

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of)
) Docket No. IF&R-V-002-95
 Roger Antkiewicz and)
 Pest Elimination)
 Products of America, Inc.)
)
 Respondents)

INITIAL DECISION

Pursuant to Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §1361(a), the Respondents Roger Antkiewicz and Pest Elimination Products of America, Inc., are jointly and severally assessed a total civil penalty in the amount of \$3500 for selling an unregistered pesticide in violation of FIFRA §12(a)(1)(A), 7 U.S.C. §136j(a)(1)(A). Respondents are found not liable for the several other violations alleged in the Amended Complaint.

Appearances

For Complainant: Richard R. Wagner, Esq.

Associate Regional Counsel

U.S. EPA Region 5

Chicago, Illinois

For Respondents: Roger Antkiewicz

President

Pest Elimination Products of America, Inc.

New Baltimore, Michigan

Proceedings

On December 27, 1994, the Region 5 Office of the United States Environmental Protection Agency (the "Complainant" or "Region") filed a Complaint against Roger Antkiewicz, of New Baltimore, Michigan (the "Respondent"). The Complaint charged Mr. Antkiewicz with two violations of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"). The Respondent filed an Answer on January 19, 1995.

Upon a motion granted by the former presiding Administrative Law Judge ("ALJ"), the Complainant filed an Amended Complaint on April 3, 1996. The Amended Complaint added Mr. Antkiewicz' company, Pest Elimination Products of America, Inc. ("PEPA"), as a co-Respondent, and added four additional counts of violations of FIFRA, based on a subsequent inspection of Respondents' establishment. Respondents filed their Answer to the Amended Complaint on April 26, 1996.

The Amended Complaint charges Respondents with the following violations:

- Count I: distributing or selling an unregistered pesticide, in violation of FIFRA §12(a)(1)(A), 7 U.S.C. §136j(a)(1)(A);
- Count II: producing a pesticide in an establishment not registered as required by FIFRA §7(a), 7 U.S.C. §136e(a), in violation of FIFRA §12(a)(2)(L), 7 U.S.C. §136j(a)(2)(L);
- Count III: distributing or selling an unregistered pesticide on another occasion, in violation of FIFRA §12(a)(1)(A);
- Count IV: distributing or selling a registered pesticide with an altered label on two occasions, thus making claims differing from the claims made as part of the pesticide's registration statement, in violation of FIFRA §12(a)(1)(B), 7 U.S.C. §136j(a)(1)(B);
- Count V: distributing or offering for sale a registered pesticide with an altered label on another occasion, in violation of FIFRA §12(a)(1)(B)); and
- Count VI: selling a pesticide in violation of a "Stop Sale, Use or Removal Order," in violation of FIFRA §12(a)(2)(I), 7 U.S.C. §136j(a)(2)(I).

The Complaint proposed a total civil penalty of \$29,500 for the alleged violations (seven violations in six counts). In their Answer, the Respondents denied the material allegations of the Complaint.

The hearing in this matter convened before Administrative Law Judge ("ALJ") Andrew S. Pearlstein on September 17 and 18, 1996, in Mount Clemens, Michigan. The Complainant presented four witnesses. Respondents presented two witnesses. The record of the hearing consists of a stenographic transcript of 431 pages, and 30 exhibits received into evidence. Three additional exhibits were marked for identification but not received into evidence.

The parties each submitted post-hearing briefs and reply briefs. The record of the hearing closed on December 18, 1996, upon the ALJ's receipt of the reply briefs.

Findings of Fact

1. Roger Antkiewicz, with his brother Vincent Antkiewicz, operates a pesticide supply business under the name Pest Elimination Products of America, Inc. ("PEPA"), in New Baltimore, Michigan. Roger Antkiewicz has been in the pesticide business since 1980, except for a period from 1989 to 1992. Vincent Antkiewicz has been in the pesticide for about 12 years. At the time of the events that are the subjects of this proceeding, 1992 to 1995, PEPA operated a retail store on 23 Mile Road in New Baltimore. During this period, Raymond Balinski also worked in the PEPA business. (Tr. 261, 358).⁽¹⁾

2. PEPA filed Articles of Incorporation in the State of Michigan on March 6, 1992. Roger Antkiewicz is listed as the president of the corporation. Vincent Antkiewicz is the secretary, and Raymond Balinski the treasurer. (Ex. 29). These same three individuals are also listed as occupying the same offices, and as the incorporators, of two other corporations, Allstate Services, Inc., and Metro Pest Supply, Inc. (Exs. 30 and 31). Allstate Services was incorporated on October 18, 1991, and Metro Pest Supply on June 13, 1994. PEPA essentially replaced Allstate as the business operated by Respondents. All three companies give their place of business at the same address on 23 Mile Road in New Baltimore, Michigan, and list Roger Antkiewicz as their registered agent. The store operated under the name of PEPA. Tax returns were filed under the name Allstate Services, Inc. (Ex. 16). Roger Antkiewicz is the person with the greatest responsibilities in the conduct of PEPA's business, and the

chief contact person with the federal and state regulatory authorities in all events described below. (Tr. 318, 364-377).

3. One of the pesticidal products sold by PEPA was labeled "New Residual Spray." PEPA purchased this pesticide from Chem-Tox, Inc., of McHenry, Illinois, its manufacturer. Chem-Tox sold this product under the name "Chem-Tox Do-it-Yourself Pest Control." PEPA purchased quantities of this pesticide periodically from Chem-Tox and offered it for sale at its establishment during the period 1992 until September 1994, as New Residual Spray. PEPA had the New Residual Spray labels printed through Chem-Tox. Chem-Tox placed them on the containers of the do-it-yourself pesticide as "private labels," and shipped them to PEPA. (Exs. 4, 5, 12, 23, 19, 20; Tr. 331-340, 347).

4. PEPA also had another run of labels printed through its order to a local printer in Michigan. These labels were similar to the private labels supplied by Chem-Tox, but were somewhat smaller and had a different adhesive backing. PEPA placed these labels on the spray tanks it leased to its regular customers. (Ex. 18; Tr. 200).

5. Joseph Strzalka, an inspector for the Michigan Department of Agriculture ("MDA"), inspected Respondents' establishment on August 17, 1993. He documented a sale of New Residual Spray that took place on August 12, 1993. (Ex. 4).

6. PEPA received a distributor number from the EPA in a letter dated April 16, 1992. The letter, directed to the attention of Roger Antkiewicz, stated that a notice of supplemental registration, known as Form 8570-B, signed by both the sub-registrant and registrant, must be filed before shipment or sale of a distributor product. PEPA did not obtain a supplemental registration for its New Residual Spray until September 28, 1994, upon an application submitted by Chem-Tox, the basic registrant. Chem-Tox canceled that supplemental registration on January 20, 1995. (Exs. 4, 24; Tr. 170-171).

7. On September 21, 1995, at the time of an inspection by Joseph Strzalka and Susan Downey of the MDA, PEPA offered for sale one-gallon containers of the pesticide Bonide Diazinon 12.5%E. Eight of sixteen such containers had the words on the right-hand panel of the label "DO NOT USE IN THE HOME" blacked out with marker ink. The other eight containers had unmarked labels. The same warning "DO NOT USE IN THE HOME" appeared unmarked in the center panel of all the labels and in the attached directions pamphlet. Containers that were just removed from their shipment boxes did

not have such marked labels. Respondent had sold two of these containers with these marked labels to Allen Kodet, proprietor of Foxfire Farms, in August and September, 1995. (Exs. 1, 2, 3, 6; Tr. 18, 51-53).

8. In its distribution of New Residual Spray, PEPA also entered into service agreements with its customers, for their use of spray tanks, similar to a lease. PEPA sold the pesticide to the customer, in its original container. The customer also entered into a service agreement with PEPA for the free use of a spray tank and spray assembly, under which the customer left PEPA a \$15.00 security deposit. The spray tanks were labeled with PEPA's label for its name for the product, New Residual Spray. After the sale of the pesticide container, either the customer or a PEPA employee would then transfer the product into the spray tank. The customer would keep the spray tank, and have it refilled periodically when it purchased additional containers of New Residual Spray. (Tr. 395-402). PEPA entered into such a service agreement and sale of New Residual Spray with the Country Style Bakery on May 19, 1993. (Ex. 32; Tr. 112, 134-135).

9. The Region issued a Stop Sale, Use or Removal Order ("SSURO") against PEPA, and Roger Antkiewicz, as President of PEPA, on September 1, 1994, prohibiting the sale or distribution of New Residual Spray as an unregistered pesticide. (Ex. 9). Susan Downey of the MDA served the SSURO on Roger Antkiewicz on September 15, 1994.

10. Under the service agreement with the Country Style Bakery, two spray tanks were present at the bakery on March 2 and March 3, 1995, during inspections by Susan Downey of the MDA. (Ex. 7; Tr. 109-112). PEPA had sold Country Style Bakery a container of pesticide, and/or leased a replacement spray tank, on February 29, 1995. (Ex. 10, 33; Tr. 424-425). However, that pesticide was Bonide Home Pest Control, not New Residual Spray. (Tr. 121, 313). Samples taken from the full spray tank at the bakery showed traces of both pesticides. (Tr. 138-139). Respondents had substituted the Bonide product for the New Residual Spray after issuance of the SSURO in September 1994. Respondents did not however change the label on the spray tank it provided to the bakery for the application of these pesticides.

11. Neither PEPA nor Roger Antkiewicz, nor any of his related corporations or establishments, were registered with EPA as a producer at any time during this period. (Tr. 171-172).

DISCUSSION

Liability for the Alleged Violations

- Count I

Count I of the Amended Complaint charges Respondent with selling an unregistered pesticide, in violation of FIFRA §12(a)(1)(A), 7 U.S.C. §136j(a)(1)(A). That subsection renders it unlawful for any person to distribute or sell any pesticide that is not registered under the procedures set forth in 7 U.S.C. §136a.

Respondents allege that they believed the product had been sub-registered to them by Chem-Tox. Respondents based this belief on the course of prior dealings with that company, in which other products were properly registered. This claim does not affect Respondent's liability, but may be considered in determining the appropriate amount for a civil penalty. It is not disputed that Respondents did not file the requisite notice of supplemental registration until September 1994, after sales of New Residual Spray in 1993. (Finding of Fact, or "FF" #5).

Respondent admits that it sold containers labeled New Residual Spray, that it received from Chem-Tox with PEPA's private label. In correspondence with the EPA, Chem-Tox denied that it supplied privately labeled pesticide containers to PEPA. (Exs. 21, 22). This correspondence is however contradicted the testimony of Vincent and Roger Antkiewicz, as well as by the actual invoices and a memo showing that the product was shipped with private labels. (FF #3-4; Exs. 12, 20, 25; Tr. 210-214, 227-228, 331). The Antkiewicz' testimony that they received and sold the privately labeled New Residual Spray is actually against their own interest. If they had only received containers with the Chem-Tox label, their sale would not constitute the violation of selling an unregistered pesticide. The actual New Residual Spray label was received into evidence and is visible in photographs (Exs. 5, 11). It can be seen that it differs from the smaller label that PEPA printed on its own for attachment to the spray tanks (FF #4; Ex. 18). The preponderance of the evidence supports the Respondent's testimony that several shipments of the do-it-yourself product were received from Chem-Tox with the PEPA private label, and then sold by PEPA to its customers.

It is undisputed that PEPA did not obtain a supplemental registration for New Residual Spray until September 1994. The product was registered only by the manufacturer, Chem-Tox, Inc., under the name Chem-Tox Do-it-Yourself Pest Control. A

distributor who sells a registered pesticide under a different name is required to file a notice of supplemental distribution with the EPA pursuant to 40 CFR §152.32, called a form 8570-5. Respondents were notified of this requirement in their distributor letter from EPA in April 1992. (FF #6). Although PEPA's distributor number was on the labels, such a notice of supplemental registration of a distributor product was not submitted until September 1994. PEPA was therefore in violation of FIFRA §12(a)(1)(A) for selling New Residual Spray in 1993, as alleged.

A corporate officer may be held liable, in civil as well as criminal actions, for wrongful acts of the corporation in which he participated. 18B Am. Jur. 2d, §§1877, 1893. Roger Antkiewicz, as the president of PEPA, did participate fully in the violation of selling an unregistered pesticide. He testified he was the person who primarily ran the office and PEPA's store. (Tr. 318). He was in charge of the store at the time of the August 1993 inspection. Roger Antkiewicz also corresponded with Chem-Tox and the EPA concerning supplemental registration procedures. (FF #2; Exs. 4, 24). Hence, both PEPA and Roger Antkiewicz are liable for the violation alleged in Count I of selling an unregistered pesticide.

- Count II

Count II of the Amended Complaint alleges that Respondents violated FIFRA §12(a)(2)(L), by not registering as a "producer" as required by FIFRA §7, 7 U.S.C. §136e. Subsection (a) provides that "[n]o person may produce any pesticide . . . unless the establishment in which it is produced is registered with the Administrator." A producer is required to submit an application for such registration, giving the establishment's name and address. Within 30 days thereafter, the producer must submit information on the types and amounts of pesticides produced. 7 U.S.C. §136(c).

Respondents' liability for this count turns on whether PEPA meets the definition of "producer" in FIFRA and the regulations. FIFRA §2(w), 7 U.S.C. §136(w), reads as follows:

Producer and produce.--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 "produce" means to manufacture, prepare, compound, propagate, or process any pesticide or device or active ingredient used in producing a pesticide.

The FIFRA regulations, at 40 CFR §167.3, provide a somewhat broader definition of these terms, as follows:

Produce means to manufacture, prepare, propagate, compound, or process any pesticide . . . , or to package, repackage, label, relabel, or otherwise change the container of any pesticide or device.

Producer means any person, as defined by the Act, who produces any pesticide, active ingredient, or device (including packaging, repackaging, labeling and relabelling).

The statute further defines the term "establishment" as "any place where a pesticide or device or active ingredient used in producing a pesticide is produced, or held, for distribution or sale." 7 U.S.C. §136(dd). The regulations define "establishment" as "any site where a pesticidal product, active ingredient, or device is produced . . ." 40 CFR §167.3. Thus, under the CFR definitions, a producer would include any person who merely repackages or relabels a pesticide, without physically processing the pesticide in any way.

PEPA contrived a unique transaction or service in which it sold its customers a pesticide while simultaneously leasing them the use of a spray tank for application of that pesticide. The preponderance of the evidence in this proceeding supports Respondents' assertion that they leased the spray tanks, and sometimes poured the product into them, *after* the pesticide was sold to the customer in the original unbroken container. In this way, PEPA did succeed in avoiding becoming a "producer" under the regulations.

The Complainant did not produce any witnesses who could testify from their own personal knowledge that Respondents had sold the spray tanks already filled with the pesticide. Both MDA inspectors testified to statements made by PEPA's customers, the Country Style Bakery and the Mug and Jug. Such hearsay statements are either ambiguous or consistent with the Antkiewicz' testimony that the spray tanks were leased separately from the sale of the pesticide. (See, e.g., Tr. 135). If in fact PEPA had transferred the product to the tank and then sold it (which would render PEPA a producer by repackaging a pesticide), Complainant should have been able to produce a customer as a witness who could furnish firsthand testimony to that effect.

The testimony of Vincent and Roger Antkiewicz, on the other hand, was credible on this point. Roger Antkiewicz explained why the sale-lease transaction could have been understood in his Answer, and in conversations with the MDA inspectors, as if he sold the spray tanks to the customers. (Tr. 395-402). It is easy to understand how the inspector, Joseph Strzalka, was not made aware of the distinction, due to the unusual nature of the transaction and his muddled recollection of past conversations with Roger Antkiewicz in 1993. The Respondents' consistent assertion that PEPA never sold the spray tanks containing pesticide was not contradicted by any substantial evidence.

Respondents had nothing to gain by transferring the product and then selling the tanks of New Residual Spray. PEPA's entire purpose in leasing the spray tanks was to provide a do-it-yourself service to their customers without becoming a producer. In this they quite cleverly succeeded. The inspection by Mr. Strzalka and Mr. Antkiewicz' follow-up conversations with the Region clarified PEPA's need to allow repackaging or relabelling the tanks only after the sale to the customer. Once the product is sold in its original container to the customer, it is immaterial who actually pours into the spray tank or who owns the tank. The MDA inspector, Joseph Strzalka, agreed with this proposition. (Tr. 89-90). After the sale, the pesticide has passed out of PEPA's ownership and control without it having done any repackaging or relabelling.

One reason this transaction was confusing and apparently misunderstood was PEPA's practice of placing its own New Residual Spray labels on the spray tanks.⁽²⁾ PEPA left those labels on the tanks even after it substituted another product for New Residual Spray. Vincent Antkiewicz testified they did so as a gratuitous aid to the customers. However, Respondents never hid the fact that they did this and even discussed it openly with Terry Bonace of the Region at that time. (Tr. 204). The Region and the MDA advised PEPA to remove those labels to avoid being charged with a mislabelling violation under FIFRA. (Tr. 123-124). This labeling practice does not, however, render PEPA a producer. There is no requirement that there be any label on a spray tank to which a pesticide is transferred after its sale. Again, after the sale, the product is in the control of the purchaser, not PEPA.

Complainant points to a PEPA receipt for \$15 from the Country Style Bakery, dated February 29, 1995 (Ex. 33), as evidence that Respondent sold the spray tank containing pesticide to the customer. The receipt, on which is written "1 replacement tank,"

is, however, ambiguous. Roger Antkiewicz testified that the receipt was consistent with the usual monthly transaction of selling the bakery a one-gallon container of pesticide for \$15, in addition to replacing a defective tank for no charge, under the original service agreement (Ex. 32; Tr. 422-424). It could also have been an additional deposit for a second tank used by the bakery. This would be consistent with Ms. Downey's observation on March 2, 1995 that the bakery had recently acquired a second spray tank. (Tr. 112). Mr. Antkiewicz admitted he could not recall the specific transaction. The Region did not produce anyone from the bakery to testify contrary to Respondents' assertions. Respondent's explanation is at least as plausible as Complainant's supposition that the receipt represents the sale of the tank. The evidence relating to the transaction with the Country Style Bakery thus does not show that PEPA sold a spray tank containing pesticide, or that PEPA was thus rendered a "producer" within the meaning of the FIFRA regulations.

The evidence as a whole indicates that while PEPA distributed an unregistered pesticide, it did not produce a pesticide. The placement of New Residual Spray labels on the leased spray tanks may have constituted a labeling violation, but it did not render PEPA a producer. PEPA may have transferred pesticide to the spray tanks, but only after the pesticide was sold to the customer in its original container. PEPA was therefore not required to register as a producer with the EPA under FIFRA §12(a)(2)(L). Hence, Respondent is not liable for the alleged violation in Count II of the Amended Complaint.

- Counts III and VI

In Count III of the Amended Complaint, Respondents are charged with another sale of the unregistered pesticide New Residual Spray -- to the Country Style Bakery on or about February 29, 1995. In connection with that same sale, Count VI charges Respondents with

violating the Stop Sale, Use, or Removal Order ("SSURO") issued by the Region in September 1994. (FF #9). The Region based these charges on an inspection of the Country Style Bakery, by Susan Downey of the MDA, on March 2, 1995. During that inspection, Ms. Downey observed a spray can with the New Residual Spray label at the bakery. (FF #8).

In response to these charges, Mr. Antkiewicz asserts that the product sold to the bakery on the alleged date was actually

"Bonide Home Pest Control Do-It-Yourself," not New Residual Spray. PEPA had substituted the Bonide product for the New Residual Spray after service of the SSURO. Respondents told this to Ms. Downey when she first asked them about the spray cans at the bakery, during her inspection of PEPA several days later, on March 8, 1995. (Tr. 121-124). Although she was shown a couple of leftover detached labels, and an opened, partly full container labeled New Residual Spray, for Respondents' own use, Ms. Downey did not find any containers of New Residual Spray offered for sale at PEPA during that inspection. (Tr. 120, 135).

The Region sampled the contents of the spray tank found at the Country Style Bakery on March 2, 1995. Although Complainant did not offer the analysis results into evidence, Respondents elicited that information on cross-examination of Ms. Downey. The analysis showed traces of the active ingredients of both New Residual Spray (chloropyrifos) and Bonide (diazinon). (Tr. 138-139). This supports PEPA's claim that it substituted the Bonide product after issuance of the SSURO against New Residual Spray.

Respondents have explained that they sold the product in its original container, and that it was placed in the spray can by the customer (or a PEPA employee) after the sale. The Antkiewicz' have consistently maintained that the New Residual Spray label was left on the spray tanks in order to at least provide some notice and directions to customers, although the product may have changed. The original product sold to the Country Style Bakery was New Residual Spray, before issuance of the SSURO. (Ex. 32). Roger Antkiewicz testified he spoke with Terry Bonace at the Regional office about the spray tank labels, and was advised to remove them, as they could constitute a labeling violation. The Region did not produce Mr. Bonace to testify although he was listed as a witness in Complainant's prehearing exchange. Ms. Downey gave PEPA the same advice at the March 1995 inspection. (Tr. 123-124).

In these circumstances, the Region has failed to prove by a preponderance of the evidence that the product sold to the Country Style Bakery on February 29, 1995, was the unregistered and prohibited pesticide New Residual Spray. The preponderance of the evidence supports Respondents' assertions on this point. Although the New Residual Spray labels remained on the spray tanks at the bakery, PEPA had substituted the Bonide product after issuance of the SSURO, for sale to the bakery. Therefore, Counts III and VI of the Amended Complaint, alleging sale of an unregistered pesticide and violation of the SSURO, will be dismissed.

- Counts IV and V

Count IV of the Amended Complaint charges Respondent with selling two containers of a pesticide for which a false claim was made, in connection with the sale of Bonide Diazinon 12-1/2%E to Alan Kodet on August 17, 1995. Count V alleges the same violation in connection with offering such pesticide for sale at PEPA's store on September 21, 1995. PEPA had sold and offered for sale some containers of this Bonide product with the words "DO NOT USE IN THE HOME" blacked out on one part of the label. (FF #6). These acts are alleged to constitute violations of FIFRA §12(a)(1)(B), 7 U.S.C. §136j(a)(1)(B), which prohibits the distribution or sale of "any registered pesticide if any claims made for it as a part of its distribution or sale substantially differ from any claims made for it as a part of the statement required in connection with its registration under section 136a of this title."

Photographic evidence demonstrated that the words "DO NOT USE IN THE HOME" were blacked out with marker ink on two Bonide Diazinon containers sold to Alan Kodet, and on 8 of 16 such containers offered for sale at the PEPA store in September 1995. (Exs. 3 and 6). Those photographs, compared with a product label (Ex. 8), also show that the same legend "DO NOT USE IN THE HOME" was not blacked out on the bottom of the red center panel of the label. It was only blacked out on the yellow right side panel, at the end of the paragraph entitled Precautionary Statements. The yellow left side panel also states that the attached tag contains the directions for the product's use. This refers to a small pamphlet in a plastic envelope attached to the neck of the container. The actual tag booklet was not offered or admitted into evidence. However, Ms. Downey read from a sample pamphlet the same legend, in bold letters, "DO NOT USE IN THE HOME." (Tr. 153). The MDA inspectors did not check the pamphlets on the containers offered for sale by PEPA on the date of the inspection. (Tr. 154).

Complainant argues that the evidence at least implies that Respondents altered the labels, but that, even if they did not, the sale of this product with the altered label constitutes a violation of FIFRA §12(a)(1)(B). Respondents assert that they did not alter the labels, and that those containers came that way from the manufacturer.

In any event, the crux of the problem here is that the Region failed to prove the elements of the violation charged in Counts IV and V. Complainant did not show that this marking out of the

words "DO NOT USE IN THE HOME" in one part of the label constitutes making a *claim* substantially different from any claim made in the product's registration statement. The registration statement or application was not introduced into evidence. Even assuming it is fully consistent with the label (Ex. 8), the Region has not explained how crossing out one of the statements "DO NOT USE IN THE HOME" constitutes making a false claim.

The statement "DO NOT USE IN THE HOME" is an imperative sentence, a warning and part of the directions for use. It is not a declaratory "statement of fact" or "assertion of truth," the standard dictionary definitions for this meaning of "claim."⁽³⁾ The marked labels may create some confusion about the proper directions and locations for the product's use. But without some substantial evidence on the record, there is no basis to leap to the conclusion that the partially marked out legend converts somehow to a "claim" that the product can be used in the home.

There was a dispute over the testimony of Mr. Kodet with respect to statements made by Roger Antkiewicz at the time of the sale to Foxfire Farms. Mr. Kodet testified that Mr. Antkiewicz told him the Bonide product could be used in the home if further diluted. Roger Antkiewicz denied having said this. He recalled advising Mr. Kodet that earlier less concentrated formulations could be used indoors if diluted, but not this product, which would require much greater dilution. (Tr. 307-310). Mr. Antkiewicz' explanation seems plausible in that Mr. Kodet may well have misunderstood Mr. Antkiewicz' explanation of dilution rates for the product. But in any event, the conversation in connection with the sale to Mr. Kodet concerned the directions for use, not the possible making of false claims for the product.

With regard to the marked labels, Respondents could have been charged with selling a misbranded pesticide, a violation of FIFRA §12(a)(1)(E), or with altering a label, a violation of FIFRA §12(a)(2)(A). The evidence does not, however show that their sale or distribution of these pesticides involved making a claim substantially different from that in the product's registration statement. Therefore, Counts IV and V of the Amended Complaint will be dismissed.

Amount of Civil Penalties

FIFRA §14(a)(1) provides for civil penalties of up to \$5000 for violations by dealers, retailers, and distributors. Section 14(a)(4) sets forth the factors the Administrator must consider in determining the amount of the penalty. Those are "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." In this case, Respondents did not claim that assessment of the penalty would adversely affect their ability to continue in business, or pursue the issue of the size of the business. Therefore, the only inquiry concerns the gravity of the single violation for which Respondents are found liable in this decision -- the sale of an unregistered pesticide, a violation of FIFRA §12(a)(1)(a).

The Region calculated its proposed penalty for this count, as well as the other counts, by following the guidelines in the Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), dated July 2, 1990 (the "ERP," Ex. 15). That method calculates the proposed penalty by first establishing a base penalty that depends on the average gravity of the particular violation and the size of the respondent's business. Adjustments are then made to the base penalty for such factors as pesticide toxicity, potential harm to human health and the environment, and the respondent's culpability. The proposed base penalty for the violation of selling an unregistered pesticide here was \$5000. After making the appropriate adjustments, the Region proposed a 30% reduction in the base penalty amount for this violation, resulting in a proposed penalty of \$3500.

The proposed amount represents an appropriate reflection of the gravity of Respondents' violation of selling an unregistered pesticide. The Region properly considered Respondent's culpability for this violation as resulting from negligence. Although Respondent may well have believed that the New Residual Spray had been supplementally registered by Chem-Tox, PEPA should have known that it had never filled out the necessary supplemental registration form for submission through the basic registrant.

I have previously held that the violation of the sale of a pesticide that is not supplementally registered merits a reduction in the base penalty gravity amount relative to the sale of a pesticide that was never basically registered.⁽⁴⁾ However this case does not present some of the equitable special circumstances presented in the *Avril* case, particularly concerning the issue of multiple violations. For example, the

Respondent here could likely have been charged with more than one violation of selling an unregistered pesticide.

In addition, although this decision finds that the Region failed to prove that Respondents committed the other violations alleged, the evidence did show that Respondents engaged in several questionable practices. Complainant could not prove that PEPA was technically a "producer" of pesticides, because of the sequence of the sale and lease transactions. However this type of transaction treads a fine line, and does outwardly appear to be, in effect, the sale of a repackaged or relabelled pesticide. PEPA also should not have let its New Residual Spray labels remain on the spray tanks after issuance of the SSURO. In addition, Respondents should have been aware of the alteration of some labels on the Bonide Diazinon 12-1/2% E containers, and taken steps to remedy the confusion. There was also evidence indicating that Respondents did not make a great effort to keep abreast of FIFRA regulatory developments, although they had been in the pesticide business for many years.

These circumstances indicate that the Region had a reasonable basis to bring these charges (or perhaps to allege other violations), although proving them turned out to be another matter. In any event, in the context of the totality of these circumstances, there is no basis to reduce the gravity-based penalty amount of \$3500 for the violation of selling an unregistered pesticide.

Conclusions of Law

1. Respondents Pest Elimination Products of America, Inc., and Roger Antkiewicz, are jointly and severally liable for committing the violation of selling an unregistered pesticide, a violation of FIFRA §12(a)(1)(A), 7 U.S.C. §136j(a)(1)(A), as alleged in Count I of the Amended Complaint.

2. Respondents are not liable for the following violations alleged in the remaining counts of the Complaint:

- failing to register their establishment as a producer as required by FIFRA §7, 7 U.S.C. §136e, in violation of FIFRA §12(a)(2)(L), 7 U.S.C. §136j(a)(2)(L), as alleged in Count II;
- selling an unregistered pesticide to the Country Style Bakery in violation of FIFRA §12(a)(1)(A), 7 U.S.C. §136j(a)(1)(A), as alleged in Count III;

- selling a pesticide to Foxfire Farms in which a claim was made as part of the sale that substantially differed from the pesticide's registration statement, in violation of FIFRA §12(a)(1)(B), 7 U.S.C. §136j(a)(1)(B), as alleged in Count IV;

- offering for sale a pesticide for which a claim was made substantially differing from that pesticide's registration statement, in violation of FIFRA §12(a)(1)(B), 7 U.S.C. §136j(a)(1)(B), as alleged in Count V; and

- violating a Stop Sale, Use, or Removal Order with respect to the alleged sale of New Residual Spray to the Country Style Bakery, in violation of FIFRA §12(a)(2)(I), 7 U.S.C. §136j(a)(2)(I), as alleged in Count VI of the Amended Complaint.

3. The amount of \$3500 is an appropriate civil penalty for Respondents' violation of FIFRA §12(a)(1)(A), 7 U.S.C. §136j(a)(1)(A), pursuant to FIFRA §14(a), 7 U.S.C. §1361(a).

Order

1. Respondents are jointly and severally assessed a civil penalty of \$3500.

2. Payment of the full amount of this civil penalty shall be made within 60 days of the service date of this order by submitting a certified or cashier's check in the amount of \$3500, payable to the Treasurer, United States of America, and mailed to:

EPA - Region 5

P.O. Box 360582M

Chicago, IL 60673.

A transmittal letter identifying the subject case and docket number, and Respondents' names and addresses, must accompany the check. Respondents may be assessed interest on the civil penalty if they fail to pay the penalty within the prescribed period.

3. Pursuant to 40 CFR §22.27(c) this Initial Decision shall become the final order of the Agency, unless an appeal is taken to the Environmental Appeals Board within 20 days of service of this order, or the Board elects to review this decision *sua sponte*, as provided in 40 CFR §22.30.

Andrew S. Pearlstein

Administrative Law Judge

Dated: September 25, 1997

Washington, D.C.

1. Citations to the hearing exhibits ("Ex.") and the stenographic transcript ("Tr.") are representative only, and are not intended to be complete or exhaustive.

2. These labels were the limited run that PEPA had printed itself, for placement on the tanks. (FF #4; Ex. 18). They are distinguished from the larger labels Chem-Tox had printed as a private label for shipment to PEPA as New Residual Spray, as discussed above in relation to Count I. (FF #3; Ex. 5). PEPA's use of those labels rendered it liable for distributing an unregistered pesticide. But, since PEPA itself did not repackage or relabel the containers, it is not rendered a producer by selling products with those labels.

3. Webster's II New Riverside University Dictionary, Houghton Mifflin Company, 1988, p. 267. See also *In re Sporicidin International*, Docket No. FIFRA-88-H-02, Initial Decision, November 1, 1988, p. 16 (among definitions of "claim" is an "assertion, statement or implication [as to value, effectiveness, qualification, eligibility] often made or likely to be suspected of being made without adequate justification.").

4. *In re Avril, Inc.*, Docket No. IF&R III-41-C, Initial Decision, March 24, 1996, pp. 10-12.