12/6/95

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Monsanto Company and	)	Docket No.I.F.& R.-VII-1193C-93P
Simpson Farm Enterprises, Inc.,	)	
	)	
Respondents	)	

ORDER ON MOTIONS

The complaint in this proceeding under Section 14(a) of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA or the Act), 7 U.S.C. § 136l(a), charged Respondents, Simpson Farm Enterprises, Inc. (Simpson Farm) and Monsanto Company (Monsanto), with violating Section 12(a)(1)(C), 7 U.S.C. § 136j(a)(1)(C) and Section 12(a)(1)(E), 7 U.S.C. § 136j(a)(1)(E), of FIFRA by holding for sale a misbranded and adulterated pesticide, Landmaster Bindweed Herbicide (EPA Registration No. 524-351), whose composition was allegedly inconsistent with that on the registration statement for the pesticide.[1/] For these alleged violations, Complainant proposes to assess Respondents a civil penalty of $5,000, as permitted by the Act (7 U.S.C. § 1361(a)).

Monsanto answered the Complaint on March 16, 1993, denying that it violated FIFRA, denying any liability for civil penalties, and requested a hearing. Monsanto argued that the complaint

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[1/] Simpson Farm Enterprises is no longer a party to this proceeding, having entered into a Partial Consent Agreement and Partial Consent Order, effective September 10, 1993, wherein it agreed to pay a penalty of $1,500. Accordingly, future references to Respondent herein are to Monsanto.

failed to state a cause of action, that EPA lacked jurisdiction, and that the acts or omissions which form the basis of the complaint do not relate to Monsanto, but to the conduct of entities over which Monsanto has no control.

Responding to an order of the ALJ, dated June 2, 1993, both parties have filed prehearing exchange information. As part of its prehearing exchange, Complainant requested that the ALJ take judicial notice of: 1) FIFRA and the regulations promulgated thereunder; 2) the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits, 40 CFR Part 22, as amended; and 3) the July 2, 1990 Enforcement Response Policy for FIFRA.

In it's prehearing exchange, dated October 1, 1993, Respondent indicated that it intended to have the EPA-retained sample analyzed by an independent laboratory and to submit the result of that analysis in a supplemental prehearing exchange.[2/] Respondent objected to the ALJ's order that it provide information tending to demonstrate that it did not cause the alleged contamination, arguing that, because the complaint was based on a theory of strict or vicarious liability, information to demonstrate lack of fault was irrelevant and unnecessary.

Monsanto is the registrant and manufacturer of the pesticide Landmaster Bindweed Herbicide, EPA Registration No. 524-351 (Landmaster). Monsanto entered into a Repackaging Agreement with

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[2/] To date, Respondent has not submitted any evidence of independent testing of EPA's sample.

Simpson Farm as "customer" on November 2, 1989 (C's Preh. Exh. 20). The agreement referred to a Sales Agreement entered into by Monsanto and Simpson Farm (not in the record), which provided in part, for the purchase and sale of certain Monsanto pesticide products in bulk form, stated that "customer" desired to repackage said products and to use Monsanto's labels on the products as accepted by EPA. Among other things, the agreement provided that Monsanto granted "customer" a non-exclusive authorization to use [its] labels in connection with the repackaging of [pesticide] products, that Monsanto supplied "customer" with sufficient quantities of labels for use by "customer" in the sale of products repackaged in "mini-bulk containers" as described in attached exhibits ("guidelines") (not in the record). Additionally, the agreement provided that "labels" be used only in connection with products which met Monsanto's specifications and which had been repackaged in accordance with the "guidelines", that only labels supplied to "customer" directly by Monsanto be used on repackaged products, that such labels only be distributed to customers of "customer" who purchased repackaged products, and that containers be properly marked, labeled, and placarded in accordance with EPA and DOT regulations. The agreement provided that "customer" has no authority to represent Monsanto in any capacity other than as set forth in the agreement and that "customer" was not and should not purport to act as a commercial agent for Monsanto under the agreement.

Simpson Farm operates a registered pesticide producing facility in Ransom, Kansas, EPA Establishment Number 63095-KS-001. In accordance with the Repackaging Agreement described above, Monsanto arranged for bulk quantities of Landmaster pesticide to be transported to Simpson Farm and placed into a large "holding tank". Monsanto provided its registered labels to Simpson Farm and authorized Simpson Farm to use the labels in the distribution and sale of repackaged Landmaster. Simpson repackaged the pesticide from the holding tank into "mini-bulk containers", attached Monsanto's labels, and released the product for shipment.[3/] Although the Repackaging Agreement obligates Simpson Farm to clean "bulk tanks" and reusable containers at the end of each season, it is not clear whether the tanks and containers are owned by Monsanto or Simpson Farm.

On May 12, 1992, an authorized EPA inspector appeared at Simpson Farm's location and drew a sample of Landmaster from the holding tank.[4/] EPA's analysis of the sample revealed that the product contained 0.5% alachlor, an active ingredient not listed on

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[3/] The preamble to the revised registration procedures rule (53 Fed. Reg. 15952, May 4, 1988) states that "released for shipment" is part of the definition of "distribute and sell" and that the term is used in FIFRA § 9 to define when a product may be inspected for compliance purposes (Id. 15953).

[4/] This tank is referred to as a "bulk pesticide storage container" in para. 10 of the complaint.

the registered label of Landmaster.[5/] The inspector returned to Simpson Farm on January 28, 1993, and obtained a signed statement from Mr. Greg Simpson to the effect that all pesticides in bulk tanks are held for resale, except for a small amount used in their own farming operation (C's Preh. Exhs. 16 & 19). Although there is no reason to question the general accuracy of this statement, the Repackaging Agreement indicates that resales are in "mini-bulk containers", which supports the conclusion that pesticides are not "packaged (repackaged), and released for shipment" until placed in such containers.

Accompanying Monsanto's prehearing submission were two additional motions: 1) Respondent's Motion to Compel EPA to Either Amend Its Complaint To Include Particularized Allegations That Monsanto Caused, or Is In Fact, Responsible For The Alleged Pesticide Contamination...or Stipulate that EPA Does Not Allege Any Fault or Causation ... or In The Alternative to Bar EPA From Asserting Any Such Claim or Evidence; and 2) Motion to Dismiss or, In The Alternative, For Accelerated Decision In Favor of Respondent. Monsanto reiterated its view that the ALJ should not require evidence that it was not "at fault" and should bar Complainant from producing any evidence of fault unless Complainant amends the complaint to allege a fault theory. Respondent alleged that Complainant cannot establish a prima facie case of liability,

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[5/] An addendum to the Bulk Repackager Inspection Report (C's Preh. Exh. 11) quotes Mr. Greg Simpson of Simpson Farm as stating that the holding tank previously contained "Lasso". "Lasso" is another herbicidal pesticide product produced by Monsanto.

because Respondent was not the "person" who sold or distributed the allegedly contaminated pesticide. According to Respondent, neither FIFRA nor EPA regulations impose liability upon a manufacturer/registrant after the product has been sold to an independent contractor for packaging. Moreover, if permitted by FIFRA, any such liability may only be imposed after notice and comment rulemaking procedures pursuant to the Administrative Procedure Act (APA), 5 U.S.C. § 553.

Complainant responded to the motions on October 12, 1993, asserting that the complaint was sufficient on its face, that a prima facie case was established, and that it was not necessary to amend the complaint. Explaining that FIFRA is a strict liability statute, Complainant argued that it was not required to demonstrate fault. Complainant further contended that an accelerated decision is not proper, because genuine issues of material fact exist, i.e., whether the "Landmaster" found at Simpson Farm was contaminated with alachlor.

Respondent filed a Reply to Complainant's Response to Respondent's Motion to Compel and Motion to Dismiss on October 21, 1993, which reiterated its view that Complainant should be limited to a theory of strict liability and asked the ALJ to bar Complainant from asserting a theory of vicarious liability.

Respondent also requested that the ALJ decide the legal issue of strict liability before a hearing on factual disputes.[6/]

D I S C U S S I O N

Complainant's Motion for Official Notice

Complainant requested that the ALJ take judicial notice of: 1) FIFRA and the regulations promulgated thereunder; 2) the Consolidated Rules of Practice; and 3) the 1990 FIFRA Enforcement Response Policy. The ALJ may take "official notice" of "any matter judicially noticed in the Federal courts and of other facts within the specialized knowledge and experience of the Agency" (Rules of Practice, 40 CFR § 22.22(f)). Judicial (official) notice permits the fact finder to "accept as conclusive" facts that are "essentially uncontestable."[7/] Official notice of statutes and published regulations is not necessary. The ALJ must apply statutes and applicable Agency regulations irrespective of

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[6/] On November 22, 1993, Complainant filed a motion asking the ALJ to consider an Order on Cross Motions for Accelerated Decision issued by Judge Vanderheyden, In re ICI Americas, Inc. and Dodge City Coop. Exch., I.F.&R. No. VII-1191C-92P (ALJ, Nov. 16, 1993) (hereinafter Dodge City), a case factually similar to this one. Judge Vanderheyden held the manufacturer/registrant liable for the distribution or sale of an adulterated or misbranded pesticide, finding that there was an agency relationship between the manufacturer/registrant and the repackager. Dodge City will be considered along with other relevant decisions in resolving similar issues in this proceeding. Complainant's motion is, therefore, granted. Judge Vanderheyden certified the mentioned ruling for interlocutory appeal, and it should be noted that, prior to any decision on the appeal, evidence was discovered indicating that the product was not, in fact, adulterated or misbranded. The complaint was dismissed on September 20, 1994.

[7/] See FEDERAL RULE OF EVIDENCE 201; C.B. Mueller & L.C. Kirkpatrick, Federal Evidence § 48, § 55 (2d ed. vol. I 1994).

official notice. Complainant's motion for official notice of the statute and regulations will be denied as unnecessary.

The 1990 Enforcement Response Policy for FIFRA is an agency penalty guideline that the ALJ is required to "consider" in determining an appropriate penalty (40 CFR § 22.27(b)). While to " 'consider' a penalty guideline does not mean to adopt it or to adhere to its terms,"[8/] the fact that the guideline or policy is referred to in the Rules of Practice, albeit in general terms, supports, if not requires, the ALJ to take official notice of applicable penalty guidelines. Although it does not appear that the 1977 "Enforcement Policy Applicable to Bulk Shipments of Pesticides" (C's Preh. Exh. 21) is referred to in any published rule, it is referred to in a proposed rule, Standards for Pesticide Containers and Containment, 59 Fed. Reg. 6712, at 6740 (February 11, 1994). Moreover, the policy appears to have been given wide circulation in the regulated community and it is concluded that taking official notice of the existence of such policies is appropriate. The better practice, however, is that followed by Complainant herein, that is, to include applicable penalty and enforcement policies as proposed exhibits in prehearing exchange submissions.

[8/] In re Employers Insurance Co. of Wausau, TSCA-V-C-66-90 (ALJ, Sept. 29, 1995). See also, U.S. Telephone Ass'n v. Federal Communications Commission, 28 F.3d 1232 (D.C. Cir. 1994).

Respondent's Motion to Dismiss or, In the Alternative, for Accelerated Decision

The complaint alleges that Respondents violated FIFRA sections 12(a)(1)(C), distribution or sale of a pesticide the composition of which differs from claims made in the registration statement, and 12(a)(1)(E), distribution or sale of a pesticide which is adulterated or misbranded.[9/] The complaint and Complainant's arguments herein leave no doubt that it is proceeding on a theory of strict liability. Vicarious liability is a form of strict liability and therefore is encompassed by the complaint. Monsanto defends upon the ground that the complaint failed to allege a prima facie case of liability as to it and argues that Complainant is attempting to impose new substantive requirements without notice and an opportunity for comment as required by the APA. Monsanto contends that an accelerated decision should be granted in its favor, because Complainant may not impose "strict label liability" upon a manufacturer/registrant. According to Monsanto, the repackager, Simpson Farm, was not acting as its agent.

FIFRA § 3(a) provides that "no person in any State may distribute or sell to any person any pesticide that is not registered" (7 U.S.C. § 136a(a)). Exceptions to this requirement

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[9/] Section 12(a)(1)(C) states that "[i]t shall be unlawful for any person in any State to distribute or sell to any person ... any registered pesticide the composition of which differs at the time of its distribution or sale from its composition as described in the statement required in connection with its registration...." Section 12(a)(1)(E) states that "[i]t shall be unlawful for any person in any State to distribute or sell to any person ...any pesticide which is adulterated or misbranded...." 7 U.S.C. § 136j(a)(1)(C)&(E).

are that an unregistered pesticide may be transferred from one registered establishment to another registered establishment operated by the same producer solely for packaging or for use as a constituent part of another pesticide produced at the second establishment or in accordance with the requirements of an experimental use permit (FIFRA § 3(b)). From the inception of EPA regulations implementing the rewrite of FIFRA enacted by the Federal Environmental Pesticide Control Act of 1972 (Public Law 92-516, October 21, 1972), however, "operated by the same producer" has been defined as including "another registered establishment operated under contract with the registrant of the pesticide either to package the pesticide product or to use the pesticide as a constituent of another pesticide product, provided that the final pesticide product is registered by the transferor establishment" (40 Fed. Reg. 28268, July 3, 1975, codified 40 CFR § 162.3(dd) (1976)). Although the regulation was rewritten in 1988 to conform the definition of "operated by the same producer" to that which the Agency concluded was intended by the Act (53 Fed. Reg. 15952, May 4, 1988), the Agency at the same time promulgated an exemption allowing the transfer of unregistered pesticides between registered establishments operated by different producers for further formulation, packaging or labeling into a product which is

registered.[10/] That exemption is contained in 40 CFR § 152.30, which provides in pertinent part:

> (b) A pesticide transferred between registered establishments not operated by the same producer. An unregistered pesticide may be transferred between registered establishments not operated by the same producer if:
> (1) The transfer is solely for the purpose of further formulation, packaging, or labeling into a product that is registered;
> (2) Each active ingredient in the pesticide, at the time of transfer, is present as a result of incorporation into the pesticide of either:
> (i) A registered product; or
> (ii) A pesticide that is produced by the registrant of the final product; and
> (3) The product as transferred is labeled in accordance with part 156 of this chapter.

A "pesticide product" is "a pesticide in the particular form (including composition, packaging, and labeling) in which the pesticide is, or is intended to be, distributed or sold" (40 CFR § 152.3(t)). Thus, a pesticide registration includes EPA approval of the pesticide substance along with the proposed packaging and labeling in which the product will be distributed or sold.

Applying the foregoing to the case at hand, it is undisputed that Landmaster was registered when it was transferred to Simpson Farm. Moreover, there is no allegation or contention that the product was not properly labeled at the time of the transfer. See 40 CFR § 156.10(a)(1) "Contents of the label" and (a)(4)(ii) "Tank cars and other bulk containers". Although it is not altogether

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[10/] 53 Fed Reg. 15956 (May 4, 1988). The preamble states in part: "(a)s long as the products used are registered, the final product is registered, and the transferred intermediate products are properly labeled, the Agency is confidant that adequate environmental and regulatory safeguards are in place." Id.

clear, it appears that the Landmaster label in the record (C's Preh. Exh. 10) is an end-user label intended to be affixed to "mini-bulk containers" when the product is sold by Simpson Farm to the ultimate user. The label in the record does not contain Simpson Farm's establishment number, but has a blank for the inclusion of such number.

Monsanto avers that Simpson Farm is not its agent, but an independent entity over which it has no control. According to Monsanto, its responsibility for the integrity of the product ended once the product was delivered and sold to Simpson Farm. It is clear, however, that the product was delivered (sold) to Simpson Farm with the understanding that it would be repackaged in "mini-bulk containers" and Monsanto's labels affixed thereto. Under Agency regulations, such repackaging and relabeling constitutes the production of a pesticide requiring a separate registration.[11/]

A second registration was not required, however, if Monsanto and Simpson Farm followed the instructions in the Agency's 1977 Enforcement Policy Applicable to Bulk Shipments of Pesticides (Bulk Policy), supra, sometimes referred to as the "56 gallon" policy, which is by its terms applicable to volumes of pesticide greater

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[11/] See 40 CFR § 167.3 which defines produce as follows:

> Produce means to manufacture, prepare, propagate, compound, or process any pesticide, including any pesticide produced pursuant to section 5 of the Act, any active ingredient or device, or to package, repackage, label, relabel, or otherwise change the container of any pesticide or device.

than 55 gallons or 100 pounds held in an individual container.[12/] In essence, the policy provided that

> "...so long as the transfer of a registered pesticide in 'bulk' involves only the changing of the product container with no change 1) to the pesticide formulation, 2) to the product's accepted labeling (with exceptions noted in Part III B and C below), and 3) to the identity of the party accountable for the product's integrity, the new product resulting from the transfer will be considered as encompassed within the terms of the registration of the product which was transferred."

Bulk Policy II(A).

The stated purpose of the policy was to encourage the distribution of pesticides in bulk quantities and to address practices involved in such transfers which were unclear or unaddressed by the Act and regulations. The policy was applicable to supplementally registered, presently referred to as "supplementally distributed", products, as well as to the basic registered product.[13/]

The rationale for the Bulk Policy is more fully set forth in Part II(B) of the policy. After reciting FIFRA § 3(a) which provides that "...no person...may distribute, sell, offer for sale,

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[12/] In 1991 the Bulk Policy was amended to allow the repackaging of any quantity of pesticides into refillable containers, provided: (1) the container is designed and constructed to accommodate the return and refill of greater than 55 gallons or 100 pounds of the product; and (2) either: (a) the containers are dedicated to and refilled with one specific active ingredient in a compatible formulation, or (b) the specific container is throughly cleaned according to written instructions provided by the registrant to the dealer prior to introducing another chemical to the container in order to avoid cross-contamination; and (3) all other conditions of the July 11, 1977, policy are met (C's Preh. Exh. 22).

[13/] See 40 CFR § 152.132, Supplemental distribution.

hold for sale, [sic] ...to any person any pesticide which [sic] is not registered with the Administrator," the policy provides that before a pesticide product which is not encompassed within the terms of an existing registration enters the channels of trade, a separate registration must be obtained. Bulk Policy II(B). Changes in the formulation of a registered product, changes in accepted labeling, as well as any repackaging of a pesticide into another container will activate the registration requirement, unless the purposes of registration would be fully met by carrying forward the federal registration of the constituent product. The policy cites four purposes of registration, the third being "... registration of a product identifies the party accountable for its integrity of composition, labeling and effects resulting from its use." Bulk Policy II(B).

The policy recites that the commercial transfer of a pesticide in "bulk" may, at various stages of the shipping or distribution process, involve changing the container of the pesticide. For the reasons stated above, such "repackaging" would normally be subject to the registration requirements. According to the policy, the key to determining the applicability of FIFRA § 3 to a repackaged bulk product is whether the purposes of registration continue to be satisfied upon further sale and distribution after transfer. Bulk Policy III(A). These purposes are summarized as safety and efficacy review, label review, identification of the accountable party, and communication to the user of relevant information. The policy provides that to the extent a bulk transfer involves

changing the container, e.g., repackaging a registered end-use pesticide with no change to the pesticide formulation, its label, or the accountable party, the repackaged product is encompassed within the terms of the original registration. Conversely, the policy recites that if any of these factors change, the purposes of registration will not be satisfied, thereby activating the registration requirement for the repackaged product. Of the mentioned requirements, the policy recognizes that the most difficult criterion to satisfy is that of accountability and states that this requirement will be considered as met if a pesticide "1) is transferred in bulk at an establishment owned by the registrant as specified in 40 CFR § 162.3(dd); 2) is transferred at a registered establishment operated under contract with the registrant within the meaning of 40 CFR § 162.3(dd); or 3) is transferred at a registered establishment owned by a party not under contract to the product registrant, but who has been furnished written authorization for use of the product label by the registrant".[14/]

Implicit in the foregoing is the assumption that responsibility for a pesticides' integrity remains with the registrant, whose label is affixed to the pesticide container or whose label otherwise accompanies the pesticide. While Monsanto is correct that it may legally transfer (sell) bulk quantities of a

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[14/] The policy refers to § 162.3(dd) of the former EPA regulations, which were revised in 1988. Elements of the former § 162.3(dd) now appear at 40 CFR § 152.3(q) and 40 CFR § 152.30.

registered pesticide for repackaging at a registered establishment, the question is whether it may thereby divest itself of responsibility for product integrity where the registration contemplated that the approved Monsanto label would appear on the repackaged product, in this case "mini-bulk containers". It is concluded that, while no definite determination of Monsanto's liability may be made on the present record, this question, prima facie, must be answered in the negative.

Firstly, FIFRA has been held to be a strict liability statute.[15/] A person violating a provision of the statute is subject to civil penalties and intent or good faith is immaterial.[16/] Monsanto points out that FIFRA does not clearly provide for strict liability and is distinguishable from other statutes, e.g., CWA and CERCLA, which have been held to provide for strict liability in whole or in part. It is concluded, however, that holding FIFRA to be a strict liability statute is a

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[15/] In re South Coast Chemical, Inc., FIFRA 84-8, 2 EAD 139, (CJO, March 11, 1986); In re Cascade Chemical, Inc., 1086-03-40-012, (ALJ, Sept. 26, 1986). See also In re Microft Systems International Holdings, S.A. and Alfred Waldner Company, Docket No. FIFRA-93-H-03 (Order On Default, July 15, 1994) (strict liability for inaccurate registration data). (The correct citation of Aeromaster, Inc. v. U.S. EPA (Microft at 11) is 765 F.2d 746 (8th Cir. 1985)).

[16/] See In re Pen-Kote Paint Co., Inc., I.D. No. 88455 (ALJ, March 26, 1974) (noting that a person may only be criminally charged under section 14(b) for "knowingly" violating a provision of the Act, whereas the word "knowingly" is omitted from section 14(a), which provides for civil penalties).

permissible construction of the Act and that this long standing interpretation would be upheld by the courts.

The registrant must assure the accuracy of information found on its registered labels and the integrity of its product prior to placing the product on the market.[17/] The registrant is strictly liable for any FIFRA violations upon initial sale or distribution of its product, because the registrant cannot relinquish ownership or control until the product is in the final form in which it is to be distributed or sold.[18/] The registrant is, therefore, always a "person," in FIFRA section 3(a), who distributes or sells the registered product when it is first introduced in the market. When an authorized repackager distributes or sells a repackaged product

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[17/] The extent of the registrant's responsibility for its product is described in the preamble to the 1988 regulations:

> FIFRA provides a comprehensive regulatory scheme covering all pesticide products. Registration is the principal means of ensuring that a product is brought under the FIFRA regulatory scheme. The registrant must demonstrate to the Agency's satisfaction that the product meets the statutory criteria for registration with respect to composition, labeling, and lack of unreasonable adverse effects. The registrant must take responsibility for quality control of the product's composition and for adequate labeling describing the product, its hazards and uses. He must submit or cite data concerning the pesticide's impact on man and the environment, and must assume obligations required by section 3(c)(1)(D) with respect to data compensation. Once registered, a registrant is required under FIFRA sec. 6(a)(2) to report to EPA any factual information concerning the unreasonable adverse effects of the pesticide on the environment. 53 Fed. Reg. 15956 (May 4, 1988).

[18/] "It was the Agency's intention to require that pesticides be registered before they are sold or transferred from one person to another...." 53 Fed. Reg. 15955 (May 4, 1988).

for which it is not the registrant, the repackager is acting for the registrant as well as itself, and both the registrant of the repackaged product and the repackager are strictly liable for FIFRA violations occurring during the repackaging and labeling process.

If Monsanto is the registrant of the new pesticide product that was packaged, labeled, and sold by Simpson Farm, then Monsanto is strictly liable for the sale by Simpson Farm of an adulterated form of Monsanto's product. There is a factual dispute, however, regarding whether Monsanto was the product's registrant. Monsanto argues that it transferred title of the pesticide to Simpson Farm when it placed the pesticide into the bulk holding tank, and it is not responsible for Simpson Farm's actions after that initial sale of its registered pesticide product. Complainant, however, alleges that Monsanto's registration contemplated that the product would be repackaged and sold in "mini-bulk containers" under Monsanto's label and that Monsanto remained the owner and registrant of the product that Simpson Farm distributed.

Secondly, a pesticide manufacturer is liable for FIFRA violations caused by its agents. In re ICI Americas, Inc. and Dodge City Coop. Exch., IF&R No. VII-1191C-92P (ALJ, Nov. 16, 1993) (Withdrawn Sept. 20, 1994 on other grounds) (hereinafter Dodge City). When an agent distributes or sells a pesticide on behalf of the principal as well as itself, then both the principal and the agent qualify as a "person" who sold or distributed the pesticide under FIFRA section 3(a). An agency relationship may exist between the parties regardless of their agreement, contract, or

understandings; whether an agency exists depends upon the actual relationship and deeds of the parties.[19/] The primary element of agency is the extent to which the agent acts subject to the principal's direction and control. Id, citing In re Shulman Transport Enterprises, Inc., 744 F.2d 293, 295 (2d Cir. 1984). The factual elements required for agency are: "the manifestation by the principal that the agent shall act for him, the agent's acceptance of the undertaking and the understanding of the parties that the principal is to be in control of the undertaking." Id, quoting The Restatement (Second) of Agency § 1 comment b (1958). An agency relationship may exist between the registrant and the repackager even if the registrant transferred title of the product. Culbertson v. Jno. McCall Coal Co., 275 F. Supp. 662, 679 (S.D.W.Va. 1967), aff'd, 495 F.2d 1403 (4th Cir. 1974).

The registrant is not liable, however, for subsequent violations committed by purchasers of its product, once an initial

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[19/] "Agency is a legal concept which does not depend on the intent of the parties to create it, nor their belief that they have done so...if the agreement results in the factual relation between them to which are attached the legal consequences of agency, an agency exists although the parties did not call it agency and did not intend the legal consequences of the relation to follow...." Dodge City at 9, quoting Restatement (Second) of Agency § 1 comment b (1958). See, e.g., Electric Power Bd. of Metro. Gov. of Nashville v. Woods, 558 S.W.2d 821, 823 (Tenn. 1977) ("An agreement, contract or understanding between the parties that their acts are those of principal and agent is not necessary for an agency to exist. The existence of an agency is determined by the actual relationships and deeds of the parties").

sale is complete. The factors that indicate a "sale" were set forth in Dodge City as follows:

> (1) That the consignee gets legal title and possession of the goods. However, one can transfer legal title to an agent so that he can deal more freely with the subject matter...
> (2) That the consignee becomes responsible for an agreed price, either at once or when the goods are sold...
> (3) That the consignee can fix the price at which he sells without accounting to the transferor for the difference between what he obtains and the price he pays. [But] an agent may be allowed to fix the selling price and keep the difference as compensation...
> (4) That the goods are incomplete or unfinished and it is understood that the transferee is to make additions to them or complete the process of manufacture.
> (5) That the risk of loss by accident is upon the transferee.
> (6) That the transferee deals, or has a right to deal, with the goods of persons other than the transferor.
> (7) That the transferee deals in his own name and does not disclose that the goods are those of another.

Dodge City, quoting The Restatement (Second) of Agency § 14J.

In Dodge City, Judge Vanderheyden found an agency relationship between the registrant and the repackager when the bulk tanks were approved by an agent of the registrant, labeled "property of [registrant]", title remained with the registrant, any removal of the product from the tank was deemed a purchase by the repackager, and insurance for accidental physical loss remained with the registrant until the product was withdrawn from the tank or invoiced. The registrant was in control of quantity of inventory, had right of access to the tanks and facility at all times, provided requirements for manner of storage, required the repackager to report monthly to registrant regarding disposition and replacement of all inventory, and supplied written instructions for cleaning of containers. Many, but not all, of these indicators

exist in the case at issue. The repackaging agreement between Simpson Farm and Monsanto provides some evidence of the existence of an agency relationship. For example, Simpson Farm was obligated to repackage and resell the product pursuant to Monsanto's guidelines, attach Monsanto's labels, and sell the product under Monsanto's name. Simpson Farm was also limited as to whom it could redistribute the product. Monsanto would be strictly and vicariously liable for any FIFRA violations committed by Simpson Farm while acting as Monsanto's agent. Monsanto alleges, however, that Simpson Farm was not its agent and that it transferred title of the product to Simpson Farm, who then repackaged and resold the product solely for its own benefit. Whether an agency relationship existed between Monsanto and Simpson Farm, therefore, is a disputed factual determination and a finding of an agency relationship in an accelerated decision would not be appropriate at this time.

Thirdly, The Bulk Pesticide Enforcement Policy requires that accountability for the transferred product remain with the original registrant. Respondent interpreted the Policy to permit the pesticide registrant who transfers its product to an independent EPA registered pesticide producing establishment to also transfer accountability for the product's integrity. Respondent misstates the purpose of establishment registration. The statute requires a registered establishment to comply with certain data collection and production reporting requirements, whereas product registration involves labeling and misbranding compliance. See, In re Cascade Chemical, Inc., 1086-03-40-012 (ALJ, Sept. 26, 1986). Establishment

registration neither imposes responsibility for product integrity, nor protects the establishment from liability as a pesticide producer. The enforcement policy states that "registration of a product identifies the party accountable for its integrity of composition, labeling and effects resulting from use" and requires the registrant of the transferred product to authorize, in writing, use of its labels on the repackaged product. In order for Simpson Farm to distribute or sell a repackaged product with authorized use of Monsanto's Landmaster label, the agreement between the parties must provide for Monsanto to recognize the repackaged product as encompassed by its Landmaster registration and, as registrant, to accept accountability for the integrity of the product when it is first introduced into the stream of commerce in its repackaged and relabeled form.

Respondent argues that the Bulk Policy is invalid because it imposes new requirements upon the registrant without notice and comment rulemaking procedures in violation of the APA § 553, 5 U.S.C. § 553. It is not the Bulk Policy, however, but the contractual arrangement between the registrant and repackager, that imposes new restrictions (if any) upon the registrant. The Bulk Policy announces criteria to which a manufacturer and repackager must adhere in order to sell an unregistered pesticide that would otherwise violate the statute and regulations. Absent the Bulk Policy, Simpson Farm would potentially be liable for the sale or distribution of an unregistered pesticide and Monsanto could possibly be subject to liability for misrepresenting that a product

is registered by authorizing use of its name on the product's label or pursuant to a finding that Simpson Farm acted as its agent.

Because the Bulk Policy announces an exercise of the Agency's enforcement discretion, it does not violate the APA.[20/] Registrants and repackagers who wish protection from enforcement action under the Bulk Policy must establish a repackaging agreement that complies with all the requirements of the policy, including retention of accountability with the original registrant. Evidence to show that Monsanto and Simpson Farm intended to be protected from enforcement action by complying with the Bulk Policy, therefore, is one indicator that the parties intended for the original registrant, Monsanto, to remain accountable for the product's integrity, that they intended Monsanto's registration to encompass the repackaged product, and that they intended to establish an agency relationship.

Under the Consolidated Rules of Practice, the Presiding Officer may only render an accelerated decision "if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law as to all or any part of the proceeding." 40 CFR § 22.20(a). In this case several issues of material fact remain: 1) whether Respondent was the registrant of the product sold by Simpson Farm; 2) whether Simpson Farm acted as Respondent's agent; 3) whether the pesticide product was held for sale and

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[20/] An agency's decision not to take an enforcement action is generally not reviewable. Heckler v. Chaney, 470 U.S. 821 (1985).

"released for shipment" at the time of sampling;[21] and 4) whether the product that was sampled was, in fact, contaminated.[22] Because Complainant has established a prima facie case of liability but material fact questions remain in dispute, Respondent's motion to dismiss or for accelerated decision will be denied.

Respondent's Motion to Compel Complainant to Amend its Complaint and to Bar Evidence

For the reasons stated above, it is not necessary for Complainant to amend its complaint. Respondent's motion to compel amendment will be denied.

Respondent also requested that the ALJ bar Complainant from submitting evidence regarding fault, and objected to the ALJ's request for evidence from Respondent to demonstrate lack of fault or causation. The ALJ must "admit all evidence which is not irrelevant, immaterial, unduly repetitious, or otherwise unreliable or of little probative value." 40 CFR § 22.22. Although FIFRA imposes civil liability for a violation, regardless of fault, a

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[21] See, In re Associated Chemists, Inc., I.F.&R. No. X-17C (ALJ, Sept. 2, 1975); In re Elco Manufacturing Co., I.F.&R. No. III-33C (ALJ, June 4, 1975).

Although the complaint alleges that Landmaster was "repackaged, relabeled and released for shipment", the sample appears to have been drawn from the "bulk holding tank" rather than from a "mini-bulk container". If the sample was taken prior to completion of the production process, which includes repackaging and relabeling, then the sample would arguably not prove a violation of section 12(a)(1) of FIFRA. See, 7 U.S.C. § 136g(a).

[22] Respondent questioned the validity of Complainant's test results that indicated that the pesticide product was contaminated. If the pesticide was not contaminated, there would, of course, be no FIFRA violation.

demonstration of either good faith, lack of causation, negligence, or knowing violation may be considered when calculating the amount of penalty to be imposed.[23/] It would, therefore, be inappropriate to bar Complainant from introducing evidence to prove either Respondent's bad faith or that Respondent caused the alleged contamination to occur. Respondent is invited, although not required, to present evidence either of good faith, or to show Respondent's safeguards to avoid contamination. I will consider this evidence in the event that Respondent is found liable and a penalty is appropriate. Respondent's motion to bar evidence will be denied.

O R D E R

1. Official Notice is taken of the 1990 FIFRA Enforcement Response Policy and the 1977 Enforcement Policy Applicable to Bulk Shipments of Pesticides. Complainant's motion for official notice of FIFRA and the regulations promulgated thereunder is denied as unnecessary.

[23/] In re South Coast Chemical, FIFRA 84-4, 2 EAD 138, 143 (CJO, Mar. 11, 1986)("If the presiding officer is persuaded by [Respondent's] assertion of good faith, however, he may take it into account in determining the amount of penalty"). In re Pen-Kote Co., Inc., I.D. No. 88455, (ALJ, March 26, 1974) ("While knowledge is not an essential element to establish a violation where a civil penalty is to be imposed, it is a factor that may properly be taken into consideration in evaluating the culpability of the respondent as bearing on the gravity of the offense").

2. Complainant's motion for consideration of In re ICI Americas, Inc. and Dodge City Coop. Exch., I.F.&R. No. VII-1191C-92P (ALJ, Nov. 16, 1993) is granted.

3. Respondent's motion to dismiss, or in the alternative, for accelerated decision is denied. Several issues of material fact remain:

   a. Whether Monsanto was the registrant of the pesticide product that was distributed or sold by Simpson Farm. Relevant factual inquiries include, but are not limited to: Who held title to the Landmaster product while it was in the bulk storage tank? What label appeared on the product transferred from Monsanto to Simpson Farm? What label appeared on the product transferred from Simpson Farm to consumers? Which label was provided to EPA as a part of the Landmaster registration? Did the Landmaster registration provide for bulk packaging and/or mini-bulk packaging?

   b. Whether Simpson Farm acted as Monsanto's agent when it sold or distributed the allegedly adulterated pesticide product. Relevant factual inquiries include: Who owned the bulk tanks and the mini-bulk tanks? What was included in the "sales agreement" between Monsanto and Simpson Farm? What were the "guidelines" that Monsanto provided to Simpson Farm? To what extent was Monsanto permitted entry onto Simpson Farm's facility for inspections? Did Monsanto provide training of Simpson

Farm's employees? How did Monsanto limit Simpson Farm's distribution of the product? and any other indicia of control (or lack thereof) of Monsanto over Simpson Farm's storage, handling, distribution, or sale of the Landmaster product.

c. Whether the pesticide product was "held for distribution or sale" or "released for shipment" at the time that it was sampled. Relevant factual inquiries include, but are not limited to: Was the sample taken from a bulk storage tank or a mini-bulk container? How was the pesticide product stored and distributed -- were the mini-bulk containers filled and stored by Simpson Farm, or were the mini-bulk containers reusable containers that were brought to the site by consumers and filled upon demand? How was the product labeled while in the bulk tank? How and when was the product labeled when in the mini-bulk container?

d. Whether the pesticide product that was sampled was, in fact, adulterated. Relevant factual inquiries include, but are not limited to: Was there any other testing of the product at the time it was found to be adulterated by EPA? What was the result of any independent testing of EPA's retained sample?

4. Respondent's Motion to Compel Complainant to Amend its Complaint and to Bar Evidence is denied.

5. Neither party has sufficiently addressed the penalty to be assessed in the event of a finding of liability. The parties are requested to provide information regarding an appropriate penalty. In particular, what effect should the $1,500.00 settlement payment by Simpson Farm have upon the amount attributed to Monsanto in the event of a finding of liability?

Dated this 6th day of December 1995.

Spencer T. Nissen
Administrative Law Judge

CERTIFICATE OF SERVICE

This is to certify that the original of this ORDER ON MOTIONS, dated December 6, 1995, in re: Monsanto Co. and Simpson Farm Enterprises, Inc., Dkt. No. IF&R-VII-1193C-93P, was mailed to the Regional Hearing Clerk, Reg. VII, and a copy was mailed to Respondent and Complainant (see list of addressees).

Helen F. Handon

Helen F. Handon
Legal Staff Assistant

DATE: December 6, 1995

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