UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

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

ORDER DENYING RESPONDENT'S MOTION TO AMEND INFORMATION EXCHANGE

This Tribunal's Prehearing Order of April 7, 2005 ("PHO") required, *inter alia*, that Respondent submit its Prehearing Exchange ("PHE") of information on or before June 17, 2005, and that such PHE contain "the names of the expert and other witnesses intended to be called at hearing, with a brief narrative summary of their expected testimony." PHO at 2. Respondent submitted its PHE on June 15, 2005, identifying fourteen potential witnesses.

On September 1, 2005, Respondent filed the instant "Motion to Amend Information Exchange" ("Respondent's Motion" or "Respondent's Motion to supplement PHE"). Respondent's Motion identifies four additional proposed witnesses, as follows:

1. Antonio Fuentes Agostini (Clear Out);
2. Raúl Maldonado (Agro Chemicals);
3. Augusto Palmer (ex President of OCHOA); and
4. Pedro Vivoni (Agro servicios).

Motion to Amend at 1. Respondent's Motion states that:

> These witnesses will testify as to the alleged initiative or lack thereof in Puerto Rico by the agency to implement the precepts of FIFRA. Respondent has attempted to obtain information in regard to the above mentioned initiative from the Puerto Rico Department of Agriculture to no avail.
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> In addition, the agency has objected to the taking of deposition [sic] of

> Ms. Kathleen Callahan[1] or to her utilization as a witness by [Respondent] even though this person would have direct knowledge as to EPA's initiative in Puerto Rico.

Id. Thus, Respondent offers the testimony of the four proposed witnesses in connection with a "selective enforcement" defense.[2]

Complainant's Response to Respondent's Motion ("Complainant's Response"), filed September 13, 2005, objects to Respondent's Motion to supplement its PHE on the grounds that, *inter alia*, Respondent has failed to articulate the relevance of the four additional witnesses, in that Respondent's claim of "selective prosecution" is not a valid defense. Therefore, Complainant moves this Tribunal to deny Respondent's Motion to supplement its PHE.

Pursuant to Rule of Practice 22.16(b), 40 C.F.R. § 22.16(b), Respondent's Reply (if any) to Complainant's Response to the Motion was due to be filed on or before September 23, 2005. As of the date of this Order, Respondent has not filed any such Reply.

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 at 40 C.F.R. Part 22 ("Rules" or "Rules of Practice"). Pursuant to Rule 22.19(a)(1), "any witness whose name and testimony summary has not been included in prehearing information exchange shall not be allowed to testify." Therefore, Complainant's request that this Tribunal deny Respondent's Motion amounts to a motion to exclude the testimony of the four proposed witnesses.

The burden of proof on the part of a proponent of "selective enforcement"[3] is "rigorous,"

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[1]Ms. Callahan is currently the Deputy Administrator for Region II of the U.S. Environmental Protection Agency ("EPA").

[2]Respondent's "Motion for the Issuance of Discovery and Hearing Subpoenas" ("Motion for Subpoenas"), filed September 2, 2005, seeks the issuance of "discovery subpoenas for the taking of the depositions of Ms. Kathleen Callahan, EPA Region II Interim Administrator, and Mr. Carl A. Soderberg, EPA Director, Puerto Rico Office," stating that Ms. Callahan's and Mr. Soderberg's deposition testimony is "relevant to respondent's *affirmative defense of selective prosecution*," and that "[t]he probative value of this information is related specifically to the question of whether Martex Farms, S.E. was *singled out for the imposition of extreme civil penalties* for mere alleged technical violations." Motion for Subpoenas at 1-2 (emphasis added).

[3]The parties to this case refer at times to "selective prosecution" and to "selective enforcement." Because this proceeding is a civil enforcement adjudication, the term "prosecution" is not applicable. However, this Tribunal understands the terms, for the purposes of the instant Order, to be interchangeable.

"demanding," and "high." *See, e.g., In re Environmental Protection Services, Inc.*, EPA Docket No. TSCA-03-2001-0331, 2003 EPA ALJ LEXIS 13 (Order Denying Motion to Strike Defense of Selective Prosecution, Feb. 28, 2003):

> Governmental authorities have a **broad range on discretion** in enforcing the law. United States v. Armstrong, 517 U.S. 456, 463-64 (1996). Due to limited enforcement budgets, government regulators must make difficult decisions about who to pursue in enforcing the law. Futernick v. Sumpter Township, 78 F.3d 1051, 1058 (6th Cir.), *cert. denied,* 519 U.S. 928 (1996); *In re B & R Oil Co.*, 8 E.A.D. 39, 52-53 (EAB 1998). However, government enforcement discretion is still subject to constitutional restrictions, such as discrimination based on race, religion, or any other arbitrary classification. Armstrong, 517 U.S. at 464.
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> To prevail in a defense of selective prosecution, the Respondent must show:
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> > (1) defendants have been singled out while other similarly situated violators were left untouched, *and* (2) that the government selected defendants for prosecution "invidious[ly] or in bad faith, *i.e.*, based upon such impermissible considerations as race, religion, or the desire to prevent the exercise of [their] constitutional rights."
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> United States v. Smithfield Foods, Inc., 969 F. Supp. 975, 984-85 (E.D. Va. 1997) (emphasis added) (*Citing to and quoting in part*, United States v. Production Plated Plastics, Inc., 742 F. Supp. 956, 962 (W.D. Mich.), *opinion adopted by,* 955 F.2d 45 (6th Cir.) (mem.), *cert. denied,* 506 U.S. 820 (1992)).
>
> **The standard for proving selective prosecution is high**.

Environmental Protection Services, supra, at *2-*4 (including n.1) (emphasis added). *See also, In re United States Department of the Navy, Naval Air Station Oceana*, EPA Docket No. RCRA-III-9006-062, 2000 EPA ALJ LEXIS 76 (Order on Cross Motions for Accelerated Decision, November 15, 2000):

> The **Federal government has "wide discretion" in exercising its prosecution powers**. United States v. Smithfield Foods, Inc., 969 F.Supp. 975, 985 (E.D. Va. 1997). A challenge to the government's decision to prosecute is a **"demanding" burden**, and the courts presume that prosecuting officials have properly discharged their duties. United States v. Armstrong, 517 U.S. 456, 463-464 (1996). To establish a claim of selective enforcement, the respondent must show: (1) that respondent "has been singled out while other similarly situated violators were left untouched," and (2) that the EPA selected respondent "for prosecution 'invidiously or in bad faith, *i.e.*, based upon such considerations as race, religion, or the desire to prevent the exercise of Constitutional rights.'" *Newell Recycling Company, Inc.*, 1999 EPA App. LEXIS 28, TSCA App. No. 97-7 (EAB, Sept. 13, 1999), *aff'd,* — F.3d — (5th Cir., Nov. 8, 2000)(*quoting* Smithfield Foods, 969 F.Supp. at 985)(*quoting* United States v. Production Plated Plastics, Inc., 942 F.

Supp. 956, 962 (W.D. Mich. 1990)).

Oceana, *supra*, at *48-*49 (emphasis added). *See also*, *In re Goodman Oil Company*, EPA Docket No. RCRA-10-2000-0113, 2001 EPA ALJ LEXIS 152 (Order on Complainant's Motion for Partial Accelerated Decision, August 22, 2001):

> Respondents acknowledge that **the standards for selective enforcement are "rigorous."** Opposition at 21; *see, B & R Oil Co.*, RCRA (3008) App. No. 97-3, 1998 EPA App. LEXIS 106 (EAB, Nov. 18, 1998); United States v. Production Plated Plastics, 742 F.Supp. 956, 962 (W.D. Mich. 1990), *opinion adopted by* 955 F.2d 45 (6th Cir. 1992), *cert. denied*, 506 U.S. 820 (1992). The Supreme Court has stated, "**The conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation.**" Oyler v. Boles, 368 U.S. 448, 456 (1962). Indeed, "Agency officials have broad discretion in deciding against whom to institute disciplinary proceedings." Allred's Produce v. Dep't of Agriculture, 178 F.3d 743, 747 (5th Cir.), *cert. denied*, 528 U.S. 1021 (1999)(**there is no authority for the proposition that "an otherwise culpable violator is shielded from the consequences of this [sic] actions simply because [the law] is applied unevenly** . . ."); *see also*, Production Plated Plastics, 742 F.Supp. at 962. To make a claim that enforcement action was in bad faith based on a desire to prevent the exercise of a constitutionally protected right, a defendant has been required to show: "(1) the exercise of a protected right; (2) the prosecutor's 'stake' in the exercise of that right; (3) the unreasonableness of the prosecutor's conduct; and, presumably, (4) that the prosecution was initiated with the intent to punish the [defendant] for exercise of the protected right." Futernick v. Sumpter Township, 78 F.3d 1051, 1056 (6th Cir.), *cert. denied*, 519 U.S. 928 (1996).

Goodman Oil, *supra*, at *25-*27 (emphasis added).

Thus, the test for "selective prosecution" is two-pronged. The proponent must show both that: 1) the proponent has been "singled out," *and* 2) that the proponent has been singled out based upon such impermissible considerations as race, religion, or prevention of the exercise of constitutional rights. Further, a proponent of a "selective enforcement" defense is not entitled to a hearing on the issue based upon a "mere allegation" of selective enforcement, but instead must make a "threshold or preliminary showing" of the elements of the defense. That is, assuming the facts alleged by the proponent of the defense to be true, an evidentiary hearing on the issue is necessary only when the proponent alleges facts sufficient to state a valid defense. *See, e.g.*,United States v. Jacob, 781 F.2d 643 (8th Cir. 1986):

> The government argues that appellant was not entitled to an evidentiary hearing or discovery because his defense of selective prosecution was rejected in Wayte and thus **does not state a valid defense**... **[T]he mere allegation of selective prosecution does not require discovery or an evidentiary hearing**. *See* United

> States v. Catlett, 584 F.2d at 865. The defendant **must first make a preliminary or threshold showing of the essential elements** of the selective prosecution defense. *Id., citing* United States v. Berrios, 501 F.2d 1207, 1211-12 (2d Cir. 1974); *see also* Eklund, 733 F.2d at 1290-91. "A hearing is necessitated only when the motion **alleges sufficient facts [in support of the selective prosecution claim] to take the question past the frivolous state** and raises a reasonable doubt as to the prosecutor's purpose." United States v. Catlett, 584 F.2d at 866 (citations omitted); *see* Eklund, 733 F.2d at 1290-91. We hold [that] ... **[e]ven assuming the facts alleged to be true**, appellant has no valid selective prosecution defense.

U.S. v. Jacob, 781 F.2d at 646-647 (citations omitted) (emphasis added). *See also*, United States v. Moon, 718 F.2d 1210 (2nd Cir. 1983), *cert. denied*, 466 U.S. 971 (1984):

> Both appellants contend that the prosecution mounted against them was impermissibly motivated by hostility toward their religion and that the district court erred in denying their request for discovery and a hearing on the issue of selective prosecution. In this Circuit, a defendant who advances a claim of selective prosecution **must do so in pretrial proceedings**, *see* United States v. Taylor, 562 F.2d 1345, 1356 (2nd Cir.), *cert. denied*, 432 U.S. 909, 53 L. Ed. 2d 1083, 97 S. Ct. 2958 (1977). The person asserting such a claim bears the burden of establishing *prima facie* both [elements of the defense]. United States v. Berrios, 501 F.2d 1207, 1211 (2d Cir. 1974). **No evidentiary hearing or discovery is mandated unless the district court, in its discretion, *see id.* at 1212, finds that both prongs of the test have been met.** *See* United States v. Ness, 652 F.2d 890, 892 (9th Cir.), *cert. denied*, 454 U.S. 1126, 71 L. Ed. 2d 113, 102 S. Ct. 976 (1981); United States v. Catlett, 584 F.2d 864, 866 (8th Cir. 1978); Berrios, 501 F.2d at 1211. We cannot say on this record that the district court abused its discretion in holding that appellants failed to demonstrate the necessary factual predicates for their claim of selective prosecution.

United States v. Moon, 718 F.2d at 1229 (quotation omitted) (emphasis added).

In the present case, Respondent has asserted, directly or indirectly, an "affirmative defense" of "selective prosecution" in its Answer to the Complaint ("Answer"), its "Motion in Opposition of Complainant's Motion for Findings of Fact and Conclusions of Law and Complainants's Motion for Partial Accelerated Decision as to Liability" ("Accelerated Decision Response"), its "Initial Prehearing Exchange" ("PHE"), and as described *supra*, in its Motion for Subpoenas and its instant Motion to Amend PHE.

Respondent's Answer states: "The complaint is discriminatory and is intended to damage the reputation and well being of a local agricultural enterprise. EPA's press release of February 3, 2005, has already caused considerable damages to appearing party, putting at risk the economic well-bing and stability of the company." Answer, ¶ 125(5), under Section VII

("Affirmative Defenses").

> Respondent's Accelerated Decision Response states:
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> [T]here are solid indications that Respondent has been singled out by the EPA in what amounts to be *selective prosecution*, and that instant complaint [sic] is *nothing more than a mechanism devised to send a strong message and warning to the regulated community*. To create a center of attention and lure journalists to attend the February 3, 2004, press conference held in San Juan, Puerto Rico, EPA announced that Respondent's fines in this case to be [sic] "the highest ever imposed in the US for violations of FIFRA."

Accelerated Decision Response at 4, including n.9 (emphasis added).[4] Respondent's Accelerated Decision Response also alludes to RX-W, item 24, "that includes statements attributed to Ms. Kathleen Callahan, Acting EPA Regional (Region II) Director, to the effect that 'she (EPA) expects Martex Farms to make efforts to fix the problem rather than pay fines.'" Respondent's Accelerated Decision Response at 5, n.15.

> Respondent's PHE states that:
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> Ms. Kathleen Callahan ... may be called to testify about the existence of EPA's *local initiatives to protect agricultural workers*, handlers and neighboring communities; about EPA's *selective prosecution of farmers*; about the agency's stated policy to correct problems rather than impose penalties for FIFRA alleged violations; and as to *information made available to the press* before notifying Respondent of the alleged violations and amount of proposed penalties in [the] instant complaint. See Respondent's **EXHIBIT A, S, T** and **W-24**.

Respondent's PHE at 3 (italics added) (bold type in original). Further, this Tribunal's April 7, 2005 Prehearing Order ("PHO") directed Respondent to provide "a detailed narrative statement that *fully elaborates the exact factual and legal basis* of each one of Respondent's twelve (12) affirmative defenses set forth in its Answer (paragraphs 125 (1)-(12)), and a *copy of all documents in support of this statement*." PHO at 5, ¶ 3(E) (emphases added). In response to this requirement, Respondent's PHE states, with regard to ¶ 125(5) of Respondent's Answer (quoted

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[4]Respondent's Accelerated Decision Response contains no citation to the quotation attributed to "the February 3, 2004 Press Conference." However, Respondent's PHE contains Respondent's Exhibit ("RX") A, which Respondent states is a "EFE news services, press release published in San Juan, Puerto Rico, dated February 3, 2005." Respondent's PHE at 5. However, RX-A is written entirely in Spanish language and is not accompanied by any translation into English language. Nonetheless, for the purposes of this Order, this Tribunal assumes to be true and accurate Respondent's apparent representation that RX-A is an "EPA press release" which states, in part, that "Respondent's fines in this case [are] to be 'the highest ever imposed in the US for violations of FIFRA.'"

supra):

> The complaint is <u>*discriminatory*</u> *and is intended to damage the reputation and well being* of a local agricultural enterprise. EPA's *press release of February 3, 2005*, has already caused ... damages... With the *sole purpose of luring reporters into attending a press conference*, EPA disseminated erroneous information... [T]he agency's representatives stated that Respondent clearly exhibits a disregard for worker welfare, that the situation at two of Respondents [sic] South coast properties are a very serious safety matter, and that Respondent has never remedied the problems... Knowing that such statements were certainly wrong, Ms. Callahan went on and added that this was the *largest fine for a FIFRA violation in U.S. history*. Respondent's **EXHIBIT A, S** and **W-24**.

Respondent's PHE at 29, ¶ 6 (italics and underlining added) (bold type in original).

Finally, as described *supra*, Respondent's Motion to Amend PHE and Motion for Subpoenas refer to the proposed testimony of Ms. Callahan, which Respondent states would be "relevant to respondent's *affirmative defense of selective prosecution*," in that "[t]he probative value of this information is related specifically to the question of whether Martex Farms, S.E. was *singled out for the imposition of extreme civil penalties* for mere alleged technical violations." Motion for Subpoenas at 1-2 (emphasis added).[5]

Thus, taken together, Respondent's various pleadings allege an affirmative defense of "selective enforcement," pointing to RX-A, RX-S, RX-T, and RX-W (Item 24). As noted *supra*, RX-A, which Respondent states is a "EFE news services, press release published in San Juan, Puerto Rico, dated February 3, 2005" (Respondent's PHE at 5), is written entirely in Spanish language and is not accompanied by any translation into English language. Nonetheless, for the purposes of this Order, this Tribunal assumes to be true and accurate Respondent's apparent representation that RX-A is an "EPA press release" which states, in part, that "Respondent's fines in this case [are] to be 'the highest ever imposed in the US for violations of FIFRA.'" RX-S appears to be a copy of a January 6, 2005 EPA, Region 2 "news release" stating that "EPA is seeking penalties of $742,500 against [Clarke Environmental Mosquito Management, Inc.]" for

[5]By Order dated September 16, 2005, this Tribunal has already denied Respondent's request for subpoenas because there is no statutory authority for such subpoenas under FIFRA.

violations of FIFRA stemming from applications of pesticides in New York City.[6] RX-T appears to be a copy of a one-page document, written entirely in Spanish with no English translation, bearing a photograph which apparently includes Ms. Callahan. RX-W (Item 24) appears to be copies of a number of newspaper articles from February, 2005 (only one of which is in English), reporting on the proposed civil penalty in this case.

Although Respondent's PHE at 29, ¶ 6 alleges that the proposed penalty in this case is "discriminatory," Respondent does not state in what sense it feels that the proposed penalty is "discriminatory." Beyond this solitary statement, Respondent's essential argument is that it has been "singled out" with a large proposed penalty as "a mechanism devised to send a strong message and warning to the regulated community." However, "singling out" an alleged violator is not, by itself, an improper method of enforcement. As this Tribunal found in *In re Goodman Oil Company*, EPA Docket No. RCRA-10-2000-0113, 2001 EPA ALJ LEXIS 152 (Order on Complainant's Motion for Partial Accelerated Decision, August 22, 2001):

> The Supreme Court has stated, "The conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation." Oyler v. Boles, 368 U.S. 448, 456 (1962). Indeed, "Agency officials have broad discretion in deciding against whom to institute disciplinary proceedings." Allred's Produce v. Dep't of Agriculture, 178 F.3d 743, 747 (5th Cir.), *cert. denied*, 528 U.S. 1021 (1999)(there is no authority for the proposition that "an otherwise culpable violator is shielded from the consequences of this [sic] actions simply because [the law] is applied unevenly . . ."); *see also*, Production Plated Plastics, 742 F.Supp. at 962.

Goodman Oil, *supra*, at *25-*27 (emphasis added). Further, "deterrence" is not an "impermissible consideration" such as race, religion, or prevention of the exercise of constitutional rights. For example, the court in U.S. v. Municipal Authority of Union Township, 929 F.Supp. 800, 806 (M.D.Pa. 1996), explained in the context of the Clean Water Act:

> The Clean Water Act's penalty provision is aimed at deterrence with respect to both the violator's future conduct (specific deterrence) and the general population regulated by the Act (general deterrence). Student Public Interest Research Group of New Jersey, Inc. v. Hercules, Inc., 19 Envtl.L.Rep. 20903, 20904, 1989 WL 159629, *3 (D.N.J. April 6, 1989) (*citing* Chesapeake Bay Foundation v. Gwaltney of Smithfield, Ltd., 611 F.Supp. 1542, 1557 (E.D.Va. 1985) (subsequent history omitted)). The goal of deterrence requires that a penalty have two components. First, it must encompass the economic benefit of noncompliance... Second, the penalty must include a punitive component... Without the second component, those regulated by the Clean Water Act would

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[6]While this Tribunal expresses no opinion regarding the relevance of the "Clarke" matter to the instant case, it is noted that the proposed penalty in the "Clarke" matter appears to be higher than the penalty proposed in the present case.

understand that they have nothing to lose by violating it.

(Citation omitted). Indeed, the Supreme Court, citing legislative history involving the Clean Water Act Penalty Policy, has observed that: "The legislative history of the [CWA] reveals that Congress wanted the district court to consider the need for retribution and deterrence, in addition to restitution, when it imposed civil penalties." Tull v. United States, 481 U.S. 412, 422, 107 S.Ct. 1831, 95 L.Ed.2d 365 (1987) [*citing* 123 Cong. Rec. 39191 (1997) (remarks of Sen. Muskie citing EPA memorandum outlining enforcement policy)]. The FIFRA "Penalty Policy," as did the CWA Penalty Policy at issue in Municipal Authority of Union Township and Tull, similarly states that it is "designed to ... deter future violation of FIFRA by the respondent *as well as other members of the regulated community*." Complaint, Att. C at 1 (emphasis added).

Thus, to the extent that Complainant in the present case may have chosen to propose the penalty it has proposed against Respondent in order to deter others than Respondent from violating FIFRA by "making an example" of Respondent, such deterrence is an entirely appropriate goal of the penalty assessment under FIFRA. Importantly, Respondent has not pointed to any evidence whatsoever to support the second prong of the "selective enforcement" test of an improper motivation or consideration on the part of Complainant, or even suggested a specific theory of what such an improper motivation might be. The "mere allegation" that the proposed penalty is "discriminatory" does not require an evidentiary hearing on that issue. Even assuming the facts alleged by Respondent to be true, Respondent has failed to allege facts sufficient to make a "threshold or preliminary showing" that its "selective enforcement" theory states a valid defense. Respondent is therefore not entitled to a hearing on the issue of "selective enforcement."

Therefore, because an evidentiary hearing on Respondent's "selective enforcement" defense is not warranted, and because the testimony of the four witnesses proposed in Respondent's Motion to supplement its PHE would pertain solely to that defense, Respondent's Motion to Amend Information Exchange is **DENIED**.

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Susan L. Biro
Chief Administrative Law Judge

Dated: September 26, 2005
Washington, D.C.