

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
BEFORE THE REGIONAL ADMINISTRATOR

RECEIVED  
REGIONAL OFFICE  
JUL 28 1976  
P. 3: 29  
QUARTERS  
ALERT

In the matter of  
N. Jonas & Co., Inc.,  
Respondent

I. F. & R. Docket No. III-121C

INITIAL DECISION

This is a civil penalty proceeding pursuant to Section 14(a)(1) of the Federal Insecticide, Fungicide and Rodenticide Act as amended (7 U.S.C. 136 1(1) (1976)). The proceeding was commenced by a document entitled "Amended Complaint," dated December 16, 1976, which contained two counts: Count I alleged that Respondent distributed, sold, offered for sale, held for sale, shipped or delivered the product "Scorch," that "Scorch" was a pesticide within the meaning of Section 2(u) of the Act and implementing regulations (40 CFR 162.3(ff) and 162.4(a)), that "Scorch" was not registered in accordance with Section 3 of the Act and that Respondent's action in distributing, selling, offering for sale, holding for sale, shipping or delivering for shipment the product "Scorch" was a violation of Section 12(a)(1)(A) of the Act; Count II alleged that on July 14, 1976, Complainant's employee (Consumer Safety Officer Latchaw) attempted to conduct an establishment inspection and obtain a sample of the product "Scorch," that Respondent's President, Mr. Nathaniel Jonas, refused to allow

Officer Latchaw admission for the purpose of sampling the product "Scorch," claiming that the product was not an economic poison, that "Scorch" is a pesticide within the meaning of Section 2(u) of the Act and applicable regulations and that the refusal of Respondent's President to allow Officer Latchaw to sample the product "Scorch" was a violation of Section 12(a)(2)(B) of the Act. Penalties of \$2,992 were sought for the violation alleged in Count I and \$4,675 for the violation in Count II for a total of \$7,667. Respondent answered, denying that "Scorch" was a pesticide and denying that it was liable for any penalty whatsoever, and requested a hearing.

On August 15, 1977, Complainant filed a motion to amend the complaint so as to claim a penalty of \$3,080 for the violation alleged in Count I and \$5,500 for the violation in Count II or a total of \$8,580. This motion was granted on August 24, 1977. A hearing on this matter was held in Philadelphia, Pennsylvania, March 14 through March 17, 1978.

#### FINDINGS OF FACT

Based on the entire record, including the briefs and proposed findings and conclusions of the parties, (proposed findings not adopted herein are rejected), I find that the following facts are established:

1. Respondent, N. Jonas & Co., Inc., is a registered producer of pesticides, holding EPA Establishment No. 3432-PA-1.
2. Respondent's business is the production and distribution of chemicals for swimming pool sanitation and maintenance (Tr. 592). At the time of the hearing, Respondent had approximately 38 products registered with EPA (Tr. 647).

3. Under date of September 3, 1975, Respondent filed an application for the registration of a product called "Scorch" (Application File, Exh. 26). The method of support cited for efficacy and safety data was 2(c) of the Interim Policy Statement (38 F.R. No. 222 at 31862 et seq., November 19, 1973), i.e., proceed on the basis of established use patterns. However, regulations, which become effective on August 4, 1975 (40 F.R. No. 129 at 28242 et seq., July 3, 1975), issued pursuant to amendments to FIFRA effected by the Federal Environmental Pesticide Control Act of 1972 eliminated the 2(c) method of support. See 41 F.R. No. 15 at 3339 et seq., (January 22, 1976). Because the new regulations required applicants for registration to submit necessary safety and efficacy data with their applications or to reference such data, the effect of the regulations was to make it difficult to obtain new registrations (Tr. 268, 319).
4. Although there is some confusion in the record, Respondent's application mentioned in the preceding finding was accompanied by a label (Tr. 709, R's Exh. N), which was apparently misplaced by EPA. The label indicated that the purpose of Scorch was "To rid your pool of organic wastes and restore its SPARKLE" and that its active ingredients were 65% calcium hypochlorite, resulting in 65% available chlorine. Inert ingredients were 35%. The rear panel of the label stated that swimming pool water can accumulate large quantities of organic waste, perspiration, suntan lotions, hairsprays, etc. and that "Scorch" will actively reduce most of these wastes. A formula statement submitted with the

application for registration indicated that the material used was "Sentry" (Sentry) obtained from Pennwalt Corp. (EPA Reg. No. 335-188) and that its purpose was for use as a bactericide and as an oxidizing agent. Mr. Jonas, Respondent's President, testified that the only purpose in making bactericidal and pesticidal claims was to get the product registered (Tr. 625-27). Some support for this testimony is derived from the fact that the label (Resp.'s Exh. N) made no express pesticidal claims.

5. Respondent's application for the registration of Scorch was formally rejected as deficient by letter, dated August 1, 1977 (Exh. 26). Mr. Castillo, product manager of chlorinated products used in swimming pools in the Disinfection Branch of EPA's Registration Division, explained the reason for the delay as the fact Jonas was relying on their supplier (Pennwalt) to support the registration and there may have been some problems with Pennwalt's data as complying with current requirements (Tr. 315-16). This testimony is confirmed in part by a letter from Pennwalt, dated November 18, 1975 (Exh. 26), authorizing EPA to use data submitted by Pennwalt in support of the registration of its product "Sentry" in connection with Respondent's application for the registration of "Scorch." Mr. Castillo further testified that he kept Respondent's Mr. Wexler advised of the status of the application by telephone (Tr. 315). Although Mr. Wexler recalled speaking to Mr. Castillo only with reference to the possibility of marketing Scorch without a registration (Tr. 554-55), the fact that the Pennwalt letter referred to above is dated over two months subsequent to the date of the application makes it likely that there was some communication from EPA to Respondent during that period with respect to the application.

6. Mr. Edward Wexler, Vice-President of Respondent, testified that through pesticide newsletters he became aware that EPA had in effect frozen all registrations, and approval of the application for the registration of Scorch not being forthcoming and the time for the production of chemicals for the coming swimming pool season running out, he attempted to call Mr. A. E. Castillo, a product manager in EPA's Registration Division, with whom he had had prior dealings (Tr. 555). He was unable to contact Mr. Castillo and thereupon spoke to Mr. Adamczyk or a Mr. Mumford, individuals in the Registration Division with whom he had dealt in the past concerning the registration of other products. Mr. Wexler explained that his firm desired to market a product containing 65% hypochlorite, which would be used as a shock or oxidizing treatment for swimming pools and was not intended for viral, bacterial or algae control (Tr. 556). The individual with whom Mr. Wexler spoke stated that he thought it would be alright, i.e., the product would not be subject to FIFRA, but suggested that a disclaimer be placed on the label (Tr. 580). When Mr. Wexler inquired what was meant by a disclaimer, he was informed: show that you do not intend the product to be used for that purpose, i.e., for control of bacteria or algae (Tr. 556, 579-80).
7. After the aforementioned telephone conversation concluded, Mr. Wexler informed Respondent's President, Mr. Jonas, of the

substance of the conversation (Tr. 630-31). Messrs. Wexler and Jonas then reviewed the firm's copy of the label submitted with the application for the registration of "Scorch," dated September 3, 1975, removed the EPA establishment number, any claims considered to be pesticidal and included a disclaimer statement. Mr. Wexler proceeded to contact an artist who makes up label work and to order printed labels and bags from a firm in New Jersey (Tr. 556-57). The bill from the artist was dated January 22, 1976, and by referring to the bill, Mr. Wexler fixed the approximate date of the conversation mentioned in finding 6 as on or about January 18, 1976 (Tr. 575, 577).

8. The Mr. Mumford, mentioned by Mr. Wexler as possibly being the individual to whom he spoke concerning whether "Scorch" was subject to FIFRA has not been identified. However, Mr. Thomas E. Adamczyk, Chief of the Fungicide-Herbicide Branch, Office of Pesticide Programs, EPA, appeared as a witness at the hearing. He did not deny speaking with Mr. Wexler about the product "Scorch" in January or the winter of 1976, but asserted that he did not recall such a conversation, explaining that he was on the telephone hundreds of times a week with various representatives of chemical companies (Tr. 193-94).
9. Sometime during the period early to mid-February 1976, Mr. Wexler telephoned Mr. Castillo of EPA concerning another matter and in the course of the conversation explained to Mr. Castillo what Respondent intended to do with the product

"Scorch." Mr. Castillo stated that he did not think they could do what they intended (Tr. 572-73, 576-79; Ltr., dtd May 26, 1977, Exh. 25). In other words, Scorch was subject to FIFRA and had to be registered.

10. Respondent proceeded to package and market the product "Scorch" (Tr. 23, 25, 573, 578, 583-84). Shipments were made on at least June 7 and 11, 1976 (Exhs. 14, 15, 56, 58, 59 and 60). The parties stipulated that Scorch contained 65% calcium hypochlorite (Tr. 28).
11. The label for "Scorch," the product referred to in the preceding finding (Exhs. 9, 10 and 20), provides in pertinent part:  
(front label)

"SCORCH

"FOR BURNING OUT  
ORGANIC MATERIAL  
IN SWIMMING POOLS

(rear label)

"SCORCH

"ACTIVE INGREDIENTS:  
"Calcium hypochlorite            65%  
"INERT INGREDIENTS            35%

"Swimming pool water can accumulate large quantities of organic waste, perspiration, suntan lotions, hair sprays, etc. It is important to remove these wastes periodically. "SCORCH" will actively reduce most of these wastes.

"IMPORTANT: SCORCH IS NOT TO BE USED FOR DAILY DISINFECTION OR ALGAE CONTROL OF YOUR POOL.

"Directions: Use Scorch at the rate of 1 lb. per 10,000 gals. of pool water. Add entire amount at one time, spreading over the pool water surface - add Scorch when pool is not in use. Scorch should be used every week in hot weather and once every two weeks in cooler weather. Should also be used after heavy rain or other source of contamination takes place."

12. Respondent is basically a repackager of the product "Scorch," obtaining the ingredients from Pennwalt Corporation. Respondent applied for a supplemental registration of Scorch based on Pennwalt's product "Pennswim Big Shot" (EPA Reg. No. 335-198) on March 1, 1976, which was approved on April 7, 1976 (Resp.'s Exhs. B & E). The rear panel of this label for Scorch indicates that a purpose of Scorch is algae control. Mr. Jonas explained the reference to algae control as due to the necessity of conforming to the Pennwalt label (Tr. 674).
13. By letter addressed to the Enforcement Division, EPA, dated April 29, 1976, a firm marketing a competing product enclosed a copy of a label of "Scorch" (Exh. 20) and inquired whether the product required an EPA registration (Exh. 19). Evaluation of this request resulted in the initiation of a document entitled "Enforcement Case Review" (Exh. 23). The files were checked to determine if the product was registered resulting in a determination that it was not registered but that an application for registration of Scorch was pending, and the matter was laid before Mr. Elizah Brown, Chief of the Disinfectants Branch, Registration Division, Office of Pesticide Programs, EPA, on June 24, 1976 (Tr. 38, 147, 150-51; Exh. 23). Mr. Brown determined, in accordance with the policy of the Registration



Division, that the addition of a chlorine containing chemical or product to swimming pool water was sufficient in and of itself to identify the product as a pesticide (Tr. 38-40). The reason for this policy was that the maintenance of a chlorine concentration of between 0.6 and 1 parts per million (ppm) residual available chlorine was sufficient to disinfect the water (Tr. 40, 41).

14. Elaborating on his reasons for determining that Scorch was a pesticide, Mr. Brown asserted that the claim on the label for burning out organic material in swimming pools was significant because oxidizing organic materials would deprive bacteria of a source of nutrients, and thus mitigate bacteria (Tr. 47, 48, 50, 52). He explained that this purpose was reinforced by the label statement that swimming pool water can accumulate large quantities of organic waste, perspiration, suntan lotions, hair sprays, etc. He stated that the statement Scorch should also be used after heavy rain or other source of contamination takes place was significant because bacteria and debris could be blown or washed into the pool and the word "contamination" was sufficiently broad to include bacteria, algae and fungi (Tr. 54). He discounted the so-called disclaimer - Scorch is not to be used for daily disinfection or algae control of your pool - for the reason, among others, that if it rains every day, the user could theoretically add Scorch every day (Tr. 59, 60).
15. The determination that Scorch was a pesticide was transmitted to Region III by means of a document entitled "Special Request For Sample," dated June 29, 1976 (Exh. 22). By letter, dated July 8, 1976, the complaining firm was advised that Scorch had been determined to be a pesticide, that a request had been made to

collect an official sample and that appropriate enforcement action would be taken (Exh. 21).

16. The Special Request For Sample (S/R) mentioned in the preceding finding was received by Mr. John W. Smith, Chief of the Field Investigation Section, EPA, Philadelphia (Tr. 407, 408).

Mr. Smith placed notations on the S/R as follows: "7-8-76

"Sherm:

Please check this out.

JWS

"Not state reg.

JWS

"Per D. S.

"Let get this product shipment."

"Sherm" refers to Mr. Sherman Latchaw, EPA Consumer Safety Officer for the Philadelphia area, "DS" refers to Dave Steiger, Pennsylvania State inspector, who advised that the product was not registered with the state, and "Let get this product shipment," means get records of shipments of this product in interstate commerce and pick up a shipment (sample) at the producing establishment (Tr. 409-10, 437-39).

17. In accordance with the request referred to in the preceding finding, Consumer Safety Officer Latchaw attempted an establishment inspection of Respondent's premises on July 14, 1976. Prior to visiting the N. Jonas & Company plant, Mr. Latchaw filled out in his own handwriting a form entitled "Notice of Inspection." The form indicated that the purpose of the inspection was to determine if any of the product "Scorch" was on hand which had been packaged, labeled and released for shipment, to obtain a sample and to perform

a book and record search to determine if the product had been shipped interstate or intrastate (Tr. 455-56; Exh. 50). Upon his arrival at the N. Jonas & Company facility, Mr. Latchaw filled in the hour, 9:50 a.m., identified himself, presented his credentials and handed the notice of inspection to Respondent's Vice-President, Mr. Edward Wexler (Tr. 458-59).

18. Mr. Wexler read the notice of inspection and stated "It [Scorch] is not a pesticide" (Tr. 459). Mr. Latchaw replied that based on the fact the product contained chlorine and was used in swimming pools, Washington had determined that it was a pesticide. Mr. Wexler then conferred with Mr. Jonas, Respondent's President. Messrs. Jonas and Wexler approached Mr. Latchaw and Mr. Jonas stated the product was not a pesticide (Tr. 460). Mr. Latchaw read from the Enforcement Case Review (Exh. 23) various information, including the statement that "Chlorine containing product added to water in swimming pool is sufficient to identify product as pesticide" (Tr. 460-61). When Mr. Latchaw produced a copy of the label for Scorch, Messrs. Jonas and Wexler pointed to the disclaimer statement to the effect that Scorch was not to be used for daily disinfection or algae control and one of them stated they had been advised by someone in O.C. that if they placed a disclaimer statement on the label, the product would not be a pesticide (Tr. 461). This statement was essentially repeated by Mr. Wexler prior to Mr. Latchaw's departure from the Jonas plant (Tr. 467). Mr. Latchaw's efforts to learn the identity of the individual who gave this advice was met by the

assertion that if he (Jonas) needed the person as a witness he would be called (Tr. 466).

19. Mr. Jonas stated that he wished to speak to his lawyer before allowing Mr. Latchaw to inspect (Tr. 462). Mr. Jonas left, returning in a short time, stating that he could not reach his lawyer, but that based on his prior experience with Mr. Latchaw, he was not going to allow him to inspect. The prior experience referred to a previous inspection by Mr. Latchaw which resulted in a civil penalty proceeding which was terminated by a consent agreement and final order assessing Jonas a penalty of \$5,000 (finding 33, infra). Mr. Latchaw inquired whether Mr. Jonas was aware that refusal to allow an inspection was an unlawful act, which could result in a civil penalty, receiving an affirmative answer (Tr. 462-63).
20. After an interval of approximately 15 minutes, Mr. Jonas again approached Officer Latchaw and informed him that he could inspect any pesticide in his plant, but that Scorch was not a pesticide (Tr. 464). At Mr. Jonas' request, Mr. Latchaw spoke on the telephone to a gentleman identified as Jonas' counsel. He did not remember the man's name or the content of the conversation (Tr. 465-66). Mr. Jonas stated his attorney was going to send a letter to the EPA Regional Office and Officer Latchaw asked Mr. Jonas to give him (Latchaw) a letter before he left the premises. Mr. Jonas agreed to do so.
21. Mr. Latchaw called his supervisor, Mr. John W. Smith, and informed him that Jonas had refused permission to conduct an inspection (Tr. 466-67). At Mr. Smith's request, Mr. Latchaw

asked Mr. Jonas to include in the letter a statement that the refusal extended to a book and record inspection. Before leaving the Jonas plant, Mr. Latchaw was handed a letter, dated July 14, 1976, signed by Mr. Jonas and addressed to Mr. John Smith, EPA Region III (Exh. 51). The letter stated that we (Jonas) would be more than willing for Mr. Latchaw to inspect, take samples and look at records of any product in the plant. However, the letter continued, according to our attorney, the product Scorch is not an economic poison within the meaning of the Act and accordingly, EPA has no jurisdiction over records relating thereto. The letter closed with a statement to the effect that if a determination was made by mutual consent that Scorch is subject to the Act, Jonas would reverse its determination.

22. In a letter, dated July 15, 1976, addressed to Mr. John Smith, Mr. Albert Momjian of the law firm of Abrahams & Loewenstein, Philadelphia, Pennsylvania, confirmed having given advice that Mr. Latchaw had no jurisdiction to make the specific inspection of the N. Jonas & Company plant requested by him on July 14, 1976 (Exh. 49). The reasons advanced were that it was quite clear from the label that product was not intended as a pesticide and the informal advise from a representative of EPA to place the disclaimer on the label.
23. On July 14, 1976, the date Mr. Latchaw was attempting to make an establishment inspection of Respondent's plant, a copy of the Enforcement Case Review and a copy of the Scorch label (Exh. 20) were presented to Mr. Adamczyk (identified in finding 8) for his

determination of the pesticidal status of the product (Tr. 178-180, 182). Mr. Adamczyk reviewed the label and determined Scorch was a pesticide for the reason that "The labeling term 'organic material' was an implied claim for algae and bacteria control" (Tr. 183; Exh. 24). He wrote the quoted statement beneath the statement that chlorine containing product added to water in swimming pool is sufficient to identify product as pesticide, added a sentence providing "Despite the disclaimer, the product would mitigate or control algae and bacteria" signed his name and inserted the date. His reasons for making that determination were that calcium hypochlorite is a widely known and used bactericide and algaecide, that algae and bacteria are organic materials, and that bacteria and algae control would result from its application to swimming pool water at the dosage recommended (Tr. 183-86, 198-99, 203, 224-26).

24. Calcium hypochlorite is an unstablized form of chlorine, which when combined with water produces hypochlorous acid (Tr. 347, 373). The amount of hypochlorous acid formed is pH dependent--a high pH decreases the amount of hypochlorous acid (chlorine) formed and thus decreases its effective disinfection or killing power. A commonly prescribed and recommended pH for swimming pool water is 7.2 to 7.6 (Tr. 252, 371). Hypochlorous acid is destructive of microbiological forms of life, making it an effective germicide and algaecide. However, it is unstable in the presence of sunlight and is dissipated or destroyed by the rays of the sun (Tr. 373, 747, 761). In order to prolong the effectiveness of chlorine, stabilizers such as cyanuric acid are added to chlorine compounds used for

swimming pool sanitation or the acid is added to the water in a separate application. A daily application of chlorine or a chlorine compound calculated to result in 0.6 to 3 ppm chlorine will result in a disinfection effect, but will not destroy or kill all algae and bacteria present in the pool water (Tr. 250, 255, 273, 640).

25. Chlorine is also a powerful oxidizing agent (Tr. 347, 747).

While the cyanurate stabilizers prolonged the effectiveness of chlorine as a disinfectant, the stabilizers suppressed the oxidizing properties of chlorine, aiding in the formation of chloramines, sometimes referred to as combined chlorine (Tr. 366-67, 374-76, 738-39, 747-49). Chloramines are characterized by a chlorine odor and are formed by the combination of chlorine and nitrogen (Tr. 375-76, 743-44, 752, 757). Nitrogen and ammonia in swimming pool water result principally from perspiration and urination (Tr. 386, 793).

26. Chlorine in swimming pool water will achieve some disinfection in the presence of chloramines. However, chloramines have to be taken care of or broken up in order to achieve effective disinfection and it is only free available chlorine over and above chlorine demand that acts as an effective disinfectant (Tr. 79, 247). Chlorine demand of the water, i.e., the amount of chlorine used up in oxidation, is dependent upon the amount of organic material present (Tr. 78).

27. In order to overcome the effects of chloramines, the practice of superchlorination or shock treatment was developed (Tr. 366-67, 377, 743-44). This involves the periodic application of an unstabilized chlorine at a rate several times the rate supplied

for daily disinfection purposes in order to oxidize or burn out nitrogenous material. Superchlorination involves the phenomena of breakpoint chlorination which is the point at which chloramines are broken up and organic and nitrogenous materials are destroyed or become gaseous (Tr. 125, 367-68, 370, 372, 749-53, 834). Chlorine present or added to the water prior to reaching or achieving breakpoint chlorination may be used up or oxidized in the chlorine demand of the water and chlorine added or available after achieving breakpoint chlorination is referred to as free available chlorine. Free available chlorine results in immediate inactivation of micro-organisms in the water and in excellent disinfection (Tr. 734, 752-53).

28. While there is no assurance that application of Scorch at the rate or frequency suggested on the label will result in breakpoint chlorination (Tr. 120-21, 252, 258, 313, 384, 687-88, 691, 812, 830, 849, 872-73) it is highly probable, that application of Scorch at the suggested rate will achieve breakpoint chlorination (Tr. 258, 835). It is also probable that achieving breakpoint chlorination would result in free available chlorine in the water (Tr. 834), which, as found previously (finding 27), results in excellent disinfection.
29. The concept of superchlorination began to be explained and taught to swimming pool owners and operators by the industry in the late 1960's and early 1970's (Tr. 376-77). By 1976 the concept was generally recognized and widely practiced (Tr. 377-79, 401, 521-23, 527, 544-45).



30. A recommended and generally accepted program for swimming pool maintenance consists of the daily or continuous application of a stabilized chlorine compound for disinfection purposes, the periodic addition of an algaecide for algae control and periodic superchlorination (Tr. 366, 371-72, 395, 401, 596-98, 760, 772; Excerpt from Consumer's Report, Resp.'s Exh. T).
31. It is the pattern and practice of industry to register with EPA chlorinated products for use in swimming pools (Tr. 275, 281-82). Some products, marketed as superchlorinators, containing hypochlorite and registered with EPA are also indicated to be for algae control (Tr. 608-09, 625). However, there are products, such as Oxy-brite and Oxy-Shock, represented to contain no chlorine, being marketed for burning-out or oxidizing organic material or contamination in swimming pools, which are not registered with EPA. (Resp.'s Exh. O & S).
32. Bacteria and algae are common in swimming pools and although its effectiveness will depend on the amount of organic material present in the pool water, mitigation or control of algae and bacteria can result from application of Scorch to swimming pool water at the dosage recommended on the label. Literature available to the public in 1976 and prior years (Supplemental Registered Label for Scorch, Resp.'s Exh. E; Public Pool Care Guide, Resp.'s Exh. I; Pool Gard, Pool Care Guide, Resp.'s Exh. Y and Everything You Always Wanted to Know About Pool Care, Resp.'s Exh. U) indicate that a purpose of superchlorination can include algae control and the reasonable pool owner or operator would expect at least algae control or mitigation to result from the use of Scorch.

33. By a Consent Agreement and Final Order, dated June 8, 1976, Respondent agreed to pay a penalty of \$5,000 for shipping an unregistered pesticide in interstate commerce and for holding for sale and offering for sale certain pesticides which were misbranded (Exh. 31). By a Consent Agreement and Final Order, dated March 19, 1974, Respondent agreed to pay a penalty of \$300 for shipping an unregistered pesticide in interstate commerce (Exh. 32). Between the dates of April 20, 1973 and July 11, 1969 Respondent received 13 separate notices of contemplated proceedings for alleged violations of FIFRA. However, no further proceedings resulted from these notices.

#### CONCLUSIONS

1. Mitigation or control of bacteria and algae can result from the application of Scorch to swimming pool water at the dosage recommended on the label, the reasonable pool owner or operator would expect at least algae control to result from the use of Scorch, and Scorch is a pesticide as defined in Sec. 2(u) of the Act (7 U.S.C. 136(u)(1976)) and implementing regulations 40 CFR 162.3(ff) and 40 CFR 162.4(a).
2. Scorch was not registered with the Administrator as required by Sec. 3(a) of the Act (7 U.S.C. 136a(a)).
3. Respondent's action in distributing, offering for sale, holding for sale, shipping and delivering for shipment the pesticide Scorch without the pesticide being registered with EPA is a violation of Secs. 3(a) and 12(a)(1) of the Act (7 U.S.C. 136a(a) and 136 j(a)(1)(A)).

4. Scorch being a pesticide, Respondent's refusal on July 14, 1976, to allow Officer Latchaw, a duly authorized representative of the Administrator, entry for the purpose of inspecting and obtaining a sample of the product Scorch was a violation of Secs. 9a and 12(a)(2)(B) of the Act (7 U.S.C. 136g(a) and 136j(a)(2)(B)).
5. For each of the violations referred to in conclusions 3 and 4, Respondent is liable for a civil penalty. (Sec. 14(a)(1), 7 U.S.C. 136 1(a)(1)).

#### DISCUSSION

Under Sec. 2(u) of FIFRA (7 U.S.C. 136(u)) the term pesticide is defined as follows:

"(u) PESTICIDE - The term pesticide means (1) any substance or mixture of substances intended for preventing destroying, repelling, or mitigating any pest, 1/ and (2) any substance or mixture of substances intended for use as a plant regulator, defoliant, or dessicant: \* \* \* ."

Sec. 2(t) (7 U.S.C. 136(t)) defines a pest as follows:

"(t) Pest.--The term 'pest' means (1) any insect, rodent, nematode, fungus, weed, or (2) any other form of terrestrial or aquatic plant or animal life or virus, bacteria, or other micro-organism (except viruses, bacteria, or other micro-organisms on or in living man or other living animals) which the Administrator declares to be a pest under section 25(c)(1)."

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1/ The quoted definition of a pesticide is essentially that of an economic poison in FIFRA of 1947, which appears to have been lifted from the Insecticide Act of 1910 (36 Stat. 335) wherein an insecticide was defined in Sec. 5 in pertinent part as "\* \* any substance or mixture of substances intended to be used for preventing, destroying, repelling, or mitigating any insects \* \* ."

The statutory definitions are repeated and amplified in the regulations. 40 CFR 162.3(ff) provides:

"(ff) The term "pesticide" means any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest, and any substance or mixture of substances intended for use as a plant regulator, defoliant, or desiccant. The term "pesticide" when not specifically modified or delimited by other words, shall include any one or combination of the following aspects of the term: The active ingredient (chemical or biological); the pesticide formulation; and the pesticide product.

"The following are examples of classes of pesticides:

- Amphibian and reptile poisons and repellents
- Antimicrobial agents
- Attractants
- Bird poisons and repellents
- Defoliants
- Desiccants
- Fish poisons and repellents
- Fungicides
- Herbicides
- Insecticides
- Invertebrate animal poisons and repellents
- Mammal poisons and repellents
- Nematicides
- Plant regulators
- Rodenticides
- Slimicides"

40 CFR 162.4(a) provides:

"(a) Determination of intent of use. A substance or mixture of substances is a pesticide under the Act if it is intended for preventing, destroying, repelling or mitigating any pest. (See section 2(u) of the Act and §162.3(ff).) Such intent may be either expressed or implied. If a product is represented in any manner that results in its being used as a pesticide, it shall be deemed to be a pesticide for the purposes of the Act and these regulations."

The statute speaks in terms of the purpose for which the product or substance is intended and the cases are clear that the intended

use of a product may be or is to be determined by what the product holds itself out to be as evidenced by labeling, promotional material, advertising fliers, etc. See United States v. 681 Cases \* \* \* Kitchen Klenzer, 63 F. Supp. 286 (E.D. Mo., 1945) (a product represented by its labeling as being a fungicide was such for purposes of Insecticide Act of 1910 irrespective of whether it was in fact a fungicide) and United States v. An Article \* \* \* Sudden Change, etc., (409 F.2d 734, C.A. 2, 1969) (intended use of a product may be determined from labeling, promotional and advertising material, etc. and regardless of the actual physical effect of a product, it will be deemed a drug for the purposes of the Federal Food, Drug and Cosmetic Act (21 U.S.C. 301 et seq.) where labeling and promotional claims show intended uses that bring it within the drug definition (21 U.S.C. 321(g)(c))).

The regulation (40 CFR 162.4(a)) provides that the intent (intended use) may be express or implied and that if a product is represented in any manner that results in it being used as a pesticide, it shall be deemed a pesticide.<sup>2/</sup>

Scorch is a chlorine compound and it is represented for use in swimming pools. It is not disputed that algae and bacteria are common problems (pests) in swimming pool water and that the addition of a chlorine compound to swimming pool water will have pesticidal effects. It is, of course, true that effective algae and bacteria

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<sup>2/</sup> Sec. 25 of FIFRA (7 U.S.C. 136w) authorizes the Administrator to promulgate regulations to carry out the provisions of the Act and Respondent has not specifically alleged that the regulations are invalid as exceeding the Administrator's authority under the statute.

control requires that the chlorine concentration or residual be maintained above 0.6 ppm (ideally between 0.6 and 1.5 ppm).

It is Respondent's contention that disinfection and mitigation or control of algae in swimming pool water are now commonly, if not universally, accomplished by the addition of a stabilized chlorine compound on a daily or continuous basis, that additional algae control is accomplished by use of an algaecide sold as such and that superchlorinators such as Scorch are used and intended for use to oxidize or burn-out organic materials in swimming pools and not for algae or bacteria control. Respondent concedes (Opening Statement, Tr. 13; Tr. 615, Proposed Findings, p. 9) that Scorch has a minor and incidental effect in killing algae and bacteria but points to other products used in swimming pools<sup>3/</sup> which also have an incidental effect in killing bacteria but which are not registered and are not regarded as pesticides. Respondent emphasizes the intended [use] language of the statute and argues that Scorch would not be registerable because the label and advertising literature (Exh. W) made no pesticidal claims and because, even if Scorch was intended for algae and bacteria control, it would not be effective for such purposes because it is unstabilized and would be rapidly burned off or dissipated by the sun and because, assuming an appropriate chlorine residual (0.6 to 1.5 ppm) had been maintained, there would not be a significant number of bacteria in the pool at the end of a week (Tr. 87).

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<sup>3/</sup> Examples of such products are: muriatic acid (hydrochloric acid) for control of ph and cyanuric acid for stabilization purposes (Tr. 217, 663-70, 839).

An immediate problem with Respondent's position is that it seems to be generally conceded that if a chlorine concentration or residual of 0.6 to 1.5 ppm is maintained in swimming pool water, there is no need for an algaecide.<sup>4/</sup> In this connection, Mr. Castillo<sup>5/</sup> testified that the formation of chloramines, which it is a purpose of superchlorination to oxidize or breakup, was a sign that other things had gone wrong with the pool such as excessive proliferation of bacteria and their metabolic by-products and excessive algaecidal problems.<sup>6/</sup> Although Respondent's expert witness, Mr. Strand (note 5, supra) denied that the quantitative presence of chloramines bore any relationship to the bacteria count of the pool, under cross-examination, he conceded that bacteria could contribute to the formation of chloramines as a matter of theoretical chemistry (Tr. 388-89). Moreover, Mr. Castillo's testimony is supported in part by "Everything you always wanted to know about Pool Care" (Note 4, supra) which states at page 35:

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<sup>4/</sup> Everything you always wanted to know about Pool Care (Resp.'s Exh. U) at 39: "\* truth of the matter is, you don't need algaecides unless your chlorination program breaks down. An algaecide is like an insurance policy. Or a backup quarterback."

<sup>5/</sup> Mr. Frank Strand, a witness for Respondent, a chemist and an expert in swimming pool water chemistry, accepted Mr. Castillo as a true expert in the dimensions in which he was addressing the subject of the use of chlorinated compounds in swimming pools (Tr. 381).

<sup>6/</sup> TR. 298. This testimony is supported by "Everything you always wanted to know about Pool Care" (Note 4, supra) at 60:

"A breakdown in the control of algae signals a takeover by bacteria and vice versa.

"Bacteria thrive on decaying algae. And vice versa."

"Organic material is loosely defined as something that once lived. When it decays, it (sic) forms nitrogeneous and ammonia type products." 7/

It is also noted that the cited publication (p. 15) states that the growth of algae takes carbon dioxide from the water, thus raising the pH, and it will be recalled (finding 24) that the amount of hypochlorous acid (chlorine) formed when calcium hypochlorite is added to water decreases as the pH rises. It therefore seems reasonable to conclude and it is hereby concluded that the reason it becomes increasingly difficult to maintain an appropriate chlorine residual<sup>8/</sup> or for the breakdown of the chlorination program is due to the growth of algae, bacterial action or other micro-organic activity.

One of Mr. Brown's reasons for determining that Scorch was a pesticide was that the claim or oxidizing organic material was a pesticidal claim because oxidizing organic material would deprive

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7/ Dr. Mood, an expert witness for Respondent, whose credentials as an expert in the sanitation and chemistry of swimming pool water are indeed impressive (Exh. AA) and whose qualifications as an expert were in effect conceded by counsel for Complainant (Tr. 736), testified repeatedly that a purpose of superchlorination is to oxidize nitrogeneous material (Tr. 832-33, 838-39, 876).

8/ Mr. Brown testified that because of chloramines it was very difficult to maintain a chlorine level or residual of 0.6 to 1 ppm without superchlorinating (Tr. 76, 77).



bacteria of a source of nutrients (finding 14).<sup>9/</sup> This testimony was disputed by Dr. Mood (note 7, supra) who asserted that bacteria growth or multiplication does not normally occur in swimming pools and that proteinaceous material, a common one being urine, would not be relevant to the growth of bacteria in swimming pools (Tr. 757-59, 819). However, the article from Consumer Reports, "Swimming Pool Chemicals" (Resp.'s Exh. T) supports Mr. Brown, stating (p. 367) in part:

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<sup>9/</sup> Respondent has objected to the introduction and consideration of any evidence and reasons for considering that Scorch is a pesticide subsequent to June 24, 1976, contending that the EPA determination must stand or fall on the rationale initially advanced, i.e., that addition of a chlorine containing compound to swimming pool water was sufficient in and of itself to identify the product as a pesticide, pointing out that the complaining firm was informed of the EPA determination by letter dated, July 8, 1976 (finding 15) and citing the rule that administrative action is to be judged by the reasons actually cited in support thereof rather than arguments or rationalizations advanced at a later time when the administrative decision is called into question. While the rule cited by Respondent is well established and it is true that in a sense the EPA determination was published when the letter to the complaining firm was issued on July 8, 1976, the rule is simply inapplicable here because it applies only to final agency decisions, i.e., those ripe for judicial review.

"\* \* The swimmer himself, however, is the primary source of material on which bacteria and algae feed, thrive and multiply. He constantly sheds minute amounts of skin, dirt, hair, body secretions and other organic material in the water."

Moreover, while Dr. Mood denied that proteinaceous material in swimming pool water serve as a nutrient for bacteria, he, nevertheless, conceded that such material served as a host substance for bacteria or other micro-organisms:

"\* \* Virtually we do not discharge organisms into the atmosphere--into the environment free of foreign materials. \* \* \* and since we're talking about water is the fact that it's virtually impossible to have any type of micro-organism which is of human origin anyway--virus, bacteria and so forth--present in there without the presence of some foreign material which was largely the vehicle that put it there. It may be sputum, it may be urine, it may be feces, it may be perspiration, but it is their presence with this which is the vehicle. These organisms do not exist without the presence of some type of a host substance."(Tr. 819)

It is significant that Dr. Mood made no similar claim as to algae, i.e., that proteinaceous material would not serve as a nutrient for algae. In this regard Mr. Castillo testified that maintenance of free available chlorine above 5 ppm would result in bacteria and algae control (Tr. 250, 284-85, 849-51, 854).

See also Pool Gard, Pool Care Guide (Resp.'s Exh. Y), which states as reasons for periodically burning out nonfilterable wastes:

"\* \* Some swimmer wastes act as nutrients for growth of algae and may materially reduce chlorine efficiency and also increase chlorine demand in the pool."

Accordingly, even if Dr. Mood is correct in his assertion that proteinaceous material in swimming pool water does not serve as a nutrient for bacteria, this testimony does not apply to algae and it seems reasonable that burning out or oxidizing such material would tend to mitigate bacteria or other micro-organisms by depriving them of a host substance which is essential for their existence.<sup>10/</sup>

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<sup>10/</sup> Respondent (Reply Brief at 10) attacks the premise that a product or substance which deprives bacteria of a source of nutrients can be said to mitigate a pest within the meaning of the Act and points out that under the regulations (40 CFR 162.3(ff)(2)(i)(c)) bacteriostats are limited to those intended to inhibit the growth of bacteria in the presence of moisture. Respondent contends that no definition of moisture can include a swimming pool. As noted (note 1, supra), the definition of a pesticide appears to be based essentially on the definition of an insecticide in the Insecticide Act of 1910. No legislative history or cases on point appear to exist. However, the dictionary definition of mitigate (Webster's Third New International Dictionary) includes "to make less severe, \* \* intense \* \*, to soften, alleviate" \* \* and to "lessen," and it is considered reasonable to regard a substance which would deprive bacteria of a source of nutrients as tending to make bacteria less severe, intense, to alleviate or lessen their number. Moreover, the regulatory definition of a bacteriostate cited by Respondent is actually contained in a list of antimicrobial agents (40 CFR 162.3(ff)(2)(i)) which are stated to include, but are not limited to those in the list.

The significance of the foregoing is, of course, that burning out or oxidizing organic material in swimming pools has more of a pesticidal effect (preventing, destroying, repelling or mitigating pests) than the incidental effect conceded by Respondent. Pesticidal effect is important because of the regulation (40 CFR 162.4(a), quoted supra) to the effect that if a product is represented in any manner that results in its being used as a pesticide, it will be deemed to be a pesticide. In this connection, United States v. Sudden Change, supra, is frequently cited for the proposition that the intended use of a product may be determined from its label, accompanying labeling, promotional or advertising material, etc. Sudden Change is also cited for the proposition that if the claimant ceases to make drug [pesticidal] claims the product would not be deemed a drug for the purposes of the Federal Food, Drug and Cosmetic Act. Overlooked is the court's qualification which is as follows:

"\* \* that if claimant ceases to employ these promotional claims and avoids any others which may fairly be interpreted as claiming to affect the structure, of the skin in some physiological, though temporary way, then assuming arguendo that no actual physical effect

exists, the product will not be deemed a drug for purposes of the Act." (emphasis supplied)  
409 F.2d at 742 11/

Having determined that a chlorine containing or liberating compound such as Scorch when applied to swimming pool water for the purpose of oxidizing or burning out organic material can have pesticidal effects, the next question is whether the intent for such an effect may fairly be gleaned from the label. 12/ Relevant to

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11/ Respondent relies upon Continental Research Corporation, I.F. & R. Docket No. VII-154C (Initial Decision, April 26, 1977) involving the product "MUNICI-PAL FAST ACTING SEWER AND DRAIN OPENER" whose label described the intended use of the product as including: "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 \* \* ." The ALJ held that the claim for removal or dissolution of roots made the product a herbicide and thus an economic poison within the meaning of FIFRA of 1947. Apparently relying on Sudden Change, supra, the Judge stated that elimination of these pesticidal claims i.e. the "removal or dissolution of roots," would remove the product from the definition of an economic poison or pesticide. This dictum overlooks the qualification in Sudden Change concerning the absence of physiological [pesticidal] effects and fails to consider possible pesticidal claims involved in a label claiming to remove or dissolve grease and other organic material.

12/ It is recognized that the finding of pesticidal effect when Scorch is applied to swimming pool water at the recommended dosage and the regulation (40 CFR 162.4(a)), providing that if a product is represented in any manner that results in it being used as a pesticide, it shall be deemed a pesticide, would seem sufficient to warrant a finding that Scorch is a pesticide.

this question is the purpose for which the reasonable pool owner or operator would use Scorch. Although Mr. Strand (Tr. 379), Mr. Jonas (Tr. 615) and Dr. Mood (Tr. 803-04) testified that the swimming pool industry and the general public would not intend or expect bacteria and algae control to result from the use of a superchlorinator such as Scorch, they are well educated men, experts in the field and evidence to support a contrary conclusion. <sup>13/</sup> is contained in exhibits introduced by Respondent. See the quote in the text from "Pool Gard, Pool Care Guide" and the quote (note 4, supra) from "Everything you always wanted to know about Pool Care." The Public Pool Care Guide (Resp.'s Exh. I), written and edited by Mr. Strand and published by the National Swimming Pool Institute (1st printing 1967; 2nd printing 1970), states (p. 8) that chlorine is added to swimming pool water for disinfection and oxidation and that the purpose of oxidation is to react with and destroy contaminants such as algae, body oil, etc. It is also noted that the supplemental registration for the product Scorch (Resp.'s Exh. E), which as we have seen (finding 12), is based upon the registration for Pennswim Big Shot (Exh. 27), states that Scorch is used to eliminate discomforting irritation due

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<sup>13/</sup> In this connection, Dr. Mood compared the question of whether disinfection was actually achieved by the daily dosage of chlorine or by superchlorination to the question if I was cut by a buzz saw, which tooth cut me? (Tr. 836-37).

to chloramines and for algae control.<sup>14/</sup> While Respondent contends that this label is irrelevant because if the product Scorch represented by the supplemental registration is identical with the product Scorch involved in this proceeding then Scorch was supplementally registered and the charge, if any, should have been misbranding,<sup>15/</sup> the point is that the supplementally registered Scorch (Resp.'s Exh. E) was available to the public and the label states that one of its purposes is algae control.<sup>16/</sup>

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<sup>14/</sup> Labels for Pennswim Big Shot (Exh. 27), Rockwin Shock Treatment (Exh. 28) and hth Dry Chlorinator Tablets (Exh. 29), which describe products containing 65% or 70% calcium hypochlorite and which indicate that a purpose of superchlorination is algae control, have not been considered because the labels bear EPA acceptance stamp dates in May and July of 1977, and because the labels were admitted over Respondent's objection for the sole purpose of showing industry practice to register products containing calcium hypochlorite for use in swimming pools (Tr. 279-80). It is noted, however, that Mr. Castillo testified that these were the most recently accepted labels, and that no new registrations for products containing calcium hypochlorite had been issued since 1975 (Tr. 317). However, Mr. Castillo only guessed that similar algae claims had been made for such products prior to 1977 (Tr. 293).

<sup>15/</sup> At the hearing counsel for Respondent agreed that he would stand on the pleadings as presently constituted, i.e., Respondent would not rely on the defense of misbranding (Tr. 846-47).

<sup>16/</sup> As noted (finding 12), Mr. Jonas explained the reference to algae control as due to the necessity of conforming to the Pennwalt label. While complainant points out that the regulation (40 CFR 162.6(b)(4)(i)(c)) provides that specific claims may be deleted from the label of the supplementally registered product if by so doing no other changes are made necessary, Mr. Jonas may be pardoned for this apparently erroneous belief, since Mr. Castillo testified that the supplemental registrant had little or no control over the text of the label (Tr. 334-35). Nevertheless, Mr. Jonas indicated some familiarity with pesticide regulations and that his firm had a copy of the regulation (Tr. 681), and a permissible conclusion might be that the reference to algae control was not deleted because he wanted the user to conclude that algae control would result from use of the product.

Mr. Herbert Budd and Mr. George Piper, operators of New Jersey retail establishments selling swimming pool supplies and equipment and providing various services to swimming pool owners and operators, testified that they instructed their customers to use a stabilized chlorine on a daily basis for disinfection, a superchlorinator or a supershock to burn out organic wastes in the pool, and an algae controller (not chlorine) for control of algae (Tr. 521, 525, 543-44). While this advice coincides with what they were taught at various pool schools and seminars and is consistent with Jonas' teachings at such educational and informational gatherings, this evidence falls short of solid evidence as to what a reasonable pool owner or operator<sup>17/</sup> would consider was the purpose of superchlorination and that it was not for algae control. In view thereof and in view of the record evidence described previously indicating that a purpose and effect of superchlorination is algae control, it is concluded that the reasonable pool owner or operator would regard the purpose of superchlorination as, at the very least, including algae control.<sup>18/</sup>

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<sup>17/</sup> This standard is undoubtedly too high if the standard of U.S. v. Sudden Change, supra, is applied, which indicates that intended use is to be measured by how the claim might be understood by the "ignorant, unthinking or credulous consumer." However, see the explanatory notes to the Regulations For The Enforcement of The Federal Insecticide, Fungicide and Rodenticide Act (40 F.R. No. 29, July 13, 1975, at 28245) which indicates that the use for which the product is reasonably intended will govern.

<sup>18/</sup> Rejection of Mr. Jonas' testimony as to the stated reasons for making pesticidal claims in the application for the registration of Scorch (finding 4) and on the label for the supplementally registered product Scorch (finding 12) would, of course, furnish additional support for finding the requisite pesticidal intent (note 16, supra).



The fact that Scorch is represented as burning out organic material in swimming pools, that it is represented as containing 65% hypochlorite, that it will actively reduce most of these (organic) wastes, that it is to be used every week in hot weather and once every two weeks in cooler weather<sup>19/</sup> and that it should be used after heavy rain (rain can be a source of increased algae and bacteria spores in a pool (Tr. 257, 310)) or other source of contamination takes place, and that algae are common in swimming pools, tend to reinforce the conclusion, albeit indirectly, that an intended use of Scorch is or may be algae control. This brings us to the question of the so-called disclaimer: "Important: Scorch is not to be used for daily disinfection or algae control of your pool." Complainant argues that the presence of the word "daily" implies that Scorch could be used for weekly disinfection or algae control. While the word "daily" clearly modifies disinfection and not algae control and it is reasonable to read the disclaimer as negating algae control rather than daily algae control, the recommended dosage or application rate is such that Scorch would not normally be used on a daily basis in any event (Tr. 186). Accordingly, and although Complainant's argument that the label implies that Scorch could be used for weekly disinfection<sup>20/</sup> has some merit as a matter of technical interpretation, the disclaimer is considered to have little or no bearing on the outcome of this case.

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<sup>19/</sup> Cold or cool water tends to retard the growth of algae (Tr. 201). This is consistent with the label direction to use Scorch every two weeks in cooler weather.

<sup>20/</sup> The "ignorant, unthinking or credulous consumer" would be unlikely to reach such a conclusion.

The reason is that a disclaimer will not be deemed to negative what may be reasonably gleaned or fairly implied from the balance of the label.<sup>21/</sup>

For the foregoing reasons, Scorch must be determined to be a pesticide<sup>22/</sup> within the meaning of FIFRA and implementing regulations.<sup>23/</sup>

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<sup>21/</sup> Any other holding would allow ready circumvention of the statute. See 40 CFR 162.10(a)(5)(viii) which includes as examples of misbranding labeling disclaimers which detract from labeling statements required under the Act or regulations.

<sup>22/</sup> Respondent relies heavily on Gulf Oil Corp. v. EPA, 9 ERC 1989, 548 F.2d 1228(C.A.5, 1977), wherein an EPA determination that a patio torch fuel represented to contain oil of Citronella was a pesticide within the meaning of FIFRA was reversed because not supported by substantial evidence. The cited case is distinguishable because there the only possible pesticidal claim arose from the representation that the fuel contained oil of Citronella, which had been widely used as a pesticide prior to World War II but such use had been discontinued because Citronella's effectiveness was limited, and other more effective pesticides were available, there was no probative evidence that the general public recognized Citronella as a pesticide, and there was substantial evidence that Citronella was now widely used and recognized as a perfume. Here there is no question as to the general effectiveness of a chlorine containing compound as a pesticide when applied to swimming pool water at a rate calculated to result in 7.8 ppm chlorine and, as we have seen, there is language on the Scorch label, apart from the disclaimer, from which a pesticidal intent can be implied.

<sup>23/</sup> The only apparent difference between Scorch and Oxy-brite and Oxy-Shock, which, as noted (finding 31), are represented for use in burning out or oxidizing organic material in swimming pools, is that Scorch contains chlorine. This difference is more apparent than real in the case of Oxy-brite, which although it contains no chlorine, nevertheless, reacts with chloride in the water (indicated to be in 99.9% of all swimming pools to form hypochlorous acid (Progress Report, Resp.'s Exh. X). The just cited exhibit notes the anomalous situation of Oxy-brite not requiring an EPA registration even though it acts as a pesticide in the water. The regulation (40 CFR 162.4(c)(6)) including as examples of products not considered pesticides "Intermediate substances intended for the production of a pesticide product by a chemical reaction with other substances" applies only to production and is not applicable. Be that as it may, the record does not reveal an official EPA determination that Oxy-brite does not require registration and Mr. Brown expressed doubt that Oxy-brite was appropriately not registered (Tr. 101).

Respondent has set forth a series of arguments to the effect that EPA should be estopped from prosecuting this proceeding by virtue of (i) its unreasonable delay in acting upon the application for registration of Scorch, (ii) Respondent's compliance with the informal EPA advice to the effect that inclusion of a disclaimer on the label would remove Scorch from the coverage of the Act, (iii) the so-called freeze on registration, (iv) EPA's failure to publish final guidelines for the registration of pesticides as required by the Act, (v) discriminatory prosecution in that other firms marketing unregistered products which are represented to be used for the same purpose as Scorch are not prosecuted, (vi) EPA's witting or unwitting action in being a party to a scheme by a competitor to keep Scorch off of the market and (vii) alternatives to prosecution, i.e., a notice of contemplated proceedings, should have been issued because Scorch had been supplementally registered and use of the labels for the unregistered product discontinued.

In order to avoid unduly lengthening this opinion, reasons for rejecting these arguments will be abbreviated. As to (i) above, it is true that the Act (Sec. 3(c)(3)) admonishes the Administrator to "as expeditiously as possible" register the pesticide or notify the applicant that it does not comply with the Act and that the regulation (40 CFR 162.7(c)) states that where practicable the application shall be approved or denied within 90 days. However, even if 90 days is regarded as a reasonable period for acting on the application, because

no data was submitted with the application, the 90 days should run not from the date, September 8, 1975, the application was received, but from the date, November 24, 1975, the Pennwalt letter, dated November 18, 1975 (finding 5), was received authorizing use of Pennwalt's data submitted in connection with the registration of its product Sentry to support the registration of Scorch. Because Respondent had acted within 90 days from November 24, 1975, to secure labels for and produce the unregistered "Scorch," the principle of estoppel based on unreasonable delay advocated by Respondent has no application. Moreover, insofar as the record discloses, Respondent made no inquiry as to the status of the application which tends to support Mr. Castillo's testimony (finding 5) that Respondent was informed of the application's status by telephone. Accordingly, even if there are circumstances wherein unreasonable delay might preclude institution of proceedings for violations of the Act,<sup>24/</sup> it is concluded that Complainant is not estopped from prosecuting this proceeding.

With respect to (ii), Respondent's reliance on informal advice from an EPA employee to the effect that inclusion of a disclaimer would remove Scorch from jurisdiction of the Act is flawed by the fact that the employee was in possession of neither the label

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<sup>24/</sup> Delays in cases cited by Respondent were for much longer periods than involved herein. See, e.g., Nader v. Federal Communications, 520 F.2d 182 (D.C.Cir., 1975) (10 years) and Silverman v. NLRB, 543 F.2d 428 (Ind Cir., 1976) (5 years).

nor the language of the proposed disclaimer. Cases cited by Respondent<sup>25/</sup> are distinguishable and do not control here. Respondent's contention that the informed advice referred to estops Complainant from proceeding herein is rejected.

Concerning the so-called freeze on registrations ((iii) above), it is true that Mr. Castillo testified that no new registrations for calcium hypochlorite products for use in swimming pools had been issued since September 1975 (Tr. 317). However, as pointed out (finding 3) the requirement that data relied upon to support the application be submitted with the application or specifically referenced therein was a result of regulations (40 F.R. 28242, et seq., July 3, 1975) issued pursuant to FIFRA amendments effected by the Federal Environmental Pesticide Control Act of 1972. Accordingly, the additional data requirements are a result of the statute and not EPA caprice. Moreover, Mr. Jonas testified that generation of necessary safety and efficacy data cost hundreds of thousands of dollars (Tr. 627-28), which may be assumed to be beyond the financial

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<sup>25/</sup> In Brandt v. Hicel, 427 F.2d 53 (9th Cir., 1970), the advice given was written and was ambiguous as to whether it constituted a final decision. Other cases cited by Respondent, e.g., United States v. Lazy FC Ranch, 481 F.2d 985 (9th Cir., 1973) and United States v. Wharton, 514 F.2d 406 (9th Cir., 1975) indicate that estoppel will be invoked only if necessary to prevent serious or manifest injustice and only if there was affirmative misconduct on the part of the Government. Here, because the advice was informal, and the employee involved had neither a copy of the label nor the disclaimer, respondent's right to rely upon such advice is at least questionable. In addition, Respondent received an opinion to the contrary within 30 days after receipt of the informal advice relied upon, but, nevertheless, proceeded to market Scorch.

capability of most firms with total sales in the range of Respondent's (see penalty section, infra). The point being that firms such as Respondent will of necessity rely on firms with greater financial resources to generate data to support registration of their products. Accordingly, the alleged freeze has not been shown to be the source of Respondent's difficulties in registering Scorch. In any event, as noted previously, Respondent acted to obtain labels for and produce the unregistered Scorch without waiting a reasonable time for action on its application.

Respondent's contention ((iv) above), that an estoppel arises from EPA's failure to promulgate final guidelines for the registration of pesticides is flawed for the reason noted above that the absence of such final guidelines have not been demonstrated to be the source of Respondent's difficulty in registering Scorch. Moreover, this argument ignores the regulation, published on July 3, 1975 (40 F.R. 28242 et seq.; 40 CFR Part 162), which became effective August 4, 1975, setting forth registration procedures, the status of products as pesticides and in general terms data required to support an application for registration. Mr. Jonas appeared to be familiar with the general types of data required (Tr. 627), and although Respondent's assertion that the guidelines have yet to be published in final form is accurate (43 F.R. 29696, July 10, 1978), the proposed guidelines were, nevertheless, available to the public (40 F.R. No. 123, June 25, 1975, at 28602 et seq.). The contention that an estoppel arises from failure to publish the guidelines in final form is rejected.

Respondent's argument ((v) above), that it is being singled out for prosecution while other firms marketing unregistered superchlori-

nators are not proceeded against appears to be based primarily upon the products Oxy-Shock and Oxy-brite. The pesticidal status of Oxy-brite appears indeed anomalous (note 23, supra). However, the record does not disclose a formal determination that Oxy-brite is not a pesticide and, in any event, the record simply will not support findings of intentionally invidious and discriminatory enforcement which would be required to sustain Respondent's position. See, e.g., Inland Steel Co. v. EPA, 574 F.2d 367, 11 ERC 1353 (7th Cir., 1978). Respondent's argument that discriminatory prosecution estops EPA from presenting this proceeding is lacking in merit and is rejected.

While it is true that the instant proceeding resulted from an inquiry by a firm manufacturing or distributing a competing product, Respondent's assertion that EPA is a party to a scheme to keep Scorch off of the market ((vi) above), assumes bad faith or malice upon the part of EPA and must be rejected as not supported by any evidence. The allegation that EPA is an unwitting party to such a scheme is rejected as not supported by evidence, because Scorch has been determined to be a pesticide and it is EPA's duty to enforce the law.

Respondent's assertion ((vii) above), that alternatives to suit such as a notice of contemplated proceedings should have been utilized appears to be based primarily on the belief that the decision to prosecute in this instance was based on Respondent's history of compliance with the Act. While it is true Mr. Smith, whose primary function is enforcement (Tr. 430), expressed the opinion that the decision to institute this proceeding was based on Respondent's past history of compliance (Tr. 435), the decision to prosecute was made

in the legal branch and not by Mr. Smith. In any event, even if the decision to prosecute was based on Respondent's past history of compliance, discretion as to the institution of proceedings under the Act is broad and the record simply will not support a finding of an abuse of discretion in this respect. Respondent's argument that EPA was obligated to utilize alternatives to suit is rejected.

#### Refusal to Permit Inspection

Respondent argues that because Scorch had already been determined to be a pesticide the only relevant inspection in this instance was a book and record inspection pursuant to Section 8 of FIFRA (7 U.S.C. 136f), points out that Officer Latchaw did not testify that he requested a book and record inspection at the time of his July 14, 1976, visit to the Jonas plant and that the Notice of Inspection (Exh. 50) refers only to Section 9 of the Act. Although the face page of the Notice of Inspection refers to a book and record inspection and it has been found (finding 17) that a copy of the notice was delivered to Mr. Wexler,<sup>26/</sup> Respondent has been charged with refusal to permit an inspection under Section 9 for the purpose of obtaining a sample of Scorch. Respondent's argument that it could properly be charged only under Section 8, overlooks EPA's legitimate interest in

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<sup>26/</sup> Although Mr. Wexler at first denied receiving a copy of the Notice of Inspection (Tr. 562), he subsequently testified that he didn't remember [receiving a copy], but that it was possible (Tr. 563).



sampling Scorch for the purpose of testing to ascertain if the label representations as to active ingredients were accurate<sup>27/</sup> and are lacking in merit. Regardless of whether Respondent could have been charged with refusal to permit a book and record inspection under Section 8, respondent clearly refused to allow the inspection and was properly charged under Section 9 of the Act.

Respondent also argues that the attempted inspection was illegal in any event, because no warrant was obtained, citing Ray Marshall, Secretary of Labor, et al. v. Barlow's, Inc., \_\_\_\_\_ U.S. \_\_\_\_\_, 46 Law Week 4483 (May 23, 1978). In the cited case, the Supreme Court held that a provision of the Occupational Safety and Health Act of 1970 (29 U.S.C. 654 et seq.) was unconstitutional insofar as the Act purported to authorize inspections or searches without a warrant or its equivalent. Barlow's, Inc. is distinguishable or inapplicable for at least two reasons. First, it is clear that the refusal to permit the inspection in that case was based on the absence of a warrant. Here, there is no question but that the refusal of inspection was based on the contention that Scorch was not a pesticide and no objection to inspecting and sampling products considered to be pesticides was raised.<sup>28/</sup> Secondly, the Supreme Court excepted from the warrant

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<sup>27/</sup> The record reveals that after samples of Scorch were obtained from other sources, the samples were tested and determined to conform to the representations on the label as to calcium hypochlorite content.

<sup>28/</sup> See the Jonas letter, dated July 14, 1976 (Exh. 51). Although Mr. Jonas, explaining his refusal to permit the inspection, stated that he was standing on what he considered to be his constitutional rights with respect to Scorch because it was not a pesticide (Tr. 639), the mentioned letter expresses willingness to permit inspection and sampling of products that were pesticides.

requirement closely regulated industries long subject to close supervision and inspection which could have no reasonable expectation of privacy (examples stated were liquor and firearms) and it is reasonable to consider pesticides as within the exception in view of the long history of regulation (insecticides and fungicides have been regulated since 1910) and the potential for harm to the public health and environment.

While EPA has acknowledged that absent permission a warrant is necessary for entry and inspection under the Noise Control Act of 1972,<sup>29/</sup> in the absence of authoritative precedent as to the closely regulated industries encompassed within the exception in Barlow's, Inc., supra, it is concluded that the cited decision does not control here. Accordingly, it must be held that Mr. Jonas' refusal to permit an inspection and sampling of Scorch pursuant to Section 9 of the Act was a violation of Section 12(a)(2)(B) (7 U.S.C. 136j(a)(2)(B)) for which Respondent is liable for a civil penalty in accordance with Section 14(a)(1) (7 U.S.C. 136 1(1)).

#### Penalty

The Act (7 U.S.C. 136 1(a)(3)) and the Regulations (40 CFR 168.60(b)(1)) provide that in evaluating the appropriateness of the proposed penalty, the following factors are to be considered:

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<sup>29/</sup> See 43 F.R. 27988-90 (June 28, 1978).

(i) the gravity of the violation, (ii) the size of respondent's business, and (iii) the effect of such proposed penalty on respondent's ability to continue in business. In determining an appropriate penalty, I am authorized to rely upon, but am not bound by the Guidelines for the Assessment of Civil Penalties (39 F.R. 27711, July 31, 1974).

Gravity of the violation is usually considered from two aspects: gravity of harm and gravity of misconduct. With respect to the former aspect, the Scorch label (Exhs. 9, 10 and 20) did not contain cautions concerning allowing the chlorine residual to drop to 2 ppm or below before swimmers entered the pool and a warning that the product was toxic to fish and that treated effluent should not be discharged where it would drain into lakes, streams, etc. (see the label for the supplementally registered Scorch, Resp.'s Exh. E). Tempering the lack of the mentioned health and environmental cautions is Dr. Mood's undisputed testimony that swimmer's have entered pools containing as high as 15 ppm available chlorine residual without harm<sup>30/</sup> and the fact that unstabilized chlorine is rapidly dissipated by the rays of the sun. It is concluded that no substantial adverse effects to health

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<sup>30/</sup> TR. 798. While the accepted label states that the available chlorine residual is to be determined by a suitable test kit, Mr. Jonas (Tr. 726-28) and Dr. Mood (Tr. 824-28, 876), testified that such kits were not available to or used by the average pool owner or operator.

or the environment have been demonstrated as likely to result from the use of Scorch (Exh. 20) and that the gravity of harm is slight.

Gravity of misconduct encompasses good faith and Respondent's history of compliance with the Act. See 40 CFR 168.60(b)(2) listing these as factors to be considered in determining gravity of the violation. Respondent's assertion that it relied upon informal advice from one of two individuals in EPA to the effect that the absence of pesticidal claims and the inclusion of a disclaimer would remove Scorch from the Act has been accepted and is some evidence of good faith. However, this is offset by the fact that Respondent proceeded to market Scorch even though it had an application for the registration of Scorch pending and even though within a month of the informal advice mentioned above, it was informed by Mr. Castillo of his opinion that Scorch was a pesticide and had to be registered. A mitigating factor is that Respondent acted promptly thereafter to obtain a supplemental registration for Scorch.

Respondent's history of compliance with the Act includes two consent agreements and final orders wherein Respondent agreed to pay civil penalties for violating the Act and 13 separate notices of contemplated proceedings for alleged violations of the Act (finding 33). The consent agreement and final order, dated June 8, 1976, wherein Respondent agreed to pay a penalty of \$5,000 (Exh. 31) contains no qualifying language, such as the admissions and agreement herein are not to be used in any other proceeding, and is appropriately considered herein. However, the consent agreement and final order, dated March 19, 1974, wherein respondent agreed to pay a penalty of \$300

(Exh. 32), states that Respondent consents to the issuance of the order, with the stipulations and admissions of facts and conclusions of law for the purpose of this proceeding only and may not be considered herein. The notices of contemplated proceedings, which EPA apparently considered were not of sufficient gravity to warrant further action, have been considered only insofar as the notices demonstrate knowledge of the Act by Respondent. These facts demonstrate, at the very least, a heedless regard for the Act or a reckless disregard for compliance therewith, warranting a finding of grave misconduct. With respect to the size of Respondent's business, Complainant has calculated the proposed penalty upon the basis of Respondent being in Category V of the Civil Penalty Assessment Schedule (sales exceeding \$1,000,000). The amount proposed (\$3080) is based on the Category V guideline figure (\$2,800) for selling or holding for sale an unregistered pesticide where an application for registration is pending plus a 10% increase as permitted by Par C.(2) of the preamble to the Guidelines, 39 F.R. at 27712. There is no direct evidence in the hearing record that Respondent's sales exceed \$1,000,000. However, Complainant has made it abundantly clear (Motion to Amend Complaint, dated August 15, 1977) that the proposed penalty was calculated on that basis and a letter from counsel for Respondent, dated August 26, 1977, submitted in response to the undersigned's direction for a prehearing exchange, indicates Respondent's total sales in 1976 were in excess of \$1,800,000. Respondent has not contended that imposition of the proposed penalty

would adversely effect its ability to continue in business. Under all the circumstances, and considering the fact that gravity of harm potential has been determined to be slight, a penalty of \$2,500 is proposed for Respondent's violation in offering for sale, holding for sale, shipping and selling Scorch, an unregistered pesticide.

Concerning Respondent's refusal to allow an inspection under Section 9 for the purpose of sampling Scorch, Complainant asserts that lack of good faith is demonstrated by Mr. Jonas' allusion to prior experience with Officer Latchaw (finding 19). Respondent vigorously argues that good faith is conclusively demonstrated by the fact that refusal to allow an inspection was based upon its attorney's advice that Scorch was not an economic poison or pesticide. Because in this instance the advice given by the attorney is not in doubt and has been confirmed in writing (Exh. 49), it will be presumed that the attorney had sufficient information before him so as to make Respondent's reliance on such advice reasonable.<sup>31/</sup> It is concluded that Respondent's reliance on its attorney's advice is a mitigating factor.


In determining the proposed penalty for refusal to allow a Section 9 inspection, Complainant has, as in the proposed penalty for

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<sup>31/</sup> Respondent's objection to cross-examination of Mr. Jonas for the purpose of determining information given or available to the attorney was sustained in the absence of a waiver by Mr. Jonas of the attorney-client privilege (Tr. 718-20).

in the amended complaint. Respondent is ordered to pay the aforesaid sum by forwarding a cashier's or certified check payable to the United States of America in the amount of \$6,500 to the Regional Hearing Clerk within 60 days after receipt of this order.

Dated this 27th day of July 1978.

  
Spencer T. Nissen  
Administrative Law Judge