IN THE MATTER OF ODESSA UNION WAREHOUSE CO-OP, INC.

FIFRA Appeal No. 93–1

ORDER ON INTERLOCUTORY APPEAL

Decided March 19, 1993

Syllabus

This case arises on an interlocutory appeal of a Presiding Officer's Order Denying Motion to Dismiss, which the Presiding Officer has certified for Board review under 40 C.F.R. §22.29(b). At issue is whether Respondent, Odessa Union Warehouse Co-op, Inc. ("Odessa") is a "commercial applicator" or "private applicator" of pesticides under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). Resolution of this issue is significant in determining Odessa's potential penalty liability for alleged violations of FIFRA. Private applicators are subject to lesser maximum penalties and, unlike commercial applicators, may be assessed a penalty only after prior notice.

Odessa stores and collects grain for its farmer-members. It also, as necessary, applies pesticides to this grain. Odessa clearly fits within the definition of a private applicator in all respects but one, whether it applies pesticides "for the purposes of producing" the grain, as required to meet the definition of a private applicator. Odessa asserts that it does and EPA Region X argues that it does not. In his Order Denying Motion to Dismiss, the Presiding Officer concluded that Odessa does not apply pesticides "for the purposes of producing" the grain and thus was a commercial rather than a private applicator.

Held: Odessa is a commercial applicator. It does none of the things encompassed within the definition of producing the grain (planting, cultivating, harvesting); the grain is already "produced" when Odessa acquires it. Thus, Odessa does not meet the definition of a private applicator and must instead be a commercial applicator. The Presiding Officer's Order is upheld.

Before Environmental Appeals Judges Nancy B. Firestone, Ronald L. McCallum, and Edward E. Reich.

Opinion of the Board by Judge Reich:

This matter arises on an interlocutory appeal from an Order Denying Motion to Dismiss issued on January 11, 1993, by the Presiding Officer, Chief Administrative Law Judge Henry Frazier, III. Judge Frazier certified his Order for appeal to the Board pursuant

to 40 C.F.R. § 22.29(b) on March 4, 1993.[1] We find that the certification was appropriate and will address the merits of the Order so certified.

This case involves an enforcement action brought by the U.S. EPA Region X against Respondent, Odessa Union Warehouse Co-op, Inc. ("Odessa") to assess civil penalties for alleged violations of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. § 136 et seq. More specifically, Region X has alleged that Odessa violated Section 12(a)(2)(G) of FIFRA, 7 U.S.C. § 136j(a)(2)(G), by using Fumitoxin, a registered pesticide, in a manner inconsistent with its labeling. The complaint alleged that an employee of Respondent applied Fumitoxin pellets to grain stored in its bins and transferred the grain in an incompletely aerated state to 17 railcars. The complaint further alleges that the grain was shipped without proper testing and placarding and that Respondent failed to notify the consignee that the grain had been fumigated. Seventeen separate violations were alleged for shipping without proper testing and placarding,[2] one for each railcar. An eighteenth violation was alleged for failure to notify the consignee.[3]

For purposes of a decision on the Motion to Dismiss, it was assumed by all parties that Odessa committed the violations as al-

[1] 40 C.F.R. § 22.29(b) provides as follows:

> (b) *Availability of interlocutory appeal.* The Presiding Officer may certify any ruling for appeal to the Environmental Appeals Board when (1) the order or ruling involves an important question of law or policy concerning which there is substantial grounds for difference of opinion, and (2) either (i) an immediate appeal from the order or ruling will materially advance the ultimate termination of the proceeding, or (ii) review after the final order is issued will be inadequate or ineffective.

[2] As alleged in the complaint, the label for Fumitoxin requires placarding of all entrances to a fumigated area until the area is completely aerated, containing 0.3 ppm or less of phosphine gas. The label is quoted as providing that "[t]ransfer of incompletely aerated commodity to a new site is permissible, however, the new storage site must be placarded if more than 0.3 ppm is detected."

While Respondent allegedly did not test the railcars for phosphine gas, a fumigant odor was detected when the railcars arrived at the Louis Dreyfus grain elevator in Portland, Oregon, and the railcars were tested by a private fumigation company hired by Louis Dreyfus. The levels of phosphine in the 17 cars allegedly exceeded the 0.3 ppm limit, thus requiring placarding to comply with the label. Complaint, at 3.

[3] The complaint quotes the Fumitoxin label as stating: "Notify consignee that the railcar has been fumigated." *Id.* Odessa takes the position that since the railcars themselves were not fumigated, it was not required to notify the consignee. Memorandum in Support of Motion for Summary Disposition, at 3.

leged.[4] We will similarly make this assumption for purposes of deciding this appeal.

The central issue addressed in Judge Frazier's Order Denying Motion to Dismiss is whether Odessa is a "private applicator" or a "commercial applicator" under FIFRA. This distinction is important, perhaps decisive, because under § 14(a)(2) of FIFRA, 7 U.S.C. § 136*l*(a)(2), penalties for violations by a private applicator may be assessed at a level not more than $1,000 per offense and only for violations "subsequent to receiving a written warning from the Administrator or following a citation for a prior violation." Violations by a commercial applicator may be assessed at a level not to exceed $5,000 per offense and there is no comparable requirement for a prior written warning or citation. FIFRA § 14(a)(1), 7 U.S.C. § 136*l*(a)(1). In this case, Region X, in belief that Odessa is a commercial applicator, has proposed a penalty of $90,000 (i.e., $5,000 per violation for 18 violations). Perhaps more significantly, Odessa asserts that it received no prior warning or citation for a prior violation.[5] For purposes of the Motion to Dismiss only, Region X does not dispute this.[6] If this were true and if Odessa were, as it claims, a private applicator rather than a commercial applicator, this would be fatal to the Region X complaint.

Odessa is a farmers' cooperative headquartered in Odessa, Washington, which stores and markets grain, principally wheat and barley. In describing its operations, Marvin Greenwalt, Odessa's general manager, states as follows:

> Odessa purchases certain types of farm supplies for resale, but does not purchase registered or unregistered pesticides for either wholesale or retail resale. Odessa does not distribute or sell pesticides to others. Odessa does not apply pesticides for purposes other than the production of an agricultural commodity.
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[4] Order Denying Motion to Dismiss, at 7; Memorandum in Support of Motion for Summary Disposition, at 4; Memorandum in Opposition to Motion for Summary Disposition, at 3.

[5] Memorandum in Support of Motion for a Summary Disposition, at 3–4.

[6] Memorandum in Opposition to Motion for Summary Disposition, at 3.

> Odessa does not apply pesticides other than on property it owns or leases. Odessa is not available to apply pesticides "for hire" to the general public, its members, or any third parties. To my knowledge no Odessa employee has on behalf of Odessa applied pesticides to any commodities other than those owned or controlled by Odessa. Odessa only purchases pesticides for use by its employees.
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> Odessa does not supply or distribute pesticides to its members. Its application of pesticides is only incidental to the bulk of its business: the storage and marketing of grain.

Affidavit of Marvin Greenwalt, Exhibit A to Memorandum in Support of Motion for Summary Disposition, at 2.

DISCUSSION

We now turn to the definitions of private and commercial applicator and how they apply to Odessa. The relevant definitions are found at § 2(e) of FIFRA, 7 U.S.C. § 136(e) and read as follows:

> (2) *Private applicator.*—The term "private applicator" means a certified applicator who uses or supervises the use of any pesticide which is classified for restricted use for purposes of producing any agricultural commodity on property owned or rented by the applicator or the applicator's employer or (if applied without compensation other than trading of personal services between producers of agricultural commodities) on the property of another person.
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> (3) *Commercial applicator.*—The term "commercial applicator" means an applicator (whether or not the applicator is a private applicator with respect to some uses) who uses or supervises the use of any pesticide which is classified for restricted use for any purpose or on any property other than as provided by paragraph (2).

Since "commercial applicator" is defined in terms of applicators excluded from the definition of a "private applicator," the definition of private applicator is central to this appeal.

In analyzing the definition of "private applicator" and its potential applicability to Odessa, certain elements of the definition do not appear to be in dispute. The Odessa employee who fumigated the grain at issue is conceded to be a certified applicator[7] and Fumitoxin is a registered, restricted use pesticide.[8] It is uncontested that the fumigation took place on property "owned or rented" by Odessa.[9] The basic point of contention is whether the use of the pesticide in this instance was "for purposes of producing any agricultural commodity." Odessa argues that the pesticides were applied "in the production of an agricultural commodity" on property owned or leased by Odessa,[10] this prong of the definition of a private applicator is satisfied, and thus Odessa fits within the definition. Region X contends that Odessa does not "produce" the grain but only stores and markets it, that at this stage the commodity has already been produced, and thus the application of the pesticide was not "for the purposes of producing" the grain.[11]

In its initial memorandum to support its motion, Odessa does not discuss the interpretation of "producing" an agricultural commodity. Instead, to support its interpretation of the statute, it looks to the legislative history of FIFRA. It quotes from a previous administrative law judge opinion, as follows:

> The legislative history of the Act * * * strongly suggests that the Congress intended Section 14(a)(1) to apply to all persons "in the pesticide business" and Section 14(a)(2) to apply to all persons not "in the pesticide business".

In re Hygienic Sanitation Company, Inc., No. I.F. & R. III–131–C, at 19–20 (ALJ, Dec. 21, 1978). It further quotes the statement that "[p]rivate applicators would be those certified by the States which do not apply pesticides for hire." S. Rep. 838, 92nd Cong., 2d Sess. reprinted in 1972 U.S.C.C.A.N. 3993, 4114.

Odessa argues that it is not available to apply pesticides "for hire" to the public, its members, or anyone else and thus it "is not in the pesticide business under any interpretation of its business

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[7] Memorandum in Support of Motion for Summary Disposition, at 8.

[8] EPA Registration Number 5857–2.

[9] The complaint indicates that the fumigation occurred at Odessa's warehouse bins in Ephrata, Washington.

[10] Memorandum in Support of Motion for Summary Disposition, at 8.

[11] Memorandum in Opposition to Motion for Summary Disposition, at 3, 7.

activities."[12] Therefore, it is not within the class of persons intended to be held to the penalty provisions of FIFRA applicable to a "commercial applicator."

Odessa expands upon this argument in its Reply to Memorandum in Opposition to Motion for Summary Disposition. It argues that, contrary to the Region's assertions, Odessa does not apply pesticides for a fee. It bills its members for storage and handling but there are no specific charges for application of pesticides. As such, "[n]o individual member is charged for application of pesticides" and Odessa cannot be considered as applying pesticides "for hire."[13]

As noted, the Region disputes this interpretation. In its view, Odessa stores and markets grain for its members for a fee. As part of its services, it applies pesticides. Therefore, "Odessa receives compensation for storing, handling, and transporting the commodities, a part of which includes applying [pesticides], as in this case."[14] As such, it is the type of operation intended to be regulated as a commercial applicator.

In any event, the central issue is not whether the application was "for hire", but whether, in the terms of the statute, it was "for the purposes of producing any agricultural commodity." The Region argues that it was not because Odessa does not "produce" the grain but rather stores and markets grain already produced by the farmer.[15]

Odessa takes issue with the Region's interpretation. It characterizes the Region's position as arguing that "to produce" a commodity means "to grow" the commodity. Odessa states that "[t]his unsubstantiated interpretation would unduly narrow the statute beyond its plain and intended meaning."[16] Absent a statutory or regulatory definition, Odessa looks to a dictionary definition which it asserts suggests a broader usage.[17]

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[12] Memorandum in Support of Motion for Summary Disposition, at 12.

[13] Reply to Memorandum in Opposition to Motion for Summary Disposition, at 6.

[14] Memorandum in Opposition to Motion For Summary Disposition, at 4–5.

[15] *Id.* at 7.

[16] Reply to Memorandum in Opposition to Motion for Summary Disposition, at 2.

[17] Odessa quotes a definition of "produce" from Webster's II New Riverside University Dictionary (1984) as follows:

> 1. To bring forth: YIELD. 2. to create by physical or mental effort. 3. To manufacture. 4. To give rise to. 5. To bring forward: EXHIBIT. 6. To Sponsor and present to the public * * * 7. To extend

Continued

Odessa further states that the use of the term "commodity" also supports a broader definition. It argues that that term implies "a marketable good—one that is not necessarily growing or recently harvested." [18]

In his Order Denying Motion to Dismiss, Judge Frazier notes the absence of any statutory or regulatory definition of the key words and thus the need to look to their "ordinary, contemporary, common meaning." The plain or ordinary meaning should govern absent a clear legislative intent to the contrary, unless it would lead to absurd results, or would otherwise defeat the purposes of the statute.[19]

Judge Frazier then discusses the definition of "produce" as follows:

> "Produce" is defined *inter alia*, as "to bring forth;" or "to bring into existence; or to bring crops to a point where they will command a price." The *Dictionary of Agricultural and Allied Terminology* defines a producer as "[o]ne who grows farm crops or performs the farm or ranch operations which result in the product, in contrast to processor, distributor, and consumer." In contrast, a "distributor" is defined as "[a]n agent or a wholesaler who sells goods in quantity."

Order Denying Motion to Dismiss, at 10–11 (footnotes omitted). Judge Frazier then concludes that the ordinary meaning of the term "producing an agricultural commodity" would appear to be:

> planting, cultivating, and harvesting crops so as to bring any product of agriculture to the point where it will command a price. The producer of such agricultural commodities is one who performs such farm operations in contrast to one who ships, transports, processes, distributes or consumes the commodity. Hence, an agent or wholesaler who sells or distributes such commodities in quantity or who ships such commodities would not be a producer of agricultural commodities.

(an area or volume) or lengthen (a line) * * * To make or yield the customary product or produce or products.

[18] Reply to Memorandum in Opposition to Motion for Summary Disposition, at 4.

[19] *See* Order Denying Motion to Dismiss, at 10 and cases cited in notes 6–9.

Id. at 12.

With this definition as context, Judge Frazier reviews the facts of this case. He concludes that the application of the pesticide was not made for the purpose of facilitating the planting, cultivating and harvesting of the grain. By the time the grain is transferred to the cooperative, it has already reached the point where it would "command a price". "In contrast to the activities of the farmer who performs farm operations related to planting, cultivating and harvesting, the activities of the Respondent (even though the organization has farmer members) are more analogous to a concern which stores, ships or sells agricultural commodities. These are not activities relating to the production of such commodities."[20] Further, while there is no separate charge for the application of pesticides, the cost of fumigation is an "indirect charge * * * which each user of Respondent's services must bear."[21]

For these reasons, Judge Frazier concludes that Odessa does not fit the definition of a private applicator and thus was acting as a commercial applicator. We believe Judge Frazier's determination is correct.

We agree that, in the absence of a statutory or regulatory definition, it is appropriate to use the common meaning of the terms at issue. The definition included in the Order Denying Motion to Dismiss is a reasonable one.[22] As applied to Odessa, we find that Odessa does none of the actions (planting, cultivating or harvesting) envisioned by this definition. Therefore, it cannot be considered to have applied the pesticide "for purposes of producing" the grain.[23]

[20] *Id.* at 13.

[21] *Id.*

[22] Obviously, each dictionary will have a different definition but we believe the definition quoted is a representative one. Indeed, we note that Odessa never explained why, using its proposed definition (quoted in note 17, *supra*), it could be said to have produced the grain. We believe even under that definition, the words "create", "make" or "yield" suggest that the grain is produced by the farmer prior to its transfer to Odessa.

[23] We also reject Odessa's contention that it produces the grain because "[t]he cooperative is an extension of the farmer-members. Odessa and its members are one in the same. Thus, in a very real sense, Odessa grows the commodity." Reply to Memorandum in Opposition to Motion for Summary Disposition, at 5. This argument ignores the separate, corporate identity of Odessa. Odessa is clearly a distinct legal entity and not "one in the same" as its members.

The parties devote a significant amount of time in their briefs to the question of whether Odessa applies the pesticides for hire. We do not believe this is determinative. The definition of "private applicator" discusses application "without compensation" only in the context of applying pesticides on the property of another person, which is not the case here. However, to the extent the Congress could be viewed as having intended to subject those "in the pesticide business" to higher penalty limits without any requirement for prior notice, this category fairly encompasses Odessa. As part of its commercial operations, it routinely applies pesticides to the grain of its members. The rates charged to its members must necessarily be set at levels that allows Odessa to cover the costs of such services. The fact that the cost is not separately charged does not make it any less significant a part of the package of services afforded by Odessa for which it receives compensation.

The legislative history does not directly explain why there is disparate treatment of private and commercial applicators under the penalty provisions of FIFRA. However, we note that in explaining why a violation by a registrant should be treated more seriously than that of a householder, home gardener, or farmer, Congress focused on the registrant's "greater knowledge of the dangers of pesticides and greater familiarity with the law regulating their use."[24] In establishing higher penalty levels and eliminating prior notice requirements for commercial applicators, *i.e.*, those "in the pesticide business," Congress may well have been recognizing that persons routinely applying pesticides as a part of the commercial services offered to others could similarly be expected to have greater knowledge than a private applicator. Odessa routinely applies pesticides as part of its commercial operations and can be fairly held to this higher standard of knowledge.

Therefore, in summary, we find that Odessa does not "produce" an agricultural commodity, its application of the pesticide was not "for purposes of producing an agricultural commodity," it does not meet the definition of a "private applicator," and thus is a "commercial applicator" under Section 2(e)(3) of FIFRA. Judge Frazier's Order Denying Motion to Dismiss is upheld.

So ordered.

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[24] S. Rep. No. 838, 92d Cong., 2d Sess. (1972), *reprinted in* 1972 U.S.C.C.A.N. 3993, 4045.