

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF AGRICULTURE AND)	
CONSUMER SERVICES,)	
)	
Petitioner,)	
)	
vs.)	Case No. 06-0729
)	
AG-MART PRODUCE, INC.; JUSTIN)	
OELMAN AND JOSH CANTU,)	
)	
Respondents.)	
)	
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DEPARTMENT OF AGRICULTURE AND)	
CONSUMER SERVICES,)	
)	
Petitioner,)	
)	
vs.)	Case No. 06-0730
)	
AG-MART PRODUCE, INC.; WARRICK)	
BIRDWELL; AND CHARLES LAMBERT,)	
)	
Respondents.)	
)	
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RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in these cases before Lawrence P. Stevenson, Administrative Law Judge of the Division of Administrative Hearings (DOAH), via video-teleconference from sites in Tampa and Tallahassee, Florida, on May 19, May 24, and June 2, 2006.

APPEARANCES

For Petitioner: David W. Young, Esquire
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For Respondent: David J. Stefany, Esquire
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STATEMENT OF THE ISSUES

Whether Respondents, Ag-Mart Produce, Inc. (Ag-Mart), and its employees' Justin Oelman (in DOAH Case No. 06-0729) and Warrick Birdwell (in DOAH Case No. 06-0730), committed some, any, or all of the violations alleged in the Administrative Complaints detailed herein and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

On October 12, 2005, Petitioner, the Department of Agriculture and Consumer Services (the Department), issued two Administrative Complaints against Respondents, Ag-Mart and its named employees, who were licensed pesticide applicators working at Ag-Mart's South Florida farm in Immokalee and its North Florida farm in Jennings. The Administrative Complaints alleged a total of 88 separate violations of the Florida Pesticide Law, Chapter 487, Part I, Florida Statutes (2005)¹, and of Florida

Administrative Code Rules 5E-2, which governs pesticides, and 5E-9, which governs licensure for pesticide applicators.

The Administrative Complaints were forwarded to DOAH on February 27, 2006. The Administrative Complaint regarding Ag-Mart's Immokalee farm was assigned DOAH Case No. 06-0729 (the South Florida Complaint). The Administrative Complaint regarding Ag-Mart's Jennings farm was assigned DOAH Case No. 06-0730 (the North Florida Complaint). By Order dated March 7, 2006, the parties' joint motion to consolidate the cases for hearing was granted, and the consolidated matter was set for hearing on May 19, 2006. The amount of testimonial and other evidence necessitated that the hearing be continued to May 24, 2006, and then June 2, 2006.

Prior to the hearing, the parties filed a Pre-hearing Stipulation in which they agreed to the following five items in partial settlement of the controversy:

1. The Department voluntarily dismissed Counts XLVII through XLIX of the South Florida Complaint;
2. Without admitting any violations of the Florida Pesticide Law or worker protection standards, Ag-Mart agreed not to dispute Counts L through LIV of the South Florida Complaint and Counts XVII and XVIII of the North Florida Complaint, and agreed to pay \$3,000 to the Department to resolve those counts;

3. The Department acknowledged that "Bravo Weather Stik" was erroneously listed as a pesticide applied in Counts V, VI, XV, XVI, XXV through XXXII, XXXVI, and XXXIX through XLVI of the South Florida Complaint;

4. The Department voluntarily dismissed without prejudice all charges against Josh Cantu, an Ag-Mart employee named in the original South Florida Complaint, and amended Counts L through LXVI of that complaint to eliminate any reference to Mr. Cantu; and

5. The Department voluntarily dismissed without prejudice all charges against Charles Lambert, an Ag-Mart employee named in the original North Florida Complaint, and amended Counts XIX through XXII of that complaint to eliminate any reference to Mr. Lambert.

At the hearing, the Department presented the testimony of three Department employees: Field Inspector Neil Richmond; Case Reviewer Jessica Fernandez; and Bureau of Compliance Monitoring Chief Dale Dubberly. The Department's Exhibits lettered A through V were admitted into evidence. The Department also introduced the depositions of Ag-Mart employees Warrick Birdwell, Justin Oelman, Amanda Collins, and Donald Long, without objection.

Ag-Mart presented the testimony of the following Ag-Mart employees: President Donald Long; former Human Resources

Manager Angelia Cassell; former Crop Protection Manager Justin Oelman; Farm Manager Warrick Birdwell; Farm Compliance Officer Amanda Collins; and Crew Leaders Sergio Salinas and Juan Anzualdo. Ag-Mart Exhibits numbered 1, 2, 8, 11, 18 through 23, 29, 31 through 37, and 40 were admitted into evidence. Ag-Mart's Exhibits numbered 22 and 23 were admitted with the understanding that they were hearsay documents and thus of limited evidentiary value. Ag-Mart also introduced the deposition of Department employee Dale Dubberly, without objection.

On June 13, 2006, the parties filed a stipulated request that they be allowed 20 days from the filing of the transcript, within which, to file proposed recommended orders. The request was granted ore tenus. A Transcript of the proceeding was filed with DOAH on August 18, 2006. The parties timely filed their Proposed Recommended Orders on September 7, 2006.

FINDINGS OF FACT

Based upon the evidence presented at the final hearing, the following relevant findings of fact are made:

1. The Department is the state agency charged with administration of the Florida Pesticide Law, Chapter 487, Part I, Florida Statutes. Among the duties of the Bureau of Compliance Monitoring within the Division of Agricultural Environmental Services are the designation and regulation of

restricted-use pesticides, the testing and licensure of certified pesticide applicators, and the enforcement of federal worker protection standards regarding the exposure of farm workers to pesticides. §§ 487.011, 487.042, 487.044, and 487.051, Fla. Stat.; Fla. Admin. Code R. 5E-2.039.

2. The Administrative Complaints allege two types of violation of the Florida Pesticide Law. First, they allege that Ag-Mart harvested tomatoes prior to the end of the pre-harvest interval, the period of time that must pass after a pesticide is applied to a tomato plant before that plant's fruit may be safely harvested. The pre-harvest interval is specified on the labels of restricted-use pesticides. Second, they allege that Ag-Mart allowed workers to enter sprayed fields prior to the end of the restricted entry interval, the period of time that must pass after a pesticide is applied before it is safe for a worker to enter or remain in the treated area. The restricted entry interval is also specified on the labels of restricted-use pesticides.

3. In 2004, Ag-Mart operated farms in several locations in Florida and North Carolina. Ag-Mart operated packing houses in Plant City, Florida, and in New Jersey. Ag-Mart grows, packages, and distributes grape tomatoes under the "Santa Sweets" label, and a round-type tomato marketed as "Ugly Ripe." During all times relevant to this proceeding, Ag-Mart's

principal administrative offices were located in Plant City, Florida, and Ag-Mart's operations were managed by its president, Donald Long.

4. At the final hearing, several Ag-Mart employees, including Mr. Long, testified as to Ag-Mart's practices in establishing planting and pesticide spraying schedules, carrying out those schedules in the field, and ensuring that legal restrictions on pesticide use are observed. This testimony is credited as to Ag-Mart's general pattern and practice, but does not disprove the Department's evidence as to particular instances of pre-harvest interval or restricted entry interval violations.

5. Among other duties, Mr. Long was responsible for scheduling Ag-Mart's cultivation of tomato plants at the company's farms, so that product is available year-round. Mr. Long prepared a 2004 planting schedule that spaced the planting of new crops a week to ten days apart to ensure a continuous flow of tomatoes once the plants matured. For the 2004 season, the South Florida farm began planting in September 2003, with harvesting commencing in December 2003 and continuing through May 2004. The North Florida farm started its spring season plantings in March and April 2004, with harvest beginning in early June 2004 and lasting until August 2004.

6. Each "planting" at Ag-Mart consists of a specific amount of acreage that is cultivated for a specific period of time to produce an expected yield of tomatoes. Mr. Long determines the size of each planting based on past yields and projected needs. A single planting of grape tomatoes is harvested multiple times. Depending on conditions, a planting of grape tomatoes at the South Florida farm can be harvested between ten and 15 times in the fall, with fewer harvesting opportunities in the spring. A planting of grape tomatoes at the North Florida farm may be harvested between eight and ten times.

7. Each planting takes up portions of acreage called "fields," which are divided by land features and irrigation systems. Fields are of varying sizes, depending on the nature of the terrain and the irrigation system. The fields are numbered, and a planting is usually done in a certain number of roughly contiguous fields. A field is further divided into separately numbered "blocks," each block consisting of six rows of tomato plants, three rows on each side of a "drive area" through which tractors and harvest trucks can maneuver to reach the plants. The blocks are numbered in sequence from the beginning to the end of the field.

8. At the South Florida farm in 2004, Ag-Mart cultivated ten separate plantings of between 79 and 376 gross acres. Each

planting contained as few as three and as many as ten separate fields. At the North Florida farm in 2004, Ag-Mart cultivated five separate plantings of between 92 and 158 gross acres. Each planting contained either two or three separate fields.²

9. The cycle of farming activities at the Ag-Mart farms included ground preparation, planting, staking, tying, harvesting, and post-harvest clean-up. Farm laborers were recruited and transported to the fields by crew leaders, who must be registered as farm labor contractors with the Department of Business and Professional Regulation pursuant to Chapter 450, Part III, Florida Statutes, and Florida Administrative Code Rule 61L-1.004. The crew leaders supervised the field laborers and prepared their weekly time cards. The crew leaders were directed by Ag-Mart's labor supervisors as to where the laborers were to work and which tasks were to be performed at any given time.

10. Crew leaders providing services to Ag-Mart in 2004 included: Sergio Salinas, d/b/a Salinas & Son, Inc.; Pascual Sierra; and Juan Anzualda, d/b/a Juan Anzualda Harvesting, Inc. Mr. Salinas and Mr. Anzualda were crew leaders at the South Florida farm in the spring 2004 season. Mr. Sierra was a crew leader at the North Florida farm in 2004.

11. At the South Florida farm, Mr. Salinas and three or four supervisors called "field walkers" oversaw the daily work

of the 150 to 200 farm laborers who worked in Mr. Salinas' crew. Mr. Salinas owned and operated buses that transported the workers to and within the farm. Mr. Salinas also operated trucks to haul the harvested tomatoes from the fields to the shipping dock on the South Florida farm. A truck was also needed to move portable toilets to the fields for the use of the laborers. Because of the amount of equipment necessary to conduct a harvest, and the intense hand labor required to pick a row of tomatoes, Mr. Salinas always kept his crew together in one location while harvesting. During the period of January through May 2004, Mr. Salinas' crew typically harvested in one or two fields per day, and never more than four fields in one day.

12. Mr. Anzualda and his 15 field walkers supervised a crew of 150 laborers at the South Florida farm during March and April 2004. Mr. Anzualda always kept his crew together when performing harvesting activities, due to the amount of equipment and the time necessary to set up near the work areas. Mr. Anzualda estimated that it took between 45 and 90 minutes to set up his equipment and line up his workers along the rows before harvesting could commence in a given field. Mr. Anzualda's crew typically harvested in one or two fields per day at the South Florida farm during the peak harvest period of

March and April 2004, and never in more than four fields in one day.

13. Ag-Mart paid the farm laborers the piece rate of \$2.50 per tub of grape tomatoes. A "tub" weighs about 21 pounds. Different piece rates applied to different forms of work. For tying activities, the laborers under Mr. Salinas were paid \$0.75 per 100 linear feet of work, while those under Mr. Anzualda were paid \$0.50 per 100 linear feet. The laborers were paid the minimum wage of \$5.15 per hour for some work, such as weeding and the harvest of Ugly Ripe tomatoes. In any event, the laborers were guaranteed the minimum wage, and were paid \$5.15 per hour if that amount was greater than their pay would have been under piece work rates.

14. Planting activities are performed by hand. Tomato plants are started in greenhouses, and then transplanted to the field when they are six weeks old and about six inches high. Staking is performed manually and by machine, as stakes are placed between the tomato plants to support the plants as they mature. Tying is performed manually, from about the second week after planting until the eighth or ninth week. "Tying" involves tying the tomato plants with string to the stakes to allow them to grow up the stakes as they mature. The tomato plants are six to seven feet tall at maturity.

15. After the tomatoes were planted in 2004, Ag-Mart's farms began the application of pesticides according to a company-wide spray program devised by Mr. Long prior to the season. The spray program outlined the type and volume of pesticide products to be applied to the maturing tomato plants from the first week of planting through the end of the harvest. Once tying and harvesting activities began, Ag-Mart's spray program called for the application of pesticides "behind the tying" or "behind the harvest," meaning that spraying was done immediately after tying or harvesting was completed in a field. The spraying was done behind the workers because picking and tying opens up the plants, which enables the pesticide to better penetrate the plant. The timing of the spraying also allows fungicide to cover wounds from broken leaves caused by picking, thus preventing infection.

16. Harvesting is performed manually by the farm laborers, who pick the ripe fruit from the tomato plants and place it into containers. The crew leader lines up the laborers with one person on each side of a row of tomatoes, meaning that a crew of 150 laborers can pick 75 rows of tomatoes at a time. The farm workers pick all of the visible fruit that is ripe or close to ripe on the blocks that are being harvested. Once the picking is complete on a block, it takes seven to ten days for enough

new fruit to ripen on that block to warrant additional harvesting.

17. Justin Oelman was Ag-Mart's crop protection manager at the South Florida farm in 2004. Mr. Oelman worked for Ag-Mart for eight years as a farm manager and crop protection manager before leaving in 2005 and had three years prior experience as a crop protection manager for another tomato grower. As crop protection manager in 2004, Mr. Oelman was the licensed pesticide applicator responsible for ordering chemicals and directing the application of pesticides. His job included writing up the "tomato spray ticket" for each pesticide application. The spray ticket is a document that, on its face, indicates the date and time of a pesticide application and its location according to planting, field, and block numbers. The spray ticket also states the name of the tractor driver who physically applies the pesticide, the type and amount of the pesticide applied, and the number of acres treated. Licensed pesticide applicators are required by Department rule to record the information included on the spray ticket. Fla. Admin. Code R. 5E-9.032.

18. In applying pesticides to the South Florida farm's grape tomato crop in 2004, Mr. Oelman followed the spraying program designed by Mr. Long before the season. Because the pesticides were applied behind the farm workers' field activity,

Mr. Oelman maintained close communications with Josh Cantu, the Ag-Mart labor supervisor in charge of tying activities on the South Florida farm, and with Eduardo Bravo, the labor supervisor in charge of grape tomato harvesting. Mr. Bravo in turn directed crew leaders such as Mr. Salinas and Mr. Anzualda on where to take their crews to conduct harvesting work. These communications kept Mr. Oelman apprised of where the crews were working and how much progress the tying or harvesting activities were expected to make by the end of the day. Mr. Oelman was then able to plan the next day's pesticide applications so that his tractor drivers would be ready to enter the field and apply the pesticides soon after the tying or harvesting activities were completed.

19. Mr. Oelman typically wrote the spray tickets on the day before the actual pesticide application, based on the information gathered from Mr. Bravo and Mr. Cantu. Thus, the starting times shown on the tickets are times that were projected by Mr. Oelman on the previous afternoon, not necessarily the time that spraying actually commenced. Spraying could be delayed for a number of reasons. At times, the work in the fields would not progress as quickly as Mr. Cantu or Mr. Bravo had anticipated, due to the heaviness of the harvest. Pesticides are not applied to wet plants; therefore, rain could delay a planned spray application.

20. Mr. Oelman's practice was to write a new spray ticket if a day's planned application was completely cancelled. However, if the planned spray application was merely delayed for a time, Mr. Oelman did not create a new spray ticket or update the original ticket to reflect the actual starting time. Mr. Oelman failed to explain why he did not always create a new ticket when the information on the existing ticket ceased to be accurate.

21. Mr. Oelman directly supervised the Ag-Mart employees who drove the tractors and operated the spray rigs from which pesticides were applied to the tomato plants. Mr. Oelman trained the tractor drivers not to spray where people were working, but to wait until the tying or harvesting activities in designated fields had been completed. Once the fields had been sprayed, Mr. Oelman would orally notify Mr. Bravo and Mr. Cantu of the location of the pesticide applications. Mr. Oelman would also post copies of the spray tickets at the farm's central posting board, on which was posted relevant information regarding the pesticides being used at the farm, the restricted entry intervals and pre-harvest intervals for the pesticides, and other safety information.³

22. When restricted-use pesticides⁴ were to be applied, Mr. Oelman posted the entrances to the field with warning signs before the application began. The signs, which stated

"Danger/Pesticides/Keep Out" in English and Spanish, were left in place until twelve hours after the expiration of the restricted entry interval for the applied pesticide. Mr. Oelman attested that he always made these postings when restricted-use pesticides such as Monitor and Danitol were applied at the South Florida farm. Mr. Salinas and Mr. Anzualda testified that they never harvested tomatoes from fields posted with pesticide warning signs. Mr. Anzualda checked for warning signs every day to ensure that his crew was not being sent into fields where pesticides had recently been applied.

23. The restricted entry interval (REI) and the pre-harvest interval (PHI) are set forth on the manufacturer's label of each restricted-use pesticide, in accordance with 40 C.F.R. Parts 156 (labeling requirements for pesticides and devices) and 170 (worker protection standard). The REI, a worker safety standard, is the time period after application of a restricted-use pesticide that must elapse before workers are allowed to enter the treated area. The PHI, a food safety standard, is the time period that must elapse after a spray application before harvesting can begin. The REI and PHI vary according to individual pesticides.

24. In 2004, Warrick Birdwell was the farm manager at Ag-Mart's North Florida farm in Jennings. Prior to 2004, Mr. Birdwell had worked ten years for other tomato growers in

Virginia and Florida. As farm manager, Mr. Birdwell was responsible for all operations from ground preparation through post-harvest clean-up at the North Florida farm. Mr. Birdwell was also a licensed restricted-use pesticide applicator and was responsible for the application of pesticides at the North Florida farm. In 2004, Mr. Birdwell was assisted in carrying out the spray program by Dale Waters, who supervised the tractor drivers and equipment.⁵

25. During 2004, grape tomatoes were harvested at the North Florida farm on a rotation of at least seven days per block, meaning that it would take at least seven days after a harvest, in a given field, to grow enough vine ripe fruit to warrant another harvest. Mr. Birdwell prepared the spray tickets for the planned application of pesticides. He created his spray tickets a day or two before the actual date that the application was scheduled to take place. At times, delays occurred due to weather, equipment failures, or slower than anticipated progress in the harvest. Mr. Birdwell's practice was to create a new ticket and destroy the old one if the delay prevented a scheduled application from occurring on the scheduled date. However, if the spraying was commenced on the scheduled date, but had to be completed on the next day, Mr. Birdwell kept the original spray ticket without amendment. Mr. Birdwell failed to give a reason why a new ticket was not

created each time the information, included in the original ticket, ceased to be accurate.

26. Mr. Birdwell communicated throughout the day with Charles Lambert, the North Florida farm's labor supervisor, to monitor the progress of the harvesting activities and ensure that workers did not enter fields where REIs or PHIs were in effect. Mr. Birdwell also directed that warning postings be placed at the entrances to fields where restricted-use pesticides had been applied. Farm labor crews were allowed to move on the farm property only at the specific direction of Mr. Lambert, whose constant communication with Mr. Birdwell helped ensure that labor crews stayed out of treated fields until it was safe to enter them.

27. Harvested product received at Ag-Mart's packing houses is tracked by foreman receiving reports, which identify the product and its quantity, the name of the crew leader responsible for harvesting the product, the farm from which the product was shipped, and the planting number from which the product was harvested. The receiving reports are used to calculate the commission payments due to the Ag-Mart crew leaders, who are paid based on the amount of fruit their crews harvest, and to analyze the yields of specific plantings. The "date received" column on the receiving reports showed the date the product was shipped from the farm to the packinghouse.

28. In March 2005, the Palm Beach Post published an article stating that three women, who harvested tomatoes for Ag-Mart in 2004, bore children who suffered from birth defects. The article questioned whether the birth defects were connected to the pesticides used by Ag-Mart on its tomatoes. The women had worked at both the South Florida and North Florida farms, and at an Ag-Mart farm in North Carolina.

29. In response to the article, the Collier County Health Department began an inquiry to determine the cause of the birth defects and asked for the Department's help in performing a pesticide use inspection at the South Florida farm, where the three women, identified as Francisca Herrera, Sostenes Salazar, and Maria de la Mesa (also called Maria de la Mesa Cruz), worked from February through July 2004.

30. The Department's investigation commenced with a work request sent from Tallahassee to Environmental Specialist Neil Richmond in Immokalee on March 7, 2005.⁶ Mr. Richmond regularly conducts inspections at golf courses, farms, chemical dealers, and fertilizer plants throughout Collier County. The work request directed Mr. Richmond to obtain pesticide use records for Ag-Mart covering the period of February through July 2004 and employee records showing the names of the three employees and the dates they worked in 2004. The work request further directed Mr. Richmond to conduct a pesticide use

inspection at the South Florida farm to document the pesticide products used in the field. Finally, the work request directed Mr. Richmond to conduct a full worker protection standard inspection to document the posting of fields, central posting information, and REIs at the South Florida farm.

31. Mr. Richmond initially visited Ag-Mart's South Florida farm on March 28, 2005, accompanied by two persons from the Collier County Health Department. During the course of the inspection, Ag-Mart's farm manager, Doug Perkins, produced spray tickets for both the South Florida and North Florida farms for the period February through July 2004. Mr. Perkins also produced a spreadsheet identifying the dates worked and the farm locations for each of the three women named in the newspaper article. This spreadsheet was prepared at the direction of Ag-Mart's human resources manager, Angelia Cassell, and was derived from the three workers' timesheets for 2004.

32. On March 30, 2005, Mr. Richmond filed a written report with the documents he received from Ag-Mart. The Department's Bureau of Compliance Monitoring then assigned the matter to Case Reviewer Jessica Fernandez in Tallahassee. Ms. Fernandez was given the task of reviewing all the information gathered by the Department's inspectors to determine whether Ag-Mart had violated the Florida Pesticide Law or any of the Department's implementing rules.

33. On April 12, 2005, Ms. Fernandez sent a request for additional information to Mr. Richmond, which stated in relevant part:

According to the work log included in this file, Ms. Fransisca [sic] Herrera, Ms. Maria de la Mesa Cruz and Ms. Sostenes Salazar worked at the Ag-Mart farm located in Immokalee between January 2004 and October 2004. Please obtain as much information as possible regarding the specific Planting, Field and Block numbers in which these workers worked during the period of February 2004 through June 2004.

34. Mr. Richmond went to the South Florida farm on March 13, 2005, and communicated this request for additional information to Mr. Oelman, who responded that it would take several days to gather the requested information. Mr. Richmond returned to the farm on April 15, 2005. On that date, Mr. Oelman explained to Mr. Richmond the sequencing of harvesting and spray activities at the South Florida farm. Mr. Oelman told Mr. Richmond that Ag-Mart's harvest records indicate, only, which planting the laborers were working in on a given day and that a planting includes more than one field. Mr. Oelman also told Mr. Richmond that Ag-Mart's spray records are kept according to field and block numbers and that his practice was to spray behind the picking.

35. On April 22, 2005, Ms. Cassell faxed to Mr. Richmond a spreadsheet entitled "Field Locations for SFL 2/04 thru 6/04."

All involved understood that "SFL" referred to the South Florida farm.⁷ With the assistance of subordinates in her office, Ms. Cassell produced this document to show, in her words, "the total of what field locations the [three] women might have worked in." Ms. Cassell started with time cards, which indicated the dates and hours the three women worked. Then she obtained foreman receiving reports, which she understood to tell her which plantings were harvested on which dates. Finally, she obtained, from the farm, a handwritten document showing which fields were included in each planting. From this information, Ms. Cassell was able to fashion a spreadsheet indicating the range of fields each woman could have worked in from February through June 2004.

36. Mr. Richmond testified that he read the spreadsheet's title and understood the document to show where the women actually worked each day. The document appeared self-explanatory. No one from Ag-Mart told Mr. Richmond that the spreadsheet showed only where the women could have worked, or "possible" locations. Mr. Richmond passed the spreadsheet on to Ms. Fernandez, with a report stating that it showed "the field locations for Ms. Herrera, Ms. Salazar, and Ms. de la Mesa where they worked on respective dates." Ms. Fernandez also operated on the assumption that the spreadsheet showed what its title

indicated, the actual field locations of the three women on any given day from February through June 2004.

37. Ms. Cassell testified that she put the title on the spreadsheet without much thought, simply as an identifier for the file on her computer's hard drive. Ms. Cassell understood that she was creating a spreadsheet of all the fields the women could possibly have worked in on a given day. She could be no more precise, because Ag-Mart did not keep records that would show the specific fields where an individual worked on a given day.

38. The president of Ag-Mart, Mr. Long, confirmed that Ag-Mart does not keep records on which fields a worker is in on a given day. At the time the Department made its request, Mr. Long told Ms. Cassell that there was no way Ag-Mart could provide such precise worker location data. The closest they could come would be to correlate harvest or receiving data, which showed what plantings a crew had harvested from, with the workers' time cards. Ag-Mart knew whose crew each woman had worked in; so the spreadsheet listed all the fields in the planting worked by the crew, as a way of showing which fields the women might have worked in.

39. On May 4, 2005, Ms. Fernandez sent Compliance Monitoring Bureau Chief Dale Dubberly a request for additional information, which Mr. Dubberly forwarded to Mr. Richmond the

next day. Ms. Fernandez first requested the time work started and ended for each worker in each field on every date listed in the spreadsheet provided on April 22, 2005. Ms. Fernandez next asked for the field location for each worker from July 2004 to November 2004. She asked for the block numbers corresponding to each of the fields in North Florida, South Florida, and North Carolina during the 2004 season and a map showing the distribution of blocks, fields and plantings for those farms during the 2004 season. She asked for spray records for South Florida for October and November 2004. Finally, Ms. Fernandez requested a more legible copy of the spreadsheet, which she stated "shows each worker's field location."

40. Upon receiving this request through Mr. Richmond, Ms. Cassell, her staff, and Ag-Mart farm compliance manager, Amanda Collins created a new spreadsheet, which Ms. Cassell titled "Field Locations for 3 Employees for 2004." This spreadsheet was identical in format to the earlier document, but was expanded to include the dates the three women worked for all of 2004. For each worker, the spreadsheet provided a cell for each day worked, and within that cell a list of field numbers. Again, the Department took these field numbers to represent fields in which the women actually worked, when Ag-Mart actually intended them to represent fields in which the women possibly

worked. Some of the cells listed as many as 23 field numbers for one day.

41. The method of developing this spreadsheet was similar to that employed for the first one. The weekly time cards of the three women were used to provide the days they worked. Ag-Mart's weekly time cards show the name of the employee, the rounded hours worked each week, the number of piece units worked, the hours worked for minimum wage, and the initials of the crew leader for whom the employee worked that week. For their South Florida farm work in 2004, Ms. Herrera and Ms. Salazar worked exclusively for crew leader Sergio Salinas. Ms. de la Mesa worked at South Florida for crew leader Juan Anzualda and at North Florida for crew leader Pascual Sierra.⁸

42. To identify the fields where the three women might have worked on a given day, Ms. Cassell and her staff again used foreman receiving reports and planting schedules. The receiving reports were understood to provide the dates of shipping for harvested product, and these were correlated to the dates on which the three women worked. Again, Ms. Cassell listed every field within a planting as a possible work location, because Ag-Mart kept no data that identified the fields in which the women actually worked on a given date.

43. On May 6, 2005, Mr. Richmond met with Ms. Cassell and Ms. Collins at Ag-Mart's Plant City administrative offices. The meeting lasted no more than 15 minutes and consisted of Ag-Mart employees turning over various documents to Mr. Richmond, along with some explanatory conversation. Ms. Cassell specifically recalled explaining to Mr. Richmond that the field location spreadsheet indicated the "total possible fields that the three employees could have worked in." Mr. Richmond denied that Ms. Cassell gave him any such explanation. Ms. Collins recalled that Mr. Richmond and Ms. Cassell had some discussion about the spreadsheet, but could recall no particulars.⁹

44. Mr. Richmond forwarded the documents received at the May 6, 2005, meeting to Ms. Fernandez in Tallahassee. His written summary, also dated May 6, 2005, represents Mr. Richmond's contemporaneous understanding of the meaning of the documents he was given at the Plant City meeting. The summary stated, in relevant part:

Ms. Collins provided the times which the three ladies worked at the various locations which came from the three ladies time cards (See Exhibits V-1 through V-3, copies of time worked information). Ms. Collins stated that this has the start and finished [sic] times, but does not have which fields they worked at a particular time as they may pick in several fields throughout the day. Ms. Collins provided another copy of the field locations for each of the three ladies (See Exhibits W-1 and W-2, copies of field locations of workers). Ms. Collins also

provided maps with field locations depicting blocks and plantings (See Exhibits X-1 through X-13, maps depicting field locations with blocks and plantings). The field no. is the main number in each block, the first two numbers are the numbers of the planting, while the remaining number in the set is the block number. . . .

45. At the hearing, Mr. Richmond testified that he "absolutely" would have communicated to Ms. Fernandez any conversation he had with, either, Ms. Cassell or Ms. Collins indicating that the field location spreadsheet was anything other than a document showing where the women worked on a given day. This testimony is credible and, coupled with Mr. Richmond's contemporaneous written statement, leads to the finding that Mr. Richmond's testimony regarding the May 6, 2005, meeting in Plant City should be credited.

46. On May 12, 2005, Ms. Cassell sent Mr. Dubberly an e-mail with an attachment correcting some aspects of the spreadsheet. Ms. Cassell's e-mail message stated:

I have attached the the [sic] revision to the original sheet given on the 3 woman's [sic] field locations. I included which field location for NC. There was one revision I made for Francisca on week ending 4/24/05 [Ms. Cassell clearly means 2004]. She was in NC that week and on the last two days of that week I had SFL field numbers and it should of [sic] been NC [sic] please discard old report and replace with revised one.

47. The Department cites this e-mail as further indication that Ag-Mart represented the spreadsheet as indicating actual field locations for the three women, or at least that Ag-Mart said nothing to clarify that the spreadsheet showed something other than the fields where the women actually worked.

48. Ms. Fernandez, the case reviewer whose analysis led to the filing of the Administrative Complaints against Ag-Mart, believed that the field location spreadsheets prepared by Ms. Cassell and her staff reflected the actual work locations for Ms. Herrera, Ms. Salazar, and Ms. de la Mesa.

49. As a case reviewer, Ms. Fernandez receives files compiled by the field staff and reviews the files to determine whether a violation of the Florida Pesticide Law has occurred. The procedure of the Bureau of Compliance Monitoring appears designed to ensure that the case reviewers have no contact with the subjects of their investigation and, instead, rely on field inspectors to act as conduits in obtaining information from companies such as Ag-Mart. As a result, Ms. Fernandez had no direct contact with anyone from Ag-Mart and, thus, had no direct opportunity to be disabused of her assumptions regarding the field location spreadsheet.

50. Ms. Fernandez conceded that she had never been on a tomato farm at the time she conducted her review of the Ag-Mart case. She did not take into consideration the acreage of the

fields or the size of the work crews and their manner of operation. She made no attempt to visualize the effort it would take for one worker to harvest in ten or 20 fields in one day. She assumed that each woman worked in at least part of each field listed on the spreadsheet for each day listed. Ms. Fernandez believed that the spreadsheet was clear on its face and saw no need to make further inquiries as to the plausibility of the assumption that it reflected actual, not possible, field locations.

51. As found above, Ag-Mart made no statement to any Department employee to qualify that the spreadsheet meant only possible field locations. Nonetheless, common sense should have caused someone in the Department to question whether this spreadsheet really conveyed the information that its title appeared to promise. On some days, the spreadsheet places a single field worker in 23 fields. Ag-Mart's crew leaders credibly testified that their crews never worked in more than four fields in one day and more often worked in only one or two. Even granting Ms. Fernandez' ignorance, Mr. Dubberly or some other superior in the Department should have had enough knowledge of farm operations to question the plausibility of Ms. Fernandez' assumptions. While Ag-Mart is at fault for not explaining itself clearly, the Department is also at fault for

insisting that the spreadsheet be taken at face value, no matter how implausible the result.¹⁰

52. At the hearing, Ms. Fernandez explained how she used the documents provided by Ag-Mart to draft the Administrative Complaints. As an example, Counts I and II of the North Florida Complaint provide:

Count I

On June 6, 2004, Mr. Cesar Juarez and Mr. Alexis Barrios treated approximately 157.6 acres of grape tomatoes, planted in fields 7-8, with a mixture of Bravo Weather Stik, Monitor 4 Spray and Danitol 2.4 EC Spray. The Monitor 4 Spray supplemental label states: "REMARKS . . . Do not apply more than a total of 10 pints per acre per crop season, nor within 7 days of harvest." Worker field location records show that tomatoes were harvested from fields 7 and 8 on June 7, 2004. Therefore, these tomatoes were harvested prior to the 7 day pre-harvest interval stated on the Monitor 4 Spray label.

Count II

The Danitol 2.4 EC Spray label states: "TOMATO . . . Do not apply the DANITOL + MONITOR 4 Spray tank mix within 7 days of harvest." As noted in the previous paragraph, fields 7-8 were treated with a mixture of Bravo Weather Stik, Monitor 4 Spray and Danitol 2.4 EC Spray on June 6, 2004. Tomatoes were harvested from these same fields on June 7, 2004. Therefore, these tomatoes were harvested prior to the 7 day pre-harvest interval stated on the Danitol 2.4 EC Spray label.

53. Ms. Fernandez obtained the information regarding the date, time, and manner of pesticide application from the spray tickets described above. She obtained the Monitor and Danitol PHI information from the product label. She obtained the harvest information from the spreadsheet, which indicated that Ms. de la Mesa worked in fields 7 and 8 on June 7, 2004.

54. Counts I and II alleging violations of the PHIs for Monitor and Danitol had an accompanying Count XIX, alleging a violation of the REI for Monitor arising from the same set of facts:

Count XIX

The Monitor 4 Spray and the Danitol 2.4 EC Spray labels contain the following language:

"AGRICULTURAL USE REQUIREMENTS. Use this product only in accordance with its labeling and with the Worker Protection Standard, 40 CFR part 170. This Standard contains requirements for the protection of agricultural workers on farms, forests, nurseries, and greenhouses, and handlers of agricultural pesticides. It contains requirements for training, decontamination, notification, and emergency assistance. It also contains specific instructions and exceptions pertaining to the statements on this label about personal protective equipment (PPE) and restricted entry interval. The requirements in this box only apply to users of this product that are covered by the Worker Protection Standard."

On June 6, 2004, Mr. Cesar Juarez and Mr. Alexis Barrios treated approximately 157.6 acres of grape tomatoes, planted in fields 7-8, with a mixture of Bravo Weather Stik, Monitor 4 Spray and Danitol 2.4 EC Spray. The application started at 11:30 am and ended at 5:30 pm on June 6, 2004. The Monitor 4 Spray label states: "Do not enter or allow worker entry into treated areas during the restricted entry interval (REI) of 48 hours." Work records show that Ms. de la Mesa, directed by licensed applicators Mr. Charles Lambert (PV38793)¹¹ and Mr. Warrick Birdwell (PV36679), worked in fields 7 and 8 on June 7, 2004, and that her working hours for June 7, 2004, were

8:00 am to 6:30 pm. Therefore, Ms. de la Mesa and other workers were instructed, directed, permitted or not prevented by the agricultural employer, Ag-Mart Produce, Inc. from entering treated fields before the expiration of the REI stated on the Monitor 4 Spray label.

55. Throughout the hearing, Ag-Mart contended (and the Department did not dispute) that no statute or rule requires Ag-Mart to keep a daily log of the fields where its employees work. The Department also conceded that Ag-Mart was cooperative throughout its investigation.¹² Ag-Mart contends that all counts should be dismissed because of the Department's reliance on the field location spreadsheet, which shows only the possible field locations of the workers. This contention goes to far. For example, the counts set forth above are well taken, because the spray tickets indicate that fields 7 and 8 were sprayed on June 6, 2004, and the field location spreadsheet indicates that Ms. de la Mesa worked only in fields 7 and 8 on June 7, 2004.

56. Ag-Mart further attacked the spreadsheet by suggesting the unreliability of the dates on the foreman receiving reports. As found above, the receiving reports generally showed the date the product was shipped from the farm to the packinghouse, as well as the crew leader who provided the tomatoes and the planting from which the tomatoes were harvested. At the hearing, Ag-Mart contended that the date the product was shipped was not always the same date it was harvested. Further, Ag-Mart

demonstrated that one of the receiving reports relevant to this proceeding showed the date the product was received at the packing house, rather than the date the product was shipped from the farm, due to a clerical error. Ag-Mart argued that this example showed that the receiving reports were not a reliable source for determining the precise dates of harvest in a given field on the North Florida farm. Ag-Mart's evidence is insufficient to demonstrate the unreliability of the receiving reports, where Ag-Mart itself relied on the reports to provide the Department with the spreadsheet showing possible field locations of the three workers. Ag-Mart had ample opportunity to make a thorough demonstration of the reports' alleged unreliability and failed to do so.

57. Ag-Mart also attempted to cast doubt on the accuracy of the spray tickets through the testimony of Mr. Oelman and Mr. Birdwell, both of whom stated that the spray tickets are written well in advance of the pesticide applications and are not invariably rewritten or corrected when the spraying schedule is pushed back due to rain or slow harvest. However, the pesticide applicator is required by law to maintain accurate records relating to the application of all restricted-use pesticides, including the date, start time and end time of the treatment, and the location of the treatment site. Fla. Admin. Code R. 5E-9.032(1). The Department is entitled to inspect

these records. Fla. Admin. Code R. 5E-9.032(6). Ag-Mart may not attack records that its own employee/applicators were legally required to keep in an accurate fashion. The Department is entitled to rely on the spray tickets as accurate indicators of when and where pesticide applications occurred.

58. Thus, the undersigned has accepted the accuracy of the spray records and the receiving reports, but not of the field location spreadsheet. However, there are some dates on which the fields shown on the spreadsheet perfectly match the fields shown on the spray tickets, as in Counts I, II, and XIX of the North Florida Complaint set forth above. It is found that the Department has proven these counts by clear and convincing evidence.

59. In addition to Counts I, II, and XIX of the North Florida Complaint, the Department has proven the following counts of the North Florida Complaint by clear and convincing evidence: Counts XI, XII, and XXII (spraying in fields 7 and 8 on June 17, 2004; Ms. de la Mesa worked only in fields 7 and 8 on June 19, 2004); and Count XIII (spraying Agrimek 0.15 EC Miticide/Insecticide, with PHI of seven days, in fields 7 and 8 on June 3, 2005; Ms. de la Mesa worked only in fields 7 and 8 on June 7, 2004).

60. The Department has proven none of the counts in the South Florida Complaint by clear and convincing evidence. Some

explanation must be made for the finding that Counts XXXI and XXXII were not proven by clear and convincing evidence. Those counts allege as follows:

Count XXXI

On April 17, 2004, Mr. Lorenzo Reyes, Mr. Demetrio Acevedo and Mr. Francisco Vega treated approximately 212.5 acres of grape tomatoes, planted in fields 11, 6 and 4, with a mixture of Bravo Weather Stik, Monitor 4 Spray and Danitol 2.4 EC Spray. The Monitor 4 Spray supplemental label states: "REMARKS . . . Do not apply more than a total of 10 pints per acre per crop season, nor within 7 days of harvest." Worker field location records show that tomatoes were harvested from fields 11, 6 and 4 on April 21, 2004. Therefore, these tomatoes were harvested prior to the 7 day pre-harvest interval stated on the Monitor 4 Spray label.

Count XXXII

The Danitol 2.4 EC Spray label states: "TOMATO . . . Do not apply the DANITOL + MONITOR 4 Spray tank mix within 7 days of harvest." As noted in the previous paragraph, fields 11, 6 and 4 were treated with a mixture of Bravo Weather Stik, Monitor 4 Spray and Danitol 2.4 EC Spray on April 17, 2004. Tomatoes were harvested from these same fields on April 21, 2004. Therefore, these tomatoes were harvested prior to the 7 day pre-harvest interval stated on the Danitol 2.4 EC Spray label.

61. These counts base their allegation that tomatoes were harvested from fields 11, 6, and 4 on April 21, 2004, on the field location spreadsheet, which indicates that Ms. Salazar possibly worked in fields 4, 6, 9, 10, and/or 11 on April 21,

2004. Thus, the spreadsheet does not definitely prove that Ms. Salazar harvested tomatoes in the three sprayed fields within the PHI. At the final hearing, the Department introduced a spray ticket showing that Monitor and Danitol were also applied to fields 9 and 10 on April 15, 2004. This additional spray ticket completed the Department's demonstration that every field in which Ms. Salazar harvested tomatoes on April 21, 2004, had been sprayed with Monitor and Danitol within the seven-day PHI.

62. However, the Department did not amend the South Florida Complaint to allege the fact of the second spray ticket, and, so, must be held to the allegations actually made in the complaint. Ag-Mart may not be found guilty of facts or violations not specifically alleged in the South Florida Complaint. See Cottrill v. Department of Insurance, 685 So. 2d 1371, 1372 (Fla. 1st DCA 1996) (facts not alleged in the Administrative Complaint). See also B.D.M. Financial Corporation v. Department of Business and Professional Regulation, 698 So. 2d 1359, 1362 (Fla. 1st DCA 1997) (violations not alleged in the Administrative Complaint).

63. In similar fashion, Counts XLI and XLII of the South Florida Complaint allege that fields 21, 22, 18, and 19 were sprayed with Monitor and Danitol on May 15, 2004, and allege PHI violations in fields 21, 22, 18, and 19 on May 20, 2004, based

on the field location spreadsheet's indication that Ms. Salazar possibly worked in one or more of fields 18 through 25 on that date. Thus, the spreadsheet does not definitely prove that Ms. Salazar harvested tomatoes in the four sprayed fields within the PHI. At the final hearing, the Department introduced a spray ticket showing that Monitor and Danitol were, also, applied to fields 20, 23, 24, and 25 on May 14, 2004. This additional spray ticket completed the Department's demonstration that every field in which Ms. Salazar harvested tomatoes on May 20, 2004, had been sprayed with Monitor and Danitol within the seven-day PHI. Again, however, the Department failed to amend the South Florida Complaint to reflect its subsequently developed evidence.

64. Subsection 487.175(1)(e), Florida Statutes, provides that the Department may enter an order imposing an administrative fine not to exceed \$10,000 for each violation. The statute further provides as follows:

When imposing any fine under this paragraph, the department shall consider the degree and extent of harm caused by the violation, the cost of rectifying the damage, the amount of money the violator benefited from by noncompliance, whether the violation was committed willfully, and the compliance record of the violator.

65. Mr. Dubberly testified that the Department does not have a rule for determining the amount of fines, but uses a

matrix, attaching a rating of 0 to 5 for each of the criteria named in the quoted portion of the statute, with 5 representing the most egregious violation.

66. The extent of harm caused by the violation is divided into two classifications: (A) the degree and extent of harm related to human and environmental hazards and (B) the degree and extent of harm related to the toxicity of the pesticide(s). The remaining criteria considered in the matrix are: (C) the estimated cost of rectifying the damage, (D) the estimated amount of money the violator benefited by noncompliance, (E) whether the violation was committed willfully, and (F) the compliance record of the violator. Each factor is given its numerical value. The values for factors (B) through (F) are added, then the total is multiplied by the value for factor (A). The resulting number is then multiplied by \$100.00 to determine the amount of the fine.

67. The PHI violations were primarily food safety violations, the concern being that there might be an unacceptable pesticide residue on the tomatoes if they were harvested within the PHI. The REI violations were based on concerns for worker safety from pesticide exposure. In determining the fines for PHI violations, the Department assigned a numerical value of 2 for factor (A). In determining the fines for REI violations, the Department assigned a

numerical value of 3 for factor (A), based on a reasonable probability of human or animal death or injury, or a reasonable probability of serious environmental harm.

68. For purposes of this proceeding, all the pesticides used by Ag-Mart were restricted-use pesticides. In considering the value to be assigned to factor (B), the Department relied on the pesticide labels, which contain signal words for the category of potential hazard to human or animal life posed by that pesticide. Monitor contained the signal word "Danger," which represents the highest level of potential hazard. A value of 5 was assigned for factor (B) in the alleged violations involving the use of Monitor. Danitol and Agrimek contained the signal word "Warning," which indicated a lesser potential hazard. A value of 3 was assigned for factor (B) in the alleged violations involving Danitol or Agrimek.

69. Because the estimated cost of rectifying the damage and the estimated amount of money the violator benefited by noncompliance was unknown, the Department assigned a value of 0 to factors (C) and (D).

70. As to factor (E), dealing with the willfulness of the violation, the Department assigns a value of 0 if there is no evidence of willfulness, a value of 1 if there is apparent evidence of willfulness, and a value of 5 if it determines the violation was intentional. Because of the large number of

alleged PHI and REI violations, the Department assigned a value of 1 for factor (E), finding apparent evidence of willful intent for each alleged violation.

71. As to factor (F), dealing with the violator's compliance history, the Department considers the three years immediately preceding the current violation. The Department assigns a value of 0 if there are no prior violations, a value of 1 for a prior dissimilar violation, a value of 2 for multiple prior dissimilar violations, a value of 3 for a prior similar violation, and a value of 4 for multiple prior similar violations. Because Ag-Mart had one prior dissimilar violation within the preceding three years, the Department assigned a value of 1 for factor (F) for each alleged violation.

72. Because the sole basis for finding apparent evidence of willful intent was the number of alleged violations, the Department calculated its recommended fines in two ways: by assigning a value of 0 based on no evidence of willful intent and by assigning a value of 1 based on apparent evidence of willful intent. In DOAH Case No. 06-0730, the North Florida Complaint, the Department recommended a fine of either \$1,200 (no evidence of willful intent) or \$1,400 (apparent evidence of willful intent) for each of the PHI violations alleged in Counts I, III, V, VII, IX, and XI, which involved the use of Monitor. The Department recommended a fine of either

\$800 (no evidence) or \$1,000 (apparent evidence) for Counts II, IV, VI, VIII, X, and XII, involving the use of Danitol, and for Counts XIV, XV, and XVI, involving the use of Agrimek. For each of the REI violations alleged in Counts XIX through XXII, the Department recommended a fine of either \$1,800 (no evidence) or \$2,100 (apparent evidence).

73. The Department established by clear and convincing evidence seven of the 20 counts of the North Florida Complaint that remained at issue at the time of the hearing, and none of the 58 counts of the South Florida Complaint that remained at issue at the time of the hearing. The undersigned accepts the Department's calculation of the recommended fines for these violations and recommends that the Department apply the lower calculation for each of the violations.

74. Thus, the recommended fines are as follows: Count I, PHI violation involving the use of Monitor, \$1,200; Count II, PHI violation involving the use of Danitol, \$800; Count XI, PHI violation involving the use of Monitor, \$1,200; Count XII, PHI violation involving the use of Danitol, \$800; Count XIII, PHI violation involving the use of Agrimek, \$800; Count XIX, REI violation, \$1,800; and Count XXII, REI violation, \$1,800. Thus, the total recommended fine for the seven proven violations is \$8,400.

75. In conclusion, it is observed that these cases demonstrate a gap in the enforcement mechanism of the Florida Pesticide Law, at least as it is currently understood and practiced by the Department. The law requires licensed applicators to comply with the PHI and REI restrictions on the labels of the restricted-use pesticides they apply to these crops. The law requires the applicators to keep accurate records of when and where they apply pesticides and of the kind and quantity of pesticides applied in each instance.

76. Yet all parties to this proceeding agreed that the law does not require either the applicators or the growers to keep accurate records of when and where farm workers enter the fields and conduct the harvest. This failure to complete the record-keeping circle makes it extremely difficult for the Department to prove by clear and convincing evidence that a PHI or REI violation has taken place. The PHI and REI restrictions appear virtually unenforceable through company records, except when some fluke of record keeping allows the Department to establish that a given worker could only have been in a recently sprayed field on a given day.

77. It does little good to know when the pesticides were applied to a field if there is no way of knowing when workers first entered the field or harvested tomatoes after the spraying. Ag-Mart credibly demonstrated that its general

practices are designed to minimize worker exposure and guarantee safe harvest, but the company keeps no records to demonstrate to its customers that it observes these practices in particular instances and is under no legal obligation to keep such records. This state of regulatory affairs should be as disturbing to Ag-Mart as to the Department, because purchasers of tomatoes in Florida's grocery stores do not require clear and convincing evidence in order to switch brands.

CONCLUSIONS OF LAW

78. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this case pursuant to Section 120.569 and Subsection 120.57(1), Florida Statutes (2006).

79. The Department has the burden to prove the allegations against Ag-Mart by clear and convincing evidence in order to impose an administrative fine. See Dept. of Banking & Finance v. Osborne, Stern & Co., 670 So. 2d 932, 935 (Fla. 1996).

80. In Evans Packing Co. v. Department of Agriculture and Consumer Services, 550 So. 2d 112, 116, n. 5 (Fla. 1st DCA 1989), the court defined clear and convincing evidence as follows:

[C]lear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the evidence must be precise and explicit and

the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact the firm belief of conviction, without hesitancy, as to the truth of the allegations sought to be established. Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

81. Judge Sharp, in her dissenting opinion in Walker v. Florida Department of Business and Professional Regulation, 705 So. 2d 652, 655 (Fla. 5th DCA 1998)(Sharp, J., dissenting), reviewed recent pronouncements on clear and convincing evidence:

Clear and convincing evidence requires more proof than preponderance of evidence, but less than beyond a reasonable doubt. In re Inquiry Concerning a Judge re Graziano, 696 So. 2d 744 (Fla. 1997). It is an intermediate level of proof that entails both qualitative and quantitative [sic] elements. In re Adoption of Baby E.A.W., 658 So. 2d 961, 967 (Fla. 1995), cert. denied, 516 U.S. 1051, 116 S. Ct. 719, 133 L.Ed.2d 672 (1996). The sum total of evidence must be sufficient to convince the trier of fact without any hesitancy. Id. It must produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established. Inquiry Concerning Davey, 645 So. 2d 398, 404 (Fla. 1994).

82. Section 487.031, Florida Statutes, provides, in relevant part:

It is unlawful:

* * *

(10) For any person to use any pesticide, including a restricted-use pesticide, or to dispose of any pesticide containers in a

manner other than as stated in the labeling or on the label or as specified by the department or the United States Environmental Protection Agency. . . .

83. Florida Administrative Code Rule 5E-2.039 provides, in relevant part:

The worker protection standard for agricultural pesticides as specified in 40 CFR 170, revised as of July 1, 1993, and amended in 59 FR 30264, published June 10, 1994, is hereby adopted by reference.

84. 40 C.F.R. Part 170 is the Worker Protection Standard, which is

A standard 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 or in nurseries, greenhouses, and forests and also from the accidental exposure of workers and other persons to such pesticides. It 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.

85. 40 C.F.R. Section 170.3, titled "Definitions," provides, in relevant part:

Agricultural employer means any 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.

86. 40 C.F.R. Section 170.110, titled "Restrictions associated with pesticide applications," provides, in relevant part:

(a) Farms and forests. During the application of any pesticide on a farm or in a forest, the agricultural employer shall not allow or direct any person, other than an appropriately trained and equipped handler, to enter or to remain in the treated area.

87. 40 C.F.R. Section 170.112, titled "Entry restrictions," provides, in relevant part:

(a) General restrictions.

(1) After the application of any pesticide on an agricultural establishment, the agricultural employer shall not allow or direct any worker to enter or to remain in the treated area before the restricted-entry interval on the pesticide label has expired, except as provided in this section.

* * *

(3) When two or more pesticides are applied at the same time, the restricted-entry interval shall be the longest of the applicable intervals.

(4) The agricultural employer shall assure that any worker who enters a treated area under a restricted-entry interval as permitted by paragraphs (c), (d), and (e) of this section uses the personal protective equipment specified in the product labeling for early-entry workers and follows any other requirements on the pesticide labeling regarding early entry. . . .

88. Ag-Mart employed the three workers, Francisca Herrera, Maria de la Mesa, and Sostenes Salazar, to perform services related to the production of agricultural plants, including but not limited to the harvesting of tomatoes, and was the agricultural employer of these workers for all purposes of these proceedings.

89. Justin Oelman, a Respondent in DOAH Case No. 06-0729, was employed by Ag-Mart as crop protection manager at the South Florida farm in 2004. The only allegations against Mr. Oelman, Counts L through LIV of the South Florida Complaint, have been resolved by the parties.

90. Warrick Birdwell, a Respondent in DOAH Case No. 06-0730, was employed by Ag-Mart as farm manager of the North Florida farm in 2004. The only allegations against Mr. Birdwell, Counts XVII and XVIII of the North Florida Complaint, have been resolved by the parties.

91. The Department has met its burden by proving by clear and convincing evidences that Ag-Mart violated Subsection 487.031(10), Florida Statutes, as alleged in Counts I, II, XI, XII, and XIII of the North Florida Complaint.

92. The Department has met its burden by proving by clear and convincing evidence that Ag-Mart violated Subsection 487.031(10), Florida Statutes; Florida Administrative Code Rule 5E-2.039; 40 C.F.R. Section 170.110; and 40 C.F.R. Section

170.112 as alleged in Counts XIX and XXII of the North Florida Complaint.

93. The Department has not met its burden as to the remaining counts of the North Florida Complaint and did not meet its burden as to any of the counts in the South Florida Complaint.

94. The parties have stipulated that Ag-Mart will pay the sum of \$3,000 to resolve Counts L, LI, LII, LIII, and LIV of the South Florida Complaint and Counts XVII and XVIII of the North Florida Complaint.

95. Neither party has demonstrated entitlement to attorney's fees or costs in this proceeding.

RECOMMENDATION

Based on the foregoing Findings of Facts and Conclusions of Law, it is

RECOMMENDED that the Department enter a final order that provides as follows:

1. That Ag-Mart committed the violations alleged in Counts I, II, XI, XII, and XIII of the North Florida Complaint, for which violations Ag-Mart should be assessed an administrative fine totaling \$8,400;

2. That Ag-Mart pay to the Department \$3,000 to resolve Counts L through LIV of the South Florida Complaint and Counts XVII and XVIII of the North Florida Complaint; and

3. That all other counts of the North Florida Complaint and the South Florida Complaint be dismissed.

DONE AND ENTERED this 16th day of March, 2007, in Tallahassee, Leon County, Florida.



LAWRENCE P. STEVENSON
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 16th day of March, 2007.

ENDNOTES

1/ All references to Florida Statutes are to Florida Statutes (2005) unless otherwise indicated.

2/ The varying size of fields can be illustrated by the fact that planting 3 at the North Florida farm and planting 7 at the South Florida farm were of comparable total acreage (152 versus 147 gross acres), but the North Florida planting required only three fields to roughly equal the acreage covered by nine fields in the South Florida planting.

3/ Mr. Oelman frankly testified that he had no idea whether anyone ever read the notices posted on the central board.

4/ Subsection 487.021(58), Florida Statutes, provides the following definition:

"Restricted-use pesticide" means a pesticide which, when applied in accordance with its

directions for use, warnings, and cautions and for uses for which it is registered or for one or more such uses, or in accordance with a widespread and commonly recognized practice, may generally cause, without additional regulatory restrictions, unreasonable adverse effects on the environment, or injury to the applicator or other persons, and which has been classified as a restricted-use pesticide by the department or the administrator of the United States Environmental Protection Agency.

5/ Mr. Birdwell eventually fired Mr. Waters for job performance reasons unrelated to the matters at issue in this proceeding.

6/ Field Inspector William Martin was sent to the North Florida farm on the same date. Mr. Martin did not testify, and the great majority of the testimony regarding the Department's investigation and Ag-Mart's response centered on the South Florida farm. The documentation provided by Ag-Mart for the North Florida farm was of the same type as that provided for the South Florida farm, and the issues raised concerning the Department's reliance on those documents are the same.

7/ In other documents, "NFL" was used to refer to the North Florida farm.

8/ All three women also worked in North Carolina for part of 2004, but that work is not relevant to this proceeding.

9/ In fact, during her direct testimony at the hearing, Ms. Collins stated that "we told him what [the spreadsheet] was when we gave it to him . . . that these were the field locations within a planting that the workers could have been in." However, on cross-examination, counsel for the Department confronted Ms. Collins with her deposition testimony that she had no recollection of what she had heard Mr. Richmond and Ms. Cassell discussing. Ms. Collins then conceded that she had no clear recollection of the specifics of the conversation between Mr. Richmond and Ms. Cassell about the spreadsheet.

10/ The Department's insistence on a literal reading of the spreadsheet would have more force if Ag-Mart were required by law or rule to track where its workers harvest from day to day. Ag-Mart produced this spreadsheet voluntarily and apparently

without knowing that the Department intended to base a prosecution on it.

11/ As noted in the Preliminary Statement above, the Department has dismissed all allegations against Mr. Lambert.

12/ Ag-Mart's cooperativeness was partly based on its own mistaken assumptions. Mr. Long testified that his company's response was premised on the understanding that the Department was gathering information to assist the Collier County Health Department in determining whether a correlation existed between the pesticides used at the farms where the women worked and their children's birth defects. Mr. Long stated that he would not have provided this information to the Department had he known that the Department was going to use it to attempt to prove specific times, REIs, and PHIs in order to impose a fine on Ag-Mart.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this recommended order. Any exceptions to this recommended order should be filed with the agency that will issue the final order in this case.