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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
ENVIRONMENTAL APPEALS BOARD

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ENVIR. APPEALS BOARD

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In re :  
: MARTEX FARMS, S.E. : Appeal No. 07-01  
: : Docket No. 02-2005-5301  
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1201 Constitution Avenue, NW.  
Washington, D.C.

Monday, November 5, 2007

The HEARING in this matter began at  
approximately 10:03 a.m. pursuant to notice.

BEFORE:

JUDGE EDWARD E. REICH

JUDGE ANNA L. WOLGAST

JUDGE KATHIE A. STEIN

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<p>1 APPEARANCES:</p> <p>2 On behalf of Environmental Protection Agency:</p> <p>3 DANIELLE C. FIDLER, ESQUIRE</p> <p>4 Special Litigation and Projects Division</p> <p>5 Office of Enforcement and Compliance Assurance</p> <p>6 United States Environmental Protection Agency</p> <p>7 1200 Pennsylvania Avenue, NW., MC 2248A</p> <p>8 Washington, D.C. 20460-2001</p> <p>9 (202) 564-0660</p> <p>10 On behalf of Martex, S.E.:</p> <p>11 ROMANO A. ZAMPIEROLLO-RHEINFELDT, ESQUIRE</p> <p>12 Melendez-Perez Moran &amp; Santiago, LLP</p> <p>13 P.O. Box 270105</p> <p>14 San Juan, Puerto Rico 00927-0105</p> <p>15 (787) 645-9966</p> <p>16 ALSO PRESENT:</p> <p>17 Gary Jonesi</p> <p>18 Carl Eichenwald</p> <p>19</p> <p>20 * * * * *</p> <p>21</p> <p>22</p>	<p>1 Honors. Danielle Fidler for Complainant,</p> <p>2 Office of Enforcement and Compliance</p> <p>3 Assurance, and I'm joined today by Gary</p> <p>4 Jonesi and Carl Eichenwald, also of OECA.</p> <p>5 JUDGE WOLGAST: Thank you. Mr.</p> <p>6 Zampierollo, if you could begin and also</p> <p>7 advise the Board as to whether you'll be</p> <p>8 saving any of your 30 minutes for rebuttal</p> <p>9 please.</p> <p>10 MR. ZAMPIEROLLO-RHEINFELDT: Yes,</p> <p>11 Your Honor. I will save about five minutes</p> <p>12 for rebuttal, if necessary.</p> <p>13 JUDGE WOLGAST: Thank you.</p> <p>14 MR. ZAMPIEROLLO-RHEINFELDT: We are</p> <p>15 ready whenever you are ready.</p> <p>16 JUDGE WOLGAST: Yes. Please begin.</p> <p>17 MR. ZAMPIEROLLO-RHEINFELDT: Thank</p> <p>18 you. Your Honor, this is a case of selected</p> <p>19 prosecution, where EPA singled out Martex,</p> <p>20 while the rest of the Puerto Rico</p> <p>21 agricultural community is left untouched.</p> <p>22 The selection of Martex was made in</p>

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<p>1 PROCEEDINGS</p> <p>2 THE CLERK: Environmental Appeals</p> <p>3 Board of the United States Environmental</p> <p>4 Protection Agency is now in session for oral</p> <p>5 argument In Re Martex Farms, S.E., Docket</p> <p>6 Number FIFRA 02-2005-5301, FIFRA Appeal</p> <p>7 Number 07-02.</p> <p>8 The Honorable Judges Ed Reich, Anna</p> <p>9 Wolgast, Kathie Stein, presiding. Please be</p> <p>10 seated.</p> <p>11 JUDGE WOLGAST: Good morning.</p> <p>12 We're here pursuant to the Board's order of</p> <p>13 September 18th, 2007, to hear argument in</p> <p>14 this FIFRA Civil Penalty matter.</p> <p>15 Under that order, each side has 30</p> <p>16 minutes for argument. If counsel could</p> <p>17 please introduce themselves for the record.</p> <p>18 MR. ZAMPIEROLLO-RHEINFELDT: Good</p> <p>19 morning, Your Honor, members of the Board.</p> <p>20 My name is Romano Zampierollo, and I am</p> <p>21 counsel for Martex Farms.</p> <p>22 MS. FIDLER: Good morning, Your</p>	<p>1 bad faith and are objectionable and</p> <p>2 impermissible consideration to send a strong</p> <p>3 message to the Puerto Rican community.</p> <p>4 Certain not to protect agricultural</p> <p>5 workers or handlers, but to extract a payment</p> <p>6 from the respondent that is punitive and not</p> <p>7 remedial. I would like to make reference to</p> <p>8 Exhibit 24, Respondent Exhibit 24. This is</p> <p>9 some remarks made by Ms. Kathleen Callahan in</p> <p>10 San Juan, Puerto Rico, on or about February</p> <p>11 3, 2005. This was several days before Martex</p> <p>12 was served with the complaint. My client</p> <p>13 didn't know about this when he had to</p> <p>14 confront the press, and this statement.</p> <p>15 However, Ms. Callahan was quoted as</p> <p>16 saying that she expects Martex Farms to make</p> <p>17 effort to fix the problems rather than to pay</p> <p>18 fines.</p> <p>19 This is part of the record in this</p> <p>20 case, Your Honor.</p> <p>21 JUDGE REICH: Can I ask for a</p> <p>22 clarification? Since selective prosecution</p>

<p style="text-align: right;">6</p> <p>1 is really a kind of term of art, are you  2 arguing that you meet the standards for  3 selective prosecution, because I understood  4 your brief at footnote 24 to indicate that  5 the administrative record shows that Martex  6 could not pursue the defense of selective  7 prosecution for lack of an initial showing  8 that the agency had selected the respondent  9 for enforcement action in bad faith based on  10 impermissible consideration, such as race,  11 religion, or the desire to prevent the  12 exercise of constitutional rights.  13 So given that footnote, I'm a  14 little unclear about your reasserting the  15 argument that this was selective prosecution.  16 MR. ZAMPIEROLLO-RHEINFELDT: Your  17 Honor, we are reasserting the argument, but  18 we are aware that we could not meet the  19 threshold questions.  20 JUDGE REICH: Okay.  21 MR. ZAMPIEROLLO-RHEINFELDT: We are  22 not talking about constitutional violations</p>	<p style="text-align: right;">8</p> <p>1 MR. ZAMPIEROLLO-RHEINFELDT: We  2 have been --  3 JUDGE STEIN: I un -- but I  4 understand that EPA has chosen to take an  5 enforcement action against your client, and  6 that you appear to be upset that an action  7 wasn't taken against others; but that given  8 that, you know, the law gives EPA discretion  9 as to, you know, particularly in light of  10 resources, how many enforcement actions to  11 take, I don't understand why they're taking  12 of a single action would amount to bad faith?  13 MR. ZAMPIEROLLO-RHEINFELDT: Well,  14 Your Honor, Martex was inspected by EPRDA,  15 EPA inspectors on March 24th, 2003.  16 JUDGE STEIN: Right.  17 MR. ZAMPIEROLLO-RHEINFELDT: And by  18 one EPA inspector, Mr. Anthony Lammano  19 precisely at the Caoca facility, which is the  20 biggest farm that we have in Santa Isabel  21 municipality. And no violations were found.  22 Unexpectedly, a couple of weeks or</p>
<p style="text-align: right;">7</p> <p>1 here. But taken as whole, the 10 mistakes  2 that I'll try to address in a moment point to  3 the direction that EPA acted on bad faith and  4 other things. So if --  5 JUDGE STEIN: Could you explain to  6 me what the bad faith is?  7 MR. ZAMPIEROLLO-RHEINFELDT: Yes,  8 Your Honor.  9 JUDGE STEIN: And what specific  10 facts you're alleging constitute bad faith?  11 MR. ZAMPIEROLLO-RHEINFELDT: I'm  12 referring to Respondent's Reply Brief. For  13 example, Your Honor, look, I will go through  14 all of them.  15 The complaint is discriminatory.  16 We were singled out. There is no evidence of  17 a local initiative to enforce FIFRA in Puerto  18 Rico or the islands, so we understand that  19 absent this local initiative, everything what  20 EPA said about this matter was just wrong,  21 because there is no local initiative.  22 JUDGE STEIN: Yeah --</p>	<p style="text-align: right;">9</p> <p>1 months later, we received a flurry of visits  2 and inspections, about four or five in 2003.  3 And beginning with the April 26th, 2004  4 inspection, we had about four additional  5 inspections.  6 So nobody else was being inspected  7 by EPA in the islands.  8 JUDGE STEIN: So your argument in  9 essence is based on a lack of prior  10 enforcement by EPA?  11 MR. ZAMPIEROLLO-RHEINFELDT: Based  12 on a lack of -- probably this is the first  13 case EPA has prosecuted pertaining to FIFRA  14 violations. So probably, yes, lack of prior  15 enforcement.  16 See when we responded to the  17 complaint, and we prepared the pre-hearing  18 exchange of witnesses, we made a particular  19 announcement that we wanted to have several  20 EPA employees present subpoenaed for the  21 trial.  22 We wanted Mrs. Cathleen Callahan,</p>

10	<p>1 who was in San Juan on March the 3rd, 2004;</p> <p>2 engineer Carl Soderberg; and Mr. Jorge</p> <p>3 Maldonado, an EPA PRDA ex-inspector, Mr. de</p> <p>4 Jesus, another inspector, and Ana Delya</p> <p>5 Martinez, a lady who was -- who has been</p> <p>6 giving WPS training to Martex since about six</p> <p>7 or seven years ago; and other EPA personnel.</p> <p>8 We could not obtain the subpoena order for</p> <p>9 deposing these witnesses, nor making them</p> <p>10 appear --</p> <p>11 JUDGE STEIN: Is that an argument</p> <p>12 that you've raised on appeal?</p> <p>13 MR. ZAMPIEROLLO-RHEINFELDT: Yes.</p> <p>14 Yeah. But I'm aware, Your Honor, I'm aware</p> <p>15 that crop allows to subpoena witnesses, if</p> <p>16 the particular law allows it.</p> <p>17 Unfortunately, under FIFRA, the</p> <p>18 hearing examiner was not allowed to issue the</p> <p>19 subpoenas. But that does not change the fact</p> <p>20 that our hands were tied -- to present</p> <p>21 witnesses. We could not present witnesses</p> <p>22 that knew what was the reason behind this</p>	12	<p>1 on April 26th, 2004, the mango harvest was</p> <p>2 over, but they already had the party to</p> <p>3 celebrate the harvest. The harvest was over.</p> <p>4 And there was nobody there working doing any</p> <p>5 agricultural activity.</p> <p>6 JUDGE REICH: Did the inspectors</p> <p>7 testify at trial?</p> <p>8 MR. ZAMPIEROLLO-RHEINFELDT: Yes.</p> <p>9 JUDGE REICH: And I assume they</p> <p>10 were cross examined?</p> <p>11 MR. ZAMPIEROLLO-RHEINFELDT: Oh,</p> <p>12 yes, Your Honor, at length.</p> <p>13 JUDGE REICH: And did the</p> <p>14 Administrative Law Judge in her decision find</p> <p>15 their testimony to be credible?</p> <p>16 MR. ZAMPIEROLLO-RHEINFELDT: You</p> <p>17 see, Your Honor, I have a great respect for</p> <p>18 Attorney Susan Bero, and I think she's a</p> <p>19 great judge, but I think that here she made a</p> <p>20 couple of mistakes.</p> <p>21 JUDGE REICH: So that means she did</p> <p>22 find their testimony to be credible?</p>
11	<p>1 enforcement.</p> <p>2 You see --</p> <p>3 JUDGE REICH: In terms of that, I</p> <p>4 mean, since we've already I think heard that</p> <p>5 you're not arguing selective prosecution in</p> <p>6 the strict sense, then issues as to liability</p> <p>7 they may basically come down to factual</p> <p>8 issues as to whether you were or weren't</p> <p>9 meeting the applicable standards.</p> <p>10 Why are the arguments that you're</p> <p>11 making, if relevant at all, relevant only to</p> <p>12 the penalty, which has more an ability to</p> <p>13 consider equities than the underlying issue</p> <p>14 of whether or not you're in violation?</p> <p>15 MR. ZAMPIEROLLO-RHEINFELDT: Well,</p> <p>16 not necessarily the penalties, Your Honor.</p> <p>17 We understand that the inspectors</p> <p>18 who visited the Cotalarel facility, Mr. Juan</p> <p>19 Carlos Munoz, and two Saiach or private</p> <p>20 contractors, they were prejudiced against the</p> <p>21 company when they did this inspection,</p> <p>22 because actually when they went to Cotalarel</p>	13	<p>1 MR. ZAMPIEROLLO-RHEINFELDT: Yes.</p> <p>2 I can't deny that, Your Honor, because he was</p> <p>3 very -- the demeanor of EPA's witnesses was</p> <p>4 very shaky.</p> <p>5 I'm a trial attorney. I've been</p> <p>6 trying cases for about 30 years, and I can</p> <p>7 see, I can feel, I can smell when a witness</p> <p>8 is not --</p> <p>9 JUDGE REICH: Because you're there.</p> <p>10 MR. ZAMPIEROLLO-RHEINFELDT: Because</p> <p>11 I'm there. I know the --</p> <p>12 JUDGE REICH: And isn't that the</p> <p>13 reason -- I'll answer the question myself. I</p> <p>14 think that is the reason why this Board tends</p> <p>15 to give great deference to an ALJ in</p> <p>16 evaluating witness credibility, because, as</p> <p>17 you yourself suggest, you know being there is</p> <p>18 a critical element. And if she was there and</p> <p>19 made that determination, I think that</p> <p>20 presents a pretty high bar for us to second</p> <p>21 guess any determination that's geared to</p> <p>22 whether or not the witness was credible.</p>

4 (Pages 10 to 13)

<p style="text-align: right;">14</p> <p>1 MR. ZAMPIEROLLO-RHEINFELDT: Yeah</p> <p>2 I think, Your Honor, that you are right, but</p> <p>3 the law authorizes this panel of judges to</p> <p>4 make de novo decisions. And you can go</p> <p>5 through, if available, through the trial</p> <p>6 record. There are five volumes this thick.</p> <p>7 And sifting through the record, you</p> <p>8 can "observe" how the witnesses were</p> <p>9 testifying, because the way the questions</p> <p>10 were posed and the way the answers were</p> <p>11 given, you can see that. You can see that.</p> <p>12 That's why I'm telling you I think</p> <p>13 that Judge Bero is an excellent judge, but I</p> <p>14 think she probably made a mistake here, a</p> <p>15 couple of mistakes.</p> <p>16 I don't -- I'm not sure if I</p> <p>17 answered all the questions and I can go</p> <p>18 ahead?</p> <p>19 JUDGE WOLGAST: Well, could you</p> <p>20 explain to us why you think the judge erred</p> <p>21 or made mistakes as to liability?</p> <p>22 MR. ZAMPIEROLLO-RHEINFELDT: That's</p>	<p style="text-align: right;">16</p> <p>1 know, with all of the protections of the</p> <p>2 Administrative Procedures Act?</p> <p>3 MR. ZAMPIEROLLO-RHEINFELDT: I'm</p> <p>4 not saying that, Your Honor. You see these</p> <p>5 things you cannot take them separated one</p> <p>6 from the other. It's all --</p> <p>7 JUDGE STEIN: Well, in order for us</p> <p>8 to be able to parse through the materials,</p> <p>9 and we have parsed through the materials and</p> <p>10 the testimony, is we need to understand what</p> <p>11 specific factual finding or conclusion of law</p> <p>12 is clearly erroneous.</p> <p>13 MR. ZAMPIEROLLO-RHEINFELDT: For</p> <p>14 example --</p> <p>15 JUDGE STEIN: And we've been</p> <p>16 through the materials, and we've looked at</p> <p>17 your arguments and if, you know, there are</p> <p>18 one or two of your arguments that are most</p> <p>19 important to you that you want to explain a</p> <p>20 little beyond the briefs, I think that would</p> <p>21 be helpful to us.</p> <p>22 But I do think we need to</p>
<p style="text-align: right;">15</p> <p>1 a tough nut to crack, Your Honor.</p> <p>2 You see something that we cannot</p> <p>3 leave aside is the fact that EPA</p> <p>4 Administrative Law Judge is an EPA employee.</p> <p>5 And all the witnesses that were attending</p> <p>6 this trial or went to testify are either EPA</p> <p>7 employees or Puerto Rico Department of</p> <p>8 Agriculture deputized EPA employees.</p> <p>9 So there's a common or more common</p> <p>10 than not interest in having the rule of law,</p> <p>11 the point of view of the agency sustained or</p> <p>12 --</p> <p>13 JUDGE STEIN: And where in your</p> <p>14 briefs did you lay out that argument?</p> <p>15 MR. ZAMPIEROLLO-RHEINFELDT: All</p> <p>16 over the brief, Your Honor. It's-</p> <p>17 JUDGE STEIN: That --</p> <p>18 MR. ZAMPIEROLLO-RHEINFELDT: We</p> <p>19 were --</p> <p>20 JUDGE STEIN: -- your argument is</p> <p>21 that the proceeding is not fair because the</p> <p>22 ALJ is an employee of EPA, with certain, you</p>	<p style="text-align: right;">17</p> <p>1 understand, you know, in order for us to find</p> <p>2 that the Administrative Law Judge erred, we</p> <p>3 need to understand what that clear error</p> <p>4 might be.</p> <p>5 MR. ZAMPIEROLLO-RHEINFELDT: You</p> <p>6 see, Your Honor, as I told at the beginning,</p> <p>7 this is a whole procedure, a whole process.</p> <p>8 When Ms. Callahan was in San Juan,</p> <p>9 Puerto Rico and made the announcement about</p> <p>10 this biggest penalty in U.S. history, she was</p> <p>11 dealing with something else. She was dealing</p> <p>12 with the exit of the Navy from Roosevelt</p> <p>13 Roads and the Vieques.</p> <p>14 So the impression many individuals</p> <p>15 have in Puerto Rico and I share that</p> <p>16 impression is that the EPA wanted to give a</p> <p>17 strong warning to the inhabitants of this</p> <p>18 island.</p> <p>19 JUDGE WOLGAST: But, for instance,</p> <p>20 how did the judge err in finding that the</p> <p>21 company violated regulatory procedures to</p> <p>22 provide notice of application in accordance</p>

18	<p>1 with 170.122?</p> <p>2 MR. ZAMPIEROLLO-RHEINFELDT: Okay.</p> <p>3 For example, Stipulation Number 23 that is a</p> <p>4 --</p> <p>5 JUDGE WOLGAST: Yes.</p> <p>6 MR. ZAMPIEROLLO-RHEINFELDT: --</p> <p>7 basic issue in this litigation was</p> <p>8 interpreted by EPA's counsel, and I also have</p> <p>9 great respect for Ms. Fidler, but she made a</p> <p>10 mistake, and the judge. The way -- see we</p> <p>11 think -- I think in Spanish. I've been</p> <p>12 living in South America all my life, except</p> <p>13 for two or three years in Italy, where I went</p> <p>14 to school. So I think in Spanish, and I</p> <p>15 translate.</p> <p>16 So when I think and something that</p> <p>17 is written or is going to be written, my</p> <p>18 first interpretation of that is what I know</p> <p>19 is in Spanish, not in English.</p> <p>20 So if in Stipulation 23, we stated</p> <p>21 that on April 26th, 2004 no applications of</p> <p>22 clear out were posted, we were meaning -- I</p>	20
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19	<p>1 was thinking that on that particular day,</p> <p>2 April 26th, not before. But --</p> <p>3 JUDGE STEIN: But didn't the judge</p> <p>4 find wholly apart from the stipulation,</p> <p>5 didn't she make a finding that there was</p> <p>6 sufficient evidence in the record to conclude</p> <p>7 there was liability, even if one were to</p> <p>8 disregard that stipulation?</p> <p>9 MR. ZAMPIEROLLO-RHEINFELDT: Well,</p> <p>10 if you --</p> <p>11 JUDGE STEIN: I'm not saying that</p> <p>12 it would be appropriate to disregard it, but</p> <p>13 I'm saying that unnecessarily, but I'm saying</p> <p>14 that above and beyond that stipulation, my</p> <p>15 reading of the ALJ's opinion is that she</p> <p>16 found that additional evidence also supported</p> <p>17 the finding of liability on that point.</p> <p>18 MR. ZAMPIEROLLO-RHEINFELDT: Well,</p> <p>19 if you eliminate Stipulation Number 23,</p> <p>20 probably under the first set of first</p> <p>21 categories of a violation, we would only have</p> <p>22 violation 150 and 151, the last two.</p>	21
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6 (Pages 18 to 21)

<p style="text-align: right;">22</p> <p>1 -- and that Exhibit 21B is good for  2 sustaining those violations, it's also good  3 to sustain that Martex was complying with the  4 law.  5 JUDGE WOLGAST: How so?  6 MR. ZAMPIEROLLO-RHEINFELDT: Because  7 e of Federal Rule of Evidence 106. This a  8 rule of fairness, Your Honor.  9 JUDGE WOLGAST: But what about the  10 exhibit are you relying on for your defense  11 to that finding of violation?  12 MR. ZAMPIEROLLO-RHEINFELDT: All  13 the exhibit, Your Honor. All exhibits -- 21B  14 that has a complete list of applications.  15 There's another one. There's an  16 Exhibit 21.  17 JUDGE REICH: Was the list that's  18 21B, was that list itself posted someplace?  19 MR. ZAMPIEROLLO-RHEINFELDT: I  20 understand that this list was posted on the  21 bulletin board, Your Honor. And this is the  22 information that EPA received in an</p>	<p style="text-align: right;">24</p> <p>1 and herbicides with the same crew, with the  2 same supervisor.  3 The rest of the pesticides that,  4 for example, Kocide, Boa, Trilogy, you name  5 it, they were applied by a different crew.  6 Why? Because this company just thought that  7 that was the proper way to do it.  8 And my client inherited that  9 procedure. So when a posting of herbicide is  10 sent to the WPS posting, the posting, for  11 example, in this case, Clearout, which is a  12 herbicide, is sent along and probably the  13 next day it's corrected because they really  14 don't know if the pesticide is going to be  15 applied or not.  16 The rest of the pesticides that are  17 applied by other crews are applied after 4:00  18 p.m., by another group of people. So the  19 company knows for sure when the posting is  20 there that that pesticides are applied.  21 So there's a difference. And our  22 agronomist, Mr. Acosta, tried to explain</p>
<p style="text-align: right;">23</p> <p>1 electronic file on July 20.  2 JUDGE REICH: So you're saying the  3 day the inspectors showed up, that particular  4 list was posted on the bulletin board?  5 MR. ZAMPIEROLLO-RHEINFELDT: This  6 one?  7 JUDGE REICH: Yeah.  8 JUDGE WOLGAST: Did -- who  9 testified to that effect?  10 MR. ZAMPIEROLLO-RHEINFELDT: Well,  11 Mr. Roberto Rivera, EPA's Inspector,  12 testified that the list was not there.  13 Martex representative, one of the owners,  14 Veny Mardi, Jr., testified that it was there.  15 JUDGE REICH: Was there and was  16 posted on the bulletin board, both?  17 MR. ZAMPIEROLLO-RHEINFELDT: On the  18 bulletin board in the main office. You see  19 to understand this postings, Your Honor, we  20 have to go a little back.  21 Martex bought this concerns from an  22 Israeli company who used to apply fertilizers</p>	<p style="text-align: right;">25</p> <p>1 that, and obviously he was not successful in  2 doing that because the message was not --  3 they don't get through.  4 JUDGE STEIN: I'd like to ask you a  5 question for a moment about EPA's appeal.  6 I take it you're aware that EPA has  7 filed an appeal and cross appeal in this  8 case?  9 MR. ZAMPIEROLLO-RHEINFELDT: Yes.  10 JUDGE STEIN: And I take it you  11 also understand that if the Board were to  12 agree that that appeal was well taken,  13 there's a possibility that the penalty in  14 this matter could go up?  15 MR. ZAMPIEROLLO-RHEINFELDT: Yes,  16 Your Honor, we are aware of that, and we are  17 also aware that in this case, EPA did at  18 least three or maybe four calculations for  19 the penalties.  20 With the initial complaint, filed  21 on January 28th, 2004, there was a first one;  22 first penalty calculation by Mr. Kramer from</p>

26

1 New York.

2 The complaint was amended on July

3 and again on August, I believe, and new

4 penalty calculations were prepared by EPA.

5 JUDGE STEIN: All right.

6 MR. ZAMPIEROLLO-RHEINFELDT: After

7 the trial on February 10th, 2006, well after

8 the trial, EPA came up with another set of

9 calculations, and I'm referring, Your Honor,

10 to EPA's Post Hearing Brief, Appendix B.

11 This is a sworn statement by Mr.

12 Kramer -- well, months after the trial, where

13 he states that he was not aware that he was

14 -- he did not fully consider Attachment 2B of

15 the 1997 interim final work and protection

16 penalty.

17 He all -- this gentleman also

18 stated that in 20 years working for EPA, it

19 was the first time, first time, he was doing

20 WPS calculation. I asked him, Mr. Kramer,

21 you are practicing with my client? And he

22 said no. And the answer went -- was

27

1 disregarded.

2 He was practicing with Martex. He

3 would -- never, never he did this

4 calculation.

5 So I really doubt that after all

6 the effort that Administrative Law Judge Bero

7 went or did in this calculation, I doubt that

8 EPA can come with a new set of calculations,

9 because --

10 JUDGE STEIN: My question isn't

11 really the question about new calculations.

12 My question was to make sure that you were

13 fully aware that as part of EPA's cross

14 appeal, they have challenged a few of the

15 findings of the ALJ, and in particular the

16 fact that they felt that in certain areas an

17 additional penalty should have been assessed.

18 And that is one of the things that the Board

19 will be looking at in rendering its decision

20 in this case?

21 MR. ZAMPIEROLLO-RHEINFELDT: Yes,

22 I'm aware of that, Your Honor, and I'm aware

28

1 that for category three, which is failure to

2 -- for this posting for handlers is the same,

3 exactly the same, situation than as workers.

4 In addition to that, handlers are

5 four. We have from maybe three to six, but

6 usually we have four handlers, and these

7 gentlemen are Jovine Ortiz, Angel Rosario,

8 Elvis Santiago. You can find their names in

9 the initial decision, page 36. And another

10 individual called PeeWee. His name is in

11 page 21 of the initial decision.

12 They know what they're doing. They

13 know what they're doing, when they're doing

14 it, why they're doing it, how they're doing

15 it. They know everything about pesticides

16 application.

17 So it is preposterous to think that

18 these individuals were taken by surprise;

19 that they didn't know what was going in Caoca

20 fields?

21 JUDGE WOLGAST: Mr. Zampierollo,

22 you're out of time for your initial argument.

29

1 We will reserve five minutes for rebuttal.

2 Thank you.

3 MR. ZAMPIEROLLO-RHEINFELDT: Thank

4 you, Your Honor.

5 MS. FIDLER: Good morning, Your

6 Honors. If it please the Board, I would like

7 to spend a few short minutes making an

8 introductory statement, and would then like

9 to use the remainder of my time to address

10 the issues raised by Complainant in its cross

11 appeal.

12 Your Honors, although respondent

13 paints a picture of complex regulations,

14 purported government conspiracies against it,

15 and a plague of legal errors, this picture

16 would obfuscate what is, in fact, a very

17 straightforward and relatively simple matter.

18 This case involves one of the

19 largest commercial farms in Puerto Rico.

20 Respondent's farms cover nearly 3,000 acres

21 and employ hundred of people to grow and

22 harvest crops that are sold globally.

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1 Respondent's business also involves  
2 the near daily use of pesticides. Working  
3 with pesticides is hazardous. Several of the  
4 pesticides used at Respondent's farms can  
5 cause serious injury and can even be lethal  
6 if people are exposed to them.  
7 This is why pesticides have labels  
8 that, when followed, are designed to minimize  
9 the likelihood of exposure.  
10 This is why following the label  
11 directions is the law, as set forth under  
12 FIFRA 12(a)(2)(g), and why enforcement of  
13 that law is absolutely critical.  
14 All registered pesticide labels  
15 require agricultural use of that product to  
16 comply with the worker protection standard.  
17 This standard is designed to protect farm  
18 employees from pesticide exposure and the  
19 steps required are fairly simple,  
20 inexpensive, and are based on commonsense:  
21 Train your employees; provide them  
22 decontamination supplies; make sure they have

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1 protective gears -- gear; let them know  
2 what's going on and where so they can stay  
3 away from it.  
4 The real story here is that  
5 Respondent failed to follow the pesticide  
6 label requirements, including the worker  
7 protection standard, and in doing so, they  
8 inherently increased the risk of harm to the  
9 health and lives of its workers and handlers.  
10 The heart of this case is perhaps  
11 best reflected in the testimony of  
12 Respondent's owners, who testified to their  
13 ability to comply with extremely complex  
14 European Union regulations so that they could  
15 export their produce there; and, yet, after  
16 several notices of violation from the Puerto  
17 Rico Department of Agriculture and even after  
18 this complaint was filed, they haven't  
19 bothered to read the worker protection  
20 standard.  
21 Mr. Venancio Marti, Jr., one of  
22 Respondent's co-owners, testified that he has

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1 a Ph.D. in agronomy and his staff includes  
2 two people with master's degrees, and yet  
3 stated that if the government inspectors do  
4 not tell him when he's in compliance with the  
5 worker protection standard, "it's impossible  
6 for me to know. You guys are the experts."  
7 Despite Respondent's size,  
8 sophistication, and its revenues of over \$10  
9 million a year, it failed to make certain  
10 that its worker and handlers consistently had  
11 the basic decontamination supplies of water,  
12 soap, and paper towels.  
13 Respondent's appeal would draw  
14 attention away from these simple facts with a  
15 lot of arguments about whether it was singled  
16 out, whether there were alternative methods  
17 of compliance, and whether the ALJ erred in  
18 using its own admissions against it. But  
19 Respondent fails to provide any evidence to  
20 support these arguments, which is why the ALJ  
21 rejected them.  
22 As the ALJ found, even when all of

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1 the evidence presented by Respondent as  
2 viewed in a light most favorable to it, the  
3 record is clear that respondent repeatedly  
4 violated FIFRA and the worker protection  
5 standard, and we thus request that  
6 Respondent's appeal be denied.  
7 Although Complainant generally  
8 agrees with Judge Bero's findings of  
9 liability in this case, as this is the first  
10 FIFRA worker protection case to come before  
11 the Board, and because Respondent appears to  
12 have appealed the entire decision,  
13 Complainant felt it was necessary to present  
14 its views on some of the ALJ's  
15 interpretations of the worker protection  
16 standard and the relevant penalty policies.  
17 Complainant has thus cross appealed  
18 three discrete, but very important issues in  
19 the case.  
20 First, Complainant requests that  
21 the ALJ's findings regarding whether  
22 applications conducted within 30 minutes may

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1 be combined for purposes of compliance with  
2 display requirements set forth at 40 CFR  
3 170.22 and Section 170.22; that this finding  
4 be clarified to require that when doing so,  
5 the start and end time of the application be  
6 listed in the display of pesticide  
7 application information.  
8 JUDGE REICH: So you're not  
9 objecting to the combination? The only issue  
10 is what start time is listed?  
11 MS. FIDLER: That's correct. For  
12 purposes of this matter, Complainant has not  
13 objected to the combination of the  
14 applications taking place within 30 minutes.  
15 JUDGE REICH: Dos that mean that  
16 you accept that as an interpretation or  
17 you're just choosing not to argue it in this  
18 case?  
19 MS. FIDLER: We are choosing not to  
20 argue that in this case.  
21 JUDGE REICH: But you're reserving  
22 the right to argue it elsewhere?

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1 MS. FIDLER: That's correct.  
2 JUDGE REICH: Okay.  
3 MS. FIDLER: The second issue in  
4 Complainant's cross appeal is that the ALJ  
5 misinterpreted the law on relevant penalty  
6 policies in her analysis of whether 170.122  
7 and 170.222 are dependent claims and, to the  
8 extent that she found that -- might have  
9 considered them independent abused her  
10 discretion in not assessing a civil penalty  
11 for Respondent's failure to notify handlers  
12 of pesticide application information.  
13 Complainant requests, therefore,  
14 that this portion of the assessment be set  
15 aside and that a penalty for those 68 counts  
16 of liability be added to the \$92,620 already  
17 assessed by the ALJ.  
18 And finally, the ALJ found that,  
19 although Respondent was negligent as a legal  
20 matter, she reduced Respondent's level of  
21 culpability based on a finding that  
22 Respondent passed a subsequent worker

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1 protection standard inspection and took steps  
2 to come into compliance with the worker  
3 standard regulations.  
4 These findings, however, are  
5 contradicted by the record and Complainant,  
6 therefore, asks that her findings be set  
7 aside and the Board increase the overall  
8 civil penalty accordingly.  
9 I would turn now to an in-depth  
10 review of the cross appeal unless there are  
11 further questions regarding Respondent's  
12 appeal for Complainant.  
13 JUDGE WOLGAST: Yes. Just a quick  
14 question. As to the second and third point,  
15 precisely what are you asking the Board to do  
16 in terms of increasing the penalty.  
17 MS. FIDLER: Penalty. We are  
18 asking that the penalty that has been  
19 assessed by the ALJ should be a floor; that  
20 an additional penalty for each count should  
21 be assessed under the relevant penalty  
22 policies and applied for the 68 counts of

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1 liability for Respondent's failure to notify  
2 its handlers of pesticide application  
3 information.  
4 Further, to the extent that there's  
5 an overall decrease of roughly 10 percent and  
6 in one case of 20 percent of the Respondent's  
7 liability under the -- the value under the  
8 penalty policy for the negligence assessment,  
9 because that finding was in error, we request  
10 that it be overturned and that the entire  
11 penalty be increased accordingly.  
12 JUDGE STEIN: What do those numbers  
13 translate to if we were to do what you're  
14 asking us to do?  
15 MS. FIDLER: Roughly -- I'm sorry,  
16 Your Honor. I hadn't put out the exact  
17 amount, and, of course, the Board has a  
18 discretion, but at least another \$65,000 for  
19 the counts at issue. The entire penalty  
20 should be increased by at least 10 percent.  
21 We would argue that the maximum  
22 penalty should be assessed here, in light of

10 (Pages 34 to 37)

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1 the harm of the -- the potential harm of the  
2 violations, recognizing that this is within  
3 the Board's de novo --  
4 JUDGE STEIN: And there is no  
5 inability to pay claim in this case?  
6 MS. FIDLER: There is none.  
7 JUDGE STEIN: Okay.  
8 MS. FIDLER: With regard to the  
9 ALJ's findings for 170.122 and 170.222, she  
10 found that applications must take place more  
11 than 30 minutes apart in order to be  
12 considered separate violations under these  
13 two provisions.  
14 However, the ALJ did not explain  
15 how combined applications should be reflected  
16 in the WPS records displayed for workers and  
17 for handlers, and Complainant is, therefore,  
18 worried about the ALJ's holding on this point  
19 might be interpreted either by respondent or  
20 by the regulated community.  
21 The problem here is that the ALJ's  
22 interpretation of time under 120 --

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1 170.122(c) and 170.222 (c) is insufficiently  
2 protective of workers and handlers.  
3 The ALJ does note the relationship  
4 between the time of the application and the  
5 restricted entry interval, or REI, but holds  
6 that the time a pesticide is to be applied  
7 may be and I quote: "listed on a WPS display  
8 in increments of an hour."  
9 She then concludes that a time  
10 difference of a half hour or less between the  
11 time that individual handlers begin their  
12 pesticide application in a particular field  
13 does not appear to be a significant factor  
14 for determining whether there is a separate  
15 application for purposes of the WPS display.  
16 This rationale is extremely  
17 troubling as it does not appear to properly  
18 interpret the point of the regulatory scheme,  
19 and that is to keep employees out of a field  
20 both before the pesticide application, during  
21 the application, and during the -- after the  
22 end of the application during the restricted

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1 entry interval.  
2 JUDGE STEIN: Ms. Fidler, I'm  
3 having a little difficulty with this  
4 argument, because if I understand it, you  
5 have an appealed the AL -- and I may not  
6 understand it correctly -- but you haven't  
7 appealed the ALJ's finding in this particular  
8 case of being to have this, you know,  
9 30-minute period collapsed in some fashion.  
10 And yet, you're asking us to by  
11 interpretation come up with an interpretation  
12 that it strikes me might be more appropriate  
13 for the agency to do in the form of guidance  
14 rather than for the Board to do.  
15 If you are challenging that  
16 conclusion, then, of course, we would look  
17 at, you know whether we agreed or disagreed  
18 but by not challenging the conclusion, it  
19 seems to me you're sort of asking for us to  
20 do something that I'm not sure the Board is  
21 well suited or the appropriate body to do.  
22 MS. FIDLER: As I will lay out in

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1 further detail, the issue here is that  
2 there's flexibility -- and the worker  
3 protection standard regulations were designed  
4 to give flexibility to farm owners in how  
5 they were going to comply.  
6 For purposes of this case, and  
7 especially because the issue wasn't brought  
8 up -- we didn't realize at hearing that this  
9 was an issue of concern to the ALJ, the idea  
10 that an application a half hour earlier, an  
11 application a half hour later could be  
12 combined for purposes of the display is not  
13 inherently problematic as long as the  
14 combination -- if the farm decided to treat  
15 that as one application, that isn't forbidden  
16 under the rules.  
17 But they would have to make sure  
18 that for that entire time, people are kept  
19 out of the fields, both before the first  
20 application and that it was clear that the  
21 end of the application was the half hour  
22 later.

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1 So from that perspective, there's  
2 no -- that's not an impermissible thing for a  
3 farm to do.  
4 However, it just left open the  
5 concern the way that the ALJ wrote her  
6 opinion that a farm application could occur  
7 at 11:00 and one at 11:30, but only one of  
8 them, one of those times might be listed in  
9 the display.  
10 JUDGE REICH: But you're putting us  
11 I think in a very strange position if you're  
12 still, as you indicated earlier, reserving  
13 the right to argue in other cases that  
14 combining these two applications 30 minutes  
15 apart may not be permissible at all.  
16 You're asking us to basically  
17 provide guidance on how to implement that  
18 30-minute discrepancy while reserving the  
19 argument to come back later in a different  
20 case and argue that that's not even an  
21 acceptable premise to begin with, which I  
22 think reinforces Judge Stein's uneasiness

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1 about our gratuitously, you know, expressing  
2 an opinion on that issue.  
3 MS. FIDLER: The -- it's not -- the  
4 idea here isn't that we would come-that the a  
5 -- that Complainant intends to come back and  
6 revisit this exact issue.  
7 It's just that there might be a  
8 situation where, for example, there -- a  
9 farm, in this case, Respondent chose to lists  
10 these applications as separate.  
11 And in the future, a farm might  
12 have an application that's listed as  
13 separate; sends somebody in for early entry  
14 for the second one unprotected.  
15 The point here is not that we would  
16 go against the ruling, what we're trying to  
17 make sure happens here is that to the extent  
18 that a farm chooses to have an application be  
19 one, that are within 30 minutes that it's  
20 interpreted consistently with the regulatory  
21 scheme of keeping people out before, during,  
22 and after -- and until the end of the

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1 restricted entry interval.  
2 JUDGE STEIN: But isn't that the  
3 kind of thing the agency typically would do  
4 by guidance rather than asking this Board to  
5 offer an opinion on that topic?  
6 I mean, it strikes me that there  
7 are a host of examples across different  
8 statutes where, to the extent that the agency  
9 has a concern of that nature, they would  
10 issue guidance in some form in a place that  
11 frankly people are probably -- people  
12 affected by the regulation may be probably  
13 more likely to see it, you know, than hidden  
14 in a footnote somewhere in a Board decision.  
15 So I don't want to beat this, you  
16 know, kind of literally horse to death here,  
17 but it does (off mike)  
18 MS. FIDLER: If I can, Your Honor,  
19 I'd just like to set out an example of this  
20 is actually how the regulatory scheme exists  
21 and should be interpreted.  
22 The point here is that, yes,

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1 guidance is a better way perhaps of handling  
2 these sorts of confusions, but to the extent  
3 this can also take decades to issue new  
4 guidance. And the fear here is that we're  
5 not sure how Respondent is going to view the  
6 ALJ's holding as it regards Respondent.  
7 And to the extent that any members  
8 of the regulated community would look at this  
9 opinion and misinterpret it, the harm here is  
10 not a theoretical one. It's a very real one.  
11 So the point here in asking the Board to step  
12 in is to make sure that the interpretation,  
13 which I think the ALJ actually intended to  
14 read it in the scheme, but it didn't quite  
15 come out that way.  
16 And so, for example, the intent of  
17 the -- I'm sorry -- the intent of the  
18 regulation is actually fairly clear when  
19 looked at as whole. 171.22 and 222 are, when  
20 they're read in conjunction with the other  
21 notification provisions, it's not that this  
22 -- that the request here, the time be the

12 (Pages 42 to 45)

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1 start time and the end time is unclear.  
2 So, for example, the need here is  
3 to -- the point of the worker protection  
4 standard is, in part, one of the main points  
5 is to keep people out of treated areas.  
6 And this is done in two ways. The  
7 first way is to provide notice. Notification  
8 can be oral or can be posted or both  
9 depending on the label, and it's clear from  
10 -- and I'll -- this is 170.120 -- that the  
11 intention here is that from the -- and this  
12 is 120(b)(3)(i).  
13 Notice need not be given to a  
14 worker if the agricultural employer can  
15 assure that one of the following is met.  
16 From the start of the application until the  
17 end of the application and during any  
18 restricted entry interval the worker will not  
19 enter, work in, remain in, or pass through on  
20 foot the treated area or any area within a  
21 quarter mile of the treated area.  
22 The second method of notifying

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1 workers and one of the only ways of notifying  
2 handlers if handler isn't making the  
3 particular application follows in 170.122 and  
4 170.222.  
5 And I'm sorry just to reiterate  
6 what 170.120, the notifi -- oral warning  
7 requires that this information needs to  
8 include the location and description of the  
9 treated area, the time during which entry is  
10 restricted, and instructions not to enter the  
11 treated area until the restricted entry  
12 interval has expired.  
13 When looking at 170.222,  
14 essentially this enhances the oral  
15 notifications that are provided and adds  
16 extra requirements that are designed to  
17 provide necessary information should a  
18 medical emergency arise.  
19 So the same information is required  
20 under 170.122 as is required under 170.120.  
21 In terms of the required information -- this  
22 is 170.122(c) -- shall include the location

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1 and description of the treated area, the  
2 product name, EPA registration number and  
3 active ingredients, the time and date the  
4 pesticide is to be applied, the restricted  
5 entry interval for the pesticide.  
6 The sum total is if the time and  
7 date doesn't convey either at the start the  
8 estimated start and end time or you list the  
9 start time and you go back and update the  
10 records to reflect the end time, the  
11 requirement for the restricted entry interval  
12 is almost meaningless, because it has to run  
13 according to the regulations, from the  
14 immediate end of the application.  
15 So what we're asking is that the  
16 Board just reinforce what is already there in  
17 the regulatory scheme.  
18 JUDGE STEIN: Is this something  
19 that the agency asked the ALJ to clarify in  
20 her opinion?  
21 MS. FIDLER: No, it did not.  
22 JUDGE STEIN: Okay.

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1 JUDGE WOLGAST: And just to  
2 summarize your argument, what I understand  
3 you say is that you're not taking issue with  
4 what I read to be the main premise of the  
5 ALJ's point here was that when someone begins  
6 an application in one corner of a field and  
7 someone else begins an application 15 minutes  
8 later in another corner of a field that that  
9 could be treated as an application, a single  
10 application for purposes of these notice  
11 requirements.  
12 But rather, you're saying that the  
13 instigation of the application began with  
14 person 1, whomever is the earliest person to  
15 apply the pesticide?  
16 MS. FIDLER: That's correct. If it  
17 please the Board, I would turn to the ALJ's  
18 penalty assessment unless there are further  
19 questions on this point?  
20 Your Honors, if the Complainant has  
21 cross appealed the ALJ's penalty assessment  
22 in this matter for three reasons.

50	<p>1 The first is that the ALJ's penalty 2 assessment findings on the issue of 3 Respondent's liability for failing to notify 4 handlers of pesticide application information 5 and on the issue of Respondent's culpability 6 were the result of clear error and abuse of 7 discretion, and, thus, should be set aside as 8 a legal matter.</p> <p>9 The second and perhaps more 10 important concern is that her penalty 11 assessment, if allowed to stand, would create 12 a perverse incentive for Respondent and other 13 regulated entities to make less of an effort 14 to protect its workers and handlers from 15 potential exposure to pesticides rather than 16 more, a policy that is -- that clearly 17 undermines the point of worker protection 18 standards.</p> <p>19 Finally, the ALJ's holding also 20 takes away the incentive for parties to come 21 into immediate compliance, not after a 22 complaint is filed, but immediately upon</p>	52	<p>1 from the penalty policy must be clear and 2 compelling. The ALJ's decision on this point 3 commences by misquoting the FIFRA enforcement 4 policy by stating that the agency may assess 5 separate penalties for independent violations 6 of FIFRA.</p> <p>7 However, there is no such 8 discretionary language in FIFRA, and I've -- 9 it's here.</p> <p>10 This provision starts out by 11 stating that a separate civil penalty up to 12 the statutory maximum shall be assessed for 13 each independent violation of the act. So 14 where the complaint has made an allegation of 15 independent counts, a penalty must be 16 assessed.</p> <p>17 A valuation is independent if it 18 results from an act or failure to act which 19 is not the result of any other charge for 20 which a civil penalty is to be assessed or if 21 the elements of proof of the violations are 22 different.</p>
51	<p>1 notification of the violation.</p> <p>2 And it also takes away the 3 incentive to settle cases, since essentially 4 if she allows the carrot for such good 5 behavior to be used after a violating entity 6 has waited until the stick of litigation has 7 been applied.</p> <p>8 So using the \$92,620 as a floor, 9 Complainant, therefore, requests that the 10 Board set aside the ALJ's penalty assessment 11 on this point, and use its de novo authority 12 to establish a higher penalty consistent with 13 the penalty policies.</p> <p>14 As a primary matter with regard to 15 the ALJ's penalty assessment with regard to 16 failing to assess counts for 170.222, it is 17 unclear even from the start of the opinion 18 whether the ALJ believes that she is 19 following the FIFRA penalty policy or is 20 justifying a departure there from.</p> <p>21 Thus, the ALJ fails to meet even 22 the threshold requirement that a departure</p>	53	<p>1 JUDGE REICH: And you're not 2 questioning that she could choose to vary 3 from that if she made a justification for 4 doing so?</p> <p>5 MS. FIDLER: If that justification 6 had support in the record, yes.</p> <p>7 JUDGE STEIN: Am I correct in 8 understanding that part of the reason that 9 she didn't assess a separate penalty was she 10 viewed the violations as dependent in some 11 fashion?</p> <p>12 MS. FIDLER: Yes. That's -- that 13 is also how we how interpreted it, and, 14 however, this is -- this is a 15 misinterpretation and misapplication of the 16 law on dependency and the penalty policies at 17 issue.</p> <p>18 Much like the language here in the 19 FIFRA penalty policy, the concept of 20 dependence, as the Board held in re Consumer 21 Scrap, the dependent violations in the 22 context of a single statutory provision can</p>

<p style="text-align: right;">54</p> <p>1 best be described in a you can't have B  2 without first having had A kind of  3 relationship.  4 At issue in that case were two  5 provisions of the Clean Air Act. 40 CFR  6 82.156 required the Respondent to take  7 certain records, and 40 CFR 82.166 required  8 the Respondent to keep those records.  9 And as the Board held, you can't  10 keep records if you haven't made them in the  11 first place, and, thus, they are dependent  12 violations.  13 However, unlike <i>Consumer Scrap</i>, the  14 regulations at issue are two totally  15 independent unrelated provisions with  16 separate requirements. Just because one is a  17 worker-employer and has workers on the  18 establishment within 30 days of a pesticide  19 application does not inherently mean that one  20 is also a handler-employer, and there are  21 handlers on the establishment within 30 days  22 of the pesticide application.</p>	<p style="text-align: right;">56</p> <p>1 each instance have been performed via a  2 single posting?  3 MS. FIDLER: In this case, the  4 Respondent keeps one central posting area.  5 There was testimony from the  6 handlers that there was concern whether this  7 was actually an appropriate set up because  8 there's testimony that workers were actually  9 driving directly to the field, and handlers  10 were going to the workshop. So nobody was  11 using the area that they had chosen or that  12 was the fear of the inspectors given their  13 impression when they were there.  14 But, yes, technically, and the  15 Agency allows that if there is a central area  16 that both workers and handlers are using, you  17 can use that one area.  18 But that doesn't change -- that  19 doesn't change the legal obligation to make  20 sure both of those groups are being actively  21 notified of what's going on.  22 This is so key. I mean, ideally,</p>
<p style="text-align: right;">55</p> <p>1 This view is reflected also in the  2 FIFRA penalty policy.  3 So the ALJ decides that while the  4 two sets of violations are legally separate,  5 she notices that there are different  6 requirements for the two. She decides that  7 they seem to be factually dependent in this  8 case.  9 It appears that she thinks that the  10 FIFRA penalty policy thus gives her  11 discretion to combine -- to merge the counts.  12 But the ALJ is confusing the obligation here.  13 She seems to think that the  14 obligation is to have one central posting  15 area. But there are really two obligations  16 here.  17 The obligation is to provide your  18 workers with pesticide application  19 information. And second is to provide your  20 handlers with pesticide application  21 information.  22 JUDGE WOLGAST: Could the notice in</p>	<p style="text-align: right;">57</p> <p>1 you'd want to have -- in this case if the  2 workers are driving to the field, you'd want  3 to have the information posted for those  4 workers in the field.  5 And if the handlers are using the  6 workshop, you want them to be posting that  7 information for handlers at the workshop.  8 The result of this is that the  9 ALJ's holding essentially incentivizes doing  10 less instead of doing more, doing what's  11 necessary to keep people out of the -- out of  12 danger.  13 JUDGE WOLGAST: Well, the Agency,  14 though, didn't allege that it was  15 insufficient notice to post at the central  16 workshop, did they?  17 MS. FIDLER: That's correct.  18 JUDGE WOLGAST: Did or did not?  19 MS. FIDLER: We didn't -- the  20 Complainant did not allege that it could not  21 use that central area -- location area.  22 Finally, the ALJ seems to imply</p>

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1 that even if she were to have considered  
2 these to be independent violations and to  
3 assess a separate penalty under the relevant  
4 penalty policies, she found that there's no  
5 significantly increased harm for failing to  
6 notify a few handlers then for failing  
7 hundreds of workers.

8 This finding is flawed for several  
9 reasons. First, there is programmatic harm  
10 here, as Dr. Enache testified to. But she  
11 never once addresses why the penalty policies  
12 do not adequately take into account her  
13 concerns. Why there couldn't have been  
14 adjustments made to what she thought the harm  
15 was, and at least have applied some penalty  
16 for failing to notify handlers.

17 Second, she does not give a  
18 pressing need to depart from the penalty  
19 policy in the first place. She has in no way  
20 shown that assessing a penalty for both sets  
21 would violate -- both sets of violation would  
22 violate equity concerns. There's no

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1 inability to pay issue here.

2 And third, by failing to assess a  
3 penalty, she undermines the entire  
4 programmatic scheme and gives absolutely no  
5 value whatsoever to the health or life of a  
6 handler versus that of a worker. Even if  
7 it's one person, if that person had died or  
8 had been seriously injured, there was a value  
9 there.

10 Therefore, her penalty deserves no  
11 deference by the Board, and we request that  
12 an additional penalty be assessed for each of  
13 these counts of failing to notify handlers.

14 Another point that she had made  
15 was-and -- that Respondent made -- makes  
16 today is that the handler in these questions  
17 would know who supervised the application.

18 But the point isn't about just what  
19 was applied that day. It's about the past 30  
20 days. And the ALJ seems to ignore the  
21 testimony by Dr. Enache about the need to  
22 have that data available in case of emergency

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1 so that take it with it to the -- take it  
2 with you to the doctor.

3 And the importance of these  
4 regulations can be seen by public data made  
5 available in the -- by the California  
6 Department of Pesticide Regulation which  
7 tracks these types of injuries and has found  
8 in 2004, 18 pesticide exposure cases  
9 resulting from early entry violations, one of  
10 these cases involving a field worker who got  
11 sick eating some grapes in a field he had  
12 sprayed with a pesticide the day before, but  
13 the application hadn't been put in the  
14 records.

15 It can happen. It does happen. It  
16 is important that these groups of people be  
17 notified.

18 Your Honor, if -- I see that I've  
19 run out of time. May I take a couple of  
20 extra minutes to address the final point?

21 JUDGE WOLGAST: Yes, briefly.  
22 MS. FIDLER: Thank you. With

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1 regard to the ALJ's assessment of  
2 culpability, the ALJ found that the  
3 Respondent's worker protection violations  
4 were the result of negligence, but that  
5 Respondent took steps to prevent the  
6 violation from recurring.

7 She based this conclusion largely  
8 on self-serving statements that Respondent  
9 made at hearing, and testimony that, for  
10 example, upon notification that  
11 decontamination supplies were missing for  
12 handlers, the Respondent's farm manager went  
13 out and bought a towel, when there were, in  
14 fact, seven handlers working that day. And  
15 each one is required to have a clean towel.

16 Her basis is also refuted by the  
17 record, which demonstrates clearly that the  
18 visit in 2005 was in no way a full worker  
19 protection inspection.

20 Even more revealing perhaps on this  
21 point is the testimony of Respondent's  
22 co-owner in his description of that visit.

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1 He said that they received an inspection that  
2 they tried to do and they came on Monday to  
3 check our farm to find out how many things  
4 did we still have without fixing it.  
5 *And frankly speaking, I was*  
6 surprised, because they tried to do it, and  
7 God didn't give them a -- give the chance to  
8 them, because we were in a dry period and we  
9 have rain and rain, and they couldn't do the  
10 job, but couldn't. The next day was rain and  
11 rain, and another day rain and rain, so the  
12 doctor he couldn't look at the farm, so God  
13 is with us. That's why we have been  
14 successful.

15 JUDGE REICH: Apart from the  
16 question of whether or not the record  
17 supports the factual findings, is there an  
18 issue of whether those are even appropriate  
19 considerations to be taken into account in  
20 setting the penalty?  
21 MS. FIDLER: I'm sorry. Can -- I  
22 --

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1 JUDGE REICH: Whether the kinds of  
2 considerations that you're discussing; that  
3 is, those taken to prevent reoccurrence are  
4 legitimate considerations to be taken into  
5 account, which, to me, it's a question you  
6 have to address before you get into what the  
7 record suggests about those issues.  
8 MS. FIDLER: That's correct. And  
9 as we pointed out in our brief, the --  
10 essentially what the ALJ seems to be doing is  
11 crediting the Respondent here with taking  
12 steps after -- not only after the violation  
13 happened, but after the complaint was filed  
14 And what the point of the assessment is to  
15 assess negligence at the time of the  
16 violation. And here it was clear at the time  
17 of violation that the Respondent had several  
18 notices of violation and this subsequent  
19 inspection. So to even go to that point is  
20 essentially trying to give a break that is  
21 normally reserved for someone doing  
22 settlement or someone who immediately took

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1 steps to come into compliance, not someone  
2 who waited until after a complaint was filed  
3 to make some efforts -- we're not even sure  
4 that they're complying with anything besides  
5 than what they've been told to comply with.  
6 JUDGE STEIN: Does the FIFRA  
7 penalty policy speak to that? But if I  
8 recall correctly, the RICRA penalty policy  
9 had some language that coming into compliance  
10 after the fact is not good faith. And I'm  
11 wondering if there's any kind of an analogue  
12 in FIFRA?  
13 MS. FIDLER: I don't have that  
14 prepared. I'm happy to submit a brief to the  
15 Board.  
16 JUDGE STEIN: No, I just wanted to  
17 know if you knew.  
18 MS. FIDLER: I am not aware of any  
19 currently, but I'm happy to reevaluate that.  
20 Thank you. Thank you, Your Honors.  
21 MR. ZAMPIEROLLO-RHEINFELDT: If it  
22 please the court, yes, I just want to address

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1 a couple of issues raised by counsel Fidler,  
2 very briefly.  
3 *The first one has to do with*  
4 application of pesticides in a given field.  
5 Some applications begin at let's say 8:00  
6 a.m., and the other one in the same field  
7 continues 8:30, 9:30 p.m. That depends on  
8 the length of the field. That's an  
9 agricultural practice consideration, not  
10 something that must be set up or decided here  
11 in Washington in EPA's headquarters.  
12 How a business, an agribusiness, is  
13 run is a decision that has to be made by  
14 agronomists in the field.  
15 So if Judge Bero determined what  
16 she determined pertaining to the hours of  
17 application is a technical matter, and  
18 depends on the length or the area of the  
19 field.  
20 Our fields are divided in  
21 relatively small fields because we have to  
22 keep a precise control of what is sprayed for

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<p>1 our European markets. So we have to be very  2 careful about that. That's the reason why  3 fields are so small.</p> <p>4 But if we want to go around the  5 law, FIFRA, we can name one field a thousand  6 acres. So it would be one violation. That's  7 ridiculous.</p> <p>8 So we are -- I don't want this  9 Board to get involved into a discussion of  10 semantics. This is not the issue. The issue  11 is the application of pesticides is a  12 technical matter. It's response to  13 particular crops, to particular pesticides.</p> <p>14 So if you start spraying a field at  15 8:00 a.m., the reentry time depending on the  16 pesticide is either four hours for clear out  17 or Trilogy T24 hours or whatever, depends  18 when the field was sprayed. If the field is  19 very long, and it takes five day, then (off  20 mike) regulation would suggest that you for  21 reentry, you have to wait seven days for the  22 -- in the case of trilogy to have not reentry</p>	<p>1 Administrative Law Judge went to great pains  2 trying to figure out a sensible way of  3 applying penalties.</p> <p>4 The maximum was set after the third  5 or fourth revision at \$1,100 per violation.  6 But she was asking look what happens if  7 somebody dies at the field. Do we impose a  8 higher penalty? We can't, because the  9 penalty is already fixed.</p> <p>10 So it does not matter if you have  11 injuries, if the community is affected,  12 nothing, because the penalty is already  13 there, and that makes no practical sense.</p> <p>14 We have to, we have to, after so  15 many years with EPA, dealing with these  16 matters (off mike) 1968, we should start to  17 rethink our involvement or EPA's involvement  18 in these matters because if the idea of the  19 law, of the purpose of the law is to protect  20 workers and handlers and the communities,  21 then we should do that.</p> <p>22 EPA received documents in August</p>
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<p>1 (off mike) particular eye flushing devices  2 for personnel.</p> <p>3 But the fact is that the first part  4 of that field was sprayed eight or 10 or 15  5 days before. So it makes no sense unless to  6 have that regulation apply in the way EPA  7 wants, because it's -- the length of the  8 field is very important. If the field is  9 very small, then a particular consideration  10 takes place. If the field is very large, or  11 long in that case, the same area but a very  12 long field, it's different.</p> <p>13 We have, as I stated before, (off  14 mike) four handlers and they exactly know  15 what, where, when, why, how those pesticides  16 are applied. So having them go on and read  17 in a central posting station what they're  18 going to do, what they did the day before,  19 what they did -- they know, because they are  20 the only pesticide handlers.</p> <p>21 In terms of Judge Bero's  22 determination of penalties, the</p>	<p>1 2004. They waited eight months to file a  2 complaint.</p> <p>3 Look if Martex was doing things so  4 badly, they should have stopped the company  5 the next day, and said look you cannot apply  6 those pesticides the way you are doing it.  7 So you are out of business. They didn't do  8 that.</p> <p>9 The way I feel is I think that the  10 agency really was trying to make a point, to  11 send a message, and it took Martex as an  12 example. Thank you.</p> <p>13 JUDGE WOLGAST: Thank you. Thank  14 you for the arguments, and the case is  15 submitted.</p> <p>16 THE CLERK: All rise. This session  17 of the Environmental Appeals Board now stands  18 adjourned.</p> <p>19 (Whereupon, at 11:11 a.m., the  20 HEARING was adjourned.)  21 * * * * *  22</p>

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