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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE REGIONAL ADMINISTRATOR

In the Matter of WYOMING DEPARTMENT OF AGRICULTURE Respondent	)	I. F. & R. Docket No. VIII-18C

ORDER

Respondent Wyoming Department of Agriculture has moved to dismiss the complaint on the grounds that the Federal Insecticide, Fungicide, and Rodenticide Act is not applicable to it as an agency of the State of Wyoming. Briefs in support of and in opposition to the motion have been submitted, and respondent has also moved for leave to file a supplemental brief in support of its motion. It is, accordingly,

ORDERED that respondent is granted leave to file its supplemental brief.

Upon consideration of the briefs and papers filed in this case, it is,

FURTHER ORDERED that the motion to dismiss is denied for the reasons set forth in the accompanying opinion.

OPINION

This is a proceeding under Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended, 7 U.S.C. 136 1(a) (Supp. V, 1976), ("FIFRA"), for the assessment of civil penalties

against the Wyoming Department of Agriculture ("Wyoming") for alleged violations of the Act.[1/] The proceeding was instituted by a complaint issued by the United States Environmental Protection Agency ("EPA") and charged Wyoming with using the pesticide COMPOUND 1080 in a manner inconsistent with its labeling by using it to destroy mammals in violation of Section 12 (a)(2)(G) of FIFRA. The complaint also charged that Wyoming refused to allow the inspection of records pursuant to Section 8 of FIFRA, in violation of Section 12(a)(2)(B) of the Act. Wyoming answered and moved to dismiss the complaint on the grounds that as an agency of the State of Wyoming it is not subject to the statutory prohibitions upon which the complaint is based. Wyoming also denied that it has violated FIFRA and affirmatively alleged that its use of COMPOUND 1080 to destroy coyotes was in accordance with FIFRA and the regulations.

The motion to dismiss is based upon the legal premise that FIFRA's prohibitions do not apply to Wyoming. For purposes of this motion, accordingly, I take all well-pleaded factual allegations of the complaint as admitted. Cf. Walker Process Equipment, Inc. v. Food Machinery and Chemical Corp., 382 U.S. 172, 174-75 (1965). Thus the question presented is whether Wyoming is subject to FIFRA, assuming

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1/ References to FIFRA will be to the sections of the statute. A table giving parallel citations to the statute and to Title 7 of the United States Code (Supp. V) is attached to this opinion.

that Wyoming has used COMPOUND 1080 in a manner inconsistent with its labelling and has refused to allow a duly designated employee of the EPA to inspect its records.

I find that Wyoming is subject to the prohibitions of FIFRA and that the motion to dismiss must be denied.

DISCUSSION

Section 12 of FIFRA prohibits unlawful acts by "any person." Wyoming asserts that "person" does not include States arguing generally that this construction accords with the plain language of the Act, which separately defines "person" and "State",[2/] and is supported by the legislative history demonstrating that FIFRA's purpose was to establish cooperative Federal-State programs for regulating pesticides, and not to have Federal programs preempt State-run programs. In addition, Wyoming argues that the rules of statutory construction favor an interpretation of the Act which avoids encroachments on state sovereignty and the 10th amendment constitutional question raised thereby.

EPA in opposition argues that the definitions of "State" and "person" in Section 2 must be read in the context of the entire Act,

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2/ The definitions are as follows:

> [Sec. 2](s) PERSON.--The term "person" means any individual, partnership, association, corporation or any organized group of persons whether incorporated or not.
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> * * * * * * *
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> [Sec. 2](aa) STATE.--The term "State" means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the Trust Territory of the Pacific Islands and American Samoa.

and that an examination of FIFRA in its entirety as well as its legislative history demonstrates that States as well as private parties were to be subject to FIFRA's regulatory and inspection provisions.

In any question of statutory interpretation the cardinal rule is that the language must be construed so as to give effect to the intent of Congress. United States v. American Trucking Association, 310 U.S. 534, 543 (1940); State of California v. United States, 320 U.S. 577, 585-86 (1944); Portland Cement Association v. Ruckelshaus, 486 F.2d 375, 379-80 (D.C. Cir. 1973). As the court said in Portland Cement Association, supra, 486 F.2d at 380, n. 13:

> "[T]he 'plain meaning' doctrine has always been subservient to a truly discernible legislative purpose however discerned," by equitable construction or recourse to legislative history (citations omitted).

Similarly, the Supreme Court stated in American Trucking Association, supra, 310 U.S. at 543:

> There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the Act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one "plainly at variance with the policy of the legislation as a whole" this Court has followed that purpose rather than the literal words . . . (citations omitted).

A case even closer to the question involved here is State of California v. United States, 320 U.S. 577 (1944). In that case, the argument was made that the State of California was not subject to regulation by the United States Maritime Commission under the Shipping Act of 1916, as amended, 46 U.S.C. 801 et seq., because it was not a "person" as defined in the Act. The definition of "person" was similar to that in FIFRA. In rejecting the argument, the Court stated, 320 U.S. at 585:

> . . . We need not waste time on useless generalities about statutory construction in order to conclude that entities other than technical corporations, partnerships, and associations are "included" among the "persons" to whom the Shipping Act applies if its plain purpose precludes their exclusion. . . .

It is clear, therefore, contrary to what Wyoming seems to argue, that States can be "persons" subject to FIFRA even if they do not exactly fit any of the categories included in the definition. Nor is the definition of persons necessarily narrowed so as to exclude States by the fact that States are separately defined. FIFRA has specific provisions dealing with the responsibilities and authorities of States, namely Section 4 (State Certification of Applicators), Section 5 (State Issuance of Experimental Permits), Section 20 (Federal-State Cooperation in Enforcement and Training and Certification of Applicators), and Section 24 (State Authority to Regulate Pesticides Within Their Jurisdictions). Consequently, the separate definition

of "State" as embracing certain other governmental entities can be explained on the grounds that Congress had in mind only these particular provisions and did not intend to exclude state agencies from the provisions of the Act generally. That is, state agencies do come within the broad classification of persons subject to FIFRA's regulatory provisions, but for certain purposes are, in turn, defined to include other governmental entities as well. It does not follow, as Wyoming seems to argue, that because a state is a person, a person must also be a state under the Act. States are defined solely as government entities, and the provisions relating to states deal with the exercise of governmental powers. It would be truly a strained construction to read the term "States" as also including private associations in these circumstances.

In support of its argument that a state agency is subject to FIFRA, EPA points to the specific exemptions applicable to States in Sections 18 and 12(e)(3). Section 18 in pertinent part provides: "The Administrator may, at his discretion, exempt any Federal or State agency from any provision of this Act if he determines that emergency conditions exist which require such exemption." (Emphasis added.) Section 12(e)(3) provides that the penalties prescribed for a violation of Section 12(a)(1) shall not apply to any public official while engaged in the performance of his official duties.[3/]

3/ The violations charged in this proceeding are of Section 12(a)(2).

EPA aruges that these two provisions would be meaningless if Congress had already intended that States themselves should be excluded from the regulatory and inspection requirement of FIFRA. Wyoming's answer is that Congress inserted these two provisions so that there would be the same exemptions for authorized state regulatory programs as for federal programs. It would be unwarranted, so Wyoming argues, to construe these exemptions as evidence of Congressional intent to also make States themselves subject to federal regulation.

I do not believe that Wyoming has really answered EPA's argument. Sections 18 and 12(e)(3) on their face would seem to make activities of both federal and state agencies and officials subject to FIFRA, except as they are exempted by these two sections. The EPA General Counsel, in fact, appears to have construed Section 18 as making all federal agencies subject to FIFRA, as the EPA has pointed out in its rebuttal memorandum. If the activities of federal agencies were subject to FIFRA but activities of state agencies were not, then state programs would enjoy a greater exemption than federal programs. But it is not necessary to consider to what extent the activities of federal agencies are made subject to FIFRA. Certainly the two exemptions do not advance Wyoming's argument for exclusion of state agencies and the applicability of FIFRA to States, the only question in this case.[4/]

4/ Whether or not state action has been preempted by a federal statute could be a different question than whether action by other federal agencies has also been superseded by the statute.

In sum, an examination of FIFRA itself does not disclose any plain Congressional purpose to exclude state agencies from the Act's regulatory and inspection provisions. In fact, precisely the opposite is disclosed, namely that state agencies are subject to FIFRA, since the Act establishes a comprehensive regulatory program covering both federal and state regulation and authorizes state regulation only if it is not prohibited by federal regulation.[5/]

When the legislative history is examined, what is again made clear is the all-inclusive scope of FIFRA in regulating the use of pesticides.

The bill (H.R. 10729) to amend the Federal Insecticide, Fungicide, and Rodenticide Act originated in the House of Representatives. In reporting out the bill, it was stated as follows, H.R. Rep. No. 92-511, 92d Cong., 1st Sess. 1-2 (1971):

> Section 2 of the bill contains a series of amendments to the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) which completely rewrite that statute. The thrust of these amendments is to change FIFRA from a labelling law into a comprehensive regulatory statute that will henceforth more carefully control the manufacture, distribution, and use of pesticides.
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> In so changing old FIFRA the statute would contain the following main provisions:
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> . . . . State authority to change Federal labelling and packaging is completely preempted and State authority to further regulate "general use" pesticides is partially preempted.

5/ See Section 24.

Among the reasons given for the bill in the House Report was the "need for . . . strengthening regulatory controls on the uses and users of pesticides." H.R. Rep. No. 92-511 supra at 4. The Senate Report showed a similar concern with stopping the misuse of pesticides. See S. Rep. No. 92-838, 92d Cong. 2d Sess. 4-16 (1972).

The purpose of the provision which ultimately became Section 24 of the Act (Section 24 in the House bill and Section 23 in the Senate bill), was explained as follows: "This section specifies the authorities retained by the States under the Act. Generally the intent of the provision is to leave to the States the authority to impose stricter regulation on pesticides use than that required under the Act." H.R. Rep. No. 92-511, supra at 28; S. Rep. No. 92-838, 92d Cong. 2d Sess. 30 (1972).

Congress also addressed itself to state action in considering the exemption under Section 18. As originally drafted, the bill would have provided only for exemption of federal agencies by Executive Order of the President if he determines that emergency conditions exist which require such exemption. H.R. Rep. No. 92-511, supra at 63. The Senate substituted its own amendment which broadened the exemption to include state agencies and provided that the Administrator may at his discretion exempt a federal or state agency if he determines that such exemption would be consistent with the purpose of the Act and would be in the public interest. S. Rep. No. 92-838, 92d Cong, 2d Sess. 69 (1972).

As enacted, the bill incorporated the Senate provision authorizing the Administrator to exempt both federal and state agencies, but retained the House provision that such exemptions should be only for emergency conditions. The explanation in the Conference Report was simply that, "[Section 18] permits the Administrator under emergency conditions to exempt Federal or State agencies." H.R. Rep. No. 92-1540, 92d Cong. 2d Sess. 33 (1972).

This history of Section 18 certainly indicates that Congress intended to give the States a limited exemption for emergency situations where otherwise there would have been no exemption at all.

Section 12(b)(3) was not specifically discussed in the Congressional reports on H.R. 10729. An exemption for public officials was contained in FIFRA prior to 1972.[6/] Congress, however, did not merely carry over this provision into the amended FIFRA without change. It had to replace the reference to Section 3a of the old FIFRA with a reference to the revised and greatly expanded list of violations in Section 12 of the new FIFRA. While it did revise the wording of the exemption in minor respects, it did not extend the exemption to the new violations

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6/ See former Section 135e(3) of the Federal Insecticide, Fungicide, and Rodenticide Act, Ch. 125, Sec. 7, 61 Stat 169 (1947) which provided, "The penalties provided for in violation of Section 3a shall not apply . . . to public officials while engaged in the performance of their official duties."

set out in Section 12(a)(2). Under the circumstances, it is reasonable to infer that Congress deliberately intended to make public officials subject to civil penalties for violations of Section 12(a)(2).[7/]

In sum, the legislative history does not lend any support to Wyoming's contention that Congress intended state agencies to be any more exempt from FIFRA's prohibitions than private persons.

Wyoming nevertheless claims that it is exempt from FIFRA under the 10th amendment which reserves to the States or to the people all powers not delegated to the United States nor prohibited to the States. Where the Federal law, however, is within the scope of powers vested in the National Government, States may not exercise their powers so as to conflict with the Federal law. In that case, article VI making the federal law the supreme law of the land comes into play. See Jones v. The Rath Packing Company, 45 U.S.L.W. 4323 (U.S. Mar 29, 1977); Nash v. Florida Industrial Comm., 389 U.S. 235 (1967). State action cannot stand which frustrates the purpose of the national legislation. Nash v. Florida Industrial Comm., supra at 238; California v. United States, 320 U.S. 577, 585 (1944); United States v. California, 297 U.S. 175, 185 (1936).

7/ Wyoming argues that former Section 135e(3) was never construed as granting authority by which inspection of statehouse records could be demanded. It does not necessarily follow, however, that because the power was not asserted that it accordingly did not exist. See National Petroleum Refiners Ass'n v. FTC, 482 F.2d 672, 694 (D.C. Cir. 1973), cert. denied, 415 U.S. 951 (1974).

There can be no doubt that Wyoming is claiming a right of state action which conflicts with FIFRA and frustrates its purpose. One of the evils against which FIFRA was expressly directed was the misuse of pesticides. The misuse charged here is that the manner in which COMPOUND 1080 is being used to kill coyotes also endangers the lives of non-target animals. See PR Notice 72-2, reproduced in 40 FR 44734 (Sep. 29, 1975). Wyoming argues, however, that even though its citizens are prohibited from misusing a pesticide in such a manner, Wyoming itself is not prohibited from doing so for the benefit of its citizens. Such a construction would make FIFRA largely ineffective to accomplish its objectives of protecting the environment. There is no discernible difference in the impact on the environment whether the misuse is by a state agency or a private person.

Wyoming nevertheless aruges that construing FIFRA to include a state's activities raises a serious constitutional question which should be avoided. I do not find the constitutional question to be of that magnitude. The case which Wyoming relies on is National League of Cities v. Usery, 96 S. Ct. 2464 (1976). That case held that Congress could not extend the minimum wage and maximum hours provisions of the Fair Labor Standards Act to state employees engaged in such state activities as fire prevention, police protection, education, sanitation, public health, and parks and recreation. The Court said that the employer-employee relation which was sought to be regulated was outside

the scope of national power under the Commerce clause, and was protected by the 10th amendment. This was because the federal regulation operated to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions. 96 S. Ct. at 2474. The case, however, is readily distinguishable from this case.

The federal wage and hour provision considered in National League of Cities affected all state activity regardless of the function performed. The specific question presented here was not considered by the Court, namely, to what extent may a State for the benefit of its citizens continue to engage in pesticide uses which may be environmentally harmful and which are prohibited by federal law to the State's citizens. Where the health of the environment is at stake, much more than the purely local interest of any one State is likely to be involved. In United States v. California, supra, the Supreme Court held that a State was bound by the Federal Safety Appliance Act in the operation of a state-owned railroad. In so ruling the Court said "[w]e can perceive no reason . . . to exempt a business carried on by a state from the otherwise applicable provisions of an Act of Congress, all-embracing in scope and national purpose, which is as capable of being obstructed by state as by individual action." 297 U.S. at 186. The continued validity of United States v. California was recognized in National League of Cities, supra, 96 S. Ct. at 2475, n. 18. I believe this case to fall within the principle expressed in United States v. California.

Here also is an Act of Congress which is all-embracing in scope and national in purpose, and which is as capable of being obstructed by state as well as by individual action.

Wyoming argues that Congress in the past has maintained a high respect for sovereignty and separate existence of the States in the area of pest and wildlife control. This may be true, and in enacting FIFRA Congress did recognize the right of the States to regulate the use of pesticides, but with the limitation that State regulation cannot contravene federal law. I do not find either in FIFRA or its legislative history a Congressional intention to exclude state agencies from the Act's prohibitions, or in the case law authority against making the prohibitions of FIFRA apply to state agencies as well as to private parties.[8/]

The motion to dismiss is denied. It is my intention to conduct a prehearing exchange of information by correspondence as authorized by Section 136(e) of the Rules, 40 CFR 136(e), and the parties will be notified with respect thereto.

Gerald Harwood
Gerald Harwood
Administrative Law Judge

May 5, 1977

8/ EPA also argues that Wyoming is estopped from claiming it is exempt under FIFRA by having applied for registrations of pesticides, citing Gottesman v. General Motors Corp., 222 F. Supp. 342 (S.D. N.Y. 1963). I have not considered this argument since it is unnecessary to my decision.

FEDERAL INSECTICIDE, FUNGICIDE, AND RODENTICIDE ACT, (FIFRA) AS AMENDED ON OCTOBER 21, 1972, 86 STAT. 973, PUBLIC LAW 92-516 AND NOVEMBER 28, 1975, 89 STAT. 751, PUBLIC LAW 94-140

Parallel Citations

Statutes at Large	7 U.S.C.	Statutes at Large	7 U.S.C.
Section 2	Section 136	Section 15	Section 136m
3	136a	16	136n
4	136b	17	136o
5	136c	18	136p
6	136d	19	136q
7	136e	20	136r
8	136f	21	136s
9	136g	22	136t
10	136h	23	136u
11	136i	24	136v
12	136j	25	136w
13	136k	26	136x
14	136 l	27	136y

CERTIFICATE OF MAILING

I hereby certify that the original of Order and Opinion of Gerald Harwood, Administrative Law Judge, EPA, dated May 5, 1977, was mailed via United States Mail, to Ms. Ginny Burns, Regional Hearing Clerk, EPA, Region VIII, and that a copy was sent to the following on May 6, 1977:

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May 6, 1977

CERTIFICATION

I hereby certify that the original of this letter was mailed to the Regional Hearing Clerk, Region VIII and that a copy was sent to the addressees on May 6, 1977.

Shirley G. Clifford

Shirley G. Clifford

May 6, 1977