

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 33-02

For a Declaratory Ruling

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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 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.

At issue in this ruling is an interpretation of Environmental Conservation law ("ECL") §§33-1001(1) and (2), which govern the specification of pesticide application dates in commercial lawn care contracts and arrangements for alternative dates. These provisions read as follows:

§33-1001 Requirements and restrictions

1. Prior to any commercial lawn application the applicator shall enter into a written contract with the owner of the property or his agent specifying the approximate date or dates of application, number of applications, and total cost for the service to be provided....

2. In the event that application on the date

or dates specified becomes infeasible, the person who is to provide such application shall give the owner or his agent oral or written notice of the proposed alternate date or dates, and shall receive acceptance of such alternate date or dates from the owner or his agent prior to initiating commercial lawn application.

The Director of the Bureau of Pesticide Management issued, on July 17, 1989, a memorandum to registered pesticide businesses providing turf and ornamental application services, advising them of the Department's interpretation of the statute. That interpretation was, in part, as follows:

For each proposed application, a contract must specify a given date on which the application is proposed to occur (emphasis added).

The petitioner's contention is that this expression of the Department's interpretation of the statute requires a promulgation of the interpretive memorandum as a rule. This contention, however, is not supported by any statutory authority. The pertinent SAPA definition of a "rule" is set forth in SAPA §102(2)(a)(i):

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

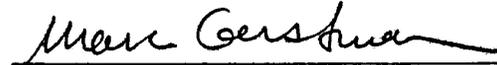
Excepted from that definition are "interpretive statements... which in themselves have no legal effect but are merely explanatory." SAPA §102(2)(b)(iv). The Department's July 17, 1989, memorandum is exactly that; it interprets and explains the statute and itself has no legal effect. The July 17 memorandum

only conveys to the regulated community the Department's interpretation of the statute and is merely explanatory. Consequently, the guidance provided by the memorandum does not fall within the SAPA definition of a "rule."

Petitioner's basis for asserting the need for a rule appears to be based more upon the allegation that the interpretation of the statute is legally incorrect than upon the alleged statutory requirement that a rule be promulgated. The Department must of necessity interpret the statute which it is obligated to enforce. In this instance, it has done so upon a reasonable basis. While reasonable persons may differ as to the correctness of a statutory interpretation, such a disagreement is not a basis for requiring promulgation of a rule.

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

August 22, 1990  
Albany, New York

  
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Marc S. Gerstman  
Deputy Commissioner and  
General Counsel