Exhibit D: EPA General Counsel Memorandum

1973 WL 21961 (E.P.A.G.C.)

Environmental Protection Agency (E.P.A.)
Office of the General Counsel

Pesticides

*1 July 1973
[FNa1]

QUESTION
To what extent does EPA have legal authority to regulate advertising of pesticide products under the Federal Environmental Pesticide Control Act of 1972?

ANSWER
In comparison to the FTC's statutory mandate to regulate false, misleading, or deceptive advertising, EPA's authority to control advertising of pesticide products rests upon a weak (or perhaps non-existent) reed.

It can be defensibly argued that EPA has jurisdiction to regulate advertising of pesticide products on two grounds. One theory is premised on EPA's authority to approve all claims made in conjunction with registration of a pesticide and to move against any claims made as a part of the distribution or sale of a registered pesticide which substantially differ from claims made for the pesticide during the registration process. The second theory is that EPA's power to regulate labels and labeling extends to advertising.

However, should the advertising question be litigated, a court might likely hold that EPA has general jurisdiction over labeling but can only regulate advertising if a pesticide product registered for restricted use is advertised without giving its classification. Accordingly, the FTC would have exclusive jurisdiction over false, misleading, or deceptive advertising.

At best, EPA would have concurrent jurisdiction with the FTC to regulate advertising of pesticide products, since Congress evidently did not intend EPA to occupy the pesticide advertising field. Thus, the knotty problem would remain: which agency could best fill the breach and protect the consumer from deceptive advertising?

In short, there is no clear legal answer to the EPA/FTC jurisdictional dispute over regulation of pesticide advertising. The FTC position, however, seems to have more clout.

DISCUSSION
The jurisdiction of the Federal Trade Commission to control false or deceptive advertising is well established. [15 U.S.C. 45(a)(1)]. Nothing in the Federal Environmental Pesticide Control Act of 1972 (hereinafter "the Act") [7 U.S.C. 136a-136y; P.L. 92-516] seems to curtail the FTC's authority to regulate advertising of pesticide products. Accordingly, this memorandum will proceed on the assumption that, regardless of EPA's jurisdiction over pesticide product advertising, the FTC does have authority to control such advertising.

EPA could rely on at least two theories to establish concurrent jurisdiction with the FTC to regulate advertising of pesticide products. For ease of identification, the theories will be denominated "the claims approach" and "the label-

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ing approach."

a. *The Claims Approach*
Section 3(c)(1)(C) of the Act requires each application for registration of a pesticide to include "a statement of all claims made for it." Thus, as part of the registration procedure, each application must detail *all* claims that will be made in connection with a particular pesticide. The applicant bears the burden of proof to substantiate claims made for the pesticide by test data. In fact, a pesticide may not be registered until the Administrator determines that the pesticide's composition is such as to warrant the claims for it. [Section 3(c)(5)(A)]. This statutory scheme is buttressed by Section 12(a)(1)(B), which makes the distribution, sale, or delivery of any registered pesticide unlawful if any claims made for the pesticide as a part of its distribution or sale substantially differ from any claims made for it in the registration statement.

***2** Thus, EPA can invoke stringent sanctions against any person who sells, distributes, or delivers a registered pesticide if claims made in the distribution or sale of that pesticide substantially differ from those included in the registration statement. This provision may apply to "claims" made in advertising. Congress, however, used the words "distribution or sale" instead of the word "advertising" in Section 12(a)(1)(B). Section 12(a)(2)(E) provides that it is unlawful for any person who is a registrant, wholesaler, dealer, retailer, or other distributor to *advertise* a pesticide product registered for restricted use without giving its classification. The negative implication of the use of "advertise" in one section and not in the other perhaps indicates that the words of art "distribution or sale" should be read more narrowly than advertising in general. "Distribution or sale" may only connote claims made in graphic or written material accompanying the pesticide. [Cf. Definition of "labeling," Section 2(p)(2)].

If Section 12(a)(1)(B) does apply to "claims" made in advertising, a salient question is whether that section also provides EPA with a handle to regulate all deceptive and misleading advertising of pesticide products. The "claims" requirement would appear to limit EPA from exercising jurisdiction over advertising which, although forged from claims identical to the ones submitted with the registration application, is still misleading or deceptive. The totality of an advertisement may, after all, because of its trapping convey a message beyond the literal language contained in it. The Lysol case, which will be discussed in more depth later in this memorandum, presents this issue in a concrete manner.

Arguments spawned by the meaning of claims substantially different from ones originally proferred in registration applications could widen this potential gap in EPA jurisdiction over deceptive or misleading advertising into a veritable canyon. [Section 12(a)(1)(B)]. Parsing the language of the original claim might not make the claim substantially different, but nuances could produce a deceptive advertisement. EPA would be powerless to attack misleading advertising unless "claim" means "advertising" under the Act, and that does not seem to be the case. As noted previously, Congress specifically used the word "advertise" in one provision of the Act [Section 12(a)(2)(E)], and could have easily substituted "advertisement" for "claim" in other places.

In sum, at first blush the "claims approach" appears to grant EPA jurisdiction to regulate advertising of pesticide products, or at least "claims" made in such advertising. However, there may be some question whether Section 12(a)(1)(B) applies to advertising. Even if the provision does encompass advertising, EPA could not control deceptive advertising formed from claims identical to or not substantially different from ones submitted in the registration application. Thus, the claims approach does not provide a sufficient statutory foundation for EPA to regulate advertising in general, but does allow the agency to police contradictory claims made for pesticide products.

b. *The Labeling Approach*
***3** Henry Korp in his memorandum of March 5, 1973, posed the question: "To what extent does the labeling authority under FIFRA extend to regulation of advertising claims?"

Section 2(p) of the Act defines label and labeling as follows:

(1) Label.–The term "label" means the written, printed, or graphic matter on, or attached to, the pesticide or device or any of its containers or wrappers.

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(2) Labeling.–The term "labeling" means all labels and all other written, printed, or graphic matter–

(A) accompanying the pesticide or device at any time; or

(B) to which reference is made on the label or in literature accompanying the pesticide or device, except to current official publications of the Environmental Protection Agency; the United States Department of Agriculture and Interior; the Department of Health, Education, and Welfare; State experiment stations; State agricultural colleges; and other similar Federal or State institutions or agencies authorized by law to conduct research in the field of pesticides.

The key question again becomes whether the term "label" or "labeling" encompasses advertising in general. The limitation of "written, printed, or graphic matter" would not appear to include radio and television commercials, except in highly unusual cases. If this definitional roadblock could be overcome, however, EPA would be home free by focusing on the term of art "misbranded."

A pesticide is misbranded "if its labeling bears any statement, design, or graphic representation relative thereto or to its ingredients which is false or misleading in any particular." [Section 2(q)(1)(A)], Pursuant to Section 12(a)(1)(E) it is unlawful for any person to distribute, ship, or sell any pesticide which is misbranded. Accordingly, EPA could forcefully assert jurisdiction over labeling–advertising that is false or misleading in any way. The question of whether labeling can be interpreted to mean advertising, then, is well worth pursuing in depth.[FN1]

c. *Comparison of the Claims Approach and the Labeling Approach*

The claims approach vests EPA with jurisdiction to regulate advertising "claims" which substantially differ from those proferred in the registration application. There may be some doubt, however, whether claims made as part of the distribution or sale of a pesticide are equivalent to claims made in advertising. The claims approach also appears to contain inherent jurisdictional gaps, both as to claims not substantially different from ones submitted in the registration application and also for deceptive or misleading advertising which nevertheless parodies the approved label.

The labeling approach can only be effective if threshold definitional hurdles are overcome, i.e. that labeling can be stretched to mean advertising. However, once this barrier is passed, EPA would obtain general jurisdiction over any false or misleading advertising by focusing on the definition of misbranded.

***4** Neither approach is entirely satisfactory standing alone; the best theory would be to weave a statutory web by plucking the best from both theories. Perhaps in this manner EPA could assume full concurrent jurisdiction with the FTC to control advertising of pesticide products. The knotty practical problem would still remain, however, of establishing each agency's fiefdom.

The Lysol Case

This memorandum would be incomplete if the pesticide advertising cases pending before the FTC were not mentioned. The Lysol dispute, which has advanced to the hearing stage [FTC Docket No. 8899], presents some particularly interesting questions.

The kernel of the FTC Lysol complaint alleges that television advertising has represented that one should use Lysol brand disinfectants to kill influenza virus, and other germs and viruses, on environmental surfaces and in the air, and that such use will be of significant medical benefit in reducing the incidence of colds, influenza, and other upper respiratory diseases within the home. According to the complaint, however, germs and viruses on environmental surfaces do not play a significant role in the transmission of colds, influenza, and other upper respiratory diseases, the use of Lysol brand spray disinfectant does not eliminate significant numbers of airborne germs and viruses, and such use will not be of significant medical benefit for the prevention of the foregoing diseases. The alleged representations, therefore, are claimed to be false, misleading, and deceptive.

Lysol, besides denying the allegations, raised three affirmative defenses, the first of which is particularly in point. In

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essence, Lysol argued that all labeling of Lysol brand disinfectants had been reviewed and accepted by EPA, and that the advertising challenged in the complaint had at all times conformed with such labels. In a nutshell, Lysol contended that the FTC should not assert jurisdiction over territory already covered by EPA.

The FTC administrative law judge dismissed Lysol's arguments, holding that the complaint concerns advertising, not labeling or labels. The judge further opined that registration of Lysol labels did not constitute EPA approval of the advertising promoting them. [Prehearing conference order, FTC Docket No. 8899, p. 2]. The judge further ruled that even if the advertising conformed to the labels, it still could be deceptive under the FTC allegations. To bolster his decision, the judge cited EPA regulations disclaiming any interest in advertising that will "never be used as labeling," and which state that it is EPA policy for advertising to be handled by the FTC. [40 CFR §162.107 (d)].

The Lysol controversy presents such issues as:

(1) Can advertising ever be false or misleading if label claims are literally repeated? (Probably, yes)

(2) If such advertising was held to be false or misleading, would this necessarily affect the legality of a registration? (Probably, no).

Further, the Lysol case demonstrates the necessity of revising EPA's regulation governing advertising of pesticide products.

Pesticide Advertising Regulation

*5 Any discussion of EPA/FTC authority to regulate advertising of pesticide products calls into play EPA's regulation interpreting FIFRA with respect to advertising. [40 CFR §162.107]. This nettlesome regulation generates more questions than answers. The contradictory provisions shroud EPA's position in ambiguity, and although this may have been the regulation's purpose when drafted, prompt revision would seem to be in EPA's best interest.

For example, the administrative law judge in the Lysol controversy cited the regulation to bolster the FTC's contentions. Particularly damaging to EPA's cause is the sweeping statement that "in general, the policy is for advertising, other than labeling, to be handled by the FTC." [40 CFR § 162.107(d)]. Even so, EPA can point to statements in the regulation that arguably buttress its jurisdiction over *all* advertising of pesticide products. [See 40 CFR §162.107(a)].

RECOMMENDATION

Hopefully, the upshot of this memorandum will be a refined consideration of remaining legal questions and a thorough policy consideration of the thorny practical ramifications of the various alternatives for regulating pesticide product advertising with or without FTC participation. The cornerstone of any final decision should be a wholesale revision of 40 CFR §162.107 to reflect actual EPA policy. A coherent regulation would well serve all parties, including the pesticide consumer.

FNa1. Note: This opinion is somewhat dated in many respects.

FN1. For example, the FDA's experience in this area should be scrutinized.

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