UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE REGIONAL ADMINISTRATOR

In the Matter of	)	
	)	
Hygienic Sanitation Company, Inc.,	)	I. F. & R. Docket No. III-184C
	)	
	)	
Respondent	)	

Initial Decision

This is a civil penalty proceeding under Sec. 14(a)(1) of the Federal Insecticide, Fungicide and Rodenticide Act, as amended (7 U.S.C. 1361 (1976 Ed.)).[1/] The proceeding was commenced by a complaint, dated October 6, 1978, charging Respondent with misuse (use inconsistent with labeling) of the pesticide "Weldwood Penta Chlorophenol Wood Preservative" in violation of Sec. 12(a)(2)(G) of the Act in that on August 9, 1977, the pesticide had been applied to parts of the cellar of a private residence contrary to cautions on the label which stated in pertinent part "Do not use or mix this product indoors or in any other confined area where the vapors may concentrate and cause injury to plant and animal life." A penalty of $2,800 was proposed to be assessed against Respondent.

Respondent filed an answer admitting application of chemicals to the premises described in the complaint on the day in question, but averring

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1/ FIFRA was further amended by the Federal Pesticide Act of 1978, Public Law 95-396, September 30, 1978 (92 Stat. 819). Although, as will be seen, certain of the amendments are relevant to interpretation of the statute, the amendments were not in effect at the time of the alleged violation. References will be to the Act prior to the 1978 amendments unless otherwise indicated.

that the chemical was permitted by label and manufacturer's directions to be used in interior areas so long as reasonable ventilation is available and denied that the product was used in a manner inconsistent with relevant provisions of the label.

A hearing on this matter was held in Philadelphia, Pennsylvania on July 19, 1979, wherein certain facts were stipulated and exhibits were stipulated into evidence.

Findings of Fact

Based on the entire record including the posthearing submissions of Respondent,[2/] I find that the following facts are established.

1. Respondent, Hygienic Sanitation Company, Inc., whose address is 113 East Main Street, Lansdale, Pennsylvania, is in the pest control business. There is no evidence that Respondent sells or distributes pesticides apart from their application for pest control purposes. Except for the fact that there is no evidence that Respondent or any of its employees were certified applicators as defined in Sec. 2(e)(1) of the Act or that Pennsylvania had a program for the certification

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2/ Neither party submitted proposed findings and conclusions or briefs within 20 days after receipt of the transcript as required by the Rules of Practice or requested an extension of time in which to do so. By letter, dated August 31, 1979, the parties were informed that unless posthearing submissions were filed on or before September 7, 1979 the matter would be decided on the record as then constituted. Only Respondent elected to comply with that time limitation.

of applicators on August 9, 1977, Respondent would be within the definition of a commercial applicator as defined in Sec. 2(e)(3) of the Act.

2. On August 9, 1977, Respondent's employee, Mr. Andrew J. Steglik, applied the registered pesticide "Weldwood Penta Chlorophenol Wood Preservative" (EPA Rég. No. 1409-7) in the cellar of a private residence located at 1900 Allentown Road, Hatfield, Pennsylvania, owned and occupied by Mrs. Dolly M. Black. The purpose of the application was to treat powder post beetles. The pesticide solution, which the label specifies is to be diluted with ten parts of fuel oil or diesel oil to one part of concentrate, was mixed outside of the house.

3. There are two windows approximately 24" x 24" on opposite sides of the cellar in the residence mentioned in the preceding finding. Both of these windows are in wells, one of which was covered on August 9, 1977. The other window was covered by plywood containing an opening in which a 14" or 15" diameter exhaust fan had been installed. This fan was operated while the pesticide was applied.

4. Access to the cellar was by means of interior stairs. Although a sketch (R's Exh. 1) drawn by Mr. Richard Shultz, Respondent's office manager, shows a double door apparently over a stairwell leading from the cellar outside on the west side of the house, the stairwell and door must have been installed subsequent to August 9, 1977. This is so because a sketch, dated August 12, 1977 (Complainant's

Exh. I), bearing the initials DJS for David J. Steiger, EPA or PDA pesticide inspector, does not show such double door but only a narrow stairwell leading from the cellar on the north side of the house, which the record does not show to have been in use at the time of the pesticide application. This sketch was made at the time and for the purpose of showing where wood chips from the treated joists were collected.

5. After the pesticide was applied, the occupants of the house did not sleep or have regular meals there for two or three days because of the odor and fumes. Although odor was noticeable in the cellar as long as eight days after the pesticide was applied, operation of a large exhaust fan supplied by the fire department cleared the ground and second floors of the house of odor.

6. The label (Complainant's Exh. A) of Weldwood Penta Chlorophenol Wood Preservative which was applied as indicated in finding 2 contains precautions providing in pertinent part:

> "* * Vapors will cause injury if adequate ventilation is not insured. Do not use or mix indoors or in any other confined area where the vapors may concentrate and cause injury to plant and animal life. When spraying Penta, protect eyes, nose and throat from heavy concentration of fumes. Open all doors and windows. * * *."

7. Under "Directions" the label for Penta Chlorophenol referred to in the preceding finding included the following: "* * * Do not use for interior treatment or on wood that is to be finished or any place where odor or lack of drying may be objectionable. * *. " * * *

"FOR: fence posts, guard rails, timbers, structural lumber. * *"

The final sentence on the label was as follows: "If used for other than personal, family or household purposes, any implied warranty of MERCHANTABILITY OR FITNESS FOR PARTICALAR USE is excluded."

8. The EPA approved label for Pentachlorophenol (Complainant's Exh. B) was issued to Roberts Consolidated Industries and included the following precautions:

"* * * Use only in well ventilated areas.

"Wear rubber gloves and protective clothing when handling the freshly treated lumber. Not for use or storage in or around the home.

"* * *."

The parties have stipulated that Respondent is not responsible for any changes from the approved label to the label on the product actually used in this instance.

9. The cellar of the residence here concerned, which residence was originally constructed in 1708, having only two relatively small windows, both of which are in wells, one of the wells being covered, the other window having a small exhaust fan and for all that appears no exterior entrance in use on August 9, 1977, cannot be considered adequately or well ventilated.

10. Pentachlorophenol is by label and custom an accepted treatment for powder post beetles. Adverse effects, if any, from use of Pentachlorophenol under the circumstances herein are unknown.

11. Official notice is taken of the fact that Respondent has previously been cited and assessed a civil penalty for use of a pesticide inconsistent with its labeling in violation of Sec. 12(a)(2)(G) of the Act (Hygienic Sanitation Company, Inc., I. F. & R. Docket No. III-131C, Initial Decision December 21, 1978, on appeal to the Regional Administrator).

12. Respondent's sales for the year ending December 31, 1978, totaled $2,113,975.45. This figure was used by Complainant in calculating the proposed penalty of $2,800 in accordance with the Civil Penalty Assessment Table (39 FR 27711, July 31, 1974).

13. An affidavit of John T. Lowery, Respondent's Treasurer & Comptroller, dated September 7, 1979, which was submitted as a late exhibit pursuant to agreement of the parties at the hearing, is to the effect that as of July 31, 1979, Respondent faces critical and continuing financial problems resulting from accumulated losses; that a number of independent accounting firms, including Haskins & Sells, have been solicited for the purpose of preparing audited financial statements but that each of said firms have advised that the condition of Respondent's records and accounts precludes preparation of such statements; that as of July 31, 1979, Respondent had a debit balance in its Retained Earnings Account of approximately $9,000; that as of July 31, 1979, Respondent had trade accounts due and payable and in substantial arrears in excess of $234,000; that as of the mentioned date Respondent had overdue and unsettled state tax liabilities for the period 1969 through 1977 in excess of $69,000, consisting of

New Jersey and Pennsylvania sales taxes, Pennsylvania corporate tax, New Jersey disability benefits withholding tax, Philadelphia city payroll tax, Philadelphia unemployment tax, Philadelphia real estate taxes and accumulated interest and penalties of not less than $34,000; that as of July 30, 1979, Respondent was in default on $25,000 of federal income withholding taxes and in default on contracted settlement payments for prior unpaid federal withholding taxes in the amount of $12,000; that as of July 31, 1979, arrearages due on wages of Respondent's branch office managers were not less than $18,000; that Respondent's sole real estate holding was its office and storage building located at 248 West Wingohocking Street, Philadelphia, which is in seriously deteriorated condition and had been refused as collateral for any form of loan by three commercial banks; that Respondent's only other capital asset, other than hand tools used by its service men, was its fleet of approximately 80 motor vehicles which had been financed to their full value at the time of acquisition, that only approximately 25% of these vehicles were under two years of age and that virtually all have been so used and depreciated that the balance due on the loans exceeds their present fair market value; that in 1970 Respondent had approximately 20 branch offices but in order to cut costs it has had to sell, close or otherwise liquidate all but 12 of such offices; that Respondent's gross sales have remained constant for approximately three years, are not increasing and are not keeping pace which inflation, that Respondent has in fact continued to suffer a loss of approximately 1,000 retail customers a

year and has recently lost its principal commercial pest control account, Acme Markets, which is expected to result in a substantial curtailment of gross sales for the year 1979; and that the Respondent's general condition is such that it is unable to meet its routine obligations as they accrue and unable to pay any fine or penalty.

There being no evidence to dispute this affidavit, it is accepted as true.

Conclusions

1. Weldwood Penta Chlorophenol Wood Preservative (EPA Reg. No. 1409-7) was a pesticide registered under Sec. 3 of FIFRA on and prior to August 9, 1977.
2. A reasonable construction of the label for Weldwood Penta Chlorophenol Wood Preservative is that the product is not to be mixed or used in interior areas.
3. Even if the label statement "Open all doors and windows" together with other label language could be construed as permitting, by implication, use of the pesticide in interior areas where adequate ventilation is available, such circumstances are not present here because the cellar of the residence at 1900 Allentown Road, Hatfield, Pennsylvania, where the pesticide was applied on August 9, 1977, was not adequately or well ventilated.
4. Application of the pesticide referred to in the precluding conclusions under the circumstances prevailing on August 9, 1977, was a use inconsistent with its labeling and in violation of Sec. 12(a)(2)(G) of the Act.

5. There being no evidence that Respondent or any of its employees were certified applicators as defined in Sec. 2(e)(1) of the Act or that Pennsylvania had a program for the certification of applicators on August 9, 1977, and no evidence that Respondent sold any pesticides apart from their application for pest control purposes, Respondent was not a commercial applicator and not a distributor within the meaning of Sec. 14(a)(1) of FIFRA, but having been previously cited, may be assessed a penalty of up to $1,000 in accordance with Sec. 14(a)(2) of the Act.

Discussion

At the hearing, counsel for Complainant took the position that the label, properly read, proscribed indoor use of Penta under all circumstances and that accordingly, there was no occasion to reach the question of whether the cellar of the premises where the pesticide was applied was adequately ventilated. Respondent argues that the prohibitory language "Do not use or mix this product indoors or in any other confined areas where the vapors may concentrate and cause injury to plant and animal life" can reasonably be read in the conjunctive and that the sentence simply means that the pesticide is not to be used in either interior or exterior areas where vapors may concentrate and cause injury. Respondent points to the preceding sentence "Vapors will cause injury if adequate ventilation is not insured," to the language "Open all doors and windows," to the references regarding structural use and to the

obvious implication from the warranty language that use for household purposes is proper as supporting its position.

Acceptance of Respondent's position would mean that the product could be mixed as well as used indoors if adequate ventilation was available, and renders the reference to "indoors" redundant. Under Respondent's reading the sentence simply means "Do not mix or use in any confined area where vapors may concentrate and cause injury to plant and animal life." Respondent's reading gives little or no significance to the phrase "any other confined area" which implies that indoor areas are considered to be confined and that the areas referred to thereafter are distinct from or in addition to indoor areas. It is not difficult to conceive of excavations, tents, open sheds, fence corners, etc., which, while not literally indoors, might be considered confined under some circumstances. For these reasons, Respondent's interpretation of the cited portion of the label is rejected. Any doubt as to a reasonable interpretation of the label as a whole would seem to be resolved by the following sentence appearing under "DIRECTIONS: PENTA: "* * Do not use for interior treatment or on wood that is to be finished or any place where odor or lack of drying may be objectionable."

However, if the references to opening all doors and windows, to treatment of lumber for structural purposes and to the implication from the warranty language that use for household purposes was proper be regarded as rendering the label ambiguous so that Respondent's reading must be accepted, application of the pesticide under the circumstances

herein was, nevertheless, use inconsistent with the label. A cellar having two relatively small windows, both of which were in wells, one of the wells being covered, the other having only a small exhaust fan and for all that appears no operable exterior entrance simply cannot be considered adequately ventilated. It is concluded that Respondent's application of Penta on August 9, 1977, under the circumstances prevailing constituted use inconsistent with its labeling in violation of Sec. 12(a)(2)(G) of the Act.

Applicator - Distributor

Sec. 14, Penalties of the Act, provides in pertinent part:

"(a) Civil Penalties--

(1) In General--Any registrant, commercial applicator, wholesaler, dealer, 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.

(2) Private Applicator--Any private applicator or other person not included in paragraph (1) who violates any provision of this Act subsequent to receiving a written warning from the Administrator or following a citation for a prior violation, may be assessed a civil penalty of not more than $1,000 for each offense."

Respondent contends that it was not a commercial applicator because it was not certified and that because it does not sell pesticides

apart from their application,[3/] it cannot be considered a distributor within the meaning of Sec. 14(a)(1) of the Act. Respondent relies on the decisions of the Judicial Officer for Region IX and of the Regional Administrator in the matter of Evergreen Pest Control, Docket No. IX-157C. Although counsel for Complainant elected not to file a brief, Complainant's position, as derived from the General Counsel's opinion referred to infra, may be summarized: Agency enforcement policy, allegedly of long standing, is to treat pest control operators and applicators, such as Respondent herein, as distributors; indications in the legislative history of the Federal Environmental Pesticide Control Act of 1972 are that Congress intended that those in the pest control business be held to a higher standard than householders, gardeners and farmers and consequently, should be subject to greater penalties;[4/] and to indications in the legislative history of the Federal Pesticide Act of 1978 (Senate Report 95-334, 95th Congress, 1st Session (1977) at

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3/ Although there is no evidence as to Respondent's general practice, the service order in this case (Complainant's Exh. Y) indicates that a flat charge of $80.00 was made for the application at issue, a separate charge for the pesticide used or applied not being stated. Assuming this was Respondent's normal practice, it would tend to support Respondent's contention that it did not sell pesticides.

4/ Statements in the legislative history of the FEPCA (Senate Report No. 92-970, 92nd Congress, 2nd Sess. at 23 (1972) (Committee on Agriculture and Forestry) to the effect that those in the business of making, selling and applying pesticides were to be held to higher standards and consequently, subject to higher penalties than householders, gardeners and farmers can reasonably be regarded as being made on the assumption that the programs for certification of applicators were in effect. As noted infra, these provisions were not and could not be effective immediately.

12, 24, 29 and House Report 95-663, 95th Congress, 1st Session (1977) at 17, 49) to the effect that Congress beleived that pesticide applicators such as Respondent were subject to inspections by the Administrator under Secs. 8 & 9 of the Act prior to the 1978 amendments. The General Counsel opinion also relies on the principle that remedial legislation such as FIFRA is to be liberally construed to accomplish its intended purpose.

Complainant's position in this matter has been accepted in three initial decisions: Evergreen Helicopters, Inc., I. F. & R. Docket No. IV-214C (June 10, 1977) no appeal taken; Evergreen Pest Control, I. F. & R. Docket No. IX-157C (September 29, 1977) and Hygienic Sanitation Company, Inc., I. F. & R. Docket No. III-131C (December 21, 1978) appeal taken.

The decision in Evergreen Pest Control, supra, was reversed by the Judicial Officer for Region IX (Final Decision, May 5, 1978), whose decision has been affirmed by the Regional Administrator (Decision and Order on Reconsideration, April 27, 1979). The Judicial Officer's rationale was that the Respondent in that case not being a registrant or commercial applicator (California not having in effect a certification program for pesticide applicators at the time of the violation), Respondent could be included within the term "other distributor" as used in Sec. 14(a)(1) only if it sold or distributed pesticides in a manner similar to wholesalers, retailers and dealers. He reasoned that to include persons who distribute pesticides in the course of their application as within the term "other distributor" would render the specific inclusion of "commercial applicators" in Sec. 14(a)(1) completely redundant and meaningless because all applicators would also be distributors. He concluded from a reading of Sec. 4

of the Federal Environmental Pesticide Control Act of 1972 (P.L. 92-516, 86 Stat. 973 as amended by P.L. 94-140, 89 Stat. 754) that Congress intended to defer assessment of civil penalties against commercial pesticide applicators until approved State certification programs were in effect.

The Regional Administrator, while affirming the Judicial Officer, adopted a different approach. He cited one of the basic tenets of statutory construction, that is, that words are presumed to be used in the ordinary sense and should be given their ordinary, commonly used meanings. He stated that the word "distributor" was commonly used in the commercial world to identify a person who has possession of an inventory of goods the title of which is in the manufacturer, emphasized that a distributor as thus defined was distinct in a commercial sense from a retailer, whosesaler or dealer, and concluded that although the Respondent in that case, as an applicator, may distribute or apportion pesticides in the course of its business, it was not a distributor as that term is commonly used. He purported to find a distinction between the words "distributor" and "distributer" and pointed to the changes to FIFRA effected by the Federal Pesticide Act of 1978 as supporting his ultimate conclusion. Although the 1978 amendments made it clear that an applicator who holds or applies registered pesticides only to provide a service of controlling pests without delivering any unapplied pesticide to any person so served was not a seller or distributor (Sec. 2(e)(1)),

the amendments also deleted the word "certified" from the definition of a commercial applicator (Sec. 2(e)(3)) so that a commercial applicator did not have to be certified in order to be within the reach of Sec. 14(a)(1) of the Act. He applied the presumption that such a material change in phraseology of a statute was intended to effect a change in the meaning and cited legislative history (H.R. 95-343, actually H.R.95-663, 95th Congress, 1 st Sess., 1977, at 21) to support his determination that Congress did not interpret the Act, prior to the 1978 amendments, as subjecting uncertified applicators to the same penalties as persons listed in Sec. 14(a)(1).

Neither the Judicial Officer's nor the Regional Administrator's decision is completely satisfactory. The Judicial Officer's conclusion that to interpret the term "other distributor" as including applicators would render the inclusion of "commercial applicators" in Sec. 14(a)(1) completely redundant and meaningless overlooks the premise that the term "other distributor" implies that all those specifically listed, i.e., registrants, commercial applicators, wholesalers, dealers and retailers, are considered to be distributors. If this view is adopted, the redundancy perceived by the Judical Officer disappears because the term "other distributor" refers to all persons in a similar class or category to those specifically named. Moreover, the argument goes, Respondent not being a commercial applicator because it was not certified, it is reasonable to regard such business or professional applicators as similar to commercial applicators and thus within the embrace of the term "other distributor."

Nevertheless, the Judical Officer's ultimate holding is sound because as he held the statutory scheme indicates that Congress intended to defer assessment of the higher penalties against commercial applicators until certified programs were in effect and, as fully developed by the Regional Administrator, the context in which "other distributor" appears in Sec. 14 makes it evident that "distributor" is used in the commercial sense.

Secion 4 of the Federal Environmental Pesticide Control Act of 1972 provided in pertinent part:

> "(c) * * *
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> "(3) Any requirement that a pesticide be registered for use only by a certified applicator shall not be effective until four years from the date of enactment of this Act.
>
> "(4) A period of four years from the date of enactment shall be provided for certification of applicators." 5/

The quoted paragraphs plus the definition of a commercial applicator as a "certified applicator * * who uses or supervises the use of any pesticide which is classified for restrictive use * * * *" (Sec. 2(e)(3)) seemingly affords ample support for the Judicial Officer's view of the statutory scheme. Further support for this view is provided by legislative history of the FEPCA (Senate Report No. 92-838, 92nd Congress (June 7, 1972)), appearing in U.S.Code & Adm. News (1972), Vol. 3 at 4009-10:

> "The following exceptions to immediate effectiveness of amendments [to FIFRA] are made:
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> " * *

5/ The four year periods in the quoted sections were changed to five years by Public Law 94-140, November 28, 1975 (89 Stat. 753).

"(4) Certification of applicators shall take place during a four year period from the date of enactment: * *

"* * *

"In addition to the foregoing the Administrator shall publish in the Federal Register regulations relating to criminal and civil penalty, and no person shall be subject to such a penalty under the amendments to this Act until 60 days after the Administrator has published final regulations and taken such other action as may be necessary to permit compliance." 6/

In view of the foregoing, it appears clearly contrary to the statutory scheme to attempt bringing uncertified applicators such as Respondent within the heavier penalty provided by Sec. 14(a)(1) through an expanded interpretation of the term "other distributor."

The Regional Administrator cited no support for his conclusion that the word "distributor" as commonly used in the commercial world identifies a person who has possession of an inventory of goods the title to which is in the manufacturer. Indeed, the only case cited by the Regional Administrator, England v. Automatic Canteen Company, 349 F.2d 989 (6th Cir., 1965) does not contain that definition. The accepted business or commercial definition is that a distributor is a wholesaler,

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6/ It is worthy of note that an integral part of the plan for the certification of applicators was the classification of pesticides and that the Act envisaged that previously registered pesticides would be classified as part of the reregistration process. It was considered that programs for training and certification of applicators would be impeded unless pesticides were properly classified. See House Report 95-663 at 16 (U.S. Code & Administrative News (1978), Vol. 3 at 1989 et seq.). See also Senate Report 95-334 at 2. Reregistration was to be completed within four years of the effective date of the Act. This deadline was extended one year by Public Law 94-140, November 28, 1975 and removed altogether by Sec. 8 of the Federal Pesticide Act of 1978 (Sec. 3(g) of FIFRA as amended). Sec. 3(d)(1)(A) of FIFRA, as amended by the Federal Pesticide Act of 1978, specifically authorizes classification of registered pesticides prior to reregistration.

jobber or other merchant middleman authorized by a manufacturer or supplier to sell chiefly to retailers and commercial users. Levine & Co. v. Calcraft Paper Co., 429 F. Supp. 1039 (D.C. Mich., 1976). See also 27 C.J.S. Distributor and cases collected 13 Words and Phrases Distributor. The Regional Administrator's defnition of distributor leaves scant room for distinguishing a sales agent or agency. 7/

Likewise, the dictionary (Websters Third New Int. Dictionary, 1967) indicates that "distributer" is merely a variation of "distributor" and thus affords no support for the Regional Administrator's attempted distinction between "distributer" and "distributor." The Regional Administrator adopted a restrictive definition of distributor in order to support his determination that the term "other distributor" in Sec. 14(a)(1) referred to a class distinct from a wholesaler, dealer or retailer. However, it is unnecessary to agree with the Regional Administrator's definition of distributor or to give any effect to the purported distinction between "distributer" and distributor," in order to conclude that the Regional Administrator's decision is correct and that Respondent herein, no less than Evergreen in that case, may not be included within the term "other distributor" in Sec. 14(a)(1). Even if the rule of "ejusdem generis" is applied with caution or ignored, the context in which "other distributor" appears compels the conclusion that "distributor"

7/ See Rubinger v. Int. Tel. & Tel. Corp., 310 F.2d 552 (2nd Cir., 1962) (sales agent derives income from commissions on sales it generates while distributor purchases for its account and resells).

was used in a business or commercial sense.[8/] To apply the broad definition of distributor as simply "one who distributes" would mean that a person not in the pesticide business such as a farmer applying a pesticide to his fields or transferring unused pesticide to his neighbor as a courtesy would be a distributor.[9/] It is, of course, true that Respondent is in the pesticide business and in a certain sense could be regarded as selling the pesticides it applies. However, there is no evidence that Respondent is any type of merchant middleman authorized by a manufacturer or supplier to sell chiefly to retailers and commercial users or that Respondent does so. (Levine & Co. v. Calcraft Paper Co., supra). Moreover, there is no evidence that Respondent would be considered a distributor by businessmen or anyone familiar with the way the term is commonly used and understood in the business or commercial world.

Subsequent to the Regional Administrator's decision in Evergreen Pest Control, supra, the Office of General Counsel reaffirmed its prior opinion that pest control operators or applicators, such as Respondent herein, may

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8/ The maximum noscitur a sociis (a word is known from its associates) leads ineluctably to this conclusion. See, e.g., Amoco Oil Co. v. United States, 450 F. Supp. 185, 11 ERC 1693 (D.C. Mo., 1978) wherein the Court applied the cited maxim in ruling that a narrower or more restrictive definition of the word "leases" was appropriate and that under the circumstances "leases" as used in Clean Air Act regulation concerning retail gasoline outlets did not include plaintiff as lessor.

9/ If it be contended that this view of distributor is precluded by Sec. 14(a)(2) of the Act, reference to that Sec. merely strengthens the conclusion that distributor as used in Sec. 14(a)(1) was employed in the business or commercial sense.

properly be considered distributors within the meaning of Sec. 14(a)(1) of FIFRA (Memorandum, dated May 15, 1979). This memorandum employs selected reading of the legislative history of the Federal Pesticide Act of 1978 to support the conclusions reached and is not convincing. Absent from the memorandum is any reference to the Conference Committee Report (House Conference Report 95-1560 (95th Congress, 2nd Sess., 1978)), cited by the Regional Administrator, which makes it evident that deletion of "certified" from the definition of commercial applicator had the effect of expanding the coverage of the penalty provisions of FIFRA.[10/] While the Senate Committee on Agriculture, Nutrition and Forestry and the Senate arguably acquisced in EPA's position,[11/] the Committee's explanation

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10/ The cited House Conference Report states at 44 "The House amendment contains no comparable provision [to the Senate bill which would have established a separate class of professional applicators], but adds to the definition of "certified applicator" in FIFRA a provision that any certified applicator who holds and applies pesticides only to provide pest control service without delivering unapplied pesticides to any person so served is not to be deemed a "seller" or "distributor." Commercial applicators would normally fit this exception. The House amendment also expands the definition of "commercial applicator" in FIFRA to include noncertified as well as certified applicators. This has the effect of expanding the coverage of the penalty provisions of FIFRA to all persons who apply restricted use pesticides commercially, not just applicators certified under FIFRA."

11/ Senate Report No. 95-334 (95th Congress, 1st Session) states at 12 "Several witnesses at the Subcommittee hearings had testified to the need for clarifying the status of professional applicators. Under present law, the Administrator considers them as sellers or distributors of pesticides." To the same effect Id. at 29, note 12, infra. In view thereof, the statement, referring to the Senate bill "(Professional applicators are now considered as sellers or distributors for the purposes of enforcing FIFRA)" should be read as meaning considered by the Administrator or the Agency.

of the term "professional applicators,"[12/] which the Senate bill would have established, makes it reasonable to conclude that the proposed new class of "professional applicator" was among those specifically listed as being subject to the higher penalties of Sec. 14(a)(1) in order to close the loophole created by the requirement applicators for hire were not within the definition of commercial applicators unless certified.[13/]

12/ After referring to the need for clarifying the status of professional applicators (note 11, supra) and to concern that broad authority given the Administrator under present law to inspect the premises of sellers and distributors might be construed as authorizing warrantless searches of private homes and businesses where professional applicators were applying pesticides, the rationale for the new class was expressed as follows: "The Subcommittee agreed to amend the Act to provide a distinction between sellers and distributors and professional applicators, although professional applicators would remain subject to the record-keeping requirements, inspection authorities, and the penalties under present law. However, the Subcommittee further agreed that, although new language in the Act did not appear necessary, the inspection provisions of the Act are intended to authorize inspection only at the business premises of professional applicators, and not at application sites, i.e., private homes and businesses." Senate Report at 12.

13/ Senate Report 95-334 at 29 states: "Professional applicators--a group as defined under S. 1678 as persons "who apply pesticides for hire." They might be included in the "commercial applicator" group as well, if they are certified. "Current agency enforcement policy treats persons who apply pesticides for hire as distributors or sellers of pesticides they apply. S. 1678 recognizes a distinction between applicators and sellers. However, the bill holds professional applicators to the same higher penalties as other certified applicators and makes their business premises subject to inspection to permit enforcement officials to assure the products they apply are appropriately registered S. 1678 also makes it unlawful for them to use unregistered products." Although consistent with the establishment of the new class of professional applicator, an arguable negative inference from the language "same higher penalties as other certified applicators" is that uncertified applicators were not previously subject to such penalties. Senator Leahy's apparent view that the only purpose and effect of the proposed new class of "professional applicators" was to subject applicators for hire to the penalty provisions of Sec. 14(a)(1) in cases where the pesticide was furnished by one with whom the applicator had contracted for the application of a pesticide is difficult to credit. In any event, the Senate version of the bill was not accepted for the Federal Pesticide Act of 1978 did not establish a class of professional applicators.

In order to avoid unduly lengthening his opinion, discussion of the legislative history of the Federal Pesticide Act of 1978 as developed in the House will be abbreviated. However, there can be little doubt that the House Report explaining the cited statute supports the conclusion, derived from a reasonable reading of Sec. 2 & 14 of the Act, as amended, that deletion of the word "certified" from the definition of commercial applicator had the effect of expanding the coverage of Sec. 14(a)(1) to include applicators for hire irrespective of whether they were certified.[14/] The General Counsel's opinion emphasizes the legislative history concerning the 1978 amendments on the Administrator's inspection authority under Secs. 8 and 9 of the Act, seemingly regarding that matter as dispositive of the question of whether applicators, such as respondent, were distributors. It is worthy of note, however, that the word "distributor" does not apear in Sec. 9 of the Act and that the so-called "English" amendment, providing essentially that applicators engaged only in a providing a service to customers would not be considered sellers or distributors, as explained by the House Agriculture Committee, applied only to certified applicators.[15/]

14/ See House Report 95-663, 95th Congress, 1st Session, at 49. "Additionally, the committee also adopted a second portion of the amendment of Mr. McHugh to provide that a commercial applicator need not be certified. The amendment was designed to make clear that the penalty provisions of the Act applied to any person who applied restricted use pesticides in violation of the act and not only to certified applicators: * * *"

15/ "The Subcommittee then unanimously adopted an amendment offered by Mr. English, providing, essentially, that certified applicators engaged only in providing a service to their customers would not be considered "sellers or distributors" under the Act. The purpose of the amendment was to preclude EPA from inspecting the books and records of such persons and from inspecting their premises without a warrant as it is authorized to do with respect to "sellers" or "distributors" of pesticides. * *." House Report 663 at 45, U.S. Code & Adm. News (1978) Vol. 3 at 2018.

While consistent with the deletion of "certified" from the definition of commercial applicator the cited restriction in the Act, as amended, is not limited to certified applicators (Sec. 2(e)(1)), an obvious inference is that only certified applicators were previously regarded as sellers or distributors.

Legislative history of the 1978 amendments to FIFRA is, of course, concerned with Congressional views as to the effect of the amendments and thus indicative of Congressional understanding of the law prior to the amendments. Such indications have been held to be entitled to consideration as "secondarily authoritative expression of expert opinion."[16/] The General Counsel was concerned with the effect of the Regional Administrator's inspection authority under Secs. 8 & 9 of the Act. Even if the legislative history of the 1978 amendments overwhelmingly supported the General Counsel's opinion (as we have seen, it does not), such concern would afford an inadequate basis for an expanded reading of the term "other distributor" in Sec. 14(a)(1), because the loophole, if it be regarded as such, as to the Administrator's inspection authority created by defining "distributor" in the commercial or business sense has been closed by the 1978 amendments (Sec. 26(c) of the Act, as amended).

If the matter of the application of Sec. 14(a)(1) of the Act to Respondent under the circumstances prevailing herein be regarded as doubtful,

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16/ Amchem Products, Inc, v. GAF Corporation and Douglas M. Costle, _____ F.2d _____ (5th Cir., 1979). The Court observed that the Supreme Court has cautioned that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." (Citations omitted).

the principle that statutes calling for civil penalties,[17] no less than criminal statutes,[18] must be strictly construed is controlling. It is well settled that the law must be clear to exact a penalty and that in the application of penalties all questions of doubt must be resolved in favor of those from whom a penalty is sought.[19]

For the foregoing reasons, Respondent cannot be held to be a distributor within the meaning of Sec. 14(a)(1) of the Act.

Penalty

Respondent not being a commercial applicator or "other distributor" within the meaning of Sec. 14(a)(1) of the Act, but the initial decision, dated December 21, 1978, in I. F. & R. Docket No. III-131C, supra, conclusively establishing a citation for a prior violation, Respondent may be assessed a penalty of up to $1,000 in accordance with Sec. 14(a)(2) of the Act.

In determining the amount of the penalty, I am to consider: "(i) the gravity of the violation, (ii) the size of respondent's business and

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17/ A penalty is an exaction imposed by statute for an unlawful act. United States v. La Franca, 282 U.S. 568, 51 S. Ct. 278 (1931).

18/ Indeed, it is sometimes difficult to distinguish between a civil penalty and an exaction for a criminal act. See, e.g., Ward v. Coleman, _____ F.2d _____, 13 ERC 1213 (10th Cir., 1979) (penalty for oil and hazardous waste spills under Clean Water Act held to be criminal rather than civil).

19/ See Anuchik v. American Freight Lines, 46 F. Supp. 861 (D.C. Mich., 1942); Hatfield, Inc. v. C.I.R., 162 F.2d 628 (3rd Cir., 1947) and generally 70 C.J.S. Penalties, Sec. 1.

(iii) the effect of such proposed penalty on respondent's ability to continue in business." (40 CFR 168.60(b)(1)). Gravity of the harm is generally considered from two aspects: gravity of the violation and gravity of misconduct, the latter including Respondent's history of compliance with the Act (See 40 CFR 168.60(b)(2)). As indicated in the findings, adverse effects, if any, of the violation herein found are unknown. The findings herein and in the matter of Hygienic Sanitation Company, Inc., I. F. & R. Docket No. III-131C,[20/] establish that Respondent, its officers and employees, have a careless or indifferent attitude toward their responsibilities under the Act.

Although Respondent's sales of over $2,000,000 place it in Category V of the Civil Penalty Assessment Table (39 FR 27711 et seq., July 31, 1974), that Table has little relevance herein because Respondent is not within the ambit of Sec. 14(a)(1) of the Act. Respondent's financial condition as shown by the affidavit of its Treasurer and Comptroller can only be deemed precarious and such that its continuation as a going concern is in serious doubt. Under all the circumstances, including the fact that adverse effects of the violation have not been shown, a penalty of $250.00 is considered appropriate and is hereby proposed.

20/ Although this decision has been appealed, the reference to a citation for a prior violation in Sec. 14(a)(2) of the Act would seem to indicate that it, nevertheless, is for consideration herein.

Final Order 21/

The violation of Sec. 12(a)(2)(G) of the Federal Insecticide, Fungicide and Rodenticide Act, as amended, having been established as alleged in the complaint, a penalty of $250.00 is assessed against Respondent, Hygienic Sanitation Company, Inc., in accordance with Sec. 14(a)(2) of the Act and Respondent is ordered to pay the above sum by forwarding a certified check in the amount of $250.00 payable to the United States of America to the Regional Hearing Clerk within 60 days after receipt of this order.

Dated this 18th day of September 1979.

Spencer T. Nissen
Administrative Law Judge

21/ In accordance with Sec. 168.46(c) of the Rules of Practice (40 CFR 168.46(c), this initial decision shall become the final order of the Regional Administrator unless appealed to the Regional Administrator in accordance with 168.51(a) or the Regional Administrator elects to review the same, sua sponte, in accordance with Sec. 168.51(b).