

6/25/76

ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE REGIONAL ADMINISTRATOR



In re)
)
The Paravax Company) I.F.&R. Docket No. VII-183C
)
Respondent)

Initial Decision

By Complaint filed February 26, 1976, the Chief, Pesticides Branch, US Environmental Protection Agency, Region VII (hereinafter Complainant), charged The Paravax Company of Council Bluffs, Iowa (hereinafter Respondent), with a violation of Section 12(a)(2)(L) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended^{1/} (FIFRA), in that it, as a pesticide producer, failed to submit to the Administrator (of EPA) the information required by Section 7(c) of the Act and regulations thereunder. The Complaint, issued pursuant to Section 14 of the Act, proposed to assess a civil penalty of \$1760. The Respondent filed its Answer on March 16, 1976, admitting that the annual report was not filed by February 1, 1976, but objected to the penalty proposed to be assessed as excessive, and requested an Adjudicatory Hearing. Hearing was held in Council Bluffs, Iowa, on May 26, 1976. The Complainant was represented by Daniel J. Shiel, Legal Branch, US EPA Region VII, and Respondent was represented by Joe Ranney, Jr., President of Respondent Company. The Complainant filed proposed findings of fact, conclusions and order, and
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^{1/} For parallel citations of FIFRA (86 Stat. 973) and United States Code see Attachment A.

also a brief in support thereof. The Respondent did not file documents of such nature. The documents filed by Complainant have been duly considered.

Section 7(a) of the Act requires that establishments producing pesticides be registered with the Administrator. Section 7(c) requires the producer operating a registered establishment to submit certain information within 30 days after its registration and thereafter to keep the information current by submitting annual reports as the Administrator may require by regulation.

The regulation issued under this section is found in 40 CFR Part 167, Section 167.5 (38 FR 36557, November 6, 1973). It requires information as to the types of pesticides produced, the past year's amount of production and the sales or distribution of each product, and the amount of current production of each product. The reports are required to be filed annually on or before February 1.

The Respondent freely admits the fact that it failed to file the annual report as required by regulation. It further admits it received a notice informing it of the requirement to file the annual report accompanied by the report form and instructions for completing the form. The notice stated that the form must be completed and returned to the E.P.A. Regional Office by February 1. Evidence shows that a form letter, accompanied the foregoing and stated (paragraph 2, page 2 thereof) that "failure to file the Pesticide Report by February 1, 1976, will result in the initiation of civil or criminal proceedings."

The report form not having been completed and filed by February 26, 1976, the Complaint in this case was issued. It is undisputed that the completed report was mailed by Respondent on March 5 and received by Complainant on March 8, 1976. Respondent reported on February 28 that the form had been lost and requested another report form, which was supplied.

The proposed penalty of \$1760 was based on Guidelines for Assessment of Civil Penalties as published in the Federal Register on July 31, 1974 (39 FR 27711) as modified by an interim deviation notice issued on April 22, 1975. The Guidelines utilize five "size of business" gradations based on a respondent's annual gross sales for the prior fiscal year, as follows: I - less than \$100,000; II - between \$100,000 and \$400,000; III - between \$400,000 and \$700,000; IV - between \$700,000 and \$1,000,000; and V - over \$1,000,000.

The said Guidelines for the type of violation here involved proposes \$5,000 for a Category V firm, \$2750 for a Category III firm, and \$1250 for a Category II firm. These amounts were reduced by a memorandum entitled "Interim Deviation from Civil Penalty Assessment Schedule" dated April 22, 1975 from the Director, Pesticides Enforcement Division to the Regional Enforcement Division Directors. The reduction in the categories mentioned was to \$3200, \$1750, and \$800, respectively.

During the course of Prehearing Conference and exchange, it was established that Respondent's gross annual sales for the preceding fiscal year did not exceed \$400,000 but were actually in the amount of \$372,348.76.

as further evidenced by Respondents Exhibit "C", and therefore, the penalty proposed has been by Complainant lowered from \$1760 to \$800, in accordance with said Assessment Schedule.

Section 14(a)(3) of FIFRA states in pertinent part:

In determining the amount of the penalty the Administrator shall consider 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.

Section 168.60 (b)(1) of the Rules of Practice also enumerates these same three criteria and Section 168.60 (b)(2) adds two other factors to be considered in evaluating the gravity of the violation-- (1) Respondent's history of compliance with the Act, and (2) good faith or lack thereof.

The Guidelines were issued to provide direction to Agency personnel assessing penalties and are designed to facilitate, in the different regions, a comparable penalty for similar violations. The Rules of Practice (Section 168.46(b)) provide that the Administrative Law Judge may consult and may rely on the Guidelines but that he "may at his discretion increase or decrease the assessed penalty proposed to be assessed in the Complaint."

In arriving at an amount which I feel should be assessed as a civil penalty to be paid by Respondent, I have considered that Respondent has experienced business losses, in the eight years since the witness, Mr. Ranney, took over management of the firm, in a total amount of around \$75,000. A loss of \$4,163.77 last year (Respondent's Exhibit "C", and a projected loss of an even greater amount in 1976 (Respondent's Exhibit "B"), is undisputed. Though Respondent's gross sales in 1975 approached \$400,000, it is also undisputed that this amount represents

gross sales of hundreds of items. Five items, registered as pesticides, but described by witness Ranney as disinfectants, comprise but two to three percent of the total sales of this firm, according to testimony that was not challenged or contradicted. It is sufficient comment on Respondent's failure to file its report by the date required, that same was not intentional or a lack of good faith, but resulted from negligence on the part of management and the employees given the responsibility for completing and mailing the report to Complainant. In previous years the filing of this report was timely as by regulation required. The record reflects that steps have been taken to assure that such negligent handling of Respondent's business will not be repeated in the future. Respondent's witness also recounted the extreme difficulty experienced with respect to illness, retirement, and indifference of respective employees during the period after receipt of the form and up to February 1, 1976, when it should have been mailed. This furnishes some explanation for the negligent manner in which the forwarding of the report was handled, but, legally, it does not lessen the responsibility placed on Respondent to comply with the Act to furnish current information respecting the pesticides presently and prospectively manufactured, collected, and shipped from its registered establishment.

Said Section 7 formulates a scheme of regulation which, when properly implemented, provides the tools for protection against products whose harmful effects, if uncontrolled, will seriously effect the health and wellbeing of the public in general. It is readily apparent that reports,

such as the one required of Respondent, supply a necessary tool for maintaining adequate control and supervision over inherently dangerous products and their manufacture, shipment, and use. Any failure to apply adequate sanctions in instances where the Act is violated will, in effect, invite violations in increasing numbers which will ultimately frustrate and defeat the scheme of regulation required and contemplated by the Act. Respondent's violation, by itself, may appear trivial; however, the instant violation taken together with that of many others is far from trivial. [See Wickard v. Filburn, 317 US 111, 63'S.Ct. 82].

Although the evidence shows that the Respondent sustained an operating loss in 1975, and its financial posture for the current year is conditioned on improved sales during the summer months, I find the penalty herein assessed will have no adverse effect on its ability to continue in business.

In the premises, I find that the amount of \$350 is appropriate as a civil penalty under the facts and circumstances here presented, and a penalty in said amount is hereby assessed against the Respondent.

The foregoing includes the Administrative Law Judge's Findings of Fact, Conclusions and reasons therefor.

Proposed Final Order^{1/}


1. Pursuant to Section 14(a) of the Federal Insecticide, Fungicide and Rodenticide Act, as amended, a civil penalty of \$350 is hereby

^{1/} 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)].

assessed against Respondent, The Parwax Company, for the violation of the Act found herein.

2. Payment of the full amount of the civil penalty assessed shall be made within 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.

June 25, 1976



Marvin E. Jones
Administrative Law Judge
U.S. EPA, Region VII

ATTACHMENT A

FEDERAL INSECTICIDE, FUNGICIDE, AND RODENTICIDE ACT,
AS AMENDED (FIFRA)

Parallel Citations

<u>FIFRA, 86 Stat. 973</u> <u>P.L. 92-516</u>	<u>7 U.S.C.</u>	<u>FIFRA, 86 Stat. 973</u> <u>P.L. 92-516</u>	<u>7 U.S.C.</u>
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 <u>l</u>	27	136y