

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	Docket No. IF&R
	)	VII-449C-82P
Xentex Corporation	)	-----
	)	Marvin E. Jones
Respondent	)	Administrative Law Judge

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LAW JUDGE

1. Registration of Establishments - Section 7 of the Federal Insecticide, Fungicide and Rodenticide Act (hereinafter "the Act", or "FIFRA") requires that any producer, operating an establishment under the Act, shall inform the Administrator, within 30 days after registration, of the types and amounts of pesticides which he is currently producing, as well as that produced, sold or distributed during the past year; and said section further requires that said producer keep current such information by submitting a report, required by 40 CFR 167.5(c), to be filed annually on or before February 1.
2. Federal Insecticide, Fungicide and Rodenticide Act - Section 7 of the Act, which places on each producer the duty to file an annual report of its current and annual production, is a "regulatory", as opposed to a "registration", provision, in that such information required thereby is essential to the proper performance by the Agency of its regulatory function.
3. Federal Insecticide, Fungicide and Rodenticide Act - Section 7 of the Act does not require that the U.S. Environmental Protection Agency ("the Agency", "EPA") annually notify each producer of its duty to file said required report.
4. Federal Insecticide, Fungicide and Rodenticide Act - Respondent producer's failure to file its annual report required by Section 7 of the Act does not support a conclusion that none of subject registered pesticides were produced, sold or distributed; and such failure is in violation of the Act.
5. Civil Penalty - Gravity of subject violation is determined from consideration of two factors, namely, gravity of misconduct and gravity of harm.
6. Civil Penalty - Where Respondent producer admittedly received a notice in March, 1982, and possibly received the earlier notice mailed by the Agency, a finding that it exercised due care will not be made.

8. Civil Penalty - Intent is not an element of the violation charged; therefore, a claim of oversight, inadvertence or lack of intent is not defensive; however, facts and circumstances attendant to such oversight, as, e.g., compliance in previous years, and the ultimate filing of subject report, though tardy, will be considered as mitigating factors in determining the gravity of producer's misconduct.

Appearances:

Rupert G. Thomas, U.S. Environmental Protection Agency, Region VII, Kansas City, Missouri, for Complainant.

David B. Sexton, Snowden and DeCuyper, Kansas City, Missouri, for Respondent.

INITIAL DECISION

By Complaint filed August 12, 1982, Respondent, Xentex Corporation (hereinafter "Xentex") is charged with violation of Section 12 (7 USC 136) of the Federal Insecticide, Fungicide and Rodenticide Act, hereinafter "FIFRA" or "the Act", as amended, 7 USC 136 et seq (1976 and Supp. III 1979), in that Respondent failed to file its annual "Pesticide Report" pursuant to the requirements of Section 7 of FIFRA.<sup>1/</sup> For such alleged violation, Complainant, pursuant to Section 14 of FIFRA (7 USC 136 1), proposes that a civil penalty 2/ of \$2,880 be assessed against Respondent.

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<sup>1/</sup> In addition to Section 7 (7 USC 136(e), 40 CFR 167.5 requires that any producer operating a registered pesticide-producing establishment shall inform the EPA of the types and amounts of pesticides it is currently producing, and which it has produced, sold or distributed during the preceding year (167.5(a)); and that annual reports shall be filed on or before February 1 of each year (167.5(c)).

<sup>2/</sup> Stipulation 4, page 4, infra, indicates that Respondent is in Category IV (not V) of the Civil Penalty Guidelines indicating a proposed penalty of \$2,448.

Said Section 7 provides, in pertinent part, that:

"(c) Information Required. -

"(1) Any producer operating an establishment registered under this section shall inform the Administrator within 30 days after it is registered of the types and amounts of pesticides and, if applicable, active ingredients used in producing pesticides -

"(A) which he is currently producing;

"(B) which he has produced during the past year; and

"(C) which he has sold or distributed during the past year.

"The information required by this paragraph shall be kept current and submitted to the Administrator annually as required under such regulations as the Administrator may prescribe."

Said Section 12 provides, in pertinent part, that:

"(a)(2) It shall be unlawful for any person...

"(L) who is a producer to violate any of the provisions of Section 7;

\* \* \*

"(N) who is a registrant, wholesaler, dealer, retailer, or other distributor to fail to file reports required by this Act; ..."

An adjudicatory hearing was held in the 10th Floor Conference Room, 324 East 11th Street, in Kansas City, Missouri, on Tuesday, December 14, 1982.

The parties stipulated to the following:

1. That the subject annual report was completed and filed by Respondent on September 3, 1982. Due to the fact that the signature of Respondent's president, William G. McLaughlin (T. 35), did not appear thereon, said report was returned to be signed, after which it was again submitted on October 19, 1982 (T. 6).

2. That Respondent did not file its annual pesticide report prior to September 3, 1982 (T. 8).
3. That Respondent is a registered pesticide-producing establishment (T. 7).
4. That Respondent's gross sales for 1981 were \$885,828 (T. 7; T. 45; Respondent Exhibit No. 1).

Findings of Fact

1. Respondent is a Missouri Corporation (T. 38) with its business currently, and from and after summer, 1981, at 11841 West 83rd Terrace, Lenexa, Kansas (T. 35; T. 41).
2. Previous to summer, 1981, Respondent's business address was 8607 Quivira Road, Lenexa, Kansas (T. 35).
3. Respondent moved to its new location over a period of two or three months (T. 35; T. 39).
4. Respondent has never produced any chemicals (T. 37), and has never produced any BIOX-W or BIOX-N.
5. Respondent has completed and filed the annual reports required by said Section 7 for the years 1978, 1979 and 1980 (Exhibits C-4, C-5, C-6). Said reports for previous years were filed in a timely manner.
6. The amount of BIOX-W and BIOX-N reported on the 1978 report of Respondent was not a report of actual sales. It estimated the amount of product which Respondent's employee anticipated would be sold prospectively. Actually, no amount of either product was ever produced, sold or distributed (T. 54).
7. Respondent's failure to file its subject annual pesticide report for 1981 was an oversight on the part of Respondent's president (T. 47).

8. Respondent's president testified (T. 40) that he had no recollection of receipt of a report form mailed by EPA in December 1981, but stated that it possibly reached his office (T. 38; T. 39; T. 41 and T. 53).

9. EPA's Director of the Division for Air and Waste Management notified Respondent by letter on March 5, 1982, that the subject Annual Pesticides Report form, sent by EPA, Washington, D.C., in December, 1981, had not been filed, as required by said Section 7 of the Act, and granted Respondent 20 days after receipt of said letter of March 5, 1982 in which to file subject report without assessment of any penalty (Exhibit C-3).

10. Said letter of March 5, 1982, addressed to 8607 Quivira Road (Exhibit C-3), was received by Jerry Roterts, secretary to Respondent's president, on March 15, 1982 (Exhibit C-2; T. 53). The Return Receipt signed by Respondent's said representative erroneously bore the address of 8670 Quivira Road, Lenexa, Kansas (Exhibit C-2). Although Respondent had then moved from Quivira Road to its present location, the EPA was not advised of the "change of address".

11. Respondent's president admits that the Respondent received the notices in question and that the requirement of filing subject report was overlooked until September, 1982 (T. 53, 1. 17).

12. Respondent obtained its establishment number 38708 in contemplation of producing said products, but none was ever produced (T. 54).

#### Conclusions of Law

1. Respondent violated Section 12 of the Act by its failure to file its Annual Pesticides Report on or before February 1, 1982, pursuant to Section 7 of the Act and 40 CFR 167.5 (Regulations).

2. In determining the amount of the civil penalty to be assessed, we must consider the size of the business of Respondent, whether, and to what extent, Respondent's ability to continue in business will be affected by its payment, and the gravity of the violation (Section 14(a)(4) of the Act).

3. In addition to the criteria, supra, in fixing said penalty amount, we must consider also Respondent's history of compliance with the Act and any evidence of good faith or lack thereof (40 CFR 22.35(c)).

4. An appropriate penalty to be assessed herein, on consideration of the facts reflected by this record and the criteria provided by the Act and Regulations, is \$950.

#### Discussion

There is no issue left undecided by the evidence in the record. Neither Section 7 of the Act nor the pertinent regulations provides for EPA giving notice to registrants of their obligation to furnish information advising the types and amounts of pesticides produced, sold and distributed currently and over the preceding year. Therefore, the onus is on Respondent, the registrant, to "(Keep) current such information" by submitting annually a pesticides report (the Act, Section 7(c), as prescribed by regulation (40 CFR 167.5(c)). The EPA has made it a practice to remind registrants of their said duty under the Act and, in December of each year, notices go out of EPA's Washington, D.C. Headquarters to each registrant at its address of record (see 40 CFR 162.6(4)).<sup>3/</sup> Although Respondent moved its

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<sup>3/</sup> Said Section 162.6(4) provides that registrants can have only one address of record. It is essential to each registrant that it notify the EPA if its "address of record" changes.

business location in summer, 1981, its president admitted that the notice sent by EPA was received (Finding 10), but, through oversight, the required report was not made until September, 1982 (within one month after filing of the instant Complaint). Just as was the case in the three previous years, Respondent neither produced, sold nor distributed any of the chemicals for which it was registered. Respondent contends for a Finding that, even though due care was not exercised, since no harm to health or the environment resulted, no penalty is appropriate.

It is in this context we examine the criteria to be considered. Gravity (of the violation) must be determined from the consideration of two factors, namely, the gravity of misconduct, and the gravity of harm. Failure to file subject report in a timely manner is clearly a violation of said Section 7, and Respondent's further failure, whether through oversight or indifference, to respond to succeeding notices, until after the filing of this Complaint, amounts to misconduct, even should Respondent's claim of oversight and good intention be believed. Respondent submits that no harm could have resulted because no products were produced, sold or distributed. It should be apparent, however, that EPA could not justify a conclusion that none of the products were produced or sold merely from the findings that the required report was not filed. This is ample reason why Respondent should file its annual report, regardless of its content, as it is essential that said report be considered along with other annual reports as a means of the Agency performing its regulatory function. As we stated in

the Industrial Chemical Laboratories case, IF&R Docket No. VII-181C (1976), at page 5, cited in The World's Best Products, Incorporated (Accelerated Decision, page 4), IF&R Docket No. V-331C:

"I find that Section 7 is a 'regulatory', as opposed to a 'registration', provision...(sic) not only the registration, but also the reports required thereafter, are the tools or instruments used in the regulation of establishments producing pesticides..." (emphasis supplied).

And at page 6:

"...That the Administrator...shall prescribe the regulations for the furnishing of future information does not make the requirement less substantive..."

Such report is there described as a tool essential for maintaining regulatory control in an area where the public health and welfare must be protected.

Again, in the Industrial Chemical case at page 6, note 1:

"I find persuasive the statement of Complaint that 'this information is essential for EPA to...perform its regulatory functions.' It is apparent that a multitude of violations like the subject violation can only have a serious negative effect on the entire regulatory program." (See also Wickard v. Filburn 317 US 111 (1942), where the U.S. Supreme Court recognized that, while one minor violation taken alone may be trivial, many individual minor violations taken together can defeat the purpose of a regulation.)

In the premises, I find that said violation resulted from the lack of due care on the part of Respondent. Its characterization of the violation as oversight, rather than indifference, is supported by its compliance with subject section on the three preceding years in which reports indicating zero production, sales and distribution of subject product were filed. The previous reports are not indicative of Respondent's future intent, nor could the Agency properly "presume" as to what the subject report would indicate. Actually, Respondent has not, even at this time, abandoned its original intention to produce BIOX-W and BIOX-N. Its president stated (T. 55):

"...I've got too much invested now to drop it. I'd better get into it and make some and sell some in order to recoup..."



He further indicated that the employee (Musgrave) who had precipitated interest in the products, had left (T. 55).

He stated that he understood that so long as his EPA establishment number was maintained, he had a duty to file an annual report on or before February 1 of each year.

After the instant Complaint was filed, Respondent filed the 1982 annual report on September 3, 1982.

Thus, the oversight and the explanation for its having occurred are apparent on this record. Due care was lacking, but such lack is attributable, in part, to the fact that the president was accustomed to leaving this function to another person who was no longer available to so serve at the time pertinent.

On this record, the oversight (overlooking the duty to file subject report and to respond to notices received) resulted from circumstances different from those existing in prior years, including the moving of their business office. For these reasons, I find that good faith on the part of Respondent was present even in the face of the admitted failures. Just as the lack of intent is not a defense to the admitted violation, neither is the oversight. However, the aforementioned circumstances are mitigating and will be so considered.


It is concluded that, on consideration of this record, and the Findings, Conclusions, Briefs and Arguments proposed and submitted by the parties, the violation by Respondent subjects it to a civil penalty, and in consideration of the criteria hereinabove set forth, I find that an appropriate civil penalty is \$950. It is, therefore, proposed that the following Order should be issued:

ORDER\*

1. Pursuant to Section 14(a) of the Federal Insecticide, Fungicide and Rodenticide Act, as amended, a civil penalty of \$950 is hereby assessed against Respondent, Xentex Corporation, for the violation of the Act found herein.

2. Payment of the full amount of the civil penalty assessed shall be made within sixty (60) days after receipt of the Final Order by forwarding to the Regional Hearing Clerk, U.S. Environmental Protection Agency Region VII, a cashier's or certified check payable to the Treasurer, United States of America.

Dated: February 10, 1983



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Marvin E. Jones  
Administrative Law Judge

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\* 40 CFR 22.27(e) provides that this Initial Decision shall become the Final Order of the Administrator within forty-five (45) days after its service upon the parties unless (1) an appeal is taken by a party to the proceedings, or (2) the Administrator elects, sua sponte, to review the Initial Decision.

CERTIFICATION OF SERVICE

I hereby certify that, in accordance with 40 CFR 22.27(a), I have this date forwarded to the Regional Hearing Clerk of Region VII, U.S. Environmental Protection Agency, the original of the above and foregoing Initial Decision of Marvin E. Jones, Administrative Law Judge, and have referred said Regional Hearing Clerk to said section which further provides that, after preparing and forwarding a copy of said Initial Decision to all parties, she shall forward the original, along with the record of the proceeding, to the Hearing Clerk, who shall forward a copy of the Initial Decision to the Administrator.

Dated: February 10, 1983



Mary Lou Clifton  
Secretary to Marvin E. Jones, ADLJ