

Done

4/28/77

RECEIVED
EPA HEADQUARTERS
HEARING CLERK

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE REGIONAL ADMINISTRATOR P 3: 17

In the Matter of

Norris and Company,
Incorporated

Respondent

)
)
)
)

I. F. & R. Docket No. VIII-26C

ACCELERATED INITIAL DECISION

This is a proceeding under Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), as amended, 7 U.S.C. 136 1(a) (Supp. V, 1975), for assessment of a civil penalty for violations of Section 12(a)(1)(F) of the Act, 7 U.S.C. 136j(a)(1)(F). The proceeding was initiated by Complaint dated August 13, 1976, alleging violations relating to the Norris MR-1 Electronic Mosquito Repeller ("Repeller"). In substance, the allegations are as follows:

1. The Repeller does not repel biting insects as its name and labeling claim.
2. The statements render the Repeller misbranded within the meaning of Section 2(q)(1)(A) of FIFRA, 7 U.S.C. 136(q)(1)(A) in that its labeling bears a statement that is false and misleading.
3. On or about May 21, 1976, Respondent sold and shipped a quantity of Repellers to the Abraham and Strauss Company, Brooklyn, New York.

4. On or about June 30, 1976, Respondent sold and shipped a quantity of the Repellers to Garfinckel's Department Store, Washington, D.C.

5. On or about June 30, 1976, Respondent sold and shipped a quantity of Repellers to Bamberger Stores, Newark, New Jersey.

6. On or about July 1, 1976, Respondent sold and shipped a quantity of Repellers to Stewart and Company, Baltimore, Maryland.

The civil penalties proposed to be assessed totaled \$11,200.00, computed on the basis of \$2,800.00 per sale, above.

The Respondent filed an Answer in which it denied the following allegations: That the Repeller is a device, that the Repeller does not repel mosquitoes; and that the Repeller is misbranded.

Complainant filed a Motion for Accelerated Decision with supporting documents, pursuant to Section 168.37 of the Rules of Practice, 40 CFR 168.37, contending that there is no genuine issue of any material fact and that it is entitled to judgment as a matter of law. Respondent filed a Response to this Motion in which it elected not to oppose the Motion. Respondent did make certain assertions as to its financial condition, claiming that it is insolvent and burdened with debts in excess of \$75,000.00.

Complainant filed a Motion seeking to compel the production of financial data by Respondent to substantiate the financial claims made in the Response. Respondent filed an affidavit of Mr. Elwood G. Norris, President of Respondent, setting out certain data with respect to sales and debts of the Respondent.

Pursuant to Section 168.36(d) of the Rules of Practice, 40 CFR 168.36(d), the Administrative Law Judge conducted a telephonic pre-hearing conference with the parties for the purpose of accomplishing some of the objectives of a prehearing conference. A written summary of this conference is in the record.

The findings of fact, conclusions, and proposed final order contained herein are based upon my consideration of the entire record.

FINDINGS OF FACT

1. The Respondent, Norris and Company, Incorporated, is a corporation organized to do business in the State of Utah.
2. Respondent was engaged in the business of selling the Norris MR-1 Electronic Mosquito Repeller ("Repeller").
3. The labeling that accompanied the sale of the Repeller made the claim that the "tuning fork type of sound" that it emitted repelled mosquitoes.
4. The scientific evidence presented in this case establishes that sound has no effect on the actions of the female mosquito, which is the only mosquito that bites human beings.
5. Tests conducted by the Environmental Protection Agency established that the Repeller does not repel mosquitoes.
6. On or about May 21, 1976, Respondent sold and shipped a quantity of Repellers to the Abraham and Strauss Company, Brooklyn, New York.

7. On or about June 30, 1976, Respondent sold and shipped a quantity of the Repellers to Garfinckel's Department Store, Washington, D.C.

8. On or about June 30, 1976, Respondent sold and shipped a quantity of Repellers to Bamberger Stores, Newark, New Jersey.

9. On or about July 1, 1976, Respondent sold and shipped a quantity of Repellers to Stewart and Company, Baltimore, Maryland.

10. Respondent is insolvent. A civil penalty of any amount would adversely affect Respondent's ability to continue in business.

CONCLUSIONS

1. The Repeller is a device within the meaning of Section 2(h) of FIFRA, 7 U.S.C. 136(h).

2. The Repeller was misbranded within the meaning of Section 2(q)(1)(A) insofar as its labeling made claims that the Repeller was effective for repelling mosquitoes.

3. The four sales of the Repeller made by Respondent, and as described in Findings of Fact, Paragraphs 6 through 9, were unlawful and in violation of Section 12(a)(1)(F) of FIFRA, 7 U.S.C. 136j(a)(1)(F).

Having considered the entire record and based upon the Findings of Fact and Conclusions herein, it is recommended that the following order be issued.

FINAL ORDER^{1/}

Pursuant to Section 14(a)(1) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended 7 U.S.C. 136 1(a)(1), and in consideration of Respondent's financial condition, no civil penalty is assessed for its violations of FIFRA which have been established on the basis of the Complaint issued August 13, 1976.

Gerald Harwood

Gerald Harwood
Administrative Law Judge

1/ The Initial Decision and the proposed Final Order shall become the Final Order of the Regional Administrator, unless appealed or reviewed by the Regional Administrator as provided in 40 CFR 168.46(c).

April 28, 1977