3/6/74

ENVIRONMENTAL PROTECTION AGENC

BEFORE THE ADMINISTRATOR

In Re	:	
Southern Mill Creek Products, Inc.,	:	I.D. Nos. 88486 and 88575
Respondent	:	

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 penalties 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 1(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 Rules 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/]

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.

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.

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 of pesticides and certified applicators which are not in issue here.

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. 313, 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.
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> (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.
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> (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.

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.

(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 basic 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 promulgation 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 1

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

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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.

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 a non-registration 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. 8/ 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. 92-1540, p. 33, in explaining section 4(d) states, in part, as follows:

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

> 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. 22496, 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, but had "taken such other action as may be necessary to permit compliance with the provisions under which the penalty is to be 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):

> [§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" <u>and substituted</u> 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 regulations 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.

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

> For purposes of determining any . . . civil penalty . . . 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."

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 availability 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 implementation 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

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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 was issued, it developed a standard complaint form and regional policy for seeking the imposition of civil penalties.

> application of this statutory term, we need not find that its construction 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 proceedings.' (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.' (cases 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 enforcing 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); Untersinger 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 bases 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 bases for the alleged violation.

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. It 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.

March 6, 1974

Bernard D. Levinson
Administrative Law Judge