UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
Martex Farms, Inc.,	)	Docket No. FIFRA-02-2005-5301
	)	
RESPONDENT	)	
	)	

ORDER ON COMPLAINANT'S MOTION FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW AND FOR PARTIAL ACCELERATED DECISION AS TO LIABILITY

I. Background

This proceeding was initiated on January 28, 2005 by the filing of a Complaint by the United States Environmental Protection Agency ("EPA" or "Complainant")[1] pursuant to Section 14(a) of the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136*l*(a), against Martex Farms, S.E. ("Respondent"). Pursuant to Orders Granting Leave to Amend, Complainant subsequently filed a First Amended Complaint on July 13, 2005 and a Second Amended Complaint on September 2, 2005.[2] The Complaint alleges 336 violations of FIFRA Section 12(a)(2)(G), 7 U.S.C. § 136j(a)(2)(G), and the FIFRA regulations setting forth the Worker Protection Standard ("WPS") at 40 C.F.R. Part 170, by "us[ing] ... registered pesticide[s] in a manner inconsistent with [their] labeling." FIFRA Section 12(a)(2)(G). More specifically, Counts 1-151 of the Complaint allege that Respondent failed to notify "workers"[3] of pesticide applications in violation of 40 C.F.R. § 170.122; Counts 152-153 allege that Respondent failed to

[1]Specifically, Complainant is the Director of the Special Litigation & Projects Division of the Office of Regulatory Enforcement of the Office of Enforcement & Compliance Assurance of the United States Environmental Protection Agency.

[2]The specific Amendments are discussed in this Tribunal's Orders Granting Leave to Amend and need not be reiterated here. For convenience, references herein to the "Complaint" shall mean the "Second Amended Complaint" unless otherwise specified.

[3]"Worker" is defined by the WPS at 40 C.F.R. § 170.3, quoted *infra*.

provide decontamination supplies to workers in violation of 40 C.F.R. § 170.150 (Count 152) and FIFRA Section 12(a)(2)(G) (Count 153); Counts 154-304 allege that Respondent failed to notify pesticide "handlers"[4] of pesticide applications in violation of 40 C.F.R. §170.222; Counts 305-321 allege that Respondent failed to provide decontamination supplies to handlers in violation of 40 C.F.R. § 170.250; Counts 322-334 allege that Respondent failed to provide personal protective equipment ("PPE") to handlers in violation of 40 C.F.R. § 170.240; and Counts 335-336 allege that Respondent failed to provide decontamination supplies to a handler in violation of 40 C.F.R. § 170.250. While Counts 1-334 of the Complaint pertain to Respondent's "Jauca facility," Counts 335 and 336 pertain to Respondent's "Coto Laurel facility."

Respondent filed an Answer to the Second Amended Complaint ("Answer"[5]) on September 20, 2005, wherein Respondent admitted or denied various allegations, denied liability on all Counts of violation, and asserted fourteen "affirmative defenses."

On July 25, 2005, Complainant filed "Complainant's Motion for Findings of Fact and Conclusions of Law and Complainant's Motion for Partial Accelerated Decision as to Liability" ("Motion for Accelerated Decision"), together with a "Memorandum of Points and Authorities" in support thereof ("Accelerated Decision Memorandum"). Complainant's Motion seeks Accelerated Decision on liability as to Counts 1-334 of the Complaint (the "Jauca Counts"). Complainant's Motion does not seek Accelerated Decision on liability as to Counts 335 or 336 (the "Coto Laurel Counts") or on the penalty assessment in regard to any Count. On August 30, 2005, Respondent filed "Respondent's Motion in Opposition of Complainant's Motion for Findings of Fact and Conclusions of Law and Complainant's Motion for Partial Accelerated Decision as to Liability" ("Respondent's Accelerated Decision Response"), together with nineteen Attachments.[6] On September 8, 2005, Complainant filed "Complainant's Reply to

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[4]"Handler" is defined by the WPS at 40 C.F.R. § 170.3, quoted *infra*.

[5]For convenience, references herein to the "Answer" shall mean the "Answer to the Second Amended Complaint" unless otherwise specified.

[6]The Attachments to Respondent's Accelerated Decision Response consist of copies of three declarations, four invoices, ten photographs, a diagram of the Jauca facility (not to scale), and a table of distances. *See* Respondent's Accelerated Decision Response at 2-3. Complainant "requests that this [Tribunal] exclude the information attached to [Respondent's Accelerated Decision Response] from evidence." Complainant's Accelerated Decision Reply at 5. To the extent that Complainant requests that this Tribunal refuse to consider the attachments to Respondent's Accelerated Decision Response for the purposes of this Order, Complainant's request is **denied**. As noted *infra*, the Supreme Court has noted that there is no requirement that a party opposing a motion for summary judgment produce evidence in a form that would be admissible at trial in order to avoid summary judgment. Celotex Corp. v. Catrett, 477 U.S. 317 at 323-324 (1986). Further, this Tribunal shall defer the question of admissibility of such

Respondent's Motion in Opposition of Complainant's Motion for Findings of Fact and Conclusions of Law and Complainant's Motion for Partial Accelerated Decision as to Liability" ("Complainant's Accelerated Decision Reply").

On August 19, 2005, the parties filed "Joint Prehearing Stipulations" ("Stipulations").

II. Standard for Accelerated Decision

This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, 40 C.F.R. Part 22 ("Rules of Practice"). Section 22.20(a) of the Rules of Practice authorizes the Administrative Law Judge to "render an accelerated decision in favor of a party as to any or all parts of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law." 40 C.F.R. § 22.20(a).

Motions for accelerated decision under 40 C.F.R. § 22.20(a) are analogous to motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure ("FRCP"). *See, e.g., In re BWX Technologies, Inc.*, 9 E.A.D. 61, 74-75 (EAB 2000); *In re Belmont Plating Works*, Docket No. RCRA-5-2001-0013, 2002 EPA ALJ LEXIS 65 at *8 (ALJ, Sept. 11, 2002). Therefore, federal court rulings on motions for summary judgment under FRCP 56 provide guidance for adjudicating motions for accelerated decision under Rule 22.20(a) of the Rules of Practice. *See In re CWM Chemical Service*, 6 E.A.D. 1 (EAB 1995).[7]

Rule 56(c) of the FRCP provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of any material fact and that the moving party is entitled to a judgment as a matter of law."

The United States Supreme Court has held that the party moving for summary judgment bears the burden of showing that no genuine issue of material fact exists. Adickes v. S. H. Kress & Co., 398 U.S. 144, 157 (1970). In considering such a motion, the judge must construe the evidentiary material in the light most favorable to the non-moving party, indulging all reasonable

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evidence until such time as those exhibits might be offered into evidence at hearing, at which time admissibility will be decided pursuant to the standard set forth at 40 C.F.R. § 22.22(a).

[7] *See also, In re Patrick J. Neman, D/B/A The Main Exchange*, 5 E.A.D. 450, 455, n.2 (EAB 1994) ("In the exercise of ... discretion, the Board finds it instructive to examine analogous federal procedural rules and federal court decisions applying those rules. *See In re Wego Chemical & Mineral Corporation*, TSCA Appeal No. 92-4, at 13 n.10 (EAB, Feb. 24, 1993) (although the Federal Rules of Civil Procedure do not apply to Agency proceedings under Part 22, the Board may look to them for guidance); *In re Detroit Plastic Molding*, TSCA Appeal No. 87-7, at 7 (CJO, Mar. 1, 1990) (same).").

inferences in that party's favor. *See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1985); Adickes, 398 U.S. at 158-59; Cone v. Longmont United Hospital Assoc., 14 F.3d 526, 528 (10th Cir. 1994); Griggs-Ryan v. Smith, 904 F.2d 112, 115 (1st Cir. 1990). Summary judgment is inappropriate when contradictory inferences may be drawn from the evidence. Rogers Corp. v. EPA, 275 F.3d 1096, 1103 (D.C. Cir. 2002).

A factual dispute is "material" for summary judgment purposes where, under the governing law, it might affect the outcome of the proceeding (Anderson, 477 U.S. at 248; Adickes, 398 U.S. at 158-159), or where the factual issue "needs to be resolved before the related legal issues can be decided." Mack v. Great Atlantic & Pacific Tea Co., 871 F.2d 179, 181 (1st Cir. 1989). The substantive law involved in the proceeding identifies which facts are material. Anderson, 477 U.S. at 248; Adickes, 398 U.S. at 158-159.

The Supreme Court has found that a factual dispute is "genuine" if the evidence is such that a reasonable finder of fact could return a verdict in favor of the non-moving party. Anderson, 477 U.S. at 248. That is, a dispute is "genuine" if "there is sufficient evidence supporting the claimed factual dispute to require a choice between the parties' differing versions of truth at trial." Garside v. Osco Drug, Inc., 895 F.2d 46, 48 (1st Cir. 1990). In determining whether a genuine issue of fact exists, the judge must decide whether a finder of fact could reasonably find for the non-moving party under the evidentiary standards in a particular proceeding. Anderson, 477 U.S. at 252.

Once the party moving for summary judgment meets its burden of showing the absence of genuine issues of material fact, FRCP 56(e) requires the opposing party to offer countering evidentiary material or to file a Rule 56(f) affidavit. Under FRCP 56(e), "[w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but must set forth specific facts showing there is a genuine issue for trial." The Supreme Court has found that the non-moving party must present "affirmative evidence," and that it cannot defeat the motion without offering "any significant probative evidence tending to support" its pleadings. Anderson, 477 U.S. at 256 (*quoting* First Nat'l Bank of Arizona v. Cities Service Co., 391 U.S. 253, 290 (1968)).

More specifically, the Court has ruled that the mere allegation of a factual dispute will not defeat a properly supported motion for summary judgment, as FRCP 56(e) requires the opposing party to go beyond the pleadings. Celotex Corp. v. Catrett, 477 U.S. 317 at 322 (1986); Adickes, 398 U.S. at 160. Similarly, a simple denial of liability is inadequate to demonstrate that an issue of fact does indeed exist. *In re Strong Steel Products*, Docket Nos. RCRA-05-2001-0016, CAA-05-2001-0020, and MM-05-2001-0006, 2002 EPA ALJ LEXIS 57 at *22 (ALJ, Sept. 9, 2002). "Bare assertions, conclusory allegations or suspicions" are insufficient to raise a genuine issue of material fact. Jones v. Chieffo, 833 F.Supp. 498, 503 (E.D. Pa. 1993). A party responding to a motion for accelerated decision must either reference some evidence which places the moving party's evidence in question and raises a question of fact for an adjudicatory hearing, or produce such evidence. *In re Strong Steel*, 2002 EPA ALJ LEXIS 57 at *22-*23; *see also, In re Bickford, Inc.*, Docket No. TSCA-V-C-052-92, 1994

TSCA LEXIS 90 (ALJ, Nov. 28, 1994); *In re Clarksburg Casket Company*, 8 E.A.D. 496, 502 (EAB 1999); *In re Green Thumb Nursery*, 6 E.A.D. 782, 793 (EAB 1997).

The Supreme Court has noted, however, that there is no requirement that the moving party support its motion with affidavits negating the opposing party's claim, or that the opposing party produce evidence in a form that would be admissible at trial, in order to avoid summary judgment. Celotex, 477 U.S. at 323-324. A party may move for summary judgment or successfully defeat summary judgment without supporting affidavits, provided that other evidence referenced in FRCP 56(c) adequately supports its position.[8] Of course, if the moving party fails to carry its burden to show that it is entitled to summary judgment under established principles, then no defense is required. Adickes, 398 U.S. at 156.

The evidentiary standard of proof in the matter presently before this Tribunal, as in all other cases of administrative assessment of civil penalties governed by the Rules of Practice, is a "preponderance of the evidence." 40 C.F.R. § 22.24. In determining whether or not there is a genuine factual dispute, this Tribunal, as the judge and finder of fact, must consider whether it could reasonably find for the non-moving party under the "preponderance of the evidence" standard. In so doing, this Tribunal's function is not to weigh the evidence and determine the truth of the matter, but rather to determine whether there is a genuine issue for an evidentiary hearing. Anderson, 477 U.S. at 249.

Accordingly, a party moving for accelerated decision must establish through the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, the absence of genuine issues of material fact and that it is entitled to judgment as a matter of law by a preponderance of the evidence. On the other hand, a party opposing a properly supported motion for accelerated decision must demonstrate the existence of a genuine issue of material fact by proffering significant probative evidence from which a reasonable fact finder could find in that party's favor by a preponderance of the evidence.

Finally, even if a judge believes that summary judgment is technically proper upon review of the evidence in a case, sound judicial policy and the exercise of judicial discretion permit a denial of such a motion for the case to be developed fully at trial. *See* Roberts v. Browning, 610 F.2d 528, 536 (8th Cir. 1979).

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[8]FRCP 56(c) references "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any ..."

III. Statutory and Regulatory Background

Section 12(a)(2)(G) of FIFRA, 7 U.S.C. § 136j(a)(2)(G), states that: "It shall be unlawful for any person ... to use any registered pesticide in a manner inconsistent with its labeling." Section 2(s) of FIFRA, 7 U.S.C. § 136(s), defines a "person" as "any individual, partnership, association, corporation, or any organized group of persons whether incorporated or not."

Pursuant to Section 25 of FIFRA, 7 U.S.C. § 136w, the EPA has promulgated implementing regulations in the form of the Worker Protection Standard ("WPS") at 40 C.F.R. Part 170. *See* 57 Fed.Reg. 38102-38176 (Aug. 21, 1992). 40 C.F.R. § 170.9(a) states:

> Under [FIFRA] section 12(a)(2)(G) it is unlawful for any person "to use any registered pesticide in a manner inconsistent with its labeling." When this part is referenced on a label, users must comply with all of its requirements except those that are inconsistent with product-specific instructions on the labeling.

The term "use" is defined to include "[p]reapplication activities" such as "mixing and loading," "[a]pplication," "[p]ost-application activities necessary to reduce the risks of illness and injury resulting from handlers' and workers' ... exposures ... during the restricted-entry interval plus 30 days," and "[o]ther pesticide-related activities." 40 C.F.R. §§ 170.9(a)(1)-(4). Further, 40 C.F.R. § 170.9(b) states that "[a] person who has a duty under this part, as referenced on the pesticide product label, and who fails to perform that duty, violates FIFRA section 12(a)(2)(G) and is subject to a civil penalty under section 14."

Subpart B of Part 170 sets forth the WPS applicable to "workers." The term "worker" is defined as "any person ... who is employed for any type of compensation and who is performing activities relating to the production of agricultural plants[9] on an agricultural establishment[10] to which subpart B of this part applies." 40 C.F.R. § 170.3. The WPS for "workers" applies "when any pesticide product is used on an agricultural establishment in the production of agricultural plants" (40 C.F.R. § 170.102), and sets forth "duties and prohibited actions" applicable to "agricultural employer[s]." 40 C.F.R. § 170.7. The term "agricultural employer" means:

> [A]ny person who hires or contracts for the services of workers, for any type of compensation, to perform activities related to the production of agricultural

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[9]The term "agricultural plant" means "any plant grown or maintained for commercial or research purposes and includes, but is not limited to, food, feed, and fiber plants; trees; turfgrass; flowers, shrubs; ornamentals; and seedlings." 40 C.F.R. § 170.3.

[10]The term "agricultural establishment" means "any farm, forest, nursery, or greenhouse." 40 C.F.R. § 170.3. The terms "farm," "forest," "nursery," and "greenhouse" are further defined by 40 C.F.R. § 170.3.

> plants, or any person who is an owner[11] of or is responsible for the management or condition of an agricultural establishment that uses such workers.

40 C.F.R. § 170.3.

Subpart C of Part 170 sets forth the WPS applicable to "pesticide handlers" ("handlers"). The term "handler" is defined as:

> [A]ny person, including a self-employed person: (1) Who is employed for any type of compensation by an agricultural establishment or commercial pesticide handling establishment to which subpart C of this part applies and who is: (i) Mixing, loading, transferring, or applying pesticides. (ii) Disposing of pesticides or pesticide containers. (iii) Handling opened containers of pesticides. (iv) Acting as a flagger. (v) Cleaning, adjusting, handling, or repairing the parts of mixing, loading, or application equipment that may contain pesticide residues. (vi) Assisting with the application of pesticides. (vii) Entering a greenhouse or other enclosed area after the application and before the inhalation exposure level listed in the labeling has been reached or one of the ventilation criteria established by this part (Sec. 170.110(c)(3)) or in the labeling has been met: (A) To operate ventilation equipment. (B) To adjust or remove coverings used in fumigation. (C) To monitor air levels. (viii) Entering a treated area outdoors after application of any soil fumigant to adjust or remove soil coverings such as tarpaulins. (ix) Performing tasks as a crop advisor: (A) During any pesticide application. (B) Before the inhalation exposure level listed in the labeling has been reached or one of the ventilation criteria established by this part (Sec. 170.110(c)(3)) or in the labeling has been met. (C) During any restricted-entry interval.

Id. The WPS for "handlers" applies "when any pesticide is handled for use on an agricultural establishment" (40 C.F.R. § 170.202), and sets forth "duties and prohibited actions" applicable to "handler employer[s]." 40 C.F.R. § 170.7. The term "handler employer" means "any person who is self-employed as a handler or who employs any handler, for any type of compensation." 40 C.F.R. § 170.3.

IV. Undisputed Facts

The uncontested facts relevant to the issues raised in Complainant's Motion for

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[11]The term "owner" means "any person who has a present possessory interest (fee, leasehold, rental, or other) in an agricultural establishment covered by this part." 40 C.F.R. § 170.3.

Accelerated Decision are as follow:

Respondent is a "Special Partnership" incorporated and/or organized under the laws of the Commonwealth of Puerto Rico. Complaint ¶ 4; Answer ¶ 4; Stipulations ¶ 1.[12] At all relevant times,[13] Respondent has owned[14] and operated a farm known as the "Jauca facility," located at Road No. 1, Km 96.2, Santa Isabel, Puerto Rico, for the commercial production of various fruits and ornamental plants. Complaint ¶ 6; Answer ¶ 6; Stipulations ¶ 2. Respondent also owned and operated a farm known as the "Coto Laurel facility," located at Road No. 511, Km 1.0, Bo. Real Anon, Ponce, Puerto Rico, for the commercial production of mangos. Stipulations ¶ 3. Respondent engaged in the outdoor production of agricultural plants at its Jauca and Coto Laurel facilities. Stipulations ¶ 6. Respondent hired persons to perform activities related to the production of agricultural plants on its farms. Complaint ¶ 15; Answer ¶ 15; Stipulations ¶ 7. Respondent hired persons to mix, load, transfer, and apply pesticides, handle open containers of pesticides, and assist with the application of pesticides on its farms. Stipulations ¶ 8. Respondent was a "private applicator" within the meaning of FIFRA § 2(e)(2), 7 U.S.C. § 136(e)(2).[15] Stipulations ¶ 9.

Each of the following pesticides is a registered pesticide and has an EPA-approved label setting forth specific directions regarding its use: "Boa" (EPA Registration number 1812-420); "ClearOut 41 Plus" ("ClearOut") (EPA Registration number 70829-3); "Kocide 101" ("Kocide") (EPA Registration number 1812-288); and "Trilogy 90EC" ("Trilogy") (EPA Registration number 70051-12). Stipulations ¶ 22. The label of each of the four pesticides (Boa, ClearOut, Kocide, and Trilogy) has an "Agricultural Use Requirements" section that states: "Use this product only in accordance with its labeling and the Worker Protection Standard at 40 CFR Part 170." Stipulations ¶¶ 24, 26, 30, and 31. The Kocide label further indicates that its active ingredient is copper hydroxide and states: "The following equipment and precautions must be

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[12]The numbered paragraphs of the Stipulations cited herein refer to the paragraphs in Section II ("Facts") of the Stipulations.

[13]For the purposes of this Order, all factual references shall hereinafter implicitly be to facts in existence "at all relevant times."

[14]Paragraph 6 of the Complaint refers to a "possessory interest," and paragraph 2 of the Stipulations refers to a "proprietary interest." However, for the purposes of this Order, this Tribunal shall use the term "own" to refer to such interests. *See* definition of "owner," 40 C.F.R. § 170.3, quoted *supra*.

[15]FIFRA defines the term "private applicator" as "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." 7 U.S.C. § 136(e)(2).

followed for 7 days following the application of this product: – An eye-flush container, designed specifically for flushing eyes, must be available at the WPS decontamination site for workers entering the area treated with copper hydroxide." Stipulations ¶ 28.

The ClearOut label states that applicators and other handlers must wear the following personal protective equipment ("PPE"): long-sleeved shirt and pants, shoes plus socks, chemical-resistant gloves, and protective eyewear. Stipulations ¶ 32. The Kocide label states that applicators and other handlers must wear the following PPE: long-sleeved shirt and long pants; chemical-resistant gloves made of any waterproof material, such as polyvinyl chloride, nitrile rubber, or butyl rubber; shoes plus socks; and protective eyewear. Stipulations ¶ 33. The Boa label states that applicators and other handlers must wear the following PPE: long-sleeved shirt and long pants, shoes plus socks, chemical resistant gloves, protective eyewear, and a dust/mist National Institute of Occupational Safety and Health-approved respirator with any N, R, P, or HE filter. The Boa label also requires that people mixing and/or loading Boa must wear a face shield and chemical-resistant apron in addition to the above-mentioned PPE. Stipulations ¶ 34.

Between March 29, 2004 and April 26, 2004, Respondent's pesticide handlers applied ClearOut to fields at its Jauca facility at least fifty-seven times. Complaint ¶¶ 56 and 71; Answer ¶¶ 56 and 71. As set forth in paragraphs 56 and 71 of the Complaint and the Answer, the 57 applications of ClearOut at the Jauca facility to which Respondent has admitted by indicating "Ok" in the "Comments" section of its "Application Table" are "Application numbers" 1, 2, 6-8, 10, 11, 13, 15, 17, 18, 20, 23, 25, 30, 34, 36, 40, 44-46, 48, 50, 55, 58, 60, 68-72, 74, 76, 82-84, 86-88, 90, 94, 95, 99, 103, 111, 112, 119, 120, 127, 128, 133, 136, 137, 144, 145, 150, and 151. Complaint ¶¶ 56 and 71; Answer ¶¶ 56 and 71.[16]

On April 21, 2004, Respondent applied Kocide to the JC-11 mango field at its Jauca facility. Complaint ¶ 61; Answer ¶ 61; Stipulations ¶ 25.

On April 26, 2004, Respondent's handlers made the following applications at the Jauca facility: Two applications of ClearOut (fields OS-11 and ON-52CLT); eight applications of Kocide (fields JC-31, JC-32, OS-11, OS-12, TX-21, TX-22, OS-15, and OS-16); three applications of Boa (all three to field OE-11G); and four applications of Trilogy (fields TX-52G, TX-54G, OE-21G, and OE-22G). Complaint ¶¶ 81 and 97; Answer ¶¶ 81 and 97.

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[16]The admitted applications of ClearOut pertain to the following Counts of the Complaint with regard to "workers:" Counts 1, 2, 6-8, 10, 11, 13, 15, 17, 18, 20, 23, 25, 30, 34, 36, 40, 44-46, 48, 50, 55, 58, 60, 68-72, 74, 76, 82-84, 86-88, 90, 94, 95, 99, 103, 111, 112, 119, 120, 127, 128, 133, 136, 137, 144, 145, 150, and 151. The admitted applications of ClearOut pertain to the following Counts of the Complaint with regard to "handlers:" Counts 154, 155, 159-161, 163, 164, 166, 168, 170, 171, 173, 176, 178, 183, 187, 189, 193, 197-199, 201, 203, 208, 211, 213, 221-225, 227, 229, 235-237, 239-241, 243, 247, 248, 252, 256, 264, 265, 272, 273, 280, 281, 286, 289, 290, 297, 298, 303, and 304.

On April 26, 2004, an authorized Puerto Rico Department of Agriculture ("PRDA")[17] Pesticides Inspector visited Respondent's Jauca facility with the consent of Respondent in order to inspect the facility for compliance with FIFRA and its implementing regulations. Complaint ¶ 30; Answer ¶ 30; Stipulations ¶ 19. During the April 26, 2004 inspection of the Jauca facility, workers were present at that facility, including, as observed by the PRDA Inspector, approximately twenty workers picking mangos in the JC-11 field at the Jauca facility. Complaint ¶ 64; Answer ¶ 64; Stipulations ¶¶ 20 and 27.

On April 26, 2004, no applications of ClearOut were included in the WPS posting in the central posting area for workers at the Jauca facility. Stipulations ¶ 23.

On April 26, 2004, there was no eye-flush container designed specifically for flushing eyes available to workers working in the JC-11 mango field at the Jauca facility. Complaint ¶ 67; Answer ¶ 67; Stipulations ¶ 29.

V. Findings Applicable to All Counts

As an initial matter before considering each of the four categories of counts set forth in the Complaint, applying the above recited undisputed facts to the above recited statutory and regulatory definitions, this Tribunal makes the following findings: First, Respondent is a "person," an "agricultural employer," a "handler employer," an "owner" of an agricultural establishment, and a "private applicator" as defined by FIFRA and the WPS. Second, Respondent's "Jauca facility" is an "agricultural establishment" under the relevant definition.[18] Third, all four pesticides here at issue (ClearOut, Kocide, Boa, and Trilogy) are "registered pesticides" whose labels reference Section 12(a)(2)(G) of FIFRA, such that any person who uses any of those pesticides must comply with all of the requirements of the WPS (as well as any other requirements set forth on the labels), and failure to do so constitutes a violation of Section 12(a)(2)(G) of FIFRA. Fourth, Respondent's applications of any of the four pesticides constitutes a "use" of the pesticide. Therefore, any application by Respondent or Respondent's handlers of any of the four pesticides at the Jauca facility which did not comply with all of the requirements of the WPS and the requirements set forth on the labels constitutes a violation of Section 12(a)(2)(G) of FIFRA.

VI. Counts 1-151 (Failure to Notify <u>Workers</u> of Pesticide Applications)

The WPS at 40 C.F.R. § 170.122 requires agricultural employers to provide workers with information about pesticide applications. Specifically, that Rule states:

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[17]The Complaint and the Stipulations refer to a "PRDA-EPA Pesticides inspector." *See, e.g.*, Complaint ¶ 22; Stipulations ¶ 19. However, the precise relationship between the "PRDA" and the "EPA" remains unclear.

[18]This Tribunal need not consider, for the purposes of this Order, whether any other facility at issue in this case is an "agricultural establishment."

> 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 ... specific information about the pesticide... The information shall be displayed in the location specified for the pesticide safety poster in Sec. 170.135(d) and shall be accessible and legible... 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... 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... 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... 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.

40 C.F.R. § 170.122 (emphasis added).

Respondent has admitted that Respondent's handlers applied ClearOut to fields at its Jauca facility at least fifty-seven times between March 29, 2004 and April 26, 2004. Complaint ¶¶ 56 and 71; Answer ¶¶ 56 and 71. As set forth in the "Application Tables" of paragraphs 56 and 71 of the Answer, those 57 applications are "Application numbers" 1, 2, 6-8, 10, 11, 13, 15, 17, 18, 20, 23, 25, 30, 34, 36, 40, 44-46, 48, 50, 55, 58, 60, 68-72, 74, 76, 82-84, 86-88, 90, 94, 95, 99, 103, 111, 112, 119, 120, 127, 128, 133, 136, 137, 144, 145, 150, and 151.[19] Complaint ¶¶ 56 and 71; Answer ¶¶ 56 and 71. Respondent has also admitted that during the April 26, 2004 inspection of the Jauca facility, workers were present at that facility. Complaint ¶ 64; Answer ¶ 64; Stipulations ¶¶ 20 and 27. Finally, Respondent has admitted that on April 26, 2004, no applications of ClearOut were included in the WPS posting in the central posting area for workers at the Jauca facility. Stipulations ¶ 23. Thus, there are no genuine issues of material fact regarding Respondent's liability for violating Section 170.122 of the WPS and Section 12(a)(2)(G) of FIFRA by making the fifty-seven admitted applications of ClearOut without posting the required information for workers. Therefore, a finding of liability on Accelerated Decision is appropriate on Counts 1, 2, 6-8, 10, 11, 13, 15, 17, 18, 20, 23, 25, 30, 34, 36, 40, 44-46, 48, 50, 55, 58, 60, 68-72, 74, 76, 82-84, 86-88, 90, 94, 95, 99, 103, 111, 112, 119, 120, 127, 128, 133, 136, 137, 144, 145, 150, and 151 of the Complaint.

Regarding the balance of Counts 1-151, Respondent makes three arguments: 1) the

[19]"Application numbers" 1-151, for purposes of the "worker" Counts, correspond to "Counts" 1-151 of the Complaint.

"Count has been duplicated;"[20] 2) the Count pertains to a field which does not exist at the Jauca facility;[21] or 3) the field "is not a fruit field," but rather a "nursery,"[22] "fence,"[23] or "workshop."[24] Answer ¶ 56. In addition, regarding Application/Count numbers 29 and 59, Respondent simply states: "?." *Id*.

With regard to the first class of Respondent's contentions, Respondent makes no argument beyond simply stating "Count has been duplicated"[25] and referring to another entry in the "Application Table" which sets forth identical information except for the "Application #" (*i.e.*, the same "date of application," "field name," and "crop"). Indeed, the corresponding entries in Paragraphs 56 and 71 of the Complaint contain the same information. However, Complainant has marked the "duplicate" entries with an asterisk and noted that "[a]pplications marked with an asterisk denote separate applications of a pesticide to the same field on the same day by *different handlers*." Complaint at 8 and 16 (emphasis in original). Complainant's explanation appears to be supported by CX-21(b), which Complainant states consists of "Pesticide Application Records for Martex Farms (March 26, 2004 – April 26, 2004) (108 pages)." Complainant's PHE at 5. For example, Respondent contends that Application/Counts 1, 3, and 4 are "duplicates," all pertaining to applications of ClearOut on March 29, 2004 to Field MJF-04G for the crop "Guineo (Banana)." *See, e.g.*, Answer at 9. However, the application records offered as CX-21(b) indicate that there *were* three such applications, but that they were made by three *different applicators*: Jovino Ortiz, Angel L. Rosario, and Elvis J. Santiago. *See* CX-21(b) at 6-7.[26] Thus, although a finding of liability on Accelerated Decision regarding the so-called "duplicate" applications *may* be technically proper upon a painfully close scrutiny of

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[20]*See* Application/Counts 3-5, 9, 12, 14, 19, 21, 27-28, 37, 42, 47, 49, 51-54, 56, 57, 73, 75, 77, 91, 92, 96, 97, 100-102, 104, 107, 113-116, 122-124, 129-131, 135, 138, 139, 142, 143, and 146-149.

[21]*See* Application/Counts 16, 22, 24, 26, 41, 43, 61, 65-67, 78-81, 85, 89, 93, 98, 108, 109, 117, 118, 121, 125, 126, 132, 134, 140, and 141.

[22]*See* Application/Counts 31, 32, and 35.

[23]*See* Application/Counts 33, 38, 39, 105, 106, and 110.

[24]*See* Application/Counts 62-64.

[25]This argument is not to be confused with Respondent's unrelated argument, addressed *infra*, that Counts 154-304 of the Complaint pertaining to "handlers" are improperly duplicative of Counts 1-151 pertaining to "workers."

[26]The record of this case also contains application records as part of CX-13 (document entitled "Martex Farms Asperjaciones por Finca"), but those records do not appear to contain identical information as does CX-21(b), and CX-13 is written in Spanish language without an English translation.

the 108 pages of technically dense (and partially Spanish) application records, sound judicial policy requires that the numerous facts pertinent to this issue be fully developed at hearing. In particular, in light of this Tribunal's observation that at least some, if not all, of the so-called "duplicate" applications appear to indeed have been performed by different handlers (in which case they are *not* "duplicates"), this Tribunal would benefit from a more precise explanation from Respondent as to *exactly* which of the 151 applications of ClearOut at the Jauca facility it believes are *identical* to *exactly* which of the other applications, and the evidence upon which Respondent relies. In sum, the arguments of the parties regarding so-called "duplicate" applications describe factual issues which can only be properly measured against the backdrop of an evidentiary hearing. Therefore, Accelerated Decision on liability as to those Counts of the Complaint is denied.

With regard to the second class of Respondent's contentions (the Count pertains to a field which does not exist at the Jauca facility), Respondent states that the Jauca facility "only includes those fields identified as OBEN NORTE, OBEN SUR, OBEN ESTE, TEXIDOR, MJF, and JAUCA ... [and] [a]ny other fields ... belong[] to other Respondent's farms, but not to the Jauca facility." Respondent's Accelerated Decision Response at 9 (capitalization and underlining in original). In support of this assertion, Respondent relies on RX-W(14) (drawn diagram of Jauca facility), and two items attached to Respondent's Accelerated Decision Response: another drawn diagram of the Jauca facility,[27] and a declaration of Venancio Luís Martí Soler ("Mr. Martí"), the Vice President of Martex Farms, S.E., stating that "any ... fields whose names ... begin with a capital D (Descalabrado) or a capital R (Río Canas) or a capital C (Coto Laurel) ... do not form part of the Jauca facility." Martí Declaration ¶ 6. Thus, construing the evidence in the light most favorable to Respondent, it appears, for the purposes of this Order, that Application/Counts 16, 22, 24, 26, 41, 43, 61, 65-67, 78-81, 85, 89, 93, 98, 108, 109, 117, 118, 121, 125, 126, 132, 134, 140, and 141 pertain to fields which are not part of the Jauca facility. Therefore, without considering whether liability on those Counts may nevertheless ultimately be found, a genuine issue of material fact does appear to exist, precluding Accelerated Decision on those Counts.

With regard to the third class of Respondent's contentions (the field "is not a fruit field," but rather a "nursery," "fence," or "workshop"), Respondent has presented nothing more than a "bare assertion," pointing to no factual or legal support whatsoever for its position that such areas are not subject to the WPS. Respondent does not explicitly claim that such nurseries, fences or workshops are not part of the Jauca facility, an "agricultural establishment." The term "agricultural establishment" means "any farm, forest, *nursery*, or greenhouse." 40 C.F.R. § 170.3 (emphasis added). The term "farm," is further defined by 40 C.F.R. § 170.3 to mean "any operation, other than a nursery or forest, engaged in the outdoor production of agricultural plants." Given the fact that the WPS *explicitly* lists "nurseries" as part of the definition of an "agricultural establishment," Respondent's bare assertion that some applications took place at a

[27]Respondent states that the diagram attached to Respondent's Accelerated Decision Response is submitted "in substitution" of RX-W(14). *See, e.g.*, Respondent's Accelerated Decision Response at 3 (note 7) and 11.

"nursery" is simply of no avail. Therefore, a finding of liability on Accelerated Decision is appropriate as to Counts 31, 32, and 35. However, in the interest of sound judicial policy, and although liability may ultimately be found, this Tribunal exercises its judicial discretion to deny Accelerated Decision as to the Applications/Counts which Respondent contends pertain to "fences" (numbers 33, 38, 39, 105, 106, and 110) and/or "workshops" (numbers 62-64).

Finally, with regard to Application/Count numbers 29 and 59, Respondent simply states: "?." Answer ¶ 56. It goes without saying that this "statement" fails to raise a genuine issue of material fact in the face of, *inter alia*, the application records offered as CX-21(b). Therefore, a finding of liability on Accelerated Decision is appropriate as to Counts 29 and 59.

In sum, regarding the "failure to notify workers" Counts, Respondent has admitted the elements of the violations on Counts 1, 2, 6-8, 10, 11, 13, 15, 17, 18, 20, 23, 25, 30, 34, 36, 40, 44-46, 48, 50, 55, 58, 60, 68-72, 74, 76, 82-84, 86-88, 90, 94, 95, 99, 103, 111, 112, 119, 120, 127, 128, 133, 136, 137, 144, 145, 150, and 151 of the Complaint, and Accelerated Decision is therefore **granted** on those Counts. Accelerated Decision is **denied** as to the so-called "duplicate" applications (Counts 3-5, 9, 12, 14, 19, 21, 27-28, 37, 42, 47, 49, 51-54, 56, 57, 73, 75, 77, 91, 92, 96, 97, 100-102, 104, 107, 113-116, 122-124, 129-131, 135, 138, 139, 142, 143, and 146-149). Accelerated Decision is **denied** as to the applications on fields which Respondent claims are not part of the Jauca facility (Counts 16, 22, 24, 26, 41, 43, 61, 65-67, 78-81, 85, 89, 93, 98, 108, 109, 117, 118, 121, 125, 126, 132, 134, 140, and 141). Accelerated Decision is **granted** as to the applications on areas which Respondent claims are "nurseries" (Counts 31, 32, and 35). Accelerated Decision is **denied** as to the applications on areas which Respondent claims are "fences" (Counts 33, 38, 39, 105, 106, and 110) and/or "workshops" (Counts 62-64). Accelerated Decision is **granted** as to Counts 29 and 59, Respondent's argument about which consists of the single typographical character: "?."

VII. Counts 152 & 153 (Failure to Provide <u>Workers</u> with Decontamination Supplies)

The WPS at 40 C.F.R. § 170.150 requires agricultural employers to provide workers with decontamination supplies. Such supplies must include water, soap, and single-use towels, and must be located not more than 1/4 mile from where the workers are working. Specifically, the Rule states:

> The agricultural employer must provide decontamination supplies for workers in accordance with this section whenever: (i) Any worker on the agricultural establishment is performing an activity in the area where a pesticide was applied or a restricted-entry interval (REI) was in effect within the *last 30 days*, and; (ii) The worker contacts anything that has been treated with the pesticide, including, but not limited to soil, water, plants, plant surfaces, and plant parts... The agricultural employer shall provide workers with enough *water for routine washing and emergency eyeflushing*... The agricultural employer shall provide *soap and single-use towels* in quantities sufficient to meet worker's needs... The decontamination supplies shall be located together and be reasonably accessible to

> and *not more than 1/4 mile* from where workers are working... For worker activities performed more than 1/4 mile from the nearest place of vehicular access: (i) The soap, single-use towels, and water may be at the nearest place of vehicular access. (ii) The agricultural employer may permit workers to use clean water from springs, streams, lakes, or other sources for decontamination at the remote work site, if such water is more accessible than the water located at the nearest place of vehicular access.

40 C.F.R. § 170.150 (emphasis added).

Respondent has admitted that it applied Kocide to the JC-11 mango field at its Jauca facility on April 21, 2004 (Complaint ¶ 61; Answer ¶ 61; Stipulations ¶ 25); that the Kocide pesticide label has an "Agricultural Use Requirements" section that states: "Use this product only in accordance with its labeling and the Worker Protection Standard at 40 CFR Part 170" (Stipulations ¶ 26); and that the Kocide label further indicates that its active ingredient is copper hydroxide and states: "The following equipment and precautions must be followed for *7 days* following the application of this product: – An *eye-flush container, designed specifically for flushing eyes,* must be available at the WPS decontamination site for workers entering the area treated with copper hydroxide." Stipulations ¶ 28 (emphasis added). Respondent has further admitted that approximately twenty workers were picking mangos in the Jauca facility's JC-11 field on April 26, 2004 (five days after the April 21 Kocide application) (Complaint ¶ 64; Answer ¶ 64; Stipulations ¶27), and that on that date there was no eye-flush container designed specifically for flushing eyes available to those workers. Complaint ¶ 67; Answer ¶ 67; Stipulations ¶ 29.

A. Count 152 (WPS requirements for soap, water, and single-use towels)

Count 152 of the Complaint alleges that Respondent failed to provide the decontamination supplies specified in the WPS (water, soap, and single-use towels) within 1/4 mile of the workers working in the JC-11 field on April 26, 2004, constituting one violation of FIFRA § 12(a)(2)(G). Complaint ¶ 65. Complainant states: "The JC-11 mango field is approximately 0.6 miles from the *central posting facility <u>and</u> main decontamination area* of Respondent's Jauca facility." Complaint ¶ 63 (emphases added). In support of this proposition, Complainant cites CX-21, containing PRDA-EPA Pesticides Inspector Roberto Rivera Vélez's August 2, 2004 "Supplemental Summary Findings." *See* Complainant's PHE at 17: "On a later inspection conducted July 20, 2004, the inspector measured the distance from the *central decontamination area* to the JC-11 field as being 0.6 miles... *See* [CX]-21 (Supplemental Summary of Findings)." (Emphasis added). *See also*, Complainant's Accelerated Decision Memorandum at 31. Mr. Vélez's "Supplemental Summary Findings" actually state:

> At the *storage area*, I interviewed four ... Applicators... From this *storage facility* I asked Mr. Acosta to put on zero (0), the odometer of his vehicle and I did the same on mine. We drove to the site where I had initially interviewed the workers ... on April 26, 2004. I asked him what his odometer had measured (0.6) miles

> just as mine. We also measured the distance from the storage facility to where the tractor loads. Both vehicles measured (0.8) miles.

CX-21 at 3 (emphasis added). Complainant further argues that "Respondent admits that there were no single-use towels at the main decontamination facilities," citing Respondent's PHE ¶ 80. Complainant's Accelerated Decision Memorandum at 32. Paragraph 80 of Respondent's PHE states: "[D]uring the April 26, 2004, inspection, all other required decontamination supplies were available on the main decontamination area... However, the inspector observed that it was also necessary to have clean towels... Corrective actions were taken immediately to replenish inventory..." Respondent's PHE ¶ 80.

Respondent counters that:

> The Complainant has wrongly assumed that the main decontamination area and the central posting facility are at the same place, and that they are at equal distance from the JC-11 mango field. This is not the case since the main decontamination area and the central posting facility are different and separate sites, although the former is closer to mango field JC-11. See [RX-W(14)], Farm Maps, map number 2, and see enclosed map (*not to scale*) in substitution of the map included in Respondent's Initial [PHE].

Respondent's Accelerated Decision Response at 11 (emphases added).[28] *See also*, Answer ¶ 63. Respondent further argues that "a fruit washing station, similar to a huge shower" is and/or was "less than 0.3 miles"[29] from the JC-11 mango field, and that "Respondent supplies abundant water and makes available *bathroom facilities* to all employees at the main *decontamination area*, the *central office* where the central posting facility is located, and the *main packing plant* ... located next [to] the central office." Answer ¶ 63 (italics added) (underlining in original); Respondent's Accelerated Decision Response at 12-13 (italics added) (underlining in original). In support of these propositions, Respondent cites to the diagram offered as RX-W(14) (map 2) and the diagram attached to Respondent's Accelerated Decision Response and offered "in substitution" of RX-W(14) (map 2),[30] as well as RX-W(11), which appears to be a list[31] of

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[28]Respondent apparently attempts to rely on *both* the diagram offered as RX-W(14) (map 2) *and* the diagram attached to Respondent's Accelerated Decision Response and offered "*in substitution*" of RX-W(14) (map 2). Of course, if the former is intended to "substitute" for the latter, then it is illogical to simultaneously rely on both documents.

[29]40 C.F.R. § 170.150 requires that the decontamination supplies be "not more than 1/4 mile from where the workers are working." While "less than 0.3 miles" could logically include "not more than 0.25 miles," it is noted that decontamination supplies located "0.3 miles" from where the workers are working would *not* satisfy the WPS set forth at 40 C.F.R. § 170.150.

[30]Of course, since Respondent's diagrams are "not to scale," they are of no use in determining precise distances.

purchases of, *inter alia*, "hand cleaner," "single-use towels," and "soap." *See* Answer ¶ 63; Respondent's Accelerated Decision Response at 12-13.

This Tribunal finds that a genuine issue of material fact exists regarding the distance between the place where the workers were working in the JC-11 mango field on April 26, 2005 and the nearest location where water, soap, and single-use towels in quantities sufficient to satisfy the WPS *may* have been found at the Jauca facility on that date. While Complainant's pleadings state that "the JC-11 mango field is approximately 0.6 miles from the *central posting facility and main decontamination area*," the "central posting facility" appears to be a separate location from various "decontamination areas" shown on Respondent's diagrams, and Inspector Vélez appears to have driven to only *one* location, to which he refers as a "storage area/facility." Because Complainant relies entirely upon Inspector Vélez's statements contained in CX-21 for the "0.6 miles" determination, and because the current record does make clear precisely which location Mr. Vélez was referring to as the "storage area/facility," Accelerated Decision is not appropriate as to Count 152 of the Complaint. Therefore, this Tribunal need not consider, for the purposes of this Order, the parties' various arguments regarding whether WPS-satisfying decontamination supplies may or may not have existed on April 26, 2004 at the "main decontamination area," "central posting facility," "main packing plant," or "fruit washing station,"[32] or the distances of those locations from the place where the workers were working in the JC-11 mango field on April 26, 2004.

B. Count 153 (Kocide label requirements for an eye-flushing container)

Count 153 of the Complaint alleges that Respondent failed to provide "at the WPS decontamination site" "an eye-flush container, designed specifically for flushing eyes" to the workers working in the JC-11 field on April 26, 2004, constituting one violation of FIFRA § 12(a)(2)(G). Complaint ¶ 68.

Respondent admits that it applied Kocide to the JC-11 mango field on April 21, 2004 (Complaint ¶ 61; Answer ¶ 61; Stipulations ¶ 25), and that the Kocide label indicates that its active ingredient is copper hydroxide and states: "The following equipment and precautions must be followed for *7 days* following the application of this product: – An *eye-flush container, designed specifically for flushing eyes*, must be available at the WPS decontamination site for workers entering the area treated with copper hydroxide." Stipulations ¶ 28 (emphasis added).

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[31]The list appears to have been generated by Respondent and does not contain actual invoices. While Respondent's Accelerated Decision Response includes four Attachments which appear to be copies of invoices (written entirely in Spanish) for water, these four documents do not substantiate the list offered as RX-W(11).

[32]It is noted, however, that Paragraph 80 of Respondent's PHE suggests that "towels" were not available at any possible decontamination site, in which case the simple availability of water within 1/4 of where the workers were working would *not* satisfy the WPS set forth at 40 C.F.R. § 170.150.

Respondent further admits that approximately twenty workers were picking mangos in the JC-11 field on April 26, 2004 (five days after the April 21 Kocide application) (Complaint ¶ 64; Answer ¶ 64; Stipulations ¶27), and that on that date there was no eye-flush container designed specifically for flushing eyes available to those workers. Complaint ¶ 67; Answer ¶ 67; Stipulations ¶ 29. Therefore, Respondent admits all of the elements of the violation alleged in Count 153 of the Complaint and a finding of liability on Accelerated Decision is appropriate.

C. Summary

In sum, regarding the "failure to provide workers with decontamination supplies" Counts, Accelerated Decision is **denied** as to Count 152 and **granted** as to Count 153.

VIII. Counts 154-304 (Failure to Notify Handlers of Pesticide Applications)

The WPS at 40 C.F.R. § 170.222 requires agricultural employers to provide handlers with information about pesticide applications. Specifically, that Rule states:

> When handlers ... 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 handler employer shall display ... specific information about the pesticide... The information shall be displayed in the same location specified for the pesticide safety poster in Sec. 170.235(d) of this part and shall be accessible and legible, as specified in Sec. 170.235(e) and (f) of this part... 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... The information shall be posted before the application takes place, if handlers ... will be on the establishment during application. Otherwise, the information shall be posted at the beginning of any such handler's first work period... 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 the handlers are no longer on the establishment, whichever is earlier... 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.

40 C.F.R. § 170.222 (emphasis added).

The analysis of Counts 154-304 pertaining to "handlers" is essentially identical to the analysis of Counts 1-151, *supra*, regarding "workers." Where possible, the previous discussion will simply be referenced in this section of this Order without reiteration.[33]

[33]Similarly, in addressing Counts 154-304, Respondent simply cites to its previous

Respondent has admitted that Respondent's handlers applied ClearOut to fields at its Jauca facility at least fifty-seven times between March 29, 2004 and April 26, 2004. Complaint ¶¶ 56 and 71; Answer ¶¶ 56 and 71. As set forth in the "Application Tables" of paragraphs 56 and 71 of the Answer, those 57 applications are "Application numbers" 1, 2, 6-8, 10, 11, 13, 15, 17, 18, 20, 23, 25, 30, 34, 36, 40, 44-46, 48, 50, 55, 58, 60, 68-72, 74, 76, 82-84, 86-88, 90, 94, 95, 99, 103, 111, 112, 119, 120, 127, 128, 133, 136, 137, 144, 145, 150, and 151. Complaint ¶¶ 56 and 71; Answer ¶¶ 56 and 71. "Application numbers" 1-151, for purposes of the "handler" Counts, correspond to "Counts" 154-304 of the Complaint. The term "handler" includes, *inter alia*, people who are "applying" or "assisting with the application" of pesticides (40 C.F.R. § 170.3), such that "handlers" were present and performing the applications of ClearOut between March 29 and April 26, 2004. Respondent has admitted that on April 26, 2004, no applications of ClearOut were included in the WPS posting in the central posting area for workers[34] at the Jauca facility. Stipulations ¶ 23. Thus, there are no genuine issues of material fact regarding Respondent's liability for violating Section 170.222 of the WPS and Section 12(a)(2)(G) of FIFRA by making the fifty-seven admitted applications of ClearOut without posting the required information for handlers. Therefore, a finding of Respondent's liability on accelerated decision is appropriate on Counts 154, 155, 159-161, 163, 164, 166, 168, 170, 171, 173, 176, 178, 183, 187, 189, 193, 197-199, 201, 203, 208, 211, 213, 221-225, 227, 229, 235-237, 239-241, 243, 247, 248, 252, 256, 264, 265, 272, 273, 280, 281, 286, 289, 290, 297, 298, 303, and 304 of the Complaint.

Regarding the balance of Counts 154-304, Respondent makes three arguments: 1) the "Count has been duplicated;"[35] 2) the Count pertains to a field which does not exist at the Jauca facility;[36] or 3) the field "is not a fruit field," but rather a "nursery,"[37] "fence,"[38] or "workshop."[39]

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discussion of Counts 1-151. *See* Respondent's Accelerated Decision Response at 13.

[34]Paragraph 23 of the Stipulations states: "On April 26, 2004, no applications of the herbicide ClearOut 41 Plus were included in the WPS posting in the central posting area for *workers* at Respondent's Juaca [sic] facility." (Emphasis added). However, as Respondent argues that "one adequately placed posting site for both categories of employees satisfies FIFRA's policies" (Answer ¶ 69), paragraph 23 of the Stipulations is fairly read to state that no ClearOut applications were included in the WPS posting area for "handlers" as well.

[35]*See* Counts 156-158, 162, 165, 167, 172, 174, 180, 181, 190, 195, 200, 202, 204-207, 209, 210, 226, 228, 230, 244, 245, 249, 250, 253-255, 257, 260, 266-269, 275-277, 282-284, 288, 291, 292, 295, 296, and 299-302.

[36]*See* Counts 169, 175, 177, 179, 194, 196, 214, 218-220, 231-234, 238, 242, 246, 251, 261, 262, 270, 271, 274, 278, 279, 285, 287, 293, and 294.

[37]*See* Counts 184, 185, and 188.

[38]*See* Counts 186, 191, 192, 258, 259, and 263.

Answer ¶ 71. In addition, regarding Counts 182 and 212, Respondent simply states: "?." *Id*. Finally, Respondent argues that Counts 154-304 of the Complaint pertaining to "handlers" are improperly duplicative of Counts 1-151 pertaining to "workers" and should therefore be dismissed. *See* Answer ¶¶ 69 and 71; Respondent's Accelerated Decision Response at 9-10 and 13.

With regard to the first class of Respondent's contentions, Respondent makes no argument beyond simply stating "Count has been duplicated"[40] and referring to another entry in the "Application Table" which sets forth identical information except for the "Application #" (*i.e.*, the same "date of application," "field name," and "crop"). However, as described in detail *supra* regarding Counts 1-151, the arguments of the parties regarding so-called "duplicate" applications describe factual issues which can only be properly measured against the backdrop of an evidentiary hearing. Therefore, Accelerated Decision on liability as to those Counts of the Complaint is denied.

With regard to the second class of Respondent's contentions (the Count pertains to a field which does not exist at the Jauca facility), as described in detail *supra* regarding Counts 1-151, construing the evidence in the light most favorable to Respondent, it appears, for the purposes of this Order, that Counts 169, 175, 177, 179, 194, 196, 214, 218-220, 231-234, 238, 242, 246, 251, 261, 262, 270, 271, 274, 278, 279, 285, 287, 293, and 294 pertain to fields which are not part of the Jauca facility. Therefore, without considering whether liability on those Counts may nevertheless ultimately be found, a genuine issue of material fact does appear to exist, precluding Accelerated Decision on those Counts.

With regard to the third class of Respondent's contentions (the field "is not a fruit field," but rather a "nursery," "fence," or "workshop"), as described in detail *supra* regarding Counts 1-151, given the fact that the WPS *explicitly* lists "nurseries" as part of the definition of an "agricultural establishment," Respondent's bare assertion that some applications took place at a "nursery" is simply of no avail. Therefore, a finding of liability on Accelerated Decision is appropriate as to Counts 184, 185, and 188. However, in the interest of sound judicial policy, and although liability may ultimately be found, this Tribunal exercises its judicial discretion to deny Accelerated Decision as to the Counts which Respondent contends pertain to "fences" (Counts 186, 191, 192, 258, 259, and 263) and/or "workshops" (Counts 215-217).

Regarding Counts 182 and 212, Respondent simply states: "?." Answer ¶ 71. It goes without saying that this "statement" fails to raise a genuine issue of material fact in the face of, *inter alia*, the application records offered as CX-21(b). Therefore, a finding of liability on Accelerated Decision is appropriate as to Counts 182 and 212.

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[39]*See* Counts 215-217.

[40]This argument is not to be confused with Respondent's unrelated argument that Counts 154-304 of the Complaint pertaining to "handlers" are improperly duplicative of Counts 1-151 pertaining to "workers."

Finally, Respondent contends that Counts 154-304 regarding "handlers" are improperly duplicative of Counts 1-151 regarding "workers." Specifically, Respondent argues:

> [A]gricultural establishments are not required to duplicate their posting sites and state identical [WPS] information to workers and to handlers that share the same working environment. Since both regulatory requirements are for all practical purposes, identical ... one adequately placed posting site for both categories of employees satisfies FIFRA's policies. Therefore, counts 154-304 are nothing more than a duplication of counts 1-151 and either group of proposed penalties should be dismissed at once.

Answer ¶ 69. *See also*, Answer ¶ 71; Respondent's Accelerated Decision Response at 9-10 and 13. Complainant, on the other hand, argues:

> EPA's revision of the WPS in 1992 *deliberately changed* the structure of the WPS regulations from a single set of regulations coving all farmworkers to two distinct sets of regulations designed to target two different types of agricultural employees: workers and handlers... Whether or not Respondent *could have* met the requirements of both 40 C.F.R. §§ 170.122 and 170.222 with a single posting if it had displayed the requirements is irrelevant to the fact that Respondent had a duty to provide pesticide application [information] to its workers and a separate duty to provide such information to its handlers *and failed to meet either duty*.

Complainant's Accelerated Decision Memorandum at 43-44 (citations omitted) (emphasis in original). Complainant's argument in this regard is well taken and Respondent's contention that Counts 154-304 of the Complaint are improperly duplicative of Counts 1-151 is rejected.

In sum, regarding the "failure to notify handlers" Counts, Respondent has admitted the elements of the violations on Counts 154, 155, 159-161, 163, 164, 166, 168, 170, 171, 173, 176, 178, 183, 187, 189, 193, 197-199, 201, 203, 208, 211, 213, 221-225, 227, 229, 235-237, 239-241, 243, 247, 248, 252, 256, 264, 265, 272, 273, 280, 281, 286, 289, 290, 297, 298, 303, and 304 of the Complaint, and Accelerated Decision is therefore **granted** on those Counts. Accelerated Decision is **denied** as to the so-called "duplicate" applications (Counts 156-158, 162, 165, 167, 172, 174, 180, 181, 190, 195, 200, 202, 204-207, 209, 210, 226, 228, 230, 244, 245, 249, 250, 253-255, 257, 260, 266-269, 275-277, 282-284, 288, 291, 292, 295, 296, and 299-302). Accelerated Decision is **denied** as to the applications on fields which Respondent claims are not part of the Jauca facility (Counts 169, 175, 177, 179, 194, 196, 214, 218-220, 231-234, 238, 242, 246, 251, 261, 262, 270, 271, 274, 278, 279, 285, 287, 293, and 294). Accelerated Decision is **granted** as to the applications on areas which Respondent claims are "nurseries" (Counts 184, 185, and 188). Accelerated Decision is **denied** as to the applications on areas which Respondent claims are "fences" (Counts 186, 191, 192, 258, 259, and 263) and/or "workshops" (Counts 215-217). Accelerated Decision is **granted** as to Counts 182 and 212, Respondent's argument about which consists of the single typographical character: "?."

IX. Counts 305-321 (Failure to Provide Handlers with Decontamination Supplies)

The WPS at 40 C.F.R. § 170.250 requires handler employers to provide handlers with decontamination supplies. Such supplies must include water, soap, single-use towels, and one clean change of clothing, and must be located not more than 1/4 mile from each handler during the handling activity, except that for "mixing activities" the supplies must be located *at* the mixing site. Specifically, the Rule states:

> During any handling activity, ... [t]he handler employer shall provide handlers with enough *water* for routine washing, for emergency eyeflushing, and for washing the entire body in case of an emergency... The handler employer shall provide *soap* and *single-use towels* in quantities sufficient to meet handlers' needs... The handler employer shall provide *one clean change of clothing*, such as coveralls, for use in an emergency... The decontamination supplies shall be located together and be reasonably accessible to and *not more than 1/4 mile from each handler* during the handling activity... For mixing activities, decontamination supplies shall be *at the mixing site*.

40 C.F.R. § 170.250 (emphasis added).

Respondent admits that on April 26, 2004, Respondent's handlers made the following seventeen pesticide applications at the Jauca facility: Two applications of ClearOut (fields OS-11 and ON-52CLT); eight applications of Kocide (fields JC-31, JC-32, OS-11, OS-12, TX-21, TX-22, OS-15, and OS-16); three applications of Boa (all three to field OE-11G); and four applications of Trilogy (fields TX-52G, TX-54G, OE-21G, and OE-22G). Complaint ¶¶ 81 and 97; Answer ¶¶ 81 and 97. In addition, Respondent admits that each of the four pesticides is a registered pesticide with an EPA-approved label setting forth specific directions regarding its use, including an "Agricultural Use Requirements" section that states: "Use this product only in accordance with its labeling and the Worker Protection Standard at 40 CFR Part 170." Stipulations ¶¶ 22, 24, 26, 30, and 31.

Complainant alleges:

> During the April 26, 2004 inspection of Respondent's Jauca facility, Respondent's decontamination facility for handlers ... [exhibited] an absence of single-use towels... [T]he inspector also visited the Jauca facility's mixing site and was told that decontamination supplies were in a box that was locked... When the box was unlocked, the inspector found a measuring cup with pesticide residues atop of pair of overalls and a glove. The inspector also found a first aid box that had no eyewash... The mixing site and decontamination facility for handlers are more than 1/4 mile from the OS-11, OS-12, OS-15, OS-16, ON-52CLT, OE-11G, OE-21G, JC-31, TX-21, and TX-22 fields... On April 26, 2004, there were no single-use towels at the central decontamination area and no

decontamination supplies at the mixing site.

Complaint ¶¶ 76, 77, 79, and 80. Therefore, Complainant alleges that each of the seventeen listed applications constitutes one violation of FIFRA § 12(a)(2)(G) for failure to comply with the WPS at 40 C.F.R. § 170.250. Specifically, Counts 305 and 306 of Complaint pertain to the two applications of ClearOut (Complaint ¶ 84); Counts 307-314 pertain to the eight applications of Kocide (Complaint ¶ 87); Counts 315-317 pertain to the three applications of Boa (Complaint ¶ 90); and Counts 318-321 pertain to the four applications of Trilogy (Complaint ¶ 93). In support of the allegations, Complainant cites CX-13 (a 217-page Inspection Report) and CX-31 (satellite photographs and three image files in Erdas Image format). *See* Complainant's Accelerated Decision Memorandum at 37.

Respondent contends (without any supporting citation) that "decontamination supplies at the mixing site are kept inside a six inch PVC tube that is glued closed at one end, with a screwed-in cap at the other end." Answer ¶ 77. Respondent also advances a number of arguments similar to those discussed, *supra*, regarding Counts 152 and 153 (failure to provide workers with decontamination supplies) (*e.g.*, the alleged presence of the "fruit washing facility" and the alleged purchase of decontamination supplies), again citing RX-W(11) and the two diagrams. *See, e.g.*, Answer ¶¶ 79; Respondent's Accelerated Decision Response at 14-15. In addition, Respondent cites a "table prepared by [Mr.] Martí," attached to Respondent's Accelerated Decision Response, which Respondent contends "shows that fields OS-16, TX-21 and TX-22 are at less than a 1/4 mile from the mixing site; that fields OS-11, OS-12 and ON-52CLT are at less than a 1/4 mile from a main hose...; and that field JC-31 is almost on top of the fruit washing facility." Respondent's Accelerated Decision Response at 14-15 (footnotes omitted).

This Tribunal finds that a genuine issue of material fact exists regarding the distances between the relevant fields, mixing site, and the nearest location where water, soap, single-use towels, and change in clothing in quantities sufficient to satisfy the WPS *may* have been found at the Jauca facility on April 26, 2004. Thus, Accelerated Decision is not appropriate as to Counts 305-321 of the Complaint. Therefore, this Tribunal need not consider, for the purposes of this Order, the parties' various arguments regarding whether WPS-satisfying decontamination supplies may or may not have existed on April 26, 2004 within 1/4 mile of the relevant fields and/or at the mixing site.[41] While liability on Counts 305-321 may ultimately be found, Complainant's Motion for Accelerated Decision on those Counts is **denied**.

X. Counts 322-334 (Failure to Provide Handlers with Personal Protective Equipment)

The WPS at 40 C.F.R. § 170.240 requires handler employers to provide handlers with personal protective equipment ("PPE") and storage space for the PPE when such equipment is

[41]It is noted, however, that the simple availability of water within 1/4 of each handler and/or at the mixing site, absent soap, towels and change of clothing, would *not* satisfy the WPS set forth at 40 C.F.R. § 170.150.

specified by the pesticide label. Specifically, the Rule states, in part:

> Any person who performs tasks as a pesticide handler shall use the clothing and personal protective equipment specified on the labeling for use of the product... Personal protective equipment (PPE) means devices and apparel that are worn to protect the body from contact with pesticides or pesticide residues, including, but not limited to, coveralls, chemical-resistant suits, chemical-resistant gloves, chemical-resistant footwear, respiratory protection devices, chemical-resistant aprons, chemical-resistant headgear, and protective eyewear... Long-sleeved shirts, short-sleeved shirts, long pants, short pants, shoes, socks, and other items of work clothing are not considered personal protective equipment for the purposes of this section and are not subject to the requirements of this section, *although pesticide labeling may require* that such work clothing be worn during some activities... When personal protective equipment is *specified by the labeling of any pesticide for any handling activity, the handler employer shall provide the appropriate personal protective equipment* in clean and operating condition to the handler... The handler employer shall assure that handlers have a *clean place(s) away from pesticide storage and pesticide use areas* where they may: (i) Store personal clothing not in use. (ii) Put on personal protective equipment at the start of any exposure period. (iii) Remove personal protective equipment at the end of any exposure period.

40 C.F.R. §§ 170.240(a), (c), and (f)(9) (emphasis added).

Respondent admits that on April 26, 2004, Respondent's handlers made the following thirteen pesticide applications at the Jauca facility: Two applications of ClearOut (fields OS-11 and ON-52CLT); eight applications of Kocide (fields JC-31, JC-32, OS-11, OS-12, TX-21, TX-22, OS-15, and OS-16); and three applications of Boa (all three to field OE-11G). Complaint ¶¶ 81 and 97; Answer ¶¶ 81 and 97.[42] Respondent further admits that each of the three pesticides is a registered pesticide with an EPA-approved label setting forth specific directions regarding its use, including an "Agricultural Use Requirements" section that states: "Use this product only in accordance with its labeling and the Worker Protection Standard at 40 CFR Part 170." Stipulations ¶¶ 22, 24, 26, and 30. In addition, Respondent admits that the ClearOut label states that applicators and other handlers must wear the following PPE: long-sleeved shirt and pants, shoes plus socks, chemical-resistant gloves, and protective eyewear (Stipulations ¶ 32); that the Kocide label states that applicators and other handlers must wear the following PPE: long-sleeved shirt and long pants; chemical-resistant gloves made of any waterproof material, such as polyvinyl chloride, nitrile rubber, or butyl rubber; shoes plus socks; and protective eyewear (Stipulations ¶ 33); that the Boa label states that applicators and other handlers must wear the following PPE: long-sleeved shirt and long pants, shoes plus socks, chemical resistant gloves, protective eyewear, and a dust/mist National Institute of Occupational Safety and Health-

[42]These applications are the same applications at issue regarding Counts 305-321, with the exception that the four Trilogy applications are not included with regard to Counts 322-334.

approved respirator with any N, R, P, or HE filter (Stipulations ¶ 34); and that the Boa label also requires that people mixing and/or loading Boa must wear a face shield and chemical-resistant apron in addition to the above-mentioned PPE. Stipulations ¶ 34.

Complainant alleges:

> During the April 26, 2004 inspection..., the inspector asked to see [PPE] available to and used by handlers... he was initially directed to a locked box, which he was told contained PPE for one of the handlers, but for which Mr. Acosta ... had no key. In the mixing facility, the inspector found a measuring cup with pesticide residues on top of waterproof gloves and overalls, and a first-aid box which had no eye-wash. *Despite his specific request to see handler PPE, at no time during the April 26, 2004 inspection was the inspector shown PPE*... At no time during the inspection was the inspector shown an area where PPE could be stored..., an area where handlers could store personal clothing..., or facilities where PPE could be cleaned... On July 20, 2004, the inspector returned to Respondent's Jauca site and was able to see the contents of the locked box... [T]he inspector found a spraying hose and equipment, but no PPE.

Complaint ¶¶ 95-96 (emphases added). Therefore, Complainant alleges that each of the thirteen listed applications constitutes one violation of FIFRA § 12(a)(2)(G) for failure to comply with the WPS at 40 C.F.R. § 170.250. Specifically, Counts 322 and 323 of the Complaint pertain to the two applications of ClearOut (Complaint ¶ 100); Counts 324-331 pertain to the eight applications of Kocide (Complaint ¶ 103); and Counts 332-334 pertain to the three applications of Boa (Complaint ¶ 106). In support of the allegations, Complainant cites CX-13 (a 217-page Inspection Report from April 26 and 29, 2004) and CX-21 (a 132-page Inspection Report from July 20, 2004). *See* Complainant's Accelerated Decision Memorandum at 39-40.

Respondent contends (without any supporting citation) that:

> Respondent affirmatively alleges that it did provide all of its handlers with *the appropriate PPE*. On April 26, 2004 Mr. Acosta informed the inspector that handlers received from their supervisor clean PPE on a daily basis, at the beginning of each working shift. *Said PPE kept in the small warehouse located at the central office was shown to the inspectors*... Mr. Acosta also told the inspector that normally the handlers kept their clean clothes in *personal bags* that were either left in the main decontamination area or in their private vehicles... *Respondent affirmatively alleges that PPE was shown to [the] inspector.*

Answer ¶¶ 95-96 (emphases added). *See also*, Respondent's Accelerated Decision Response at 16. Respondent further contends that it "has continuously purchased ... all necessary PPE for handlers," citing RX-W(11) (the list of purchases of various supplies). Respondent's Accelerated Decision Response at 15-16.

Although a finding of liability on Accelerated Decision regarding Counts 322-334 *may* be technically proper in light of Respondent's scant citation to the record (consisting solely of citation to RX-W(11)) and possible admission that no PPE storage space was available on April 26, 2004, sound judicial policy requires that the facts pertinent to this issue be fully developed at hearing. In particular, in light of Respondent's clear, straightforward, and repeated assertions that "appropriate PPE ... was shown to the inspectors," while Complainant maintains precisely the opposite, this Tribunal would benefit from an evidentiary hearing in which the demeanor of the relevant witnesses may be observed. In sum, the arguments of the parties regarding the provision of PPE to handlers describe factual issues which can only be properly measured against the backdrop of an evidentiary hearing. Therefore, Accelerated Decision as to Counts 322-334 of the Complaint is **denied**.

XI. Counts 335 & 336 (Failure to Provide Decontamination Supplies to Handler at Coto Laurel Facility)

Although Respondent's Response to Complainant's Motion for Accelerated Decision devotes considerable discussion to Counts 335 and 336 of the Complaint,[43] this Tribunal notes that neither Respondent nor Complainant seek Accelerated Decision on those Counts, and therefore, this Order does not address the issue of Respondent's liability as to those Counts. The fact that Complainant has not sought Accelerated Decision as to all counts in the Complaint does not preclude a finding of liability on Accelerated Decision as to some counts of the Complaint.

XI. Penalty

Again, because Respondent's Response to Complainant's Accelerated Decision Motion devotes considerable discussion to the amount of the proposed penalty,[44] this Tribunal notes that Complainant does not seek Accelerated Decision on penalty, and this Order therefore does not address the proposed penalty.

ORDER

1. Regarding the "failure to notify workers" Counts of the Complaint (Counts 1-151), Complainant's Motion for Accelerated Decision on Liability is **GRANTED** as to Counts 1, 2, 6-8, 10, 11, 13, 15, 17, 18, 20, 23, 25, 29, 30-32, 34-36, 40, 44-46, 48, 50, 55, 58-60, 68-72, 74, 76, 82-84, 86-88, 90, 94, 95, 99, 103, 111, 112, 119, 120, 127, 128, 133, 136, 137, 144, 145, 150, and 151. Complainant's Motion for Accelerated Decision on Liability is **DENIED** as to Counts 3-5, 9, 12, 14, 16, 19, 21, 22, 24, 26-28, 33, 37-39, 41-43, 47, 49, 51-54, 56, 57, 61-67, 73, 75, 77-81, 85, 89, 91-93, 96-98, 100-102, 104-110, 113-118, 121-126, 129-132, 134, 135, 138-141, 142, 143, and 146-149.

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[43] *See* Respondent's Response to Accelerated Decision at 5-8.

[44] *See* Respondent's Response to Accelerated Decision at 3-5.

2. Regarding the "failure to provide workers with decontamination supplies" Counts of the Complaint (Counts 152-153), Complainant's Motion for Accelerated Decision on Liability is **GRANTED** as to Count 153. Complainant's Motion for Accelerated Decision on Liability is **DENIED** as to Count 152.

3. Regarding the "failure to notify handlers" Counts of the Complaint (Counts 154-304), Complainant's Motion for Accelerated Decision on Liability is **GRANTED** as to Counts 154, 155, 159-161, 163, 164, 166, 168, 170, 171, 173, 176, 178, 182-185, 187-189, 193, 197-199, 201, 203, 208, 211-213, 221-225, 227, 229, 235-237, 239-241, 243, 247, 248, 252, 256, 264, 265, 272, 273, 280, 281, 286, 289, 290, 297, 298, 303, and 304. Complainant's Motion for Accelerated Decision on Liability is **DENIED** as to Counts 156-158, 162, 165, 167, 169, 172, 174, 175, 177, 179-181, 186, 190-192, 194-196, 200, 202, 204-207, 209, 210, 214, 215, 217-220, 226, 228, 230-234, 238, 242, 244-246, 249, 250, 253-255, 257-260, 263, 266-271, 274-279, 282-285, 287, 288, 291-296, and 299-302.

4. Regarding the "failure to provide handlers with decontamination supplies" Counts of the Complaint (Counts 305-321), Complainant's Motion for Accelerated Decision on Liability is **DENIED** as to Counts 305-321.

5. Regarding the "failure to provide handlers with personal protective equipment" Counts of the Complaint (Counts 322-334), Complainant's Motion for Accelerated Decision on Liability is **DENIED** as to Counts 322-334.

6. The issue of liability on Counts 335 and 336 of the Complaint (failure to provide decontamination supplies to a handler at the Coto Laurel facility) is not addressed by this Order and is reserved for hearing.

7. The issue of penalty amount is not addressed by this Order and is reserved for hearing.

8. To the extent that "Complainant's Motion for Findings of Fact and Conclusions of Law" may be separate and distinct from "Complainant's Motion for Partial Accelerated Decision as to Liability," the former Motion is **DENIED** as moot in light of the findings and conclusions set forth in this Order.

9. The hearing in this matter as currently scheduled for **October 24-28, 2005** shall proceed as planned.

10. Within **5 days** of this Order, the parties shall reconvene a settlement conference wherein they shall, in good faith, attempt to negotiate a settlement of this case, taking into account this Order. Complainant shall report the occurrence of such conference and the status of settlement to the undersigned within **7 days** of this Order.

Susan L. Biro
Chief Administrative Law Judge

Dated: October 4, 2005
Washington, D.C.