ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE REGIONAL ADMINISTRATOR

In re	)	
	)	
Contact Industries, Inc.,	)	I.F. & R. Docket No. II-186C
	)	
Respondent	)	Initial Decision

Preliminary Statement

This is a proceeding under section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended (7 U.S.C. 136 l(a), 1976 Ed.), instituted by a complaint issued June 29, 1977, by the Director, Enforcement Division, Environmental Protection Agency, Region II, New York, New York. The complaint alleges that Respondent, Contact Industries, Inc., on or about November 3, 1975, shipped the pesticide Superior Sanicide Air Purifier in interstate commerce in violation of the act in that such product was not registered thereunder. The complaint proposed a civil penalty in the amount of $3,200 for such violation.

On or about August 16, 1977, Respondent filed an answer to the complaint in which it denied that Superior Sanicide Air Purifier is a pesticide under the act and therefore denied that it is subject to registration thereunder. Subsequently, Respondent also contested the appropriateness of the proposed penalty.

Complainant filed a Motion for Accelerated Decision November 8, 1977, pursuant to section 168.37 of the rules of practice (40 CFR 168.37), and Respondent filed a Cross-Motion for Accelerated Decision. Both motions were denied January 19, 1978.

After the submission of prehearing materials pursuant to section 168.36 of the rules of practice (40 CFR 168.36), a prehearing conference and oral hearing were held on April 6, 1978, in Newark, New Jersey, before Herbert L. Perlman, Chief Administrative Law Judge, Environmental Protection Agency. Respondent was represented at the hearing by Marc S. Friedman, Friedman and Siegelbaum, Attorneys at Law, Newark, New Jersey, and Complainant was represented by Susan C. Levine, Legal Enforcement Branch, Enforcement Division, Environmental Protection Agency, New York, New York. Complainant presented one witness and introduced two exhibits into evidence. Two witnesses testified for Respondent and nine exhibits were received into evidence on Respondent's behalf. Official notice was taken of a Consent Agreement and Final Order issued December 29, 1975, in In re Contact Industries, Inc., I.F. & R. Docket No. II-76C. Briefs were filed by the parties after the hearing pursuant to section 168.45 of the rules of practice (40 CFR 168.45).

Findings of Fact

1. Respondent, Contact Industries, Inc., is a corporation whose present address is 641 Dowd Avenue, Elizabeth, New Jersey. Respondent

is engaged in the business, in part, of manufacturing and distributing pesticides and many of its products are registered under the act.

2. On or about November 3, 1975, Respondent shipped in interstate commerce from Hicksville, New York, to Chattanooga, Tennessee, the product Superior Sanicide Air Purifier which it manufactured and sold to Superior Industries. Respondent prepared the product in accordance with Superior's specifications and attached a label which had been supplied by Superior. The product was contained in aerosol spray containers each having a net weight of 14 ounces.

3. The label of the product Superior Sanicide Air Purifier shipped by Respondent in interstate commerce on or about November 3, 1975 contained on the front thereof, approximately at the bottom of the upper third of the label, in large conspicuous letters, the word SANICIDE. The size of the lettering employed is considerably larger, and the lettering is thicker, than the lettering of any other word on the label and is black on a white background. Immediately below the word SANICIDE are the words AIR PURIFIER, also in black lettering on a white background, but in smaller type. The upper portion of the lower third of the front panel contains the words GLYCOLIZED AIR PURIFIER AND INDUSTRIAL ODOR ABSORBENT in relatively conspicuous letters which are also black primarily on a white background. The upper portion of the back panel of the label contains the word SANICIDE in the largest and most conspicuous lettering thereon, which lettering is black on a white background. Below this word is the following:

DISPELS ODORS
AND SMOKE INSTANTLY

Eliminates objectionable odors due to certain medical conditions, chemical compounds, smoke, etc. Keeps area clean and freshly scented.

RECOMMENDED FOR. . .
Meeting Rooms, Lavatories, Locker Rooms, Sick Rooms, Gymnasiums, Garbage Refuse Area, etc.

DIRECTIONS

Concentrated so light spraying is all that is necessary.

CAUTIONS

Contents under pressure. Do not puncture container, throw in fire or store in temperature exceeding 120°F. Do not take internally. KEEP OUT OF REACH OF CHILDREN.

4. The product Superior Sanicide Air Purifier shipped by Respondent in interstate commerce on or about November 3, 1975 was not registered under the act.

Conclusions

I

The primary issue for determination in this proceeding is whether the product shipped by Respondent in interstate commerce on or about November 3, 1975 from Hicksville, New York, to Chattanooga, Tennessee, is a "pesticide" as defined in the act. "Pesticide" is defined in section 2(u) thereof (7 U.S.C. 136(u)) to be "any substance or mixture of substances intended for preventing, destroying, repelling or mitigating any pest. . . ." (Emphasis supplied). The intended use of a product may be determined from its label. See, e.g., United States v. An Article. . . Consisting of 216 Cartoned Bottles, 409 F.2d 734 (2d Cir. 1969). The scope of the word "intended" in the definition of pesticide is more fully defined in the regulations issued pursuant to the act to encompass both express and implied intent and such regulations further provide that "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." See section 162.4(a) (40 CFR 162.4(a)). In addition, section 162.4(b) and (c) of the regulations (40 CFR 162.4(b) and (c)) provides, in pertinent part, as follows:

> (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. . .

(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.

At issue herein is the intent implied by or the meaning of the following words found on the product's label: "Sanicide", "air purifier", and "glycolized air purifier."

The term purifier connotes a product which eliminates impurities and polluting matter. We are in agreement with the conclusion of Complainant's expert witness that the "word purifier is sufficiently broad to include ridding the air of objectionables, including microorganisms as they would exist." An air purifier would therefore cleanse the air of air-borne bacteria, virus, and fungi particles. If Respondent had intended for the product to be understood to be merely an air freshener or deodorizer, the label could have contained the term air freshener (cf. Respondent's Ex. 7) or been limited to the claim that the product was an industrial odor absorbent and not also a glycolized air purifier. In fact, the latter phrase would be somewhat redundant in the context in which it is employed on the label if all that was intended thereby was to inform the consumer that the product functions as an air freshener. As indicated by Complainant's expert witness, the term air purifier especially when

taken together with the word "Sanicide" on the label would indicate that the product is intended to rid the air of germs, that is, bacteria or viruses.

"Sanicide" is printed in bold-face, conspicuous type on the front of the label. The word also appears at the top of the back of the label in type which is in larger and bolder print than all other words on that side of the label. It is clear that the word "Sanicide" is meant to provide the most conspicuous reference to the product.

"Sanicide" implies both a sanitizing and a killing action or, at the least, a killing action. Sanitize means to free from dirt, germs, etc., as by cleaning or sterilizing. The suffix -cide means killer or killing. See Webster's Third New International Dictionary (1966). A consumer would, we believe, recognize the meaning of the suffix -cide as is evidenced by the common usage of words such as homicide, pesticide, and insecticide.

In interpreting broad remedial legislation, the consumer is not assumed to be an expert or one possessing special knowledge or ability, and includes "the ignorant, the unthinking, and the credulous." United States v. An Article. . .Consisting of 216 Cartoned Bottles, supra at p. 740 and cases cited therein; United States v. An Article of Drug. . .47 Shipping Cartons. . ., 331 F.Supp. 912, 917 (D. Md. 1971). Nor can we assume that the buying public will exercise great selectivity and caution in what they choose to believe of what they

read. United States v. Articles of Drug, Etc., 263 F.Supp. 212 (D. Neb. 1967). Cf. Helbros Watch Company v. Federal Trade Commission, 310 F.2d 868, , 869 (D.C. Cir. 1962), cert. denied 372 U.S. 976 (1962), rehearing denied 374 U.S. 857 (1963), and cases cited therein. A consumer would be justified in believing that the product he purchased had the capability of both cleansing the area sprayed (sanitizing) and killing microorganisms present in the area sprayed. This is especially so when the term "Sanicide" is read in conjunction with representations that the product is an air purifier or a glycolized air purifier. Certainly, the use of the prefix sani- with the suffix -cide has greater significance than the use of that prefix in other contexts disclosed in the record.

Antimicrobial agents are specifically included as one of the classes of sanitizers or pesticides subject to registration under the act. (See section 162.3(ff) of the regulations (40 CFR 162.3(ff))). The claim that the product Superior Sanicide Air Purifier is an air purifier when read in conjunction with the word "Sanicide" would indicate that the product is indeed an antimicrobial agent "intended to reduce the number of living bacteria or viable virus particles on inanimate surfaces, in water, or in air", in this case. See 40 CFR 162.3(ff)(2)(i)(B) (Emphasis supplied).[1/] Thus, representations made

1/ Microorganisms, including but not limited to algae, fungi, and bacteria, and viruses have been declared by the Administrator to be pests when they exist under circumstances that make them deleterious to man or the environment (See 40 CFR 162.14(b)(4) and (5)).

on the product's label result in the classification of Superior Sanicide Air Purifier as an antimicrobial agent, a pesticide as that term is defined by the act.

Complainant sees additional significance in the fact that Respondent included the term glycolized in the description of the product. Glycol is a widely used chemical in air sanitizers. In fact, the Agency's Registration Division does not require the submission of data in support of a product's effectiveness as an air wash in an application for registration if the formulation at issue contains at least 5 percent glycol. Glycol can also be used as a humectant or moisture retainer, but would not be used as such in an air spray. As an air wash, glycol reduces the concentration of suspended particles, including bacteria, virus, and fungi. It mitigates pests present in the air where they could be inhaled.[2/] In this connection, Complainant's expert witness, an individual trained in biology and micro-biology, testified, in effect, that the use of glycol on the label and in the product supported and, in part, independently led to the conclusion that such product was a pesticide as defined in the act. However, the "views of persons with extensive training in science and chemistry as to the character of a substance is merely slight evidence of the perceptions of potential consumers. . ." Gulf Oil Corporation v. Environmental Protection Agency,

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2/ "Pest" is defined in section 2(t) (7 U.S.C. 136(t)) to be:

> (1) any insect, rodent, nematode, fungus, weed, or (2) any other form of terrestrial or aquatic plant or animal life or virus, bacteria, or other microorganism (except viruses, bacteria, or other microorganisms on or in living man or other living animals) which the Administrator declares to be a pest under section 25(c)(1).

548 F.2d 1228, 1231 (5th Cir. 1977).[3/] Complainant has, in reality, failed to establish the public perception of the word "glycolized." In contrast, the other pertinent words contained on the label, and their placement and emphasis thereon, do not require evidence in addition to that contained in the record to determine their meaning or their probable effect on the consuming public.

Respondent contends, in effect, that it did not intend that Superior Sanicide Air Purifier be considered a pesticide. However, the intended use of a product is determined by "reference to objective intent as evidenced by what the product holds itself out to be." United States v. 681 Cases. . .Kitchen Klenzer, 63 F.Supp. 286, 287 (E.D. Mo. 1945). In Kitchen Klenzer the court said at page 287 with respect to the Insecticide Act of 1910 (the predecessor of FIFRA), "Any other construction of this Statute would lead to the absurd result that a manufacturer could actually label a product a fungicide and yet avoid the implication of the Act by reservations and his own knowledge of its inefficacy."

Respondent contends that the record contains insufficient evidence of current public perception of the nature of its product. Cf. Gulf Oil Corporation v. Environmental Protection Agency, supra. We have concluded

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3/ In the Gulf Oil case the only alleged pesticidal representation on the label was the name of an ingredient contained in the product involved and the label contained "no other words that could be construed as an express or implied pesticidal claim". Gulf Oil Corporation v. Environmental Protection Agency, supra at p. 1231. Clearly, to that extent Gulf Oil is distinguishable from the facts of this controversy.

above, except for the word "glycolized" contained on the label, that this, in effect, is not so or is unnecessary. In addition, Complainant's expert witness testified as to his perception of the claims appearing on the label. He further concluded, in effect, that the label contained several pesticidal claims which would be recognized as such by the general public.

Respondent's witness in this regard testified as to his experience in marketing of this and similar products, and stated that he did not believe that the label made pesticidal claims. As support for his opinion, he relied upon the differences between labels of products registered under the act and labels of products not so registered and especially on the fact that the label in issue did not carry a description of the pests that the product was intended to kill. However, some of the distinctions advanced by Respondent between the label in issue and the labels of pesticidal products are due to the requirements of the act and the regulations issued thereunder and the fact that the latter labels or products were intended to be and are registered under the act. In addition, there is no requirement that a product specifically claim to control a particular pest or pests before it will be considered to be a pesticide under the act. It seems to us that all consumers recognize the presence of, at the least, bacteria in the air. The representation that a product purifies air is a claim that such product removes at least bacteria therefrom. The most that can be said for Respondent's position is that the label in issue, when viewed in its entirety, demonstrates an intention for use of the product as a pesticide and for other purposes.

II

By reason of Part I of these Conclusions, it is concluded that the shipment by Respondent of the unregistered pesticide product Superior Sanicide Air Purifier in interstate commerce on or about November 3, 1975 constitutes a violation of section 12(a)(1)(A) of the act (7 U.S.C. 136j(a)(1)(A)), as charged, and that a civil penalty may be assessed against Respondent for such violation pursuant to section 14(a) thereof (7 U.S.C. 136 l(a)). Complainant proposes the assessment of a civil penalty of $3200 for the violation found.

The appropriateness of the penalty is to be determined with regard, in part, "to the size of the business of the person charged, the effect on the person's ability to continue in business, and the gravity of the violation." 7 U.S.C. 136 l(a)(3). The gravity of the violation is evaluated in terms of both gravity of harm and gravity of misconduct. See, e.g., In re Amvac Chemical Corporation, I.F. & R. Docket No. IX-4C; In re Beaulieu Chemical Company, I.F. & R. Docket No. IX-10C. Respondent's failure to register its product did not result in harm to the public from a health or environmental standpoint. However, we do see possible misrepresentation to the public to the extent that purchasers of the product involved expected an efficacious antimicrobial agent or pesticide. Consumers who use the product in the recommended area (i.e., meeting rooms, lavatories, locker rooms,

sick rooms, gymnasiums, garbage refuse area, etc.) may not get the pesticidal protection they expect from the claims appearing on the product's label as the formula of the product was not submitted to the Agency and it was not tested for efficacy. In addition, an element of unfair competition is present as the Agency does not permit such a broad claim as air purifier to be utilized in connection with registered sanitizers. Also, Respondent's expert witness was familiar with the fact that most companies which market air fresheners have avoided use of the term air purifier due to Agency policy.

The shipment of an unregistered pesticide is a serious violation of the act. See e.g., In re Amvac Chemical Corporation, supra. Respondent was the distributor of the product, and was primarily responsible for seeing that the product it placed in interstate commerce was properly registered. Respondent intended to distribute a nonregistered product with full knowledge of the implications of its actions with regard to the act. Respondent has registered some of the products it manufactures and distributes and is familiar with the registration requirements of the act.

Another factor in considering the gravity of the violation is the Respondent's history of compliance with the act (See section 168.60(b)(2)). On December 29, 1975, a consent order was issued assessing a civil penalty of $2,100 against Respondent for three

misbranding violations. In re Contact Industries, I.F. & R. Docket No. II-76C.

Respondent admits that imposition of the proposed penalty will not cause it to go out of business. Respondent maintains, however, that the proposed penalty will have a substantial adverse effect on its ability to continue in business.[4/] Respondent did not place in evidence "certified financial records of all business operations of respondent." Instead, it presented evidence with respect to fines imposed by, and costs for compliance with the requirements of, other Federal and State agencies. We see no basis by reason thereof to reduce the civil penalty provided in the Guidelines, the purpose of which is, in part, to have uniform treatment for violations of the act. The Respondent is in category V, with gross sales of approximately $2,000,000 for its last fiscal year of operation, and there is no dispute that the amount proposed to be assessed in the complaint

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4/ Respondent relies on the following language found in section I D(2)(c) of the "Guidelines for the Assessment of Civil Penalties Under Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act, As Amended,":

> (c) Inability to continue in business. An unlimited adjustment may be made in the proposed civil penalty upon showing by respondent that the proposed penalty will have a significant adverse effect upon his ability to continue in business. The burden of providing the information supporting the contention that the proposed penalty will have such adverse effect rests upon respondent. A determination of such adverse effects shall be made only upon an analysis by complainant of certified financial records of all business operations of respondent. Such records shall be provided to the Agency at respondent's expense and shall conform to generally recognized accounting procedures.

was properly arrived at by use of the Guidelines. We see no significant adverse effect upon Respondent's ability to continue in business by reason of the proposed penalty which is a relatively small amount of money compared to the costs involved in Respondent's violations of other statutes. In any event, Respondent has not sustained its burden in the manner required by the Guidelines. In addition, it would be ironic indeed to reduce the amount of the penalty herein because Respondent has failed to comply with other requirements of law and we see no reason why the administration of this act should have a lower priority than other regulatory requirements. The fact that Respondent may suffer some economic hardship in paying the penalty is certainly not a convincing basis for its reduction. Such consideration, where the ability of the violator to remain in business is not, in reality, affected, would be contrary to and inconsistent with the purpose of civil penalties. In short, we see no convincing reason to deviate from the proposed penalty resulting from the operation of the Guidelines.

All contentions of the parties presented for the record have been considered and whether or not specifically mentioned herein, any suggestions, requests, etc., inconsistent with this Initial Decision are denied.

Order[5/]

Pursuant to section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended (7 U.S.C. 136 l(a), 1976 Ed.), a civil penalty of $3,200 is hereby assessed against Respondent Contact Industries, Inc., for the violation of the act found herein.

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

Herbert L. Perlman
Chief Administrative Law Judge

September 25, 1978

5/ 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)).

CERTIFICATION

RE: Contact Industries, Inc.
IF&R Docket No. II-186C

I hereby certify that on September 28, 1978 the original and 7 copies of the Initial Decision in the above case were received by me from the Administrative Law Judge. On October 4, 1978 one copy was mailed, certified mail, return receipt requested, to Mark S. Friedman, attorney for respondent, 17 Academy Street, Newark, N.J. 07102; two copies were sent by regular mail to Sonia Anderson, Hearing Clerk, EPA, Office of Administrative Law Judges, Washington, D.C.; and one copy was hand delivered to: Eckardt C. Beck, Regional Administrator and to Susan C. Levine, attorney for complainant.

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Dated: 10/4/78