

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of)
Chem-O-Lene Corporation,) Docket No. FIFRA-09-0445-C-85-24.
Respondent)

FIFRA - Where EPA has no record of a report being filed, burden is on Respondent to show that report had been properly mailed to EPA.

FIFRA - Proof that Respondent's general procedure was to put outgoing mail into a basket for mailing by secretary held insufficient to establish that a report had been properly mailed and was lost after it had been delivered to the EPA.

Appearance for Complainant: David M. Jones, Esquire
U.S. Environmental Protection Agency
Region IX
215 Fremont Street
San Francisco, CA 94105

Appearance for Respondent: Robert L. McCord, Jr., Esquire
Taylor, McCord, Paul & Johnson
721 East Main Street
P.O. Box 1477
Ventura, CA 93002

INITIAL DECISION

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

A complaint was issued against Respondent Chem-O-Lene Corporation, on August 15, 1986, alleging that Respondent operates an establishment where pesticides are produced and that it failed to file the annual report required of such establishment for the year 1985. A penalty of \$3200 was requested.

Thereafter, a hearing was held in Ventura, CA, on June 3, 1986. Following the hearing both parties submitted post-hearing briefs. This decision is being rendered on consideration of the entire record and the briefs of the parties.

Discussion, Findings, Conclusion and Penalty

Pursuant to FIFRA, Section 7(c)(1), 7 U.S.C. 136 e(c)(1), and the regulations issued thereunder, 40 CFR 167.5, pesticide producers operating an establishment at which pesticides are produced must file by February 1 of each year an annual report covering the pesticides produced and sold or

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.

distributed during the proceeding year. This proceeding arises from Respondent's alleged failure to file its report due in 1985 (hereafter referred to as the "1985 report"). In that year the time for filing the report had been extended from February 1 to April 15. 2/

Mr. Gavin, a case development officer for the EPA within the pesticide program branch testified that Respondent was referred to him early in June 1985, as a pesticide producing establishment for which no annual report had been received. A warning letter was sent, accordingly, on June 14, 1985, notifying Respondent that its report for that year had not been filed and directing it to file a report within 20 days of receipt of the letter or it would be subject to a civil penalty and termination of its establishment registration. 3/ No report was received.

As proof that a report was mailed, Respondent called as witnesses Mrs. Beverly Martin, an officer of the company, and Ms. Sharlen Kolek, a secretary who handled the company's mail. Mrs. Martin testified that she filled out the 1985 report, and put it in a position to be mailed by the company. She did not remember whether it was signed by Mr. Martin, Respondent's president, or by herself. 4/

Ms. Kolek testified that the company has a basket on top of the file cabinet for the outgoing mail. At the end of the day she stamps the outgoing mail and either drops it in the mailbox, or, if she leaves the office

2/ Transcript of proceedings (hereafter "Tr."), 23-24.

3/ Tr. 7-8; Complainant's Exh. 1.

4/ Tr. 50-51, 54, 58-59.

after 5:00 p.m., deposits the mail at the Ventura Post Office the next morning. She does not recall, however, specifically mailing a product report to the EPA during the period from January 1985 through June 1985. 5/

Respondent argues that the more likely inference is that the report was lost by the EPA, given the size and complexity of the EPA's operations. The experience of the EPA, however, has been that the reports properly mailed to it rarely go astray. 6/ It seems more probable that the failure of the report to reach the EPA was caused by some mistake at Respondent's offices. Respondent's methods for handling outgoing mail do not appear to be so well controlled as to make this unlikely. In fact, the evidence is ambiguous as to whether this particular report was actually put directly into the outgoing mail basket described by Ms. Kolek or left somewhere else in the office to be picked up and mailed. 7/

Also not to be overlooked is that Mrs. Martin's recollection of having filled out and mailed the report may simply have been in error. The absence of a copy of the report in the company's files, and it seems to

5/ Tr. 39, 47.

6/ Tr. 32-33.

7/ Ms. Martin's testimony (and the details were really contained in the question asked by Respondent's attorney) was that what she did with the report after she prepared it was to "place it into a position to be mailed" with the company. Tr. 58. Counsel's words may have been carefully chosen or they may have been no more than a round-about way of saying that the form was put into the outgoing mail basket.

have been the company's practice to keep a copy, indicates that this could well have been the case. 8/

When the EPA has no record of receiving a form, the one filing the form may still be able to escape liability by showing that the form was put in a properly addressed envelope with postage prepaid and deposited in an authorized postal mail box. If this is shown there is a strong (but rebuttable) presumption that the form was delivered in due course in the mails, and that it was lost or misdirected after reaching the EPA. Legille v. Dann, 544 F.2d 1, 4-5 (D.C. 1976). The burden of showing that the form was properly mailed is upon Respondent. Respondent would have it inferred from its procedures for handling the mail that the report was mailed. For the reasons stated above, the evidence is insufficient to establish that fact.

I find, accordingly, that Respondent failed to file its 1985 annual report and thereby violated FIFRA, Sections 12(a)(2)(L) and 12(a)(2)(N), 7 U.S.C. 136 j(a)(2)(L) and (a)(2)(N).

The EPA proposes the base penalty of \$3200 set out in the FIFRA penalty guidelines for a failure to file a report when the violation is by a company

8/ The files that would have contained the copy were seized by the State in March 1985, on a matter unrelated to this proceeding. Respondent's Exh. 6. They were not returned to Respondent until January 1986, when it did appear that there were a few pages missing. Tr. 62, 65, 67-68. While Respondent could have suffered two mishaps with respect to filing the report, the loss of the original in the mail or by the EPA, and the loss of the copy in the seized files, the more likely explanation and the one which is consistent both with the non-receipt of the report by the EPA and the absence of a copy in the files, is that Respondent simply overlooked sending the report.

the size of Respondent, and contends that there are no mitigating circumstances to be considered. 9/ The reports provide information about the production and sales of pesticides which can be used to determine the magnitude of harm and what response is needed if a problem arises with a particular pesticide. They can also be used to trace shipments of a particular pesticide. They are, in short, of sufficient importance to the regulatory purposes of FIFRA to justify a penalty of \$3200, except that I find, contrary to what the EPA contends, that there are special circumstances that warrant a downward adjustment in the amount of the penalty.

In March of 1985, prior to the time the 1985 report was due, Respondent's files were seized under a search warrant issued by a state court. 10/ Included in the files taken were the files in which Respondent kept the papers relating to the pesticide reports filed with the EPA and the State. These files were not returned to Respondent until January 1986. 11/ Had those files been available in June when Respondent received the EPA's warning letter, Respondent would have been able to verify whether, in fact, it had mailed the 1985 report. Moreover, without its files it appeared that Respondent lacked the necessary information for completing the report. 12/ The EPA contends that on receipt of the warning letter, Respondent should

9/ Complainant's post-hearing brief at 4.

10/ Respondent's Exh. 6.

11/ Tr. 62-63.

12/ See Tr. 74. It is clear that Respondent in good faith believed it had filed the 1985 report when it received the warning notice, and was not simply disregarding its obligation to file one. See Tr. 73; Respondent's Exh. 3.

have immediately gotten in touch with the EPA and explained its predicament. No doubt it would have been wise for Respondent to have done so as it might possibly have spared Respondent the expense of this proceeding. What Respondent did do was to spend its time after the receipt of the warning notice in attempting to obtain a copy of the report to send in, apparently without taking into consideration that the EPA would sue for civil penalties if Respondent was not promptly heard from. ^{13/} Consequently, the fact that Respondent did not immediately call the EPA does not adversely reflect on Respondent's good faith efforts to comply with the reporting requirement. Also, to be taken into account in determining Respondent's good faith is that Respondent did file reports for the previous two years of 1983 and 1984. ^{14/} Accordingly, I find that the appropriate penalty for the violation found herein is \$1600. Respondent has produced financial information showing for 1984, net sales of over \$1 million and costs which exceeded net sales by about \$23,000. ^{15/} The "operating costs", which amounted to over 50% of Respondent's costs, are not broken down. Because of the scanty financial information furnished, I am unable to find that a penalty of \$1600 would be beyond Respondent's ability to pay. Nevertheless, the order will provide that the penalty may be paid in installments if the Regional Administrator so approves.

^{13/} See Tr. 75.

^{14/} The first report filed in 1983, was filed late, but it appears to have been filed within such time that no further action was taken by the EPA. See Tr. 21-22; Respondent's Exhs. 1 and 2.

^{15/} Respondent's prehearing conference memorandum at 2; Tr. 87-88.

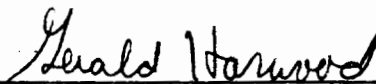
FINAL ORDER 16/

Pursuant to the Federal Insecticide, Fungicide and Rodenticide Act, Section 14(a)(1), U.S.C. 136 1(a)(1), a civil penalty of \$1600 is assessed against Respondent Chem-O-Lene Corporation for violation of the Act found herein.

Payment of the civil penalty shall be made by submitting a certified cashier's check payable to the United States of America and mailed to:

EPA - Region 9
(Regional Hearing Clerk)
P.O. Box 360863M
Pittsburgh, PA 15251

Payment of the full amount shall be made within 60 days of the service of the final order unless prior thereto, upon application by Respondent, the Regional Administrator approves in writing a delayed payment schedule or an installment plan with interest, in which case payment shall be made according to said schedule or plan.



Gerald Harwood
Chief Administrative Law Judge

Dated: August 28, 1986

16/ 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).