UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
Martex Farms, Inc.,	)	Docket No. FIFRA-02-2005-5301
	)	
RESPONDENT	)	
	)	

ORDER DENYING RESPONDENT'S MOTION REQUESTING RECOMMENDATION FOR INTERLOCUTORY REVIEW OF ORDER ON ACCELERATED DECISION

On October 11, 2005, Respondent filed a "Motion to Request that the Order On Complainant's Motion for Findings of Fact and Conclusions of Law and for Partial Accelerated Decision as to Liability be Certified to the Environmental Appeals Board" ("Motion for Review").[1] The Motion seeks a recommendation from this Tribunal that the Environmental Appeals Board ("EAB") interlocutorily review this Tribunal's October 4, 2005 "Order on Complainant's Motion for Findings of Fact and Conclusions of Law and for Partial Accelerated Decision as to Liability ("Order on Accelerated Decision"). Respondent's Motion for Review is timely filed pursuant to 40 C.F.R. § 22.29. Also on October 11, 2005, Complainant filed a "Notice" stating that "[w]hile Complainant opposes Respondent's Motion [for Review], it has decided not to file a response brief with regard to the Motion."

This proceeding was initiated 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 Martex Farms, S.E. ("Respondent"). Pursuant to Orders Granting Leave to Amend, Complainant subsequently filed a First Amended Complaint on July 13, 2005 and a Second

[1]This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits at 40 C.F.R. Part 22 ("Rules" or "Rules of Practice"). Respondent's Motion certifies that it was sent "via FedEx" to the Hearing Clerk on October 10, 2005. Motion for Review at 14-15. The Motion was "received" by the Hearing Clerk, and therefore "filed," on October 11, 2005. *See* Rule 22.5(a), 40 C.F.R. § 22.5(a).

Amended Complaint on September 2, 2005.[2]

The Complaint alleges 336 violations of FIFRA Section 12(a)(2)(G), 7 U.S.C. § 136j(a)(2)(G), and the FIFRA regulations setting forth the Worker Protection Standard ("WPS") at 40 C.F.R. Part 170, by "us[ing] ... registered pesticide[s] in a manner inconsistent with [their] labeling." FIFRA Section 12(a)(2)(G). More specifically, the Complaint alleges **six "categories"** of violation, as follow: Counts 1-151 allege that Respondent failed to notify "workers"[3] of pesticide applications in violation of 40 C.F.R. § 170.122 ("worker notification"); Counts 152-153 allege that Respondent failed to provide decontamination supplies to workers in violation of 40 C.F.R. § 170.150 and FIFRA Section 12(a)(2)(G) ("worker decontamination supplies"); Counts 154-304 allege that Respondent failed to notify pesticide "handlers"[4] of pesticide applications in violation of 40 C.F.R. § 170.222 ("handler notification"); Counts 305-321 allege that Respondent failed to provide decontamination supplies to handlers in violation of 40 C.F.R. § 170.250 ("handler decontamination supplies"); Counts 322-334 allege that Respondent failed to provide personal protective equipment ("PPE") to handlers in violation of 40 C.F.R. § 170.240 ("handler PPE"); and Counts 335-336 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 ("handler decontamination supplies – Coto Laurel"). While Counts 1-334 of the Complaint pertain to Respondent's "Jauca facility," Counts 335 and 336 pertain to Respondent's "Coto Laurel facility."

Respondent filed an Answer to the Second Amended Complaint ("Answer"[5]) on September 20, 2005, wherein Respondent denied liability on all Counts and asserted fourteen "affirmative defenses."

On July 25, 2005, Complainant filed a "Motion for Findings of Fact and Conclusions of Law and Complainant's Motion for Partial Accelerated Decision as to Liability" ("Motion for Accelerated Decision"), together with a "Memorandum of Points and Authorities" in support thereof ("Accelerated Decision Memorandum"). Complainant's Motion sought Accelerated Decision on liability as to Counts 1-334 of the Complaint (the "Jauca Counts"). Complainant's Motion did not seek Accelerated Decision on liability as to Counts 335 or 336 (the "Coto Laurel Counts") or on the penalty assessment in regard to any Count. On August 30, 2005, Respondent filed a "Motion in Opposition of Complainant's Motion for Findings of Fact and Conclusions of

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[2]For convenience, references herein to the "Complaint" shall mean the "Second Amended Complaint" unless otherwise specified.

[3]"Worker" is defined by the WPS at 40 C.F.R. § 170.3.

[4]"Handler" is defined by the WPS at 40 C.F.R. § 170.3.

[5]For convenience, references herein to the "Answer" shall mean the "Answer to the Second Amended Complaint" unless otherwise specified.

Law and Complainant's Motion for Partial Accelerated Decision as to Liability" ("Accelerated Decision Response"). On September 8, 2005, Complainant filed a "Reply to Respondent's Motion in Opposition of Complainant's Motion for Findings of Fact and Conclusions of Law and Complainant's Motion for Partial Accelerated Decision as to Liability" ("Accelerated Decision Reply").

On August 19, 2005, the parties filed "Joint Prehearing Stipulations" ("Stipulations").

On October 4, 2005, this Tribunal issued an Order on Accelerated Decision. Regarding the first "category" of alleged violation (Counts 1-151 regarding "worker notification"), the Order granted Accelerated Decision on sixty-two of the Counts and denied Accelerated decision on eighty-nine of the Counts. Specifically, the Order granted Accelerated Decision where: 1) Respondent admitted having made the pesticide applications as alleged;[6] 2) Respondent admitted having made the pesticide applications but asserted that the applications had occurred in a "nursery;"[7] and 3) Respondent's response to the allegation of pesticide application consisted of the single typographical character, "?."[8] Regarding the second "category" of alleged violation (Counts 152-153 regarding "worker decontamination supplies"), the Order denied Accelerated Decision on Count 152 and granted Accelerated Decision on Count 153, where Respondent admitted that it failed to provide an "eye-flush container" to workers exposed to the pesticide "Kocide 101" ("Kocide") as required by that particular pesticide label, and therefore required by FIFRA Section 12(a)(2)(G), 7 U.S.C. § 136j(a)(2)(G). Regarding the third "category" of alleged violation (Counts 154-304 regarding "handler notification"), the Order granted Accelerated Decision on sixty-two of the Counts and denied Accelerated decision on eighty-nine of the Counts. Specifically, the Order granted Accelerated Decision where: 1) Respondent admitted having made the pesticide applications as alleged;[9] 2) Respondent admitted having made the pesticide applications but asserted that the applications had occurred in a "nursery;"[10] and 3) Respondent's response to the allegation of pesticide application consisted of the single typographical character, "?."[11] Regarding the fourth "category" of alleged violation (Counts

[6]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.

[7]Counts 31, 32, and 35.

[8]Counts 29 and 59.

[9]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.

[10]Counts 184, 185, and 188.

[11]Counts 182 and 212.

305-321 regarding "handler decontamination supplies"), the Order denied Accelerated Decision on all Counts. Regarding the fifth "category" of alleged violation (Counts 322-334 regarding "handler PPE"), the Order denied Accelerated Decision on all Counts. Regarding the sixth "category" of alleged violation (Counts 335-336 regarding "handler decontamination supplies" at the "Coto Laurel facility"), Complainant's Motion for Accelerated Decision did not seek Accelerated Decision on those Counts and the Order therefore did not consider those Counts. Thus, the Order granted Accelerated Decision on 125 Counts, denied Accelerated Decision on 209 Counts, and did not consider two (2) Counts of the Complaint. Finally, Complainant's Motion for Accelerated Decision did not seek Accelerated Decision regarding the proposed penalty amount, and the Order did not consider the proposed penalty.

Respondent's instant "Motion for Review" seeks interlocutory review of this Tribunal's Order on Accelerated Decision regarding one hundred and eleven (111) of the Counts.[12] Regarding the first "category" of alleged violation (Counts 1-151 regarding "worker notification"), Respondent seeks review regarding fifty-five of the sixty-two Counts on which Accelerated Decision was granted. Specifically, Respondent seeks review of fifty-five of the fifty-seven Counts on which Accelerated Decision was granted because Respondent admitted

[12]Respondent states that "[t]he Order herein addressed granted 'Complainant's Motion For Accelerated Decision On Liability' involving *a total of 115 counts*, divided into three groups" (Motion for Review at 2 (emphases added and removed)), and that Respondent seeks review regarding "all counts *challenged herein, except Counts 150 and 151* of the First Group of Counts, *and Counts 303 and 304* of the Third Group of Counts." *Id.* at 14 (emphases added). As noted *supra*, the Order on Accelerated Decision actually granted Accelerated Decision on 125 counts. Thus, Respondent appears to seek review of the Order on Accelerated Decision regarding 111 Counts (*i.e.*, the 55 "*worker* notification" Counts regarding which Respondent has admitted the pesticide applications as alleged in *paragraph 56* of the Complaint, except Counts 150 and 151 pertaining to April 26, 2004 – the date of inspection; Count 153 pertaining to the "Kocide" "eye-flush container;" and the 55 "*handler* notification" Counts regarding which Respondent has admitted the pesticide applications as alleged in *paragraph 71* of the Complaint, except Counts 303 and 304 pertaining to April 26, 2004 – the date of inspection). Respondent does *not* appear to seek review of the Order on Accelerated Decision regarding the six "nursery counts" (Counts 31, 32, 35, 184, 185, and 188) or the four Counts to which Respondent's response consisted of the single typographical character, "?" (Counts 29, 59, 182 and 212). However, had Respondent's Motion sought such review, this Tribunal would have found, based on the definition of "agricultural establishment" at 40 C.F.R. § 170.3 (explicitly including the term "nursery") and the legal standards to be applied in this proceeding for "accelerated decision," that this Tribunal's granting of Accelerated Decision on Counts 29, 31, 32, 35, 59, 182, 184, 185, and 188, and/or 212 does not involve a "question of law or policy concerning which there is [sic] substantial grounds for difference of opinion" which would warrant interlocutory review.

having made the pesticide applications as alleged.[13] Respondent does *not* seek review regarding the remaining two Counts in this sub-category (Counts 150 and 151) involving pesticide applications which took place on April 26, 2004 (the day of the inspection).[14] Further, Respondent does *not* appear to seek review regarding the three Counts in this category involving a "nursery" (Counts 31, 32, and 35), or the two Counts in this category to which Respondent's response consisted of the single typographical character, "?" (Counts 29 and 59). Regarding the second "category" of alleged violation (Counts 152-153 regarding "worker decontamination supplies"), Respondent seeks review regarding Count 153 pertaining to the "eye-flush container" required by the "Kocide" label. Regarding the third "category" of alleged violation (Counts 154-304 regarding "handler notification"), Respondent seeks review regarding fifty-five of the sixty-two Counts on which Accelerated Decision was granted. Specifically, Respondent seeks review of fifty-five of the fifty-seven Counts on which Accelerated Decision was granted because Respondent admitted having made the pesticide applications as alleged.[15] Respondent does *not* seek review regarding the remaining two Counts in this sub-category (Counts 303 and 304) involving pesticide applications which took place on April 26, 2004 (the day of the inspection).[16] Further, Respondent does *not* appear to seek review regarding the three Counts in this category involving a "nursery" (Counts 184, 185, and 188), or the two Counts in this category to which Respondent's response consisted of the single typographical character, "?" (Counts 182 and 212).

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[13]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, and 145.

[14]*See, e.g.*, Motion for Review at 14.

[15]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, and 298.

[16]*See, e.g.*, Motion for Review at 14.

Pursuant to Rule 22.29(b), this Tribunal may recommend the Order on Accelerated Decision for review only if it, *inter alia*, "involves an important question of law or policy concerning which there is [sic] *substantial grounds* for difference of opinion." 40 C.F.R. § 22.29(b)(1) (emphasis added). Because "substantial grounds for difference of opinion" do not exist in this case regarding any of the issues raised in Respondent's Motion for Review, this Tribunal declines to recommend its Order on Accelerated Decision to the EAB for review.

Respondent's Motion for Review begins its "substantive" discussion on page 4 with a section entitled "Table Included in Paragraphs 56 and 71 of EPA's Complaints and Respondent's Answers."[17] Respondent first observes that Complainant has twice amended the Complaint, including the withdrawal of two counts pertaining to one (now withdrawn) alleged application of the pesticide "ClearOut 41 Plus" ("ClearOut") at the Jauca facility between March 29, 2004 and April 26, 2004.[18] Respondent then quotes at length paragraphs 56 and 71 of its "Answer to the Second Amended Complaint" ("Answer"), to the effect that Respondent disputes many of the 151 applications of "ClearOut" as alleged in paragraphs 56 and 71 of the Complaint. Specifically, Respondent reiterates its arguments that some of the allegations are "flawed," in that: 1) they involve fields which are not part of the Jauca facility; 2) they involve "fences or property limits," "workshops," and/or "nurseries;" and/or 3) they "have been duplicated." Motion for Review at 5. Respondent concludes this section of its Motion for Review by stating:

> But, curiously, after being notified with a ... sworn statement ... that some fruit fields that Complainant had included in paragraphs 56 and 71 did not belong to the Jauca facility, but to other facilities owned and/or operated by [Respondent], the agency, after deleting Application No. 10 from both tables and removing the two associated counts, insists in claiming 151 applications of the herbicide ClearOut related to activities performed by ***"workers"*** and 151 applications of the same herbicide related to ***"handlers."***

Motion for Review at 5-6 (emphases in original).

As an initial matter, it is noted that this Tribunal's Order on Accelerated Decision discussed in detail Respondent's arguments regarding "fields which may not be part of the Jauca facility;" "fences or property limits," "workshops," and/or "nurseries;" and alleged applications which may "have been duplicated." *See, e.g.*, Order on Accelerated Decision at 11-14, 19-20. In fact, this Tribunal ***denied*** *Accelerated Decision* as to *all* Counts regarding which Respondent raised any of these issues – ***including*** those Counts subject to Respondent's "fields not at the

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[17]The first three and ½ pages of Respondent's Motion for Review consists of background information and a brief summary of the arguments presented on pages 6-14 of the Motion.

[18]The specific Amendments are discussed in this Tribunal's Orders Granting Leave to Amend and need not be reiterated here.

Jauca facility" argument[19] – except that this Tribunal granted Accelerated Decision on the six Counts allegedly pertaining to "nurseries" because the relevant definition of "agricultural establishment" *explicitly includes* "nurser[ies]." *See* 40 C.F.R. § 170.3.[20]

Further, to the extent that the implicit import of Respondent's argument as set forth at pages 4-6 of its Motion for Review is the wildly extrapolative assertion that, due to *some* alleged "flaws" in *some* of the Counts of the Complaint, "[c]onsequently, *all* of EPA's allegations included in this complaint are flawed, and ... should be denied" (Motion for Review at 5 (*quoting* Answer ¶¶ 56 and 71) (emphasis added)), Respondent's contention is unsupported by law or fact and is rejected. Similarly, to the extent that the terms "workers" and "handlers" are emphasized with italic and bold type on page 6 (line 3) of Respondent's Motion for Review in order to imply Respondent's contention that Counts 154-304 (pertaining to "handler notification") improperly "duplicate"[21] Counts 1-151 (pertaining to "worker notification"), that argument was rejected in the Order on Accelerated Decision (page 21), and Respondent's Motion for Review does not raise any "substantial grounds for difference of opinion" regarding that conclusion.

In addition to its general "flaws in the allegations of paragraphs 56 and 71 of the Complaint" argument, Respondent advances three specific arguments in support of its Motion for Review.

First, regarding the <u>first "category"</u> of alleged violations (Counts 1-151 regarding "worker notification"), Respondent seeks review regarding fifty-five Counts[22] on the grounds that this Tribunal "[e]rroneously ... did not consider [Complainant's Exhibit ("CX") 21]," and because "*Stipulation No. 23 refers to Monday* ***April 26, 2004, <u>limited</u> to Counts 150 and 151****,*

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[19]*See* Order on Accelerated Decision regarding 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, 141, 169, 175, 177, 179, 194, 196, 214, 218-220, 231-234, 238, 242, 246, 251, 261, 262, 270, 271, 274, 278, 279, 285, 287, 293, and 294.

[20]In any event, as noted *supra*, Respondent's instant Motion for Review does not appear to seek review of the Order on Accelerated Decision regarding the "nursery" Counts (*e.g.*, Counts 31, 32, 35, 184, 185, and 188). However, had Respondent's Motion sought such review, this Tribunal would have found, based on the definition of "agricultural establishment" at 40 C.F.R. § 170.3, that Respondent's "nursery" argument does not "involve[] an important question of law or policy concerning which there is [sic] substantial grounds for difference of opinion" which would warrant interlocutory review.

[21]This argument is not to be confused with Respondent's unrelated argument that certain of the applications as alleged in paragraphs 56 and 71 of the Complaint are "duplicated."

[22]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, and 145.

and does ***not extend to any other date*** of herbicide applications included in [CX-21]." Motion for Review at 6-7 (emphases added).[23] Respondent's argument that this Tribunal "did not consider" CX-21 is without merit, as CX-21 was in fact *cited* in the Order on Accelerated decision at least seven times. Further, CX-21 is a 132-page Inspection Report with multiple Attachments, and Respondent's Motion for Review fails to identify any particular part of CX-21 which Respondent feels escaped consideration, conclusorily stating that CX-21 "demonstrates that there are genuine issues of material fact regarding [various Counts 1-145]." Motion for Review at 7. Respondent's argument regarding "Stipulation 23" is also rejected. Respondent's characterization of Stipulation 23 is flatly incorrect. Stipulation 23 in fact states: "On 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. Nothing in Stipulation 23 (or in any other part of the Stipulations) "limits" Stipulation 23 to any specific Counts. To the contrary, Stipulation 23 applies to *any* Count of the Complaint to which a "ClearOut" posting (or lack thereof) on April 26, 2004 is relevant. In this regard, Respondent's Motion for Review itself quotes the WPS at 40 C.F.R. § 170.122, which states in part:

> 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... 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... 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.

40 C.F.R. § 170.122 (*quoted in* Motion for Review at 6-7) (emphases added). All of the 151 alleged applications set forth in paragraphs 56 and 71 of the Complaint allegedly occurred between March 29 and April 26, 2004 (*i.e.*, within thirty days of April 26, 2004). Thus, the absence of a required WPS posting on April 26, 2004 is clearly relevant to *all* of the alleged applications set forth in paragraphs 56 and 71 of the Complaint. Therefore, Respondent has failed to identify "substantial grounds for difference of opinion" regarding this Tribunal's Order on Accelerated Decision on any Count from 1 to 151 of the Complaint.

Second, regarding the second "category" of alleged violations (Counts 152-153 regarding "worker decontamination supplies"), Respondent seeks review regarding Count 153 pertaining to the "eye-flush container" required by the "Kocide" label, on the grounds that this Tribunal, "in the process of weighing Stipulation No. 29," "failed to consider [CX-13]" and EPA's "Agricultural Worker Protection Standard 40 CFR Parts 156 & 170 Interpretive Policy" ("Interpretive Policy"). Respondent's argument that this Tribunal "did not consider" CX-13 is

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[23]Thus, Respondent does *not* seek review regarding Counts 150 and 151 involving pesticide applications which took place on April 26, 2004 (the day of the inspection).

without merit, as CX-13 (a 217-page Inspection Report with multiple Attachments) was in fact referenced in the Order on Accelerated decision at least three times. Further, Respondent's argument regarding 40 C.F.R. § 170.150 and EPA's "Interpretive Policy" appears to be based upon a fundamental misunderstanding of the law, to wit: while Respondent argues that CX-13 refers to the presence of "'a five (5) gallon drinking can'"[24] which Respondent contends "might as well satisfy the eyeflush water requirement *of Section 170.150*," (Motion for Review at 9 (emphases added), Count 153 of the Complaint pertains *not* to the general "emergency eyeflushing" requirement of the WPS at 40 C.F.R. § 170.150,[25] but rather to the *specific* requirements of the "Kocide" pesticide *label*. In this regard, this Tribunal has previously explained that Section 12(a)(2)(G) of FIFRA, 7 U.S.C. § 136j(a)(2)(G), straightforwardly states that: "It shall be unlawful for any person ... to use any registered pesticide in a manner *inconsistent with its labeling*." (Emphases added). Pursuant to Section 25 of FIFRA, the EPA has promulgated implementing regulations in the form of the WPS at 40 C.F.R. Part 170. Those rules, at 40 C.F.R. § 170.9(a), state:

> Under [FIFRA] section 12(a)(2)(G) it is unlawful for any person "to use any registered pesticide in a manner inconsistent with its labeling." When this part is referenced on a label, users must comply with all of its requirements except those that are inconsistent with product-specific instructions on the labeling.

Also, 40 C.F.R. § 170.9(b) states that "[a] person who has a duty under this part, *as referenced on the pesticide product label*, and who fails to perform that duty, violates FIFRA section 12(a)(2)(G)." (Emphases added). Respondent admits that it applied Kocide to the JC-11 mango field on April 21, 2004 (Complaint ¶ 61; Answer ¶ 61; Stipulations ¶ 25), and that the Kocide label indicates that its active ingredient is copper hydroxide and states: "The following equipment and precautions must be followed for *7 days* following the application of this product: – An *eye-flush container, designed specifically for flushing eyes*, must be available at the WPS decontamination site for workers entering the area treated with copper hydroxide." Stipulations ¶ 28 (emphasis added). Respondent further admits that approximately twenty workers were working in the JC-11 field on April 26, 2004 (five days after the April 21st Kocide application[26]) (Complaint ¶ 64; Answer ¶ 64; Stipulations ¶27), and that on that date there was no eye-flush container *designed **specifically*** for flushing eyes available to those workers. Complaint ¶ 67;

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[24]Motion for Review at 8, *quoting* unknown portion of CX-13. Despite reliance upon this "quotation," Respondent fails to provide any page citation.

[25]The WPS at 40 C.F.R. § 170.150(b)(1) states in part: "The agricultural employer shall provide workers with enough water for routine washing and emergency eyeflushing."

[26]Respondent's underlined emphasis of the term "five days earlier" on page 12 of its Motion for Review appears to imply that Inspector Vélez improperly cited an alleged violation after such a passage of time. However, Respondent's emphasis is misplaced, as the Kocide label explicitly requires the eye-flush container to be available for *seven* days after an application of Kocide.

Answer ¶ 67; Stipulations ¶ 29.[27] Therefore, Respondent admits all of the elements of the violation alleged in Count 153 of the Complaint and a finding of liability on Accelerated Decision is appropriate. The availability to workers of "a five gallon drinking can," even if true, would not satisfy the specific requirements of the Kocide label. Therefore, Respondent's citation to CX-13, 40 C.F.R. ¶ 170.150, and/or EPA's "Interpretive Policy"[28] fails to raise any "substantial grounds for difference of opinion" regarding this Tribunal's Order granting Accelerated Decision on Count 153 of the Complaint.

Third, regarding the third "category" of alleged violations (Counts 154-304 regarding "handler notification"), Respondent seeks review regarding fifty-five Counts[29] on the grounds that this Tribunal "[e]rroneously ... did not consider [CX-21]," and because "*Stipulation No. 23 refers to Monday* ***April 26, 2004, limited to Counts 303 and 304****, and does* ***not extend to any other date*** of herbicide application included in [CX-21]." Motion for Review at 12-13 (emphases added).[30] Respondent's arguments in this regard are essentially identical to its arguments regarding the "first category" of alleged violation (Counts 1-151 regarding "worker notification"), discussed *supra*. Again, Respondent's argument that this Tribunal "did not consider" CX-21 is without merit, as CX-21 was in fact *cited* in the Order on Accelerated decision at least seven times. Further, CX-21 is a 132-page Inspection Report with multiple Attachments, and Respondent's Motion for Review fails to identify any particular part of CX-21 which Respondent feels escaped consideration, conclusorily stating that CX-21 "demonstrates that there are genuine issues of material fact regarding [various Counts 154-298]." Motion for Review at 13. Respondent's argument regarding "Stipulation 23" is also rejected. Respondent's characterization of Stipulation 23 is flatly incorrect. Stipulation 23 in fact states: "On April 26,

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[27]Stipulation 29 forthrightly admits: "On April 26, 2004, there was no eye-flush container designed specifically for flushing eyes available to workers working in the JC-11 Mango field at Respondent's Jauca facility." Stipulations ¶ 29.

[28]It is noted that, even if the "Interpretive Policy" spoke to the specific label requirements of Kocide (which is does not), the "Interpretive Policy" states: "Please note that the EPA *requirement is not for 'water safe for drinking'* but that the water be of such a quality and temperature that will not cause illness or injury when it contacts the skin or eyes or if it is swallowed;" and also states that "the EPA requirement *does not preempt other requirements*. It is acceptable to use eye flush dispensers provided all the WPS emergency eye flushing requirements are met." Interpretive Policy ¶¶ 3.17 and 3.19 (emphasis added). *See* http://www.epa.gov/oppfod01/safety/workers/wpsinterpolicy.htm#3.1%20Decontamination.

[29]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, and 298.

[30]Thus, Respondent does *not* seek review regarding Counts 303 and/or 304 involving pesticide applications which took place on April 26, 2004 (the day of the inspection).

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. Nothing in Stipulation 23 (or in any other part of the Stipulations) "limits" Stipulation 23 to any specific Counts. To the contrary, Stipulation 23 applies to *any* Count of the Complaint to which a "ClearOut" posting (or lack thereof) on April 26, 2004 is relevant. In this regard, Respondent's Motion for Review itself quotes the WPS at 40 C.F.R. § 170.222, which states in 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 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.

40 C.F.R. § 170.122 (*quoted in* Motion for Review at 12-13) (emphases added). All of the 151 alleged applications set forth in paragraphs 56 and 71 of the Complaint allegedly occurred between March 29 and April 26, 2004 (*i.e.*, within thirty days of April 26, 2004). Thus, the absence of a required WPS posting on April 26, 2004 is clearly relevant to *all* of the alleged applications set forth in paragraphs 56 and 71 of the Complaint.

Regarding this "third category" of alleged violation, Respondent further argues that "Respondent's employee Mr. Alvaro Acosta, should be allowed to testify pertaining to his role and participation during the April 26, 2004 inspection," quoting paragraphs 55 and 70 of Respondent's Answer, to wit: "[S]tatements attributed to Mr. Alvaro Acosta have been taken out of context." Motion for Review at 14. This Tribunal has not excluded Mr. Acosta's proposed testimony, nor has Complainant sought to have it excluded. Further, this Tribunal did not rely upon either of the two Affidavits of Mr. Acosta, offered as parts of CX-13 and CX-15, for any factual finding or legal conclusion in the Order on Accelerated Decision. Thus, Respondent's arguments regarding Mr. Acosta do not raise any "substantial grounds for difference of opinion" regarding the Order on Accelerated Decision on any Count of the Complaint.

Therefore, Respondent has failed to identify "substantial grounds for difference of opinion" regarding this Tribunal's Order on Accelerated Decision on any Count from 154 to 304 of the Complaint.

For all of the forgoing reasons, this Tribunal **declines** to recommend its October 4, 2005 "Order on Complainant's Motion for Findings of Fact and Conclusions of Law and for Partial Accelerated Decision as to Liability" to the Environmental Appeals Board for review, and Respondent's "Motion to Request that the Order On Complainant's Motion for Findings of Fact

and Conclusions of Law and for Partial Accelerated Decision as to Liability be Certified to the Environmental Appeals Board" is **DENIED**. **The hearing of this matter currently scheduled to begin on Monday, October 24, 2005 will proceed as planned.**

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Susan L. Biro
Chief Administrative Law Judge

Dated: October 12, 2005
Washington, D.C.