UNITED STATES OF AMERICA

ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	:	
SKARDA FLYING SERVICE, INC.,	:	FIFRA Docket No. VI-672C
Respondent.	:	

RULING ON RESPONDENT'S MOTION TO DISMISS

Environmental Protection Agency
401 M Street, S.W.
Washington, D.C.

Thursday, October 13, 1994

The telephonic hearing in the above-entitled matter convened, pursuant to notice, at 10:00 a.m.

Before:

JON G. LOTUS, Administrative Law Judge

APPEARANCES:

On behalf of the Complainant:

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P R O C E E D I N G S

JUDGE LOTIS: We'll be on the record.

The purpose of today's session is to rule upon Skarda's motion to dismiss.

The issue present here is whether the Environmental Protection Agency is barred from bringing an enforcement action under the Federal Insecticide, Fungicide and Rodenticide Act against a respondent who already had been penalized by the State for the same acts.

My ruling is that the EPA is not barred.

First, some background. The complaint in this proceeding was filed on September 25, 1991, under Section 14 of FIFRA. The complaint charges the respondent, Skarda Flying Service, Inc., in one count of 38 instances of the application of a registered pesticide in a manner inconsistent with its labelling. These applications occurred between May 5, 1989, and June 6, 1989.

Complainant seeks a civil penalty in the amount of $19,000.

In it's motion to dismiss, Skarda asserts that the EPA waived its right to bring the current action because it did not file the complaint in a timely manner, in accordance

with 7 U.S.C. Section 136w, and 7 U.S.C. Section 136u(a).

Skarda also argues that this Federal action is action barred and preempted by previous State action against it by the Arkansas State Plant Board. Skarda cites language from FIFRA, namely Section 136w-1(a), which states in relevant part as follows, and I'll quote from that.

Quote, "For the purposes of this subchapter, a State shall have primary enforcement responsibility for pesticide use violations during any period for which the administrator determines that such State, (1) has adopted adequate pesticide use laws and regulations; (2) has adopted an is implementing adequate procedures for the enforcement of such State laws and regulations," unquote.

Skarda further cites Subsection (b) of that Sections, which states in relevant part, and I'll quote, "Notwithstanding the provisions of Subsection (a) of this Section, any State that enters into a cooperative agreement with the administrator under Section 136u of this title for the enforcement of pesticide use restrictions shall have the primary enforcement responsibility for pesticide use violations," unquote.

Skarda asserts that this language gives the State

of Arkansas, which has implemented its own statutes for pesticide use, primary enforcement authority over Skarda.

Skarda further states that since the Arkansas Stat Plant Board has already exercised its authority in this matter, by placing Skarda on probation, and by putting a letter of reprimand in its file, that it has been penalized enough. Skarda argues that the complainant cannot punish the respondent a second time for the same violations.

Skarda also cites 7 U.S.C. Section 136w-2. Skarda argues that this requires the EPA to act within 30 days if it believes that the State has not taken appropriate enforcement action.

On November 26, 1993, EPA filed its response in opposition to Skarda's motion to dismiss. EPA states that it clearly has authority to act in this case, and then goes on to address the various arguments, at length, that have been made by Skarda in its motion, and in its supporting brief.

My analysis shows that EPA is correct in asserting that it is a well-settled principle of administrative law that an agency's interpretation of the regulations that it promulgates and administers is entitled to great deference,

and I cite the case of Udall v. Tallman, 380 U.S. 1, page 16, 1965 decision.

A reasonable interpretation is controlling unless it is plainly erroneous or inconsistent with the regulations. So said the Court in the case of PPG Industries v. Harrison, at 660 Fed 2nd, 628, page 633, 5th Circuit decision of 1981.

Deference is accorded and is afforded to the agency in deciding whether the agency has acted within its statutory authority. See the case of Whirlpool Corporation versus Marshall, at 445 U.S. 1, page 11, 1980 decision.

Unless an interpretation is unreasonable it will be upheld. So said the Court in Lead Industries Association, Inc. versus EPA, 647 Fed 2nd, 1130 at page 1147, D.C. Circuit decision of 1980, in which cert was denied at 101 Supreme Court 621, 1980.

As stated in Chrysler Corporation v. EPA, at 631 Fed 2nd, 865, at page 884, a D.C. Circuit decision in 1980, and let me quote from that decision: "We recognize that the special expertise of EPA in interpreting the legislation which it is called upon to administer requires that we defer to the judgment of the agency where that judgment is

reasonable, and is consistent with the language and purpose of the legislation," unquote.

I would refer the parties also to the case of Wilderness Society v. Morton, 470 Fed 2nd, 842, pages 864 to 870, D.C. Circuit decision in which cert was denied in 1973 by the Supreme Court at 411 U.S. 917.

In the present case, deference must be given to the EPA in the interpretation of its own statutes. EPA is correct in asserting that 7 U.S.C. Section 136w-2(a) does not impose a 30-day statutory deadline, or in effect a stature of limitations upon the EPA.

Skarda's reading of the law is incorrect, and is not supportable by a plain reading of the relevant language. The statute confers no such limitations on the EPA.

While the State of Arkansas has primary enforcement authority in this matter, Arkansas utilized that authority when they found Skarda to be in violation of FIFRA, and placed Mr. Skarda on probation for one year, and placed a letter of reprimand in Skarda's file.

This does not end the matter. In keeping with EPA's mandate, EPA determined that further action was necessary. To this end, EPA filed a complaint for a

monetary penalty, which is the subject of this litigation.

The memorandum of understanding between the State of Arkansas and the EPA states that when evidence gathered in an investigation into a potential violation indicates a possible violation of both State and Federal laws, that there shall be a, quote, "presumption that the State will bring the appropriate enforcement under the State's pesticide laws," unquote.

The State in this instance did bring such an action. The present action, however, centers on the issue of whether or not the complainant believe the State response to be an appropriate enforcement action.

Appropriate enforcement action is also defined in the memorandum of understanding as follows: "If the region determines that the State's intended enforcement responses to the violation are inappropriate, the Region will first attempt to negotiate an appropriate State enforcement response.

"If the State is unwilling or unable to alter its original enforcement response, EPA may bring its own action, after notice to the State. An appropriate enforcement action will take into account the gravity of the violation,

the risks associated with the violation, the history of prior violations, size of business, the act of knowingly violating a provision of Federal or State law, and deterrence potential of enforcement action," unquote.

In the present case the State was unable to alter its original enforcement response, because Arkansas does not have the authority to assess fines to violators like Mr. Skarda. Instead, the State assessed a one-year probation. Therefore the State could not alter its original remedy to include a response EPA considered to be adequate.

Therefore, EPA was justified in pursuing this action, after appropriate notice was given to the State.

This position is bolstered by a review of the final interpretative rule on the subject, which may be found in the Federal Register, Volume 48, No. 3, of the date of Wednesday, January 5, 1983. The interpretative rule states as follows:

"If, after consultation with the State, EPA determines that the State's intended enforcement response to the violation in inappropriate, EPA may bring its own action, after notice to the State. Regional attorneys may not, however, initiate an enforcement proceeding sooner than

30 days after the matter was referred to the State."

Continuing on with this quote: "At times a State may find that the particular enforcement remedy it views as the appropriate response to a use violation is not available under the State's pesticide control laws. Therefore the State may at any time request the EPA to act upon a violation, utilizing remedies available under FIFRA.

"In these instances, of course, the EPA will immediately pursue its own action, if one is warranted," unquote.

No time constraint, however, is placed on the EPA as to when it may bring such and action.

It is clear then that EPA has the authority under the statute, the memorandum of understanding, and the final interpretative rule, to pursue its own enforcement action, once it determined the State action to be inappropriate. EPA has made such a determination in this instance.

Therefore, respondent's assertion that such an action on the part of the EPA after the completion of the State action is inappropriate, cannot be supported.

Further, respondent's contention that the EPA had a mere 30 days after the commencement of the State action in

which to act is in error. This position cannot be supported by any reasonable reading of the statute.

The 30-day time period referred to in Section 136w-2(a) is a minimum amount of time that the EPA must wait before commencing an action after it has been referred to a State. It is not, as respondent argues, the maximum amount of time EPA has to act on a matter.

A plain reading of the statute allows no such constraint on EPA in pursuing matters for which it believes in its own estimation to have not adequately been addressed at the State level.

Therefore, respondent's arguments that complainants have waived their right to bring this action because EPA did not bring the action within the 30-day time period is without merit.

In conclusion, Skarda's motion to dismiss is denied. The amount of penalty remains at issue, and will be determined after further proceedings, including a hearing, if necessary.

I once again encourage the parties to pursue informal settlement discussions, to determine whether an amicable resolution of the penalty issue can be attained.

This would save considerable time and expense for all parties -- the government and the respondent.

I urge counsel on both sides to look seriously at the possibility of settlement.

There being no further matters to consider this morning, this session will be adjourned.

[Whereupon, at 10:15 a.m., the ruling session was adjourned.]

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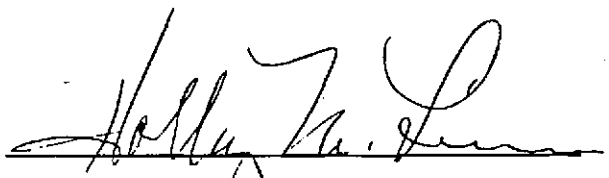
CERTIFICATE

I, **HOLLEY M. LINN**, the Official Court Reporter for Miller Reporting Company, Inc., hereby certify that I recorded the foregoing proceedings; that the proceedings have been reduced to typewriting by me, or under my direction and that the foregoing transcript is a correct and accurate record of the proceedings to the best of my knowledge, ability and belief.



HOLLEY M. LINN