IN RE RICHARD ROGNESS AND PRESTO-X COMPANY

FIFRA Appeal No. 95-8

FINAL DECISION AND ORDER

Decided July 17, 1997

Syllabus

Respondents, Richard Rogness and Presto-X Company of Cedar Rapids, Iowa (hereinafter referred to collectively as "Presto-X") have appealed from an initial decision holding Presto-X liable for violating section 12(a)(2)(G) of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136j(a)(2)(G), making it unlawful to use a registered pesticide in a manner inconsistent with its labeling.

In an accelerated decision, an EPA administrative law judge ("Presiding Officer") concluded that Presto-X had violated FIFRA by applying a restricted use pesticide (Degesch Phostoxin Coated Pellets-Prepac, EPA registration number 40285-2 ("Phostoxin")) to the contents of a moving van containing electrical appliances even though § 2.4 of the label's precautionary statements stated that electrical equipment "should be" protected or removed prior to application. After fumigation, the electrical appliances did not function properly. The Presiding Officer concluded that the phrase "should be protected or removed" in § 2.4 of the label created a mandatory obligation and that Presto-X's failure to remove or protect the electrical equipment was inconsistent with the label and thus Presto-X violated the Act. Following the liability determination, the parties reached an agreement on a stipulated penalty amount ($4,500 against Presto-X Company and $0 against Richard Rogness) and filed a joint motion for assessment of penalty. The joint motion also stated that Presto-X retained the right to appeal this matter to the Board. The Presiding Officer then granted the joint motion and assessed the agreed-upon penalty amount. Presto-X has appealed.

On appeal, Presto-X argues that the Presiding Officer erred in concluding that the "should" language in § 2.4 of the label was mandatory rather than advisory. Presto-X also points out that the Agency itself has stated that in certain contexts related to pesticide and termiticide labeling that the term "should" is advisory.

By order dated November 21, 1996, the Board ordered the parties to submit additional briefs on the issue of fair notice. In particular, the Board stated that even if the word "should" in § 2.4 of the label's precautionary statements could properly be interpreted as mandatory, the question arises as to whether Presto-X or other members of the regulated community had fair notice of this interpretation. The Board therefore ordered each party to submit additional briefs addressing the issue of whether Presto-X had fair notice that it was required to remove or protect electrical equipment before applying the pesticide product at issue in this case. In its brief on fair notice, rather than directly addressing the issue of fair notice in the context of § 2.4 of the label's precautionary statements, the Region revised its theory of liability. In particular, the Region argued that Presto-X's liability turned not on the failure to comply with the "should" lan-

guage in § 2.4 of the label's precautionary statements, but on the fact that household electrical appliances were not affirmatively enumerated in the Phostoxin label as commodities on which Phostoxin could be used.

Held: The Board upholds the Presiding Officer's liability determination although on different grounds than those relied on by the Presiding Officer. In particular, the Board concludes that because electrical appliances were not listed on the labeling as items that may be fumigated with Phostoxin, Presto-X's application of Phostoxin to these appliances constituted the use of a pesticide in a manner inconsistent with its labeling in violation of FIFRA § 12(a)(2)(G).

Although this theory of liability was not the basis for the Presiding Officer's decision, the Board has the authority to uphold a finding of liability on grounds different than those relied on by a Presiding Officer. Moreover, in its statement of the issue on appeal, Presto-X expressly asked the Board to decide "whether the complaint in this action states a prima facie case of violation of the [FIFRA]." The Board concludes that it does, and that this theory of liability is consistent with the complaints filed against Presto-X Company and Richard Rogness. Furthermore, the record before us demonstrates that Presto-X was on notice of, and had an opportunity to respond to the complaints and to the Region's submissions before the Presiding Officer and this Board, including the Region's brief on fair notice in which the Region articulated its revised theory of liability. Accordingly, based on the complaints and the parties' submissions, this issue is squarely before the Board. Further, since there are no material factual issues in dispute, the Board concludes that Presto-X is liable for the violations alleged in the complaints.

With regard to penalty, the parties agreed upon, and the Presiding Officer assessed, a stipulated penalty amount of $4,500 against Presto-X Company and $0 against Richard Rogness. The Board finds no reason to disturb the parties' agreement in this regard and upholds the Presiding Officer's penalty assessment of $4,500 against Presto-X Company and $0 against Richard Rogness.

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

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

By appeal dated August 15, 1995, Richard Rogness and Presto-X Company of Cedar Rapids, Iowa (hereinafter referred to collectively as "Presto-X"), have appealed from an initial decision holding Presto-X liable for violating section 12(a)(2)(G) of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136j(a)(2)(G). That section makes it unlawful "to use any registered pesticide in a manner inconsistent with its labeling." In an on-the-record conference call on March 16, 1995 (hereinafter cited as "Telephone Transcript"), later memorialized in a written order dated May 15, 1995,[1] an EPA Administrative Law Judge ("Presiding Officer") issued a partial accelerated decision concluding that Presto-X had violated FIFRA by apply-

[1] *See* Order Granting Partial Accelerated Decision and Setting Further Procedures (May 16, 1995) ("Accelerated Decision").

ing a restricted use pesticide product (Degesch Phostoxin Coated Pellets-Prepac, EPA registration number 40285-2 ("Phostoxin")) to the contents of a moving van containing, among other things, certain household electrical appliances even though the pesticide product's labeling indicated that electrical equipment "should be" protected or removed prior to treatment. *See* Accelerated Decision at 2-4.

Following the partial accelerated decision on liability, Presto-X and complainant, U.S. EPA Region VII, reached an agreement on a stipulated penalty amount — $4,500 against respondent Presto-X Company and $0 against respondent Richard Rogness — and filed a Joint Motion on Assessment of Penalty ("Joint Motion").[2] On July 24, 1995, the Presiding Officer granted the Joint Motion and assessed the agreed-upon penalty amounts. Together, the liability and penalty decisions constitute an initial decision pursuant to 40 C.F.R. § 22.20(b). Initial decisions may be appealed to the Environmental Appeals Board pursuant to 40 C.F.R. § 22.30(a). For the reasons stated below, we affirm.

I. *BACKGROUND*

On August 31, 1989, Richard Rogness, a certified applicator employed by Presto-X Company, fumigated a moving van with Phostoxin. The van contained household furnishings including clothing, furniture, food, and various electrical appliances. After fumigation, the electrical appliances, including a vacuum cleaner, an electrical hand mixer, a television set, and a video cassette recorder, did not function properly. The owner of these items then filed a complaint with the Iowa Department of Agriculture and Land Stewardship ("IDALS"). After conducting an investigation, IDALS referred the case to EPA Region VII ("Region").

On January 4, 1991, the Region filed two complaints — one against Presto-X Company and the second against Richard Rogness. These complaints were later consolidated for hearing. *See* Order Consolidating Cases and Setting Initial Procedures (Apr. 3, 1991). Except for the names of the parties, the complaints are virtually identical. That is, in both complaints the Region alleged that:

> Respondent's use of DEGESCH PHOSTOXIN COATED PELLETS was inconsistent with label directions in that

[2] The Joint Motion also stated that Presto-X retained the right to appeal "this matter" to the Board. Joint Motion at 1.

> the product was used on household furniture and household electrical appliances not named on the label.

Complaint and Notice of Opportunity for Hearing, I.F. & R. Docket Nos. VII-1088C-91P and VII-1075C-91P ("Complaints") at ¶ 10 (Jan. 4, 1991). The Complaints also quoted the following statement appearing in the "precautionary statements" section of the Phostoxin label:

> Metals such as copper, brass and other copper alloys, and precious metals such as gold and silver are susceptible to corrosion by phosphine.[3] Thus, small electric motors, smoke detectors, brass sprinkler heads, batteries and battery chargers, fork lifts, temperature monitoring systems, switching gears, communication devices, computers, calculators and other electrical equipment *should be* protected or removed before fumigation.

Complaints at ¶ 9; Phostoxin Label at § 2.4 (emphasis added).

In his Accelerated Decision, the Presiding Officer concluded that the phrase "should be protected or removed" in the above-quoted portion of the pesticide label was mandatory in nature. In particular, the Presiding Officer stated that this language:

> [O]bligated any person applying Degesch Phostoxin to protect or remove the electrical equipment * * * before use of the pesticide. See, for example, Webster's New World Dictionary 372 (3d College Edition 1988), which states that "should" is "used to express obligation, duty, propriety, or desirability." See also Black's Law Dictionary 1237 (5th ed. 1979), where "should" is described as "ordinarily implying duty or obligation."

Accelerated Decision at 2 (footnote omitted); Telephone Transcript at 13-14. Thus, according to the Presiding Officer, "[f]ailing to remove or protect electrical appliances prior to fumigation with Degesch

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[3] As the label's introduction explains:

> Phostoxin and other DEGESCH metal phosphide fumigants are acted upon by atmospheric moisture to produce hydrogen phosphide (phosphine, PH_3) gas.

Phostoxin Label at § 1.

Phostoxin constitute[d] using this pesticide in a manner not permitted by the labeling and therefore constitute[d] using this pesticide in a manner inconsistent with its labeling" in violation of FIFRA § 12(a)(2)(G).[4] Accelerated Decision at 4.

On appeal, Presto-X argues that the Presiding Officer erred in interpreting the word "should" in section 2.4 of the Phostoxin label as mandatory, *i.e.*, as the equivalent of "must" or "shall," rather than as merely advisory. Citing the same Webster's definition of "should" used by the Presiding Officer, Presto-X asserts that "[n]o principled basis emerges as why an average person or a certified pesticide applicator would interpret 'should' to express obligation as opposed to desirability." Respondents' Brief on Appeal at 8.

Presto-X also states that the Agency itself has interpreted "should" as advisory rather than mandatory. Respondents' Brief on Appeal at 8-9. In particular, Presto-X cites a July 7, 1994, draft Pesticide Regulation Notice concerning termiticide labeling ("Draft PR Notice") in which EPA's Office of Pesticide Programs states:

> Labeling statements need to be clear as to whether they are mandatory or advisory. **Mandatory** statements, which **require** that certain directions or precautions be followed, are **enforceable**. To be mandatory, a statement either contains such key terms as "must," "shall" or "will" or contains an imperative expression (e.g., "Do not * * *," "Use only * * *" or "For use only by * * *") which indicates the necessity of acting according to the statement. **Advisory** statements, which **suggest** but do not require that a direction or precaution be followed, are **not enforceable**. Such statements contain words or phrases like "should," "may," "it is recommended that," "it is advisable to," etc.

Draft PR Notice at 2-3 (emphasis in original); Respondents' Brief on Appeal at 7-8. Presto-X concludes that the Presiding Officer's liability determination should be reversed because "[t]here was no basis in fact

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[4] The phrase "to use any registered pesticide in a manner inconsistent with its labeling" is defined as follows:

> The term "to use any registered pesticide in a manner inconsistent with its labeling" means to use any registered pesticide in a manner not permitted by the labeling * * *.

FIFRA § 2(ee), 7 U.S.C. § 136(ee).

or law for Mr. Rogness to believe that his application was not permitted by the label." Respondents' Brief on Appeal at 9.

In response, the Region, joined by the Office of Enforcement and Compliance Assurance, argues that the Phostoxin label does not permit fumigation of electrical appliances, and in fact warns applicators that such items could be damaged if not protected or removed before fumigation. Complainant's Reply to Respondents' Appeal from the Initial Decision ("Region's Reply") at 4. According to the Region:

> Clearly it was not intended for label directions to authorize Respondents to gamble with the protection of the public. However, this is the line Respondents pursue with its [*sic*] position that the use of the word "should" is advisory in nature. In other words, apply the pesticide without removal or protection and see if damage does occur (as it did in this matter). This game of chance to see if damage occurs is clearly not consistent with the mandate to protect the public.

Region's Reply at 4-5 (emphasis in original).[5] With regard to the above-mentioned Draft PR Notice, the Region states that the notice has no probative value because it was issued in July 1994, almost five years after the Phostoxin application took place in this case, and because the notice concerns a termiticide rather than the application of a restricted use pesticide. Region's Reply at 6.

The Region's response also alerted the Board to the existence of PR Notice 95-2, entitled "Notice to Manufacturers, Producers, Formulators, and Registrants of Pesticide Products." (Attachment C to Region's Reply). The notice, dated May 31, 1995, "describes new policies and procedures effective immediately which will help streamline and accelerate many registration amendments." PR Notice 95-2 at 1. Included on the notice's list of registration amendments that may be accomplished through notification is the adding, revising or deleting

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[5] Although the Region charges Presto-X in the Complaints with the use of a pesticide in a manner inconsistent with the labeling because of Presto-X's failure to remove "household furniture" *and* "household electrical appliances," in its pleadings before the Presiding Officer and in its briefs before this Board, the Region appears to have abandoned its objection to the presence of household furniture. *See* Region's Reply at 3 ("the inconsistency with the label is not the site of application or the target pest, but rather it is the failure to remove or protect the electrical appliances * * *."); *see also* Complainant's Opposition to Respondents' Motion for Dismissal or in the Alternative for an Accelerated Decision, and Complainant's Motion for Accelerated Decision at 5, 7 (June 11, 1991) ("Of course the van could be fumigated. The electrical apparatus could be removed or protected, and then the van could be fumigated.").

of advisory statements on pesticide labels. *Id*. at 3. The notice gives the following example of an advisory statement: "This product *should* not be used with products containing X due to risk of explosive reaction." *Id*. at 3-4 (emphasis added). The notice also gives the following examples of mandatory phrases: "do not," "must not," and "shall not." *Id*. at 3. Thus, at least for the purposes of determining when advisory language on a pesticide label may be added, revised, or deleted, the term "should" is considered by EPA's Office of Pesticide Programs as advisory rather than mandatory.

Having alerted the Board to the existence of this notice, the Region takes the position the notice should have no impact on the present case because it only addresses procedures for making certain additions or deletions from pesticide labels and "does not authorize users to disregard instructions that appear on an E.P.A. approved label." Region's Reply at 7. In addition, the Region states (as it did with regard to the Draft PR Notice) that PR Notice 95-2 could not have influenced Presto-X's actions in this case because the notice was issued after the alleged violations occurred.

The Region also requested, and the Board granted, a 30-day period in which to obtain clarification from the Office of Pesticide Programs on the application of PR Notice 95-2, and to submit a supplemental brief once this clarification was received. *See* Region's Reply at 7-8; Order [Granting 30-day Period to Submit Supplemental Brief] (Sept. 8, 1995) (giving the Region until Sept. 25, 1995, to submit supplemental brief to the Board); Order Granting Extension of Time to Supplement Brief (October 10, 1995) (giving the Region until November 1, 1995, to submit its supplemental brief to the Board).

The Region filed its supplemental brief on October 31, 1995 ("Region's Supplemental Brief"), and Presto-X filed a reply on November 20, 1995 ("Respondents' Supplemental Reply"). Although its brief is somewhat cryptic and far from clear, the Region appears to argue that PR Notice 95-2 is inapplicable in the present context because it "pertains *only* to the registration process." Region's Supplemental Brief at 2 (emphasis in original). Thus, according to the Region, because the violation alleged in the present case involves the improper *use* of a pesticide rather than any violations of the registration requirements, the notice should have no relevance.

In response, Presto-X argues that if the term "should" on a pesticide label is considered advisory for purposes of the pesticide registration process, it is not "upon registration approval * * * magically transmuted into a mandatory, enforceable requirement sufficient to

charge the applicator with use inconsistent with the label." Respondents' Supplemental Reply at 2. In addition, Presto-X states that:

> [The Region's] "clarification" *does not* indicate that the Office of Pesticide Programs now believes it was in error in interpreting "should" as advisory. Nor does this "clarification" provide or point to any other regulatory authority that says "should", while advisory when being read by government employees trained to interpret [FIFRA] and implementing regulations, becomes mandatory when read by the population of pesticide users.

Id. at 1-2 (emphasis in original). Presto-X concludes that because the Region has failed to present any evidence indicating that the Agency has ever interpreted the term "should" as creating a mandatory and enforceable obligation, the Presiding Officer's liability determination must be reversed.

By order dated November 21, 1996, the Board ordered the parties to submit additional briefs on the issue of fair notice. Order For Additional Briefing. In particular, we stated:

> Even if the Board were to agree with Complainant that the word "should" in the product's label could properly be interpreted as mandatory in this case, the question arises as to whether Presto-X or other members of the regulated community had fair notice of this interpretation.

Id. at 2.[6] We therefore ordered each party to submit additional briefs addressing the issue of whether Presto-X had fair notice that it was required to remove or protect electrical equipment before applying the pesticide product at issue in this case.[7] *Id*.

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[6] We also noted the existence of the above-mentioned Draft PR Notice and PR Notice 95-2 and the fact that the label's instructions for use contain both the terms "should" and "must." Order for Additional Briefing at 2.

[7] The Board also ordered the parties to address the applicability of *General Electric Co. v. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995) ("If, by reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, with 'ascertainable certainty,' the standards with which the agency expects parties to conform, then the agency has fairly notified a petitioner of the agency's interpretation.").

The Region submitted its supplemental brief on December 18, 1996. Appellee's Brief on Fair Notice and Other Matters ("Region's Brief on Fair Notice").[8] Rather than directly addressing the issue of fair notice in the context of section 2.4 of the label's precautionary statements, however, the Region revised its theory of liability.[9] In particular, the Region argued that Presto-X violated FIFRA § 12(a)(2)(G) not because it failed to comply with section 2.4 of the label, which states that electrical appliances should be protected or removed, but because household appliances were not affirmatively enumerated in the Phostoxin label as commodities on which Phostoxin could be used. *Id*. at 1. The Region states:

> [T]he relevant issue in this case is not whether use of the word "should" in the "Precautionary Statements" portion of the label (Section 2) is advisory or creates a mandatory obligation, but instead whether Presto-X's use of this highly toxic pesticide was, under FIFRA § 2(ee), "not permitted" and, thus, a "use inconsistent with the label" as the complaint alleged (item 10). * * * [T]he critical label requirements found in the accepted uses section (Sections 3.4-3.4.3) include many enumerated commodities and foods that may be treated, but none even remotely related to electrical equipment or metals. Presto-X cannot create a new use for this pesticide by relying on precautionary statements found elsewhere on the label.

Region's Brief on Fair Notice at 1 (footnote omitted).

In its response, Presto-X asserts that the Region did not argue this theory of liability before the Presiding Officer or in its response to the present appeal. Thus, according to Presto-X, the issue is not properly before the Board. Appellants' Brief in Response to Order for Additional Briefing ("Presto-X's Brief on Fair Notice") at 2-3 (Feb. 3, 1997). On the issue of fair notice, Presto-X contends that "the clear meaning and understanding to persons likely to use or supervise use

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[8] The Brief indicates that it was prepared with the assistance of the Office of Enforcement and Compliance Assurance.

[9] The Region noted that "should" means different things in different contexts without expressly addressing whether the term was mandatory or advisory in this context. Rather, the Region stated that the "should" language buttresses other provisions in the label indicating that no use on metals is accepted due to the stated risk of corrosion. Region's Brief on Fair Notice at 8, 9 n.4.

of a pesticide is that 'should' is an advisory, not mandatory statement." *Id*. at 6. In addition, Presto-X states that the Region has not pointed to any regulatory provision or policy statement in which the term "should" in this or other contexts has ever been interpreted as creating a mandatory obligation. *Id*. at 4. For these reasons, Presto-X argues that the Phostoxin label was insufficient to allow regulated parties to identify with "ascertainable certainty," the standard with which the Region now argues Presto-X should have conformed. *Id*. (*citing General Electric v. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995)). Presto-X concludes that the Board should reverse the initial decision and dismiss the Complaints with prejudice.

II. *DISCUSSION*

A. *Liability*

As stated above, the Presiding Officer's liability determination was based solely on his conclusion that the statement: "electrical equipment should be protected or removed before fumigation" in section 2.4 of the Phostoxin label's precautionary statements created a mandatory obligation to protect or remove electrical appliances prior to application. On appeal, Presto-X contests this conclusion, arguing that the term "should" is not generally considered mandatory in nature, and pointing out that the Agency itself has interpreted the term as advisory rather than mandatory. For the following reasons, we uphold the liability determination, although on different grounds than those relied on by the Presiding Officer.

As a preliminary matter, we do not rely on the theory of liability on which the Presiding Officer's Accelerated Decision is based. Even if we were to agree with the Presiding Officer that liability in this case turned only on the interpretation of section 2.4 of the label's precautionary statements, and that the phrase "should be protected or removed" as used in this section created a mandatory obligation, we have doubts about whether Presto-X had fair notice that this provision of the label created a mandatory obligation.[10] In this regard, as men-

[10] We recognize and do not disagree with the views expressed in the concurring opinion insofar as they state that a certified applicator reading this label as a whole should have known of the risk of corrosion damage and of the advisability of removing or protecting electrical equipment. However, the question raised by the Presiding Officer's opinion was whether Presto-X had sufficient notice that § 2.4 of the Phostoxin label created a mandatory obligation such that it was appropriate to subject Presto-X to civil penalties (and, we note, potential criminal penalties as well) for failing to remove or protect electrical equipment. It is on this proposition that we remain doubtful.

tioned above, we note that the Agency itself has, in certain contexts related to pesticide and termiticide labeling, stated that the term "should" is advisory.[11] *See* Draft PR Notice; PR Notice 95-2; *see also* Sutherland Stat. Const. § 57.03 (5th ed. 1992) ("'should' generally denotes discretion and should not be construed as 'shall'"); *Emery v. Secretary of the Navy*, 708 F. Supp. 1335, 1338 (D.D.C. 1989) ("While 'shall' denotes a mandatory action when used in statutes and contracts, 'should' does not ordinarily express such certainty."). However, as we conclude that liability turns on a different ground than that relied upon by the Presiding Officer, we need not decide this issue in today's decision.[12]

Instead, we conclude that because electrical appliances were not listed on the labeling as items that may be fumigated with Phostoxin, Presto-X's application of Phostoxin to these appliances constituted the use of a pesticide in a manner inconsistent with its labeling in violation of FIFRA § 12(a)(2)(G). As previously stated, FIFRA § 2(ee), 7 U.S.C. § 136(ee), defines the term "to use any registered pesticide in a manner inconsistent with its labeling" as "us[ing] any registered pesticide in a manner *not permitted* by the labeling."[13] (Emphasis added).

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[11] Although the Agency's statements postdated the violations in this case, we nonetheless are troubled by the position which the Region initially urged upon this Board that a provision of a pesticide label can be considered advisory for purposes of registration but mandatory in an enforcement context. The Agency wisely appears to have abandoned this position.

[12] In concluding that liability does not turn on the "should" language in section 2.4 of the label's precautionary statements and thus that we need not decide the fair notice question outlined in the text above, we do not suggest that the Agency's enforcement efforts need not meet the standards of due process. *See, e.g., B.J. Carney Industries, Inc.*, 7 E.A.D. 171 (EAB 1997) (rejecting due process claim where regulation was sufficiently clear to give a person of ordinary intelligence a reasonable opportunity to know what conduct is prohibited);*CWM Chemical Services, Inc.*, 6 E.A.D. 1 (EAB 1997). (holding that because Chemical Waste Management ("CWM") was under no legally enforceable obligation to measure compliance with regulations governing disposal of polychlorinated biphenyls on a dry weight basis, principles of due process preclude a finding that CWM violated a requirement to conduct dry weight measurement); *General Electric Co. v. EPA*, 53 F.3d 1324 (D.C. Cir. 1995).

[13] FIFRA defines the term "label" as "the written, printed, or graphic matter on, or attached to, the pesticide or device or any of its containers or wrappers." FIFRA § 2(p)(1), 7 U.S.C. § 136(p)(1). The term "labeling" is defined as:

> all labels and all other written, printed, or graphic matter —
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> (A) accompanying the pesticide or device at any time; or
>
> (B) to which reference is made on the label or in literature accompanying the pesticide or device * * *.

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Thus, with certain exceptions not applicable to this case,[14] the application of a registered pesticide to control a pest on items or commodities not affirmatively listed by the labeling as a permitted use constitutes a violation of FIFRA § 12(a)(2)(G). *See United States v. Saul*, 955 F. Supp. 1076 (E.D. Ark. 1996) (affirming defendants' criminal liability for the application of a restricted use pesticide in a manner inconsistent with its labeling and stating that the use of a restricted use pesticide "is restricted to only to those uses specifically permitted by its approved label and supplement"). *See also United States v. Corbin Farm Service*, 444 F. Supp. 510, 522 (E.D. Cal. 1978) (stating that "where the pesticide application involves a deviation from uses which are allowed on the accepted label, any person who * * * applies * * * any registered pesticide in a manner inconsistent with its labeling may be subject to civil or criminal sanctions under FIFRA"), *aff'd*, 578 F.2d 259 (9th Cir. 1978).

Section 3.4.3 of the label's directions for use contains the following list of commodities suitable for fumigation with Phostoxin:

> Nonfood Commodities Which May be Fumigated With Phostoxin
>
> Processed or Unprocessed Cotton, Wool and Other Natural Fibers or Cloth, Clothing
> Straw and Hay
> Feathers

FIFRA § 2(p)(2), 7 U.S.C. § 136(p)(2). In the present case, the written material accompanying the Phostoxin label states, in part, as follows:

> THIS PRODUCT IS ACCOMPANIED BY AN APPROVED LABEL AND APPLICATOR'S MANUAL. READ AND UNDERSTAND THE ENTIRE LABELING. ALL PARTS OF THE LABELING ARE EQUALLY IMPORTANT FOR SAFE AND EFFECTIVE USE OF THIS PRODUCT. CALL DEGESCH AMERICA, INC., OR EPA IF YOU HAVE ANY QUESTIONS OR DO NOT UNDERSTAND ANY PART OF THE LABELING.
>
> REFER TO THE APPLICATOR'S MANUAL FOR DETAILED PRECAUTIONS, RECOMMENDATIONS, AND DIRECTIONS FOR USE.

The citations to the Phostoxin label in this decision actually appear in the applicator's manual attached to the approved label. As the above-definition makes clear, however, this manual is part of the pesticide's "labeling" for purposes of FIFRA § 12(a)(2)(G).

[14] *See infra* n. 15.

Human Hair, Rubberized Hair, Vulcanized Hair, Mohair
Leather Products, Animal Hides and Furs
Tires (for mosquito control)
Tobacco
Wood, Cut Trees, Wood Chips and Wood and Bamboo Products
Paper and Paper Products
Dried Plants and Flowers
Seeds (grass seed, ornamental herbaceous plant seed and vegetable seed)

As electrical appliances are not included on this list, Presto-X's application of Phostoxin to these appliances was not permitted by the labeling and was thus in violation of FIFRA § 12(a)(2)(G).[15] As far as we can tell,

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[15] FIFRA § 2(ee) also includes a limited number of exceptions to the statutory definition of the phrase "to use any registered pesticide in a manner inconsistent with its labeling." In particular, that section states, *inter alia*, that:

> The term "to use any registered pesticide in a manner inconsistent with its labeling" * * * shall not include:
>
> (2) applying a pesticide against any target pest not specified on the labeling if the application is to the crop, animal, or site specified on the labeling, unless the Administrator has required that the labeling specifically state that the pesticide may be used only for the pests specified on the labeling * * *,
>
> (3) employing any method of application not prohibited by the labeling unless the labeling specifically states that the product may be applied only by the methods specified in the labeling[.]

Presto-X has asserted that its application of Phostoxin was not a "use * * * in a manner inconsistent with its labeling" because the application fell within one or both of these exceptions. *See* Appeal at 4-5. The Presiding Officer rejected this assertion (*See* Telephone Transcript at 11), and we reject it as well. The Region has not alleged that either the target pest or the method of application was improper in this case. *See* Region's Response at 3 ("the issue is neither the site of the application nor the target pest, nor a method of application not prohibited by the label."); Telephone Transcript at 11 ("the matter at issue is not the method of application * * *."). Moreover, based on our review of the record on appeal, Presto-X has not shown that it applied Phostoxin to a "target pest not specified on the labeling" or employed some alternative method of application not prohibited by the labeling such that the above-quoted exemptions would apply to this case. Thus, Presto-X's assertions to the contrary notwithstanding, we conclude that Presto-X has failed to meet its burden of establishing that any of these exceptions would apply to the circumstances of this case. *See United States v. First City National Bank of Houston*, 386 U.S. 361, 366 (1967) (a party claiming the benefits of a statutory exception has the burden of establishing that it falls within the exception); *In re Rybond, Inc.*, 6 E.A.D. 614, 637 n.33 (EAB 1996) ("[a] statutory exception (or exemption) must be raised as an affirmative defense, with the

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the "should" language in section 2.4 of the label's precautionary statements is an additional warning to applicators that certain items such as smoke detectors, sprinkler heads, fork lifts, and temperature monitoring systems typically found in sites where Phostoxin would be applied, such as warehouses, should be removed or protected to avoid possible damage from corrosion. *See* Phostoxin Label at § 2.4. A further warning appears in the label's safety recommendations summary. Phostoxin Label at § 1. Recommendation number 17 in that summary states: "Protect materials containing metals such as copper, silver, gold and their alloys and salts from corrosive exposure to hydrogen phosphide." Such recommendations, which alert an applicator to the risks associated with application to certain metals, cannot create additional permitted uses for a pesticide beyond those listed on the label. Accordingly, because electrical appliances are not included on the label's list of nonfood commodities which may be fumigated with Phostoxin, Presto-X is liable for using a registered pesticide in a manner inconsistent with its labeling regardless of whether Presto-X had fair notice that the "should" language in section 2.4 of the label's precautionary statements created a mandatory obligation to remove or protect metals.[16]

burden of persuasion and the initial burden of production upon the party that seeks to evoke the exception") (*citing In re Standard Scrap Metal Co.*, 3 E.A.D. 267, 272 n.9 (CJO 1990)).

[16] We note that the label's directions for use state that "[i]t is a violation of Federal law to use [Phostoxin] in a manner inconsistent with its labeling[]" (Phostoxin Label § 3.1) and that "Phostoxin is a highly hazardous material and should only be used by individuals trained in its proper use[;] * * * Before using, read and follow all label precautions and directions." *Id*. at § 3.1.2. Furthermore, IDALS has provided EPA with the 1985 Iowa Core Manual which it represents was available for pesticide applicators such as Mr. Rogness preparing for the Iowa Core Test in 1987 or 1988 to obtain certification as a pesticide applicator in the State of Iowa. IDALS further states that "Mr. Rogness would have taken the Iowa Core test based on the information in this manual." Letter from Mark E. Lohafer, Field Staff Supervisor, IDALS, to Mary E. McDonnell, U.S. EPA Office of Enforcement and Compliance Assurance (Dec. 13, 1996). This manual states, in pertinent part, as follows:

> An applicator may not use any pesticide in a manner not permitted by the labeling. A pesticide may be used only on the plants, animals, or sites specified in the directions for use.

The Iowa Core Manual, Cooperative Extension Service, Iowa State University (February 1985) ("Iowa Manual") at 3 (Attachment to Region's Brief on Fair Notice). In addition, the Iowa Manual states:

> The instructions on how to use the pesticides are an important part of the label. This is the best way to find out the right way to apply the product.
>
> The use instructions tell: * * * the crop, animal, or other item the product can be used on; * * *.

Continued

Although this theory of liability was not the basis for the Presiding Officer's determination, the Board has the authority to uphold a finding of liability on grounds different than those relied on by a Presiding Officer. *See Securities and Exchange Commission v. Chenery Corporation*, 318 U.S. 80, 88 (1943) (it is well-settled that a reviewing court must affirm the decision of a lower court if the result is correct "although the lower court relied upon a wrong ground or gave a wrong reason") (*citing Helvering v. Gowran*, 302 U.S. 238, 245 (1937)); *Office and Professional Employees International Union, Local 2 v. Washington Metropolitan Area Transit Authority*, 724 F.2d 133, 139 (D.C. Cir. 1983) (same); *United States v. County of Humboldt*, 628 F.2d 549, 551 (9th Cir. 1980) (reviewing court may affirm a judgment on any basis supported by the record). Moreover, in its statement of the issue on appeal, Presto-X expressly asked the Board to decide "whether the complaint in this action states a prima facie case of violation of the [FIFRA]."[17] Respondents' Brief on Appeal at 1. We conclude that it does, and as there are no material factual issues in dispute (*see infra*), we see no reason to remand this case to the Presiding Officer for any additional fact finding. *See Chenery*, 318 U.S. at 88 (remand may be appropriate where there are disputed factual issues yet to be decided that are within the domain of the fact finder). The only liability issue to be resolved is a legal one — whether the use of Phostoxin on electrical appliances even though such appliances are not included on the label's list of items suitable for fumigation with Phostoxin constitutes a violation of FIFRA. Having found that it does, we conclude that Presto-X is liable for the violations alleged in the Complaints.

This theory of liability, although not addressed by the Presiding Officer, is consistent with each complaint. Specifically, paragraph 10 of each complaint alleges that the use of Phostoxin was inconsistent with the label directions in that the product was used on "household

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> Do not use a product on a crop or for a pest not listed on the label. Do not use it at more than the recommended rate. Before the product could be registered, EPA required the manufacturer to conduct many tests to be sure the label directions were correct. Following them exactly, will give the best results the product can give and avoid breaking the law.

Id. at 22. Thus, in addition to the notice provided to Presto-X by the statute and the label itself, the applicator was aware, or should have been aware, that use of a restricted use pesticide such as Phostoxin on an item not listed on the label was a violation of FIFRA.

[17] Although Presto-X largely raised this issue in the context of its assertion that its Phostoxin application fell within one of the statutory exclusions to FIFRA § 2(ee), *see supra* n. 15, Presto-X's framing of the question nonetheless asks us to determine whether the Complaints state a cause of action.

electrical appliances not named on the label." Further, paragraphs 8 and 9 reference the label's list of commodities that may be fumigated with Phostoxin and paragraph 8 states that electrical appliances "are not listed as target items on the Phostoxin label."[18]

In addition, the record before us demonstrates that Presto-X was on notice of, and had an opportunity to respond to the Complaints and to the Region's submissions before the Presiding Officer and this Board. For example, in its brief on appeal Presto-X has conceded that it fumigated "the entire contents of the moving van and did not remove or otherwise protect from fumigation the household electrical equipment included in the contents of the van." Respondents' Brief on Appeal at 2. Presto-X has also conceded that electrical appliances "are not specifically listed as commodities which may be fumigated." Motion for Dismissal, or in the Alternative, for an Accelerated Decision at 8 (May 24, 1991) ("Motion for Dismissal"). Moreover, in its brief on appeal before this Board and in its submissions before the Presiding Officer, Presto-X explicitly acknowledged that the claim of violation alleged by the Region appeared in paragraph 10 of the Complaints in which the Region stated that Presto-X's use of Phostoxin "was inconsistent with the label directions *in that the product was used on * * * household electrical appliances not named on the label*." Respondents' Brief on Appeal at 3 (emphasis in original); Motion for Dismissal at 2. Presto-X's appeal further stated that EPA's rationale for the alleged violation "appears in Paragraph 8 of the Complaints which state in pertinent part that '[h]ousehold furnishings and household appliances *are not listed as target items on the PHOSTOXIN label*.'" Respondents' Brief on Appeal at 3 (emphasis in original); Motion for Dismissal at 2. Thus, as revealed by its own submissions, Presto-X was on notice that the substance of the Region's Complaints concerned the use of Phostoxin on items not listed on the labeling as suitable for fumigation and Presto-X had an opportunity to respond to this allegation.[19] Moreover,

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[18] On appeal, Presto-X asserts, among other things, that the Complaints failed to "apprise[ ] respondents that the basis of the claim was a failure to remove electrical appliances before fumigation." Respondents' Brief on Appeal at 4. This assertion has no merit. On its face paragraph 10 of both Complaints makes clear that the violation being alleged is the use of Phostoxin on electrical appliances even though such appliances were not listed on the label as items that may be fumigated with Phostoxin. While Presto-X was free to dispute the merits of this allegation and to present whatever defenses Presto-X deemed appropriate, it cannot be said that the Complaints were insufficient to apprise respondents of the charges against them.

[19] Although the clarity of the Region's initial submissions before the Board leaves much to be desired, we nonetheless find that the issue of whether Presto-X used a restricted use pesticide in a manner inconsistent with its labeling is squarely before us. *See supra* n. 15; *see also supra* text accompanying note 17.

Presto-X had a full and fair opportunity to respond to the Region's Brief on Fair Notice in which the Region articulated its revised theory of liability.

B. *Penalty*

As stated above, the parties agreed upon, and the Presiding Officer assessed, a stipulated penalty amount of $4,500 against Presto-X Company and $0 against Richard Rogness. We see no reason to disturb the parties' agreement in this regard.[20] Accordingly, we uphold the Presiding Officer's penalty assessment of $4,500 against Presto-X Company and $0 against Richard Rogness.

Presto-X Company shall pay the full amount of the civil penalty within sixty (60) days after this order has become final. Payment shall be made by forwarding a cashier's check or certified check in the full amount payable to the Treasurer, United States of America at the following address:

EPA - Region VII
Regional Hearing Clerk
P.O. Box 360748
Pittsburgh, PA 15251-6748

So ordered.

***Concurring Opinion by Judge McCallum*:**

Although I fully agree with the Board's factual summary and the rationale upon which the Board bases its liability determination, I would also find liability on the grounds relied on by the Presiding Officer. That is, I believe that the label creates a mandatory obligation to remove or protect electrical appliances and that Presto-X had fair notice of this obligation.

The precautionary statement at section 2.4 of the label states, in part:

[20] Even were we inclined to assess a penalty different from the amount stipulated by the parties, the record before us is insufficient to make a reasoned determination in this regard without a remand. We do not believe that a remand at this late stage of the proceedings, especially given the passage of time and in the face of the parties' prior stipulation, would be in the interests of justice.

> Pure phosphine (hydrogen phosphide) gas is practically insoluble in water, fats and oils, and is stable at normal fumigation temperatures. However, it may react with certain metals and cause corrosion, especially at high temperatures and relative humidities. Metals such as copper, brass and other copper alloys, and precious metals such as gold and silver are susceptible to corrosion by phosphine. Thus, small electric motors, smoke detectors, brass sprinkler heads, batteries and battery chargers, fork lifts, temperature monitoring systems, switching gears, communication devices, computers, calculators and other electrical equipment should be protected or removed before fumigation.

Phostoxin Label at § 2.4. Similarly as the Board's decision points out, an additional warning appears in the label's safety recommendations summary where applicators are warned to "[p]rotect materials containing metals such as copper, silver, gold and their alloys and salts from corrosive exposure to hydrogen phosphide." Phostoxin Label at § 1 (recommendation 17). In addition, the label's directions for use states, in part:

> Hydrogen phosphide gas may react with certain metals and their salts to produce corrosion. This gas is corrosive to copper, copper alloys and precious metals such as silver and gold. Sensitive equipment and items containing these elements should be removed or protected prior to fumigation with Phostoxin.

Phostoxin Label at § 3.1.15.

As these warnings make clear, Phostoxin has a corrosive effect on certain metals. Thus, certified applicators[21] are advised to take those precautions necessary to remove or protect equipment containing such metals, such as electrical appliances, to avoid damage. In this context, notwithstanding use of the term "should," the warnings create a mandatory obligation either to remove or protect electrical appliances before fumigation. *See West Virginia Manufacturers Ass'n v. State of West Virginia*, 714 F.2d 308, 314 (4th Cir. 1983) (where the meaning of a statute is discoverable from its context, the statute provides "full and fair notice to those of ordinary intellect that certain specified conduct is prohibited.").

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[21] Phostoxin is a restricted use pesticide and may only be applied by a certified applicator trained in its use. *See* Phostoxin Label at § 3.1.2 ("Phostoxin is a highly hazardous material and should be used only by individuals trained in its proper use.").

Under the circumstances of this case, it would be unreasonable to allow a licensed commercial applicator whose training emphasizes the importance of following label directions[22] and whose livelihood depends on the safe and economical use of a pesticide, the option to ignore three separate warnings regarding corrosion damage. Rather, a prudent applicator acting in good faith, when presented with a choice between either ignoring the warning, and thereby potentially incurring liability to the owner for the cost of repair or replacement of damaged property, or complying with it, would choose compliance.

It is unfortunate that in their initial submissions before the Presiding Officer and this Board the parties became fixated on the word "should" without sufficient regard for the context in which it is used. As Presto-X points out in its appeal, the common definition of "should" indicates that it can be both precatory and mandatory depending on how it is used.[23] When stripped of context the term can create considerable confusion. Indeed, the Agency appears to have fallen victim to just such confusion in the above-cited guidance document prepared by the Office of Pesticide Programs (PR Notice 95-2) which gives the following example of an advisory rather than a mandatory phrase: "This product *should* not be used with products containing X due to risk of explosive reaction." PR Notice 95-2 at 3-4 (emphasis added). Surely, no rational applicator would ignore such a warning and risk injury and/or property damage from an explosion. Thus, in context, such a warning would have a mandatory effect. Similarly, in the present case, due to the clearly stated risk of corrosion damage from phosphine gas, the label requires the protection or removal of electrical appliances before fumigation.

I therefore respectfully disagree with that section of the Board's decision where the majority, in *dicta*, expresses "doubts" about whether Presto-X had fair notice that it was obligated to remove or protect electrical appliances. As the Board did not reach this issue, however (*see supra* n.12 and accompanying text), I concur in the Board's judgment.

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[22] *See generally* Iowa Manual Ch. 20 (Labels and Labeling).

[23] The definition of "should" cited in Presto-X's appeal indicates that the term can be used to express "obligation, duty, propriety, *or desirability*." Respondent's Brief on Appeal at 8 (emphasis in original) (*citing* Websters New World Dictionary (3d College Edition 1978)). Although Black's Law Dictionary (Fifth Edition 1979) notes, *inter alia*, that "should" is the past tense of shall, and "ordinarily impl[ies] duty or obligation," it also describes the word as "usually no more than an obligation of propriety or expediency, or a moral obligation, thereby distinguishing it from 'ought'."