BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In the Matter of:	)	**FIFRA Appeal No. 07-01**
	)	
Martex Farms, S.E.	)	
	)	
Docket No. FIFRA-02-2005-5301	)	
	)	

COMPLAINANT S RESPONSE TO RESPONDENT S APPEAL,
NOTICE OF CROSS-APPEAL,
AND SUPPORTING BRIEF

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

FEDERAL STATUTES AND LEGISLATIVE MATERIALS

FEDERAL REGULATIONS

I. INTRODUCTION

Pursuant to 40 C.F.R. § 22.30 and the March 1, 2007 Order of the Environmental Appeals Board (EAB or Board), the U.S. Environmental Protection Agency (EPA or the Agency) submits this Response to Respondent s Appeal, Notice of Cross-Appeal, and Supporting Brief. For the reasons set forth below, EPA respectfully requests that Respondent s Appeal be denied and that Chief Administrative Law Judge Susan L. Biro s January 19, 2007 Initial Decision in *In the Matter of Martex Farms*, Docket No. FIFRA-02-2005-5301 be upheld, with the exception of the following areas: EPA requests that the ALJ s Initial Decision (1) be clarified with regard to the appropriate display of specific pesticide application information; (2) be reversed with regard to the decision not to assess penalties for violations involving 40 C.F.R. § 170.222; and (3) be vacated with regard to the ALJ s assessment of Respondent s culpability under the relevant penalty policies. EPA respectfully requests that the Board assess an appropriate civil penalty under its *de novo* authority of review.

II. SUMMARY OF RESPONDENT S ARGUMENT ON APPEAL AND SYNOPSIS OF COMPLAINANT S RESPONSE

Respondent s Appeal Brief (Respondent s Appeal) seeks vacatur of the ALJ s Initial Decision with regard to all but four of her 170 findings of legal liability for violating the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) § 12(a)(2)(G) and requests that corresponding penalties assessed by the ALJ be voided. Respondent s Appeal at 17-31. Respondent primarily argues that the ALJ erred in her findings of fact with regard to all of these

counts.[1] *Id.* Respondent further argues that the Agency s entire Complaint against Respondent is discriminatory . . . deficient . . . biased . . . in bad faith . . . plagued with inaccuracies . . . based on hearsay . . . speculation . . . erroneous factual allegations . . . [and] a wrongful interpretation of the law. Respondent s Appeal at 2-3.

Respondent s arguments are flatly refuted by the record in this case. The ALJ s decision with respect to Respondent s legal liability in this case was based an exhaustive review of an extensive record and should be upheld. The record demonstrates that the ALJ carefully considered all of the assertions currently being made by Respondent on appeal and all the evidence offered by Respondent in support thereof, and found that Complainant proved by a preponderance of the evidence that during the April 26, 2004 inspection of Respondent s farms, Respondent s workers and handlers lacked certain required decontamination materials and personal protective equipment (PPE) and that Respondent s WPS records on display that day lacked certain required pesticide application information. Because Respondent primarily takes issue with the ALJ s factual findings but fails to show that her findings were not supported by the record, Respondent has not demonstrated clear error or an abuse of discretion by the ALJ and its appeal should be denied.[2]

Finally, with regard to Respondent s remaining arguments, Respondent raises what

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[1]Respondent also alleges that the ALJ erred in not setting aside Joint Stipulation No. 23 and that she possibly erred in her interpretation of when alternative methods of compliance can be used under 40 C.F.R. §§ 170.150 and 170.250. Respondent s Appeal at 18-21, 23-24, 26-28.

[2]To the extent that Respondent argues that the ALJ misinterpreted the ability of Respondent to use alternative means of compliance for providing decontamination materials, as set forth in § 170.250, the record shows that the ALJ did agree that alternative methods could be employed, but found that as a factual matter, Respondent s proposed alternative compliance areas also lacked the necessary decontamination supplies. *See* Initial Decision at 50-51.

appear to be several affirmative defenses, and as was the case when Respondent initially raised these defenses before the ALJ, again fails to provide factual support for any of them or show how they are in fact defenses against the ALJ s findings of liability. To the extent that Respondent argues that it is the victim of selective prosecution, Respondent still has not made even an allegation that it has been singled out based on a desire to prevent the exercise of a constitutional right, and therefore Respondent may not avail itself of such a defense. Respondent has in no way demonstrated clear error or abuse of discretion by the ALJ in her ruling on Respondent s defenses, and the Board should therefore uphold her findings in this regard.

III. SUMMARY OF THE ISSUES PRESENTED FOR REVIEW ON CROSS-APPEAL AND RELIEF SOUGHT

Complainant s cross-appeal requests a narrow clarification of one of the ALJ s holdings regarding the proper interpretation of 40 C.F.R. §§ 170.122 and 170.222, and seeks review of the ALJ s penalty assessment with regard to her failure to assess penalties for Respondent s violations of 40 C.F.R. § 170.222 and her inappropriate assessment of Respondent s culpability for penalty calculation purposes. First, Complainant asserts that the ALJ s holding with regard to pesticide applications conducted within thirty (30) minutes of one another failed to require that when the choice is made to combine multiple pesticide applications for purposes of compliance with 40 C.F.R. § 170.122(c) or § 170.222(c), the time that should be entered on the pesticide application display is the latest in time of the applications. Failure to require that the time listed be the latest application runs contrary to the intent of the regulations as embodied in 40 C.F.R. Part 170 and is underprotective of workers and handlers. Complainant requests that the EAB exercise its *de novo* authority to clarify that when an employer chooses to combine multiple

pesticide applications taking place within thirty (30) minutes or less of each other for purposes of compliance with 40 C.F.R. §§ 170.122(c) and 170.222(c), that the time listed in the display be the latest of the subject pesticide applications.

Second, Complainant requests that the EAB exercise its *de novo* review of the ALJ s penalty assessment for violations of 40 C.F.R. § 170.222 by Respondent. While the ALJ s Initial Decision found Respondent liable for sixty-eight (68) counts of violating 40 C.F.R. § 170.222, she failed to assess any penalty whatsoever for these violations. Complainant avers that this holding represents clear error or an abuse of discretion, as the ALJ s analysis lacked sufficient clarity and completely departed from EPA s July 2, 1990 Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act (hereinafter, FIFRA ERP) and September 1997 Worker Protection Standard Penalty Policy (hereinafter, WPS Penalty Policy) (together hereinafter, the relevant penalty policies) without a persuasive or convincing rationale. Because the ALJ committed clear error and/or an abuse of discretion in departing from the relevant penalty policies, Complainant respectfully requests the Board to reverse this portion of the ALJ s Initial Decision and assess an appropriate penalty under its *de novo* review authority.

Finally, Complainant asserts that the ALJ assumed facts not supported by the record and inappropriately applied mitigation factors when assessing Respondent s culpability under the relevant penalty policies. Accordingly, Complainant also respectfully requests the Board to vacate those portions of the Initial Decision and assess an appropriate penalty under its *de novo* review authority.

IV. NATURE OF THE CASE AND FACTS RELEVANT TO THIS CROSS-APPEAL

A. Inspection History

Respondent, Martex Farms, S.E., is one of the largest commercial farms in Puerto Rico, and owns several agricultural establishments on almost 3000 acres in Puerto Rico, including two establishments known as the Jauca and Coto Laurel farms. Initial Decision at 13. Martex has 300 to 400 employees, including pesticide handlers. *Id.* 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. *Id.* at 11. In 2003, Respondent s farms were inspected by the Puerto Rico Department of Agriculture (PRDA) and Respondent was found to be in violation of FIFRA and the Worker Protection Standard regulations at 40 C.F.R. Part 170. *Id.* at 16-18. PRDA issued several Notices of Violation to Respondent regarding the violations found during the 2003 inspections. *Id.*

On April 26, 2004, authorized PRDA-EPA Pesticides inspectors visited Respondent s Juaca and Coto Laurel facilities with the consent of Respondent to inspect it for compliance with FIFRA and its implementing regulations. *Id.* at 18, 24; Complainant s Hearing Exhibits (C s Exs.) 13-16; Hearing Transcript (Tr.) at 98, 102, 570, 614, 636-37, 641, 644-45, 1390. On April 26, 2004, agricultural workers and handlers were present at the Juaca facility and a handler was present at the Coto Laurel facility. Initial Decision at 18, 21, 55.

During the April 26, 2004 inspection of Respondent s Juaca facility, PRDA-EPA inspectors asked to see Respondent s pesticide application records for the facility. Respondent presented the inspectors with, among other things, handwritten records of applications of the herbicide ClearOut41 Plus (ClearOut). Initial Decision at 22. ClearOut is a registered pesticide with an EPA-approved label requiring compliance with 40 C.F.R. Part 170. C s Ex 20. When the inspectors compared the handwritten application records to the pesticide applications

records that were displayed in the central posting area (WPS Application Records), they noticed that no ClearOut applications were listed. *Id.* at 21-22. Records obtained from Respondent during a follow-up inspection in July 2004, show that between March 29, 2004, and April 26, 2004, Respondent s handlers made 151 applications of ClearOut on fields at its Juaca facility. *Id.* at 27. None of these applications of ClearOut were included in Respondent s WPS display at Respondent s Juaca facility during the April 26, 2004 inspection. Initial Decision at 22, 29-36.

On April 26, 2004, the EPA-PRDA inspectors observed that workers in a field at the Jauca facility lacked the required WPS decontamination materials of an eyeflush bottle, soap, single-use towels, and sufficient water for washing the entire body in case of emergency; they also observed that the central decontamination area for handlers as well as the Jauca facility mixing site lacked proper WPS decontamination materials. *Id.* at 18-20, 23-24, 45-51. During the inspection, Respondent was unable to show the inspectors PPE or a place to store clean clothes for handlers making the April 26, 2004 pesticide applications at the Jauca facility. *Id.* at 20-21, 51-53. Respondent s Coto Laurel facility was also found to have no place for handlers to shower or bathe, and the handler at the facility indicated that the farm had no eyeflush. *Id.* 24-26, 53-56.

B. Procedural History

On January 28, 2005, EPA filed a Complaint and Notice of Opportunity for Hearing against Martex alleging 338 counts of violations under Section 14(a) of FIFRA that took place at its Jauca and Coto Laurel farms.[3] The Complaint alleged that Respondent violated certain regulations set forth in 40 C.F.R. Part 170, and therefore violated Section 12(a)(2)(G) of FIFRA,

[3]EPA later withdrew two counts in a Second Amended Complaint (Complaint).

including: failure to display specific pesticide application information for workers, as required by 40 C.F.R. § 170.122; failure to provide decontamination supplies for workers, as required by 40 C.F.R. § 170.150; failure to provide an eyeflush bottle to workers as required by the pesticide label in violation of FIFRA § 12(a)(2)(G); failure to display specific pesticide information for handlers, as required by 40 C.F.R. § 170.222; failure to provide handlers with decontamination supplies, as required by 40 C.F.R. § 170.250; and failure to provide personal protective equipment (PPE) for handlers, as required by 40 C.F.R. § 170.240.

On July 25, 2005, EPA filed a Motion for Findings of Fact and Conclusions of Law and Complainant s Motion for Partial Accelerated Decision as to Liability (Motion for Accelerated Decision) seeking accelerated decision with regard to 334 counts of the Complaint. The Court issued its Order on Complainant s Motion for Findings of Fact and Conclusions of Law and for Partial Accelerated Decision as to Liability (Order on Accelerated Decision) on October 4, 2005, in which it granted Complainant s Motion for Accelerated Decision in part, finding Respondent liable for 124 counts.[4] Respondent sought interlocutory review of the Order on Accelerated Decision, which was denied. Initial Decision at 12-13. Hearing proceeded from October 24-28, 2005 on the remaining counts and the issue of penalty. *Id.* at 6.

On January 19, 2007, the ALJ issued an Initial Decision holding Martex liable for 170

[4]Included in the Order on Accelerated Decision was the ALJ s finding that Respondent was liable for one violation of 40 C.F.R. § 170.122 (failure to display pesticide application information for workers) and a separate violation of 40 C.F.R. § 170.222 (failure to display pesticide application information for handlers) for each failure to display information of an application of ClearOut made by one handler on a particular field at the Jauca facility on a particular day. *See* Initial Decision at 36. Remaining at issue was the question of whether 40 C.F.R.§§ 170.122 and 170.222 required the display of information regarding applications of ClearOut to a particular field on a particular day but by *different handlers. Id.*

counts of violating FIFRA, and assessed a total penalty of $92,620. Of these 170 counts, 136 were for failing to display specific pesticide application information for workers and handlers, twenty-one (21) were for failing to provide them with decontamination supplies, and the remaining thirteen (13) involved failure to provide handlers with required PPE. With regard to claims for failing to display specific pesticide application information, although the ALJ s Order on Accelerated Decision had already rejected Respondent s argument that Counts 1-151 and 154-304 were duplicative, the ALJ returned to the question of whether failure to notify workers and failure to notify handlers of pesticide information regarding the same pesticide application constituted separate, independent violations of FIFRA, and concluded:

> Clearly, the regulations, 40 C.F.R. Sections 170.122 and 170.222, set out separate duties to provide the information for workers and for handlers and thus provide for separate findings of violation.

Initial Decision at 36-45 (holding Respondent liable for additional violations of 40 C.F.R. §§ 170.122 and 170.222), 63.

When examining whether applications of the same pesticide to the same field on the same day but by *different handlers*, the ALJ determined that where the application also took place at *the same time*, i.e., where a team of handlers was applying the same pesticide to a field at a given time, these applications constituted one pesticide application for purposes of complying with requirements to provide specific application information to workers and to handlers under 40 C.F.R. §§ 170.122 and 170.222. Initial Decision at 36-39. The ALJ further concluded that a time difference of a half an hour or less between the time that individual handlers *begin* their pesticide application in a particular field does not appear to be a significant factor for determining whether there is a separate application for purposes of the WPS display. *Id.* at 39.

While the ALJ based her holding on this point in large part upon the restricted entry interval (REI) requirements of the WPS, which commence at the time an application is *ended* (*see* 40 C.F.R. § 170.5), she held Respondent liable in one instance for failing to disclose the earlier *start time* of two applications, a decision that goes against the basis of the ALJ s rationale and leaves the potential for underprotection of workers and handlers. Initial Decision at 38-39.

Having found Martex liable for 170 counts of violating FIFRA § 12(a)(2)(G), the ALJ examined the violations according to the FIFRA ERP and WPS Penalty Policy for determining penalty amounts per violation. With regard to the sixty-eight (68) counts of violating WPS § 170.222 - failing to display specific pesticide application information for handlers - for which she had already determined both in her Order on Accelerated Decision and in the Initial Decision to constitute separate violations of FIFRA, the ALJ rejected Complainant s request to assess separate penalties for these counts in a complete departure from the relevant penalty policies. The ALJ stated that while violations of § 170.122 and § 170.222 were separate violations as a legal matter, they were dependent in the circumstances of this case . . . because Respondent employs a single pesticide information display for both workers and handlers. *Id.* at 63. She further held that there was no significantly increased risk of exposure, harm to human health, or harm to the WPS program from Martex failure to notify the handlers of the pesticide applications. *Id.* She therefore found that it was not appropriate to assess a second penalty under Section 170.222 for each application. *Id.*

Although the ALJ reviewed the remaining counts within the framework of the relevant penalty policies, with regard to the gravity factor of culpability, the ALJ mitigated Respondent s culpability under the WPS Penalty Policy based on statements by Respondent that it had

corrected the problems at issue and would prevent them from recurring, and facts not supported by the record regarding Respondent s subsequent compliance with the WPS. The ALJ held that Respondent was negligent but took steps to prevent the violation from recurring, and mitigated Respondent s level of culpability across her entire penalty assessment. Initial Decision at 65, 67, 69, 71.

V. STANDARD OF REVIEW

Under the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation /Termination or Suspension of Permits (CROP), any party may appeal an adverse order or ruling of the Presiding Officer by submitting an appeal to the EAB within 30 days of service of the Initial Decision. 40 C.F.R. § 22.30(a). The EAB s authority to review the factual and legal conclusions of the Presiding Officer is *de novo*. *See* 40 C.F.R. § 22.30(f) (The EAB has authority to adopt, modify, or set aside the findings of fact and conclusions of law or discretion contained in the decision or order being reviewed); *In re Billy Yee*, 10 E.A.D. 1, 10 (EAB 2001). However, the EAB has stated that it will generally give deference to findings of fact based upon the testimony of witnesses because the Presiding Officer is in a position to assess their credibility. *In re: Chippewa Hazardous Waste, Remediation & Energy, Inc., d/b/a, Chippewa Hazardous Waste, Inc.* CAA Appeal No. 04-02, slip op. at 15 (EAB, Sept. 30, 2005) 12 E.A.D. _. When reviewing questions of liability, the EAB applies the preponderance of the evidence standard established by 40 C.F.R. § 22.24(b), which requires that a fact finder should believe that his factual conclusion is more likely than not. *See In re The Bullen Companies*, Inc., 9 E.A.D. 620, 632 (EAB, Feb. 1, 2001); *In re Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 522, 530 (EAB 1998).

With regard to penalty assessments, the CROP provides that the ALJ must determine the amount of the recommended civil penalty based on the evidence in the record and in accordance with any penalty criteria set forth in the Act. 40 C.F.R. § 22.27(b). An ALJ must also consider any civil penalty guidelines issued under the Act, and, if he or she decides to assess a penalty different in amount from the penalty proposed by the Complainant, . . . set forth in the initial decision the specific reasons for the increase or decrease. *Id*. The EAB generally views penalty policies such as the FIFRA ERP and WPS Penalty Policy to be useful mechanisms for ensuring consistency among civil penalty assessments by facilitating the application of statutory penalty criteria. *In re William E. Comley, Inc. & Bleach Tek, Inc.,* 11 E.A.D. 247, 262 (EAB 2004); *In re Chempace Corp.,* 9 E.A.D. 119, 131 (EAB 2000). The Board has also held that an ALJ may consider equality and fairness as a basis for penalty determination under FIFRA. *In re Johnson Pac. Inc.*, 5 E.A.D. 696, 704 (EAB 1995).

The Board s decisions have established that once an ALJ has seriously considered the penalty policy, the ALJ is not bound to follow it. *In re FRM Chem, Inc., a/k/a Industrial Specialties*, FIFRA Appeal No. 05-01, 12 E.A.D. ___, slip op. at 19 (EAB, June 13, 2006) (citations omitted). The Board has stated that an ALJ is free to disregard a penalty policy if reasons for doing so are set forth in the Initial Decision. *Id*. An ALJ s freedom to depart from the framework of a Penalty Policy preserves an ALJ s discretion to handle individual cases fairly where circumstances indicate that the penalty suggested by the Penalty Policy is not appropriate. *See FRM*, slip op. at 19 (citing *In re Employers Ins. of Wausau*, 6 E.A.D. 735, 759 (EAB 1997)). In appeals seeking review of the assessed penalty, the Board will generally defer to an ALJ s penalty determination if it falls within the range of an applicable Penalty Policy absent a

showing that the ALJ has committed an abuse of discretion or clear error. *Id.*

VI. ARGUMENT IN RESPONSE TO RESPONDENT S APPEAL

A. Complainant Met its Burden of Proof Regarding Liability

Respondent challenges the ALJ s findings of liability on all counts of the Complaint for the same reasons articulated before the ALJ in the earlier proceedings. The EAB considers an appeal of liability based on the preponderance of the evidence in the record. *In re Friedman*, 11 E.A.D. 302, 314-15 (EAB 2004). When reviewing an ALJ's conclusions with respect to the factual issues raised, the EAB focuses on whether each "'factual conclusion is more likely than not.'" *In re: Chippewa Hazardous Waste,* slip op. at 15 (citations omitted); *In re Great Lakes Div. of Nat'l Steel Corp*., 5 E.A.D. 355, 363 n.20 (EAB 1994) (explaining that the preponderance of the evidence means that a fact is more probably true than untrue). While the burden to prove liability in this case rests initially with Complainant, once it has established a *prima facie* case, that burden switches to Respondent to rebut. *Chippewa*, slip op. at 25 (citing *In re New Waterbury, Ltd.* 5 E.A.D. 529, 538-39 (EAB 1994)).

In its Appeal Brief, Respondent reviews the testimony presented at hearing and appears to argue that Complainant has failed to meet its burden regarding liability for the Counts alleged in the Complaint on the following grounds: Complainant failed to demonstrate that Respondent s WPS records on display on April 26, 2004, contained no applications of ClearOut; there was sufficient water at the JC-11 field to meet the eyeflush requirement of the Kocide 101 label and no need for a separate eyeflush container; all the necessary WPS decontamination supplies were in its farm manager s truck during the April 26, 2004 inspection of Respondent s Jauca facility; Complainant has not shown that the central decontamination area is more than 1/4 mile from the

workers in the JC-11 field; Respondent s lake and fruit washing station at the Jauca facility served as alternative decontamination sites; because Complainant s inspectors did not see applications of pesticides take place on April 26, 2004, they cannot be held liable for failure to provide handlers with decontamination supplies or PPE; and Respondent had several alternative decontamination sites at Coto Laurel that would have met WPS requirements for the April 20 and April 21, 2004 applications of Kocide 101 at that facility.

i. Respondent Is Liable for Violations of 40 C.F.R. § 170.122 As Assessed By the ALJ

Respondent challenges its liability with regard to Counts 1-151 on the following bases: (a) Respondent s records on April 26, 2004, *did*, in fact, contain ClearOut applications for the 30-day period preceding that date; and (b) the ALJ improperly relied on Stipulation 23 in her finding on this point.

a. *Complainant demonstrated by a preponderance of the evidence that the WPS records on display for workers and for handlers on April 26, 2004, contained no pesticide application information pertaining to applications of ClearOut at the Jauca facility.*

Because Respondent admitted to the facts substantiating the remaining elements of liability regarding Counts 1-151,[5] Respondent was held liable for many of the alleged violations of 40 C.F.R. § 170.122 as a matter of law. *See* Order on Accelerated Decision at 7-14. Questions of liability at trial focused on whether certain of these counts were duplicative of others. Initial Decision at 11. Respondent insisted repeatedly, in motions opposing Complainant s Motion on

[5]Namely that workers were on its establishment on April 26, 2004, that within the prior 30 days Respondent s handlers had made applications of ClearOut at that establishment, and that ClearOut requires compliance with FIFRA and the WPS. *See* Joint Prehearing Stipulations (Stipulations) 20, 22, 24, 25, 30, 31; Answer to the Second Amended Complaint (Answer), ¶ 56; Initial Decision at 11.

Accelerated Decision, in its requests for reconsideration of the ALJ s Order on Accelerated Decision, and on the first day of hearing, that the ALJ should not consider its own stipulation that [o]n 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 Jauca facility. Stipulations ¶ 23; Tr. at 37-40. In fact, counsel for Respondent stated on the record:

> THE COURT: . . . So in regard to stipulation 23, are you alleging that it is an erroneous fact, you cannot stipulate to its accuracy because it is false?
> MR. SANTIAGO: I think what happened is that the drafting of the stipulation is what s causing the problem, basically . . . . Well, there were applications for ClearOut 41 Plus posted on April 26, just the two applications on that day were not posted. Prior applications were posted. That s the problem. It says, no application ; that s what s causing the problem.
> THE COURT: Okay.
> MR. SANTIAGO: *And the evidence will show that.*

Tr. at 37-38 (emphasis added).

However, despite five days of hearing, half of which consisted of testimony by Respondent s own witnesses, Respondent failed to provide one shred of evidence to support its assertion. Respondent s witness and co-owner Venancio Marti, Sr. did not provide any such testimony, and admitted that he was not there during the April 26, 2004 inspection of the Jauca facility. Tr. at 1374. Respondent s witness and co-owner Venancio Marti, Jr. provided lengthy testimony as to how Respondent s records are generally compiled (*Id*. at 1553-59), but even he admits that not only did he not see the WPS records on display on April 26, 2004, but that when Respondent reviewed its recordkeeping/reporting procedures after this inspection that they found the possibility of certain loopholes. *Id.* at 1560. Mr. Marti, Jr. acknowledged for the record that it was indeed possible that for some reason the WPS records covering the prior 30 days of applications at Respondent s establishment did not include applications of ClearOut

41 Plus. *Id.* at 1565. Finally, Respondent s witness and farm manager, Mr. Alvaro Acosta, who avoided directly answering the question of whether such applications were anywhere on display that day for so long as to be deemed nonresponsive by the ALJ, was careful *not* to say that he *did* see any such applications, and finally confessed that he didn t see the binder [containing the WPS posting of the prior 30 days of pesticide applications at the Jauca facility] way over there on display. And it wasn t brought to the office, so I didn t see [it.] *Id.* at 1880-86.

Complainant s witnesses, Inspector Roberto Rivera and Ms. Tara Masters-Glynn, were clear on this point, however. Both stated that they reviewed the entire set of WPS postings of pesticide applications on display at the Jauca facility central posting area for workers and handlers, and that neither the bulletin board, which had applications for that day, nor the binder, which contained the prior 30-plus days of pesticide applications at Jauca, contained a single entry for the herbicide ClearOut 41 Plus. Tr. at 294-96, 413, 541, 547, 594-601, 642-643. In fact, Inspector Rivera stated that he asked Mr. Acosta to explain the discrepancy between Martex internal spray records, which had some applications of ClearOut listed and the WPS records on display for workers, which did not, and was told by Mr. Acosta that it was not Respondent s practice at the time to include herbicides in the WPS posting. *Id.* at 295-296. This testimony is corroborated by Mr. Acosta, who stated:

> at the moment the [WPS display records were] requested, the *herbicide did not appear in the report.* And I said it was because the herbicide was applied during the day. And I went into all that. And I explained it. I explained the programming that it has, the way it s registered and documented, that it s very different from [other types of pesticide applications that are] done at night.

Id. at 1805.

Inspector Rivera also testified that at the end of the April 26, 2004 inspection, he drafted

an affidavit listing all his inspection findings, including the failure to include the herbicide applications of ClearOut in the WPS postings on display for workers at the Jauca farm. *Id*. at 302. He further testified that he went over this affidavit with Mr. Acosta, that he asked Mr. Acosta to review the affidavit, and that if he was in agreement with the contents of the affidavit then he could sign it, and if he was not in agreement, to let him know of anything he disagreed with. *Id.* at 302-303. Inspector Rivera testified that Mr. Acosta reviewed the affidavit, offered no changes, and signed it. *Id.* Ms. Masters-Glynn corroborated this account. *Id.* at 599. Even Mr. Acosta admitted that he read and signed the affidavit stating that no herbicide applications were included in the WPS posting on display in the central area for workers on April 26, 2004. C s Exs. 13.a at 4-7,13.c at 67; Tr. at 1899. He also admits that he did not ask for changes to the text of that affidavit because, in his words, I was going to work the next morning on why on the reasons for the irregularities that were being presented to us. Tr. at 1887-88.

The evidence presented at hearing supported the ALJ s conclusion that no specific information regarding applications of ClearOut was provided to workers at the Jauca facility on April 26, 2004. Initial Decision at 36. In light of this evidence, and in light of the earlier findings made by this ALJ in her Order on Accelerated Decision, Complainant met its burden of persuasion regarding Respondent s violations of 40 C.F.R. § 170.122.

b. *The ALJ did not improperly rely on Stipulation 23.*

Respondent argues that Joint Stipulation Number 23[6] makes no sense, is erroneous, plainly and factually wrong, unreliable and in total contradiction to the reality, particularly when

[6]Stipulation 23 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.

compared to Complainant s Exhibit No. 21.b and its non identical translation marked as Complainant s Exhibit No. 21.c. Respondent s Appeal at 18. Respondent claims that the ALJ s reliance on it is clear error. *Id.*

The ALJ gave repeated and exhaustive attention to Respondent s argument on this point, through several motions by Respondent, at hearing, and in her Initial Decision.[7] That the ALJ erred in her reliance on Stipulation 23 is belied not only on her thoughtful and lengthy opinion on the merits of Respondent s argument (*see* Initial Decision at 30-33) but by the fact that despite having denied Respondent s request to set aside Stipulation 23 twice already,[8] she nonetheless permitted Respondent to present evidence at hearing to support its contention that the records as set forth in C s Ex. 21.b[9] were, as a matter of fact, on display during the April 26, 2004 inspection of Respondent s Jauca facility. Respondent had every opportunity to prove that it did in fact display information regarding applications of ClearOut, but failed to prove the essential element: that the records Respondent points to as evidence of its compliance with 40 C.F.R. § 170.122 (as embodied in C s Ex. 21.b) *were*, in fact, *on display* during the April 26, 2004 inspection of Respondent s Jauca facility. Initial Decision at 34-36. The ALJ s finding on this

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[7]*See* Order Denying Respondent s Motion Requesting Recommendation for Interlocutory Review of Order on Accelerated Decision at 8; Order on Respondent s Motion Requesting Recommendation of Interlocutory Review of Prior Orders Denying Such Same Relief, and/or for Reconsideration, and to Set-Aside Joint Stipulation at 2-3; Tr. at 37-41, 62; Initial Decision at 29-36.

[8]*Id.*

[9]Respondent s attempt to make an issue of minor mistakes in the English translation attached as C s Ex 21.c is unavailing: all parties agreed, including the ALJ, that where there were differences between the English and Spanish versions, the Spanish version - C s Ex. 21.b - would control. Tr. at 16-18.

point did not rest solely on Stipulation 23, but rather on the conclusion that Complainant had demonstrated by a preponderance of the evidence - even without consideration of Stipulation 23 - that the WPS pesticide application records on display at Respondent s Jauca facility on April 26, 2004 did not include *any* applications of ClearOut whatsoever. *Id.* at 36. There was thus no error on the part of the ALJ and the EAB should uphold her findings regarding Respondent s legal liability for Counts 1-151 of the Complaint.

ii. Respondent is Liable for Violations of 40 C.F.R. § 170.150 As Assessed by the ALJ

Respondent argues that the ALJ s holding with regard to Counts 152-153, which allege Respondent violated FIFRA § 12(a)(2)(G) and 40 C.F.R. § 170.150 by failing to supply its workers in the Jauca JC-11 field with required WPS and label-specific decontamination materials, should be vacated because: (a) Respondent had applied the relevant pesticide, Kocide 101, five days earlier and that under prevalent ambient conditions that promote pesticide loss, a 5-day safe time frame for a worker to enter a field that has been treated with Kocide may be as safe as the 7-day FIFRA requirement; (b) all necessary decontamination supplies were on site at the time; (c) that additional alternative water sources were within 1/4 mile of the workers in violation of its own WPS policies. Respondent s Appeal at 21-25. However, none of these arguments are supported in fact or in law and the ALJ s Initial Decision should be upheld with regard to Counts 152 and 153.

a. *A 5-day safe time frame is not permitted by the Kocide label.*

Respondent raises its 5-days is as safe as 7-days argument for the first time on appeal,

and therefore is barred from raising such a defense at this stage.[10] In any event, Respondent s argument regarding the safe time clearly fails on its merits.

As a threshold matter, the Kocide pesticide label in question is unequivocal regarding the requirement that an eyeflush bottle be provided to workers coming into contact with plants within seven days of its application.[11] Respondent s argument that a 5-day safe time frame for a worker to enter a field that has been treated with Kocide may be as safe as the 7-day FIFRA requirement is neither supported by evidence according to Respondent s own terms[12], nor in any way relevant to a finding of whether Respondent followed the Kocide label instructions, as required by law.[13] As such, Respondent s argument utterly fails to demonstrate clear error on the part of the ALJ.[14]

b. *Complainant established by a preponderance of the evidence that Respondent lacked the necessary decontamination materials for its workers in the JC-11 field*

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[10]Respondents are barred from raising on new defenses for the first time on appeal. Nothing anywhere in this record even makes the slightest indication of Respondent s purported argument and therefore consideration of it at this point should be barred. *In re Woodcrest Mfg., Inc.*, 7 E.A.D. 757, 764 (EAB 1998).

[11]*See* C s Ex 20 at 5.

[12]I.e., Respondent has not shown that as a factual matter there was rain at the Jauca facility in the prior 5 days or, more importantly, that the Kocide in the JC-11 field had, in fact, broken down.

[13]As testified to repeatedly by Complainant s expert witness on pesticide labeling, under FIFRA, *the label is the law*. Tr. at 659, 693; *see also* S. Rep. 92-838 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3993, 3993, 3995, 4008, 4012 (1972) (stating labels will indicate prohibited uses).

[14]Respondent already admitted to all the elements of Count 153, on which liability was found by the ALJ as a matter of law in her Order on Accelerated Decision. *See* Stipulations 25, 27, 28, 29; Initial Decision at 12. In light of Respondent s Stipulations, liability on Count 153 should be upheld.

As Respondent admitted to facts supporting the other legal elements regarding Complainant s alleged violations of FIFRA § 12(a)(2)(G) and 40 C.F.R. § 170.150,[15] the only remaining issue with regard to Count 152 to be determined at hearing was whether the required WPS decontamination supplies (soap, water, and single-use towels) were located together and within 1/4 mile of the workers in the JC-11 field on April 26, 2004. Complainant showed by a preponderance of the evidence that Respondent had not, in fact, provided such decontamination materials and thus the ALJ s findings of legal liability on these Counts should be upheld.

Inspector Rivera testified that on April 26, 2004, he interviewed workers harvesting mangoes in the JC-11 field. Tr. at 267. He stated that he was inspecting to see whether they had decontamination supplies and testified that there were no decontamination supplies in the field. *Id.* at 268. Inspector Rivera s inspection report from the April 26, 2004 inspection also confirms this. C s Ex. 13 at 4. Ms. Masters-Glynn testimony corroborates that there were no decontamination supplies no water, no soap, and no paper towels for the workers in the JC-11 field. Tr. at 583. Both Inspector Rivera and Ms. Masters-Glynn stated that the closest decontamination supplies for those workers would have been at the main decontamination site next to the Jauca workshop. *Id.* at 268, 584. However both Inspector Rivera and Ms. Masters-Glynn testified that even at the main decontamination site there were no single-use towels or clean towels. *Id.* at 264, 584. Furthermore, the JC-11 field is well over 1/4 mile away from the main decontamination site. C s Ex. 31; Tr. at 269, 282-284.

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[15]Namely that on April 26, 2004, there were workers at Respondent s facility coming into contact with anything treated with a pesticide requiring compliance with FIFRA and the WPS within the prior 30 days. 40 C.F.R. § 170.150(a)(1); Stipulations 22, 25, 27.

Respondent provided no credible evidence to refute this testimony. Mr. Marti, Jr., who provided some testimony regarding purchases of decontamination materials, never said that he knew for a fact whether any of those items were made available to Martex workers in the JC-11 field on April 26, 2004, since he was not present at any of the inspections. Tr. at 1538. In fact, he testified that while the practice *now* is to have supervisors carry all necessary decontamination supplies in their trucks, that [i]n the past I cannot tell you that all of them had them. Tr. at 1508.

The only evidence presented to the ALJ regarding whether decontamination supplies were *actually available* to workers in the JC-11 field came from Mr. Acosta, who testified that he had decontamination supplies including water, soap, and single-use towels in his pickup truck on April 26, 2004.[16] Tr. at 1758-59. However, Mr. Acosta acknowledges that despite being asked by the inspectors to show them decontamination supplies on April 26, 2004, he did not show the inspectors these decontamination supplies, even though Mr. Acosta also testified that he has read the WPS requirements and understands that decontamination supplies are required to be provided to workers within 1/4 mile. Tr. at 1843, 1866, 1875. Mr. Acosta also stated that he was present at the September 2003 WPS inspection of the Jauca facility, where inspectors had also checked to ensure that workers in the fields had decontamination supplies. *Id.* at 1855. He acknowledged that during the September 2003 inspection there were also irregularities regarding

[16]An important point here is that even if Respondent were able to show that Mr. Acosta had decontamination supplies in his truck, he was taking the inspectors with him around the farm on April 26, 2004, and thus Respondent has not shown that its workers in the JC-11 field who were already present and working in the field when Mr. Acosta and the inspectors arrived, had the necessary decontamination supplies prior to Mr. Acosta s arrival and after his departure, as required by 40 C.F.R. § 170.150.

decontamination supplies for workers in the fields. *Id.* *See also* C s Ex. 10, 10.c. Mr. Acosta also acknowledged, as discussed above, that he signed an affidavit on April 26, 2004, stating that there were no decontamination supplies for workers in the field, and did not ask for changes to be made to that affidavit. Tr. at 1886-88. Mr. Acosta s allegation, therefore, that such decontamination supplies were there but he just chose not to show them to the inspectors should not be given any weight by the Board.

The ALJ examined all the evidence presented by Respondent in a light most favorable to it and found that even if Mr. Acosta s assertion were taken as true (that he had the relevant decontamination supplies in his truck), there was no testimony from anyone that there were disposable towels, soap, an eyeflush container specifically designed for flushing eyes, and water *in sufficient amounts*[17] for routine washing and emergency eyeflushing located together and within 1/4 mile of the workers in the JC-11 field on April 26, 2004. Complainant has shown by a preponderance of the evidence that decontamination supplies, as required by 40 C.F.R. § 170.150, were not made available within 1/4 mile of the workers in the JC-11 field on April 26, 2004, and the ALJ s findings regarding liability on these counts should be upheld.

c. *Respondent does not qualify for the use of alternative decontamination sites by the plain language of the statute and Complainant s Interpretive Guidance*

Respondent points repeatedly to the availability of alternative water sources all over its Jauca facility, to support its claim that it did have the requisite decontamination supplies.

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[17]At best, Respondent was able to show that it had 5 gallons of *drinking water* available for workers in the field. Yet Complainant established that the bare minimum amount of water required for decontamination purposes under the Kocide label was 6-8 gallons. Initial Decision at 47-48.

Respondent also condemns Complainant for its supposed failure to follow its own *Agricultural Worker Protection Standard 40 CFR Parts 156 & 170 Interpretive Policy*[18] (hereinafter Interpretive Guidance) or to educate Respondent in this Interpretive Guidance. Respondent s Appeal at 22-25. While Respondent presented evidence that the fruit washing station may have had water on April 26, 2004, it has demonstrated neither that there was soap and single-use towels at those stations either then or now, nor that the fruit washing station is within 1/4 mile of the JC-11 field. As section 170.150 of the WPS requires that all of the decontamination supplies be located together and within 1/4 mile of workers, the presence of water at the fruit washing station - or at a lake or anywhere else - without more, is irrelevant.

Furthermore, Respondent s attempt to use alternative sources of water for decontamination is unjustified, as section 170.150(c)(ii) only allows the use of clean water from springs, streams, lakes, or other sources for decontamination *if such source is closer than the nearest point of vehicular access.* 40 C.F.R. § 170.150(c)(ii). Respondent has never argued, much less demonstrated, that any of the proposed alternative sources of water are in fact closer than the nearest point of vehicular access for any of its fields. Thus, as a threshold matter, Respondent is barred from using the fruit washing station as an alternative water source for workers in the JC-11 field. *See also* Initial Decision at 45. The ALJ s decision on Respondent s liability as a factual and legal matter on this point should therefore also be upheld.

iii. Respondent is Liable for Violations of 40 C.F.R. § 170.222 As Assessed By the ALJ

[18]This policy can be found on the internet at http://www.epa.gov/pesticides/safety/workers/wpsinterpolicy.htm

Because it had admitted the other elements of legal liability,[19] like the discussion *supra* with regard to Respondent s violations of 40 C.F.R. § 170.122, the only remaining issue at hearing with regard to Counts 154-304 of its Complaint was whether Respondent provided specific information to handlers of *any* of the prior 30 days worth of applications of the pesticide ClearOut 41 Plus to the Jauca facility fields.

Respondent only maintains one central WPS posting area for purposes of displaying pesticide application information for workers and for handlers. Tr. at 396-97, 575, 818-819. Because the fact at issue at hearing and on appeal (i.e., whether applications of ClearOut were included in Respondent s central display area for workers and handlers) and Respondent s arguments on this issue are essentially identical[20] to those set forth Part V.A.1, *supra*, Complainant will refrain from reiterating the same points here, but incorporates them by reference. The evidence presented at hearing supported the ALJ s conclusion that no specific information regarding the applications of ClearOut at issue was provided to handlers at the Jauca facility on April 26, 2004. In light of this evidence, and in light of the earlier findings discussed above, the ALJ s findings with regard to Respondent s legal liability for violations of 40 C.F.R. § 170.222 should be upheld by the Board.

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[19]Namely, that on April 26, 2004, Respondent s handlers were present at the Jauca facility, and there had been pesticide applications of ClearOut at the facility within the prior 30 days, and ClearOut requires compliance with FIFRA and the WPS. *See* 40 C.F.R. § 170.222; Stipulations 22, 23, 24; Answer ¶ 69, 71.

[20]With the exception of whether handlers were at the Jauca facility on April 26, 2004, and whether Respondent is a handler employer, both of which points were admitted by Respondent. Answer ¶ 69; Stipulation 8.

iv. Respondent is Liable for Violations of 40 C.F.R. § 170.250 As Assessed By the ALJ

Respondent alleges that it is not liable for failure to provide its handlers with decontamination supplies for the pesticide applications conducted by them on April 26, 2004, as required by 40 C.F.R. § 170.250 and that the ALJ s findings on Counts 305-307 and 310-314 should be vacated. Respondent argues: that Complainant failed to show that the fields where the applications in question were taking place were more than 1/4 mile away from the main decontamination site and the mixing site; that eight of the sites were within 1/4 mile of the mixing site or the fruit washing station; that the ALJ improperly relied on testimony from Complainant s witness that water coming from a faucet of a sink or jug of water is insufficient to wash the entire body; and that while a few fields were at a greater than the 1/4 mile requirement, they only violated storage requirements, and requests that the EAB see if the EPA s [Interpretive Guidance] allows for a FIFRA reasonable alternative compliance method. Respondent s Appeal at 28. Respondent has shown no clear error on the part of the ALJ s findings of fact on this matter or her conclusion that EPA proved Respondent s violations of section 170.150 by a preponderance of the evidence, and the Board should uphold the ALJ s finding.

a. *Complainant demonstrated Respondent s violations of 40 C.F.R. § 170.250 by a preponderance of the evidence.*

Because Respondent admitted to facts supporting all other elements of legal liability with regard to Complainant s allegations that Respondent failed to provide its handlers with

decontamination supplies as required by 40 C.F.R. § 170.250,[21] the only remaining issue at hearing with regard to Counts 305-321 of the Complaint was whether or not, on April 26, 2004, Respondent actually provided decontamination supplies to its handlers as required by 40 C.F.R. § 170.250. Section 170.250 of the WPS requires that the handler employer shall provide for handlers, in accordance with this section, decontamination supplies for washing off pesticides and pesticide residues. 40 C.F.R. § 170.250(a). The WPS then specifies that the following supplies are required: (1) enough water for routine washing, for emergency eyeflushing, and for washing the entire body in case of an emergency; (2) soap and single-use towels in quantities sufficient to meet handlers needs; and (3) one clean change of clothing, such as coveralls, for use in an emergency. 40 C.F.R. § 170.250(b). The WPS states that the supplies shall be *located together* and be reasonably accessible. . . 40 C.F.R. § 170.250(c) (emphasis added). It also requires that [f]or mixing activities, decontamination supplies *shall be at* the mixing site. *Id.* Finally, in addition to the above requirements, section 170.250 also requires that [a]t the end of any exposure period, the handler employer shall provide at the site where handlers remove personal protective equipment, soap, clean towels, and a sufficient amount of water so that the handlers may wash thoroughly. 40 C.F.R. § 170.250(e). The handler employer, to be in compliance with section 170.250 must meet *all* of these requirements. Thus, if Respondent used a registered pesticide referencing the WPS and that for that use it failed to meet *any* of the requirements set forth in section 170.250, such failure would constitute a violation of FIFRA § 12(a)(2)(G).

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[21]Namely, that on April 26, 2004, Respondent s handlers were conducting handling activities involving pesticides requiring compliance with FIFRA and the WPS. *See* Answer, ¶ 81; Stipulations 22, 24, 25, 26, 30, 31.

The record demonstrates unequivocally that Complainant met its burden with respect to Counts 305-321 of the Complaint. As discussed in the Order on Accelerated Decision, Respondent had already admitted that its handlers made each of the seventeen alleged pesticide applications listed in paragraph 81 of the Complaint and that each of those pesticides had a label requiring compliance with the WPS. Answer, ¶ 81; C s Exs. 17-20. At hearing, Inspector Rivera and Ms. Masters-Glynn both testified that there were no clean towels at the decontamination site where handlers remove PPE. Tr. at. 264-265, 576-577; *see also* C s Ex. 13 at 4. Nor did any of Respondent s witnesses contest this fact. Mr. Marti, Jr. even admits this as fact but points out helpfully that Mr. Acosta went out and purchased a single towel [22] after the inspection. Tr. at 1579-80. Mr. Acosta differs somewhat in when he supposedly purchased the towel, which he claims he was going to do the day after the inspection, but does not dispute the absence of clean towels from the decontamination site in the first place. Tr. at 1796, 1887, 1900. Although Mr. Marti, Jr. testified that handlers *supervisors* often had decontamination supplies in their trucks, he never offered testimony that there were *clean* towels as required by section 170.250 in those trucks, only that there were paper towels. Tr. at 1506. Complainant presented considerable evidence that clean towels referred to in section 170.250(e) are not disposable towels - the term refers to cloth towels used after a shower. Tr. at 551-552, 915-917. Nor was there any evidence presented anywhere by Respondent that the practice of its handler supervisors was to take the bag of decontamination supplies from their truck with them into the post-application

[22] As the records indicate that on April 26, 2004, more than one handler made these seventeen applications, one single towel to presumably be shared among the seven different handlers making those applications (*see* C. s Exs. 21.b and 21.c, pp. 105-108) would still not constitute compliance with this requirement. *See* Tr. at 916.

decontamination site.[23] Because this omission alone was sufficient to demonstrate Respondent s failure to comply for each of the seventeen violations of section 170.250 as alleged by Complainant, the ALJ was clearly correct in holding Respondent liable for Counts 305-321. Initial Decision at 51.

Complainant also notes that while the lack of clean towels at the decontamination site for handlers is sufficient to meet Complainant s burden with respect to proving Counts 305-321, Respondent also failed to provide decontamination supplies to its handlers at the mixing site, as required by 40 C.F.R. § 170.250(c)(1). As testified to by Inspector Rivera and Ms. Masters-Glynn, their inspection of Respondent s mixing site showed that inside a locked box at the site, there was a glove, a set of coveralls with a dirty mixing cup atop them, and a first aid box, but there was no soap, no single-use towels, and no clean change of clothing. Tr. at 286-288; 586-587. While Respondent alleges that handlers supervisor[24] had decontamination supplies in their trucks, the language of section 170.250(c)(1) requires these supplies to be located *at the mixing site*. Respondent provided no evidence to demonstrate that its handlers had their supervisors trucks with them when mixing pesticides at the mixing site on April 26, 2004, and that the handlers in fact took their bag of decontamination supplies out of the truck and kept it with them *at the mixing site* when mixing chemicals on April 26, 2004. Respondent thus failed to rebut Complainant s *prima facie* evidence of failure to comply with section 170.250(c)(1).

Additionally, were the Board to accept Respondent s argument that each of its handlers

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[23]At one point, Mr. Acosta testifies that *mechanics* at its Jauca facility have their own towels, but doesn t discuss handlers. Tr. at 1789.

[24]The record shows that there was only one handler supervisor for pesticide spraying activities. Tr. at 1507.

had decontamination supplies within 1/4 mile of where they were applying pesticides,[25] Respondent s assertion was that the handlers carry five-gallons of water with them. Tr. at 1506. Yet, as Complainant s witness, Yvette Hopkins, testified, for each of the pesticides applied on April 26, 2004, five gallons of water would be insufficient to meet the emergency eyewashing requirements set forth on the label.[26] Tr. at 683. Although Respondent presents many arguments about the proximity of some of the fields to alternative water sources such as the mixing site, a lake on the property, and the fruit washing station, Respondent s attempt to use alternative sources of water for decontamination is unjustified, as section 170.250(c)(ii) only allows the use clean water from springs, streams, lakes, or other sources for decontamination if such source is closer than the nearest point of vehicular access. 40 C.F.R. § 170.150(c)(ii). Respondent has not shown that any of the proposed alternative sources of water are in fact closer than the nearest point of vehicular access for any of its fields. Nor has Respondent shown that all of these alternative water sources clean, as required by the WPS. As Complainant s expert witness, Dr. Adrian Enache, the manager of pesticide programs for U.S. EPA Region II, testified, due to the

[25]This is itself an unlikely proposition given Respondent s application records, which indicate that on April 26, 2004, Kocide was being applied to fields JC-31 and TX-21 at 4:50 pm that day. C s Ex. 21.b at 105-108. As the ALJ points out, Respondent presented no evidence that the handler supervisor s truck was located in a position close enough to the fruit washing station, mixing area, workshop or lake that the water and other supplies could be considered located together and within 1/4 mile of the handlers conducting these applications. Initial Decision at 51.

[26]Respondent assumes the ALJ based her decision upon Complainant s witness Dr. Enache s testimony that water from a faucet or sink could not give one a thorough body wash. Respondent s Appeal at 27. Yet, as discussed here and by the ALJ, regardless of whether the water was of significant force, the fact is that assuming there even was water with the handlers, the five-gallon jug was an insufficient amount to even properly rinse a handler s eyes in case of contact with a pesticide. Tr. at 683, 686, 689; Initial Decision at 51.

risk of pesticide contamination, he would not consider water coming from any of Respondent s proposed alternative water sources to be compliant with WPS requirements without prior testing of the water. Tr. at 895, *see also* Tr. 603-605. Even Respondent s co-owner did not think that water coming from its lake would necessarily be clean. *Id.* at 1470-71. Its other co-owner could not verify that well-water feeding the other areas was always available. *Id.* at 1322.

Thus, even in the light most favorable to Respondent, in which all of its arguments are assumed to be true, Respondent still fails to present evidence showing full compliance with 40 C.F.R. § 170.250. Complainant proved by a preponderance of the evidence that Respondent failed to provide its handlers with the decontamination materials required by section 170.250 and the pesticide labels in question. The ALJ was thus correct to hold Respondent liable for Counts 305-321, and the Board should uphold this finding on appeal.

v. Respondent is Liable for Violations of 40 C.F.R. § 170.240 As Assessed By the ALJ

Respondent argues that Counts 322-334 should be vacated because Complainant s inspectors did not observe handlers on April 26, 2004, and that consequently, if the inspectors did not find PPE, this was probably due to the fact that handlers were actually wearing it while applying pesticides, or that they had retrieved the equipment before the applications of chemicals was scheduled to commence. Respondent s Appeal at 29. Complainant, however, demonstrated at hearing that Respondent s handlers were *not* conducting pesticide applications during the time of inspection and thus should have been able to produce PPE for inspection. Initial Decision at 52-53. The ALJ agreed with this point and held that since Respondent was not able to present PPE for inspection, it was in violation of the WPS requirements regarding the

provision of PPE and its cleaning and storage on April 26, 2004, a finding which the Board should uphold.

a. *Complainant demonstrated by a preponderance of the evidence that respondent did not provide proper PPE or storage areas, as required by 40 C.F.R. § 170.240.*

Because Respondent admitted facts relating to the other elements of liability for 170.240,[27] the only remaining issues with regard to Counts 322-334 of its Complaint at hearing was whether Respondent actually provided the appropriate PPE to its handlers and met the other PPE requirements required by the pesticide labels and the WPS.

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. C. Ex. No. 20. The Kocide 101 label states that applicators and 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. C s Ex. 18. The Boa label states that applicators and handlers must wear the following PPE: long-sleeved shirt and long pants; shoes plus socks; chemical resistant gloves; protective eyewear, and a National Institute of Occupational Safety and Health-approved dust/mist respirator with any N, R, P, or HE filter. C s Ex. 17. The label also requires that those mixing and/or loading Boa must wear a face shield and chemical-resistant apron in addition to the above-mentioned PPE. *Id*. Thus, Respondent was required to provide the required PPE for handlers when they applied the pesticides listed in paragraph 97 of the Complaint. 40 C.F.R.

[27]Namely, Respondent admits that its handlers applied pesticides on April 26, 2004, which labels required compliance with 40 C.F.R. § 170.240. Answer ¶ 94, 97; Stipulations 22, 24, 26, 30-34.

§ 170.240(c).

Respondent did not deny in its Answer that on April 26, 2004, Respondent was unable to show the inspectors that it had protective eyewear or respirator masks for its handlers. Answer, ¶ 95; Tr. at 1868, 1879. The inspectors also testified that Respondent also failed to show them at any time during the inspection, a face shield or chemical resistant coveralls. Tr. at 289, 588[28]. Respondent essentially agrees with Complainant s description of events on April 26, 2004, namely, that Respondent told Complainant s inspectors that protective eyewear and respirators were kept in a locked box for which Respondent s agronomist had no key (nor, according to Mr. Acosta, did any of Respondent s handlers) and thus at no time were the inspectors shown such PPE on April 26, 2004. *See* Complaint, ¶ 95; Answer, ¶ 95, Tr. at 289-290, 1867-68, 1879. While Mr. Acosta stated that the rest of the PPE could not be seen ostensibly because the handlers were wearing it (Tr. at 1780), the records demonstrate that with the possible exception of Respondent s handler, Peewee, who could theoretically have been in the field since his pesticide application times are never entered into the WPS record (a violation in and of itself), no other handlers were making applications during the hours of the inspection. C s Ex. 21.b and 21.c, at 105-108. These uncontroverted facts alone demonstrate that Respondent was unable to demonstrate that its handlers were actually provided the required PPE for the subject pesticide applications on April 26, 2004.

Complainant has also shown, and Mr. Acosta agreed, that when Inspector Rivera was finally able to access the contents of the locked box supposedly containing the handlers PPE - *on*

[28]Inspector Rivera also testified that even when he returned - with advance notice - to inspect Respondent s PPE on July 20, 2004, Respondent s handlers *still* lacked a face shield and chemical-resistant apron. Tr. at 329-330.

July 20, 2004 - there was no PPE in the locked box. *See* C s Ex. 13, 21; Tr at 324-325, 1880. In fact, Inspector Rivera testified that not only did the box generally appear too small to hold all the necessary PPE for the seven handlers doing the applications at issue (*see* C s Ex. 21.b and 21.c, at 105-108), but that when he did finally see the opened box on July 20, 2004, the contents included spraying equipment. Tr. at 289-290, 325.

Respondent s obligations with respect to PPE do not end with the provision thereof, however. Respondent is required to assure that PPE is used correctly and is required to assure, *before each day of use*, that all PPE is inspected for leaks, holes, tears, or worn places. 40 C.F.R. § 170.240(e). Section 170.240(f) requires Respondent to assure that all PPE is cleaned properly before each day of reuse, that any contaminated PPE is kept separately from other clothing and laundry, that it is dried thoroughly, and that PPE is stored separately from personal clothing and contaminated areas. That section also requires Respondent to assure that handlers have a clean place(s) away from pesticide storage and pesticide use areas where they may store personal clothing not in use, put on PPE at the start of any exposure period, and remove PPE at the end of any exposure period. 40 C.F.R. § 170.240(f).

Complainant s inspectors testified that although no application of pesticide was taking place during their inspection of the Jauca farm on April 26, 2004, not only did they not see any PPE, they did not see anywhere workers could keep their clothes separate from PPE or anyplace PPE could be stored anywhere at the facility. Tr. at 289, 515-516, 588-589, 593-594. Inspector Rivera stated that even on his July 20, 2004 visit, Respondent *still* did not have a place to store clean clothing apart from PPE. *Id.* at 326-329. He also noticed on that later visit that Respondent s handlers, who, when he arrived, were waiting dressed head-to-toe in what appeared

to be brand new PPE, had no idea how to ensure that their respirators fit properly. *Id.* at 319-322, 339.

Respondent stated in its Answer that the inspectors were informed that normally the handlers kept their clean clothes in personal bags which were either left in the main decontamination area or in their private vehicles. Answer, ¶ 95; Tr. at 1780. Even if true, Respondent s practice does nothing to assure compliance with 40 C.F.R. § 170.240(f)(9), as Respondent would have no idea if such personal bags were away from pesticide storage and pesticide use areas. Respondent admits that Complainant s inspectors suggested that by acquiring lockers they could be in compliance with the requirement and states that it did so shortly after the inspection. Answer, ¶ 95. This act supports the allegation made by Complainant, namely that on April 26, 2004, Respondent did *not* assure that its handlers had a clean place to store personal clothing, put on PPE, or remove PPE for the thirteen (13) pesticide applications listed in the Complaint. Complaint, ¶¶ 95, 99, 103, 106; C s Ex. 13. If there had been such a place, perhaps if there had actually been PPE at Martex for its handlers on April 26, 2004, Mr. Acosta would have been able to show properly stored PPE to the inspectors.

When taken in the entirety the inability to show the inspectors PPE, despite the fact that there were no applications being done at Jauca at that time, or a place to store PPE or clean clothes, the fact that the box alleged to contain PPE ultimately was revealed to contain spray equipment, the lack of a face shield or chemical-resistant apron even on a later pre-scheduled inspection, the fact that on that later inspection, Respondent s handlers PPE appeared to the inspector to be brand new, and the fact that none of Respondent s handlers knew how to ensure that their respirators fit properly provide compelling evidence that Respondent failed to comply

with several requirements of section 170.240 of the WPS on April 26, 2004. Thus, Respondent met its burden of persuasion for the violations of FIFRA § 12(a)(2)(G) alleged in Counts 322-334 of the Complaint.

b. *Respondent s argument that handlers were wearing PPE is unsupported by the evidence.*

Respondent has admitted that handlers applied pesticides requiring compliance with the WPS at the Jauca facility on April 26, 2004. Respondent s Appeal at 29. Its argument on appeal that because the inspectors did not see the applications take place no WPS violation can be assessed is both disingenuous and troubling, as it implies that Complainant is not allowed to use deductive reasoning to enforce FIFRA or the WPS.

While true that Inspector Rivera and Ms. Masters-Glynn did not actually witness the pesticide applications made on April 26, 2004, what they did see at the Jauca farm that day was a lack of any respirators, protective eyewear, chemical-resistant aprons, or face shields, as well as a lack of any storage for clean clothes apart from PPE. *See* Tr. 288-291, 586-589. However, the record establishes and Respondent admits, that its handlers made seventeen pesticide applications at Jauca on April 26, 2004, whose labels required compliance with the WPS. Answer, ¶ 81; Stipulations ¶¶ 22, 24, 26, 30, 31. As the record shows that no handlers were making pesticide applications during the time of the inspection (C s Ex. 21.b and 21.c. at 105-108), and that the pesticides applied that day had labels requiring all of these items (C s Exs. 17-20), all of these PPE elements should have been available for inspection, since WPS regulations require that PPE be cleaned and stored at the farm. 40 C.F.R. § 170.240(f).

Respondent has presented no direct evidence, such as testimony from the handlers

themselves, photographs taken on April 26, 2004, showing PPE, or even testimony from Mssrs. Marti and Acosta to contradict the findings of the inspectors. Mr. Marti, Jr. states that they regularly bought decontamination supplies and various kinds of PPE, but never testifies that those items were definitely available to handlers on April 26, 2004. Mr. Acosta states that the locked box in the workshop that was supposed to contain PPE was locked, not that he went back, opened the box, and ensured that respirators and masks were there; he never testifies that he went to check to make sure the handlers applying pesticides in the evening had all the necessary PPE. Respondent thus failed to rebut Complainant s evidence regarding liability for violations of sections 170.240 and 170.250 as set forth in Counts 305-334 of the Complaint. The ALJ s finding of liability on these counts should therefore be upheld by the Board.

vi. Respondent is Liable for Violations of 40 C.F.R. § 170.250 Regarding its Coto Laurel Facility As Held by the ALJ

Respondent argues that Counts 335 and 336 should be vacated because the evidence shows that on April 20 and 21, 2004, the handler making applications of Kocide to a mango field at the Coto Laurel facility had access to an abundant supply of water and other decontamination materials in the immediate vicinity of the field, at the fruit packing plant as well as in the compound s bathrooms, at the mixing site, and water tanks near the workshop. Respondent s Appeal at 30. However, the evidence does not show that the decontamination materials available to Respondent s handler included any means for him to wash his entire body in case of emergency, as required by 40 C.F.R. § 170.250. The ALJ s finding of liability on these counts therefore should be upheld.

a. *Complainant demonstrated Respondent s liability for violating 40 C.F.R. § 170.250 by a preponderance of the evidence.*

Respondent admits that on April 20, 2004, and on April 21, 2004, its handlers applied the pesticide Kocide 101 to a mango field at its Coto Laurel facility. Stipulations 35, 36. Kocide 101 requires that the product be used in compliance with 40 C.F.R. Part 170. Stipulation 26, C s Ex. 18. Respondent was required to provide the handler making the two Kocide 101 applications soap, clean towels, and a sufficient amount of water at the site where its handler removes his PPE, so that he may wash thoroughly. 40 C.F.R. §§ 170.202, 170.250(e).

On April 26, 2004, Inspector Juan Carlos Munoz inspected Respondent s Coto Laurel facility for compliance with FIFRA and the WPS. C s Ex. 15 at; Tr. at 98. While there, he interviewed the handler for the Coto Laurel facility who made the two Kocide 101 applications the week before. C s Ex. 15 at 3; Tr. at 109. During the interview, the handler informed him that there was no decontamination site at the Coto Laurel facility where he could wash thoroughly after a pesticide application. C s Ex.. 15 at 3, 20, 22, C s Ex. 15.a at 99; Tr. at 109, 112. Even Mr. Marti, Sr. admitted that the limited decontamination facilities at the Coto Laurel farm would render a full body-wash essentially impossible. Tr. at 1311-12.

Section 3.12 of the Interpretive Guidance interprets this section of the WPS to allow workers to wash their entire bodies, which is why the requirement calls for clean towels instead of single-use towels, as single-use towels would be awkward for whole-body drying. Interpretive Guidance Questions and Answers, 3.12, Single-use towels (March 22, 1993) All of the inspectors testified that was how the regulations were interpreted for purposes of inspection, and thus while a formal shower was not required, some way for a handler to fully decontaminate his or her entire body after pesticide handling activities is required. Tr. at 210-211, 262-263. Dr.

Enache testified also that the Agency s interpretation of section 170.250(e) is that while a formal shower is not required, the ability of handlers to have a thorough body-wash afterwards is. Tr. at 914-915.

Respondent accused Inspector Munoz of failing to notice that Coto Laurel had an abundant supply of water and other decontamination materials in the immediate vicinity of the [C-001] field. Respondent s Appeal at 30, 37. This is an inaccurate portrayal of Inspector Munoz testimony, as he did in fact testify that he is aware of the dwelling units, of the packing house, and of the bathrooms in question, and that he couldn t remember if he saw the tanks Respondent s counsel was describing to him. Tr. at 152-153. Inspector Munoz also testified that he was told by the very handler making the applications in question (who was trained in the requirements of the WPS) that there was no decontamination area for handlers at the Coto Laurel facility. Tr. at 181-182, 215-219. Inspector Munoz further stated that he did not consider a pool or showers in a private home to qualify as meeting the requirement of section 170.250. Tr. at 212.

Further, Respondent never provides evidence that any of these proposed alternatives were available to the handler on April 20 and April 21, 2004, or that they had the necessary elements of soap, clean towels, and water that would not harm the worker. Mr. Marti, Sr. cannot attest for sure that the bathrooms at Coto Laurel s packing plant were even available in April 2004, but acknowledges that this is in any case not an official decontamination area for handlers and goes so far as to admit that it is unlikely that a handler would ever even use such an area. Tr. at 1296-1302, 1307-1308. As for the area with the tanks and hoses, this is Coto Laurel s mixing site, and Mr. Marti, Sr. acknowledged that the water pressure coming out of the three-inch diameter

nozzle is very forceful and potentially dangerous if not delicately opened. Tr. at 1314-15. He also acknowledged that the photos of this area, which show neither soap nor towels, were taken after April 26, 2004. Tr. at 1312, 1315-16. Most importantly, though, if Respondent s own handler for Coto Laurel does not even know of the existence of any of these alternative decontamination facilities, then they might as well not exist, since not knowing they were there or available, he certainly would not use them. Thus, Respondent failed to rebut Complainant s evidence supporting Counts 334 and 336 of the Complaint, and the ALJ s finding of liability on these counts should be upheld on appeal.

B. Respondent Has Failed to Establish a Defense Against Liability

In the section entitled Issues, Problems and Opportunities, Respondent makes several arguments that appear to be, at least in part, intended as affirmative defenses against liability. Among these claims include arguments that the EPA s entire action against Respondent is discriminatory, deficient, biased, pursued in bad faith, plagued with inaccuracies, based on hearsay, speculation, and erroneous factual allegations, and based on a wrongful interpretation of the law. Respondent s Appeal at 31-43. However, Respondent fails to provide factual support for several of these claims, and does not explain how any of them are defenses against liability. Respondent therefore has not met its burden of establishing such defenses.

i. Respondent s Burden of Proof

The burden of presentation of evidence relating to a defense, including an affirmative defense, rests with the Respondent. 40 C.F.R. § 22.24. Respondent also bears the burden of proving a defense by a preponderance of the evidence. *Id.*; *see also In re Norman Mayes*, 12 E.A.D. __, slip op. at 48 n.28 (EAB Mar. 3, 2005) (citations omitted); *In re Carroll Oil Co.*, 10

E.A.D. 635, 663 (EAB 2002) (citing 2A Moore s Federal Practice Manual 8-17a (2d ed. 1994) (A true affirmative defense, which is avoiding in nature, raises matters *outside* the scope of the plaintiff s prima facie case.). The EAB has clearly described the burden of proof as encompassing two concepts:

> the burden of production, and the burden of persuasion. The first of these to come into play is the burden of production -- that is, the "duty of going forward with the introduction of evidence." This burden may shift during the course of litigation; if a complainant satisfies its burden of production, the burden then shifts to the respondent to produce, or go forward with the introduction of, rebuttal evidence. The burden of persuasion comes into play only "if the parties have sustained their burdens of producing evidence and only when all of the evidence has been introduced." This burden refers to what a "litigating proponent must establish in order to persuade the trier of facts of the validity of his claim." Importantly, this burden does not shift between the parties during the course of litigation.

In re New Waterbury, Ltd., 5 E.A.D. 529, 536-37 n.16 (EAB 1994) (citations omitted).

ii. Respondent Has Failed to Establish a Defense of Discrimination or Bad Faith

Respondent s argument regarding discrimination and bad faith on the part of Complainant, and Respondent s related argument regarding the inability to subpoena witnesses under FIFRA, is really a continuation of the selective prosecution argument Respondent has made since the inception of the proceedings. Answer, ¶ 125; Respondent s Appeal at 31-34, 38-39; Initial Decision at 28; *see also* Motion for the Issuance of Discovery and Hearing Subpoenas; Complainant s Response to Respondent s Motion for the Issuance of Discovery and Hearing Subpoenas; Motion Requesting That the Order Denying Respondent s Motion to Amend Information Exchange be Certified to the Environmental Appeals Board.

Although Respondent would argue that Complainant has singled it out among companies in Puerto Rico for prosecution, this in no way amounts to selective prosecution. In *In the Matter*

of Newell Recycling, the EAB held:

> In attempting to establish such a defense, Newell confronts a daunting burden. *In re B&R Oil Co.,* 8 E.A.D. 39, 50 51 (EAB1998). [C]ourts have traditionally accorded governments a wide berth of prosecutorial discretion in deciding whether, and against whom, to undertake enforcement actions. *Id.* To substantiate a claim of selective enforcement or selective prosecution, Newell must therefore establish (1) [that it has] been singled out while other similarly situated violators were left untouched, *and* (2) that the government selected [Newell] for prosecution invidiously or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent the exercise of constitutional rights.

In re Newell Recycling, 8 E.A.D. 598, 634-635 (EAB 1999) (citations omitted).

Respondent has failed to make even the argument that it meets the requirements for a showing of selective prosecution, namely the exercise of a constitutionally-protected right, and an enforcement action designed to prevent Respondent from exercising that right. *See* Answer, ¶ 125; Respondent s Appeal at 31-34.[29] Respondent s sole basis for arguing discrimination or bias is that it was prosecuted where others were not; however, as the Sixth Circuit noted in

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[29]Respondent also challenges the constitutionality of FIFRA in its Appeal in that the absence of subpoena authority under FIFRA allegedly prevented Respondent from making its case of selective prosecution. Respondent s Appeal at 32-34, 34 n.24. As an initial point, Complainant would argue that challenges to the constitutionality of FIFRA are outside the authority granted to the EAB or the ALJ under 40 C.F.R. § 22.1. *See In re NPDES Permit Systems for 170 Alaska Placer Mines, More or Less*, 1 E.A.D. 616, 630 (Administrator 1980). Relying on *Weinberger v. Salfi*, 422 U.S. 749, 765 (1975), the Administrator in *170 Placer Miners* stated, It is generally considered that the constitutionality of Congressional enactments is beyond the jurisdiction of administrative agencies. *See also*, *Johnson v. Robison*, 415 U.S. 361, 368 (1974) (adjudication of the constitutionality of Congressional enactments has generally been thought beyond the jurisdiction of administrative agencies.); *In re Tillamook County Creamery Assn.*, Dkt. No. EPCRA-1094-01-325 (ALJ Greene June 1, 1995) (affirmative defense based on constitutional due process stricken for lack of jurisdiction; Constitutional challenges, whether statutory or regulatory, are beyond the jurisdiction of this tribunal. *Id.* at 1.). However, the EAB need not even reach this question, as Respondent would need to have made a threshold showing to warrant issuance of further discovery, which it did not. *United States v. Jacob,* 781 F.2d 643, 646 (8th Cir. 1986).

Futernick v. Sumpter Township, there is no right under the Constitution to have the law go unenforced against you, even if you are the first person against whom it is enforced, and even if you think (or can prove) that you are not as culpable as some others who have gone unpunished. The law does not need to be enforced everywhere to be legitimately enforced somewhere; and prosecutors have broad discretion in deciding whom to prosecute. *Futernick v. Sumpter Twp.*, 78 F.3d 1051, 1056 (6th Cir. 1996). Thus, as a threshold matter, Respondent s argument of selective prosecution fails on its face.

Even Respondent s attempts to show that it has been singled out are contradicted by the extensive testimony of Dr. Enache detailing the procedure by which Respondent was discovered to be in violation of FIFRA and why the decision was made to pursue an enforcement action against it. Tr. at 803-814, 924-926, 982-992. Dr. Enache s testimony with regard to Complainant s WPS compliance initiatives are very similar to those at issue before the Board in *In re B&R Oil Co.*, where another EPA enforcement initiative:

> followed an orderly, rational process to arrive at a target group for investigation, and then focused its enforcement efforts on the one company, B&R, whose response to the information request revealed it was not in compliance with the financial responsibility regulations. Moreover, B&R has presented no evidence that other UST owners and operators in Indiana or the Region were in violation of the regulations.

In re B&R Oil Co., 8 E.A.D. 39, 52 (EAB 1998).

Respondent has not made even a claim that it has been singled out based on a desire to prevent the exercise of a constitutional right, nor has it provided any factual evidence to support its allegations of selective prosecution whatsoever, and therefore Respondent may not avail itself of such a defense. *Id.* at 52-53; *Newell*, 8 E.A.D. at 635. The ALJ s findings on this issue should

therefore be upheld and Respondent s request for appeal be denied.

iii. Respondent Has Failed to Demonstrate Deficiency or Inaccuracy as a Defense to Liability

Respondent argues in its appeal that certain minor inaccuracies in Complainant s original Complaint - specifically with regard to the initial service of process, the inclusion of certain fields that were ultimately determined to be at a non-Jauca facility, and changes in Complainant s penalty calculations - make the Complaint deficient. Respondent s Appeal at 35, 39. As a threshold matter, Respondent has failed to explain how or why any of these mistakes would be a defense to liability, and thus it fails to meet its burden of proof. *New Waterbury*, 5 E.A.D. at 536-37 n.16. Further, Respondent s own argument and evidence clearly showed that Complainant had served Respondent with the Complaint via Certified Mail a week prior to the press conference to which Respondent refers, and that when Complainant was notified on February 4, 2005 that the U.S. Postal Service returned the copy of the Complaint as undeliverable as addressed, Complainant had a PRDA-EPA inspector hand-deliver a fax copy of the body of the Complaint and served Respondent with another full copy of the Complaint and its relevant attachments via Federal Express, which Respondent received on February 9, 2005. Respondent s Appeal at 31-32; Respondent s Hearing Exhibits (R s Exs.) 28, 29; Initial Decision at 28. More importantly, while even Complainant regrets that Respondent had not received a copy of the Complaint, as it had intended, prior to the February 3, 2005 press conference where Complainant s Regional Administrator discussed the filing of the Complaint during a visit to Puerto Rico, Respondent has shown neither an obligation on Complainant s part to ensure Respondent had the Complaint, nor how the initial defective service has prejudiced

Respondent in this proceeding.[30] Thus dismissal of the Complaint is not warranted and Respondent s defense fails. *United Foods and Commercial Workers Union v. Alpha Beta Co.*, 736 F.2d 1371, 1382 (9th Cir. 1984) (defendant s appearance and defense of a matter enough to prevent invalidation of service of process) (citation omitted).

With regard to counts of the Complaint that were ultimately demonstrated by Respondent - *at hearing*[31] - to be at a non-Jauca facility, there is again no explanation by Respondent how this would be a defense against liability, especially since Complainant voluntarily withdrew such counts after Respondent had provided evidence demonstrating that the fields in question were not part of the Jauca farm, as Complainant had initially been led to believe. *See* Tr. at 412, 438-439.

Finally, with regard to the alleged mistakes made by Complainant in the penalty assessments attached to the Complaint, such mistakes were minor and were in one case due to new penalty guidance issued by the Agency after the original Complaint in this matter had been filed;[32] further, Respondent has failed to even argue how it has been prejudiced by them. Respondent has thus failed to meet its burden of proof, and its appeal on this issue should be denied.

iv. Respondent Has Failed to Demonstrate Bias as a Defense to Liability

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[30]Additionally, Respondent has presented no evidence of the alleged considerable damages to Martex as a result of either the press conference or these proceedings. Respondent s Appeal at 31; Initial Decision at 60.

[31]Respondent could have, but did not, clarify this fact in its Answer or Prehearing Exchange of Information. Not until hearing did Respondent put evidence into the record explaining the relationship between the field names and the facility of which they are a part. Tr. at 1424-38.

[32]*See* Motion for Leave to File Second Amended Complaint at 1.

Respondent alleges that testimony by Complainant s witnesses, Inspector Munoz and Dr. Enache reveal a bias on the part of Complainant. However, as above, Respondent fails to articulate what that bias *is*. Respondent asks the EAB to make this guess, suggesting that [m]aybe the desire to scrutinize a complex agricultural operation in order to find violations and assess higher fines lies behind the Agency s motives. Respondent s Appeal at 36. Respondent s failure to set out even a theory of bias fails to meet the burden of proof articulated by the EAB in *New Waterbury*. 5 E.A.D. at 536-37.

Further, Respondent presented no evidence to support its allegations of bias. None of Complainant s witnesses, nor even Complainant, stand to benefit financially from any penalties assessed in this matter, as they would ultimately go to the U.S. Treasury. Complaint ¶ 116. Further, the evidence shows overwhelmingly that Respondent had a pattern of WPS violations starting in 2003, for which it had received several notices of violation. C s Exs. 1, 1B, 2, 2A, 6, 6A, 7, 8, 8A, 10, 10B, 11, 11A. Even Respondent admits that there were violations prior to those at issue in this case, but excuses them on the basis that the company took immediate corrective measures as soon as any suggestion and/or deficiencies were detected by the regulators, an assertion belied by the results of the April 26, 2004 inspection. Respondent s Appeal at 3. Respondent s allegation that Inspector Munoz failed to do his job because he did not inform Respondent that it could use the mixing station or any of Respondent s other proposed alternative decontamination sources and failed . . . to call to the attention of Respondent that the handler at the Coto Laurel facility on April 26, 2004, was not a handler for WPS purposes, ignores the fact that Inspector Munoz found Respondent s proposed alternatives not to be compliant with the WPS or its Interpretive Guidance, and the handler to be covered by the WPS, findings that

Complainant has shown by a preponderance of the evidence to be true. Tr. at 212, 218 Initial Decision at 53-56; *see supra* at Section VI.A.vi. Finally, Respondent s allegations with regard to Dr. Enache s testimony do not provide evidence of the fact they are offered to support. Respondent s Appeal at 38. Testimony regarding the effects of undiluted pesticides is particularly relevant to the case at hand, which involves allegations that Respondent s handlers, who handle undiluted pesticides, some of which at issue are fatal in very small amounts, lacked the required decontamination supplies and PPE required by the pesticide labels. Tr. at 937-938, 942-943, 995-997, 1009, 1012.

Thus, Respondent has failed to even present a valid defense of bias, much less to have established it by a preponderance of the evidence. The ALJ s finding on this point should thus be upheld and Respondent s appeal of it denied.

v. Respondent s Hearsay Defense Is Inapplicable

Respondent argues that Complainant s claims are based on hearsay. Respondent s Appeal at 40. Yet, Respondent never presents what, exactly, it believes to constitute hearsay, in what way such hearsay was given improper weight in a finding of liability, nor how such supposed hearsay evidence constitutes a defense to its liability in this case. Hearsay evidence is permitted under 40 C.F.R. § 22.22 which states that a Presiding Officer *shall* admit all evidence which is not irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value, except that evidence relating to settlement which would be excluded in the federal courts under Rule 408 of the Federal Rules of Evidence . . . is not admissible. There is no exclusion for hearsay evidence, which has been found by the EAB to be admissible if it meets the other requirements of section 22.22. *In re: William E. Comley, Inc. and Bleach Tech., Inc.*, FIFRA

Appeal No. 03-01, 11 E.A.D. 247, 266 (EAB 2004) citing *In re J.V. Peters & Co.*, 7 E.A.D. 77, 104 (EAB 1997) (hearsay evidence is not excluded by Part 22); *In re Great Lakes Division of National Corp.*, 5 E.A.D. 355, 368-69 (EAB 1994); 40 C.F.R. § 22.22(a). Respondent has thus failed to meet its burden of presenting a defense based on hearsay, and its appeal on this basis should be denied.

vi. Respondent Has Failed to Establish Speculation, Erroneous Factual Allegations, or Wrongful Interpretation of the Law as Defenses to Liability

Respondent makes several arguments that the claims against it are based on speculation, erroneous factual allegations, or wrongful interpretation of the law, purportedly as defenses to liability. Respondent s Appeal at 41-44. Yet again, Respondent fails to meet the threshold requirement that any of these allegations would support a defense against liability even if shown to be true, nor does Respondent present evidence to support its allegations. *Id.* Despite Respondent s arguments on appeal that it immediately corrected deficiencies, that there is no claim of harm to health or the environment, or that it posts all relevant WPS information, Respondent fails to explain how the first two arguments, if true would be a defense against liability, nor does it provide convincing factual support for any of these assertions.[33] Respondent s bald assertions, without supporting evidence, are insufficient to rebut the *prima facie* establishment by Complainant of Respondent s liability on these issues, much less establish a defense against liability. *In re City of Salsbury, Maryland*, 10 E.A.D. 263, 288 (2001); *Chapa v. Local 18*, 737 F.2d 929, 932 (11th Cir. 1984) (ruling against party where there was no

[33]In the case of Respondent citing R s Ex. 27 as proof of lack of harm to health or the environment, this letter is not from Complainant and is clearly contradicted by the violations found by PRDA s own inspectors which are the subject of this Complaint.

evidence in the record save party s bald assertion). Respondent s defenses in this regard fail to meet the *New Waterbury* burden of proof and should be denied.

a. *Complainant s claims in this case resulted from logical inferences.*

Complainant s argument with regard to applications made at the Coto Laurel property are not based on speculation, but upon a reasonable inference that can be drawn from the condition of Respondent s facilities five days after the inspections at Coto Laurel were made, especially in light of Respondent s failure to present evidence to demonstrate that it *was* in compliance with 40 C.F.R. § 170.250 on April 20 and 21, 2004, and a statement made to Inspector Munoz on April 26, 2004, by the handler who made the applications at issue that no shower was available at the Coto Laurel facility at all. *See* Initial Decision at 53-56; Tr. at 82. Likewise, claims involving failure to provide PPE were logical deductions made by Complainant based on Respondent s obligation to clean and store PPE at the Jauca facility under 40 C.F.R. § 170.240, the fact that its handlers were not applying pesticides at the time of inspection, and the fact that Respondent was unable to show inspectors PPE when they asked to see it on April 26, 2004. *See* Initial Decision at 51-53.

b. *Respondent s PR State Insurance Fund is not proof of absence of harm to human health or liability under FIFRA and the WPS.*

Respondent s argument that it provided training to its employees and has an outstanding labor safety record with the PR State Insurance Fund, are not defenses to liability for the matter at hand, nor does Respondent explain how they could be. Respondent s Appeal at 42-43. As a factual matter, the insurance rates paid by Respondent have no relation to whether or not it actually violated FIFRA and the WPS, as alleged in the Complaint, because the Fund is a

workers compensation fund that pays workers who report on-the-job injuries (Tr. at 1269-73, 1333), and no evidence was presented to show that the Fund inspects Respondent for or otherwise considers its compliance with FIFRA or the WPS. Nothing regarding the Fund or Respondent s fees therefor prove that no injuries have resulted at Martex Farms due to exposure to pesticides. Even Mr. Marti, Sr. admits that in his review of Respondent s own records, there were five cases that involved exposure to chemicals. Tr. at 1275. Mr. Marti, Jr. further testified that there are injuries that occur at Martex that are never even reported to the Fund. Tr. at 1519-21. Nor does it appear that Respondent even knows about every potentially chemically-related injury at Martex Farms. Tr. at 1519. This is not surprising.[34] Although one of the claims appeared to have involved a skin eruption, Mr. Marti, Sr. is of the opinion that this report, although filed officially with the state, is an injury that was probably not real and an excuse to get out of work. Tr. at 1338. Mr. Acosta, Respondent s agronomist, qualifies his earlier report that a man was injured after exposure to some biological bags he used on bananas, stating at hearing that the man was probably just a drunk with a hangover. Tr. at 1828-30. In fact, Mr. Acosta testified that his general view of the workers at Martex Farms is that they are low class criminals who are divorced and becoming grandparents at 35. Tr. at 1818-19. Such a managerial attitude toward its workers would not serve to encourage openness with regard to pesticide-related injuries.

Thus, Respondent s attempts to use its rating with the Fund as evidence that no pesticide-

[34] As recently documented in a Washington State Department of Health study of agricultural workers, pesticide-related injuries often go unreported for fear of employer reprisals and concern that doctors would not believe them. *See* Pesticide-related illnesses among farm workers often unreported, June 17, 2004, Washington State Department of Health, found at http://www.doh.wa.gov/Publicat/2004_news/04-070.htm, last checked March 26, 2004.

related injuries have occurred at Martex Farms and thus that there has been no injury to human health as a result of the violations alleged in the Complaint lacks merit. The fact of the matter is that no one can know for certain exactly what the extent of human exposure or injury is with regard to the failure of Respondent to comply with FIFRA and the WPS. What *is* known for a fact is that the risks to human health presented by Respondent s behavior are very serious and potentially lethal. *See* Tr. at 681, 689, 929-943. Exposure to the pesticide Boa, for which Respondent was found liable for not having provided its handlers with decontamination supplies or PPE, as required by the Boa label, can cause extremely deleterious effects, including lung failure, kidney, liver, and . . . other internal organs. . . arrhythmia . . . . serious ulcerations of the skin. Tr. at 942. If absorbed into the bloodstream it can be fatal. *Id.* Dr. Enache testified that ingestion of a mere half teaspoon of Boa can cause these effects. *Id.*

Thus Respondent s allegation that there is no claim of harm to health or the environment (Respondent s Appeal at 43) is unsupported by the record. Because the pesticides used at Respondent s farm can be very dangerous even lethal the requirement to warn people of and take active measures to protect them from exposure to such chemicals is crucial to their safety. The WPS was designed as a whole to reduce occupational pesticide exposure and, therefore, failure to comply with requirements such as 40 C.F.R. § 170.122 increased the risk of exposure to deadly pesticides.[35] Respondent s violations created the potential for serious or widespread harm to human health by preventing the achievement of the basic goals of FIFRA. A violation that undermines a regulatory program may present a major potential for harm to human

[35]It is appropriate in assessing penalties to give greater weight to the risk of the violation than to actual harm; it also is appropriate to consider the risk of potential serious or widespread harm to humans. WPS Penalty Policy at 9.

health and the environment, even where the violation does not harm the health of specific individuals or components of an ecosystem. *Green Thumb Nursery, Inc.*, 6 E.A.D. 782, 802-803 (EAB 1997) (failure to register pesticide was harmful to the FIFRA regulatory program and the public, even where there was no individualized and specific injury to health or the environment); *In re Everwood Treatment Company, Inc.*, 6 E.A.D. 589, 602-604 (EAB 1996), *affirmed*, 1998 U.S. Dist. Lex. 927 (D. Ala. 1998) (where violation created adverse effect on the RCRA program, the potential for harm was considered "major" even where there was no evidence of actual harm); *In re I. E. Du Pont De Nemours & Co.*, Docket No. FIFRA-95-H-02, 1998 EPA ALJ LEXIS 129, at * 49 (Apr. 30, 1998) (a violation that undermines a regulatory program may be a serious violation even in the absence of actual or potential harm to the health of specific individuals.) The following language from the EAB's decision in *Green Thumb* is instructive:

> Respondent spends most of its efforts alleging, in one way or another, that the gravity of its offense is low, that it is guilty only of a technical violation, and that no one has been harmed. Respondent is wrong. A regulatory program has been harmed by Green Thumb's refusal to meet the requirements of [FIFRA].

6 E.A.D. at 803.

The potential for harm to the regulatory program serves as an independent basis for a finding of potential serious or widespread harm to human health. In *Everwood*, the EAB specifically held that where an adverse effect on the RCRA program had been established, there was no need to reach the issue of whether there was actual harm. 6 E.A.D. 589, 602 n.23.

Respondent is thus incorrect that no allegations of harm to human health are at issue in this case and its appeal on this basis should be denied.

c. *Respondent has not shown that it took immediate corrective action, nor how corrective action would be a defense to liability.*

Respondent alleges that it immediately took all corrective measures as soon as any suggestion and/or deficiencies were found but fails to explain how this would be a defense against liability. Respondent s Appeal at 43. Documents cited by Respondent as evidence of its corrective actions are not dated, nor did Respondent present testimony to verify or explain their content, or to clarify when the actions contained therein were taken. As for the events of April 26, 2004, although Mr. Marti, Jr. claims that they bought a single towel the same day of the inspection, Mr. Acosta says he was planning to do it the next day. Tr. at 1853-54. At no time during the hearing did Respondent present clear uncontroverted evidence that it remedied any of the violations set forth in the Complaint *on April 26, 2004*. Thus, Respondent has not shown that its handlers making the evening pesticide applications on April 26, 2004 (after the inspection revealed violations of the WPS) had proper decontamination supplies at the mixing site, the appropriate PPE, or a place to store their clean clothing. Nor has Respondent claimed that it fixed the WPS records on display on April 26, 2004. Therefore, Respondent s allegations that it took corrective actions after April 26, 2004 and after the filing of this Complaint is no defense to liability.

Additionally, it is clear from Inspector Rivera s testimony that even in July 2004, Respondent still did not have a separate area for handlers to store clean clothes; Mr. Marti s testimony is also clear that some compliance actions were not taken until after the Complaint was filed, and that unless PRDA or EPA tells Respondent when it is not in compliance it s impossible for me to know. Tr. at 326, 1534. This evidence points to a pattern and practice of Respondent *not* assuring full and continuous compliance with the FIFRA and the WPS. Tr. at

326, 1534.

d. *Complainant bears no responsibility to educate Respondent as to how to comply with the WPS.*

Respondent repeatedly cites to a supposed failure of Complainant to educate Respondent as to the approved alternate methods of WPS compliance. *See generally,* Respondent s Appeal. Again, Respondent has failed to meet the *New Waterbury* burden of proof, as Respondent fails to explain the basis of such a duty to educate, fails to explain how such failure would be a defense against liability, and fails to provide any factual support for its assertions. Respondent is responsible for complying with laws governing its business. Ignorance of the law is no defense to liability. *In re B.J. Carney Indus., Inc.*, 7 E.A.D. 171, 201 (EAB 1997) ([c]itizens, including corporate citizens who regularly deal with the government, are charged with full knowledge of the applicable law); *United States v. International Minerals & Chemical Corp.*, 402 U.S. 558, 563 (1971) (noting that it is a general rule that ignorance of the law is no excuse). Its appeal on this basis should therefore be denied.

VII. ARGUMENT ON CROSS-APPEAL

A. The ALJ s Holding That Multiple Pesticide Applications Within Thirty Minutes May Be Listed As a Single Application For Purposes of 40 C.F.R. §§ 170.122 and 170.222 Needs Clarification

As part of her analysis as to whether certain counts in the Complaint were duplicative, the ALJ noted that there were some applications of ClearOut made to the same field, on the same day, but at different times. Initial Decision at 38. For example, she noted that the Order on Accelerated Decision had held Respondent liable for Counts 99 and 252, where ClearOut had been applied to Jauca facility field OE-22G at 10:30am on April 14th, 2004, and there were four

remaining counts involving applications to OE-22G that the record indicated took place at 10:00am the same day. *Id.* Additionally, Respondent had been found liable on accelerated decision for two counts relating to the application of ClearOut to Jauca facility field JC-07P at 11:00am on April 22, 2004, and four additional counts were outstanding for applications to that field listed as occurring at 11:30am that day. *Id.* The ALJ then questioned whether these time differences are significant to the extent of rendering them a separate application or use of a pesticide. *Id.* at 39. The ALJ concluded:

> Sections 170.122 and 170.222 do not require specific increments of time to be listed in the WPS Display, but merely require the time and date the pesticide is to be applied. Thus, the time of an application may be listed on a WPS display in increments of an hour and, such a listing would be logical in that REIs are expressed in terms of hours. Thus, a time difference of a half an hour or less between the time that individual handlers *begin* their pesticide application in a particular field does not appear to be a significant factor for determining whether there is a separate application for purposes of the WPS display. Therefore, Counts [relating to applications to OE-22G at 10:00am on April 14 and at JC-07P at 11:30am on April 22] are **dismissed** as duplicative.

Id. (emphasis in original).

The Agency did not know that the meaning of date and time under 40 C.F.R. §§ 170.122 and 170.222 was of concern to the ALJ and was not asked to provide briefing on the issue prior to the ALJ s Initial Decision. Complainant nevertheless does not challenge the ALJ s interpretation or her findings as it applies to this case. However, as the ALJ s holding interprets the WPS in a manner that is not limited to the present case, Complainant requests that the EAB clarify that in future cases, should a worker or handler employer opt to combine multiple applications occurring within thirty minutes into a single application for purposes of display requirements under 40 C.F.R. §§ 170.122 and 170.222, that time and date the pesticide is to be

applied be read to include the latest of the combined applications.

As noted by the ALJ, 40 C.F.R. §§ 170.122 and 170.222 requires that when workers or handlers are going to be on a facility that has had received pesticide applications in the prior thirty (30) days, the employer needs to: (1) display pesticide application information (consisting of the location and description of the treated area, the product name, EPA registration number, and active ingredient, the date and time the pesticide is to be applied, and the restricted-entry interval (REI) for the pesticide); (2) display this information in a central and freely-accessible location; and (3) display this information before an application takes place and continue to display it for thirty days after the end of the REI for the pesticide. *See* 40 C.F.R. §§ 170.122 and 170.222. The point of this regulatory scheme is to prevent workers and handlers from entering an area that is being treated with a pesticide, keep them out of the area during the REI (i.e., how long to stay out of the treated area), and provide them with information regarding the prior thirty days of pesticide application information should it be needed for medical or other purposes. *See* C s Ex 26: Worker Protection Standard, Hazard Information, Hand Labor Tasks on Cut Flowers and Ferns Exception; Final Rule, and Proposed Rule, 57 Fed. Reg. 38102, 38102-5, 38126-27, 38130, 38132 (Aug. 21, 1992) (hereinafter WPS Preamble)

The ALJ notes in her opinion that notice of the time that the application ended may be important for determining whether [employees] can enter the field. Initial Decision. at 39. This information is not only important, it is crucial to determine when the restricted-entry interval expires and it is safe to re-enter a treated area or what protective measures a worker or handler might need to take should he or she need to re-enter the field prior to expiration of the REI. *See* 40 C.F.R. § 170.3 (definition of restricted entry interval); 40 C.F.R. § 170.112. It is crucial, in

order to effectuate the intent of the WPS, to inform employees of the start time and the end time of an application. Time the pesticide is to be applied, when read in the context of the WPS as a whole, ideally requires an agricultural establishment to list the start and end times of an application in its WPS display of specific pesticide application information under sections 170.122 and 170.222. However, it is also accepted practice that on the day of the application, the information on display lists the start time of the application and that the WPS records are updated afterward to reflect the end time of the application. *See, e.g.,* Interpretive Guidance 13.22, *Updating central posting information* (March 15, 1995) (To meet the requirements of the regulations, the central posting information must remain reasonably accurate during the . . . 30 days after the application, so that a worker will be able to determine which pesticides may be present in areas he will enter. Meeting this performance standard can be accomplished in a number of ways, including:. . . updating the information); Interpretive Guidance 11.14, *Notice of application*, (Feb. 28, 1995) (One of the most important requirements involves keeping workers out of treated areas *during* applications *and while the REI remains in effect* . . .) (emphasis added). Even Respondent seemed to understand this practice. Tr. at 1556-1562.

Although Complainant is willing to accept the ALJ s decision that farms are allowed to combine multiple applications within 30 minutes into one for purposes of complying with WPS display requirements for workers and for handlers, Complainant is concerned that the ALJ does not opine on which time should be displayed. In particular, Complainant is concerned that employers may choose to list only the earlier of the application start times, a choice that increases the likelihood that workers and handlers may enter treated areas prior to the expiration of the REI without the proper PPE. Based on the ALJ s holding, Martex need only have displayed the application of ClearOut to the JC-07P field at 11:00am (as alleged in Counts 137 and 290), when

in fact, the true end of the application was 11:30am at the earliest (as alleged in Counts 138, 143, 291, and 296). Under that scenario, the REI would in fact have run at least 30 minutes later than Martex employees would have been led to believe, had Respondent only posted the 11:00 am application in its display of information per the ALJ s holding and not later updated its records to reflect the later application. Had Martex then allowed its workers back in the field without PPE when the REI for ClearOut expired at 11:00pm, Respondent would have been in violation not only of §§ 170.122 and 170.222, but also the re-entry interval requirements at 170.112, and its workers would have been at greater risk for pesticide exposure.[36]

Given this potential harm to agricultural employees and to the WPS program, Complainant requests that the EAB clarify that when multiple applications are listed as one for purposes of complying with 40 C.F.R. §§ 170.122 and 170.222, employers should either list start and end times of applications or update their WPS records after application to reflect the latest-in-time of the pesticide applications.

B. The ALJ s Decision That No Penalty Was Warranted for Respondent s Failure to Display Specific Pesticide Application Information for Handlers is Clear Error or an Abuse of Discretion

i. *The ALJ s penalty analysis*

In her Order on Accelerated Decision, the ALJ found that Respondent was liable for failure to display specific pesticide application information for workers regarding applications of ClearOut, as required by FIFRA § 12(a)(2)(G) and 40 C.F.R. § 170.122. Order on Accelerated Decision at 14. When examining whether Respondent was also liable for failure to display this

[36]While it is unlikely in this particular scenario that employees would be on the farm at 11pm, many pesticides have REIs of 4 hours, and others are at 24, 48, and 72 hours (*see* Tr. at 692, 698, 700-701) - the expiration of any of which times would have been likely to fall when employees would be working.

information for handlers, as required by 40 C.F.R. § 170.222, the ALJ examined at length the same argument Respondent raises in its appeal, namely that such violations are duplicative of those alleged in Counts 1-151, because it was not required by the regulations to maintain separate posting areas for workers and for handlers and, as a matter of practice, Respondent chose to maintain only one set of WPS records on display for both workers and handlers. *Id.* at 21. The ALJ s Order on Accelerated Decision cited at length the Agency s brief with regard to why Martex had a duty under § 170.122 to display specific information to its workers regarding pesticide applications at the farm, and a *separate* duty under § 170.222 to display specific pesticide information to handlers. Order on Accelerated Decision at 21. The ALJ described as well-taken the Agency s point that:

> EPA s revision of the WPS in 1992 *deliberately changed* the structure of the WPS regulations from a single set of regulations covering all farmworkers to two distinct sets of regulations designed to target two different types of 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.*

Id. (emphasis in original). The ALJ then held Martex liable for all counts involving violation of § 170.222 where Respondent had stipulated to the alleged pesticide application at issue. *Id.*

The ALJ s Initial Decision reaffirms her position that Respondent was legally liable for violations of failing to meet its obligations to inform workers of ClearOut applications and also of failing to inform handlers of these applications, as required by 40 C.F.R. §§ 170.122 and 170.222. Initial Decision at 11-12.

The ALJ s penalty analysis of Counts 1-151 and 154-304 commences with a synopsis of

the FIFRA ERP, stating that it provides that a penalty may be assessed for each independent violation of FIFRA, and then summarizing the FIFRA ERP s definition of independent and dependent violations. *Id.* at 63 (citing FIFRA ERP at 26). While the Initial Decision continues to uphold the findings of liability on Counts 154-304 as established under the Order on Accelerated Decision, the ALJ found that while Counts 1-151 and Counts 154-304 are legally separate, they are factually dependent in this case:

> A violation of Section 170.122 requires proof that workers are on the agricultural establishment, whereas a violation of Section 170.222 requires proof that handlers are on the agricultural establishment, so they require one different element of proof. On the other hand, the failure to display pesticide application information is a single lack of action which is being considered as two unlawful acts under the regulations. The two unlawful acts *are dependent in the circumstances of this case*: if Respondent failed to display pesticide information for workers, then it necessarily failed to display it for handlers (and *vice versa*), because Respondent employs a single pesticide information display for both workers and handlers.

Id. at 63 (emphasis added).[37]

While the ALJ determines that Martex is legally liable for 68 counts of violating § 170.122 and sixty-eight (68) counts of violating § 170.222, she ultimately held that no penalty was appropriate for the sixty-eight (68) counts of violating § 170.222:

> Clearly the regulations...set out separate duties...and thus provide for separate findings of violation. However, as to the penalty, the record does not suggest that there is any significantly increased risk of exposure or harm to human health, nor any significantly increased harm to the FIFRA WPS regulatory program, resulting from failing to display the information for the few handlers at the Jauca facility than for failing to display it for any number of workers. Regardless of the number

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[37]The ALJ is incorrect that there is only one difference in the elements of proof - not only must there be handlers on the farm, but it must also be established that Respondent is a handler employer. *See* 40 C.F.R. § 170.222. Not all agricultural establishments are handler employers; it is not uncommon to have agricultural establishments hire commercial operators to apply pesticides rather than employ its own handlers as foreseen by the language of 40 C.F.R. § 170.222 exempting its application when commercial applicators are the handlers in question.

> of workers at the establishment on the particular day, April 26, 2004, that is, whether there was one worker or 100 workers, there is only one penalty for violation of Section 170.122 per application that was not displayed. Therefore it is not appropriate to assess a second penalty under Section 170.222 for each application due merely to the fact that there were additionally four or five handlers at the Jauca facility that day, especially where those handlers either made the application or their supervisor ordered the application. . . . Accordingly, the evidence of record does not support assessments of separate penalties for Counts [involving] 40 C.F.R. § 170.222.

Id. at 63-64.

ii. *Standard of review of penalty assessments*

As stated earlier, the EAB generally defers to an ALJ s penalty assessment absent a showing of clear error or abuse of discretion. *See, In re FRM Chem, Inc., a/k/a Industrial Specialties*, FIFRA Appeal No. 05-01, 12 E.A.D. ___, slip op. at 19 (EAB, June 13, 2006). However, not all penalty assessments receive deferential treatment by the EAB, which requires that an ALJ should make clear his or her reasoning such that the parties and an appellate body are informed of the basis for the penalty decision. *See FRM*, slip op. at 16 (citations omitted). The Board has further explained that one should not have to engage in conjecture in order to identify the reasons for which a Presiding Officer has deviated from a recommended penalty. *Id*. The Board s case law also demonstrates that when an ALJ substantially or completely departs from the relevant penalty policy, it will closely scrutinize the ALJ s penalty analysis to determine whether the ALJ s reasons for rejecting the policy framework are persuasive or convincing. *See FRM*, slip op. at 20. *See also In re Chem Lab Prods., Inc.*, 10 E.A.D. 711, 725 (EAB 2002) (quoting *In re M.A. Bruder & Sons, Inc.,* 10 E.A.D 598, 613 (EAB 2002) (In cases where an ALJ has decided to forego application of a penalty policy in its entirety, the Board will closely scrutinize the ALJ s reasons for choosing not to apply the policy to determine

[whether the reasons] are compelling.). If the Board concludes that the ALJ s rationale is not persuasive or convincing the Board will not afford the ALJ s penalty analysis any deference and may fashion its own penalty assessment or remand the penalty determination to the ALJ. *See FRM*, slip op. at 20, 20 n.16. Among the bases for overturning an ALJ s departure from a penalty policy are: failure to take seriously harm to the FIFRA program; judicial speculation regarding facts without supporting evidence; and improper consideration of cooperative efforts by the respondent during investigation. *Id.* at 25-28.

iii. *The ALJ s analysis fails as a legal matter.*

The ALJ s view that violations of 40 C.F.R. §§ 170.122 and 170.222 are legally separate yet dependent for penalty purposes essentially splits the baby, since a conclusion that the acts are dependent in this case would necessitate a legal finding that the failure to display information for handlers is really dependent on a failure to display information for workers, a finding which is not legally possible given the different legal requirements for §§ 170.122 and 170.222. A dependent claim is one that requires violation of another in order to be true. *In re Consumers Scrap Recycling*, 11 E.A.D. 269, 283-284 (EAB 2004); *see also* US v. Wood, 568 F.2d 509, 513 n.1 (6th Cir. 1978) (noting that claims are separate unless identical facts prove each). However, not only do the two provisions have different legal requirements, but neither regulation requires a violation of the other in order to be true. Had no workers been present at Respondent s facility on April 26, 2004, Respondent still would have been required to provide its handlers with information regarding the ClearOut applications. The ALJ s rationale translates to a finding that because Respondent is a worker employer, had workers at its facility within 30 days of applications of the pesticide ClearOut at its facility, and failed to provide its workers with

that application information, as required by 40 C.F.R. § 170.122, then Respondent is thus necessarily also a handler employer, had handlers at its facility, and failed to notify handlers of the ClearOut applications. Such a rationale makes no logical sense and is thus neither comprehensible nor compelling.

Complainant s position is also supported by the Board s discussion of merger of violations in *Consumers Scrap*, which discussed independence of claims derived from a single statutory provision. 11 E.A.D. at 283-284. There, the EAB examined the plain language of the regulations at issue to determine whether the Presiding Officer had erred in failing to penalize the respondent for both 40 C.F.R. §§ 82.156 and 82.166. *Id.* at 282. The Board held that the plain language of record-keeping requirements set forth in section 82.166 applied only if valid records had been obtained under section 82.156. *Id.* at 283. Because the respondent had failed to obtain valid records in the first place, the EAB found that no violation of the record-keeping requirements at section 82.166 were applicable, since section 82.166 *presupposed the existence* of records generated under section 82.156 in the first instance. *Id.* As demonstrated above, 40 C.F.R. §§ 170.122 and 170.222 have no such relationship - neither provision presupposes requirements of the other. Because the two sets of violations are clearly independent, the relevant penalty policies required the ALJ to assess separate civil penalties and the ALJ s decision to merge them for penalty purposes constitutes clear error.[38] *See also In the Matter of*

[38]Further, testimony in the record indicated concern by the inspectors that neither Martex workers, nor its handlers, were using the central posting area. Tr. at 300, 574. Farms should be encouraged to display pesticide application information in places used daily by each group of employees. The ALJ s holding would have the effect of discouraging such a practice, since it would reward employers who fail to take such extra steps with reduced legal and financial liability compared to those who make extra efforts to inform and protect their employees.

Sav-Mart, Inc., Docket No. FIFRA-09-0819-C-92-36 (ALJ 1994), at 3-4; *In the Matter of Holmquist Grain & Lumber Co.*, FIFRA Appeal No. 83-3, Final Decision (CJO 1985).

iv. *Respondent s violations of sections 170.122 and 170.222 are legally independent violations that require a separate penalty assessment under the relevant penalty policies.*

The ALJ s decision on this issue is a complete departure from the relevant penalty policies. Because the CROP requires that penalties be determined according to the applicable penalty policies, the EAB requires an ALJ to have first seriously considered the penalty policy and if she should depart from the policy the reasons for such a departure must be clear, and compelling. *See In re FRM Chem, Inc., a/k/a Industrial Specialties*, FIFRA Appeal No. 05-01, 12 E.A.D. ___, slip op. at 16 (EAB, June 13, 2006); *In re M.A. Bruder & Sons, Inc.,* 10 E.A.D 598, 613 (EAB 2002). However, the ALJ does not follow these steps in her penalty assessment for violations of § 170.222.

As a primary matter, the ALJ s brief analysis of whether or not Respondent s violations of 40 C.F.R. § 170.222 are dependent on its violations of 40 C.F.R. § 170.122 fails to seriously consider the relevant penalty policies. The ALJ mischaracterizes the FIFRA ERP at the start, stating that a separate penalty may be assessed for independent violations, whereas the FIFRA ERP clearly states that [a] separate civil penalty . . . *shall* be assessed for each independent violation of the Act. Initial Decision at 63; FIFRA ERP at 25. The FIFRA ERP then gives examples of independent vs. dependant violations under FIFRA: a violation is independent if it results from an act (or failure to act) *which is not the result* of any other charge for which a civil penalty is to be assessed, or *if the elements of proof for the violations are different*; dependent violations are those where a single event or action (or lack of action) . . . can be considered as

two unlawful acts of FIFRA. *Id.* at 25-26. Further, the WPS Penalty Policy, which the ALJ appears to not have considered in her assessment of Respondent s violations of 40 C.F.R. § 170.222, clearly sets forth what constitutes an independent violation of the WPS and how penalties should be applied in such cases:

> Distinct acts giving rise to violations of the same provision of FIFRA are independently assessable charges, even if the violative acts occurred during one pesticide application. For example, if a handler employer misused a registered product by failing to provide proper warning information for the pesticide application, failing to provide personal protective equipment, and failing to provide decontamination supplies, then *each of those failures to act* would be a *separately assessable violation* of FIFRA. . . subject to a penalty of up to $5,000 [each].

WPS Penalty Policy at 5 (emphases added). The ALJ s inquiry does not discuss the fact that the WPS Penalty Policy establishes separate base penalties and FIFRA & TSCA Tracking System (FTTS) codes for violations of § 170.122 and § 170.222, an indication that the Agency views these sections of the WPS as constituting *independent* provisions, the violation of both of which would be subject to two *separate* penalties under FIFRA. WPS Penalty Policy at 6, 15-16. The WPS Penalty Policy states that it should be used in conjunction with the current FIFRA ERP. *Id.* at 1. The ALJ s failure to discuss the WPS Penalty Policy at all in her cursory analysis of whether Counts 1-151 and 154-304 are dependent violations, is evidence that she failed to seriously consider the relevant penalty policies before departing from them.

Not only does the ALJ give short shrift to the relevant penalty policy requirements, but her penalty assessment rationale is unclear and confusing. While her legal finding regarding Counts 154-304 would indicate agreement that the claims are legally independent, the ALJ ultimately concludes that the two unlawful acts are dependent in the circumstances of this case

since Martex chooses to use a single display for both workers and handlers. Initial Decision at 63.[39] The ALJ s rationale here is confusing, and undermines her initial finding that the claims are legally separate.

First, the phrase the two unlawful acts are dependent already suggests independent claims according to the FIFRA ERP definition of dependency being a single event or action (or lack of action). Second, dependency of claims is a *legal*, not simply a factual question. Here, the ALJ confuses the fact that there are in fact two independent sets of omissions by Respondent (i.e., the failure to provide its workers with pesticide application information and the separate failure to provide its handlers with pesticide application information), each set of omissions having different legal elements, with the fact that in this case, the required injunctive relief to remedy both omissions *could* be effected by one display of pesticide application information. At issue is not Respondent s failure to put up one set of pesticide applications - there is no such requirement in the WPS - rather, the issue is Respondent s failure to *provide this information* to its workers and *provide this information* to its handlers. In other words, the ALJ confused the Respondent s multiple and independent requirements set forth in the WPS regulations to provide pesticide application information to two separate groups of people with the Interpretive Guidance

[39]The ALJ s entire penalty analysis for these counts seems influenced by the idea that since Martex *chose* to have only one central area for display of information for both workers and handlers the fact that the violations of §§ 170.122 and 170.222, the fact that these violations could have been cured with a single display of information should somehow be considered a mitigating factor for failing to meet its independent legal duties to notify *both* workers *and* handlers of specific pesticide application information. While it is true that the WPS interpretive guidance does *permit* agricultural establishments to maintain one central posting area for both workers and handlers if, as a factual matter, the chosen location is a central area for both sets of employees, it is clear from the regulatory requirements that this has no bearing on the legal obligation of a worker and handler employer to provide pesticide application information to both groups.

permission to maintain a single display area for both groups. This is clear legal error on the ALJ s part.

a. *The ALJ s alternative penalty rationale lacks evidentiary support.*

The ALJ s penalty assessment seems to suggest, although it is unclear from her rationale, that even if she were to consider the two sets of violations as independent, no penalty for Respondent s violations of 40 C.F.R. § 170.222 is necessary. Initial Decision at 63. This alternative basis for the ALJ s penalty assessment also fails to meet the relevant penalty policy requirements. Assuming that Complainant is correct that the ALJ intends her rationale at the bottom of page 63 of her Initial Decision to constitute an alternative penalty analysis of what an appropriate penalty would be were she to have held Respondent s violations of 40 C.F.R. § 170.222 to be independent, rather than going through the exercise of analyzing Martex sixty-eight violations of 40 C.F.R. § 170.222 under the guidelines set forth by the relevant penalty policies, and conducting any analysis as to why such a penalty calculation would be unfair to Respondent, the ALJ skips the entire penalty calculation analysis, stating without support that

> the record does not suggest that there is any significantly increased risk of harm to handlers or to the WPS program from Martex failure to display information for handlers in addition to workers, especially where those handlers either made the application or their supervisor ordered the application.

Id. at 63-64. Because of this, the ALJ concludes that assessing a second penalty would not be appropriate. *Id.* at 63. This finding is contradicted by the record, and as such is clear error.

First, Dr. Enache testified that the increased risk of harm to handlers who lack pesticide application information is considerable. Tr. at 817, 944-945. The fundamental goal of revising

the WPS regulations was to better protect the two groups of agricultural employees in light of their different needs and different exposures. WPS Preamble at 38102-104; Tr. at 815-816. Common sense would also dictate that handlers, who work with undiluted pesticides and apply chemicals for a living, are at far greater risk than workers to be exposed to a toxic pesticide. *See id* at 38118 (noting that risk of exposure is especially high for handlers who apply pesticides frequently). The chief purpose of 40 C.F.R. § 170.222 is to provide handlers with this pesticide application information in case of exposure, and the Preamble to the 1992 revisions to the WPS regulations states that the 30-day display period on which most WPS requirements are set comes from available data indicating that the onset of pesticide poisoning ranged from 1 to 66 days after exposure, with a mean of 20 days. WPS Preamble at 38133. The importance of having the prior 30 days of pesticide application information is thus not just because of what the pesticide handler might have been exposed to *that day*, but as a means of providing critical information of *all* pesticides a handler may have been exposed to, when, and in what amounts, over the prior 30 days. This information requirement was designed to both help reduce risks generally by informing handlers of pesticide hazards, but also to ensure that should a medical condition or emergency arise, specific information about a handler s pesticide exposures would be available to bring to medical personnel. *Id.* at 38104.[40]

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[40]The ALJ may be correct that handlers would know what chemicals they applied or their supervisors applied on April 26, 2004, but it is highly unlikely that any handler would know every chemical they had applied or their supervisors had ordered over the last *30 days*. Had a medical emergency arisen on April 26, 2004, it is extremely doubtful that a given handler would have been able to inform medical personnel of every pesticide, its active ingredient, and when he applied it, over the prior 30 days. This is exactly what the regulations at 40 C.F.R. § 170.222 are designed to achieve. Respondent s failure to comply with it *did* put its handlers at greater risk of harm than did Respondent s failure to comply with 40 C.F.R. § 170.122.

Second, the ALJ s framing of the analysis in terms of whether there was a *significantly increased* harm to handlers from failing to comply with 40 C.F.R. § 170.222 in beyond the harm presented to workers by failing to comply with § 170.122 creates a legal hurdle that does not exist in the regulations, was not brought up at hearing, and which the Agency had no reason to believe would apply. The WPS Penalty Policy has gravity adjustment factors designed to take into account factual circumstances such as the varying levels of risk of exposure, risk of harm to human health, and other case-specific factors, and the ALJ has failed utterly to explain either why the existing structure of the WPS Penalty Policy was inadequate to address her concerns or why the Agency s evidence regarding potential risk of harm to handlers was unconvincing.[41]

Finally, the ALJ s claim that there is no harm to the FIFRA WPS regulatory program from Respondent s failure to comply with 40 C.F.R. § 170.222 could not be further from the truth. The ALJ s holding would effectively render meaningless and would undermine the concept of the independence between regulations designed to protect workers and those designed to protect handlers - a concept expressly stated as the underlying purpose of the WPS revisions in 1992 the separate duties set forth under 40 C.F.R. §§ 170.122 and 170.222. *See generally*, WPS Preamble at 38102-104. If left to stand, the ALJ s rationale for refusing to assess a penalty for Respondent s violations of § 170.222 sends a message to the regulated community that it should strive for the least amount of effort in protecting and informing its handlers about pesticide

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[41]For example, the ALJ could have assigned lower values for human health and exposure than did the Agency, as the ALJ did with respect to all other claims. Assuming that the ALJ had followed her general analysis of other handler claims, she likely would have arrived a gravity adjustment value of 6, which would have entitled Martex to a 20% reduction per count. Because the ALJ did not make such an adjustment, it is unclear why the penalty policies, in this instance, would result in an unjust penalty amount.

applications to which they are routinely exposed. Thus, the ALJ s failure to assess penalties for Respondent s failure to comply with section 170.222 *does* harm the FIFRA and WPS regulatory scheme and puts handlers at greater risk, an end result clearly at odds with plain language of the WPS regulations and the relevant penalty policies. The ALJ s finding that there is no harm to the WPS program is thus clear error and an abuse of discretion and should be overturned by the Board. *See FRM*, slip op. at 24-25.

b. *Even if violations of 40 C.F.R. §§ 170.122 and 170.222 are dependent in the circumstances of this case, the ALJ s assessment failed to follow the relevant penalty policies.*

Even if the ALJ were correct in her analysis that the two sets of counts were dependent under the circumstances of the case, according to the FIFRA ERP, the ALJ should have analyzed a penalty for both sets of violations and then capped the combined amount at the statutory maximum for one set of violations. *See* FIFRA ERP at 26 (a single event or action . . . which can be considered as two unlawful acts of FIFRA (section 12) cannot result in a civil penalty *greater than the statutory limit* for one offense of FIFRA) (emphasis added). Not only does the ALJ fail to impose any penalty against Respondent for its violations of 40 C.F.R. § 170.222, but she reduces Respondent s liability for violations of § 170.122 by ten percent. A more appropriate result under a finding that the two sets of counts were dependent given the facts of the case would have been to analyze the penalty due for 40 C.F.R. §§ 170.122 and 170.222, mitigating as permitted by the relevant penalty policy gravity adjustments for each set of violations, and then capping the per-Count penalty of the two sets at $1,100. This would at least have given some effect to the responsibility Respondent had, and failed to meet, with regard to its responsibility towards both groups of employees, as set forth under the WPS regulations.

The ALJ s penalty analysis with regard to Respondent s violations of 40 C.F.R. § 170.222 lacks sufficient clarity, is neither compelling nor convincing, and, as such, is clear error or an abuse of discretion by the ALJ. Complainant requests that reverse the ALJ s decision on this issue and use its *de novo* authority on review to assess an appropriate penalty for these violations.

C. The ALJ failed to follow the FIFRA and WPS penalty policies when calculating Respondent s culpability under those policies and, further, assumed facts not in evidence to support her departure from those policies

The FIFRA ERP and WPS Penalty Policy s gravity adjustment factors contain a category called culpability which is listed in the penalty policies as having four values: 4" for knowing or willful violations of the statute; 2" for negligence or where culpability is unknown, and 0" for violations that were neither knowing nor willful and did not result from negligence[; v]iolator instituted steps to correct the violation immediately after discovery of the violation. In its penalty calculations, the Agency assigned a value of 2" to the gravity adjustment factor for culpability. C s Ex 36. Complainant s witness, Dr. Adrian Enache, testified that his opinion Martex was in the very least negligent and that a value of 2" was conservative in light of its repeated prior Notices of Violation of FIFRA. Tr. at 947-948.

The ALJ ultimately assigned a value of 1" for culpability in all her penalty calculations. She based this value on self-serving statements by Respondent s owners that it has taken steps to ensure such a problem will not occur again, efforts to install additional decontamination sites that were taken after the Complaint was filed, and her conclusion that Dr. Enache was invited by Martex and its attorneys to visit its farms, and no notice of violation or complaint was warranted. Initial Decision at 65, 67, 69, 71-72. The ALJ concluded that these violations are a

result of negligence, but that Respondent took steps to prevent the violation from recurring.

The ALJ s holding in this regard is outside the requirements of the FIFRA ERP and WPS Penalty Policy, as negligence is clearly assigned a value of 2 under both policies, and the ALJ found Respondent to be negligent. *Id.* As an initial matter, even taking as true the ALJ s assertion that Respondent made good faith efforts and has come into compliance with the WPS, Respondent s culpability is based on its level of negligence *at the time of the violation*. Although the FIFRA ERP and WPS Penalty Policy both allow a culpability level of 0" where a violation was neither knowing nor wilful and *did not result from negligence* [and the v]iolator instituted steps to correct the violation immediately after discovery of the violation, all Respondent s violations have been shown to be the result of negligence. FIFRA ERP at B-2; WPS Penalty Policy at 9 (emphases added); Initial Decision at 65, 67, 69, 71-72.

While both penalty policies permit mitigation of a civil penalty based on the type of good faith efforts to come into compliance the ALJ considers, such mitigation is only allowed in the context of settlement negotiations and is inappropriate at this juncture in legal proceedings. As stated by the EAB in *FRM Chemicals*:

> Positive attitude and good faith attempts to comply with the law can be appropriate considerations for up to a twenty percent penalty reduction during settlement negotiations with EPA and a second twenty percent reduction if those circumstances are extraordinary and equity so requires. *Penalty Policy* at 26-28. In this case, however, the parties litigated the case instead of negotiating a settlement so this provision does not apply.

FRM Chemicals at 27; FIFRA ERP at 27-28.. The ALJ s assessment of culpability under the relevant penalty policies inappropriately gives Respondent credit for its purported efforts at compliance after the time for such credit has expired.

Additionally, the ALJ s factual bases for mitigation are contradicted by the record. Dr. Enache stated clearly that his presence at Respondent s Jauca facility in May 2005 was not for a full inspection, but for a visit, and that while there he did in fact observe additional WPS violations, but used enforcement discretion in deciding not to pursue them. Tr. at 1035-1037. Dr. Enache s testimony directly contradicts the ALJ s description thereof, and demonstrates clear error on this point. The ALJ s statement that Respondent had come into compliance with the WPS PPE requirements[42] is directly contradicted by the testimony of Inspector Roberto Rivera of PRDA, who stated at hearing that on a subsequent inspection of Respondent s facilities, the farm still lacked appropriate PPE and PPE storage, and handlers interviewed in July 2005 didn t know how to properly use their PPE, testimony the ALJ cited in her Initial Decision s Findings of Fact. Tr. at 326, 329-330; Initial Decision at 26-27. In fact, Respondent s owners testified that they *still* have not read the WPS in full, despite being responsible for ensuring compliance therewith.[43] Tr. at 1355-56, 1528-29. Respondents also failed to establish credibly that it came into compliance prior to the *filing of this Complaint*. Tr. at 1534. These statements are evidence that Respondent has *not* mitigated its culpability for the violations at issue - they can only at best stand for the idea that Respondent is possibly in better compliance with some of those elements of the WPS for which it has been found liable than it was prior to the issuance of the Complaint. The ALJ s reliance on Respondent s compliance efforts as mitigation for its culpability under the relevant penalty policies is thus not supported by the record. Complainant requests that the EAB

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[42]Initial Decision at 71.

[43] Respondent lays responsibility for compliance with the WPS at the feet of EPA and PRDA, who are supposed to tell them what they are supposed to do to comply since it would otherwise be impossible to know. Tr. 1528-29.

vacate this portion of the ALJ s penalty assessment and assess a more appropriate penalty under its *de novo* authority of review.

VIII. CONCLUSION

Based on the foregoing, EPA respectfully requests that Respondent s Appeal be denied and that the ALJ s Initial Decision be upheld, with the exception of the following areas: EPA requests that the ALJ s Initial Decision (1) be clarified with regard to the appropriate display of specific pesticide application information; (2) be reversed with regard to the decision not to assess penalties for violations involving 40 C.F.R. § 170.222; and (3) be vacated with regard to the ALJ s assessment of Respondent s culpability under the relevant penalty policies. EPA respectfully requests that the Board assess an appropriate civil penalty under its *de novo* authority of review.

Respectfully submitted,

_____ _____

Date

Danielle C. Fidler, Attorney-Advisor
Special Litigation and Projects Division
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., NW, MC-2248A
Washington, DC 20460

and

Eduardo Quintana, Enforcement Attorney
Legal Enforcement Program, MC-ENF-L
U.S. Environmental Protection Agency
1595 Wynkoop St.
Denver, CO 80202-1129

Of counsel: Gary Jonesi

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Complainant s Response to Respondent s Appeal, Notice of Cross-Appeal, and Supporting Brief was sent to the following persons, in the manner specified, on the date below:

Original, via hand delivery:

Eurika Durr, Clerk of the Board
U.S. Environmental Protection Agency
Environmental Appeals Board
Colorado Building
1341 G Street, N.W., Suite 600
MC 1103B
Washington, D.C. 20005

Electronic copy via CDX submitted by Gary Jonesi

Copy via interoffice mail:

Hon. Susan L. Biro
U.S. Environmental Protection Agency
Office of Administrative Law Judges
1099 14th Street, NW, Suite 350
MC-1900L
Washington, DC 20005

Copy, via Federal Express:

Romano Zampierollo-Rheinfeldt
116 Calle Mallorca
Urb. Floral Park
San Juan, Puerto Rico 00917-3121

Venancio Marti
Martex Farms, S.E.
Rd. No. 1, Km. 96.2
Santa Isabel, Puerto Rico 00757

Dated: _____ _____

Danielle C. Fidler
U.S. EPA