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Rules of Practice & Procedure

Environmental Appeals Board

Employment Opportunities

## UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

### BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Chempace Corporation	)	Docket No. 5- IFFRA-
96- 017	)	
	)	
Respondent	)	

#### INITIAL DECISION

Pursuant to Section 14 of the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §1361, the Respondent, Chempace Corporation, is assessed a civil penalty of \$92,193 for selling unregistered or misbranded pesticides on 98 occasions, and producing pesticides in an unregistered establishment.

By: Andrew S. Pearlstein, Administrative Law Judge

Dated: February 25, 1999

#### Appearances

For Complainant:	Kris P. Vezner, Esq. Assistant Regional Counsel Timothy J. Chapman, Esq, Associate Regional Counsel U. S. EPA Region 5
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## Chicago Illinois

**For Respondent: David S. Hoffman, Esq.  
McMahon, DeGulis, Hoffmann  
& Blumenthal, L. L. P.  
Cleveland, Ohio**

### Proceedings

On September 26, 1996, the Region 5 Office of the United States Environmental Protection Agency (the "Complainant" or "Region") filed a Complaint against the Chempac Corporation, of Toledo, Ohio (the "Respondent" or "Chempac"). The Complaint charges the Respondent with a series of violations of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"). The Respondent filed its initial Answer on October 18, 1996.

The Complaint charges Chempac with 99 counts of violations of FIFRA, as follows:

- Counts I - XXVI - selling or distributing the unregistered and canceled pesticide "Trigger" on 26 occasions, in violation of FIFRA §12(a)(1)(A), 7 U.S.C. §136j(a)(1)(A), as well as violating a cancellation order in connection with such sales, in violation of FIFRA §12(a)(2)(K), 7 U.S.C. §136j(a)(2)(K);
- Counts XXVII - XXIX - selling or distributing the unregistered and canceled pesticide "Uni-Rooter" on 3 occasions;
- Counts XXX - LV - selling or distributing the unregistered pesticide "GLY" on 26 occasions;
- Counts LVI - LXX - selling or distributing the misbranded pesticide "Uni-Quat 14" on 15 occasions, in violation of FIFRA §12(a)(1)(E), 7 U.S.C. §136j(a)(1)(E);
- Counts LXXI - XC - selling or distributing the misbranded pesticide "Complete" on 20 occasions;
- Counts XCI - XCVIII - selling or distributing the misbranded pesticide "Eradicate" on 8 occasions; and
- Count XCIX - producing all the above pesticides in an establishment not registered as a producer with EPA, in violation of FIFRA §7(a), 7 U.S.C. §136e(a).

The Complaint proposes that Respondent pay a civil penalty of \$200,000 for these alleged violations. [\(1\)](#)

In its original Answer, Respondent pleaded "no contest" to most of the material allegations of the Complaint. In its Amended Answer, Respondent denied, or denied knowledge of, most of the material allegations in the Complaint, and raised several defenses.

The Region filed a Motion for Partial Accelerated Decision on June 6, 1997, seeking a determination that Chempac violated FIFRA as alleged in the 99 counts in the Complaint. Chempac filed a response in opposition to the motion for accelerated decision. In a decision dated October 15, 1997, the undersigned Administrative Law Judge ("ALJ") granted the Region's motion, finding Chempac liable for the 99

violations alleged in the Complaint. The issue of the appropriate amount of the civil penalty remained for hearing.

The hearing in this matter convened before ALJ Andrew S. Pearlstein on April 7 and 8, 1998, in Toledo, Ohio. Each party produced three witnesses. Thirty exhibits were received into evidence. <sup>(2)</sup> The stenographic transcript of the hearing consists of 572 pages. The parties each submitted post-hearing briefs and reply briefs. The record of the hearing closed on August 17, 1998, upon the ALJ's receipt of the reply briefs.

In the interest of completeness, the findings of fact below include those already found in the order granting accelerated decision on liability, as well as those found in the record of the hearing, in relation to the penalty. Citations are to the stenographic transcript of the hearing ("Tr."), and to the exhibits received at hearing ("Ex."). Citations are representative only and not intended to be exhaustive. Materials cited in the Order Granting Partial Accelerated Decision will not necessarily be cited again in this Initial Decision.

### Findings of Fact

#### Background

1. The Chempace Corporation is a manufacturer and distributor of maintenance chemicals, such as cleaners, degreasers, and deodorizers. Chempace operates from a facility it owns in Toledo, Ohio, consisting of a warehouse and offices. Chempace's predecessor began operating at that location in 1969. That is the same year that Chempace's current President, Ralph Wooddell, started working in the office there as a clerk. Mr. Wooddell held various positions at Chempace until he became President in 1979, the same year he received his B.A. in business administration. (Tr. 374-375).

2. Robert Shall, Chempace's current Chairman of the Board, created the company in its current form when he merged another chemical company with Chempace in 1983. Mr. Shall owned 45% of the stock in Chempace at that time. His partner Jack Y. Stone, owned 45%, and Mr. Wooddell owned 10%. (Tr. 332-334).

3. On September 1, 1987, Chempace executed an agreement with Mr. Stone to buy his share of the company. Chempace agreed to purchase Mr. Stone's stock for \$75,000; to pay him \$54,000 for a covenant not to compete with Chempace; to pay him \$58,000 for a consulting contract; and to pay him \$21,800 as a retirement benefit, by canceling a debt that Mr. Stone owed the company. The agreement was structured so that Chempace paid Mr. Stone a total of \$5000 or more per month for three years, ending in August 1990. As a result of this transaction, Mr. Shall now owns 81.8% of Chempace's stock and Mr. Wooddell the remaining 18.2%. (Ex. 30, Tr. 392).

4. Over the years, Chempace has employed several persons in the facility, and up to about 10 salesmen who generally work outside, on the road. In the early years, the company employed a warehouse man and a bookkeeper/receptionist, in addition to Mr. Wooddell as, in effect, the office supervisor. Chempace also hires an independent chemist on an hourly retainer basis. The chemist maintains the Respondent's production records. Mr. Wooddell is the chief supervisor of day-to-day business activities. He has also spent substantial time on the road, selling, during certain periods. Mr. Shall has generally been less involved in the day-to-day business. He oversees strategic planning, and continues to spend much of his time outside the facility, seeking to maintain and expand the company's customer base. (Tr. 355, 386-392).

5. Chempace's business has increased in recent years. The company currently (at the time of the hearing in April 1998) employs 13 persons. There are three telemarketers, three outside salesmen (including Mr. Shall), four warehouse men, two office workers, and Mr. Wooddell. (Tr. 438-440).

6. Chempace's product and customer mix has changed over the years. In the 1980's the company sold primarily janitorial chemicals, as well as pesticides and herbicides, to a large number of commercial and government customers in northern Ohio and neighboring parts of Michigan and Indiana. At that time Chempace employed salesmen in those territories. In the late 1980's and early 90's, some of these salesmen retired, and those contracts started to dwindle. (Tr. 335, 375-385).

7. Primarily through the efforts of Mr. Shall, Chempace then began shifting into different, narrower product lines, and sought to develop major customers. Currently the largest single segment of Chempace's business, about 40%, is the sale of portable toilet deodorizers throughout the world. Chempace also supplies maintenance chemicals to over a dozen Ford Motor Company plants, and to federal government facilities in the region. The sale of janitorial supplies to local commercial establishments is now a relatively small part of Respondent's business. (Tr. 382-384).

#### Prior Pesticide Activity and Violation

8. Chempace maintained registrations for several pesticides under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") prior to October 1989. Those pesticides included Trigger, Uni-Quat 14, and Uni-Rooter. In January 1989, Chempace determined that it was not economical to continue to pay the annual maintenance fees for these pesticides, and decided to stop producing them and to let the registrations lapse. On October 10, 1989, the EPA's Office of Pesticides and Toxic Substances sent Chempace a Cancellation Order that applied to those, as well as several other pesticides then produced by Respondent, for non-payment of the annual registration maintenance fees. The Order prohibited Chempace from producing any more of those pesticides, and allowed it to sell existing stocks until exhausted, but no later than the disposition date of March 1, 1990. The EPA issued a similar cancellation order for the pesticide GLY on December 18, 1990. (Ex. 14; Tr. 406).

9. The EPA has delegated authority to the Ohio Department of Agriculture ("ODA") to conduct federal FIFRA compliance inspections on behalf of the EPA. The ODA also conducts inspections for compliance with Ohio state laws and regulations governing pesticides. Matthew Hofelich, an inspector with the Ohio Department of Agriculture ("ODA"), conducted a routine FIFRA compliance inspection of Chempace's establishment on March 7, 1991. Mr. Hofelich met with Mr. Wooddell of Chempace during that inspection. At that time, in accord with the cancellation orders, Chempace was not producing any pesticides. (Ex. 13, p. 1).

10. On September 10, 1991, Mr. Hofelich returned to Chempace to conduct a state product registration check. On that occasion, he met with both Mr. Wooddell, and Chempace's president, Robert Shall. During that inspection, Mr. Hofelich found products for distribution for which the Ohio state registrations had lapsed. Chempace was then allowed to renew its state registrations for those products without penalty. (Ex. 13, p. 1).

11. The Region 5 Office of the EPA filed an administrative complaint (Docket No. IF&R-V-26-91) against Chempace on September 27, 1991, charging the Respondent with failing to file an annual pesticide production report for calendar year 1990, as required by FIFRA §7(c)(1), 7 U.S.C. §136e(c)(1), and the FIFRA regulations,

specifically 40 CFR §167.85(d). The complaint sought assessment of a civil penalty of \$5000 against Chempace for this violation. Mr. Wooddell filed an answer to the complaint on behalf of Chempace. The answer stated that he did not believe filing the annual report was required since Chempace was no longer producing any pesticides.

(Ex. 26-A,C).

12. Although Chempace's pesticide product registrations had been canceled, Chempace had not canceled its EPA producer establishment registration. Such an establishment is required to file an annual report even if it produced no pesticides during the calendar year. Hence, the Region and Chempace executed a Consent Agreement and Consent Order on January 15, 1992, resolving the administrative complaint. Chempace agreed to pay a compromised civil penalty of \$500. The agreement also stated that Chempace certified it was no longer producing pesticides and had requested cancellation of its establishment number. The EPA did then terminate Chempace's FIFRA establishment registration in a notice sent on March 13, 1992. (Exs. 26-K; 15, 16).

#### Current FIFRA Violations

13. On April 27, 1994, Mr. Hofelich found several containers of Trigger during an inspection of the pesticide storage area of the Ottawa County Courthouse in Port Clinton, Ohio. The Trigger labels indicated that the products were produced by Chempace. Mr. Hofelich was aware from his prior contacts that Chempace had canceled its product registrations and establishment number in 1991 or 1992. He checked with EPA and confirmed that Chempace had not reactivated those registrations. He then scheduled a follow-up inspection of the Chempace facility for May 4, 1994. (Ex. 13, p. 2; Tr. 48-50).

14. On May 4, 1994, Mr. Hofelich, along with another ODA inspector, first entered the Chempace facility and met with Mr. Wooddell. Mr. Hofelich presented Mr. Wooddell with a notice of inspection that indicated on its face that the violation of producing and selling a canceled pesticide was suspected. During that inspection, Mr. Wooddell allowed Mr. Hofelich full access to the warehouse area and Chempace's records. Mr. Hofelich took photographs of the containers and labels of the pesticides Trigger, Uni-Rooter, GLY, Uni-Quat 14, Complete and Eradicate. He also took copies of the sales invoices of those products. Mr. Wooddell signed sample collection reports authorizing Mr. Hofelich to collect this information. Since production records were maintained by Chempace's chemist and were not available at the facility, Mr. Hofelich arranged to return to obtain those records a few days later. On May 9, 1994 he did return and obtained the production records for Trigger, Uni-Rooter, GLY, and Uni-Quat 14. (Ex. 13).

15. Chempace, represented by Mr. Wooddell, was generally fully cooperative with Mr. Hofelich during these inspections. During the 1994 inspection, Mr. Wooddell granted Mr. Hofelich full access to the facility and provided copies of all requested documents. Once Mr. Wooddell became aware that Chempace could be legally vulnerable, he telephoned the company's lawyer during the inspection, who advised him not to answer any more questions. At some point during the inspection, Mr. Wooddell admitted that Chempace had been producing pesticides although its establishment and product registrations had been canceled. (Tr. 53-55, 110-112, 418-419, 463).

16. At the conclusion of the inspection, Mr. Hofelich issued a Stop Sale, Use, and Removal Order ("SSURO") prohibiting Chempace from selling Chempace's existing stocks of Trigger, GLY, Uni-Rooter, and Uni-Quat 14. At that time, on May 4, 1994,

Chempace had no inventory of Trigger, 55 gallons of Uni-Rooter, 56 gallons of GLY, and 23½ gallons of Uni-Quat 14 on hand. (Ex. 13, p. 20).

17. Chempace sold the unregistered and canceled pesticide Trigger on 26 occasions from June 1992 to June 1993, as indicated by the invoices. That product's registration number had been canceled in 1989 and Chempace's establishment number had been canceled in March 1992. These sales comprised a total of about 1160 gallons, at an average price of about \$14 per gallon, bringing Chempace about \$16,000 in revenue. The quantities of Trigger sold in individual sales ranged from one to 330 gallons. Chempace's production records also showed that the Respondent had produced 2000 gallons of Trigger from July 1992 until August 1993. (Ex. 13, pp. 43-46, 50-74, 77, 162, 164).

18. In July 1992 and May 1993, Chempace produced 375 gallons of a defoliant pesticide, Uni-Rooter. That product's registration had been canceled in 1989, and Chempace's establishment number had been canceled in March 1992. From August 1992 until May 1993, Chempace made 3 sales of Uni-Rooter, comprising 27 pails or 135 gallons. Chempace received a total of approximately \$1900 from these sales of Uni-Rooter. (Ex. 13, pp. 75-79).

19. From August 1992 until July 1993, Chempace produced 1496 gallons of a product called GLY, or GLY-Cherry. The EPA had canceled that product's registration in December 1990, and Chempace's producer establishment registration had been canceled in March 1992. From June 1992 until June 1993, Chempace made 26 sales of GLY, comprising some 1175 gallons. All but 20 of those gallons of GLY were sold in 55-gallon drums to Envirosafe Services of Ohio, the operator of a landfill, for use as a deodorizer. The GLY label also however made the pesticidal claim that it would aid in destroying bacteria. Chempace realized revenue of about \$8800 from its sales of GLY. (Ex. 13, pp. 97-127).

20. From June 1992 until June 1993, Chempace made 15 sales, represented by separate invoices, of the pesticide Uni-Quat 14. The label on this product was misbranded in that it indicated that the product was registered to Chempace, and listed a false registration number for Chempace. Uni-Quat 14 was actually registered with another producer establishment at that time. From August 1992 until June 1993, Chempace also produced some 1400 gallons of Uni-Quat 14 at its facility. The Uni-Quat sales comprised some 318 gallons, and brought Chempace approximately \$2900 in receipts. The quantity of individual sales of Uni-Quat 14 ranged from one to 60 gallons. (Ex. 13, pp. 26, 80-96, 159-161).

21. From June 1992 until June 1993, Chempace made 20 sales, represented by invoices, of the pesticide Complete, in quantities of less than 55 gallons. Chempace had repackaged and produced the Complete by removing it from the 55-gallon drums in which it came when purchased, and transferring it into smaller containers.<sup>(3)</sup> The Complete containers were misbranded in that their labels indicated a false registration number for Chempace as the registrant. In fact, Complete was then registered to another producer establishment. Those sales comprised some 342 gallons and brought Chempace approximately \$5000 in receipts. (Ex. 13, pp. 28, 138-161).

22. From June 1992 until June 1993 Chempace made 8 sales of small quantities of the pesticide Eradicate, as shown by invoices. The Eradicate had been removed from 55-gallon drums and placed in smaller, relabeled containers for sale. Those containers were misbranded in that they indicated a false registration number for Chempace on their labels. At that time, Eradicate was actually registered to another producer establishment. These sales of Eradicate comprised some 23 gallons, and brought Chempace approximately \$500 in receipts. (Ex. 13, pp. 28, 157-164).

23. In the latter half of 1992, and into 1993, as stated above, Chempace produced various quantities of the pesticides Trigger, Uni-Rooter, GLY, Uni-Quat 14, Complete, and Eradicate. As also stated above, Chempace's producer establishment number had been canceled by EPA on March 13, 1992. Hence, during this period, Chempace produced pesticides without the authorization of a producer establishment registration.

24. If Chempace had maintained its product registrations, the annual maintenance fee that would have been due to EPA for each active primary pesticide registration during this period (1992 and 1993) was \$650 for the first registration, and \$1300 for each subsequent registration. Chempace distributed three pesticides that would have been subject to this fee: Trigger, Uni-Rooter, and GLY. For these three pesticides, Chempace would have owed the EPA an annual fee of \$3250 for each of the two years it sold these pesticides, if it had maintained its registrations. (Tr. 169).

25. Chempace's sales of these unregistered and misbranded pesticides generated receipts of approximately \$35,000 from June 1992 until August 1993.<sup>(4)</sup> The vast majority of these sales took place in Chempace's fiscal year ending June 30, 1993. The illegal sales represented approximately 2% of Chempace's gross sales receipts during that fiscal year. (Exs. 18, 19).

26. During the period from June 1992 until August 1993, while Chempace produced and sold these pesticides, both Mr. Shall and Mr. Wooddell were spending most of their time on the road selling new products for the company. The orders for canceled and misbranded pesticides represented remnants of Chempace's older business from smaller clients. The orders were telephoned in to the bookkeeper or receptionist by the salesman or customer and then sent to the warehouse man for mixing, packaging, and shipping, without the regular oversight of either Mr. Shall or Mr. Wooddell. During this period, Chempace employed a succession of poorly qualified and trained warehouse men, due to the company's financial straits. Neither Mr. Shall nor Mr. Wooddell specifically trained other Chempace employees in FIFRA compliance or directed them not to produce or sell canceled or misbranded pesticides. (Tr. 342-348, 358-359, 387-388, 415-416, 442-443, 450-452).

#### Chempace's Financial Circumstances

27. Chempace was heavily debt-ridden and in a tenuous business position during the period from 1990 to about 1993, after completion of the buyout of Jack Stone, the former partner. The company's long-term debt peaked in August 1991 when Chempace's mortgage lender, the Society Bank & Trust, threatened to foreclose on the collateral, Chempace's land and building. Mr. Shall and Mr. Wooddell were personally liable on this note. The bank did finally renegotiate and extend the loan upon the same basic terms, but with additional restrictions and collateral. (Ex. 1, p. 2-3; Tr. 334-337, 393-395).

28. The need to shore up Chempace's financial position then led Mr. Shall and Mr. Wooddell to embark on a campaign to expand Chempace's business into new products and customers, as described above. (See Findings of Fact, "FF," ##6-7). This campaign required Mr. Shall and Mr. Wooddell to spend most of their time on the road in 1992 and 1993, limiting their ability to oversee the operations of the home warehouse. (Tr. 338, 342-343).

29. As a result of Mr. Shall's and Mr. Wooddell's efforts, Chempace has experienced a steady growth in gross sales each year since 1991. For the fiscal year ending June 30, 1991, Chempace had approximately \$1,252,600 in gross income. Chempace's

gross sales for fiscal years ending in June 1992, 1993, 1994, 1995, 1996, and 1997, were, respectively: \$1,532,268; \$1,707,501; \$1,758,631; \$2,220,239; \$2,340,324; and \$2,900,148. For the last four complete years of record at the time of the hearing, fiscal years 1994 to 1997, Chempace's average gross income was \$2,304,836. (Exs. 1-6, 22).

30. Chempace was profitable, and reported taxable income in each fiscal year from 1991 to 1996. Chempace's taxable income in fiscal year 1996 was \$72,000, and it averaged about \$58,000 during this period. The corporation's largest expenses are for officers' compensation and employees' salaries and wages. Other expenses include employees' benefits, repairs and maintenance, taxes, depreciation, interest payments, and advertising. (Exs. 1-12).

31. Chempace paid its two active officers, Robert Shall and Ralph Wooddell, a total of \$321,000 in compensation in fiscal year 1996. The total salaries, wages, and commissions paid to other employees (not including the amounts paid to Messrs. Shall and Wooddell) amounted to \$345,000. The officers' salaries have increased in recent years, as the company's sales have increased.

32. Chempace has, in recent years, devoted a greater proportion of its gross receipts (about 14%) than the industry-wide average for chemical companies of its approximate size. As reported by the Robert Morris Associates, a statistical business service, the median ratio of officers' compensation to gross receipts for chemical wholesale companies with sales of from \$1-3 million is 9.4%. These industry averages, however, do not account for particular differences among companies and the specific duties and performance of their officers. (Ex. 24, Attachment C; Tr. 496-504).

33. While Chempace's sales have steadily increased, the company has remained heavily debt-ridden. As of June 30, 1996, Chempace had total current liabilities in the amount of approximately \$583,000. At the close of the fiscal year in June 1997, Chempace's current liabilities had increased to \$723,000. These include obligations on various short and long term bank loans, accounts payable to suppliers, payments due for employees' salaries and benefits, and taxes. Virtually all bank loans are secured by the personal guarantees of Messrs. Shall and Wooddell. Due to a shortage of working capital, Chempace chronically is 15 to 17 days late in paying its debts. (Exs. 6, 22; Tr. 517-518).

34. At the close of the 1996 fiscal year, Chempace had total current assets of \$615,000. These are primarily accounts receivable and inventories. Fixed assets, including primarily the company's building and improvements, vehicles, and equipment, amount to about \$254,000. Along with minor additional assets, Chempace had total assets of \$873,000 on June 30, 1996. Chempace's working capital, the excess of current assets over current liabilities, was \$32,000 at that time. At the close of fiscal year 1997, Chempace's current liabilities of \$723,000 exceeded its current assets of \$704,000, resulting in a deficit of \$19,000 in working capital. (Ex. 6, 22; Tr. 518).

35. Chempace is authorized to issue 125 shares of stock. The treasury has retained 56.25 of those shares, which represents the stock purchased from Jack Stone, the former partner, for \$75,000. The remaining 68.75 shares are outstanding and held by Mr. Shall, with 82%, and Mr. Wooddell, who has 18%. The total stockholders' equity in Chempace, on June 30, 1996, which represents the difference between total assets and total liabilities, was \$238,070. The company paid dividends to its stockholders of \$6875 in fiscal year 1996. It did not pay any dividends in the preceding four years. Chempace had retained earnings of \$307,820 at the close of the fiscal year on June 30, 1996.

#### Discussion

The accelerated decision in this case has already established that Chempace sold unregistered or misbranded pesticides on 98 occasions, as alleged in the Complaint, and produced pesticides without an EPA establishment number. The only issue remaining is the appropriate amount to assess against Respondent for a civil penalty. The Complainant seeks assessment of a penalty of \$200,000. The Respondent does not specify an amount it believes is appropriate, but argues that the amount of the penalty should be much smaller.

FIFRA §14(a)(1), 7 U.S.C. §1361(a)(1), provides that the Administrator of the EPA may assess a civil penalty of up to \$5000 against distributors of pesticides for each violation of FIFRA. The Act further provides that "in determining the amount of the penalty, the Administrator shall consider the appropriateness of such penalty to the size of the business of the person charged, the effect on the person's ability to continue in business, and the gravity of the violation." FIFRA §14(a)(4), 7 U.S.C. §1361(a)(4).

The EPA's Offices of Compliance Monitoring and Pesticides and Toxic Substances have promulgated the Enforcement Response Policy for FIFRA, dated July 2, 1990 (the "ERP," Ex. 17). The ERP is designed to be applied by the EPA's Regional Offices and other enforcement branches to "provide fair and equitable treatment of the regulated community by ensuring that similar enforcement responses and comparable penalty assessments will be made for comparable violations." (Ex. 17, p. 1).

The EPA Rules of Practice require the ALJ to consider such civil penalty guidelines as the FIFRA ERP, and to state specific reasons for deviating from the amount of the civil 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.*, 6 E.A.D. 184, 189 (EAB, TSCA Appeal No. 94-2, September 27, 1995).

The ERP sets forth a matrix in which various determinations that relate to the statutory penalty factors are assigned values for each violation. These include consideration of the size of the respondent's business, the toxicity of the subject pesticides, the risk of human and environmental harm, the respondent's compliance history and culpability. The Region followed the ERP's calculation process in determining its proposed penalty for these violations. (Ex. 27).

In this case, the Region placed Chempace, with sales exceeding \$1,000,000 per year, in the largest business size category. All violations were assigned a base penalty of \$5000 under the ERP's guidelines. The Region next determined the gravity adjustments to the base penalty amount. The Complainant assigned the lowest values (one point) for pesticide toxicity, risk to human health, and risk to the environment. Respondent received 2 points on the matrix for its compliance history, on the basis of having received one prior violation (Finding of Fact, or "FF" #12). The Region then assigned Chempace the maximum value of 4 points for culpability, representing a determination that all the violations were knowing or wilful. The total of 9 points for each violation, leads to no adjustment of the \$5000 base penalty for all 99 violations according to the ERP's Table 3 (Ex. 17, p. C-1).

Thus, assuming each unlawful sale of a pesticide constitutes a separate violation, Respondent is subject to a maximum penalty of \$495,000. In the Complaint, however, the Respondent reduced the proposed penalty to \$200,000 on the basis of its evaluation of Respondent's ability to pay a penalty of this magnitude and remain in business.<sup>(5)</sup> The hearing focused mainly on the issue of ability to pay, and secondarily, on the issues of Respondent's culpability and other factors affecting the gravity of the violations. This decision assesses a reduced penalty based on

the primarily on the effect of the proposed penalty on Chempace's ability to remain in business. In the interest of completeness, however, all issues will be discussed below.

#### Chempace's Culpability

Chempace contends that its principals, Mr. Shall and Mr. Wooddell, were unaware in 1992 and 1993 that the company was continuing to sell unregistered and misbranded pesticides, and was producing pesticides, despite the cancellation of its pesticide registrations and establishment number. The Region argues that, as indicated in its penalty calculation, these violations were knowing and wilful.

Under the ERP's guidelines, if the violations are determined to have resulted from negligence, their total gravity value would be reduced to 7 points. (Ex. 17, p. B-2). This would in turn result in a 10% reduction from the base penalty amount for 98 of the violations, to \$4500 each. (ERP, Table 3; Ex. 17, p. C-1). This change would then result in a total calculated penalty of \$446,000 for all 99 violations. Since the Region is seeking a penalty of only \$200,000, any 10% reduction for lack of wilfulness would seem to have little practical effect on the amount ultimately assessed, at least under the ERP's guidelines. However, the ALJ is not bound by the ERP. In addition, the conflicting evidence concerning Respondent's culpability will be discussed to provide a factual context for Chempace's violations.

In light of all the circumstances, it is difficult to believe Chempace's assertion that its principals, Mr. Shall and Mr. Wooddell, were completely unaware that the company was unlawfully producing and selling pesticides in 1992 to 1993. Even if they were actually unaware of these violations, their degree of negligence in failing to oversee FIFRA compliance was so high as to amount to wilfulness. These men are savvy, successful businessmen. They founded and sustained Chempace through their sales and business skills, with herculean efforts during the company's period of financial crisis. One does not generally run a successful business without being aware of what is going on in the office and the warehouse, even if one is on the road much of the time.

The unlawful sales began within five months of the Respondent's execution of a Consent Agreement in which it certified it was no longer producing pesticides, and within three months of the EPA's notice of cancellation of its establishment number. Respondents admitted they failed to train or instruct their employees to ensure that canceled pesticides would no longer be produced in the warehouse. This omission alone may be considered wilfulness even if Mr. Shall and Mr. Wooddell did not actually know of such production and distribution. Although Chempace was having trouble retaining a competent warehouse manager, that does not excuse the officers from not even attempting to instruct that person about canceled pesticide products. How difficult would it have been to provide the warehouse and office personnel with a list of pesticides that were now prohibited from being produced and sold?

In light of the finding of wilfulness in Chempace's failure to supervise its production of canceled pesticides, it is not necessary to completely resolve all the conflicting evidence concerning Mr. Shall's and Mr. Wooddell's actual contemporaneous knowledge of the violations. Nevertheless, to Mr. Wooddell's credit, he did not try to conceal the pesticides or records from the Ohio inspector, Mr. Hofelich. Mr. Hofelich confirmed that Mr. Wooddell was fully cooperative during the inspection, although, after consulting with his attorney, he stopped answering questions, at one point, as was his right. It is not clear from the record whether Mr. Wooddell admitted that Chempace had been producing pesticides only after being shown the evidence by the inspector. (See FF #15). The sales of canceled or misbranded pesticides only represented a small fraction of the company's receipts during this period, but the total sales amount of \$35,000 is not insubstantial.

The record as a whole points to a "see-no-evil, hear-no-evil" type of scenario. If Mr. Shall and Mr. Wooddell did not actually know of the sales of canceled and misbranded pesticides, they certainly should have known. Regardless of their knowledge, their failure to take any action to prevent these violations constitutes an omission that amounts to wilfulness, rather than mere negligence. Therefore, for the purpose of weighing the gravity of the violations at issue in this proceeding, the Respondent's level of culpability is deemed knowing and wilful.

#### Other Gravity Considerations

The Respondent has argued that the gravity of these violations should not be considered great because Chempace did not realize much income from these pesticide sales. Related to that point, Respondent argues that the large number of small sales results in an exaggerated penalty amount. Chempace also argues that its compliance history should not be considered an aggravating factor.

#### Independently Assessable Charges

FIFRA §12(a)(1) provides that "it shall be unlawful to distribute or sell to any person . . . (A) any pesticide that is not registered . . . " or "(E) any pesticide which is adulterated or misbranded." FIFRA §14(a)(1) provides for assessment of a civil penalty against dealers or distributors of "not more than \$5000 for each offense." For these types of offenses, each act of sale or distribution, as provided in the ERP, constitutes an independently assessable charge. (See Ex. 17, p. 25).

Nevertheless, the Region or the ALJ has discretion to reduce the number of counts or propose to assess a lower penalty where circumstances concerning the overall gravity of the violations so warrant.<sup>(6)</sup> In this case, it could be argued that the selling of unregistered pesticides (Counts I-LV) are graver violations than the selling of misbranded pesticides (Counts LVI-XCVIII). The harm to the regulatory program would appear to be greater in the former case than in the latter, where Chempace merely relabeled or repackaged another company's registered pesticide. The distribution of a large shipment of unregistered or misbranded pesticides could certainly be considered more serious than the distribution of a small quantity of such pesticides. It could even more forcefully be argued that Chempace's production of six unregistered and misbranded pesticides over an extended period, which enabled the other 98 violations, is a much more serious offense than any single act of sale or distribution. Yet the penalty for Count XCIX is only calculated to assess the same \$5000 penalty as the other individual sales of unregistered or misbranded pesticides.<sup>(7)</sup>

The true gravity of Chempace's violations, however, also stems from its extended pattern of engaging in these illegal sales and production activities. Although many of the individual sales were small, the harm to the EPA's pesticides regulatory program is considerable when a company sells and produces multiple unregistered and misbranded pesticides for over a year. The agency would have no valid data on these transactions. The EPA and the State of Ohio would be hampered in their ability to take appropriate action if any environmental or human health problems arose from Chempace's activities.

In any event, in view of the reduction in the penalty based on the Respondent's ability to pay, it is unnecessary to depart from the ERP's guidelines in assessing separate charges, or further weigh the gravity of the violations. The amount assessed is substantial and adequately accounts for the serious nature of

Chempace's violations.

#### Economic Benefit

The total amount realized by Respondent from its unlawful sales, \$35,000, should be considered a minimum starting point in considering an appropriate penalty. <sup>(8)</sup> (FF #25). Chempace also saved \$6500 in annual pesticide registration fees by not registering the three pesticides it produced and sold. (FF #24). The penalty assessed by this decision sufficiently exceeds the total of these amounts to fully recover the economic benefit Chempace gained by these violations.

#### Compliance History

Chempace committed one prior violation of FIFRA, failing to file an annual production report, that was memorialized by a Consent Agreement and Consent Order on January 15, 1992. (FF ##11-12). The Respondent argues that, under the FIFRA ERP, this prior violation should have been resolved with only a notice of warning. Then it would not be considered a prior violation that could have the effect of increasing the gravity of the current violation, under the ERP. (See the ERP, Ex. 17, pp. 5, B-3). In the penalty calculation here, the prior violation was cited to raise the gravity adjustment value for each violation by two points. (Ex. 17, p. B-2; Ex. 27).

It would be unduly speculative in this proceeding to attempt to determine if EPA should only have issued a notice of warning to Chempace for the earlier violation. The Region has considerable discretion in choosing its enforcement response. The notice of warning is intended to be used only for the most minor violations. At this point the record of the prior proceeding must speak for itself. It would not be practical to revisit that enforcement action in this proceeding.

In addition, the prior violation resulted in an explicit representation by Chempace that it was no longer producing pesticides, and in the cancellation of its establishment number. Only months later, Chempace was illegally again producing pesticides. Regardless of the ERP's penalty calculation, the prior violation is significant here in demonstrating Chempace's knowledge of the requirements and its culpability. Also, even if the prior violation is not considered in the ERP calculation, it only results in a 10% reduction of the penalty. This is superseded by the reduction assessed by this decision based on the effect on the Respondent's ability to continue in business.

#### Ability to Pay

In determining the appropriateness of the amount of a civil penalty, the Administrator is required to consider, in addition to the gravity of the violation, "the size of the business of the person charged" and "the effect on the person's ability to continue in business." FIFRA §14(a)(4), 7 U.S.C. §1361(a)(4). The Region bears the burden of proof as to the appropriateness of the penalty in light of these statutory factors. *In re New Waterbury, Ltd.*, 5 EAD 529, 538 (TSCA Appeal No. 93-2; EAB, Oct. 20, 1994). Both parties presented substantial expert evidence on the size of Chempace's business, and the effect of the proposed penalty on the company's ability to continue in business. The preponderance of that evidence demonstrates that a penalty in the amount of \$200,000 would have a significant adverse effect on the Respondent's ability to continue in business. Therefore, the penalty will be assessed in accordance with a guideline in the FIFRA ERP -- at 4% of the Respondent's average gross income. (ERP, Ex. 17, p. 23).

The Complainant misconstrues the respective burdens of proof borne by each party with respect to the this issue. Both parties have met their initial burden of going forward with substantive evidence on the issue of Respondent's ability to pay. However, the Complainant always bears the ultimate burden of proof or persuasion that its proposed penalty is appropriate. The EPA Rules of Practice provide that:

The complainant has the burden of going forward with and of proving that the violation occurred as set forth in the complaint and that the proposed civil penalty . . . is appropriate. . . . Each matter of controversy shall be determined by the Presiding Officer upon a preponderance of the evidence.

40 CFR §22.24 (See also *New Waterbury*, *supra*, 5 EAD 537.).

It is not clear what burden under *New Waterbury* the Complainant is referring to in its brief as not having been sustained by the Respondent.<sup>(9)</sup> The Respondent met its burden of going forward by submitting ample specific evidence to show that the proposed penalty calculation was inappropriate with respect to its effect on Chempace's ability to continue in business. The Region may certainly argue that the testimony and evidence that it submitted on this issue should outweigh that of the Respondent. But resolution of the penalty issue at this point turns only on whether, based on the preponderance of the evidence, the Region carried *its* ultimate burden of proof.

The financial evidence in the record, and the testimony of Chempace's accountant, Mr. Bernstein, show that a penalty of \$200,000 would have a significant adverse effect on Respondent's ability to continue in business. Essentially, Mr. Bernstein showed that funds of that magnitude are simply not available without the business having to liquidate assets such as inventory or equipment that it needs to continue in business.<sup>(10)</sup> The evidence also showed that it was unlikely that Chempace could obtain a loan to pay a penalty of this magnitude. Chempace is already heavily indebted and does not have sufficient cash flow currently to pay its debts on time. Any loan would require the personal guarantees of Mr. Shall and Mr. Wooddell, who have already guaranteed the company's current outstanding debt.

The Region presented a written analysis of Chempace's ability to pay and testimony by Charlotte Resseguie, an accountant and financial analyst with the EPA's National Enforcement Investigations Center. Ms. Resseguie relied primarily on Chempace's corporate tax returns for fiscal years ending June 30, 1991 to 1996 (Exs. 7-12). Although Ms. Resseguie and the Region complained that Respondent did not disclose several additional documents the Region had requested, the equivalent information was disclosed in Chempace's detailed financial statements (Exs. 1-6). Any gaps were filled in by Mr. Bernstein's testimony. Although the financial statements were unaudited and prepared by Chempace's accountant, Mr. Bernstein, who also sits on the company's Board of Directors, there is no basis to question their accuracy. They were properly prepared for the board as part of Chempace's annual reports, according to generally accepted accounting principles. The figures in the statements were corroborated by the tax returns and other evidence in the record.

The Region's argument that the Respondent could pay a civil penalty of \$200,000 is based on wishful thinking. Complainant cites several potential sources of funds for payment of such a penalty, without fully taking into account business realities. For example, the Region claims that Messrs. Shall and Wooddell could defer or divert part of their compensation in order to pay the penalty. However, as indicated by the history of the company and testimony of Mr. Bernstein, the services of these two individuals comprise Chempace's heart and soul. If either were to leave, the company could likely not survive. Mr. Bernstein's testimony also

showed that their compensation was not excessive when viewed historically and when proper comparisons are made to the statistics for similarly sized specialty chemical companies. The Region thus failed to show that a diversion of officers' compensation could succeed at a level to pay a \$200,000 penalty without having a significant adverse effect on Chempace's ability to remain in business.

The financial records also indicate that Chempace would have difficulty obtaining a loan in order to pay a penalty of \$200,000. The company is already heavily indebted with obligations personally guaranteed by Mr. Shall and Mr. Wooddell. Chempace is already chronically late in meeting its current obligations. At the close of the fiscal year 1997, Chempace's current liabilities exceeded its current assets. In addition, as Mr. Bernstein testified, the company does not have excess assets that it could sell without having a significant effect on its ability to continue in business.

This does not mean that Chempace cannot pay any penalty, or, indeed, a substantial penalty. Chempace did not offer evidence on a proposed specific alternate smaller penalty amount that it could pay. Respondent did, however, show that it could not pay as much as \$200,000. In the absence of any more specific evidence on the amount it could pay, it is appropriate to rely on the ERP's guideline of 4% of average gross income. The ERP states that "EPA will generally not collect a total civil penalty which exceeds a violator's ability to pay." (ERP, Ex. 17, p. 23). The average gross income is determined with reference to the "current year and the prior three years." (*Id.*). The use of this guideline is appropriate where the large number of violations would otherwise result in assessment of a civil penalty that exceeds a violator's ability to pay or would have a significant adverse effect on the violator's ability to continue in business.

A penalty based on the ERP's guideline of 4% of average gross income still results in a civil penalty that is nearly half of the proposed penalty close to \$100,000. This is still a significant expense for the Respondent and an appropriate amount as well in light of the Respondents' culpability, economic benefit, and other factors affecting the gravity of the violations.

The parties differ over the proper 4-year period for the purpose of calculating the average gross income under the ERP's guideline. The Region contends that the period should be the most recent, and further argues that the Respondent did not supply its most current financial information at the hearing. Chempace contends that the appropriate time frame should end at the time of the filing of the Complaint.

The better view is that the most recent available financial information should be used in calculating the penalty. The statute speaks in terms of the respondent's ability to continue in business. That logically makes the most sense at the time the penalty is actually assessed, rather than when the violations were committed or the complaint was filed. Chempace has remained in business up to now, and the prospective resolution of this proceeding by the assessment of a penalty at this time is what we must be concerned with. There is no reason that a company's ability to pay a penalty cannot be reassessed to some degree during the hearing process, as new evidence comes to light. Using the most recent financial information would protect companies that have had a decline in earnings since the violations, as easily as it could increase the potential liability for growing companies.

In this case, Chempace furnished five years of financial data that was current at the time of the prehearing exchange, extending to June 30, 1996. (Exs. 1-12). This was supplemented by a Dun & Bradstreet Report providing information, including gross sales, for the fiscal year ended June 30, 1997. This information is more than sufficient, and sufficiently current, for the purpose of assessing the Respondent's ability to pay a penalty. The hearing took place in April 1998. The data extends to the last completed fiscal year before the hearing. The financial evidence in the record, supplemented by Mr. Bernstein's testimony, was more than sufficient for the

Respondent to meet its burden of going forward with specific evidence concerning its ability to pay the proposed penalty.

The Region also argues that the Respondent must prove that it could also not pay the proposed penalty in the form of installment payments. As discussed above, this formulation inappropriately shifts the ultimate burden of persuasion to the Respondent. In addition, as the Region notes, the preferred means of payment is a single lump sum. The ALJ has discretion whether or not to require installment payments. In this case, the lump sum penalty assessed by this decision, in accord with the ERP guidelines, is found appropriate in all the circumstances.

Respondent's gross income for the current year at the time of the hearing, the fiscal year ending June 30, 1997, was \$2,900,148. For the three preceding years, ending in June of 1994, 1995, and 1996, Chempace's gross income was, respectively: \$1,758,631; \$2,220,239; and \$2,340,324. The average gross income for those four years is \$2,304,836. Four percent of that amount is \$92,193.

In several cases, the EAB has applied the 4% of average gross income guideline for civil penalties in FIFRA and TSCA cases, or has assessed a lower penalty, based on the respondent's demonstrated inability to pay that much. <sup>(11)</sup> No precedent has been found, however, for assessment of a civil penalty that exceeds the 4% guideline at all, let alone doubles or quadruples it as the Region seeks here. A penalty of that magnitude is simply out of proportion to the gravity of these violations, as well as to the size of Respondent's business. The Region's demand for a penalty of that size is not justified in the circumstances as revealed by the record in this matter.

Therefore, the civil penalty assessed for Chempace's violations of FIFRA in this case will be \$92,193. This is an amount that is sufficient to provide a substantial deterrent, and appropriately reflects the gravity of the violations, the size of Respondent's business, and the effect of the penalty on the Respondent's ability to continue in business.

#### Conclusions of Law

1. The Respondent, Chempace Corporation, as found in the Order Granting Partial Accelerated Decision, committed the violations alleged in the Complaint of selling unregistered and canceled pesticides, selling misbranded pesticides, and producing pesticides in an unregistered establishment. These comprise, respectively, 55 violations of FIFRA §12(a)(1)(A), 7 U.S.C. §136j(a)(1)(A); 43 violations of FIFRA §12(a)(1)(E); 7 U.S.C. §136j(a)(1)(E); and one violation of FIFRA §7(a), 7 U.S.C. §136e(a).

2. An appropriate total civil penalty for these violations, pursuant to FIFRA §14(a)(4), 7 U.S.C. §136l(a)(4), is \$92,193.

#### Order

1. The Respondent, Chempace Corporation, is assessed a civil penalty of \$92,193.
2. Payment of the full amount of this civil penalty must be made within 60 days of service of this order by submitting a certified or cashier's check in the above amount, payable to the Treasurer, United States of America, and mailed to: EPA - Region 5, P.O. Box 70753, Chicago, Illinois 60673. A transmittal letter identifying

the subject case and docket number, and Respondent's name and address, must accompany the check. Respondent may be assessed interest on the civil penalty if it is not paid within the prescribed period.

Appeal Rights

Pursuant to 40 CFR §22.27(c) and §22.30, this Initial Decision shall become the final order of the Agency, unless an appeal is filed with the Environmental Appeals Board within 20 days of service of this order, or the Board elects to review this decision *sua sponte*.

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Andrew S. Pearlstein  
Administrative Law Judge

Dated: March 25, 1999  
Washington, D.C.

1. In its post-hearing brief, the Region has argued that Chempace should be assessed a civil penalty of \$495,000, which was the amount calculated before applying a reduction based on an assessment of Respondent's ability to pay. The Region has not, however, moved to amend the Complaint to seek the higher penalty. Therefore, the Region is bound by the \$200,000 amount sought in the Complaint. See 40 CFR §22.14.
2. This includes one exhibit received after the hearing on Respondent's motion.
3. During this period, Chempace also made bulk sales of Complete in 55-gallon drums. These sales, without repackaging or relabeling of the pesticide, did not constitute violations of FIFRA. (Ex. 13, pp. 128-137).
4. There are no invoices or other evidence in the record of Chempace's sales of these unregistered and misbranded pesticides from approximately mid-1993 until the date of the inspection in May 1994. Chempace also apparently produced substantially more Trigger, Uni-Quat 14, and GLY than the total amount that was sold, according to the invoices, plus the amount remaining in inventory on the date of the inspection. These discrepancies remain unexplained on the record. There is no indication that Chempace withheld any documents or denied any access to the facility during the inspection. Therefore, it would be unduly speculative to draw any inferences from the discrepancies between the amounts produced and sold.
5. As seen above in note 1, the Region in its brief argues that the Respondent should be assessed a penalty of \$495,000. The Region never moved to amend its complaint, however, to raise the proposed penalty sought.
6. See, e.g., *In re Avril, Inc.*, Docket No. IF&R III-441-C (ALJ, March 24, 1997) (Multiple sales combined into single counts in Complaint, and penalty further reduced based on gravity of violations).
7. The Region could have charged the Respondent with six violations of producing

pesticides in an unregistered establishment - one for each of the six separate unregistered or misbranded pesticides that Chempac produced and then sold. (See ERP, Ex. 17, p. 25).

8. The record does not reflect the profit margin or the cost to Chempac in producing and selling the canceled and misbranded pesticides.

9. See, e.g., Complainant's Post-Hearing Brief, pp. 55 and 60.

10. The EAB has stated, under a similar penalty statute, the Toxic Substances Control Act §16(a)(2)(B), that a penalty that forces a respondent into bankruptcy is not "theoretically" precluded, where the penalty is justified under the totality of the circumstances. *New Waterbury, supra*, 5 E.A.D. at 540. However, the Region does not argue that proposition in this case. The ALJ concurs that these violations, while serious, were not so egregious as to warrant forcing Chempac into bankruptcy with the real risk that it could then not continue in business.

11. See, e.g., *New Waterbury, supra*, 5 E.A.D. at 547; *In re James C. Lin and Lin Cubing, Inc.*, 5 E.A.D. 595, 601 (EAB, December 6, 1994); and *In re Birnbaum Scrap Yard*, 5 E.A.D. 120, 125 (EAB, March 7, 1994).

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