PURDUE PESTICIDE PROGRAMS

Purdue University Cooperative Extension Service

PESTICIDES AND THE LAW

A GUIDE TO THE LEGAL SYSTEM

Fred Whitford, Coordinator, Purdue Pesticide Programs
Michael Olexa, Agricultural Law Specialist, University of Florida
Michael Thornburg, Agricultural and Environmental Specialist, Purdue University
David A. Gunter, Attorney, Cromer and Eaglesfield
John Ward, Chief, Pesticide Programs Section, U.S. Environmental Protection Agency
Larry LeJuene, Assistant Pesticide Director, Louisiana Department of Agriculture and Forestry
Gerald Harrison, Professor of Agricultural Economics, Purdue University
Joe Becovitz, Pesticide Program Specialist, Office of the Indiana State Chemist

Edited by

Arlene Blessing, Purdue Pesticide Programs

TABLE OF CONTENTS **PAGE**

Responsibility and Liability Focused on the Pesticide User 3
Recognition, Correction, and Prevention 4
Inspection, Investigation, and Reporting 5
Civil Liability 8
Citizen Lawsuit 11
Labels and Applicator Certification Set Standards of Conduct 14
Environmental Site Assessments 19
Liability Insurance 23
Transfer of Property and Environmental Disclosure Documents 24
Summary 26
Points to Remember 26
Acknowledgments 27

PURDUE UNIVERSITY COOPERATIVE EXTENSION SERVICE • WEST LAFAYETTE, IN 47907

Responsibility and Liability Focused on the Pesticide User

Both the public and the press have increasingly focused on the negative impacts of agricultural, urban industrial, and residential chemicals. The benefits are often overlooked. Pesticides in today's pest control picture are essential components of integrated pest management. In many circumstances, pesticides may be the only effective means of controlling disease organisms, weeds, or insect pests.

Consumers receive direct benefits from pesticides through wider selections and lower prices for food and clothing. Pesticides protect private, public, and commercial dwellings from structural damage associated with termite infestations. Pesticides also contribute to enhanced human health by preventing disease outbreaks through the control of rodent and insect populations. Pesticides are used to sanitize our drinking and recreational water and to disinfect indoor areas (e.g., kitchens, operating rooms, nursing homes) as well as dental and surgical instruments.

The pesticide industry also provides benefits to society. Local communities and state governments are dependent upon the jobs and tax base that pesticide manufacturers, distributors, dealers, commercial applicators, and farmers provide. Taxes support public schools, roads, hospitals, and government infrastructure. The federal government depends on the revenues generated by the pesticide industry to reduce balance of trade deficits with foreign countries. Many positive contributions to society can be directly attributed to the use of pesticides.

While pesticides provide many benefits, there are also inherent risks, or liabilities, associated with their production and use. It is important to balance the benefits associated with pesticides with their potential for negative impact on human and environmental safety. The risks of acute poisoning and concerns about chronic (long-term) impacts of exposure to pesticide residues in food continue to be debated. Natural resources can be degraded when pesticide

residues in storm water runoff enter streams or leach into ground water. Pesticides that drift from the site of application to wildlife habitat may harm or kill nontarget plants, birds, fish, or other wildlife. The mishandling of pesticides in storage facilities and in mixing and loading areas contributes to soil and water contamination.

Understanding the legal responsibilities of the pesticide applicator is critical in managing pesticide risks. A heightened awareness of potential risks from exposure to pesticides compels the applicator to be mentally sharp, well trained, and attuned to all of the activities associated with pesticide use. The applicator must recognize potential pesticide problems and prevent their occurrence.

The critical message is clear: Mistakes with pesticides seldom go unnoticed. Local, state, and federal laws and regulations place the responsibility and liability for correct pesticide use squarely on the shoulders of the pesticide applicator through 'codes of conduct'. Companies and individuals cannot afford to take a wait-and-see attitude but must instead shift to a system which emphasizes loss prevention and quality control. They can incur significant liability for breach of these duties. Increasing regulation of the environment coupled with our increasingly litigious society provides the backdrop for *Pesticides and the Law*.

Recognition, Correction, and Prevention

'Liability' has many legal definitions, but in lay terms 'liability' is a responsibility to provide compensation or restitution to another person when a wrong has occurred.

Today's competitive work environment requires pesticide-related businesses not only to perform a quality job at a reasonable price but also to accept responsibilities associated with pesticides, including record-keeping, storage, disposal, transportation, worker health, and environmental issues such as water quality and endangered species.

Pesticide risk management requires the same level of intensity and commitment generally assigned to those

activities that produce income. Managing pesticide risks is accomplished by recognizing the potential for problems and developing prevention strategies. It is essential to recognize that pesticide use—transportation, storage, application, disposal—carries the potential to cause harm to people and degrade the environment. Each phase of pesticide handling has unique problems. Corrective actions are required when preventive actions have failed or when a change in law requires additional measures. These general concepts—recognition, correction, and prevention—will not shelter the pesticide user from liability, but often they reduce the likelihood of legal actions by regulatory agencies and citizens.

Inspection, Investigation, and Reporting

Federal and state governments regulate pesticide use to manage pests in urban, industrial, institutional, and agricultural settings. This is accomplished through product registration, applicator certification and licensing, and enforcement. The regulatory system controls all uses of pesticides through laws administered by several governmental agencies. It incorporates such elements as product label registration, restricted-use pesticide dealer licensing, applicator certification and licensing, rules of conduct, and recordkeeping requirements. Inspections or investigations by regulatory agencies may lead to the discovery of acts or omissions which are considered improper, questionable, or illegal.

Routine Compliance Monitoring

State, federal, and local officials may arrive at a facility, announced or unannounced, to conduct a routine compliance audit of pesticide activities. These regulatory visits provide officials the opportunity to review records and evaluate practices to ensure compliance with current laws and regulations. Their activities may include inspecting the facility for good housekeeping practices, collecting pesticide samples for analysis, and reviewing records for completedness.

Routine inspections may not always occur at the main facility. Collecting tank samples from trucks transporting pesticides and workers applying them enables inspectors to determine whether label directions and other pertinent regulations are being followed.

Expectations to Meet Deadline Reporting

Meeting deadlines imposed by law is more than just paperwork; failure to meet them is one of the easiest

ways to incur liability. Deadlines are associated with community right-to-know activities, reporting of state fertilizer volume sales for fee assessment, pesticide production and repackaging, reporting pesticide or fertilizer spills, constructing pesticide and fertilizer containment facilities, and renewing applicator certifications, business or dealer licenses, and product registrations.

Complaint Leading to an Investigation

Investigations typically occur when a complaint is made that a pesticide or fertilizer product is being handled in a manner that violates a specific law or potentially endangers human health or the environment. Most pesticide and fertilizer complaints are filed with a state's department of agriculture or environmental agency and/or the U.S. Environmental Protection Agency (EPA). Under certain circumstances, other agencies such as the Federal Food and Drug Administration, the Department of Agriculture, the Department of Transportation, the Occupational Safety and Health Administration, or local health departments may be called to investigate a complaint. Agents representing these agencies usually have the authority to appear on-site to gather all information pertinent to the complaint. The investigators' initial goal is to investigate the complaint and conduct personal interviews. These 'fact gathering' investigations may include written statements and records, photographs, and the collection of air, water, soil, and plant samples.

To the extent possible, it is usually beneficial to cooperate with the investigator. However, if there is concern about the investigation, an attorney may be retained for assistance. It is important to be polite during the questioning period and provide answers to questions asked. If you do not know an answer, say so. Never guess or make assumptions. Consider the following points when involved in an investigation.

- Make certain to be alert and well prepared.
- Check the investigators' credentials. Write down their names, positions, agencies, and phone numbers, or obtain a business card from each individual involved.
- If the inspection is conducted under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), the firm or individual must be issued a 'Notice of Inspection' identifying the purpose of the inspection or investigation and stating whether or not a violation is suspected. Even if the inspection is not under FIFRA, the purpose of the inspection and whether or not a violation is suspected should be specifically determined.

• Ask the agents 1) who filed the complaint, 2) what laws allegedly have been broken, and 3) what authority they have to conduct the investigation. Some states may have legal authority to withhold this information if it is based on confidential or privileged information.

• Answer specific questions, but do not answer if you believe you need to discuss the question and answer with legal counsel.

• Never be rude or show a lack of respect for the investigators.

• Do not tolerate rudeness or lack of respect for yourself or your property.

• Be cooperative to the extent possible. However, remember that it is the investigators' responsibility to ask questions and to uncover evidence.

• Request a duplicate or split sample of whatever the investigators collect. Make sure that the investigators record and handle the split sample in a manner similar to the way they handle their own. When involved with EPA or their agents, ensure that the samples are sealed according to EPA protocol.

• You will probably be asked to sign a receipt for any physical samples or copies of records that the investigators collect. Be sure that the information is correct before signing.

• Obtain copies of all completed forms and written information compiled by the agents.

• Ask the agents what you should expect from the agency as the complaint is investigated further.

• Seek legal counsel whenever it appears advisable. The need for representation will be obvious by the proposed penalty. Take your own notes on questions asked and answers provided. Good notes help provide your legal counsel with valuable facts pertinent to the case investigation.

• Depending on the basis of the complaint, notify your insurer of the investigation.

Accidental Releases into the Environment

A pesticide release can be a major source of liability. When a major release occurs, the scene is often filled with first responders (firefighters, law enforcement officers, and medical professionals) who will attempt to secure the site and prevent further contamination of the surrounding area. Officials representing state departments of agriculture and environmental agencies often will respond to gather information about the accidental release if it threatens the health of a community (e.g., fire at a pesticide facility) or poses imminent danger to aquatic or human life due to surface water contamination. In addition to the cost

of remediation for the accident site, fines and penalties may be assessed against the responsible parties. It is advisable to seek the services of an attorney and an environmental consultant when involved in a major pesticide accident.

Environmental Site Assessments

Farmers, commercial applicators, and even some homeowners may be required to conduct an environmental site assessment of real estate prior to transfer (sale) of the property, when borrowing funds against the value of the property, or when leasing the property. Environmental assessments may be regulated or mandated by a lender, purchaser, or state statute. The goal of an environmental assessment is to identify possible sources of pollution and to uncover any potential problems that could impair the value of the property or make it risky as collateral in lending situations. In addition, audits also may be required at the end of a lease before the property owners or new tenants assume possession of the property. A thorough environmental site assessment also may assist in establishing a 'due diligence' in forming an 'innocent purchaser' defense if contamination is subsequently discovered.

Civil Liability

Information collected by regulatory agencies is often used to determine compliance with federal, state, and local laws. Information collected during an investigation generally is not publicly available until the case is completed and an enforcement decision has been rendered.

In many instances, regulatory agencies will not continue the inquiry into alleged wrongdoing when the facts collected during the investigation do not corroborate the accusations, or when a causal relationship cannot be proven based upon a preponderance of evidence. It is advisable to request a written response confirming that the investigation of the complaint was not substantiated by the evidence collected. This

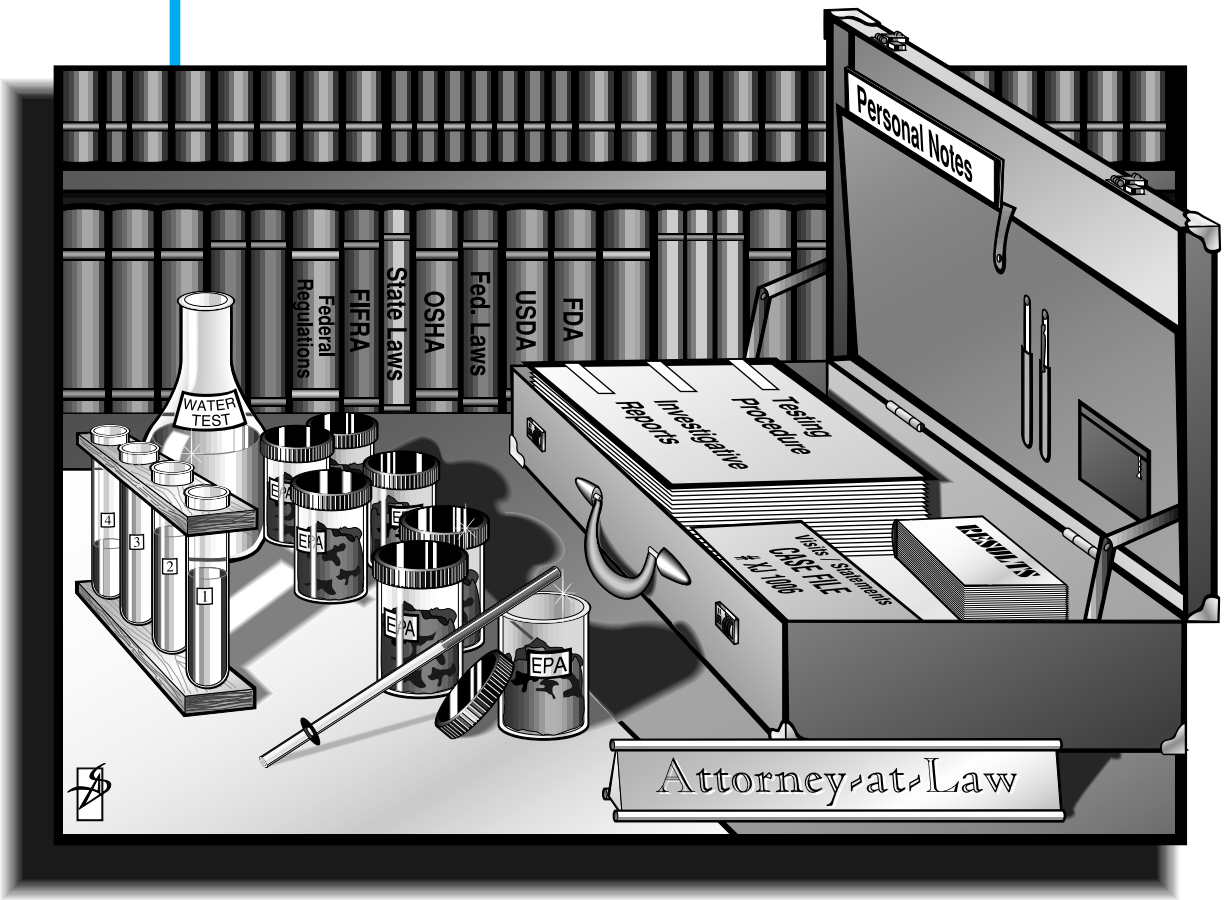
written response may be a valuable document to the person being investigated and often, as part of the public record, completes the investigation file.

The information collected may indicate the pesticide complaint has validity and that a stronger civil response is required by the agency. Based on laws passed by a legislative branch and regulations promulgated through formal and informal rule-making, the appropriate agency has authority to pursue legal remedies (enforcement actions) when a person has not complied with a particular statute or regulation.

The procedures employed by regulatory agencies to officially charge a person with breaking a law or regulation differs among states and among federal governmental units. It is important to understand the procedures used in determining guilt or liability. The following discussion on procedures provides a general guide for someone who has been formally charged with violating rules and regulations.

Official Charges Against Defendant

The normal regulatory procedure is to send a formal enforcement letter by certified mail (or other legal



service) to the person alleged to have violated the law. The enforcement letter typically contains an explanation of the agency's authority under appropriate laws and administrative code, the facts associated with the case, and a statement of possible legal penalties. A document may be included which allows the recipient to admit or deny the allegations, or which explains the methods of payment available for proposed penalties. Enforcement letters also may provide for an informal settlement conference or a formal hearing before a judicial officer to hear the facts of the case and establish or recommend penalty. It is important to respond promptly to enforcement correspondence. In some cases, failure to respond by a certain deadline will allow an individual's rights to be waived or a default to be entered, resulting in an impairment or loss of the right to defend oneself and contest the charges. The deadline for response usually will be contained in the letter. An attorney should be contacted if there are doubts as to admitting or denying a charge, how the response should be worded, or the deadline.

Determination of Case by Informal Meeting

When there are mitigating circumstances or other pertinent facts that might affect the outcome of a complaint, the respondent may ask for an informal hearing with the regulatory agency. The informal hearing procedure generally affords the person being charged an opportunity to present the facts from their own perspective and to clarify any discrepancies.

Facts should be presented in a calm and professional manner after the case file has been carefully reviewed for accuracy. Usually this should be handled by an attorney. If there is a plausible explanation for the violation, the regulatory agency will want to hear it. The position of the accused should be presented in a firm but reasonable manner. The outcomes of informal hearings vary but may include retraction of the enforcement letter, renegotiation of civil penalties, or no change relative to the charge letter. An attorney should be consulted if the accused is unfamiliar with these rules. Certain rights may be relinquished and certain evidence may not be allowed, later, if the rules are not followed.

Determination of Case by Formal Hearing

A formal administrative hearing process is important because it allows for an independent review of the facts associated with the case. Administrative hearings generally involve legal counsel for a state or federal agency presenting the evidence and legal counsel

presenting the facts on behalf of the respondent. The evidence from both sides is presented to an administrative law judge (ALJ) or to a panel of individuals comprising a commission or review board.

Specific procedures must be followed in formal hearings. If the accused decides to represent himself and is unfamiliar with the prescribed procedures, an attorney should be consulted for a legal interpretation of protocol. Certain rights may be relinquished and certain evidence may be disallowed, later, if the rules are not followed. The ALJ will render a decision regarding compliance or noncompliance based on oral and/or written testimony and other evidence. The ALJ typically will also determine any civil penalty to be levied.

In other federal and state agencies, an ALJ will preside over a hearing to ensure fairness to all parties, but the outcome of the case is decided on the basis of a formal public vote by commission or review board members. The vote determines if the alleged charges are substantiated by facts collected. Many commissions and review boards also are responsible for assessing penalties, including revocation or suspension of license or certification, fines, probation, and restoration to the victim (if any). Usually, the review is limited to the facts as stated in the administrative record.

Decisions to Appeal to State or Federal Court

Generally, any respondent assessed a penalty has the right to appeal the state or federal government decision to a court of law when the respondent feels that the facts or law do not support either the decision reached or the punishment administered through an informal or formal hearing. Often there are limits as to what can be presented; e.g., if rules of procedure are not followed in the administrative process, certain aspects of the case may be declared inadmissible.

Citizen Lawsuit

A tort or civil wrong is a product of common law. Common law represents the customs, ethics, and codes of conduct that guide society and the American judicial system. Common law—*court made law*—has been established by the court system and generally emanates from earlier case decisions to form the legal basis of subsequent, similar cases. Common law theories become the legal precedents that help provide the framework of common law practiced by the judicial court system.

A common law theory arises from the generalized legal duty individuals in a law abiding society owe to one another. Every adult is obligated to a certain duty of care for the personal and property rights of others when engaged in daily activities. A violation of this responsibility may give rise to a cause of action (lawsuit) whereby the injured party may pursue a legal or equitable remedy.

A tort action is brought to the court by a plaintiff who alleges to have suffered some injury to his person or property as a result of the commission or omission of certain acts by another person—the defendant. Common law theories, as they pertain to pesticide storage, transport, application, and disposal, typically fall into one or more of the following categories: trespass, nuisance, negligence, or strict liability.

Trespass Theory

A trespass is an unauthorized entry onto the property of another, which causes damage. An injury to another person's land, either above or below ground, is a trespass regardless of the condition of the land and regardless of whether or not there is negligence. Trespass to land need not involve the actual entry of one person upon the land of another. A trespass may be committed by discharging materials such as pesticides onto someone else's land. The line between this type of trespass and other types of tort liability is sometimes difficult to determine. Generally a plaintiff must demonstrate 1) an invasion affecting an interest in the exclusive possession of his property; 2) an intentional commitment of the act which results in the invasion; 3) reasonable foreseeability that the act committed could result in an invasion of the plaintiff's possessory interest; and 4) substantial damages to the property.

Nuisance Theory

A nuisance arises whenever a person uses his property to cause injury or annoyance to a neighbor. A nuisance is an activity which arises from the use by a

person of their own property that causes an obstruction or injury to the right of another or to the public to the quiet enjoyment of property by producing annoyance, inconvenience, or discomfort. Pesticide use can produce potentially offensive odors and may also cause discomfort in certain individuals.

Many states have enacted right-to-farm statutes to protect farmers and certain agricultural operations which follow generally acceptable agricultural practices. Right-to-farm statutes often form the basis of defense in a nuisance suit. The farmer (or industry) must meet certain conditions to qualify for this defense. Right-to-farm statutes generally will not protect farmers from acts of negligence. Many activities would fall under this exclusion. Also, even though those statutes may limit *civil* liability, they often do not limit *criminal* liability (e.g., it can be a criminal offense to maintain a public nuisance).

Negligence Theory

Negligence is the legal standard charged to an individual who has failed to act in a reasonable and prudent manner in a situation where the individual had a duty to another person or to the public. A person who is negligent is responsible for the damages that the act or omission causes—unless some defense is available.

The standard of care imposed by law is that which would be exercised by a person exhibiting ordinary prudence under the same set of circumstances. This is often referred to as the 'reasonable person' standard.

For a pesticide user to be liable, the act or omission must be legally related to the cause of injury. Generally, the user's act would have to have caused a natural and continuous sequence that produced injury which otherwise wouldn't have happened. Any person allegedly harmed by the improper application, transportation, or storage of pesticides can attempt to recover any losses under a negligence cause of action.

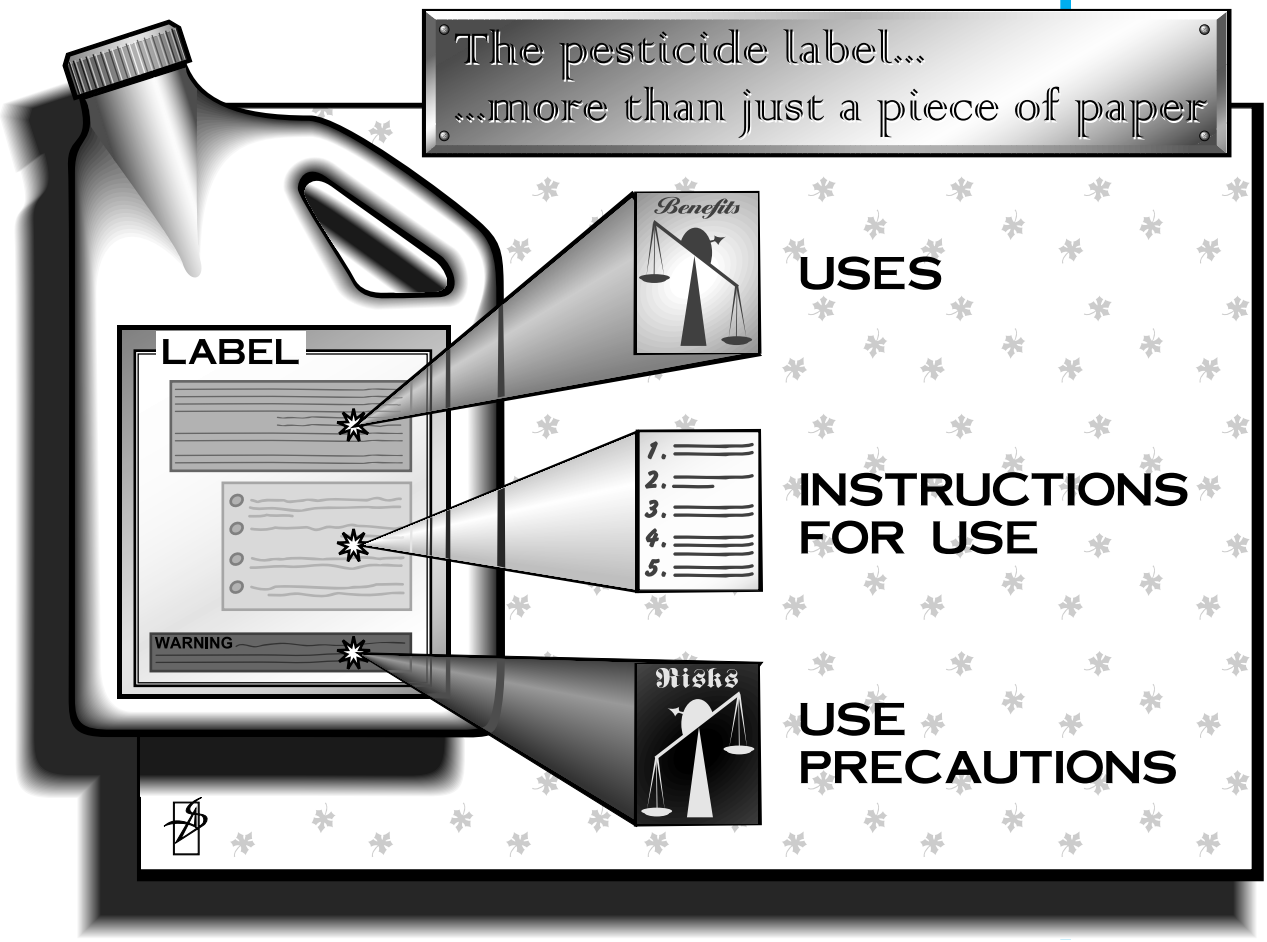
Strict Liability Theory

A few states have imposed a legal concept making individuals responsible for the consequences of their activities regardless of other contributing factors or defenses they may put forth. In other words, a person is liable if they performed the act, regardless of fault. Strict liability is associated with activities that have an inherently dangerous or ultrahazardous nature. In some jurisdictions, even though strict liability may not be directly applicable, a heightened duty may be applied to pesticide applicators.

The Label as the Primary Source of Liability

Accompanying each pesticide product is a label which provides written instructions for achieving the desired level of pest management—the *benefits.* The label also provides detailed statements communicating the risks and standards of care associated with the use of the product—the *liabilities.* The instructions and precautions become a legal benchmark by which the actions of the user are compared to the expected 'standards of conduct' outlined by the label.

It is the label that establishes a standard of care. The label statement, *It is a violation of federal law to use this product inconsistent with its labeling,* obligates the user to follow product stewardship instructions. This label statement legally binds the user to follow label directions because FIFRA and state pesticide laws



mandate that actions contrary to label directions are considered unlawful acts.

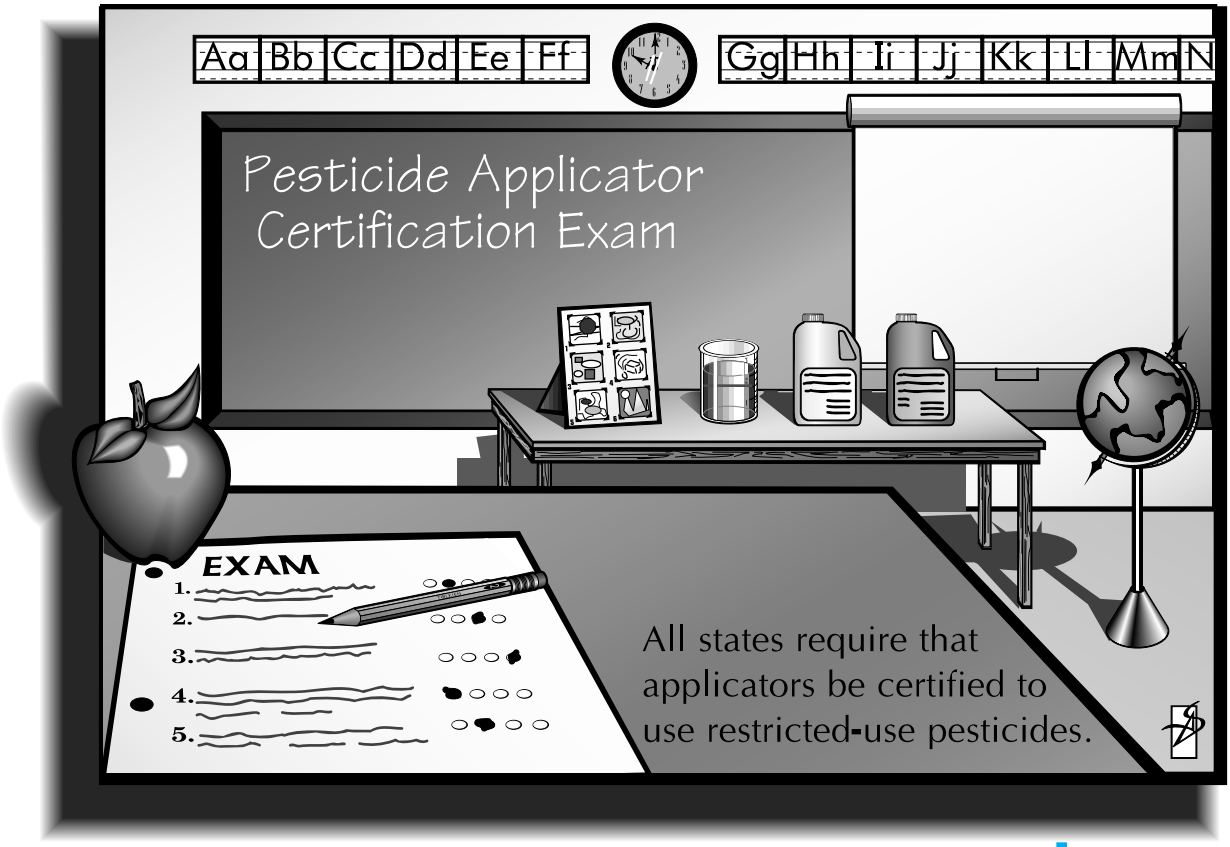
The words *use, inconsistent,* and *labeling* need further explanation in the sentence, *It is a violation of federal law to use this product in a manner inconsistent with its labeling.* The pesticide label and additional written materials that accompany a product collectively comprise the pesticide *labeling.* Labeling also includes additional sources of information (e.g., EPA Worker Protection Standard, EPA Endangered Species Program Bulletin, state Ground Water Management Plan, company Product Use Bulletins) referenced on the label or accompanying materials.

The word *use* carries the usual connotation of pesticide application, but its legal definition is intended to include handling, mixing, loading, storage, transportation, and disposal. This all-encompassing definition covers every activity that involves a pesticide—from product purchase to container disposal.

Use of a pesticide contrary to its labeling represents inconsistency, and inconsistent use establishes potential liability. For example, label directions that contain the phrases *shall not, do not,* and *must not* provide regulatory investigators with 'enforceable language'. Label terminology such as *may, can,* and *recommend* is considered nonenforceable, informational, or 'advisory' language. It is very important when reading label directions to differentiate between enforceable and advisory language; contact the manufacturer of the product, Cooperative Extension Service personnel, or pesticide regulatory agencies for label interpretations when there is any doubt.

Certified Pesticide Applicators Held to a Higher Standard of Conduct

Pesticide applicator certification holds an individual to a higher standard of conduct and increased duty of care than the non-certified person. Private applicators—primarily farmers and ranchers—receive training from their local Cooperative Extension Service; commercial pesticide applicators may elect to attend Extension training programs, or they may opt to study on their own for state pesticide applicator certification exams. The exams are administered by the state pesticide regulatory agencies. Laws and regulations, human and environmental safety, formulations, label comprehension, pest biology, and integrated pest management are topics that may be covered by educational programs and written examinations. In addition to passing state certification exams, applicators in many states are encouraged to meet continuing education standards for recertification (in lieu of



retesting) to ensure that they remain current on pesticide issues.

Instructions with Special Meaning

Practicing common sense and good judgment in areas where pesticides are stored, mixed, and applied often will prevent situations where human health and environmental quality may be jeopardized. The experience of the pesticide applicator may dictate that additional (sometimes preventive) steps be taken to supplement label directions in a given situation. The following list pinpoints areas of special concern, since use inconsistent with the label may pose a hazard to human and environmental safety. Misuse often instigates civil or criminal charges filed by regulatory agencies and lawsuits filed by organized associations or individual citizens.

Safety Precautions to Avert Liability

• KEEP OUT OF REACH OF CHILDREN is an obvious safeguard for all pesticides.

• Restricted-use pesticides may have special health or environmental implications that require prudence in mixing, application, and disposal. Read the label carefully.

• Compliance with re-entry statements specifying a time span that must elapse between a pesticide application and the admittance of persons or animals into the treated area is critical to minimizing pesticide exposure.

• Terminology such as "...until dusts have settled" and "...until sprays have dried" represents the minimum standard for re-entry. Many pesticide labels now prohibit entry into treated areas for 12, 24, 48, or even 72 hours after application, as mandated by EPA's Worker Protection Standard.

• Provide any pertinent safety training—required or not—for both non-certified *and* certified employees.

Application Precautions to Avert Liability

• Maintain up-to-date certification, licensing, and insurance.

• Fulfill state and federal pesticide recordkeeping requirements.

• Comply with manufacturers' label instructions to maintain product warranty.

• Use pesticides only on crops and sites specified by the label, and only at labeled rates. Failure to do so may result in crops with illegal pesticide residue; and such crops are subject to confiscation and destruction by state or federal authorities.

• Follow preharvest guidelines to ensure that harvested crops will meet federal and state pesticide residue tolerances.

• Comply with EPA worker protection standards which assign responsibility to both employers *and* employees.

Environmental Precautions to Avert Liability

• Extreme care at mixing and loading sites is critical in preventing soil and water contamination.

• Have a plan and the necessary equipment in place to contain a pesticide spill, and know how to properly mitigate the damage.

• Understand your requirements under the Community Right-To-Know Act. Some states have posting and notification regulations for informing the general public.

• Dispose of pesticide containers and rinsate as specified on the label or as required by local, state, or federal requirements which may be more restrictive. Burning or burying pesticide containers is illegal in most states.

• Keep pesticides on the targeted application site; avoid drift which might subject the applicator to liability claims.

• Never store, mix, load, or wash equipment near wells, bodies of water, ditches, or drains.

• Make sure that specific buffer zones are maintained according to label directions, best management practices, and watershed restrictions.

• Follow instructions from relevant endangered species bulletins.

• Maintain a controlled inventory to guard against theft and the necessity to store old or canceled products. Stay current with the industry to receive information on products due to be phased out; and make a conscious effort to use any such products during the prescribed phaseout period. If in spite of efforts expended the applicator is left holding canceled pesticide products, they should be checked frequently to make sure that all containers are secure (i.e., not leaking). The storage, handling, transportation, and disposal of such waste must be conducted under the jurisdiction of EPA and/or state and/or local operators and facilities. Failure to do so could result in criminal enforcement.

• If using a pesticide subject to ground water protection regulations, comply with all provisions of the specific state management plan for the product (e.g., handling provisions, rate reductions, geographic restrictions).

Inconsistent Use May Violate Product Warranty

Pesticide manufacturers guarantee in the warranty section of the label that the product conforms to the chemical description described in the ingredient statement. The warranty also will specify that the product will perform as represented on the label when used according to directions. However, the label language also will indicate that the buyer or user of the product assumes all liability when the product is used in a manner inconsistent with label directions and precautions; i.e., misuse voids the manufacturer's warranty.

Loans on Environmentally Damaged Properties

Lending institutions usually require that environmental assessments be conducted when real estate associated with the storage, use, and application of pesticides is being sold or used as collateral against loans. Environmental assessment has become a valuable screening tool for buyers, sellers, and lending institutions to assess the possibility of environmental contamination (e.g., soil and water). These assessments often are supported by state laws that require disclosure of known contamination.

Lender Liability for Contamination

Lenders are very cautious about making loans on 'environmentally damaged' properties: first, because the situation may reduce the property's value as collateral; second, because under 'super lien' provisions the property may be subject to liens to satisfy environmental liability ahead of a lender's mortgage; also, because the borrower's operating funds may be diverted from meeting loan obligations to the funding of remediation of the environmental contamination. The costs of 'fixing' environmentally polluted property can exceed the amount of the loan and/or the appraised value of the property. Lenders sometimes can even be forced to fund correctional procedures necessitated by an environmental situation if they have become actively involved in management of the property. Thus, environmental assessments typically are deemed necessary to protect the assets of the buyer and the collateral of the mortgage holder.

Assessments Reduce Liability by Providing Valuable Information

Presale or preloan environmental assessments—whether administered by a loan officer, an environmental consultant, or an environmental attorney—usually

involve a line of questioning aimed to (1) disclose historical uses of and pest management practices employed on the property and (2) determine whether or not the property is in compliance with current environmental regulations.

Phase 1 Environmental Site Assessments—the Investigation Stage

Phase 1 includes a search for and a review of private and public documents related to the history of the property, a visual inspection of the site, and mapping of the physical characteristics of the property. This in-depth research provides crucial details about the history of pesticide use on the property. Documents that piece together the history of the property may include title transfers for the preceding fifty years, site plans, old and new photographs of the site, and topographic maps. Public records from municipal fire departments, utility companies, county health departments, and environmental regulatory agencies may provide details of compliance with environmental laws and regulations. Interviews with past and present landowners, tenants, and neighbors may render additional information.

A visual inspection of the property is a crucial component of Phase 1 Environmental Site Assessments. Evidence suggestive of potential pollution problems might include signs of improper disposal such as bare earth, ditches barren of vegetation, distressed vegetation in field margins, burn piles containing pesticide containers, or discarded pesticide containers; soil or concrete staining from spills or leaks at the chemical production or storage facility; records which disclose costly disposal of stored pesticides that have been cancelled from further use; water contamination from uncapped wells or storage of chemicals near wells; strong chemical odors at the mixing and loading site; abandoned pesticide container dumps; and old, underground tanks (either active or abandoned).

A favorable Phase 1 assessment does not guarantee contamination-free property but, rather, that the retrieved records and the on-site visual inspection did not reveal either the potential for or the presence of contamination. The assessment demonstrates that the buyer has exercised due diligence to make discovery and, if the audit findings are noted with the transfer, serves to distance the buyer from liability for past actions on the property. Normally, a lender or buyer will not ask for additional testing or investigation when the Phase 1 environmental assessment reveals no credible evidence of environmental abuse of the property. If contamination is suspected, a more detailed, Phase 2 assessment (e.g., soil and water sampling) may be necessary to verify the contamination and determine its extent. However, it is also conceivable that the lender will simply deny the loan or that the buyer will lose interest in purchasing the property when an environmental audit indicates contamination problems—or even a potential for them.

Phase 2 Environmental Assessment—the Sampling Stage

In a Phase 2 Environmental Assessment, visual characterization of and background information on the site are supplemented by the collection and analyses of air, soil, and/or water samples. Sampling methods used to determine the presence and level of contaminants often are federally or state prescribed. A Phase 2 environmental assessment may be very expensive and requires a greater level of technical expertise than does the Phase 1 assessment.

Soil samples at the surface or subsurface may be collected across the property or at a specific site of concern. Samples are collected at various depths and sent to laboratories equipped for analyses of environmental contamination. The analytical results often are presented on a map indicating where each sample was

taken and what levels of contamination exist across the surface and at certain soil depth intervals (e.g., 0-1 foot, 1-2 feet). When the deepest samples indicate contamination, a second round of soil sampling may take place to determine the level at which contamination is no longer detected.

Surface water samples may be collected from ditches, ponds, creeks, and even reservoirs. Environmental auditors often will focus on wells. Ground water may be sampled from wells already on-site, or from shallow monitoring wells drilled into the water table.

A thorough review of environmental sampling data will reveal the identity of any contamination and 'hot spots' of pesticide concentrations; it will facilitate a general assessment of the property. Care must be exercised to request laboratory analyses (in addition to scheduled regulatory analyses) for all pesticides known to have been present on the property at any time. Combining the Phase 1 and Phase 2 information into a *Site Assessment Document* provides a benchmark that enables consultants, environmental engineers, and regulatory authorities to determine what actions might be necessary under Phase 3.

Phase 3 Environmental Assessment—the Cleanup Stage

Phase 3 requires the property owner and any other potentially responsible parties, along with the consultant firms, to meet and discuss with the regulatory agencies a plan outlining specific objectives for site remediation. The details are very much driven by site-specific information, cost, and technologies available to aid the procedure.

Federal and state guidelines generally dictate to environmental firms how they must handle, remove, transport, and dispose of soil, water, concrete, and other contaminated items. These standards, along with site expertise developed by environmental engineers, are used to draft a *Site Remediation Document* which has as its core one or more methods that will achieve remediation of the site: soil excavation; placement of ground water monitoring systems or extraction wells; on-site treatment of contaminated soil and water; construction of subsurface barriers or retaining walls; bioremediation; incineration. In addition, a site-specific cleanup standard is listed for approval by regulatory agencies. The *Site Remediation Document* also describes in some detail what health and safety practices must be followed: the monitoring of surrounding areas for potential impact during remediation; transportation routes to be followed when contaminated materials are removed from the site; the name of the

disposal company that will be accepting the pesticide waste; and the time frame for filing reports with regulatory agencies.

Selecting Environmental Experts Requires Homework

Proven experience, a documented track record, a list of references, and good rapport with regulatory agencies are important characteristics to identify when engaging an individual or firm to conduct environmental assessment. It may be necessary to organize a team to handle serious environmental problems. The environmental team may consist of individuals with specific expertise as environmental consultants, environmental engineers, environmental chemists, and/or environmental attorneys: The key word is *environmental.*

The remediation of environmental problems often necessitates guidance from very specific kinds of experts in addressing corresponding technical and regulatory issues; i.e., environmental consultants are able to coordinate projects associated with environmental audits and should represent the client by interfacing with the technical scientists and state and federal agencies. Environmental engineering firms are responsible for site assessments, soil and water remediation, and transportation of hazardous waste. Environmental chemists are crucial where analytical findings set in motion a series of related events. Environmental attorneys specialize in environmental law and protect the client's interest relevant to regulatory compliance. These experts' collective knowledge can protect the client's interest.

Liability Insurance

Insurance policies must be read carefully—and understood. Written clarification of unfamiliar or vague terminology should be requested. The following list is representative of the variables which might affect coverage.

• Limitations. Policies can provide coverage on a per occurrence basis, or they can limit coverage to damage resulting from certain specific activities (e.g., drift).

• Exclusions. Almost all liability insurance policies state certain situations which are not covered; they should be spelled out clearly.

• Pollution. Many comprehensive general liability insurance policies limit (or totally exclude) pollution coverage; the corresponding phraseology should be clearly understood, leaving no room for interpretation.

• Level of Coverage. The maximum amount the policy will pay—and the specific circumstances which would qualify for payment—should be stated clearly.

• Sources of Liability. Pesticide 'use' encompasses purchase, transportation, storage, mixing, loading, application, and disposal of containers and leftover chemicals. Therefore, the policy should specifically state coverage for all of these elements. If the word *use* is applied within the policy as a collective term for all such elements, the policy should likewise contain a precise definition of the collective term.

Old insurance policies should not be discarded. The policy in effect at the time of an incident usually is considered the source of monetary compensation, even if evidence surfaces and/or litigation occurs many years hence; so it is important that the insured party maintain accurate and complete records of past insurance coverage.

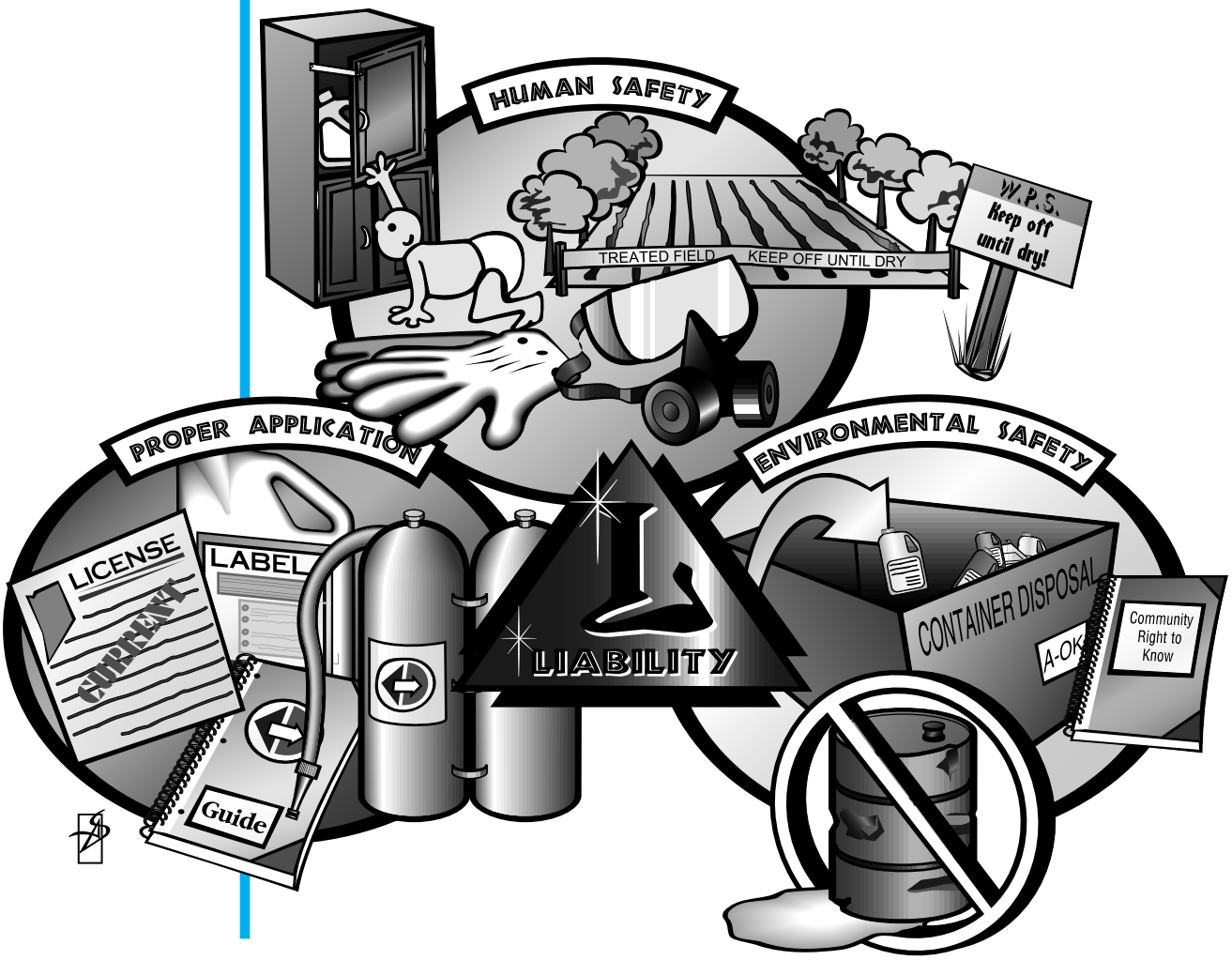
If it is believed that insurance coverage exists in a given situation, it is important to file a claim promptly and also to have the policy reviewed by an attorney with experience in insurance analysis. Environmental law, in particular, is a very active area; courts rule every day on issues relevant to the applicability of existing or previous insurance coverage to environmental situations. Oftentimes the insurance underwriter is held financially responsible for the policyholder's legal defense fees, damages, and cost of remediation.

Transfer of Property and Environmental Disclosure Documents

Many states have property transfer laws that require a seller or transferor to prepare and deliver an environmental disclosure document prior to the completion of a transaction. Failure to disclose an environmental defect, such as a leaking storage tank, in an environmental disclosure document may excuse a purchaser from an agreement or expose the seller to damages or penalties. Increasingly, buyers and lenders are requiring disclosure documents even when there is no state law compelling the seller or transferor to supply them.

The Indiana Responsible Property Transfer Act (IRPTA), is an example that may mark a new era for the transfer of real estate. This law requires a seller/transferor of certain categories of property to deliver an Environmental Disclosure Document (EDD) to other parties to the transfer—the transferee/buyer and the buyer's lender (if identified)—30 days before the transfer occurs. If an environmental defect previously unknown to the buyer or lender is disclosed in the

EDD, the buyer and lender may be excused from the agreement to purchase or finance, respectively. Environmental defects are conditions that 1) constitute a material violation of an environmental statute, regulation, or ordinance; 2) require remedial activity under an environmental statute, regulation, or ordinance; 3) present a substantial endangerment to public health, public welfare, or the environment; 4) have a material or adverse effect on the market value of the property or of an abutting property; or 5) prevent or materially interfere with another party's ability to obtain a permit or license required under an environmental statute, regulation, or ordinance.



Summary

Pesticide users are obligated to store, handle, and dispose of pesticides in a responsible manner to protect nontarget areas, public safety, and the environment. Improper pesticide use leaves the user vulnerable to a myriad of liabilities. Pesticide labels provide the user not only with specific instructions for using the product to its greatest advantage, but also with a mechanism to minimize liabilities by following label information.

It is a violation of both federal and state law to use a pesticide in a manner inconsistent with its labeling. The label is the key element in determining whether or not the user is in compliance with the law. The pesticide user should be aware of state laws and regulations pertaining not only to pesticide use, recordkeeping, and containment, but also to real estate transfer; with this knowledge, the user can evaluate and minimize the potential for liability. Environmental assessment is an effective method for evaluating liability probabilities and for establishing 'innocent landowner' status to protect the buyer from being held liable for situations which originated prior to purchase. Assessment should be performed by reputable expert environmental consultants with financial security against errors and omissions. Records of past liability insurance policies should be maintained, complete with specific dates of inception and expiration. Current policies should be reviewed regularly to assure adequate coverage.

Points to Remember

• Reduction of the potential for being held liable in situations involving pesticide use can be accomplished by recognizing the problem, identifying corrective measures, and following through with corrective actions.

• Liability issues generally do not focus on the benefits to individuals, communities, or society in general but, instead, on the health and environmental risks associated with improper transportation, storage, application, and disposal of pesticides.

• Local, state, and federal laws and regulations are intended to reduce or eliminate pesticide risks and place the primary *responsibility* and *liability* for pesticides on the user and persons under the supervision of the user.

• Managing liability requires the same level of intensity and commitment generally assigned to those activities which are revenue-producing.

• The label provides the user with written instructions for achieving the desired level of pest management and associated benefits. It also provides detailed statements used to communicate the risks—the potential liabilities—along with mandatory applicator or handler requirements intended to protect both human health and the environment.

• The label is the law. The label statement "it is a violation of federal law to use this product inconsistent with its labeling" requires the user to follow all label instructions; failure to do so can result in liability for those actions contrary to label directions. This same statement is written into FIFRA and state laws under unlawful acts.

• Pesticide certification and legal obligations expressly created by the label establish a set of standards for the pesticide user; these standards must be met in order to limit liability actions by citizens and civil or criminal actions by regulatory agencies.

• Lending institutions are increasingly requiring that environmental assessments be performed when real estate associated with the storage, transfer, and application of pesticides is being sold or used as collateral against loans. The costs of cleaning up property contaminated by pesticides can easily exceed the value of the loan on—or even the appraised value of—the property. Thus, environmental audits are necessary to protect the assets of the buyer, seller, and lender.

Acknowledgments

The authors are very grateful to the following reviewers for their constructive comments and suggestions that improved the accuracy of *Pesticides and the Law:*

• David Horning, Countrymark Cooperative, Inc.

• Thomas Keefer, E. I. du Pont de Nemours and Company.

• Richard Kramer, National Pest Control Association.

• Charles Rock, Ciba-Geigy Corporation.

The senior author is extremely grateful to Stephen Aducci for his original illustrations.

Hiring an Attorney

If you need the services of an attorney—whether to provide legal advice regarding your potential liabilities, to review your insurance policies, or to defend you in a lawsuit or administrative hearing—keep the following in mind:

• Today it is common for lawyers, like physicians, to develop specialties. Therefore, not all lawyers will be equally competent to handle your problem. Seek out those with specialized experience or training in handling situations like or similar to your own.

• Be certain to discuss rates to be charged, the nature of the services which the attorney expects to perform, and the estimated total cost for the services. Also, it is important to understand what costs or expenses are your responsibility. Written fee agreements are recommended.

• If the services are to be billed on a hourly basis, the lowest rate quoted will not always result in the lowest *total* bill. Attorneys with more experience and training may charge higher rates (on an hourly basis) but handle the matter more efficiently and effectively.

• Make certain that you are comfortable with your attorney's good judgment; you'll often have to rely on it when making tactical and strategic decisions.

• It is critical that you *candidly* discuss your legal problems with your attorney. If you do not disclose everything you know, your attorney may be hindered in representing you; and you'll run the risk that you and/or your attorney will be surprised at an inopportune time. Remember, the attorney-client privilege will protect you from damaging disclosures.

• Hiring an attorney at the first sign of a problem will often save you money, since prevention may still be possible.

• Don't fall into the trap of thinking that you can defend yourself, cheaper. Rules of procedure and evidence have been established at most levels of administrative hearing and at all court levels, *and they must be followed.* If you do not know these, the facts of your case most favorable to you may never be heard.

REVIEWED: 5/01

The information given herein is supplied with the understanding that no discrimination is intended and no endorsement by the Purdue University Cooperative Extension Service is implied.

It is the policy of the Purdue University Cooperative Extension Service, David C. Petritz, Director, that all persons shall have equal opportunity and access to the programs and facilities without regard to race, color, sex, religion, national origin, age, marital status, parental status, sexual orientation, or disability. Purdue University is an Affirmative Action employer.