1/6/78

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE REGIONAL ADMINISTRATOR

In the matter of	)	78 JAN 6 P 3: 34
	)	
Pueblo Chemical and Supply d/b/a/	)	
	)	
Growers Ag Service	)	I.F. & R. Docket No. VI-98C
	)	
Respondent	)	INITIAL DECISION

This is a proceeding under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), Section 14(a)(1), 7 U.S.C. 1(a)(1) (Supp V, 1975), for the assessment of civil penalties for violation of the Act.[1/] The amended complaint charged that Pueblo Chemical and Supply d/b/a Growers Ag Service ("Respondent") violated FIFRA, Section 12(a)(1)(E) by having shipped the pesticide 4 M PARATHION which was misbranded within the meaning of FIFRA, Section 2(q).[2/] The specific misbranding alleged was that the label of the pesticide did not bear the required warning or caution statement (FIFRA, Section 2(o)(1)(G)), the required ingredient statement (FIFRA, Section 2(q)(2)(A)), the required directions for use (FIFRA, Section 2(o)(1)(F)), the assigned registration number (FIFRA, Section 2(q)(2)(c)(iv)), or the required statement of net weight or measure of contents (FIFRA, Section 2(q)(2)(c)(iii)). A penalty of $5,000 was requested.

1/ This proceeding was initially assigned to Administrative Law Judge Bernard D. Levinson. On Judge Levinson's death it was reassigned to Administrative Law Judge Gerald Harwood on September 6, 1977.

2/ A list of the pertinent sections of FIFRA with parallel citations to Title 7 of the United States Code, Supp. V, 1975, is appended hereto.

Respondent answered admitting the shipment of the pesticide, but denying that it was misbranded at the time of shipment. It also contested the appropriateness of the proposed civil penalty, and raised certain procedural defenses to the issuance of the complaint and the assessment of a penalty.

A prehearing exchange of documents, witness lists and other information was accomplished through correspondence as permitted by the Rules of Practice, 40 C.F.R. 168.36(e), and these prehearing responses are made a part of the record. A hearing was held on October 14, 1977, in Wichita, Kansas. The parties have filed proposed findings of fact, and conclusions of law, and a posthearing brief. These submissions have been considered by the undersigned. Respondent is found to have violated FIFRA as alleged in the amended complaint. Its procedural objections to these proceedings are rejected for the reasons given later in this decision. All proposed findings and conclusions not specifically adopted herein are rejected.

FINDINGS OF FACT

1. Respondent has a formulation plant in Garden City, Kansas, and its administrative headquarters and a central warehouse are at that location. Respondent also maintains a warehouse in Ponca City, Oklahoma.

2. On January 31, 1976, respondent shipped four 55 gallon drums of the pesticide 4# Methyl Parathion from its Ponca City warehouse to Mr. Dwaine "Doc" Perkins, owner of Perkins Aerial Spray, to be delivered at Crossroads 66 Service, Randalette, Oklahoma. Mr. Perkins is a commercial applicator. The drums were delivered via a truck owned by respondent and driven by an employee of respondent. The shipment was covered by respondent's Invoice No. 4454, dated January 30, 1976.

3. On March 25, 1976, Mr. David Lopez, a Consumer Safety Officer employed by the U.S. Environmental Protection Agency, Region VII, conducted a routine inspection of Perkins Aerial Spray, at its place of business at Caldwell, Kansas. The inspection was conducted under authority of and consistent with the prescribed procedures of FIFRA.

4. During his inspection, Mr. Lopez discovered two unopened and one opened and partially filled 55 gallon drums containing 4# Methyl Parathion. Those drums were three of the four drums shipped by respondent to Mr. Perkins on January 31, 1976.

5. The three drums viewed by Mr. Lopez lacked labeling as described in the Complaint, as amended, issued in this proceeding. The only labeling on the drums consisted of the words "4# PARATHION LOT 1176" stenciled on the tops and a skull and crossbones and drum handling and drum disposal instructions, which were lithographed on the side of the drums.

6. When Mr. Lopez inspected the drums, there were no traces of glue or shreds of paper to indicate that the drums had at any time contained additional labeling.

7. The drums exhibited no sign of having been subjected to extreme weathering or rough handling which might have affected any labeling on the drums.

8. The three drums of 4# Methyl Parathion were not labeled as required by FIFRA when they were shipped to Mr. Perkins, and were therefore misbranded within the meaning of FIFRA, Section 2(q) at the time of shipment.

9. 4# Methyl Parathion is extremely hazardous to both human and animal life in that it is toxic via dermal absorption, inhalation, or ingestion.

10. On March 26, 1976, Mr. Lopez served a Stop Sale, Use, or Removal Order to Perkins Aerial Spray which covered the subject three drums. Mr. Darrol Hodge of Perkins Aerial Spray then requested permission from the EPA to return the drums of Methyl Parathion to respondent in Ponca City, Oklahoma.

11. On April 8, 1976, respondent, pursuant to its request and after having obtained authorization from the EPA, labeled the drums of 4# Methyl Parathion and transported them to the Ponca City warehouse.

12. Between January 31, 1976, when the four drums were delivered and March 26, 1976, when the stop sale, use or removal order was issued with respect to the remaining two filled drums and one partially filled drum, there is no evidence that there were any incidents of harm to the environment.

13. Giving consideration to the gravity of the violation, the size of respondent's business and the effect of the proposed penalty on respondent's ability to continue in business, it is determined that a civil penalty in the amount of $2,500 is appropriate.

DISCUSSION AND CONCLUSIONS

FIFRA Section 9(c) Has Not Established Requirements for Giving Respondent Notice and Opportunity to Present Its Views Which Invalidate the Complaint in this Proceeding

Respondent at the outset raises a jurisdictional objection under FIFRA, Section 9(c). Section 9, in Subsections (a) and (b), deals generally with the authority of the EPA to make inspections for enforcement purposes and to obtain court warrants to aid in inspections. Section 9(c) provides as follows:

> (c) Enforcement.
>
> (1) Certification of Facts to Attorney General.--The examination of pesticides or devices shall be made in the Environmental Protection Agency or elsewhere as the Administrator may designate for the purpose of determining from such examinations whether they comply with the requirements of this Act. If it shall appear from any such examination that they fail to comply with the requirements of this Act, the Administrator shall cause notice to be given to the person against whom criminal or civil proceedings are contemplated. Any person so notified shall be given an opportunity to present his views, either orally or in writing, with regard to such contemplated proceedings, and if in the opinion of the Administrator it appears that the provisions of this Act have been violated by such person, then the Administrator shall certify the facts to the Attorney General, with a copy of the results of the analysis or the examination of such pesticide for the institution of a criminal proceeding pursuant to section 14(b) or a civil proceeding under section 14(a), when the Administrator determines that such action will be sufficient to effectuate the purposes of this Act.
>
> (2) Notice Not Required.--The notice of contemplated proceedings and opportunity to present views set forth in this subsection are not prerequisites to the institution of any proceeding by the Attorney General.
>
> (3) Warning Notices.---Nothing in this Act shall be construed as requiring the Administrator to institute proceedings for prosectuion of minor violations of this Act whenever he believes that the public interest will be adequately served by a suitable written notice of warning.

Under the Agency's rules, proceedings for the assessment of civil penalties are "instituted" by issuing a complaint. 40 C.F.R. 168.30. It is undisputed that prior to the service of the complaint on it respondent was neither notified that civil penalty proceedings were contemplated against it, nor was it given the opportunity to present its views. Respondent accordingly asserts that the complaint must be dismissed on the grounds that Section 9(c) has not been complied with. Respondent's position in effect is that Section 9(c) obligated the agency to give respondent notice and opportunity to present its views prior to complaint in addition to the notice given by the complaint, and the opportunity afforded respondent after complaint to present its views both in informal settlement negotiations and in a formal hearing.[3/]

Assuming that Section 9(c) does contemplate that a respondent shall be given notice and opportunity for hearing before a complaint is issued, there is still the question whether Congress intended the procedure to be mandatory or only directory. That is to be determined by ascertaining what purpose Congress intended the procedure to serve. United States v. Morgan, 222 U.S. 274 (1911); United States v. St. Regis Paper Co., 355 F. 2d 688, 692 (2d Cir. 1966). The fact that mandatory words are used, i.e., the Administrator "shall" cause notice to be given and the person notified "shall" be given an opportunity to present his views is not in itself controlling. See United States v. Morgan, supra.

3/ See 40 C.F.R. 168.33, 168.35.

Respondent argues that the maxim expressio unis est exclusio alterius is appropriate here. The legislative history, however, casts doubt on its reliability in ascertaining Congress' intention.

Section 9(c) was added by the Federal Environmental Pesticide Control Act of 1972, Pub. L. No. 92-516, 86 Stat 988. The predecessor bill was H.R. 10729. As it initially passed the House, H.R. 10729 provided in Section 9(c)(1) only for notice and opportunity for a hearing to be given when criminal proceedings were contemplated against a person. It also contained the provision in Section 9(c)(2) that notice was not a prerequisite to the institution of any proceedings by the Attorney General. H.R. Rep. No. 92-511, 92d Cong., 1st Sess. 56-57 (1971). Thus, Section 9(c)(2) was originally drafted without any consideration of its applicability to the institution of civil proceedings by the Agency but simply to make clear that notice was not a prerequisite to suits by the Attorney General.

When the bill was considered by the Senate, Section 9(c)(1) was amended to include that notice be given of contemplated civil as well as criminal proceedings. S. Rep. No. 92-838, 92d Cong., 2d Sess. 61 (1972), reprinted in [1972] U.S. Code Cong. and Ad. News 4017. The explanation for the change was as follows, [1972] U.S. Code Cong. and Ad. News at 4017:

> If the examination of pesticides or devices indicates that they fail to comply with the Act, the Administrator must give notice to the person against whom proceedings are contemplated and provide an opportunity to present his views. If thereafter the Administrator believes the Act has been violated he shall certify the facts to the Attorney General for the institution of criminal proceedings, or shall institute civil proceedings if he believes that such action will be sufficient to effectuate the purposes of the Act. However, the notice and opportunity to present views are not prerequisites to the institution of any proceeding by the Attorney General....

When the bill went to conference, the Senate Amendment to Section 9(c)(1) was accepted. The report gives the following explanation for the amendment, H.R. Rep. No. 92-1540, 92d Cong., 2d Sess. 32, reprinted in [1972] U.S. Code Cong. and Ad. News at 4133:

> It [H.R. 10729 as reported] specifically provides for certification of facts to the Attorney General with respect to the institution of proceedings for civil penalties (Section 9(c)).

The only changes in Section 9(c) from H.R. 10729 as it originally passed the House, were adding the references to civil proceedings to Section 9(c)(1) and a technical amendment substituting Section 14(b) for Section 16 in referring to suits instituted by the Attorney General.[4/] Thus, the explanation in the conference report seems to be directed solely to the authority of the Attorney General in Section 14(a) to bring suits for the collection of assessed civil penalties. This same conception of the amended Section 9(c) as providing for certification to the Attorney General of civil as well as criminal proceedings is also reflected in the explanation given on the floor when the Conference Report was considered by Congress.[5/]

4/ Compare Section 9(c) of the original House Bill, as printed in Hearings on H.R. 10729 Before the Subcommittee on Agricultural Research and General Legislation of the Senate Comm. on Agriculture and Forestry, 92d Cong., 2d Sess. 3 (1972), with Section 9(c) as reported in the Conference Report, H.R. Rep. No. 92-1540 at 18.

5/ In the synopsis which Congressman Kyl included in his remarks on the conference bill, it was stated, 118 Cong. Rec. 35545 (1972):

> If a violation of the Act appears to have occurred, the Administrator shall notify the suspected violator, and shall certify the facts to the Attorney General for the institution of criminal or civil proceeding....

See also 118 Cong. Rec. 33922 (1972).

In view of the fact that the reference to civil proceedings in Section 9(c)(1) was added subsequent to the exception in Section 9(c)(2) for the institution of proceedings by the Attorney General, and the differences in the explanation given for the change as the bill progressed through Congress, the rule of expressio unis est exclusio alterius seems of little value. What is indicated instead is that Congress in changing Section 9(c)(1) to include civil proceedings was actually focusing its attention on the desirability of the Agency conferring with respondent before certifying any case to the Attorney General rather than intending to set up a jurisdictional prerequisite for civil penalty proceedings instituted by the Administrator.

While it is difficult to fathom from the Congressional history precisely what "civil proceedings" Congress had in mind in Section 9(c)(1), a logical explanation of Section 9(c) and one which seems to best fit with what Congress really intended was that the Agency upon discovering a violation should confer with the party before referring the matter to the Attorney General for criminal proceedings. If as a result of the conference the Agency decided that bringing a civil penalty assessment proceeding was sufficient to effectuate the purposes of FIFRA, it could then do so. Under this construction, a conference with respondent before proceedings are instituted would be unnecessary if the Agency never contemplated enforcement by criminal proceedings.

In arriving at the conclusion that notice and opportunity to present views prior to the administrative complaint are not mandatory, it is appropriate also to make a comparison between the results to which each construction leads. United States v. St. Regis Co., 355 F. 2d 688, 695 (2d Cir. 1966).

Respondent argues that Congress intended that the business community should have every opportunity to resolve differences short of litigation. But it has not been shown that this purpose cannot be achieved through informal settlement discussions which, under the rules, can be immediately commenced after the complaint is issued.[6/] At the same time proceedings have been set in motion for promptly disposing of the matter by a formal hearing if no settlement is reached. On the other hand, it would undoubtedly be difficult for the Agency to informally settle cases once the case had been referred to the Attorney General for criminal proceedings, and in such instances a conference with the Agency first seems reasonable.

Consequently, little would be gained but delay in requiring the Agency to give a respondent the opportunity to be heard prior to issuing an administrative complaint. Opportunities for delay can impair the effectiveness of the Agency's enforcement of the statute, and a construction which impairs the effectiveness of a statute should be avoided, if possible. See E.I. duPont de Nemours & Co. v. Train, 97 S. Ct. 965, 977 (1977).[7/]

6/ 40 C.F.R. 168.35. The complaint in this proceeding also called attention to the Agency's policy encouraging the parties to discuss settlement.

7/ Respondent in its amended answer also argued that Section 6(c) of the Agency's Pesticides Enforcement Division Case Proceedings Manual makes specific reference to "notice of contemplated proceedings." A reading of Section 7A.1.c., and page A-2 (following Tab 31), indicates that the reference is to the notice given by issuing an administrative complaint.

The Violation

On March 25, 1976, David Lopez, an EPA Consumer Safety Officer made a routine inspection of Perkins Aerial Spray, an aerial pesticide applicator, at a place in Caldwell, Kansas, where it kept its equipment and materials. He found in the possession of Perkins Aerial Spray two full and one partially filled 55-gallon drums of the pesticide Methyl Parathion. On none of these drums was there an EPA-approved label. The drums did have stencilled on the top the words, "4M PARATHION LOT 1176", and lithographed on the side a skull and crossbones, and instructions for handling and disposing of the drums. The three drums had been purchased from respondent and had been delivered by respondent to Perkins Aerial Spray at Randalette, Oklahoma, on January 31, 1976. They had thus been in the possession of Perkins Aerial Spray for about 7 1/2 weeks. At issue is whether these drums had an EPA label attached when respondent delivered them to Perkins Aerial Spray.

No witness from Perkins Aerial Spray testified in this case, but contentions have been made with respect to an affidavit by Mr. Perkins and to the fact that he did not notify respondent of the deficiency in labeling on delivery of the drums, which will first be disposed of. Complainant relies on the statement of Mr. Dwaine Perkins in his affidavit that the drums were unlabeled when they were received by Mr. Perkins as proof of that fact. Complainant Exhibit 4. On being first interviewed by the EPA investigator, however, Mr. Perkins told him that the drums had been received at night and no one had been around to notice delivery. Tr. 28. Receipt of the delivery, moreover,

was actually acknowledged at the time for Mr. Perkins by a Mike Mulford. Tr. 100-101; Respondent's Exhibit 1.[8/] In view of these inconsistencies in Mr. Perkins' affidavit, no weight has been given to it.

Respondent claims that the failure of Mr. Perkins on delivery of the drums to notify respondent that the drums were unlabeled gives rise to the presumption that the drums did have labels. Possibly an inference could be drawn from Mr. Perkins' silence, if there were some legal obligation on the part of Mr. Perkins to notify respondent, or if Mr. Perkins would have had reason to complain about the absence of a label. Respondent has not pointed to any legal obligation on the part of Mr. Perkins to notify respondent, and I know of none. Since the contents were identified at the top of the drum, and since methyl parathion has been used for many years and any experienced applicator would presumably know how to handle this product,[9/] Mr. Perkins would not have been prompted to notify respondent because of some need to have the label in order to be able to use the product. Consequently, I do not find that any inference as to the presence or absence of a label can justifiably be drawn from Mr. Perkins' silence.

8/ Reference is to the transcript of the hearing and to the exhibits introduced into evidence.

9/ See Tr. 67. It was assumed by respondent that Mr. Perkins was an experienced applicator. See respondent's Proposed Findings of Fact and Conclusions and Brief in Support Thereof at 2.

It is undisputed that when the drums were inspected by the EPA on March 25, 1976, they showed no traces of glue or shreds of paper which indicated that they had ever had an EPA-approved label attached. Nor did the drums exhibit any sign that they had been subjected to extreme weathering or rough handling which would possibly have affected a label if one had been attached. On one of the unlabeled drums was a paper label respondent had put on prior to shipment pursuant to the requirements of the Department of Transportation. This label also showed no signs of having been subjected to extreme weathering or rough handling. Tr. 24; Administrative Law Judge's Exhibit No. 1.

The existence of drums showing no trace of a label and no evidence of having been subjected to weathering or handling which would affect the labeling, has been held to establish a prima facie case that the drums had never been labeled. Chapman Chemical Co., I.F. & R. Docket No. IV-67C.[10/] The likelihood that the drums had never been labeled is reinforced here by evidence that it is very unusual, although not unknown, for a label to come off and leave no traces of paper or glue. See Tr. 52-54, 81-82. Mr. Holland, President of respondent and employed by it for 20 years, testified that he knew of no instance where this had happened to respondent's labels. He had known of instances several years ago where the labels of others had come off and left a

---

10/ Case No. 1912, EPA Notice of Judgment (November 1976).

slick drum as a result of having been carried on a truck going down the road at 60 miles an hour in a rain storm. The effect under such conditions, according to Mr. Holland, is the same as having put a high pressure hose on the drum. Tr. 81-82.[11/]

Respondent in its defense testified that under its procedures it would have been impossible to deliver an unlabeled drum to Perkins Aerial Spray. These procedures consisted generally of the following:

First, respondent instructed its employees at the formulation plant in Garden City that the drum must contain an EPA label along with the name of the pesticide on the top of the drum and the D.O.T. sticker, before it was shipped out. Tr. 76-80. The name on the top of the barrel, in this case "4M PARATHION LOT 1176", is a company requirement which allows a man on a loaded truck to tell the contents without having to move the barrel to get down and look at the labels. Tr. 78.

Next, on arrival of the drums at the Ponca City warehouse, the employees are instructed to disregard the name of the contents on the top of the drums so that they would have to rely on the label to identify the contents in loading and delivering pesticides. Tr. 86. If a drum

---

11/ Mr. Chesnutt, manager of respondent's Ponca City warehouse, testified that he had seen some drums returned to him which were completely slick. It is not clear whether he was referring to respondent's drums. He also testified that under his procedures for handling drums it was impossible for a drum to leave his warehouse unlabeled. It is unlikely that if an unlabeled drum of respondent's were returned to Mr. Chesnutt that he would admit that the missing label was the fault of respondent. See Tr. 88-89.

received from Garden City is found to be unlabeled, and there are instances where this had happened, Mr. Chesnutt, however, would rely on the name on top of the drum to obtain a proper label from the Garden City plant, which is then affixed to the drum. Tr. 92-94.

Respondent's driver, Mr. Kennedy, who delivered the three drums to Perkins Aerial Spray also testified. Testifying from his recollection of the delivery, Mr. Kennedy said that with the help of the plant foreman, he loaded four drums of methyl parathion and two drums of another pesticide on his truck for delivery to Perkins Aerial Spray at Randalette, Oklahoma about 260 miles from Ponca Ciy. He recalled that he left in the morning and arrived at Perkins Aerial Spray in mid-afternoon. He found a Mr. Mulford who gave him instructions as to unloading the shipment and who signed the delivery ticket after Mr. Kennedy finished unloading. Tr. 91, 98, 101, 107; Respondent's Exhibit 1.

The gist of Mr. Kennedy's testimony was that he knew there were EPA labels on the drums when he delivered them because, in his words, "I would have to [have seen the labels], because that's the only way I know of getting what I'm taking off the truck. I'd have to say I saw them." Tr. 103-104. Mr. Kennedy disavowed any reliance on the name stencilled at the top to identify the contents because, "[p]rimarily because I'm told not to and various reasons. I personally just don't trust it." Tr. 102. Apparently, recognizing that in this case the entire shipment went to Perkins Aerial Spray, Mr. Kennedy said that as he remembered, he was told to put part of the delivery on Mr. Perkins'

trailer and part on the ground, so he would have had to look at the labels to know what to put in the trailer and what to put on the ground. Tr. 108.

Mr. Kennedy's recollection of how carefully he inspected the drums for an EPA label when he unloaded them did appear to be affected by his interest in absolving himself and his employer from any responsibility for the absence of the labels. His testimony would have been more persuasive if he had been delivering mixed loads to different customers in the course of making the delivery to Perkins Aerial Spray.

The explanation given by respondent that the loss of the labels was caused by something happening to the drums after they were delivered would be more convincing if only one drum had been involved. The probability seems very slight, for example, that all three drums would have been exposed to a driving rain in such a manner as to completely remove all traces of a label. Added to this is the fact that none of the drums showed any evidence of having been exposed to extreme weather conditions or rough handling. On the other hand, respondent's methods in applying the EPA-approved labels do not preclude the possibility that the labels will not be put on at the time the drums are filled, when the procedures call for the label being affixed. See e.g., Tr. 78. Respondent's practice in relying on its employees to ignore the name stencilled at the top, which, when the drums are stacked together, is more readily seen than the EPA label on the side, and to look instead at the EPA label as a

means of insuring that the label is attached, does not appear to be the kind of procedure that would prevent unlabeled drums from slipping through because of inattention or carelessness on the part of those handling the drums.

On consideration of the entire record, I find accordingly that the three drums were not labeled at the time they were shipped by respondent, and that respondent violated FIFRA, Section 12(a)(1)(E) by shipping the misbranded pesticide 4M Parathion.

Respondent's Other Procedural Objections

Respondent argues that the Agency has unfairly enforced the law against respondent, because the aerial applicator, Mr. Perkins, has not also been prosecuted.

The Agency did issue a stop sale, use or removal order against the unlabeled drums held by Mr. Perkins. Whether it should have gone further and also prosecuted Mr. Perkins is totally irrelevant to the question of respondent's liability. See United States v. Legett & Platt, Inc., 542 F. 2d 655, 658 (6th Cir. 1976), cert. denied, 45 U.S.L.W. 3651 (U.S., March 29, 1977)(No. 76-855).

Respondent argues, however, that it is entitled to a statement of reasons why the Agency has prosecuted it but not Mr. Perkins. Respondent's liability is that of the "shipper" of the misbranded pesticides. Mr. Perkins' liability, if any, on the other hand would be that of a commercial applicator who received the misbranded containers and used the contents. Different legal questions appear to

be involved as well as different factual questions. The two parties are thus not so identically situated as to suggest that the Agency has acted arbitrarily to respondent's disadvantage in the absence of some explanation for the allegedly different treatment. Cf., Oyler v, Boles, 368 U.S. 488, 456 (1962); United States v. Leggett & Platt, Inc., supra, 542 F. 2d at 658.

Respondent claims that the complaint incorrectly charges it with a multiplicity of violations and that it should have been charged with the sole violation of shipping a pesticide without a label. The amended complaint correctly charges respondent with shipping a misbranded product, with the misbranding consisting of not having certain required information on the label or labeling for the product.[12/] The absence of this information, however, adds up to only a single violation of misbranding and the civil penalty assessed has been for only one violation.[13/] Respondent's fears that in the future it will be treated on the Agency's records as having committed seven separate violations is pure conjecture. If this should ever occur, the record can always be set straight by reference to this decision itself.

12/ "Label" is defined in FIFRA, Section 2(p) as meaning the written, printed or graphic matter on or attached to the pesticide. "Labeling" is defined to include all labels. What information the pesticide did have on it in the form of written, printed or graphic material was insufficient.

13/ The original complaint did allege that the omission of each required item of information was a separate violation. This was corrected by the amended complaint to charge only one violation of misbranding in accordance with the rule established in Hawk Industries, Inc., I.F. & R. Docket No. II-120C (EPA, issued December 21, 1976).

Finally, respondent argues that to consider the size of respondent's business and respondent's ability to pay in fixing the amount of the penalty deprives respondent of the equal protection of the laws and violates the Fourteenth Amendment. Due process is not offended by making the amount of a civil penalty proportionate to a person's ability to pay. It is reasonable that a person's financial condition be considered in determining an appropriate penalty, and this has been recognized by the courts. See Atlas Roofing Co. v. Occupational Safety and Health Review Commission, 518 F. 2d 990, 1011 (5th Cir., 1975), aff'd. 97 S. Ct. 1261 (1977); United States v. Ancorp National Services, Inc., 367 F. Supp. 1221, 1224 (S.D.N.Y. 1973), aff'd., 516 F. 2d 198 (2d Cir. 1975).

The case of Williams v. Illinois, 399 U.S. 235 (June 29, 1970), on which respondent relies is not in point. In that case the Supreme Court struck down a method of imposing punishment under which indigents who could not pay fines were subject to imprisonment beyond the statutory limit. Indeed, the Court seemed to be concerned that the punishment was unfair precisely because it did not take into account the person's ability to pay the fine.[14/]

14/ Respondent at the hearing also claimed that the Agency's procedures for assessing civil penalties were in excess of the authority granted in FIFRA, Section 25 to make rules. Tr. 7. That argument was abandoned by respondent in its posthearing brief (See pp. 13-14).

The Amount of the Penalty

Complainant in the amended complaint has proposed a penalty of $5,000. This is the maximum penalty for a single misbranding violation for a person of respondent's size under the Guidelines for the Assessment of Civil Penalties, 39 Fed. Reg. 27711 (Jul 31, 1974).[15/]

In determining the proposed penalty, I am to consider the size of respondent's business, the effect on respondent's ability to continue in business, and the gravity of the violation.[16/] In determining the gravity of the violation, I am to consider respondent's history of compliance with FIFRA, and any evidence of respondent's good faith.[17/] I may consult and rely on the guidelines for the assessment of civil penalties but I am not required to follow them.[18/]

15/ There are several modes of misbranding alleged in the amended complaint, each of which has its own civil penalty assessment schedule. Complainant appears to have picked the maximum penalty which would apply to misbranding arising from the failure of the label to bear a caution or warning statement, or a proper ingredient statement, or proper directions for use. As noted above, only one penalty is proposed because misbranding arising from a label which is deficient is considered as a single violation.

16/ FIFRA, Section 14(a)(3); Rules of Practice, 40 C.F.R. 168.60(b), which by 40 C.F.R. 168.46(b) is made applicable to initial decisions.

17/ 40 C.F.R. 168.60(b).

18/ 40 C.F.R. 168.46(b).

Respondent does not claim that its ability to continue in business will be affected by the proposed penalty. It has stipulated that its business falls within the size category which under the guidelines justifies the maximum penalty (gross annual sales of over $1 million.[19/]

Consequently, the only issue is whether the gravity of the violation merits the proposed penalty.

In addition to the respondent's history of complaince and good faith, the gravity of violation has been held to involve an evaluation of two factors, gravity of misconduct and gravity of harm. Amvac Chemical Corp, EPA Notice of Judgment (June 1975), No. 1499 at 986. Here there is no question but that respondent has made a good faith effort to comply with FIFRA. The misconduct here seems to have resulted from inadvertence rather than from any deliberate neglect of respondent's obligations under FIFRA. Respondent moved promptly to take back the misbranded misbranded containers and put proper labels on them. Respondent's history of compliance with FIFRA also appears to have been good.[20/]

19/ See Administrative Law Judge's Exhibit 1.

20/ Respondent admits to having been cited for a minor violation in 1975 which was settled by a consent decree. Tr. 11. Complainant has not considered this violation significant enough to be a factor in determining the penalty.

A more difficult question comes in evaluating the gravity of harm. There is no question but that the potential for harm is great in view of the fact that methyl parathion is highly toxic. Nevertheless, the potential for harm was undoubtedly lessened here by the fact that the unlabeled containers remained in the control of an experienced applicator. Giving consideration to this fact and to respondent's good faith, I find that $2,500 is an appropriate penalty.

FINAL ORDER[21/]

Pursuant to Section 14(a)(1) of the Federal Insecticide, Fungicide and Rodenticide Act, as amended, 7 U.S.C. Section 136 l(a)(1) (Supp V, 1975), a civil penalty of $2,500 is assessed against respondent Pueblo Chemical and Supply Co., d/b/a/ Growers Ag Service for the violation which has been established on the basis of the complaint, as amended by order of the Administrative Law Judge dated May 25, 1977.

Gerald Harwood
Administrative Law Judge

January 6, 1978

21/ Unless an appeal is taken by the filing of exceptions pursuant to Section 168.51 of the rules of practice, 40 C.F.R. 168.51, or the Regional Administrator elects to review this decision on his own motion, the order shall become the final order of the Administrator. See 40 C.F.R. 168.46(c).

ATTACHMENT

Parallel Citations to Sections of FIFRA
in the Statutes at Large and in Title 7, United States Code,
Supp. V (1975)

Statutes at Large	7 U.S.C.	Statutes at Large	7 U.S.C.
Section 2	Section 136	Section 15	Section 136m
3	136a	16	136n
4	136b	17	136o
5	136c	18	136p
6	136d	19	136q
7	136e	20	136r
8	136f	21	136s
9	136g	22	136t
10	136h	23	136u
11	136i	24	136v
12	136j	25	136w
13	136k	26	136x
14	136 l	27	136y