REGIONAL HEARING CLERK
JUL 31 1980
REGION VII

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
324 East 11 Street
Kansas City, Missouri 64106

IN THE MATTER OF:	)	DOCKET NO. I.F.&R. VII-344-C
	)	
WILLIAM MYERS, d/b/a GIFT SALES COMPANY Wichita, Kansas	)	Marvin E. Jones Administrative Law Judge

INITIAL DECISION

This is an action for the assessment of civil penalties under Section 14(a)(1) [7 U.S.C. 1361(a)(1)] of the Federal Insecticide, Fungicide and Rodenticide Act (hereinafter "FIFRA" or the Act) instituted by Complaint filed September 28, 1979 by the US Environmental Protection Agency, Region VII, Kansas City, Missouri (hereinafter "EPA") against Respondent, William Myers, doing business as Gift Sales Company for alleged violations under Section 12(a)(1)(A), 7 U.S.C. 136j(a)(1)(A). Said Complaint alleges that on August[1/] 24, 1978 Respondent's products Chem-O Sparkle Pure Para Moth Balls and Chem-O Sparkle Moth Crystals, were shipped by Respondent from Wichita, Kansas to Frederick, Oklahoma and that both of said products were not registered under Section 3 of the Act, 7 U.S.C. 136a(a).

The Act[2/] provides, in pertinent part, as follows:

"Sec. 3. Registration of Pesticides.

"(a) Requirement. Except as otherwise provided by this Act, no person in any State may distribute, sell, offer for sale, hold for sale, ship, deliver for shipment, or receive and (having so received) deliver or offer to deliver, to any person any pesticide which is not registered with the Administrator."

"Sec. 12. Unlawful Acts.

"(a) In General.--

1/ Date of alleged violation was actually September 24, 1978, which correction is noted in the record.

2/ The Act, as amended 7 U.S.C. 136 et seq., was further amended effective September 30, 1978 (PL 95-396). We must look to the provisions of the Act in effect prior to its 1978 amendments. It is noted, however, that the texts of the Sections of the Act, here pertinent, remain unchanged by said amendment.

"(1) ...it shall be unlawful for any person in any State to distribute, sell, offer for sale, hold for sale, ship, deliver for shipment, or receive and (having so received) deliver or offer to deliver, to any person--

"(A) any pesticide which is not registered under section 3, ..."

"Section 14. Penalties

"(a) Civil Penalties.

"(1) In General. Any registrant, commercial applicator, wholesaler, dealer, retailer, or other distributor who violates any provision of this Act may be assessed a civil penalty by the Administrator of not more than $5,000 for each offense."

"Section 2(u) Pesticide. The term 'pesticide' means (1) any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest, ..."

The Rules and Regulations here applicable provide, in pertinent part, as follows:

"Section 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:

* * *

"(3) The product is intended for use as a pesticide after reformulation or repackaging; or

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

After the submission of prehearing materials, pursuant to Section 168.36(e) of the Rules of Practice, an administrative hearing was held in Wicnita, Kansas on April 30, 1980. At said hearing, Respondent was represented by Attorney Roger Sherwood and Complainant was represented

by Attorney James F. Adler. Three witnesses testified and four exhibits were introduced into evidence on behalf of Complainant. One witness testified and four exhibits were introduced into evidence on behalf of Respondent; in addition, pursuant to agreement at the Hearing, a copy of Respondent's 1979 Federal Income Tax Return was provided, and is included in the record. After the hearing, parties filed Proposed Findings of Fact, Conclusions of Law, and Suggestions in Support thereof.

On the basis of the evidence and exhibits contained in the record and on consideration of the Proposed Findings of Facts, Conclusions of Law and Supporting Comments filed by and on behalf of the respective parties hereto, I make the following

FINDINGS OF FACT

1. It is stipulated (T. 8) by the parties that on September 24, 1978 Respondent William Myers shipped in interstate commerce from Wichita, Kansas to Frederick, Oklahoma quantities of the packaged products manufactured and sold by him, namely, Chem-O Sparkle Pure Para Moth Balls (Complainant Exhibit 2) and Chem-O Sparkle Moth Crystals (Complainant Exhibit 3).

2. Complainant's Exhibits 2 (T. 13) and 3 (T. 17) fairly and accurately represent the packaging containing, respectively, the said products so manufactured and sold and shipped in interstate commerce by Respondent on September 24, 1978, in that the label on Chem-O Sparkle Pure Para Moth Balls contained:

a. The product's name;

b. Directions, including the following:

(1) Use at the rate of 1 bag (5 oz) for each 25 cubic feet of tightly enclosed space, and

(2) Do not mix para balls with naphthalene balls as will cause discoloration; and

the label on Chem-O Sparkle Moth Crystals contained, particularly, the following:

a. The product's name;

b. The following claims:

(1) Kills Moths.

(2) Kills hard to reach moth worms.

(3) Aids in protecting...from mildew.

3. Neither of said products (Chem-O Sparkle Pure Para Moth Balls and Chem-O Sparkle Moth Crystals) were at any of the times here pertinent registered under Section 3 of FIFRA.

4. By application dated February 19, 1971, Respondent applied for registration of its product "Chem-O Sparkle Pure Para Moth Balls" which application referred to its product as an"insecticide" and was accompanied by proposed labeling which was a lithographed multi-colored cardboard carton containing thereon the name of the product and claim that said product "Kills moths, eggs, larvae" and "protects fabric" and "prevents mildew".

5. On or about May 6, 1971 Respondent was advised by letter that it's said product was acceptable for registration with the provision that the label would be revised to provide:

a. The 8 oz. package is for 50 (not 60) cubic feet of tightly closed space.

b. Products which control mildew growth by releasing vapors must specify that additional materials be added when the treated space is open or unsealed.

Said letter further advised that USDA Reg. No. 8629-4 was reserved and must appear on the finished label; and that said letter "does not constitute Registration".

6. EPA Pesticides Regulation Division letter dated June 30, 1972 replied to Respondent's Application for Registration dated May 22, 1972 and

advised said product (Chem-O Sparkle Pura Para Moth Balls) "will be acceptable for registration provided finished labeling is submitted incorporating the following revisions":

a. Ingredient statement should read ACTIVE INGREDIENT 100% Paradichlorobenzene.

b. Increase the type size of the precautionary signal word and/or the statement "Keep Out of Reach of Children".

c. The Statement "Keep Out of Reach of Children" must be separated from the text and in close proximity to the signal word on the front panel.

d. Provision "b" set forth in Finding 5, above, regarding "mildew".

The letter further required that Respondent furnish "finished labeling" before Notice of Registration would be issued and advised that said product could not be marketed in interstate commerce "until it is registered". An enclosure was attached for guidance in preparing Finished Labeling defined as that labeling which will be attached to or accompany the product.

7. The record does not reveal any further action was taken by Respondent until a new application was filed in April 1975.

8. On April 5, 1975 Respondent filed its application with "Registration Division Pesticides, EPA, who received same on April 14, 1975 (Complainant Exhibit C-4), enclosing a corrected label (Box) advising that:

> "The corrections on the label are so placed that we may use a pressure sensitive label on the box. We have approximately 10,000 boxes on hand that we would like to be able to use in this manner.
>
> "We are submitting these corrections and additions for your approval."

9. Said Registration Division, on May 23, 1975, advised by letter, signed by William H. Miller, Product Manager, EPA Registration Division in Washington, D.C., who appeared as a witness at subject Hearing (T. 15), that

the aforesaid labeling "is not acceptable for the reasons given below," and issued the following requirements:

a. Other than the brand name, eliminate the terms "moth", "moths" and "moth worms" whenever they occur on the label. Specify the particular moths to be controlled. "Clothes moths" and "clothes moth larvae" would be acceptable.

b. There must be instructions for keeping the storage closet, chest, trunk, or other containers tightly closed at all times for at least 7 days.

c. It should be indicated that since fumes are heavier than air it is desirable to place the crystals near the top of the closet or other containers.

d. In the paragraph titled "note" change the rate of 8 oz. for 60 cubic feet to 8 oz. for 50 cubic feet.

e. It is suggested that you combine the general directions pertaining to use in tightly confined storage areas. For instance the statement "Replenish with ... is opened" should not appear on the front panel. Combine this with other general directions. The top three paragraphs titled "Clean all garments first", "Note" and "Chests Drawers" could be combined which would eliminate some redundancy.

f. For instance, a rate is given in the paragraph titled "Note" and there is also the statement of using 1/4 to 1/2 pound in average sized chest..." in the paragraph titled "Chests, Drawers".

g. What is a Sparkle Garment Bag Hanger? If it is a receptacle to hold the crystals then a rate equivalent to 2.5 pounds per 100 cubic feet of tightly confined space must be given for that type of applicator.

h. Under directions for rugs and carpets change the phrase "one pound to a large rug, other in proportion" to read "one pound for 8 x 10 foot rug". The front panel precautionary labeling must meet the type size and prominence requirements.

i. The statement "Keep Out of Reach of Children" must be separate from the text and in close proximity to the signal word on the front panel.

j. The front panel must bear the following additional precautionary labeling: See other precautions on the back/side panel.

10. Respondent 1971 applications for registration were directed to the Department of Agriculture. The 1972 applications, and subsequent applications in 1975, were directed to the US Environmental Protection Agency.

11. The applications for registration of Respondent's product Chem-O Sparkle Moth Crystals were made at approximately the times above referred to and the same or similar responses were made by Complainant Agency at all of said times.

12. FIFRA was amended in October 1972 after which time the Registration Division of EPA was governed by new and additional provisions. The requirements included in the 1975 letter was the means used to update the label of the Respondent to bring it under the requirement of the new law (T. 28).

13. Respondent's applications for registration were administratively withdrawn after a notice, sent by EPA to all Registrants on or about August 19, 1975, was not responded to by Respondent (T. 30).

14. Respondent Myers attended a seminar in Kansas City, Missouri where EPA representatives from Washington, D.C. appeared in an effort to instruct applicants regarding registration and labeling which Myers did not feel was helpful.

15. Respondent talked several times with Mr. Morby, Supervisor in the EPA Region VII Pesticides Branch in Kansas City, regarding problems with product registration, which conversations were before his conversation with witness Anderson, EPA Consumer Safety Officer, in December 1977.

16. Witness Anderson advised Myers by telephone following his personal visit to Respondent establishment, that the labeling on Chem-O Sparkle Pure Para Moth Balls was such that marketing of said product would violate FIFRA unless said product was registered.

CONCLUSIONS OF LAW

1. Chem-O Sparkle Pure Para Moth Balls is a pesticide within the meaning of the Act for the reason that the words "Moth Balls", particularly when read with the "Directions" contained on the label, indicate that said product is intended for use in preventing, destroying or repelling moths.

2. Chem-O Sparkle Moth Crystals is a pesticide within the meaning of the Act for the reason that the words "Moth Crystals" and the further pesticidal claims "Kills Moths", "Kills ... moth worms" and "Aids in protecting clothing and fabric from certain mildews" indicate that said product is intended for preventing, destroying or repelling moths.

3. The shipment by Respondent on September 24, 1978 from Wichita, Kansas to Frederick, Oklahoma of quantities of unregistered pesticide Chem-O Sparkle Pure Para Moth Balls, violated Section 3 of the Act and a civil penalty should be assessed against Respondent for such violation.

4. The shipment by Respondent on September 24, 1978 from Wichita, Kansas to Frederick, Oklahoma of quantities of the unregistered pesticide Chem-O Sparkle Moth Crystals violated Section 3 of the Act and a civil penalty should be assessed against Respondent for such violation.

DISCUSSION

I

The parties are in agreement that the questions presented for decision are the following:

1. Can a substance not subject to registration under the FIFRA be made subject to the act by reason of the product name?

2. Should any penalty be imposed on respondent under the circumstances of the instant case, where the company has made a good faith effort to register the subject product in compliance with the Act?

Both of said questions must be answered in the affirmative for the reasons hereinafter set forth .

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. See United States v Article ...Consist.of 216 carton Bot., 409 F.2d 734 (1969),citing United States V Hohensee, 243, F. 2d 367, 370 (3 Cir. 1957).and other cases there cited. Respondent points out that In Re: Gulf Oil Corp., I.F.&R. Docket No. IV-86-C, Initial Decision, Honorable Herbert L. Perlman, was reversed by the United States Court of Appeals, 5th Circuit, in Gulf Oil Corp. v Environmental Protection Agency, 548 F.2d 1228 (1977). The Court's holding did not dispute the findings and conclusions otherwise found in said decision; rather, its reversal was bottomed on the narrow finding by the Court that there was not "substantial evidence that oil of citronella is recognized by the public or a large segment thereof as an insectifuge or insect repellant". In contrast, evidence in the instant case is not limited to a showing that the label contains an unqualified reference to "Pure Para" (or some substance which a large segment of the public might consider a moth repellant) but further shows that the target pest is named on the label, a cardboard carton, which states that the product contained therein is "pura para moth balls", which I find

is a representation to the public, and particularly to prospective purchasers to whom such claim is addressed, that said product is intended for use in the repelling, prevention or mitigation of moths. (See U.S. v Articles of Drug, etc., 263 F.S. 212, 215 (8) 1967).

The directions found on the labeling are pertinent to our inquiry. They contain the strong suggestion that the product contained therein is to repel or mitigate moths, and indicate that Respondent intended that such use should be made.

The directions state, in pertinent part:

> "...Use at the rate of 1 bag (5 oz) for each 25 cubic feet of tightly enclosed space." (emphasis supplied).

and

> "Do not mix para balls with Naphthalene balls as will cause discoloration."

The specification that the area of use should be tightly enclosed indicates the means by which the product's efficacy against the pest can be intensified; the further caution not to mix para balls with naphthalene balls (as will cause discoloration) indicates that the consumer might, before or after use of the Respondent's product, use naphthalene balls, a recognized defense against moths. I find that such directions, when read with the prominent words "Moth Balls" on the carton, further express the intention that the product's intended use is for "preventing, destroying, repelling or mitigating "moths". [See Section 162.4(a) and (b)].

40 CFR 162.3(ff) defines the term "pesticide" as "any substance or mixture of substances intended for preventing, destroying, repelling or mitigating any pest,...".

Further, 40 CFR 162.4(a) states:

> "(a) Determination of extent of use. A substance or mixture of substances is a pesticide under the Act if it is 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."

I find that the presence, particularly on consideration of their position and prominence, of the words "moth balls" on the carton containing said product is a pesticidal claim in that it, at least, clearly implies that the product controls moths and I further find that the placing of said words on the carton was intended as an indication to the buying public that said product could be used as a moth repellant.

My said findings are supported by record evidence provided by William H. Miller, Product Manager of the EPA Registration Division, who testified (T. 32) that while the Act would not characterize the word "moth" (by itself) nor the word "balls" as pesticidal claims, the presence of the words "moth balls" on the labeling of subject product is a pesticidal claim as said words, used together on said label, imply that the product controls moths. Further, it is observed that Webster's New Ideal Dictionary (1978), page 343 defines "moth ball" as "an item used to keep moths out of clothing"; American College Dictionary, Random House (1970) defines the term as "a small ball...which repels moths and protects clothing".

I have also considered that the product "Chem-O Sparkle Moth Crystals" was contained in the subject shipment by Respondent, along with the Moth Balls. Admittedly the Crystals, though unregistered, contain pesticidal claims on the labeling. Further, Respondent's registered product "Chem-O Sparkle Moth Block" (Respondent Exhibit R-4) is labeled as a pesticide containing various claims including "kills all moth life";

"prevents mildew"; and its active ingredient is, like the Moth Balls, "100% Paradichlorobenzene". The record does not contain evidence of Respondent's marketing practices or the practices of retailers who sell to the ultimate consumer; but experience dictates that all of said products will very likely appear in the same section in most, if not all, retail outlets to afford the purchaser a choice. I conclude that a purchaser will reason that the moth balls which contains the same active ingredient as the moth block and crystals will be just as effective to combat moths. [Section 162.4(a)].

II

In evaluating the civil penalty properly to be assessed in this case, I am governed by 40 CFR 168.46(b) and 168.60(b)(1) wherein it is directed that consideration should be given to (1) the gravity of the violation, (2) size of respondent's business, and (3) effect of such proposed penalty on respondents ability to continue in business.

Also to be considered is respondents history of compliance with the Act and any evidence of good faith or lack thereof.

"Gravity of the violation" should be determined from the standpoints of both gravity of harm and the gravity of misconduct (e.g., In Re: Amvac Chemical Corp., I.F.&R. Docket IX-4-C; In Re: Beaulieu Chemical Co., I.F.&R. Docket IX-10-C).

Little, if any, harm to the public in the sense of danger to health and environment will result by reason of the violation found herein. However, it is significant that Respondent shipped said product, which was unregistered, with full knowledge of the requirements of the Act and that said requirements had not by him been complied with. Under these circumstances it must be concluded that respondent shipped such unregistered

product with a knowing disregard of statutory requirements. The statement in Gulf Oil Corp., I.F.&R. Docket IV-86-C, page 19, is appropriate: "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." However, we do not think that Respondent's previous efforts to register his products, and his experience in connection therewith, can be ignored. His efforts to register both of said products, Chem-O Sparkle Pure Para Moth Balls and Chem-O Sparkle Moth Crystals, were started in 1971 when the program was under the jurisdiction of the Department of Agriculture. His most recent application for registration of subject products was made to the EPA in 1975. Respondent then advised, along with its application on April 5, 1975, that he had approximately 10,000 boxes on hand that he would like to utilize by the use of a pressure sensitive label on the box. Whether or not Respondent's inquiry and contention in this regard had merit, it accompanied and was relevant to the application and deserved a forthright response by the Agency.

Whereas the registration division did reply to the application on May 23, 1975, they did not respond to the inquiry stating said problem peculiar to the Respondent; rather they advised only that the labeling "is not acceptable" and then proceeded to set out 10 different paragraphs with which Respondent would have to comply. Whereas it is clear from this record that requirements so included in the response to Respondent's 1975 application were requirements necessary to update label of Respondent under the new law then in existence, the communication of 10 separate and onerous requirements and a complete disregard of Respondent's inquiry wherein he sought cooperation from EPA in the use of approximately 10,000 boxes that he had on hand was not conducive to the kind of cooperation and rapport that should exist between the Agency and its applicants. We must recognize that remedial legislation is promulgated for the protection of the interest of the public as a whole and the Respondent is no less a part of the public than those considered to be the consuming

public; and whereas Respondent has not and cannot here justify his violations of Section 3 of the Act, Complainant cannot deny its handling of Respondent's 1975 application, and its failure and refusal to recognize said problem of this small business as this record indicates. I find that such omission on the part of the Agency is a mitigating circumstance that should be accorded some weight in the assessment of the penalty appropriately to be exacted from the Respondent [See 40 CFR 168.60(b)(2)(ii).] Consideration has been given to the fact of a previous violation by Respondent; I find that the amount proposed as a civil penalty will not affect Respondent's ability to continue in business.

In the premises, we feel that two violations clearly exist but that the penalty proposed is inappropriate and we feel that a fair and appropriate amount to be assessed for such violations is the total sum of $1,200.00.

FINAL ORDER [3/]

Pursuant to Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended (7 U.S.C. 136l(a)(1), 1973 Suppl), civil penalties in the total sum of $1,200.00 are hereby assessed against Respondent William Myers, doing business as Gift Sales Company for the violations of the Act found herein.

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

July 31, 1980

ALJ

3/ 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)].