UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	**)**
	)
FERRY COUNTY NOXIOUS	**) Docket No. FIFRA-10-2002-0048**
WEED CONTROL DISTRICT,	**)**
	)
Respondent.	**)**

ORDER ON MOTION FOR ACCELERATED DECISION AND MOTION TO DISMISS

Complainant has filed a Motion for Accelerated Decision on Liability, Penalty and Motion to Strike Defenses. Respondent has opposed such Motion and filed a Motion to Dismiss, which is opposed by Complainant. After consideration, it is determined that both Motions will be **DENIED**, for the reasons set forth below:

I. Background

This action was initiated by the filing of a Complaint on March 22, 2002. It arises under the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), 7 U.S.C. §§ 136-136y. The Complaint charges Respondent with two violations of FIFRA arising from its alleged application, in a manner inconsistent with labeling, of two registered pesticides, "Tordon 22K" and "Hi-Dep," in violation of 7 U.S.C. §136j(a)(2)(G). Complainant seeks a civil penalty of $2,255 for these two violations.[1]

On April 4, 2002, Respondent filed its Answer to the Complaint. In its Answer, Respondent admitted applying a mixture of the two pesticides on May 24, 2001, but denied it applied the pesticides in a manner inconsistent with their labeling. Respondent also raised a number of "miscellaneous defenses" including the assertion that the labeling restriction it is alleged to have violated is unconstitutionally vague.[2]

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[1] In the Motion to Dismiss, Complainant notes that the slightly higher penalty amount of $2,310 set forth in the Complaint was pled in error. *See*, Complainant's Motion, p.6 fn. 1. Pursuant to an Order dated January 9, 2003 granting Complainant's Motion to Amend, an Amended Complaint was filed, *inter alia,* correcting this error.

[2] Respondent indicated in its prehearing exchange that it was abandoning the two other (continued...)

On November 26, 2002, Complainant filed a Motion for Accelerated Decision on Liability, Penalty and to Strike Defenses, to which Respondent filed a Memorandum in response dated December 12, 2002. A Reply to Respondent's Memorandum dated December 26, 2002 was subsequently filed by Complainant.

On November 27, 2002, Respondent filed a Motion to Dismiss, to which Complainant filed a Response on December 6, 2002.[3]

The issues raised by Complainant's Motion for Accelerated Decision and Respondent's Motion to Dismiss will be addressed below, in inverse order.

II. Respondent's Motion to Dismiss

A. Standards for Motions to Dismiss

Section 22.20(a) of the Consolidated Rules of Practice provides that –

> The Presiding Officer, upon motion of the respondent, may at any time dismiss a proceeding without further hearing or upon such limited additional evidence as he requires, on the basis of failure to establish a prima facie case or other grounds which show no right to relief on the part of the complainant.

40 C.F.R. § 22.20(a).

Respondent's Motion to Dismiss, based upon section 22.20, is analogous to a motion to dismiss for failure to state a claim upon relief may be granted under Section 12(b)(6) of the Federal Rules of Civil Procedure Rule 12. The standards for deciding such a motion are well established. A complaint should not be dismissed for failure to state a claim unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of its claim which would entitle it to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *see also, May v. Commissioner of Internal Revenue*, 752 F.2d 1301, 1303 (8th Cir.1985); *Fusco v. Xerox Corp.*, 676 F.2d 332, 334 (8th Cir. 1982). In reviewing the sufficiency of a complaint, "the allegations of plaintiffs' complaint must be assumed to be true, and further, must be construed in their favor." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *May v. Commissioner of Internal Revenue, supra*.

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[2](...continued)
affirmative defenses it raised in its Answer.

[3] Complainant also addresses the issues raised by Respondent's Motion to Dismiss as part of its Motion to Strike Defenses and Reply to Respondent's Memorandum regarding the Accelerated Decision Motion. Respondent addresses the issues raised in its Motion to Dismiss also in its Memorandum in response to Complainant's Motion for Accelerated Decision.

B. Arguments of the Parties

In its Motion, Respondent moves to dismiss this case "on the grounds that the pesticide label restriction which reads 'do not apply directly to water [or] areas where water is present' is unconstitutionally vague, and is unenforceable." Respondent's Motion, p.1. As grounds therefor, Respondent refers to the arguments set forth in its Initial Prehearing Exchange. Additionally, Respondent requests that its Motion be heard by oral argument conducted telephonically. In turn, in its Prehearing Exchange, Respondent argues that the label restriction is "void for vagueness" on the basis that the phrase "'areas where surface water is present' is not defined in the law and it is unclear how close to water one can spray." *See*, Respondent's Prehearing Exchange, p. 3.

In reply, Complainant asserts that the labels on the registered pesticides at issue went through an EPA examination process authorized by Congress and "should be accorded a presumption of validity like that attaching to an administrative regulation adopted pursuant to power granted by Congress." Further, Complainant argues that the label language is not unconstitutionally vague because the totality of the pertinent information on the labels of the two pesticides provides clear descriptions of the limitations and parameters for their use, and what is meant by the terms "area" and "present" is commonly understood. Finally, Complainant notes its opposition to Respondent's Request for oral argument.[4]

C. The Label Language at Issue

Two pesticide labels at issue in this case are those for Hi-Dep and Tordon 22K. Under the heading "Environmental Hazards," the Hi-Dep package label reads in relevant part that –

> This product is toxic to aquatic invertebrates. Drift or run off may adversely affect aquatic invertebrates and nontarget plants. For terrestrial uses, do not apply directly to water, or to areas where surface water is present or to intertidal areas below the mean high water mark.

See, Complainant's Prehearing Exhibit 1c.[5]

The label on the package of Tordon 22K notes that it is a restricted use pesticide which may only be sold to and used by (or under the direct supervision of) a certified pesticide applicator. The label refers to a label booklet for directions as to use. The label booklet provides under the heading "Environmental Hazards" that –

> This pesticide is toxic to some plants at very low concentrations. Non-targeted

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[4] Based upon the pleadings filed in this case, no oral argument before decision was deemed necessary and Respondent's Motion in this regard is **DENIED**.

[5] This language is repeated in the pesticide's label booklet. *See,* Complainant's Prehearing Exhibit 1c.

> plants may be adversely affected if pesticide is allowed to drift from areas of application. Do not apply directly to water, to areas where surface water is present or to intertidal areas below the mean high water mark. . . . Do not allow run-off or spray to contaminate wells, irrigation ditches or any body of water used for irrigation or domestic purposes. Do not make application when circumstances favor movement from treatment site.
>
> * * *
>
> This chemical can contaminate surface water through spray drift. Under some conditions, picloram [the main active ingredient in Tordon 22K] may also have a high potential for runoff into surface water (primarily via dissolution in runoff water). These include poorly draining or wet soils with readily visible slopes toward adjacent surface waters, frequently flooded areas, areas over-laying extremely shallow ground water, areas with in-field canals or ditches that drain to surface water, areas not separated from adjacent surface waters with vegetated filter strips, and areas over-laying tile drainage systems that drain to surface water.

See, Complainant's Prehearing Exhibit 1d, p. 2, as filed with its Rebuttal Prehearing Exchange.

D. Presumption of Validity

As indicated above, Respondent has raised here a Constitutional challenge on the basis of vagueness regarding language set forth in a pesticide *label* or in a pesticide *label booklet,* which Complainant seeks to enforce pursuant to 7 U.S.C. §136j(a)(2)(G) which provides that "[i]t shall be unlawful for any person .. . to use any registered pesticide in a manner inconsistent with its labeling."[6]

In reliance upon the case of *United States v. Corbin Farm Service*, 444 F. Supp. 510 (E.D.Cal. 1978), *aff'd on other grounds,* 578 F.2d 259 (9th Cir. 1978), Complainant suggests, "In that a label has been examined by EPA according to a procedure authorized by Congress, the label should be accorded a presumption of validity like that attaching to an administrative regulation adopted pursuant to power granted by Congress."[7] Complainant's Response to Motion to Dismiss

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[6] Federal Regulations require that pesticide products bear labels containing certain specified information including the existence of the statutory prohibition set forth in 7 U.S.C. 136j(a)(2)(g) - that use of the product inconsistent with the label is a violation of Federal law. *See,* 40 C.F.R. § 156.10. The labels of the two products at issue here contained such a notification. *See,* Complainant's Prehearing Exhibits 1c and 1d.

[7] In *Corbin*, the Court noted that as part of the pesticide registration process required under FIFRA, the manufacturer submits its proposed label to EPA for approval. The Agency reviews the label for consistency with the law as part of the registration approval process. *Corbin*, 444 F. Supp. at 516. *See also*, 7 U.S.C. §136a(a) (requiring pesticide producers to apply for and obtain an EPA

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at p. 3. *Corbin* is a criminal case involving, *inter alia*, FIFRA violations. In that case, the Court found that the phrases on the pesticide label were not entitled to a "strong presumption" of validity given to statutes, but were entitled to "a presumption" of validity like that attaching to a regulation promulgated pursuant to authority granted by Congress, and reviewed in that light most of the phrases on the pesticide label at issue (for the pesticide Furadan) were not unconstitutionally vague.[8]

The Environmental Appeals Board (EAB) has applied a higher threshold for review than the courts, regarding constitutional challenges on the basis of vagueness of *regulations* -

> As a preliminary matter, we note that constitutional challenges to regulations, even challenges based upon due process claims, are rarely entertained in Agency enforcement proceedings, and there is a strong presumption against entertaining challenges to the validity of a regulation in an administrative enforcement proceeding. . . . The decision to review such challenges "is at best discretionary, and a review of a regulation will not be granted absent the most compelling circumstances." . . . Further, "the mere assertion of a constitutional claim alone does not amount to a compelling circumstance justifying a deviation from the general rule against reviewing the validity of regulations in administrative enforcement actions." (Citations omitted).

B.J. Carney Industries, Inc., 1997 EPA App. LEXIS 7, *57; 7 E.A.D. 171 (EAB 1997) (citing *Norma J. Echevarria*, 1994 EPA App. LEXIS 62, 5 E.A.D. 626, 634 (EAB 1994). *See also, South Coast Chemical, Inc.*, 1986 EPA App. LEXIS 34; 2 E.A.D. 139 (EAB 1986)(refusing to entertain vagueness challenge because to do so would violate the general rule that attacks on the validity of agency regulations are rarely entertained in the context of an administrative enforcement hearing absent the most compelling of reasons); *American Ecological Recycle Research Corp.*, 1985 EPA

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[7](...continued)
registration of their products prior to distribution or sale); 7 U.S.C. §136a(c)(1)(requiring that as part of the registration process the producer submit to EPA a complete copy of the draft labeling of the pesticide and any directions for its use); 7 U.S.C. § 136a(c)(5)(the Administrator may register a pesticide if, *inter alia*, she determines that its labeling and other material required to be submitted comply with the requirements of FIFRA and if the pesticide "when used in accordance with widespread and commonly recognized practice . . . will not generally cause unreasonable adverse effects on the environment"); and 40 C.F.R 152.108 (the Agency reviews all draft labeling submitted with an application for registration).

[8] Some of the phrases challenged in *Corbin* as being unconstitutionally vague were in the statute, although some only appeared only on the label. *Corbin*, 444 F. Supp. at 516. Furthermore, the Court in Corbin reserved decision on the issue of whether the words "repeatedly" and "known" were unconstitutionally vague as applied deferred until after the parties rested on their evidence. *Corbin*, 444 F. Supp. at 540.

App. LEXIS 14, *6, 2 E.A.D. 62, 64-65 (CJO 1985))(refusing to deviate from the "general rule that challenges to rulemaking are rarely entertained in an administrative enforcement proceeding.").

However, while Federal FIFRA regulations mandate generally and specifically much of what appears on pesticide labels (*see*, 40 C.F.R. §156.10), the particular language of the pesticide label and label booklet being challenged *in this case*, regarding not applying pesticides "directly to water or areas where surface water is present," appears *not* to be among that required by regulation.[9] Rather, it appears that the use of such language on pesticide labels was imposed by Agency policy, namely, Pesticide Regulation Notice No. 93-3, dated March 9, 1993.[10] *See,* Complainant's Prehearing Exhibit 12, attached to Complainant's rebuttal prehearing exchange. Thus, the language in dispute here did not go through the notice and comment process required under the Administrative Procedure Act for regulations. It is this process and opportunity therein to challenge the regulatory language which would seem to justify imposing a higher threshold of "compelling circumstances " for entertaining in enforcement proceedings challenges to the validity of language.[11]

Furthermore, while in construing statutes *the courts,* as in *Corbin,* generally defer to agency interpretations, in the form of regulations and adjudications (*United States v. Mead Corporation,* 121 S.Ct. 2164, 150 L.Ed.2d 292, 305 n. 12 (2001); *Christensen v. Harris County*, 529 U.S. 576, 587 (2000); *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999)), the EAB, which reviews ALJ decisions, *does not* generally defer to Agency interpretations because the EAB's decision *is* the Agency

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[9] In 1984, the Agency proposed regulations which would have required "Each product intended for outdoor use (unless application to water or wetlands is specified on the label) must bear the statement, 'Do not apply directly to water or wetlands'" in the environmental hazards section of pesticide labels. *See*, 49 FR 37960 (September 26, 1984)(proposed section 40 C.F.R. §156.55(c)(2)). However, that provision does not appear in the regulations currently in effect. The regulations only provide, at 40 C.F.R. § 156.10(h)(2)(ii)(F), "For all outdoor uses other than aquatic applications the label must bear caution 'Keep out of lakes, ponds or steams. Do not contaminate water by cleaning of equipment or disposal of wastes.'"

[10] The Policy, effective upon issuance, provides that EPA would only accept applications for registration of new products using the language regarding water at issue here and requiring that current registrants also adopt the label language. *See,* Complainant's Prehearing Exhibit 12, attached to Complainant's rebuttal prehearing exchange.

[11] Under the Administrative Procedure Act, the notice and comment requirements are not required for "interpretative rules, general statements of policy, rules of Agency organization, procedure, or practice, or in any situation in which the Agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553.

interpretation, constituting final Agency action.[12] *Ocean State Asbestos Removal, Inc.*, 1998 EPA App. LEXIS 82; 7 E.A.D. 522, 543 n. 22 (EAB 1998) ("Because we serve as final decision maker for the Agency in [an] adjudication, this aspect of *Chevron* deference does not apply in our review; instead, we perform our own 'independent review and analysis of the issue'"(citations omitted)); *Lazarus, Inc.,* 1997 EPA App. LEXIS 27; 7 E.A.D. 318 n. 55 (1997)("Parties in cases before the [EAB] may not ordinarily raise the doctrine of administrative deference as grounds for requiring the [EAB] to defer to an interpretation of statutory or regulatory requirements advanced by any individual component of the EPA"); *Mobil Oil Co.,* 1994 EPA App. LEXIS 52, 5 E.A.D. 490 n. 30 (EAB 1994)(EAB, declining to apply a deferential standard of review to EPA's interpretations in Notices of Proposed Rulemaking, stated that deference under *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984)or *Skidmore v. Swift & Co.,* 323 U.S. 134 (1944) does not apply to its deliberations);[13] 40 C.F.R. § 22.31(a).

Similarly, the ALJ *does not defer* to statutory interpretations issued by the Agency, because the ALJ's initial decision constitutes final Agency action if not appealed or reviewed on the EAB's own initiative. 40 C.F.R. § 22.27(c). The ALJ "is part of the decisionmaking unit of the Agency, whereas a court is not," and "the statutory and constitutional restrictions which apply to a court and which prevent it from substituting its judgment for that of the Agency do not apply to the [ALJ]." *Louisville Gas & Electric Co.*, *Trimble County Power Plant*, 1 E.A.D. 687, 690-691 (JO 1981). Agency adjudication, like rulemaking, is an adversarial process involving statutory interpretation. Adjudication in the courts, on the other hand, involves the Constitutional principle of separation of powers. *Lazarus,* 7 E.A.D. 318 n. 54. The Supreme Court's rationale for deference in *Skidmore*, that agency interpretations "are based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case," does not necessarily apply to administrative law judges, who have specialized experience interpreting and applying the statutes administered by the agency for which they adjudicate cases. 323 U.S. at 139.

Consequently, EPA's interpretation of FIFRA as expressed in its policy and guidance documents, such as the Pesticide Regulation Notice, is not entitled to deference in this proceeding in regard to challenges on the grounds of vagueness.

E. Vagueness Standards

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[12] Regulations typically involve technical and policy matters, and "it is in the rulemaking context that [such] issues are appropriately presented to the Agency," which receives the input of Agency experts and representatives of affected industries. *Woodkiln, Inc.,* 7 E.A.D. 254, 269 (EAB 1997).

[13] Under *Skidmore,* "courts and litigants may properly resort for guidance" to an agency interpretation contained in a policy statement, guidance document, or informal ruling or opinion, according it weight depending on the "thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade." 323 U.S. at 140.

It is well established that a law is "void for vagueness" and, therefore, violates due process, "if men of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. General Const. Co.*, 269 U.S. 385, 391 (1926); *see also Pacific Mut. Life Ins. Co. v. Haslip,* 499 U.S. 1, 44 (1991); *Grayned v. City of Rockford*, 408 U.S. 104, 108, (1972). "The essential purpose of the 'void for vagueness' doctrine is to warn individuals of the *criminal* consequences of their conduct." *Jordan v. De George*, 341 U.S. 223, 230 (1951) (emphasis added); *see also Grayned*, 408 U.S. at 108. Although "the doctrine's chief application is in respect to criminal legislation," *Lopez-Lopez v. Aran*, 844 F.2d 898, 901 (1st Cir. 1988), it has also been applied to laws implicating fundamental constitutional rights, especially First Amendment rights (*see e.g., Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982)). Furthermore, the prohibition against vagueness applies not only to statutes but also to administrative regulations (*General Electric Co. v. U.S. EPA*, 53 F.3d 324, 1328-1329 (D.C. Cir. 1995)) and to language in pesticide labeling. *See, Corbin*, 444 F. Supp. at 516.

However, where the provision at issue neither imposes criminal penalties[14] nor implicates fundamental constitutional rights, its language is subject to a less strict vagueness test than those laws that do. As the Supreme Court explained:

> The degree of vagueness that the Constitution tolerates--as well as the relative importance of fair notice and fair enforcement--depend in part on the nature of the enactment. Thus, economic regulation is subject to a less strict vagueness test because its subject matter is often more narrow, and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action. Indeed, the regulated enterprise may have the ability to clarify the meaning of the regulation by its own inquiry, or by resort to an administrative process. The Court has also expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe.

Hoffman Estates, 455 U.S. at 498-99 (footnotes omitted). Moreover, a law that does not implicate constitutionally protected rights is unconstitutionally vague only if it "is impermissibly vague in all of its applications." *Hoffman Estates*, 455 U.S. at 495, 497; *see also United States v. Salerno*, 481

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[14] FIFRA authorizes civil penalties, which are penal in nature but do not approach the severity of criminal penalties. *See*, 7 U.S.C. § 136*l*(a)(1)(providing for civil penalties of not more than $5,000 for each offense). FIFRA also authorizes criminal sanctions on persons who 'knowingly' violate the regulations. 7 U.S.C. § 136*l*(b)(1) (providing for fines of up to $50,000 or imprisonment of up to one year). The EAB in *South Coast Chemical, Inc.* 1986 EPA App. LEXIS 34; 2 E.A.D. 139, 141-142 n. 5 (EAB 1986) noted in regard to penalties under FIFRA and under the Toxic Substances Control Act (TSCA) that the juxtaposition of the two types of penalty provisions in the statutes is strong evidence of a Congressional intent to establish a statutory scheme which has a remedial function insofar as the civil sanctions are concerned. The EAB stated that FIFRA's civil penalty provisions therefore must be viewed as remedial in nature and not punitive.

U.S. 739, 745 (1987) (stating that a law "might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid."). Furthermore, to be unconstitutionally vague, a law must be vague "'not in the sense that it [establishes] an imprecise but comprehensible normative standard, but rather in the sense that no standard . . . is specified at all." *Record Head Corp. v. Sachen*, 682 F.2d 672, 676 (7th Cir. 1982) (quoting *Coates v. City of Cincinnati*, 402 U.S. 611, 614, (1971)); *see also Hoffman Estates*, 455 U.S. at 495 n.7.

In determining whether a challenged provision is unconstitutionally vague, the courts ask the question, "Does the regulation provide a person of ordinary intelligence reasonable notice of the prohibited conduct?" *See, Grayned v. City of Rockford*, 408 U.S. 109 (1972); *see also Boyce Motor Lines v. United States* 342 U.S. 337, 340 (1952)("Regulations affecting only economic interests must be sufficiently definite so that ordinary people exercising common sense will know what they mean."); *Norma J. Echevarria and Frank J. Echevarria, d/b/a Echeco Environmental Services,* 1994 EPA App. LEXIS 61, 5 E.A.D. 626, 637 (EAB 1994); *Tennessee Valley Authority,* CAA Docket No. 00-6, 2000 EPA App. LEXIS 25 (EAB, Sept. 15, 2000) ("[T]he question is not whether a regulation is susceptible to only one possible interpretation but rather whether the particular interpretation advanced by the regulator was ascertainable by the regulated community."); *General Elec. Co. v. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995)(If, by reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, with 'ascertainable certainty,' the standards with which the agency expects parties to conform, then the agency has fairly notified a petitioner of the agency's interpretation.). Further, as part of this analysis, the courts look generally to canons of statutory construction and particularly often note that, in the absence of statutory definition, words and phrases are to be given their plain and ordinary meaning. *See, e.g., Matter of Merchants Grain, Inc. By and Through Mahern*, 93 F.3d 1347, 1353-54 (7th Cir. 1996), *cert. denied*, 519 U.S. 1111 (1997).

F. Analysis

Respondent asserts that the prohibition on the label "Do not apply . . . to areas where water is present" is vague because it does not specify the distance from water where spraying is permissible. After careful analysis, it is concluded that the label language at issue withstands Respondent's attack on the basis of vagueness.

In its Motion, Respondent cites no examples where these commonly used words have been found to be unconstitutionally vague. The reason is clear. The words "area" and "present" have well-established meanings, and are sufficiently clear to persons of ordinary intelligence to give fair notice of the proscribed conduct. "Area" means "a flat piece of ground or open space" and "present" means "being at hand." *See*, Webster's II New Riverside Dictionary at 123 and 931 (1988 ed.) and other similar dictionary definitions cited by Complainant. Respondent has admitted applying pesticides "along a right of way" which is part of a road running "alongside Onion Creek and an unnamed Creek." *See*, Complaint paragraph 3 and Answer paragraph 3. Certainly most people of ordinary intelligence would understand that applying pesticides *alongside* creeks, should they have water in them, might fall within language regarding applying in an "area" where "surface water is

present."[15] An even stronger assumption of such understanding must apply to persons who are certified pesticide applicators who have been trained regarding the use and application of such chemicals. It is simply unreasonable to suggest that the Agency or pesticide manufacturer foresee and describe every type of factual variation in topography so as to designate with greater specificity the exact distance from water where pesticides may not be sprayed. *See, United States Civil Service Comm'n v. National Ass'n of Letter Carriers AFL-CIO*, 413 U.S. 548, 578 (1973) ("there are limitations in the English language with respect to being both specific and manageably brief"); *Koppers Co., Inc.* 1990 EPA App. LEXIS 11, 3 E.A.D. 130 (EAB 1990)(That a rule must give fair notice of its requirements "does not guarantee that the meaning of every law will be immediately apparent and easily determined. If indisputable clarity were the touchstone for valid regulation, one wonders what would become of the CFR or the U.S. Code.").[16]

Therefore, I find the language of the pesticide labels regarding applying "to areas where surface water is present" is not unconstitutionally vague.

III. Complainant's Motion for Accelerated Decision

Complainant has moved for accelerated decision as to both liability and penalty, asserting that there are no genuine issues of material fact necessitating a hearing. Respondent asserts its entitlement to a hearing arguing that "the Weed District has always simply and factually denied spraying herbicide on the water or areas where water was present." Respondent's Memorandum p. 2.

A. Standards for Motions for Accelerated Decision

Section 22.20(a) of the Consolidated Rules of Practice provides as follows:

> The Presiding Officer may at any time render an accelerated decision in favor of a party as to any or all parts of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and the party is entitled to judgment as a matter of law.

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[15] The Agency Policy states that the term "water" means natural or man-made bodies of water such as lakes, streams, rivers, canals, ponds, reservoirs, bays, oceans, etc. "Areas where surface water is present" means such areas as swamps, bogs, potholes and marshes where water is present on the soil surface; this phrase does not include irrigation ditches which have been drained. *See*, Complainant's Prehearing Exhibit 12, attached to Complainant's rebuttal prehearing exchange.

[16] There is nothing in the record to suggest that Respondent did not have the opportunity to consult with regulators as to the meaning of the phrase "areas where surface water is present," before it applied the pesticides alongside the creeks. *Hoffman Estates,* 455 U.S. at 498-499, suggests that a regulated entity's opportunity to clarify the meaning of a regulatory provision by inquiry prior to acting supports a higher threshold for a finding of vagueness.

40 C.F.R. 22.20(a).

As the moving party, Complainant bears the initial burden to show the absence of any genuine issues of material fact by "identifying those portions of the 'pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (quoting Fed. R. Civ. Proc. 56(c)). The movant who carries the burden of persuasion at trial "must present evidence that is so strong and persuasive that no reasonable jury is free to disregard it." *BWX Technologies, Inc.,* RCRA (3008) Appeal No. 97-5, 2000 EPA App. LEXIS 9 (EAB, April 5, 2000), slip op. at 22. Moreover, in evaluating a motion for summary judgment, the record must be viewed in a light most favorable to the non-moving party, indulging all reasonable inferences in that party's favor. *Griggs-Ryan v. Smith*, 904 F.2d 112, 115 (1st Cir. 1990).

B. Parties' Arguments as to Accelerated Decision

FIFRA provides that "[i]t shall be unlawful for any person . . . to use any pesticide in a manner inconsistent with its labeling." 7 U.S.C. § 136j(a)(2)(G). As indicated above, Respondent is charged in the Complaint with two violations of this section resulting from its alleged application of two pesticides directly to water or in areas where surface water was present. Complainant alleges that Respondent is a "commercial applicator" within the meaning of Sections 2(e)(3) and 14(a)(1) of FIFRA, 7 U.S.C. §§ 136(e)(3) and 136*l*(a)(1), and is therefore liable for a penalty under Section 14(a)(1) of FIFRA, which authorizes EPA to impose against any commercial applicator who violates any provision of FIFRA a penalty of up to $5,000 for each offense.

In it Motion, Complainant asserts that there is no genuine issue of material fact with respect to the use of "Hi-Dep" and "Tordon 22K" by Respondent in a manner inconsistent with the labels of these registered pesticides. In support thereof, Complainant notes that it has alleged, and Respondent has admitted, that the labels and/or label booklets for the pesticides Hi-Dep and Tordon 22K provide that they shall not be applied "directly to water [or] to areas where surface water is present . . . ." Further, Complainant has alleged and Respondent has admitted that on May 24, 2001, Respondent applied a mixture of two pesticides (Hi-Dep and Tordon 22K) along a right-of-way which is part of Elbow Lake Road which runs alongside Onion Creek and an unnamed creek. *See*, Complaint, paragraphs 3 and 4.

In further support of its Motion, Complainant references a number of exhibits submitted with its Prehearing Exchange. Included among those exhibits are: a) Respondent's record of its chemical application confirming that on May 24, 2001 it applied 190 [ounces] of the pesticides Tordon and Hi-Dep at the rate of 16 and 32 oz/acre respectively on the west side of Elbow Lake Road for approximately two hours using the broadcast application method; b) an unsworn narrative statement of Larry Finley, a Natural Resource Enforcement Sargent with the Confederated Tribes of the Colville Reservation, dated June 19, 2001, wherein Mr. Finley reported personally observing, in the presence of another, a truck driving down Elbow Lake Road on May 24, 2001 spraying "the wetland area," Onion Creek and Barnaby Creek; and c) the unsworn Case Investigation Report of Eric Gjevre, a Tribal Pesticide Inspector wherein Mr. Gjevre states that, based upon a complaint filed by

Larry Finley, on June 5, 2001 (10 days after application), he interviewed Dwayne Radcliff, the pesticide applicator, examined the alleged application site, and took photographs thereof as well as plant samples from the creek bed. Attached to Mr. Gjevre's report are, *inter alia,* lab reports of the samples finding the presence of pesticides in the samples; photographs allegedly showing the presence of surface water in the area where the application occurred and plants affected by pesticide application near the water. Also included among the exhibits are elevation and other maps showing the location of Elbow Lake, Onion Creek, Barnaby Creek, and an unnamed creek. *See*, Complainant's Prehearing Exchange exhibits.

Accompanying Complainant's Motion is the Declaration of Jed Januch. Mr. Januch is an Environmental Protection Specialist with the EPA Office of Environmental Assessment, Investigation and Engineering Unit. In his Declaration, Mr. Januch opines that the boom application method of applying pesticides involves the continuous spraying of relatively large quantities of pesticides over a large swath of area from a vehicle mounted tank which results in the area (and plants existing therein) being saturated with pesticides. He further opines that this method of pesticide application (as compared to the spot or hand-line method) is "more likely to result in herbicide drift." Additionally, Mr. Januch opines that the photographs included among Complainant's Prehearing Exhibits show plants exhibiting symptoms characteristic of exposure to herbicides such as that in Tordon and Hi-Dep. *See,* Declaration of Jed Januch accompanying Complainant's Motion.

In its Memorandum in opposition to Complainant's Motion, Respondent reiterates its denial that it sprayed the pesticides to water or to areas where water was present suggesting the Complainant's evidence does not establish this as a fact. Respondent challenges the observations made by Mr. Finley claiming that if Mr. Finley actually observed the unlawful application "why didn't Finley, as a tribal officer stop the vehicle in the process?" and asserting that Mr. Finley's "story won't survive the scrutiny of cross examination." Additionally, Respondent also raises the legal issue of the distinction between mandatory and advisory elements on the label, stating that the prohibition against applying the pesticides to water or areas where surface water is present is mandatory but the comments in the label about drift or runoff adversely affecting nontargeted plants is advisory.[17] Respondent submits no affidavits in support of its response.

Moreover, in its Prehearing Exchange, Respondent asserts that the pesticide applicator, Mr. Radcliff, will testify that he sprayed in the area of Onion Creek and the unnamed creek but not continually, and that the unnamed creek is a drainage ditch that was dry at the time he sprayed. He

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[17] Respondent cites in this regard EPA's "Guidance for Mandatory and Advisory Labeling Statements," 65 Fed. Reg 31313-31315 (May 17, 2000) which provides that mandatory statements are those written in imperative terms (such as "shall," must," "do this," "do not"). The phrase at issue here is "do not apply directly to water or areas where surface water is present." Both parties agree that this language makes the provision imperative or mandatory, rather than advisory. *See,* Complainant's Reply dated December 26, 2002; Respondent's Memorandum dated December 12, 2002 p.3-5.

denies spraying in or near the creeks. Further, that Mr. Davidson, the coordinator for the Weed Control District, will testify that on some unstated date he inspected the area where plants were supposedly sprayed with pesticides and "found plant life growing;" and that the unnamed creek is often dry. Included among the exhibits are weather reports allegedly evidencing very little rain in the days prior to the pesticide application, but some thereafter, and copies of photographs taken by Mr. Davidson.

I find that Respondent's Prehearing Exchange raises issues of material fact which can only be resolved at an oral evidentiary hearing. These issues include whether, in fact, there was surface water present in the area *at the time and on the day* Respondent sprayed, and whether Respondent sprayed directly into or near areas of surface water.

CONCLUSION

THEREFORE, it is this day,

ORDERED, that the Complainant's Motion for Accelerated Decision and Respondent's Motion to Dismiss are hereby **DENIED**.

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Susan L. Biro
Chief Administrative Law Judge

Dated: January 22, 2003
Washington, D.C.