6/3/75

ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE REGIONAL ADMINISTRATOR

In re	)	I.F. & R. Docket No. IV-86C
	)	
Gulf Oil Corporation,	)	
	)	
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.), instituted, in effect, by an amended complaint issued August 20, 1974 by the Director, Enforcement Division, Environmental Protection Agency, Region IV, Atlanta, Georgia. The amended complaint charges that Respondent, Gulf Oil Corporation, on or about January 24, 1974, shipped the pesticide Gulf Lite Patio Torch Fuel in interstate commerce in violation of the act in that such product was not registered thereunder and was misbranded because the label borne by it did not bear an ingredient statement as required by the act. The amended complaint proposed a penalty of $2,700 for each violation or a total civil penalty of $5,400 for the violations charged therein.

On September 12, 1974, Respondent filed an answer to the amended complaint in which it denied that Gulf Lite Patio Torch Fuel is a pesticide or economic poison under the act and subject to registration

thereunder or that the product shipped by Respondent was misbranded as alleged. Subsequently, Respondent also contested the appropriateness of the proposed penalty.

After the submission of prehearing materials pursuant to section 168.36(e) of the rules of practice (39 F.R. 27656, 27663) and a prehearing conference held January 13, 1975, an oral hearing was held in Atlanta, Georgia, January 14, 1975, before Herbert L. Perlman, Chief Administrative Law Judge, Environmental Protection Agency. At the hearing, Respondent was represented by Robert W. Ellis, Law Department, Gulf Oil Corporation, Atlanta, Georgia, and Complainant was represented by Bruce R. Granoff and James Sargent, Legal Support Branch, Environmental Protection Agency, Atlanta, Georgia. One witness testified on behalf of Complainant and Complainant introduced 2 exhibits into evidence. Two witnesses testified for Respondent and one exhibit was received into evidence on behalf of Respondent. In addition, 2 separate stipulations were entered into by the parties and were received into evidence. Subsequently, due to the deletion of a paragraph of a stipulation, the record was, in effect, reopened for the submission of limited written testimony. After the hearing, the parties filed briefs.

Findings of Fact

1. Respondent, Gulf Oil Corporation, is a corporation which, at all times material herein, maintained a district office and terminal located at Jacksonville, Florida.

2. On May 9, 1972, Respondent delivered for shipment its product Gulf Lite Patio Torch Fuel in interstate commerce from Atlanta, Georgia, to Overland Park, Kansas.

3. On January 19, 1973, Complainant advised Respondent in writing that Gulf Lite Patio Torch Fuel bearing the claim "CONTAINS OIL OF CITRONELLA" implies repellency of insects, particularly mosquitoes, and is subject to, and needs to be registered under, the act. Respondent was further advised that interstate shipments of this unregistered product violated the act.

4. Subsequently, Respondent was orally at a March 23, 1973 conference and in writing informed by Complainant that the prominence of the statement "CONTAINS OIL OF CITRONELLA" on the label of Gulf Lite Patio Torch Fuel without qualification or clarification makes this product subject to the act.

5. An application for the registration of Gulf Lite Patio Torch Fuel was received May 25, 1973. The application listed the amount of oil of citronella as 0.1 percent and the proposed label stated "Aids in Chasing Mosquitoes and Similar Night Flying Insects . . . Scented with Oil of Citronella." Registration was sought on the basis of the prior registration and efficacy data of Tiki Torch Fuel.

6. On October 9, 1973, Respondent sent experimental data, previously requested by Complainant, supporting its claim that Gulf Lite Patio Torch Fuel aids in repelling mosquitoes and similar night flying insects and a label change of "chasing" to "repelling" and "scented with" to "contains," as requested by Complainant.

7. By letter dated December 6, 1973, Complainant denied the revised label as not acceptable because the experimental data required clarification, demonstrated efficacy would not satisfy consumer expectancy and the language "similar night flying insects" was to be deleted.

8. On or about January 24, 1974, Respondent shipped its product Gulf Lite Patio Torch Fuel in interstate commerce from Jacksonville, Florida, to Valdosta, Georgia. This product was apparently contained in one gallon cans which had on the label thereon in large conspicuous letters on the front and back panels the words "CONTAINS OIL OF CITRONELLA". These words were placed on the right side of the front and back panels at the approximate center of the label next to a drawing of a lighted patio torch. The size of the lettering employed is larger than all other lettering on the label except for that of the name of the product itself and the color of the lettering is white on a dark blue background. The words are also separate from any other lettering on the front and back panels. One of the side panels contains the words "with Citronella" immediately beneath the name of the product, in smaller type

than the name or the words "CONTAINS OIL OF CITRONELLA" on the front and back panels. The words "with Citronella" again appear on the second side panel of the label, in lettering similar to the lettering employed on the other side panel, below the name of the product. Beneath the words "with Citronella", in part, are the words "Pleasant Odor" in smaller lettering.

9. The Gulf Lite Patio Torch Fuel shipped in interstate commerce on or about January 24, 1974 contained 0.1 percent oil of citronella, was not registered under the act and the label thereof did not contain an ingredient statement as required by the act.

10. During the period 1970-1972 when Respondent surveyed and entered the torch fuel market similar products were in commerce. One unregistered product claimed on the label that it contained oil of citronella and made no further claims. A second unregistered product claimed on the label that it contained oil of citronella and that it kills pesky mosquitoes and other night flying insects. A product registered by the United States Department of Agriculture claimed on the label that it contained 100 percent mineral spirits and aids in chasing mosquitoes and similar night flying insects. Corrective action was taken by Complainant with respect to all torch fuels making pesticidal claims.

11. By letter dated September 9, 1974, Respondent's application for registration of Gulf Lite Patio Torch Fuel received May 25, 1973

and labeled as described in Finding of Facts 5 and 6, was denied by Complainant.

12. The labeling of the product Gulf Lite Patio Torch Fuel currently marketed by Respondent contains no reference to oil of citronella. This form of label was placed on the market beginning with the 1974 marketing season.

Conclusions

The principal issue for determination in this proceeding is whether the product shipped by Respondent in interstate commerce on or about January 24, 1974 from Jacksonville, Florida to Valdosta, Georgia, that is, Gulf Lite Patio Torch Fuel, is an "economic poison" as defined in the act.[1/] Admittedly, it was not registered under the act and the label thereon did not contain an ingredient statement as required by the act, as charged in the amended complaint.

1/ The Federal Insecticide, Fungicide, and Rodenticide Act, as amended, (7 U.S.C. 135 et seq.) was further amended by the Federal Environmental Pesticide Control Act of 1972 (FEPCA), 86 Stat. 973, 7 U.S.C. 136 et seq., 1973 Supp. Section 4 of FEPCA provides, in effect, that the provisions of the statute prior to such amendment and the regulations thereunder with respect to registration would remain in effect for a period of time which encompasses the shipment involved herein. Consequently, we must look to the act prior to its 1972 amendment and the regulations issued thereunder to determine whether Respondent violated the registration requirements of the act. Therefore, we must determine whether Gulf Lite Patio Torch Fuel is an "economic poison" as distinguished from a "pesticide" although, in reality, the 1972 amendment made no pertinent substantive changes in the definition of "pesticide" from its predecessor term.

The term "economic poison" is defined in the act, in part, as "any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any insects . . ." (7 U.S.C. 135(a)) (Emphasis supplied). The regulations issued pursuant to the act, in section 162.2(d) thereof (40 CFR 162.2(d)), define "economic poison" to include "all preparations intended for use as insecticides . . . Substances which have recognized commercial uses other than uses as economic poisons shall not be deemed to be economic poisons unless such substances are:

(1) Specifically prepared for use as economic poisons, or

(2) Labeled, represented, or intended for use as economic poisons, or

(3) Marketed in channels of trade where they will presumably be purchased as economic poisons."[2/]

In addition, the regulations issued pursuant to the act contain an interpretation of terms included in the definition of economic poison. Section 162.101 thereof (40 CFR 162.101) reads, in part, as follows:

> (a) Definition of economic poison. Under section 2a of the Act the term "economic poison" means any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any insects. . .

2/ The term "insecticide" is defined in the act to mean "any substance or mixture of substances intended for preventing, destroying, repelling or mitigating any insects which may be present in any environment whatsoever." (7 U.S.C. 135(c)). (Emphasis supplied). See also section 2m of the act for the definition of the term "insect" (7 U.S.C. 135(m)).

(b) Status of products as economic poisons.

(1) A substance or mixture of substances is or is not an economic poison depending upon the purposes for which it is intended. Determination of intent in the marketing or distribution of these products is therefore of major importance. This determination will depend upon the facts in the particular case which tend to show the intended use of the product. In general, if a product is marketed in a manner that results in its being used as an economic poison, it is considered to be the intended result. Such intentions may be either expressed or implied. It is assumed that the distributor is aware of the purposes for which his product will be used.

(i) A product will be considered to be an economic poison if:

(a) The label or labeling of the product bears claims for use as an economic poison;

(b) Claims or recommendations for use as an economic poison are made in collateral advertising such as publications, advertising literature which does not accompany the product, or advertisements by radio or television; or

(c) Claims or recommendations for use as an economic poison are made verbally or in writing by representatives of the manufacturer, shipper, or distributor of the product.

(ii) When all or most of the uses of a product are for economic poison purposes, it will be considered to be intended for use as an economic poison unless other intentions are clearly defined. Examples of products in this category are: pyrethrum concentrates, lead arsenate, calcium arsenate, DDT, toxaphene, pentachlorophenol, quaternary ammonium solutions, warfarin, pival, 2,4-D, and captan. . . .

(3) Economic poisons include, but are not limited to:

. . .

(ii) Products intended for use both as economic poisons and for other purposes. (Such products are subject to all provisions of the Act including section 2a(1) under which a product is misbranded if its labeling bears any statement which is false or misleading concerning any of its uses or in any other particular.)

(4) Products not considered economic poisons include:

(i) Deodorants, bleaching agents, and cleaning agents, which bear no claims for the control of any pests;

(ii) Embalming fluids;

(iii) Building materials, such as lumber, fiber boards, wallpaper paste, and paints, which have been treated to protect the material itself against any pest and which bear no claims for protection of other surfaces or objects;

(iv) Fabrics which have been treated to protect the fabric itself from insects, fungi, or any other pest, and which bear no claims for protection of other surfaces or objects;

(v) Fertilizers and other plant nutrients; and

(vi) Preparations intended only for experimental use to determine their value as economic poisons, or their toxicity or other properties, when the user expects no benefit in pest control.

The product involved was apparently contained in one gallon cans which had on the label thereon in large conspicuous letters on the front and back panels the words "CONTAINS OIL OF CITRONELLA." These words were placed on the right side of the front and back panels

at the approximate center of the label next to a drawing of a lighted patio torch. The size of the lettering employed appears to be larger than all other lettering on the label except for that of the name of the product itself and the color of the lettering is white on a dark blue background which makes it prominent. The words are also separate from any other lettering on the front and back panels. One of the side panels contains the words "with Citronella" immediately beneath the name of the product, in smaller type than the name of the words referred to herein on the front and back panels. On the second side panel of the label in letters similar to that described for the other side panel, the words "with Citronella" again appear below the name of the product and immediately underneath, in part, are the words "Pleasant Odor" in smaller lettering.

It appears to us that Gulf Lite Patio Torch Fuel, labeled as described above, is, indeed, an economic poison subject to regulation under the act. We so conclude on the basis of the label contained thereon. The size and prominence of, and the placement or positioning on the label of, the words "CONTAINS OIL OF CITRONELLA" and the inferences to be drawn from such language mandates this result.

Oil of citronella is recognized as an insect repellent and insectifuge. The record indicates that this is so with respect to the understanding of specialists, including Complainant, and the general

and historical understanding of the utilization thereof. Respondent agrees and admits that before and during World War II citronella was probably the best known insect repellent. Research made necessary or prompted by that war resulted in the discovery of probably more efficacious insect repellents. This fact does not detract from our conclusion with respect to the common understanding of the use of oil of citronella as we know of no evidence that the common understanding of that period has been totally dissipated or undone. The fact that some of the purchasing public had not been born at that time, an argument advanced by Respondent, is not persuasive. Obviously, a large portion of the purchasing or consumer public was. It is true that Complainant did not conduct a consumer survey to measure the understanding of the purchasing public. Perhaps that would have been helpful. It certainly was not essential. We are here dealing, in part, with the not so distant past. Even Respondent admits that "it is not disputed that some people would consider repellent properties when o/c is mentioned." Also, the common dictionary definition of the term includes its properties as an insect repellent.[3/] We believe that the record supports the conclusion that oil of citronella is recognized by the public or a large segment thereof as an insectifuge or insect repellent.

3/ See, e.g., Webster's Third New International Dictionary (1967) which defines citronella oil, as distinguished from citronella, as an "essential oil with lemonlike odor obtained from either of two grasses and used esp. as an insect repellent."

The words "CONTAINS OIL OF CITRONELLA" were prominently displayed for some purpose. Cf. United States v. 681 Cases, More or Less, Containing "Kitchen Klenzer," 63 F. Supp. 286 (E.D. Mo. 1945). To us, they presented a pesticidal claim and we are of the opinion they were intentionally meant to do so (See Part II of these Conclusions). The consuming or buying public, whether "a not unreasonable person," "the ignorant, the unthinking and the credulous" or "people of ordinary understanding and intelligence" could well believe so especially as the words and the substance were in connection with a torch fuel presumably to be utilized outdoors during the evening hours. Cf. United States v. 681 Cases, More or Less, Containing "Kitchen Klenzer," supra at 288; United States v. Article . . . Consisting of 216 Cartoned Bottles, 409 F. 2d 734 (2d Cir. 1969); United States v. Article of Drug, Etc., 331 F. Supp. 912 (D. Md. 1971); United States v. Articles of Drug, Etc., 263 F. Supp. 212 (D. Neb. 1967). Reference on one side panel of the label in relatively small lettering to "Pleasant Odor" would not negative this belief. The much more eye catching and prominent wording on the front and back panels of the label was not qualified and had no similar language.[4/]

[4/] It should be noted in this connection that Complainant informed Respondent prior to the marketing of the product involved that qualifying language accompanying the words or claim involved, that is, "contains oil of citronella for pleasant odor only" or "contains oil of citronella as perfume only", would take the product out from registration under the act.

It is well settled that the intended use of a product may be determined from its label. United States v. Article . . . Consisting of 216 Cartoned Bottles, supra at p. 739 and cases cited therein. Gulf Lite Patio Torch Fuel was labeled, represented, or intended for use as an economic poison pursuant to section 2a of the act and section 162.2(d) of the regulations issued thereunder. See also section 162.101(b)(3) and (4) of the regulations. The Court in United States v. 681 Cases, More or Less, Containing "Kitchen Klenzer," supra at p. 288, stated that "the court is at a loss to know why the claimant would waste printer's ink (and some of it red) unless some inference was sought by this label over and beyond that of a pure cleaning agent." We similarly are at a loss to know why the Respondent would waste printer's ink unless some inference was sought by the label involved over and beyond that of a pure torch fuel. The inference was that the product involved also functioned as an insect repellent.

Undoubtedly, as contended by Respondent, Gulf Lite Patio Torch Fuel was basically just that, a torch fuel. However, this fact does not alter our conclusions. The label employed tended to indicate to the public or a significant portion thereof that this product had additional, added or ancillary benefits, that is, insect repellency. The pesticidal claim contained on the label by virtue of the utilization in prominent letters of the words "CONTAINS OIL OF CITRONELLA"

and the placement of such words on the can, as described above, was enough to make the product an "economic poison" under the act. We find no requirement that the sole purpose of a product be for use as an economic poison. See sections 162.101(b)(3) and (4) of the regulations. Cf. also United States v. Article . . . Consisting of 216 Cartoned Bottles, supra and cases cited therein.[5/] To demand that this be its major or only function is to ignore the regulations issued under the act and the many products registered thereunder where the pesticidal character of the product is in addition to its major purpose, such as, for example, paint containing an insecticide or fungicide or ceiling tile containing a bacteriocide,[6/] and would unduly and without legal basis restrict the scope of the statute. Respondent's contentions herein run counter to the well accepted principle that remedial legislation such as the Federal Insecticide, Fungicide, and Rodenticide Act, as amended, is to be given a liberal construction to achieve the Congressional purpose. See e.g., United States v. An Article of Drug . . . Bacto-Unidisk, 394 U.S. 784 (1969);

5/ Section 162.101(b)(ii) is of no assistance to Respondent and, in fact, reenforces Complainant's contentions herein as it is clear from such section that the "product" referred to therein relates to the active chemical ingredient and not the final or end product.

6/ See section 162.101(b)(4) of the regulations and Leave to Intervene and Denial of Petition to File Appeal in In re Chapman Chemical Company et al., I.F. & R. Dockets No. 246 et al. (May 9, 1973).

United States v. Dotterweich, 320 U.S. 277 (1943); Sunshine Anthracite Coal Company v. Adkins, 310 U.S. 381 (1940); McDonald v. Thompson, 305 U.S. 263 (1938); Piedmont & Northern Railway Company v. Interstate Commerce Commission, 286 U.S. 299 (1932).[7/]

II

The foregoing conclusions were based upon an assessment of Respondent's objective intent as evidenced by what the product held itself out to be. Cf. United States v. 681 Cases, More or Less, Containing "Kitchen Klenzer," supra. We are of the opinion that Respondent's subjective intent was similar.

The one fact that almost "leaps from the page" or record is the keen awareness and concern of Respondent's employees of the competitive products on the market when it was to merchandise Gulf Lite Patio Torch Fuel. We find no fault with such concern, but it must be given much weight in attempting to determine Respondent's intentions in connection with the product involved and its labeling. Respondent's employees had apparently surveyed the market and it was their intent to present a product which could compete on a par or

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7/ Respondent also argues matters not in the record and Complainant, in part, responds thereto. We have not considered matters outside the record.

advantageously and certainly not at a disadvantage with existing products. Two of the competitive products, one of which stated that it contained oil of citronella, made additional affirmative pesticidal claims. A third product, the label of which stated it contained oil of citronella, was also on the market. Respondent's employees were well aware that oil of citronella was an insectifuge and, while they were also aware that the 0.1 percent of oil of citronella to be contained in the product would not be efficacious as an insect repellent, we do not believe that it was their intent to feature its presence on the label for its scenting properties only. The composition of the label negatives any such intent and Respondent could have easily made such fact clear on the label if it so desired. In addition, the keen interest in competitive products makes any such conclusion totally lacking in credibility. In fact, Respondent attempted to register a torch fuel product containing the same insignificant amount of oil of citronella but with more affirmative pesticidal claims knowing that the oil of citronella was not effective. The conduct of Respondent's employees in response to the competitive products makes its contentions herein that its sole purpose for utilizing oil of citronella was as a perfume is patently lacking in belief despite references to pieces of intra-company correspondence. Rather, we believe that it was Respondent's

subjective intent as well as its objective intent, as determined by the label involved, to make a pesticidal claim on such label as its competitors were then doing.

III

By reason of Part I and Part II of these Conclusions, separately and collectively, it is concluded that the shipment by Respondent of the unregistered product Gulf Lite Patio Torch Fuel in interstate commerce on or about January 24, 1974, as charged, constitutes a violation by Respondent of sections 3a and 4 of the act (7 U.S.C. 135a(a)(1) and 135(b)) and that such product was also misbranded in violation of section 12(a)(1)(E) of the act (7 U.S.C. 136j(a)(1)(E)) in that the label thereon did not bear the ingredient statement required thereby. (See section 2(q)(2)(A) of the act [7 U.S.C. 136(q)(2)(A)]).

We turn now to the difficult question of assessing the sanction to be imposed herein. Complainant proposes the assessment of a civil penalty pursuant to section 14(a) of the act (7 U.S.C. 136 l(a)) of $2,700 for each violation charged and found herein or a total of $5,400. The parties have stipulated and agreed that such proposed penalty is in conformance with the Civil Penalty Assessment Schedule of July 31, 1974

(39 F.R. 27711) and is, in fact, $100 less than the maximum allowable base penalty in each instance.[8/]

In considering the appropriateness of the penalty to the "gravity of the violation" (see section 14(a)(3) of the act), the evaluation should be made on the basis of the gravity of harm and the gravity of misconduct. See e.g., In re Amvac Chemical Corporation, I.F. & R. Docket No. IX-4C; In re Beaulieu Chemical Company, I.F. & R. Docket No. IX-10C. We find no gravity of harm to the public in the sense of danger to health and the environment by reason of the violations found herein. However, we do see misrepresentation to the public to the extent that purchasers of Respondent's product expected an efficacious insect repellent.

Of great significance in connection with the sanction to be imposed herein is the gravity of Respondent's misconduct. Respondent shipped the unregistered and misbranded pesticide on January 24, 1974 with full knowledge of the requirements of the act and the position of Complainant with respect to the use of the unqualified language employed on its label. We are not presented herein with innocent shipment of an unregistered product, but, rather, with a knowing disregard of statutory requirements. A May 9, 1972 shipment of the same

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8/ Respondent's gross sales exceeded $1,000,000 in 1973 and no evidence has been adduced that payment of the proposed civil penalty would affect Respondent's ability to continue in business. Nor could such evidence be adduced. (See 39 F.R. 27711, 27712).

product by Respondent was the subject of a letter of citation and a conference with Complainant.[9/] As stated by counsel for Complainant, registration is at the core of the statute and persons such as Respondent have a duty to assure that products marketed by them meet the requirements of the act, including registration and proper labeling. Respondent, in effect, marketed the unregistered product knowingly and at its peril. Under these circumstances, we believe that the civil penalty proposed by Complainant is appropriate. Penalties imposed upon a bankrupt Respondent or as the result of settlement for similar violations of the act are not measures to be utilized or compared in a contested proceeding. Nor do we see any selective prosecution of Respondent, as apparently alleged, as all known violators of the act shipping unregistered torch fuels containing oil of citronella with pesticidal claims were similarly proceeded against.

All contentions of the parties presented for the record have been considered and whether or not specifically mentioned herein, any suggestions, requests, etc., inconsistent with this Initial Decision are denied.

9/ Respondent's reference to In re Beaulieu Chemical Company, supra, in this connection is lacking in substance as the situation here is clearly distinguishible as the prior citation involved the same product and is utilized herein not for the purpose of assessing a respondent's prior history of compliance, but to establish that Respondent knowingly violated the act.

Order [10/]

Pursuant to section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended (7 U.S.C. 136 l(a)(1), 1973 Supp.), civil penalties of $5,400 are hereby assessed against Respondent Gulf Oil Corporation for the violations of the act found herein.

Payment of the full amount of the civil penalty assessed shall be made within sixty (60) days of the service of the final order upon Respondent by forwarding to the Regional Hearing Clerk a cashier's check or certified check payable to the United States of America in such amount.

Herbert L. Perlman
Chief Administrative Law Judge

June 3, 1975

10/ 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)).