

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of

Electronic Exterminators, Inc.;

Docket No.

I. F. & R. IV-384-c

Respondent

J. Lawrence Zimmerman, Esq., Region IV, Legal Branch, U. S. Environmental Protection Agency, 345 Courtland Street, N.E., Atlanta, Georgia 30308, for the Complainant; and Michael T. Newton, Esq. of the same address, and Theodore W. Firetog, Esq., 401 M Street, S.W., Washington, D.C. 20460, on the brief for the complainant.

John Brealey, Electronic Exterminators, Inc., 1442 10th Court, Lake Park, Florida 33403, for the Respondent.

(Decided March 31, 1981)

Before: J. F. GREENE, Administrative Law Judge

DECISION AND ORDER

This matter arises under 7 U.S.C. Section 136, et seq., the Federal Insecticide, Fungicide, and Rodenticide Act, as amended (hereafter "the Act"), and regulations issued pursuant to authority contained therein, 40 C.F.R. Section 168.01 et seq. In this civil action, the Environmental Protection Agency, the complainant herein, seeks assessment of civil penalties against the respondent pursuant to 7 U.S.C. 136 1 (a)(1), Section 14(a)(1) of the Act, for certain alleged violations of the Act.

The complaint herein alleges that on or about February 23, 1979, the respondent corporation held for sale two products, "devices" within the meaning of 7 U.S.C. 136(h), which were "misbranded" within the meaning of that term as it applies to pesticides, 7 U.S.C. 136(q) and devices, 40 C.F.R. § 162.15, because the labels thereon made claims for the products which the complaint further alleges were false and misleading 1/. It is unlawful, under the provisions of Section 12(a)(1)(F) of the Act, 7 U.S.C. 136j(a)(1)(F), for "any person in any State to ... hold for sale ... any device which is misbranded." Specifically, the complaint charges that the product "Exterma Pulse Nofleez" will not effectively control or eliminate fleas, and the product "Exterma Pulse Pest Control" will not effectively control mice, rats, roaches, and certain other pests. 2/ In addition, the complaint alleges that the establishment where the "Exterma Pulse Nofleez" was produced was not registered pursuant to Section 7 of the Act, 7 U.S.C. 136e, made applicable to producers of "devices" by 40 C.F.R. § 162.15, which constitutes a violation of Section 12(a)(2)(L), 7 U.S.C. 136j(a)(2)(L). 3/

1/ 7 U.S.C. 136(a)(1): "A pesticide is misbranded if (A) its labeling bears any statement, design, or graphic design relative thereto or to its ingredients which is false or misleading in any particular." 40 C.F.R. § 162.15 makes this section applicable also to "devices."

2/ Paragraphs A-3 and B-2, part I of the complaint.

3/ Paragraph A-4 of the complaint.

The respondent generally denies that the two products, which are claimed in promotional materials and labels to eliminate pests by electromagnetic pulses which disorient them, are misbranded, and asserts affirmatively that they do in fact control, under actual conditions of operation, the pests against which they are said to be effective; and, in response to the charge that the producing establishment was not registered, contends that (a) an official of the Environmental Protection Agency had told him it was not necessary to register, and (b) subsequent to the complainant's investigation, but some months before the issuance of the complaint, the establishment was in fact registered 4/.

The record shows that no tests of any kind -- in the usual sense of the word -- were performed upon the two devices here involved, either by the respondent or by the complainant. The allegations that neither of the products controls pests as claimed are based largely upon laboratory tests conducted by the National Bureau of Standards and personnel of the University of California at Davis and Riverside upon other devices which the complainant argues are essentially the same as the respondent's devices.

The testimony of the several experts on behalf of the complainant is persuasive that the devices tested are sufficiently similar to the respondent's devices to justify inferences that, at least under the same conditions as the test conditions, the same results, or lack thereof, are to be expected. Further, examining the entire record according to the standard applicable here, i.e. the preponderance of the evidence, Steadman v. Securities and Exchange Commission, United States Supreme Court No. 79-1266, February 25, 1981, 5/ it must be concluded that there is insufficient evidence upon which to base a finding that the test results are not applicable to pests living in their natural environment. The complainant's experts were unanimous in their opinions that nothing known about the insects and rodents in question suggests that their biological responses to the electromagnetic output of the strength shown here would be different in, for example, a warehouse, than they would be under laboratory test conditions. 6/ Accordingly, it will be held that the devices Exterma Pulse Nofleez and Exterma pest control are "misbranded," as that term is defined and made applicable to "devices" by the Act and regulations cited above.

4/ In February, 1979, the establishment was not registered; as of April 10, 1979, registration was obtained. On September 5, 1979, the complaint in this matter was issued.

5/ See slip opinion, particularly at pp. 5-11.

6/ The respondent, very ably represented by Mr. Brealey, who is the sole stockholder of the company which owns the respondent, offered evidence of Mr. Brealey's observations that the devices, when correctly installed, and under field conditions, do eliminate the target pests.

With regard to the charge, admitted by the respondent, that the establishment was not registered with the Administrator of the Environmental Protection Agency, the record shows that the respondent did make an effort to find out what requirements applied in connection with devices, and was informed on August 1, 1978, by the Agency's Pesticide Branch Chief that "devices are not required to be registered with EPA ... (T)hank you for your willingness to fully cooperate in this matter. We will be in touch with you if or when additional information is needed." 7/ Although the statement does relate to the registration of devices rather than to the registration of establishments that produce devices, the failure of this respondent to make the necessary distinction and appreciate that his establishment did have to be registered is not difficult to understand. 8/ Moreover, soon after the complainant's investigation, the respondent did register the establishment. Accordingly, considering all of the circumstances, it seems both reasonable and fair to assess no penalty for this violation of the Act and applicable regulations.

In considering the appropriateness of the penalties sought for the two "misbranding" violations, it is noted that regulations issued by the Environmental Protection Agency pursuant to the Act provide for consideration of the gravity of the violation, the size of the respondent's business, and the effect of payment of the penalty as proposed on the respondent's ability to continue in business. In connection with the gravity of the violation, numerous factors may be taken into account, including the scale and type of use or anticipated use of the product, and evidence of good faith, or lack thereof, in the circumstances; the potential that the alleged acts have to injure persons or the environment; and the severity of such potential injury. In addition, the extent to which the applicable provisions of the Act were in fact violated may be considered. 39 Federal Register July 31, 1974, pp. 27712, 27718.

All of the above matters considered, including the evidence of the respondent's financial position, and there being no evidence of previous violations of the Act, it is determined that a penalty of \$500 per violation, i.e. for each "misbranded" device, should be assessed.

7/ Respondent's Exhibit 1.

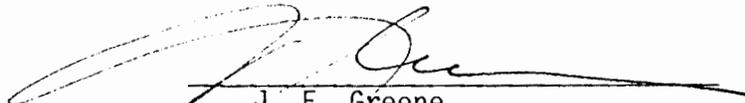
8/ It is noted that a reading of the Act itself gives no suggestion that establishments that produce [or "prepare" or "process"] devices, 7 U.S.C. 136(w), must register. Section 7 of the Act, 7 U.S.C. 136e, which relates to the registration of establishments, speaks only of pesticides, which are defined in such a way as to exclude devices. It is necessary to find 40 C.F.R. §162.15, and then refer back to the Act, to determine that device establishments are within the terms of Section 7.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The respondent Electronic Exterminators, Inc. is a corporation organized, existing, and doing business under the laws of the State of Florida, having its principal place of business at 1442 10th Court, Lake Park, Florida 33403, with gross sales for the year 1978 of less than \$100,000.
2. At all relevant times herein the respondent has been engaged in the promotion, sale, and distribution of the products Exterma Pulse Nofleez and Exterma Pulse Pest Control, "devices" within the meaning of 7 U.S.C. 136(h); is a "person" within the meaning of 7 U.S.C. 136(s), and is therefore subject to the provisions of the Act. At all relevant times, the respondent has been a "producer" within the definition of 7 U.S.C. 136(w), which includes persons who "prepare" or "process" a "device".
3. On or about February 23, 1979, the respondent held for sale the above-named devices in an establishment that was not, on that date, registered as provided by 7 U.S.C. 136e and 40 C.F.R. §162.15; the respondent was therefore in violation of those provisions until April 10, 1979, but no penalty will be assessed therefor.
4. The device Exterma Pulse Nofleez bears a label which claims that device effectively controls fleas and will eliminate them within a matter of weeks; the device Exterma Pulse Pest Control bears a label which claims that the device will effectively control mice, rats, and roaches, among other pests.
5. The above named devices do not effectively control the pests which the labeling on the products claims that they control, and, accordingly, they are "misbranded", as the term is defined at 7 U.S.C. 136 (q)(1), as made applicable by 40 C.F.R. § 162.15, in violation of 7 U.S.C. 136j(a)(1)(F), Sec. 12(a)(1)(F) of the Act.
6. Therefore, the respondent, a distributor of the above-named "devices", who is in violation of provisions of the Act, may be assessed a civil penalty in accordance with 7 U.S.C. 136 1 (a)(1), Sec. 14(a)(1) of the Act.

FINAL ORDER

Accordingly, it is ORDERED, pursuant to Section 14(a)(1) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended, 7 U.S.C. 136 1 (a)(1), and upon consideration of the entire record herein, after evaluating the gravity of the violations and the appropriateness of the penalty proposed, that the respondent Electronic Exterminators, Inc., pay, within sixty (60) days of service upon it of the final order, the amount of \$1000 as a civil penalty for violations of the said Act by forwarding to the Regional Hearing Clerk a cashier's check or a certified check for the said amount payable to the Treasurer, United States of America, 40 C.F.R. Sec. 22.31(b).



J. F. Greene
Administrative Law Judge

March 31, 1981
Washington, D.C.

Note: This Final Order shall become the final order of the Administrator unless appealed or reviewed as provided by 40 C.F.R. Sec. 22.27(c) and 22.30 of the Consolidated Rules of Practice.