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

IN THE MATTER OF:)
) DOCKET No. IF&R 403-C-81P
Ealy Spraying Service, Incorporated)
) Marvin E. Jones
Respondent) Administrative Law Judge

INITIAL DECISION

By Complaint filed August 30, 1981, Respondent is charged, in two counts, with violation of Section 12 (7 USC 136j) of the Federal Insecticide, Fungicide and Rodenticide Act ("the Act"), as amended (FIFRA), alleging that, in two instances, on July 8, 1980, (i.e., LaRue premises) and on July 18, 1980 (i.e., Goettl premises), CLEAN CROP 6-3 PARATHION - Methyl Parathion (EPA Registration No. 34704-16) was "used in a manner inconsistent with its labeling" in violation of Section 12(a)(2)(G) of the Act. Said label (Respondent's Exhibit No. 6) provides the following "Precautionary Statements" pertinent to the subject Complaint:

> "USAGE CAUTION: DO NOT ALLOW THIS MATERIAL TO DRIFT ONTO NEIGHBORING CROP OR NON-CROP AREAS OR USE IN A MANNER OR AT A TIME OTHER THAN IN ACCORDANCE WITH DIRECTIONS BECAUSE PLANT INJURY, EXCESSIVE RESIDUES OR OTHER UNDESIRABLE RESULTS MAY OCCUR."

Said label further directs:

> "DO NOT apply when weather conditions favor drift from areas treated."

Specifically, the Complaint alleges that (1) on or about July 8, 1980, Respondent aerially applied the pesticide Clean Crop 6-3 Parathion - Methyl Parathion to a corn crop belonging to Darrell White, and (2) on or about

July 18, 1980, Respondent aerially applied said pesticide to a corn crop belonging to Ervin and Ron Friehe. These facts are admitted by Respondent (Complaint's Exhibits A and B, Affidavits of Respondent, dated July 23, 1980). The Complaint further alleges that Respondent, in aerially applying said pesticide, in both instances allowed and permitted such pesticide to reach the residential properties* of (1) Frank LaRue and (2) Beverly and Roger Goltl, both of which are non-crop and non-target areas. It is the latter part of Complainant's said allegations with which Respondent takes issue. Said issue is resolved by the evidence elicited at the requested Adjudicatory Hearing held on June 2, 1982, in Courtroom No. 1 in the Buffalo County Courthouse in Kearney, Nebraska.

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

FINDINGS OF FACT

1. Frank LaRue testified (T.43 et seq) that, while in his house on July 8, 1980, at about 8 a.m., he heard Respondent's spray plane, and went outside and saw an airplane at the west edge of a cornfield (Darrell White's crop) across the county road and east of his property. He sighted a plane flying north over the corn field and spray was coming from the plane (T.46); the plane sighted was the second of two planes (T.107). When the said airplanes made turns at the ends of the cornfield, they flew over areas that were not cornfields and came very close to, though not directly over, his

* The LaRue property is located west of and across a county road from the White corn field; the Goltl property is located east of the Friehe corn field.

property (T.46).

2. While LaRue was standing about 30 feet in front of his house and in the middle of his front yard, he felt the spray (T.46, 48) after seeing it coming from the airplane sighted. He went inside and washed out his eyes and washed his face with water (T.48, 49, 67).

3. LaRue called the Federal Aviation Administration (FAA) and the U.S. Environmental Protection Agency in Lincoln, Nebraska (T.67); later, on the afternoon of July 8, 1980, LaRue was called by Mrs. Rex Ealy, Respondent's wife, who confirmed it was their aircraft which sprayed the Darrell White cornfield (T.47) with subject pesticide.

4. Beverly Jean Goltl testified (T.13) that on July 18, 1980, between the hours of 10:30 a.m. and 11:30 a.m., when she went outside her house to go to her mail box, she was "sprayed" by Respondent's airplane (T.16) headed east (T.14), at which time she observed "little wet spots" (T.14) on the sidewalk in front of her house.

5. The aircraft seen and heard by Mrs. Goltl and which sprayed her was then engaged in applying an insecticide to land, west of her property (T.14, 15), belonging to Irvin Friehe (T.15).

6. Mrs. Goltl immediately took a shower and washed her hair (T.15), and thereafter contacted Friehe who reported that the company doing the spraying was Respondent (T.16). Thereafter, she reported the incident to the EPA.

7. Mrs. Goltl was subsequently contacted by Respondent (i.e., Mrs. Rex Ealy) who acknowledged that it was their aircraft which sprayed the Friehe cropland on July 18, 1980, and stated that the pesticide used was parathion (T.17).

8. The label of subject pesticide states that "Parathion is a very dangerous poison. It rapidly enters the body on contact with all skin surfaces and eyes. Clothing wet with this material must be removed immediately. Exposed persons must receive prompt medical treatment or they may die." (Respondent's Exhibit 6.)

9. A sample (T.128) taken from foliage near the said Goltl mail box, south of their residence, and a sample of foliage next to a fence on the west side of said residence contained detectable levels of ethyl parathion. Two soil samples taken in the Goltl yard and from the north edge of the driveway in front of the house did not contain detectable levels of either parathion or ethyl parathion (T.160; Complainant's Exhibits C-1 through C-5).

10. Samples taken July 22, 1980, from foliage in the vicinity of a county road, ditch and fence (immediately east of the LaRue premises); from foliage from trees in LaRue's yard; and from soil from a flower bed next to and on the east side of the LaRue house, contained detectable levels of ethyl parathion when tested on February 13, 1981 (T.159 et seq; Complainant's Exhibits D-1 through D-5.)

11. Subject pesticide, the insecticide Clean Crop 6-3, contains twice as much ethyl parathion (Parathion) as methyl parathion (T.175).

12. Both parathion and methyl parathion are unstable pesticides, that is, they degrade rapidly. Methyl parathion tends to dissipate more rapidly than ethyl parathion (T.175) (also referred to as "Parathion").

13. It is possible that residual amounts of methyl parathion, in amounts below the minimum detectable level (MDL) was contained in said samples from the LaRue premises.

14. It is stipulated (T.109) that two aircraft owned by Respondent, Ealy Flying Service, and flown by Greg Hock and Wayne Awtry, employees of Respondent, were used on July 8, 1980, in spraying the pesticide Clean Crop 6-3 Parathion, Methyl Parathion on 75 acres of corn owned by Darrell White; and that one aircraft, piloted by said Wayne Awtry, was used on July 18, 1980, in applying said pesticide on 67 acres of corn owned by Irvin and Ron Friehe.

CONCLUSIONS OF LAW

1 The direct testimony of Beverly Goltl that, on July 18, 1980, she saw and heard Respondent's east-bound spray plane (T.14), and saw and felt a spray from said aircraft, and saw "little wet spots" on the sidewalk (T.14) in front of her house; and that she felt "wet" and took a shower and washed her hair (T.15), makes out a prima facie case that Respondent used subject pesticide "in a manner...other than in accordance with (label) directions..." in that Respondent's employee allowed and permitted said pesticide to fall from said aircraft onto non-crop and non-target areas.

2. The direct testimony of Frank LaRue (T.44) that, on July 8, 1980, he saw and heard Respondent's north-bound spray planes (T.44, 45) very close to his property (T.46) and felt a spray from said aircraft (T.63), and he went immediately inside his house to wash said spray from his face and eyes (T.67), makes out a prima facie case that Respondent used subject pesticide "in a manner...other than in accordance with (label)directions..." in that Respondent's employees had permitted said pesticide to fall from said aircraft onto non-crop and non-target areas.

3. Said prima facie cases (Goltl and LaRue) are corroborated by the admission

that Respondent was at said time engaged in spraying subject pesticide onto the Friehe cornfield just west of the Goltl premises, and onto the Darrell White cornfield across the road and east of LaRue's premises,
and the further finding of detectable amounts of said pesticide on said Goltl premises and on the LaRue premises (T.17; T.47; T.162; Exhibits C-1 through C-4; D-1 through D-4).

4. The subject corroborative evidence is not controverted by mere conjecture that land south of the Goltl property "probably were sprayed" where no record evidence is available to pinpoint the identity of the sprayer, the degree of care exerted, the date and time of such spraying, or the pesticide allegedly used (T.23; T.22; Texas Distr., Inc. v Local U #100, etc., 598 F.2d 393 CA Tex 1979); Walker v Trico Mfg. Co., Inc., 487 F.2d 595 CA ILL 1973); nor by the inability of witness LaRue to estimate, with credible preciseness, the height and speed of Respondent's aircraft and distances involved in describing the proximity of the target area with the non-target areas.

5. Intent or lack thereof is not an element of the violation charged in a civil penalty case (Section 14(a), the Act); however, such finding can be considered in determining the gravity of misconduct concerning any violation found, and on the question of good faith, in considering the appropriateness of the penalty proposed to be assessed (40 CFR 22.35(c)).

DISCUSSION

Respondent does not controvert the statement of witness Beverly Goltl that Respondent's airplane (a Grumman Ag Cat) flew over the area in front of the Goltl residence on July 18, 1980, but theorizes that the droplets, witnessed on the driveway and the sidewalk leading to the Goltl residence, were

moisture on the trees - that when the plane raised up over the trees, the propeller (prop wash) knocked droplets of moisture from the trees onto the sidewalk and driveway. This theory was suggested by Respondent Ealy (T.220):

Q. It is...my understanding...that there is a high bunch of trees along there?

A. That is correct.

Q. Is there any air swirl or pressure that those planes give that could have knocked any moisture out of those trees that would have been droplets?

A. If they had dew on them, definitely, because when you pull up, you exert a lot of down pressure (sic).

Q. That is one possible explanation of any droplets...

Earlier in his testimony, Mr. Ealy testified that early in the morning (T.218), if the dewpoint and temperature are real close together..., you can see condensation swinging off the propeller and coming off the wing tips. The witness opined that "the large droplets couldn't have come out of our airplanes." (T.219)

Pressed for a further possible explanation of the large droplets viewed by the witness Goltl, Mr. Ealy explained (T.219) how the fog or mist is created by the fogging apparatus on the Ag Cat biplane:

A. ...the spray comes from the pump and goes into the boom, and it goes through a screen and then through what they call swirl discs that...help determine the size...orifices...determine the size of the droplets.

Previous (T.214) and subsequent testimony (Hock, T. 246) revealed that the pesticide comes out of the nozzles (under pressure) in droplets the size of a pinhead; that one gallon covers one acre. The flow through the nozzles (spray valves) is activated by pushing the "money handle" (on the pilot's

left) forward and is turned off when the handle is pulled back (T.247). Pilot Hock (T.249) stated that he shut off "the spray" when he made the pass by the buffer zone between the sprayed area and the LaRue house. Mr. Awtry, who was in a second plane on July 8, 1980, and flew the plane sighted by Mrs. Goltl on July 18, 1980, described the buffer zone (LaRue) as 100 to 150 feet wide; the wind was out of the southwest blowing northeast at six miles per hour on July 18, and thus the drift was "away" from the Goltl property. He had to fly over the trees which he estimated to be 50 feet tall at the west side of the Goltl property. He was 70 feet over the Goltl sidewalk (T.260), to clear the trees. His "boom" was then shut off (T.259) and, to his knowledge, he did not spray the Goltl property.

No foundation was laid to support any of the theories advanced as to why the large droplets were seen on the Goltl sidewalk and drive and felt by Mrs. Goltl on her body; nor why Mr. LaRue felt "spray" on his person when he stepped out of his house at a time when the spray plane was in close proximity.

From the testimony given that the liquid is pumped into a boom and then through a fine screen, swirl discs and orifices, it is apparent that a great amount of pressure is required to produce droplets the size of a pinhead. It is assumed in the testimony of Mr. Ealy and both his pilots that when the "money handle" is pulled back that activation of the liquid is terminated. There is indication that, while the "money handle" turns off the pumps, a volume of liquid remains in the system between the pump and the orifices. It could be theorized, on the basis of the limited evidence in this record, that the pressure in the system immediately abates and ultimately dissipates completely, but that, in the interim, enough pressure is still present in the system to move the remaining liquid on through the apparatus; and that, because the pressure is dissipating, the fogging function is lost, resulting in larger

droplets than those produced by the screen swirl discs and orifices. Thus, when the plane pulled up over the trees, droplets of varying size, which had by then found their way to the surface of the nozzle, were forced into the air by pressure created by the climbing maneuver of the aircraft.

The problem with both theories, of course, is that no foundation is laid. There is no evidence that dew was actually present on July 18, nor is the precise manner in which operation of the fogging apparatus on the aircraft activates and deactivates developed.

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 (Cases cited 21 F.Pr. Dig. Key 98; see Texas Distributors, Inc. v Local Union #100, etc, 598 F.2d 393, l.c. 402(23) (CA Tex, 1979); Pitman v Western American Insurance Co., 299 F.2d 405, l.c. 411(4) (CA Mo, 1962)).

I have concluded that there is no evidence to refute the evidence furnished by Mr. LaRue and Mrs. Goltl; that they both heard and saw the aircraft over their respective residential property and by using their senses of sight, smell and feeling, discerned that quantities of pesticide had been sprayed or dropped onto their premises. I find that, by the direct testimony of both Mr. LaRue and Mrs. Goltl, Complainant has made out its prima facie case. Such testimony is corroborated by the sampling and testing done by and at the instance of Complainant, showing detectable amounts of subject pesticide (parathion) present on subject premises. Respondent stipulated to the propriety of the taking and handling of the samples tested (T.130).

Evidence elicited by Respondent that "other spraying" had occurred in the area in close proximity to the sample sites does not, without resorting to conjecture or surmise, detract from the corroborative support given by the detectable amounts of parathion found at the sites specified by witnesses La Rue and Goltl. The Respondent has the burden of proof to show that such amounts of parathion are attributable to a source different from that alleged by Complainant. In that event, a further showing of the time of spraying, the degree of care exerted and the pesticide used would be required. To meet said burden requires more than the elicitation of evidence which creates a doubt which cannot be resolved on this record (21 F.Pr. Dig., supra; see also Bauer v. Clark, 161 F.2d 397, 400(2), (CCA 2nd, 1947), citing Reliance Life Insurance Co. v. Burgess, 112 F.2d 234, l.c. 237).

The Proposed Findings of Fact and Conclusions submitted by the Parties have been considered. To the extent they are consistent with the Findings of Fact and Conclusions herein, they are granted, otherwise they are denied.

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.

The parties stipulated on January 25, 1982, that the appropriate amount to be proposed under the Civil Penalty Guidelines (39 FR 227711), is $4,250.00

for each of the two violations alleged. The guidelines consider but one aspect of "gravity of the violation", that is, the gravity of harm. The cases have consistently held that the other aspect of gravity, i.e., gravity of misconduct (of Respondent) must be considered. It is clear on this record that Respondent did not intend that drift of the subject pesticide would be permitted and that instructions to his employees was consistent with an intent to aerially apply subject pesticide in conformity with label directions. However, as is stated in the matter of Applied Biochemists, Inc., FIFRA Docket Number V-329-C (1976), intent is not an element of the offense. charged under the civil penalty provision of Section 14(a) of the Act, citing U.S. v Dotterweich, 320 US 277 (1943). The word "knowingly" does not appear in Section 14(a), as in the Criminal Penalty Section 14(b).

Though intent is not an element of the offense charged, it can and will be noted in determining the gravity of misconduct as evidenced by the record. Respondent and his employees are experienced pilots and are aware of the effect of the wind direction and velocity when applying a pesticide such as parathion. They observe windmills, ponds, streams and road dust in checking the direction and velocity of the wind at or near the time and place of the spraying contracted. Their pilots are instructed to turn around and return to base if the wind is thought to be excessive. The maximum wind that pilots are advised to operate with is 10 mph (T.205). On the dates in question, the wind at Curtis, Nebraska, was characterized as less than 10 mph velocity. When the job permits, the pilots attempt to spray cross-wind (T.254) and the spray is released when the aircraft is down within three feet of the top of the crop, so that there will be less likelihood of drift (T.207). This record indicates that parathion reached the premises of both Goltl and LaRue, but there is also evidence that the Respondent made a good faith attempt, in adapting precautionary measures such as leaving a buffer zone, to prevent

such occurrences. In view of the findings here made, Respondent should consider the possibility that a residual amount of pesticide is dispersed from the aircraft after the "money handle" is pulled to an "off" position; and that it is advisable to avoid flying over residential properties whenever possible. In the event that dispersal of the pesticide persists to any extent, after the deactivation of the pressure pump, Respondent's operation should take this into consideration.

In conclusion, I find that the gravity of harm is appreciable because of the character of parathion as evidenced by the label; however, I find gravity of Respondent's misconduct greatly minimized for the reason that, on this record, subject violations apparently occurred despite good-faith efforts by him to avoid them.

It is consistently held that possibility for harm (as opposed to probability) is to be considered in characterizing the gravity to be discerned concerning violations such as here found. See in re. Briggs and Stratton Corporation, 101 ALC 118 (1981).

Further effort should be exerted by Respondent in the future to monitor his equipment to determine the actual cause of the incidents here considered, and to prevent additional incidents of this character. 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 civil penalty to be here assessed is $2,250 for each such violation, or a total sum of $4,500.00.

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

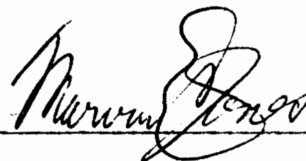
PROPOSED FINAL ORDER 1/

1. Pursuant to Section 14(a) of the Federal Insecticide, Fungicide and Rodenticide Act, as amended, a civil penalty of $2,250 is hereby assessed against Respondent, Ealy Spraying Service, Incorporated, for violation of Section 12(a)(2)(G) of the Act (7 USC 136j(a)(2)(G))on or about July 8, 1980.

2. Pursuant to Section 14(a) of the Federal Insecticide, Fungicide and Rodenticide Act, as amended, a civil penalty of $2,250 is hereby assessed against Respondent, Ealy Spraying Service, Incorporated, for violation of Section 12(a)(2)(G) of the Act (7 USC 236j(a)(2)(G))on or about July 18, 1980.

3. Payment of $4,500, the total amount of the civil penalties 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: *Sept. 22, 1982*



Marvin E. Jones
Administrative Law Judge

1/ 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.

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. 22, 1982

Mary Lou Clifton
Mary Lou Clifton
Secretary to Marvin E. Jones, ALJ