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UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

85 DEC 2 A11: 16

In the Matter of	)	
	)	
Tierra Verde Company, Inc.,	)	Docket No. FIFRA-09-0422-C-85-1
	)	
Respondent	)	

Federal Insecticide, Fungicide and Rodenticide Act. Sale of restricted use pesticides to uncertified applicators is unlawful.

Federal Insecticide, Fungicide and Rodenticide Act. The proviso contained in Sec. 12(a)(2)(F) permitting the sale of restricted use pesticides to uncertified applicators is inoperative in the absence of regulations issued by the Administrator.

Federal Insecticide, Fungicide and Rodenticide Act. It was incumbent upon Respondent to determine existence or nonexistence of regulations permitting sale of restricted use pesticies to uncertified applicators.

Federal Insecticide, Fungicide and Rodenticide Act. In the absence of action by a State with certification authority under Sec. 4 to submit a plan for the sale of restricted use pesticides to uncertified applicators, and approval thereof by the Administrator, or independent action by the Administrator to approve a plan applicable to all States, 40 CFR 171.11 is inoperative except in any State and on any Indian Reservation where, because there is no approved State or Tribal certification plan in effect, the Administrator implements an EPA plan for the Federal certification of applicators of restricted use pesticides.

APPEARANCES

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ACCELERATED DECISION[1/]

This is a proceeding under the Federal Insecticide, Fungicide and Rodenticide Act, as amended, (FIFRA), Section 14(a)(1), 7 U.S.C. 136 l(a)(1) for assessment of a civil penalty for alleged violations of the Act.[2/]

Complaint was issued by the Environmental Protection Agency (EPA/Complainant), Region IX, against Tierra Verde Company, Inc. on November 13, 1984 charging Respondent with four counts of sale of restricted use pesticides to persons who are not certified for application of restricted use pesticides. The restricted use pesticide is Paraquat as classified pursuant to Sec. 3(d)(1)(C) of FIFRA (7 U.S.C. 136a(d)(1)(C)). The civil penalty proposed is $20,000.00.

Respondent filed a timely Answer admitting the factual allegations of the Complaint in its First Affirmative Defense, as follows:

> The Complaint fails to state a claim upon which relief may be granted in that the sales of Paraquat alleged in the Complaint were made to persons who were not certified applicators, but the Paraquat was applied by, or under the direction of, a certified applicator.

Factual Background

Tierra Verde is a California corporation engaged in the business of selling pesticide products. Among the pesticide products which Tierra Verde has

1/ This Accelerated Decision constitutes an Initial Decision. 40 CFR 22.20(b).

2/ FIFRA, Section 14(a)(1) provides, as follows:

> Any registrant, commercial applicator, wholesaler, dealer, retailer or other distributor who violates any provision of this Act may be assessed a civil penalty by the Administrator of not more than $5,000 for each offense.

sold is the restricted use pesticide Paraquat. As a pesticide seller, Tierra Verde has been subject to both state and federal regulation.

During a September 1984 inspection of Tierra Verde's retail store, including its books and records, an inspector determined that Tierra Verde had sold Paraquat to four growers who were not certified applicators of restricted use pesticides. Although the Tierra Verde records indicated that the Paraquat had been provided directly to the four growers, in each instance the Paraquat was, in fact, applied under the direction of a certified applicator of restricted use pesticides. See declarations of Robert Campo, John Kamburoff, and Gregory Shortey. The only violations alleged in the instant Complaint are that Tierra Verde "made Paraquat available for use" to persons who were not certified applicators.

Subsequent thereto, Complainant filed, on April 15, 1985, a Motion For Accelerated Decision, together with a Memorandum In Support thereof, as follows:

> Respondent is charged with the violation of Section 12(a)(2)(F) of FIFRA [7 U.S.C. §136j(a)(2)(F)] on four different occasions. That Section reads, as follows:
>
> (a) In General.-- . . . .
>
> (2) It shall be unlawful for any person -- . . . .
>
> (F) to make available for use, or to use, any registered pesticide classified for restricted use for some or all purposes other than in accordance with Section 3(d) and any regulations thereunder; Provided, That it shall not be unawful to sell, under regulations issued by the Administrator, a restricted use pesticide to a person who is not a certified applicator for application by a certified applicator; [Emphasis Added.]

FIFRA prohibits the making available for use by an uncertified applicator of restricted use pesticides as well as the use by such applicator.

The prohibitions in the statutory provision are conditioned upon the issuance of regulations by the Administrator, EPA. (See Section 25(a) of FIFRA [7 U.S.C. §136w(a)].) The conditional language of Sec. 12(a)(2)(F) of the statute was added by the Congress by P.L. 95-396 which was signed by the President on September 30, 1978. Anterior to the enactment thereof, the Administrator, EPA, published in the Federal Register of Thursday, February 9, 1978, at page 5783, the following:

> IX. Purchase By Uncertified Persons For Use By Certified Applicators
>
> An area of concern that goes back several years relates to the farmer who buys pesticides in the fall or when prices are favorable, and has them applied by a commercial applicator at a later time. The farmer frequently does not know the identity of the applicator at the time of purchase since he will contract with the bidder who best meets his needs. Thus, such purchase cannot reasonably be construed to be "under the direct supervision of a certified applicator," a procedure allowed by current regulations. The argument can be made that certification is sufficiently easy to obtain and that it is not unduly burdensome to require the non-applicator farmer to become certified in order to purchase a restricted use pesticide. The Agency also believes that it would be environmentally beneficial and administratively simpler to limit the sale of restricted use pesticides to certified applicators and persons working under their direct supervision. However, the House of Representatives has recently passed a bill to amend FIFRA which, among other things, would allow uncertified persons to make such purchases. In addition the State-Federal Implementation Advisory Committee, composed primarily of State regulatory officials who are responsible for certification, as well as individual State program administrators, have advocated the controlled authorization of purchase of restricted pesticides by uncertified persons.

> In light of the urgent need to finalize these regulations, the Agency cannot postpone their promulgation until final resolution by Congress. The Administrator has therefore determined that sale of a restricted use pesticide to, or purchase, transportation, or storage of a restricted use pesticide by, an uncertified person is not inconsistent with the intent of the Act if they occur in any State which the Administrator has determined, upon request by the State, has in effect laws and/or regulations governing sale, purchase, transportation, and storage which: (a) require uncertified purchasers of restricted use pesticides to furnish written evidence that the pesticide is being purchased for use by a certified applicator, and (b) require sellers to maintain adequate records of such evidence. Any acquisition of a restricted use pesticide by an uncertified person must be in compliance with those laws and/or regulations. Notice of the Administrator's determination will be published in the Federal Register. 43 FR 5983. 3/ (Emphasis supplied.)

Complainant continues.

The preamble to the Federal Register Notice of November 29, 1983 makes it clear that restricted use pesticides are not to be made available for use by uncertified applicators under FIFRA prior to publication of a regulation. For example: Page 53972, column 1 reads: "[t]he rule will. . .prescribe conditions under which pesticide dealers can make restricted use pesticides available to

3/ By way of explanation, the critical portion of this language is that which relates to any State which the Administrator has determined, upon request by the State, has in effect laws and/or regulations governing sale, etc. . . . .and further, any acquisition of a restricted use pesticide by an uncertified person must be in compliance with those laws and/or regulations. Notice of the Administrator's determination will be published in the Federal Register. No State, including Arizona, has made such application, nor has the Administrator made such a determination for any State. The proviso contained in Sec. 12(a)(2)(F) was added to the statute in September 1978 amendments to FIFRA (P.L. 95-396, 92 Stat. 832). It will be noted that the proviso required the promulgation of regulations which has not occurred.

uncertified persons for use by a certified applicator. . . ." and in column 2, "[a]t the present time, persons to whom such restricted use pesticides are made available for use must be certified." Page 53973, column 3, reads:

> EPA recognizes the need to ensure that restricted use pesticides are made available only to persons who are qualified to use them safely, without making it unduly burdensome for certified applicators to obtain restricted use pesticides. Therefore, the Agency has amended the rule to permit pesticide dealers to make restricted use pesticides available to uncertified persons for use by certified applicators only under the circumstances set forth therein.
>
> This rule affects only pesticide dealers making restricted use pesticides available to uncertified persons in States or on Indian Reservations where the Administrator conducts the pesticide applicator certification and training program.
>
> . . . 4/

The State of Arizona where the delivery of the restricted use pesticides which are the subject of the Complaint took place has a State plan to certify and train applicators approved under Section 4 of FIFRA [7 U.S.C. §136b], but has not adopted a similar State plan procedure for making restricted use pesticides available to uncertified applicators which has been approved by the Administrator and published in the Federal Register.

In summary, the law applicable to these proceedings at Section 12(a)(2)(F) prohibits making restricted use pesticides available for use by an uncertified applicator except in the states which have their own certification program where provisions similar to those set out at 40 CFR Part 171 exist.

4/ The Administrator only conducts the pesticide applicator certification and training program in Colorado and Nebraska on Indian Reservations.

That there were sales to uncertified applicators is admitted by Respondent.

Respondent, under date of April 29, 1985, filed a Cross Motion For Accelerated Decision and Memorandum In Support thereof agreeing that there are no genuine issues of material fact and that this case can be disposed of on a motion for accelerated decision.[5/]

Respondent's cross motion asserts that first, the sales of Paraquat at issue here did not constitute a violation of Section 12(a)(2)(F) because in each instance the Paraquat was applied under the direction of certified applicators. Second, that even if the sale of Paraquat at issue here were technically not in compliance with Section 12(a)(2)(F), any deviations from the statutory requirements are so minor that an enforcement action is unwarranted.

Respondent argues in its motion, as follows:

> Section 12(a)(2)(F) of FIFRA provides, as follows:
>
> It shall be unlawful for any person --
>
> * * *
>
> (F) to make available for use, or to use, any registered pesticide classified for restricted use for some or all purposes other than in accordance with Section 3(d) and any regulations thereunder; Provided, that it shall not be unlawful to sell, under regulations issued by the Administrator, a restricted use pesticide to a person who is not a certified applicator for application by a certified applicator. (Emphasis in original.)

5/ Both parties agree that the accelerated decision should be limited to a determination as to whether or not a violation of Sec. 12(a)(2)(F) occurred and requested that the issue of assessment of civil penalty be reserved for hearing.

In accordance with this section, it is unlawful as a general rule to make a restricted use pesticide available for use by a person other than a certified applicator. However, the statute expressly creates an exception to this general rule allowing restricted use pesticides to be sold, under regulations issued by EPA, to persons who are not certified applicators "for application by a certified applicator."

The exception contained in Section 12(a)(2)(F) was added to the statute by the 1978 FIFRA amendments (Pub. Law 95-396, 92 Stat. 832). The purpose of that amendment to Section 12(a)(2)(F) was described in H.R. Report No. 95-663, House Committe on Agriculture, 95th Cong., 1st Sess. (1977) at 34:

> Unlawful Acts. -- Section 16 would amend Section 12(a)(2)(F) of FIFRA which states that it is unlawful for any person to make available for use, or to use, any registered pesticide classified for restricted use for some or all purposes other than in accordance with Section 3(d) and any regulations thereunder. This section would allow the sale of a restricted use pesticide to a person who is not a certified applicator for application by a certified applicator. Under this provision farmers would be permitted to purchase their own restricted use pesticides (and thus perhaps realize some savings) and have them applied by certified applicators.

Although EPA has consistently opposed allowing the sale of restricted use pesticides to noncertified applicators, prior to enactment of the 1978 FIFRA amendments (and in anticipation of these amendments) EPA announced in the Federal Register that it was adopting a policy which would allow such sales to be made subject to certain limitations.

43 Fed. Reg. 5782, 5783, February 9, 1978. However, EPA did not publish any regulations at that time implementing its stated policy. Id.

More than five years after Section 12(a)(2)(F) was amended to allow the sale of restricted use pesticides directly to growers, EPA finally promulgated limited regulations setting forth procedures to be followed in selling restricted use pesticides directly to growers. 48 Fed. Reg. 53972 (November 29, 1983). However, those regulations (40 CFR 171.11(g)(2)(ii)) were applicable only in states which have no approved certification plan in effect. No regulations were published. . . . Instead, EPA again retreated to its earlier position of publishing a policy statement, without implementing regulations, purportedly allowing sales of restricted use pesticides to noncertified applicators subject to certain limitations. 48 FR at 53973-74. Thus, at this time -- more than six and a half years after Congress amended Section 12(a)(2)(F) to allow the sale of restricted use pesticides -- EPA still has not promulgated regulations setting forth procedures governing the sale of restricted use pesticides to growers in states which have approved certification plans in effect.

As noted above, Section 12(a)(2)(F) establishes as a general rule that it is unlawful to sell a restricted use pesticide to a person who is not a certified applicator, but that section also contains an exception to the general rule which allows the sale of restricted use pesticides to growers for application by certified applicators. Although EPA contends that the exception allowing sales of restricted use pesticides to growers is not effective until it promulgates implementing regulations, it has not yet promulgated such regulations. . . . Under these circumstances, this administrative tribunal should hold that the Section 12(a)(2)(F) exception is effective without implementing regulations. To hold otherwise would allow EPA to thwart the clear intent of Congress expressed in the 1978 FIFRA Amendments to allow the sale of restricted use pesticides to growers in states which have approved certification plans by the administrative device of failing to promulgate regulations.

In this instance, the Paraquat sold to the growers was in fact applied under the supervision of certified applicators. See Campo, Kamburoff, and Shortey Declarations. EPA does not dispute this fact. Thus, if the Court holds that the exception to Section 12(a)(2)(F) allowing sales of restricted use pesticides is effective without implementing regulations, the sales of Paraquat at issue here do not constitute violations

of Section 12(a)(2)(F) because in each instance the Paraquat was applied under the direction of a certified applicator.

And further, it is important to note that, with one exception, all of the Paraquat sales at issue in this case occurred prior to November 23, 1983, the date when EPA first promulgated its regulations establishing requirements for the sale of restricted use pesticides to growers in states without approved certification plans. Thus, at the time those sales were made, EPA did not even have any regulations in place for states which did not have approved certification plans in effect.

Complainant filed, under date of May 15, 1985, a Response To Respondent's Cross Motion wherein it is stated that:

The 1978 amendment of FIFRA does not impose a requirement that the Administrator must publish regulations implementing the exception in Section 12(a)(2)(F).. The general authority for implementing FIFRA by the Administrator through the publication of regulations is found at Section 25 [7 U.S.C. §136w]. The reasonable interpretation of the language found in that Section is that the authority is discretionary so long as there is compliance with the standards set forth in that Section. The specific authority for the Administrator to regulate with respect to restricted use pesticides is found at Section 4(a) of FIFRA [7 U.S.C. §136b(a)]. The 1978

amendments to FIFRA did not change the Administrator's exercise of discretion with the respect to the need to regulate. Common sense dictates that the fact the Administrator did not see fit to regulate with respect to the making available for use, restricted use pesticides by uncertified applicators until November 1983, can provide no defense to Respondent's failure to comply with the law applicable to Respondent prior to the publication of the final rule.

This November 29, 1963 Federal Register notice, again, only applies to Agency administered programs in Colorado, Nebraska and Indian Reservations.

The final rule published on November 29, 1983, by the Administrator was published in its proposed form at 47 FR 32551 on July 28, 1982. That publication should have been sufficient notice to anyone engaged in the business of selling highly toxic pesticides classified under FIFRA for restricted use such as Respondent that there were limitations pertaining to such sales under the law.

In Complainant's Memorandum at page 5, line 5, it was indicated that the State of Arizona applied for and was given authority to certify private and commercial applicators as authorized by 40 CFR 171.7. The preamble to the proposed rule published at 47 FR 32551 makes it very clear at page 32551 that:

> At the present time, persons to whom such restricted use pesticides are made available for use must be certified in accordance with regulations at 40 CFR Part 171.

Complainant continues.

Contrary to Respondent's contentions in the Memorandum, (bottom of page 6, top of page 7) the current status of the law is that it is the States of Arizona or California, not the United States Environmental Protection Agency, who must act before it is lawful for Respondent to make restricted use pesticides available to uncertified applicators. The alternative to states such as the States of Arizona or California subsequent to the publication of the aforementioned final rule is found in the preamble to the final rule beginning with the sentence that starts on the last line of the last column of page 53973 and continues to the following page, which reads:

> States having State Plans approved under FIFRA Section 4 and wishing to adopt a similar procedure of making restricted use pesticides available to uncertified persons shall submit to the Administrator a Plan containing the minimum standards outlined in 40 CFR Part 171.

The above is partly true. The EPA could, on its own, amend the final rule in 40 CFR 171 to include all states and not simply states in which EPA administers the program.

While the Cross Motion and Response thereto address recordkeeping requirements for sales of restricted use pesticides, the Complaint does not, in fact, charge such a violation, nor is any penalty proposed therefor. However, it should be noted that the minimum recordkeeping requirements to which Respondent is subject are found in State law by virtue of the requirements imposed on the States of Arizona and California under 40 CFR §171.7(b)(1)(iii)(E). The record-

keeping requirements set forth in Section 171.11 apply to EPA administered programs which means on Indian reservations and the States of Colorado and Nebraska. The recordkeeping obligation imposed by the regulations is derived from the authority set forth in Section 4 of FIFRA [7 U.S.C. §136b] and has no bearing upon the application of Section 12(a)(2)(F).

Findings of Fact

1. Tierra Verde Company, Inc. is a California Corporation, and a person within the meaning of Section 2(s) of FIFRA [7 U.S.C. §136(s)], which has a place of business located at 15th and Lovekin; Blythe, California (Facility).

2. At the above-described Facility, Respondent distributes into commerce the product, "Paraquat."

3. Paraquat is a pesticide within the meaning of Section 2(u) of FIFRA [7 U.S.C. §136(u)] and is registered pursuant to the requirements of Section 3 of FIFRA [7 U.S.C. §136a] and has been classified as a restricted use pesticide pursuant to Section 3(d)(1)(C) of FIFRA [7 U.S.C. §136a(d)(1)(C)].

4. On or about September 5, 1984, an authorized EPA inspector conducted a pesticide dealer compliance inspection of the Facility. This inspection included a survey of invoices recording sales of restricted use pesticides.

5. The records survey revealed that on three occasions during 1983, Respondent sold Paraquat to J. R. Jordan of J. R. Jordan Ranches,

Frank Lueppe, T. & J. Farms, owned by Tony and Joe Martinez, and to Henry Leivas.

6. All individuals named in paragraph 5 were uncertified applicators at the time of sale.

7. The Paraquat sold to these individuals was applied by certified applicators or under their direct supervision.

8. The Guidelines for the Assessment of Civil Penalties were followed in the computation of these penalties. Violation Code E28 -- Category V was used to determine proposed penalty.

Discussion and Conclusion

Obviously, the primary question to be answered here is whether or not the proviso contained in Sec. 12(a)(2)(F) of FIFRA is operative in light of the fact that neither Arizona nor California has submitted a plan to the Administrator for the adoption of procedures for making restricted use pesticides available to uncertified applicators, and the Administrator has not issued regulations pertaining thereto.

Another question which is posed by the facts of the case, but is not determinative of the conclusion reached is: In the absence of action by a State with authority under Sec. 4 to submit such a plan and therefore no approval or Federal Register notice by the Administrator, is 40 CFR 171.11 enforceable?

The answer to both is in the negative.

As to the sale of restricted use pesticides to uncertified applicators, the law is clear that in the absence of regulations as provided for in the proviso contained in Sec. 12(a)(2)(F) the proviso permitting such sale is inoperative.

The fact that it has been almost seven years since the enactment of the proviso without any action by the Agency to promulgate regulations pursuant thereto does not alter the fact that regulations are required to permit a sale to an uncertified applicator. Additionally, Respondent, upon investigation to determine the content of these regulations, would have found that no regulations exist and, therefore, the sale to uncertified applicators would be unlawful.

Further, the February 9, 1978 Federal Register Notice was published when legislation was under consideration by Congress to allow uncertified sale. Therefore, it was written as an interim policy in anticipation of legislation. The conditions under which a State could permit uncertified sale were outlined. If a State wished to allow uncertified sale, EPA was required to review State procedures upon request by the State against the criteria in the February 9th Notice. If EPA found State procedures for uncertified sale in accord with the criteria in the February 9th Federal Register Notice, EPA was required to publish a Federal Register Notice announcing acceptance of that State's procedures for uncertified sale. This has not been accomplished in or for any State.

While the proviso of Sec. 12(a)(2)(F) would allow sale of restricted use pesticides to uncertified applicators, this language clearly required regulations for approval of State procedures. Since the status of the February 9, 1978 Notice was unclear, a January 19, 1979 Notice was published in the Federal Register, 44 FR 4357, which stated that the interim procedures of the February 9, 1978 Notice would remain in effect pending the promulgation of regulations mandated by the 1978 proviso amendment to Sec. 12(a)(2)(F). It should be noted that these interim procedures are not law.

Next, on May 18, 1983, a document was issued over the signature of A. E. Conroy, II; Director; Compliance Monitoring Staff; Office of Pesticides and Toxic Substances, entitled "FIFRA Complaince Program Policy No. 12.4; Making Restricted Use Pesticides Available To Persons Without Pesticide Applicator Certification." This document is part of the FIFRA Compliance/Enforcement Guidance Manual -- Policy Compendium.

This document commences as follows:

FIFRA Compliance Program Policy No. 12.4

Making Restricted Use Pesticides Available to Persons Without Pesticide Applicator Certification

FIFRA Section: 12(a)(2)(F)

Issue:

In a State where the EPA Administrator conducts the pesticide applicator certification and training program, will EPA take enforcement action against pesticide dealers who make restricted use pesticides (RUP's) available for use to persons who are not certified applicators?

Policy:

In a State where the Administrator conducts the pesticide applicator certification and training program, 1/ EPA will take enforcement action against any pesticide dealer who cannot document that the restricted use pesticide made available to a person who is not a certified applicator will be applied by a certified applicator.

The referred to footnote states:

1/ This policy affects only pesticide dealers making restricted use pesticides available to uncertified persons in States or on Indian reservations where the Administrator conducts the pesticide applicator certification and training program. States having approved FIFRA §4 State Plans and wishing to adopt a similar procedure of making restricted use pesticides available to uncertified persons shall submit to the Administrator a plan containing minimum standards as outlined in 40 CFR Part 171. Such a procedure should contain the requirements as outlined in this policy and in "IX. Purchase By Uncertified Persons For Use By Certified Applicators" of the document entitled "Optional Procedures for Classification of Pesticides Uses by Regulation; Pesticide Use Restrictions" published in the FEDERAL REGISTER of February 9, 1978 (43 FR page 5783).

This policy statement continues:

EPA has not promulgated rules covering the sale of RUP's to uncertified persons but plans to do so in the near future. In the meantime, EPA's policy is to ensure that RUP's are made available only to persons qualified to use them safely, without making it unduly burdensome for certified applicators to obtain RUP's.

Until promulgation of the pertinent regulations, the Agency will implement the following policy:

The Agency will not take enforcement action under FIFRA §12(a)(2)(F) against any person who can document that he made a RUP available to an uncertified person for use by an applicator certified for its use. [Emphasis supplied.]

Adequate documentation consists of a record for each transaction either on the sales invoice or in a document accompanying the

invoice, which includes the following information:

(A) The name and residence or business address of the person, whether certified or uncertified, to whom the RUP is made available.
(B) The name and residence or business address of the certified applicator who will use the restricted use pesticide, if this is different from (A).
(C) The certified applicator's certification number, the State (or other governmental unit) that issued his certification card, the expiration date of the certification, and the categories in which the applicator is certified, if appropriate.
(D) The product name, EPA registration number, and the State special local need registration number, granted under §24(c) of the FIFRA (if any) on the label of the pesticide.
(E) The quantity of the pesticide made available for use in the transaction.
(F) The date of the transaction.

At the time of each transaction, EPA recommends that the dealer obtain the information required in (A)--(C) above and assure himself that the RUP is made available for use by a certified applicator by examining one of the following sets of documents:

(1) The original of the certified applicator's certification card, and a driver's license or other State, County or Tribal identification document issued to the uncertified person to whom the restricted use pesticide is made available; etc.

The Policy statement continues:

The Agency will take enforcement action for first time violatons of FIFRA Sec. 12(a)(2)(F), as follows: There are five examples set forth which indicate the action to be taken in each case. The fourth example is:

4) If a dealer sells a RUP to an uncertified person without documentation to prove the RUP is to be used by a certified applicator, but the RUP is actually applied by a certified applicator, a notice of warning should be sent for the first violation. 6/

6/ These Pesticide Enforcement Policy Statements (PEPS) were instituted in 1975. 40 FR 19526 and are intended to inform interested parties of the policies adopted by the Agency in the exercise of its prosecutorial discretion in the enforcement of FIFRA, as amended.

Again, these policy statements apply only to dealers making restricted use pesticides available to uncertified applicators in States or on Indian Reservations where the Administrator conducts the pesticide applicator and training program. The status of this policy is therefore the same as 40 CFR 171, i.e., inoperative in this matter.

O R D E R[7/]

While it is evident that the sales of Paraquat here were unalwful, it is unconscionable to find that the 1978 amendment to Sec. 12(a)(2)(F), with its clear legislative intent to permit making restricted use pesticides available to uncertified applicators, has not been implemented by the Administrator so as to apply to all States. From the facts of the case and both the intent of Congress and of the Agency, the procedures used by Respondent here were within the letter of that intent. For the foregoing reason, the Complaint herein is dismissed.

Edward B. Finch
Chief Administrative Law Judge

Dated: December 2, 1985

Washington, D. C.

7/ Unless an appeal is taken pursuant to the rules of practice, 40 CFR 22.30, or the Administrator elects to review this decision on his own motion, the Initial Decision shall become the final order of the Administrator. See 40 CFR 22.27(c).

CERTIFICATE OF SERVICE

I hereby certify that the original of this Accelerated Decision was hand-delivered to the Hearing Clerk, U. S. EPA, Headquarters, and that three copies were sent by certified mail, return receipt requested, to the Regional Hearing Clerk, U. S. EPA, Region IX, for distribution pursuant to 40 CFR 22.27(a).

Leanne B. Boisvert
Leanne B. Boisvert
Legal Staff Assistant

Dated: December 2, 1985