

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTERS OF)
)
BOYER VALLEY FERTILIZER CO.,) IF&R Docket No. VII-1132C-92P
 and)
UAP SPECIAL PRODUCTS, INC.,) IF&R Docket No. VII-1133C-92P
)
Respondents)

ORDER GRANTING COMPLAINANT'S MOTION

FOR ACCELERATED DECISION

The complaints in the subject matters charge each respondent with distributing a pesticide which is not registered under section 3 of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. § 136. The complaints allege that such actions constitute a violation of section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A). Each complaint seeks a proposed penalty of \$4,000. It is alleged, concerning Boyer Valley Fertilizer Company (Boyer), that on or about July 26, 1991, it distributed forty 50-pound bags of a pesticide consisting of Triumph 4E (EPA Registration No. 100-643) and fertilizer to respondent UAP Special Products, Inc. (UAP). It is charged that the product contained a blend of isazofos and fertilizer; that isazofos is a well-known insecticide and nematocidal, implying pesticidal intent and thus within the purview of FIFRA; and that the pesticide product Triumph 4E and fertilizer

(sometimes blend) was not registered pursuant to section 3 of FIFRA, 7 U.S.C. § 136(a). In their answers, respondents admit to paragraph 8 of the complaint, which portion of that pleading states that the product contained a blend of isazofos, the actual ingredient in Triumph 4E, and fertilizer. As an affirmative defense, respondents admit that the product was "a custom blend of a registered pesticide and fertilizer which was blended at the request of the purchaser in accordance with a specific order therefore as permitted under Section 2(ee) of FIFRA . . . and other relevant provisions, and appropriate regulations issued thereunder." It is complainant's position that the blend and the relabeling created a new pesticide, and that it was not registered with EPA (sometimes complainant). Complainant argues that EPA has a policy concerning the custom blending of pesticides; that it provides an exemption from the requirement to register a pesticide if specified conditions are met; that respondents have failed to meet these conditions; and therefore are not entitled to the exemption. (Motion at 1-2)

The subject matters, pursuant to 40 C.F.R. § 22.12, were consolidated in an order issued April 21, 1992. For the reasons stated in its motion served June 5, 1992, complainant, pursuant to 40 C.F.R. § 22.20, seeks an accelerated decision in this matter. The response in opposition to the motion was served July 1, 1992. On July 14, complainant served a reply to the response.

An accelerated decision may be granted as to all or any part of the proceeding "if no genuine issue of material fact exists."

40 C.F.R. § 22.20(a). The parties are aware of their positions and they will be repeated here only to the extent where the undersigned Administrative Law Judge (ALJ) deems necessary.

As understood from the pleadings, the undisputed facts in this matter are as follows: An undated document with the caption "Request for Custom Blend Triumph + Fertilizer" stated, in pertinent part, that a combination of "insecticide and fertilizer can be made available upon request" and "[B]ecause this combination is only manufactured by special order, we would like to have you sign this request form for the area to be treated." A person named Regina Troxel (Troxel) filled in her name at the bottom of the document, followed by the form language "am requesting application of Triumph + Fertilizer 15-00-00 containing 35% slow release nitrogen to my property at 8803 Newton Avenue - Kansas City, MO 64138." The document was signed and dated "7/21/91." The person soliciting the request for the order apparently does not appear on the document. The parties, however, concur that it was the IPC Lawn Service Co., Inc. (IPC) of 11780 East 83rd Street, Raytown, Missouri. (Motion at 6, Exhibit 4; Response at 2) Respondents relate that IPC did not formulate the blend; and that on or about July 24, 1991, it got in touch with respondent UAP, a wholesaler, to request a blend of the registered pesticide product Triumph 4E and fertilizer sufficient to treat the 15 acres of property managed by Troxel. (Motion at 7; Response at 2) UAP is located at 1115 Erie, North Kansas City, Missouri. (Complaint, ¶ 4) By invoice dated July 26, 1991, respondent UAP sent a purchase order to

respondent Boyer located at South Sioux City, Nebraska, requesting forty 50-pound bags of "15-0-0 25/SCU + Triumph." (Motion, Exhibit 3D; Response, Exhibit B) The investigation at Boyer disclosed that 2,000 pounds of the blend had been produced and packaged into forty 50-pound bags and shipped to UAP on July 26, 1991; that two labels were attached to each 50-pound bag, which labels had been provided by UAP; and that the percentages for the blend of Triumph plus fertilizer mix were arrived at by information provided to Boyer by an individual from UAP. (Motion, Exhibits 3, 3E, 3B) The label indicated that the bags contained a blend of Triumph 4E and fertilizer and showed further the ingredients of the fertilizer. (Response at 3, Exhibit E) By invoice dated August 1, 1991, UAP shipped forty 50-pound bags of the blend to IPC.

Timothy Pickering (Pickering), President of IPC, is certified to apply restricted-use pesticides. After receiving the blend, Pickering, sometime between August 1, 1991 and August 7, 1991, applied 10 of the 40 bags to the lawn of the apartment complex managed by Troxel. On August 7, 1991, Darryl Slade of the Missouri Department of Agriculture issued a "Stop Sale, Use, or Removal Order" to Pickering applicable to the 30 remaining bags of the blend. The 50-pound bags of the blend did not have an EPA Registration Number on them. (Response at 4, Exhibit H; Motion at 6, Exhibits 4 and 7)

The pertinent section of the regulations, 40 C.F.R. § 167.3, states:

Custom blender means any establishment which provides the service of mixing pesticides to a

customer's specifications, usually a pesticide(s)-fertilizer(s), pesticide-pesticide, or a pesticide-animal feed mixture, when: (1) The blend is prepared to the order of the customer and is not held in inventory by the blender; (2) the blend is to be used on the customer's property (including leased or rented property); (3) the pesticide(s) used in the blend bears end-use labeling directions which do not prohibit use of the product in such a blend; (4) the blend is prepared from registered pesticides; (b) [sic] the blend is delivered to the end-user along with a copy of the end-use labeling of each pesticide used in the blend and a statement specifying the composition of mixture; and (6) no other pesticide production activity is performed at the establishment.

Complainant also makes reference to policy statements of EPA concerning custom blending. The substance of these is that the custom blending exemption was not intended to apply to commercial pesticide applicators and registrants; that the intent of custom blending was for the blend to be applied to the property of the person requesting the blend within a day or two following blending, and that the user knows the person who manufactured the blend. (Motion, Exhibit 2C)

Complainant urges that respondents did not comply with the conditions to meet custom blending: First, Boyer prepared the blend for UAP, not for Troxel, the end-user customer; that Boyer put UAP labels on the bags; that the order did not originate with the end-user; that the blend was never delivered to the end-user, nor was any labeling or statement of the mixture delivered to the end-user; that it was sent to Boyer who delivered it to UAP; that Troxel did not apply the blend to the lawn; nor is she certified to use a restricted use pesticide; that a sale of the blend to Troxel

would also have been a violation of section 12(a)(2)(F) of FIFRA, 7 U.S.C § 136j(a)(2)(F), unless she was to apply the blend under the supervision of a certified applicator; and that here, someone other than the end-user did the application.

Complainant's position is that the custom blend policy was to permit farmers to have a local feed and fertilizer establishment blend combinations of pesticides or pesticides and fertilizer to the farmer's special order for the latter's property to be applied within a day or two of the blending; that the policy was never intended to apply to commercial application, which would permit circumvention of the product registration requirements. (Motion at 3-4, Exhibits 2A and 2C)

In its response to the motion, respondent agrees that there is no significant controversy concerning the facts in this matter and that it is amenable to an accelerated decision, but the decision should be in its favor. It is urged that FIFRA does not require registration of a custom blending; that Boyer "prepared for Ms. Troxel" by mixing a registered end-use pesticide with fertilizer; and that FIFRA expressly allows mixing a registered end-use pesticide with fertilizer prior to use, without registration, if the pesticide label does not prohibit such blending. In support, respondent cites section 12(2)(G), 7 U.S.C. § 136j(b)(2)(G) and section 2(ee), 7 U.S.C. § 136(ee). (Response at 4-5) The former section of FIFRA makes it unlawful for any person "to use a registered pesticide in a manner inconsistent with its labeling." The latter quoted section of FIFRA is its definitional portion. In

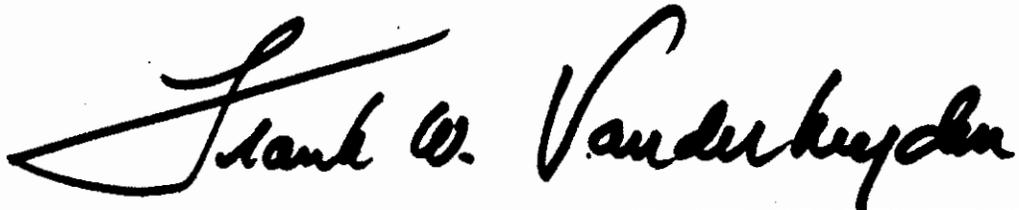
significant part, section (ee) provides that the term "to use any registered pesticide in a manner inconsistent with its labeling, . . . shall not include . . . (4) mixing a pesticide or pesticides with a fertilizer when such mixture is not prohibited by the labeling" Respondent's observations, while interesting, are not particularly relevant to the issue. It is observed initially that the blend was not prepared for "Ms. Troxel" but rather for UAP. Second, the nub of this case is not concerned with the use of a pesticide inconsistent with its labeling. The core of the controversy here is whether or not the respondents were properly custom blenders as set forth in the regulations at 40 C.F.R. § 167.3, and EPA policy statements. Respondents are in error in stating that FIFRA does not require registration of a custom blend prepared by Boyer for Troxel. The ALJ concurs in complainant's thinking that this would be correct only if Troxel decided what blend she needed and requested it directly from Boyer. This was not the case. IPC decided it needed a blend and it, not Troxel, requested it from UAP. Other arguments raised by respondent are equally unresponsive. It is clear from the facts that respondents did not follow the custom blend policy and the regulations set forth in Exhibits 1A, 1B and 1C attached to the motion. Complainant makes a trenchant point when it notes that to follow respondents logic would mean that pesticides could be blended and distributed without benefit of registration "so long as someone requested the product." (Reply at 3) It is concluded

that each respondent, as charged in the complaint, is in violation of section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A).

ORDER

IT IS ORDERED that:

1. Complainant's motion for an accelerated decision concerning the issue of liability be GRANTED.
2. Respondents' cross motions for an accelerated decision are DENIED.
3. The parties engage in good faith settlement negotiations concerning the amount of penalty in this matter.
4. Complainant shall arrange for a telephone prehearing conference for the purpose of scheduling a hearing date if this matter is not settled by February 15, 1993.



Frank W. Vanderheyden
Administrative Law Judge

DATED: December 23, 1992

IN THE MATTERS OF BOYER VALLEY FERTILIZER CO. AND UAP SPECIAL PRODUCTS, INC., Respondents,
Docket Nos. IF&R VII-1132C-92P and IF&R VII-1133C-92P

Certificate of Service

I certify that the foregoing Order, dated 12/23/92, was sent this day in the following manner to the below addressees:

Original by Regular Mail to:

Ms. Venessa R. Cobbs
Regional Hearing Clerk
U.S. Environmental Protection
Agency, Region VII
726 Minnesota Avenue
Kansas City, KS 66101

Copy by Regular Mail to:

Attorney for Complainant:

Henry F. Rompage, Esquire
Assistant Regional Counsel
U.S. Environmental Protection
Agency, Region VII
726 Minnesota Avenue
Kansas City, KS 66101

Attorney for Respondents:

Steven Schatzow, Esquire
Amy F. Roach, Esquire
MORGAN, LEWIS & BOCKIUS
1800 M Street, N.W.
Washington, D.C. 20036

Marion I. Walzel
Marion I. Walzel
Legal Staff Assistant

Dated: Dec. 28, 1992