UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Flying Lion, Inc., d/b/a	)	Docket No. 10-95-0090 FIFRA
Round-Up Crop Dusters,	)	
	)	
Respondent	)	

INITIAL DECISION

By: Carl C. Charneski

Administrative Law Judge

Issued: December 9, 1997

Washington, D.C.

Appearances

For Complainant:

Timothy B. Hamlin, Esq.

U.S. Environmental Protection Agency

Region X

Seattle, WA

For Respondent:

Dennis L. Childers

Round-Up Crop Dusters

Pendleton, OR

I. Introduction

The U.S. Environmental Protection Agency ("EPA") filed a complaint pursuant to Section 14(a) of the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), against Flying Lion, Inc., d/b/a Round-Up Crop Dusters ("Round-Up"). 7 U.S.C. § 136l(a). The complaint charges Round-Up with two violations of Section 12(a)(2)(G) of FIFRA. 7 U.S.C. § 136j(a)(2)(G). Section 12(a)(2)(G) prohibits the use of a registered pesticide in a manner inconsistent with its labeling. EPA proposes a civil penalty of $500 for each violation.

A hearing was held in this matter on October 29 and 30, 1996, in Pendleton, Oregon. For the reasons that follow, Round-Up is held to have committed the two FIFRA violations as alleged, and a civil penalty totaling $700 is assessed for these violations.

II. Facts

This case involves a pesticide spray operation conducted in the Klamath Marsh National Wildlife Refuge area in July of 1994. The pesticide spray operation was intended to suppress an outbreak of grasshoppers. Compl. Ex. 1, Attach. 5. The Klamath Marsh National Wildlife Refuge is located in Klamath County, Oregon, and it is managed by the

U.S. Fish and Wildlife Service. Tr. 34; Compl. Ex. 2, at 2.

Round-Up was hired by the U.S. Department of Agriculture to conduct the Klamath Marsh spray operation. Compl. Ex. 2, at 9. Using a fixed-wing aircraft, Round-Up applied Fyfanon ULV (Ultra Low Volume) Concentrate Pesticide ("Fyfanon"), and De-Bug 5% Carbaryl Bait ("Carbaryl"). Both Fyfanon and Carbaryl are pesticides registered under FIFRA. Compl. Ex. 2, at 3.

Fyfanon is a Malathion pesticide and it was sprayed on privately-owned rangelands in the Klamath Marsh area. Fyfanon was applied at a rate of 8 ounces per acre. Carbaryl is a granular Sevin bait pesticide and it was applied to the rangeland in the Klamath Marsh National Wildlife Refuge. Carbaryl was applied at a rate of 10 pounds per acre. Tr. 36; Compl. Ex. 2. See Jt. Ex. 1 (map of spray area).

Kent Smith, a pesticide investigator with the State of Oregon Department of Agriculture, and Dan Heister, an EPA FIFRA project officer, were assigned to observe Round-Up's application of the pesticides. Tr. 26-28, 113.(1) Smith and Heister arrived at the spray area on June 29, 1994. Tr. 37, 116.

The next day, June 30, Smith met with Dennis Childers, the owner of Round-Up, to discuss the spray operation. Tr. 38. Among the items discussed were the rate of application of the pesticides, their dilution, and the method of application. Tr. 39; Compl. Ex. 2, at 9.

Also on June 30, Smith and Heister went to the spray area to establish pesticide sampling sites. Tr. 41. Three sampling sites were established. These sites were given the names Area 1, Area 2, and Area 3. See Jt. Ex. 1. Areas 1 and 2 were located inside the Klamath Marsh Wildlife Refuge, while Area 3 was located outside the refuge boundaries.

Tr. 126.

Area 1 was a deep ditch located along the north side of the Silver Lake Highway. Heister described the area as being "fairly lush with tall grasses and growth." Tr. 118. Smith explained that the Silver Lake Highway crossed through a rangeland area that changed to a marshy area in the eastern portion. Tr. 105-106. Smith described the eastern portion "as a marsh, not real deep ponds with absolutely just plain water." Tr. 106. In addition, Smith testified that the ditches running along side the highway in this area "were primary water drainages." At the time, the ditches in Area 1 were not running with water. Rather, they were "either muddy or had some standing water in them." Id.

Area 2 included the Pat Kane Pond. The pond had a surface area of slightly less than one acre. While Smith didn't measure the depth of the Pat Kane Pond, he stated that it contained "a considerable amount of water." Tr. 107.

Area 3 included a portion of Sand Creek. This creek originates in the upper slopes of the mountains around Crater Lake and flows in an easterly direction, where it either empties into the Klamath Marsh or is diverted into one of three channels. Tr. 207-209, 443.

In each of these sampling areas, Smith and Heister placed five sterile gauze pads for sample collection. Tr. 41, 116-118. The gauze pads were 4 inches-by-4 inches in size. Heister was informed by the EPA laboratory in Manchester, Washington, that these pads would be good media for collecting the pesticide samples. Tr. 121. Heister used clothes pins to secure the gauze pads. After placing the pad in the "jaws" of the clothes pin, Heister took an EPA custody seal and secured it around the jaws. He then placed his social security number and signature on the custody seal. Tr. 121.

On the morning of July 1, 1994, Smith and Heister observed the application of Fyfanon in Area 3. Tr. 40-41, 124-125. The same day, immediately after the Fyfanon spraying was completed, Heister collected the Area 3 samples. Tr. 128-130. The Carbaryl bait was applied to Areas 1 and 2 on July 4, 1994. Tr. 193-195. Because of the intervening July 4th holiday, Heister did not retrieve the samples in Areas 1 and 2 until July 5, 1994. Tr. 130-131.

In collecting the samples from all three areas, Heister wore surgical gloves. He placed each sample in a sterile container. Heister then sealed the container and secured it with an EPA custody seal bearing the date, his social security number, and signature. Thereafter, Heister mailed the samples to EPA's laboratory in Manchester, Washington. He instructed that the samples from Area 1 and Area 2 be

analyzed for the presence of Carbaryl and that the samples from Area 3 be analyzed for the presence of Fyfanon. Tr. 131.

Steve Reimer is an EPA chemist at the Manchester laboratory and it was he who received the Klamath Marsh samples. Reimer broke the custody seals on the sample jars and performed an extraction process on each sample medium. Tr. 239-240, 269. Reimer then analyzed the Carbaryl samples and Robert Rieck, also an EPA chemist, analyzed the Fyfanon samples. Tr. 241, 253, 269.

The sample numbers analyzed by Reimer included Numbers 94264420 through 94264429. Tr. 241. Carbaryl was found to be present in these samples. Tr. 245; Compl. Ex. 1B. The sample numbers analyzed by Reick included Numbers 94264430 through 94264434. Tr. 269. Fyfanon, also referred to as Malathion, was found to be present in these samples. Tr. 269, 282; Compl. Ex. 1.

III. Discussion

A. The Violations

Section 12(a)(2)(G) makes it unlawful "to use any registered pesticide in a manner inconsistent with its labeling." 7 U.S.C. § 136j(a)(2)(G). It is not disputed that both Fyfanon and Carbaryl are pesticides registered with the EPA. What is in dispute is whether Round-Up applied these registered pesticides in a manner not authorized by their labeling.

1. The Fyfanon Violation

The Fyfanon label lists certain product restrictions under the heading of "Environmental Hazards." The label in part reads:

This product is toxic to fish. Keep out of lakes, streams, ponds, tidal marshes and estuaries. Do not apply where runoff is likely to occur.

Compl. Ex. 1, Attach. 4.

EPA sampled for, and found, Fyfanon in Area 3. These samples were collected along Sand Creek. See Compl. Ex. 1, Photo. 20. EPA argues that the Area 3 sample results prove conclusively that Round-Up violated Section 12(a)(2)(G) because it applied Fyfanon to a stream, contrary to the restrictions on the pesticide's label. Round-Up primarily defends on the ground that there was little, if any, water in Sand Creek at the time of the pesticide's application. Round-Up submits, therefore, that because Sand Creek essentially was dry when the Fyfanon spray operation occurred, there was no violation of Section 12(a)(2)(G).

Whether water was present in Sand Creek at the time of the Fyfanon application is a critical inquiry. It is one in which the parties are in heated disagreement, each offering their own "eye-witness" account of events. First, Round-Up's side of the story.

Respondent called ranchers Scott Runels and Willis Tompkins to testify.(2) Both Runels and Tompkins own ranches in the Klamath Marsh area. Tr. 359-360, 416. In fact, the portion of Sand Creek where EPA established its Fyfanon sampling sites is located on Runels's ranch. Tr. 360.(3)

Runels testified that the part of Sand Creek that is on his ranch is nothing more than an irrigation ditch. Tr. 361. He further testified that before the pesticide spraying began, he closed a "diversion ditch" on Sand Creek to cut off the flow of water. According to Runels, on the day of the Fyfanon application there was no water in the area of Sand Creek where EPA had established its sampling sites. Tr. 361-365, 382. In fact, Runels stated that the water in Sand Creek was shut off two to three days prior to Round-Up's application of the pesticide in order to ensure that the area would be dry during the aerial spraying. Tr. 364, 382.

Tompkins agreed with Runels that the area of Sand Creek being referred to is an irrigation ditch. Tr. 422. Tompkins also agreed that the water running in Sand Creek was shut off one to two days before the pesticide spraying. In fact, like Runels, Tompkins testified that he observed Sand Creek around the time of the Fyfanon spraying and that the creek was dry. Tr.427; see Tr. 384-385.

The EPA witnesses' description of Sand Creek at the time of the Fyfanon spraying is exactly the opposite. Kent Smith, the State of Oregon pesticide investigator, testified that the creek was three to four feet in width, and six inches to one foot in depth. Tr. 56, 107-108. He described Sand Creek as a "flowing stream," with a flow rate of approximately ten cubic feet per second. Tr. 107. Dan Heister, the EPA FIFRA project officer, described Sand Creek as being swift moving, and somewhat larger than Smith's description. Tr. 152. According to Heister, the creek was two to two and one-half feet in depth and five to six feet in width.

Tr. 178, 459. He added that it did not have the appearance of an irrigation canal. Id.

In addition, Smith was recalled as a rebuttal witness to refute Runels's testimony that a diversion gate in Area 3 was used to shut off the water running to Sand Creek prior to the application of Fyfanon. Smith testified that he met with Runels on June 30, 1994, just one day before the spraying of Area 3, to discuss the water shut off on Sand Creek. Smith stated that Runels refused to divert the water from Sand Creek because it was needed for his cattle.

Tr. 458-459.

While the witnesses from both parties are in substantial disagreement as to the condition of Sand Creek when the Fyfanon was applied on July 1, 1994, there at least is agreement that at the time the Klamath Marsh Wildlife Refuge was in the midst of a drought. Tr. 167, 368. Accordingly, the water that the witnesses observed during this time period was less than what would be expected in that area under normal conditions. The questions to be resolved though are (1) whether the water that was observed near the EPA sampling sites in Area 3 was in fact the Sand Creek or whether it was an irrigation ditch, and (2) whether water actually was present in that creek or ditch on July 1, the pesticide application date.

A review of the testimony and relevant exhibits establishes that the water next to the EPA sampling sites where Fyfanon was detected was indeed the Sand Creek and that water was present in the creek when the pesticide was applied. Photograph 20 of Complainant's Exhibit 1 is the key to making this critical finding of fact.

Photograph 20 is described as a "Sample Area 3 photo of Sand Creek east side of [the] railroad tracks and locations of sample #13 [and] #15." See description on reverse side of photograph; see also, Jt. Ex. 1 for map reference. EPA employee Heister took this photograph on June 30, 1994, the date that the EPA samples were set out and one day prior to the Fyfanon spraying. Tr. 140.(4)

On examination by the court, Round-Up witness Runels testified that the water diversion in Area 3 is shown at the top center portion of Photograph 20, just above the person in the picture. Tr. 406-407.(5) Runels added that the person appearing in the photograph is to the west of where the witness believes that Sand Creek ends. Tr. 407. He also testified that the water shown in Photograph 20 is Sand Creek and that it flows from the bottom of the picture to the top. Tr. 408.

On recross-examination, Runels placed the individual in Photograph 20 as standing between the railroad tracks and the diversion ditch, marked on the map (i.e., Joint Exhibit 1) as being east of the railroad tracks. Tr. 409. Finally, Runels stated that the diversion marked as "D" on Joint Exhibit 1 is in the approximate location as the brown object shown at the top center of Photograph 20. Tr. 409-410.

The above-referenced testimony by Runels is quite significant. This testimony along with Photograph 20 of Complainant's Exhibit 1 and Joint Exhibit 1, the Klamath Marsh area map, supports the EPA witnesses' version of events. For example, even if Runels diverted Sand Creek prior to the Fyfanon spraying as he asserts, the water shown in Photograph 20 would still have been present in the creek when the pesticide was applied. In other words, according to Runels's testimony, the water flows from the bottom of the picture to the top, and it isn't diverted until it reaches the brown-colored diversion in the top-center of the photograph.

Therefore, the record evidence supports the finding that water was present in Sand Creek on July 1, when the pesticide was applied. Moreover, given the fact that EPA sample Numbers 13 and 15, which were placed along the water's edge and which are identified in Photograph 20 by an orange flag, tested positive for the presence of Fyfanon, EPA proved a violation of Section 12(a)(2)(G) of FIFRA. These EPA samples show that Round-Up applied Fyfanon to Sand Creek, contrary to the prohibition on the pesticide's label that it not be applied to streams.

2. The Carbaryl Violation

Carbaryl bait is a flaky, bran-like pesticide that was applied to Area 1 and Area 2 of the Klamath Marsh National Wildlife Refuge on July 4, 1994. Tr. 194, 207; see Jt. Ex. 1. Like Fyfanon, Carbaryl was applied by means of an aircraft. The Carbaryl label appears in Complainant's Exhibit 1, Attachment 3. Under the heading "Environmental Hazards," this label states:

This pesticide is extremely toxic to aquatic and estuarine invertebrates. Do not apply directly to water or wetlands. Do not contaminate water by cleaning of equipment or disposal of wastes.

Emphasis added.

Like the Fyfanon count, the factual dispute here centers on whether the pesticide Carbaryl was applied to water. Unlike the Fyfanon violation, however, whether Round-Up committed the Carbaryl violation is more easily resolved in favor of EPA.

Area 1 was located within the boundaries of the Klamath Marsh National Wildlife Refuge. Tr. 95, 126; Jt. Ex. 1. It ran directly along the Silver Lake Highway and on the border of the rangeland and refuge area. Compl. Ex. 1, at 3. Smith described Area 1 as being marshy in some places, with standing water, and muddy in other places. Tr. 105-106.(6) Heister gave a similar account, stating that there was clear standing water in some portions of Area 1, while other portions were more mud-like. Tr. 118-119, 137. In that regard, he referenced Photographs 8 and 9 of Complainant's Exhibit 1 as showing water in this area.

Tr. 138. In Heister's view, Area 1 was a marsh or a wetland, "since it directly bordered and was being recharged by a designated marsh." Tr. 136.

Area 1 included a deep ditch located along the north side of the Silver Lake Highway. Smith described this ditch as an "[e]xtremely wet environment," with "a lot of mud, extensive vegetation growth, typical of a wet area like that, [with] standing water in places." Tr. 97-98.

Heister likewise described this ditch as being "fairly lush with tall grasses and growth."

Tr. 118.

It was along this ditch that Smith and Heister established a pesticide sampling site. As with Area 3, five sample collection points were set up in Area 1. Tr. 44, 116, 125. See Compl. Ex. 1, at pp. 3-4 & Attach. 5, for positioning of samples and sampling diagram. The samples were set out on June 30, 1994. Tr. 53-54.

Area 2 is located at the north end of the spray operation. See Jt. Ex. 1. It includes the Pat Kane Pond, which was approximately one acre in size when the events in this case occurred. Tr. 107. Heister described the pond as being very saturated along its perimeter, but with clear water three feet from the edge. Tr. 119. This pond contained brook trout.

Tr. 206. As with Areas 1 and 3, five sampling points were set up along the edge of the Pat Kane Pond. Tr. 54, 117. See Compl. Ex. 1, at p. 4 & Attach. 6.

Mark Willard, an engineering equipment operator employed by the U.S. Fish and Wildlife Service, observed the application of Carbaryl on July 4, 1994. Tr. 193, 207. He testified that he saw the aircraft that was applying the pesticide make a pass over water. The aircraft flew over the Pat Kane spring area and the Pat Kane drainage. Tr. 205-206.

Upon traveling to that area, Willard observed "Carbaryl bait floating on ponds of water, up and down muddy ditches." Tr. 194-195. The ditches referred to by the witness are in what is known as the "Graveyard Ditch" area. Tr. 195. Photographs identified as 4A and 4B of Complainant's Exhibit 1 were taken of the Graveyard Ditch.(7) These photographs were taken within 5 minutes of the aerial application of Carbaryl. Tr. 203. Willard testified that the substance shown floating on the water is Carbaryl. He added that not even a wind storm produces as much debris as was observed floating on the water. Tr. 231.

The samples set out in Area 2 were collected on July 5, 1994, by Heister. After verifying that the spray operations had been completed, Heister followed the same procedure for collecting the Carbaryl samples as he had done with the Fyfanon samples. He put the gauze in sterile jars, placed signed and dated custody seals on the jars, and then put the samples on ice until they could be refrigerated. The samples were then shipped to the EPA laboratory in Manchester, Washington, on July 6, 1994. Compl. Ex. 1, at p. 6.

EPA laboratory personnel analyzed the samples sent by Heister. As noted earlier, they determined that all five samples from Area 1 and all five samples from Area 2 contained the pesticide Carbaryl. Tr. 245, 250, 259.

As to the Carbaryl violation, Round-Up again relies upon the contrary testimony of ranchers Runels and Tompkins. While most of their testimony concerned the application of Fyfanon to Area 3, Runels and Tompkins nevertheless also testified that Areas 1 and 2 were essentially dry, and that the Carbaryl bait was not applied to any streams, creeks, ponds, or any other bodies of water. Tr. 366-368, 401, 428.

The testimony of the EPA witnesses is found to be more credible. First, the testimony of the complainant's on-site observers is internally consistent and is sufficiently detailed to support a finding that the conditions in Areas 1 and 2 during the application of the Carbaryl are as they had testified. Second, both the photographs contained in Complainant's Exhibit 1 and the Manchester laboratory results showing the presence of Carbaryl corroborate the testimony of the EPA witnesses.

The crediting of the testimony of EPA's witnesses necessarily requires a rejection of respondent's argument that the material observed in Photographs 4A and 4B is not Carbaryl bait. See Tr. 375, 393, 419-420. Given the fact that EPA witness Willard observed the pesticide in the water as depicted in the photographs, and given the fact that the photographs were taken approximately five minutes after the aerial application of the pesticide, Round-Up's challenge must fail. Moreover, as noted, the fact of the matter is that the samples taken in the area of Photographs 4A and 4B tested positive for Carbaryl.

Accordingly, for these reasons, it is held that EPA has established that Round-Up violated Section 12(a)(2)(G) of FIFRA by applying the pesticide Carbaryl in a manner inconsistent with its labeling.

3. Other Defenses Raised By Round-Up

With little or no substantive argument, Round-Up raises several other defenses which warrant only brief treatment. First, respondent argues that EPA employee Heister "did not absolutely" protect the integrity of the pesticide samples. This argument is rejected. The testimony of Heister and EPA chemist Reimer, which has been discussed earlier, is sufficient to establish that the samples were in no way contaminated and that a proper chain of custody was established.(8) Moreover, the fact that Willard observed the application of Carbaryl to areas containing standing water further supports the finding that the Carbaryl samples were not compromised.

Second, citing to transcript page 493, Round-Up argues that EPA failed to prove that it "was the source of any problem since two other aircraft were involved in the project." Resp. Br. at 1. Apparently, respondent is arguing that someone else might have applied the pesticide to the water.

This argument, however, likewise fails. Transcript page 493 contains the testimony of EPA witness Heister. In responding to an inquiry from the court, Heister acknowledged that a second plane was used in the pesticide application operation. Heister, however, explained that the second plane "was brought in under contract to Mr. Childers to help him apply." See Compl. Ex. 2, at 1, listing Round-Up as the "operator." Heister added that the pilot of the second plane had informed him that he was working for Childers, the owner of Round-Up. Tr. 493.(9) In light of this evidence, there is no question but that Round-up is the liable party.

B. Civil Penalty Assessment

EPA seeks a civil penalty of $500 each for the Fyfanon and Carbaryl violations. Citing to its Enforcement Response Policy for FIFRA (i.e., Complainant's Exhibit 10), EPA states that Round-Up is subject to the lower penalty amounts set forth in FIFRA Section 14(a)(2).

7 U.S.C. § 136l(a)(2). Compl. Br. at 2-3. EPA's penalty breakdown for the $500 per violation proposal appears in Complainant's Exhibit 12, its penalty calculation worksheet.

Section 14(a)(4) of FIFRA sets forth the penalty criteria to be taken into account in assessing a civil penalty. Section 14(a)(4) in part provides:

In determining the amount of the penalty, the Administrator shall consider [1] the appropriateness of such penalty to the size of the business of the person charged, [2] the effect on the person's ability to continue in business, and [3] the gravity of the violation.

7 U.S.C. § 136l(a)(4).

With respect to the penalty issue, EPA essentially relies upon the testimony of Lyn Frandsen, the head of EPA Region 10's pesticide program, as well as Complainant's Exhibit 10 (the FIFRA Penalty Policy), Exhibit 11 (a 1995 Dun & Bradstreet report), and Exhibit 12 (the Penalty Calculation Worksheet). Tr. 297. Round-Up, represented by its owner Dennis Childers, did not specifically address the penalty issue in presenting its case-in-chief.(10) Also, respondent made no mention of this issue in its post-hearing submissions.

Upon consideration of the statutory penalty criteria, a civil penalty of $700, $350 for each violation, is held to be appropriate. In that regard, given the evidence submitted by EPA on the penalty issue and given the small penalty amount involved here, the "size of the business" and the "ability to continue in business" penalty criteria have limited impact on the penalty determination. It is the "gravity of the violation" criterion which takes center stage.

As to the gravity of the violations, EPA witness Frandsen testified that both pesticides were considered to be in the middle to lower toxicity range. In EPA's view, the misuse of the pesticides here presented only a minor potential for actual harm to human health. Tr. 311-312. In addition, while EPA was not aware of the actual harm that was done to the environment, Frandsen explained that EPA took into account the fact that both pesticides are highly toxic to aquatic organisms, fresh water aquatic organisms, and to fresh water fish.

Tr. 312, 325. Indeed, Frandsen referenced the fact that shortly after the pesticide spraying EPA collected a number of aquatic invertebrates that had been killed. Tr. 325.

Given these facts, EPA certainly was not unreasonable in proposing a civil penalty totaling $1,000. Nonetheless, there are two considerations which call for a limited penalty reduction of $150 per violation.

The first is that Childers flew over the spray area the day before the operation and was shown the bodies of water and other sensitive areas that couldn't be sprayed. This indicates that Childers made the effort to do the job correctly -- i.e., not to apply the pesticides to water. Secondly, EPA witness Frandsen admitted that EPA possessed a memorandum from the U.S. Department of Agriculture stating that the Sand Creek over-spray may have been due to the fact that tall pine trees obscured the pilot's approach to that area. Tr. 327.

These considerations serve to lessen the degree of respondent's negligence and thus lower the gravity of the violations. The result is to lower the total penalty assessment from $1,000 to $700. The fact that EPA would have preferred to have proposed a penalty of $1,000 for each violation, but could not "because of special statutory language restricting the maximum penalty to $500 per violation in cases involving the first violation by a 'for hire' applicator," is not a valid reason for precluding consideration of such circumstances favorable to the respondent. See Compl. Br. at 10-11; see also, FIFRA Section 14(a)(2), 7 U.S.C.

§ 136l(a)(2).

Indeed, following the approach suggested by EPA and declining to lower the penalty in this case would render ineffective Congress's mandate in Section 14(a)(4) that the gravity of the violation be considered in assessing a penalty. There is no indication in the statute that Congress did not intend the Section 14(a)(4) penalty criteria to apply to private applicators who are first-time offenders.

ORDER

The U.S. Environmental Protection Agency has established that Flying Lion, Inc., d/b/a Round-Up Crop Dusters, has committed two violations of Section 12(a)(2)(G) of the Federal Insecticide, Fungicide, and Rodenticide Act. 7 U.S.C. § 136l(a)(2)(G). Respondent is assessed a civil penalty totaling $700 for these violations.

Payment of the civil penalty shall be made within 60 days of the date of this order. Respondent may mail or present a cashier's or certified check made payable to the Treasurer of the United States of America. The address is: U.S. EPA Region X (Regional Hearing Clerk), Mellon Bank, P.O. Box 36903, Pittsburgh, Pennsylvania, 15251.(11)

Carl C. Charneski

Administrative Law Judge

1. Heister's report on the Klamath Marsh spraying operation is listed as Complainant's Exhibit 1. Smith's report on this operation is listed as Complainant's Exhibit 2.

2. Dennis Childers did not testify in this case.

3. Runels used a blue marker to show the location of Sand Creek on Joint Exhibit 1. Tr. 360.

4. The back side of the photograph incorrectly indicates that it was taken on July 1, 1994.

5. On cross-examination, Runels agreed that the diversion in Photograph 20 consisted of the two brown objects placed closely together in the upper center portion of the photograph. Tr. 381.

6. Area 1 is pictured in Photographs 1 through 10 of Complainant's Exhibit 1.

7. Photographs 4A and 4B are identical. EPA included both photographs in Complainant's Exhibit 1 because of a difference in their coloring. Tr. 198.

8. Also, while Heister didn't retrieve the Area 1 and Area 2 samples until July 5, 1994, he observed no disturbances in those areas when the samples were collected. Tr. 131.

9. Also, rancher Scott Runels, called as a witness by Round-Up, testified that it was Childers who was flying the plane during the July 1, Fyfanon spray application. He also testified that it was Childers who had the contract to apply the Carbaryl. Tr. 392.

10. For example, respondent offered no evidence to challenge the $1,000,000 projected sales figure contained in the Dun & Bradstreet report. Compl. Ex. 11.

11. This decision will become a final order of the Environmental Appeals Board ("EAB") unless it is appealed to the EAB in accordance with 40 C.F.R. 22.30, or unless the EAB elects to review this decision sua sponte. 40 C.F.R. 22.27(c).