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BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
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In the Matter of:

ENVIR. APPEALS BOARD

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

Respondent /

FIFRA Appeal No. 07-01

US EPA Docket No. /
FIFRA 02-2005-5301 /
Before the Hon. Susan L. Biro, /
Chief Administrative Law Judge /

Proceeding under Section 14(a) of the /
Federal Insecticide, Fungicide and /
Rodenticide Act ("FIFRA"), as amended, /
7 U.S.C. §1361(a) /

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**SHORT ANSWER TO COMPLAINANT'S RESPONSE TO
RESPONDENT'S APPEAL, NOTICE OF CROSS-APPEAL
AND SUPPORTING BRIEF**

TO THE HONORABLE ENVIRONMENTAL APPEALS BOARD (EAB):

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

The United States Environmental Protection Agency ("EPA" or "Agency") submitted a Response to Respondent's Appeal, Notice of Cross-Appeal, and Supporting Brief ("Complainant's Response") dated March 28, 2007 and notified via FEDEX the 30th day of March, 2007. In the same, the agency requested to this EAB to issue a four pronged decision in this litigation. In the first place, it requested to this EAB to deny Respondent's Appeal of the Initial Decision issued by Chief Administrative Law Judge ("ALJ") Susan L. Biro dated January 19, 2007. The agency also

requested clarification with regard to the appropriate display of specific pesticide application information for future cases, and further requested that the ALJ's Initial Decision be upheld, with the exception of the following: (1) be reversed the decision not to assess penalties for violations involving 40 C.F.R. §170.222; and (2) be vacated as to the ALJ's assessment of Respondent's culpability under the relevant penalty policies, and that the same be assessed by this EAB under its *de novo* review authority.

Respondent's Appeal

Related to the agency's request that instant appeal be denied, Martex respectfully submits that said petition be rejected by this EAB and all remedies requested in the Appeal Brief be granted. As addressed in the Appeal Brief, numerous considerations make up the backdrop of this case and the agency's isolated consideration of individual matters has failed to acknowledge and measure the true nature of their interactions. The chain of errors that has plagued this case from its inception¹ is exacerbated by the absence of delegated authority to allow additional discovery, for taking deposition to agency's personnel and to subpoena witnesses to testify at the trial of the case.

The administrative record shows that pursuant to Rule 22.19(f) of the CROP, Martex filed a Motion To Amend Information Exchange on August 31, 2005, requesting the inclusion of four additional witnesses, owners or principals of agricultural entities that sell chemicals and pesticides to local farmers that could testify if there were other local farmers pursued by EPA, and as to the agency's alleged initiative or lack thereof to implement the precepts of FIFRA in Puerto Rico. The same was denied by the ALJ. Martex also filed a Motion *In Limine* dated August 31, 2005, to

¹ Among others, a partial and deficient service process of the Complaint, flawed because Martex was initially served an unsigned copy and all the attachments were missing. The lack of analysis of information submitted by Martex to PRDA-EPA personnel, erroneously mixing and confusing names of farms, crops and application of pesticides. A well orchestrated publicity stunt in a press conference held in the San Juan, Puerto Rico, EPA headquarters, to announce the largest proposed penalty (\$400,000) in U.S. history against Martex, for 338 FIFRA violations. The zigzagging assessment of penalties by Region 2 personnel, their departure from EPA's procedures and the agency's failure to educate the regulated community in relation of alternative methods of compliance with WPS requirements.

request that four documents announced and submitted by the agency be excluded as inadmissible at the trial of this case, because the deleted parts make the documents not trustworthy.^{2/} The ALJ denied said motion in its entirety in her Order dated September 27, 2005. Also, pursuant to Rule 22.19(e), Martex filed another Motion For The Issuance Of Discovery And Hearing Subpoenas, dated September 1, 2005. Its purpose was to take depositions to two high ranking EPA officials, Ms. Kathleen Callahan and Mr. Carl Soderberg, and to have them testify at the trial as to their personal knowledge of the alleged local initiative to protect agricultural workers, since neither the PRDA or EPA had provided any information. The motion was also denied on September 16, 2005.

The lack of adequate tools to confront the Complainant is plainly and constitutionally wrong, because it does not provide all the legal means to effectively defend against unjustified governmental intervention and selective prosecution. Martex has been unevenly facing an agency whose claim is discriminatory, deficient, biased, pursued in bad faith, plagued with inaccuracies, based on hearsay, speculations, erroneous factual allegations and wrongful interpretation of the law. In spite of the above, the administrative record has sufficient evidence and elements of analysis and this EAB is requested to use a holistic approach so that a just and fair judgment is rendered in this case.

Complainant's Clarification Request

Respondent does not address the agency's arguments in support of the request to clarify for future cases (should a worker or handler employer opt to combine multiple pesticide applications occurring within thirty minutes into a single application for purposes of display requirements under 40 C.F.R. §§ 170.122 and 170.222) that time and date the pesticide is to be applied be read

² Said documents were announced by the agency and later presented at the trial and marked as follows: Complainant's Exhibit No. 10(a), Inspection notes of Mr. Roberto Rivera, dated September 5, 2003; Complainant's Exhibit No. 13 (a), Inspection notes of Mr. Roberto Rivera to Worker Protection Standard Use Inspection report for April 26 and 29, 2004; and two reports prepared by EPA's private contractors dated June 8, 2004, marked Complainant's Exhibit No. 14 and Complainant's Exhibit No. 16.

to include the latest of the combined applications. Complainant's Response at 3-4, 54-55. It is respectfully submitted that FIFRA's regulatory scheme [40 C.F.R. Part 170] provides more than enough guidance, and that streamlining and simplifying said already complex regulations, not adding more requirements, is the appropriate course to follow to completely attain the purposes of the law.^{3/}

Assessment Of Penalties For Violations Involving 40 C.F.R. §170.222

The agency has also requested that the Initial Decision be upheld, but reversed as to the ALJ's decision not to assess penalties for violations involving 40 C.F.R. §170.222. Here, EPA argued that there is a separate duty to display specific pesticides applications information to workers under 40 C.F.R. §170.122, and to handlers under 40 C.F.R. §170.222. Complainant's Response at 57-60. Along this line of reasoning, the agency submitted to this EAB that "while the ALJ determines that Martex is legally liable for 68 counts of violating §170.122 and sixty-eight (68) counts for violating §170.222, she ultimately held that no penalty was appropriate for the sixty-eight (68) counts for violating §170.222." Complainant's Response at 59.

EPA then submitted that the ALJ's decision to merge the two sets of violations for penalty purposes constitutes clear error, because the two sets of violations are clearly independent and the relevant penalty policies required the ALJ to assess separate civil penalties. Complainant's Response at 62-63. Then, to lend support to the challenge related to the alleged failed duty to provide pesticide application information in case of an emergency, in footnote 40, Complainant's

³ "The internal effects of a mutable policy are still more calamitous. It poisons the blessing of liberty itself. It will be of little avail to the people, that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated, or undergo such incessant changes that no man, who knows what the law is to-day, can guess what it will be to-morrow. Law is defined to be a rule of action; but how can that be a rule, which is little known, and less fixed?" (emphasis added) Federalist No. 62, James Madison.

Response at 67, the agency added the following: "The ALJ may be correct that handlers would know what chemicals they applied or their supervisors applied on April 26, 2004, but it is highly unlikely that any handler would know every chemical they had applied or their supervisors had ordered over the last 30 days. Had a medical emergency arisen on April 26, 2004, it is extremely doubtful that a given handler would have been able to inform medical personnel of every pesticide, its active ingredient, and when he applied it, over the prior 30 days. This is exactly what the regulations at 40 C.F.R. §170.222 are designed to achieve. Respondent's failure to comply with it *did* put its handlers at greater risk of harm than did Respondent's failure to comply with 40 C.F.R. §170.122." The above conclusion is farfetched because it ignores how farm information is passed on to multiple recipients, particularly to agricultural workers and to a small group of handlers in charge of the applications of the pesticide ClearOut 41 at the Jauca facility from April from March 26 through April 26, 2004. This conclusion is also wrong because the agency is assuming a string of facts not in evidence.

The record shows that Martex operates five farms: (1) Coto Laurel, in the Municipality of Ponce; (2) Descalabrado and (3) Río Canas, in the Municipality of Juana Díaz, and (4) Paso Seco and (5) the Jauca farms in the Municipality of Santa Isabel. The record also shows that the Jauca farm is the largest, close to a thousand acres. [TRANSCRIPTS, VOL IV, page 1290-1293]. Martex employs over 300-400 agricultural workers, including three to six handlers and twelve to fifteen supervisors in high unemployment and economically depressed areas of Southern Puerto Rico. See the Initial Decision, at 13. The evidence shows that each farm owned or operated by Martex has a posting facility (central posting area) where information is easily available to visitors, workers, handlers, supervisors and office personnel. Respondent's Exhibit No. 14.

The evidence also shows that the Jauca facility is subdivided in several plots meticulously identified using letters (ON, OE, OS, TX, MJF, JC) and numbers. Respondent's Exhibit No. 51. The record shows that three or four individuals, using backpacks to carry a herbicide solution, sprayed the pesticide ClearOut 41 at various fields located in the the Jauca facility from April from March 26 to April 26, 2004. [TRANSCRIPTS, VOL V, page 1812]. These pesticide applications were performed by the same individuals --Jovino Ortíz, Angel L. Rosario, Elvis J. Santiago and Pewee-- that make up a group of handlers that applied the pesticide ClearOut 41 at the Jauca facility during this period. Complainants Exhibit No. 21.b and Complainants Exhibit No. 22.c. In other words, these handlers could easily remember and inform medical personnel that the pesticide ClearOut 41 was the pesticide they applied during this 30 day period at the Jauca facility (lots ON, OE, OS, TX, MJF, JC) because the record shows that this chemical was the only pesticide they sprayed at the Jauca facility.

Based on the above, Martex requests that the Initial Decision be upheld related to the ALJ's decision not to assess penalties for violations involving 40 C.F.R. §170.222.

Assessment Of Respondent's Culpability: FIFRA ERP And WPS Penalty Policy

The agency finally requested that the Initial Decision be upheld, but vacated as to the ALJ's assessment of Respondent's culpability under the relevant penalty policies, and that the same be assessed by the EAB under its *de novo* review authority.

EPA claims that the FIFRA ERP and the WPS Penalty Policy's gravity adjustments factors contain a category called culpability, that has four (sic) values: "4" knowing or willful violation of the statute; "2" for violation resulting from negligence or where culpability is unknown; and "0" for violations that were neither knowing nor willful and did not result from negligence. Violator instituted steps to correct the violation immediately after discovery of the violation. It is

respectfully noted that Appendix B, Footnotes, Table B-3 (footnote 5) reads: "EPA enforcement officials are not required to determine culpability at the time the complaint is issued (especially if this information is not readily available). EPA enforcement officials may instead assign a weighting factor of 2 (culpability unknown), at the time of the issuance of the complaint. Culpability adjustments may be considered during settlement negotiations." In other words, the regulation sets this culpability category as a default with a value of "2". As a matter of fact, Mr. Kramer, in all his penalty calculations, assigned this default value of "2" for all culpability matters.

On the other hand, based on the Respondent's continuous efforts to be in compliance with FIFRA requirements, in her penalty calculations, the ALJ revised the numbers used by Mr. Kramer and assigned to all categories of violations a value of "1" for culpability. Not only did the ALJ adhere to the spirit of FIFRA when assessing the revised Respondent's culpability, she also considered the fact that after Dr. Enache visited the Jauca facility on May 16, 2005, the agency found that everything was in order. The following answers given by Dr. Enache are certainly very illustrative. [TRANSCRIPTS, VOL III, pages 1034-37]

- Q But the fact is, the true fact is that you wanted to inspect Martex on Monday, 16, 2005, of May?
- A That was incorrect.
- Q That was not the purpose --
- A That is incorrect.
- Q What would be the correct motivation for that visit to Puerto Rico?
- A We had been invited by Martex and you counselors to visit Martex Farms, and indeed to be shown to us **that at this time Martex Farms was a hundred percent in compliance.**
- Q And what --
- A And we have promised that the first opportunity we have we will be happy to oblige. And we did exactly that.
- Q So you're stating to the Court we invited you to come and inspect our facilities?
- A Not to inspect. To visit.
- Q To visit?
- A Yes.

- Q And you came to Puerto Rico following that invitation?
- A I have come for many other reasons. And while here, yes, we have visited Martex Farms.
- Q Could you tell us if you found any violation on that visit?
- A **Minor things**, yes.
- Q Minor things?
- A Yes.
- Q Could you be more specific?
- A You really want me to be specific?
- Q Well, yes, I think --
- A Sure.
- Q -- I think the Court would like to hear it.
- A Absolutely, yes.
It did take the people that you had talked to us at the farm a great deal of time until they were able to extract the information that had been requested as to the training program -- hours and hours and hours.
- Q To extract the information?
- A It did rain, indeed, so we had spent a great deal of time on the farm's porch admiring the central posting display. When the rain stopped they took us in the field to the mixing/loading area where now they had a big plastic pipe. There was cap at the end of it where they had the contamination supplies in it. **While there I had pointed out to Mr. Marti, Sr. that the law does require to have a backflow preventer installed onto the line in order to make sure that the pesticides may not revert back to the lake, or whatever was the water source there. That's just a minor thing**, isn't it?
- Q And as a result of that inspection did you issue an additional notice?
- A No.
- Q **Additional complaints?**
- A No.

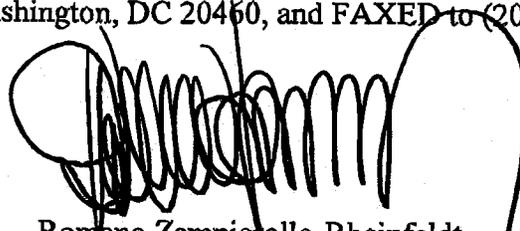
Based on the above, the ALJ's assessment of Respondent's culpability under the relevant penalty policies must be sustained by this EAB.

It is respectfully requested that this EAB takes into account the administrative record as a whole, accept the appeal submitted by Martex, and applying the standard set forth in 40 C.F.R. §22.24(b), grant all the remedies requested by the appearing party.

RESPECTFULLY SUBMITTED. In San Juan, Puerto Rico. April 24, 2007.

CERTIFICATE OF SERVICE: I certify the mailing (HAND DELIVERY) of the original and five copies of this motion to: U.S. Environmental Protection Agency, Clerk of the Board,

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



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