8/10/95

**UNITED STATES**
**ENVIRONMENTAL PROTECTION AGENCY**

**BEFORE THE ADMINISTRATOR**

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| **In the Matter of** | ) | |
| | ) | |
| **John Sauter,** | ) | **Docket No.I.F.& R.-VIII-95-362C** |
| | ) | |
| **Respondent** | ) | |

ORDER DENYING MOTION FOR
ACCELERATED DECISION

The complaint in this proceeding under Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended (7 U.S.C. § 136l), issued on September 29, 1994, charged Respondent, John Sauter, with three counts of violating the Act.[1/] Specifically, it was alleged that on or about May 2, 1993, Respondent, a certified private applicator in the State of Colorado, applied the restricted use pesticide ("RUP") "Cyclone" (EPA Registration No. 10182-111) to the parking lot of the Holy Family Catholic Church and also to the front lawn of his own residence. A general use pesticide (Surflan Preemergent, EPA Registration No. 62710-112) was allegedly applied in conjunction with the application of Cyclone.

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[1/] On October 24, 1994, prior to the date Respondent filed its answer, Complainant filed an amended complaint. The only change in the First Amended Complaint was in the docket number.

Count I of the complaint alleged, inter alia, that a private applicator's use of RUPs is specifically limited to purposes of producing agricultural commodities on property owned or rented by the applicator or his employer, that Respondent neither owned nor rented the church, and that, accordingly, Respondent's commercial application of a RUP without a commercial applicator's license was a violation of Section 12(a)(2)(F) of the Act. Count II alleged that the label for "Cyclone" provided "Do Not Use Around Home Gardens, Schools, Recreation Parks, or Playgrounds", that Respondent's application of the RUP to the church parking lot and to his own front lawn were inconsistent with clearly expressed label directions and a violation of FIFRA § 12(a)(2)(G). Count III alleged that Respondent had used the RUP Cyclone in a manner inconsistent with its labeling in making the mentioned applications, because the label required protective clothing, a face shield and impermeable gloves, which Respondent had not used. For these alleged violations, it was proposed to assess Respondent a penalty of $5,000 for each count or a total of $15,000.

Respondent answered, denying the Agency's jurisdiction for the reason that enforcemant authority was vested in the State of Colorado, admitting the application of the RUP Cyclone to the church parking lot, but denying for lack of recollection the alleged application to his lawn. Additionally, Respondent denied that the application of Cyclone was made without the use of protective clothing and contested the proposed penalty as improper and inappropriate. Accompanying Respondent's answer was a Motion

for Accelerated Decision dismissing the complaint. Respondent alleged that he was a certified private applicator (EPA Certification No. 00065284), whose certification was valid on dates relevant to the complaint and that, as such, he was entitled to a warning pursuant to FIFRA § 14(a)(2), which was never issued, prior to any attempt by the Agency to assess penalties.[2/] Alternatively,

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[2/] FIFRA § 14 entitled "Penalties" provides in pertinent part:
(a) Civil Penalties.-

(1) In general.-Any registrant, commercial applicator, wholesaler, dealer, retailer, or other distributor who violates any provision of this subchapter may be assessed a civil penalty of not more than $5,000 for each offense.

(2) Private applicator.-Any private applicator or other person not included in paragraph (1) who violates any provision of this subchapter subsequent to receiving a written warning from the Administrator or following a citation for a prior violation, may be assessed a civil penalty of not more than $1,000 for each offense, except that any applicator not included under paragraph (1) of this subsection who holds or applies registered pesticides, or use dilutions of registered pesticides, only to provide a service of controlling pests without delivering any unapplied pesticide to any person so served, and who violates any provision of this subchapter may be assessed a civil penalty by the Administrator of not more than $500 for the first offense nor more than $1,000 for each subsequent offense.

(3) Hearing.-No civil penalty shall be assessed unless the person charged shall have been given notice and opportunity for hearing on such charge in the county, parish, or incorporated city of the residence of the person charged.

(4) Determination of penalty.-In determining the amount of the penalty, the Administrator shall consider the appropriateness of such penalty to the size of the business of the person charged, the effect on the person's ability to continue in business, and the gravity of the violation. Whenever the Administrator finds that the violation occurred despite the exercise of due care

(continued...)

Respondent asserted that, if by some legal determination [legerdemain] he was subject to being charged as a certified commercial applicator, the Agency was obligated, prior to instituting its action, to allow the State of Colorado an opportunity to fulfill its obligations under the State plan, which had been adopted pursuant to FIFRA § 11.

Complainant filed a response to the motion under date of December 1, 1994, devoting the major portion thereof to answering Respondent's argument that jurisdiction to enforce the alleged violations was vested in the State of Colorado. Complainant referred to the Cooperative Enforcement Agreement between EPA and the State (1985), a copy of which was attached. With respect to Respondent's contention that he was entitled to a warning letter from EPA pursuant to FIFRA § 14(a)(2), Complainant stated that, while the parties agreed that Respondent was a certified private applicator at the time he applied the RUP to the church parking lot and at his home, under federal law persons performing such applications are certified commercial applicators for those applications, citing FIFRA § 2(e) (Resonse at 4).

On May 10, 1995, Complainant filed a supplement to its response to the motion for the purpose of correcting citations to the Colorado Pesticide Applicator's Act, Colo. Rev. Stat. ("CRS") § 35-10-101, et seq. Complainant stated that, since its response was

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[2/](...continued)
or did not cause significant harm to health or the environment, the Administrator may issue a warning in lieu of assessing a penalty.

filed, it had become aware that the Colorado Pesticide Applicator's Act had been repealed and reenacted in 1990. Complainant maintained, however, that the improper citations had no affect on the arguments advanced in its response and that, contrary to the situation under FIFRA, Respondent was not a commercial applicator under the Colorado statute for the acts and failures to act at issue here.

Complainant quoted the definition of "commercial applicator" in C.R.S. § 35-10-103(2) as "any person who engages in the business of applying pesticides or operating a device for hire", and asserted that Respondent was neither a "commercial applicator", a "limited commercial applicator",[3/] nor a "public applicator"[4/] for the applications at issue. Citing C.R.S. § 35-10-104(2),[5/]

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[3/] C.R.S. § 35-10-103(8) defines "limited commercial applicator" as "any person engaged in applying pesticides in the course of conducting a business; except that such application shall be only in or on property owned by the person or the person's employer."

[4/] C.R.S. § 35-10-103(12) defines "public applicator" as "any agency of the state, any county, city and county, or municipality, or any other governmental entity or political subdivision which applies pesticides."

[5/] Section 35-10-104(2) provides in pertinent part:

> [t]he provisions of this article [the State Act] shall not apply to:
>
> (b) [a]ny individual who operates a device or uses any pesticide or who supervises, evaluates, or recommends such acts on the property of another without compensation; or
>
> (c) [a]ny individual who uses a device or applies

(continued...)

Complainant says that the violations at issue were arguably not subject to the Colorado statute. Moreover, Complainant argues that, even if Respondent's acts were subject to regulation under the State statute, there is nothing to preclude EPA from bringing this action.

Respondent served a response to Complainant's supplement under date of June 1, 1995, reiterating his contention that as a certified private applicator, he could only be penalized under FIFRA § 14(a(2) and, citing certain provisions of the Cooperative Enforcement Agreement Between EPA and the State of Colorado,[6/] alleged that EPA had breached that agreement and was barred from bringing this action until the Agreement had been enforced by the State.

## D I S C U S S I O N

The Cooperative Enforcement Agreement expressly provides, inter alia, that nothing in this Agreement is intended to usurp the authority of EPA to commence enforcement actions for alleged

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[5/](...continued)
any pesticide or who supervises such acts at his home or on his property, when such use or supervision is not compensated and is not in the course of conducting a business.

[6/] For example, the Agreement at 3 "Cooperative Enforcement Actions" provides that the Colorado Department of Agriculture shall have primary enforcement responsibility for pesticide use violation enforcement and that EPA will refer all pesticide use complaints involving commercial applicators in Colorado to the Department of Agriculture for investigation.

violations of FIFRA (Part III, General Conditions) and it is concluded that the Agreement is not a bar to the instant EPA enforcement action.[7/]

Section 2(e) of FIFRA provides in pertinent part:

> Certified applicator, etc.-
>
> (1) Certified applicator.- The term "certified applicator" means any individual who is certified under section 136i of this title as authorized to use or supervise the use of any pesticide which is classified for restricted use.....
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> (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 other than as provided by paragraph (2).

Because, under the quoted definition, a private applicator's use of RUPs is limited to purposes of producing agricultural commodities, and because commercial applicator is defined as an applicator who uses or supervises the use of a RUP for any purpose

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[7/] See, e.g., In re Gordon Redd Lumber Company, RCRA (3008) Appeal No. 91-4 (EAB, June 9, 1994) (respondent was not a beneficiary of Memorandum of Agreement (MOA) between EPA and the State of Mississippi and the MOA did not create any rights enforceable by respondent), slip opinion at 17, note 20. See also In re Skarda Flying Service, Inc., Docket No. FIFRA VI-672C (Transcript of Bench Ruling, October 13, 1994) (motion to dismiss upon the ground the State of Arkansas had taken enforcement action for the same violations denied).

other than as a private applicator, Respondent was a commercial applicator for the applications at issue. No contention has or could realistically be made that the applications were for "agricultural production" purposes. See In re Odessa Union Co-Op, Inc., FIFRA Appeal No. 93-1 (EAB, March 19, 1993) (operator of grain elevator who applied a fumigant to grain stored and shipped for Co-Op members was a commercial applicator for such applications, because it was not a producer of the grain). See also In re James C. Lin and Lin Cubing, Inc., Docket No. FIFRA-09-0826-C-93-01 (Initial Decision, April 14, 1994) (Respondents could properly be penalized as commercial applicators in applying a RUP to semi-trailer loads of alfalfa cubes, because they were not producers of the alfalfa), affirmed on other grounds, FIFRA Appeal No. 94-2 (EAB, December 6, 1994).

It is, of course, immediately apparent that, in contrast to the situation here, Odessa and Lin Cubing, supra, involved application of RUPs during commercial activities and it may readily be concluded that Congress intended such applicators to be treated as commercial applicators. In this regard, legislative history of the Federal Insecticide, Fungicide, and Rodenticide Act, Public Law 92-516 (October 21, 1972), 86 STAT. 973-999, indicates that under the Act as initially drafted and passed by the House (H.R. 10729) a certified applicator, who applied a RUP on the property of another without compensation, was a "private applicator". See Senate Report No. 92-838, reprinted U.S. Code, Cong. & Adm. News (1972) 3993, 4092, at 4010: A "private applicator" is a certified

applicator who uses restricted use pesticides only on his own or his employer's property, or on the property of another without compensation." Accord, Senate Report No. 92-970, reprinted Id. 4092, 4130, at 4116. See also Id. at 4114 concerning recordkeeping by private applicators: "Private applicators would be those certified by the States which do not apply pesticides for hire." The only change to § 2(e)(2) of H.R. 10729 listed by the Joint Conference Report No. 92-1540, reprinted U.S. Code Cong. & Adm. News (1972) 4130, 4135, at 4131, is the following: "It permits an employee to apply pesticides on his employer's land as a private applicator." No explanation of the origin, or reason for, the limiting phrase "for the purposes of producing any agricultural commodity" in the definition of private applicator in the statute as enacted has been found.

The foregoing indicates that, while Respondent, as an uncompensated applicator, is within the spirit of the FIFRA definition of a private applicator, he is not within the letter as the applications were not made for the purpose of producing "any agricultural commodity." Accordingly, Respondent must be regarded as a commercial applicator in making the applications at issue, he was not entitled to a notice pursuant to FIFRA § 14(a)(2), and the motion for a decision dismissing the complaint for that reason must be denied. For all that appears, however, there is no evidence or allegation that the alleged violations caused any "significant harm to health or the environment" and this appears to be a case where a warning pursuant to FIFRA § 14(a)(4) in lieu of assessing a

penalty would be particularly appropriate. See In Re Aquarium Products, Inc., I.F.& R. Docket No. III-439-C (Initial Decision, June 30, 1995) (warning issued pursuant to FIFRA § 14(a)(4) for sale of an unregistered and misbranded pesticide in lieu of assessing a penalty).

## O R D E R

Respondent's motion for an accelerated decision dismissing the complaint is denied. Liability for Counts II and III and the amount of the penalty, if any, remains at issue and will be decided after further proceedings including a hearing, if necessary.[8/]

Dated this 1st day of August 1995.

Spencer T. Nissen
Administrative Law Judge

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[8/] The attention of the parties is invited to the President's memorandum "Regulatory Reform-Waiver of Penalties and Reduction of Reports", 60 Fed. Reg. 20621 (April 26, 1995) and EPA's implementation thereof, "Interim Policy on Compliance Incentives for Small Businesses", 60 Fed. Reg. 32675 (June 23, 1995). If this matter is not settled, I will issue an order requiring the parties to exchange pre-hearing information in accordance with Rule 22.19(b) (40 CFR Part 22).

**CERTIFICATE OF SERVICE**

This is to certify that the original of this **ORDER DENYING MOTION FOR ACCELERATED DECISION**, dated August 1, 1995, in re: John Sauter, Dkt. No. IF&R-VIII-95-362C, was mailed to the Regional Hearing Clerk, Reg. VIII, and a copy was mailed to Respondent and Complainant (see list of addressees).

Helen F. Handon
Legal Staff Assistant

DATE: August 1, 1995

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8/7/95

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

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| IN THE MATTER OF | ) | |
| | ) | |
| VICKERY & ASSOCIATES, INC., | ) | Docket No. TSCA-V-C-006-1992 |
| | ) | |
| Respondent | )11 | |

ORDER GRANTING MOTION TO DISMISS WITHOUT PREJUDICE

On July 3, 1995, Complainant filed a motion seeking to dismiss the Complaint filed herein without prejudice. The basis for the motion is that the Respondent is no longer in business and has no remaining assets. Moreover, the former primary stockholder and president of the Respondent has had to sell his house to pay down a business loan to a bank, and is now employed as an hourly carpenter. No opposition has been filed to the motion to dismiss.

Accordingly, since good cause has been shown, the motion to dismiss is granted and the Complaint filed herein is dismissed without prejudice.

SO ORDERED.

S/

Daniel M. Head
Administrative Law Judge

Dated: _____
Washington, DC