UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Kay Dee Veterinary, Division of Kay Dee Feed Company,	)	IF&R Docket No. VII-595C-84P
	)	
Respondent	)	

Federal Insecticide, Fungicide and Rodenticide Act. Sale and shipment of Toxaphene-formulated products for uses cancelled by Federal Register notice constitutes a violation of Section 12(a)(2)(K).

Appearances:

Bruce A. Crary, Esquire
Crary, Huff, Clem, Raby & Inkster, P.C.
614 Pierce Street
Box 27
Sioux City, Iowa 51102

Counsel for Respondent

Rupert G. Thomas, Esquire
Office of Regional Counsel
U. S. EPA, Region VII
726 Minnesota Avenue
Kansas City, Kansas 66101

Counsel for Complainant

INITIAL DECISION

Honorable Edward B. Finch
Chief Administrative Law Judge

This is a proceeding under the Federal Insecticide, Fungicide and Rodenticide Act, as amended, (FIFRA), Section 14(a)(1), 7 U.S.C. 136 l(a)(1) for assessment of a civil penalty for alleged violations of the Act.[1/]

Complaint was issued by the Environmental Protection Agency (EPA/Complainant), Region VII, against Kay Dee Veterinary, Division of Kay Dee Feed Company on September 24, 1984, charging Respondent with six separate counts of selling the product KAY DEE TOX II in violation of the cancellation by the EPA of toxaphene-formulated products for certain cancelled uses. 47 FR 53784 - Nov. 29, 1982.

The label of the pesticide KAY DEE TOX II stated, in part: (EPA 11)

" * * *

KAY DEE TOX II

* * *

For Use as a Dip or Spray to Aid in the Control of Horn Flies, Lice, Sarcoptic and Psoroptic Mange, and ticks

* * *

Direction ... Backrubbers ... Flies ... Horses and Beef Cattle ... Hogs ... Sheep and Goats ... Utility Spray

* * *

EPA Reg. No. 6552-5

* * *"

1/ FIFRA, Section 14(a)(1) provides, as follows:

> Any registrant, commercial applicator, wholesaler, dealer, retailer or other distributor who violates any provision of this Act may be assessed a civil penalty by the Administrator of not more than $5,000 for each offense.

Complainant further avers that on November 29, 1982, under the authority of §6(b) of FIFRA [7 U.S.C. §136d(b)], the EPA published in the Federal Register its Notice of Intent to Cancel within 30 days all uses of toxaphene with the following exceptions: (1) dipping of beef cattle and sheep to control scabies; (2) use on cotton, corn, or small grains to control army worms, cutworms, or grasshoppers, all under approved emergency exemptions only; (3) use on pineapple to control mealy bug and pineapple gummosis moth and use on bananas for weevil control in the Virgin Islands and Puerto Rico only; and (4) manufacturing use only for formulating to products listed above.

Uses on the above label were cancelled March 3, 1983. Therefore, toxaphene-formulated products, the labels of which bore cancelled uses and were released for shipment by the registrant on or after the effective date of cancellation, were in violation of the Agency's cancellation order.

In addition, a letter detailing the terms of the Federal Register notice and the requirements placed upon registrants was sent to each registrant by certified mail in January 1983. A copy of a return receipt (EPA - 14) is for delivery of the letter dated January 21, 1983 addressed to Kay Dee Feed Company; 1919 Grand Avenue; Sioux City, Iowa.

The alleged unlawful sales took place on June 9, 13, 27, 29 and July 5, 1983.

2/ It should be noted that the address on the receipt for Kay Dee Feed Company is 1919 Grand Avenue, Sioux City, IA 51107. Respondent raises the issue of cancellation notification being received since the inspection was conducted at another office of Kay Dee Veterinary at 220 Cunningham Drive, Sioux City, Iowa, a Division of Kay Dee Feed Company.

Complainant has suggested a proposed $5,000 penalty for each separate sale, totalling $30,000.

Respondent does not contest the fact that the sales occurred. It does, however, argue that at most, the facts before the Court in this case show an unintentional sale by Respondent of products known as Toxaphene, which sales were made at a time by Respondent when it was totally unaware that the uses of such products had been cancelled by EPA and noting that that notice of termination and cancellation, allegedly mailed to Respondent, was not addressed to the normal, regular, business mailing address of Respondent and the address at which its registration certificate clearly indicated as its place of business.

The main issue in these proceedings is whether Kay Dee Veterinary, Division of Kay Dee Feed Company (hereinafter Respondent) violated Section 12(a)(2)(K) [7 U.S.C. 136j(a)(2)(K)] of FIFRA.

The other issues in the case are: whether or not the payment by Respondent of the civil penalty proposed in the Complaint will put the Respondent out of business; and whether or not Respondent received notice of the EPA decision to cancel most uses of toxaphene products, including those uses that were on the labels of Respondent's products.

The conclusions reached herein are based upon the facts that Kay Dee Feed Company is the Respondent, and of primary concern, Kay Dee Veterinary is merely a division thereof and that the Notice of Registration which reflects "Kay Dee Veterinary Division" does not alter the fact that the Kay Dee Feed Company is the Registrant.

It is important that in analyzing the merit of this case we do not lose sight of the important responsibility of the EPA to prevent harm to health and the environment. Simply stated, a Respondent's allegedly financial hardship and said Respondent's violation of an environmental act or regulation, should only be considered to the extent that policy or law allows for such consideration.

Respondent at the adjudicatory hearing did not argue that the allegations made against it in Counts 1 through 6 of the Complaint were not violations of §12(a)(2)(K) of FIFRA, 7 U.S.C. §136j(a)(2)(K). Respondent's argument basically dealt with the question of the Notice of Cancellation and its allegedly financial hardships.

Proposed Findings Of Fact

1. Respondent is Kay Dee Feed Company.

2. Respondent's establishment is located at 1919 Grand, Sioux City, Iowa. Respondent maintains a division known as Kay Dee Veterinary Division at 220 Cunningham Drive, Sioux City, Iowa. The distance between the above establishments is approximately three (3) blocks (T. 39, 7-9).

3. Royal and William Lohry and their spouses own all the stock of Respondent, Kay Dee Feed Company.

4. Royal and William Lohry are the only officers of Respondent. Royal Lohry has been president of Kay Dee since 1954.

5. Richard Pruehs has been the General Manager of Kay Dee Veterinary Division for ten (10) years. His father, Ed Pruehs was General Manager for fifteen (15) years. Richard Pruehs succeeded his father as General Manager.

6. The officers, owners and operators of Respondent and the Division are identical.

7. Respondent and Kay Dee Veterinary Division maintain a single bank account and file consolidated Income Tax Returns.

8. Jean Viser, an employee of Respondent, received the letter and Notice of Cancellation of Toxaphene sent by the EPA.

9. Whenever a package or letter for Respondent is delivered to Respondent, and was intended for the Veterinary Division, said package or letter would be so delivered.

10. Respondent received a letter from Imperial, Inc., Respondent's manufacturing source of its toxaphene products, which contained a copy of the Federal Register Notice of November 29, 1982, stating EPA's intent to cancel within thirty (30) days most uses of toxaphene.

11. On or about July 24 or 25, 1983, David W. Wilcox, an authorized representative of EPA, visited and inspected Respondent's Division establishment at 220 Cunningham Drive, Sioux City, Iowa. Mr. Wilcox spoke with Carol Rosen and Richard Pruehs, employees of Respondent. Mr. Wilcox, during the above-mentioned inspection, gathered evidence including labels for the toxaphene product KAY DEE TOX II, sales and shipping records of toxaphene products, also statments from Richard Pruehs regarding the toxaphene products.

12. The evidence gathered by David W. Wilcox showed that the date of the shipments, receipt or sale of the toxaphene products by Respondent was subsequent to the effective date for the cancellation of said products.

13. Kay Dee Feed Company is the Registrant of KAY DEE TOX II. The EPA company number for Kay Dee is 6552 and the product KAY DEE TOX II is registered as product number 6552-5.

14. The uses on the label of the product KAY DEE TOX II were cancelled effective March 3, 1983.

15. Respondent received the Notice of Cancellation of Toxaphene uses from EPA on January 31, 1983.

16. The U. S. Corporation Income Tax Return filed for 1982 showed a gross receipt or sales of $24,729,480 for the businesses owned by the Lohrys.

Discussion

The arguments and the exhibits presented at the adjudicatory hearing on Wednesday, July 17, 1985, clearly demonstrates that Respondent violated §12(a)(2)(K) of FIFRA, 7 U.S.C. §136j(a)(2)(K) on six counts as alleged by Complainant EPA. Said section of the Act clearly states that it is unlawful for any person to violate any cancellation of a pesticide. Respondent's absence of argument addressing the question of violation is, indeed, a realization by Respondent of its culpability. Respondent therefore elects to address the issues of notice and its alleged inability to pay the thirty thousand dollars ($30,000.00) proposed by the EPA in the Complaint.

It is important that we acknowledge that even if Respondent demonstrates that paying of the proposed penalty would create an adverse financial impact on its business, Respondent has not demonstrated that the payment of the proposed penalty would put it out of business. It is inconceivable that the

law would completely protect a violator from any professed hardship that a penalty may extract. Although the law and certain policy may apply compassion in certain situations, the law is not intended to totally vindicate a violation.

Admittedly, the EPA's Penalty Policy provides that any adverse hardship that a proposed penalty would cause a business is to be taken into consideration. However, it would be ludicrous to believe that the above-mentioned policy calls for the elimination of a penalty when the payment of the penalty would cause some adverse financial impact. All financial penalties extract and diminish a person's financial resources. The payment of the proposed civil penalty by Respondent will certainly not create a situation wherein Respondent closes its doors. In fact, the Lohrys' enterprises reflected gross sales in excess of $24,000,000 in 1982; and Royal and William Lohry drew annual salaries of $27,000 each from Respondent, the allegedly dying corporation.

Respondent has attempted to show that Respondent and its Division are so distinct in their daily operations that the activities of one is foreign to the other; yet, they share a single bank account, consolidate their tax returns and share the same corporate officers.

The EPA published in the Federal Register of November 29, 1982 its intent to cancel toxaphene. This is public notice. Respondent also received a copy of the Federal Register, along with a letter from its supplier, a

corporation Respondent contracted with to produce KAY DEE TOX II, a toxaphene product. Jean Viser, an employee of Respondent also signed for the envelope containing the cancellation notice that was sent to Toxaphene Registrants. Said letter was signed for by Ms. Viser on January 31, 1983. It should also be noted that Kay Dee, and not the Division, is the registrant of the product KAY DEE TOX II. Kay Dee EPA Company Number is 6552, and the product number for KAY DEE TOX II is 6552-5. The Division does not have its own EPA company number. The EPA did the proper thing in sending the cancellation notice to the Registrant of Record, Kay Dee Feed Company.

If the employees of Kay Dee did not advise the employees of the Veterinary Division of the toxaphene cancellation notice, the problem seems to be either lack of coordination or oversight. Since the officers and stockholders of Kay Dee and Respondent are identical, it is rational to conclude that they all share common business interests. Mr. Royal Lohry comes forward to testify on behalf of Respondent. Nothing less is expected. We must certainly credit Mr. Lohry, the other officers of Kay Dee and Respondent to look after the welfare of the respective businesses. The record reflects that whenever customers or letters that deal with Respondent come to the attention of Kay Dee, Kay Dee personnel make sure that these people or things reach the Veterinary Division, three blocks away.

Respondent has not and cannot successfully argue that the uses on the labels of KAY DEE TOX II were not cancelled by the EPA effective March 3, 1983; neither can Respondent refute the fact that it sold toxaphene products

subsequent to the cancellation dates. Respondent clearly violated §12(a)(2)(K) of FIFRA, 7 U.S.C. §136j(a)(2)(K) on six (6) counts as alleged in the Complaint. Respondent was aware of the cancellation of toxaphene by the EPA. The publication of the EPA's intent of toxaphene cancellation in the Federal Register is public information.

Conclusions of Law

Based on the evidence presented at the adjudicatory hearing on Wednesday, July 17, 1985, at Sioux City, Iowa, the Proposed Findings of Facts and the Arguments submitted herein, it is concluded that Respondent violated §12(a)(2)(K) of FIFRA, 7 U.S.C. §136j(a)(2)(K) on six (6) counts as alleged in the original Complaint.

O R D E R [3/]

I hereby find Respondent in violation of six (6) counts of §12(a)(2)(K) of FIFRA, 7 U.S.C. §136j(a)(2)(K) as alleged in the Complaint filed by the Complainant EPA, and a civil penalty of Thirty Thousand Dollars ($30,000.00) is hereby assessed against Respondent.

3/ Unless an appeal is taken pursuant to the rules of practice, 40 CFR 22.30, or the Administrator elects to review this decision on his own motion, the Initial Decision shall become the final order of the Administrator. See 40 CFR 22.27(c).

Respondent shall within thirty (30) days of the effective date of this Order pay a civil penalty of Thirty Thousand Dollars ($30,000.00). The amount of the penalty shall be paid by cashier's or certified check made payable to the United States Treasury, and delivered to:

Mellon Bank
U.S. EPA, Region VII
Regional Hearing Clerk
P. O. Box 350748M
Pittsburgh, Pennsylvania 15251

It is so ordered.

Edward B. Finch
Chief Administrative Law Judge

Dated: February 26, 1986
Washington, D. C.

CERTIFICATION

I hereby certify that the original of this Initial Decision was hand-delivered to the Hearing Clerk, U. S. EPA, Headquarters, and that three copies were sent by certified mail, return receipt requested, to the Regional Hearing Clerk, U. S. EPA, Region VII, for distribution pursuant to 40 CFR 22.27(a).

Leanne B. Boisvert
Leanne B. Boisvert
Legal Staff Assistant

Dated: February 26, 1986