UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	**)**
CHEM LAB PRODUCTS, INC.,	**) Docket No. FIFRA-9-2000-0007**
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Respondent	**)**

Appearances:

For Complainant:

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For Respondent:

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Federal Insecticide, Fungicide and Rodenticide Act-Sales of an Unregistered Pesticide-Determination of Penalty-Enforcement Response Policy

Although the general rule is that the amounts for which other similar cases are settled is not controlling in determining the penalty for violations of the Act (sales of an unregistered pesticide) by Respondent in the case at bar, evidence that EPA in a settlement with another firm had permitted the sale and distribution of similar unregistered pesticides for swimming pool use by simply posting placards in retail outlets where the products were sold to the effect that the product had not been approved by EPA was relevant to determining the harm or potential for harm from the violations and, where other evidence supported Respondent's contention that it had a good faith belief that its product did not require registration, ERP was disregarded in determining penalty for violations at issue.

INITIAL DECISION

This proceeding under Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended, 7 U.S.C. §136l was commenced on July 7, 2000, by the filing of a complaint by the Senior Associate, Cross Media Division, United States Environmental Protection Agency, Region 9 ("Complainant") charging Respondent, Chem Lab Products, Inc. ("Chem Lab"), with violations of the Act. Specifically, the complaint, in each of 24 counts, alleged that Chem Lab sold and distributed "Shock-Quick", an unregistered pesticide, on separate occasions between June 23, 1998, and September 23, 1998, to various Orchard Supply Hardware Stores in California, in violation of FIFRA § 12(a)(1)(A), 7 U.S.C.§ 136(j)(a)(1)(A). For these alleged violations, it was proposed to assess Chem-Lab the maximum penalty of $5,500 for each count for a total of $132,000.

Under date of August 7, 2000, Chem Lab answered, admitting the sales of "Shock Quick" alleged in the complaint, admitting that "Shock Quick" is a pesticide and that it was not registered with EPA at the time of the sales alleged in the complaint. Chem Lab, however, contested the amount of the proposed penalty as inappropriate and requested a hearing.

Pre-trial proceedings included the filing of a motion for an accelerated decision as to liability by Complainant on October 19, 2000, that was granted by an order, dated January 26, 2001, which is attached hereto and made a part hereof by reference, finding Respondent liable for 24 separate sales of "Shock Quick", an unregistered pesticide, in violation of FIFRA § 12(a)(1)(A) as alleged in the complaint. Additionally, an order, dated April 12, 2001, denied Complainant's motion to exclude proposed exhibits and testimony, contained in Chem Lab's

Prehearing Exchange, relating to whether "Shock Quick" was a pesticide and concerning EPA's enforcement activities against another firm, Bio-Lab, Inc.

A hearing on this matter was held in San Bernardino, California, on May 8, 2001.

Based upon the entire record including proposed findings and briefs submitted by counsel[1] and the Joint Stipulations Of Parties, I make the following:

Findings of Fact[2]

1. Respondent, Chem Lab Products, Inc, was at all times relevant to the complaint, a corporation organized under the laws of Nevada and registered to do business in California.

2. Chem Lab is the owner and operator of an establishment located at 5160 Airport Drive, Ontario, California. Among products manufactured at, and distributed from, this establishment is a product for use in swimming pools known as "Shock Quick ".

3. The label for "Shock Quick" indicates that it is an organic, chlorinated isocyanurates mixture, that it is a strong oxidizing agent and that it "clarifies pool water" and " removes swimmer waste" (C's Exh. 10). Mr. Randall Hitchens, who became President and CEO of Chem Lab in March of 1997, testified that "Shock Quick" was developed and marketed because he decided that Chem Lab had to have a product to protect its customer base (Tr. 71). He explained that a much

[1]. Chem Lab has not submitted proposed findings, but has objected and proposed alternates to certain findings proposed by Complainant.

[2]. Proposed findings not accepted are either rejected or considered unnecessary to the decision.

larger competitor, Bio- Lab, Inc., by whom he had been employed for 24 years prior to coming to Chem Lab, had developed and was aggressively marketing a new product "Shock Plus", which was promoted as safer than existing products used for " shocking" swimming pools.[3] He pointed out that existing products used for that purpose were extremely flammable and that several of the major retailers, i.e., Home Depot, Lowe's and Wal Mart, had incurred destructive fires and were even considering not stocking swimming pool chemicals as a result. Mr. Hitchens testified that buyers were eager to stock the new product, which did not burn under normal conditions, that "you could see retailers changing brands" and that Chem Lab had already lost a couple of accounts to Bio-Lab because of this product (Tr.69, 70)..

4. According to Mr. Hitchens, Bio-Lab started promoting "Shock Plus" in 1995 and actually started shipping the product in the spring of 1996. On November 18, 1996, Jeffrey R. Cornett, then President and CEO of Chem Lab, addressed a letter to Carlton Layne, Chief Pesticide Section, USEPA Region 4, concerning the product "SHOCK PLUS 4-IN-1 Pool Shock" manufactured by Pool Time, a

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[3]. Tr. 68, 69. "Shock" may be simply defined as an extra heavy dose of chemical to cure a particular condition. Aden Leeds Inc., "Dictionary of Common Pool Terms", enclosure to Chem Lab letter, dated March 3, 1998, to Cheryn Jones, EPA Region 4 (R's Exh 2). The "Dictionary" defines "Super Chlorination" as an occasional heavy dose of chlorine to kill algae and bacteria which have developed tolerances to existing chemical conditions in pool. Other explanatory materials enclosed with the mentioned letter do not distinguish between "shock treatment" and "super chlorination", referring to both as terms used to describe raising the chlorine level of a pool or adding enough oxidizer to kill or oxidize contaminants that are resistant to normal chlorination. Users are informed that this procedure should be conducted every two to four weeks depending on pool temperature or usage.

subsidiary of Bio-Lab, Inc., Decatur, Georgia (R's Exh 1). Among other things, Mr. Cornett pointed out that product registrations at both the federal and state levels were very costly and so, if "Shock Plus" were a suitable precedent, i.e, did not require registration, then Chem Lab should be able to utilize the same exemption to the regulations. Mr. Cornett emphasized that the manner in which a label is written is critical to whether it can be sold without registration, but asserted that to write a label for a known pesticide product in such a way that, even though it is being used as a pesticide, no official pesticide claims are being made should not be allowed. He requested to be informed of whether "Shock Plus" did not require registration because of a change in the Agency's directives [regulations].

5. Enclosed with the letter from Mr. Cornett referred to in the preceding finding was a letter of even date also addressed to Carlton Layne ,EPA Region 4, written by Chem Lab's chief chemist, Dana Somesla. Referring to the enclosed copy of a product label for "SHOCK PLUS 4-IN-1 POOL SHOCK", which he states appears to be an unregistered pesticide, Mr. Somesla points out that the label uses the term "Shock" throughout its claims, but never refers to superchlorination, which is the traditional meaning of "shocking". He further points out that over the past few years several other unregistered shocking agents for swimming pool and spa use have been brought into the market place, but that these were not chlorinating compounds. He states that the main ingredient in Shock Plus is 60% sodium dichloroisocyanurate ,a common "active ingredient" for EPA registered

swimming pool treatment, including various brands of pool and spa shocking products, some of which are currently packaged by the parent company and/or Bio-Lab or its subsidiaries.

6. In the mentioned letter, Mr. Somesla states that the Shock Plus label appears to be a clear attempt at deception in its quasi EPA appearance, specifically using EPA approved statements for the Practical Treatment and Storage and Disposal of sodium dichloroisocyanurate, but then not addressing or including the Precautionary Statement for Hazards to Humans and Domestic Animals or Environmental Hazards, which hazards are identical to those [posed by] product containing that active ingredient and bearing an EPA approved label. Additionally, he points out that following label directions exactly will cause problems with the chlorination level in pool water as there is no warning on the label to test for chlorine before adding Shock Plus or making any adjustment to the dose to add a safe amount. In summary, he states that this product has a name, Shock Plus, that implies chlorination and it contains a chlorinating compound commonly used for swimming pool treatment. Mr. Somesla emphasized that Chem Lab's concern is that, if Shock Plus is a legitimate product that does not require registration, then Chem Lab would be free to make its own version and offer its customers a comparable product without the delays attendant on registration.

7. EPA, Region 4, replied to Chem Lab's inquiry by a letter, dated September 4, 1997, signed by Cheryn L. Jones, Compliance Officer, stating that Shock Plus

was considered a pesticide, which required registration (C's Exh 12). The letter referred to a determination made by the Risk Assessment Branch, Antimicrobials Division, Office of Pesticide Programs, which pointed out that the product label lists chlorinated isocyanurates as an active ingredient and that chlorinated isocyanurates are registered for use as disinfectants, sanitizers, and algicides for [use in] swimming pools. In addition, the determination stated that the name "Shock Plus" and the claim that it "produces super clear water" are consistent with other swimming pool products of this type which are subject to registration under FIFRA. Mr. Hitchens testified that when Chem Lab received this letter, Bio-Lab had been selling Shock Plus for two years, gaining significant market share (Tr.70, 72). He asserted that it had gotten to the point that buyers did not want Chem Lab's old style "shock" anymore, because it was considered unsafe.

8. By a letter, dated March 3, 1998, addressed to Cheryn Jones, EPA Region 4, signed by Thomas R. Kincaid, Vice President Marketing, Chem Lab referred to a prior conversation with Ms. Jones and enclosed information concerning "Shock" products (supra note 3). The letter stated that by reviewing the attachments, you can see that "our industry" has tried to separate products that "shock" and remove waste from products that " superchlorinate" and sanitize the water. The letter noted that a lot of shock products had been introduced in the industry over the last 15 years, but that the claims for these new items did not significantly differ from those of the past. Additionally, the letter pointed out that there had been a management change at Chem Lab and that the new management did not feel the

same about these new products as expressed in the letter from [then president] Jeff Cornett. Because of new management's knowledge of the industry and of the products that have been around for some time, EPA was informed that Chem Lab would like to withdraw its objections to these types of new products.

9. Mr. Hitchens testified that at this time, the new product marketed by Bio-Lab had already cost Chem Lab considerable business, that they had been in contact with Cheryn Jones [Region 4] concerning Bio-Lab [lack of EPA enforcement action] and that "we" came to the conclusion that perhaps Bio-Lab was right and the product did not need to be registered (Tr.72, 73). He asserted that EPA still had not made a determination as to whether the Bio-Lab product required registration. This assertion is not literally accurate as Chem Lab had been informed that "Shock Plus" was considered a pesticide requiring registration in a letter from Region 4, dated September 4, 1997 (finding 7), and it is concluded that Mr Hitchens was referring to the apparent lack of EPA enforcement action against Bio-Lab. He explained that the conclusion "Shock Quick" did not require registration was supported by the fact that the label did not contain any "kill claims" and by the fact that household bleach products containing sodium hydrochloride which did not claim to kill bacteria did not require EPA registration (Tr.73, 74). While the latter statement is supported by the regulation,[4] the "Shock

[4]. The regulation, 40 C.F.R. § 152.10, provides that a product which is not intended to prevent, destroy, repel, or mitigate a pest, or to defoliate, desiccate or regulate the growth of plants is not considered to be a pesticide. Examples of products which are not considered pesticides unless a pesticidal claim is made on their labeling or in connection with their distribution and sale are deodorizers, bleaches and

Quick" label indicates that it is a strong oxidizing agent and it is noted that literature enclosed with the March 3, 1998, Chem Lab letter uses" oxidizing" and "killing" interchangeably (finding 3).

10. Mr. Hitchens testified that Chem Lab kept EPA informed of what they were proposing to do and, in fact, sent Cheryn Jones a copy of the label for "Shock Quick" (C's Exh 10). On April 27, 1998, EPA, Region 4, issued Stop Sale, Use, or Removal Orders to Bio-Lab, Inc., SSURO-98F037 relating to "Shock Plus 4-in-1 Schock" and SSURO-98036 relating to "BioGuard Lite Oxidizing Clarifier"(R's Exh 3). These orders were based on the determination that Bio-Lab was distributing the mentioned products which were pesticides not registered with EPA. Ms. Jones faxed a copy of the Bio-Lab orders to Chem Lab and Mr. Hitchens testified that when we received the orders he instructed " our chemist" to immediately file for registration [of "Shock Quick"] (Tr.75). Chem Lab applied for registration under the name of "Shock Power" on May 19, 1998, and EPA Registration No. 7616-75 was granted on May 5, 1999. Mr. Hitchens stated that upon receipt of the registration, he immediately stopped sale of the product under the old label.

11. The EPA approved label for "Shock Power" (C'S Exh 11) indicates that the active ingredient is Trichloro-S-Triazinetrone [Triazinetrione] at 40%, that inert ingredients are 60% and that available chlorine is 36%. The label contains the signal word "Danger" and more clearly makes pesticidal claims, e.g., "Swimming

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cleaning agents.

Pool Water Disinfectant" and "controls algae and bacteria."

12. Chem Lab's facility in Ontario, California was initially inspected by a representative of the California Department of Pesticide Regulation, Kari Carrillo, on June 18 [19], 1998 (Notice of Inspection, C's Exh 1). The reason for the inspection was to investigate a complaint concerning the possible production and sale of an unregistered swimming pool shock product, "Shock Quick". Ms. Carrillo met with Mr. Somesla and agreed to return on June 22 when Mr. Somesla promised to have available information and documents she had requested. . Ms. Carrillo returned on June 22 and collected a physical sample of "Shock Quick", documentary samples, invoices showing sales of "Shock Quick" during the period October 1997 through [to] June 1998, a copy of Chem Lab's new product registration application for "Shock Power" and other documents (Investigation Summary, C's Exh 2; Receipt for Samples, C's Exh 4).

13. In an inspection in June 1999, Ms. Carrillo collected invoices reflecting sales of "Shock Quick" and other items to various Orchard Hardware Supply stores in California during the period June 19, 1998, through September 23, 1998 (Notice of Inspection; Receipt for Samples and Invoices, C's Exhs 7, 8, and 9). The invoices show sales and delivery of "Shock Quick" and other items to Orchard Hardware Supply stores in the following cities in California on the following dates: Capitola, on June 19, July 14, August 14 and September 10, 1998; Merced on June 23, 1998; Antioch on June 26, July 31,August 28 and September 18, 1998; Redwood City on June 26, July 31, August 14 and September 11, 1998;

Modesto on June 26, June 30, and September 8, 1998; San Jose on July 16, July 24, August 19 and September 23, 1998; Sand City on July 24, August 7, and August 28, 1998 and Manteca on July 28, 1998.[5] Mr. Hitchens testified that these sales were made to protect our existing customer base and that [no effort was made] to solicit new business (Tr. 74, 77). He asserted that the sales were only defensive until a final decision [as to whether the product required registration] was reached.

14. On September 16, 1998, EPA Region 4 issued a press release announcing a settlement with Bio-Lab, Inc of an administrative enforcement action concerning the sale by Bio-Lab of two swimming pool products, "Shock Plus 4-in-1 Pool Shock" and "BioGuard Lite Oxidizing Clarifier" (R's Exh 5). The announcement stated that these products contained chlorinated isocyanurates, a compound commonly use in swimming pool sanitizers, and that the products were not registered with EPA. While not admitting to liability, Bio-Lab agreed to pay an administrative penalty of $319,000 and to seek registration of not only the named products, but of five other [swimming pool] products containing chlorinated isocyanurates .As an interim measure pending registration, Bio-Lab was permitted to continue sale of the affected products by posting placards in retail outlets where the products were sold containing a statement: "(This product) has not been accepted by U.S. EPA for use as a disinfectant, sanitizer or algicide."

[5]. This totals 25 sales of "Shock Quick" to the mentioned locations on the specified dates.

15. The Consent Agreement and Consent Order with Bio-Lab, Inc, IF&R Docket No. 04-98F040-C, referred to in the preceding finding, was executed by Bio-Lab on September 9, 1998, and by EPA Region 4 on September 14, 1998 (R's Exh 6). The CACO, while reciting that Bio-Lab denied the violations of FIFRA alleged in the complaint and referring to the possible presence of unregistered pesticides in the channels of trade under the control of Respondent, essentially reflected Bio-Lab's agreement to file within 90 days applications for registration of the products, "Shock Plus 4-in-1 Pool Shock" and " BioGuard Lite Oxidizing Clarifier", which were the subject of the Stop Sale, Use and Removal Orders, issued on April 27, 1998, and five other products having the same basic formulation, sold under the names "Synergy Clear", "Simplicity Clear", "Snap Clear", "SpaGuard Enhanced Shock", and " Bermuda Blue Enhancer".[6] Additionally, Bio-Lab agreed to install by September 4, 1998 and use reasonable efforts to maintain placards containing the notice specified in finding 14 in the approximately 5,000 retail outlets that sell "Shock Plus" and to use reasonable efforts to install and maintain placards containing the mentioned notice in all of the retail stores that sell "BioGuard Lite". Bio-Lab agreed to use agreed revised labeling containing the notice on all "Shock Plus" produced after July 31, 1998, and on all "BioGuard Lite" produced after July 13, 1998. Bio-Lab also agreed, inter alia, to a schedule for installing and maintaining placards containing the

[6]. The Bio-Lab registrations for "Shock Plus" and " BioGuard Lite" were granted in April of 1999 and supplemental registrations for "Snap Clear", "Simplicity Clear" and " Synergy Clear" were granted in May, 1999 (Tr. 62).

mentioned notice on all pallet and shelf displays of the remaining Affected Products (the products listed above) in retail stores which sell the products and to include the notice on all advertising and marketing information. Upon receipt of written notification that EPA had granted registration of an Affected Product, Bio-Lab agreed to stop selling or distributing any unregistered containers of the Affected Product, except that Bio-Lab was permitted to sell or distribute stocks of the Affected Product existing as of 30 days after the date of notification of registration. Existing stocks were those Affected Products for which all steps of formulation, packaging and labeling have been completed, but which have not been released for shipment. Bio-Lab was permitted to sell or distribute such existing stocke of Affected Products, subject to certain requirements of the CACO, until such stocks are exhausted, or for 90 days following receipt of notice that registration of the Affected Product had been accepted for registration, whichever period of time is shorter (Id. 7; Tr.91, 92). Bio-Lab agreed to pay a penalty, which with interest totaled $327,200 , in three installments at intervals of 30 days, 180 days and 365 days.

16. Mr. Hitchens testified that after he received a copy of the Stop Sale, Use and Removal Orders issued to Bio-Lab, Ms Jones faxed him a copy of a Temporary Restraining Order (TRO) which Bio-Lab had obtained from the United States District Court for the District of Columbia on May 6, 1998, allowing Bio-Lab to continue selling its products (Tr.74). The TRO restrained the Administrator and officers and employees of the Agency from enforcing the Stop Sale, Use and

Removal Orders (R's Exh 4). The matter was set for hearing on preliminary injunction on May 20, 1998, and it is not clear whether an injunction was issued or whether the TRO was simply dissolved. Be that as it may, Mr. Hitchens testified that because Chem Lab did not make any "kill claims" on its label and because the TRO [or settlement negotiations] allowed Bio-Lab to continue selling its products, "we felt that we were on solid ground", i.e., that "Shock Quick" was a legitimate product not requiring registration (Tr. 73, 74). He pointed out that Chem Lab was inspected on June 18 and told there was a possible violation (Tr.77). He emphasized that Chem Lab was not issued a " Stop Sale" nor were they told that Chem Lab was in violation. He complained that under the Consent Agreement Bio-Lab was permitted to continue selling its products by merely putting up a placard saying " this product had not been accepted [by EPA]" (Tr. 78, 79). He asserted that Chem Lab would gladly have done that, but that we were not given that option. He concluded that Bio-Lab was still distributing unregistered "Shock Plus" in February of 2000 because he had stopped on his way to a meeting with Amy [Miller], identified finding 21, and purchased a package of "Shock Plus" product from a Home Depot store (Tr.90). He asserted that Dana [Somesla] purchased a package of unregistered "Shock Plus" from another store on his way to the same meeting in San Francisco. He testified that swimming pool chemicals that contain chlorine do not age well on the shelf, while labels on the packages he and Dana purchased looked crisp and new and showed no signs of aging, thus indicating the material had not been packaged

very long (Tr. 96).

17. Mr. Hitchens stated that Chem Lab was a $23 million sales company competing against Bio-Lab which is a $1.5 billion sales company (Tr. 71). As a former executive of Bio-Lab, he explained that their financials were not separated from those of the parent, Great Lakes Chemical (Tr. 83, 84). He pointed out that registrations were very expensive, that state registration [fees] were in addition and that Bio-Lab had an unfair advantage over anything " we could do in the market place" (Tr. 76, 77, 87). He asserted that he did not understand the [penalty] policy, because Bio-Lab was fined $319,000 for selling seven products over four years, which equals approximately $45,000 a product, while the fine for Chem Lab is $132,000 for selling one product for three [actually four] months (Tr. 83, 84) He testified that during the three-year period when Chem Lab was selling "Shock Quick" only to existing customers, they lost a tremendous amount of business and that he had to close plants in Florida and Texas (Tr.81). He explained that, although there may be 70 or 80 items that make up the swimming pool chemical line, the number one selling item was the one-pound container of shock, that buyers judged producers by that product and so that kind of " rules everything else you do" (Tr.82). He testified that Chem Lab barely made a profit in 1997, lost money in 1998, broke even in 1999 and started again making money in 2000. He related, however, that after "we had our registration", our product was widely accepted by both retailers and consumers and that we acquired significant new business. Mr. Hitchens specifically disclaimed any notion that

Chem Lab was unable to pay the proposed penalty.

18. Mr. Robert S. Brennis, product manager in the Anti microbial Division of the Office of Pesticide Programs, EPA Headquarters, Washington, D.C., testified as to the registration process (Tr. 42, 43).He explained that his responsibilities included reviewing the [adequacy] of the registration application and any supporting data to make certain that the product may properly be registered, i.e., doesn't cause [unreasonable] adverse effects on human health or the environment, and that the label has the proper precautionary and warning statements. He testified that he had registered a host of products- insecticides, surface sanitizers, surface disinfectants, swimming pool and spa products, swimming pool and spa disinfectants and water purifiers (Tr. 45). Mr. Brennis has registered five or six products manufactured by Chem Lab, the most recent being "Shock Power" in May of 1999 and " Shock Power 67" in the year 2000 (Tr. 46). He indicated that a review of the EPA FIFRA database revealed that Chem Lab has registered a total of 54 products with EPA and that 18 of these registrations were still active (Tr .46, 47). Chem Lab is thus familiar with the registration process. Describing the registration process for "Shock Power", Mr. Brennis testified that this was an "end-use" registration specifically for swimming pool use and that Chem Lab was able to rely on what he referred to as the "formulator's exemption", meaning that it was unnecessary to supply generic data for the basic chemical (Tr.47). He stated that for "end-use" products we generally require six acute toxicity studies, but that in this instance three of the studies, acute dermal,

dermal sensitization and primary eye irritation, were waived because as to the dermal studies, it was determined that this product could be no worse than the source product and as to the primary eye irritation study, the registrant agreed that it was in Category 1, the most severe category as to hazard, and that it was unnecessary to damage a lot of animals [to demonstrate that fact] (Tr. 47, 48). Mr. Brennis explained that "Shock Power" was registered for use as a swimming pool disinfectant, one use being as part of the regular swimming pool maintenance program and the other use as a "super chlorinator" when pools become contaminated with bacteria and other contaminants and it is necessary to " shock" or superchlorinate the pool to remove the contamination (Tr.49, 50).

19. Mr. Brennis testified that an additional responsibility of a product manager is the monitoring of pesticide products after registration, which involves the review of adverse incident reports which registrants are required by the Act to submit (Tr. 44). H e stated that the active ingredient of "Shock Power" is Trichloro-S-Triazinetrone [Triazinetrione] and that the Agency had received approximately 200 incident reports from the use of products containing that active ingredient (Tr. 50, 51). He described the reports as generally reflecting injuries such as eye and skin irritation, vomiting and incidents such as explosions resulting from mishandling. Most of the incidents involved residential users who are not as well informed as [commercial pool users] as to the proper handling of these chemicals (Tr.52). He explained the Agency attempted to deal with such situations through label language [suitable warnings and precautionary statements].

20. Testifying with reference to the EPA registered label for "Shock Power" (C's Exh 11), Mr. Brennis noted that the language under "Precautionary Statements" read as follows:

> Danger. Causes irreversible eye damage. May be fatal if inhaled. Causes skin irritation Harmful if swallowed or absorbed through skin. Do not get in eyes, on skin or clothing. Do not breathe dust. Wear goggles or face shield, and a mask or pesticide respirator approved by the National Institute for Occupational Safety and Health. Wash thoroughly with soap and water after handling. Remove contaminated clothing and wash clothing before reuse. (Tr.53, 54).

Mr. Brennis explained that this language was required by our assumptions as to acute toxicity data and routes of exposure. Additional language on the label under "Physical or Chemical Hazard" highlighted the fact that "Shock Power" was a strong oxidizing agent, that contact with water slowly liberates irritating and hazardous chlorine gases and that it decomposes at 460 degrees Fahrenheit to 480 degrees Fahrenheit with the liberation of harmful gases. Mr. Brennis testified that this language was required on the label because this compound was very volatile and may explode if mixed with other [incompatible] ingredients or mishandled. He emphasized that many of the reported adverse effect incidents involved explosions (Tr.56).

21. Ms. Amy Miller, an enforcement officer and team leader in the Pesticide Program, Region 9, testified as to the computation of the proposed penalty (Tr. 15-17). She said that she had been an EPA enforcement officer for six years and that during that time she had calculated penalties in approximately 50 cases, of which approximately 40 were penalties under FIFRA. In determining the

proposed penalty herein, she used the Enforcement Response Policy for FIFRA (July 2, 1990) (ERP) (C's Exh 15) and her determinations are reflected on the Civil Penalty Calculation Worksheet (C's Exh 16). She explained that the first step in penalty calculation was determining the base penalty which involved consideration of the nature of the violation (Tr. 19, 20). In this instance, the violation is the sale and distribution of an unregistered pesticide which is a violation of FIFRA § 12(a)(1)(A). Ms. Miller pointed out that Appendix A of the ERP, FIFRA Charges and Gravity Levels, provides that the sale and distribution of an unregistered pesticide is gravity Level 2., which is serious. She testified that the next step was determining the violator category as between FIFRA § 14(a)(1), that is registrants, [commercial] applicators, wholesalers, dealers, and other distributors who may be penalized up to $5,000 [$5,500] for each offense, and FIFRA § 14(a)(2), private applicators and other persons not included in § 14(a)(1) who may, subsequent to receipt of a notice, be penalized not more than $1,000 for each offense. Chem Lab is a registrant and a distributor of pesticides and thus subject to the maximum penalty under § 14(a)(1).

22. Continuing to explain the penalty calculation, Ms. Miller testified that the next step was to determine the size of Chem Lab's business (Tr. 21).She researched EPA databases and consulted Dun & Bradstreet and determined that Chem Lab was in Category I, sales of over $1 million (Tr. 21, 22). This determination is clearly correct because Mr. Hitchens acknowledged that Chem Lab was a $23 million sales company (finding 17). Applying a Level 2 violation and a

Category I size of business to the Civil Penalty Matrix at 19 of the ERP resulted in a base penalty of $5,000 , $5,500 because of the inflation adjustment (40 C.F.R. Part 19).The next step was to determine gravity adjustments and Ms. Miller stated that there were five [possible] gravity adjustments: pesticide toxicity, human harm, environmental harm, compliance history and culpability (Tr. 22, 23). She explained that each of these adjustment factors was assigned a point value from Appendix B of the ERP with zero being the least serious and five being the most serious. For example, Appendix B "Gravity of Harm", indicates that pesticides in Category I for toxicity, that is, those bearing the signal word "Danger", restricted use pesticides, and, inter alia, pesticides that are associated with chronic health effects are assigned a value of 2. Ms. Miller testified that pesticides [having active ingredients] from the chlorinated isocyanurates family were assigned Category I [as to toxicity] because of the possibility of severe eye damage (Tr. 24).

23. The next adjustment factor is "harm to human health" and she compared the unregistered label for "Shock Quick" with the EPA registered label for "Shock Power", noting that the former did not contain the warning "May be fatal if inhaled" and that while the "Shock Quick" label included a warning not to get in eyes, on skin or on clothing and to wear eye protection when handling the product, the approved label contained the detailed notice as to eye protection set forth in finding 20 (Tr. 25-27). Comparing the "Practical Treatment (First Aid)" statements on the approved label for "Shock Power" with the " First Aid" notice

on the unregistered "Shock Quick" label, Ms. Miller noted that the former stated "If On Skin: Immediately brush off excess chemical and flush with plenty of soap and water. Remove contaminated clothing. Wash clothing before reuse. Get medical attention if irritation persists,"while the "Shock Quick" label merely stated : "If On Skin:Wash with plenty of soap and water. Get medical attention." (Tr. 27, 28). She also noted that here was only a three-step direction for use on the unregistered label, while "Directions For Use" on the approved label had much more detail as to the type [condition] of the pool,[e.g., check pH daily]. She asserted that these differences were significant. Turning to the ERP and Appendix B, she pointed out that this product was widely used by residential users who may not be trained in the proper use of these chemicals (Tr. 28,29). Therefore, she gave " harm to human health" a value of 3 "potential for serious or widespread harm to human health".

24. The next adjustment factor is "environmental harm" and because the product is used in confined areas, swimming pools, and thus not likely to escape into the environment, Ms. Miller gave this factor a value of 1, "minor potential for actual harm to the environment" (Tr. 29). Because Chem Lab had no record of prior violations within the past five years, she gave it a value of zero for " compliance history". The final adjustment factor is "culpability", which ranges from zero "violation was neither knowing nor willful and did not result from negligence" to 4, "knowing or willful violation of the statute." A value of two is assigned for instances where "culpability is unknown" or the "violation resulted from

negligence." Because she considered that Chem Lab had been warned or notified at least three times that "Shock Quick" was an unregistered pesticide, Ms. Miller testified that a value of 2 was assigned for culpability. She explained that she informed Mr. Kincaid of Chem Lab in a telephone conversation on May 8, 1998, that "Shock Quick" was an unregistered pesticide and that Chem Lab should immediately stop selling the product (Tr. 30) The other two times that Chem Lab was placed on notice that it might be selling an unregistered pesticide were the Notices of Inspection, dated June 18[19], and 22, 1998 (C's Exhs 1 and 2), which stated the reason for the inspections as "possible selling of unregistered pesticide product (Shock Quick)"(Tr. 31).

25. Ms. Miller testified that the values from Appendix B of the ERP are added up and that, if the values are eight or higher, the matrix value is assessed and no adjustment is made (Tr. 23, 32). This is in accordance with the ERP at 22, Table 3 and Appendix C, Table 3. Because the values assigned to the Chem Lab violations totaled eight, no adjustments in the matrix penalty were made (Tr. 32, 33). She reached the same conclusion after reviewing other adjustment factors listed in the ERP, e.g., ability to continue in business/ ability to pay, voluntary disclosure, good faith, etc. She considered that none of these factors were applicable and assessed the full amount of the matrix penalty. Under cross-examination, she testified that the ERP was guidance which provides for a uniform and consistent method of applying FIFRA penalties (Tr. 34). She acknowledged that point values for gravity adjustments such as harm to human

health and the environment and culpability required a determination [judgment] based on the facts in each case (Tr.35).

Conclusions

1. Chem Lab is a registrant and distributor of pesticides and made each of the 24 sales of the unregistered pesticide "Shock Quick" alleged in the complaint. These sales were in violation of FIFRA § 12(a)(1)(A).

2. In accordance with FIFRA § 14(a)(1), Chem Lab is liable for a penalty for the sales referred to above.

3. It is well settled that "gravity of the violation" as appearing in FIFRA § 14(a)(4) is considered from two aspects: gravity of the harm and gravity of the misconduct.[7]

   Inasmuch as there is no evidence or allegation of actual harm from the use of "Shock Quick", the "gravity of the harm" component is limited to the potential for harm to human health and the environment or to the regulatory program. The Agency's assessment of the seriousness of this potential is belied by the fact that it permitted Bio-Lab to sell similar unregistered products containing chlorinated isocyanurates as the active ingredient by posting placards in retail outlets where the products were sold to the effect that "this product has not been approved by EPA as a disinfectant, sanitizer or algicide." Similarly, although Chem Lab was

[7]. FIFRA § 14(a)(4), Determination of penalty, provides in pertinent part: In determining the amount of the penalty, the Administrator shall consider the appropriateness of the penalty to the size of the person charged, the effect on the person's ability to continue in business, and the gravity of the violation.....

aware of facts indicating that EPA considered Bio-Lab's similar products to be pesticides requiring registration, the fact, among others, that even after issuance of the "Stop Sale", Bio- Lab was permitted by the TRO to continue the sale of its products , supports Chem Lab's contention that it had a good faith belief that "Shock Quick" did not require registration.

4. It is concluded that the penalty as proposed by Complainant overstates both the gravity of the harm and the gravity of the misconduct and it is my decision to disregard the ERP as I am permitted to do by Rule 22.27 (b) (40 C.F.R. Part 22)[8]. An appropriate penalty is the sum of $50,000.

Discussion

Chem Lab has admitted and there is no dispute that "Shock Quick" was an unregistered pesticide at the time of the sales alleged in the complaint and found above (finding 13). These sales were thus in violation of FIFRA § 12(a)(1)(A), 7 U.S.C. § 136(j)(a)(1)(A), which prohibits any person in any state from selling or distributing any pesticide which is not registered[9]. Chem

[8] Rule22.27(b) provides in pertinent part: **Amount of civil penalty.** If the Presiding Officer determines that a violation has occurred and the complainant seeks a civil penalty, the Presiding Officer shall determine the amount of the recommended civil penalty based on the evidence in the record and in accordance with any civil penalty criteria set forth in the Act. The Presiding Officer shall consider any civil penalty guidelines issued under the Act. The Presiding Officer shall explain in detail in the initial decision how the penalty to be assessed corresponds to any penalty criteria set forth in the Act. If the Presiding Officer decides to assess a penalty different in amount from that proposed by complainant, the Presiding Officer shall set forth in the initial decision the specific reasons for the increase or decrease.....

[9]. FIFRA § 12, entitled "Unlawful Acts", provides in pertinent part:
(a) In general
(1) Except as provided by subsection (b) of this section, it ahall be unlawful for any person in any state to distribute or sell to any person–

Lab is thus liable for a penalty for these violations of the Act in accordance with FIFRA § 14(a)(4) and the amount of an appropriate penalty is the only matter at issue herein.

Strictly adhering to the ERP, Complainant has proposed that Chem Lab be assessed the maximum penalty of $5,500 for each violation. It is, of course, well settled that a penalty may be excessive even if it is computed in accordance with an applicable penalty policy or ERP. James C. Lin and Lin Cubing, Inc,, FIFRA Appeal No.94-2, 5 E.A.D.595 (EAB, 1994). See also Rybond, Inc., RCRA (3008) Appeal No.95-3, 6 E.A.D. 614 (EAB 1996). For the reasons stated above and as more fully explained below, it is concluded that the penalty as proposed by Complainant is excessive.

As noted previously, " gravity of the violation" as appearing in FIFRA § 14(a)(4) is considered from two aspects: gravity of the harm or potential for harm and gravity of the misconduct. Lin Cubing, supra. There is no evidence or allegation of actual harm resulting from the use of "Shock Quick" and the gravity of the harm component of the penalty is limited to potential for harm to human health and the environment or to the regulatory program. Complainant has made a superficially strong case that the potential for harm to human health from the use of products containing chlorinated isocyanurates is serious because it may be fatal if inhaled and because of the potential for irreversible eye damage. These concerns as well as alleged harm to the regulatory program are belied by the fact that Bio-Lab was permitted to sell similar unregistered products having chlorinated isocyanurates as the active ingredient by merely posting placards at retail outlets where the products were sold stating that " this product has not

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> (A) any pesticide that is not registered under section 136a of this title [FIFRA § 4] or whose registration has been canceled or suspended, except to the extent that distribution or sale has otherwise been authorized by the Administrator under this subchapter;

been approved by EPA as a disinfectant, sanitizer or algicide." Moreover, even after receipt of notification that an Affected Product had been accepted for registration, Bio-Lab was permitted by the CACO to sell stocks of Affected Products existing 30 days after such notification and to sell or distribute such products until existing stocks were exhausted or for 90 days thereafter, whichever period of time is shorter (finding 15). It is concluded that the penalty as computed by Complainant overstates the gravity of the harm or potential for harm resulting from the sales and distribution of "Shock Quick" shown by this record

Turning to the gravity of the misconduct, there can be no doubt that Chem Lab was on notice of facts indicating that EPA considered that Bio-Lab's similar product, "Shock Plus", containing chlorinated isocyanurate as the active ingredient, was a pesticide requiring registration. Chem Lab was notified that EPA considered "Shock Plus" a pesticide in a letter from Region 4, dated September 4, 1997, and although over seven months elapsed before "Stop Sale Use and Removal Orders" were issued to Bio-Lab on April 27, 1998, Chem Lab received a copy of these orders by fax almost immediately thereafter (findings 7 & 10). Chem Lab's contention that it had a good faith belief that "Shock Quick" was not a pesticide is based upon the fact that household bleach products containing sodium hydrochloride which do not claim to kill bacteria do not require registration and upon the asserted fact that the "Shock Quick" label did not make any "kill" claims (findings 9 & 16). This belief was supported by the TRO issued by the U.S. District Court for the District of Columbia on May 6, 1998, which prevented enforcement of the "Stop Sale" orders and which permitted Bio-Lab to continue the sale and distribution of its products. Mr. Hitchens, whom I find was a credible witness, testified that for the mentioned reasons Chem Lab was of the belief that "Shock Quick" did not require

registration. He pointed out that Chem Lab was merely told at the time of the inspection in June 1998, that there was a possible violation and that Chem Lab was not issued a "Stop Sale" order . Under the circumstances, it is concluded that Chem Lab's contention that it had a good faith belief that "Shock Quick" was not a pesticide requiring registration is sufficiently reasonable that Chem Lab's culpability and thus the gravity of the misconduct is slight.

Having concluded for the reasons stated above, that the penalty computed by Complainant in accordance with the ERP is excessive in that it overstates both the gravity of the harm and the gravity of the misconduct and that the ERP will be disregarded in determining the penalty, it is necessary to determine an appropriate penalty using the criteria in the statute, FIFRA § 14(a)(4). This centers on the " gravity of the violation" as Chem Lab has made no contention that the penalty proposed by Complainant will adversely affect its ability to continue in business or otherwise stated that it lacks the ability to pay the penalty (finding 17). Mr. Hitchens, however, asserted that the penalty proposed against Chem Lab is disproportionate to that assessed Bio-Lab as Bio-Lab was fined $319,000 for selling seven unregistered pesticides over four years , which he stated equaled approximately $45,000 a product, while Chem Lab is fined $132,000 for selling one product over a three-month (actually four-month) period (Id.). In this regard, there is substantial authority for the proposition that, because of the myriad factors which may lead to or be involved in settlements, amounts by which seemingly similar cases are settled are not relevant to determining a penalty in a particular case. See, e.g., Chautauqua Hardware Corporation, EPCRA Appeal No.91-1, 3 E.A.D.616, 1991 WL 310028 (CJO, 1991). See also Titan Wheel Corporation of Iowa, Docket No. RCRA VII 98-H-003, Order Granting Complainant's Motion to Strike, 2000 EPA ALJ LEXIS 91 (ALJ, December 13, 2000). As noted

in the Order Denying Complainant's Motion to Exclude, these holdings are made notwithstanding that the Agency's penalty policies cite uniformity of penalties as one of the reasons for the policy and that the ERP at issue here provides that "...the ERP is designed to provide fair and equitable treatment to the regulated community by ensuring that similar enforcement responses and comparable penalty assessments will be made for comparable violations." (Id. 1). It therefore seems anomalous to hold that penalties purportedly determined in accordance with an applicable penalty policy are not relevant to the penalty for a similar violation in the case at bar. Moreover, the effect of the cited decisions is to preclude a defense that a proposed penalty is arbitrary, because a respondent seeking to make such a showing has little chance of success unless he can compare the proposed penalty with penalties assessed in other cases. It should also be noted that, while the ERP purports to consider the criterion in FIFRA § 14(a)(4) "appropriateness of the penalty to the size of the person charged" by placing all firms with gross revenues of over $ one million in Category I, a strong argument can be made that the quoted language contemplates comparing the penalty assessed against a firm of one size with the penalty for a similar violation assessed against firms of the same or a different size.

Under the circumstances, the Agency's assessment of the gravity of the harm or potential harm being refuted by its conduct in permitting the sale with placards of Bio-Lab's similar swimming pool products and Chem Lab having a reasonable belief that "Shock Quick" was not a pesticide, it is concluded that a penalty of $50,000 is adequate to deter future violations and will adequately compensate for damage to the regulatory program. This is $2,000 for each sale, if the number of sales is considered to be 25 (finding 13) or $20,833 if the number of sales is 24 as

alleged in the complaint.

Order

Chem Lab Products, Inc. having violated the Act (FIFRA § 12(a)(1)(A)) by the sales of an unregistered pesticide as alleged in the complaint, a penalty of $50,000 is assessed it in accordance with FIFRA § 14(a)(1).[10] Payment of the full amount of the penalty shall be made by delivering a cashier's or certified check in the amount of $50,000 payable to the Treasurer of the United States to the following address within 60 days of the date of this order:

Regional Hearing Clerk
U.S. EPA, Reg. VIII
P.O. Box 360863M
Pittsburgh, PA 15251-6859

Dated this _____day of January 2002.

_____

Spencer T. Nissen
Administrative Law Judge

[10].Unless this decision is appealed to the Environmental Appeals Board in accordance with Rule 22.30 (40 C.F.R. Part 22) or unless the EAB elects to review the same sua sponte as therein provided, this decision will become the final decision of the EAB in accordance with Rule 22.27 (c).

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the **INITIAL DECISION, Docket No.FIFRA-9-2000-0007**, dated January 2, 2002 was sent this day in the following manner to the addresses listed

Original & One Copy by Regular Mail to:

Danielle Carr
Regional Hearing Clerk
U.S. EPA-Region 9
75 Hawthorne Street, ORC-1
San Francisco, CA 94105

Copy by Regular Mail

David Kim, Esq.
Assistant Regional Counsel
Office of Regional Counsel (ORC-2)
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_____
Cynthia Tingle
Legal Staff Assistant

Date: January 2, 2002