UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

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IN RE)
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EVERGREEN HELICOPTERS, INC.) IF&R No. IV-538-C
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Respondent)

1. Federal Insecticide, Fungicide and Rodenticide Act - Elements of a prima facie case involving failure to follow label directions resulting in spray drift to non-target property discussed.

2. Federal Insecticide, Fungicide and Rodenticide Act - Use of penalty policy documents in assessing appropriate civil penalty discussed and approved.

3. Federal Insecticide, Fungicide and Rodenticide Act - One who uses an aerial spray device different from one required by product label has the burden of proving that the device actually used in the "equivalent" of one required.

4. Federal Insecticide, Fungicide and Rodenticide Act - Where the presence of a pesticide is shown on non-target property by laboratory analysis, a clear and persuasive case must be made that source therof was other than spraying admitted to by the Respondent.

Appearances:

For Complainant: Donna Matthews Post, Esquire
U.S. Environmental Protection Agency
Atlanta, Georgia

For Respondent: Theodore G. Kolias, Esquire
Lord, Bissell & Brook
Chicago, Illinois

INITIAL DECISION

This is a proceeding under Section 14(a) of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), as amended, 7 U.S.C. 136 l(a), for assessment of civil penalties for violations of 7 U.S.C. 136-136y (1972), of

the Federal Insecticide, Fungicide and Rodenticide Act, as amended. This proceeding was initiated by a complaint issued on November 8, 1982 alleging the violation of the above-mentioned Act on the part of the Respondent for applying two restricted-use pesticides in a manner inconsistent with label instructions. The two pesticides in question are Tordon 101 mixture and Weedone 2,4-DP Woody Plant Herbicide. The Respondent filed his answer on November 24, 1982 and admitted that its agent supplied the pesticides in question but denied that such application was done in contravention of label instructions and urged that no penalty be assessed in this matter.

Following a pre-hearing exchange and an opportunity for settlement as directed by the Court, the matter was set for trial and a hearing was held in Atlanta, Georgia on December 7, 1983. Following the distribution of the transcript, initial and reply briefs and proposed findings of facts and conclusions of law were received, and the matter is now before me for decision.

Discussion

The Respondent, Evergreen Helicopters, Inc., is a large corporation doing business throughout the United States primarily in the area of the application of pesticides to crops and woodlands.

The spraying in question took place on June 28, 1980 on land owned by the Georgia Kraft Corporation. The sprayed land shares a common border with the property of Mr. Rodney Price, separated by a rural dirt road of approximately 15 feet in width. Two weeks prior to the spraying activities, Mr. Rodney Price witnessed surveyors on the Georgia Kraft property, laying out ribbons and making roads. On the day of the actual spraying, Mr. Price observed a

helicopter land on a pad previously prepared for that purpose by a bulldozer and asked the pilot what it was they proposed to do. Upon being advised that they intended to spray herbicide on the Georgia Kraft property, Mr. Price advised the pilot that he and his brother had recently planted a vegetable garden about 50 feet from the edge of Georgia Kraft's property. A first pass of the herbicide application was made and the helicopter returned to the pad. At that time, Mr. Rodney Price and his brother, Terry, who was also on the property, indicated that spray drift from the application was coming over onto their property onto their garden and, according to Mr. Rodney Price, such drift extended to the edge of Mr. Price's house trailer which is located approximately 125 feet from the Georgia Kraft property. After the first pass was made, the pilot and Georgia Kraft representatives examined the Price property. Following some discussion, subsequent passes were made at a distance further from the property line. During the herbicide application, Mr. Rodney Price was standing on the western edge of his property which borders the dirt road separating his property from Georgia Kraft and felt herbicide spray on his skin which he described as having an oily base. During this first application, Mr. Terry Price who was standing 75-80 feet east of the boundary line between the two properties could see herbicide spray on the hair of his arms and when he climbed into a vehicle parked approximately 75-80 feet east of the western edge of the Price property, herbicide spray was visible on the windshield of the vehicle.

Shortly after this application, the Prices (on June 30th) contacted the EPA office and Mr. Benjamin Woods, a consumer safety officer for the Agency, visited their property on July 3, 1980. During the course of his visit,

Mr. Woods collected several soil and vegetation samples from the Price property and noted the discoloration and some dead leaf tissue and a crinkling effect on some of the crops in the Price's garden.

Mr. Sohler, who piloted the helicopter during the applications in question, testified that having been notified of the existence of the Price's vegetable garden, some 50 feet from the edge of the Gerogia Kraft's property, elected to begin his first pass some 150 feet from that border and was criticized by Georgia Kraft representatives for leaving the 150 foot buffer zone untreated. This testimony is in conflict with that of the Price's which indicated that the first helicopter pass was made about 50 feet from the border, rather than 150 feet. Mr. Sohler also examined the garden on the day of the application and testified that the condition of the garden was poor, the ground was dry and it appeared to him that the crops were suffering from drought damage.

In regard to the samples taken by Mr. Woods, the record indicates that he obtained the samples and preserved them in a manner consistent with recognized and accepted procedures, and shipped them to the Florida Department of Agriculture and Consumer Service in Tallahassee, Florida for chemical analysis. The active ingredients in Tordon are picloram and 2,4-D. The results of the analytical tests performed on the five soil samples taken by Mr. Woods indicated the presence of detectable levels of picloram and sub-sample 5 of Sample Number 122019 contained a detectable level of 2,4-D. The results of the analysis of the five vegetable foilage samples contained detectable levels of picloram.

The Respondent's witnesses testified that they observed no aerial drift of the herbicide to the Price's property and attempted to explain the presence

of the herbicides found by the laboratory analysis to result from the presence of an old garbage dump on the edge of the Price's property. It is apparently the Respondent's theory that persons walking through that garbage dump would somehow pick up pesticide materials on their clothing and shoes, and walk through the Price's garden, thus accounting for the presence of the herbicide materials therein. I find this hypothesis to be worthy of little or no weight given the alternative hypothesis which would explain the presence of the herbicide in the garden. Most of the witnesses agreed that at the time of the application, the wind speed was low, somewhere in the neighborhood of 2-5 miles per hour, and that the temperature was somewhere between 75-80°F.

The label of Tordon 101 contains the following use directions:

> "For aerial applications, use NALCO-TROL drift control additive at at least one-half percent concentrations or apply through the Microfoil Boom or equivalent drift control system. Thickened sprays prepared by using high viscosity invert systems or other drift reducing systems may be utilized if they are made as drift free as are mixtures containing NALCO-TROL or applications made with the Microfoil Boom."

The label, furthermore, under use precautions contains the following provisions:

> "Avoid spray drift: Applications should be made only when there is no hazard from spray drift since very small quantities of spray which may not be visible may severely injure susceptible crops during both growing and dormant periods. Use coarse sprays to minimize drift since, under certain weather conditions, fine spray droplets may drift a mile or more. Exept when applying with a Microfoil Boom a spray thickening agent, such as NALCO-TROL should be used with this product to aid in reducing spray drift..."
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> "Aerial Application: With aircraft, drift can be lessened by applying with the Microfoil Boom; by applying a coarse spray; by using no more than 30 lbs spray pressure at nozzle; by using straight stream directed straight back; by using a spray boom no longer than 3/4 the wing span of the aircraft; by using a spray thickening agent; and by spraying only when wind velocity is less than 10 miles per hour."

The use directions clearly provide that in making aerial applications, the applicator must either use the Microfoil Boom or equivalent drift control system or use NALCO-TROL drift control additive at the given concentration. Immediately prior to the hearing in this case, it was stipulated between the parties that the Respondent did not use NALCO-TROL nor did it use a Microfoil Boom in its application of the pesticide in question. The Respondent used a standard boom utilizing "Raindrop" nozzles. It is also uncontradicted in the record that the nozzle configuration was at a downward angle of 45 degrees. As indicated above, the directions also suggest that the stream should be directed straight back. It is, thus, apparent from the record that the Respondent violated the directions for use in that they did not use the Microfoil Boom nor did they use NALCO-TROL thickening agent and that they oriented the nozzles at a 45 degree downward angle rather than straight back as required by the label, unless it can be established that the "Raindrop" nozzle is an "equivalent drift control system" as envisioned by the label directions.

In this regard, the Respondent's witness, Mr. Banks, who is a long-term employee of the Respondent and has approximately 4,000-5,000 of helicopter pesticide application experience, testified that, in his opinion, the use of the "Raindrop" nozzle was consistent with the label directions since it is an equivalent drift control device and would, in fact, provide better drift control than the Microfoil Boom required by the label. Mr. Holst, appearing on behalf of the Agency, testified that in his judgement the "Raindrop" nozzle is not an equivalent device to the Microfoil Boom in that it produces a larger percentage of fines which are, in his opinion, moisture droplets less than 500 microns in diameter. It was his opinion based on his experience in research on the question of spray drift that the Microfoil Boom produces

nearly uniform droplets in the range between 500-1,000 microns and perhaps to 1,200 microns in size. It was Dr. Holst's opinion that the raindrop nozzle is not the equivalent of the Microfoil Boom in its ability to control drift since the "Raindrop" nozzle produces a wide range of droplets and considerably more droplets below 500 microns in diameter. Dr. Holst also testified that by orienting the nozzles in a downward direction of 45° the shearing effect of the wind would tend to increase the number of fines produced in the spray, thus contributing to the likelihood of drift.

Mr. Ben Woods, the EPA inspector who observed the condition of the Price's garden and took the samples hereinabove referred to, also testified as to the condition of the foilage in the garden stating that, in his opinion and based upon his years of experience in the field, the condition of the plants were consistent with that associated with herbicide damage. Dr. Holst also testified that the amounts of the herbicide shown by the laboratory analysis to be present in the leaves of the foilage samples would be consistent with the type of injury that Mr. Woods observed.

Although there is a conflict in the testimony as between the Price brothers and Mr. Sohher, the pilot of the plane, as to how far from the Price's property the first pass was made, it is apparent that, regardless of the distance involved, spray drift to the Price's property took place. The existence of the drift is demonstrated by several pieces of evidence: (1) the eye-witness accounts of the Price brothers as to the drift coming over onto their land, their property and their person; (2) the presence of the herbicides on the garden as demonstrated by the laboratory analysis performed by Dr. Fong of the Florida laboratory; and (3) the damage observed by Mr. Woods, the EPA inspector, as well as that observed by the Prices. Although the Respondent is an experienced applicator and, in its opinion, took necessary precautions to

avoid drift, apparently these precautions were not sufficient inasmuch as the herbicide did, in fact, drift onto the adjacent property of the Prices causing damage to the very types of vegetation which the label instructions warn about. It is quite likely that the Respondent's failure to use a Microfoil Boom or a thickening agent in conjunction with a device other than a Microfoil Boom, coupled with the downward orientation of the nozzles caused a production of an excess amount of fines which caused the drift observed by the witnesses.

In its brief, the Complainant directed the Court's attention to two opinions written by Judge Marvin Jones of the EPA concerning what constitutes a prima facie case in situations as herein presented. The two cases are: Saunders County Aeriel Spraying, and Ealy Spraying Service, Inc., both written in the fall of 1982. In those two decisions, Judge Jones concluded that a prima facie case is established where: (1) Respondent admitted applying the subject herbicide to land adjacent to the non-target area allegedly contaminated by Respondent's herbicide; (2) an eye-witness testified that the subject herbicide drifted onto or reached the non-target area allegedly contaminated by Respondent's herbicide; and (3) laboratory analyses of soil and foilage samples collected from the non-target area allegedly contaminated by Respondent's herbicide revealed detectable levels of the subject herbicide.

The preponderance of the evidence in this case clearly meets the three-fold test identified by Judge Jones in the above-mentioned cases. I am, therefore, of the opinion that based on all of the above, the Respondent did, in fact, violate the instructions for use associated with the above-mentioned herbicides in two particulars: (1) sufficient care was not taken to avoid drift, and drift, in fact, occurred; (2) causing damage to susceptible plants such as those present in the vegetable garden of the Prices. The Respondent

also violated the directions for use in that they failed to use either a thickening agent in conjunction with an equivalent drift control device or a Microfoil Boom as required by the label and further placed the nozzles in a 45 degree downward configuration in violation of the label instructions all of which contributed to the production of fine particles which are susceptible to drifting a considerable distance from the point of application.

Having concluded that violations as alleged in the complaint occurred, the only remaining task at hand is to determine an appropriate penalty to be assessed.

The Penalty

In its complaint the Agency after determining that the gross sales of the Respondent are greater than $1 million, placing it in Category 5 of the civil penalty assessment schedule, and considering the gravity of the alleged violations proposed a penalty in the amount of $5,000.00.

In determining the amount of the penalty which should be appropriately assessed, §14(a)(3) of the Act requires that there shall be considered the appropriateness of the penalty to the size of the Respondent's business, the effect on Respondent's ability to continue in business and the gravity of the violation. The regulations further provide that in evaluating the gravity of the violation there should also be considered the Respondent's history of compliance with the Act and any evidence of good faith efforts of the Respondent.

In previously decided civil penalty cases under FIFRA, it has been held that the gravity of the violation should be considered from two aspects: that is, gravity of harm and gravity of misconduct.

It is clear on this record that the Respondent did not intend the drift of the subject pesticide be permitted. However, it is well settled that intent is not a factor of the offense.

Mr. William Pfister, who testified on behalf of the Agency, and whose function it is to determine a proposed penalty in these cases, stated that considering that the Respondent is a commercial applicator and that the misuse concerned a restricted-use pesticide, by reference to a penalty policy issued by the Agency on August 22, 1978, he determined that a penalty in the amount of $5,000.00 was appropriate for this violation. The document to which Mr. Pfister referred is found in Complainant's Exhibit No. 31. A careful reading of this document appears to sustain Mr. Pfister's testimony in that the Agency's penalty policy relative to violations such as found here suggest that the maximum penalty be assessed against commercial applicators who apply restricted-use pesticides in a manner inconsistent with the label instructions. The amount of the proposed penalty, that is $5,000.00, is also consistent with the penalty policy appearing in Federal Register, Vol. 39, No. 148, Wednesday, July 31, 1974, which suggests that in situations where adverse effects are highly probable for use violations of a Respondent whose financial situation places him in Category 5 would also be $5,000.00. It should also be noted that the record reflects that the Agency, in this Region, has cited this same Respondent on two previous occasions for similar violations which resulted in settlement of the case, in one instance in the amount of $3,500.00, and in the second instance in the amount of $5,000.00. Since the regulations suggest that I must consider the prior history of the Respondent in determining an appropriate penalty to be assessed, I find that no reason to reduce the penalty proposed in the complaint and, therefore, find that a civil penalty in the amount of $5,000.00 is appropriate and should be assessed in this case.

In making this decision, I have considered the entire record including the briefs and proposals of the parties and any argument, suggestion or finding therein which is inconsistent with this decision is hereby rejected.

Having considered the entire record, and based upon the discussions herein, it is proposed that the following order be issued:

PROPOSED FINAL ORDER

1. Pursuant to FIFRA §14(a) (7 U.S.C. 136l(a)), as amended, a civil penalty of $5,000.00 is assessed against Respondent, Evergreen Helicopters, Inc., for violation of FIFRA §12(a)(2)(G) (7 U.S.C. 136j(a)(2)(G)), as amended, on or about June 28, 1980.

2. Payment of $5,000.00, the civil penalty assessed, shall be made within sixty (60) days after receipt of the Final Order by forwarding to the Regional Hearing Clerk, United States Environmental Protection Agency, Region IV, a cashier's check or certified check, made payable to the Treasurer, United States of America.

Thomas B. Yost
Administrative Law Judge

DATED: March 8, 1984

1/ 40 C.F.R. 22.27(c) provides that this Initial Decision shall become the Final Order of the Administrator within 45 days after its service upon the parties unless an appeal is taken by one of the parties herein or the Administrator elects to review the Initial Decision.

Section 22.30(a) provides for appeal herefrom within 20 days.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IV

345 COURTLAND STREET
ATLANTA, GEORGIA 30365

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IN RE)
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EVERGREEN HELICOPTERS, INC.)
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Respondent)

IF&R No. IV-538-C

INITIAL DECISION

CERTIFICATION OF SERVICE

In accordance with §22.27(a) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties. . . (45 Fed. Reg. 24360-24373, April 9, 1980), I hereby certify that the original of the foregoing Initial Decision issued by Honorable Thomas B. Yost, along with the entire record of this proceeding was served on the Hearing Clerk (A-110), U.S. Environmental Protection Agency, 401 "M" Street, S.W., Washington, D.C. 20460 by Certified Mail Return Receipt Requested; and that true and correct copies were served on: Donna Matthews Post, Esquire, U.S. Environmental Protection Agency, Region IV, 345 Courtland Street, Atlanta, Georgia 30365 (service by hand-delivery); and Theodore G. Kolias, Esquire, Lord, Bissell & Brook, 115 South LaSalle Street, Chicago, Illinois 60603 (service by Certified Mail, Return Receipt Requested).

Dated in Atlanta, Georgia this 8th day of March 1984.

Sandra A. Beck
Regional Hearing Clerk