IN RE BOYER VALLEY FERTILIZER CO. AND UAP SPECIAL PRODUCTS, INC.

FIFRA Appeal No. 93-2

FINAL DECISION AND ORDER

Decided July 26, 1994

Syllabus

Boyer Valley Fertilizer Company (Boyer) and UAP Special Products, Inc. (UAP) (referred to collectively as respondents) appeal from an Initial Decision assessing a penalty of $4,000 against each respondent for violation of Section 12(a)(1)(A) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended, 7 U.S.C. § 136 *et seq.* The alleged violation stems from respondents' sale and distribution of a pesticide/fertilizer blend that was not registered pursuant to Section 3 of FIFRA, 7 U.S.C. § 136a.

The basic facts are not in dispute. In July of 1991, IPC Lawn Service Company (IPC) informed Regina Troxel, the manager of an apartment complex, of the benefits of applying a pesticide/fertilizer blend to the 15 acres of property she managed. Thereafter, Troxel signed a form supplied by IPC ordering the blend. IPC then contacted UAP, a wholesaler, and requested enough blend to treat the property. UAP then sent Boyer, a custom blender, a purchase order requesting that one ton of the blend be placed in forty, 50-pound bags. Boyer prepared the blend and shipped it to UAP. UAP then delivered the blend to IPC. IPC then began applying the blend to the property. Thereafter U.S. EPA Region VII issued complaints against Boyer and UAP for distributing an unregistered pesticide in violation of FIFRA.

The sole issue on appeal is whether the transaction in the present case satisfied the conditions of a 1982 FIFRA Compliance Program Policy (No. 3.4). Under this policy, custom blenders may be excused from the Act's pesticide registration requirements if certain conditions are met. Among other things, the policy requires that 1) the blend be prepared to the order of the user; and 2) the blend be delivered to the user together with a copy of the end-use labeling of the pesticide used in the blend and a statement specifying the composition of the mixture. The Presiding Officer agreed with the Region that respondents failed to meet these two conditions.

Held: Because we believe that the conditions of the 1982 compliance policy have been satisfied, the Initial Decision is reversed and the complaints dismissed.

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

Opinion of the Board by Judge McCallum:

Respondents Boyer Valley Fertilizer Company (Boyer) and UAP Special Products, Inc. (UAP) have appealed from two accelerated decisions

issued by Administrative Law Judge Frank W. Vanderheyden (Presiding Officer) under the Federal Insecticide, Fungicide, and Rodenticide Act, as amended, 7 U.S.C. § 136 *et seq.* (FIFRA or Act). In the first decision, dated December 23, 1992, the Presiding Officer found both Boyer and UAP liable for alleged violations of section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), arising from the distribution of an unregistered pesticide product. *See Order Granting Complainant's Motion for Accelerated Decision* (Accelerated Decision). In the second decision, dated March 19, 1993, the Presiding Officer assessed an administrative penalty of $4,000 against each respondent for the violations referenced in the first decision. *See Order Granting Motion for Partial Accelerated Decision* (Partial Accelerated Decision). The Presiding Officer stated that the penalty decision, coupled with the earlier liability decision, "comprise[s] a complete accelerated decision and order which is dispositive of the entire proceeding." Partial Accelerated Decision, at 3.

Together, the resulting decisions constitute an initial decision pursuant to 40 C.F.R. § 22.20(b). Initial decisions may be appealed to the Environmental Appeals Board pursuant to 40 C.F.R. § 22.30. For the reasons stated below the initial decision is reversed.

I. *BACKGROUND*

This matter concerns two complaints filed by U.S. EPA Region VII on February 5, 1992. The complaints alleged that respondents had distributed a pesticide that was not registered pursuant to section 3 of FIFRA, 7 U.S.C. § 136a,[1] and that such actions constituted a violation of FIFRA § 12(a)(1)(A), 7 U.S.C. § 136j(a)(1)(A).[2] The Region sought a penalty of $4,000 against

[1] FIFRA § 3(a), 7 U.S.C. § 136a(a), states:

> Except as provided by this subchapter, no person in any State may distribute or sell to any person any pesticide that is not registered under this subchapter. To the extent necessary to prevent unreasonable adverse effects on the environment, the Administrator may by regulation limit the distribution, sale, or use in any State of any pesticide that is not registered under this subchapter and that is not the subject of an experimental use permit under section 136c of this title or an emergency exemption under section 136p of this title.

[2] Section 12(a)(1)(A) provides as follows:

> (a) In General—
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> (1) Except as provided by subsection (b) of this section, it shall be unlawful for any person in any State to distribute or sell to any person—
>
> (A) any pesticide that is not registered under section 136a of this title or whose registration has been cancelled or suspended, except to the extent that distribution or sale otherwise has been authorized by the Administrator under this subchapter; * * *.

each respondent. These matters were consolidated by order dated April 21, 1992. *See* 40 C.F.R. § 22.12(a) (Consolidation). Both respondents are represented by the same counsel and have taken identical positions on appeal.

The basic facts are not in dispute. In July of 1991, IPC Lawn Service Company, Inc. (IPC) informed Regina Troxel, the manager of a 15-acre apartment complex in Kansas City, Missouri, that instead of applying pesticide and fertilizer separately, they could be blended and applied simultaneously. Brief in Support of Appeal to the Environmental Appeals Board (Appeal), at 5. On July 21, 1991, Troxel, at IPC's recommendation, signed a form supplied by IPC requesting a blend of the registered pesticide Triumph 4E and the fertilizer.[3] *Id.* IPC did not formulate the blend itself however. Rather, on July 24, 1991, IPC contacted respondent UAP, a wholesaler with whom IPC had dealt in the past, and requested enough of the blend to treat the 15 acres of property managed by Troxel. *Id.* UAP then sent Boyer, a custom blender, a purchase order dated July 25, 1991, requesting that Boyer prepare one ton of the blend to be placed in forty 50-pound bags. *See* Exhibit 3D to Motion for Accelerated Decision. UAP provided Boyer with the percentages for the blend and labels to be placed on each bag indicating that they contained a blend of Triumph 4E and fertilizer and stating the ingredients of the fertilizer. Response to Motion for Accelerated Decision, at 3. Boyer produced and packaged the blend and then shipped it to UAP on July 26, 1991. Boyer did not register the blend under section 3 of FIFRA.[4] Thereafter, on August 1, 1991, UAP shipped the bags to IPC. Appeal, at 6.

Between August 1 and August 7, 1991, Timothy Pickering, the president of IPC, applied 10 of the 40 bags of pesticide/fertilizer blend to the lawn of Troxel's apartment complex. Appeal, at 7. The application was halted on August 7, 1991, after an inspection of IPC's facility by the Missouri Department of Agriculture (MDOA) revealed that the 50-pound bags of blend did not have an EPA registration number. Following the inspection, the MDOA issued a "STOP SALE, USE, OR

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[3] *See* exh. A to Appeal. Triumph 4E (EPA Registration No. 100-643) is a restricted-use pesticide containing the active ingredient isazofos, a well-known insecticide and nematicide. Accelerated Decision, at 1.

[4] It is undisputed that the blending of a registered pesticide with a fertilizer and the relabeling of the blend prior to distribution constitute production of a new pesticide that, unless some exemption applies, must be registered under section 3 of FIFRA. *See* FIFRA § 2(w), 7 U.S.C. § 136(w) (stating that the term "produce" means "to manufacture, prepare, compound, propagate, or process any pesticide or device or active ingredient used in producing a pesticide."); 40 C.F.R. § 167.3 (stating, in part, that to produce means "to package, repackage, label, relabel, or otherwise change the container of any pesticide or device."); 40 C.F.R. § 152.15 (pesticide products required to be registered).

REMOVAL ORDER" preventing IPC from applying the remaining 30 bags of blend. Appeal, at 7 & Exh. H; Exh. 4 to Motion for Accelerated Decision. Thereafter, on February 5, 1992, the Region issued complaints against Boyer and UAP charging both companies with distributing an unregistered pesticide in violation of section 12(a)(1)(A) of FIFRA.

On June 3, 1993, Region VII filed a Motion for Accelerated Decision with regard to liability. The motion stated that there was no dispute in the administrative record that Boyer blended, relabeled, and distributed a custom blend of a registered pesticide and a fertilizer, but failed to register the new product with the Agency pursuant to Section 3 of FIFRA, and that UAP subsequently distributed the unregistered blend to IPC. Motion for Accelerated Decision, at 2, 5. Thus, according to the Region, both Boyer and UAP were in violation of the Act, which prohibits the distribution of unregistered pesticides unless authorized by EPA's Administrator in accordance with the Act. FIFRA § 12(a)(1)(A), 7 U.S.C. § 136j(a)(1)(A).

In their response to the Region's motion for accelerated decision (Response to Motion), Boyer and UAP agreed that the basic facts were not in dispute and that the matter was amenable to an accelerated decision, but argued that the decision should be in their favor. The response consisted of two arguments. First, respondents argued that Sections 12(a)(2)(G) and 2(ee) of FIFRA, when read together, expressly allow the blending of a registered pesticide with a fertilizer. Response to Motion, at 5. Section 12(a)(2)(G) states that it is unlawful for any person "to use any registered pesticide in a manner inconsistent with its labeling," while Section 2(ee) defines such misuse of a registered pesticide in a way that expressly excludes the mixing of a pesticide with a fertilizer (so long as such mixing is not prohibited by the pesticide's labeling). FIFRA § 2(ee)(4), 7 U.S.C. § 136(ee)(4). Because Triumph 4E's labeling did not prohibit mixing the pesticide with fertilizer, respondents argued that creating the blend was not a prohibited misuse and, therefore, they reasoned that the blended product did not need to be registered under the circumstances presented in this case. Response to Motion, at 5.

Second, Respondents pointed out that on May 10, 1982, the Agency issued a policy statement indicating that the Agency would not require custom blenders to register custom blends if certain conditions were met. FIFRA Compliance Program Policy 3.4 (hereinafter referred to as the 1982 Compliance Policy) (Exh. J to Appeal). This policy states, in part:

In order for a custom blender to avoid liability for failure to meet the requirements of [FIFRA] section 3, the following conditions must be met:

> (1) the blend is prepared to the order of the user and is not held in inventory by the blender; *and*
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> (2) the pesticide(s) used in the blend bears end-use labeling directions which do not prohibit use of the product in such a blend; *and*
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> (3) the blend is prepared in a registered establishment; *and*
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> (4) the blend is delivered to the user together with:
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> (a) a copy of the end-use labeling of the pesticide used in the blend, *and*
>
> (b) a statement specifying the composition of the mixture.

Compliance Policy, at 1-2 (footnote omitted) (emphasis in original).[5] Respondents assert that each of the conditions in this policy were satisfied in the present case.

The Region's Motion for Accelerated Decision (pp. 2-8) also addressed the issue of whether Respondents had satisfied the above-listed conditions in the 1982 Compliance Policy. The Region argued that Respondents had failed to meet at least two of these conditions. First, the Region stated that the blend was not prepared "to the order of the user" as required by the first condition. Motion for Accelerated Decision, at 2-3. Rather, Boyer prepared and packaged the blend to the order of UAP, a wholesaler, using labels provided by UAP. The Region interpreted the term "user" to refer to the ultimate customer, in this case Ms. Troxel. Motion for Accelerated Decision, at 2-3. Second, the

[5] As respondents have pointed out, this policy has been widely disseminated and relied upon by the regulated community. *See* Response to Motion for Accelerated Decision, at 8 n.6. For example, the Administrator explicitly mentioned this policy in at least two Federal Register notices addressing an exemption to the establishment registration requirements for custom blenders. *See* 52 Fed. Reg. 9504, 9505 (March 25, 1987) (Preamble to proposed rule); 53 Fed. Reg. 35,056, 35,057 (Sept. 8, 1988) (Preamble to final rule); 40 C.F.R. §§ 167.20(a) (Establishments requiring registration) and 167.3 (defining "custom blender").

Region contended that the blend was not delivered to the user as required by condition 4 of the compliance policy, but to UAP who then delivered it to IPC, a commercial applicator. *Id.* at 3. According to the Region, the custom blender exemption was not intended to apply to intermediaries or commercial applicators, but only end-use customers, in this case Ms. Troxel. *Id.* at 3-4. Finally, the Region asserted that because UAP did not prepare the blend, it was not the custom blender and thus could not rely on the custom blender exemption.

In his accelerated decision, dated December 23, 1992, the Presiding Officer agreed with the Region that the blend should have been registered pursuant to FIFRA § 3 and that respondents had not met the requirements for an exemption from the registration requirements under the 1982 Compliance Policy. The Presiding Officer essentially adopted the Region's reasoning in this regard. Accelerated Decision, at 7-8.[6] Thereafter, on March 19, 1993, the Presiding Officer issued the second accelerated decision assessing an administrative penalty of $4,000 against each respondent, the amount sought in the complaints. This appeal followed.

II. *DISCUSSION*

On appeal, respondents contend that they complied with the provisions of the 1982 Compliance Policy and were therefore exempt from the pesticide registration requirements of FIFRA § 3. Appeal, at 8. In addition, Respondents argue that if their actions did not fall within the terms of the Compliance Policy no penalty should be assessed, or, at most, a penalty of $3,000 rather than $4,000 should be assessed against each respondent. *Id.* at 18-19. For the following reasons, the initial decision is reversed.

We note at the outset that it is unclear from the record on appeal whether the Policy reflects the Agency's interpretation of FIFRA or is a statement of how the Agency will exercise its enforcement discretion.[7] Based on our review of various documents relating to the Policy,

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[6] With regard to respondents' argument that the pesticide was not used in a manner inconsistent with its labeling, the Presiding Officer stated that "[r]espondent's observations, while interesting, are not particularly relevant to the issue. * * * [T]he nub of this case is not concerned with the use of a pesticide inconsistent with its labeling." Accelerated Decision, at 7. Respondents are not charged with violating FIFRA § 12(a)(2)(G), "us[ing] any registered pesticide in a manner inconsistent with its labeling." This issue has not been raised in the present appeal.

[7] The Agency's decision to excuse a facility's failure to register a custom blend does not appear in the statute or associated regulations; rather, it is an invention of the 1982 Compliance Policy, the validity of which (together with its various conditions and limitations) is not being challenged by the respondents. We surmise that the need for the Policy stems from the lack of clear authority in either

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including the Region's own brief on appeal, it is our conclusion that the Agency has never focussed on this distinction and in fact has sent mixed signals regarding the exact status of the Policy.[8] As a consequence, we are obliged to look upon the Policy as a hybrid doctrine having no strong affinity to either side of the issue. This is unfortunate because the distinction between a policy that interprets the Act versus one that merely represents an expression of the Agency's enforcement discretion is more than semantic, since it obviously affects the analysis of respondents' liability. That is, if the Policy constitutes an interpretation of FIFRA, compliance with the Policy's provisions would exempt respondents from liability under the Act. If, on the other hand, the Policy is a statement of how the Agency will exercise its enforcement discretion, compliance with the Policy's provisions does not constitute

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the statute or the regulations that would allow custom blenders to distribute and sell custom blended products in certain circumstances without first obtaining a separate registration for the blended product. The statutory exemption for blending in FIFRA § 2(ee) certainly does not supply the missing authority, for it merely shields the person who mixes the pesticide and fertilizer from being charged with a misuse violation under FIFRA § 12(a)(2)(G). This statutory exemption is thus narrowly limited to exempting persons such as farmers from violating the misuse provisions of FIFRA if they themselves wish to blend a fertilizer with a pesticide and do not distribute or sell the blended product to others. There is no parallel exemption in the Act or the regulations covering the Act's registration requirements as they pertain to the distribution or sale of blended products. Consequently, the distribution and sale of such products comes under the prohibition in FIFRA § 12(a)(1)(A) against the distribution and sale of unregistered pesticides. *See supra* n.2. The respondents in this case are charged with violating this prohibition. The analysis of respondents' potential liability absent the Policy does not end there however. The Agency has published a regulation that exempts "custom blenders" (defined at 40 C.F.R. § 167.19) from the *establishment* registration requirement, which is otherwise applicable to any establishment where a pesticidal product is produced. 40 C.F.R. § 167.20(a). While this exemption could only have been written on the premise that commercial custom blending in some circumstances could lawfully take place, its reach appears to be limited to exempting custom blenders from the establishment registration requirement, not from the requirement to register the blended pesticide product itself. In other words, it would appear that the regulation exempting custom blenders from registering their establishments does not go far enough. This of course is where the 1982 Compliance Policy comes into play: its terms closely mirror the establishment registration exemption above, but the Policy specifically states that distribution and sale in accordance with its terms will enable a custom blender to avoid liability for violating FIFRA § 12(a)(1)(A). The Policy therefore supplies the authority apparently missing from the express terms of the statute and the regulations.

[8] *E.g., compare* 53 Fed. Reg. 35,057 (September 8, 1988) (stating that in issuing the compliance policy, the Agency determined that the registration of custom blends "would not be necessary to fulfill the intent of FIFRA"); Region's Motion for Accelerated Decision, at 1 (stating that the custom blend policy is an "exemption" from the statutory registration requirements); *with* Memorandum dated September 3, 1975 from Edwin L. Johnson, Deputy Assistant Administrator for Hazardous Materials Control, and A. E. Conroy II, Director, Pesticide Enforcement Division, to Pesticide Branch Chiefs and Enforcement Division Directors (titled: Interim Regulations Regarding Registration of Custom Blends and Custom Blending Establishments), at 4 (exh. I to Appeal) (stating that no *enforcement action* is anticipated against custom blenders failing to register blends meeting certain conditions (virtually identical to those appearing in the 1982 Compliance Policy) until the Agency publishes an interim regulation) (this memorandum is cited in the 1982 Compliance Policy); Region's Reply, at 5 (stating that the Compliance policy is "akin" to an exercise of enforcement discretion).

compliance with the Act but rather means that the Agency is stating that it will nevertheless decline to bring an enforcement action even though a technical violation of the Act has occurred. Based on the facts before us in this case, however, a definitive characterization of the Policy is not essential in order to issue a ruling, for as explained below we conclude that respondents have met the conditions of the Policy and therefore no penalty should be assessed. Therefore, the initial decision should be reversed and the complaint dismissed.

In its brief on appeal the Region contends that the initial decision should be upheld because respondents did not satisfy the terms of the Compliance Policy. In particular, the Region argues that: 1) the transaction in the present case did not "conform to the policy condition that the request originate with the end-user" because the order was solicited by and delivered to IPC rather than Troxel;[9] and 2) respondents did not comply with the Policy provision requiring that the blend be delivered to the end-user (Troxel); rather, Boyer delivered the blend to UAP, a wholesaler, who then delivered it to IPC, a commercial applicator. For the following reasons we reject the Region's arguments and conclude that Respondents have satisfied the provisions of the 1982 Compliance Policy.

First, the Compliance Policy does not require that the customer request the blend directly from the blender. Rather, it simply states that the blend must be prepared "to the order of the user." It is undisputed that the order in the present case originated with Troxel and was requested by her specifically for application to the property she managed. Contrary to the Region's assertion, whether or not IPC influenced Troxel's decision to order the blend does not affect this conclusion. As stated above, Troxel, after learning of the benefits of a single application, voluntarily signed a form requesting the pesticide/fertilizer blend at issue in the present appeal. We therefore conclude that the blend was prepared to the order of the user as provided by the Compliance Policy.

Second, we reject the Region's assertion that because intermediaries and a commercial applicator were involved, the blend was not "delivered to the user" as required by the condition four of the Compliance Policy. Nothing in the language of the Compliance Policy contains or implies the existence of such a limitation. In fact, the use of a commercial applicator would be required where, as here, the blend

[9] Region's Reply, at 3. The Region also states that the blend could not have been legally sold and delivered to Troxel because Triumph 4E is a restricted use pesticide and can only be applied by a certified applicator or under the supervision of a certified applicator. *Id.* at 2. *See* FIFRA § 12(a)(2)(F), 7 U.S.C. § 136j(a)(2)(F). Troxel is not certified to use a restricted use pesticide.

contains a restricted-use pesticide and the individual ordering the blend is not licensed to apply such a pesticide. In such a case, individuals would appropriately look to the services of a licensed applicator. Under these circumstances, delivery to an applicator hired by the customer ordering the blend constitutes delivery to the user. It is undisputed that the blend was ultimately delivered to IPC, a licensed applicator working for Troxel, together with a copy of the end-use labeling of the pesticide used in the blend and a statement specifying the composition of the mixture.

Although the Region attempts to narrow the scope of the Compliance Policy by stating that the Policy was not intended to apply to commercial applicators,[10] there are only two unpublished, internal Agency memoranda that arguably support the Region.[11] Both memoranda state, without supporting authority or analysis, that the Compliance Policy was intended:

> to allow [an] individual to have a local feed and fertilizer store blend pesticide/fertilizer or pesticide/pesticide combinations to the custom order of the individual for use on his own property. The polic[y] was never intended to apply to commercial pesticide applicators and registrants * * *.

These memoranda, however, were prepared in response to specific questions regarding the application of the Agency's custom blending policies and, as far as we can tell from the record on appeal, they were not published or otherwise made widely available to the regulated community. Thus, the Region may not now rely on these memoranda to narrow the scope of the 1982 Compliance Policy.[12] Moreover, we find nothing in the language of the Policy itself to support such a narrow interpretation of the Compliance Policy. We therefore reject

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[10] Region's Reply, at 2.

[11] The two memoranda in question are: (1) Memorandum from Ken Shiroishi, Director, Compliance Division, to William Spratlin, Director, Region VII Air & Toxics Division (June 27, 1988); and (2) Memorandum from John J. Neylan III, Director, Policy & Grants Division, Office of Compliance Monitoring, to John Ward, Region V (Feb. 6, 1990). *See* exhs. O & P to Appeal.

[12] *See* Freedom of Information Act 5 U.S.C. § 552 (a)(2) ("A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied upon, used, or cited as precedent by an agency against a party * * * only if (i) it has been indexed and either made available or published as provided by this paragraph; or (ii) the party has actual knowledge and timely notice of the terms thereof."). The Region has not established or even alleged that respondents had actual knowledge of these memoranda.

the Region's assertion that the blend was not delivered to the user within the meaning of the Compliance Policy.

III. *CONCLUSION*

Although Section 3 of FIFRA would appear to require that pesticide/fertilizer blends be registered with the Administrator, the Agency has determined that custom blenders who satisfy the terms and conditions of the 1982 Compliance Policy will be excused from complying with this section. As Boyer satisfied these terms and conditions, the Agency may not assess a penalty for Boyer's failure to register the blend at issue in the present case. Similarly, because Boyer's failure to register the blend was excused by the 1982 Compliance Policy, we conclude the Agency may not penalize UAP for delivering the blend to IPC. There is nothing in the Policy to shift responsibility for registration to an intermediary who did nothing but assist in getting the blended product to the rightful customer.[13] Accordingly, the Initial Decision is hereby reversed and the complaints are dismissed. Furthermore, irrespective of whether the Policy reflects the Agency's interpretation of FIFRA or is a statement of how the Agency will exercise its enforcement discretion—an ambiguity the Agency would be well advised to correct—we specifically hold that respondents' conduct in this case (which complied with the Policy) shall not be construed as a past violation for penalty assessment purposes.[14] We believe that this result is necessary to provide the full relief contemplated by the Policy, because the Policy excuses respondents' conduct even if technically violative of FIFRA.

So ordered.

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[13] This is not to say that the Agency cannot further publicly clarify the 1982 Compliance Policy by, for example, specifying the types of activities that the Policy's limited immunity is (or is not) intended to reach; but at present any such specification that would exclude UAP from that salutary aspect of the Policy's scope is neither self-evident from the words of the Policy nor does it have any self-evident policy support.

[14] The issue of whether the respondents' conduct is treated as a violation is potentially important to respondents, for if they are ever involved in another enforcement action under FIFRA, any past noncompliance with the Act could be taken into consideration in assessing a penalty.