

10/2/93

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

FILED

DEC 13 1993

ENVIRONMENTAL PROTECTION AGENCY
REGION IX
HEARING CLERK

IN THE MATTER OF
CHEM MARK OF RENO,

Respondent

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DOCKET NO. FIFRA-09-0823-C-92-40

FIFRA Section 14: A civil penalty of \$1,000.00 is assessed
for the violations admitted by Respondent at the hearing.

Appearances:

For Complainant: David M. Jones, Esquire
Office of Regional Counsel
U. S. EPA, Region IX
75 Hawthorne St.
San Francisco, CA 94105

For Respondent: Lance R. Van Lydegraf, Esquire
Lander Street Law Center
526 Lander Street
Reno, NV 89509

Before: Henry B. Frazier, III
Chief Administrative Law Judge

INITIAL DECISION

I. Complaint and Answer

This is a proceeding under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended, 7 U.S.C. Section 136 et seq. An administrative complaint was issued on September 28, 1992, by the United States Environmental Protection Agency (EPA, Complainant or Agency) alleging that Chem Mark of Reno (Respondent or Chem Mark) had violated Section 12 of FIFRA, 7 U.S.C. Section 136j. An amended complaint was filed on September 7, 1993.^{1/} The amended complaint charged Respondent with the violation of Section 12 of FIFRA in five counts.

More specifically, the complaint alleged in Count I that Respondent had violated Section 12(a)(1)(E) of FIFRA, 7 U.S.C. Section 136j(a)(1)(E) by distributing a misbranded pesticide, SANI 250, because the label contained an incorrect Establishment Number. In Count II, it was alleged that Respondent had violated Section 12(a)(1)(E) of FIFRA, 7 U.S.C. Section 136j(a)(1)(E) by distributing a pesticide, KLOR 300, that was misbranded because the label contained an incorrect Establishment Number. In Count III, it was alleged that Respondent had violated Section 12(a)(2)(L) of FIFRA, 7 U.S.C. Section 136j(a)(2)(L), by failing to comply with established reporting requirements. In Count IV, it was alleged that Respondent had violated Section 12(a)(1)(E) of FIFRA, 7 U.S.C. Section 136j(a)(1)(E) by offering for sale the registered product, SANI 250, which was adulterated

^{1/} An order granting the motion to amend the complaint was issued by the Presiding Chief Administrative Law Judge on October 1, 1993.

in that it contained 1.73% sodium hypochlorite as the active ingredient while the label showed a concentration of 2.50%. In Count V, it was alleged that Respondent had violated Section 12(a)(1)(E) of FIFRA, 7 U.S.C. Section 136j(a)(1)(E) by offering for sale the registered product, KLOR 300, which was adulterated in that it contained 4.6% sodium hypochlorite as the active ingredient while the label showed a concentration of 6%.

The Complainant proposes to assess a total civil penalty in the amount of \$7,700.00 against Respondent for the alleged violations. The individual penalties proposed for each count are:

Count I	\$ 700.00
Count II	700.00
Count III	2,100.00
Count IV	2,100.00
Count V	<u>2,100.00</u>
Total:	\$7,700.00

A hearing was held in this matter in Reno, Nevada, on October 14, 1993. At the hearing, counsel for the Respondent admitted on the record that the facts as alleged in the complaint "are correct and can be proven by the government."^{2/} In response to a question by the Presiding Officer, counsel for Respondent acknowledged that Respondent was admitting liability as alleged in the complaint.^{3/} Respondent waived his right to a hearing and requested that the Presiding Officer decide "the issue of the proposed civil penalty based upon facts to be submitted."^{4/} Complainant and Respondent filed their post hearing submissions on November 17, 1993, and November 15, 1993, respectively. No responses thereto were filed.

^{2/} Tr. 6

^{3/} Id.

^{4/} Id.

II. Findings of Fact and/or Conclusions of Law

Accordingly, I make the following findings of fact and/or conclusions of law based upon the allegations in the complaint and as admitted by Respondent:

1. This is a civil administrative action instituted pursuant to Section 14(a) of FIFRA, as amended, 7 U.S.C. Section 136 et seq. The Complainant is the United States Environmental Protection Agency, Region IX. The Respondent is Chem Mark of Reno.

2. The Complainant has reason to believe that Respondent has violated Section 12 of FIFRA, 7 U.S.C. Section 136j.

3. Respondent is a "person" as that term is defined in Section 2(s) of FIFRA, 7 U.S.C. Section 136(s).

4. Respondent owns, operates, controls, or is otherwise responsible for its place of business located at 7675 Hughes Drive, Reno, Nevada 89506 (Facility).

5. At the Facility, Respondent produces, distributes, sells, offers for sale, holds for sale, ships, delivers for shipment, receives and delivers, offers to deliver in commerce or some combination thereof, the product SANI 250, EPA Registration Number 47230-1-52848.

6. SANI 250 is a pesticide as defined in Section 2(u) of FIFRA, 7 U.S.C. Section 136(u) in that its label makes the claim it is a "sanitizer".

7. At the Facility, Respondent produces, distributes, sells, offers for sale, holds for sale, ships, delivers for shipment, receives and delivers, offers to deliver in commerce or some combination thereof, the product KLOR 300, EPA Registration Number 07726-24-52848.

8. KLOR 300 is a pesticide as defined in Section 2(u) of FIFRA, 7 U.S.C. Section 136(u) in that its label makes the claim it is a "sanitizer".

9. Respondent has registered the Facility as a Pesticide Producing Establishment in compliance with Section 7(a) of FIFRA, 7 U.S.C. Section 136e(a). The EPA Establishment Registration Number is 07726-NV-002.

10. Any registrant, commercial applicator, wholesaler, dealer, retailer or other distributor who violates any provisions of FIFRA, 7 U.S.C. Section 136 et seq., may be assessed a civil penalty by the Administrator of the EPA of up to \$5,000.00 for each offense. Section 14 of FIFRA, 7 U.S.C. Section 136i.

11. The EPA Administrator's authority has been delegated to the Regional Administrator and redelegated to the Director of the Air and Toxics Division, EPA Region IX (EPA Order 1280-4; EPA Regional Order R1260.27).

12. The latest approved labeling for SANI 250, EPA Registration Number 47230-1-52748 was accepted by EPA on June 4, 1982.

13. Section 2(q) of FIFRA, 7 U.S.C. Section 136(q), states that a pesticide is misbranded if its labeling bears any statement, design, or graphic representation relative thereto or to its ingredients which is false or misleading in any particular.

14. The term "labeling" means all labels and all other written, printed, or graphic matter accompanying the pesticide or device at any time, or to which reference is made on the label or in literature accompanying the pesticide or device. Sections 2(p)(2)(A) and (B) of FIFRA, 7 U.S.C. Section 136(p)(2)(A) and (B).

15. Section 12(a)(1)(E) of FIFRA, 7 U.S.C. Section 136j(a)(1)(E), provides that it shall be unlawful to distribute, sell, or offer for sale to any person any registered pesticide which is adulterated or misbranded.

16. On or about November 28, 1990, an inspection of the Facility was conducted by Inspector Charles Moses of the Nevada Department of Agriculture, EPA Credential No. 2321.

17. At the time of the inspection, the Inspector observed that SANI 250, EPA Registration Number 47230-1-52748, was being sold or distributed by Respondent, and that the product was misbranded in that the sampled labeling stated that the Establishment Number was 52748-NV-01, a statement which is false since this number, shown as the Establishment Number, has not been assigned to any establishment. The labeling used by Respondent on the SANI 250 product was in violation of Section 12(a)(1)(E) of FIFRA, 7 U.S.C. Section 136j(a)(1)(E). [Count I.]

18. The latest approved labeling for KLOR 300, EPA Registration Number 07726-24-52748 was accepted by EPA on April 29, 1988.

19. At the time of the inspection, the Inspector observed that KLOR 300 was being sold or distributed by Respondent, and that the product was misbranded in that the sampled labeling stated that the Establishment Number was 52748-NV-01, a statement which is false since this number, shown as the Establishment Number, has not been assigned to any establishment. The labeling used by the Respondent on the KLOR 300 product was in violation of Section 12(a)(1)(E) of FIFRA, 7 U.S.C. Section 136j(a)(1)(E). [Count II.]

20. Any producer operating an establishment registered under Section 7 of FIFRA, 7 U.S.C. Section 136e shall inform the Administrator of the types and amounts of pesticides which he is currently producing, which he has produced during the last year and which he has sold or distributed during the past year. The information required shall be kept current and submitted to the Administrator annually as required under such regulations as the Administrator may prescribe.

21. It is unlawful under Section 12(a)(2)(L) of FIFRA, 7 U.S.C. Section 136j(a)(2)(L) to violate any of the provisions of Section 7.

22. Respondent produces, distributes, sells, offers for sale, holds for sale, ships, delivers for shipment, receives and delivers, offers to deliver in commerce or some combination thereof, the product SANI 250, EPA Registration Number 47230-1-52748.

23. At the time of inspection, the Inspector collected a copy of the SANI 250 production record showing production of SANI 250 in 1990.

24. The term "establishment" means any place where a pesticide or active ingredient used in producing a pesticide is produced, or held, for distribution or sale.

25. The term "producer" means the person who manufactures, prepares, compounds, propagates, or processes any pesticide or active ingredient used in producing a pesticide. The term "producer" also means to repackage or otherwise change the container of any pesticide or active ingredient. Section 2(w) of FIFRA, 7 U.S.C. Section 136(w).

26. The Respondent filed the 1990 Pesticide Producing Establishment Report (Report) on February 1, 1991.

27. The 1990 Report does not include any data for the production of SANI 250, EPA Registration Number 47230-1-52748, which was produced by the

Respondent, in violation of Section 12(a)(2)(L) of FIFRA, 7 U.S.C. Section 136j(a)(2)(L). [Count III.]

28. The term "adulterated" applies to any pesticide if its strength or purity falls below the professed standard of quality as expressed on its accepted label. Section 2(c)(1) of FIFRA, 7 U.S.C. Section 136(c)(1).

29. During the course of the inspection, on November 28, 1990, Inspector Moses sampled a bottle of SANI 250, EPA Registration Number 47230-1-52748. The SANI 250, EPA Registration Number 47230-1-52748, was sealed with an EPA seal and marked as Sample No. SN11289023210103.

30. On or about November 28, 1990, the Nevada State Department of Agriculture reported that Sample No. 11289023210103 contained 1.73% sodium hypochlorite as the active ingredient. The label on SANI 250 lists 2.5% sodium hypochlorite as the active ingredient.

31. On or about November 28, 1990, the Respondent offered for sale the registered product, SANI 250, EPA Registration Number 47230-1-52748, which was adulterated in violation of Section 12(a)(1)(E) of FIFRA, 7 U.S.C. Section 136j(a)(1)(E). [Count IV.]

32. During the course of the inspection on November 28, 1990, Inspector Moses sampled a bottle of KLOR 300, Lot 056. The KLOR 300 was sealed with an EPA seal and marked as Sample No. SN11289023210102.

33. On or about November 28, 1990, the Nevada State Department of Agriculture reported that Sample No. 11289023210102 contained 4.6% sodium hypochlorite as the active ingredient. The label lists 6% sodium hypochlorite as the active ingredient.

34. On or about November 28, 1990, the Respondent offered for sale the registered product, KLOR 300, EPA Registration Number 7726-24-52748, which was adulterated in violation of Section 12(a)(1)(E) of FIFRA, 7

U.S.C. Section 136j(a)(1)(E). [Count V.]

In summary, Respondent is found to have violated: Section 12(a)(1)(E) of FIFRA as alleged in Count I of the complaint; Section 12(a)(1)(E) of FIFRA as alleged in Count II of the complaint; Section 12(a)(2)(L) of FIFRA as alleged in Count III of the complaint; Section 12(a)(1)(E) of FIFRA as alleged in Count IV of the complaint; and Section 12(a)(1)(E) of FIFRA as alleged in Count V of the complaint.

III. The Penalty

Section 14(a)(4) of FIFRA, 7 U.S.C. Section 1361(a)(4), states that "[i]n determining the amount of the penalty, the Administrator shall consider the appropriateness of such penalty to the size of the business of the person charged, the effect on the person's ability to continue in business, and the gravity of the violation." Section 14(a)(1), 7 U.S.C. Section 1361(a)(1) limits the civil penalty for any "dealer, retailer or other distributor" to \$5,000.00 for each offense.

Section 22.27(b) of the Consolidated Rules of Practice (40 C.F.R. Section 22.27(b)) states, in pertinent part:

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. If the Presiding Officer decides to assess a penalty different in amount from the penalty recommended to be assessed in the complaint, the Presiding Officer shall set forth in the initial decision the specific reasons for the increase or decrease.

The Agency has published civil penalty guidelines in the Enforcement Response Policy (ERP) for FIFRA (July 2, 1990).

Computation of the penalty amount under the ERP is determined in a five stage process. These stages are: (1) determination of gravity or "level" of the violation; (2) determination of the size of business category for the violator; (3) use of civil penalty matrices 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 of the base penalty in potential harm to human health and/or the environment, the compliance history of the violator, and the culpability of the violator; and (5) consideration of the effect that payment of the total civil penalty will have on the violator's ability to continue in business.

Complainant urges that I determine that the proposed civil penalty in the first amended complaint was determined in accordance with Section 14(a) of FIFRA and the ERP, "subject however to the adjustment factors set forth in the ERP including Ability to Continue in Business/Ability to Pay. . . and Special Circumstances/Extraordinary Adjustments. . . ." Complainant also maintains that Respondent is not entitled to an adjustment based on Respondent's "good faith". Complainant acknowledges that Respondent should be permitted to pay whatever penalty may be assessed in installments over a two-year period.

Respondent urges the reduction or elimination of the civil penalty proposed by Complainant. To justify a reduction of the proposed penalty, Respondent submits that I should consider Respondent's history of compliance with the Act and Respondent's good faith as well as Respondent's limited ability or inability to pay a civil penalty for the violations found. In support of the last factor, Mr. Joe Lane, who does business as Chem Mark of

Reno, has submitted an affidavit explaining his financial circumstances and which demonstrates that his personal expenses far exceed his income each month.

At the hearing, the Complainant waived the opportunity to challenge this evidence pertaining to the ability to pay or to continue in business, or to offer any rebuttal evidence on the question of ability to pay and agreed to "honor the submission by counsel" for Respondent.^{5/}

Based upon Respondent's submission, I conclude that Respondent has a very limited ability to pay a penalty. Respondent's monthly expenses exceed income by more than \$1,500.00. Respondent has no previous history of noncompliance with FIFRA.

In this case, two of the violations involved the erroneous use of a distributor number in lieu of an Establishment Number which apparently had been assigned to Chem Mark of Reno by EPA but sent to the Registrant, Mark Chemical Company of Orange, California.^{6/} The essence of these violations committed by Chem Mark resulted from its use of incorrect labels on some containers of ordinary household chlorine bleach. While the product at issue which Chem Mark produces and distributes is a pesticide required to be registered with EPA, chlorine bleach is available for purchase without restriction in supermarkets throughout the United States. It is used everyday by ordinary citizens throughout the country in doing their household laundry. When the product labels for SANI 250 and KLOR 300 were submitted by Chem Mark of Reno for EPA review and approval, the distribution number was included on the labels.^{7/} However, the labels were apparently accepted without challenge^{8/} by EPA.

^{5/} Tr. 8.

^{6/} Complainant's Exhibit (Comp. Exh.) 15.

^{7/} Compl. Exhs. 3 and 4.

^{8/} Id. See Also Complainant's Prehearing Exchange at 2 ("Product label for SANI 250 accepted April 14, 1988.")

In recognition of Respondent's very limited ability to pay a penalty and the special circumstances surrounding at least two of the violations, I conclude that a penalty of \$1,000.00 should be assessed in this matter. The penalty is to be paid in quarterly installments of \$125.00 each over an extended period of time.

9/
ORDER

Pursuant to Section 14 of FIFRA, 7 U.S.C. Section 1361, a civil penalty in the amount of \$1,000.00 is assessed against Respondent, Chem Mark of Reno, for the violations of Section 12 of FIFRA, 7 U.S.C. Section 136j found herein.

IT IS ORDERED that Respondent, Chem Mark of Reno, pay a civil penalty to the United States in the sum of \$1,000.00. I direct that the penalty be paid in eight equal payments of \$125.00, the second payment at a three-month interval after the first, and each payment thereafter at a three-month interval until the full amount of \$1,000.00 is paid. Payments shall be made by cashier's or certified check payable to "Treasurer, United States of America." The checks shall be sent to:

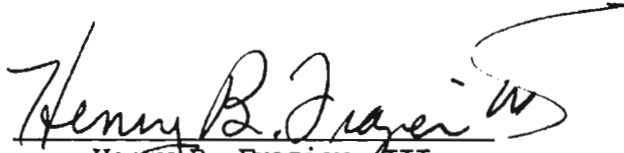
U. S. EPA - Region 9
(Regional Hearing Clerk)
P. O. Box 360863M
Pittsburgh, PA 15251

9/ Pursuant to 40 C.F.R. Section 22.27(c), this initial decision shall become the final order of the Environmental Appeals Board unless an appeal to the Environmental Appeals Board is taken by a party or the Environmental Appeals Board elects to review the initial decision upon its own motion. 40 C.F.R. Section 22.30 sets forth the procedures for appeal from this initial decision.

Respondent shall note on the checks the docket number specified on the first page of this initial decision. At that time of each payment, Respondent shall send a notice of such payment and a copy of the check to:

Regional Hearing Clerk
U. S. EPA - Region 9
75 Hawthorne Street
San Francisco, Ca 94105

Attn: Steven Armsey


Henry B. Frazier, III
Chief Administrative Law Judge

Dated: December 7, 1993

Washington, D. C.