UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
	)	
FRM CHEM, INC.,	)	**DOCKET NO. FIFRA-07-2008-0035**
ADVANCED PRODUCTS TECHNOLOGY, INC.,	)	**DOCKET NO. FIFRA-07-2008-0036**
SYNISYS, INC.,	)	**DOCKET NO. FIFRA-07-2009-0041**
CUSTOM COMPOUNDERS, INC.,	)	**DOCKET NO. FIFRA-07-2009-0042**
	)	
	)	
RESPONDENTS	)	

ORDER ON COMPLAINANT'S RENEWED MOTION TO AMEND COMPLAINTS AND MOTION FOR OTHER DISCOVERY PURSUANT TO 40 C.F.R. § 22.19(e)

The Initial Prehearing Exchange in these consolidated cases was completed on March 17, 2010, when Complainant filed its Rebuttal Prehearing Exchange. Included in that Rebuttal Prehearing Exchange was a Motion to Amend Complaints and for Other Discovery Pursuant to 40 C.F.R. § 22.19(e) ("Initial Motion"). This motion was accompanied by several attachments and a Memorandum in Support of Complainant's Motion to Amend Complaints and for Other Discovery Pursuant to 40 C.F.R. § 22.19(e) ("Supporting Memo"). On March 29, 2010, Respondent filed a response entitled Respondents' Reply to Complainant's Motion to Amend Complaints and for Other Discovery Pursuant to 40 C.F.R. § 22.19(e) ("Initial Response"). Briefing on that motion was completed on April 7, 2010, when Complainant filed its Reply to Respondent's Reply to Complainant's Motion to Amend Complaints and for Other Discovery Pursuant to 40 C.F.R. § 22.19(e) ("Initial Reply").

On April 15, 2010, in an Order addressing only the Motion to Amend portion of the Initial Motion, I denied the Motion to Amend due to Complainant's failure to file proposed amended complaints

along with its Initial Motion.[1/] The Motion for Other Discovery Pursuant to 40 C.F.R. § 22.19(e) remained pending before me. On April 27, 2010, this Tribunal received a new motion from Complainant also entitled Complainant's Motion to Amend Complaints ("Motion"). By the Motion, Complainant states that it:

> re-files the Motion to Amend Complaints [and] requests that the Presiding Officer consider the documents [including the Supporting Memo] filed [with is Initial Motion on March 15, 2010] to be supporting documents in the instant Motion as well as the portion of the March 15, 2010 Motion still under consideration.

Motion at 2. On May 7, 2010, Respondents submitted a one-page response entitled "Respondents' Reply to Complainant's Motion to Amend Complaints" ("Response"), which adopts the Initial Response of March 29, 2010. On May 11, 2010, Complainant filed its reply entitled "Complainant's Reply to Respondents' Reply to Complainant's Motion to Amend Complaints" ("Reply"), which adopts the Initial Reply of April 7, 2010, and offers additional arguments.

This Order will address the instant Motion and the portion of the Initial Motion still pending (the Motion for Other Discovery), first ruling on the Motion to Amend the Complaints and then ruling on the Motion for Other Discovery.

I. Motion to Amend

In the part of its Motion seeking leave to amend the Complaints, Complainant requests permission to add parties to two cases. First, Complainant seeks to add Respondent Advanced Products Technology, Inc. ("Advanced Products") as a party in the matter of Custom Compounders, Inc., Docket No. FIFRA-07-2009-0042. Second, Complainant seeks to add Respondent FRM Chem, Inc. ("FRM") as a party in the matter of Synisys, Inc., Docket No. FIFRA-07-2009-0042.

Complainant seeks these changes based on representations made by the Respondents Custom Compounders, Inc. ("Custom Compounders") and Respondent Synisys, Inc. ("Synisys") in their respective Answers and their joint Prehearing Exchange. Specifically, Custom Compounders and Synisys allege that

---

[1/] On April 26, 2010, these consolidated cases were scheduled for hearing in St. Louis, Missouri.

Respondents Advanced Products and FRM are responsible for the alleged violations stated in the respective Complaints.

Second, Complainant seeks to add two additional parties, Keith G. Kastendieck and Karlan C. Kastendieck, to each of the consolidated cases. Complainant appears to ground its request upon allegations that both individuals were "personally involved in the sales and distributions of the two FRM Chem, Inc. products alleged in the four Complaints." Supporting Memo at 13.

The final amendment Complainant seeks to make involves the addition of five (5) counts to the Complaint in Advanced Products Technology, Inc., Docket No. FIFRA 07-2008-0036, and a corresponding increase in penalty proposed in that case. The additional counts allege that Advanced Products engaged in five (5) separate unlawful sales or distributions of an unregistered pesticide during the first seven (7) months of 2009. Complainant seeks to add $37,500 to the proposed penalty in that case, for a total penalty of $63,500.

Applicable Standard

This proceeding is governed by 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. §§ 22.1-22.32. Section 22.14(c) of the Rules of Practice allows the complainant to amend the complaint once as a matter of right at any time before the answer is filed, and otherwise "only upon motion granted by the Presiding Officer." 40 C.F.R. § 22.14(c). The Rules of Practice do not, however, illuminate the circumstances when amendment of the complaint is or is not appropriate. In the absence of administrative rules on this subject, the Environmental Appeals Board ("EAB") has offered guidance by consulting the Federal Rules of Civil Procedure ("FRCP")[2/] as they apply in analogous situations. *In re Carroll Oil Co.*, 10 E.A.D. 635, 649 (EAB 2002); *In re Asbestos Specialists, Inc.*, 4 E.A.D. 819, 827 n. 20 (EAB 1993).

The FRCP adopt a liberal stance toward amending pleadings, stating that leave to amend "shall be freely given when justice

---

[2/] The FRCP 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 Corp.*, 4 E.A.D. 513, 524 n.10 (EAB 1993).

so requires." Fed. R. Civ. P. 15(a).[3/] The Supreme Court has also expressed this liberality in interpreting Rule 15(a), finding that "the Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Foman v. Davis*, 371 U.S. 178, 181-82 (1962) (quoting *Conley v. Gibson*, 355 U.S. 41, 48 (1957)).

In considering a motion to amend under Rule 15(a), the Court has held that leave to amend shall be freely given in the absence of any apparent or declared reason, such as undue delay, bad faith or dilatory motive on the movant's part, repeated failure to cure deficiencies by previous amendment, undue prejudice, or futility of amendment. *Id.* at 182; accord *Carroll Oil*, 10 E.A.D. at 649-51; *see also Yaffe Iron and Metal Co. v. U.S. EPA*, 774 F.2d 1008, 1012 (10th Cir. 1985) (administrative pleadings should be "liberally construed" and "easily amended").[4/] Similarly, the EAB has found that a complainant should be given leave to freely amend a complaint in EPA proceedings in accordance with the liberal policy of FRCP 15(a), as it promotes accurate decisions on the merits of each case. *In re Asbestos Specialists, Inc.*, 4 E.A.D. at 830; *In re Port of Oakland and Great Lakes Dredge and Dock Company*, 4 E.A.D. 170, 205 (EAB 1992).

Discussion

A. Addition of Corporate Respondents

[3/] FRCP 15(a) provides that:

A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served . . . . Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

[4/] The burden is on the party opposing the amendment to show prejudice, bad faith, undue delay or futility. *Chancellor v. Pottsgrove School Dist.*, 501 F. Supp. 2d 695, 700 (E.D. Pa. 2007).

As an initial matter, I note that Respondents do not object to the addition of Advanced Products to the Complaint in Custom Compounders, Inc., Docket No. FIFRA-07-2009-0042; nor do they object to adding FRM to the Complaint in Synisys, Inc., Docket No. FIFRA-07-2009-0041. In fact, Respondents make it clear in their Initial Response that such an amendment would be "appropriate in light of Respondents' Prehearing Exchange." Initial Response at 1; *see also* Response at 1 (reaffirming this position). Complainant's request to amend the Complaints to add Advanced Products and FRM is therefore granted.

B. Addition of Individual Respondents

Respondents object to Complainant's attempt to add Keith and Karlan Kastendieck as individual respondents in each of the consolidated cases. As stated above, administrative pleadings should be freely amended in the absence of any apparent or declared reason recognized by the Supreme Court in *Foman v. Davis*. 371 U.S. at 182. Respondents' undeveloped arguments do not fit neatly into the *Foman* categories, but appear to identify at least two viable grounds for objection.

1. Undue Delay and Failure to Cure

Respondents allege in their Response that "Complainant has been aware of the personal status of Keith G. Kastendieck and Karlan C. Kastendieck since at least October of 2008." Initial Response at 1. This language implies that Respondent believes Complainant has purposefully delayed in naming these parties. Respondents go on to state that two of the matters (FRM Chem, Inc. and Advanced Products Technology, Inc.) "were filed first and have already been amended once on or about December 17, 2009." *Id.* This language suggests some hybrid argument of undue delay or failure to cure in that Complainant has already requested and been granted leave to amend two of the complaints in these consolidated cases. Neither party cites any authority directly addressing the issue of delay or failure to cure; however, I find Respondents' objection unpersuasive for the following reasons.

As the EAB has observed, a court's primary concern in reviewing a claim of undue delay is whether the delay in amending the complaint would unduly prejudice the opposing party. *See Carroll Oil*, 10 E.A.D. at 650; *Zaclon, Inc., et al*, 2006 WL 3406355 (EPA ALJ, April 21, 2006). As noted in the ALJ's decision in *Carroll Oil*, the EAB has observed that "[p]rejudice is usually manifested by a lack of opportunity to respond or need for additional pre-hearing fact-finding and preparation that

cannot be readily accommodated." *In re Lazarus, Inc.*, 7 E.A.D. 318, 330 (EAB 1997); *Carroll Oil Company, Inc.*, Docket No. RCRA-8-99-05, 2001 WL 459117 at *8 (EPA ALJ, Apr. 30, 2001). I am not persuaded that Respondent will be unduly prejudiced by the addition of Keith and Karlan Kastendieck as parties.

In this case, the deadlines in the Prehearing Order have been met and the hearing in this matter is over four months in the future, leaving ample time to address any prehearing needs that may arise from an Amended Complaint. Therefore, no delay in the prehearing schedule will result from adding Keith and Karlan Kastendieck. Moreover, Respondents have not identified any prejudice or additional burden that may result from adding two individual parties.

Similarly, I find any implicit claim of failure to cure to be unpersuasive. As Respondents state, Complainant has amended the Complaints once in two of the four cases and it is true that Complainant did not attempt to add individual respondents at that time. However, this does not constitute "*repeated* failure to cure deficiencies by amendments previously allowed." *Isochem North America*, TSCA-02-2006-9143, 2007 WL 4565889 (EPA ALJ, Dec. 27, 2007) (emphasis in original), citing *Foman v. Davis*, 371 U.S. at 181-82.[5/]

2. Futility

Respondents' alternative argument in opposition to adding Keith and Karlan Kastendieck is that such amendment "will not aid in the determination of the threshold issue." Response at 2. This "threshold issue," according to Respondents, is the basic existence of liability alleged against *all* parties in these cases.[6/] *Id.* In objecting to the amendment on the basis of "no

---

[5/] Moreover, Complainant has never amended the Complaints in the remaining two cases. Instead, these cases all have been consolidated because they present common questions of fact and law, consolidation is expeditious, and the rights of the parties are not adversely affected. As Complainant notes, amending the Complaints to add Keith and Karlan Kastendieck will serve the interests of judicial economy "as the alternative is to file separate Complaints against each person." Initial Reply at 2.

[6/] Respondents go on to argue that there is no liability because Respondents "were not notified that they could not distribute or sell [the subject] products." *Id.* Complainant

(continued...)

liability," Respondents implicitly raise the issue of futility, although they do not counter Complainant's arguments nor do they present any authority to the contrary in their Initial Response or Response. Still, the burden of presenting a *prima facie* case rests on Complainant and the legal sufficiency of an allegation must be determined based on the proponent's pleadings. Thus, I address this issue directly.[7/]

When assessing futility of amendment, the fundamental question is whether the proposed addition is legally sufficient.[8/] To determine legal sufficiency, the basis of the claim must first be identified. Were Complainant proposing these amendments as factual allegations in a new Complaint in a separate matter, it would be clear that Complainant would be required to state a *prima facie* case against these individuals

---

[6/] (...continued)
correctly points out in its Initial Reply that "[a]dvance notification by EPA that sale or distribution of a product is not allowed under FIFRA is not a prerequisite to establishing a violation of Section 12(a)(1)(A) of FIFRA." Initial Reply at 2. However, this does not end the inquiry. If Respondents' assessment of the "threshold issue" were accepted as stated (i.e., the issue is whether Respondents were notified of the cancellation), there would be no debate over this particular amendment because notification of cancellation is irrelevant to determining liability under Section 12(a)(1)(A) of FIFRA.

[7/] Indeed, Complainant anticipates this issue in its Supporting Memo and offers a separate argument to justify the addition of Keith and Karlan Kastendieck as individuals. *See* Complainant's Supporting Memo at 10-11.

[8/] Courts have treated the futility of amendment factor to mean that the amendment would not withstand a motion to dismiss. *See U.S. v. Keystone Sanitation Co., Inc.*, 903 F. Supp. 803, 814 (M.D. Pa. 1995), citing *Coventry v. U.S. Steel Corp.*, 856 F.2d 514, 519 (3d Cir. 1988); *Massarsky v. General Motors Corp.*, 706 F.2d 111, 125 (3d Cir.), *cert. denied*, 464 U.S. 937 (1983); *Glassman v. Computervision Corp.*, 90 F.3d 617, 623 (1st Cir. 1996) ("[i]n reviewing for 'futility,' the district court applies the same standard of legal sufficiency as applies to a [motion to dismiss pursuant to] Rule 12(b)(6)").

under Section 12(a)(1)(A) of FIFRA.[9/] However, Keith and Karlan Kastendieck are alleged to be employees, managers, officers, directors, creditors and shareholders of the various corporate Respondents and Complainant proposes to add them to complaints alleging unlawful *corporate* actions. These facts muddy the analytical waters and require a closer inspection of the standard of liability Complainant seeks to apply.

The first step is to determine whether Complainant seeks to hold Keith and Karlan Kastendieck directly or personally liable or, instead, derivatively liable under a "piercing the corporate veil" theory.[10/] The general rule in corporate law is that the principle of limited liability protects officers, owners, and shareholders from being held responsible for acts of a valid corporation, and only by piercing the corporate veil can these individuals be held derivatively liable for tortious acts of the corporation. *See, e.g., Riverside Mkt. Dev. Corp. v. Int'l Bldg. Prods, Inc.*, 931 F.2d 327, 330 (5th Cir. 1991). Equally true is the proposition that "an officer of a corporation is liable for torts in which he personally participated, whether or not he was acting within the scope of his authority." *Cruz v. Ortho Pharm. Corp.*, 619 F.2d 902, 907 (1st Cir. 1979) (internal quotations omitted). Whether an officer or agent of a corporation participated personally in the tortious activity is a critical issue.

It is apparent from the Supporting Memo that Complainant is attempting to allege some form of individual liability and not derivative liability. Specifically, Complainant states that:

> Karlan C. Kastendieck and Keith G. Kastendieck were *personally* involved in the sales and distribution of the two FRM Chem., Inc. products alleged in the four

---

[9/] Specifically, Complainant would have to allege that Keith and Karlan Kastendieck were persons (as defined in FIFRA Section 2(s)) who distributed or sold (as defined in FIFRA Section 2(gg)) unregistered pesticides or pesticides whose registration had been cancelled. 7 U.S.C. §§ 136j(a)(1)(A), 136(s), and 126(gg).

[10/] *See, e.g., U.S. v. Northeastern Pharm. & Chem. Co., Inc.*, 810 F.2d 726, 744 (8th Cir. 1986) (noting the distinction between direct, personal liability, where an individual has personally participated in conduct that violates a statute, and derivative liability, which results from piercing the veil of a corporation that is less than *bona fide*).

> Complaints, and, as such, may be held *individually liable* under FIFRA for the alleged violations.

Complainant's Supporting Memo at 13 (emphasis supplied). Nonetheless, the Amended Complaints as proposed do not expressly rule out a claim for derivative liability. Despite the Supporting Memo's focus on direct liability, the Amended Complaints do allege the shareholder relationship between the individual respondents and the corporate respondents, opening the door to claims of derivative liability.[11/] At the same time, Complainant does not seek to add counts that establish separate factual bases for Keith or Karlan Kastendieck's direct FIFRA liability. Instead, Complainant's Supporting Memo provides detailed descriptions of these individuals' roles in the various companies and vigorously suggests that certain allegedly unlawful pesticide sales were caused by them. *Id.* at 12-13.

Similarly, the proposed Amended Complaints do not state specific factual allegations that would establish separate bases for personal liability, instead relying on allegations of corporate sales and individual involvement. *See* Proposed Amd. Compl. in FRM Chem, Inc. (FIFRA-07-2008-0035) at ¶¶ 34 - 326; Proposed Amd. Compl. in Advanced Products Technology, Inc.

[11/] In its Initial Motion requesting additional discovery, Complainant posits that the named corporate respondents are not *bona fide* companies, thus raising the possibility of pursuing a corporate veil-piercing theory of liability. Supporting Memo at 19.

Additionally, Complainant cites *In re New Waterbury, Ltd.*, 5 E.A.D. 529, 542 (EAB 1994), for the proposition that financial assets of corporate entities that are "interrelated small companies" or "related entities" to the named parties may be appropriately considered when determining a Respondent's cash flow and ability to pay a proposed penalty. Supporting Memo at 18. These arguments put the issue of related entity funding sources in play as well.

Finally, Complainant raises the possibility of corporate liability for Respondents Custom Compounders and Synisys on the basis of *respondeat superior*. *See* Supporting Memo at 11, 13 ("acts in [sic] performed by Keith G. Kastendieck and Karlan C. Kastendieck [ ] in their roles as employees of the two latter [FRM and Advanced Products] corporations may also be imputed to effecting the violations alleged against Custom Compounders, Inc., and Sysisys, Inc.").

(FIFRA-07-2008-0036) at ¶¶ 68 - 102; Proposed Amd. Compl. in Synisys, Inc. (FIFRA-07-2009-0041) at ¶¶ 26 - 74; and Proposed Amd. Compl. in Custom Compounders, Inc. (FIFRA-07-2009-0042) at ¶¶ 23 - 62.

The combined effect is to allege violative corporate conduct, individual involvement and responsibility for each corporation, and, thus, individual and corporate liability for the alleged violations of FIFRA. Based on Complainant's arguments set forth in its Supporting Memo, Complainant relies on an indirect justification for personal liabliity: that Keith and Karlan Kastendieck were "personally involved in or directly responsible for *corporate acts*" (i.e., the same unlawful sales and distributions previously and originally alleged against the four corporate Respondents in the initial Complaints). *Id.* at 11.

Although Complainant includes many allegations describing the positions of these potential individual respondents as managers, officers, shareholders, and directors of each of the corporate Respondents, it should be noted that personal liability will not flow merely by dint of an individual's status as an officer or agent. Rather, as the Tenth Circuit has held:

> Specific direction or sanction of, or active participation or cooperation in, a positively wrongful act [or omission] . . . is necessary to generate individual liability in damages of an officer or agent of a corporation for the tort of the corporation.

Lobato v. Payless Drug Stores, 261 F.2d 406, 408-09 (10th Cir. 1958); *see also* 3A S. Flanagan & C. Keating, *Fletcher Cyc. of the Law of Private Corps.* § 1337 (1975) ("Corporate officers are liable for their torts, although committed when acting officially").

The EAB has applied this reasoning in its own cases, affirming an ALJ's holding that "a corporate officer may be held liable, in civil as well as criminal actions, for wrongful acts of the corporation in which he participated." *In re Roger Antikiewicz & Pest Elimination Prods. of Am.*, 8 E.A.D. 218, 230 (EAB 1999). Indeed, the cases cited by Complainant appear initially appear to support the contention that individual owners, corporate officers, and employees may be held personally liable under FIFRA.

Complainant cites three federal environmental cases in its Supporting Memo that address individual liability for corporate

acts. They are *U.S. v. NE Pharma. & Chem. Co., Inc.* ("*NEPACCO*"), 810 F.2d 726 (8th Cir. 1986), *U.S. v. Gurley* ("*Gurley*"), 43 F.3d 1188 (8th Cir. 1994), and *Browning-Ferris Ind. of Ill., Inc. v. Ter Maat* ("*Browning-Ferris*"), 195 F.3d 953 (7th Cir. 1999). Each of these cases addresses when individuals may be personally liable for clean up costs under the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6901 *et seq.*, and the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601 *et seq.*

In *NEPACCO*, the Eighth Circuit[12/] held that a corporate officer can be individually liable under Section 107(a)(1) of CERCLA "because he personally participated in conduct that violated CERCLA" and under Section 7003(a) of RCRA "if they were personally involved in or directly responsible for corporate acts in violation of RCRA." *NEPACCO*, 810 F.2d at 744-45; *accord New Jersey Dept. of Envtl. Prot. v. Gloucester Envtl. Mgmt. Servs., Inc.*, 800 F. Supp. 1210, 1219 (D.N.J. 1992). *See also New York v. Shore Realty Co.*, 759 F.2d 1032 (2d Cir. 1985) (imposing liability on principal officer and shareholder because of his active and extensive role in the daily management of the company).

In *Gurley*, the Eighth Circuit extended the *NEPACCO* holding to include not only shareholders and officers involved in hazardous waste disposal, but also employees, provided the employee had authority to control hazardous waste disposal activities and "exercised that authority either by personally performing the tasks necessary to dispose of the hazardous wastes or by directing others to perform those tasks." *Gurley*, 43 F.3d at 1193.[13/]

[12/] I note that while many of the counts in these consolidated cases arise in states within the Eighth Circuit, some counts involve parties and events that fall within other Circuit Court jurisdictions. *See, e.g.*, FRM Chem, Inc. Proposed Amd. Compl. at ¶¶ 48 (8th Cir.), 68 (10th Cir.), 118 (7th Cir.), and 183 (11th Cir.).

[13/] The Eleventh Circuit has adopted an even broader test for individual liability for corporate violations of CERCLA, which does not require that the individual "actually controlled the specific decision to dispose of hazardous substances. Rather, it is enough if the individual actually participated in the operations of the facility or actually exercised control over, or was otherwise

(continued...)

In *Browning-Ferris*, the Seventh Circuit, citing the *NEPACCO* decision, remanded a CERCLA contribution action to the District Court because it failed to consider the possibility that the defendant, Ter Maat, was individually liable for clean up of a landfill on the National Priorities List, *see* 42 U.S.C. §§ 9605(8)(B), 9616(d), (e). The *Browning-Ferris* Court, speaking through Chief Judge Posner, held that a corporate officer is not immune from liability for acts committed in his official capacity if he personally operated the landfill "rather than merely directing the business of the corporations. . . ." *Browning-Ferris*, 195 F.3d at 956, *citing U.S. v. Bestfoods*, 524 U.S. 51, 55 (1998).

While the holdings of these cases unequivocally bring corporate officers, shareholders, and employees with the scope of liability for corporate actions based on personal involvement, these cases, while informative, are not dispositive of the present issue for at least two reasons.

First, these cases are concerned with liability under CERCLA and RCRA, not under FIFRA. Although all three are major, federal environmental statutes, their scopes and purposes are not identical and case law construing one statute does not necessarily carry the same force when applied to another statute. *See, e.g., NEPACCO*, 810 F.2d at 743-45 (noting the importance of Congress' intent[14/] to impose RCRA liability upon the persons involved in handling and disposal of *hazardous substances* and finding that requiring personal ownership or actual possession of such substances as a precondition to personal liability "would be inconsistent with the broad remedial purposes of CERCLA"); *U.S. v. Pollution Abatements Servs. of Oswego, Inc.*, 763 F.2d 133, 135 (2d Cir. 1985) (reaching the same conclusion upon review of the statutory language and precedents under the Rivers and Harbors Act and noting the Circuit's "expansive construction of *remedial*

[13/] (...continued)
intimately involved in the operations of the corporation immediately responsible for the operation of the facility." *Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489, 1505 n.19 (11th Cir. 1996) (internal citations omitted).

[14/] *See U.S. v. Conservation Chem. Co. of Illinois*, 660 F. Supp. 1236, 1246 (N.D. Ind. 1987) (upholding EPA's complaint as sufficient to allege a cause of action against an individual defendant under RCRA "because holding corporate officers liable under RCRA is consonant with Congressional intent").

environmental statutes") (emphasis supplied). Unlike CERCLA, RCRA, and even the River and Harbors Act, FIFRA is not a remedial statute. It is concerned primarily with registration and commercial regulation of pesticidal products. As such, holdings related to individual liability under these laws do not necessarily apply to FIFRA claims.

Second, Complainant in this case emphasizes the similarity between FIFRA's definition of "person," 7 U.S.C. § 136(s), and the definitions of "person" found in RCRA and CERCLA. Supporting Memo at 11 n.12. Specifically, Complainant argues that the *NEPACCO* court "found it persuasive that, as with FIFRA, the term 'person' as defined in both CERCLA and RCRA, includes both individuals and corporations and does not exclude corporate officers or employees." *Id.* Although the description of these provisions may be accurate, the definition at issue in *NEPACCO* and the other above-cited RCRA/CERCLA cases is the term "owner or operator" and not the term "person". *See U.S. v. Kayser-Roth Corp.*, 724 F. Supp. 15, 20-21 (D.R.I. 1989) (discussing cases, including *NEPACCO*); *Gurley*, 43 F.3d at 1193; *New York v. Shore Realty*, 759 F.2d at 1052; *Riverside Mkt. Dev. Corp. v. Int'l Bldg. Prods., Inc.*, 931 F.2d 327, 330 (5th Cir. 1991) (noting that individuals are liable under CERCLA "when, as 'operators,' they themselves actually participate in the wrongful conduct").

For these reasons, the persuasiveness of the cited RCRA/CERCLA cases is diminished, though not entirely extinguished. Rather, we must look to cases construing FIFRA in order to draw persuasive parallels to the issues raised in this case. There are at least two administrative FIFRA cases that bear directly on the present issue.[15/] They are: *Roger Antkiewicz and Pest Elimination Prods. of Am., Inc.* ("*Antkiewicz*"), Docket. No. IF&R-V-002-95, 1997 EPA ALJ LEXIS 167 (ALJ, Sept. 25, 1997) and *Safe & Sure Prods., Inc. and Lester J. Workman* ("*Workman*"), Docket No. IF&R-04-907003-C, 1998 WL 422206 (ALJ, June 26, 1998).

In *Antkiewicz*, the ALJ held both Respondents, Roger Antkiewicz and Pest Elimination Products of America "PEPA", jointly and severally liable for a civil penalty under FIFRA for selling an unregistered pesticide in violation of Section 12(a)(1)(A), 7 U.S.C. § 136j(a)(1)(A). *Antkiewicz*, 1997 EPA ALJ LEXIS 167 at *31. The ALJ based this decision on several findings, including: that Mr. Antkiewicz was PEPA's president, its registered agent, "the person with the greatest

---

[15/] Both cases are cited by Complainant. Reply at 3 n.2.

responsibilities in the conduct of PEPA's business and the chief contact person with the federal and state regulatory authorities." *Id.* at *5. In his Discussion, the ALJ noted that individual liability was proper because, as president, Mr. Antkiewicz "did participate fully in the violation of selling an unregistered pesticide" and was "the person who primarily ran the office and PEPA's store" including "at the time of the [EPA] inspection." *Id.* at *12.

On appeal, the EAB upheld the ALJ's decision on individual liability, noting that, "given his active involvement and oversight of all aspects of PEPA's operations, [Antkiewicz] should have ensured his company's compliance with the pesticide laws." *In re Roger Antkiewicz & Pest Elimination Prods. of Am., Inc.*, 8 E.A.D. 218, 230 (EAB 1999). The EAB went on to cite *Cruz v. Ortho Pharm. Corp.*, *supra* at 8, for the proposition that corporate officers can be held individually liable for wrongful corporate acts in which they participate.

Of particular relevance to the present case is the EAB's observation regarding the amended complaint in *Antkiewicz*. "Specifically [the EAB wrote] the amended complaint charged Respondents, jointly and severally, with [six counts including] unlawful sale or distribution of New Residual Spray, an unregistered pesticide." *Antkiewicz*, 8 E.A.D. at 226. Here, the proposed Amended Complaints do not specifically allege that Keith and Karlan Kastendieck engaged in the unlawful sale or distribution of an unregistered pesticide, only that they are liable for the violations committed by the corporate Respondents. *See* Discussion Section B.2., *supra* at . However, this detail appeared in the general background section of the Final Decision and was not relied upon by the EAB in its ultimate conclusion upholding Antkiewicz's individual liability.

The second, relevant, FIFRA case, *Workman*, was decided a year after *Antkiewicz*, and largely followed the same reasoning. Citing *Antkiewicz* for the proposition that individual liability for corporate officers under FIFRA has precedent, the ALJ made the following findings with respect to Mr. Workman, the individual respondent: he was the "controlling figure," "principal stockholder," and "only functioning corporate officer." *Workman*, 1998 WL 422206 at *19. "Accordingly [the ALJ

found] Mr. Workman is clearly liable for his actions as a 'person' under FIFRA." *Id.*[16/]

Based on the *Antkiewicz* and *Workman* cases, it is clear that individual corporate officers and shareholders may properly be charged with individual FIFRA liability in cases where the individual respondents are proved to be the "controlling figure," the "guiding light," or are actively involved in all aspects of the corporate respondents' operations. Of course, this Order does not reach any conclusions as to the specific roles that Keith and Karlan Kastendieck may have played within the organizational structures of the corporate respondents in this case. Rather, the only question presented by this Motion, is whether the Complainant has sufficiently alleged a cause of action in the proposed Amended Complaints that states a claim against the Kastendiecks in their individual capacity and would not be futile under *Foman v. Davis*.

Turning to the proposed Amended Complaints, I note that each states multiple factual allegations regarding the positions that Keith and Karlan Kastendieck respectively occupy in each of the entities named as corporate respondents. In the FRM Chem, Inc. proposed Amended Complaint, Complainant alleges that Karlan Kastendieck served as the sales manager for FRM and was responsible for sales management, writing product labels, and daily operations for FRM. Complainant alleges that Keith Kastendieck served as vice-president, part owner, and plant manager for FRM and was responsible for purchasing, quality control, and manufacturing control for the company's products. At all relevant times, Complainant further alleges, Karlan and Keith Kastendieck were two of the four principal stockholders, corporate officers, and members of the FRM board of directors. *See* Proposed Amd. Compl. in FRM Chem, Inc. (FIFRA-07-2008-0035) at ¶¶ 24 - 28.

These allegations are largely repeated in the proposed Amended Complaint in Advanced Products. *See* Proposed Amd. Compl. in Advanced Products Technology, Inc. (FIFRA-07-2008-0036) at ¶¶ 19 - 24. Complainant goes one step further here by alleging that Karlan Kastendieck was the sales manager and Keith Kastendieck the plant manager for *all the businesses* operating at the subject

---

[16/] On appeal, the EAB upheld the ALJ's findings, noting that his "holding that Mr. Workman is individually liable as a person for the unlawful conduct alleged in the Complaint is well supported by the law and the administrative record." *In re Safe & Sure Prods., Inc. and Lester J. Workman*, 8 E.A.D. 517, 527 (EAB 1999).

property (50/60 Hi-line Drive). *Id.* at ¶¶ 21, 23. These same factual allegations appear in the two other proposed Amended Complaints as well. *See* Proposed Amd. Compl. in Synisys, Inc. (FIFRA-07-2009-0041) at ¶¶ 14 - 18; and Proposed Amd. Compl. in Custom Compounders, Inc. (FIFRA-07-2009-0042) at ¶¶ 15 - 19.

On balance I find that the Complainant has alleged sufficient allegations against the proposed individual respondents, Keith and Karlan Kastendieck, that their addition as parties would not be futile. Previous administrative decisions on individual FIFRA liability recognize the potential to hold individual corporate officers and owners responsible for violative corporate actions where they play such an integral role in the decision-making processes of the corporation as to become individually responsible for ensuring the company's compliance with federal pesticide laws. Whether Keith and Karlan Kastendieck are, in fact, liable will depend on factual evidence presented at the hearing and is not decided here. However, Complainant's request in this instance is soundly based on the factual allegations in the proposed Amended Complaints and, as stated, is sufficient to state a claim. Accordingly, Complainant's request to add these individuals as parties in the consolidated cases is hereby granted.

C. Additional Counts Against Advanced Products

Respondents object to the addition of five (5) counts in the Advanced Products (FIFRA-07-2008-0036) case arguing that "this proposed amendment lacks the necessary allegation that Respondents 'claimed the product was registered' which they did not." Initial Response at 2. Respondents' argument suggests that Complainant has failed to state a necessary element of its *prima facie* case and, therefore, fails to state a claim. This implicitly raises the issue of futility, one of the factors recognized in *Foman v. Davis*. 371 U.S. at 82. However, Section 12(a)(1)(A) of FIFRA, on its face, does not require Complainant to allege or prove that Respondents made any claims about the registered status of any pesticides.

With respect to the proposed additional counts against Advanced Products, there is no other apparent or declared reason to deny this part of the motion.[17/] Accordingly, Complainant's

---

[17/] Specifically, there is no undue delay because these counts allege actions that occurred in the months immediately preceding the filing of the original Complaint and, according to Complainant,

(continued...)

request to add counts five through nine (5 - 9) is hereby granted.

II. Motion for Other Discovery

In its Initial Motion of March 15, 2010, Complainant moved this Tribunal for an Order directing additional discovery under 40 C.F.R. § 22.19(e). Complainant seeks the financial information identified in its "Additional Information Request" ("AIR") from six individual stockholders, including the two individuals named as parties in the proposed Amended Complaints, and five allegedly related companies that share the same operating location as the corporate respondents.[18/] In its Supporting Memo, Complainant identifies three justifications for this additional discovery. First, Complainant argues that by raising a claim of "inability to pay," one of the FIFRA statutory penalty factors, Respondents are obliged to provide additional financial documentation to justify that claim. Second, Complainant argues that Respondents' statements in the Prehearing Exchange and Answers create ambiguity as to the financial status of each corporate respondent and raise the need for additional discovery in order to clarify those statements. Third, Complainant argues that Respondents' "size of business," another FIFRA statutory penalty factor, is a contested issue based on Respondents' Answers. As such, Complainant argues, additional discovery is warranted to settle these issues.

[17/] (...continued)
were only revealed through a subsequent request for information to a third party. There is no evidence or suggestion that the amendment is made in bad faith. Similarly, as this is the first attempt to amend the complaint in this matter, there is no evidence that Complainant has repeated failed to cure a deficiency. Lastly, the allegations are similar to the original allegations and will require the production of similar evidence. Respondents are not prejudiced by this amendment because there is ample time before hearing to address questions of discovery.

[18/] The scope of information requested by the AIR is substantial and covers twenty different categories of documents, from checking account statements to asset ledgers and corporate bylaws. Yet, given the alleged, conflicting statements by Respondents as to operational history and ownership of each corporation, as well as the "ability to pay" issue raised by Respondents, it is reasonable to allow Complainant access to these financial documents.

Applicable Standard

The Rules of Practice provide for other discovery, subsequent to the initial Prehearing Exchange, at 40 C.F.R. § 22.19(e). Under 22.19(e), the Presiding Officer may grant a motion for additional discovery only if it:

> (i) Will neither unreasonably delay the proceeding nor unreasonably burden the non-moving party;
> (ii) Seeks information that is most reasonably obtained from the non-moving party, and which the non-moving party has refused to provide voluntarily; and
> (iii) Seeks information that has significant probative value on a disputed issue of material fact relevant to liability or the relief sought.

40 C.F.R. § 22.19(e). As the EAB has noted, applying this standard "involves the exercise of considerable discretion since it requires a subjective judgment on the need for, and value of, the additional discovery and the possible delay and disruption it might entail." *In re Chempace Corp.*, 9 E.A.D. 119, 134 (EAB 2000).

Discussion

In support of its Initial Motion, Complainant delineates the factors that must be considered when evaluating a request for Other Discovery under Section 22.19(e)(i)-(iii) and argues that each factor is met. Supporting Memo at 15. Although Complainant's statement at page 15 - that this Tribunal "has not set a hearing date" - is no longer accurate, the hearing in this matter is not set to begin until September 27, 2010, more than eighteen weeks from now. Thus, reasonably prompt production of the requested information will not delay the proceedings.

Respondents baldly state in their Initial Response that the request for financial data "is an undue hardship," but rely solely on the notion that such "hardship" is a result of the timing and not the substance of the actual request. Initial Response at 3. According to Respondents, financial information related to the named parties and non-party entities should only come *after* a determination of liability. *Id.* This argument lacks merit, particularly given Complainant's position that additional financial information is necessary to determine which entity(ies) or individual(s) is (are) actually liable in the first instance.

With respect to subsection (ii), Complainant asserts that complete information concerning Respondents' finances is within Respondents' possession because the information sought is the type kept in the ordinary course of business. Supporting Memo at 15. According to Complainant, despite the production of financial documents, provided prior to the Initial Motion, the financial status of each Respondent remains unclear and Respondents have not voluntarily provided the information Complainant now requests. *Id.*[19/]

As to subsection (iii), Complainant offers three separate bases for concluding that the financial information it seeks holds significant probative value as to disputed material facts. First, Complainant argues that it must have an opportunity to review the relevant financial documents in order to prepare itself to answer Respondents' inability to pay claim, as raised in their Initial Prehearing Exchange. Supporting Memo at 15. As the EAB has explicitly stated, "in any case when ability to pay is put in issue, the Region [Complainant] must be given access to the respondent's financial records before the start of such hearing." *In re New Waterbury, Ltd.*, 5 E.A.D. at 542.

Second, Complainant argues that the named corporate respondents may not be *bona fide* corporations and, as such, individual stockholders, including the individual respondents named as proposed parties in the Motion, may be "the ultimately liable parties for the violations alleged in the Complaints." Supporting Memo at 19. Complainant goes on to cite several examples of corporate transactions involving Respondents that call into question their corporate integrity.[20/] Whether these allegations can be proven, Complainant at least raises a dispute as to a material fact that may well be answered by granting the request for additional discovery.

Third, Complainant notes that each answering Respondent disagrees with Complainant's initial assessment of the "size of

---

[19/] Complainant also notes in its Initial Reply that its request for Respondents' federal tax forms, submitted to the Internal Revenue Service, has been denied by that Agency. Initial Reply at 6 n.5.

[20/] Additionally, Complainant included multiple documentary attachments with its Initial Motion outlining a broad matrix of corporate actions that demonstrate a basis for pursuing a corporate veil-piercing theory. Accordingly, Complainant must be allowed broader latitude for discovery, such as it requests in its Motion.

business" factor and argues that the requested financial records "are of significant probative value to resolving not only issues of material fact as to liability, but also as to the relief sought in this matter." Supporting Memo at 24-25.

Aside from its statement that disclosure of financial information should follow a determination of liability, Respondents offer no argument to support a denial of the Motion for Other Discovery. I recognize that the nature of the information request is intrusive and onerous, but if Respondents plan to raise an inability to pay argument, Complainant must be allowed access to the relevant documentation. By granting the Complainant's request for leave to file Amended Complaints, this Order enlarges the class of Respondents and avenues of liability, providing further justification for additional discovery. However, this access is not unlimited.

Several of the requested items in the AIR go too far and cannot be demanded of the parties at this time. The AIR identifies three categories of documents that Complainant seeks from six different individual stockholders, including Raymond E. Kastendieck, Ann P. Kastendieck, Keith G. Kastendieck, Karlan C. Kastendieck, Janice Kastendieck, and Alan Kastendieck. With the exception of Keith and Karlan Kastendieck, none of these individuals is named as a party in any of the consolidated cases. As such, it is inappropriate to require the Respondents to produce any of the items identified in the AIR section entitled "For all individuals/stockholders" for those unnamed individuals. With respect to Keith and Karlan Kastendieck, I find that item number three (3) ("all notes, correspondence, minutes, financial documents, [etc.]") is too broad and onerous. Complainant specifies no time period to constrain the scope of this request and the items identified include such a diverse set of documents from such a diverse set of entities that the burden on Respondents would be too great. Respondents are directed to disclose the remaining items (1 and 2) for Keith and Karlan Kastendieck.

With respect to the items requested in the AIR section entitled "For all companies", I find that the items numbered eight (8), 12, and 13, are also too expansive. These three items are overbroad in scope, too onerous a burden for Respondents and the allegedly related entities, and are of questionable probative value in this case. Accordingly, I deny in part Complainant's motion for additional discovery as to these items. However, based on Complainant's arguments, and given Respondents' lack of substantive response, I must grant in part Complainant's request

as to all other items identified in the AIR, as delineated below.[21/]

In its Initial Motion, Complainant requests that the parties be given an additional 60 days within which to complete this additional discovery. Initial Motion at 2. The parties are given 45 days to complete the additional discovery directed by this Order.

III. ORDER

The Complainant's Renewed Motion to Amend Complaints is hereby **Granted.** Complainant's Motion for Other Discovery Pursuant to 40 C.F.R. § 22.19(e) is hereby **Granted in part** as to Keith G. Kastendieck and Karlan C. Kastendieck for the items one (1) and two (2) requested for all individuals, and for the corporate respondents and the identified companies for the items 1 - 7, 9 - 11, and 14 - 17, inclusive. Complainant's Motion for Other Discovery Pursuant to 40 C.F.R. § 22.19(e) is hereby **Denied in part** as to the corporate respondents and the identified companies for the items 8, 12, and 13.

The parties are directed to complete the additional discovery requested in the Motion within 45 days from the date of this Order.

So ordered.

_____
Barbara A. Gunning
Administrative Law Judge

Dated: May 27, 2010
Washington, DC

[21/] In granting the request for additional discovery, I note that nothing in this Order guarantees that any information subsequently submitted is necessarily admissible at hearing. This Order merely addresses prehearing information sharing with an aim towards narrowing the issues for the hearing.