UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Office of Administrative Law Judges
Washington, DC 20460

In the Matter of	)	
	)	
David Petrocco Farms, Inc.,	)	Docket No. FIFRA-08-2003-0012
14110 Brighton Road	)	
Brighton, Colorado 80601	)	
Respondent	)	

Federal Insecticide, Fungicide and Rodenticide Act-Written Warning-Preponderance of Evidence

The preponderance of evidence established that David Petrocco Farms as a private applicator received a written warning in accordance with FIFRA § 14(a)(2) and thus could be assessed a penalty within the limitations of that section for violations occurring subsequent to receipt of the warning.

Federal Insecticide, Fungicide and Rodenticide Act-Worker Protection Standard-Incorporation By Reference-Use Of A Registered Pesticide Inconsistent With Its Labeling-Preponderance Of Evidence

The record established that between July 12, 2002, and August 10, 2002, David Petrocco Farms made 220 applications of 22 registered pesticides identified in the complaint. Labels on each of these pesticides incorporated by reference the Worker Protection Standard (WPS), 40 C.F.R. Part 170. The preponderance of evidence established that at the time of an EPA inspection on August 8, 2002, David Petrocco Farms was not displaying a record of information about pesticide applications made within the last 30 days while workers were on the establishment as required by the WPS, 40 C.F.R. § 170.122, at a central location as required by § 170.135(d). Each separate application of a registered pesticide while workers were on the establishment and information about pesticide applications made within the last 30 days was not displayed as required by WPS is a use of a pesticide in a manner inconsistent with its labeling and thus a violation of FIFRA §12(a)(2)(G).

Federal Insecticide, Fungicide and Rodenticide Act-Use Of A Pesticide Inconsistent With Its Labeling-Unit Of Violation-Dependent Violations

Where in addition to counts alleging use of registered pesticides in a manner inconsistent with their labeling for failure to comply with the display requirements of the WPS, Complainant alleged in separate counts for the same applications use of a pesticide inconsistent with its labeling for applications at rates in excess of that permitted by the label or on a crop not permitted by the label, it was held that the unit of violation was "use" of a registered pesticide in a manner inconsistent with its labeling for which only one penalty per application could be assessed. Moreover, Complainant has not sustained its burden of proof as to these additional counts and, in any event, the ERP makes it clear that these are dependent violations for which only one penalty per application may be assessed

Federal Insecticide, Fungicide and Rodenticide Act-Private Applicator-Debt Collection Improvement Act-Maximum Penalty

Although the Agency apparently intended to increase the maximum penalty for a single violation by a private applicator subsequent to receipt of a written warning, or a citation for a prior violation, from $1,000 as provided by FIFRA § 14(a)(2) to $1,100 for violations occurring on or after January 30, 1997, as authorized by the Debt Collection Improvement Act of 1996, Agency was bound by rule as published, 61 Fed. Reg. 69364 (December 31, 1996) and thus maximum penalty of $1,000 per violation was unchanged, 40 C.F.R. § 19.4 (2002-2004).

Federal Insecticide, Fungicide and Rodenticide Act-Use Of A Registered Pesticide Inconsistent With Its Labeling-Determination Of Penalty-Enforcement Response Policy-WPS Penalty Policy

Proposed penalty for violation of regulation requiring display of pesticide application information made within the last 30 days while workers were on the establishment computed in slavish adherence to ERP and WPS Penalty Policy rejected as too high, because it overstated the gravity of the harm, attributing benefits to the display of pesticide application information in reducing the risk or potential risk of worker exposure to pesticides which the record did not support. Nevertheless, a substantial penalty was justified because it must be presumed that the WPS is valid and that compliance with the display requirement will reduce the risk to workers of pesticide exposure. A penalty of $114,400 was determined to be appropriate and was assessed.

Appearances:

For Complainant:

Eduardo Quintana, Esq.
Enforcement Attorney
U.S. EPA
Denver, Colorado

and

Kathy M. Clark, Esq
Toxics and Pesticides Enforcement Division
U.S. EPA
Washington, D.C.

For Respondent:

John D. Faught, Esq.
John Faught & Associates, P.C.
Denver, Colorado

And

Randy L. Sego, Esq
Randy L. Sego, L.L.C.
Denver, Colorado

Initial Decision

This proceeding under Section 14(a) of the Federal Insecticide, Fungicide and Rodenticide Act, as amended ("FIFRA"), 7 U.S.C. § 136$\underline{1}$(a), was commenced on June 3, 2003, by the filing of a complaint by the Office of Enforcement, Compliance and Environmental Justice, U.S. EPA, Region 8, charging Respondent, David Petrocco Farms, Inc.("Petrocco") with 229 counts of use of registered pesticides inconsistent with their labeling in violation of Section 12(a)(2)(G) of the Act. The complaint alleged, inter alia, that Petrocco operates a farm located at 14110 Brighton Road, Brighton, Colorado, where it grows various fruits and vegetables, that in the course of its planting and growing activities Petrocco applies registered pesticides and as to such applications is a "private applicator" as defined in FIFRA § 2(e)(2), that the labels on 22 identified pesticides used by Petrocco Farms incorporated the Worker Protection Standard, codified at 40 C.F.R. Part 170, and that Petrocco violated such standard subsequent to receiving a Written Notice of Warning ("NOW") contemplated by FIFRA § 14(a)(2). For these alleged violations, it was proposed to assess Petrocco a penalty totaling $231,900.

Petrocco answered, alleging, inter alia, that the complaint should be dismissed because Petrocco had not violated any provision of FIFRA subsequent to receiving a written warning from the Administrator, denying that it was properly served with any written warning of the alleged violations, denying the alleged violations, contesting the amount of the penalty as excessive and unwarranted, and requested a hearing. Thereafter, Petrocco filed a motion to amend its answer to the complaint as to paragraphs 101, 113, 191 and 227, which was granted. The original answer had admitted that Petrocco had applied the pesticides identified in these paragraphs at specified locations, while the amended answer denied in whole or in part the applications on the dates alleged.

Thereafter the parties exchanged prehearing information in accordance with an order of the ALJ and filed a series of motions. Rulings on these motions included granting the parties' respective motions to supplement prehearing exchanges, granting Complainant's motion to exclude witnesses, granting Respondent's motion to amend its answer, denying Complainant's motion to dismiss certain affirmative defenses, denying Respondent's motions to dismiss and granting Complainant's motion to compel Respondent's compliance with prehearing order.

A hearing on this matter was held in Brighton, Colorado, during the period April 5 through April 7, 2004. Based upon the entire record including the proposed findings, conclusions and briefs of the parties, I make the following:

Findings of Fact

1. David Petrocco Farms, Inc is a corporation organized under the laws of Colorado and a person as defined in Section 2(s) of FIFRA. Additionally, David Petrocco Farms is a private

applicator as defined in FIFRA § 2(e)(2).[1]

2. David Petrocco Farms, Inc. ("Petrocco Farms") is the operator of an "agricultural establishment"[2] with a place of business located at 14110 Brighton Road, Brighton, Colorado. Petrocco Farms grows various vegetables including onions, cabbage, lettuce, spinach, kale and collard greens, peppers, turnips, green beans, red beets and sweet corn . Although Petrocco Farms' overall operation is large, vegetables with the exception of cabbage and sweet corn are grown on very small plots in order to meet the needs of its customers for fresh produce (Tr. 704-05).

3. In the course of its growing and planting activities, Petrocco Farms finds it necessary to apply registered pesticides to control insects and plant diseases. These pesticides, by trade name and registration number, include:

Ambush, EPA Reg. No. 10182-18;
Ammo, EPA Reg. No. 379- 3027;
Asana XL, EPA Reg. No.352-515;
Avaunt, EPA Reg. No. 352-597;
Confirm, EPA Reg. No. 707-238;;
DiPel DF, EPA Reg. No. 275-103
Dimethoate; EPA Reg. No.51036-110;
Di-Syston, EPA Reg.No. 3125-307;
Dithane F45, EPA Reg. No.707-156;
Ecozim (Amvac AZA 3% EC) EPA Reg. No. 5481-476;
Lannate, EPA Reg. No.352-384;
Larvin, EPA Reg. No. 264-379;
Nu -Cop, EPA Reg. No. 51036-269;
Manex, EPA Reg. No. 1812-251;
Proclaim, EPA Reg. No. 100-904;
Provado, EPA Reg. 3125-457;
Pyronyl, EPA REG. No.655-498;
Spin Tor, EPA Reg. No.62719-294;
Serenade, EPA Reg. No. 69592-7;

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[1]Section 2(e)(2) defines "private applicator" as follows:

> The term "private applicator" means a certified applicator who uses or supervises the use of any pesticide which is classified for restricted use for purposes of producing any agricultural commodity on property owned or rented by the applicator or the applicator's employer or (if applied without compensation other than trading of personal services between producers of agricultural commodities) on the property of another person.

[2]. An agricultural establishment is defined as any farm, forest, nursery, or greenhouse (40 C.F.R. § 170.3).

Sevin XLR, EPA Reg. No.264-333;
Thiodan, EPA Reg. No. 279-2924;
Warrior T, EPA Reg. No. 10182-18.

Ambush, Ammo, Asana XL, Di-Syston, Lannate, Larvin, Proclaim and Warrior from the above list are restricted use pesticides meaning, inter alia, that the pesticides may be applied only by or under the supervision of a certified applicator. The labels on each of the referenced pesticides (C's Exhs 9-30) incorporate the Worker Protection Standard (40 C.F.R. Part 170).

4. During the peak harvesting season, Petrocco Farms employs approximately 250 people, the majority of whom are seasonal field workers. Approximately 20 of Petrocco Farms' employees are permanent or year-around.

5. On September 20, 2001, David Petrocco Farms, Inc., 14110 Brighton Road, Brighton, Colorado, was inspected by Ms. Britta Campbell, now Ms. Britta Copt, an EPA environmental protection specialist, to determine compliance with the Worker Protection Standard (Tr. 114; Report on Inspection, C's Exh 1). Ms. Copt was accompanied on the inspection by Eddie Sierra, an interpreter, who at the time was the Director for Planning and Targeting, EPA Region 8 (Tr. 118).

6. Ms. Copt and Mr. Sierra arrived at Petrocco's offices on the date and at the address mentioned in the preceding finding at approximately 2:00 pm. (Tr. 117, 120; Notice of Inspection, C's Exh 1b). They approached a building, described by Ms. Copt as the "main office building" (photo, R's Exh A), which had two doors, one on the right marked "Employees Only", and the one on the left marked "Shipping and Receiving" (Tr. 117-18). They entered through the door marked Shipping and Receiving and asked for Mr. Joe Petrocco.

7. Ms. Copt and Mr. Sierra met Mr. Petrocco, who identified himself as "Co-director", and presented their credentials. They explained the purpose of their visit as a Worker Protection Standard inspection (Exh 1). Thereafter, they proceeded to Mr. Petrocco's office where Ms. Copt filled out a Notice of Inspection form and asked Mr. Petrocco to sign it (Tr. 120). Mr. Petrocco consented to the inspection by signing the Notice of Inspection on the line "Entry by Consent" (Tr. 121; Notice of Inspection).

8. Mr. Petrocco described Petrocco Farm's operations as growing spinach, green beans, cabbage, lettuce, sweet corn, peppers and other crops (Tr. 122; Exh 1).. He stated that Petrocco employs approximately 250 people, the majority of whom are seasonal, doing regular field work, and that about 20 are permanent. Asked what pesticides were used by Petrocco Farms, he replied mostly Lannate, Dimethoate, Dipel and Nu-Cop, but that many other pesticides were also used. He explained that, while Petrocco hired some of the applications to be performed aerially, most were ground applications performed by employees of Petrocco.. He said that Petrocco has about ten employees he referred to as "pesticide handlers". The term "handler" is defined in 40 C.F.R.§ 170.3. Asked for pesticide application records for the last 30 days, Mr.

Petrocco supplied records for the period August 18 through September 19, 2001 (Tr. 123; Exh 1c).

9. Asked about worker safety training programs, Mr. Petrocco replied that Petrocco trains their workers and handlers once a year (Tr. 125; Exh 1). He explained that workers are trained using a flip chart and afterwards they were given a brochure "Protect Yourself From Pesticides." He further explained that" handlers" are trained by use of a video followed by a question and answer session. Mr. Petrocco is a certified applicator and conducts the training. He provided Ms. Copt a copy of a roster of employees who were trained (Tr, 126; Exh 1d). The most recent date on this roster appears to be February 25, 1997, while other lists of employees trained are dated in 1995 and 1996. Mr. Petrocco acknowledged that not all employees were trained by the fifth day after their hiring, which is a requirement of the Worker Protection Standard (WPS) (Tr. 128).

10. Ms, Copt discussed with Mr. Petrocco re-entry intervals, decontamination supplies, personal protective equipment, pesticide application procedures and central location information (Tr.128). Mr. Petrocco informed Ms. Copt that Petrocco provides personal protective equipment (PPE) to employees as [pesticide] labels require, that decontamination supplies, i.e., soap, water and paper towels are provided in portable toilets that accompany workers in the field and that for handlers these items were in the cab of the sprayer (Exh 1). Ms. Copt was shown the PPE equipment and pesticide storage areas (Tr. 131) Mr. Petrocco answered in the negative when asked whether they provided handlers with a change of clothing and emergency eye-flush water. He was informed by Ms. Copt that these items would have to be provided. (Exh 1). Petrocco's emergency plan consisted of providing transportation [of ill workers] to the nearest medical center and that they would make certain that the doctors were provided with a copy of the label for the pesticide used.

11. Asked how Petrocco ensures that workers are not exposed to pesticides during pesticide applications, Mr. Petrocco replied that workers are moved to a different field when pesticides are going to be applied (Exh 1). He stated that Petrocco never has "early entry" workers and that workers are informed orally the day before any spraying is to occur. Pesticide handlers are told not to spray when crews are in the field and to stop spraying when it gets windy. Radio contact is maintained with handlers in case of an emergency (id.). If he has a handler who does not read or speak English, Mr. Petrocco goes over the label with him to make sure that all label directions are understood.

12 .Mr. Petrocco stated that Petrocco did not have a pesticide safety poster with emergency information and did not post applications made in the last 30 days (Exh 1). Ms. Copt provided Mr. Petrocco a pesticide safety poster and told him that it would have to be posted before she completed her inspection. Ms. Copt asked Mr. Petrocco to write a statement summarizing what he had told her, which he proceeded to do (Tr. 131; Affidavit, Exh 1e).. The statement provides:

"We do worker and handler training to all our workers. Booklets for workers, Video for handlers. We did not know that workers needed training within 5 days of hiring, but are

now doing so. We did not have a pesticide poster posted in the break room, but we do now, it was in my drawer, just needed to be found and posted. We also need to post all applications done within the past 30 days."

13. Mr. Petrocco stated that he had to leave and Ms. Copt asked him to sign the Notice of Inspection, which he did. The office portion of the inspection concluded at 3:30 pm. Ms. Copt and Mr. Sierra then proceeded to a field to interview some workers and observe the decontamination supplies provided by Petrocco. A photo taken by Ms. Copt (Tr. 134), shows what the inscription describes as water, soap and towels located next to a portable toilet in the field (Exh 1f). Ms. Copt and Mr. Sierra next interviewed two field workers who told them that they did not handle any pesticides and they (the workers) had been trained in pesticide safety, being shown a video and holding a meeting afterward (Exh 1). The workers stated that water, soap and towels were located in the portable toilet. Both were aware of what an REI was and stated that no activities [in the field] were allowed during that period. They stated that if an emergency occurred, transportation to a hospital would be provided.

14. Ms Copt's Report of Inspection is dated October 26, 2001 (Exh 1). Findings in the report state that David Petrocco Farms does not have a central location where a pesticide safety poster, emergency information, and an application list are posted. Additionally, it states that all workers are not trained within five days of being hired. After completing her report, Ms. Copt testified that she discussed it with EPA management and it was decided to send Petrocco Farms a Notice of Warning (NOW). Ms. Copt drafted a Notice of Warning (Tr.136).

15. A letter, dated October 31, 2001, labeled a Notice of Warning, addressed to Mr. Joe Petrocco, David Petrocco Farms, 14110 Brighton Road, Brighton Road, Brighton, Colorado, is in the record (C's Exh 2). The letter was signed by Mr. Connally Mears, Director Technical Enforcement Program, EPA, Region 8, and Mr. Michael Risner, Director Legal Enforcement Program (Tr. 41, 42; Exh 2). The letter states that it constitutes a notice of warning pursuant to Section 9(c)(3) of FIFRA[3] and that there is reason to believe that you have used a registered pesticide in violation of Section 12(a)(2)(G), 7 U.S.C. § 136j(a)(2)(G). The letter would have been more understandable to a person not familiar with the Act or not having access to the United. States Code had it explained that the cited section made it unlawful for any person to use any registered pesticide in a manner inconsistent with its labeling. Moreover, the reference to Section 9(c)(3) could lead the recipient to believe that the violations were not serous inasmuch as the provision is phrased in the negative, i.e., the Administrator is not required to institute proceedings for the prosecution of minor violations, if he or she believes the public

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[3]. Section 9 (c) is entitled "Enforcement" and provides in pertinent part:..." (3) Warning Notice Nothing in this subchapter shall be construed as requiring the Administrator to institute proceedings for prosecution of minor violations of this subchapter whenever the Administrator believes that the public interest will be adequately served by a suitable written notice of warning."

interest would be served by a written notice of warning. Be that as it may, the letter stated that EPA interprets the term "use" to include pre-application activities including training, and post-application activities necessary to reduce the risks of illness and injury. The letter recites that during a Worker Protection Standard inspection on September 20, 2001, you told the inspector that Petrocco Farms does not train all of its field workers before the sixth day of work. Petrocco was informed that this is a violation of 40 C.F.R. Part [§] 170.130(a)(3)(ii). Additionally, the letter states that the inspector did not observe a pesticide safety poster, emergency information, and a pesticide application list posted in a central location, on the date of the inspection. The letter asserted that you also informed the inspector, on that date, that you do not display the pesticide safety poster to meet the minimum basic requirements as required by 40 C.F.R. Part 170.122 and 170.35.

16. Mr. Connally Mears, formerly Director of the Technical Enforcement Program, testified that as the Director he had authority to sign letters of warning, complaints and consent agreements (Tr. 39, 40). He testified that it was standard procedure to issue Notices of Warning, that the letter to Petrocco Farms (Exh 2) was prepared by an investigator under his (Mears') supervision and signed by himself and Michael Risner, Director Legal Enforcement Program (Tr. 41, 42). The letter bears a date stamp of October 31, 2001, and Mr. Mears testified that the original was delivered to the recipient, Petrocco Farms. He stated that it was EPA's practice to retain copies of all correspondence mailed out and that the copy in the record, EPA Exh 2, came from files maintained by his office (Tr. 43). Mr. Mears explained the purpose of Notices of Warning was to make sure that the facility was aware violations of the law were found and to encourage the facility to correct the violations (Tr. 45). He pointed out that a consequence of [delivery of] a Notice of Warning was that penalties could be imposed if the violations continued. He answered in the negative the question of whether a NOW was required to include notice of the specific violations of the Worker Protection Standard [found or suspected] (Tr. 46). Mr. Mears explained that EPA nevertheless included specific warnings in order to ensure that the facility fully understood the requirements of the law and to enable it to return to compliance in the shortest and least expensive way (Tr. 47). Asked what provisions of the WPS Petrocco was alleged to have violated, Mr. Mears replied that there was a failure to adequately train workers and a failure to display pesticide application information.

17. Mr. Mears testified that as a general practice EPA and his office sent Notices of Warning by Certified Mail [Return Receipt Requested] (Tr. 48, 49). He explained that it was important to have a return receipt in the record in case the violations continued and further proceedings were necessary (Tr. 49). He testified that the NOW in this instance was sent [to Petrocco Farms] by Certified Mail, Return Receipt Requested, because it was "our" standard practice and because the top of the letter (Exh 2) so indicated. He instructed his clerical assistant to send the NOW by Certified Mail and pointed out that it was addressed to Mr. Joe Petrocco, David Petrocco Farms, 14110 Brighton Road, Brighton, Colorado 80601. The Certified Mail Receipt or stub (C's Exh 3) is for an item, bearing Tracking No. 7000 1670 0011 7028 7689, addressed simply to Joe Petrocco, 14110 Brighton Blvd, Brighton, Colorado 80601..Mr. Mears testified that this was the same street address as on the NOW (Tr. 51). This is inaccurate

because the street address on the NOW is 14110 Brighton Road, while that on the receipt or stub is 14110 Brighton Blvd.

18. A Return Receipt for Certified Mail, bearing the above tracking number, and for an item addressed (Box 1) to Joe Petrocco, David Petrocco Farms, 14110 Brighton Blvd, Brighton, CO, 80601, is in the record (Tr. 52, 60, 61; C's Exh 4). The receipt bears a stamped date "Nov-6 2001", the signature of Rose Wolf, having a box entitled "Agent" checked, and a stamped "SCANNED" in Box D which is for a delivery at an address different from that shown in Box 1. Beneath the outline of the form on the copy is a stamped date "Nov-2 2001". Instructions beneath a heading on the Return Receipt entitled "Sender Complete This Section" include the following: Print your name and address on the reverse so that we can return the card to you." The address on the reverse (page 2 of Exh 4) is as follows: "US Environmental Protection Agency ATTN: Jolene Montoya, Technical Enforcement, 999 18th Street Suite 300 Denver, CO 80202-2466." This page bears a stamped "RECEIVED Nov-9, 2001 Office of Enforcement", indicating receipt by EPA on that date. Mr. Mears testified that receipts [for Certified Mail when received] are retained in the same file as "our" copy of the letter sent out on a particular enforcement case (Tr. 53, 54) He did not know who Rose Wolf was nor did he know the meaning of the term "Scanned" on the receipt . He stated that his office had no occasion to check to see if a NOW was actually received by the addressee, because "we" assume that the U.S. Postal Service had procedures in place to assure receipt of the document by the addressee (Tr. 56). He had no personal knowledge that the NOW had been delivered (Tr. 61).

19. Ms. Rose Wolf testified that she had been employed by the U.S. Postal Service at the Brighton Post Office for 15 years (Tr. 66, 67). Her present job title and her title in 2001 and 2002 was "Rural Carrier". She stated that Petrocco Farms was on her postal route and indicated that whether a letter was addressed to Brighton Road or Brighton Boulevard [on her route] would not make any difference as to its delivery (Tr. 67, 68). She identified Exhibit 3 as a Certified Mail Receipt ["stub"] for an [article] addressed to Joe Petrocco at 14110 Brighten Boulevard, Brighton, Colorado 80601 and Exhibit 4 as a Return Receipt for an article addressed to [David] Petrocco Farms, [at the same address] signed by her and dated November 6, 2001 (Tr. 68, 69). She pointed out that the Certified Mail number on the stub and on the return receipt were the same. Asked whether she had attempted the initial delivery of the mentioned Certified Mail article on November 2, 2001, she answered in the negative, stating that it was her day off (Tr. 69). She explained that [in her absence] a substitute carrier would have the same duties as a regular carrier and would deliver or attempt to deliver Certified Mail (Tr. 71). Describing what happened in case of an attempt to deliver Certified Mail and no one was there to accept it, she stated that [the carrier] would leave a [Form] 3849, which is a "notification" and which we call a "peach slip" (Tr. 72). She testified that the notification would include information as to whom the article was addressed, who it was from, the Certified Mail number of the article attempted to be delivered, the date and the date the article can be picked up from the Post Office. A blank Form 3849 is in the record (C's Exh 44b). Asked how she knew or recalled that she was not the carrier who attempted delivery of the referenced Certified Mail article to Petrocco Farms on November 2, 2001, Ms. Wolf replied that she recognized her substitute's writing on the

notification (Tr. 73). As indicated infra, this portion of completed Form 3849 is not available, having been destroyed in accordance with normal Postal Service procedures. Ms. Wolf explained that she saw the signature of Stephanie Case on the notification at Petrocco Farms at an unspecified date (Tr. 73, 74). Although the signature on the form is "S. Case", Ms. Wolf testified that she knew Stephanie Case, that she worked for Petrocco Farms and that Stephanie was in the front where she (Ms. Wolf) delivered the mail. A roster of key personnel of Petrocco Farms and their e-mail addresses from the Petrocco Farms' Web site, identifies Stephanie Case as "Financial Office Director, Bookkeeper, Accounts Pa[yable]" ("Contact Information", C's Exh 5).

20. Ms, Wolf testified that, after seeing Stephanie Case's signature on Form 3849, she took the slip back to the Post Office and gave it to the check-in-clerk, who would retrieve the article and put it in her (Ms. Wolf's) bin for delivery the next day (Tr. 76). She testified that she would have taken the article "back out" to deliver [to Petrocco], but they must not have been there. Seeing that Stephanie had filled out both sides of the back of [Form] 3849, Ms. Wolf explained that she signed the "38" [PS Form 3811 Domestic Return Receipt] letter. The facing page of United States Postal Service Form 3849 states "Sorry We Missed you! We Deliver For You." To the right and in bold print "We will redeliver or you or your agent can pick up. See reverse." (Exh 44b). The heading on the reverse of Form 3849 states: "We will redeliver OR you or your agent can pick up your mail at the post office. Bring this form and proper ID. If your agent will pick up, sign below in Item 2, and enter agent's name [here]. "The "Delivery Section" on the reverse of the form is beneath the address of the Brighton Post Office and contains spaces for "Signature", "Printed Name" and "Delivery Address". To the left on the form are instructions: "1.a. Check all that apply in section 3, b. Sign in section 2 below, and c. Leave this notice where your carrier can see it. 2. Sign Here to Authorize Redelivery or to Authorize an Agent to Sign for You and 3. Redeliver (Enter day of week)."

21. Asked to explain what she meant by "both sides of the [reverse] of the form having been filled out by Ms. Case", Ms Wolf replied that the only part of the [Form 3849] that the Post Office retains is the part that says "Signature", "Printed Name" and "Delivery Address" . She added that there was a section to the left, numbered 1, 2, 3 [described in the previous finding] which also has a place to sign, to [authorize] redeliver[y] and provide them [the carrier] an address (Tr. 76). Referring specifically to the executed Return Receipt (C's Exh 44a), Ms. Rose acknowledged that was her signature (Tr. 77, 78). Asked why she signed the form, she replied that she did not remember specifically, but that the only way she would have signed it was because no one was there and both sides of the [reverse] of the peach slip were signed (Tr. 78, 80). She maintained that she would not have signed it, if only one side of the form were signed. She alluded to language on the form providing that [by signing here], I authorize redelivery or an agent to sign for me. She acknowledged that she was not named as agent on the form.

22. A fax transmission from the United States Postal Service, dated 08/21/2003, addressed to Complainant's counsel states, with reference to Certified item number

70001670001170270287689, that the delivery record shows that this item was delivered on 11/06/2001 at 2:07 PM in Brighton, CO 80601 (Exh 44c). The mentioned transmission further states that the scanned image of the recipient information is provided below: Delivery Section [,] Signature of Recipient "S Case" and beneath that line [representing space for the printed name] "S Case" and Address of Recipient "14110 Brighton Rd, Brighton, CO 80601" (Tr. 82). The mentioned delivery record is in evidence because Ms. Wolf identified it and because of a Certificate of Authenticity of Domestic Business Records Pursuant to Federal Evidence Rule of Evidence 902(11).[4] Ms. Wolf testified that she would have had to have picked this up in order to deliver an article (Tr. 81). Asked how such precision in the delivery time was possible, Ms. Wolf replied that we have scanners and that there is a UPC code on each letter and also on the peach slip and that they scan the article to be delivered. If delivery is not effected, we put "attempted" on the scanner and if delivery is [subsequently} effected, we scan the 3849 which has the time and the date. Although she testified that she had no specific memory of delivery of the Certified Mail article at issue here, she indicated that she performed the scanning on the Return Receipt (Exh 44a) and that the result of this scanning (Exh 44c) would have been from the "Delivery Section" of Form 3849 (Exh 44b). On cross-examination, she stated that she scanned the number or UPS symbol which connects [with the article] and states the time and date (Tr.101-02), She explained, however, that Exhibit 44c was not [from] the scanner she used, but was a photocopy from Denver where all of these forms get sent to be copied..

23. Ms. Copt conducted a follow-up inspection of Petrocco Farms on August 8, 2002 (Tr. 137, 138; Report on Inspection, C's Exh 6). The Report on Inspection is dated October 3, 2002. Ms Copt was accompanied by Elias Balbinder, who was to act as an interpreter for interviews with Spanish-speaking employees and, although the Report on Inspection doesn't mention her presence, by Peg Perrault, an EPA environmental scientist who was receiving on-the-job training as an inspector (Tr. 140). As on the prior inspection, they were met by, and presented their credentials to, Mr. Joe Petrocco, who identified himself as Assistant Director. Mr. Petrocco consented to the inspection by signing the Notice of Inspection (Tr. 141-42, 144;

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[4]. C's Exhibit 45. The Certificate is an affidavit, dated December 9, 2003, by Juan Muñoz, Postmaster of the Brighton Post Office, who states that he is the custodian of the records for such business entity. He further states that the attached record [delivery and recipient information for delivery of Certified item number 70001670001170287689] is a true duplicate of the original record which was in the custody of the Brighton Post Office but the original record was sent to the Denver Post Office for scanning and disposal of such records as is the regular practice of the USPS, and that I am custodian of the attached record consisting of one page. Mr. Muñoz further states that the attached "scanned image of the recipient information " record to this certificate was made at or near the time of the occurrence of the matters set forth, by, or from information transmitted by, a person with knowledge of those matters; such record was kept in the course of regularly conducted business activity of making certified mail delivery record available to postal customers by internet computer access; and such record was made by the USPS as a regular practice.

C's Exh 6a). Mr. Petrocco described crops grown by Petrocco as lettuce, spinach, cabbage, sweet corn, [green beans], peppers and other crops (Tr. 144). Although the Report on Inspection quotes Mr. Petrocco as stating that Petrocco Farms had about 250 field workers, it appears that 250 is the total number of employees and that about 20 of these are permanent (Tr. 144).

24. Asked whether Petrocco had applied pesticides in the last 30 days, Mr. Petrocco answered "yes" and asked for records of such applications, he produced a notebook of computer generated [application] records (Tr. 145). The Report on Inspection, dated October 3, 2002 (Exh 6), written by Ms. Copt, contains no indication that she was shown a notebook of application records. Her testimony, however, was that upon looking through the notebook, she did not observe any applications within the last 30 days (Tr. 145-46) She pointed this out to Mr. Petrocco, who responded that the secretaries had not yet entered the last 30 days of applications into the computer system (Tr. 146). Mr. Petrocco then a produced a handwritten applicator's log covering the period July 12, 2002, through August 4, 2002, which had not yet been translated from Spanish into English (Tr. 146-47; C's Exh 6-b). Ms. Copt identified some of the pesticides in the handwritten log as Nu-Cop, DiPel, Dimethoate, Warrior, Asana, as well as others and testified that the log covered [only] ground applications (Tr. 148). There is, however, no persuasive evidence that there were any aerial applications during this period. Asked what requirements of the [WPS] were not included in the log, Ms. Copt replied that it did not include the active ingredient for the pesticide, the EPA registration number, the time of application, or the restricted entry interval (Tr. 150). She testified that, if this document were displayed in a central location, it would not meet the requirements [of the regulation] for displaying specific information concerning pesticide applications (Tr. 151).

25. Ms. Copt testified that when she asked Mr. Petrocco about training, he replied that they usually train all of their workers and handlers once a year (Tr. 151; Exh 6) They use a "flip chart" presentation for workers followed by a brochure "Protect Yourself From Pesticides." Handlers are trained by use of a video, followed by a question and answer session.. Mr. Petrocco is a certified applicator and conducts the training. A roster of employees trained on April 1, 2002, is in evidence (C's Exh 6-c). Asked how they ensured that no workers were exposed to pesticides during application activities, Mr.Petrocco replied that notification of applications is done orally over the radio. He denied ever having early [re]-entry workers.

26. Ms. Copt testified that she discussed with Mr. Petrocco re-entry intervals, pseticide application procedures, personal protective equipment, de-contamination supplies and central location information.(Tr. 153; Exh 6). She told Mr. Petrocco that she was looking for a pesticide safety poster and information concerning pesticide applications made within the last 30 days (Tr. 154). He then took her to the employee lunchroom where there was a pesticide safety poster having emergency information hanging on the wall outside the lunch room. Ms. Copt took photographs of the poster which appear to show emergency and safety information in English and in Spanish. Xerox copies of these photos are in evidence (Exh 6-e). Although an inscription attached to the photos and the Report of Inspection state that the poster was posted outside the lunch room, Ms. Copt testified that this poster, a first-aid kit and labor-related notices were

posted on the wall in the " break room" at Petrocco Farms (Tr. 155). She did not observe any evidence of pesticide applications displayed at or near the safety poster and she informed Mr. Petrocco that they would need to post specific information about pesticide applications made in the last 30 days near the safety poster in order to be in compliance with WPS for central location information (Tr. 154-55). She read from an EPA Question and Answer document (Exh 33) that EPA used the word "display" to indicate that access to the information must be unrestricted and that [pesticide application information] need not be requested (Tr. 157) Asked whether the employee break room at Petrocco Farms was consistent with the mentioned requirements for display [at a central location], she answered in the affirmative (Tr. 157-58).

27. Ms. Copt informed Mr. Petrocco that they wished to see decontamination supplies and to interview one or two field workers. Prior to following Mr. Petrocco out to the field, they returned to his office to complete the paperwork (Report of Inspection, Exh 6). Mr. Petrocco wrote out a statement (affidavit) summarizing what he had told the EPA inspectors (Exh. 6-d). That statement is as follows:

"TO Whom It May Concern:

We, here at Petrocco Farms, train our employees, both workers and handlers, according to EPA Worker Protection Standards. After training each employee receives an appropriate card certifying that they were trained.

We have the EPA poster in our break room with emergency info on it.

We keep our pesticide records on computers, inputted by our secretaries after they have been applied and documented by our applicators. Our sanitation facilities are in the field at fill stations."

Mr. Petrocco then signed the Notice of Inspection, signifying that he had received a copy (Exh 6-a).

28. Ms. Copt and the assisting inspectors then followed Mr. Petrocco out to a field where a crew was harvesting lettuce (Report of Inspection). Joe Petrocco did not accompany them on this portion of the inspection. They did, however, meet David Petrocco (Sr.?), who gave them permission to speak to some workers, but said that the crew would be moving on in a couple of minutes. Interviews were conducted in Spanish with Mr. Balbinder as interpreter. The first worker interviewed had only been working for Petrocco about three months. He stated that he had never been trained in pesticide safety, that he was not aware of what pesticides were being applied and that he was not told when [pesticide] applications will be made (Tr. 174) This worker ran away to rejoin his crew, who were leaving the area. The second worker interviewed had been working for Petrocco for years, said he had been trained in pesticide safety, that he is told when spraying activities will occur, that he knows what an REI is and that no activities [in the field] are allowed during that period. This worker also stated that they were provided with water, soap and paper towels which were located in the portable toilet. Ms. Copt verified that water, soap and paper towels were provided. Findings in the Inspection Report prepared by Ms. Copt state that David Pertocco Farms does not post an application list of all pesticides applied within the last 30 days in a central location accessible to all their workers.

Additionally, the Report states that, based on worker interviews, it was unclear whether all workers were trained in pesticide safety prior to work in the fields.

29. Ms. Copt testified that she called Joe Petrocco on or about May 13, 2003, and asked him for a copy of pesticide application records showing EPA registration numbers for pesticides applied during the period July 12, 2002, through August 4, 2002 (Tr. 176). She explained that EPA registration numbers were not provided in the handwritten applicator's log she obtained during the inspection on August 8, 2002. In response, she received a three-part fax from Mr. Petrocco, which along with a covering memo totaled 25 pages (C's Exh 7).. The memo stated, inter alia, the following is the chemical reporting we have from July 12-2002 through August 4-2002. Ms. Copt stated and examination of the application record, confirms, that the exhibit (computer printout) includes applications made during the period July 10, 2002, through August 12, 2002 (id.; Tr. 177, 181). At Ms. Copt's request, Petrocco Farms, by letter, dated May 16, 2003, provided a hard copy of the application records which had previously been faxed to Ms. Copt (C's Exh 8). As does the fax copy, this copy includes applications made during the period July 10, 2002, through August 12, 2002. The letter, signed by Julie Petrocco, Office Manager, states that in order to properly interpret the records, [you] should pay attention only to the date of each application. The actual application number indicates the order in which each of the sprayings were performed. In other words, we have a few different employees that are sprayers. They hand in their spray reports at different times during the week, and we try to get them in the system as soon as possible The letter further states that the application number indicates the order in which the sprayings were performed, that is, the system assigns numbers by chronological order, not by date.

30. Ms. Copt testified that the computer printouts of the application records included applications made between August 5, 2002, and August 8, 2002, which were not included in the handwritten applicator's log (Exh 6-b) she obtained during the August 8, 2002, inspection (Tr. 182). She stated that nine separate pesticide application entries were made during this period, each of which represented the application of 27 pesticides. This testimony is erroneous as it appears that eight pesticide application entries were made during this period, representing 27 pesticide applications.[5] Testifying with reference to Julie Petrocco's letter which forwarded a hard copy of the computer application records (finding 29), Ms. Copt pointed out that the letter indicated that records of pesticide applications were entered into the computer system after the applications were made and that this would not comply with WPS which required that specific information about pesticide applications be displayed prior to the applications being made, if workers were on the establishment or, if workers were not on the establishment when the

[5] Tr. 182 Counting two entries representing pesticide applications on August 8, 2002, there are eight entries after August 4, 2002, and through August 8, 2002, even allowing for the fact there are two applications numbered 315 on August 7, one to a lettuce field and one to an onion field (Exh 8 at 22 and 24). These entries represent a total of 27 pesticide applications rather than each entry representing the application of 27 pesticides (Tr. 183).

applications were being made, prior to the first work period (Tr. 184-85). She emphasized that Ms. Petrocco's letter was in accord with the statement in Mr. Petrocco's affidavit (Exh 4), i.e., that records of pesticide applications are inputted to the computer system after the applications are made. Because she had asked Mr. Petrocco for application records for the last 30 days and he had informed her that these applications had not [yet] been entered into the computer, she estimated that at the time of the inspection on August 8, 2002, there was a delay of at least 30 days between the time of the application, the application record was written, turned into the office, translated from Spanish into English, entered into the computer and printed out to be displayed (Tr. 186-87).

31. Ms. Copt explained the application number that appears in the upper left corner of every entry in the computer application records (Tr. 187). She stated that these numbers were automatically assigned by the computer software in sequential order, analogous to the numbers in a checkbook. She pointed out that the lowest application number would correspond to the earliest date an application entry was entered into the computer (Tr. 188).She testified that the lowest application number was 202, Exhibit 7 at 10, representing applications made on August 1, 2002 (Tr. 189, 190-91) The next highest application number was 235, also on page 10 of Exhibit 7, representing applications made on August 12, 2002. These application numbers reflect the sequence in which application numbers are entered into the computer rather than the date of the applications. This indicates that Application Nos. 313, 314 , 315, 317 and 319 made on August 5 , 7 and 8, 2002 (Exh 8 at 22, 24) were entered into the computer prior to any applications made in July 2002. See, e.g., Application No. 457 made on July 10, 2002, and Application No. 513 made on July 31, 2002 (id. at 3, 17). This anomaly is not explained by Ms. Julie Petrocco's statement that [sprayers] hand in their reports at different time during the week (finding 29), but seemingly is indicative of much greater delays in entering application data into the computer (finding 30) . Ms. Copt testified that she had spoken with a representative of the software vendor who told her that the application number was a unique number assigned by the computer software, which could not be manipulated by the user. This information was confirmed in a letter from Famous Software, dated March 8, 2004.[6] In further testimony, Ms. Copt opined that the only application number which could have been in the computer on the date of her inspection on August 8, 2002, was No. 202, representing pesticide applications made on August 1, 2002, and that all other [higher] application numbers had to have been entered into the computer subsequent to August 1 [8], 2002 (Tr. 205-06).

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[6]. Exhibit 55. The letter states in part: The chemical application entry screen is used, as the name implies, to enter and track applications of chemicals. The entry screen allows a user to enter specifics regarding a specific operator, site and crop. A key to this entry screen is the application number field identified as Appl. #. This field is a sequential number that is automatically assigned by the software and cannot be changed by the user. The application number is a means of grouping chemical applications that occurred on a site on a given day and time and serves as the basis for reporting information.

32. Mr. Jerry "Sonny" Anderson is the chemical manager for Petrocco Farms and has occupied that position since 1995 (Tr.623-24). His duties include "keeping track" of records of pesticide applications. He identified the photograph (R's Exh A), building to the right, as Petrocco Farms'office building warehouse.[7] The smaller building in front of the warehouse, which appears to be attached to the warehouse, has two doors, the one on the left marked "Shipping and Receiving", marked No. 1 on the photo, and the one on the right marked "Employees [Only]". Mr. Anderson testified that [upon entering the door marked Shipping and Receiving and turning right] there was hallway, which he described as basically open, leading to the Employees Only entrance, marked No. 2 on the photo (Tr. 626). Beyond a half-door was an area referred to as the "worker reception area." Mr. Anderson testified that his office was not shown in the photo, but was approximately 300 feet to the south of the building to the left in the photo [and across the driveway from the office warehouse] , marked No. 3 on the photo(Tr. 627, 632). Describing the location of the employee lunchroom, he referred to a black square to the right [and adjacent to stacked forklift pallets] in the photo, marked No. 4, of the building to the left as the entrance to the employee lunchroom. Close examination of the photo reveals another door inside this entrance. Mr. Anderson stated that inside the walkway and to the right was the entrance to the employees' lunch room and to the left is a roll-up door to a warehouse (Tr. 628)

33. Describing pesticide application records maintained in 2001, Mr. Anderson stated that "we" used a form purchased from Gempler's which asked for the date of the application, and the time, the name and brand name of the chemical, the EPA registration number, the amount applied per acre, the re-entry time and the applicator's name (Tr. 629). He testified that the Pesticide Application Record (C's Exh 1-c) was the type of record maintained by Petrocco and that, at the time of the September 20 inspection, these records were maintained in his office.(Tr. 631-32). He estimated the distance between the lunch room and the employee entrance in the office warehouse as 75 feet.[8] In addition to confirming that employees were given EPA Worker Standard Training, he testified that a sign "Do Not Enter " was posted in a field as it was sprayed (Tr. 630). Mr. Joe Petrocco indicated that this practice was discontinued

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[7] Tr. 624-25. Complainant objected to the introduction of the photograph of Respondent's office building and warehouse area (Exh A) upon the ground it was not identified as a prehearing exhibit and alleges on brief that Respondent's use of this photo was highly prejudicial to Complainant (Brief in Support of Proposed Findings and Conclusions at 31, note 22). However, a photo of an immoveable object such as a building is not readily subject to manipulation and the photo served to facilitate as well as make comprehensible testimony which otherwise would have been difficult to follow. Under these circumstances, the contention that the photo was highly prejudicial is not persuasive. Complainant's argument that the photo should not be considered is rejected.

[8]. The employee lunch room had not been installed at the time of the EPA inspection on September 20, 2001 (Joe Petrocco, Tr. 654). Mr. David Petrocco, Sr. testified that the lunchroom was built in the spring of 2002 (Tr. 714).

because they kept forgetting to remove the signs.[9] Referring to other measures to ensure that workers did not enter fields being sprayed [or before it was safe to do so], he stated that first of all, they would not be there unless they were told [by crew chiefs] to be there (Tr. 644-45).

34. Mr. Anderson recalled meeting three people from EPA at the time of the inspection in September, 2001 (Tr. 632).The only one whose name he remembered was Britta [Copt]. He testified that he met her inside the shipping and receiving door of the office building and that he showed her the [spraying] records which were in a three-ring binder (Tr. 633-34). He asked her if the records were okay and was told that they were.[10] Upon being told that the records were maintained in his (Anderson's) office, Ms. Copt stated that the records needed to be kept in a "central location", which Mr. Anderson understood to mean the [office] building they were in (Tr. 634-35). Respondent acknowledges, however, that Ms. Copt left determination of the "central location" to Petrocco (Proposed Findings of Fact No. 3). Ms. Copt did not mention meeting Mr. Anderson in her testimony nor does the Report on Inspection written by her refer to any such meeting. Nevertheless, Complainant maintains that Mr. Anderson's recollection of his conversation with Ms Copt during the September 20 inspection concerning a "central location" is inconsistent with Mr. Petrocco's testimony concerning safety posters (infra finding 38) and in effect acknowledges that the mentioned conversation between Ms. Copt and Mr. Anderson did in fact occur (Brief In Support of Proposed Findings and Conclusions at 32). Mr. Anderson testified that during the 2002 season pesticide application information was kept in a three-ring binder on a shelf near the door marked No. 2 on the photo, sometimes referred to as the "worker reception area", in the office building (Tr. 636-37). He stated that this area was accessible to everybody and that you did not have to ask to see the notebook. Mr. Anderson further testified that there was poster with emergency information on the wall near the binder (Tr. 639-40). In April of 2002, Petrocco switched to maintaining pesticide application records on a computer (Tr. 638). This method had not been used before, but the thought was that it

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[9]. Report on Inspection, Exh 6 at 2. The regulation, 40 C.F.R. § 170.120(b), provides in pertinent part " (1) If the pesticide product labeling has a statement requiring both the posting of treated areas and oral notification to workers, the agricultural employer shall post signs in accordance with paragraph (c) of this section and shall provide oral notification of the application to the worker(s) in accordance with paragraph (d) of this section." Only the labels for Di-Syston and Lannate require both posting and oral notification (Exhs 17 and 19). The record establishes that Petrocco Farms provides oral notification to workers of all scheduled and actual pesticide applications and there is no evidence or allegation that it failed to comply with posting requirements for Di-Syston and Lannate.

[10]. Complainant acknowledges that the "Gempler" forms kept but not displayed by Respondent in 2001 would have met the requirements of the regulation, if displayed at a central location and, if the records included all applications made within 30 days and displayed within the timing requirements of the regulation (Brief in Support of Proposed Findings of Fact and Conclusions of law at 17, note 12).

would be a better system by eliminating handwriting and making it easier to track applications. Mr. Anderson was not present during the EPA inspection on August 8, 2002.

35. Mr. Joe Petrocco is the son of David Petrocco, Sr. He testified that he has been involved with the family-owned business, David Petrocco Farms, Inc., "pretty much all my life" (Tr. 646-47). He has a B.A. in biology, emphasis botany with a minor in Spanish, obtained in 1995. By his own assessment, he speaks Spanish fluently. Although he called himself "co-director", he stated that [essentially] he was a grower. He testified that he did a lot of the interviewing and hiring [for Petrocco Farms] and that, inter alia, he installed and ran computer systems in use throughout the farm. Mr. Petrocco is a certified applicator and conducts pesticide safety training for workers and handlers (Tr. 649, 651). For this purpose, he uses a "flip chart" , which is written in both English and Spanish and which covers every thing in the Worker Protection Standard, on how to protect yourself from pesticides for workers and a video, followed by a question and answer session, for handlers (Tr. 648). He stated that he spoke to employees in Spanish and that 99.9% of workers (including warehouse workers) and handlers spoke only Spanish (Tr.649-50). He did not know any of these employees who read English (Tr. 651). Describing protective equipment provided by Petrocco to handlers, he mentioned coveralls, boots and gloves (Tr. 652). He added that field- workers were required to wear long-sleeved shirts and that wash water was provided.

36. Mr. Petrocco testified as to the EPA inspection on September 20, 2001 (Tr. 653-54). After [Ms.Copt] showed him her badge, he signed the consent [to the inspection]. He cooperated with her [by answering her questions] and providing everything she asked for. When she asked for application records, which were kept in Sonny's office, he (Petrocco) called Sonny to bring the records which Sonny did. Mr. Petrocco did not recall Ms. Copt commenting on whether the records were appropriate, but testified that she wanted the records maintained in a central location so that they would be available to all employees to inspect (Tr.655). He acknowledged that Ms. Copt did not specify exactly where the records were to be kept, but explained that she indicated generally that it should be where most employees congregate (Tr. 656). After discussions with Sonny and David Petrocco, Sr., it was decided that the records for 2002 should be maintained where employees come to pick up their mail and pay checks, i.e., the office (" worker reception area"), marked No. 2 on the photo, Exh A (Tr. 656-57). Describing the location of the notebook containing pesticide application records beginning in April, 2002, Mr. Petrocco testified that the notebook was on a shelf above and to the side of a desk and that this shelf was accessible to all workers. [11] He stated that the notebook could be reached without having to ask for it and that a [safety] poster was posted in that area.

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[11]. Tr. 659-60. The transcript reflects that Respondent's counsel phrased a question as to the label on the binder as "Pesticide Application Log 2001" (Tr. 660). It is clear, however, that at the time of the September 20 inspection, the binder containing pesticide application records was maintained in Sonny Anderson's office.

37. Mr. Petrocco described meeting Ms. Copt in the hallway between door No. 1 and door No. 2 as depicted on the photo (Exh A) at the time of the inspection on August 8, 2002 (Tr. 661, 663). As in the prior inspection, he signed consent to the inspection, allowed her access to wherever she wanted to go and provided her the information she requested (Tr. 663-64, 665). He testified that at the time the notebook of pesticide [of computer generated] application information (application log) was maintained [behind] the employees door, No. 2 [on Exh A], otherwise referred to as the "worker reception area" (Tr. 664). Mr. Petrocco further testified that Ms. Copt asked to see the notebook or pesticide application log, that he gave it to her and that she also asked for spray records which he provided (id.).Although the Report on Inspection written by Ms. Copt (C's Exh 6) contains no indication that she was shown a notebook of application records, her testimony was that the notebook did not contain any record of applications made within the last 30 days (finding 24). Ms. Copt described deficiencies in the handwritten applicator's log (spray records) for the period July 12, 2002, through August 4, 2002, as failure to include the active ingredient and the EPA registration number of the pesticide, the time of application and the restricted entry interval (id.).

38. Upon being asked to see the safety poster, Mr. Petrocco took Ms. Copt to the lunch-room (No. 4 on Exh A) where there was a safety poster hanging on the wall outside the lunch-room (Tr. 665). Mr. Petrocco testified that at this time, Petrocco had three safety posters posted, one in the worker reception area, one at the lunchroom and a third immediately inside the door marked "Shipping and Receiving" (Tr.667, 673-74, 675, 677). Asked why he had taken Ms. Copt to see the poster at the lunchroom rather than showing her the poster inside the door (No. 1 on Exh A), Mr. Petrocco replied that at the time of the September 20 inspection, the warehouse worker's lunchroom was on a platform above the cucumber line through the door marked No. 6 [at the extreme right side of Exh A] (Tr. 678). He testified that in his opinion this was a very poor place for employees to have their break, but that is where it was and that [because that was where employees congregated], Ms. Copt indicated that was where the poster should be. As indicated (finding 26), an inscription on photos of the safety poster taken by Ms. Copt states that the [poster] was posted outside the lunchroom. Her testimony, however, was that a safety poster, a first-aid kit and labor related notices were posted in the" break room" at Petrocco Farms. Although Ms. Copt did not describe her understanding of "break room", it appears to be clear that it is not the same as the lunch room referred to in her report of the inspection conducted on August 8, 2002 (finding 26). Moreover, the statements (affidavits) written by Mr. Petrocco at the time of the inspections on September 20, 2001, and August 8, 2002 (findings 12 and 27) refer to the break room and it is likely that this term refers to what has otherwise been identified as the "employee reception area" (Exh A, No.2).

39. Describing the pesticide application and record keeping employed by Petrocco Farms, Mr. Petrocco explained that the handlers would take the application [record], referred to as a "recipe", after they had been directed to make the application by a grower directly to the receptionist whether she was there or not and that the receptionist would input the information into the computer and [after printing] place it in the two- or three-ring binder (Tr. 681). Asked whether this meant that applications were entered into the computer on a daily basis and before

the applications took place, Mr. Petrocco replied that, "it depends" (Tr. 681-82). He stated that, if there were workers in a field by themselves, yes [applications were entered into the computer before the applications were made.]. His explanation, however, does not support this assertion, for he said that at daybreak, they would write the recipe, turn it into the black box, and go apply the pesticide.[12] When the secretary arrived, she would get it, input it and post it. Nevertheless, David Petrocco, Sr. testified that, if workers were on the establishment, record of the application was entered into the computer prior to the application (Tr. 730-31). Joe Petrocco answered in the affirmative whether Exhibit 7 contained the type of information displayed [in a three-ring binder] at the time of the August 8, 2002 inspection, explaining that the display would include applications before that date (Tr. 683). He testified that Exhibit 7 was a copy of the printout displayed in his office on August 8, except for applications after that date.[13] Asked on cross-examination about the computer run dates (10/03/02 and 11/26/2002) which appear at the top of the pages of application records, Exhibits 7 and 8, Mr. Petrocco responded that it seems like anymore that "...we print it out just about every day "(Tr. 684). He explained that we get questions about EPA inspections and that some customers request the printouts on a regular basis, that labeling situations come up and that he has used [the printouts] for a variety of situations (Tr.685).Mr. Petrocco insisted that, notwithstanding the Notice of Inspection which he signed refers only to spray records and makes no mention of computer application records (Exh 6-a), he had given or shown Ms. Copt a notebook of computer application records at the time of the August 8 inspection (Tr. 695-96, 697-98). While Mr. Petrocco's testimony in this regard is accurate, he did not recall her leaving with [a copy] of the computer printout application record. Asked whether it was possible that the computer application record he had shown Ms. Copt did not contain records of applications made within the last 30 days, he replied "I suppose anything is possible " (Tr.699).

40. Asked whether, subsequent to the EPA inspection on September 20, 2001, he had ever received a letter from EPA referred to as a Notice of Warning, Mr. Petrocco replied that he had not (Tr. 667-68). In fact, he denied ever seeing the Notice of Warning, dated October 31, 2001 (Exh 2), until after the complaint herein was filed (Tr. 668).

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[12].Mr. Anderson identified the "black box" visible in the photo at the side of the office building (Exh A) as a mail box (Tr.640). He said that mail was left there when the office was closed.

[13].Application No. 531 was performed on August 10, 2002, and Application Nos.532, 533, 534, 235 and 242 were performed on August 12, 2002 (Exh 7 at 5, 6, and 10). Application Nos. 528 and 529 appear to have been performed on September 10, 2002 (id. at 5), which seems unlikely and may be a typographical error. If, however, the September 10 date is accurate, it throws into doubt Complainant's contention that application numbers are entered into the computer in chronological order.

41. Mr. David Petrocco, Sr. is the president and an owner of Petrocco Farms, Inc (Tr. 700-01). He identified vegetables grown by Petrocco Farms as including cabbage, lettuce, bulb onions, spinach, various bunch greens, red beets, green beans and peppers, saying that he sometimes forgets one or two. He testified that he has been in the farming business all of his life and in business for himself for nearly 40 years (Tr. 702). He identified members of his family involved in the business as two brothers, Dominic and Albert; his wife, Susan; his daughter, Julie; his son, David, Jr.; apparently forgetting his son, Joe (Tr. 703). He confirmed that during the peak season Petrocco Farms had approximately 250 employees of whom about 20 were permanent (Tr. 704).Twenty is a the approximate number of warehouse employees. Describing Petrocco Farms' operation, Mr. Petrocco explained that some vegetables. e.g., red beets and spinach are planted in very small plots of one-to- three acres according to demand or sales in previous years and in sequence so that our production meets sales in a particular segment of the market place. He contrasted these crops with a large volume crop such as cabbage which is grown on 10-to-20 acre plots (Tr. 704-05).

42. Asked how they determined when to apply a pesticide, Mr. Petrocco replied that each one of our "growers" does scouting to observe the crop for disease and insect pressures (Tr.705). In addition, he stated that we employ a professional service to scout and assist us. He knows that all pesticides applied by Petrocco Farms are EPA registered from the labels. Mr. Petrocco testified that "we" at Petrocco Farms are "hands-on growers" (Tr. 705-06). He explained that basically there are four growers including himself and that each grower is assigned a different location or farm and is responsible for crops thereon from seed to harvest. Below the growers are approximately seven crew chiefs that have been trained for the harvest of specific crops. He noted, however, that there were other operations such as weeding and thinning which the workers have been trained to do and that at harvest time specific groups harvest specific crops (Tr. 707). Further explaining the process by which a grower determines to apply a pesticide, Mr. Pestrocco stated that in order to produce a crop that is salable as U.S. No. 1, the vegetable must be relatively free of such thing as holes in the leaves, droppings, scar tissue from insects such as aphids sucking on tissue and tarnish from bacteria and fungi (Tr. 707-08). After ordering the application, the grower notifies the crew chief of spraying and, being very conscious of the establishment, and if workers are to be on the establishment while the application is being made, the notification is [the date of the determination]. Asked what responsibilities crew chiefs have with regard to pesticide applications, Mr. Petrocco replied that they are notified of areas that are to be treated and make sure that workers do not enter a field until expiration of the RE[I] (Tr.708-09).

43. Mr. Petrocco testified that Petrocco Farms has a very high return rate among workers some of which have been " with us" as long as 24- to- 28 years (Tr. 709).He referred to seasonal workers which migrate from other growing areas and return in the summer time. He acknowledged that some were from Mexico as well. He estimated that 90% of field workers return more than one or two years and that crew chiefs have been employed by Petrocco Farms an average of 15 years (Tr. 710). He described his relationship with crew chiefs and field workers as excellent. He stated that "we" provide housing for worker that have been with us for

some years as an incentive and estimated that housing is provided for about on-third of the workers (Tr. 711). Mr. Petrocco estimated that one percent of field workers speak English, that 10% of field workers cannot read Spanish and that 100% cannot read English (Tr. 710.). He testified that he speaks Spanish, but not properly, and said that he converses with field workers and crew chiefs [in Spanish] on a daily basis (Tr. 711).

44. Mr. Petrocco was aware of the Worker Protection Standard (Tr. 712). He confirmed the pesticide safety training given [workers and handlers] by his son, Joe, and identified personal protective equipment furnished to handlers as including masks, goggles, gloves, coveralls and "everything that is required" (Tr. 713). He pointed out that the spray rigs have enclosed Sound Guard cabs with charcoal filters and are extra safe for the applicators who actually apply the pesticides. Referred to the Notice of Warning issued by EPA, dated October 31, 2002 (Exh 2), he denied seeing the letter in October or November of 2001, and testified that he did not see it until after the complaint was filed (Tr. 714-15). To his knowledge, no one at Petrocco Farms received Exhibit 2. Under cross-examination, he testified that, if a letter of this magnitude had reached Joe [Petrocco], it would have reached me (David Petrocco, Sr.), and asserted that "it did not reach us" (Tr. 733).

45. The complaint alleges, inter alia , that on July 15, 2002, Respondent applied Dimethoate and Dithane F45 on a cabbage field, located in "Farm 4", that cabbage is not listed as one of the crops for which Dithane F45 may be applied and that, therefore, this application constitutes the use of a pesticide in a manner inconsistent with its labeling (Count 19, ¶¶ 38-40); that on July 22, July 24 2002, and August 2, 2002, Respondent applied pesticides including Asana XL on cabbage fields, located in " Farm 3", "Farm 1" and Road 10, and that, although the label specifies the maximum rate at which Asana XL may be applied to a cabbage crop is 9.6 ounces per acre, these applications were made at a rate of 32 ounces per acre, thus constituting uses of a pesticide inconsistent with its labeling (Count 91, ¶¶ 104-106 ; Count 102, ¶¶ 116-118 and Count 194, ¶¶ 195-196); and that on August 10, 2002, Respondent applied DiPel DF to an onion field., located in Farm 5, at a rate of three pounds per acre even though the label specifies that the maximum allowable ratio for an onion crop is two pounds per acre (Count 229, ¶¶ 228-230). Mr. Petrocco testified that DiPel is not a pesticide that Petrocco Farms used on onions, because DiPel was [an insecticide] used for worm control and we have no problem with worms eating our onions (Tr.715). He further testified that Dithane was a fungicide and that, while Dithane was used on onions, it would not be used on cabbage, because it would burn and cause crop destruction (Tr. 716). He denied having any such burn or crop destruction incidents in 2002. Referring to Counts 91, 102 and 194 relating to the alleged use of Asana XL on cabbage at a rate of 32 ounces per acre, while the maximum permitted by the label is 9.6 ounces per acre, Mr. Petrocco testified that he could think of no circumstance under which he would put Asana XL [a restricted use pesticide] on a crop at a rate of 32 ounces per acre (Tr. 717). The handwritten applicator's log (Exh 6-b) reflects that Aseite was applied to Farm No. 3 on July 13, 2002; to Farm No. 5 on July 17, 2002; to Farm No 3 on July 20, and 22, 2002; to Farm Nos. 1 and 3 on July 24, 2002; to Farm No. 5 on July 25, 2002; to Farm Nos. 3 and 14 on July 27, 2002; to Farm No, 10 on August 2, 2002; to Farm No. 4 on August 3, 2002;

and to Farm No. 3 on August 4, 2002. Asked what Asiete was, Mr Petrocco replied that Asiete was a crop oil used as an adjutant or helper to carry or spread the chemical over the leaf better (id.) . For reasons discussed infra, it is concluded that Complainant has not carried its burden of proof as to these counts, that the unit of violation is "use" of a pesticide inconsistent with its labeling for which only one penalty may be assessed and that, in any event these are dependent violations under the ERP for which only one penalty may be assessed.

46. The handwritten applicator's log covering the period July 12, 2002, through August 4, 2002, indicates that Asiete not Asana XL was applied to cabbage fields at the rate of two pounds" per carga" on Farm Nos.1 and 3, respectively, on July 22, and 24, 2002, (Counts 91 and 102) and at two pounds per acre on Farm 10 on August 2, 2002 (Count 194) [14]. These applications correspond to Application Nos.488, 491, and 485 (Exhs 7 and 8). which do not show application of Asiete, but do show application of Asana XL at a rate of two pounds per acre. It is therefore concluded that the mentioned entries showing applications of Asana XL to cabbage at the rate of two pounds per acre are the result of translation or transcription errors in that Asiete, rather than Asana XL,was in fact applied. In addition to the mentioned counts alleging use of pesticides inconsistent with their labeling because applied at a rate or on a crop not permitted by the label, the same applications are included in the counts (Counts 18, 90, 101; and 193), alleging application of pesticides inconsistent with their labeling due to failure to display pesticide application information.

47. EPA issued a press release at the time it issued complaints for alleged violations of the Worker Protection Standard against Petrocco Farms and other vegetable growers in Colorado. Mr. Petrocco pointed out that the press release or bulletin, basically said that Petrocco Farms and other [growers] put workers in harm's way (Tr. 720). An article entitled "Put 'in Harm's Way' ", published in the Rocky Mountain News on June 7, 2003, states, inter alia, that EPA is seeking a record penalty of $231,990 from Petrocco Farms and reports that Petrocco received 229 notices of violation.[15] Mr. Petrocco stated that [because of the publicity] our customers became gravely concerned. He testified that our leading customer told us that if there were any kind of a customer boycott of their stores, we would no longer be able to market product with them and stated that, if that happened, we would basically be out of business (Tr.

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[14]. Exh 6-b. Presumably "per carga" refers to the tanks or cargo on the tractor or spraying rig. Because there is no evidence of the capacity of the tanks on the sprayer, it is not possible to determine what rate of application "2 P. per carga" represents.

[15]. Exhibit B. The article was offered not for the truth of the matters stated, but as illustrative of the potential impact on the company and was admitted over Complainant's objection (Tr. 722-23). The article quotes an EPA attorney as saying the 229 violations were for keeping the required warnings in a notebook inside the office rather than the posting of signs and that the violations were particularly egregious, because it would not take that much to comply.

721). Mr. Petrocco was particularly incensed at the implication that Petrocco Farms would put any of its workers in harm's way, emphasizing that he has had workers for many years and that there was no way he would put one of his workers in harm's way (Tr. 722). He insisted that it is not going to happen, it hasn't happened, and will never happen He had no knowledge of any employees of Petrocco Farms ever becoming ill from the application of pesticides and the failure to post the application list in a central location (Tr. 723)..

48.On cross-examination, Mr. Petrocco testified that he had not lost any customers yet [because of the publicity over alleged WPS violations] and that he did not know of any groups which were threatening to boycott Petrocco Farms (Tr. 731, 733). He estimated that the gross income of Petrocco Farms was about $12 million and that the net income [of the corporation] prior to taxes was $192,000. [16]

49. Dr. Suzanne Wuerthele is the Region 8 toxicologist (Tr. 321). She defined a toxicologist as a person who studies the adverse effects of chemicals on living systems and stated that there were many types of toxicologists (Tr. 322). In her own case, she explained that she studies the adverse effects of chemicals [under] specific exposure scenarios. Dr. Wuerthele has received a bachelor of science degree in biology, a master of arts degree in teaching science and a doctorate in pharmacology; she has worked as a toxicologist for EPA since 1984; has been board certified as a toxicologist by the American Board of Toxicology since 1988 and has testified as an expert in at least 20 cases some of which concerned pesticides (Tr. 324, 325-26, 329). Dr. Wuerthele explained that "we" are assessing not just the hazards of the chemicals and identifying the fact that specific chemicals can cause specific effects, but that we are looking at the risk of those hazards being realized (Tr. 336). She testified that a large part of what she does is risk assessment and that in fact she was considered a national expert in risk assessment. . Dr. Wuerthele was offered and accepted as an expert in toxicology (Tr. 330, 340).

50. Dr. Wuerthele prepared a narrative summary of her proposed testimony (Tr.342; Exh 53). Although she has not visited Petrocco Farms, she described, from information furnished her, Petrocco Farms as a large , complex operation consisting of eight separate farming areas of from 15 to 350 acres. On these areas what she described as a patchwork of small field plots (generally 2-3 acres) are planted and replanted so that Petrocco Farms may supply product [fresh produce] to its customers throughout the growing season. Dr. Wuerthele prepared Table 1, listing the 22 pesticides used at different times by Petrocco Farms, the percentage of their active ingredients, their toxicity class and their re-entry interval in hours (Tr. 346, 350-51; Exh 53(a)). She testified that the first step in evaluating the toxicity or the toxic potential of these chemicals was to pair the active ingredient with the trade names of the pesticides (Tr 350-51).

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[16]. Tr. 731, 734. Complainant's proffer of a Dun & Bradstreet on Petrocco Farms was rejected because it was produced subsequent to the deadline established by the ALJ for the exchange of exhibits and because the WPS Penalty Policy provides that D & B Reports will not be used in FIFRA § 14(a)(2) cases (id. at 7).

This data she obtained from the labels. She also obtained the toxicity class of the pesticides from the labels. She explained that EPA classifies the acute or short-term toxicity of pesticides into three classes, which reflect the potency of the pesticide and which are indicated by signal words on the label (Tr. 352-53). Signal words on the label are “danger”,” warning”, and “caution”, which correspond with Toxicity Classes 1, 2, and 3, respectively. Acute toxicity refers to toxicity which manifests itself shortly after exposure. Toxicity classes are based on the acute inhalation, dermal and oral potency of the pesticide as determined from animal studies (Exhs 53(a) and 53(c)).

51. Dr. Wuerthele pointed out that, although not every pesticide has a re-entry interval, every pesticide used by Petrocco Farms has a re-entry interval (Tr. 352). She testified that [only] pesticides which have sufficient toxicity to cause harm to workers will have re-entry intervals. Toxicological criteria for establishing REIs are based on the degree of acute or chronic effects of the active ingredients of the pesticide. Table 1 prepared by Dr. Wuerthele indicates that the active ingredients in four of the 22 pesticides used by Petrocco Farms are in Toxicity Class 1, active ingredients in seven are in Toxicity Class 2, and active ingredients in the balance are in Toxicity Class 3 (Exh 53(a)). Dr Wuerthele explained that what that tells us is that some of the chemicals used at [Petocco Farms] have a very serious potential to cause a very serious acute toxicity (Tr. 355). She pointed out that EPA takes that [toxicity] into account in setting re-entry intervals .and that, as a toxicologist, “we” want to make sure that workers are familiar with re-entry intervals.

52. Asked what [in addition to toxicity] REIs were based on, Dr. Wuerthele replied that one of the other factors was the length of time it takes for the pesticide to degrade in the environment (Tr. 355). She pointed out that, if [the pesticide] takes a long time to break down, high concentrations [of the chemical] will remain for a longer period. She explained that the [break-down period] may be effected by factors such as moisture, light, or microorganisms in the soil As an example, she stated that some of the pesticides used by Petrocco Farms are organophosphates such as Lannate which break down by hydrolysis, which means that they are chemically split in water (Tr. 356). She testified that the re-entry period [for organophosphates] is longer when you are working in a dry climate. In this regard, she noted that the average [annual] rainfall in the Denver area was 15 inches, which was considered to be a semi-desert (Tr. 356-57) Although re-entry intervals are not established based upon specific inches of [annual] rainfall, she pointed out some labels provide that if you are working in a dry area, the re-entry interval should be longer (Tr. 357)..

53. Another factor in establishing re-entry intervals is how the pesticide is actually applied. Dr. Wuerthele explained that the workers’ exposure to a pre-emergent herbicide may be different than [exposure] to a pesticide applied [to plants] where workers may brush against

Leaves as they walk through the rows.[17] The table prepared by Dr. Wuerthele indicates that of the pesticides used by Petrocco Farms only one (Di-Syston) has a re-entry interval of 72 hours, four have re-entry intervals of 48 hours, five have re-entry intervals of 24 hours, eight have re-entry intervals of 12 hours and four have re-entry intervals of four hours.[18] Dr. Wuerthele testified, however, that re-entry intervals are based on an average amount of time and that there have been instances of workers being poisoned when they entered a field after the expiration of the re-entry interval (Tr. 360) .In addition, she alluded to "hot spots" where extra chemical may have been applied due, e.g., to a malfunctioning valve, or there may have been an extra dry area where the chemical did not break down as quickly. She opined that exposure to chemicals can occur even after the re-entry interval and emphasized that the Agency is never saying that exposure to pesticides is safe (Tr. 360-61).

54. Explaining "chronic toxicity", Dr. Wuerthele testified that because pesticides are never safe, there can be multiple exposures which are so low that no signs or symptoms are evident, but that pesticides are nevertheless accumulating in the body, which, for example, may cause reproductive or carcinogenic effects (Tr.361) She indicated that these risks are recognized [by EPA] and may result in longer re-entry intervals. Dr. Wuerthele prepared a table which reflects that the pesticides used by Pertocco Farms are in 11 different chemical classes (Tr. 368; Exh 53(b)). She pointed out that the first thing that tells a toxicologist is that there is a broad range of potential health effects due to exposure at Petrocco Farms.

55 Another table prepared by Dr. Wuerthele, "Examples of Chronic Health Hazards of Pesticides Used at Petrocco Farms", reflects the chemical class, the trade name of the pesticide and the health hazards (Exh 53(d)). As examples of potential adverse effects from such exposures, she cited Pyronyl, Ambush, Asana XL, Ammo and Warrior, pyrethrins and pyrethroids used at Petrocco Farms, which have the potential to cause allergenic responses (Tr.

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[17]Mr. David Petrocco disclaimed use of herbicides (Tr.718-19). It is not clear, however, whether the disclaimer included pre-emergent herbicides.

[18]. Exhibit 53(a). Dr. Wuerthele explained that initially she listed Lannate as having a REI of 72 hours, but because she did not know whether there were separate labels or formulations for this product and she did not wish to be exaggerating, she used the label which listed Lannate as having a REI of 48 hours (Tr.358).

66, 368-69); Proclaim, derived from an antibiotic, for which there is concern about reproductive toxicity, i,e, developmental or birth defects (Tr. 368); Dimehoate, Di-Syston, Lannate, Larvin, and Sevin XLR Plus, which are organophosphates and carbomates, called “cholinesterase inhibiters”, which inhibit an enzyme “ acetylcholinestrase”, which is important for the nerve function and may cause neurological problems (Tr. 369) ; Dithane F-45 and Manex which are ethylene bis dithiocarbamates (“EBDCs”), which are toxic to the thyroid and from cumulative exposures may be a thyroid carcinogen (Tr.372); the pesticide “Confirm” is in the chemical class of ‘diacyl hydrazines” and health hazards are blood dyscracias (abnormalities) (id., Tr. 376-77), which she likened to leukemia; and the pesticide “Thiodan” is in the chemical class of “organochlorines” and the health hazards are central nervous system stimulation at massive doses (cardiac dysrhythmias, tremors, disorientation, blurred vision, convulsions); testicular damage(id.; Tr. 379). The pesticides “Dimethoate”, “Di-Syston”, “Lannate”, “Larvin”, and “Sevin XLR Plus” are in the chemical class of “organophosphates” and “carbamates” for which the health hazards are gastrointestinal distress, visual problems, muscle cramps, difficulty breathing, coma; developmental or birth defects (id.). “Avaunt” is in the chemical class of “oxadiazines” for which the health hazards are dermal sensitization (development of allergies (id.; Tr. 380).

56. Dr. Wuerthele read from the preamble to the Worker Protection Standard relating to reported incidents of illnesses or poisoning of agricultural field-workers resulting from exposure to residues of organophosphates in California (Tr. 362-63).She explained that this was the basis for the Worker Protection Standard and that they were reporting instances of symptoms or poisoning many days after working in the fields and after re-entry intervals had expired (Tr. 364). Such incidents indicated that the re-entry interval needed to be lengthened. Asked how workers could use the pesticide-specific information required [to be displayed] by the Worker Protection Standard, Dr. Wuerthele replied that a worker could write down the pesticides to which they have been exposed and which they are working with (Tr. 364). She stated that, if they had symptoms, they could take that information with them to their doctor. She acknowledged that [the worker] may not understand the active ingredient, but that the doctor could contact Poison Control Centers or EPA to ascertain the toxic effects of the pesticide and to assist the physician in diagnosing and treating the symptoms [exhibited by the worker] (Tr. 365). If the worker’s problem is not caused by pesticides, it nevertheless gave that worker an opportunity to understand and to show his physician [the pesticide] to which he has been exposed. Additionally, if a worker has symptoms and easy access to the pesticides to which he has been exposed, he may be able to take that information to his physician or otherwise understand the problem with a pesticide, even if the re-entry interval has expired. Also, according to Dr, Wuerthele, if a worker has knowledge of when a particular pesticide was applied, he can differentiate between a field where the pesticide was applied 29 days ago from a field where the pesticide was applied two days ago (Tr.365-66).

57. Dr. Wuerthele opined that without having access to information [concerning particular pesticides applied at Petrocco Farms] workers have an increased risk of having an acute exposure due to accidently [reentering a field prior to expiration of the re-entry interval], an increased risk of not understanding the causes of ongoing or recurring illnesses, and an

increased risk of being mis-diagnosed by their physicians and increased risks of having health effects now and in the future (Tr.383-84). She testified that, even if they were properly allowed back into the fields after expiration of the re-entry interval, their risks were increased without having an opportunity [to determine whether the re-entry interval had in fact expired]. She emphasized that, while it was important to inform the workers in any way possible [of pesticides used or applied], it was important that they have something written which they could copy and take to their physician or take home to try to understand their own health situation (Tr. 384-85).

58. On cross-examination, Dr. Wuerthele testified that, while her opinions in this case were based on a variety of information, her [primary concern] was the potential for pesticides used at Petrocco Farms to cause serious acute and chronic toxicity (Tr. 387). She stated that she had concerns about exposure to pesticides generally whether or not the re-entry interval had expired (Tr. 392). She explained that, if the Worker Protection Standard were complied with, it would help to alleviate her concerns about exposure to pesticides, but would not eliminate these concerns entirely, because these pesticides all have the potential to cause acute and chronic effects and the chronic effects can occur after a re-entry interval. She emphasized that she had continuous and ongoing concerns about exposures to pesticides and that some risks remain regardless of whether the Worker Protection Standard and the label were complied with (Tr. 392-93). Dr. Wuerthele acknowledged that she was not aware of workers at Petrocco Farms being actually exposed to pesticides (Tr. 394). Asked whether the fact that the Worker Protection Standard required that [pesticide application information] be maintained in English and that the workers at Petrocco Farms by-and -large could not read English made any difference in her opinion [as to the risks posed by failure to post the information], Dr. Wuerthele replied “no”, because the workers probably do not understand these words whether they are in English or Spanish (Tr.395-96). She explained that the whole purpose of requiring that this information be posted in a common area was so that the workers could write it down and take it to someone who could translate it for them. She stated that the point is that the workers have access to the information and can write it down. She had no knowledge of how many field- workers carried pens or pencils and paper to work (Tr. 398-99).

59. Dr. Wuerthele testified that she had no knowledge of any worker at Petrocco Farms being denied access to any information related to pesticides (Tr. 397). In the same vein, she had no knowledge of the number of employees at Petrocco Farms, who had looked at or asked to see an application list (Tr. 408). Asked how practical was it to expect an agricultural worker who can read and speak only Spanish to copy something written in English, she replied that she expected it to be as complicated for an English speaker as for a Spanish speaker (Tr. 397-98). She stated that the expectation is that they will copy this down, and that if, over time, a culture of education is developed at a place like Petrocco Farms, they will learn what these words mean. She emphasized that if the information is never provided, they do not have that opportunity (Tr. 398). She opined that the practicality increased [as the postings are established] and that, while it may be difficult for some people in the beginning, eventually it may be able to serve its purpose.

60. The proposed penalty against Petrocco Farms was calculated by Mr. Timothy Osag, Senior Environmental Coordinator at EPA Region 8, who has been employed by EPA for 32

years (Tr. 418, 421). About 80% of Mr. Osag's time with the Agency has concerned enforcement activities under FIFRA and the Clean Air Act. His primary responsibility is to assure the implementation of a credible enforcement program in the two states, Colorado and Wyoming, where EPA retains FIFRA enforcement authority. He has been in his present position since 1995 and involved in the FIFRA enforcement program since 1990 (Tr. 420) He has calculated over 300 penalties of which approximately 300 have involved FIFRA (TR. 421). He testified that he first became involved with the Petrocco Farm's case when he reviewed Britta Copt's 2001 inspection report and concurred in the issuance of a Notice of Warning. Thereafter, he reviewed Britta's second inspection report and worked with the legal enforcement to develop the case and [issue the complaint]. He checked the list of Colorado Private Pesticde applicators maintained by EPA (Exh 41). This was important for several reasons, the first being that some of the pesticides used by Petrocco Farms are restricted use pesticides which can only be applied by or under the supervision of a certified applicator. Secondly, being a certified applicator qualified an individual to provide training for their workers and thirdly, being a certified applicator made it more likely the user had knowledge of the Worker Protection Standard (TR. 430-31). Mr. Osag identified David Petrocco, Jr., David Petrocco, Sr., Dominic Petrocco and Joe Petrocco on the list of certified applicators (Tr.433-34, 435; Exh 41).

61. Mr. Osag testified that he was the custodian of the enforcement file relating to Petrocco Farms including the return receipt from the Post Office for the Notice of Warning (Tr. 437-38; Exh 4). He stated that when the issue of whether Petrocco Farms had in fact received the NOW first arose, he attempted to determine if anyone by the name of S. Case was employed by Petrocco Farms (Tr. 436-37). Although he did not state where he obtained the name "S. Case", it appears that it was obtained from the Certificate of Authenticity issued by the Postmaster of the Brighton Post Office to which was attached the "scanned image of recipient information" (finding 22). Mr. Osag's contact with the Petrocco Farm's web site confirmed that Stephanie Case was employed by Petrocco Farms (Tr. 439; Exh 5). Stephanie Case and "S. Case are one and the same individual (finding 19).Mr. Osag concluded that the Notice of Warning was appropriately delivered. He explained that his next step in preparing the enforcement action was to compile a list of pesticide applications made by Petrocco Farms during the 30 days preceding the inspection on August 8, 2002 (Tr. 440). He obtained this information from the handwritten application records obtained by Ms. Copt during the August 8 inspection which covered the period July 12 to August 8 (Exh 6-b) and faxed and mailed computer printouts received from Petrocco Farms in May of 2003 (Exhs 7 and 8). He obtained labels for each of the 22 pesticides applied by Petrocco Farms during the mentioned period.(Exhs 9-30) He needed the labels to verify EPA registration numbers and to determine pesticide toxicity for penalty calculation purposes.(Tr. 442). Mr. Osag testified that the labels were the versions of labels in effect at the time the pesticides were applied.[19]

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[19]. Tr. 443-44, 446. Some doubt is thrown on this testimony by the fact that several pesticide labels in the record bear EPA notification or acceptance dates contemporaneous with or beyond the dates of the applications at issue. See Exh 15, the label for Dimethoate, Notification Date: 7/03/2002; Exh 22, the label for Nu Cop 50 DF, Acceptance Date: 7/29/2002; Exh 23, the label for Proclaim, Acceptance Date: 9/23/2002; Exh 26, the label for Serenade, Acceptance Date: 7/22/2002; and Exh 28, the label for Spin Tor, Acceptance Date: 7/11/2002.

62. According to Mr. Osag, he applied the statutory factors listed in FIFRA § 14(a)(4) to calculate the proposed penalty (Tr. 454). He did this by using the Enforcement Response Policy for FIFRA (July 2, 1990) ("ERP") (Exh 31) and the Interim Final Penalty Policy for the FIFRA Worker Protection Standard (October 21, 1997) ("WPS Penalty Policy") (Exh 32) (Penalty Calculation Narratives, Exhs 35 and 36). There are two Penalty Calculation Narratives (Ehs 35 and 36) and two sets of Penalty Calculation Worksheets (Exhs 37 and 38) in the record. The first penalty calculation is dated May 29, 2003, immediately prior to issuance of the complaint, while the second penalty calculation is dated November 20, 2003, and was issued to correct errors in the penalty calculation. Although the November 20th Penalty Narrative indicates that the penalty as calculated totals $228, 140, Mr. Osag testified, and Complainant on brief asserts, that the penalty now claimed totals $231,550. Mr. Osag pointed out that the statutory factors were the appropriateness of the penalty to the size of the business, the effects of the proposed penalty on the firm's ability to continue in business, and the gravity of the violation (Tr. 455). He explained that use of the penalty policies assured that the statutory factors were applied in a consistent and fair manner nationwide. Asked whether EPA could deviate from the policy, he replied in the affirmative saying "we" could legally deviate because it was guidance, not regulation (Tr. 456). He stated, however, that we are encouraged to follow the policy and that we could deviate only under very unusual circumstances which would probably require consultation at a national level.

63. Although five of the counts (Counts 19, 91, 102, 194, and 229) involve alleged applications of pesticides at rates or on crops not permitted by the labeling, all 229 counts allege use of a pesticide in a manner inconsistent with its labeling in violation of FIFRA § 12(a)(2)(G). For the pesticide applications represented by these counts except for Count 229, Complainant proposes to assess an additional penalty for the reason that on August 8, 2002, Petrocco Farms was not displaying specific information about these pesticide applications while workers were on the establishment as required by 40 C.F.R. § 170.122. Although this practice is authorized by the WPS Penalty Policy, it is concluded infra, that for § 12 (a)(2)(G) the unit of violation is "use" of a pesticide inconsistent with its labeling for which only one penalty may be assessed. Moreover, Complainant simply has not carried its burden of proof as to these counts and, in any event the ERP makes it clear that these are dependent violations for which only one penalty may be assessed.

64. The WPS Penalty Policy provides that the appropriate sanction for a private applicator such as Petrocco Farms (§ 14(a)(2) violator) for a second violation occurring within five years is a civil administrative complaint. [20] Asked which of the situations in which an

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[20]. Id. 4. The WPS Penalty Policy provides the following examples of when a civil administrative complaint proposing civil penalties [for a § 14(a)(2) violator is usually appropriate:

> • Where a violation presents actual or potential risk of harm to human health or the environment; or
> •Where the violation impedes EPA's ability to fulfill FIFRA goals or harms the regulatory program; or
> • Where the violation resulted from ordinary negligence, inadvertence or mistake (id. 3).

administrative complaint proposing civil penalties was appropriate (note 20 supra) applied to Petrocco Farms, Mr. Osag replied all three (Tr. 529). Elaborating on the reasons for this determination, he stated that there were 22 chemicals being applied on numerous fields, that there were as many as 250 employees potentially on the property, and that failure to provide them information regarding pesticide applications represented a potential risk to their health. He emphasized that the fact the violation occurred despite information [the necessity of posting or displaying application information] furnished to Respondent during the first inspection and despite the issuance of a Notice of Warning undercut the ability of EPA to implement the program (Tr. 529-30). Additionally, he pointed out that the purpose of WPS was to reduce the risk of human exposure and that these violations eliminated any opportunity to provide the workers information they could use to avoid [or reduce] risk and undercut the goals of the program. This testimony is hyperbole at best, because it confines the benefits of notification to the display when oral notification of pesticide applications, the posting of signs and crew chief direction are more likely to be the primary factors in protecting workers from pesticide exposure at least under the circumstances prevailing at Petrocco Farms.

65. The ERP provides at Appendix A-4 that a person's use of a registered pesticide in a manner inconsistent with its labeling in violation of FIFRA § 12(a)(2)(G) is assigned a Gravity Level of 2 Mr. Osag testified that failure to post [specific] application information is also assigned a value of 2 (Tr. 468; WPS Penalty Policy at 15). The next step in the penalty calculation is to determine the size of business category into which Petrocco Farms should be placed for penalty calculation purposes. Table 2, the "size of business" table in the ERP, reflects that § 14(a)(2) violators are divided into three categories, Category I representing sales or [gross] revenues of over $200,000, Category II representing sales or [gross] revenues of $50,000 to $200,000 and Category III representing sales or gross revenues of $50,000 or below (id. 20). Mr. Osag pointed out that, if information as to the exact size of business were not available, the penalty was to be calculated based on the assumption the highest sales category was applicable (Tr. 469). Mr. Osag thought that Petrocco Farms had in excess of 250 employees and had to have sales substantially in excess of $200,000 per year. In addition, he testified that he had reviewed a D & B Report on Petrocco Farms for the year 2000, the proffer of which, as indicated (note 16 supra) was rejected. Mr. Osag placed Petrocco Farms in Category I, size of business, for all penalty calculations (Penalty Calculation Worksheets, Exhs 37 and 38).There is no dispute but that Pertocco Farms' gross sales exceed $200,000 a year. (finding 47).

66. The Penalty Matrix reflects that for violations occurring after January 30, 1997, the base penalty for a § 14(a)(2) violator, Gravity Level 2, size of business Category I, is $1100 (Tr. 479; ERP at 19-A, WPS Penalty Policy at 7). This purports to be the maximum penalty for a single violation by a private applicator occurring after January 30, 1997, and prior to March 15, 2004, considering the Civil Monetary Inflation Adjustment Rule (40 C.F.R. Part 19).The Rule as published, however, limits the penalty for a violator subject to § 14(a)(2) to $1000 per violation It is concluded infra that the Agency is bound by the rule as published. Mr. Osag determined the base penalty for each of the 229 violations alleged in the complaint was $1100 (Penalty Calculation Worksheets). The next step in the penalty calculation process is to apply the five gravity adjustment factors found on page 9 of the WPS Penalty Policy. These factors are

pesticide toxicity, human exposure, human injury, compliance history, and culpability (Tr, 480). Mr. Osag separated the five counts involving misuse other than WPS violations from the 224 counts of WPS violations (Tr. 440). He explained that, while the penalty calculations are similar, the gravity [adjustment] values were different. He separated the 22 pesticides used by Petrocco Farms into three classes according to their toxicity (Tr. 466). The third group, Class III Toxicity (least toxic), included Avaunt, Confirm, Di Pel DF, Dithane F-45, Manex, Provado 1.6 Flowable, Pyronyl Crop Spray, Serenade, Sevin XLR Plus, and Spin Tor. The labels for Class III Toxicity pesticides bear the signal word " caution" and were given a Toxicity Value of 1 (Tr. 466, 480). Class II Toxicity included Ecozim (Amvac AZA 3% EC), and Dimethoate and received a Toxicity Value of 2.[21] Class I Toxicity (most toxic) included the restricted use pesticides Ambush, Ammo 1,5 EC, Asana XL, Di- Syston 8, Lannate 3.2, Nu-Cop, Proclaim, Thiodan 3EC, and Warrior and received a Toxicity Value of 3 (id.)

67. The next gravity adjustment value is 7b "Human Exposure" (WPS Penalty Policy at 9) is applicable only to the WPS counts.. These values range from zero to 5, zero being the value where no agricultural employees were exposed and 5 being the value where a large number of agricultural workers were exposed. Mr. Osag testified that, while "we" knew that a lot of pesticides were being applied and that there were 250 people on the premises, we did not have a lot of information about the extent of exposure (Tr. 482).He used a value of 3, which he explained was the value to be used where exposure was expected, but there is no way of determining actual exposure "it's unknown" (id.) Asked on cross-examination whether he had any evidence of actual exposure of a worker at Petrocco Farms due to the failure to post pesticide application information on August 8, 2002, Mr. Osag replied it was his belief that given the number of pesticides and the number of workers involved, it was highly likely there could have been exposure due to the lack of knowledge of applications being made (Tr.583). He defended use of a Human Exposure Value of 3-medium number of agricultural employees exposed; or no known exposure resulting- for penalty adjustment purposes, asserting that category covers the situation much better than to assume there was absolutely no exposure. He opined that there was almost a zero probability that there could not be some exposure resulting from this incidence (Tr. 583-84). He stated that without providing [field workers] information as far as the fields that have been treated and the chemicals that were used, it was his belief that you almost guarantee that there is going to be some exposure to these individuals (Tr. 585). Asked whether that was different from failure to post information in a central location, he replied that he did not see it as different, because that was the subject [of the regulation]. He denied that the information could be conveyed verbally, because the regulation did not so state and because of the number of pesticides and applications over a 30-day period [made it unlikely the information would be remembered] (Tr. 585-86).In calculating the proposed penalties, Mr. Osag did not assume that the workers could read English, explaining that he did not consider much of the information as English or Spanish (Tr. 588-89) In this regard, he alluded specifically to restricted entry

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[21]. Tr. 467, 481. Although the initial and revised Penalty Narratives indicate that Nu-Cop is in toxicity Class II ,bearing the Signal Word "Warning", Mr. Osag testified that this was an error and that Nu-Cop carried the Signal Word "Danger" with the result that it had a Toxicity Value of 3 (Tr.490).

intervals, what fields were being treated and what products were applied.. Being unaware of any other safeguards [to protect workers from pesticide exposure], Mr.Osag did not consider any such safeguards in his penalty calculations (Tr. 591).

68 Mr. Osag had no information. as to 7c “Human Injury” and assigned a value of zero to this adjustment factor (Tr. 483). The next gravity adjustment value is 7d “Compliance History”, for which values range from zero, no prior FIFRA violations, to 5 for a § 14(a)(2) violator category with more than two prior FIFRA violations and at least one prior gravity “level 1" violation.. Because Petrocco Farms had no history of violations for which it was assessed a civil penalty within the previous five years, Mr. Osage assigned a zero value to this factor (Tr.483). He pointed out that a Notice of Warning was considered not to be a prior violation for penalty adjustment purposes (Tr.483-84). The final adjustment factor is “culpability” for which Mr. Osag assigned a value of 2 for situations where the violation resulted from negligence or culpability was unknown. Explaining why he attributed the violations to negligence, he stated that Petrocco Farms was told during the 2001 inspection that it was not posting application information; secondly, it received a Notice of Warning notifying it of the failure to post pesticide information and of the potential civil and criminal penalties for failure to do so; and thirdly, several members of the Petrocco organization were certified applicators and should have been aware of the of the requirement to post application information (Tr. 484-85).

69. Summarizing the result of the determinations recited in the previous finding, Mr. Osag testified that pesticides in Class III toxicity received a total Gravity Adjustment Value of 6, Class II toxicity pesticides received a total Gravity Adjustment Value of 7, and Class I toxicity pesticides received a total Gravity Adjustment Value of 8 (Tr. 485). Mr. Osag then referred to Table 3 in the ERP which indicates that for a total Gravity Value of 6, the matrix penalty value is to be reduced by 20%; for a total Gravity Value of 7, the matrix penalty value is to be reduced by 10%; and for a total Gravity Value of 8, the matrix penalty value is to be assessed. The penalty for failure to post pesticide application information for Class III Toxicity pesticides was thus $880 per count, for Class II pesticide toxicity the proposed penalty was $990 per count and the penalty for Class I toxicity pesticides and RUPS was $1,100 per count (Tr. 486-87). Mr. Osag testified that there were 70 counts involving Class III Toxicity pesticides, 38 counts involving Class II Toxicity pesticides and 116 counts involving Class I Toxicity pesticides and RUPs (Tr. 487). He considered that each application of a pesticide was separate violation even if multiple pesticides were applied in a single application (Tr.577-76, 578, 606). This resulted in a total proposed penalty of $226,820 for the 224 WPS counts.

70. Five counts, Nos. 19, 91, 102, 194, and 229, involved alleged application of pesticides on crops or at rates not permitted by the label. Three of these counts, Nos. 91, 102 and 194, involve the alleged application of Asana XL to a cabbage field at the rate of 32 ounces per acre while the maximum application rate of Asana XL to cabbage permitted by the label is 9.6 ounces per acre. For these three counts, Mr. Osag used the ERP and arrived at a Pesticide Toxicity Value of 2, a Human Harm Value of 3 and a Culpability Value of 2 for a total Gravity Adjustment value of 7 (Penalty Calculation Narrative, Exh 36; Penalty Calculation Worksheets, Exh 38 at 33,. 38, and 70). He used a Toxicity Value of 2 for this calculation even though Asana

XL is a restricted use pesticide and he had placed it in Toxicity Level 3 for WPS calculations (Tr. 510, 512-13, 546-47).) As indicated, supra, a Gravity Adjustment Value of 7 results in a 10% reduction from the penalty matrix of $1100 or $990 per count. Thus, the proposed penalty for Counts 91, 102 and 94 totals $2,970. The other non-WPS counts involve the alleged application of Dithane F-45 to a cabbage field, a use not permitted by the label (Count 19) and an alleged application of Di Pel DF on an onion field at a ratio of 3 pounds per acre when the maximum ratio permitted by the label on an onion crop is 2 pounds per acre (Count 229). For these counts, Mr. Osag arrived at a Toxicity Value of 1, a Human Harm Value of 3 and Culpability Value of 2 for a Gravity Adjustment Value of 6 (Penalty Calculation Narrative, Exh 36; Penalty Calculation Worksheets, Exh 38 at 7 and 83). Mr. Osag considered that these alleged violations were the result of negligence, because Petrocco Farms had received a Notice of Warning and because several members of the Petrocco organization were certified applicators and should have known [of the need] to understand and follow label directions (Tr. 507). A Gravity Adjustment Value of 6 results in a 20% reduction in the matrix penalty value of $1100 or $880. Thus, the proposed penalty for Counts 19 and 229 totals $1,760, which added to $2,970 equals $4,730 for the non-WPS violations. This sum added to $226,820 for the WPS counts totals $231,550., a reduction of $440 from the $231,990 penalty sought in the complaint. (Tr. 491, 517-18).

71. On cross-examination, Mr. Osag acknowledged that the five non-WPS counts, the alleged applications of Asana XL, Di Pel DF and Dithane F-45, were based on application records provided by Petrocco Farms (Tr. 563). With respect to the three alleged applications of Asana XL at a rate of two pints per acre when the maximum permitted by the label is 9.6 ounces per acre (Counts 91, 102, and 194), Mr. Osag acknowledged that the product applied as shown by the handwritten application records (Exh 6-b) was Asiete, an oil (Tr. 564-65). See finding 45. Asked whether there was anything improper about applying Asiete to cabbage, he replied that he was not certain what Asiete was in this instance and was not sure he could draw that conclusion (Tr. 565).

72. The deposition of Sandra McDonald, an expert witness for Respondent, dated May 6, 2004, has been stipulated into evidence.[22] She received a Phd in Agronomy/ Weed Science from the University of Florida, an M.S. in Plant Pathology from Clemson University and a B.S. in Biology from Erskine College, Due West, S.C. (Curriculum Vitae, Deposition Exh 1). Ms. McDonald is currently, and for the past 7 and ½ years has been, an Environmental and Pesticide Education Specialist at Colorado State University. She testified that her current duties included providing educational programs in conjunction with the Colorado Department of Agriculture to commercial applicators to keep their licenses up to date (Deposition at 5). One of these programs is the Worker Protection Standard. The Worker Protection Standard is also included in training materials provided to the agricultural sector. Explaining further her duties at CSU, Ms.

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[22]. Although Ms. McDonald did not regard herself as a witness for Petrocco Farms, stating that she was appearing [in an educational capacity] to give an overview of the situation as to agriculture and the Worker Protection Standard in Colorado (Deposition at 29, 30), the fact is that her testimony was sponsored by Petrocco Farms.

McDonald stated that she worked in an interdisciplinary program which combines plant pathology, entomology, and weed science to provide pesticide safety and education training; pesticide use and needs assessment; as well as working with a program called IR-4, which is the development of pest management tools for minor crops (Deposition at 6).

73. Ms. McDonald's Curriculum Vitae indicates, inter alia, that she is a co-author of the Colorado Commercial Pesticide Application Study Guide. Additionally, she stated that she had written a series of well-over 50 fact sheets on different aspects of pesticides, about ten of which specifically address the Worker Protection Standard (Deposition at 13, 14). She testified that after EPA's [well publicized] assessment of fines against five firms for violation of the WPS, her program started doing a tremendous number of WPS activities. These included expansion of a newsletter dealing with pesticide issues in Colorado to include a large section dealing with WPS, developing a series of fact sheets [dealing with WPS], developing a training module for employers, [explaining] what they needed to know concerning WPS, and performing a series of mailings to pesticide dealers and crop consultants concerning WPS because these were the first persons growers see when purchasing pesticides (Deposition at 11, 12.). Additionally, she testified that " we" put together a series of packets for County Extension Offices, because that is another place growers will go and ask questions [concerning WPS]. She considered herself one of the experts in the State of Colorado on WPS (Deposition at 13). By virtue of her experience, Ms. Mc Donald is accepted as expert in WPS. In connection with "ag tours", her research and the IR-4 program to develop pesticides for minor uses, Ms.McDonald estimated that she visits an average of 50 farms a year in Colorado and nationally (Deposition at 9, 10). She estimated that she had visited approximately 300 farms in Colorado during her employment at CSU. Referring specifically to Petrocco Farms, Ms. McDonald stated that she had personally led tour groups of Petrocco Farms in order to show them the Petrocco operation, that she had participated in tours of Petrocco Farms sponsored by the County Extension Office and the Colorado Onion Association and that she had done research on Petrocco Farms (Deposition at 20). When she asked for recommendations as to farms to be included in tours for participation in "our minor crop project", Petrocco Farms was highly recommended and was one she did include (Deposition at 21). Ms. McDonald testified that after the announcements last June of WPS violations, she received a series of phone calls from consultants and other growers expressing shock that Petrocco Farms had been fined because of their reputation [for worker protection]. Based on her experience and from what she knows about people who have recommended Petrocco Farms and her visits to other farms in Colorado and nationally, she opined that Petrocco Farms was in the top 10 percent of growers in the State as to worker protection (Deposition at 22, 23).

Conclusions

1. Petrocco Farms, Inc. is a person as defined in FIFRA § 2(s) and a private applicator as defined by FIFRA § (2 (e))(2) .

2. The preponderance of evidence establishes that Petrocco Farms received the Notice of Warning issued by EPA on October 31, 2001. Therefore, Petrocco Farms is subject to penalties for violations of FIFRA subsequent to receipt of the notice in accordance with the limitations of

FIFRA § 14(a)(2).

3. Between July 12, 2002, and August 10, 2002, Petrocco Farms made 220 applications of the registered pesticides listed in finding 3. The labels on each of these pesticides incorporate by reference the worker Protection Standard, 40 C.F.R. Part 170.

4. The preponderance of evidence establishes that at the time of an EPA inspection on August 8, 2002, Petrocco Farms was not, while workers were on the establishment, displaying specific information about pesticide applications made within the last 30 days as required by 40 C.F.R. § 170.122. Information concerning pesticide applications required to be displayed is set forth in § 170.122(c) [23] and the required location for the display of the information is set forth in § 170.135(d).[24]

5. Each pesticide application made while information concerning that application was not

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[23] The regulation, 40 C.F.R. § 170.122, Providing specific information about applications, provides:

When workers are on an agricultural establishment and, within the last 30 days, a pesticide covered by this subpart has been applied on the establishment or a restricted-entry interval has been in effect, the agricultural employer shall display, in accordance with this section, specific information about the pesticide.

(a) Location, accessibility, and legibility. The information shall be displayed in the location specified for the pesticide safety poster in § 170.135(d) and shall be accessible and legible, as specified in §170.135 (e) and (f).

(b) Timing. (1) If warning signs are posted for the treated area before an application, the specific application information for that application shall be posted at the same time or earlier.

(2) The information shall be posted before the application takes place, if workers will be on the establishment during application. Otherwise, the information shall be posted at the beginning of any worker's first work period.

(3) The information shall continue to be displayed for at least 30 days after the end of the restricted-entry interval (or, if there is no restricted-entry interval, for at least 30 days after the end of the application) or at least until workers are no longer on the establishment, whichever is earlier.

(c) Required information. The information shall include:

(1) The location and description of the treated area.
(2) The product name, EPA registration number, and active ingredient(s) of the pesticide.
(3) The time and date the pesticide is to be applied.
(4) The restricted-entry interval for the pesticide.

[24] . Posted pesticide safety information", 40 C.F.R. § 170.135, provides in pertinent part:

(a) Requirement. When workers are on an agricultural establishment and, within the last 30 days, a pesticide covered by this subpart has been applied on the establishment or a restricted-entry interval has been in effect, the agricultural employer shall display, in accordance with this section, pesticide safety information.

.....

(d) Location. (1) The information shall be displayed in a central location on the farm or in the nursery or greenhouse where it can be readily seen and read by workers.

(e) Accessibility. Workers shall be informed of the location of the information and shall be allowed access to it.

(f) Legibility. The information shall remain legible during the time it is posted.

being displayed as required by §§ 170.122(c) and 170.135(d) constitutes use of a registered pesticide in a manner inconsistent with its labeling in violation of FIFRA § 12(a)(2)(g).

6. Complainant has failed to sustain its burden of proof as to Count 19, which alleges that on July 15, 2002. Petrocco Farms applied Dithane F45 to a cabbage field when cabbage is not listed on the label as a permissible use of Dithane F45. Count 19 will be dismissed. Complainant has also failed to sustain its burden of proof as to Counts 91, 102 and 194 of the complaint which allege that on July 22, July 24 and August 2, 2002, Petrocco Farms applied Asana XL to cabbage fields at the rate of 32 ounces per acre when the maximum permitted by the label as applied to cabbage is 9.6 ounces per acre; and as to Count 229, which alleges that on August 10, 2002, Petrocco Farms applied DiPel DF to an onion field at the rate of 3 pounds per acre when the maximum permitted by the label as applied to onions is 2 pounds per acre. All of these counts allege use of a registered pesticide in a manner inconsistent with its labeling in violation of FIFRA § 12(a)(2)(G) . These counts will be dismissed. The associated counts (18, 90, 101 and 193) also allege violations of § 12(a)(2)(G) for failure to comply with the display requirement of WPS at the time these applications were made. Because Complainant has failed to show that Dithane F45 was applied as alleged in Counts 18 and 19 and has failed to show that Asana XL or indeed, any pesticide was applied as alleged in Counts 91, 102, and 194, the associated counts, Count 90, 101, and 193, alleging violations of WPS for failure to display specific information about pesticide applications at the time the applications were made will also be dismissed. In any event, the ERP makes it clear that Counts 18, 90, 101, and 193 are violations dependent on the violations alleged in Counts 19, 91, 102, and 194, for which only one penalty per count may be assessed.

7. Although the Agency apparently intended to increase the maximum penalty for a single violation by a private applicator subsequent to receipt of a written warning, or a citation for a prior violation, from $1,000 as provided by FIFRA § 14(a)(2), to $1,100 for violations occurring on or after January 30, 1997, as authorized by the Debt Collection Improvement Act of 1996 (31 U.S.C. § 3107), the Agency is bound by the rule as published, 61 Fed. Reg. 69364 (December 31, 1996) and republished, and thus maximum penalty of $1,000 per violation by a private applicator is unchanged, 40 C.F.R. § 19.4 (2002-2004).

8. Although the proposed penalty was calculated in slavish devotion to the ERP and the WPS Penalty Policy, it overstates the gravity of the harm for the WPS violations because it elevates the benefits of the display requirement in reducing the risk or potential risk of worker exposure to pesticides beyond what the record will support. Therefore, the ERP and the WPS Penalty Policy are rejected as a basis for determining the penalty. Under all the circumstances, it is concluded that a penalty of $114,400 is appropriate and will be assessed.

Discussion

1. The Preponderance of Evidence Establishes That Petrocco Farms Received the Notice of Warning, Dated October 31, 2001, on November 6, 2001

The NOW, dated October 31, 2001, was in the form of a letter, addressed to Joe Petrocco, David Petrocco Farms, 14110 Brighton Road, Brighton, Colorado. In accordance with EPA practice, the Notice of Warning was sent Certified Mail, Return Receipt Requested (finding 17). The Return Receipt for the mentioned letter was signed by Rose Wolf, the Rural Carrier who delivers mail on a route which includes Petrocco Farms, on November 6, 2001 (findings 18 and 19). This was the second attempt to deliver the letter, the first attempt having been made on November 2, 2001, by a substitute carrier. Although Ms. Wolf is an employee of the U.S. Postal Service and is not an agent of Petrocco Farms, she signed the receipt because no one was there and she recognized the signature of Stephanie Case, actually "S. Case", on both sides of Postal Service Form 3849, referred to as a "peach slip", which is a "notification" of an attempt to deliver Certified Mail (findings 20 and 21). The original of this slip has been destroyed in accordance with Post Office Procedures. Stephanie Case is an employee of Petrocco Farms and S. Case and Stephanie Case are one and the same individual (finding 19). A fax from the Postmaster of the Brighton, Colorado Post Office states the mentioned Certified Mail article was delivered on November 6, 2001, at 2:07 PM in Brighton, Colorado (finding 22). The scanned image of the delivery information shows the signature of the recipient as "S Case" and below the line "SCase" and the address of the recipient as"14110 Brighton Rd, Brighton, Colorado".

As opposed to the evidence summarized above showing delivery of the NOW, both Joe Petrocco and David Petrocco, Sr. denied ever seeing the NOW until after receipt of the complaint (findings 40 and 44). Although Joe Petrocco and David Petrocco, Sr. are credible witnesses, their testimony is insufficient to overcome the evidence of delivery and it is concluded that the Notice of Warning was received by Petrocco Farms within the meaning of FIFRA § 14(a)(2). As noted above (finding 15), the NOW is not a model of draftsmanship. It is sufficient, however, to put Petrocco Farms on notice of violations of FIFRA and, as a private applicator, it may be penalized for violations occurring subsequent to receipt of the NOW in accordance with the limitations of FIFRA § 14(a)(2).

2. Between July 12, 2002. and August 10, 2002, Petrocco Farms Made 220 Applications of the Registered Pesticides Listed in Finding 3. The Labels On Each of These Pesticides Incorporated By Reference the Worker Protestion Standard, 40 C.F.R. Part 170.

See findings 3, 29, 31, 63, and 69.

3. The Preponderance of Evidence Establishes That At the Time of an EPA Inspection on August 8, 2002, Petrocco Farms Was Not, While Workers Were on the Establishment, Displaying Specfic Information About Pesticide Applications Made Within the Last 30 Days as Required By 40 C.F.R.§ 170.122

Mr. Joe Petrocco testified that the EPA inspector, Ms. Copt, was shown a notebook of computer application records at the time of her inspection on August 8, 2002 (finding 37). This testimony was confirmed by Ms. Copt (finding 24). Although the Report on Inspection written by Ms. Copt refers only to spray records and makes no reference to a notebook of application

records, her testimony was that the notebook did not contain any record of applications made within the last 30 days.[25] Findings in the Report on Inspection state that David Petrocco Farms does not post an application list of all pesticides applied within the last 30 days in a central location accessible to all their workers (finding 28). From this, it could be inferred that the problem with the notebook was not its content, but its location. It is concluded infra, however, that the "worker reception area", where employees congregate to pick up mail and paychecks, is a "central location" within the meaning of 40 C.F.R. § 170.135(d)(1). The record establishes that a notebook containing pesticide application information was located on a shelf in the worker reception area during the 2002 growing season and that the safety poster required by 40 C.F.R.§ 170.135(b) was on the wall near the binder (finding 34). The binder was accessible to everyone and it was not necessary to ask to see it (id.).

While the evidence cited above establishes that at the time of the EPA inspection on August 8, 2002, Petrocco Farms displayed a notebook of pesticide application records at a central location within the meaning of § 170.122, the preponderance of evidence is that the notebook did not contain records of pesticide applications made within the last 30 days. Firstly, Ms. Copt testified that she did not see any record of pesticide applications made within the last 30 days in the notebook she was provided by Mr. Petrocco (finding 24). When Ms. Copt pointed this out to Mr. Petrocco, his response, according to her, was that the last 30 days of applications had not as yet been entered into the computer system (id.). Secondly, Mr. Petrocco's affidavit, written at the time of the inspection, states that records of pesticide applications are inputted into the computer by our secretaries after they have been applied and documented by our applicators (finding 27). Thirdly, the letter, dated May 16, 2003, signed by Julie Petrocco, Office Manager, forwarding a hard copy of computer application records for the period July 10, 2002, through August 12, 2002, confirms that spray records are entered into the computer system after the applications have been made (finding 29). The WPS, of course, requires that information about pesticide applications be displayed prior to the applications being made, if workers were on the establishment at the time of the application (40 C.F.R. § 170.122(b)(2)). In this regard, there is no dispute but that workers were on the establishment at the time the applications at issue were made. Fourthly, the pesticide application numbers, which are automatically assigned by the computer in sequential order and which cannot be manipulated by the user reflect that entries in

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[25] Id. Respondent refers to the ALJ's prehearing order, dated November 12, 2003, which, inter alia, directed Complainant to provide copies of any documents which support the pesticide applications and the violations alleged in the complaint. Respondent points to Complainant's failure to furnish Ms. Copt's notes made at the time of her inspection and seeks to invoke Rule 22.19(g) of the Rules of Practice under which it may be inferred that information within a party's control required by Rule 22.19, which a party failed to provide, would be adverse. Complainant says that it did not provide the notes because it did not intend to introduce the notes into evidence and the notes did not provide any information which was not contained in the inspection reports included in its Prehearing Exchange (Reply Brief at 11, note 5). Although Respondent was clearly entitled to review the notes upon request, there is no evidence that it made such a request and its attempt post-hearing to make an issue of Complainant's failure to provide the notes is simply too late.

early August were entered into the computer prior to any applications made in July, 2002. (finding 31). As opposed to this evidence is Joe Petrocco's testimony that Exhibit 7, the faxed copy of the application records provided Ms. Copt (finding 29), was the type of information displayed in a three-ring binder in his office, which apparently included the worker reception area, at the time of the inspection on August 8, 2002, except for applications after that date (finding 39). While this testimony is accepted as accurate, it does not overcome the specific evidence that records of pesticide applications were entered into the computer system after the applications were made. Moreover, although Mr. David Petrocco's testimony that, if workers were on the establishment, a record of the application was entered into the computer prior to the application (id.), may represent Petrocco Farms' policy, the evidence does not show that it represented Petrocco Farms' practice at the time of the August 8 inspection.

4. Each Application Of A Registered Pesticide Made While Information Concerning Pesticide Applications Made Within The Last 30 Days Was Not Being Displayed While Workers Were On The Establishment As Required By 40 C.F.R. §§ 170.122(c) and !70.35(d) Constitutes Use Of A Registered Pesticide In A Manner Inconsistent With Its Labeling and Thus A Violation Of FIFRA § 12(a)(2)(G).

FIFRA § 12(a)(2) provides that "It shall be unlawful for any person….(G) to use any registered pesticide in a manner inconsistent with its labeling:….".This language makes it clear that the unit of violation is the "use" of a registered pesticide inconsistent with the labeling of a particular pesticide and, it follows that each use or application of a pesticide inconsistent with the label is a separate violation even if multiple pesticides were applied in one application.. As found above, the labels on each of the 22 registered pesticides used by Petrocco Farms identified in the complaint incorporate by reference the Worker Protection Standard, 40 C.F.R. Part 170. Section 170.122 concerns providing specific information about pesticide applications and provides that when workers are on an agricultural establishment and within the last 30 days s pesticide covered by this subpart has been applied on the establishment or a restricted- entry interval has been in effect, the agricultural employer shall display, in accordance with this section, specific information about the pesticide. The information is required to be displayed in the location for the safety poster as provided in § 170.135(d) and shall be posted before the application takes place, if workers will be on the establishment during the application. (supra note 24). Information to be displayed must include: (1) the location and description of the treated area. (2) The product name, EPA registration number, and active ingredients of the pesticide. (3) The time and date the pesticide is to be applied. (4) The restricted-entry interval for the pesticide. Section 170.135(d) provides that the information shall be displayed in a central location on the farm or in the nursery or greenhouse where it can be readily seen and read by workers. (supra note 25). These requirements clearly apply to each pesticide, the label of which incorporates the WPS.

5. Counts 18, 19, 91, 102, 194, and 229 Of The Complaint Will Be Dismissed Because Complainant Has Failed To Sustain Its Burden Of Proof That The Violations Occurred As Alleged. Moreover, The Unit Of Violation For A Violation of § 12(a)(2)(G) Is "Use" Of A Pesticide Inconsistent With Its Labeling For Which Only One Penalty Per Application May Be

Assessed and , In Any Event, The ERP Makes It Clear That The Violations Alleged In Counts 18, 90, 101, And193 Are Violations Dependent On The Violations Alleged In Counts 19, 91, 102, And 194 For Which Only One Penalty Per Violation May Be Assessed

Count 19 of the Complaint alleges that on July 15, 2002, Petrocco Farms applied Dithane F45 to a cabbage field and that cabbage is not listed on the label as a permissible use of Dithane F45. The associated count, Count 18, alleges that specific information about this application was not being displayed at the time this application was made as required by 40 C.F.R. § 170.122. Counts 91, 102, and 194 allege that on July 22, July 24, and August 2, 2002, respectively, Petrocco Farms applied Asana XL to cabbage fields at the rate of 32 ounces per acre when the maximum permitted by the label is 9.6 ounces per acre; and Count 229 alleges that on August 10, 2002, Petrocco Farms DiPel DF to an onion field at the rate of 3 pounds per acre when the maximum permitted by the label as applied to onions is 2 pounds per acre. Additionally, Counts 90, 101, and 193 involve the application of Asana XL alleged in Counts 91, 102, and 194, and in common with 223 other counts in the complaint, allege that these applications were made while information concerning such applications was not displayed as required by WPS.

The violations alleged above are based on application records provided Complainant by Petrocco Farms. It might be argued that Petrocco Farms should be bound by its records of pesticide applications and will not be heard to question their accuracy. Indeed, the Environmental Appeals Board has stated, "It is well established that reports or records required to be kept by law, such as DMRs [Discharge Monitoring Reports] and other laboratory reports, may be used to establish a respondent's liability. *City of Salisbury*, 2002 EPA App. LEXIS 6 (EAB, Jan. 16, 2002). However, such reports are not conclusive evidence of the information within; a respondent may rebut the information with evidence. *Id*., 2002 EPA App. LEXIS 6 *54-55; *United States v. Allegheny Ludlum Corp*., 366 F.3d 164, 173 (3d Cir. 2004)(although the Clean Water Act is a strict liability statute and a DMR is sufficient for the government's burden of production, information in the DMR is not conclusive, as "the trier of fact must still be convinced that the permit was in fact violated. Evidence that the reports inaccurately overreported the level of discharge are certainly relevant to show that no violation occurred.")

Pesticide application records are not as reliable as DMRs for proving liability. There is a heavy emphasis on accuracy in the Clean Water Act and a clear Congressional policy that DMRs should be used for enforcement purposes. *Chesapeake Bay Foundation v. Bethlehem Steel Corp.*, 608 F. Supp. 440, 452 (D. Md. 1985). NPDES permittees are required by law to maintain records of effluent discharge monitoring results, and report the results in the DMR to the relevant state or federal agency, with a certification as to the accuracy of information contained in the DMR. *Id.* (citing 40 C.F.R. § 122.22). The regulations require that the DMRs must contain a complete and accurate record of pollutant monitoring, and accuracy is encouraged by the availability of criminal penalties for false statements. *Id.*, (citing 40 C.F.R. §§ 122.22(d). 122.41 (1)(4)(i), 33 U.S.C. § 1319(c) (2). On the other hand, pesticide application records are merely required to be displayed at the agricultural establishment for the protection of workers. 40 C.F.R. § 170.222. There is nothing in the WPS or the preamble thereto that provides that records of

pesticide applications are binding evidence that the pesticide application in fact occurred as written in the pesticide application record.

Accordingly, Respondent having denied application of the pesticides identified in the mentioned counts, there is no sound reason not to apply the normal rule placing the burden upon Complainant of proving the violations alleged in the complaint. As noted, Count 19 alleges that on July 15, 2002, Petrocco Farms applied Dithane F 45 to a cabbage field and that the label does not list cabbage as a permissible use of Dithane F45. The evidence is, however, that Dithane F45 is a fungicide which is not used on cabbage, because it would burn the crop and cause crop destruction (finding 45). Mr. David Petrocco denied having any burn or crop destruction incidents [on cabbage] in 2002. While it is likely that the pesticide actually applied was DiPel, the evidence is unclear on this point. Accordingly, it is concluded that Count 19 will be dismissed for Complainant's failure to sustain its burden of proof. It follows that the associated count, Count 18, which alleges that on July 15, 2002, Petrocco Farms applied Dithane F45 to a cabbage field while failing to display information concerning that application as required by WPS, will also be dismissed.

Counts 91, 102 and 194 allege that on July 22, July 24, and August 10, 2002, Respondent applied Asana XL to a cabbage crop at the rate of 32 ounces per acre when the maximum permitted by the label as applied cabbage is 9.6 ounces per acre. The evidence, however, establishes that the product actually applied during these applications was Asiete, a crop oil which has not been shown to be a pesticide (findings 45 and 46). Therefore Counts 91, 102, and 194 will be dismissed. The same applications alleging use of a pesticide inconsistent with its labeling for failure to display application information as required by WPS are included in Counts 90, 101, and 193. Complainant having failed to show that a pesticide was applied as alleged, these counts will also be dismissed.

Count 229 alleges that on August 10, 2002, Petrocco Farms applied DiPel DF to an onion field, located in Farm 5, at a rate of 3 pounds per acre, when the maximum permitted by the label as applied to onions is 2 pounds per acre. The evidence is, however, that Petrocco Farms does not apply DiPel DF to onions. This count will be dismissed for Complainant's failure to sustain its burden of proof. This application was made subsequent to the August 8 inspection and is the only count in the complaint which does not also allege use of a pesticide inconsistent with it labeling for failure to display information concerning that application as required by WPS.

FIFRA § 12(a)(2) provides that "It shall be unlawful for any person-…(G) to use any registered pesticide in a manner inconsistent with its labeling;"

The quoted language makes it clear that the unit of violation is the "use" of a registered pesticide in a manner inconsistent with its labeling and the fact that a particular manner of use may be inconsistent with its labeling in more than one way affords no support for the contention that the "use" may be broken into multiple components, thus constituting multiple violations of FIFRA § 14(a)(2), and authorizing more than one penalty.

If an interpretation of FIFRA § 12(a)(2)(G) as authorizing only one penalty for misuse in a single application irrespective of the number of ways the use was inconsistent with the label be regarded as dubious, the ERP puts the matter to rest making it clear, e.g., that Counts 18, 90, 101, and 193 are counts dependent on Counts 91. 102, and 194 for which only penalty per count may be assessed. Regarding independently assessable charges, the ERP provides:

A separate civil penalty, up to the statutory maximum, shall be assessed for each independent violation of the Act. A violation is independent if it results from an act (or failure to act) which is not the result of any other charge for which a civil penalty is to be assessed, or if the elements of proof for the violations are different.****

Consistent with the above criteria, the Agency considers violations that occur from each shipment of a product (by product registration number, not individual containers), or each sale of a product, or *each individual application of a product to be independent offenses of FIFRA.*

A *commercial applicator that misuses a restricted use product on three occasions (either three distinct applications or three separate sites) will be charged with three counts of misuse, and assessed penalties of up to $15,000.*****

On the other hand, a single event or action (or lack of action) which can be considered as two unlawful acts of FIFRA (section 12) cannot result in a civil penalty greater than the statutory limit for one offense of FIFRA.**** (ERP at 25, 26)

"Another example of a dependent violation is multiple misbranding on a single label. If a single product label is misbranded in one way or ten ways as defined by FIFRA section 2(q), it is still misbranding on a single product label and is considered a single violation of FIFRA section 12(a)(1)(E)."

Although the WPS Penalty Policy authorizes the multiple counts and penalties Complainant is claiming here, the WPS Penalty Policy does not trump the ERP. For example, the Memorandum, dated October 21 1997, which distributed the WPS Penalty Policy states that it was intended to be an appendix to the ERP (Exh 32).

6. Maximum Penalty For Each Violation By A Private Applicator Subject To FIFRA § 14(a)(2) is $1000, The Amount Set Forth In The Statute

The Civil Monetary Penalty Adjustment Rule, 61 Fed. Reg. 69360 (December 31, 1996) was mandated by the Debt Collection Improvement Act of 1996 (31 U.S.C. § 3701). The Rule provided that all violations which occurred after January 31, 1997, would be subject to the new statutory penalty maximums. The Act limited the initial penalty adjustment amount to ten per cent. Table A, Summary of Civil Penalty Inflation Adjustment Calculations, reflects that the maximum penalty amount for a § 14(a)(2), 7 U.S.C. § 136*l(a)*(2), violation after increase and P.L. 101-410 rounding is 1,200/2,000, while the maximum penalty amount after P.L. 101-410

rounding and the 10% limit is 550/1100 (61 Fed. Reg. 69360). However, the cited Federal Register added a new Part 19, Adjustment Of Civil Monetary Penalties For Inflation, to Title 40 of the Code of Federal Regulations (id. at 69364). Section 19.4, Penalty Adjustment and table, provides: The adjusted statutory penalty provisions and their maximum applicable amounts are set out in Table 1.The last column in the table provides the newly effective maximum penalty amounts. Table 1 of Section 19.4-Civil Monetary Inflation Adjustments, provides in pertinent part:

U.S. Code section	Civil monetary penalty description	New maximum Penalty amount
7 U.S.C. § 136[*l*](a)(2)	FIFRA Civil Penalty-Private Applicators First And Subsequent Offenses or Violations	550/1000

If this is a typographical error, the Agency has had ample opportunity to correct it. See 62 Fed. Reg.13514 (March 20, 1997), where the Agency corrected errors in the citation of, inter alia, 7 U.S.C. § 136*l*(a)(2), and corrected errors in the new maximum penalty figures, but left the new maximum penalty amounts in Table 1 at § 19.4 for violations subject to 7 U.S.C. § 136*l*(a)(2) occurring subsequent to January 31, 1997, to read "$550/1000"; 62 Fed. Reg. 35038 (June 27, l1997), where the Agency added to the Civil Monetary Penalty Adjustment Rule new maximum penalties applicable to the Lead-Based Paint Hazard Reduction Act of 1992 and the Noise Control Act of 1992, but made no change in Table 1 of § 19.4 applicable to the FIFRA violations at issue here; 67 Fed. Reg.41343 (June 18, 2002), where the Agency, inter alia, purported to increase the maximum penalty amount for violations subject to 7 U.S.C. § 136*l*(a)(2) occurring after August 19, 2002, to "630/1300"; 67 Fed. Reg. 53743 (August 19, 2002), where the Agency withdrew the rule published on June 18, 2002, at 67 Fed. Reg. at 41343; 68 Fed. Reg. 39885 (July 3, 2003), where the Agency proposed, inter alia, to increase the maximum penalties for violations subject to 7 U.S.C. § 136*l*(a)(2), occurring subsequent to July 3, 2003, so that the new maximum amount in dollars in Table 1 of § 19.4, would read "$650/1100"; 68 Fed. Reg.45788 (August 4, 2003), changing the effective date of the rule published at 68 Fed. Reg. 3885 from July 3, 2003, to the "date of publication of the final rule"; and 69 Fed. Reg. 7121 (February 13, 2004), which changed the new maximum penalty amount in Table 1 of § 19.4 for FIFRA violations subject to 7 U.S.C. § 136*l*(a)(2), occurring subsequent to March 15, 2004, to "$650/1,200". The amount in Table 1 for violations occurring between January 31, 1997, and March 15, 2004, continued to read "$550/$1000". See 40 C.F.R. § 19.4 (2004).

The Debt Collection Improvement Act of 1996 required the Agency to review its [civil] penalties and to adjust them as necessary for inflation at least once every four years in accordance with a specified formula. The Agency purported to comply with Act by issuance of the Civil Monetary Penalty Adjustment Rule, 67 Fed. Reg. 69630 (December 31, 1996), which provided, inter alia, that all violations which take place after January 30, 1997, will be subject to the new statutory civil penalty amounts. The Act limited the initial adjustment to ten percent. Table A-Summary of Civil Monetary Penalty Inflation Adjustment Calculations (69 Fed. Reg. 69630) provides with respect to FIFRA § 136*l*(a)(2) private applicators-1st and subsequent

offenses or violations- that the maximum penalty amount after P.L.-410 rounding and 10% limit is "550/1,100". However, the cited Federal Register added a new section § 19.4 "Penalty Adjustment and Table" which provides that the last column in the table provides the newly effective maximum penalty amounts; (supra at 45)

The new maximum penalty amount for a FIFRA § 14(a)(2) violator reads "550/1000". The new Part 19 was republished each year from 1997 through 2003 in Title 40 of the Code of Federal Regulations and continues to show the maximum penalty for a single violation by a private applicator to be $1,000. Moreover, the Table was amended on February 13, 2004 (69 Fed.Reg. 7124) to include new maximum penalty amounts effective after March 15, 2004, in which the maximum penalty for private applicators under FIFRA § 14(a)(2), 7 U.S.C. § 136*l*(a)(2), is $650 for initial violators and $1,200 for subsequent violators. For penalties applicable to private applicators effective between January 30, 1997, and March 15, 2004, the Table continues to read "$550/1000", 40 C.F.R. § 19.4 (2004).

Although the Civil Penalty Matrix in the ERP at 19-A and the WPS Penalty Policy at 7 provide for a maximum penalty of $1,100 with respect to violations by private applicators occurring on or after January 30, 1997, and $1,100 is the amount used by Mr. Osag in his penalty calculations, it is concluded that the Agency is bound by the rule as published and that the maximum penalty for a single violation by Petrocco Farms as a private applicator is $1,000, the figure provided in FIFRA § 14(a)(2). Under basic principles of statutory construction, penalty policies and rule preambles may indicate the Agency's interpretation of, or intent behind, a rule, they are not binding authority and do not override the plain and unambiguous text of a statute or rule. See, e.g., *Natural Resources Defense Council v. U.S. EPA.* 915 F.2d 1314, 1321 (9th Cir, 1990) ("The ordinary presumption is that Congress' drafting of the text of a statute is deliberate"); *Business Guides, Inc. v Chromatic Communications Enterprises, Inc.* 498 U.S. 533, 540-41 (1991) (the Court gives the Federal Rules of Civil Procedure their plain meaning, and as with a statute, the Court's inquiry is complete if the Court finds the text of the Rule to be clear and unambiguous). The role of judges in the judicial branch of government is to interpret statutes, but not to correct or amend statutes enacted by Congress. As the Supreme Court has stated, "If Congress enacted into law something different from what was intended, then it should amend the statute to conform to its intent. 'It is beyond our province to rescue Congress from its drafting errors, and to provide what we might think….is the preferred result'. This allows both of our branches to adhere to our respected, and respective, constitutional roles." See *Lamie v. United States Trustee,* 540 U.S. 526, 542 (2004) (despite obvious legislative drafting error in omitting words from original statutory text, language of bankruptcy provision was upheld where it was plain on its face and did not lead to absurd results). See also, *Duriex-Gauthier v Lopez-Nieves,* 274 F,3d 4, 6 (1st Cir 2001) (language of regulation applied as written despite claim that the regulation contained a scrivener's error in not being revised when pertinent statute was amended).

The foregoing principles are applicable in the administrative context as an ALJ's role is to interpret statutes and rules, but not to correct or amend rules which were promulgated through Agency rulemaking procedures. See, *Ashland Oil, Inc.*, 4 E.A.D. 235, 248 (EAB 1992) (Generally, the validity of final Agency regulations is not reviewable in Agency enforcement

proceedings. Otherwise, Agency enforcement proceedings would turn into routine requests to reconsider regulations at the expense of scarce Agency resources and established rulemaking procedures "); *USGen New England, Inc, Brayton Point Station*, NPDES Appeal Lexis 26 *80-84 (EAB, July 23, 2004) (EAB generally does not entertain challenges to final Agency regulations). See also, *United States Department of the Navy, Kingsville Naval Air Station,* 9 E.A.D 19*, 31 (EAB 2000)(* EAB declined to interpret regulation broadly and suggested that if EPA intended such broad interpretation, EPA must amend the regulation through rulemaking procedures).

7. Proposed Penalty For Failure To Display Information As To Pesticide Applications As Required By WPS Computed In Slavish Devotion To ERP And WPS Penalty Policy Is Rejected As Too High Because It Overstates The Gravity Of The Harm By Elevating The Benefits Of The Display Requirement In Reducing The Risk Or Potential Risk to Workers Of Pesticide Exposure Beyond What The Record Will Support

It is well settled that a penalty may be computed in accordance with an applicable penalty policy and still be too high. See, e.g., *James C. Lin And Lin Cubing, Inc.*, 5. E.A.D. 595 (EAB 1994) (penalty for application of restricted use pesticide by an uncertified applicator assessed without regard to complex formula in penalty policy, because penalty computed in accordance with penalty policy overstated the actual gravity [of the violation] ; penalty was reduced from $4,000 per violation assessed by ALJ to $1,000 per violation). The same rationale applies here, because it is unrealistic to expect workers who cannot read English, indeed, some are apparently illiterate and cannot read either English or Spanish, to be consulting pesticide application records for the names of pesticides applied active ingredients, re-entry intervals, etc. Dr. Wuerthele's opinions as to the utility of the display of pesticide application information in reducing the risk or potential risk of worker exposure to pesticides appear to be based on the premise that workers will write the information down (findings 56-59). Apart from simple questions as to whether workers have access to pencils and paper and a place to store or preserve information they have written, problems with this approach were well stated in the preamble to the regulation explaining the reasons, which include language, literacy and accessibility, for requiring worker. training as a means of reducing occupational exposure to pesticides rather than relying on posters.[26] Problems with accessibility included the fact that many agricultural workers go

[26] 67 Fed. Reg. 38126 (August 21, 1992): The preamble provides in part:

> The Agency believes that providing information about ways to avoid or to mitigate occupational exposure to pesticides will reduce pesticide-related illnesses and injuries among agricultural workers significantly, and it has been convinced by the public comments that training as well as displaying a poster will better convey this information. A poster may be effective in conveying a simple message, but training more effectively conveys larger amounts of information. Reliance on a poster also presents problems relating to language, literacy, and accessibility. Many agricultural workers go directly to the work site, rather than to a central location; these workers would have neither the opportunity nor the

directly to the work site rather than to a central location (id.). Moreover, Dr. Wuerthele clearly had reservations with the effectiveness of the display requirement as a means of reducing the risk of worker exposure to pesticides, opining that eventually it may serve its [intended] purpose (finding 59).

The foregoing is not to question the validity of the WPS including the display requirement, which must be presumed to be valid. It must also be presumed that compliance with the display requirement of WPS will reduce the risk of worker exposure or potential exposure to pesticides. It does not follow, however, that the large penalty proposed herein, which was calculated in slavish devotion to the ERP and the WPS Penalty Policy, and which overstates the gravity of the harm by placing a benefit on the display requirement as a means of reducing the risk or potential risk of worker exposure to pesticides, which the record will not support, and which the ALJ is convinced is punitive rather than remedial, is appropriate.

The record shows that Petrocco Farms made 220 pesticide applications while workers were on the establishment and while failing to display information about pesticide applications made within the last 30 days in violation of 40 C.F.R. § 170.22. Under all of the circumstances, the penalty for these violations is computed as follows:

Toxicity Class III Pesticides	69 x $400 = $27,600
Toxicity Class II Pesticides	38 x $500= $19,000
Toxicity Class I Pesticides	113 x $600= $67,800
Total	$114, 400

This is a very substantial penalty which adequately considers the gravity of the harm and the gravity of the misconduct. Moreover, although under the ERP a respondent is not entitled to credit for a record of no prior violations, apparently on the premise that compliance with the law is to be expected and is not to be rewarded, the ERP makes it clear that issuance of a NOW is not considered a prior violation for the purpose of gravity adjustment criteria (ERP, Appendix B at 3). Additionally, it should be noted that it has been held, the ERP and other penalty policies notwithstanding, that a respondent's history of no prior violations may be considered in reducing

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Footnote 26 continued:

> incentive to examine a poster. For workers not literate either in English or their native language, adding a paragraph to the poster in any language advising them to have the poster explained to them would do little good. From the comments, EPA has concluded that an oral or audiovisual training program is an essential complement to a poster in communicating pesticide safety information to workers, and therefore such a requirement is a necessary component of worker protection standards.

a penalty from that derived from a penalty policy. See, e.g., *Johnson Pacific Incorporated,* 5 E.A.D. 696 (EAB, 1995); see also, *Catalina Yachts, Inc.,* 8 E.A.D. 199 (EAB 1999) (fact that Catalina was good corporate citizen and had no prior violations tipped the scales in favor of a reduction for compliance). The same principle is applicable here and Petrocco Farms' stellar record of having no prior violations and its reputation for worker safety are additional reasons for rejecting the harsh penalty calculated under the ERP and the WPS Penalty policy.

Although the financial information in the record is scanty, it is concluded that the penalty assessed herein is appropriate to the size of Petrocco Farms' business and will not affect its ability to continue in business. The penalty of $114, 400 is appropriate and will be assessed.

Order

1. Counts 18, 19, 90, 91, 101, 102, 193, 194 and 229 are dismissed.

2. It having been determined that David Petrocco Farms, Inc. violated the Worker Protection Standard (40 C.F.R. Part 170) and FIFRA § 12(a)(2)(G) 220 times as alleged in the complaint, a penalty of $114,400 is assessed against it in accordance with FIFRA § 14(a)(2).[27] Payment of the full amount of the penalty shall be made by sending or delivering a certified or cashier's check in the above amount payable to the Treasurer of the United States to the following address within 60 days of the date of this order:

EPA Region 8
(Regional Hearing Clerk)
P.O. Box 360582M
Pittsburgh, PA 15251

Dated this _____4th_____day of August, 2005.

_____
Spencer T. Nissen
Administrative Law Judge

[27] Unless appealed to the Environmental Appeals Board (EAB) in accordance with Rule 22.30 (40C.F.R.Part 22), or unless the EAB elects to review this decision sua sponte as therein provided, this decision will become the final order of the EAB and of the Agency in accordance with Rule 22.27(c)).