4/26/77

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE REGIONAL ADMINISTRATOR

In the Matter of

Continental Research Corporation,	)	I. F. & R. Docket No. VII-154C
	)	
Respondent	)	INITIAL DECISION

I

Preliminary Statement

This is a proceeding under section 14(a)(1) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended,[1/] (FIFRA 1972) for the assessment of a civil penalty for shipping a pesticide (economic poison) called MUNICI-PAL Sewer and Drain Opener that was not registered. It is alleged in substance that the product was not registered under section 4 of FIFRA 1947, 7 U.S.C. 135b[2/] and that the shipment was in violation of

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1/ FIFRA was originally approved on June 25, 1947 and will be referred to as FIFRA 1947. It is codified in 7 U.S.C. 135 et seq. Extensive amendments were made by the legislative mechanism cited as Federal Environmental Pesticide Control Act of 1972 (FEPCA). Section 2 of FEPCA contains the complete FIFRA, as then amended, in sections numbered 1 through 27. This is codified in 7 U.S.C. 136 et seq. and will be referred to as FIFRA 1972. Section 4 of FEPCA sets forth the effective dates of FIFRA 1972 and contains certain saving clauses.

FIFRA 1972 was amended on November 28, 1975, P.L. 94-140, but these amendments do not effect the case now under consideration.

2/ This section provides in pertinent part:

"Every economic poison which is ... shipped or delivered for shipment from any State ... to any other State ... shall be registered ..."

section 3a of FIFRA 1947, 7 U.S.C. 135a.[3/] The complaint was issued on December 9, 1975 and alleges that the shipment, from St. Louis, Missouri, to Sawyer, Kansas, was made on June 25, 1975. A penalty of $3,520 was proposed to be assessed.

The respondent filed an answer in which it denied every allegation in the complaint.[4/] The answer denied that the product is a pesticide, herbicide or economic poison.[5/] The answer also raised certain constitutional questions under the Due Process clauses of the Fifth and Fourteenth Amendments. A hearing was requested.

Pursuant to section 168.36(e) of the applicable Rules of Practice (Rules) (40 CFR, Part 168) I initiated a prehearing exchange through correspondence with the parties for the purpose of disposing of an issue of law that I considered was appropriate for disposition before the case proceeded. Both parties filed memoranda of law and I issued a ruling on this matter on June 9, 1976 which is part of the record. Thereafter, I

3/ This section provides in pertinent part:
"It shall be unlawful for any person ... to ship or deliver for shipment from any State ... to any other State ... (1) Any economic poison which is not registered pursuant to the provisions of section 135b of this title ..."

4/ The answer also raised questions relating to the statutory references in the complaint since complainant along with the complaint had furnished only a copy of FIFRA 1972 and certain references in the complaint were to FIFRA 1947. Subsequently, complainant furnished to respondent a copy of FIFRA 1947.

5/ In FIFRA 1972 the term "pesticide" replaced "economic poison" of FIFRA 1947, but the coverage is the same. H.R. Rep. No. 92-511, 92d Cong., 1st Sess., p. 13. The terms "pesticide" and "economic poison" will be used herein interchangeably.

again corresponded with the parties pursuant to section 168.36(e). In the prehearing exchange the respondent admitted that the product in question was not registered and that it was shipped in interstate commerce as alleged in the complaint.

The case was set for hearing for August 25, 1976. On August 18, 1976 the respondent filed an action in the United States District Court of the Eastern District of Missouri for declaratory judgment and injunctive relief. On November 16, 1976 the Court dismissed the action with prejudice. The case was rescheduled for hearing and a hearing was held in St. Louis, Missouri, on February 8, 1977. The complainant was represented by Daniel J. Shiel, Esq., an attorney in the Enforcement Division of EPA, Region VII. The respondent was represented by Pat L. Simons, Esq., and Gerard F. Hempstead, Esq., both of St. Louis, Missouri. Following the hearing the parties submitted proposed findings of fact, conclusions of law, proposed orders, and briefs in support thereof. The parties also filed reply briefs. These have been duly considered.

II

Findings of Fact

1. The respondent, Continental Research Corporation, has a place of business in St. Louis, Missouri and is engaged in the business of distributing chemicals and maintenance products. The company does not manufacture or formulate pesticides.

2. One of the products the respondent distributes is basically a blend of caustics which it purchases from the manufacturer and which is packaged for the respondent under the name MUNICI-PAL Sewer and Drain Opener.

3. On July 26, 1975 respondent made a shipment of MUNICI-PAL from St. Louis, Missouri, to Sawyer, Kansas. The product was not registered with the Environmental Protection Agency as required by the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 135b.

4. The label of the product included the following:

MUNICI-PAL

FAST ACTING

SEWER AND DRAIN

OPENER

A ready-to-use sewer and drain pipe cleaner that absorbs and dissolves harmful obstructions caused by grease, hair, paper, roots, matches, rags and other organic matter.

. . .

To be used for removing both complete and partial blocks from service lines; such as rags, tree roots, grease and other types of impediments.

5. The product shipped was an economic poison within the meaning of section 2(a) of the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 135(a).

6. The act of shipping this unregistered economic poison was a violation of section 3a(a)(1) of FIFRA, 7 U.S.C. 135a(a)(1). By reason of such violation the respondent is subject to the assessment of a civil penalty under section 14(a)(1) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended, 7 U.S.C. 136 l(a)(1).

7. Considering the size of respondent's business, the effect on respondent's ability to continue in business, and the gravity of the violation, it is determined that a civil penalty in the amount of $2,000 is appropriate.

III

Discussion and Conclusions

The controverted issues presented in this case may be stated as follows:

1. Is the product in question an economic poison within the meaning of FIFRA 1947?

2. May a civil penalty be assessed against a party under section 14(a) of FIFRA 1972 (7 U.S.C. 136 l) for shipping an unregistered economic poison in violation of FIFRA 1947, 7 U.S.C. 135a?

3. It is a fact that the Administrator failed to promulgate regulations providing for the registration of pesticides within two years after the enactment of the Federal Environmental Pesticide Control Act of 1972 (FEPCA) on October 21, 1972, as set forth in section 4(c)(1) of said Act. Is this failure of the Administrator a bar to prosecution of the present case?

4. Is the statute defective by reason of the fact that it does not specify who must register the product?

5. If a penalty is imposable, what is the appropriate amount of the penalty?

The parties have not set forth the controverted issues in the case as I have enumerated them but I believe the issues as I have stated them cover the points which are in issue.

With respect to points 2, 3, and 4, the respondent attacks the proceeding on constitutional grounds claiming that the assessment of a civil penalty is void and in violation of respondent's right to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the Constitution.

I do not decide this case on the constitutionality of the legislation. It is well settled by numerous court decisions that an administrative agency has neither the power nor competence to pass on the constitutionality of statues. Montana Chapter of Association of Civilian Technicians, Inc. v. Young, 514 F.2d 1165, 1167 (9th Cir. 1975); Downer v. Warner, 481 F.2d 642 (9th Cir. 1973); Finnerty v. Cowen, 508 F.2d 979, 982 (2d Cir. 1974); Panitz v. District of Columbia, 112 F.2d 39 (D.C. Cir. 1940). Only the courts have authority to declare legislation unconstitutional and thereby take action which runs counter to the expressed will of the legislative body. See Davis, Administrative Law Treatise (1958) section 20.04.

I avoid passing on the constitutionality of the legislation and I decide these pertinent issues on the basis of statutory construction and application.

1. The Product in Question is a Pesticide

The respondent denies that the product is an economic poison or herbicide. Since it is charged with shipping an unregistered economic poison in violation of FIFRA 1947, we should look to the statute and regulations in effect at the time of the shipment for a definition of those terms.

Section 2a of FIFRA 1947 [7 U.S.C. 135(a)] defined "economic poison" in pertinent part to mean "any substance or mixture of substances intended for preventing, destroying, repelling or mitigating ... weeds or other forms of plant or animal life ..."[6/] Section 2f[7 U.S.C. 135(f)] defines "herbicide" to mean "any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any weed". The term weed is defined in section 2 l[7 U.S.C. 135(l)] to mean "any plant which grows where not wanted".[7/]

The regulations in effect at the time of the violation appeared in 40 CFR, Part 162, and were published in the Federal Register on November 25, 1971, 36 FR 22496. Section 162.2(d), in pertinent part, defined "economic poison" to include "all preparations intended for use as ...

6/ For definition of pesticide under FIFRA 1972, see 7 U.S.C. 136(t).
7/ FIFRA 1972 contains the same definition for weed, 7 U.S.C. 136(cc).

herbicides". Section 162.2(f) defined "herbicide" in pertinent part, as follows: 8/

> "Herbicide" means any substance or mixture of substances intended for preventing, destroying, repelling or mitigating any weed, including ... any plant parts growing where not wanted.

Section 162.25 of these regulations declared pests to include "Roots and other plant parts growing where not wanted". Section 162.101(b)(1), under the heading of "Status of products as economic poisons", declared:

> (i) A product will be considered to be an economic poison if:
>
> (a) the label or labeling of the product bears claims for use as an economic poison;

The label of the product in question represented it "to be used for removing both complete and partial blocks from service lines; such as rags, tree roots, grease and other types of impediments". Also on the label the product was represented as "a ready-to-use sewer and drain pipe cleaner that absorbs and dissolves harmful obstructions caused by ... roots ... and other organic matter".

Applying the definition of economic poison (which included herbicides) to the product in question it it readily apparent that the product is an economic poison.

It has long been held and it is well settled that the intended use of a product may be determined by the representations for use of the product.

8/ The regulations under FIFRA 1972 (which superseded the regulations under FIFRA 1947) at 40 CFR 162.3(ff)(9)(iv) includes in the definition of herbicides, "Root control herbicides intended to prevent the growth of, or kill roots in certain sites, such as sewer lines and drainage tiles".

In United States v. 681 Cases ... Kitchen Klenzer, 63 F. Supp. 286 (E.D. Mo. 1945) a case under the Insecticide Act of 1910 (predecessor of FIFRA) the term "fungicide" was defined to include "any substance intended to be used for preventing, destroying, repelling or mitigating any and all fungi ..." The court held that Congress "employed the words 'intended to be used' in reference to objective intent as evidenced by what the product holds itself out to be." The court continued:

> Any other construction of this statute would lead to the absurd result that a manufacturer could actually label his product a fungicide and yet avoid the application of the Act by reservations and his own knowledge of its inefficacy.

This construction has consistently been applied in cases arising under the Federal Food, Drug, and Cosmetic Act where "intended" or "intended for use" is used in defining "drug". In United States v. Article Labeled in Part ... Sudden Change, 409 F.2d 734, 739 (2d Cir. 1969) the court cited numerous cases and said:

> It is well settled that the intended use of a product may be determined from its label, accompanying labeling, promotional material, advertising and any other relevant source. (Cases omitted.)

The Sudden Change case is particularly pertinent as applied to this case. The issue there was whether the article was a cosmetic or a drug. If a drug, the label was required to bear the name of each active ingredient which the label of the product did not bear. The distributor of the product there argued that the claims on the label brought the product within the definition of cosmetic and not within the definition of drug. The labeling of the product made ten different claims

(p. 737). The court held (p. 742) that because of two particular claims, the product was deemed to be a drug. The court further held that if complainant ceased to employ these two promotional claims and made no others which brought the product within the definition of drug, the product would not be deemed a drug.

This holding in the Sudden Change case answers the respondent's argument in this case that the appearance of the words "roots" or "tree roots" on the label does not transform the article into a pesticide. The fact is that the representations on the label that the product would be effective in dissolving and removing roots or tree roots is what brings the product within the definition of "economic poison". I might add, as suggested in the Sudden Change case, that removal of these pesticidal claims would remove the product from the definition of economic poison or pesticide. It appears that the respondent has accomplished this in the revised label of the product. See Resp. Ex. 1.

The respondent argues that the intended use of this product was as a drain opener and it is, therefore, not an economic poison. The Supreme Court has said that "statutory definitions of terms used therein prevail over colloquial meanings". Western Union Telegraph v. Lenroot, 323 U.S. 490, 502 (1945).

2. A Civil Penalty May Be Assessed Against Respondent Under Section 14(a) of FIFRA 1972 (7 U.S.C. 136 l) For Shipping an Unregistered Economic Poison in Violation of FIFRA 1947, 7 U.S.C. 135a.

There was no provision in FIFRA 1947 for the assessment of civil penalties for violations of the Act. The civil penalty assessment

provision was an amendment to FIFRA 1947 that became effective under FIFRA 1972.

Section 4 of FEPCA sets forth the effective dates of the provisions of the Act which were enacted on October 21, 1972. The pertinent portions of the section are quoted in the ruling I issued in this case on June 19, 1976 (pp. 3, 4). In said ruling I referred to the case of Southern Mill Creek Products, Inc. I issued a ruling in that case on March 6, 1974. This ruling is published in full in an official publication of the Environmental Protection Agency entitled Notices of Judgment Under the Federal Insecticide, Fungicide, and Rodenticide Act,[9/] issue of June 1975, Case No. 1479. A copy of the ruling is attached hereto.

I stated in my ruling on June 9, 1976, as follows:

> In the case of Southern Mill Creek Products, Inc., I held that in a civil penalty prosecution under section 14(a) of FIFRA 1972 [7 U.S.C. 136 l(a)] it was proper to charge a violation of section 3(a)(1) of FIFRA 1947 [7 U.S.C. 135a(a)(1)] for interstate shipments in April and May 1973 of pesticides that were not registered under section 4 of FIFRA [7 U.S.C. 135(b)]. The crux of the holding was that under section 4(a) of FEPCA, the provision of section 14(a) of FIFRA 1972 became effective at the close of the date of enactment (October 21, 1972) and that under section 4(b) of FEPCA the provision of FIFRA 1947, was in effect at the time of said interstate shipments. In other words, it was held that it was proper to seek a civil penalty under FIFRA 1972 for a nonregistration violation of FIFRA 1947 under provisions that were continued in effect by virtue of the saving clause in section 4(b) of FEPCA.

My reasons for the ruling in the Southern Mill case are set forth in full in sections designated I, II, and III, and are applicable to the case now before us. I confirm my ruling in the Southern Mill case and

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9/ Notices of Judgment are issued pursuant to section 16(d) of FIFRA 1972 [7 U.S.C. 136n(d)] which states, "The Administrator shall, by publication in such manner as he may prescribe, give notice of all judgments entered in actions instituted under authority of this Act".

and incorporate herein by reference the reasons for the ruling.

3. The Failure of the Administrator to Promulgate Regulations Providing for the Registration of Pesticides Within Two Years After the Enactment of FEPCA is Not a Bar to the Prosecution of the Present Case.

Section 4(c)(1) of FEPCA provides as follows:

> Two years after the enactment of this Act the Administrator shall have promulgated regulations providing for the registration and classification of pesticides under the provisions of this Act and thereafter shall register all new applications under such provisions.

I stated in my ruling of June 9, 1976 as follows:

> The Administrator did not promulgate regulations providing for the registration of pesticides under FIFRA 1972 within two years after the enactment of FEPCA [see section 4(c)(1) above]. Proposed regulations were published on October 16, 1974, 39 F.R. 36973, and final regulations were published on July 3, 1975, 40 F.R. 28267, effective August 4, 1975.10/
>
> The respondent is charged with having violated section 3a(1) of FIFRA 1947 [7 U.S.C. 135a(a)(1)] by making an interstate shipment on June 26, 1975, of a pesticide that was not registered under section 4 of FIFRA 1947 (7 U.S.C. 135b). The question, therefore, is whether the failure of the Administrator to have promulgated registration regulations within the two year period is fatal to the prosecution in this case. In my view, it is not.

I held, in effect, that the two year period set forth by Congress for the promulgation of regulations providing for the registration of pesticides was directory and not mandatory and that the saving clause in section 4(b) of FEPCA should be broadly construed to effectuate the legislative intent to provide a continuous program for registration of pesticides.

10/ Under section 4(d) of FEPCA the regulations became enforceable on October 5, 1975, 60 days after the Administrator published effective regulations.

My reasons for holding as I did are fully set forth in my ruling of June 9, 1976 which is part of the record in this case. I hereby confirm that ruling.

4. The Statute Is Not Defective By Reason Of The Fact That It Does Not Specify Who Must Register The Product.

The respondent argues "that there is nothing in the statute which specifically requires the distributor to register this product"; "that it is impossible to determine from FIFRA's statutory language pertaining to registration exactly who must register"; and "the language is so vague that one must guess at its meaning and at its application with respect to him".

It is apparent from the arguments that the respondent misconstrues the charge in this case. The respondent is not charged with not registering this product. The respondent is charged under 7 U.S.C. 135a, with shipping a product that was not registered. The unlawful act was not the non-registration but rather the shipping of a non-registered product. The respondent did not necessarily have the obligation to register but it did have the obligation to see that the product it shipped was registered. The statute is clear in placing this obligation on it.

The holding of the court in United States v. Parfait Power Puff Co., 163 F.2d 1008 (7th Cir. 1947), cert. denied 332 U.S. 851, is applicable to this case. That was a case under the Federal Food, Drug, and Cosmetic Act where the defendant was charged with introducing into interstate commerce

a product that was in violation of the Act. The defendant disclaimed responsibility and sought to place it on the manufacturer of the product. In rejecting this argument, the court said, p. 1010:

> The person who brings goods into commerce, by whatever means or implements, is bound to see that the commodity thus put in commerce, is not beyond the pale of the legislative act.

5. Amount of Penalty

Having determined that there was a violation and that a civil penalty is imposable, I reach the question as to the amount of the penalty.

In determining the amount of penalty that should be imposed for a violation, section 14(a)(3) of FIFRA, as amended, 7 U.S.C. 136 l(a)(3) sets forth the following factors that shall be considered: size of respondent's business; effect on respondent's ability to continue in business; and gravity of the violation. Section 168.60(b)(2) of the Rules provides that there shall also be considered respondent's history of compliance with the Act and evidence of good faith or lack thereof.

The proposed civil penalty was derived from the Guidelines for Assessment of Civil Penalties under section 14(a) of FIFRA, 39 F.R. 27711, et seq., July 31, 1974.[11/] As to size of respondent's business, it had gross sales in excess of one million dollars in the past fiscal year. The respondent urges that imposition of a civil penalty in any amount would be improper and that if any penalty should be imposed, the amount proposed in the complaint ($3,520) is excessive. The respondent makes no claim that the imposition of the proposed civil penalty will effect is ability to continue in business.

11/ Section 168.45(b) of the Rules provides that the Administrative Law Judge may, at his discretion, increase or decrease the assessed penalty from the amount proposed in the complaint.

I then reach the point of determining the appropriate penalty based on "gravity of the violation". It has generally been accepted by Administrative Law Judges that "gravity of the violation" should be considered from two aspects - gravity of harm and gravity of misconduct.

As to gravity of harm, the case development technician of the regional office of EPA who calculated the proposed penalty and the chief of the enforcement section of the pesticide branch of the region, both testified that this product had slight potential for injury.[12/] On this evidence, I conclude that the gravity of harm has a low degree.

Gravity of misconduct poses a more difficult question. One of the important elements on this aspect is whether respondent had knowledge of the statutory or regulatory requirements. The testimony from the president of the company was that he knew that a pesticide had to be registered before it was marketed. The respondent has had products registered under its name, some within the preceding year.[13/]

Another element affecting gravity of misconduct is the intent of respondent. Although it is not necessary to show intent to establish a violation in a civil penalty assessment case [cf. United States v. Dotterweich, 320 U.S. 277 (1943); United States v. Parfait Power Puff, supra] it is an element that is properly considered in evaluating gravity of misconduct.

12/ Presumably, when used as directed on the label.
13/ The evidence is not clear as to whether respondent is presently distributing products which are registered under its name.

The respondent did not ship this unregistered product with knowledge that it was a pesticide and should have been registered. The evidence shows that in all instances where the respondent had products registered under its name it relied on the manufacturer of the product to obtain the registration and the respondent was not involved in the registration process. In this instance the respondent relied on its manufacturing supplier to obtain registration if that was required. The promotional material furnished by the supplier represented that the product would be effective in dissolving and removing roots, along with other organic matter. Notwithstanding this representation, the technical director of the supplier, who was also involved in labeling and registering products for his company, did not recognize that this product was a pesticide. The supplier did not register the product and did not inform the respondent that it should be registered.

As soon as respondent was informed by EPA that the product was a pesticide it revised the label by removing the pesticidal claims relating to roots and tree roots.

The complainant asserts that bad faith on behalf of respondent is demonstrated by the fact that it requested the attendance of two employees of EPA as witnesses at the hearing and did not call either of them to testify. I consider this incident as completely irrelevant as touching on the question of good faith relating to the violation in question.

There was admitted into evidence over objection of respondent, Notice of Judgment No. 1593, Issue of September 1975. This shows that

in a civil action respondent had been charged under provisions of FIFRA 1947 and FIFRA 1972 with having made shipments in February and March 1974 of two pesticides. The charges included nonregistration, adulteration and misbranding. In that case the respondent signed a consent agreement and the final order assessed a civil penalty of $6,000.

This history of prior violations was not received for the purpose of showing that the respondent had committed the violation in question or to establish any elements of the violation. The document was admitted pursuant to section 168.45(b) of the Rules [and its reference to 168.60(b)] which provides that in evaluating the appropriateness of the penalty the Administrative Law Judge shall consider respondent's history of compliance with the Act or its predecessor statute. It was received into evidence solely for this purpose.

There were mitigating factors before me which, apparently, were not before the regional office when the proposed penalty of $3,520 was assessed. I consider of significance the fact that respondent relied on its supplier with regard to the registration process and respondent's mistaken understanding that the product was not a pesticide. These factors do not excuse the violation but they are appropriate for consideration in determining the amount of the penalty.

Having considered the entire record and based on the Findings of Fact, and Discussion and Conclusions herein, I determine that a penalty of $2,000 is appropriate and I propose that the following order be issued.

Final Order[14/]

Pursuant to section 14(a)(1) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended, 7 U.S.C. 136 l(a)(1) a civil penalty of $2,000 is hereby assessed against respondent, Continental Research Corporation, for the violation of section 3a(1) of the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 135a(a)(1) for shipping an unregistered economic poison on June 26, 1975.

Bernard D. Levinson
Administrative Law Judge

April 26, 1977

14/ Unless appeal is taken by the filing of exceptions pursuant to section 168.51 of the Rules of Practice, or the Regional Administrator elects to review this decision on his own motion, the order shall become the final order of the Regional Administrator. [See section 168.40(c).]

N. J., I.F.R. 1451–1500 Issued June 1975

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
OFFICE OF ENFORCEMENT
OFFICE OF GENERAL ENFORCEMENT
PESTICIDES ENFORCEMENT DIVISION

NOTICES OF JUDGMENT UNDER THE FEDERAL INSECTICIDE, FUNGICIDE, AND RODENTICIDE ACT

Nos. 1451–1500

Notices of Judgment report cases involving seizure actions taken against products alleged to be in violation, and criminal and civil actions taken against firms or individuals charged to be responsible for violations. The following Notices of Judgment are approved for publication as provided in Section 16(d) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended (7 U.S.C. 136n).

Richard H. Johnson
Acting Assistant Administrator
for Enforcement

Washington, D.C.

1479. In Re: Southern Mill Creek Products, Inc., EPA Region IV, July 22, 1974, (I.F.&R. No. IV-13C, I.D. Nos. 88486 and 88575.)

This was a civil action charging the respondent with violating the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 135a(a)(1) and 135b. The action pertained to shipments made on April 9 and May 16, 1973, from Tampa, Florida, to Tuscaloosa and Gadsden, Alabama. The pesticides involved were **SMCP MALATHION ULV CONCENTRATE** and **MALATHION ULV CONCENTRATE;** the respondent requested a hearing in which he raised two defenses to the charges set forth in the complaint. After the ruling by the Administrative Law Judge that the respondent's defenses were not applicable to the charges in the complaint, the respondent signed a Consent Agreement. The Final Order assessed a civil penalty of $2,500.00.

The following is Administrative Law Judge Bernard D. Levinson's ruling on the defenses.

Ruling On First And Second Defenses Of Respondent's Answers

On November 2, 1973, two complaints [1] were issued against the Respondent proposing to assess civil panalties pursuant to section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended (hereinafter FIFRA 1972), Public Law 92–516, October 21, 1972 (7 U.S.C. 136 l(a)) for alleged violations of section 12 of the Act. FIFRA 1972 amended the Federal Insecticide, Fungicide, and Rodenticide Act of 1947 (hereinafter FIFRA 1947).

Interim Rule of Practice governing proceedings conducted in the assessment of civil penalties under FIFRA were promulgated on September 14, 1973, and published in the Federal Register on September 20, 1973, 28 F.R. 26360 (hereinafter the Rules), which added a new Part 168 to Title 40, Code of Federal Regulations. By

order dated December 4, 1973, the two proceedings were consolidated by the Administrative Law Judge pursuant to section 168.22 of the Rules.

Each complaint alleges that respondent violated section 12 of the Act by delivering for shipment from Tampa, Florida, to a city in another state, [2] a pesticide that was "not registered under section 4 of the Act. [3] (7 U.S.C. 135a(a)(1), 135b)."

The Respondent filed timely answers and requests for hearing. Each answer raises the same two legal defenses which the Administrative Law Judge considered should be disposed of before proceeding further with the case. [4] At the request of the Administrative Law Judge, the parties have filed memoranda of law in support of their positions.

The first defense alleges that the complaint fails to state a claim for civil penalty against Respondent pursuant to section 4 of FIFRA, as amended, [5] and 40 CFR 168.31(a) in that it fails to set forth a concise statement of the factual basis for the alleged violation and refers to a statutory section not relevant to the proceeding. The second defense alleges that the Agency is without jurisdiction to impose a civil penalty on Respondent, as (1) the alleged violation occurred before the publication of effective regulations in the Federal Register and (2) 7 U.S.C. 136 l by its terms is not applicable to a violation of 7 U.S.C. 135a(a)(1) and 135b.

I.

Effectiveness Of The Registration Requirement Under FIFRA 1947

The first Federal regulation of pesticides was under the Federal Insecticide Act of 1910. Under this law, there was no requirement for registration. This Act was repealed in 1947 and replaced with the Federal Insecticide, Fungicide, and Rodenticide Act, FIFRA 1947. This Act, for the first time, required registration of pesticides (which in the Act were designed as "economic poisons"). 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. 813, 80th Cong., 1st Sess., 1947, pp. 2–3.

In 1959 and 1964, there were amendments to the 1947 Act, which are not here material. The 1972 Act resulted in extensive amendments to the 1947 Act. It is to be observed that the 1972 enactment amended the 1947 law and did not repeal it.

The legislative mechanism used in 1972 to amend FIFRA 1947 was designated Federal Environmental Pesticide Control Act of 1972 (hereinafter FEPCA). The 1972 amendments retained the basic requirements and purposes of registration but changed some of the procedures relating thereto and also provided for classification of pesticides for general and/or restricted use.

Section 4 of FEPCA, entitled "Effective Dates of Provisions of Act," [6] provides in pertinent part as follows:

> (a) Except as other wise provided in the Federal Insecticide, Fungicide, and Rodenticide Act, as amended by this Act, and as otherwise provided by this section, the amendments made by this Act shall take effect at the close of the date of the enactment of this Act, provided if regulations are necessary for the implementation of any provision that becomes effective on the date of enactment, such regulations shall be promulgated and shall become effective within 90 days from the date of enactment of this Act.

(b) The provisions of the Federal Insecticide, Fungicide, and Rodenticide Act and the regulations thereunder as such existed prior to the enactment of this Act shall remain in effect until superseded by the amendments made by this Act and regulations thereunder: Provided, That all provisions made by these amendments and all regulations thereunder shall be effective within four years after the enactment of this Act.

(c)(1) Two years after the enactment of this Act the Administrator shall have promulgated regulations providing for the registration and classification of pesticides under the provisions of this Act and thereafter shall register all new applications under such provisions.

(c)(2) After two years but within four years after the enactment of this Act the Administrator shall register and reclassify pesticides registered under the provisions of the Federal Insecticide, Fungicide, and Rodenticide Act prior to the effective date of the regulations promulgated under subsection(c)(1).

(d) No person shall be subject to any criminal or civil penalty imposed by the Federal Insecticide, Fungicide, and Rodenticide Act, as amended by this Act, for any act (or failure to act) occurring before the expiration of 60 days after the Administrator has published effective regulations in the Federal Register and taken such other action as may be necessary to permit compliance with the provisions under which the penalty is to be imposed.

(e) For purposes of determining any criminal or civil penalty or liability to any third person in respect of any act or omission occurring before the expiration of the periods referred to in this section, the Federal Insecticide. Fungicide, and Rodenticide Act shall be treated as continuing in effect as if this Act had not been enacted.

Section 3(a)(1) of FIFRA 1947, 7 U.S.C. 135a(a)(1), among other things, prohibited the interstate shipment of any economic poison

that is not registered pursuant to section 4, 7 U.S.C. 135(b). Section 4 of FIFRA 1947, 7 U.S.C. 135b, required, among other things, that every economic poison which is shipped or delivered for shipment in interstate commerce be registered. Section 12(a)(1)(A) of FIFRA 1972, 7 U.S.C. 136j(a)(1)(A) and section 3 of FIFRA 1972, 7 U.S.C. 136a(a), respectively, are comparable to the foregoing sections of FIFRA 1947. Section 12(a)(1)(A) of FIFRA 1972 prohibits the shipment of an unregistered pesticide and section 3 requires the regulation of pesticides in commerce.

It is a bisic principle of statutory construction that the various provisions of a statute must be construed together. We look at sections 4(b) and 4(c)(1) of FEPCA. Section 4(c)(1) grants the Administrator of EPA two years within which to promulgate regulations providing for the registration of pesticides under the provisions of this Act. Section 4(b) states that the provision of FIFRA 1947 and the regulations thereunder as such existed prior to the enactment of FIFRA 1972, shall remain in effect until superseded by the amendments made by this Act and regulations thereunder. The regulations under FIFRA 1947 relating to registration of pesticides appear in 40 CFR 162.10. Since Congress granted the Administrator two years within which to promulgate regulations providing for registration of pesticides and further provided that the provisions of FIFRA 1947 and regulations thereunder, shall remain in effect until superseded by the new amendments and regulations thereunder, it is clear that Congress intended that the registration provisions of FIFRA 1947 and regulations thereunder shall remain in effect until new regulations under FIFRA 1972 are promulgated and that the new regulations must be promulgated within two years after October 21, 1972.

The two years allowed for promulgating of new regulations providing for registration of pesticides has not expired and new regulations have not been promulgated. Thus, the requirement of registration under FIFRA 1947 and regulations thereunder are still in effect and will remain so until regulations for registration are promulgated under FIFRA 1972.

This conclusion is fortified by section 4(c)(2) of FEPCA which provides that after two years (the time limit for promulgating new registration regulations) but within four years, the Administrator shall register and reclassify pesticides which were registered under the provisions of FIFRA 1947 "prior to the effective date of the regulations promulgated under subsection (c)(1)." It is apparent that Congress intended that the registration requirement of FIFRA 1947 and regulations thereunder should remain in effect until superseded within two years by new regulations under FIFRA 1972 and that registrations under FIFRA 1947 should remain in effect until registered under the new regulations, which must be accomplished within four years.[7] We cannot impute to Congress the intent to leave EPA without any registration requirements or regulations relating thereto for a period of time up to two years and the possibility of having unregistered pesticides marketed for four years.

II.

Effectiveness of Section 14(a) of FIFRA 1972, 7 U.S.C. 136 l

Section 14(a) of FIFRA 1972, provides for the imposition of civil penalties for violations of the Act.

Section 4(a) of FEPCA, states in substance that the amendments therein shall take effect on enactment except as otherwise provided or "if regulations are necessary for the implementation of any of provisions that becomes effective on date of enactment," such regulations shall be promulgated and become effective within 90 days from date of enactment.

An analysis of section 14(a) does not disclose that any regulations are necessary for its implementation. The substance of 14(a)(1), with which we are here concerned, simply states that any person in the categories listed who violates any provision of this Act shall be assessed a civil penalty by the Administrator of not more than $5,000 for each offense. We have but to look to the prohibited acts to ascertain if the person charged performed an unlawful act. As above concluded, under Section I herein, the requirements and regulations under FIFRA 1947 relating to registration of pesticides,

remained in effect when FIFRA 1972 was enacted and were in effect when the alleged violation occurred. Further, there is nothing in section 4 of FEPCA that requires new regulations for the enforcement of nonregistration violation.

As above indicated, the basic requirements for registration of pesticides shipped in interstate commerce (with which we are here concerned), are the same under FIFRA 1947 and FIFRA 1972. Whether we look to FIFRA 1947 or FIFRA 1972, the act of shipping an unregistered pesticide in interstate commerce was and is a violation.

Section 4(d) of FEPCA does not preclude the effective operation of section 14(a) of FIFRA 1972 on the date of enactment. The purpose of section 4(d) is to prevent the enforcement of new regulatory requirements without notice and without the Administrator having taken such other action as may be necessary to permit compliance with the provisions under which the penalty is to be imposed.

The Conference Report on the 1972 amendments, S. Rep. No. 2–1540, p. 33, in explaining section 4(d) states, in part, as follows:

> It makes penalties effective only after the Administrator has taken such action as may be necessary to permit compliance (as well as having issued regulations).

The Report gives several illustrations that are new requirements under FIFRA 1972, e.g., failure to have a plant registration number on a label and failure to comply with provisions relating to extension of the Act to intrastate commerce. Certainly, if new regulations were required to implement provisions of FIFRA 1972, such regulations would have to be published in the Federal Register and no person would be subject to criminal or civil penalty for a violation "occurring before the expiration of 60 days after the Administrator has published effective regulations . . . and taken such other action as may be necessary to permit compliance . . . ."

As above noted, regulations regarding registration under FIFRA 1947 had been issued and were in effect when FIFRA 1972 was

enacted. These appeared in 40 CFR 162.10. The regulations and amendments were published in the Federal Register, 36 F.R. 24802.

On January 9, 1973, an "Implementation Plan, Pesticide Control Act", issued by the Administrator, EPA, was published in the Federal Register, 38 F.R. 1142, et seq. This set forth the views of the Agency regarding the implementation of FIFRA 1972. At p. 1443, it is stated:

> Until such time as regulations are issued to implement the registration procedures of the new Act, all provisions and pertinent rules and regulations governing registrations under the 1947 FIFRA will remain in full force and effect.

This could be considered as a republication of the existing regulations relating to registration. At least, it put all parties on notice that the pertinent regulations under FIFRA 1947 were in force and effect and that compliance with them was required. The Administrator had not only published effective regulations in the Federal Register, had "taken such other action as may be necessary to permit mpliance with the provisions under which the penalty is to imposed."

We have not overlooked the statements in the legislative reports relating to section 4 of FEPCA.

A House proposal as to the contents of section 4(d) provided as follows (see H.R. 10729, Sept. 16, 1971, and as reported to House Sept. 25, 1971, Union Calendar 235):

> (Section 4)(d) No person shall be subject to any criminal or civil penalty imposed by the Federal Insecticide, Fungicide, and Rodenticide Act, as amended by this Act, for any act (or failure to act) occurring before the expiration of 60 days (after final regulations (relating to such penalty) under the Federal Insecticide, Fungicide, and Rodenticide Act, as amended, are published in the Federal Register.) (Brackets added.)

This amendment could be construed as requiring procedural regulations relating to penalties, both criminal and civil. The Senate, apparently realizing the undesirability of including a requirement for procedural regulations relating to penalties, struck the final phrase "final regulations (relating to such penalty) under the Federal Insecticide, Fungicide, and Rodenticide Act, as amended, are published in the Federal Register" and substituted the language in the bill which was enacted, to wit, "after the Administrator has published effective regulations in the Federal Register and taken such other action as may be necessary to permit compliance with the provisions under which the penalty is to be imposed."

In commenting on the House proposal, which required reguulations relating to penalties, the House Committee stated (H.R. Rep. No. 92–511):

> In addition to the foregoing, the Administrator shall publish in the Federal Register regulations relating to criminal and civil penalty, and no person shall be subject to such a penalty under the amendments of this Act until 60 days after publication of the final regulations.

This comment by the House Committee, while it may have been appropriate to a bill that required penalty regulations, is inappropriate to the bill as enacted which requires no penalty regulations. Although the Senate amendment eliminated the requirement of penalty regulations, in the Senate Committee Report, S. Rep. No. 92–838, it adopted the same comment as in the House report and added the phrase "and taken such other action as may be necessary to permit compliance."

It is common practice for a Committee of one of the Houses of Congress in its report on a particular bill to adopt the language from the Committee report of the other House. It must be concluded that it was an oversight on the part of the Senate Committee to adopt the language of the House report regarding the requirement of penalty regulations when the Senate bill had eliminated such requirement.

On further comment on this subject. Section 4(e) of FEPCA states, in pertinent part:

> For purposes of determining any . . . civil penalty . . . in respect to any act or omission occurring before the expiration of the periods referred to in this section, the Federal Insecticide, Fungicide, and Rodenticide Act shall be treated as continuing in effect as if this Act had not been enacted."

The period we are here concerned with is the two-year period after October 21, 1972, within which the Administrator is required to issue regulations providing for registration (section 4(c)(1)). There were no civil penalty provisions in FIFRA prior to the 1972 amendments. Since the registration requirements and regulations of FIFRA 1947 are effective until superseded by the amendments of 1972 and regulations thereunder, it is apparent from section 4(e) that Congress intended the immediate avialability of civil penalty enforcement for violations of the registration requirements under FIFRA 1947.

III.

The Agency Construction of Section 14(a) of FIFRA 1972

The implementaiton statement above referred to, published in the Federal Register, on January 9, 1973, considered section 4 of FEPCA, and particularly section 4(d). The statement contains the following at 38 F.R. 1143:

> It is the Agency's view that, with certain exceptions section 4 makes the 1972 amendments effective as of the date of their enactment. These exceptions concern primarily the registration, classification, and the certification of applicator sections. In addition, those sections where regulations are "necessary" do not become effective until 60 days after final regulations are promulgated. This provision in the Agency's view, refers only to those sections of the amendments where the

> Congress has expressly directed the Agency to prepare regulations, e.g., the provisions for licensing pesticide producing establishments. (Emphasis added.)

With regard to section 14, the statement provided (38 F.R. at 1144):

> Section 14(a) of Public Law 92–516 became effective on October 22, 1972. This provision will be implemented when policy and procedures are developed. Section 14(b) of Public Law 92–516 became effective on October 22, 1972. These increased criminal penalties apply to all violations occurring on or after October 22, 1972, whether unlawful acts are cited under the FIFRA of 1947 or under Public Law 92–516. (Emphasis added.)

The Agency construed section 14(a), as well as 14(b) relating to criminal penalties, to be immediately effective. Obviously, it became Agency policy to bring actions to enforce the civil penalty provision. [9] It is apparent that procedures were developed for prosecuting such cases. [10] (See pages 2 and 3 of Complaint). This Respondent (and presumably others) were informed as to the basic procedures of requesting a hearing, filing answer, etc. and were also informed that a hearing, if requested, would be conducted in accordance with the provisions of the Administrative Procedure Act. (5 U.S.C. 552, et seq.).

It is a well established principle of statutory construction that contemporaneous construction of a statute by the Agency that is charged with its administration, is entitled to great weight. The Government brief cites numerous judicial precedents in support of this proposition. It is sufficient to quote from one, particularly pertinent. In Udall v. Tallman, 380 U.S. 1 (1965), the Supreme Court said at p. 16:

> When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. 'To sustain the Commission's application of this statutory term, we need not find that its con-

struction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceeding.' (cases cited). 'Particularly, is this respect due when the administrative practice at stake involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts working efficiently and smoothly while they are yet untired and new.' (case cited).

We conclude that the Agency construction of FIFRA 1972: (1) that section 14(a) was immediately effective and (2) that the registration requirements and regulations under FIFRA 1947 are effective until superseded by new regulations (within two years after October 21, 1972), are reasonable, if not required.

IV.

Whether the Rules of Practice Result in Retroactive Application of Section 14(a)

As above concluded, section 14(a) of FIFRA 1972, the civil penalty provision was effective on enactment and substantive regulations were not necessary to implement its enforcement. Since enforcement of the civil penalty provision was on a Regional basis, it was desirable, if not necessary, that there be uniform Rules of Practice for implementing enforcement.

The Rules of Practice that were published in the Federal Register do not amend or modify the substantive provisions of section 14(a). The Rules, as stated therein, "govern all proceedings conducted in the assessment of a civil penalty, as provided in section 14(a)." It is further stated that "the Rules provide a procedure for assessment of civil penalties" and "establish a mechanism" for issuing complaints, and whereby Respondent may contest liability and the appropriateness of the penalty. The Rules were issued under the general authority granted to the Administrator in section 25(a) of FIFRA 1972 "to prescribe regulations to carry out the provisions of this Act."

The Rules do not create any unlawful acts nor do they impose any substantive obligations to meet the requirements of the Act. The Rules relate solely to procedures for enforcement of the penalty provision after violations have occurred.

The Rules do not affect Respondent's substantive rights. A change in procedure for enforceing existing liabilities, whether the liabilities accrued before or after the change in procedure, are subjected to the new procedure. Beatty v. U.S. , 191 F. 2d 317 (8th Cir. 1951); N.L.R.B. v. National Garment Co.,166 F.2d 233 (8th Cir. 1948), cert. denied, 334 U.S. 645; U.S. v. Haughton, 413 F.2d 736 (9th Cir. 1969); Untersigner v. U.S., 181 F. 2d 953 (2d Cir. 1950). This Respondent is charged with a violation that occurred after the enactment of FIFRA 1972. The cases go even further and hold that a new procedural remedy may be applied to violations of existing, substantive provisions, which occurred even before the enactment of the new remedy. See Miller v. United States, 196 F. 2d 937 (5th Cir. 1951): Montana Power v. FPC, 445 F.2d 739, 747 (D.C. Cir. 1970).

V.

Adequacy of Charges In The Complaints

The Respondent urges that the Complaints are ambiguous and fail to give notice of the charges which it is called upon to defend or the laws which it is accused of violating. The Respondent also points out that section 168.31(a) of the Rules of Practice requires that the Complaint shall contain specific reference to the provision of the Act alleged to have been violated and a concise statement of the factual basis for the alleged violations.

The Complaints do contain concise statements of the factual basis for the alleged violations. Each complaint alleges that a named pesticide was delivered for shipment on a specified date from Tampa to a city in another state and that each pesticide was not in compliance with the provisions of the Act because it was not registered. These are complete and concise statements of the factual basis for the alleged violation.

[1] The complaints are entitled "Penalty Assessment and Notice of Opportunity for Hearing."

[2] I.D. No. 88486, May 16, 1973, SMCP Malathian ULV Concentrate from Tampa to Tuscaloosa, Alabama. I.D. No. 88575, April 9, 1973, Malathian ULV Concentrate Insecticide from Tampa to Gadsden, Alabama.

[3] The reference is to section 4 of FIFRA 1947, which required registration of pesticides shipped in interstate commerce.

[4] There are two other defenses in each answer. One denies certain factual allegations in the complaint and the other attacks as excessive the amount of penalty proposed to be assessed in each instance. These two defenses are not here considered but will await further proceedings.

[5] It appears that this reference should be to section 4 of FIFRA 1947, which requires registration. Section 4 of FIFRA 1972 deals with use of restricted use pesticides and certified applicators which are not in issue here.

[6] "Section 4 of the bill sets forth various effective dates in order to put the new program into operation as quickly and effectively as possible." H.R. Rep. 92–511, 92d Cong., 1st Sess., 1971, p. 2.

[7] Thus, if the pesticides in question at the time of alleged violations were not registered under FIFRA 1947, they were not registered under FIFRA 1972.

[8] FIFRA 1972 added requirements relating to intrastate shipments of pesticides.

[9] The Government brief (p. 24) states that the civil penalty provision of 14(a) has been utilized in some 228 cases.

[10] The Government brief (p. 23) states that shortly after the statement

It must be acknowledged that there is an inconsistency in the citation of the statutory references for the alleged violations. It is stated that the "penalty is based on a determination of violation of section 12 of the Act by delivering for shipment, the pesticide . . ." for interstate shipment. The reference is to section 12 of FIFRA 1972 wherein shipment of an unregistered pesticide is declared to be unlawful (section 12(a)(1)(A)). However, the statutory references given are 7 U.S.C. 135(a)(a)(1) and 135(b). These are the references to FIFRA 1947 for unlawful interstate shipment of an economic poison and the requirement for registration. While the inconsistency should be cured by amendment, we do not consider it to be a fatal defect.

Interstate shipment of an unregistered pesticide is a violation both under FIFRA 1947 and FIFRA 1972 and the Respondent has not been misled by the allegations in the Complaint. It is clear from Respondent's brief that it is fully aware of the nature of the charges against it and what its unlawful acts are alleged to be. The Respondent has reasonably been apprised of the issue in controversy. As was said in Cella v. United States, 208 F.2d 783 (7th Cir. 1953), cert. denied, 347 U.S. 1016:

> In an administrative proceeding it is only necessary that the one proceeded against be reasonably apprised of the issues in controversy, and any such notice is adequate in the absence of a showing that the party was misled.

See also Golden Grain Macaroni Co. v. F.T.C., 474 F.2d 882 (9th Cir. 1972); L. G. Balfour Co. v. F.T.C., 442 F.2d 1 (7th Cir. 1971); Davis Administrative Law Treatise, Sec. 8.04.

Conclusion

It is concluded that the First and Second Defenses set forth in Respondent's Answers are not applicable and furnish no defense to the charges in the Complaints. The said defenses are overruled. The case will proceed under the Third and Fourth Defenses of Respondent's Answers.