S 9-94

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Harold L. Thomsen, and Thomsen Aerial Spraying Inc.,	)	**Docket No.I.F.& R.-VII-1123C-92P**
	)	
Respondents	)	

Federal Insecticide, Fungicide and Rodenticide Act - Civil Penalties - Evidence - Burden of Proof

A complaint alleging use of a pesticide inconsistent with its labeling was dismissed where Complainant failed to carry its burden of establishing that parathion found in foliage from a tree on property of the complaining witness resulted from activities of Respondents.

Appearance for Complainant:

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Assistant Regional Counsel
U.S. EPA, Region VII
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Appearance for Respondents:

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INITIAL DECISION

This proceeding under Section 14(a)(1) of the Federal Insecticide, Fungicide and Rodenticide Act, as amended (7 U.S.C. § 136l(a)(1)), was commenced by the issuance of a complaint on December 31, 1991, charging Respondent, Harold L. Thomsen, d/b/a Thomsen Aerial Spraying, Inc. (Thomsen) with violating Section 12(a)(2)(G) of the Act, i.e., use of a pesticide inconsistent with its labeling. Specifically, the complaint alleged that on August 10, 1990, Thomsen aerially applied Cornbelt Parathion E8, a restricted use pesticide, to a milo field and that, during the application, a mist of the pesticide drifted onto adjacent property and onto the person of one Mary Caster. This allegedly was inconsistent with the label for the mentioned pesticide which contained a warning to the effect that unprotected persons were to be kept away from the treated area or where there was danger of drift. For this alleged violation, the complaint, as amended, proposed to assess Thomsen a penalty of $3,000. The amended complaint also changed the style of the case to: "Harold L. Thomsen and Thomsen Aerial Spraying, Inc."

Respondents answered, admitting the pesticide application alleged in the complaint, but denying any violation of the Act and requested a hearing.

A one-day hearing on this matter was held in Beatrice, Nebraska.

Based on the entire record, including the stipulations, briefs and proposed findings submitted by the parties, I make the following:

Findings of Fact

1. Thomsen Aerial Spraying, Inc. is a corporation organized under the laws of the State of Nebraska. Harold L. Thomsen is Vice-President of Thomsen Aerial Spraying, Inc. and a certified applicator in the State of Nebraska, Certification No. NE602516 (Stipulations; Tr. 10).
2. Thomsen Aerial Spraying Inc. and Harold L. Thomsen are persons as defined in Section 2(s) of the Act.
3. On August 10, 1990, Mr. Thomsen aerially applied "Cornbelt Parathion E8," EPA Reg. No. 10107-24, a restricted use pesticide, to a milo field owned or operated by Ray Scheidler (Scheideler). The application was for the purpose of controlling "green bugs." The active ingredient in Cornbelt Parathion is "ethyl parathion" (Stipulations; Tr. 10, 11).
4. The label for Cornbelt Parathion includes the following under "Work Safety Rules": "Keep all unprotected persons and children away from treated areas or where there is danger of drift" (Stipulations; label, C's Exh 30).
5. Ms. Mary Caster resides in Wymore, Nebraska. The residence occupied by Ms. Caster is on property located immediately to the north of the Scheideler milo field, which was

treated by Mr. Thomsen on August 10, 1990, as reflected in finding 3.

6. On August 13, 1990, Ms. Caster addressed a letter to EPA's Lincoln Field Office (C's Exh 2). The letter referred to spraying of crops on the field to the south of her residence, alleged that this spraying (over-spraying) had [in the past] killed her peach trees, grapes and flowers and caused her health problems such as earaches and headaches. The letter stated that on the 10th of August of this year she was mowing her yard and "got it again."

7. Investigation of Ms. Caster's complaint was assigned to Mr. Kyle E. Winters, an environmental protection specialist in the Lincoln Field Office. Mr. Winters interviewed Ms. Caster at her home and collected foliage samples from trees in her yard on September 25, 1990. An affidavit, handwritten by Mr. Winters, signed by Mary Caster on that date states in pertinent part: "On Aug. 10, 1990 at approximately 10:00 a.m., I was outside mowing my lawn when I was hit by a pesticide spray drift from an aerial applicator spraying a sorghum field just south of my home. This has happened in the past and the drift has damaged or killed my trees, flowers and garden."[1/]

[1/] C's Exh 7. The parties have stipulated that any damage to trees and other vegetation in Ms. Caster's yard was not caused by alleged drift or over-spray from the parathion application at issue (Tr. 10).

8. Following his interview with Ms. Caster, Mr. Winters interviewed Harold Thomsen at his office at the airport south of Wymore. The handwritten affidavit, which Mr. Thomsen reportedly agreed was correct, but refused to sign, provides in pertinent part:

> On this date Kyle Winters presented his letter of authorization and issued a notice of Pesticide use/Misuse inspection.
>
> On Aug. 10, 1990 at 9:00 A.M. I applied Parathion E8 to the Ray Scheidler property at 9:00 A.M. The target field was a milo field South of West A in Wymore, NE. The target pest was green bugs. The wind was East at approximately 8 mph. I applied Parathion E8 EPA Reg. No. 10107-24 at the rate of ½ pound per acre.
>
> I left a 50' buffer zone on each side of the field.
>
> My applicator number is NE 602516 (7/93 exp.)

9. During the interview referred to in finding 8, Mr. Thomsen produced a copy of the application record and invoice for the pesticide application at issue (C's Exh 16). This printed form is divided into three parts, the first part containing the customer's name and address, the crop to be treated, the target pest, chemical to be applied, application rate per acre, number of acres and the date the order was received. In this instance, the customer's name is written as "Ray Scheidler," the date is 8/9/90, the crop to be treated is milo for "green bugs," the chemical to be applied is Parathion at a rate of ½ [#] per acre and the number of acres is stated to be 175.8.

10. The second or middle portion of the form, referred to in finding 9, is blank for the purpose of showing a sketch of the field to be treated; obstructions, such as trees, power lines, buildings, and adjoining crops. In practice, this portion of the form appears to have been used to show the invoice amount for treating various parcels and, where applicable, to divide the bill between the owner and operator.

11. The lower portion of the "applicator record and invoice" referred to in finding 9 contains, inter alia, spaces for date completed, temperature, time, wind, pilot's name, total acreage and EPA Reg. In this instance, the form as filled out shows that the job was completed on 8/10, that the temperature was 78, that the time was 9 a.m., that the wind was out of the east at 8 mph, that the pilot was Harold, that the total acreage was 175.8 and that the EPA Reg. No. was 10107-24.

12. Mr. Winters' typewritten report of "Use/Misuse Inspection," dated September 25, 1990, quotes Ms. Caster as stating that on August 10, 1990, she was mowing her lawn at approximately 9:00 or 10:00 a.m. when she was "hit" by pesticide drift from an aerial applicator who was applying

pesticide to a sorghum field immediately south of her lawn.[2/] Ms. Caster reportedly stated that she could detect a chemical odor on her property as a result of the pesticide application. She identified the applicator as Harold Thomsen of Wymore, NE.

13. The report referred to in finding 12 includes Mr. Winters' subsequent interview on September 25 with Mr. Thomsen. Mr. Thomsen is quoted as stating that he applied Parathion E8, EPA Reg. No. 10107-24 to the milo field south of West A Street [Wymore, NE] at approximately 9:00 a.m. on August 10, 1990. Mr. Thomsen is also reported to have stated, inter alia, that he left a 50-ft. buffer strip on each side of the field to minimize the possibility of any drift and as denying that any drift occurred from the application.

14. At the time of his September 25 interview with Mary Caster, Mr. Winters collected samples of foliage from a maple tree and from a walnut tree in her yard (Tr. 53, 54; C's Exhs 3, 6 and 9). A sketch (C's Exh 8) shows the approximate location of the trees from which the samples were taken in relation to Ms. Caster's house and the property line. The sketch shows that the walnut tree from which the second sample was taken is closest to the property line and the

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[2/] C's Exh 3. There is no evidence in the record as to the length of time which elapsed after Mr. Winters returned to his office and typing of the report.

application site. Although Mr. Winters testified in some detail as to his methods of collecting and preserving the samples, i.e., use of latex gloves, washing aluminum foil in which the samples are placed with isopropanol, etc. (Tr. 53, 54, 64-72), he did not use any particular random method in selecting the samples (Tr. 78). The samples were placed in a cooler in the van Mr. Winters was driving and put in a freezer when he returned to his office in Lincoln. The samples were mailed to the EPA laboratory in Kansas City on September 26, 1990. The analysis requested was for the presence of Parathion E8. The parties have stipulated to the chain of custody for these samples (Tr. 11).

15. Results of analyses of the samples were reported under date of June 21, 1991 (C's Exh 11). The report states that holding times have not been established for parathion and that the samples were kept frozen until extraction. Analyses of the samples were performed by Paula Ann Woodland, a chemist employed by ManTech Environmental Technology, Inc., an EPA contractor, using gas chromatography (GC) (Tr. 79-85). Ethyl parathion was not detected in the sample from the maple tree (No. SLB HH001), ethyl parathion was, however, found in the sample from the walnut tree (No. SLBHH002) at a concentration of 2.62 ug/kl (2.62 parts per billion).

16. The test report (C's Exh 11) states that EPA Method 8140 was used for the analyses. Ms. Woodland testified however,

that Method 8140 provides that when this method is used to analyze unfamiliar samples, compound identification should be supported by two additional qualitative techniques when mass spectroscopy cannot be used (Tr. 87). She stated that mass spectroscopy could not be used in this instance, because the concentration was so low. She further testified that at the time, "we" (her laboratory) did not have the equipment to analyze by additional qualitative techniques (Tr. 87, 91). Ms. Woodland explained that these additional techniques related to compound identification, verification of that identification, and confidence in that identification, rather than the accuracy of the concentration (Tr. 92). She indicated that she was at least 80 percent confident in the positive identification of ethyl parathion.[3/]

17. On March 3, 1992, Mary Caster signed a typewritten affidavit (C's Exh 34). The affidavit states, inter alia,

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[3/] Methods For Evaluating The Attainment Of Cleanup Standards, EPA-230-R-92-014 (July 1992), defines confidence level as follows:

> The degree of confidence associated with an interval estimate. For example, with a 95 percent confidence interval, we would be 95 percent certain that the interval contains the true value being estimated. By this, we mean that 95 percent of independent 95 percent confidence intervals will contain the population mean. In the context of a statistical test, the confidence level is equal to 1 minus the Type I error (false positive rate). In this case, the confidence level represents the probability of correctly concluding that the null hypothesis is true.

(Id. G-3).

that on August 10, 1990, at approximately 9:00 or 10:00 a.m. she was mowing her lawn when she was "hit" by pesticide drift from an aerial applicator who was applying pesticide to a sorghum field immediately south of her lawn. She felt the drift hit her face and detected a strong chemical odor. The affidavit further states that she observed the aerial applicator and recognized him as Harold Thomsen and that this type of drift has happened several times in the past when Mr. Thomsen has aerially applied pesticides in the area. The affidavit concludes by stating that she has never used any pesticides on her property.

18. Ms. Caster was not certain, but believed that the affidavit referred to in finding 17 was delivered to her for signature by an EPA employee (Tr. 36). Although she referred to phone calls with EPA personnel, she did not recall any discussions concerning the content of the affidavit (Tr. 37). She repudiated that portion of her affidavit relating to recognition of Harold Thomsen, asserting that, even though he lived approximately eight blocks from her home, she had never seen him until the day of the hearing (Tr. 16, 31, 37). She claimed, however, to recognize his plane, because she had driven by the airport and to have known that Mr. Thomsen was doing the spraying, because she had known Laura and Mr. Scheideler all her life (Tr. 17, 38). Under cross-examination, she was more explicit, acknowledging that she knew he (Mr. Thomsen) was

doing the spraying, because she was told so by the Scheidelers (Tr. 32). Curiously, however, she denied ever discussing the drift incident with Mr. Scheideler (Tr. 39).

19. Ms. Caster testified that she began mowing her yard at about 9 o'clock on the morning of August 10, 1990 (Tr. 28, 34). According to Ms. Caster, she was sitting on her [riding] mower at approximately 10:00 a.m. when she was hit by drift [from an aerial pesticide application] (Tr. 30, 37). She described the drift as a "light mist" (Tr. 20, 21). She glanced up and observed a plane headed east to the east and south of her house. She claimed to know who it was, because he (Mr. Thomsen) had allegedly sprayed her and her yard several times in the past (Tr. 22, 23, 25-27, 38). Under cross-examination, however, she was unable to describe the color of the plane other than "it was a light color" (Tr. 32). Photos of the plane used by Mr. Thomsen show that the fusilage and leading edges of the wings are outlined in red and that the balance of the aircraft is white or cream colored (R's Exh 17, photo "g").

20. The affidavit signed by Ms. Caster on March 3, 1992 (C's Exh 34), states that she detected a strong "chemical odor" when hit by the pesticide spray drift. She was unable to describe the odor, however, other than to say it was different than being sprayed with water (Tr. 22). In further testimony, she stated that she could not smell on August 10, 1990 (Tr. 31, 39). She amplified this

testimony, explaining that she could not smell flowers or food cooking (Tr. 41).

21. Harold L. Thomsen testified that he had held a commercial pilot's license and been involved in the aerial application of pesticides for 19 years (Tr. 121-22). Describing equipment used in his operation, he referred to a "Dwier" meter on a buford scale to determine wind velocities and a direction meter which tells the direction from which the winds are coming (Tr. 124). These instruments are maintained at the airport. He described safety precautions as including a "fly by" of the area to be sprayed and repeated checks of wind direction and velocity, usually including a "smoker pass" to double check the direction of the wind (Tr. 124-25). He testified that, after determining that it was safe to fly the field and that the wind was in the proper direction, he would proceed to the downwind side and work upwind. After completing the job, he would fly back to the airport, land and make out the rest of the ticket, showing the time, wind velocity, temperature, the chemical and amount used and the EPA registration number.

22. In addition to the pesticide application for Ray Scheideler at issue here, Mr. Thomsen applied parathion to a milo field owned or operated by Mr. Scheideler's brother Harold on the morning of August 10, 1990 (Application Records, R's Exhs 5 & 6; Log Book, R's Exh 3). Mr. Thomsen testified

that he performed the applications for the Scheideler brothers and one other job with the same plane load (Tr. 127). He further testified that it was 9:00 a.m. when he returned to the airport and signed the ticket (Tr. 127, 130, 146, 161). He estimated that he would have started the Ray Scheideler job an hour-and-a-half or two hours before 9:00 a.m. or at 7:00 to 7:30 (Tr. 127-28). At another point, Mr. Thomsen indicated that he may have started the application for Ray Scheideler as early as 6:30 a.m. (Tr. 161). The application records, however, reflect that he completed the Harold Scheideler application at 8:00 a.m. and the Ray Scheideler application at 9:00 a.m. (R's Exhs 5 & 6). Although difficult to read, the record for the Harold Scheideler application appears to show the wind from the east at 0.6 [mph].

23. The Ray Scheideler milo field referred to in finding 22 contained 175.8 acres, while the field operated by his brother Harold, contained 68 acres.[4/] Mr. Thomsen testified that it would require approximately an hour and 30-to-40 minutes to treat 175 acres (Tr. 152). In subsequent testimony, he estimated the time required to complete Ray Scheideler's field as a "little over an hour" (Tr. 180). He acknowledged completing Harold Scheideler's field first and then proceeding to Ray Scheideler's, but

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[4/] R's Exhs 5 & 6. Figures on Exh 5, however, reflect that the area treated totaled 99.4 acres.

stated that the time (8:00 a.m.) of completion of the application for Harold Scheideler was approximate (Tr. 168). He insisted, however, that the time of 9:00 a.m. shown on the application record for Ray Scheideler's job was exact, being the time he completed the application and landed at the airport. He testified that the time was taken "off the wall" [from the clock in his airport office] (Tr. 169).

24. Mr. Thomsen testified that there was a general "green bug" infestation in the Wymore area at the time (Tr. 128). He identified other aerial pesticide applicators in the general area as Charles Thomas of Liberty, NE, Jim Young at Adams, NE, Jeff Engels at Beatrice, NE and Dean Luvgren of Marysville, Kansas. Although he did not recall seeing any of these applicators on August 10, he indicated that it would not have been unusual to do so, as they saw one or another about every day. Mr. Thomsen denied ever applying a herbicide for the Scheidelers, stating that they do that themselves or hire a "ground floater machine" (Tr. 162). He also denied having any prior complaints from Mary Caster (Tr. 172-74). Although acknowledging the presence of trees in Mary Caster's yard, he insisted that he had a "very good view" and saw no one in her yard (Tr. 145, 185). Photos show that Ms. Caster's yard is generally open to the south of her house (R's Exh 17, C's Exh 19).

25. Weather Bureau records for Beatrice, NE for August 9 and 10, 1990, are in evidence (R's Exh 1). These records show that at 5:50 a.m. on August 10, 1990, the wind was from the northeast at 5 knots, that at 6:52 a.m. the wind was directly from the east at 6 knots and that at 7:51 a.m. and 8:52 a.m. the wind had shifted and was from the southeast at 11 knots. At 9:47 a.m., the wind had shifted even more to the south east, maintaining a velocity of 11 knots. Official notice is taken of the fact that Wymore, NE is within 15 miles of Beatrice.

26. Marjorie Thomsen is Harold Thomsen's wife and assists him in the conduct of his business by taking orders, keeping the books, sending out billings, "gassing up" the plane, etc. (Tr. 187-88). Referring specifically to Respondents' Exhibits 5 and 6, the pesticide application records for the applications performed for the Scheideler brothers on the morning of August 10, 1990, Mrs. Thomsen testified that she "made up" and completed the forms (Tr. 188-89). She further testified that the times shown on these records were "logged in" when her husband completed the job and landed (Tr. 190). Under cross-examination, she acknowledged that the times shown on application records were approximate, that is, "within 15 minutes to a half hour" (Tr. 193).

27. Mr. Thomsen testified that at the time of the application of the parathion at issue here, he was using a product

called "Nalco-Trol" as a drift control (Tr. 143). He stated that a quart of "Nalco-Trol" was used to 100 gallons of water and that its purpose was to keep drift [spray] particles small and avoid "fines" (Tr. 144). Literature on Nalco-Trol states that it can increase deposition in the spray swath by 30% or more and greatly reduce spray drift (R's Exh 2). Other literature indicates that droplet stability is the goal and that spray droplets between 250 and 400 microns represent optimum sizes for effective aerial deposition of herbicides (R's Exh 14). Improvements described by Mr. Thomsen in order to minimize drift included having the booms no more than 75 percent of the length of the wing, lowering the spray booms, using spray booms which were angled and aerodynamically designed and angling the nozzles (Tr. 157-59). Recommended boom lengths and mountings, nozzle angles and spacing and application altitudes are contained in other literature (R's Exhs 15 & 16). According to Mr. Thomsen, this combination of equipment plus the speed of the plane [and the low altitude at which the spraying was performed] pushes the spray right down to the ground instantly so that it doesn't get a chance to get away [drift].[5/]

[5/] Referring to a video where he flew his plane along the Ray Schiedeler/Mary Caster property line and used the "smoker," shown for illustrative purposes (R's Exh 12), Mr. Thomsen estimated his altitude at "five feet off of the ground" (Tr. 154-55).

28. Mr. Edvert Aden resides in Wymore, Nebraska and has known Mary Caster for 40 years (Tr. 212). He testified that gardening was his hobby and that, after his retirement in 1989, he "took on" two more gardens, one of them for Ms. Caster. He described the location of Ms. Caster's garden as south of her house and about 20 feet north of the Ray Scheideler property line (Tr. 214). He stated that, in 1990, half of Ms. Caster's garden was planted to peanuts and the other half to dry, edible beans, i.e., lima beans, baby lima beans, kidney beans and pinto beans. Mr. Aden testified that all of the beans except the pinto beans were killed by an infestation of striped beetles (Tr. 213). He saw no indication of pesticide drift affecting his garden or the beetles in August of 1990. Mr. Marvin, identified finding 29, testified that the label for parathion states that it is recommended for bean beetle control (Tr. 217).

29. Mr. Philip H. Marvin is an entomologist and a consultant who has qualified as an expert witness in numerous court proceedings (Tr. 194-95, 208; Qualifications Statement, R's Exh 18). He compared the concentration of parathion found in the foliage sample from the walnut tree in Mary Caster's yard "to one second in about 35 years" (Tr. 196). He described instances in which pesticides, 2,4-D and endrin, had been borne great distances by winds and then "deposited" by frontal or cold systems (Tr. 202). He opined that, with the heavy green bug infestation in the

Wymore area in 1990, the parathion found in foliage from Mary Caster's yard could have come from many sources (Tr. 205). He referred to instances in which people were certain they were feeling spray drift, which turned out to be drippings from "leaf hoppers" (Tr. 203-04).

30. Mr. Marvin declined to estimate the "half-life" of parathion under the circumstances present here, stating that it would be affected by wind, temperatures, humidity and sunlight.[6/] He expressly denied, however, that the length of time between the spraying and the collection of the samples on September 25, 1990, made it impossible for the parathion in the foliage samples to have come from the parathion application by Mr. Thomsen on August 10, 1990 (Tr. 210-11).

CONCLUSIONS

1. In accordance with Rule 22.24 of the Consolidated Rules of Practice (40 CFR Part 22), Complainant has the burden of establishing the violation alleged in the complaint by a preponderance of the evidence.

2. Complainant has not met this burden and the complaint will be dismissed.

[6/] Tr. 210. An excerpt from a 1990 Farm Chemicals Handbook, C's Supp. Exh 2, states that the half-life of parathion in soil is 14 days.

D I S C U S S I O N

At the outset, I find that all witnesses in this proceeding were forthright and credible. In this regard, I have no doubt that Ms. Mary Caster sincerely believes that on the morning of August 10, 1990, she felt mist from an aerial application of parathion and that Respondent, Harold Thomsen, was the applicator.

The initial affidavit, handwritten by Mr. Kyle Winters, signed by Ms. Caster, which is apt to more accurate, states, however, that she was mowing her lawn at approximately 10:00 a.m. on August 10, 1990, when she was hit by a pesticide spray drift from an aerial applicator spraying a sorghum field just south of her home (finding 7). The time of this incident was changed to approximately 9:00 or 10:00 a.m. in Mr. Winters' typewritten report of "Use/Misuse Inspection" and in the subsequent affidavit signed by Ms. Caster on March 3, 1992 (findings 12 and 17). This change was made after Mr. Winters' interview with Mr. Thomsen, which revealed that he (Thomsen) had applied parathion to the Scheideler milo field or completed the application by 9:00 a.m. (findings 13 and 22). While the extent of Ms. Caster's discussions with EPA personnel, who prepared the affidavit which she signed on March 3, 1992, is unclear, this affidavit lacks credibility, because the fact is that she

recognized neither Mr. Thomsen or his plane (findings 17, 18, and 19).

Ms. Caster testified that she began mowing her yard at about 9 o'clock on the morning of August 10, 1990, and, if it be accepted that the 9:00 a.m. completion time shown on the application record is approximate rather than exact, it is certainly possible that mist from the parathion application by Mr. Thomsen drifted onto Ms. Caster as she maintains (findings 19 and 22). Some support for this thesis is provided by the fact that Weather Bureau records from the station in Beatrice show that the wind was from the southeast at 11 knots at 8:52 a.m. and 9:47 a.m. on August 10, 1990 (finding 25). It should be emphasized, however, that Ms. Caster's initial affidavit placed the time of the drift incident at approximately 10:00 a.m. and that she generally confirmed this time in her testimony (finding 19). Acceptance of the contention that the drift incident occurred at approximately 9:00 a.m. would require the conclusion that Ms. Caster felt the spray mist immediately after she began mowing. If this is true, it is curious that she did not say so.

The pesticide application record forms utilized by Respondents include a space for the date completed (finding 11). This strongly supports Mr. Thomsen's testimony (finding 23) that

the time of 9 a.m. shown on the Ray Scheideler application record at issue here is the time the application was completed rather than the time the application was commenced. It is recognized that at least some of the times shown on the application records are approximations (finding 26). Indeed, Mr. Thomsen so testified with respect to the 8:00 a.m. completion time shown on the record for the Harold Scheideler application, which the evidence reflects was accomplished with the same plane load as the Ray Scheideler application (findings 22 and 23). Mr. Thomsen insisted, however, that the 9:00 a.m. time of completion of the Ray Scheideler application was exact, being taken from the clock on the wall of his airport office after he landed.

The fact that the completion time shown on the Ray Scheideler application form might not be exact and that Ms. Caster might have been mistaken as to the time when she felt the pesticide spray mist enhance the possibility that she felt mist from Respondents' parathion application for Ray Scheideler as alleged in the complaint. Under Rule 22.24, however, Complainant's burden is to prove the violation alleged by a preponderance of the evidence and I conclude that this standard has not been met. "Preponderance of evidence" simply means that

the existence of the fact sought to be proved is more probable than its nonexistence. 33 Words and Phrases, "Preponderance of Evidence." Here, Ms. Caster's initial statement, which is apt to be more accurate, that the drift incident occurred at approximately 10 o'clock together with the application record showing the Ray Scheideler application was completed at 9:00 a.m. precludes the necessary finding, i.e., that, it is more likely than not, that Ms. Caster was struck by drift from Respondent's parathion application. If the evidence is thought to be in equipoise, the result is the same, the party having the burden of proof cannot prevail.

While it is true that the minute concentration of parathion found in foliage collected from a walnut tree in Ms. Caster's yard tends to support Complainant, these samples were drawn over six weeks after the spray incident at issue here and Mr. Marvin's testimony that there were many possible sources for this parathion (finding 29) seemingly merely expresses a truism.

A quite similar case, involving the application of Parathion 8E to a milo field, is Erisman Spraying Company, Inc. and Gerald P. Schreiner, FIFRA Docket No. VII-1134C-92P (Initial Decision, April 7, 1994), wherein Judge Lotis dismissed a complaint alleging use of a pesticide inconsistent with its labeling, finding that Complainant had failed to show the

violation alleged by a preponderance of the evidence. There, as here, the time shown on the application record or job ticket was inconsistent with the testimony of the complaining witness. There, as here, other applicators were in the area and Complainant produced no evidence of their activities at the time and day in question.

O R D E R

The complaint is dismissed.[7]

Dated this 9th day of August 1994.

Spencer T. Nissen
Administrative Law Judge

[7] Unless this decision is appealed to the EAB in accordance with Rule 22.30 (40 CFR Part 22) or, unless the EAB elects sua sponte to review the same as therein provided, this decision will become the final order of the EAB as provided in Rule 22.27(c).