UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
IN AND FOR REGION 10
1200 6th Avenue
Seattle, Washington

In the Matter of:	
AG-AIR FLYING SERVICES, INC.;	Docket No. : FIFRA-10-2005-0065
Respondent.	PRE-HEARING EXCHANGE DISCLOSURES AS PER COURT ORDER, DATED JULY 20, 2005
	[ESTIMATED TIME FOR HEARING IS THREE (3) DAYS]

COME NOW the respondents, AG-AIR FLYING SERVICES, INC., a Washington corporation, and Lenard "Red" Beierle, Jr., by and through its/his attorney of record, J.J. Sandlin, WSBA #7392, of the Sandlin Law Firm, P.O. Box 1005, Zillah, Washington 98953 [telephone number (509) 829-3111/fax: 3100 and

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cell phone (206) 852-1004; Internet address: Sandlinlaw@aol.com and sandlinlaw@nwinfo.net] (email attachments for service is acceptable, if reciprocal accommodation is provided); and submits proposed hearing evidence, as follows:

1. **Names of experts and other witnesses intended to be called at hearing, with brief narrative of expected testimony:**

(a) Expert witness Carlton Layne; please refer to his initial letter opinion, and resume, attached as exhibit "1," which also includes the exhibits he relied upon which were provided by the respondents. His opinion, based upon the substantial facts provided to him, and the documentary evidence, as well as the prehearing exchange documentation of the complainant EPA, is simply that this case should never have been prosecuted, that there is insufficient evidence to proceed, that there is no reliable evidence that the respondents were responsible for any improper drift contamination of the "adjacent" (there is actually a barrier separating the vineyard from the target crop where *Warrior* was applied) vineyard, and related opinions found in Exhibit "1" attached hereto and incorporated herein by reference. Mr. Layne is a well-known expert witness, who is scheduled to instruct Region X EPA officials in investigation techniques and other matters later in September, 2005; and this Court is probably aware of Mr. Layne's credibility concerning these types of claims.

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(b) Gary Buckner, of Washington State Department of Agriculture. He is being called pursuant to subpoena, as he does not wish to volunteer his services to the respondents. However, he shall provide testimony concerning the proper protocol concerning the investigation of spray drift claims, including the protocol on the sovereign territorial lands of the Confederated Tribes and Bands of the Yakama Nation. His testimony shall assist the Court in concluding the EPA did not follow proper protocol in its acquisition of evidence, and opinions, and that the factual basis for concluding a violation occurred here is insufficient.

(c) Gail Amos, of Washington State Department of Agriculture. He is a horticulturalist, and shall also provide his analysis of the investigation protocol in this case, and shall provide his opinions and facts concerning this case, based upon his knowledge of the respondents, the location of the target crop for which *Warrior* was applied, and the unlikelihood that *Warrior* chemicals drifted in this case upon the "adjacent" vineyard. (Note: Mr. Amos must also be subpoenaed, and his testimony is not subject to volunteerism. Respondents shall avoid redundancy in the presentation of opinions and facts elicited from witnesses Buckner and Amos.)

(d) Mike Fisher, and employee of AG AIR FLYING SERVICE, INC. He loaded the respondents' aircraft with the proper mixture of *Warrior*, and shall so testify. He shall verify flight times, and verify that respondents properly conducted

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a pre-flight inspection of the aircraft, and that the nozzle settings were appropriate. He shall testify that Warrior was mixed at a concentration of 3.84 ounces per acre, and the surfactant was mixed at the concentration of twelve ounces per one hundred gallons; that the aircraft tank was a five hundred gallon tank, and the aircraft model was an "Airtractor," known as an "AT502B."

(e) Lenard "Red" Beierle, Jr., an employee of AG AIR FLYING SERVICE, INC., who shall testify as an expert witness and a fact witness. He is president of the Pacific Northwest Agricultural Aviation Association and has over 8,000 hours of successful flight time as an agricultural applicator, with not one claim of spray drift in all of those hours. He shall describe the use of the SATLOC GPS system, which records the *actual track of the aircraft* during a spray application, and he shall provide exhibits as attached in the Carlton Layne expert witness report, authenticating each exhibit, and verifying that he did not release any of the *Warrior* near or over the vineyard in this case. Mr. Beierle has successfully applied spray to over 1,100,000 acres of agricultural lands without one claim of spray drift being brought against him. He is not guilty of any such claim in this case. Mr. Beierle shall testify to each element of the claims asserted against him, and refute each claim against him, with first-hand observations and his

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professional knowledge of proper spray application protocol. His résumé is attached as Exhibit "2," and incorporated herein by reference.

(f) Ms. Patricia Beierle, of Grandview, Washington. She is one of the principal owners of AG-AIR FLYING SERVICE, INC. She shall verify that Red Beierle (her son) has never been a corporate officer of the respondent company, and that there is no intent for him to ever have that position with the company. There may be other areas for which she may testify, depending upon the complainant's presentation in its case-in-chief.

(g) CPA Don Warmenhoven, the respondent company's accountant. He shall testify concerning the inability of the respondent company to absorb a serious fine asserted by the complainant in this case; he shall testify that the respondent company is simply "breaking even" or worse, and that a fine in this case would create a hardship upon the company, and upon co-respondent Red Beierle. Mr. Warmenhoven may have working papers and financial statements at the time of hearing, which are not currently available. When they are prepared, they shall be provided to the complainant and this Court.

(h) Steven Miller, and/or John McClure, employees of SATLOC, a CSI Wireless Company, located in Scottsdale, Arizona. One of them shall travel to Washington State and provide testimony concerning the accuracy and log data

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integrity and the performance of the SATLOC technology in this case. A copy of the letter confirming this witness availability is attached hereto as Exhibit "3" and incorporated herein by reference.

(i) Lehigh John, Lands Manager for the Confederated Bands and Tribes of the Yakama Nation. He is expected to testify that the Yakama Nation retains exclusive jurisdiction over its sovereign lands within the reservation boundaries, and that he is aware of a protocol for resolution of spray drift claims by pact between the Yakama Nation and the Washington State Department of Agriculture. He is not aware of any precedent establishing the EPA as a primary agency for resolution of spray drift claims, and that this action is precedent-setting. He shall not volunteer to testify, and shall be subject to subpoena. He may bring documents, but the respondents are not privy to the nature or identification of any such corroborating documents held by Lehigh John in his official capacity as a representative of the Yakama Nation.

2. **Copies of all documents and exhibits intended to be introduced into evidence:**

(a) Exhibit "1" is the written opinion and report of expert witness Carlton Layne, which also includes exhibits marked by Mr. Layne as "Exhibits A, B, C, D and E," plus Mr. Layne's résumé.

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(b) Exhibit "2" is the résumé of Lenard "Red" Beierle.

(c) Exhibit "3" is the confirmation letter from SATLOC, indicating the availability of the company's witnesses to travel to Washington State for the evidentiary hearing in this case, for the purpose of authentication and verification of the accuracy of the SATLOC GPS system used in the aircraft applicator in this case.

(d) Exhibit "4" is invoice number 639 dated July 12, 2004, issued by AG AIR FLYING SERVICE, INC. for the application of *Warrior* "adjacent" to the vineyard that ostensibly was contaminated by *Warrior* drift. *The respondents vigorously deny that any such drift occurred.*

(e) Exhibit "5" is the Washington State University Public Agricultural Weather System records of local air temperatures, dew point temperatures, and windage for the relevant time frame involved in the application of *Warrior* by the respondents. The report conclusively proves that there could not be any drift from the target crop to the "adjacent" vineyard on the date of *Warrior* application in this instance.

(f) Exhibit "6" is a true and accurate copy of the actual track of the applicator aircraft, where the red-coded dotted lines indicate the release of Warrior, and the light yellow-coded dotted lines indicate the aircraft track when the

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application nozzles were not open. (Note: Red Beierle shall testify as to the water-tight integrity of the nozzles, as this was part of his pre-flight inspection for each load of spray.)

(g) Exhibit "7" is a copy of the *Warrior* label, for the substance applied to the target crop in this instance.

(h) Exhibit "8" is an aerial photograph with true north depicted upon the photograph, which illustrates an accurate depiction of the target crop and the "adjacent" vineyard, exposing the two hundred feet border/barrier that separates the vineyard from the target crop, where the target crop lies to the south of the irrigation canal (vineyard is in the top center of the photograph, target crop is to the left of center, depicted by the green-colored crop).

(i) Exhibit "9" is the current résumé of expert witness Carlton Layne.

(Note: the above exhibits are in addition to selected exhibits that are disclosed by the complainant EPA.)

3. **Statement of respondents' views regarding the appropriate place of hearing and estimation of time to present respondents' direct case:**

(a) The respondents propose a hearing room at Yakima County courthouse, where a superior court room or district court room may be utilized, or some other governmental facilities such as the local federal courthouse building,

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all of which are located in the City of Yakima, Yakima County, Washington (where this complaint arose). Most of the witnesses are from this area, and in the interest of witness availability it would be proper to hold all such hearings in the City of Yakima.

(b) The respondents estimate the time to present the respondents' direct case is three days; but the rebuttal evidence shall probably require at least another day and one-half.

4. **Additional disclosures required in Part 3 of the Court's Prehearing Order:**

(a) The factual basis for denial of liability in this case is simply a "general denial." The drift simply did not occur, and as the expert opinion of Carlton Layne, together with attached exhibits, amply demonstrates, the Warrior applied to the target crop was not capable of drifting upwind and over a 200-foot boundary/barrier, as illustrated in the aerial photograph (Respondents' Exhibit "8"). The SATLOC actual track of the aircraft, the wind direction and speed, the testimony of respondent Red Beierle, and the expert testimony of Carlton Layne, WSDA witnesses Buckner and Amos, and the corroborating witnesses all explain the impossibility of the "drift" in this event. The telling evidence is also supported by the following statement, under penalty of perjury, of Carlton Layne: "A query

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to the California Department of Pesticide Regulation website revealed 45 pesticide products having the same chemical code as lambda cyhalothrin and 37 products with the same active ingredient...". (Carlton Layne report dated August 11, 2005 at page 7). Lambda cyhalothrin is the active ingredient in *Warrior*, yet it is also the active ingredient or has the same chemical code as substantial numbers of other products that were not ruled out in this case. The complainant's case is built upon speculation and poor investigative protocol, and the complaint should be dismissed upon pre-hearing motion practice, or upon the *sui generis* action of this Court. (The respondents encourage the Court to take the matter upon the Court's own motion and dismiss this action.)

(b) The Court has ordered the respondents to provide exact factual and legal bases for the paragraph 5 Answer indicating the respondent, Red Beierle, is *not* an officer of the corporation. Respectfully, how can the respondents prove a *negative*? There is simply no evidence to counter the respondents' position that Red Beierle has never been a corporate officer of AG AIR FLYING SERVICE, INC. True, Red Beierle was the owner of a predecessor sole proprietorship known as AG-AIR, but that business was sold to his parents, due to bank financing difficulties. Both the testimony of Patricia Beierle and CPA Don Warmenhoven shall corroborate the direct testimony of Red Beierle, namely, that he has never

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been a corporate officer of AG AIR FLYING SERVICE, INC. (Being a member of the Board of Directors does not lead to the conclusion that a board member is therefore a corporate officer.)

(c) The exact factual and legal bases for the respondents' denial that the registered pesticide was used in a manner inconsistent with its labeling is provided in the Carlton Layne letter opinion, provided this Court under penalty of perjury, as Exhibit "1" attached hereto. Additionally, Red Beierle shall so testify, and shall describe the application rates, the actual track of the applicator aircraft, the wind direction and wind speed at the time of application, and the knowledge of the target crop location and its location with respect to the "adjacent" vineyard.

(d) The testimony of CPA Don Warmenhoven shall corroborate the testimony of Red Beierle, concerning the inability of AG AIR FLYING SERVICE, INC. to pay a penalty in this case. Specifically, Red Beierle was forced to sell his ag flying business to his parents because of a difficult dissolution of marriage proceeding that has been festering for several years; he could not qualify for any further bank loan to operate the business. Due to the EPA action against the respondents, the new company, AG AIR FLYING SERVICE, INC. has suffered extensive loss of business on the Yakama reservation lands. The new company is only at "break-even" or perhaps even below "break-even" as a result of this

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frivolous claim against the respondents. The accountant has not provided his computations to show how the business has fared for the past few months, and therefore the evidence is still being developed in this regard. The increased cost of fuels and products have also adversely impacted the profit line for this fledgling business, and therefore the imposition of a fine in this instance could seriously harm the company.

(e) Pursuant to the Court's instructions, and suggestions, the respondents shall move to require the complainant EPA to produce "other discovery," which has not yet been provided, as the complainant has ignored substantial specific discovery requests found within the respondents' answer and affirmative defenses.

(f) The bases for the respondents' affirmative defenses are as follows:

(i) The complainant's claims of evidence against the respondents fail because of contamination of the evidence, (i.e. the collected "samples" are ambiguous due to failure to establish a chain of custody and to properly isolate and preserve the vineyard samples), by lack of proper sample collection controls, (i.e., there were *no* controls upon the sample collections, and the samples cannot be considered reliable), lack of proper transportation and storage of samples, (i.e., there is no documentation of any such proper protocol in this regard), lack of proper chain of custody controls, (i.e., the

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lack of any sample chain of evidence is laughable---it does not exist), failure to eliminate third party sources of any potential contamination of the complaining witness's grape vineyard (if any contamination actually occurred at any time; please refer to page 7 of expert witness Carlton Layne's declaration under penalty of perjury—Respondents' Exhibit "1"), failure to obtain best evidence of application records, pyramided hearsay of material allegations that contaminate reliability of claims, improper or total failure of documentation of potential drift of any pesticide, improper or lack of recordation of actual chemicals applied in this instance, negligence of investigators and substandard qualifications of at least some of the critical witnesses and/or investigators, failure to rule out other sources or persons who may have contaminated complaining witness's grapes, if at all (all of these problems are addressed in the Carlton Layne testimony by declaration).

(ii) When the evidence is in such disarray as described in subparagraph (i) above, the Court is invited to dismiss the action, *sui generis*, based upon the insufficiency of the evidence. This is not to state that there is not a *scintilla* of proof supporting the frivolous claims of the complainant EPA in this instance, but that is not the invitation suggested by

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the respondents: this case should be subject to the Court's discretion to dismiss the action based upon principles of judicial economy, elimination of wasted time, and in short, the action should be subject to a *mercy killing*.

(iii) Lack of jurisdiction: In this case the EPA is asserting jurisdiction over the sovereign lands of the Confederated Bands and Tribes of the Yakama nation, an action of federal government sovereignty that is in violation of the treaty rights of the Yakama Nation. The proper protocol has traditionally been to defer to the Washington State Department of Agriculture for these types of investigations, which has a pact with the Yakama Nation for policing these types of incidents. There is no precedent for the EPA action in this case, and this case is in fact a *test case* brought by the EPA to try to establish EPA jurisdiction over the Yakama Nation, through the Yakama Nation's employees who have apparently assisted the EPA in developing the complaint against these respondents. But in this case, subject matter jurisdiction does not attach, and therefore the action should be dismissed.

(iv) Estoppel and equitable estoppel: Based upon the analysis by Carlton Layne, and the improper violations of investigation protocol observed by Mr. Layne, and the failure of the evidence to rise to the proper

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standards for prosecution of a claim in this instance, the complainant EPA should be prevented from proceeding to judgment with its claims. The equities lie with the respondents in this case. The respondents have been required to prove their innocence, and the presumption of their innocence was taken from them without any semblance of due process of law. In fact, the evidence has been so manipulated and tainted that the complainant should be required to reimburse the respondents for their expenses of bringing a defense in this action.

(v) In a perfect world, the complainant would be entitled to a presumption that a mere *scintilla* of evidence entitles the complainant EPA to bring this action to the Court's attention. But the parties operate in a real world, where the grievances against this planet are egregious, and the violations of EPA regulations are blatant. This action is not such a case. The respondents are encouraging this Court to do the correct thing, the expeditious thing, the realistically appropriate thing, and find that the EPA has failed to state a cause of action for which relief can be granted. This sends the appropriate message to all investigators, all regulators, that the EPA rules and regulations require sound, legitimate evidence of violations, rather that pyramided hearsay, speculation, and guesswork. The adverse

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effect upon small businesses and property owners is devastating, by the actions of the EPA in cases like this. The Court is urged to dismiss this case upon its own motion.

(vi) The respondents shall rely upon any working papers and/or financial statements that may be produced by Accountant Don Warmenhoven to prove the respondents cannot afford the monetary sanction in this instance. Those documents have not been provided by Mr. Warmenhoven (his wife is seriously ill with recurrent cancer), but when they are available they shall be immediately submitted to EPA and this Court.

(vii) The respondents elect to defend themselves against the EPA claims by "all three means," i.e., (1) direct evidence, (2) rebuttal evidence, and (3) cross-examination of complainant's witnesses---*and challenges to the admissibility of complainant's documentary or other evidence*.

CONCLUSION

The respondents have complied with the Court's orders requiring pre-hearing disclosures of evidence and witnesses. In closing, the respondents request the Court examine carefully the complainant's Exhibit "3," a Washington State Secretary of State record submitted to the state by Ms. Patricia Beierle, as a corporate officer of AG AIR FLYING SERVICE, INC. In that "annual report,"

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one can see by mere inspection of the document that there are *two* "*Lenard Beierle*" persons; namely "Lenard Beierle, Sr." and "Lenard Beierle, Jr." But "Lenard Beierle, Jr." is only listed as a board member, not as a corporate officer. The respondent is Lenard Beierle, Jr. This oversight in preparation of the EPA claims in this matter is illustrative of the inaccurate, careless production of evidence, and speaks more emphatically than anything this counsel can suggest to encourage this Court to dismiss this action on the Court's own motion.

The respondents respectfully reserve the right to present rebuttal witnesses and rebuttal evidence as the EPA direct evidence presentation may require.

Respectfully submitted this 19th day of August, 2005.

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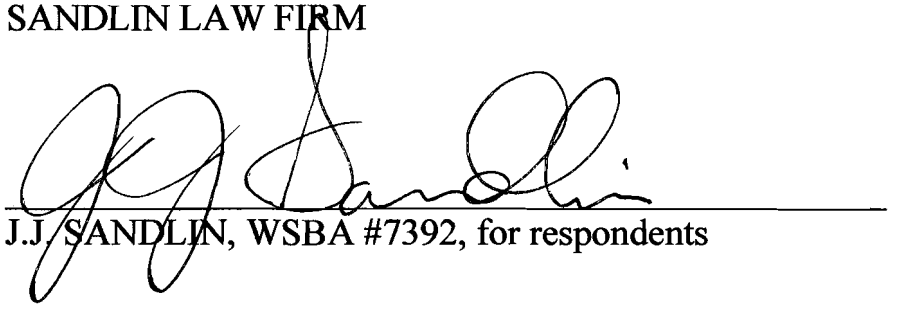

J.J. SANDLIN, WSBA #7392, for respondents

Certificate of Service

J.J. SANDLIN hereby certifies as follows:

On Friday, August 19, 2005, I caused to be mailed, U.S. First Class Mail, the original of the Respondents' Pre-Hearing Exchange, to Regional Hearing Clerk, U.S. Environmental Protection Agency, Region 10, 1200 Sixth Avenue, ORC-158,

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Seattle, Washington 98101; and a duplicate original of said document to Attorney Richard Mednick, Associate Regional Counsel, Office of Regional Counsel, U.S. Environmental Protection Agency, Region 10, 1200 Sixth Avenue, ORC-158, Seattle, Washington 98101, and a duplicate original to the Honorable Susan L. Biro, Chief Administrative Law Judge, U.S. EPA, Mail Code 1900L, 1200 Pennsylvania Avenue N.W., Washington, D.C. 20460. Fax: 202-565-0044.

Declared under penalty of perjury this 19th day of August, 2005.

J.J. SANDLIN, WSBA #7392, for Respondents

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UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	)	
	)	
Ag-Air Flying Services, Inc.,	)	**Docket No. FIFRA-10-2005-0065**
	)	
Respondent	)	

ORDER ON COMPLAINANT'S MOTION FOR ACCELERATED DECISION ON LIABILITY AND PENALTY, MOTION TO SUPPLEMENT COMPLAINANT'S PREHEARING EXCHANGE, AND MOTION FOR DISCOVERY

I. Background

The Complaint in this matter was filed on January 21, 2005, charging Respondent Ag-Air Flying Services, Inc. with a violation of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. § 136*l*(a) *et seq.* The Complaint alleges that Respondent is a commercial applicator of pesticides and that on June 22, 2004, Respondent applied "Warrior," a registered and restricted use pesticide, to grape vines on private property, which was not an authorized use of the pesticide product, and thus Respondent used it in a manner inconsistent with its labeling, in violation of Section 12(a)(2)(G) of FIFRA, 7 U.S.C. § 136j(a)(2)(G). The Complaint proposed a penalty of $3,120 for this alleged violation.

Respondent filed an Answer to the Complaint on February 23, 2005, denying the alleged violation and asserting affirmative defenses. Thereafter, the parties filed prehearing exchange information and various motions and responses, which are not directly pertinent to the outcome of this Order.

On September 22, 2005, Complainant filed a Motion for Accelerated Decision on Liability and Penalty, and Memorandum in Support (Motion), asserting that there are no genuine issues of material fact as to Respondent's liability for the alleged violation or for the assessment of the proposed penalty, and that Complainant is entitled to judgment as a matter of law as to both liability and the proposed penalty. In the alternative, should such relief not be granted, Complainant requests an accelerated decision resolving any of the issues in this case, in order to narrow the scope of the hearing and preserve the use of resources. Complainant seeks an accelerated decision on the affirmative defenses on the basis that they were improperly pled and lack necessary support or raise issues of pure law that are ripe for accelerated decision, and that they should be stricken. On October 13, 2005, Respondent filed a Memorandum Opposing the

Motion (Opposition), and on October 27, 2005, Complainant filed a Reply in support of its Motion.

On November 1, 2005, Complainant filed a Motion to Supplement Complainant's Prehearing Exchange, seeking to add Sandra Bird as an expert witness. On November 23, 2005, Complainant filed a Motion for Additional Discovery. To date, no response to either motion has been received from Respondent.

II. Standard for Accelerated Decision

The Rules of Practice, 40 C.F.R. Part 22 provide at section 22.20(a) that

> "The Presiding Officer may at any time render an accelerated decision in favor of a party as to any or all parts of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law."

Accelerated decision is similar to summary judgment under Rule 56(c) of the Federal Rules of Civil Procedure (FRCP), and therefore case law thereunder is appropriate guidance as to accelerated decision. *CWM Chemical Services, Inc.*, 6 E.A.D. 1, 12 (EAB 1995); *Mayaguez Regional Sewage Treatment Plant* 4 E.A.D. 772, 780-82, (EAB 1993), *aff'd sub nom., Puerto Rico Aqueduct and Sewer Authority v. EPA,* 35 F.3d 600, 606 (1st Cir. 1994), *cert. denied,* 513 U.S. 1148.

First it must be determined whether, under FRCP 56(c), the movant has met its initial burden of showing that there exists no genuine issue of material fact, by identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show[ing] that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986)(quoting FRCP 56(c)). For the EPA to prevail on a motion for accelerated decision on liability, it must present "'evidence that is so strong and persuasive that no reasonable [factfinder] is free to disregard it'" [and] "'must show that it has established the critical elements of [statutory] liability and that [the respondent] has failed to raise a genuine issue of material fact on its affirmative defense . . . .' " *Rogers Corporation v. EPA*, 275 F.3d 1096, 1103 (D.C. Cir. 2002) quoting *BWX Technologies, Inc.,* RCRA (3008) Appeal No. 97-5, 2000 EPA App. LEXIS 13 at *38-39, 43 (EAB, April 5, 2000).

Well settled case law on FRCP 56 states that the non-movant must designate specific facts showing that there is a genuine issue for trial by presenting affidavits, depositions, answers to interrogatories, admissions on file, or other evidence. *Celotex,* 477 U.S. at 324. The motion for summary judgment places the non-movant on notice that all arguments and evidence opposing the motion, including affirmative defenses, must be properly presented and supported. *Pantry, Inc. v. Stop-N-Go Foods, Inc.,* 796 F. Supp. 1164 (S.D. Ind. 1992). To avoid the

summary judgment motion being granted, the non-movant must provide "sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). In other words, the evidence supporting a claimed factual dispute must be sufficient to require a jury or judge to resolve the parties' differing versions of the truth at trial. *T.W. Electrical Service Inc. v. Pacific Electrical Contractors*, 809 F.2d 626, 630 (9th Cir. 1987).

As to affirmative defenses, the EPA initially must "show that there is an absence of support in the record for the [affirmative] defense." *Rogers*, quoting *BMX* at *44. If the EPA makes this showing, then the respondent "as the non-movant bearing the ultimate burden of persuasion on its affirmative defense, must meet its countervailing burden of production by identifying 'specific facts' from which a reasonable factfinder could find in its favor by a preponderance of the evidence." *Id.*

Inferences may be drawn from the evidence if they are "reasonably probable." *Id.* In evaluating a motion for summary judgment, the record must be viewed in a light most favorable to the non-moving party, indulging all reasonable inferences in that party's favor. *Griggs-Ryan v. Smith*, 904 F.2d 112, 115 (1st Cir. 1990). "Summary judgment is inappropriate when contradictory inferences can be drawn from the evidence." *Rogers,* 275 F.3d at 1103. Furthermore, summary judgment should not be granted when a case involves complicated issues of law and fact, and a proper resolution of these issues would be advanced by further development of the record. *In re Rigden,* 795 F.2d 727, 731 (9th Cir. 1986).

Summary judgment is also inappropriate where credibility is challenged as to a material fact. *Marine Shale Processors, Inc.,* 5 E.A.D. 461, 1994 EPA App. LEXIS 45 *30 (EAB 1994)(citing, *inter alia, Richardson v. Oldham*, 12 F.3d 1373, 1379 (5th Cir. 1994)(credibility determinations have no place in summary judgment proceedings); *Hackley v. Roudebush*, 520 F.2d 108, 159 (D.C. Cir. 1975)(summary judgment is particularly inappropriate where motivation and credibility are integral components of a material factual conflict)). As stated by the Supreme Court, "at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter . . . Credibility determinations [and] the weighing of evidence . . . are jury functions, not those of a judge" ruling on a motion for summary judgment. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249, 255 (1986).

III. Requirements for an Accelerated Decision as to Liability

Respondent is alleged in the Complaint to have violated Section 12(a)(2)(G) of FIFRA, which provides: "It shall be unlawful for any person – * * * to use any registered pesticide in a manner inconsistent with its labeling." In its Answer, Respondent admits allegations in the Complaint that Respondent is a "person," and that a pesticide product named "Warrior" was applied onto a cornfield by aerial spraying from an aircraft on June 22, 2004 by Respondent's commercial applicator. Complaint ¶¶ 8, 9, 13, 25; Answer ¶ 1. Respondent admits in its Answer that the labeling for "Warrior" states that it is a "restricted use product" and that "It is a

violation of Federal law to use this product in a manner inconsistent with its labeling," and Respondent admits that the labeling does not provide that application to grape vines is an acceptable use of the product. Complaint ¶¶ 26, 27; Answer ¶ 1.

The Complaint alleges that Heidi Bolong leases and/or occupies a parcel of property, upon which are a residence and grape vines, that this property is adjacent to the cornfield, and that during the aerial application of Warrior on June 22, 2004, some of the pesticide product was applied to her property. Complaint ¶¶ 16, 18, 19. The Complaint alleges that Heidi Bolong observed spray from Respondent's aircraft landing on her property, that an EPA authorized inspector on June 29, 2004 obtained a composite residue sample from grape vines on her property, and that an analysis of the sample found Lambda-cyhalothrin, the active ingredient in Warrior. Complaint ¶¶ 20, 21, 22, 23, 24. The Complaint alleges that "Warrior" is identified by a certain registration number. Complaint ¶ 14. These allegations are not admitted in Respondent's Answer.

Thus, to grant a motion for accelerated decision as to liability, first, Complainant must show evidence of the facts establishing that during the aerial application of Warrior on June 22, 2004, some of the Warrior was applied to grape vines on Ms. Bolong's property. Second, Complainant must show that there are no genuine issues material to those facts. Third, Complainant must establish that none of the affirmative defenses would preclude a finding of liability either as a matter of law, or for Respondent's failure to support affirmative defenses. Fourth, it must be determined as a matter of law that the application of Warrior on June 22, 2004 constitutes a "use [of a] registered pesticide in a manner inconsistent with its labeling."

IV. Arguments of the Parties as to Liability

In support of its allegation that Warrior is a registered pesticide, Complainant points to Exhibit 15 in its Prehearing Exchange ("CX"), which is a pesticide application of Syngenta Crop Protection, Inc., containing clarifications and edits for the labeling of Warrior Insecticide with Zeon Technology, and indicating that it is a Restricted Use Pesticide (RUP). In support of its allegation as to the active ingredient of Warrior, Complainant points again to Exhibit 15, which states at page AA-052 that Warrior Insecticide with Zeon Technology contains the active ingredient lambda-cyhalothrin.

Complainant presents three declarations of witnesses, under penalty of perjury, in support of its Motion. First, Complainant presents a Declaration of Heidi Bolong (Bolong Declaration, attached to Motion), in which Ms. Bolong states that she and her family live in a house on property located on the Yakama Reservation, across a public access road immediately to the north of the cornfield referenced in the Complaint, that there are a field of grape vines on her property, and that she observed from the deck of her house on June 22, 2004 a yellow airplane flying over her property, in a racetrack pattern directly over her vineyard, while continuously emitting a spray. Bolong Declaration ¶ 6. She states that she "watched the airplane pass over [her] property and continuously spray for perhaps 40 minutes," making approximately 10 to 20

flights directly over her property. *Id.* ¶ 8. She states further that within a couple of days after the spraying, one of her chickens died and another one became ill, and that they had been apparently healthy before the spraying. *Id.* ¶ 9. She states that she made inquiries as to who sprayed her property, finding that the airplane belonged to Ag-Air Services, Inc., that Warrior was the insecticide sprayed, and that the cornfield located across the road to the south of her property was the intended target for the insecticide spraying, and on June 24, 2004, she contacted the Washington State Department of Agriculture. *Id.* ¶¶ 10, 11. Finally, she states that she was at home on a fairly regular basis during the weeks prior to and following June 22, 2004, and that she has never observed or heard of any other airplane overflights and spraying onto her property. *Id.* ¶ 20.

Second, Complainant presents a Declaration of Rodney M. Guske (Guske Declaration, attached to Motion), who states that he is a Tribal Program Specialist employed by the Yakama Nation of Toppenish, Washington, that he is authorized by the U.S. EPA to conduct inspections under FIFRA, and that he conducts such inspections related to pesticide use on the Yakama Reservation. Guske Declaration ¶ 1. He asserts that his training and work experience included the taking and handling of samples. *Id.* ¶ 2. He states that on June 29, 2004, he met with Ms. Bolong at her residence and that she reported her observations of June 22, 2004. *Id.* ¶ 4. He states that he obtained a composite sample of leaves from grape vines, more than two dozen leaves from different grape vines within a quarter mile radius, in the area which Ms. Bolong indicated had been impacted by mist from the airplane. *Id.* ¶ 5. He describes his sampling protocol, including the gathering of a composite sample of leaves from another grape vineyard located on the east side of the road, and his transportation of the samples to the Washington State Chemical and Hop Laboratory. *Id.* ¶¶ 5-7.

Third, Complainant presents a Declaration of Mike Firman (Firman Declaration, attached to Motion), who states that he is employed as a chemist and supervisor at the Chemical Hop Laboratory of the Washington State Department of Agriculture, and that he supervises the two individuals at the laboratory who performed the testing of the two samples brought to him by Mr. Guske on June 29, 2004. Firman Declaration, ¶¶ 1, 2. He describes the qualifications of the individuals who were involved with the samples, and states that the results of the analysis show that the sample of leaves from Ms. Bolong's vineyard contained 0.015 parts per million of lanbda cyhalothrin and that the other sample from the other vineyard was non-detect for that chemical. *Id.* ¶ 4-8.

Complainant asserts that the test results confirm the observations of Ms. Bolong that grape vines on her property were sprayed by Respondent, and that they are further corroborated by the fact that the control sample taken from neighboring property, where Ms. Bolong has not observed any spraying by Respondent, was free of Warrior. Motion at 13.

In its Opposition, Respondent presents the Declaration of Carlton Layne and Certificate John McClure, who are Respondent's proposed expert witnesses, and a Declaration of Lenard "Red" Beierle, who is the pilot of the airplane which sprayed Warrior on the cornfield on June 22, 2004. Respondent argues that EPA's claims must fail because of the material facts that are

contested and because "there is no credible factual basis for the EPA claims." Opposition at 3. Respondent asserts that its affirmative defenses are verified by Mr. Beierle. Respondent requests not only that it should not be found liable but also that the affirmative defenses not be stricken, and that the claims should be dismissed *sui generis*.

The Declaration of Carlton Layne asserts his qualifications to testify as to the legality of pesticide applications and investigations of alleged misuse of pesticides, and asserts that he has reviewed documents in the case file, visited the site at issue, examined the aircraft at issue, and interviewed Mr. Beierle. He challenges the credibility of Ms. Bolong's observation that in flights over her vineyard, the spray was emitted from beneath the end of one wing across to the end of the other wing, by asserting that Ag-Air uses a GPS integrated system on the aircraft that records in digital format and in real time the speed, altitude, location and direction of the aircraft's flight path, that the SATLOC system linked to the application equipment provides a permanent record of where the aircraft was at any given time during the flight and whether the spray system was operating, that he examined the printout of the flight at issue, that the spray system was only operational during the time the aircraft was over the cornfield, and that "At no time was the spray system in the on position when it was over Ms. Bolong's vineyard, her yard or her home." Layne Declaration ¶ 4. He asserts that the active ingredient of Warrior "is only slightly toxic to birds" and cites information on the Material Data Safety Sheet for this pesticide. *Id.* ¶ 7. He states that in his former employment with EPA, he co-authored and edited the FIFRA Inspection Manual. *Id.* ¶ 8. He challenges the sampling protocol of Mr. Guske, asserting that he did not mention presentation of his credentials or use of a Notice of Use/Misuse Inspection or Receipt for Use/Misuse Samples as required, did not make any effort to learn what pesticides had been used on the vineyard by Ms. Bolong or her agents or on nearby fields, and did not follow instructions in the FIFRA Inspection Manual to wrap samples in aluminum foil before putting in a polyethylene bag or to place it in a glass jar, as required to insulate the vegetation sample and prevent possible interaction between the chemical and plastics in the bag. *Id.* ¶¶ 8-12.

In his Certificate, Mr. McClure asserts that he is an Engineering Manager in the employ of SATLOC/CSI Wireless which specializes in GPS and guidance applications for air and ground, and asserts his qualifications and a description of SATLOC software. He asserts that he examined a file from Mr. Beierle. He states that SATLOC logs are a proprietary binary format displayed and decoded by MapStar mapping program, and that the only people given access to it outside the company must sign nondisclosure forms and must be using it for known uses. Certificate of John McClure ¶¶ 7.1, 7.3. He states that each record shows time to the hundredth of a second, latitude and longitude, altitude, speed, heading, "instantaneous xtrack error, age of differential correction and spray and area status." *Id.* ¶7.5. He states that "only by knowing the exact file formats of each record type could a user go in to modify the information," that each record would need to be modified, and each checksum regenerated and saved in the data. *Id.* ¶ 7.9. He includes data from the records of June 22, 2004 in his Certificate. He states that only a computer professional with detailed knowledge of SATLOC formats would be able to alter the records, and concludes that he is able to state and certify that there is no evidence of tampering with the files. *Id.* ¶ 8.

Lenard "Red" Beierle in his Declaration states that he did not apply Warrior to Ms. Bolong's vineyards or over her house area, that he applied Warrior to the cornfield south of her property, and that Ms. Bolong's observations are inaccurate. Declaration of "Red" Beierle ¶ 1. He describes the mixing and loading of Warrior onto the aircraft, and states that the loading system "is the finest system available." *Id.* ¶ 3. He states that he started flying in a racetrack pattern in an east-west fashion, and that he had very favorable winds away from Ms. Bolong's property throughout the application, "making it impossible for any drift to find its way onto the Bolong property." *Id.* ¶ 4. He states further that he continuously monitors the Satloc system and his spray pressure gauge throughout the application, and describes the nozzles on the airplane, and comments that they "are the finest in the industry" *Id.* ¶¶ 5-6. He admitted that he placed his turns above the Bolong property, and that he made a series of steep field entries and departures to the cornfield. *Id.* ¶ 7.

In its Reply, Complainant asserts that Respondent's argument that there must be a party other than Respondent which caused the pesticide contamination in Ms. Bolong's vineyard is unsupportable conjecture. Because Mr. Guske had valid eyewitness information from Ms. Bolong identifying the source of the contamination, he had no reason to search for a different source. Complainant presents a Second Declaration of Mr. Guske, asserting that he learned that the farmer and caretaker of the Bolong vineyard did not use any pesticide product on the Bolong vineyard, and a Second Declaration of Ms. Bolong, asserting that the Bolong family did not use or arrange for use of any pesticide product on it in 2004.

Complainant argues that there are flaws associated with the SATLOC information and that Respondent failed to reveal and substantiate certain crucial facts. In the alternative, Complaint argues that even if everything claimed about the equipment were true, Respondent has committed a violation of FIFRA. Complainant presents a Declaration of Sandra Bird, an Environmental Engineer at EPA, who states that she has written publications on her work with the effects related to pesticide spray drift from aerial applications, and has reviewed the information in this case. She states that Respondent has not provided sufficient information to clearly document the exact mechanism of movement of Warrior into Ms. Bolong's vineyard, but that the level of residue on the grape leaf sample is consistent with, *inter alia*, leaks in the boom, or drift from application of Warrior on the cornfield or adjacent strip of land. Respondent failed to provide any facts that would indicate the size of the droplets of Warrior that were released on the date at issue, the altitude of the flight, the type of CP nozzle, and equipment testing or maintenance records. Ms. Bird states that droplet size or spray quality, and spray height are major factors affecting spray drift, and that leakage and lag is a possibility following shut off of the boom. Complainant notes an incorrect date in Respondent's Exhibit 6, the Satloc printout.

Complainant argues that, due to dispersal and movement through air, the spray of Warrior over the cornfield could have contaminated the Bolong vineyard. Furthermore, Complainant points out that on the SATLOC printout, there are red dots, representing pesticide release areas, outside the cornfield property boundary on the northern edge. This application over the 200 foot strip between the cornfield and Bolong properties, which includes a public road and drainage and irrigation ditches, is an application which may contact persons and where

surface water could have been present, and therefore is not an authorized use of the pesticide. Complainant asserts that 3 or 4 red dots on the printout are located where the road and ditches directly abut the Bolong vineyard, and would only need to have traveled 50 feet horizontally to settle on the area sampled, which is likely given the speed and direction of the airplane, and thus which could account for the presence of Warrior detected on Mr. Guske's sample. Therefore, Complainant concludes that it has met the burden of showing that there is no issue of material fact pertaining to Respondent's misuse of a pesticide.

V. Discussion and Conclusions on Motion for Accelerated Decision

Complainant has identified proposed exhibits and presented affidavits in support of its position that during the aerial application of Warrior on June 22, 2004, some of the Warrior was applied to grape vines on Ms. Bolong's property. Respondent, however, has designated specific facts to show that there is a genuine issue for trial by presenting declarations and proposed evidence which challenge the Complainant's position. The question is whether that evidence is sufficient, if all reasonable inferences are taken in favor of Respondent, for a factfinder to conclude that Respondent is not liable.

First, it is abundantly clear that the credibility of Ms. Bolong's observation that her vineyard was sprayed during an aerial spraying on June 22, 2004 is being challenged by Respondent. Her observation is a major factual allegation upon which Complainant relies in charging Respondent with misuse of a pesticide. Complainant's assertions that the pesticide was released outside the cornfield property boundary in the area of the public road and ditches, and that it would only needed to have traveled 50 feet horizontally to reach the area sampled, do not establish a lack of genuine issues of material fact. Carlton Layne's statement that the spray system was only operational during the time the aircraft was over the cornfield, and Lenard Beierle's statement that the wind direction was away from the Bolong property, directly challenge Complainant's assertions and Ms. Bolong's observation. Therefore accelerated decision is not appropriate. *Marine Shale Processors, Inc., supra.* Viewing the evidence in a light most favorable to Respondent, indulging reasonable inferences in its favor, the Respondent's evidence is sufficient to require the Presiding Judge to resolve the parties' differing versions of the truth at trial.

Furthermore, the fact that Complainant has pointed out some gaps in Respondent's evidence does not render it insufficient to establish the existence of a genuine issue of material fact. At this point, it is not clear whether facts indicating the size of the droplets of Warrior that were released, the altitude of the flight, the type of CP nozzle, and equipment testing or maintenance records, would support Complainant's case or Respondent's case. The assertions made by Complainant in its Motion for Additional Discovery underscore the need for further development of the facts in this case. The lack of factual development on these issues does not support an accelerated decision. *In re Rigden, supra.*

VI. Motion to Supplement Prehearing Exchange and Motion for Additional Discovery

In its Motion to Supplement the Prehearing Exchange, Complainant seeks to add one witness, Ms. Sandra Bird, to its list of proposed witnesses. Complainant states that she would testify about her observations and conclusions regarding likely impacts from the Respondent's aerial application of pesticides on June 22, 2004, in rebuttal to the aerial application issues raised by Respondent in its Prehearing Exchange. Complainant included her Biographical Sketch as Attachment 1 to her Declaration in Complainant's Reply supporting the Motion for Accelerated Decision.

In its Motion for Additional Discovery, Complainant asserts that the information provided by Respondent does not allow a thorough review and assessment of the particular equipment and settings used on the Respondent's airplane on June 22, 2004, and does not provide a full accounting of information which may be gleaned from the SATLOC system. Complainant seeks information which would allow it to conduct modeling of the flight at issue. Therefore, Complainant requests production of the "full data file from the 'GPS SATLOC system' for the flight on June 22, 2004," and documents which specify the: (1) droplet size for the pesticide applied by Respondent, (2) specific type of nozzle used for the application, (3) orifice size of the nozzle used, (4) angle of the nozzle during the application, (5) boom pressure during the application, (6) speed of the aircraft at each point depicted on the SATLOC printout in Respondent's Prehearing Exchange Exhibit 6, (7) elevation of the aircraft at these points, and (8) maintenance and testing of the spray boom and nozzle set-up prior to and following the application.

The Rules of Practice provide, at 40 C.F.R. § 22.16(b) that a response to a motion must be filed within fifteen days after service of the motion, and that "any party who fails to respond within the designated period waives any objection to the granting of the motion." As noted above, Respondent has not filed any response to Complainant's Motion to Supplement the Prehearing Exchange or to the Motion for Additional Discovery. For this reason, the Complainant's Motions to Supplement the Prehearing Exchange and for Additional Discovery may be granted.

Furthermore, there is no reason to deny the Motions on their merits. There is no prejudice apparent in this proceeding from the addition of the proposed witness two months prior to the hearing. Discovery requests are governed by 40 C.F.R. § 22.19(e), which provides that such discovery may be ordered only if it (1) will neither unreasonably delay the proceeding nor unreasonable burden the non-moving party, (2) seeks information that is most reasonably obtained from the non-moving party, and which the non-moving party has refused to provide voluntarily, and (3) seeks information that has significant probative value on a disputed issue of material fact relevant to liability or the relief sought. As to the first criterion, the hearing in this matter is set to commence on February 14, 2006, and Respondent should be able to supply Complainant with the discovery information requested well in advance of that date, and there is no claim that there would be any undue burden, difficulty or delay in doing so. As to the second criterion, Complainant has not asserted that Respondent has refused to provide the information

voluntarily. Complainant in its Motion asserted that it "has not been able to learn whether Respondent intends to oppose this Motion," which, together with the delays in Respondent submitting its prehearing exchange,[1] and the lack of the ability of the parties to come to an agreement on *any* stipulations,[2] suggests that Respondent has not been fully cooperative in volunteering information in this litigation. Therefore, the Motion for Additional Discovery will not be denied on the basis that Complainant failed to state that Respondent refused to provide the information voluntarily. As to the third criterion, the information requested appears to be probative as to issues of spray drift and the accuracy of the SATLOC information, which are the central issues in this case. The criteria of 40 C.F.R. § 22.19(e) are sufficiently satisfied to grant the Complainant's Motion for Additional Discovery.

ORDER

1. Complainant's Motion for Accelerated Decision is **DENIED.**

2. Complainant's Motion to Supplement Complainant's Prehearing Exchange, dated November 1, 2005, is **GRANTED.**

3. Complainant's Motion for Additional Discovery, dated November 22, 2005, is **GRANTED**. Respondent shall submit the information requested in Complainant's Motion for Additional Discovery on or before **January 6, 2006**.

4. In view of the hearing being rescheduled to commence on February 14, 2006, the due date for prehearing briefs is hereby adjusted. If a party wishes to file a prehearing brief, it shall be filed on or before **January 27, 2006.**

5. The parties shall continue in good faith to attempt to settle this matter. Complainant shall file a report of the status of settlement efforts on or before **January 20, 2006.**

Susan L. Biro
Chief Administrative Law Judge

Dated: December 19, 2005
Washington, D.C.

[1]See Order on Motions for Extensions of Time, dated July 20, 2005.

[2] See Status Report Regarding Stipulations, dated November 17, 2005.

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UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

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) **Docket No. FIFRA-10-2005-0065**
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ON COMPLAINANT'S MOTION FOR LEAVE TO FILE OUT OF TIME AND TO SHORTEN TIME FOR RESPONSIVE PLEADINGS

An Order Scheduling Hearing, dated September 1, 2005, set a due date of November 30, 2005 for all prehearing motions, and set the hearing in this matter for February 7 through 10, 2006. By Order dated September 8, 2005, the hearing was re-scheduled to commence on February 14, 2006, and continue through February 17, 2006. On January 20, 2006, Complainant filed a Motion for Leave to File Out of Time and to Shorten Time for Responsive Pleadings, along with a Motion to Reschedule Hearing and Motion for Default for Failure to Submit Additional Discovery.

As grounds for the Motion for Leave to File Out of Time, Complainant states that the factual basis for these motions recently became ripe. Complainant requests that the time be shortened for filing responses to the motions, because they may have an impact on the scheduled hearing, and there is very limited time before the date of hearing.

The Complainant's Motion for Default is based upon the Complainant's assertion that Respondent did not submit the discovery documents which were requested by Complainant and which Respondent was required, by Order dated December 19, 2006, to submit on or before January 6, 2006. The Motion for Default could not have been filed by the prehearing motion due date of November 30, 2005. It is noted that Complainant did not state in the Motion for Leave to File Out of Time whether or not it contacted Respondent to determine whether it opposes the Motion, as directed in the Prehearing Order issued in this matter on March 22, 2005. However, Complainant stated in the accompanying Motion for Default and Motion to Reschedule that Complainant has been unable to learn whether Respondent opposes those Motions, so it can be presumed that Complainant also was unable to determine, prior to filing, whether Respondent opposed the Motion for Leave to File Out of Time. As there are no grounds upon which Respondent could successfully oppose the request for Leave to File Out of Time, and given the limited time before the hearing, the request will be granted without waiting for a response.

As to the request to shorten the time for filing responses to motions, the Consolidated Rules of Practice (Rules), 40 C.F.R. part 22 provide that "A party's response to any written motion must be filed within 15 days of service of such motion. . . .The Presiding Officer . . . may set a shorter or

longer time for response . . . ." 40 C.F.R. § 22.16(b). The Rules provide that where a document is served by first class mail, five days shall be added to the time allowed by the Rules. 40 C.F.R. § 22.7(c). As the Motions for Default and to Reschedule Hearing were filed and served by first class mail on January 20, 2006, responses would be due on February 9, 2006, only two working days prior to the hearing. Even if rulings on the Motions could be issued on one of those two days, the parties would need to prepare for the hearing to begin on February 14, 2006. Spending time and resources to prepare for a hearing until it is either cancelled upon a default order, or rescheduled, a day or even a few days before the hearing, would be exceedingly unfair to both parties, and may also inconvenience the many proposed witnesses in this case. Therefore, the request to shorten the time for responses to motions will be granted.

Given the circumstances of this case, including the Respondent's lack of cooperation in providing information in this proceeding,[1] the simplicity of the issues raised in the Motion for Default and in the Motion to Reschedule Hearing, the imminence of the hearing, and the need for adequate notice to the parties as to any rescheduling or cancellation of the hearing, Respondent shall have until January 26, 2006 to file any responses to the Motion for Default and Motion to Reschedule Hearing. Pursuant to 40 C.F.R. § 22.4(c)(10),[2] Respondent shall be required to submit any such responses by facsimile to the undersigned and to counsel for Complainant.

Accordingly, IT IS ORDERED THAT:

File Out of Time is hereby **GRANTED.**

me for Responsive Pleadings is hereby **GRANTED.** Respondent shall file and serve any responses to the Complainant's Motion for Default or Motion to Reschedule Hearing on or before **January 26, 2006.** Respondent shall send any such responses **by facsimile** to the undersigned and to Complainant's counsel on or before **January 26, 2006**.

Susan L. Biro
Chief Administrative Law Judge

Washington, D.C.

[1] See, Order dated December 19, 2005, at 10.

[2] 40 C.F.R. § 22.4(c)(10) provides that the Presiding Officer may "Do all other acts and take all measures necessary for the maintenance of order and for the efficient, fair and impartial adjudication of issues arising in proceedings" governed by the Rules.

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

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) **Docket No. FIFRA-10-2005-0065**
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RDER GRANTING COMPLAINANT'S MOTION FOR DEFAULT FOR FAILURE TO SUBMIT ADDITIONAL DISCOVERY

On November 22, 2005, Complainant filed a Motion for Additional Discovery, requesting Respondent to produce certain documents. By Order dated December 19, 2005, the Motion was granted and Respondent was required to submit the documents on or before January 6, 2006.
on January 20, 2006 based upon Respondent's failure to submit the required documents. Respondent did not file a Response to the Motion for Default within the time allotted.[1] For the reasons which follow, the Motion for Default will be **GRANTED**.

The Complaint in this matter, issued on January 21, 2005, alleges that Respondent violated Section 12(a)(2)(G) of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. § 136j(A)(2)(G), by using a registered pesticide in a manner inconsistent with its labeling during an aerial application. The Respondent denied the alleged violation in its Answer, and asserted affirmative defenses. On March 22, 2005, a Prehearing Order was issued requiring the parties to submit their respective prehearing exchange information, including proposed exhibits and a list of proposed witnesses, by certain dates. Complainant timely submitted its Prehearing Exchange. However, Respondent failed to submit its prehearing exchange by its due date of June 3, 2005 as required by the Prehearing Order of this Tribunal, and did not move for an extension of time to file such information as permitted by Rule 22.7(b) of the Consolidated Rules of Practice ("Rules") (40 C.F.R. § 22.7(b)), applicable in this proceeding.[2]

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[1] See discussion below regarding the Order on Complainant's Motion for Leave to File Out of Time and to Shorten Time for Responsive Pleadings.

[2] Respondent was served with a copy of the Rules with the Complaint in accordance with Rule 22.14(b) (40 C.F.R. § 22.14(b)) and such Rules were explicitly referenced in the Prehearing Exchange Order.

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Two weeks after the Respondent's deadline had passed, on June 17, 2005, Complainant filed a Motion for Default, on grounds that Respondent had still not filed its prehearing exchange. Thirteen days later, on June 30, 2005, Respondent requested a three day extension of time to file its response to the Motion for Default, which was granted, giving Respondent until July 11th to file its response to the Motion for Default. On July 11, 2005, Respondent mailed its "Objection to Motion for Default, and Request for Leave to File, Late, the Respondent's Discovery, with Disclosure of Expected Evidence and Experts at Time of Hearing." In its Objection, Respondent stated that it "submits its proposed prehearing evidence with request for leave to file said discovery late," and listed proposed exhibits, but enclosed only a summary of testimony of and a curriculum vitae for one of the witnesses, and a statement of another witness. Also in its Objection, Respondent requested an *additional* extension of ten days to respond to the Motion for Default, asserting that Complainant has not submitted documents requested in Respondent's Answer,[3] and listed arguments in its defense to the allegations in the Complaint. Extending great leniency to Respondent, by Order dated July 20, 2005, this Tribunal denied the Motion for Default and granted Respondent even more time, until August 19, 2005, to file its prehearing exchange.[4] In

[3] Respondent's request, contained in its Answer, for Complainant to submit documents, is not consistent with the Rules. Rule 22.19(e)(1) provides that ***"After the information exchange*** provided for in paragraph (a) of this section, a party may move for ***additional*** discovery." 40 C.F.R. § 22.19(e)(1) (emphasis added). This is a "mechanism for discovery should any be necessary *after* the parties have completed their prehearing exchange." 64 Fed. Reg. 40138, 40160 (preamble to Final Rule amending 40 C.F.R. Part 22, July 23, 1999)(emphasis added). Motions for other discovery must be filed in accordance with the requirements of 40 C.F.R. § 22.16(a). Complainant was not required under the Rules or any order of this Tribunal to submit the documents requested by Respondent in the Answer. Such request also appears to be inconsistent with Federal Rules of Civil Procedure. *See,* Federal Rule of Civil Procedure 26(d).

[4] In resetting the deadline for filing the Respondent's Prehearing Exchange until August 19th, this Tribunal gave the Respondent almost *five* months from the Prehearing Order to draft and submit its Prehearing Exchange.

doing so, however, Respondent was warned that, "In the event . . . that Respondent fails to strictly abide by the requirements of this Order or the Rules regarding proceedings in this case, Complainant's Motion for default may be revived or refiled." Order on Motion for Extensions, dated July 20, 2005, at 3. On August 19, 2005, Respondent sent by first class mail its Prehearing Exchange. Both Respondent's Objection to Motion for Default and its Prehearing Exchange were only *mailed*, but not *filed*, by the due dates, and thus too were technically submitted late. *See*, Rule 22.5(a), 40 C.F.R. § 22.5(a)("A document is filed when it is received by the appropriate Clerk.")

On November 22, 2005, in response to Respondent's Prehearing Exchange, Complainant filed a Motion for Additional Discovery requesting that Respondent produce "the full data file from the 'GPS SATLOC system' for the flight on June 22, 2004," and "other documents which may show pertinent facts about the aerial application of *Warrior* by Respondent on the morning of June 22, 2004," including documents which specify the droplet size for the pesticide applied by Respondent, documents which show the specific type of nozzle used during the application, documents which specify the orifice size of the nozzle used during the application, documents which specify the angle of the nozzle during application, documents which specify the boom pressure during the application, documents which show the speed of the aircraft at each point depicted in the "GPS SATLOC system" computer printout, documents which show the elevation of the aircraft at the points along the flight, and documents which show maintenance and testing of the spray boom and nozzle set-up prior to and following the application.[5] Motion at 2-3. This Motion was granted, pursuant to 40 C.F.R. § 22.19(e)(1), by Order dated December 19, 2005. The December 19th Order set a due date of January 6, 2006 for Respondent to submit the requested additional discovery documents.

The Motion for Default for Failure to Submit Additional Discovery, filed on January 20, 2005, just before 9:00 a.m. Pacific Standard Time, states that, to date, Respondent has failed to submit the additional discovery which was as required to be submitted two weeks earlier (on or before January 6, 2005) by this Tribunal's Order of December 19, 2005.

On January 20, 2006, at 12:36 p.m. Pacific Standard Time, Respondent's counsel sent an e-mail message to Respondent's counsel, with a copy by e-mail to the undersigned's staff attorney, stating that he is attaching the information Complainant's counsel requested. The e-mail message further states that Respondent's counsel received a voice mail message asking whether he would object to a default order regarding discovery, and that Respondent does object to it. The attachment to the e-mail states as follows:

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[5] Complainant requested these documents in response to Respondent's claim that computerized records of its aircraft show that it had not sprayed the pesticide in the inappropriate area as alleged by Complainant.

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EPA requests:

310 microns
2. CP-09-3e
.078-.125
4. 5 deg
5. 30 psi
6. 130.7 to 141.2 working speed
7. Aircraft working height of 3 to 5 feet above crop

Maintenance and testing is very limited, on a daily basis, due to only 1 moving part, and that being the aphragm in the check valves. Although I can see my booms and nozzles while piloting the aircraft, I believe it very important to exit the aircraft after every load, to inspect the booms, valves, and do a general walk around the aircraft as it is not uncommon to have a gun pointed at you or fireworks shot at you while applying esticides on the Yakima Indian reservation.

or the numerical figures. Respondent did not submit any "documents" which specify or show the information as requested in the Motion. Even if this e-mail attachment could be considered a document which specifies information requested, there is no indication of who authored this document, except that the e-mail message suggests that it is from his "client," presumably the representative of Respondent's company, Red Beierle. Furthermore, the e-mail attachment does not include all of the information that Respondent was ordered to provide, as it does not include "the full data file from the 'GPS SATLOC system' for the flight on June 22, 2004," nor does it explain Respondent's failure to produce such information. Moreover, the information attached to the e-mail was supplied two weeks after the deadline established by Order of this Tribunal for submitting such additional discovery, without any sufficient justification or motion for extension of time in regard thereto. Therefore, it is concluded that Respondent stands in violation of the Order, dated December 19, 2005, regarding the submission of Additional Discovery.

The Rules provide at 40 C.F.R. § 22.17(a) that "A party may be found to be in default . . . upon failure to comply with the information exchange requirements of § 22.19(a) or an order of the Presiding Officer . . . ." The Rules provide at 40 C.F.R. § 22.17(c), "When the Presiding Officer finds that a default has occurred, he shall issue a default order against the defaulting party, as to any or all parts of the proceeding unless that record shows good cause why a default order should not be issued." The Rules also provide that "Where a party fails to provide information within its control as required pursuant to this section [40 C.F.R. § 22.19], the Presiding Officer may, in his discretion: (1) Infer that the information would be adverse to the party failing to provide it; (2) Exclude the information from evidence; or (3) Issue a default order under § 22.17(c)." The issue here is whether the record of this proceeding shows good cause not to issue a default order, but instead to draw an inference adverse to Respondent, exclude the information from evidence, or not take any action against Respondent for its failure to comply with the December 19th Order.

The Environmental Appeals Board (EAB) has recently stated that "where a respondent fails to adhere to a

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procedural requirement, [the EAB] has traditionally applied a 'totality of circumstances' test to determine whether a default order should be . . . entered . . . ." *JHNY, Inc.* CAA Appeal No. 04-09 (Final Order, September 30, 2005), slip op. at 16-17. The EAB considers several factors under this test: the alleged procedural omission, considering whether a procedural requirement was indeed violated, whether a particular procedural violation is proper grounds for a default order, and whether there was a valid excuse or justification for not complying with the procedural requirement. *Id.*, slip op. at 17.[6] The EAB stated that it is not necessary to find repeated failures to timely submit prehearing exchange information in order to issue a default order. *Id.*, slip op. at 24. The EAB upheld a default order upon respondent's tardiness in filing, and failure to attach proposed exhibits to, the initial prehearing exchange statement, where respondent alleged that the documents were provided to complainant in settlement discussions. *Id.*

In Federal court, sanctions may be assessed for failure to comply with discovery orders under Federal Rule of Civil Procedure 37(b)(2), in order to protect the court's integrity and prevent abuses of the judicial process. *Webb v. District of Columbia*, 146 F.3d 964 (D.C. Cir. 1998). The D.C. Circuit has set forth three basic justifications to support the use of default judgment or dismissal as a sanction: (1) the party's behavior has severely hampered the other party's ability to present his case, or that he has been so prejudiced by the misconduct that it would be unfair to require him to proceed further in the case; (2) the prejudice caused to the judicial system when the party's conduct has put "an intolerable burden on a district court by requiring the court to modify its own docket and operations in order to accommodate the delay; and (3) the need "to sanction conduct that is disrespectful to the court and to deter similar misconduct in the future." *Webb*, 146 F.3d at 971 (citing *Shea v. Donohoe Construction Company*, 795 F.2d 1071 (D.C. Cir. 1986)).

An analysis of this case, considering the factors set forth by the EAB and the D.C. Circuit, begins with the circumstances and substance of the Respondent's response to the Motion for Default must be examined, among other circumstances of this case. The Motion for Default was filed on January 20th, and was received in the undersigned's office on January 23rd by facsimile. Along with the Motion for Default, Complainant filed a Motion for Leave to File Out of Time and to Shorten Time for Responsive Pleadings, and a Motion for Continuance of Hearing Date. In light of the impending hearing scheduled to start on February 14, 2006, the time for Respondent to file a response to the Motion for Default was shortened by Order dated January 24, 2006, and Respondent was given until January 26, 2006 to file such response. Respondent received copies of the Order by facsimile and e-mail on January 24th. Upon inquiry from the undersigned's staff attorney, the Regional Hearing Clerk reported on January 27, 2006 that no response to the Motion for Default had been filed in her office by the Respondent.

Under the provision of the Rules that "Any party who fails to respond within the designated period waives any objection to the granting of the motion" (40 C.F.R. § 22.16(b)), Respondent could be

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[6] On a motion to *set aside* a default order, the EAB considers whether the defaulting party would likely succeed on the substantive merits if a hearing were held. *JHNY*, slip op. at 17.

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deemed to have waived an objection to the Motion for Default. Respondent, however, did submit by e-mail on January 27th to Complainant's counsel and the undersigned's staff attorney, a Memorandum Opposing the Motion for Default (Opposition). The certificate of service on the Opposition states that on January 26, 2006, Respondent's counsel "caused to be mailed, U.S. Priority (one day service) Mail (and return receipt requested)" the Opposition to the Regional Hearing Clerk, the undersigned, and Complainant's counsel. Again, Respondent's counsel did not *file* the document by the due date, but asserts that it was only *mailed* on the due date. This is an example of yet another failure of Respondent's counsel to comply with the Rules and/or this Tribunal's orders.

In its Opposition, Respondent asserts that he was not in the office from December 20, 2005 until January 23, 2006, "having been quite ill" and that the discovery requested has been delivered. [7] As to the full data file from the SATLOC system, Respondent asserts:

e DOS program for the SATLOC track is proving difficult to take apart and download for the EPA to use for its own urposes (ignoring for the moment the copyright proprietary rights of the manufacturer). The respondent has intended to mply turn on the respondent's computer at the evidentiary hearing, and run the SATLOC track that has been recorded, which nclusively proves the actual location of the release of *Warrior* . . . .

at it sent a second e-mail message to Complainant's counsel on January 23, 2006, which stated, *inter alia,* "I have had to take our computer to a computer professional to have this particular log extracted. The original program is in DOS form. I have been assured by these professionals that they will be able to get the needed information as quickly as possible." Respondent asserts that there are issues of material fact regarding Respondent's liability or the affirmative defenses, that Complainant does not have sufficient evidence to proceed, and that the penalty proposed is not a fair and reasonable application of the statutory and policy factors. Respondent requests that if further evidence is needed, both parties should be granted the opportunity to discover the evidence. Respondent argues that it has "been encumbered with procedural hocus-pocus when the parties simply need to settle down and try this case on the facts" and that Complainant has "clouded this action with procedural maneuverings, [and] accusations of intransigence by the respondent."[8]

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[7] Respondent appears to challenge the shortened response time set in the January 24th Order on the basis that the parties have "stipulated to a continuance" of the hearing. However, the motions for continuance of the hearing have not been granted.

[8] Such comments evidence a disrespect as well as a disregard for the procedural rules of this Tribunal.

Respondent's only argument relevant to its failure to comply timely with the December 19th Order is his counsel's bald statement that he was ill. The only argument relevant to its failure to submit a complete response to the December 19th Order is that the log needs to be extracted by a computer professional, which has not yet been done. Respondent does not state when it was submitted to the computer professional, or when the information will be submitted to Complainant. Respondent does not explain why it waited until January 23rd to state these circumstances, given the fact that Respondent knew since the Motion for Additional Discovery was filed on November 23, 2005 that Complainant was requesting the SATLOC data file. Respondent does not explain why it did not submit a motion for extension of time to submit the information, other than the assertion that its counsel was ill. Respondent expects to release the information only during the hearing, which undermines the purposes of discovery and the policies of avoiding surprise at hearing. This would severely hamper the Complainant's case, and it would be unfair to require Complainant to proceed to hearing, facing such surprise evidence.

Indeed, in its Motion for Default, Complainant asserts that it is prejudiced by the lack of timely filing of discovery information, and states that the anticipated testimony of an expert witness who would rely on the requested information is potentially jeopardized, and that a timely filing of the discovery may have allowed Complainant the opportunity to produce modeling of the flight and application of pesticide by Respondent, which could then be presented at the hearing. It is apparent that Complainant is being prejudiced by the unnecessary time and expense involved in prosecuting this case, for which it seeks a penalty of only $3,120, resulting from Respondent's counsel's persistent violations of the Rules applicable to this proceeding and the Orders of this Tribunal. While Respondent's difficulties of being a solo practitioner are understood, as well as his asserted illness and issues related to the dissolution of his marriage and custody of his children, the delays and lack of cooperation by Respondent's counsel in this case have gone beyond excusable behavior and have stepped up to the level of abuse of the administrative litigation process. If Respondent's counsel was unable to submit documents on behalf of his client in the course of this proceeding in the time allotted, he could have easily submitted a one-paragraph motion for extension of time, or he could have requested assistance of other counsel. He chose to do neither, and instead, as evidenced by the record in this case, he has caused Complainant as well as this Tribunal to unnecessarily expend significant amounts of time and effort responding to his repeated failures to comply with procedural Rules and Orders of this Tribunal. Delaying the smooth progress of this case and increasing the costs of the litigation to opposing party, this Tribunal, and thus the public in general, in such a manner, are not tolerable litigation tactics.

And such tactics by Respondent's counsel have continued. During the Prehearing Conference held on January12, 2006, Respondent asserted for the first time that the four days set for hearing of this case established by Order of this Tribunal issued *four months ago*, in September 2005, is insufficient.[9] Respondent claims that he still requires the three days to present his case in chief

[9] By Order dated September 1, 2005, the hearing of this case was originally scheduled to

and a day and a half for rebuttal as initially proposed in his prehearing exchange and thus with Complainant require seven to eight full days of hearing time. Further, aware that Complainant in an effort to minimize its travel expenses would like to try the case straight through, he has indicated that he and his client are not available for hearing except for one week in March, and one week a few weeks later in April, then not again until October 2006. *See*, Stipulated Motion for Continuance of Hearing, dated January 25, 2006, and facsimile received on January 26, 2006 from Respondent's counsel's staff.

This Tribunal has an obligation to manage proceedings in an efficient manner, under Section 555(b) of the Administrative Procedure Act, which requires each Federal agency to proceed to conclude a matter presented to it within a reasonable time,[10] and under the Rules. The hearing in this case was set by this Tribunal for four days, despite the initial estimates of the parties in their Prehearing Exchanges indicating that the case might take a few days longer to try, based upon this Tribunal's years of experience in such matters. This Tribunal has found that the estimates of hearing length offered in the parties' initial Prehearing Exchanges generally overstate the time required because as cases proceed towards hearing, the issues requiring presentation during an oral hearing - those on which there are actual contested issues of material fact, are narrowed by decisions on Motions and stipulations of the parties.[11] Moreover, in cases such as this, with a proposed penalty of only $3,120 and, more importantly, a claim of *inability to pay* that even that nominal penalty, it is simply fiscally illogical for the Respondent and his counsel to propose to expend four days at hearing, or more, in that even at a modest hourly rate of $100, counsel fees for the just hearing itself would consume more than the total proposed penalty.[12] Thus,

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commence on February 7 and continue through February 10, as necessary, a period of four days, in Yakima, Washington. On the basis that Respondent had a conflict regarding those dates, by Order dated September 8, 2005, the hearing was rescheduled to commence on February 14 and continue through February 17, again a period of four days. The Hearing Order of September 1, 2005 also set a due date of November 30, 2005 for "all pre-hearing motions." Respondent did not file any motion by the due date in regard to the length of hearing time set.

[10] Consistent with this mandate, the Office of Administrative Law Judges has adopted a policy of having its cases, on average, be fully adjudicated or settled within eighteen months of receipt by this Office.

[11] It is the understanding of this Tribunal that despite Complainant's request, Respondent's counsel has indicated an unwillingness to stipulate anything in regard to this case. Furthermore, Respondent has not presented a cooperative attitude in communications with this Tribunal's staff.

[12] Counsel fees incurred during the hearing itself, are of course not the only expense of hearing. For example, Respondent has indicated a desire to call expert witnesses from Arizona to testify at the hearing, which will certainly increase the cost of hearing. There are also expenses involved in hearing preparation and potentially post hearing briefing activity.

Respondent's counsel's late request to reset the hearing, for an increased length, combined with his claimed unavailability to appear in such hearing until October 2006, *ten months from now*, is concluded to be simply another unjustified delay tactic.[13]

The alternatives to a default order would not result in an efficient, fair and impartial adjudication of the issues in this case. To deny the Motion for Default and allow this case to proceed to hearing either on the date currently scheduled (in two weeks), to schedule the hearing for the two weeks available to Respondent upon the unlikely chance that the 14 proposed witnesses, Presiding Judge, and Complainant's counsel are available those weeks, or to wait until October to commence the hearing, would either prejudice Complainant such that it would be unfair to require Complainant to proceed further in the case, and/or would put a burden on this Tribunal by requiring it to modify its docket and operations in order to accommodate the delay. Moreover, drawing an adverse inference against Respondent for failure to comply with the December 19th Order would effectively deprive Respondent of its chief arguments in defense of the Complaint, which would eventually lead to a result similar to a default order, and would result in a waste of the parties' and this Tribunal's time and resources. Excluding the evidence from the hearing would severely hamper Complainant's preparation for cross examination of Respondent's witnesses and its ability to rebut Respondent's case.

After careful consideration of the facts and circumstances of this case, based upon Respondent's counsel's persistent, unjustified, violation of the Orders of this Tribunal and Rules, a default is deemed appropriate in this action. While a default has been considered a drastic remedy, and affects the client rather than its counsel, the Supreme Court has stated that clients must be held accountable for the acts and omissions of their attorneys. *Link v. Wabash R. Co.*, 370 U.S. 626 (1962) (client may be held to suffer consequences of dismissal of its lawsuit because of its attorney's failure to attend a pretrial conference); *Taylor v. Illinois,* 484 U.S. 400, 417-18 (1988) (Court stated that "it is not unfair to hold petitioner responsible for his lawyer's misconduct" and excluded witness testimony for failure to identify timely the witness, in violation of discovery rules). The Court in *Link* stated, "Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each person is deemed bound by the acts of his lawyer agent." 370 U.S. at 633. If an attorney's

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[13] Under the Administrative Procedure Act, a Respondent is entitled to an "opportunity" for a hearing. 5 U.S.C. § 554(c)(2). He is not entitled under the APA to have a hearing whenever he so desires, for as long as he so desires. He may squander such opportunity by repeatedly violating the Orders of the Tribunal and Rules of Proceeding without sufficient justification.

conduct falls substantially below what is reasonable in the circumstances, the client's remedy against the attorney is a suit for malpractice.

The Rules of Practice provide that "Default by respondent constitutes, for purposes of the pending proceeding only, an admission of all facts alleged in the complaint and a waiver of respondent's right to contest such factual allegations." 40 C.F.R. § 22.17(a). Therefore, the facts alleged in the Complaint are taken as true. If, however, Complainant has failed to state allegations of fact in the Complaint that support the elements of the violation alleged, then a default order should not be issued. In other words, Complainant must set forth the prima facie elements of the case: that Respondent is a "person", and a "commercial applicator", who used a registered pesticide in a manner inconsistent with its labeling, and acted in an unlawful manner according to Section 12(a)(2)(G) of FIFRA, 7 U.S.C. § 136j(a)(2)(G). The Complaint alleges that Respondent made an aerial application of the RUP *Warrior* on June 22, 2002, during which application Respondent sprayed grave vines on Heidi Bolong's property, and the label for *Warrior* does not allow application to grape vines. Complainant has submitted proposed evidence in its Prehearing Exchange in support of these allegations. Upon review of the Complaint and Prehearing Exchange, it is concluded that the allegations properly state a claim for using a registered pesticide in a manner inconsistent with its labeling, in violation of Section 12(a)(2)(G) of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C.

It is concluded that the record does not show good cause for why a default order should not be issued. Accordingly, Respondent is hereby found liable for the violation alleged in the Complaint.

Complainant's Motion for Default requests that the proposed penalty be assessed. The Rules provide:

the order resolves all outstanding issues and claims in the proceeding, it shall constitute the initial decision .... The relief oposed in the complaint or the motion for default shall be ordered unless the requested relief is clearly inconsistent with the cord of the proceeding or the Act.

enalty in accordance with the 1990 Enforcement Response Policy for FIFRA ("ERP"), and has taken into account the statutory factors in Section 14(a) of FIFRA, namely, the size of the business, effect on ability to continue in business, and gravity of the violation. Complainant's Prehearing Exchange, Exhibit 8. Complainant calculated a proposed base penalty of $3,900, which is the matrix value in Appendix C of the ERP, as adjusted for inflation under the Civil Penalty Inflation Adjustment Rules, for the category of the smallest businesses, Category III, with gross revenues of $0 to $300,000, and a Level 2 gravity of the violation. Complainant determined the gravity level from Appendix A of the ERP, which provides that violations of FIFRA § 12(a)(2)(g) are assessed a gravity level of 2. Complainant then decreased the base penalty by $780, representing a 20% reduction from $3,900, based on the pesticide toxicity (assessed at the highest level because *Warrior* is a Restricted Use Pesticide), lowest level of potential harm to human health, lowest level of potential environmental harm, no history of noncompliance, and culpability (assessed at mid-level for apparent negligence). *Id.*

Complainant has submitted in its Prehearing Exchange a printout, which appears to be from American Business Directory, of a listing for Ag Air, last revised July 2004, showing sales of $84,000. To date, Respondent has not submitted any documents in support of any reduction of the penalty based on effect of the penalty on its ability to continue in business.

It is concluded that the proposed penalty is consistent with the record of this case and with the statutory penalty factors of FIFRA.

ORDER

nal's Order for Additional Discovery, as concluded above, Respondent is hereby found in **DEFAULT.** 2. Respondent Ag-Air Flying Services, Inc. is hereby assessed a civil administrative penalty in the amount of **$ 3,120.**3. Payment of the full amount of this civil penalty shall be made within thirty (30) days after this Initial Decision becomes a final order under 40 C.F.R. § 22.27(c), as provided below. Payment shall be made by submitting a certified or cashier's check in the amount of $ 3,120, payable to "Treasurer, United States of America," and mailed to:

EPA - Region 10
Regional Hearing ClerkP.O. Box 360903MPittsburgh, PA 15251
subject case and EPA docket number as well as Respondent's name and address, must accompany the check.

ıalty within the prescribed statutory period after entry of this Order, interest on the penalty may be assessed. *See,* 31 U.S.C. § 3717; 40 C.F.R. § 13.11.5. Pursuant to 40 C.F.R. § 22.27(c), this Initial Decision shall become a final order forty-five (45) days after its service upon the parties and without further proceedings unless (1) a party moves to reopen the hearing within twenty (20) days after service of this Initial Decision, pursuant to 40 C.F.R. § 22.28(a); (2) an appeal to the Environmental Appeals Board is taken within thirty (30) days after this Initial Decision is served upon the parties; or (3) the Environmental Appeals Board elects, upon its own initiative, to review this Initial Decision, pursuant to 40 C.F.R. § 22.30(b).[14]

[14] For good cause, this Tribunal may set aside a default. 22 C.F.R. § 22.17(c). If Respondent has such *good cause*, it is strongly encouraged to file a motion setting forth such cause as expeditiously as possible. The mere right to file such a Motion does not delay the running of the time for filing an appeal.

Susan L. Biro
Chief Administrative Law Judge

Washington, D.C.

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