

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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In the Matter of the Petition of

WALTER D. SCHROEDER

DECLARATORY RULING
DEC 33-01

For a Declaratory Ruling
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INTRODUCTION

Petitioner Walter D. Schroeder, a certified commercial pesticide applicator, seeks a Declaratory Ruling, pursuant to section 204 of the State Administrative Procedure Act ("SAPA") and paragraph 619.1(a)(2) of Title 6 of the New York Code of Rules and Regulations ("NYCRR"), to determine whether certain advice rendered by this Department's Office of General Counsel and Bureau of Pesticide Management should have been promulgated as a rule. For the reasons presented below, I conclude that promulgation of a rule was not required in this circumstance.

FACTS

At issue in this ruling is an interpretation of 6 NYCRR §325.19, which governs the eligibility of persons seeking to take the written examination required to become a certified commercial pesticide applicator in the State of New York. The specific matter under scrutiny was the significance of becoming "provisionally" certified, an interim stage available to certain persons not yet qualified to complete the certification requirements.

An Assistant Counsel in the Office of General Counsel of the Department issued a memorandum on August 9, 1989, to the Director of the Bureau of Pesticide Management giving an opinion on the question described above. The Bureau Director then issued a memorandum to regional pesticide staff informing them of the opinion and forwarding a copy of the opinion.

The opinion quoted the relevant provisions of 6 NYCRR §325.19, which read as follows:

(a) An individual shall not be permitted to take the examinations provided by section 325.21 of this Part unless that individual has at least three years of full time experience within the last five years in a category or categories of commercial pesticide application as listed in section 325.16 of this Part.

(c) An individual who has met the training requirements of subdivision (a) of this section or who has successfully completed a vocational type course such as one conducted by a community college which covers all of the topics listed in Appendix 8-A of this Title, infra, but who has not met the experience requirements, may take the examination and, if passed may be provisionally certified until the necessary experience requirements have been met. The length of the provisional period will be based on the type of previous education. Those individuals meeting the educational requirements of this section will be in provisional status for no less than one year. All others will be on provisional status for no less than three years.

Based solely upon the wording of the regulation, the opinion determined that provisional certification did not carry with it any of the authority of full certification, but was instead simply a device which authorizes a variation in the sequence of meeting the certification requirements different from the order in which they customarily would be satisfied.

The petitioner's contention is that this interpretation of the regulation requires a re-promulgation of the regulation. This contention, however, is not supported by any statutory authority. The pertinent SAPA definition of a "rule" is

the whole or part of each agency statement, regulation or code of general applicability that implements or applies law, or prescribes the procedure or practice requirements of any agency, including the amendment, suspension or repeal thereof

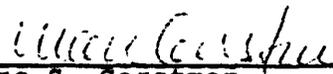
SAPA §102(2)(a)(i). In this instance, the agency statement of general applicability is 6 NYCRR §325.19, which has been promulgated as a rule. The opinion, and the resulting guidance to the relevant program field staff, simply review the meaning of the rule, and do not represent an amendment, suspension or repeal of the rule. As a result there is no legal obligation to promulgate the opinion or program memorandum as a rule. In fact, it would paralyze the functioning of this, or, in fact any, regulatory agency if every opinion or advisory memorandum addressing an existing rule was itself required to be promulgated as a rule.

Petitioner's basis for asserting the need for a rule appears, in part, to be based upon an unsubstantiated allegation that the interpretation of the rule has changed. Not only does the plain language of the rule support the opinion advanced in the opinion memorandum, but the Hearing Record for the certification rulemaking expressly states that "It is recommended that a provisional type of certification be issued to those persons who have acceptable training and can pass the exam but do not have

the necessary experience for a full certification."¹ To the extent, if any, that the Department may not have strictly implemented the rule in the past, it is not foreclosed from now doing so.

In conclusion, it is my ruling that the Department proceeded properly in this matter, in that a rule was not required to be promulgated.

December 5, 1989
Albany, New York



Marc S. Gerstman
Deputy Commissioner and
General Counsel

1 Hearing Officer's Report - Certification of Pesticide Applicators, April 21, 1976.