

5/8/67

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
324 East 11 Street
Kansas City, Missouri 64106

IN THE MATTER OF:)	DOCKET NO. I.F.&R. V-604-C
)	-----
Bradley Exterminating Company)	Marvin E. Jones
Richfield, Minnesota)	Administrative Law Judge

INITIAL DECISION

This is an action for the assessment of civil penalties under Section 14(a)(1) [7 U.S.C. 1361(a)(1)] of the Federal Insecticide, Fungicide and Rodenticide Act (hereinafter "FIFRA" or "The Act") instituted by complaint filed December 14, 1978 by the U.S. Environmental Protection Agency, Region V, Chicago, Illinois (hereinafter "EPA") against Respondent, Bradley Pieper d/b/a Bradley Exterminating Company ^{1/}(hereinafter "Bradley") for alleged violations under Sections 12(a)(2)(G) and 12(a)(1)(A) [7 U.S.C. 136j(a)(2)(G) and 136j(a)(1)(A)].

The Complaint, which consists of four Counts, alleges that Bradley:

1. applied the registered pesticide SEVIN DUST in a manner inconsistent with its labeling in violation of the Act;
2. applied the registered pesticide ROZOL TRACKING POWDER on over 200 separate occasions in a manner inconsistent with its labeling in violation of the Act;
3. applied the registered pesticides SEVIN, SEVIN DUST and DIAZINON on 29 separate occasions in a manner inconsistent with their labeling in violation of the Act; and

^{1/} The record reflects that at all times pertinent hereto, Bradley was a proprietorship owned by Bradley Pieper and Dianna Pieper, husband and wife, and that Bradley Pieper was the manager. Subsequently, said company was incorporated as, and is now, Bradley Exterminating Company, Incorporated.

4. manufactured and distributed for sale to the general public the unregistered bat control kit, RID-O-PAK, in violation of the Act.

[That part of the Complaint alleging misuses of Rozol against squirrels was withdrawn by Complainant (II T. 652)^{2/}].

Section 12 (7 U.S.C. 136j) of the Act provides, in pertinent part, as follows:

"Sec. 12. UNLAWFUL ACTS.

"(a) In General.--

"(1) ...it shall be unlawful for any person in any State to distribute, sell, offer for sale, hold for sale, ship, deliver for shipment, or receive and (having so received) deliver or offer to deliver, to any person --

"(A) any pesticide which is not registered under section 3, ...

...

"(2) It shall be unlawful for any person--

"(G) to use any registered pesticide in a manner inconsistent with its labeling,"

Section 14 (7 U.S.C. 136l) provides, in pertinent part:

"Sec. 14. PENALTIES,

"(a) Civil Penalties.--

"(1) In General. -- Any registrant, commercial applicator, wholesaler, retailer, or other distributor who violates any provision of this Act may be assessed a civil penalty by the Administrator of not more than \$5,000 for each offense."

A prehearing conference was held in Minneapolis, Minnesota on June 7, 1979. Seven days of Adjudicatory Hearing were held September 5-7 and October 23-26, 1979 in St. Paul, Minnesota. The record consists of 1364 pages of transcript along with 133 exhibits.

^{2/} Transcript page number preceded by (II T.) indicates that part of the record testimony transcribed during the second phase of the Hearing October 23 to 26, 1979.

Respondent, in his Brief, states his defenses as follows:

(I) The EPA lacks jurisdiction to assess a civil penalty against Respondent under Section 14(a) of FIFRA;

(II) The EPA Complaint is based entirely upon inadmissible evidence obtained following an illegal search and seizure at Respondent's premises in violation of the United States Constitution and FIFRA;

(III) There is no substantial record evidence supporting the allegations that violations of FIFRA have occurred;

(IV) Respondent is not subject to prosecution under FIFRA because its actions meet the requirements set forth in EPA Pesticide Enforcement Policy Statement No. 2 (PEPS-2); and

(V) The EPA has improperly calculated the civil penalties sought to be assessed against the Respondent.

For purposes of this decision, the defenses numbered I and II, supra, have been resolved as result of decision rendered pursuant to an interlocutory appeal to the Regional Administrator, pursuant to Section 168.50 of the Rules and Regulations governing this proceeding.

The questions certified for decision inquired:

(1) Whether an action for collection of civil penalties commenced December 14, 1978 under Section 14(a) of FIFRA may be properly maintained against a pest control operator who holds or applies pesticides only to provide a service of controlling pests without delivering unapplied pesticides to persons served; and

(2) Whether a complaint under Section 14(a) of FIFRA, based upon evidence seized under authority of Sections 8 and 9 of FIFRA should

be dismissed as a matter of law where the respondent is a pest control operator not engaged in the production, manufacture, sale or distribution of pesticides under the Act.

The Regional Judicial Officer, appointed by the Regional Administrator, in her decision rendered on January 18, 1980, responded to the first certified question in the affirmative, concluding that Respondent herein is a "distributor" within the meaning of said Section 14(a)(1) of the Act for the reason that all of the persons specifically listed in said section are persons in the pesticide business and that "other distributors" is interpreted to include other persons in the pesticide business.^{3/}

It was further held that the response to question 2 turned on the determination of whether Respondent is a "distributor" for the purposes of Section 8 and 9 of the Act, and thus that Respondent was subject to inspections under the 1972 Act, and therefore the response to the question so certified was in the negative.^{4/}

Having fully considered the evidence and arguments of Counsel, I make and find the following Findings of Fact and Conclusions of Law which are pertinent to the consideration of the issues remaining:

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- ^{3/} The Regional Judicial Officer, appointed by the Regional Administrator of Region V to render a decision on the said questions submitted by Respondent and Certified on Interlocutory Appeal, adopted the reasoning of an EPA General Counsel Memorandum of Law dated May 15, 1979, which (page 3 thereof) gave deference to the Report of the Senate Committee on Agriculture and Forestry [S.Rep. No. 92-970, 92d Cong., 2d Sess. 19, 23 (1972)] from which it is concluded that "it is clear that Congress intended the stricter penalty provisions of Section 14(a)(1) to apply to persons in the "business of applying pesticides".
- ^{4/} The Regional Judicial Officer declined to decide the issues (raised in Respondent's brief) that (1) the warrant was inadequate in that it was lacking in specificity and (2) Complainant's Inspector exceeded the scope of the Search authorized by the warrant. These issues are addressed in the Discussion appearing in this Decision.

FINDINGS OF FACT

1. Respondent, Bradley Pieper, d/b/a Bradley Exterminating Company (Bradley), is a licensed structural pest control operator conducting business in the State of Minnesota at all times material herein.

2. Bradley Exterminating Company at all times pertinent hereto was owned by Mr. Bradley Pieper and his wife, Mrs. Dianna Pieper, and employed approximately six servicemen and two office staff.

3. During 1978 Bradley generated gross revenues of \$266,801 and realized net earnings from operations of \$28,325 or 10.6 percent of sales. Aside from minimal interest income (\$568 in 1978) net earnings from operations constitute the sole source of income for Mr. and Mrs. Pieper. They receive no salary from the company.

4. Bradley provides comprehensive pest control services for business and residential customers throughout an expanding service territory, which includes the control of snakes, squirrels and bats. The company also conducts a limited retail sales operation involving the sale of various deodorants and insecticides.

5. On July 17, 1978, Bradley performed a pest control service at the home of Ira Adelman, 144 S. Mississippi River Blvd., St. Paul, MN.

6. In the performance of the service at the Adelman residence, Respondent applied the pesticide SEVIN DUST as a tracking powder for the stated purpose of controlling, killing or otherwise eliminating rats.

7. On July 11, 1978, Bradley performed a pest control service at a rental house next door to and owned by Mrs. Robert Nelson, and located at 417 - 4th Street, White Bear Lake, MN.

8. In the performance of the Nelson service, Respondent applied the pesticide ROZOL TRACKING POWDER to and from the outside of said mouse at the overhang or eave area for the stated purpose of controlling, killing or otherwise eliminating bats.

9. On June 22, 1978, Bradley performed a pest control service at the residence owned by Mr. Dennis Chirhart, 1052 Ottawa Avenue, West St. Paul, MN.

10. In the performance of the service at the Chirhart residence, Respondent applied the pesticide ROZOL TRACKING POWDER which was dispersed in the attic through outside "bat entrance holes" by means of a nozzled device referred to as a duster, for the stated purpose of controlling, killing or otherwise eliminating bats.

11. On August 17, 1977, May 24, 1978 and June 28, 1978, Bradley performed pest control services at the residence of Mr. Dale Carlton, 4540 Pleasant Avenue, South Minneapolis, MN.

12. In the performance of the services at the Carlton residence, Respondent applied the pesticide ROZOL TRACKING POWDER, a rodenticide, into entrance points from outside the attic, for the stated purpose of controlling, killing or otherwise eliminating bats.

13. On August 30, 1977 and May 2, 1978, Bradley performed pest control services at the residence of Mr. and Mrs. William Tirole, 2217 James Avenue North, Minneapolis, MN.

14. In the performance of the services at the Tirole residence, Respondent applied the pesticide ROZOL TRACKING POWDER to the roof and peak of the attic, for the stated purpose of controlling, killing or otherwise eliminating bats.

15. Apart from those instances enumerated in the preceding eight paragraphs, between January 1, 1977 and July 31, 1978, 196 bat control treatments or retreatments utilizing the pesticide ROZOL TRACKING POWDER were conducted by Bradley (as evidenced by Complainant's Exhibit 28).

16. The Bradley use pattern for treating bats with ROZOL consists of locating the bat entrance holes on the outside of the bat-infested structure, and applying ROZOL through the bat entrance and exit holes by use of a "duster"--an apparatus containing a canister of Rozol Powder to which is connected an 18-inch long tube, which is three inches in diameter, to the end of which is attached a three-inch long pointed nozzle which disperses the dust to areas where the bats are roosting, which in most cases are areas inaccessible from inside the attic. Bradley can do a more thorough job on bats working on the outside rather than from the inside of the house.

17. Bats die from the ROZOL ingested when the bats lick it off their bodies after it has been dusted in their roosting area, through entrance and exit holes usually in the roof and eaves.

18. On July 12, 1978, Bradley sold and delivered the pesticide product RID-0-PAK to Mrs. Robert Nelson, 414 - 4th Street, White Bear Lake, MN.

19. The sale and delivery of the RID-0-PAK by Respondent to Mrs. Nelson was for the stated purpose of controlling, killing or otherwise eliminating bats, and occurred on the day following a bat control treatment with ROZOL TRACKING POWDER of the Nelson residence by Bradley.

20. On July 12, 1978, Bradley sold and delivered the pesticide product RID-0-PAK to Mrs. David Savino, 5181 Division Avenue, White Bear

Lake, MN, which she purchased for \$40.34 in preference to expending \$225, the amount of an estimate given by a Bradley serviceman to "control the bats."

21. The sale and delivery of the RID-O-PAK by Respondent to Mrs. Savino was for the stated purpose of controlling, killing or otherwise eliminating bats, according to records retained and furnished by her.

22. Apart from those instances described in the preceding four paragraphs, the pesticide RID-O-PAK was, between January 1, 1977 and July 31, 1978, sold to 36 of its customers by Respondent, for bat control purposes.

23. On June 19, June 30 and July 8, 1978, Bradley performed pest control services at the home of Mrs. Martin Kuretsky, 8822 Westmoreland Lane, St. Louis Park, MN.

24. In the performance of the services at the Kuretsky residence, Respondent applied the insecticides SEVIN, SEVIN DUST and/or DIAZINON for the stated purpose of controlling, killing or otherwise eliminating snakes.

25. On March 31 and May 10, 1978, Bradley performed pest control services at the home of Mrs. Sheldon Azine, 8600 Westmoreland Lane, St. Louis Park, MN.

26. In the performance of the services at the Azine residence, Respondent applied the insecticides SEVIN DUST and DIAZINON for the stated purpose of controlling, killing or otherwise eliminating snakes.

27. On July 14, 1978, Bradley performed a pest control service at the home of Mrs. Jerry Peterson, 2066 Theresa, Mendota Heights, MN.

28. In the performance of the service at the Peterson residence, Respondent applied the insecticide DIAZINON for the stated purpose of controlling, killing or otherwise eliminating snakes.

29. On April 18, and May 12, 1978, Bradley performed pest control services at the home of Mrs. Rocco Altobelli, 1300 Dearwood Road, Eagon, MN.

30. In the performance of the service at the Altobelli residence, Respondent applied the insecticides DIAZINON and SEVIN DUST for the stated purpose of controlling, killing or otherwise eliminating snakes.

31. On April 14 and May 1, 1978, Bradley performed a pest control service at the home of Mrs. Ken Kusske, 2300 Highland View Ave., Burnsville, MN.

32. In the performance of the service at the Kusske residence, Respondent applied the insecticide SEVIN DUST for the stated purpose of controlling, killing or otherwise eliminating snakes.

33. Apart from those instances above enumerated and described, the evidence shows further that between January 1, 1977 and July 31, 1978, 26 snake control treatments or retreatments utilizing the insecticide SEVIN, SEVIN DUST and/or DIAZINON were conducted by Bradley.

Findings Re: Adelman Incident

34. On July 17, 1978, a Bradley serviceman came to the Ira Adelman residence and conducted a treatment for rats. The serviceman was asked by Adelman to put down a tracking powder. He applied SEVIN DUST which he represented verbally and in writing to be a tracking powder put down to kill rats.

35. The insecticide SEVIN DUST is a federally registered insecticide. It is not approved for use as a tracking powder, or for use in rodent control.

Findings re: Bat Control and
Use of ROZOL TRACKING POWDER for Bat Control

36. Bats in the United States are insectivores (with two minor exceptions). The blood-sucking or vampire bat is not found in the United States. The non-insect eating bats found in the United States feed on nectar.

37. Bats migrate during the cold season; bats are found in all 50 states.

38. Because their consumption of insects is ravenous, bats control insects that would otherwise decimate crops, or would cause a public health concern, such as mosquitoes.

39. Many fears and a mystique are associated with bats. Apart from legitimate concern with picking up a sick bat which could bite, these fears are not well-founded. They are the result of conditioning.

40. The habits of a species of bats do not differ much from state to state.

41. There has been one death in the United States resulting from histoplasmosis, presumably acquired from bat guano (droppings).

42. Histoplasmosis is not common in the northern United States.

43. Bats are more likely to be found at the peak of an attic than rats and mice.

44. It is not likely that bats would feed on insects found in attics. Bats secure their food on the wing.

45. Bats are frequently encountered in specific sites which are commonly known as bat roosts, and some structures become bat roosts.

46. Bats and rats are creatures of different habits. Rats and mice are rodents. Bats are not rodents.

47. The main places in the home where rats and mice normally enter is at or near the ground level. The main places where bats are found in the home are above the ground level; they do not have runways.

48. When bats become pests in buildings, there are two methods of control: (1) block the holes when the bats depart to eat or migrate, so no re-entry; and (2) make the interior undesirable for the bats, by eliminating the niches or slots where they live, providing more light, or inducing drafts.

49. The only permanent way to get rid of a colony of bats is to exclude them from the building by plugging their entrance holes (bat-proofing).

50. Bat-proofing through physical means may be exceedingly easy. The pest control operator can assist in locating and closing up structural deficiencies, as a permanent means of controlling bat problems.

51. Technical Release No. 5-75 of the National Pest Control Association (Complainant's Exhibit 111) pertaining to bat control states that no chemicals are registered specifically for bat control. The release also states that the only current method of bat control when human health is not endangered is trapping or mechanical exclusion.

52. The use of lethal chemicals (including DDT) is contraindicated in bat control, since they are usually only temporarily effective and may create a human health hazard associated with the use of long-life toxicants in closed areas of the home.

53. The only permanent way of getting rid of bats is to build them out of the structure. Anything else is going to be temporary. Other bats will come and replace any that are killed. If repellent is used, the effect will be dissipated after a while and other bats will come back in.

54. Toxicants exert slow and prolonged effects on members of bat colonies, leading to scattering sickened bats which increases rather than eliminates potential hazards to humans, since moribund bats often fall to the floor of buildings and into yards following the application of pesticides.

55. Bats fly great distances on migration. Some fly a 50-mile radius during an individual night. Bats can fall hundreds of miles from where they ingested pesticide.

56. The use of chemicals to control bats creates a hazard, a worse hazard than having the bats present, because it results in downed bats which creates the potential hazard of bat bites to inquisitive people and pets. Bats bite in self-defense.

57. A great percentage of bats downed for any reason will bite in self-defense if picked up and, therefore, anything that increases bat fallout is to be discouraged.

58. Rabies is the only infection that will knock bats down, and its incidence is exceedingly low. The latest study done and just published showed a rabies infection rate of 0.09 to 0.50 percent.

59. Up to 75 percent of the bats in a given mass population have shown immunity to rabies. We don't get outbreaks of rabies with bats, and bats don't attack when they develop rabies.

60. Anyone bitten by a bat has to be started on the anti-rabies treatment without delay. When a bat can't be tested, the assumption has to be made that it has rabies, so that a bat knocked down for any reason bites someone and doesn't get tested, the full treatment is mandated. The complete anti-rabies treatment, which is to be administered in the event of a bat bite, consists of 24 shots. The total cost, doctor's bill and governmental costs, is around \$1,700 for the complete anti-rabies treatment following a bat bite, not including the anguish and pain attendant to undergoing treatment or having a pet destroyed.

61. Purdue study indicates that ROZOL is a chronic toxicant, and according to Chempar's efficacy tests for ROZOL use on bats, the shortest time period it took to kill bats is five days.

62. Before a pesticide product can be registered or approved for a particular use pattern, the safety of the product has to first be established.

63. The Toxicology Branch of the Hazard Evaluation Division of the Office of Toxic Substances of the Environmental Protection Agency, Washington, D.C. (five individuals) is concerned with the safety of pesticides with regard to humans and domestic animals; and it determines whether pesticides are safe to humans and domestic animals from the proposed use pattern that accompanies a registration application.

64. A Toxicology Review, an independent evaluation by a toxicologist of the toxicity studies submitted, was conducted for the ROZOL TRACKING POWDER use on bats.

65. On review of the use pattern described by the proposed registrant, a determination could not be made, regarding safety, due to the absence of needed toxicity data, thus the safety of ROZOL TRACKING POWDER for bat control has not been established. Unless and until its safety is established, ROZOL will not be approved for bat control use.

66. ROZOL TRACKING POWDER is very hazardous. There is a danger that the anti-coagulant ROZOL TRACKING POWDER, when applied to an attic, can get to other areas of the building.

67. Bats, when in attics, are found near the ceiling; the presence of rats and mice is almost always at floor level or in walls, but almost never at the top of an attic. Bats and rats/mice are found in different places in an attic, thus the use of Rozol to control rats and mice, even in attics, is in a different manner.

68. The number of ounces or pounds of ROZOL TRACKING POWDER used in a bat control job is not relevant to determining whether the product is safe or unsafe; the "no-observable effect" level for ROZOL TRACKING POWDER's use on bats has not been determined because the necessary studies requested by EPA have not been submitted by the manufacturer.

69. EPA requested two teratology studies from the manufacturer of ROZOL in order to assess potential hazards associated with product use for bat control. A teratology study is the study of the effect of a pesticide on the fetus when it's within its mother's womb.

70. It is known that ROZOL TRACKING POWDER is a stable chemical that probably would take years to degrade, thus, it would be a sound practice for a pest control operator or a homeowner to remove ROZOL from an attic in the event that it has been used.

71. Studies have shown that when mothers were taking anti-coagulants for embryotic diseases during the first trimester of pregnancy, the children were born with congenital malformations, the most prominent one being facial disfigurations.

72. ROZOL TRACKING POWDER is an anti-coagulant, the active ingredient which is chlorophacinone, which is as powerful and toxic as any anti-coagulant known.

73. The total approximate cost to the manufacturer of toxicological studies needed to determine the safety of ROZOL TRACKING POWDER for bat control is \$250,000. To date these studies have not been submitted to EPA.

74. The probability is present that, when ROZOL TRACKING POWDER is used to exterminate bats in an attic, the powder would be blown around throughout the living spaces of the house, due to the downward drift of air currents.

75. EPA contends that the fact that 14 states have approved the use of ROZOL TRACKING POWDER for bat control does not mean that it is safe.

76. ROZOL, when used for rats and mice, is applied in a different manner than when applied for bats. For rats and mice, the powder is sprinkled around; for bats the powder is blown into an area.

77. The applicant for pesticide registration for a particular use pattern gets the registration and label approved. Then the Pest Control Operator (P.C.O.) can use the product, and not before.

78. That "several pounds" of ROZOL TRACKING POWDER would be used in bat control jobs is an amount determined, submitted or suggested by Chempar Chemical Company in its registration application.

79. EPA judgment concerning the safety of pesticides is acceptable to the National Pest Control Association.

80. Dr. Denny G. Constantine, a California State Department of Health Public Health Veterinarian, and an authority on bats expressed the opinion that the desire of the manufacturer of ROZOL TRACKING POWDER to legitimize the product's use on bats is part of its effort to sell the product, rather than reflective of a desire to help people, or a generous act; that Chempar's ROZOL ads are misleading; and that National Pest Control Association took poor and incomplete field reports and used them as a basis to generate a misleading report that favors Chempar's intended use of their tracking powder on bats.

81. It is also Dr. Constantine's opinion that the P.C.O. is biased in favor of a toxicant for bat control, and will encourage its acceptance and use for reasons such as:

(1) client associates killing the pest with permanency, and will be more willing to pay a substantial fee;

(2) it is easy and inexpensive to blow a toxicant into attic, as opposed to doing job correctly (bat-proofing);

(3) use of toxicant generates repeat business because of reinfestation.

82. P.C.O.s prefer to use toxicants, over going in and boarding out the bats. P.C.O.s are worried about rabies; P.C.O.s are concerned bats will attack, though they will not. P.C.O.s, once educated, are sensitive to more legitimate concerns.

83. The professional (P.C.O.) should do the hole plugging, in order for it to be handled correctly.

84. Persons who do bat control work should take the same precautions as any who handle wild animals--take the pre-exposure immunization against rabies (several shots).

85. Regarding pesticide registration, once the EPA has accepted the data that has been supplied by an applicant for registration, a number is assigned, and the label that has been presented by the applicant now becomes the label of that product, and for all intents and purposes is a legal document, very important in the pesticide business as it protects the user and provides for the efficacious use of the product.

86. Every pesticide product which has been registered since 1972 has satisfied the tests necessary for registration.

87. There are approximately 35,000 pesticide products currently registered by EPA.

88. The Product Manager is responsible for moving the registration application through all of the key areas of evaluation and has knowledge of the registration status of a product under his authority at any given time, and thus has an authoritative role when dealing with a registration application.

89. Prior to being finally accepted for registration, a pesticide product cannot be used for the purposes sought. Such use would be a violation--use of an unregistered product, or sale/distribution of unregistered product.

PEPS Generally and PEPS 2

90. The EPA developed the Pesticide Enforcement Policy Statements (PEPS) in order to inform interested individuals that a common sense approach would be taken to the regulation of pesticides.

91. If one had questions pertaining to the applicability of a particular pesticide enforcement policy statement, he would be expected to call or write the EPA Regional Office that served his region, as full legal responsibility for pesticide misuse has to lie with the user.

92. PEPS-2 permits the use of a pesticide product which is registered for a particular use against a pest which is not named on the label of the product if certain conditions are met.

93. Apart from PEPS-2, from the period 1972 to 1978, a pesticide product could not be used prior to actual federal registration. If the product were so used, it would constitute a misuse.

94. Concerning the misuse of pesticides under FIFRA Section 12(a)(2)(G), the EPA indicated in the PEPS that it would exercise its prosecutorial discretion. Determination on whether there is a violation is made by the EPA Pesticide Misuse Review Committee on a case-by-case basis.

95. For PEPS-2 to apply, the basic condition that must be met is that the pest is few in number and sporadic in occurrence, and then under that, there are regulations that the label directions for use must be met, the product must be registered for the site, cautionary language must be observed, use directions must be followed, it must be recommended or used by a knowledgeable expert, and it must be safe.

96. Regarding PEPS-2, "limited in number and sporadic in occurrence" means that a very unusual condition of a pest occurs, and to meet the existence of that pest, to alleviate the existence of that pest, a product must be found to be used (against) it.

97. The user of the pesticide bears the burden of meeting the requirements of PEPS-2.

98. The fact that PEPS-2 says that it is to be applied to situations where the pest is limited in number and sporadic in its occurrence is an integral part of the pesticide enforcement policy statement.

99. FIFRA Section 24(c), which gives States the right to regulate the use of pesticides within their borders, was intended by Congress to encompass pest problems within states or areas of the United States that were of such limited or local nature that the chemical companies either declined or had no interest in the pursuit of registration for a product against that pest.

100. If a certain type of pest were found in substantial numbers in each of the 50 states, there could not be a special local need.

101. The EPA does not review any data when it takes action on a Section 24(c) application. The State informs the EPA that it has received safety and efficacy data and is satisfied.

102. The standard of review by the federal EPA when evaluating a Section 24(c) submittal is a lesser standard than used by the EPA when evaluating a Section 3 registration because the local state department of agriculture is expected to make the comprehensive review of data submitted for a special local need registration.

103. Witness Marsh testified that it was his opinion that the Agency (EPA) has taken the position that if an intent is observed to subvert the purposes of Section 3 by Section 24(c) registrations, it will take action.

104. The State of Minnesota works with the EPA in administering FIFRA. It has, on occasion, received from the federal agency the authorization to issue special local needs registrations in Minnesota, under Section 24(c).

105. Minnesota's interpretation of the statute is that a special local need is something that exists primarily within a state, and is of a special significance either because of the time or type of pest; conversely, any product which would be used in a number of contiguous states would not constitute a special local need, and that the issuance of a 24(c) state registration lies within the authority of the state.

Status of Rozol Tracking Powder
and its use for bat control

106. The product ROZOL TRACKING POWDER is registered by the EPA for indoor use only for mice and rats as a tracking powder. The use for bat control is not indicated on the label; its use outdoors is not appropriate.

107. The label of ROZOL TRACKING POWDER provides: "Seller makes no warranty, expressed or implied, concerning the use of this product other than indicated on the label. Buyer assumes all risk of use and/or handling of this material when such use and/or handling is contrary to label instructions".

108. S. Pitchon, a Chempar executive, testified that the EPA requires safety studies for ROZOL TRACKING POWDER use (against) bats which has not been completed, and thus said product is not registered for such use.

109. As a result of a toxicology review, the EPA concerns about the use of ROZOL TRACKING POWDER for bats include chronic inhalation possibilities and the possible exposure to females.

110. Chempar Chemical Company was notified by the EPA in 1978 that the toxicity studies which were submitted were not sufficient, in that they did not allow an assessment of the possible hazards associated

with long-term exposure. Further, EPA notified Chempar of concerns with the ROZOL label, which was unclear and could lead to misuse.

111. The data submitted by Chempar Chemical Company to EPA was not sufficient to support the bat claims on a Section 3 registration.

112. EPA is concerned that there are public health hazards, involved with the use of ROZOL TRACKING POWDER for bats, that have not been resolved.

113. EPA has consistently taken the position that the use of ROZOL TRACKING POWDER for bats under the terms of PEPS-2 does not apply.

114. Chempar Chemical Company issued a newsletter entitled "Rozol Tracking Powder for Bat Control" in December 1975, stating that the product may be used for bat control under the terms of PEPS-2.

115. In a letter dated January 23, 1976, Chempar Chemical Company was notified by the EPA that ROZOL TRACKING POWDER could not be used for bat control under PEPS-2. In that letter, Chempar was requested to amend its said newsletter.

116. Dr. Philip Spear, Research Director for the National Pest Control Association, testified that the Association does not have in its possession or files any written communication from EPA indicating that ROZOL TRACKING POWDER can be used for bats under PEPS-2.

117. As far as the National Pest Control Association is concerned, there aren't any written documents from EPA to the Association stating that it is acceptable to use ROZOL TRACKING POWDER for bats under PEPS-2, and it recognizes that ROZOL TRACKING POWDER cannot be used in most areas that bats would use as a roosting site, under the terms of PEPS-2.

118. Respondent's witness, Pitchon, stated that in his interpretation of PEPS-2, ROZOL TRACKING POWDER could not be used on bat roosting sites, since roosting sites are not mentioned on the label.

119. The product Wil-Kil Naphthalene Flakes is now and was during most of 1977 and 1978 registered for use against squirrels and bats by the EPA, and was available and obtainable.

120. The registration of naphthalene flakes for bat control still exists.

121. Between March 11, 1975 and September 1978, the product Wil-Kil Naphthalene Flakes was federally registered.

122. The product Methyl Bromide is federally approved for the control of bats. It is a fumigant and a very toxic chemical, that must be used with great care and caution.

123. The product Methyl Bromide was available to pest control operators during all times relevant in this case.

124. Chempar Chemical Company Vice President Pitchon testified that it has attempted to avoid the federal registration process by pursuing multiple state registrations of ROZOL for bat control because EPA was asking for very expensive tests that it felt could not be economically justified.

125. The Deputy Commissioner of the Minnesota Department of Agriculture stated that Chempar Chemical Company's application to register ROZOL TRACKING POWDER as a special local need in Minnesota did not meet the criteria for registration as a special local need. The application was rejected for the further reason that it was concerned that the product's use for that purpose might scatter sickened bats.

126. The State of Minnesota found that control of bats is not a special local need situation, but a national problem found in all 50 states, and pursues a policy that if special local need registration is to be meaningful, it must involve a special local need rather than a national need, and bats represent a national need.

127. In denying Chempar's 24(c) for ROZOL on bats, Minnesota reviewed the submittal, looked at the need, discussed the application with specialists from the agriculture department and state university, as well as other specialists in the field.

128. The special local need registration of ROZOL TRACKING POWDER for use on bats in the State of New Jersey was cancelled by the State after Chempar Chemical Company failed to provide the required efficacy data.

129. The State of Maine Department of Agriculture, after being notified by EPA, re-evaluated the control methods in the area of bats, and decided to approve the use of ROZOL TRACKING POWDER only in extreme cases.

RID-O-PAK

130. An official sample of Bradley Exterminating Company's RID-O-PAK was sent by Region V to EPA Headquarters in Washington, D.C. for an Enforcement Case Review.

131. The concern by EPA in evaluating pesticide products in an Enforcement Case Review is with claims being made by the producer rather than the chemical analysis.

132. The EPA, through the Enforcement Case Review process, made the determination that the product RID-O-PAK was making pesticidal claims, and that it was not a registered pesticide.

133. Bradley was notified in January 1979, that based on an EPA evaluation, the sale of RID-O-PAK was in violation of Section 12 of FIFRA, in that the product is not registered under the Act. The company was advised that they may not sell, use or remove the product without registering it or amending their label; Bradley received a "Stop Sale, Use or Removal Order" from EPA in January 1979, and has never contacted the EPA regarding the amendment of its RID-O-PAK label.

Use of Insecticides for Snake Control

134. The term "reptiles" includes snakes. The most common snakes found in the Minnesota-St. Paul area are the garter snake, bull snake and fox snake. Garter snakes feed on fish, amphibians, frogs, lizards occasionally and some insects; the bull snake is almost exclusively a rodent feeder; the fox snake feeds on rodents, lizards, and some amphibians.

135. The red-belly snake is found in the area and it feeds on soft-bodied insects, worm slugs, and other invertebrates.

136. The dekayi snake is found in the area and feeds on savage food items. The dekayi snake is also known as the northern brown snake.

137. The blue racer, found in the area, feeds on rodents, bird eggs, amphibians, and other snakes.

138. The eastern milk snake, found occasionally in the area, feeds on other snakes, amphibians, and some lizards.

139. The northern water snake, usually found in the northern part of the twin cities, feeds almost exclusively on fish and amphibians.

140. The plains hognose snake feeds on rodents, amphibians, and lizards.

141. The eastern hognose snake feeds primarily on toads, frogs, and some amphibians.

142. The smooth green snake, which is found in the area but is not likely to be seen, feeds primarily on insects and spiders.

143. John Lewis, curator of Minneapolis Zoological Gardens, and a trained herpetologist, testified that the primary food sources of snakes found in the Minneapolis-St. Paul area are not insects.

EPA Enforcement Procedures and
the Bradley Exterminating Matter

144. EPA guidance to an organization such as Bradley is available, through either the Regional Office or Headquarters, where response to inquiries regarding pesticide use and registration can be obtained.

145. The EPA Region V office in Chicago maintains complete label files of all registered pesticide products, which is updated periodically, along with scientific expertise available to provide information to the public and others. All forms of inquiries were, and are, acceptable.

146. If a certain use practice presents a question of legality, or efficacy, EPA recommends that it be stopped immediately.

147. If a certain pesticide use practice were questionable concerning safety, the EPA would recommend vigorously that it be stopped immediately.

148. The procedures involved in the decision to institute a legal action by EPA is that it is a joint approach from the Enforcement Division, the Air and Hazardous Materials Division, and EPA Headquarters.

149. There are guidelines to be followed in proposing the assessment of civil penalties in pesticide enforcement cases.

150. The determination to seek a \$25,000 fine in this case was a concurrence of several individual EPA officials.

151. Mr. Marsh, EPA Chief Investigator, was kept completely informed at all times during the course of the investigation of the Bradley case.

152. EPA sent in two outside investigators to assist Mr. Leis in his efforts on the Bradley case.

153. Prior to the Bradley case, Mr. Marsh, Mr. Leis' supervisor, had received no complaints concerning the conduct of Inspector Leis.

154. The Deputy Commissioner of Minnesota Department of Agriculture testified that he had extensive contact with Mr. Leis and characterized him as a very firm individual in administering the laws, but extremely fair. He also described him as cooperative and willing to listen and work with individuals and firms as problems arise.

155. A Bradley customer, Mrs. Robert Nelson, testified that EPA Inspector Leis conducted himself in a professional manner; another Bradley customer, Mr. and Mrs. Dennis Chirhart, testified that Leis' conduct was very professional.

156. The interaction between the Minnesota Department of Agriculture and Bradley has become negative, attributable in part to the fact that the Department has received a number of complaints regarding Bradley's operation and has from time to time investigated these complaints, and has also placed products of Bradley under Stop Sale.

157. The Minnesota Department of Agriculture Deputy Commissioner related that an attempt has been made to work out solutions to the problems with Bradley with no positive results.

158. There have been complaints in Minnesota regarding pesticide use by Bradley, including use of products not in accordance with label instructions; the number of complaints against Bradley received by the Department has been greater than average.

159. Bradley has been uncooperative with officials and employees in the Minnesota Department of Agriculture.

160. Bradley personnel have made phone calls to Minnesota Department of Agriculture employees and have made uncomplimentary and accusatory comments and statements to said employees.

161 Bradley and Chempar Chemical Company are members of the National Pest Control Association.

162. The National Pest Control Association occasionally provides data to pesticide manufacturers to assist in federal registration, and tries to assist pest control operators when various questions arise. In that role as an adviser, there is no means of indemnification if the advice turns out to be erroneous, and when asked to pay part of the costs of the Bradley litigation, they denied that request.

CONCLUSIONS OF LAW

1. Section 12(a)(2)(G) of FIFRA [7 U.S.C. 136j(a)(2)(G)] makes it "unlawful for any person to use any registered pesticide in a manner inconsistent with its labeling".

2. Bradley violated said Section 12(a)(2)(G) by applying Sevin Dust as a rodent tracking powder at the home of Ira Adelman on July 17, 1978, for the reason that said registered pesticide is an insecticide and its label does not permit such use and is not now, nor at any time here pertinent has it been, approved for use against rodents.

3. Bradley, in July 1978, violated said Section 12(a)(2)(G) by applying, by use of a duster, Rozol Tracking Powder (hereinafter "Rozol") from the outside into the attic of a house next door to and owned by Mrs. Robert Nelson, White Bear Lake, MN, for the stated purpose of controlling, killing or otherwise eliminating bats, for the reason that said product is registered as a rodenticide to be used against rats and mice and its label does not permit its use against bats, which are not rodents.

4. Bradley, in June 1978, violated said Section 12(a)(2)(G), by applying Rozol onto bat roosting areas at the residence of Dennis Chirhart, West St. Paul, MN, for the stated purpose of controlling, killing or eliminating bats, because the label on Rozol provides for its use only against rats and mice and does not permit its use against bats.

5. Bradley, on June 28, 1978, violated said Section 12(a)(2)(G), by applying Rozol onto bat roosting areas at the residence of Dale Carlton, Minneapolis, MN, for the stated purpose of controlling, killing or eliminating bats, because the label on Rozol provides for its use only against rats and mice and does not permit its use against bats.

6. Bradley, on August 30, 1977 and on May 2, 1978, violated said Section 12(a)(2)(G), by applying Rozol to the peak of an attic at the residence of Mr. and Mrs. William Thole, Minneapolis, MN, for the stated purpose of controlling, killing or eliminating bats, because the label on Rozol provides for its use only against rats and mice and does not permit its use against bats.

7. Bradley, on June 19, 1978, on June 30, 1978 and on July 8, 1978, violated said Section 12(a)(2)(G), by applying Sevin, Sevin Dust and/or Diazinon at the residence of Mrs. Martin Kuretsky, St. Louis Park, MN, for the stated purpose of controlling, killing, or eliminating snakes, for the reason that said products are registered as insecticides and none of the labels permit said insecticides, or any one or combination of same, to be used against snakes.

8. Bradley, on March 31, 1978 and on May 10, 1978, violated said Section 12(a)(2)(G), by applying Sevin Dust and Diazinon at the residence of Mrs. Sheldon Azine, St. Louis Park, MN, for the stated purpose of controlling, killing, or eliminating snakes, for the reason that said products are registered as insecticides and neither of the labels permits said insecticides, or any one or combination of same, to be used against snakes.

9. Bradley, on July 14, 1978, violated said Section 12(a)(2)(G), by applying Diazinon at the residence of Mrs. Jerry Peterson, Mendota Heights, MN, for the stated purpose of controlling, killing, or eliminating snakes, for the reason that said product is registered as an insecticide and the label on Diazinon does not permit said insecticide to be used against snakes.

10. Bradley, on April 18, 1978 and on May 12, 1978, violated section 12(a)(2)(G), by applying Diazinon and Seven Dust at the residence of Mrs. Rocco Altobelli, Eagon, Minn, for the stated purpose of controlling,

killing, or eliminating snakes, for the reason that said products are registered as insecticides and neither of the labels permits said pesticides, or any one or combination of same, to be used against snakes.

11. Bradley, on April 14 and on May 1, 1978, violated said Section 12(a)(2)(G), by applying Sevin Dust at the residence of Mrs. Ken Kusske, Burnsville, MN, for the stated purpose of controlling, killing or eliminating snakes, for the reason that said product is registered as an insecticide and the Sevin Dust label does not permit said insecticide to be used against snakes.

12. EPA Exhibit 10, offered and received in evidence as business records of the Respondent, proves that, on various dates during the period January 1, 1977 to July 31, 1978, Respondent used insecticides for the stated purpose of controlling, killing or eliminating snakes and received payment therefor at 31 separate residences in the Minneapolis-St. Paul, Minnesota area; said treatments, and each of them, violated said Section 12(a)(2)(G) for the reason that said insecticides, nor any of them, are registered as reptilicides, and the labels thereon do not permit such use.

13. 40 CFR 168.03(s) provides that terms defined in the Act and not explicitly defined in a particular part are used with the meanings given in the Act.

14. The term "pesticide" means any substance or mixture of substances intended for preventing, destroying, repelling or mitigating any pest [40 CFR 162.3(ff)].

15. A product is considered to be a pesticide if:

a. Claims or recommendations for use as a pesticide are made on the label or labeling of the product;

b. Claims or recommendations for use as a pesticide are made verbally or in writing by representatives of the manufacturer or distributor of the product;

c. The product is intended for use as a pesticide after reformulation or repackaging; or

d. The product is intended for use both as a pesticide and for other purposes [40 CFR 162.4(b)].

16. Products such as deodorizers and cleaning agents, which are usually not considered to be pesticides, become pesticides once pesticidal claims are made in connection with their manufacture, sale or distribution [40 CFR 162.4(c)(1)].

17. Pesticides must be registered before they may be lawfully sold, offered for sale or held for sale (40 CFR 162.5).

18. RID-0-PAK is a pesticide for the reason that it was recommended, sold, or intended for use to destroy, repel or mitigate pests.

19. As said pesticide was not, at any of the times herein pertinent, registered under the Act, each instance of its being sold or offered for sale constitutes a violation of Section 12(a)(1)(A) of the Act, for which an appropriate civil penalty should be assessed.

20. Bradley, on or about July 12, 1978, violated Section 12(a)(1)(G) because of the sale and delivery by him to Mrs. Robert Nelson, White Bear Lake, MN, of RID-0-PAK, a pesticide not registered as required under Section 3 of the Act.

21. Bradley, on or about July 12, 1978, violated Section 12(a)(1)(A) because of the sale and delivery by him to Mrs. David Savino,

White Bear Lake, MN, of RID-0-PAK, a pesticide not registered as required under Section 3 of the Act.

22. EPA Exhibit 35, offered and received in evidence as business records of the Respondent, proves that, on various dates during the period January 1, 1977 to July 31, 1978, Respondent sold RID-0-PAK, an unregistered pesticide, to 36 different people to destroy, repel or mitigate bats.

23. EPA Pesticide Enforcement Policy Statement No. 2 (PEPS-2) is not a law or regulation, but rather, a statement expressing agency policy permitting the conditional use of pesticides against unnamed target pests; and proof of the existence of PEPS-2 at the time herein pertinent furnishes no defense to Respondent (on the charges of using ROZOL on bats, an unnamed target pest) absent a showing that he sustained his burden of showing that he complied with criteria set forth in PEPS-2, to wit:

that --

(a) the pesticide is registered for use at the specific type of site which is to be treated;

(b) a knowledgeable expert is either the user or recommends, in writing, the (intended) use;

(c) no pesticide registered for use against the (unnamed) target pest in, on or adjacent to any structure is reasonably available in the geographic area in which the pesticide is to be used;

(d) the user complied with all other instructions, warnings, precautions and prohibitions which appear on the label;

(e) The use is efficacious, in that it (the use) has beneficial effects and is not harmful to man or the environment.

24. On this record, Bradley has not made a sufficient showing that he complied with the criteria set forth in the foregoing Conclusion of Law.

25. The administrative search warrant obtained by EPA on 7/31/78 on the basis of a complaint that Bradley had unlawfully applied an insecticide in the treatment of a residential basement for rats, which warrant indicated that (documents) sought reflected illegal applications of pesticides in violation of Title 7, U.S.C., Section 136 et seq.: was sufficiently specific to include respondent's records indicating illegal application of Rozol Tracking Powder in treating residential attics for bats, for the reason that the records seized bear a reasonable relation to the object of the subject search.

26. EPA Exhibit 28, offered and received in evidence as business records of Respondent, proves that, on various dates during the period January 1, 1977 to July 31, 1978, Respondent used Rozol Tracking Powder to "treat for bats" and received payment for said treatments at approximately 196 separate residences in the Minneapolis-St. Paul, MN area. Said evidence considered in connection with the "use pattern" proven by this record, (II T. 223-228) whereby said "treatment for bats" was accomplished by dusting Rozol from the outside of the subject structures, through bat entrance and exit holes proves that Bradley, in so using Rozol Tracking Powder to "treat for bats" should, on the basis of said Exhibit 28, be assessed a civil penalty for 196 separate violations of said Section 12(a)(2)(G).

27. Each transaction wherein Bradley used Rozol against bats, insecticides against snakes, and sold RID-O-PAK for bat control is a separate violation and a civil penalty for each such violation should be assessed for the reason that each such violation required proof of facts not required by other such violations in that each such violation occurred as a result of a contract with a different person at a different time and at a different place.

28. On consideration of the evidence and pursuant to the Act and in accordance with 40 CFR 168.46(b) and 168.60(b), \$14,540 is an appropriate total amount to be assessed as a civil penalty against the Respondent.

DISCUSSION

I

Respondent devotes much space in his brief to arguing that the use of Rozol Tracking Powder was justified, arguing that the statute, Section 12(a)(2)(G) of FIFRA, was never intended to preclude a pest control operator from using a general-use pesticide against structural pests not named specifically on the pesticide label. In support of this he adverts to the citation of a discussion of this section by the Senate Committee in 1972. He further cites the language used in the 1978 Amendment to FIFRA. It is sufficient to point out, as to the last contention, that the 1978 Amendment is not pertinent to violations here charged which occurred prior to the effective date of said Amendment.

As to the first contention, it is well settled that the statutory interpretation of an agency which is charged with administration of a particular Act will not be overturned by a court unless it is patently unreasonable. Courts have consistently deferred to an objective agency interpretation and have held that the interpretation made need not be the only possible interpretation but simply a reasonable one. [See Train v IRDC, 421 US 60, 87 (1975); Udall v Tallman, 380 US 1, 16-18, 85 S.Ct. 792, 801 (1965)]. We will here proceed on the premise that we are bound by the applicable regulations, which are presumptively valid unless and until overturned. Respondent's Brief then proceeds to justify the use of Rozol by arguing that its application poses no unreasonable risks to man's health or to the environment and, in connection therewith, further argues that a balancing of risks inherent in the use of the chemical should be made with the benefits to be derived from said use. It needs no citation of authority to point out that any determination as to the safety of the chemicals here involved, or any pesticide presented for registration, must be approved by the agency responsible for such

determination. It is further manifest, from this record, that the subject determination involved extensive consideration of risks and benefits involved. We conclude that EPA, the agency charged with administration of the Federal Insecticide, Fungicide and Rodenticide Act, is the only entity given the authority and responsibility to approve or disapprove a label. The label provisions authorize the use pattern for the chemicals or pesticides in question. Any use or use pattern not consistent with said label provisions is clearly a violation of the statute. For each such violation a civil penalty should be assessed. Whether Respondent has met the conditions of a Pesticide Enforcement Policy Statement (PEPS), as here contended by Respondent, is discussed below.

II

Respondent next contends that the EPA case is base entirely upon evidence obtained as a direct result of an illegal search and seizure of the Bradley premises. This is based on further contention that the warrant issued in this case lacked necessary specificity to assure constitutional protection. He relies on Marshall v Barlow's, Inc., 436 US 307, 323 98 S.Ct. 1816, (1978) for the proposition that a valid administrative search warrant must adequately advise a businessman of the scope and object of the search. [But see Marshall, 1.c. 1824(5)].

I have previously ruled in the course of the Hearing herein that constitutional questions cannot properly be determined in this forum [See Johnson v Robison, 415 US 361, 94 S.Ct. 1160, 1166(6), 1974; and see discussion, Engineers P.S. Co. v SEC, 78 US App. D.C. 199, 215-216, 138 F2d 936, 952 (1943).] However, Respondent is insistent that a denial of procedural due process is apparent from said alleged lack of specificity in the subject search warrant. In addition, while the Regional Judicial Officer, Weinstein, held that Sections 8 and 9 of the Act are applicable

in this case, the questions of the adequacy of the warrant and the scope of the search were not within the purview of the questions certified to the Regional Administrator on interlocutory appeal and thus were not by her determined.

The warrant in question (Respondent Exhibit 8) recites that Witness Leis made an affidavit that on the premises known as the business office of (Bradley) there is now being concealed..."mailings, books, papers, receipts and documents reflecting suspected illegal (applications) of pesticides;...".

The record reflects that Witness Leis (EPA Inspector) received a complaint that Sevin Dust, a pesticide, had been used by Bradley on July 17, 1978 as a tracking powder to kill rodents. In pursuance of this complaint, Leis went to the Bradley business office and requested to inspect records, so that the extent of the practice, indicated by the Adelman violation, could be determined. It was Bradley's refusal to permit an inspection of his records that precipitated the application for the search warrant with which Mr. Leis returned on July 31, 1978. What is sufficiently specific and overly broad cannot be resolved in the abstract, but only in relation to facts, circumstances and the purpose for which a warrant is issued. [See Vonder Ahe v Howland, 508 F2^d 364, 369(3) (9 Cir. 1975)].

In connection with the execution of a warrant, items may be seized if they have a reasonable "nexus" with the illegal act under investigation, bear a reasonable relation to the purpose of the search, or constitute evidence of other illegal acts. This principle is enunciated by US v McCoy, 515 F2 962, 964(2,3)(5 Cir. 1975); see also US v Feldman, 366 F.S. 356 (D.C. Hawaii, 1973); and US v Geldon, 357 F.S. 735, 738(10) (D.C. ND, 1973). It has also been held that where circumstances make

an exact description difficult, a warrant can only be expected to describe generic classes of items sought. [US v Auerbridge, 375 F.S. 418 (SDNY, 1974), citing James v US, 416 F2d 467 (5 Cir. 1969)]. By reason of the foregoing, I find that the procedural due process of Respondent has not been violated or abridged in the respects charged by the use of the warrant to obtain the records which showed illegal acts which bore a reasonable relation to the object of the subject search on July 31, 1978.

III

Respondent presented evidence and has devoted considerable argument in an effort to support his contention that, because of the existence of Pesticide Enforcement Policy Statement No. 2 (PEPS-2), his actions, whereby he used Rozol Tracking Powder, a rodenticide, on bats, an unnamed target pest, were justified. Throughout he has contended he met the criteria, limitations and conditions set forth in PEPS-2.

Thus, the proper inquiry in this case, is whether or not Bradley's actions do, in fact, comply with all operating provisions of PEPS-2, as alleged in Respondent's Brief. Any suggestion that Bradley was authorized to violate the provisions of said section because of any communication from the National Pest Control Association, or by its Director, Dr. Philip Spear, or that he received such authority because of communications from Chempar Chemical Company or Crown Chemical Company, or any of their officials, is rejected. The determination is clearly reserved to EPA. In addition, all such communications cautioned that any use of Rozol under PEPS-2 was "subject to fulfilling all requirements". (Respondent's Exhibits A, B, and R). It is necessary to examine PEPS-2 to determine the conditions which must be complied with and whether EPA's determination was reasonable and not arbitrary.

It should be understood that PEPS-2 is not a law, nor is it a regulation; rather it is a statement that prosecutorial discretion will be exercised when a violation consists of using "in structural pest control", registered pesticide in a manner inconsistent with its label, i.e., on unnamed target pests.

"It neither addresses, nor in any way affects, the requirement of compliance with affirmative provisions of an approved label." (PEPS-2, paragraph I.)

PEPS-2 contemplates a determination by EPA (case-by-case) whether the user has met his burden of making a sufficient showing that he has reasonably met the criteria set forth therein. These limiting and defining provisions (set forth in PEPS-2, paragraph II) are an integral part thereof. Paragraph III discusses the applicability of PEPS-2 on the premise provided in paragraph I that the unnamed target pest is "limited in number" and "sporadic in occurrence"; or of that class of pests unpredictable or unprecedented in their occurrence.

The Statement, Paragraph II, provides, in pertinent part, as follows:

"The agency has determined that the use of a registered pesticide at use sites approved on the label for control of unnamed target pests in, on or adjacent to any structure is permitted, provided that: (A) the pesticide selected is registered for use at the type of site which is to be treated; (B) that the user is a knowledgeable expert in structural pest control..., (C) no pesticide registered for use against a target pest in, on or adjacent to any structure is reasonably available in the geographic area in which the pesticide is to be used; (D) the user complies with...warnings, precautions...which appear on the label..of the product which is used; and (E) the use is efficacious in that it has beneficial effects, and is not harmful to man or the environment."

On this record, I find that Bradley, in the use of Rozol, did not conform to making "application at the specific type of use site for which the product, Rozol, is registered". (Paragraph III.A.) Bats, when in attics, are found in the ceiling area or on rafters, while rats and mice, the named target pests on the Rozol label, are almost always found at the floor level or in the walls and seldom, if ever, at bat roosting sites. It is apparent that the use pattern for bats (including dusting of Rozol from outside the structure) is materially different from that contemplated for rats and mice, as provided by the label.

The label directs that the product be applied "only as specified on this label". The rate of application provided by the label is one to two pounds per 40 square feet of runway area, depending on the type of rodent targeted. The specific site is further provided: "Dust (Rozol) into holes, burrows, runways through which mice travel from nests to feeding places".

Obviously, the "application rates and intervals", in using Rozol against bats, will differ materially from its use against rodents, where the approximate number and location of bats are known and the chemical is applied by means of a duster from outside the structure, and the concern of the user (pest control operator) is to achieve a result of either killing, mitigating or otherwise controlling the noisy pests.

Other products were actually available during the period in question, namely, Wil-Kil Naphthalene Flakes, as well as the product Methol Bromide, both of which are registered and federally approved for the control of bats. Other limiting and defining provisions, while an integral part of said statement, do not here require discussion.

As to the showing required under (4)(E) of PEPS-2 that the chemical is not harmful to man or the environment, this record presents

extensive evidence (including the label, Exhibits 52 and 52A) that the use of Rozol warrants the use of great caution. Dr. William Dykstra testified, representing the Toxicology Branch of the Hazard Evaluation Division of the Office of Toxic Substances of the EPA in Washington, D.C., which agency determines whether pesticides are safe "to man and the environment". They consider whether the proposed use pattern that accompanies a registration application is one that is safe. Rozol Tracking Powder is as powerful and toxic as any anti-coagulant known, its active ingredient being Chlorophacinone. They have determined that its use pattern against rats and mice can be beneficial if precautions are taken as prescribed by the label. They have not approved Rozol for use against bats for the reason that, one, it is applied by "the powder" being dusted into the bat-infested area, whereas when used against rats and mice the powder is sprinkled in runways at the ground level. Because of the very hazardous character of Rozol, every precaution should be taken, when it is applied in an attic, that the chemical cannot get into other areas of the building. The label direction is "keep away from humans...and pets". On review of the application of the registrant, Chempar Chemical Company, a determination could not be made that Rozol's use against bats was safe, due to the absence of needed toxicological data; it was concluded by EPA that, unless and until safety is established, Rozol should not and would not be approved for bat control use. To find that Rozol is "not harmful to man or the environment"--as required by limiting provision II(E)--would be contrary to the showing made on this record.

On this point, EPA's credibility, as a regulator, does suffer due to the fact that 14 or more states have provided for the use of Rozol Tracking Powder for bat control in their state, under Section 24(c) of the Act, which provides, in effect, that such state approval cannot subsist for more than 90 days without concurrence of EPA (II T. 626).

Dr. William Dykstra, on cross examination, following his direct testimony concerning the hazards of Rozol, when confronted with the inconsistency presented by EPA inaction on 24(c) applications, stated:

"What can I say?

"They either liked the idea or they're not doing their job, because we have, you know, you have my memorandum." (II T. 622)

I find that the testimony of Dr. Dykstra to the effect that the use of Rozol involves a serious health hazard is otherwise uncontradicted. The use of Rozol against bats as practiced by Respondent makes its hazards even more serious.

On the basis of the foregoing, I conclude that Respondent Bradley's showing under PEPS-2 is deficient in at least the following respects:

(a) In subject geographic area bats are not limited in number, nor sporadic, unpredictable or unprecedented in their occurrence.

(b) The use pattern for application of Rozol against bats does not utilize the specific type of use site for which the product is registered (that provided on the Rozol label).

(c) The record shows that at the times here pertinent other pesticides registered for use against bats were available in the subject geographic area.

(d) The use pattern of Bradley was practiced without sufficient regard for the instructions, warnings, precautions, and prohibitions appearing on the Rozol label.

(e) This record does not prove that the use of Rozol against bats is "not harmful to man and the environment".

IV

Respondent Bradley suggested on the record (T. 145) and now contends that violations relating to the use of Rozol in approximately 200 different instances constitute but one assessable offense. I disagree.

The test to be applied in determining any question of "identity" of violations charged in the complaint is whether proof of facts are required to prove one violation which is not required to prove any other. Each of the charges of use of Rozol against bats--a non-target pest--required proof of the person who contracted with Bradley for the job requiring application of the chemical; and further required proof of the place and the time of such application, and it is clear from this record that the customer, time and place in each instance was different. Manifestly, the violations were not identical. [See Ianelli v US, 420 US 770, 1.c. 795, 95 S.Ct. 1284, 1.c. 1293(6), (1975); Tesconia v Hunter, 151 F2 589 (10, 1945); Carpenter v Hudspeth, 112 F2 126 (10, 1940); Reger v Hudspeth, 103 F2^d 825 (10, 1939); and Gilmore v U.S., 124 F2^d 537 (6,7), (10, 1942) where this principal is clearly enunciated.] For the above reasons, the charges, where proven, that Bradley used chemicals on snakes or bats inconsistent with label directions will be considered and dealt with as separate violations and a separate penalty will be assessed for each such violation. Each sale of RID-0-PAK, where found to be violative of Section 12(a)(1)(A), as charged, will be considered and dealt with as a separate violation, and each such violation found warrants the assessment of a separate civil penalty.

CIVIL PENALTY

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

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

"(b) Evaluation of civil penalty.

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

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

Gravity of the violation should be considered from the standpoint, first of the misconduct involved, and second, the gravity of the violation itself.

In considering the appropriate penalty to be assessed we must separately consider the different areas of violations, namely:

1. improper use of Rozo for bat control;
2. improper use of insecticide for snake control;
3. use of insecticide at the Adelman residence for rodent control; and
4. illegal sale of RID-O-PAK, a pesticide product.

In determining Bradley's misconduct, it should be pointed out that the evidence reflects that, particularly in this area, Bradley is a

person possessing greater than "ordinary intelligence" (the term used by him in his brief). He has been in the pesticide business approximately 14 years; he professes in his advertising that he was "awarded a Master Exterminator Certificate" by the State of Minnesota, which certificate is required for Minnesota Pest Control Operators. He has consulted extensively with personnel of the Minnesota Department of Agriculture and discussed aspects of the pesticide business.

I will first consider Respondent's use of Rozol Tracking Powder and the safety risk involved.

The record shows that Bradley corresponded with Chempar Chemical Company, the manufacturer of Rozol Tracking Powder and received written material from them, and Crown Chemical Company and Dr. Spear of National Pest Control Association, respecting the use of Rozol under PEPS-2. He uses the writings as an excuse for the use of Rozol, inconsistent with its label; however, it is clear from the correspondence appearing in this record that, even if the idea of using Rozol against unnamed target pests such as bats originated with Chempar, Crown Chemical, or Dr. Spear, he was in each instance referred to the provisions of PEPS-2 and was cautioned, particularly in the communication with Chempar and Dr. Spear, that any use under PEPS was "subject to fulfilling all requirements". (See Respondent Exhibits A, B, and R, which is correspondence from Crown, Chempar and Dr. Spear respectively.).

From a reading of PEPS-2, it is obvious that the use of a pesticide against an unnamed target pest required strict adherence to "limiting and defining provisions" which are set forth therein and discussed. The language following the "criteria", to wit:

"all of the limiting and defining provisions contained in the paragraphs which follow are an integral part of PEPS. Whether the user has reasonably met the criteria set forth in this PEPS will be determined by the Agency on a case-by-case basis. The burden of showing that the criteria set forth herein has been met rests with the person applying or otherwise using a registered pesticide for the control of unnamed target pests in structural pest control", (emphasis added).

is sufficient to warrant the conclusion that Bradley, from a profit motive, chose to take the risk of being charged with the subject violations. It is apparent from a mere casual inspection of PEPS-2 that it was not a blanket grant of authority to use any pesticide against any and all unnamed target pests, but rather that, in most, if not all, instances a determination was to be made, case-by-case, that the use contemplated came within its provisions. I have previously concluded and now again observe that Bradley's attempt to justify his conduct and the consequent violations of the Act fall far short. Each such instance of the use of Rozol against bats presented a serious hazard of harm to people and the environment. Even if the gravity of one isolated violation be not readily apparent, the suggestion of repeated use of Rozol against bats (over 200 such violations) as shown by this record, lend added significance to the testimony of Dr. Constantine, Dr. Dykstra and Dr. Dennistoun, all of whom consider use of Rozol against bats most hazardous to the public for the many reasons heretofore mentioned. We must further consider that a failure to here impose a deterrent penalty will, in effect, invite future such violations in increasing magnitude, which could ultimately frustrate and defeat the scheme of regulation contemplated by the Act.

Bradley was not unaware of the inherently dangerous character of Rozol; rather it appears from the record he possessed actual knowledge.^{5/}

^{5/} While knowledge is not an essential element to establish a violation where a civil penalty is to be imposed, it is a factor that may properly be considered in evaluating the culpability of respondent as bearing on the gravity of subject offenses. (See Pem Kote Paint Co., I.D. No. 88455, EPA Region IV, March 26, 1974.)

This is amply demonstrated by one of the invoices, dated 10/22/77 and contained in Exhibit 28, to one Luvern Campbell, 3465 East Lake Street., Long Lake, MI, which contained the caution thereon "do not go into the attic for one month". In July 1978 and again in September 1978, witness Dennis Chirhart was first urged not to use his upstairs--and later Rozol re-treatment for bats was offered only on the condition that the Chirharts vacate the house for two weeks. Further, it cannot be assumed that Bradley was unaware of the label directions (Exhibit 52A).

In the premises, it cannot be concluded that the penalty assessed should be decreased on the grounds of good faith. Nor do I deem an increase warranted on this account. While it is clear that Bradley's attitude was, by Dr. Dennistoun, characterized as "negative" and he recited a history of complaints being received against Bradley, the times of the complaints were not pinpointed so that they could be accurately evaluated and it would appear that such feeling might have arisen from general disagreements not related to the instant inquiry. The evidence, in general, further indicates an uncooperative attitude toward EPA on the part of Bradley. However, there is also evidence of a clash of personalities--involving that of Bradley and witness Leis, the responsibility for which is not adequately addressed in this record. For that reason, I will not disturb an assessment otherwise appropriate, except to reflect that Bradley used Rozol against bats for approximately one year after he was advised that said use violated the Act.

The effect of a penalty (in the approximate amount of that proposed by EPA) on Respondent's ability to continue in business has been considered. Bradley's business has grown in size from a Category I business to a Category II (See 39 FR 27711, et seq.) in a relatively short time. Use of the penalty assessment guideline would indicate an assessment (for Rozol violations) of from \$24,000 to \$250,000. To the

amount appropriately assessed for the Rozol violations must be added an appropriate amount for the 38 sales of RID-0-PAK, an unregistered pesticide, which amount I find to be \$1,500. For the 31 violations where pesticides were used against snakes, an unnamed target pest, an appropriate penalty is \$3,100. For the use of an insecticide against rodents at the home of Ira Adelman, I conclude that an appropriate penalty is \$500. Because of Bradley's inability to pay, in view of his liability for the subject Rozol violations, I am reducing the said last-mentioned amounts, totaling \$5,100, to \$2,040.

I have concluded that an appropriate assessment for the 200 Rozol violations proven by this record is \$100,000. For the reason that Bradley's ability to continue in business will obviously be affected by the assessment of so large a penalty, said penalty for said Rozol violations is reduced to \$12,500. I am, therefore, proposing a total assessment of \$14,540.00.^{6/}

It should be here mentioned that the assessment of a civil penalty is used for the sole purpose of achieving compliance with the Act. It is for that reason that it can be found reasonable to assess as a penalty only that amount which a respondent can pay without

^{6/} When questioned as to the impact of paying the \$25,000 penalty proposed, Dianna Pieper, wife of Bradley Pieper and joint owner of the Respondent business opined that the payment of a penalty in such amount would require them to lay off personnel and "retrench", and cease to expand the business (I I T. 506). Gross sales were \$99,000 in 1976; \$170,000 in 1977; \$266,000 in 1978; and estimated at \$300,000 in 1979. Telephone and advertising expense was 12.8 percent and 16.9 percent of sales in 1977 and 1978; entertainment was estimated at approximately \$1,000. The Bradley incidental benefits include auto use and Health and Life Insurance benefits.

experiencing significant adverse effect on his ability to continue in business.^{7/} Conversely, it can be seen from this record that each violation becomes a more serious hazard to man and the environment as the number of violations increase. Therefore, it should be pointed out that the amounts herein assessed are not based on nor should they be considered as a precedent. Future cases will be decided on a case-by-case basis after a consideration of all the factors set forth in the regulations.

I further suggest that the Regional Administrator be receptive to an application by Respondent whereby he may propose payment of 40 percent of the said penalty within 60 days from and after the date hereof, and the remaining 60 percent over a period thereafter and on such terms to which the parties may agree.

Based on the foregoing, I hereinafter submit the following:

^{7/} I conclude that any effects from assessment of a penalty of \$14,540 will not significantly effect Respondent's ability to continue in business. This is not to suggest that the penalty will not present some adverse effect or that it can be borne with facility.

PROPOSED FINAL ORDER^{8/}

1. Pursuant to Section 14(a) of the Federal Insecticide, Fungicide and Rodenticide Act, as amended, a civil penalty of \$14,540.00 is hereby assessed against Respondents Bradley Pieper and Dianna Pieper d/b/a Bradley Exterminating Company for the multiple violations of the Act found herein.

2. Payment of the full amount of the civil penalty assessed shall be made within 60 days of the service of the Final Order upon Respondent by forwarding to the Regional Hearing Clerk a cashier's or certified check payable to the United States of America.

May 8, 1980

Marvin E. Jones
Marvin E. Jones
Administrative Law Judge

^{8/} Unless appeal is taken by the filing of exceptions pursuant to Section 168.51 of the Rules of Practice, or the Regional Administrator elects to review this decision on his own motion, the order shall become final order of the Regional Administrator [see Section 168.46(c)].

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION V

IN THE MATTER OF:)
) DOCKET NO. I. F. & R. V-604-C
BRADLEY EXTERMINATING COMPANY)
RICHFIELD, MINNESOTA)

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Initial Decision filed on May 8, 1980, by Marvin E. Jones, Administrative Law Judge in the above-referenced cause and this certification have been served on May 12, 1980 as shown below.

Certified Mail to: John B. Van de North, Jr., Esq.
Briggs and Morgan
2200 First National Bank Building
St. Paul, Minnesota 55101

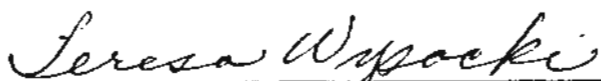
Hand delivered to: Donald S. Rothschild, Esq.
U.S. Environmental Protection Agency
Enforcement Division, Region V
230 South Dearborn Street
Chicago, Illinois 60604

John McGuire
Regional Administrator
U.S. Environmental Protection Agency
230 S. Dearborn Street
Chicago, Illinois 60604

Hand delivered to the Regional Judicial Officer pursuant to Region V

Delegation 5-15:

Susan B. Weinstein
Acting Regional Judicial Officer
U.S. Environmental Protection Agency
230 South Dearborn Street
Chicago, Illinois 60604


Teresa Wysocki, Regional Hearing Clerk