STATE OF NORTH DAKOTA

AGRICULTURE COMMISSIONER

IN THE MATTER OF:	)	**RECOMMENDED**
	)	**FINDINGS OF FACT,**
Jerry Spilde	)	**CONCLUSIONS OF LAW,**
	)	**AND ORDER**
Respondent.	)	

. . . . . .

On November 13, 2000, a Complaint was filed with the Commissioner of Agriculture by Jeff K. Weispfenning, Deputy Commissioner of Agriculture, requesting imposition of a civil penalty against Jerry Spilde, a commercially certified pesticide applicator in the state of North Dakota. Spilde is employed as a pesticide applicator with Fowler's Sky Farmer of Ypsilanti, North Dakota. On February 1, 2001, Reid A. Brady, assistant attorney general, Office of Attorney General, attorney for the Department of Agriculture, filed an Amended Complaint with the Commissioner of Agriculture against Spilde. The Amended Complaint alleges as grounds for administrative action, violations of N.D.C.C. §§ 4-35-15 and 4-35-23. It also asks for imposition of a civil penalty against Spilde. Generally, the Amended Complaint alleges violations of N.D.C.C. § 4-35-15(2) and (5), application of pesticides inconsistent with the labels, and operating in the application of pesticides in a faulty, careless, or negligent manner. Both of these alleged violations relate to a pesticide application allegedly made by Spilde on May 21, 2000.

On January 8, 2001, the Department of Agriculture requested the designation of an administrative law judge (ALJ) from the Office of Administrative Hearings to conduct a hearing

and to issue recommended findings of fact and conclusions of law, as well as a recommended order, in regard to the Complaint. On January 10, 2001, the undersigned ALJ was designated.

On January 17, 2001, the ALJ issued a Notice of Hearing. The hearing was held as scheduled on February 27, 2001, in the Office of Administrative Hearings, Bismarck, North Dakota. Assistant Attorney General Brady represented the Department of Agriculture. The Respondent was present at the hearing. Brad Fowler, the owner of Fowler's Sky Farmer, represented the Respondent at the hearing. The Department called two witnesses, Brad Meckle, a consumer protection specialist for the Department, and Gerald Thompson, the pesticide coordinator for the Department. Both Mr. Spilde and Mr. Fowler testified. Nineteen exhibits were offered and admitted. The Department offered exhibits 1-15 and 18. Spilde offered exhibits 16, 17, and 19.

At the close of the evidentiary portion of the hearing, the ALJ heard oral argument from Mr. Brady and Mr. Fowler.

Based on the evidence presented at the hearing and the oral argument of the parties, the administrative law judge makes the following recommended findings of fact and conclusions of law.

FINDINGS OF FACT

1. On the date in question, May 21, 2000, Jerry Spilde was a commercially certified pesticide applicator in the state of North Dakota. His certification number is 138367. He is certified in the core, ag pest, and fumigation categories. Fowler's Sky Farmer, Ypsilanti, North Dakota, employs him.

2. On May 20 and 21, 2000, Spilde was making a ground application of the pesticides Puma and Bronate (applying a mixture of the two) on a barley field farmed by Darren

Orr. Spilde was spraying the pesticide mixture on Orr's barley field on Sunday, May 21, 2000, between about 8:00 a.m. - 10:00 a.m. The Orr barley field was on land adjacent to the Loren Kittelson homestead.

3. Kittelson, whose homestead is just a few miles southeast of Jamestown, ND (*see* blue "x" on map, exhibit 5), filed a misapplication of pesticide complaint against Spilde with the Department regarding the Spilde pesticide ground application on Orr's barley field.

4. Kittelson had apparently complained to Spilde or Fowler on May 20, 2000, about Spilde's pesticide application in the same area on that day, so Spilde knew about Kittelson's concern about pesticide applications. Fowler even called Orr on the evening of May 20 to talk about Kittelson "causing trouble." *See* exhibits 18 and 1. Nevertheless, Spilde returned on Sunday morning, the next day, to finish the job on the Orr barley field.

5. Brad Meckle investigated the Kittelson complaint for the Department on June 5, 2000. He took statements from those involved and sampled vegetation from the Kittelson homestead. *See* exhibits 6 and 18 (statements of Brad Fowler and Darren Orr, respectively), and exhibit 2 (Affidavit of Dean Sletten with attachments - the two attachments are the testing results of the two samples taken by Meckle). Meckle also drew a map of the area helping to explain the incident. *See* exhibits 4 and 14 (exhibit 14 is the rough map he drew at the time of his investigation, exhibit 4 is a more detailed map drawn later from the earlier map and incorporating information Meckle had learned from his investigation).

6. Meckle took two samples of vegetation from the Kittelson homestead. He took vegetation from three locations for the first sample (*see* exhibit 4 - three locations marked "1st" on the north end of the homestead. He took vegetation from two locations for the second sample (*see* exhibit 4 - two locations marked "2d" on the south end of the homestead).

7. Meckle also testified that on the day he took samples he saw curled leaves in the tree belt around the Kittelson homestead. This could be a result of pesticide spray from a mixture of Puma and Bronate drifting onto the leaves of the tree. *See* exhibits 12 and 13, Bronate and Puma labels, respectively.

8. Testing by a chemist (chemical analysis) of these two samples (*see* exhibit 2 with attachments) shows that the north sample (BM-2002) contained substantial amounts of Bromoxynil, Fenoxaprop-p-ethyl, and MCPA. Bromoxynil and MCPA are the active ingredients of Bronate. Fenoxaprop-p-ethyl and MCPA are the active ingredients of Puma. Puma is used to control grasses and Bronate is used to control broad leaf weeds. The testing shows that the south sample (BM-2003) contained only a small detectable amount of MCPA but not detectable amounts of either Bromoxynil or Fenoxaprop-p-ethyl.

9. The location of the vegetation for the south sample (BM-2003) was virtually straight east of the southeast corner of the barley field that Spilde was spraying. The location of the vegetation for the north sample (BM-2002) was north and east of the southeast corner of the barley field that Spilde was spraying, straight east of the central portion of the field, and south and east of the northern corner of the field. *See* exhibit 4.

10. When Spilde finished his application on May 21, at about 10 a.m., the wind was from the south, southwest at from 3-8 mph. At least this is what Spilde recorded on the Fowler's Sky Farmer pesticide application record. *See* exhibits 7 and 8. Spilde testified that when he left Ypsilanti at about 6:00 a.m. on May 21, 2000, to travel to the job, the wind was light and from the southeast.

11. Kittelson testified that on May 20, 2000, and again between 8:00 a.m. and 10:00 a.m. on May 21, 2000, he observed Spilde make a ground application of pesticides to the land

adjoining his farm. He said that on May 21 the application truck came within three feet of the west side of his homestead. He said that on May 21, at the time of the pesticide application by Spilde, the wind was from a southwest direction. Exhibit 1.

12. In a statement made shortly after the incident, Orr said that when he arrived at the scene of the application on May 21, at a time which must have been close to 10:00 a.m., he "knew that he was going to be trouble so I took note of the wind." Exhibit 18. He estimated the wind at about 5-10 mph from the south, southeast. *Id.*

13. Much later, in another statement, again referring to the May 21 incident, Orr said that the wind was out of the south at about 10-12 mph. Exhibit 16.

14. For investigations of pesticide violations involving drift, it is standard operating policy of the Department to verify wind direction and velocity and to obtain weather records from three reliable weather sources (locations) in the area close by the site of the alleged violation, usually from a national weather service location or from the NDAWN system. *See* In the Matter of Michael Gundvordahl and/or Monroe Chase d/b/a Dakota Ag Control, Inc. Recommended Findings of Fact, Conclusions of Law, and Order, dated April 3, 1997. The information from three close by sources allows the Department to triangulate and be better able to determine and verify the wind velocity and direction at the actual site of the pesticide application.

15. In this matter the Department offered weather records from the NDAWN system for cites at Jamestown, Edgeley, and McLeod, North Dakota. Exhibits 9-11. It also offered weather records from the National Weather Service at Jamestown. Exhibit 15. The Kittelson homestead is just a few miles southeast of Jamestown. Edgeley is 37 miles straight south of Jamestown. McLeod is about 100 miles southeast of Jamestown.

16. At 8:00 a.m., 9:00 a.m., and 10:00 a.m. on May 21, 2000, the winds recorded at the above weather locations were as follows:

Jamestown (NDAWN) -- 14-19 mph from the west, southwest (WSW); 13-20 mph WSW; and 14-20 mph from the south, southwest (SSW), respectively.

Jamestown (National Weather Service) -- 18-27 mph from the SSW; 19-34 mph SSW; and 19-39 mph WSW, respectively.

Edgeley (NDAWN) -- 12-20 mph from the WSW; 15-21 mph WSW; and 12-18 mph WSW, respectively.

McLeod (NDAWN) -- 5-6 mph from the WSW; 4-6 WSW; and 5-9 WSW, respectively.

See exhibits 9, 10, 11, and 15.

17. Spilde presented some pictures and some testimony about the numerous pesticide containers that were in Kittelson's yard after the May 21, 2000, incident. However, there was no evidence presented about what type of pesticides these contained or may have contained at one time. Also, there was no evidence presented about whether Kittelson was spraying any pesticides on or about May 21, 2000.

18. Spilde presented testimony that there was a field of grain planted across the road and immediately south of the Kittelson Homestead and that, perhaps, pesticides from applications on that field drifted onto the Kittelson Homestead on or about May 21, 2000. However, this is merely speculation because there was no evidence presented showing that anyone applied pesticides to the fields south of the Kittelson homestead on or about May 21, 2000.

19. It is not speculation that chemical analysis showed substantial amounts of the active ingredients of the same pesticides that Spilde applied to Orr's field on May 20 and 21 in a

sample taken from a location on the Kittelson homestead where the pesticides would drift to with a southerly wind, especially a SSW or WSW wind. Although the winds may have been from a more SSE or straight south direction earlier in the day, they most certainly were from a SSW or even WSW direction by the time Spilde completed his spraying. Although he claims that the winds were only from 3-8 mph in a SSW direction when he finished spraying, and that by that time he was quite some distance from the Kittelson homestead, having sprayed the parts closer to the Kittelson homestead earlier, other evidence shows that the winds were likely considerably stronger and had probably shifted to being more from the west earlier.

20. All things considered, the Department has shown, by the greater weight of the evidence, that Spilde's application of Puma and Bronate resulted in pesticide drift which left substantial amounts of these chemicals on vegetation on the Kittelson homestead. Any evidence presented by Spilde does not adequately rebut the evidence showing this.

21. The label for Bronate states, in part, "[d]o not apply this product in a way that will contact workers or other persons, either directly or through drift…[d]o not apply when winds are gusty or when other conditions favor poor spray coverage and/or off target spray movement." Exhibit 12.

22. The label for Puma states, in part,

> [d]o not apply this product in a way that will contact workers or other persons, either directly or through drift… Ground Application: DO NOT apply when winds are gusty, or when conditions will favor movement of spray particles of the desired spray target. To avoid drift and ensure consistent weed control, apply PUMA … with the spray boom as low as possible while maintaining a uniform spray pattern." Exhibit 13. (Emphasis in the original.)

23. Spilde testified that he had the boom height of the spray vehicle at about 15 inches when he was spraying the Orr barley field. He did not leave a buffer strip when he sprayed the barley field but sprayed right up to the grass next to the tree row on the Kittelson

homestead (*i.e.*, to the edge of the Orr barley field). *See* exhibit 19 (pictures). Spilde claims that when he sprayed the portion of the field adjoining the Kittelson homestead, the winds were not favorable for pesticide drift to the northeast onto the Kittelson homestead.

24. Vernon Hofman, an extension agricultural engineer at North Dakota State University, testified that herbicides should not be applied to a portion of land immediately adjoining land with a homestead when wind of any magnitude is blowing in a direction from the land being sprayed toward such adjoining land. He recommends leaving a suitable buffer strip if the winds are not favorable and returning to spray the buffer strip when the winds are favorable. He said that the buffer strip practice is one commonly used by sprayers in North Dakota.

COMMENTARY ON F FINDINGS OF FACT

The evidence in this matter is such that by the greater weight it is shown that there is a causal connection between Spilde's ground spraying on May 21, 2000, and pesticides being detected on vegetation of the Kittelson homestead shortly thereafter. In other words, the evidence shows that, likely, Spilde's spraying caused the pesticides Puma and Bronate to drift onto Kittleson's homestead. The winds were, likely, favorable for drift to the northeast onto the Kittelson homestead. It was inappropriate for Spilde to make the application that he did in the manner that he did, especially considering the trouble that he and his company had with Kittelson just the day before.

The evidence of substantial amounts of the pesticide sprayed by Spilde being detected by chemical analysis on the Kittelson vegetation is the most conclusive evidence. There is no other explanation from the evidence as to how the pesticide got to where it did except by the spraying of Spilde on May 21. Anything else would be speculation. It is not speculation to conclude that

Spilde spraying was the cause. The scenario shown by the evidence fits with the findings and conclusions made. It is logical and reasonable to conclude that pesticide spray applied by Spilde on May 21, 2000, on or near the southeast corner, or possibly even all along most of the east side of the Orr barley field, drifted onto the vegetation of the Kittelson homestead.

CONCLUSIONS OF LAW

1. Spilde is a commercially certified agricultural pesticide applicator of pesticides in North Dakota subject to the provisions of the pesticide laws under N.D.C.C. ch. 4-35.

2. The evidence shows, by the greater weight of the evidence, that on May 21, 2000, Spilde made a ground pesticide application inconsistent with the label. Spilde's application of Puma and Bronate was made when the winds were gusty and when conditions favored movement of spray particles off the desired spray target and onto an occupied homestead located adjacent to the field to be sprayed. Spilde's application of pesticides on May 21, 2000, was in violation of N.D.C.C. § 4-35-15(2).

3. The evidence shows, by the greater weight of the evidence, that on May 21, 2000, Spilde made a ground pesticide application that was operation as a pesticide applicator in a faulty, careless, or negligent manner, in violation of N.D.C.C. § 4-35-15(5). At the time that the pesticide application was made by Spilde, in the manner that he made it with the winds as they likely were blowing, his operation was faulty, careless, or negligent. He could have easily avoided drift onto the Kittelson homestead by using a buffer strip or waiting until the conditions were more favorable to spray the Orr barley field. If there had not been a homestead right next to where Spilde had sprayed, his operation may not have been considered to be faulty, careless, or negligent. But there was a homestead.

4. The Commissioner of Agriculture has authority under N.D.C.C. § 4-35-23(4) to impose a civil penalty of up to $5,000 for each violation of the pesticide laws of N.D.C.C. ch. 4-35 proven at an administrative hearing. The Amended Complaint in this matter alleges two counts of violation of N.D.C.C. ch. 4-35, but all stemming from the same incident. The Amended Complaint requests imposition of a $1,400 civil penalty for the violations alleged. The violations alleged have been proven.

RECOMMENDED ORDER

The greater weight of the evidence shows that Spilde violated the provisions of N.D.C.C. § 4-35-15(2) and (5) as alleged in the Amended Complaint. The ALJ recommends that as a result of the violations proven at the administrative hearing, the Commissioner impose the $1,400 civil penalty requested by the Department.

Dated at Bismarck, North Dakota, this 15th day of March, 2001.

State of North Dakota
Commissioner of Agriculture
Roger Johnson

By: _____
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Administrative Law Judge
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