UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	**)**	
	)	
MARTEX FARMS, S.E.,	**)**	**DOCKET NO. FIFRA-02-2005-5301**
	)	
Respondent	**)**	

INITIAL DECISION

DATED: January 19, 2007

FIFRA: Pursuant to Section 14(a)(1) of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136*l*(a)(1), Respondent Martex Farms, S.E. was charged with 336 counts of violating the Worker Protection Standards, 40 C.F.R. Part 170, including failure to display information about pesticide applications to agricultural workers and pesticide handlers, failure to provide decontamination supplies, and failure to provide personal protective equipment to pesticide handlers, which constitute use of registered pesticides in a manner inconsistent with its labeling, in violation of FIFRA Section 12(a)(2)(G), 7 U.S.C. § 136j(a)(2)(G). Of these 336 counts, Respondent was found liable for 125 counts on accelerated decision, 58 counts were subsequently withdrawn by Complainant, and upon hearing, Respondent is held liable for an additional 45 counts with the remaining 108 counts dismissed as duplicative. For the 170 counts upon which Respondent is liable, a penalty of $67,320 is assessed for the 68 violations of failure to display information about pesticide applications for workers, no additional penalty is assessed for the 68 violations of failure to display the same information for pesticide handlers, and a penalty of $25,300 is assessed for the 34 violations of failure to provide decontamination supplies and personal protective equipment. Respondent is assessed an aggregate penalty of $92,620 for the violations.

PRESIDING OFFICER: CHIEF ADMINISTRATIVE LAW JUDGE SUSAN L. BIRO

APPEARANCES:

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I. Background

This proceeding was instituted on January 28, 2005 by the filing of a Complaint by the United States Environmental Protection Agency ("EPA" or "Complainant") pursuant to Section 14(a) of the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136*l*(a), against the Respondent Martex Farms, Inc. The Complaint charges the Respondent with 338 counts of violating FIFRA's "Worker Protection Standard" (WPS), consisting of a set of regulations codified at 40 C.F.R. Part 170, which are "designed to reduce the risks of illness or injury resulting from workers' and handlers' occupational exposures to pesticides used in the production of agricultural plants on farms . . . and also from the accidental exposure of workers and other persons to such pesticides" and which "requires workplace practices designed to reduce or eliminate exposure to pesticides and establishes procedures for responding to exposure-related emergencies." 40 C.F.R. § 170.1. Those regulations were promulgated by EPA to implement Section 12(a)(2)(G) of FIFRA, 7 U.S.C. § 136j(a)(2)(G), which makes it "unlawful for any person . . . to use any registered pesticide in a manner inconsistent with its labeling."[1]

In its Answer to the Complaint, dated March 3, 2005, Respondent advised that its correct name is Martex Farms, *S.E.*, as it is a "special partnership" registered in the Commonwealth of Puerto Rico. It further denied the violations alleged, asserted several "affirmative defenses," and requested a hearing.

Respondent, Martex Farms, S.E., ("Respondent" or "Martex") owns and operates a number of agricultural establishments[2] in Puerto Rico on which it engages in the business of commercially growing agricultural plants such as mangoes, bananas, palms, avocados, plantains, and ornamentals. Included among those facilities are its farm known as "Coto Laurel" located at Road No. 511, Km 1.0, Bo. Real Anon, Ponce, Puerto Rico, where it grows primarily mangos, and its "Jauca," farm located at Road No. 1, Km 96.2, Santa Isabel, Puerto Rico, where it grows various fruits and ornamental plants. At such establishments, Respondent employs persons called agricultural "*workers*," who perform production activities, such as picking the fruits and vegetables, and also employs persons called pesticide "*handlers*," who mix, load, transfer, and apply the pesticides used in its production process.[3]

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[1] Section 2(s) of FIFRA, 7 U.S.C. § 136(s), defines a "person" as "any individual, partnership, association, corporation, or any organized group of persons whether incorporated or not."

[2] The term "agricultural establishment" is defined in 40 C.F.R. § 170.3 as "any farm, forest, nursery or greenhouse." The parties stipulated that Respondent has a "proprietary interest" in the farms. The term "proprietary interest" is defined as "the interest of an owner of property together with all rights appurtenant thereto." Black's Law Dictionary at 637 (Abridged 5th ed. 1983).

[3] The term "handler" is defined in 40 C.F.R. § 170.3 as any person "(1) Who is employed for any (continued...)

Respondent, in connection with its agricultural production, utilizes various pesticides including Boa, ClearOut 41 Plus ("ClearOut"), Kocide 101 ("Kocide"), and Trilogy 90EC ("Trilogy"). Each of those pesticides is registered with EPA and has an EPA-approved label setting forth specific directions regarding its use. Stipulations ¶ 22. Relevant here, the "Agricultural Use Requirements" sections of those labels state: "Use this product only in accordance with its labeling and the Worker Protection Standard at 40 CFR Part 170." Stipulations ¶¶ 24, 26, 30, 31.

The record reflects that on April 26, 2004, at the Jauca facility, Respondent's pesticide handlers applied ClearOut to two fields, applied Kocide to eight fields, applied Boa to three fields, and applied Trilogy to four fields. Complaint and Answer ¶¶ 81, 97. Between March 29, 2004 and April 26, 2004, Respondent's pesticide handlers applied ClearOut to fields at its Jauca facility at least fifty-seven times, designated in the Complaint and Answer as Application numbers 1, 2, 6-8, 10, 11, 13, 15, 17, 18, 20, 23, 25, 30, 34, 36, 40, 44-46, 48, 50, 55, 58, 60, 68-72, 74, 76, 82-84, 86-88, 90, 94, 95, 99, 103, 111, 112, 119, 120, 127, 128, 133, 136, 137, 144, 145, 150 and 151. Complaint and Answer ¶¶ 56, 71. On April 21, 2004, Respondent applied Kocide to the JC-11 mango field at its Jauca facility. Complaint and Answer ¶ 61; Stipulations ¶ 25.

On April 26, 2004, authorized inspectors from the Puerto Rico Department of Agriculture (PRDA), along with EPA personnel, conducted WPS inspections of Respondent's Jauca and Coto Laurel facilities, and found violations of the WPS requirements.[4] PRDA inspectors conducted a follow-up inspection on July 20, 2004.

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[3](...continued)
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 . . . (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."

[4] PRDA had previously conducted inspections of the Coto Laural facility (on August 20, 2003) and the Juaca facility as well as other Martex facilities (on September 5, 2003) and issued Notices of Warning citing Respondent for WPS violations as a result thereof.

Based on the inspections of April 26 and July 20, 2004, Complainant filed the Complaint, amending it on July 14, 2005 (First Amended Complaint) and again on September 6, 2005 (Second Amended Complaint). As amended, the Complaint[5] charges Respondent in 336 Counts with violating Section 12(a)(2)(G) of FIFRA and the WPS. Counts 1 through 151, corresponding to the 151 alleged pesticide applications listed in paragraphs 56 and 71 of the Complaint and Answer, allege that Respondent failed to notify pesticide *workers* of pesticide applications, in violation of 40 C.F.R. § 170.122. Counts 152 and 153 allege that Respondent failed to provide decontamination supplies to *workers* in violation of 40 C.F.R. § 170.150 (Count 152) and FIFRA Section 12(a)(2)(G) (Count 153). Counts 154 through 304, corresponding to the same 151 pesticide applications, allege that Respondent failed to notify pesticide *handlers* of pesticide applications in violation of 40 C.F.R. §170.222. Counts 305 through 321 allege that Respondent failed to provide decontamination supplies to *handlers* in violation of 40 C.F.R. § 170.250. Counts 322 through 334 allege that Respondent failed to provide personal protective equipment ("PPE") to *handlers* in violation of 40 C.F.R. § 170.240. All of these violations, in Counts 1 through 334, are alleged to have occurred at Respondent's Jauca facility. Counts 335 and 336 allege that Respondent failed to provide decontamination supplies to a handler at Respondent's Coto Laurel facility, in violation of 40 C.F.R. § 170.250. Complainant proposes to assess an aggregate civil penalty of $369,600 for the 336 alleged violations.

Numerous prehearing motions were filed, including Complainant's July 25, 2005 Motion for Partial Accelerated Decision as to Liability as to Counts 1-334 of the Complaint, to which Respondent filed an Opposition. On August 19, 2005, the parties filed Joint Prehearing Stipulations ("Stipulations"). An Order was issued on October 4, 2005 ("October 4th Order"), granting Complainant accelerated decision as to liability for Counts 1, 2, 6-8, 10, 11, 13, 15, 17, 18, 20, 23, 25, 29-32, 34-36, 40, 44-46, 48, 50, 55, 58-60, 68-72, 74, 76, 82-84, 86-88, 90, 94, 95, 99, 103, 111, 112, 119, 120, 127, 128, 133, 136, 137, 144, 145, 150, 151, 154, 155, 159-161, 163, 164, 166, 168, 170, 173, 176, 178, 182-185, 187-189, 193, 197-199, 201, 203, 208, 211-213, 221-225, 227, 229, 235-237, 239-241, 243, 247, 248, 252, 256, 264, 265, 272, 273, 280, 281, 286, 289, 290, 297, 298, 303 and 304, all of which pertain to failure to notify workers (Counts 1-151) and handlers (Counts 154-304) of pesticide applications. Accelerated decision was also granted as to Count 153, alleging Respondent's failure to provide an eyeflush container for workers as required by the label of a certain pesticide, Kocide 101, that was applied at Respondent's Jauca facility. Accelerated decision was denied as to the remaining allegations of failure to notify workers and handlers in Counts 1 through 304, and as to Counts 152, and 305 through 334, alleging failure to provide handlers with decontamination supplies and personal protective equipment. Accelerated decision was not requested or ruled upon as to Counts 335 and 336.

[5] The term "Complaint" hereinafter refers to the Second Amended Complaint. Respondent filed Answers to the Amended Complaints, and the term "Answer" hereinafter refers to the Answer to the Second Amended Complaint.

On October 11, 2005, Respondent filed a motion requesting recommendation for interlocutory review of the October 4th Order. Although Complainant noted that it opposed the motion, it stated that it would not file a response brief. The motion was denied on October 12, 2005, in the Order Denying Second Motion for Interlocutory Review ("October 12th Order").

A hearing in this matter was held in San Juan, Puerto Rico on October 24th through October 28, 2005, on the remaining issues of liability and as to the penalty to assess for the violations. At the hearing, Complainant presented testimony of six witnesses, namely Juan Carlos Munoz, Roberto Rivera Vélez ("Mr. Rivera"), Tara Masters-Glynn ("Ms. Masters"), Yvette Sophia Hopkins, Michael Farmer, and Dr. Adrian J. Enache. Respondent presented testimony of five witnesses, namely Venancio Martí, Sr., Venancio Luis Martí, Jr., William Hunt, Alvaro Acosta Rodriguez ("Mr. Acosta"), and Carmen Oliver Canabal. Numerous exhibits offered by the parties were admitted into evidence.[6]

II. Relevant Statutory and Regulatory Provisions

In the prohibition of FIFRA section 12(a)(2)(G) on the "use" of any registered pesticide "in a manner inconsistent with its labeling," the term "use" is interpreted in the Worker Protection Standard (WPS) to include not only application of a pesticide, but also pre-application and post-application activities such as mixing and loading the pesticide and making preparations for the application, responsibilities related to worker notification, decontamination, and use and care of personal protective equipment. 40 C.F.R. §§ 170.9(a)(1)-(4). When the WPS (40 C.F.R. Part 170) is referenced on a label of a pesticide, users must comply with *all* of the WPS requirements, except any that are inconsistent with product-specific instructions on the labeling. 40 C.F.R. §170.9(a).

The WPS states that "[a] person who has a duty under this part [170], as referenced on the pesticide product label, and who fails to perform that duty, violates FIFRA section 12(a)(2)(G) and is subject to a civil penalty under section 14." 40 C.F.R. § 170.9(b). Section 14(a)(2) of FIFRA provides that "[a]ny private applicator or . . . person [other than a pesticide registrant, commercial applicator, wholesaler, dealer, retailer or other distributor] who violates any provision of this subchapter subsequent to receiving a written warning from the Administrator or following a citation for another violation, may be assessed a civil penalty of not more than $1,000 for each offense . . . ." 7 U.S.C. § 136*l*(a)(2).

A "private applicator" is defined in Section 2(e)(2) of FIFRA as "a certified applicator who uses or supervises the use of any pesticide which is classified for restricted use for purposes of producing any agricultural commodity on property owned or rented by the applicator or the

[6] A number of the witnesses testified with the aide of a certified English-Spanish translator and a number of the exhibits were translated from Spanish to English in connection with this proceeding.

applicator's employer or (if applied without compensation other than trading of personal services between producers of agricultural commodities) on the property of another person." 7 U.S.C. § 136(e)(2).

Subpart B of Part 170, the WPS standard for workers, applies "when any pesticide product is used on an agricultural establishment in the production of agricultural plants" (40 C.F.R. § 170.102), and sets forth duties and prohibitions for "agricultural employers," defined as:

> [A]ny person who hires or contracts for the services of workers, for any type of compensation, to perform activities related to the production of agricultural plants, or any person who is an owner of or is responsible for the management or condition of an agricultural establishment that uses such workers.

40 C.F.R. § 170.3. Subpart C of Part 170, the WPS applicable to pesticide handlers, applies "when any pesticide is handled for use on an agricultural establishment" (40 C.F.R. § 170.202), and sets forth duties and prohibitions for "handler employers," defined as "any person who is self-employed as a handler or who employs any handler, for any type of compensation." 40 C.F.R. § 170.3.

Agricultural employers are required to provide workers with information about pesticide applications. Specifically, 40 C.F.R. § 170.122 states:

> When workers are on an agricultural establishment and, within the last *30 days*, a pesticide covered by this subpart has been applied on the establishment or a restricted-entry interval has been in effect, the agricultural employer shall display . . . specific information about the pesticide.
> (a) . . .The information shall be displayed in the location specified for the pesticide safety poster in Sec. 170.135(d) and shall be accessible and legible . . . .
> (b)(1) If warning signs are posted for the treated area before an application, the specific application information for that application shall be posted at the same time or earlier.
> (2) The information shall be posted before the application takes place, if workers will be on the establishment during application. Otherwise, the information shall be posted at the beginning of any worker's first work period.
> (3) 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 .
> (c) . . . The information shall include: (1) The location and description of the treated area. (2) The product name, EPA registration number, and active ingredient(s) of the pesticide. (3) The time and date the pesticide is to be applied. (4) The restricted-entry interval for the pesticide.

Similarly, handler employers are required to provide their handlers with such information. The requirement regarding display of pesticide application for handlers, in 40 C.F.R. 170.222, is identical except that the word "handlers" or "handler's" appears where the term "workers" or "worker's" appears in Section 170.122, and the term "handler employer" appears in Section 170.222 instead of the term "agricultural employer" in Section 170.122.[7]

As to decontamination supplies for workers, the WPS provides at 40 C.F.R. § 170.150, in pertinent part as follows:

> (a)(1) *Requirement.* The agricultural employer must provide decontamination supplies for workers in accordance with this section whenever:
> (i) Any worker on the agricultural establishment 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;
> (ii) The worker contacts anything that has been treated with the pesticide, including, but not limited to soil, water, plants, plant surfaces, and plant parts.
> * * *
> (b) *General conditions.* (1) The agricultural employer shall provide workers with enough water for routine washing and emergency eyeflushing.
> * * *

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[7] Section 170.222 provides, in pertinent part:

> When handlers ... are on an agricultural establishment and, within the last 30 days, a pesticide covered by this subpart has been applied on the establishment or a restricted-entry interval has been in effect, the handler employer shall display ... specific information about the pesticide... The information shall be displayed in the same location specified for the pesticide safety poster in Sec. 170.235(d) of this part and shall be accessible and legible, as specified in Sec. 170.235(e) and (f) of this part... If warning signs are posted for the treated area before an application, the specific application information for that application shall be posted at the same time or earlier... The information shall be posted before the application takes place, if handlers ... will be on the establishment during application. Otherwise, the information shall be posted at the beginning of any such handler's first work period... 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 the handlers are no longer on the establishment, whichever is earlier... The information shall include: (1) The location and description of the treated area. (2) The product name, EPA registration number, and active ingredient(s) of the pesticide. (3) The time and date the pesticide is to be applied. (4) The restricted-entry interval for the pesticide.

(3) The agricultural employer shall provide soap and single-use towels in quantities sufficient to meet worker's needs.

* * *

(c) *Location*. (1) The decontamination supplies shall be located together and be reasonably accessible to and not more than 1/4 mile from where workers are working.
(2) For worker activities performed more than 1/4 mile from the nearest place of vehicular access:
(i) The soap, single-use towels, and water may be at the nearest place of vehicular access.
(ii) The agricultural employer may permit workers to use clean water from springs, streams, lakes, or other sources for decontamination at the remote work site, if such water is more accessible than the water located at the nearest place of vehicular access.

Decontamination supply requirements for handlers are provided in 40 C.F.R. § 170.250 as follows, in pertinent part:

(a) *Requirement.* During any handling activity, the handler employer shall provide for handlers, in accordance with this section, decontamination supplies for washing off pesticides and pesticide residues.
(b) *General conditions.* (1) The handler employer shall provide handlers with enough water for routine washing and emergency eyeflushing, and for washing the entire body in case of an emergency.

* * *

(3) The handler employer shall provide soap and single-use towels in quantities sufficient to meet handlers's needs.
(4) The handler employer shall provide one clean change of clothing, such as coveralls, for use in an emergency.
(c) *Location*. The decontamination supplies shall be located together and be reasonably accessible to and not more than 1/4 mile from where workers are working.

* * *

(3) *Exception for handling pesticides in remote areas.* When handling activities are performed more than 1/4 mile from the nearest place of vehicular access:
(i) The soap, single-use towels, clean change of clothing, and water may be at the nearest place of vehicular access.
(ii) The handler employer may permit handlers to use clean water from springs, streams, lakes, or other sources for decontamination at the remote work site, if such water is more accessible than the water located at the nearest place of vehicular access.

* * *

(d) *Emergency eyeflushing*. To provide for emergency eyeflushing, the handler employer shall assure that at least 1 pint of water is immediately available to each

handler who is performing tasks for which the pesticide labeling requires protective eyewear. The eyeflush water shall be carried by the handler, or shall be on the vehicle . . . the handler is using, or shall be otherwise immediately accessible.
(e) *Decontamination after handling activities.* At the end of any exposure period, the handler employer shall provide at the site where handlers remove personal protective equipment, soap, clean towels, and a sufficient amount of water so that the handlers may wash thoroughly.

Pesticide handlers are also required to have personal protective equipment ("PPE"), defined as "devices and apparel that are worn to protect the body from contact with pesticides or pesticide residues, including, but not limited to, coveralls, chemical-resistant suits, chemical resistant gloves, chemical-resistant footwear, respiratory protection devices, chemical resistant aprons, chemical-resistant headgear, and protective eyewear," the latter of which is defined as goggles, face shield, safety glasses or full face respirator. 40 C.F.R. § 170.240(b)(1) and (7). The requirements for pesticide handlers are set forth in 40 C.F.R. § 170.240 as follows, in pertinent part:

(c) *Provision*. When personal protective equipment is specified by the labeling of any pesticide for any handling activity, the handler employer shall provide the appropriate personal protective equipment in clean and operating condition to the handler.

* * *

(f) *Cleaning and maintenance.*
(1) The handler employer shall assure that all personal protective equipment is cleaned according to the manufacturer's instructions or pesticide product labeling instructions before each day of reuse.

* * *

(3) The handler employer shall assure that contaminated personal protective equipment is kept separately and washed separately from any other clothing or laundry.

* * *

(5) The handler employer shall assure that all personal protective equipment is stored separately from personal clothing and apart from pesticide-contaminated areas.

* * *

(9) The handler employer shall assure that handlers have a clean place(s) away from pesticide storage and pesticide use areas where they may:
(i) Store personal clothing not in use.

* * *

(10) The handler employer shall not allow or direct any handler to wear home or to take home personal protective equipment contaminated with pesticides.

III. Conclusions in the Order on Motion for Accelerated Decision

The October 4th Order on Accelerated Decision concluded that Respondent is a "person," an "agricultural employer," a "handler employer," an "owner" of an agricultural establishment, and a "private applicator" as defined by FIFRA and the WPS, and that Respondent's "Jauca facility" is an "agricultural establishment." October 4th Order.

The parties stipulated 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). Based upon this stipulation and the undisputed facts evidencing that ClearOut had been applied at the facility 57 times in the 30 days preceding April 26, 2004, the October 4th Order concluded that there were no genuine issues of material fact regarding Respondent's liability for violating Section 170.122 of the WPS and Section 12(a)(2)(G) of FIFRA by making the 57 admitted applications of ClearOut without posting the required information for workers. Therefore, Respondent was found liable on Accelerated Decision for Counts 1, 2, 6-8, 10, 11, 13, 15, 17, 18, 20, 23, 25, 30, 34, 36, 40, 44-46, 48, 50, 55, 58, 60, 68-72, 74, 76, 82-84, 86-88, 90, 94, 95, 99, 103, 111, 112, 119, 120, 127, 128, 133, 136, 137, 144, 145, 150 and 151 of the Complaint.

As it was undisputed that handlers also were at the Jauca facility during the April 26th inspection, the October 4th Order further concluded that there were no genuine issues of material fact regarding Respondent's liability for violating Section 170.222 of the WPS by making the 57 admitted applications of ClearOut without posting the required information for *handlers.* In making this ruling, Respondent's contention that the violations contained in Counts 154-304 regarding "handlers" are improperly duplicative of those in Counts 1-151 regarding "workers," was rejected. October 4th Order, slip op. at 21.

Specifically, Respondent had argued that the regulatory requirements for workers and handlers are identical, and agricultural establishments are not required to duplicate their posting sites or to provide the identical WPS information separately to workers and to handlers, who share the same working environment, and so counts 154-304 should be dismissed. Complainant, on the other hand, successfully argued that EPA's revision of the WPS in 1992 deliberately changed the structure of the WPS regulations from a single set covering all farm workers to two sets designed to target two different types of agricultural employees, namely workers and handlers, and that regardless of whether a single posting could meet both 40 C.F.R. §§ 170.122 and 170.222, Respondent had separate duties to provide the pesticide application information to its workers and to its handlers. Therefore, Respondent was found liable on Accelerated Decision for the handler Counts # 154, 155, 159-161, 163, 164, 166, 168, 170, 171, 173, 176, 178, 183, 187, 189, 193, 197-199, 201, 203, 208, 211, 213, 221-225, 227, 229, 235-237, 239-241, 243, 247, 248, 252, 256, 264, 265, 272, 273, 280, 281, 286, 289, 290, 297, 298, 303, and 304 of the Complaint.

Respondent also argued in opposition to the accelerated decision motion that pesticide application numbers 31, 32, 35, 184, 185 and 188 took place at a "nursery" rather than a farm

and therefore such applications were not required to be displayed. The Order on accelerated decision rejected this argument based upon the fact that the WPS *explicitly* lists "nurseries" as part of the definition of an "agricultural establishment," and consequently Respondent was also found liable on Counts 31, 32, 35, 184, 185, and 188. Furthermore, the October 4th Order found that as to Applications 29 and 59, corresponding to Counts 29, 59, 182 and 212, Respondent's simple response of "?" in its Answer (¶¶ 56, 71) did not bar a finding of liability, so accelerated decision as to Respondent's liability was granted for Counts 29, 59, 182 and 212.

As to the issue of decontamination supplies, based upon the stipulations that Kocide was applied to the JC-11 mango field at the Jauca farm on April 21, 2004, that the Kocide label required an eye-flush container designed specifically for flushing eyes be available to workers for seven days after application, that workers were working in the JC-11 field on April 26, 2004, and that no such eye-flush container was available to the workers on April 26, 2004 (Stipulations 25, 27, 28, 29), accelerated decision was further granted in favor of Complainant on Count 153.

Accelerated decision was denied as to the remaining counts for which accelerated decision was requested, and therefore liability for those counts, and Counts 335 and 336, remained at issue for the hearing.

IV. Order Denying Second Motion for Interlocutory Review

Respondent sought interlocutory review of the October 4th Order on Accelerated Decision. The presiding judge may recommend an order or ruling for interlocutory review by the Environmental Appeals Board (EAB) when the order "involves an important question of law or policy concerning which there is substantial grounds for difference of opinion" *and* an immediate appeal will materially advance the termination of the proceeding or review after the final order will be inadequate or ineffective. 40 C.F.R. §22.29(b). Respondent sought interlocutory review on the following grounds: (1) that many allegations of violation are flawed; (2) that as to the application display requirements, Complainant's Exhibit 21 was not considered and Stipulation 23 was not interpreted correctly; and (3) that as to Count 153, Complainant's Exhibit 13 indicates that a five-gallon drinking can was available to the workers, and EPA's Agricultural Worker Protection Standard 40 CFR Parts 156 and 170 Interpretive Policy ("Interpretive Policy") would allow such amount of water to satisfy eye-flush requirements.

The October 12th Order denying interlocutory review first observed that the argument that many allegations are flawed simply reiterates arguments set forth in Respondent's Answer which were fully addressed in the October 4th Order. Second, the October 12th Order stated that Complainant's Exhibit 21 was considered and referenced several times in the October 4th Order, and that Respondent's characterization of Stipulation 23 is incorrect. Third, the October 12th Order pointed out that the label on Kocide required an eye-flush *container* designed specifically for flushing eyes, and that the Interpretive Policy only addresses the WPS requirement of *emergency* eye-flush under 40 C.F.R. § 170.150. Therefore, the October 12th Order did not recommend the October 4th Order on Accelerated Decision for interlocutory review, finding that

the issues decided did not meet the standard set forth in 40 C.F.R. § 22.29(b)(1) in that they did not "involve[] an important question of law or policy concerning which there is substantial grounds for difference of opinion."

V. Findings of Fact

A. Martex Farms

1. Respondent Martex Farms, S.E. owns five agricultural establishments on almost 3000 acres in Puerto Rico, comprising the largest tropical fruit farm, and one of the largest farm companies, in Puerto Rico. Tr. 1079. 1144, 1290, 1351. Sixty percent of Respondent's sales volume comes from mangoes, most of which are exported to Europe. Tr. 1154-1156. Martex has a gross income of over $10 million dollars. Tr. 1293.

2. Martex's agricultural establishments, or farms, are called Jauca, Coto Laurel, Paso Seco, Rio Canas and Descalabrado. Tr. 1142-1144, 1718, 1812; R's Ex. 14. The Jauca farm consists of close to 1,000 acres. Tr. 1293. In 1999, Respondent acquired property, including the Coto Laurel farm, from International Fruits, Inc. Tr. 1140-1142.

3. Respondent has 300 to 400 employees, including three to six handlers at the Jauca farm. Tr. 1184, 1290, 1440, 1811. There are twelve supervisors at the Jauca farm, including one in charge of pesticide spraying, and each has a vehicle. Tr. 1507, 1736, 1787.

4. Mr. Venancio Luis Marti, *Sr.*, a licensed civil engineer, started his career in the construction business in Puerto Rico in 1968, and created two construction companies - Martex General Construction and Martex Development, in which he is still actively involved. Tr. 1124, 1126-1127, 1333-1334. About 20 to 25 years ago, he started agricultural operations and developed and became president of Respondent Martex, S.E. Tr. 1127. In 2005, Mr. Marti, Sr., was appointed by the U.S. Department of Agriculture to be a member of the National Mango Board, and represents all of the mango producers in the United States. Tr. 1134-1136; R's Ex. 41.

5. Mr. Venancio Luis Marti, *Jr.*, has a master's degree in Business Administration, and is the vice president and an owner of Respondent Martex. Tr. 1389, 1542, 1719. He is in charge of Respondent's local sales, supervising the packing and processing plants, and supporting the farm supervisors. Tr. 1389-1390.

6. Mr. Acosta is Respondent's field agronomist. Tr. 1811. Mr. Jaime Oyola is an agronomist and is Respondent's purchasing manager. Tr. 1390-1391.

B. Pesticide Application, Labels, Toxicity and Required Personal Protective Equipment

7. Pesticides are applied at Respondent's farms by handlers either spraying from tractors or manually spot-spraying from a canister carried on the handler's back. Tr. 1295, 1450-1451. Most pesticides are applied in the evening, after 4:00 p.m., but the herbicides, such as ClearOut, are applied during the day. Tr. 1303-1304, 1378-1379. Because the rows of bananas and palms are narrow, herbicides are applied manually, and because the plantation is large, to cover the amount of area required, three handlers at a time apply a herbicide; one handler working alone would take days to apply it. Tr. 1305-1306, 1441, 1451.

8. Yvette Hopkins testified for Complainant as an expert in EPA pesticide registration procedures and standards. Tr. 664.

9. Dr. Enache testified as an expert in toxicology and pesticide use. Tr. 909.

10. Toxicity is measured on the basis of dermal and eye sensitization, and inhalation and oral toxicity. Tr. 678-679.

11. Trilogy has the signal word "Caution" on its label, which indicates it is in Category 3 for toxicity, the second to lowest category of toxicity. Tr. 678-679, 928; C's Ex. 19. For Trilogy, the reentry interval ("REI"), or the minimum amount of time workers must wait after application before entering the field, is four hours. Tr. 693-694; C's Ex. 19 p. 2. Trilogy is a biological product, an extract of Neem, a plant from Southeast Asia. Tr. 694-695. For Trilogy, the "Lethal Dose 50," *i.e*, the dose at which 50 percent of persons exposed dermally or orally to the chemical would die, is 2.5 to 3 cups of Trilogy for a person of average weight of 160 pounds. Tr. 928-931. Possible harmful effects from less exposure are moderate to severe skin problems, upper respiratory irritation, and moderate to severe eye irritation. Tr. 929.

12. The label for Kocide, which contains 77% copper hydroxide, has the signal word "Danger," placing it in Category 1 for toxicity, and is very corrosive to eyes. Tr. 680-681. The Kocide label requires a dedicated eyeflush container and eyewash to be available for 7 days after application for workers and handlers. Tr. 682; C's Ex. 18 p. 5. In the event it gets into the eye, the label requires rinsing the eye with water for 15 to 20 minutes (C's Ex. 18 p. 3), which, Ms. Hopkins testified, would require six to eight gallons of water using an eyeflush container. Tr. 683. Dr. Enache testified that Kocide exposure may cause irreversible eye damage and even blindness, ingestion may cause renal failure and severe gastrointestinal problems, and repeated inhalation exposure may cause lung failure. Tr. 938, 941. Dr. Enache further testified that four teaspoons can cause any of these effects. Tr. 938, 941. Repeated exposure to copper hydroxide leads to copper poisoning. Tr. 939-940. Handlers working with Kocide are required to have personal protective equipment including chemical resistant gloves and protective eyewear, which could be goggles, safety glasses with bridge and temple protection, or a face shield. Tr. 683; C's Ex. 18; Stipulation 33. The REI for Kocide is 24 hours. Tr. 698; C's Ex. 18.

13. Boa, which contains 37% paraquat dichloride, is a Restricted Use Pesticide (RUP), which may be fatal if swallowed or inhaled, and its label requires handlers of it to use chemical resistant gloves, protective eyewear, and a National Institute of Occupational Safety and Health (NIOSH) approved dust or mist respirator with N, R, P or HE filter. Tr. 686, 688-689; C's Ex. 17; Stipulation 34. The Boa label requires that when mixing and/or loading Boa handlers must wear a face shield and chemical-resistant apron in addition to the gloves and respirator. Stipulation 34; C's Ex. 17. As with Kocide and ClearOut, in the event Boa gets into the eye, the label requires rinsing the eye with water for 15 to 20 minutes, which, Ms. Hopkins testified, would require six to eight gallons of water using an eyeflush container. Tr. 689. Dr. Enache testified that if poisoning with Boa is not treated immediately it leads to the failure of organs such as lung, kidney and liver. Tr. 942. He further testified that dermal exposure results in the skin breaking apart and the skin "keeps on breaking apart, the fingernails fall," and ulcerations, and perhaps death. Tr. 942-943. Dr. Enache described Boa as "one of the most toxic pesticides available on the market these days," that the Lethal Dose 50 is 15 to 50 milligrams per kilogram of body weight, and that exposure to half of a teaspoon could cause these effects. Tr. 941-943. The REI for Boa is 24 hours. C's Ex. 17; Tr. 700.

14. ClearOut, which contains 41% glyphosate, has the signal word "Danger" on its label, and is in Category 1 for toxicity, based on its formulation, which includes ingredients that are more toxic than the glyphosate. Tr. 684-685, 932-933; C's Ex. 20. ClearOut's label further states that it causes irreversible eye damage, and that it is harmful if swallowed or absorbed through skin. C's Ex. 20; Tr. 685-686, 933. The label requires handlers to wear chemical resistant gloves and protective eyewear when working with it. C's Ex. 20. Dr. Enache testified that ClearOut is extremely corrosive and that severe exposures may cause very severe dermatitis or affect the central nervous system. Tr. 933, 936. He further testified that the Lethal Dose 50 for glyphosate is 4,300 milligrams per kilogram of body weight, and exposure to 1.2 cups of ClearOut would trigger the adverse health effects, which a handler can get exposed to within half of a day working without the required PPE. Tr. 933-934. Dr. Enache testified that repeated exposure to ClearOut is "going to lead to chronic effects." Tr. 937. In the event it gets into the eye, the label requires rinsing the eye with water for 15 to 20 minutes, which, Ms. Hopkins testified, would require six to eight gallons of water using an eyeflush container. Tr. 686. The REI for ClearOut is 12 hours, and it is applied during the day. C's Ex. 20; Tr. 700, 1375.

C. The Inspections in 2003

15. Since 1973, U.S. EPA and the Puerto Rico Department of Agriculture (PRDA) have agreed that PRDA will enforce FIFRA in Puerto Rico. Tr. 73, 154.

16. On March 24, 2003, Ms. Dilsia Barros Lopez of PRDA and Anthony Lammano of the New York State Department of Environmental Conservation conducted an inspection of Martex's Jauca farm. Tr. 969-972; R's Ex. 30. It was noted in the Summary of Findings

of the inspection that the central information area complies with the legal requirements, that no violation was found as to pesticide safety training, and that PPE and the decontamination site were inspected and no violations were found. R's Exs. 27, 30. *See also*, Tr. 974-980, 1030.

17. Mr. Munoz is a PRDA pesticide inspector supervisor who has conducted over 200 FIFRA inspections, almost all of which were WPS inspections. Tr. 67-70.

18. On August 20, 2003, Mr. Munoz conducted a FIFRA inspection of Respondent's Coto Laurel farm, along with Mr. Rivera and Jorge Maldonado Medina of the PRDA, and Dr. Enache and Ken Stoller of EPA. Tr. 74-75, 922. Dr. Enache testified that he and Mr. Stoller were taken by the PRDA inspectors to the Coto Laurel facility upon the PRDA inspectors' presumption that it would be an example of a facility which would be in compliance with the law, and that they were surprised to find violations. Tr. 924-925, 986. They observed that the WPS display records at Coto Laurel facility did not include information as to the percentage of active ingredient in the pesticides, EPA registration number, and re-entry interval. Tr. 79-80, 922-923; C's Ex. 1 pp. 25-36, C's Ex. 1-B. They also observed that there were no disposable towels at the facility for the workers, and that there was no training program for the workers. Tr. 80-81, 85, 922-923, 959-960; C's Ex. 1, 1-B.

19. Based on the August 20, 2003 inspection of the Coto Laurel farm, a Notice of Warning was issued by PRDA to Martex on September 26, 2003 alleging that Respondent failed to: (1) place pesticide warning signs 24 hours before application and remove them *after* (rather than when) the re-entry interval expired; (2) include in its application records EPA registration, active ingredient, and re-entry interval information; (3) maintain a training program of pesticide safety; and (4) provide disposable towels to remove pesticide residue. C's Exs. 2, 2A; Tr. 924. These are alleged violations of 40 C.F.R. §§ 170.120(c)(6)(i) and (iii), 170.122(c)(2) and (4), 170.222(c)(2) and (4), 170.130(d) and (e), 170.150(b)(3) and 170.250(b)(3).

20. Mr. Rivera is a pesticide inspector employed by the PRDA, who has conducted over 200 inspections on behalf of PRDA and EPA, over 100 of which were WPS inspections. Tr. 225-228.

21. On September 5, 2003, Mr. Rivera conducted a FIFRA inspection at the Jauca farm, during which he was accompanied by Mr. Acosta of Martex. C's Ex. 10; Tr. 229-230, 233, 445. Mr. Rivera observed at that time that pesticide application records were posted in the central office area, but as to one of the products no EPA registration number was listed. Tr. 235-237. As to PPE, during the inspection Mr. Acosta showed Mr. Rivera a locked storage box which he represented contained PPE, but indicated he did not have the key to it with him, so Mr. Rivera could not personally observe the contents of the box. Tr. 237-238. Mr. Acosta also pointed out to the inspector what Mr. Rivera described as "clean, brand new" water resistant coveralls, dust masks, and waterproof

gloves, all located in the farm's main office. Tr. 238. Mr. Rivera did not see respirators, face masks, or chemical resistant aprons. Tr. 239. In the absence of Mr. Acosta, Mr. Rivera interviewed eight workers who were in a banana field, cutting dry leaves with machetes, and asked them if water, disposable towels and soap were provided, and the workers indicated that they did not know what a decontamination area was and that these items were not provided. Tr. 240-241, 244-245, 445-448, 450, 453-454; C's Ex. 10 p. 6; C's Ex. 10B p. 58. Mr. Rivera testified that he did not see any such items or even drinking water in the field. Tr. 240-241. Mr. Rivera pointed out to the workers that water, soap and shower are available in the workshop building. Tr. 454. He did not observe any handlers applying pesticide at the Jauca facility that day. Tr. 486. He testified that he asked Mr. Acosta whether he had a WPS training program, and that Mr. Acosta said he did not. Tr. 247. Mr. Rivera said he gave Mr. Acosta two training program cassettes, presented the WPS inspection checklist, and had him sign an Affidavit indicating the findings upon inspection. Tr. 247, 249-251, 254-255; C's Ex. 10 p. 8; C's Ex. 10B.

22. Based on the September 5, 2003 inspection of the Jauca facility, a Notice of Warning was issued by PRDA to Martex on October 30, 2003, alleging with regard to the Jauca farm that Respondent: (1) did not have the EPA registration number for mineral oil in the WPS display records; (2) did not have a WPS training program for workers without WPS cards; and (3) did not provide water, soap, or disposable towels for workers. These are alleged violations of 40 C.F.R. §§ 170.122(c)(2), 170.130(a)(3) and (d)(1), and 170.150(b)(10 and (3). C's Exs. 11, 11-A.

23. Also on September 5, 2003, Mr. Munoz of EPA conducted a FIFRA inspection of Respondent's Rio Canas farm, along with Jorge Maldonado Medina, a PRDA inspector. Tr. 91-92; C's Ex. 7; R's Ex. 20. Mr. Munoz observed during the inspection that not all of the pesticide application records for the last 30 days were posted, that such records did not include the EPA registration numbers, that only two out of 10 workers had received PRDA pesticide training, and that the workers did not have decontamination supplies of water, soap and towels. Tr. 94; C's Ex. 7; R's Ex. 20. Based on this inspection, the PRDA issued a Notice of Violation to Martex on October 29, 2003 with regard to the Rio Canas farm alleging that Respondent (1) did not maintain WPS display records in the central information area for 30 days following application; (2) did not maintain WPS display records with EPA registration numbers; (3) did not maintain a training program on pesticide safety; and (4) did not provide water, soap and disposable towels. These are alleged violations of 40 C.F.R. §§ 170.122(b)(3); 170.222(b)(3), 170.122 (c)(2)(4), 170.222(c)(2)(4); 170.130(d) and (e), an 170.150(b)(3). C's Ex. 8, 8-A.

24. In a follow-up inspection of the Rio Canas farm on or about September 9, 2003, Mr. Maldonado noted that the violations regarding the application logs and decontamination equipment had been corrected, and that there were no violations occurring during a pesticide application he observed. Tr. 1456-1459; R's Ex. 20.

25. On December 5, 2003, Mr. Jose Alberto de Jesus, a PRDA inspector, conducted an inspection of Respondent's Paso Seco farm, and noted that it did not have a WPS training program. Tr. 96-97.

26. On October 6, 2003, PRDA issued a Notice of Violation alleging that Respondent had not provided evidence that its workers had receive all the requisite training over the past 5 years. C's Exs. 6, 6-A.

D. The Jauca Facility and Inspection on April 26, 2004

27. Mr. Rivera conducted an inspection of Martex's Jauca facility on April 26, 2004, starting at 8:45 a.m., with EPA inspectors Ms. Masters and Ms. Vera Soltero observing the inspection. Tr. 257-258, 569-570. Ms. Soltero served as a translator for Ms. Masters since the latter did not speak Spanish. Tr. 570, 614, 636-637, 641, 644-645.

Decontamination

28. During the April 26, 2004 inspection of the Jauca farm, Mr. Rivera and Ms. Masters observed a decontamination site for handlers at the workshop which had a shower and soap, but it did not include a towel, paper towels or eyeflush. Tr. 264, 397-398, 576-577, 584; C's Ex. 13 p. 4, 85, C's Ex. 13 p. 82.

29. On April 21, 2004, Kocide was applied to the JC 11 field. C's Ex. 13 p. 19, C's Ex. 13-C p. 78. During the April 26, 2004 inspection, Mr. Rivera, along with Ms. Masters, interviewed about 20 workers in the JC 11 field, who were harvesting mangoes. Tr. 267; C's Ex. 13 p. 4. The temperature was between 80 and 90 degrees, and it was humid. Tr. 582. Mr. Acosta was not present during the interview. Tr. 1734. Mr. Rivera observed several automobiles in the area, which suggested to him that workers drove directly to the field. Tr. 299-300; C's Ex. 13 p. 4. He and Ms. Masters observed that in the field there was a five gallon can of water, but there was no soap, paper towels or additional water in the field. Tr. 267-268, 583, 607-608; C's Ex. 13 p. 4. Mr. Rivera's Agricultural Worker Interview form included the question "Do you know *what* a decontamination area is?" and the answer was marked "Yes," and to the next question "*where* is it?" the handwritten response was "Yes," apparently because, as he testified at hearing, he asked them *if they knew* where the decontamination area was. C's Ex. 13 p. 86; C's Ex. 13-C p. 83; Tr. 459. He did not check any box on the form for the question "Is it available all day." *Id.* Boxes on the form were checked for the items potable water, soap, paper towels, and fresh water, a box was checked to indicate the employer provided it, and a handwritten note stated "Decon site of the warehouse did not have soap or towel." *Id.* He explained on cross and redirect examination that he asked the workers if they knew what a decontamination site is supposed to have, and they provided correct answers so he marked the form accordingly. Tr. 461-463, 516-519, 524. Mr. Rivera and Ms. Masters

believed that the workshop was the closest decontamination site to the workers in the JC 11 field. Tr. 268, 583-584.

30. Ms. Masters testified that Mr. Acosta drove them to the field where the workers were picking mangoes, and when they were out in the field, Mr. Rivera and Ms. Masters asked Mr. Acosta whether there were any decontamination supplies at the site of the workers, and that he said "no." Tr. 608-610, 613.

31. Mr. Acosta stated at the hearing that on April 26, 2004, Mr. Rivera did not ask him whether the workers have water, and that when they were in the field with the workers, Mr. Rivera did not ask him to show decontamination supplies, and that if the inspectors had asked him where the decontamination materials were, he would have said, "in the supervisor's vehicle." Tr. 1772-1773, 1868-1869, 1871-1872. While he agreed on cross examination with counsel's statement "[y]ou testified that the inspectors asked to see decontamination supplies," he testified immediately afterward about PPE and therefore apparently was referring only to PPE. Tr. 1866-1867. Mr. Acosta testified that Mr. Rey, a mango harvesting supervisor, was in the field with the workers on April 26, 2004 and waited with him while Mr. Rivera interviewed the workers, and that Mr. Jose Martinez, another mango harvesting supervisor, was in the next field, JC-21. Tr. 1734-1735, 1739-1740, 1872. Mr. Acosta answered in the affirmative when asked whether, on April 26, 2004, he and Mr. Rey had water in their trucks, whether on that date he had the decontamination materials in his truck, and whether he knew if Mr. Rey had the same materials on that day. Tr. 1737-1739. He testified that Mr. Martinez "had the material and equipment out in the field." Tr. 1872.

32. Mr. Marti, Sr. suggested that the main decontamination area is the supervisors' pickup truck. Tr. 1319. Mr. Acosta and the supervisors all have pickup trucks in which they carry water, and the workers always have one or more supervisors around. Tr. 1310, 1508, 1736-1737, 1740. Mr. Marti, Sr. testified that the supervisors also have decontamination equipment including a PVC pipe, which is used to contain the decontamination equipment, but he was not sure that they had it at the time of the inspections. Tr. 1152, 1310-1311, 1319. *See also*, R's Ex. 49 (photograph showing PVC pipe at Coto Laurel decontamination area). Mr. Acosta and Mr. Marti, Jr. testified that the supervisors all carry in their trucks five gallon containers of water as well as soap, paper towels, and "protection equipment," which Mr. Marti, Jr. described as an extra set of coveralls, an extra set of gloves and eyewash. Tr. 1506, 1736-1738. Mr. Acosta testified that his truck contains an overall, towel, a roll of paper towels, soap and one or two gallon bottles. Tr. 1738-1739.

33. Mr. Marti, Jr. testified that since he can remember, the handler supervisors had decontamination equipment in their pickup trucks, and that after the September 2003 inspections, Martex assigned more decontamination materials to the harvest supervisors. Tr. 1535-1536.

34. The handler supervisor, with written pesticide spraying instructions, meets with handlers in front of the office and gives instructions to each handler. The handlers get in the supervisor's pickup truck and travel to the workshop, pick up the chemicals and equipment, and travel to the mixing site, and mix the pesticide in the tanks. Tr. 1556-1557.

35. At the Jauca farm, near the Jauca 41 and 42 fields in the southern part of the farm, along the road which Mr. Rivera went to interview the workers at the Jauca 11 field and to return to the storage and workshop areas, is a fruit washing station, which is a metal pipe structure with sprays, and which has a faucet to which a hose can be attached. Tr. 1320-1324, 1464-1467, 1473, 1770-1772, 1775-1776.; R's Exs. 50, 51. The fruit washing station does not include soap or towels. Tr. 1323, 1325; R's Ex. 50. There is a five-acre irrigation lake near the OS-11 field on the northern part of the Jauca farm. Tr. 1329-1332, 1469, 1471; R's Ex. 51. Near the lake there is a hose and valve used for filling pesticide mixing tanks with water. Tr. 1325-1328, 1470; R's Ex. 50.

36. Respondent presents photographs and documents which indicate that it supplied decontamination materials to supervisors and set up mobile decontamination sites, but these photographs and documents are dated after the initial Complaint was filed or are undated. R's Exs. 15, 16, 17, 18, 19.

37. A log of purchases of decontamination materials, including eye cups, eyewash, soap and single-use towels since January 2003, shows that between February 2003 and before May 2004, Respondent made three purchases of $132 for four boxes containing 12 packages of 400 single-use towels, and one purchase of two boxes of soap for $179.50. R's Ex. 11; Tr. 1515-1516. However, Mr. Marti, Jr. testified that these supplies are used not only as decontamination materials, but are also used in the bathrooms at the different farms, and at the processing plant. Tr. 1399-1400.

PPE

38. After interviewing the workers during his April 26, 2004 inspection, Mr. Rivera asked to see the farm's personal protective equipment (PPE). C's Ex. 13 p. 4; Tr. 284. Although Mr. Acosta said that PPE was located in the workshop, the inspectors did not see any PPE there, but did see a locked wooden box on the wall of the workshop, with no key available. Tr. 284-285, 578-579; 1778-1780. Mr. Acosta testified that the box contained face masks, that some "masks" were being used by handlers on the evening shift, which begins at 4 p.m., and that in the office there were protection materials in small containers, with overalls and "masks that are used to protect yourself from dust." Tr. 1777, 1779-1780, 1782, 1784, 1867-1868. Mr. Acosta also showed the inspectors a pesticide mixing-loading site, where there was a box containing a glass mixing cup, a waterproof glove, chemical-proof coverall, and first aid supplies, but no eyewash, chemical resistant gloves, chemical resistant apron, safety eyewear, respirator, face mask, or place for handlers to store clean clothes. Tr. 286-289; C's Ex. 13 p. 4.

39. Mr. Rivera did not see any handlers at the Jauca facility on April 26, 2004. Tr. 485-486. The only pesticide applications scheduled during the day of April 26th were applications of Boa by three handlers at 6:30 a.m. to a banana field and applications of ClearOut by Mr. Pewee to two fields, and the earliest pesticide (Kocide) application scheduled for the evening shift was at 4:50 p.m. C's Ex. 21 pp. 105-108.

40. From January 2003 through March 2005, Respondent periodically purchased chemical resistant gloves, dust masks, aprons, hand soap, and single-use towels. R's Ex. 11; Tr. 1392-1399. Respondent purchased coveralls, respirators and filter cartridges and pesticide pre-filters for the respirators prior to the April 26, 2004 inspection. R's Ex. 11; Tr. 1401-1404. Respondent purchased eye-wash containers in January and December 2003 and May and November 2004, and eyewash in October and December 2003 and May and November 2004. R's Ex. 11; Tr. 1404-1408. A log of purchases of PPE from January 2003 until the April 26, 2004 inspection shows that Respondent purchased a box of dust masks for $101 in May 2003, a box of dust masks for $119 in September 2003, many boxes containing over 50 masks identified as "Disp. Resp. Nuisance 50/BX mask" at $8.60 per box, three masks identified as "P.E.L. 2000 ½ mask M/L F95" for $36 per mask, five masks identified as "P.E.L. 1000 ½ mask LG F" for $16 per mask, many boxes of tyvek coveralls and nitrille gloves, six boxes of respirators at $85 per box, respirator cartridges and filters, goggles, and many "aprons" and "gloves." R's Ex. 11. Most of Respondent's suppliers are in Puerto Rico, in the vicinity of the farms. Tr. 1397-1400, 1404. Mr. Marti, Jr. testified that PPE is used every day on the farm. Tr. 1581.

Notification of Pesticide Applications

41. During the inspection, Mr. Rivera and Ms. Masters observed that in the central posting area at the Jauca facility, there were documents posted ("WPS Display Records") containing information of pesticides applied, date of application, active ingredient, EPA registration number, and reentry interval. C's Ex. 13; Tr. 292-296, 574, 596-597, 599-600. The WPS Display Records were posted in a binder placed in a holder on a bulletin board on the porch of the main building at the Jauca farm. Tr. 536-537; R's Ex. 3.

42. Mr. Rivera and Ms. Masters reviewed each page of the WPS Display Records for the prior 30 days of pesticide applications, and observed that they did not include any applications of ClearOut. C's Ex. 13; C's Ex. 13-C p. 78; Tr. 292-296, 334, 413, 502-504, 535-537, 539-541, 595-597, 600-601, 642-643.

43. After observing the WPS Display Records, at the wrap-up of the inspection, Mr. Rivera asked Mr. Acosta for application records of the last 30 days. Tr. 291-293, 594, 546-547. In response, Mr. Acosta provided the inspector with a one-page chart with 12 handwritten listings of applications of ClearOut made from March 29th to April 2, 2004, and eight pages of records for applications to mango crops from March 26th to April 23, 2004, which Mr. Marti, Jr. described as farm spraying instructions ("Jauca Spraying

Instructions") for mangoes, and included applications of fertilizer, and 15 listings of ClearOut, from March 26th through April 23, 2004, but did not include the EPA registration number, active ingredient, or reentry interval. C's Ex. 13 pp. 4, 8-15, 18; C's Ex. 13-C pp. 68-75, 77; Tr. 292-294, 545-546, 594-595, 1553. The Jauca Spraying Instructions were not the same as the WPS Display Records. *Id.* Mr. Rivera recalled that the WPS Display Records he reviewed were about 30 or 40 pages, and the Jauca Spraying Instructions he reviewed, for mangoes only, had eight pages, listing approximately 98 pesticide applications, including 15 applications of ClearOut, and some fertilizer applications. C's Ex. 13 pp. 8-15; Tr. 292, 539-540.

44. Mr. Rivera testified that he asked Mr. Acosta why there was a difference between the two sets of records (the WPS Display Records and the Jauca Spraying Instructions), and that Mr. Acosta told him that they didn't include herbicide application in their WPS Display Records. Tr. 296.

45. Mr. Marti, Jr. explained that the Jauca Spraying Instructions are used by the agronomists to keep track of what they are doing on the farm, and they are initiated by a handwritten paper given out to the field spraying supervisors to instruct them which product to spray on which field. Tr. 1553-1554; C's Ex. 13 p. 18, C's Ex. 13-C p. 77. At the Jauca farm, there is only one supervisor for pesticide spraying. Tr. 1507. The supervisor assigns the size of the tank and the handler, and gives the handwritten paper to the employee who is in charge of the database at the main office at the Jauca farm, who enters that information into the computer before the application takes place, and produces two documents: handler spray instructions for the specific handler and date, and the WPS Display Record which gets posted on the bulletin board for that day, from that afternoon until the next afternoon. Tr. 1554-1556. The evening work shift begins at 4:00 p.m. Tr. 1782, 1784. After the work shift ends around 11:00 p.m., the handlers give the supervisors spray instructions confirmation and updated information, such as which fields were or were not sprayed and the time of spraying. Tr. 1557-1558. This updated information from the handlers is entered into the records in the database the next day by the person who does computer data entry. Tr. 1558-1559. The updated information is supposed to be reprinted and posted in the WPS Display. Tr. 1562. Mr. Marti, Jr. explained that the discrepancies between the WPS Display Records and the Jauca Spraying Instructions are the result of the latter being updated by the supervisors' confirmation of pesticide applications, and the WPS Display Records not being replaced with the updated information. Tr. 1591-1592; R's Ex. 31.

46. Mr. Acosta observed during the April 26th Jauca inspection that applications of ClearOut made on April 26th were not included in the WPS Display Records. Tr. 1806-1809, 1899-1900. Mr. Acosta did not review the WPS Display Records for the prior month during the April 26th inspection. Tr. 1885-1886.

47. Mr. Rivera asked for and took with him on April 26th the page of Jauca WPS Display Records for only one day, April 21, 2004, because he wanted to prove that workers were

in the area, the JC-11 field, where he interviewed the workers that day, and where a pesticide (Kocide) had been recently applied. Tr. 501, 537-538, 540, 597-599, 641, 1895-1896; C's Ex. 13 p. 19, C's Ex. 13-C p. 78.

48. Mr. Rivera could not remember at the hearing why they did not get a copy of the full set of WPS Display Records for the past 30 days. Tr. 296. Ms. Masters testified that the inspectors did not get a copy of the whole set because "they" (Respondent's personnel) told the inspectors in Spanish, and Ms. Soltero translated to English for Ms. Masters, that the copier was broken. Tr. 596-599, 635-637, 640-642, 1713-1714. The inspectors received copies of the Jauca Spraying Instructions for mangoes for the past month, a chemical inventory, a map of the Jauca farm, and the WPS Display Records for April 21, 2004. Tr. 635-636; C's Ex. 13-B pp. 6, 7; C's Ex. 13-C p. 67. Ms. Masters testified that when they "got to that point that's what they told us, that [the photocopier] was broken or that it had broke, or something to that effect," that the inspectors received the records printed from a computer, and that the WPS Display Records were "the last thing we asked for." Tr. 635-636. Mr. Marti, Jr. testified that farm maps are provided at the beginning of an inspection. Tr. 1422-1423. Mr. Acosta testified, "specifically that day [April 26, 2004] there was a problem with the photo – well, everything was given and everything was okay . . . ." Tr. 1808-1809. Later, in re-cross examination, when asked about that testimony, he stated that he didn't deal with the computer or photocopier, but that the inspectors asked for documents and other employees of Respondent would get them from the computer and print copies, and that whatever the inspectors asked for, he gave to them. Tr. 1898-1899.

49. At the end of the April 26th Jauca inspection, Mr. Rivera drafted an Affidavit listing his findings and had Mr. Acosta read it, and then Mr. Acosta signed the Affidavit. C's Ex. 13 p. 6, C's Ex. 13-C p. 67; Tr. 301, 303, 1793-1795, 1899.

50. The Affidavit regarding the Jauca farm states in part that "[t]he inspectors visited the decontamination shower area and there was no towel there. . . . No inspector found safety glasses or face masks. The herbicide application is not being included on the WPS Reports, but it is documented. . . . There are no disposable towels, soap or water for the workers interviewed." C's Ex. 13 p. 6, C's Ex. 13-C p. 67.

51. Mr. Acosta testified that when he read the Affidavit he told the inspectors that it is "too general" and that "there were things that could be clarified and corrected immediately as had been done before," and that "if there were any irregularities, then, the next day, immediately, they would be corrected . . . ." Tr. 1795-1796. He explained that he "sort of trusted all of the situation because if there was something that was wrong it would be corrected . . . . at that point it was like an inspection, like an audit, which in an audit when something is found, when there's a finding, you're told: You have a month to correct this. And the next time I'm here it has to be corrected. So basically I had been in this strategy for about three or four years and improving." Tr. 1795-1797.

E. The Coto Laurel Facility and Inspection on April 26, 2004

52. At all times relevant to the Complaint, the Respondent's Coto Laurel property included a mechanic shop, a warehouse, an office area, and a 70,000-square-feet packaging and hot-water treatment plant for mangoes. Tr. 1144-1145, 1296-1297; R's Ex. 49.

53. On April 26, 2004, the Coto Laurel farm was inspected by Mr. Munoz, accompanied by Ms. Jennifer Larkins and Mr. Carlton Layne, who are contractors for EPA, and Mr. Jaime Oyola. Tr. 98, 102, 1390; C's Exs. 15, 15A. Neither Mr. Acosta nor Mr. Marti accompanied Mr. Munoz during his inspection of the Coto Laurel farm. Tr. 99, 1724.

54. According to Respondent's pesticide application records, Kocide had been applied on the 20th and 21st of April 2004 in a field referenced as "Mango C-001." Tr. 104, 125; C's Ex. 15 pp. 6, 109; C's Ex. 15A p. 90. Because he could not obtain a photocopy, Mr. Munoz took a photograph of the application record showing the Kocide application on April 21, 2004. C's Ex. 15 p. 109; Tr. 125, 129-130.

55. As part of his inspection, Mr. Munoz interviewed a handler at the farm, who was the only employee present at the farm. Tr. 105-107, 109, 147-148. The handler at the Coto Laurel farm is also the handler supervisor. Tr. 1535. The handler was in the mechanic shop at the time and was not handling pesticides. Tr. 149-150, 192. Mr. Munoz also interviewed Mr. Oyola. Tr. 106. Based on these interviews and his inspection of the facility, Mr. Munoz found that the Coto Laurel farm did not have eye-flush for handlers or a shower for handlers to bathe in after applying pesticides, if necessary. Tr. 107-109, 112-113, 116; C's Ex. 15 pp. 3, 19, 20, 22, 23; C's Ex. 15A p. 99. Mr. Munoz testified that the handler told him "the farm doesn't have any showers," and replied in the negative when asked whether he had a place to take a bath, and that when Mr. Munoz asked Mr. Oyola whether the farm had any showers and any eyeflush he replied in the negative. Tr. 107-108, 113, 119, 182. The decontamination site had soap, clean clothing, water, and a towel, but no shower or place to bathe. Tr. 108, 112.

56. Mr. Munoz acknowledged that the requirement of 40 C.F.R. § 170.250(b) to provide "enough water . . . for washing the entire body in the case of an emergency" does not require a shower, but just requires enough clean water to take a bath. Tr. 210-211.

57. At the time of the inspection, former owners of Fruit International lived in two mobile homes on the Coto Laurel property, in a compound which includes a swimming pool. Tr. 1145-1147. Large water tanks are located on the Coto Laurel property which provided potable water to the packaging plant. Tr. 1147-1148, 1296; R's Exs. 48, 49 photographs 1-3. Mr. Munoz acknowledged he did not remember seeing the water tanks. Tr. 152-153. At all times relevant to the Complaint, the packaging and hot-water treatment plant at Coto Laurel included a cafeteria and two bathrooms, and the office area had three bathrooms and a kitchen. Tr. 1145, 1151-1152. Bathrooms in the packaging plant could

be used by handlers to wash, but they did not have showers or faucets appropriate for washing the body. Tr. 1296-1297, 1309, 1312; R's Ex. 49 photographs 4, 5.

58. Respondent's photograph of a decontamination area at the mechanic shop shows decontamination equipment contained in a PVC pipe, soap, paper towels, and water faucet over a basin, with which, as Mr. Marti Sr. acknowledged, it would be "tough" to wash the whole body. Tr. 1152-1153, 1307-1309, 1311-1312; R's Ex. 49 photograph 6.

59. In the mixing area, there is a water hose with a nozzle that is about three inches in diameter, that can be adjusted to control the flow of water, and which is used to fill chemical mixing tanks. Tr. 1313-1314; R's Ex. 49 photograph 7. The photograph does not show any soap or a towel, but Mr. Marti, Sr. testified that in the event that workers or handlers in the field become contaminated with pesticide on more than their face and hands, supervisors could transport them in the supervisor's truck to the mixing area and provide soap and towel for bathing. Tr. 1315-1316, 1318-1319.

60. Mr. Munoz had not notified Respondent of a lack of showers for bathing when he had previously conducted an inspection of Coto Laurel on August 20, 2003. Tr. 214.

61. After the inspection of Coto Laurel on April 26, 2004, Mr. Munoz went to the Jauca farm, prepared an Affidavit, and requested Mr. Acosta read and sign it. Tr. 178-180, 1726-1728, 1730. Mr. Munoz testified that Mr. Oyola was not authorized to sign documents, and that Mr. Marti Sr. had a meeting and told Mr. Munoz that Mr. Acosta was in charge of everything and was authorized to sign documents. Tr. 180-181. The Affidavit stated, in English:

> They [Mr. Munoz, Ms. Larkins and Mr. Layne] found on the Coto Laurel the following violations: (1) There was no eyeflush for the handler, (2) There was no shower for the handler, (3) An air extractor from the pesticides storage fail [sic] to turn on and another didn't have electricity. Also Mr. Munoz told me that I had to improve my training program in order to have more evidence in who's trained or not.

C's Ex. 15 p. 5. Mr. Acosta testified that although the document is in English, he understood it. Tr. 1726. He signed the Affidavit, he testified, because Mr. Munoz told him "there wasn't any problem with me signing it, there wasn't any type of legal situation, and I believed him. I assumed that . . . there was something to correct and we would do it immediately, as we had done before with other inspections and other audits." Tr. 1728.

F. Follow-Up to the Jauca Inspection

62. On April 29, 2004, Mr. Rivera returned to the Jauca farm to take photographs of pesticide products, ClearOut and Kocide. C's Ex. 13 p. 3.

63. Messrs. Rivera and Munoz conducted a follow-up inspection of Respondent's Jauca facility on July 20, 2004 beginning at about 3:30 p.m., after calling Mr. Acosta approximately a week in advance to schedule the inspection. Tr. 315-317; C's Ex. 21. When the inspectors arrived at the facility, they met with Mr. Acosta, and Mr. Rivera gave him a Notice of Pesticide Use/Misuse Inspection which indicated a possible violation of the WPS from the inspection on April 26th. Tr. 315-316; C's Ex. 21 p. 22; C's Ex. 21-D p. 110. Mr. Rivera intended to get the complete set of WPS records related to the April 26th inspection, and asked Mr. Acosta for the application records of the last 30 days of the Jauca farm, but they were not provided that day. Tr. 316-317, 412, 438. Mr. Rivera testified that Mr. Acosta indicated to him that it was too late in the day to photocopy so many records, but that he offered to send the records to the inspectors thereafter. Tr. 317-318.

64. During the July 20th inspection, Mr. Rivera interviewed four or five of Respondent's pesticide handlers at the workshop. Tr. 318-319; C's Ex. 21 p. 3. He testified that the handlers had equipment with them, and he specifically referred to chemical resistant overalls and respirators, which appeared to be new. Tr. 319, 399. His "Supplemental Summary of Findings" dated August 2, 2004 (Inspection Report), stated that the handlers "all had the personal protective equipment clean and in order." C's Ex. 21 p. 3. Mr. Rivera testified that the handlers did not know how to do a "fit test" to ensure the respirator face mask makes a seal around the face to protect against pesticide exposure, so he showed them how to do it. Tr. 320-321.

65. During the July 20th inspection, the wooden box in the workshop which had been locked during the April 26th inspection was unlocked, and was found not to contain personal protective equipment at that point. Tr. 324-325; C's Ex. 21 pp. 15, 16. New lockers for handlers to store PPE were on the Jauca site during the July 20th inspection. Tr. 326; C's Ex. 21 pp. 17, 18. Mr Rivera did not see a separate place for storing clean clothes. Tr. 326. He did not see any face masks or chemical resistant aprons during this inspection. Tr. 329-330.

66. On July 20th, Mr. Rivera drove his vehicle on the roads at the site, traveling north and then west, following Mr. Acosta, and Mr. Rivera measured the distance from his vehicle's odometer to be 0.6 mile from the decontamination site to the place where he had interviewed the workers in the Jauca 11 mango field on April 26th. Tr. 269, 278, 472-473; C's Ex. 21. Measuring a straight line from the mango field to the decontamination site with a ruler on a satellite photograph of the Jauca site, and calculating by the scale from inches to kilometers, and then converting to miles, the distance between the two points is a half mile. Tr. 471.

67. On or about July 23, 2004, Mr. Acosta provided to Mr. Munoz an electronic copy, on a disk, of 108 pages of application records entitled "Martex Farms Worker Protection Standard" ("Application Records") showing applications of pesticides from March 26th through April 26, 2004 and they were in turn submitted in electronic form to Mr. Rivera and Ms. Masters. C's Exs. 21-B, 21-C; Tr. 331, 427, 498, 506, 600. The Application Records reflect 151 or more applications of ClearOut, and include the EPA registration number, active ingredient, and re-entry interval. C's Exs. 21-B, 21-C; Tr. 601. These Records include the pesticide handlers' names, and have some other discrepancies from the WPS Display Records, such as differences in application times, and in applications of Kocide appearing on the WPS Display Records but not the Application Records. Tr. 498-500; C's Ex. 13 p. 19; C's Ex. 13-C p. 78; C's Exs. 21-B, 21-C p. 93.

68. The Application Records list pesticide applications to fields at the Jauca farm as well as to other farms owned by Respondent, including 29 applications of ClearOut to fields at Respondent's other farms. Tr. 1426-1438, 1443-1446; C's Exs. 21-B, 21-C. Mr. Rivera, however, believed that the Application Records contained information only for the Jauca farm. Tr. 506.

69. Martex has nurseries at the Jauca and Paso Seco farms. Tr. 441-442, 1427. There is a workshop at the Jauca farm, the Rio Canas Farm, and the Coto Laurel farm. Tr. 1430. There are fence lines at all five of Respondent's farms. Tr. 1428, 1574. There is a fence around the Jauca farm and in the mixing area around the operation pond. Tr. 1574.

70. The Application Records include applications of ClearOut to fence lines and workshops but do not indicate whether they were at the Jauca farm or Respondent's other farms, because Respondent's employees did not include on the computer records the data of the particular farm on which the fence lines and workshops were being treated with herbicide, so the data for spraying fence lines and workshops appeared in application records for all five of Respondent's farms. Tr. 1572-1574; C's Exs. 21-B, 21-C. The Application Records do not specify which part of fence lines was sprayed. Tr. 1574-1575.

VI. Discussion, Additional Findings, and Conclusions

A. Respondent's general defenses

Respondent continues to argue in its Post-Hearing Brief (R's Brief) at pp. 8-10 defenses as to liability that have been addressed in previous orders issued in this proceeding, including the October 4th Order on accelerated decision and/or October 12th Order on interlocutory review. Under the doctrine of the "Law of the Case," the findings of liability remain unchanged in successive stages of the same litigation unless there are "extraordinary circumstances" such as where a ruling is "clearly erroneous and would work a manifest injustice." *Rogers Corporation*, 9 E.A.D. 534, 553-554, 2000 EPA App. LEXIS 28 (EAB 2000)(quoting *Christianson v. Colt*

Indus. Operating Corp., 486 U.S. 800, 815-816 (1988) and *Arizona v. California*, 460 U.S. 605, 618 n. 8 (1983)). Respondent has not met this standard in reasserting these arguments with regard to Counts upon which liability was found on Accelerated Decision. Therefore, the defenses are not reconsidered here in regard to those Counts.

As to the Counts for which liability was not decided on accelerated decision, the defense of failure to state a claim is addressed in the discussion below to the extent relevant to the individual types of violation. Respondent argues that the Complaint has inaccuracies, erroneous factual allegations, and wrongful application of law, and this has been fully addressed in the October 12th Order, at pp. 6-7. The argument is addressed below to the extent it is relevant to various Counts remaining at issue.

As to Respondent's defense that the Complaint is discriminatory and intended to damage Respondent's reputation and well being, it was held in the Order Denying Respondent's Motion Requesting Recommendation of Interlocutory Review, dated October 5, 2004, that Respondent had not established the elements of a selective prosecution defense, so liability cannot be barred on that defense. Specifically, Respondent had not alleged or shown that any government action or inaction was based upon impermissible considerations such as race, religion, or the desire to prevent the exercise of constitutional rights.

Respondent argues that service of the complaint on February 4, 2005 was questionable on the basis of being illegible, unsigned, and without attachments, until it was [re-]served on February 9, 2005. Respondent has not claimed that it did not have notice of the allegations made against it and has not claimed any prejudice resulting from the first copy being unsigned, illegible and missing attachments. Therefore, dismissal of the Complaint or any Counts therein on this basis is not warranted. *See, United Foods and Commercial Workers Union v. Alpha Beta Co.*, 736 F.2d 1371, 1382 (9th 1984)(Federal Rule of Civil Procedure 4 is a flexible rule that should be liberally construed so long as a party receives sufficient notice of the complaint; absent a showing of prejudice resulting from defective service, dismissal is not warranted).

Respondent asserts that Complainant disregarded official EPA policy in Agricultural Worker Protection Standard 40 CFR Parts 156 and 170 Interpretive Policy regarding decontamination. This policy and argument was considered as to Count 153 in the October 12th Order at pp. 8-9, and is discussed below with regard to other counts of violation.

Other "affirmative defenses" listed by Respondent, such as failure to issue a warning prior to assessing a penalty, are not pertinent to liability, and to the extent they are pertinent to the penalty, they are discussed below.

B. Failure to Notify Workers and Handlers of Pesticide Applications

Of Counts 1 through 151, alleging the failure to display pesticide application information to workers, Complainant states it is no longer pursuing Counts 16, 22, 24, 26, 41, 43, 61, 65-67,

78-81, 85, 89, 93, 98, 108, 109, 117, 118, 121, 125, 126, 132, 134, 140 and 141, and of Counts 154 through 304, alleging the failure to display such information to handlers, Complainant states that it is no longer pursuing Counts 169, 175, 177, 179, 194, 196, 214, 218-220, 231-234, 238, 242, 246, 251, 270, 271, 274, 278, 279, 285, 287, 293 and 294, all of which correspond to the pesticide applications from March 29th through April 26, 2004 to fields other than those at the Jauca farm. Complainant's Post-Hearing Brief (C's Brief) 33, nn. 1, 2. Remaining at issue regarding liability are Counts (also Application Numbers) 3-5, 9, 12, 14, 19, 21, 27, 28, 33, 37-39, 42, 47, 49, 51-54, 56, 57, 62-64, 73, 75, 77, 91, 92, 96, 97, 100-102, 104-107, 110, 113-116, 122-124, 129-131, 135, 138, 139, 142, 143, and 146-149 pertaining to notification of workers, and Counts 156-158, 162, 165, 167, 172, 174, 180, 181, 186, 190-192, 195, 200, 202, 204-207, 209, 210, 215-217, 226, 228, 230, 244, 245, 249, 250, 253-255, 257-260, 263, 266-269, 275-277, 282-284, 288, 291, 292, 295, 296, and 299-302, which involve the same alleged applications, but which pertain to notification of handlers.

1. Whether applications of ClearOut were displayed

Stipulation 23 entered into before hearing states 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." At hearing, Respondent's counsel moved to have Stipulation 23 set aside. Tr. 37-41, 62. He argued that the language of the stipulation is ambiguous, and alleged that there *were* applications for ClearOut made during the prior month posted on April 26th, except not the two applications of ClearOut specifically applied *on* April 26th. Tr. 37. In response, counsel for Complainant stated that the stipulation is clear on its face - that *no* applications of ClearOut were in the Display, and stated that the Respondent's reinterpretation of the stipulation was a new argument. Tr. 38-39. Respondent's counsel argued that the evidence, including Complainant's exhibit, will show that the applications of ClearOut were included in the Display. Tr. 38, 39-40. Complainant's counsel stated at outset of the hearing that Complainant's witnesses would be prepared to testify that there were no applications of ClearOut in the WPS Display Records on April 26th. Tr. 40.

Stipulation 23 formed the basis for holding Respondent liable for certain of Counts 1 to 151 and 154-304 on accelerated decision, and could form the basis for holding Respondent liable on other counts remaining at issue at the hearing. The question presented is whether Respondent must be held to the stipulation, or whether it can be set aside.

As a general rule, a stipulation is a judicial admission which is binding on the parties making it. *Vallejos v. C. E. Glass Co.*, 583 F.2d 507, 511 (10th Cir. 1978). Stipulations "are entered into in order to dispense with proof over matters not in issue, thereby promoting judicial economy at the convenience of the parties." *United States v. McGregor*, 529 F.2d 928, 932 (9th Cir. 1976), citing 9 J. Wigmore, Evidence § 2588-2597 (3d ed. 1940). While a stipulation "cannot be disregarded or set aside at will," trial courts are "vested with broad discretion in determining whether to hold a party to a stipulation or whether the interests of justice require that the stipulation be set aside." *Wheeler v. John Deere Co.*, 935 F.2d 1090, 1097-1098 (10th Cir. 1991)(citations omitted).

A stipulation "is binding unless relief from the stipulation is necessary to prevent 'manifest injustice' or the stipulation was entered into through inadvertence or based on an erroneous view of the facts or law." *Graefenhain v. Pabst Bewing Co.*, 870 F.2d 1198, 1206 (7th Cir. 1989); *see also, United States v. Wingate*, 128 F.3d 1157, 1160-61 (even in a criminal case, defendant may be held to his stipulation regarding an essential element of proof, in the absence of manifest injustice, inadvertence, or a mistake as to the facts or law of the case); *McGregor*, 529 F.2d at 931–932 (party may be relieved from a stipulation in circumstances where the party did not have "informed and voluntary assent" to the stipulation, such as where the party entered into it by inadvertence, and the opposing party would not be treated unfairly by setting the stipulation aside); *Vallejos*, 583 F.2d at 511 (party was bound to its stipulation where it made no objection to the stipulation, offered no contrary proof, and its counsel should not have been misled by the stipulation as worded by the opposing counsel).

As to manifest injustice, four factors have been used by courts to determine whether enforcing a stipulation would result in manifest injustice: the effect of the stipulation on the person seeking to withdraw it, the effect of withdrawing the stipulation on the other parties to the litigation, the occurrence of intervening events since the stipulation, and whether evidence contrary to the stipulation is substantial. *Waldorf v. Shuta*, 142 F.3d 601, 617-618 (3rd Cir. 1998). To be considered under the first factor is whether the party had available to it evidence contrary to the stipulation, the adequacy of its explanation of any prior failure to submit such evidence, or any change in circumstances. *Chemical Leaman Tank Lines, Inc. v. Aetna Casualty & Surety*, 71 F. Supp. 2d 394, 397 (D. NJ 1999). Considerations under the second factor are the prejudice to the other parties and the court, including whether any additional litigation would be required, the time and effort expended by the court in ruling on motions involving the stipulation, whether other stipulations would be relitigated, and the length of time between the stipulation and the request to withdraw it. *Chemical Leaman*, 71 F. Supp. 2d at 398. Considerations for the third factor are any relevant change in the law, newly discovered evidence, or a change in circumstances that is "so dramatic that strict adherence to pretrial stipulations result in manifest injustice." *Id.* at 399.

It has been said that the fourth factor, substantial evidence contrary to the stipulation, is the "least compelling" factor, on the basis that "allowing parties repeated bites of the apple for their failure to 'get it right' the first time unnecessarily encumbers the courts and removes counsel's burden to earnestly pursue the stipulation process." *Id.* at 400. As stated by the Court of Appeals for the Eighth Circuit:

> If substantial evidence were all that was required to disregard [a stipulation], the purpose of stipulations would be severely undercut . . . If a party could be relieved of a stipulation on a mere showing of substantial contrary evidence, litigants could not rely on stipulations of fact and would have to be fully prepared to put on their proof.

Sims v. Wyrick, 743 F.2d 607, 610 (8th Cir. 1984)(quoted with approval in *Chemical Leaman*, 71 F. Supp. 2d at 401).

Complainant argues that Respondent failed to provide any evidence to support its position that any ClearOut applications were included in the display on April 26th, citing to testimony of Messrs. Marti, Sr., Marti, Jr., and Acosta. C's Brief at 46-47. Complainant points to the testimony of Mr. Rivera and Ms. Masters, that they reviewed the WPS display records for pesticide applications, and that neither the bulletin board, which had applications for that day, nor the binder, with the prior 30 days of applications, contained any entry for ClearOut. C's Brief at 47; Tr. 294-296, 413, 541, 547, 594-601, 642-643. Mr. Acosta in his Affidavit stated that "[t]he herbicide application is not being included in the WPS reports, but it is documented." C's Ex. 13-C p. 67; *see also* C's Ex. 13-A p. 6. Complainant also directs this Tribunal to the testimony of Mr. Rivera to the effect that Mr. Acosta reviewed the Affidavit, and that Mr. Rivera told Mr. Acosta that if he is agreement with it, he can sign it, and if he is not in agreement with the statements made therein, then he should tell Mr. Rivera what portions of the Affidavit he does not agree with. Tr. 302-303, 1887-1888.

Respondent contends that herbicides were included on the WPS Display Records. R's Brief at 25. Respondent characterizes Mr. Rivera's testimony regarding the WPS Display Records as involving "confusion," characterizes Mr. Acosta as being "confused" and as having given "wrong answers" in his Affidavit, and emphasizes that the Affidavit is hearsay and inconsistent with Mr. Acosta's hearing testimony. R's Brief at 24, 25. Respondent argues that Stipulation 23 is an example of "plain error," which is an exception to the law of the case doctrine precluding rulings in a case from being relitigated in subsequent stages of a proceeding. R's Reply Brief at 14.

Respondent's arguments suggest that Stipulation 23 was entered into by Respondent's counsel through his inadvertence, in not recognizing that it would be interpreted as applying to all pesticide applications in the previous month rather than only to the two applications made specifically on April 26th. The strength of this argument depends to some extent on the likelihood, based on the wording of the stipulation, that Respondent's counsel would recognize the broader interpretation.

Again, Stipulation 23 states 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." The clear meaning of Stipulation 23 is that on April 26, 2004, *no* applications of ClearOut were included in *the entire* WPS Display Records posted in the central posting area, because "the WPS posting in the central posting area" includes the current day plus the past 30 days. Respondent's reading of Stipulation 23, that on April 26, 2004, no applications of ClearOut made *on that date* were included in the WPS posting, requires the addition of the italicized phrase, or another, to convey the meaning that Respondent intends. Thus, the wording of Stipulation 23 is not ambiguous and does not suggest that Respondent's counsel was misled. Moreover, Stipulation 23 goes to the very core of the allegations of over three hundred counts of violation in the Complaint that clearly put Respondent on notice that the WPS postings for an entire month were at issue, and not just the applications made on the date of April 26, 2004. *See*, Complaint ¶¶ 55-59. There are no facts presented, such as signing the

wrong document or mis-communication, that weigh in favor of setting aside the stipulation based upon inadvertence. Mere inadvertence, misunderstanding or misinterpreting a stipulation which is not misleading or ambiguous, is a less compelling reason to set aside a stipulation than substantial evidence contrary to the stipulation, which courts have found to be the least compelling of the four "manifest injustice" factors. *Chemical Leaman*, 71 F. Supp. 2d at 400 ("failure to 'get it right' the first time unnecessarily encumbers the courts and removes counsel's burden to earnestly pursue the stipulation process."); *Sims v. Wyrick*, 743 F.2d at 610 ("If substantial evidence were all that was required to disregard [a stipulation], the purpose of stipulations would be severely undercut . . . ."). Therefore, in the circumstances of this case, inadvertence on the part of Respondent or its counsel is not a sufficient reason to set aside Stipulation 23.

Turning to the other basis for setting aside a stipulation, manifest injustice, under the first factor -- the effect of the stipulation on the Respondent -- Mr. Acosta was available to Respondent and its counsel since the initial Complaint was filed, to counter the following allegations therein (Complaint ¶¶ 55, 56, 58, 70, 71, 73):

> On April 26, 2004, during an inspection of Respondent's Juaca [sic] facility, the PRDA-EPA inspector compared Respondent's pesticide application records with the WPS posting hanging in the central posting area . . . and observed that no applications of the herbicide ClearOut 41 Plus were included in the WPS posting . . . . Respondent's agronomist, Mr. Alvaro Acosta, acknowledged that this was true and stated it was Respondent's practice not to include herbicide applications on its WPS postings.
> Between March 29, 2004 and April 26, 2004, . . . Respondent's handlers applied the herbicide ClearOut 41 Plus . . . a total of 151 times . . .
> On April 26, 2004, Respondent was not displaying specific information to notify workers [handlers] of pesticide applications . . . regarding the March 29 - April 26, 2004 applications of ClearOut 41 Plus to the fruit fields at the Jauca facility . . . .

Respondent could have submitted testimony contrary to this allegation in an affidavit of Mr. Acosta in the Prehearing Exchange, or in response to Complainant's Motion for Accelerated Decision. Respondent did not do so and does not explain its failure to do so.

As to the second factor, the effect of withdrawing the stipulation on the other parties to the litigation, setting aside Stipulation 23 would require revisiting the issues of liability on the many counts on which Respondent was found liable in the October 4th Order for failure to include ClearOut in the WPS Display Records. Also to be considered are the time and effort expended by the Complainant on these issues in the Motion for Accelerated Decision, and in responding to some of Respondent's motions that followed it, and the time and effort of this Tribunal in ruling on those motions. These considerations weigh against setting aside

Stipulation 23. There is also nothing as to the third factor to support setting aside Stipulation 23, as there are no intervening events since the stipulation.

The fourth factor - whether evidence contrary to the stipulation is substantial – requires consideration of the following direct testimony of Mr. Acosta at the hearing:

> BY MR. ZAMPIEROLLO [Respondent's Counsel]:
> Q: What exactly, Mr. Acosta, did you have in mind when you signed this affidavit that stated that no herbicides are included – have not been included in the WPS? What did you have in mind? * * * *
>
> A: That day the instructions for the programming of the herbicide was not posted on the bulletin board, together with the rest of the spraying instructions for all the rest of the farms that were registered, documented and posted.
>
> * * *
>
> Well, in a document for that day for the farm, for the application of the chemical for fungicide, we noticed that for that day the spraying for the herbicide was not there.
>
> Q: Okay. When you are referring to "that day for the spraying of that herbicide" that that application was not there, what do you mean by that?
>
> A: Well, that it wasn't that – it wasn't documented in front of the bulletin board in the central area of the office; that the WPS report, it wasn't there, the programming wasn't there.
>
> Q: I'm asking you, what you are saying then is that it was not posted for that date of that particular application or other times?
>
> A: Well, that day, that day, it was Monday, the beginning of the week from Friday through Monday. It's a few days. It's three days.
>
> Q: What you are saying is that– you correct me – the Court is very interested in this point – what you are saying is that the application of that herbicide for that Monday morning, April 26, 2004, that application was not posted; is that what you are saying?
>
> A: Yes, that's what I meant to say.
>
> Q: I'm asking you: why did you sign the affidavit in a broad sense, in broad terms, why?
>
> A: Well, on several things, at the moment that I signed the affidavit, just before that – just before that I was also signing Juan Carlos' affidavit. * * * * And when I was signing Juan Carlos' affidavit, I was signing Juan Carlos' affidavit and he said that there was nothing illegal here, that there was no problem, that everything was clear. And I said that if

things need to be corrected they would be corrected immediately. And I asked if there were things that needed to be corrected. * * * *
So I signed one of the affidavits and just minutes after that – just minutes – I signed the second affidavit. So it was a very uncomfortable environment.

Tr. 1806-1809.

The following testimony also suggests that Mr. Acosta did not intend to agree that there were no listings of ClearOut in the WPS Display Records for the past 30 days:

BY MS. FIDLER {Complainant's counsel]:
Q: But the affidavit that you signed that day says that there were no applications of ClearOut in the WPS, but yes, records of it are kept; you signed that, didn't you?

A: Yes.

Q: So they did tell you that there was a problem with the WPS records. They said: It has no ClearOut 41 Plus anywhere in the records.

A: No, they didn't say that.

Q: It just doesn't make any sense why you would sign an affidavit that says that if they didn't say that.

A: Well, the next day I checked why what had been programmed for herbicides for that field, for that day, hadn't been documented or posted. I told them that I was going to check that the next day and that it was going to be corrected.

Tr. 1899-1900.

However, testimony on cross examination reveals that Mr. Acosta did not testify, and could not testify, from personal knowledge that on April 26, 2004 there were in fact entries of ClearOut in the WPS Display Records for the past month, because he did not review the pages in the binder which contained the application information for the prior 30 days:

BY MS. FIDLER:
Q: Did you see with your own eyes any applications of ClearOut 41 Plus listed in any of the WPS records that were on display at the Jauca farm on April 26, 2004?

A: Well, I was in the office. And I didn't see the binder way over there on display. And it wasn't brought to the office, so I didn't see – it has all of the documents for all the days, but I don't know, it has – it's a lot of pages, the document – well, I don't know, it has all of the spraying for the five farms.

Q: So the answer to my question is: No you didn't see it that day, you did not see any applications of ClearOut for that day?

A: For that day, yes, correct.

Tr. 1885-1886. Thus, Mr. Acosta's testimony taken as a whole does not constitute substantial evidence contrary to the accuracy of Stipulation 23.

Mr. Rivera and Ms. Masters testified credibly that on April 26, 2004, they reviewed the WPS Display Records for the past 30 days and observed that those records did not include any listings of ClearOut. Respondent attempts to cast doubt on this testimony by pointing out that Complainant did not present copies of the WPS Display Records as evidence, but instead relied upon the Respondent's Application Records (C's Ex. 21-B), that do show applications of ClearOut. Respondent also attempts to cast doubt on the testimony that the photocopier was broken, on the basis that the inspector obtained some copies during the inspection. Mr. Acosta's testimony does not persuasively indicate that Respondent's photocopier was functioning throughout the April 26th inspection. Tr. 1898-1899. There is no other testimony or evidence which refutes Ms. Masters' testimony as to the photocopier. The fact that some copies were obtained does not rule out the possibility that further copies could not be obtained. The testimony that Respondent's employees did not provide the inspectors with copies of the entire set of WPS Display Records because they were told that the photocopier was broken, is credible.

The testimony of Mr. Acosta as to what he believes was in the WPS Display Records on April 26, 2004 for applications made the prior month, undercut as it is by his admission that he did not personally review the WPS Display Records for the prior month that day, and the mere fact that Complainant failed to obtain and submit copies of the WPS Display Records into the record, does not constitute substantial evidence contrary to the stipulation and contrary to the testimony of Mr. Rivera and Ms. Masters that on April 26, 2004, no applications of ClearOut were included in the WPS Display Records.

Therefore, it is concluded that Respondent has not met the criteria for setting aside Stipulation 23. It is further concluded that even if this Tribunal were to set aside Stipulation 23, it would not be of material significance to the outcome of the case, since Complainant has nevertheless shown 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. Finding of Fact 42.

2. Duplicate violations

In the October 4th Order on accelerated decision, Respondent was held liable for one violation of 40 C.F.R. Section 170.122 (failure to notify workers), and for one violation of 40 C.F.R. Section 170.222 (failure to notify handlers), for each failure to display information as to an application of ClearOut by one handler on a particular field on a particular day. The parties dispute whether Respondent also should be held liable for failure to display information as to

each application of ClearOut on the same field on the same day, but by different handlers. For example, Respondent's Application Records show that on March 29, 2004 on the banana field designated "TX-52G," at 6:30 a.m., three handlers, namely Mr. Santiago, Mr. Ortiz, and Mr. Rosario, applied the pesticide Clearout. C's Ex, 21-B, 21-C. In the October 4th Order, Respondent was held liable for the application by Mr. Santiago, and liability for the applications by Mr. Ortiz and Mr. Rosario remained at issue for the hearing. Complainant's position is that these should each be considered separate "uses" of a pesticide and thus separate violations. Respondent's position is that these are duplicate counts of violation, and that a pesticide application to one field on one day should be one violation, even if more than one handler, or a team of handlers, applies it.

Complainant argues that the alleged violation is based upon the responsibility to provide workers with information based on the "use" of the pesticide, and that the term "use" in the WPS regulation includes pre-application (such as mixing and loading), application, and post-application activities, such as the display of specific pesticide application information, that are necessary to reduce risks of illness or injury. Thus, Complainant argues, the requirement of 40 C.F.R. § 170.122 is triggered whenever a pesticide is "used," and that pesticide was applied by different handlers each carrying a backpack of pesticides they had mixed and loaded, and thus each constitutes a separate "use." Complainant points out that when the WPS was promulgated in 1992, the term "application of a pesticide" was "the placement for effect of a pesticide at or on the site where the pest control or other response is required," which refers to the act (by a person or a machine) of placing a pesticide, not the receipt by the target area of a pesticide. Finally, Complainant questions Respondent's assertion that the handlers applied the pesticide at the same time, pointing out that Respondent's records show that on April 14, 2004, Mr. Rosario and Mr. Santiago were applying ClearOut to the OS-25H field and the OE-22G field at 10:00 a.m., and that Mr. Ortiz applied ClearOut to the OE-22G field at 10:30 a.m. that day. C's Brief at 43-44.

Mr. Marti, Jr. testified that herbicides are applied either by tractors with sprayers, or manually by teams of handlers each with a pesticide backpack for spot spraying. Tr. 1450-1451. The team goes to the same field at the same time to apply the same pesticide product. Tr. 1451-1452. If Respondent had kept its records to show only one application by three handlers or if one handler applied twenty times more product by tractor than the amount the team sprayed, then Respondent would only be penalized for one violation. *Id.* If Respondent employed 25 people to manually spray the same field at the same time, then under Complainant's theory it would be penalized with 25 separate violations. Tr. 1452. Respondent points out that 48 counts in the Complaint charge Respondent with failure to include in the WPS display the applications of ClearOut made by second and third handlers in a team, noting Respondent has already been held liable for the applications made by one handler in the team. Tr. 1447-1448, 1453.

Interpretation of a regulatory provision starts with its plain language, and the language and design of the regulation as a whole. *See, K-Mart v. Cartier, Inc.*, 486 U.S. 281, 191 (1988)("If the statute is clear and unambiguous, that is the end of the matter . . . . In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole."). The regulatory provisions at

issue, 40 C.F.R. § 170.122 and § 170.222, state in pertinent part (different terms in Section 170.222 shown in brackets):

> When workers [handlers] are on an agricultural establishment and, within the last 30 days, a pesticide . .. has been applied on the establishment or a restricted-entry interval has been in effect, the . . . employer shall display, in accordance with this section, specific information about the pesticide.
> * * *
> (b) *Timing.* * * *
> (2) The information shall be posted before the application takes place, if workers [handlers] will be on the establishment during application. Otherwise, the information shall be posted at the beginning of any worker's [handler's] first work period.
> * * *
> (c) *Required information.* The information shall include:
> (1) The location and description of the treated area.
> (2) The product name, EPA registration number, and active ingredient(s) of the pesticide.
> (3) The time and date the pesticide is to be applied.
> (4) The restricted-entry interval for the pesticide.

The requirement, in essence, is to display the required information about a pesticide which has been applied in the last 30 days, or which will be applied while workers or handlers are on the establishment. The protection afforded by Sections 170.122 and 170.222 is not directed to the handler who applies the pesticide, but to the workers and other handlers who are on the establishment during or after application. According to the plain text of Sections 170.122 and 170.222, the required application information consists of: (1) the particular pesticide product and its REI, (2) the distinct location of the "treated area," and (3) the particular time and date of application. The text does not require or suggest that each person who applies the pesticide product be listed in the WPS display, nor does it require information as to how many handlers were involved in an application. If several handlers apply the same product to the same distinct area at the same time, there is no basis to consider each handler to be performing a separate application for purposes of the WPS display information. There is no definition of "application" in the applicable current regulations, and the 1992 definition ("the placement for effect of a pesticide at or on the site . . ."), does not necessarily refer to an act by an individual person or machine, but could refer to the placement of pesticide by a team of handlers or a group of machines. Separate pesticide backpacks, separate machines or items of spraying equipment, or separate persons involved in applying a pesticide to one area at one time do not create separate applications of a pesticide in this context, and thus do not create separate violations of Sections 170.122 or 170.222. *Cf., United States v. Woods*, 568 F.2d 509, 513-514 (6th Cir. 1978)(statutory language did not indicate Congress intended to multiply offenses of narcotics possession at any given time based on evidence that heroin may have been separately packaged or stashed). Therefore, as to Sections 170.122 and 170.222, the unit of application or "use" of the pesticide consists of a particular product applied to a particular area at a particular time and date, regardless of how many handlers are involved.

As to notification of *workers*, there are 44 counts that allege applications of ClearOut on the same date and time to the same field (Counts/Applications 3, 4, 5, 9, 12, 14, 19, 21, 27, 28, 37, 42, 47, 49, 51, 52, 53, 54, 73, 75, 77, 91, 92, 96, 97, 101, 104, 107, 113, 114, 116, 122, 123, 124, 129, 130, 131, 135, 139, 142, 146, 147, 148, and 149) as some of the counts/applications upon which Respondent has been held liable in Counts/Applications 1, 2, 10, 18, 20, 25, 36, 46, 50, 70, 71, 72, 90, 94, 95, 103, 111, 112, 119, 120, 127, 128, 133, 136, 144, and 145. Thus, these 44 counts involve the same application or "use" of the pesticide for purposes for Sections 170.122 and, therefore these counts are **dismissed** as duplicative.

As to notification of *handlers*, there are 44 counts which involve the same applications, namely, Counts 156, 157, 158, 162, 165, 167, 172, 174, 180, 181, 190, 195, 200, 202, 204, 205, 206, 207, 226, 228, 230, 244, 245, 249, 250, 254, 257, 260, 266, 267, 269, 275, 276, 277, 282, 283, 284, 288, 292, 295, 299, 300, 301, and 302. These counts involve the same application or "use" of the pesticide, for purposes for Sections 170.222, as some of the counts for applications upon which Respondent has been held liable, namely, Counts 154, 155, 163, 171, 173, 178, 189, 199, 203, 223, 224, 225, 243, 247, 248, 256, 264, 265, 272, 273, 280, 281, 286, 289, 197 and 198. Therefore, these counts are also **dismissed** as duplicative.

There are seven other alleged applications of the pesticide ClearOut on the same date and field *but at different times* as applications upon which liability was previously found. For example, Respondent was held liable on Counts 55 and 208 for an application to Field MJF-07P on April 6, 2004 at *6:30 a.m.*, and in Counts 56, 57, 209 and 210, Respondent is alleged to be liable for applications to the same field by two other handlers on the same day at *8:30 a.m.* Additionally, Respondent was held liable on Counts 99 and 252 for an application to Field OE-22G at 10:30 a.m. on April 14th, and in Counts 100, 102, 253 and 255, Respondent is alleged to be liable for applications to the same field by two other handlers at 10:00 a.m. the same day. Further, Respondent was held liable on Counts 111 and 264 for an application to Field OE-21G at 6:30 a.m. on April 16th, and in Counts 115 and 268, Respondent is alleged to be liable for applications to the same field by another handler at 9:00 a.m. the same day. Respondent was also held liable on Counts 137 and 290 for an application to Field JC-07P at 11:00 a.m. on April 22nd, and in Counts 138, 143, 291 and 296 Respondent is alleged to be liable for applications to the same field by two other handlers at 11:30 a.m. the same day. The longest time difference between the time listed for one handler to begin application and the time listed for the other handlers is two and a half hours, and the shortest is half an hour. The question is whether these time differences are significant to the extent of rendering them a separate application or "use" of a pesticide.

Sections 170.122 and 170.222 do not require specific increments of time to be listed in the WPS Display, but merely require the "time and date" the pesticide is to be applied. Thus, the "time" of an application may be listed on a WPS display in increments of an hour and, such a listing would be logical in that REIs are expressed in terms of hours. Thus, a time difference of a half an hour or less between the time that individual handlers *begin* their pesticide application in a particular field does not appear to be a significant factor for determining whether there is a

separate application for purposes of the WPS display. Therefore, Counts 100, 102, 138, 143, 253, 255, 291 and 296 are **dismissed** as duplicative.

It is noted that the Application Records for the date of April 6, 2004 show that Mr. Ortiz, as well as Mr. Rosario and Mr. Santiago, was scheduled to apply ClearOut at 6:30 a.m. to the workshop, but that Mr. Ortiz was also scheduled to apply ClearOut to the palm field MJF-07P at the same time, 6:30 a.m., and Mr. Santiago and Mr. Rosario were scheduled to apply ClearOut at 8:30 a.m. to that palm field. This appears to be a typographical error in Respondent's Application Records, in that they should have shown that Mr. Ortiz as well as the other two handlers were scheduled to begin applying ClearOut at 8:30 a.m. to the MJF-07P palm field. There is nothing in the record to support a finding that Mr. Ortiz in fact began applying ClearOut to the palm field on April 6, 2004 at a different time than the other handlers. Complainant, which has the burden of proof, has not established by a preponderance of the evidence that Mr. Ortiz began application at a different time than Mr. Santiago and Mr. Rosario began application of ClearOut to the MJF-07P palm field. Therefore, Counts 56, 57, 209 and 210 are **dismissed** as duplicative.

Intervals of time of an hour or longer between the time the first handler began application and the other handlers began are more significant. With REIs stated in terms of hours, it is reasonable to expect that the "time" of an application would be listed on a WPS display in increments of an hour or less, and therefore a handler that is scheduled to begin applying pesticide to a field an hour or more after another handler is to begin would be listed separately on a WPS display. Counts 115 and 268 involve handlers scheduled to begin application two a half hours after the first handler began. If one handler starts two and a half hours after another handler started, the times that each handler stops his pesticide application *may* vary by as much time. The REI for ClearOut is 12 hours, and it is applied during the day, so for any handlers, or possibly any workers, that intend to enter a field in the evening, notice of the time that the application ended may be important for determining whether they can enter the field. Therefore it is reasonable to conclude that Counts 115 and 268 involve different "times" of application and thus separate applications for purposes of liability under Sections 170.122 and 170.222. Respondent is therefore liable for the violations alleged in Counts 115 and 268.

3. Fences and workshops

In the October 4th Order, in the interest of sound judicial policy, accelerated decision was denied as to the counts in the Complaint which Respondent contends pertain to "fences," namely Counts 33, 38, 39, 105, 106, 110, 186, 191, 192, 258, 259, and 263, and/or "workshops," namely Counts 62, 63, 64, 215, 216 and 217.

Respondent denies liability for failure to provide WPS display information as to applications of ClearOut to fences and workshops, arguing that the WPS Display Records at issue are at the Jauca facility but Complainant has not established that the fences and workshops referenced in these counts were at the Jauca facility. There are fence lines at all five of

Respondent's farms, and a workshop at the Jauca, Rio Canas, and the Coto Laurel farms. Tr. 1428, 1430, 1574.

Complainant points out that Mr. Marti, Jr. admitted that the Jauca farm has fences and a workshop and that he has no knowledge or evidence that the alleged applications *did not* take place at the Jauca farm. Complainant points out further that Section 170.122 requires the WPS information display when a pesticide "has been applied on the establishment" and that an "agricultural establishment" includes any "farm" which refers to "an operation . . . engaged in the outdoor production of agricultural plants." 40 C.F.R. § 170.3. Complainant suggests that fence lines and workshops are highly trafficked areas and therefore it is important to notify workers and handlers when they are treated with pesticide.

Complainant has the burden to establish the elements of a violation of Sections 170.122 and 170.222, that (1) workers [handlers] are on an agricultural establishment, (2) within the last 30 days a covered pesticide has been applied on the establishment or an REI has been in effect, and (3) the specific information has not been displayed in accordance with paragraphs 170.122 (a), (b) and (c) [paragraphs 170.222(a), (b) and (c)].

Complainant has the burdens of presentation and persuasion that the violation occurred as set forth in the complaint, and each matter of controversy must be decided upon a preponderance of the evidence. 40 C.F.R. § 22.24. The Complaint alleges, in pertinent part, as follows:

> During the April 26, 2004 inspection, "workers" . . . were present at the Jauca facility.
> During the April 26, 2004 inspection, "handlers" . . . were present at the Jauca facility.
> On April 26, 2004, during an inspection of Respondent's Jauca facility, the PRDA-EPA inspector . . . observed that no applications of the herbicide ClearOut 41 Plus were included in the WPS posting as required by 40 C.F.R. § 170.122. . . . . Respondent's handlers applied the herbicide ClearOut 41 Plus to fruit fields at its Jauca facility . . . as set forth below:
>
> Application # Date of Application Field Name/Crop
>
> * * *
>
> 33 April 2, 2004 . . . Verjas (Fenceline)/Crop Not Listed *
>
> * * *
>
> 38 April 2, 2004 . . . Verjas (Fenceline)/Crop Not Listed *
> 39 April 2, 2004 . . . Verjas (Fenceline)/Crop Not Listed *
>
> * * *
>
> 62 April 6, 2004 . . . Taller (Workshop)/Crop Not Listed*
> 63 April 6, 2004 . . . Taller (Workshop)/Crop Not Listed*
> 64 April 6, 2004 . . . Taller (Workshop)/Crop Not Listed*
>
> * * *
>
> 105 April 15, 2004 . . . Verjas (Fenceline)/Crop Not Listed*
> 106 April 15, 2004 . . . Verjas (Fenceline)/Crop Not Listed *

* * *

110 April 2, 2004 . . . Verjas (Fenceline)/Crop Not Listed *

> On April 26, 2004, Respondent was not displaying specific information . . . of pesticide applications . . . to the fruit fields at the Jauca facility, as listed in paragraph 56 [and 71].

Complaint ¶¶ 31, 38, 55, 56, 58, 70, 71, 73; *see*, Complaint, footnote on page 8 ("*" denotes alleged "separate applications of a pesticide to the same field on the same day by different handlers").

The evidence establishes that workers and handlers were on the "agricultural establishment" of the Jauca farm on August 26, 2004. The Application Records in evidence show that ClearOut was applied to fence lines and workshops.[8] C's Ex. 21-B, 21-C. The Jauca farm has fences around the perimeter of the farm in the pesticide mixing area, and a workshop in which pesticide equipment is stored, and which includes a decontamination area. Tr. 261-262, 397, 1557, 1574; R's Ex. 51. Therefore, fences and the workshop at the Jauca farm are part of "an operation . . . engaged in the outdoor production of agricultural plants" within the definition of an "agricultural establishment" in 40 C.F.R. Section 170.3. However, the Application Records do not specify whether ClearOut was applied on the *Jauca* "establishment." The question is whether Complainant carried its burden to prove by a preponderance of the evidence that ClearOut was applied to fence lines and a workshop on the Jauca farm.

The Application Records received do not refer to Jauca or otherwise indicate that they are records of applications only at the Jauca farm. C's Exs. 21-B, 21-C. There is no evidence in the record that Respondent actively represented to the inspectors that the Application Records received July 23, 2004 pertained to the Jauca establishment only. There is a wide disparity between the number of pages in the WPS Display Records Mr. Rivera recalls having seen in the notebook at the Jauca farm on April 26, 2004 (about 30 or 40), and the number of pages in the Application Records (108), and a disparity between the number of applications of ClearOut to mangoes in the Jauca Spraying Instructions (about 15) and the number of total applications of ClearOut in the Application Records (about 151). C's Ex. 13 pp. 8-15; Tr. 292, 539-540; C's Exs. 21-B, 21-C; Tr. 749. These facts should have indicated to Complainant that the Application Records received on July 23, 2004 may have included applications at Respondent's facilities other than the Jauca farm, and that the fences and workshops listed may not refer to the Jauca facility. On the other hand, it is reasonable to infer from these facts and from Respondent's

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[8] The fact that the Complaint alleges that the applications were made to "fruit fields" and that applications to fence lines, nurseries and workshops may not be "fruit fields" do not render these allegations of violation invalid. The allegation of a "fruit field" is not an element of the violation. Complainant need only prove that pesticide was applied "on the establishment." There is no dispute that the workshop, nursery and fence lines are not fruit fields. Tr. 1430, 1574. Therefore, the Complaint may be deemed amended to conform to the proof at the hearing that these areas were not "fruit fields."

failure to specify in the Application Records the particular farm at which workshop and fences were to be sprayed, that workshops and fences at *all* of Respondent's farms were scheduled to be sprayed, including those at the Jauca facility.

Respondent's counsel suggested at the hearing that the information as to whether the workshops and fence lines at issue were at the Jauca farm could be "reconstructed . . . taking into account who was applying the pesticide where, in which field. . . . if Peewee was in the area and the fence was sprayed with pesticide on that day, you could say . . probably this was the ten that Peewee applied or treated." Tr. 1198. However, this suggestion was not followed up by either party.

Without the benefit of any argument in Post-Hearing Briefs, nevertheless, the evidence shows that Mr. Ortiz, Mr. Rosario, or Mr. Santiago were each scheduled to begin Applications 33, 38 and 39 (to fence lines) one hour after they were scheduled to apply ClearOut to a banana field at the Jauca farm (Applications 36, 37, 42), they were scheduled to begin Applications 62, 63 and 64 (to a workshop) two hours before they were scheduled to apply ClearOut to a palm field at the Jauca facility (Applications 55, 56, 57), and they were scheduled to begin Applications 105, 106 and 110 (to fence lines) one and a half hours before they were scheduled to begin applying Clear Out to a banana field at the Jauca farm (Applications 103, 104, 107). C's Ex. 21-B, 21-C. There was testimony that there were 25 handlers employed by Respondent (who were given WPS training) in June 2000. Tr. 1603, 1606. Mr. Marti, Jr., testified that there are three to six handlers specifically for the Jauca farm, and that they also tend the Paso Seco farm. Tr. 1576-1577. Respondent's Application Records show that all of the listings of ClearOut to fields at the Jauca farm between March 26 and April 26, 2004 were applied by Mr. Ortiz, Mr. Rosario, Mr. Santiago, or Mr. Pewee. C's Ex. 21-B, 21-C. ClearOut was applied to fields at Respondent's other farms by other handlers. C's Exs. 21-B, 21-C pp. 16, 18, 19, 22, 29, 33, 42, 45, 46, 48, 59, 63, 67, 70, 74, 81, 83, 86, 93, 96, 101. Inferences can be drawn that other handlers generally were available at Respondent's other farms to apply ClearOut during the relevant times, that Mr. Ortiz, Mr. Rosario and Mr. Santiago thus would not be needed to apply ClearOut to any fence lines or workshops at Respondent's other farms, and that they were at the Jauca farm around the time that they were scheduled to apply ClearOut to fence lines and a workshop. Based on a preponderance of the evidence and reasonable inferences drawn therefrom, it is concluded that Applications 33, 38, 39, 62, 63, 64, 105, 106 and 110 were made at the Jauca farm.

4. Duplicate violations as to Fences, Workshop and Nursery

Applications 31, 32, and 35 were listed on the Application Records as starting at 6:30 a.m. on April 2, 2004, by Mr. Rosario, Mr. Ortiz, and Mr. Santiago, respectively.[9] C's Ex. 21-B,

[9] The Complaint (¶¶ 56, 71) lists the alleged applications to nurseries as follows, in pertinent part:

Application # Date of Application Field Name/Crop

(continued...)

21-C. The "field" was listed as "Invernader" (in English, "*nursery*"). *Id.* Applications 33, 38, and 39 were listed on the Application Records as starting at 9:30 a.m. on April 2, 2004, by Mr. Ortiz, Mr. Rosario and Mr. Santiago, respectively. C's Ex. 21-B, 21-C. The "field" was listed as "verjas" (in English, "*fence line*"). *Id.* Applications 62, 63 and 64 were listed on the Application Records, starting at 6:30 a.m. on April 6, 2004, by Mr. Ortiz, Mr. Santiago and Mr. Rosario, respectively. *Id.* The field listed was "taller" (in English, "*workshop*"). Applications 105, 106 and 110 were listed on the Application Records, for "verjas" ("*fence line*"), as starting at 6:30 a.m. on April 15, 2004, by Mr. Ortiz, Mr. Rosario and Mr. Santiago, respectively. *Id.*

The October 4th Order did not address the issue of whether these counts are separate "applications" or "uses" of a pesticide, for purposes of 40 C.F.R. §§ 170.122 and 170.222. Indeed, it was not clear in Respondent's Answer to the Complaint or arguments in response to the Complainant's motion for accelerated decision that Respondent intended to argue that any counts representing alleged applications to nurseries, fence lines or workshops were duplicative. *See*, Respondent's Motion in Opposition of Complainant's Motion . . . for Partial Accelerated Decision as to Liability, dated August 29, 2005, at 10 (referring to Answer and C's Ex. 21-B). In the Answer, Respondent asserted that "over 50 applications" of ClearOut have been duplicated, and that, consequently, all of EPA's allegations in the Complaint are flawed. Answer, p. 8. In a table of applications reflective of that in the Complaint, Respondent only provided one defense regarding the alleged applications to nurseries, workshops and fence lines, that "This is not a fruit field, [it] is a nursery [workshop or fence]," and did not mention Applications/Counts 32, 35, 38, 39, 63, 64, 106 or 110 as being "duplicated," as it did with respect to alleged applications to fruit fields. Answer, pp. 10-12.

As noted above, in the October 4th Order, Respondent was found liable on Accelerated Decision for Counts/Applications 31, 32, and 35 and corresponding Counts 184, 185, and 188. Under the doctrine of the "Law of the Case," the findings of liability for Counts 31, 32, 35, 184, 185 and 188 remain unchanged in successive stages of the same litigation unless there are "extraordinary circumstances" such as where a ruling is "clearly erroneous and would work a manifest injustice." *Rogers Corporation*, 9 E.A.D. 534, 553-554, 2000 EPA App. LEXIS 28 (EAB 2000)(quoting *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 815-816 (1988) and *Arizona v. California*, 460 U.S. 605, 618 n. 8 (1983)). After being found liable for these Counts, Respondent did not refer to the issue of duplicate violations regarding liability for applications to a nursery in its motions requesting certification for interlocutory appeal or reconsideration of the October 4th Order. There is very little testimony or evidence in the record as to the nursery at the Jauca farm. *See e.g.*, Tr. 1427 ("we have two different nurseries, one in

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[9](...continued)

* * *

31 April 2, 2004 . . . Invernader (Nursery)/Ornamental *

* * *

32 April 2, 2004 . . . Invernader (Nursery)/Ornamental *

35 April 2, 2004 . . . Invernader (Nursery)/Ornamental *

Jauca and one in Paso Seco"); R's Ex. 51. No extraordinary circumstances have been shown as to the ruling in the October 4th Order that Applications/Counts 31, 32 and 35, and Counts 184, 185 and 188 constitute violations of 40 C.F.R. §§ 170.122 and 170.222, and Respondent has not even alleged much less shown that it is "clearly erroneous and would work a manifest injustice."

As to the Counts for which liability remained at issue at the hearing, the following testimony of Mr. Marti, Jr. suggests that alleged applications to the workshop and fences could be included in the claim of duplicative violations, as follows:

> BY MR. ZAMPIEROLLO:
> Q: Have you been able to review these applications that have been marked with an asterisk in [the Complaint in] this case?
>
> A: I have.
> * * * *
> Q: So would you state to this Court that any line that has an application identified with an asterisk is one or more applications of the – is one application done at that particular field on that day by two or more handlers; that would be the case?
>
> A: Correct. It's exactly the same application performed by more than one person.

Tr. 1349-1440.

As discussed above, Sections 170.122 and 170.222 require the display of application information including the distinct location of the "treated area" and the particular time and date of application, but not the name or quantity of handlers who apply the pesticide, and that the unit of violation of those regulatory provisions is based on a particular product applied to a particular area at a particular time and date, regardless of how many handlers are involved.

The workshop at the Jauca farm is one discrete building, or distinct location, as shown on a map of the Jauca facility. R's Ex. 51. Complainant has not shown that there were three distinct locations or times of application of ClearOut being applied on April 6. Therefore, there was only one application of ClearOut on April 6, 2004 to the workshop, for purposes of the WPS display requirements of 40 C.F.R. §§ 170.122 and 170.222. Accordingly, Respondent is liable for Counts 62 and 215. Counts 63, 64, 216 and 217 are **dismissed** as duplicative.

The Respondent's Application Records did not provide any more specific information on the location of the applications to fence lines. C's Ex. 21-B, 21-C. The fences at the Jauca farm include a fence around the perimeter of the farm and a fence in the mixing area. Tr. 1574. These are two distinct locations. If three handlers applied ClearOut to fence lines at the Jauca farm, it is likely that they applied it to at least two separate areas, given the two separate fence lines, the large size of the farm (almost 1000 acres), and the fact that the applications are to linear areas rather than covering specific fields. Tr. 1293; C's Ex. 21-B, 21-C. However, Complainant,

which has the burdens of presentation and persuasion that the violation occurred as set forth in the complaint, has not shown by a preponderance of the evidence that ClearOut was applied to *three* separate locations of fence lines. A preponderance of the evidence shows that ClearOut was applied to two distinct locations. Accordingly, Respondent is liable for the violations alleged in Counts 33, 38, 105, 106, 186, 191, 258, and 259, representing violations stemming from applications to two separate fence line areas by the first and second handlers listed in the Application Records. Counts 39, 110, 192, and 263, representing violations stemming from the third handlers' alleged application, are **dismissed** as duplicative.

C. Failure to Provide Workers with Decontamination Supplies

Count 152 alleges that Respondent failed to provide the workers in the JC-11 field on April 26, 2004 with decontamination supplies as required by 40 C.F.R. §170.150. Specifically, Count 152 alleges that on April 21, 2004, Respondent applied Kocide to the JC-11 mango field at the Jauca farm, that the field is approximately 0.6 miles from the main decontamination area, that during the April 26th inspection the inspector observed approximately 20 workers picking mangoes in the JC-11 field, and that he observed that there were no decontamination supplies, including water, soap or single use towels, available to the workers within 1/4 mile of the JC-11 field. Complaint ¶¶ 61, 63, 64.

Sections 170.150(b) and (c), of 40 C.F.R. require Martex to provide "enough water for routine washing and emergency eyeflushing," and "soap and single-use towels in quantities sufficient to meet worker's needs" together in a location "reasonably accessible to and not more than 1/4 mile from where workers are working." Subsection 170.150(c)(2) provides an exception for worker activities performed more than 1/4 mile from the nearest place of vehicular access, that the soap, towels, and water may be at the nearest place of vehicular access or at springs, streams, lakes, or other sources for decontamination if more accessible than the nearest access for vehicles. Respondent does not claim, and there is no evidence, that there was any water source for decontamination that is closer than the nearest place of vehicular access at the Jauca farm, so the exception does not apply. It is undisputed that the distance between the JC-11 field and the decontamination area in the workshop exceeds 1/4 mile. Tr. 283-284; C's Ex. 31. The evidence shows that the fruit washing station provides water, but does not include soap or towels, and therefore does not meet the requirement of Section 170.150 that the materials be in the same location. Tr. 1323; R's Ex. 50.

The record includes, on the one hand, Mr. Rivera's and Ms. Masters' observations that on April 26, 2004 there was only a five gallon container of water and no decontamination supplies in the JC-11 field and, on the other, Mr. Acosta's and Mr. Marti, Jr.'s testimony that water, soap and paper towels are carried in the supervisors' trucks near the workers. Tr. 266-268, 583, 1506, 1736-1738, 1740; C's Ex. 13 pp. 4, 86; C's Ex. 13-C p. 83.

Mr. Rivera's and Ms. Masters' testimony that there was no soap or towels at the site of the workers in the Jauca 11 field and that the workshop was the closest decontamination site to

the workers, Ms. Masters' testimony that they asked Mr. Acosta whether there were decontamination supplies at the site and that he replied in the negative, and the evidence that the workshop was more than 1/4 mile away from the workers, shows *prima facie* that they were not provided with decontamination supplies as required by 40 C.F.R. § 170.150. Tr. 267-269, 583-584, 608-610

Respondent challenges Mr. Rivera's and Ms. Masters' observations by asserting that the supervisor was not present for the interview, and they did not tally the "yes" and "no" responses of the workers during the interview, did not ask the workers if they had decontamination materials available by alternate means, did not see the fruit-washing station, did not ask Mr. Acosta whether he had decontamination supplies in his vehicle, and did not ask the supervisor in the JC-11 field about decontamination supplies. R's Brief at 29, 31, 40-41; Post-Hearing Reply Brief at 9.

Respondent's undated or post-Complaint photographs and documents as to decontamination materials, and its log of purchases of decontamination materials (R's Exs. 11, 12, 13, 15, 16, 17, 18, 19; Tr. 1515-1516) that were not exclusively for Jauca nor exclusively for decontamination (Tr. 1399-1400), do not support any inferences as to the availability of decontamination supplies on April 26, 2004 in the JC-11 field.

Mr. Acosta's testimony indicates that on April 26, 2004, he and Mr. Rey had decontamination material in their trucks, and he directly contradicts Ms. Masters' testimony that he was asked whether there were decontamination materials at the site where the workers were. Tr. 1737-1740. The fact that Mr. Acosta signed the Affidavit which stated that there was no soap, water or disposable towels for the workers interviewed, when considered along with his explanation for signing the Affidavit without contesting its contents, does not negate his testimony. His testimony however is undermined by the following statement in a document presented by Respondent in response to the alleged violation: "Up to April 2004 decontamination materials were only kept in the designated decontamination areas . . . .: the main decontamination area, the mixing site, the office and the packhouse. In addition the handler supervisors kept a decontamination material kit and there was one mobile decontamination station for the harvesting crew." R's Ex. 31. Mr. Acosta's testimony that Mr. Martinez was in the next field and that he "had the material and equipment out in the field" (Tr. 1739-1740, 1872) is simply too vague to establish that he had a five gallon container of water in his truck for the 20 workers and within 1/4 mile of them.

On the other hand, Ms. Masters' testimony is weakened by the absence of supporting testimony and evidence from Mr. Rivera, who did not testify that he asked Mr. Acosta or the workers whether there were decontamination materials at the site, and who did not provide answers on the interview form as to the location of the decontamination area or whether it was available all day. C's Ex. 13 p. 86, C's Ex. 13-C p. 83. Furthermore, Ms. Masters does not speak Spanish, did not ask the questions during the inspection, and had Ms. Soltero translate the conversations for her, which, as Ms. Masters acknowledged, made it difficult for her to know the contents of the exact conversations. Tr. 570, 614, 636-637, 641, 644-645.

While Mr. Rivera's and Ms. Masters' exercise of official duties in making observations is entitled to a presumption of regularity, it will not withstand clear evidence to the contrary. "The presumption of regularity supports the official acts of public officers and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties." *United States v. Chemical Foundation*, 272 U.S. 1, 14-15 (1926)(where validity of Department of State official's orders was challenged on basis they were induced by misrepresentation and made without knowledge of material facts, but no conspiracy, fraud or deception was established, the orders were taken, under the presumption of regularity, to be made with knowledge of material facts, and the validity of reasons stated in the orders and underlying facts were not reviewed by courts); *National Archives and Records Administration v. Favish*, 541 U.S. 157 (2004); *United States Department of State v. Ray*, 502 U.S. 164, 179 (1991)("we generally accord Government records and official conduct a presumption of legitimacy").

If Mr. Acosta's testimony is taken as true, it can be inferred that at least *some* decontamination materials were "reasonably accessible to and not more than 1/4 mile from where workers were working." However, there was no testimony or evidence that they had disposable towels, soap and water *in sufficient amounts* for routine washing and emergency eyeflushing on that day. The Kocide label requires an "eyeflush container, specifically designed for flushing eyes" to be available for seven days after application for workers and handlers, and rinsing the eye for 15 to 20 minutes if it gets into the eye.[10] Tr. 682; C's Ex. 18 pp. 3, 5. Indeed, Kocide had been sprayed in the field five days prior to the inspection. C's Ex. 13-C p. 78; C's Ex 21. Ms. Hopkins' testimony to the effect that the label requirement to rinse the eye with water for 15 to 20 minutes requires six to eight gallons of water (tr. 683, 686, 689), indicates that a minimum of six gallons of water is required within 1/4 mile of workers to meet the requirement of 40 C.F.R. § 170.150 of "enough water for . . . emergency eyeflushing." Even under the minimum requirement for emergency eyeflushing in 40 C.F.R. § 170.150(b)(4) of one pint of water for each worker who is performing early entry activities (entering the area before the REI has expired), for 20 workers, two and a half gallons of water would be required at the site just for emergency eyeflushing. However, additional water would be needed for "routine washing" and drinking.

There is no testimony or evidence that the five gallon container of water observed by the inspectors was for decontamination, or that there was another source for drinking. There was no evidence as to replenishing the container of water. It can be inferred that the five gallon container seen by the inspectors was drinking water, and that as the workers consumed the water, there was an insufficient amount for decontamination. Even assuming *arguendo* that Mr. Rey had a full five gallons of water for these workers, this would not be sufficient for eyeflushing required by the Kocide label *and* for routine washing, especially considering that there were 20 workers, the weather was hot and humid, and that some if not all of the water may have been used for drinking. Tr. 582.

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[10] On Accelerated Decision, Respondent was held liable on Count 153 for failure to provide an eyeflush *container* designed specifically for flushing eyes. Count 152 alleges failure to provide required decontamination supplies, including water for emergency eyeflushing.

A preponderance of the evidence shows that Respondent failed to provide workers with decontamination supplies in the JC-11 field on April 26, 2004, as required by 40 C.F.R. § 170.150.

D. Failure to Provide Handlers with Decontamination Supplies

Counts 305 through 321 each represent one of the seventeen pesticide applications made at various fields at the Jauca farm on April 26, 2004: two applications of ClearOut (fields OS-11 and ON-52CLT); eight applications of Kocide (fields JC-31, JC-32, OS-11, OS-12, TX-21, TX-22, OS-15, and OS-16); three applications of Boa (all to field OE-11G);[11] and four applications of Trilogy (fields TX-52G, TX-54G, OE-21G, and OE-22G). Complaint and Answer ¶ 81. Each Count alleges that as to the particular pesticide application, handlers were not provided with adequate decontamination supplies as required by 40 C.F.R. § 170.250(b), and Respondent did not provide the handlers with decontamination supplies at the mixing site nor within 1/4 mile of the handling activities. Specifically, the Complaint alleges that there were no single-use towels at the decontamination site for handlers, there were no decontamination supplies at the pesticide mixing site, and the mixing site and decontamination site 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. Complaint ¶ 76, 79, 80.

The requirement at issue, 40 C.F.R. Section 170.250, requires the handler employer "during any handling activity" to provide for handlers "decontamination supplies for washing off pesticides and pesticide residues," which includes "enough water for routine washing and emergency eyeflushing, and for washing the entire body in case of an emergency, . . .soap and single-use towels in quantities sufficient to meet handlers' needs," and "one clean change of clothing, such as coveralls, for use in an emergency." The decontamination supplies are required to be "located together and be reasonably accessible to and not more than 1/4 mile away from each handler during the handling activity," except that for mixing activities, "decontamination supplies shall be at the mixing site." 40 C.F.R. § 170.250(c). In addition, Section 170.250(e) requires that at the site where handlers remove PPE, the handler employer must provide "soap, clean towels, and a sufficient amount of water so that the handlers may wash thoroughly." Paragraph 170.250(c)(3) provides an exception for handling activities performed more than 1/4 mile from the nearest place of vehicular access, that the soap, towels, clean change of clothing, and water may be at the nearest place of vehicular access or at springs, streams, lakes, or other sources for decontamination if more accessible than the nearest access for vehicles. There is no evidence, and Respondent does not claim, that there was any water source for decontamination

[11] The Application Records show that there were three handlers who applied Boa to field OE-11G at 6:30 a.m on April 26, 2004. C's Ex. 21 pp. 106-108. While these would not be considered three separate applications for purposes of notification required by 40 C.F.R. §§ 70.122 and 170.222, as discussed above, the decontamination requirements are directed to the safety of *individual* handlers as they are applying pesticides, and thus may be considered separate applications for purposes of 40 C.F.R. § 170.250.

that is closer than the nearest place of vehicular access at the Jauca farm, so the exception does not apply.

Along with the arguments also presented as to Count 152, Respondent argues that Mr. Rivera did not see any handlers applying pesticides on April 26, 2004, and did not ask them about the availability of decontamination supplies. R's Brief at 18; R's Reply Brief at 10. Respondent points out that there is an irrigation lake at the Jauca farm, near the OS-11 field, with a levy where there is a hose and valve for mixing tanks with water, and argues that the lake can be used for decontamination. Tr. 1325-1331; R's Ex. 50, 51.

The inspectors need not have observed the handlers applying pesticide or even handlers on the farm on the day at issue; there is no dispute that the 17 applications occurred on April 26, 2004. An inference can be drawn from observations as to decontamination materials at fixed sites on that day that they existed as such at the time of the applications.

Respondent's undated or post-Complaint photographs and documents as to decontamination materials, and its log of purchases of decontamination materials (R's Exs. 11, 12, 13, 15, 16, 17, 18, 19; Tr. 1515-1516) that were not exclusively for Jauca nor exclusively for decontamination (Tr. 1399-1400), do not support any inferences as to the availability of decontamination supplies on April 26, 2004. Respondent presents a chart, entitled "Distances from Jauca Fields to Available Water Facilities," showing distances from each field at issue to the mixing site, the main decontamination site at the workshop, the lake valve, and the fruit washing station. R's Ex. 52. Respondent's photographs of the lake valve and fruit washing station do not show any soap, towels, or a clean change of clothing. R's Ex. 50. The evidence shows that there were no decontamination supplies at the mixing site, which had water and a locked box containing, among other things, a chemical-proof coverall, but there is no evidence of soap and towels at the mixing site. Tr. 286-289; C's Ex. 13 p. 4; R's Exs. 51, 52. The decontamination site at the workshop had a shower and soap, but no towels on April 26, 2004. Tr. 264, 397-398, 576-577, 584; C's Ex. 13 p. 4, 85, C's Ex. 13-A p. 82.

However, testimony of record indicates that the handlers' supervisor at the Jauca facility had decontamination supplies in his truck. Mr. Marti, Jr. testified as follows:

BY MR. ZAMPIEROLLO:
Q: Those 13 individuals [Supervisors and agronomist at the Jauca farm], they each have the personal company-provided truck?

A: All of them.

Q: And all of them have the decontamination supplies, the ones that you have just related to the Court.

A: Yes, they do, today they do have it. In the past I cannot tell you that all of them had them. But most of them had them, *at least the handlers*, yes.

* * * *

BY MS. FIDLER:
Q: You stated that there were decontamination supplies in the pickup trucks of the supervisors; there was water, soap and towels in the pickup trucks. When did that practice start? That started after April 26, 2004, didn't it?

A: Not completely. Not completely. *Since I can remember, all the handler supervisors . . . have in their trucks decontamination materials* that you are talking about after – after the September – the August-September 2003 group, as your inspectors conveniently pointed out to us that we needed to improve on that area, we assigned more decontamination materials to other supervisors, to the harvest supervisors, which are the ones that have the majority of the workers.

Tr. 1508, 1535-1536 (emphasis added).

At the Jauca farm, there is only one supervisor for pesticide spraying. Tr. 1507. The mixing site is where the handlers travel with the supervisor in his truck to mix the pesticide in the tanks. Tr. 1556-1557. The evidence indicates that the mixing site had water, but did not have soap, towels and clean change of clothing. Tr. 286-289; C's Ex. 13 p. 4; R's Exs. 51, 52. However, according to Mr. Marti, Jr.'s testimony, these materials are in the handler supervisor's truck, so the record suggests that decontamination materials would be located together with the water as required, at the mixing site, during the mixing of pesticides.

However, as to the fields, the evidence does not establish that the supervisor had his truck within 1/4 mile of each handler during each of the 17 applications, and it may not have been possible for him to do so. For example, Kocide was to be applied to both fields JC-31 and TX-21 at 4:50 p.m. that day. C's Ex. 21 pp. 105-108. There is no evidence that during the applications, his truck was located in a position close enough to the fruit washing station, mixing area, workshop or lake that the water and other supplies could be considered "located together." Assuming *arguendo* that his truck was within 1/4 mile of where each of the handlers were applying pesticides for all 17 applications, and that he had a five gallon container of water in his truck (Tr. 1736-1739) for decontamination, Respondent has not established that the handlers had "enough water for routine washing and emergency eyeflushing, *and for washing the entire body in case of an emergency*, . . .[and] soap and single-use towels in quantities sufficient to meet handlers' needs," *together in one location*. The five gallon container of water could not be sufficient to meet requirements for emergency eyeflushing, routine washing and washing the entire body.

A preponderance of the evidence shows that Respondent did not provide handlers with the decontamination supplies on April 26, 2004 as required by 40 C.F.R. § 170.250, for the seventeen applications alleged in Counts 305-321.

E. Failure to Provide Handlers with Personal Protective Equipment

Counts 322 through 334 each represent one of the following thirteen pesticide applications made at various fields at the Jauca farm on April 26, 2004: two applications of ClearOut (fields OS-11 and ON-52CLT); eight applications of Kocide (fields JC-31, JC-32, OS-11, OS-12, TX-21, TX-22, OS-15, and OS-16); and three applications of Boa (all to field OE-11G). Complaint and Answer ¶ 97. Each of these pesticides require handlers to wear certain Personal Protective Equipment (PPE). The Complaint alleges that during the inspection on April 26, 2004, the inspector asked to see PPE, and that at no time was he shown PPE, an area where PPE could be stored separately from clean clothes, an area to store personal clothing when not in use, or facilities where PPE could be cleaned. Complaint ¶ 95. The Complaint alleges that Respondent did not provide its handlers with the appropriate PPE or a place for storing PPE or clean clothes, for each of the thirteen applications.

The regulation at issue, 40 C.F.R. § 170.240, requires, "When personal protective equipment is specified by the labeling of any pesticide for any handling activity, the handler employer shall provide the appropriate personal protective equipment in clean and operating condition to the handler." The PPE required by this regulation to be provided by the handler employer includes "coveralls, chemical-resistant suits, chemical resistant gloves, chemical-resistant footwear, respiratory protection devices, chemical resistant aprons, chemical-resistant headgear, and protective eyewear, which is defined in 40 C.F.R. § 170.240((c)(7) as goggles, face shield, safety glasses or full face respirator. 40 C.F.R. § 170.240(b)(1). The regulation states at Section 170.240(b)(2) that work clothing, such as long pants and long-sleeved shirts, "are not subject to the requirements of this section," although the pesticide labeling may require that work clothing be worn during some activities. The regulation requires that handler employers provide "a clean place(s) away from pesticide storage and pesticide use areas" for handlers to store personal clothing not in use. 40 C.F.R. § 170.240(f)(9)(i). Handler employers are required to assure that contaminated PPE is "kept separately and washed separately" from any other laundry, cleaned before each day of reuse, stored separately from personal clothing and pesticide-contaminated areas, and not worn home or taken home by any handler. 40 C.F.R. § 170.240(f)(1), (3), (5) and (10).

The ClearOut label and Kocide label require handlers to wear chemical-resistant gloves and protective eyewear. Stipulations ¶ 32, 33. The Boa label requires handlers to wear chemical resistant gloves, protective eyewear, *and* a dust/mist National Institute of Occupational Safety and Health (NIOSH) approved respirator with any N, R, P, or HE filter. The Boa label also requires that people mixing and/or loading Boa must wear a face shield and chemical-resistant apron in addition to the gloves and respirator. Stipulations ¶ 34. While the labels for ClearOut, Kocide and Boa also require handlers to wear long-sleeved shirt and pants, and shoes with socks, they are not subject to the requirements of Section 170.240. Thus, Respondent was required under Section 170.240 to provide the following PPE items: chemical resistant gloves, protective eyewear, face shields, NIOSH-approved respirators, and chemical resistant aprons.

During the April 26th inspection, Mr. Rivera asked Mr. Acosta to show him PPE, and the inspectors did not see any PPE, except a chemical proof coverall and waterproof glove, nor did they see a place to store clean clothes. Tr. 284-289, 326, 578-579; 1778-1780; C's Ex. 13 p. 4. Mr. Acosta indicated that PPE was in a locked wooden box on the wall of the workshop, but it could not be opened during the inspection because there was no key available. Tr. 284-285, 578-579; 1778-1780. In a written statement in response to the allegations in the Complaint, Respondent explains that only the handlers and their immediate supervisor have access to the box, and that the inspectors were shown protective eyewear and respirator masks during the follow-up inspection on April 29, 2004. R's Ex. 31. However, this statement, Respondent's evidence of its purchases of PPE and Mr. Marti, Jr.'s testimony as to the instances when inspectors *did* see PPE on Respondent's farms do not establish that PPE was provided to the handlers at the Jauca farm on April 26, 2004. R's Ex. 11; Tr. 1540. The only evidence in the record that Respondent provided PPE at the Jauca farm on April 26th is Mr. Acosta's testimony that the box contained face masks, that some masks were being used by handlers, and that in the office there were protection materials in small containers, with overalls and "masks that are used to protect yourself from dust." Tr. 1777, 1779-1780. His testimony is undermined, however, by the following facts. First, the record does not show that the inspectors were shown any PPE in the office and there is no indication in the record that "masks . . . to protect yourself from dust" were the required PPE face shields or NIOSH-approved respirators. Second, there is no evidence or testimony that the "face masks" Mr. Acosta testified were in the locked box and being used by handlers, were the required PPE face shields or respirators. Third, the inspection began at 8:45 in the morning, and the only pesticide applications scheduled during the day were applications of Boa by three handlers at 6:30 a.m. to a banana field and applications of ClearOut by Mr. Pewee to two fields, and the earliest pesticide application scheduled for the evening shift (Kocide) was at 4:50 p.m. C's Ex. 21 pp. 105-108; Tr. 258, 570. Fourth, on July 20th the locked box was found not to contain any PPE. Tr. 324-325.

Even taking as true Mr. Acosta's testimony that there were face masks in the box on April 26th, and assuming further that they were the required PPE respirators and face shields, there is no evidence as to the remaining required PPE. In that regard, on July 20th, the record shows that there were no face shields, chemical resistant aprons, or place to store clean clothes. Tr. 286-289, 318-319, 325-326, 329-330. The record is unclear as to whether on July 20th the handlers had *full face NIOSH approved* respirators, goggles or safety glasses, as Mr. Rivera's Inspection Report states merely that the handlers "all had the personal protective equipment clean and in order." C's Ex. 21 p. 3.

Respondent asserts that Mr. Rivera was speculating that the handlers lacked PPE, because he never asked the handlers about the availability of PPE. R's Reply Brief at 10. Tr. 485, 486. However, the inspectors did not see any handlers on April 26th, and Respondent did not establish by persuasive testimony or evidence that they were out in the fields wearing the PPE during the inspection. The PPE should be on the premises of the establishment, absent evidence that it was sent elsewhere for cleaning, because, as noted above, the regulation requires that PPE be provided by the employer, cleaned before each day of reuse and not worn home or taken home by any handler.

Respondent points to EPA's Agricultural Worker Protection Standard 40 CFR Parts 156 and 170 Interpretive Policy ("Interpretive Policy"),[12] and in particular Section 12.9 therein concerning storage of PPE "apart" and "away." R's Brief at 10. Section 12.9 states that employers must assure that changing of clothes and storage of PPE occurs in an area separate from pesticide storage and use areas so these activities will not result in personal clothing or PPE coming into contact with pesticide residues. However, Respondent has not rebutted Complainant's *prima facie* evidence -- the inspectors' observations -- with any evidence of an area for personal clothing and clean PPE.

Accordingly, Complainant has shown by a preponderance of the evidence that Respondent failed to provide handlers with PPE at the Jauca facility on April 26, 2004 for each of the thirteen applications of Boa, ClearOut and Kocide.

F. Failure to Provide Handlers with Decontamination Supplies at Coto Laurel

Counts 335 and 336 allege that Respondent failed to provide enough water for routine washing, for emergency eyeflushing, and for washing the entire body at the Coto Laurel farm with regard to two applications of Kocide to the C-001 mango field, one on April 20th and one on April 21, 2004. These allegations were based on the observation of the inspector, Mr. Munoz, during his inspection on April 26, 2004, that there were no showers for handlers to bathe, and on his interview of Mr. Oyola and a handler who was in the workshop. Tr. 106-109, 112-113, 116, 149-150; C's Ex. 15 p. 19, 23; C's Ex. 15A p. 99.

Respondent argues that the handler interviewed was not applying or mixing pesticides, but doing other chores at the workshop, and therefore he was not covered by WPS requirements under the EPA's Final Interpretive Guidance Workgroup Questions & Answers, March 26, 2004 ("WPS Q&A"), Q&A 2004-2.[13] R's Brief at 13; R's Reply Brief at 5-6. The WPS Q&A provides at Answer 2004-2 that "employees of an agricultural establishment . . . that are not performing worker or handler tasks are not covered by the WPS. . . . Examples of employees that would not normally be considered workers or handlers under the WPS would include . . . building maintenance/cleaning crews . . . and any other employees not engaged in WPS defined worker/handler activities." The presence of the handler at the facility on April 26, however, is not an element of the alleged violation; he was merely a source of information as to the decontamination facilities at the farm. At issue are the decontamination supplies provided for the handler at the time he applied the pesticide on April 20th and 21st.

Respondent challenges the allegations by pointing out that in Mr. Munoz's previous visits to the Coto Laurel farm, he never noted a deficiency of shower facilities, and after the August 2003 inspection, he did not notify Respondent about missing showers. R's Brief at 14-

[12] http://www.epa.gov/pesticides/safety/workers/wpsinterpolicy.htm

[13] http://www.epa.gov.oppfead1/safety/workers/igw-interplcy.htm

15; R's Reply Brief at 4; Tr. 214. Respondent points out that the fruit packing plant had abundant water and there were several bathrooms, that there was a swimming pool used by employees, and that "just around the corner of a workshop that had a decontamination area," there were two large potable water tanks, with several water faucets, hoses and water pumps" next to the tanks. R's Exs. 48, 49 photographs 1-3; R's Brief at 13-14. Respondent argues that the Interpretive Policy allows alternate methods to comply with decontamination requirements for water. R's Brief at 16, R's Reply Brief at 5. Respondent, however, does not state which alternate methods existing at the Coto Laurel farm meet the decontamination requirements, and no such alternative methods are otherwise found in the evidence of record.

Complainant argues that these alternative areas were not shown to be available to the handler on April 20th and 21st, and were not shown to have had soap and towels. C's Reply Brief at 8-9. Complainant suggests that the water pressure from the 3-inch diameter hose is forceful and potentially dangerous if not carefully opened. *Id.* As to the handler's indication that there was no place to bathe (tr. 182), Complainant argues that any such area suggested by Respondent might as well not exist if he did not know of such an area and therefore would not use it.

The fact that the lack of bathing facilities was not noted in previous inspections or notified to Respondent does not give rise to any defense of equitable estoppel or lack of fair notice. The elements of a defense of equitable estoppel as applied to the Government are that it "reasonably relied upon its adversary's actions to its detriment," and that the government "engaged in some affirmative misconduct." *BWX Technologies, Inc.*, 9 E.A.D. 61, 80 (EAB 2000)(citing *United States v. Hemmen*, 51 F.3d 883, 892 (9th Cir. 1995). "When equitable estoppel is asserted against the government, as here, a party bears an especially heavy burden" and "[c]ourts have routinely held that 'mere negligence, delay, inaction, or failure to follow agency guidelines does not constitute affirmative misconduct sufficient to estop the government.'" *BWX*, 9 E.A.D. at 80 (quoting *Board of County Comm'rs of the County of Adams v. Isaac*, 18 F.3d 1492, 1499 (10th Cir. 1994). "At a minimum, the [government] official must intentionally or recklessly mislead the estoppel claimant." *United States v. Marine Shale Processors*, 81 F.3d 1329, 1350 (5th Cir. 1996). As to "fair notice," even assuming *arguendo* that there was some ambiguity in the WPS regulations as to facilities "for washing the entire body in case of emergency" as applied to the Coto Laurel farm, it has been held that an agency's simple failure to cite a company during a past inspection, that is, past silence of agency officials, cannot be construed as a sign of approval and thus "does not, standing alone, constitute a lack of fair notice." *Daniel v. OSHRC*, 295 F.3d 1232, 1238 (11th Cir. 2002)(no evidence that inspectors said or did anything that would have induced the company to believe it did not need to take action to comply). Accordingly, the failure to cite, warn or notify Respondent regarding bathing facilities in previous inspections does not provide a defense to liability for Counts 335 and 336.

Such failure also does not undermine the credibility, accuracy or reliability of Mr. Munoz' observations in the April 26, 2004 inspection. *See,* Finding of Fact 55; *United States v. Chemical Foundation*, 272 U.S. 1, 14-15 (1926)("The presumption of regularity supports the official acts of public officers and, in the absence of clear evidence to the contrary, courts

presume that they have properly discharged their official duties."). Furthermore, Respondent has not rebutted his testimony and evidence with any evidence of decontamination supplies that meet the requirements of 40 C.F.R. § 170.250. The bathrooms at Coto Laurel and the decontamination area at the mechanic shop did not have faucets appropriate for washing the whole body. Tr. 1152-1153, 1296-1297, 1307-1309, 1311-1312; R's Ex. 49 photographs 4, 5, 6. The photograph of the water pump near the packing plant shows a faucet, but there is no evidence of the distance, other than Respondent's description of "just around the corner," between the faucet and remaining decontamination supplies: soap, towel and clean change of clothing. There is no evidence that these decontamination supplies were provided at the mixing site or at the swimming pool.[14] See, R's Ex. 49 photograph 7.

There was testimony that the handler, who was also the handler supervisor, has such supplies in his truck and he could drive to the water supplies. Tr. 1315-1316, 1318-1319, 1535. However, there is no evidence or testimony as to his truck being located at the mixing site or water pump during the applications on April 20th and 21st so that the decontamination supplies would be "located together" as required by 40 C.F.R. § 170.250(c). It is noted that if the handler drove in the truck with the other decontamination supplies to the water supply, he presumably would arrive there faster than if he walked to the water supply with the truck parked there, and in any event would access all of the decontamination supplies at the same time whether he drives his empty truck to a water supply which includes all other decontamination supplies, or whether he drives the decontamination supplies in his truck to the water supply. Nevertheless, Respondent has not supported its argument with any evidence that the location of the handler, as he applied pesticide in the C-001 field, was within 1/4 mile of the water pump, mixing site, or any other supply of water suitable for washing the entire body and emergency eyeflushing. *See*, R's Ex. 14 (hand drawn map, not to scale, of Coto Laurel farm, with no indication of distances).

It is concluded that Respondent did not provide 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, with regard to the applications of Kocide to the C-001 mango field on April 20th and April 21, 2004.

THE PENALTY

Section 14(a)(4) of FIFRA, 7 U.S.C. § 136*l*(a)(4), provides that, "In determining the amount of the penalty, the Administrator shall consider the appropriateness of [the] 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." The Consolidated Rules of Practice, 40 C.F.R. part 22, provide that the presiding officer "shall determine the amount of the civil penalty based on

[14] It would seem that the swimming pool water, presumably containing chlorine, likely would not be "of a quality . . . that will not cause illness or injury when it contacts the . . . eyes . . . ." 40 C.F.R. § 170.250(b).

the evidence in the record and in accordance with any penalty criteria set forth in the Act," and "shall consider any civil penalty guidelines issued under the Act." 40 C.F.R. § 22.27(b).

A. Complainant's Penalty Calculation

Michael G. Kramer, EPA Region 2 FIFRA Enforcement Coordinator, calculated the proposed penalty. Tr. 709, 711, 720-721; C's Ex. 36. As part of his duties, he has been involved with approximately 50 FIFRA enforcement cases, but has been involved in only one other WPS case, and the present case is the first WPS case for which he has calculated a penalty. Tr. 710-711, 745.

Mr. Kramer calculated the proposed penalty using the Enforcement Response Policy for FIFRA ("ERP," C's Ex. 22) and the WPS appendix to the ERP, entitled the Interim Final Worker Protection Penalty Policy, dated September 1997 ("WPS Appendix," C's Ex. 23) Tr. 712-713, 716. The same steps are included in the ERP and WPS Appendix. Tr. 721; C's Exs. 22, 23.

Complainant issued a complaint for the assessment of a penalty rather than issuing a warning under FIFRA, comparing Respondent to a "private applicator" under Section 14(a)(2) of FIFRA, because Respondent had had FIFRA violations within the previous five years. Tr. 714-715, 723.

Mr. Kramer explained that the first step in calculating a penalty under the ERP is to determine the type of violation, and in this case, the violations are "misuse" violations, under Section 12(a)(2)(G) of FIFRA, which under the ERP constitutes a "Level 2" gravity of violation.[15] Tr. 716, 721-723; C's Exs. 23, 36.

Next, the size of the violator's business is determined, considering whether the violator is a private applicator or commercial applicator. Tr. 723; C's Ex. 23. For private applicators (FIFRA § 14(a)(2) violators), the largest category for size of business is Category I, defined as a business with $200,000 gross sales or gross income. Tr. 723; C's Ex. 22 p. 20. Based on a Dun & Bradstreet Report indicating that Respondent had gross sales of $10,048,167, Mr. Kramer

[15] After the hearing, Complainant discovered that it had not submitted into the record Attachment 2B to the WPS Appendix, which designates gravity levels for various WPS violations, so Complainant sent a copy of the full WPS Appendix to Respondent's counsel and along with the Post-Hearing Brief in February 2006. C's Brief, Attachment A. Mr. Kramer submitted with Complainant's Post-Hearing Brief a Declaration in which he acknowledged that he did not consider Attachment 2B, and that Counts 152 and 322 through 334 should have been assessed at a Level 1, rather than a Level 2, for the gravity of those violations according to the WPS Appendix. C's Brief, Exhibit B (Declaration of Mr. Kramer, dated February 9, 2006). However, because the penalty matrix provides for the same amount of penalty (the statutory maximum) for Level 1 and Level 2 gravity for a Category I size of business, there is no difference in the proposed penalty, Mr. Kramer explained in his Declaration, so the omission is not material to the penalty calculation. *Id*; C's Ex. 22 p. 19-A.

classified Respondent's size of business as Category I. Tr. 723-724; C's Ex. 22 p. 20, C's Ex. 23 p. 8, C's Exs. 24, 36.

The base penalty is determined from a matrix in Table 1 of the ERP. C's Ex. 22. For violations occurring after January 30, 1997, the maximum penalty that may be assessed under Section 14(a)(2) of FIFRA is $1100. C's Ex. 22 p. 19-A. For a Level 2 or Level 1 gravity and Category I size of business, the base penalty according to the matrix in the ERP is $1100. C's Ex. 22 p. 19-A; Tr. 726. Finding that each of the alleged violations is a Level 2 gravity violation (or Level 1 for Counts 152 and 322 through 334, as he later corrected himself), and Respondent's size of business is Category I, Mr. Kramer calculated a base penalty of $1100 for each of the alleged violations. C's Ex. 36.

The next step is to apply the WPS Appendix gravity adjustments to the base penalty, by assigning values for each of the gravity factors: Pesticide Toxicity, Human Exposure, Human Injury, Compliance History and Culpability. C's Ex. 23 p. 10; Tr. 726-727. The ERP provides that the gravity adjustment numbers from each of the five adjustment factors are to be added (up to a maximum total value of 21) and, based upon Table 3 in the ERP (C's Ex. 22 p. 22, Table 3), the gravity base penalty is either assessed as is, raised or lowered. If the sum of the adjustment factors is 7 or below the penalty is reduced or eliminated, if the sum is between 8 and12 the base penalty is assessed, and if the sum of adjustments is 13 or above the penalty is theoretically increased. C's Ex. 22 at 22.

To account for the relative toxicity of the specific pesticide involved in the violations, the WPS Appendix provides three numerical choices, *i.e*. either 1, 2 or 3. C's Ex. 23 p. 10. Pesticides rating a value of 1 are those in Toxicity Categories III or IV, assigned the signal word "caution," and have no known chronic effects. Pesticides rating a value of 2 are Toxicity Category II pesticides, requiring a signal word "warning." Pesticides in Toxicity Category I, are those requiring the signal word of "danger," identified as "extremely flammable" or "flammable," are restricted use pesticides, or pesticides with chronic health effects, and they are assigned a value of 3. *Id.*; Tr. 728.

To account for the criterion of Human Exposure, the numerical values are 0 (representing that no agricultural employees were actually exposed), 1 (representing a small number of employees were exposed), 3 (representing a medium or unknown number of employees were exposed), and 5 (representing a large number of employees were exposed). C's Ex. 23 p. 10.

For the criterion of Human Injury, the numerical values are 0 (representing no injuries or adverse health effects occurred), 1 (representing fewer than 10 persons incurring minor injuries), 3 (representing one serious injury or more than 10 persons or unknown number incurring minor injuries), and 5 (representing one or more deaths or serious injury, or widespread serious injury). *Id.*

For Compliance History, prior violations that operate under the gravity adjustments to increase the penalty are prior FIFRA complaints for assessment of a penalty, but not Notices of

Warning. Tr. 730. The possible numerical values are 5 for a violator with more than two prior FIFRA violations and at least one prior Gravity Level 1 violation, 4 for more than two prior FIFRA violations, 2 for two prior FIFRA violations, or 0 for no prior FIFRA violations. Tr. 729-730; C's Ex. 23 p. 10. Mr. Kramer assigned the value of 0 for Compliance History for all of the alleged violations because Respondent had no prior FIFRA penalty complaints. Tr. 733

For Culpability, the possible numerical values are 4 for a knowing or willful violation with knowledge of general hazards of action, 2 for a violation resulting from negligence or where culpability is unknown, and 0 for a violation that did not result from negligence and the violator took steps immediately after discovery of the violation to correct it. Tr. 730-731; C's Ex. 23 p. 10.

From the base penalty of $1100 for each of the alleged violations, Mr. Kramer in accordance with the ERP assigned values for each of the gravity adjustment factors and added the values together to determine a percentage of adjustment to the base penalty. C's Ex. 22 p. 22 Table 3; C's Ex. 36. The gravity adjustments and calculations are discussed below with respect to each type of violation.

B. Respondent's General Arguments as to Penalty

Respondent sets out several arguments as "affirmative defenses" on pages 8 to 10 of its Post-Hearing Brief which appear to address the penalty assessment in general. These arguments include citations to three provisions of FIFRA in an effort to show that no penalty should be assessed. First, Respondent argues that under Section 14(a)(2) of FIFRA, a written warning must be issued for a violation of FIFRA prior to assessment of a penalty. Second, Respondent points out that under 14(a)(4), EPA may issue a Notice of Violation (NOV) in lieu of a penalty if the agency determines that the violation occurred despite exercise of due care or the violation did not cause significant harm to health or the environment. Third, under FIFRA 9(c)(3), an NOV may be issued in lieu of a penalty for minor violations where the Administrator believes the public interest will be adequately served.

As to the first argument, Section 14(a)(2) provides in pertinent part that any person who violates FIFRA "subsequent to receiving a written warning. . . or following a citation for a prior violation, may be assessed a civil penalty . . . ." Respondent did receive a Notice of Warning and Notices of Violation for violations observed during inspections on September 5th and December 5, 2003, prior to receiving the Complaint for the assessment of a penalty. C's Exs. 6, 6-A, 8, 8-A, 11, 11-A. Such Notices constitute "a written warning" or "a written citation for a prior violation" within the meaning of Section 14(a)(2) of FIFRA. There is no regulatory requirement that the prior warning or citation for violation be of the same provision as that

charged in the Complaint and therefore there is no merit to Respondent's defense in regard to this issue.

As to the second two arguments, Sections 9(c)(3) and 14(a)(4) refer to the discretion of the Administrator to choose whether to initiate a proceeding for assessment of a penalty or to issue a warning. Respondent has not alleged nor shown that EPA abused its discretion in electing to issue a complaint for assessment of a penalty against Respondent and therefore these arguments too are without merit.

Respondent also argues that EPA delayed commencing this proceeding for almost one year after the relevant inspections evidencing, Respondent states, that its intention is not to protect the workers and handlers but to cause undue hardship to Respondent. Mr. Marti, Jr. further stated during his testimony that the inspectors did not inform Respondent of the violations on the date of, or immediately after, the April 26, 2004 inspections, which he suggests indicates that the violations were not as dangerous to the workers and handlers as EPA now alleges. Tr. 1531-1533, 1592.

The ten month time period between the inspections in April 2004 and issuance of the Complaint in February 2005 is not unusually long, considering the preparation, review and approvals necessary before a complaint is issued. Respondent, an agricultural employer, as well as every other person in the regulated community, is presumed to be familiar with Federal regulations that apply to its activities through notice in the Federal Register. *Ed Taylor Construction Co. v. OSHRC*, 938 F.2d 1265, 1272 (11th Cir. 1991)(whether employers are in fact aware of each OSHA regulation and fully understand it, they are charged with this knowledge and are responsible for compliance); *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380, 384-385 (1947)(Just as everyone is charged with knowledge of the U.S. Statutes at Large, Congress has provided that the appearance of rules and regulations in the Federal Register gives legal notice of their contents). An inspection of a person's facility presumably would bring that person's attention to these Federal regulatory requirements, particularly where, as here, Notices of Warning and Notices of Violation were issued. Particularly in these circumstances, delay on the part of EPA in issuing a complaint should not result in mitigation of the potential harm to human health. *See, FRM Chem, Inc.*, FIFRA App. No. 05-01, slip op. at 26 (EAB, June 13, 2006)(EPA's delay in filing the complaint does not change the actual toxicity or harmfulness of the pesticide); *William Comley*, 11 E.A.D. 247, 267 (EAB 2004)(three year delay from inspection to issuance of complaint does not mitigate the potential for harm in light of the pesticide's acute toxicity, high degree of human exposure and dangers of improper application). Therefore, the ten month period of time does not suggest that Respondent's workers and handlers were put at risk, that the violations were not dangerous to workers and handlers, or that the Complaint was issued with an improper motive.

Respondent argues that it has already been penalized for the violations alleged in this case by virtue of EPA's press release of February 3, 2005 which put at risk its economic well being and stability. Specifically, Respondent refers to the fact that on February 3, 2005 EPA announced in a press conference and press release (and on February 4th a newspaper article was

published in the San Juan Star in regard thereto) that Martex faced more than $400,000 in fines, the largest penalty demand by EPA in U.S. history for alleged FIFRA violations. R's Exs. 24, 25; Tr. 1161, 1163. The newspaper article contains photographs and information which are accusatory toward Respondent and inaccurately refers to melons and vegetables, which Respondent does not grow. Tr. 1172-1175. Mr. Marti, Sr. testified that as a result of such pre-judgment publicity Respondent's clients might have stopped buying its products, and that it might have had to close down operations as a result. Tr. 1182-1184. Mr. Marti Sr. testified that he was notified of the press conference by telephone only the night before it was held, without being given the opportunity to examine the Complaint beforehand, which he did not see until two days after the press conference. Tr. 1161-1163. However, a letter written by Carmen Oliver Canabal of the PRDA, dated February 15, 2005, in response to Respondent's request after the press conference, appears to remedy any such damage. R's Ex. 39; Tr. 1278, 1364-1365. The letter is addressed to "All Martex Farms distributors and clients," and states that the PRDA confirms that to the best of its knowledge "all fruits produced by Martex Farms are 100% safe." R's Ex. 39. In addition, the San Juan Star article presented by Respondent states that Acting EPA Regional Director Kathleen Callahan said that "the products are safe for consumers." R's Ex. 24. Assuming *arguendo* that any alleged damages to Respondent could be factored into the penalty calculation, Respondent has not proffered any evidence to show that any actual damages occurred despite Ms. Oliver's letter and Ms. Callahan's statement.

Respondent also disputes Complainant's allegations that it failed to provide and/or document WPS training, as stated in NOVs issued against Respondent. Mr. Marti, Jr. testified that Respondent has had its workers and handlers trained in WPS at least once or twice per year since the early 1990's, and trained by the PRDA since June 2000, but acknowledged that Respondent did not properly document such training. Tr. 1473-1479, 1483; R's Ex. 8, 10. He further testified that "most" of Respondent's employees had EPA certified training, but he admitted that many of Respondent's workers are seasonal, and there is a lot of turnover. Tr. 1483, 1575, 1612. Mr. William C. Hunt, certified by the Florida Department of Agriculture and Consumer Services to conduct WPS training, who is a pesticide spray specialist who supplies spraying equipment to Respondent, testified on behalf of Respondent. Tr. 1578, 1603. Pursuant to a request from Respondent, Mr. Hunt conducted WPS training for Respondent's employees, including 125 workers and 25 handlers, on June 14, 2000, after which he issued WPS certification cards for the workers and handlers, valid for five years. Tr. 1603-1606, 1618. Mr. Munoz testified that he could not find any evidence that the workers at Coto Laurel had received WPS training within six days of working in the field, but he acknowledged that Ms. Ana Delia Martinez had given training to Martex employees four or five times since 2003. Tr. 137-140, 145. Since the 2004 inspections, in which Mr. Munoz provided training videos, Mr. Marti, Jr. testified that they document each employee's training with the training video. Tr. 1484-1485. Respondent is not charged in this Complaint with any deficiencies in regard to WPS training, however admittedly if the evidence showed that handlers and many workers were *not* provided with the requisite training, that could be taken into account in calculating the penalty, as increased Culpability or Human Exposure.

Respondent argues that the violations have not caused any harm to health or the environment, that its insurance costs were reduced for having an outstanding positive labor record, and that it promptly took corrective measures to deal with any deficiencies. These factors are discussed below.

Respondent's argument that the proposed penalties are exaggerated, unrealistic, unreasonable, disproportionate and totally unrelated to the severity of the violations does not apply here where the penalties have been significantly reduced from those proposed.

Respondent presented testimony that indicates that it has made efforts to reduce its use of pesticides and to use less dangerous pesticides, from which an inference may be drawn that its workers and handlers would experience less pesticide exposure and less injury from pesticides than if Respondent did not make those efforts. Mr. Marti, Sr. testified that, in order for his agricultural operation to succeed in the market, where it competes with Third World countries, Respondent had to produce more volume and to export to Europe, where quality was appreciated more than price. Tr. 1129-1133. To meet European standards for chemical residues on mangoes, Respondent "had to be very careful with the [chemical] product that we apply to the fruit . . . we're very limited in terms of the chemical product that we apply to the mango . . .it makes us almost organic regarding the fruit." Tr. 1157-58. Therefore, over the past eight years, Respondent implemented integrated pest management techniques to decrease use of chemical pesticides, including transplanting over 15,000 trees to decrease the density of the trees, setting up a windbreak of neem trees, mowing, pruning and mulching the fruit trees, and re-grafting them with more pest-resistant varieties of mangoes. Tr. 1159, 1487-1491, 1493, 1496-1498; R's Exs. 23, 50. Two of the pesticide products used by Respondent, Aza-Direct and Trilogy, have extract of neem oil as the active ingredient, which is derived from the neem tree of South Asia, and on the basis of precautionary statements on the label, is less harmful to agricultural workers than other fungicides such as Kocide. Tr. 929, 1461, 1494-1496; C's Exs. 19, 20. This testimony and evidence is considered herein below as a backdrop to the penalty calculation.

C. The Base Penalty

Under the WPS Appendix, Attachment 2-B, for each of the violations for which Respondent has been found liable, the Gravity Level is 2, except for Counts 152 and 322 through 334, for which the Gravity Level is 1.

As to the Size of Business, Mr. Marti, Sr. testified that Martex has a gross income of over $10 million. Tr. 1293. Table 2 of the FIFRA ERP provides that Section 14(a)(2) violators with gross revenues of over $200,000 in the prior calendar year are in Category I, the highest level.

Respondent points out testimony that Complainant's project officer attempted to obtain financial information by telephoning Respondent. Tr. 1059, 1066. Mr. Kramer determined the size of business based on a Dun & Bradstreet report. Tr. 723-724. Respondent points out that the WPS Appendix states that Dun & Bradstreet reports should be used for FIFRA § 14(a)(1)

violators "but may not be for 14(a)(2) violators." C's Ex. 23 p. 8; Tr. 1061. Respondent argues that no attempts were made by the inspector or case development officer to document the size of Respondent's business. R's Brief at 10. These arguments do not affect the categorization of the size of Respondent's business where there is no dispute as to the gross income.

According to the WPS Appendix Table A, for Category 1 Size of Business and Gravity Level 1 or 2, the base penalty for each violation is $1100. Mr. Kramer's error in assigning Gravity Level 2 to Counts 152 and 322 through 334, which under the WPS Appendix should be assessed Gravity Level 1, does not change the base penalty.

Respondent has not presented any persuasive reason to depart from the base penalty provided in the WPS Appendix Table A. Therefore in the following discussion of each type of violation, only the particular issues raised by Respondent and the gravity adjustment criteria are discussed, with the exception of Compliance History, which is undisputed and is appropriately assigned the value of 0.

D. Failure to Notify Workers and Handlers of Pesticide Applications

The regulations provide that employers must post the pesticide application information for workers "in a central location on the farm . . . where it can be readily seen and read" by workers, and for handlers "in a central location on the farm . . . where it can be readily seen and read" by handlers. 40 C.F.R. §§ 170.122(a), 170.135(d)(1), 170.222(a), 170.235(d)(1). There is no dispute that the information generally is posted for workers and handlers in the same location, unless there are different central locations for handlers and workers. Tr. 396-397, 575, 818-819. Complainant assesses separate violations and separate penalties for Respondent's failure to display each ClearOut application for workers, and for failure to display each of the same applications for handlers, where the pesticide application information was in the same display for workers and handlers.

Mr. Kramer 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. Tr. 716-718; C's Ex. 22 p. 6. Thus, he stated that a separate penalty would be assessed for each application of a pesticide that was made but not included in the WPS display, and that separate penalties would be assessable for failure to notify workers under 40 C.F.R. § 170.122 and for failure to notify handlers of a pesticide application under 40 C.F.R. § 170.222. Tr. 718-719.

Respondent argues that assessing penalties for violations of the identical regulatory requirements of 40 C.F.R. 170.122 and 170.222 is contrary to serving the public interest.

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. For example, an applicator that misuses a pesticide on three occasions (either three distinct applications or three separate sites) will be charged with three counts of misuse. It provides further that "a single event or action (or lack of action) which can be considered as two unlawful acts of FIFRA (section 12) cannot result in a civil penalty greater than the statutory limit for one offense of FIFRA." ERP at 26.

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. On the other hand, the failure to display pesticide application information is a single lack of action which is being considered as two unlawful acts under the regulations. The two unlawful acts are dependent in the circumstances of this case: if Respondent failed to display pesticide information for workers, then it necessarily failed to display it for handlers (and *vice versa*), because Respondent employs a single pesticide information display for both workers and handlers. Clearly the regulations, 40 C.F.R. Sections 170.122 and 170.222, set out separate duties to provide the 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 for the few handlers at the Jauca facility than for failing to display it for any number of workers. Regardless of the number of workers at the establishment on the particular day, April 26, 2004, that is, whether there was one worker or 100 workers, there is only one penalty for violation of Section 170.122 per application that was not displayed. Therefore it is not appropriate to assess a second penalty under Section 170.222 for each application due merely to the fact that there were additionally four or five handlers at the Jauca facility that day, especially where those handlers either made the application or their supervisor ordered the application. *See*, Tr. 485-486; C's Ex. 21 pp. 105-108. Accordingly, the evidence of record does not support assessment of separate penalties for Counts 154, 155, 159-161, 163, 164, 166, 168, 170, 171, 173, 176, 178, 182-189, 191, 193, 197-199, 201, 203, 208, 211-213, 215, 221-225, 227, 229, 235-237, 239-241, 243, 247, 248, 252, 256, 258, 259, 264, 265, 268, 272, 273, 280, 281, 286, 289, 290, 297, 298, 303 and 304, which represent Respondent's failure to notify handlers of applications of ClearOut as required by 40 C.F.R. § 170.222.

From the base penalty of $1100, the next step is to assess values for the gravity adjustment factors. For toxicity, ClearOut has a signal word of "Danger or "Flammable" on the label, so Mr. Kramer properly assigned the value of 3. Tr. 732, 735-736.

Mr. Kramer testified that he did not know whether there was an exposure resulting from the pesticide applications, so for the criterion of Human Exposure, he assigned a value of 3. Tr. 732, 736, 778-780. He stated at the hearing that he assigned a value of '0' for the criterion of Human Injury, but that he believes it was a mistake because no one informed him of any number or severity of any injuries, so the value should be 3. Tr. 732-733, 736, 746-747, 780-781. Dr. Enache testified that if a worker got a rash, he would need the information regarding the pesticide to give to a physician for treatment or to treat himself. Tr. 936. However, Dr. Enache

stated at the hearing that EPA had no documented exposure or injury events at Respondent's facilities. Tr. 947.

The record shows that in July 2004, Respondent was granted a 14 percent rebate in its insurance premium from the State Insurance Fund on accident protection for workers based on Respondent's low cost of accident claims. Tr. 1269-1273; R's Ex. 37. Accidents are required by law to be reported to the Fund. Tr. 1333. Mr. Marti, Sr. and Mr. Marti, Jr. testified that according to Respondent's records, over the past five years, only five accidents could be considered related to chemicals, and generally occurred at the nurseries and packing houses; Mr. Marti believed that three were at the packing plant and possibly two at nurseries. Tr. 1275, 1334-1340, 1502-1504. One or more incidents involved a skin eruption on the hands, one involved inhalation of chlorine bleach or cleaning chemical, and another one involved a man who became sick when filling a banana bag, but Mr. Marti, Jr. testified that the banana bag was either plastic, without pesticide, or "biological," meaning it may contain or be impregnated with pepper or garlic to repel insects. Tr. 1338, 1413-1417, 1519. Mr. Marti, Sr. testified that while ClearOut is being applied, no workers are in that area, because the workers know the handler, the pesticide equipment (container on the handler's back, and white overalls), and that pesticide is being applied, and the workers' foreman is informed about herbicide application before it is applied. Tr. 1375, 1381-1382. The REI for ClearOut is 12 hours, and it is applied during the day. C's Ex. 20; Tr. 700, 1375.

Each Count represents only one application of ClearOut at one of the farms (Jauca). 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 shows that a group of 20 workers harvested in one field at Martex. Finding of Fact 29. The evidence also shows 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. Findings of Fact 19, 21, 23, 29. The appropriate level of Human Exposure is a value of 3, representing that an unknown number, or a "medium number," of employees were exposed to ClearOut by Respondent's failure to display each application of ClearOut.

Drawing an inference from the Respondent's records of accidents, that there were at most two or three pesticide related injuries over five years among the five farms, there is an average of less than one pesticide related injury for the thousands of pesticide applications made at the five farms made every year. It would be overstating the level of Human Injury to assess a value of 1 representing that some, but fewer than ten persons with minor injuries occurred as a result of Respondent's failure to display one application of ClearOut. Therefore, a value of '0' is appropriate to assess for Human Injury.

For the criterion of Culpability, Mr. Kramer stated that Respondent's culpability was unknown, so he assigned the value of 2. Tr. 733, 736, 782. Dr. Enache described this assessment as "conservative" considering that Martex had repeat violations and Notices of Violation. Tr. 947-948. In regard to Respondent's culpability, Mr. Marti, Jr. explained that the

supervisor of herbicide application issues the spray application instructions when he arrives at 7:00 in the morning, and the WPS Display information for that day was printed the previous afternoon, so a new WPS Display Record would have to be printed in order to include the herbicide application, which may not have always happened. Tr. 1563, 1569-1570; R's Ex. 31. Mr. Marti, Jr. explained that Martex has taken steps to assure such a problem will not occur again. R's Exs. 1, 7, 31. In May 2005, Dr. Enache was invited by Martex and its attorneys to visit its farms, and no notice of violation or complaint was warranted. Tr. 1033-1037. In sum, the totality of 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.

In calculating the proposed penalty, Mr. Kramer found that the sum of the gravity adjustment values is 8, which results in no penalty adjustment, and thus assessment of the maximum penalty of $1100, according to the ERP. C's Ex. 22 p. 22, Table 3; C's Ex. 36; Tr. 733-734, 736. However, upon a review of the record, the appropriate sum of values is 7 , resulting in a reduction of 10 percent from the base penalty, according to Table 3 of the ERP.

A penalty of $990 is assessed for each of Counts 1, 2, 6-8, 10, 11, 13, 15, 17, 18, 20, 23, 25, 29-36, 38, 40, 44-46, 48, 50, 55, 58, 59, 60, 62, 68-72, 74, 76, 82-84, 86-88, 90, 94, 95, 99, 103, 105, 106, 111, 112, 115, 119, 120, 127, 128, 133, 136, 137, 144, 145, 150 and 151 of the Complaint. The total penalty for these 68 Counts is $67,320.

No penalty is assessed for Counts 154, 155, 159-161, 163, 164, 166, 168, 170, 171, 173, 176, 178, 182-189, 191, 193, 197-199, 201, 203, 208, 211-213, 215, 221-225, 227, 229, 235-237, 239-241, 243, 247, 248, 252, 256, 258, 259, 264, 265, 268, 272, 273, 280, 281, 286, 289, 290, 297, 298, 303 and 304.

E. Failure to Provide Workers with Decontamination Supplies at Jauca on April 26, 2004- Counts 152 and 153

Respondent is liable for Count 152 as a result of its failure to provide decontamination supplies within 1/4 mile of the 20 workers in the JC-11 field on April 26, 2004. Respondent is liable for Count 153 for failing on that date to provide those workers with an eyeflush container for flushing eyes as required by the Kocide label. The workers were working in the JC-11 field five days after Kocide had been applied to the field, within the seven-day time frame in which a dedicated eyeflush container and eyewash were required to be available to employees entering the field. See, Findings of Fact 12, 29.

For toxicity, Kocide is a Class I pesticide, so Mr. Kramer properly assigned the value of 3. Tr. 734. For the criterion of Human Exposure, he assigned a value of 3, because there was a medium number of employees exposed or no known exposure. Tr. 734-735, 778-780. He stated that he assigned a value of '0' for the criterion of Human Injury, but that he believes it was a mistake because the number and severity of injuries is unknown, so the value should be 3. Tr.

735, 780-781. Dr. Enache testified that all of the decontamination supplies are required to be located within a quarter of a mile from the location of the workers, because if they are located a half mile or more away, a worker who gets exposed to a pesticide may not be able to effectively wash off the pesticide. Tr. 911-912. Symptoms of pesticide exposure may occur at different times depending on many factors. Tr. 912. Towels must be provided because some pesticides are not easy to wash off. Tr. 913. Single use towels are important to supply because if a towel is used it has pesticide residue on it and if another person uses it, they may be exposed. Tr. 912-913. He testified that failure to provide decontamination supplies or an eyeflush bottle placed the workers at risk of irreversible eye damage and even blindness from exposure to Kocide, and that repeated exposure may cause copper poisoning, including renal failure and severe gastrointestinal problems. Tr. 937-938, 940-941.

The evidence showed that the decontamination site at the workshop was 0.6 miles from the workers and that on April 26th it had a shower and soap, but not a towel, paper towels or eyeflush. Tr. 264, 269, 397-398, 576-577, 584; C's Ex. 13 p. 4, 85, C's Ex. 13 p. 82. Twenty workers did not have sufficient water for decontamination within 1/4 mile, and even if soap and towels were provided in a supervisor's truck, they were not very effective where there was insufficient water.

The WPS Appendix (at 10) does not define "small " or "medium" or "large number of employees exposed." Considering that there were 20 workers in the JC-11 field, and that Kocide had been applied five days earlier, it is concluded that there was a "medium number" of employees exposed, and therefore the appropriate value under the WPS Appendix for Human Exposure is 3. As to Human Injury, Mr. Rivera observed and interviewed the 20 workers but did not indicate that any of them had any injuries or adverse health effects resulting from pesticide exposure on April 26th. Therefore the appropriate value for Human Injury is '0."

For the criterion of Culpability, Mr. Kramer stated that Respondent's culpability was unknown, so he assigned the value of 2. Tr. 735. Respondent asserts that immediately after the inspection, it purchased eyeflush and placed it at decontamination areas, that it was shown to the inspectors during the inspection on April 29, 2004, and that Respondent then purchased more eyeflush and provided it to all supervisors and decontamination areas. R's Exs. 22, 31. Respondent provides evidence that it substantially increased the number of areas with decontamination materials on each farm, provided three mobile decontamination stations including 120 gallon water tanks for harvesting crews, provided decontamination kits with water tanks and distributed them to supervisors, established a decontamination inventory, and established a decontamination materials monitoring system. R's Exs, 12-19, 31. As noted above, in May 2005, no notice of violation or complaint was warranted. Tr. 1033-1037. Given that the violation was a result of negligence, but Respondent corrected the violations immediately, it is concluded that a value of 1 for culpability is appropriate.

According to Mr. Kramer's calculation, the sum of the gravity adjustment values is 8, which results in no penalty adjustment, and thus assessment of the maximum penalty of $1100, according to the ERP. C's Ex. 22 p. 22, Table 3; C's Ex. 36; Tr. 734, 736. Mr. Kramer testified

that the sum of the values would be 11 with a value of 3 for human injury, which also would result in the maximum penalty assessment. Tr. 735, 736. However, upon a review of the record, the appropriate sum of values is 7, resulting in a reduction of 10 percent from the base penalty, according to Table 3 of the ERP. Accordingly, for Counts 152 and 153, the penalty for each Count is $990.

F. Failure to Provide Handlers with Decontamination Supplies for Applications at Jauca on April 26, 2004 - Counts 305-321

Respondent was found liable for failing to provide handlers with decontamination supplies within 1/4 mile from the handling activities with respect to seventeen pesticide applications at the Jauca farm on April 26, 2004: applications of ClearOut to fields OS-11 and ON-52CLT (Counts 305 and 306); applications of Kocide to fields JC-31, JC-32, OS-11, OS-12, TX-21, TX-22, OS-15, and OS-16 (Count 307 through Count 314); three applications of Boa to field OE-11G (Counts 315 through 317); and applications of Trilogy to fields TX-52G, TX-54G, OE-21G, and OE-22G (Counts 318 through 321). The decontamination supplies Respondent was required to provide within 1/4 mile of the handling activities are water for routine washing, emergency eyeflushing, and for washing the entire body; soap; single-use towels; and a clean change of clothing. 40 C.F.R. § 170.250(b) and (c). Respondent was also required to provide at the site where handlers remove PPE, soap, clean towels and sufficient water to wash thoroughly. 40 C.F.R. § 170.250(e).

Mr. Kramer assigned the same gravity adjustment values for the violations involving Respondent's failure to provide decontamination equipment for handlers as he assigned for failure to provide decontamination equipment for workers, except with regard to toxicity as to Counts 318, 319, 320 and 321, which involve the pesticide Trilogy. C's Ex. 36; Tr. 736-742. Mr. Kramer assigned a toxicity value of 1 for Trilogy, which on his penalty calculation worksheet resulted in a total gravity value of 6 for Counts 318 through 321. C's Ex. 36; Tr. 742-743. The ERP provides that a total gravity value of 6 results in a 20 percent decrease from the base penalty, and thus would yield a total penalty of $880. C's Ex. 22 p. 22 Table 3. The penalty calculation worksheet, however, shows that the final proposed penalty for those Counts is $1100, and Mr. Kramer acknowledged that was an error. Tr. 742; C's Ex. 36. Yet, as with the other violations, Mr. Kramer stated that he would adjust the human injury value to 3, resulting in no adjustment to the base penalty. Tr. 742.

The toxicity value was properly assessed by Mr. Kramer for Counts 305 through 317 as 3, and for Counts 318 through 321 as 1. As to Human Exposure, the evidence showed that the 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. Tr. 1508, 1535-1536, 1736-1739. Dr. Enache testified that water coming from a sink or jug of water is not effective for washing the whole body because pesticides cling onto skin in very hard-to-reach places of the body. Tr. 915. Where there was a sufficient water supply at the mixing

site, fruit washing station, and lake valve, there were no other decontamination supplies. R's Exs. 50, 51, 52. At the workshop decontamination site there were no towels. Tr. 264, 397-398, 576-577, 584; C's Ex. 13 p. 4, 85; C's Ex. 13-A p. 82. Dr. Enache testified that the clean towel for each handler is an additional precaution after the shower for wiping off any pesticide residues. Tr. 916-917.

Dr. Enache testified that failure to provide decontamination supplies where a person is exposed to ClearOut or Kocide may result in blindness, and repeated dermal exposure could lead to chronic health effects. Tr. 937-941. He testified that dermal exposure to half of a teaspoon or more of Boa makes the skin break apart, fingernails fall, and ulcerations to develop. Tr. 942-943. He testified that if the decontamination supplies are a half mile or more away, there is not enough time to effectively wash off the pesticide, and that if not all of the supplies are provided, the decontamination is not sufficient. Tr. 912, 913-915. Without adequate decontamination, any pesticide exposure would become more significant. Each Count represents only one handler doing one application. For applications of ClearOut, Kocide and Boa, it cannot be said that "no agricultural employees were exposed" (for a value of 0). Rather, the facts support a finding that there was a "small number of agricultural employees exposed" so the appropriate value is 1 for Counts 305 through 317.

As to Counts 318 through 321, Dr. Enache testified that skin problems and eye irritation could result from exposure to two and a half cups or more of undiluted Trilogy. Tr. 929-931. The likelihood of one handler during one application to be exposed to a significant amount of undiluted Trilogy is low, and significantly less than the likelihood of any significant exposure to pesticides such as Boa or Kocide. Tr. 931, 938, 943. Therefore, the value for Human Exposure is '0' for Counts 318 through 321.

For the value of Human Injury, the evidence does not reveal any actual injuries or adverse health effects resulting from these violations. As noted above, each Count represents only one handler doing one application, and Respondent's records indicate very few injuries or adverse health effects from pesticides over the past years. In these circumstances, the appropriate value of Human Injury for the applications of Boa, Kocide, ClearOut and Trilogy referenced in Counts 305 through 321, is '0.'

Mr. Marti, Jr. suggested that workers take home for their personal use the soap, towels, paper towels and eyewash provided to them by Martex. Tr. 1526, 1580. However, there was no testimony that these items were taken from the handler supervisor's truck, or that the fruit washing station and lake valve were supplied with decontamination materials. Therefore, the evidence supports a finding that Respondent was negligent in failing to ensure that each handler had decontamination supplies within 1/4 mile of the application and all decontamination supplies at the decontamination sites. Respondent points out testimony that after the April 26th inspection, Mr. Acosta purchased a new towel and eyewash and put it at the Jauca farm. Tr. 1579-1580. As noted above, Respondent provides evidence that it substantially increased the number of areas with decontamination materials on each farm, established a decontamination inventory, established a decontamination materials monitoring system, and in May 2005, upon Dr. Enache's

visit to Martex, no notice of violation or complaint was warranted. R's Exs. 12-19, 31; Tr. 1033-1037. Given these facts, the appropriate value for culpability is 1.

The total of the gravity adjustment values for Counts 305 through 317 is 5, resulting in a penalty reduction of 30 percent from the base penalty, or a penalty of $770 per Count. The total of the gravity adjustment values for Counts 318 through 321 is 2. Table 3 of the ERP provides that a value of 3 or below results in a penalty reduction of 50 percent from the base penalty. However, rather than equate a violation with a gravity adjustment value of 3 to one with a value of 2, it is logical to reduce the penalty by another ten percent, just as Table 3 provides a ten percent reduction for each value lower than 8. Therefore a penalty of $440 per Count is assessed for each of Counts 318 through 321. The total penalty for Counts 305 through 317 is $10,010, and the total penalty for Counts 318 through 321 is $1,760.

G. Failure to Provide Handlers with PPE for Applications at Jauca on April 26, 2004 - Counts 322-334

Respondent was found liable for failure to provide handlers with PPE with regard to thirteen pesticide applications made at various fields at the Jauca farm on April 26, 2004: applications of ClearOut to fields OS-11 and ON-52CLT (Counts 322 and 323); applications of Kocide to fields JC-31, JC-32, OS-11, OS-12, TX-21, TX-22, OS-15, and OS-16 (Counts 324 through 331); and three applications of Boa to field OE-11G (Counts 332 through 334).

As noted above, Respondent was required to provide chemical resistant gloves, protective eyewear, face shields, NIOSH- approved respirators, and chemical resistant aprons, in accordance with the labels for Boa, Kocide and ClearOut. C's Ex. 17, 18, 19, 20. Under 40 C.F.R. § 170.240, the employer is required to provide handlers "a clean place(s) away from pesticide storage and pesticide use areas" for handlers to store personal clothing not in use. 40 C.F.R. § 170.240(f)(9)(i).

The evidence shows that there was no PPE at the Jauca facility on April 26, 2004, except a possibility that there were "face masks" – which may or may not have been the required "face shields" -- in the locked wooden box. Furthermore, on July 20th, the record shows that there were no face masks or chemical resistant aprons. The evidence also showed that there was no suitable place to store clean clothes and clean PPE. Tr. 286-289, 318-319, 325-326, 329-330.

Mr. Kramer assigned the same gravity adjustment values for the violations involving Respondent's failure to provide handlers with PPE as for the violations in Counts 305-317. Tr. 743. The toxicity value was properly assessed by Mr. Kramer as 3.

Dr. Enache testified that it is "very probable" that a handler could be exposed to pesticide if he does not wear PPE. Tr. 943. He testified that PPE should be kept in the decontamination area in a specially provided space and stored in such a way that the handler has full access to it before engaging in handling activities. Tr. 919-920. He stated that the regulations do not allow

handlers to take PPE home because it has been contaminated by contact with pesticides, and although PPE is required to be clean at the end of the day, it may not get thoroughly cleaned and may expose the handlers' families. Tr. 920. Therefore, given the absence of PPE at the Jauca farm on April 26th, either the handlers did not have it or they had it but took it home, potentially exposing the handlers and their families at home. The evidence showed that there is only one application by one handler involved as to each Count. Therefore, the value for Human Exposure is 1, representing that a "small number" of employees were exposed.

For the value of Human Injury, Dr. Enache testified that failure to provide PPE where a person is exposed to ClearOut or Kocide may result in blindness, and repeated dermal exposure could lead to chronic health effects. Tr. 937-941. While he testified that inhalation of Kocide can cause respiratory irritation and continued inhalation of Kocide can cause lung failure, there is no requirement for handlers to use a respirator or face shield. Tr. 938; C's Ex. 18. Dr. Enache testified that dermal exposure to Boa makes the skin break apart, fingernails fall, and ulcerations to develop, which may lead to Boa being taken into the bloodstream, which could be fatal, and that half of a teaspoon of undiluted Boa could cause these effects. Tr. 942-943. Dr. Enache testified that a handler would have severe and "extremely serious" health consequences if he is exposed and does not have or use the proper PPE, putting his life in danger. Tr. 943. He acknowledged that the pesticides are diluted when applied, and therefore are far less toxic. Tr. 995-997, 1009-1012. One third of an ounce of Boa is to be added to one gallon of water, or a ratio of one to 14, for spot treatment. Tr. 999-1000. The evidence does not reveal any actual injuries or adverse health effects resulting from these violations, and each Count represents only one application by one handler. The appropriate value in these circumstances is '0.'

The inspection of July 20th indicated that Respondent provided PPE to the handlers, and therefore had corrected the violation at the Jauca facility to some degree, as the record does not show that chemical resistant aprons and face shields were provided at the Jauca facility that day. However, Respondent's evidence that it had been purchasing PPE mitigates the level of negligence. As noted above, in May 2005, Dr. Enache was invited by Martex and its attorneys to visit its farms, and no notice of violation or complaint was warranted. Tr. 1033-1037. Given the degree of negligence in failing to provide PPE and place for storing clean clothes on April 26, and the Respondent's attempts to remedy the violation, the value for culpability is 1.

The total gravity adjustment values is 5, resulting in a penalty of $770 for each Count. The total penalty for Counts 322 to 334 is $10,010.

H. Failure to Provide Handlers with Decontamination Supplies at Coto Laurel - Counts 335-336

Respondent was held liable on Counts 335 and 336 for failure to provide enough water for routine washing, for emergency eyeflushing and for washing the entire body together with other decontamination supplies, with regard to two applications of Kocide to the C-001 mango field at

the Coto Laurel farm, on April 20th and April 21, 2004. Tr. 106-109, 112-113, 116, 149-150; C's Ex. 15 p. 19, 23; C's Ex. 15-A p. 99.

Mr. Kramer assigned the same gravity adjustment values for the violations involving Respondent's failure to provide handlers with decontamination supplies at Coto Laurel as for the same violations at the Jauca farm. Tr. 743.

Mr. Kramer properly assigned a value of 3 for toxicity. As to Human Exposure, the evidence shows that there were water supplies at the fruit packing plant, bathrooms, swimming pool, mixing site and the water tanks near the workshop, but without soap, towels and change of clothing. R's Exs. 48, 49 photographs 1-3; R's Brief at 13-14. The evidence also shows that the decontamination site had soap, clean clothing, towel and water over a basin, but not for bathing the whole body. Tr. 108, 112. There is no evidence that the handler in the C-001 field was within 1/4 mile of all required decontamination supplies. See, R's Ex. 14 (hand drawn map, not to scale, with no indication of distance). Therefore, the evidence supports a finding that a "small number" of employees was exposed to pesticide by the applications of Kocide on April 20 and 21 to the C-001 mango field. Accordingly, the value for Human Exposure is 1.

For the value of Human Injury, each Count represents only one handler doing one application, the evidence does not reveal any actual injuries or adverse health effects resulting from these violations, and as noted above, Respondent's records show very a low incidence of pesticide injuries or health effects. The appropriate value in these circumstances is '0.'

The evidence supports a finding that Respondent was negligent in failing to ensure that the handler had all decontamination supplies together, including sufficient water for bathing, within 1/4 mile of the applications. Respondent asserts, and there is no evidence to the contrary, that it built a shower at the Coto Laurel Farm in May 2004. R's Ex. 31; Tr. 1033-1037. Therefore, the value for culpability is 1.

The total of the gravity adjustment values is 5, resulting in a penalty of $770 for each of Counts 335 and 336.

I. Total Penalty

The total penalty for the violations in the Complaint for which Respondent was found liable is $92,620.

ORDER

1. Counts 3, 4, 5, 9, 12, 14, 19, 21, 27, 28, 37, 39, 42, 47, 49, 51, 52, 53, 54, 56, 57, 63, 64, 73, 75, 77, 91, 92, 96, 97, 100, 101, 102, 104, 107, 110, 113, 114, 116, 122, 123, 124, 129, 130, 131, 135, 138, 139, 142, 143, 146, 147, 148, and 149 of the Complaint, alleging Respondent's failure to provide information to workers about applications of a pesticide as required by 40 C.F.R. § 170.122, are hereby **DISMISSED**.

2. Counts 156, 157, 158, 162, 165, 167, 172, 174, 180, 181, 190, 192, 195, 200, 202, 204, 205, 206, 207, 209, 210, 216, 217, 226, 228, 230, 244, 245, 249, 250, 253, 254, 255, 257, 260, 263, 266, 267, 269, 275, 276, 277, 282, 283, 284, 288, 291, 292, 295, 296, 299, 300, 301, and 302 of the Complaint, alleging Respondent's failure to provide information to handlers about applications of a pesticide as required by 40 C.F.R. § 170.222 are hereby **DISMISSED**.

3. Respondent is liable for failure to provide information to workers about applications of a pesticide as required by 40 C.F.R. § 170.122, as alleged in Counts 33, 38, 62, 105, 106, and 115 of the Complaint.

4. Respondent is liable for failure to provide information to handlers about applications of a pesticide as required by 40 C.F.R. § 170.222, as alleged in Counts 186, 191, 215, 258, 259, and 268 of the Complaint.

5. Respondent is liable for failure to provide workers at the JC 11 field of the Jauca farm on April 26, 2004 with decontamination supplies required by 40 C.F.R. § 170.150, as alleged in Count 152 of the Complaint.

6. Respondent is liable for failure to provide handlers with decontamination supplies required by 40 C.F.R. § 170.250 for seventeen pesticide applications at the Jauca facility on April 26, 2004.

7. Respondent is liable for failure to provide handlers with the required Personal Protective Equipment required by 40 C.F.R. § 170.240 for thirteen pesticide applications at the Jauca facility on April 26, 2004.

8. Respondent is liable for failure to provide 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 required by 40 C.F.R. § 170.250, with regard to the applications of pesticide to a mango field on April 20 and April 21, 2004.

9. For the violations of FIFRA § 12(a)(2)(A) found to have been committed, Respondent Martex Farms, Inc., is hereby assessed an aggregate civil penalty in the amount of $92,620.

10. Payment of the full amount of this civil penalty shall be made within thirty (30) days after this Initial Decision becomes a final order under 40 C.F.R. § 22.27(c), as provided below.

Payment shall be made by submitting a certified or cashiers' check(s) in the requisite amount, payable to the Treasurer, United States of America, and mailed to:

EPA - Region 2
P.O. Box 360188M
Pittsburgh, PA 15251

11. A transmittal letter identifying the subject case and the EPA docket number, as well as the Respondent's name and address, must accompany the check.

12. If Respondent fails to pay the penalty within the prescribed statutory period after entry of this Initial Decision, interest on the penalty may be assessed. *See,* 31 U.S.C. § 3717; 40 C.F.R. § 13.11.

13. Pursuant to 40 C.F.R. § 22.27(c), this Initial Decision shall become a final order forty-five (45) days after its service upon the parties and without further proceedings unless: (1) a party moves to reopen the hearing within twenty (20) days after service of this Initial Decision, pursuant to 40 C.F.R. § 22.28(a); (2) an appeal to the Environmental Appeals Board is taken within thirty (30) days after this Initial Decision is served upon the parties pursuant to 40 C.F.R. § 22.30(a); or (3) the Environmental Appeals Board elects, upon its own initiative, to review this Initial Decision, pursuant to 40 C.F.R. § 22.30(b).

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Susan L. Biro
Chief Administrative Law Judge

Date: January 19, 2007
Washington, D.C.