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

In the Matter of:	/	
	/	
Martex Farms, S.E.	/	
Rd. No. 1, Km. 96.2	/	
Santa Isabel, Puerto Rico 00757	/	
	/	
Respondent	/	
.....	/	FIFRA Appeal No. 07-01
US EPA Docket No.	/	
FIFRA 02-2005-5301	/	
Before the Hon. Susan L. Biro,	/	
Chief Administrative Law Judge	/	
.....	/	
Proceeding under Section 14(a) of the	/	
Federal Insecticide, Fungicide and	/	
Rodenticide Act ("FIFRA"), as amended,	/	
7 U.S.C. §136l(a)	/	
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APPEAL BRIEF

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APPEAL BRIEF

TO THE HONORABLE ENVIRONMENTAL APPEALS BOARD (EAB):

COMES NOW the Respondent Martex Farms, S.E. ("Martex") through the undersigned attorney, and respectfully states and prays as follows:

I. Introduction

A. Appeal Brief Is Timely Filed.

Pursuant to Rule 22.30(a) of the Consolidated Rules of Practice (CROP), 40 C.F.R. §22.30(a), and the EAB's Practice Manual of June, 2004, Martex filed a Notice of Appeal dated February 13, 2007, seeking review of the Initial Decision issued by Chief Administrative Law Judge ("ALJ") Susan L. Biro dated January 19, 2007. A facsimile of the Initial Decision was originally sent to Martex on the same date of issuance, and the document subsequently delivered (USPS, certified mail) on January 25, 2007. Since said Initial Decision was served by first class

mail, but not by overnight or same-day delivery, Rule 22.7(c) of the CROP extends the deadline for filing the Notice of Appeal and the Appeal Brief, allowing 5 additional days to the 30-day period to file both documents. 40 C.F.R. §22.7(c). Martex, in a parallel motion dated February 13, 2007, requested to the EAB a two-week extension to file this Appeal Brief; the petition was granted and the filing date extended to March 9, 2007. This appeal arises under the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), 7 U.S.C. §§ 136 et seq., and the regulations promulgated thereunder, and this Appeal Brief is filed within the time frame allotted.

B. The Respondent.

Martex is a law abiding agricultural operation that has been unjustly singled out and targeted by the agency to send a strong message to the regulated community. In this case, the United States Environmental Protection Agency ("EPA" or "Agency") is pursuing a claim against Martex that is discriminatory, deficient, biased, pursued in bad faith, plagued with inaccuracies, based on hearsay, speculations, erroneous factual allegations and a wrongful interpretation of the law. In spite of the competence revealed by the ALJ in her attempts to provide suitable remedies to both parties, as well as to sensibly adjust gravity levels under the "Workers Protection Standards" ("WPS") Appendix, Attachment 2-B, it is respectfully stated that Martex did not receive a fair treatment, and that the outcome of this litigation is not proportionate to the alleged FIFRA violations.

The administrative record shows that Martex operates five farms, about 3,000 acres. The Coto Laurel farm is located in the Municipality of Ponce; two additional facilities, Descalabrado and Río Canas, are located in the Municipality of Juana Díaz. In the Municipality of Santa Isabel, Martex operates the Paso Seco and Jauca farms. The record also shows that the Jauca facility is the largest, close to a thousand acres. [TRANSCRIPTS, VOL IV, page 1290-1293]. Martex employs over 300-400 agricultural workers, including three to six handlers and twelve to fifteen supervisors

in high unemployment and economically depressed areas of Southern Puerto Rico. See the Initial Decision, page 13.

For several years Martex's personnel has received WPS training offered by Mr. William Hunt, a private consultant based in the State of Florida. [TRANSCRIPTS, VOL. IV, pages 1473-1484, and 1600-1619]. The record shows that Martex has provided the required WPS training to well over 300 employees from August, 1998, through June, 2005. Respondent's Exhibit No.10. From the year 2000 on, said WPS training has also been delivered by Ms. Ana Delia Martínez, a Puerto Rico Department of Agriculture ("PRDA") employee and WPS training coordinator.[1]/ [TRANSCRIPTS, VOL I, pages 138, 140 and 142]. Respondent's Exhibit No. 8.

The record shows that PRDA-EPA inspectors visited the Jauca facility on March 24, 2003. Initial Decision. Findings of Fact 16. The inspection was done by Ms. Dilsia Barros and Ms. Nayda Alvarez, PRDA, and Mr. Anthony Lammano, EPA Pesticides Control Specialist; no violations were found at Jauca during said inspection. [TRANCRIPTS, VOL III, pages 972 and 1039]. Respondent's Exhibit No. 27; Respondent's Exhibit No. 30. [2]/ Other PRDA-EPA personnel performed several subsequent inspections of Martex's facilities, and the company took immediate corrective measures as soon as any suggestion and/or deficiencies were detected by the regulators.

Despite all of Martex's efforts to have said inspectors as witnesses at the trial, the PRDA-EPA inspectors did not appear to testify about previous inspections to Coto Laurel, Río Canas and

[1] Ms. Ana Delia Martínez, was announced as a Respondent's witness to testify as to as to WPS training of Martex's personnel from 2000 to present. For reasons unknown to Martex said witness did not attend the trial.

[2] The three PRDA-EPA inspectors noted that the central information center was complete, that no violations were found as to WPS pesticide safety training, that posted warning signs and methods to notify applications and removal of signs after expiration of REI was adequate and that written and oral notification was given, that no violations were found as to PPE and that upon checking the decontamination site for handlers and workers no violation was found.

Viveros facilities. Complainant's Exhibit No. 7, [3]/ and Complainant's Exhibit No. 5. [4]/ Also, Respondent's Exhibit No. 31 and Respondent's Exhibit No. 32.

Martex has regularly purchased PPE and decontamination material for the Respondent's employees. Respondent's Exhibit No. 11. The record shows that some PRDA-EPA inspectors have observed farm personnel utilizing PPE on many occasions. [TRANSCRIPTS, Vol. IV, pages 1540-1541]. Mobile decontamination stations have been added to further promote the safety and well being of Respondent's agricultural workers and handlers that work in all the company's farms. Respondent's Exhibit 17.

There has been no claim that Martex has caused harm to health or has damaged or degraded the environment. Respondent's Exhibit No. 27. On the contrary, Respondent has adequately served the public interest and the ultimate purpose of the law. Respondent's Exhibit No. 39. As a matter of fact, Martex posts all required and relevant WPS information on the bulletin board at the central posting station of the Jauca facility. See Complainants Exhibit No. 21.b and Complainants Exhibit No. 22.c.

Martex provides a full service vehicle to each supervisor, has several trucks, about 50-60 tractors, mowers and other mechanical equipment that are routinely serviced in the company's facilities. The company employs welders, two mechanics and about three to four assistants that work in Martex's workshops. The Jauca facility workshop has a bathroom complete with toilet, shower, water faucet, mirror, towel, soap and protection equipment. The Coto facility workshop

[3] Mr. Jorge Maldonado, a PRDA-EPA inspector also present at inspections of Coto Laurel facility held on August 20, 2003, and Río Canas of September 5, 2003 was announced as a Respondent's witness to testify as to all corrective measures implemented by Respondent and full compliance with WPS requirements observed during a September 8, 2003, follow-up visit to Río Canas. For reasons unknown to Martex said witness did not attend the trial.

[4] Mr. José A. de Jesús, another PRDA-EPA inspector also present during the inspection of the Viveros facility held on September 5, 2003, was also announced to appear as a Respondent's witness to testify as to the observations he recorded during the visit and full WPS compliance. For reasons unknown to Martex said witness did not attend the trial.

also had similar facilities. Respondent's Exhibit 49. In Puerto Rico, people normally prefer to use their own cleaning equipment, including towels. [TRANSCRIPTS, VOL V, page 1786-1790].

Sound agricultural methods and the use of innovative technologies to reduce and minimize pesticide applications have been a standard practice in all farms owned and operated by Martex. The quality of the Respondent's products sold in the local, continental US and international markets has won continuous acclaims and praises from the federal government and from the government of the Commonwealth of Puerto Rico. Respondent's Exhibit 39.

During the past five to eight years Martex has been actively pursuing integrated pest management activities to substantially reduce the dependence on pesticides, primarily through the use of mechanical means for pest control, by transplanting over 15,000 trees to decrease the tree density per acre, by spot spraying herbicides, and by using biological pest control methods such as the planting of neem trees along fencelines to serve as windbreakers. Initial Decision, page 61. Such practices promote air circulation in the company's fields and reduces the need to use pesticides. [TRANSCRIPTS, VOL IV, pages 1450, 1488-1491, 1494]. Also, see Respondent's Exhibit No. 23.

Martex's farms are routinely audited and all operations reviewed and monitored by a number of state, federal and international organizations as well as independent concerns. For more than fifteen years, Martex has always been found to be in compliance; multiple certifications and awards at the local, national and international levels recognize the Respondent's safety commitment to employees, visitors, clients and communities surrounding all five farming facilities.

The Jauca facility successfully passed a March 24, 2003, inspection, and the Summary of Findings noted that the central information area complied with legal requirements, no violation was found as to pesticide safety training, and that Personal Protective Equipment (PPE) and the

decontamination site were in compliance and no violations were found during the inspection. Initial Decision, Findings of Fact 16, at page 16.

In July 2004, Martex was granted a fourteen (14%) percent rebate in its insurance premium from the State Insurance Fund on accident protection for workers based of its low cost of accident claims. [TRANSCRIPTS, VOL IV, pages 1269-1273]. Also, see Respondent's Exhibit No. 37, and Initial Decision, page 64. No evidence was submitted by the agency to the effect that surrounding communities objected to the Respondent's agricultural practices or pesticides applications. In other words, Martex is also a good neighbor.

The record shows that the PRDA uses Martex's farms to showcase prime local agricultural operations when foreign visitors are invited by the Commonwealth government. [TRANSCRIPTS, VOL IV, pages 1359-1360].

After the filing of the Complaint, the President of Martex was appointed by the U.S. Department of Agriculture to be a member of the National Mango Board. Initial Decision, page 13; Respondent's Exhibits No. 40-42.

C. Date And Place Of The Trial.

The trial of this case was held in San Juan, Puerto Rico, from October 24 to October 28, 2005. Parties to this lawsuit presented witnesses that were examined and cross-examined, and submitted documents admitted and marked into evidence. The transcripts of the case, five volumes and over 1,700 pages, contain all matters that transpired during the trial.

II. The Complaint

A. Initial Complaint

The record shows that, on April 26, 2004, two employees of the PRDA, Mr. Roberto Rivera and Mr. Juan Carlos Muñoz, guided two teams of regulators to visit Martex's farms to inspect

farming operations and pesticides applications at the Jauca and Coto Laurel facilities. Under the terms of a cooperative agreement entered between EPA and the PRDA, the agency funds the Commonwealth's counterpart and PRDA employees stationed at the Agrological Laboratory, Dorado, Puerto Rico, actively participate in local FIFRA enforcement activities. As part of the cooperative agreement, local performance is measured in terms of the number of inspections conducted in a given year. [TRANSCRIPTS, VOL I, pages 154-157]. This PRDA-EPA agreement dates back to 1973. Initial Decision. Findings of Fact 15.

The day of the inspection, April 26, 2004, a group of regulators arrived at Respondent's farms at 8:45 a.m. and went to the Jauca facility main office. Mr. Rivera remained at the site to inspect the Jauca facility, assisted by EPA's Region 2 personnel Ms. Tara Masters and Ms. Vera Soltero who observed the inspection and served as translator to Ms. Masters because she does not speak Spanish. See Initial Decision, Findings of Fact 27, page 18. Inspector Juan Carlos Muñoz, assisted by two of EPA's private contractors, Mr. Carlton Lane and Ms. Jennifer Larkins, went to the Coto Laurel facility to complete a parallel inspection.[5]/ [TRANSCRIPTS VOL I, page 98].

These private contractors submitted two reports dated June 8, 2004, but the same were censored by EPA prior to their production as Complainant's Exhibit No. 14 and Complainant's Exhibit No. 16. The administrative record shows that after the service of the Complaint, Martex filed a Motion *In Limine* dated August 31, 2005, to request that both documents as well as other documents announced and submitted by the agency --see Complainant's Exhibit No. 10(a), Inspection notes of Mr. Roberto Rivera, dated September 5, 2003, and Complainant's Exhibit No. 13 (a), Inspection notes of Mr. Roberto Rivera to Worker Protection Standard Use Inspection report for April 24 and 29, 2004-- be excluded as inadmissible at the trial of this case, because the

[5] At the time of the April 26, 2004, Coto Laurel inspection, Mr. Carlton Lane and Ms. Jennifer Larkin were employed by the consulting company Science Application International Corporation (SAIC). See Complainant's Exhibit No. 16.

deleted parts make the documents not trustworthy. The 27th. day of September 2005, the ALJ denied said motion in its entirety.

Pursuant to Section 14(a)(1) of the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136*l*(a)(1), the agency filed a Complaint against Martex on January 28, 2005. EPA originally claimed that Martex had committed 338 violations of FIFRA's "Workers Protection Standards" (WPS), 40 C.F.R. Part 170, and demanded a penalty of $405,600 to be assessed against the Respondent. The record shows that the base penalty for each count was originally set at $1,200. See Complaint and Complainant's Exhibit No. 25.

The 338 violations were allegedly found during inspections of two of the Respondent's farms. The agency claimed that 336 violations were detected by the PRDA-EPA team of inspectors leaded by Mr. Rivera during a visit to the Jauca facility held on April 26, 2004, and that the last two violations were detected during a parallel inspection of the Coto Laurel facility held on the same date by a different PRDA-EPA team leaded by Mr. Muñoz. Among other documents listed and included in Complainant's Initial Prehearing Exchange of May 26, 2005, the agency announced Complainant's Exhibit No. 21.b. It is respectfully submitted that the record shows that Complainant's Exhibit No. 21.b was later translated by the agency, then marked and admitted into evidence as Complainant's Exhibit No. 21.c. [TRANSCRIPTS, VOL III, pages 1095-1096].

Both WPS documents are similar, but they do not contain the same information. Complainant's Exhibit No. 21.b shows 11 pesticide applications for Friday, April 23, 2004, and 6 applications for Monday, April 26, 2004. Whereas the new document submitted by the agency, Complainant's Exhibit No. 21.c, shows 37 applications for April 23, 2004, but none for April 26, 2004. Additionally, Complainant's Exhibit No. 21.c has two ClearOut 41 Plus applications for Jauca fields OS-11 and ON-52CLT, as if both were made on April 23, 2004, instead of the true date

for these applications which is correctly shown on Complainant's 21.b, that is to say, April 26, 2004. This anomaly is very confusing and certainly mislead the ALJ when she decided to hold to the erroneous interpretation of the meaning and extension of Joint Prehearing Stipulation No. 23, dated August 19, 2005, to be addressed later in this motion.

B. The Press Release And Press Conference

The administrative record shows that Martex's spraying records for all the facilities the company owned and/or operated were copied to an electronic media and delivered to PRDA-EPA personnel several months before the agency proposed such documents and marked them as Complainant's Exhibit No. 21.b.

However, PRDA personnel did not bother to review and/or analyze the information obtained from Martex to see if other than the Jauca facility's records were included in the WPS report. The fact is that Martex provided the information available for all of Respondent's owned and/or operated farms, including a considerable number of fields located in the Coto Laurel, Descalabrado, Río Canas, and Paso Seco facilities. [TRANSCRIPTS, VOL 2, page 410-411]. The regulator's lack of analysis had the effect of substantially expanding and dramatizing the alleged number (338) FIFRA violations.

This lack of analysis and subsequent flawed information was passed on from the PRDA Agrological Laboratory to EPA Region 2 personnel, without any further attempt to correct mistakes and/or misleading information. Then, through a well orchestrated publicity stunt, the agency convened a press conference held in the San Juan, Puerto Rico, EPA headquarters, to announce the largest proposed penalty ($400,000) in U.S. history for 338 FIFRA violations.

The flawed information was fed to the media and to the general public attending the February 3, 2004, press conference. Respondent's Exhibit No. 24. As discussed in further detail

below, the agency's press conference and press release of that date caused considerable damages to Martex, putting at risk the reputation, economic well-being and stability of the company.

Martex could not answer the multiple requests for interviews simply because the Complaint had no yet been served; the same was partially served on February 4, 2004, after the press conference. Respondent's Exhibit No. 29. Finally, on February 9, 2005, several days after the press conference, Martex was notified and served with a full set of the Complaint containing a complete set of enclosures.

C. Subsequent Amendments To The Complaint

EPA twice submitted motions for leave to file amendments to the Complaint. The first one dated July 13, 2005, meant to correct some technical errors and misidentifications, resulted in the First Amended Complaint that reduced the alleged violations from 338 to 336 counts,[6]/ but keeping the original base penalty of $1,200 per count. See Complainant's Exhibit No. 33.

Months later, on September 2, 2005, EPA filed a Second Amended Complaint still claiming that Martex had committed 336 violations of FIFRA's WPS, 40 C.F.R. Part 170, but now based on a updated base penalty of $1,100 per count, and demanded that a total penalty of $369,600 be imposed against the Respondent. See Complainant's Exhibit No. 35. The record shows that the agency distributed these 336 counts in six "categories" of violations. A summary of said categories is presented below:

First Category. Counts 1-151: Martex failed to notify "workers" of pesticide applications in violation of 40 C.F.R. § 170.122 ("worker notification");

Second Category. Counts 152-153: Martex failed to provide decontamination supplies to workers within ¼ mile of JC-11 field in violation of 40 C.F.R. § 170.150 and FIFRA Section

[6] EPA claimed 334 alleged violations committed at the Jauca facility, and two violations at the Coto Laurel facility.

12(a)(2)(G) ("worker decontamination supplies"), and lack of eye-flush container designed specifically for flushing eyes available at the same JC-11 field;

Third Category. Counts 154-304: Martex failed to notify pesticide "handlers" of pesticide applications in violation of 40 C.F.R. § 170.222 ("handler notification");

Fourth Category. Counts 305-321: Martex failed to provide decontamination supplies to handlers in violation of 40 C.F.R. § 170.250 ("handler decontamination supplies");

Fifth Category. Counts 322-334: Martex failed to provide personal protective equipment ("PPE") to handlers in violation of 40 C.F.R. § 170.240 ("handler PPE"); and the

Sixth Category. Counts 335-336: Martex failed to provide decontamination supplies to a handler at Respondent's "Coto Laurel facility" on this same date, in violation of 40 C.F.R. § 170.250 ("handler decontamination supplies at Coto").

III. Brief Notes On The Nature Of The Case

As stated above, the agency filed a Complaint against Martex dated January 28, 2005, and demanded that a penalty of $405,600 be assessed for 338 WPS violations allegedly detected on April 26, 2004, during an inspection of the Respondent's Jauca and Coto Laurel facilities. As also stated above, EPA twice submitted motions for leave to file amendments to the Complaint.

The first motion dated July 13, 2005, had the purpose to correct some technical errors and misidentifications, and to propose "that the Spanish name identified on the Respondent's Worker Protection Standard ("WPS") records (attached to EPA's Prehearing Exchange as Complainant's Exhibit No. 21.b) be provided in each table, with the correct English translation in parentheses." In addition to the correction of technical errors and to propose the translation of documents, the agency also stated that "Application No. 10 in the tables presented in Paragraphs 56 and 71 of the Complaint incorrectly identified Field JC-41 as a Mango field in which the pesticide 'ClearOut 41

Plus' had been applied on March 29, 2004. See Answer, ¶¶ 56, 71. Complainant proposes to remove these two Applications and the two counts associated therewith, as reflected in Paragraphs 59 and 74 of the Complaint."

This EAB should note that both tables presented in Paragraphs 56 and 71 of the Complaint show all the fields in which Martex applied the pesticide 'ClearOut 41 Plus' between March 29, 2004, and April 26, 2004. Also, that the corresponding paragraphs 59 and 74 of the Complaint summarize the 152 violations (1-152) originally included in the table of paragraph 56, [7]/ and the additional 152 violations (155-305) also originally included in the table of paragraph 71.[8]/ The removal of application No.10 in both tables presented in Paragraphs 56 and 71 of the Complaint, attributed to the misidentification of Field JC-41 as a Mango field in which the pesticide 'ClearOut 41 Plus' had been applied on March 29, 2004, had the effect of reducing by two counts the total number of violations reflected in paragraphs 59 and 74 of the Complaint. The record shows that the First Amended Complaint of July 13, 2005, incorporates the proposed corrections.

Even though the First Amended Complaint alleged 336 violations instead of the original 338, the agency retained the original penalty calculation based on a statutory maximum of $1,200 per count. See Complainant's. See Exhibit No. 33. Consequently, EPA demanded payment of a revised penalty in the amount of $403,200, instead of $405,600 originally demanded. The trial record shows that Complainant's Exhibit No. 25 was later renamed Respondent's Exhibit No. 55, and Complainant's Exhibit No. 33 was renamed Respondent's Exhibit No. 56. [TRANSCRIPTS, VOL V, page 1908].

A second motion requesting a leave to file amendments to the Complaint was submitted by the agency on September 2, 2005, with the purpose of addressing a penalty calculation discrepancy.

[7] First Category. Counts 1-152, ("worker notification").
[8] Third Category. Counts 155-305, ("handler notification").

The discrepancy, as claimed in a letter dated August 30, 2005, signed by Ms. Ann Pontius, Director of Toxics and Pesticide Enforcement Division, resulted from a 1996 typographical error of the rounding provisions of the Civil Monetary Penalty Inflation Rule that was undetected by EPA for a number of years. See Complainant's Exhibit No. 35. As a result of the above, EPA's Second Amended Complaint corrected the statutory maximum for penalty calculations, $1,100 per count instead of $1,200 used in the two initial Complaints. After making the corrections, EPA followed up and submitted a third set of calculation for the alleged FIFRA violations, demanding a revised penalty of $ 369,600. [9]/

The record shows that this third set of calculations submitted by EPA was also prepared by Mr. Michael G. Kramer, US EPA Region 2, FIFRA Enforcement Coordinator. See Complainant's Exhibit No. 36. By his own account an experienced FIFRA enforcement coordinator, Mr. Kramer admitted at the trial that the case at bar was the first WPS penalty calculations he had done in the 20 years he has worked for the agency. [TRANSCRIPTS, VOL II, page 745]. Also, see the Initial Decision, page 56.

Interestingly, after the trial, and just one day before the agency submitted its initial post trial brief, Mr. Kramer executed a Declaration under Oath dated February 9, 2006, stating that he did not fully consider Attachment 2B of the 1997 Interim Final Worker Protection Penalty Policy when assigning the FTTS Code and Gravity Level designation for each set of counts outlined in his civil penalty calculation worksheet for this case. EPA acknowledged that said attachments of the WPS Penalty Policy were missing from the documents available at the trial, but claimed that the error was ultimately harmless because the information contained therein had no bearing on the final penalty

[9] Ms. Pontius, in her letter dealing with the statutory maximum penalty for FIFRA violations, stated: **"EPA rarely assesses penalties under FIFRA § 14(a)(2) so this issue has not come to light before."**

amount proposed by the agency. See Complainant's Exhibit No. 23. Also, see the Initial Decision, page 62.

The record also shows that Mr. Kramer was very elusive in his answers and did not identify the Case Development Officer responsible for EPA's Complaints, a matter that was required by agency's regulations, nor could he explain the reason(s) he had to depart from the procedures and request a Dun & Bradstreet (B&D) financial report of Martex, instead of adhering to agency policies. [TRANSCRIPTS, VOL II, page 747-750]. The WPS Appendix states that a D&B report should be used for FIFRA § 14(a)(1) violators, but may not be for §14(a)(2) violators as in this case.[10]/ See again Initial Decision, page 62.

As elusive as Mr. Kramer has been, Mr. Adrian Enache was more elusive in answering Martex's requests of information about alleged local initiative to enforce FIFRA. Baffling as it may sound, nobody at the local agency or at EPA Region 2 seemed to know about this local initiative, a lack of answers that inevitably leads to the conclusion that the alleged local initiative simply does not exist.

The above mistakes and the series of other blunders of federal and state regulators, some already identified and other to be addressed later in this document, are examples of the numerous inaccuracies, erroneous factual allegations, objectionable documents, bias and wrongful application of the law that has plagued this process from the beginning.

The administrative record shows that the instant prosecution is discriminatory, deficient, biased, pursued in bad faith, plagued with inaccuracies, based on hearsay, speculations, erroneous factual allegations and wrongful interpretation of the law. Pertaining to the agency's bias in this prosecution, the administrative record also shows that an alleged 2003 local initiative to enforce FIFRA in Puerto Rico is nonexistent.

[10] FIFRA's Enforcement Response Policy (ERP) Table 2. See Complainant's Exhibit No. 23.

Curiously, Martex was the only local facility inspected in 2003 and again in 2004, that was later prosecuted. [TRANCRIPTS, VOL III, pages 983-985].

IV. Summary Of The Ruling

In its Initial Decision, the ALJ found Martex liable for 125 counts on accelerated decision, the largest part of which resulted from the erroneous interpretation of the meaning and extension of Joint Prehearing Stipulation No. 23. Said stipulation dated August 19, 2005, has been challenged by Martex from its inception.[11]/ EPA then withdrew 58 counts and, upon the hearing of the case, Martex was held liable for an additional 45 counts, with the remaining 108 dismissed as duplicative. In total, the ALJ found Martex liable for an aggregate total of 170 counts for a total penalty of $92,620. [12]/ A partial penalty of $67,320 was assessed for 68 violations of the First Category (Counts 1-151), for failure to notify "workers" of pesticide applications in violation of 40 C.F.R. § 170.122 ("worker notification"), and Martex was taxed with a revised penalty of $990 per count. [13]/

The ALJ determined that in the Third Category (Counts 154-304), Martex also violated FIFRA 68 times, for failure to notify pesticide "handlers" of pesticide applications in violation of 40 C.F.R. § 170.222 ("handler notification"). However, the ALJ imposed no penalty for these 68 violations, a determination that is not challenged by Martex.

The ALJ also found Martex liable for the remaining 34 counts of the Second Amended Complaint, imposing a combined partial penalty of $25,300, as follows. In the Second Category (Counts 152-153), for failure to provide decontamination supplies to workers in violation of 40

[11] The Joint Prehearing Stipulations dated August 19, 2005, reads: ... 23. "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."

[12] To summarize, these **170** counts are: 68 alleged violations for the First Category, and 68 for the Third Category, for a total of **136** counts, and other **34** counts for failure to provide decontamination supplies and personal protective equipment.

[13] Upon review of the record, the ALJ determined that a ten (10%) percent reduction of the base penalty of $1,100, for the violations of the First Category Counts was appropriate, and proposed a revised penalty of $990 per count. See the Initial Decision, page 65.

C.F.R. § 170.150 and FIFRA Section 12(a)(2)(G) ("worker decontamination supplies"), the ALJ taxed the same with a revised penalty of $990 per count, a total of $1,980 for two violations. Initial Decision, pages 66 and 67.

In the Fourth Category (Counts 305-321), for failure to provide decontamination supplies to handlers in violation of 40 C.F.R. § 170.250 ("handler decontamination supplies"), the ALJ taxed the first group of counts 305-317 with a revised penalty of $770 per count, a total of $10,010, and the last group of counts 318-321, with a revised penalty of $440 per count, a total of $1,760. In the Fifth Category (Counts 322-334), for failure to provide personal protective equipment ("PPE") to handlers in violation of 40 C.F.R. § 170.240 ("handler PPE"), the ALJ taxed all twelve counts with a revised penalty of $770 per count, a total of $10,010.

Finally, in the Sixth Category (Counts 335-336), for failure to provide decontamination supplies to a handler at Respondent's "Coto Laurel facility"on this same date, in violation of 40 C.F.R. § 170.250 ("handler decontamination supplies at Coto"), the ALJ taxed both counts with a revised penalty of $770 each, for a total of $1,980.

V. Summary Of The Issues Presented For Review And Relief Sought

Pursuant to 40 C.F.R. §22.30(f), Martex respectfully submits for review and requests to this EAB to set aside and vacate those portions of the Initial Decision, violations and penalties, as are described below.

A. Except for Counts 150 and 151, vacate all the remaining violations for counts of the First Category (Counts 1-151), and adjust the base penalty.

B. Vacate violations for Counts 152 and 153 of the Second Category, and void all the penalties imposed.

C. Except for Counts 303 and 304, vacate all the remaining violations for counts of the Third Category (Counts 154-304). As stated above, the ALJ imposed no penalty for these 68 violations, a determination that is not challenged by Martex.

D. Vacate violations for Counts 305-321 in the Fourth Category, for failure to provide decontamination supplies to handlers, should be partially set aside as further discussed below, and all penalties revised accordingly.

E. Vacate all thirteen violations for counts (322-334) included in the Fifth Category, and void all the penalties imposed.

F. Vacate both violations for counts (335 and 336) included in the Sixth Category, and void all the penalties imposed.

VI. Argument In Support Of The Issues Presented For Review And Relief Sought

A. Except for Counts 150 and 151, vacate all the remaining violations for counts of the First Category (Counts 1-151), and adjust the base penalty accordingly.

Concerning the assessment of 68 violations of the First Category (Counts 1-151), for failure to notify "workers" of pesticide applications in violation of 40 C.F.R. § 170.122 ("worker notification"), and subsequent taxation with a revised penalty of $990 per count, it is respectfully stated that Complainant's Exhibit No. 21.b shows that ClearOut 41 Plus applications for the 30-day period preceding the inspection of April 26, 2004, were included in the WPS displayed at the Jauca facility. Therefore, only two violations can be assessed and taxed in this case, Counts 150 and 151, for failure to include in the WPS posting the applications of ClearOut 41 Plus made on that date: April 26, 2004.

As stated in the Notice of Appeal of February 13, 2007, among other matters of seminal importance to this appeal that are further discussed herein, is the erroneous interpretation of

Stipulation No. 23 recorded in the Joint Prehearing Stipulations dated August 19, 2005. Stipulation No. 23 reads: "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." As interpreted by the agency and also by the ALJ --see the Initial Decision at pages 31 and 32-- said stipulation makes no sense, is erroneous, plainly and factually wrong, unreliable and in total contradiction to the reality, particularly when confronted to Complainant's Exhibit No. 21.b and its non identical translation marked Complainant's Exhibit No. 21.c.

The administrative record shows that this group of documents was proposed by the agency and later admitted into evidence, and that said documents are precisely the documents used by EPA to base its claim that Martex violated FIFRA 151 times on April 26, 2004. [TRANSCRIPTS, VOL III, pages 1095-1096]. It is a fact that Martex has consistently challenged the erroneous interpretation, meaning and extension of Stipulation No. 23, [14]/ and again challenged the same the first day of the trial. [TRANSCRIPTS, VOL I, pages 37-40].

The ALJ committed a clear error or an abuse of discretion in her factual findings and conclusions of law related to Respondent's commission of 68 violations of FIFRA §12(a)(2)(G), because it failed to notify "workers" of pesticide applications, as required by 40 C.F.R. § 170.122, regarding the March 29-April 26, 2004, applications of the pesticide ClearOut 41 Plus on the Jauca facility. It is respectfully submitted that the ALJ's determination is based on the also wrong interpretation of Joint Prehearing Stipulations No. 23. Again, said stipulation is contrary to the information contained in Complainant's Exhibit No. 21.b. This document shows that Martex had

[14] Motion Requesting That The Order Denying Respondent's Motion To Amend Information Exchange Be Certified To The Environmental Appeals Board, dated October 3, 2005; Motion To Request That The Order On Complainant's Motion For Findings Of Fact And Conclusions Of Law And For Partial Accelerated Decision As To Liability Be Certified To The Environmental Appeals Board, dated October 10, 2005; and Motion To Request That The Order Denying Respondent's Motion Requesting Recommendation For Interlocutory Review Of Order On Accelerated Decision Be Certified To The Environmental Appeals Board (EAB); Alternatively, To Reconsider Its Order, dated October 20, 2005.

the pesticides application information posted as required by law. The 108 pages translation that EPA marked as Complainant's Exhibit 21.c has the discrepancy mentioned previously,[15]/ that aggravates the erroneous interpretation of Joint Stipulation No. 23.

If the Complainant's Exhibit No. 21.b is appropriate and competent for the agency to base the allegations of the Second Amended Complaint, then it should also be appropriate and competent to be used by Martex to throw out Stipulation No.23 in its entirety, and for this EAB to endorse the claim that all ClearOut 41 Plus applications for the previous 30-day period preceding the April 26, 2004, inspection, were posted in the WPS displayed at the Jauca facility. Consequently, that only two FIFRA violations, for "workers" (First Category, Counts 150 and 151), could be claimed and successfully prosecuted by the agency. [16]/

The issues presented herein are sheltered by the common-law doctrine principles of the rule of completeness, embodied in Rule 106 of the Federal Rules of Evidence. (FRE) Plainly stated, if the agency used Complainant's Exhibit No. 21.b to allege in the Second Amended Complaint that Martex committed 336 FIFRA violations at the Jauca and Coto Laurel facilities, and charged with 302 counts related to the WPS posting of ClearOut 41 Plus applications, [17]/ then certainly Martex can use the same document to successfully challenge and set aside Joint Prehearing Stipulations No. 23. The underlying principle of FRE 106 is essentially one of fairness. The Rule states: "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at any time of any other part or any other writing or recorded statement which

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[15] Complainant's Exhibit No. 21.b has 11 pesticide applications for Friday, April 23, 2004, and 6 applications for Monday, April 26, 2004. Whereas the new document submitted by the agency, Complainant's Exhibit No. 21.c, shows 37 applications of pesticides for April 23, 2004, but none for April 26, 2004. Additionally, Complainant's Exhibit No. 21.c has two ClearOut 41 Plus applications for Jauca fields OS-11 and ON-52CLT, as if both were made on April 23, 2004, instead of the true date for these applications which is correctly shown on Complainant's 21.b, that is to say, April 26, 2004.

[16] Correspondingly, only two FIFRA violations, for "handlers" (Third Category, Counts 303 and 304), could also be claimed by EPA.

[17] With 151 violations for the First Category, Counts 150 and 151; and with 151 violations for the Third Category, Counts 154-304.

ought in fairness to be considered contemporaneously with it." Pertaining to the same underlying principle of fairness mentioned above, the California Evidence Code, Section 350 states: "§ 356. Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence."

FRE 106, "which authorizes the introduction into evidence of the remainder of a writing when a part of the writing is introduced, is underlain by and constitutes a partial codification of the common-law doctrine of completeness, which addresses the concerns that a court not be misled because portions of a statement are taken out of context and that an out-of-context statement may create such prejudice that it is impossible to repair by a subsequent presentation of additional material." See Beech Aircraft Corp.v. Rainey, 488 U.S. 153 (1988); 102 L. Ed. 2d 445. For an earlier treatment of the same principle, see James Greenleaf's Lessee vs. James Birth, 30 U.S. 132; 8 L. Ed. 72; 1831 (Decided, February 4, 1831). [18]/

Summarizing, when portions of a document or recording are admitted into evidence and marked as such, the opposing party has the right to have the court review other portions of said documents or recordings, or related documents, explaining, focusing or putting in context the documents so admitted and marked.

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[18] "Plaintiff brought an ejectment action against defendant to recover a certain lot of land. The circuit court entered judgment on a jury verdict in favor of defendant, and plaintiff sought review. The court reversed the judgment and remanded the case for a trial de novo because it found that assignments were sufficiently in evidence on defendant's proofs to entitle plaintiff to deduce his title to the lot in controversy without the introduction of the copies of the deeds of assignment, which were offered and rejected. The circuit court erroneously refused the parol evidence offered by a competent witness who was not present at the survey. The parol evidence would have established that the lessor of the plaintiff was in possession of the land under the claim of title as set forth in the bill of exception. The circuit court also erroneously refused to admit the copy of the deed to plaintiff's lessor into evidence, after it had admitted in evidence the proceedings in bankruptcy. Therefore, a new trial was warranted." (emphasis added)

B. Vacate violations for Counts 152 and 153 of the Second Category, and void all the penalties imposed.

Also included as issues for review are Counts 152 and 153 in the Second Category, for alleged failure to provide decontamination supplies to workers within ¼ mile of the JC-11 Jauca field on April 26, 2004, in violation of 40 C.F.R. § 170.150 and FIFRA Section 12(a)(2)(G) ("worker decontamination supplies").[19]/ Count 152 states that within ¼ mile of the JC-11 field, Martex failed to provide decontamination supplies to twenty workers picking up mangoes in said JC-11 field on April 26, 2004. Count 153, states that on same date, April 26, 2004, Martex failed to provide these workers with an eyeflush container for flushing eyes as required by the Kocide 101 label. The workers were working in the JC-11 Jauca field after the pesticide had been applied to the field, within the seven-day time frame in which a dedicated eyeflush container and eyewash were required to be available to employees entering the field. Both violations were taxed with a revised penalty of $990 per count, a total of $1,980. See the Initial Decision, pages 45-48 and 66.

The ALJ committed a clear error or an abuse of discretion in her factual findings and conclusions of law related to Respondent's commission of the two additional violations mentioned above. It is respectfully stated that workers at the JC-11 Jauca field had access to an abundant supply of water and other decontamination materials in the vicinity of the field. [TRANSCRIPT, VOL. IV, pages 1463, and 1469-1471.

Based on the record, and for the following reasons, this EAB should use its discretion and vacate both violations eliminating all the penalties imposed. Paragraph 61 of the Second Amended Complaint alleges that the pesticide Kocide 101 was applied to JC-11 field on April 21, 2004, five days before the twenty workers were participating in the mangoes harvesting activity of April 26, 2004. It is respectfully requested to this EAB to note that when the April 26, 2004, inspection took

[19] The administrative record shows that a ¼ mile is equivalent to 402.34 meters. See Respondent's Exhibit No. 52.

place, the temperature at the field was between 80 and 90 degrees and it was humid. See the Initial Decision, Findings of Fact 29, page 18. It is also important to note that tropical conditions (warm weather and humidity) have the effect of speeding up the loss of pesticides. As a matter of fact, the agency's expert witness, Mrs. Yvette Hopkins, testified at the trial that it was fair to assume, in any climate, that if a pesticide is applied before a rain, much of the material is lost to the ground. [TRANSCRIPTS, VOL. 2, page 691]. Therefore, 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.

The major and most widely used decontamination solvent is precisely water, and the record shows that water was plentiful and readily available to theses twenty workers within ¼ mile of the JC-11 Jauca field on April 26, 2004. To begin with, a five gallon can of water was available at the Jauca JC-11 field on the day of the inspection, and both PRDA-EPA inspectors, Mr. Roberto Rivera and Ms. Tara Masters, noted that there were several automobiles in the area, which suggested that workers drove directly to the field. See Initial Decision, Findings of Fact 29, page 18.

The record also shows that Martex had about 10-12 supervisors working at the Jauca facility, and that all of them were provided with F-150 vehicles. The group of workers harvesting mangoes at JC-11 Jauca field was supervised by Mr. Rey, who also had a pick-up and carried water, towels, soap, protection equipment, fire extinguishers, flags, and others. It is an uncontested fact that on that same day, during the interview conducted by the the PRDA-EPA inspectors, Mr. Alvaro Acosta was also present at the JC-11 Jauca field. This witness stated that he also has a full service company provided pick-up, and that he carried an overall, soap, towel, paper towel, a roll of Bounty, containers, bottles, one or two gallon bottles, tools, and a toolbox in case the vehicle

breaks down. He also stated that when workers are on a particular field they always have a supervisor present. [TRANSCRIPTS, VOL V, pages 1735-1740].

Also, at a very short distance from Jauca field JC-11, the harvesting site where the twenty workers were harvesting --and well within the ¼ mile from Jauca field JC-11-- Martex had built a huge shower-like structure, fully operational at the time of the April 26, 2004 inspection, located on the farm road connecting the workshop to field JC-11, passing through fields JC-31, JC-41, JC-32 and JC-42. Said installation, built in 1995, provided abundant and readily available water for decontamination of workers and handlers. [TRANSCRIPTS VOL IV, pages 1463-1468.]. Respondent's Exhibit 50.and Respondent's Exhibit No. 52.

The five gallon can of water, one or two gallon bottles, bottles and containers of water, towel, paper towels including a roll of Bounty, soap, protection equipment, fire extinguishers, flags, tools, and the huge shower-like structure close the Jauca field JC-11, certainly satisfied the eyeflush and abundant water requirements of Section 170.150 of the WPS, as well as the Kocide label requirements.[20]/ See EPA's Agricultural Worker Protection Standard 40 CFR Parts 156 & 170 Interpretative Policy allowing alternate methods to comply with WPS requirements, for example, the use of PPE, single use towels, eyeflush containers, availability of eyeflush, and water, among others. [21]/

This policy document, produced and disseminated by the agency for the benefit of the regulated community, has a chapter on Decontamination (3.1), dealing with issues such as (3.11) size of eyeflush containers, (3.12) single-use towels, (3.13) decontamination materials for flaggers, (3.14) immediate availability of eyeflush, (3.15) examples of immediate availability, (3.17) WPS and OSHA requirements for decontamination water, and (3.21) use of diluent water for

[20] Eye-flush container designed specifically for flushing eyes, available at the site.
[21] http://www.epa.gov/oppfod01/safety/workers/wpsinterpolicy.htm

decontamination, as well as other chapters dealing with (12.1) personal protective equipment, (12.12) chemical resistant footwear, (12.15) eye protection for dilute formulation, and (12.19) storage of PPE "apart" and "away", among others, and contains various alternate methods to comply with WPS requirements.

A review of the same reveals that in the case at bar, PRDA-EPA personnel did not bother to guide and/or educate Martex as to ways of complying with FIFRA. On the contrary, the agency's only purpose was to single out and punish the Respondent.

It is evident that EPA-PRDA regulators have disregarded their own published policies and have prosecuted Martex with the sole purpose of sending a strong message to the regulated community, regardless of substantive legal merit. The EPA is bound and has to follow its own directives. In general, see Padula v. Webster, 261 U.S. App. D.C. 365 (1987); 822 F. 2d. 97, 100 (1980), "It is well settled that an agency, even one that enjoys broad discretion, must adhere to voluntarily adopted, binding policies that limit its discretion. *Vitarelli v. Seaton*, 359 U.S. 535, 539, 3 L. Ed. 2d 1012, 79 S. Ct. 968 (1959); *Service v. Dulles*, 354 U.S. 363, 372, 77 S. Ct. 1152, 1 L. Ed. 2d 1403 (1957). In determining whether an agency's statements constitute "binding norms," we traditionally look to the present effect of the agency's pronouncements. Statements that are merely prospective, imposing no rights or obligations on the respective parties, will not be treated as binding norms. *American Bus Ass'n v. U.S.*, 201 U.S. App. D.C. 66, 627 F.2d 525, 529 (D.C. Cir. 1980). We also examine whether the agency's statements leave the agency free to exercise its discretion. Pronouncements that impose no significant restraints on the agency's discretion are not regarded as binding norms. As a general rule, an agency pronouncement is transformed into a binding norm if so intended by the agency. *Doe v. Hampton*, 184 U.S. App. D.C. 373, 566 F.2d 265,

281-282 (D.C. Cir. 1977), and agency intent, in turn, is "ascertained by an examination of the statement's language, the context, and any available extrinsic evidence." *Id.* at 281.

Based on the above, it is therefore respectfully requested to this EAB to use its discretion and set aside Counts 152 and 153 of the Second Category, and to void all the penalties imposed.

C. Except for violations for Counts 303 and 304, vacate all the remaining violations of the Third Category (Counts 154-304). As stated above, the ALJ imposed no penalty for these 68 violations, a determination that is not challenged by Martex.

For the alleged 68 violations in the Third Category (Counts 154-304), for failure to notify "handlers" of pesticide applications, Martex also claims that Complainant's Exhibit No. 21.b proves that ClearOut 41 Plus applications for the 30-day period preceding the April 26, 2004, inspection were included in the WPS displayed at the Jauca facility. Therefore, based on the evidence, only two violations can be assessed in this case. Counts 303 and 304, for failure to include in the WPS posting the applications of ClearOut 41 Plus made on that date: April 26, 2004. These 68 alleged violations are identical as the ones included in the First Category (Counts 1-151), therefore no further discussion is warranted. As stated above, the ALJ imposed no penalty for these 68 violations, a determination that is not challenged by Martex.

D. Counts 305-321 in the Fourth Category, violations for failure to provide decontamination supplies to handlers, should be partially set aside and all penalties revised accordingly as shown below. .

Paragraphs 79 and 81 of the Second Amended Complaint alleges that on April 26, 2004, Martex violated FIFRA seventeen times because it failed --within a ¼ of a mile of the mixing site and the decontamination facility-- to provide decontamination supplies to handlers applying

pesticides to Jauca fields OS-11, OS-12, OS-15, OS-16, ON-52CLT, OE-11G, OE-21G, JC-31, TX-21, and TX-22. [22]/

The record shows that EPA's allegations pertaining to the above mentioned ¼ mile distance from the mixing site and the decontamination facility were neither addressed or substantiated by the agency at the trial. The sole document submitted by EPA that refers to the ¼ mile standard, is Complainant's Exhibit No. 31. However, Complainant's Exhibit No. 31 only deals with distances to and from Jauca field JC-11, a field that was not included in the above list of fields where the 17 pesticide application took place. It is noted that Mr. Roberto Rivera testified about the ¼ mile measurements, but also limited to distances to and from JC-11 Jauca field, and not about distances linked to the fields alleged in paragraphs 79 and 81 of the Second Amended Complaint. [TRANSCRIPTS, VOL I, pages 282, 283].

It is respectfully submitted that the only evidence in the administrative record linked to distances to and from Jauca fields OS-11, OS-12, OS-15, OS-16, ON-52CLT, OE-11G, OE-21G, JC-31, TX-21, and TX-22, is the evidence submitted by Martex. The record shows that Jauca fields OS-12, OS-16, TX-21 and TX-22 are less than a ¼ mile from the mixing site, fields OS-11, OS-15, ON-52CLT are less than a ¼ mile from an existing lake, and field JC-31 is at the fruit washing station, the shower-like structure located on the dirt road from JC-11 towards fields JC-31, JC-41, JC-32 and JC-42. Respondent's Exhibit No. 52. The record shows that the mixing site, the lake, and the fruit washing station provide substantial amounts of water. Therefore, abundant water and other decontamination supplies appear to have been available for handlers within the ¼ mile requirement in the eight Jauca fields addressed above.

As to the availability of other decontamination supplies available to handlers applying pesticides in the above mentioned fields, it is respectfully brought to the attention of this EAB that

[22] The record shows that a ¼ mile is equivalent to 402.34 meters. See Respondent's Exhibit No. 52.

the ALJ stated at page 68 of the Initial Decision that: ..."the evidence showed that the supervisor may have had his truck, containing five gallons of water and the other decontamination supplies, within ¼ mile of some handlers during the 17 applications, but did not carry enough water for routine washing, emergency eyeflushing, and washing the entire body." In other words, other decontamination supplies were available to some handlers spraying pesticides in those fields. Where it appears to be a controversy is in the closing remark, to the effect that [the supervisor] "did not carry enough water for routine washing, emergency eyeflushing, and washing the entire body."

The above statement is erroneous and this part of the Initial Decision should be voided. It is respectfully stated that the ALJ erred in her appreciation of the evidence presented by the agency because she gave excessive credit to the following Dr. Adrian Enache's remarks quoted herein: "When you do use the water coming from a faucet of a sink or a jug of water, you cannot have a thorough body wash. And the pesticides do have the nasty habit of clinging onto your skin in all of the unwanted and very hard-to-reach places." [TRANSCRIPTS, VOL III, page 915, lines 7-11]

Dr. Enache's comments are highly speculative to say the least. He was not present at the site on the day of this particular PRDA-EPA inspection so he could not possible know the details of the clothing used by the handlers he didn't see, nor the type of water dispensers they had at their disposal. This witness did not testify and the record does not say if Dr. Enache took any measurements, or did any calculations, or in any way tested Martex's water installations to figure out their actual pressure. In sum, his testimony pertaining to this matter is totally irrelevant and should be discarded

Finally, in relation to the other nine remaining counts included in the Fourth Category, this EAB is respectfully requested to conclude, based on the record and the lack of evidence proposed by the agency to substantiate the allegations contained in paragraphs 79 and 81 of the Second

Amended Complaint, that handlers spraying pesticides in Jauca fields JC-32, OE-11G, TX-52G, TX-54G, OE-21G and OE-22G also had decontamination supplies, both water and other supplies, and that the same were provided by the supervisor, just as the ALJ stated at page 68 of the Initial Decision.

Based on the above, it is respectfully requested to this EAB to vacate eight of the seventeen counts (305, 306, 307, 310, 311, 312, 313 and 314) of the Fourth Category, and to void all the penalties imposed. The record shows that for eight pesticide applications at fields in the Jauca facility on April 26, 2004, handlers had readily available the principal decontamination item, an abundant water supply to wash entire body, and that this water was well within the ¼ mile from the field where handling activities took place.

As to the other nine counts (308, 309, and 315-321) included in this category, the lack of evidence in the record suggests that some fields are at a greater than the ¼ mile requirement and therefore this condition could only signal a violation of storage space for decontamination supplies violation, since all handlers had decontamination supplies, both water and other supplies, either provided by their supervisors or otherwise available at the Jauca facility. This EAB is again requested to face this possible violation of storage space for decontamination supplies, to see if EPA's Agricultural Worker Protection Standard [40 CFR Parts 156 & 170] Interpretative Policy allows for a FIFRA reasonable alternate compliance method. After doing so, Martex respectfully request that this EAB determine if indeed a violation is warranted, and then adjust accordingly the penalties for counts 308, 309, 315, 316, 317, 318, 319, 320 and 321.

E. Vacate all thirteen violations for counts (322-334) included in the Fifth Category, and void all the penalties imposed.

Pertaining to Counts 322-334 included in the Fifth Category, for failure to provide personal protective equipment ("PPE") to handlers in violation of 40 C.F.R. § 170.240 ("handler PPE"), Martex respectfully requests to this EAB to vacate all thirteen counts. The agency's allegations as to these violations are based in speculations because PRDA-EPA inspectors never observed handlers doing their chores during the April 26, 2004, inspection, nor did they even request to be taken to interview handlers the day of the inspection. Consequently, if PRDA-EPA inspectors did not find PPE in the handler's lockers, 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.

It is an admitted fact that handlers applied pesticides to various Jauca fields on April 26, 2004, as follows: two applications of ClearOut 41 Plus to fields OS-11 and ON-52CLT (Counts 322 and 323); applications of Kocide to fields JC-31, JC-32, OS-11, OS-12, TX21, TX22, OS-15, and OS-16 (Counts 324-331); and three applications of Boa to field OE-11G (Counts 322 through 334). See Initial Decision, page 69. Mr. Roberto Rivera, the PRDA-EPA inspector who visited Martex's Jauca facility, testified at the trial that he did not see handlers during the April 26, 2004, inspection. [TRANSCRIPTS. VOL II, page 513]. Therefore, Mr. Rivera could not determine or conclude if handlers were using or not the PPE at the above mentioned Jauca fields. It is respectfully submitted to this EAB that handlers were wearing their PPE because on April 26, 2004, they were applying pesticides in said fields. [TRANSCRIPTS VOL V, page 1876-1878]. The record shows that PRDA-EPA inspector Rivera returned to the Jauca farm on April 29, 2004, for a follow-up visit of the facility. He prepared a Supplemental Summary of Findings dated May 5, 2004, and a

handwritten report dated April 29, 2004, whose content is unknown because portions of the report had been censored presumably by the agency. Complainant's Exhibit No. 13 (a). [23]/

As a matter of fact, inspector Rivera also testified that he interviewed handlers, for the first time, during a July 20, 2004, subsequent visit to Martex's farms. [TRANSCRIPTS VOL II, page 399]. During this visit, the PRDA-EPA inspectors noted that Respondent had provided PPE to the handlers. See the Initial Decision, page 71.

F. To vacate both violations for counts (335 and 336) included in the Sixth Category, and void all the penalties imposed.

Finally, Martex respectfully requests to this EAB to also vacate both counts 335 and 336 included in the Sixth Category, for failure to provide decontamination supplies to a handler at Respondent's Coto facility, violation of 40 C.F.R. § 170.250.

The agency claimed that on April 20 and April 22, 2004, Kocide was applied to the C-001 mango field and that the handler involved in both applications lacked decontamination supplies. However, the evidence shows that in the Coto Mixing Area, the handler applying pesticides at the C-001 mango field five days earlier 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 Exhibit No. 49. The evidence also shows that the decontamination site had soap, clean clothing, towel and water over a basin, but not a shower for bathing the whole body. See Initial Decision, page 71. It is noted that the packing plant, the bathrooms, the (2) water tanks, the workshop and decontamination site are clustered in the same place. And the swimming pool is at a walking

[23] The handwritten report contains the inspection notes of Mr. Roberto Rivera, attached to the Worker Protection Standard Use Inspection report for April 24 and 29, 2004. It is a fact that Martex filed a Motion *In Limine* dated August 31, 2005, to request that this documents as well as three other documents announced and submitted by the agency be excluded as inadmissible.

distance from the cluster. Additional water for washing the entire body is provided by the Puerto Rico Aqueduct and Sewers Authority (PRASA). See Respondent Exhibit No. 48.

Based on the record, and taking into account the above reasons, this EAB is respectfully requested to vacate both violations and to void all the corresponding penalties imposed.

VII. Issues, Problems and Opportunities

Martex has continuously claimed that EPA has shown a distinct pattern of discriminatory behavior and selective prosecution with the sole purpose of singling out the Respondent to send a strong, albeit unfounded message to the regulated community, not to protect agricultural handlers, workers or the environment. In spite of the so-called severity of the violations included in the complaint, EPA deferred for about a year the commencement of this prosecution and no further action has been taken by the agency. Without prior notice or warning and acting in bad faith, the agency convened a press conference held in San Juan, Puerto Rico on February 3, 2005, to announce that Martex faced huge penalties for the largest FIFRA violation in U.S. history. Said press conference was held before the Complaint was partially served to the Respondent of February 9, 2005. Respondent's Exhibit No. 24.

The agency's press conference and press release of February 3, 2005 caused considerable damages to Martex , putting at risk the reputation, economic well-being and stability of the company. Additionally, the administrative record shows that the service of process of the instant Complaint was deficient. The record shows that the initial Complaint was mailed to the Respondent, but returned to the agency by the United States Postal Service, and then faxed to EPA's San Juan representatives on February 4, 2005, to be sent to Martex on the same day. Respondent's Exhibit No. 26. Respondent's Exhibit No. 29. On February 9, 2005, several days after the press conference

held in San Juan, Puerto Rico, Martex was notified and served with a full set of the Complaint containing a complete set of enclosures.

Mr. Juan Carlos Muñoz, PRDA Inspector Supervisor, is the person who partially served the Complaint and delivered it to Martex. Respondent's Exhibit No. 29. [TRANSCRIPTS, VOL I, page 68]. The service process was partial and deficient and thus highly questionable and flawed because Martex was initially served an unsigned copy of the Complaint, and all the attachments were missing. Mr. Muñoz stated that it was at trial when he realized that he had partially served the Complaint and that the information he passed on to the agency was not true. [TRANSCRIPTS, VOL I, pages 176, 177 and 178].

Martex respectfully requests that this EAB critically review all the efforts made to obtain a fair process in this case, to no avail. After answering the Complaint, Martex announced a list of witnesses in its Initial Prehearing Exchange dated June 15, 2005, to include PRDA current employees and/or PRDA-EPA inspectors. Pursuant to Rule 22.19(f) of the CROP, Martex filed a Motion To Amend Information Exchange dated August 31, 2005, requesting the inclusion of four additional witnesses to testify as to EPA's alleged initiative or lack thereof, to implement the precepts of FIFRA in Puerto Rico. These witnesses are owners or principals of four agricultural entities that sell chemicals and pesticides to local farmers and would most probably know if there were other farmers pursued by the agency, or if only Martex had been targeted and a subject of the agency's selective enforcement. On September 26, 2005, the motion was denied by the ALJ.

Then, pursuant to Rule 22.19(e) of the CROP, Martex filed another Motion For The Issuance Of Discovery And Hearing Subpoenas, dated September 1, 2005. Its purpose was to take depositions to two high ranking EPA officials, Ms. Kathleen Callahan and Mr. Carl Soderberg, and to have them testify at the trial of the case as to their personal knowledge of the alleged local

initiative to protect agricultural workers, since neither the PRDA or EPA had provided any information. The motion was denied by the ALJ on September 16, 2005. One of the reasons for the denial is the absence of authorization to issue this kind of orders under FIFRA. It is conceded that FIFRA does not authorize the issuance of subpoenas in administrative proceedings, but the same are allowed by other environmental statutes. This means that FIFRA's lack of delegated authority to allow the issuance of discovery subpoenas is plainly and constitutionally wrong, because it does not make available to the regulated community all the legal means to effectively defend itself against unjustified governmental intervention and selective prosecution.

Martex also filed a Motion *In Limine* dated August 31, 2005, to request that four documents announced and submitted by the agency be excluded as inadmissible at the trial of this case, because the deleted parts make the documents not trustworthy. As stated above, said documents were announced by the agency and later presented at the trial and marked as follows: Complainant's Exhibit No. 10(a), Inspection notes of Mr. Roberto Rivera, dated September 5, 2003; Complainant's Exhibit No. 13 (a), Inspection notes of Mr. Roberto Rivera to Worker Protection Standard Use Inspection report for April 26 and 29, 2004; and two reports prepared by EPA's private contractors dated June 8, 2004, marked Complainant's Exhibit No. 14 and Complainant's Exhibit No. 16.

The ALJ denied said motion in its entirety in her Order dated 27th. day of September 2005,

The above ought to convince this EAB that Martex has been unevenly facing an agency whose claim is discriminatory, deficient, biased, pursued in bad faith, plagued with inaccuracies, based on hearsay, speculations, erroneous factual allegations and wrongful interpretation of the law.

The agency is pursuing a <u>discriminatory</u> claim against Martex

Despite all efforts made before and in the course of the trial, Martex has not been able to obtain an official response as to alleged 2003 and 2004 PRDA initiatives designed to enforce

FIFRA in Puerto Rico. [24]/ Respondent's Exhibit No. 33. Respondent's Exhibit No. 36. [TRANCRIPTS, VOL III, pages 949-975].

In his testimony, Dr. Enache could not explain if the ensuing inspections held at Martex's farms during the rest of 2003 and 2004 were in fact part of governmental initiatives, or just isolated enforcement acts intended to harass the company. The record shows that Respondent's requests to have additional information on enforcement matters have gone unanswered as of today. [25]/

The trial record shows that no local agricultural enterprises were prosecuted after the 2003 initiative and that Martex was the only facility reinspected several times in 2004 and later prosecuted as a result of the April 26, 2004, inspection. [TRANCRIPTS, VOL III, pages 983 and 984]. PRDA-EPA personnel again visited the Jauca facility on Monday May 16, 2005, at the invitation of Martex. When taken to the mixing/loading area, Dr. Enache found "minor things" to be wrong, a backflow preventer installed onto the line in order to make sure that the pesticides may not revert back to the lake, or whatever was the water source there. [TRANCRIPTS, VOL III, page 1035-1037].

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[24] The administrative record shows that Martex could not pursue the defense of "selective prosecution" for lack of an initial showing that the agency had selected the Respondent for enforcement action in bad faith, based of impermissible considerations such as race, religion or the desire to prevent the exercise of constitutional rights. Martex could not subpoena two high ranking EPA employees to testify about the existence of EPA's local initiatives to protect agricultural workers, handlers and neighboring communities; about EPA's selective prosecution of farmers; about the agency's stated policy to correct problems rather than impose penalties for FIFRA alleged violations; and as to information made available to the press before notifying Respondent of the alleged violations and amount of proposed penalties in instant complaint, and therefore could not make the "threshold of preliminary showing" necessary to be entitled to said defense. Absent the "threshold of preliminary showing" Martex was not allowed to present four additional witnesses not listed in the preliminary exchange dated June 15, 2005.

[25] Mrs. Carmen Zayas, a high ranking PRDA official in charge of the Dorado facilities was announced as a Respondent's witness to testify as to WPS training of personnel from 2000 to present and in relation with PRDA-EPA inspections of Respondent's farms. For reasons unknown to Martex said witness did not attend the trial. Mrs. Ana Delia Martínez was another PRDA witness who failed to attend the hearings and testify as to her WPS training of Respondent's.

The agency is pursuing a claim against Martex Farms, S.E. that is deficient

Also according to the trial record, PRDA-EPA inspector Mr. Roberto Rivera received complete information of all applications of pesticides at the Respondent's farms from March 26 to April 26 2004, but did not verify if the information was limited to Jauca or also included other farms or sites such as fences, workshops, and the like. The record also shows that Ms. Masters, one of the two EPA Region 2 employees that accompanied Mr. Rivera during the Jauca facility inspection, one month after the April 26, 2004 inspection was still wandering what information she actually had in her files. Respondents Exhibit No. 35.

Despite having received a complete record of pesticides applications for a 30-day period until Monday April 26, 2004, neither Mr. Roberto Rivera, his PRDA supervisor Mr. Juan Carlos Muñoz, or any other higher ranking PRDA and/or EPA personnel, took the time to review the material provided by Martex in order to delete unwanted information and keep only those applications that were done at the Jauca facility. The end result of this lack of interest was a complaint that included non-Jauca applications of ClearOut, applications of ClearOut to unknown fences, applications of ClearOut to unknown workshops, applications of ClearOut to unknown nurseries and double applications of ClearOut done at Jauca fields. [TRANSCRIPTS, VOL. IV, pages 1450 -1454]. It was not until the agency submitted the Complainant's Proposed Finding Of Facts, Conclusions Of Law, And Order: And Brief In Support Thereof, dated February 10, 2006, that 29 no-Jauca applications were finally removed, though the EPA insists in keeping all other ClearOut applications to unknown fences, to unknown workshops, to unknown nurseries and all double applications of ClearOut at Jauca fields.

The agency is pursuing a claim against Martex Farms, S.E. that is biased

Dr. Enache acknowledged the Jauca facility inspection of March 24, 2003, and testified that three inspectors (PRDA-EPA's Barros and Alvarez, and EPA's Lammano) found everything to be in compliance. [TRANCRIPTS, VOL III, page 972]. These inspectors noted in writing that the central information center was complete, that no violations were found as to pesticide safety training, that posted warning signs and methods to notify applications and removal of signs after expiration of the re-entry interval ("REI") was adequate and that written and oral notification was given, that no violations were found as to PPE and that upon checking the decontamination site for handlers and workers no violations were noted. Respondent's Exhibit 30. [TRANCRIPTS, VOL III, page 1039]

According to the testimony of Mr. Juan Carlos Muñoz we also know as a fact that in previous visits (three to four times) to Coto Laurel he had never noted a violation for lacking shower facilities, and after his earlier August 20, 2003 inspection, when the Coto Laurel facility was already owned by the Respondent, he did not notify Martex about missing showers.

What prompted the following PRDA-EPA inspections if everything was found to be in order? Maybe the desire to scrutinize a complex agricultural operation in order to "find" violations and assess higher fines.

Attention is again called to the remarkably biased statements of Mr. Juan Carlos Muñoz when he testified about his inspections of Martex's farms, in particular the April 26, 2004 Coto Laurel facility visit to perform a routine WPS inspection accompanied by Ms. Larkin and Mr. Jones, and his testimony about his objectionable role in serving the agency's initial Complaint. At the trial, the testimony offered by Mr. Muñoz, the agency's first witness, not only failed to prove the Sixth Category, Counts 335-336 of the Second Amended Complaint, but set the pace and the thrust

for the rest of EPA's witnesses: go after Martex and, at any cost, do whatever is necessary to nail this company.

This experienced PRDA-EPA Pesticide Inspector Supervisor, presumably familiar with EPA's policy, failed to do his job and call the attention of Respondent's personnel to the fact that EPA's Agricultural Worker Protection Standard 40 CFR Parts 156 & 170 Interpretative Policy allowed alternate methods to comply with WPS requirements as to the availability of water for decontamination purposes. Respondent's Exhibit No. 49.

The trial record shows that on April 26, 2004 no workers were present at the Coto Laurel farm because the harvest had finished and they were at a party celebrating the end of the season. Mr. Muñoz interviewed the only handler present at the facility, a Martex's employee who was not applying or mixing pesticides, but at the workshop doing some other chores.

In spite of the above, Mr. Muñoz noted that there was no eyeflush at the Coto Laurel facility, nor a shower for this handler was available at said facility on the date of the inspection. Once again, Mr. Juan Carlos Muñoz, presumably familiar with EPA's policy, failed to do his job and call to the attention of Martex's personnel that certain employees of an agricultural establishment (including contract labor) are not covered by the WPS if they are employed by the establishment but do not meet the WPS definition of workers or handlers because they are not performing worker or handler activities/tasks. Examples of theses employees that would not normally be considered workers or handlers under the WPS would include (but are not necessarily limited to): office employees; retail sales staff; building and construction crews; building maintenance/cleaning crews; food preparation or food service staff; truck drivers and/or haulers; mechanics; road workers; surveyors; power line crews; and any other employees not engaged in WPS defined worker/handler activities. See EPA's Final Interpretive Guidance Workgroup (IGW)

Questions & Answers For Release March 26, 2004, in particular, IGW Question 2004-2 and IGW Answer 2004-2. [26]/

Mr. Muñoz testified that in previous visits (three to four times) to Coto Laurel he had never noted a violation for lacking shower facilities, and after his earlier August 20, 2003 inspection, when the Coto Laurel facility was already owned by Martex, he did not notify Martex Farms, S.E. about missing showers.

The record also shows that Dr. Enache constantly dramatized the toxic effect of pesticides -- as if the same were intended to be ingested in their pure form by workers and handlers-- instead of being diluted and sprayed to particular crops at the Respondent's farms. The same as other agency witnesses who testified in this case, the trial record shows that Dr. Enache was as well biased against Martex and that EPA's proposed fines do not seek to protect agricultural workers or handlers, but the extraction of a payment from the Respondent that is punitive and not remedial.

With bad faith the agency is pursuing a claim against Martex

On February 3, 2005, without prior notice or warning, the EPA, acting in bad faith, convened a press conference to announce that Martex Farms, S. E. faced more than $400,000.00 in fines, in what the agency called the largest FIFRA violation in U. S. history. [Respondent's Exhibit No. 24] As steted before in this Appeal Brief, EPA's press conference and press release of February 3, 2005 caused considerable damages to Martex, putting at risk the reputation, economic well-being and stability of the company.

Martex has made numerous efforts to secure PRDA employees to testify at the trial in support of the Respondent's position based on their knowledge of this case. Only one witness, Mrs. Carmen Oliver Canabal, current Deputy Secretary of the PRDA for the Special Services Area, did attend and testified. For reasons unknown to Martex the rest of the PRDA-EPA witnesses that were

[26] http://www.epa.gov/oppfead1/safety/workers/igw-interplcy.htm

announced in the Initial Prehearing Exchange did not attend the trial. Neither PRDA-EPA inspectors or EPA personnel ventured to answer questions pertaining to probable reasons that could explain the absence of PRDA employees announced by the Respondent to testify at the trial on behalf of Martex.

The agency is pursuing a claim against Martex Farms, S.E. that is plagued with inaccuracies

The administrative record shows that the Complaint was amended twice due to alleged technical errors and because of a mistake in the base penalty assessments that was discovered as late as August 30, 2005. However, the Second Amended Complaint that the agency intended to prove at the trial still included alleged violations that did not occur at the Respondent's Jauca facility. The record also shows that penalty calculations were prepared three times prior to the October 24-28, 2005 hearings held in this case. However, after the trial and resulting from an alleged oversight, the agency was forced to prepare a fourth penalty calculation. The responsible EPA official in charge for this penalty calculation process, circumvented regulations in order to obtain economic data pertaining to the Respondent. As stated previously, the record shows that Mr. Kramer did more than one penalty calculations, including one after the agency came across the letter signed by EPA's official Ms. Ann Pontius, dated August 30, 2005, that prompted the Second Amended Complaint. Also as stated above, the trial record also shows that Mr. Kramer was very elusive and did not identify the case development officer responsible for this complaint, nor he could explain the reason(s) he had to request a D&B report for Respondent instead of following agency policy.

The trial record shows that Dr. Enache was reluctant to admit that Respondent was in full compliance of the law as shown in EPA's documents, [27]/ and was as elusive as Mr. Kramer when

[27] See again the results of a previous visit conducted by three PRDA-EPA inspectors at Respondent's Jauca facility on March 24, 2003.

questioned about the reason(s) that his unit had to request a D&B report for Respondent, a 14(a)(2) alleged violator.

The agency is pursuing a claim against Martex Farms, S.E. based on <u>hearsay</u>

Both PRDA-EPA inspectors that testified in this case have overstated and exaggerated their alleged findings. Even though Mr. Juan Carlos Muñoz knew that Mr. Alvaro Acosta did not observe the alleged violations because he was not present during the April 26, 2004 Coto Laurel inspection, this PRDA-EPA Inspector Supervisor ignored the fact, drafted a report in English and deceitfully gave it to Martex's agronomist for his signature. Complainant's Exhibit No. 15. [TRANSCRIPTS, VOL I, page 179]

As in previous visits, Mr. Roberto Rivera requested to be left alone with workers he interviewed them. He did the same when he interviewed twenty workers harvesting mangoes at Jauca field JC-11during the April 26, 2004 inspection.[28]/ He also testified that workers at this Jauca field did not have soap or towels, just a five gallon can of water. He did not bother to advise any of the workers he interviewed, or their supervisor at the field or Mr. Acosta, that the five gallon can of water that he had seen at said Jauca field JC-11 during the inspection satisfied the WPS eyeflush water requirements according to EPA policy. Nor did he ask to the interviewed workers, after observing that they had their cars in the field, if they had decontamination materials available by other alternate means. The interviewed workers allegedly told to the inspector that they didn't know what an area of decontamination was. It is indeed strange and puzzling how Mr. Roberto Rivera interpreted the answers given by twenty workers as to the lack of potable water, soap and paper towels, items allegedly missing from a facility unknown to the individuals being interviewed. According to his testimony, Mr. Rivera does not tally the answers given during an interview.

[28] An interview similar to the one he held of September, 2003 that consisted in asking questions and filling out a yes-no form.

It is also strange and puzzling that Mr. Roberto Rivera, who crisscrossed and drove back and forth the Jauca facility to interview workers picking up mangoes at field JC-11on April 26, 2004, failed to see --at the midpoint between the JC-11 mango field and the main decontamination area of the Jauca facility-- that Martex had installed a fruit washing station, similar to a huge shower, that doubles as a decontamination facility. [TRANSCRIPTS, VOL II, pages 477, 478 and 479].

The agency is pursuing a claim against Martex based on speculation

Mr. Juan Carlos Muñoz was certainly speculating when he concluded that a handler present at the Coto Laurel facility on April 26, 2004 (though not applying or mixing pesticides the day of the inspection, but at the workshop doing some chores), who allegedly lacked decontamination supplies on the day of the inspection, also lacked the same supplies on earlier dates (April 20 and on April 21, 2004 during a Kocide application to C-001 Coto field.)

Additionally, PRDA-EPA inspector Mr. Roberto Rivera was also speculating when he noted in this inspection report of September 5, 2003 that Martex did not have a training program for new employees that came to work at the farm. [TRANSCRIPTS, VOL I, pages 247-248]. He was also speculating when he stated that workers by-passed the central information area, driving their cars directly to work at Jauca field JC-11. It is a speculation because Mr. Roberto Rivera did not ask them. [TRANSCRIPTS, VOL II, pages 479-481].

At the trial of the case, Mr. Roberto Rivera admitted he was again speculating when he testified about certain biological bag's content and regarding the pesticides applied to a banana field. [TRANSCRIPTS, VOL II, pages 405, 406, 407]. As stated previously, Mr. Rivera also admitted that on his visits of September 5, 2003 and April 26, 2004, he had never seen or interviewed applicators (handlers) in the field applying pesticides, but that he did interview four or five applicators (handlers) during a follow up inspection of July 20, 2004.

Although said July 20 visit to Jauca had other purposes, one of them to find out if handlers knew what a "fit test" was, Mr. Roberto Rivera never asked the handlers about the availability of decontamination supplies or about their PPE. [TRANSCRIPTS, VOL II, pages 485 and 486]. Therefore he was just speculating when he noted in the inspection report that handlers lacked PPE during the April 26, 2004, inspection because they were doing their chores at the field, and presumably were wearing their PPE.

The trial record further shows that PRDA-EPA inspector Mr. Roberto Rivera and EPA Inspector Ms. Tara Masters, in addition of their highly speculative testimony, both failed to call to the attention of Respondent that EPA's Agricultural Worker Protection Standard 40 CFR Parts 156 & 170 Interpretative Policy allowed alternate methods to comply with WPS requirements. [29]/

The agency is pursuing a claim against Martex that is based on erroneous factual allegations

The Complainant pretends to build its claim basing the same on erroneous factual allegations, challenged by the Respondent and successfully defeated at trial. Among other facts addressed and established at the hearings of this case, and discussed previously in this Appeal Brief, the following are particularly relevant:

No violations were found at Jauca during an earlier March 24, 2003 inspection of PRDA-EPA personnel Respondent's Exhibit No. 27, Respondent's Exhibit No. 30 [TRANCRIPTS, VOL III, pages 972 and 1039].

For several years Respondent's employees received WPS training delivered by a private consultant. [TRANSCRIPTS, VOL. IV, pages 1473-1484, and pages 1600-1619]. Respondent's Exhibit No.10. Then, after the year 2000, said WPS training has also been delivered by Ms. Ana

[29] The five gallon can of water available at the Jauca JC-1 I interview of workers; the water, soap, towel, paper towel, a roll of Bounty, containers, bottles, overalls and other items in a toolbox with flags, fire extinguisher carried in their pick-up vehicles by supervisors; and the huge shower like structure built by Martex to wash fruit satisfied the eyeflush and water requirements of Section 170.150 of the WPS.

Delia Martínez, a PRDA employee and WPS training coordinator. [TRANSCRIPTS, VOL I, pages 138, 140 and 142].

Respondent had always been careful for the safety of employees and has an outstanding labor safety record with the PR State Insurance Fund, and was awarded a reduction of insurance costs. Respondent's Exhibit No. 37.

Respondent has regularly purchased PPE and decontamination material for its employees. Respondent's Exhibit No. 11. PRDA-EPA inspectors have actually seen farm personnel utilizing PPE. [TRANSCRIPTS, Vol. IV, pages 1540-1541.

Martex immediately took corrective measures as soon as any suggestion and/or deficiencies were found during PRDA-EPA inspections. Complainant's Exhibit No. 7. Complainant's Exhibit No. 5. Also, see Respondent's Exhibit No. 31. Respondent's Exhibit No. 32.

There is no claim or evidence that Respondent has caused harm to health or the environment. Respondent's Exhibit No. 27.

Martex has adequately served the public interest and the ultimate purpose of the law. Respondent's Exhibit No. 39.

Respondent posts all relevant WPS information on the bulletin boards at central posting areas of each Martex facility. Complainants Exhibit No. 21 b.

The agency is pursuing a claim against Martex that is based on the <u>wrongful interpretation</u> of the law

PRDA-EPA inspectors Muñoz, Rivera and their supervisors at tha Agrological Laboratory as well as the agency's officials, Ms. Masters and Dr. Enache, have consistently ignored and disregarded the agency's policy, opting to find violations at any cost, in order to "thicken" the assessment of penalties against Martex, instead of educating the Respondent as to approved alternate methods of WPS compliance.

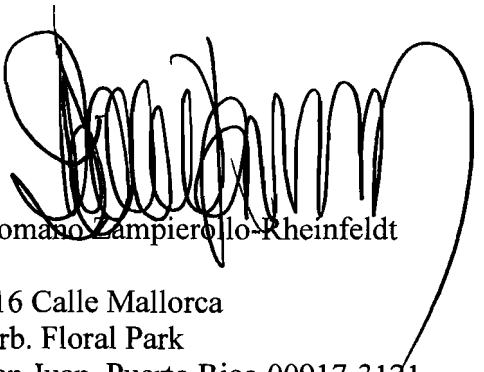
VIII. Concluding Remarks

This pattern of discrimination and selective prosecution against Martex developed after a successful PRDA-EPA inspection held at the Jauca facility on March 24, 2003. The alleged initiative to enforce FIFRA in Puerto Rico is nonexistent; if the same exists, it is a very guarded secret because nobody knows about the same.

Based on the above and taking into account the administrative record as a whole, this EAB is respectfully petitioned to accept this appeal and, applying the standard established by 40 C.F.R. §22.24(b), to enter a decision as requested, thus vacating and setting aside the ALJ's determinations and penalties of the Initial Decision that have been addressed herein.

RESPECTFULLY SUBMITTED. In San Juan, Puerto Rico. March 7, 2007.

CERTIFICATE OF SERVICE: I certify the mailing (HAND DELIVERY) of the original and five copies of this motion to: U.S. Environmental Protection Agency, Clerk of the Board, Environmental Appeals Board, Colorado Building, 1341 G. Street, N.W., Suite 600, Washington, D.C. 20005, and FAXED to (202) 233-0121; two copies sent (first class mail) to Ms. Sybil Anderson, Headquarters Hearing Clerk, US EPA, Office of Administrative Law Judges, 1099 14th. Street, N.W., Suite 350, Washington, DC 20005, and FAXED to (202) 565-0044; one copy sent to the Hon. Susan L. Biro, US EPA, Office of Administrative Law Judges, 1099 14th. Street, N.W., Suite 350, Washington, DC 20005, and FAXED to (202) 565-0044; one copy sent to Mr. Eduardo Quintana, Esq., Legal Enforcement Program (8ENFL), USEPA, 999 18th Street, Suite 300, Denver, Colorado 80202-2466, and FAXED to (303) 312-6953; and one copy sent to Ms. Danielle Fidler, Esq., Special Litigation and Projects Division, Office of Regulatory Enforcement, US EPA, 1200 Pennsylvania Ave. NW (MC-2248A), Washington, DC 20460, and FAXED to (202) 564-0010.



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