

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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In the Matter of The Petition of :
JOHN R. HAWTHORNE : DECLARATORY RULING
for a Declaratory Ruling : DEC 33-03
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Introduction

Petitioner John R. Hawthorne, a certified commercial pesticide applicator and President of Hawthorne Brothers Tree Service, Inc. ("HBTSI"), by his attorney, Randall G. Lawrence, Esq., seeks a Declaratory Ruling, pursuant to State Administrative Procedure Act §204 and Part 619 of Title 6 of the New York Code of Rules and Regulations ("6 NYCRR"), to determine whether he is entitled to a duplicate of pesticide samples taken by the Department of Environmental Conservation ("DEC") in an investigation of possible violations of law related to pesticide use by Mr. Hawthorne and HBTSI. For the reasons presented below, I conclude that the tender of a duplicate sample is not required in this circumstance.

Background

Petitioner and HBTSI have been under investigation for, inter alia, failure to comply with 6 NYCRR §325.2, which regulates the application of pesticides. The investigation relates to alleged over-spray of pesticides onto adjacent, non-target property during the process of tree spraying. In support of a possible civil or administrative enforcement action, DEC Pesticide Control

Specialists obtained samples of various media on the adjacent property in order to determine if there was any presence of pesticides which might constitute a violation. These "environmental" samples were then forwarded to the DEC's pesticide laboratory for analysis. Petitioner was provided with the results of these analyses.

Petitioner requested, and was denied, duplicates of samples taken from the adjacent property. Petitioner now asserts that such denial is inconsistent with the Environmental Conservation Law ("ECL") §33-0501, which states that duplicate pesticide samples must be tendered to the person in charge of the pesticide.

Discussion

At issue is the applicability of ECL §33-0501(1), which states that:

The commissioner shall take and seal samples of pesticides in duplicate in the presence of at least one witness and shall tender, and, if accepted, deliver to the person in charge of the pesticide one of such samples.

Petitioner contends that this statutory provision entitles the subject of a pesticide enforcement investigation to a duplicate of any sample taken. This view fails to consider the focus of this section and the distinction between types of samples.

ECL §33-0501 was adopted without substantial changes from former Agriculture and Markets Law §151-e, which was enacted in 1960. L.1960, c.284. At the time the duplicate sample requirement was enacted into Agriculture and Markets Law §151-e,

pesticide regulation was focused on consumer protection of pesticide users, and the sampling contemplated was for purity of product and conformation with product labeling. The Department of Agriculture and Markets was authorized to regulate solely the distribution, sale and transportation of pesticides; there was no jurisdiction to regulate any pesticide use. Authority to regulate use of pesticides was not granted until 1968 when the New York Legislature added a new Article 11-A -- Custom Application of Pesticides, to the Agriculture and Markets Law. L.1968, c.1015. The Department of Agriculture and Market's pesticide regulatory authority was transferred to DEC in 1970. L.1970, c.140, §82. The pesticide law was recodified into the ECL in 1972. L.1972, c.664.

An examination of ECL §33-0501 in the context of its history demonstrates that the provision applies to sampling of pesticide formulations prior to their end-use, to assure purity and safety of products on the market. This consumer protection function is evidenced by subsection 3 of that section, which requires the public disclosure of the results of any sample analyses performed. The potential for public scrutiny of the results, provided by ECL §33-0501(3), justifies the duplicate sample requirement: it gives pesticide producers the chance to rebut an analysis that jeopardizes the marketability of their products. The sampling of environmental samples, however, is a test for identification or presence; there is no determination of purity or label conformance for the product.

Moreover, the reading of ECL §33-0501 as applying to pre-application sampling is supported, most simply, by the language used to declare the requirement. The duplicate sample provision, ECL §33-0501(1), requires the tender of a sample to "the person in charge of the pesticide". A pesticide that has been deposited off the intended site is manifestly beyond the charge of the applicator. The language of the statute is consistent with its purpose relating to the testing of pesticides prior to use, and should not be interpreted to confer rights upon a person that, by his or her use, has surrendered control of the pesticide.

Conclusion

Based on the above, I rule that ECL §33-0501(1) does not mandate the tender of duplicate samples in the context of an enforcement investigation.

September 14, 1993
Albany, New York



Marc S. Gerstman
Deputy Commissioner and
General Counsel