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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

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| In the Matter of | ) | |
| | ) | |
| Hines Wholesale Nurseries, Inc., | ) | Docket No. IX-81-RCRA-079 |
| | ) | |
| Respondent | ) | |

## Initial Decision

This is a civil penalty proceeding under Section 3008 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act (42 U.S.C. 6928). The proceeding was commenced by a document entitled "Determination of Violation, Compliance Order and Notice of Right to Request Hearing" issued by the Acting Director of the Enforcement Division, EPA Region IX, on January 30, 1981. The Determination of Violation (DOV) alleged that Hines Wholesale Nurseries, Inc. (Respondent or Hines) generates rinsewater containing pesticides at a rate of 100,000 gallons per year and that the rinsate contains Chlordane, Temik and Tiovel, which were classified as acute hazardous wastes (Nos. U036, P070 and P117 respectively) in 40 CFR 261.33(e) and (f). It was further alleged that Hines failed to file a notification with the Administrator stating the location and general description of its activity and the identified or listed hazardous wastes which were handled as required by Section 3010(a) of the Act and 40 CFR Part 122. Hines was ordered to cease generating listed or identified hazardous wastes until such time as the required notification was filed and assessed a penalty of $500. Hines answered, disputing the contention that it had violated the Act and requested a hearing.

The parties have submitted this matter for decision on the basis of a stipulation of facts and upon the understanding that the amount of the penalty is to be negotiated between the parties or if necessary, determined after a hearing, if Respondent was found in violation.

Based on the stipulation, the proposed findings and conclusions and briefs of the parties, I find that the following facts are established:

## Findings of Fact

1. Hines Wholesale Nurseries, Inc. of Santa Ana, California is a division of Weyerhaesuer Company of Tacoma, Washington.
2. Hines is a grower of horticultural commodities, including ornamental plants, shrubbery and the like, which are the sole products of its Santa Ana facility. These plants, grown in individual containers, are subjected to applications of pesticides from time to time during the growing period.
3. Hines' Pest Control Manager, Mr. Dominick Carissimo, is in charge of Hines' pesticide operations, which includes supervision of the handling of all pesticides, determining application schedules, preparing the pesticides for application, assuring that chosen pesticide applications are properly made and that proper disposition is made of any wastes resulting from pesticide operations.
4. During 1980, Mr. Carissimo was responsible for and made determinations with regard to the pesticides Thiodan (Tiovel) and Temik. Thiodan and Tiovel are substantially equivalent, both containing the active ingredient endosulfan.
5. Endosulfan is a commercial chemical product, hazardous waste number P050, listed at 40 CFR 261.33(e).

6. Hines did not use chlordane during 1980 at its Santa Ana facility and therefore no waste residues of Chlordane were produced or generated during 1980 at the mentioned facility.

7. Temik was and is applied as a solid and no waste residues of Temik were produced at Hines' Santa Ana facility during 1980. All containers of Temik were triple-rinsed onto the plants in the field during 1980.

8. Applications of pesticides are recorded on Pest Control Recommendation (PCR) forms prepared by Mr. Carissimo. Hines documents (PCR 1 through 7 (enclosed) with letter, dated May 13, 1981) record all applications of Thiodan and Temik at the Santa Ana facility during 1980.

9. Thiodan contains about three pounds of endosulfan per gallon. This is diluted with water prior to being applied. For example, Hines Document No. 1, dated October 20, 1980, shows that one quart of Thiodan 2E was added to 100 gallons of water to make an application strength pesticide. This document also shows that 4 oz. of a spreader-sticker surfactant is added to each 100 gallons of water. Containers containing the commercial pesticide products are triple-rinsed into the sprayer or applicator tanks during dilution or mixing of pesticides.

10. Application of pesticides is made from engine-driven portable sprayers, having tanks of varying sizes. Although the sprayers are equipped with pumps and agitators, a residue of pesticide is left in the tank after application of the pesticide, which at no time exceeds five gallons. If more than one tank of a particular pesticide is applied on a particular day, succeeding tanks are made up without emptying this residue.

11. At the end of each operating day, pesticide residues remaining in the sprayer tanks are emptied into a 10,000-gallon waste holding tank at Hines' Santa Ana facility. Sprayer tanks are rinsed and this rinsate is emptied into the mentioned waste holding tank. An undetermined quantity of water from the washing of exteriors of applicator tanks also enters the waste holding tank.

12. On the assumption that five gallons of pesticide remain in each sprayer tank at the end of an operating day no more than 30 gallons (25 in September and five in October) of Thiodan (Tiovel) residues were emptied into the 10,000-gallon waste holding tank during 1980 (Hines Exh 12). These rinse or wash-outs, totaling five in September and one in October 1980, resulted in .085 kg of concentrated Thiodan (endosulfan) being emptied into the waste tank during September and .017 kg being emptied into the waste tank during October. The weight of 25 gallons of pesticide residue or rinsate is greater than one kilogram.

13. When accumulated waste in the holding tank reach approximately 7,000 gallons, the wastes are pumped into a tank truck and delivered to a designated solid waste landfill approved by the State of California. Hines holds a California Extremely Hazardous Waste Disposal Permit for this purpose. The number of times the waste holding tank was pumped out during 1980 is shown on Hines Exhibit 13.

14. The accumulation of endosulfan in the waste holding tank during September 1980 never exceeded 0.085 kg as the tank was pumped for disposal on September 10 and October 7, 1980.

15. The accumulation of Thiodan in the waste holding tank during October 1980 never exceeded 0.017 kg as the tank was pumped for disposal on October 7 and October 30, 1980.

16. No pesticide wastes, other than possible field runoff, other than those described above are produced at Hines' Santa Ana facility.

17. Relying in part on advice from EPA's Region X office to the effect that rinsewaters from the pesticide application tanks are not regulated under RCRA unless the rinsewater meets one of the characteristics of hazardous waste, i.e., ignitability, corrosivity, reactivity, or toxicity, set forth in 40 CFR 261 Subpart C, Respondent concluded that the pesticide rinsates at issue here were not hazardous wastes.

## Conclusions

1. Endosulfan is a commercial chemical product listed at 40 CFR 261.33(e), hazardous waste number P050.

2. Thiodan is a pesticide containing endosulfan as its sole active ingredient.

3. In accordance with 40 CFR 261.33(a) any commercial chemical product having a generic name listed in 40 CFR 261.33(e) or (f) is a hazardous waste when discarded or intended to be discarded.

4. Hines' action in disposing of or discarding pesticide rinsates of Thiodan is the disposition of a formulated chemical product in which a listed hazardous waste (endosulfan) is the sole active ingredient.

5. Mixing and diluting Thiodan with water and adding a minute quantity of a spreader-sticker surfactant to make an application strength pesticide does not constitute manufacturing and the quantities remaining in the sprayer tanks after application of the pesticide are not manufacturing process wastes within the meaning of the comment to 40 CFR 261.33(d).

6. Because the entire dilute quantity of Thiodan intended for discard must be regarded as hazardous waste, Hines is not eligible for the small quantity generator exclusion in 40 CFR 261.5.

7. Hines' activities in 1980 bring it within the notification requirements of Sec. 3010 of RCRA and 40 CFR Part 122.

## Discussion

Applicable regulations (40 CFR 261.33) provide in pertinent part:

> "The following materials or items are hazardous wastes if and when they are discarded or intended to be discarded:
>
> > (a) Any commercial chemical product or manufacturing chemical intermediate having the generic name listed in paragraphs (e) or (f) of this section."

As indicated (finding 5), endosulfan is a commercial chemical product listed at 40 CFR 261.33(e), hazardous waste number P050. Thiodan is a trade name for a pesticide containing endosulfan. In the revisions to the regulations published on November 25, 1980, trade names were deleted from the lists of hazardous wastes in 40 CFR 261.33(e) and (f), but generic chemical equivalents were retained (45 FR No. 229, November 25, 1980, 78524 et seq.).

Hines contends that it is excluded from the operation of the regulation by the comment to 40 CFR 261.33(d) providing as follows:

> "The phrase 'commercial chemical product or manufacturing chemical intermediate having the generic name listed in * * *' refers to a chemical substance which is manufactured or formulated for commercial or manufacturing use which consists of the commercially pure grade of the chemical, any technical grades of the chemical that are produced or marketed,

> and all formulations in which the chemical is the sole active ingredient. It does not refer to a material, such as a manufacturing process waste, that contains any of the substances listed in paragraphs (e) or (f). Where a manufacturing process waste is deemed to be a hazardous waste because it contains a substance listed in paragraphs (e) or (f), such waste will be listed in either Sec. 261.31 or 261.32 or will be identified as a hazardous waste by the characteristics set forth in Subpart C of this part." (45 FR No. 229, at 78541).

Hines asserts correctly that the pesticide wastes at issue here are not listed in 40 CFR 261.31 or 261.32 (Brief at 1). Hines also asserts that its wastes do not have any of the characteristics listed in 40 CFR 261, Subpart C, that is, ignitability, corrosivity, reactivity or toxicity.[1/] Hines argues that the term "manufacturing process waste" in the quoted comment is broad enough to include the pesticide residues and rinsates at issue here. Alternatively, Hines argues that whether or not its processes constitute manufacturing in the strictest sense, the pesticide wastes at issue are equivalent or identical to manufacturing process wastes within the general thrust of the exclusionary comment (Brief at 3). Hines expresses the view that "discarded commercial

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1/ Although Complainant has not expressly disputed this assertion, it has referred to the preamble to the amended regulation (45 FR, November 25, 1980, at 78539), which points out that many of the trade products regulated under this section (40 CFR 261.33) are pesticides or fungicides, produced for the express purpose of destroying plant or animal life and that it is evident, that such a substance, when discarded, meets the definition of a hazardous waste (Reply Brief at 2). Complainant also refers to the Background or Support Document for the May 19, 1980, regulation, which indicates that most of the listed chemicals need only be present in low concentrations to have toxic effects.

products" in the context of 40 CFR 261.33 refers to substantially pure or at least relatively concentrated solutions or formulations of hazardous substances and that the exclusionary sentence of the comment excludes materials containing any of the substances listed in 261.33(e) or (f), so long as they are similar to "manufacturing process wastes" as that term would be understood by the regulated community.

Complainant contends that the pesticide rinsates and residues produced by Hines are hazardous wastes because they are formulations of chemical substances listed in 40 CFR 261.33(e) and (f) in which the chemical substances are the sole active ingredients (Brief at 2). Complainant asserts that the concept of formulations is broad enough to include dilutions of the active chemical constituent to an application strength pesticide. Dilution is a formulation according to Complainant, because it is based upon a prescribed, systematic method of making the commercial chemical useful or suitable for application as a pesticide. Complainant argues that the pesticide residues and rinsates at issue are not manufacturing process wastes within the meaning of the exlusionary comment to 40 CFR 261.33(d), because Hines simply dilutes the commercial chemical products rather than actually manufacturing or producing the Section 261.33 product.

Hines' assertion that discarded chemical products within the scope of 40 CFR 261.33 refer to listed chemical substances in their pure or relatively pure form was correct under the regulation as promulgated on

May 19, 1980.[2/] The amendment of November 25, 1980, by reference to the comment in 40 CFR 261.33(d), broadened the definition of "commercial chemical product or manufacturing chemical intermediate having the generic name * *" to include a "chemical substance which is manufactured or formulated for manufacturing or commercial use which consists of the commercially pure grade of the chemical, any technical grades of the

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2/ The regulation was then limited to listed commercial chemical products or off-specification varieties thereof in their pure or undiluted form. The preamble to the cited regulation (45 FR No. 98, May 19, 1980) provides at 3115 in pertinent part:

> "In listing these materials [hazardous wastes] in the proposed rule, EPA intended to encompass those chemical products which possessed toxic or other hazardous properties and which, for various reasons, are sometimes thrown away in pure or undiluted form. The reasons for discarding these materials might be that the materials did not meet required specifications, that inventories were being reduced, or that the product line had changed. The regulation was intended to designate chemicals themselves as hazardous wastes, if discarded, not to list all wastes which might contain these chemical constituents. In drawing up these lists, the Agency drew heavily upon previous work by EPA and other organizations identifying substances of particular concern.
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> * * * Second, a number of the substances, which meet the criterion for listing acutely hazardous wastes, are separately listed in 261.33(e). This section applies to the chemical substances if they or their off-specification species are thrown away in their pure form, containers and inner liners containing these materials, and spill residue and debris created by spills of these listed materials. Section 261.5(c) establishes low quantity exclusion levels for these acutely hazardous materials."

chemical that are produced or marketed and all formulations in which the chemical is the sole active ingredient." While the definition of formulation is sufficiently broad to include the application strength pesticide at issue,[3/] it is unnecessary to conclude that Hines is a formulator in order to find that the wastes of concern are within the scope of the quoted comment and thus of 40 CFR 261.33. This is because the manufacturing or formulating referred to occurs in the production of the pesticide Thiodan in which endosulfan, the sole active ingredient, is present in dilute form.[4/] Accordingly, when Hines purchases Thiodan it purchases a formulation in which a listed chemical substance is the

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3/ Formulate means "to make or prepare in accord with a formula" and formulation is simply "an act or the product of formulating" (Webster's 3rd New International Dictionary, 1967).

4/ The clause of the comment "which is manufactured or formulated" for commercial or manufacturing use" indicates that the reference is to initial production of the chemical substance or a formulation thereof.

sole active ingredient within the meaning of the comment.[5/] This conclusion is supported by the preamble to the amended regulation.[6/]

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5/ At the time the purchase is made Thiodan is a commercial product and it is unnecessary to consider whether the application strength pesticide made up by Hines is a commercial or trade product. See 45 FR 78538, providing in pertinent part:

> "B. Questions also have been raised as to the precise meaning of the regulatory language "having the generic name listed in paragraphs (e) or (f)." The Agency intends that this language include the commercially pure grade of the chemical, any technical grades of the chemical that are produced or marketed, and all formulations in which the chemical is the sole active ingredient. This scope of coverage was expressed in the May 19th regulation where hundreds of such products were listed by name in 261.33(e) and (f). We also believe that this reading conforms to usual understanding. Commercial chemicals are almost never sold in pure form. Generally, a chemical need not be present at full strength for a product to have its intended effect, and so is diluted to the desired concentration. For practical purposes, however, the product is considered to be the chemical comprising its active portion. For example, persons purchasing the fungicide pentachlorophenol (U-242) do not normally receive a pure chemical, but rather a formulation (e.g., Permatox DP-2) in which the fungicide pentachlorophenol is the active ingredient. There is no doubt, however, that this trade product formulation is identified with the active chemical constituent." * * *

6/ See 45 FR 78539, November 25, 1980, providing in pertinent part:

> "The approach outlined above--that products containing a generically listed chemical as the sole active ingredient are included within the scope of the regulation--has a number of significant advantages. First, the approach seems to reflect normal commercial understanding. Further, a potential unintended loophole for diluted formulations of generically-listed chemicals is eliminated. In addition, the regulation would have little practical effect, and would be at odds with usual understanding, if it were read as applying only to pure chemicals, since 100% pure chemicals are used only rarely in commercial practice.
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> There should be little question that single active ingredient products containing a generically-listed chemical as its active ingredient will usually and frequently be toxic and thus a

The next question is whether the pesticide residues and rinsates at issue are manufacturing process wastes within the meaning of the exclusionary sentence of the comment at 40 CFR 261.33(d). There being no definition of manufacturing in the regulation, the term must be given its ordinary and generally accepted meaning. Generally, manufacturing requires a transformation so that a new and different article emerges having a distinctive name, character or use. See, e.g., Anheuser-Busch Brewing Association v. United States, 207 U.S. 556 (1908); Solite Corporation v. King George County, 220 Va. 661, 261 S.E. 2d. 535 (1980) and Commonwealth v. Perfect Photo, Inc., 371 A. 2d 580 (Pa. 1977). Although Complainant asserts that Respondent has simply diluted a dry chemical product[7/] for the purpose of making its application more convenient and that there has been no manufacturing because the chemical properties of Thiodan have not been altered, mixing and blending activities

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6/ continued

"hazardous waste when discarded. The toxicity data contained in the May 19th Background Document indicates that most of the chemicals need be present in only low concentrations for the product to have toxic effects. We further believe that products which are identified with the generically-listed chemical because the chemical is the sole active ingredient will normally contain concentrations of the chemical far higher than necessary to produce toxic effects or will be present in combination with so-called inert ingredients which tend to magnify its toxic effects (e.g., solvents and surfactants). The products mentioned as synonyms for 1,1,1 trichloroethane in Dow's comments, for example, contain over 90% of the generically-listed chemical. We also note that many of the trade products regulated under this section are pesticides or fungicides, produced for the express purpose of destroying plant or animal life. It is evident that such a substance, when discarded, meets the RCRA definition of hazardous waste."

7/ It appears that the principal inert ingredient of Thiodan is petroleum distillate and that Thiodan is actually purchased in liquid form (Respondent's Reply Brief at 2).

very similar to Respondent's have been held to be manufacturing. See Shelby County Board of Assessment Appeals v. Gro-Green Chemical Co., Inc., 602 S.W. 2d 155 (Ky. 1980) (blending and mixing of nitrogen, phosphate, potash, sulphur, potassium and boron to make fertilizer according to needs of particular customer held to be manufacturing and fact that components were not chemically altered was immaterial); Canteen Co. v. Bowers, 148 N.E. 2d 684 (Ohio, 1958) (coin operated machines which mixed ingredients (water, carbon dioxide and syrup) to dispense carbonated beverages and coffee (the ingredients of which were water, instant coffee, powdered cream, sugar and corn starch), held to be manufacturing equipment within meaning of tax statute); and Wakefield Ready Mixed Concrete Co. v. State Tax Commissioner, 247 N.E. 2d 869 (Mass. 1969) (mixing concrete in delivery trucks held to be manufacturing). Cf. Masao Hirasuna v. McKenney, 135 F. Supp 897 (D.C. Hawaii, 1955) (manufacture includes any process with a resulting product, other than natural products, so long as the hand of man was instrumental in bringing it about).

Accordingly, under the broad view of manufacturing adopted in the cited cases, Respondent's dilution and mixing of Thiodan to make an application strength pesticide could conceivably be considered manufacturing. Moreover, Complainant's contention that simple dilution is involved overlooks the addition of four ounces of a spreader-sticker surfactant per 100 gallons of water which is mixed in making the application strength pesticide. The more ingredients which are blended and mixed would seem to make more credible the contention Respondent's activities are within the ambit of manufacturing.

It is concluded, however, that under the better and more accepted view, Hines' activities herein described do not rise to the level of manufacturing but are simply processing activities incident to using the completed article as intended. Among the definitions of processing are to prepare for market, manufacture or other commercial use by subjecting to some process as cattle by slaughter, milk by pasteurizing, grain by milling, cotton by spinning, etc. (Webster's 3rd New International Dictionary (1967)). See, e.g., Commonwealth v. Orange-Madison Cooperative Farm Service, 220 Va. 655, 261 S.E. 2d 532 (1980) (manufacturing requires a transformation into an article of substantially different character, while processing merely requires a treatment rendering the product more marketable or useful). See also Intelex Systems, Inc. v. United States, 318 F. Supp 518 (Cust. Ct. 1970) (processes incident to obtaining or producing a completed article and processes incident to using the completed article for the purpose intended are vastly different concepts in commercial and common understanding; examples of latter are cake mixes and dehydrated products which have to be further processed to be used as intended). Hines seems to recognize that merely mixing Thiodan to make an application strength pesticide may not properly be considered manufacturing and argues that what should be considered as manufacturing is the entire process of producing finished ornamental shrubs and plants. Growing crops and plants and raising livestock however, are not

normally considered to be manufacturing or manufacturing processes as production of natural items is generally excluded from the definition of that term. Hirasuna v. McKenney, supra.

Concluding that the pesticide residues and rinsates at issue here are not manufacturing process wastes does not end the inquiry, however, because of the words "such as" prior to the term "manufacturing process wastes" in the exclusionary sentence of the comment to 40 CFR 261.33(d), which clearly indicates that wastes in addition to the described wastes are also within the scope of the exclusion. Pertinent here is Hines' contention that the pesticide residues and rinsates at issue are identical or equivalent to manufacturing process wastes within the general thrust or tenor of the exclusion. Although the scope of the intended exclusion as applying to wastes other than manufacturing process wastes is not altogether clear, a reasonable construction is that the exclusion is limited to wastes engendered in the manufacture or production of substances or articles where the fact that the waste contains a listed substance is

simply a necessary or incidental byproduct. In other words, the exclusion does not apply where the waste retains a generic or the trade name equivalent of a listed waste.[8/]

Summarizing, Thiodan is a commercial chemical product, containing endosulfan, a listed hazardous waste as its sole active ingredient, the pesticide residues and rinsates retain their identification when discarded or intended to be discarded, and the pesticide residues and rinsates at issue are not manufacturing process wastes or sufficiently similar thereto to be within the exclusionary sentence of the cited

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8/ Support for this interpretation is found in the preamble to the amended regulation providing in pertinent part at 78540:

> "* * * The purpose of 261.33 is to regulate only the listed chemical products and intermediates and their trade name equivalents (and certain off-specification variants, emptied containers and spill residues and debris thereof) as hazardous wastes when they are discarded or intended to be discarded.
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> * * * EPA intends that the materials listed in 261.33 include only those commercial chemical products and manufacturing chemical intermediates that are known by the generic name of the chemicals listed in paragraphs (e) and (f) of that section. Manufactured articles that contain any of the chemicals listed in paragraphs (e) and (f) are rarely, if even (sic), known by the generic name of the chemical(s) they contain and, therefore, are not covered by the 261.33 listings." (45 FR 78541)

See also note 5, supra.

comment, because the exclusion is not applicable where the waste retains a generic or the trade name equivalent of a listed chemical.[9/]

Remaining for consideration is Hines' contention that it is within the small quantity exemption in 40 CFR 261.5. The cited section (45 FR No. 225, November 19, 1980) provides at 76623-24:

> "(e) If a small quantity generator generates acutely hazardous waste in a calendar month in quantities greater than set forth below, all quantities of that acutely hazardous waste are subject to regulation under Parts 262 through 265 and Parts 122 and 124 of this chapter, and the notification requirements of Section 3010 of RCRA:
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> (1) A total of one kilogram of a commercial chemical products and manufacturing chemical intermediates having the generic names listed in 261.33(e), and off-specification commercial chemical products and manufacturing chemical intermediates which, if they met specifications, would have the generic names listed in 261.33(e).
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9/ In support of its contention that the pesticide wastes at issue are similar to manufacturing process wastes within the scope of the exclusionary comment and accordingly, would be hazardous wastes only if listed in 40 CFR 261.31 or 32, Respondent cites tetrachloroethylene, which is listed in 40 CFR 261.33(f), hazardous waste No. U210, and also appears in Section 261.31, "Generic, F001--The spent halogenated solvents used in degreasing, tetrachloroethene, trichloroethylene, methylene chloride, 1,1,1-trichloroethane, carbon tetrachloride, and the chlorinated fluorocarbons; and sludges from the recovery of these solvents in degreasing operations." Respondent points out that if Complainant's interpretation of the scope of the exclusionary phrase "such as a manufacturing process waste" as being limited to manufacture or production of listed chemicals was accurate, it would not be necessary to list tetrachloroethylene in Section 261.31. Responding to this argument, Complainant asserts that once tetrachloroethylene has been used in degreasing operations it has been mixed with grease and other materials and has lost its identification as tetrachloroethylene and accordingly, would be a hazardous waste only if listed in Sections 261.31 or 32 (Reply Brief at 3). This explanation is in accord with the conclusion reached above that the exclusion does not apply where the waste retains its generic or a trade equivalent name. Quaere: Whether the contaminated soil and debris referred to in 40 CFR 261.33(d) may properly be considered as retaining the generic name of a listed chemical?

"(h) Hazardous waste subject to the reduce requirements of this section may be mixed with non-hazardous waste and remain subject to these reduced requirements even though the resultant mixture exceeds the quantity limitations identified in this section, unless the mixture meets any of the characteristics of hazardous wastes identified in Subpart C.

(i) If a small quantity generator mixes a solid waste with a hazardous waste that exceeds a quantity exclusion level of this section, the mixture is subject to full regulation."

Hines contends that the pesticide residues and rinsates at issue become solid wastes when they are intended to be discarded (40 CFR 261.2) and at that time the total weight of the commercial chemical that it contains is less than one kilogram (Brief at 6). Hines points out that dilution is expressly permitted by 40 CFR 261.5(h), which is quoted above. Complainant asserts that disposal of the diluted pesticide solution, containing endosulfan as its sole active ingredient, is disposal of the Section 261.33(e) product and that as long as the total weight of this solution exceeds one kilogram in a month, the weight of the concentrate in the solution is irrelevant (Brief at 6).

It is concluded that Complainant's position must be sustained. As has been seen, the diluted application strength pesticide (Thiodan) is a formulation in which endosulfan is the sole active ingredient, which formulation remains a Section 261.33(e) product and becomes an acutely hazardous waste when it is discarded or intended to be discarded. As long as the weight of the solution discarded or intended to be discarded

exceeds one kilogram in a month, the small quantity exclusion for acutely hazardous wastes is not applicable (40 CFR 261.5(i)). Respondent points out (Reply Brief at 2-4), that this analysis makes all important the time at which the decision to discard is made and argues that this distinction that is, whether the dilution takes place before or after the decision to discard is made, should be without regulatory significance.[10/]

Respondent would apparently overcome this apparent anomaly as applied to it by regarding only the concentrated chemical product, and not the solution in which it is contained, as the acutely hazardous waste for the purpose of the small quantity exclusion. This position is precluded by the "mixing rule," 40 CFR 261.3(b), providing in pertinent part:

> "(b) A solid waste which is not excluded from regulation under paragraph (a)(1) of this section becomes a hazardous waste when any of the following events occur:
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> * * * *
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> (2) In the case of a mixture of solid waste and one or more listed hazardous wastes, when a hazardous waste listed in Subpart D is first added to the solid waste."

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10/ Hines postulates a situation where it intends to make four separate 25-gallon batches of pesticide, using its normal mix of 1.02 kilograms of Thiodan per 100 gallons of water. Before the last 25-gallon batch is made-up, a decision is made not to use that batch and to discard the remainder. Hines points out that as long as the amount of Thiodan remaining was less than one kilogram, it could be discarded in its undiluted form or mixed with 25-gallons or more of water without being subject to regulation as a hazardous waste. The weight of the mixture exceeding one kilogram in weight, this, of course, would not be true if the decision to discard was made after the last batch was made-up.

See also the preamble to the amended regulation, 45 FR No. 229, November 25, 1980, at 78540, providing:

> "However, when a solid waste is mixed with one of these discarded materials, the resulting mixture is a hazardous waste until delisted (with certain exceptions set forth in 261.5(h)). See 261.3(a)(2)(ii). As set out in 261.3(b)(2), the solid waste becomes a hazardous waste when the mixing of the 261.33 chemical takes place either as an act of discarding that chemical or the time the chemical is intended for later discard (i.e., at the time the 261.33 substance becomes a hazardous waste)." See also 45 FR 76622, November 19, 1980.

It is concluded that, however illogical the small quantity exclusion and the provision permitting dilution of wastes within the small quantity exclusion may be as applied to certain hypothetical fact situations, Respondent's activities as described herein are not within the scope of that exclusion.

## Conclusion

Respondent's activities as described herein are within the scope of the Act and the regulation as amended and the order directing it to cease generating listed or identified hazardous wastes until it has filed a notification with the Administrator of EPA as required by Section 3010 of the Act will be affirmed. Notwithstanding this conclusion and the understanding that determination of the amount of the penalty would be deferred if a violation was found, it is concluded that no penalty may properly be assessed and that part of the order of January 30, 1981, assessing a penalty of $500 is annulled. This is because it is one thing to order future compliance with a regulation whose scope has heretofore

been in reasonable doubt, and quite another to assess a penalty for violation of an unclear regulation prior to the time its application has been clarified.[11/]

## Order[12/]

It having been determined that the activities of Hines Wholesale Nurseries, Inc. with respect to wastes of the pesticide Thiodan are

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11/ See Liberty Light & Power, TSCA Appeal No. 81-4 (Decision of Judicial Officer, October 27, 1981) (penalty may not be assessed upon the basis of an unclear and misleading regulation). See also Cole v. Young, 351 U.S. 536, 76 S. Ct. 861 (1956) (ambiguities in executive order resolved against government). The pesticide residues and rinsates at issue were not within the coverage of the regulation of May 19, 1980, and Respondent could have reasonably concluded that its wastes were sufficiently similar to manufacturing process wastes as to be within the exclusionary sentence of the comment at 40 CFR 261.33(d).

12/ The proposed order included with Complainant's brief, inter alia, orders Respondent to operate its facility in compliance with the California Hazardous Waste Act, California Health and Safety Code, sections 25100 et seq. It being doubtful that the ALJ has authority to issue such an order, the order entered here substantially tracks the order entered with the Determination of Violation.

subject to the Solid Waste Disposal Act, as amended and applicable regulations (40 CFR Parts 122 through 124 and Parts 262 through 265), Hines Wholesale Nurseries, Inc. shall cease generating any identified or listed hazardous wastes subject to Subtitle C of the Act, until such time as Hines has filed with the Administrator of EPA a notification in accordance with Section 3010 of the Act stating the location and general description of such activity and the identified or listed hazardous wastes handled by Hines Wholesale Nurseries, Inc.[13/]

Dated this 9th day of November 1981.

Spencer T. Nissen
Administrative Law Judge

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13/ Unless this decision is appealed to the Administrator in accordance with Section 22.30 of the Rules of Practice (40 CFR 22.30), or unless the Administrator elects, sua sponte, to review the same as therein provided, this initial decision shall become the final order of the Administrator and of the Agency (40 CFR 22.27(c)).