPA Exhibits 2-3, H.T. 31-33, 147, 152-155.]

5. The label affixed to the A-2-Z VAPONA DIAZINON sample collected by CSO Layne on August 9, 1977, and identified as I.D. No. 123153, sets forth an identifying pesticide product registration number, namely USDA Reg. No. 100-463, which appeared on the left column of the label. [EPA Exhibits 2-3, H.T. 32, 35-37.]

6. The pesticide registration number designation USDA Reg. No. 100-463 was not a valid EPA product registration number assigned to the Respondent company, but was the approved product registration number assigned by the EPA on October 1, 1971, to Geigy Agricultural Chemicals, Division of Geigy Chemical Corporation, for DIAZINON 4E INSECTICIDE and appears on the lower right column of the product label. [EPA Exhibit 6, H.T. 32-34, 82, 98-100, and 104.]

7. The revised labeling for the DIAZINON 4E for food handling establishments, USDA Reg. No. 100-463, was accepted by the EPA on July 31, 1974. [EPA Exhibit 6.]

8. The A-2-Z VAPONA DIAZINON pesticide formulated by the Respondent consists of a mixture of Diazinon and Vapona diluted with water, and has been marketed by the Respondent with the USDA Reg. No. 100-463 for a three and one-half (3 1/2) to five (5) year period. [H.T. 136-137.]

9. The Diazinon 4E, used by the Respondent in the formulation of its own pesticide product, was previously purchased from Woodbury Chemical which received it from CIBA-GEIGY. [H.T. 137-138.]

10. Respondent's manager and formulator testified that he had passed the State examination and was a certified pesticide applicator (certified by the State of Florida), and was trained in the handling of pesticides, production of pesticides, and the reading and preparation of pesticide labels. [H.T. 140-142.]

11. Respondent's manager-formulator, a certified applicator, further testified that he did not read the labels of the Diazinon and Vapona pesticides used by him in the formulation of the A-2-Z VAPONA DIAZINON to determine if they were federally-registered pesticides. [H.T. 140-141.]

12. The act of holding for sale a misbranded pesticide is a violation of F.I.F.R.A. [7 U.S.C. 137j(a)(1)(E) and 7 U.S.C. 136(c)(1)(A)].

13. Respondent's gross sales (total business revenues from all business operations) were between $100,000 and $400,000 in 1976, thereby placing the company in Category 2 of the Rules of Practice governing procedures conducted in the assessment of civil penalties under the Act, as amended. [39 F.R. 27656, et. seq..]

Discussion and Conclusion

In his answer, Respondent admitted Paragraphs 1 and 2 of Part I of the Complaint, that is to say, that the Respondent held for sale the product A-2-Z VAPONA DIAZINON insecticide; and secondly, that the product is a pesticide within the meaning of 7 U.S.C. 136(u). The Respondent denied that the product was not registered or was misbranded in any respect. Therefore, the purpose of the hearing was to determine: (1) whether or not the product in question was registered; and (2) whether or not it was misbranded in the two regards indicated above under Findings of Fact.

The Complainant, in response to my Order pursuant to §168.36 of the Rules of Practice, indicated that it would produce three witnesses to testify in support of its complaint. These persons being: Mr. Carlton Layne, an EPA Consumer Safety Officer, who made the inspection and took the samples; Mr. Theodore P. Keller, Jr., Chief, Northern Compliance Section, EPA Region IV, testifying as to the validity of the proposed penalty and also to discuss applicable policies and regulations giving the factors used to determine the proposed penalty; and Mr. Edward L. Bunch, Enforcement Coordinator, EPA Registration Division, Washington, D.C., to testify that the Respondent had not filed an application for registration for the product in question, and that the EPA Registration No. appearing on the label is assigned to the CIBA-GEIGY Corporation of Greensboro, North Carolina for the product, DIAZINON 4E, and not to the Respondent company.

At the Hearing, only one of the three proposed witnesses was present, that being Mr. Carlton Layne, the inspector. Mr. Keller had retired, and in his stead, the Complainant offered Mr. Roy Clark, who is Chief of the Pesticides Branch and Mr. Keller's former supervisor. Mr. Bunch was not present.

and no other witness was offered as a substitute for him. It was established through Mr. Layne and Mr. Clark that the product was misbranded in that the label did not contain the proper numbers and that the USDA registration number affixed to the label is an improper identification number and that that number has, in fact, been given to the CIBA-GEIGY Geigy Corporation which produces the chemical components from which the subject pesticide was formulated and not to the Respondent, A-2-Z Termite and Pest Control Corporation of Ocala, and, further, that the EPA number appearing at the top of the upper right-hand corner of the label should have been amended to include the terminology FL-01 following the EPA number.

As to the allegation of non-registration, the Agency failed to sustain the burden of proof placed upon it by 40 C.F.R. 168.43 of the appropriate Regulations, which states that:

> "In establishing that the violation occurred as set forth in the complaint and that the civil penalty assessed is appropriate, the complainant has the burden of going forward with and proving an affirmative case. Following the establishment of a prima facie case, respondent shall have the burden of presenting and of going forward with any affirmative defense of any allegations set forth in the complaint. Each matter of controversy shall be determined by the Administrative Law Judge upon the preponderance of the evidence."

The Agency, despite its pre-trial allegation that it would have present as its witness Mr. Bunch, who would testify as to the non-registration of the pesticide in question, did not offer him as a witness. In lieu of Mr. Bunch's oral testimony, Complainant sought to have introduced into evidence in this case, an unsworn statement by someone other than Mr. Bunch to the effect that A-2-Z had not registered its product, nor filed any notice of intent to register. Counsel for the Respondent objected to the introduction of this piece of paper on the grounds that: (1) the Complainant had in its pre-trial

statements indicated that Mr. Bunch would be present to testify and that he was not present; and (2) that the document was not even in the form of an affidavit and sworn to, and was not subject to any cross-examination by counsel for the Respondent. Upon hearing arguments from counsel on this motion, the motion was sustained and the unsworn paper was not admitted as evidence in this case.

As indicated earlier, the sole question for proof in this case and the only violation for which the Agency sought penalties was the failure to register the product. It occurs to me that when only one factual matter is in controversy in a case, it behooves the Complainant to present at the hearing a live witness to testify as to the facts surrounding that violation and be subjected to cross-examination by opposing counsel so as to probe the validity and accuracy of the witness' sworn testimony. In this case, we had neither a live witness, nor a sworn affidavit, but merely a statement signed by an official in Washington, D.C. to which had been affixed the great seal of the Environmental Protection Agency. Although impressive in appearance, the proffered document was not deemed admissible, even under the relaxed Rules of Evidence governing administrative proceedings such as this. Mr. Clark, although the custodian of certain records in his office in Atlanta, was not the custodian of the type of records and documents which would indicate product registration and, therefore, his attempt to testify on the primary question of registration was, likewise, not permitted. The end result of all of this is that the Agency failed to make out a prima facie case on the alledged violation involving non-registration.

The Complainant Agency did, however, sustain its burden of proof on the question of mislabeling, which violation was not contested by the Respondent.

Although counsel for the Complainant argues that the Respondent should have put forth some sort of defense on the issue of registration, his arguments are not persuasive inasmuch as the Respondent had no burden or responsibility to come forward with any testimony concerning an issue about which the Agency had not made a prima facie case. Therefore, Respondent's failure to produce witnesses or evidence concerning registration was both understandable and completely proper.

Although the Agency did not, in its complaint, levy a fine or attempt to assess a penalty concerning the misbranding allegations in the complaint, the evidence in the case indicates that the product was in fact, misbranded in two regards. That the Agency did not assess a penalty for the misbranding violations is consistent with Agency policy and Court rulings that dictate that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision require proof of an additional fact which the other does not. [See Blockburger v. United States, 284 U.S. 299 at 304.] The earlier decisions of the Agency in pesticide cases have followed that ruling and have been consistent therewith, and, for that reason, the Agency, in cases such as this, will, in the words of Mr. Clark, who stated that "if there is additional violations that occur by the one act, the gravest of the violations takes precedent. There is misbranding of the product in question as well as the alleged non-registration. The gravity of the offense--the greatest portion--is the non-registration." [T-120.]

Had the Agency proved up its case on the non-registration violation and a penalty was ultimately assessed therefore, no further discussion of the misbranding violations would be necessary. However, since no non-registration

violation was proved, it is necessary to address the misbranding violations. The Rules of Practice governing these proceedings states that the Administrative Law Judge, in determining the penalty to be assessed, is not bound by either the guidelines or the amount of penalty proposed by the Agency, but rather has the discretion to increase or decrease the assessed penalty from the amount proposed to be assessed in the complaint. [§168.16(b).]

In determining the amount of penalty to be assessed, Section 14(a)(3) of the Statute, 7 U.S.C. 136 l(a)(3) requires that there shall be considered the appropriateness of the penalty to the size of Respondent's business, the effect on Respondent's ability to continue in business, and the gravity of the violation. Section 168.60(b) of the Rules of Practice provides that in evaluating the gravity of the violation there shall also be considered Respondent's history of compliance with the Act and any evidence of good faith or lack thereof.

In the factors to be considered in assessing civil penalties, the guidelines as published in the Federal Register on July 31, 1974, 39 F.R. 27712, as to "gravity of violation" states:

> 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 circumstances.

We recently expressed our view in another case under the civil penalty provision that in considering appropriateness of the penalty to the "gravity of the violation" the evaluation should be made from two aspects--gravity of harm and gravity of misconduct.

In this case, the misbranding consisted of two improper numerical configurations appearing on the label of the product, that is, the label stated in part, "EPA No. 35487", whereas the label should read "EPA Est. Reg. No. 35487-FL-01". The evidence showed that the label was additionally misbranded in that it stated, in part, "USDA Reg. No. 100-463", and that number was used incorrectly. As to the gravity of harm, since the Agency did not subject the collected sample to any laboratory anaysis to determine the efficacy of the components thereof, it must be assumed that the product contains properly-formulated components manufactured by the CIBA-GEIGY Corporation which are approved and previously registered by the Environmental Protection Agency. Therefore, the gravity of harm to the general public and to the environment is, for all practical purposes, nonexistent.

It was testified to by Mr. Layne, the Agency inspector, that assuming all proper registration had been accomplished by the Respondent, the label would have been proper by adding the terminology "FL-01" to the establishment number appearing on the label, and that the USDA number should have been removed from the label. In considering the gravity of misconduct, it is important to note that the Respondent has sold no more than one dozen containers of the product involving total retail sales of approximately $100.00, and that upon service of the complaint, the Respondent ceased to market the product and intends to refrain and continue to refrain from said marketing until all matters involving the label deficiencies and potential non-registration have been complied with. The record further indicates that the Respondent has no prior history of violations of F.I.F.R.A. and, therefore, the gravity of misconduct should be adjudged as relatively low. Considering the gravity of misconduct, which is moderate and gravity of harm, which is slight, I am of the view that an appropriate penalty for the misbranding charge is $125.00.

Final Order[2/]

Pursuant to Section 14(a)(1) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended [7 U.S.C. 136 l(a)(1)], civil penalties totaling $125.00 are hereby assessed against Respondent, A-2-Z Termite and Pest Control Corporation of Ocala, for the violations which have been established on the basis of the complaint issued on May 4, 1978.

DATED: May 31, 1979

Thomas B. Yost
Administrative Law Judge

2/ Unless appeal is taken by the filing of exceptions pursuant to Section 168.51 of the Rules of Practice, or the Regional Administrator elects to review this decision on his own motion, the order shall become the Final Order of the Regional Administrator. [See Section 168.40(c).]

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IV

345 COURTLAND STREET
ATLANTA, GEORGIA 30308

IN THE MATTER OF	)	
	)	I. F. & R. Docket No. IV-308-C
A-2-Z TERMITE AND PEST CONTROL CORPORATION OF OCALA	)	
	)	CERTIFICATION OF SERVICE
Respondent	)	

In accordance with §168.46(a) of the Rules of Practice Governing Proceedings Conducted in the Assessment of Civil Penalties under the Federal Insecticide, Fungicide and Rodenticide Act, as amended, I hereby certify that the original and two copies of the foregoing Initial Decision issued by the Honorable Thomas B. Yost was received by me as Regional Hearing Clerk; that a copy was hand-delivered to Mr. John White, Regional Administrator, EPA Region IV; that two (2) copies were served by Certified Mail, Return Receipt Requested on Ms. Sonia Anderson, Hearing Clerk, EPA Headquarters, Washington, D.C. 20460; and that a copy was served on the individual parties by hand-delivery to Counsel for Complainant, Bruce R. Granoff, Esquire, EPA Region IV; and by Certified Mail, Return Receipt Requested to Counsel for Respondent, Charles Ruse, Jr., Esquire, Post Office Box 135, Ocala, Florida 32670. Dated in Atlanta, Georgia this 1st day of June 1979.

Sandra A. Beck
Regional Hearing Clerk