

3/28/26

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)	

ORDER DENYING COMPLAINANT'S MOTION FOR ACCELERATED DECISION
AND TO STRIKE AFFIRMATIVE DEFENSES

This matter arises under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136 *et. seq.* Respondent, Flying Lion, Inc., d/b/a/ Round-Up Crop Dusters, is charged by the U.S. Environmental Protection Agency ("EPA") with using the registered pesticides Fyfanon ULV ("Fyfanon") and De-Bug 5% Carbaryl Bait ("Carbaryl") in a manner inconsistent with their labeling requirements, in violation of Section 12(a)(2)(G) of FIFRA, 7 U.S.C. § 136j(a)(2)(G).. The alleged violations stem from aerial applications of pesticides by Respondent for grasshopper control on rangeland adjacent to the Klamath Forest National Wildlife Refuge in Oregon.

EPA moved for accelerated decision on the issue of liability. Respondent filed a response to EPA's motion. For the reasons that follow, EPA's motion is denied.

The label for Fyfanon states, in pertinent part:

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.

Complainant's Exhibit C.

In its motion, EPA relies primarily on a memorandum (unsworn) from the EPA employee who conducted the sampling upon which the Complaint is based. This employee states that he took samples adjacent to a ditch of water, an elongated pond, and a stream within the spray area. Complainant's Exhibit G at 3-5.¹ EPA maintains that Malathion, the active ingredient in Fyfanon, was found in certain of these samples, and that as a result,

¹ The employee indicates that photographs were taken at each of these locations. These photographs, however, were not submitted along with EPA's motion for accelerated decision.

Respondent violated Section 12(a)(2)(G) of FIFRA. Complainant's Motion for Accelerated Decision and to Strike Affirmative Defenses at 6-7.

In its response, Respondent maintains that the bodies of water referenced by the Fyfanon label--lakes, ponds, and streams--"did not exist" in the spray area due to a seven-year drought.² Response to Motion for Accelerated Decision and to Strike Affirmative Defenses at 1. Respondent states that:

To better understand the water issue in this case, you would only have to see this area in mid-July when most of the water is dried up. Thirsty, hungry cattle herds are kicking up dust as they wander looking for water to drink or a blade of grass that is not dried up.

Id. at 2.

Respondent's submission raises a genuine issue of material fact as to whether lakes, streams, or ponds existed in the spray area at the time of the spraying.³ EPA's submissions have failed to resolve this question. The record at this stage lacks conclusive evidence that the EPA samples were taken adjacent to the bodies of water described on the product label.⁴ Accordingly, EPA's motion must be denied as to the Fyfanon count.

With regard to the Carbaryl count, the Carbaryl label states, in pertinent part:

² The Klamath Forest National Wildlife Refuge is too far inland for the other bodies of water referenced on the Fyfanon label -- tidal pools and estuaries -- to be of relevance.

³ Respondent need not establish that there was no water in the spray area. He need only raise an issue as to whether there were lakes, streams, or ponds.

⁴ EPA relies also upon a document prepared by the United States Fish and Wildlife Service ("USFWS"). Complainant's Exhibit I. This document describes the effects of the spraying in and around a ditch with standing water, a muddy channel bed, a small pool of standing open water, a spring, and a "dry" channel containing "pockets of exposed surface water." Exhibit I at 2-3. The document makes no reference to a lake, stream, or pond. Again, photographs apparently taken at each location are not part of the record.

This product is extremely toxic to aquatic estuarine invertebrates. Do not apply directly to water or wetlands.

Complainant's Exhibit D.

EPA maintains that Carbaryl was found in samples taken adjacent to water. Complainant's Motion at 7-8. Nevertheless, there is a genuine issue as to whether the product was applied directly to water. Respondent maintains:

The precautionary statement, "do not apply directly to water," by strict definition would mean to turn off the bait applying apparatus over water. Carbaryl bait is a light, dusty flake that could be picked up and blown by the wind.

Response at 1.

EPA has not addressed the issue of product drift and its relation to the "applied directly" question.⁵ Accordingly, there remains a genuine issue of fact as to whether Carbaryl was applied directly to water. EPA's motion, therefore, must be denied as to the Carbaryl count.

ORDER

Accordingly, Complainant's Motion for Accelerated Decision and to Strike Affirmative Defenses is denied.

Carl C. Charneski

Carl C. Charneski
Administrative Law Judge

Issued: March 28, 1996
Washington, D.C.

⁵ The EPA employee who conducted the sampling noted in his memorandum that on July 1, 1994, "the air was still." Complainant's Exhibit G at 5. However, the Carbaryl spraying did not take place on July 1, 1994. Id. at 7. There is no indication in the record of the wind conditions on July 3, 1994, the alleged Carbaryl spray date.