
OFFICE OF THE ATTORNEY GENERAL

DATE: 10/29/2002
TO: JENNINGS, HENRY
FROM: MARK RANDLETT
RE: PRIVATE VS. COMMERCIAL APPLICATORS

Over the last few weeks we have had several discussions regarding the distinction between private and commercial applicators. This has arisen primarily under the scenario where a farmer is growing crops on another person's land pursuant to a contract to sell the crops to that person. It is my understanding that this involves the application of restricted, limited or general use pesticides. The question is whether the farmer would be deemed a commercial applicator under these circumstances.

22 M.R.S.A. § 1471-C(5) defines a commercial applicator as "any person...whether or not the person is a private applicator with respect to some uses, who uses or supervises the use of any limited or restricted-use pesticides on any property other than as provided by subsection 22 (private applicators), or who uses general use pesticides in custom application on such property." This definition, therefore, requires a review of the definition of "private applicator" so far as the use of limited or restricted use pesticides is involved, and of "custom application" with respect to general use pesticides.

22 M.R.S.A. § 1471-C(22) defines a private applicator as "any person who uses or supervises the use of any pesticide which is classified for restricted or limited use for the purposes of producing any agricultural commodity on property owned or rented by him or his employer or, if applied without compensation other than the trading of personal services between producers of agricultural commodities, on the property of another person." Therefore, under this definition, a person would be deemed a private applicator when that person, for the purposes of growing an agricultural commodity, applies a restricted or limited use pesticide:

- 1) on land owned or rented by him;


- 2) on land owned or rented by his employer;
- 3) on land owned by another person, so long as the application is made without compensation other than the trading of personal services between producers of agricultural commodities.

When rented land is involved there should be evidence showing the existence of an actual landlord/tenant relationship; such as a written rental agreement, the payment of a cash rent, or the retention of control by the tenant over the crop.

The exchange of personal services, while undefined, would seem to pertain to arrangements where, for example, grower A agrees to spray grower B's field in return for B's agreement to bale A's hay. Growers exchanging fields for the purposes of crop rotation also seems consistent with this definition. Growing crops on another person's land pursuant a contract to sell the crops that person, however, cannot fairly be said to involve an exchange of personal services.

Consequently, I am of the opinion that the application of restricted or limited use pesticides on another person's land for the purposes of growing a crop for that landowner pursuant to a contract, where the land is not being rented by the grower, constitutes a commercial application as defined under 22 M.R.S.A. § 1471-C(5). Because the definition of private applicator is contained in statute, a legislative change would be needed to alter this conclusion. However, this is impractical given the fact that the federal definition of private applicator is virtually identical.

Turning now to the application of general use pesticides in a custom application, we see that "custom application" is defined by 22 M.R.S.A. § 1471-C(5-A) as being "any application of a pesticide under contract or for which compensation is received...." Chapter 10.2(N)(1) of the Board's rules further defines "under contract" to mean "verbal or written agreements to provide services which include the use of any pesticide; i.e., private or commercial rental agreements, pest control service agreement, landscape maintenance agreements, etc." and, pursuant to Chapter 10.2(N)(2), "compensation is deemed to have been received for a pesticide application where any form of remuneration has been or will be exchanged, including payment of cash, rent or other financial consideration, or by the exchange of goods and/or services." It is reasonable to conclude that growing crops for another person, on that person's land pursuant to a contract, involves an agreement to provide a service that includes the use of a pesticide. Accordingly, such an arrangement would be "under contract" and, therefore, a custom application. Of course, in so far as the definitions of "under contract" and "compensation" are provided by Board rule, those definitions could be changed through rulemaking. This means that such arrangements can



be excluded from the definition of custom application allowing for the application of *general use* pesticides without a commercial applicator's license.

In summary, the application of any pesticide while growing crops on another person's land pursuant a contract to sell the crops that person requires a commercial applicator's license. It may be possible to change this with respect to general use pesticides through a rule amendment. However, this is not the case for restricted or limited use pesticides to which the statutorily defined term "private applicator" applies.

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