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

IN THE MATTER OF:	)	Docket No. IF&R VII-442C-82P
	)	
Robert G. Naumann d/b/a	)	
Saunders County Aerial Spraying	)	Marvin E. Jones
	)	Administrative Law Judge
Respondent	)	

INITIAL DECISION

By Complaint filed February 23, 1982, Robert G. Naumann d/b/a Saunders County Aerial Spraying (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 Dow ESTERON 99 Concentrate 2,4-D HERBICIDE was in a manner "inconsistent with label directions in that the pesticide was allowed to drift onto non-target desirable broadleaf plants" in violation of Section 12(a)(2)(G) of FIFRA (7 USC 136j(A)(2)(G)). Said label (Complainant Exhibit C) in pertinent part, provides as follows:

> "USE PRECAUTIONS: Avoid contact with 2,4-D SUSCEPTIBLE CROPS AND OTHER DESIRABLE BROADLEAF PLANTS: ESTERON 99 Concentrate herbicide is injurious to most broadleaf plants. Therefore, do not apply directly to or otherwise permit even minute amounts to contact cotton, grapes, tobacco, fruit trees, vegetables, flowers, ornamentals or other desirable plants susceptible to 2,4-D." "Do not apply in the vicinity of COTTON, GRAPES, TOBACCO, TOMATOES OR OTHER DESIRABLE 2,4-D SUSCEPTIBLE CROPS OR ORNAMENTAL PLANTS." "DO NOT SPRAY WHEN WIND IS BLOWING TOWARDS SUSCEPTIBLE OR ORNAMENTAL PLANTS." "AVOID SPRAY DRIFT".

Specifically, the Complaint alleges that Respondent, on or about June 25, 1981, aerially applied subject pesticide to an oat field farmed

by Richard Berry and situated adjacent to and north of a three-acre tract, being the residence of Mr. and Mrs. Anthony Komenda, and that Respondent allowed said pesticide to drift onto or reach said residential property, thereby causing damage to plantings on the Komenda property. On this record, Respondent does not deny the aerial application of subject pesticide at the time and place alleged. Respondent appeared at the Adjudicatory Hearing representing himself and there took issue with the allegation that he allowed or permitted said pesticide to drift onto or reach non-target areas. Said issue is resolved by the instant record, including evidence elicited at the requested hearing held on June 4, 1982, in Courtroom No. 2, United States District Court, 100 Centennial Mall, Lincoln, Nebraska. After said hearing, the parties were advised that they were permitted by the regulations to file proposed findings of fact and conclusions of law accompanied by brief and arguments, but were not required to do so (T.73). The parties were instructed that said post-trial documents should be prepared and filed within 20 days following receipt of the transcript. An additional ten days was provided for filing of reply briefs (T.74). No post-trial filings were made by Respondent.

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

FINDINGS OF FACT

1. On or about June 25, 1981, Mr. and Mrs. Anthony Komenda were at their residence at the corner of Northwest Ninety-eighth, West Agnew

Road, Rural Route 1 (on a three-acre tract), Box 38B, Valparaiso, Nebraska, between the hours of 8:00 and 10:00 p.m.

2. At about 8:30 to 9:00 p.m., while outside in the yard at their said residence, the Komendas witnessed the aerial spraying of adjacent cropland, north of their house, being an oat field farmed by Richard Berry (T.17).

3. While outside their residence, on the date and at the time above, Mr. Komenda witnessed the plane pass over their property and witnessed spray still coming from the plane as it passed over the road beside their property, and flew over their property (T.17).

4. Anthony Komenda subsequently identified the aerial sprayer as Respondent Robert Naumann, doing business as Saunders County Aerial Spraying (T.17).

5. Mrs. Komenda subsequently, on June 30, 1981, reported the incident to the Environmental Protection Agency (EPA).

6. Steve Morris, EPA Consumer Safety Officer in Lincoln, Nebraska, met with Mrs. Komenda at the Komenda residence on July 1, 1981 (T.36)

7. On that date, Mr. Morris, with permission, collected samples of foliage and soil samples from the Komenda property, identifying the foliage samples with identification numbers 172518, 172519, 172520, and the soil sample identification number 172521.

8. Mr. Morris used proper collection, storage, preservation and sealing techniques in the handling of the above samples (T.40-42).

9. Mr. Morris shipped the above samples to the Iowa Department of Agriculture Pesticide Laboratory in Des Moines, Iowa, by parcel post (T.42).

10. On July 9, 1981, Don Doxon (T.3), sample custodian, Iowa Department of Agriculture Pesticide Laboratory, received from Steve Morris by parcel post, foliage and soil samples identified as sample numbers 172518, 172519, 172520, and 172521, and placed said samples in the residue freezer, after determining the seals were intact.

11. On July 7, 1981, Steve Morris met with Mr. Robert Naumann of Saunders County Aerial Spraying and identified himself as an EPA employee (T.42).

12. On said date, Mr. Morris obtained copies of Respondent's aerial applicator records (Exhibit A) which established Respondent as the aerial applicator for the Berry crops on June 25, 1981, and subsequently obtained an affidavit (Exhibit B) from Mr. Naumann, in which Mr. Naumann acknowledges spraying the oat field with 2,4-D pesticide at approximately 8:30 p.m. on June 25, 1981 (T.44)

13. Mr. Morris took photographs (Exhibit C) of the container containing the pesticide identified by Mr. Naumann as that used at the Berry location on June 25, 1981, i.e., Esteron 99 Concentrate 2,4-D. The label's "Use Directions" prohibit use in a manner that allows drift onto nearby susceptible crops or other desirable plants.

14. In his testimony at the hearing, Mr. Naumann again acknowledged he was the aerial applicator at the Berry location on June 25, 1981, and that he used subject 2,4-D pesticide (T.67-72).

15. On November 3, 1981, in the course of his duties, Kurt Beane, Chemist, Iowa Department of Agriculture Pesticide Laboratory, began analysis of Sample numbers 172518, 172519, 172520, 172521 above, by removing said samples from the residue freezer, determining the seals were intact, breaking the seals, removing the samples from the packages, and preparing the samples for analysis by gas chromatograph, according to approved procedures (T.58-60).

16. Mr. Beane analyzed said samples by gas chromatograph according to a set approved procedure, and determined said samples contained detectable levels of the pesticide 2,4-D in all four samples (T.60-61).

17. Mr. Beane ran calibration checks on the gas chromatograph during the analysis of all said samples (T.60).

18. Mr. Beane confirmed the results of the analysis for accuracy (T.63).

19. Residue of the pesticide 2,4-D has been found in foliage samples up to forty-five days after application (T.65).

20. The residue of 2,4-D in sample number 172519, specifically 1.7 parts per million (ppm) 2,4-D, and sample number 172520, specifically 2.6 ppm 2,4-D, are high levels of concentration of 2,4-D (T.65).

CONCLUSIONS OF LAW

1. The admitted fact that Respondent, on June 25, 1981, about 8:30 p.m., aerially sprayed an oat field farmed by Richard Berry, coupled with the testimony of Witness Anthony Komenda (T.17) that Respondent's aircraft passed over the Komenda property, at which time spray was seen still

coming from the plane, makes a submissible case as to the violation charged in subject Complaint, to wit, that Respondent's use of Dow Esteron 99 Concentrate (2,4-D) was inconsistent with label directions, in that amounts of said pesticide were allowed to come into contact with non-target susceptible crops and desirable broadleaf plants on said Komenda property.

2. Said testimony is corroborated by the further testimony that samples of foliage and soil taken from and near plant life in the area allegedly sprayed, when analyzed, contained detectable levels of 2,4-D.

3. Respondent did not carry his burden of presenting and going forward with a defense to the prima facie case established by Complainant (Rule 22.24).

4. For a 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)).

5. Intent or lack thereof is not an element of the violation charged in a civil penalty case (Section 14(a), the Act).

6. On consideration of the criteria provided by Section 14(a)(3) (7 USC 1361(a)(3)) of the Act and the additional criteria provided by 40 CFR 22.35(c), and the evidence in this record, I find that the $250 civil penalty proposed is reasonable and appropriate.

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 $250 is hereby assessed against Respondent, Robert G. Naumann, d/b/a Saunders County Aerial Spraying, for violation of Section 12(a)(2)(G) of the Act (7 USC 236j(a)(2)(G)) on or about June 25, 1981.

2. Payment of $250, 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: October 1, 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 parites, 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: October 1, 1982

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