UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	**)**	
	)	
CHURCH & DWIGHT CO., INC.,	**)**	**DOCKET NO. FIFRA-02-2001-5109**
	)	
Respondent	**)**	

ORDER DENYING RESPONDENT'S MOTION TO DISMISS

BACKGROUND

On June 22, 2001, the United States Environmental Protection Agency, (the "EPA" or "Complainant") filed a Complaint under Section 14(a)(1) of the of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136*l*(a)(1), alleging that Respondent, Church & Dwight Co., Inc. ("Respondent"), distributed or sold an unregistered pesticide, Arm & Hammer® Antibacterial Carpet and Room Odor Neutralizer ("Product"), on fifteen separate occasions in violation of Section 12(a)(1)(A) of FIFRA, 7 U.S.C. §136j(a)(1)(A). The Complaint seeks a civil administrative penalty of $82,500 for these alleged violations.

On August 27, 2001, Respondent filed a Motion to Dismiss on the ground that the Arm & Hammer® Antibacterial Carpet and Room Deodorizer[1] qualifies for the minimum risk pesticide exemption contained in the FIFRA regulations at 40 C.F.R. §152.25(g), which expressly exempts certain pesticides from the requirements of FIFRA, including registration.[2] Respondent argues that as the regulations allow for the sale of minimum risk pesticides without registration, the Complaint must be dismissed for failure to state a claim upon which relief may be granted. The EPA opposes

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[1] Respondent, in its Motion to Dismiss, refers to the pesticide product at issue as Arm & Hammer® Antibacterial Carpet and Room Deodorizer. The Complaint identifies the product as Arm & Hammer® Antibacterial Carpet and Room Odor Neutralizer.

[2] Respondent's Motion to Dismiss was not served on the Administrative Law Judge. The motion, upon request by the Administrative Law Judge, was sent to the Administrative Law Judge on September 17, 2001.

the Motion to Dismiss.

STANDARD FOR ADJUDICATING RESPONDENT'S MOTION

Respondent filed its Motion To Dismiss pursuant to Section 22.20(a) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (the "Rules of Practice"), 40 C.F.R. § 22.20(a). Section 22.20(a) of the Rules of Practice, 40 C.F.R. § 22.20(a), concerning accelerated decisions and decisions to dismiss, provides as follows:

> The Presiding Officer,[3] may at any time render an accelerated decision in favor of a party as to any or all parts of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law. The Presiding Officer, upon motion of the respondent, may at any time dismiss a proceeding without further hearing or upon such limited additional evidence as he requires, on the basis of failure to establish a prima facie case or other grounds which show no right to relief on the part of the complainant.

In connection with its Motion to Dismiss, Respondent maintains that its motion is analogous to a motion to dismiss for failure to state a claim upon relief may be granted under Section 12(b)(6) of the Federal Rules of Civil Procedure. Motion to Dismiss at 2. Respondent points out that the standards for deciding such a motion are well established.

> A complaint should not be dismissed for failure to state a claim unless it appears beyond a doubt that plaintiffs can prove no set of facts in support of their claim which would entitle them to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46, (1957); *see also, May v. Commissioner of Internal Revenue*, 752 F.2d 1301, 1303 (8th Cir.1985); *Fusco v. Xerox Corp*., 676 F.2d 332, 334 (8th Cir. 1982). In reviewing the sufficiency of a complaint, "[t]he allegations of plaintiffs' complaint must be assumed to be true, and further, must be construed in their favor." Scheuer v. Rhodes, 416 U.S. 232, 236 (1974); *May v. Commissioner of Internal Revenue, supra*.

Motion to Dismiss at 2.

In its Motion to Dismiss, Respondent does not refute that it distributed or sold a pesticide, as that term is defined under FIFRA. Rather, Respondent maintains that the EPA

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[3] The term "Presiding Officer" here means the Administrative Law Judge designated by the Chief Administrative Law Judge to serve as the Presiding Officer. 40 C.F.R. § 22.3(a).

failed to take into account the minimum risk pesticide exemption contained in the FIFRA regulations at 40 C.F.R. §152.25(g), which expressly exempts certain pesticides from the requirements of FIFRA, including registration. Respondent asserts that the Product qualifies for this minimum risk pesticide exemption. As a result, Respondent argues that the EPA can prove no set of facts in support of its claim that would entitle it to relief under the law even when the allegations of the Complaint are assumed to be construed in the EPA's favor.

The EPA correctly points out that Respondent's claim that its Product is exempt from the FIFRA registration requirements pursuant to the exemption under 40 C.F.R. §152.25(g) is an affirmative defense. Complainant's Response to Respondent's Motion to Dismiss ("Complainant's Response") at 1. As such, Respondent bears the burden of proof for this defense and it is not a matter that the EPA must establish as part of its *prima facie* case. *See* 2A Moore's Federal Practice Manual 8-17a (2d ed. 1994). Under such circumstances, Respondent's motion is deemed to be more appropriately addressed within the context of the standard for adjudicating a motion for accelerated decision rather than for a motion to dismiss. I observe that the standard for deciding a motion to dismiss, as characterized by Respondent, is more stringent than that for a motion for accelerated decision.

Motions for accelerated decision under 40 C.F.R. § 22.20(a) are akin to motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure ("FRCP").[4] Rule 56(c) of the FRCP provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is *no genuine issue of any material fact* and that the moving party is entitled to a judgment as a matter of law" (emphasis added). Thus, by analogy, Rule 56 provides guidance for adjudicating motions for accelerated decision. *See In the Matter of CWM Chemical Service*, TSCA Appeal No. 93-1, 6 E.A.D. 1 (EAB, May 15, 1995).

Therefore, I look to federal court decisions construing Rule 56 of the FRCP for guidance in applying 40 C.F.R. § 22.20(a) to the adjudication of motions for accelerated decisions. In interpreting Rule 56(c), the United States Supreme Court has held that the party moving for summary judgment has the burden of showing the absence of a genuine issue as to any material fact and that the evidentiary material proffered by the moving party in support of its motion must be viewed in the light most favorable to the opposing party. *See Anderson v. Liberty Lobby, Inc., 477*

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[4] The Federal Rules of Civil Procedure are not binding on administrative agencies but many times these rules provide useful and instructive guidance in applying the Rules of Practice. See *Oak Tree Farm Dairy, Inc. v. Block, 544 F. Supp. 1351, 1356 n. 3 (E.D.N.Y. 1982); In re Wego Chemical & Mineral Corporation, TSCA Appeal No. 92-4, 4 E.A.D. 513 at 13 n. 10* (EAB, Feb. 24, 1993).

U.S. 242, 248 (1985); Adickes v. S. H. Kress & Co., 398 U.S. 144, 157 (1970). Further, the judge must draw all reasonable inferences from the evidentiary material in favor of the party opposing the motion for summary judgment. *See Anderson, supra, at 255; Adickes, supra, at 158-159; see also Cone v. Longmont United Hospital Assoc., 14 F.3d 526, 528 (10th Cir. 1994).*

In assessing materiality for summary judgment purposes, the Court has found that a factual dispute is material where, under the governing law, it might affect the outcome of the proceeding. *Anderson, supra, at 248; Adickes, supra, at 158-159.* The substantive law identifies which facts are material. *Id*.

The Court has found that a factual dispute is genuine if the evidence is such that a reasonable finder of fact could return a verdict in favor of the nonmoving party. *Id*. Further, in *Anderson*, the Court ruled that in determining whether a genuine issue of fact exists, the judge must decide whether a finder of fact could reasonably find for the nonmoving party under the evidentiary standards in a particular proceeding. There must be an incorporation of the evidentiary standard in the summary judgment determination. *Anderson, supra, at 252.* In other words, when determining whether or not there is a genuine factual dispute, the judge must make such inquiry within the context of the applicable evidentiary standard of proof for that proceeding.

Once the party moving for summary judgment meets its burden of showing the absence of genuine issues of material fact, Rule 56(e) then requires the opposing party to offer any countering evidentiary material or to file a Rule 56(f) affidavit.[5] Rule 56(e) states: "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but must set forth specific facts showing there is a genuine issue for trial." However, if the moving party fails to carry its burden to show that it is entitled to summary judgment under established principles, then no defense is required. *Adickes, supra, at 156.*

The type of evidentiary material that a moving party must present to properly support a motion for summary judgment or that an opposing party must proffer to defeat a properly supported motion for summary judgment has been examined by the Court. *See Celotex Corp. v. Catrett, 477 U.S. 317 (1986); see also Anderson, supra; Adickes, supra.* The Court points out that Rule 56(c) itself provides that the decision on a motion for summary judgment must be based on the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, submitted in support or opposition to the motion. With regard to the sufficiency of the evidentiary

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[5] Rule 56(f) states:

> (f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

material needed to defeat a properly supported motion for summary judgment, the Court has found that the nonmoving party must present "affirmative evidence" and that it cannot defeat the motion without offering "any significant probative evidence tending to support" its pleadings. *Anderson, supra, at 256* (quoting *First National Bank of Arizona v. Cities Service Company, 391 U.S. 253, 290 (1968)).*

More specifically, the Court has ruled that the mere allegation of a factual dispute will not defeat a properly supported motion for summary judgment as Rule 56(e) requires the opposing party to go beyond the pleadings. *Celotex, supra, at 322; Adickes, supra.* The Court has noted, however, that there is no requirement that the moving party support its motion with affidavits negating the opposing party's claim or that the opposing party produce evidence in a form that would be admissible at trial in order to avoid summary judgment. *Celotex, supra, at 323-324.* The parties may move for summary judgment or successfully defeat summary judgment without supporting affidavits provided that other evidence referenced in Rule 56(c) adequately supports its position.

The regulation governing motions for accelerated decision under 40 C.F.R. § 22.20(a) does not define or provide examples to illustrate the meaning of the phrase "genuine issue of material fact," nor does it provide significant guidance as to the type of evidence needed to support or defeat a motion for accelerated decision. Section 22.20(a) states, in pertinent part, that the Presiding Officer may render an accelerated decision "without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law." As an adjunct to this regulation, I note that under another governing regulation, a party's response to a written motion, which would include a motion for accelerated decision, "shall be accompanied by any affidavit, certificate, [or] other evidence" relied upon. 40 C.F.R. § 22.16(b).

Inasmuch as the inquiry of whether there is a genuine issue of material fact in the context of an accelerated decision is quite similar to that in the context of a summary judgment and in the absence of significant instruction from the regulation governing accelerated decisions, the standard for that inquiry as enunciated by the Court in *Celotex, Anderson,* and *Adickes* is found to be applicable in the accelerated decision context.[6]

Moreover, review by the Environmental Appeals Board ("EAB") in determining whether there is a genuine issue of material fact requiring an oral evidentiary hearing is governed by the "administrative summary judgment" standard which was articulated by the EAB in *Green Thumb Nursery, Inc.*, FIFRA Appeal No. 95-4a, 6 E.A.D. 782, 793 (EAB, Mar. 6, 1997). Under this standard, there must be timely presentation of a genuine and material factual dispute, similar to judicial summary judgment under FRCP 56, in order to obtain an evidentiary hearing. Otherwise, an accelerated decision based on the documentary record is sufficient. *Id*. *Compare* In the *Matter*

[6] An accelerated decision, as a summary judgment, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. Rule 56(c) FRCP; 40 C.F.R. 22.20(a).

of Mayaguez Regional Sewage Treatment Plant, NPDES Appeal No. 92-23, 4 E.A.D. 772, 781 (EAB, Aug. 23, 1993) (wherein the EAB adopted the standard for summary judgment articulated by the Court in *Anderson* to determine whether there is a genuine issue of material fact warranting an evidentiary hearing under 40 C.F.R. § 124.74 for the issuance of a permit under Section 301(h) of the Clean Water Act).

The evidentiary standard of proof in the matter before me, as in all other cases of administrative assessment of civil penalties governed by the Rules of Practice, is a "preponderance of the evidence." 40 C.F.R. § 22.24. Thus, by analogy, in determining whether or not there is a genuine factual dispute, I, as the judge and finder of fact, must consider whether I could reasonably find for the nonmoving party under the "preponderance of the evidence" standard.[7] In addressing the threshold question of the propriety of a motion for accelerated decision, my function is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for an evidentiary hearing. *See Anderson, supra, at 249.*

Accordingly, by analogy, a party moving for accelerated decision must establish through the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, the absence of genuine issues of material fact and that it is entitled to judgment as a matter of law by the preponderance of the evidence. In this regard, the moving party must demonstrate, by a preponderance of the evidence, that no reasonable presiding officer could not find for the nonmoving party. On the other hand, a party opposing a properly supported motion for accelerated decision must demonstrate the existence of a genuine issue of material fact by proffering significant probative evidence from which a reasonable presiding officer could find in that party's favor by a preponderance of the evidence.

DISCUSSION

The EPA filed the Complaint in this matter against Respondent under the authority of Section 14(a)(1) of FIFRA. The Complaint alleges that Respondent sold the Product, an unregistered pesticide, on fifteen separate occasions in violation of Section 12(a)(1)(A) of FIFRA. Respondent admits that the Product is a pesticide as defined by FIFRA, but argues that the Product falls within the minimum risk pesticide exemption contained in the FIFRA regulations at 40 C.F.R. §152.25(g). Respondent's Answer ("Answer") at ¶ 17; Respondent's Motion to Dismiss at 2-5.

The federal regulations provide that certain pesticides are exempt from FIFRA regulation, including registration, if certain requirements are met. 40 C.F.R. Subpart B. Under the minimum

[7] Under the governing Rules of Practice, an Administrative Law Judge serves as the decision maker as well as the fact finder. *See* 40 C.F.R. § § 22.4(c), 22.20, 22.27.

risk exemption claimed by Respondent, a product is exempt if it contains certain active and inert ingredients which must be identified on the label of the product and

> (ii) the product must not bear claims either to control or mitigate microorganisms that pose a threat to human health, including but not limited to disease transmiting bacteria or viruses, or claims to control insects or rodents carrying specific diseases, including, but not limited to ticks that carry Lyme disease.
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> (iii) The product must not include any false and misleading labeling statements, including those listed in 40 C.F.R. 156.10(a)(5)(i) through (viii).

40 C.F.R. §§ 152.25(g)(3)(ii),(iii).

Respondent argues that its Product meets these requirements of the minimum risk pesticide exemption rule.[8] The label on the Product bears claims such as: "Antibacterial - Fights odor-causing germs", "Fights odor-causing germs," "To fight germs that cause odors in your carpet," "Arm & Hammer Anti-Bacterial Odor Control Formula combines proven antibacterial technology," "Fight odor causing germs every time you use it," and "It penetrates deep into your carpet to fight odor causing germs." Respondent maintains that these claims are not prohibited because they do not mention specific public health pathogens or use established terms of heightened efficacy associated with public health pathogens. Rather, Respondent asserts that its labels make only aesthetic claims. In support of its argument, Respondent cites the EPA's published Labeling Guidelines for Pesticide Use Directions- Antibacterial Products-Subdivision H ("Subdivision H") guidance document, which allegedly allows such language and is consistent with the FIFRA regulations.

Respondent further argues that in addition to its avoidance of using claims of heightened efficacy, its antibacterial claims use qualifying language such that the terms "antibacterial" and "germs" are clearly not referring to human health microorganisms. It is maintained by Respondent that in all circumstances, the term "antibacterial" is qualified as applying to odor-causing germs and that the term "germs" is well qualified as referencing aesthetic-only claims. Respondent thus argues that there is no question that the Product is not a public health pesticide, and that the Product's label cannot be viewed as containing false or misleading claims. Again, Respondent cites Subdivision H in support of its position.

Respondent asserts that in 1988 the EPA found that similar claims were acceptable. Respondent's Reply to Complainant's Response to Respondent's Motion to Dismiss ("Respondent's Reply") at 4. According to Respondent, the EPA found that the label on Kitty Litter® Brand Premium Cat Box Filler, which had similar claims regarding odor causing germs and bacteria, was acceptable. Further, Respondent cites correspondence between counsel for Respondent and Jeff

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[8] Complainant does not dispute that Respondent's Product contains the prescribed active ingredients for the minimum risk pesticide exemption under 40 C.F.R. § 152.25(g)(1).

Kempter of the EPA's Office of Pesticide Programs- Antimicrobial Division and Dr. Adrian J. Enache, leader of the pesticides team for Region II of the EPA, in January 2001 which discusses efforts to produce an acceptable label.[9] In response to the EPA's request, Respondent replaced the term "odor-causing germs" with "odor-causing bacteria" and removed the term "antibacterial" from the Product's label even though Respondent did not believe that the former terms were misleading. The January 30, 2001 letter from Dr. Enache states that the EPA accepted Respondent's proposed changes but the letter did not specifically address each change.

Finally, Respondent argues that the Product does not bear any false or misleading claims. Respondent asserts that the labeling statements at issue do not fall into any of the regulatory criteria for misleading claims. Respondent notes that under the Pesticide regulations, a product will not qualify for the minimum risk exemption if it bears statements that fall under the following categories:

> (i) A false or misleading statement concerning the composition of the product;
> (ii) A false or misleading statement concerning the effectiveness of the product as a pesticide or device;
> (iii) A false or misleading statement about the value of the product for purposes other than as a pesticide or device;
> (iv) A false or misleading comparison with other pesticides or devices;
> (v) Any statement directly or indirectly implying that the pesticide or device is recommended or endorsed by any agency of the Federal Government;
> (vi) The name of a pesticide which contains two or more principal active ingredients if the name suggests one or more but not all such principal active ingredients even though the names of the other ingredients are stated elsewhere in the labeling;
> (vii) A true statement used in such a way as to give a false or misleading impression to the purchaser;
> (viii) Label disclaimers which negate or detract from labeling statements required under the Act and these regulations;

40 C.F.R. § 156.10(a)(5)(i)-(viii).

In particular, Respondent submits that, contrary to the EPA's assertion, the claim "proven antibacterial technology" does not imply that the Product is endorsed by the EPA or any other federal agency. Respondent's Reply at 6. Respondent contends that EPA's assertion is baseless and ignores the thousands of independent laboratories and test centers throughout the country that conduct such tests. *Id.* As noted above, Respondent otherwise

[9] This correspondence took place after an inspection of Respondent's corporate headquarters in October 2000.

maintains that its Product's labels contain no false or misleading statements.

The EPA opposes Respondent's Motion to Dismiss. The EPA argues that the claims on Respondent's Product's label do not meet the regulatory criteria for an exemption as a minimum risk pesticide. Complainant's Response at 2. The EPA contends that Respondent's Product's labeling claims to control or mitigate microorganisms that pose a threat to human health. The EPA also argues that the Product labeling includes false or misleading statements concerning the effectiveness of the product as a pesticide and the direct or indirect implication of federal agency recommendation or endorsement.

Specifically, the EPA argues that Respondent's use of the terms "antibacterial"[10] and "germs" in the Product's label and shipping records is a human health claim. The EPA also argues that these terms cannot be properly qualified with language denoting a non-human health claim because consumers have long associated these terms with products that provide human health protection. In support of this argument, the EPA cites Pesticide Registration (PR) Notice 2000-1, Applicability of the Treated Articles Exemption to Antimicrobial Pesticides, March 6, 2000, and the Administrative Law Judge's ruling in *Microban Products Company*, Docket No. FIFRA 98-H-01, Order on Motions for Discovery, 1998 EPA ALJ LEXIS 135 (Sept. 18, 1998.)

The EPA additionally argues that the terms "antibacterial" and "odor-causing germs" exceed the limitation of effectiveness against non-health related microorganisms. According to the EPA, these terms are false or misleading because they imply broad and indefinite pesticidal efficacy. The EPA maintains that Subdivision H, cited by Respondent, is a non-regulatory guidance document and is not intended to be an exhaustive list of acceptable claims.

The EPA cites PR Notice 2000-1 as discussing the term "antibacterial" as a broad claim relating to human health and draft PR Notice 00-, List of Pests of Significant Public Health Importance, as limiting the term "public health." Respondent argues that PR Notice 2000-1 does not apply to minimum risk pesticides. Respondent's Reply at 3. The EPA also cites the Proposed Rule for the Registration Requirements for Antimicrobial Pesticide Products and Other Pesticide Regulatory Changes which sets forth criteria for determining whether claims are misleading. Proposed Rule, 64 Fed. Reg. 50671, 50726 (Sept. 17, 1999). In this regard, the EPA states that its policies concerning pesticidal claims have been revised and noticed by publication.

The EPA notes that Subdivision H provides that the general term "antibacterial," without any qualifiers, is too broad and is generally not acceptable in product labeling. Subdivision H at §101-

[10] The EPA emphasizes that the word "antibacterial" appears in larger and bolder letters.

1(e). On the other hand, Respondent avers that the term "antibacterial" is a broad claim that the product is effective against all bacteria. Respondent notes that in every instance where the claim "antibacterial" is used, the qualifier "fights odor-causing germs" immediately follows. As such, Respondent argues that the general claim "antibacterial" is always placed in proper context limiting the claim to aesthetic claims only.[11] Respondent's Reply at 2.

The guidance documents cited by the parties are not clear or persuasive on the questions at issue. Moreover, these documents are not binding. Although the proposed rules cited by the EPA appear to alter and clarify the EPA's views on antibacterial products and labeling claims, the proposed rules are not binding. As pointed out by Respondent, the EPA's attempt to rely upon these proposed rules in an enforcement action is contrary to established case law because proposed regulations have no legal effect. *See Sweet v. Sheahan, 235 F.3d 80, 87 (2d Cir. 2000), citing*

LeCroy Research Sys. Corp. v. Commissioner, 446 F.2d 981, 990 n. 4, 993 n. 7 (2d Cir. 1984); *see also Vanscoter v. Sullivan*, 920 F.2d 1441, 1449 (9th Cir. 1990). Respondent's Sur-Reply to Complainant's Supplemental Response at 2. Even if the rule were to become final, the EPA must show that it applies to claims made before the rule became final. This is not to say, however, that the EPA cannot establish that its earlier position as stated in Subdivision H is sufficiently clear or that this nonbinding guidance document is consistent with the governing FIFRA regulation.

Moreover, upon reading the requirements for the minimum risk pesticide exemption under 40 C.F.R. § 152.25(g), I find that there are genuine questions as to whether Respondent's Product bears claims either to control or mitigate microorganisms that pose a threat to human health, including but not limited to disease transmitting bacteria or viruses, or includes misleading labeling statements.[12] 40 C.F.R. §§ 152.25(g)(3)(ii), (iii). At this juncture, I find that the parties have raised genuine issues of material fact that only can be properly adjudicated following a full evidentiary hearing. Under the standard for adjudicating motions for accelerated decisions, discussed above, the evidentiary material proffered by the moving party must be viewed in the light most favorable to the opposing party and all reasonable inferences from the evidentiary material must be drawn in favor of the nonmoving party. I emphasize that in making this threshold determination, I have not weighed the evidence and determined the truth of the matter but have simply determined that Complainant has adequately raised genuine issues of material fact for evidentiary hearing and that Respondent has not established that it is entitled to judgment as a matter of law. Accordingly, Respondent's Motion to Dismiss is Denied. *See* Section 22.20(a) of the Rules of Practice, 40 C.F.R. § 22.20(a).

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[11] The EPA asserts that the term "antibacterial" appears in the Product's shipping records without any qualifying language. Complainant's Supplemental Response at 5.

[12] The question of whether statements in the Product's labeling directly or indirectly imply that the pesticide is recommended or endorsed by any agency of the Federal Government is not reached. 40 C.F.R. §§ 152.25(g)(3)(iii), 156.10(a)(5)(v).

ORDER

Respondent's Motion To Dismiss is Denied.

Dated: November 16, 2001
Washington, DC

Barbara A. Gunning
Administrative Law Judge

In the Matter of Church & Dwight Company, Inc., Respondent
Docket No. FIFRA-02-2001-5109

CERTIFICATE OF SERVICE

I certify that the **Order Denying Respondent's Motion To Dismiss**, dated November 16, 2001, was sent this day in the following manner to the addressees listed below.

_____
Maria Whiting-Beale
Legal Staff Assistant

Dated: November 16, 2001

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