IN RE MARTEX FARMS, S.E.

FIFRA Appeal No. 07-01

FINAL DECISION AND ORDER

Decided February 14, 2008

Syllabus

Martex Farms, S.E., ("Martex") filed an appeal from an Initial Decision issued by Chief Administrative Law Judge ("ALJ") Susan L. Biro on January 19, 2007. The U.S. Environmental Protection Agency ("EPA" or "Agency"), in turn, filed a cross-appeal. The Agency's administrative complaint charged Martex with violations of section 12(a)(2)(G) of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136j(a)(2)(G), and the Worker Protection Standard ("WPS") regulations set forth at 40 C.F.R. part 170. The Agency proposed a total civil administrative penalty of $369,600, derived from the *Enforcement Response Policy for the [FIFRA]* ("*ERP*") and the *Worker Protection Standard Penalty Policy* ("*WPS Penalty Policy*").

The alleged violations occurred at two Martex agricultural establishments known as the Jauca facility and the Coto Laurel facility. The allegations consist of six types of violations: (1) failure to display specific information to farm "workers" regarding pesticide applications to fields at the Jauca facility, in violation of 40 C.F.R. § 170.122; (2) failure to provide decontamination supplies to workers at the Jauca facility, in violation of 40 C.F.R. § 170.150; (3) failure to display specific information to pesticide "handlers" regarding pesticide applications to fields at the Jauca facility, in violation of 40 C.F.R. § 170.222; (4) failure to provide decontamination supplies to pesticide handlers at the Jauca facility, in violation of 40 C.F.R. § 170.250; (5) failure to provide personal protective equipment to handlers at the Jauca facility, in violation of 40 C.F.R. § 170.240; and (6) failure to provide decontamination supplies to a pesticide handler on two occasions at the Coto Laurel facility, in violation of 40 C.F.R. § 170.250. Martex disputed both its liability and the penalty amount. After an administrative hearing, the ALJ found Martex liable for most of the alleged violations and assessed a $92,620 penalty.

On appeal, Martex seeks vacatur of all but four of the ALJ's findings of liability and the reassessment of the penalty to reflect such a vacatur. Martex also advances a selective prosecution argument. The Agency's cross-appeal raises three additional issues for the Board's consideration. The Agency asks the Board to: (1) determine for future cases the appropriate times that should be displayed in the pesticide application notices that are posted pursuant to 40 C.F.R. §§ 170.122 and 170.222, in light of the ALJ's holding that multiple pesticide applications conducted by different handlers within thirty minutes of each other at a single field constitute a single application; (2) review the ALJ's determination not to assess penalties, despite finding Martex liable, for violations of 40 C.F.R. § 170.222; and (3) review those aspects of the ALJ's penalty calculation that credited Martex outside of the settlement negotiation context for corrective measures implemented after filing of the complaint.

Held: The Board upholds the ALJ's determinations of liability, rejects Martex's selective prosecution argument, and exercises its *de novo* penalty assessment authority to recalculate certain aspects of the civil penalty. Specifically, the Board assesses a civil penalty in the amount of $163,680, and in doing so, concludes the following:

(1) The Board disagrees with the ALJ's penalty assessment in the following respects:

> (a) The ALJ erred in finding that violations of 40 C.F.R. §§ 170.122 and 170.222 were dependent. The two regulations differ as to a single element of proof, which is sufficient for a finding that the two violations are distinct and that separate penalties appropriately may be assessed for each. Martex's decision to comply with the display requirements of both regulations by posting the pesticide application information in a single location central to both workers and handlers does not necessarily lead to a finding that the regulatory violations are legally dependent.
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> (b) The ALJ impermissibly credited Martex outside the context of settlement negotiations for taking corrective measures after the Agency filed the administrative complaint. "Positive attitude and good faith attempts to comply with the law" are not eligible for a penalty reduction when the violations were not self-discovered and the violator has, as here, decided to litigate the case rather than negotiate a settlement.

(2) The Board declines to clarify the time that should be displayed on the notices of pesticide applications required to be provided to workers and handlers pursuant to 40 C.F.R. §§ 170.122 and 170.222.

(3) The penalty of $163,680 is properly calculated under the *ERP* and *WPS Penalty Policy*, is supported by the evidence, and is appropriate based on the facts and circumstances of the case.

The Initial Decision is affirmed in all other respects.

Before Environmental Appeals Judges Edward E. Reich, Kathie A. Stein, and Anna L. Wolgast.

Opinion of the Board by Judge Wolgast:

On March 12, 2007, Martex Farms, S.E., ("Martex") filed an appeal from an Initial Decision by Chief Administrative Law Judge Susan L. Biro (the "ALJ") dated January 19, 2007. The U.S. Environmental Protection Agency ("EPA" or "Agency"), in turn, filed a cross-appeal. The administrative complaint filed by the Director of the Special Litigation and Projects Division, Office of Civil Enforcement, Office of Enforcement and Compliance Assurance ("OECA"), U.S. EPA, arises from a joint inspection that EPA Region 2 (the "Region") and the Puerto Rico Department of Agriculture ("PRDA") conducted on April 26, 2004, of two

Martex-owned "agricultural establishments"[1] in Puerto Rico. Based on the April 26, 2004 inspection and a followup inspection that PRDA conducted on July 20, 2004, OECA filed an administrative complaint against Martex, which after two amendments charged Martex with 336 violations of section 12(a)(2)(G) of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA" or "Act"), 7 U.S.C. § 136j(a)(2)(G), and the Worker Protection Standard ("WPS") regulations set forth at 40 C.F.R. part 170. The Second Amended Complaint requested a total penalty of $369,600.

The allegations presented in the Second Amended Complaint involve five regulatory provisions – 40 C.F.R. §§ 170.122, 170.150, 170.222, 170.240, and 170.250 – that generally require employers of farm "workers"[2] and pesticide "handlers"[3] to display specific information regarding pesticide applications, provide

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[1] An "agricultural establishment" is defined in the Worker Protection Standard ("WPS") regulations as "any farm, forest, nursery, or greenhouse." 40 C.F.R. § 170.3.

[2] The WPS regulations define a "worker" as the following:

> [A]ny person, including a self-employed person, who is employed for any type of compensation and who is performing activities relating to the production of agricultural plants on an agricultural establishment to which subpart B of this part applies. While persons employed by a commercial pesticide handling establishment are performing tasks as crop advisors, they are not workers covered by the requirements of subpart B of this part.

40 C.F.R. § 170.3.

[3] The WPS regulations define a "handler" as the following:

[A]ny person, including a self-employed person:

> (1) Who is employed for any type of compensation by an agricultural establishment or commercial pesticide handling establishment to which subpart C of this part applies and who is:
> (i) Mixing, loading, transferring, or applying pesticides.
> (ii) Disposing of pesticides or pesticide containers.
> (iii) Handling opened containers of pesticides.
> (iv) Acting as a flagger.
> (v) Cleaning, adjusting, handling, or repairing the parts of mixing, loading, or application equipment that may contain pesticide residues.
> (vi) Assisting with the application of pesticides.
> (vii) Entering a greenhouse or other enclosed area after the application and before the inhalation exposure level listed in the labeling has been reached or one of the ventilation criteria established by this part (§ 170.110(c)(3)) or in the labeling has been met:
> (A) To operate ventilation equipment.
> (B) To adjust or remove coverings used in fumigation.
> (C) To monitor air levels.

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decontamination supplies, and provide personal protective equipment ("PPE").

In this appeal to the Environmental Appeals Board ("Board" or "EAB"), Martex seeks vacatur of all but four of the ALJ's findings of liability and the reassessment of the penalty to reflect such a vacatur. Martex also advances a selective prosecution argument. The Agency's cross-appeal raises three additional issues for the Board's consideration. The Agency asks the Board to: (1) determine for future cases the appropriate times that should be displayed in the pesticide application notices that are posted pursuant to 40 C.F.R. §§ 170.122 and 170.222, in light of the ALJ's holding that multiple pesticide applications conducted by different handlers within thirty minutes of each other at a single field constitute a single application; (2) review the ALJ's determination not to assess penalties, despite finding Martex liable, for violations of 40 C.F.R. § 170.222; and (3) review those aspects of the ALJ's penalty calculation that credited Martex outside of the settlement negotiation context for corrective measures implemented after filing of the complaint. Complainant's Response to Respondent's Appeal, Notice of Cross-Appeal, and Supporting Brief ("Agency's Br.") at 3-4.

For the reasons set forth below, we dismiss Martex's appeal. In response to the Agency's request, we decline to clarify the time that should be displayed on the notices of pesticide applications required to be provided to workers and handlers pursuant to 40 C.F.R. §§ 170.122 and 170.222. In reviewing the ALJ's penalty assessment, we address the Agency's argument that a separate penalty should have been assessed for violations of 40 C.F.R. § 170.222, as well as the argument that the ALJ erred in crediting Martex for taking corrective measures. We overturn the ALJ's civil penalty assessment but decline to remand the case for further proceedings. Instead, we review the penalty *de novo* and assess a civil penalty totaling $163,680. The Initial Decision is affirmed in all other respects.

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> (viii) Entering a treated area outdoors after application of any soil fumigant to adjust or remove soil coverings such as tarpaulins.
> (ix) Performing tasks as a crop advisor:
> (A) During any pesticide application.
> (B) Before the inhalation exposure level listed in the labeling has been reached or one of the ventilation criteria established by this part (§ 170.110(c)(3)) or in the labeling has been met.
> (C) During any restricted-entry interval.
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> (2) The term does not include any person who is only handling pesticide containers that have been emptied or cleaned according to pesticide product labeling instructions or, in the absence of such instructions, have been subjected to triple-rinsing or its equivalent.

40 C.F.R. § 170.3.

I. *BACKGROUND*

A. *Statutory and Regulatory Background*

Pursuant to section 12(a)(2)(G) of FIFRA, 7 U.S.C. § 136j(a)(2)(G), it is unlawful for any person to use any registered pesticide in a manner inconsistent with the pesticide's labeling. Section 2(ee) of FIFRA, 7 U.S.C. § 136(ee), essentially provides that a registered pesticide is used in a manner inconsistent with its labeling if the registered pesticide is used in a manner the labeling does not permit. The WPS regulations set forth at 40 C.F.R. part 170 regulate the application and use of registered pesticides through product labeling to reduce the risks to agricultural workers of occupational exposures. 40 C.F.R. § 170.1. In general, a violation of the labeling requirements of part 170 constitutes a violation of FIFRA section 12(a)(2)(G), 7 U.S.C. § 136j(a)(2)(G). *See* 40 C.F.R. § 170.9(b) ("A person who has a duty under this part, as referenced on the pesticide product label, and who fails to perform that duty, violates FIFRA section 12(a)(2)(G) * * * .").

Part 170 contains standards that "agricultural employers" and "handler employers" must maintain with respect to two types of persons employed at an agricultural establishment: workers and pesticide handlers. *See generally* 40 C.F.R. §§ 170.3, .7. The standards for workers are set forth in subpart B, while subpart C contains the standards for pesticide handlers. The regulatory provisions of particular relevance in this appeal are §§ 170.122 and 170.150 pertaining to standards for workers, and §§ 170.222, 170.240, and 170.250 pertaining to standards for handlers. Under 40 C.F.R. § 170.122, agricultural employers must display, in a central location where it can be seen and read by workers, specific information regarding pesticide applications that have occurred at the agricultural establishment for the past thirty days. *Id.* §§ 170.122, .135(d). Section 170.150 requires agricultural employers to provide decontamination supplies for workers when a pesticide has been applied at the agricultural establishment within the last thirty days. *Id.* § 170.150.

Several of the provisions pertaining to standards for handlers are similar to the standards that pertain to workers. Pursuant to 40 C.F.R. § 170.222, a self-employed handler or an employer of the handler, *see* 40 C.F.R. § 170.3 (defining "handler employer"), must display, in a central location where it can be seen and read by handlers, specific information regarding pesticide applications that have occurred at the agricultural establishment for the past thirty days. *Id.* §§ 170.222, .235(d). Section 170.240, which does not parallel a regulation for workers, requires a handler employer to provide to the handler personal protective equipment, or PPE, that is clean and in operating condition. *Id.* § 170.240(c). Finally, under 40 C.F.R. § 170.250, handler employers must provide to handlers "decontamination supplies for washing off pesticides and pesticide residues" during any handling activity. *Id.* § 170.250(a).

B. *Factual and Procedural Background*

1. *EPA's Complaint*

On April 26, 2004, inspectors from PRDA and EPA conducted an inspection of Martex Farms. Based on that inspection, and on a followup inspection conducted on July 20, 2004, the Agency filed an administrative complaint on January 28, 2005. EPA filed a Second Amended Complaint on September 2, 2005, and alleged that Martex had committed 336 violations of FIFRA § 12(a)(2)(G) by failing to comply with the WPS regulations at 40 C.F.R. part 170. The alleged violations occurred at two Martex agricultural establishments known as the Jauca facility and the Coto Laurel facility. Specifically, the Second Amended Complaint alleged that Martex: (1) failed to display specific information to farm "workers" regarding 151 pesticide applications to fields at the Jauca facility, in violation of 40 C.F.R. § 170.122 (Counts 1-151); (2) failed to provide decontamination supplies to workers at the Jauca facility, in violation of 40 C.F.R. § 170.150 (Counts 152-153); (3) failed to display specific information to pesticide "handlers" regarding 151 pesticide applications to fields at the Jauca facility, in violation of 40 C.F.R. § 170.222 (Counts 154-304); (4) failed to provide decontamination supplies to pesticide handlers at the Jauca facility, in violation of 40 C.F.R. § 170.250 (Counts 305-321); (5) failed to provide PPE to handlers at the Jauca facility, in violation of 40 C.F.R. § 170.240 (Counts 322-334); and (6) failed to provide decontamination supplies to a pesticide handler on two occasions at the Coto Laurel facility, in violation of 40 C.F.R. § 170.250 (Counts 335-336). Second Am. Compl. at 7-28. The Agency proposed a penalty of $369,600.

2. *Proceedings Before the ALJ*

On July 25, 2005, the Agency sought accelerated decision as to liability for a portion of the alleged violations. *See In re Martex Farms, S.E.*, Docket No. FIFRA-02-2005-5301, at 5 (ALJ Jan. 19, 2007) (Initial Decision) (citing Complainant's Motion for Findings of Fact and Conclusions of Law and Complainant's Motion for Partial Accelerated Decision as to Liability) . The parties filed Joint Prehearing Stipulations ("Stipulations") on August 19, 2005. In addition to agreeing to certain joint stipulations of fact, Martex also stipulated that "it has the ability to pay the proposed penalty." Stipulations at III. On October 4, 2005, the ALJ issued an order partially granting the Agency's Motion for Partial Accelerated Decision. *See In re Martex Farms, S.E.*, Docket No. FIFRA-02-2005-5301 (ALJ Oct. 4, 2005) (Order on Complainant's Motion for Findings of Fact and Conclusions of Law and for Partial Accelerated Decision as to Liability). Specifically, the ALJ found Martex liable for 125 counts, consisting of sixty-two violations of § 170.122; sixty-two violations of § 170.222; and one failure to provide eyewash, in violation of the FIFRA § 12(a)(2)(G) labeling requirement and § 170.150. *Id.* at 26-27. On October 12, 2005, the ALJ denied Martex's subsequent motion seeking certification of an interlocutory appeal or, alternatively, for reconsideration.

See In re Martex Farms, S.E., Docket No. FIFRA-02-2005-5301 (ALJ Oct. 12, 2005) (Order Denying Respondent's Motion Requesting Recommendation for Interlocutory Review of Order on Accelerated Decision).

From October 24 through October 28, 2005, the ALJ conducted an administrative hearing in San Juan, Puerto Rico, regarding the remaining issues of liability and the penalty assessment for the violations. The Agency subsequently withdrew a total of fifty-eight counts concerning alleged violations of 40 C.F.R. §§ 170.122 and .222. *See In re Martex Farms, S.E.*, Docket No. FIFRA-02-2005-5301, at 29 (ALJ January 19, 2007) (Initial Decision) (citing Complainant's Proposed Findings of Fact, Conclusions of Law, and Order; and Brief in Support Thereof at 33). The ALJ's conclusions are presented in the January 19, 2007 Initial Decision. *Id.* at 72.

In the Initial Decision, the ALJ found Martex liable for forty-five counts in addition to those included in the accelerated decision, raising the total counts of liability to 170. These consisted of a total of sixty-eight violations of § 170.122; sixty-eight violations of § 170.222; two violations of § 170.150; thirteen violations of § 170.240; and nineteen violations of § 170.250.[4] As to the penalty, the ALJ assessed $67,320 for the violations of § 170.122, no additional penalty for violations of § 170.222, and $25,300 for all the remaining violations. *Id.* at 65-72. The aggregate penalty assessed was $92,620. *Id.* at 72.

With respect to the violations of 40 C.F.R. § 170.222, failure to display notice to handlers of pesticide applications, the ALJ did not impose a separate penalty because she found "the failure to display pesticide application information" to be "a single lack of action which is being considered as two unlawful acts under the regulations." *Id.* at 63. The ALJ determined that the §§ 170.122 and 170.222 violations were "dependent", based on Martex's ability to satisfy the requirements of both regulatory provisions with one act, in this case, by posting pesticide application information in a place accessible to both workers and handlers. *Id.* at 63-64.

3. *Martex's Appeal and EPA's Cross-Appeal*

Martex filed an appeal on March 12, 2007, seeking the Board's review of nearly all findings of WPS regulatory violations and alleging that EPA's actions against Martex constituted a pattern of selective prosecution and otherwise

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[4] The ALJ determined that among the alleged 40 C.F.R. § 170.122 violations remaining following the accelerated decision, fifty-four counts were duplicative of each other. Init. Dec. at 38, 45, 73. Similarly, the ALJ determined that fifty-four of the alleged § 170.222 violations were also duplicative. *Id.* at 38, 45, 73. Consequently, the ALJ dismissed 108 counts of alleged § 170.122 and § 170.222 violations. *Id.* at 73.

"discriminatory behavior." The Agency filed a response and cross-appeal on March 28, 2007. Martex filed a reply to the Agency's response and cross-appeal on April 25, 2007. The Board heard oral argument on November 5, 2007.

According to Martex, all but two of the findings that the company failed to provide notice to workers, as required by 40 C.F.R. § 170.122, should be vacated because the ALJ misinterpreted a factual stipulation. Martex contends that it intended to stipulate that it had failed to provide notice for only the two herbicide applications that occurred on the day of the inspection, April 26, 2004, and that Martex, in fact, had posted notices advising its workers and handlers of all the herbicide applications made prior to the inspection date. Similarly, Martex argues that all but two of the findings that the company violated the requirement to provide notice to handlers, 40 C.F.R. § 170.222, should be vacated for the same reason.

Martex also argues that the ALJ's finding of two violations of the requirement to provide decontamination supplies to workers at the Jauca facility, 40 C.F.R. § 170.150, should be vacated because the pesticide application fell within an exception allowing a shortened period of time during which decontamination supplies would be required.[5] Martex further argues that the workers had an abundant supply of water and other decontamination materials within the required distance from the fields. Martex asserts that, although the containers holding the water were not specifically designed for flushing eyes, they satisfied EPA's policy allowing alternate methods of compliance with WPS requirements.

Additionally, Martex seeks to have the seventeen violations of the requirement to provide decontamination supplies to handlers, 40 C.F.R. § 170.250, vacated. Martex argues that, with respect to eight handling activities, the record shows an adequate supply of water for the purpose of decontamination within the required one-quarter of a mile from the workers in the fields. As to the remaining nine counts, Martex argues that the Agency did not demonstrate that the handling activities that underlie the alleged violations were performed within one-quarter of a mile away from the nearest point of vehicular access, so therefore, according to Martex, the handling activities occurred more than one-quarter of a mile from the nearest point of vehicular access and are subject to an exception to the rule. The exception permits decontamination supplies to be located at the nearest point of vehicular access, rather than within one-quarter of a mile from the handling activity area. *See* 40 C.F.R. § 170.250(c)(3). Martex argues that it satisfied the regulatory requirements of the exception because the handlers all had decontamination supplies "provided by their supervisors or otherwise available at the Jauca facility." *See* Martex's Appeal Brief ("Martex's Br.") at 28. Martex argues that,

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[5] As explained in Part II.B.2.a, *infra*, at footnote 10, it is unclear whether this is actually Martex's argument because the Agency's response addresses a slightly different argument.

with respect to these remaining nine counts, it should be liable only for "violation of storage space for decontamination supplies" and further requests the Board to review whether Martex's actions with respect to "storage space for decontamination supplies" is a reasonable alternative compliance method under the Agency's interpretive policy.[6] *Id.* (emphasis omitted).

Martex also requests that the Board vacate the ALJ's finding of thirteen violations of the requirement to provide PPE to pesticide handlers, as provided in 40 C.F.R. § 170.240. Martex argues that the record does not show that the inspectors actually observed handlers applying pesticides, and therefore, the record does not show that the PPE was not used by the handlers when applying the pesticides. *Id.* at 29. With respect to the two violations for failure to provide decontamination supplies to a handler, as required by 40 C.F.R. § 170.250, Martex contends that the two violations should be vacated on the ground that abundant water was available for decontamination. *Id.* at 30. Finally, Martex claims that, in pursuing this enforcement action, "EPA has shown a distinct pattern of discriminatory behavior and selective prosecution with the sole purpose of singling out the Respondent * * * ." *Id.* at 31.

The Agency's cross-appeal raises three additional issues for the Board's consideration. First, the Agency seeks a "narrow clarification of one of the ALJ's holdings regarding the proper interpretation of 40 C.F.R. §§ 170.122 and .222." Agency's Br. at 3. Specifically, the Agency seeks clarification regarding the time or times to be displayed on notices of pesticide applications when there are multiple applications on a field beginning within half an hour of each other and constituting a single application for the purpose of notice requirements in 40 C.F.R. §§ 170.122 and 170.222.[7] The Agency also seeks review of the ALJ's

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[6] Specifically, Martex states:

> [T]he lack of evidence in the record suggests that some fields are at a greater [distance] than the 1/4 mile requirement[,] and therefore[,] this condition could only signal a violation of storage space for decontamination supplies * * * , since all handlers had decontamination supplies, both water and other supplies, either provided by their supervisors or otherwise available at the Jauca facility. This EAB is again requested to face this possible violation of storage space for decontamination supplies, to see if EPA's Agricultural Worker Protection Standard [40 CFR Parts 156 & 170] Interpretive Policy allows for a FIFRA reasonable alternative compliance method.

Martex's Br. at 28.

[7] As explained in Parts B.1 and B.6, *infra*, 40 C.F.R. §§ 170.122 and 170.222 require the "time and date" of pesticide applications to be posted. The ALJ determined that multiple pesticide applications on a single field within a thirty-minute period are considered a single application for purposes of 40 C.F.R. §§ 170.122 and 170.222, and, consequently, dismissed eight counts of the Second Amended

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determination not to assess penalties, despite finding Martex liable, for violations of § 170.222, when the ALJ assessed penalties for § 170.122 violations arising from the same failure to act. Agency's Br. at 4. Finally, the Agency asks that the Board review the ALJ's application of "mitigation factors when assessing [Martex's] culpability under the relevant penalty policies[,] * * * vacate those portions of the Initial Decision[,] and assess an appropriate penalty * * *." *Id.*

II. *DISCUSSION*

A. *Standard of Review*

In an enforcement proceeding, the Board conducts a *de novo* review of an administrative law judge's factual findings and legal conclusions. 40 C.F.R. § 22.30(f) (the Board shall "adopt, modify, or set aside the findings of fact and conclusions of law or discretion contained in the decision or order being reviewed, and shall set forth in the final order the reasons for its actions"); *see*, *e.g.*, Administrative Procedure Act, 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."). In so doing, the Board will typically grant deference to an administrative law judge's determinations regarding witness credibility and the factual findings based thereon because the Board recognizes that the administrative law judge has "the opportunity to observe the witnesses testify and to evaluate their credibility * * *." *In re Echevarria*, 5 E.A.D. 626, 639 (EAB 1994).

b. *Analysis*

1. *Display of Pesticide Application Information*

The WPS regulations require agricultural employers to provide specific information to workers and handlers regarding pesticide applications and to keep the information posted for a minimum of thirty days.[8] *See* 40 C.F.R. §§ 170.122,

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Complaint as duplicative. Init. Dec. at 39. Although the Agency does not challenge this determination or dismissal of the counts, the Agency seeks clarification regarding how to apply the "time and date" requirement.

[8] The relevant provision for workers provides the following:

> The information shall continue to be displayed for at least 30 days after the end of the restricted-entry interval (or, if there is no restricted-entry interval, for at least 30 days after the end of the application) or at least until workers are no longer on the establishment, whichever is earlier.

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.222. Martex asserts that it is liable for only two violations of § 170.122 and two violations of § 170.222.

The ALJ identified three types of documents that recorded Martex's pesticide application information. Martex posted one set of documents "in a binder in a holder on a bulletin board on the porch of the main building at the Jauca farm" ("WPS Display Records"). Init. Dec. at 21 (citing ALJ Hearing Transcript ("ALJ Tr.") at 536-37). Martex posted the WPS Display Records with the intent to comply with 40 C.F.R. §§ 170.122 and .222. The ALJ concluded that the WPS Display Records did not contain information regarding the application of the ClearOut 41 Plus pesticide. Init. Dec. at 22. Martex also maintained a set of handwritten spraying instructions ("Spraying Instructions"), which instructed field spraying supervisors as to the pesticides and their quantities to be sprayed on specified fields. *Id.* Finally, Martex maintained the set of records that constitute EPA Exhibit 21.b, which the ALJ referred to as Martex's "Application Records." *Id.* at 35. The ALJ found that both the Spraying Instructions and Exhibit 21.b contained information regarding the application of ClearOut 41 Plus. *Id.* at 22, 35.

According to Martex, the ALJ's findings of sixty-eight violations of § 170.122 and sixty-eight violations of § 170.222 are based on her erroneous interpretation of the parties' stipulation that "[o]n April 26, 2004, no applications of the herbicide ClearOut 41 Plus were included in the WPS posting in the central posting area for workers at Respondent's Juaca [sic] facility." Stipulations ¶ 23. Martex states that this stipulation means – and was intended to mean – that the central posting area for workers did not contain any information about applications of the herbicide made on that day only. EAB Oral Arg. Tr. at 18-19 ("EAB Tr.") . Under Martex's construction of Stipulation 23, Martex would be liable for not posting the required information for only the two herbicide applications that occurred on April 26, 2004.

Martex also insists that EPA Exhibit 21.b demonstrates that Martex had the "pesticides application information posted as required by law" and is contrary to Stipulation 23. Martex's Br. at 18-19. Martex argues that the exhibit met the requirements of §§ 170.122 and .222 because the exhibit "shows that ClearOut 41 Plus applications for the 30-day period preceding the inspection of April 26, 2004, were included in the WPS displayed at the Jauca facility." *Id.* at 17, 19. Further, according to Martex, if it is permissible for EPA to use EPA Exhibit 21.b as the basis for the allegations in the administrative complaint, the same exhibit "should also be appropriate and competent to be used by Martex to throw out Stipulation

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40 C.F.R. § 170.122(b)(3). The provision for handlers contains the same requirement. *Id.* § 170.222(b)(3).

No. 23 in its entirety."[9]

The administrative complaint alleged that pesticide applications had occurred in the thirty days prior to the April 26, 2004 inspection and that Martex failed to display information related to the applications. Second Am. Compl. at 7-14. The Agency did not rely solely on the stipulation at the administrative hearing. Similarly, the stipulation is not the ALJ's sole basis for the findings of liability. She explained:

> [E]ven if this Tribunal were to set aside Stipulation 23, it would not be of material significance to the outcome of the case, since [EPA] has nevertheless shown by a preponderance of the evidence that the WPS Display Records at [Martex's] Jauca facility on April 26, 2004 did not include *any applications* of ClearOut from March 29, 2004 through April 26, 2004.

Init. Dec. at 35-36. EPA relied on the testimony of PRDA and EPA inspectors, who identified discrepancies between the pesticide information contained in the Spraying Instructions and the pesticide information contained in the WPS Display Records posted in the central information area. Init. Dec. at 22 (citing ALJ Tr. at 292-94, 296, 545-45, 1553); Agency Br. at 15. The Spraying Instructions for March 26 through April 23, 2004, documented applications of the ClearOut 41 Plus pesticide to mango crops; however, the WPS Display Records did not include any applications of ClearOut 41 Plus during this time frame. Init. Dec. at 22 (citing ALJ Tr. at 292-96, 334, 413, 502-04, 535-37, 539-41, 545-46, 595-97, 600-01, 642-43, 1553); Agency Br. at 15.

We observe that Martex's interpretation of the stipulation is, at a minimum, a strained interpretation of the language. However, whether the stipulation bears the meaning Martex advances or the meaning that the Agency puts forth is irrelevant to the outcome of this case because, as previously stated, the ALJ found that the Agency showed "by a preponderance of the evidence that the WPS Display Records at the Jauca facility on April 26, 2004 did not include *any applications* of ClearOut from March 29, 2004 through April 26, 2004." Init. Dec. at 36. EPA Exhibit 21.b also does not support Martex's defense. A review of the exhibit reveals that it lists the pesticide applications made from March 26, 2004 through April 26, 2004, including applications of ClearOut 41 Plus. *See* EPA Ex. 21.b.

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[9] In making this argument, Martex invokes Federal Rule of Evidence 106, which provides for the admission of documents in their entirety into evidence, and which is irrelevant here, where the writing at issue has already been entered into evidence. *See* Fed. R. Evid. 106 advisory committee's note; Stipulations at 1-2 (stipulating to admit certain documents, including EPA Exhibit 21.b, into evidence at hearing).

However, nothing about the exhibit on its face suggests that the exhibit was posted at the central location, and the ALJ heard testimony from an EPA witness stating that Exhibit 21.b is not comprised of the same set of documents as the WPS Display Records that were posted on or provided in a binder at the bulletin board during the April 26, 2004 inspection. ALJ Tr. at 413-13, 600-01.

Additionally, although Martex also relies on the testimony of its witness to support the claim that Exhibit 21.b, with its information regarding application of ClearOut 41 Plus, was posted or made available to workers and handlers, EAB Tr. at 23, the ALJ has already determined that testimony to be unpersuasive. Because this issue turns in large part on the credibility of the witnesses who testified at the administrative hearing, the Board defers to the ALJ's assessment of credibility and her ultimate finding that Martex failed to display information about ClearOut applications as required by 40 C.F.R. §§ 170.122 and 170.222. *In re Echevarria*, 5 E.A.D. 626, 639 (EAB 1994). Accordingly, we affirm the ALJ's findings of liability for failure to post notices of pesticide applications pursuant to 40 C.F.R. §§ 170.122 and 170.222.

2. *Provision of Decontamination Supplies to Workers at the Jauca Facility*

The ALJ found that Martex failed to provide decontamination supplies to workers at the Jauca facility and, as a result, neither met the requirements of 40 C.F.R. § 170.150 nor followed the specific labeling requirements of the pesticide Kocide 101. Martex appeals both findings of noncompliance and sets forth two arguments to support its contention that the ALJ erred. First, Martex argues that ambient weather conditions should be considered in determining whether decontamination supplies were required to be provided to workers following an application of Kocide 101. Martex's Br. at 22. Second, according to Martex, under the Agency's own interpretive policy, Martex possessed and provided adequate water and eye-flush supplies to workers to meet the regulatory and Kocide 101 label requirements. *Id.* at 23 (citing U.S. EPA, *Agricultural Worker Protection Standard 40 CFR Parts 156 & 170 Interpretive Policy*, http://www.epa.gov/pesticides/safety/workers/wpsinterpolicy.htm (last visited February 11, 2008) ("*Interpretive Policy*")). Each of these defenses is considered separately.

a. *Effect of Ambient Weather on the Requirement to Have Decontamination Supplies Available for at Least Seven Days After an Application*

Agricultural employers must provide decontamination supplies for workers on an agricultural establishment when the worker "is performing an activity in the area where a pesticide was applied or a restricted-entry interval (REI) was in effect within the last 30 days, and * * * the worker contacts anything that has been

treated with the pesticide * * * ." 40 C.F.R. § 170.150(a)(1). An exception to this mandate relates to the application of pesticides that have an REI of four hours or less:

> The 30-day time period * * * shall not apply if the only pesticides used in the treated area are products with an REI of 4 hours or less on the label (but not a product without an REI on the label). When workers are in such treated areas, the agricultural employer shall provide decontamination supplies for not less than 7 days following the expiration of any applicable REI.

Id. § 170.150(a)(2). The decontamination supplies, which include soap, single-use towels and adequate water for routine washing and emergency eyeflushing, must be "located together and be reasonably accessible to and not more than 1/4 mile from where workers are working." *Id.* § 170.150(b)-(c)(1). The specific labeling requirements of Kocide 101, the pesticide that the Agency alleged Martex applied, further state in relevant part:

> The following equipment and precautions must be followed for 7 days following the application of this product:
> – An eye-flush container, designed specifically for flushing eyes, must be available at the WPS decontamination site for workers entering the area treated with [Kocide 101].

EPA Ex. 3 at 2 (Kocide 101 label).

Martex argues that its application of Kocide 101, made five days prior to EPA and PRDA's April 26, 2004 inspection, had the practical effect of being applied more than seven days prior to the inspection because the ambient weather conditions had "the effect of" accelerating the loss of pesticides such that it "may be as safe as the 7-day FIFRA requirement." Martex's Br. at 22. The Agency points out that Martex raises this defense for the first time at the appeal stage.[10] Agency's Br. at 18-19. Martex does not rebut this allegation. *See generally*

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[10] It is unclear whether Martex is using this defense to rebut the argument that it failed to follow the Kocide 101 label requirements or to demonstrate that the exception found at 40 C.F.R. § 170.150(a)(2) applies to Martex's application of Kocide 101. Martex states that "a 5-day 'safe' time frame * * * may be as safe as the 7-day FIFRA requirement[,]" which suggests Martex may be asserting the regulatory exception as a defense. Martex's Br. at 22. The Agency's response does not address a potential regulatory exception and focuses solely on the label requirements for the pesticide. Agency's Br. at 19 ("Respondent's argument that 'a 5-day safe time frame * * * may be as safe as the 7-day FIFRA requirement' is * * * [not] in any way relevant to a finding of whether Respondent followed the Kocide label instructions * * * .").

Martex's Short Answer to Complainant's Response to Respondent's Appeal, Notice of Cross-Appeal and Supporting Brief ("Martex's Reply"). A review of the record reveals that Martex did not raise this argument before the ALJ.

It is well settled that the Consolidated Rules of Practice that govern this proceeding provide that issues not raised before the ALJ are waived in the event of an appeal to the Board. *See, e.g.*, *In re Veldhuis*, 11 E.A.D. 194, 219-20 (EAB 2003); *In re Spitzer Great Lakes Ltd.*, 9 E.A.D. 302, 317-18 (EAB 2000); *see also* 40 C.F.R. § 22.30(c) (limiting scope of appeal to "those issues raised during the course of the proceeding and by the initial decision"). We have consistently held that arguments raised for the first time on appeal are deemed to have been waived. *In re Woodcrest Mfg., Inc.*, 7 E.A.D. 757, 764 (EAB 1998) (citing *In re Lin*, 5 E.A.D. 595, 598 (EAB 1994)), *aff'd*, 114 F. Supp. 2d 775 (N.D. Ind. 1999)). Accordingly, the Board need not reach the merits of this argument.

Even if the Board were to consider the argument, we would find that Martex's defense fails. To the extent that Martex is arguing that its application of Kocide is an exception from the requirements of 40 C.F.R. § 170.150, Martex has not shown that Kocide meets the threshold requirements set forth in the regulations for the exception to apply. As previously stated, the exception applies if the pesticide's label states an REI of four hours or less, in which case decontamination supplies must be provided for at least seven days following the expiration of the REI. 40 C.F.R. § 170.150(a)(2). Martex does not demonstrate that the REI stated on the Kocide 101 label is four hours or less, and Martex also fails to demonstrate that it provided decontamination supplies for at least seven days after the expiration of the REI.

Martex's argument also fails as a defense to the allegations that it did not follow the Kocide 101 label requirements. As previously stated, the label provides:

> The following equipment and precautions must be followed for 7 days following the application of this product:
> – An eye-flush container, designed specifically for flushing eyes, must be available at the WPS decontamination site for workers entering the area treated with [Kocide 101].

EPA Ex. 3. A violation of FIFRA § 12(a)(2)(G) arises when a pesticide is used in a manner inconsistent with its labeling; therefore, compliance with the statute in this case would require Martex to provide eye-flush containers at the decontamination site for seven days after the product's application. Martex readily admits that the appropriate containers were not available for all seven days, and Martex has not demonstrated that the dissipating potency of the ingredients in Kocide 101 within five days is a defense to liability. Accordingly, we conclude that Martex's

defense related to the ambient weather at the time of a pesticide application does not refute a finding that Martex violated the Kocide 101 label requirements and 40 C.F.R. § 170.150.

b. *Agency Guidance Regarding Adequate Water and Eye-flush Supplies*

Section 3.11 of the *Interpretive Policy* provides that a container equal to or larger than one pint would meet the eye-flush water requirement of § 170.150 "if it were immediately accessible to each worker or handler who requires it." While "immediately accessible" is not defined, the regulations analogize the phrase, in the context of emergency eye-flush water, as something that is carried on the person or in the vehicle the person is using. *See* 40 C.F.R. § 170.150(b)(4). Section 3.1 of the *Interpretive Policy* does not provide guidance as to the amount of water that constitutes "enough water for routine washing and emergency eyeflushing" for those workers who are not conducting the activities described in 40 C.F.R. § 170.150(b)(4) (i.e., "performing early entry activities permitted by § 170.112" where the pesticide labeling requires protective eyewear). *Id.* § 170.150(b)(1).

Martex argues that it possessed and provided adequate water and eye-flush supplies, as construed in Agency guidelines, to meet the requirements of 40 C.F.R. § 170.150 and the Kocide 101 label. Martex states that "a five-gallon can of water was available at the * * * field on the day of the inspection," but Martex does not provide the location of the water in relation to the workers. Martex's Br. at 22. Martex also represents that one supervisor had a motor vehicle present at the field and "carried water, towels, soap, protection equipment, fire extinguishers, [and] flags[,]" and another supervisor was present on the site with a vehicle carrying "an overall, soap, towel, paper towel, a roll of Bounty, containers, bottles, one or two gallon bottles, tools, and a toolbox in case the vehicle breaks down." *Id.* at 22-23. Additionally, "at a very short distance" less than one quarter of a mile from the field where twenty workers were, there was a "fully operational" "huge shower-like structure" that "provided abundant and readily available water for decontamination of workers and handlers." *Id.* at 23. Martex claims that, together, this assortment of equipment and supplies "certainly satisfied the eyeflush and abundant water requirements of Section 170.150 of the WPS, as well as the Kocide label requirements." *Id.*

The Agency states that Martex was unable to demonstrate that the items were "located together and within 1/4 mile of the workers at one of the fields." Agency's Br. at 20. The Agency also presented evidence that "a minimum of six gallons of water is required within 1/4 mile of workers" to have enough water for emergency eyeflushing described on the pesticide label. Init. Dec. at 47 (citing ALJ Tr. at 683, 686, 689).

With respect to the eye-flush supply requirement, Martex has not shown how the five-gallon can and "shower-like structure" it had on site meet the regulatory requirements or even qualify as acceptable alternatives under the *Interpretive Policy*. As the ALJ found, the Agency presented evidence that six gallons of water was the minimum amount that would meet the emergency eyeflushing requirements described on the pesticide label, and Martex has not presented any evidence to the contrary. Init. Dec. at 47 (citing ALJ Tr. at 683, 686, 689). The Board therefore concludes that Martex's defense that its water supply satisfied the requirements of 40 C.F.R. § 170.150 fails.

3. *Provision of Personal Protective Equipment to Handlers at the Jauca Facility*

On appeal, Martex challenges the ALJ's factual findings with respect to whether Martex failed to provide PPE to handlers on April 26, 2004, as required by 40 C.F.R. § 170.240.[11] Martex's Br. at 29. The ALJ found persuasive the testimony of Agency witnesses regarding their observations of the absence of PPE. Init. Dec. at 53. At the same time, the ALJ determined that Martex was unable to "establish by persuasive testimony or evidence that [the handlers] were out in the field wearing the PPE during the inspection." *Id.*

On appeal, Martex argues that the Agency's allegations – and the ALJ's findings – as to the thirteen violations of 40 C.F.R. § 170.240 are based on speculation:

> PRDA-EPA inspectors never observed handlers doing their chores during the April 26, 2004 inspection, nor did [the inspectors] even request to be taken to interview handlers the day of the inspection. Consequently, if PRDA-EPA inspectors did not find PPE in the handler's lockers, this was probably due to the fact that handlers were actually wearing [the PPE] while applying pesticides, or that they had retrieved the equipment before the applications of chemicals was scheduled to commence.
>
> * * *

[11] Martex's appeal addresses only Martex's failure to provide PPE to handlers. *See* Martex's Br. at 29. However, there are multiple bases for the ALJ's 40 C.F.R. § 170.240 liability findings. In addition to finding that Martex did not provide PPE to handlers on April 26, 2004, in violation of 40 C.F.R. § 170.240(c), the ALJ also found that Martex did not provide appropriate storage for handlers' personal clothing when not in use, in violation of 40 C.F.R.§ 170.240(f)(9). Init. Dec. at 53.

> [T]he PRDA-EPA inspector who visited Martex's Jauca facility testified at the trial that he did not see handlers during the April 26, 2004 inspection. Therefore, [he] could not determine or conclude [whether] handlers were using * * * the PPE * * * . It is respectfully submitted * * * that handlers were wearing their PPE because * * * they were applying pesticides in [the] fields.

Martex's Br. at 29 (citing ALJ Tr. at 513, 1876-78). Martex's argument is essentially that the preponderance of the evidence does not support the ALJ's conclusion, which was derived from inferences based on witness testimony.

The Agency makes the following counterargument, which is also based on the testimony adduced at the hearing:

> When taken in its entirety – the inability to show the inspectors PPE, despite the fact that there were no applications being done at Jauca at that time, or a place to store PPE or clean clothes, the fact that the box alleged to contain PPE ultimately was revealed to contain spray equipment, the lack of a face shield or chemical-resistant apron even on a later pre-scheduled inspection, the fact that on later inspection, [Martex's] handlers' PPE appeared to be brand new, and the fact that none of [Martex's] handlers knew how to ensure that their respirators fit properly – [the record] provides compelling evidence that [Martex] failed to comply with several requirements of section 170.240.

Id. at 34; *see also id.* at 33-34 (citing ALJ Tr. at 289, 319-22, 326-29, 339, 515-16, 588-89, 593-94).

At issue is whether circumstantial evidence may be used to prove failure to provide PPE and, specifically, whether the ALJ erred by inferring from the facts before her that Martex did not provide PPE to handlers on April 26, 2004, in violation of 40 C.F.R. § 170.240. "[C]ircumstantial evidence can be effectively used to state a proposition of material fact in the absence of direct evidence[,]" provided that the inferences drawn from the evidence are reasonable. *In re BWX Techs., Inc.*, 9 E.A.D. 61, 78 (EAB 2000); *see also U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 714 n.3 (1983) ("As in any lawsuit, the plaintiff may prove his case by direct or circumstantial evidence. The trier of fact should consider all evidence, giving it whatever weight and credence it deserves."). Further, the part 22 rules that govern this proceeding do not prohibit the use of circumstantial evidence to support a party's claims at an administrative hearing. The Board has acknowledged that, in some cases, circumstantial evidence may be in-

sufficient to overcome the heavy burden of *rebutting* a prima facie case. *In re City of Salisbury*, 10 E.A.D. 263, 291-92 (EAB 2002) (discussing federal case law using direct and circumstantial evidence to rebut Clean Water Act liability based on the regulated entity's own "Discharge Monitoring Reports"). However, this is not a case where circumstantial evidence was used to rebut a prima facie case. Rather, the ALJ relied on circumstantial evidence to find that the Region successfully established its prima facie case that Martex violated 40 C.F.R. § 170.240 and further found that Martex was not able to show that it *did* provide the appropriate PPE and storage space for PPE. Martex does not otherwise challenge the reasonableness of the ALJ's conclusions based on the circumstantial evidence, nor do we find the ALJ's inferences unreasonable. Consequently, the Board finds that the ALJ did not err when she used circumstantial evidence to find that Martex failed to provide PPE to handlers at the Jauca facility on April 26, 2004.

4. *Provision of Decontamination Supplies to Handlers*

The ALJ found that Martex violated 40 C.F.R. § 170.250 at both the Jauca facility and the Coto Laurel facility by failing to provide adequate decontamination supplies (i.e., water, soap, single-use towels, and clean changes of clothing), located together, to handlers working within the specified distance. Generally, "decontamination supplies shall be located together and be reasonably accessible to and not more than 1/4 mile from each handler during the handling activity." 40 C.F.R. § 170.250(c). Exceptions to this rule apply to handling activities performed more than one-quarter of a mile from the nearest place of vehicular access and pesticide mixing activities. In such cases, "[f]or mixing activities, decontamination supplies shall be at the mixing site[,]" *id.* § 170.250(c)(1), and for handling activities performed more than one-quarter of a mile from the nearest place of vehicular access, "[t]he soap, single-use towels, clean change of clothing, and water may be at the nearest place of vehicular access" and "clean water from springs, streams, lakes, or other sources" may be used for decontamination "if such water is more accessible than the water located at the nearest place of vehicular access."[12] *Id.* § 170.250(c)(1)-(3). The violations at each facility are analyzed separately below.

a. *Jauca Facility*

The ALJ made several findings with respect to the availability of decontamination supplies to handlers at the Jauca facility. First, the ALJ found "no evidence

[12] There are neither allegations in the complaint nor findings in the Initial Decision that pesticide mixing activities occurred at Martex's facilities; therefore, unless the mixing site are within one-quarter of a mile of each handler during the handling activity, the Agency's assertions that the mixing sites lacked soap and towels are generally irrelevant to the question of whether Martex provided decontamination supplies. *See* 40 C.F.R. § 170.250(c)(1).

* * * that there was any water source for decontamination that [was] closer than the nearest place of vehicular access * * * ." Init. Dec. at 49. She also found that although the Jauca facility mixing site lacked soap and towels, the handler supervisor's truck contained decontamination supplies, so when the truck was at the mixing site, the decontamination materials, including water, were located together. *Id.* at 50. However, "the evidence [did] not establish that the supervisor had his truck within 1/4 mile of each handler during each of the 17 applications," and "[t]here [was] no evidence that during the applications, [the handler supervisor's] truck was located in a position close enough to the fruit washing station, mixing area, workshop or lake" such that the water sources and the remaining decontamination supplies could be considered "located together." *Id.* at 50-51. The ALJ further found that even if the truck were located within the required distance, there was no evidence that it carried an adequate amount of water for routine washing, emergency eyeflushing, and emergency washing of the entire body. *Id.*

Because Martex reads the Initial Decision as the ALJ having found that Martex satisfied all aspects of the decontamination supply requirement except for the provision of adequate water, *see* Martex's Br. at 26-27 (citing Init. Dec. at 68), Martex challenges only the finding that an adequate supply of water was not available within one-quarter of a mile from the fields where handlers worked at the Jauca facility.[13] In its appeal, Martex appears to categorize the seventeen offenses into two groups: (1) pesticide applications on fields less than one-quarter of a mile from the "principal decontamination item, an abundant water supply[,]" *id.* at 28, and (2) pesticide applications on fields more than one-quarter of a mile from the nearest place of vehicular access. In particular, Martex states that four fields "are less than a 1/4 mile from the mixing site," three additional fields are "less than 1/4 mile from an existing lake," another field is "at the fruit washing station," and that a "shower-like structure" is on the road, between one of the aforementioned fields and four other fields. *Id.* at 26. According to Martex, for

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[13] Martex's summation of the charges it faced is somewhat confusing. Martex states that:

> Paragraphs 79 and 81 of the Second Amended Complaint alleges [sic] that on April 26, 2004, Martex violated FIFRA seventeen times because it failed – within a 1/4 mile of the mixing site and the decontamination facility – to provide decontamination supplies to handlers applying pesticides to Jauca fields OS-11, OS-12, OS-15, OS-16, ON-52CLT, OE-11G, OE-21G, JC-31, TX-21 and TX-22.

Martex's Br. at 25-26. It is unclear from Martex's statement to what the one-quarter of a mile distance is intended to refer. Paragraph 79 of the Second Amended Complaint states: "The mixing site and the decontamination facility for handlers are more than 1/4 mile from the OS-11, OS-12, OS-15, OS-16, ON-52CLT, OE-11G, OE-21G, JC-31, TX-21 and TX-22 fields at Respondent's Jauca facility." The text of Paragraph 81 provides: "On April 26, 2004, Respondent's handlers applied the following pesticides to mango, citrus, and banana fields at its Jauca facility, as set forth below * * * ." A table follows the text and lists seventeen pesticides applications, including the name of the pesticide applied, name of the field and type of crop. *See* Second Am. Compl. at 23, ¶ 81.

these fields,[14] the mixing site, the lake and the fruit washing station "provide substantial amounts of water" and satisfy the water requirements. *Id.*

As to the nine remaining applications,[15] Martex argues that the Agency failed to prove that the affected fields were within one-quarter of a mile from the point of nearest vehicular access, which Martex argues should have resulted in the ALJ finding that the fields are, in fact, located in remote areas more than one-quarter of a mile from the point of nearest vehicular access. Consequently, according to Martex, the exception for handling pesticides in remote areas applies to these nine applications, and "soap, single-use towels, [a] clean change of clothing, and water may be at the nearest place of vehicular access[,]" and the water sources described in 40 C.F.R. § 170.250(c)(3)(ii) (i.e., "clean water from springs, streams, [and] lakes") will meet decontamination requirements if they are more accessible than the water located at the point of nearest vehicular access. *See id.* at 28. Martex relies again on the finding regarding the supervisor's truck referred to above, which may have contained "five gallons of water and the other decontamination supplies[,]" to support the argument that Martex provided decontamination supplies and adequate water to the handlers. *Id.* at 27. Martex states that:

> [I]n relation to the other nine remaining counts * * * , [the] EAB is respectfully requested to conclude * * * that the handlers spraying pesticides * * * also had decontamination supplies, both water and other supplies and that the same were provided by the supervisor * * *.

Id. at 27-28 (citing Init. Dec. at 68). Therefore, according to Martex, the only violation it could have incurred was "a violation of storage space for decontamination supplies * * * since all handlers had decontamination supplies, both water and other supplies, either provided by their supervisors or available at the Jauca facility." *Id.* at 28. Without identifying which provision is applicable to this situation, Martex urges the Board to consider whether the *Interpretative Policy* pro-

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[14] Martex identifies these alleged offenses as the following counts in the Second Amended Complaint: 305, 306, 307, 310, 311, 312, 313 and 314. *See* Martex's Br. at 28. These counts correspond with one pesticide application on each of the following Jauca facility fields: OS-11, OS-12, OS-15, OS-16, ON-52CLT, JC-31, TX-21, and TX-22. *See* Second Am. Compl. at ¶ 81.

[15] Martex identifies these applications as the following counts in the Second Amended Complaint: 308, 309, 315, 316, 317, 318, 319, 320, and 321. *See* Martex's Br. at 28. These counts correspond with pesticide applications on the following Jauca facility fields: OS-11, JC-32, OE-11G, TX-52G, TX-54G, OE-21G, and OE-22G. *See* Second Am. Compl. at ¶ 81. Notably, counts 305 and 309 both pertain to pesticide applications occurring at the OS-11 field, yet Martex has categorized count 305 as a pesticide application occurring within the quarter mile of "an abundant water supply" while simultaneously categorizing count 309 as an application occurring more than a quarter mile away from the nearest place of vehicular access.

vides for an alternative compliance method related to the storage of decontamination supplies. *Id.*

According to the Agency, Martex's appeal does not address Martex's other shortcomings with respect to the provision of decontamination supplies. Agency's Br. at 25-30. In addition to failing to provide decontamination supplies within one-quarter of a mile from handlers applying pesticides in the fields, the Agency argues that the decontamination supplies, specifically the water, were not "together." *Id.* at 29 n.25. The Agency also argues that the mixing site did not contain decontamination supplies, as required by § 170.250(c)(1). *Id.* at 28.

Assuming, *arguendo*, that the mixing site, the lake and the fruit washing station, all of which Martex asserts are within one-quarter of a mile from eight of the fields at issue, provide adequate water for routine washing, emergency eyeflushing, and "washing the entire body in case of an emergency[,]" the decontamination supplies must still be "located together" with the water sources. 40 C.F.R. § 170.250(c). Therefore, the soap, single-use towels, and clean change of clothing must all be at the same location as the mixing site, the lake, and the fruit washing station, respectively. Martex relies on, and misapplies, the ALJ's finding that a "supervisor may have had his truck, containing five gallons of water and the other decontamination supplies within 1/4 mile of some handlers during the 17 applications, but did not carry enough water for routine washing, emergency eyeflushing, and washing the entire body." Martex's Br. at 27 (quoting Init. Dec. at 68) (internal quotations omitted). In particular, Martex does not demonstrate that this truck carrying the decontamination supplies was located together with the water at the mixing site, the lake, or the fruit washing station.[16] Therefore, the ALJ correctly held that decontamination supplies were not together with the water, regardless of its abundance.

As to the remaining nine fields at the Jauca facility, to the extent that Martex's argument is accurately summarized, it is first noted that the Agency has not charged Martex with "violations of storage space for decontamination supplies." Second Am. Compl. ¶¶ 75-93, at 22-25. Further, the *Interpretive Policy* upon which Martex relies to assert compliance with the storage rule refers to storage in only two contexts, neither of which concerns decontamination supplies: (1) as an example of a location where emergency eyeflush may be considered "immediately available" to handlers and early entry workers, *see Interpretive Policy* ¶ 3.15 (providing that "running water, a commercial eyeflush dispenser, or decontamination water in a carboy" at a storage site for handlers may be "immediately available"), and (2) as guidance relating to where PPE may be maintained

[16] The ALJ found that Martex's "photographs of the lake valve and fruit washing station do not show any soap, towels, or a clean change of clothing." Init. Dec. at 49 (citing Martex Ex. 50). The record also does not demonstrate that soap and towels were at the mixing site.

when not in use. *Id.* ¶ 12.19. With respect to the argument that the truck contained adequate decontamination supplies and water, Martex does not demonstrate that the truck was located at the point of nearest vehicular access for all the fields at issue. Additionally, the testimony adduced during the hearing does not support a finding that five gallons of water was an adequate amount for the handlers. ALJ Tr. at 683, 686, 689. As a result, we affirm the ALJ's determination that Martex failed to comply with the regulatory requirement to provide decontamination materials to handlers at the Jauca facility.

b. *Coto Laurel Facility*

The ALJ found that "[t]he bathrooms of Coto Laurel and the decontamination area at the mechanic shop did not have faucets appropriate for washing the whole body []" and the available water was not together with the "remaining supplies: soap, towel and clean change of clothing." Init. Dec. at 55. Martex argues that the ALJ erred when she found that with respect to pesticide applications made on April 20 and 21, 2004, Martex did not provide a handler conducting handling activities with "sufficient water for routine washing, for emergency eyeflushing, and for washing the entire body at the Coto Laurel farm together with the remaining decontamination supplies." *Id.* at 53; Martex Br. at 30. Martex acknowledges that "soap, clean clothing, [a] towel[,] and water over a basin [were available at the field], but not a shower for bathing the whole body." Martex's Br. at 30. In the immediate vicinity of the field are bathrooms at a dwelling and two water tanks, and a swimming pool is within walking distance. *Id.* at 30-31. Martex essentially argues that these water sources are alternatives that meet the regulatory requirements and relies on photographs in its Exhibit 49 to support this contention. The Agency responds that Martex did not show that the bathrooms in a dwelling, water tanks and swimming pool were available to the handler, and even if they were available, Martex did not demonstrate that the sites with alternate water sources contained the other decontamination supplies of "soap, clean towels and water that would not harm the worker." Agency's Br. at 38.

At issue is whether bathrooms in a dwelling, water tanks, and a swimming pool constitute adequate sources of water for routine washing, emergency eyeflushing and washing the entire body in case of pesticides-related emergencies at the Coto Laurel facility, and, if so, whether the water at these sources are of a "quality and temperature that will not cause illness or injury when it contacts the skin or if it is swallowed." 40 C.F.R. § 170.250(b)(1). Other than pointing out that the water sources exist, Martex does not elaborate as to why and how they meet the regulatory requirements. The Board is not persuaded on this record that water in bathrooms in a dwelling to which a handler may not have access and the water found in a swimming pool or water tank constitute adequate water sources for "routine washing."

Even if the bathroom, water tank, and swimming pool water were adequate for routine washing, Martex has not show that soap and towels were available at those sites. Martex Exhibit 49 consists of seven photographs labeled as the "Coto Facility." The labels further identify the images as water tanks, the space behind the water tanks, full bathrooms with running water (pedestal sinks, a soap dispenser and disposable paper towel dispenser, and in one photograph, a roll of paper towels), a decontamination area, and a mixing area with water hose. *See* Martex Ex. 49. For the most part, the photographs in this exhibit do not show all the decontamination supplies together, and although there are soap dispensers by the sinks, there is no corroborating evidence that they contained soap and were functioning. *Id.* Additionally, the ALJ found compelling the testimony that the bathrooms did not have faucets appropriate for washing the whole body. Init. Dec. at 55. After reviewing Martex Exhibit 49 and deferring to the ALJ with respect to finding the relevant testimony credible, we conclude that Martex did not provide decontamination supplies to a handler at the Coto Laurel facility on April 20 and 21, 2004.

5. *Pattern of Discriminatory Behavior and Selective Prosecution*

Martex contends that it has "been unevenly facing an agency whose claim is discriminatory, deficient, biased, pursued in bad faith, plagued with inaccuracies, [and] based on hearsay, speculations, erroneous factual allegations and wrongful interpretations of the law." Martex's Br. at 33. According to Martex, examples of this behavior are: (1) the Agency's delayed prosecution despite characterizing the violations as severe; (2) amendment of the administrative complaint multiple times; (3) convening a press conference announcing "Martex faced huge penalties for the largest FIFRA violation in U.S. history" prior to serving the administrative complaint; (4) deficient service of the administrative complaint; and (5) the ALJ's denial of Martex's pre-hearing motions to (a) amend its information exchange, (b) issue subpoenas to take depositions of "two high ranking EPA officials",[17] and (c) exclude as inadmissible at hearing certain documents the Agency included in its pre-hearing exchange.[18] *Id.* at 31-33. Martex further alleges that this enforcement action is discriminatory because it constitutes selective prosecution, and the denial of the motion to issue subpoenas prohibited Martex's pursuit of the selective prosecution defense. *See id.* at 34 n.24 ("Martex could not subpoena two high ranking EPA employees * * * and therefore could not make the 'threshold of

[17] Martex also challenges FIFRA's constitutionality due to the statute's "lack of delegated authority to allow the issuance of discovery subpoenas * * * [,] which denies the regulated community all the legal means to effectively defend itself against unjustified governmental intervention and selective prosecution." Martex's Br. at 33.

[18] Martex's appeal does not seek review of the ALJ's denial of these motions. Rather, Martex argues that their denials reflect Martex's attempts to "obtain [] fair process in this case, to no avail." Martex's Br. at 32.

preliminary showing' necessary to be entitled to [the selective prosecution] defense.").

One who alleges selective prosecution or enforcement "faces a daunting burden in establishing that the Agency engaged in illegal selective enforcement, for courts have traditionally accorded governments a wide berth of prosecutorial discretion in deciding whether, and against whom, to undertake enforcement actions." *In re B&R Oil Co.*, 8 E.A.D. 39, 51 (EAB 1998). Prosecutorial discretion may also extend to decisions regarding when to commence enforcement actions, within the parameters of applicable statutes of limitations. *See, e.g.*, *N.J. Dep't of Envtl. Prot. v. Gloucester Envtl. Mgmt. Servs., Inc.*, 668 F. Supp. 404, 407 (D.N.J. 1987) ("The EPA's decision as to the timing of an enforcement action is one within its discretion."). To prevail on a claim of selective prosecution, one must establish that "(1) the government 'singled out' a violator while other similarly situated violators were left untouched, and (2) the selection was in bad faith based on such impermissible considerations as race, religion, or the desire to prevent the exercise of constitutional rights." *B&R Oil*, 8 E.A.D. at 51 (citing *United States v. Smithfield Foods, Inc.*, 969 F. Supp. 975 (E.D. Va. 1997)).

Although Martex conceded at oral argument that it was not arguing selective prosecution in the strict sense, Martex maintained its position that the Agency acted in bad faith and that those actions caused the finding of Martex's FIFRA liability and should be taken into account when determining the penalty to be assessed. EAB Tr. at 6, 11. Martex does not provide any legal support for how its selective prosecution contention should be considered in spite of the admission that the company did not meet the requisite legal standard.

Martex's bad faith claim is based on the press conference and press release announcing the enforcement action against Martex. Martex's Br. at 38. The press conference and press release allegedly "caused considerable damages to Martex, putting at risk the reputation, economic well-being and stability of the company." *Id.* It appears that Martex also alleges that the nonappearance of PRDA employees to testify on behalf of Martex further illustrates the Agency's bad faith. *Id.* ("Neither PRDA-EPA inspectors or EPA personnel ventured to answer questions pertaining to probable reasons that could explain the absence of PRDA employees announced by [Martex] to testify at the trial on behalf of Martex."). In short, neither of these examples of alleged bad faith implicate a constitutionally protected right like those described in *B&R Oil*, and the Board is not persuaded that the Agency's actions constituted selective prosecution.[19]

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[19] At oral argument, Martex seemed to suggest – but then recant – that the administrative process was unfair towards Martex, or shrouded with Agency bad faith:

Continued

The decision regarding when to commence an enforcement action is, as previously discussed, a matter of enforcement/prosecutorial discretion that is afforded great deference. That the Agency took approximately nine months after an inspection before serving the administrative complaint is not a defense to FIFRA liability.[20]

6. *Information Requirements for Notices of Multiple Pesticide Applications Beginning within Thirty Minutes of Each Other and Constituting a Single Application*

The ALJ concluded that multiple pesticide applications beginning on a single field within thirty minutes of each other constitute a single application for the purposes of the display requirements in 40 C.F.R. §§ 170.122 and 170.222.[21] Consequently, the ALJ dismissed eight counts as duplicative. Init. Dec. at 39. The ALJ did not elaborate on how the display requirements set forth in 40 C.F.R. §§ 170.122(c)(3) and .222(c)(3) were to be complied with in such circumstances, nor did either party seek a clarification in this matter. EAB Tr. at 48. The Agency does not challenge the ALJ's holding or her dismissal of the relevant counts in this case, although EPA reserved the right to challenge a similar issue should it arise in a future case. *Id.* at 34-35. However, the Agency now seeks a clarification from the Board regarding the application of 40 C.F.R. §§ 170.122(c)(3) and 170.222(c)(3) and, more specifically, the requirement to display the time of pesticide application when there is more than one application commencing within a thirty-minute period at a single field. The Agency urges the Board to hold that the appropriate time to be displayed in a notice for such combined applications should

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(continued)

> A [S]omething that we cannot leave aside is the fact that [the] EPA Administrative Law Judge is an EPA employee. And all the witnesses that * * * went to testify are either EPA employees or [PRDA-]deputized EPA employees. So there's a common * * * interest in having the rule of law [or] the point of view of the [A]gency sustained.
>
> * * *
>
> Q [Y]our argument is that the proceeding is not fair because the ALJ is an employee of the EPA * * * ?
>
> A I'm not saying that, Your Honor.

EAB Tr. at 15-16.

[20] The inspection giving rise to the claims in the complaint occurred on April 26, 2004. The Agency served the complaint on or about February 4, 2005.

[21] These rules require an employer to post pesticide information, including the "time and date [a] pesticide is to be [or was] applied[,]" when workers or handlers are present on an agricultural establishment on which pesticides will be, or within the past thirty days have been, applied. 40 C.F.R. §§ 170.122(c)(3), .222(c)(3).

be "the latest of the subject pesticide applications." Agency's Br. at 4, 56. The Agency "is concerned that employers may choose to list only the earlier of the application start times, a choice that increases the likelihood that workers and handlers may enter treated areas prior to the expiration of the [restricted-entry interval] without the proper PPE." *Id.* As the Agency's request does not affect the outcome of this case, Martex does not provide a substantive rebuttal to the Agency's argument. Martex's Reply at 3-4 ("Respondent does not address the agency's arguments in support of the request to clarify * * * .")

The Agency's request for clarification without a challenge to the ALJ holding creates an unusual set of circumstances, where (1) the resulting clarification would have no effect on the penalty assessment, and (2) the Agency does not even concede for the purposes of future cases that multiple pesticide applications on one field can be collapsed into a single application if they begin within the same thirty-minute period. When confronted with cases where neither party has appealed the amount of the penalty, the Board has previously expressed its concern about rendering a decision on the merits when true adversaries do not exist. The administrative adjudicatory process becomes less adversarial when parties do not possess a financial stake in an appeal's outcome, resulting in little incentive to fully research and present arguments regarding the issues appealed. *In re Burlington N. R.R.*, 5 E.A.D. 106, 108-09 (EAB 1994). The reservation the Board has expressed in previous cases regarding the potential lack of "full and balanced briefing of the issues" is illustrated in this case by Martex's limited discussion of the issue. *See, e.g.*, *In re Rhee Bros., Inc.*, 13 E.A.D. 261, 269-71 (EAB 2007) (declining to vacate administrative law judge's analysis). Martex's demonstrated disinterest in litigating the merits of the Agency's contention reinforces our concern regarding the lack of adversaries. Moreover, the Board is reluctant to render an advisory opinion interpreting Agency regulations when the regulated entities are likely better served by Agency-created guidance. Absent a compelling justification to consider this issue, the Board declines review.

C. *Penalty*

1. *Legal Framework for Penalty Determinations*

Section 14(a)(2) of FIFRA, 7 U.S.C. § 136*l*(a)(2), authorizes a civil penalty of up to $1,000 for each FIFRA violation. Pursuant to relevant EPA regulations and Agency memoranda that have been promulgated and issued in accordance with the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, as amended by the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3710, the current maximum civil penalty is $1,100 for each violation. *See* 40 C.F.R. pt. 19; 69 Fed. Reg. 7121 (Feb. 13, 2004); Memorandum from Stephanie P. Brown, Acting Dir., Toxics & Pesticides Enforcement Div., Office of Civil Enforcement, U.S. EPA, *Penalty Policy Supplements Pursuant to 2004 Civil Monetary Penalty Inflation Adjustment Rule* 1, 7 (June 5, 2006) ("Brown

Memorandum") (providing amended civil penalty "matrices [] superced[ing] or void[ing] any interim matrices for the 2004 rule issued or used by [EPA enforcement personnel]" and noting that "the statutory maximum penalty for FIFRA § 14(a)(2) in the recent Civil Monetary Penalty Inflation Adjustment Rule that was effective on March 15, 2004, was incorrectly increased to $1,200 when the penalty amount should have remained $1,100. Therefore, * * * $1,100 is the statutory maximum for violations occurring on or after March 15, 2004."); Memorandum from Ann Pontius, Dir., Toxics &Pesticides Enforcement Div., Office of Civil Enforcement, U.S. EPA, *Interim Correction of Penalty Amounts Under FIFRA § 14(a)(2)* (Aug. 30, 2005); Office of Compliance & Monitoring and Office of Pesticides & Toxic Substances, U.S. EPA, *Enforcement Response Policy for the Federal Insecticide, Fungicide and Rodenticide Act (*"*FIFRA*"*)* 19-C n.1 (July 2, 1990) ("*ERP*") (as amended by Brown Memorandum).

Section 14(a)(4) of FIFRA provides the criteria the Administrator must consider in determining the amount of the penalty:

> [T]he Administrator shall consider the appropriateness of such penalty to the size of the business of the person charged, the effect on the person's ability to continue in business, and the gravity of the violation. Whenever the Administrator finds that the violation occurred despite the exercise of due care or did not cause significant harm to health or the environment, the Administrator may issue a warning in lieu of assessing a penalty.

7 U.S.C. § 136*l*(a)(4).

EPA regulations impose further requirements for a penalty determination. They state:

> If the Presiding Officer[22] determines that a violation has occurred and the complaint seeks a civil penalty, the Presiding Officer shall determine the amount of the recommended civil penalty based on the evidence in the record and in accordance with any penalty criteria set forth in the Act. The Presiding Officer shall consider any civil penalty guidelines issued under the Act. The Presiding Officer shall explain in detail in the initial decision how the penalty to be assessed corresponds to any penalty criteria set forth in the Act. If the Presiding Officer decides to assess

[22] The Presiding Officer is the ALJ except in circumstances not relevant here. 40 C.F.R. § 22.3.

> a penalty different in amount from the penalty proposed by complainant, the Presiding Officer shall set forth in the initial decision the specific reasons for the increase or decrease.

40 C.F.R. § 22.27(b).

The *ERP* is the civil penalty guideline applicable to FIFRA penalties and provides that its use should occur in conjunction with "[g]uidance on the appropriate enforcement response for violations of specific FIFRA programs." *ERP* at 2. The applicable supplemental guidance on appropriate responses to specific FIFRA WPS violations is the *Worker Protection Standard Penalty Policy*. Office of Enforcement & Compliance Assurance, U.S. EPA, *Worker Protection Standard Penalty Policy* (interim final Sept. 1997) ("*WPS Penalty Policy*"). The *WPS Penalty Policy* sets forth a multi-step process for determining the penalty for certain FIFRA violations, including misuse violations under FIFRA § 12(a)(2)(G), 7 U.S.C. § 136j(a)(2)(G). In general, these steps are: (1) identifying the statutory provisions violated; (2) assigning the appropriate "FIFRA & TSCA Tracking System" ("FTTS") code using the Charge and Gravity Level Matrix at Attachment 2-B of the *WPS Penalty Policy*;[23] (3) determining the gravity or "level" of the violation, also using the Charge and Gravity Level Matrix at Attachment 2-B; (4) identifying the violator category, described in FIFRA §§ 14(a)(1) or 14(a)(2); (5) determining the violator's size of business category using Table 2 in the *ERP*; (6) determining the base penalty using Table A of *WPS Penalty Policy* Attachment 3;[24] (7) evaluating whether and to what extent adjustment to the base penalty is warranted after consideration of the Gravity Adjustment Criteria found on page 9 of the *WPS Penalty Policy*, and applying the appropriate percent increase or decrease, if any, to the base penalty by referring to Table 3 of the *ERP*; (8) calculating the penalty amount after adjustments; and (9) considering the violator's claim with respect to its ability to pay. *WPS Penalty Policy* at 6-10.

The statutory provision that has been violated in this case is FIFRA section 12(a)(2)(G). The *ERP* provides that a "separate civil penalty, up to the statutory maximum, shall be assessed for each independent violation of the Act." *ERP* at 25. The *WPS Penalty Policy* further provides that for pesticide misuse violations, "[d]istinct acts giving rise to violations of the same provision of FIFRA are independently assessable charges, even if the violative acts occurred during one pesti-

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[23] The FTTS code appears to have minimal, if any, impact on the actual penalty calculation and is designed for "better tracking of Agency and State FIFRA enforcement actions." *WPS Penalty Policy* at 6.

[24] Attachment 3 is the 1996 Civil Monetary Penalty Inflation Adjustment Rule, 61 Fed. Reg. 69,360 (Dec. 31, 1996). It does not appear that this portion of the *WPS Penalty Policy* text has been updated to reflect the corrected maximum penalty amount for FIFRA § 14(a)(2) violators.

cide application." *WPS Penalty Policy* at 5. The *WPS Penalty Policy* explains that the "fail[ure] to provide proper warning information for [a] pesticide application, fail[ure] to provide personal protective equipment, and fail[ure] to provide decontamination supplies" all arising from a single application "would each be a separately assessable violation of FIFRA § 12(a)(2)(G)." *Id.* at 5. The *WPS Penalty Policy* does not address how to assess violations of separate regulatory provisions, one of which pertains to workers and another of which pertains to handlers, and where an employer could comply with both regulatory requirements in a single act.

The Gravity Adjustment Criteria consist of six considerations – pesticide toxicity, human exposure, human injury, environmental harm, compliance history, and culpability – that are each broken down into various levels of gravity and then assigned a numerical value on scales from 0 to 5. *Id.* at 9. In this case, the ALJ assigned gravity values in only three of the six considerations: toxicity, human exposure, and culpability. In this appeal, the parties dispute only the value the ALJ assigned to the culpability criterion. Culpability is assessed by considering, in general, the violator's level of knowledge regarding the violation and the wilfulness when committing the violation. *Id.* Three possible levels of culpability are identified. *Id.* At the least culpable end of the spectrum, a "[v]iolation that was neither knowing nor willful and did not result from negligence[, and where the v]iolator institute[d] steps to correct the violation immediately after discover[y] of [the violation" is assigned the gravity value 0. *Id.* The highest gravity value of 4 is assigned to those violators who knowingly and wilfully violated FIFRA and had knowledge of the general hazardousness of their actions. *Id.* The policy recommends assigning the gravity value 2 to violations that result from negligence or unknown culpability. *Id.*

Finally, the Board's case law clarifies that equity and fairness, though not specifically mentioned in the main calculations of the *ERP*, may also be considered in making a penalty determination under FIFRA. *See, e.g.*, *In re Johnson Pac., Inc.*, 5 E.A.D. 696, 704 (EAB 1995).

2. *Review of the ALJ's Penalty Determination*

The Board has the discretion to review the ALJ's penalty assessment on a *de novo* basis and assess a penalty, which may be "higher or lower than the amount recommended to be assessed in the [Initial D]ecision * * * or from the amount sought in the complaint * * * ." 40 C.F.R. § 22.30(f). However, "[i]n cases where an [administrative law judge's] penalty assessment falls within the range of penalties provided in the penalty guidelines, the Board will generally not substitute its judgment for that of the [administrative law judge] absent a showing that the [administrative law judge] has committed an abuse of discretion or a clear error in assessing the penalty." *In re Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 522,

536 (EAB 1998) (finding clear error in administrative law judge's rejection of Agency-proposed upward increase for gravity component of penalty).

In this case, as explained below, the Board finds that the ALJ clearly erred when she (1) failed to assess a penalty for Martex's 40 C.F.R. § 170.222 violations and (2) assigned the culpability gravity level 1 to all violations. We therefore exercise our *de novo* review authority to assess an appropriate penalty. 40 C.F.R. § 22.30(f); *In re Cutler*, 11 E.A.D. 622, 654 (EAB 2004). The *ERP* offers a consistent methodology for applying the statutory factors to individualized cases, and because we conclude it produces an appropriate penalty for the case at hand, we deploy it for purposes of our own analysis. Accordingly, we assess a penalty for the sixty-eight violations of 40 C.F.R. § 170.222, and as described in detail below, we reinstate the Agency's proposed culpability gravity value of 2 for each violation.

a. *Whether 40 C.F.R. § 170.122 and 40 C.F.R.§ 170.222 Present Separate and Distinct Regulatory Violations*

In determining a penalty amount, the ALJ reviewed the terms of 40 C.F.R. § 170.122 and 40 C.F.R. § 170.222 and considered whether these provisions constitute separate regulatory violations warranting separate penalty assessments. Although the ALJ determined that these regulatory provisions were distinct, she also found that, under the circumstances of this case, a separate penalty for each violation was not appropriate. We disagree.

Section 170.122 provides that agricultural employers must display, in a central location where it can be seen and read by workers, specific information regarding pesticide applications that have occurred at the agricultural establishment for the past thirty days. 40 C.F.R. §§ 170.122, .135(d). A similar requirement pertaining to handlers is provided at 40 C.F.R. § 170.222, which states that handler employers must display, in a central location where it can be seen and read by handlers, specific information regarding pesticide applications that have occurred at the agricultural establishment for the past thirty days. *Id.* §§ 170.222, .235(d).

The *ERP* provides the following:

> A separate civil penalty, up to the statutory maximum, shall be assessed for each independent violation of the Act. A violation is independent if it results from an act (or failure to act) which is not the result of any other charge for which a civil penalty is to be assessed, or if the elements of proof for the violations are different.

ERP at 25. The *ERP* echoes the well-established holding of *Blockburger v. United States*, 284 U.S. 299 (1932):

> [W]here the same act or transition constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not.

284 U.S. at 304 (cited in *In re Lin*, 5 E.A.D. 595, 605 (EAB 1994)).

The Initial Decision only cites without further reference to the *WPS Penalty Policy* when considering the penalty assessment for 40 C.F.R. § 170.222 violations, and the ALJ acknowledged the testimony of an EPA witness, who "explained that under the ERP, each distinct act, failure to act, or application of a pesticide, which gives rise to a violation of FIFRA § 12(a)(2)(G) for 'misuse' of a pesticide, is assessed a separate penalty." Init. Dec. at 63 (citing ALJ Tr. at 716-18; *WPS Penalty Policy* at 6). The ALJ's enunciation of the applicable policy was:

> The ERP (at p. 25) provides that a penalty may be assessed for each independent violation of FIFRA, and a violation is independent if the violation results from an act or failure to act which is not the result of any other violation, or if the elements of proof for the violations are different.
>
> * * *
>
> A violation of Section 170.122 requires proof that workers are on the agricultural establishment, whereas a violation of Section 170.222 requires proof that handlers are on the agricultural establishment, so they require one different element of proof.

Id.

Therefore, the ALJ found that 40 C.F.R. §§ 170.122 and 170.222 each require one different element of proof. *Id.* Rather than ending the analysis here and determining that §§ 170.122 and 170.222 give rise to independent violations, the ALJ determined that, despite the different element of proof, under the circumstances of this case – that is, Martex's decision to simultaneously comply with both regulations by displaying in an area accessible to both workers and handlers one set of WPS records containing the required pesticide application information – "the failure to display pesticide application information is a single lack of action which is being considered as two unlawful acts under the regulations." *Id.* Based on this, the ALJ considered the regulatory violations to be legally dependent, and

therefore, penalties for violations of only one regulation could be assessed. *Id.* The ALJ stated:

> Clearly the regulations, 40 C.F.R. Sections 170.122 and 170.222, set out separate duties to provide information for workers and for handlers, and thus provide for separate findings of violation. However, as to the penalty, the record does not suggest that there is any significantly increased risk of exposure or harm to human health, nor any significantly increased harm to the FIFRA WPS regulatory program, resulting from failing to display the information * * * . Therefore, it is not appropriate to assess a second penalty under Section 170.222 for each application * * * .

Id. The ALJ's analysis essentially used criteria other than the *WPS Penalty Policy*'s "distinct acts" to conclude that violations of 40 C.F.R. §§ 170.122 and 170.222 arising from the failure to display pesticide application information at a central posting area were not independently assessable counts.

The fact that Martex chose to simultaneously comply with the display requirements of 40 C.F.R. §§ 170.122 and 170.222 by posting the pesticide application information in a place central to both workers and handlers does not mean that violations of the regulations are legally dependent. *See Lin*, 5 E.A.D. at 604-05 (finding "fatally flawed" the argument that offering the same evidence to prove seven claims necessarily indicated that the claims were indistinguishable). A violation of the requirement to display information to workers is not a prerequisite to a finding of failure to display information to handlers; similarly, a violation of the requirement to display information to handlers is not a prerequisite to a finding of failure to display information to workers. The regulatory requirements are for the benefit of two separate groups of individuals, and although the regulations share several elements of proof, the distinction between the regulations is the intended recipient of the information.

Martex's argument in favor of assessing penalties for only the 40 C.F.R. § 170.122 violations does not discuss whether § 170.222 violations are dependent on § 170.122 violations. Rather, Martex argues that it was appropriate to assess penalties for only the 40 C.F.R. § 170.122 violations because of how information is actually exchanged at the Jauca facility. Martex's Reply at 5. Martex suggests that all of its handlers would be capable of providing medical personnel specific information regarding the pesticides to which a handler was exposed in the past thirty days because of "how farm information is passed on to multiple recipients, particularly to agricultural workers and to a small group of handlers * * * ." *Id.*; *see also* EAB Tr. at 28, 67 ("[Martex has] * * * four handlers and they [] know what, where, when , why, [and] how those pesticides are applied. So having [the

handlers] go on and read in a central posting station what they're going to do [or] what they did the day before [is extraneous] because they are the only pesticide handlers."); ALJ Tr. at 1381 ("All of the workers know what [pesticide] is being applied * * * ."). According to Martex, one penalty for violations of both regulations is appropriate because there was only a small group of handlers in charge of applying certain pesticides during the thirty-day time period at issue, and these handlers "could easily remember and inform medical personnel [which pesticide] they applied during this 30 day period at the Jauca facility * * * because * * * this chemical was the only pesticide they sprayed at the Jauca facility." Martex's Reply at 5. However, there is no evidence in the record that demonstrates the handlers actually did know the specific information that was required to be posted, such as a pesticide's EPA registration number and active ingredients. *See* 40 C.F.R. § 170.222(c) (listing required information).

Martex's handlers receive spraying instructions from a field spray supervisor orally and/or in writing. ALJ Tr. at 1553-54. The evidence adduced at the administrative hearing reveals that these instructions initially provide only the field to be sprayed, pesticide or mixture to be used, and the "dose" or quantity of the pesticide, and do not satisfy the information requirements of 40 C.F.R. § 170.222. *Id.* at 1554. The supervisor then adds the type of equipment used and assigns the task to a handler. *Id.* at 1555. The information on the handwritten spray instructions is then entered into an electronic database. *Id.* at 1554-55, 1559. After completion of the spraying, the handler adds the time at which the task was performed. *Id.* at 1557-58. There is no showing that the EPA registration number or active ingredients are included on either the computer printout or handwritten versions of the spray instructions, or otherwise conveyed to the handler. *See* EPA Ex. 13, at 8-15, 18. Additionally, the regulation's history addresses the issue of posting pesticide application information versus a less formal "passing along" of information among employees, and concludes that unimpeded access to pesticide application information is paramount.

In 1992, EPA revised the WPS regulations and expanded their scope "to include not only workers performing hand labor operations in fields treated with pesticides, but [also] * * * employees who handle (mix, load, apply, etc.) pesticides for use * * * ." Worker Protection Standard Final Rule, 57 Fed. Reg. 38,102, 38,102 (Aug. 21, 1992). The revised WPS regulations set forth "three types of provisions intended to: (1) eliminate or reduce exposure to pesticides; (2) mitigate exposures that occur; and (3) inform employees about the hazards of pesticides." *Id.* at 38,104. Among the provisions added to inform handlers of pesticide hazards are regulations that require handlers to be given access to pesticide-specific information listings at a centrally located place at the agricultural establishment, for thirty days after an application and any REI of any pesticide applied on any area of the agricultural establishment. *Id.* at 38,105. EPA arrived at this final rule after initially proposing a requirement that product-specific infor-

mation be provided upon an employee's request. *Id.* at 38,135. The Agency received comments regarding this proposed rule, and in response, EPA became:

> [C]onvinced that workers must have unhampered access to product-specific information about the pesticides to which they are exposed occupationally. The Agency was persuaded that some agricultural workers may be intimidated and that oral communication of this information may be complex and inconvenient.

Id. at 38,136; *see also* Worker Protection Standards for Agricultural Pesticides Notice of Proposed Rulemaking, 53 Fed. Reg. 25,970 (July 8, 1988). As a result, the Agency amended the provision "to require employers to list the product-specific information in a central place on the agricultural establishment and to allow workers unimpeded access to this information." 57 Fed. Reg. at 38,136.

Based on the terms of the WPS regulations, preamble language, and applicable penalty guidance, the Board is persuaded that the requirement to provide pesticide application information to handlers under 40 C.F.R. § 170.222 is separate and distinct from the requirement to provide pesticide application information to workers under § 170.122, regardless of whether an employer could theoretically have satisfied both provisions through a single act. Accordingly, separate penalties are appropriately assessed for both regulatory violations.

b. *Culpability Gravity Value Adjustment*

The ALJ mitigated Martex's penalty for all violations for which she assessed a penalty by adjusting the gravity value to reflect decreased culpability based on Martex's corrective measures following discovery of the violations. The ALJ assigned the culpability gravity value of 1 for all the violations. The *WPS Penalty Policy* does not have a category of circumstances that precisely fit the ALJ's finding. But, it appears that the ALJ fashioned the gravity value of 1 to account for both negligence, for which the value 2 is recommended, and instituting corrective measures, for which the value 0 is recommended if the violation also did not arise from negligence. *See, e.g.*, Init. Dec. at 65 ("[T]he totality of the evidence suggests that these violations are the result of negligence but that Respondent took steps to prevent the violation from recurring. The appropriate value to assess for Respondent's culpability in these circumstances is 1."); *see also id.* at 67, 69, 71-72. We disagree with the ALJ's findings.

The ALJ's findings with respect to the corrections are based on undated or post-complaint dated photographs and documents indicating that Martex purchased decontamination supplies, that supervisors maintained decontamination materials, and that mobile decontamination sites existed. *See id.* ¶¶ 36, 40, at 20-21, 67 (citing Martex Exs. 11-19, 22, 31). The ALJ also relied on the testi-

mony of an EPA witness, Dr. Adrian J. Enache, who visited the Jauca facility in May 2005 at Martex's invitation. *Id.* at 67. Accordingly, the ALJ found that "in May 2005, no notice of violation or complaint was warranted." *Id.*

With few exceptions, the corrective measures described in the record occurred after the Agency filed the administrative complaint. FIFRA does not specify post-complaint compliance as one of the statutory penalty factors that the Agency must consider in assessing an administrative penalty under § 14(a)(4). *See* FIFRA § 14(a)(4), 7 U.S.C. § 136*l*(a)(4). The *ERP* and *WPS Penalty Policy* have interpreted "gravity of the violation" to include culpability and the institution of corrective steps immediately after discovery of the violation as a circumstance that could mitigate culpability and, consequently, gravity. *ERP* at 21 & app. B-2; *WPS Penalty Policy* at 8-9.

The *ERP* is "designed to provide swift resolution of environmental problems and to deter future violations of FIFRA by the respondent * * * ." *ERP* at 1. Consistent with this goal, the *ERP* encourages voluntary disclosure of violations and recommends a 40% penalty reduction when a violator immediately takes steps to come into compliance after promptly and voluntarily reporting self-discovered FIFRA violations outside of the inspection context. *Id.* at 26. Recognition for initiating steps to come into FIFRA compliance is also briefly discussed in the culpability considerations in the Gravity Adjustment Criteria matrices provided in both the *ERP* and *WPS Penalty Policy*. The matrices recommend assignment of a culpability value of 0 when the following circumstances exist: "Violation was neither knowing nor wilful and did not result from negligence. Violator instituted steps to correct the violation immediately after discovery of the violation." *ERP* at app. B-2. A footnote to the matrices provides as follows:

> EPA enforcement officials are not required to determine culpability at the time the complaint is issued * * * [and] may instead assign a weighting factor of 2 (culpability unknown), at the time of the issuance of the complaint. Culpability adjustments may be reconsidered during settlement negotiations.

Id. at app. B-3 n.5. Although the matrices do not specify when the discovery of a violation must have been made, or by whom the violation should have been discovered, consistent interpretation of the *ERP* favors discovery by the violator, rather than the regulator, and the implementation of corrective steps prior to the filing of an administrative complaint. We have previously stated that "[p]ositive attitude and good faith attempts to comply with the law" do not render a violator eligible for a penalty reduction when the violator has, as here, decided to litigate the case rather than negotiate a settlement. *In re FRM Chem, Inc.*, 12 E.A.D. 739, 759 (EAB 2006) (declining to affirm ALJ's penalty reduction based on crediting violator with cooperation during two investigations) (citing *ERP* at 26-28). With

these principles in mind, we turn to the culpability values assigned to Martex's violations.

The corrective measures upon which the ALJ relies to mitigate Martex's culpability were not undertaken in response to self-discovery of violations. The undated photographs – Martex Exhibits 13, 17, and 18 – do not reveal the timing of Martex's corrections; without more, it is unclear whether the corrections occurred immediately after the April 26, 2004 inspection or followed the filing of the administrative complaint. The remaining documents upon which the ALJ relies, Martex Exhibits 11, 12, 14, 15, 16, 19, 22, and 31, also do not support a finding of immediate correction. Martex Exhibit 11 is an undated document titled "Purchases of Decontamination Materials since January 2003" and lists the products – such as gloves, hair nets, dust masks, hand cleaner, single-use towels, soap, and coveralls – that Martex purchased from various vendors and the date of each listed purchase. ALJ Tr. at 1391-96, 1397-1409. Martex Exhibit 12 is a document listing dates ranging from March 18, 2005, and April 7, 2005, and indicates quantities of various decontamination materials, such as masks, gloves and overalls. Martex Exhibit 14 is a set of maps of Martex facilities, including the Jauca facility and Coto Laurel facility. The maps for the Jauca facility and Coto Laurel facility contain hand-drawn depictions of the fields and include written notations of mixing sites and "decon" sites. The maps lack legends indicating whether they were drawn to scale. Consequently, we cannot conclude on this evidence that the decontamination sites were located an appropriate distance from the workers and handlers in the fields, even if the decontamination sites provided adequate decontamination materials. Martex Exhibit 15 is a signed "Decontamination Material Release" letter dated February 10, 2005, to an employee and listing the decontamination materials that were issued to him. Martex Exhibit 16 is an undated list of sixteen employees to whom Martex issued decontamination materials. Martex Exhibit 19 consists of two signed forms, dated April 15 and 18, 2005, verifying the placement of decontamination materials at certain locations. Martex Exhibit 22 is an invoice dated April 28, 2004, for the purchase of twenty-four four-ounce eye-wash containers. We note that evidence of decontamination supply purchases and alleged handler possession does not demonstrate that Martex actually put the supplies together with appropriate water sources.

Martex Exhibit 31 consists of typewritten reports prepared by Martex's vice president and part owner, Mr. Venancio Luis Marti, Jr., after receiving the administrative complaint. ALJ Tr. at 1499. The reports provide Mr. Marti's summaries or descriptions of violations as provided in correspondence Martex received from either PRDA or EPA since 2003. *Id.* Each report indicates the date of the facility visit; the name of the facility visited; whether a notice of violation was issued; a description of the violation, if any, found; background of the site visit; and any corrective action taken. Several entries in Martex Exhibit 31 pertain to violations found as a result of the April 25, 2004 inspection. Mr. Marti's summaries of the violations relevant to this appeal are: (1) "inspectors could not see handler's pro-

tective eyewear and respirator masks" at the Jauca facility; (2) "inspectors pointed out that the herbicide application was not included on the WPS report, but was documented" at the Jauca facility; (3) failure to "provide water, soap, and single-use towels for workers in the field" at the Jauca facility; (4) lack of eyeflush for a handler at the Coto Laurel facility; and (5) lack of a "shower for handler" at the Coto Laurel facility. According to Martex Exhibit 31, Martex corrected all these violations, as follows: (1) Martex stored an extra set of keys unlocking the boxes and lockers where the protective equipment was stored and ordered individual lockers, which were shown to inspectors in July 2004, for handlers' use; (2) Martex altered its procedures for electronically recording pesticide applications so that reports printed from the computer database would reflect actual applications; (3) Martex increased the number of areas on each farm where decontamination materials are available, improved the infrastructure of decontamination sites, distributed decontamination kits to workers and handlers, added mobile decontamination stations, and monitored the decontamination kits and sites; (4) Martex purchased eyeflush for the Coto Laurel site; and (5) Martex constructed a shower at the Coto Laurel facility in May 2004. Martex Ex. 31. With the exception of the Coto Laurel facility shower construction, the exhibits do not reflect when these changes occurred. As to the Coto Laurel shower described as having been constructed, the exhibits also do not reveal the location of the remaining decontamination supplies and whether they were brought "together with" the water provided in the shower area.

The ALJ found Martex negligent, and our review of the record reveals that the weight of the evidence supports a finding that it was the federal and PRDA regulators – and not an individual affiliated with Martex – who discovered Martex's violations. Moreover, the timing of Martex's corrective measures are generally unclear or after the filing of the complaint. We agree with the Agency that the ALJ's negligence finding results in a gravity value of 2, rather than 1, and that after-the-fact corrective measures are not entitled to the type of penalty reduction the ALJ authorized. Consequently, the Board adopts the Agency's recommendation to assign the value 2 to each violation's culpability gravity value.

c. *Penalty Calculations*

Our findings that the 40 C.F.R. § 170.222 violations are separately assessable and that the appropriate culpability gravity value for all the penalties in this case is 2 requires a recalculation of the penalties. The penalty calculations that follow consider the violations in seven different groups: Counts 1-151;[25] Counts

[25] As discussed in Part I.B.2, *supra*, the ALJ dismissed and the Agency withdrew a total of eighty-three counts alleging violations of 40 C.F.R. § 170.l22 and eighty-three counts alleging violations of 40 C.F.R. § 170.222. Because the actual counts for which Martex is liable are not consecu-
Continued

152-153; Counts 154-304; Counts 305-317[26]; Counts 318-321; Counts 322-334; and Counts 335-336.

(i) *Counts 1 – 151*

The ALJ had assigned a total gravity value of 7 to the sixty-eight violations of 40 C.F.R. § 170.122. The new total gravity value reflecting the restoration of the proposed culpability value is 8. The appropriate penalty assessment for these violations is the matrix value, without upward or downward adjustment. *See ERP* at 22 tbl. 3. The base value is $1,100 per violation; therefore, the total penalty for the § 170.122 violations is $74,800.

(ii) *Counts 152 – 153*

The ALJ assigned a total gravity value of 7 for the violations described in Counts 152 and 153 and decreased the base penalty of $1,100 per violation by ten percent. Because we reinstate the culpability gravity value of 2, the appropriate total gravity value is 8, which Table 3 of the *ERP* reflects does not warrant an upward or downward adjustment to the base penalty. Accordingly, the appropriate penalty assessed for these two violations is $2,200.

(iii) *Counts 154 – 304*

The ALJ neither considered nor assessed a penalty for the violations of 40 C.F.R. § 170.222; therefore, the Board assesses a penalty, *de novo*, after consideration of the ALJ's findings with respect to violations of 40 C.F.R. § 170.122,[27] the EPA penalty recommendation, record evidence, and the penalty regulations and guidelines. From the base penalty of $1,100 per violation, we assign values for the gravity adjustment factors. EPA proposed a total gravity value

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(continued)
tively numbered, for simplicity, we refer to the sixty-eight 40 C.F.R. § 170.122 violations collectively as "Counts 1-151" and the sixty-eight 40 C.F.R. § 170.222 violations collectively as "Counts 154-304."

[26] Counts 305-321, which are grouped together in both the Second Amended Complaint and the Board's analysis at Part II.B.2, *supra*, allege violations of 40 C.F.R. § 170.250 for failure to provide decontamination supplies to pesticide handlers at the Jauca facility. In our penalty calculation, we take into account that the violations described in these counts involve the application of several pesticides that have different levels of toxicity. Counts 305-317 involve applications of pesticides to which EPA assigned the toxicity value of 3. Init. Dec. at 68. EPA assigned the toxicity level of 1 to the pesticide applied in Counts 318-321. *Id.* Accordingly, the Board's penalty calculation for the 40 C.F.R. § 170.250 violations at the Jauca facility consists of two separate calculations for Counts 305-317 and Counts 318-321.

[27] As previously noted, with the exception of one element of proof, the terms of the 40 C.F.R. § 170.122 requirement to provide notice to workers of pesticide applications are identical to the terms of 40 C.F.R. § 170.222, which address notice to handlers.

of 8 for Martex's violations of 40 C.F.R. § 170.222. This consisted of the following values: 3 for toxicity; 3 for human exposure; and 2 for culpability. Notably, EPA proposed, and the ALJ adopted, identical gravity values for the violations of 40 C.F.R. § 170.122. As the pesticides involved in the §§ 170.122 and 170.222 violations are identical, we adopt the gravity value 3 for toxicity. With respect to the human exposure value for § 170.122, the ALJ made the following conclusion:

> There is no evidence as to whether or not any employees were actually exposed to ClearOut during the time period at issue or whether they entered any areas where the applications of ClearOut were made. However, the evidence show[ed] that a group of 20 workers harvested in one field * * * [and that] workers at Martex often did not have access to all decontamination supplies near their work sites, which increases the significance of the exposure to pesticides.

Init. Dec. at 64-65. Therefore, the ALJ assigned a gravity level of 3 for human exposure to reflect that "an unknown number, or a 'medium number' of employees,' were exposed to ClearOut * * * ." *Id.* at 65. This reasoning does not extend to the human exposure of ClearOut to handlers in this case, where the record reflects that approximately three to six individuals served as handlers at the Jauca facility. EAB Tr. at 28; ALJ Tr. at 1440. The number of persons potentially exposed to pesticides as a result of Martex's failure to post notices for handlers in accordance with the regulations is small. According to the *WPS Penalty Policy*, the appropriate gravity value to assign for human exposure in this circumstance is 1. Finally, we assign a culpability value of 2. The resulting total gravity value for the sixty-eight violations of 40 C.F.R. § 170.222 is 6, for which the *ERP* recommends a twenty percent reduction to the $1,100 base penalty. Accordingly, we assess an $880 penalty for each violation, resulting in a total penalty of $59,840 for the 40 C.F.R. § 170.222 violations.

(iv) *Counts 305-317*

The ALJ assigned a total gravity value of 5 to the violations described in Counts 305 through 317 and decreased the base penalty by thirty percent. Restoration of the culpability gravity value to 2 increases the total gravity value to 6 and, based on Table 3 of the *ERP*, warrants only a twenty percent reduction from the $1,100 base penalty. Therefore, each violation is assessed an $880 penalty, resulting in a total penalty of $11,440 for the thirteen violations of 40 C.F.R. § 170.250 that are described in Counts 305 through 317.

(v) *Counts 318-321*

The ALJ assigned a total gravity value of 2 to each of the four violations described in Counts 318 through 321 and decreased the base penalty by sixty percent. Restoration of the culpability gravity value to 2 increases the total gravity value to 3 and, in accordance with Table 3, warrants a fifty percent reduction in the base penalty of $1,100 per violation. Therefore, each violation is assessed a $550 penalty. The Board assesses a total penalty of $2,200 for the violations of 40 C.F.R. § 170.250 that are described in Counts 318 through 321.

(vi) *Counts 322-334*

The ALJ assigned a total gravity value of 5 to each of the thirteen violations described in Counts 322 through 334 and decreased the base penalty by thirty percent. Restoration of the culpability gravity value to 2 increases the total gravity value to 6 and, based on Table 3, warrants a twenty percent reduction in the base penalty. The Board assesses a $880 penalty for each violation, resulting in a total penalty of $11,440 for the 40 C.F.R. § 170.240 violations that are described in Counts 322 through 334.

(vii) *Counts 335 and 336*

The ALJ assigned a total gravity value of 5 to the violations described in Counts 335 and 336 and decreased the base penalty by thirty percent. Restoration of the culpability gravity value to 2 increases the total gravity value to 6 and, in accordance with Table 3, warrants a twenty percent reduction to the base penalty, to $880 per violation. Accordingly, we assess a $1,760 penalty for the 40 C.F.R. § 170.250 violations that are described in Counts 335 and 336.

III. *CONCLUSION*

Based on the foregoing analysis, we assess a total penalty of $163,680[28] against Martex for violating FIFRA and the WPS regulations promulgated under

[28] The total penalty is computed as follows:

40 C.F.R. § 170.122 violations	$74,800
Counts 152-153	$2,200
40 C.F.R. § 170.222 violations	$59,840
Counts 305-317	$11,440
Counts 318-321	$2,200
Counts 322-334	$11,440
Counts 335-336	$1,760
Total	**$163,680**

FIFRA. Payment of the entire amount of the civil penalty shall be made within thirty (30) days of service of this Final Decision and Order, by cashier's check or certified check payable to the Treasurer, United States of America, and forwarded to:

U.S. EPA
Fines and Penalties
Cincinnati Financial Center
P.O. Box 979077
St. Louis, MO 63197-9000

A transmittal letter identifying the case name and the EPA docket number must accompany the check. 40 C.F.R. § 22.31(c).

So ordered.