12/31/93

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
SHIELD-BRITE CORPORATION,	)	**Docket No. FIFRA-90-H-02**
	)	
Respondent	)	

Federal Insecticide, Fungicide, and Rodenticide Act -- Civil Penalty -- Under the 1974 Penalty Policy, Respondent's failure to affix bilingual labeling on pesticides exported to a non-English speaking country was less serious than a failure to affix any required precautionary labeling, but more serious than affixing labeling with insufficient prominence or conspicuousness; and accordingly the civil penalty imposed on Respondent is midway between the amounts that would be imposed on Respondent for these other two violations (the instant Initial Decision).

Federal Insecticide, Fungicide, and Rodenticide Act -- Bilingual Labeling -- For pesticides exported to a non-English speaking country, bilingual labeling is required, and this labeling must be affixed before the pesticides arrive in the importing country (Order Granting Motion for Accelerated Decision on Liability (June 28, 1991) (attached to the Initial Decision)).

Appearances

For Complainant:

Scott B. Garrison, Esq.
Toxics Litigation Division (LE-134P)
Office of Enforcement
U.S. Environmental Protection Agency
401 M Street, S.W.
Washington, DC 20460

For Respondent:

Albert Hanan, Esq.
Hanan and Hanan
1700 Pacific Building
720 Third Avenue
Seattle, WA 98104-1811

Before

Thomas W. Hoya
Administrative Law Judge

INITIAL DECISION

This Initial Decision determines the recommended civil penalty to be assessed against Shield-Brite Corporation ("Respondent") in a case brought by the Director, Compliance Division, Office of Compliance Monitoring, U.S. Environmental Protection Agency ("Complainant"). Respondent has been charged with a violation of the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136-136y. (This Act is referred to hereinafter as "FIFRA".)

After initial submissions by the parties, Complainant moved for an accelerated decision that would declare Respondent to have violated FIFRA as charged. A June 28, 1991 Order granted Complainant's motion by declaring that Respondent violated FIFRA through its exports of a pesticide to a non-English speaking country without the bilingual labeling required by FIFRA.[1] This June 28, 1991 Order is attached to this Initial Decision.

The June 28, 1991 Order further directed the parties to try to negotiate an appropriate civil penalty. When these negotiations failed, the parties agreed that the amount of the penalty should be decided on the basis of their written submissions.

Complainant proposed a civil penalty of $2,800 for each of Respondent's 33 export shipments, for a total of $92,400. Complainant's proposal was based on a penalty policy for FIFRA issued by EPA in 1974 (referred to hereinafter as the "1974 Penalty Policy").[2] Respondent agreed to the applicability to this case of this 1974 Penalty Policy, but raised several challenges to the manner in which Complainant sought to apply it.

This Order recommends a civil penalty of $1,600 per violation, for a total of $52,800. This amount is arrived at by according merit to one of Respondent's challenges and by rejecting the others. Complainant's calculation of its proposed $92,400 penalty and Respondent's challenges thereto are reviewed below.

---

[1] Order Granting Motion for Accelerated Decision on Liability (June 28, 1991).

[2] This 1974 Penalty Policy, titled Civil Penalties under the Federal Insecticide, Fungicide, and Rodenticide Act, as Amended, 39 Federal Register 27,711 (July 31, 1974), consists essentially of two documents. These documents are: Guidelines for the Assessment of Civil Penalties Under Section 14(A) of the Federal Insecticide, Fungicide, and Rodenticide Act, As Amended, 39 Federal Register 27,711 (July 31, 1974); and Citation Charges for Violations of the Federal Insecticide, Fungicide, and Rodenticide Act, As Amended, 39 Federal Register 27,721 (July 31, 1974). This 1974 Penalty Policy was submitted for the record of this case by the parties in their Resubmission of Stipulations (November 8, 1991).

Discussion

Under the 1974 Penalty Policy, the amount of Respondent's civil penalty is determined by several factors, including particularly the gravity of the violation, the size of a respondent's business, and any inability of a respondent to continue in business as a result of the penalty. In this case, Respondent made no claim of inability to remain in business because of the penalty, and Respondent and Complainant agreed on the size of Respondent's business for purposes of any penalty calculation. Consequently, their dispute as to the proper amount of the penalty focused on characterizing the gravity of the violation.

Gravity of the Violation

Parties' Positions. For gravity, the 1974 Penalty Policy identifies several dozen distinct violations of FIFRA, and designates a civil penalty value for each on the basis of its seriousness. The problem for this case is that Respondent's offense--a failure to affix bilingual labeling--is not one of the violations thus identified.

Complainant's proposed solution to this problem was to select what it considered the most similar violation from those identified in the 1974 Penalty Policy.

> Although the 1974 Penalty Policy does not explicitly specify a penalty for failure to provide bilingual labeling for exported pesticides, this type of misbranding is comparable to certain others.... Most of the statements required ... to appear bilingually related to the safe use and handling of the pesticide. Failing to include this information on the label in a language likely to be read and understood by those coming into contact with the pesticide is of precisely the same gravity as a failure to supply the information at all. Accordingly, applying the 1974 penalty policy the Agency has proposed penalties in this case as Code E3 "Deficient Precautionary Statements: Lacks Required Precautionary Labeling".
>
> * * *
>
> The penalty proposed in this case, $2,800 per violation, is appropriate for ... [Respondent's situation.] It is useful to compare the penalty proposed in this case with the 1974 Penalty Policy's assessments for other violations of FIFRA for a business of Respondent's size. For example, violations of the lowest gravity, violation of a cancellation order by a person with no knowledge of the order, the penalty would be $1,000. The $2,800 penalty proposed here is,

> appropriately, higher than those for unknowing violation of a suspension order ($1,200), unknowing failure to register an establishment ($1,800), or net weight less than stated on label ($1,800). It is also, appropriately, lower than the penalties designated ... for violation of a stop sale order ($5,000), unlawful tests on human beings ($5,000), or failure to allow inspection ($5,000).[3]

Respondent challenged Complainant's conclusion that Respondent's lack of bilingual labeling should be equated with "a failure to supply the information at all."

> Certainly the inclusion of a label in English would provide greater information than having no label at all and not providing any information at all. Respondent's exporting of the pesticide was to sophisticated agricultural users, some of whom it can be assumed would probably be able to understand the label though printed in English only or who at least would know enough to have the label translated.[4]

Respondent's Point Is Sound. Respondent's basic point is sound. Whatever the sophistication of the importer in a non-English speaking foreign country, a precautionary label in English is surely a more effective warning than no label at all.

In today's world, English has become sufficiently global in use that even many unsophisticated residents of non-English speaking countries have some familiarity with the language. For residents of these countries with no knowledge of the language, the presence of the English label might still inspire them to obtain a translation. Of course, neither the foreigner's understanding the English label nor his seeking a translation is assured; but clearly the foreigner handling a pesticide labeled in English has a better chance of grasping the precautionary message than somebody, in the United States or elsewhere, handling a totally unlabeled pesticide.

Another consideration is the situation of any respondent. Those respondents who at least make the effort to affix a label in English--as did Respondent here--would seem less culpable and less deserving of a sanction than those respondents who attach no label at all.

EPA's 1990 Policy. There is a further reason why

---

[3] Complainant's Brief in Support of Proposed Penalty (November 18, 1991) at 11-12, 15-16.

[4] Respondent's Brief in Answer to Proposed Penalty (December 13, 1991) at 5.

Complainant's proposed $2,800 per offense is excessive. This reason is suggested by Complainant's reference to a new penalty policy for FIFRA issued by EPA in 1990[5] (referred to hereinafter as the "1990 Enforcement Response Policy").

The 1990 Enforcement Response Policy was issued in July of that year, several months after the issuance of the January 1990 complaint in this case. Complainant did not try to amend its complaint to conform it to the 1990 Enforcement Response Policy, and thus this case was argued by both parties on the basis of the 1974 Penalty Policy. Nevertheless, the 1990 Enforcement Response Policy was cited by Complainant, as discussed below, and it does have relevance for this proceeding.

This 1990 Enforcement Response Policy, like the 1974 Penalty Policy, provides that the penalty should be determined particularly by the gravity of the violation, the size of a respondent's business, and the effect of a penalty on a respondent's ability to stay in business. As with the 1974 Penalty Policy, the last two are undisputed between Complainant and Respondent, and the pivotal issue again becomes characterizing the gravity of the violation. Here the 1990 Enforcement Response Policy, like the 1974 Penalty Policy, identifies several dozen distinct violations of FIFRA, and accords each a level of seriousness.

But with the 1990 Enforcement Response Policy, unlike with its 1974 predecessor, Complainant stated that one of these several dozen thus identified "is an exact match" for Respondent's violations. Complainant explained as follows.

> The Court held Respondent liable for violating FIFRA section 2(q)(1)(E). The violation category 1EE (page A-2 of the 1990 ERP) is an exact match for Shield-Brite's violations as described in FIFRA section 2(q)(1)(E), and is therefore appropriate for use in this case.[6]

Violation 1EE is set forth on page A-2 of the 1990 Enforcement Response Policy with these words.

> Sold or distributed a pesticide or device which is MISBRANDED in that any words, statements, or other information required by the Act were not prominently placed on the label in such a way as to make it readable or understandable.

---

[5] Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) (July 2, 1990).

[6] Complainant's Reply Brief in Support of Proposed Penalty (January 13, 1992) at 2 n.2.

In view of Complainant's postulation of this 1990 category 1EE as "an exact match" for Respondent's violations, one logical question is whether any category in the 1974 Penalty Policy bears a description that is similar. In fact, what is called code E14 in the 1974 Penalty Policy comes close. It is described as follows.

> Deficient Precautionary Statements: Precautionary Labeling not Prominently or Conspicuously Displayed.[7]

Nevertheless Complainant, in selecting a category from the 1974 Penalty Policy for Respondent's violations, did not choose code E14. Instead, as set forth above in the quotation from Complainant's submission,[8] Complainant selected code E3. The description for that violation, also set forth in the quotation from Complainant, states as follows.

> Deficient Precautionary Statements: Lacks Required Precautionary Labeling.

This description for code E3 makes it a plausible accounting for Respondent's violations, although, as noted, it suffers from grouping Respondent with those who failed to affix any labeling at all.

Statutory Correlations. Still another factor in the 1974 Penalty Policy, however, suggests that code E3 is less suited to Respondent's violations than code E14. The Policy correlates its various categories of violation with the sections of FIFRA. Code E3 is stated to represent violations of section 2(q)(1)(G), whereas code E14 is stated to represent violations of section 2(q)(1)(E).[9] Respondent, of course, was charged with violating, and was found to have violated, section 2(q)(1)(E).

This correlation of violation category with FIFRA section, incidentally, obtains as well in the 1990 Enforcement Response Policy. The category of violation claimed by Complainant to be "an exact match" for Respondent's violations--category 1EE--is stated to represent violations of FIFRA section 2(q)(1)(E),[10] the same FIFRA section as its apparent counterpart in the 1974 Penalty Policy, code E14. Also, for the category selected by Complainant from the 1974 Penalty Policy--code E3--the apparent counterpart in

---

[7] 39 Federal Register 27,713 (July 31, 1974).

[8] See supra text accompanying note 3.

[9] 39 Federal Register 27,721-27,722 (July 31, 1974).

[10] Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) (July 2, 1990) at A-2.

the 1990 Enforcement Policy is category 1EG.[11] That category, like code E3, is stated to represent violations of FIFRA section 2(q)(1)(G).[12]

Summary. What difference does it make which code--E3, or E14--is used to apply the 1974 Penalty Policy to Respondent? The difference lies in the dollar amounts that each code provides for violations. Each has three levels, depending on a further criterion of seriousness. As applied to a party of Respondent's size, for code E3 the three are $5,000--$2,800--$1,200, whereas for code E14 they are only $2,800--$2,000--$1,200.[13] In the 1990 Enforcement Response Policy, the counterpart of code E3, category 1EG, also carries a heavier sanction than the counterpart of code E14, category 1EE.[14]

So which code--E3, E14, or perhaps something else--should be applied to Respondent's violations? As noted, code E3 exaggerates Respondent's violations by grouping them with a total failure to affix labeling. Code E3 is also stated in the 1974 Penalty Policy to represent a FIFRA section different from the one Respondent violated.

Code E14, on the other hand, is stated in the 1974 Penalty Policy to represent the FIFRA section that Respondent violated, and its counterpart in the 1990 Enforcement Response Policy was advanced by Complainant as "an exact match" for Respondent's violations. Is code E14, therefore, the answer for Respondent's situation?

Actually, just as code E3 overstates the seriousness of Respondent's violations, code E14 understates it. The description

---

[11] Id. The description in the 1974 Enforcement Response Policy for category 1EG is as follows.

> Sold or distributed a pesticide or device which is MISBRANDED in that the label did not contain a warning or caution statement adequate to protect health and the environment.

Id. The description of code E3 in the 1974 Penalty Policy, as set forth in the quotation from Complainant's submission in the text above accompanying note 3, is: "Deficient Precautionary Statements: Lacks Required Precautionary Labeling."

[12] Id.

[13] 39 Federal Register 27,713 (July 31, 1974).

[14] Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) (July 2, 1990) at A-2, 19.

of code E14 is: "Deficient Precautionary Statements: Precautionary Labeling not Prominently or Conspicuously Displayed."[15] However, if the labeling on a pesticide simply lacks required prominence or conspicuousness, at least it is present on the pesticide in a form that can be read. Many people handling a pesticide probably know that special precautions must frequently be taken; thus they will be motivated to seek out any instructions on a label, thereby becoming satisfactorily informed, despite the label's failure adequately to call attention to itself.

By contrast, if the label is only in English in a non-English speaking country, the chance for a non-English speaking handler of the pesticide to become satisfactorily informed is distinctly less. The possibility always exists, of course, for such person to obtain a translation of the label. But in the flow of daily life, time pressures often combine with the unavailability of ready translation resources to make impractical any obtaining of a translation. Thus frequently the non-English speaking person will probably go ahead and handle the pesticide without knowledge of the label's contents.

Because the lack of required bilingual labeling thus seems more likely to lead to uninformed handling of a pesticide than the lack of required prominence or conspicuousness of the labeling, the former merits a more severe sanction. Accordingly, code E14 understates the seriousness of Respondent's violations. Therefore the appropriate approach should be a sanction greater than provided by code E14, but still less than provided by code E3.

Which Level of Proper 1974 Code?

It has been determined above that Respondent's violations fall between code E3 and code E14. But applying the 1974 Penalty Policy to Respondent involves one further step. As noted above,[16] both code E3 and code E14 have three levels of violation, depending on another criterion of seriousness. Consequently, to use these codes as a guide to Respondent's situation, a selection has to be made from these three.

The parties addressed this question only for the category proposed by Complainant, code E3--Deficient Precautionary Statements: Lacks Required Precautionary Labeling. Their positions are reviewed below.

Code E3--Parties' Arguments. For code E3, the levels of seriousness provided by the 1974 Penalty Policy depend on the extent of the possible adverse effects from the violation. The

---

[15] 39 Federal Register 27,713 (July 31, 1974).

[16] See supra text accompanying note 13.

three levels, together with the accompanying penalty figure that applies to a party of Respondent's size, are as follows: "Adverse Effects Highly Probable"--$5,000; "Adverse Effects Unknown"--$2,800; and "Adverse Effects Not Probable"--$1,200.[17] Complainant conceded that Respondent's pesticide was an insufficiently "potent acute or chronic toxic, or highly persistent in the environment" to justify calling its adverse effects "Highly Probable."[18] Hence the parties' dispute centered on which of the other two categories is appropriate.

Complainant postulated as most suitable the middle category: "Adverse Effects Unknown." To support this choice, Complainant first noted that Respondent's pesticide at issue, Shield DPA 25%, has no EPA-approved label. But, Complainant stated, the parties have stipulated that its label should include at least the precautionary information that is contained on the label for EPA-approved Shield DPA 15%. Complainant noted further the parties' stipulation that Shield DPA 25% has two-thirds more active ingredient (viz., diphenylamine, or "DPA") than Shield DPA 15%.

Complainant summarized the situation of Shield DPA 15% and Shield DPA 25% as follows.

> Review of the precautionary information required on the label for the EPA-registered pesticide Shield DPA 15% demonstrates that Shield DPA 15% is harmful to humans if it comes in contact with skin or eyes, and immediate medical attention is required if it is swallowed. It is harmful to domestic animals, toxic to fish and should never be introduced into any body of water. Even under ideal conditions the use of Shield 15% DPA may cause injury even to the fruit it is used to protect. Food and Drug Administration regulations prohibit sale of fruit with DPA residues in excess of 10 ppm, and the label warns against use of treated apples as pomance or livestock feed, because illegal residues may occur in meat or milk. Shield 15% DPA is also a flammable liquid which poses a fire hazard. All of these cautionary statements point to significant risks of harm to health and the environment from misuse or even lawful use of Shield 15% DPA. The exported product that is the basis of this action was Shield Liquid DPA 25% Concentrate, with 66% more of the active ingredient DPA than the registered product Shield 15% DPA, and therefore, poses

---

[17] 39 Federal Register 27,713 (July 31, 1974).

[18] Complainant's Brief in Support of Proposed Penalty (November 18, 1991) at 13.

a greater risk of harm from misuse.[19]

(footnotes omitted)

Respondent countered that the proper category is "Adverse Effects Not Probable." Respondent's argument is quoted below.

> The Complainant ... reviewed the information required on the label for the EPA-registered pesticide Shield DPA 15%, and because that label's precautionary statements set forth certain possible hazards to humans, the environment, and to products, EPA then made the judgment that the proper level ... was "Adverse Effects Unknown." Respondent submits that the EPA has acted arbitrarily in making that judgment. The effects are known and were taken from the label by EPA in making its assessment of "Adverse Effects Unknown". The fact that the label lists certain possible effects does not render the product unqualified to be classified as "Adverse Effects Not Probable." The active ingredient while classified as a pesticide under FIFRA is not a pesticide as such; rather, it is an oxygen-scavenger used to keep apples green. The exported product, which was the subject of the violation, has a very low toxicity. Its active ingredient DPA (Diphenylamine) has been used world-wide and in the United States for many years with little or no bad results. The exported product is similar to other federally registered products of Respondent - specifically Shield 15% DPA, which has an EPA-approved label.... In view of the wide use and low incidence of

---

[19] Complainant's Brief in Support of Proposed Penalty (November 18, 1991) at 13-15. Complainant quoted the following statements from the label for Shield DPA 15%.

> "If Swallowed: Get medical attention immediately....If In Eyes: Wash eyes thoroughly with water for at least 15 minutes, get medical attention immediately."
> "This product is toxic to fish. Do not apply directly to any body of water. Do not contaminate water when disposing of equipment washwaters."
> "Do not contaminate water, food or feed by storage or disposal."
> "Triple rinse (or equivalent) empty container."
> "The established tolerance of DPA on apples is limited to 10 ppm, by the FDA."
> "Do not use treated apples for pomance or livestock feed, as illegal residues may occur in meat or milk."

Complainant's Reply Brief in Support of Proposed Penalty (January 13, 1992) at 9.

> adverse effects with respect of the active ingredient, Respondent submits that a gravity level of "Adverse Effects Not Probable" would have been the more appropriate classification.[20]
>
> Complainant replied as follows.
>
> Respondent ... argues that the category, "Adverse Effects Unknown", is inappropriate, asserting that the adverse effects of Shield 25% DPA Concentrate are known. Complainant does not know what use or misuse these exported pesticides may have been put to, nor does Complainant know what adverse effects actually occurred in foreign countries. The best that Complainant (or Respondent) can do is estimate the likelihood of misuse in the absence of labels in the local languages and the probability of harm resulting from any misuse.... Respondent's assertion that Diphenylamine has been used world-wide "with little or no bad results" ... is both irrelevant and unsupported by evidence in the record.... The intermediate category, "Adverse Effects Unknown", better characterizes of [sic] the gravity of Respondent's violations than either "Adverse Effects Not Probable" or "Adverse Effects Highly Probable". Complainant concedes that the phrase "Adverse Effects Unknown" was an infelicitous choice of words, and that the 1974 Penalty Policy might have been more clear had it said "Moderate Probability of Adverse Effects" instead.[21]

(emphasis in original)

Code E3--Conclusion. Complainant's argument is the more persuasive. Whatever the history of Shield DPA 15%--and the record of this case lacks any evidence on the point--the consequences of any misuse are plain from its label, and these consequences are serious. Shield DPA 25% contains two-thirds more of the active ingredient, and the possibility of its misuse if those handling it cannot read the label is significant. In conclusion, the resulting situation risks consequences too serious to be classified as "Adverse Effects Not Probable."

Respondent reasonably contended that the remaining category--"Adverse Effects Unknown"--is also inapt, since the parties' arguments suggest some knowledge on this issue. Complainant conceded that the name for this category was "infelicitous." But,

---

[20] Respondent's Brief in Answer to Proposed Penalty (December 13, 1991) at 7-8.

[21] Complainant's Reply Brief in Support of Proposed Penalty (January 13, 1992) at 10-11 & n.12.

of the two other alternatives, "Adverse Effects Highly Probable" overstates the risk, and "Adverse Effects Not Probable" understates it.

What seems to fit Respondent's violations, as suggested by Complainant, is a category somewhere between those at either extreme. Complainant suggested that this intermediate category might be named "Moderate Probability of Adverse Effects."[22] The important element, of course, is not the precise name, but rather the greater suitability of an intermediate category as compared with either extreme. For the reasons stated--the respective overstatement and understatement of the risk by the other two levels--the intermediate level of code E3 seems most appropriate to Respondent's violations. That level carries a dollar figure of $2,000 per violation.

Code E14--Proper Level. For code E14 under the 1974 Penalty Policy, the three levels of sanction are distinguished by "the level of toxicity of the material."[23] For a party of Respondent's size, if the level is "Danger," the penalty is $2,800; if "Warning," $2,000; and, if "Caution," $1,200.[24]

The 1974 Penalty Policy offers no definition of "the level of toxicity." A sensible place to look for a definition is the regulations issued pursuant to FIFRA that prescribe the labeling requirements for pesticides.[25] These regulations specify the criteria for determining whether a pesticide must be labeled "Danger," "Warning," or "Caution."[26] Since the 1974 Penalty Policy itself supplies no definitions, these regulatory definitions seem the logical ones to use.

The parties have made certain stipulations as to the contents of the proper labeling for Respondent's pesticide at issue here.[27] The criteria in the regulations can thus be applied to these stipulations.

The parties' stipulations as to the proper labeling for

---

[22] Id. 11.

[23] 39 Federal Register 27,713 (July 31, 1974).

[24] Id.

[25] 40 C.F.R. Part 156.

[26] 40 C.F.R. § 156.10(h)(1)(i).

[27] Resubmission of Stipulations (November 8, 1991); see Stipulated Facts and Stipulations to the Admissability of Certain Documents at 1-3.

Respondent's pesticide are, however, inexact. They stated that the label should contain "at minimum" the contents of an EPA-approved label for a lesser strength pesticide of Respondent, and then set forth some of the contents of that approved label.[28] Nevertheless, the parties' stipulation will suffice for determining the level of toxicity for calculating Respondent's civil penalty.

According to the regulations for labeling pesticides, a pesticide that is labeled "Danger" because of its "oral, inhalation, or dermal toxicity" must bear the word "Poison" and a "skull and crossbones."[29] Nothing in the parties' stipulations indicates that Respondent's pesticide should be labeled "Danger" for any reason, or that, although contact with skin and eyes is to be avoided, it should contain the word "Poison" or a "skull and crossbones." If the word "Danger" were required to be included for any reason, that point would seem so significant that it likely would have been included in the stipulations. Therefore the level of toxicity for Respondent's pesticide is adjudged to be less than "Danger."

The choice between "Warning" and "Caution" for Respondent's pesticide is less clear. The regulations contain a table "depict[ing] typical precautionary statements."[30] The language in the parties' stipulations for the EPA-approved label seems slightly closer to the statements in this table for the "Caution" level. More telling is that the language in the stipulations includes the word "Caution," but not the word "Warning."

Favoring the "Warning" alternative is that the parties' stipulated language is for a pesticide of only three-fifths the strength of the pesticide at issue here. If a further two-fifths of the active ingredient were added to the pesticide at issue, it is of course possible that the required labeling would rise to the "Warning" level.

On balance, the weight of available evidence points to the "Caution" level--or $1,200 per violation--for Respondent's pesticide involved in the violations. The appearance in the parties' stipulations of the word "Caution" seems, of all the evidence in the record, to characterize the pesticide most closely, even though this word relates to a lesser strength pesticide.

Calculating Respondent's Penalty

As discussed, Respondent's failure of bilingual labeling is

---

[28] Id.

[29] 40 C.F.R. § 156.10(i)(A).

[30] 40 C.F.R. § 156.10(i)(B).

less serious than code E3's lack of required labeling, but more serious than code E14's insufficiently prominent or conspicuous labeling. Respondent's violation falls about midway between these two codes. Again as discussed, under code E3 the proper level was the intermediate one, at $2,000 per violation; and, under code E14, it was the "Caution" level, at $1,200 per violation.

Since Respondent's violation comes roughly midway between these two code approaches, it is reasonable to split the difference, for a dollar figure of $1,600 per violation. Multiplying that figure by the 33 violations produces a final civil penalty assessment of $52,800.

Respondent's Other Challenges.

Respondent raised three challenges to Complainant's proposed civil penalty in addition to those challenges already reviewed. These three were based on Respondent's alleged good faith, on the absence of a warning to Respondent, and on the alleged lack of any need for a deterrent. Each of these challenges is unconvincing; and accordingly the $52,800 penalty calculated above is not further reduced.

As to Respondent's claimed good faith, Respondent cited its record of no previous violations, and its affixing of labels in English. These points, Respondent contended, should have mitigated the penalty. Complainant replied that its penalty calculation did give Respondent the benefit of no prior violations because, had any such violation existed, it would have increased the proposed penalty. Respondent's efforts in affixing the English language labels did not, according to Complainant, constitute an effort at compliance of such a magnitude as to warrant a penalty mitigation.

Respondent's arguments regarding good faith do in fact fall short of what would justify a mitigation on that basis. Respondent's absence of prior violations did benefit it by removing from the penalty calculation any increase that a prior record would have produced. As to Respondent's affixing of the English language labeling, Respondent has received some mitigation from that effort, since it served as the ground for rejecting code E3 as the sole guide for calculating Respondent's penalty. That benefit is all to which Respondent is entitled on this basis. Its affixing of the English language labeling, as far as the submissions in this case disclose, resulted from a simple misreading by Respondent of the regulations. Nothing suggests any unusual efforts by Respondent to comply of a nature that could warrant any further mitigation.

Respondent argued also that, had it been given a warning by EPA regarding the bilingual requirement, it could have begun compliance earlier, thereby reducing the number of its violations. Complainant replied that Respondent was entitled only to the notice of the bilateral requirement that was achieved by its proper

publication in the Federal Register.

On this issue, Complainant is correct. Respondent's entitlement was only to the proper notice of the bilingual requirement. Although the issuance of a warning at some point may have been within Complainant's procedural discretion, Respondent has presented nothing to show that Complainant's treatment of Respondent and Complainant's prosecution of this case is any abuse of that discretion.

Finally, Respondent argued that the civil penalty need not be large enough to serve as a deterrent, because Respondent's ownership has changed. Complainant rejoined that "specific deterrence" is still needed, because "substantial identity" still exists "between the principal investors." [31] Respondent sought to minimize the connection between its old and new owners. But Complainant additionally argued that, regardless of the completeness of any change in ownership, the penalty still has to be large enough to serve as a "general deterrent."[32] Otherwise, according to Complainant, the regulated community might believe that violators could escape or at least reduce their liability by arranging a change of ownership, even among related parties.

Respondent's argument regarding deterrence is unpersuasive. Notwithstanding any change of ownership, some deterrence is a legitimate purpose of this civil penalty. The calculation of the penalty, as adjusted by this Initial Decision, reasonably serves, without exceeding, purposes of legitimate deterrence.

Order

Pursuant to Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended (7 U.S.C. 136 l(a)) ("FIFRA"), a civil penalty of $52,800 is hereby assessed against Respondent Shield-Brite Corporation. This assessment is imposed for violations of FIFRA by Respondent, as such violations were declared by the attached Order Granting Motion for Accelerated Decision on Liability (June 28, 1991).

Respondent shall pay the full amount of the civil penalty within 60 days after receipt of the final order[33] in this

---

[31] Complainant's Reply Brief in Support of Proposed Penalty (January 13, 1992) at 16, 17.

[32] Id. 17.

[33] Pursuant to Section 22.27(c) of the Consolidated Rules of Practice, 40 C.F.R. Part 22, that govern this proceeding, this Initial Decision "shall become the final order of the Environmental Appeals Board within forty-five (45) days after its service upon

proceeding by forwarding a cashier's check or certified check, payable to the Treasurer, United States of America, to the following address:

Regional Hearing Clerk, Region III
U.S. Environmental Protection Agency
P.O. Box 360515M
Pittsburgh, PA 15251

Thomas W. Hoya
Administrative Law Judge

Dated: December 31, 1992

---

the parties and without further proceedings unless" it is appealed by a party to the Environmental Appeals Board or the Environmental Appeals Board elects, sua sponte, to review it. Under Section 22.30(a) of these Consolidated Rules, parties have twenty (20) days after service upon them of this Initial Decision to appeal it.