UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Sultan Chemists, Inc.	)	Docket No. FIFRA-95-H-05
	)	
Respondent	)	

INITIAL DECISION

By: Charles E. Bullock
Administrative Law Judge

Issued: August 4, 1999
Washington, D.C.

Appearances

For Complainant: Carl Eichenwald, Esquire
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INTRODUCTION

Complainant (Jesse Baskerville, Director, Toxics and Pesticides Enforcement Division, Office of Regulatory Enforcement, Office of Enforcement and Compliance Assurance, United States Environmental Protection Agency) filed the complaint in this proceeding on February 15, 1995, under authority of section 12(a)(1)(A) of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. § 136(j)(1)(A), and requested $445,000 in penalties. On brief, Complainant has reduced the proposed penalty amount to $197,421.(1) Sultan Chemists, Inc. (Respondent or Sultan) argues that no penalty should be assessed.(2) For the reasons set forth below, a penalty amount of $175,000 is prescribed.(3)

BACKGROUND

A. Liability

1. General

The following facts are uncontroverted. Respondent is a corporation located at 85 West Forest Avenue, Englewood, New Jersey 076321. Respondent manufactures and distributes dental materials and equipment. Transcript (Tr.) 185. Respondent is a "person" as that term is defined by section 2(s)of FIFRA, 7 U.S.C. § 136(s), and is a "producer" of pesticides as that term is defined by section 2(w) of FIFRA, 7 U.S.C. § 136(w). Respondent is a "registrant" as that term is defined by section 2(y) of FIFRA, 7 U.S.C. § 136(y).

During two lawfully conducted inspections of Respondent in May and June of 1993, EPA collected sales receipts and inventory reports which show that Respondent distributed or sold four unregistered products.(4) Tr. 9; Complainant's Exhibit (C.Ex.)8; C.Ex. 9. Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), provides that it shall be unlawful for any person in any state to distribute or sell to any person any pesticide that is not registered under section 3 of FIFRA.

While Respondent does not challenge the fact that the four products were not registered, Respondent does assert that Complainant has failed to prove the "distribution or sale" element of certain counts of the Complaint. Complainant asserts that it has proved all elements of the "distribution or sale" component.

In general, Complainant has met its burden of proof regarding this matter. Counts 1 through 36 and 89 alleged distribution or sale of the Towelettes. The distributions or sales in Counts 1 through 35 were established by Respondent's business records. C.Ex. 15. The distribution or sale in Count 36 was established by the inspection which found that the Towelettes were (1) in their finished package, (2) released for shipment and (3) stored with other pesticides that were also finished and

released for shipment. C.Ex. 3 at 1; C.Ex. 5 at 1; C.Ex. 7 at 1-2; C.Ex. 8 at 1-2. See also FIFRA section 2(gg), 7 U.S.C. § 136(gg); 40 C.F.R. § 152.3(j).

Counts 37 through 86 alleged distribution or sale of the WipeOut Spray. The distributions or sales in Counts 37-85 were established by Respondent's business records. C.Ex. 15. The distribution or sale in Count 86 was established by the inspection which found the Spray, which was in its finished package and released for shipment, stored with other pesticides that were finished and released for shipment. C.Ex. 3 at 1; C.Ex. 5 at 2; C.Ex. 7 at 1-2; C.Ex. 8 at 1-2. See also FIFRA section 2(gg), 7 U.S.C. § 136(gg); 40 C.F.R. § 152.3(j).

Count 87 of the Complaint alleges distribution or sale of the Wand. The distribution or sale was established by the inspection which found the Wand in its finished package released for shipment stored with other pesticides that were also finished and released for shipment. C.Ex. 3 at 1; C.Ex. 5 at 4; C.Ex.7 at 1-2; C.Ex. 8 at 1-2. *See also* FIFRA § 2(gg), 7 U.S.C. § 136(gg); 40 C.F.R. § 152.3(j).

Count 88 of the Complaint alleges distribution or sale of the QuicKit. The distribution or sale was established by the inspection which found the QuicKit in its finished package released for shipment stored with other pesticides that were also finished and released for shipment. C.Ex. 3 at 1; C.Ex. 5 at 3; C.Ex. 7 at 1; C.Ex. 8 at 1-2. *See also* FIFRA 2(gg), 7 U.S.C. § 136(gg); 40 C.F.R. § 152.3(j).

2. Miscellaneous Liability Issues

It is not completely clear whether Respondent wanted the following arguments considered as arguments to limit its liability, its penalty amount, or both. To ensure a full consideration of Respondent's case, these issues will be discussed as liability issues below, and as penalty issues later in this Initial Decision.

Respondent argues that it was merely holding, and not shipping, the unregistered pesticides which are the subject of Counts 86-89. Respondent's Initial Post-Hearing Brief (R. In. Br.) at 16 citing to Tr. 87. Respondent states that "after receiving notice of the problem," it did not ship those goods, and instead held them for EPA's inspection. R. In. Br. at 16. It argues that EPA admitted that this was the proper procedure to follow. *Id.* citing to Tr. 112-113. Yet, Respondent asserts, Complainant is seeking to penalize Respondent $20,000 for following the proper procedure. Complainant asserts that these products were in their finished packages released for shipment and held with other pesticides that were also in their finished packages and released for shipment.

Complainant's argument is persuasive. The products at issue in Counts 86-89 clearly meet the statutory criteria of FIFRA of being "distributed or sold" in the provision that states that "it shall be unlawful for any person in any State to *distribute or sell* to any person . . . any pesticide that is not registered under section 3 . . ." (Emphasis added.) Section 12(a)(1)(A)of FIFRA, 7 U.S.C. § 136j. Section 2(gg) of FIFRA, 7 U.S.C. § 136(gg), defines, in part, the term to distribute or sell as "to distribute, sell, offer for sale, hold for distribution, hold for sale, hold for shipment, ship, deliver for shipment, release for shipment, or receive and (having so received) deliver or offer to deliver." Distribute or sell is further defined in FIFRA's implementing regulations to also include releasing for shipment to any person in any State. 40 C.F.R. § 152.3(j). As discussed in Section A.1. of this Initial Decision, the record supports this conclusion. This case is clearly distinguishable from *In the matter of E.I. Dupont de Nemours and Co.*, Docket No. FIFRA 95-11, Order Granting Complainant's Motion to Amend, Granting Respondent's Motion for Accelerated Decision and Dismissing Complaint, and Denying Complainant's Motion for Accelerated Decision (January 6, 1997). In that case, although the pesticides had once been distributed or sold, they had been recalled and withdrawn from the market and placed in a sectioned-off part of a warehouse which contained only those recalled products. Further, the pesticides had remained there for a period of time *before* the EPA inspection in that particular case had occurred, and there was no evidence to refute Respondent's

assertion that it had no intent to ever return these pesticides to the marketplace. Accordingly, for these reasons and those set forth in Section A.1. above, this argument by Respondent is rejected as a defense to liability. However, it will be considered further below in the discussion of the penalty issue.

Respondent argues that there should be no liability for Counts 35, 36, 39, 82, 84, and 85 because they relate to sales to Ventura Oral Systems, Inc., "which is located in England, not in the United States." R. In. Br. at 16. (Emphasis in the original.)

Complainant urges rejection of this argument because it is not supported by a citation to the record in this proceeding and has not been mentioned before. Therefore, Complainant asserts that the argument is excludable pursuant to 40 C.F.R. § 22.15(b)(1). Complainant also asserts that even assuming, for purposes of argument, that these sales were in fact made to a foreign country, those sales were in violation of the Act.

Section 12(a)(1) of FIFRA, 7 U.S.C. § 136j(a)(1), speaks in terms of it being "unlawful for any person in any State to distribute or sell to any person . . . any pesticide that is not registered under section 136a of this title . . ." There is an exception to this general rule for sale or distribution of unregistered pesticides to foreign purchasers. FIFRA permits the export sale of unregistered pesticides to a purchaser in a foreign country if the seller obtains a signed statement from the foreign purchaser acknowledging that the pesticide is not registered in the United States and may not be sold in the United States. FIFRA Section 17(a)(2), 7 U.S.C. § 136o(a)(2). Respondent has cited no evidence in the record to show that the provisions of this statute have been satisfied. Accordingly, Respondent's argument is rejected.[(5)]

Respondent also asserts that Counts 25-33 and 74-79 should be dismissed because they deal with shipments of products "to Sultan's salespeople for demonstration purposes only." R. In. Br. at 16. Complainant urges rejection of this argument.

Good cause exists to deny Respondent's request. There is no citation to the record in support of Respondent's argument. Also, as noted earlier in this Initial Decision, the definition of distribution or sale in FIFRA section 2(gg), 7 U.S.C. § 136(gg), includes "to ship." Additionally, as noted earlier in this Initial Decision, the products in these counts were distributed or sold within the meaning of FIFRA. Therefore, Respondent's request for dismissal of Counts 25-43 and 74-79 is denied.

Respondent argues that 18 of the "shipments" making up the counts of the complaint are duplicative (and in one case triplicative), reflecting the same shipment to the same customer on the same day. [(6)] Complainant asserts that Respondent's proposal is "inconsistent with the statute and EPA policy." Complainant's Reply Brief (C. R.Br.) at 13. For the reasons set forth below, Respondent's argument is rejected insofar as it is a defense against liability.

FIFRA Section 12(a)(1)(A) states that "it shall be unlawful for any person in any State to distribute or sell to any person . . . any pesticide that is not registered under section 136a of this title [7 U.S.C. § 136j(1)(A)]. . ." This title makes it an offense to sell anyone an unregistered pesticide. With respect to all of the pairs of Counts listed in Appendix A, with one exception, it is clear that each Count in each pair of Counts is for a different pesticide, even though the delivery is to the same customer. For example, Count 1 relates to a delivery of WipeOut Large Towelettes to Becker Parkin Dental on or about December 14, 1992, while Count 40 relates to a delivery of WipeOut Disinfectant Spray to that same customer on the same day. Complaint at 5 and 20. The last group of Counts deal with deliveries made to Ventura Oral Systems, Inc. on February 27, 1993. Count 36 deals with a delivery of the Towelettes, while Count 39 deals with the delivery of Lot #2G04 of the Spray and Count 85 deals with the delivery of Lot #2A05 of the Spray. Clearly, Count 36 deals with a different pesticide than do Counts 39 and 85. Counts 39 and 85 deal with *two separate lots* of the same pesticide, the Spray. Clearly, Complainant has not charged Respondent more than once for any of the Counts listed

in Appendix A. Accordingly, Respondent's argument as it relates to the liability issue is rejected.

3. The Guaranty Issue

1. Positions of the Parties

Respondent argues that, notwithstanding any of the issues discussed above, Respondent should not be held liable in this proceeding because it received a written guaranty from Health Care Products, Inc. (HCP) and Meditox, Inc. (Meditox) that all of the Product Line had been properly registered with the EPA. HCP was the manufacturer of the Product Line and Meditox was HCP's principal distributor of the Product Line in the United States. The Product Line that is the subject of this Complaint consists of four HCP-manufactured items, the Towelettes, WipeOut Cold Sterilizing Solution, the Spray and the QuicKit (Products), all of which contain a glutaraldehyde solution (Solution).

Respondent cites 7 U.S.C. § 136j(b)(1) (the Guaranty Statute) in FIFRA as support for the argument that it had received a guaranty from the manufacturer (HCP) of the Product Line and therefore was not liable for selling unregistered pesticides, as alleged by Complainant in this proceeding. While Respondent admits that the specific language in the contract (C.Ex. 21 at 7, Section 1.04(a)) speaks in terms of a guarantee by HCP (and Meditox) that the Solution in all respects meets the EPA's specifications for a sterilant, Respondent argues that the Solution should be read interchangeably with the term Products because all of the Products contain the Solution and it was the intent of all of the parties, *i.e. Respondent, HCP and Meditox,* that the guaranty in the contract cover all of the Products at issue in this proceeding, thus obviating any liability by Respondent in this proceeding. As support for this argument, Respondent offers the testimony of its attorney, Gabriel Kaszovitz, and Paul Seid, its president and sole shareholder, who were parties to the negotiations leading to the execution of the contract.[(7)] That testimony was subject to a motion to strike by Complainant, at least insofar as that testimony relates to the issue of liability.

Complainant asserts that the contract clearly distinguishes between the term Product, and the term Solution, to which the guaranty in Section 1.04(a) of the contract applies. Therefore, it is argued, the guaranty does not apply to the four items in the Product Line that are the subject of this Complaint. Complainant asserts that Respondent has not supported the use of the testimony of Mr. Kaszovitz and Mr. Seid as to the meaning of the contract, at least insofar as the issue of liability is concerned. Therefore, Complainant argues that the guaranty language is not a defense to Respondent's liability in this proceeding. For the reasons set forth below, Respondent's proposed use of the guaranty language in the contract as a defense to its *liability* in this proceeding is rejected.[(8)]

2. Discussion

The Guaranty Statute in FIFRA states in pertinent part as follows:

> [A]ny person who establishes a guaranty signed by, and containing the address of, the registrant or person residing in the United States from whom the person purchased or received in good faith the pesticide in the same unbroken package, to the effect that the pesticide was lawfully registered at the time of sale and delivery to the person, and that it complies with the other requirements of this subchapter, and in such case the guarantor shall be subject to the penalties which would otherwise attach to the person holding the guaranty under the provisions of the subchapter . . .

FIFRA § 12(b)(1), 7 U.S.C. § 136j(b)(1).

The question to be resolved is whether or not the contract between Respondent and the manufacturer, HCP, (and Meditox)(C.Ex. 21) provides a guaranty by HCP ". . . to the effect that the . . . [four items at issue here were] . . . lawfully registered at the time of sale and delivery to the person, and that . . . [they comply] . . . with the other requirements of the subchapter . . ." such that HCP, and not Respondent, was liable for any violations of these provisions. *Id.* In evaluating the meaning of the contract, both parties agree that section 17(a) of the contract provides that the contract is to be governed by the law of the State of Florida. Furthermore, they agree that the contract is subject to the provisions of the Uniform Commercial Code contained in the Florida Code (the Florida U.C.C.).

Specifically, the Florida U.C.C. governs transactions for "goods." "Goods" are defined in relevant part as:

> all things(including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid . . .

Fla. Stat. Ann. § 672.105 (West 1998).

The contract required Respondent to buy pesticide products from HCP and Meditox and to distribute these pesticide products on behalf of the parties to the contract. C.Ex. at 21. The pesticides were movable things at the time of identification to the contract. Therefore, under the Florida U.C.C., the pesticide products were considered "goods." In addition, the Florida U.C.C. governs contracts for the "sale of goods." "Sale of goods" is defined in relevant part as follows:

> In this chapter unless the context otherwise requires "contract" and "agreement" are limited to those relating to the present or future sale of goods. "Contract for sale" includes both a present sale of goods and a contract to sell goods at a future time. A "sale" consists in passing title from seller to buyer for a price...

Fla.Stat.Ann. § 672.106(1)(West 1998).

Since the contract called for Respondent to buy pesticide products at future dates, the contract was for the "sale of goods" under the Florida U.C.C..

Having determined that the contract is subject to the Florida U.C.C., the question now arises as to whether extrinsic evidence can be used to interpret the contract. The Florida U.C.C. provides in pertinent part:

Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing as a final expression of their agreement with respect to such terms as are included therein *may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement* but may be explained or supplemented:

> (1) By course of dealing or usage of trade (s. 671.205) or by course of performance (s. 672.208); and
>
> (2) By evidence of consistent additional terms unless the court finds the writing to have been intended as a complete and exclusive statement of the agreement.

Fla. Stat. Ann. § 672.202. (Emphasis added.)

The contract provides that:

> MEDITOX and HCP warrant that the licensed PRODUCTS are suitable for any claims made in their labeling. Except MEDITOX and HCP make no Guarantee,

> or Warranty, expressed or implied, of any kind whatsoever respecting the use of the Licensed PRODUCTS except
>
> (i) that the Solution in its sterilant form will not contain more than 0.33 percent (subject to EPA accepted allowances) Glutaraldehyde;
>
> (ii) that the Solution in its high-level disinfectant form will not contain more than 0.165 percent (subject to EPA accepted allowances) Glutaraldehyde;
>
> (iii) that the Solution containing 0.3 percent Glutaraldehyde has been approved by the EPA as a sterilant;
>
> (iv) warranties of merchantability and fitness for a particular use; and
>
> (v) HCP has submitted the Formula to the FDA for a PMA, as in Paragraph 1.04 above provided.[sic] and no person has any authority to extend any other warranty on behalf of MEDITOX and/or HCP.

C.Ex. 21 at 20, section 10.00(f).

Section 1.04(a) of the contract provides that:

> HCP and MEDITOX hereby warrant to the DISTRIBUTOR [Respondent] that the Solution containing not more than 0.3 percent Glutaraldehyde in all respects meets the EPA's specifications for a sterilant, and that such solution containing no more than 0.3 percent Glutaraldehyde has been approved by the EPA as a sterilant.

C.Ex. 21 at 7, section 1.04(a).

Paragraph 10.00(b) of the contract states that:

> MEDITOX and HCP warrant that the U.S. EPA has assigned No. 58994-1, to the Solution, the formulation of which forms the basis for all of the PRODUCTS.

C.Ex. 21 at 19.

Schedule C of the contract states:

SCHEDULE "C"

List of Registrations in All Jurisdictions

> HCP confirms that it has registered its Solution with the local offices of Environmental Protection Agency and/or its state equivalent in each of the states of the United States, excepting Alaska. Said registrations are in addition to HCP's Federal registration with the U.S. Environmental Protection Agency.

C.Ex. 21 at 27.

Schedule "A" of the contract defines the term *Products.* C.Ex.21 at 24. Item (a) is described as:

> Liquid Solution comprised of either:
>
> - 0.3% Glutaraldehyde in STERILANT form andin U.S. Gallons, or
> - 0.15% Glutaraldehyde in high level disinfectant form and in U.S. Gallons, or
> - such lesser percentage Glutaraldehyde concentrations as may be developed from time to time.

Id.

Items (b), (c) and (d) define various types of Towelettes with no reference to the term *Solution*. Items (e) and (f) discuss QuicKits and refills, again with no reference to the term *Solution.* Item (g) defines High level disinfectant spray with no reference to the term *Solution*. Item (h) discusses a product called

Sterilant/High level disinfectant solution concentrate, another variation of the *Solution.* [(9)]

Schedule "A" to the contract makes a distinction between *Products,* which incorporates several items including the Solution, **and** the Solution in various forms in items (a) and (h), all of which are a subset of the term *Products.* C.Ex. 21 at 24. Section 10.00(f) of the contract makes clear what HCP (and Meditox) are promising Respondent insofar as the EPA is concerned: guarantees as to the Solution in its sterilant form [clause (i)] and the Solution in its high-level disinfectant form [clause (ii)]. *Id.* at 20. Section 1.04(a) of the contract expresses a warranty only as to two variants of the Solution and does not mention the other items which comprise the Product Line. *Id.* at 7.

But Respondent argues that section 10.00 of the contract, which asserts that the language to the effect that Meditox and HCP had warranted that EPA had " . . . assigned No. 58994-1 to the Solution, the formulation of which forms the basis for all of the PRODUCTS," demonstrates that the contract clearly equates the term Solution with the term Product. Respondent's argument is not persuasive. The quoted language speaks in terms of assignment of the EPA number to the Solution, not the Products. The fact that the Solution "forms the basis for all of the Products" does not make the Solution *the equivalent of* the Products.

It is also clear that Respondent has not justified the use of extrinsic evidence to support its argument as to liability. Section 17.00(d) states that:

> (i) sets forth the entire understanding between the parties with respect to the subject matter of the Agreement;
>
> (ii) supersedes all previous communications, representations and agreements between the parties with respect to the said subject matter;
>
> (iii) may not be amended except by an instrument in writing signed by all the parties.

Id. at 23.

Thus, extrinsic evidence cannot be introduced pursuant to section 672.202(2) of the Florida U.C.C. which only allows the consideration of " . . . evidence of consistent additional terms unless the court finds the writing to have been intended as a complete and exclusive statement of the agreement." *Fla. Stat. Ann. § 672.202(2).* The above-quoted language from section 17.00(d) of the contract makes clear that the contract is " . . . intended as a complete and exclusive statement of the agreement." *Id. See,* C.Ex. 21 at 23.

However, Respondent argues that the proposed extrinsic evidence can be admitted under section 672.202(1) which provides that evidence can be considered to explain or supplement a contract " . . . by course of dealing or usage of trade (s.671.205)..." *Fla. Stat. Ann. § 672.202(1).* Respondent also asserts that the intent of the parties must be considered by looking at the intent of the parties, the object of the contract, the subject matter of the contract and the surrounding circumstances of the contract.

More specifically, Respondent asserts that during the course of dealings under the contract, the parties established that the contract contained representations that all of the Product Line was properly registered with the EPA. As support for this assertion, Respondent cites witness Paul Seid's testimony, Tr. 198-204, and various writings introduced into evidence (R.Exs. 1,2,3,4,6,7 and 8). Mr. Seid's testimony generally describes Respondent's Exhibits 1-4 and 6-8.

The labels and witness Seid's discussion of the labels do not demonstrate a "course of dealing." Respondent's Exhibits 1 and 2 are apparently proposed labels for the Spray and the Towelettes, respectively. It appears that they are drafts sent by Respondent to HCP, and thus do not represent a guaranty from HCP. Respondent Exhibit 3 is a memorandum from HCP to Sultan discussing the assertion that "EPA has

approved the label," but no label is attached. Respondent Exhibit 4 contains various sheets that are purportedly labels, but the writing on them and the lack of specific explanation of these sheets makes unclear as to whether these are drafts, who wrote on them, or any other clear indication as to their status. Respondent Exhibit 6 is a question and answer about various products, but again contains no clear explanation as to its status. Respondent Exhibits 8 and 9 are similarly ambiguous. Respondent's arguments are rejected.

Where reasonable, the terms "course of dealing" and "express terms of a contract" are to be construed as consistent with each other, but if such a construction is unreasonable " . . . express terms control . . . course of dealing . . ." *Fla. Stat. Ann.* § 671.205(4)[(10)]. The evidence proposed by Respondent discussed above is not specific enough to evidence a clear course of dealing, and, in any event, is not sufficient to contradict or modify the specific contract terms discussed earlier herein limiting the guaranty to the Solution.[(11)]

B. Penalty

1. General

Complainant recommends a penalty of $197,421 based upon its analysis of **(1)** the statutory factors, FIFRA § 14(a)(4), 7 § 136l(a)(4), **(2)** the Enforcement Response Policy For The Federal Insecticide, Fungicide, and Rodenticide Act issued July 2, 1990 (Penalty Policy), and **(3)** the record evidence in this proceeding. Respondent asserts that, based upon the record evidence in this proceeding, the proposed penalty is too high, and that no penalty should be imposed.[(12)] For the reasons set forth below, a penalty of $175,000 is found to be reasonable and appropriate and is adopted.

2. Complainant

Complainant asserts that in order to assess an appropriate penalty, the statutory factors for assessing an appropriate penalty, as expanded upon and interpreted by the Penalty Policy, should be used. It also argues that the arguments set forth by Respondent for a zero penalty, or in the alternative, for a reduced penalty, should be rejected.

Complainant's analysis begins with a determination of gravity, which is said to consist of risk, harm, and culpability. In matters such as this proceeding, Complainant asserts that risk should be given more weight than harm because actual harm is difficult to assess. Using the Penalty Policy, Appendix A, Complainant recommends that this case be treated as a level 2 violation.

For size of business, Complainant recommends treating Respondent as business category I because Respondent's gross revenues exceed $1,000,000 annually. The gravity level and size of business are applied to the FIFRA Civil Penalty Matrix to determine a penalty appropriate for the nature of the violation and the size of business. For Respondent, a FIFRA section 14(a)(1) violator in size of business category I who has committed a gravity level 2 violation, the FIFRA Civil Penalty Matrix indicates a base penalty of $5,000, the statutory maximum.

Next, Complainant determined what adjustments to the base penalty, if any, should be made for the toxicity of the specific pesticide involved, the actual or potential harm to human health or to the environment, and the compliance history and culpability of the violator. In so doing, Complainant used a set of five "Gravity Adjustment Criteria" described in Appendix B of the Penalty Policy. The following values were assigned: Pesticide - 0; Harm to human health - 3; Environmental harm - 3; Compliance history - 0; and Culpability - 2. The sum of the gravity factors is 8. Complaint then referred to Table 3 of the Penalty Policy and determined that a gravity adjustment value of 8 calls for no adjustment of the penalty for each Count

below the statutory maximum of $5,000 per violation.

Using the final criterion, the ability to stay in business, Complainant calculated a four-year average of Respondent's gross revenues which resulted in a figure of $4,935,538. Using the 4% of the four-year average gross sales guideline from the Penalty Policy, Complainant came up with a figure of $197,421 (4% x $4,935,538 = $197,421).(13)

Complainant also argues that it exercised "great restraint" in not charging Respondent with additional violations. Complainant asserts that no reduction in the proposed penalty should be given to Respondent for good faith as that term is used in 40 C.F.R. § 22.35(c)and voluntary disclosure of the violations. Complainant again argues that no reduction is appropriate because of the serious risk posed to public health by Respondent's actions. Complainant also argues that no reduction in penalty should be given for arguments previously considered in the discussion of liability in this Initial Decision. The arguments that Complainant is referring to include the testimony of Mr. Seid and Mr. Kaszovitz that their intent in negotiating the contract with HCP and Meditox was to have the Guaranty from HCP and Meditox cover all of the Product Line; that the products from the appearance of the packages in which they were to be marketed seemed to be properly registered with EPA; and that certain documents, such as Respondent Exhibit 6, and certain clauses in the agreement, such as sections 1.04(a) and 10.00(b), support Respondent's assertion that the entire Product Line is covered by the Guaranty Clause.

Complainant also urges rejection of certain arguments discussed earlier in this Initial Decision concerning the unregistered pesticides in Counts 86-89; sales to Ventura Oral Systems, Ltd. in England; shipments to sales people; and shipment of different pesticides to the same person on the same day. Complainant states that the financial arguments set forth by Respondent against the size of Complainant's proposed penalty are not supported by the evidence.

As indicated earlier, Respondent argues that the Guaranty Clause in the agreement absolves it of all liability. In the alternative, Respondent makes several additional arguments against Complainant's proposed penalty. In general, Respondent argues that Sultan is a small business which had no prior history of violations, which has cooperated fully with EPA, and is being punished in a sense for one small mistake, that of relying upon the written warranties of the manufacturer and primary distributor of the Product Line. Respondent asserts that even Complainant agrees that Respondent did not deliberately break the law. Respondent argues that in a recent year it had only a net income of $27,000, far too little to pay the proposed penalty. Respondent's arguments about the four shipments that were never shipped out; the sales to Ventura in England; the shipments to sales people for demonstration purposes only; and the allegedly duplicative shipments were considered in the section of this Initial Decision on liability, but will be also considered here in the context of the proposed penalty.

Respondent argues that it has been assessed the maximum penalty allowed by law when it is not even alleged to have deliberately violated the law. Respondent states that Complainant has used a minor violation, which occurred in 1995 and resulted in a fine of $3,200, to support its proposal. Respondent states that no recognition was given to the fact that it stopped selling shipments once it knew of the problem with the registration; a procedure that EPA allegedly agreed was proper. Respondent argues that Complainant improperly used packing units in calculating the proposed penalty. Respondent states that the record does not support Complainant's charge that Respondent sold the WipeOut Disinfectant Wand. Respondent asserts that the charge of mislabeling is unsupported as are the allegations that Sultan did not act in good faith and did not voluntarily disclose the violations. Even though the proposed penalty of $197,421 is 55% less than the original amount of $445,000, Respondent still argues that the penalty is unjustified.

3. Discussion

Section 14(a)(1) of FIFRA, 7 U.S.C. § 136l(a)(1), states that a registrant, commercial applicator, wholesaler, dealer, or distributor of pesticides may be assessed a civil penalty of up to $5,000 for each violation of FIFRA. In determining the amount of the penalty, consideration must be given to:

> ". . .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. § 136l(a)(4).

Part 22 of EPA's Regulations, 40 C.F.R. Part 22, directs the Presiding Judge to consider the Agency's Penalty Policy.(14) A Presiding Judge may deviate from the Penalty Policy after considering these guidelines,(15) if the decision to do so is supported by adequate reasoning and evidence in the initial decision. In this case, the Penalty Policy, for the most part, is used as a basis for determining the penalty amount, subject to a deviation therefrom which is discussed below. Accordingly, for the reasons set forth below, the penalty to be assessed shall be $175,000.

Under the Penalty Policy, the determination of the penalty amount is made pursuant to:

> "...a five stage process in consideration of the FIFRA section 14(a)(4) criteria listed below. These steps are : (1) determination of gravity or 'level' of the violation using Appendix A of this ERP [i.e., Penalty Policy]; (2) determination of the size of business category for the violator, found in Table 2 [of the Penalty Policy]; (3) use of the FIFRA civil penalty matrices found in Table 1 to determine the dollar amount associated with the gravity level of violation and the size of business category of the violator; (4) further gravity adjustments to the base penalty in consideration of the specific characteristics of the pesticide involved, the actual or potential harm to human health and/or the environment, the compliance history of the violator, and the culpability of the violator, using the 'Gravity Adjustment Criteria' found in Appendix B [to the Penalty Policy]; and consideration of the effect that payment of the total civil penalty will have on the violator's ability to continue in business, in accordance with the criteria established in this ERP . . . ."

Penalty Policy at 18, C.Ex. 25 at 18.

With the modification set forth later in this Initial Decision, the rationale and methodology proposed by Complainant is adopted. The first step is to determine the intrinsic gravity level of the violation. A value of 2 is assigned to this element. The highest value to be assigned for the highest level of gravity is 4 and for the lowest, 1. Appendix A of the Penalty Policy assigns a level 2 to the sale or distribution of an unregistered pesticide. C.Ex. 25 at Appendix A, page A-1. The second step under the Penalty Policy framework is to determine the size of the business. The record indicates that Respondent had gross revenues of more than $1,000,000 in each year from 1990 to 1993. R.Ex. 5, R.Ex. 9. As such, under Table 2 of the Penalty Policy under the heading of section 14(a)(1) violators, Respondent is determined to be a category I business because its gross revenues are over $1,000,000 per year.(16) When those values are placed in the Civil Penalty Matrix for Section 14(a)(1), C.Ex. 25 at 19, a base penalty of $5,000, the statutory maximum results. This preliminary result is reasonable, based upon the record evidence in this proceeding.

The violations at issue here are for the sale and distribution of four unregistered pesticides that are labeled for such uses as disinfecting hard surfaces like countertops, hospital operating tables, and medical equipment in hospitals. C.Ex. 10; C.Ex. 11; C. Ex. 12, and C.Ex. 13. The risks are clear. In the first instance, there is the risk of adverse effects to health or the environment as a result of

exposure to the pesticide. Second, and perhaps more important, there are the risks of infection when the pesticide does not perform as expected. The purpose of FIFRA as it applies to the Product Line is to assure that the products were properly registered with EPA which means that they have received scientific and regulatory scrutiny from EPA to ensure that these products are properly labeled and bear appropriate warnings and proper use designations. C.Ex. 49 at 6-8, 30-36. Since the products in question were not properly registered with EPA, they present an unreasonable risk of harm to human health and the environment. C.Ex. 49 at 40.

In addition, since none of these products ever completed the EPA review procedure for sterilant or disinfectant products,[(17)] persons using these products were mislead as to the effectiveness of these products in preventing infection, thus creating a substantial risk to those who relied, perhaps to their detriment, on the effectiveness of these products in killing micro-organisms. C.Ex. 49 at 13-14, 20-21, and 24-25.

As a company with an excess of $1,000,000 in gross annual revenues, [R.Ex. 5; R.Ex. 9] Respondent is clearly of a size to be treated as a large business in Category I. This finding is supported by the fact that Respondent has, or should have, a level of sophistication in dealing with this issue insofar as it is a pesticide registrant and has continuously maintained pesticide registrations with EPA since 1973, and each of the several pesticide registrations held by Respondent has been for an anti-microbial product making public health protection claims. C.Ex. 49 at 27-28.

The next step under the Penalty Policy methodology is to determine what adjustments to the base penalty of $5,000 per violation, if any, are appropriate to account for the toxicity of the specific pesticide involved, the actual or potential harm to human health and environment, and the compliance history and culpability of the violator using a set of five "Gravity Adjustment Criteria" described in Appendix B of the Penalty Policy. C.Ex. 25 at Appendix B. Accordingly, the $5,000 per violation is reasonable.

It is appropriate to assign a value of zero to the first criterion, "pesticide." Because the products are unregistered, the pesticide toxicities have not been determined, and thus are not available for use as an adjustment factor. C.Ex. 25 at B-1; C.Ex. 50 at 9.

For the factor of "harm to human health" posed by the unregistered pesticides which comprise the Product Line, a value of 3 is assigned because a full data review has not been done with respect to these pesticides. Therefore, the risks to human health cannot be quantified with specificity and are thus classified as unknown. C.Ex. 25 at B-1; C.Ex. 17; C.Ex. 23; C.Ex. 50 at 9. Similarly, because of the absence of a full data review, Respondent was given a value of 3 for the criterion "harm to human health." *Id.* Even though there was no individualized and specific injury to human health or the environment, the failure to register the pesticides is harmful to the FIFRA regulatory program. *See* Green Thumb Nursery, Inc., FIFRA Appeal No. 95-1, 6 E.A.D. 782, 802-803(Final Order issued March 6, 1997). This finding also supports the assignment of the value of 3 to both "harm to human health" and "environmental harm."

For the fourth criterion, "compliance history," it is appropriate to assign a value of zero for having no prior violations. C.Ex. 50 at 9; C.Ex. 23. The undersigned agrees with Complainant that this finding should not be modified because of a $3,200 penalty assessed to Respondent for a "failure to report" violation that occurred three months after the complaint in the instant proceeding was filed.

For "culpability," the Penalty Policy has a range from four, knowing or willful violation, or knowledge of the general hazardousness of the action, **to** 2, culpability unknown or violation resulting from negligence, **to** a low of zero, violation was not knowing or willful nor the result of negligence, and violator took immediate steps to correct the violation as soon as it was discovered. C.Ex. 25 at Appendix B-2. It is reasonable and appropriate to assign a value of 2 for this element because Respondent's culpability is unknown, but the facts of the case

suggest that a presumption of negligence is appropriate. C.Ex. 50 at 9; C.Ex. 23. However, later in this Initial Decision, further consideration shall be given to the element of culpability, as a part of the analysis of the statutory factor of gravity.

The sum of the gravity adjustment factors is 8. A review of Table 3 of the Penalty Policy indicates that a gravity adjustment value of 8 calls for no adjustment of the penalty. C.Ex. 25 at 22; C.Ex. 50 at 9.

At this point, the penalty remains at $445,000, which is the product of 89 counts x $5,000/count. It is now appropriate to consider the factor of ability to stay in business. The Penalty Policy sets forth a guideline of the penalty being no more than 4% of gross sales. The four-year average of Respondent's gross sales for the years 1990-1993 equals $4,935,538.[(18)] Four percent of $4,935,538 equals $197,421.

At this point, one further adjustment to the penalty amount is required. The result set forth above is the same result that would occur if Respondent had been a manufacturer of the pesticides in question, such as HCP. While the analysis above clearly sets forth Respondent's culpability and failure to ensure that the pesticides were properly registered with EPA, an adjustment needs to be made to reflect the fact that Respondent was not the actual manufacturer of the pesticides (Tr. 9), that Respondent did not intentionally violate the law (See Tr. 98), and the fact that the testimony of Mr. Seid (Tr. 198-205) and Mr. Kaszovitz (Tr. 126-132), two of the parties who participated in the negotiations leading up to the agreement among HCP, Meditox, and Respondent, indicates that they thought they had a guaranty that the Products had been properly registered. Thus, the penalty is hereby reduced by approximately 11% to $175,000 to reflect those considerations. This adjustment is made under the statutory factor of "gravity" and reflects a deviation from a strict application of the Penalty Policy, but one that is well supported by principles of equity, as well as the record in this proceeding. However, at the same time, the adjustment should be no more than the approximately 11% amount, in light of the discussion earlier in this Initial Decision involving the risk to human health, to the environment and to the FIFRA regulatory program resulting from Respondent's actions at issue in this proceeding.

Respondent's argument that it is financially unable to pay the proposed penalty because for a recent year it had only a net income of $27,000 is not persuasive. The record reflects that the salary of Mr. Seid, Respondent's president and sole shareholder (Tr. 184), as reported on the financial statement for 1992 (when Respondent claimed a profit of only $5,515), contained a pass through of operating profits of approximately $300,000 to $400,000. Also, Respondent's assets exceed its liabilities by approximately $1,500,000. Tr. 237. Respondent is well able to pay the penalty of $175,000 without its ability to stay in business being threatened.

Respondent's arguments as to its good faith and lack of willfulness have already been factored into the penalty amount. Its good faith, including the testimony of Mr. Seid and Mr. Kaszovitz as to their belief regarding the meaning of the contract insofar as HCP's assurances are concerned, is reflected in the approximately 11% reduction in the penalty discussed above so that no further adjustment is required. Its lack of willfulness was reflected in choosing the value of 2 for culpability in the discussion of the Gravity Adjustments to Base Penalty, rather than a higher value of 4, which is for respondents whose violations are knowing or willful, or who have knowledge of the general hazardousness of its actions. C.Ex. 25 at Appendix B-2. Accordingly, these arguments are rejected.

Respondent argues that it has not been given credit for the fact that when it realized that there was a problem with the Products, it withheld shipment of the products that were the subject of Counts 86, 87, 88, and 89, and did not ship them out. It asserts that Complainant "...admits that this was the proper procedure to be followed." R. In. Br. at 16. This argument is not persuasive. A review of page 87 of the transcript wherein Respondent's counsel was cross-examining Complainant's witness Dyer, indicates that the items in question had not been shipped out, but, as Mr. Dyer testified, were collected by the inspector ". . . from a - an area at the facility where they were held for sale and distribution." Mr. Dyer indicated

that he did not know how long these items had been held in this area. Tr. 87-88. This testimony does not support Respondent's argument that it withheld further shipments of the products when it discovered that a problem existed with the products.[(19)] Further, the testimony cited by Respondent for the proposition that EPA agreed that withholding the shipments was the correct procedure to follow in this instance does not support that conclusion. R. In. Br. at 16. Counsel for Respondent asked Complainant's Witness Dyer "[i]f a business learned that there was a problem with the registration of a product it had been distributing, would the EPA consider it to be, in any way, a wrongful procedure for that business to stop its shipments and to hold the shipments that were ready to go out for an EPA inspection?" Mr. Dyer answered "No." Tr. 112-113. While it could be inferred that if EPA had no problem with such a procedure, it might also consider it "the proper procedure to be followed," the cited testimony does not clearly support this conclusion. For the reasons set forth above, these arguments are rejected.

A review of the arguments regarding the shipments to England and the shipments to salespeople are rejected for the same reasons discussed in the section of this Initial Decision on liability. Similarly, the arguments as to duplicative and triplicative shipments (*i.e.,* products) to the same customers on the same day present no basis for further reducing the amount of the penalty, particularly in light of the findings earlier in this Initial Decision about the risk caused by Respondent's actions to human health, the environment and to the FIFRA regulatory program. Therefore, these arguments are also rejected.

ORDER

1. A civil penalty in the amount of $175,000 is assessed against Respondent, Sultan Chemists, Inc.

2. Payment of the full amount of the civil penalty assessed shall be made within sixty (60) days of the service date of the final order by submitting a certified check or cashier's check payable to Treasurer, United States of America, and mailed to:

Mellon Bank
EPA-Washington D.C. (Hearing Clerk)
P.O. Box 360277 M
Pittsburgh, PA 15251

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

4. Failure upon the part of Respondent to pay the penalty within the prescribed statutory time frame after entry of the final order may result in the assessment of interest on the civil penalties. 31 U.S.C. § 3717; 40 C.F.R. § 102.13(b)(c)(e).

5. Pursuant to 40 C.F.R. § 22.27, this Initial Decision shall become the final order of the Environmental Appeals Board (EAB) within forty-five (45) days after its service upon the parties and without further proceedings unless (1) an appeal to the EAB is taken from it by a party to this proceeding, pursuant to 40 C.F.R. § 22.30(a), **within 20 days after the Initial Decision is served upon the parties** or (2) the EAB elects, upon its own motion, to review the Initial Decision.

_____
Charles E. Bullock
Administrative Law Judge

APPENDIX A

Respondent's List of Alleged Double Counting of Violations

Count Nos.	Date	Customer
1 & 40	12/14/92	Becker Parkin Dental
5 & 48	1/23/93	Dental Service Co., Inc.
9 & 52	11/5/92	Healthco Mattydale
16 & 62	11/16/92	Ott Dental Supply Co.
21 & 66	11/24/92	PRN Dental Supplies
24 & 69	11/18/92	Sullivan Dental Products, WI
25 & 70	11/10/92	Paul Perry
26 & 71	11/10/92	Lorne Wilkinson
27 & 72	11/10/92	Kathleen McCory
28 & 74	11/10/92	Doug Hawkins
29 & 75	11/10/92	Barbara Horton
30 & 76	11/10/92	George Rogiokos
31 & 77	11/10/92	Tom Osborne
32 & 78	11/10/92	Vicki Horn
33 & 79	11/10/92	Tammy Beise-Schaffer
35 & 82	1/28/93	Ventura Oral Systems, Ltd.
36, 39, & 85	2/27/93	Ventura Oral Systems, Ltd.

1. Complainant presented the testimony of David Anderson, Walter Francis, and Bryan Dyer plus Exhibits C-1 through C-50 in support of its case.

2. Respondent submitted the testimony of Paul Seid and Gabriel Kaszovitz plus Exhibits R-1 through R-9 in support of its case.

3. A hearing was held on September 28, 1998. The briefing schedule (Tr. 242) provided for Initial Briefs to be submitted by December 5, 1998 and for Reply Briefs to be submitted by January 15, 1999. The commencement of the hearing was substantially delayed because of a severe injury to a family member of one of the principal participants in this proceeding.

4. The parties have stipulated that Respondent did not manufacture any of the four products in question. Tr. 9. The parties also stipulated that WipeOut Medi Disinfectant Wand (Wand), the QuicKit Biological Fluid Emergency Spill Kit (QuicKit) , and the WipeOut Household or Office Disinfectant Spray - 12oz. (Spray) are unregistered pesticide products. Id. Respondent does not challenge Complainant's contention that the WipeOut Disinfectant Towelette (flat pack) (Towelettes) is an unregistered pesticide. *See* C.Ex. 18; C.Ex. 32 at 1; C.Ex. 39; C.Ex. 49 at 21.

5. In light of this ruling, there is no need to consider Complainant's argument that this argument should be excluded pursuant to 40 C.F.R. § 22.15(b)(1).

6. *See* Appendix A to this Initial Decision.

7. In the alternative, Respondent argues that the testimony of Mr. Kaszovitz and Mr. Seid should be used to show that Complainant's proposed penalty for Respondent is excessive. This argument will be dealt with later in this Initial Decision in the section discussing the proposed penalty to be imposed in this proceeding.

8. Again, as with certain issues discussed previously in this Initial Decision, this argument will be revisited in the context of the determination of the appropriate penalty in this proceeding.

9. The Wand, which is the subject of Count 87, is never specifically mentioned in Appendix "A" to the contract or anywhere else in the contract .

10. *See generally* Neuman v. Ferris, 432 So. 2d 641 (1983); Flagship v. Gray, 485 So. 2d 1336 (1986). *See also* BMW v. Krathen, 471 So. 2d 585 (1985) (where contract language is clear and unambiguous, courts cannot indulge in construction or interpretation of its plain meaning).

11. Complainant requests that this evidence and related evidence be struck from the record as inconsistent with the applicable sections of the Florida U.C.C. As noted above, the proposed use of this evidence as a defense to liability has been rejected. However, this evidence will not be struck from the record in order that it may be considered in the assessment of an appropriate penalty.

12. As indicated earlier in this Initial Decision, Respondent argues that the Guaranty Statute is a complete bar to liability in this proceeding. Thus, Respondent's arguments as to the appropriate level of penalty are arguments in the alternative in the event its arguments as to the applicability of the Guaranty Statute are not accepted.

13. This reflects use of gross sales data supplied by Respondent and represents a reduction from Complainant's original proposed penalty of $445,000. Complainant based its original penalty on the 4% formula multiplied by a gross sales figure of $11,000,000 from a Dun and Bradstreet report (4% x $11,000,000 = $440,000). C.In.Br. at 49.

14. "If the Presiding Officer determines that a violation has occurred, the Presiding Officer shall determine the dollar amount of the recommended civil penalty to be assessed in the initial decision in accordance with any criteria set forth in the Act relating to the proper amount of a civil penalty, and must consider any civil penalty guidelines issued under the Act." 40 C.F.R. § 22.27(b).

15. *In re Employers Insurance of Wausau and Group Eight Technology, Inc.,*TSCA Appeal

No. 95-6, 6 E.A.D. 735 (EAB Feb.11, 1997).

16. Medium level businesses are assigned a level II ($300,001 - $1,000,000) and small businesses are assigned a value of level III ($0 - $300,000). C. Ex. 25 at 20.

17. C.Ex. 49 at 10-11, 15, 17-18, 21-22.

18.

1990: $3,859,660
1991: $4,761,582
1992: $5,501,012
1993: $5,619,900

Four-year average : $4,935,538

R.Ex. 5; R.Ex. 9.

19. Similarly, a review of another portion of the transcript cited by Respondent (Tr. 56 which is cited at page 18 of Respondent's Reply Brief) indicates that the testimony cited does not support Respondent's assertion that it voluntarily stopped all sales of the Product Line after being notified by EPA of a problem with those pesticides.