

MEMORANDUM FOR AMC Environmental Law (Lingo)

SUBJECT: AERIAL APPLICATION OF PESTICIDES ON ARMY AGRICULTURAL
OUTLEASES.

LEGAL OPINION

CONCLUSIONS:

The application of pesticides to lands leased to non-DoD entities for agricultural purposes on DoD installations requires both inclusion in the pest management plan and pre-validation. The provisions of the agricultural lease do not protect the Commander from Civil or Criminal penalties.

BACKGROUND:

I received an initial assignment to research an issue, concerning agricultural outleases, presented to AMC by Steven R. Bennett, U.S. Army Environmental Center, Pest Management Program. Dr. Bennett's issue was as follows:

The matter has to do with special DoD documentation/approval requirements for pest control operations that involve aerial applications of pesticides. DoD requires installations to prepare - and professional consultants like me to review - plans for all such operations (to include evidence that supporting NEPA documentation is in order).

The DoD position is that these "Aerial Validation Requests" are necessary to protect DoD commanders because of increased risks of off-post and/or unwanted environmental impacts that could occur and thus result in civil or criminal actions against installation commanders. At issue is whether operations of lessees under Army Ag outlease agreements need to

be covered within the scope of these validation plans.

My position is that aerial applications by private growers on Army lands are not exempted from this requirement. The Cdr remains at least partially responsible for (because he has the right to control or limit grower activities in a lease agreement) and thus can be at risk of legal challenges from adverse consequences of aerial pesticide applications by his lessees.

The other position is that Ag lease agreements are written in a way that protects Commanders from these risks, so that Lessee aerial applications of pesticides are exempt from the scope of the DOD validation requirement. I hope that you will be able to staff this matter in-house, but if not, I can raise with AEC or HQDA counsel. Again, please let me know your thoughts on this.

I spoke with Dr. Bennett by phone. He stated that one of the Army's three measures of merit is the reduction of pesticide use by 50%. He said that for this reason, the natural resource manager is already obligated to report applications of pesticides to leased areas. However, Commanders have not been seeking AEC pre-validation of aerial spraying done by Ag lessees.

Dr. Bennett stated that Sal Marici, AMSIO-ISR, has pointed out that there are practical difficulties with this requirement. He has also talked to Jerry Huff, AMC (stationed in Rock Island). Apparently installation Pest Management Plans are frequently completed by Contractors who have not contractually committed to include ag leases in the Plan. They are unwilling to do so (at least, without additional compensation). Apparently this would require additional information gathering as to what will be applied, by whom, when, and where. Dr. Bennett stated that there should be a "what if drill" in the plan because of the increased risk of off-post and/or unintended results associated with aerial application. He is not asking that

the lessee apply to AEC for permission, but rather that the Commander have Ag lease usage included in his Plan.

We discussed applicable law. According to Dr. Bennett, the 420 Regulations were initially installation management regulations. Later, AR 420-76 was deemed more an environmental regulation. However, the ag lease situation was not addressed in 420-76, nor has it been carefully considered. He stated that Army Regulation, 40-574, Aerial Dispersal of Pesticides, referenced in AR 420-76, was a joint regulation which is obsolete. It did not discuss agricultural leases either. The Army now relies on the new Air Force Instruction 32-1074, 1 May 1998 entitled Aerial Application of Pesticides. It also does not specifically mention agricultural leases.

THE APPROACH

I first reviewed applicable Department of Defense and Army and Air Force regulations for direct references or pertinent language. I then applied rules of construction. Finally, I looked to the Federal law and regulations which the Department of Defense and Army regulations were promulgated to implement.

REFERENCES AND DATA:

DOD Directive 4150.7;

AR200-2;

AR200-3, Section 2-14

AR420-76, Section 3; and Appendix H

AR40-5 Section 10.12;

Commander's Guide to Environmental Management;

ER405-1-12, Section 8-126.a &b

ER405-1-12, Figure 8-B-1(Ag lease);

DD Forms 1532 and 1532-1;

Office of Pesticide Programs internet page summarizing
the Worker Protection Standard,

CFR part 170 Standard for Workers and Standard for
Pesticide Handlers;

Pest Management Model Plan for U.S. Army Yucca
Proving Ground dated 1 Oct 94.

Air Force Instruction 32-1074

ISSUE I: WHETHER OR NOT AERIAL APPLICATIONS OF PESTICIDES TO LAND LEASED TO NON-DOD ENTITIES FOR AGRICULTURAL USE MUST BE INCLUDED IN PEST MANAGEMENT PLANS?

A. The Environmental Climate

Executive Order 12856, "Federal Compliance with Right-to-Know Laws and Pollution Prevention Requirements", requires federal agencies to develop goals to reduce releases of toxic chemicals into the environment by 50% (from 1993 levels) by December 31, 1999. The Department of Defense established the following measures of merit:

Measure of Merit 1 - Installation Pest Management Plans. By the end of FY 97, 100 percent of all DoD installations will have pest-management plans prepared, updated, and reviewed by their respective MAJCOM Entomologist.

Measure of Merit 2 - Annual Amount of Pesticide Applied. By the end of FY 2000, the amount of pesticide applied annually on DoD installations will be reduced by 50 percent from the FY 93 baseline in pounds of active ingredient.

Measure of Merit 3 - Installation Pesticide Applicator Certification. By the end of FY 98, 100 percent of all DoD installation pesticide applicators will be properly certified within two years of employment.

B. Statutory Harmony

DoD Instruction 4150.7. states that it implements policy, assigns responsibility, and prescribes procedures for the Department of Defense Pest Management Program. The Instruction contains a requirement for a pest management plan. The Instruction does not specifically address

agricultural leases. Notwithstanding the fact that agricultural use is neither addressed nor specifically exempted in DoD 4150.7, there are many indications in the far reaching scheme that make it unlikely that agricultural leases would be exempt whether based on leased status or agricultural status. One of the rules of statutory construction is that a statute will be construed to maintain harmony among its provisions. All parts *pari materi* will be construed together.

The following are some pertinent provisions of DoD 4150.7:

1. Heads of DoD components are tasked, among other requirements, to:

Maintain accurate and complete reporting and record-keeping of pest management operations and pesticide use.

Establish surveillance programs to assess potential adverse environmental or public health effects from pesticide use and to monitor the health and safety of persons who apply pesticides

Monitor the use of IPM (Integrated Pest Management) and reduction of pesticide use in installation pest management programs.

2. Heads of DoD components are tasked to ensure that installations:

Have all pesticide applications to DoD installations made only by properly trained and certified personnel in accordance with DoD Plan for the Certification of Pesticide Applicators of Restricted Use Pesticides or by State-certified applicators.

Use pesticides in accordance with applicable laws including FIFRA and the constraints of subsection B.5.,

Use only pesticides that have been approved by a DoD pest management consultant

Maintain complete daily pesticide application and pest management operations records as required by FIFRA and 7

U.S.C. 136i-1 or for pest management measures of merit, using DD Form 1532-1 or a computer-generated equivalent.

Produce a monthly summary, using DD Form 1532 or computer-generated equivalent, to provide data for regulatory, DoD, Federal, State, or local agency data calls; Component program review and oversight; and Measures of Merit. Installation commanders shall ensure these records are archived after two years for permanent retention.

3. The Components shall ensure that Installation Commanders:

Plan and budget for the development and maintenance of the **pest management plan**.

Ensure that qualified personnel develop and update the pest management plan annually.

Ensure that all pest management operations performed on the installation, except those for personal relief, are recorded, and ensure that all records are properly maintained and are reported to the cognizant component pest management consultant.

The above tasks all suggest **comprehensive planning, approval, monitoring, and record-keeping**. DoD 4150.7 is broad not only in its scope, but also in its applicability:

[It] Applies to all DoD operations, activities, and installations worldwide including appropriated fund activities; non-appropriated fund activities; contracted activities; and Government-owned, contractor-operated facilities.

Applies to all DoD buildings, structures, lands, public works, equipment, aircraft, vessels, and vehicles.

Applies to all DoD vector control and pest management operations performed worldwide during peacetime, wartime, and military deployments including those done by contract.

Only two exceptions are listed:

- a. The civil works function of the Army Corps of Engineers.
- b. State-owned or State-operated (funded) installations or facilities that the National Guard uses part-time or full-time.

There is no exception within the Instruction for any outleased agricultural parcels, nor for any outleased parcels .

C. Explicit Provisions

Another rule of statutory construction is that no provision shall be deemed superfluous. An indication that agricultural outgrants are not excluded can be found in the provisions concerning the pest management plan itself.

Outleases are specifically included. Pest management plans shall be comprehensive, long-range, narrative documents, as outlined in enclosure 8 (of the Instruction), and shall:

Describe all installation and satellite installation pest management requirements and programs, including those for contracts, natural resources, golf courses, and **out leases**, and identify minimum pest management staffing requirements.

Furthermore, the **aerial application** of pesticides is specifically mentioned:

Describe any pest management operation with special environmental considerations such as those that use any pesticide application that may contaminate surface or ground water or **involve aerial application of pesticides.**

Section 10 "Reports and records" includes outleases as well. The provisions are:

a. The DoD Components shall ensure that all DoD installations maintain complete daily records of pesticide applications and non-chemical pest management operations using DD Form 1532-1 or a computer-generated equivalent as stated in section E.3.v.(7) of the main body of this Instruction. These records shall account for all shop operations and shall provide a historical record of pest management operations and pesticide applications for each building, structure, or outdoor site.

(1) Records shall include information on kinds, amounts, uses, dates, places of application, and applicators names and certification numbers.

(2) The record shall include all pesticide applications performed on the installation, including work done on golf courses, by non-appropriated fund activities, by contract services, and **as part of out leases** and land management and forestry programs, as well as work performed by installation pest management shops.

b. DD Form 1532, "Pest Management Report," or an equivalent computer product, shall be produced monthly using DD Form 1532-1 information and shall be forwarded at least quarterly to major command headquarters for review and oversight.

c. Pest management consultants shall use this data to evaluate the efficiency of the overall installation pest management program and pest management operations.

d. Pesticides applied by installation personnel for their own relief are excluded from the record-keeping requirement.

Thus, though agricultural outleases are not specifically mentioned, the wide-ranging scope of the Instruction and the specific requirements for the contents of the Pest Management Plan and the records provisions are all indicative of the intent that agricultural leases be included. Note too that the only exclusion mentioned in the recording keeping provisions is for installation personnel for their own relief.

D. The Army Regulations

AR 420-76 is entitled "Pest Management". Chapter 3 is the Policy Guidance. The policy guidance addresses personnel and installation pest management programs, but not agricultural leases. Aerial applications are addressed in paragraph 3.10 which states that application will be in accordance with AR 40-574. An environmental assessment is required followed by an environmental impact statement if necessary. Paragraph 3.11 states that outgrant holders must comply with "all animal damage control laws, ordinances, specifications, and rules in land use regulations that are part of the outgrant document."

Concerning use and disposition, there is a catch-all provision. According to AR 420-76, paragraph 4.1.A, use of pesticides will also be in accordance with AR 40-5, AR 200-2 and appropriate Federal, State, and local regulations.

Under the recording requirements reports will include pest control operations conducted by the following: facilities engineer, contractors, Government-owned, contractor operated activities, nonappropriated fund activities, **all outgrant leaseholders**, and installation self-help pest control activities.

AR 40-574 is entitled Aerial Dispersal of Pesticides. It has not been updated since 1976. This is the regulation which Dr. Bennett said is obsolete. I could not find any evidence that it has been formally repealed.

E. The Statutory Basis

The Department of Defense Instruction was promulgated to carry out the requirements of the Federal Insecticide, Fungicide, And Rodenticide Act (FIFRA). FIFRA is a Federal

statute which pertains to the sale, distribution, and application of pesticides. FIFRA provides at 7 USC 136a(a), "[e]xcept as provided by this Act, no person in any State may distribute or sell to any person any pesticide that is not registered under this Act." Subsection(d) "Classification Of Pesticides", provides that as a part of the registration of a pesticide the Administrator [of the Environmental Protection Agency (EPA)] shall classify it as being for general use or for restricted use.

FIFRA also provides for the certification of persons who apply pesticides. Section 136i provides that if the Administrator approves a plan submitted under this paragraph, then each State shall certify applicators of pesticides with respect to such State.

The Administrator shall prescribe standards for the certification of applicators of pesticides. Such standards shall provide that to be certified, an individual must be determined to be competent with respect to the use and handling of pesticides, or to the use and handling of the pesticide or class of pesticides covered by such individual's certification. The certification standard for a **private applicator** shall, under a State plan submitted for approval, be deemed fulfilled by his completing a certification form. The Administrator shall further assure that such form contains adequate information and affirmations to carry out the intent of this Act, and may include in the form an affirmation that the private applicator has completed a training program approved by the Administrator **so long as the program does not require the private applicator to take, pursuant to a requirement prescribed by the Administrator, any examination to establish competency in the use of the pesticide...**7USC 136i (a) (1)

Agricultural lessees on Army installations would qualify as private applicators. Private applicator is defined at Chapter 7, Sec. 136(e) (2) as

a certified applicator who uses or supervises the use of any pesticide which is classified for restricted use for purposes of **producing any agricultural commodity** on property owned or **rented by** him or his employer or (if applied without compensation other than trading of personal services between producers of agricultural commodities) on the property of another person.

This is to be distinguished from a commercial applicator defined at Sec.136(e) (3):

The term commercial applicator means an applicator (whether or not he is a private applicator with respect to some uses) who uses or supervises the use of any pesticide which is classified for restricted use for any purpose or on any property other than as provided.. [in the previous definition].

FIFRA has a provision for Federal certification in states where the Administrator has not approved a plan.

Sec.136i(a) (1) FEDERAL CERTIFICATION.-
In any State for which a State plan for applicator certification has not been approved by the Administrator, the Administrator, in consultation with the Governor of such State, shall conduct a program for the certification of applicators of pesticides. Such program shall conform to the requirements imposed upon the States under the provisions of subsection (a) (2) of this section and **shall not require private applicators to take any examination to establish competency in the use of pesticides.**

It is clear from these two provisions that private applicators are held to a less stringent qualification.

There is an additional exemption for private applicators under Sec 136I, Use of restricted use pesticides; applicators:.

(d) IN GENERAL.- NO regulations prescribed by the Administrator for carrying out the provisions of this Act shall require any private applicator to maintain any **records or file any reports or other documents.**

(e) SEPARATE STANDARDS.- When establishing or approving standards for licensing or certification, the Administrator [Environmental Protection Agency] shall establish separate standards for commercial and private applicators.

The next question is what standards the Administrator has set for licensing or certification. This requires referencing the regulations promulgated by the Environmental Protection Agency. Turning to 40 CFR part 171, definitions identical to FIFRA are used to define private vs. commercial applicators. The requirements for private applicators are again less stringent than for commercial. There is, however, an apparent conflict between the Regulation and FIFRA. Though FIFRA prohibits the testing of private applicators, the regulations provide that:

A certification system shall employ a written or oral testing procedure, or such other equivalent system as may be approved as apart of a State plan.

40 CFR Sec.171.5(a) (5) (b)

In summary, under the Federal statute, FIFRA, agricultural applications by private owners or those who are leasing agricultural lands are handled differently than commercial applications. Private applicators may not be required to either test for competency or to keep

records. Under the EPA regulations, private applicators may be required to test.

According to the publication Commander's Guide to Environmental Management, the Environmental Protection Agency (EPA) has authorized the Department of Defense DoD to specify training and certification requirements for personnel who apply pesticides on DoD property. The two agencies have entered into formal agreements to comply with the Executive order through a Pesticide Environmental Stewardship Program. The Memorandum of Agreement between EPA and DoD is Attachment #1.

Neither the DoD Instruction 4150.7 nor the Army Regulation AR 420-76 provide for a special status, less stringent requirements, or an exemption from recording/reporting for private agricultural applications. There is no legislative history available to indicate whether the lesser standard for agricultural applications in FIFRA and the supporting regulations was considered in the drafting of either DoD Instruction or the Regulation. The failure to exempt agricultural applications or set lesser standards could have been an oversight or could have been deliberate. Even though the EPA was directed to set separate standards for private applicators, the Department of the Army would not be prohibited from setting more stringent requirements for Army owned property.

ISSUE II: WHETHER OR NOT AERIAL APPLICATIONS OF PESTICIDES TO LAND LEASED TO NON-DOD ENTITIES MUST BE PRECEDED BY A PRE-VALIDATION.

Assuming from the above analysis that agricultural outleases are included within the scope of DoDI 4150.7 and AR 420-76, we must next examine the requirement for pre-validation. A key provision of AR 420-76 is found at paragraph 4.4d. It states, "Each year installations will prepare a report of anticipated installation pest management programs or projects that involve application of pesticides by aircraft. The report will describe all anticipated aerial application programs for a 1-year period(1 April through 31 March)...Appendix H provides guidance on the information needed to complete this report." This is the "Annual Approval Request for Aerial Application Projects." Again though

Agricultural leases are not specifically mentioned, they are not exempted in paragraph 4.4d.

Another pertinent regulation is AR 40-5. Section 10.12 states that "All aerial dispersal of pesticides must receive appropriate prior MACOM approval." This segment also states "Actual application will be conducted under the direct and continuing supervision of an applicator certified in the category of aerial dispersal of pesticides."

ISSUE III; WHETHER OR NOT THE PROVISIONS OF ARMY AGRICULTURAL OUTLEASES OFFER PROTECTION TO COMMANDERS FOR LIABILITY UNDER ENVIRONMENTAL STATUTES.

A. Contents of Agricultural Outleases

The Army Corps of Engineers is the Army's real estate agent. Therefore, I turned to the Engineer Regulations for the provisions concerning agricultural outgrants. ER 405-1-12, paragraph 8-126, is entitled "Agricultural and Grazing Purposes." Sub-paragraph a states that military or civil works lands may be leased concurrently or exclusively for agricultural and grazing purposes. According to paragraph b(1) all A&G leases will have land use regulations attached. There is nothing specific concerning environmental matters in the provisions. However, in the earlier general provisions, paragraph 8-49 states

The outgrant instrument may specifically require compliance with particular state and local laws, ordinances, and regulations; however all outgrant instruments will contain a general provision as shown in each approved outgrant format. Site specific environmental, cultural and historical requirements may be added. The standard condition shown in the applicable format for a specific outgrant type may include additional language tailored to the type of outgrant and shall not be deleted or modified.

Figure 8-b-1 is the format for a standard agricultural lease. (Attachment #1). Paragraph 22, Environmental

Protection, addresses environment duties and prohibitions. It requires the protection of the air, ground, and water from pollution to the extent of the lessee's legal powers. The lessee is required to obey all environmental rules and regulations, and must obtain written approval prior to the application of pesticides or herbicides. Therefore, data should be readily available for reporting requirements.

The lease does not specify how far in advance of application the request for permission must be. In order for Commanders to address these applications in an annual pest management plan, the lessee would have to follow an application plan covering a whole year rather than seeking permission only at the time of application.

Paragraph 6 is a general requirement to comply with all applicable laws and regulations. Paragraph 19, Prohibited Uses, concerns only soil conversation. There is no mention of environmental concerns. Paragraph 20, Protection of Natural Resources, contains a requirement to keep the premises free of weeds which are detrimental to the value of the premises for agricultural purposes. This would seemingly require the use of herbicides. (Herbicides are covered under FIFRA).

B. Commander Liability Under Pesticide Regulations

Concerning protection for Commanders, Paragraph 13 is an indemnity clause which indemnifies against damages to persons or property "not including damages due to the fault or negligence of the United States or its contractors." This paragraph would provide contractual protection for civil liability for damages. The lessee could be pursued for reimbursement of damages assessed. However, the Commander would not be protected from Civil or Criminal liability penalties under 1361.(b)(1). The indemnification provisions do not include penalties but rather actual damages.

I found some cases which indicated that contracts agreeing to indemnification for criminal penalties are permissible, at least in some jurisdictions. Contra is California Civil Code § 1668, which states that contracts that "have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against

the policy of the law." Cited in Bodell v. Walbrook Insurance Company, Et Al, United States Court Of Appeals For The Ninth Circuit, 119 F.3d 1411(1997)

Another interesting discovery was a Federal aiding and abetting statute for criminal liability, 18 U.S.C. § 2. This is of interest because the agricultural lease requires the Commander to give written permission for pesticide application and the contract itself requires the lessee to control weeds.

The aiding and abetting statute provides:

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b)Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

Based on the examination of the agricultural lease itself and liability under FIFRA, I conclude that there is no protection for Commanders notwithstanding assertions to the contrary.

ADDENDUM:

Scott Farley, an attorney for the Army Environmental Center, offered these additional thoughts for consideration:

1. AR 200-3, Section 2-14, contains a pretty detailed provision governing "agricultural leases."

a. This section makes clear that the installation commander is responsible for identifying in reports of availability of land for leasing all applicable environmental requirements and restrictions. All requirements and conservation measures should be carried forward in the lease.

b. With respect to application of pesticides the AR requires that such applications be carried out in accordance with the provisions of the installations

integrated pest management plan UNLESS the lease commits the lessee to assume full responsibility for such applications in accordance with applicable Federal laws and regulations. AR 200-3, Section 2-14.a.(4) citing AR 420-76.

2. Paragraph 1.b. above may provide a justification for allowing lessees who have assumed pest management responsibilities from complying with DA internal procedures such as prior notification and approval for aerial applications.

Prudential considerations, however, should discourage following such a path, primarily because the installation commander remains on the hook for compliance with other environmental laws that could be triggered by an aerial application.

For example:

a. an aerial application of pesticides will trigger NEPA compliance requirements, unless the EA supporting the outlease somehow anticipated the environmental impacts of such an activity. This is highly unlikely. Proceeding in the absence of a supporting document would result in a violation of law attributed to the installation commander.

b. if an aerial application of pesticides has the potential to effect threatened or endangered species or designated critical habitat, then proceeding in the absence of Section 7 would result in a violation of law. In a worst case scenario, such a violation could be criminal if the application somehow resulted in a "take" of a listed species without the requisite "incidental take" permit (obtained through the Section 7 process).

3. In short, the installation commander remains liable under several statutory and regulatory schemes for the

proper protection of the land and resources comprising the "installation" under his/her jurisdiction. An outlease of a portion of the installation does not eliminate those responsibilities.

Therefore, in addition to the [above]conclusions...,the installation commander is simply at risk of violating applicable legal requirements when he is not on notice of activities that have the potential to adversely affect environmental resources under his jurisdiction and control.

AR 200-3 contains this provision applicable to pest management on agricultural leases:

Excluded are outleases whose contract contains provisions for lessees to assume full responsibility for the application of pesticides and animal damage control on their leases according to the provisions of applicable federal laws and regulations. See AR 420-76. Supplemental agreements to existing leases should be negotiated to amend them to comply with this provision. All pesticide uses will be reported by the responsible installation in accordance with AR 420-76.

Though it provides a possible loophole, standard COE agricultural leases would have to be amended. As Mr. Farley states there is no NEPA protection. There is also the question whether "assuming full responsibility" may be equated with indemnification and whether criminal liability can be indemnified.

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