UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
324 East 11th Street
Kansas City, Missouri 64106

IN THE MATTER OF:	)	DOCKET NO. IF&R 408-C-82P
	)	
Becker Flying Service, Inc.	)	
	)	Marvin E. Jones
Respondent	)	Administrative Law Judge

INITIAL DECISION

By Complaint filed December 17, 1981, Becker Flying Service, Incorporated (Respondent) is charged with violation of Section 12 (7 USC 136j) of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) ("the Act"), as amended, alleging that Respondent's use of the registered pesticide CLEAN CROP LV 6-D 2,4-D HERBICIDE was "in a manner inconsistent with label directions in that the pesticide was allowed to drift onto non-target susceptible plants" in violation of Section 12(a)(2)(G) of FIFRA, 7 USC 136j(A)(2)(G). Said label (Respondent Exhibit E), in pertinent part, provides as follows:

> "Minute quantities may cause severe injury by drift. Avoid drift of spray and use a coarse spray, which is less likely to drift. Although this product contains an ester of low volatility, use it with caution where the spreading of vapors can damage nearby susceptible plants."

In addition to the "Warning", said label also contains the following "CAUTION":

> "This product may cause skin irritation. Avoid inhaling spray mist. Harmful if swallowed..."

Specifically, the Complaint alleges that Respondent, on or about June 19, 1981, aerially applied subject pesticide to 32 acres of pasture, operated by Arlo Arens and situated adjacent to and south of the leased

land and residence of Richard A. Heikes, and that Respondent allowed said pesticide to drift, thereby causing damage to trees on the Heikes property. Respondent does not dispute the aerial application of subject pesticide at the time and place alleged (Respondent Brief, page 1), but takes issue with the allegation that it allowed or permitted it to drift onto non-target areas. Said issue is resolved by the instant record, including evidence elicited at the requested hearing held on June 3, 1982, in Courtroom No. 3, Hall County Courthouse, Grand Island, Nebraska.

On consideration of the record, including the transcript of the evidence and the Proposed Findings of Fact, Conclusions of Law, Briefs and Arguments submitted, I make the following Findings and Conclusions:

FINDINGS OF FACT

1. On or about June 19, 1981, Richard A. Heikes witnessed Respondent's airplane flying over his house and barn and over land (herein referred to as Arlo Arens' farm) adjoining Heikes' property on the south, and could see spray being applied (from said airplane) to said Arens land (T.6).

2. Heikes testified by affidavit, received into the record by stipulation of the parties, that the wind, at the time and place hereinbefore referred to, was "out of the south" (T.6).

3. Heikes further testified that said spray was then and there drifting onto his property (T.6).

4. A few days after observation of said spraying by Respondent, Heikes noticed some of his trees were damaged (T.6); whereupon he telephoned and notified said Arlo Arens who came to Heikes' property, observed the trees and advised Heikes not to eat pie cherries thereon, which were ripe. Arens identified Respondent (Bud Becker) as the pesticide applicator and then stated he would tell Becker of the damage (T.6).

5. Heikes' grandmother, Mrs. Rasmussen, called Becker about the same date of Arens report (T.109), complaining of damage to the cherry crop on subject Heikes premises (T.119, 120).

6. Respondent (Becker) called Heikes, stating he had used 2,4-D (in spraying the Arens land) and told Heikes to eat the cherries because 2,4-D "wouldn't hurt anything" (T.6).

7. Respondent, when contacted by EPA Consumer Safety Officer Wilcox on August 7, 1981, identified the pesticide used as Clean Crop LV 6-D, 2,4-D.

8. The parties stipulated that Mr. Heikes, on July 4, 1981, sprayed his corn crop by ground rig with 2,4-D (T.136-137; T.7).

9. At the time Respondent inspected trees on Heikes' premises, the latter part of June, 1981 (T.111; T.131), Heikes' ground spray rig was located on his premises (Respondent Exhibits 5-8). The record does not reveal whether said rig then contained pesticide, or when and where it was filled, operated and parked on any subsequent date except that it is agreed that it was used by Heikes on July 4, 1981 (T.7).

10. Respondent, by affidavit dated August 7, 1981, acknowledged that he sprayed said 2,4-D on said Arens property on June 19, 1981 (Complainants Exhibit F).

11. On May 19, 1981, 2,4-D pesticide was applied by Mr. Cornette of Eagle Aerial Spraying to land of Jerry Schroeder, which is located one mile north and one mile east of the Heikes land. Said Schroeder land does not touch the subject Heikes land, as there is a 160-acre tract between the Heikes and Schroeder properties (T.135).

12. On or about July 21, 1981, David A. Ramsey, a representative of EPA, collected five subsamples of vegetation from trees on the property leased by Richard A. Heikes, which was adjacent to and north of the Arlo Arens property, and identified those subsamples as Sample No. 180094 (Respondent Brief, paragraph 6).

13. When analyzed, three of the five subsamples were found to contain residue of 2,4-D acid in the following amounts: cherry leaves: 0.0 parts per million (ppm); mulberry leaves: 0.0 ppm; box elder leaves: .051 ppm; walnut leaves: 0.014 ppm, and hackberry leaves: 3.5 ppm (R. Brief, par. 7)

14. Heikes telephoned the U.S. Environmental Protection Agency (EPA) office in Lincoln, Nebraska, on or about July 15, 1981, reporting damage to his trees which he attributed to pesticide drifting from Respondent's aircraft onto his property (Respondent Brief, Proposed Findings Nos. 4 and 9).

15. It is not disputed that the pesticide spray applied by Respondent, on June 19, 1981, and any drift of same, was probably visible to Heikes (T.123-124).

16. Respondent aircraft is equipped with a "smoker" which lets out a puff of smoke on the field to which the pesticide is being applied; by watching "which way the smoke drifts", they obtain an indication of the direction and velocity of the wind, if any (T.99). If there is no wind, the smoke puff remains where dropped (T.101).

17. Other indicators of wind used by Respondent and other pilots are tree leaves, road dust and ripples on bodies of water (T.100).

18. Respondent attributed Heikes' impression that pesticide spray was drifting onto his property to the puff of smoke "let out onto the field for a reference point" (T.123).

19. Respondent Becker testified that the gross income of his corporation was "pretty close" to $100,000 (T.129, 130).

CONCLUSIONS OF LAW

1. The testimony of Richard A. Heikes that on June 19, 1981, he witnessed the spraying operation of Respondent; that he could see said pesticide spray being applied to said Arens' land; that the wind at said time was "out of the south"; and that he saw said spray then and there drifting onto his property, makes out a submissible case that said pesticide was applied "in a manner inconsistent with label directions" in violation of the Act.

2. The testimony that Mr. Heikes inspected his trees, conveyed his findings to his grandmother, Mrs. Rasmussen, and to Arlo Arens, who, in response to Heikes' telephone call, came to Heikes' premises; the further

facts that Mrs. Rasmussen and Arens both considered the pie cherries unsafe for human consumption in reliance on information conveyed to them by Heikes; and the contacts by Arens (reporting the alleged damage to Heikes' trees purportedly resulting from drift), along with Mr. Becker's response that 2,4-D "won't hurt anything", render more certain and lend support to Heikes' testimony that he saw the spray which was then being applied to Arens' land and that it drifted onto Heikes' land. 1/

3. The analyses of samples collected July 21, 1981, by EPA representative Ramsey from the Heikes premises is not, standing alone, corroborative of testimony that subject drift occurred for the reason that Heikes sprayed his corn fields on July 4, 1981, by use of a ground sprayer, apparently using a pesticide similar to that used by Becker on June 19, 1981. 2/ However, said analyses do lend support to and render more certain Heikes' testimony when considered with the facts set forth in the foregoing paragraph, Conclusion No. 2 (31 ACJS Sec. 163, p.444, n.79).

4. The testimony concerning spraying on May 19, 1981, of the Schroeder land is too vague and indefinite and too remote, from the standpoints of time and distance, to be considered as substantial evidence bearing on the issues herein considered.

1/ See 31ACJS, Section 163, p.444, n.79.

2/ It is well established in the law that evidence which is equally consistent with two conflicting hypotheses tends to support neither, and the party having the burden must fail (See Ealy Spraying, Inc., Docket No. IF&R 403-C-81P(1982); cases cited 21 Fed. Prac. Dig. Key No. 98; Texas Distrib., Inc. v. Local Union #100, etc., 598 F.2d 393, l.c. 402(23)(CATex 1979).

5. Intent or lack thereof is not an element of the violation charged in a civil penalty case for the reason that Section 14(a) of the Act does not provide that such act or mission must be "knowingly"; however, such finding should be considered in determining the gravity of misconduct present, and on the the question of good faith, in considering the appropriateness of the penalty proposed (40 CFR 22.35(c)).

DISCUSSION

The testimony of Richard Heikes makes out a submissible case in that he saw the spray being applied to the Arens field; and saw its drift to his property. Whereas Mr. Becker's affidavit and testimony expressed his contention that no wind prevailed (Complainant Exhibit F, T.99), he speculated that the substance seen by Heikes which drifted onto Heikes' property was "the smoker" (T.123), i.e., a "puff of smoke (you) let out into the field". On this record (T.123, 124), the spray was probably visible to Heikes, and if sufficient wind was present to move the smoke, it logically follows that the spray could also have drifted as testified (T.6).

Complainant presented testimony of samples taken from trees which, according to Heikes, were in the area to which the spray drifted. The presence of amounts of 2,4-D in said samples, assuming the subject spraying of June 19, 1981, was the only incident to be considered, would corroborate and support the violation charged. However, on a date subsequent to June 19, 1981, and prior to the date of the samples, Mr. Heikes also sprayed his corn, situated in fields to the north and to the east of the

sample sites. This record falls far short of establishing that the use by Heikes of a ground spray rig, in spraying the corn, accounted for the presence of the 2,4-D detected on subject trees; however, the facts presented by Respondent do raise question as to the source of the pesticide residue found in the subject samples.

On this record, the evidence is equally consistent with both contentions as to the source of the pesticide found in the samples; 3/ thus, standing alone, the corroborative effect intended by Complainant is lost. As set forth in Conclusions 2 and 3, the sample analyses should be and are considered with other facts which render more certain and lend support to Complainant's prima facie case (see Shenko v. Jack Cole Co., 147 F.2d 361,362(1), cited 31ACJS Sec. 163, supra.)

I conclude that Respondent has not carried its burden of meeting the evidence presented by Complainant in support of a finding of the violation charged.

CIVIL PENALTY

In determining the amount of the civil penalty to be assessed, Section 14(a)(3) (7 USC 1361(a)(3)) requires that I shall consider the appropriateness of the penalty to the size of Respondent's business, the effect on Respondent's ability to continue in business and the gravity of the violation. 40 CFR 22.35(c) (Rules of Practice) provides that, in addition to the above criteria, I must consider (1) Respondent's history of compliance...and (2) evidence of good faith or lack thereof.

3/ For either party to meet its burden of proof, more is required than merely creating a doubt which cannot be resolved on this record (Bauer v. Clark, 161 F.2d 397,400(2)).

The penalty proposed in the Complaint is $500, which places Respondent in Category I of the Guidelines (39 FR 17711, July 31, 1974), indicating that its gross receipts in a representative 12-month period is under $100,000 (see T.130). The Guidelines consider one aspect of gravity of the violation, that is, gravity of harm. Unquestionably, subject pesticide is very toxic to people and to the environment, as evidenced by the label (Complainant's Exhibit E.) Further, it is consistently held that possibility for harm (as opposed to probability) is to be discerned in characterizing the gravity of harm here present (see Briggs & Stratton Corp., 101 ALC 118 (1981). The cases have consistently held that gravity of misconduct (of Respondent) must also be considered. I find on this record that the pilot, Roman Becker, is an experienced pilot who did not intend that drift of subject pesticide should be permitted; that his actual intent was to apply said pesticide in conformity with label directions. However, as we previously stated (see In the Matter of Applied Biochemists, Inc., FIFRA Docket No. V-329-C (1976)), intent or lack thereof is not an element of the offense charged, citing U.S. v. Dotterwich, 320 US 77 (1942). The word "knowingly" does not appear in Section 14(a), as in the Criminal Penalty Section 14(b), of the Act.

Intent can and will be noted in determining the gravity of misconduct as evidenced by the record. Respondent anticipated that, at the early morning hour on June 19, 1981, the wind would be, at most, minimal. There is no evidence that, in passing over the Heikes' house and barn, dispersal, in any amount, of subject pesticide resulted.

We caution, however, that extreme care should be exerted in every instance to avoid, whenever possible, flying over residential property and that frequent checks of the pump and spray mechanism be made to assure Respondent that, after the spray handle is moved to an "off" position, no residual amount in the "system" is dispersed into the air.

I find that the gravity of misconduct present, on this record, is greatly minimized as it appears that a good-faith effort was exerted to avoid any violation such as is here found. I do not find evidence of previous such violations, and, on consideration of the criteria provided in the Act and Regulations, I find that an appropriate penalty to be assessed is $275.

Having considered the entire record, and based upon the Findings of Fact and Conclusions herein, it is proposed that the following Order be issued:

PROPOSED FINAL ORDER[4/]

1. Pursuant to Section 14(a) of the Federal Insecticide, Fungicide and Rodenticide Act, as amended, a civil penalty of $275 is hereby assessed against Respondent, Becker Spraying Service, Incorporated, for violation of Section 12(a)(2)(G) of the Act (7 USC 236j(a)(2)(G)) on or about June 19, 1981;

4/ 40 CFR 22.27(c) provides that the instant Initial Decision shall become the Final Order of the Administrator within 45 days after its receipt by the Hearing Clerk and without further proceedings unless (1) an appeal to the Administrator is taken from it by a party to the proceedings, or (2) the Administrator elects, sua sponte, to review the Initial Decision.

2. Payment of $275, the civil penalty assessed, shall be made within sixty (60) days after receipt of the FINAL ORDER by forwarding to Regional Hearing Clerk, U.S. Environmental Protection Agency, Region VII, a cashier's or certified check, payable to the Treasurer, United States of America.

DATED: September 29, 1982

Marvin E. Jones
Administrative Law Judge

CERTIFICATION OF SERVICE

I hereby certify that, in accordance with 40 CFR 22.27(a), I have this date hand-carried to the Regional Hearing Clerk of Region VII, U.S. Environmental Protection Agency, the original of the above and foregoing Initial Decision of Marvin E. Jones, Administrative Law Judge, and have referred said Regional Hearing Clerk to said section which further provides that, after preparing and forwarding a copy of said Initial Decision to all parties, she shall forward the original, along with the record of the proceeding, to the Hearing Clerk, who shall forward a copy of the Initial Decision to the Administrator.

DATED: Sept. 29, 1982

Mary Lou Clifton
Secretary to Marvin E. Jones, ALJ