3/26/74

ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In Re: Pen-Kote Paint Company, Inc., Respondent.	I.D. No. 88455 Initial Decision

Preliminary Statement

This is a proceeding under section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended in 1972 (hereinafter FIFRA 1972), 7 U.S.C. 136, et seq., for the assessment of civil penalty for violations of the Act. A complaint [1/] (designated "Penalty Assessment and Notice of Opportunity for Hearing"), was issued against the respondent on September 25, 1973, by the Director, Enforcement Division, Region IV, Environmental Protection Agency.

The complaint alleges, in substance, that on January 18 and February 1, 1973, the respondent delivered for shipment, the pesticide, Pen-Kote Copper Naphthenate Preservate for Wood-Canvas-Rope (hereinafter CNP), from Pensacola, Florida, to Mobile, Alabama, and that said pesticide was not in compliance with the provisions of the Act in that it was not registered and was misbranded. [2/] A civil penalty of $1,250 was proposed to be assessed. The respondent filed a request for hearing and was furnished with a copy of the Interim Rules of Practice governing proceedings of this type (38 F.R. 26360, September 20, 1973).

1/ This was an amended complaint to correct an error in the original complaint.

2/ The misbranding allegation was failure of the label to bear the required statement of net weight or measure. 7 U.S.C. 136 2(q)(2)(C)(iii).

The respondent filed an answer to the complaint dated October 26, 1973, in which it admitted the charges. With respect to the non-registration charge, the respondent alleged that it had no knowledge of the Act and did not act with intention to violate. It further alleged that the product was now properly registered. As to the misbranding charge, the respondent alleged that this was a minor violation and was corrected with very few changes in the label. The answer also contends that the amount of the fine, which the attorney for EPA has agreed to reduce to $1,000, is unreasonable and unjustified and would put a severe financial strain on the company.

Settlement negotiations between the parties were not successful (see Rules of Practice, section 168.35), and pursuant to section 168.36(d) of the Rules of Practice, we corresponded with the parties for the purpose of accomplishing some of the objectives of a prehearing conference. Since the violations were admitted, the correspondence related to the appropriateness of the penalty.

A hearing was held in Pensacola, Florida, on February 21, 1974. EPA was represented by James H. Sargent, Esq., Acting Chief, Legal Support Branch, Region IV. Three witnesses testified on behalf of EPA. Mr. Bob Crumpton, president of respondent company, appeared for and testified on its behalf.

At the hearing, counsel for EPA stated that the misbranding charge was based on a minor violation, and while he was not withdrawing this charge, he was not now seeking to assess a penalty thereon. In the light of this statement and in the circumstances, we are of the view that any

consideration of the misbranding charge would be purely academic and we are eliminating it from our consideration of this case.

At the conclusion of the taking of evidence, the parties waived their right to file proposed findings of fact, conclusions, a proposed order, and brief (see Rules of Practice, section 168.48).

In view of the relatively simple nature of the case, we did not require them to do so.

Findings of Fact

1. The respondent, Pen-Kote Paint Company, Inc., is a corporation with a place of business in Pensacola, Florida. The company is engaged primarily in the manufacture and distribution of paints of various types. The company also manufactures and distributes a product which it calls Pen-Kote Copper Naphthenate Preservate (CNP). The company purchases copper naphthenate and petroleum distillate separately and mixes them to make the finished product which it sells. The company has been marketing this product since the latter part of 1971 or early 1972.
2. The product CNP is represented as a preservative for wood, fabric, and rope and its label represents that its use will arrest the action of decay, rot fungi, termites, and other wood infesting insects. CNP is a pesticide within the meaning of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended (FIFRA 1972). The respondent does not manufacture or distribute any other product that requires registration under FIFRA.

3. The product CNP, at the times here material, was not registered as required by the provisions of FIFRA 1972 and section 4 of the Federal Environmental Pesticide Control Act of 1972 (86 Stat. 973).
4. On January 18, 1973, and February 1, 1973, the respondent delivered for shipment and shipped quantities of the unregistered product CNP from Pensacola, Florida, to Mobile, Alabama.
5. On April 24, 1973, the Regional Office of EPA in Atlanta, issued a citation to respondent advising it of the violations that had been discovered and giving it an opportunity to express its views thereon in writing or in person, or both. Enclosed with the citation were forms for applying for registration of a pesticide. The respondent applied to EPA for registration of CNP on May 8, 1973.
6. EPA registered the product in due course. Certain cautionary and environmental protection statements, which did not previously appear on the label of the product, were required before registration was approved.
7. The distribution and use of the unregistered product, without the required statements referred to in the previous finding, posed hazards which could have adverse effects on man and the environment.
8. The respondent's gross sales for the year 1973, were approximately $188,000. A financial statement from respondent's accountant for the year ending February 28, 1973, shows retained earnings of approximately $39,000, including approximately $7,319 net income for the year ending February 28, 1973.

9. The respondent's violations were not intentional. The respondent has no prior history of violations of FIFRA 1972 or FIFRA 1947.

10. The assessment of a civil penalty of $500, while it will temporarily inconvenience respondent and affect its cash flow, will not effect its ability to continue in business.

Conclusions

On two occasions the respondent shipped a pesticide from Pensacola, Florida, to Mobile, Alabama; said pesticide was not registered as required by the Federal Insecticide, Fungicide, and Rodenticide Act, as amended; the respondent violated section 12(a) of said Act, 7 U.S.C. 136j(a), and is subject to the assessment of a civil penalty under section 14(a) of said Act, 7 U.S.C. 136 l(a); taking into consideration the size of respondent's business, the effect on respondent's ability to continue in business, and the gravity of the violation, a penalty assessment of $500 is appropriate.

This is the first case in any of the Regions of EPA in which an Initial Decision is being issued under the civil penalty provision of FIFRA 1972. We consider it appropriate to comment briefly on several subjects of general interest in this type of case.

Federal registration of pesticides (previously called economic poisons) was first required under the Federal Insecticide, Fungicide, and Rodenticide Act of 1947 (FIFRA 1947). Among the purposes of registration were to provide additional protection to the public; to assist manufacturers in complying with the provision of the Act; to bring to the attention of enforcement officials the formula, label, and claims made with respect to

pesticides before they are offered to the public; to prevent false and misleading claims; to prevent worthless articles from being marketed, and to provide a means of obtaining speedy remedial action if such articles are marketed. "Thus, a great measure of protection can be accorded directly through the prevention of injury, rather than having to resort solely to imposition of sanctions for violations after damage or injury has been done. Registration will also afford manufacturers an opportunity to eliminate many objectionable features from their labels prior to placing an economic poison on the market." H.R. Rep. No. 313, 80th Cong., 1st Sess., 1947, pp. 2-3.

The purpose of FIFRA 1972 was to provide "for the more complete regulation of pesticides in order to provide for the protection of man and his environment and the enhancement of the beauty of the world around him." S. Rep. No. 92-838, 92d Cong., 2d Sess. (1972), p. 3.

The requirement for registration of pesticides was carried over from FIFRA 1947 into the amended law and the procedures and conditions for registration were amended.[3/]

The legislative mechanism used to amend FIFRA 1947 was the Federal Environmental Pesticide Control Act of 1972 (FEPCA). Under sections 4(b) and 4(c)(1) of FEPCA, the registration requirements and regulations of FIFRA 1947, are to remain in effect until superseded by the 1972 amendments and regulations thereunder. New registration regulations

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3/ Among other things, the amended law requires registration of all pesticides in the channels of U.S. trade whereas under the previous law only pesticides in interstate commerce were required to be registered. Interstate shipments are involved in this case.

are required to be promulgated within two years after Octobet 21, 1972, and such regulations as of this date have not been promulgated. The registration requirements of FIFRA 1947 are still in effect.

The enforcement program, in individual cases, for the assessment of civil penalties under section 14(a) of FIFRA 1972, from the outset, has been handled by the Regional Offices of EPA, of which there are ten throughout the country. The overall policies and procedures to be followed by the various Regions are established by the Pesticides Enforcement Division, Office of General Counsel and Enforcement, at the central office in Washington, D.C. The Rules of Practice are applicable to all cases brought for assessment of civil penalties.

The complaints for civil penalty assessments are issued in the Regions and the proposed civil penalty in each complaint is set by enforcement officials in the Regions. In hopes of assuring that there would be uniformity as to the amount of penalty assessed in the various Regions for violations of comparable gravity, the Pesticides Enforcement Division prepared a Civil Penalty Assessment Schedule [4/] to be used in all Regions. This schedule was prepared by personnel in the Pesticides Enforcement Division in collaboration with individuals in the Regions who were involved in the program. Most of the Pesticides Enforcement Division personnel who worked on the project had had experience in the pesticide enforcement program in EPA and in the Department of Agriculture

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4/ The Civil Penalty Assessment Schedule was introduced as an exhibit at the hearing. We have been informed that it will be published together with the final Rules of Practice.

before the pesticide program was transferred to EPA on December 20, 1970, under Reorganization Plan No. 3. Although there was no civil penalty provision in FIFRA prior to October 21, 1972, the experience that these individuals had in developing, preparing, and referring criminal cases for prosecution under FIFRA, was readily transferable to the civil penalty program.

Under section 14(a)(1) of FIFRA 1972, the maximum civil penalty that can be imposed on a registrant, commercial applicator, wholesaler, dealer, retailer, or other distributor for violations of the Act is $5,000 for each offense. In determining the amount of civil penalty, the statute requires the Agency to consider the appropriateness of the penalty to the size of respondent's business, the effect on his ability to continue in business, and the gravity of the violation.

In setting up the schedule, the Agency gave primary consideration to two factors -- the gravity of the violation and the size of the respondent's business. The gravity factor was considered to be the more important. In proposing the amount of the penalty, the third factor to be considered -- the effect on respondent's ability to continue in business -- was considered to have some relationship to the size of respondent's business. At the Regional level, the amount of the penalty to be assessed is negotiable. [5/] Each complaint that is issued advises respondent that he has an opportunity to confer with Regional personnel regarding the appropriateness of the penalty, as well as the alleged violation. A respondent may also contest the appropriateness of the

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5/ Section 168.35(a) states that it is Agency policy to encourage settlement where it is consistent with the provisions and objectives of the Act.

penalty and the violation charges at a formal hearing, such as was held in this case. Thus, a respondent has ample opportunity to present evidence and arguments on the matter of violations and on all factors that must be considered in determining the appropriateness of the penalty.

The Civil Penalty Assessment Schedule set up three categories of sizes of business based on annual gross sales. The size categories are: I - less than $200,000; II - between $200,000 and $1,000,000; III - over $1,000,000. The gravity of violations run the scale downward from the serious knowing violations, and particulary those that would have serious adverse effects on humans, to minor misbranding violations. The scale of penalties runs from the maximum of $5,000 for a respondent in size category III for the most serious violation to minor misbranding violations which, standing alone, are deemed not serious enough to warrant assessment of a civil penalty. The minimum penalty on the schedule is $250 for a respondent in size category I for a violation that is not of a high degree of gravity.

It is undoubtedly proper and desirable for the enforcement officials of the pesticide program to adhere to or be guided by the Civil Penalty Assessment Schedule. However, we are of the view that the Administrative Law Judge who hears the case is not bound by the schedule. Section 14(a)(3) of the Act, as we read it, contemplates an administrative hearing not only on the matter of violations, but also on the appropriateness of the penalty. The Administrative Law Judge, after hearing the evidence, must make an

independent judgment on both of these factors. He may look to the schedule to learn the basis on which the enforcement officials arrived at the amount of the proposed penalty. But, the evidence before him may be different from that which was before the enforcement officials or, if the same, he may not agree with their evaluation of it, including their evaluation of the factors which must be considered in assessing the penalty. Accordingly, if he finds that there was a violation, he may increase (within the limit set by the statute) or decrease the amount of the penalty proposed by the enforcement officials.

The amount of penalty assessed herein is less than the amount set forth in the Civil Penalty Assessment Schedule. However, in deciding the amount of civil penalty that should be assessed, we have given considerable weight to the following factors: respondent's violation was not intentional; respondent promptly applied for registration after the non-registration violation was brought to its attention and the product was subsequently registered; respondent is primarily in the paint business and the product in question is the only pesticide in which it deals; lack of history of previous violations; and the honest and forthright manner in which respondent's president and only witness testified.

The respondent has urged that his conduct was not an intentional or knowing violation. We have no reason to question his representations in this regard. However, knowledge or intent are not required elements in a violation for the assessment of a civil penalty under section 14(a). In statutes that are designed for social betterment or for the welfare of the public (as in FIFRA), the Congress has often authorized the

imposition of penalties even though there is no intent to violate and no awareness of wrongdoing. U.S. v. Dotterweich, 320 U.S. 277; U.S. v. Balint, 258 U.S. 250. See also Morissette v. U.S., 342 U.S. 246, 256.

It is to be observed that under section 14(b) of FIFRA 1972, a criminal violation is not established unless the person charged "knowingly violates." Significantly, the word "knowingly" is omitted in section 14(a), the civil penalty provision.

While knowledge is not an essential element to establish a violation where a civil penalty is to be imposed, it is a factor that may properly be taken into consideration in evaluating the culpability of the respondent as bearing on the gravity of the offense.

Having considered the entire record and based on the Findings of Fact and Conclusions herein, it is proposed that the following order be issued.

Final Order

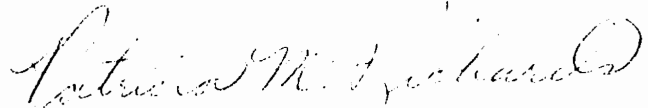
Pursuant to section 14(a)(1) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended, a civil penalty of $500 is assessed against the respondent, Pen-Kote Paint Company, Inc., for violations of said Act as set forth in the amended complaint dated September 25, 1973.

Bernard D. Levinson
Administrative Law Judge

March 26, 1974

CERTIFICATE OF SERVICE

I hereby certify that the original of this Initial Decision and a copy were sent by certified mail to the Regional Hearing Clerk, Region IV, EPA, and a copy was sent by certified mail to Pen-Kote Paint Company, 2601 North "T" Street, Pensacola, Florida 32505, and to James H. Sargent, Esq., Acting Chief, Legal Support Branch, 1421 Peachtree Street N.E., Atlanta, Georgia 30309.



Patricia M. Richards
Secretary to ALJ Levinson

March 26, 1974