

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
625 BROADWAY
ALBANY, NEW YORK 12233-1010

In the Matter

- of -

the Alleged Violations
of Article 33 of the Environmental
Conservation Law of the State of New
York and Parts 320-329 of Title 6
of the Official Compilation of the
Codes, Rules and Regulations of the
State of New York

- by -

ORGANICANDNATURE.COM, INC.,

Respondent.

DEC File No. R1-20020418-71

DECISION AND ORDER OF THE COMMISSIONER

June 28, 2006

DECISION AND ORDER OF THE COMMISSIONER

Staff of the New York State Department of Environmental Conservation ("Department"), by service of a notice of hearing and complaint dated May 1, 2002, commenced an administrative enforcement proceeding against respondent Organicandnature.com, Inc. for allegedly violating State laws and regulations governing pesticides. Specifically, Department staff alleged that respondent caused or allowed the distribution of a pesticide product which was not registered with the State of New York and which was misbranded.

Department staff subsequently filed a motion for an order without hearing. Administrative Law Judge ("ALJ") Richard R. Wissler, to whom the matter was assigned, denied Department staff's motion on March 13, 2003. An administrative enforcement hearing was held before ALJ Wissler on May 7 and 8, and August 20 and 21, 2003, at the Department's Region 1 office in Stony Brook, New York. Department staff was represented by Assistant Regional Attorney Vernon G. Rail. Respondent appeared by Jeffrey Lederer, its employee and sole corporate officer.

Upon review of the record, I hereby adopt the hearing report of ALJ Wissler (a copy of which is attached), subject to the following comments.

Registration

The Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") is the primary federal statute that regulates the registration, manufacture, distribution, sale and use of pesticides (see sections 136 to 136y of title 7 of the United States Code ["USC"]). FIFRA provides that a state may regulate the sale or use of any federally registered pesticide, "but only if and to the extent the regulation does not permit any sale or use prohibited by [FIFRA]" (7 USC § 136v[a]). New York State has enacted comprehensive legislation to regulate the registration, commercial use, purchase and application of pesticides within the state (see article 33 of the Environmental Conservation Law ["ECL"]).

"Pesticide" is defined in part to mean "[a]ny substance or mixture or substances intended for preventing, destroying, repelling, or mitigating any pest" (ECL 33-0101[35]). Section 33-0701 of the ECL requires that every pesticide which is "used, distributed, sold or offered for sale within this state or delivered for transportation or transported in intrastate

commerce or between points within the state through any point outside this state" be registered with the Department every two years (see also section 326.14[a] of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ["6 NYCRR"] [establishing requirements for pesticide registration]). Absent such state registration, the use, distribution, transportation, sale or offering for sale of a pesticide product is unlawful (see ECL 33-1301[1][a]).

The record of this hearing establishes that, on or about July 13, 2001, respondent distributed four 24-ounce containers of a pesticide product, Nature's Glory All Purpose Insecticide ("Nature's Glory" or "insecticide") to the Division of Vector Control of Suffolk County's Department of Public Works ("DVC"). The product labels contained no federal or New York State pesticide registration numbers.

Respondent did not claim that the insecticide had been registered, but argued that Nature's Glory constituted a "minimum risk pesticide" and, as such, was exempt from registration under FIFRA. As discussed in the hearing report, products defined as "minimum risk pesticides" which contain certain ingredients and meet other regulatory criteria may qualify for an exemption from FIFRA registration (see section 152.25[f] of title 40 of the Code of Federal Regulations ["40 CFR"]).¹ For purposes of the exemption, such a product, among other things, must bear a label identifying the name and percentage by weight of each active ingredient and the name of each inert ingredient (see 40 CFR 152.25[f][3][i]). The labels on the containers of Nature's Glory that respondent provided to DVC failed to meet this criterion. Accordingly, the product was not exempt from FIFRA registration requirements.²

¹The Hearing Report cites to 40 CFR 152.25(g), and specifically to 40 CFR 152.25(g)(3)(i). By amendment, effective February 22, 2002, section 152.25(g) was redesignated as section 152.25(f), but no changes were made to the content of the section. For purposes of this order, the current citation is used.

²Even if the product had qualified as a "minimum risk pesticide" and had therefore been exempt from federal registration requirements, states retain the authority to require state registration of "minimum risk pesticides" if they so choose (see 61 Fed Reg 8876-77 [1996][noting that the "minimum risk pesticide" rule only affects federal regulation and that states are free to continue to enforce state pesticide provisions]; see

The record demonstrates that this pesticide product was not registered as a pesticide, and that no exemption from the registration requirement applied. Accordingly, respondent's distribution of the four containers of an unregistered pesticide product violated ECL 33-1301(1)(a) and 33-0701, and 6 NYCRR 326.14(a).³

Misbranding

Department staff also alleged that the label on the insecticide was inadequate and that the insecticide was thus "misbranded." The statutory definition of "misbranded" (see ECL 33-0101[32]) sets forth nine categories of misbranding. In this proceeding, Department staff alleged that the pesticide was misbranded because its label: did not contain "a warning or caution statement which may be necessary and, if complied with, adequate to prevent injury to health and the environment"; was "not visible and readable on the outside of the marketing package which is presented or displayed under customary conditions of purchase"; and failed to conform to the labeling requirements of FIFRA (see, respectively, ECL 33-0101[32][d],[e], and [i]). Under New York law, no person may distribute, sell, offer for sale or use any pesticide which is misbranded (ECL 33-1301[1][e]).

The ALJ determined that the product label did not comport with FIFRA because it failed to identify the pesticide product's inert ingredients as required by 40 CFR 152.25(f)(3)(i).⁴ Accordingly, he concluded that Nature's Glory

also Pesticide Registration [PR] Notice 2000-6, United States Environmental Protection Agency, May 7, 2000, at 7 ["[e]ven if a pesticide product is exempt from FIFRA requirements, the product may not be exempt from state registration or other [state] regulatory requirements. . . . A pesticide product exempted from federal regulation is not automatically exempt in a state"]. Although the Department does not currently regulate "minimum risk pesticides," it is not precluded from exercising its regulatory authority over such pesticides.

³ Respondent suggested that Nature's Glory might be exempt from registration as an experimental use pesticide. However, pursuant to 6 NYCRR 326.14(b), experimental use pesticides are also required to be registered in New York State (see also Adjudicatory Hearing Transcript, at 364).

⁴ See footnote 1.

was misbranded and that respondent violated ECL 33-1301(1)(e).

I agree with the ALJ that the insecticide was misbranded and that respondent violated ECL 33-1301(1)(e), but I decline to adopt the legal reasoning set forth in the hearing report. Section 152.25(f)(3)(i) of 40 CFR, on which the hearing report relies, constitutes one of the factors for determining whether a pesticide is exempt from registration under FIFRA. Although failure to satisfy 40 CFR 152.25(f)(3)(i) may suggest that a product is misbranded, the relevant criteria to be examined for purposes of a violation of New York State law are those listed in the definition of "misbranded" at ECL 33-0101(32)(a-i) and, pursuant to ECL 33-0101(32)(i), the federal labeling regulations at 40 CFR 156.10.

The record establishes that the product label for Nature's Glory failed to provide any warning or cautionary instructions (see Adjudicatory Hearing [Staff] Exhibit 1); Adjudicatory Hearing Transcript, at 357-58), nor did it include any pesticide registration number as required by the federal regulations. Because the product label failed to satisfy the criteria in ECL 33-0101(32)(d) and (i), the product was misbranded and, accordingly, was in violation of ECL 33-1301(1)(e). In light of the foregoing, I do not have to reach Department staff's allegations of misbranding under ECL 33-0101(32)(e).

Civil Penalty

The ALJ determined that a civil penalty should be imposed on respondent for its distribution of four samples of an unregistered and misbranded insecticide, and I concur. In determining the appropriate civil penalty, I have considered the Department's Civil Penalty Policy and the facts of this case. As the ALJ discussed, because of the threat from the West Nile virus, the DVC was under a mandate from the Suffolk County Legislature to conduct research on non-toxic methods of controlling mosquito population. Pursuant to that mandate, the DVC contacted respondent about Nature's Glory. Respondent, which is a distributor but not a manufacturer of Nature's Glory, provided DVC with a one-page product description, a three page product label, a material safety data sheet and other product information (see, e.g., Adjudicatory Hearing [Staff] Exhibit 3), in addition to the four sample containers.

Following receipt of the containers, DVC contacted the Department to report that the product was inadequately labeled (Adjudicatory Hearing Transcript, at 337). The containers of

Nature's Glory provided to DVC were not used by Suffolk County and their contents were not released to the environment. However, when the Department investigated the complaint, the DVC failed to inform or provide the Department's investigator with much of the information that respondent had furnished on the insecticide.

The ALJ has recommended, in light of the facts of this case (see, e.g., Hearing Report, at 12-15 [discussing the threat of West Nile virus and the circumstances of the distribution of this pesticide product]), a civil penalty of four thousand dollars (\$4,000). I accept the ALJ's penalty recommendation.

NOW, THEREFORE, having considered this matter, and being duly advised, it is ORDERED that:

I. Respondent Organicandnature.com is adjudged to have violated ECL 33-1301(1)(a), 33-1301(1)(e), and 33-0701 and 6 NYCRR 326.14(a).

II. Respondent is to cease the distribution, sale, transport, offer for sale or use of Nature's Glory within New York State until such time that Nature's Glory is registered with the State of New York in accordance with ECL 33-0701 and 6 NYCRR 326.14, or that it is demonstrated that the product is exempt from registration.

III. Respondent is assessed a civil penalty in the amount of four thousand dollars (\$4,000.00), which is due and payable within thirty (30) days of service of this order upon respondent. Payment shall be made in the form of a cashiers check, certified check or money order payable to the order of the "New York State Department of Environmental Conservation" and sent to the Department at the following address: Vernon G. Rail, Esq., Assistant Regional Attorney, New York State Department of Environmental Conservation, Region 1, Division of Legal Affairs, Building 40, SUNY Campus, Stony Brook, New York 11790-2356.

IV. All communications from respondent to the Department concerning this order, including but not limited to the payment of the penalty, shall be made to Vernon G. Rail, Esq., Assistant Regional Attorney, New York State Department of Environmental Conservation, Region 1, Division of Legal Affairs, Building 40, SUNY Campus, Stony Brook, New York 11790-2356.

V. The provisions, terms and conditions of this Order shall bind respondent, its agents, successors and assigns in any and all capacities.

NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION

/s/

By: _____
Denise M. Sheehan,
Commissioner

Dated: Albany, New York
June 28, 2006

TO:

Organicandnature.com, Inc. (By Certified Mail)
25 Franklin Blvd., No. 4E
Long Beach, New York 11561
Attn: Jeffrey Lederer

Vernon G. Rail, Esq. (By Regular Mail)
Assistant Regional Attorney
NYSDEC Region 1
Division of Legal Affairs
Building 40 - SUNY Campus
Stony Brook, New York 11790-2356

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
625 Broadway
Albany, New York 12233-1550

In the Matter

- of the -

Alleged Violations of Article 33, Pesticides, of the
Environmental Conservation Law of the State of New York

- by -

ORGANICANDNATURE.COM, INC. ,

Respondent.

DEC FILE NO. R1-20020418-71

HEARING REPORT

- by -

/s/
Richard R. Wissler
Administrative Law Judge
March 7, 2005

PROCEDURAL BACKGROUND

On May 1, 2002, Department Staff of Region 1 of the Department of Environmental Conservation (Department) served a notice of hearing and complaint upon Respondent, Organicandnature.com, Inc., alleging two causes of action. The first cause of action in the complaint alleges that Respondent, on or before July 13, 2001, caused or allowed the distribution of a pesticide, called "Nature's Glory All Purpose Insecticide" (Nature's Glory), which was not registered with the Department in violation of sections 33-0701 and 33-1301(1)(a) of the Environmental Conservation Law (ECL) and section 326.14 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR), to the Suffolk County Department of Public Works' Division of Vector Control (Vector Control). The second cause of action in the complaint alleges that the aforementioned pesticide was, at the time of its distribution to Vector Control, misbranded in violation of ECL 33-1301(1)(e).

Respondent did not serve an answer to the complaint. However, on June 12, 2002, at a conference of the parties, Respondent, a corporation, appeared by its sole employee and officer, Jeff Lederer. The parties agreed to continue the case so that the possible settlement of the matter might be explored. These discussions were unavailing and, on or about July 9, 2002, Mr. Lederer advised Department Staff that Respondent was unwilling to resolve the matter through a negotiated settlement. By notice of motion dated July 16, 2002, Department Staff moved for an order without hearing, pursuant to 6 NYCRR 622.12. This motion alleged the same violations articulated in the complaint of May 1, 2002, and included an additional cause of action alleging that the pesticide distributed as aforementioned on or before July 13, 2001, was not properly labeled in accordance with the requirements of ECL 33-1301(1)(b). This last cause of action was withdrawn by Department Staff during the subsequent adjudicatory hearing. By an undated letter received by the Department's Office of Hearings and Mediation Services on August 20, 2002, Respondent filed a response to Department Staff's motion for order without hearing, opposing the motion and requesting a hearing.

On March 13, 2003, the undersigned denied Department Staff's motion for order without hearing and directed that an adjudicatory hearing be held with respect to the causes of action alleged by the Department. The matter was set down for a conference with the parties on April 9, 2003.

At the adjudicatory hearing, Department Staff called two witnesses, Dominick Ninivaggi, Superintendent for the Division of Vector Control in the Suffolk County Department of Public Works, and Bruce Cronemeyer, a Pesticide Control Specialist 2, in the Department's Region 1 office in Stony Brook, New York. Respondent called two witnesses, Jeffrey Lederer, sole corporate officer of Respondent, and Nathan Gordon, a former employee of Respondent.

The adjudicatory hearing commenced on May 7, 2003, with the testimony of Dominick Ninivaggi and was continued on May 8, 2003, for discovery, so that Mr. Ninivaggi could produce requested documents related to Nature's Glory that had been supplied to Vector Control but had not previously been provided to Department Staff by his office nor to Respondent. These documents included field evaluation studies, data sheets, copies of email correspondence and a copy of a resolution of the Suffolk County Legislature. Also on the afternoon of May 7, 2003, at 1:18 PM, David Lubin, Esq., of Ehrenreich, Eilenberg & Krause LLP, advised the undersigned, by letter sent by facsimile transmission, that he would be representing Respondent in the present matter. At about 3:00 PM, a conference call with the parties and Mr. Lubin was held and Mr. Lubin advised the parties and the undersigned that his representation of Respondent was limited to assisting and advising Respondent with respect to the newly disclosed documents only, and that he would not otherwise be participating in the adjudicatory hearing. (Transcript of Hearing of May 7, 2003, at pages 205-210; hereinafter abbreviated "H," date and page number.) On May 8, 2003, following a review of the documents supplied by Mr. Ninivaggi, the hearing was adjourned for a status conference on June 18, 2003. On June 18, 2003, the conference was held. Although he was offered the opportunity to participate by phone, Mr. Lubin advised the office of the undersigned that he did not wish to participate in the conference. After a discussion of the various documents produced, the matter was adjourned and the adjudicatory hearing continued on August 20 and 21, 2003. Closing briefs were filed by the parties on December 12, 2003, whereupon the record closed.

FINDINGS OF FACT

- 1) Respondent, Organicandnature.com, Inc., is an active, duly constituted domestic business corporation established under the laws of the State of New York, with business offices located at 130-30 31st Avenue, College Point, New York 11354. The company is engaged in the sale of various cleaning and janitorial products, including insecticides and herbicides, which it asserts are environmentally safe.

- 2) At present, the sole corporate officer and employee of Respondent is Jeff Lederer, whose business address is the same as that of Respondent corporation.
- 3) Respondent maintains a website on the internet with a URL address of <http://www.organicandnature.com>.
- 4) During 2001, Respondent had in its employ an individual by the name of Nathan Gordon.
- 5) On or about July 13, 2001, Nathan Gordon, on behalf of Respondent, hand delivered four 24-ounce containers of a pesticide product called Nature's Glory All Purpose Insecticide to the Vector Control Division of the Suffolk County Department of Public Works (Vector Control), located in the Town of Brookhaven, Suffolk County, New York.
- 6) Nature's Glory All Purpose Insecticide (Nature's Glory), at all times relevant to this matter, was manufactured by, and a product of, Ecoval Corporation, located in Lewiston, New York.
- 7) In an effort to control mosquito populations, in particular to address the threat of the West Nile virus, the Suffolk County Legislature passed Resolution No. 727-2000, dated August 31, 2000, directing Vector Control to:
 - A. Conduct research on non-toxic methods of controlling mosquito and other hominoxious arthropod populations;
 - B. Provide recommendations to Vector Control for the implementation of pilot programs utilizing non-toxic methods and recommendations for site selections for each pilot program as well as the applicable technology and research methodology;
 - C. Assist the County Department of Public Works in the implementation of selected non-toxic pilot programs for Suffolk County;
 - D. Assist in the data collection and analysis of the effectiveness of each pilot program; and
 - E. Prepare a report on the various control technologies examined and the findings and conclusions of the studies.

- 8) In furtherance of this legislative mandate, Vector Control contacted Respondent, and some weeks prior to delivery of the four containers of Nature's Glory by Respondent, and under a cover letter dated May 10, 2001, addressed to Dominick Ninivaggi, Superintendent of Vector Control, and signed by Nathan Gordon on behalf of Respondent, Respondent provided to Vector Control a one-page product description of Nature's Glory, a three-page product label, an eight-page bio study of the product's efficacy, and a two-page material safety data sheet.
- 9) When the four 24-ounce containers of Nature's Glory were inspected by Department Staff on July 16, 2001, at the offices of Vector Control, the three-page product label referred to in Finding of Fact 8, above, was not attached to any of the containers. Department Staff was not provided with this three-page product label until Mr. Ninivaggi did so at the adjudicatory hearing on May 8, 2003.
- 10) The three-page product label, annexed hereto as Appendix A, contains only the following information with respect to the ingredients in Nature's Glory:

"Made from lemon juice components.

Active Ingredients:

Citric Acid.....	0.3%
Inert Ingredients.....	99.7%
Total.....	100.0%"
- 11) The three-page product label, Appendix A, contains no USEPA or New York State registration numbers.
- 12) The four 24-ounce containers of Nature's Glory provided by Respondent to Vector Control were samples of the product and not packaged for commercial sale.
- 13) Vector Control did not use any of the Nature's Glory provided to it by Respondent in any pilot study, nor did it in any other way allow its release to the environment.

APPLICABLE STATUTORY PROVISIONS

Pesticide Registration

Title 7 of article 33 of the Environmental Conservation Law (ECL) provides for the registration of pesticides within the State of New York. Section 33-0701 of the ECL states, in

pertinent part: "Every pesticide which is used, distributed, sold, or offered for sale within this state ... shall be registered every two years with the office of the commissioner...."

In addition, ECL 33-1301(1)(a) declares that "[i]t shall be unlawful [f]or any person to distribute, sell, offer for sale or use within this state ... [a]ny pesticide which has not been registered pursuant to the provisions of this article...."

Finally, state implementing regulation 6 NYCRR 326.14(a) essentially reiterates ECL 33-0701 providing that "[e]very pesticide product which is used, distributed, sold, or offered for sale within this State ... shall first be registered with the commissioner...."

The aforementioned New York statutory and regulatory provisions must be read and interpreted in light of the provisions of the federal statute, the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 USCA 136-136y. Specifically, 7 USCA 136v, entitled, "Authority of States," provides:

"(a) In general

A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter.

"(b) Uniformity

Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter."

For the purposes of determining whether a particular pesticide must be registered with the State of New York, the federal mandate at 7 USCA 136v(a) is clear. First, registration is required by New York of those pesticides for which federal registration is also required. Second, New York may require registration of a pesticide even where federal registration is not required, provided such registration does not permit any sale or use prohibited by FIFRA. While it retains the inherent authority to mandate such registration in the future, it is the current policy of the Department to require registration at the state level only if such registration is required at the federal level.

Among the pesticides which are exempt from the federal registration requirements of FIFRA are those called "minimum risk pesticides." Former section 152.25 of title 40 of the Code of Federal Regulations (CFR), as in effect July 1, 1999, and introduced as Court Exhibit 5, provides:

"[Section] 152.25 Exemptions for pesticides of a character not requiring FIFRA regulation.

"The pesticides or classes of pesticides listed in this section have been determined to be of a character not requiring regulation under FIFRA, and are therefore exempt from all provisions of FIFRA when intended for use, and used, only in the manner specified.

....

"(g) Minimum risk pesticides--

(1) Exempted products. Products containing the following active ingredients are exempt from the requirements of FIFRA, alone or in combination with other substances listed in this paragraph, provided that all of the criteria of this section are met.

[List of Active Ingredients begins]...

Citric acid

...

Sodium lauryl sulfate

....

"(2) Permitted inert. A pesticide product exempt under paragraph (g)(1) of this section may only include inert ingredients listed in the most current List 4A. This list is updated periodically and is published in the Federal Register. The most current list may be obtained by writing to Registration Support Branch (4A Inerts List) Registration Division (7505C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460.

"(3) Other conditions of exemption. All of the following conditions must be met for products to be exempted under this section:

"(i) Each product containing the substance must bear a label identifying the name and percentage (by weight) of each active ingredient and the name of each inert ingredient."

Misbranded Pesticide

Section 33-1301(1)(e) of the ECL provides that "[i]t shall be unlawful [f]or any person to distribute, sell, offer for sale or use within this state ... [a]ny pesticide which is ... misbranded."

Section 33-0101(32) of the ECL defines the term "misbranded" as follows:

"32. "Misbranded" shall apply to any pesticide:
... e. If the label is not visible and readable on the outside of the marketing package which is presented or displayed under customary conditions of purchase;
... i. If its labeling in any other way fails to conform to the labeling requirements of the Federal Insecticide, Fungicide, and Rodenticide Act of 1972, as amended."

DISCUSSION

First Cause of Action

The first cause of action in the complaint alleges that "on or before July 13, 2001, Respondent, Organicandnature.com, Inc., caused or allowed the distribution of a non-NYS registered pesticide, namely, 'Nature's Glory All Purpose Insecticide' in violation of ECL Sections 33-0701 and 33-1301(1)(a) and Part 326.14 of 6 NYCRR."

From the proof adduced at the adjudicatory hearing in this matter and in accordance with the mandates of 6 NYCRR 622.11(c), it is clear that the Department sustained its burden with respect to this cause of action by a preponderance of the credible evidence.

With respect to its federal or state registration as a pesticide, some of the testimony at the hearing concerned whether or not Nature's Glory was exempt from such a registration requirement, Respondent asserting that it was exempt. (H, 8/21/03, p. 455)

In this matter, the question of the exemption of Nature's Glory from federal, and, therefore, state registration requirements turns not only on the composition of its ingredients but on the nature and adequacy of the label supplied with the product, as well. When Department Staff inspected the four containers of Nature's Glory on July 16, 2001, the only label was

that printed and visible on the containers themselves. (H, 8/21/03, p. 337-338) A photocopy of this label was entered as Department Staff Exhibit 1. On one side of each container were the words "NATURE'S GLORY ALL PURPOSE INSECTICIDE - RTU 24 FL OZ," and, on the other side, the words, "DISTRIBUTED BY: ORGANICANDNATURE, INC. (877) 520-5433 WWW.ORGANICANDNATURE.COM."

During the hearing, Department Staff introduced three different product labels which had been provided to Vector Control by Respondent and comprising Department Staff Exhibits 3, 4 and 5. (H, 8/20/03, pp. 158-183) Department Staff Exhibit 3 contained the three-page product label referred to in Findings of Fact 8 through 11, above and annexed hereto as Appendix A. Department Staff Exhibit 4 was a three-page label entitled "Nature's Glory All Purpose Insecticide Concentrate" indicating the following ingredients:

Active Ingredients:	
Citric Acid.....	12.00%
Inert Ingredients (Acetic Acid, Sodium Lauryl Sulfate, Water).....	88.00%
Total.....	100.00%

Department Staff Exhibit 5 was a three page label entitled "Nature's Glory All Purpose Insecticide - Ready To Use" indicating the following ingredients:

Active Ingredients:	
Citric Acid.....	0.4%
Inert Ingredients (Water, Acetic Acid, Sodium Lauryl Sulfate).....	99.6%
Total.....	100.00%

At the outset, it should be noted that Department Staff Exhibit 4 is a label for a concentrated version of Nature's Glory, and cannot be considered a label appropriate to a ready to use form of the pesticide. Moreover, both Department Staff Exhibits 4 and 5 list sodium lauryl sulfate as an inert ingredient. However, 40 CFR former 152.25(g)(1) lists Sodium Lauryl Sulfate as an active ingredient in a minimum risk pesticide and, in accordance with 40 CFR former 152.25(g)(2), notice may be taken of the fact that sodium lauryl sulfate is not on the 4A Inerts List. Moreover, 40 CFR former 152.25(g)(3)(i) requires that the percentage by weight of each active ingredient

be disclosed on the product's label, but such a disclosure with respect to sodium lauryl sulfate is not made on either label. Thus, even if either of these labels was affixed to the four 24-ounce containers of Nature's Glory, they would not comport with the express requirements of 40 CFR former 152.25(g)(3)(i) that to be exempt from federal and, therefore, state registration, the product "must bear a label identifying the name and percentage (by weight) of each active ingredient and the name of each inert ingredient."

Respondent insists, however, that the three-page product label sent to Dominick Ninivaggi of Vector Control on May 10, 2001, and part of Department Staff's Exhibit 3 and annexed as Appendix A herein, was, in fact, folded and affixed to each of the four 24-ounce containers that Nathan Gordon delivered to the Division of Vector Control. At the adjudicatory hearing on August 21, 2003, the following colloquy ensued (H, 8/21/03, pp. 480-481):

THE COURT: So there were four bottles that went to Suffolk County, each of them had that product label, part of Staff's 3, taped to it?

MR. LEDDERER: As Nathan [Gordon] discussed we have products. This answers why somebody would accept

THE COURT: I don't want you to explain. I want to know what happened.

MR. LEDDERER: Yes. The answer is yes. We have a product label May 10 sent to them. We have a history of supplying municipalities with product.

THE COURT: So if the label was first of all folded up and taped, in order to read the label you would have to remove it?

MR. LEDDERER: Yes, a hundred percent. That's correct. In order to read the label you would have to remove it.

THE COURT: And when you removed it you would be left with that bottle with the labeling on it that we see?

MR. LEDDERER: That's correct. There is a sticky substance here. I'm not saying that that's us but I'm

saying there is a sticky substance here.

THE COURT: In other words it could be the tape?

MR. LEDDERER: I think.

However, even assuming a copy of the label was attached to each of the containers as Respondent asserts, it is apparent that the label does not satisfy the strict federal requirements for exemption from registration because this label does not identify "the name of each inert ingredient" as required by the express language of 40 CFR former 152.25(g)(3)(i), providing instead, as noted in Finding of Fact 10, as follows:

Active Ingredients:	
Citric Acid.....	0.3%
Inert Ingredients.....	99.7%
Total.....	100.0%

Moreover, as explicitly stated in 40 CFR former 152.25(g), in order to qualify for exemption from federal registration, all of the conditions of this section must be met. Without a listing of the inert ingredients, the requirements of the section are not met and the pesticide is not exempt from federal and, therefore, state registration, notwithstanding the fact that the active ingredients of the pesticide are included in the list of exempted products enumerated in 40 CFR former 152.25(g)(1). Accordingly, Respondent is in violation of ECL 33-1301(1)(a) and 33-0701 and 6 NYCRR 326.14(a), for distributing a pesticide not registered with the State of New York.

While the salient aspect of the violation articulated by this cause of action involves a defect in the label and not the fact that the active ingredients in Nature's Glory would not otherwise qualify the product as a minimum risk pesticide and exemption from federal and state registration, the finding with respect to this cause of action is neither draconian nor the triumph of form over substance. There is no regulatory middle ground, either a pesticide must be registered or it is exempt. But if it was to be considered exempt as a minimum risk pesticide, it must have fully and completely met the requirements imposed by 40 CFR former 152.25(g). If it failed to meet any of the requirements of this section of the CFR, it did not qualify for exemption from registration under FIFRA, and, accordingly, the registration requirements of both FIFRA and the ECL still applied. Pesticides by their very nature cause harm to living organisms and can, if used in ignorance of their contents, cause harm to human beings. This being so, the ultimate user of a

pesticide product must never be left to speculate as to that product's contents, hence, the strict language and precise requirements of both the federal and state pesticide regulations.

Second Cause of Action

The second cause of action in the complaint alleges that "on or before July 13, 2001, Respondent, Organicandnature.com, Inc., caused or allowed the distribution of a misbranded pesticide, namely, 'Nature's Glory All Purpose Insecticide' in violation of ECL Sections 33-1301(1)(e)."

From the proof adduced at the adjudicatory hearing in this matter and in accordance with the mandates of 6 NYCRR 622.11(c), it is clear that the Department has sustained its burden with respect to this cause of action by a preponderance of the credible evidence.

The record in this matter strongly suggests that the three-page product label identified in Findings of Fact 8 through 11 and annexed hereto as Appendix A, was, in fact, attached to each of the containers as Respondent asserts, and that in order to read it, it would have to be removed from its respective container of Nature's Glory. This evidence would further suggest that a violation of ECL 33-1301(1)(e) has been demonstrated inasmuch as ECL 33-0101(32)(e) states, in part, that a pesticide is misbranded "[i]f the label is not visible and readable on the outside of the marketing package...." But the facts in this case show that the containers of Nature's Glory provided by Respondent were intended as samples of the product and not packaged for commercial sale and, thus, the label was not "... presented or displayed under customary conditions of purchase," as also required by ECL 33-0101(32)(e).

However, from the foregoing discussion with respect to the first cause of action, it is apparent that the product label, Appendix A, does not comport with FIFRA because it fails to identify the pesticide product's inert ingredients as required by 40 CFR 152.25(g)(3)(i). Thus, it is misbranded within the meaning of that term as provided in ECL 33-0101(32)(i) inasmuch as "its labeling ... fails to conform to the labeling requirements of the Federal Insecticide, Fungicide, and Rodenticide Act of 1972, as amended." Accordingly, Respondent is in violation of ECL 33-1301(1)(e) for distributing a pesticide within this state which was misbranded.

PENALTY TO BE ASSESSED

With respect to administrative sanctions authorized for a violation of article 33, ECL 71-2907(1) provides:

"Except as otherwise provided in this subdivision, any person who violates any provision of article 33 of this chapter or any rule, regulation or order issued thereunder or commits any offense described in section 33-1301 of this chapter shall be liable to the people of the state for a civil penalty not to exceed five thousand dollars for a first violation, and not to exceed ten thousand dollars for a subsequent offense, to be assessed by the commissioner after a hearing or opportunity to be heard."

In determining the appropriate penalty in this matter, an awareness of certain factual material developed during the hearing is helpful. From the record it is apparent that Vector Control received a large amount of information regarding Nature's Glory. Some of this information came from Respondent in the form of written product descriptions, labels, efficacy studies and a material safety data sheet. Other information came in the form of telephone conversations and emails between Vector Control and Respondent. Other information came directly from Ecoval, the manufacturer of Nature's Glory. Indeed, Dominick Ninivaggi stated that prior to the Department's involvement in the matter, he had a telephone conversation with Ecoval regarding the use of Nature's Glory. (H, 5/7/03, pp. 193-194) Moreover, Mr. Ninivaggi conceded, although he couldn't be sure, that when Nathan Gordon delivered the four containers of Nature's Glory to Vector Control that "[h]e probably gave us information with the bottles." (H, 8/20/03, p. 288)

During his testimony, Bruce Cronemeyer, a Pesticide Control Specialist 2 with the Department's Region 1 office, asserted that he had asked Vector Control for all documents in their possession relating to Nature's Glory, but that all he had been provided by Vector Control were the containers and two efficacy studies. (H, 8/21/03, pp. 394 and 347) This is corroborated by the Department's Receipt For Samples form and the Quarantine Order form both filled out on July 16, 2001, by Mr. Cronemeyer and signed by both he and Mr. Ninivaggi. (Court Exhibits 10 and 6, respectively) The Receipt For Samples form indicates the Department's physical receipt of one 24-ounce container of Nature's Glory and two efficacy studies, the Quarantine Order listing the remaining three container of Nature's Glory. At the

hearing on August 21, 2003, Mr. Cronemeyer testified (H, 8/21/03, p. 347):

THE COURT: So when you went out there [to Vector Control] you saw the bottles?

THE WITNESS: Four bottles of these and two efficacy studies. Those were the only things presented to me that day by Suffolk County.

THE COURT: Mr. Ninivaggi or anybody from his staff did not give [you] what has been now entered in evidence as Staff's 3, 4, or 5, being these two labels and that May 10 correspondence?

THE WITNESS: No, I just saw [them] the first time when everybody else did here.

During his testimony, Mr. Cronemeyer also observed that the labeling actually on the containers of Nature's Glory was inadequate to determine whether the product needed to be registered, but that, in his view, had the label entered as Department Staff Exhibit 5, been attached to the containers, he would not have pursued a violation of the pesticide registration regulations in this matter.

From the earlier discussion of the proof adduced at the hearing with respect to pesticide registration, it is clear that a violation of these regulations has been demonstrated by a preponderance of the credible evidence. However, the above discussion of the facts developed at the hearing is relevant to the penalty that is appropriate to the unique circumstances of this case.

With due regard and consideration for the foregoing, the facts in this case show that Respondent, though not its manufacturer, distributed four 24-ounce containers of Nature's Glory to Vector Control. Due to the threat of the West Nile virus, Vector Control was under a mandate from the Suffolk County Legislature to conduct research on non-toxic methods of controlling mosquito populations. Pursuant to this mandate, Vector Control contacted Respondent with respect to Nature's Glory and Respondent provided Vector Control with various labels, efficacy studies, a material data safety sheet and other product information. The three-page label accompanying the four 24-ounce containers of Nature's Glory provided by Respondent did not comport with the requirements of 40 CFR former 152.25(g) and, thus, did not exempt the product from New York registration

requirements. The Nature's Glory product supplied by Respondent was not actually tested or used by Vector Control and was not otherwise released to the environment.

Section IV of the Department's Civil Penalty Policy of June 20, 1990, states that "the penalty should equal the gravity component, plus the benefit component, plus or minus any adjustments." With respect to the gravity component, in this case, the violations proven are of a nature that undermine the regulatory oversight contemplated by ECL article 33 and its implementing regulations, a regulatory scheme intended to ensure the health and safety of the public. As previously noted, pesticides by their very nature cause harm to living organisms and can, if used in ignorance of their contents, cause harm to human beings. Hence, the strict requirements of state and federal pesticide labeling laws are imposed so that the safety of the ultimate user of a pesticide product is never put at risk. The benefit component in this matter is, on these facts, de minimis, since no sale of Nature's Glory was actually made to Suffolk County.

With respect to the registration violations pursuant to ECL 33-1301(1)(a), Department Staff has recommended a civil penalty of \$2,000 for each of the four containers. With respect to the misbranding violations pursuant to ECL 33-1301(1)(e), Department Staff has recommended a civil penalty of \$2,000 for each of the four containers, for a total penalty of \$16,000.

In support of its position with respect to the appropriate penalty amount, Department Staff cites Matter of J & C Marketing, Inc. (Order of the Commissioner, December 21, 1999), as being consistent with prior Department action in such matters. However, I do not find that the cited case is dispositive in the unique circumstances presented here. In J & C Marketing, the respondent was the actual manufacturer of the subject pesticide product and, moreover, was offering the product for retail sale to the consumer at a public retail store. Neither of these circumstances is present here. In this case, the record shows that Respondent was responding to an inquiry by Vector Control and was supplying them with information and product samples regarding a pesticide product it believed would assist Vector Control in meeting the threat of West Nile virus. No commercial sale of Nature's Glory was actually made, although the solicitation and delivery of the product by Respondent constituted a distribution within the meaning of ECL 33-0701 and 33-1301(1).

Accordingly, upon the unique facts of this case, with respect to the registration violations pursuant to ECL 33-1301(1)(a), I recommend a civil penalty of \$500 for each of the four containers. With respect to the misbranding violations pursuant to ECL 33-1301(1)(e), I recommend a civil penalty of \$500 for each of the four containers, for a total penalty of \$4,000.

CONCLUSION AND RECOMMENDATION

In consideration of the above Findings of Fact and Discussion, I recommend the Commissioner issue an order (a) finding that Respondent, Organicandnature.com, Inc., violated ECL Sections 33-0701 and 33-1301(1)(a) and Part 326.14 of 6 NYCRR, with respect to the first cause of action, and violated ECL 33-1301(1)(e), with respect to the second cause of action; (b) directing Respondent to take all steps necessary to either register Nature's Glory with the State of New York pursuant to ECL 33-0701, or to adequately demonstrate the product's exemption from such statutory mandate; and (c) assessing a civil penalty in the amount of Four Thousand Dollars (\$4,000) to be due and payable in full to the Department within 30 days of service of such Commissioner's order. Moreover, I recommend that the provisions, terms and conditions of any such order bind Respondent, its agents, servants, employees, successors and assigns and all persons, firms and corporations acting for or on behalf of Respondent.