

2/2/92

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of)
)
Electronics for Industries, Inc.,) Docket No.
) IF&R 04-93F007-C
)
Respondent)

ORDER ON COMPLAINANT'S MOTION FOR PARTIAL ACCELERATED DECISION

This is a proceeding under the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), section 14, 7 U.S.C. 1361(a), instituted by an administrative complaint issued December 14, 1992, by the Director, Air, Pesticides and Toxics Management Division, EPA, Region V. The complaint alleges that Respondent, Electronics for Industries, Inc., has violated FIFRA, section 12(a)(1)(F), 7 U.S.C. 136J(a)(1)(F), by manufacturing and distributing a device that was misbranded in that its label did not bear the registration number assigned under FIFRA, section 7, 7 U.S.C. 136e. This number is required to be included in the labeling for the device by FIFRA, section 2(q)(1)(D), 7 U.S.C. 136(q)(1)(D).

Respondent answered, denying that the item at issue, "Dog Chaser" is subject to the labeling requirements of FIFRA, section 2(q)(1)(D). Respondent admits that the label for "Dog Chaser" does not bear an EPA registration number assigned under FIFRA, section 7.

Both parties exchanged witness lists and documents as requested by Chief Administrative Law Judge, then presiding over the matter. On June 17, 1993, Judge Frazier issued an order

directing the parties to file legal briefs on the question of whether electronic instruments such as "Dog Chaser" are "devices" within the meaning of FIFRA, section 2(h), 7 U.S.C. 136(h), and subject to the labeling requirements of FIFRA, section 2(q)(1)(D). Complainant filed a motion for partial accelerated decision on this question with a supporting brief and Respondent filed its brief opposing the motion.

The Facts

There is no genuine issue with respect to the following facts:

"Dog Chaser" is an instrument which emits ultrasonic waves to repel approaching or attacking dogs.¹ Typical of the claims made for the product is the following from one its brochures:

You need never be bothered by attacking or annoying dogs again. The amazing new DOG CHASER affords positive protection! When in operation, the dog chaser emits a high frequency sound that causes extreme discomfort to the attacking dog. Mean dogs simply cannot stand the high pitched sound, and the closer they come the greater the degree of pain. So they leave you alone.

Whereas chemical sprays used to drive away menacing animals may cause after effects, and can result in costly law suits, the DOG CHASER causes only discomfort when the dog is attacking.²

Another brochure states the following:

What are the advantages of Dog Chaser over chemical sprays?

* * *

Dog Chaser will stop the dog while he is further away. Very seldom will a dog get within six to ten feet. It

¹ Respondent's brief at 7.

² Inspection Report, Exhibit A to Complainant's prehearing exchange.

will back him up and keep him further from you with less chance of missing him that [sic] you would have with a spray.³

DISCUSSION

It is unlawful, under the provisions of FIFRA, section 12(a)(1)(F), 7 U.S.C. 136j(a)(1)(F), for "any person in any State to distribute or sell to any person . . . any device which is "misbranded." A device is defined in FIFRA as "any instrument or contrivance (other than a firearm) which is intended for trapping, destroying, repelling, or mitigating any pest or other form of animal life."⁴

Pursuant to FIFRA, section 2(q)(1), 7 U.S.C. 136(q)(1), a pesticide is misbranded under the Act if its label does not bear the registration number assigned under FIFRA, section 7, 7 U.S.C. 136e, to each establishment in which it was produced.⁵ FIFRA authorizes the Administrator of the EPA to specify those classes of devices which are subject to these provisions in addition to pesticides.⁶ Pursuant to this authority, the Administrator, by regulation, made the following devices subject to FIFRA:

Instruments declared to be devices subject to 2(q)(1) and section 7 of the Act include but are not limited to:
(D) mole thumpers, sound repellents, foils and rotating devices, for which claims are made to repel certain mammals. The Administrator will designate such provisions of paragraph 2(q)(1) and section 7 of the act to be applicable to devices as he finds necessary to effectuate

³ Id.

⁴ FIFRA, section 2(h), 7 U.S.C. 136(h).

⁵ FIFRA, section 2(q)(1)(D), 7 U.S.C. 136(q)(1)(D).

⁶ FIFRA, section 25(c)(4), 7 U.S.C. 136w(c)(4).

the purposes of the Act.⁷

The Administrator, by regulation, has designated as applicable to devices, the provisions of FIFRA, section 2(q)(1) and 40 C.F.R. Part 156 of the regulations with respect to labeling.⁸ One of these requirements is that the label for the product bear the registration number assigned to the establishment where it was produced.⁹ The registration of the producing establishment and the assignment of an establishment registration number are required by FIFRA, section 7, and 40 C.F.R. Part 167, which the Administrator has also designated as applicable to devices.¹⁰

Respondent argues that "Dog Chaser" does not fit the definition of a pesticide because the emission of sound cannot be viewed as a "substance or mixture of substances", which is how a "pesticide" is defined under the Act.¹¹ The argument ignores the fact that the Act covers not only pesticides but also devices that, like pesticides, are "intended for ...repelling, or mitigating any pest."¹² It is not disputed that "Dog Chaser" meets the definition of a device.¹³ As the Act and the regulations make

⁷ 40 Fed. Reg. 28242, 28266 (July 3, 1975).

⁸ 40 C.F.R. 153.240(b)(1).

⁹ FIFRA, section 2(q)(1)(D); 40 C.F.R. 156.10(a)(1)(v).

¹⁰ 40 C.F.R. 153.240(b)(2).

¹¹ See FIFRA, section 2(t), 7 U.S.C. 136(t).

¹² Compare definition of "device" in FIFRA, section 2(h) with definition of a "pesticide" in FIFRA, section 2(u).

¹³ Respondent's Brief at 12.

clear, it is the intended use for the product, whether pesticide or device, that makes it subject to regulation under FIFRA.¹⁴

Respondent further argues that a dog is not a "pest" under FIFRA because FIFRA's purpose will not be furthered by declaring a dog - a domesticated animal kept as a pet companion, safekeeper - a "Pest". Respondent's device, however, is intended as a protection against a specific kind of dog, namely, a menacing or an attacking dog.¹⁵ A dog under such circumstances, threatening bodily harm, clearly comes within the definition of a pest as an animal "deleterious to man."¹⁶

Respondent also argues that while "Dog Chaser" comes within the literal definition of a "device" under FIFRA, there is no justification for regulating "Dog Chaser" under FIFRA because it does not contain any chemicals and does no harm to the environment to humans or even to the dogs it repels.¹⁷ Again, Respondent overlooks what is made clear by the Act itself and the regulations thereunder, that it is the intended use of the device, in this

¹⁴ FIFRA, sections 2(h) and 2(u). See also 40 C.F.R. 153.240(a) (defining a device), and 40 C.F.R. 152.3(s) (defining a pesticide) and 152.10 (A product that is not intended to prevent, destroy, repel or mitigate a pest is not considered to be a pesticide.)

¹⁵ Indeed, Respondent's brochures represent that friendly dogs will not be affected by the device. See brochures for "Dog Chaser" in Exhibit A to Complainant's prehearing exchange statement.

¹⁶ 40 C.F.R. 152.5. See FIFRA, section 25(c), 7 U.S.C. 136w(c), (authorizing the Administrator to declare a pest any form of plant or animal life (other than man and other than bacteria, virus, and other micro-organisms on or in living man or other living animals) which is injurious to health or the environment.)

¹⁷ Respondent's brief at 13.

instance as a repellent against menacing or attacking dogs, that subjects it to regulation under FIFRA.

The Agency's regulation of "Dog Chaser" under FIFRA as a device is warranted by the plain language of the Act and the regulations. It is also consistent with the Agency's long-standing interpretation of the Act and the regulations that ultrasonic and electromagnetic repelling instruments are "devices" subject to regulation under FIFRA.¹⁸

Conclusions and Order

I conclude, accordingly, that Respondent's "Dog Chaser" is a device within the meaning of FIFRA, section 2(h), and subject to the labeling requirements of FIFRA, section 2(q)(1). I further conclude that at the time Respondent's establishment was inspected, as alleged in the complaint, said device was misbranded in that its labelling did not bear an establishment registration number assigned under FIFRA, section 7.

¹⁸ See e.g., Electronics For Industry, Inc., Docket No. IF&R-04-8506-C (Initial Decision, July 25, 1986) (Electronic device intended for repelling rodents); Panasony Electronics Corp., Docket No. IF&R-V-114-P (Default Order, August 17, 1984) (Electronic device intended for repelling flying or crawling pests); Monty's Environmental Services, Inc., (Initial Decision, December 5, 1979) (Electromagnetic device intended to control rodents). Nor is this the only instance where the EPA has proceeded against an electronic dog-repeller as a device regulated under FIFRA. Claims made for the ultrasonic product DAZER by its manufacturer, K-II Enterprises, similar to those made for "Dog Chaser", were brought to the attention of the EPA. The product and its claims were carefully reviewed by the EPA's enforcement section and it was determined that the product was a device and subject to the misbranding provisions of FIFRA, section 12(a)(1)(F). The product's label now bears an establishment registration number. See Complainant's brief in support of motion for a partial accelerated decision, Exhibits G and H.

Complainant's motion for a partial accelerated decision finding Respondent liable for the violation alleged in the complaint is granted. Still to be determined is the appropriate penalty for the violation.

Gerald Harwood

Gerald Harwood
Senior Administrative Law Judge

Dated: February 28, 1994

In the Matter of Electronics for Industries, Inc., Respondent
Docket No. IF&R-04-93F007-C

Certificate of Service

I certify that the foregoing **Order On Complainant's Motion For Partial Accelerated Decision**, dated February 28, 1994, was sent this day in the following manner to the addressees listed below.

Original by Regular Mail to:

Julia P. Mooney
Regional Hearing Clerk
U.S. EPA
345 Courtland Street, N.E.
Atlanta, GA 30365

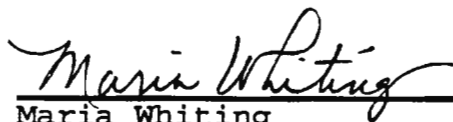
Copy by Regular Mail to:

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Maria Whiting
Legal Staff Assistant

Dated: February 28, 1994