

6/27/96

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of)
)
 Roger Antkiewicz and) Docket No. IF&R-V-002-95
 Pest Elimination)
 Products of America, Inc.)
)
 Respondents)

PREHEARING ORDERS
and
ORDER SCHEDULING HEARING.

Proceedings

The Region 5 Office of the United States Environmental Protection Agency (the "Complainant" or "EPA") commenced this action by filing a Complaint and Notice of Opportunity for Hearing on Roger Antkiewicz, New Baltimore, Michigan (the individual "Respondent"), on or about December 21, 1994. The Complaint charged Respondent with two violations of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), and requested assessment of a civil penalty of \$7000. Specifically, the Complaint charged Mr. Antkiewicz with the sale of an unregistered pesticide in violation of FIFRA §12(a)(1)(A), 7 U.S.C. §136j(a)(1)(A); and producing a pesticide at an unregistered establishment in violation of FIFRA §12(a)(2)(L), 7 U.S.C. §136j(a)(2)(L).

Respondent filed an Answer *pro se* to the Complaint on January 19, 1995. Mr. Antkiewicz raised a number of factual defenses and asserted he was acting only in his capacity as an officer and employee of a corporation, Pest Elimination Products of America, Inc. ("PEPA").

The former presiding Administrative Law Judge ("ALJ") in this proceeding, Chief ALJ Jon G. Lotis, issued an Order Establishing Procedures on June 15, 1995.

On December 6, 1995, the EPA filed two motions to amend the Complaint. The first motion sought to add four additional counts, comprising five additional violations of FIFRA, to those in the original Complaint. The additional counts increased the proposed civil penalty from \$7000 to \$29,500. The second amendment sought to add PEPA as a respondent to this proceeding. Mr. Antkiewicz did not file a reply in opposition to the motions to amend the Complaint, but did file an "Answer" to the motions, dated December 20, 1995, in which he responded to the new allegations in the proposed amended Complaint.

Judge Lotis granted the motions to amend the Complaint in an Order dated March 25, 1996. That order also extended the time for filing prehearing exchanges, to May 24, 1996 for the initial exchange, and June 14, 1996 for the reply exchange. Respondent then filed another Answer to the Second Amended Complaint on April 26, 1996.

Complainant submitted its initial prehearing exchange on May 24, 1996. Respondent filed a prehearing exchange on or about June 17, 1996.

These rulings will address two pending motions filed by the parties, and schedule this proceeding for hearing.

Complainant's Motion to Strike Respondent's Answer

On April 12, 1996 Complainant filed a motion to strike, directed at Respondent's Answer that was filed on December 20, 1996. Complainant alleged that Respondent, in that Answer, failed to "clearly and directly admit, deny or explain the factual allegations contained in the complaint" as required by 40 C.F.R. §22.15(b). Complainant sought an order requiring Respondent to file another answer in compliance with the rules. However, as outlined above, this Answer was actually filed before leave was granted to Complainant to serve its amended Complaint, and Respondent has since filed another Answer to that amended Complaint. Thus, Complainant's motion is denied as moot. Respondent's Answer dated April 26, 1996 (which addresses the new counts in the amended Complaint) is accepted as superseding the December 20, 1995 Answer. The April 26, 1996 Answer, and the original January 19, 1995 Answer (which addresses the first two counts in the Complaint) will together constitute Respondent's Answer for the record of this proceeding.

Respondent's Motion for Summary Disposition

Along with its Answer of April 26, 1996, Respondent filed a "Motion for Summary Disposition" as to the individual Respondent, Roger Antkiewicz. This motion is equivalent to a motion for accelerated decision or a motion to dismiss an action pursuant to 40 C.F.R. §22.20. Complainant did not file a response to this motion. Pursuant to 40 C.F.R. §22.17(b), if no response is filed, the party may be deemed to have waived any objection to the granting of the motion. The ALJ is nevertheless free to determine the motion based on its merits. In the Matter of Asbestos Specialists, Inc., 4 EAD 819, 825-826 (EAB, October 6, 1993).

Respondent's motion is based on the contention that the individual Respondent, Mr. Antkiewicz, cannot be held personally liable for the alleged violations where he was acting at all relevant times as an employee of the corporate co-Respondent, PEPA.

This is not a correct exposition of the applicable law. The general rule is that an individual who commits a tortious act cannot escape liability on the ground that he was acting for a corporation. The individual and corporation are jointly liable and may be joined as defendants. 18B Am. Jur. 2d §2125, Corporations at 948 (1986). The corporate officer, director or employee is liable only if he participated in the wrongful act on behalf of the corporation. Escude Cruz v. Ortho Pharmaceutical Corp., 619 F.2d 902,907 (1st Cir., 1980).

This principle has been extended to liability for civil administrative violations of environmental statutes, as the commission of a "legislative tort" or "tort against the public." In the Matter of Scotch Cap, Inc., EPA Docket No. 1087-0820-309(g) (Order, April 26, 1988, p. 11-12); In the Matter of Aero Plating Works, Inc., EPA Docket No. V-W-84-R-071-P (Initial Decision, February 13, 1986, p. 14-15). Thus, the individual Respondent, Mr. Antkiewicz, may be held jointly liable with the corporate Respondent, PEPA, for the violations alleged in the Complaint, if it is shown that he personally participated in the commission of the violations.

However, in this case the Complainant did not respond to the Respondent's motion to dismiss the charges as to the individual Respondent, Mr. Antkiewicz. The EPA may therefore be deemed to have waived any objection to the granting of the motion. Complainant had previously moved to add the corporation PEPA as a party Respondent. The EPA has complete discretion to bring an administrative complaint against a corporation, and/or employees or officers of the corporation, that it believes are liable for violations of FIFRA. In these circumstances, Complainant's lack of response to Respondent's motion can only be interpreted as an exercise of its discretion to pursue this action only against the corporate Respondent.

Respondent's motion to dismiss the Complaint as to the individual Respondent, Roger Antkiewicz, is therefore granted. The caption will in future pleadings include only the name of the Respondent Pest Elimination Products of America, Inc.

Order Scheduling Hearing

The parties have filed prehearing exchanges, rendering this action ready for scheduling of the hearing.¹

¹ Although Respondent's prehearing exchange was apparently mailed on June 17, 1996, after the June 14 date set for filing reply exchanges, it is accepted. There is no prejudice, since the hearing will not be held for several months. The parties may each supplement their prehearing exchanges freely up to 30 days before the hearing, and on motion after that time.

The hearing will be held in the vicinity of Mt. Clemens, Macomb County, Michigan, beginning at 9:30 A.M. on September 17, 1996, continuing if necessary on September 18, 1996. If a suitable hearing facility cannot be found in Macomb County, the hearing may be held in the nearest large city, Detroit, Michigan. The Regional Hearing Clerk should consult with the Respondent to first seek a hearing room in the Mt. Clemens area.

The parties will be notified of the exact location and of other hearing procedures after those arrangements are made.

Andrew S. Pearlstein

Andrew S. Pearlstein
Administrative Law Judge

Dated: June 27, 1996
Washington, D.C.

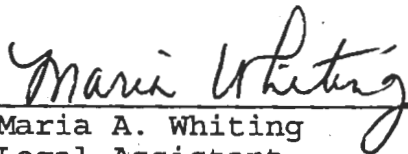
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of America, Inc.
Docket No. IF&R-V-002-95

This will certify that the foregoing Prehearing Orders and
Order Scheduling Hearing, dated June 27, 1996, was sent by first
class mail to the addressees listed below:

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Dated: June 27, 1996
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