**UNITED STATES**
**ENVIRONMENTAL PROTECTION AGENCY**

**BEFORE THE ADMINISTRATOR**

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| **IN THE MATTER OF:** | **)** | |
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| **Ag-Air Flying Services, Inc.,** | **)** | **Docket No. FIFRA-10-2005-0065** |
| | **)** | |
| **Respondent** | **)** | |

# ORDER ON COMPLAINANT'S MOTION FOR ACCELERATED DECISION ON LIABILITY AND PENALTY, MOTION TO SUPPLEMENT COMPLAINANT'S PREHEARING EXCHANGE, AND MOTION FOR DISCOVERY

## I. Background

The Complaint in this matter was filed on January 21, 2005, charging Respondent Ag-Air Flying Services, Inc. with a violation of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. § 136*l*(a) *et seq.* The Complaint alleges that Respondent is a commercial applicator of pesticides and that on June 22, 2004, Respondent applied "Warrior," a registered and restricted use pesticide, to grape vines on private property, which was not an authorized use of the pesticide product, and thus Respondent used it in a manner inconsistent with its labeling, in violation of Section 12(a)(2)(G) of FIFRA, 7 U.S.C. § 136j(a)(2)(G). The Complaint proposed a penalty of $3,120 for this alleged violation.

Respondent filed an Answer to the Complaint on February 23, 2005, denying the alleged violation and asserting affirmative defenses. Thereafter, the parties filed prehearing exchange information and various motions and responses, which are not directly pertinent to the outcome of this Order.

On September 22, 2005, Complainant filed a Motion for Accelerated Decision on Liability and Penalty, and Memorandum in Support (Motion), asserting that there are no genuine issues of material fact as to Respondent's liability for the alleged violation or for the assessment of the proposed penalty, and that Complainant is entitled to judgment as a matter of law as to both liability and the proposed penalty. In the alternative, should such relief not be granted, Complainant requests an accelerated decision resolving any of the issues in this case, in order to narrow the scope of the hearing and preserve the use of resources. Complainant seeks an accelerated decision on the affirmative defenses on the basis that they were improperly pled and lack necessary support or raise issues of pure law that are ripe for accelerated decision, and that they should be stricken. On October 13, 2005, Respondent filed a Memorandum Opposing the

Motion (Opposition), and on October 27, 2005, Complainant filed a Reply in support of its Motion.

On November 1, 2005, Complainant filed a Motion to Supplement Complainant's Prehearing Exchange, seeking to add Sandra Bird as an expert witness. On November 23, 2005, Complainant filed a Motion for Additional Discovery. To date, no response to either motion has been received from Respondent.

## II. Standard for Accelerated Decision

The Rules of Practice, 40 C.F.R. Part 22 provide at section 22.20(a) that

> "The Presiding Officer may at any time render an accelerated decision in favor of a party as to any or all parts of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law."

Accelerated decision is similar to summary judgment under Rule 56(c) of the Federal Rules of Civil Procedure (FRCP), and therefore case law thereunder is appropriate guidance as to accelerated decision. *CWM Chemical Services, Inc.*, 6 E.A.D. 1, 12 (EAB 1995); *Mayaguez Regional Sewage Treatment Plant* 4 E.A.D. 772, 780-82, (EAB 1993), *aff'd sub nom., Puerto Rico Aqueduct and Sewer Authority v. EPA,* 35 F.3d 600, 606 (1st Cir. 1994), *cert. denied,* 513 U.S. 1148.

First it must be determined whether, under FRCP 56(c), the movant has met its initial burden of showing that there exists no genuine issue of material fact, by identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show[ing] that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986)(quoting FRCP 56(c)). For the EPA to prevail on a motion for accelerated decision on liability, it must present "'evidence that is so strong and persuasive that no reasonable [factfinder] is free to disregard it'" [and] "'must show that it has established the critical elements of [statutory] liability and that [the respondent] has failed to raise a genuine issue of material fact on its affirmative defense . . . .' " *Rogers Corporation v. EPA*, 275 F.3d 1096, 1103 (D.C. Cir. 2002) quoting *BWX Technologies, Inc.*, RCRA (3008) Appeal No. 97-5, 2000 EPA App. LEXIS 13 at *38-39, 43 (EAB, April 5, 2000).

Well settled case law on FRCP 56 states that the non-movant must designate specific facts showing that there is a genuine issue for trial by presenting affidavits, depositions, answers to interrogatories, admissions on file, or other evidence. *Celotex*, 477 U.S. at 324. The motion for summary judgment places the non-movant on notice that all arguments and evidence opposing the motion, including affirmative defenses, must be properly presented and supported. *Pantry, Inc. v. Stop-N-Go Foods, Inc.,* 796 F. Supp. 1164 (S.D. Ind. 1992). To avoid the

summary judgment motion being granted, the non-movant must provide "sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). In other words, the evidence supporting a claimed factual dispute must be sufficient to require a jury or judge to resolve the parties' differing versions of the truth at trial. *T.W. Electrical Service Inc. v. Pacific Electrical Contractors*, 809 F.2d 626, 630 (9th Cir. 1987).

As to affirmative defenses, the EPA initially must "show that there is an absence of support in the record for the [affirmative] defense." *Rogers*, quoting *BMX* at *44. If the EPA makes this showing, then the respondent "as the non-movant bearing the ultimate burden of persuasion on its affirmative defense, must meet its countervailing burden of production by identifying 'specific facts' from which a reasonable factfinder could find in its favor by a preponderance of the evidence." *Id.*

Inferences may be drawn from the evidence if they are "reasonably probable." *Id.* In evaluating a motion for summary judgment, the record must be viewed in a light most favorable to the non-moving party, indulging all reasonable inferences in that party's favor. *Griggs-Ryan v. Smith*, 904 F.2d 112, 115 (1st Cir. 1990). "Summary judgment is inappropriate when contradictory inferences can be drawn from the evidence." *Rogers*, 275 F.3d at 1103. Furthermore, summary judgment should not be granted when a case involves complicated issues of law and fact, and a proper resolution of these issues would be advanced by further development of the record. *In re Rigden*, 795 F.2d 727, 731 (9th Cir. 1986).

Summary judgment is also inappropriate where credibility is challenged as to a material fact. *Marine Shale Processors, Inc.*, 5 E.A.D. 461, 1994 EPA App. LEXIS 45 *30 (EAB 1994)(citing, *inter alia, Richardson v. Oldham*, 12 F.3d 1373, 1379 (5th Cir. 1994)(credibility determinations have no place in summary judgment proceedings); *Hackley v. Roudebush*, 520 F.2d 108, 159 (D.C. Cir. 1975)(summary judgment is particularly inappropriate where motivation and credibility are integral components of a material factual conflict)). As stated by the Supreme Court, "at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter . . . Credibility determinations [and] the weighing of evidence . . . are jury functions, not those of a judge" ruling on a motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 255 (1986).

## III. Requirements for an Accelerated Decision as to Liability

Respondent is alleged in the Complaint to have violated Section 12(a)(2)(G) of FIFRA, which provides: "It shall be unlawful for any person – * * * to use any registered pesticide in a manner inconsistent with its labeling." In its Answer, Respondent admits allegations in the Complaint that Respondent is a "person," and that a pesticide product named "Warrior" was applied onto a cornfield by aerial spraying from an aircraft on June 22, 2004 by Respondent's commercial applicator. Complaint ¶¶ 8, 9, 13, 25; Answer ¶ 1. Respondent admits in its Answer that the labeling for "Warrior" states that it is a "restricted use product" and that "It is a

violation of Federal law to use this product in a manner inconsistent with its labeling," and Respondent admits that the labeling does not provide that application to grape vines is an acceptable use of the product. Complaint ¶¶ 26, 27; Answer ¶ 1.

The Complaint alleges that Heidi Bolong leases and/or occupies a parcel of property, upon which are a residence and grape vines, that this property is adjacent to the cornfield, and that during the aerial application of Warrior on June 22, 2004, some of the pesticide product was applied to her property. Complaint ¶¶ 16, 18, 19. The Complaint alleges that Heidi Bolong observed spray from Respondent's aircraft landing on her property, that an EPA authorized inspector on June 29, 2004 obtained a composite residue sample from grape vines on her property, and that an analysis of the sample found Lambda-cyhalothrin, the active ingredient in Warrior. Complaint ¶¶ 20, 21, 22, 23, 24. The Complaint alleges that "Warrior" is identified by a certain registration number. Complaint ¶ 14. These allegations are not admitted in Respondent's Answer.

Thus, to grant a motion for accelerated decision as to liability, first, Complainant must show evidence of the facts establishing that during the aerial application of Warrior on June 22, 2004, some of the Warrior was applied to grape vines on Ms. Bolong's property. Second, Complainant must show that there are no genuine issues material to those facts. Third, Complainant must establish that none of the affirmative defenses would preclude a finding of liability either as a matter of law, or for Respondent's failure to support affirmative defenses. Fourth, it must be determined as a matter of law that the application of Warrior on June 22, 2004 constitutes a "use [of a] registered pesticide in a manner inconsistent with its labeling."

## IV. Arguments of the Parties as to Liability

In support of its allegation that Warrior is a registered pesticide, Complainant points to Exhibit 15 in its Prehearing Exchange ("CX"), which is a pesticide application of Syngenta Crop Protection, Inc., containing clarifications and edits for the labeling of Warrior Insecticide with Zeon Technology, and indicating that it is a Restricted Use Pesticide (RUP). In support of its allegation as to the active ingredient of Warrior, Complainant points again to Exhibit 15, which states at page AA-052 that Warrior Insecticide with Zeon Technology contains the active ingredient lambda-cyhalothrin.

Complainant presents three declarations of witnesses, under penalty of perjury, in support of its Motion. First, Complainant presents a Declaration of Heidi Bolong (Bolong Declaration, attached to Motion), in which Ms. Bolong states that she and her family live in a house on property located on the Yakama Reservation, across a public access road immediately to the north of the cornfield referenced in the Complaint, that there are a field of grape vines on her property, and that she observed from the deck of her house on June 22, 2004 a yellow airplane flying over her property, in a racetrack pattern directly over her vineyard, while continuously emitting a spray. Bolong Declaration ¶ 6. She states that she "watched the airplane pass over [her] property and continuously spray for perhaps 40 minutes," making approximately 10 to 20

flights directly over her property. *Id.* ¶ 8. She states further that within a couple of days after the spraying, one of her chickens died and another one became ill, and that they had been apparently healthy before the spraying. *Id.* ¶ 9. She states that she made inquiries as to who sprayed her property, finding that the airplane belonged to Ag-Air Services, Inc., that Warrior was the insecticide sprayed, and that the cornfield located across the road to the south of her property was the intended target for the insecticide spraying, and on June 24, 2004, she contacted the Washington State Department of Agriculture. *Id.* ¶¶ 10, 11. Finally, she states that she was at home on a fairly regular basis during the weeks prior to and following June 22, 2004, and that she has never observed or heard of any other airplane overflights and spraying onto her property. *Id.* ¶ 20.

Second, Complainant presents a Declaration of Rodney M. Guske (Guske Declaration, attached to Motion), who states that he is a Tribal Program Specialist employed by the Yakama Nation of Toppenish, Washington, that he is authorized by the U.S. EPA to conduct inspections under FIFRA, and that he conducts such inspections related to pesticide use on the Yakama Reservation. Guske Declaration ¶ 1. He asserts that his training and work experience included the taking and handling of samples. *Id.* ¶ 2. He states that on June 29, 2004, he met with Ms. Bolong at her residence and that she reported her observations of June 22, 2004. *Id.* ¶ 4. He states that he obtained a composite sample of leaves from grape vines, more than two dozen leaves from different grape vines within a quarter mile radius, in the area which Ms. Bolong indicated had been impacted by mist from the airplane. *Id.* ¶ 5. He describes his sampling protocol, including the gathering of a composite sample of leaves from another grape vineyard located on the east side of the road, and his transportation of the samples to the Washington State Chemical and Hop Laboratory. *Id.* ¶¶ 5-7.

Third, Complainant presents a Declaration of Mike Firman (Firman Declaration, attached to Motion), who states that he is employed as a chemist and supervisor at the Chemical Hop Laboratory of the Washington State Department of Agriculture, and that he supervises the two individuals at the laboratory who performed the testing of the two samples brought to him by Mr. Guske on June 29, 2004. Firman Declaration, ¶¶ 1, 2. He describes the qualifications of the individuals who were involved with the samples, and states that the results of the analysis show that the sample of leaves from Ms. Bolong's vineyard contained 0.015 parts per million of lanbda cyhalothrin and that the other sample from the other vineyard was non-detect for that chemical. *Id.* ¶ 4-8.

Complainant asserts that the test results confirm the observations of Ms. Bolong that grape vines on her property were sprayed by Respondent, and that they are further corroborated by the fact that the control sample taken from neighboring property, where Ms. Bolong has not observed any spraying by Respondent, was free of Warrior. Motion at 13.

In its Opposition, Respondent presents the Declaration of Carlton Layne and Certificate John McClure, who are Respondent's proposed expert witnesses, and a Declaration of Lenard "Red" Beierle, who is the pilot of the airplane which sprayed Warrior on the cornfield on June 22, 2004. Respondent argues that EPA's claims must fail because of the material facts that are

contested and because "there is no credible factual basis for the EPA claims." Opposition at 3. Respondent asserts that its affirmative defenses are verified by Mr. Beierle. Respondent requests not only that it should not be found liable but also that the affirmative defenses not be stricken, and that the claims should be dismissed *sui generis*.

The Declaration of Carlton Layne asserts his qualifications to testify as to the legality of pesticide applications and investigations of alleged misuse of pesticides, and asserts that he has reviewed documents in the case file, visited the site at issue, examined the aircraft at issue, and interviewed Mr. Beierle. He challenges the credibility of Ms. Bolong's observation that in flights over her vineyard, the spray was emitted from beneath the end of one wing across to the end of the other wing, by asserting that Ag-Air uses a GPS integrated system on the aircraft that records in digital format and in real time the speed, altitude, location and direction of the aircraft's flight path, that the SATLOC system linked to the application equipment provides a permanent record of where the aircraft was at any given time during the flight and whether the spray system was operating, that he examined the printout of the flight at issue, that the spray system was only operational during the time the aircraft was over the cornfield, and that "At no time was the spray system in the on position when it was over Ms. Bolong's vineyard, her yard or her home." Layne Declaration ¶ 4. He asserts that the active ingredient of Warrior "is only slightly toxic to birds" and cites information on the Material Data Safety Sheet for this pesticide. *Id.* ¶ 7. He states that in his former employment with EPA, he co-authored and edited the FIFRA Inspection Manual. *Id.* ¶ 8. He challenges the sampling protocol of Mr. Guske, asserting that he did not mention presentation of his credentials or use of a Notice of Use/Misuse Inspection or Receipt for Use/Misuse Samples as required, did not make any effort to learn what pesticides had been used on the vineyard by Ms. Bolong or her agents or on nearby fields, and did not follow instructions in the FIFRA Inspection Manual to wrap samples in aluminum foil before putting in a polyethylene bag or to place it in a glass jar, as required to insulate the vegetation sample and prevent possible interaction between the chemical and plastics in the bag. *Id.* ¶¶ 8-12.

In his Certificate, Mr. McClure asserts that he is an Engineering Manager in the employ of SATLOC/CSI Wireless which specializes in GPS and guidance applications for air and ground, and asserts his qualifications and a description of SATLOC software. He asserts that he examined a file from Mr. Beierle. He states that SATLOC logs are a proprietary binary format displayed and decoded by MapStar mapping program, and that the only people given access to it outside the company must sign nondisclosure forms and must be using it for known uses. Certificate of John McClure ¶¶ 7.1, 7.3. He states that each record shows time to the hundredth of a second, latitude and longitude, altitude, speed, heading, "instantaneous xtrack error, age of differential correction and spray and area status." *Id.* ¶7.5. He states that "only by knowing the exact file formats of each record type could a user go in to modify the information," that each record would need to be modified, and each checksum regenerated and saved in the data. *Id.* ¶ 7.9. He includes data from the records of June 22, 2004 in his Certificate. He states that only a computer professional with detailed knowledge of SATLOC formats would be able to alter the records, and concludes that he is able to state and certify that there is no evidence of tampering with the files. *Id.* ¶ 8.

Lenard "Red" Beierle in his Declaration states that he did not apply Warrior to Ms. Bolong's vineyards or over her house area, that he applied Warrior to the cornfield south of her property, and that Ms. Bolong's observations are inaccurate. Declaration of "Red" Beierle ¶ 1. He describes the mixing and loading of Warrior onto the aircraft, and states that the loading system "is the finest system available." *Id.* ¶ 3. He states that he started flying in a racetrack pattern in an east-west fashion, and that he had very favorable winds away from Ms. Bolong's property throughout the application, "making it impossible for any drift to find its way onto the Bolong property." *Id.* ¶ 4. He states further that he continuously monitors the Satloc system and his spray pressure gauge throughout the application, and describes the nozzles on the airplane, and comments that they "are the finest in the industry" *Id.* ¶¶ 5-6. He admitted that he placed his turns above the Bolong property, and that he made a series of steep field entries and departures to the cornfield. *Id.* ¶ 7.

In its Reply, Complainant asserts that Respondent's argument that there must be a party other than Respondent which caused the pesticide contamination in Ms. Bolong's vineyard is unsupportable conjecture. Because Mr. Guske had valid eyewitness information from Ms. Bolong identifying the source of the contamination, he had no reason to search for a different source. Complainant presents a Second Declaration of Mr. Guske, asserting that he learned that the farmer and caretaker of the Bolong vineyard did not use any pesticide product on the Bolong vineyard, and a Second Declaration of Ms. Bolong, asserting that the Bolong family did not use or arrange for use of any pesticide product on it in 2004.

Complainant argues that there are flaws associated with the SATLOC information and that Respondent failed to reveal and substantiate certain crucial facts. In the alternative, Complaint argues that even if everything claimed about the equipment were true, Respondent has committed a violation of FIFRA. Complainant presents a Declaration of Sandra Bird, an Environmental Engineer at EPA, who states that she has written publications on her work with the effects related to pesticide spray drift from aerial applications, and has reviewed the information in this case. She states that Respondent has not provided sufficient information to clearly document the exact mechanism of movement of Warrior into Ms. Bolong's vineyard, but that the level of residue on the grape leaf sample is consistent with, *inter alia*, leaks in the boom, or drift from application of Warrior on the cornfield or adjacent strip of land. Respondent failed to provide any facts that would indicate the size of the droplets of Warrior that were released on the date at issue, the altitude of the flight, the type of CP nozzle, and equipment testing or maintenance records. Ms. Bird states that droplet size or spray quality, and spray height are major factors affecting spray drift, and that leakage and lag is a possibility following shut off of the boom. Complainant notes an incorrect date in Respondent's Exhibit 6, the Satloc printout.

Complainant argues that, due to dispersal and movement through air, the spray of Warrior over the cornfield could have contaminated the Bolong vineyard. Furthermore, Complainant points out that on the SATLOC printout, there are red dots, representing pesticide release areas, outside the cornfield property boundary on the northern edge. This application over the 200 foot strip between the cornfield and Bolong properties, which includes a public road and drainage and irrigation ditches, is an application which may contact persons and where

surface water could have been present, and therefore is not an authorized use of the pesticide. Complainant asserts that 3 or 4 red dots on the printout are located where the road and ditches directly abut the Bolong vineyard, and would only need to have traveled 50 feet horizontally to settle on the area sampled, which is likely given the speed and direction of the airplane, and thus which could account for the presence of Warrior detected on Mr. Guske's sample. Therefore, Complainant concludes that it has met the burden of showing that there is no issue of material fact pertaining to Respondent's misuse of a pesticide.

## V. Discussion and Conclusions on Motion for Accelerated Decision

Complainant has identified proposed exhibits and presented affidavits in support of its position that during the aerial application of Warrior on June 22, 2004, some of the Warrior was applied to grape vines on Ms. Bolong's property. Respondent, however, has designated specific facts to show that there is a genuine issue for trial by presenting declarations and proposed evidence which challenge the Complainant's position. The question is whether that evidence is sufficient, if all reasonable inferences are taken in favor of Respondent, for a factfinder to conclude that Respondent is not liable.

First, it is abundantly clear that the credibility of Ms. Bolong's observation that her vineyard was sprayed during an aerial spraying on June 22, 2004 is being challenged by Respondent. Her observation is a major factual allegation upon which Complainant relies in charging Respondent with misuse of a pesticide. Complainant's assertions that the pesticide was released outside the cornfield property boundary in the area of the public road and ditches, and that it would only needed to have traveled 50 feet horizontally to reach the area sampled, do not establish a lack of genuine issues of material fact. Carlton Layne's statement that the spray system was only operational during the time the aircraft was over the cornfield, and Lenard Beierle's statement that the wind direction was away from the Bolong property, directly challenge Complainant's assertions and Ms. Bolong's observation. Therefore accelerated decision is not appropriate. *Marine Shale Processors, Inc., supra*. Viewing the evidence in a light most favorable to Respondent, indulging reasonable inferences in its favor, the Respondent's evidence is sufficient to require the Presiding Judge to resolve the parties' differing versions of the truth at trial.

Furthermore, the fact that Complainant has pointed out some gaps in Respondent's evidence does not render it insufficient to establish the existence of a genuine issue of material fact. At this point, it is not clear whether facts indicating the size of the droplets of Warrior that were released, the altitude of the flight, the type of CP nozzle, and equipment testing or maintenance records, would support Complainant's case or Respondent's case. The assertions made by Complainant in its Motion for Additional Discovery underscore the need for further development of the facts in this case. The lack of factual development on these issues does not support an accelerated decision. *In re Rigden, supra.*

## VI. Motion to Supplement Prehearing Exchange and Motion for Additional Discovery

In its Motion to Supplement the Prehearing Exchange, Complainant seeks to add one witness, Ms. Sandra Bird, to its list of proposed witnesses. Complainant states that she would testify about her observations and conclusions regarding likely impacts from the Respondent's aerial application of pesticides on June 22, 2004, in rebuttal to the aerial application issues raised by Respondent in its Prehearing Exchange. Complainant included her Biographical Sketch as Attachment 1 to her Declaration in Complainant's Reply supporting the Motion for Accelerated Decision.

In its Motion for Additional Discovery, Complainant asserts that the information provided by Respondent does not allow a thorough review and assessment of the particular equipment and settings used on the Respondent's airplane on June 22, 2004, and does not provide a full accounting of information which may be gleaned from the SATLOC system. Complainant seeks information which would allow it to conduct modeling of the flight at issue. Therefore, Complainant requests production of the "full data file from the 'GPS SATLOC system' for the flight on June 22, 2004," and documents which specify the: (1) droplet size for the pesticide applied by Respondent, (2) specific type of nozzle used for the application, (3) orifice size of the nozzle used, (4) angle of the nozzle during the application, (5) boom pressure during the application, (6) speed of the aircraft at each point depicted on the SATLOC printout in Respondent's Prehearing Exchange Exhibit 6, (7) elevation of the aircraft at these points, and (8) maintenance and testing of the spray boom and nozzle set-up prior to and following the application.

The Rules of Practice provide, at 40 C.F.R. § 22.16(b) that a response to a motion must be filed within fifteen days after service of the motion, and that "any party who fails to respond within the designated period waives any objection to the granting of the motion." As noted above, Respondent has not filed any response to Complainant's Motion to Supplement the Prehearing Exchange or to the Motion for Additional Discovery. For this reason, the Complainant's Motions to Supplement the Prehearing Exchange and for Additional Discovery may be granted.

Furthermore, there is no reason to deny the Motions on their merits. There is no prejudice apparent in this proceeding from the addition of the proposed witness two months prior to the hearing. Discovery requests are governed by 40 C.F.R. § 22.19(e), which provides that such discovery may be ordered only if it (1) will neither unreasonably delay the proceeding nor unreasonable burden the non-moving party, (2) seeks information that is most reasonably obtained from the non-moving party, and which the non-moving party has refused to provide voluntarily, and (3) seeks information that has significant probative value on a disputed issue of material fact relevant to liability or the relief sought. As to the first criterion, the hearing in this matter is set to commence on February 14, 2006, and Respondent should be able to supply Complainant with the discovery information requested well in advance of that date, and there is no claim that there would be any undue burden, difficulty or delay in doing so. As to the second criterion, Complainant has not asserted that Respondent has refused to provide the information

voluntarily. Complainant in its Motion asserted that it "has not been able to learn whether Respondent intends to oppose this Motion," which, together with the delays in Respondent submitting its prehearing exchange,[1] and the lack of the ability of the parties to come to an agreement on *any* stipulations,[2] suggests that Respondent has not been fully cooperative in volunteering information in this litigation. Therefore, the Motion for Additional Discovery will not be denied on the basis that Complainant failed to state that Respondent refused to provide the information voluntarily. As to the third criterion, the information requested appears to be probative as to issues of spray drift and the accuracy of the SATLOC information, which are the central issues in this case. The criteria of 40 C.F.R. § 22.19(e) are sufficiently satisfied to grant the Complainant's Motion for Additional Discovery.

## ORDER

1. Complainant's Motion for Accelerated Decision is **DENIED.**

2. Complainant's Motion to Supplement Complainant's Prehearing Exchange, dated November 1, 2005, is **GRANTED.**

3. Complainant's Motion for Additional Discovery, dated November 22, 2005, is **GRANTED**. Respondent shall submit the information requested in Complainant's Motion for Additional Discovery on or before **January 6, 2006**.

4. In view of the hearing being rescheduled to commence on February 14, 2006, the due date for prehearing briefs is hereby adjusted. If a party wishes to file a prehearing brief, it shall be filed on or before **January 27, 2006.**

5. The parties shall continue in good faith to attempt to settle this matter. Complainant shall file a report of the status of settlement efforts on or before **January 20, 2006.**

Susan L. Biro
Chief Administrative Law Judge

Dated: December 19, 2005
Washington, D.C.

[1]See Order on Motions for Extensions of Time, dated July 20, 2005.

[2] See Status Report Regarding Stipulations, dated November 17, 2005.