UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In re:	)	
	)	
Zoo Med Laboratories, Inc.,	)	Docket No. FIFRA-09-0886-C-98-11
	)	
Respondent	)	

ORDERS ON MOTIONS

As reflected in the Second Amended Complaint[(1)], this case, brought by the Environmental Protection Agency ("EPA") involves 15 (Fifteen) Counts under the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. Section 136 et seq., 12 (twelve) of which assert that Zoo Med Laboratories, Inc. ("Zoo Med" or "Respondent") sold unregistered pesticides, (Wipe Out 1, Wipe Out 2, Tick Off, and Mite Off), two which assert that Zoo Med sold adulterated pesticides,[(2)] and one asserting that Zoo Med failed to register its facility as a pesticide producing establishment.

The complaint was filed in the wake of two "neutral scheme" and one "for cause" inspection at pet stores in EPA Regions 3 and 4 (Pennsylvania and North Carolina) during April and May 1997, during which the products described above were found to have labels making pesticidal claims and determined to be unregistered with EPA. Subsequently, on April 7, 1998, samples of Wipe Out 1 and 2 were taken and laboratory results detected no observable reading of the active ingredient for these products.[(3)]

This Order addresses: Zoo Med's Cross-Motion for Accelerated Decision; EPA's Motion for Accelerated Decision; EPA's effort to restrict Zoo Med's use of the Freedom of Information Act; and EPA's Motion to Strike Exhibits.

Discussion

I. Preliminary Observations.

In the midst of the various motions filed by the parties, it must be remembered that the starting point for any analysis of the issues raised begins with the Complaint and the Answer. Here, it is the Second Amended Complaint, dated January 22, 1999[(4)] with its attached exhibits,[(5)] not earlier versions of the Complaint, that is under consideration. In contrast, the Answer consists of two documents for consideration: Zoo Med's original Answer, dated November 6, 1998; and its February 18, 1999 letter, addressed to the Court, in which it "adopts and incorporates by reference as its Answer ...the [November 6th] Answer..."[(6)]

Count I alleges that on or about February 26, 1996, Zoo Med, a California corporation, had not registered "Wipe Out 1"with EPA and at that time distributed, sold, offered for sale, held for sale, shipped, delivered for shipment, received and delivered, offered to deliver in commerce or some combination thereof the product to APC Pet Supply, Charlotte, NC., as evidenced by Zoo Med's Invoice No. 9581 and the number 7811 under "Our Order Number." EPA submitted Exhibit No. 1, an apparent photocopy of a Zoo Med invoice copy reflecting these dates and numbers, to support the Count.

In its Answer Zoo Med admitted that Wipe Out was not registered with EPA, but maintained that it "lack[ed] sufficient information to admit or deny that it sold and distributed Wipe Out 1 on or about February 26, 1996." Zoo Med's February 18, 1999 letter to the Court adopted and incorporated by reference its November 6th Answer, except to the extent that the Second Amended Complaint alleged new facts or documents.

Count II alleges the same offense as Count I, concerns the same product, Wipe Out 1, and the same North Carolina vendee, APC Pet Supply. Only the date, February 4, 1997, and invoice numbers differ. The Count is supported by Exhibit 2, an invoice photocopy reflecting the dates, numbers and vendee reference numbers. As with Count 1, Zoo Med admits the product was unregistered. Further, Zoo Med admits that it sold the product on the date alleged.

Count III alleges the same offense, this time referring to the product "Wipe Out 2," sold by Respondent to Caldwell Supply, a Pennsylvania vendee, on or about October 4, 1996. Zoo Med admitted that the product was not registered and that it was sold and distributed on that date. It denied that it issued Purchase Order 92796b and averred that any Wipe Out 2 purchase orders were issued by parties other than Zoo Med. The February 18, 1999 letter, already described, added nothing by way of Answer.

Count IV alleges the same 'sale of an unregistered pesticide' offense, involving APC Pet Supply in North Carolina and the sale of Wipe Out 2 on or about February 4, 1997.

Count V again alleges another 'sale of an unregistered pesticide' offense, to the same Caldwell Supply of Pennsylvania, involving the pesticide "Tick Off"on or about October 4, 1996.

Count VI also alleges a 'sale of an unregistered pesticide' offense, to the same APC Pet Supply in North Carolina involving the pesticide Tick Off on or about February 4, 1997.

Count VII returns to Caldwell Supply of Pennsylvania, alleges the 'sale of an unregistered pesticide,'this time the sale of "Mite Off,"on or about October 4, 1996.

Count VIII again involves Mite Off, alleging a 'sale of an unregistered pesticide' to the same APC Pet Supply in North Carolina, on or about February 4, 1997.

Count XI[7] again alleges the Respondent's sale of an unregistered pesticide, the aforementioned Wipe Out 1, on or about July 26, 1996, but in this instance the vendee was Royal Pet Supply of Edgewood, New York.

Count XII, another charge alleging the Respondent's sale of an unregistered pesticide, Wipe Out 2, involves the same vendee, Royal Pet Supply of New York, on or about August 8, 1996.

Count XIII involves the same Royal Pet Supply of New York, identified in Counts XI and XII, charging that on or about September 6, 1996, the unregistered pesticide Tick Off was sold to Royal by Respondent, Zoo Med.

Count XIV is the final Count alleging the sale of an unregistered pesticide. In this instance the pesticide is Mite Off, with the allegation that it was sold to the same Royal Pet of New York, as identified in Counts XI through XIII, on or about October 9, 1996.

Count IX alleges that Zoo Med sold, *from its California facility*, an adulterated pesticide, Wipe Out 1, to Caldwell Supply, *a Pennsylvania vendee*, in that laboratory test results from a sample of the product taken from that vendee on or about April 7, 1998, indicated no detectable level of the product's active ingredient, Alkyl Dimethyl Benzyl Ammonium Chloride.

In its Answer Zoo Med generally averred that it lacked sufficient information to admit or deny the allegation, that the allegation was directed to the actions of Omega Biotech, a separate and independent entity, that their was insufficient identification of the packages of Wipe Out 1 bearing a label listing the active ingredient and its percentage in the product, and, cryptically, it denied "selling and distributing an adulterated pesticide that constitutes a violation of FIFRA Section 12(a)(1)(E) for which EPA can impose the penalty proposed in the Complaint[8]."

Count X, like Count IX, alleges that Zoo Med sold, *from its California facility*, an adulterated pesticide, in this instance the pesticide Wipe Out 2, to the same Caldwell Supply of *Pennsylvania* on or about February 11, 1998, and that the same active ingredient, as listed in Count IX, was also undetectable based on a sample taken on or about April 7, 1998.

II. EPA's and Zoo Med's Motions for Accelerated Decision[9].

EPA argues that Zoo Med failed to meet the standard for avoiding an order granting an accelerated decision by not raising genuine issues of material fact through its Answer, as supplemented by its February 18th letter. First, as to whether the Zoo Med products identified in the complaint are pesticides under FIFRA, EPA maintains that Zoo Med's response, asserting that the determination is a legal conclusion, is a sham which fails to plead material facts contradicting the allegation.

The Court does not agree with EPA's characterization of Zoo Med's Answer in this regard. Zoo Med has not contested the accuracy of the copies of the product labels, so no factual issue has been asserted. However Zoo Med is correct that whether the products named in the Complaint are pesticides is a legal determination. They have made no statement regarding the proper interpretation of that term as it applies to the products named in the Complaint, thereby leaving the matter to the Court.

The term "pesticide" is defined in Section 2(u) of FIFRA, 7 U.S.C. Section 136(u). As pertinent here the definition provides it applies to "...any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest..." The term "Pest," in turn, is broadly defined as including "any... fungus...or...form of terrestrial or aquatic... life...or virus, bacteria, or other micro-organism..." FIFRA Section 2(t), 7 U.S.C. 13 (t).

As noted by the Chief Judicial Officer in Exsterex,Inc., FIFRA Appeal No. 85-3, 1985 EPA App. LEXIS 1; 2 E.A.D. 130, December 13, 1985, the presiding judge has the authority to determine whether the products in question are pesticides as defined in FIFRA. Id at *5. Evidence of a pesticidal purpose can be demonstrated by claims made about the product through its labeling. In the Matter of Predex Corporation, 1996 EPA ALJ LEXIS 151, at *13, February 16, 1996, In the Matter of Chempace Corporation, 1997 EPA ALJ LEXIS 164, at *11-12, October 15, 1997.

Here, the labels of Wipe Out 1 and Wipe Out 2 make pesticidal claims. Both state that the products are "antimicrobial cleaner[s], cleaner[s] and disinfectant[s]." The Wipe Out 1 label states that it "kills microbes on contact, including many strains of salmonella," while the Wipe Out 2 label asserts it "will eliminate...bacteria." While more subdued, the Tick Off and Mite Off labels each assert the product, respectively, "controls ticks" and "controls mites." The words employed on each of these labels clearly fall within the ambit of destroying, repelling or mitigating a "pest" and accordingly it is concluded that the products are properly classified as pesticides.

The thrust of EPA's Motion is that Zoo Med failed to comply with the Procedural Rules ("Rules"), 40 C.F.R. Part 22, by not clearly and directly denying the factual allegations of the Complaint. EPA notes that in its opposition Zoo Med suggests that a more complete answer could have been obtained by the Complainant's filing a motion for an amended answer. Zoo Med Opposition at 19. In response to this suggestion EPA observes that a Respondent's is responsible for its answer and that Complainant has the option of challenging the sufficiency of the answer through the Motion for Accelerated Decision. EPA also notes that it could have simply filed a motion for judgment on the pleadings.

Of greater significance than the particular label attached to the Motion is the substantive challenge being asserted. In this regard EPA notes that Zoo Med's response is silent as to Counts I through VIII and XI through XIV. EPA Response to Zoo Med's Opposition to Motion for Accelerated Decision at 6. Review of the Zoo Med's Opposition confirms that, apart from restating its objection to EPA's successive amendments to the Complaint and suggesting that EPA or the Court could have sought an amended Answer, no challenge to the facts is presented as to those Counts. Zoo Med Opposition at 18-20.

Zoo Med has admitted in its Answer that for Counts I, II, III, IV, V, VI, VII, and VIII, the pesticides therein identified had not been registered. Zoo Med's November 6, 1998 Answer responding to the corresponding paragraphs of the First Amended Complaint, at Paragraphs 7, 11, 16, 20, 25, 29, and 34. For these Counts, as discussed above, the Second Amended Complaint merely honed the description of the *same* sales documents described in the First Amended Complaint. In answering the Second Amended Complaint, if it had a genuine dispute as to the invoices described in those Counts, Zoo Med had a duty to respond more fully to the more precisely identified sales documents than merely asserting that it generally denied any "new facts or ...documents not discussed previously." Zoo Med's February 18, 1999 letter "adopting and incorporating" its previous Answer. The Court looks askance at Respondent's inartful attempt to dodge admission to these Counts.[(10)]

In its Cross Motion for Accelerated Decision[(11)] Zoo Med points to the July 14, 1997 "Stop Use Order" issued by the New York Department of Environmental Conservation ("NYDEC"or "New York"). The Stop Use Order states that New York documented Zoo Med's unlawful sale and offer for sale of one or more of the following products:Wipe Out 1 and 2, Mite Off and Tick Off, on or about July 26, 1996, August 8, 1996, September 6, 1996 October 10, 1996, November 11, 1996, December 11, 1996 and February 7, 1997 to Royal Pet Supply of Edgewood, New York. Following the Stop Use Order, Zoo Med executed, on August 13, 1998, a final Order on Consent with NYDEC, "resolv[ing] all of NYDEC's allegations regarding the sale and distribution of unregistered pesticide products..." Zoo Med's Cross Motion at 5. The NYDEC Order on Consent incorporates the New York sales during the above described time span from July 1996 through February 1997 and while it provides Zoo Med with relief from penalties occurring *prior* to that time span, it specifically does not provide

relief from its obligation to comply with applicable provisions of federal or other laws.

Zoo Med's Arguments

Zoo Med asserts that EPA's enforcement action is barred by virtue of its delegation of authority to NYDEC and by the doctrine of *res judicata*. According to Zoo Med's theory, the action is barred by EPA's delegation of authority to New York. Thus, EPA's entrance into a cooperative agreement with New York for the enforcement of FIFRA meant NYDEC "'stands in the shoes' of EPA for purposes of enforcing FIFRA." Zoo Med Cross Motion at 8.

Respondent also points to Harmon Industries, Inc. v. Browner, 19 F. Supp.2d 988 (W.D.Mo.1998) ("Harmon"), a RCRA case, in support of its argument that dual (i.e. federal/state) enforcement is precluded where a cooperative agreement exists and that such a conclusion is consistent with FIFRA Section 24(b). Under this theory Zoo Med concludes that "EPA's attempt to file a duplicate enforcement action without regard to a final NYDEC settlement of claims *arising under the same facts*, undermines the goal of giving primacy to the enforcement efforts of authorized states. Zoo Med Cross Motion at 13.

On an independent basis, Zoo Med maintains that *res judicata* also bars EPA from bringing this enforcement action. After reciting the three elements that must be met,[(12)] it glibly asserts that the NYDEC Order satisfies the first element, that both the federal and state actions involve the same facts or at least the same "nucleus of facts" and that all the counts occurred before August 13, 1998, the date the New York Order of Consent was signed, thereby satisfying the second element.[(13)] Zoo Med claims that the third element, whether the case involves the same parties or their privies, is also present, with the casual assertion that "NYDEC represented EPA in the prosecution of Zoo Med." Id. a t 15-16.

In response, EPA asserts that Zoo Med's reliance on Harmon is misplaced since that case involved a true state court judgment, arising out of a consent decree which was lodged with the state court. EPA discerns a difference between that case and Zoo Med in that the NYDEC's Stop Use Order and the negotiations that led to an Order on Consent between NYDEC and Zoo Med "was not lodged with any New York Court as was the case in Harmon." EPA Response at 11. Retreating from this initial assertion, EPA then acknowledges that in light of United States v. Utah Construction & Mining Co., 384 U.S. 394 (1966), ("Utah Construction"), "[t]here is authority for treating state administrative adjudications as if they were judgments." Id at 12. However, EPA argues that NYDEC was not acting in a judicial capacity as required by Utah Construction and that the Order on Consent Zoo Med entered into was more akin to a contract than a judgment. Id.

On independent grounds, EPA also asserts "[e]xcepting (sic) the penultimate statement by Respondent ...[that the cause of action is identical in the New York and EPA actions]... Respondent's statements ignore the presence of dual sovereignty..." and that New York was acting only under its own authority. EPA concludes that the suggestion there is a principal and agent relationship offends this sovereignty Id. at 15-18. For that reason, it concludes, the causes of action are not the same.

Finally, in response to the assertion that the case involves the same parties or their privies, EPA refers to the definition of privity set forth in Harmon, asserting that since New York would have no authority to bind the federal government even if a state suit named it as a party, the case is strengthened further where the federal government is not even named. Id. at 19.

In its Reply to EPA's Response, Zoo Med reiterates its reliance on Harmon as controlling in the present matter, and argues that agreements may be deemed judgments, even without a court's imprimatur. Responding to EPA's sovereign immunity arguments, Zoo Med asserts that: such arguments are not relevant; that NYDEC exercised EPA's authority by delegation through their cooperative agreement; and that there are "overwhelming similarities between the operative facts and legal

requirements in these two actions." Zoo Med Reply at 4-5.

III. The Court's Ruling on the Cross Motions for Accelerated Decision

Eleven of the fifteen counts are easily resolved. Counts I through VIII, IX, X, and XV each pertain to violations that occurred in North Carolina or Pennsylvania and, in one instance (Count XV) California. Any arguments mustered concerning New York's Department of Environmental Conservation's enforcement actions against Zoo Med obviously have no bearing on alleged violations occurring in states other than New York.[(14)] Thus Zoo Med's assertion that the New York action involves the same "nucleus of facts" is totally without merit. The actions arising out of alleged violations in states other than New York obviously stem from a separate and independent nucleus of operative facts. Under the theory advanced by Respondent's counsel, it would have New York's Department of Environmental Conservation usurp the EPA's role, not just in New York, but nationally, regarding the claims against Zoo Med. Unsurprisingly, no authority for this grand assertion was advanced by Zoo Med. Further, the notion that the date the Consent Order was signed controls the time span of the covered violations is at odds with the plain terms of the document itself. That document provided that the established New York violations occurred between July 26, 1996 and February 7, 1997 and, in addition to not relieving Zoo Med from federal, state or local laws, its preclusive effect was only for NYDEC based violations which occurred before the July 14, 1997 date of notification, by that entity's issuance of the Stop Use Order.

The Court finds that there are no new and material facts alleged in Count I of the Second Amended Complaint, that Zoo Med admitted Wipe Out 1 was not registered and that the assertion that it lacked sufficient information to admit or deny that it sold and distributed the product on or about February 26, 1996 was without a good faith basis. Given Exhibit 1, Zoo Med had an obligation to do more than simply assert the boiler plate response that it lacked sufficient information to admit or deny the claim. As the Court observed in its January 28, 1999 Order Reaffirming Granting of Second Amended Complaint, the Second Amended Complaint merely provided a valid description of each sales document and identified the same documentation applicable to Counts IX and X. Given that, the Court found that Zoo Med had not been unduly taxed and granted the Motion For Leave to Amend the Complaint. The Court also permitted Zoo Med to stand on its original Answer and merely submit a letter to that effect, an option for which Zoo Med availed itself. However, the option to stand on its original Answer was available only to the extent that it was "appropriate" for Zoo Med to do so. Clearly, given that the Motion to Amend was granted, the option did not excuse Zoo Med from responding to any new facts or documents not previously submitted. Based on the pleadings, the Court finds that the Motion for Accelerated Decision as to liability should be and is Granted as to Count 1.

For the same reasons articulated in the discussion above for Count I, the Court finds that an Accelerated Decision as to liability should be and is Granted as to Counts II, III, IV, V, VI, VII, and VIII. Each alleges the same offense of selling or distributing a pesticide that was unregistered. For each Count, Zoo Med admits that the cited products were not registered. For each of these Counts EPA has provided an invoice photocopy reflecting the pesticides named, the vendees and the invoice dates. Zoo Med's Answers to these Counts are not materially different, either admitting that it sold and distributed the product on the date charged or that it lacked sufficient information to admit or deny the sale or distribution. As discussed above, in the instances where it did not admit the sale or distribution, in the face of being presented with the invoices, Zoo Med had an obligation to do more than merely assert it lacked sufficient information to admit or deny the charge.

Counts IX and X, both stemming from violations found in Pennsylvania, charge Zoo Med with selling an adulterated pesticide, based upon laboratory test results showing no detection of the active ingredient for the Wipe Out 1 and 2 products.

EPA's Motion for Accelerated Decision is DENIED as to these two counts, as Zoo Med has raised a legitimate issue of material fact by challenging the accuracy of the laboratory results.

Counts XI, XII, XIII and XIV. These Counts raise a thornier issue than those previously discussed, as they do relate to the same time period, involve the same class of violation (sale of unregistered pesticides) and the same retail store (Royal Pet Supplies in Edgewood, New York) addressed in the NYDEC action. Thus these four counts legitimately raise the overfiling issue.

As mentioned, Zoo Med has argued that the principles of Harmon are applicable. There, the federal district court noted that, under RCRA Section 3006(a), EPA can delegate enforcement authority to states. In its ruling, determining that ... the Court looked with approval to the reasoning of the District Court in Horizon Coal Corp. v. U.S., 876 F.Supp. 1512 (N.D. Ohio 1993), rev'd on other grounds, 43 F. 3d 234 (6th Cir. 1994), which found that it would be against public policy to allow states authorization to aid in enforcement of that law and then ignore such state actions by considering them not binding on the United States. The District Court in Harmon found that the plain language of Section 3006 provides that the state program operates in lieu of the federal program as long as the former is equivalent and provides adequate enforcement and that such a construction avoids the "schizophrenic approach" of allowing EPA to reject part of a state's action on an incident-by-incident basis because it believes a particular penalty to be inadequate. Id.at 995. On separate grounds the Court in Harmon also found that EPA was barred from seeking a civil penalty on *res judicata* principles. Focusing on the privity element of a *res judicata* claim, which requires that the previous litigation involve the same parties or their privies, it noted that privity is established where the same legal rights have been asserted in both actions and the underlying legal interests are nearly identical. Id. at 997.

Others have found EPA's position on overfiling troublesome. In Martin Electronics, Inc., 1987 EPA App. LEXIS 6; 2 E.A.D. 381, June 22, 1987, the Chief Judicial Officer made reference to his initial analysis in BKK Corporation, RCRA Appeal No. 84-5, May 10, 1985, in which he determined that EPA was prohibited as a matter of law under RCRA "from taking enforcement action for RCRA violations in the face of adequate enforcement action for the same violations by an authorized state." Although this was subsequently vacated by the Administrator's Order on Petition for Reconsideration, issued October 23, 1985, it is noteworthy that although EPA did not oppose the policy result of Chief Judge McCallum that the Agency "should stay its hand in the face of reasonable and appropriate enforcement action by an authorized state...," it opposed that it be *required* to do so. BKK Corporation, Docket No. IX-84-0012, 1985 EPA App. LEXIS 40; 2 E.A.D. 93, October 23, 1985. The Administrator, recognizing the importance of the states' views on the issue, particularly since "the overwhelming majority of enforcement actions are to be initiated by the states," vacated the proceeding without deciding the controversy to permit debate outside of the adjudicatory setting. Id. at EPA App. LEXIS *4.

In Skarda Flying Service, Inc., FIFRA Docket No. VI-672C, 1994 EPA ALJ LEXIS 90, October 13, 1994,("Skarda"), Administrative Law Judge Jon G. Lotis addressed the overfiling issue in a FIFRA case. Although Judge Lotus found that EPA was not barred from bringing a FIFRA enforcement action where the State had already penalized the Respondent for the same acts, he also ruled that EPA must first make a determination that the state's enforcement action was inappropriate and give notice of that determination to the state before initiating its own enforcement action. In Skarda the state, *with no authority to assess fines*, was relegated to putting the Respondent on "probation," and putting a letter of reprimand in the file.

Administrative Law Judge Gerald Harwood examined such a Section 23 FIFRA cooperative agreement in Evergreen Pest Control, 1977 EPA ALJ LEXIS 13, September 29, 1977, a case involving use of a pesticide in a manner inconsistent with its label. The decision reflects that, under the agreement's terms, EPA was to take action only after following certain steps, including "discuss[ing] with the State Coordinator and County involved, the appropriateness of initiating such civil

action against pesticide users alleged to be in violation...." Despite the agreement's provision that "[c]ivil action under FIFRA shall be undertaken only when the alleged violator has previously been issued a written warning by EPA," the judge declined to accept the Respondent's argument that this was a condition precedent to instituting a civil penalty suit.(15)

Another FIFRA Cooperative Enforcement Agreement was examined by Administrative Law Judge Spencer T. Nissen in the case captioned In the Matter of John Sauter, 1995 EPA ALJ LEXIS 97, August 1, 1995. There the judge accepted the plain terms of the agreement, which expressly provided that "nothing in this Agreement is intended to usurp the authority of EPA to commence enforcement actions for alleged violations of FIFRA," concluding that there was no bar to EPA's action. Id. at *7.

In Wisconsin Public Intervenor, et al v. Ralph Mortier, et al, 501 U.S. 597; 1991 U.S. LEXIS 3632, June 21, 1991, the Supreme Court, in holding that FIFRA did not pre-empt local government regulation of pesticides, noted that the Act "specifies several roles for state...authorities [among them] authoriz[ing] the EPA Administrator to enter into cooperative agreements with the States to enforce FIFRA provisions." Id. at 601, also citing 7 U.S.C. Sections 136u, and 136w-1.

Although the focus of the decision involved whether the Attorney General's authority to prosecute was restricted under FIFRA Section 136w-1, in United States v. Orkin Exterminating Co., 688 F. Supp. 223; U.S. Dist. LEXIS 5724, June 9, 1998, the federal district court observed there that the Section "delegates primary enforcement authority to a state when either the Administrator of (sic) [or] the EPA has determined that a state is qualified to have primary enforcement authority" and noted that under Section 136 w-2, the Administrator retains and may utilize enforcement authority when the "state action is either nonexistant, inappropriate, or inadequate." Id. at 225, LEXIS **8, 9 (emphasis added). So too, the court in The New York State Pesticide Coalition, Inc. v. Jorling, 704 F. Supp. 26, U.S. Dist. LEXIS 464, January 19, 1989, stated that "...states may act as primary enforcers of FIFRA through cooperative agreements with the EPA." Id. at *30, LEXIS ** 13.

Nowhere in its Response to Respondent's Motion for Accelerated Decision does EPA challenge that the same products and sales are involved in both the New York State and EPA actions. Several aspects of EPA's discussion of Harmon warrant discussion. First, EPA concedes that in Harmon the agency made a determination that the state's RCRA enforcement action was inadequate and thereafter filed its own action. Second, EPA incompletely characterizes the district court's decision by stating that it simply "applied Missouri law and found the doctrine of *res judicata*(16) barred the enforcement of the action by the Region." EPA Opposition at 9. The Harmon District Court, apart from its discussion of the res judicata dimension, independently addressed the RCRA "Overfiling or Overriding State Action" issue, and determined that the plain language of the statute provided that the state program operates in lieu of the federal program. Adopting the reasoning of the court in Horizon Coal Corp., 876 F. Supp. 1512 (N.D. Ohio 1993), rev'd on other grounds, 43 F.3d 234 (6th Cir. 1994), it agreed that:

> ...it would be against public policy to promulgate a law whereby states can apply for and receive authorization from the United States to aid in the implementation and enforcement of that law if subsequent decisions issued under the authority of just such an approved program are not to be considered binding upon the United States.

Id. at *994, quoting Horizon at 1518.

EPA also presents an alternative theory for defeating Zoo Med's *res judicata* argument, by asserting that the United States and New York's "dual sovereignty" must be respected, precluding one sovereign's action from interfering with the other. Shifting to the distinct concept of sovereign immunity, and pointing to United States v. United States Fidelity & Guaranty Co., 309 U.S. 506 (1940), EPA submits that sovereign immunity precludes a finding that the privity element of res judicata can be established. EPA Opposition at 19-20. Although complicated by the fact that an Indian Nation was involved, in its essence the case involved a claim

brought by the United States on behalf of a particular Indian Nation under a bankruptcy reorganization proceeding. In that proceeding the debtor's larger cross-claim was allowed. Subsequently the United States brought an action against the debtor's surety with the surety asserting that *res judicata* applied. The Supreme Court held that, as the court in the initial proceeding lacked affirmative statutory authority to adjudicate the cross-claim, the doctrine of immunity applied. Id. at *515. But an issue of statutory authority is precisely what is involved here: whether the applicable FIFRA statutory provisions, giving authority to States under certain conditions, preclude EPA from independently pursuing the Counts already addressed in the New York proceeding.

As provided in FIFRA Section 23, "[t]he Administrator may enter into cooperative agreements with States ... to delegate ...the authority to cooperate in the enforcement of [the environmental pesticide control] subchapter..." 7 U.S.C. Section 136u. Section 26 adds that a State shall have primary enforcement responsibility for pesticide use violations[(17)] as long as the Administrator has determined that the state has adopted adequate pesticide use laws and regulations and that it has adopted adequate procedures for the enforcement of them. Apart from this provision, FIFRA Section 26 (Section 136w-1) also provides that where a State has entered into a cooperative agreement with the Administrator under Section 136u for the enforcement of pesticide use restrictions, it shall have the primary enforcement responsibility for pesticide use violations. Finally, FIFRA Section 27 (Section 136w-2) provides that significant violations of the pesticide use provisions are to be referred by the Administrator to the appropriate State officials and in those instances where it is determined that a State is inadequately enforcing the provisions, and fails to correct the identified deficiencies, the primary enforcement responsibility may be rescinded.

EPA entered into such a Section 23 cooperative agreement with New York in 1996 and 1997. Four documents from this time period are described as "Pesticide Enforcement" Programs. One, entitled "FFY '96-97 Pesticide Enforcement Program" ("NY Program") provides details about the agreement. Under the heading "Enforcement Activities" it states that "The NYSDEC will conduct cancellation/suspension inspections and other compliance monitoring activities to assure compliance with major pesticide regulatory actions..." Id. at p.2. The NY Program goes on to specifically reference FIFRA Sections 26 and 27 and provides that "[a]ll pesticide use cases identified as significant will be referred to NYSDEC by EPA..." and that if EPA "determines that the enforcement response to the violation is inappropriate, *EPA will first attempt* to negotiate an appropriate NYSDEC enforcement response." Only after EPA determines that the state is unwilling or unable to alter its original enforcement response, and so notifies the State with a detailed explanation of the reasons the State's action is deemed inadequate, may EPA bring its own enforcement action. Id. at 5-6.[(18)]

There has been no averment by EPA that such procedures were followed in this case. Accordingly, on the basis of the current record, Counts XI, XII, XIII, and XIV are dismissed under the doctrine of *res judicata* by virtue of the FIFRA statutory provisions discussed above, and the cooperative agreement between EPA and the State of New York which emanated from those provisions.

IV. Resolution of Other Pending Matters

Zoo Med's FOIA action

On March 18, 1999 EPA Counsel sent the Presiding Judge a letter calling attention to a letter from Respondent's Counsel concerning Zoo Med discovery requests. The letter, dated March 18, 1999 sought the voluntary production of certain EPA documents. After EPA advised that the request was misdirected, Zoo Med thereafter filed a Freedom of Information Act (FOIA) request seeking the information. EPA Counsel objects to Zoo Med's FOIA request on the basis that it is an attempt to circumvent the discovery provisions of the Consolidated Rules and in particular the

requirement that, under Section 22.19(f), "further discovery" may only be obtained with the approval of the Presiding Judge. This, in turn, provoked a reply by Counsel for Zoo Med which, while conceding that it was using that avenue to obtain information to support its position in this enforcement proceeding that the penalties sought were excessive, still objected to EPA's attempt to limit its rights under FOIA. Thereafter, on April 14, 1999, EPA replied, conceding that although Zoo Med had the right to acquire such information, but still contending that it is for the Presiding Judge to determine if "the information gathered using FOIA will be used as evidence in the subject action." Taking a stance somewhat at odds with the concession that Zoo Med has the right under FOIA to seek information, the same letter goes on to cite the Presiding Judge's Order Quashing EPA Subpoenas In re: Arco Chemical Company, Docket No. EPCRA-III-240, CERCLA -III-027, March 8, 1999 ("Arco") for the proposition that the prehearing exchange is the primary discovery mechanism and that the required showing must be made before a motion for other discovery will be granted. On this basis EPA apparently takes the position that Zoo Med is limited to the information derived from the prehearing exchange and that other information can only be obtained with the Presiding Judge's approval.

EPA's reliance on the Court's decision in Arco is ill-founded. There, it was determined that CERCLA Section 122 (e)(3)(B) was being used as a subterfuge and "not for the limited purpose of that provision of gathering information for the allocation of liability among those potentially responsible." Id. at 3. FOIA, as EPA apparently concedes, is an entirely independent statutory information gathering mechanism and this Court is without authority to interfere with its operation. Therefore, to the extent EPA's position can be construed as a Motion to restrict access to FOIA's provisions, it is DENIED. The separate issue of the admissibility of any information which may be derived from that endeavor will be resolved at the appropriate time, upon motion, and will be guided by Sections 22.19 and 22.22 of the Consolidated Rules.

EPA's Motion to Strike Exhibits[(19)]

On March 22, 1999 EPA filed a Motion to Strike Exhibits, a Motion directed towards the documents submitted in the Respondent's First Prehearing Exchange. Although the documents were identified in the Motion, by page number and an accompanying description, EPA asserts, without any particularized basis, that the documents are irrelevant or of little probative value. Zoo Med took note of this deficiency in its Reply to the Motion and argues that it need not commit to offering the documents into evidence nor must the documents be obviously relevant at the Prehearing Exchange juncture.[(20)]

Upon consideration, EPA's Motion is DENIED. The Court's earlier stated rulings in this Order substantially reduce the remaining issues in this matter. Given that an Accelerated Decision as to Liability has been granted as to Counts I, II, III, IV, V, VI, VII, and VIII and that Counts XI, XII, XIII, and XIV have been dismissed, the only issues remaining encompass Counts IX and X, for factual resolution of liability, and the determination of the appropriate penalty for all Counts not dismissed by this Order.

No further Motions will be entertained. This matter will now be set for hearing to resolve the identified outstanding issues.[(21)] Questions involving relevance and admissibility of documents exchanged by the parties will be resolved, to the extent there is contention, on an exhibit-by-exhibit basis at the hearing. Given this Order, the parties are directed to exchange a revised witness and exhibit list and submit a copy to the Presiding Judge by August 12, 1999. The witness list must identify the location, by city and state, for each witness. The parties are also to submit a revise estimate of the time needed to put on their respective sides of the case.

So Ordered.

_____

William B. Moran
United States Administrative Law Judge

Dated: July 28, 1999

1. The Court granted EPA's earlier filed Motion for Leave to File a Second Amended Complaint on January 13, 1999 and reaffirmed its Order on January 28, 1999.

2. The EPA's Memorandum in Support of Motion for Accelerated Decision contains several clerical errors, as does the Second Amended Complaint. In the former, as two examples, the document repeats, at page 1, Count XI for two distinct violations and describes, again at page 1, the Counts for adulteration as Counts X and XI, instead of IX and X. In the Complaint, even on the third try, Count XIV, paragraph 76 states only: "On or about October 9, 1996, Respondent had not." (The following paragraph allowed the Court to glean that EPA was alleging another failure to register a pesticide violation.) The Court notes that in other cases, involving different EPA counsel, EPA has failed to be attentive to clerical details. *See* In the Matter of: Auto Alliance International, Inc., 5 EPCRA 98-023, Order on Motions, May 13, 1999 in which EPA was reminded to be more attentive to details. Clerical details are important. It is counsel's responsibility to review complaints, motions, and briefs for errors prior to their submission.

3. The Motion relates that when Respondent had the EPA samples tested on its own, the active ingredient was detected, but at a level less than stated on the label.

4. Accordingly, unless otherwise specified, all references to the Complaint, refer to the Second Amended Complaint.

5. The attached Exhibits, Numbers 1 through 8, first appear with the Second Amended Complaint. Each of these Exhibits are apparent copies of Zoo Med documents.

6. In response to the assertion by Zoo Med that it was unfair to require it to respond to EPA's third version of the Complaint, the Court, in its January 28, 1999 Order Reaffirming Granting of Second Amended Complaint, permitted Zoo Med "[if] appropriate, given the content of the Second Amended Complaint, ... [to] simply stand on its original answer by filing a letter to that effect." January 28, 1999 Order at 2. (emphasis added).

7. For purposes of a more orderly discussion, all the violations alleging the sale of unregistered pesticides are discussed first. For that reason, Counts IX and X are intentionally discussed out of sequence.

8. Among other possible interpretations, two are that Zoo Med could be stating that while it sold an adulterated pesticide, the sale does not constitute a FIFRA violation, or that having sold it and conceding that it constitutes a violation, the penalty proposed by EPA can not be imposed.

9. The related nature of the issues raised in the Motions necessitates that they be discussed together.

10. There is additional reason to doubt whether Zoo Med genuinely opposes EPA's Motion for Accelerated Decision as to most of the Counts, as its Opposition only "moves for a hearing on its liability under Counts IX-X ... [and] as to Count XV." Apart from its claim of res judicata, which it asserts for all Counts, and its standing challenge to the appropriateness of the penalty proposed for each Count, Zoo Med makes clear that genuine issues of material fact are in dispute only for Counts IX, X, and XV. Opposition at 2, and Exhibit 1, attached thereto.

11. Zoo Med's Cross Motion for Accelerated Decision was combined with its Opposition to EPA's Motion for Accelerated Decision.

12. Under New York law res judicata claims are assessed by determining "(1) whether there is a final judgment rendered on the merits; (2) whether the same cause of action is asserted in the later litigation; and (3) whether the case involves the same parties or their privies." Zoo Med Cross Motion for Accelerated Decision at 13-14.

13. With regard to the second element Zoo Med cites In the Matter of the Beaumont Company, Docket No. RCRA-III-238, 1994 EPA ALJ LEXIS 32 at *43 (October 24, 1994), interlocutory order granted, Docket No. RCRA-III-238, 1994 EPA ALJ LEXIS 31 (December 15, 1994).

14. Mysteriously, EPA only obliquely makes this obvious point.

15. The judge expressed the view that "a much stronger showing of the intention of the parties than is manifested by [the] agreement" was needed to establish EPA's being bound to first issue warnings, although there was no expression of what would constitute that "stronger showing." Id. at *21.

16. Even in regard to its discussion of the *res judicata* aspect, in attempting to distinguish the present case from Harmon, EPA takes an elusive position, arguing first that the negotiated consent degree in Harmon became a state court judgment and thus entitled to res judicata effect, while here, though Zoo Med's negotiations with New York ended with an Order on Consent, as it was only an administrative judgment, it is not entitled to deference under the Full Faith and Credit Clause. However, EPA then immediately concedes that, under United States v. Utah Construction & Mining Co., 384 U.S. 394 (1966), there is authority for giving similar effect to state administrative judgments, but attempts to distinguish Utah Construction by asserting that the Zoo Med Order on Consent resembles a contract more than a judgment. EPA Opposition at 11-14. Such tortured reasoning deserves little comment.

17. In this context, the term "pesticide use" does not appear to be defined nor have the parties identified such an applicable definition. As used here, the term appears to relate broadly to the provisions of the Environmental Pesticide Control Subchapter.

18. This arrangement is consistent with the "Final FY 1995 Pesticide Cooperative Agreement Guidance," issued April 26, 1994, in providing that EPA may bring its own enforcement action *only after* there has been a determination of a state's inappropriate enforcement response and issuance of a notice to the state articulating the basis for that conclusion.

19. In the Motion, EPA also alludes to the Respondent's silence on the ability to pay issue, noting that no documents on that subject were submitted with Zoo Med's First Prehearing Exchange, but no relief is sought as the Motion only "raises questions" about the accuracy of the Respondent's claims. In any event, Zoo Med's Reply moots this issue by making it clear that it is not asserting an ability to pay issue. Zoo Med Reply at 4.

20. The parties continued to joust over this matter with EPA filing a Motion seeking

leave to respond to Zoo Med's opposition, followed by Zoo Med's Opposition to that Motion, and EPA's Response to the Opposition. Each of these were considered by the Court.

21. A conference call will be initiated by the Court to determine the date and location for the hearing.