

Section 2(c)(1) and 2(Q)(1)(G) are as follows:

"2(c) Adulterated.--The term 'adulterated' applies to any pesticide if:

"(1) its strength or purity falls below the professed standard of quality as expressed on its labeling under which it is sold."

"2(q) Misbranded.--

"(1) A pesticide is misbranded if--

"(G) the label does not contain a warning or caution statement which may be necessary and if complied with, together with any requirements imposed under section 136a(d) of this title, is adequate to protect health and the environment."

An Adjudicatory Hearing was convened on October 6, 1977 in Sioux City, Iowa, pursuant to a request dated July 20, 1977, by Respondent's President, Arlin N. Pottebaum, who appeared for Respondent at said Hearing.

It is agreed by the Parties that the only issue to be decided in this cause is the appropriateness of the civil penalty proposed. That Respondent's gross annual sales place it in Size of Business Category No. 3 under the Guidelines for the Assessment of Civil Penalties, is uncontroverted, and it is agreed to by the parties that said product will be partially effective; i.e., it will be effective for use on animals, but not totally effective for use on buildings; and that Respondent made no sales of said product after receipt of a Stop Sale Order issued by Complainant regarding this product.

Respondent's contention is that the \$1,540.00 civil penalty proposed is "gravely excessive" for it because of its financial condition. It presented its Financial Statement dated December 31, 1976 (Silak Exhibit No. 1) which shows a deficit net worth position. This can be attributed to a significant degree to a major fire in May 1976 and another fire on February 7, 1977 (Tr. 33).

Respondent does not contend that it will not be able to continue in business if the penalty proposed were assessed (Tr 33) and it is now "starting to make money". It does show considerable financial stress being now experienced with accounts payable nearing \$200,000 (Silak Exhibit No. 2) and with annual sales barely exceeding \$500,000.

40 CFR 168.46 provides that the Administrative Law Judge (ALJ) in determining the dollar amount of the civil penalty appropriate to be assessed, shall consider the elements set forth in Section 168.60(b); it further provides that the ALJ may consult the Guidelines for the Assessment of Civil Penalties (39 FR 27711), but may at his discretion, increase or decrease the assessed penalty from the amount proposed to be assessed in the Complaint.

40 CFR 168.60(b) states, in pertinent part:

"(b) Evaluation of Civil Penalty.

"(1) In evaluating...the Regional Administrator must consider (i) the gravity of the violation, (ii) the size of respondent's business, and (iii) the effect of such penalty on respondent's ability to continue in business.

"(2) In evaluating the gravity of the violation,... shall also consider (i) respondent's history of compliance with the Act,...and (ii) any evidence of good faith or lack thereof."

On consideration of all factors and, in particular, Respondent's good record in complying with regulations in the past and its cooperation in this instance, I find that an appropriate civil penalty to be assessed is in the sum of \$900.00, and it is the assessment of that amount that is hereinafter recommended.

This Initial Decision and the following proposed Final Order assessing a civil penalty shall become the Final Order of the Regional

Administrator unless appealed or reviewed by the Regional Administrator as provided in 40 CFR 168.46(c):

FINAL ORDER

Pursuant to Section 14(a)(1) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended [7 USC 1361(a)(1)], a civil penalty of \$900.00 is assessed against Respondent Silak Company, for violations of said Act which have been established on the basis of Complaint issued herein, and Respondent is ordered to pay same by Cashier's or Certified Check, payable to the United States Treasury within sixty (60) days of the receipt of this Order."

This Initial Decision is signed and filed this 29th day of November 1977, at Kansas City, Missouri.



ALJ

ATTACHMENT

Parallel Citations to Sections of FIFRA
in the Statutes at Large and in Title 7, United States Code,
Supp. V (1975)

<u>Statutes at Large</u>	<u>7 U.S.C.</u>	<u>Statutes at Large</u>	<u>7 U.S.C.</u>
Section 2	Section 136	Section 15	Section 136m
3	136a	16	136n
4	136b	17	136o
5	136c	18	136p
6	136d	19	136q
7	136e	20	136r
8	136f	21	136s
9	136g	22	136t
10	136h	23	136u
11	136i	24	136v
12	136j	25	136w
13	136k	26	136x
14	136 <u>l</u>	27	136y