UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE REGIONAL ADMINISTRATOR

In the Matter of:	)	
	)	
Hygienic Sanitation Company, Inc.	)	I. F. & R. Docket No. III-131-C
	)	
Respondent	)	

INITIAL DECISION

Preliminary Statement

This is a proceeding initiated under Sec. 14(a)(1) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended, (FIFRA) [7 U.S.C. 136 l(a)(1)], 1973 Supp., for the assessment of a civil penalty for violation of the Act.

On June 15, 1977, the United States Environmental Protection Agency (Complainant) issued a Complaint and Notice of Opportunity for Hearing, charging Hygienic Sanitation Company, Inc. (Hygienic), a Pennsylvania corporation (Respondent), with a violation of the Act. An Answer to said Complaint and Request for Hearing was duly filed and dated July 1, 1977. 1/

1/ Count Three of the Complaint was withdrawn by motion granted (Tr. 185) and a new Count Three substituted by motion granted (Tr. 192).

Factually, Mr. and Mrs. Wayne C. Weimer engaged Hygienic to treat their home in Strongstown, Pennsylvania for termites. Hygienic inspected the premises and, as a result, did treat said premises on July 21, 1975. The Complaint herein arose from the manner and means by which said treatment was accomplished and the effects thereof on the surrounding environment, primarily the fact that the pesticide made its way through a drain pipe to a nearby stream and ultimately to a fish hatchery where approximately 2,400 trout were killed.

Complainant alleges that the Respondent violated FIFRA by:

(1) allowing the pesticide Shell Aldrite 4 Emulsifiable Concentrate Insecticide (EPA Reg. No. 201-245-AA) (hereinafter "Shell Aldrite") to come into contact with and substantially and adversely affect a stream and beneficial wildlife during the application of said pesticide at the home of Mr. and Mrs. Wayne C. Weimer, Strongstown, Pennsylvania, to control termites;

(2) applying the pesticide Shell Aldrite to a garden and apple tree;

(3) applying the pesticide Shell Aldrite aboveground to the corners and eaves of the Weimer home;

(4) allowing the pesticide Velsicol Gold Crest Termide (EPA Reg. No. 876-233 and 876-233-AA) (hereinafter "Gold Crest") to come into contact with and substantially and adversely affect a stream and beneficial wildlife;

(5) applying the pesticide Gold Crest to a garden and apple tree; and

(6) applying the pesticide Gold Crest aboveground to the corners and eaves of the Weimer home.

The labeling for the Gold Crest states, in pertinent part:

WARNING

> Do not contaminate feed or foodstuffs. This product is toxic to fish, birds and other wildlife. Birds and other wildlife in treated areas may be killed. Keep out of lakes, streams or ponds. Do not apply where runoff is likely to occur. Do not apply when weather conditions favor drift from areas treated. Do not contaminate water by cleaning of equipment or disposal of wastes. Apply this product only as specified on this label. (Emphasis Added) EPA Ex. 3 and 4.

The labeling for the Shell Aldrite states, in pertinent part:

READ THE DIRECTIONS AND PRECAUTIONS CAREFULLY
AND FOLLOW THEM AT ALL TIMES.

. . . .

> Do not apply or allow to drift to areas occupied by unprotected humans or beneficial animals. Do not contaminate feed and foodstuffs. This product is poisonous to fish and wildlife. Keep out of lakes, ponds and streams. Do not apply in any manner not specified on the label. (Emphasis Added) (EPA Ex. 5 and 6.)

The labels and EPA's registration of those labels (EPA Ex. 3-6) were stipulated to and admitted into evidence, without objection by Respondent. (Tr. 3-6) While Respondent did attempt, however, to subsequently question the authenticity of each of the labels, an affidavit (EPA Ex. 9) signed by Mr. William Carson, one of Respondent's witnesses and a participant in the July 21, 1975 application of the pesticides, was stipulated to by the parties (EPA Ex. 2 and 2A) and admitted into evidence without objection by the Respondent. (Tr. 6, 8) This affidavit establishes

that the pesticides applied by Respondent on July 21, 1975, were those registered by EPA. Mr. Carson's affidavit, in fact, cites the same registration numbers for the Shell Aldrite and the Gold Crest as set forth on the EPA registered label for each of those products.

Complainant avers that each of the allegations set forth in subparagraphs 1 through 6 above is inconsistent with the relevant pesticides' labeling, and thus is a violation of Sec. 12(a)(2)(G), (7 U.S.C. §136j(a)(2)(G)).

The parties have entered into the following stipulation of fact and law (EPA Ex. 1, Tr. 1-2):

1. On or about July 21, 1975, Hygienic Sanitation Company, Inc. was a corporation doing business in the State of Pennsylvania.

2. On or about July 21, 1975, John E. Potts was an employee of Hygienic Sanitation Company.

3. On or about July 21, 1975, William E. Carson was an employee of Hygienic Sanitation Company.

4. The residence of Mr. and Mrs. Wayne C. Weimer is located in Strongstown, Pennsylvania.

5. Carney Run is an intermediate stream.

6. Carney Run supplies the source of water for the Blue Goose Fish Hatchery.

7. Hygienic Sanitation Company has had an approximate annual gross sales of $1.2 million.

8. On or about July 21, 1975, Hygienic Sanitation Company, acting through its employees, Messrs. Carson and Potts, used and applied Shell Aldrite 4 Emulsifiable Insecticide, a termaticide, in and about the residence of Mr. and Mrs. Wayne C. Weimer.

9. On or about July 21, 1[illegible], Hygienic Sanitation Company, acting through its empl[illegible]es, Messrs. Carson and Potts, used and applied Velsicol Gold Crest Termide, a termaticide, in and about the residence of Mr. and Mrs. Wayne C. Weimer.

10. On or about July 21, 1975, Shell Aldrite 4 and Gold Crest Termide, as used and applied by respondent, came into contact with Carney Run.

11. On or about July 21, 1975, approximately 2,400 brook trout at the Blue Goose Fish Hatchery were exposed to Shell Aldrite 4, a termaticide, and Gold Crest Termide, a termaticide, and as a consequence were killed.

12. On or about July 21, 1975, Shell Aldrite 4 Emulsifiable Concentrate Insecticide, a termaticide, was a pesticide within the meaning of the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. Sec. 136(u).

13. On or about July 21, 1975, Velsicol Gold Crest Termide Emulsifiable Concentrate, a termaticide, was a pesticide within the meaning of the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C., Sec. 136(u). [2/]

Both the Shell Aldrite and Gold Crest labels state that each product is to be applied only as specified on the label. The labels of both products also state that the products should be kept out of lakes, ponds and streams. (EPA Ex. 3 and 5).

Respondent has by stipulation admitted that its pesticide application at the home of the Weimers eventually entered Carney Run which resulted in the fish kill. Respondent, however, denies liability for other reasons which will be discussed later.

2/ Respondent also stipulated, with minor exceptions, to Complainant's Exhibits 1-44 as evidence. Respondent's exceptions are set forth in EPA Ex. 2B and 2C. Respondent did not object to any of the samples taken of the stream nor of the results of those samples. These samples indicated gross pesticide contamination of Carney Run.

Complainant has proposed a civil penalty assessment of $5,000 for each of the six alleged violations or a total assessment of $30,000.

The remaining primary issues of fact are as follows:

1. Whether the pesticide Shell Aldrite was applied by Respondent to the Weimer's garden and apple tree;

2. Whether the pesticide Shell Aldrite was applied above ground by Respondent to the corners and eaves of the Weimer's residence;

3. Whether the pesticide Gold Crest was applied by Respondent to the Weimer's garden and apple tree; and

4. Whether the pesticide Gold Crest was applied above ground by Respondent to the corners and eaves of the Weimer's residence.

Before discussing these issues, reference should be made to certain facts which, although the subject of the stipulation previously referred to, have been raised or questioned by Respondent either during the hearing or on briefs. These issues are:

a) Whether Carney Run is a stream;

b) Whether the chemicals Shell Aldrite and Gold Crest are pesticides; and

c) Whether a person other than Respondent caused the death of the brook trout at the Blue Goose Fish Hatchery on July 21, 1975.

Respondent stipulated to a and b above and there was nothing inserted into the record to alter the facts of the stipulation. Therefore, as to a and b I find that these facts are as stipulated, i.e., Carney Run is an intermediate stream and Shell Aldrite and Gold Crest are pesticides within the meaning of FIFRA.

As to c above, the record is clear that the fish kill was the result of the application of pesticides by Hygienic at the Weimer residence on July 21, 1975. The Department of Environmental Resources of the State of Pennsylvania (hereinafter "DER") did, in fact, ascertain that Respondent's application of pesticides at the Weimer residence caused the contamination on July 21, 1975. Mr. Thomas Proch of DER succinctly described DER's investigation of the contamination and stated that the stream contamination began at the 6" pipe,[3/] adjacent to the Weimer residence. (Tr. 117-119)

Mr. McCarthy, also of DER, testified that it was readily apparent that the pesticide application at the home had caused the problem and that it was not caused by any other source. (Tr. 157-158) Respondent's application of Shell Aldrite and Gold Crest were the only sources of contamination that killed the approximately 2,400 brook trout at the Blue Goose Fish Hatchery.

Discussion:

a. Whether the pesticide Shell Aldrite was applied by Respondent to the Weimer's garden and apple tree;

b. Whether the pesticide Shell Aldrite was applied above ground by Respondent to the corners and eaves of the Weimer's residence.

The testimony of both Mr. Wayne Weimer and Mrs. Darleen Weimer indicates that Respondent applied the pesticides above ground to the garden, apple tree, and corners and eaves of the Weimer residence. (Tr. 56-57)

3/ This 6" pipe ran directly from the Weimer residence to the bank of Carney Run. Samples were taken from above and below the entrance of the pipe into Carney Run. No contamination was shown above the pipe. Contamination below the pipe indicated many parts per million of the constituents of the pesticides in question. (Tr. 125, 163, EPA Ex. 12, 23, 26-28.)

Mr. Weimer further stated that Mr. Potts:

> ...didn't actually apply it (the pesticide) to the garden. It just happened to fall in the garden, the flower bed that was under the eaves. He wasn't trying to apply it.
>
> Ms. Blackwell: So he was spraying the area that you gave a description?
>
> Mr. Weimer: He more or less ran the rod up and down the eaves, and, of course, the splash fell down into a flower garden that bordered on the side of the house. Mr. Potts applied the pesticide by pulling the rod from the ground and spraying the pesticide onto the house and garden. (Tr. 73)

Mr. Potts, in his deposition, did not remember spraying the pesticides nor discussing the spraying with the Weimers. (Supp. Tr. 45-46) He specifically denied spraying the flower garden. (Supp. Tr. 52) As for the spraying of the corners and eaves, Mr. Potts testified as follows:

> Q. Do you recall that day at any point, Mr. Potts, having treated any of the eaves or exterior portions of the house?
>
> A. (Mr. Potts:) They said no. I don't remember putting anything up there. I don't know what we had any reason for. We put some bombs off in the house but the eaves was there. No; I don't remember doing anything, or I don't remember Bill do anything on the outside. I don't know what was done for. (Supp. Tr. 20; Emphasis added)

Mrs. Weimer testified that she saw the spraying of the corners and eaves of the house and flower garden. (Tr. 76)

Mr. Carson, the supervisor of Mr. Potts in 1975, stated that use of the pesticides above ground would not have been a common, ordinary procedure in 1975. (Tr. 94) Yet, two people saw Mr. Potts apply pesticides above ground to the corners and eaves of the home and incidentally to the flower garden.

Such applications are not permitted by the Shell Aldrite label which also states that the pesticide not be used in a manner not prescribed by

the label. (EPA Ex. 5-6) Additionally, termites, not wasps or bees, are target pests of the pesticides. Therefore, Respondent's applications to the corners and eaves and the garden would be inconsistent with the label.

From the above references to the record, and from the demeanor of the witnesses, Mr. and Mrs. Weimer,[4/] I must conclude that Mr. Potts did attempt to spray the eaves possibly with the thought of being helpful to the Weimers. I also conclude that there was not a direct spraying of the garden except as a consequence of the spraying of the eaves.[5/]

As for the application to the apple tree, Mr. Potts stated that he applied the pesticides to the apple tree. (Supp. Tr. 46, 50-52, 65; EPA Ex. 7) Mr. and Mrs. Weimer both witnessed him applying the pesticides to the apple tree. (Tr. 56, 76) Mr. Weimer specifically stated that Mr. Potts sprayed around "the base, the trunk of the tree and up the sides and in a few of the limbs." Mr. Weimer also testified that Mr. Potts stated he didn't feel the tree problem was from termites, but he sprayed it anyway. (Tr. 57)

Mr. Potts stated that he rodded the tree, but did not spray the tree. (Supp. Tr. 19-20, 46, 50-53) He did testify that he had rodded into the ground around the tree. (Supp. Tr. 63) Mr. Potts, however, stated in his affidavit of October 15, 1975, prior to his deposition on August 25, 1978, that he had sprayed the surface of the ground below the apple tree. (EPA Ex. 7) Therefore, it seems from his testimony, he both sprayed and rodded the tree and the ground around the tree.

4/ Mr. Potts' testimony was by deposition on August 25, 1975, at which the ALJ was not present.

5/ The record is clear that at the time of this application, neither Mr. Potts nor Mr. Carson had received any formal training on the application of pesticides. (Tr. 97-98)

A sample taken of the ground around the base of the tree showed the presence of aldrin (a constituent of Shell Aldrite) and heptachlor and chlordane (constituents of Gold Crest). (EPA Ex. 34-36)

Spraying and rodding of an apple tree is not a use permitted by the label of the pesticide Shell Aldrite. Therefore, it must be concluded that Shell Aldrite was sprayed on the surface and rodded into the ground around the apple tree in contravention of the instructions on the label.

c. Whether the pesticide Gold Crest was applied to the Weimer's garden and apple tree.

d. Whether the pesticide Gold Crest was applied above ground to the corners and eaves of the Weimer residence.

The facts set forth in DISCUSSION a and b are essentially the same for the allegations set forth in c and d. Therefore, the discussion in those paragraphs are applicable to c and d.

A sample taken of the inside of the apple tree indicated the presence of chlordane. Other constituents were not detected in the sample. (EPA Ex. 34-36) This corresponds with the chlordane found in the soil samples taken of the ground surface at the base of the tree. In those samples, however, aldrin, dieldrin and heptachlor were also detected.

The spraying of the corners and eaves of a home is not a use permitted by the Gold Crest label. Also not permitted by the label is an application of Gold Crest to an apple tree. Accordingly, such applications are all in violation of the label, which states that applications are only to be conducted in accordance with label specifications.

The record is unclear as to at what point one of the pesticides was used as opposed to the other for any use.

Mr. Carson was responsible for mixing the pesticides used on July 21, 1975. (Tr. 98; Supp. Tr. 17) Yet, Mr. Carson did not even know that he had mixed the pesticide Shell Aldrite. (Tr. 85-86) Mr. Carson, at the hearing, however, stated that:

> ...(T)he one can must have had Aldrin <u>and</u> Chlordane.

Such a mixture of aldrin and chlordane is a violation of each of the pesticide's label directions for use because each of the pesticides is only to be mixed with water, not another pesticide. Given the chemical constituency of the soil samples around the tree and the stream samples, Respondent in all likelihood mixed and applied the two pesticides together out of one barrel. Additionally, Mr. Carson stated that only one barrel at a time could be used. (Tr. 95) Mr. Weimer did not recall more than one drum being used at a time (Tr. 55), but he recalled that the spraying of the pesticide and the basement application came from the same drum. (Tr. 66) Mrs. Weimer recalled the same. (Tr. 79) Only this conclusion can explain the presence of both pesticides in the stream and outside. If only one pesticide was being used at a time, the samples could have been different.

Accordingly, Respondent may also he found to have violated each of the use directions of the label by having mixed and applied the Shell Aldrite with the Gold Crest pesticide.

Complainant has not proposed a separate penalty for such violation. However, it may be considered in determining the amount of penalty should one be appropriate.

Additionally, as to application of pesticides to a garden and apple tree or applying the pesticides above ground to the corner and eaves of the Weimer home, there is no evidence in the record to indicate anyone other

than Hygienic may have accomplished such application and I conclude that liability for such application shall [illegible] imposed upon Hygienic.

Issues of Law

A. Whether the legality of the installation of and the discharge from the 6" pipe is relevant and material to Respondent's violations of FIFRA;

B. Whether Respondent is a distributor within the meaning of FIFRA;

C. Whether the proposed penalty of $30,000 should be assessed against Respondent for its violations of FIFRA.

A. Whether the legality of the installation of and the discharge from the 6" pipe is relevant and material to Respondent's violations of FIFRA:

Respondent, in its Answer, alleged that the pesticides had come into contact with Carney Run because of "an unknown, unauthorized, unlawful and improper drain device system installed and maintained by the property owner(s) in contravention of local building codes and ordinances and/or by virtue of latent conditions of the property of which Hygienic was not lawfully charged with notice." Mr. Weimer testified that he did not have a permit for the discharge from the 6" pipe nor for the coverage of the drainage system after it had been installed. (Tr. 46, 71)

Complainant argues that whether or not there was a permit for the pipe is irrelevant to Respondent's violations of FIFRA. Essentially, Respondent is attempting to argue that the lack of a permit for the pipe is an intervening or superceding cause and therefore absolves Respondent from its liability under FIFRA.

Complainant has briefed this point thoroughly with the resultant conclusion that, if a person is aware, or should be aware of an inter-

vening factor liability will not be superseded.

In my opinion it is not necessary to consider this issue of law to reach a conclusion on this point. Respondent was under a duty to ascertain, prior to undertaking the application of the pesticides, whether they would or could flow into a stream or harm humans or wildlife. Respondent did not exercise reasonable due care in discovering that which would have been found had Respondent properly inspected the Weimer property or asked further appropriate questions.

Mr. Scherrah, Mr. Potts' manager, testified that Mr. Potts had told him that he had not attempted to determine whether there were any springs or drains about or around the house.

> Mr. Stapleton: Did you ever discuss with Mr. Potts whether he had attempted to determine whether there were springs, drains around or about the house?
>
> Mr. Scherrah: Yes, I asked him
>
> Mr. Stapleton: And what did he say?
>
> Mr. Scherrah: No. It wasn't a logical question that would come up. It never happened before. (Tr. 222)

Yet, Mr. Potts testified that he had asked about the springs. (Supp. Tr. 11)

Complainant's brief (Br. 23, 24, 25, 26, and 27) sets forth a detailed description of the testimony of Mr. Potts relative to his visits to the Weimer home particularly with respect to his first visit. While most of these assertions of what Mr. Potts did or did not observe are capable of different interpretations, these references do indicate what seemed apparent at the hearing, that Mr. and Mrs. Weimer informed Mr. Potts

of the presence of the spring, the overall condition of the basement of the house and the yard area, and Mr. Potts and Mr. Carson apparently concluded that the treatment of the house and yard area could proceed without incident. It was not for Mr. or Mrs. Weimer to make the decision. It was incumbent upon the agents of Hygienic to make a thorough survey of the premises which would have disclosed the spring, the 6" pipe, the stream, and possibly even the existence of the fish hatchery. Mr. Weimer's knowledge of the premises and of what might be a consequence of the use of the pesticides as the result of the layout of said premises should not have been relied upon.

Mr. Potts apparently ignored Mr. Weimer's statement about the drain (Tr. 43), and he did not properly react to the statements about drainage problems. (Tr. 55)

The facts show that Respondent, instead of exercising due care, performed in a negligent manner in its application of the pesticides. Respondent was under a duty to anticipate any problems that may have arisen because of the toxic nature of the pesticides involved. Respondent failed to anticipate, much less ascertain, any foreseeable problems. Therefore, Respondent's liability cannot be superceded. Mr. Weimer's lack of a permit for the pipe does not excuse nor mitigate Respondent's negligence.

B. Whether Respondent is a distributor within the meaning of FIFRA:

The imposition of Civil penalties for violations of FIFRA is governed by Section 14(a) of the Act, which provides in pertinent part as follows:

"(1) In General. -- Any registrant, commercial applicator, wholesaler, dealer, retailer, or other distributor who violates any provision of this Act may be assessed a civil penalty by the Administrator of not more than $5,000 for each offense.

"(2) Private Applicator. -- Any private applicator or other person not included in paragraph (1) who violates any provision of this Act subsequent to receiving a written warning from the Administrator or following a citation for a prior violation, may be assessed a civil penalty by the Administrator of not more than $1,000 for each offense." 6/

Hygienic raises a jurisdictional objection to these proceedings. It contends that it is not a registrant, commercial applicator, wholesaler, dealer, retailer or other distributor included in Section 14(a)(1), and that Section 14(a)(2) consequently governs the proceedings against it. Under Section 14(a)(2), Hygienic can be assessed a civil penalty since it has been the subject of and has received a written warning or a citation for a prior violation. EPA contends that Hygienic is a distributor of pesticides within the meaning of Section 14(a)(1), since it supplies the pesticide which it uses in its exterminating operations.

It should be noted that on September 30, 1978, FIFRA was amended. (P.L. 95-396, 92 Stat. 819) (Federal Pesticides Act of 1978). These amendments now state that any applicator who does not apply an unregistered pesticide is subject only to a penalty of not more than $1,000 per violation [§14(a)(2)] Such applicators are not sellers or distributors of pesticides. [§2(e)(1)] Both pesticides herein are registered.

6/ It would also follow that under Section 14(a)(2), Hygienic would be subject to much lighter penalties.

It is EPA's position that any violations that occurred prior to September 30, 1978, are subject to the provisions and interpretations of the statute in existence at the time of the violation. I agree. It is also EPA's policy that all cases, now in existence or to be instituted, based on violations prior to September 30, 1978, are to be processed in accordance with FIFRA as it existed prior to the amendments. All violations occurring on or after September 30, 1978, are to be prosecuted under the Federal Pesticides Act of 1978.

The word "distributor" is not defined in FIFRA. In ordinary usage it means one who "distributes," which commonly means to deal out or spread out units among a number of recipients, with no particular manner of distribution being specified. 7/

Hygienic's position, however, is that as used in FIFRA, "distributor" means specifically one who commercially deals in pesticides by selling them. Hygienic asserts that it did not sell Shell Aldrite and/or Gold Crest, but only used it in the sale of a service.

The terms "registrant, commercial applicator, wholesaler, dealer, retailer" which precede "other distributor" all refer to persons who are generally in the business of supplying or applying pesticides. It seems obvious that the term "other distributor" was added to make clear that the preceding terms were not intended to be a complete listing of the types of commercial distribution of pesticides which were to be subject to Section 14(a)(1).

7/ See e.g., Webster's New World Dictionary of the American Language (College Edition).

The treatment performed by Hygienic using a pesticide purchased by it was in substance a commercial distribution of a pesticide. It would not be accurate to say, as Hygienic does, that furnishing the pesticide was simply "incidental" to the rendition of the service of applying it. Hygienic's services were utilized because the pesticides were hazardous and must be handled with care, but it was the pesticide itself which accomplished the destruction of the pests.

Section 14 of FIFRA was added by the Federal Environment Pesticide Control Act of 1972, P. L. No. 92-516, 86 Stat, 973 (1972) ("1972 Act"), which completely rewrote FIFRA as it then existed. The purpose of the 1972 Act was "to change FIFRA from a labeling law into a comprehensive regulatory statute that will henceforth more carefully control the manufacture, distribution and use of pesticides." H. R. Rep. No. 92-511, 92d Cong. 1st Sess. 1 (1971). Section 14, providing for the first time for civil penalties was considered a necessary part of the regulatory program. Id. at 25.

An explanation for Congress' reasons in Section 14 for subjecting some persons to more stringent sanctions than others is found in a supplemental report of the Senate committee on Agriculture and Forestry on H. R. 10729, the bill which subsequently became the 1972 Act. The report stated, S. Rep. No. 92-838 (Part II) 92d Cong., 2d Sess. 23 (1972):

> "The amendment [to Section 14] of the Committee on Agriculture and Forestry provided for an orderly progression of penalties based on the seriousness of the offense. Thus, starting with the ordinary householder, private applicator, farmer, or other person not in the pesticide business committing an offense not deemed suitable for criminal prosecution the Committee on Agriculture provided for a maximum civil penalty of $1,000. For an offense by such a person deemed serious enough for criminal prosecution the maximum penalty would be $1,000 plus imprisonment for 30 days. The Committee on Agriculture and Forestry felt that an offense by a registrant, commercial applicator, wholesaler, dealer, retailer, or other distributor should be treated more seriously than an offense by a householder. A registrant, for example, should have greater knowledge of the dangers of pesticides and greater familiarity with the law regulating their use. A violation by a registrant would be much more likely to have widespread and serious effects than a violation by a householder, home gardener, or farmer. Consequently, the amendment of the Committee on Agriculture and Forestry prescribed a civil penalty of not more than $5,000 for an offense by a person in the business of <u>making, selling, or applying</u> pesticides. An offense by such a person serious enough for criminal prosecution would be subject to a fine of up to $25,000 and imprisonment for up to 1 year."

Section 14(a)(2) with its less rigorous enforcement provisions was thus intended to apply only to persons not in the pesticide business, which would not be true of Hygienic. Violations by persons not in the pesticide business were regarded as less serious than violations by persons in the pesticide business. While the report discussed specifically the difference in penalties, the reasoning applies with equal force to the

fact that persons in the pesticide business are held to a stricter standard of care than persons not in the pesticide business, and can be assessed civil peanlties without first having been given a written warning or a citation for a prior violation.

It is EPA's position that the activity of a structural pest control operator in supplying and applying a pesticide is a form of distribution. He sells not only a service (the application), but also a product (the pesticide). The price paid by the customer necessarily reflects the cost of the application and the cost of the pesticide.

In the instant case, Hygienic is a structural pest control operator. In the ordinary course of business, Hygienic supplies the pesticides which it applies. Therefore, the activity of Hygienic in supplying and applying a pesticide is a form of distribution and Hygienic is a "distributor" within the meaning of Section 14(a)(1).

The legislative history of the Act, supra, p. 13, strongly suggests that the Congress intended Section 14(a)(1) to apply to all persons "in the pesticide business" and Section 14(a)(2) to apply to all persons not "in the pesticide business." Congress recognized that a person in the pesticide business has "greater knowledge of the dangers of pesticides and...the law regulating their use" than a person not in the pesticide business and that a violation by a person in the pesticide business is "more likely to have widespread and serious effects" than a violation by a person not in the pesticide business. Therefore, Congress felt that a violation by a person in the pesticide business "should be treated more seriously" than a violation by a person not in the pesticide business. Section 14(a) was structured to

carry out this legislative policy.

Buttressing the legislative history is the principle that where general words follow specific, the former are held to the same class as the latter. Under this principle, a catch-all provision is formed which includes all of the same class and allows none to escape by reason of not heing specifically named. Garner v. Louisiana, 368 U. S. 157, 82 S.Ct. 248, 7 L.Ed.2d 207 (1968). The persons specifically named in Section 14(a)(1), "registrant, commercial applicator, wholesaler, dealer, retailer," are in the pesticide business. Therefore, the general words "other distributor" form a catch-all provision which includes all persons of the same class, namely all persons in the pesticide business.

A structural pest control operator is in the pesticide business. Therefore, he should be treated more seriously than a person not in the pesticide business and held accountable under Section 14(a)(1). To interpret the Act otherwise would be to hold a structural pest control operator to the same standard of care as householders, home gardeners, and farmers. Such a holding would defeat the statutory purpose in having two levels of liability. A statute susceptible of either of two opposed interpretations must be read in the manner which effectuates rather than frustrates the major purpose of the legislative draftsmen. Shapiro v. United States, 335 U.S. 1, 68 S.Ct. 1375, 92 L.Ed. 1787 (1948).

It is a generally accepted proposition that remedial legislation should be construed broadly to effectuate its purposes. Tcherepnin v. Knight, 389 U.S. 332, 88 S.Ct. 548, 19 L.Ed.2d. 564 (1967). Congress intended FIFRA to protect human health and the environment from the adverse effects

of pesticides. Thus, FIFRA is considered to be a remedial statute and should be given a liberal interpretation to achieve the Congressional intent.

Hygienic argues that subjecting it to liability under Section 14(a)(1) is contrary to Congress' intention in expressly providing that the provision for certification of applicators in amended FIFRA shall not become effective until five years after the date of enactment of the 1972 Act (i.e., until October 21, 1977). It claims that by so doing Congress intended not to hold people with inferior training to the same level of exposure for civil penalties as those people who proved their expertise in complying with Federal standards by becoming certified commercial applicators.

This argument ignores the distribution aspects of Hygienic's operations. As heretofore found, Hygienic supplies the pesticide as well as applies it. There is, therefore, in a real sense, a widespread distribution of pesticides by Hygienic. Given the stated congressional purpose of generally subjecting persons in the pesticide business to the more rigorous enforcement provisions of Section 14(a)(1), it is more in accord with that purpose to construe narrowly any exemption of a person in the pesticide business from that section.

Hygienic argues that the words "other distributor" as used in Section 14(a)(1) are necessarily limited by the preceding terms "wholesaler, dealer, retailer," to those who sell only in the same manner as those persons customarily do. The rule of "ejusdem generis" is a useful cannon of construction, but it should not be used to defeat the legislative purpose. United States v. Alpers, 338 U. S. 680, 682-83 (1950). Here, subjecting Hygienic to liability under Section 14(a)(1) is in accordance with the purpose of the statute.

Accordingly, I found that Hygienic is a distributor subject to liability under Section 14(a)(1).

The conclusion that Hygienic is a distributor is also supported by Pesticide Enforcement Policy Statement ("PEPS") No. 6, issued by the Environmental Protection Agency on December 17, 1976, 41 FR 55932 (December 23, 1976). In construing a statute, it is appropriate to consider how it has been interpreted by the agency charged with enforcing it. See American Meat Institute v. EPA, 526 F. 2d 442, 450 (7th Cir 1973); In re Evergreen Helicopters, Inc., I.F.&R. Docket No. IV - 214c (EPA) (June 10, 1976); Cf. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1940). PEPS No. 6 deals with the EPA's enforcement policy with respect to the use by professional structural pest control operators of service containers to transport and temporarily store pesticides prior to applying them.[8/] The statement

---

8/ The enforcement policy statement does not explicitly define the term "structural pest control operator" but the discussion in the statement leaves no doubt that the term includes professionals who apply pesticides to buildings and other structures. See Pesticide Enforcement Policy Statement No. 5, 41 FR 41142 (Sept. 21, 1976).

considered specifically the applicability to structural pest control operations of the following provisions of FIFRA: Section 3(a), which provides that no person may "distribute, sell, offer for sale, hold for sale, ship, deliver for shipment, or receive and (having so received) deliver or offer to deliver" an unregistered pesticide to another person; Section 8(b) making the books and records of any "producer, distributor, carrier, dealer or any other person who sells or offers for sale, delivers or offers for delivery" any pesticide, subject to inspection by the EPA; Section 9(a) authorizing the EPA to enter and inspect any establishment or other place where pesticides "are held for distribution or sale;" and Section 12(a)(1) making it unlawful for any person "to distribute, sell, offer for sale, hold for sale, ship, deliver for shipment, or receive and (having so received) deliver or offer to deliver" to any person any pesticide which is unregistered or adulterated or misbranded or which, or the claims for which, do not comply with FIFRA in other respects.

In PEPS No. 6, the EPA took the position that professional structural pest control operators who supply and apply pesticides for hire engage in the distribution or sale of pesticides within the meaning of FIFRA. Accordingly, it was stated that their books and records and their premises where they store pesticides are subject to inspection pursuant to Sections 8(b) and 9(a), and that they are subject to the prohibitions of Section 12(a) in their use of the service containers to store or transport pesticides prior to application.

PEPS No. 6 is significant because it is a reminder that Section 14 must be interpreted in the context of the entire statute. See United States v.

American Trucking Association, 310 U.S. 534, 542-43 (1940). Who is a distributor within the meaning of FIFRA cannot be determined solely by reference to the prohibitions against misusing pesticides. Other consequences also flow from whether a person is a distributor or not. The conclusion that Hygienic is a distributor in judging its liability for misuse of a pesticide, is consistent with the EPA's interpretation of other provisions of FIFRA regulating the sale and distribution of pesticides.

C. Whether the proposed penalty of $30,000 should be assessed against Respondent for its violations of FIFRA.

Section 14(a)(1) of FIFRA provides that any distributor who violates any provision of the Act may be assessed a civil penalty of not more than $5,000 for each offense. 7 U.S.C. §136 l(a)(1). In determining the amount of the penalty which is appropriate the Administrator must consider (i) the gravity of the violation, (ii) the size of the respondent's business, and (iii) the effect on the person's ability to continue in business.

In evaluating the gravity of the violation, the Administrator must consider (i) Respondent's history of compliance with FIFRA, and (ii) any evidence of good faith or lack thereof. It is also appropriate to consider the nature of the violations which are the subject of this proceeding, the environmental risks associated with these violations, and the actual environmental harm which was caused by the violations.

The facts in this case militate in favor of a high penalty or the maximum penalty since the Respondent has been charged with violation of FIFRA previously. (EPA Ex. 14 and 15) Further, Mr. Carson, the manager

of Respondent's Johnstown office for years testified that the Respondent did not train applicators on the proper methods for administering pesticides before hiring them and sending them out to work for the company. (Tr. 97-98) In addition, Mr. Carson testified that he believed the training given by the Respondent was inadequate. (Tr. 105-106) He also testified that he didn't always read pesticide labels before mixing and using pesticides. (Tr. 103) In fact, after completion of the application to the Weimer residence, Mr. Carson could not state what pesticides had been applied. (Tr. 98-99) At a minimum, it was negligent to apply the Shell Aldrite and Velsicol Gold Crest when they knew or should have known that there were underground springs under the Weimer premises. Mr. and Mrs. Weimer, Mr. Proch and Ms. Setright heard these springs. (Tr. 56, 75, 119, 147, 148 and 153) Also, Mr. Potts, Respondent's employee, knew that the water supply for the Weimer residence came from an underground spring on the premises. (Supp. Tr. 8-10) Clearly, the application of these pesticides to the roof eaves and the apple tree constitute violations of the label directions for use and Section 12(a)(2)(G) of the Act. Moreover, these created a serious environmental risk to humans by spraying the pesticide around the Weimer family. No warning or precautionary statements about inhalation of the pesticides being sprayed was given to the Weimers. (Tr. 57-58)

In determining the appropriate penalty to be assessed, the Administrative Law Judge may consult and rely upon the Guidelines for the Assessment of Civil Penalties ("Guidelines"), published in the Federal Register at 39 FR 27711. 40 CFR §§168.46 and 168.60 (July 1, 1977). These regulations

provide further that, in his discretion, he may increase or decrease this amount.

The Guidelines provide for the establishment of the maximum civil penalty for each offense since Respondent is a Category V company with gross sales of approximately $2 million annually (Tr. 250) and since it was highly probable that there would be adverse effects caused by these violations. Indeed, a serious fish kill resulted and extensive clean-up operations were necessary to mitigate the adverse environmental impact of these violations.

Initially, it must be presumed that assessment of a civil penalty pursuant to the Guidelines will not affect the ability of the Respondent to continue in business. 40 CFR §168.43 and Guidelines Section IC(1)(c), 39 FR 27711-12 (July 31, 1974).

The Administrative Law Judge and the Administrator may, in their discretion, reduce the penalty proposed insofar as is necessary to permit the Respondent to continue in business provided the Respondent submits bona fide financial information which conforms to generally recognized accounting procedures and which proves that assessment of a given penalty will not permit it to continue in business.

In this proceeding, the Respondent has failed to provide a reliable and persuasive showing that it will be unable to continue in business if a $30,000 penalty is assessed. Although the Respondent claims, through its treasurer, Mr. Lowery, that it is unable to pay any penalty, (Tr. 258-259), it has not provided adequate documentation of this claim.

Mr. Lowery's testimony is somewhat inconsistent. It indicates that the balance sheets and other financial documents submitted into evidence do not accurately present the economic status of the Respondent. Mr. Lowery has testified that he is familiar with the financial statements he presented and that they fairly and accurately set forth the financial status of the Company for the applicable time periods. (Tr. 245, 247, 248, 249 and 299) However, he also testified that there are no entries on the balance sheets for accounts receivable although the Company had receivables (Tr. 262) and he knows that this data is "relevant." (Tr. 294) He doesn't know the details surrounding the $5,000 loan from Central Penn Bank. (Tr. 263-264) He doesn't know the basis of the $27,033.39 liability listed as owing to George Brehm, the former president of the Respondent. (Tr. 265-266)

Respondent failed to sustain the burden that either the Respondent will be unable to continue in business if the penalty is assessed or special circumstances exist which militate against the proposed penalty.

Contrary to Respondent's characterization of the record, the record indicates that Respondent only borrowed money one time to meet its payroll (Tr. 259) and Respondent's outstanding loans on its fleet of cars and trucks is only $80,113 while the net book value of this fleet is $183,592.07 (Resp. Ex. 2). There is no testimony on the market value of this fleet, but one can assume that it is approximately equal to the net book value of the fleet which is the purchase price minus the accumulated depreciation.

Respondent also argues that Mr. Lowery's testimony was unchallenged. Complainant did not offer any rebuttal witness to address the Respondent's financial exhibits which were presented to it for the first time at the beginning of Mr. Lowery's testimony. However, even recognizing that Mr. Lowery had only recently been employed by Hygienic, his testimony is inconsistent, incomplete and not persuasive. First, he testified that he was familiar with the financial statements he presented and that they fairly and accurately set forth the financial status of the Company. Later, he contradicted himself, admitted he was not familiar with the basis for several of the entries under current liabilities and admitted that accurate information on the value of Respondent's accounts receivable is relevant though this value does not appear in the financial statements submitted by him.

Respondent has not submitted any financial evidence which conforms to generally recognized accounting procedures in accordance with Sections IC(1)(c) and ID(2)(c) of the Guidelines for Assessment of Civil Penalties. I must conclude that the penalty proposed under the Guidelines will not affect the ability of Respondent to continue in business.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After consideration of the entire record and the proposed findings and conclusions submitted by the parties, I make the following findings and conclusions of law. To the extent proposed findings and conclusions are not included, I have rejected them as either not being supported by a preponderance of the evidence, or as being unnecessary for the ultimate decision reached.

Findings of Fact

1. On or about July 21, 1975, Hygienic Sanitation Company was a corporation doing business in the State of Pennsylvania with its office and principal place of business located at American and Wingohocking Streets, Philadelphia, Pennsylvania 19104.

2. On or about July 21, 1975, John L. Potts was an employee of Hygienic Sanitation Company.

3. On or about July 21, 1975, William E. Carson was an employee of Hygienic Sanitation Company.

4. The residence of Mr. and Mrs. Wayne C. Weimer is located in Strongstown, Pennsylvania and was so on July 21, 1975.

5. Carney run is an intermediate stream.

6. Carney Run supplies the source of water for the Blue Goose Fish Hatchery.

7. Hygienic Sanitation Company has an annual gross sales of approximately $2 million.

8. On or about July 21, 1975, Hy[illegible]ic Sanitation Company, acting through its employees, Messrs. Carson and Potts, used and applied Shell Aldrite 4 Emulsifiable Insecticide, a termaticide, in and about the residence of Mr. and Mrs. Wayne C. Weimer.

9. On or about July 21, 1975, Hygienic Sanitation Company, acting through its employees, Messrs. Carson and Potts, used and applied Velsicol Gold Crest Termide, a termaticide, in and about the residence of Mr. and Mrs. Wayne C. Weimer.

10. On or about July 21, 1975, Shell Aldrite 4 and Gold Crest Termide, as used and applied by Respondent, came into contact with Carney Run.

11. On or about July 21, 1975, approximately 2,400 brook trout at the Blue Goose Fish Hatchery were exposed to Shell Aldrite 4, a termaticide, and as a consequence were killed.

12. On or about July 21, 1975, approximately 2,400 brook trout at the Blue Goose Fish Hatchery were exposed to Gold Crest Termide, a termaticide, and as a consequence were killed.

13. On or about July 21, 1975, Hygienic Sanitation, acting through its employees, Messrs. Carsun and Potts, used and applied Velsicol Gold Crest Termide to the Weimer's garden and apple tree.

14. On or about July 21, 1975, Hygienic Sanitation, acting through its employees, Messrs. Carson and Potts, used and applied Velsicol Gold Crest Termide above ground to the corners and eaves of the Weimer's residence.

15. On or about July 21, 1975, Hygienic Sanitation, acting through its employees, Messrs. Carson and Potts, used and applied Shell Aldrite 4 above ground to the Weimer's residence.

16. On or about July 21, 1975, Hygienic Sanitation, acting through its employees, Messrs. Carson and Potts, used and applied Shell Aldrite 4 to the Weimer's garden and apple tree.

17. After the application of the Shell Aldrite 4 and Gold Crest Termide and the resultant contamination of the soil under the home of Mr. and Mrs. Wayne C. Weimer and the resultant contamination of Carney Run, the Weimer home was relocated on the same premises and the soil under the home was excavated, packaged, and deposited in a sanitary landfill.

Conclusions of Law

1. On or about July 21, 1975, Shell Aldrite 4 Emulsifiable Concentrate Insecticide, a termaticide, was a pesticide within the meaning of the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C., Sec. 136(u).

2. On or about July 21, 1975, Velsicol Gold Crest Termide Emulsifiable Concentrate, a termaticide, was a pesticide within the meaning of the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C., Sec. 136(u).

3. Hygienic Sanitation Company, on July 21, 1975, was a distributor of pesticides, 7 U.S.C. Sec. 136 l(a).

4. On or about July 21, 1975, Hygienic Sanitation Company, acting through its employees, Messrs. Carson and Potts, distributed the pesticides Shell Aldrite 4 and Velsicol Gold Crest Termide to Mr. and Mrs. Wayne C. Weimer.

5. On or about July 21, 1975, Hygienic Sanitation Company applied Shell Aldrite 4 in a manner inconsistent with its labelling by applying it to the Weimer's garden and apple tree, and thus violated 7 U.S.C. §136j(a)(2)(g).

6. On or about July 21, 1975, Hygienic Sanitation Company applied Shell Aldrite 4 in a manner inconsistent with its labelling by applying it above ground to the corners and eaves of the Weimer's residence and thus violated 7 U.S.C. §136j(a)(2)(g).

7. On or about July 21, 1975, Hygienic Sanitation Company applied Shell Aldrite 4 in a manner inconsistent with its labelling by applying it to the Weimer's residence so as to allow the pesticide to come into contact with a stream and beneficial wildlife and thus violated 7 U.S.C. §136j(a)(2)(g).

8. On or about July 21, 1975, Hygienic Sanitation Company applied Velsicol Gold Crest Termide in a manner inconsistent with its labelling by applying it to the Weimer's garden and apple tree, and thus violated 7 U.S.C. §136j(a)(2)(g).

9. On or about July 21, 1975, Hygienic Sanitation Company applied Velsicol Gold Crest Termide in a manner inconsistent with its labelling by applying it above ground to the corners and eaves of the Weimer's residence and thus violated 7 U.S.C. §136j(a)(2)(g).

10. On or about July 21, 1975, Hygienic Sanitation Company applied Velsicol Gold Crest Termide in a manner inconsistent with its labelling by applying it to the Weimer's residence so as to allow the pesticide to come into contact with a stream and beneficial wildlife and thus violated 7 U.S.C. §136j(a)(2).

11. For the above-mentioned violations of FIFRA, Respondent is subject to a civil penalty under Section 14 (a)(1) of FIFRA, 7 U.S.C. §136(a)1.

12. Taking into consideration the size of Respondent's business, the effect on Respondent's ability to continue in business, and the gravity

of the violations (including Respondent prior history of violations of FIFRA), it is determined that a penalty of $10,500 is appropriate.

CONCLUSION

Complainant has proposed a civil penalty of $5,000 for each of six separate violations, (*supra*. p. 2) for a total of $30,000.

I agree that the full penalty of $5,000 should be assessed relative to the fact that the pesticides Shell Aldrite 4 Emulsifiable Concentrate Insecticide and Velsicol Gold Crest Termide were allowed to come into contact with and substantially and adversely affect a stream and beneficial wildlife. However, since the record indicates that both pesticides were used and it is not clear to what extent or amount or at what points on the premises either was used, Mr. Carson thinking he was using only one of them, I consider this to be one violation and not two separate violations. A civil penalty of $5,000 is assessed for such violation.

The rodding and spraying of the apple tree and the spraying of the corners and eaves do constitute misuses for which penalties shall be assessed. It seems obvious that these services were performed by Mr. Carson and Mr. Potts with the thought in mind of assisting the Weimers in resolving problems for which they were not hired. In spite of this gratuitous effort, both men should have known that to proceed with such treatment would be in violation of label uses. This is one of the types of actions which this law is intended to halt. Therefore, a civil penalty of $2,500 is assessed for each violation for a total of $5,000.

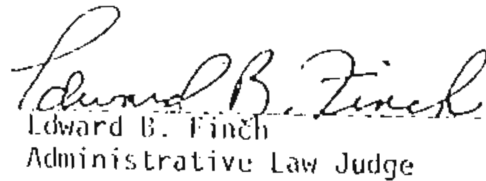
The spraying of the garden was only incidental to the other misuses and was not intentionally accomplished. However, again this is a misuse of

the pesticides and warrants assessment of a civil penalty of $500.

The total civil penalty assessed h. eby is $10,500.

FINAL ORDER [9/]

Pursuant to Section 14(a)(1) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended, 7 U.S.C. Section 136 l(a)(1) (Supp. V, 1975), a civil penalty of $10,500 is assessed against Respondent, Hygienic Sanitation Company, Inc., for the violations which have been established on the complaint, as amended, issued on June 15, 1977 and Hygienic is ordered to pay this amount by cashier's or certified check, payable to the United States of America, within sixty days of receipt of this final order.



Edward B. Finch
Administrative Law Judge

December 21, 1978

9/ Unless an appeal is taken by the filing of exceptions pursuant to Section 168.51 of the rules of practice, 40 C.F.R. 168.51, or the Regional Administrator elects to review this decision on his own motion, the order shall become the final order of the Administrator. See 40 C.F.R. 168.46(c).