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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

IN THE MATTER OF:)
)
Erisman Spraying Company, Inc.,) FIFRA Docket No. VII-1134C-92P
and Gerald P. Schreiner,)
)
Respondents)

INITIAL DECISION

APPEARANCES

On Behalf of the Agency:

JULIE VAN HORN, Assistant Regional Counsel
PATRICIA GILLESPIE MILLER, Assistant Regional Counsel
Environmental Protection Agency
726 Minnesota Avenue
Kansas City, Kansas 66101
Phone: (913) 551-7010

On Behalf of the Respondents:

JOSEPH H. MURRAY, Esquire
Germer, Murray & Johnson
147 North 4th Street
Hebron, Nebraska 68370
Phone: (402) 768-7400

Pursuant to 40 C.F.R. § 22.27(c) this initial decision shall become the final order of the Environmental Appeals Board within forty-five (45) days after its service upon the parties and without further proceedings unless (1) an appeal to the Environmental Appeals Board is taken from it by a party to this proceeding or (2) the Environmental Appeals Board elects, sua sponte, to review this initial decision.

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In the Matter of	:
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Erisman Spraying Company,	:
Inc., and Gerald P.	:
Schreiner,	:
	:
Respondents.	:
	:
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401 M Street, S.W.,
Room 2107
Washington, D.C. 20460

Thursday, April 7, 1994

The proceedings, via conference call, in the above matter convened at 10 a.m.

BEFORE:

JON G. LOTIS
Acting Chief Judge
Office of Administrative Law Judges
Environmental Protection Agency

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APPEARANCES:

On behalf of the Respondents:

JOSEPH MURRAY, ESQ.

On behalf of the Complainant:

JULIE VAN HORN, ESQ.

P R O C E E D I N G S

JUDGE LOTIS: We will be on the record.

This is Judge Lotis. Just so we have a record of who is on the telephone call today, who will be listening here for the respondents today?

MR. MURRAY: Judge, this is Joe Murray, attorney for respondents.

JUDGE LOTIS: And for the complainant?

MS. VAN HORN: Good morning. This is Julie Van Horn.

JUDGE LOTIS: Thank you. I wanted to make one preliminary comment. In the reply brief of the complainant, on page 1, complainant asked that respondents' initial brief not be accepted, since it was, allegedly, filed out of time. Whether it was filed out of time or not, due to the small amount of time that alleged to have been involved and the fact that I could see no prejudice to the complainant by that filing, I am going to accept the brief and deny the request that it be rejected.

Going on to the merits of this case --

First, another preliminary matter. I had sort of indicated to the parties near the close of the hearing that

I intended to act rather expeditiously on this. I apologize for my lack of expedition. Since that time, as of the first of the year, I have been named Acting Chief Judge here. Along with a large influx of cases, which has saddled this office with over 1,100 enforcement cases, it has meant that there has been a delay in handling of all matters in this office. I apologize for the delay. I wish I could have gotten to this much sooner.

Now commencing with my decision, I want to first give the background much as if it was a written decision. This is an administrative action for an assessment of civil penalties. The action was brought by Region 7, the United States Environmental Protection Agency, who is the complainant in this case. The action was brought on December 31, 1991.

The respondents are Erisman Spraying Company, Inc., of Fairmont, Nebraska, and Gerald P. Schreiner, one of its employees.

The EPA alleges that the respondents violated Section 12(a)(2)(g), of the Federal Insecticide, Fungicide and Rodenticide statute by using a pesticide in a manner not consistent with its labeling. More specifically, the EPA

claims that, in spraying parathion 8E on one farmer's field, the respondents allowed the spray to come into contact with the soil and foliage on another farmer's property. The complainant proposes that a penalty of \$4,600 be assessed against the respondents.

The respondents denied liability and requested a hearing. That hearing was held in Geneva, Nebraska, on August 31, 1993. Witnesses were presented by both parties. Briefing was completed on November 19, 1993.

Certain of the basic facts surrounding the alleged violation are not in dispute. They were the subject of a stipulation, which was entered into the record in the case. Rather than repeating all of those matters that have been stipulated to, I will now ask the reporter at this time to copy into the transcript as if read the three-page stipulation that I will now hand her.

[Material follows:]

1 "Complainant and Respondent hereby stipulate
2 and agree as follows:

3 "1. The Respondent, Erisman Spraying Company,
4 Inc., Fairmont, Nebraska, (Respondent Erisman) is
5 a corporation incorporated under the laws of the
6 State of Nebraska.

7 "2. The Respondent, Gerald P. Schreiner (Re-
8 spondent Schreiner) is a certified commercial
9 applicator, certification number NE600296, classi-
10 fication 01 - Agricultural Plant Pest Control.

11 "3. Respondent Schreiner is employed by Re-
12 spondent Erisman.

13 "4. Respondent Erisman is a person as de-
14 fined by the Section 2 of Federal Insecticide,
15 Fungicide and Rodenticide Act (FIFRA).

16 "5. Respondent Schreiner is a person as de-
17 fined by the Section 2 of Federal Insecticide,
18 Fungicide and Rodenticide Act (FIFRA).

19 "6. On July 1, 1991 Respondent Schreiner
20 while working within the course and scope of his
21 employment with Respondent Erisman, aerially
22 applied PARATHION 8E, EPA Registration Number
23 34704-9, to 3 acres of milo belonging to Arnold
24 Nadherny.

25 "7. PARATHION 8E is a registered pesticide

1 classified for restricted use pursuant to Sec-
2 tion 3 of FIFRA.

3 "8. The active ingredient in PARATHION 8E
4 is ethyl parathion.

5 "9. Arnold Nadherny's property is located
6 at the south one-half of the southwest quarter
7 of Section 35, Glengary Township, Fillmore County,
8 Nebraska.

9 "10. Respondent's application of PARATHION
10 8E was made for the control of chinch bugs.

11 "11. The property located to the southeast
12 of the application site across a county road is
13 farmed by Len Schropfer (Schropfer property).

14 "12. Len Schropfer also lives in a house
15 located on the Schropfer property.

16 "13. The Schropfer property is located at
17 the north one-half of the northeast quarter of
18 Section 2, Franklin Township, Fillmore County,
19 Nebraska.

20 "14. On July 2, 1991, Kyle E. Winters an
21 EPA inspector and authorized EPA representative,
22 conducted an investigation of the application of
23 PARATHION 8E by Respondent Schreiner to the pro-
24 perty of Arnold Nadherny.

25 "15. On July 2, 1991 Kyle E. Winters took

1 two foliage and one soil sample from the Schropfer
2 property, and one foliage sample from the property
3 located directly east of the application site,
4 for a total of four samples, as diagramed in Ex-
5 hibit 8 to Complainant's Prehearing Exchange.

6 "16. The three foliage samples and one soil
7 sample were analyzed and all of the samples con-
8 tained ethyl parathion.

9 "17. The PARATHION 8E label bears the fol-
10 lowing statement:"

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

18 "18. The parties stipulate to the entry into
19 evidence of all of the documents submitted as
20 Complainant's Prehearing Exchange except that re-
21 spondents reserve the right to object as to rele-
22 vance on Exhibits 27 - 40."

23 "19. The parties stipulate to the entry into
24 evidence of Exhibits 1, 2, and 3 of Respondents'
25 Prehearing Exchange."

JUDGE LOTIS: The record shows that, according to Mr. Schropfer, somewhere around 9 a.m., on July 1, 1991, he saw a white plane with blue markings spraying pesticide to Mr. Nadherny's milo field, just northwest of his property, across the county road.

I am going to give you transcript citations as I go along for my statements, much as if it was a written decision.

The basis for that is transcript page 79 to page 80, and also the complainant's exhibit 22.

According to Mr. Schropfer, the plane made a north to south pass over the Nadherny property and continued across the county road spraying the northwest corner of his property. I would ask the parties to see transcript page 48 and pages 78 to 79.

A visual depiction of the two properties can be seen from complainant's exhibits 46 and 47.

Mr. Schropfer also testified that he saw no other plane that morning at 9, 10, or 11 a.m. That is at transcript page 74.

The respondent Schreiner admits that he sprayed parathion 8E on three acres of milo belonging to Mr.

Nadherny for the control of chinch bugs. However, the respondents say that Mr. Nadherny's property was not sprayed until 10 a.m. According to the work ticket made out by the pilot, Mr. Schreiner, the application was made to the Nadherny field at 10 a.m. I direct the parties to complainant's exhibit 16.

This time, in a related work ticket, was supplied to the EPA investigator the following day on July 2, 1991, when the inspector made a visit to respondent's business. I would direct the parties to complainant's exhibits 2 and 15.

The EPA investigator, Kyle Winters, also, interviewed Mr. Nadherny, who stated that he saw his milo field being sprayed by a blue and white plane from Erisman Spraying Company, at approximately 10 a.m. Mr. Nadherny stated to Mr. Winters that he did not notice the blue and white plane making any pesticide applications in the area before making the application to his milo field. I direct the parties at this point to exhibit 20.

The respondents do not deny that their plane was in the area. The respondents, also, do not deny that parathion 8E was found on Mr. Schropfer's property. They, however, do deny that respondents had a hand in applying the

pesticide to Mr. Schropfer's property.

Now the consolidated rules of practice, more specifically, 40 C.F.R., Section 22.24, says that each matter of controversy shall be decided by the presiding officer based upon a preponderance of the evidence. The matter of controversy here is whether the respondents were responsible for the parathion 8E that was found on Mr. Schropfer's property.

I find that the preponderance of the evidence does not show that the respondents were responsible for the parathion 8E found on Mr. Schropfer's property. I do so for a number of reasons. This is not a case where the only evidence is Mr. Schropfer's word as to his sighting at about 9 am., and Mr. Schreiner's word that he did not spray Mr. Nadherny's property until 10 a.m. This is a case where corroborating eyewitness information was supplied to EPA from Mr. Nadherny that his field was sprayed at 10 a.m., and that he did not notice any application before that time.

With the corroborating information supplied by Mr. Nadherny, it was incumbent upon EPA to go further in its investigation than it did. For example, EPA should have taken the initiative to determine whether other spraying

service companies were in the area at the time. EPA's witness testified that EPA did not call any other aerial applicators or check the records to see where they might have been that morning or where they might have been the afternoon of July 1, 1991, or where they might have been the morning of July 2, 1991, before the samples were taken. This testimony can be found at transcript page 124.

The evidence also shows that five or six aerial spraying services work in Glengary Township, in Fillmore County. That is at transcript page 141.

I believe a fair reading of the testimony of Mr. Heddon, owner of Erisman Spraying Company, Inc., is that there are a lot of blue and white planes among those five or six companies. I would refer the parties to transcript pages 142 to 143. That testimony was not impeached on cross-examination nor was other evidence introduced by EPA to refute or rebut that testimony.

As the record now stands, I have only the one eyewitness account of Mr. Schropfer, which conflicts with the other eyewitness account of Mr. Nadherny. The preponderance of evidence in this record does not support the complaint that the respondents are guilty of the offense

charged.

Complainant cites the case of Ealy Spraying Service Inc. That was an Initial Decision issued by Judge Jones on September 22nd of, I believe it was, 1982. In that case, it was found that the respondent had the burden to show that the improper aerial spraying of parathion came from a service other than respondent's. That case, though, and this case are factually distinguishable. In the Ealy case, two eyewitnesses, which EPA relied upon, testified that, on the same day, their property was improperly sprayed with parathion. In the Ealy case, respondent had an affirmative burden to show another spraying service was in the area where it was essentially a case of complainant's two eyewitnesses accounts versus the spraying service company's conjecture that someone else might have sprayed the properties in question.

In this case, complainant basis its case on one eyewitness account, which conflicts with another eyewitness account, which corroborates respondents' position. The government in this instance should have investigated further to rule out the possibility that the property was sprayed by another spraying service company in the area.

In the circumstances of this case, it is EPA's burden to show by a preponderance of evidence that respondents sprayed Mr. Schropfer's property. It has not met that burden here. That is my Initial Decision in the case.

For purposes of review, as far as I am concerned, the rules do not specifically address a decision from the bench, an oral decision. My view of it and a fair reading of the rules, which would be that the time for an appeal would begin running from the time I issue this decision, and I intend to do so.

As soon as the transcript becomes available, I will put a covering page on it titled, "Initial Decision." I will note on that covering page the appearances of both counsel here and the appearances that were entered in the record the day of the hearing. I would also put a date on that covering page, and that date on that covering page would be the date when the time would start running for an appeal.

There being no further matters to be considered, this hearing session is adjourned.

Thank very much.

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MS. VAN HORN: Thank you, Your Honor.

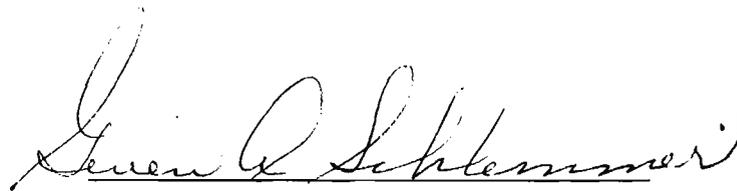
MR. MURRAY: Thank you.

[Whereupon, at 10:14 a.m., the proceedings in the
above matter were concluded.]

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C E R T I F I C A T E

I, **GWEN A. SCHLEMMER**, the Official Court Reporter for Miller Reporting Company, Inc., hereby certify that I recorded the foregoing proceedings; that the proceedings have been reduced to typewriting by me, or under my direction and that the foregoing transcript is a correct and accurate record of the proceedings to the best of my knowledge, ability and belief.

A handwritten signature in cursive script, reading "Gwen A. Schlemmer". The signature is written in dark ink and is positioned above the printed name.

GWEN A. SCHLEMMER