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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE REGIONAL ADMINISTRATOR

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IN RE	)	
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CHATTAHOOCHEE RESEARCH COMPANY	)	I. F. & R. DOCKET NO. IV-254-C
	)	
RESPONDENT	)	

INITIAL DECISION

Preliminary Statement

This is a proceeding under Section 14(a) of the Federal Insecticide, Fungicide and Rodenticide Act, as amended (7 U.S.C. 136(l)(a), 1973 Supp.) for the assessment of a civil penalty for violation of the Act.

On March 30, 1977, the Director of the Enforcement Division, U.S. Environmental Protection Agency, Region IV (Complainant) issued a complaint together with notice for opportunity for hearing charging Chattahoochee Research Company (Respondent) with violations of the Act. By letter dated April 17, 1977, Respondent answered the complaint, denying the allegations therein, and requesting a hearing.

The complaint charged the respondent with violating Section 12(a)(1)(A, 7 U.S.C. 136j(a)(1)(A) of the Federal Insecticide, Fungicide and Rodenticide Act) in that:

1. On or about August 20, 1976, Chattahoochee Research Company, hereinafter called Respondent, shipped the product "Mildew and Mold Detergent GB-22 Concentrate" from Atlanta, Georgia to West Lumber Company, Atlanta, Georgia.

2. Said product is a pesticide within the meaning of 7 U.S.C. 136(U). Label claims imply a mixture of substances intended for preventing, destroying, repelling or mitigating mildew and mold growth in the home.

3. Said product was not registered as required by 7 U.S.C. 136a(a). [12(a)(1)(A); 7 U.S.C. 136j(a)(1)(A)].

A civil penalty had been proposed by the Complainant in accordance with the civil penalty assessment schedule (39 F.R. 2713) which permits an assessment, in view of the Respondent's gross sales, of $220.00.

The matter was referred to the undersigned Administrative Law Judge on May 20, 1977 and the time to respond to the pre-trial order was extended on two occasions to allow for the possibility of settlement and the review of the terms of said settlement by Headquarters' Registration Division.

The parties were unsuccessful in their attempts to settle this matter and, accordingly, a hearing was held thereon on October 6, 1977 in the conference room of the U.S. Environmental Protection Agency, Region IV in Atlanta, Georgia.

Immediately prior to the hearing, the parties entered into a stipulation which is hereby marked as Joint Exhibit No. 1 and placed in the record of this proceeding. This stipulation reflects that the product was shipped by the Respondent, it was collected according to applicable procedures by a representative of the EPA, that the product has never been registered nor has an application for registration been made, that a copy of the label of the product, as found in Complainant's Exhibit No. 1, is a true representation of the actual label of the product in issue, that the Respondent's gross sales was less than $100,000.00 for 1976, that the total business

revenues of the Respondent, which properly placed him in Category 1, further shows there would be an adverse effect upon his ability to continue in business by the payment of $220.00 civil penalty.

The question then to be decided here relates solely to whether or not the statements made on the label of the product "Mildew and Mold Detergent GB-22 Concentrate" renders such product a pesticide in the meaning of the appropriate law. At the hearing, the Complainant was represented by Bruce R. Granoff of the Legal Support Branch of the Enforcement Division, Region IV, EPA, and the Respondent appeared pro se on his own behalf.

The parties have filed briefs and reply briefs in support of proposed findings of fact, and conclusions of law and order which I have carefully considered.

Findings of Fact

1. Respondent, Chattahoochee Research Company, is a single proprietorship engaged in the manufacture and marketing of the product "Mildew and Mold Detergent GB-22 Concentrate" (hereinafter, "GB-22") and operates under the mailing address of Post Office Box 12141 in Atlanta, Georgia.

2. On August 20, 1976, Chattahoochee Research Company shipped the product "GB-22" from its place of business in Atlanta, Georgia to West Lumber Company, also located in Atlanta, Georgia.

3. On September 1, 1976, a sample of the product "GB-22" was collected by a representative of the EPA under Sample No. 110421.

4. The label affixed to the "GB-22" sets forth the following statements of claim:

> Mildew and Mold Detergent GB-22 Concentrate--penetrates to the roots and cleans away unwanted mildew, mold, fungus and moss from all exterior and interior surfaces. ...For a completely clean, safe and healthy household environment...GB-22 can be used diluted or full strength depending on severity of growth...Formula GB-22 contains everything for even the most difficult growth problems. ...For heavy growths such as moss on brick walls soak with diluted GB-22 and leave set for a few days.

5. The product "GB-22" which was held for sale by West Lumber Company was not registered with the EPA as required by FIFRA.

6. The act of shipping an unregistered pesticide was a violation of Section 3(a) of FIFRA, as amended, 1972.

7. Respondent's gross sales (total business revenues from all business operations) was less than $100,000 in 1976.

8. Respondent has shown by documentary evidence that his total business revenues from all business operations places his company in Category I and that there will be an adverse effect upon his ability to continue in business by the payment of the said $220.00 civil penalty.

Conclusions of Law

1. The words "mildew," "mold," "fungus" and "moss" found on Responsent's label of "Mildew and Mold Detergent GB-22 Concentrate" are terms for "pests" which are defined in Section 2 of FIFRA.

2. The term "pest" is defined in Section 2(t) as "...any insect, rodent, nematode, fungus, weed...which the Administrator declares to be a pest under Section 25(c)(1).

3. "Moss" is a "weed" as defined in Section 2(cc) of FIFRA and also a "pest" as alluded to in the above-referenced definition.

4. The product shipped, by virtue of the claims on the label is a pesticide within the meaning of Section 2(u) of FIFRA.

5. The act of shipping the unregistered pesticide was in violation of Section 3(a) of FIFRA, as amended, 1972.

Discussion and Conclusions

The Respondent denies that the product is a pesticide. Since it is charged with shipping an unregistered pesticide in violation of FIFRA, we should look to the statute and regulations in effect at the time of the shipment for a definition of those terms.

Section 2(u) of FIFRA defines "pesticide," in pertinent part, to mean "any substance or mixture of substances intended for preventing, destroying, repelling or mitigating any pest."

In pertinent part, Section 2(t) defines "pest" as any form of terrestrial or aquatic plant or animal life or virus, bacteria, or other micro-organism..."

Further, Section 2(k) defines "fungus," a pest covered by the Act, as "any non-chlorophyll-bearing thallophyte, as for example--rust, smut, mildew, mold..."

Funk and Wagnell's Standard College Dictionary defines "mold" as being "any of a variety of fungeous growths..."

Section 162.4 of Pesticide Programs, Registration, Reregistration and Classification Procedures 40 F.R. 28272, July 3, 1975, provides:

162.4 Status of products as pesticides.

(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 Section 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.

(b) Products considered to be pesticides. A product will be considered to be a pesticide if:

(1) Claims or recommendations for use as a pesticide are made on the label or labeling of the product including, but not limited to collateral advertising, such as publications, advertising literature which does not accompany the product, or advertisements by radio or television;

* * * * *

(4) The product is intended for use both as a pesticide and for other purposes.

(c) Products not considered pesticides. The following are examples of the types of products which are not considered pesticides:

(1) Deodorizers, bleaching agents, and cleaning agents for which no pesticidal claims are made in connection with manufacture, sale, or distribution;

It has long been held and it is well settled that the intended use of a product may be determined by the representations for use of the product. In United States v. 681 Cases...Kitchen Klenzer, 63 F. Supp. 286 (E.D. Mo. 1945) a case under the Insecticide Act of 1910 (predecessor of FIFRA) the term "fungicide" was defined to include "any substance intended to be used for preventing, destroying, repelling or mitigating any and all fungi..." The court held that Congress "employed the words 'intended to be used' in reference to objective intent as evidenced by what the product holds itself out to be." The court continued:

> Any other construction of this statute would lead to the absurd result that a manufacturer could actually label his product a fungicide and yet avoid the application of the Act by reservations and his own knowledge of its inefficacy.

This construction has consistently been applied in cases arising under the Federal Food, Drug, and Cosmetic Act where "intended" or "intended for use" is used in defining "drug." In United States v. Article Labeled in Part...Sudden Change, 409 F.2d 734, 739 (2d Cir. 1969) the court cited numerous cases and said:

> It is well settled that the intended use of a product may be determined from its label, accompanying labeling, promotional material, advertising and any other relevant source. (Cases omitted.)

The Sudden Change case is particularly pertinent as applied to this case. The issue there was whether the article was a cosmetic or a drug. If a drug, the label was required to bear the name of each active ingredient which the label of the product did not bear. The distributor of the product there argued that the claims on the label brought the product within the definition of cosmetic and not within the definition of drug. The labeling of the product made ten different claims (p. 737). The court held (p. 742) that because of two particular claims, the product was deemed to be a drug. The court further held that if complainant ceased to employ these two promotional claims and made no others which brought the product within the definition of drug, the product would not be deemed a drug.

As indicated in the Compalinant's Exhibit No. 1, the label of the product in question reads in pertinent part as follows:

MILDEW & MOLD DETERGENT

GB 22

CONCENTRATE

Penetrates to the roots and cleans away
unwanted mildew, mold, fungus and moss
from all exterior and interior surfaces.
A pre-painted aid.
For a completely clean, safe and healthy
household environment.
WORKS ON:
Shower tile - Floor tile - Painted surfaces
Boats - Wood - Window frames - Window
screens - Roof tile - Shower curtains -
Clothing - Masonry & Cement - Pipes

The proposed findings and briefs of the parties attempt to raise the question of whether or not the intent of the manufacturer is important in determining whether or not label language brings the product into the purview of the FIFRA Act. I am of the opinion that the intent of the producer as to the use for which his product is to be made by the consumer is relatively immaterial. What is critical and determinative in these cases, in my judgement, is whether or not the language on the label would cause the average consumer to believe the product would be efficacious as a pesticide. In making that determination, one must look at the label in its entirety and determine whether or not such label would lead the average person to believe the product was in fact useful as a pesticide as that term has been heretofore defined. The label indicates that the product will penetrate to the roots and clean away unwanted mildew, mold, fungus and moss, all of which growths are within the meaning of the word pesticide as used in the Act and regulations. The Respondent argues that the label makes

no claim that it will destroy or repel any of the named growths, but that it is simply a detergent and cleaner, and merely washes these growths away from surfaces and does not destroy them. The testimony of the Agency's expert witness on the question of interpretation of pesticide labels was not particularly helpful. Dr. Grable based his opinion that the product in question made pesticidal claims on the label by the following language--the phrase "cleans away unwanted mildew, mold, fungus and moss." Dr. Grable was of the opinion that in order to clean away moss, you would have to destroy it; "it's not something you would wash away like dirt" (Transcript 40). Dr. Grable (on page 42 of the transcript) equated the words "cleans away" on the label with "remove, get rid of and destroy." Dr. Grable also was of the opinion that "cleans" means, perhaps, to get rid of 99% of the growth, but the use in conjunction with the word "cleans away" he felt that this meant 100% removal which he felt could only be accomplished by destroying the growth, not merely just washing it. Although I find Dr. Grable's observations helpful, I am not satisfied that his opinion in this matter is determinative of the entire issue. In many cases concerning interpretations of labels, it is possible to pick one or two words which hold the key to a decision as to whether or not pesticidal claims are made. In this case, I feel that one must look to the label in its entirety and determine from such a review whether pesticidal claims are made.

The product is marketed, according the the Respondent, as a cleaner and detergent and not as a pesticide or something that destroys, mitigates or repels pests. Therefore, it may be helpful to look at the word "clean" and determine what its definition is. Webster's Third New International Dictionary, 1976, defines "clean" as follows: "free from whatever sullies, contaminates, or defiles...free from foreign matter; unadulterated; pure; free from dirt or filth; having no blemish or residue..." The dictionary also states that the word clean "is the word in common and literal use of the removal of dirt." This label does not proport to be something that cleans away dirt, but rather something that cleans away mildew, mold, fungus and moss.

Based upon all of the above, I am of the opinion that when viewed in its totality using common and well-accepted definition of the words that appear on the label, the label does in fact make pesticidal claims in that the average person reading such label would be lead to believe that the product removes, destroys and mitigates "pests" and as such, does more than just wash away surface growth and flush them down the drain. This is particularly true since several places on the label, the manufacturer relates to the product as being able to control even the most difficult growth problems. When one reads all of these materials together, such as--"penetrates the roots," "contains everything even for the most difficult growth problems"--one must come to the conclusion that the claims are pesticidal and that the consumer would expect the product to clean away growth problems and do more than just wash a dirty surface.

Having determined that the product is in fact a pesticide and was, therefore, shipped in violation of the statute, there remains the question of assessing the penalty to be levied in this case. In determining the amount of civil penalty, the statute requires the Agency to consider the appropriateness of the penalty to the size of respondent's business, the effect on his ability to continue in business, and the gravity of the violation. As noted above, the Complainant in this case recommends the assessment of a penalty in the amount of $220.00. The stipulation filed in this case states that the imposition of a penalty in the amount of $220.00 would have a detrimental effect on the respondent's ability to continue in business. As to the gravity of the violation, I do not feel that the violation is of such a serious nature that much weight should be accorded to that portion of the assessment, in as much as, there are warnings on the label which caution the user to the hazards associated with the use of the product and, therefore, it is unlikely that the label would mislead the purchaser in this regard.

The Respondent has urged that his conduct was not an intentional or knowing violation. We have no reason to question his representations in this regard. However, knowledge or intent are not required elements in a violation in the assessment of a civil penalty under Section 14(a). Congress has often authorized the imposition of penalties even where there is no intent to violate and no awareness of wrong doing. While knowledge is not an essential element to establish a violation for a civil penalty, it is a fact that it may properly be taken into consideration in evaluating the cullability of the Respondent as bearing on the gravity of the offense.

Conclusions

I have taken into account all of the factors that are required to be considered in determining the appropriateness of the penalty. I am of the view that a penalty of $50.00 is appropriate.

The proposed findings of fact and conclusions submitted by the parties have been considered. To the extent that they are consistent with the findings of facts, and discussions and conclusions herein, they are granted, otherwise, they are denied.

Having considered the entire record, based on the findings of fact, and discussions and conclusions, herein, it is proposed that the following order be issued.

Final Order

Pursuant to Section 14(a)(1) of the Federal Insecticide, Fungicide and Rodenticide Act, as amended (7 U.S.C. 136(1)(a)(1)) a civil penalty of $50.00 is assessed against Respondent, Chattahoochee Research Company, for the violation which has been established on the basis of the complaint issued on March 30, 1977.

DATED: January 11, 1978

Thomas B. Yost
Administrative Law Judge

Unless appeal is taken by the filing of exceptions pursuant to Section 168.51 of the Rules of Practice or the Regional Administrator elects to review this decision on his own motion, the order shall become the final order of the Regional Administrator. (See Section 168.46(c).)

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE REGIONAL ADMINISTRATOR

CERTIFICATION OF SERVICE

I hereby certify that the original of this Initial Decision was hand-delivered to me as Regional Hearing Clerk, EPA, Region IV; and that a true and correct copy of the same was served by Certified Mail upon all those listed below. Dated in Atlanta, Georgia this 13th day of January 1978.

Ms. Sonia Anderson (2 copies)
Hearing Clerk (A-110)
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