IN RE ROGER ANTKIEWICZ & PEST ELIMINATION PRODUCTS OF AMERICA, INC.

FIFRA Appeal Nos. 97–11 & 97–12

FINAL DECISION

Decided March 26, 1999

Syllabus

Roger Antkiewicz is president of a pesticide supply business in southeastern Michigan known as "Pest Elimination Products of America, Inc." ("PEPA"). PEPA stocks a variety of pesticides for sale to the public. PEPA purchased a ready-to-use chlorpyrifos insecticide, called "Chem-Tox Do It Yourself Pest Control," from Chem-Tox, Inc. of McHenry, Illinois. One practice followed by PEPA was to pour this product into pressurized spray tanks of the kind used by professional exterminators, affixing to the tanks its own private "PEPA New Residual Spray" labels. It then gave or delivered the product to its customers. The parties dispute whether the product was poured into tanks only after it was sold to the customer.

Some customers, such as Country Style Bakery of Chesterfield Township, Michigan, had sales/service arrangements whereby PEPA delivered New Residual Spray to them on a monthly basis. Customers purchased the pesticide but not the pressurized spray tanks. Instead, customers paid a security deposit for each spray tank, refundable upon return of the tank in good working order. In return, PEPA agreed to repair or replace malfunctioning tanks for the life of the sales/service agreement.

On September 1, 1994, Region V of the U.S. Environmental Protection Agency ("EPA") issued a Stop Sale, Use, or Removal Order ("SSURO") prohibiting all further sale, use, shipment, or delivery of New Residual Spray by PEPA. PEPA thereafter substituted a different product, manufactured by Bonide Chemical Company, to fill its New Residual Spray orders. The new product, called "Bonide Home Pest Control Ready-to-Use," contained, according to Roger Antkiewicz, the same active ingredient—chlorpyrifos—as New Residual Spray. PEPA stated that it left the New Residual Spray labels on the pressurized spray tanks because the company was uncomfortable with the notion that the tanks should bear no label. Roger Antkiewicz felt that the instructions for use and antidotal measures were similar enough between New Residual Spray and Home Pest Control Ready-to-Use to provide protection to his product's users should accidental ingestion or improper contact occur.

PEPA also sold another insecticide manufactured by Bonide Chemical Company, called Bonide Diazinon 12.5%E. This product, a concentrate, bore a registered label with the phrase "DO NOT USE IN THE HOME" prominently displayed in three different places—the yellow right-side panel, the red center panel, and in a pamphlet hanging from

the container neck. On August 17 and September 15, 1995, PEPA sold Bonide Diazinon 12.5%E to Foxfire Farms. The jugs containing the pesticide had "DO NOT USE IN THE HOME" on the yellow side panel crossed out with black marker, while the other two instances of the phrase were unaltered. In addition, PEPA offered eight jugs of the pesticide for sale on February 21, 1995, again with the phrase on the yellow side panel, but not those on the center panel or pamphlet, crossed out.

Complainant EPA Region V filed an amended complaint on April 3, 1996, charging Roger Antkiewicz and PEPA, Respondents, with seven violations (in six counts) of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"). In Count I, Complainant charged Respondents with the unlawful sale or distribution of New Residual Spray, an unregistered pesticide. In Count II, Complainant alleged that Respondents engaged in the unlawful "production" — which includes repackaging and relabeling — of New Residual Spray at "establishments" that were not registered as required under FIFRA. In Count III, Complainant claimed that Respondents sold an unregistered pesticide (New Residual Spray) to Country Style Bakery on or about February 29, 1995. Count IV alleged that, on two occasions, Respondents sold Bonide Diazinon 12.5%E to Foxfire Farms with the phrase "DO NOT USE IN THE HOME" on the yellow side panel crossed out with black marker. In so doing, Respondents purportedly made claims for the product that were substantially different from the claims made in conjunction with the product's registration. In Count V, Complainant similarly alleged that Respondents offered to sell eight jugs of Bonide Diazinon 12.5%E with that phrase crossed out, thereby making substantially different claims. Finally, Count VI charged Respondents with the unlawful sale on February 29, 1995, of New Residual Spray to Country Style Bakery in violation of the SSURO and FIFRA.

In the proceedings below, Administrative Law Judge Andrew S. Pearlstein ("Presiding Officer") found Respondents liable for Count I and assessed a $3,500 penalty therefor. The Presiding Officer then dismissed Counts II through VI. Region V timely appealed the dismissal of these counts.

Held: The Board reverses the Presiding Officer's dismissal of Count II. Under FIFRA, it is unlawful for any person to "produce" any pesticide unless the "establishment" in which the pesticide is produced is registered with EPA. "Produce" means, among other things, to repackage or relabel, and "establishment" means "any place where a pesticide * * * is produced, or held, for distribution or sale." The Presiding Officer held that Respondents sold pesticides *before* repackaging them and thus escaped becoming a "producer" that must register its pesticide-producing establishments. The Board finds that Respondents repackaged and relabeled (i.e., produced) pesticides at their facilities and then gave those pesticides to customers for their use or delivered them to the customers' premises. As such, Respondents "distributed" pesticides they had "produced" in their facilities. Accordingly, Respondents were obliged to comply with the establishment registration requirements of FIFRA. Their failure to so comply is a violation of FIFRA as alleged in Count II.

The Board affirms the Presiding Officer's dismissal of Counts III and VI, which involve Respondents' alleged sale of New Residual Spray to Country Style Bakery on February 29, 1995, in violation of FIFRA and the SSURO. The complaint characterized New Residual Spray as being supplied to Respondents by Chem-Tox, Inc. Respondents, however, plausibly argued that they had replaced the Chem-Tox product with Bonide Chemical Company's Home Pest Control Ready-to-Use, another chlorpyrifos insecticide. The Region contended that Respondents held supplemental registrations for neither the Chem-Tox nor the Bonide product, so Respondents' argument could not defeat an allegation that they had sold an unregistered pesticide. The Board, however, finds that, as written, the complaint specifically linked the identity of New Residual Spray to a particular supplier (Chem-Tox), thus defining the scope of the violation alleged. With the allegations in the complaint so defined, the Presiding Officer did not err in dismissing these counts in the absence of a

preponderance of evidence establishing that the chemical sold to Country Style Bakery was indeed the Chem-Tox chemical.

Finally, the Board affirms the Presiding Officer's dismissal of Counts IV and V. Respondents sold and offered to sell Bonide Diazinon 12.5%E with one of three occurrences of the phrase "DO NOT USE IN THE HOME" crossed out with black marker. Complainant alleged that in so doing, Respondents implicitly claimed the product is effective for use in the home, in contravention to the implicit registered claim that the product is not effective for use indoors. The Board holds that, when viewed as a whole, Bonide Diazinon 12.5%E's labeling cannot reasonably be construed as making an implied "claim" that the product should be used in the home. The label plainly states, in two other places, "DO NOT USE IN THE HOME." Under the circumstances of this case, the crossing out of one instance of a phrase repeated three times on the label does not equate to the making of a claim. While the label may send conflicting signals, it would likely cause confusion rather than assure a customer that indoor use is appropriate.

In accordance with these findings, the Board assesses a total penalty of $7,000 ($3,500 for Count I and $3,500 for Count II) against Respondents on a joint and several basis.

Before Environmental Appeals Judges Ronald L. McCallum, Edward E. Reich, and Kathie A. Stein.[1]

Opinion of the Board by Judge Reich, in which Judge Stein joined. Judge McCallum joined in the Board's judgment and filed a separate concurring opinion:

Complainant EPA Region V appeals the Initial Decision of Administrative Law Judge Andrew S. Pearlstein ("Presiding Officer") in this enforcement action under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA" or "Act"), 7 U.S.C. §§ 136–136y. In the proceedings below, Region V charged Respondents Roger Antkiewicz and Pest Elimination Products of America, Inc. ("PEPA") with seven violations of FIFRA (in six counts) and proposed an administrative penalty of $29,500. The Presiding Officer found Respondents jointly and severally liable on one of the counts: selling an unregistered pesticide in violation of FIFRA § 12(a)(1)(A), 7 U.S.C. § 136j(a)(1)(A), and assessed a $3,500 penalty. The Presiding Officer dismissed the five other counts.[2]

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[1] The Board's November 20, 1998 decision in this case is replaced and superseded by today's reissued Final Decision. The November 20th decision henceforth has no precedential value in this or any other case.

[2] Respondents had also filed an appeal asking the Board to overturn the Presiding Officer's sole finding of liability against them. Their appeal was untimely filed, and the Board dismissed it on that ground. Respondents later filed a motion for reconsideration of the dismissal, which the Board took under advisement.

Continued

On appeal, Region V argues that the Presiding Officer erred in dismissing these charges. The Region asks the Environmental Appeals Board ("Board") to find Respondents liable on all five counts and to reinstate the proposed penalty. For the reasons set forth below, we affirm the Presiding Officer's dismissal of Counts III through VI, reverse his dismissal of Count II, and assess a total civil penalty of $7,000 against Roger Antkiewicz and PEPA on a joint and several basis.

The Board typically requires strict compliance with the time limits set forth in the rules of practice governing these proceedings. *See* 40 C.F.R. pt. 22. Indeed, the Board has held that the "'time requirements for appeals must be followed unless special circumstances warrant [their] relaxation.'" *In re Gary Dev. Co.,* 6 E.A.D. 526, 529 (EAB 1996) (emphasis added) (quoting *In re B&B Wrecking & Excavating, Inc.,* 4 E.A.D. 16, 17 (EAB 1992)). In this case, Respondents have identified no "special circumstances" justifying their untimely appeal. They claim only that, because of an alleged U.S. Postal Service mistake, they received the Initial Decision just one day before their notice of appeal was due. *See* Motion to Reconsider Order Dismissing Respondents' Appeal ¶¶ 4–7.

The factual record on the date of receipt by Respondents is murky at best. For example, the record contains a return receipt signed by Vincent Antkiewicz, Roger Antkiewicz's brother and business partner, ten days before the appeal due date. *See id.* att. 2. There is also a letter from a post office official stating that the "mail piece was still at the [post] office on 10/22/97," but it also notes that "[c]ertified mail piece #P950–737–860 was notified by the carrier on route 4711 on 10/07/97, and 10/15/97." *Id.* att. 1. This seems to imply that Respondents had the opportunity to pick up the documentation in a timely way and chose not to do so.

In any event, Respondents' problems with delivery, which they attribute to a change of address, flow directly from their failure to comply with the rules governing these proceedings. Under the Consolidated Rules of Practice — which were served on Roger Antkiewicz along with the original complaint — a party's change of address must be "communicated promptly to the Regional Hearing Clerk, Presiding Officer, and all parties to the proceeding." 40 C.F.R. § 22.05(c)(4). Moreover, "[a] party who fails to furnish such information and any changes thereto shall be deemed to have waived his right to notice and service under these rules." *Id.*

Respondents moved their place of business in April 1997 from 35372 23 Mile Road to 35211 23 Mile Road in New Baltimore, Michigan. Six months later, when the Presiding Officer served his Initial Decision, Respondents had still not notified the parties or the Presiding Officer of their move. On these facts, Respondents have waived their right to notice and service and "cannot rely on any alleged insufficiency of service to justify the untimely filing of [their] appeal." *Gary Dev.,* 6 E.A.D. at 531. We therefore deny Respondents' motion for reconsideration (which we note was *itself* untimely).

I. *BACKGROUND*

Roger Antkiewicz and his brother Vincent operate a pesticide supply business in southeastern Michigan. Their business, known at all times relevant to this proceeding as Pest Elimination Products of America, Inc. ("PEPA"), has gone through several permutations over the years. In 1980, the Antkiewiczes incorporated a company called Pest Eliminators, Inc., which ceased operations in 1989. Hearing Transcript ("Tr.") at 342. Roger and Vincent Antkiewicz, along with Raymond Balinski, subsequently incorporated three pesticide supply companies in the 1990s: Allstate Services Inc. on October 18, 1991, PEPA on March 6, 1992, and Metro Pest Supply Inc. on June 16, 1994. *See* Hearing Exhibits ("Exs.") 29–31. Roger Antkiewicz is listed in the articles of incorporation for all three companies as president and registered agent, Vincent Antkiewicz as vice president, and Raymond Balinski as treasurer. *Id.* All three companies are operated out of the same facilities, which, after numerous address changes, are currently located at 35211 23 Mile Road in New Baltimore, Michigan.[3]

In April 1992, PEPA contacted Chem-Tox, Inc. of McHenry, Illinois, a pesticide manufacturer, regarding a ready-to-use insecticide known as "Chem-Tox Do It Yourself Pest Control." Ex. 24. The insecticide's active ingredient, 0.5% chlorpyrifos, is used to kill cockroaches, ants, clover mites, crickets, firebrats, silverfish, spiders, carpet beetles, fleas, brown dog ticks, earwigs, flies, and mosquitoes. Ex. 5. PEPA wanted to distribute Chem-Tox's product under a private label as "Pest Elimination Products of America New Residual Spray." Tr. at 382; Ex. 24. PEPA arranged to have the private labels printed through Chem-Tox, which placed the labels on one-gallon containers of Chem-Tox Do It Yourself Pest Control and shipped the containers to PEPA. Between April 1992 and September 1994, PEPA offered Chem-Tox's insecticide for sale in one-gallon jugs as New Residual Spray. Tr. at 331–40, 347; Exs. 4–5, 12, 19–20, 23.

PEPA's vision of the pesticide trade, based on the Antkiewiczes' experience as licensed exterminators, Tr. at 328–29, 347, 361, prompted it to seek innovative ways to market its products. New Residual Spray originally came with a hand sprayer device, which customers would attach to the top of the gallon jug when they wanted to spray the pesticide. Tr. at 328. PEPA's customers were unhappy with this method of dispensing the product. They needed more flexibility to reach narrow cracks

[3] Over the span of six or seven years, the Antkiewiczes' business has moved from 51106 D.W. Seaton, New Baltimore, Michigan, to 17929 South Wind Drive, Fraser, Michigan, to 35372 23 Mile Road, New Baltimore, Michigan, to 35211 23 Mile Road, New Baltimore, Michigan.

and crevices than an unwieldy one-gallon container could provide, and their hands became tired after repeated pumping of the hand spray nozzle. PEPA decided to provide to its customers a pressurized spray tank, similar (if not identical) to the kind of tank employed by professional exterminators, for use in dispensing New Residual Spray. Tr. at 328–29.

PEPA devised a sales/service package that bundled New Residual Spray and the spray tank together. Under this package (as described by PEPA), PEPA would sell New Residual Spray in the one-gallon manufacturer's container, and then PEPA or the customer would pour the insecticide from the manufacturer's container into the pressurized spray tank.[4] Tr. at 395–402. PEPA would collect a $15 security deposit for each spray tank, refundable upon return of the tank in good working order, and would agree to repair or replace malfunctioning tanks for the life of the sales/service agreement. Customers would forfeit their security deposits if the tanks in their care were lost or stolen. Tr. at 329–30. No rent was charged for the use of the tanks.

PEPA hired a local printer to produce New Residual Spray labels similar to, though slightly smaller than, those wrapped around Chem-Tox's one-gallon manufacturer's containers. Tr. at 197–200; *see* Exs. 5, 18. PEPA placed these labels on the pressurized spray tanks it distributed to its customers as part of its sales/service agreements. PEPA described this labeling as a "safety" measure taken to ensure that the insecticide would always be identified and antidotal measures described in case the product were accidentally ingested or applied to humans or pets. Tr. at 201, 204, 321–25.

On August 12, 1993, Joseph Strzalka of the Michigan Department of Agriculture ("MDA") inspected the Mug & Jug Party Store in Berkley, Michigan. Mr. Strzalka found on the premises a spray tank bearing the New Residual Spray label. Tr. at 59, 95. According to Mr. Strzalka, the proprietor of the Mug & Jug told him that he had purchased the spray tank and insecticide from PEPA. Tr. at 59. This information prompted Mr. Strzalka to conduct an inspection of PEPA on August 17, 1993, in an effort to determine whether PEPA qualified as a "producer" of pesticides under the FIFRA regulations. *Id.* According to Mr. Strzalka, Roger Antkiewicz told him during the inspection that PEPA poured New Residual Spray into spray tanks and sold the product in that form. Tr. at 35–37. Mr. Strzalka

[4] PEPA claims that such pouring occurred only after the product had been sold to the customer. Tr. at 402. The Region, however, believes PEPA sold New Residual Spray after it had been poured from the Chem-Tox containers into the spray tanks. *See* Complainant's Appeal Brief at 6–17.

read the regulatory definitions of "producer" and "establishment" to Roger Antkiewicz and informed him that his transfer of pesticides from one container to another made him a producer. Tr. at 44–46. Roger Antkiewicz told Mr. Strzalka that, in his view, PEPA was a distributor, but not a producer, of New Residual Spray. Tr. at 35–36, 46.

A year later, on September 1, 1994, EPA Region V issued a Stop Sale, Use, or Removal Order ("SSURO") prohibiting all further sale, use, shipment, or delivery of New Residual Spray by PEPA. Ex. 9. Susan Downey, an MDA inspector, delivered the Order to Roger Antkiewicz on September 15, 1994, in conjunction with her performance of another MDA inspection of PEPA. Tr. at 102. Ms. Downey found no New Residual Spray on the premises during her inspection. Tr. at 106.

Region V subsequently filed an administrative complaint against Roger Antkiewicz on December 27, 1994, alleging two violations of FIFRA and seeking $7,000 in civil penalties. The complaint charged Roger Antkiewicz with: (1) the unlawful sale of New Residual Spray, an unregistered pesticide, in violation of FIFRA § 12(a)(1)(A), 7 U.S.C. § 136j(a)(1)(A); and (2) unlawful "production" of a pesticide (New Residual Spray) in an unregistered "establishment," in violation of FIFRA § 12(a)(2)(L), 7 U.S.C. § 136j(a)(2)(L). Complaint ¶¶ 10–13, 14–18. The Region simultaneously filed an administrative complaint against Chem-Tox, Inc. for FIFRA violations relating to Chem-Tox's dealings with PEPA.

On March 2–3, 1995, Susan Downey of MDA inspected Country Style Bakery in Chesterfield Township, Michigan. She found two pressurized spray tanks on site with New Residual Spray labels affixed to them. Tr. at 109–12; Ex. 7. According to Ms. Downey, the bakery's owners informed her that they leased the spray tanks from PEPA and purchased the pesticide on a monthly basis from PEPA (one gallon per month at a cost of $15). Tr. at 135. Ms. Downey collected one of the tanks for laboratory testing. Samples from the tank contained traces of two different chemicals: chlorpyrifos and diazinon. Tr. at 139.

Several days later, on March 8, 1995, Ms. Downey visited PEPA again. When asked about the spray tanks found at Country Style Bakery (seemingly in violation of the SSURO), Roger Antkiewicz explained that PEPA was substituting a different product, manufactured by Bonide Chemical Company, for New Residual Spray. The new product, called "Bonide Home Pest Control Ready-to-Use," contained, according to Roger Antkiewicz, "exactly the same" active ingredient — chlorpyrifos — as New Residual Spray. Tr. at 313, 334. Vincent Antkiewicz also testified that the Bonide product was "exactly [the] same" product as the

Chem-Tox/PEPA New Residual Spray. Tr. at 231. PEPA had left the New Residual Spray labels on the pressurized spray tanks because the company was uncomfortable with the notion that the tanks should bear no label. Roger Antkiewicz felt that the instructions for use (and antidotal measures) were similar enough between New Residual Spray and Home Pest Control Ready-to-Use to provide protection to his product's users should accidental ingestion or improper contact occur. Tr. at 320–25. Ms. Downey informed him that putting New Residual Spray labels on hand sprayers containing Bonide Home Pest Control is a violation and that PEPA should make it a priority to remove those labels. Tr. at 123–24.

MDA returned six months later, on September 21, 1995, to inspect PEPA again. This time, Joseph Strzalka and Susan Downey conducted a "federal marketplace" inspection. They examined the products available for purchase on PEPA's sales shelves and found a number of one-gallon jugs of another insecticide manufactured by Bonide Chemical Company, called "Bonide Diazinon 12.5%E." This insecticide is not "ready to use" out of the bottle, as are the Chem-Tox and Bonide chlorpyrifos products mentioned above, but must be diluted prior to use. Bonide Diazinon 12.5%E kills "certain outdoor insects [that] destroy lawns, roses, flowers, fruits, vegetables, trees and shrubs, or annoy pets and people." Ex. 8. The jugs containing the diazinon product bore labels with, among other things, the words "Do Not Use in the Home" in capital letters. In one section on the labels of eight of the jugs, these words had been crossed out with black marker. Tr. at 51–53, 73; Ex. 6. However, the instruction "Do Not Use in the Home" was present in several other places on the product's labeling, including on a directions-for-use pamphlet attached to the neck of the container. Tr. at 76–79; Ex. 8.

When queried about the blacked-out words, Roger Antkiewicz said, according to Mr. Strzalka, that it was the first he had heard of marks on the labels. Tr. at 52. However, on August 17, 1995 and September 15, 1995, PEPA had sold several jugs of Bonide Diazinon 12.5%E to Allen Kodet of Foxfire Farms, and Mr. Kodet testified that he had discussed the blacked-out words with Roger Antkiewicz during his purchases. Tr. at 18; *see* Ex. 3. Thus, it appears that Roger Antkiewicz was aware of the altered labels before the MDA inspection. According to Mr. Kodet, Roger Antkiewicz told him the jugs bearing blacked-out words on their labels arrived that way from the manufacturer. Tr. at 18. However, the inspectors asked Roger Antkiewicz to open one new box of the diazinon product, and when he did so, the labels on the four jugs in the box did not have the words blacked out, as the jugs on the sales floor did. Tr. at 53; Ex. 6.

Based on the information gathered in these later inspections, Region V filed an amended complaint on April 3, 1996. The amended complaint added PEPA as a respondent, charged Roger Antkiewicz and PEPA with seven violations of FIFRA in six counts, and sought $29,500 in administrative penalties. Specifically, the amended complaint charged Respondents, jointly and severally, with:

> (1) Count I: unlawful sale or distribution of New Residual Spray, an unregistered pesticide, in violation of FIFRA § 12(a)(1)(A), 7 U.S.C. § 136j(a)(1)(A);
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> (2) Count II: unlawful "production" of a pesticide (New Residual Spray) at an unregistered "establishment," in violation of FIFRA § 12(a)(2)(L), 7 U.S.C. § 136j(a)(2)(L);
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> (3) Count III: unlawful sale of New Residual Spray, an unregistered pesticide, to Country Style Bakery on or about February 29, 1995, in violation of FIFRA § 12(a)(1)(A), 7 U.S.C. § 136j(a)(1)(A);
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> (4) Count IV (2 violations): unlawful sales on or about August 17, 1995 and September 15, 1995 to Foxfire Farms of a registered pesticide, Bonide Diazinon 12.5%E, with the words "DO NOT USE INDOORS" on its registered label crossed out, in violation of FIFRA § 12(a)(1)(B), 7 U.S.C. § 136j(a)(1)(B);
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> (5) Count V: unlawful offering for sale of eight jugs of Bonide Diazinon 12.5%E with the words "DO NOT USE INDOORS" on the product's registered label crossed out, in violation of FIFRA § 12(a)(1)(B), 7 U.S.C. § 136j(a)(1)(B); and
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> (6) Count VI: unlawful sale on or about February 29, 1995, of New Residual Spray to Country Style Bakery in violation of the SSURO and of FIFRA § 12(a)(2)(I), 7 U.S.C. § 136j(a)(2)(I).

After a two-day hearing, at which Roger Antkiewicz appeared on his own and PEPA's behalf, the Presiding Officer held that the Complainant had proved its case on the first count but dismissed the remaining five counts as unproved by a preponderance of the evidence. He assessed a $3,500 penalty for Respondents' violation of Count I. The appeals followed.

II. *DISCUSSION*

The Board reviews the Presiding Officer's factual and legal conclusions on a *de novo* basis. 40 C.F.R. § 22.31(a). Matters in controversy must be established by a preponderance of the evidence. *Id.* § 22.24; *see In re B.J. Carney Indus., Inc.,* 7 E.A.D. 171, 217 (EAB 1997). We first address Complainant's appeal of the five dismissed counts and then turn to the penalty calculation.

A. *Complainant's Appeal*

1. *Count II: Producing Pesticides at an Unregistered Establishment*

It is unlawful under FIFRA for any person to "produce" any pesticide unless the "establishment" in which the pesticide is produced is registered with EPA. FIFRA §§ 7(a), 12(a)(2)(L), 7 U.S.C. §§ 136e(a), 136j(a)(2)(L). The term "produce" means, among other things, to "process" any pesticide, FIFRA § 2(w), 7 U.S.C. § 136(w), or to "repackage," "relabel," or "otherwise change the container" of any pesticide. 40 C.F.R. § 167.3. An "establishment" is "any place where a pesticide * * * is produced, or held, for distribution or sale." FIFRA § 2(dd), 7 U.S.C. § 136(dd). Thus, if a party is repackaging and relabeling pesticides at a facility, and then distributing or selling the repackaged and relabeled pesticides, the party must register the facility as an "establishment." Failure to so register is a FIFRA violation.

In accordance with the foregoing definitions, Region V alleged that Respondents' former facilities at 35372 23 Mile Road, New Baltimore, 17929 South Wind Drive, Fraser, and 51106 D.W. Seaton, New Baltimore were "establishments," and that Respondents violated FIFRA by failing to register them with EPA prior to producing New Residual Spray at those locations. Amended Complaint ¶¶ 3, 15–18. To the Region, Respondents' practice of transferring New Residual Spray from the manufacturer's containers into pressurized spray tanks, placing New Residual Spray labels thereon, and then purportedly selling the repackaged and relabeled product to customers constituted unlawful activity within the meaning of these FIFRA provisions. *See id.* ¶¶ 7, 9, 17–18.

At the hearing before the Presiding Officer, Roger Antkiewicz conceded that PEPA had poured New Residual Spray from manufacturer's containers into spray tanks and had placed labels on the tanks, but he claimed that the transfers had occurred *only after* the pesticide had been sold to the customer. Tr. at 399–402. According to MDA Inspector

Downey, Roger Antkiewicz told her that transfers of the pesticide took place at PEPA's or the customer's facilities, depending on convenience. Tr. at 144. In light of this evidence, the Presiding Officer held that PEPA had succeeded in "avoiding becoming a 'producer' under the regulations" because its repackaging activities occurred after the sale of the pesticide. Init. Dec. at 7–9. Because PEPA was not a "producer," he held, the company was not required to register its facilities as "establishments" under FIFRA § 7(a), 7 U.S.C. § 136e(a). Init. Dec. at 9.

Region V argues on appeal that, in so finding, the Presiding Officer erroneously ignored substantial evidence in the record. Complainant's Appeal Brief at 6. Most germane for our purposes is the Region's assertion that Respondents "distributed" repackaged and relabeled pesticides. *See* Complainant's Appeal Brief at 13–17. Under FIFRA, facilities that produce or hold pesticides for distribution, as well as for sale, must be registered as establishments. FIFRA § 2(dd), 7 U.S.C. § 136(dd). In concluding that Respondents sold New Residual Spray before repackaging it, the Presiding Officer appears to have overlooked the question of whether Respondents "distributed" the repackaged product.[5] *See* Init. Dec. at 7–9.

The term "distribution" is defined in the FIFRA regulations as, among other things, the "act[] of distributing." 40 C.F.R. § 152.3(j); *accord* FIFRA § 2(gg), 7 U.S.C. § 136(gg). The legislative history and federal case law do not further elucidate the meaning of the term, so we turn to other sources for assistance. For example, as EPA explained in the preamble to its final regulations, "distribution" occurs when, among other things, a finished product is "released for shipment," meaning it is "both packaged and labeled in the manner in which it [will] be shipped or * * * [is] stored in an area where such finished products are stored." 53 Fed. Reg. 15,952, 15,953 (May 4, 1988). As a second example, an administrative law judge deciding a FIFRA case noted that "distribution" in its legal sense "implies or imports transfer or delivery." *In re Willis Stores,* IF&R Dkt. No. VIII–59C (ALJ, June 11, 1981). Finally, in common parlance, "distribution" means "the act or process of distributing," and "distributing" means "to divide

[5] *But see* Init. Dec. at 9 ("The evidence as a whole indicates that while PEPA *distributed* an unregistered pesticide, it did not produce a pesticide.") (emphasis added). It is not clear whether the word "distributed" is used here in its "sales" sense or its "delivery" sense. Considering that the rest of the Presiding Officer's discussion of Count II focuses on the "sale" of New Residual Spray, it may be that the "sales" sense is intended in the sentence quoted above. In any event, the quoted sentence is confusing because "produce" means only to repackage or relabel pesticides, which Respondents unquestionably did. The significance of whether there was a sale or distribution derives from the definition of "establishment," not from the definition of "produce."

among several or many * * * [or] to give out or deliver." Webster's Third New International Dictionary 660 (1986).

From these materials we glean that "distribution" (and its variants "distribute," "distributing," and so on) generally means "to deliver," "to transfer," "to give out," or "to release for shipment" finished products that are packaged and labeled. Roger Antkiewicz's own admissions indicate that, under this definition, Respondents more likely than not distributed pesticides they had produced (i.e., relabeled and repackaged). For instance, Roger Antkiewicz admitted in the answer to the initial complaint that "[PEPA] employees did pour a product purchased from Chem-Tox Inc. out of their one gallon containers into a 1½ gallon spray tank owned by [PEPA] and *provided for use to its customers*." Answer to Complaint and Request for Hearing (Jan. 19, 1995) (emphasis added). Roger Antkiewicz confirmed this statement at the hearing, testifying that "[a]fter the customer purchases the gallon, sometimes if the customer didn't pour it in and asks somebody to pour it into that container spray tank, we did, after they purchased the product." Tr. at 402.

The record also contains evidence indicating that Respondents more likely than not delivered spray tanks full of pesticide to its customers at various times. For example, MDA Inspector Downey testified that "firms" told her they were only "leasing" the pressurized spray tanks from PEPA but "were purchasing the product that was already in the tank when it arrived on their premises." Tr. at 145–46. This kind of transaction surely constitutes the "delivery/distribution" of pesticides that have been produced by PEPA, regardless of when the "sale" was made and title to the pesticides formally passed from PEPA to the customers.

Another piece of evidence that sheds light on PEPA's business practices is a receipt obtained by MDA Inspector Downey from Country Style Bakery. The receipt shows that on February 29, 1995, PEPA billed the bakery $15 for "1 REPLACEMENT TANK." Exs. 10, 33. PEPA had an agreement with the bakery to deliver New Residual Spray approximately once a month, and on March 3, 1995, the bakery had two of PEPA's spray tanks on hand. Tr. at 112. Ms. Downey testified that the bakery owner told her the receipt was for a new, unopened spray tank bearing the New Residual Spray label. *Id.* When questioned about the receipt, Roger Antkiewicz testified that he had no personal knowledge of the transaction but that, in general, "[w]hen we went to deliver product to the customer, this is the type of receipt we left the customer to let them know that we were there, plus they're paying $15 for the products." Tr. at 425–27.

The evidence discussed above tends to show that at least some of the time, PEPA delivered pesticides inside pressurized spray tanks to its customers. PEPA therefore was "distributing" pesticide it had "produced" (i.e., repackaged and relabeled) at its facilities. As such, its facilities qualify as establishments that must be registered under FIFRA. The Presiding Officer erred by finding otherwise.

Both Respondents are liable for the violation alleged in Count II. Under FIFRA, it is unlawful for "any person" to produce pesticides at an unregistered establishment. FIFRA §§ 7(a), 12(a)(2)(L), 7 U.S.C. §§ 136e(a), 136j(a)(2)(L). The term "person" means, among other things, any individual or corporation. FIFRA § 2(s), 7 U.S.C. § 136(s). PEPA, a corporation, is liable because it repackaged and relabeled pesticides, for later distribution, in facilities that were not registered as FIFRA establishments. Roger Antkiewicz, an individual, is liable because, given his active involvement and oversight of all aspects of PEPA's operations, he should have ensured his company's compliance with the pesticide laws. As the Presiding Officer held, "[a] corporate officer may be held liable, in civil as well as criminal actions, for wrongful acts of the corporation in which he participated." Init. Dec. at 6; *accord Cruz v. Ortho Pharm. Corp.,* 619 F.2d 902, 907 (1st Cir. 1979) ("Cases [that] have found personal liability on the part of corporate officers have typically involved instances of direct personal participation, as where the defendant was the 'guiding spirit' behind the wrongful conduct, * * * or the 'central figure' in the challenged corporate activity.") (citations omitted). Roger Antkiewicz, the person with the greatest responsibilities in the conduct of PEPA's business, was plainly the "guiding spirit" and "central figure" in PEPA's activities. *See, e.g.,* Tr. at 17–19, 42–47, 105–06, 113–18, 121, 124, 149, 205, 318–20, 341–42, 346–47, 366–83, 391, 402–05; Exs. 4, 24, 29–31, 32. Accordingly, he will be held to account for the company's shortcomings.

2. *Counts III and VI: Sale/Distribution of New Residual Spray in February 1995 in Violation of FIFRA and SSURO*

In Counts III and VI of the amended complaint, Region V alleged that on or about February 29, 1995, Respondents sold New Residual Spray to Country Style Bakery in violation of FIFRA and the SSURO (issued September 1, 1994). Amended Complaint ¶¶ 19–20, 29–31. The Presiding Officer held that the Region failed to prove, by a preponderance of the evidence, that the pesticide sold to the bakery was in fact New Residual Spray. Init. Dec. at 9–10. Respondents had claimed that they substituted Bonide Home Pest Control Ready-to-Use for the New Residual Spray they normally would have provided—but for the SSURO—to the bakery under their service agreement. Tr. at 121, 231, 313.

The Presiding Officer found support for this claim in laboratory analyses of the bakery's spray tank contents, which purportedly "showed traces of the active ingredients of both New Residual Spray (chlor[]pyrifos) and Bonide (diazinon)."[6] Init. Dec. at 10. The Presiding Officer also noted that MDA Inspector Downey found no containers of New Residual Spray offered for sale during a March 8, 1995 inspection of PEPA, and that, with regard to the labeling on the spray tanks, "[t]he Antkiewicz' [*sic*] 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." *Id.* On this evidence, the Presiding Officer dismissed both counts.

On appeal, Region V contends the Presiding Officer erred because FIFRA prohibits the sale of *any* unregistered pesticide, and here, neither the Chem-Tox nor the Bonide product was registered by Respondents. Complainant's Appeal Brief at 18. The Region also contends the Presiding Officer erred because the SSURO prohibits the sale, use, and removal of New Residual Spray that is "identified 'with the EPA Reg. No. 45385–11 or 45385–15,'" and not simply the sale, use, or removal of that particular pesticide. *Id.* The Region argues that even if the product inside the bakery's spray tanks was the Bonide, and not the Chem-Tox, product (as Respondents allege), Respondents are nonetheless guilty of these charges because the spray tank labels identified (albeit incorrectly), by the specified registration numbers, the pesticide purportedly inside. *Id.* at 18–20.

A close review of the complaint shows why Region V's arguments are not persuasive. Under the Consolidated Rules of Practice, "each complaint for the assessment of a civil penalty shall include * * * [a] concise statement of the factual basis for alleging the violation." 40 C.F.R. § 22.14(a)(3). This requirement is "no more onerous" than that of the

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[6] Specifically, the Presiding Officer relied on evidence that one of Country Style Bakery's spray tanks contained traces of two chemicals, chlorpyrifos (trade name "Dursban") and diazinon. *See* Tr. at 139. The Presiding Officer held that this evidence supported PEPA's claim "that it substituted the Bonide product after issuance of the SSURO against New Residual Spray." Init. Dec. at 10. In our review of the record, however, we found repeated statements by Roger and Vincent Antkiewicz that New Residual Spray and Bonide Home Pest Control Do-It-Yourself contain "exactly the same" active ingredient — chlorpyrifos — and are "exactly [the] same" pesticide product. *See* Tr. at 231, 313, 334; *see also* Tr. at 350 (products have "identical formulation"). In addition, the record contains a back label for the Bonide product, which indicates that chlorpyrifos is one of the active ingredients of that product and makes no mention of diazinon. *See* Ex. 27. Given this evidence, we cannot say that any diazinon in the bakery's spray tank necessarily derived from Bonide Home Pest Control Do-It-Yourself, or that any laboratory tests could even determine whether the spray tank contained New Residual Spray or Bonide. Accordingly, we decline to rely on the evidence.

Federal Rules of Civil Procedure, which calls for "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2); *see In re CID-Chemical Waste Management of Ill., Inc.,* RCRA (3008) Appeal No. 90–1, slip op. at 4–5 n.3 (JO, July 24, 1990) (Consolidated Rules § 22.14(a)(3) does not impose "stringent pleading requirements"; it is "no more onerous on its face" than Federal Rules' "short and plain statement" standard). Many federal courts have held, in construing Fed. R. Civ. P. 8(a), that:

> [T]he main purpose of the complaint is to provide notice to the defendant of what plaintiff's claim is and the grounds upon which the claim rests. * * * [The] plaintiff must at least set forth enough details so as to provide defendant and the court with a fair idea of the basis of the complaint and the legal grounds claimed for recovery.[7]

The Consolidated Rules' standard is similar: complainants must include enough detail to fairly inform respondents of the claim they must defend against.[8]

In construing the use of particular words or phrases in a complaint, we look to the complaint as a whole.[9] In the complaint at issue here, Region V referred to "the product 'New Residual Spray'" as a "pesticide" that Respondents received "from [their] supplier, Chem-Tox, Inc." Amended Complaint ¶¶ 7–8. The Region did not redefine "New Residual Spray" at any point later in the complaint. Accordingly, when the Region referred in Counts III and VI to "the product 'New Residual Spray,'" the obvious and indeed most reasonable interpretation was that the Region

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[7] *Self Directed Placement Corp. v. Control Data Corp.,* 908 F.2d 462, 466 (9th Cir. 1990) (citations omitted); *accord Anderson v. Office of Attorney Gen.,* 890 F. Supp. 648, 648 (E.D. Mich. 1995) (Rule 8 requirements are intended to give adverse party "'fair notice of what the plaintiff's claim is and the grounds upon which it rests'") (quoting *Conley v. Gibson,* 355 U.S. 41, 47 (1957)).

[8] *See CID-Chemical Waste,* RCRA (3008) Appeal No. 90–1; *In re Yaffe Iron & Metal Co.,* 1 E.A.D. 719, 721–22 (JO, Aug. 9, 1982) ("purpose of a complaint is to give adequate notice of the alleged charge so that the charged party has an opportunity to prepare a defense"), *aff'd & remanded on other grounds,* 774 F.2d 1008 (10th Cir. 1985).

[9] *See, e.g., Bachman v. Seaboard Air Line R. Co.,* 80 F. Supp. 976, 979 (E.D.S.C. 1948) (in construing a pleading, a court "must look to 'the substance of the entire pleading.' It will not do 'to take words used in one part of the complaint, and, by separating them from the context and considering them without reference to the complaint as a whole, to draw from them an inference * * * opposed to the one deduced from a reading of the whole complaint, and the one [that] the pleader evidently had in mind in framing it.'") (quoting *Foote v. Ffoulke,* 67 N.Y.S. 368, 369 (N.Y. App. Div. 1900)).

was referencing the chemical supplied to Respondents by Chem-Tox, Inc.[10] Indeed, Respondents construed the complaint in this way, as evidenced by their decision to claim as a defense the fact that the chemical actually sold to Country Style Bakery on February 29, 1995, was supplied to Respondents by Bonide Chemical Company, not Chem-Tox, Inc. The Presiding Officer also construed the complaint in this way. *See* Init. Dec. at 9–10.

It is also reasonable to associate the term "New Residual Spray" with Chem-Tox, Inc.'s chlorpyrifos product and not with Bonide Chemical Company's chlorpyrifos product for several other reasons as well. First, the record is replete with references to New Residual Spray as a private label product that Respondents began purchasing from Chem-Tox, Inc. in April 1992 and continued purchasing until 1994. Second, the PEPA New Residual Spray labels contained ingredient lists, instructions for use, antidotal measures, and other information reflecting the ingredients and formulation of the Chem-Tox, but not necessarily the Bonide, product.[11] Third, Respondents successfully obtained a short-lived supplemental registration—from approximately September 1994 to January 9, 1995—to sell Chem-Tox Do It Yourself Pest Control as PEPA New Residual Spray. All these factors work to tie the name "New Residual Spray" to the Chem-Tox product.

It appears that Region V was placed in an awkward position in this case by the Respondents' untimely introduction of evidence showing the chemical they sold to Country Style Bakery on February 29, 1995, was

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[10] The plain language of the SSURO similarly reveals its focus on the Chem- Tox product. The SSURO states:

> [Y]ou are hereby ordered not to sell, use, or remove the pesticide product, New Residual Spray (also called New Flea Spray), identified on the label with the EPA Reg. No. 45385–11 or 45385–15. * * *
>
> This Order shall pertain to all quantities of New Residual Spray, (or New Flea Spray) identified on the label with the EPA Reg. No. 45385–11 or 45385–15, within the ownership, control, or custody of [PEPA].

Ex. 9. The registration number prefix "45385" belongs to Chem-Tox. *See* Tr. at 268; Ex. 24.

[11] Indeed, it has never been made clear whether the Chem-Tox and Bonide products have the same chemical makeup (despite Respondents' testimony to that effect) because neither Complainant nor Respondents introduced definitive evidence, such as ingredient labels for *both* products, establishing this point.

supplied by Bonide Chemical Company, not Chem-Tox, Inc.[12] However, the Region could have moved to amend the complaint to conform it to the evidence presented, thus making it clear that the chemical origin of the pesticide product Respondents supplied to Country Style Bakery was not intended as a limitation on the scope of the alleged violation. In other words, the Region could have sought an amendment to the complaint to make it clear that the sale or distribution of an unregistered product consisting of the spray container bearing the New Residual Spray labeling was a violation of FIFRA section 12(a)(1)(A) whether the product contained the Chem-Tox chemical or the Bonide chemical. Instead, the Region tried to pretend that the term "New Residual Spray" did not have a prior specific meaning, one that it itself had used in the complaint.

By linking the identity of the pesticide to a specific supplier in the manner done in this complaint, Region V defined the scope of the violation alleged. The Respondents' defense quite logically focused on the essence of that allegation, which was that they sold "New Residual Spray" received "from [their] supplier, Chem-Tox, Inc." It is quite unlikely that Respondents would have presented the defense they did (showing that they sold a product supplied by Bonide) if they had thought such a sale was also encompassed within the scope of the complaint. Clearly, Respondents were not given fair notice of the interpretation of the complaint the Region now propounds.

In sum, while there may have been a legitimate basis for charging Respondents with a violation of FIFRA's registration requirements, we cannot find that Region V has established, by a preponderance of the evidence, the specific violations alleged in the complaint. Accordingly, the Presiding Officer did not err by dismissing these two counts.

3. *Counts IV and V: Differing Product Claims*

Under FIFRA, any applicant wishing to register a pesticide must file a statement that includes "a complete copy of the labeling of the pesticide, a statement of all claims to be made for it, and any directions for its

[12] Respondents' evidence on this point should have been included in the prehearing exchange but was not. *See* 40 C.F.R. § 22.19(b) ("each party at the prehearing conference shall make available to all other parties (1) [t]he names of the expert and other witnesses he intends to call, together with a brief narrative summary of their expected testimony, and (2) copies of all documents and exhibits [that] each party intends to introduce into evidence").

use." FIFRA § 3(c)(1)(C), 7 U.S.C. § 136a(c)(1)(C). It is unlawful for any person to sell or distribute 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 [FIFRA § 3, 7 U.S.C. § 136a].

FIFRA § 12(a)(1)(B), 7 U.S.C. § 136j(a)(1)(B).

In the amended complaint, Region V alleged that Respondents violated FIFRA § 12(a)(1)(B) by selling and offering to sell Bonide Diazinon 12.5%E, a registered pesticide, with certain words on the pesticide's registered label crossed out with black marker. The words, "DO NOT USE IN THE HOME" (which Complainant misquoted as "DO NOT USE INDOORS"), appeared on the label's yellow right-side panel, the red center panel, and on a directions-for-use pamphlet attached to the neck of the pesticide container. Tr. at 131, 153, 168; Exs. 6, 8. Only the instruction on the yellow side panel was marked through; the other two duplicate instructions were unaltered. Complainant contended that Respondents sold containers of Bonide Diazinon 12.5%E mismarked in this way to Foxfire Farms on two occasions (August 17 and September 15, 1995) and offered eight such containers for sale at its shop in New Baltimore on September 21, 1995. Amended Complaint ¶¶ 21–25, 26–28.

The Presiding Officer dismissed these allegations on several grounds. First, the Presiding Officer construed "DO NOT USE IN THE HOME" to be "an imperative sentence, a warning and part of the directions for use," but not a "claim" in the ordinary sense of the word. Init. Dec. at 11–12. Complainant did not explain, found the Presiding Officer, how crossing out that warning constituted making a false claim. *Id.* at 11. Second, the Presiding Officer observed that by failing to introduce into evidence the diazinon registration statement and showing how the "claims" substantially differed, Complainant fell short of proving the elements of the violation charged in Counts IV and V. *Id.* Third, the Presiding Officer found contradictory testimony of Roger Antkiewicz and Alan Kodet of Foxfire Farms to be uninstructive. Mr. Kodet had testified that Roger Antkiewicz told him he could use Bonide Diazinon 12.5%E in the home if he diluted it; Mr. Antkiewicz claimed to have been referring to other products. Tr. at 17–18, 307–10. The Presiding Officer deemed Mr. Antkiewicz's explanation "plausible" in that Mr. Kodet may have misunderstood his discussion of dilution rates. Init. Dec. at 12. The Presiding Officer ultimately discounted the men's conversation because it pertained to "directions for use, not the possible making of false claims for the product." *Id.*

On appeal, Region V contends that the phrase "DO NOT USE IN THE HOME" is a claim and that the Presiding Officer erred in finding otherwise. The Region takes the position that statements made on a pesticide's registered label can be "claims" regardless of whether they are warnings, directions for use, or statements of efficacy. According to the Region:

> The registered label of Bonide 12½%E represents that it is effective in killing insects outside, and, when the statement appears on the label of this product "DO NOT USE IN THE HOME," the implied representation is being made that the product is not effective for use in the home. When that product is sold with "DO NOT USE IN THE HOME" blacked-out, it is being represented by the seller that the product is effective for use in the home.

Complainant's Appeal Brief at 28. In addition, the Region notes that it submitted into evidence the Bonide Diazinon 12.5%E label, which comprises at least one component of the product's registration statement. *Id.* at 24; *see* FIFRA § 3(c)(1)(C), 7 U.S.C. § 136a(c)(1)(C) (to register pesticide, applicant must file statement that includes, among other things, "a complete copy of the labeling of the pesticide"). That registered label clearly states that the pesticide should not be used in the home. *See* Ex. 8.

At the outset, we find the question whether "DO NOT USE IN THE HOME" is itself a "claim" to be less clear-cut than the Presiding Officer assumed it to be when he determined that this phrase was not a claim. First, the word "claim" is not defined in the statute, legislative history, regulations, or regulatory history. Second, the case law on this issue is thin, and what precedents do exist, while helpful, are not dispositive.[13] Third, if we interpret "claim" as taking its commonly understood meaning,[14] we can arrive at more than one plausible conclusion.

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[13] *See, e.g., In re Sporicidin Int'l,* Dkt. No. FIFRA–88–H.02 (ALJ, Nov. 1, 1988) (the word "claim" in FIFRA § 12(a)(1)(B) is used in its common, ordinary sense and means, among other things, an "'assertion, statement or implication (as to value, effectiveness, qualification, eligibility) often made or likely to be suspected of being made without adequate justification'") (quoting Webster's Third New Int'l Dictionary), *aff'd,* 3 E.A.D. 589 (CJO 1991); *cf., e.g., Lowe v. Sporicidin Int'l,* 47 F.3d 124, 130 (4th Cir. 1995) (referencing "claims" made "in connection with" a pesticide's registration as including label statements such as "avoid skin contact," "avoid eye contact," and "use in ventilated areas").

[14] *See Perrin v. United States,* 444 U.S. 37, 42 (1979) ("A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.").

Moreover, if we look to other provisions of FIFRA for guidance in interpreting the term "claim,"[15] we find that the FIFRA registration provisions refer to "directions for use" separately from "claims."[16] The phrase "DO NOT USE IN THE HOME" would appear, on its face, to fit quite naturally within the category of "directions for use." Of course, it is entirely conceivable that a word or phrase could be both a direction for use and a claim; nothing in the language, structure, or legislative history of FIFRA would appear to preclude such an interpretation.

We need not resolve the question whether "DO NOT USE IN THE HOME" is itself a claim, however.[17] The threshold issue in addressing these counts is whether, under the circumstances of this case, the *crossing out* of *one* instance of a phrase repeated *three* times equates to the making of a "claim" of any kind. We do not believe that it does.[18]

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[15] *See K Mart Corp. v. Cartier, Inc.,* 486 U.S. 281, 291 (1988) ("In ascertaining the plain meaning of [a] statute, [a] court must look to * * * the language and design of the statute as a whole.").

[16] *See* FIFRA § 3(c)(1)(C), 7 U.S.C. § 136a(c)(1)(C) (pesticide registrants must file statements that include "a complete copy of the labeling of the pesticide, a statement of all claims to be made for it, and any directions for its use").

[17] EPA appears to have recognized that there could be difficult issues involved in defining the term "claim," as used in section 12(a)(1)(B). In the late 1980s, Assistant Administrator Moore established an Agency-wide workgroup to address advertising issues and, as part of its work, to craft a definition of "claim." *See In re Sporicidin Int'l,* Dkt. No. FIFRA–88–H.02 (ALJ, Nov. 1, 1988) (discussing establishment of workgroup and quoting letter regarding tasks of same), *aff'd,* 3 E.A.D. 589 (CJO 1991). Nothing regarding the outcome of this workgroup is cited in the briefs or record before us, nor have we found any guidance or policy documents purporting to be the end product of the group's effort or other efforts to define what constitutes a claim.

[18] In his concurring opinion, our colleague, Judge McCallum, states that "[a] central question presented to us for decision in this appeal is whether the Presiding Officer erred in holding that the phrase 'DO NOT USE IN THE HOME,' * * * does not constitute a 'claim,' as that term is used in FIFRA § 12(a)(1)(B)." Judge McCallum goes on to analyze whether this phrase constitutes a claim and decides that it does not. We believe the issue of what constitutes a "claim" is a complex one that we would prefer to address when more squarely presented and more thoroughly briefed. While we do not necessarily disagree with Judge McCallum's analysis, we also do not find this issue to be a "central question" in deciding this appeal. What Respondents were charged with under Counts IV and V was making an inconsistent "claim" by virtue of their crossing out the statement in one of three places on the label. It seems to us that a logical starting point of the analysis is to focus on the act cited in the complaint as constituting the violation. This is not the inclusion of the statement on the label, but rather the crossing out of the statement on the yellow right-side panel. Having determined that, under the facts of this case, this crossing out does not constitute a claim of any kind, there is no need for further analysis. As to the need to provide "much-needed guidance to the Agency" on this issue, we would expect the Agency itself to consider what further guidance may be necessary in light of the issues actually presented in this case.

When viewed as a whole, the product's labeling cannot reasonably be construed as making even an implied affirmative statement that the pesticide *should* be used in the home. In two places, the label plainly states, "DO *NOT* USE IN THE HOME" (emphasis added). Thus, if a purchaser is able to read the crossed-out "DO NOT USE IN THE HOME" through the black marker ink, as Mr. Kodet did, Tr. at 24, then the label may send conflicting signals, but it would likely cause confusion regarding the product's use rather than assure the customer that indoor use is appropriate.

As the Region aptly noted, a basic purpose of FIFRA is "'to regulate the labeling of [pesticides] to provide purchasers with assurance of effectiveness and safety when used in compliance with the manufacturer's instructions.'" Complainant's Appeal Brief at 28 (quoting *Continental Chemiste Corp. v. Ruckelshaus,* 461 F.2d 331, 335 (7th Cir. 1972)). Respondents' sale and offer to sell Bonide Diazinon 12.5%E with blacked-out words on its registered label badly undermines this basic purpose of FIFRA by creating ambiguity where there should be clarity. However, in this case, where identical language appears prominently in one place and is crossed out in another, we cannot interpret the label as necessarily making a "substantially different claim" of the type necessary to find liability under FIFRA § 12(a)(1)(B), 7 U.S.C. § 136j(a)(1)(B). Rather, the circumstances of this case provide clear evidence of a violation of a separate provision of FIFRA, which makes it unlawful to "detach, alter, deface, or destroy, in whole or in part, any labeling required under this chapter." FIFRA § 12(a)(2)(A), 7 U.S.C. § 136j(a)(2)(A). The evidence in the record is sufficient to establish that Respondents more likely than not were the ones who crossed out the words on the Bonide labels. *See, e.g.,* Tr. at 52–54; Ex. 6. As such, the Region could have successfully charged Respondents with unlawful alteration or defacement of a pesticide's registered labeling, or perhaps with selling a misbranded pesticide in violation of FIFRA § 12(a)(1)(E), 7 U.S.C. § 136j(a)(1)(E). The Presiding Officer rightly noted the availability of both these alternative sections in his Initial Decision. *See* Init. Dec. at 12.

With respect to the conflicting testimony of Mr. Kodet and Roger Antkiewicz, we defer to the Presiding Officer's judgment as to witness veracity. *See In re Port of Oakland,* 4 E.A.D. 170, 193 n.59 (EAB 1992) (Board "will generally give weight to the presiding officer's findings since the presiding officer had the opportunity to hear the witnesses and to evaluate their credibility"). Mr. Antkiewicz denies telling Mr. Kodet to dilute and use Bonide Diazinon 12.5%E in the home. In light of Mr. Kodet's experience with pesticides in his work as a professional exterminator, we find nothing in the record to support the Presiding Officer's conjecture that Mr. Kodet may have misunderstood Mr. Antkiewicz's

explanation of dilution rates. Nonetheless, our misgivings are not sufficiently great to cause us to overturn the Presiding Officer's determination in this regard.

For all the foregoing reasons, we affirm the Presiding Officer's dismissal of Counts IV and V.

B. *Penalty*

In the interest of bringing this case to conclusion without further delay, we now determine the appropriate penalty for Count II rather than remand the case to the Presiding Officer for establishment of the penalty. FIFRA authorizes a civil penalty of up to $5,000 for each violation of the statute.[19] FIFRA § 14(a)(1), 7 U.S.C. § 136l(a)(1). The Act mandates that three factors be taken into consideration in determining a penalty: "[1] the appropriateness of [the] penalty to the size of the business of the person charged, [2] the effect on the person's ability to continue in business, and [3] the gravity of the violation." FIFRA § 14(a)(4), 7 U.S.C. § 136l(a)(4). The Board may use EPA's FIFRA Enforcement Response Policy ("ERP") to guide its analysis of these factors, but it is not required to do so. *In re Helena Chem. Co.,* 3 E.A.D. 26, 33 (CJO 1989); *see* U.S. EPA, Office of Compliance Monitoring & Office of Pesticides & Toxic Substances, *Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)* (July 2, 1990).

Region V has proposed a penalty of $3,500 for Respondents' failure to register the establishments at which they produced, and from which they distributed, pesticides. Amended Complaint at 6. In settling upon this figure, the Region conducted a detailed analysis of the three statutory penalty factors and relied on the ERP to inform its calculations. *See, e.g.,* Complainant's Final Argument at 26–51. The Region evaluated the gravity of the violation, the size of Respondents' business, pesticide toxicity, harm to human health and the environment, compliance history, culpability, good faith efforts, and Respondents' ability to continue in business. *See id.*

In the proceedings below, Respondents raised several challenges to Complainant's penalty calculation. Their initial protest appeared in Roger Antkiewicz's January 1995 answer to the original complaint, in which he

[19] Subsequent to the violations at issue in this case, Congress enacted the Debt Collection Improvement Act of 1996. The Act directs EPA and other agencies to adjust maximum civil penalties on a periodic basis to incorporate inflation. *See* 61 Fed. Reg. 69,360 (Dec. 31, 1996).

claimed, "[PEPA] is only 2 years old and the penalty proposed in the complaint [then $7,000] will cause a financial hardship that would cause the company to go out of business." Respondent Roger Antkiewicz's Answer to Complaint and Request for Hearing at 3. However, Respondents did not raise the ability to pay argument again, nor did they provide financial records for PEPA or Roger Antkiewicz, despite court orders and Complainant requests for such information.[20] As a result, the Presiding Officer stated during the hearing that "the issue of the Respondent[s'] ability to pay is simply waived as far as any objection to the penalty on that ground by their failure * * * to assert it, and to submit evidence in accordance with our pre-hearing orders in that regard, so ability to pay will not be an issue. That's not going to be any grounds for reducing the penalty." Tr. at 189. We agree.

Respondents also raised an objection to the Region's analysis of the level of harm to human health and the environment caused by Respondents' violation of Count II. The Region had assigned a value of "1" to this factor, Complainant's Final Argument at 39, which is the lowest value available under the ERP and indicates minor potential or actual harm to human health or the environment that is neither serious nor widespread. ERP app. B, at B–1. Notably, harm that is of "unknown" severity rates a level "3." *Id.* Respondents claimed that the Region's assessment of harm had "no foundation," stating:

> The product [New Residual Spray] was exactly the same as the product sold by [Chem-Tox] under its own label. The [Chem-Tox] product is a registered pesticide with the U.S. EPA. Other tha[n] the name on the front of the label, the directions for use are the same.

Respondents' Answer to Complainant's Final Argument at 2. Respondents' argument points to no evidence showing that their failure to register their establishments caused no harm to human health or the environment. We cannot find, in the absence of any evidence on this point, that Respondents' violation caused absolutely no such harm. Rather, we agree with the Region that Respondents' violation of Count II most likely caused minor potential or actual harm that is neither serious nor widespread. Alternatively, we would have to find that the level of harm is unknown, which warrants a "3" in the penalty calculation. This finding would increase Respondents' penalty and, as such, is against their own interest. The Region's approach is the most reasonable in these circumstances.

[20] Instead, Roger Antkiewicz produced three years of tax returns for Allstate Services, Inc. and claimed that PEPA had no tax returns.

We reviewed all other portions of the Region's penalty analysis and found them also to be reasonable. Accordingly, we assess a $3,500 penalty for Respondents' violation of FIFRA § 12(a)(2)(L), 7 U.S.C. § 136j(a)(2)(L), as alleged in Count II of the Amended Complaint. *Cf. In re Johnson Pac. Inc.,* 5 E.A.D. 696, 702–03 (EAB 1995) (where size of penalties are not great and no important legal or policy questions are raised, Board will not examine presiding officer's penalty assessment under a microscope). This is in addition to the $3,500 the Presiding Officer assessed for Count I.

III. *CONCLUSION*

For the foregoing reasons, a civil penalty of $7,000 (i.e., $3,500 for Count I and $3,500 for Count II) is assessed against Roger Antkiewicz and PEPA, jointly and severally, for violating FIFRA in the conduct of their business in Michigan. Payment of the entire amount of the civil penalty shall be made within sixty (60) days of receipt of this final order (unless otherwise agreed to by the parties), by cashier's check or certified check payable to the Treasurer, United States of America, and forwarded to:

U.S. Environmental Protection Agency, Region V
Regional Hearing Clerk
Post Office Box 70753
Chicago, Illinois 60673.

So ordered.

Concurring Opinion by Judge McCallum:

I join in the decision of the Board in all respects save one. A central question presented to us for decision in this appeal is whether the Presiding Officer erred in holding that the phrase "DO NOT USE IN THE HOME," which appears on the labeling of Bonide Diazinon 12.5%E, does not constitute a "claim," as that term is used in FIFRA § 12(a)(1)(B). The majority opinion does not answer the question, leaving it in suspension for a future case. I do not think this stratagem is either necessary or responsible; nor is rendering a decision on this point particularly onerous, given that the Presiding Officer has marked the way clearly and decisively. Therefore, I propose to complete the decisionmaking task presented to us on appeal, for to do so precisely tracks the regular orbit of the Board's everyday responsibilities.

The purpose and design of FIFRA and its predecessors provide clues as to Congress' intent in using the word "claim" in section 12(a)(1)(B).

Stretching as far back as 1910, with the enactment of the Insecticide Act, "Congress was primarily concerned with the effectiveness of [pesticides] and [with] protecting purchasers from deceptive labeling." *Stearns Elec. Paste Co. v. EPA,* 461 F.2d 293, 302 (7th Cir. 1972). FIFRA, enacted in 1947, repealed the Insecticide Act, but "like its predecessor," FIFRA's "text indicate[d] a primary interest in protecting consumers from the purchase of ineffective products." *Id.* By allowing the federal government to "'become familiar with the formula, label, and claims made with respect to any [pesticide] before it is offered to the public,'" FIFRA made it possible to "'prevent false and misleading claims, and to prevent worthless articles from being marketed.'" *Id.* at 303 (quoting House Report on 1947 Act). Congress continued these goals when it amended FIFRA in 1972 and put the Act into its current format.[21] Under the current Act, a pesticide is registrable if EPA determines, among other things, that the pesticide's "composition is such as to warrant the proposed claims for it." FIFRA § 3(c)(5)(A), 7 U.S.C. § 136a(c)(5)(A). In short, these particular goals of FIFRA and its predecessors have been consistent for nearly a century: Congress wants to protect consumers from misrepresentations as to pesticides' efficacy, safety, or other qualities, and thus manufacturers must prove that the "claims" they make for their products are true.

Consistent with the purpose and design of FIFRA, the Presiding Officer rejected Region V's contention that the phrase "DO NOT USE IN THE HOME" is a "claim." He held, instead, that the phrase

> 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."

Init. Dec. at 11 (footnote omitted). Given the absence of any definition of "claim" in the statute or regulations, the Presiding Officer rightly looked to the ordinary meaning of the word for assistance in interpreting it in this case. *See Perrin v. United States,* 444 U.S. 37, 42 (1979) ("A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning."). In plain English, the term "claim" connotes an

[21] Congress added important new goals pertaining to environmental protection in 1972. *See* FIFRA § 3(c)(5)(C)–(D), 7 U.S.C. § 136a(c)(5)(C)–(D) (EPA will register pesticide if, among other things, Agency determines that pesticide "will perform its intended function without unreasonable adverse effects on the environment," and "when used in accordance with widespread and commonly recognized practice it will not generally cause unreasonable adverse effects on the environment"). However, the existing goals described in the text above were retained. *See, e.g.,* FIFRA § 3(c)(5)(A), 7 U.S.C. § 136a(c)(5)(A); *Ruckelshaus v. Monsanto Co.,* 467 U.S. 986, 991–92 (1984).

affirmative representation, whether express or implied, as to certain attributes, results, and so on. For example, the phrases "repels insects," "safe for use on tomatoes," "does not irritate skin," "effective only if user allows 8 months to elapse after application before planting follow crops," "kills mold and mildew on contact," "for best results, use before first frost," and "nontoxic to humans and pets" all constitute "claims" because they provide the reader with definitive, EPA-validated information about a product's efficacy, safety, or other qualities.

Region V asserts that the phrase "DO NOT USE IN THE HOME" is a "claim" because it is an implied representation that the product is not effective for use in the home. Complainant's Appeal Brief at 28. The Region is in error. The phrase tells the reader nothing definitive, as required by FIFRA, about the product's efficacy, safety, or other qualities, but instead could mean any of several different things. First, the phrase could mean that the product is, in fact, not effective indoors and that Bonide Chemical Company, the manufacturer, compiled data establishing that fact. Second, the phrase could mean that the product is effective but not safe for use indoors and that Bonide compiled data establishing these facts. Third, the phrase could simply be a disclaimer to cover Bonide because the company has no data whatsoever about the product's performance when used inside homes. In light of these equally plausible alternatives, it would be a travesty to find "DO NOT USE IN THE HOME" to be a FIFRA "claim" that has been vetted and approved by EPA to ensure the public will not be misled. It is more reasonable to conclude, as the Presiding Officer did, that "DO NOT USE IN THE HOME" simply directs or warns consumers to avoid using the product indoors.

For the reasons expressed above, I would hold that "DO NOT USE IN THE HOME," as used in this case, is not a claim. Such a holding would provide much-needed guidance to the Agency on the meaning of "claim," as used in FIFRA § 12(a)(1)(B).[22] On all other points, I concur in the majority's opinion.

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[22] The majority opinion disputes the need for the Board to provide guidance to the Agency, asserting in footnote 18 that "we would expect the Agency itself to consider what further guidance may be necessary in light of the issues actually presented in this case." This expectation flows from an apparent downplaying of two important factual considerations. First, as the majority is aware, the Agency convened a workgroup 10 or more years ago in part to define the term "claim," but no such definition emerged from the group's efforts. *See supra* note 17. Second, in its brief on appeal, Region V argued strenuously against the Presiding Officer's ruling that the phrase "DO NOT USE IN THE HOME" is not a "claim." *See* Complainant's Appeal Brief at 21, 27–29. The Region's argument is an unambiguous request that the Board overturn that ruling. Ten years plus one appeal later strikes this judge as occasion enough to step into the breach by providing definitive guidance on this pending issue.