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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

ENVIRONMENTAL APPEALS BOARD

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In re

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MARTEX FARMS, S.E.

: Appeal No. 07-01

: Docket No. 02-2005-5301

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1201 Constitution Avenue, NW.

Washington, D.C.

Monday, November 5, 2007

The HEARING in this matter began at
approximately 10:03 a.m. pursuant to notice.

BEFORE:

JUDGE EDWARD E. REICH

JUDGE ANNA L. WOLGAST

JUDGE KATHIE A. STEIN

1 APPEARANCES:

2 On behalf of Environmental Protection Agency:
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 4 Office of Enforcement and Compliance Assurance
 United States Environmental Protection Agency
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7 On behalf of Martex, S.E.:
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11 ALSO PRESENT:

12 Gary Jones
 Carl Eichenwald

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1 P R O C E E D I N G S

2 THE CLERK: Environmental Appeals
3 Board of the United States Environmental
4 Protection Agency is now in session for oral
5 argument In Re Martex Farms, S.E., Docket
6 Number FIFRA 02-2005-5301, FIFRA Appeal
7 Number 07-02.

8 The Honorable Judges Ed Reich, Anna
9 Wolgast, Kathie Stein, presiding. Please be
10 seated.

11 JUDGE WOLGAST: Good morning.
12 We're here pursuant to the Board's order of
13 September 18th, 2007, to hear argument in
14 this FIFRA Civil Penalty matter.

15 Under that order, each side has 30
16 minutes for argument. If counsel could
17 please introduce themselves for the record.

18 MR. ZAMPIEROLLO-RHEINFELDT: Good
19 morning, Your Honor, members of the Board.
20 My name is Romano Zampierollo, and I am
21 counsel for Martex Farms.

22 MS. FIDLER: Good morning, Your

1 Honors. Danielle Fidler for Complainant,
2 Office of Enforcement and Compliance
3 Assurance, and I'm joined today by Gary
4 Jonesi and Carl Eichenwald, also of OECA.

5 JUDGE WOLGAST: Thank you. Mr.
6 Zampierollo, if you could begin and also
7 advise the Board as to whether you'll be
8 saving any of your 30 minutes for rebuttal
9 please.

10 MR. ZAMPIEROLLO-RHEINFELDT: Yes,
11 Your Honor. I will save about five minutes
12 for rebuttal, if necessary.

13 JUDGE WOLGAST: Thank you.

14 MR. ZAMPIEROLLO-RHEINFELDT: We are
15 ready whenever you are ready.

16 JUDGE WOLGAST: Yes. Please begin.

17 MR. ZAMPIEROLLO-RHEINFELDT: Thank
18 you. Your Honor, this is a case of selected
19 prosecution, where EPA singled out Martex,
20 while the rest of the Puerto Rico
21 agricultural community is left untouched.

22 The selection of Martex was made in

1 bad faith and are objectionable and
2 impermissible consideration to send a strong
3 message to the Puerto Rican community.

4 Certain not to protect agricultural
5 workers or handlers, but to extract a payment
6 from the respondent that is punitive and not
7 remedial. I would like to make reference to
8 Exhibit 24, Respondent Exhibit 24. This is
9 some remarks made by Ms. Kathleen Callahan in
10 San Juan, Puerto Rico, on or about February
11 3, 2005. This was several days before Martex
12 was served with the complaint. My client
13 didn't know about this when he had to
14 confront the press, and this statement.

15 However, Ms. Callahan was quoted as
16 saying that she expects Martex Farms to make
17 effort to fix the problems rather than to pay
18 fines.

19 This is part of the record in this
20 case, Your Honor.

21 JUDGE REICH: Can I ask for a
22 clarification? Since selective prosecution

1 is really a kind of term of art, are you
2 arguing that you meet the standards for
3 selective prosecution, because I understood
4 your brief at footnote 24 to indicate that
5 the administrative record shows that Martex
6 could not pursue the defense of selective
7 prosecution for lack of an initial showing
8 that the agency had selected the respondent
9 for enforcement action in bad faith based on
10 impermissible consideration, such as race,
11 religion, or the desire to prevent the
12 exercise of constitutional rights.

13 So given that footnote, I'm a
14 little unclear about your reasserting the
15 argument that this was selective prosecution.

16 MR. ZAMPIEROLLO-RHEINFELDT: Your
17 Honor, we are reasserting the argument, but
18 we are aware that we could not meet the
19 threshold questions.

20 JUDGE REICH: Okay.

21 MR. ZAMPIEROLLO-RHEINFELDT: We are
22 not talking about constitutional violations

1 here. But taken as whole, the 10 mistakes
2 that I'll try to address in a moment point to
3 the direction that EPA acted on bad faith and
4 other things. So if --

5 JUDGE STEIN: Could you explain to
6 me what the bad faith is?

7 MR. ZAMPIEROLLO-RHEINFELDT: Yes,
8 Your Honor.

9 JUDGE STEIN: And what specific
10 facts you're alleging constitute bad faith?

11 MR. ZAMPIEROLLO-RHEINFELDT: I'm
12 referring to Respondent's Reply Brief. For
13 example, Your Honor, look, I will go through
14 all of them.

15 The complaint is discriminatory.
16 We were singled out. There is no evidence of
17 a local initiative to enforce FIFRA in Puerto
18 Rico or the islands, so we understand that
19 absent this local initiative, everything what
20 EPA said about this matter was just wrong,
21 because there is no local initiative.

22 JUDGE STEIN: Yeah --

1 MR. ZAMPIEROLLO-RHEINFELDT: We
2 have been --

3 JUDGE STEIN: I un -- but I
4 understand that EPA has chosen to take an
5 enforcement action against your client, and
6 that you appear to be upset that an action
7 wasn't taken against others; but that given
8 that, you know, the law gives EPA discretion
9 as to, you know, particularly in light of
10 resources, how many enforcement actions to
11 take, I don't understand why they're taking
12 of a single action would amount to bad faith?

13 MR. ZAMPIEROLLO-RHEINFELDT: Well,
14 Your Honor, Martex was inspected by EPRDA,
15 EPA inspectors on March 24th, 2003.

16 JUDGE STEIN: Right.

17 MR. ZAMPIEROLLO-RHEINFELDT: And by
18 one EPA inspector, Mr. Anthony Lammano
19 precisely at the Caoca facility, which is the
20 biggest farm that we have in Santa Isabel
21 municipality. And no violations were found.

22 Unexpectedly, a couple of weeks or

1 months later, we received a flurry of visits
2 and inspections, about four or five in 2003.
3 And beginning with the April 26th, 2004
4 inspection, we had about four additional
5 inspections.

6 So nobody else was being inspected
7 by EPA in the islands.

8 JUDGE STEIN: So your argument in
9 essence is based on a lack of prior
10 enforcement by EPA?

11 MR. ZAMPIEROLLO-RHEINFELDT: Based
12 on a lack of -- probably this is the first
13 case EPA has prosecuted pertaining to FIFRA
14 violations. So probably, yes, lack of prior
15 enforcement.

16 See when we responded to the
17 complaint, and we prepared the pre-hearing
18 exchange of witnesses, we made a particular
19 announcement that we wanted to have several
20 EPA employees present subpoenaed for the
21 trial.

22 We wanted Mrs. Cathleen Callahan,

1 who was in San Juan on March the 3rd, 2004;
2 engineer Carl Soderberg; and Mr. Jorge
3 Maldonado, an EPA PRDA ex-inspector, Mr. de
4 Jesus, another inspector, and Ana Delya
5 Martinez, a lady who was -- who has been
6 giving WPS training to Martex since about six
7 or seven years ago; and other EPA personnel.
8 We could not obtain the subpoena order for
9 deposing these witnesses, nor making them
10 appear --

11 JUDGE STEIN: Is that an argument
12 that you've raised on appeal?

13 MR. ZAMPIEROLLO-RHEINFELDT: Yes.
14 Yeah. But I'm aware, Your Honor, I'm aware
15 that crop allows to subpoena witnesses, if
16 the particular law allows it.

17 Unfortunately, under FIFRA, the
18 hearing examiner was not allowed to issue the
19 subpoenas. But that does not change the fact
20 that our hands were tied -- to present
21 witnesses. We could not present witnesses
22 that knew what was the reason behind this

1 enforcement.

2 You see --

3 JUDGE REICH: In terms of that, I
4 mean, since we've already I think heard that
5 you're not arguing selective prosecution in
6 the strict sense, then issues as to liability
7 they may basically come down to factual
8 issues as to whether you were or weren't
9 meeting the applicable standards.

10 Why are the arguments that you're
11 making, if relevant at all, relevant only to
12 the penalty, which has more an ability to
13 consider equities than the underlying issue
14 of whether or not you're in violation?

15 MR. ZAMPIEROLLO-RHEINFELDT: Well,
16 not necessarily the penalties, Your Honor.

17 We understand that the inspectors
18 who visited the Cotalarel facility, Mr. Juan
19 Carlos Munoz, and two Saiach or private
20 contractors, they were prejudiced against the
21 company when they did this inspection,
22 because actually when they went to Cotalarel

1 on April 26th, 2004, the mango harvest was
2 over, but they already had the party to
3 celebrate the harvest. The harvest was over.
4 And there was nobody there working doing any
5 agricultural activity.

6 JUDGE REICH: Did the inspectors
7 testify at trial?

8 MR. ZAMPIEROLLO-RHEINFELDT: Yes.

9 JUDGE REICH: And I assume they
10 were cross examined?

11 MR. ZAMPIEROLLO-RHEINFELDT: Oh,
12 yes, Your Honor, at length.

13 JUDGE REICH: And did the
14 Administrative Law Judge in her decision find
15 their testimony to be credible?

16 MR. ZAMPIEROLLO-RHEINFELDT: You
17 see, Your Honor, I have a great respect for
18 Attorney Susan Bero, and I think she's a
19 great judge, but I think that here she made a
20 couple of mistakes.

21 JUDGE REICH: So that means she did
22 find their testimony to be credible?

1 MR. ZAMPIEROLLO-RHEINFELDT: Yes.

2 I can't deny that, Your Honor, because he was
3 very -- the demeanor of EPA's witnesses was
4 very shaky.

5 I'm a trial attorney. I've been
6 trying cases for about 30 years, and I can
7 see, I can feel, I can smell when a witness
8 is not --

9 JUDGE REICH: Because you're there.

10 MR. ZAMPIEROLLO-RHEINFELDT: Because
11 I'm there. I know the --

12 JUDGE REICH: And isn't that the
13 reason -- I'll answer the question myself. I
14 think that is the reason why this Board tends
15 to give great deference to an ALJ in
16 evaluating witness credibility, because, as
17 you yourself suggest, you know being there is
18 a critical element. And if she was there and
19 made that determination, I think that
20 presents a pretty high bar for us to second
21 guess any determination that's geared to
22 whether or not the witness was credible.

1 MR. ZAMPIEROLLO-RHEINFELDT: Yeah.

2 I think, Your Honor, that you are right, but
3 the law authorizes this panel of judges to
4 make de novo decisions. And you can go
5 through, if available, through the trial
6 record. There are five volumes this thick.

7 And sifting through the record, you
8 can "observe" how the witnesses were
9 testifying, because the way the questions
10 were posed and the way the answers were
11 given, you can see that. You can see that.

12 That's why I'm telling you I think
13 that Judge Bero is an excellent judge, but I
14 think she probably made a mistake here, a
15 couple of mistakes.

16 I don't -- I'm not sure if I
17 answered all the questions and I can go
18 ahead?

19 JUDGE WOLGAST: Well, could you
20 explain to us why you think the judge erred
21 or made mistakes as to liability?

22 MR. ZAMPIEROLLO-RHEINFELDT: That's

1 a tough nut to crack, Your Honor.

2 You see something that we cannot
3 leave aside is the fact that EPA
4 Administrative Law Judge is an EPA employee.
5 And all the witnesses that were attending
6 this trial or went to testify are either EPA
7 employees or Puerto Rico Department of
8 Agriculture deputized EPA employees.

9 So there's a common or more common
10 than not interest in having the rule of law,
11 the point of view of the agency sustained or
12 --

13 JUDGE STEIN: And where in your
14 briefs did you lay out that argument?

15 MR. ZAMPIEROLLO-RHEINFELDT: All
16 over the brief, Your Honor. It's-

17 JUDGE STEIN: That --

18 MR. ZAMPIEROLLO-RHEINFELDT: We
19 were --

20 JUDGE STEIN: -- your argument is
21 that the proceeding is not fair because the
22 ALJ is an employee of EPA, with certain, you

1 know, with all of the protections of the
2 Administrative Procedures Act?

3 MR. ZAMPIEROLLO-RHEINFELDT: I'm
4 not saying that, Your Honor. You see these
5 things you cannot take them separated one
6 from the other. It's all --

7 JUDGE STEIN: Well, in order for us
8 to be able to parse through the materials,
9 and we have parsed through the materials and
10 the testimony, is we need to understand what
11 specific factual finding or conclusion of law
12 is clearly erroneous.

13 MR. ZAMPIEROLLO-RHEINFELDT: For
14 example --

15 JUDGE STEIN: And we've been
16 through the materials, and we've looked at
17 your arguments and if, you know, there are
18 one or two of your arguments that are most
19 important to you that you want to explain a
20 little beyond the briefs, I think that would
21 be helpful to us.

22 But I do think we need to

1 understand, you know, in order for us to find
2 that the Administrative Law Judge erred, we
3 need to understand what that clear error
4 might be.

5 MR. ZAMPIEROLLO-RHEINFELDT: You
6 see, Your Honor, as I told at the beginning,
7 this is a whole procedure, a whole process.

8 When Ms. Callahan was in San Juan,
9 Puerto Rico and made the announcement about
10 this biggest penalty in U.S. history, she was
11 dealing with something else. She was dealing
12 with the exit of the Navy from Roosevelt
13 Roads and the Vieques.

14 So the impression many individuals
15 have in Puerto Rico and I share that
16 impression is that the EPA wanted to give a
17 strong warning to the inhabitants of this
18 island.

19 JUDGE WOLGAST: But, for instance,
20 how did the judge err in finding that the
21 company violated regulatory procedures to
22 provide notice of application in accordance

1 with 170.122?

2 MR. ZAMPIEROLLO-RHEINFELDT: Okay.

3 For example, Stipulation Number 23 that is a

4 --

5 JUDGE WOLGAST: Yes.

6 MR. ZAMPIEROLLO-RHEINFELDT: --

7 basic issue in this litigation was

8 interpreted by EPA's counsel, and I also have

9 great respect for Ms. Fidler, but she made a

10 mistake, and the judge. The way -- see we

11 think -- I think in Spanish. I've been

12 living in South America all my life, except

13 for two or three years in Italy, where I went

14 to school. So I think in Spanish, and I

15 translate.

16 So when I think and something that

17 is written or is going to be written, my

18 first interpretation of that is what I know

19 is in Spanish, not in English.

20 So if in Stipulation 23, we stated

21 that on April 26th, 2004 no applications of

22 clear out were posted, we were meaning -- I

1 was thinking that on that particular day,
2 April 26th, not before. But --

3 JUDGE STEIN: But didn't the judge
4 find wholly apart from the stipulation,
5 didn't she make a finding that there was
6 sufficient evidence in the record to conclude
7 there was liability, even if one were to
8 disregard that stipulation?

9 MR. ZAMPIEROLLO-RHEINFELDT: Well,
10 if you --

11 JUDGE STEIN: I'm not saying that
12 it would be appropriate to disregard it, but
13 I'm saying that unnecessarily, but I'm saying
14 that above and beyond that stipulation, my
15 reading of the ALJ's opinion is that she
16 found that additional evidence also supported
17 the finding of liability on that point.

18 MR. ZAMPIEROLLO-RHEINFELDT: Well,
19 if you eliminate Stipulation Number 23,
20 probably under the first set of first
21 categories of a violation, we would only have
22 violation 150 and 151, the last two.

1 In the second category, we won't
2 have violations. The third category, which
3 is the same as the first one, but for
4 handlers, the same situation.

5 JUDGE REICH: But I don't think
6 that's exactly responsive to the question,
7 because I don't think the question was how
8 you would interpret the effect of not having
9 the stipulation.

10 I think it was a more direct
11 question about what the ALJ, in fact, found
12 and whether the ALJ did not, in fact, find
13 that even apart from the stipulation, the
14 evidence proved the violations.

15 MR. ZAMPIEROLLO-RHEINFELDT: Well,
16 for example, for how come inspection of field
17 JC 11, or JC 1,1, the inspectors went there
18 from the main offices of Martex Farms and
19 they didn't notice, on their way to J field
20 -- J 11, that there was huge, gigantic
21 structure that is used to wash fruits and it
22 uses water?

1 That structure could be used
2 according to EPA's regulations, 17.156, I
3 believe, and 176, as an alternate method for
4 WPS compliance.

5 JUDGE WOLGAST: But let's stay with
6 the notice question before we move on to the
7 violations on decontamination supplies.

8 As to the notice, I understood that
9 what Judge Bero was relying on was that there
10 was no -- the inspectors testified that there
11 was no posting of any pesticide, even though
12 there had been, if there were prior
13 applications, that posting would still have
14 to be there for the ensuing 30 days.

15 And at the time of the April 26th
16 inspection, they found no postings of any
17 application of a pesticide.

18 MR. ZAMPIEROLLO-RHEINFELDT: Well,
19 the application was -- all the documents were
20 given to EPA in an electronic file. EPA used
21 Exhibit, Complainant Exhibit 21B, to sustain
22 Martex violations. If that is so, and it's

1 -- and that Exhibit 21B is good for
2 sustaining those violations, it's also good
3 to sustain that Martex was complying with the
4 law.

5 JUDGE WOLGAST: How so?

6 MR. ZAMPIEROLLO-RHEINFELDT: Because
7 of Federal Rule of Evidence 106. This is a
8 rule of fairness, Your Honor.

9 JUDGE WOLGAST: But what about the
10 exhibit are you relying on for your defense
11 to that finding of violation?

12 MR. ZAMPIEROLLO-RHEINFELDT: All
13 the exhibit, Your Honor. All exhibits -- 21B
14 that has a complete list of applications.

15 There's another one. There's an
16 Exhibit 21.

17 JUDGE REICH: Was the list that's
18 21B, was that list itself posted someplace?

19 MR. ZAMPIEROLLO-RHEINFELDT: I
20 understand that this list was posted on the
21 bulletin board, Your Honor. And this is the
22 information that EPA received in an

1 electronic file on July 20.

2 JUDGE REICH: So you're saying the
3 day the inspectors showed up, that particular
4 list was posted on the bulletin board?

5 MR. ZAMPIEROLLO-RHEINFELDT: This
6 one?

7 JUDGE REICH: Yeah.

8 JUDGE WOLGAST: Did -- who
9 testified to that effect?

10 MR. ZAMPIEROLLO-RHEINFELDT: Well,
11 Mr. Roberto Rivera, EPA's Inspector,
12 testified that the list was not there.
13 Martex representative, one of the owners,
14 Veny Mardi, Jr., testified that it was there.

15 JUDGE REICH: Was there and was
16 posted on the bulletin board, both?

17 MR. ZAMPIEROLLO-RHEINFELDT: On the
18 bulletin board in the main office. You see
19 to understand this postings, Your Honor, we
20 have to go a little back.

21 Martex bought this concerns from an
22 Israeli company who used to apply fertilizers

1 and herbicides with the same crew, with the
2 same supervisor.

3 The rest of the pesticides that,
4 for example, Kocide, Boa, Trilogy, you name
5 it, they were applied by a different crew.
6 Why? Because this company just thought that
7 that was the proper way to do it.

8 And my client inherited that
9 procedure. So when a posting of herbicide is
10 sent to the WPS posting, the posting, for
11 example, in this case, Clearout, which is a
12 herbicide, is sent along and probably the
13 next day it's corrected because they really
14 don't know if the pesticide is going to be
15 applied or not.

16 The rest of the pesticides that are
17 applied by other crews are applied after 4:00
18 p.m., by another group of people. So the
19 company knows for sure when the posting is
20 there that that pesticides are applied.

21 So there's a difference. And our
22 agronomist, Mr. Acosta, tried to explain

1 that, and obviously he was not successful in
2 doing that because the message was not --
3 they don't get through.

4 JUDGE STEIN: I'd like to ask you a
5 question for a moment about EPA's appeal.

6 I take it you're aware that EPA has
7 filed an appeal and cross appeal in this
8 case?

9 MR. ZAMPIEROLLO-RHEINFELDT: Yes.

10 JUDGE STEIN: And I take it you
11 also understand that if the Board were to
12 agree that that appeal was well taken,
13 there's a possibility that the penalty in
14 this matter could go up?

15 MR. ZAMPIEROLLO-RHEINFELDT: Yes,
16 Your Honor, we are aware of that, and we are
17 also aware that in this case, EPA did at
18 least three or maybe four calculations for
19 the penalties.

20 With the initial complaint, filed
21 on January 28th, 2004, there was a first one;
22 first penalty calculation by Mr. Kramer from

1 New York.

2 The complaint was amended on July
3 and again on August, I believe, and new
4 penalty calculations were prepared by EPA.

5 JUDGE STEIN: All right.

6 MR. ZAMPIEROLLO-RHEINFELDT: After
7 the trial on February 10th, 2006, well after
8 the trial, EPA came up with another set of
9 calculations, and I'm referring, Your Honor,
10 to EPA's Post Hearing Brief, Appendix B.

11 This is a sworn statement by Mr.
12 Kramer -- well, months after the trial, where
13 he states that he was not aware that he was
14 -- he did not fully consider Attachment 2B of
15 the 1997 interim final work and protection
16 penalty.

17 He all -- this gentleman also
18 stated that in 20 years working for EPA, it
19 was the first time, first time, he was doing
20 WPS calculation. I asked him, Mr. Kramer,
21 you are practicing with my client? And he
22 said no. And the answer went -- was

1 disregarded.

2 He was practicing with Martex. He
3 would -- never, never he did this
4 calculation.

5 So I really doubt that after all
6 the effort that Administrative Law Judge Bero
7 went or did in this calculation, I doubt that
8 EPA can come with a new set of calculations,
9 because --

10 JUDGE STEIN: My question isn't
11 really the question about new calculations.
12 My question was to make sure that you were
13 fully aware that as part of EPA's cross
14 appeal, they have challenged a few of the
15 findings of the ALJ, and in particular the
16 fact that they felt that in certain areas an
17 additional penalty should have been assessed.
18 And that is one of the things that the Board
19 will be looking at in rendering its decision
20 in this case?

21 MR. ZAMPIEROLLO-RHEINFELDT: Yes,
22 I'm aware of that, Your Honor, and I'm aware

1 that for category three, which is failure to
2 -- for this posting for handlers is the same,
3 exactly the same, situation than as workers.

4 In addition to that, handlers are
5 four. We have from maybe three to six, but
6 usually we have four handlers, and these
7 gentlemen are Jovine Ortiz, Angel Rosario,
8 Elvis Santiago. You can find their names in
9 the initial decision, page 36. And another
10 individual called PeeWee. His name is in
11 page 21 of the initial decision.

12 They know what they're doing. They
13 know what they're doing, when they're doing
14 it, why they're doing it, how they're doing
15 it. They know everything about pesticides
16 application.

17 So it is preposterous to think that
18 these individuals were taken by surprise;
19 that they didn't know what was going in Caoca
20 fields?

21 JUDGE WOLGAST: Mr. Zampierollo,
22 you're out of time for your initial argument.

1 We will reserve five minutes for rebuttal.

2 Thank you.

3 MR. ZAMPIEROLLO-RHEINFELDT: Thank
4 you, Your Honor.

5 MS. FIDLER: Good morning, Your
6 Honors. If it please the Board, I would like
7 to spend a few short minutes making an
8 introductory statement, and would then like
9 to use the remainder of my time to address
10 the issues raised by Complainant in its cross
11 appeal.

12 Your Honors, although respondent
13 paints a picture of complex regulations,
14 purported government conspiracies against it,
15 and a plague of legal errors, this picture
16 would obfuscate what is, in fact, a very
17 straightforward and relatively simple matter.

18 This case involves one of the
19 largest commercial farms in Puerto Rico.
20 Respondent's farms cover nearly 3,000 acres
21 and employ hundred of people to grow and
22 harvest crops that are sold globally.

1 Respondent's business also involves
2 the near daily use of pesticides. Working
3 with pesticides is hazardous. Several of the
4 pesticides used at Respondent's farms can
5 cause serious injury and can even be lethal
6 if people are exposed to them.

7 This is why pesticides have labels
8 that, when followed, are designed to minimize
9 the likelihood of exposure.

10 This is why following the label
11 directions is the law, as set forth under
12 FIFRA 12(a)(2)(g), and why enforcement of
13 that law is absolutely critical.

14 All registered pesticide labels
15 require agricultural use of that product to
16 comply with the worker protection standard.
17 This standard is designed to protect farm
18 employees from pesticide exposure and the
19 steps required are fairly simple,
20 inexpensive, and are based on commonsense:
21 Train your employees; provide them
22 decontamination supplies; make sure they have

1 protective gears -- gear; let them know
2 what's going on and where so they can stay
3 away from it.

4 The real story here is that
5 Respondent failed to follow the pesticide
6 label requirements, including the worker
7 protection standard, and in doing so, they
8 inherently increased the risk of harm to the
9 health and lives of its workers and handlers.

10 The heart of this case is perhaps
11 best reflected in the testimony of
12 Respondent's owners, who testified to their
13 ability to comply with extremely complex
14 European Union regulations so that they could
15 export their produce there; and, yet, after
16 several notices of violation from the Puerto
17 Rico Department of Agriculture and even after
18 this complaint was filed, they haven't
19 bothered to read the worker protection
20 standard.

21 Mr. Venancio Marti, Jr., one of
22 Respondent's co-owners, testified that he has

1 a Ph.D. in agronomy and his staff includes
2 two people with master's degrees, and yet
3 stated that if the government inspectors do
4 not tell him when he's in compliance with the
5 worker protection standard, "it's impossible
6 for me to know. You guys are the experts."

7 Despite Respondent's size,
8 sophistication, and its revenues of over \$10
9 million a year, it failed to make certain
10 that its worker and handlers consistently had
11 the basic decontamination supplies of water,
12 soap, and paper towels.

13 Respondent's appeal would draw
14 attention away from these simple facts with a
15 lot of arguments about whether it was singled
16 out, whether there were alternative methods
17 of compliance, and whether the ALJ erred in
18 using its own admissions against it. But
19 Respondent fails to provide any evidence to
20 support these arguments, which is why the ALJ
21 rejected them.

22 As the ALJ found, even when all of

1 the evidence presented by Respondent as
2 viewed in a light most favorable to it, the
3 record is clear that respondent repeatedly
4 violated FIFRA and the worker protection
5 standard, and we thus request that
6 Respondent's appeal be denied.

7 Although Complainant generally
8 agrees with Judge Bero's findings of
9 liability in this case, as this is the first
10 FIFRA worker protection case to come before
11 the Board, and because Respondent appears to
12 have appealed the entire decision,
13 Complainant felt it was necessary to present
14 its views on some of the ALJ's
15 interpretations of the worker protection
16 standard and the relevant penalty policies.

17 Complainant has thus cross appealed
18 three discrete, but very important issues in
19 the case.

20 First, Complainant requests that
21 the ALJ's findings regarding whether
22 applications conducted within 30 minutes may

1 be combined for purposes of compliance with
2 display requirements set forth at 40 CFR
3 170.22 and Section 170.22; that this finding
4 be clarified to require that when doing so,
5 the start and end time of the application be
6 listed in the display of pesticide
7 application information.

8 JUDGE REICH: So you're not
9 objecting to the combination? The only issue
10 is what start time is listed?

11 MS. FIDLER: That's correct. For
12 purposes of this matter, Complainant has not
13 objected to the combination of the
14 applications taking place within 30 minutes.

15 JUDGE REICH: Does that mean that
16 you accept that as an interpretation or
17 you're just choosing not to argue it in this
18 case?

19 MS. FIDLER: We are choosing not to
20 argue that in this case.

21 JUDGE REICH: But you're reserving
22 the right to argue it elsewhere?

1 MS. FIDLER: That's correct.

2 JUDGE REICH: Okay.

3 MS. FIDLER: The second issue in
4 Complainant's cross appeal is that the ALJ
5 misinterpreted the law on relevant penalty
6 policies in her analysis of whether 170.122
7 and 170.222 are dependent claims and, to the
8 extent that she found that -- might have
9 considered them independent abused her
10 discretion in not assessing a civil penalty
11 for Respondent's failure to notify handlers
12 of pesticide application information.

13 Complainant requests, therefore,
14 that this portion of the assessment be set
15 aside and that a penalty for those 68 counts
16 of liability be added to the \$92,620 already
17 assessed by the ALJ.

18 And finally, the ALJ found that,
19 although Respondent was negligent as a legal
20 matter, she reduced Respondent's level of
21 culpability based on a finding that
22 Respondent passed a subsequent worker

1 protection standard inspection and took steps
2 to come into compliance with the worker
3 standard regulations.

4 These findings, however, are
5 contradicted by the record and Complainant,
6 therefore, asks that her findings be set
7 aside and the Board increase the overall
8 civil penalty accordingly.

9 I would turn now to an in-depth
10 review of the cross appeal unless there are
11 further questions regarding Respondent's
12 appeal for Complainant.

13 JUDGE WOLGAST: Yes. Just a quick
14 question. As to the second and third point,
15 precisely what are you asking the Board to do
16 in terms of increasing the penalty.

17 MS. FIDLER: Penalty. We are
18 asking that the penalty that has been
19 assessed by the ALJ should be a floor; that
20 an additional penalty for each count should
21 be assessed under the relevant penalty
22 policies and applied for the 68 counts of

1 liability for Respondent's failure to notify
2 its handlers of pesticide application
3 information.

4 Further, to the extent that there's
5 an overall decrease of roughly 10 percent and
6 in one case of 20 percent of the Respondent's
7 liability under the -- the value under the
8 penalty policy for the negligence assessment,
9 because that finding was in error, we request
10 that it be overturned and that the entire
11 penalty be increased accordingly.

12 JUDGE STEIN: What do those numbers
13 translate to if we were to do what you're
14 asking us to do?

15 MS. FIDLER: Roughly -- I'm sorry,
16 Your Honor. I hadn't put out the exact
17 amount, and, of course, the Board has a
18 discretion, but at least another \$65,000 for
19 the counts at issue. The entire penalty
20 should be increased by at least 10 percent.

21 We would argue that the maximum
22 penalty should be assessed here, in light of

1 the harm of the -- the potential harm of the
2 violations, recognizing that this is within
3 the Board's de novo --

4 JUDGE STEIN: And there is no
5 inability to pay claim in this case?

6 MS. FIDLER: There is none.

7 JUDGE STEIN: Okay.

8 MS. FIDLER: With regard to the
9 ALJ's findings for 170.122 and 170.222, she
10 found that applications must take place more
11 than 30 minutes apart in order to be
12 considered separate violations under these
13 two provisions.

14 However, the ALJ did not explain
15 how combined applications should be reflected
16 in the WPS records displayed for workers and
17 for handlers, and Complainant is, therefore,
18 worried about the ALJ's holding on this point
19 might be interpreted either by respondent or
20 by the regulated community.

21 The problem here is that the ALJ's
22 interpretation of time under 120 --

1 170.122(c) and 170.222 (c) is insufficiently
2 protective of workers and handlers.

3 The ALJ does note the relationship
4 between the time of the application and the
5 restricted entry interval, or REI, but holds
6 that the time a pesticide is to be applied
7 may be and I quote: "listed on a WPS display
8 in increments of an hour."

9 She then concludes that a time
10 difference of a half hour or less between the
11 time that individual handlers begin their
12 pesticide application in a particular field
13 does not appear to be a significant factor
14 for determining whether there is a separate
15 application for purposes of the WPS display.

16 This rationale is extremely
17 troubling as it does not appear to properly
18 interpret the point of the regulatory scheme,
19 and that is to keep employees out of a field
20 both before the pesticide application, during
21 the application, and during the -- after the
22 end of the application during the restricted

1 entry interval.

2 JUDGE STEIN: Ms. Fidler, I'm
3 having a little difficulty with this
4 argument, because if I understand it, you
5 have an appealed the AL -- and I may not
6 understand it correctly -- but you haven't
7 appealed the ALJ's finding in this particular
8 case of being to have this, you know,
9 30-minute period collapsed in some fashion.

10 And yet, you're asking us to by
11 interpretation come up with an interpretation
12 that it strikes me might be more appropriate
13 for the agency to do in the form of guidance
14 rather than for the Board to do.

15 If you are challenging that
16 conclusion, then, of course, we would look
17 at, you know whether we agreed or disagreed,
18 but by not challenging the conclusion, it
19 seems to me you're sort of asking for us to
20 do something that I'm not sure the Board is
21 well suited or the appropriate body to do.

22 MS. FIDLER: As I will lay out in

1 further detail, the issue here is that
2 there's flexibility -- and the worker
3 protection standard regulations were designed
4 to give flexibility to farm owners in how
5 they were going to comply.

6 For purposes of this case, and
7 especially because the issue wasn't brought
8 up -- we didn't realize at hearing that this
9 was an issue of concern to the ALJ, the idea
10 that an application a half hour earlier, an
11 application a half hour later could be
12 combined for purposes of the display is not
13 inherently problematic as long as the
14 combination -- if the farm decided to treat
15 that as one application, that isn't forbidden
16 under the rules.

17 But they would have to make sure
18 that for that entire time, people are kept
19 out of the fields, both before the first
20 application and that it was clear that the
21 end of the application was the half hour
22 later.

1 So from that perspective, there's
2 no -- that's not an impermissible thing for a
3 farm to do.

4 However, it just left open the
5 concern the way that the ALJ wrote her
6 opinion that a farm application could occur
7 at 11:00 and one at 11:30, but only one of
8 them, one of those times might be listed in
9 the display.

10 JUDGE REICH: But you're putting us
11 I think in a very strange position if you're
12 still, as you indicated earlier, reserving
13 the right to argue in other cases that
14 combining these two applications 30 minutes
15 apart may not be permissible at all.

16 You're asking us to basically
17 provide guidance on how to implement that
18 30-minute discrepancy while reserving the
19 argument to come back later in a different
20 case and argue that that's not even an
21 acceptable premise to begin with, which I
22 think reinforces Judge Stein's uneasiness

1 about our gratuitously, you know, expressing
2 an opinion on that issue.

3 MS. FIDLER: The -- it's not -- the
4 idea here isn't that we would come-that the a
5 -- that Complainant intends to come back and
6 revisit this exact issue.

7 It's just that there might be a
8 situation where, for example, there -- a
9 farm, in this case, Respondent chose to lists
10 these applications as separate.

11 And in the future, a farm might
12 have an application that's listed as
13 separate; sends somebody in for early entry
14 for the second one unprotected.

15 The point here is not that we would
16 go against the ruling, what we're trying to
17 make sure happens here is that to the extent
18 that a farm chooses to have an application be
19 one, that are within 30 minutes that it's
20 interpreted consistently with the regulatory
21 scheme of keeping people out before, during,
22 and after -- and until the end of the

1 restricted entry interval.

2 JUDGE STEIN: But isn't that the
3 kind of thing the agency typically would do
4 by guidance rather than asking this Board to
5 offer an opinion on that topic?

6 I mean, it strikes me that there
7 are a host of examples across different
8 statutes where, to the extent that the agency
9 has a concern of that nature, they would
10 issue guidance in some form in a place that
11 frankly people are probably -- people
12 affected by the regulation may be probably
13 more likely to see it, you know, than hidden
14 in a footnote somewhere in a Board decision.

15 So I don't want to beat this, you
16 know, kind of literally horse to death here,
17 but it does (off mike)

18 MS. FIDLER: If I can, Your Honor,
19 I'd just like to set out an example of this
20 is actually how the regulatory scheme exists
21 and should be interpreted.

22 The point here is that, yes,

1 guidance is a better way perhaps of handling
2 these sorts of confusions, but to the extent
3 this can also take decades to issue new
4 guidance. And the fear here is that we're
5 not sure how Respondent is going to view the
6 ALJ's holding as it regards Respondent.

7 And to the extent that any members
8 of the regulated community would look at this
9 opinion and misinterpret it, the harm here is
10 not a theoretical one. It's a very real one.
11 So the point here in asking the Board to step
12 in is to make sure that the interpretation,
13 which I think the ALJ actually intended to
14 read it in the scheme, but it didn't quite
15 come out that way.

16 And so, for example, the intent of
17 the -- I'm sorry -- the intent of the
18 regulation is actually fairly clear when
19 looked at as whole. 171.22 and 222 are, when
20 they're read in conjunction with the other
21 notification provisions, it's not that this
22 -- that the request here, the time be the

1 start time and the end time is unclear.

2 So, for example, the need here is
3 to -- the point of the worker protection
4 standard is, in part, one of the main points
5 is to keep people out of treated areas.

6 And this is done in two ways. The
7 first way is to provide notice. Notification
8 can be oral or can be posted or both
9 depending on the label, and it's clear from
10 -- and I'll -- this is 170.120 -- that the
11 intention here is that from the -- and this
12 is 120(b)(3)(i).

13 Notice need not be given to a
14 worker if the agricultural employer can
15 assure that one of the following is met.
16 From the start of the application until the
17 end of the application and during any
18 restricted entry interval the worker will not
19 enter, work in, remain in, or pass through on
20 foot the treated area or any area within a
21 quarter mile of the treated area.

22 The second method of notifying

1 workers and one of the only ways of notifying
2 handlers if handler isn't making the
3 particular application follows in 170.122 and
4 170.222.

5 And I'm sorry just to reiterate
6 what 170.120, the notifi -- oral warning
7 requires that this information needs to
8 include the location and description of the
9 treated area, the time during which entry is
10 restricted, and instructions not to enter the
11 treated area until the restricted entry
12 interval has expired.

13 When looking at 170.222,
14 essentially this enhances the oral
15 notifications that are provided and adds
16 extra requirements that are designed to
17 provide necessary information should a
18 medical emergency arise.

19 So the same information is required
20 under 170.122 as is required under 170.120.

21 In terms of the required information -- this
22 is 170.122(c) -- shall include the location

1 and description of the treated area, the
2 product name, EPA registration number and
3 active ingredients, the time and date the
4 pesticide is to be applied, the restricted
5 entry interval for the pesticide.

6 The sum total is if the time and
7 date doesn't convey either at the start the
8 estimated start and end time or you list the
9 start time and you go back and update the
10 records to reflect the end time, the
11 requirement for the restricted entry interval
12 is almost meaningless, because it has to run,
13 according to the regulations, from the
14 immediate end of the application.

15 So what we're asking is that the
16 Board just reinforce what is already there in
17 the regulatory scheme.

18 JUDGE STEIN: Is this something
19 that the agency asked the ALJ to clarify in
20 her opinion?

21 MS. FIDLER: No, it did not.

22 JUDGE STEIN: Okay.

1 JUDGE WOLGAST: And just to
2 summarize your argument, what I understand
3 you say is that you're not taking issue with
4 what I read to be the main premise of the
5 ALJ's point here was that when someone begins
6 an application in one corner of a field and
7 someone else begins an application 15 minutes
8 later in another corner of a field that that
9 could be treated as an application, a single
10 application for purposes of these notice
11 requirements.

12 But rather, you're saying that the
13 instigation of the application began with
14 person 1, whomever is the earliest person to
15 apply the pesticide?

16 MS. FIDLER: That's correct. If it
17 please the Board, I would turn to the ALJ's
18 penalty assessment unless there are further
19 questions on this point?

20 Your Honors, if the Complainant has
21 cross appealed the ALJ's penalty assessment
22 in this matter for three reasons.

1 The first is that the ALJ's penalty
2 assessment findings on the issue of
3 Respondent's liability for failing to notify
4 handlers of pesticide application information
5 and on the issue of Respondent's culpability
6 were the result of clear error and abuse of
7 discretion, and, thus, should be set aside as
8 a legal matter.

9 The second and perhaps more
10 important concern is that her penalty
11 assessment, if allowed to stand, would create
12 a perverse incentive for Respondent and other
13 regulated entities to make less of an effort
14 to protect its workers and handlers from
15 potential exposure to pesticides rather than
16 more, a policy that is -- that clearly
17 undermines the point of worker protection
18 standards.

19 Finally, the ALJ's holding also
20 takes away the incentive for parties to come
21 into immediate compliance, not after a
22 complaint is filed, but immediately upon

1 notification of the violation.

2 And it also takes away the
3 incentive to settle cases, since essentially
4 if she allows the carrot for such good
5 behavior to be used after a violating entity
6 has waited until the stick of litigation has
7 been applied.

8 So using the \$92,620 as a floor,
9 Complainant, therefore, requests that the
10 Board set aside the ALJ's penalty assessment
11 on this point, and use its de novo authority
12 to establish a higher penalty consistent with
13 the penalty policies.

14 As a primary matter with regard to
15 the ALJ's penalty assessment with regard to
16 failing to assess counts for 170.222, it is
17 unclear even from the start of the opinion
18 whether the ALJ believes that she is
19 following the FIFRA penalty policy or is
20 justifying a departure there from.

21 Thus, the ALJ fails to meet even
22 the threshold requirement that a departure

1 from the penalty policy must be clear and
2 compelling. The ALJ's decision on this point
3 commences by misquoting the FIFRA enforcement
4 policy by stating that the agency may assess
5 separate penalties for independent violations
6 of FIFRA.

7 However, there is no such
8 discretionary language in FIFRA, and I've --
9 it's here.

10 This provision starts out by
11 stating that a separate civil penalty up to
12 the statutory maximum shall be assessed for
13 each independent violation of the act. So
14 where the complaint has made an allegation of
15 independent counts, a penalty must be
16 assessed.

17 A valuation is independent if it
18 results from an act or failure to act which
19 is not the result of any other charge for
20 which a civil penalty is to be assessed or if
21 the elements of proof of the violations are
22 different.

1 JUDGE REICH: And you're not
2 questioning that she could choose to vary
3 from that if she made a justification for
4 doing so?

5 MS. FIDLER: If that justification
6 had support in the record, yes.

7 JUDGE STEIN: Am I correct in
8 understanding that part of the reason that
9 she didn't assess a separate penalty was she
10 viewed the violations as dependent in some
11 fashion?

12 MS. FIDLER: Yes. That's -- that
13 is also how we how interpreted it, and,
14 however, this is -- this is a
15 misinterpretation and misapplication of the
16 law on dependency and the penalty policies at
17 issue.

18 Much like the language here in the
19 FIFRA penalty policy, the concept of
20 dependence, as the Board held in re Consumer
21 Scrap, the dependent violations in the
22 context of a single statutory provision can

1 best be described in a you can't have B
2 without first having had A kind of
3 relationship.

4 At issue in that case were two
5 provisions of the Clean Air Act. 40 CFR
6 82.156 required the Respondent to take
7 certain records, and 40 CFR 82.166 required
8 the Respondent to keep those records.

9 And as the Board held, you can't
10 keep records if you haven't made them in the
11 first place, and, thus, they are dependent
12 violations.

13 However, unlike Consumer Scrap, the
14 regulations at issue are two totally
15 independent unrelated provisions with
16 separate requirements. Just because one is a
17 worker-employer and has workers on the
18 establishment within 30 days of a pesticide
19 application does not inherently mean that one
20 is also a handler-employer, and there are
21 handlers on the establishment within 30 days
22 of the pesticide application.

1 This view is reflected also in the
2 FIFRA penalty policy.

3 So the ALJ decides that while the
4 two sets of violations are legally separate,
5 she notices that there are different
6 requirements for the two. She decides that
7 they seem to be factually dependent in this
8 case.

9 It appears that she thinks that the
10 FIFRA penalty policy thus gives her
11 discretion to combine -- to merge the counts.
12 But the ALJ is confusing the obligation here.

13 She seems to think that the
14 obligation is to have one central posting
15 area. But there are really two obligations
16 here.

17 The obligation is to provide your
18 workers with pesticide application
19 information. And second is to provide your
20 handlers with pesticide application
21 information.

22 JUDGE WOLGAST: Could the notice in

1 each instance have been performed via a
2 single posting?

3 MS. FIDLER: In this case, the
4 Respondent keeps one central posting area.

5 There was testimony from the
6 handlers that there was concern whether this
7 was actually an appropriate set up because
8 there's testimony that workers were actually
9 driving directly to the field, and handlers
10 were going to the workshop. So nobody was
11 using the area that they had chosen or that
12 was the fear of the inspectors given their
13 impression when they were there.

14 But, yes, technically, and the
15 Agency allows that if there is a central area
16 that both workers and handlers are using, you
17 can use that one area.

18 But that doesn't change -- that
19 doesn't change the legal obligation to make
20 sure both of those groups are being actively
21 notified of what's going on.

22 This is so key. I mean, ideally,

1 you'd want to have -- in this case if the
2 workers are driving to the field, you'd want
3 to have the information posted for those
4 workers in the field.

5 And if the handlers are using the
6 workshop, you want them to be posting that
7 information for handlers at the workshop.

8 The result of this is that the
9 ALJ's holding essentially incentivizes doing
10 less instead of doing more, doing what's
11 necessary to keep people out of the -- out of
12 danger.

13 JUDGE WOLGAST: Well, the Agency,
14 though, didn't allege that it was
15 insufficient notice to post at the central
16 workshop, did they?

17 MS. FIDLER: That's correct.

18 JUDGE WOLGAST: Did or did not?

19 MS. FIDLER: We didn't -- the
20 Complainant did not allege that it could not
21 use that central area -- location area.

22 Finally, the ALJ seems to imply

1 that even if she were to have considered
2 these to be independent violations and to
3 assess a separate penalty under the relevant
4 penalty policies, she found that there's no
5 significantly increased harm for failing to
6 notify a few handlers then for failing
7 hundreds of workers.

8 This finding is flawed for several
9 reasons. First, there is programmatic harm
10 here, as Dr. Enache testified to. But she
11 never once addresses why the penalty policies
12 do not adequately take into account her
13 concerns. Why there couldn't have been
14 adjustments made to what she thought the harm
15 was, and at least have applied some penalty
16 for failing to notify handlers.

17 Second, she does not give a
18 pressing need to depart from the penalty
19 policy in the first place. She has in no way
20 shown that assessing a penalty for both sets
21 would violate -- both sets of violation would
22 violate equity concerns. There's no

1 inability to pay issue here.

2 And third, by failing to assess a
3 penalty, she undermines the entire
4 programmatic scheme and gives absolutely no
5 value whatsoever to the health or life of a
6 handler versus that of a worker. Even if
7 it's one person, if that person had died or
8 had been seriously injured, there was a value
9 there.

10 Therefore, her penalty deserves no
11 deference by the Board, and we request that
12 an additional penalty be assessed for each of
13 these counts of failing to notify handlers.

14 Another point that she had made
15 was-and -- that Respondent made -- makes
16 today is that the handler in these questions
17 would know who supervised the application.

18 But the point isn't about just what
19 was applied that day. It's about the past 30
20 days. And the ALJ seems to ignore the
21 testimony by Dr. Enache about the need to
22 have that data available in case of emergency

1 so that take it with it to the -- take it
2 with you to the doctor.

3 And the importance of these
4 regulations can be seen by public data made
5 available in the -- by the California
6 Department of Pesticide Regulation which
7 tracks these types of injuries and has found
8 in 2004, 18 pesticide exposure cases
9 resulting from early entry violations, one of
10 these cases involving a field worker who got
11 sick eating some grapes in a field he had
12 sprayed with a pesticide the day before, but
13 the application hadn't been put in the
14 records.

15 It can happen. It does happen. It
16 is important that these groups of people be
17 notified.

18 Your Honor, if -- I see that I've
19 run out of time. May I take a couple of
20 extra minutes to address the final point?

21 JUDGE WOLGAST: Yes, briefly.

22 MS. FIDLER: Thank you. With

1 regard to the ALJ's assessment of
2 culpability, the ALJ found that the
3 Respondent's worker protection violations
4 were the result of negligence, but that
5 Respondent took steps to prevent the
6 violation from recurring.

7 She based this conclusion largely
8 on self-serving statements that Respondent
9 made at hearing, and testimony that, for
10 example, upon notification that
11 decontamination supplies were missing for
12 handlers, the Respondent's farm manager went
13 out and bought a towel, when there were, in
14 fact, seven handlers working that day. And
15 each one is required to have a clean towel.

16 Her basis is also refuted by the
17 record, which demonstrates clearly that the
18 visit in 2005 was in no way a full worker
19 protection inspection.

20 Even more revealing perhaps on this
21 point is the testimony of Respondent's
22 co-owner in his description of that visit.

1 He said that they received an inspection that
2 they tried to do and they came on Monday to
3 check our farm to find out how many things
4 did we still have without fixing it.

5 And frankly speaking, I was
6 surprised, because they tried to do it, and
7 God didn't give them a -- give the chance to
8 them, because we were in a dry period and we
9 have rain and rain, and they couldn't do the
10 job, but couldn't. The next day was rain and
11 rain, and another day rain and rain, so the
12 doctor he couldn't look at the farm, so God
13 is with us. That's why we have been
14 successful.

15 JUDGE REICH: Apart from the
16 question of whether or not the record
17 supports the factual findings, is there an
18 issue of whether those are even appropriate
19 considerations to be taken into account in
20 setting the penalty?

21 MS. FIDLER: I'm sorry. Can -- I
22 --

1 JUDGE REICH: Whether the kinds of
2 considerations that you're discussing; that
3 is, those taken to prevent reoccurrence are
4 legitimate considerations to be taken into
5 account, which, to me, it's a question you
6 have to address before you get into what the
7 record suggests about those issues.

8 MS. FIDLER: That's correct. And
9 as we pointed out in our brief, the --
10 essentially what the ALJ seems to be doing is
11 crediting the Respondent here with taking
12 steps after -- not only after the violation
13 happened, but after the complaint was filed
14 And what the point of the assessment is to
15 assess negligence at the time of the
16 violation. And here it was clear at the time
17 of violation that the Respondent had several
18 notices of violation and this subsequent
19 inspection. So to even go to that point is
20 essentially trying to give a break that is
21 normally reserved for someone doing
22 settlement or someone who immediately took

1 steps to come into compliance, not someone
2 who waited until after a complaint was filed
3 to make some efforts -- we're not even sure
4 that they're complying with anything besides
5 than what they've been told to comply with.

6 JUDGE STEIN: Does the FIFRA
7 penalty policy speak to that? But if I
8 recall correctly, the RICRA penalty policy
9 had some language that coming into compliance
10 after the fact is not good faith. And I'm
11 wondering if there's any kind of an analogue
12 in FIFRA?

13 MS. FIDLER: I don't have that
14 prepared. I'm happy to submit a brief to the
15 Board.

16 JUDGE STEIN: No, I just wanted to
17 know if you knew.

18 MS. FIDLER: I am not aware of any
19 currently, but I'm happy to reevaluate that.

20 Thank you. Thank you, Your Honors.

21 MR. ZAMPIEROLLO-RHEINFELDT: If it
22 please the court, yes, I just want to address

1 a couple of issues raised by counsel Fidler,
2 very briefly.

3 The first one has to do with
4 application of pesticides in a given field.
5 Some applications begin at let's say 8:00
6 a.m., and the other one in the same field
7 continues 8:30, 9:30 p.m. That depends on
8 the length of the field. That's an
9 agricultural practice consideration, not
10 something that must be set up or decided here
11 in Washington in EPA's headquarters.

12 How a business, an agribusiness, is
13 run is a decision that has to be made by
14 agronomists in the field.

15 So if Judge Bero determined what
16 she determined pertaining to the hours of
17 application is a technical matter, and
18 depends on the length or the area of the
19 field.

20 Our fields are divided in
21 relatively small fields because we have to
22 keep a precise control of what is sprayed for

1 our European markets. So we have to be very
2 careful about that. That's the reason why
3 fields are so small.

4 But if we want to go around the
5 law, FIFRA, we can name one field a thousand
6 acres. So it would be one violation. That's
7 ridiculous.

8 So we are -- I don't want this
9 Board to get involved into a discussion of
10 semantics. This is not the issue. The issue
11 is the application of pesticides is a
12 technical matter. It's response to
13 particular crops, to particular pesticides.

14 So if you start spraying a field at
15 8:00 a.m., the reentry time depending on the
16 pesticide is either four hours for clear out
17 or Trilogy T24 hours or whatever, depends
18 when the field was sprayed. If the field is
19 very long, and it takes five day, then (off
20 mike) regulation would suggest that you for
21 reentry, you have to wait seven days for the
22 -- in the case of trilogy to have not reentry

1 (off mike) particular eye flushing devices
2 for personnel.

3 But the fact is that the first part
4 of that field was sprayed eight or 10 or 15
5 days before. So it makes no sense unless to
6 have that regulation apply in the way EPA
7 wants, because it's -- the length of the
8 field is very important. If the field is
9 very small, then a particular consideration
10 takes place. If the field is very large, or
11 long in that case, the same area but a very
12 long field, it's different.

13 We have, as I stated before, (off
14 mike) four handlers and they exactly know
15 what, where, when, why, how those pesticides
16 are applied. So having them go on and read
17 in a central posting station what they're
18 going to do, what they did the day before,
19 what they did -- they know, because they are
20 the only pesticide handlers.

21 In terms of Judge Bero's
22 determination of penalties, the

1 Administrative Law Judge went to great pains
2 trying to figure out a sensible way of
3 applying penalties.

4 The maximum was set after the third
5 or fourth revision at \$1,100 per violation.
6 But she was asking look what happens if
7 somebody dies at the field. Do we impose a
8 higher penalty? We can't, because the
9 penalty is already fixed.

10 So it does not matter if you have
11 injuries, if the community is affected,
12 nothing, because the penalty is already
13 there, and that makes no practical sense.

14 We have to, we have to, after so
15 many years with EPA, dealing with these
16 matters (off mike) 1968, we should start to
17 rethink our involvement or EPA's involvement
18 in these matters because if the idea of the
19 law, of the purpose of the law is to protect
20 workers and handlers and the communities,
21 then we should do that.

22 EPA received documents in August

1 2004. They waited eight months to file a
2 complaint.

3 Look if Martex was doing things so
4 badly, they should have stopped the company
5 the next day, and said look you cannot apply
6 those pesticides the way you are doing it.
7 So you are out of business. They didn't do
8 that.

9 The way I feel is I think that the
10 agency really was trying to make a point, to
11 send a message, and it took Martex as an
12 example. Thank you.

13 JUDGE WOLGAST: Thank you. Thank
14 you for the arguments, and the case is
15 submitted.

16 THE CLERK: All rise. This session
17 of the Environmental Appeals Board now stands
18 adjourned.

19 (Whereupon, at 11:11 a.m., the
20 HEARING was adjourned.)

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