UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE REGIONAL ADMINISTRATOR

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In the Matter of N. Jonas & Company, Inc., Respondent	)	I. F. & R. Docket No. III-121-C

Initial Decision on Remand

This is a civil penalty proceeding under Section 14(a)(1) of the Federal Insecticide, Fungicide and Rodenticide Act as amended (7 U.S.C. 136 l(l)). In an initial decision, dated July 27, 1978, it was determined that the product here concerned, Scorch, a chlorine based chemical for use in swimming pools, was a pesticide, that it was not registered in accordance with Section 3 of the Act and that Respondent violated Section 12(a)(1)(A) of the Act by selling and offering for sale the product Scorch while it was not registered. A penalty of $2,500 for this violation was assessed. This decision was affirmed by the Regional Judicial Officer on June 29, 1979. Respondent filed a petition for review of this decision in the Court of Appeals for the Third Circuit. Although the complaint originally contained an additional charge for Respondent's refusal to permit inspection by duly authorized representative of the Administrator, this charge has been withdrawn and is no longer in issue.

Subsequent to filing its petition for review in the Third Circuit, Respondent discovered the existence of Policy and Criteria Notice 2050.1, dated March 9, 1978, entitled "Multi-Purpose Products Treatment as Pesticides," which Respondent contends has a controlling effect on the

principal issue in this proceeding, i.e., whether Scorch is a pesticide. Counsel for the Government agreed that the Policy and Criteria Notice was relevant and filed a motion to remand the petition for review. Over Respondent's opposition, the Court granted the Government's motion and remanded the matter for further proceedings on June 11, 1980.

A hearing limited to the effect the Policy and Criteria Notice had on the decision that Scorch was a pesticide was held in Philadelphia, Pennsylvania on January 14, 1981.

Findings of Fact

Based on the entire record including the briefs and proposed findings and conclusions of the parties (findings not adopted are either rejected or considered unnecessary for the decision), I find that the following facts are established:

1. Policy and Criteria Notices are developed in the Registration Division, Office of Pesticide Programs, EPA to assure uniformity of approach by product managers and others in the interpretation and application of the Act and regulations. These notices are normally reviewed in draft form by each branch chief within the Registration Division, by the Office of General Counsel and by the Office of Enforcement, if an enforcement matter is involved, and become effective upon signature by the Director of the Registration Division.
2. Policy and Criteria Notices are not published or distributed other than within the Agency. However, they are available to and will be furnished to the public upon request.

3. Although the concurrence and signature copy of Policy and Criteria Notice 2050.1, dated March 9, 1978 (EPA Exh. A), could not be located, the Notice was issued and dated, Respondent has stipulated to its authenticity, and it is found that the Notice contains the policy of the Registration Division as to multi-purpose products.

4. Policy and Criteria Notice No. 2050.1, dated March 9, 1978, had its genesis in an OGC memorandum, dated April 6, 1977, Subject: Treatment of Multi-Purpose Substances Such as Solvents Under FIFRA (EPA Exh. C). The memorandum referred to 40 CFR 162.4(b)(3) providing that a product will be considered to be a pesticide if it is intended to be used as a pesticide after reformulation, pointed out that the regulations did not specify whose intent [manufacturer, distributor or user] was controlling in making a substance a pesticide, suggested that a regulation be developed providing that a solvent would not be considered a pesticide until it had been incorporated into a formulated pesticide product or was being distributed with claims of pesticidal efficacy or directions for the manufacture of a pesticide product and included the following:

> "This logic could be extended to cover multi-purpose technical grade products which are not solvents. Under such an approach, a technical chemical with both pesticidal and non-pesticidal uses would not be considered a pesticide unless its labeling made some kind of express pesticidal claim. * *. It might also be desirable to require registration (and enforce against sale without registration) of a product if EPA possessed evidence that the seller was, in fact, asserting pesticidal claims for the substance."

5. Policy and Criteria Notice No. 2050.1, dated March 9, 1978, is entitled "Multi-Purpose Products Treatment as Pesticides"* and provides in pertinent part:

> "Purpose: To set out the status under FIFRA of chemicals/substances which may be used for pesticidal purposes and for other non-pesticidal purposes.
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> * * * *
>
> "Policy
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> A substance shall be considered a pesticide by the the intent of the manufacturer, seller or distributor, as expressed or implied via labeling claims and recommendations, or in advertising material.
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> "A solvent or other material shall not be considered a pesticide simply because it may be used as such. The intent of the user of the substance shall not be a factor in determining pesticide status under FIFRA.
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> "Thus a solvent shall not be considered a pesticide until it is incorporated into a pesticide formulation, or unless the manufacturer distributes it with claims for efficacy or directions for use in the manufacture of pesticide products.
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> "Although solvents are the prime example, the principle may be extended to any other truly multi-purpose ingredient even a technical chemical with non-pesticidal uses."

6. Although the Policy and Criteria Notice referred to in the preceding finding is dated March 9, 1978, five days prior to the commencement of the first hearing in this proceeding, none of the individuals involved in the determination that Scorch was a pesticide and who testified at that hearing (Messrs. Thomas E. Adamczyk, Elijah Brown and Arturo Castillo) were aware of the Policy and Criteria Notice at the time of that hearing.

* A complete copy is attached as Appendix A.

Conclusions

1. Although Policy & Criteria Notice No. 2050.1 was not published in the Federal Register and thus is not a regulation promulgated in accordance with the Administrative Procedure Act, it is nevertheless binding on Complainant insofar as this Respondent is concerned and fully available to Respondent as a defense in this proceeding.
2. Policy and Criteria Notice 2050.1 states that intent of the user of the substance shall not be a factor in determining pesticide status under FIFRA. However, it also states that "(a) substance shall be considered a pesticide by the intent of the manufacturer, seller or distributor, as expressed or implied via labeling claims and recommendations, or in advertising material."
3. Although the intent of the manufacturer, seller or distributor is controlling, it is not the subjective intent that is crucial, but the intent as expressed or implied in or from the labeling or advertising material.
4. The record and the findings in the initial decision amply supporting the conclusion that the label for Scorch contained implied pesticidal claims and the label for supplementally registered Scorch containing an express pesticidal claim (algae control), application of Policy and Criteria Notice 2050.1 to the facts herein affords no basis for altering the conclusion that Scorch is a pesticide.

5. Respondent having sold and offered for sale the product Scorch, a pesticide which was unregistered, violated Section 12(a)(1)(A) of the Act (7 U.S.C. 136j(a)(1)(A)) and is liable for a civil penalty in accordance with Section 14(a)(1) of the Act.

Discussion

The principle that the Government is bound by its own regulations is not dependent upon whether the regulations were promulgated in accordance with the Administrative Procedure Act and published in the Federal Register.[1/] Of course, if the Government was attempting to enforce a new or expanded interpretation of what constitutes a pesticide, based on an unpublished regulation, the person or firm proceeded against could certainly assert the invalidity of the regulation as a defense.[2/] Here,

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1/ United States v. Heffner, 420 F. 2d 809 (4th Cir., 1969); Gulf States Mfrs., Inc. v. NLRB 579 F. 2d 1298 (5th Cir., 1978. See also Morton v. Ruiz, 415 U.S. 199 (1974). Guardian Federal Savings & Loan Association v. FSLIC, 589 F. 2d 658 (D.C. Cir., 1978), dealing with interpretative rules and general statements of policy within the exception of rules required to be published in the Federal Register by the APA, cited by counsel for Complainant, concerns application of matters of discretion to activities clearly covered by the relevant act and not the basic question involved here as to whether a particular product or matter is within the coverage of the statute.

2/ See, e.g., 5 U.S.C. 552(a)(1) to the effect that a person may not be adversely affected by a matter required to be published in the Federal Register and not so published.

Respondent contends that Policy and Criteria Notice 2050.1, eliminated intent of the user as a factor in determining whether a product was a pesticide and asserts that the conclusion that Scorch was a pesticide was based on impermissible factors, i.e., intent of the user, use to which the product may be put and effect of the product. If the facts supported its position, there could be little doubt that Respondent would have made out a valid defense and Claimant's contention that Policy and Criteria Notice 2050.1 cannot legally detract from or change existing law as stated in published regulations (e.g., 40 CFR 162.4) is rejected[3/] insofar as Respondent is concerned.

Claimant argues that Policy and Criteria Notice 2050.1 has no application to Respondent because it does not apply to products such as Scorch which are marketed to consumers at retail. Although the General Counsel Opinion (EPA Exh. C) which provides background and support for the Policy and Criteria Notice contains examples of products being utilized

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3/ It is of interest that in a letter, dated May 9, 1977 (EPA Exh. B-3), EPA informed Senator Nunn in pertinent part "consequently, if the Renfroes wish to market arsenic acid, sodium bichromate, and copper sulfate for eventual formulation into wood preservative products, these component chemicals must themselves be registered * * *," while application of Policy and Criteria Notice 2050.1 resulted in a determination that "the manufacturers or importers of copper sulfate, sodium bichromate and arsenic acid cannot be deemed producers of pesticides unless they make pesticidal claims for those ingredients * *" (Memorandum, dated May 23, 1979, EPA Exh. B).

by pesticide formulators, the Notice by its terms is not restricted to such situations and applies to any product which could be used for pesticidal and non-pesticidal purposes. Mr. Adamczyk acknowledged that if the sole purpose of the manufacturer of Scorch was to rid the pool of or reduce the concentrations of sun tan lotion, hair sprays, etc., this purpose would be non-pesticidal (R.T. 56). Claimant's contention that Policy and Criteria Notice 2050.1 does not apply to retail sales and Respondent herein is rejected.

The Policy and Criteria Notice provides that a substance shall be considered a pesticide by the intent of the manufacturer, seller or distributor, as expressed or implied via labeling claims and recommendations, or in advertising material. It also provides that the intent of the user of the substance shall not be a factor in determining pesticide status under FIFRA. While it has been determined that the Policy and Criteria Notice applies to the factual circumstance which gave rise to this proceeding, Respondent's argument that impermissible factors, i.e., intent of user, use to which product may be put and effect of the product, were considered controlling in concluding that Scorch was a pesticide is not supported by the facts and is rejected. The published regulation in effect at the time the product Scorch was offered for sale and sold (40 CFR 162.4(a)) provided in pertinent part that "(a) substance or mixture of substances is a pesticide under the Act if it is intended for preventing, destroying or mitigating any pest. * * Such intent may be either express or implied." It is thus clear that the only change or clarification effected by the Policy and Criteria Notice is to remove any doubt that the controlling intent

is that of the manufacturer, seller or distributor rather than of the user.

The Policy and Criteria Notice did not change the rule that the controlling intent is not the subjective intent of the manufacturer, distributor or seller, but the intent as reasonably derived from the label, other advertising material and all the surrounding circumstances. The pesticidal claims in this case were determined to be[4/] implied and references in the findings and discussion of the initial decision as to what a reasonable pool owner or operator[5/] would consider was the purpose or intent of Scorch, to the fact that the label for supplementally registered Scorch, an apparently identical product, stated that a use was algae control, and to the fact that calcium hypochlorite is a well known and effective bactericide and algaecide must be read in the context of, and as being relevant to, the determination of the intent of the manufacturer, seller or distributor of Scorch as derived from the label or other advertising material. Certainly, the effectiveness of a product is

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4/ The evidence supporting that conclusion is set forth and fully discussed in the initial decision and will not be repeated here.

5/ As noted in the initial decision, the Court of Appeals for the Second Circuit in determining whether a particular item was a drug under the Federal Food, Drug and Cosmetic Act (21 U.S.C. 301 et seq.), which contains language similar to FIFRA in defining a drug, ruled that intended use is to be measured by how the claim (labeling and advertising material) might be understood by the "ignorant, unthinking or credulous consumer." United States v. An Article * * Sudden Change, 409 F. 2d 734 (2nd Cir., 1969).

relevant to the question of whether the label on a product implies a pesticidal use.[6/]

The Policy and Criteria Notice affording no basis for altering the conclusion that Scorch was a pesticide, that Respondent violated the Act by selling and offering for sale Scorch while it was unregistered, Respondent is liable for a civil penalty of $2,500, the amount originally assessed.

Final Order[7/]

It having been determined that Respondent violated Section 12(a)(1) of the Act (7 U.S.C. 136(j)(a)(1)(A)) by selling and offering for sale the product Scorch, an unregistered pesticide, Respondent is liable for civil penalty of $2,500 in accordance with Section 14(a)(1) of the Act (7 U.S.C. 136 l(a)(1)) as determined in the initial decision of July 27, 1978. Respondent is ordered to pay the aforesaid sum by

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6/ Counsel for Complainant postulates a situation (Brief at 15-16) concerning a product composed primarily of DDT and asserts that such a label could be regarded as making pesticidal claims in the absence of any other statements, or directions for use and even if it contained a purported disclaimer. Be that as it may, it is highly unlikely that the Court would have reached the conclusion it did in Gulf Oil Corp. v. EPA, 548 F. 2d 1228 (5th Cir., 1977) had oil of citronella been an effective insecticide.

7/ The parties stipulated at the remanded hearing that the rules in effect at the time of the initial proceeding (40 CFR 168 (1976)) govern.

forwarding a cashier's or certified check payable to the United States of America to the Regional Hearing Clerk within 60 days after receipt of this order.

Dated this 4th day of March 1981.

Spencer T. Nissen
Administrative Law Judge

Attachment

APPENDIX A

POLICY AND CRITERIA NOTICE

NUMBER: 2050.1 DATE: MAR 09 1973

MULTI-PURPOSE PRODUCTS
TREATMENT AS PESTICIDES

PURPOSE: To set out the status under FIFRA of chemicals/substances which may be used for pesticidal purposes and for other non pesticidal purposes.

CONSIDERATIONS: Many substances exist which may be used for pesticidal purposes or in pesticide formulations, but which also have other uses which are more widespread. Solvents such as kerosene, ethanol and other hydrocarbons are the most common examples, although many other pesticide ingredients can be cited. The status of such substances under FIFRA has generated considerable confusion: should they all be considered pesticides or should none be considered pesticides unless obviously used as such, or should some intermediate variation apply?

According to FIFRA, a pesticide is one by intent, but whose intent is not specified. A manufacturer of kerosene may not produce his product intending to sell it as a pesticide, but the buyer may intend to use it as such.

The Office of General Counsel has issued an opinion that clarifies the EPA position on this matter, and it is adopted here as Registration Division policy.

POLICY:

A substance shall be considered a pestitide by the intent of the manufacturer, seller or distributor, as expressed or implied via labeling claims and recommendations, or in advertising material.

A solvent or other material shall not be considered a pesticide simply because it may be used as such. The intent of the user of the substance shall not be a factor in determining pesticide status under FIFRA.

Thus a solvent shall not be considered a pesticide until it is incorporated into a pesticide formulation, or unless the manufacturer distributes it with claims for efficacy or directions for use in the manufacture of pesticide products.

Although solvents are the prime example, the principle may be extended to any other truly multi-purpose ingredient, even a technical chemical with non-pesticidal uses.