6/28/91

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
SHIELD-BRITE CORPORATION,	)	Docket No. FIFRA-90-H-02
	)	
Respondent	)	

ORDER GRANTING MOTION FOR ACCELERATED DECISION ON LIABILITY

This Order grants a motion for an accelerated decision on liability that was filed by the Director, Compliance Division, Office of Compliance Monitoring, U.S. Environmental Protection Agency ("Complainant") against the Shield-Brite Corporation ("Respondent"). The Order also grants a motion by Complainant to amend its complaint, which serves to narrow the questions in dispute. Finally, with Respondent's liability having been established, the Order directs the parties to negotiate on the proper amount of the civil penalty to be imposed.

Two legal questions are presented by Complainant's motion for an accelerated decision. The first, for pesticides exported to a non-English speaking country, is whether bilingual labeling is required by the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136-136y? (This Act is referred to hereinafter as "FIFRA".) Second, if such bilingual labeling is required, may the requirement be satisfied by labeling that is affixed after arrival of the pesticides in the country of importing? This Order rules that such bilingual labeling is required, and that it must be affixed before the pesticides arrive in the importing country.

Procedural Background

Complainant issued a January 31, 1990 complaint against Respondent alleging several violations of FIFRA in connection with pesticides exported during 1987 and 1988. Respondent denied the allegations in a February 21, 1990 letter that has been treated as an answer to the complaint. After other submissions by the parties, Complainant moved June 27, 1990 both to amend its complaint and for an accelerated decision on liability. The motion to amend the complaint is governed by Section 22.14(d) of the Consolidated Rules of Practice of the U.S. Environmental Protection Agency ("EPA") (40 C.F.R. § 22.14(d)), and the motion for an accelerated decision is governed by Section 22.20 of these Consolidated Rules (40 C.F.R. § 22.20).

After Complainant filed its motions, the parties tried without success to negotiate a settlement. Then they made further submissions arguing Complainant's motion for an accelerated decision; and, with Complainant's last such submission on March 25, 1991, Complainant's motions are now ripe for decision.

Amendment of the Complaint

Complainant's motion to amend its complaint would remove from the complaint all allegations dealing with charges other than the lack of bilingual labeling on Respondent's exported pesticides. Its effect would be to focus the case solely on the count involving the bilingual labeling.

Respondent made no objection to this motion, and Complainant's proposed amendment would simplify the case. Accordingly,

Complainant's motion to amend the complaint is granted in the Order set forth below.

Legal Questions; Arguments of Parties

After amendment of the complaint, the only remaining charge concerns bilingual labeling. Respondent's submissions have effectively admitted the facts necessary to establish its liability under this charge, but have placed in issue two legal questions. Consequently, the resolution of both of these questions adversely to Respondent entitles Complainant to the granting of its motion for an accelerated decision on liability.

As noted, the two legal questions at issue are: whether bilingual labeling is required for pesticides exported to non-English speaking countries and, if so, when such labeling must be affixed. In ruling that such bilingual labeling is required, this Order rejects two objections advanced by Respondent to that conclusion; and, in ruling that it must be affixed before arrival of the pesticides in the importing country, the Order rejects the contrary answer suggested by Respondent.

Bilingual Labeling

FIFRA. Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), generally prohibits the distribution, sale, offering or holding for sale, and shipping of any pesticide that is misbranded. Complainant derived the requirement for bilingual labeling in exports to non-English speaking countries from Section 2(q)(1)(E) of FIFRA, 7 U.S.C. § 136(q)(1)(E), which states as follows.

> A pesticide is misbranded if ... any word, statement, or other information required ... to appear is not ... in such terms as to render it likely to be read and understood by the ordinary individual under customary conditions of purchase and use

This misbranding section is made applicable to exported pesticides by Section 17(a)(1) of FIFRA, 7 U.S.C. § 136o(a)(1), which provides as follows.

> (a) Pesticides and devices intended for export. --Notwithstanding any other provision of this subchapter, no pesticide or device or active ingredient used in producing a pesticide intended solely for export to any foreign country shall be deemed in violation of this subchapter--
>
> > (1) when prepared or packed according to the specifications or directions of the foreign purchaser, except that producers of such pesticides and devices and active ingredients used in producing pesticides shall be subject to sections 136(p), (q)(1)(A), (C), (D), (E), (G), and (H), 136(q)(2)(a), (B), (C)(i) and (iii), and (D), 136e, and 136f of this title

(emphasis added)

Complainant contended that Sections 12(a)(1)(E), 2(q)(1)(E), and 17(a)(1) of FIFRA, without more, are enough to impose the requirement of bilingual labeling on pesticides exported to a non-English speaking country. Complainant's argument ran as follows.[1]

> The language of Section 2(q)(1)(E) can be read to implicitly require that labeling of export products be in the native language of the country of import, for there is no other way to give effect to each word of the statutory requirement that the labeling be "in such terms as to render it likely to be read and understood by the ordinary individual" where pesticides are exported to foreign countries.... The ordinary individual in a country where English is not an official language can not

[1] Complainant's Memorandum in Reply to Respondent's Untimely Response (October 26, 1990) at 6, 7.

> be assumed to read and understand technical labeling information written in English, even if such a person could speak enough English to get by in social situations.

(emphasis in original)

EPA Interpretation. Thus Complainant argued that FIFRA without more requires bilingual labeling. But there is more: a published EPA interpretation of FIFRA. It is this EPA interpretation that is the subject of the two objections by Respondent, and the pertinent part of this EPA interpretation reads as follows.[2]

> Statement of Policy on the Labeling Requirements for Exported Pesticides, Devices, and Pesticide Active Ingredients and the Procedures for Exporting Unregistered Pesticides
>
> ....
>
> Every exported pesticide, device, and active ingredient used in producing a pesticide must bear a label or labeling, in English or in the language of the importing country, which meets the requirements of FIFRA section 17(a)(1). In addition, certain information which will satisfy FIFRA sections 2(q)(1)(E), (G), and (H) and 2(q)(2)(A) and (D) must also appear on the label or labeling so as to provide bilingual (in other words, in English and in the language of the importing country) information to anyone who handles or comes in contact with these products. Any language in which official government business is conducted in the country or which is the predominately spoken language of the country, is acceptable as the second language on the label.

Respondent's Defenses; Complainant's Replies. Respondent advanced two defenses, based on the above quoted language, to the liability charged against it. Other defenses raised by Respondent address not the existence of any liability, but rather the

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[2] 45 Federal Register 50,274, 50,275 (July 28, 1980).

appropriate amount of a civil penalty if such liability is ruled to exist.[3] Respondent's two defenses to liability based on the quoted language were as follows.[4]

> 1. The requirements of FIFRA STATEMENT OF POLICY on the Labeling requirements for Exported Pesticides is a Statement of Policy, not a regulation. We are dealing only with policy.
>
> 2. The Federal Register ... states:
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> "Every exported pesticide, device, and active ingredient used in producing a pesticide, must bear a label or labeling in English or in the language of the importing country, which meets the requirements of FIFRA Section 17(a)(1)."

(emphasis in original)

As to Respondent's defense numbered one--that "[w]e are dealing only with policy"--Complainant made two replies. Complainant began by stating: "What we are dealing with is an act of Congress, properly enacted and signed into law, and an Agency

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[3] The arguments raised in paragraphs 4-5 and possibly paragraph 6 of Respondents [sic] response to June 27th, 1990 Consent Agreement (October 5, 1990) concern the amount of any civil penalty to be imposed, as do all the paragraphs after the first two in Respondent's August 10, 1990 letter, transmitted with Respondent's Response to Order for Respondent's Filing (February 12, 1991).

Insofar as paragraph 6 of Respondent's October 5 response was meant to argue that Respondent should be excused from liability because it did not receive a warning from EPA that it was violating FIFRA, that contention is rejected. Respondent was not entitled to violate FIFRA free of liability therefor until advised by EPA that its operations transgressed the statute. See, e.g., In the Matter of Selco Supply Company, Inc., IF&R Docket No. VIII-32C (September 8, 1978) at 18. Respondent's good faith belief that its operations did comply with FIFRA can, however, be considered in determining the amount of any civil penalty to be imposed for such liability.

[4] Respondents [sic] response to June 27th, 1990 Consent Agreement (October 5, 1990) at 1.

interpretation of that law published after public notice and comment."[5] Complainant then made two points. The first, as noted above, was Complainant's contention that FIFRA, just by itself, establishes the requirement of bilingual labeling.

Complainant's second point characterized the role in the legal scheme of EPA's published interpretation of FIFRA.[6]

> Even though it is obvious upon reflection that section 2(q)(1)(E) [of FIFRA] must require bilingual labeling, the Agency issued a policy statement announcing the Agency's interpretation of these requirements and asserting its intent to pursue enforcement actions where pesticides are exported without labels in a language of the importing country.... This is a statement of policy, and not a regulation; as such it does not impose requirements beyond those inherent in the underlying statute. While FIFRA could be interpreted to require that all labeling information be in both English and the language of the importing country, or in all of the languages and dialects used in the foreign country, the policy statement advises the public of the Agency's narrower interpretation. The Agency interpretation states that only the information required in sections 2(q)(1)(E), (G), (H) and 2(q)(A) and (D) [of FIFRA] must be in English and any language in which the foreign country conducts official government business. The Policy makes public the Agency's interpretation of the pertinent sections of FIFRA and also places the regulated community on notice that actions contrary to that interpretation will be treated as violations of FIFRA.

(emphasis in original)

As for Respondent's second argument--that the "or" in the first textual sentence of EPA's published interpretation quoted above affords Respondent the option of labeling in English only--

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[5] Complainant's Memorandum in Reply to Respondent's Untimely Response (October 26, 1990) at 2.

[6] Id. 4, 5.

Complainant's rebuttal stated as follows.[7]

> Read together and in context, the meanings of the first two sentences on page 50275 are clear: (1) Each exported pesticide must bear labeling which contains all information required under section 17(a)(1), either in English or the language of the importing country. (2) In addition, certain crucial information must appear in both English and the language of the importing country. The third sentence offers guidance as to what the Agency considers to be "the language of the importing country", and how to proceed where there is more than one language. If the first sentence were read to allow pesticide exporters unfettered discretion to label in either language, then the second sentence would be flatly contradictory and the third sentence would be superfluous. Such a reading would violate the cannons [sic] of construction.

(emphasis in original)

Complainant argued further that its explanation of the three sentences at issue is supported by the next two paragraphs in that Federal Register publication, which amplify the first two sentences. Further to buttress its position, Complainant cited the deference normally afforded an agency's interpretation of the statutes it administers, and also the liberal construction that courts have accorded environmental laws in order to accomplish the Congressional objectives.

Labeling Affixed in Importing Country

Respondent raised a third defense: that bilingual labeling may have been applied by its distributor in Chile. Respondent stated as follows.[8]

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[7] Id. 9.

[8] Respondent's August 10, 1990 letter, submitted for the record by Respondent's Response to Order for Respondent's Filing (February 12, 1991).

> Specifically, in Chile, we know that our distributor furnished instructions to each user of our product. Our sales representative sold to our Chilean distributor (S.A.S.A. Corporation) who in turn passed on (in written form) the information to his Chilean customers. Our representative does not speak Spanish and all sales conversations and literature was [sic] passed on in the English language.

Complainant replied as follows.[9]

> It is Complainant's position that pesticide exporters are required to comply with FIFRA within the United States, and that the actions of third parties are irrelevant. FIFRA applies to the pesticide while it is in the United States, and Respondent is obliged to conduct its domestic activities in compliance with FIFRA. Respondent must label its pesticide in conformance with all requirements under FIFRA before the pesticide is introduced into the stream of commerce. Complainant maintains that a pesticide exporter must apply foreign language labels as soon as the exporter designates particular items to fill an order that the exporter knows is destined for a country where English is not an official language. Regardless of whether Respondent were operating overseas through wholly owned subsidiaries, through independent licensed distributors, or simply selling to anyone putting up the purchase price, the actions of such persons in foreign countries cannot lessen Respondent's obligation to comply with FIFRA here in the United States.

Complainant made one additional procedural argument: that Respondent's response to Complainant's motion for an accelerated decision on liability was filed late and therefore should be disregarded.[10] On this procedural ground as well, Complainant urged the granting of its motion.

Decision

Complainant's basic position is sustained: for pesticides

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[9] Complainant's Supplemental Statement (March 25, 1991) at 2.

[10] Complainant's Notice of, and Reply to, Respondent's Untimely Response (October 26, 1990).

exported to non-English speaking countries, FIFRA requires bilingual labeling; and that labeling must be affixed before the pesticides arrive in the importing country. Accordingly, Complainant's motion for an accelerated decision on liability is granted. As the next step in this proceeding, the parties are ordered to try to negotiate the appropriate amount of the civil penalty; Respondent may raise in such negotiations those of its arguments that have been held to concern the appropriate amount of any civil penalty, as opposed to the existence of any liability at all.[11]

As to bilingual labeling for pesticides exported to non-English speaking countries, the requirement for such labeling is clearly established by FIFRA and EPA's published interpretation. EPA's interpretation is a reasonable reading of the statute, and this interpretation is clearly an imposition of a mandatory requirement, as opposed to a nonbinding expression of policy. Respondent contended also that the "or" in the quoted portion of EPA's interpretation offers the option of labeling in English only. That contention is properly rebutted by the quoted extract from Complainant's submission showing the illogic of such a construction of the interpretation.[12]

As for Respondent's suggestion that its distributor in Chile may have affixed the required bilingual labeling, such an action would be too late to satisfy FIFRA. By its wording, Section

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[11] See note 3 above.

[12] See the quotation accompanying note 7 above.

17(a)(1) of FIFRA, 7 U.S.C. § 136o(a)(1), imposes this labeling requirement on "producers" of any "pesticide ... intended solely for export to any foreign country...." That language certainly imposes the requirement before the pesticides reach the foreign country. To hold otherwise would deprive "intended solely for export" and "producers" of their normal meaning.

As argued by Complainant, this same result should obtain regardless of the relationship between Respondent and the foreign importer. For example, even if the export were an intra-corporate transfer to another member of the same multinational operation, the "producer[]" that would have to satisfy the labeling requirement would still be the American producer.

As to Complainant's objection to the alleged lateness of Respondent's response to the motion for accelerated decision, no ruling is issued. It was impossible to determine, from the copy of Respondent's document that was served on this Office, whether it was timely served. Any lateness would have been slight. For purposes of this Order, the matter has been resolved by accepting Respondent's document into the record and ruling against Respondent on the merits on all of the points raised in its submission relating to the motion for an accelerated decision.

Order

Complainant's motion to amend the complaint is granted; accordingly, paragraphs 9-11 and 13-34 are stricken from the complaint and, from paragraph 12, the following sentence is stricken.

In addition, the labels on these shipments did not bear the statement "Not Registered for Use in the United States of America", in violation of section 12(a)(1)(E) of FIFRA, 7 U.S.C. 136(j)(1)(E), and section 2(q)(1)(H), 7 U.S.C. 136(q)(1)(H).

Complainant's motion for an accelerated decision on liability is granted; Respondent is thus held to have violated FIFRA, as charged in the complaint, as amended.

The parties are directed to try to negotiate an appropriate amount for Respondent's civil penalty. Complainant is directed to report by August 15, 1991 on the status of the negotiations.

Thomas W. Hoya
Administrative Law Judge

Dated: June 24, 1991

CORRECTED CERTIFICATE OF SERVICE

I do hereby certify that the foregoing Order was filed in re SHIELD-BRITE CORPORATION; Docket No. TSCA 90-H-02 and a copy of the same was mailed to the following:

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Dated: June 28, 1991