Tonia 6/8/77

RECEIVED
EPA HEADQUARTERS
HEARING CLERK

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

77 JUN 8 P 2: 57

BEFORE THE REGIONAL ADMINISTRATOR

In the Matter of	)	
	)	
R. H. Crown Company, Inc.,	)	I. F. & R. Docket No. II-139C
	)	
Respondent.	)	

PARTIAL ACCELERATED DECISION

Preliminary Statement

This is a proceeding under Sec. 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended (7 U.S.C. 136 l(a), 1973 Supp.), instituted by a complaint filed by the Director, Enforcement Division, Region II, United States Environmental Protection Agency (EPA), which was served upon Respondent R. H. Crown Company, Inc., on December 8, 1976. Respondent filed an answer by letter dated December 17, 1976. The matter was referred to the Office of Administrative Law Judges by memorandum on February 11, 1977, and a prehearing letter was issued on February 18, 1977 pursuant to Sec. 168.36(e) of the Rules of Practice (40 CFR 168.36(e)) requiring the parties to submit certain information by April 5, 1977. Complainant filed its response by letter dated March 18, 1977. Respondent requested an extension of time which was granted after which it filed its response by letter dated April 20, 1977. Further responses were received from both Complainant and Respondent dated May 3, 1977 and April 28, 1977, respectively.

Subsequent thereto both parties filed Motion For Accelerated Decision asserting that no genuine issue of any material fact exists and that the only issue is whether or not Respondent's product CII Bowl Clean is a pesticide under said Act.

A penalty of $2,200.00 was proposed to be assessed.

Findings of Fact

1. Respondent R. H. Crown Company, Inc., is a corporation engaged in the manufacture of CII Bowl Clean. Its address is 100 North Market Street, Johnstown, New York.

2. The Product CII Bowl Clean was held for sale by Chemical Industries, Inc., 831 East 43rd Street, Brooklyn, New York. Said product was shipped by Respondent on February 19, 1976 and collected on May 13, 1976.

3. The label affixed to said product sets forth the following statement: "Eliminates ugly stains, rust and lime discoloration and mold growth under urinal rims."

4. The dealer from whom the product was collected sets forth the claim that the product "disinfects" in its own advertising brochure.

5. The product was not registered with the EPA as required by FIFRA.

6. The product shipped, by virtue of the claim that it eliminates mold growth, is a pesticide within the meaning of Sec. 2(u) of FIFRA.

7. The act of shipping an unregistered pesticide was a violation of Sec. 3(a) of FIFRA, as amended, 1972.

Discussion and Conclusion

The Respondent denies that the product is a pesticide. Since it is charged with shipping an unregistered pesticide in violation of FIFRA, we should look to the statute and regulations in effect at the time of the shipment for a definition of those terms.

Section 2(u) of FIFRA defines "pesticide" in pertinent part to mean "any substance or mixture of substances intended for preventing, destroying, repelling or mitigating any pest."

In pertinent part Sec. 2(t) defines "pest" as any form of terrestrial or aquatic plant or animal life or virus, bacteria, or other micro-organism. . ."

Further, Sec. 2(k) defines "fungus" a pest covered by the act, as "any non-chlorophyll-bearing thallophyte, as for example, rust, smut, mildew, mold. . . ."

Funk & Wagnall's Standard College Dictionary defines "mold" as being "any of a variety of fungeous growths. . . ." and defines "eliminate" as "To get rid of or do away with." I find that the word "eliminates" is synomous with "destroys."

Sec. 162.4 of Pesticide Programs, Registration, Reregistration and Classification Procedures 40 FR 28272, July 3, 1975 provides:

> 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 Sec. 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:
>
> (1) Claims or recommendations for use as a pesticide are made on the label or labeling of the product including, but not limited to, collateral advertising, such as publications, advertising literature which does not accompany the product, or advertisements by radio or television;
>
> * * * * *
>
> (4) The product is intended for use both as a pesticide and for other purposes.
>
> (c) Products not considered pesticides. The following are examples of the types of products which are not considered pesticides:
>
> (1) Deodorizers, bleaching agents, and cleaning agents for which no pesticidal claims are made in connection with manufacture, sale, or distribution;

Applying the above definitions and law to the product in question, it is apparent that the product is a pesticide.

It has long been held and it is well settled that the intended use of a product may be determined by the representations for use of the product. In United States v. 681 Cases ... Kitchen Klenzer,

63 F. Supp. 286 (E.D. Mo. 1945) a case under the Insecticide Act of 1910 (predecessor of FIFRA) the term "fungicide" was defined to include "any substance intended to be used for preventing, destroying, repelling or mitigating any and all fungi . . ." The court held that Congress "employed the words 'intended to be used' in reference to objective intent as evidenced by what the product holds itself out to be." The court continued:

> Any other construction of this statute would lead to the absurd result that a manufacturer could actually label his product a fungicide and yet avoid the application of the Act by reservations and his own knowledge of its inefficacy.

This construction has consistently been applied in cases arising under the Federal Food, Drug, and Cosmetic Act where "intended" or "intended for use" is used in defining "drug". In United States v. Article Labeled in Part ... Sudden Change, 409 F.2d 734, 739 (2d Cir. 1969) the court cited numerous cases and said:

> 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. (Cases omitted.)

The Sudden Change case is particularly pertinent as applied to this case. The issue there was whether the article was a cosmetic or a drug. If a drug, the label was required to bear the name of each active ingredient which the label of the product did not bear. The distributor of the product there argued that the claims on the label brought the product within the definition of cosmetic and not

within the definition of drug. The labeling of the product made ten different claims (p. 737). The court held (p. 742) that because of two particular claims, the product was deemed to be a drug. The court further held that if complainant ceased to employ these two promotional claims and made no others which brought the product within the definition of drug, the product would not be deemed a drug.

This holding in the Sudden Change case answers the Respondent's argument in this case that the appearance of the words "mold growth" on the label does not transform the article into a pesticide. The fact is that the representation on the label that the product would be effective in eliminating mold growth is what brings the product within the definition of "pesticide". I might add, as suggested in the Sudden Change case, that removal of these pesticidal claims would remove the product from the definition of pesticide.

Having ruled that the product CII Bowl Clean is a pesticide based upon the wording of the claims set forth on the label and therefore should have been registered prior to shipment, the question remains as to the amount of the penalty.

If the parties cannot agree upon an amount of civil penalty by June 17, 1977, the Regional Hearing Clerk shall be notified and we

will then proceed to hold a hearing to resolve those determinations which affect the amount of the penalty as provided for in Sec. 14(a)(3) of FIFRA. Notice of Hearing setting the time and place of hearing will be issued forthwith.

Edward B. Finch
Administrative Law Judge

June 8, 1977