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

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

COMPLAINANT'S MOTION TO FILE
SUPPLEMENTAL RESPONSE TO BOARD'S QUESTION

The United States Environmental Protection Agency Office of Enforcement and Compliance Assurance "Complainant") submits this Motion to File Supplemental Response to Board's Question ("Motion") pursuant to section 22.16 of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("CROP"). 40 C.F.R. § 22.16. Complainant requests that the Board consider as part of its deliberations in the above-mentioned matter the following supplemental information in response to a question posed by the Environmental Appeals Board ("EAB" or "Board") during oral argument in this matter on November 5, 2007. Complainant has contacted counsel for Respondent, who opposes this Motion.

Complainant has requested in its cross-appeal and during oral argument that the Board clarify the ALJ's Initial Decision to combine separate pesticide applications of the same pesticide in the same field, on the same day, and within thirty minutes into one application for purposes of the display requirements set forth in Worker Protection Standard ("WPS") regulations at 40 C.F.R. §§ 170.122 and 170.222. *See* Complainant's Response to Respondent's Appeal, Notice of Cross-Appeal, And Supporting Brief (hereinafter "Brief"), pp. 53-57; Transcript of November

5, 2007 Oral Argument ("Tr."), pp. 33-34, 38-49. In reference to this request, after counsel confirmed for Judge Reich that Complainant was not appealing the ALJ's decision to combine the counts in this matter, but was asking the Board to clarify how a farm should display the start and end time of the combined applications, Judge Reich asked counsel for Complainant whether "that mean[s] that you accept that as an interpretation, or you're just choosing not to argue it in this case?" Tr. at 34. Counsel responded that Complainant was choosing not to argue that in this case. Judge Reich then asked whether Complainant was "reserving the right to make this argument elsewhere," and counsel for Complainant stated: "That's correct." *Id.* at 34-35.

In light of the subsequent questions asked by Judge Reich and Judge Stein regarding Complainant's reservation, as reflected in pages 42-45 of the Transcript, Complainant wishes to clarify its response with regard to its reservation of the right to "make this argument elsewhere. By "elsewhere," Complainant meant that it reserved the right to object to the combination of multiple applications of a pesticide into a single application in two other contexts: (a) where an ALJ, on her own initiative, chooses to combine separate pesticide applications into one for a respondent that was permitted to make such a combination, but chose to treat the applications as separate; and (b) for purposes of compliance with *other requirements of the WPS.*

As Complainant stated in its Brief and during oral argument, the point of the display requirements at 170.122 and 170.222 (as well as the notification requirements at 170.120) is to ensure that unprotected workers and handlers do not enter a treated field during a pesticide application or prior to the expiration of that pesticide's restricted entry interval ("REI"). *See, e.g.,* Brief, p. 55; Tr. at 46-48. It is Complainant's position that for purposes of displaying information regarding pesticide applications made on a farm, WPS sections 170.122 and 70.222

give a farm owner the flexibility to determine whether multiple applications of the same pesticide on a given area of a farm can be considered as a single application or as separate applications. This is reflected in the Agency's interpretive guidance of the notification provisions of the WPS, which states:

> Q. In some areas, fields are so large that it may take days to treat the entire field. What is the "treated area" then, the whole field, or just the part treated each day?
>
> A. The treated area is the portion of the field where the pesticide is directed. *Employers may choose* to designate only the areas being treated that day or previously treated as the treated area. Areas designated as treated and still under the REI requirements need to be posted if posting is required by the product labeling or the agricultural employer chooses to use posting as the means of notifying workers working within a quarter mile of the treated area. The whole field may be posted, but the field must remain posted until the REI expires for every section of it *[unless] specific posting is done for the sections* remaining under the REI.

"Agricultural Worker Protection Standard, 40 CFR Parts 156 & 70 Interpretive Policy Questions & Answers," U.S. Environmental Protection Agency Office of Enforcement and Compliance Assurance, June 14, 1996, Question 11.15, p. 63 (also available at www.epa.gov/pesticides/safety/workers/wpsinterpolicy.htm) (emphases added). Thus, Complainant does not object to the general principle that multiple applications of the same pesticide can be treated as one continuous application for purposes of compliance with sections 170.122 and 170.222 of the WPS, as Complainant believes this is expressly permitted by the regulations, so long as the start and end times of the application are set forth in the display.

Complainant's reservation before the Board has to do with who gets to make the decision as to whether an application is separate or continuous. Respondent in this case treated the pesticide applications at issue before the Board as separate applications: Respondent's own

records listed the pesticide applications at issue as separate entries. *See* Complainant's Hearing Exhibits 21.b and 21.c. As can be understood from the guidance mentioned above, there is a benefit to a farm owner's decision to treat multiple applications across a large area as a single application for purposes of notification and display requirements under the WPS: dividing up a large field into separate "treated areas" allows workers to resume working sooner. For example, if a farm owner had a ten acre field, upon which it wished to apply a pesticide with an REI of four hours, and treatment of that entire field would take an hour per acre to apply, if the farm owner chose to divide this field into several separate treated areas (for example, into discrete one-acre areas labeled Subfields 1-10), then if the handler made an application at Subfield from 8am-9am, workers could theoretically resume working in Subfield 1 after 1pm, instead of having to wait at least fourteen hours to resume work in any part of the field. Thus, a farmer can benefit significantly by treating multiple pesticide applications of the same field as separate applications.

In this instance, although Respondent's records in this case had the applications at issue listed as separate applications, the ALJ decided to combine them on her own initiative. As explained above, Complainant agrees with the ALJ's decision insofar as it interprets the WPS to allow *a farm* to consider applications of the same pesticide on the same field on the same day occurring 30 minutes apart to constitute one continuous application. However, Complainant does not inherently agree with the ALJ's reasoning in reaching her result and Complainant does not agree that as a matter of interpretation an ALJ can always *step in for the farm* and combine counts assessed for applications the farm considered as separate applications. Such an interpretation of the WPS undermines Complainant's prosecutorial discretion in determining what counts to allege in the Complaint. Thus, Complainant would reserve the right to appeal an

ALJ's decision to substitute her judgment for that of the farm owner by combining multiple counts assessed for applications listed by the farm as separate applications into one count for purposes of WPS display requirements at sections 170.122 and 170.222.

Additionally, Complainant believes that the combination of applications would not be permitted for purposes of compliance with other portions of the WPS, an interpretation the ALJ upheld in this case. *See, e.g.,* Initial Decision at 48 n.11. Complainant would therefore reserve the right to argue against combining multiple pesticide applications into one count for purposes of other WPS provisions that have requirements pertaining to individual workers or handlers, such as providing a handler with required decontamination supplies under section 170.250 of the WPS.

Complainant appreciates the opportunity to provide this clarifying information to the Board, and respectfully requests that it be considered by the EAB in its deliberations on this matter.

Respectfully submitted,

Danielle Fidler
Counsel for Complainant

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Complainant's Motion to File Supplemental Response to Board's Question was sent to the following persons, in the manner specified, on the date below:

Original, via inter-office mail:

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Dated: 2/7/2008

Danielle C. Fidler
U.S. EPA