UNITES STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of Health Care Products, Inc., Respondent	I.F.& R. Docket No. VIII-90-279C
In the Matter of Health Care Products, Inc., Respondent	FIFRA Docket No. 93-H-02F
In the Matter of Celltech Media, Inc. aka Health Care Products, Inc., Through its Agent, Meditox, Inc. Respondent	FIFRA Docket No. 95-H-04

ORDERS ON MOTIONS

Background Proceedings

These consolidated proceedings arise from three administrative complaints seeking civil penalties brought by the United States Environmental Protection Agency (the "Complainant" or "EPA") against Health Care Products, Inc.,[1] (the "Respondent" or "HCP"). The charges involve Respondent's registration and distribution of the disinfectant/sterilant solution WipeOut, which is regulated as a pesticide pursuant to the Federal Insecticide, Fungicide & Rodenticide Act ("FIFRA"). The charges and procedural history of the three Complaints are summarized below.

- Docket No. I.F.&R. VIII-90-279C

The Region 8 Office of the EPA, in a Complaint dated June 7, 1990 (the "1990 Complaint") charged Respondent with 7 counts of FIFRA violations based on a June 1989 inspection of Biotrol International, Inc., a distributor of Respondent's products in Woods Cross, Utah. The 1990 Complaint charges Respondent with one count

[1] The name of the Respondent has changed twice since the time of the filing of the original Complaints. As reflected in the third caption above, it became Celltech Media, Inc. on March 28, 1994. Respondent changed its name again to its current name, Smartel Communications Corporation, on June 21, 1995. These name changes are further discussed in the rulings below on Complainant's motion to recaption these actions.

of distributing or selling an unregistered pesticide product in violation of FIFRA Section 12(a)(1)(A), 7 U.S.C. §136j(a)(1)(A); five counts of distributing or selling a misbranded pesticide, bearing unapproved claims on its label, in violation of FIFRA Section 12(a)(1)(E), 7 U.S.C. §136j(a)(1)(E); and one count of producing a pesticide without an establishment registration number in violation of FIFRA Section 12(a)(2)(L), 7 U.S.C. §136j(a)(2)(L). The 1990 Complaint seeks a total civil penalty of $21,000.

The 1990 Complaint, dated June 7, 1990, was not served on Respondent until on or about January 8, 1991. Respondent filed a letter/answer by its President, Frank Strong, on January 18, 1991. Respondent disputed most of the allegations and requested a hearing. The EPA took no further action on the 1990 Complaint until March 31, 1995 when it was referred to the Office of Administrative Law Judges by the Regional Hearing Clerk.

- Docket No. FIFRA 93-H-02F

In a Complaint dated May 18, 1993 (the "1993 Complaint") the EPA (Toxics and Pesticides Enforcement Division, Office of Regulatory Enforcement, located at the Agency's headquarters in Washington, D.C.) charged Respondent with 40 additional violations of FIFRA. These alleged violations were based on a program in which the EPA tested pesticides registered as sterilants for efficacy. The Agency collected samples of WipeOut from two distributors of Respondent's products in 1991 and 1992, and had them tested. The Complaint alleges that those tests found that the product failed to perform as a sterilant when used according to the label directions.

Also on May 18, 1993, the EPA issued a Stop Sale Use and Removal Order ("SSURO") ordering the recall of all WipeOut and barring any future sales. That SSURO remains in effect.

The 1993 Complaint charges Respondent with 33 counts of distributing or selling an ineffective, and therefore misbranded, pesticide in violation of FIFRA §12(a)(1)(E); one count of distributing or selling a pesticide that was misbranded because the label did not include an EPA establishment or registration number, in violation of FIFRA §12(a)(1)(E), 7 U.S.C. §136j(a)(1)(E); one count of distributing or selling a pesticide bearing claims that differed from those made at the time of registration, in violation of FIFRA §12(a)(1)(B), 7 U.S.C. §136j(a)(1)(B); one count of failing to file a report with EPA of its own failed efficacy testing, in violation of FIFRA §12(a)(2)(N), 7 U.S.C. §136j(a)(2)(N); and four counts of failing to maintain research data on a registered pesticide as required by 40 C.F.R. §169.2(k), in violation of FIFRA §12(a)(2)(B)(i), §136j(a)(2)(B)(i). The 1993 Complaint seeks a civil penalty of $200,000 for the 40 alleged violations, based on the maximum of $5000 for each offense authorized by FIFRA §14(a)(1), 7 U.S.C. §136*l*(a)(1).

Respondent (by counsel who has since withdrawn in favor of current counsel) filed an Answer to the 1993 Complaint on July 12, 1993, and requested a hearing. Respondent denied the material allegations of the Complaint and raised a series of affirmative defenses to the charges.

- Docket No. FIFRA 95-H-04

In a Complaint dated February 14, 1995 (the "1995 Complaint"), the EPA (also headquarters staff) charged Respondent with 104 additional violations of FIFRA. These alleged violations stemmed from inspections conducted by EPA in May and June 1993 of twelve companies or dealers that distributed or sold WipeOut products throughout the country.

The 1995 Complaint charges Respondent with 64 counts of distributing or selling an ineffective, and therefore misbranded, pesticide in violation of FIFRA §12(a)(1)(E), 7 U.S.C. §136j(a)(1)(E); and 40 counts of distributing or selling unregistered pesticides, in violation of FIFRA §12(a)(1)(A), 7 U.S.C. §136j(a)(1)(A). These latter 40 counts involve the sales of WipeOut products in forms other than the registered solution, such as WipeOut towelettes, sprays, and kits under several different marketing names and configurations. The 1995 Complaint seeks a total civil penalty of $520,000, based on the maximum of $5000 for each offense authorized by FIFRA §14(a)(1), 7 U.S.C. §136l(a)(1).

Respondent filed its Answer to the 1995 Complaint on April 3, 1995, and requested a hearing. Respondent denied the material allegations of the Complaint and raised a series of affirmative defenses. These rulings on the parties several motions will address the substance of Respondent's defenses to the extent warranted.

Consolidated Proceedings

The former presiding officer in this proceeding, Administrative Law Judge Daniel M. Head, held a series of prehearing conferences and corresponded with the parties to establish a schedule for submittal of "dispositive" motions and other procedural and discovery motions. The schedule was later modified by Judge Head and the undersigned redesignated Administrative Law Judge ("ALJ"). The motions listed below were filed pursuant to those orders. The following "dispositive" motions will be addressed in these rulings: Respondent's Motion to Dismiss Administrative Complaints, dated October 23, 1995 (Complainant's Reply in Opposition dated November 13, 1995); Complainant's Motion for Partial Accelerated Decision dated October 23, 1995 (Respondent's Opposition dated November 13, 1995); Complainant's Motion to Strike Affirmative Defenses dated October 23, 1995 (Respondent's Opposition dated November 13, 1995); Respondent's Motion to Dismiss for Inability to Hold Hearings in Canada dated

April 6, 1996 (Complainant's Opposition dated April 30, 1996, plus additional submittals by both parties); and Complainant's Motion to Recaption Actions and to Require Petitioner/Respondent to Provide Complete and Accurate Information on its Name and Legal Representation dated October 23, 1995 (Respondent's Opposition dated November 13, 1995, plus additional submittals by both parties).

Respondent's Motion to Dismiss

Respondent seeks dismissal of all three administrative Complaints for a variety of reasons -- some relating to all the Complaints, and some unique only to certain parts or counts of the three proceedings. A respondent's motion to dismiss is equivalent to a motion for accelerated decision under the EPA Rules of Practice, 40 C.F.R. §22.20(a), which reads as follows:

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

For the most part, the grounds asserted in support of Respondent's motion to dismiss rest on several legal arguments, which were countered in Complainant's reply in opposition. The facts relevant to each basis for the motion are not generally in dispute. The discussion below is organized by subheadings addressing each ground asserted by Respondent in support of its motion to dismiss.

- Jurisdiction over HCP - 1993 and 1995 Complaints

Respondent contends that the "Administrative Court," the EPA Office of Administrative Law Judges, does not have personal jurisdiction over HCP. Respondent bases this argument on the misconception that, because the 1993 and 1995 Complaints were filed by the enforcement staff at EPA headquarters in Washington, the long-arm jurisdiction of the District of Columbia is somehow implicated in this proceeding. These proceedings do not invoke the law or jurisdiction of the District of Columbia in any respect. Respondent's discussion of the District of Columbia long-arm statute and minimum contacts with that jurisdiction is therefore inapposite.

The EPA's personal jurisdiction over Respondent in these cases is founded on Respondent's registration of a pesticide, WipeOut Cold Sterilizing Disinfecting Solution ("WipeOut"), followed by its commercial sales and distribution throughout the United States. Respondent registered WipeOut with the EPA in June 1989. From that time until issuance of the SSURO in 1993, HCP proceeded to distribute WipeOut, according to the Complaints, in at least 19 states. Also, as required by FIFRA's implementing regulations, 40 C.F.R. §152.50(b), Respondent, a Canadian corporation, has continuously maintained an authorized agent in the United States. These activities comprise ample "minimum contacts" with the United States and the EPA to satisfy the due process standard for invoking jurisdiction. International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

Respondent in fact concedes that the distribution of products in several states, as alleged in these Complaints, would constitute sufficient minimum contacts to establish civil long-arm jurisdiction in those states.[2] The jurisdiction in these proceedings, however, is in a federal administrative forum -- a hearing before the EPA's Office of Administrative Law Judges. The minimum contacts necessary to pass due process muster in this forum are not restricted to any one state, but consist of the Respondent's aggregate federal contacts. "When a federal court is asked to exercise personal jurisdiction over an alien defendant sued on a claim arising out of federal law, jurisdiction may appropriately be determined on the basis of the alien's aggregated contacts with the United States as a whole . . ." Cryomedics, Inc. v. Spembly, Ltd., 397 F.Supp. 287, 290 (D. Conn. 1975).

FIFRA §14(a)(1) explicitly grants the Administrator of the EPA the authority to assess civil penalties on [a]ny registrant, commercial applicator, wholesaler, dealer, retailer, or other distributor who violates any provision of this subchapter." Subdivision (a)(3) of that statute provides that the person charged shall be given notice and an opportunity for a hearing. The administrative hearing jurisdiction is implemented by the EPA Rules of Practice, specifically made applicable to FIFRA civil penalty proceedings by 40 C.F.R. §22.01(a)(1). It is true that the Administrator's office is located in Washington, D.C., while FIFRA §14(a)(3) grants the person charged with FIFRA violations a right to a hearing in the municipality of the respondent's residence. That language, however, concerns the location or venue of the hearing[3], not jurisdiction over the respondent. Jurisdiction in

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[2] Opposition of Respondent Health Care Products to Complainant's Motion to Strike Affirmative Defenses, November 13, 1995, p. 29.

[3] See also the discussion under the heading Respondent's Motion to Dismiss for Inability to Hold Hearings in Canada, below

these proceedings is in the EPA administrative hearing forum authorized by FIFRA -- not before the District of Columbia or any other state or federal court.

Personal jurisdiction over Respondent in this proceeding is therefore based on Respondent's pesticide registration and distribution activities, in the context of the FIFRA regulatory scheme. Respondent's motion to dismiss the complaints on the basis of a lack of personal jurisdiction is denied.

- Service of the Complaints

Respondent contends that the EPA did not properly serve any of the three administrative Complaints on HCP, and that the Complaints must therefore be dismissed. In all three proceedings, the EPA served Respondent's designated United States agent at the time by certified mail.[4] In addition, the 1993 and 1995 Complaints were also served by certified mail on Respondent's President, Frank Strong, in Canada. Respondent asserts that the service on its President in Canada was ineffective in that it did not comport with the requirements of the Hague Convention for service of process on a Canadian citizen. Respondent further claims that service on its United States agents was ineffective because HCP did not specifically authorize those agents to accept service of process on its behalf.

We turn first to the service on Respondent's agents in the United States. In setting forth the requirements for an application for a pesticide registration, 40 C.F.R. §152.50(b)(1) provides as follows:

> "An applicant not residing in the United States must also designate an agent in accordance with paragraph (b)(3) of this section to act on behalf of the applicant in all registration matters."

Paragraph (b)(3), entitled "*Authorized Agent,*" requires the applicant to "designate a person residing in the United States to act as his agent." The designation is made simply by sending the EPA a letter stating the name and United States address of the agent. 40 C.F.R. §152.50(b)(2) also requires the applicant to maintain a current "address of record" in the United States. That paragraph states:

"The U.S. address provided will be considered the

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in these rulings.

[4] In all 3 Complaints the Certificate of Service indicates service on Richard Rosenberg, President of Meditox, Inc., in Deerfield Beach, Florida, as Respondent's registered agent.

> applicant's address of record, and EPA will send all correspondence concerning the application and any subsequent registration to that address."

Respondent complied with these regulations, as well as 40 C.F.R. §152.122 (which requires the registrant to inform EPA of changes in its name and address of record, and changes of its authorized agent). Respondent changed its United States authorized agent and United States address of record several times during the periods covered by these Complaints and since they were filed. Each time, Respondent duly notified EPA.

Service of administrative complaints on foreign corporations in this proceeding is governed by the EPA Rules of Practice, 40 C.F.R. §22.05(b)(ii), which provides as follows:

> "Service upon a domestic or foreign corporation . . . shall be made by personal service or certified mail . . . . directed to an officer, partner, a managing or general agent, or to any other person authorized by appointment or by Federal or State law to receive service of process."

Complainant served each of the three Complaints here by certified mail on Respondent's United States agent at the time of each service.

Respondent attempts to avoid this service by asserting that HCP never appointed its agent specifically for the purpose of receiving service of process. However, under 40 C.F.R. §152.50(b)(1), Respondent's United States agent was appointed to act on behalf of HCP "in all registration matters." The administrative Complaints here arise directly from HCP's registration of WipeOut solution, and are therefore "registration matters" within the meaning of the regulations and FIFRA. They were also sent by certified mail and are therefore also "correspondence concerning the registration" within the meaning of 40 C.F.R. §152.50(b)(2). The regulatory scheme does not grant a registrant the right to restrict the authority of its U.S. agent or to claim it has not consented to United States jurisdiction. This is analogous to the general rule that a corporation is deemed to acquiesce to the service rules of the jurisdiction in which it is doing business.[5] In this case Respondent was doing business within the EPA's regulatory jurisdiction over pesticide registration matters.

The EPA Rules of Practice at 40 C.F.R. §22.05(b)(ii) explicitly encompass service of administrative complaints on

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[5] See 19 Am.Jur. 2d, Corporations §2192 at 103, §2194 at 106-107 (1986); and 36 Am.Jur. 2d, Foreign Corporations, §535 at 544-545 (1986).

foreign corporations. Despite Respondent's claim of limited authority, its United States agents were "authorized by Federal law" within the meaning of 40 C.F.R. §22.05(b)(ii) to accept service of the Complaints in these proceedings on behalf of HCP. The relevant Federal law is found in FIFRA §14(a) and its implementing regulations, particularly 40 C.F.R. §152.50(b).

Respondent's interpretation of the requirement to maintain a domestic agent is contrary to the plain language of the regulation as well as inconsistent with FIFRA's regulatory enforcement scheme. Enforcement of violations concerning a registered pesticide is a "registration matter" for which the registered agent is authorized to act on behalf of the registrant. Indeed, the availability to accept service of process is one of the chief purposes of such an agent in the regulatory scheme. The presence of a domestic agent for a foreign registrant gives effect to the legislative intent of FIFRA to "regulate the use of pesticides to protect man and the environment."[6] Section 25(a) of FIFRA, 7 U.S.C. §136w(a)(1) authorizes the Administrator to prescribe regulations to carry out the provisions of the statute. The promulgation of 40 C.F.R. §152.50(b)(1) was designed specifically to give effect to the statutory intent with respect to foreign pesticide applicants and registrants.

The Complainant has provided further explicit evidence of the regulatory intent in promulgating 40 C.F.R. §152.50(b)(1). An EPA General Counsel opinion dated June 23, 1972 expressly addresses this issue, with the title: "Must EPA Require a Foreign Registrant to Designate a Domestic Agency." That opinion determined that the proposed regulation requiring a foreign firm to designate a domestic agent would be consistent with the general delegation of authority, as "compatible with the statutory purpose and necessary to the effective enforcement of the congressional scheme."[7] The opinion specifically found that the "suggested regulation would assure the availability of a party against whom may be enforced the environmental safeguards which are the objects of the Act." *Id.*, p.21. Thus, Respondent, by its designation of a United States agent, authorized that agent to act on Respondent's behalf in all registration matters, including to accept service of the subject administrative Complaints.

Since the Complaints were properly served within the United

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[6] Legislative History of the Federal Environmental Pesticide Control Act of 1972, P.L. 92-516, Senate Report No. 92-838 (1972 U.S. Code Cong. and Adm. News 3993).

[7] EPA General Counsel Opinion, June 23, 1972, Pesticides, p.21, citing American Trucking Ass'ns, Inc. v. U.S., 344 U.S. 298; Ciba-Geigy Corporation v. Richardson, 446 F.2d 465 (C.A. 2, 1971); National Broadcasting Co. V. U.S., 319 U.S. 190.

States on Respondent's authorized agents, it is not necessary to discuss whether the service by certified mail on Respondent's President in Canada also constituted valid service. Therefore the parties' arguments concerning the consistency of that service with the requirements of the Hague Convention will not be addressed in these rulings. "Where service on a domestic agent is valid and complete under both state law and the Due Process Clause, our inquiry ends and the Convention has no further implications." Volkswagenwerk Aktienesellschaft v. Schlunk, 486 U.S. 694, 707 (1988). Service here was valid and complete on Respondent's domestic agents under federal law and the due process clause as discussed above. Respondent's motion to dismiss the Complaints on the basis of alleged improper service is therefore denied.

- Statute of Limitations

Respondent contends that most of the charges in the 1993 and 1995 Complaints are barred by the application of the 5-year statute of limitations in 28 U.S.C. §2462. The case of 3M Company v. Browner, 17 F.3d 1453, 1457 (D.C. Cir., 1994) has established the applicability of that statute of limitations to administrative civil penalty proceedings. Respondent claims that the period should begin to run on the date that it submitted its efficacy data for WipeOut to the EPA, on or about February 1, 1988. This would time-bar the charges based on efficacy in the 1993 and 1995 Complaints.[8] Alternatively, Respondent asserts the accrual date should be June 30, 1989, the date of EPA's inspection at Biotrol International, Inc. in Utah, when EPA first became aware of alleged misbranding violations of WipeOut products by Respondent. If the claim first accrued on that date, the misbranding counts in the 1995 Complaint would be barred.

The 5-year statute of limitations for civil penalties is set forth in 28 U.S.C. §2462, which reads:

> Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

As stated in the 3M case, "[a] claim normally accrues when the factual and legal prerequisites for filing suit are in place." 17 F.3d 1453, 1459 (citations omitted). After further analyzing the

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[8] In the 1993 Complaint, 33 of the 40 charges are based on WipeOut's alleged ineffectiveness. In the 1995 Complaint, 64 of the 104 charges are so based.

legislative history of the word "accrued", the D.C. Circuit concluded that "an action, suit or proceeding to assess or impose a civil penalty must be commenced within five years of the date of the violation giving rise to the penalty." 17 F.3d 1453, 1462. The Court rejected EPA's proposed "discovery rule." EPA had contended that the claim should not accrue until the violation was discovered or, in the exercise of due diligence, should have been discovered.

When these rules are applied to the instant proceeding, it is seen that none of the claims here are barred by the 5-year statute of limitations in 28 U.S.C. §2462. In the 1993 Complaint, the subject counts allege the sale or distribution of misbranded pesticides. The alleged violative conduct is Respondent's actual distribution or sale of the allegedly misbranded WipeOut solution. These claims could not and did not accrue until the products were placed in the stream of commerce. All those acts of sale and distribution are alleged to have occurred in 1991 or 1992. This is well within the five-year period preceding the May 18, 1993 filing of the Complaint. In the 1995 Complaint, all subject counts allege sales of either misbranded or unregistered WipeOut products in May and June of 1993. Those dates are less than two years preceding the February 15, 1995 filing of the Complaint.

Respondent's proposed date of accrual -- February 1, 1988, when it first submitted its efficacy data to the EPA -- is apparently based on a distorted version of the rejected discovery rule for commencing a limitations period. Respondent argues that EPA should have begun its investigation of the efficacy of WipeOut on that date, pursuant to its duty under FIFRA §3, specifically 7 U.S.C. §136a(c)(3)(A). That statute directs the Administrator to "review the data after receipt of the application and . . . as expeditiously as possible, either register the pesticide in accordance with paragraph (5), or notify the applicant of his determination that it does not comply with the provisions of the subchapter in accordance with paragraph (6)." While the 1988 date of Respondent's submittal of efficacy data might properly be cited as the accrual date for certain alleged violations concerning the submittal of application data, it has nothing to do with charges of distribution of an unregistered or misbranded pesticide. EPA's duty to review and approve the application is completely distinct from the accrual of the claims here, which depend on Respondent's sale or distribution of pesticides. As expressed by Complainant, prescience is not one of the burdens borne by the EPA in these proceedings.

Respondent's alternative proposed date of accrual, June 30, 1989, is also unavailing. On that date, EPA conducted an inspection at Biotrol International, Inc., a distributor of Respondent's products in Woods Cross, Utah. This inspection gave rise to the 1990 Region 8 Complaint, which charged Respondent with several misbranding violations. Those alleged violations, however,

concern label claims not approved by EPA -- not ineffectiveness as alleged in the 1993 and 1995 Complaints. The factual elements of the later charges are completely unrelated to those arising from the June 30, 1989 inspection. The 1993 and 1995 Complaints stem from EPA's efficacy testing done later, in 1991 and 1992. Even if some sort of discovery rule were applicable, it would not pertain in this situation where it could not be said that EPA should have discovered the ineffectiveness of WipeOut as a result of its 1989 inspection in Utah.

Respondent has not contended that any of the charges in the 1990 Complaint, or any of the remaining charges in the 1993 or 1995 Complaints (those not alleging sales of ineffective, and therefore misbranded pesticides) are barred by the statute of limitations. As discussed above, the charges alleging sales of ineffective, and therefore misbranded, pesticides are not barred by the 5-year statute of limitations of 28 U.S.C. §2462. Respondent's motion to dismiss on the basis of the statute of limitations is therefore denied.

- Laches - Unreasonable Delay

Respondent contends that the 1990 Complaint, and parts of the 1993 and 1995 Complaints, should be dismissed due to the EPA's delay in bringing those actions, under the equitable doctrine of laches. Complainant responds by asserting that the defense of laches is not generally available against the United States.[9]

While the federal government may generally be exempt from the application of the equitable doctrine of laches, administrative agencies are nevertheless bound by the standards in the Administrative Procedure Act. That statute includes the directive, at 5 U.S.C. §555(b), that "within a reasonable time, each agency shall proceed to conclude a matter presented to it." "Although an administrative agency has considerable deference in establishing a timetable for completing its proceedings, such discretion is not unbounded 'since the consequences of dilatoriness may be great.'" Public Citizen Health Group v. Commissioner, Food and Drug Administration, 724 F.Supp 1013, 1019 (1989), quoting Cutler v. Hayes, 818 F.2d 879, 896 (D.C. Cir. 1987). The D.C. Circuit Court of Appeals has elaborated on the policy behind this standard as follows:

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[9] Complainant cites U.S. v. Alvarado, 5 F.3d 1425 (11th Cir. 1993) for the proposition that the United States is exempt from the consequences of its laches. This doctrine is based on the premise that it is good public policy to protect the common rights vested in the government from the inadvertent actions of the government's agents. U.S. v. City of Palm Beach Gardens, 635 F.2d 337, 339-40 (5th Cir. 1981).

> There must be a 'rule of reason' to govern the time limit to administrative proceedings. Quite simply, excessive delay saps the public confidence in an agency's responsibilities and creates uncertainty for the parties, who must incorporate the potential effect of possible agency decisionmaking into future plans.

Potomac Electric Power Co. v. ICC, 702 F.2d 1026, 1034 (D.C.Cir. 1983), quoting MCI Telecommunications Corp. v. FCC, 627 F.2d 322, 340 (D.C. Cir. 1980).

In determining whether agency action has been unreasonably delayed, the D.C. Circuit has identified the following factors for consideration: (1) the length of the delay; (2) the justification for the delay in the context of the statute being administered; and (3) the consequences of the delay, or prejudice to the affected parties. See Public Citizen Health Research Group at 1019; and Cutler at 897-98. Although the cited cases involve agency rulemaking proceedings, the reasoning is equally applicable to adjudications. The consideration of the factors, especially that concerning the consequences of the delay, will naturally be affected by the particular statutory scheme and the nature of the agency action.

-- 1990 Complaint

We turn first to the 1990 Complaint. The 1990 Complaint was based on an EPA inspection of a distributor and subregistrant of Respondent's products, Biotrol International, Inc., in Woods Cross, Utah ("Biotrol"), on June 30, 1989. The Region 8 1990 Complaint is dated almost a year later, June 7, 1990. While service may have been attempted earlier, it was not apparently consummated until on or about January 8, 1991.[10] Respondent promptly filed an Answer and Request for Hearing by its President, Frank Strong, on January 18, 1991. The EPA then took no further action on this Complaint until March 22, 1995, when counsel at EPA headquarters filed a Notice of Substitution of Counsel, and a copy of the Answer, with the Region 8 Hearing Clerk. The Regional Hearing Clerk then, for the first time, on March 31, 1995, referred the file to the Office of

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[10] The certificate of service on the Complaint in the ALJ's file indicates it was sent by certified mail to Robert W. Dishman, Respondent's "registered agent" in Westlake Village, California on July 26, 1990. However, another copy of the 1990 Complaint attached to the affidavit of W.F. Strong in Support of Respondent's Motion to Dismiss, indicates service on "Meditox, Inc., d/b/a Health Care Products" in Deerfield Beach and Boca Raton, Florida, on January 8, 1991. Both parties apparently recognize this latter date as the effective date of service of the 1990 Complaint. (See, e.g., Complainant's Reply Memorandum of Law in Opposition to Respondent's Motion to Dismiss, p. 2.).

Administrative Law Judges for assignment of a judge to hold the hearing.[11]

Thus, the 1990 Complaint remained dormant in the Region 8 office of EPA for over four years from the time issue was joined by the filing of Respondent's Answer, until it was referred for hearing. There had already been an earlier delay of one and one half years from the time of the inspection until service of the Complaint. EPA offers no justification or reason for this delay, asserting only that this enforcement proceeding was "inactive" during that period.[12]

In determining the reasonableness of this delay, the first two factors cited above -- the length of the delay and the agency's justification -- are unreasonable on their face. There was an extremely long delay in the prosecution of this matter with no justification whatsoever. The total delay from the time of the inspection until Respondent was first actually offered an opportunity for a hearing exceeds the 5-year limitations period of 28 U.S.C. §2462. Although the Complaint was filed well within the limitations period, the statute of limitations can be considered a guideline as to what constitutes unreasonable delay in prosecuting a matter within the meaning the APA §555(b). An unjustified delay of this length can only cause uncertainty among the parties and regulated community, and sap public confidence in the FIFRA administrative enforcement program. Respondent was fully justified in believing that the matter was dropped when it received no response to its Answer, which included fairly detailed explanations of its position, for a period of years.[13]

Respondent contends it is prejudiced by the delay in prosecuting the 1990 Complaint in that it can no longer obtain testimony or evidence from former employees of Biotrol. HCP's President, W.F. Strong, has submitted an affidavit in which he states he is informed and believes that Biotrol was sold in 1991

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[11] Respondent apparently did not file the original of its Answer of January 18, 1991 with the Regional Hearing Clerk as required by 40 C.F.R. §§22.05(a) and 22.15(a), but only sent it directly to the Assistant Regional Counsel who signed the Complaint. This technical filing omission is of no consequence, however, where EPA never objected on this ground, and then waited over four years before curing the filing omission itself by forwarding a copy of the Answer to the Regional Hearing Clerk.

[12] See Complainant's Reply Memorandum of Law in Opposition to Respondent's Motion to Dismiss, dated November 13, 1995, p. 3.

[13] Declaration of W.F. Strong in Support of Motion by Respondent Health Care Products to Dismiss Administrative Complaints, October 23, 1995 ("Strong Declaration"), ¶4.

and completely shut down. Respondent further states that it has no knowledge of the whereabouts of any of Biotrol's former employees, and has no access to any records of that facility.[14] Respondent thus asserts a claim of "evidentiary or defense prejudice [which] may arise by reason of a defendant's inability to present a full and fair defense on the merits due to a loss of records, the death of a witness, or the unreliability of memories of long past events, thereby undermining the court's ability to judge facts." A.C. Auckerman Co. v. R.L. Chaides Const. Co., 960 F.2d 1020, 1033 (Fed. Cir. 1992).

Actually, however, it appears that Respondent does still have available two witnesses who have some personal knowledge of the circumstances surrounding the violations alleged in the 1990 Complaint. Mr. Strong, the President of HCP who filed the Answer to that Complaint is still in that position and listed as a witness in Respondent's prehearing exchange. In addition, Respondent has submitted the Declaration of Frank Midghall in Opposition to the EPA's Motions to Strike Affirmative Defenses and for Partial Accelerated Decision dated November 9, 1995. In that affidavit, Mr. Midghall, HCP's Director of Sales, asserts he has personal knowledge of certain of the labeling violations alleged in the 1990 Complaint (¶¶ 8,9). Mr. Midghall is also listed as a witness for Respondent.

Nevertheless, regardless of the degree to which Respondent may actually be prejudiced, the EPA's prosecution of the 1990 Complaint was so unreasonably delayed as to merit dismissal. The timing of its referral to the Regional Hearing Clerk in March of 1995, shortly after the filing of the 1995 Complaint, suggests that revival of the 1990 Complaint was an afterthought to the prosecution of the far more substantial 1993 and 1995 Complaints. This type of conduct should not be countenanced. With no explanation, the Agency's enforcement staff simply failed to prosecute a matter it had initiated for over four years, until after two additional enforcement actions had been brought against the same Respondent. The potential for abuse of prosecutorial discretion is clear where an enforcement staff can choose whether or not to act, and when to act, on a matter presented to it, with no communication to the respondent, no explanation for the delay, and no guidelines governing its prosecution.

If the EPA enforcement staff believed the 1990 Complaint was not worth pursuing for four years, it has provided no reason why it should be pursued now. The charges in the 1990 Complaint are of a different, less serious character than those in the 1993 and 1995 Complaints. The total civil penalty proposed in the 1990 Complaint is relatively low, $21,000, compared to the total of $720,000 for the other two Complaints. It appears from the

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[14] Strong Declaration, ¶5.

submittals that at least some of the mislabeling violations alleged in the 1990 Complaint may have been due to the EPA's admitted errors in its original Notice of Pesticide Registration of June 29, 1989.[15] In the absence of any explanation from EPA, we can speculate that this may have been part of the reason the proceeding remained "inactive." In any event, dismissal of the 1990 Complaint would also have the practical effect of eliminating those issues, which are unrelated to the charges in the 1993 and 1995 Complaints. This will foster a more efficient hearing that will focus on the subsequent more serious charges of distributing ineffective and unregistered pesticides.

In summary, the EPA enforcement staff failed to act to conclude the 1990 Complaint within a reasonable time, as required by the APA, 5 U.S.C. §555(b). The 1990 Complaint is therefore dismissed with prejudice.

-- 1993 and 1995 Complaints

We turn next to the 1993 and 1995 Complaints. Those Complaints depend partly on the testing of samples taken at a later inspection at Biotrol, on January 2, 1991. The charges of distributing a misbranded pesticide also are founded on testing of samples taken at two other inspections of another distributor of WipeOut: Meditox, Inc. in Deerfield Beach, Florida on September 5, 1991, and February 11, 1992.[16] Subsequent testing of those samples allegedly showed WipeOut's ineffectiveness and provided the foundation for the charges of sales of misbranded pesticides. Respondent contends that the delays in the filing and prosecution of the 1993 and 1995 Complaints were unreasonable and prejudicial to its ability to defend itself.

The 1993 Complaint was filed over two years after the 1991 inspection at Biotrol. The 1995 Complaint was filed four years afterwards. Prosecution of the 1993 Complaint was stayed from February 15, 1994 to November 1, 1994 at the request of EPA while a criminal investigation of HCP was conducted. That stay was lifted after the United States Attorney for the District of Columbia advised the parties that he was declining criminal prosecution of HCP. The 1995 Complaint was then filed.

While at first, the delays in the 1993 and 1995 appear substantial, a review of the course of the investigation and litigation reveals that the EPA was justified in following its

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[15] See letter from John H. Lee, Antimicrobial Program Branch, Registration Division, U.S. EPA, to Frank Midghall of HCP, dated September 26, 1990, Attachment 2 to Complainant's Motion for Partial Accelerated Decision.

[16] See 1993 Complaint ¶¶8-17; and 1995 Complaint ¶¶9-17.

timetable. Although the Biotrol samples were taken in early 1991, the testing of those samples by the FDA Laboratory was not completed until December 1991.[17] EPA was actively investigating the efficacy of WipeOut, and the product's sales and distribution throughout the country from 1991 to 1993, as seen by the additional samples taken at Meditox in September 1991 and February 1992. The testing of those samples was done in 1992 and 1993, and apparently not completed until May 1993, shortly before the filing of the 1993 Complaint.[18] The 1993 Complaint includes allegations of sales by Respondent throughout the years 1991 to 1993, based on the Biotrol and Meditox inspections in 1991 and 1992.

This chronology shows that the EPA was actively investigating and gathering evidence on the efficacy and sales of WipeOut throughout the period after the January 1991 Biotrol inspection until the filing of the 1993 Complaint. The Complainant has the discretion to wait after its initial inspections until it has buttressed its case with additional evidence based on a continuing investigation. Thus, EPA's delay in filing the 1993 Complaint after the 1991 inspection of Biotrol is fully justified and reasonable within the meaning of 5 U.S.C. §555(b).

The misbranding charges in the 1995 Complaint were founded on the same sampling and efficacy testing alleged in the 1993 Complaint (taken at the 1991 and 1992 inspections at Biotrol and Meditox). The 1995 Complaint then alleged numerous additional counts of the sale or distribution of misbranded pesticides based on additional inspections of distributors conducted in late May and early June of 1993. A major part of the delay between those inspections and the filing of the Complaint was occasioned by the stay of these administrative proceedings during the criminal investigation, which was in effect for 10 months of 1994. Although the stay only applied to the 1993 proceeding, it is understandable that EPA would defer the commencement of a new administrative proceeding against the same Respondent, concerning related transactions, until conclusion of the criminal investigation. Respondent concurred in the extension of the stay from February 15, 1994 until November 15, 1994.[19] The delay in filing the 1995 Complaint, as discussed above is well within the statute of

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[17] Chemical and Biological Analysis Reports, Complainant's Prehearing Exchange, CX 10, 12.

[18] Biological Reports of Analysis, Complainant's Prehearing Exchange, CX 30, 49, 51.

[19] In 1993 Docket, See Order Staying Proceeding, by Administrative Law Judge Jon G. Lotis, dated February 15, 1994; Joint Status Reports dated June 9 and August 30, 1994; and Order Granting Request to Extend Stay of Proceedings, Judge Lotis, August 29, 1994.

limitations, appears justified and is reasonable within the meaning of 5 U.S.C. §555(b).

Respondent may nevertheless be prejudiced to some extent in the 1993 and 1995 proceedings by the same circumstances described above in relation to the 1990 Complaint -- the unavailability of witnesses or evidence from the now defunct Biotrol facility. Respondent will not be precluded at the hearing from showing such prejudice in the factual context of the 1993 and 1995 Complaints. However, any such effect will be treated as any other evidentiary problem that can arise due to the unavailability of witnesses or evidence. Any such unavailability will not however be due to unreasonable delay by EPA in prosecuting the 1993 and 1995 proceedings. Respondent's motion to dismiss parts of the 1993 and 1995 Complaints, or to exclude evidence from the inspection of the Biotrol facility, on the ground of laches or unreasonable delay, is denied.

- "Split" Cause of Action

Respondent contends that the 1995 Complaint should be dismissed because it is based on the same nucleus of facts as the 1993 Complaint, amounting to an improperly "split" cause of action. Respondent points out that the 1995 misbranding charges are based on the same sampling and analysis that gave rise to the misbranding allegations in the 1993 Complaint. Further, EPA had full knowledge of all facts giving rise to the 1995 Complaint within a few weeks after the May 18, 1993 filing of the 1993 Complaint. Respondent argues that the only proper course would have been for EPA to have moved to amend the 1993 Complaint to add the new charges.

As discussed immediately above, the 1995 Complaint's charges of selling a misbranded pesticide were based on the same inspections, sampling and analyses that led the EPA to conclude that WipeOut was ineffective when used according to its label directions. The actual charges of selling or distributing misbranded pesticides in the 1995 Complaint stem, however, from a series of inspections conducted shortly after the filing of the 1993 Complaint, in late May and June, 1993, in which additional instances of distribution of WipeOut products were discovered. There is no repetition of the charges or counts in the two Complaints. The 1995 Complaint simply adds 64 additional counts of sales of misbranded pesticides, and 40 counts of sales of unregistered pesticides, based on information uncovered by those later inspections.

The alleged violative conduct in the 1995 Complaint, the acts of sales and distribution of misbranded and unregistered pesticides, are all to different retailers and at different times than those alleged in the 1993 Complaint. This is unlike the "split" causes of action in the cases cited by Respondent, such as Mars v. Nippon Conlux Kabushiki-Kaisha, 58 F.3d 616, 619 (Fed. Cir.

1995). In that case, the court barred a second cause of action alleging patent infringement arising from the same transaction that gave rise to the first action.

While it is apparently true that EPA did become aware of the facts giving rise to the 1995 Complaint within a few weeks after filing the 1993 Complaint, it commenced the 1995 proceeding within the statute of limitations, and within a reasonable time, as discussed above. EPA had discretion to either seek to amend the earlier Complaint to add the new charges, or to file a new Complaint. Since the proceedings are now consolidated, there is no practical effect of that procedural choice, in any event.[20] Therefore, Respondent's motion to dismiss the 1995 Complaint on the basis of an allegedly improperly split cause of action is denied.

Complainant's Motion to Strike Affirmative Defenses

Complainant has moved to strike most of the affirmative defenses raised in Respondent's Answers to the 1993 and 1995 Complaints. The motion to strike defenses is not specifically addressed in the EPA Rules of Practice, 40 C.F.R. Part 22. In that case, guidance may be found in the standards followed in the equivalent section of the Federal Rules of Civil Procedure, §12(f).[21] That rule provides that "the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." The function of such a motion is to expedite the proceeding by eliminating at the outset insupportable defenses that could only serve to confuse the issues or cause delay. Sun Ins. Co. Of N.Y. v. Diversified Engineers, Inc., 240 F.Supp. 606,612 (D.Mont. 1965). However, motions to strike affirmative defenses should be approached cautiously and are often disfavored because they are a "drastic sanction." 5A Wright & Miller, Federal Practice and Procedure: Civil 2d §1380 at 647 (1990). A motion to strike defenses must be denied when the sufficiency of the defense depends upon disputed questions of fact or law. Oliner v. McBride's Industries, Inc., 106 F.R.D. 14, 17 (S.D.N.Y. 1985).

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[20] Respondent asserts that Complainant should have moved to amend the Complaint, and speculates that this court would "do the right thing" and deny the motion to amend. However, Respondent does not suggest any ground for such hypothetical denial of a motion to amend the Complaint. Respondent's Motion to Dismiss dated October 23, 1996, p. 34.

[21] See, e.g. In re Halocarbon Products Corp., Docket No. TSCA-90-H-18 at 2 (Order Granting Motion to Strike, July 16, 1991); In re Hightower Plating and Manufacturing Corp., Docket No. RCRA-09-94-0004 at 8-9 (Order Granting Motion to Strike in Part, April 4, 1995).

In these proceedings, determination of Complainant's motion to strike Respondent's affirmative defenses will have little practical effect on these proceedings beyond that already wrought by the rulings on Respondent's Motion to Dismiss. These rulings will therefore only substantively address those defenses raised by Respondent's Motion to Dismiss, and several others that are insufficient on their face.

The following three defenses were addressed above in the rulings on Respondent's Motion to Dismiss and, in accord with those rulings, may be considered stricken: (1) lack of personal jurisdiction, including failure to effect proper service (Second Defense, Answer to 1995 Complaint); (2) statute of limitations (Eighth Defense, Answer to 1995 Complaint); and (3), collateral estoppel and issue preclusion (action splitting), (Ninth Defense, Answer to 1995 Complaint).

Respondent has shown no substantial legal or factual support for two defenses in the Answer to the 1995 Complaint. These are Respondent's First and Third Defenses to the 1995 Complaint, which state, respectively, that the Complaint fails to state a claim upon which relief may be granted; and that the Administrative Court lacks subject matter jurisdiction to rule on some or all of the issues raised in the Complaint. These defenses are stricken. Respondent does not attempt to support these defenses with reference to these actual proceedings, but only argues that their broad and ultimate nature renders them not susceptible to a motion to strike. In that case, of course, the defenses themselves are redundant or meaningless, rendering further discussion of whether they should be struck circular and moot.[22]

Respondent's Tenth Affirmative Defense in the Answer to the 1995 Complaint alleges that the penalties sought by Complainant are barred by the North American Free Trade Agreement ("NAFTA"), and that the Complaint "unfairly discriminates against a Canadian registrant to the benefit of United States registrants." To the extent this defense relies on NAFTA, it is stricken. The NAFTA Implementation Act §102(c)(2)[23] contains an explicit prohibition against private parties' invoking NAFTA as a basis to challenge United States agency's actions.

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[22] Also in this category, although the parties did not address it in their briefs, is Respondent's Seventh Defense in the 1995 action. That defense states that in filing the Complaint, EPA exceeded its authority, was arbitrary and capricious, abused its discretion, acted without substantial evidence, with improper motives, and otherwise not in accordance with law. This defense is stricken.

[23] Pub. L. No. 103-182, §102, 107 Stat. 2057 (1993).

The remaining Affirmative Defenses in Respondent's two Answers all concern disputed issues of fact or law that are potentially relevant to Respondent's liability or to the appropriate amount of the civil penalty to be assessed.[24] Some, such as Respondent's First and Second Defenses to the 1993 Complaint, concern the circumstances surrounding the allegations, such as the timing of the pesticide sales in relation to Respondent's notice of EPA's efficacy testing. While technically, these may not constitute complete defenses to liability, they do raise issues that could affect the gravity of any violations, and are proper matters for consideration at the hearing. There is no reason to strike such defenses, even though they may also be partially redundant of specific denials of factual or legal allegations in the Complaints. Therefore, except with regard to the defenses explicitly stricken as indicated above, Complainant's motion to strike Respondent's affirmative defenses is denied.

Complainant's Motion for Partial Accelerated Decision

Complainant moves for partial accelerated decision with respect to certain facts constituting elements of several of the violations alleged in the 1990 and 1995 Complaints. Complainant is not seeking a decision on liability on any of the charges, but a determination that no genuine issue of fact exists with respect to certain matters, pursuant to 40 C.F.R. §22.20.

The first three items for which Complainant seeks accelerated decision concern the date of the initial registration of WipeOut Cold Sterilizing and Disinfecting Solution, and the dates on which certain label claims were first approved. These items all relate only to the 1990 Complaint. Since that Complaint is dismissed with prejudice, the motion for accelerated decision on these items is moot, and is denied.

With regard to the 1995 Complaint, EPA seeks a determination

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[24] Respondent's additional defenses, that are not struck, include, for the 1995 Complaint: estoppel, laches and unclean hands (Fourth Defense); labels claims were in fact true (Fifth Defense); EPA test data is false (Sixth Defense); and, assessment of the proposed civil penalties is inappropriate (Eleventh and Twelfth Defenses). In the Answer to the 1993 Complaint, the remaining defenses address the following matters: effect of EPA approval of label claims (First Defense); timing of notice from EPA of tests showing ineffectiveness of WipeOut (Second Defense); lack of EPA raw laboratory data (Third Defense); civil penalties inappropriate in light of SSURO action (Fourth Defense); EPA samples were not intended for distribution (Fifth Defense); FIFRA §(6)(a)(2) does not require reporting of certain data (Sixth Defense); and, Respondent supplied the requested data (Seventh Defense).

that the seven WipeOut-derived products[25] named in that Complaint were unregistered pesticides at the time of the alleged violations. In opposition to Complainant's motions, Respondent has submitted an affidavit by Frank Midghall, HCP's former Director of Sales (Declaration of Frank Midghall, October 23, 1995), in which he asserts, that he communicated with an authorized EPA official and received registration approval for these products prior to their distribution.

On a motion for accelerated decision or summary judgment, it is axiomatic that the record must be construed most favorably to the party opposing the motion. Celotex v. Catrett, 477 U.S. 317 (1986). Here, although no documentary evidence of such registration has been submitted, Mr. Midghall avers to personal knowledge of this matter contrary to the facts alleged by Complainant, and is available to testify. This is sufficient to raise an issue of material fact that will defeat the motion. Complainant's motion for accelerated decision is denied.

Respondent's Motion to Dismiss for Inability to Hold Hearings in Canada - Venue of the Hearing

Respondent initially filed a motion dated November 19, 1995 "pursuant to 7 U.S.C. §136*l*(a)(3), 40 C.F.R. §22.19(d) and 40 C.F.R. §22.35(b)," requesting that all future prehearing conferences and hearing in this matter be held in Mississauga, Ontario, Canada, the location of Respondent's corporate offices. The EPA opposed that motion, contending that these hearings should be held in Washington, D.C., where previous prehearing conferences, attended by counsel for Respondent, were held.

In an Order dated March 7, 1996 the ALJ ruled that Respondent had not waived its rights to a hearing venue at the location of its residence by having previously attended conferences in Washington, D.C. In that Order I suggested that the hearing be held in Niagara Falls or Buffalo, New York, as the locations in the United States nearest Respondent's Mississauga offices, for the convenience of Respondent's witnesses. On March 19, 1996 Respondent filed its Election on Site of Future Hearings, in which it declined to agree to hold the hearings in Niagara Falls or Buffalo.

Respondent then elaborated on its position in its Motion to Dismiss for Inability to Hold Hearings in Canada, dated April 6, 1996. Complainant filed its Motion for Further Consideration on the Issue of Venue on April 5, 1996. The parties were given an opportunity to respond to their respective positions on this issue,

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[25] These products are: WipeOut Small Towelettes; WipeOut Disinfectant Towelette; WipeOut Disinfectant Spray (2 ounce); WipeOut Disinfectant Spray (12 ounce); WipeOut Disinfectant Wand; WipeOut Quickit; and WipeOut Infection Control Travel Kit.

and both did so on April 30, 1996. Since then, Respondent has filed a Motion for Leave to File Reply, and the Reply, on May 7, 1996. Complainant filed an opposition to Respondent's motion for leave to file a reply on May 17, 1996.

As a threshold matter, Complainant first contends that Respondent's motion to dismiss for inability to hold hearings in Canada should be dismissed as untimely. This contention is based on Judge Head's Order at the conference held on August 30, 1995, that any "dispositive" motions be filed by October 20, 1995 (later extended by agreement to October 24, 1996). This argument is rejected, and Respondent's motion will be addressed on its merits.

Judge Head, on the request of counsel for Respondent, specifically allowed additional "dispositive" motions to be filed later in the event that another basis was found in the course of further review of the exchanges and discovery.[26] While the instant motion to dismiss may not strictly have been founded on further review of the evidence or discovery, it would be unduly restrictive to bar this motion on such purely technical grounds.

In addition, the current ALJ's Orders of March 7 and April 9, 1996 specifically directed the parties to address this issue. Respondent is perfectly entitled to pursue its argument, upon its further review of the applicable law, to what it considers to be its full logical extent, even if that results in the motion becoming a "dispositive" one that now seeks dismissal of the actions. The parties' last replies and oppositions were received and accepted as filed on this issue.

Turning to the merits, Respondent's argument is based on the administrative civil penalty enforcement provision of FIFRA, Section 14(a)(3), 7 U.S.C. §136*l*(a)(3), which states as follows:

> **Hearing.**--No civil penalty shall be assessed unless the person charged shall have been given notice and opportunity for a hearing on such charge in the county, parish, or incorporated city of the residence of the person charged.

This statute is implemented by the Supplemental Rules of practice governing FIFRA administrative enforcement hearings, 40 C.F.R. §22.35(b), which provides as follows:

> *Venue.* The prehearing conference and the hearing shall be held in the county, parish, or incorporated city of the residence of the person charged, unless otherwise agreed in writing by all parties.

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[26] Transcript of August 30, 1995 Prehearing Conference, pp. 19-20.

In a nutshell, Respondent's position is as follows. Respondent claims that HCP's only residence is in Canada. Respondent then argues that, since FIFRA only provides for a hearing within the United States, these enforcement proceedings must be dismissed.

Respondent's argument is dependent to a large extent on its contention that the EPA lacks personal jurisdiction over it to pursue these enforcement actions. That contention has been discussed and rejected above in these rulings. Respondent confuses the distinction between jurisdiction and venue. Jurisdiction here is founded on Respondent's extensive acts of registering and marketing its WipeOut solution and other products in the United States. Personal jurisdiction was effected by service of the Complaints on Respondent's designated agents authorized under FIFRA to act on its behalf in all pesticide registration matters. The EPA's administrative enforcement jurisdiction over Respondent is granted by Congress in FIFRA §14(a)(1), which authorizes the assessment of civil penalties against "any" violators of the statute, not only U.S. residents, upon notice and an opportunity for an administrative hearing under §14(a)(3).

"'Venue' refers to locality, the place where a lawsuit should be heard." 15 Wright, Miller & Cooper, Federal Practice and Procedure §3801 at 3 (2d Ed., 1986). "The key to venue is that it is 'primarily a matter of choosing a convenient forum.'" Id. The distinction between jurisdiction and venue was described by the Supreme Court as follows:

> The jurisdiction of the federal courts -- their power to adjudicate -- is a grant of authority to them by Congress and thus beyond the scope of litigants to confer. But the locality of a lawsuit -- the place where judicial authority may be exercised -- though defined by legislation relates to the convenience of litigants and as such is subject to their disposition. This basic difference between the court's power and the litigant's convenience is historic in the federal courts. Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U.S. 165, 167-168 (1939).

Venue in FIFRA enforcement proceedings is governed by §14(a)(3), and the regulations cited above. No legislative history is necessary to discern the plain meaning of these provisions and their intent to provide a forum convenient to the respondent.

Respondent argues that the requirement of a "residence" in FIFRA §14(a)(3) is jurisdictional in nature, in that this administrative court only has the power to adjudicate an enforcement proceeding in the municipality of the respondent's residence. Respondent then asserts that EPA cannot require a foreign corporation to maintain a United States agent and then deem the agent's residence as that of the corporation. However, as

discussed above in these rulings, the regulatory requirement that a foreign corporation designate a United States agent was specifically designed to ensure jurisdiction over such corporations in all registration matters, including administrative enforcement proceedings. The agent's residence, in the absence of a more permanent office or place of business in the United States, certainly can be the residence of a foreign corporation for the purposes of jurisdiction and venue in a FIFRA enforcement action.

Respondent takes a much too restrictive view of the law on the "residence" of a corporation. The concept of the residence of a corporation is, in the law, nebulous and flexible.

> Residence is said to be an attribute of a natural person, and can be predicated of an artificial being only by a more or less imperfect analogy. Strictly speaking, therefore, a corporation can have no local residence or habitation. A corporation is a mere ideal existence, subsisting only in contemplation of law -- an invisible being that can have, in fact, no locality and can occupy no space, and therefore cannot have a dwelling place. 18A Am. Jur. 2d, Corporations §305 at 216 (1986).

The "residence" of a corporation is a legal construct, not necessarily limited only to its place of incorporation, or its principal place of business, as Respondent asserts.

The cases cited by Respondent are concerned with special statutes or situations that cannot be analogized to the instant administrative enforcement proceedings. Indeed, in one of Respondent's authorities, Pennsylvania Insurance Guaranty Ass'n. v. Charter Abstract Corp., 790 F.Supp. 82, (E.D. Pa., 1992), the court qualified its earlier statement that a corporation "is a resident of the state in which it is incorporated, and no other." In analyzing whether the defendant was a Pennsylvania resident in the context of the state's insurance guaranty act, the court said:

> Thus, the definition of "resident" becomes one of statutory construction. In such situations, residency must be determined by the context, purpose, and objective of the statute in which the term is used as well as the extent and character of the business the corporation transacts within the state. [citations omitted]. Hence, the meaning of "residence" may vary from statute to statute. Id. At 85.

Accordingly, our analysis will focus on the meaning of "residence" in the context of a FIFRA administrative civil penalty proceeding against a Canadian corporation.

The closest procedural analogy to this proceeding may be found in the Federal Judiciary Code provision on venue in civil actions

in the federal courts: 28 U.S.C. §1391. In the federal courts, venue in an action against a corporate defendant is governed by 28 U.S.C. §1391(c), which provides:

> For purposes of venue under this chapter, a defendant that is a corporation shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced.

This statute essentially deems the residence of a corporation, for federal venue purposes, to be wherever it is subject to the longarm jurisdiction of the State in which the judicial district is located. Siegel, Commentary on 1988 and 1990 Revisions of Section 1391, 28 U.S.C.A. §1391 at 18. Respondent has conceded it would be subject to the longarm jurisdiction of any of the states in which it distributed WipeOut.[27] From a slightly different perspective, FIFRA can be viewed as a regulatory statute that provides for administrative enforcement and service of process on a nationwide basis, with a special venue provision based on the respondent's "residence." In that case, reference to subdivision (c) of 28 U.S.C. §1391 would permit venue wherever service can be made. Siegel, above, at 19-20. When this principle is applied to this FIFRA administrative enforcement proceeding, venue would be in the county, parish, or incorporated city where service was made.

Historically, the leading case of Pure Oil Co. v. Suarez, 384 U.S. 202, 86 S.Ct. 1394, 16 L.Ed. 474, 476 (1966) held that the former §1391(c)[28] "applies to all venue statutes using residence as a criterion, at least in the absence of any contrary restrictive indications in any such statute." Under the predecessor statute's criterion of "doing business" venue could be found in any of the states in which Respondent distributed WipeOut. Even if the holding of Pure Oil cannot be said to apply directly to an interpretation of FIFRA §14(a)(3) due to the intervening revision of 28 U.S.C. §1391, the principle remains valid. A corporation may be sued, and is deemed to reside for federal venue purposes, in any jurisdiction where it does business, and/or where it is amenable to service of process.

The difficult wrinkle in this case, however, stems from the

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[27] Opposition of Respondent Health Care Products to Complainant's Motion to Strike Affirmative Defenses, November 13, 1995, at p. 29.

[28] Prior to 1988, 28 U.S.C. §1391(c) provided that "[a] corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes."

fact that Respondent is a Canadian corporation, and therefore an alien. In the federal courts, venue over aliens, including alien corporations, is governed by 28 U.S.C. §1391(d) which provides that: "An alien may be sued in any district." This in effect permits an alien corporation to be sued in any district in which it can be served with process. Naegler v. Nissan Motor Co., Ltd., 835 F. Supp. 1152, 1157, n. 5 (W.D. Mo. 1993); 15 Wright, Miller & Cooper, Federal Practice and Procedure §3810 at 94 (2d Ed. 1986).

Although several cases have stated that an alien is presumed by law not to reside in the United States for purposes of venue, those are in the context of the alien as a plaintiff in federal diversity actions.[29] The thrust of the venue provisions for alien defendants is to allow suit wherever the alien is found. The federal venue statute is concerned with specifying a forum in which an alien can be sued, not defining its "residence," in order to give preference to the residence of the American parties in laying venue. This scheme illustrates that jurisdiction is legally distinct from venue, but that venue may be had over a foreign corporation wherever personal jurisdiction over it is obtained.

The same principle applies in the context of a FIFRA enforcement proceeding. We have already found that jurisdiction was obtained over Respondent by service on its United States agents. Venue may then be laid where those agents were served, where Respondent's current agent is located, or any other U.S. location convenient to Respondent pursuant to 40 C.F.R. §22.35(b). The term "residence" in FIFRA §14(a)(3), 7 U.S.C. §136*l*(a)(3) should be construed "by the context, purpose, and objective of the statute in which the term is used, as well as the extent and character of the business the corporation transacts within the state." Pennsylvania Ins. Guar. Ass'n, above, 790 F. Supp. 82, 85.

Respondent here did not "merely" register to do business or appoint an agent in the United States.[30] Respondent also did extensive business in 19 states of the United States. Where a foreign corporation such as Respondent has registered a pesticide in the United States, distributed it extensively throughout the country, and has maintained a United States agent continuously, it is subject to service of process and has a U.S. residence for venue purposes under FIFRA. Respondent has sole and complete discretion over its choice of the identity and residence of its designated

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[29] See Williams v. U.S., 704 F.2d 1222 (11th Cir. 1983); and Fleifel v. Vessa, 503 F.Supp. 129 (D.C. Va. 1980).

[30] In a case cited by Respondent, Leonard v. USA Petroleum Corp., 829 F. Supp. 882, 889 (S.D. Tex. 1993), the court held that due process to support a consent to jurisdiction requires more than "mere registration to do business or appointment of an agent for service."

U.S. agent. That residence is the "address of record" of its agent which it is required to maintain pursuant to 40 C.F.R. §152.50(b).

The current United States residence of Respondent is therefore that of its current U.S. agent, whose address of record is in New York City. Unless Respondent agrees otherwise in writing pursuant to 40 C.F.R. §22.35(b), the hearing will be held there. In this regard, I will repeat my offer that the hearing be held at whatever U.S. location is most convenient to Respondent, in order to fulfill the intent of FIFRA §14(a)(3). That could be Niagara Falls, the U.S. location closest to Respondent's headquarters; Deerfield Beach, Florida, the residence of Respondent's agent at the time of service of the 1993 and 1995 Complaints; Irvine, California, the residence of Respondent's attorney and former agent; or in any of the 19 states where WipeOut was distributed. It is entirely up to Respondent to request the location it finds most convenient.

I would not even rule out holding the hearing in Mississauga or Toronto, Ontario, Canada, the actual location of Respondent's headquarters, and the area most convenient for Respondent's witnesses. Holding the hearing in Canada would not necessarily create any conflict with the judicial review provision of FIFRA §16(b), 7 U.S.C. §136n(b). That statute states that any person adversely affected by an order of the Administrator following a public hearing may obtain judicial review by filing a petition "in the United States court of appeals for the circuit wherein such person resides or has a place of business . . ." As we have seen, corporations can have more than one residence for venue purposes under federal law. Regardless of where the hearing is actually held, Respondent could subsequently seek judicial review in the circuit of its U.S. residence (its U.S. agent's address of record), or in the circuit of any other "place of business" it may have in the United States at the time of the appeal.

Holding this FIFRA enforcement hearing in Canada, upon agreement of all parties, for the convenience of the witnesses, would also not necessarily interfere with Canadian sovereignty. The hearing would only be applying American law for acts all occurring within the United States. There would be no attempt to apply American law in a foreign sovereign state, as in the American and Canadian cases cited in Respondent's brief.[31]

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[31] See Respondent's Memorandum of Law in Support of Motion to Dismiss for Inability to Hold Hearing in Canada, April 6, 1996, pp. 13-19. Respondent cites, for example, Equal Employment Opportunity Commission v. Arabian American Oil Co., 499 U.S. 244 (1991) (employment discrimination claim under Civil Rights Act of 1964 does not lie outside the territory of the United States); and U.S. v. Mitchell, 553 F.2d 996 (5th Cir., 1977) (Marine Mammal Protection Act does not apply in territorial waters of another sovereign state).

The convening of a hearing in Canada, upon agreement of the parties, for the convenience of the Canadian citizen, would not amount to the exercise of American police power in a foreign state. Additional cases cited by Respondent concern the service of compulsory process compelling foreign nationals to comply with subpoenas.[32] If Respondent agrees to hold the hearing in Canada, of course there is no compulsion. If any hearing is held in Canada, all parties would have to agree to a stipulation to the effect that it is only for the convenience of the witnesses, applying only American law for acts occurring entirely within the United States, with no infringement on Canadian sovereignty. Such a procedure would be consistent with international agreements such as the Hague Convention that allow the service of process and taking of testimony in foreign countries.

However, no precedent has been found for holding a full EPA administrative enforcement hearing in a foreign country. The acts of the judge in presiding over a hearing and swearing witnesses in a foreign territory might be viewed as acts of sovereignty. The only way to authoritatively resolve this question would be to obtain an opinion from the Canadian or Ontario Attorney General or other appropriate official authority. In view of the fact that a forum is available in the United States under the FIFRA venue provisions over a foreign corporation, it is not worth the uncertainty of convening this hearing in Canada. Therefore, that will not be an option unless Respondent, for its own convenience, changes its position and can obtain an opinion or permission from the appropriate Canadian authorities to hold this hearing in Canada upon consent as outlined above.

In summary, the hearing in this matter will be held at Respondent's current United States residence -- the address of record of its authorized agent -- in New York City, unless Respondent elects a different venue. As stated in Matter of Chem-Trol Chemical Company, (Order Designating Hearing Location, Docket No. I.F.&R.-V-001-89, J. Nissen, December 5, 1990), FIFRA §14(a)(3) "is indicative of an intent to hold the hearing in a place convenient to Respondent." Id. At 10. In that case, as between two proposed United States locations, Judge Nissen chose that most convenient to Respondent, the state of respondent's incorporation and the location of its principal offices. Here, Respondent as a foreign corporation has chosen New York City as the location for its U.S. agent, but has the discretion to request any U.S. location for its convenience for this hearing. Also, if Respondent can obtain an opinion from the Canadian authorities allowing the hearing to be held in Canada, it could be held at Respondent's

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[32] See Commodity Futures Trading Commission v. Nahas, 738 F.2d 487 (D.C. Cir. 1984); and Federal Trade Commission v. Compagnie De Saint-Gobain-Point-A-Mousson, 636 F.2d 1300 (D.C. Cir. 1980).

Canadian residence in the vicinity of Mississauga, Ontario. If Complainant objects to the venue requested, the ALJ will determine the issue, with primary consideration to be given to the convenience of Respondent and its witnesses as intended by the FIFRA venue provisions. Respondent will have 30 days from receipt of these orders to request a venue other than New York City.

Complainant's Motion to Recaption Actions

Complainant filed a pleading dated October 23, 1995, entitled "Motion to Recaption Actions and to Require Petitioner/Respondent to Provide Complete and Accurate Information on its Name and Legal Representation." Respondent filed an opposition to that motion and the parties further filed a series of pleadings relating to Complainant's motion to file an addendum to the original motion on this issue. All those pleadings are accepted to close the cycle on this particular matter.

There is actually no dispute as to the history of Respondent's name changes. Health Care Products, Inc. changed its name to Celltech Media, Inc. on March 28, 1994. Celltech Media, Inc. then changed its name to Smartel Communications Corporation ("Smartel") on June 21, 1995. 40 C.F.R. §152.122 requires a pesticide registrant to keep the agency informed of its current name and address of record. Respondent's address in Mississauga did not change during this period. The dates of the above name changes are obtained from records of the Province of Ontario Ministry of Consumer and Commercial Relations. Respondent did not officially notify EPA in writing of each of these name changes until some months after each change, but did notify EPA earlier orally. Respondent asserts that each name change was accompanied by a dilution in the company's stock, and was undertaken in an effort to assure the company's survival. Respondent concedes that Smartel is the current owner of the WipeOut registration.

Complainant argues that the name changes have caused confusion in these proceedings and could lead to uncertainty about Respondent's continued compliance with the SSURO. EPA also claims that the public has a right to know the true name of the Respondent in this litigation. Respondent counters by pointing out that there has been no real confusion or any evidence that it has not remained in full compliance with the SSURO. Respondent claims it could be unfairly prejudiced by changing the caption, as Smartel is no longer in the disinfectant business in the United States, and EPA has publicized these cases with adverse press releases in the past.

The matter of Respondent's name change was addressed by the parties and Judge Head at the prehearing conference held on August 30, 1995. There, and in its current opposition brief, Respondent suggested that this issue could involve more than a just a housekeeping matter. When Respondent's counsel stated at the conference that there were "substantial questions" about whether

Smartel would be liable as the successor to HCP for payment of any civil penalties, Judge Head directed briefing on the name change issue.[33] In Respondent's opposition brief on the recaptioning issue Respondent asserts that, although Smartel now owns the WipeOut registration, "Smartel is not, however, liable for any of the matters alleged in the three civil enforcement proceedings for which the EPA seeks to impose civil liability."[34] In response, EPA contends that this is an attempt by Respondent to raise a hypothetical issue concerning the Respondent's, or Smartel's ultimate liability to pay an assessment of civil penalty or judgment of this court. Complainant thus urges that this matter not be considered at this time as irrelevant or unripe.

EPA loses sight, however, of the fact that it initiated the motion for recaptioning the proceedings. It is also hard to conceive a more significant reason for having the correct name of the Respondent in the caption, than to ensure that any order assessing a civil penalty will be enforceable. In fact this reason dwarfs those given by the EPA concerning vague worries about compliance with the SSURO and public knowledge. Where Respondent objects to the caption change, and asserts explicitly it will not be liable for the penalty under its new name, it is incumbent on the movant to properly and thoroughly elucidate the issue. It is not an irrelevant or unripe issue if Respondent is in fact denying liability under the name Complainant urges be inserted into the caption.[35] Judge Head recognized this in his order at the prehearing conference requiring briefing of this issue.

The proper way to frame such a motion would be in the form of a motion to amend the Complaints to change the name of the Respondent, pursuant to 40 C.F.R. §22.13.[36] A change in the caption

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[33] Transcript of Prehearing Conference, August 30, 1995, pp. 16-17.

[34] Opposition of Health Care Products to Motion to Recaption Actions, November 19, 1995, p. 7.

[35] No attempt is made here to discern Respondent's theory as to why Smartel, which is not even a successor corporation, but the same corporation as HCP with a new name, would not be liable for any civil penalties imposed in these proceedings.

[36] Where the EPA Rules of Practice do not specifically address a procedure, the federal rules are used for guidance. The applicable rules for a motion to amend a complaint to change the name or substitute a party are Rules 25(c) and 15 of the FRCP. See also Matter of Chevron Corporation, Docket No. TSCA-09-93-0012 (Order on Motions to Dismiss, to Amend Complaint, for Accelerated Decision, and to Strike Defenses, J. Nissen, July 26, 1995).

of these proceedings would be, procedurally and substantively, an amendment to the Complaints. A motion thus framed will force the Respondent to directly respond to allegations concerning the effect of the name change, and its liability as Smartel. The instant motion to "recaption these proceedings" skirts the real reason to amend the Complaints -- to ensure that any final order will be enforceable against the proper party respondent.

Therefore, Complainant's motion to recaption the proceedings is denied without prejudice to renewal as a motion to amend the Complaints. Such motion to amend the Complaints must be filed within 20 days of receipt of these Orders.

Future Proceedings

The ALJ will shortly issue separate orders addressing the parties' pending motions concerning discovery, striking witnesses and exhibits, and staying these proceedings. Those orders will include directives for scheduling the hearings and further proceedings in these actions.

Orders

1. Respondent's motion to dismiss the 1990 Complaint, Docket No. I.F.& R. VIII-90-279C is granted, due to EPA's unreasonable delay in prosecuting this action. The 1990 Complaint is dismissed with prejudice.

2. Respondent's motions to dismiss the 1993 and 1995 Complaints are denied.

3. Complainant's motion to strike affirmative defenses is granted with respect to the following defenses in the Respondent's Answer to the 1995 Complaint: First Defense (failure to state a claim upon which relief can be granted); Second Defense (lack of personal jurisdiction and improper service); Third Defense (lack of subject matter jurisdiction); Seventh Defense (filing Complaint was arbitrary and capricious, abuse of discretion, etc.); Eighth Defense (statute of limitations); Ninth Defense (collateral estoppel and issue preclusion); and Tenth Defense (North American Free Trade Agreement). Complainant's motion to strike other defenses in the 1993 and 1995 Complaints is denied.

4. Complainant's motion for partial accelerated decision with respect to facts relevant to the 1990 Complaint is denied as moot, since that Complaint is dismissed with prejudice. Complainant's motion for partial accelerated decision is also denied with respect to facts relevant to 1995 Complaint.

5. Respondent's motion to dismiss these proceedings for inability to hold hearings in Canada is denied. The hearing will be held in the municipality of Respondent's current United States

residence, the address of record of Respondent's current authorized agent, in New York City. Respondent may however request a different venue in the United States, or present the ALJ with permission from the appropriate Canadian authorities to hold the hearing at the location of Respondent's offices in Mississauga, Ontario. Such request for a different venue must be filed within 30 days of Respondent's receipt of these Orders. If Complainant objects to Respondent's choice of venue, the ALJ will decide the matter in accord with the intent of FIFRA §14(a)(3).

6. Complainant's motion to recaption the actions to reflect Respondent's current name is denied without prejudice to renewal in the form of a motion to amend the Complaints. Such motion to amend must be filed within 20 days of Complainant's receipt of these Orders.

Andrew S. Pearlstein
Administrative Law Judge

Dated: June 13, 1996
Washington, D.C.

CERTIFICATE OF SERVICE

I do hereby certify that the foregoing **Orders On Motions** was filed in re Health Care Products, Inc., FIFRA Docket No. 93-H-02F; Celltech Media, Inc., FIFRA Docket No. 95-H-04; Health Care Products, Inc.; I.F. & R. Docket No. VIII-90-279C and exact copies of the same were mailed to the following:

(Interoffice)

Carl J. Eichenwald, Esq.
Toxics and Pesticides Enforcement
Division (2245A)
U.S. Environmental Protection Agencuy
401 M Street, S.W.
Washington, D.C. 20460

(Over Night Mail)

James M. Picozzi, Esq.
Nossaman, Guthner, Knox & Elliott
Lakeshore Towers, Suite 1800
18101 Von Karman Avenue
Irvine, CA 92715-1007

(1st Class Mail)

Regional Hearing Clerk, Region VIII
U.S. Environmental Protection Agency
999 - 18th Street
Denver, CO 80202-2466

Bessie L. Hammiel, Hearing Clerk
(1900)
U.S. Environmental Protection
Agency
401 M Street, S.W.
Washington, D.C. 20460

Dated: June 13, 1996