UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

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In the Matter of)
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Reabe Spraying Service, Inc.,) Docket No. I.F. & R.-V-651-C
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Respondent)

DECISION DENYING APPLICATION FOR FEES AND EXPENSES

This is an application for attorney fees and expenses pursuant to the Equal Access to Justice Act, Public Law No. 96-481, 94 Stat. 2325, specifically pursuant to Section 203(a)(1) of the Act (codified in 5 U.S.C. 504), and the Agency's implementing regulations, 40 CFR Part 17.

The applicant, Reabe Spraying Service, Inc. ("Reabe") was the respondent in a proceeding under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), Section 14(a)(1), 7 U.S.C. 136l(a)(1), for the assessment of civil penalties for alleged violations of the Act. The administrative complaint charged Reabe with six violations in connection with an aerial spraying of a mixture of Parathion, Sevin and Kocide. Four of the violations concerned Reabe's alleged failure to follow label directions in applying Parathion, one concerned its alleged failure to follow label directions in applying Sevin, and one concerned its alleged failure to follow label directions in applying Kocide. Following three days of hearings, an initial decision was filed on April 30, 1982, sustaining one of the charges relating to Parathion, but dismissing all other charges. Reabe appealed the decision, and on February 16, 1983, the Judicial Officer entered a final decision adopting the initial decision.

To be entitled to an award of attorney's fees and expenses, the applicant must be an eligible prevailing party.1/ The grounds on which fees and expenses are awarded are set forth in 40 CFR 17.06(a), which provides as follows:

> A prevailing applicant may receive an award for fees and expenses incurred in connection with a proceeding unless the position of the EPA as a party to the proceeding was substantialy justified or unless special circumstances make the award sought unjust. The fact that the EPA did not prevail does not demonstrate that the Agency's position was not substantially justified.2/

The first question to consider is whether Reabe is eligible for an award of fees. Reabe has submitted with its application an asset schedule to its 1981 income tax return showing a net worth of less than $500,000.3/ The EPA contends that this is inconsistent with Reabe's position in the proceeding wherein it elected not to contest its financial ability to pay a proposed penalty that the EPA says was calculated on the assumption that Reabe's net worth was $1,000,000. The argument is presumably intended solely for the purpose of impeaching Reabe's figures, since even if Reabe's net worth were $1,000,000, it would still be eligible to obtain fees and

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1/ See 5 U.S.C. 504(a)(1); 40 CFR 17.05.

2/ The first sentence in 40 CFR 17.06(a) follows generally the language of 5 U.S.C. 504(a)(1). The last sentence is not in the Act but is in accord with the legislative history and with judicial construction of the Act. See infra at 6-7.

3/ "Net worth" is not specifically defined in the Act or the regulations but it is assumed to have its ordinary meaning of assets less liabilities.

expenses.4/ There are serious flaws in the EPA's argument. First, the proposed penalty, in accordance with the EPA's FIFRA guidelines, was calculated on the basis of Reabe's gross sales, and was so stated in Complainant's prehearing letter dated September 18, 1981. The assumption that Reabe also had a net worth of over $1,000,000, appears to have now been disclosed for the first time and could not conceivably therefore provide a basis for any waiver by Reabe. Second, in stating that it would not contest its financial ability to pay the proposed penalty of $6,000, Reabe went on to say that it did intend to apply for all fees and costs, and so no waiver can be implied by its action.5/

I find, accordingly, that Reabe is eligible for an award.

The next matter to be considered is whether Reabe "prevailed" within the meaning of the Equal Access to Justice Act and the regulations so as to be entitled to reimbursement for expenditures in defending against the charges that were dismissed. In the complaint, four label directions for Parathion were alleged to have been violated. The one on which the complaint was upheld was the violation of the label direction to "keep all unprotected persons and children away from treated area or when there is danger of drift." A penalty of $5,000 was requested for this violation and it was the only violation with respect to Parathion for which a penalty was requested. Two other violations with respect to

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4/ Eligibility extends to corporations with a net worth of up to $5 million. 40 CFR 17.05(b)(5).

5/ See letter of Reabe's attorney dated August 18, 1981.

Parathion namely, of the label directions "Do not apply when weather conditions favor drift from the areas treated", and "Do not allow this material to drift onto neighboring crops or non-crop areas" were dismissed because they were not sustained by the evidence. A fourth violation, that of the label statement reading, "Do not breathe - Poisonous if breathed - Breathing vapors, spray mist or dust may be fatal" was dismissed because the EPA construed this label warning as being violated by Reabe if persons on adjoining land were exposed to drifting vapors and spray mist, and this construction was rejected.

In the case of the Kocide, the label direction alleged to have been violated was that reading "Do not apply when weather conditions favor drift from the areas treated." A penalty of $500 was requested. That charge was dismissed on the same grounds as the alleged violation of a similar direction on the Parathion label, namely, that it was not sustained by the evidence.

Finally, with respect to the Sevin, the label directions alleged to have been violated were the statements "Harmful if inhaled" and "Avoid breathing of dust or spray." A penalty of $500 was also requested for this violation. That charge like the charge relating to similar wording on the Parathion label was dismissed because it was found to rest on a misinterpretation of what was intended by the statements.

It can be seen, that the five charges which were dismissed all were based upon the underlying claim that the pesticidal mixture being sprayed had drifted onto adjoining property. The EPA contends that they were minor charges because no penalty was requested for the three charges relating to Parathion and only $500 each for the Sevin and Kocide charges. Even though the Agency was seeking to establish only the violation and request only a nominal penalty or none at all for these charges, however,

Reabe regarded them as important enough to defend against and not to have on its record a finding that it did commit these violations. Not to reimburse Reabe for its effort if the Agency has taken an unreasonable position, would be contrary to the intendment of the Equal Access to Justice Act. As the court stated in Goldhaber v. Foley, 698 F. 2d. 193, 197, "[T]he Act's governing principle [is] that the United States should pay those expenses which are incurred when the government presses unreasonable positions during litigation. This principle devolve's from the Act's central purpose to eliminate any barrier to litigation challenging unreasonable government conduct presented by the specter of attorney's fees."

A final argument made by the EPA is that Reabe should not be considered to have prevailed because the initial decision did not expressly adopt Respondent's position that there had not been and could not have been any drift. Instead, there was only a finding that the evidence was insufficient to establish that drift did occur or could have occurred. All that was required to be found, however, in order for Reabe to prevail, was that the EPA had failed to show by the preponderance of evidence that the facts with respect to the dismissed charges were as alleged in the complaint, i.e., that their existence was more probable than their nonexistence.6/ It is all, accordingly, that should be required for Reabe to be a prevailing party.

It is found, therefore, that Reabe is a prevailing party within the meaning of the Equal Access to Justice Act and the regulations on those charges that were dismissed, and is entitled to reimbursement unless the

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6/ See 40 CFR 22.24.

EPA's position was substantially justified or unless special circumstances make the award unjust.

As to whether the EPA's position was substantially justified or whether special circumstances make an award unjust, the legislative history has this to say about the standard to be applied:

> The test of whether or not a Government action is substantially justified is essentially one of reasonableness. Where the Government can show that its case had a reasonable basis both in law and fact, no award will be made. In this regard, the strong deterrents to contesting Government action require that the burden of proof rest with the Government. This allocation of the burden, in fact, reflects a general tendency to place the burden of proof on the party who has readier access to and knowledge of the facts in question. The committee believes that it is far easier for the Government, which has control of the evidence, to prove the reasonableness of its action than it is for a private party to marshal the facts to prove that the Government was unreasonable.
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> Certain types of case dispositions may indicate that the Government action was not substantially justified. A court should look closely at cases, for example, where there has been a judgment on the pleadings or where there is a directed verdict or where a prior suit on the same claim had been dismissed. Such cases clearly raise the possibility that the Government was unreasonable in pursuing the litigation.
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> The standard, however, should not be read to raise a presumption that the Government position was not substantially justified, simply because it lost the case. Nor, in fact, does the standard require the Government to establish that its decision to litigate was based on a substantial probability of prevailing. Furthermore, the Government should not be held liable where "special circumstances would make an award unjust. This "safety valve" helps to insure that the Government is not deterred from advancing in good faith the novel but credible extensions and interpretations of the law that often underlie vigorous enforcement efforts. It also gives the court discretion to deny awards where equitable considerations dictate an award should not be made.7/

7/ H.R. Rep. No. 1418, 96th Cong. 2d. Sess. 10-11 (1980), reprinted in 1980 U.S. Code Cong. & Ad. News 4984-90; see also H.R. Conf. Rep. No. 96-1434, 96th Cong. 2d. Sess. 21-22 (1980), reprinted in 1980 U.S. Code Cong. & Ad. News 5010-11.

In short, the inquiry is to determine whether the EPA has shown that its case had a reasonable basis in law and fact.

When Respondent prevails because the Agency was found to have not proved its case by the preponderance of evidence, the reasonableness of the Agency's position can be judged by the evidence it relied on. If, for example, the EPA had no evidence to support its case, the Agency's position could not be described as a reasonable one. See Wolverton v. Schweiker, 533 F. Supp. 420, 425 (D. Idaho 1982). On the other hand, simply to award fees and expenses because the Agency lost on the factual issues would be inconsistent with Congress' intent. The standard of reasonableness "should not be read to raise a presumption that the Government's position was not substantially justified simply because it lost the case. Nor, . . . does . . . [it] require the Government to establish that its decision to litigate was based on a substantial probability of prevailing." H.R. Rep. No. 1418, supra at 11, 1980 U.S. Code Cong. & Ad. News at 4990. See Broad Ave. Laundry and Tailoring v. U.S., 693 F. 2d. 1387, 1391-92 (Fed. Cir. 1982); Bennett v. Schweiker, 543 F. Supp. 897 (D.D.C. 1982).

Obviously, then, the EPA's burden lies somewhere in between these two polar positions: it has to show that there was evidence to support its position but does not have to show that the evidence was so overwhelming as to virtually guarantee that it would prevail. Given the risks necessarily involved in litigation where the burden is on the Government to show that the evidence preponderates in its favor, and this, in turn, depends on how the presiding officer evaluates the evidence, an appropriate test in accord with Congress' intent would appear to be that the EPA must show that the Agency was possessed of facts from which it could reasonably believe that the law had been violated. Since the facts depend upon the evidence in the Agency's possession, another

way of stating the test is that the Agency's position is reasonable if the evidence on which it proceeded was sufficient to establish a prima facie case warranting a decision in favor of the Agency if left unexplained or unrebutted. If the evidence is speculative or deficient in some other way so as not to add up to a prima facie case, it is difficult to see how the Agency's position could be justified as reasonable. I find that the Agency has sustained the burden of showing that its position was reasonable under the test as herein stated.8/

The EPA in this case relied primarily on the testimony of several adults who were present at the time of spraying and who experienced physical symptoms consistent with exposure to Parathion, Sevin or Kocide. Reabe's principal witness in defense was Dr. Morgan, an admitted expert on detecting adverse effects of pesticides on human health. Dr. Morgan had supervised tests for pesticide poisoning done on blood and urine samples taken from several of the adults who were assertedly exposed to the pesticidal spray. His testimony that the tests were reliable indications of pesticide poisoning, and that no evidence of pesticide poisoning was observed in the samples tested, was found to nullify the inference that the adults had been exposed to a pesticidal overspray. The EPA, however, did not know the substance of Dr. Morgan's testimony until his deposition was taken

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8/ An Agency may have reasonable grounds for proceeding with a case even if the evidence to support its position is so weak that the chances are against its prevailing, but I am not aware of what they would be. In any event, nothing said by the Agency in support of its position here indicates that the Agency had any grounds for proceeding other than that the facts of which it was cognizant warranted its prosecution of the case. Also developments as the case proceeds could possibly change the Agency's position from a reasonable one to an unreasonable one. Such developments, however, do not appear to have occurred in this case.

after the hearing, and even then could have concluded that the result was still in the balance, since Dr. Morgan did not purport to explain what could have caused the symptoms experienced by the adults.

Reabe asserts that the tests of samples taken by the Wisconsin Department of Agriculture, which the EPA did have in its possession, furnished the EPA with scientific evidence indicating no drift or overspray. The EPA, however, could reasonably believe that the "eyewitness" testimony from the adults who claimed they were exposed to the spray would outweigh the negative results obtained from the tests, particularly since the evidence did raise some questions about the way the samples were handled.

Finally, to show that of the weather conditions favored drift, the EPA relied on expert testimony that the reported meterological conditions at the time of the spraying could have favored drift toward the adjoining property. While this testimony was not considered sufficient because of other evidence in the record, the answer to the question as to what weather conditions should be considered as favoring drift was not clear-cut. EPA's reliance on the expert testimony to show that drift which it claimed did occur was consistent with weather conditions was reasonable, and so was the inference drawn therefrom that the weather conditions did favor drift.

In short, the factual issues in this case were sharply disputed. Although the EPA did not prevail, there is simply no basis for saying that the EPA had taken an unreasonable position on any of the factual issues.

As to the two charges which were dismissed because it was found that the EPA had misconstrued the label warning against breathing or inhaling the spray, it is to be noted that this was not a defense raised by Reabe,

who relied entirely on its factual con tention that no drift did occur could have occurred. Instead, dismissal was based on my own reading of what was intended by the statements. Assuming, however, that Reabe would still be considered a prevailing party even though it won on grounds other than those urged by it, I find that there was substantial justification for the Agency's position.9/

The EPA's interpretation did appear to be raised for the first time. It was consistent with its underlying factual position that there had been drift. Also implicit in the label warnings was that the pesticide was harmful if breathed or inhaled by anybody. There is, additionally, authority for the proposition that, being remedial in purpose, the label statements should be broadly construed to prohibit all consequences that could be inherent therein.10/ While I found that the Agency was attempting to stretch the meaning of the label statements too far, the Agency was advancing in good faith a credible interpretation of the label statements. It's position, therefore, had a reasonable basis in both law and fact and

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9/ The EPA has not specifically addressed the question of whether its interpretation of the label statements was reasonable, although its burden of proving that its action was substantially justified applies to its legal as well as factual positions. In view of the EPA's vigorous defense of its position, however, and also because Reabe has also avoided any discussion of the question in its papers, I construe the Agency's silence as attributable to an oversight or to a misunderstanding of what its burden under the Equal Access to Justice Act entails, rather than an admission that is position was unjustified. I could, of course, now ask the EPA to brief the question before deciding it, but in view of my familarity with the proceeding, such a step seems unnecessary.

10 / See Gardner & North Roofing & Siding Corp. v. Bd. of Governors of the Federal Reserve Systems, 464 F. 2d 838, 841-42 (D.C. Cir. 1972).

was substantially justified within the meaning of the Equal Access to Justice Act.11/

Since it is found that the EPA's position is substantially justified, it is unnecessary to consider the EPA's argument that special circumstances exist which would in any event make an award unjust.12/

Accordingly, it is recommended that the application for fees be denied.

Gerald Harwood
Administrative Law Judge

July 26, 1983

11/ See H.R. Rep. No. 1418 supra at 11, 1980 U.S. Code Cong. & Ad. News at 4990; S&H Riggers & Erectors Inc. v. Occupational Safety & Health Review Commission, 672 F. 2d 426, 430-31.

12/ While also not necessary for decision in this case, it is further noted that Reabe's application in its present form does not give enough information to determine the reasonableness of its request for $5,279.63 to cover its fees and expenses. Specifically, Reabe has failed to provide a detailed itemization of the time spent and the rate at which time was billed, without which no determination can be made as to whether Reabe's calculations are in compliance with the rates specified in 40 CFR 17.07(b)(1) and (2). Counsel should bear this in mind with respect to any future applicaton for fees which may be filed.