Oregon
Kate Brown, Governor

Department of Agriculture
635 Capitol St NE
Salem, OR 97301-2532

PESTICIDES PROGRAM
TEL: 503-986-4635

PERSONAL SERVICE

September 25, 2015

Michael Applebee, registered agent for:
Applebee Aviation, Inc.
39495 NW Bledsoe Creek Lane
Banks, Oregon 97106

Re: Notice of Proposed Imposition of Civil Penalty and Proposed/Final Order, and Order of Emergency License Suspension and Notice of Opportunity for a Hearing; ODA Pesticides Case No. 150406

The enclosed Notice and Order is based on a pesticide investigation performed by the Pesticides Program of the Oregon Department of Agriculture. By this order the Oregon Commercial Pesticide Operator (CPO) license of Applebee Aviation, Inc. is suspended effective immediately. This order addresses a serious danger to the public health or safety in Oregon, as well as activities violative of Oregon's State Pesticide Control Act, Oregon Revised Statutes (ORS) Chapter 634. The action is taken pursuant to statutory and regulatory provisions including but not limited to Oregon Revised Statues (ORS) 183.430(2), ORS 561.305, ORS 634.322, and Oregon Administrative Rules (OAR) 137-003-0560.

Your CPO license will be reinstated after you pay the civil penalty and provide to the Department a written plan, to the Department's satisfaction, describing how you will set in place policies, protocols and training to prevent recurrences of the violative activities noted in the order. Details on what the Department requires are in the Notice and Order.

Read all of the order carefully.

If you request a hearing regarding the license suspension your request must be made in writing to the Oregon Department of Agriculture so that it is received by the Department within 90 (ninety) days of the date of service (when you receive the notice). If you do not request a hearing this order will remain effective by default.

If you request a hearing regarding the civil penalty your request for hearing must be made in writing to the Oregon Department of Agriculture so that it is received by the Department within 10 (ten) business days of the date of service. If you do not request a hearing this Notice will become the Final Order for the purpose of the Civil Penalty.

Dale L. Mitchell

DALE L. MITCHELL, PESTICIDES COMPLIANCE PROGRAM MANAGER
OREGON DEPARTMENT OF AGRICULTURE

STATE OF OREGON
DEPARTMENT OF AGRICULTURE

Before The Director of The Department of Agriculture

In the Matter of:	)	NOTICE OF PROPOSED IMPOSITION OF CIVIL PENALTY, and PROPOSED/FINAL ORDER
Applebee Aviation, Inc.	)	for Violation of the State Pesticide Control Act, and
a Commercial Pesticide Operator licensee	)	ORDER OF EMERGENCY LICENSE SUSPENSION AND NOTICE OF OPPORTUNITY FOR A HEARING
	)	ODA Pesticides Case No. 150406

To: Applebee Aviation, Inc. (Applebee Aviation)

The Director of the Oregon Department of Agriculture (ODA or the Department) hereby proposes to assess a civil penalty in the amount of $1,110.00 against Applebee Aviation, as authorized by statutory and regulatory provisions including, but not limited to, ORS 634.900 to ORS 634.915 and OAR 603-057-0500 to 603-057-0532. The findings and conclusions on which this determination is based, and the criteria used to calculate the penalty, are set out below.

Furthermore, in response to your performance of worker safety-related pesticide application activities in a faulty, careless or negligent manner, and effective immediately, by order of the Department your license to operate as a Commercial Pesticide Operator (CPO) in Oregon is hereby suspended today, September 25, 2015. Effective immediately you must stop providing pesticide application services, or applying pesticides onto the properties of others in Oregon until further order of the Department.

Following the emergency license suspension ODA may reinstate Applebee Aviation's CPO license upon satisfaction of terms provided herein.

This order immediately suspending your CPO license is made pursuant to Oregon Revised Statues (ORS) 561.305, 634.322, and 183.430(2), which authorize the Department to enter an emergency suspension order when it finds and concludes that a licensee has violated Oregon's State Pesticide Control Act (ORS Chapter 634) and that the continued operation by the licensee presents a serious danger to the public health or safety. This order is also made pursuant to Oregon Administrative Rules (OAR) 137-003-0560, which implements ORS 183.430(2), and ORS 634.372(4), which prohibits certain pesticide application activities.

The Department finds and concludes that Applebee Aviation's CPO activities, performed contrary to the training received by its applicators, present a serious danger to Oregon's public health or safety, and have violated the State Pesticide Control Act, as described herein.

I. APPLICABLE LAW

1. The applicable law includes the following: Oregon Revised Statutes (ORS) Chapters 60 (corporations), 183 (administrative law), 561 (agriculture), and 634 (pesticides), Oregon Administrative Rules (OAR) Chapter 137, division 3; and OAR Chapter 603, division 57; Federal Insecticide, Fungicide, and Rodenticide Act, 7 United States Code (USC) §§ 136 *et seq.*; and 40 Code of Federal Regulations (CFR) Parts 152 through 180.

2. Oregon's pesticide control law is known as the State Pesticide Control Act and is codified in Oregon Revised Statutes (ORS) Chapter 634.

3. ORS 634.005 states: "The purpose of this chapter, which shall be known as the State Pesticide Control Act and shall be enforced by the State Department of Agriculture, is to regulate in the public interest the formulation, distribution, storage, transportation, application and use of pesticides. Many materials have been discovered or synthesized which are necessary and valuable for the control of insects, plant diseases and weeds. Many more pesticides will be discovered and needed. Such materials, however, may injure health, property, wildlife or environment by being distributed, stored, transported, applied or used in an improper or careless manner. The pesticide industry of this state has achieved and maintained high standards in its formulation and use of pesticides while at the same time experiencing a minimum of injury to persons, property or the environment. Currently updating the law to maintain this achievement and to consider future new pesticides and problems is necessary for the protection of persons, property, wildlife and environment of this state."

4. ORS 634.006(8) states: "Pesticide' includes: ...
   (a) 'Defoliant' which means any substance or mixture of substances intended for causing the leaves or foliage to drop from a plant with or without causing abscission;
   (b) 'Desiccant' which means any substance or mixture of substances intended for artificially accelerating the drying of plant tissue;
   (c) 'Fungicide' which means any substance or mixture of substances intended for preventing, destroying, repelling or mitigating any fungus;
   (d) 'Herbicide' which means any substance or mixture of substances intended for preventing, destroying, repelling or mitigating any weed;
   (e) 'Insecticide' which means any substance or mixture of substances intended for preventing, destroying, repelling or mitigating any insects which may be present in any environment whatsoever;
   (f) 'Nematocide' which means any substance or mixture of substances intended for preventing, destroying, repelling or mitigating nematodes;
   (g) 'Plant regulator' which means any substance or mixture of substances intended, through physiological action, to accelerate or retard the rate of growth or rate of maturation or to otherwise alter the behavior of ornamental or crop plants or the produce thereof, but shall not include substances to the extent that they are intended as plant nutrients, trace elements, nutritional chemicals, plant inoculants or soil amendments; or
   (h) Any substance, or mixture of substances intended to be used for defoliating plants or for preventing, destroying, repelling or mitigating all insects, plant fungi, weeds, rodents, predatory animals or any other form of plant or animal life which is, or which the department may declare to be a pest, which may infest or be detrimental to vegetation, humans, animals, or be present in any environment thereof."

5. ORS 634.006(13) states: "Pesticide operator' means a person who owns or operates a business engaged in the application of pesticides upon the land or property of another."

6. ORS 634.006(9) states: "Pesticide applicator' or 'applicator' means a person who:
   (a) Is spraying or applying pesticides for others;
   (b) Is authorized to work for and is employed by a pesticide operator; and

(c) Is in direct charge of or supervises the spraying or application of pesticides or operates, uses, drives or physically directs propulsion of equipment, apparatus or machinery, either on the ground or by aircraft in such activity."

7. ORS 634.122 states in part that "(2) An applicant for a pesticide applicator's license shall be required to demonstrate satisfactorily by written examination or any reexamination given by the department, an adequate knowledge of:

(a) The characteristics of pesticides and the effect of their application to particular crops.
(b) The practices of application of pesticides.
(c) The conditions and times of application of pesticides and the precautions to be taken in connection therewith.
(d) The applicable laws and rules relating to pesticides and their application in this state.
(e) Integrated pest management techniques, as defined in ORS 634.650, for pest control.
(f) Other requirements or procedures which will be of benefit to and protect the pesticide applicator, the persons who use the services of the pesticide applicator and the property of others."

8. OAR 603-057-0120 provides general standards of competence for commercial pesticide applicators; it establishes a system of written examination of applicator candidates, certification, recertification and renewal. Under these rules recertification may be obtained by re-examination or by attending training classes. OAR 603-057-0120 states, in part:

(1) Competence in the use or handling of pesticides shall be determined on the basis of written examinations which, in addition to the requirements of OAR 603-057-0125, shall include the following general standards:
  (a) Comprehension of labeling format, labeling terminology, and the labeled warnings and instructions;
  (b) Knowledge of safety factors to be considered, including need and use of protective clothing, first aid procedures in the event of accidents, symptoms of various pesticide poisonings, and proper storage, transportation, handling, and disposal methods;
  (c) Knowledge of potential consequences to the environment from the use or misuse of pesticides, as influenced by climate, topography, and existence of animal life;
  (d) Knowledge of methods of use or application, including the various forms (dust, wettable powder, etc.) of pesticides, the compatibility of various pesticides, the types of application equipment or devices, and the times when various pesticide forms or equipment would be appropriately used; and
  (e) Knowledge and comprehension of existing laws and rules governing pesticide use or application, including classifications of various pesticides (highly toxic, restricted use, or general). ...
(3) An applicant for a pesticide applicator's license renewal shall be required to take a reexamination each fifth year after taking the original examination, and be subject to the provisions of this section and OAR 603-057-0125 in regard thereto. However, if the Department's records indicate the applicant for license renewal has complied with the provisions of OAR 603-057-0150, the written examination shall be waived ... ."

9. OAR 603-057-0150 provides for license renewal through attending recertification classes in lieu of reexamination.

10. ORS 634.372(4) states: "A person may not: ... Perform pesticide application activities in a faulty, careless or negligent manner."

11. ORS 561.305(2) states: "The department may refuse to issue, refuse to renew, revoke or suspend any license or application for license issued or which may be issued pursuant to any law under its jurisdiction where it finds that the licensee has violated any provision of such law or regulations promulgated thereunder. ..."

12. ORS 634.322 states: "In carrying out and enforcing the provisions of this chapter, the State Department of Agriculture is authorized: ...

(4) In accordance with the provisions of ORS chapter 183, to revoke, suspend or refuse to issue or renew any license or certificate if it determines that an applicant, licensee or certificate holder has violated any of the provisions of this chapter."

13. The Department has responsibility and authority for the Pesticides program and may make any rule necessary for enforcement of program requirements. ORS 561.020; ORS 561.190; ORS Chapter 634.

14. Oregon Administrative Rules (OAR) Chapter 603 Division 057 is entitled Pesticide Control and implements provisions of the State Pesticide Control Act, ORS Chapter 634.

15. ORS 634.900 authorizes the Department to impose Civil Penalties for violations of ORS Chapter 634.

16. ORS 634.915 states that: "(1) The State Department of Agriculture shall adopt by rule a schedule establishing the amount of civil penalty that may be imposed for a particular violation.

(2) In imposing the penalty pursuant to the schedule authorized by this section, the Director of Agriculture shall consider the following factors:

(a) The past history of the person incurring a penalty in taking all feasible steps or procedures necessary or appropriate to correct any violation.

(b) Any prior violations of statutes, rules or orders pertaining to pesticide application, sale or labeling.

(c) The gravity and magnitude of the violation.

(d) Whether the violation was repeated or continuous.

(e) Whether the cause of the violation was an unavoidable accident, negligence or an intentional act.

(f) The violator's cooperativeness and efforts to correct the violation.

(g) The immediacy and extent to which the violation threatens the public health or safety."

17. OAR 603-057-0500 to 603-057-0532 provide rules for the implementation of the Department's authority to impose civil penalties under ORS 634.900 through 634.915.

18. ORS chapter 60 regulates corporations transacting business in Oregon.

II. FINDINGS OF FACT
ODA Pesticides Case No. 150406

1. This Notice and Order results from ODA's investigation of complaints and coordination with the Occupational Safety and Health Division of the Oregon Bureau of Labor and Industry (OR-OSHA) about Applebee Aviation's pesticide handling and application practices on and around forestlands in Douglas County, Oregon, during or about April of 2015. In this case ODA found that

some of Applebee Aviation's aerial herbicide application activities were performed in a faulty, careless or negligent manner. The workers involved in these activities include the handlers doing the mixing and loading of pesticide mixtures. Aspects of the activities include worker safety and training, use of equipment, and container control and disposal. The current or former representatives or employees of Applebee Aviation who were in contact with ODA during this investigation included Michael L. Applebee, Warren K. Howe, Brenda May, David A. McDaniel, Robert Taylor, and Darryl Ivy.

2. Applebee Aviation, Inc. (Applebee Aviation) is a domestic business corporation with a principal place of business at 22330 NW Fisher Road, Banks, Washington County, Oregon. Applebee Aviation provides custom or commercial aerial pesticide application services to foresters and agricultural growers.

3. Applebee Aviation is licensed by the Oregon Department of Agriculture as a Commercial Pesticide Operator; license number AG-1005130CPO. The several categories on this license include Forestry; it was originally issued in June of 2008.

4. Applebee Aviation uses or employs various agents or employees, some of them as pesticide applicators (pilots), others as handlers. These persons include or have included David A. McDaniel as pilot, and Robert Taylor and Darryl Ivy as handlers.

5. David A. McDaniel is licensed by ODA as a Commercial Pesticide Applicator (CPA), license number AG-L0066182CPA. The several categories on this license include Forestry; it was originally issued during October of 1991.

6. During or about April of 2015, through various agents or employees, including Mr. Taylor and Mr. Ivy, Applebee Aviation handled various herbicide products as it prepared mixtures and loaded mixtures onto a helicopter for application. These various pesticide application activities may be referred to herein as the application activities. The Applebee Aviation agents or employees performing the application activities may be referred to herein as the crew or crew members.

7. During the application activities the crew handled various pesticides, including:

Velossa Selective Herbicide, EPA Reg. No. 5905-579, active ingredient hexazinone, Helena Chemical Company, Collierville, Tennessee
Clean Slate Selective Herbicide, EPA Reg. No. 228-491, a.i. clopyralid, Nufarm Americas Inc., Burr Ridge, Illinois
Transline Specialty Herbicide, EPA Reg. No. 62719-259, a.i. clopyralid, Dow AgroSciences LLC, Indianapolis, Indiana
Element 4 herbicide, EPA Reg. No. 62719-40, a.i. triclopyr, Dow AgroSciences LLC, Indianapolis, Indiana
Agri Star 2,4-D LV6 Low Volatile Herbicide, EPA Reg. No. 42750-20, a.i. 2,4-D, Albaugh, Inc., Ankeny, Iowa
Weedone LV6 EC Broadleaf Herbicide, EPA Reg. No. 71368-11, a.i. 2,4-D, Nufarm, Inc. Burr Ridge, Illinois
Atrazine 4L Flowable Herbicide, EPA Reg. No. 35915-4-60063, a.i. atrazine, Sipcam Agro USA, Inc., Durham, North Carolina
Atrazine 4L Herbicide, EPA Reg. No. 66222-36, a.i. atrazine, Makhteshim Agan of North America, Inc., Raleigh, North Carolina
Drexel Atrazine 4L Herbicide, EPA Reg. No. 19713-11, a.i. atrazine, Drexel Chemical Company, Memphis, Tennessee

The product labels for all of these pesticide products, under DIRECTIONS FOR USE, state:

> Do not apply this product in a way that will contact workers or other persons, either directly or through drift. Only protected handlers may be in the area during application.

Each of the product labels also has an AGRICULTURAL USE REQUIREMENTS box, which includes the following statements:

> 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/s. The requirements in this box only apply to uses of this product that are covered by the Worker Protection Standard.

All of the Atrazine products are Restricted Use Pesticides (RUP), due to ground and surface water concerns. These pesticide applications may be referred to collectively as the herbicide applications.

8. During application activities in April 2015, some of the crew did not wear all of the Personal Protective Equipment (PPE) required by the product labels of the pesticide products they were applying or handling. In some of these cases, Applebee Aviation had not provided the crew with the required PPE.

9. During application activities in April 2015, Applebee Aviation did not provide the crew with water or other decontamination materials, such as could be used in the event of exposure to a pesticide.

10. During application activities in April 2015, Applebee Aviation did not provide the crew with training on how to minimize hazards to their safety and health whilst working around pesticides.

11. During application activities in April 2015, Applebee Aviation used a pesticide mixture tank that had a defective seal on the top hatch.

12. On April 26, 2015, Mr. Ivy went to Mercy Medical Center in Roseburg, Oregon, complaining of adverse health impacts that he attributed to his exposure to herbicides during the herbicide applications. On April 27, 2015 ODA and the Pesticide Analytical and Response Center (PARC) received an Oregon Emergency Response System (OERS) report on this incident.

13. On April 29, 2015, ODA and OR-OSHA met with and interviewed Mr. Applebee about the herbicide applications and Applebee Aviation's worker safety protocols.

14. On May 20, 2015, ODA and OR-OSHA met with and interviewed Mr. Taylor about the herbicide applications and Applebee Aviation's worker safety protocols.

15. On May 27, 2015, ODA and OR-OSHA met with and interviewed Mr. McDaniel about the herbicide applications he performed as pilot and Applebee Aviation's worker safety protocols.

16. On May 29, 2015, ODA and OR-OSHA met with and interviewed Mr. Ivy about the herbicide applications and Applebee Aviation's worker safety protocols.

17. Before or about August 7, 2015 an additional Applebee Aviation employee contacted OR-OSHA and said that Applebee Aviation was conducting aerial pesticide applications in Washington State, and continuing to fail to comply with worker safety requirements. On or about August 7, 2015 OR-OSHA referred these concerns to the Washington State Department of Agriculture,

18. On September 8, 2015 ODA received from Applebee Aviation copies of their pesticide application records for all of the pesticide applications they had made while Mr. Ivy was in their employ. These records documented Applebee Aviation's applications of the products listed in Paragraph II-7.

19. On September 11, 2015, ODA received from OR-OSHA their record of their inspection of Applebee Aviation's worker safety practices.

20. On or about September 15, 2015 ODA became aware of an additional employee of Applebee Aviation who was alleging that they were still performing aerial pesticide application activities without due regard to pesticide-related worker safety requirements.

III. ULTIMATE FINDINGS OF FACT

1. During April of 2015 Applebee Aviation, Inc. was a Commercial Pesticide Operator, providing aerial pesticide application services to forestland and agricultural owners in Oregon.

2. During April of 2015 Applebee Aviation applied herbicides, including some RUPs, to forest sites in Douglas County, Oregon.

3. The pesticides Applebee Aviation applied bore labels that prohibited any application such as would contact people, directly or through drift, and permitted only protected handlers in the treatment area.

4. During the herbicide applications Applebee Aviation's agents or employees handled pesticide products and spray mixtures as they mixed loads and loaded the helicopter used to make the applications. The agents or employees had not been provided with pesticide safety training prior to these activities, nor were they, during the application activities, consistently provided with water or other decontamination materials. This training and provision of materials were required by the pesticide product labels, through their Agricultural Use Requirements boxes, which require compliance with the Worker Protection Standard; 40 CFR 170. Also during these activities the agents or employees were not consistently provided with, and did not consistently wear, the PPE required by the pesticide product labels. During these activities Applebee Aviation used a pesticide mixture tank with a defective hatch seal, which presented the handlers with additional potential for exposure to pesticide mixtures. As of September 2015 Applebee Aviation is still not complying with these worker safety requirements.

5. The failure to follow label requirements, provide sufficient safety materials, equipment and training, using workers without required PPE, and having workers use improperly securable equipment, seriously endanger worker/handler's and thus the public's health or safety. These failures are also considered to be performing pesticide application activities in a faulty, careless or negligent manner.

All of these ultimate findings of fact are based on the findings of fact.

IV. CONCLUSION OF LAW

The Oregon Department of Agriculture determines that Applebee Aviation, Inc. violated Oregon Revised Statutes (ORS) Chapter 634 as follows:

VIOLATION NO. 1

Applebee Aviation, Inc. violated **ORS 634.372(4),** which states **A person may not: ... Perform pesticide application activities in a faulty, careless or negligent manner.** During or about April of 2015 Applebee Aviation used a crew or crews of its agents or employees to support and perform aerial (helicopter) pesticide applications onto forestlands in Douglas County, Oregon. During these application activities the crew handled various pesticides, including:

Velossa Selective Herbicide, EPA Reg. No. 5905-579
Clean Slate Selective Herbicide, EPA Reg. No. 228-491
Transline Specialty Herbicide, EPA Reg. No. 62719-259
Element 4 herbicide, EPA Reg. No. 62719-40, a.i. triclopyr
Agri Star 2,4-D LV6 Low Volatile Herbicide, EPA Reg. No. 42750-20
Weedone LV6 EC Broadleaf Herbicide, EPA Reg. No. 71368-11
Atrazine 4L Flowable Herbicide, EPA Reg. No. 35915-4-60063 (a Restricted Use Pesticide)
Atrazine 4L Herbicide, EPA Reg. No. 66222-36 (RUP)
Drexel Atrazine 4L Herbicide, EPA Reg. No. 19713-11 (RUP)

The product labels for all of these pesticide products state: "Do not apply this product in a way that will contact workers or other persons, either directly or through drift. Only protected handlers may be in the area during application." Further, each of these labels also has an AGRICULTURAL USE REQUIREMENTS box, which adopts the Worker Protection Standard requirements for protection of forest workers and handlers of pesticides. This standard requires that handlers be provided with training and decontamination materials.

During the pesticide application activities the agents or employees mixed the pesticides into loads and loaded the loads into the helicopter used to make the applications. The agents or employees had not been provided with pesticide safety training prior to these activities, nor were they, during the application activities, consistently provided with water or other decontamination materials. Also during these activities the agents or employees were not consistently provided with, and did not consistently wear, the PPE required by the pesticide product labels. The handlers also faced potential for pesticide exposure due to a defective hatch seal on a pesticide mixture tank. As of September 2015, according to a complaint to OR-OSHA, Applebee Aviation is still not complying with these worker safety requirements.

Performing, and continuing to perform, these pesticide application activities with a crew that had not been given the all the safety training and decontamination materials required by the Worker Protection Standard, and hence, by the pesticide product labels, and when the crew had not been given and did not consistently wear the Personal Protective Equipment required by the product labels, was pesticide application activity performed in a faulty, careless or negligent manner, in violation of ORS 634.372(4), and the continuation thereof seriously endangers the public's health or safety.

This conclusion is based on the findings of fact and ultimate findings of fact.

V. PENALTY and DEPARTMENT ACTION

Effective immediately, Applebee Aviation's CPO license is suspended. This license will be reinstated upon ODA's satisfaction that the conditions noted herein have been met. Also, the Department hereby proposes to issue a civil penalty to Applebee Aviation

LICENSE SUSPENSION

Also in response to Violation No. 1, the Commercial Pesticide Operator license of Applebee Aviation, Inc., (AG-L1005130CPO), is immediately suspended. The license will be reinstated upon ODA's satisfaction with Applebee Aviation's compliance with the terms of the Final Order for license reinstatement. The terms of the Final Order for license reinstatement are that Applebee Aviation:

1. Pay the Civil Penalty imposed by this or another Final Order resulting from this case.

2. Provide to the Department a written plan, to the Department's satisfaction, describing how it will set in place policies, protocols and training to prevent recurrences of the violative activities noted in this order. This written plan will:

Explain how Applebee Aviation will keep worker compartments, such as the crew cabs of it trucks, as clean and sanitary as reasonably possible, and for decontaminating them at the end of each work day or as reasonably needed.

Explain how Applebee Aviation will decontaminate vehicle exteriors at the end of each work day or as reasonably needed.

Explain how Applebee Aviation will handle pesticide containers, from mixing, recapping of containers for transport to the rinsing site, through the appropriate rinsing and disposition of rinsate.

Explain how Applebee Aviation will have its employees, when at public or remote locations, launder their work cloths so as to prevent contamination of the cloths of others who might follow them in using public-use laundry facilities.

Provide training protocols for training handlers prior to pesticide application activities (such as ensuring that they read the pesticide labels), and show how handlers who are not licensed Commercial Pesticide Applicators will be trained (such as by watching handler training videos). This training will cover proper work practices, PPE, emergency procedures, prevention or minimization of tracking pesticide residues into crew cabs, and physical and health effects of pesticides used by the handlers.

Explain how Applebee Aviation will document safety related problems and corrective actions, review and summarize them annually, and post the summaries where employees may read them.

Explain how Applebee Aviation will conduct and document monthly safety inspections of worksites, vehicles, machines, equipment, and work practices.

Explain how Applebee Aviation will use OSHA 300, 300-A and DCBS Form 801, or equivalent forms, to document recordable illnesses and injuries.

3. Provide to its employees at all work sites clean and operable PPE as required by the labels of the pesticides handled by the employees, and make reasonable assurance that employees will properly use the PPE. This PPE will include, but shall not be limited to, proper gloves, eye protection, and chemical resistant aprons.

4. Provide to its employees at all work sites all of the decontamination equipment and supplies required by federal regulations for pesticide handlers; 40 CFR 170.250(a). Provide employees at remote locations with relevant Safety Data Sheets (SDS).

5. Install and maintain a properly functioning eyewash station on each truck that carries any pesticide labeled with the "Danger" signal word.

CIVIL PENALTY

The total civil penalty for Violation No. 1 is $1,110.00. The penalty is determined using the criteria in ORS 634.900 to 634.915 and OAR 603-057-0500 to 603-057-0530.

$$NB + [(0.1 \times NB)\ (P+H+R+C)]$$
$$2 \times \$370.00 + [(0.1 \times 2 \times \$370.00)\ (0+0+7-2)] = \$1,110.00$$
$$\$740.00 + [(\$74.00)\ (5)] = \$1,110.00$$
$$\$1,110.00 \text{ X } 1 \text{ violation} = \$1,110.00$$

1. N, the number of related violations within a period of three years prior to and including the date of the current violative act, is 2; OAR 603-057-0530(1)(a). On December 31, 2014 Applebee Aviation was found to have violated ORS 634.372(4), after some pesticide spray mixture applied during April of 2014 in Douglas County, Oregon was found off the treatment site (ODA Pesticides Case No. 140286).

2. B, the base penalty is $370.00; OAR 603-057-0530(1)(b). The base penalty was determined as follows:

a. The MAGNITUDE is CATEGORY I (MAJOR) under OAR 603-057-0525(2)(a)(E).

b. The GRAVITY is HIGH LEVEL because the pesticides applied were used over wide areas of application; 603-057-0525(3)(a)(D)(i), and some of them were Restricted Use Pesticides 603-057-0525(3)(a)(C)(i).

3. P, the past occurrence of unrelated violations is 0 (zero) because ODA has not yet found any unrelated violative activities within the previous three years; OAR 603-057-0530(1)(c)(A).

4. H, the history of taking steps to correct a violation is 0 (zero) because there is insufficient information on which to base a finding; OAR 603-057-0530(1)(d)(B).

5. R, preventability of the violation and the presence of negligence or misconduct is 7 because the actions by Applebee Aviation determined to be violative were flagrant; OAR 603-057-0530(1)(e)(D). As an experienced operator, Applebee Aviation knew or should have known to provide its employees with appropriate PPE, training, and decontamination materials.

6. C, cooperativeness is -2 (negative two). Applebee Aviation was cooperative with ODA in this investigation; OAR 603-057-0532(1)(e), OAR 603-057-0530(1)(f)(A).

VI. RIGHT TO A HEARING, NOTICE OF RIGHTS

Regarding the License Suspension:

You have the right to a formal hearing to contest this suspension order. In order to have a hearing, you must request one in writing. You may send the request for hearing to:

Michael Babbitt
Pesticides Program
Oregon Department of Agriculture
635 Capitol Street NE
Salem, Oregon 97301-2532
Fax: 503-986-4735
mbabbitt@oda.state.or.us

If requested, such a hearing will be held pursuant to the Administrative Procedures Act (ORS Chapter 183) and OAR 137-003-0501 *et, seq*. Your written request for a hearing must be received by ODA within 90 days from the date this order was served on you or your right to a hearing will be waived and this order will remain effective by default.

If you request a hearing, this order will remain effective pending the hearing. You have a right to demand that the hearing be held as soon as practicable after ODA receives your written request. The hearing will be held by an administrative law judge from the Office of Administrative Hearings, as required by ORS 183.635. You will be notified of the date, time and place of the hearing. If you are a natural person, you may hire an attorney to represent you at the hearing. If you are a corporation, LLC, partnership, unincorporated association or similar entity you must be represented during the hearing process by an attorney, and your attorney must ratify your request for a hearing within 28 days of ODA's receipt of the request. (OAR 137-003-0550) The state will not provide legal counsel in administrative cases such as this, but private legal aid organizations may be able to assist a person with limited financial resources. At the hearing you have the right to respond to, and to present evidence and argument, on all issues. After the hearing, an order confirming, altering or revoking this suspension order will be issued.

Regarding the Civil Penalty:

You are entitled to a contested case hearing as provided by statues and rules including, but not limited to: ORS Chapter 183 (the Administrative Procedures Act), including 183.413 to 183.470, and ORS 183.745; OAR Chapter 137, division 3, including OAR 137-003-0501 to 137-003-0700; ORS 634.905; and OAR chapter 603, division 57. **If you want a hearing regarding the Civil Penalty your request must be made in writing to the Department within ten business days of the date that you receive the NOTICE;** OAR 603-057-0510(4)(f).

Any request for a hearing should be made to the attention of:

Michael Babbitt
Pesticides Program
Oregon Department of Agriculture
635 Capitol Street NE
Salem, Oregon 97301-2532
Fax: 503-986-4735
mbabbitt@oda.state.or.us

If you make a timely request for a hearing you will be notified of the date, time and place of such hearing. You will also be given information on the procedures, right of representation and other rights of parties relating to the conduct of the hearing before commencement of the hearing. An administrative law judge from the Office of Administrative Hearings will preside at any hearing, assigned as required by ORS 183.635. The Director of the Department has authority to issue the final order.

If the recipient of the enforcement notice is a corporation, partnership, limited liability company, unincorporated association, trust, or other entity that is not a natural person or individual, it must be represented in the contested case process by an attorney unless otherwise authorized by law. Furthermore, the attorney representing such a corporation or other entity must ratify the request for hearing, in writing, within 28 days of the date that the request is received by the agency; OAR 137-003-0550. This provision does not, however, require any entity to be represented by an attorney at any informal conference. Individuals may but are not required to be represented by counsel. The state will not provide legal counsel in administrative cases such as this, but private legal aid organizations may be able to assist a person with limited financial resources.

VII. FINAL ORDER

Effective immediately your CPO license is suspended, subject to your meeting the conditions outlined herein or in a contrary judgment following your request for a hearing.

If you do not make a timely request for a hearing, you will waive your right to request a hearing, the emergency suspension order will remain final and effective by default, and the order regarding the civil penalty will become final and effective by default; OAR 137-003-0672(2). If you request a hearing but later fail to appear at the hearing, withdraw the request for a hearing, or notify the agency or administrative law judge that you will not appear at the hearing and it is not rescheduled, you will waive your right to a hearing and this order will remain or become final; OAR 137-003-0672(3). In these circumstances, the Department will mail you a notice stating when this order became final. The Department has designated the relevant portions of its files on the subject of this matter, including all materials that you have submitted relating to this matter, as the record in this case for the purpose of proving a *prima facie* case upon default.

If the order regarding the civil penalty becomes final, the Department will issue a judgment against you and a civil penalty in the amount set out in this Notice will become due and payable 70 (seventy) days after the order becomes final. ORS 183.745. Your check or money order should be made payable to the Oregon Department of Agriculture and sent to:

Oregon Department of Agriculture
635 Capitol Street NE
Salem, Oregon 97301-2532

The final order regarding this Notice will become a part of Applebee Aviation's history for a period of three years. Any future violations of ORS Chapter 634 or OAR Chapter 603, division 057 within the next three years will subject Applebee Aviation to additional enforcement actions including, but not limited to, civil penalties, product seizure, or license revocation.

If this order, or any part of it, becomes or remains final you will have the right to appeal it to the Oregon Court of Appeals pursuant to ORS 183.482. To appeal you must file a petition for judicial review with the Court of Appeals within 60 days from the date the order becomes final. If you do not file a petition for judicial review within this time period you will lose your right to appeal.

DATED this 25th day of September, 2015

KATY COBA
DIRECTOR
OREGON DEPT. OF AGRICULTURE

NOTE: Copies of the Department's investigation report will be provided upon request. The request must be made in writing. There may be a monetary charge for some reports. The written request should be made to: Oregon Department of Agriculture, Pesticides Program, ATTN: SUNNY JONES, 635 Capitol Street NE, Salem, Oregon 97301-2532.

NOTICE TO ACTIVE DUTY SERVICEMEMBERS: Active duty servicemembers have a right to stay these proceedings under the federal Servicemembers Civil Relief Act. For more information contact the Oregon State Bar at 800-452-8260, the Oregon Military Department at 800-452-7500, or the nearest United States Armed Forces Legal Assistance Office through http://legalassistance.law.af.mil.

APPLEBEE AVIATION, INC.

Oregon Department of Agriculture, Pesticides Case No. 150406

Notice of Contested Case Rights and Procedures:

Pursuant to ORS 183.413(2), you are entitled to be informed of the following:

1. **Time and place of hearing.** The time and place of hearing is or will be set forth in the Notice of Hearing issued by the Administrative Law Judge (ALJ) after the prehearing conference.

2. **Issues to be considered at hearing.** The issues to be considered at hearing are those set forth in the Notice issued by the Oregon Department of Agriculture (ODA), entitled Notice of Proposed Imposition of Civil Penalty and Proposed/Final Order, and Order of Emergency License Suspension and Notice of Opportunity for a Hearing, dated Sept. 25, 2015, and those issues related thereto that are properly before the presiding officer to this proceeding.

3. **Law that applies.** The matter set for hearing is a contested case. The hearing will be conducted as provided in Chapters 183 and 634 of the Oregon Revised Statutes (ORS); the administrative rules of the ODA, OAR 603-057-0505 through 603-057-0515, and the Attorney General's Office of Administrative Hearing Rules, OAR 137-003-0501 to 137-003-0700, in particular 137-003-0560. Other laws involved include: ORS Chapters 561, 570, and 616; additional rules of ODA, OAR 603-057; Title 7, Chapter 6, Subchapter II of the United States Code; and Title 40, Parts 152, 156, and 180 of the Code of Federal Regulations.

4. **Right to attorney.** You may be represented by an attorney at the hearing. Most persons are represented by counsel for hearings involving ORS 634. You are not required to be represented by counsel, unless you are a corporation, partnership, or similar entity, in which case you are required to be represented by an attorney at the hearing, and more immediately, your request for a hearing must be ratified by an attorney within 28 days of the agency's receipt of the request, OAR 137-003-0550. If you are not represented at the hearing and during the hearing you determine that representation by an attorney is necessary, you may request a recess to allow you an opportunity to secure the services of an attorney. The hearing ALJ will decide whether to grant such a request. The ODA will be represented by an attorney. Legal aid organizations may be able to assist a party with limited financial resources.

5. **Administrative Law Judge.** The person presiding at the hearing is known as the administrative law judge (ALJ). The ALJ will rule on all matters that arise at the hearing, subject to agency consideration of matters transmitted for agency decision under OAR 137-003-0635 or matters subject to agency review under OAR 137-003-0640 or OAR 137-003-0570. The ALJ will be assigned by the Chief ALJ from the Office of Administrative Hearings (OAH). The OAH consists of employees of, and independent contractors with, the Chief ALJ. The ALJ does not have the authority to make the final decision in the case. The final determination will be made by the Director of the ODA.

6. **Discovery.** If the agency or the ALJ authorizes discovery, the agency or the ALJ shall control the methods, timing and extent of discovery. Discovery is permitted in this proceeding. Discovery is permitted as provided in OAR 137-003-0570, OAR 137-003-0572, and OAR 137-003-0573.

7. **Witnesses.** A witness must testify under oath or affirmation to tell the truth. The ODA or the ALJ will issue subpoenas for witnesses on your behalf upon a showing that their testimony is relevant to the case and is reasonably needed by you to establish your position. If you are represented by an attorney, your attorney may issue subpoenas for attendance of witnesses at hearing. Payment of witness fees and mileage to the person subpoenaed is your responsibility.

8. **Order of evidence.** A hearing is similar to a court proceeding but is less formal. Its general purpose is to determine the facts and whether the ODA's proposed action is appropriate. The order of presentation of evidence is normally as follows:
   a. Testimony of witnesses and other evidence of the ODA in support of its proposed action.
   b. Testimony of your witnesses and your other evidence.
   c. Rebuttal evidence by the ODA and by you.

9. **Burden of presenting evidence.** The burden of presenting evidence to support an allegation or position rests upon the proponent of the allegation or position. If you have the burden of proof on an issue, or if you intend to present evidence on an issue in which the agency has the burden of proof, you should approach the hearing prepared to present the testimony of

witnesses, including yourself, and other evidence that will support your position. All witnesses are subject to cross-examination and also to questioning by ALJ.

10. **Admissible evidence.** Relevant evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their serious affairs is admissible and will be received. Hearsay evidence is not automatically excluded. Rather, the fact that it is hearsay generally affects how much reliance the ALJ and the Director of the ODA will place on it in reaching a decision.

There are four kinds of evidence:

a. Knowledge of the agency or ALJ. The agency or ALJ may take "official notice" of facts based on the agency's or ALJ's knowledge in a specialized field. This includes notice of general, technical or scientific facts. The agency or ALJ may also take "judicial notice" of a fact that is not subject to reasonable dispute in that it is generally known or is capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. You will be informed if the agency or ALJ takes "official notice" or "judicial notice" of any fact and you will be given an opportunity to contest any facts so noticed.

b. Testimony of witnesses. Testimony of witnesses, including you, who have knowledge of the facts may be received in evidence.

c. Writings. Written documents including letters, maps, diagrams and other written material may be received in evidence.

d. Experiments, demonstrations and similar means used to prove a fact. The results of experiments and demonstrations may be received in evidence.

11. **Objections to evidence.** Objections to the admissibility of evidence must be made at the time the evidence is offered. Objections are generally made on one of the following grounds:

a. The evidence is unreliable;

b. The evidence is irrelevant or immaterial and has no tendency to prove or disprove any issue involved in the case;

c. The evidence is unduly repetitious and duplicates evidence already received.

12. **Continuances.** There are normally no continuances granted at the end of the hearing for you to present additional testimony or other evidence. However, if you can show that the record should remain open for additional evidence, the ALJ may grant you additional time to submit such evidence.

13. **Record.** A record will be made of the entire proceeding to preserve the testimony and other evidence for appeal. This may be done by use of a tape or digital recorder or court reporter. The record is generally not transcribed, unless there is an appeal to the Court of Appeals. However, you may obtain a copy of the tape recording upon payment of the costs of making a copy of the tape. If a court reporter is used, you may obtain a transcript or a copy of the court reporter's transcript upon payment of a transcription fee or other fee that the parties may agree upon.

14. **Proposed Order and Exceptions.** The ALJ will issue a proposed order in the form of findings of fact, conclusions of law and recommended agency action. You will be provided with a copy and you will be given an opportunity to make written objections, called "exceptions," to the ALJ's recommendations. You will be notified when exceptions to the proposed order must be filed. You will be notified when you may appear and make oral argument to the agency.

15. **Final Order.** The agency will render the final order in this case. The agency may modify the proposed order issued by the ALJ. If the agency modifies the proposed order in any substantial manner, the agency in its order will identify the modifications and will provide an explanation as to why the agency made the modifications. The agency may modify a proposed finding of "historical" fact only if the proposed finding is not supported by a preponderance of the evidence in the record.

16. **Appeal.** If you wish to appeal the final order, you must file a petition for judicial review with the Oregon Court of Appeals within 60 days after the final order is served upon you. *See* Oregon Revised Statutes 183.482.

17. **Notice to Active Duty Servicemembers.** Active duty servicemembers have a right to stay these proceedings under the federal Servicemembers Civil Relief Act. For more information contact the Oregon State Bar at 800-452-8260, the Oregon Military Department at 800-452-7500, or the nearest United States Armed Forces Legal Assistance Office through http://legalassistance.law.af.mil.

Oregon
Kate Brown, Governor

Department of Agriculture
635 Capitol St NE
Salem, OR 97301-2532

PESTICIDES PROGRAM
TEL: 503-986-4635

PERSONAL DELIVERY

November 3, 2015

Michael L. Applebee
22330 NW Fisher Road
Banks, Oregon 97106

Re: NOTICE OF
IMPOSITION OF CIVIL PENALTY,
PROPOSED REVOCATION OF APPLICATOR LICENSE,
PROPOSED REFUSAL TO REISSUE OR RENEW APPLICATOR LICENSE, and
OPPORTUNITY FOR A HEARING, ODA Pesticides Case No. 150406

This Notice is a combined Notice of Imposition of Civil Penalty, Proposed Revocation of Applicator License, Proposed Refusal to Reissue or Renew Applicator License, and Opportunity for a Hearing. This Notice is based on a pesticide investigation performed by the Pesticides Program of the Oregon Department of Agriculture and addresses violations of Oregon Revised Statutes (ORS) Chapter 634. The action is taken pursuant to statutory and regulatory provisions including but not limited to ORS chapter 183, ORS 634.900 *et seq.*, Oregon Administrative Rules (OAR) chapter 137, division 3, and OAR 603-057-0500 *et seq.*

Also enclosed is information on contested case rights and procedures. This information is provided for your consideration should you select to contest the Notice and request an administrative hearing of this matter.

Read all of the Notice carefully.

If you request a hearing in one or more of these enforcement actions, your request for hearing must be made in writing to the Oregon Department of Agriculture so that it is received by the Department within the appropriate time period described in the Notice. If for any action within this Notice you do not request a hearing the Department shall issue a Final Order by default.

Important Note: This enforcement action, issued to you as an individual, is separate from the pending enforcement actions with your business, Applebee Aviation, Inc. Those actions are specific to Applebee Aviation. The Hearing request already submitted by Applebee Aviation is separate from and has no bearing on any request submitted by you as an individual, although hearing processes could be combined if both parties request hearings.

Michael Babbitt, for

DALE L. MITCHELL
PESTICIDES COMPLIANCE PROGRAM MANAGER
OREGON DEPARTMENT OF AGRICULTURE

Encl: Notice of Contested Case Rights and Procedures

STATE OF OREGON
DEPARTMENT OF AGRICULTURE

Before The Director of The Department of Agriculture

In the Matter of:	)	NOTICE OF
	)	PROPOSED IMPOSITION OF CIVIL PENALTY,
	)	PROPOSED REVOCATION OF APPLICATOR LICENSE,
Michael L. Applebee,	)	PROPOSED REFUSAL TO REISSUE OR RENEW
	)	APPLICATOR LICENSE, and
	)	OPPORTUNITY FOR A HEARING,
a Commercial Pesticide	)	
Applicator licensee	)	for Violation of the State Pesticide Control Act
	)	ODA Pesticides Case No. 150406

To: Michael L. Applebee (Mr. Applebee)

The Director of the Oregon Department of Agriculture (ODA or the Department) hereby proposes to assess a civil penalty in the amount of $20,000.00 against Mr. Applebee, as authorized by statutory and regulatory provisions including, but not limited to, ORS 634.900 to ORS 634.915 and OAR 603-057-0500 to 603-057-0532. The findings and conclusions on which this determination is based, and the criteria used to calculate the penalty, are set out below.

Furthermore, the Director of ODA proposes to revoke and not reissue or renew Mr. Applebee's Commercial Pesticide Applicator (CPA) license for five years, due to his ordering Applebee Aviation to make commercial pesticide applications in Oregon after its Commercial Pesticide Operator (CPO) license had been suspended. Directing one's business to make commercial pesticide applications in Oregon when that business does not have a valid Oregon CPO license is a faulty, careless or negligent pesticide application activity, in violation of ORS 634.372(4), which is grounds for revocation and refusal to issue or renew under ORS 561.305(2) or ORS 634.322(4).

I. APPLICABLE LAW

1. The applicable law includes the following: Oregon Revised Statutes (ORS) Chapters 60 (corporations), 183 (administrative law), 561 (agriculture), and 634 (pesticides), Oregon Administrative Rules (OAR) Chapter 137, division 3; and OAR Chapter 603, division 57; Federal Insecticide, Fungicide, and Rodenticide Act, 7 United States Code (USC) §§ 136 *et seq.*; and 40 Code of Federal Regulations (CFR) Parts 152 through 180.

2. Oregon's pesticide control law is known as the State Pesticide Control Act and is codified in Oregon Revised Statutes (ORS) Chapter 634.

3. ORS 634.005 states: "The purpose of this chapter, which shall be known as the State Pesticide Control Act and shall be enforced by the State Department of Agriculture, is to regulate in the public interest the formulation, distribution, storage, transportation, application and use of pesticides. Many materials have been discovered or synthesized which are necessary and valuable for the control of insects, plant diseases and weeds. Many more pesticides will be discovered and needed. Such materials, however, may injure health, property, wildlife or environment by being distributed, stored, transported, applied or used in an improper or careless manner. The pesticide industry of this state has achieved and maintained high standards in its formulation and use of pesticides while at the same time experiencing a minimum of injury to persons, property or the environment. Currently updating the law to maintain this achievement and to consider future new

pesticides and problems is necessary for the protection of persons, property, wildlife and environment of this state."

4. ORS 634.006(8) states: "Pesticide' includes: ...
   (a) 'Defoliant' which means any substance or mixture of substances intended for causing the leaves or foliage to drop from a plant with or without causing abscission;
   (b) 'Desiccant' which means any substance or mixture of substances intended for artificially accelerating the drying of plant tissue;
   (c) 'Fungicide' which means any substance or mixture of substances intended for preventing, destroying, repelling or mitigating any fungus;
   (d) 'Herbicide' which means any substance or mixture of substances intended for preventing, destroying, repelling or mitigating any weed;
   (e) 'Insecticide' which means any substance or mixture of substances intended for preventing, destroying, repelling or mitigating any insects which may be present in any environment whatsoever;
   (f) 'Nematocide' which means any substance or mixture of substances intended for preventing, destroying, repelling or mitigating nematodes;
   (g) 'Plant regulator' which means any substance or mixture of substances intended, through physiological action, to accelerate or retard the rate of growth or rate of maturation or to otherwise alter the behavior of ornamental or crop plants or the produce thereof, but shall not include substances to the extent that they are intended as plant nutrients, trace elements, nutritional chemicals, plant inoculants or soil amendments; or
   (h) Any substance, or mixture of substances intended to be used for defoliating plants or for preventing, destroying, repelling or mitigating all insects, plant fungi, weeds, rodents, predatory animals or any other form of plant or animal life which is, or which the department may declare to be a pest, which may infest or be detrimental to vegetation, humans, animals, or be present in any environment thereof."

5. ORS 634.006(13) states: "Pesticide operator' means a person who owns or operates a business engaged in the application of pesticides upon the land or property of another."

6. ORS 634.116(4) states: "At least one owner or part owner of the pest control or pesticide application business shall also obtain and maintain a pesticide applicator's license if the pesticide operator is a sole proprietorship or a partnership. At least one officer or employee shall obtain and maintain a pesticide applicator's license if the pesticide operator is a corporation. If a pesticide operator is found to be in violation of this subsection, the pesticide operator's license, notwithstanding ORS chapter 183, is automatically suspended until the pesticide operator is in compliance. If the business is owned by one individual, the department shall make no charge for the pesticide applicator license issued to the individual under ORS 634.122."

7. ORS 634.006(9) states: "Pesticide applicator' or 'applicator' means a person who:
   (a) Is spraying or applying pesticides for others;
   (b) Is authorized to work for and is employed by a pesticide operator; and
   (c) Is in direct charge of or supervises the spraying or application of pesticides or operates, uses, drives or physically directs propulsion of equipment, apparatus or machinery, either on the ground or by aircraft in such activity."

8. ORS Chapter 634 authorizes the Oregon Department of Agriculture to issue pesticide licenses, including licenses for operators and applicators. ORS 634.057, 634.116, and 634.122.

9. ORS 634.122 states in part that "(2) An applicant for a pesticide applicator's license shall be required to demonstrate satisfactorily by written examination or any reexamination given by the department, an adequate knowledge of:

(a) The characteristics of pesticides and the effect of their application to particular crops.
(b) The practices of application of pesticides.
(c) The conditions and times of application of pesticides and the precautions to be taken in connection therewith.
(d) The applicable laws and rules relating to pesticides and their application in this state.
(e) Integrated pest management techniques, as defined in ORS 634.650, for pest control.
(f) Other requirements or procedures which will be of benefit to and protect the pesticide applicator, the persons who use the services of the pesticide applicator and the property of others."

10. OAR 603-057-0120 provides general standards of competence for commercial pesticide applicators; it establishes a system of written examination of applicator candidates, certification, recertification and renewal. Under these rules recertification may be obtained by re-examination or by attending training classes. OAR 603-057-0120 states, in part:

(1) Competence in the use or handling of pesticides shall be determined on the basis of written examinations which, in addition to the requirements of OAR 603-057-0125, shall include the following general standards:
  (a) Comprehension of labeling format, labeling terminology, and the labeled warnings and instructions;
  (b) Knowledge of safety factors to be considered, including need and use of protective clothing, first aid procedures in the event of accidents, symptoms of various pesticide poisonings, and proper storage, transportation, handling, and disposal methods;
  (c) Knowledge of potential consequences to the environment from the use or misuse of pesticides, as influenced by climate, topography, and existence of animal life;
  (d) Knowledge of methods of use or application, including the various forms (dust, wettable powder, etc.) of pesticides, the compatibility of various pesticides, the types of application equipment or devices, and the times when various pesticide forms or equipment would be appropriately used; and
  (e) Knowledge and comprehension of existing laws and rules governing pesticide use or application, including classifications of various pesticides (highly toxic, restricted use, or general). ...

(3) An applicant for a pesticide applicator's license renewal shall be required to take a reexamination each fifth year after taking the original examination, and be subject to the provisions of this section and OAR 603-057-0125 in regard thereto. However, if the Department's records indicate the applicant for license renewal has complied with the provisions of OAR 603-057-0150, the written examination shall be waived ... ."

11. OAR 603-057-0150 provides for license renewal through attending recertification classes in lieu of reexamination.

12. ORS 634.372(4) states: "A person may not: ... Perform pesticide application activities in a faulty, careless or negligent manner."

13. ORS 561.305(2) states: "The department may refuse to issue, refuse to renew, revoke or suspend any license or application for license issued or which may be issued pursuant to any law

under its jurisdiction where it finds that the licensee has violated any provision of such law or regulations promulgated thereunder. ..."

14. ORS 634.322 states: "In carrying out and enforcing the provisions of this chapter, the State Department of Agriculture is authorized: ...

(4) In accordance with the provisions of ORS chapter 183, to revoke, suspend or refuse to issue or renew any license or certificate if it determines that an applicant, licensee or certificate holder has violated any of the provisions of this chapter."

15. The Department has responsibility and authority for the Pesticides program and may make any rule necessary for enforcement of program requirements. ORS 561.020; ORS 561.190; ORS Chapter 634.

16. Oregon Administrative Rules (OAR) Chapter 603 Division 057 is entitled Pesticide Control and implements provisions of the State Pesticide Control Act, ORS Chapter 634.

17. ORS 634.900 authorizes the Department to impose Civil Penalties for violations of ORS Chapter 634. ORS 634.900(2) and (3) state that:

"(2) Notwithstanding subsection (1) of this section, if the violation of a provision relating to pesticide application, sale or labeling results from gross negligence or willful misconduct, the civil penalty for a first or subsequent violation may not exceed $10,000.

(3) A civil penalty may not be imposed under this section for violations other than those involving pesticide application, sale or labeling violation under this chapter."

18. OAR 603-057-0502(7) states: "Payment of a civil penalty before an order becomes final is an admission by the person of all of the allegations in the Notice of Imposition of Civil Penalty."

19. OAR 603-057-0500(5) states that "Gross negligence' means an act or omission that does not reflect an exercise of reasonable care under the circumstances and that is characterized by conscious indifference to or reckless disregard of any purpose of the State Pesticide Control Act."

20. OAR 603-057-0500(13) states that "Willful misconduct' means an act or omission that is characterized by or resulting from calculation and consideration of effects and consequences, and with awareness that the act or omission will be incompatible with any purpose of the State Pesticide Control Act."

21. ORS 634.915 states that: "(1) The State Department of Agriculture shall adopt by rule a schedule establishing the amount of civil penalty that may be imposed for a particular violation.

(2) In imposing the penalty pursuant to the schedule authorized by this section, the Director of Agriculture shall consider the following factors:

(a) The past history of the person incurring a penalty in taking all feasible steps or procedures necessary or appropriate to correct any violation.

(b) Any prior violations of statutes, rules or orders pertaining to pesticide application, sale or labeling.

(c) The gravity and magnitude of the violation.

(d) Whether the violation was repeated or continuous.

(e) Whether the cause of the violation was an unavoidable accident, negligence or an intentional act.

(f) The violator's cooperativeness and efforts to correct the violation.

(g) The immediacy and extent to which the violation threatens the public health or safety."

22. OAR 603-057-0500 to 603-057-0532 provide rules for the implementation of the Department's authority to impose civil penalties under ORS 634.900 through 634.915.

23. ORS chapter 60 regulates corporations transacting business in Oregon.

II. FINDINGS OF FACT
ODA Pesticides Case No. 150406

1. This Notice and Order results from ODA's learning that Michael Applebee directed Applebee Aviation, Inc., subsequent to being served with an Emergency Order immediately suspending its Commercial Pesticide Operator license, to perform pesticide applications onto Oregon properties it did not own or control. The persons who are in contact with ODA regarding this matter include, but may not be limited to, Michael L. Applebee, president and owner of Applebee Aviation, Inc., and Warren Howe, operations manager.

2. The Oregon legislature has over the years taken various measures intended to help protect Oregon's people and environment from adverse impacts due to pesticides being used by those who may not know how to use them responsibly. One of these measures has been the licensing of businesses and individuals that apply pesticides onto the properties of others. Through this licensing program (ORS 634.116, ORS 634.122), implemented by ODA, the State of Oregon is able to reasonably assure the public that Commercial Pesticide Operators and Applicators use pesticides as safely as reasonably possible.

3. Applebee Aviation, Inc. (Applebee Aviation) is a domestic business corporation with a principal place of business at 22330 NW Fisher Road, Banks, Washington County, Oregon. Applebee Aviation provided custom or commercial aerial pesticide application services to foresters and agricultural growers.

4. Applebee Aviation currently holds a suspended license, issued by the Oregon Department of Agriculture, as a Commercial Pesticide Operator; license number AG-1005130CPO. This license was originally issued in June of 2008.

5. Applebee Aviation has used or employed various agents or employees. In relevant periods of 2015 eleven of these individuals, including Mr. Applebee himself, were or had been licensed pesticide applicators or pilots, others worked as pesticide handlers and other positions that may not have required pesticide licensing. Mr. Applebee has been licensed by ODA as a Commercial Pesticide Applicator; license number AG-1005041CPA. This license was originally issued in May of 2008 and has been renewed repeatedly, including for 2015. During 2010 through 2014 Mr. Applebee attended 66 hours of recertification training. Since 2008 the Department has repeatedly renewed Mr. Applebee's CPA license based on certification acquired by recertification training. In September and October of 2015 Mr. Applebee was aware of pesticide licensing requirements. With this knowledge Mr. Applebee was responsible for keeping Applebee Aviation in compliance with Oregon's pesticide licensing laws.

6. On September 25, 2015 ODA issued an emergency suspension of Applebee Aviation's CPO license. This suspension order was served on Applebee Aviation on September 25, 2015.

7. During September 26 through 29, 2015, despite the fact that Applebee Aviation's CPO license was suspended, Mr. Applebee directed Applebee Aviation to use helicopters and crews to perform one or more of the following pesticide applications to Oregon forest properties of others:

Date	Client	Treatment location	Size of treated area (acres)
9-26-2015	Moore Mill Co., Bandon OR	OMG unit, Coast Range, Douglas County	52
9-26-2015	Moore Mill Co.	Schofield block, Coast Range, Douglas County	12
9-26-2015	Rome Creek Timber LLC, Dillard OR	Otter Pop unit, Coast Range, Douglas County	54
9-26-2015	Rome Creek Timber	Otter Back unit, Coast Range, Douglas County	46
9-26-2015	Rome Creek Timber	Noel Back unit, Coast Range, Douglas County	63
9-26-2015	Oregon Department of Forestry (ODF)	Hubbub A2 unit, Clatsop State Forest, Clatsop County	42
9-26-2015	ODF	Hubbub A3 unit, Clatsop State Forest, Clatsop County	29
9-26-2015	Oxbow Timber I LLC, Dillard OR	Why Argue unit	83
9-28-2015	Roseburg Resources, Oxbow Timber, Dillard OR,	Gold Creek unit, Coast Range, Douglas County	85
9-28-2015	Roseburg Resources, Oxbow Timber	Gold Member unit, Coast Range, Douglas County	98
9-28-2015	Roseburg Resources, Oxbow Timber	Fern Top Vincent unit, Coast Range, Douglas County	55
9-28-2015	Roseburg Resources, Oxbow Timber	Fall Middle unit, Coast Range, Douglas County	46
9-29-2015	Roseburg Resources, Oxbow Timber	Owen NW unit, Coast Range, Lane County	43
9-29-2015	Roseburg Resources, Derek Martin	Kester Ranch, Cottage Grove area, Lane County	92

These pesticide applications may be referred to herein as the forest applications.

8. On or before October 5, 2015, Applebee Aviation paid the civil penalty that was imposed in the Notice of Imposition of Civil Penalty that was issued with the emergency suspension of September 25, 2015.

9. At about 0915 hours on September 29, 2015 Mr. Applebee and Mr. Howe went to ODA's office in Salem, Oregon, acknowledged service of the emergency suspension order on September 25, 2015, and asked ODA if Applebee Aviation could still make certain pesticide applications that it had contracted to perform on Bureau of Land Management (BLM) property in

Oregon. ODA responded that since Applebee Aviation's CPO license was suspended, it was unlicensed and could not lawfully make the applications until the CPO license was reinstated. ODA also provided guidance on how Applebee Aviation could meet the conditions for license reinstatement. During the last week of September and the first week of October, 2015, Applebee Aviation worked on meeting the conditions set in the first suspension order for reinstatement of their CPO license.

10. On October 1 and 2, 2015 Mr. Applebee directed Applebee Aviation, while its license was suspended, to use a helicopter and crew to apply pesticides to at least some of the 800 acres of the Crack in the Ground Fire Restoration Project site on BLM (US Bureau of Land Management) land in Lake County, Oregon, about five miles north of the town of Christmas Valley. These pesticide applications may be referred to herein as the BLM applications.

11. On October 8, 2015 the Department met with Mr. Applebee at Applebee Aviation's hangar near Banks, Oregon, and reviewed Applebee Aviation's efforts at correcting the safety-related equipment and material deficiencies noted in the first suspension order. Since ODA had received allegations about post-suspension application activity, the Department then asked if Applebee Aviation had performed any commercial pesticide applications while its CPO license was suspended. Mr. Applebee replied that, at his direction, Applebee Aviation had performed the BLM applications on October 1 and 2, 2015. As his rationale, Mr. Applebee stated that the contract was worth three million dollars and that he felt pressure to complete the job despite the fact that Applebee Aviation's CPO license was suspended.

12. Continued pesticide applications by Mr. Applebee, without accountability for violations and commitment to improvement, threaten the health of workers and of the public, the efficacy and credibility of Oregon's pesticide licensing program, and the public's trust in the responsibility of commercial pesticide operators and applicators. Mr. Applebee has demonstrated that he will ignore or fail to comply with any or all pesticide application requirements if compliance would cost him money. Also, Mr. Applebee directed Applebee Aviation to not following label requirements that address worker protections and general application safety measures. Pesticides are hazardous materials and, as such, are highly regulated to protect the health and safety of Oregonians. Worker protections and safety measures are necessary to prevent exposure of workers and the public that enter the application areas to the adverse health effects of the pesticides applied by Applebee Aviation.

III. ULTIMATE FINDINGS OF FACT

1. Applebee Aviation, Inc. was an Oregon-licensed Commercial Pesticide Operator until September 25, 2015, when the Oregon Department of Agriculture suspended its license, effective immediately. Applebee Aviation actually received the suspension order on September 25, 2015. While operating, Applebee Aviation was managed by Michael L. Applebee, an experienced Oregon-licensed commercial pesticide applicator.

2. As directed by Mr. Applebee, Applebee Aviation performed one or more of the forest applications on September 26 through 29, 2015.

3. Applebee Aviation, through Mr. Applebee and Mr. Howe, acknowledged the suspension order, and declared and acted on its intent to meet the conditions for reinstatement. On September 29, 2015 Applebee Aviation, through Mr. Applebee and Mr. Howe, also asked ODA if it could make certain commercial pesticide applications in Oregon (the BLM applications), despite the suspension. ODA responded that Applebee Aviation could not make these or any other commercial applications in Oregon until its CPO license was reinstated.

4. As directed by Mr. Applebee, Applebee Aviation performed the BLM applications on October 1 and 2, 2015.

5. The failure to comply with Oregon's pesticide licensing requirements seriously endangers the public's health or safety. Despite clear notice that its CPO license was suspended and that Applebee Aviation was prohibited from engaging in pesticide application activities, Mr. Applebee knowingly and willfully directed Applebee Aviation to perform the Forest and BLM applications while its CPO license was suspended.

6. The importance of current valid licensing for commercial pesticide use has been well known in Oregon for many years. For various health and environmental reasons, the public has a strong interest in knowing that persons who apply pesticides onto the properties of others, or who apply Restricted Use Pesticides, have shown the knowledge required to get licensed and have continued to work with the pesticide regulatory program and take the measures and precautions needed to maintain their licenses. Mr. Applebee, an experienced CPA, was aware of this. From Mr. Applebee's training and experience he was aware of legal requirements regarding pesticide licensing including the need to have a valid CPO license when applying pesticides onto Oregon properties of others. Mr. Applebee, and through him, Applebee Aviation, was aware that three purposes of the State Pesticide Control Act are to prevent adverse health impacts from pesticides, to regulate the use of pesticides in the public interest, and to maintain high standards in the use of pesticides. Mr. Applebee and Applebee Aviation knew that the protection of Oregon's health and environment from adverse pesticidal impacts depends on commercial pesticide operators being properly licensed. By having CPOs licensed ODA is better able to assure that pesticides are used responsibly in Oregon, and to maintain the ability to effectively use pesticides without unacceptable risks. A person applying or using pesticides in a responsible manner in Oregon would comply with pesticide licensing requirements.

7. ORS Chapter 634 requires CPOs to obtain and maintain pesticide licenses; ORS 634.372(9) prohibits their acting as a CPO once the license is for any reason no longer valid. ORS 634.372(4) prohibits any person's performing a pesticide application activity "in a faulty, careless or negligent manner." Mr. Applebee knew that Applebee Aviation's CPO license was not valid yet directed his crews to apply pesticides onto the Oregon properties of others. Directing or telling a crew to perform, initiate or terminate a pesticide application is a pesticide application activity. Through his pesticide education and experience Mr. Applebee was aware of pesticide licensing requirements.

8. On or after September 26, 2015, after suspension of Applebee Aviation's CPO license, Mr. Applebee directed Applebee Aviation to apply one or more pesticides onto the Oregon properties of others. Because of Mr. Applebee's directions, ODA's ability to protect public health through the pesticide licensing program was compromised.

9. Regarding at least one of the forest and at least one of the BLM applications, and subsequent to the September 25 suspension order, Mr. Applebee, in knowing and willful violation of the law and the Suspension Order, directed Applebee Aviation to perform commercial pesticide applications without a pesticide operator's license.

10. Mr. Applebee calculated and considered the effects and consequences of directing Applebee Aviation to perform commercial pesticide applications without a CPO license. Before, during and after at least one of the forest and at least one of the BLM applications, Mr. Applebee had access to ORS Chapter 634 and to ODA, and knew the pesticide licensing requirements. As of September 25, 2015 Mr. Applebee knew that Applebee Aviation's CPO license was suspended. During this calculation and consideration Mr. Applebee consulted with ODA and was explicitly told that the BLM applications could not lawfully be performed until ODA reinstated Applebee Aviation's CPO license.

Mr. Applebee knew that performing an unlicensed commercial pesticide application was an act or omission that was incompatible with purposes of the State Pesticide Control Act: To prevent adverse health impacts from pesticides, to regulate the use of pesticides in the public interest, and to maintain high standards in the use of pesticides.

11. Mr. Applebee did not exercise reasonable care in relation to at least one of the forest and at least one of the BLM applications because he directed Applebee Aviation to perform commercial pesticide applications without a CPO license. Mr. Applebee's failure to comply with the statutory licensing requirements, when ODA needed to be able to assure the public that CPOs in Oregon were licensed and that their workers were reasonably safe, were acts or omissions that did not reflect the exercise of reasonable care. During these acts or omissions Mr. Applebee was aware of requirements in ORS Chapter 634 regarding licensing and why ODA and the public want CPOs to be licensed. In committing these acts or omissions Mr. Applebee was consciously indifferent to or recklessly disregarded purposes of the State Pesticide Control Act: To prevent adverse health impacts from pesticides, to regulate the use of pesticides in the public interest, and to maintain high standards in the use of pesticides.

All of these ultimate findings of fact are based on the findings of fact.

IV. CONCLUSION OF LAW

The Oregon Department of Agriculture determines that Michael L. Applebee violated Oregon Revised Statutes (ORS) Chapter 634 as follows:

VIOLATION NOs. 1 and 2

Michael L. Applebee violated **ORS 634.372(4),** which states **A person may not: ... Perform pesticide application activities in a faulty, careless or negligent manner.** On or after September 26, 2015 Mr. Applebee, as president and owner of Applebee Aviation, Inc., directed Applebee Aviation to use helicopters and crews to apply pesticides to at least one forest unit within Douglas, Clatsop, or Lane Counties, Oregon. Mr. Applebee knew or should have known that during the relevant forest application(s) Applebee Aviation's Oregon Commercial Pesticide Operator license had been suspended by the Oregon Department of Agriculture.

On or after September 26, Mr. Applebee, as president and owner of Applebee Aviation, Inc., and during the suspension of Applebee Aviation's CPO license, and after ODA verbally and explicitly told him that the BLM applications could not lawfully be performed during the CPO license suspension, directed Applebee Aviation to use a helicopter and crew to apply pesticides to at least some of the 800 acres of the Crack in the Ground Fire Restoration Project site on BLM land in Lake County, Oregon, about five miles north of the town of Christmas Valley.

During the forest and BLM applications Applebee Aviation's Oregon Commercial Pesticide Operator license was suspended. Prior to the BLM application(s) Mr. Applebee had acknowledged the suspension order. In directing Applebee Aviation to perform pesticide applications onto Oregon properties it did not own or control, without a currently valid CPO license, Mr. Applebee performed pesticide application activities in a faulty, careless or negligent manner, in violation of ORS 634.372(4), seriously endangered the public's health or safety, and compromised ODA's pesticide licensing program effectiveness. Mr. Applebee violated ORS 634.372(4) twice. Violation No. 1 was directing the performance of at least one of the forest applications; Violation No. 2 was directing the performance of at least one of the the BLM applications.

Mr. Applebee's directing Applebee Aviation to perform commercial pesticide applications in Oregon after its Oregon-CPO license had been suspended, and doing it again after he had been explicitly told that the BLM applications would not be exempt from the license suspension, was the result of willful misconduct and occurred after June 25, 2007. ORS 634.900(2) authorizes a civil penalty of up to $10,000 for each of these two violations.

1. Since he began operating Applebee Aviation Mr. Applebee has been responsible for ensuring that it only performed commercial pesticide applications in Oregon that were consistent with its Oregon pesticide licensing. After ODA suspended Applebee Aviation's Oregon CPO license, Mr. Applebee intentionally and willfully directly Applebee Aviation to apply pesticides to the Oregon properties of others (perform commercial pesticide applications in Oregon), compromising ODA's ability to ensure the public that commercial pesticide applications were performed by properly licensed businesses and with measures to protect workers and the public. Disregarding Oregon's pesticide licensing requirements is contrary to the public's interest in having effective pesticides available for use at acceptable levels of risk. This public interest is supported by three purposes of the State Pesticide Control Act. Those purposes are to prevent adverse health impacts from pesticides, to regulate the use of pesticides in the public interest, and to maintain high standards in the use of pesticides. Mr. Applebee had experience and/or training regarding pesticides and took actions relevant to these matters. Mr. Applebee knew that it was unlawful to perform unlicensed commercial pesticide applications in Oregon, knew that it was inconsistent with purposes of the State Pesticide Control Act, and knew that it would compromise ODA's ability to protect public health and the environment.

2. Mr. Applebee calculated and considered the effects and consequences of directing Applebee Aviation to perform proscribed unlicensed commercial pesticide applications in Oregon, and persisted in directing it to do so, knowing that such unlicensed activity was incompatible with at least three purposes of the State Pesticide Control Act: To prevent adverse health impacts from pesticides, to regulate the use of pesticides in the public interest, and to maintain high standards in the use of pesticides.

Alternatively, in ordering unlicensed commercial pesticide applications, Mr. Applebee committed an act or omission that did not reflect reasonable care under the circumstances, and was characterized by conscious indifference to or reckless disregard of at least three purposes of the State Pesticide Control Act: To prevent adverse health impacts from pesticides, to regulate the use of pesticides in the public interest, and to maintain high standards in the use of pesticides.

ORS Chapter 634 and OAR chapter 603, division 57, provided understandable information about licensing requirements, and Mr. Applebee had consulted with ODA about them. CPOs applying pesticides to Oregon properties of others must be properly licensed by ODA. Mr. Applebee knew the requirements of ORS Chapter 634, knew that Applebee Aviation had been specifically ordered not to perform commercial pesticide application activity in Oregon, and disregarded Oregon's pesticide law and the license suspension.

Mr. Applebee was the owner and president of Applebee Aviation at all times during 2015 that are relevant to these matters. As such Mr. Applebee was responsible for the operations of Applebee Aviation, including all pesticide application or handling activity and maintenance of licensing. Mr. Applebee had experience and training regarding pesticides and took the actions relevant to these matters. Mr. Applebee was responsible for his activities as a managing owner of Applebee Aviation, including CPO licensing.

This conclusion is based on the findings of fact and ultimate findings of fact.

V. PENALTIES and DEPARTMENT ACTION

The Department hereby proposes to revoke Mr. Applebee's CPA license, refuse to issue or renew another CPA license to him, and issue a civil penalty to Mr. Applebee.

LICENSE REVOCATION, REFUSAL TO ISSUE OR RENEW

The Commercial Pesticide Applicator license of Michael L. Applebee, (AG-L1005041CPA), will be revoked when the Department issues its Final Order, and will not be reissued or renewed for five years after the Final Order date.

CIVIL PENALTIES

The provisions for civil penalties imposed for violations of ORS 634 are given in ORS 634.900. Section (2) of ORS 634.900 states "Notwithstanding subsection (1) of this section, if the violation of a provision relating to pesticide application, sale or labeling results from gross negligence or willful misconduct, the civil penalty for a first or subsequent violation may not exceed $10,000."

The violations cited in this Notice resulted from willful misconduct. OAR 603-057-0500(13) states that "Willful misconduct' means an act or omission that is characterized by or resulting from calculation and consideration of effects and consequences, and with awareness that the act or omission will be incompatible with any purpose of the State Pesticide Control Act." Alternatively, the violation cited in this Notice resulted from Gross negligence. OAR 603-057-0500(5) states that "Gross negligence' means an act or omission that does not reflect an exercise of reasonable care under the circumstances and that is characterized by conscious indifference to or reckless disregard of any purpose of the State Pesticide Control Act."

The penalty for the violation is calculated using the formula in OAR 603-057-0525 and 603-057-0532. The calculation is summarized as follows:

$$NB + [(0.1 \times NB) (P+H+C)]$$

$$1 \times \$10,000.00 + [(0.1 \times 10,000.00) (0+0+2)] = \$12,000.00$$

$$\$12,000.00 \times 2 \text{ current violations} = \$24,000.00$$

1. N, the number of times, within a period of three years prior to and including the date of the current violative act, that the person has been determined by the Director to have committed that violative act, is 1. OAR 603-057-0532(1)(a).

2. B, the base penalty is $10,000.00. OAR 603-057-0532(1)(b). The base penalty was determined as follows:

   a. The MAGNITUDE is CATEGORY I (MAJOR) under OAR 603-057-0532(1)(b)(A) and OAR 603-057-0525(2)(a)(E).

   b. The GRAVITY is HIGH LEVEL because the products applied were used in wide areas of application. OAR 603-057-0532(1)(b)(B), OAR 603-057-0525(3)(a)(D)(i).

3. P, past occurrence of unrelated violations under ORS Chapter 634 for a period of three years prior to the date of the current violative act, is 0 (zero) because there was no prior violation within the previous three years. OAR 603-057-0532(1)(c), OAR 603-057-0530(1)(c)(A).

4. H, the history of taking steps to correct a violation, is 0 (zero) because there is no prior history or there is insufficient information on which to base a finding. OAR 603-057-0532(1)(d), OAR 603-057-0530(1)(d)(B).

5. C, cooperativeness is 2 (two). Mr. Applebee was uncooperative and disregarded ODA's explicit statement of the scope of the license suspension order. OAR 603-057-0532(1)(e), OAR 603-057-0530(1)(f)(E).

As required by ORS 634.900, the total civil penalty is limited to $20,000.00 ($10,000 per violation).

VI. RIGHTS TO A HEARING, NOTICE OF RIGHTS

You are entitled to a contested case hearing as provided by statues and rules including, but not limited to: ORS Chapter 183 (the Administrative Procedures Act), including 183.413 to 183.470, and ORS 183.745; OAR Chapter 137, division 3, including OAR 137-003-0501 to 137-003-0700; ORS 634.905; and OAR chapter 603, division 57. **If you want a hearing regarding the Civil Penalty your request must be made in writing to the Department within ten business days of the date that you receive the NOTICE;** OAR 603-057-0510(4)(f).

If you want a hearing regarding the License Revocation or Refusal to Reissue or Renew, your request must be made in writing to the Department within 21 calendar days of the date that you receive the NOTICE.

Any request for a hearing should be made to the attention of:

Michael Babbitt
Pesticides Program
Oregon Department of Agriculture
635 Capitol Street NE
Salem, Oregon 97301-2532

If you make a timely request for a hearing you will be notified of the date, time and place of such hearing. You will also be given information on the procedures, right of representation and other rights of parties relating to the conduct of the hearing before commencement of the hearing. An administrative law judge from the Office of Administrative Hearings will preside at any hearing, assigned as required by ORS 183.635. The Director of the Department has authority to issue the final order.

If the recipient of the enforcement notice is a corporation, partnership, limited liability company, unincorporated association, trust, or other entity that is not a natural person or individual, it must be represented in the contested case process by an attorney unless otherwise authorized by law. Furthermore, the attorney representing such a corporation or other entity must ratify the request for hearing, in writing, within 28 days of the date that the request is received by the agency; OAR 137-003-0550. This provision does not, however, require any entity to be represented by an attorney at any informal conference. Individuals may but are not required to be represented by counsel. The state will not provide legal counsel in administrative cases such as this, but private legal aid organizations may be able to assist a person with limited financial resources.

VII. FINAL ORDER

Regarding the License Revocation and Refusal to Reissue or Renew:

If you do not make a timely request for a hearing on the revocation, you will waive your right to request a hearing and the Department will issue its Final Order based on the license revocation component of this Notice; OAR 137-003-0672(2).

If you request a hearing but later fail to appear at the hearing, withdraw the request for a hearing, or notify the agency or administrative law judge that you will not appear at the hearing and it is not rescheduled, you will waive your right to a hearing and the Department will issue its Final Order; OAR 137-003-0672(3).

Upon issuance of the Final Order the Department will have revoked your CPA license and will refuse to renew it or reissue a new license for a period of five years.

Regarding the Civil Penalties:

If you do not make a timely request for a hearing on the civil penalty you will waive your right to request a hearing and the Department will issue its Final Order based on the civil penalty component of this Notice; OAR 137-003-0672(2).

If you request a hearing but later fail to appear at the hearing, withdraw the request for a hearing, or notify the agency or administrative law judge that you will not appear at the hearing and it is not rescheduled, you will waive your right to a hearing and the Department will issue its Final Order; OAR 137-003-0672(3).

With the Final Order the Department will issue a judgment against you and a civil penalty in the amount set out in this Notice will become due and payable 70 (seventy) days after the final order is issued. ORS 183.745. Your check or money order should be made payable to the Oregon Department of Agriculture and sent to:

Oregon Department of Agriculture
635 Capitol Street NE
Salem, Oregon 97301-2532

Regarding both Enforcement Actions:

Final Orders regarding this Notice will become a part of Mr. Applebee's history for a period of three years. Any future violations of ORS Chapter 634 or OAR Chapter 603, division 057 within the next three years will subject Mr. Applebee to additional enforcement actions including, but not limited to, civil penalties, product seizure, or license revocation.

For any Final Order regarding this Notice you will have the right to appeal it to the Oregon Court of Appeals pursuant to ORS 183.482. To appeal you must file a petition for judicial review with the Court of Appeals within 60 days from the date the order becomes final (or, for the license suspension, from the date the order is confirmed, altered or revoked following the hearing). If you do not file a petition for judicial review within this time period you will lose your right to appeal.

The Department has designated the relevant portions of its files on the subject of this matter, including all materials that you have submitted relating to this matter, as the record in this case for the purpose of proving a *prima facie* case upon default.

DATED this 3rd day of November, 2015

KATY COBA
DIRECTOR
OREGON DEPT. OF AGRICULTURE

NOTE: Copies of the Department's investigation report will be provided upon request. The request must be made in writing. There may be a monetary charge for some reports. The written request should be made to: Oregon Department of Agriculture, Pesticides Program, ATTN: SUNNY JONES, 635 Capitol Street NE, Salem, Oregon 97301-2532.

NOTICE TO ACTIVE DUTY SERVICEMEMBERS: Active duty servicemembers have a right to stay these proceedings under the federal Servicemembers Civil Relief Act. For more information contact the Oregon State Bar at 800-452-8260, the Oregon Military Department at 800-452-7500, or the nearest United States Armed Forces Legal Assistance Office through http://legalassistance.law.af.mil.

MICHAEL L. APPLEBEE

Oregon Department of Agriculture, Pesticides Case No. 150406

Notice of Contested Case Rights and Procedures:

Pursuant to ORS 183.413(2), you are entitled to be informed of the following:

1. **Time and place of hearing.** The time and place of hearing is or will be set forth in the Notice of Hearing issued by the Administrative Law Judge (ALJ) after the prehearing conference.

2. **Issues to be considered at hearing.** The issues to be considered at hearing are those set forth in the Notice/Order issued by the Oregon Department of Agriculture (ODA), entitled Notice of Imposition of Civil Penalty, Proposed Revocation of Applicator License, Proposed Refusal to Reissue or Renew Applicator License, and Opportunity for a Hearing, dated November 3, 2015, and those issues related thereto that are properly before the presiding officer to this proceeding.

3. **Law that applies.** The matter set for hearing is a contested case. The hearing will be conducted as provided in Chapters 183 and 634 of the Oregon Revised Statutes (ORS); the administrative rules of the ODA, OAR 603-057-0505 through 603-057-0515, and the Attorney General's Office of Administrative Hearing Rules, OAR 137-003-0501 to 137-003-0700, in particular 137-003-0560. Other laws involved include: ORS Chapters 561, 570, and 616; additional rules of ODA, OAR 603-057; Title 7, Chapter 6, Subchapter II of the United States Code; and Title 40, Parts 152, 156, and 180 of the Code of Federal Regulations.

4. **Right to attorney.** You may be represented by an attorney at the hearing. Most persons are represented by counsel for hearings involving ORS 634. You are not required to be represented by counsel, unless you are a corporation, partnership, or similar entity, in which case you are required to be represented by an attorney at the hearing, and more immediately, your request for a hearing must be ratified by an attorney within 28 days of the agency's receipt of the request, OAR 137-003-0550. If you are not represented at the hearing and during the hearing you determine that representation by an attorney is necessary, you may request a recess to allow you an opportunity to secure the services of an attorney. The hearing ALJ will decide whether to grant such a request. The ODA will be represented by an attorney. Legal aid organizations may be able to assist a party with limited financial resources.

5. **Administrative Law Judge.** The person presiding at the hearing is known as the administrative law judge (ALJ). The ALJ will rule on all matters that arise at the hearing, subject to agency consideration of matters transmitted for agency decision under OAR 137-003-0635 or matters subject to agency review under OAR 137-003-0640 or OAR 137-003-0570. The ALJ will be assigned by the Chief ALJ from the Office of Administrative Hearings (OAH). The OAH consists of employees of, and independent contractors with, the Chief ALJ. The ALJ does not have the authority to make the final decision in the case. The final determination will be made by the Director of the ODA.

6. **Discovery.** If the agency or the ALJ authorizes discovery, the agency or the ALJ shall control the methods, timing and extent of discovery. Discovery is permitted in this proceeding. Discovery is permitted as provided in OAR 137-003-0570, OAR 137-003-0572, and OAR 137-003-0573.

7. **Witnesses.** A witness must testify under oath or affirmation to tell the truth. The ODA or the ALJ will issue subpoenas for witnesses on your behalf upon a showing that their testimony is relevant to the case and is reasonably needed by you to establish your position. If you are represented by an attorney, your attorney may issue subpoenas for attendance of witnesses at hearing. Payment of witness fees and mileage to the person subpoenaed is your responsibility.

8. **Order of evidence.** A hearing is similar to a court proceeding but is less formal. Its general purpose is to determine the facts and whether the ODA's proposed action is appropriate. The order of presentation of evidence is normally as follows:
   a. Testimony of witnesses and other evidence of the ODA in support of its proposed action.
   b. Testimony of your witnesses and your other evidence.
   c. Rebuttal evidence by the ODA and by you.

9. **Burden of presenting evidence.** The burden of presenting evidence to support an allegation or position rests upon the proponent of the allegation or position. If you have the burden of proof on an issue, or if you intend to present evidence on an issue in which the agency has the burden of proof, you should approach the hearing prepared to present the testimony of

witnesses, including yourself, and other evidence that will support your position. All witnesses are subject to cross-examination and also to questioning by ALJ.

10. **Admissible evidence.** Relevant evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their serious affairs is admissible and will be received. Hearsay evidence is not automatically excluded. Rather, the fact that it is hearsay generally affects how much reliance the ALJ and the Director of the ODA will place on it in reaching a decision.

There are four kinds of evidence:

a. Knowledge of the agency or ALJ. The agency or ALJ may take "official notice" of facts based on the agency's or ALJ's knowledge in a specialized field. This includes notice of general, technical or scientific facts. The agency or ALJ may also take "judicial notice" of a fact that is not subject to reasonable dispute in that it is generally known or is capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. You will be informed if the agency or ALJ takes "official notice" or "judicial notice" of any fact and you will be given an opportunity to contest any facts so noticed.

b. Testimony of witnesses. Testimony of witnesses, including you, who have knowledge of the facts may be received in evidence.

c. Writings. Written documents including letters, maps, diagrams and other written material may be received in evidence.

d. Experiments, demonstrations and similar means used to prove a fact. The results of experiments and demonstrations may be received in evidence.

11. **Objections to evidence.** Objections to the admissibility of evidence must be made at the time the evidence is offered. Objections are generally made on one of the following grounds:

a. The evidence is unreliable;

b. The evidence is irrelevant or immaterial and has no tendency to prove or disprove any issue involved in the case;

c. The evidence is unduly repetitious and duplicates evidence already received.

12. **Continuances.** There are normally no continuances granted at the end of the hearing for you to present additional testimony or other evidence. However, if you can show that the record should remain open for additional evidence, the ALJ may grant you additional time to submit such evidence.

13. **Record.** A record will be made of the entire proceeding to preserve the testimony and other evidence for appeal. This may be done by use of a tape or digital recorder or court reporter. The record is generally not transcribed, unless there is an appeal to the Court of Appeals. However, you may obtain a copy of the tape recording upon payment of the costs of making a copy of the tape. If a court reporter is used, you may obtain a transcript or a copy of the court reporter's transcript upon payment of a transcription fee or other fee that the parties may agree upon.

14. **Proposed Order and Exceptions.** The ALJ will issue a proposed order in the form of findings of fact, conclusions of law and recommended agency action. You will be provided with a copy and you will be given an opportunity to make written objections, called "exceptions," to the ALJ's recommendations. You will be notified when exceptions to the proposed order must be filed. You will be notified when you may appear and make oral argument to the agency.

15. **Final Order.** The agency will render the final order in this case. The agency may modify the proposed order issued by the ALJ. If the agency modifies the proposed order in any substantial manner, the agency in its order will identify the modifications and will provide an explanation as to why the agency made the modifications. The agency may modify a proposed finding of "historical" fact only if the proposed finding is not supported by a preponderance of the evidence in the record.

16. **Appeal.** If you wish to appeal the final order, you must file a petition for judicial review with the Oregon Court of Appeals within 60 days after the final order is served upon you. *See* Oregon Revised Statutes 183.482.

17. **Notice to Active Duty Servicemembers.** Active duty servicemembers have a right to stay these proceedings under the federal Servicemembers Civil Relief Act. For more information contact the Oregon State Bar at 800-452-8260, the Oregon Military Department at 800-452-7500, or the nearest United States Armed Forces Legal Assistance Office through http://legalassistance.law.af.mil.

ELLEN F. ROSENBLUM
Attorney General

FREDERICK M. BOSS
Deputy Attorney General

DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION

August 24, 2016

VIA E-MAIL AND REGULAR MAIL

Jennifer Rackstraw
Administrative Law Judge
Office of Administrative Hearings
7995 S.W. Mohawk Street
Tualatin OR 97062

Re: *In the Matter of Michael L. Applebee; and In the Matter of Applebee Aviation, Inc.*
OAH Case Nos. 1504399 and 1504424
DOJ Case No. 603714-GN0045-16

Dear Judge Rackstraw:

Enclosed as courtesy copies, are the Final Orders for OAH Cases Nos. 1504399 and 1504424; with certificates of service.

Sincerely,

Lore Bensel

Lore Bensel
Senior Assistant Attorney General
Natural Resources Section

Enclosures
LMB:jrs#4640857
c: Dale Mitchell, Oregon Department of Agriculture
Robert Ireland, Ireland & Ireland PC

BEFORE THE DIRECTOR

OF THE OREGON DEPARTMENT OF AGRICULTURE

IN THE MATTER OF:	)	OAH Case No. 1504399
	)	Agency Case No.: 150406
	)	
MICHAEL APPLEBEE	)	**FINAL ORDER**
	)	

This is the Director's Final Order in the contested case proceeding arising from the Amended Notice of Proposed Imposition of Civil Penalty, Proposed Revocation of Applicator License, and Opportunity for a Hearing (Notice) dated February 15, 2016, and issued to Michael Applebee. Administrative Law Judge Jennifer H. Rackstraw issued her Proposed Order on June 30, 2016. The Department did not receive exceptions to the Proposed Order.

I have decided to adopt Judge Rackstaw's Proposed Order as my Final Order, subject to the following changes:

1. The first sentence of the fifth full paragraph on page 6 of 49 is replaced with the following:

On April 15, 2016, Respondents filed a Stay Request with the Department, requesting a stay of OAH Case Nos. 1504399 and 1504424.

2. A sentence is added at the end of paragraph number 6 on page 8 of 49 that states as follows:

I accept these findings for purposes of this contested case only.

3. A sentence is added to the middle of the third full paragraph on page 31 of 49 that states as follows:

General information regarding registered agents and service upon them is provided in ORS 60.111 *et seq.*

4. The last two sentences of the third full paragraph on page 36 of 49 are replaced with the following:

I direct, instead, that Mr. Applebee's CPA license will be revoked for a one-year period as described in the Order section of this document. There shall be no opportunity to reissue or renew Mr. Applebee's CPA license during the one-year period. Such a revocation is still a significant sanction to levy against a licensee and, in this matter, is more commensurate with the number and severity of Mr. Applebee's current and past violations.

5. The Order section on page 48 of 49 is replaced with the following:

ORDER

Michael Applebee shall pay a total civil penalty of $10,000 for one violation of ORS 634.372(4). The total payment shall, as provided in ORS 183.745(2), be due ten (10) days after this Order becomes final by operation of law or on appeal.

In addition, Michael Applebee's commercial pesticide applicator's license (CPA) is revoked, and shall not be reissued or renewed, for a one-year period beginning September 15, 2016, and ending on September 14, 2017.

All other portions of the Proposed Order are incorporated by reference. The Proposed Order is attached to this Final Order as Attachment 1

Dated this 23rd day of August, 2016.

Katy Coba
Director
Department of Agriculture

NOTICE OF RIGHT TO APPEAL: You are entitled to seek judicial review of this order. Judicial review may be obtained by filing a petition with the Oregon Court of Appeals within sixty (60) days from the service of this Final Order. Judicial review is pursuant to the provisions of ORS 183.482.

ATTACHMENT 1

(Proposed Order for OAH Case No. 1504399)

BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON
for the
DEPARTMENT OF AGRICULTURE

IN THE MATTER OF:	) **PROPOSED ORDER**
	)
MICHAEL APPLEBEE	) OAH Case No. 1504399
	) Agency Case No. 150406

HISTORY OF THE CASE

1. OAH Case No. 1504397

On September 25, 2015, the Oregon Department of Agriculture (the Department or ODA) issued a Notice of Proposed Imposition of Civil Penalty (First Civil Penalty) and Proposed/Final Order, and Order of Emergency License Suspension and Notice of Opportunity for a Hearing (First Emergency Suspension Order) to Applebee Aviation, Inc. (Applebee Aviation). The Department alleged that Applebee Aviation's Commercial Pesticide Operator (CPO) activities regarding worker protections presented a serious danger to Oregon's public health or safety and violated the State Pesticide Control Act. The Department proposed assessing a $1,100 civil penalty and suspending Applebee Aviation's license to operate as a CPO in Oregon, effective September 25, 2015.[1]

On December 22, 2015, the Department issued a Final Order: Termination of License Suspension Issued September 25, 2015 to Applebee Aviation. The Termination Order ended the Department's emergency suspension of Applebee Aviation's CPO license, effective September 25, 2015, but noted that the CPO license nonetheless remained suspended, effective October 13, 2015, pursuant to an October 13, 2015 Second Emergency Suspension Order and a November 3, 2015 Amended Second Emergency Suspension Order (in OAH Case No. 1504398, see below).

Also on December 22, 2015, the Department issued an Amended First Order of Emergency License Suspension and Notice of Opportunity for Hearing (Amended First Emergency Suspension Order) to Applebee Aviation, thereby implementing Applebee Aviation's

[1] ORS 183.430(2) allows an agency to suspend a license without a hearing where the agency finds "a serious danger to the public health or safety and sets forth specific reasons for such findings." OAR 137-003-0560(1) similarly provides:

> If the agency finds there is a serious danger to the public health or safety, it may, by order, immediately suspend or refuse to renew a license. For purposes of this rule, such an order is referred to as an emergency suspension order. An emergency suspension order must be in writing. It may be issued without prior notice to the licensee and without a hearing prior to the emergency suspension order.

request for hearing regarding the merits of the September 25, 2015 Notice and Order.

2. OAH Case No. 1504398

On October 13, 2015, the Department issued a Notice of Imposition of Civil Penalty, Proposed Revocation of Operator License, Proposed Refusal to Issue or Renew Operator License (Second Civil Penalty and First Revocation), and Opportunity for a Hearing, and Order of Emergency License Suspension and Notice of Opportunity for a Hearing (Second Emergency Suspension Order) to Applebee Aviation. The Department alleged that Applebee Aviation operated as a CPO in Oregon without a valid CPO license, thereby posing a serious danger to Oregon's public health or safety and violating the State Pesticide Control Act. The Department proposed assessing a $40,000 civil penalty; suspending Applebee Aviation's license to operate as a CPO, effective October 13, 2015; and revoking Applebee Aviation's CPO license, with no reissuance or renewal for up to five years.

On November 3, 2015, the Department issued an Amended Notice of Imposition of Civil Penalty, Proposed Revocation of Operator License, and Proposed Refusal to Reissue or Renew Operator License (Amended Second Civil Penalty and Revocation), and Opportunity for a Hearing, and Order of Emergency License Suspension and Notice of Opportunity for a Hearing (Amended Second Emergency Suspension Order) to Applebee Aviation. The Department sought to impose a $160,000 civil penalty, suspend Applebee Aviation's license to operate as a CPO, effective October 13, 2015; and revoke Applebee Aviation's CPO license, with no reissuance or renewal for up to five years.

On December 22, 2015, the Department issued a Second Amended Order of Emergency License Suspension and Notice of Opportunity for Hearing (Second Amended Second Emergency Suspension Order) to Applebee Aviation, which suspended Applebee Aviation's CPO license for the period October 13, 2015 through December 22, 2015.

Also on December 22, 2015, the Department issued a Second Amended Notice of Imposition of Civil Penalty, Proposed Revocation of Operator License (With No Reissuance or Renewal) and Opportunity for a Hearing (Second Amended Second Civil Penalty and Revocation) to Applebee Aviation. The Department proposed to assess a $160,000 civil penalty and revoke Applebee Aviation's CPO license, with no reissuance or renewal for five years.

3. Adjudication of Emergency Suspension Orders in OAH Case Nos. 1504397 and 1504398

On October 20 and November 3, 2016, Applebee Aviation, through counsel, requested a hearing to contest the emergency suspensions, proposed imposition of civil penalties, and proposed license revocation. On or about November 25, 2015, the Department referred the matters to the Office of Administrative Hearings (OAH).[2] The OAH assigned the matters to

[2] Although the Department assigned the same agency number to both matters (Agency Case No. 150406), the OAH designated the matters separately, as OAH Case Nos. 1504397 and 1504398.

Senior Administrative Law Judge (ALJ) Monica Whitaker.[3]

On December 28 and 29, 2015, ALJ Whitaker convened a hearing regarding the Department's proposed emergency license suspensions in OAH Case Nos. 1504397 and 1504398.[4] Senior Assistant Attorney General Lore Bensel represented the Department. Attorney Robert Ireland represented Applebee Aviation. The following witnesses testified: Applebee Aviation's former employee Warren Howe; Garnet Cooke, a pesticide coordinator with the Oregon Occupational Safety and Health Administration; Michael Odenthal, a lead investigator for the Department's pesticide program; Dale Mitchell, a Program Manager for the Department's pesticide program; Michael Applebee, Applebee Aviation's corporate principal; Michael Babbitt, a case reviewer for the Department's pesticide enforcement unit; and Applebee Aviation's employee, Brenda May. The record closed at the conclusion of the hearing on December 29, 2015.

On January 13, 2016, ALJ Whitaker issued a Proposed Order in Case No. 1504397, concluding that Applebee Aviation's conduct did not pose a serious danger to the public health or safety, and proposing that the Department revoke the September 25, 2015 First Emergency Suspension Order, as amended by the December 22, 2015 Amended First Emergency Suspension Order. Also on January 13, 2016, ALJ Whitaker issued a Proposed Order in Case No. 1504398, concluding that Applebee Aviation's acts and conduct did not pose a serious danger to the public health or safety, and proposing that the Department revoke the October 13, 2015 Second Emergency Suspension Order, as amended by the November 3, 2015 Amended Second Emergency Suspension Order and the December 22, 2015 Second Amended Second Emergency Suspension Order.

On January 28, 2016, the Department issued a Final Order in OAH Case No. 1504398. In this Final Order, the Department made changes to the Proposed Order to clarify the history of the case, correct typographical errors, add findings of fact, and clarify the opinion, rulings, and recommendations. The Final Order did not change the outcome of the case, and concluded that the Department failed to establish that Applebee Aviation's pesticide applications without a CPO license posed a serious danger to the public health and safety. The Final Order revoked the October 13, 2015 Second Emergency Suspension Order, as amended by the November 3, 2015 Amended Second Emergency Suspension Order and the December 22, 2015 Second Amended Second Emergency Suspension Order.

Also on January 28, 2016, the Department issued an Amended Proposed Order in OAH Case No. 1504397, and allowed Applebee Aviation five days in which to file exceptions to the Amended Proposed Order. The Department also provided Applebee Aviation a redlined version of the Amended Proposed Order, which alerted Applebee Aviation to the changes that the Department proposed making to ALJ Whitaker's Proposed Order. On February 2, 2016, Respondent filed exceptions to the Amended Proposed Order.

---

[3] The OAH subsequently reassigned the matter to another ALJ. However, upon the Department's filing of a request to change ALJs, the OAH assigned the matter back to ALJ Whitaker.

[4] ALJ Whitaker planned to hold a separate hearing, at a later date, regarding the Department's proposed assessment of civil penalties and proposed revocation of Applebee Aviation's CPO license.

On February 5, 2016, the Department issued a Final Order in OAH Case No. 1504397. In the Final Order, the Department made changes to the Proposed Order to clarify the history of the case, correct typographical errors, add findings of fact, and modify the opinion, rulings, and recommendations. The Final Order changed the outcome of the case and concluded that Applebee Aviation's conduct regarding worker protection equipment and training posed a serious danger to the public health and safety from September 25, 2015 through October 8, 2015. The Final Order altered the September 25, 2015 First Emergency Suspension Order, as Amended by the December 22, 2015 Amended First Suspension Emergency Order, to suspend Applebee Aviation's CPO license from September 25, 2015 through October 8, 2015.

4. OAH Case No. 1504339 (Michael Applebee)

On November 3, 2015, the Department issued a Notice of Imposition of Civil Penalty, Proposed Revocation of Applicator License, Proposed Refusal to Reissue or Renew Applicator License, and Opportunity for a Hearing (Applebee First Civil Penalty and Revocation) to Michael Applebee. The Department alleged that Mr. Applebee directed commercial pesticide applications in Oregon while Applebee Aviation's CPO license was suspended. The Department proposed to assess a $20,000 civil penalty, and to revoke Mr. Applebee's Commercial Pesticide Applicator (CPA) license, with no reissuance or renewal for up to five years.

On February 15, 2016, the Department issued an Amended Notice of Proposed Imposition of Civil Penalty, Proposed Revocation of Applicator License, and Opportunity for a Hearing (Applebee Second Civil Penalty and Revocation) to Mr. Applebee. The Department alleged that Mr. Applebee directed commercial pesticide applications in Oregon while Applebee Aviation's CPO license was suspended. The Department proposed to assess civil penalties between $1,406 and $20,000, depending on whether Mr. Applebee's alleged violations were the result of willful misconduct, and to revoke Mr. Applebee's CPA license, with no reissuance or renewal for up to five years.

5. OAH Case No. 1504424 (Applebee Aviation)

On February 15, 2016, the Department issued a Third Amended Notice of Imposition of Civil Penalty, Proposed Revocation of Operator License and Opportunity for a Hearing (Third Amended Second Civil Penalty and Revocation) to Applebee Aviation.[5] The Department alleged that Applebee Aviation made commercial pesticide applications in Oregon without a valid CPO license. The Department proposed to assess civil penalties between $13,024 and $160,000, depending on whether Applebee Aviation's alleged violations were the result of willful misconduct, and to revoke Applebee Aviation's CPO license, with no reissuance or renewal for up to five years.

6. Adjudication of Proposed Civil Penalties and License Revocations in OAH Case Nos. 1504339 and 1504424

[5] This Notice amended the December 22, 2015 Second Amended Second Civil Penalty (in OAH Case No. 1504398).

On November 3, 2015, Mr. Applebee and Applebee Aviation (collectively, Respondents), through counsel, filed a request for hearing regarding, among other things, the proposed civil penalties and proposed license revocations.

A hearing was subsequently scheduled for February 17 and 18, 2016, regarding the proposed civil penalties and proposed license revocations against Mr. Applebee (OAH Case No. 1504339) and Applebee Aviation (OAH Case No. 1504424). On or about January 29, 2016, the OAH reassigned the case to ALJ Jennifer H. Rackstraw, due to a scheduling conflict for ALJ Whitaker.

On February 16, 2016, the Department filed a Hearing Memorandum. On the morning of February 17, 2016, Respondents also filed a Hearing Memorandum.

On February 17, 2016, ALJ Rackstraw convened a hearing in Tualatin, Oregon. Ms. Bensel represented the Department. Mr. Ireland represented the Respondents. Dale Mitchell appeared as an agency representative. Michael Applebee and Bruce Pokarney, the Department's Director of Communications, were also present. The parties ultimately agreed to reset the hearing to a later date, so that the parties could brief three issues and the ALJ could issue a written ruling on the issues. The parties agreed to file their respective briefs no later than 5:00 p.m. on February 26, 2016. The hearing was reset for March 28 through 31, 2016, with amended or additional witness lists and exhibits due by March 18, 2016.

On the afternoon of February 26, 2016, the Department moved to extend the deadline for the filing of prehearing briefs to March 4, 2016. The Department cited illness and a significant deadline in another Department case as the bases for the motion. The Respondents objected to the motion, and filed their brief shortly before 5:00 p.m. on February 26. The Department did not file a brief on February 26. ALJ Rackstraw was out of the office on February 26, and was unaware of the Department's motion until February 29, 2016.

On the morning of February 29, 2016, ALJ Rackstraw granted the Department's motion to extend the briefing deadline to March 4, 2016. Because the Department would have the benefit of reviewing Respondents' brief prior to filing its own brief by March 4, the ALJ provided the Respondents with the opportunity to file a responsive brief no later than March 8, 2016. The ALJ agreed to issue a written ruling on the briefing issues by March 15, 2016, and to allow the parties to file amended or additional witness lists and exhibits by March 22, 2016.

Later on February 29, 2016, the Respondents moved for an extension of time to respond to the Department's brief and a 30-day reset of the hearing. In the motion, Respondents asserted that both attorneys of record—Mr. Ireland and Katheryn Ireland—would be out of the country and unavailable from March 1 through 14, 2016.[6] They therefore requested that the deadline for filing a responsive brief be extended to March 17, 2016. They further requested that the hearing be rescheduled until the last week in April 2016, to accommodate the later briefing. The

[6] Respondents noted in their motion that the Irelands' unavailability from March 1 through 14 was stated during the hearing on February 17, 2016 (when discussing scheduling matters). Unfortunately, ALJ Rackstraw did not recall this information when setting the March 4, 2016 deadline for Respondents to file a responsive brief.

Department did not object to the Respondents' request for additional time to file a responsive brief, but did object to postponing the hearing and noted that Ms. Bensel was unavailable for hearing in April 2016.

Later on February 29, 2016, ALJ Rackstraw notified the Department that it could elect not to file a prehearing brief, and all original deadlines/timeframes established on February 17, 2016 would remain in effect, with the hearing commencing on March 28, 2016. Or, in the alternative, the Department could elect to file its prehearing brief by March 4, 2016, the Respondents would then have until March 17, 2016 to file a response, and the hearing would need to be rescheduled to a later date (to be determined at a prehearing conference on March 16, 2016) to accommodate the extensions. The Department elected the second option, and on March 4, 2016, filed its prehearing brief.

On March 14, 2016, Applebee Aviation filed Petitions for Judicial Review with the Oregon Court of Appeals, seeking review of the Final Orders in OAH Case Nos. 1504397 and 1504398.

On March 16, 2016, ALJ Rackstraw convened a telephone prehearing conference. Ms. Bensel represented the Department. Mr. Ireland represented Respondents. Dale Mitchell was also present. A consolidated hearing on the proposed civil penalties and license revocations in OAH Case Nos. 1504339 and 1504424 was scheduled for April 26 through 29, 2016.

On March 17, 2016, Respondents filed a responsive brief. On March 29, 2016, ALJ Rackstraw issued Prehearing Rulings, concluding the following: 1) The doctrine of issue preclusion prevents Applebee Aviation and Michael Applebee from arguing that Applebee Aviation's CPO license was not suspended from September 25, 2015 through October 8, 2015; 2) ALJ Whitaker's Proposed Order in OAH Case No. 1504397 will not be admitted into the record of the current proceedings for the truth of the factual findings and rulings contained therein; 3) The current proceedings will not be stayed, pending review of the Department's Final Order in OAH Case No. 1504397 by the Oregon Court of Appeals; and 4) Respondents' request to bifurcate OAH Case No. 1504399 from OAH Case No. 1504424 is denied.

On April 15, 2016, Respondents filed a Stay Request with the Department, requesting a stay of OAH Case Nos. 1504399, 1504406, 1504424, and 1504406. On April 22, 2016, Respondents filed a Motion for Set Over regarding the hearing scheduled for April 26 through 29, 2016. On April 25, 2016, ALJ Rackstraw, Ms. Bensel, and Mr. Ireland convened by telephone for a status conference to discuss Respondents' set over motion. During the conference, ALJ Rackstraw denied the motion. Later in the day on April 25, 2016, the Department issued an Order Regarding Petitioners' Stay Request, denying the stay request.

On April 26, 2016, ALJ Rackstraw convened a hearing in Tualatin, Oregon. The hearing continued on April 27 and 28, 2016, as well. Ms. Bensel represented the Department. Mr. Ireland represented Respondents. Michael Applebee appeared on his own behalf, as well as on behalf of Applebee Aviation as its owner/president/registered agent. Dale Mitchell appeared as an agency representative. Various observers and members of the public attended portions of the

hearing over the three-day period. The following persons testified: Darryl Ivy;[7] Warren Howe; Garnet Cooke; Michael Odenthal; Sarah (Sunny) Jones; Michael Babbitt; Dale Mitchell; Patrick Hall; David (Dave) McDaniel; Kevin Vanderlei; John Metzer; Clay Clark; and Mr. Applebee. The evidentiary record closed on April 28, 2016. The parties agreed to file written closing arguments by May 27, 2016.

On April 27, 2016, Respondents filed a Second Stay Request with the Department, requesting a stay of OAH Case Nos. 1504399 and 1504424. On May 12, 2016, the Department issued an Order Regarding Petitioners' (Second) Stay Request, denying the request.

On May 26, 2016, the Department filed an unopposed motion to extend the deadline for filing closing arguments. ALJ Rackstraw granted the motion, and set a new deadline of June 10, 2016. On June 10, 2016, the Department and Respondents filed their respective closing arguments. The record closed on June 10, 2016.

ISSUES

1. Whether Mr. Applebee violated ORS 634.372(4) by directing Applebee Aviation to make commercial pesticide applications when Applebee Aviation did not have a valid CPO license.

2. If one or more violations of ORS 634.372(4) are proven, whether the Department may revoke Mr. Applebee's CPA license and not reissue or renew it for a period of up to five years, based on an alleged pattern of misconduct relating to pesticide applications.

3. Whether, and in what amount, the Department may assess civil penalties against Mr. Applebee for violating ORS 634.372(4).

EVIDENTIARY RULINGS

The Department submitted Exhibits A1 through A43, but then withdrew the following videos from Exhibit A43: I, K, L, CC, EE, JJ, LL, NN, OO, and TT. The remainder of Exhibit A43 and Exhibits A1 through A42 were admitted into the record without objection.

Respondents submitted Exhibits R1 through R38. Exhibits R1 through R34 were admitted into the record without objection. Exhibits R35, R36, R37, R37A, and R38 were admitted into the record over the Department's objection that those exhibits were not timely submitted.

FINDINGS OF FACT

Relevant Background

1. Applebee Aviation is an S corporation with its principal place of business at 22330 NW Fisher Road, in Banks, Oregon. That location is known as the "hangar." (Test. of

[7] Mr. Ivy's attorney, Karl Anuta, was present during Mr. Ivy's testimony.

Applebee, Odenthal, Howe; Ex. A38 at 1.) During the time period relevant to this matter, Applebee Aviation held a Commercial Pesticide Operator (CPO) license and provided commercial aerial pesticide application services to foresters and agricultural growers in Oregon, Washington, Idaho, South Dakota, and Minnesota. (Test. of Applebee, Odenthal.) Applebee Aviation held an FAA 137 certificate, which allowed Applebee Aviation to conduct spray operations in other states. (Test. of Applebee.)

2. During the time period relevant to this matter, Mr. Applebee was the owner, operator, president, and registered agent of Applebee Aviation. (Ex. A38 at 1; test. of Applebee, Odenthal.) He was involved in all major decisions involving Applebee Aviation. (Test. of Howe.) He held a held Commercial Pesticide Applicator (CPA) license and was in charge of hiring and firing pilots. (*See* Ex. A3 at 110; test. of Howe.)

3. The Oregon Secretary of State, Corporations Division lists 39495 NW Bledsoe Creek Lane, in Banks, Oregon as the address of the registered agent. (Ex. A38 at 1.) That location is where Mr. Applebee resides with his family. (Test. of Applebee.) It is also the location of Applebee Aviation's corporate office. (Test. of Howe.)

4. During the time period relevant to this matter, Warren Howe was the sales manager for Applebee Aviation, Brenda May worked in the Applebee Aviation office, and Applebee Aviation used and employed various agents and employees. (Test. of Howe, Applebee.)

5. Mr. Howe worked for Applebee Aviation for five years, until his employment ended in October 2015. He held a CPA license, but he was not a pilot. While employed, he performed contract negotiations with clients, and he sometimes functioned as the point of contact with pesticide application crews. He had frequent contact with the pilots who performed aerial spraying for Applebee Aviation, and he did a great deal of coordination between clients and crews. He worked closely with Mr. Applebee. (Test. of Howe.)

6. In 2014, Applebee Aviation had earnings of approximately $9 million. Prior to September 25, 2015, Applebee Aviation had approximately 30 employees and enjoyed preferred status with the Oregon Department of Forestry. After September 2015, Applebee Aviation's earnings dropped to approximately $2 million per year. (Test. of Applebee.)

Pesticide Application Crews

7. Applebee Aviation's general process for aerial pesticide spraying includes taking a concentrated chemical, mixing it with a carrier (typically water), loading it onto an aircraft, and having the aircraft spray it over a designated area. (Test. of Odenthal.) Chemical containers range in size from 1-gallon containers to 30-gallon barrels to 260-gallon cubes. (Test. of Odenthal.)

8. During the time period relevant to this matter, there were four pilots performing aerial spraying for Applebee Aviation: Clay Clark,[8] Blaine Hayes, Patrick Hall,[9] and Dave

[8] Mr. Clark worked for Applebee Aviation from 2012 until approximately late December 2015. (Test. of Clark.)

McDaniels.[10] Each pilot had a CPA license and earned a salary plus production bonuses from Applebee Aviation. When in the field, the pilots functioned as crew leaders. (Test. of Applebee, Odenthal, Howe, Hall, McDaniels; *see* Ex. A3 at 110.) The pilots were responsible for ensuring that an application was consistent with a pesticide's label, that sprays landed in the correct locations, that crew members had appropriate Personal Protective Equipment (PPE), and that crew members mixed and handled chemicals in a responsible manner. (Test. of Babbitt, Odenthal, Hall, Applebee.)

9. Each crew generally included two drivers/handlers, who were responsible for driving the trucks, loading chemicals onto the trucks, mixing and loading chemicals at the work site, and cleaning up the work site (including any spills) and chemical containers. (Test. of Odenthal.)

10. When assigned to a spray project, a pilot would learn which employees comprised his crew and which helicopter and vehicles were going on the project. The pilot and drivers/handlers (and potentially the customer as well) would convene for a pre-work meeting to talk about the project. The trucks would either be dispatched from the hangar or directly from another project. (Test. of Hall.) Before a crew deployed, Mr. Howe would purchase PPE, which was then loaded onto a truck. The CPA/pilot leading the crew was responsible for verifying that the truck contained the required PPE. (Test. of Applebee.)

Prior Investigations and Violations

11. The Department's typical procedure for investigating complaints involves the following steps: 1) respond to the complainant; 2) gather information and evidence (which includes an interview with the potential violator; 3) if there is substantive evidence of a violation, take the appropriate enforcement response (*e.g.* draft a Notice of Violation); and 4) work with the violator to make sure any compliance criteria is satisfied. (Test. of Mitchell.)

12. The Department's customary practice is to cite both the CPA and the CPO when violations occur regarding pesticide applications. (Test. of Odenthal, Mitchell.)

13. The Department has investigated multiple complaints involving Applebee Aviation. Most of the complaints were not substantiated and did not result in any enforcement action. (Test. of Odenthal; *see* Ex. R36 at 1-3.) Since July 2010, the Department has received a total of 12 complaints against Applebee Aviation. There were no violations found as to nine of the complaints. Three of the complaints were substantiated for multiple violations and led to enforcement actions against Applebee Aviation.[11] (Test. of Odenthal; *see* Ex.R36 at 2-3.)

---

[9] Mr. Hall began working for Applebee Aviation in approximately May 2009. At the time of the hearing, he was one of the only remaining employees at Applebee Aviation. (Test. of Hall.)

[10] Mr. McDaniels worked for Applebee Aviation from approximately July 2012 to late December 2015. (Test. of McDaniels.)

[11] The complaints leading to enforcement actions include an August 2010 drift violation, an April 2014 drift violation (discussed herein), and the April 2015 Ivy matter (discussed herein). (*See* Exs. R36 at 1-2, R30A at 1-11.)

14. At the time of the hearing, there was an open investigation of Applebee Aviation regarding a September 2015 drift complaint. (*See* Ex. R33A at 1-22; test. of Odenthal.)

Drift Violation

15. On or about April 16, 2014, Pilot Hall performed an aerial application of a pesticide product that included Atrazine 4L.[12] The Atrazine label prohibited applications of the pesticide to water and noted that "[d]rift potential is lowest between [wind] speeds of 2 to 10 mph * * *. Application should be avoided below 2 mph due to variable wind direction and high inversion potential." (Ex. A41 at 4-6; test. of Hall.)

16. While Mr. Hall was flying, the wind died down to below 2 mph. At the time, he was unaware that wind conditions had changed to that extent, and he continued to spray. (Test. of Hall; Ex. A41 at 7.) As a result of the wind change, and Mr. Hall's continued spraying, some of the pesticide was deposited in a creek located beyond the target unit. (Ex. A41 at 9.)

17. On December 12, 2014, the Department issued separate notices to Mr. Hall and Applebee Aviation, alleging a violation of ORS 634.372(4) (performing pesticide applications activities in a faulty, careless, or negligent manner) for allowing pesticide to drift into water. (*See* Ex. A41.)

18. Mr. Hall subsequently discussed the notice he received, and the wind conditions that were present when the violation occurred, with Mr. Applebee. Mr. Hall elected not to contest the violation and the proposed $400 fine, and Applebee Aviation chose the same course. (Test. of Hall.)

19. The Proposed Order issued to Applebee Aviation became final on December 31, 2014. (Ex. A42 at 1.) The Proposed Order issued to Mr. Hall became final on January 2, 2015 2014. (*Id.* at 2.)

20. Mr. Applebee was not directly or personally involved in the drift violation. (Test. of Odenthal.) In response to the violation, Applebee Aviation increased buffers along waterways. (Test. of Applebee.)

Rotary 2SL Violation

21. In approximately September 2014, a client provided Applebee Aviation with a chemical, Rotary 2SL, to be used for spraying over the client's property. The chemical was equivalent to another chemical whose label allowed for both forest and agricultural applications. However, the label on the Rotary 2SL only allowed for agricultural application. (Test. of Howe, Applebee.)

[12] Mr. Hall has been a helicopter pilot for approximately 10 years, and he has CPA licenses in Oregon, Washington, and Idaho. (Test. of Hall.)

22. Pilot McDaniels subsequently performed two forest applications for Applebee Aviation using the Rotary 2SL.[13] (Ex. A39 at 3-5; test. of Applebee.) There is no evidence that Mr. McDaniels applied the chemical in an unsafe manner. (Test. of Odenthal.)

23. Upon hearing about the Rotary 2SL matter, Applebee Aviation informed its employees that Rotary 2SL was not to be used in forestry applications. (Test. of Howe.) Before the Department issued a Notice of Violation regarding the matter, Mr. Applebee instituted a protocol requiring that every chemical container have a checklist sticker placed upon it. (Test. of Applebee; *see* Ex. R38.) Under the new protocol, the customer, the applicator, and an agent from Applebee Aviation would sign the sticker to confirm that the chemical had been inspected and was appropriate for the intended application. Mr. Applebee also instituted a policy requiring that Applebee Aviation source and confirm all chemicals intended for jobs to prevent the application of improper, outdated, or contaminated pesticides. (Test. of Applebee.) To this end, in approximately the summer of 2015, Mr. Howe went through all the chemical barrels at Applebee Aviation, read the labels, and put the checklist sticker on them. (Test. of Hall.)

24. On September 25, 2015, the Department issued separate notices to Mr. McDaniels and Applebee Aviation, alleging two violations of ORS 634.372(2) (prohibiting the intentional or willful application of a pesticide in a manner inconsistent with its labeling) for applying a pesticide to a site for which it was not labeled. (*See* Ex. A39.)

25. The Proposed Order issued to Applebee Aviation became final on October 9, 2015. (Ex. A40 at 1.)

26. Mr. Applebee was not directly or personally involved in the Rotary 2SL violation. (Test. of Odenthal.)

PPE at Applebee Aviation

27. Pesticide containers must have labels that are approved by the U.S. Environmental Protection Agency (EPA) and registered with the Department. Each label contains information on how to use the pesticide and what specific equipment (*i.e.* PPE) must be used during its handling. The safety information contained on the label is considered the minimum standard by which to abide and sets forth the minimum requirements for PPE. (Test. of Odenthal.) A common axiom in the pesticide industry is "The label is the law." (Test. of Howe, Odenthal.)

28. The EPA, in coordination with federal OSHA, has defined the requirements for PPE. OR-OSHA has, in turn, adopted those definitions. For example, sunglasses do not meet the criteria contained in the EPA's definition of "protective eyewear." (*See* 40 CFR §170.240(c)(7); test. of Odenthal.)

29. The pilots were responsible for training drivers and handlers at the job sites regarding PPE. (Test. of Applebee.) Each pilot working with Applebee Aviation had an Applebee

[13] It is reasonable to infer that Mr. McDaniels either did not read the label, that he read the label and did not understand it, or that he read the label and chose to disregard that the chemical was not to be used for forest applications.

Aviation credit card and was authorized to make PPE purchases (*e.g.* gloves, goggles, *etc.*) with the card while out in the field. (Test. of Howe, Applebee.) Applebee Aviation never questioned the PPE purchases made by the pilots. (Test. of Hall.)

30. In April 2015, PPE supplies were located in the storage area of the batch trucks. (Test. of Hall.) A respirator was not required for any of the chemicals Applebee aviation was spraying in April 2015. (Test. of Odenthal, Cooke.) It is not necessary to wear PPE while inside a truck at the project site. (Test. of Odenthal.)

31. From July 2014 until the late fall of 2015, John Metzer worked for Applebee Aviation as a batch truck driver. He worked on all the crews, including with pilots Clark, McDaniels, and Hall. In the field, the PPE available to him included latex gloves from NAPA that went to the wrist and long-sleeve shirts. During the last three to six months of his employment, he also had access to coveralls. During the last six months or so of his employment, Applebee Aviation informed the drivers/handlers (such as Mr. Metzer) that they needed to wear thicker chemical gloves that extended past the wrist. The handlers did not like wearing the thicker, longer gloves because they made it more difficult to perform their duties. Although Mr. Applebee required the handlers to use the thicker, longer gloves, pilots with whom Mr. Metzer worked did not require him to wear such gloves in the field. Although Mr. Metzer was aware that the batch trucks each had first aid kits, no one ever told him the kits contained any eyewash. He did not know of any eyewash on the batch trucks, except for bottled water that could potentially have been used for eyewash purposes. Some of the pilots with whom Mr. Metzer worked expected the crew members to work at a fast pace. In meetings, Mr. Applebee would instruct crew members to take their time, be safe, and do things correct the first time around. (Test. of Metzer.)

32. In 2014 and 2015, Kevin Vanderlei worked for Applebee Aviation. His duties included driving a batch truck and a one-ton truck, [14] mixing chemical concentrates, and hauling chemicals. He worked on multiple crews, including with pilots Clark and Hall. In April 2015, he was working with an Applebee Aviation crew in Roseburg, Oregon under the supervision of Mr. Clark. Applebee Aviation ultimately terminated Mr. Vanderlei's employment.[15] He has submitted an OSHA claim regarding work he performed for Applebee Aviation in Washington. (Test. of Vanderlei; *see* Ex. A2.)

33. Pilot McDaniels did not receive any training from Applebee Aviation regarding PPE. (Test. of McDaniels.) He was unaware that Applebee Aviation had any training materials for drivers/handlers until he found a training manual in one of the trucks. (Ex. A3 at 60; test. of Odenthal.)

34. Although the pilots/CPAs were responsible for PPE issues for their crews during spray projects, the overall responsibility for PPE fell to the operator, Mr. Applebee. (Test. of

[14] The one-ton trucks contained the chemicals, fuel, tools, and some gear. (Test. of McDaniels.)

[15] At hearing, Mr. Vanderlei testified that he was fired for reporting leaky valves on an Applebee Aviation helicopter. (Test. of Vanderlei.) However, Mr. Clark testified that Mr. Vanderlei was actually fired for insubordination and vandalism. (Test. of Clark.)

Babbitt.) In Mr. Odenthal's opinion, Mr. Applebee had an obligation to pay attention to what the pilots/CPAs and drivers/handlers were doing in the field, and he was ultimately responsible for the actions of his employees and agents. (Test. of Odenthal.)

Darryl Ivy and PPE

35. Darryl Ivy worked for Applebee Aviation from approximately April 8, 2015 to April 26, 2015. (*See* Ex. A3 at 19; test. of Ivy.) He had previously worked as a helicopter mechanic. His employment with Applebee Aviation marked the first time he worked with pesticides. (Test. of Ivy; *see* Ex. A3 at 36.)

36. Mr. Applebee hired Mr. Ivy as a truck driver after meeting with him briefly at the hangar and discussing Mr. Ivy's qualifications. Mr. Ivy filled out employment paperwork, and within approximately 1.5 hours he was headed to Roseburg to work on the Seneca Jones project for Applebee Aviation. (Test. of Ivy; Ex.A3 at 92.) Mr. McDaniels was the pilot/crew leader on that project. While at the project site, in addition to driving, Mr. Ivy mixed chemicals, handled concentrated pesticides, loaded chemicals onto the helicopter, and fueled the helicopter. (Test. of McDaniels, Howe, Ivy.)

37. Mr. Ivy received no safety, hazardous substance, or PPE training from Applebee Aviation prior to joining the Seneca Jones project. The only training he received occurred on-the-job at the project site, and consisted of him observing Mr. McDaniels and the other driver/handler. Mr. Ivy characterized such training as "monkey see, monkey do." (Test. of Ivy; *see* Ex. A3 at 36.)

38. Applebee Aviation provided Mr. Ivy with one or two orange long-sleeved cotton shirts and black rubber gloves that went to the wrist. Mr. Ivy was not aware until he had worked for Applebee Aviation for three or four days that he was supposed to launder his clothes each day. (Test. of Ivy; Ex. A3 at 37, 47.)

39. After working for Applebee Aviation for approximately a week, Mr. Ivy learned that Mr. McDaniels had a company credit card that could be used to purchase PPE. Mr. McDaniels purchased gloves for Mr. Ivy that only went to the wrist. Mr. Ivy elected to purchase his own Mr. Clean rubber gloves that went up to the elbow. Mr. McDaniels told Mr. Ivy that they were the wrong type of gloves for the job. (Test. of Ivy; Ex. A3 at 47.)

40. Mr. Ivy was not aware of any soap, water, or paper towels available to him at the project site for washing purposes.[16] He bought his own "wet wipes" to clean his hands and other areas, if necessary. (Ex. A3 at 48, 60; test. of Ivy.)

41. Mr. Ivy took many videos while working in the field on the Seneca Jones project. Driver/handler Robert Taylor also took some video footage of Mr. Ivy at the project site. (Test. of Ivy; *see* Ex. A43.) The videos focus primarily on drift and exposure issues. (Test. of

[16] During a May 27, 2015 interview with OR-OSHA and Department personnel, Mr. McDaniels reported that some dish soap and a roll of shop towels were stored in a tunnel box on the side of the one-ton truck. (Ex. A3 at 59.) More likely than not, Mr. Ivy was unaware of those supplies.

Odenthal; *see, e.g.*, Ex.A43 at Videos C, G, H, Q, R, S, AA, BB, KK, MM.) The only chemicals clearly identified in any of Mr. Ivy's videos are Velossa and Atrazine. (Test. of Odenthal; *see* Ex. A43.)

42. Video B shows a faulty seal on the batch truck. (Test. of Odenthal; Ex. A43 at Video B.) The Department did not notify Applebee Aviation about the presence of the bad seal until issuing the Emergency Suspension Order in September 2015. (Test. of Odenthal; *see* Ex. A25 at 7, 9.)

43. Video D shows Mr. Ivy and Mr. Taylor loading a helicopter with chemical. Mr. Ivy is wearing leather gloves and no eye protection, and Robert Taylor is wearing no gloves and no eye protection. (Test. of Odenthal; *see* Ex. A43 at Video D.) There could be potential PPE violations shown in the video, but it is unknown what chemical is being handled and what PPE requirements are on the label. (Test. of Odenthal.)

44. Video F shows open chemicals being poured and/or mixed. Mr. Ivy is wearing an orange long-sleeved shirt, black gloves, and no protective eyewear or apron. (Ex. A43 at Video F.) Video GG shows Mr. Ivy rinsing barrels while wearing black gloves and no goggles or apron. (*Id.* at Video GG.)

45. Video II shows Mr. Ivy and Mr. Taylor reloading an Applebee Aviation truck. Mr. Ivy has on yellow gloves and no goggles or apron. Mr. Taylor is not wearing any gloves, goggles, or apron. (Ex. A43 at Video II.) Video PP shows Mr. Ivy stating that he got the chemical Atrazine on his face and mouth and that there was no water with which to clean off the chemical. He states in the video that he used some wet wipes he had personally purchased to clean his face and mouth. (*Id.* at Video PP.)

46. A still photo pulled from a video shows a pair of leather gloves on top of an Applebee Aviation batch truck. (Ex. A3 at 310.) Leather gloves do not meet PPE requirements for "chemical-resistant gloves" because they are porous. (Test. of Odenthal.)

47. On April 26, 2015, Mr. Ivy showed Mr. McDaniels blisters that were on his tongue, lip, neck, and arms. Mr. McDaniels instructed Mr. Ivy to go to the doctor if he had concerns. (Test. of Ivy; Ex. A3 at 61.) Mr. Ivy quit employment with Applebee Aviation that day. (Ex. A3 at 63.)

ODA and OR-OSHA Investigation

48. In 2006, the Department and the Oregon Department of Consumer and Business Services, Occupational Safety and Health Division (OR-OSHA) entered into a Memorandum of Agreement (MOA). (Ex. R8B.) The MOA is intended to clarify the respective roles of the Department and OR-OSHA. OR-OSHA is charged with enforcing health and worker safety standards, and has jurisdiction when there is an employer/employee relationship. The Department, on the other hand, is charged with enforcement relating to licensing and the use of particular chemical products. (*See id.* at 2-3; test. of Cooke.) Pursuant to the MOA, the Department and OR-OSHA must coordinate enforcement actions where Worker Protection

Standard (WPS) violations are found.[17] (Ex. R8B at 4.)

49. An April 26, 2015 Oregon Emergency Response System (OERS) incident report states, in part:

> Hazmat 1 reported a male subject was contaminated by a low-toxicity herbicide. Occurred somewhere on BLM land and has been ongoing for 2 weeks due to inadequate workplace safety. Herbicide is identified as Atrazine. It is reported [th]at the workers are not provided proper safety gear while working with this herbicide and that the helicopter releases the herbicide overhead while they're working. The subject is Darryl Ivy * * *. Subject quit his job today and some of the information provided

[17] The Worker Protection Standard (WPS), adopted by the EPA, is designed to protect workers and pesticide handlers who conduct activities in or on farms, forests, nurseries, and greenhouses from risks of illness or injury due to pesticide exposure. 40 CFR § 170.1. For example, 40 CFR §170.240 pertains to PPE and states, in part:

> (a) [A]ny person who performs tasks as a pesticide handler shall use the clothing and personal protective equipment specified on the labeling for use of the product.
>
> (b)(1) [P]ersonal protective equipment (PPE) means devices and apparel that are worn to protect the body from contact with pesticides or pesticide residues, including, but not limited to, coveralls, chemical-resistant suits, chemical-resistant gloves, chemical-resistant footwear, respiratory protection devices, chemical resistant aprons, chemical-resistant headgear, and protective eyewear.
>
> * * * * *
>
> (c)(5)(i) Gloves shall be of the type specified on the pesticide product labeling. Gloves made of leather, cotton, or other absorbent materials may not be worn while mixing, loading, applying, or otherwise handling pesticides, unless gloves made of these materials are listed as acceptable for such use on the product labeling.
>
> * * * * *
>
> (7) When ''protective eyewear'' is specified by the product labeling, one of the following types of eyewear must be worn:
> (i) Goggles.
> (ii) Face shield.
> (iii) Safety glasses with front, brow, and temple protection.
> (iv) Full-face respirator.
>
> * * * * *
>
> (e)(1) [T]he handler employer shall assure that personal protective equipment is used correctly for its intended purpose and is used according to the manufacturer's instructions.

> may be escalated due to subject being disgruntled. Subject complained of blisters in his mouth and a swollen airway. After quitting his job today the subject went to a restaurant before seeking medical treatment. Subject arrived at Mercy Medical Center in Douglas County at approximately 1745. The ER doctor is looking into toxicology reports and will have those available for Hazmat tomorrow. Meanwhile the subject was decontaminated and his clothing secured at the recommendation of Hazmat 1[.]

(Ex. A1 at 2.)

50. On April 27, 2015, the Department received a copy of the OERS report.[18] (Ex. A1 at 1-2; test. of Odenthal.) Michael Odenthal, the lead investigator for the Department's pesticide program, consulted with Garnet Cooke at OR-OSHA and the two determined that OR-OSHA would take the lead in investigating the matter. (Test. of Odenthal, Cook.) Mr. Odenthal participated to some extent in interviews and assisted Ms. Cooke with review of pesticide labels. He did not take any notes of the interviews. (Test. of Odenthal.)

51. The investigation was initially focused on Mr. Ivy's potential exposure to pesticides. However, for the Department, the focus eventually shifted to the issue of adequate PPE. (Test. of Odenthal.)

52. On April 29, 2015, Mr. Odenthal and Ms. Cooke met with Mr. Applebee at the hangar. (Test. of Applebee, Odenthal; *see* Ex. A3 at 19-21, 23-24.) Mr. Applebee was not entirely certain of the purpose of the meeting, but he knew it had something to do with Mr. Ivy. Mr. Howe was initially present at the meeting, but he left after becoming upset. Mr. Applebee had assumed that Mr. Howe would take the lead in the meeting, and he felt unprepared after Mr. Howe left. At the time of the hearing, Mr. Applebee could not recall specific details of the conversations he had with Ms. Cooke and Mr. Odenthal on April 29, 2015. (Test. of Applebee.)

53. At the time of the April 29, 2015 meeting, Applebee Aviation employed three aerial spray crews, each of which consisted of a pilot and two drivers. The crews operated out of various locations and would stay in hotels when necessary. (Ex. A3 at 19.) Mr. Applebee could not substantiate at that time that Applebee Aviation engaged in or offered any hazardous substance training to its employees/agents.[19] (Test. of Odenthal; *see* Ex. A3 at 20.)

54. Mr. Applebee showed Ms. Cooke and Mr. Odenthal one of Applebee Aviation's batch trucks. The truck contained a very small container (approximately 7.5 ounces) of soap with a hand pump strapped to the back. Ms. Cooke and Mr. Odenthal observed no emergency eyewash units. (Ex. A3 at 20, 33; test. of Odenthal.) Ms. Cooke and Mr. Odenthal observed single-use Black Lightening nitrile examination gloves in one of the Applebee Aviation trucks. (Ex. A3 at 32; test. of Odenthal; *see* Ex. A3 at 114.)

---

[18] Mr. Ivy did not report anything to the Department directly. (Test. of Odenthal.)

[19] In approximately late June 2015, Applebee Aviation developed a written Hazard Communication Program and provided Ms. Cooke with a copy of the program. (*See* Ex. A3 at 284-290, 293.)

55. On May 20, 2015, Ms. Cooke, Mr. Odenthal, and others met with Mr. Taylor, who had worked with Mr. Ivy on the Seneca Jones project. During the interview, Mr. Taylor reported that on April 26, 2015, Mr. Ivy told him that he had dropped an Atrazine barrel on the ground, that some had splashed up onto his face, and that he had cleaned his face with wet wipes/baby wipes. (Ex. A3 at 53-55; test. of Odenthal.)

56. On May 27, 2015, Mr. Odenthal and Ms. Cooke interviewed Mr. McDaniels. (Ex. A3 at 26, 57-63; test. of Odenthal.) Mr. McDaniels reported that his crew was responsible for letting him know if they lacked (or were getting low on) PPE. (Ex. A3 at 57.) He also reported that there was a case of bottled water at the project site, as well as two pint bottles for eye flushing. (*Id.* at 59.)

57. On May 29, 2015, Ms. Cooke, Mr. Odenthal, and others met with Mr. Ivy. (Ex. A3 at 27, 38-50; test. of Odenthal.) Mr. Ivy reported that he was directly sprayed and misted with pesticides while working for Applebee Aviation, that he had concerns about rinsing empty containers with very little water, and that he had been splashed across the face with chemical and water while working, causing him to develop welts and blisters on his face. (Ex. A3 at 40, 42-44.)

58. During the OR-OSHA investigation, Mr. Ivy provided Ms. Cooke with the names of the chemicals he claims were used on the Seneca Jones project. (*See* Ex. A3 at 46.) Applebee Aviation also provided Mr. Odenthal and Ms. Cooke with a list of the application records for the project. (*See id.* at 71-72; test. of Odenthal.)

59. While working on the Seneca Jones project, the crew handled the following chemicals: Velossa;[20] Clean Slate; Transline; Element 4; Agri Star 2,4-D LV6; Weedone 2,4D; Sipcam Atrazine 4L; Drexel Atrazine 4L; and Mana Atrazine 4L.[21] (*See* Exs. A3 at 71-73, A25 at 6.) Ms. Cooke compiled a list of the PPE that was required for each chemical product used on the project. (*See* Ex. A3 at 73.)

60. The Velossa label states "DANGER! PELIGRO!" and "CAUSES EYE DAMAGE." Ex. A19 at 1, 2, 4.) The precautionary statements on the label state, in part:

> [C]auses irreversible eye damage. * * *. Do not get in eyes or on clothing. Wear protective eyewear (goggles, face shield, or safety glasses).

(*Id.*) Velossa does not require gloves for handling. (*See id.* at 4.)

61. The Clean Slate label states, in part, that "[o]nly protected handlers may be in the

[20] At hearing, Mr. McDaniels confirmed that he sprayed the Velossa while Mr. Ivy was on his crew. (Test. of McDaniels.)

[21] A table at Exhibit A3 at 72 shows the amount of each herbicide applied on the project. Atrazine and Velossa comprise the vast majority of the herbicides used. (*See* Ex. A3 at 72.)

area during application" and that applicators and other handlers must wear "[c]hemical-resistant gloves made of any waterproof material" and "[p]rotective eyewear." (Ex. A23 at 2-3.)

62. The Transline label states that the chemical causes moderate eye irritation and is harmful if absorbed through the skin. The label requires that applicators and other handlers wear "[c]hemical resistant gloves made of any waterproof material." (Ex. A3 at 267.)

63. The Weedone label requires that handlers wear chemical-resistant gloves and a chemical-resistant apron. (Ex. A3 at 175.) The Element 4 label states that the chemical "[c]auses moderate eye irritation." (Ex. A21 at 4.) The only PPE required for this chemical are long-sleeved shirts, pants, shoes, and socks. (*See id.*)

64. The Agri Star 2, 4-D LV6 label states that "[s]ome materials that are chemical-resistant to this product are neoprene or nitrile rubber[.]" (Ex. A3 at 159.) The label requires that all mixers, loaders, applicators, flaggers, and other handlers wear "[c]hemical-resistant gloves" and "[c]hemical-resistant apron when applying with any handheld nozzle or equipment, mixing or loading, cleaning up spills or equipment, or otherwise exposed to the concentrate." (*Id.*)

65. The Sipcam Atrazine 4L label states that "[s]ome materials that are chemical-resistant to this product are barrier laminate or butyl rubber or nitrile rubber[.]" (Ex. A3 at 187.) The label requires that mixers, loaders, all other applicators, flaggers, and other handlers wear "chemical-resistant gloves" and "chemical-resistant apron when mixing/loading, cleaning up spills, cleaning equipment, or otherwise exposed to the concentrate." (*Id.*) The Drexel Atrazine 4L label states that the chemical causes moderate eye irritation and is harmful if swallowed or absorbed through skin. The label also requires that mixers, loaders, all other applicators, flaggers, and other handlers wear "chemical-resistant gloves such as polyethylene or polyvinyl chloride" and a "chemical-resistant apron when mixing/loading, cleaning up spills, cleaning equipment, or otherwise exposed to the concentrate." (*Id.* at 255.) The Mana Atrazine 4L label contains the same PPE requirements as the Sipcam and Drexel labels. (*See* Ex. A22 at 2.)

66. In approximately August 2015, the Department received a draft copy of Ms. Cooke's OR-OSHA report. (Test. of Babbitt.) The draft report stated, in part:

> Employee interviews revealed a lack of training, poor work practices and general lack of awareness of cross[-]contamination principles. The indifferent attitude toward the degree of hazard posed by the herbicides was a contributing factor to splashes when pesticide containers were rinsed.
>
> Aerial forestry herbicide applications have unique practices that impact employees' exposures to herbicides and in this instance a few thousand acres during a month's time frame. These practices include:
>
> • When herbicides are applied adjacent to the landing, the drivers seek refuge in the cabs of the trucks.

• Employees do not decontaminate prior to entering the cabs, and therefore the cabs become contaminated.

* * * * *

• Employees do not decontaminate the vehicles at the end of the workday.

* * * * *

In June Mr. Ivy met with the Federal Aviation Administration and provided 15 videos and his medical records to them. * * * * *. None of the videos provided at that time le[n]d support to the violations being alleged[.]

* * * * *

Additional videos and photographs were obtained from Darryl Ivy in August 2015 which substantiated lack of proper protective equipment, decontamination supplies and poor work practices.

(Ex. A3 at 20-21.)

67. Based on the findings in the OR-OSHA report, Mr. Odenthal concluded that Applebee Aviation performed pesticide application activities in a faulty, careless, or negligent manner, and that the following specifically occurred during the period April 9 through April 26, 2015:

• Applebee Aviation's agents or employees handled pesticide products and spray mixtures as they mixed loads and loaded the helicopter to make applications;

• The agents or employees had not been provided with pesticide safety training prior to these activities, nor were they, during application activities, consistently provided with water or other decontamination materials; and

• Aviation's failure to follow label requirements, provide sufficient safety materials, equipment and training, having workers work without the required personal protective equipment, and having workers use improperly securable equipment seriously endangered worker/handlers and thus the public's health and safety.

(*See* Ex. A25 at 8.)

68. In approximately September 2015, OR-OSHA issued a Letter of Corrective Action to Applebee Aviation. (Test. of Cooke; *see* Ex. R10A at 1.) They subsequently settled the matter. (Test. of Applebee.)

Relevant events between September 25, 2015 and October 2, 2015

69. In 2009, the Department and the U.S. Department of the Interior, Bureau of Land Management (BLM) entered into a Memorandum of Understanding (MOU) specifying that pesticide applications conducted by non-BLM employees on BLM property must be licensed pursuant to the Oregon Pesticide Control Act. (Ex. R8A at 1; test. of Mitchell, Babbitt.)

70. Sometime prior to September 29, 2015, Applebee Aviation secured a large contract with the BLM. Applebee Aviation was scheduled to perform its first pesticide applications on BLM lands in Oregon on October 1 and 2, 2015.[22] (Test. of Applebee, Howe.)

71. On or about September 20, 2015, Mr. Applebee went to the Jarbridge Wilderness in Nevada for a hunting trip. He was at an elevation of approximately 10,000 feet, and he was out of cell phone range until the evening of September 27, 2015. During Mr. Applebee's trip (and absence from Oregon), Mr. Howe was in charge at Applebee Aviation. (Test. of Applebee.)

72. On September 25, 2015, based on Mr. Odenthal's determinations upon reviewing the OR-OSHA report, a review conducted by Michael Babbitt (a case reviewer for the Department's pesticide enforcement unit),[23] and Mr. Mitchell's determinations, the Department issued the First Civil Penalty and First Emergency Suspension Order [hereinafter "Emergency Suspension Order"] to Applebee Aviation.[24] (Test. of Babbitt, Mitchell; *see* Ex. A25 at 2-16.)

73. The Emergency Suspension Order includes the following allegations:

> • During application activities in April 2015, some of the crew did not wear all of the PPE required by the product labels of the pesticide products they were handling;
>
> • During application activities in April 2015, Applebee Aviation did not provide the crew with water or other decontamination materials, such as could be used in the event of exposure to a pesticide;
>
> • During application activities in April 2015, Respondent used a pesticide mixture tank that had a defective seal on the top hatch; and

[22] At hearing, Mr. Applebee testified that the October 1 and 2, 2015 sprays were just one small piece of the long-term contract. (Test. of Applebee.)

[23] As a case reviewer, Mr. Babbitt reviews investigative reports for potential enforcement actions, makes recommendations to Mr. Mitchell, and prepares notices of violation. (Test. of Babbitt.)

[24] Mr. Babbitt and Mr. Mitchell drafted the Emergency Suspension Order. (Test. of Odenthal.)

> • Applebee Aviation did not provide the crew with training on how to minimize hazards to their safety and health while working around pesticides.

(Ex. A25 at 7.) In Mr. Odenthal's opinion, Mr. Applebee is personally responsible for the application of pesticides in a faulty, careless, negligent manner with regard to PPE because Mr. Applebee did not ensure that Applebee Aviation provided necessary safety training, plans, and equipment to its employees and agents. (Test. of Odenthal.)

74. Prior to the Department's issuance of the Emergency Suspension Order, Applebee Aviation did not receive any reasonable notice from the Department that its PPE and safety training were deficient. (Test. of Applebee.)

75. The Emergency Suspension Order states, in part, that Applebee Aviation's CPO license "is hereby suspended today, September 25, 2015. Effective immediately you must stop providing pesticide application services, or applying pesticides onto the properties of others in Oregon until further order of the Department." (Ex. A25 at 2.)

76. The Department's standard practice is to serve a corporation via the corporation's registered agent. (Test. of Odenthal, Babbitt, Mitchell; *see* Ex. R37A.) Consistent with that practice, the Department set out to serve the Emergency Suspension Order to Applebee Aviation's registered agent, Mr. Applebee, on September 25, 2015. (Test. of Babbitt; *see* Exs. A38, R37A.) Because registered or certified mail could take as long as five or more days, the Department determined that personal service to Applebee Aviation's registered agent would allow service to be accomplished more quickly.[25] (Test. of Mitchell.)

77. At approximately 2:00 p.m. on September 25, 2015, Mr. Babbitt contacted ABC Legal to request that the company serve the Emergency Suspension Order to Applebee Aviation, Inc. A few minutes later, Becky Jewett, an account manager with ABC Legal, asked Mr. Babbitt via email whether the service was to be to 39495 NW Bledsoe Creek Lane, in Banks. In response, Mr. Babbitt sent the following email to Ms. Jewett:

> The registered agent, who is also the president, is on Bledsoe Creek Lane, the hangar is on Fisher Road. We typically serve to the registered agent, and that was our intent in this case, so yes, we intended service to Bledsoe Creek Lane.

(Ex. R37A; test. of Babbitt.)

78. At approximately 4:36 p.m. on Friday, September 25, 2015, ABC Legal personally served the Emergency Suspension Order to 39495 NW Bledsoe Creek Lane, Mr. Applebee's address of record. An unidentified female (noted to be a "descendent, co-resident" between 25

[25] At hearing, Mr. Mitchell testified that the Department typically issues *non-emergency* notices of suspensions and civil penalties via certified mail, with a follow-up notification via phone to the recipient of the notice, given how long it can take for the recipient to actually receive the certified or registered mail. (Test. of Mitchell.)

and 35 years of age) accepted personal service. (*See* Ex. A26 at 2; capitalization omitted.) In addition, on September 28, 2015, the Department mailed a copy of the Emergency Suspension Order to 39495 NW Bledsoe Creek Lane, addressed to Applebee Aviation, "c/o Michael Applebee, Registered Agent." (*Id.* at 4.) The copy was sent via first class mail, and was marked with the date, time, and place of substituted service. (*Id.*)

79. On September 25 and 26, 2015, while still in the Jarbridge Wilderness and out of cell phone range, Mr. Applebee had no knowledge of the Emergency Suspension Order that was served on September 25, 2015. (Test. of Applebee.)

80. On September 26, 2015, Applebee Aviation made eight commercial pesticide applications to various properties in Oregon. (Exs. A11, A12.)

81. At 12:18 p.m. on September 27, 2015, Mr. Mitchell sent an email to Mr. Applebee, with an attachment that contained the Emergency Suspension Order.[26] The text of the email stated, in relevant part:

> The [Department] has concluded it's [*sic*] investigation and have issued the following enforcement action. Please read the documents carefully. I will serve as your primary point of contact to assist with the reinstatement process of the CPO license issued to Applebee[] Aviation. Please contact me if you have any questions[.]

(Ex. A4 at 1.)

82. Mr. Applebee first saw Mr. Mitchell's September 27, 2015 email on the evening of September 27, after he descended from the Jarbridge Wilderness and his cell phone service resumed. At that time, Mr. Applebee could read the text of the email, but he was unable to download and read the email attachment containing a copy of the Emergency Suspension Order. (Test. of Applebee.)

83. On September 28, 2015, Applebee Aviation made four commercial pesticide applications in Oregon. The applications began at 6:54 a.m. and were completed by 9:50 a.m. (Ex. A13 at 2-5.)

84. On September 28, 2015, Mr. Applebee left Nevada and began the trip home to Oregon. Sometime that day, he was able to download and access the Emergency Suspension Order on his phone. He was unable to read any details of the 16-page order because he did not have his glasses with him. He understood, however, that the email and attached order were regarding a suspension of Applebee Aviation's CPO license. He forwarded the email and attached order to his wife and to Mr. Howe sometime during the afternoon of September 28. Also sometime that afternoon, he called the Department to inform Mr. Mitchell that he would be

[26] At hearing, Mr. Mitchell explained that it is common for him to work outside of the typical Monday through Friday work schedule, and that his purpose in sending the email was to convey that the Department was willing to work with Mr. Applebee and Applebee Aviation on the license issue. (Test. of Mitchell.)

at the Department's office the following morning at 9:00 a.m. to discuss the license issue. (Test. of Applebee.)

85. Mr. Applebee arrived at his home between approximately 11:00 p.m. and midnight on September 28. He did not attempt to read the Emergency Suspension Order once he arrived home because his printer was not working. (Test. of Applebee.)

86. On September 29, 2015, Applebee Aviation made two commercial pesticide applications in Oregon. The applications began at 6:56 a.m. and were completed by 9:40 a.m.[27] (*See* Ex. A14 at 2-3.)

87. On September 29, 2015, Mr. Applebee arrived at the Applebee Aviation office at approximately 7:00 a m. Mr. Howe and Ms. May were already present. At that time, Mr. Applebee had not yet closely read the Emergency Suspension Order. (Test. of Applebee.) Mr. Howe only became aware of the emergency suspension that morning when he read the forwarded email Mr. Applebee had sent to him on September 28, 2015. (Test. of Howe.) After some discussion with Mr. Howe and/or with Ms. May, Mr. Applebee directed Ms. May to notify all relevant persons at Applebee Aviation that operations were shut down. At the time, Mr. Applebee did not know where any of the spray crews were located and he was not aware of what projects might be performed that day. At Mr. Applebee's request, Mr. Howe accompanied him to the Department's office in Salem, where they arrived sometime around 9:00 a.m. (Test. of Applebee.)

88. Sometime after 9:00 a.m. on September 29, 2015, Mr. Applebee and Mr. Howe met with Mr. Odenthal and Mr. Mitchell to discuss the Emergency Suspension Order. (Test. of Applebee, Howe, Odenthal, Mitchell.) At Mr. Applebee's request, Mr. Mitchell went through the Order page by page. (Test. of Odenthal, Howe; Ex. A5 at 1.) Mr. Mitchell explained that Applebee Aviation was to make no further pesticide applications in Oregon until the requirements in the Order were satisfied and the license suspension was lifted. (Test. of Mitchell, Odenthal.) Mr. Mitchell discussed what actions Applebee Aviation needed to take to be eligible for reinstatement of the CPO license. (Ex. A5 at 1; test of Howe.)

89. During the meeting, Mr. Applebee asked whether there could be an exception to the CPO license requirement for the scheduled BLM sprays later that week. Mr. Mitchell stated that there were no exceptions. (Test. of Odenthal, Mitchell; Ex. A5 at 1.) Mr. Applebee asked Mr. Mitchell if the Department had jurisdiction on federal lands. In response, Mr. Mitchell mentioned that the Department did not have jurisdiction on tribal lands absent a memorandum of understanding. (Test. of Applebee, Mitchell.) Mr. Applebee suggested that Oregon does not follow federal laws with regard to cannabis/marijuana, so Oregon should not be regulating federal BLM land. (Test. of Howe, Mitchell.) Because Mr. Applebee seemed to be challenging the Department's interpretation of its jurisdiction on federal lands, Mr. Mitchell told him that it may be a good question for a lawyer. (Test. of Mitchell.) Mr. Mitchell also mentioned that he could get back to Mr. Applebee with more information on the jurisdiction issue. (Test. of Applebee.)

[27] The Department refers to the applications made on September 26, 28, and 29, 2015 as the "forest applications." (*See, e.g.,* February 15, 2016 Notice to Michael Applebee at 7.)

90. During the meeting, the possibility of Applebee Aviation's CPO license being reinstated as early as the following day was mentioned. (Test. of Odenthal.) Mr. Odenthal told Mr. Applebee and Mr. Howe that Applebee Aviation could go ahead and mobilize its crews to the BLM work site, in anticipation of satisfying the license reinstatement requirements, and having its CPO license reinstated, in time to perform the BLM jobs. Mr. Odenthal did not tell Mr. Applebee and Mr. Howe that Applebee Aviation could spray pesticides on the BLM land while Applebee Aviation's CPO license was suspended. (Test. of Mitchell, Odenthal, Howe.) In Mr. Odenthal's opinion, it was reasonable for Mr. Applebee and Mr. Howe to believe, by the end of the meeting, that the CPO license would soon be reinstated. (Test. of Odenthal.)

91. Neither Mr. Applebee nor Mr. Howe mentioned during the meeting that Applebee Aviation had performed commercial applications in Oregon on September 26 and 28, 2015, and that there were additional applications occurring in Oregon that very morning. (Test. of Mitchell.) Mr. Howe and Mr. Applebee were primarily focused on what they needed to do to correct any deficiencies so the Department would reinstate the CPO license and Applebee Aviation could perform the BLM job scheduled for October 1 and 2, 2015. (Test. of Howe.) At Mr. Applebee's direction, Mr. Howe wrote a check to the Department to pay the civil penalty. (Ex. A5 at 1.)

92. Sometime after the September 29, 2015 meeting, Mr. Mitchell obtained a copy of the MOU between the Department and the BLM. (Test. of Mitchell; *see* Ex. R8A.) Mr. Mitchell did not provide a copy of the MOU to Applebee Aviation prior to October 1, 2015, and he did not engage in any further jurisdictional discussions with Mr. Applebee prior to October 1, 2015. (Test. of Applebee.)

93. At approximately 3:44 p.m. on September 29, 2015, Mr. Howe emailed a two-page written plan to the Department.[28] (Exs. A7 at 1-2, A8 at 1; test. of Applebee, Mitchell.)

94. On September 30, 2015, Mr. Mitchell responded to Mr. Howe's September 29, 2015 email, and requested a telephone conference to discuss Applebee Aviation's written plan. (Exs. A5 at 2, A8; test. of Mitchell.) Mr. Mitchell believed that the plan needed more detail, clarification, and verification. (Test. of Mitchell, Odenthal; *see* Ex. A8 at 1.)

95. On September 30, 2015, Mr. Mitchell, Mr. Odenthal, and Mr. Babbitt spoke to Mr. Howe via telephone. Mr. Mitchell went through Applebee Aviation's corrective action plan point-by-point and provided advice on how the plan could be improved to meet the Department and OR-OSHA's requirements. Mr. Mitchell also suggested that Mr. Howe contact OR-OSHA for additional advice and recommendations on improving the plan. (Ex. A5 at 2.)

96. On October 1 and 2, 2015, Applebee Aviation made commercial pesticide applications to a total of approximately 800 acres of the Crack in the Ground Fire Restoration

[28] At hearing, Mr. Applebee explained that he had tasked Mr. Howe with overseeing that Applebee Aviation came into compliance with the Department and OR-OSHA after the September 29, 2015 meeting. (Test. of Applebee.)

Project site on BLM land, pursuant to the contract Applebee Aviation had with the BLM.[29] (Test. of Applebee; Ex. A15 at 2-3.) Mr. Applebee did not inform the BLM that Applebee Aviation's CPO licensed was suspended at that time. (Test. of Applebee.) There is no evidence that any employee or agent of Applebee Aviation provided such information to the BLM. (*See* Evidentiary Record.)

97. Prior to making the BLM applications on October 1 and 2, 2015, Mr. Applebee did not ask the BLM if Oregon licensure was required for Applebee Aviation to spray on BLM land. Prior to making the applications, he also did not consult with an attorney or follow up with Mr. Mitchell or anyone at the Department to request that more clarification or guidance be provided on the jurisdiction issue. (Test. of Applebee.)

Relevant events after October 2, 2015

98. On October 5, 2015, Ms. May sent an email to Ms. Cooke with attached photos showing PPE such as Uvex safety goggles and Tyvek coveralls. (Ex. A6 at 1-7.) On October 6, 2015, Ms. Cooke forwarded the email and attachments to Mr. Mitchell. Mr. Mitchell considered the photos to be sufficient verification of appropriate PPE. (Test. of Mitchell.)

99. On October 5, 2015, Ms. May provided the Department with a three-page updated written corrective action plan, with attachments, via email. (Ex. A9; test. of Mitchell.) The attachments included a "Non-Essential Repair Log" dated May 28, 2015, and Applebee Aviation pesticide handler training acknowledgements dated October 5, 2015. (Ex. A9 at 6-15.) Mr. Mitchell and Ms. Cooke subsequently reviewed the updated plan and determined that it met the requirements for reinstatement of Applebee Aviation's license to operate as a CPO. Mr. Mitchell discussed the plan with the Department's Assistant Director, Lauren Henderson, who requested that the Department conduct an onsite inspection before reinstating Applebee Aviation's CPO license. (Ex. A5 at 2; test. of Mitchell.)

100. In Mr. Odenthal's opinion, Applebee Aviation was responsive to the Department's request for a written plan and PPE improvement. (Test. of Odenthal.) In Mr. Mitchell's opinion, Applebee Aviation came into compliance after the September 29, 2015 meeting in a rather quick manner. (Test. of Mitchell.)

101. On October 7, 2015, the Department received email correspondence from Lisa Arken, the Executive Director of Beyond Toxics, inquiring as to why Applebee Aviation was scheduled to conduct aerial spraying for the Oregon Department of Forestry while its CPO license was suspended. (Ex. R35A at 1-2; test. of Odenthal.)

102. On October 8, 2015, Mr. Mitchell and Mr. Odenthal met Mr. Applebee at the hangar. (Test. of Odenthal, Mitchell; Ex. A5 at 2.) Mr. Mitchell discussed the updated written correction action plan with Mr. Applebee and requested a visual inspection of the equipment that required repair to ensure the repairs had been completed. Mr. Applebee showed Mr. Mitchell and Mr. Odenthal tote boxes of personal protective equipment that had been prepared for use in

[29] The Department refers to those two applications as the "BLM applications." (*See* February 15, 2016 Notice to Michael Applebee at 9.)

the field. (Test. of Mitchell; Ex. A5 at 2.) Mr. Odenthal and Mr. Mitchell observed that all the PPE was new.[30] (Test. of Odenthal, Mitchell.) Mr. Applebee also showed them batch truck number 128, the truck used by the crew involved in the investigation concerning Mr. Ivy, and pointed out the repaired hatch and seal. Each hatch in batch truck 128 had a seal intact. (Ex. A5 at 2; test. of Odenthal.) Mr. Applebee reported that eyewash stations had been ordered, but had not yet arrived. Mr. Applebee also provided documentation regarding training. With regard to PPE, the Department considered Applebee Aviation in compliance, as of October 8, 2015. (Test. of Odenthal.)

103. Towards the end of the October 8, 2015 meeting, Mr. Mitchell asked Mr. Applebee whether Applebee Aviation had performed any commercial pesticide applications while its CPO license was suspended. In response to the inquiry, Mr. Applebee admitted that Applebee Aviation had performed the BLM applications on October 1 and 2, 2015. (Test. of Odenthal, Mitchell; Ex. A5 at 2.) Mr. Applebee stated that it was a big project, that he felt pressured to perform the applications despite the status of Applebee Aviation's CPO license, and that the Department did not have jurisdiction anyway because the project was on federal land. (Test. of Mitchell; Ex. A5 at 2-3.) Mr. Applebee did not, at that time, specifically disclose the September 26, 28, or 29, 2015 forest applications. (Test. of Odenthal, Mitchell.)

104. Sometime between October 8 and 13, 2015, Mr. Mitchell learned from the Oregon Department of Forestry that Applebee Aviation had made two forest applications on September 26, 2015. (Test. of Mitchell.)

105. As a result of learning that Applebee Aviation had sprayed pesticides after the suspension of its license to operate as a CPO, Mr. Mitchell determined that Applebee Aviation had violated the September 25, 2015 Order suspending its license to operate as a CPO. On October 13, 2015, the Department issued another notice to Applebee Aviation, proposing a civil penalty, revocation of the CPO license, and refusal to reissue or renew the license. (Ex. A27.) At the time, the Department was aware of only four applications that occurred while Applebee Aviation had a suspended CPO license. (Test. of Babbitt; *see* Ex. A27 at 7-9.)

106. Applebee Aviation turned down more than one pesticide application job following the September 29, 2015 Department meeting. (Test. of Howe; *see* Ex. R5A at 1, 2.)

107. On October 19, 2015, a the Department and Applebee Aviation entered into a Stipulated Preliminary Injunction in Washington County Circuit Court. The injunction ordered Applebee Aviation to immediately cease all pesticide application activities in Oregon that require a CPO license, until such time as the Department reinstates the license. The injunction also ordered Mr. Applebee to immediately cease directing or causing Applebee Aviation to engage in any pesticide application activities in Oregon, until such time as the Department reinstates the license. (Ex. A17 at 1-2; test. of Mitchell.)

108. By statute, CPOs must retain pesticide application records for three years. (Test. of

[30] At hearing, Mr. Applebee testified that after the September 29, 2015 meeting, they "threw away" all of the old PPE and began anew. (Test. of Applebee.) The new PPE included, for example, Uvex safety goggles, which were appropriate protective eyewear. (Test. of Odenthal; *see* Ex. A6 at 2.)

Odenthal; ORS 634.146.) Each separate land parcel (*i.e.* unit) requires a separate record and is considered a separate application. For a large project, such as the BLM spray, each day is considered a separate application and requires a separate record. (Test. of Odenthal.)

109. Applebee Aviation provided the Department with pesticide application records for the period September 26, 2015 through October 2, 2015. The records show the eight forest applications on September 26, the four forest applications on September 28, the two forest applications on September 29, and the two BLM applications on October 1 and 2, 2015. (*See* Exs. A11 through A16; test. of Odenthal.) In addition, an invoice shows that another unit received an application on September 26, 2015, but there is no corresponding application record. (Test. of Odenthal; *see* Ex. A16.)

110. After the Department obtained the pesticide application records showing more than four applications while Applebee Aviation's CPO license was suspended, the Department issued another notice to Applebee Aviation, which alleged 16 applications. (*See* Ex. A29, test. of Odenthal.)

CONCLUSIONS OF LAW

1. Mr. Applebee violated ORS 634.372(4) by directing Applebee Aviation to make commercial pesticide applications without a valid CPO license on October 1 and 2, 2015. Mr. Applebee did not violate ORS 634.372(4) with regard to the commercial pesticide applications Applebee Aviation made without a valid CPO license on September 26, 28, and 29, 2015.

2. Mr. Applebee has shown a pattern of misconduct relating to pesticide applications by directing Applebee Aviation to make commercial pesticide applications without a valid CPO license on October 1 and 2, 2015, by allowing a pesticide to drift off-target and into water when the label prohibited all applications to water, by allowing the application of a pesticide to a site for which it was not labeled, and by allowing pesticide handlers to perform pesticide activities without necessary PPE. Based on the current proven violations, and Mr. Applebee's violation history, the appropriate sanction is a one-year suspension of Mr. Applebee's CPA license.

3. For the violation of ORS 634.37(4), the Department may assess a civil penalty in the amount of $10,000 against Mr. Applebee.

OPINION

Oregon's Pesticide Control Act (Act) is codified at ORS Chapter 634. ORS 634.005 states, in part:

> The purpose of this chapter, which shall be known as the State Pesticide Control Act and shall be enforced by the State Department of Agriculture, is to regulate in the public interest the formulation, distribution, storage, transportation, application and use of pesticides. * * * * *. The pesticide industry of this state has achieved and maintained high standards in its formulation and use of pesticides while at the same time experiencing a

> minimum of injury to persons, property or the environment. Currently updating the law to maintain this achievement and to consider future new pesticides and problems is necessary for the protection of persons, property, wildlife and environment of this state.

See also ORS 634.055.[31]

ORS 634.306 sets forth the Department's rule-making authority with respect to the Act and states, in part:

> [The Department] may adopt rules to carry out the purposes and intent of this chapter, including but not limited to rules that:
>
> * * * * *
>
> (2) Establish and maintain classifications of the various pesticides and of the various pest control or pesticide application businesses in order to facilitate the licensing or certification and regulation of pesticide consultants, operators, applicators, private applicators and trainees. In this regard the department may take into consideration:
>
> (a) Various types, formulations and characteristics of pesticides used and their purposes.
>
> (b) Various methods of application of such pesticides.
>
> (c) Precautions required for safe and effective application of such pesticides.

ORS 634.322 sets forth the Department's enforcement powers and states, in part:

> In carrying out and enforcing the provisions of this chapter, the State Department of Agriculture is authorized:
>
> (1) To collect samples of pesticides from any source, for analysis to determine compliance with this chapter.

---

[31] ORS 634.055 states, in part:

> The Legislative Assembly hereby determines that the citizens of this state benefit from a system of safe, effective and scientifically sound pesticide regulation. The Legislative Assembly further finds that a uniform, statewide system of pesticide regulation that is consistent, coordinated and comports with both federal and state technical expertise is essential to the public health, safety and welfare and that local regulation of pesticides does not materially assist in achieving these benefits.

* * * * *

(4) In accordance with the provisions of ORS chapter 183, to revoke, suspend or refuse to issue or renew any license or certificate if it determines that an applicant, licensee or certificate holder has violated any of the provisions of this chapter.

* * * * *

(8) To enter into cooperative and reciprocal agreements with the federal government, or any of its agencies, for the purpose of enforcement of the provisions of this chapter or federal laws and regulations on the same subject matters, and to receive and expend funds pursuant to such agreements in furtherance of such purpose.

ORS 634.006 defines a "pesticide applicator" and a "pesticide operator" as follows:

(9) "Pesticide applicator" or "applicator" means an individual who:

(a) Is spraying or applying pesticides for others;

(b) Is authorized to work for and is employed by a pesticide operator; and

(c) Is in direct charge of or supervises the spraying or other application of pesticides or operates, uses, drives or physically directs propulsion of equipment, apparatus or machinery during the spraying or other application of pesticides, either on the ground or, if certified under ORS 634.128, by aircraft.

(13) "Pesticide operator" means a person who owns or operates a business engaged in the application of pesticides upon the land or property of another.

The Department must prove its allegations against Mr. Applebee by a preponderance of the evidence, and it must also establish that the proposed sanctions are appropriate under the facts of the case. *See* ORS 183.450(2) ("The burden of presenting evidence to support a fact or position in a contested case rests on the proponent of the fact or position"); *Harris v. SAIF*, 292 Or 683, 690 (1982) (general rule regarding allocation of burden of proof is that the burden is on the proponent of the fact or position); *Metcalf v. AFSD*, 65 Or App 761, 765 (1983) (in the absence of legislation specifying a different standard, the standard of proof in an administrative hearing is preponderance of the evidence). Proof by a preponderance of the evidence means that the fact finder is persuaded that the facts asserted are more likely than not true. *Riley Hill General Contractor v. Tandy Corp.*, 303 Or 390, 402 (1987).

1. Pesticide applications from September 26, 2015 to October 2, 2015

Pursuant to ORS 634.372(9), a person may not, "[a]s a pesticide operator, engage in the business of * * * applying pesticides upon the land or property of another, without first obtaining and maintaining a pesticide operator's license." ORS 634.372(4) prohibits a person from performing pesticide application activities "in a faulty, careless or negligent manner."[32]

The Department contends that Mr. Applebee violated ORS 634.372(4) by directing Applebee Aviation to make commercial pesticide applications without a CPO license on September 26, 28, and 29, 2015, and then again on October 1 and 2, 2015.

A. Effective date of CPO license suspension

It is undisputed that Applebee Aviation made 16 commercial pesticide applications in Oregon between September 26, 2015 and October 2, 2015. There were eight pesticide applications performed on September 26, 2015; four on September 28, 2015; two on September 29, 2015; one on October 1, 2015; and another on October 2, 2015.

An Emergency Suspension Order, dated September 25, 2015, states, in part, that Applebee Aviation's CPO license "is hereby suspended today, September 25, 2015. Effective immediately you must stop providing pesticide application services, or applying pesticides onto the properties of others in Oregon until further order of the Department." Exhibit A25 at 2.

The Department's standard practice is to serve a corporation via the corporation's registered agent. Consistent with that practice, the Department set out to serve the Emergency Suspension Order to Applebee Aviation's registered agent, Mr. Applebee, on September 25, 2015.

OAR 137-003-0560 is titled "Emergency License Suspension" and states, in pertinent part:

> (2)(a) When the agency issues an emergency suspension order, the agency shall serve the order on the licensee either personally or by registered or certified mail;
>
> (b) The order shall include the following statements:
>
> (A) The effective date of the emergency suspension order[.]

(Emphasis added.)

[32] Pursuant to ORS 634.006(7)(a) and ORS 174.100(6), the term "person," as used in ORS 634.372, includes "individuals, corporations, associations, firms, partnerships, limited liability companies and joint stock companies." Thus, both Mr. Applebee and Applebee Aviation are considered "persons" for purposes of ORS 634.372(4) and (9).

Because registered or certified mail could take as long as five or more days, the Department determined that personal service to Applebee Aviation's registered agent would get service accomplished more quickly.[33] At approximately 4:36 p.m. on Friday, September 25, 2015, the Emergency Suspension Order was personally served to 39495 NW Bledsoe Creek Lane, the address of record for Applebee Aviation's registered agent, Mr. Applebee. At that address, an unidentified female (noted to be a "descendent, co-resident" between 25 and 35 years of age) accepted personal service. *See* Exhibit A26 at 2 (capitalization omitted).

The Department asserts that the Emergency Suspension Order became effective immediately upon service of the notice to the unidentified female on September 25, 2015. Respondents contend, however, that because Mr. Applebee, himself, was not personally served with the notice on that date, service was not effective and the emergency suspension did not become effective on September 25, 2015.

The question is therefore whether the Department satisfied the requirement in OAR 137-003-0560(2)(a) to "serve the order on the licensee * * * personally" when personal service was made on September 25, 2015 to an unidentified female at the address of record for Applebee Aviation's registered agent, Mr. Applebee. Neither OAR 137-003-0560, any of the other Model Rules,[34] nor the APA[35] defines or explains what constitutes service of an order on a licensee "personally." Although the procedures regarding service of summons contained in the Oregon Rules of Civil Procedure (ORCP) are not binding in this contested case matter, they nonetheless provide some guidance.

Under ORCP 7 D(2)(a), personal service of a summons is accomplished by "delivery of a true copy of the summons and a true copy of the complaint to the person to be served." (Emphasis added.) With regard to corporations specifically, ORCP 7 D(3)(b)(i) states that the primary service method is by "personal service or office service[36] upon a registered agent, officer, or director of the corporation; or by personal service upon any clerk on duty in the office of a registered agent."

Service of the Emergency Suspension Order to the unidentified female on September 25, 2015 does not seem to fall within either ORCP 7 D(2)(a) or 7 D(3)(b)(i). Instead, it seems more

---

[33] At hearing, Mr. Mitchell testified that when the Department sends civil penalty notices via certified or registered mail, the Department's typical practice is to also provide notification via phone to the recipient of the notice, given how long it can take for the recipient to actually receive the certified or registered mail. (Test. of Mitchell.)

[34] The Department has adopted the Attorney General's "Model Rules of Procedure for Contested Cases" (Model Rules) as the Department's rules of procedure for rulemaking activities, declaratory ruling activities, and contested case matters. OAR 603-001-0005. The Model Rules pertaining to hearings conducted by ALJs from the Office of Administrative Hearings are found at OAR 137-003-0501 through -0700.

[35] The Administrative Procedures Act (APA) is codified at ORS Chapter 183.

[36] ORCP D(2)(c) describes the procedure for "office service." Such service did not occur in the present matter.

consistent with substituted service, as described in ORCP 7 D(2)(b):

> [S]ubstituted service may be made by delivering true copies of the summons and the complaint at the dwelling house or usual place of abode of the person to be served to any person 14 years of age or older residing in the dwelling house or usual place of abode of the person to be served. Where substituted service is used, the plaintiff, as soon as reasonably possible, shall cause to be mailed by first class mail true copies of the summons and the complaint to the defendant at defendant's dwelling house or usual place of abode, together with a statement of the date, time, and place at which substituted service was made. For the purpose of computing any period of time prescribed or allowed by these rules or by statute, substituted service shall be complete upon the mailing.

As previously noted, on September 25, 2015, the Emergency Suspension Order was personally served to an unidentified female, noted to be a co-resident over the age of 14, at the registered agent's address of record. Then, on September 28, 2015, the Department mailed a copy of the Emergency Suspension Order to the same address, as follows:

> APPLEBEE AVIATION, INC.
> c/o Michael Applebee, Registered Agent
> 39495 NW Bledsoe Creek Lane
> Banks, OR 97106

Exhibit A26 at 4. The copy was sent via first class mail, and was marked with the date, time, and place of substituted service. Under ORCP 7 D(2)(b), substituted service in the current matter would have been complete upon the Department's mailing of the copy on September 28, 2015.

In sum, the ORCPs would suggest that service of the Emergency Suspension Order was not complete until sometime on September 28, 2015. However, it is important to note that OAR 137-003-0560 does not make the *effective date of the order* contingent upon the *date of completed service* (much less on the date that a licensee receives "reasonable" or "actual" notice).[37] Rather, OAR 137-003-0560 merely states that an emergency suspension order must contain the "effective date" of the order and that the order must be served on the licensee "either personally or by registered or certified mail." The administrative rule does not in any way condition the effective date of the order on the service date of the order. Hypothetically, therefore, an emergency suspension order that became effective on June 1, 2016 could be served (either personally or by registered or certified mail) on June 10, 2016 without running afoul of OAR 137-003-0560.

---

[37] See Respondents' Closing Argument at pages 2 through 5, arguing that reasonable or actual notice was required before the Emergency Suspension Order became effective and enforceable against Mr. Applebee and Applebee Aviation. Respondents' argument appears to be predicated on a mistaken belief that the ORCPs are binding in this matter. *See id.* at 3 ("The overriding principle for service for a suspension order that becomes immediately effective is whether service was 'reasonably calculated, under all the circumstances, to apprise the defendant of the pendency of the action.' ORCP 7D1.")

Given the above, I conclude that the Emergency Suspension Order became effective on September 25, 2015, the effective date specified in the order. Thus, Applebee Aviation's CPO license was suspended as of September 25, 2015, and the 16 commercial pesticide applications that occurred in Oregon between September 26, 2015 and October 2, 2015 were made while Applebee Aviation had a suspended CPO license.

B. Whether Mr. Applebee directed any applications

The next issue is whether Mr. Applebee directed one or more of the unlicensed applications that occurred between September 26, 2015 and October 2, 2015, thereby violating ORS 634.372(4). The Department asserts that Mr. Applebee knew Applebee Aviation's CPO license was not valid from September 26 through October 2, 2015, but he nonetheless directed crews to perform pesticide applications during that time period. The Department further asserts that directing or telling a crew to perform, initiate, or terminate a pesticide application is a pesticide application activity, subject to ORS 634.372(4). *See* February 15, 2016 Notice to Michael Applebee at 9.

It is necessary to determine when Mr. Applebee learned of the CPO license suspension and what actions he took, if any, to direct one or more of the unlicensed applications at issue.

1. September 26, 2015 applications

On or about September 20, 2015, Mr. Applebee went to the Jarbridge Wilderness in Nevada for a hunting trip. He was at an elevation of approximately 10,000 feet, and he was out of cell phone range until the evening of September 27, 2015. On September 25 and 26, 2015, he had no knowledge of the Emergency Suspension Order that was served on September 25, 2015. And, because he had no cell phone service at the time, he had no means by which to direct Applebee Aviation crews to perform the eight unlicensed pesticide applications that occurred on September 26, 2015.

The Department has not established that Mr. Applebee directed Applebee Aviation to make commercial pesticide applications without a valid CPO license on September 26, 2015, in violation of ORS 634.372(4).

2. September 28 and 29, 2015 applications

Based on Mr. Applebee's hearing testimony, more likely than not, he first saw Mr. Mitchell's September 27, 2015 email regarding the Emergency Suspension Order on the evening of September 27, after he descended from the Jarbridge Wilderness and his cell phone service resumed. Although at that time, Mr. Applebee was unable to download and read the email attachment containing a copy of the Emergency Suspension Order, he could read the text of the email, which stated that ODA had concluded its investigation and issued enforcement actions, and that Mr. Mitchell would be the point of contact "to assist with the reinstatement process of the CPO license issued to Applebee Aviation." Exhibit R2A at 1.

The following day, on September 28, 2015, Mr. Applebee left Nevada and began the road

trip home. Sometime on that date, he was able to download and access the Emergency Suspension Order on his phone, but he was unable to read the 16-page order because he did not have his glasses with him. He understood, however, that the email and attached order were regarding a suspension of Applebee Aviation's CPO license. Mr. Applebee forwarded the email and the attached order to both his wife and Mr. Howe sometime during the afternoon of September 28. Also sometime that afternoon, he called the Department to inform Mr. Mitchell that he would be at the Department's office the following morning at 9:00 a.m. to discuss the CPO issue. He subsequently arrived at his home between approximately 11:00 p.m. and midnight on September 28. At hearing, he admitted that he did not make an effort to read the Emergency Suspension Order once he arrived home because his printer was not working. When ODA's counsel asked Mr. Applebee at hearing whether he could have accessed the email attachment that evening on a computer (instead of his cell phone, or a printed paper copy), Mr. Applebee replied "I suppose I could've." Applebee Testimony.

On September 29, 2015, Mr. Applebee arrived at the Applebee Aviation office at approximately 7:00 a m. Mr. Howe and Ms. May were already present. At that time, Mr. Applebee had not yet closely read the Emergency Suspension Order. He engaged in some discussion with Mr. Howe (and possibly with Ms. May). He then directed Ms. May to notify all relevant persons at Applebee Aviation that operations were shut down. At the time, Mr. Applebee did not know where any of the spray crews were located and he was not aware of what projects might be performed that day. At Mr. Applebee's request, Mr. Howe accompanied him to the Department's office in Salem, where they arrived sometime around 9:00 a.m.

Based on the above circumstances, I conclude that Mr. Applebee had reasonable knowledge of the Emergency Suspension Order by the afternoon of September 28, 2015. The four pesticide applications that Applebee Aviation made on September 28, 2015 began at 6:54 a.m. and were completed by 9:50 a.m. *See* Exhibit A13 at 2-5. More likely than not, Mr. Applebee lacked sufficient knowledge of the Emergency Suspension Order before 10:00 a.m. that day, and the evidence does not establish that he directed Applebee Aviation to make those four commercial pesticide applications without a valid CPO license, in violation of ORS 634.372(4).

The Department has not proven that Mr. Applebee directed Applebee Aviation to make commercial pesticide applications without a valid CPO license on September 28, 2015, in violation of ORS 634.372(4).

As to the September 29, 2015 applications,[38] Mr. Applebee admitted at hearing that he understood by some time on September 28, 2015 that Mr. Mitchell's email and the attached order were regarding a suspension of Applebee Aviation's CPO license. He believed the matter serious enough on the afternoon of September 28 that he forwarded the email and order to his wife and to Mr. Howe, and he called the Department to set up a meeting with Mr. Mitchell for the following morning. Nonetheless, there is no evidence to establish that Mr. Applebee knew whether, and at what time, any commercial pesticide applications were scheduled to occur from

[38] The applications on September 29, 2015 began at 6:56 a.m. and were completed by 9:40 a.m. (*See* Ex. A14 at 2-3.)

that point forward, and no evidence that he directed the two unlicensed applications that occurred on the morning of September 29, 2015.

The Department has not proven that Mr. Applebee directed Applebee Aviation to make commercial pesticide applications without a valid CPO license on September 29, 2015, in violation of ORS 634.372(4).

3. BLM applications on October 1 and 2, 2015

There is no dispute that Applebee Aviation performed pesticide applications on BLM land in Oregon on October 1 and 2, 2015 without a valid CPO license, and that doing so violated the Pesticide Control Act. There is also no dispute that Mr. Applebee directed those applications to occur. The Department has therefore established that Mr. Applebee directed Applebee Aviation to make commercial pesticide applications without a valid CPO license on October 1 and 2, 2015, in violation of ORS 634.372(4).[39]

2. Whether revocation of Mr. Applebee's CPA license is appropriate

The Department has proposed to revoke Mr. Applebee's CPA license and not reissue or renew it for up to five years, based on an alleged pattern of misconduct relating to pesticide applications. The Department cites to ORS 561.305(2) and 634.322(4) as authority for the proposed revocation.

ORS 561.305(2) states, in relevant part:

> The department may refuse to issue, refuse to renew, revoke or suspend any license or application for license issued or which may be issued pursuant to any law under its jurisdiction where it finds that the licensee has violated any provision of such law or regulations promulgated thereunder[.]

Similarly, ORS 634.322 states, in part:

> In carrying out and enforcing the provisions of this chapter, the State Department of Agriculture is authorized:
>
> * * * * *
>
> (4) In accordance with the provisions of ORS chapter 183, to revoke, suspend or refuse to issue or renew any license or certificate if it determines that an applicant, licensee or certificate holder has violated any of the provisions of this chapter.

[39] Although the BLM applications lasted two days, the Department elected to treat Mr. Applebee's violation of ORS 634.372(4), as it pertains to those applications, as a single violation. (*See* February 15, 2016 Notice to Mr. Applebee at 10; Department's Closing Argument at 3.)

The Department alleges that Mr. Applebee (as the president and controlling manager of Applebee Aviation) has shown a pattern of misconduct, which warrants revocation, relating to pesticide applications by 1) directing commercial pesticide applications while Applebee Aviation lacked a valid CPO license; 2) allowing a pesticide to drift off-target and into water when the label prohibited all applications to water; 3) allowing the application of a pesticide to a site for which it was not labeled; and 4) allowing one or more Applebee Aviation workers to perform pesticide application activities without the PPE required by the pesticide labels.

Respondents contend that revocation of Mr. Applebee's CPA license is unwarranted and improper because out of approximately 20,000 spray applications by Applebee Aviation during the past three years, only three have involved violations. Respondents further contend that each time Mr. Applebee and Applebee Aviation learned of a problem leading to a violation, it took affirmative steps to address the problem. Finally, Respondents contend that the Department failed to establish a "substantiated fact pattern that decisions with actions showed a pattern of 'Willful Misconduct' or 'Gross Negligence.'" Respondents' Closing Argument at 7.

Respondents have cited to no statute, administrative rule, or case law to support their contention that suspension or revocation of a CPA license requires a pattern of conduct showing either willful misconduct or gross negligence. In fact, ORS 561.305(2) and ORS 634.322(4) seem to afford the Department broad discretion in deciding whether, and to what extent, to discipline a licensee for violation of state pesticide laws. Absent a showing that the Department has abused that discretion, its decision to seek license revocation in a particular case is within the bounds of its statutory authority. That being said, for the reasons that follow, I find that revocation of Mr. Applebee's CPA license, with no opportunity to reissue or renew the license for up to five years, is an excessively harsh sanction given the circumstances relevant to Mr. Applebee's current violation and substantiated violation history. I propose, instead, that the Department consider imposing a one-year suspension of Mr. Applebee's CPA license. Such a suspension is still a significant sanction to levy against a licensee and, in this matter, is more commensurate with the number and severity of Mr. Applebee's current and past violations.

A. Directing pesticide applications without a valid CPO license

The Department contends that Mr. Applebee's two alleged violations of ORS 634.372(4) help to demonstrate a pattern of misconduct that justifies the long-term revocation of his CPA license. Department's Closing Argument at 3.

As previously set forth, the Department has proven only one violation of ORS 634.372(4), regarding the BLM applications that occurred on October 1 and 2, 2015. To determine whether, and to what extent, that violation supports a sanction such as revocation or suspension, it is necessary to consider the circumstances surrounding Mr. Applebee's decision to direct Applebee Aviation to perform the unlicensed applications.

Respondents contend that, when Mr. Applebee directed Applebee Aviation to make the BLM applications, Mr. Applebee had a good faith belief that Applebee Aviation could lawfully apply pesticides to federal lands without a CPO license. *See* Respondents' Closing Argument at

6.[40] The Department asserts, however, that Mr. Applebee did not take any actions that good faith would require. For example, he did not contact BLM to ask whether Applebee Aviation could lawfully spray BLM lands without a CPO license; he did not contact an attorney to inquire about the issue; and he did not contact Mr. Mitchell (or anyone else at the Department) after the September 29, 2015 meeting to request additional information or guidance. The Department contends that Mr. Applebee instead "remained motivated by the financial considerations of the contract with BLM and directed his crew to apply the pesticides without even informing BLM that the CPO license from Oregon was suspended." Department's Closing Argument at 2. The Department argues that the above facts demonstrate that the October 1 and 2, 2015 violations were the result of willful misconduct.

The record establishes, by a preponderance of the evidence, that the following occurred during the September 29, 2015 meeting between Mr. Mitchell, Mr. Odenthal, Mr. Howe, and Mr. Applebee:

Mr. Mitchell went through the Emergency Suspension Order page by page, explained that Applebee Aviation was prohibited from making any pesticide applications in Oregon until the requirements in the Order were satisfied and the license suspension was lifted, and discussed what Applebee Aviation needed to do to be eligible for CPO license reinstatement. When Mr. Applebee asked whether there could be an exception to the CPO license requirement for the scheduled BLM sprays later that week, Mr. Mitchell answered in the negative. When Mr. Applebee asked Mr. Mitchell if the Department had jurisdiction on federal lands, Mr. Mitchell mentioned that the Department did not have jurisdiction on tribal lands absent a memorandum of understanding. Mr. Applebee commented that because Oregon does not follow federal cannabis/marijuana laws, Oregon should not be regulating federal BLM land. Because Mr. Applebee seemed to be challenging the Department's interpretation of its jurisdiction on federal lands, Mr. Mitchell told him that it may be a good question for a lawyer. Mr. Mitchell also mentioned that he could get back to Mr. Applebee with more information on the jurisdiction issue. The meeting participants also discussed the possibility of Applebee Aviation's CPO license being reinstated as early as the following day, and Mr. Odenthal suggested that Applebee Aviation could go ahead and mobilize its crews to the BLM work site, in anticipation of satisfying the license reinstatement requirements, and having its CPO license reinstated, in time to perform the BLM job.

Sometime after the September 29, 2015 meeting, Mr. Mitchell obtained a copy of the MOU between the Department and the BLM, but he did not provide a copy to Applebee Aviation and he did not engage in any further jurisdictional discussions with Mr. Applebee prior to October 1, 2015.

Respondents contend that when Mr. Applebee brought up the BLM job during the September 29, 2015 meeting and asked whether Applebee Aviation needed its CPO license to spray on federal lands, the Department did not provide him with an answer, promised to get back

[40] Respondents assert that Mr. Applebee "reasonably believed" that Applebee Aviation's federal FAA 137 certificate "would be satisfactory for spraying on federal lands without a CPO like it is in other states, and on some Indian Reservations in Oregon that don't have MOAs with the Department." (Respondents' Closing Argument at 6.)

to him on the issues, and told him he could go ahead and mobilize his crew. At hearing, Mr. Applebee testified that he had received "unclear guidance" from the Department, and that if the Department had definitively answered his question about whether a CPO license was required to spray the BLM land, or provided him with a copy of the MOU prior to spraying the land, Applebee Aviation would not have gone forward with the BLM sprays. Testimony of Applebee.

Although Mr. Applebee asserted at hearing that he did not feel like his federal jurisdictional question was adequately answered during the meeting, and that he believed Mr. Mitchell would contact him with more information, the record establishes, more likely than not, that on September 29, Mr. Mitchell did not waiver with regard to his (and the Department's) stated position that Applebee Aviation was not permitted to perform the BLM job while its CPO license was suspended. And, while Mr. Odenthal told Applebee Aviation that it could go ahead and mobilize its crew, so that the crew would be ready to spray the BLM land once the license became reinstated, his statement is not tantamount to telling Mr. Applebee and Applebee Aviation to go ahead and perform the BLM job without regard to whether Applebee Aviation's CPO license actually became reinstated.

Interestingly, Mr. Howe's hearing testimony reflects that he understood the Department's directive that Applebee Aviation not perform any further applications (including the BLM applications) until the CPO license was reinstated. For example, Mr. Howe testified that he and Mr. Applebee were told during the meeting that Applebee Aviation could not perform the BLM job without a CPO license, but that the issue could probably be fixed rather quickly. Mr. Howe further testified that there was talk of deployment of resources for the BLM job, with the understanding that the CPO license could probably be reinstated in time to allow for the scheduled spraying to occur. And, according to Mr. Howe's hearing testimony, during the meeting, Mr. Howe and Mr. Applebee were primarily focused on what they needed to do so the Department would reinstate the CPO license and Applebee Aviation could perform the scheduled BLM job. Testimony of Howe. Based on Mr. Howe's hearing testimony, he did not share Mr. Applebee's proffered belief that whether Applebee Aviation needed a CPO license to perform the BLM job was an open question of which even the Department was uncertain.

Although Mr. Applebee had every right to disagree with Mr. Mitchell's (and the Department's) position that a CPO license was required for Applebee Aviation to spray on BLM land in Oregon, any difference of opinion he held on the issue does not justify his decision to go forward with the BLM applications, in contravention of the Department's directives.

Mr. Applebee also testified at hearing that he believed it was relevant that the Department did not require Applebee Aviation to physically surrender the paper copy of its CPO license when the license became suspended, and that because Applebee Aviation still retained the actual physical license, the company may have likewise retained the rights that went along with having the license. Testimony of Applebee; *see also* Respondents' Closing Argument at 6 ("Also important to Mr. Applebee's mindset, at the September 29th meeting the Department never asked him to surrender the CPO license[.]") That testimony and Respondents' corresponding argument somewhat contradict Mr. Applebee's and Respondents' assertions that Mr. Applebee reasonably believed that Applebee Aviation *did not need* a CPO license to perform the BLM job.

"Willful misconduct" means an act or omission "characterized by or resulting from calculation and consideration of effects and consequences, and with awareness that the act or omission will be incompatible with any purpose of the State Pesticide Control Act." OAR 603-057-0500(13). "Gross negligence" is defined as "an act or omission that does not reflect an exercise of reasonable care under the circumstances and that is characterized by conscious indifference to or reckless disregard of any purpose of the State Pesticide Control Act. *Id.*(5).

Mr. Applebee's decision to spray the BLM land on October 1 and 2, 2015 does not demonstrate an exercise of reasonable care because, after the September 29, 2015 meeting, he did not make any efforts to obtain more information or guidance about the federal jurisdictional issue, and whether the BLM job required a CPO license. He did not, for example, contact an attorney for legal advice; he did not contact the BLM to inquire about the necessity of a CPO license; and he did not contact Mr. Mitchell (or anyone else at the Department) for additional information or guidance. Instead, he recklessly disregarded the Department's instructions not to perform any pesticide applications—including the BLM applications—until the CPO license was reinstated, in the apparent hope that his opinion regarding the necessity of having a CPO license to spray on BLM land in Oregon was the correct one.

At the very least, Mr. Applebee's decision to direct the BLM applications on October 1 and 2, 2015 demonstrates gross negligence, as defined in OAR 603-057-0500(5). Consequently, it is appropriate for the Department to accord fairly significant weight to the violation of ORS 634.372(4) when viewing the violation as part of a pattern of pesticide-related misconduct attributable to Mr. Applebee.

B. Allowing a pesticide to drift off-target

On or about April 16, 2014, Apple Aviation violated ORS 634.372(4) (performing pesticide applications activities in a faulty, careless, or negligent manner) when pesticide was deposited in a creek located beyond the target unit and the label of the pesticide prohibited applications to water.

Pilot Patrick Hall was the pesticide applicator involved in the drift incident. The Department initiated an enforcement action, and issued notices of violation to both Mr. Hall and Applebee Aviation. Mr. Hall testified at hearing that after receiving the Notice of Violation, he learned that while he had been flying, the wind died down below the minimum speed that the label on the pesticide container required. He testified that at the time he was spraying, he was unaware that wind conditions had changed.

Mr. Hall subsequently discussed the notice he received, and the wind conditions that were present when the violation occurred, with Mr. Applebee. Mr. Hall elected not to contest the violation and the Department's proposed fine, and Applebee Aviation chose the same course. Both notices became final. In response to the violation, Mr. Applebee and Applebee Aviation increased buffers along waterways.

Respondents contend that the drift violation "should be considered in the context that it occurred, a unique change in wind conditions that neither [Applebee Aviation] nor Mike Applebee [could] have directly prevented." Respondents' Closing Argument at 9.

Despite Mr. Applebee's lack of personal involvement in committing the drift violation, as the president, controlling operator, and day-to-day manager of Applebee Aviation, it is appropriate for the Department to consider violations such as this that occur within the company when assessing Mr. Applebee's recent history of compliance with the Pesticide Control Act. However, given that the drift violation was a rather isolated incident in Applebee Aviation's spray history, there is no evidence that Applebee Aviation has had other substantiated drift issues since the violation, and Mr. Applebee and Applebee Aviation responded to the incident by increasing buffers along waterways, the existence of the violation should not carry significant weight when determining whether license revocation, or some lesser sanction, is warranted with regard to Mr. Applebee in the present case.

C. Allowing application of a pesticide to a site for which it was not labeled

In September 2014, Applebee Aviation violated ORS 634.372(2) (prohibiting the intentional or willful application of a pesticide in a manner inconsistent with its labeling) by applying a pesticide to a site for which it was not labeled.

A client provided Applebee Aviation with a chemical, Rotary 2SL, to be used for spraying over the client's forest property. Even though the label on the Rotary 2SL only allowed for agricultural application, Pilot McDaniels performed two forest applications using the Rotary 2SL.

Upon hearing about the Rotary 2SL matter, Mr. Applebee and Applebee Aviation informed employees that Rotary 2SL was not to be used for forest applications. Before the Department issued any notices regarding the matter, Mr. Applebee instituted a protocol requiring that every chemical container have a checklist sticker placed upon it. Under the new protocol, the customer, the applicator, and an agent from Applebee Aviation would sign the sticker to confirm that the chemical had been inspected and was appropriate for the intended application. Mr. Applebee also instituted a policy requiring that Applebee Aviation source and confirm all chemicals intended for jobs to prevent the application of improper, outdated, or contaminated pesticides.

On September 25, 2015, the Department issued separate notices to Mr. McDaniels and Applebee Aviation, alleging two violations of ORS 634.372(2). The notice to Applebee Aviation became final on October 9, 2015.

Respondents contend that the misapplication of the chemical, when considered under the totality of the circumstances, "cuts against a pattern of misconduct." Respondents' Closing Argument at 10. Respondents further contend that Applebee Aviation and Mr. Applebee's decision to institute new protocols after learning of the incident shows their "commitment to adhering to the pesticide label requirements and following the Pesticide Control Act." *Id.*

As with the drift matter previously discussed, it is appropriate for the Department to consider the misapplication of the Rotary 2SL when assessing Mr. Applebee's recent history of compliance with the Pesticide Control Act, even though he was not personally involved in the violation. However, given Mr. Applebee's swift and appropriate responses to learning of the violation, the occurrence of the violation should not weigh heavily when determining whether license revocation, or some lesser sanction, is warranted for him in this case.

D. Allowing workers to perform activities without required PPE

The Department contends that Mr. Applebee and Applebee Aviation allowed one or more workers to perform pesticide application activities without the PPE required by the pesticide labels.

Mr. Applebee hired Mr. Ivy as a truck driver on or about April 8, 2015. Within hours, Mr. Ivy was on his way to Roseburg to work on the Seneca Jones project for Applebee Aviation. While at the project site, in addition to driving, Mr. Ivy mixed chemicals, handled concentrated pesticides, loaded chemicals onto the helicopter, and fueled the helicopter. Mr. McDaniels was the pilot/crew leader on the project.

During his approximately 17 days of employment, Mr. Ivy took numerous videos of work conditions at the Seneca Jones site. The videos show very little PPE being used at the site. However, the videos do not identify which chemicals are being handled at any particular time, so it is not known from the videos alone whether PPE violations occurred. However, when considered in conjunction with application records and the hearing testimony of Mr. Metzer, Mr. Ivy, and Mr. Applebee, the preponderance of the evidence establishes that one or more Applebee Aviation workers performed pesticide application activities without the required PPE.[41]

From July 2014 until the late fall of 2015, John Metzer worked for Applebee Aviation as a batch truck driver. His testimony establishes that it was not until the last three to six months of his employment that he had access to coveralls, and not until approximately the last six months of his employment that Applebee Aviation informed its drivers/handlers that they needed to wear

[41] At hearing, Mr. Vanderlei (a former driver/handler) testified that he considered the PPE on Applebee Aviation jobs to be "minimal." Testimony of Vanderlei. He further testified that available PPE included latex gloves that came just past the wrist, safety glasses, and coveralls, and that there were no available goggles, chemical aprons, or eyewash mechanisms. In contrast, Mr. Clark testified at hearing that Mr. Vanderlei had appropriate PPE when he was on Mr. Clark's crew in April 2015, because his crew had PPE available for their use that included coveralls, 3M respirator masks, various disposable gloves (including 14 mm "Thicksters"), bottles of eyewash, and fully encompassed safety goggles.

Mr. Clark provided seemingly credible, reliable testimony regarding the PPE that was available to his crews, and he has no known bias or motive to provide untrue testimony in this case. Mr. Vanderlei, on the other hand, has potential grounds for bias, and motive to provide unreliable testimony, because Applebee Aviation discharged him from employment and he has an OSHA claim against Applebee Aviation. For these reasons, when weighing the persuasiveness of Mr. Vanderlei's testimony against that of Mr. Clark, I find Mr. Clark's more reliable and persuasive. Thus, Mr. Vanderlei's testimony does not support the Department's contention that Applebee Aviation allowed workers to perform pesticide activities without required PPE.

thicker chemical gloves that extended past the wrist. His testimony also establishes that the handlers did not like wearing the thicker, longer gloves and that pilots with whom Mr. Metzer worked did not require him to wear such gloves in the field. His testimony further establishes that he did not know of any eyewash on the batch trucks, except for bottled water that could potentially have been used for eyewash purposes.

Prior to working for Applebee Aviation, Mr. Ivy had never previously worked with pesticides. He received no safety, hazardous substance, or PPE training from Applebee Aviation prior to joining the Seneca Jones project. The only training he received during his employment consisted of him observing Mr. McDaniels and the other driver/handler at the Seneca Jones site. At hearing, Mr. Applebee testified that in April 2015, Applebee Aviation had a "fairly broad" safety program that covered topics such as hauling fuel and chemicals and being safe around aircraft.[42] Testimony of Applebee. However, there is no evidence that Mr. Ivy was the beneficiary of any such program, as he received no safety training before heading to the field on his initial day of hire. Mr. Applebee admitted at hearing that Applebee Aviation could have done more to train Mr. Ivy and get him ready for work in the field. *Id.*

Applebee Aviation provided Mr. Ivy with one or two orange long-sleeved cotton shirts and black rubber gloves that went to the wrist. He eventually elected to purchase his own Mr. Clean rubber gloves that went up to the elbow, but Mr. McDaniels told him that they were the wrong type of gloves for the job. Mr. Ivy was not aware until he had worked for Applebee Aviation for three or four days that he was supposed to launder his clothes each day.

During an interview with OR-OSHA and Department personnel, Mr. McDaniels reported that some dish soap and a roll of shop towels were stored in a tunnel box on the side of the one-ton truck for cleaning purposes. However, Mr. Ivy was not aware of any soap or paper towels available to him at the project site. Towards the end of his employment, the chemical Atrazine splashed onto Mr. Ivy's face and mouth and — because there either was no soap and towels available, or because he did not know of their existence and location — he used some wet wipes he had previously purchased to clean the chemical off his face and mouth.

The record establishes that while working on the Seneca Jones project, the crew handled the following chemicals: Velossa; Clean Slate; Transline; Element 4; Agri Star 2,4-D LV6; Weedone 2,4D; Sipcam Atrazine 4L; Drexel Atrazine 4L; and Mana Atrazine 4L. The vast majority of the chemicals applied on the project were Atrazine (3,712 ounces), Velossa (2,560 ounces), and Clean Slate (344 ounces). *See* Exhibit A3 at 72.[43]

Velossa causes irreversible eye damage and requires handlers to wear protective eyewear (goggles, face shield, or safety glasses). It does not require gloves for handling. The three formulations of Atrazine used on the Seneca Jones project all require handlers to wear chemical-

[42] At hearing, when asked whether Applebee Aviation's safety program changed between April 2015 and September 25, 2015, Mr. Applebee was unable to articulate with any reasonable degree of certainty whether and how the training program had changed during that time period.

[43] By contrast, only 76 ounces of Agri Star 2,4-D LV6, 88 ounces of Weedone, 76 ounces of Element 4, and 8 ounces of Transline were used. (*See* Ex. A3 at 72.)

resistant gloves (including those made of barrier laminate, butyl rubber, nitrile rubber, polyethylene, or polyvinyl chloride) and a chemical-resistant apron. Clean Slate requires handlers to wear chemical-resistant gloves made of any waterproof material and protective eyewear. Transline requires handlers to wear chemical resistant gloves made of any waterproof material. Weedone requires handlers to wear chemical-resistant gloves and a chemical-resistant apron. Agri Star 2, 4-D LV6 requires that handlers wear chemical-resistant gloves (including those made of neoprene or nitrile rubber) and a chemical-resistant apron. Element 4 requires only long-sleeved shirts, pants, shoes, and socks.

To summarize the PPE criteria: 1) Velossa and Clean Slate require protective eyewear; 2) Clean Slate, Transline, Agri Star 2, 4-D LV6, Atrazine, and Weedone require chemical-resistant gloves; and 3) Agri Star 2, 4-D LV6, Atrazine, and Weedone require a chemical-resistant apron.

Video D shows Mr. Ivy and Mr. Taylor loading a helicopter with chemical. Mr. Ivy is wearing leather gloves and no eye protection, and Mr. Taylor is wearing no gloves and no eye protection. The only scenario under which this video does *not* establish a PPE violation is if the chemical being handled is solely Element 4 (which requires neither gloves nor protective eyewear). However, the table at Exhibit A3 at 71 shows all the herbicide applications performed on the Seneca Jones project and, according to the table, Element 4 was only applied in conjunction with Weedone or Agri Star 2, 4-D LV6 (both of which require chemical-resistant gloves and a chemical-resistant apron). *See* Exhibit A3 at 71.

Video F shows open chemical being poured and/or mixed. Mr. Ivy is wearing black gloves, but no protective eyewear or apron. The only scenario under which this video potentially does *not* establish a PPE violation is if the chemical being handled is solely Transline (which requires neither protective eyewear nor a chemical-resistant apron). However, according to the table at Exhibit A3 at 71, Transline was only applied in conjunction with Velossa (which requires protective eyewear). *See* Exhibit A3 at 71.

When asked at hearing what kind of PPE Applebee Aviation provided to its employees, Mr. Applebee replied, "Everything the label required, and up and beyond, times two." Testimony of Applebee. He admitted, however, that it was difficult to get employees to use required PPE in the field, particularly aprons and 22 ml gloves. *Id.* He further admitted at hearing that some of Mr. Ivy's videos showed inadequate PPE being used, and that Mr. McDaniels could have done a better job at managing field work. *Id.*

The record establishes that Mr. Howe was tasked with managing safety training for Applebee Aviation, that the pilots were responsible for training drivers and handlers regarding PPE, and that each pilot had an Applebee Aviation credit card with which to make necessary PPE purchases in the field. However, I am persuaded that Mr. Applebee (as the owner, president, and day-to-day manager of Applebee Aviation) nonetheless had an obligation to oversee how the pilots/CPAs and drivers/handlers were operating in the field, and that he was ultimately responsible for the actions of his employees and agents with regard to PPE.

In sum, the record establishes that Mr. Applebee and Applebee Aviation allowed one or more workers to perform pesticide application activities without the PPE required by the pesticide labels. However, to Mr. Applebee's credit, once he learned of the full extent of the Department's PPE concerns (via the Emergency Suspension Order, and the September 29, 2015 meeting), he took swift and reasonable steps to improve Applebee Aviation's PPE protocols and supplies, and alleviate the Department's (and OSHA's) concerns.

Consequently, it is appropriate for the Department to consider Applebee Aviation's PPE practices — both past and present — when assessing Mr. Applebee's recent history of compliance with the Pesticide Control Act.

3. Civil Penalty

As set forth above, the Department has proven that Mr. Applebee committed one violation of ORS 634.372(4) associated with the BLM applications on October 1 and 2, 2015. The Department contends that the violation is subject to an enhanced civil penalty of $10,000 because the violation was the result of Mr. Applebee's willful misconduct.

Respondents contend that no civil penalty should be imposed against Mr. Applebee for the alleged violation of ORS 634.372(4) because he was not the pilot applicator for the BLM job and Applebee Aviation, as the CPO, was responsible for the job. Those contentions are not persuasive. By directing the applications, Mr. Applebee personally committed the violation of ORS 634.372(4), and pursuant to ORS 634.900, he is therefore liable for a civil penalty.

ORS 634.900 states, in relevant part:

> (1) In addition to any other liability or penalty provided by law, the Director of Agriculture may impose a civil penalty on a person for violation of any of the provisions of this chapter relating to pesticide application, sale or labeling. The civil penalty for a first violation shall be not more than $2,000[.]
>
> (2) Notwithstanding subsection (1) of this section, if the violation of a provision relating to pesticide application, sale or labeling results from gross negligence or willful misconduct, the civil penalty for a first or subsequent violation may not exceed $10,000.

ORS 634.915 requires the Department to adopt by rule a civil penalty schedule establishing the penalty amount that may be imposed for a particular violation and provides, in part:

> (2) In imposing the penalty pursuant to the schedule authorized by this section, the Director of Agriculture shall consider the following factors:
>
> (a) The past history of the person incurring a penalty in taking all feasible steps or procedures necessary or appropriate to correct any violation.

(b) Any prior violations of statutes, rules or orders pertaining to pesticide application, sale or labeling.

(c) The gravity and magnitude of the violation.

(d) Whether the violation was repeated or continuous.

(e) Whether the cause of the violation was an unavoidable accident, negligence or an intentional act.

(f) The violator's cooperativeness and efforts to correct the violation.

(g) The immediacy and extent to which the violation threatens the public health or safety.

OAR 603-057-0502 is titled "Civil Penalties Generally" and states, in part:

(1) In addition to any other penalty provided by law, the Director may assess a civil penalty for violation of any provision of ORS 634 relating to pesticide application, sale or labeling.

* * * * *

(3) Where the Director determines that a violation did not result from gross negligence or willful misconduct, and if the violation occurred between June 25, 2007 and December 31, 2015, the Director will determine the amount of any civil penalty for that violation using OAR 603-057-0525 and 603-057-0530. The amount of such civil penalty for a first violation shall not exceed $1,000, and the amount of such civil penalty for any subsequent violation of the same provision shall not exceed $2,000.

* * * * *

(5) Where the Director determines that a violation resulted from gross negligence or willful misconduct and occurred on or after June 25, 2007, the Director will determine the amount of any civil penalty for that violation using OAR 603-057-0525 and 603-057-0532. The amount of such civil penalty for a first or a subsequent violation shall not exceed $10,000.

As previously discussed, the record establishes that the violation of ORS 634.372(4) resulted from Mr. Applebee's gross negligence. OAR 603-057-0532 therefore applies to that violation as follows:

(1) When the Director determines that the violation resulted from gross negligence or willful misconduct and that the violation occurred on or after June 25, 2007, the Director will determine the amount of the civil penalty using this section. To determine the amount of the civil penalty, calculate it utilizing the formula: NB + [(.1 x NB) x (P + H + C)] = Penalty Amount where:

(a) N = the number of times, within a period of three years prior to and including the date of the current violative act, that the person has been determined by the Director to have committed that violative act;

(b) B = the base penalty determined using the following matrix: * * *.

(A) The Magnitude of Violation is determined according to OAR 603-057-0525(2).

(B) The Gravity of Effect is determined according to OAR 603-057-0525(3).

(c) P = Past occurrence of unrelated violations under ORS Chapter 634 for a period of three years prior to the date of the current violative act. P will be weighted from 0 to 6 in the same manner as described in OAR 603-057-0530(1)(c).

(d) H = History of the person in taking all feasible steps or procedures necessary or appropriate to correct a violative action. H will be weighted from -2 to 2 in the same manner as described in OAR 603-057-0530(1)(d).

(e) C = Cooperativeness on the part of the person to assist the department in its investigation and to the extent possible, rectify the violation. C will be weighted from -2 to 2 in the same manner as described in OAR 603-057-0530(1)(f).

(2) If the calculation utilizing the formula in this section results in an amount more than $10,000, the Director will assess a penalty of $10,000. In addition, the Director may consider this adjustment if the Director remits or reduces the amount as provided in ORS 634.910 or OAR 603-057-0502(6).

The Department determined that the value of "N" is 1. Respondents do not contest that determination, and the record supports it. Pursuant to OAR 603-057-0525,[44] the Department

[44] OAR 603-057-0525 sets forth the criteria for determining the magnitude of a violation and the gravity of its effect, in relevant part, as follows:

(2)(a) Category I (Major):

determined that the magnitude of the violation was Category I (MAJOR), that the gravity of its effect was HIGH LEVEL, and that the base penalty for the violation is $10,000. *See* February 15, 2016 Notice to Michael Applebee at 12. The record supports those determinations.

The Department determined that the value of "P" is zero, because Mr. Applebee had no prior unrelated violations within the past three years. Respondents did not contest that determination, and the record supports it. The Department determined that the value of "H" is zero because there is no prior history, or there is insufficient information on which to base a finding. Respondents did not contest that determination, and the record supports it. The Department determined that the value of "C" is 2 because Applebee Aviation "was uncooperative and disregarded ODA's explicit statement of the scope of the license suspension order." February 15, 2016 Notice to Michael Applebee at 12-13. The record supports that determination with regard to the BLM applications.

The civil penalty for the violation is calculated as follows:

NB + [(.1 x NB) x (P + H + C)]

1($10,000) + [(.1 x $10,000) x (0 + 0 + 2)]

$10,000 + [$1,000 x 2]

$10,000 + 2,000 = $12,000 civil penalty

Because OAR 603-057-0532(2) limits the civil penalty to no more than $10,000 per violation, the total civil penalty for the violation of ORS 634.372(4) established against Mr. Applebee is $10,000.

---

* * * * *

(E) Perform pesticide application activities in a faulty, careless or negligent manner (ORS 634.372(4));

* * * * *

(3) Gravity of Effect: The Director shall rank the violation as to its gravity of effect. Following are the factors that may be considered in assigning a gravity ranking to a specific violation. The existence of one or more factors determined to be of high level shall result in the gravity being ranked high level. * * * * *.

(a) Rank — High Level:

* * * * *

(D) Conditions of Usage:

(i) Wide area of application[.]

ORDER

I propose that that the Oregon Department of Agriculture issue the following order:

Michael Applebee shall pay a total civil penalty of $10,000 for one violation of ORS 634.372(4). In addition, Mr. Applebee's Commercial Pesticide Applicator license shall be suspended for a period of one (1) year.

Jennifer H. Rackstraw
Senior Administrative Law Judge
Office of Administrative Hearings

EXCEPTIONS TO PROPOSED ORDER

The party in this case and Oregon Department of Agriculture staff have the right to file written exceptions to the Administrative Law Judge's Proposed Order. Because of the timelines set forth in OAR 137-003-0560(3), any exceptions must be filed with the Department within **five (5) calendar days** after issuance of the Proposed Order.

Any exceptions must be mailed to Katy Coba, Director of the Department of Agriculture, State Lands, 635 Capitol Street NE, Salem, Oregon 97301.

After considering any exceptions, the Director will issue a Final Order.

APPEAL

If you wish to appeal the Final Order, you must file a petition for review with the Oregon Court of Appeals within sixty (60) days after the Final Order is served upon you. *See* ORS 183.480 *et seq.*

CERTIFICATE OF MAILING

On June 30, 2016, I mailed the foregoing PROPOSED ORDER issued on this date in OAH Case No. 1504399.

By: First Class and Certified Mail
Certified Mail Receipt #7015 0640 0001 7130 3057

Robert Ireland
Attorney at Law
Ireland & Ireland
PO Box 273
Banks OR 97106

By: First Class Mail

Dale Mitchell
Dept. of Agriculture
635 Capitol Street NE
Salem OR 97301

Lore Bensel
Senior Assistant Attorney General
Department of Justice
1162 Court St NE
Salem OR 97301-4096

Alesia Vella
Administrative Specialist
Hearing Coordinator

CERTIFICATE OF SERVICE

I hereby certify that on August 24th, 2016, I served a courtesy copy of the FINAL ORDER by first-class mail to Jennifer H. Rackstraw, Administrative Law Judge, Office of Administrative Hearings, 7995 S.W. Mohawk Street, Tualatin, Oregon, 97062 and by e-mail to jennifer.h.rackstraw@oregon.gov and emp.oahreferral@oregon.gov.

I further certify that on August 24th, 2016, I served a copy of the FINAL ORDER by first-class mail to the persons at the addresses listed below:

Robert J Ireland
Ireland & Ireland PC
9003 NW Hwy 47
PO Box 273
Banks OR 97106
rob@irelandpc.com

DATED this 24th day of August, 2016.

ELLEN F. ROSENBLUM
Attorney General

Lore Bensel

Lore Bensel, OSB #891646
Senior Assistant Attorney General
Of Attorneys for Oregon Department of Agriculture

BEFORE THE DIRECTOR

OF THE DEPARTMENT OF AGRICULTURE

IN THE MATTER OF:	)	OAH Case No. 1504424
	)	Agency Case No.: 150406
	)	
APPLEBEE AVIATION, INC.	)	**FINAL ORDER**
	)	

This is the Director's Final Order in the contested case proceeding arising from the Third Amended Notice of Imposition of Civil Penalty, Proposed Revocation of Operator License, and Opportunity for a Hearing (Notice) dated February 15, 2016, and issued to Applebee Aviation, Inc. Administrative Law Judge Jennifer H. Rackstraw issued her Proposed Order on June 30, 2016. The Department did not receive exceptions to the Proposed Order.

I have decided to adopt Judge Rackstaw's Proposed Order as my Final Order, subject to the following changes:

1. The first sentence of the fifth full paragraph on page 6 of 53 is replaced with the following:

On April 15, 2016, Respondents filed a Stay Request with the Department, requesting a stay of OAH Case Nos. 1504399 and 1504424.

2. A sentence is added at the end of paragraph number 6 on page 8 of 53 that states as follows:

I accept these findings for purposes of this contested case only.

3. A sentence is added to the middle of the second full paragraph on page 31 of 53 that states as follows:

General information regarding registered agents and service upon them is provided in ORS 60.111 *et seq.*

4. The last two sentences of the first full paragraph on page 34 of 53 are replaced with the following:

I direct, instead, that Applebee Aviation's CPO license will be revoked for a one-year period as described in the Order section of this document. There shall be no opportunity to reissue or renew Applebee Aviation's CPO license during the second portion of the one-year period. Such a revocation is still a significant sanction to levy against a licensee and, in this matter, is more commensurate with the number and severity of Applebee Aviation's current and past violations.

5. The Order section on page 52 of 53 is replaced with the following:

ORDER

Applebee Aviation, Inc. shall pay a total civil penalty of $43,552 for sixteen violations of ORS 634.372(9). The total payment shall, as provided in ORS 183.745(2), be due ten (10) days after this Order becomes final by operation of law or on appeal. Provided, however, Applebee Aviation, Inc. may elect to pay the total amount in five equal annual installments of $8,710.40 by notifying the Department in writing of its election by no later than September 16, 2016. If the election is timely made, then the first installment shall be paid no later than the tenth (10th) day after this Order becomes final by operation of law or on appeal. The four subsequent installments shall be made on or before that date (month and day) of the following four years.

In addition, Applebee Aviation, Inc's commercial pesticide operator's license (CPO) is revoked, and shall not be reissued or renewed, for a one-year period to be served in two portions. The first portion is a total of one (1) month of credit that reflects time when the CPO was suspended, minus the time when there was a temporary restraining order or stipulated injunction in effect. The second portion is a total of 11 months, beginning September 15, 2016, and ending on August 15, 2017.

/

/

/

/

All other portions of the Proposed Order are incorporated by reference. The Proposed Order is attached to this Final Order as Attachment 1.

Dated this 23rd day of August, 2016.

Katy Coba
Director
Department of Agriculture

NOTICE OF RIGHT TO APPEAL: You are entitled to seek judicial review of this order. Judicial review may be obtained by filing a petition with the Oregon Court of Appeals within sixty (60) days from the service of this Final Order. Judicial review is pursuant to the provisions of ORS 183.482.

ATTACHMENT 1

(Proposed Order for OAH Case No. 1504424)

BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON
for the
DEPARTMENT OF AGRICULTURE

IN THE MATTER OF:	) **PROPOSED ORDER**
	)
APPLEBEE AVIATION, INC.	)
	) OAH Case No. 1504424
	) Agency Case No. 150406

HISTORY OF THE CASE

1. OAH Case No. 1504397

On September 25, 2015, the Oregon Department of Agriculture (the Department or ODA) issued a Notice of Proposed Imposition of Civil Penalty (First Civil Penalty) and Proposed/Final Order, and Order of Emergency License Suspension and Notice of Opportunity for a Hearing (First Emergency Suspension Order) to Applebee Aviation, Inc. (Applebee Aviation). The Department alleged that Applebee Aviation's Commercial Pesticide Operator (CPO) activities regarding worker protections presented a serious danger to Oregon's public health or safety and violated the State Pesticide Control Act. The Department proposed assessing a $1,100 civil penalty and suspending Applebee Aviation's license to operate as a CPO in Oregon, effective September 25, 2015.[1]

On December 22, 2015, the Department issued a Final Order: Termination of License Suspension Issued September 25, 2015 to Applebee Aviation. The Termination Order ended the Department's emergency suspension of Applebee Aviation's CPO license, effective September 25, 2015, but noted that the CPO license nonetheless remained suspended, effective October 13, 2015, pursuant to an October 13, 2015 Second Emergency Suspension Order and a November 3, 2015 Amended Second Emergency Suspension Order (in OAH Case No. 1504398, see below).

Also on December 22, 2015, the Department issued an Amended First Order of Emergency License Suspension and Notice of Opportunity for Hearing (Amended First

[1] ORS 183.430(2) allows an agency to suspend a license without a hearing where the agency finds "a serious danger to the public health or safety and sets forth specific reasons for such findings." OAR 137-003-0560(1) similarly provides:

> If the agency finds there is a serious danger to the public health or safety, it may, by order, immediately suspend or refuse to renew a license. For purposes of this rule, such an order is referred to as an emergency suspension order. An emergency suspension order must be in writing. It may be issued without prior notice to the licensee and without a hearing prior to the emergency suspension order.

Emergency Suspension Order) to Applebee Aviation, thereby implementing Applebee Aviation's request for hearing regarding the merits of the September 25, 2015 Notice and Order.

2. OAH Case No. 1504398

On October 13, 2015, the Department issued a Notice of Imposition of Civil Penalty, Proposed Revocation of Operator License, Proposed Refusal to Issue or Renew Operator License (Second Civil Penalty and First Revocation), and Opportunity for a Hearing, and Order of Emergency License Suspension and Notice of Opportunity for a Hearing (Second Emergency Suspension Order) to Applebee Aviation. The Department alleged that Applebee Aviation operated as a CPO in Oregon without a valid CPO license, thereby posing a serious danger to Oregon's public health or safety and violating the State Pesticide Control Act. The Department proposed assessing a $40,000 civil penalty; suspending Applebee Aviation's license to operate as a CPO, effective October 13, 2015; and revoking Applebee Aviation's CPO license, with no reissuance or renewal for up to five years.

On November 3, 2015, the Department issued an Amended Notice of Imposition of Civil Penalty, Proposed Revocation of Operator License, and Proposed Refusal to Reissue or Renew Operator License (Amended Second Civil Penalty and Revocation), and Opportunity for a Hearing, and Order of Emergency License Suspension and Notice of Opportunity for a Hearing (Amended Second Emergency Suspension Order) to Applebee Aviation. The Department sought to impose a $160,000 civil penalty, suspend Applebee Aviation's license to operate as a CPO, effective October 13, 2015; and revoke Applebee Aviation's CPO license, with no reissuance or renewal for up to five years.

On December 22, 2015, the Department issued a Second Amended Order of Emergency License Suspension and Notice of Opportunity for Hearing (Second Amended Second Emergency Suspension Order) to Applebee Aviation, which suspended Applebee Aviation's CPO license for the period October 13, 2015 through December 22, 2015.

Also on December 22, 2015, the Department issued a Second Amended Notice of Imposition of Civil Penalty, Proposed Revocation of Operator License (With No Reissuance or Renewal) and Opportunity for a Hearing (Second Amended Second Civil Penalty and Revocation) to Applebee Aviation. The Department proposed to assess a $160,000 civil penalty and revoke Applebee Aviation's CPO license, with no reissuance or renewal for five years.

3. Adjudication of Emergency Suspension Orders in OAH Case Nos. 1504397 and 1504398

On October 20 and November 3, 2016, Applebee Aviation, through counsel, requested a hearing to contest the emergency suspensions, proposed imposition of civil penalties, and proposed license revocation. On or about November 25, 2015, the Department referred the matters to the Office of Administrative Hearings (OAH).[2] The OAH assigned the matters to

[2] Although the Department assigned the same agency number to both matters (Agency Case No. 150406), the OAH designated the matters separately, as OAH Case Nos. 1504397 and 1504398.

Senior Administrative Law Judge (ALJ) Monica Whitaker.[3]

On December 28 and 29, 2015, ALJ Whitaker convened a hearing regarding the Department's proposed emergency license suspensions in OAH Case Nos. 1504397 and 1504398.[4] Senior Assistant Attorney General Lore Bensel represented the Department. Attorney Robert Ireland represented Applebee Aviation. The following witnesses testified: Applebee Aviation's former employee Warren Howe; Garnet Cooke, a pesticide coordinator with the Oregon Occupational Safety and Health Administration; Michael Odenthal, a lead investigator for the Department's pesticide program; Dale Mitchell, a Program Manager for the Department's pesticide program; Michael Applebee, Applebee Aviation's corporate principal; Michael Babbitt, a case reviewer for the Department's pesticide enforcement unit; and Applebee Aviation's employee, Brenda May. The record closed at the conclusion of the hearing on December 29, 2015.

On January 13, 2016, ALJ Whitaker issued a Proposed Order in Case No. 1504397, concluding that Applebee Aviation's conduct did not pose a serious danger to the public health or safety, and proposing that the Department revoke the September 25, 2015 First Emergency Suspension Order, as amended by the December 22, 2015 Amended First Emergency Suspension Order. Also on January 13, 2016, ALJ Whitaker issued a Proposed Order in Case No. 1504398, concluding that Applebee Aviation's acts and conduct did not pose a serious danger to the public health or safety, and proposing that the Department revoke the October 13, 2015 Second Emergency Suspension Order, as amended by the November 3, 2015 Amended Second Emergency Suspension Order and the December 22, 2015 Second Amended Second Emergency Suspension Order.

On January 28, 2016, the Department issued a Final Order in OAH Case No. 1504398. In this Final Order, the Department made changes to the Proposed Order to clarify the history of the case, correct typographical errors, add findings of fact, and clarify the opinion, rulings, and recommendations. The Final Order did not change the outcome of the case, and concluded that the Department failed to establish that Applebee Aviation's pesticide applications without a CPO license posed a serious danger to the public health and safety. The Final Order revoked the October 13, 2015 Second Emergency Suspension Order, as amended by the November 3, 2015 Amended Second Emergency Suspension Order and the December 22, 2015 Second Amended Second Emergency Suspension Order.

Also on January 28, 2016, the Department issued an Amended Proposed Order in OAH Case No. 1504397, and allowed Applebee Aviation five days in which to file exceptions to the Amended Proposed Order. The Department also provided Applebee Aviation a redlined version of the Amended Proposed Order, which alerted Applebee Aviation to the changes that the Department proposed making to ALJ Whitaker's Proposed Order. On February 2, 2016, Respondent filed exceptions to the Amended Proposed Order.

---

[3] The OAH subsequently reassigned the matter to another ALJ. However, upon the Department's filing of a request to change ALJs, the OAH assigned the matter back to ALJ Whitaker.

[4] ALJ Whitaker planned to hold a separate hearing, at a later date, regarding the Department's proposed assessment of civil penalties and proposed revocation of Applebee Aviation's CPO license.

On February 5, 2016, the Department issued a Final Order in OAH Case No. 1504397. In the Final Order, the Department made changes to the Proposed Order to clarify the history of the case, correct typographical errors, add findings of fact, and modify the opinion, rulings, and recommendations. The Final Order changed the outcome of the case and concluded that Applebee Aviation's conduct regarding worker protection equipment and training posed a serious danger to the public health and safety from September 25, 2015 through October 8, 2015. The Final Order altered the September 25, 2015 First Emergency Suspension Order, as Amended by the December 22, 2015 Amended First Suspension Emergency Order, to suspend Applebee Aviation's CPO license from September 25, 2015 through October 8, 2015.

4. OAH Case No. 1504339 (Michael Applebee)

On November 3, 2015, the Department issued a Notice of Imposition of Civil Penalty, Proposed Revocation of Applicator License, Proposed Refusal to Reissue or Renew Applicator License, and Opportunity for a Hearing (Applebee First Civil Penalty and Revocation) to Michael Applebee. The Department alleged that Mr. Applebee directed commercial pesticide applications in Oregon while Applebee Aviation's CPO license was suspended. The Department proposed to assess a $20,000 civil penalty, and to revoke Mr. Applebee's Commercial Pesticide Applicator (CPA) license, with no reissuance or renewal for up to five years.

On February 15, 2016, the Department issued an Amended Notice of Proposed Imposition of Civil Penalty, Proposed Revocation of Applicator License, and Opportunity for a Hearing (Applebee Second Civil Penalty and Revocation) to Mr. Applebee. The Department alleged that Mr. Applebee directed commercial pesticide applications in Oregon while Applebee Aviation's CPO license was suspended. The Department proposed to assess civil penalties between $1,406 and $20,000, depending on whether Mr. Applebee's alleged violations were the result of willful misconduct, and to revoke Mr. Applebee's CPA license, with no reissuance or renewal for up to five years.

5. OAH Case No. 1504424 (Applebee Aviation)

On February 15, 2016, the Department issued a Third Amended Notice of Imposition of Civil Penalty, Proposed Revocation of Operator License and Opportunity for a Hearing (Third Amended Second Civil Penalty and Revocation) to Applebee Aviation.[5] The Department alleged that Applebee Aviation made commercial pesticide applications in Oregon without a valid CPO license. The Department proposed to assess civil penalties between $13,024 and $160,000, depending on whether Applebee Aviation's alleged violations were the result of willful misconduct, and to revoke Applebee Aviation's CPO license, with no reissuance or renewal for up to five years.

6. Adjudication of Proposed Civil Penalties and License Revocations in OAH Case Nos. 1504339 and 1504424

[5] This Notice amended the December 22, 2015 Second Amended Second Civil Penalty (in OAH Case No. 1504398).

On November 3, 2015, Mr. Applebee and Applebee Aviation (collectively, Respondents), through counsel, filed a request for hearing regarding, among other things, the proposed civil penalties and proposed license revocations.

A hearing was subsequently scheduled for February 17 and 18, 2016, regarding the proposed civil penalties and proposed license revocations against Mr. Applebee (OAH Case No. 1504339) and Applebee Aviation (OAH Case No. 1504424). On or about January 29, 2016, the OAH reassigned the case to ALJ Jennifer H. Rackstraw, due to a scheduling conflict for ALJ Whitaker.

On February 16, 2016, the Department filed a Hearing Memorandum. On the morning of February 17, 2016, Respondents also filed a Hearing Memorandum.

On February 17, 2016, ALJ Rackstraw convened a hearing in Tualatin, Oregon. Ms. Bensel represented the Department. Mr. Ireland represented the Respondents. Dale Mitchell appeared as an agency representative. Michael Applebee and Bruce Pokarney, the Department's Director of Communications, were also present. The parties ultimately agreed to reset the hearing to a later date, so that the parties could brief three issues and the ALJ could issue a written ruling on the issues. The parties agreed to file their respective briefs no later than 5:00 p.m. on February 26, 2016. The hearing was reset for March 28 through 31, 2016, with amended or additional witness lists and exhibits due by March 18, 2016.

On the afternoon of February 26, 2016, the Department moved to extend the deadline for the filing of prehearing briefs to March 4, 2016. The Department cited illness and a significant deadline in another Department case as the bases for the motion. The Respondents objected to the motion, and filed their brief shortly before 5:00 p.m. on February 26. The Department did not file a brief on February 26. ALJ Rackstraw was out of the office on February 26, and was unaware of the Department's motion until February 29, 2016.

On the morning of February 29, 2016, ALJ Rackstraw granted the Department's motion to extend the briefing deadline to March 4, 2016. Because the Department would have the benefit of reviewing Respondents' brief prior to filing its own brief by March 4, the ALJ provided the Respondents with the opportunity to file a responsive brief no later than March 8, 2016. The ALJ agreed to issue a written ruling on the briefing issues by March 15, 2016, and to allow the parties to file amended or additional witness lists and exhibits by March 22, 2016.

Later on February 29, 2016, the Respondents moved for an extension of time to respond to the Department's brief and a 30-day reset of the hearing. In the motion, Respondents asserted that both attorneys of record—Mr. Ireland and Katheryn Ireland—would be out of the country and unavailable from March 1 through 14, 2016.[6] They therefore requested that the deadline for filing a responsive brief be extended to March 17, 2016. They further requested that the hearing be rescheduled until the last week in April 2016, to accommodate the later briefing. The

[6] Respondents noted in their motion that the Irelands' unavailability from March 1 through 14 was stated during the hearing on February 17, 2016 (when discussing scheduling matters). Unfortunately, ALJ Rackstraw did not recall this information when setting the March 4, 2016 deadline for Respondents to file a responsive brief.

Department did not object to the Respondents' request for additional time to file a responsive brief, but did object to postponing the hearing and noted that Ms. Bensel was unavailable for hearing in April 2016.

Later on February 29, 2016, ALJ Rackstraw notified the Department that it could elect not to file a prehearing brief, and all original deadlines/timeframes established on February 17, 2016 would remain in effect, with the hearing commencing on March 28, 2016. Or, in the alternative, the Department could elect to file its prehearing brief by March 4, 2016, the Respondents would then have until March 17, 2016 to file a response, and the hearing would need to be rescheduled to a later date (to be determined at a prehearing conference on March 16, 2016) to accommodate the extensions. The Department elected the second option, and on March 4, 2016, filed its prehearing brief.

On March 14, 2016, Applebee Aviation filed Petitions for Judicial Review with the Oregon Court of Appeals, seeking review of the Final Orders in OAH Case Nos. 1504397 and 1504398.

On March 16, 2016, ALJ Rackstraw convened a telephone prehearing conference. Ms. Bensel represented the Department. Mr. Ireland represented Respondents. Dale Mitchell was also present. A consolidated hearing on the proposed civil penalties and license revocations in OAH Case Nos. 1504339 and 1504424 was scheduled for April 26 through 29, 2016.

On March 17, 2016, Respondents filed a responsive brief. On March 29, 2016, ALJ Rackstraw issued Prehearing Rulings, concluding the following: 1) The doctrine of issue preclusion prevents Applebee Aviation and Michael Applebee from arguing that Applebee Aviation's CPO license was not suspended from September 25, 2015 through October 8, 2015; 2) ALJ Whitaker's Proposed Order in OAH Case No. 1504397 will not be admitted into the record of the current proceedings for the truth of the factual findings and rulings contained therein; 3) The current proceedings will not be stayed, pending review of the Department's Final Order in OAH Case No. 1504397 by the Oregon Court of Appeals; and 4) Respondents' request to bifurcate OAH Case No. 1504399 from OAH Case No. 1504424 is denied.

On April 15, 2016, Respondents filed a Stay Request with the Department, requesting a stay of OAH Case Nos. 1504399, 1504406, 1504424, and 1504406. On April 22, 2016, Respondents filed a Motion for Set Over regarding the hearing scheduled for April 26 through 29, 2016. On April 25, 2016, ALJ Rackstraw, Ms. Bensel, and Mr. Ireland convened by telephone for a status conference to discuss Respondents' set over motion. During the conference, ALJ Rackstraw denied the motion. Later in the day on April 25, 2016, the Department issued an Order Regarding Petitioners' Stay Request, denying the stay request.

On April 26, 2016, ALJ Rackstraw convened a hearing in Tualatin, Oregon. The hearing continued on April 27 and 28, 2016, as well. Ms. Bensel represented the Department. Mr. Ireland represented Respondents. Michael Applebee appeared on his own behalf, as well as on behalf of Applebee Aviation as its owner/president/registered agent. Dale Mitchell appeared as an agency representative. Various observers and members of the public attended portions of the

hearing over the three-day period. The following persons testified: Darryl Ivy;[7] Warren Howe; Garnet Cooke; Michael Odenthal; Sarah (Sunny) Jones; Michael Babbitt; Dale Mitchell; Patrick Hall; David (Dave) McDaniel; Kevin Vanderlei; John Metzer; Clay Clark; and Mr. Applebee. The evidentiary record closed on April 28, 2016. The parties agreed to file written closing arguments by May 27, 2016.

On April 27, 2016, Respondents filed a Second Stay Request with the Department, requesting a stay of OAH Case Nos. 1504399 and 1504424. On May 12, 2016, the Department issued an Order Regarding Petitioners' (Second) Stay Request, denying the request.

On May 26, 2016, the Department filed an unopposed motion to extend the deadline for filing closing arguments. ALJ Rackstraw granted the motion, and set a new deadline of June 10, 2016. On June 10, 2016, the Department and Respondents filed their respective closing arguments. The record closed on June 10, 2016.

ISSUES

1. Whether Applebee Aviation violated ORS 634.372(9) by making 16 commercial pesticide applications in Oregon while its CPO license was suspended.

2. If one or more violations of ORS 634.372(9) are proven, whether the Department may revoke Applebee Aviation's CPO license and not reissue or renew the license for a period of up to five years, based on an alleged pattern of misconduct relating to pesticide applications.

3. Whether, and in what amount, the Department may assess civil penalties against Applebee Aviation for violating ORS 634.372(9).

EVIDENTIARY RULINGS

The Department submitted Exhibits A1 through A43, but then withdrew the following videos from Exhibit A43: I, K, L, CC, EE, JJ, LL, NN, OO, and TT. The remainder of Exhibit A43 and Exhibits A1 through A42 were admitted into the record without objection.

Respondents submitted Exhibits R1 through R38. Exhibits R1 through R34 were admitted into the record without objection. Exhibits R35, R36, R37, R37A, and R38 were admitted into the record over the Department's objection that those exhibits were not timely submitted.

FINDINGS OF FACT

Relevant Background

1. Applebee Aviation is an S corporation with its principal place of business at 22330 NW Fisher Road, in Banks, Oregon. That location is known as the "hangar." (Test. of Applebee, Odenthal, Howe; Ex. A38 at 1.) During the time period relevant to this matter,

[7] Mr. Ivy's attorney, Karl Anuta, was present during Mr. Ivy's testimony.

Applebee Aviation held a Commercial Pesticide Operator (CPO) license and provided commercial aerial pesticide application services to foresters and agricultural growers in Oregon, Washington, Idaho, South Dakota, and Minnesota. (Test. of Applebee, Odenthal.) Applebee Aviation held an FAA 137 certificate, which allowed Applebee Aviation to conduct spray operations in other states. (Test. of Applebee.)

2. During the time period relevant to this matter, Mr. Applebee was the owner, operator, president, and registered agent of Applebee Aviation. (Ex. A38 at 1; test. of Applebee, Odenthal.) He was involved in all major decisions involving Applebee Aviation. (Test. of Howe.) He held a held Commercial Pesticide Applicator (CPA) license and was in charge of hiring and firing pilots. (*See* Ex. A3 at 110; test. of Howe.)

3. The Oregon Secretary of State, Corporations Division lists 39495 NW Bledsoe Creek Lane, in Banks, Oregon as the address of the registered agent. (Ex. A38 at 1.) That location is where Mr. Applebee resides with his family. (Test. of Applebee.) It is also the location of Applebee Aviation's corporate office. (Test. of Howe.)

4. During the time period relevant to this matter, Warren Howe was the sales manager for Applebee Aviation, Brenda May worked in the Applebee Aviation office, and Applebee Aviation used and employed various agents and employees. (Test. of Howe, Applebee.)

5. Mr. Howe worked for Applebee Aviation for five years, until his employment ended in October 2015. He held a CPA license, but he was not a pilot. While employed, he performed contract negotiations with clients, and he sometimes functioned as the point of contact with pesticide application crews. He had frequent contact with the pilots who performed aerial spraying for Applebee Aviation, and he did a great deal of coordination between clients and crews. He worked closely with Mr. Applebee. (Test. of Howe.)

6. In 2014, Applebee Aviation had earnings of approximately $9 million. Prior to September 25, 2015, Applebee Aviation had approximately 30 employees and enjoyed preferred status with the Oregon Department of Forestry. After September 2015, Applebee Aviation's earnings dropped to approximately $2 million per year. (Test. of Applebee.)

Pesticide Application Crews

7. Applebee Aviation's general process for aerial pesticide spraying includes taking a concentrated chemical, mixing it with a carrier (typically water), loading it onto an aircraft, and having the aircraft spray it over a designated area. (Test. of Odenthal.) Chemical containers range in size from 1-gallon containers to 30-gallon barrels to 260-gallon cubes. (Test. of Odenthal.)

8. During the time period relevant to this matter, there were four pilots performing aerial spraying for Applebee Aviation: Clay Clark,[8] Blaine Hayes, Patrick Hall,[9] and Dave

[8] Mr. Clark worked for Applebee Aviation from 2012 until approximately late December 2015. (Test. of Clark.)

McDaniels.[10] Each pilot had a CPA license and earned a salary plus production bonuses from Applebee Aviation. When in the field, the pilots functioned as crew leaders. (Test. of Applebee, Odenthal, Howe, Hall, McDaniels; *see* Ex. A3 at 110.) The pilots were responsible for ensuring that an application was consistent with a pesticide's label, that sprays landed in the correct locations, that crew members had appropriate Personal Protective Equipment (PPE), and that crew members mixed and handled chemicals in a responsible manner. (Test. of Babbitt, Odenthal, Hall, Applebee.)

9. Each crew generally included two drivers/handlers, who were responsible for driving the trucks, loading chemicals onto the trucks, mixing and loading chemicals at the work site, and cleaning up the work site (including any spills) and chemical containers. (Test. of Odenthal.)

10. When assigned to a spray project, a pilot would learn which employees comprised his crew and which helicopter and vehicles were going on the project. The pilot and drivers/handlers (and potentially the customer as well) would convene for a pre-work meeting to talk about the project. The trucks would either be dispatched from the hangar or directly from another project. (Test. of Hall.) Before a crew deployed, Mr. Howe would purchase PPE, which was then loaded onto a truck. The CPA/pilot leading the crew was responsible for verifying that the truck contained the required PPE. (Test. of Applebee.)

Prior Investigations and Violations

11. The Department's typical procedure for investigating complaints involves the following steps: 1) respond to the complainant; 2) gather information and evidence (which includes an interview with the potential violator; 3) if there is substantive evidence of a violation, take the appropriate enforcement response (*e.g.* draft a Notice of Violation); and 4) work with the violator to make sure any compliance criteria is satisfied. (Test. of Mitchell.)

12. The Department's customary practice is to cite both the CPA and the CPO when violations occur regarding pesticide applications. (Test. of Odenthal, Mitchell.)

13. The Department has investigated multiple complaints involving Applebee Aviation. Most of the complaints were not substantiated and did not result in any enforcement action. (Test. of Odenthal; *see* Ex. R36 at 1-3.) Since July 2010, the Department has received a total of 12 complaints against Applebee Aviation. There were no violations found as to nine of the complaints. Three of the complaints were substantiated for multiple violations and led to enforcement actions against Applebee Aviation.[11] (Test. of Odenthal; *see* Ex.R36 at 2-3.)

---

[9] Mr. Hall began working for Applebee Aviation in approximately May 2009. At the time of the hearing, he was one of the only remaining employees at Applebee Aviation. (Test. of Hall.)

[10] Mr. McDaniels worked for Applebee Aviation from approximately July 2012 to late December 2015. (Test. of McDaniels.)

[11] The complaints leading to enforcement actions include an August 2010 drift violation, an April 2014 drift violation (discussed herein), and the April 2015 Ivy matter (discussed herein). (*See* Exs. R36 at 1-2, R30A at 1-11.)

14. At the time of the hearing, there was an open investigation of Applebee Aviation regarding a September 2015 drift complaint. (*See* Ex. R33A at 1-22; test. of Odenthal.)

Drift Violation

15. On or about April 16, 2014, Pilot Hall performed an aerial application of a pesticide product that included Atrazine 4L.[12] The Atrazine label prohibited applications of the pesticide to water and noted that "[d]rift potential is lowest between [wind] speeds of 2 to 10 mph * * *. Application should be avoided below 2 mph due to variable wind direction and high inversion potential." (Ex. A41 at 4-6; test. of Hall.)

16. While Mr. Hall was flying, the wind died down to below 2 mph. At the time, he was unaware that wind conditions had changed to that extent, and he continued to spray. (Test. of Hall; Ex. A41 at 7.) As a result of the wind change, and Mr. Hall's continued spraying, some of the pesticide was deposited in a creek located beyond the target unit. (Ex. A41 at 9.)

17. On December 12, 2014, the Department issued separate notices to Mr. Hall and Applebee Aviation, alleging a violation of ORS 634.372(4) (performing pesticide applications activities in a faulty, careless, or negligent manner) for allowing pesticide to drift into water. (*See* Ex. A41.)

18. Mr. Hall subsequently discussed the notice he received, and the wind conditions that were present when the violation occurred, with Mr. Applebee. Mr. Hall elected not to contest the violation and the proposed $400 fine, and Applebee Aviation chose the same course. (Test. of Hall.)

19. The Proposed Order issued to Applebee Aviation became final on December 31, 2014. (Ex. A42 at 1.) The Proposed Order issued to Mr. Hall became final on January 2, 2015 2014. (*Id.* at 2.)

20. Mr. Applebee was not directly or personally involved in the drift violation. (Test. of Odenthal.) In response to the violation, Applebee Aviation increased buffers along waterways. (Test. of Applebee.)

Rotary 2SL Violation

21. In approximately September 2014, a client provided Applebee Aviation with a chemical, Rotary 2SL, to be used for spraying over the client's property. The chemical was equivalent to another chemical whose label allowed for both forest and agricultural applications. However, the label on the Rotary 2SL only allowed for agricultural application. (Test. of Howe, Applebee.)

[12] Mr. Hall has been a helicopter pilot for approximately 10 years, and he has CPA licenses in Oregon, Washington, and Idaho. (Test. of Hall.)

22. Pilot McDaniels subsequently performed two forest applications for Applebee Aviation using the Rotary 2SL.[13] (Ex. A39 at 3-5; test. of Applebee.) There is no evidence that Mr. McDaniels applied the chemical in an unsafe manner. (Test. of Odenthal.)

23. Upon hearing about the Rotary 2SL matter, Applebee Aviation informed its employees that Rotary 2SL was not to be used in forestry applications. (Test. of Howe.) Before the Department issued a Notice of Violation regarding the matter, Mr. Applebee instituted a protocol requiring that every chemical container have a checklist sticker placed upon it. (Test. of Applebee; *see* Ex. R38.) Under the new protocol, the customer, the applicator, and an agent from Applebee Aviation would sign the sticker to confirm that the chemical had been inspected and was appropriate for the intended application. Mr. Applebee also instituted a policy requiring that Applebee Aviation source and confirm all chemicals intended for jobs to prevent the application of improper, outdated, or contaminated pesticides. (Test. of Applebee.) To this end, in approximately the summer of 2015, Mr. Howe went through all the chemical barrels at Applebee Aviation, read the labels, and put the checklist sticker on them. (Test. of Hall.)

24. On September 25, 2015, the Department issued separate notices to Mr. McDaniels and Applebee Aviation, alleging two violations of ORS 634.372(2) (prohibiting the intentional or willful application of a pesticide in a manner inconsistent with its labeling) for applying a pesticide to a site for which it was not labeled. (*See* Ex. A39.)

25. The Proposed Order issued to Applebee Aviation became final on October 9, 2015. (Ex. A40 at 1.)

26. Mr. Applebee was not directly or personally involved in the Rotary 2SL violation. (Test. of Odenthal.)

PPE at Applebee Aviation

27. Pesticide containers must have labels that are approved by the U.S. Environmental Protection Agency (EPA) and registered with the Department. Each label contains information on how to use the pesticide and what specific equipment (*i.e.* PPE) must be used during its handling. The safety information contained on the label is considered the minimum standard by which to abide and sets forth the minimum requirements for PPE. (Test. of Odenthal.) A common axiom in the pesticide industry is "The label is the law." (Test. of Howe, Odenthal.)

28. The EPA, in coordination with federal OSHA, has defined the requirements for PPE. OR-OSHA has, in turn, adopted those definitions. For example, sunglasses do not meet the criteria contained in the EPA's definition of "protective eyewear." (*See* 40 CFR §170.240(c)(7); test. of Odenthal.)

29. The pilots were responsible for training drivers and handlers at the job sites regarding PPE. (Test. of Applebee.) Each pilot working with Applebee Aviation had an Applebee

[13] It is reasonable to infer that Mr. McDaniels either did not read the label, that he read the label and did not understand it, or that he read the label and chose to disregard that the chemical was not to be used for forest applications.

Aviation credit card and was authorized to make PPE purchases (*e.g.* gloves, goggles, *etc.*) with the card while out in the field. (Test. of Howe, Applebee.) Applebee Aviation never questioned the PPE purchases made by the pilots. (Test. of Hall.)

30. In April 2015, PPE supplies were located in the storage area of the batch trucks. (Test. of Hall.) A respirator was not required for any of the chemicals Applebee aviation was spraying in April 2015. (Test. of Odenthal, Cooke.) It is not necessary to wear PPE while inside a truck at the project site. (Test. of Odenthal.)

31. From July 2014 until the late fall of 2015, John Metzer worked for Applebee Aviation as a batch truck driver. He worked on all the crews, including with pilots Clark, McDaniels, and Hall. In the field, the PPE available to him included latex gloves from NAPA that went to the wrist and long-sleeve shirts. During the last three to six months of his employment, he also had access to coveralls. During the last six months or so of his employment, Applebee Aviation informed the drivers/handlers (such as Mr. Metzer) that they needed to wear thicker chemical gloves that extended past the wrist. The handlers did not like wearing the thicker, longer gloves because they made it more difficult to perform their duties. Although Mr. Applebee required the handlers to use the thicker, longer gloves, pilots with whom Mr. Metzer worked did not require him to wear such gloves in the field. Although Mr. Metzer was aware that the batch trucks each had first aid kits, no one ever told him the kits contained any eyewash. He did not know of any eyewash on the batch trucks, except for bottled water that could potentially have been used for eyewash purposes. Some of the pilots with whom Mr. Metzer worked expected the crew members to work at a fast pace. In meetings, Mr. Applebee would instruct crew members to take their time, be safe, and do things correct the first time around. (Test. of Metzer.)

32. In 2014 and 2015, Kevin Vanderlei worked for Applebee Aviation. His duties included driving a batch truck and a one-ton truck, [14] mixing chemical concentrates, and hauling chemicals. He worked on multiple crews, including with pilots Clark and Hall. In April 2015, he was working with an Applebee Aviation crew in Roseburg, Oregon under the supervision of Mr. Clark. Applebee Aviation ultimately terminated Mr. Vanderlei's employment.[15] He has submitted an OSHA claim regarding work he performed for Applebee Aviation in Washington. (Test. of Vanderlei; *see* Ex. A2.)

33. Pilot McDaniels did not receive any training from Applebee Aviation regarding PPE. (Test. of McDaniels.) He was unaware that Applebee Aviation had any training materials for drivers/handlers until he found a training manual in one of the trucks. (Ex. A3 at 60; test. of Odenthal.)

34. Although the pilots/CPAs were responsible for PPE issues for their crews during spray projects, the overall responsibility for PPE fell to the operator, Mr. Applebee. (Test. of

[14] The one-ton trucks contained the chemicals, fuel, tools, and some gear. (Test. of McDaniels.)

[15] At hearing, Mr. Vanderlei testified that he was fired for reporting leaky valves on an Applebee Aviation helicopter. (Test. of Vanderlei.) However, Mr. Clark testified that Mr. Vanderlei was actually fired for insubordination and vandalism. (Test. of Clark.)

Babbitt.) In Mr. Odenthal's opinion, Mr. Applebee had an obligation to pay attention to what the pilots/CPAs and drivers/handlers were doing in the field, and he was ultimately responsible for the actions of his employees and agents. (Test. of Odenthal.)

Darryl Ivy and PPE

35. Darryl Ivy worked for Applebee Aviation from approximately April 8, 2015 to April 26, 2015. (*See* Ex. A3 at 19; test. of Ivy.) He had previously worked as a helicopter mechanic. His employment with Applebee Aviation marked the first time he worked with pesticides. (Test. of Ivy; *see* Ex. A3 at 36.)

36. Mr. Applebee hired Mr. Ivy as a truck driver after meeting with him briefly at the hangar and discussing Mr. Ivy's qualifications. Mr. Ivy filled out employment paperwork, and within approximately 1.5 hours he was headed to Roseburg to work on the Seneca Jones project for Applebee Aviation. (Test. of Ivy; Ex.A3 at 92.) Mr. McDaniels was the pilot/crew leader on that project. While at the project site, in addition to driving, Mr. Ivy mixed chemicals, handled concentrated pesticides, loaded chemicals onto the helicopter, and fueled the helicopter. (Test. of McDaniels, Howe, Ivy.)

37. Mr. Ivy received no safety, hazardous substance, or PPE training from Applebee Aviation prior to joining the Seneca Jones project. The only training he received occurred on-the-job at the project site, and consisted of him observing Mr. McDaniels and the other driver/handler. Mr. Ivy characterized such training as "monkey see, monkey do." (Test. of Ivy; *see* Ex. A3 at 36.)

38. Applebee Aviation provided Mr. Ivy with one or two orange long-sleeved cotton shirts and black rubber gloves that went to the wrist. Mr. Ivy was not aware until he had worked for Applebee Aviation for three or four days that he was supposed to launder his clothes each day. (Test. of Ivy; Ex. A3 at 37, 47.)

39. After working for Applebee Aviation for approximately a week, Mr. Ivy learned that Mr. McDaniels had a company credit card that could be used to purchase PPE. Mr. McDaniels purchased gloves for Mr. Ivy that only went to the wrist. Mr. Ivy elected to purchase his own Mr. Clean rubber gloves that went up to the elbow. Mr. McDaniels told Mr. Ivy that they were the wrong type of gloves for the job. (Test. of Ivy; Ex. A3 at 47.)

40. Mr. Ivy was not aware of any soap, water, or paper towels available to him at the project site for washing purposes.[16] He bought his own "wet wipes" to clean his hands and other areas, if necessary. (Ex. A3 at 48, 60; test. of Ivy.)

41. Mr. Ivy took many videos while working in the field on the Seneca Jones project. Driver/handler Robert Taylor also took some video footage of Mr. Ivy at the project site. (Test. of Ivy; *see* Ex. A43.) The videos focus primarily on drift and exposure issues. (Test. of

[16] During a May 27, 2015 interview with OR-OSHA and Department personnel, Mr. McDaniels reported that some dish soap and a roll of shop towels were stored in a tunnel box on the side of the one-ton truck. (Ex. A3 at 59.) More likely than not, Mr. Ivy was unaware of those supplies.

Odenthal; *see, e.g.*, Ex.A43 at Videos C, G, H, Q, R, S, AA, BB, KK, MM.) The only chemicals clearly identified in any of Mr. Ivy's videos are Velossa and Atrazine. (Test. of Odenthal; *see* Ex. A43.)

42. Video B shows a faulty seal on the batch truck. (Test. of Odenthal; Ex. A43 at Video B.) The Department did not notify Applebee Aviation about the presence of the bad seal until issuing the Emergency Suspension Order in September 2015. (Test. of Odenthal; *see* Ex. A25 at 7, 9.)

43. Video D shows Mr. Ivy and Mr. Taylor loading a helicopter with chemical. Mr. Ivy is wearing leather gloves and no eye protection, and Robert Taylor is wearing no gloves and no eye protection. (Test. of Odenthal; *see* Ex. A43 at Video D.) There could be potential PPE violations shown in the video, but it is unknown what chemical is being handled and what PPE requirements are on the label. (Test. of Odenthal.)

44. Video F shows open chemicals being poured and/or mixed. Mr. Ivy is wearing an orange long-sleeved shirt, black gloves, and no protective eyewear or apron. (Ex. A43 at Video F.) Video GG shows Mr. Ivy rinsing barrels while wearing black gloves and no goggles or apron. (*Id.* at Video GG.)

45. Video II shows Mr. Ivy and Mr. Taylor reloading an Applebee Aviation truck. Mr. Ivy has on yellow gloves and no goggles or apron. Mr. Taylor is not wearing any gloves, goggles, or apron. (Ex. A43 at Video II.) Video PP shows Mr. Ivy stating that he got the chemical Atrazine on his face and mouth and that there was no water with which to clean off the chemical. He states in the video that he used some wet wipes he had personally purchased to clean his face and mouth. (*Id.* at Video PP.)

46. A still photo pulled from a video shows a pair of leather gloves on top of an Applebee Aviation batch truck. (Ex. A3 at 310.) Leather gloves do not meet PPE requirements for "chemical-resistant gloves" because they are porous. (Test. of Odenthal.)

47. On April 26, 2015, Mr. Ivy showed Mr. McDaniels blisters that were on his tongue, lip, neck, and arms. Mr. McDaniels instructed Mr. Ivy to go to the doctor if he had concerns. (Test. of Ivy; Ex. A3 at 61.) Mr. Ivy quit employment with Applebee Aviation that day. (Ex. A3 at 63.)

ODA and OR-OSHA Investigation

48. In 2006, the Department and the Oregon Department of Consumer and Business Services, Occupational Safety and Health Division (OR-OSHA) entered into a Memorandum of Agreement (MOA). (Ex. R8B.) The MOA is intended to clarify the respective roles of the Department and OR-OSHA. OR-OSHA is charged with enforcing health and worker safety standards, and has jurisdiction when there is an employer/employee relationship. The Department, on the other hand, is charged with enforcement relating to licensing and the use of particular chemical products. (*See id.* at 2-3; test. of Cooke.) Pursuant to the MOA, the Department and OR-OSHA must coordinate enforcement actions where Worker Protection

Standard (WPS) violations are found.[17] (Ex. R8B at 4.)

49. An April 26, 2015 Oregon Emergency Response System (OERS) incident report states, in part:

> Hazmat 1 reported a male subject was contaminated by a low-toxicity herbicide. Occurred somewhere on BLM land and has been ongoing for 2 weeks due to inadequate workplace safety. Herbicide is identified as Atrazine. It is reported [th]at the workers are not provided proper safety gear while working with this herbicide and that the helicopter releases the herbicide overhead while they're working. The subject is Darryl Ivy * * *. Subject quit his job today and some of the information provided

[17] The Worker Protection Standard (WPS), adopted by the EPA, is designed to protect workers and pesticide handlers who conduct activities in or on farms, forests, nurseries, and greenhouses from risks of illness or injury due to pesticide exposure. 40 CFR § 170.1. For example, 40 CFR §170.240 pertains to PPE and states, in part:

> (a) [A]ny person who performs tasks as a pesticide handler shall use the clothing and personal protective equipment specified on the labeling for use of the product.
>
> (b)(1) [P]ersonal protective equipment (PPE) means devices and apparel that are worn to protect the body from contact with pesticides or pesticide residues, including, but not limited to, coveralls, chemical-resistant suits, chemical-resistant gloves, chemical-resistant footwear, respiratory protection devices, chemical resistant aprons, chemical-resistant headgear, and protective eyewear.
>
> * * * * *
>
> (c)(5)(i) Gloves shall be of the type specified on the pesticide product labeling. Gloves made of leather, cotton, or other absorbent materials may not be worn while mixing, loading, applying, or otherwise handling pesticides, unless gloves made of these materials are listed as acceptable for such use on the product labeling.
>
> * * * * *
>
> (7) When ''protective eyewear'' is specified by the product labeling, one of the following types of eyewear must be worn:
> (i) Goggles.
> (ii) Face shield.
> (iii) Safety glasses with front, brow, and temple protection.
> (iv) Full-face respirator.
>
> * * * * *
>
> (e)(1) [T]he handler employer shall assure that personal protective equipment is used correctly for its intended purpose and is used according to the manufacturer's instructions.

> may be escalated due to subject being disgruntled. Subject complained of blisters in his mouth and a swollen airway. After quitting his job today the subject went to a restaurant before seeking medical treatment. Subject arrived at Mercy Medical Center in Douglas County at approximately 1745. The ER doctor is looking into toxicology reports and will have those available for Hazmat tomorrow. Meanwhile the subject was decontaminated and his clothing secured at the recommendation of Hazmat 1[.]

(Ex. A1 at 2.)

50. On April 27, 2015, the Department received a copy of the OERS report.[18] (Ex. A1 at 1-2; test. of Odenthal.) Michael Odenthal, the lead investigator for the Department's pesticide program, consulted with Garnet Cooke at OR-OSHA and the two determined that OR-OSHA would take the lead in investigating the matter. (Test. of Odenthal, Cook.) Mr. Odenthal participated to some extent in interviews and assisted Ms. Cooke with review of pesticide labels. He did not take any notes of the interviews. (Test. of Odenthal.)

51. The investigation was initially focused on Mr. Ivy's potential exposure to pesticides. However, for the Department, the focus eventually shifted to the issue of adequate PPE. (Test. of Odenthal.)

52. On April 29, 2015, Mr. Odenthal and Ms. Cooke met with Mr. Applebee at the hangar. (Test. of Applebee, Odenthal; *see* Ex. A3 at 19-21, 23-24.) Mr. Applebee was not entirely certain of the purpose of the meeting, but he knew it had something to do with Mr. Ivy. Mr. Howe was initially present at the meeting, but he left after becoming upset. Mr. Applebee had assumed that Mr. Howe would take the lead in the meeting, and he felt unprepared after Mr. Howe left. At the time of the hearing, Mr. Applebee could not recall specific details of the conversations he had with Ms. Cooke and Mr. Odenthal on April 29, 2015. (Test. of Applebee.)

53. At the time of the April 29, 2015 meeting, Applebee Aviation employed three aerial spray crews, each of which consisted of a pilot and two drivers. The crews operated out of various locations and would stay in hotels when necessary. (Ex. A3 at 19.) Mr. Applebee could not substantiate at that time that Applebee Aviation engaged in or offered any hazardous substance training to its employees/agents.[19] (Test. of Odenthal; *see* Ex. A3 at 20.)

54. Mr. Applebee showed Ms. Cooke and Mr. Odenthal one of Applebee Aviation's batch trucks. The truck contained a very small container (approximately 7.5 ounces) of soap with a hand pump strapped to the back. Ms. Cooke and Mr. Odenthal observed no emergency eyewash units. (Ex. A3 at 20, 33; test. of Odenthal.) Ms. Cooke and Mr. Odenthal observed single-use Black Lightening nitrile examination gloves in one of the Applebee Aviation trucks. (Ex. A3 at 32; test. of Odenthal; *see* Ex. A3 at 114.)

---

[18] Mr. Ivy did not report anything to the Department directly. (Test. of Odenthal.)

[19] In approximately late June 2015, Applebee Aviation developed a written Hazard Communication Program and provided Ms. Cooke with a copy of the program. (*See* Ex. A3 at 284-290, 293.)

55. On May 20, 2015, Ms. Cooke, Mr. Odenthal, and others met with Mr. Taylor, who had worked with Mr. Ivy on the Seneca Jones project. During the interview, Mr. Taylor reported that on April 26, 2015, Mr. Ivy told him that he had dropped an Atrazine barrel on the ground, that some had splashed up onto his face, and that he had cleaned his face with wet wipes/baby wipes. (Ex. A3 at 53-55; test. of Odenthal.)

56. On May 27, 2015, Mr. Odenthal and Ms. Cooke interviewed Mr. McDaniels. (Ex. A3 at 26, 57-63; test. of Odenthal.) Mr. McDaniels reported that his crew was responsible for letting him know if they lacked (or were getting low on) PPE. (Ex. A3 at 57.) He also reported that there was a case of bottled water at the project site, as well as two pint bottles for eye flushing. (*Id.* at 59.)

57. On May 29, 2015, Ms. Cooke, Mr. Odenthal, and others met with Mr. Ivy. (Ex. A3 at 27, 38-50; test. of Odenthal.) Mr. Ivy reported that he was directly sprayed and misted with pesticides while working for Applebee Aviation, that he had concerns about rinsing empty containers with very little water, and that he had been splashed across the face with chemical and water while working, causing him to develop welts and blisters on his face. (Ex. A3 at 40, 42-44.)

58. During the OR-OSHA investigation, Mr. Ivy provided Ms. Cooke with the names of the chemicals he claims were used on the Seneca Jones project. (*See* Ex. A3 at 46.) Applebee Aviation also provided Mr. Odenthal and Ms. Cooke with a list of the application records for the project. (*See id.* at 71-72; test. of Odenthal.)

59. While working on the Seneca Jones project, the crew handled the following chemicals: Velossa;[20] Clean Slate; Transline; Element 4; Agri Star 2,4-D LV6; Weedone 2,4D; Sipcam Atrazine 4L; Drexel Atrazine 4L; and Mana Atrazine 4L.[21] (*See* Exs. A3 at 71-73, A25 at 6.) Ms. Cooke compiled a list of the PPE that was required for each chemical product used on the project. (*See* Ex. A3 at 73.)

60. The Velossa label states "DANGER! PELIGRO!" and "CAUSES EYE DAMAGE." Ex. A19 at 1, 2, 4.) The precautionary statements on the label state, in part:

> [C]auses irreversible eye damage. * * *. Do not get in eyes or on clothing. Wear protective eyewear (goggles, face shield, or safety glasses).

(*Id.*) Velossa does not require gloves for handling. (*See id.* at 4.)

61. The Clean Slate label states, in part, that "[o]nly protected handlers may be in the

[20] At hearing, Mr. McDaniels confirmed that he sprayed the Velossa while Mr. Ivy was on his crew. (Test. of McDaniels.)

[21] A table at Exhibit A3 at 72 shows the amount of each herbicide applied on the project. Atrazine and Velossa comprise the vast majority of the herbicides used. (*See* Ex. A3 at 72.)

area during application" and that applicators and other handlers must wear "[c]hemical-resistant gloves made of any waterproof material" and "[p]rotective eyewear." (Ex. A23 at 2-3.)

62. The Transline label states that the chemical causes moderate eye irritation and is harmful if absorbed through the skin. The label requires that applicators and other handlers wear "[c]hemical resistant gloves made of any waterproof material." (Ex. A3 at 267.)

63. The Weedone label requires that handlers wear chemical-resistant gloves and a chemical-resistant apron. (Ex. A3 at 175.) The Element 4 label states that the chemical "[c]auses moderate eye irritation." (Ex. A21 at 4.) The only PPE required for this chemical are long-sleeved shirts, pants, shoes, and socks. (*See id.*)

64. The Agri Star 2, 4-D LV6 label states that "[s]ome materials that are chemical-resistant to this product are neoprene or nitrile rubber[.]" (Ex. A3 at 159.) The label requires that all mixers, loaders, applicators, flaggers, and other handlers wear "[c]hemical-resistant gloves" and "[c]hemical-resistant apron when applying with any handheld nozzle or equipment, mixing or loading, cleaning up spills or equipment, or otherwise exposed to the concentrate." (*Id.*)

65. The Sipcam Atrazine 4L label states that "[s]ome materials that are chemical-resistant to this product are barrier laminate or butyl rubber or nitrile rubber[.]" (Ex. A3 at 187.) The label requires that mixers, loaders, all other applicators, flaggers, and other handlers wear "chemical-resistant gloves" and "chemical-resistant apron when mixing/loading, cleaning up spills, cleaning equipment, or otherwise exposed to the concentrate." (*Id.*) The Drexel Atrazine 4L label states that the chemical causes moderate eye irritation and is harmful if swallowed or absorbed through skin. The label also requires that mixers, loaders, all other applicators, flaggers, and other handlers wear "chemical-resistant gloves such as polyethylene or polyvinyl chloride" and a "chemical-resistant apron when mixing/loading, cleaning up spills, cleaning equipment, or otherwise exposed to the concentrate." (*Id.* at 255.) The Mana Atrazine 4L label contains the same PPE requirements as the Sipcam and Drexel labels. (*See* Ex. A22 at 2.)

66. In approximately August 2015, the Department received a draft copy of Ms. Cooke's OR-OSHA report. (Test. of Babbitt.) The draft report stated, in part:

> Employee interviews revealed a lack of training, poor work practices and general lack of awareness of cross[-]contamination principles. The indifferent attitude toward the degree of hazard posed by the herbicides was a contributing factor to splashes when pesticide containers were rinsed.
>
> Aerial forestry herbicide applications have unique practices that impact employees' exposures to herbicides and in this instance a few thousand acres during a month's time frame. These practices include:
>
> • When herbicides are applied adjacent to the landing, the drivers seek refuge in the cabs of the trucks.

• Employees do not decontaminate prior to entering the cabs, and therefore the cabs become contaminated.

* * * * *

• Employees do not decontaminate the vehicles at the end of the workday.

* * * * *

In June Mr. Ivy met with the Federal Aviation Administration and provided 15 videos and his medical records to them. * * * * *. None of the videos provided at that time le[n]d support to the violations being alleged[.]

* * * * *

Additional videos and photographs were obtained from Darryl Ivy in August 2015 which substantiated lack of proper protective equipment, decontamination supplies and poor work practices.

(Ex. A3 at 20-21.)

67. Based on the findings in the OR-OSHA report, Mr. Odenthal concluded that Applebee Aviation performed pesticide application activities in a faulty, careless, or negligent manner, and that the following specifically occurred during the period April 9 through April 26, 2015:

• Applebee Aviation's agents or employees handled pesticide products and spray mixtures as they mixed loads and loaded the helicopter to make applications;

• The agents or employees had not been provided with pesticide safety training prior to these activities, nor were they, during application activities, consistently provided with water or other decontamination materials; and

• Aviation's failure to follow label requirements, provide sufficient safety materials, equipment and training, having workers work without the required personal protective equipment, and having workers use improperly securable equipment seriously endangered worker/handlers and thus the public's health and safety.

(*See* Ex. A25 at 8.)

68. In approximately September 2015, OR-OSHA issued a Letter of Corrective Action to Applebee Aviation. (Test. of Cooke; *see* Ex. R10A at 1.) They subsequently settled the matter. (Test. of Applebee.)

Relevant events between September 25, 2015 and October 2, 2015

69. In 2009, the Department and the U.S. Department of the Interior, Bureau of Land Management (BLM) entered into a Memorandum of Understanding (MOU) specifying that pesticide applications conducted by non-BLM employees on BLM property must be licensed pursuant to the Oregon Pesticide Control Act. (Ex. R8A at 1; test. of Mitchell, Babbitt.)

70. Sometime prior to September 29, 2015, Applebee Aviation secured a large contract with the BLM. Applebee Aviation was scheduled to perform its first pesticide applications on BLM lands in Oregon on October 1 and 2, 2015.[22] (Test. of Applebee, Howe.)

71. On or about September 20, 2015, Mr. Applebee went to the Jarbridge Wilderness in Nevada for a hunting trip. He was at an elevation of approximately 10,000 feet, and he was out of cell phone range until the evening of September 27, 2015. During Mr. Applebee's trip (and absence from Oregon), Mr. Howe was in charge at Applebee Aviation. (Test. of Applebee.)

72. On September 25, 2015, based on Mr. Odenthal's determinations upon reviewing the OR-OSHA report, a review conducted by Michael Babbitt (a case reviewer for the Department's pesticide enforcement unit),[23] and Mr. Mitchell's determinations, the Department issued the First Civil Penalty and First Emergency Suspension Order [hereinafter "Emergency Suspension Order"] to Applebee Aviation.[24] (Test. of Babbitt, Mitchell; *see* Ex. A25 at 2-16.)

73. The Emergency Suspension Order includes the following allegations:

> • During application activities in April 2015, some of the crew did not wear all of the PPE required by the product labels of the pesticide products they were handling;
>
> • During application activities in April 2015, Applebee Aviation did not provide the crew with water or other decontamination materials, such as could be used in the event of exposure to a pesticide;
>
> • During application activities in April 2015, Respondent used a pesticide mixture tank that had a defective seal on the top hatch; and

[22] At hearing, Mr. Applebee testified that the October 1 and 2, 2015 sprays were just one small piece of the long-term contract. (Test. of Applebee.)

[23] As a case reviewer, Mr. Babbitt reviews investigative reports for potential enforcement actions, makes recommendations to Mr. Mitchell, and prepares notices of violation. (Test. of Babbitt.)

[24] Mr. Babbitt and Mr. Mitchell drafted the Emergency Suspension Order. (Test. of Odenthal.)

> • Applebee Aviation did not provide the crew with training on how to minimize hazards to their safety and health while working around pesticides.

(Ex. A25 at 7.) In Mr. Odenthal's opinion, Mr. Applebee is personally responsible for the application of pesticides in a faulty, careless, negligent manner with regard to PPE because Mr. Applebee did not ensure that Applebee Aviation provided necessary safety training, plans, and equipment to its employees and agents. (Test. of Odenthal.)

74. Prior to the Department's issuance of the Emergency Suspension Order, Applebee Aviation did not receive any reasonable notice from the Department that its PPE and safety training were deficient. (Test. of Applebee.)

75. The Emergency Suspension Order states, in part, that Applebee Aviation's CPO license "is hereby suspended today, September 25, 2015. Effective immediately you must stop providing pesticide application services, or applying pesticides onto the properties of others in Oregon until further order of the Department." (Ex. A25 at 2.)

76. The Department's standard practice is to serve a corporation via the corporation's registered agent. (Test. of Odenthal, Babbitt, Mitchell; *see* Ex. R37A.) Consistent with that practice, the Department set out to serve the Emergency Suspension Order to Applebee Aviation's registered agent, Mr. Applebee, on September 25, 2015. (Test. of Babbitt; *see* Exs. A38, R37A.) Because registered or certified mail could take as long as five or more days, the Department determined that personal service to Applebee Aviation's registered agent would allow service to be accomplished more quickly.[25] (Test. of Mitchell.)

77. At approximately 2:00 p.m. on September 25, 2015, Mr. Babbitt contacted ABC Legal to request that the company serve the Emergency Suspension Order to Applebee Aviation, Inc. A few minutes later, Becky Jewett, an account manager with ABC Legal, asked Mr. Babbitt via email whether the service was to be to 39495 NW Bledsoe Creek Lane, in Banks. In response, Mr. Babbitt sent the following email to Ms. Jewett:

> The registered agent, who is also the president, is on Bledsoe Creek Lane, the hangar is on Fisher Road. We typically serve to the registered agent, and that was our intent in this case, so yes, we intended service to Bledsoe Creek Lane.

(Ex. R37A; test. of Babbitt.)

78. At approximately 4:36 p.m. on Friday, September 25, 2015, ABC Legal personally served the Emergency Suspension Order to 39495 NW Bledsoe Creek Lane, Mr. Applebee's address of record. An unidentified female (noted to be a "descendent, co-resident" between 25

[25] At hearing, Mr. Mitchell testified that the Department typically issues *non-emergency* notices of suspensions and civil penalties via certified mail, with a follow-up notification via phone to the recipient of the notice, given how long it can take for the recipient to actually receive the certified or registered mail. (Test. of Mitchell.)

and 35 years of age) accepted personal service. (*See* Ex. A26 at 2; capitalization omitted.) In addition, on September 28, 2015, the Department mailed a copy of the Emergency Suspension Order to 39495 NW Bledsoe Creek Lane, addressed to Applebee Aviation, "c/o Michael Applebee, Registered Agent." (*Id.* at 4.) The copy was sent via first class mail, and was marked with the date, time, and place of substituted service. (*Id.*)

79. On September 25 and 26, 2015, while still in the Jarbridge Wilderness and out of cell phone range, Mr. Applebee had no knowledge of the Emergency Suspension Order that was served on September 25, 2015. (Test. of Applebee.)

80. On September 26, 2015, Applebee Aviation made eight commercial pesticide applications to various properties in Oregon. (Exs. A11, A12.)

81. At 12:18 p.m. on September 27, 2015, Mr. Mitchell sent an email to Mr. Applebee, with an attachment that contained the Emergency Suspension Order.[26] The text of the email stated, in relevant part:

> The [Department] has concluded it's [*sic*] investigation and have issued the following enforcement action. Please read the documents carefully. I will serve as your primary point of contact to assist with the reinstatement process of the CPO license issued to Applebee[] Aviation. Please contact me if you have any questions[.]

(Ex. A4 at 1.)

82. Mr. Applebee first saw Mr. Mitchell's September 27, 2015 email on the evening of September 27, after he descended from the Jarbridge Wilderness and his cell phone service resumed. At that time, Mr. Applebee could read the text of the email, but he was unable to download and read the email attachment containing a copy of the Emergency Suspension Order. (Test. of Applebee.)

83. On September 28, 2015, Applebee Aviation made four commercial pesticide applications in Oregon. The applications began at 6:54 a.m. and were completed by 9:50 a.m. (Ex. A13 at 2-5.)

84. On September 28, 2015, Mr. Applebee left Nevada and began the trip home to Oregon. Sometime that day, he was able to download and access the Emergency Suspension Order on his phone. He was unable to read any details of the 16-page order because he did not have his glasses with him. He understood, however, that the email and attached order were regarding a suspension of Applebee Aviation's CPO license. He forwarded the email and attached order to his wife and to Mr. Howe sometime during the afternoon of September 28. Also sometime that afternoon, he called the Department to inform Mr. Mitchell that he would be

[26] At hearing, Mr. Mitchell explained that it is common for him to work outside of the typical Monday through Friday work schedule, and that his purpose in sending the email was to convey that the Department was willing to work with Mr. Applebee and Applebee Aviation on the license issue. (Test. of Mitchell.)

at the Department's office the following morning at 9:00 a.m. to discuss the license issue. (Test. of Applebee.)

85. Mr. Applebee arrived at his home between approximately 11:00 p.m. and midnight on September 28. He did not attempt to read the Emergency Suspension Order once he arrived home because his printer was not working. (Test. of Applebee.)

86. On September 29, 2015, Applebee Aviation made two commercial pesticide applications in Oregon. The applications began at 6:56 a.m. and were completed by 9:40 a.m.[27] (*See* Ex. A14 at 2-3.)

87. On September 29, 2015, Mr. Applebee arrived at the Applebee Aviation office at approximately 7:00 a m. Mr. Howe and Ms. May were already present. At that time, Mr. Applebee had not yet closely read the Emergency Suspension Order. (Test. of Applebee.) Mr. Howe only became aware of the emergency suspension that morning when he read the forwarded email Mr. Applebee had sent to him on September 28, 2015. (Test. of Howe.) After some discussion with Mr. Howe and/or with Ms. May, Mr. Applebee directed Ms. May to notify all relevant persons at Applebee Aviation that operations were shut down. At the time, Mr. Applebee did not know where any of the spray crews were located and he was not aware of what projects might be performed that day. At Mr. Applebee's request, Mr. Howe accompanied him to the Department's office in Salem, where they arrived sometime around 9:00 a.m. (Test. of Applebee.)

88. Sometime after 9:00 a.m. on September 29, 2015, Mr. Applebee and Mr. Howe met with Mr. Odenthal and Mr. Mitchell to discuss the Emergency Suspension Order. (Test. of Applebee, Howe, Odenthal, Mitchell.) At Mr. Applebee's request, Mr. Mitchell went through the Order page by page. (Test. of Odenthal, Howe; Ex. A5 at 1.) Mr. Mitchell explained that Applebee Aviation was to make no further pesticide applications in Oregon until the requirements in the Order were satisfied and the license suspension was lifted. (Test. of Mitchell, Odenthal.) Mr. Mitchell discussed what actions Applebee Aviation needed to take to be eligible for reinstatement of the CPO license. (Ex. A5 at 1; test of Howe.)

89. During the meeting, Mr. Applebee asked whether there could be an exception to the CPO license requirement for the scheduled BLM sprays later that week. Mr. Mitchell stated that there were no exceptions. (Test. of Odenthal, Mitchell; Ex. A5 at 1.) Mr. Applebee asked Mr. Mitchell if the Department had jurisdiction on federal lands. In response, Mr. Mitchell mentioned that the Department did not have jurisdiction on tribal lands absent a memorandum of understanding. (Test. of Applebee, Mitchell.) Mr. Applebee suggested that Oregon does not follow federal laws with regard to cannabis/marijuana, so Oregon should not be regulating federal BLM land. (Test. of Howe, Mitchell.) Because Mr. Applebee seemed to be challenging the Department's interpretation of its jurisdiction on federal lands, Mr. Mitchell told him that it may be a good question for a lawyer. (Test. of Mitchell.) Mr. Mitchell also mentioned that he could get back to Mr. Applebee with more information on the jurisdiction issue. (Test. of Applebee.)

---

[27] The Department refers to the applications made on September 26, 28, and 29, 2015 as the "forest applications." (*See, e.g.*, February 15, 2016 Notice to Michael Applebee at 7.)

90. During the meeting, the possibility of Applebee Aviation's CPO license being reinstated as early as the following day was mentioned. (Test. of Odenthal.) Mr. Odenthal told Mr. Applebee and Mr. Howe that Applebee Aviation could go ahead and mobilize its crews to the BLM work site, in anticipation of satisfying the license reinstatement requirements, and having its CPO license reinstated, in time to perform the BLM jobs. Mr. Odenthal did not tell Mr. Applebee and Mr. Howe that Applebee Aviation could spray pesticides on the BLM land while Applebee Aviation's CPO license was suspended. (Test. of Mitchell, Odenthal, Howe.) In Mr. Odenthal's opinion, it was reasonable for Mr. Applebee and Mr. Howe to believe, by the end of the meeting, that the CPO license would soon be reinstated. (Test. of Odenthal.)

91. Neither Mr. Applebee nor Mr. Howe mentioned during the meeting that Applebee Aviation had performed commercial applications in Oregon on September 26 and 28, 2015, and that there were additional applications occurring in Oregon that very morning. (Test. of Mitchell.) Mr. Howe and Mr. Applebee were primarily focused on what they needed to do to correct any deficiencies so the Department would reinstate the CPO license and Applebee Aviation could perform the BLM job scheduled for October 1 and 2, 2015. (Test. of Howe.) At Mr. Applebee's direction, Mr. Howe wrote a check to the Department to pay the civil penalty. (Ex. A5 at 1.)

92. Sometime after the September 29, 2015 meeting, Mr. Mitchell obtained a copy of the MOU between the Department and the BLM. (Test. of Mitchell; *see* Ex. R8A.) Mr. Mitchell did not provide a copy of the MOU to Applebee Aviation prior to October 1, 2015, and he did not engage in any further jurisdictional discussions with Mr. Applebee prior to October 1, 2015. (Test. of Applebee.)

93. At approximately 3:44 p.m. on September 29, 2015, Mr. Howe emailed a two-page written plan to the Department.[28] (Exs. A7 at 1-2, A8 at 1; test. of Applebee, Mitchell.)

94. On September 30, 2015, Mr. Mitchell responded to Mr. Howe's September 29, 2015 email, and requested a telephone conference to discuss Applebee Aviation's written plan. (Exs. A5 at 2, A8; test. of Mitchell.) Mr. Mitchell believed that the plan needed more detail, clarification, and verification. (Test. of Mitchell, Odenthal; *see* Ex. A8 at 1.)

95. On September 30, 2015, Mr. Mitchell, Mr. Odenthal, and Mr. Babbitt spoke to Mr. Howe via telephone. Mr. Mitchell went through Applebee Aviation's corrective action plan point-by-point and provided advice on how the plan could be improved to meet the Department and OR-OSHA's requirements. Mr. Mitchell also suggested that Mr. Howe contact OR-OSHA for additional advice and recommendations on improving the plan. (Ex. A5 at 2.)

96. On October 1 and 2, 2015, Applebee Aviation made commercial pesticide applications to a total of approximately 800 acres of the Crack in the Ground Fire Restoration

[28] At hearing, Mr. Applebee explained that he had tasked Mr. Howe with overseeing that Applebee Aviation came into compliance with the Department and OR-OSHA after the September 29, 2015 meeting. (Test. of Applebee.)

Project site on BLM land, pursuant to the contract Applebee Aviation had with the BLM.[29] (Test. of Applebee; Ex. A15 at 2-3.) Mr. Applebee did not inform the BLM that Applebee Aviation's CPO licensed was suspended at that time. (Test. of Applebee.) There is no evidence that any employee or agent of Applebee Aviation provided such information to the BLM. (*See* Evidentiary Record.)

97. Prior to making the BLM applications on October 1 and 2, 2015, Mr. Applebee did not ask the BLM if Oregon licensure was required for Applebee Aviation to spray on BLM land. Prior to making the applications, he also did not consult with an attorney or follow up with Mr. Mitchell or anyone at the Department to request that more clarification or guidance be provided on the jurisdiction issue. (Test. of Applebee.)

Relevant events after October 2, 2015

98. On October 5, 2015, Ms. May sent an email to Ms. Cooke with attached photos showing PPE such as Uvex safety goggles and Tyvek coveralls. (Ex. A6 at 1-7.) On October 6, 2015, Ms. Cooke forwarded the email and attachments to Mr. Mitchell. Mr. Mitchell considered the photos to be sufficient verification of appropriate PPE. (Test. of Mitchell.)

99. On October 5, 2015, Ms. May provided the Department with a three-page updated written corrective action plan, with attachments, via email. (Ex. A9; test. of Mitchell.) The attachments included a "Non-Essential Repair Log" dated May 28, 2015, and Applebee Aviation pesticide handler training acknowledgements dated October 5, 2015. (Ex. A9 at 6-15.) Mr. Mitchell and Ms. Cooke subsequently reviewed the updated plan and determined that it met the requirements for reinstatement of Applebee Aviation's license to operate as a CPO. Mr. Mitchell discussed the plan with the Department's Assistant Director, Lauren Henderson, who requested that the Department conduct an onsite inspection before reinstating Applebee Aviation's CPO license. (Ex. A5 at 2; test. of Mitchell.)

100. In Mr. Odenthal's opinion, Applebee Aviation was responsive to the Department's request for a written plan and PPE improvement. (Test. of Odenthal.) In Mr. Mitchell's opinion, Applebee Aviation came into compliance after the September 29, 2015 meeting in a rather quick manner. (Test. of Mitchell.)

101. On October 7, 2015, the Department received email correspondence from Lisa Arken, the Executive Director of Beyond Toxics, inquiring as to why Applebee Aviation was scheduled to conduct aerial spraying for the Oregon Department of Forestry while its CPO license was suspended. (Ex. R35A at 1-2; test. of Odenthal.)

102. On October 8, 2015, Mr. Mitchell and Mr. Odenthal met Mr. Applebee at the hangar. (Test. of Odenthal, Mitchell; Ex. A5 at 2.) Mr. Mitchell discussed the updated written correction action plan with Mr. Applebee and requested a visual inspection of the equipment that required repair to ensure the repairs had been completed. Mr. Applebee showed Mr. Mitchell and Mr. Odenthal tote boxes of personal protective equipment that had been prepared for use in

[29] The Department refers to those two applications as the "BLM applications." (*See* February 15, 2016 Notice to Michael Applebee at 9.)

the field. (Test. of Mitchell; Ex. A5 at 2.) Mr. Odenthal and Mr. Mitchell observed that all the PPE was new.[30] (Test. of Odenthal, Mitchell.) Mr. Applebee also showed them batch truck number 128, the truck used by the crew involved in the investigation concerning Mr. Ivy, and pointed out the repaired hatch and seal. Each hatch in batch truck 128 had a seal intact. (Ex. A5 at 2; test. of Odenthal.) Mr. Applebee reported that eyewash stations had been ordered, but had not yet arrived. Mr. Applebee also provided documentation regarding training. With regard to PPE, the Department considered Applebee Aviation in compliance, as of October 8, 2015. (Test. of Odenthal.)

103. Towards the end of the October 8, 2015 meeting, Mr. Mitchell asked Mr. Applebee whether Applebee Aviation had performed any commercial pesticide applications while its CPO license was suspended. In response to the inquiry, Mr. Applebee admitted that Applebee Aviation had performed the BLM applications on October 1 and 2, 2015. (Test. of Odenthal, Mitchell; Ex. A5 at 2.) Mr. Applebee stated that it was a big project, that he felt pressured to perform the applications despite the status of Applebee Aviation's CPO license, and that the Department did not have jurisdiction anyway because the project was on federal land. (Test. of Mitchell; Ex. A5 at 2-3.) Mr. Applebee did not, at that time, specifically disclose the September 26, 28, or 29, 2015 forest applications. (Test. of Odenthal, Mitchell.)

104. Sometime between October 8 and 13, 2015, Mr. Mitchell learned from the Oregon Department of Forestry that Applebee Aviation had made two forest applications on September 26, 2015. (Test. of Mitchell.)

105. As a result of learning that Applebee Aviation had sprayed pesticides after the suspension of its license to operate as a CPO, Mr. Mitchell determined that Applebee Aviation had violated the September 25, 2015 Order suspending its license to operate as a CPO. On October 13, 2015, the Department issued another notice to Applebee Aviation, proposing a civil penalty, revocation of the CPO license, and refusal to reissue or renew the license. (Ex. A27.) At the time, the Department was aware of only four applications that occurred while Applebee Aviation had a suspended CPO license. (Test. of Babbitt; *see* Ex. A27 at 7-9.)

106. Applebee Aviation turned down more than one pesticide application job following the September 29, 2015 Department meeting. (Test. of Howe; *see* Ex. R5A at 1, 2.)

107. On October 19, 2015, a the Department and Applebee Aviation entered into a Stipulated Preliminary Injunction in Washington County Circuit Court. The injunction ordered Applebee Aviation to immediately cease all pesticide application activities in Oregon that require a CPO license, until such time as the Department reinstates the license. The injunction also ordered Mr. Applebee to immediately cease directing or causing Applebee Aviation to engage in any pesticide application activities in Oregon, until such time as the Department reinstates the license. (Ex. A17 at 1-2; test. of Mitchell.)

108. By statute, CPOs must retain pesticide application records for three years. (Test. of

[30] At hearing, Mr. Applebee testified that after the September 29, 2015 meeting, they "threw away" all of the old PPE and began anew. (Test. of Applebee.) The new PPE included, for example, Uvex safety goggles, which were appropriate protective eyewear. (Test. of Odenthal; *see* Ex. A6 at 2.)

Odenthal; ORS 634.146.) Each separate land parcel (*i.e.* unit) requires a separate record and is considered a separate application. For a large project, such as the BLM spray, each day is considered a separate application and requires a separate record. (Test. of Odenthal.)

109. Applebee Aviation provided the Department with pesticide application records for the period September 26, 2015 through October 2, 2015. The records show the eight forest applications on September 26, the four forest applications on September 28, the two forest applications on September 29, and the two BLM applications on October 1 and 2, 2015. (*See* Exs. A11 through A16; test. of Odenthal.) In addition, an invoice shows that another unit received an application on September 26, 2015, but there is no corresponding application record. (Test. of Odenthal; *see* Ex. A16.)

110. After the Department obtained the pesticide application records showing more than four applications while Applebee Aviation's CPO license was suspended, the Department issued another notice to Applebee Aviation, which alleged 16 applications. (*See* Ex. A29, test. of Odenthal.)

CONCLUSIONS OF LAW

1. Applebee Aviation violated ORS 634.372(9) by making 16 commercial pesticide applications in Oregon while its CPO license was suspended.

2. Applebee Aviation has demonstrated a pattern of misconduct by making multiple commercial pesticide applications in Oregon while its CPO license was suspended, by allowing a pesticide to drift off-target and into water when the label prohibited all applications to water, by applying pesticide to a site for which it was not labeled, and by allowing pesticide handlers to perform pesticide activities without necessary PPE. Based on the current proven violations, and Applebee Aviation's violation history, the appropriate sanction is a one-year suspension of the CPO license.

3. For the 16 violations of ORS 634.372(9), the Department may assess civil penalties in the amount of $43,552 against Applebee Aviation.

OPINION

Oregon's Pesticide Control Act (Act) is codified at ORS Chapter 634. ORS 634.005 states, in part:

> The purpose of this chapter, which shall be known as the State Pesticide Control Act and shall be enforced by the State Department of Agriculture, is to regulate in the public interest the formulation, distribution, storage, transportation, application and use of pesticides. * * * * *. The pesticide industry of this state has achieved and maintained high standards in its formulation and use of pesticides while at the same time experiencing a minimum of injury to persons, property or the environment. Currently updating the law to maintain this achievement and to consider future new

pesticides and problems is necessary for the protection of persons, property, wildlife and environment of this state.

See also ORS 634.055.[31]

ORS 634.306 sets forth the Department's rule-making authority with respect to the Act and states, in part:

> [The Department] may adopt rules to carry out the purposes and intent of this chapter, including but not limited to rules that:
>
> * * * * *
>
> (2) Establish and maintain classifications of the various pesticides and of the various pest control or pesticide application businesses in order to facilitate the licensing or certification and regulation of pesticide consultants, operators, applicators, private applicators and trainees. In this regard the department may take into consideration:
>
> (a) Various types, formulations and characteristics of pesticides used and their purposes.
>
> (b) Various methods of application of such pesticides.
>
> (c) Precautions required for safe and effective application of such pesticides.

ORS 634.322 sets forth the Department's enforcement powers and states, in part:

> In carrying out and enforcing the provisions of this chapter, the State Department of Agriculture is authorized:
>
> (1) To collect samples of pesticides from any source, for analysis to determine compliance with this chapter.
>
> * * * * *

[31] ORS 634.055 states, in part:

> The Legislative Assembly hereby determines that the citizens of this state benefit from a system of safe, effective and scientifically sound pesticide regulation. The Legislative Assembly further finds that a uniform, statewide system of pesticide regulation that is consistent, coordinated and comports with both federal and state technical expertise is essential to the public health, safety and welfare and that local regulation of pesticides does not materially assist in achieving these benefits.

(4) In accordance with the provisions of ORS chapter 183, to revoke, suspend or refuse to issue or renew any license or certificate if it determines that an applicant, licensee or certificate holder has violated any of the provisions of this chapter.

* * * * *

(8) To enter into cooperative and reciprocal agreements with the federal government, or any of its agencies, for the purpose of enforcement of the provisions of this chapter or federal laws and regulations on the same subject matters, and to receive and expend funds pursuant to such agreements in furtherance of such purpose.

ORS 634.006 defines a "pesticide applicator" and a "pesticide operator" as follows:

(9) "Pesticide applicator" or "applicator" means an individual who:

(a) Is spraying or applying pesticides for others;

(b) Is authorized to work for and is employed by a pesticide operator; and

(c) Is in direct charge of or supervises the spraying or other application of pesticides or operates, uses, drives or physically directs propulsion of equipment, apparatus or machinery during the spraying or other application of pesticides, either on the ground or, if certified under ORS 634.128, by aircraft.

(13) "Pesticide operator" means a person who owns or operates a business engaged in the application of pesticides upon the land or property of another.

The Department must prove its allegations against Applebee Aviation by a preponderance of the evidence, and it must also establish that the proposed sanctions are appropriate under the facts of the case. *See* ORS 183.450(2) ("The burden of presenting evidence to support a fact or position in a contested case rests on the proponent of the fact or position"); *Harris v. SAIF*, 292 Or 683, 690 (1982) (general rule regarding allocation of burden of proof is that the burden is on the proponent of the fact or position); *Metcalf v. AFSD*, 65 Or App 761, 765 (1983) (in the absence of legislation specifying a different standard, the standard of proof in an administrative hearing is preponderance of the evidence). Proof by a preponderance of the evidence means that the fact finder is persuaded that the facts asserted are more likely than not true. *Riley Hill General Contractor v. Tandy Corp.*, 303 Or 390, 402 (1987).

1. Pesticide applications between September 26, 2015 and October 2, 2015

The Department contends that Applebee Aviation violated ORS 634.372(9) by making 16

commercial pesticide applications in Oregon between September 26, 2015 and October 2, 2015, while its CPO license was suspended.

ORS 634.372(9) states, in pertinent part, that a person may not "[a]s a pesticide operator, engage in the business of, or represent or advertise as being in the business of, applying pesticides upon the land or property of another, without first obtaining and maintaining a pesticide operator's license."

Pursuant to ORS 634.006(7)(a) and ORS 174.100(6), the term "person," as used in ORS 634.372, includes "individuals, corporations, associations, firms, partnerships, limited liability companies and joint stock companies." Thus, Applebee Aviation is considered a "person" for purposes of ORS 634.372(9).

It is undisputed that Applebee Aviation made 16 commercial pesticide applications in Oregon between September 26, 2015 and October 2, 2015. There were eight pesticide applications performed on September 26, 2015; four on September 28, 2015; two on September 29, 2015; one on October 1, 2015; and another on October 2, 2015.

An Emergency Suspension Order, dated September 25, 2015, states, in part, that Applebee Aviation's CPO license "is hereby suspended today, September 25, 2015. Effective immediately you must stop providing pesticide application services, or applying pesticides onto the properties of others in Oregon until further order of the Department." Exhibit A25 at 2.

The Department's standard practice is to serve a corporation via the corporation's registered agent. Consistent with that practice, the Department set out to serve the Emergency Suspension Order to Applebee Aviation's registered agent, Mr. Applebee, on September 25, 2015.

OAR 137-003-0560 is titled "Emergency License Suspension" and states, in pertinent part:

> (2)(a) When the agency issues an emergency suspension order, the agency shall serve the order on the licensee either personally or by registered or certified mail;
>
> (b) The order shall include the following statements:
>
> (A) The effective date of the emergency suspension order[.]

(Emphasis added.)

Because registered or certified mail could take as long as five or more days, the Department determined that personal service to Applebee Aviation's registered agent would get service accomplished more quickly.[32] At approximately 4:36 p.m. on Friday, September 25,

[32] At hearing, Mr. Mitchell testified that when the Department sends civil penalty notices via certified or registered mail, the Department's typical practice is to also provide notification via phone to the recipient

2015, the Emergency Suspension Order was personally served to 39495 NW Bledsoe Creek Lane, the address of record for Applebee Aviation's registered agent, Mr. Applebee. At that address, an unidentified female (noted to be a "descendent, co-resident" between 25 and 35 years of age) accepted personal service. *See* Exhibit A26 at 2 (capitalization omitted).

The Department asserts that the Emergency Suspension Order became effective immediately upon service of the notice to the unidentified female on September 25, 2015. Respondents contend, however, that because Mr. Applebee, himself, was not personally served with the notice on that date, service was not effective and the emergency suspension did not become effective on September 25, 2015.

The question is therefore whether the Department satisfied the requirement in OAR 137-003-0560(2)(a) to "serve the order on the licensee * * * personally" when personal service was made on September 25, 2015 to an unidentified female at the address of record for Applebee Aviation's registered agent, Mr. Applebee. Neither OAR 137-003-0560, any of the other Model Rules,[33] nor the APA[34] defines or explains what constitutes service of an order on a licensee "personally." Although the procedures regarding service of summons contained in the Oregon Rules of Civil Procedure (ORCP) are not binding in this contested case matter, they nonetheless provide some guidance.

Under ORCP 7 D(2)(a), personal service of a summons is accomplished by "delivery of a true copy of the summons and a true copy of the complaint to the person to be served." (Emphasis added.) With regard to corporations specifically, ORCP 7 D(3)(b)(i) states that the primary service method is by "personal service or office service[35] upon a registered agent, officer, or director of the corporation; or by personal service upon any clerk on duty in the office of a registered agent."

Service of the Emergency Suspension Order to the unidentified female on September 25, 2015 does not seem to fall within either ORCP 7 D(2)(a) or 7 D(3)(b)(i). Instead, it seems more consistent with substituted service, as described in ORCP 7 D(2)(b):

> [S]ubstituted service may be made by delivering true copies of the summons and the complaint at the dwelling house or usual place of abode of the person to be served to any person 14 years of age or older residing

---

of the notice, given how long it can take for the recipient to actually receive the certified or registered mail. (Test. of Mitchell.)

[33] The Department has adopted the Attorney General's "Model Rules of Procedure for Contested Cases" (Model Rules) as the Department's rules of procedure for rulemaking activities, declaratory ruling activities, and contested case matters. OAR 603-001-0005. The Model Rules pertaining to hearings conducted by ALJs from the Office of Administrative Hearings are found at OAR 137-003-0501 through -0700.

[34] The Administrative Procedures Act (APA) is codified at ORS Chapter 183.

[35] ORCP D(2)(c) describes the procedure for "office service." Such service did not occur in the present matter.

> in the dwelling house or usual place of abode of the person to be served. Where substituted service is used, the plaintiff, as soon as reasonably possible, shall cause to be mailed by first class mail true copies of the summons and the complaint to the defendant at defendant's dwelling house or usual place of abode, together with a statement of the date, time, and place at which substituted service was made. For the purpose of computing any period of time prescribed or allowed by these rules or by statute, substituted service shall be complete upon the mailing.

As previously noted, on September 25, 2015, the Emergency Suspension Order was personally served to an unidentified female, noted to be a co-resident over the age of 14, at the registered agent's address of record. Then, on September 28, 2015, the Department mailed a copy of the Emergency Suspension Order to the same address, as follows:

> APPLEBEE AVIATION, INC.
> c/o Michael Applebee, Registered Agent
> 39495 NW Bledsoe Creek Lane
> Banks, OR 97106

Exhibit A26 at 4. The copy was sent via first class mail, and was marked with the date, time, and place of substituted service. Under ORCP 7 D(2)(b), substituted service in the current matter would have been complete upon the Department's mailing of the copy on September 28, 2015.

In sum, the ORCPs would suggest that service of the Emergency Suspension Order was not complete until sometime on September 28, 2015. However, it is important to note that OAR 137-003-0560 does not make the *effective date of the order* contingent upon the *date of completed service* (much less on the date that a licensee receives "reasonable" or "actual" notice).[36] Rather, OAR 137-003-0560 merely states that an emergency suspension order must contain the "effective date" of the order and that the order must be served on the licensee "either personally or by registered or certified mail." The administrative rule does not in any way condition the effective date of the order on the service date of the order. Hypothetically, therefore, an emergency suspension order that became effective on June 1, 2016 could be served (either personally or by registered or certified mail) on June 10, 2016 without running afoul of OAR 137-003-0560.

Given the above, I conclude that the Emergency Suspension Order became effective on September 25, 2015, the effective date specified in the order. Thus, Applebee Aviation's CPO license was suspended as of September 25, 2015, and the 16 commercial pesticide applications that occurred in Oregon between September 26, 2015 and October 2, 2015 were made while Applebee Aviation had a suspended CPO license. The Department has therefore established 16

[36] See Respondents' Closing Argument at pages 2 through 5, arguing that reasonable or actual notice was required before the Emergency Suspension Order became effective and enforceable against Mr. Applebee and Applebee Aviation. Respondents' argument appears to be predicated on a mistaken belief that the ORCPs are binding in this matter. *See id.* at 3 ("The overriding principle for service for a suspension order that becomes immediately effective is whether service was 'reasonably calculated, under all the circumstances, to apprise the defendant of the pendency of the action.' ORCP 7D1.")

violations of ORS 634.372(9) against Applebee Aviation. Because the statute does not have a notice or knowing requirement, for purposes of determining whether one or more violations occurred, it is immaterial that Mr. Applebee was unaware of the CPO license suspension until September 28, 2015.

2. Whether revocation of Applebee Aviation's CPO license is appropriate

The Department has proposed to revoke Applebee Aviation's CPO license and not reissue or renew it for up to five years, based on an alleged pattern of misconduct relating to pesticide applications. The Department cites to ORS 561.305(2) and 634.322(4) as authority for the proposed revocation.

ORS 561.305(2) states, in relevant part:

> The department may refuse to issue, refuse to renew, revoke or suspend any license or application for license issued or which may be issued pursuant to any law under its jurisdiction where it finds that the licensee has violated any provision of such law or regulations promulgated thereunder[.]

Similarly, ORS 634.322 states, in part:

> In carrying out and enforcing the provisions of this chapter, the State Department of Agriculture is authorized:
>
> * * * * *
>
> (4) In accordance with the provisions of ORS chapter 183, to revoke, suspend or refuse to issue or renew any license or certificate if it determines that an applicant, licensee or certificate holder has violated any of the provisions of this chapter.

The Department alleges that Applebee Aviation has shown a pattern of misconduct, which warrants revocation, relating to pesticide applications by 1) making 16 commercial pesticide applications without a CPO license; 2) allowing a pesticide to drift off-target and into water when the label prohibited all applications to water; 3) allowing the application of a pesticide to a site for which it was not labeled; and 4) allowing one or more Applebee Aviation workers to perform pesticide application activities without the PPE required by the pesticide labels.

Respondents contend that revocation of Applebee Aviation's CPO license is unwarranted and improper because out of approximately 20,000 spray applications during the past three years, only three have involved violations. Respondents further contend that each time Applebee Aviation learned of a problem leading to a violation, it took affirmative steps to address the problem. Finally, Respondents contend that the Department failed to establish a "substantiated

fact pattern that decisions with actions showed a pattern of 'Willful Misconduct' or 'Gross Negligence.'" Respondents' Closing Argument at 7.

Respondents have cited to no statute, administrative rule, or case law to support their contention that suspension or revocation of a CPO license requires a pattern of conduct showing either willful misconduct or gross negligence. In fact, ORS 561.305(2) and ORS 634.322(4) seem to afford the Department broad discretion in deciding whether, and to what extent, to discipline a licensee for violation of state pesticide laws. Absent a showing that the Department has abused that discretion, its decision to seek license revocation in a particular case is within the bounds of its statutory authority. That being said, for the reasons that follow, I find that revocation of Applebee Aviation's CPO license, with no opportunity to reissue or renew the license for up to five years, is an excessively harsh sanction given the circumstances relevant to Applebee Aviation's current violations and substantiated violation history. I propose, instead, that the Department consider imposing a one-year suspension of the CPO license. Such a suspension is still a significant sanction to levy against a licensee and, in this matter, is more commensurate with the number and severity of Applebee Aviation's current and past violations.

A. Making 16 pesticide applications without a CPO license

The Department contends that Applebee Aviation's 16 violations of ORS 634.372(9) help to demonstrate a pattern of misconduct that justifies the long-term revocation of Applebee Aviation's CPO license. The Department asserts that at least four of Applebee Aviation's unlicensed pesticide applications were the result of willful misconduct — the two applications on September 29, 2015, and the two BLM applications occurring on October 1 and 2, 2015. Department's Closing Argument at 1-2. OAR 603-057-0500(13) defines willful misconduct as follows:

> "Willful misconduct" means an act or omission that is characterized by or resulting from calculation and consideration of effects and consequences, and with awareness that the act or omission will be incompatible with any purpose of the State Pesticide Control Act.

To determine the willfulness of any of the 16 pesticide application violations, it is first necessary to determine when Applebee Aviation (through its owner, president, and registered agent Mr. Applebee) learned of the suspension of the CPO license and when it had the means and opportunity to prevent any of the violations.

1. September 26, 2015 applications

On or about September 20, 2015, Mr. Applebee went to the Jarbridge Wilderness in Nevada for a hunting trip. He was at an elevation of approximately 10,000 feet, and he was out of cell phone range until the evening of September 27, 2015. On September 25 and 26, 2015, he had no knowledge of the Emergency Suspension Order that was served on September 25, 2015. Consequently, the eight pesticide applications that occurred on September 26, 2015, though technically violations of ORS 634.372(9), were not the result of any willful or grossly negligent misconduct by Mr. Applebee or Applebee Aviation. Indeed, without any knowledge of the

suspension on September 26, 2015, and no cell phone service, Mr. Applebee (and by extension, Applebee Aviation) had no incentive, opportunity, or means by which to prevent the violations that occurred on that day. I therefore find it inappropriate for the Department to consider the eight violations on September 26 as part of a pattern of pesticide-related misconduct by either Mr. Applebee or Applebee Aviation.

2. September 28 and 29, 2015 applications

Based on Mr. Applebee's hearing testimony, more likely than not, he first saw Mr. Mitchell's September 27, 2015 email regarding the Emergency Suspension Order on the evening of September 27, after he descended from the Jarbridge Wilderness and his cell phone service resumed. Although at that time, Mr. Applebee was unable to download and read the email attachment containing a copy of the Emergency Suspension Order, he could read the text of the email, which stated that ODA had concluded its investigation and issued enforcement actions, and that Mr. Mitchell would be the point of contact "to assist with the reinstatement process of the CPO license issued to Applebee Aviation." Exhibit R2A at 1.

The following day, on September 28, 2015, Mr. Applebee left Nevada and began the road trip home. Sometime on that date, he was able to download and access the Emergency Suspension Order on his phone, but he was unable to read the 16-page order because he did not have his glasses with him. He understood, however, that the email and attached order were regarding a suspension of Applebee Aviation's CPO license. Mr. Applebee forwarded the email and the attached order to both his wife and Mr. Howe sometime during the afternoon of September 28. Also sometime that afternoon, he called the Department to inform Mr. Mitchell that he would be at the Department's office the following morning at 9:00 a.m. to discuss the CPO issue. He subsequently arrived at his home between approximately 11:00 p.m. and midnight on September 28. At hearing, he admitted that he did not make an effort to read the Emergency Suspension Order once he arrived home because his printer was not working. When ODA's counsel asked Mr. Applebee at hearing whether he could have accessed the email attachment that evening on a computer (instead of his cell phone, or a printed paper copy), Mr. Applebee replied "I suppose I could've." Applebee Testimony.

On September 29, 2015, Mr. Applebee arrived at the Applebee Aviation office at approximately 7:00 a m. Mr. Howe and Ms. May were already present. At that time, Mr. Applebee had not yet closely read the Emergency Suspension Order. He engaged in some discussion with Mr. Howe (and possibly with Ms. May). He then directed Ms. May to notify all relevant persons at Applebee Aviation that operations were shut down. At the time, Mr. Applebee did not know where any of the spray crews were located and he was not aware of what projects might be performed that day. At Mr. Applebee's request, Mr. Howe accompanied him to the Department's office in Salem, where they arrived sometime around 9:00 a.m.

Based on the above circumstances, I conclude that Mr. Applebee (and by extension, Applebee Aviation) had reasonable knowledge of the Emergency Suspension Order by the afternoon of September 28, 2015. The four pesticide applications that Applebee Aviation made on September 28, 2015 began at 6:54 a.m. and were completed by 9:50 a.m. *See* Exhibit A13 at 2-5. More likely than not, Mr. Applebee lacked sufficient knowledge of the Emergency

Suspension Order before 10:00 a.m. that day, and he did not therefore have the incentive, opportunity, and/or means to prevent those four applications. The Department should not consider the four violations on September 28 as part of a pattern of pesticide-related misconduct by either Mr. Applebee or Applebee Aviation.

As to the September 29, 2015 applications, Mr. Applebee admitted at hearing that he understood by some time on September 28, 2015 that Mr. Mitchell's email and the attached order were regarding a suspension of Applebee Aviation's CPO license. He believed the matter serious enough on the afternoon of September 28 that he forwarded the email and order to his wife and to Mr. Howe, and he called the Department to set up a meeting with Mr. Mitchell for the following morning. There is no evidence to suggest that anything would have prevented Mr. Applebee, on the afternoon of September 28, 2015, from contacting relevant persons at Applebee Aviation (*e.g.* Mr. Howe, Ms. May, one or more of the pilots) and ordering them to cease all pesticide applications remaining for that day, and any applications scheduled for subsequent days (including September 29). Although Mr. Applebee may not have been aware of whether and at what time any pesticide applications were scheduled from that point forward, he should have nonetheless exercised reasonable care under the circumstances and ordered that all ongoing and further spay operations cease. His failure to do so demonstrates a reckless disregard for the seriousness of Applebee Aviation potentially making pesticide applications without a CPO license, and constitutes gross negligence, as defined in OAR 603-057-0500(5).[37] Because of Mr. Applebee's conduct, Applebee Aviation went on to make two pesticide applications on the morning of September 29, 2015,[38] in violation of ORS 634.372(9). It is appropriate for the Department to consider the two violations on September 29 as part of a pattern of pesticide-related misconduct by Mr. Applebee and Applebee Aviation.

3. BLM applications on October 1 and 2, 2015

There is no dispute that Applebee Aviation performed pesticide applications on BLM land in Oregon on October 1 and 2, 2015 without a valid CPO license, and that doing so violated the Pesticide Control Act.

Respondents contend that, when Applebee Aviation made those pesticide applications, Mr. Applebee had a good faith belief that Applebee Aviation could lawfully apply pesticides to federal lands without a CPO license. *See* Respondents' Closing Argument at 6.[39] The Department asserts, however, that Mr. Applebee did not take any actions that good faith would require. For example, he did not contact BLM to ask whether Applebee Aviation could lawfully

[37] Under OAR 603-057-0500(5), "gross negligence" is "an act or omission that does not reflect an exercise of reasonable care under the circumstances and that is characterized by conscious indifference to or reckless disregard of any purpose of the State Pesticide Control Act."

[38] The applications on September 29, 2015 began at 6:56 a.m. and were completed by 9:40 a.m. (*See* Ex. A14 at 2-3.)

[39] Respondents assert that Mr. Applebee "reasonably believed" that Applebee Aviation's federal FAA 137 certificate "would be satisfactory for spraying on federal lands without a CPO like it is in other states, and on some Indian Reservations in Oregon that don't have MOAs with the Department." Respondents' Closing Argument at 6.

spray BLM lands without a CPO license; he did not contact an attorney to inquire about the issue; and he did not contact Mr. Mitchell (or anyone else at the Department) after the September 29, 2015 meeting to request additional information or guidance. The Department contends that Mr. Applebee instead "remained motivated by the financial considerations of the contract with BLM and directed his crew to apply the pesticides without even informing BLM that the CPO license from Oregon was suspended." Department's Closing Argument at 2. The Department argues that the above facts demonstrate that the October 1 and 2, 2015 violations were the result of willful misconduct.

The record establishes, by a preponderance of the evidence, that the following occurred during the September 29, 2015 meeting between Mr. Mitchell, Mr. Odenthal, Mr. Howe, and Mr. Applebee:

Mr. Mitchell went through the Emergency Suspension Order page by page, explained that Applebee Aviation was prohibited from making any pesticide applications in Oregon until the requirements in the Order were satisfied and the license suspension was lifted, and discussed what Applebee Aviation needed to do to be eligible for CPO license reinstatement. When Mr. Applebee asked whether there could be an exception to the CPO license requirement for the scheduled BLM sprays later that week, Mr. Mitchell answered in the negative. When Mr. Applebee asked Mr. Mitchell if the Department had jurisdiction on federal lands, Mr. Mitchell mentioned that the Department did not have jurisdiction on tribal lands absent a memorandum of understanding. Mr. Applebee commented that because Oregon does not follow federal cannabis/marijuana laws, Oregon should not be regulating federal BLM land. Because Mr. Applebee seemed to be challenging the Department's interpretation of its jurisdiction on federal lands, Mr. Mitchell told him that it may be a good question for a lawyer. Mr. Mitchell also mentioned that he could get back to Mr. Applebee with more information on the jurisdiction issue. The meeting participants also discussed the possibility of Applebee Aviation's CPO license being reinstated as early as the following day, and Mr. Odenthal suggested that Applebee Aviation could go ahead and mobilize its crews to the BLM work site, in anticipation of satisfying the license reinstatement requirements, and having its CPO license reinstated, in time to perform the BLM job.

Sometime after the September 29, 2015 meeting, Mr. Mitchell obtained a copy of the MOU between the Department and the BLM, but he did not provide a copy to Applebee Aviation and he did not engage in any further jurisdictional discussions with Mr. Applebee prior to October 1, 2015.

Respondents contend that when Mr. Applebee brought up the BLM job during the September 29, 2015 meeting and asked whether Applebee Aviation needed its CPO license to spray on federal lands, the Department did not provide him with an answer, promised to get back to him on the issues, and told him he could go ahead and mobilize his crew. At hearing, Mr. Applebee testified that he had received "unclear guidance" from the Department, and that if the Department had definitively answered his question about whether a CPO license was required to spray the BLM land, or provided him with a copy of the MOU prior to spraying the land, Applebee Aviation would not have gone forward with the BLM sprays. Testimony of Applebee.

Although Mr. Applebee asserted at hearing that he did not feel like his federal jurisdictional question was adequately answered during the meeting, and that he believed Mr. Mitchell would contact him with more information, the record establishes, more likely than not, that on September 29, Mr. Mitchell did not waiver with regard to his (and the Department's) stated position that Applebee Aviation was not permitted to perform the BLM job while its CPO license was suspended. And, while Mr. Odenthal told Applebee Aviation that it could go ahead and mobilize its crew, so that the crew would be ready to spray the BLM land once the license became reinstated, his statement is not tantamount to telling Mr. Applebee and Applebee Aviation to go ahead and perform the BLM job without regard to whether Applebee Aviation's CPO license actually became reinstated.

Interestingly, Mr. Howe's hearing testimony reflects that he understood the Department's directive that Applebee Aviation not perform any further applications (including the BLM applications) until the CPO license was reinstated. For example, Mr. Howe testified that he and Mr. Applebee were told during the meeting that Applebee Aviation could not perform the BLM job without a CPO license, but that the issue could probably be fixed rather quickly. Mr. Howe further testified that there was talk of deployment of resources for the BLM job, with the understanding that the CPO license could probably be reinstated in time to allow for the scheduled spraying to occur. And, according to Mr. Howe's hearing testimony, during the meeting, Mr. Howe and Mr. Applebee were primarily focused on what they needed to do so the Department would reinstate the CPO license and Applebee Aviation could perform the scheduled BLM job. Testimony of Howe. Based on Mr. Howe's hearing testimony, he did not share Mr. Applebee's proffered belief that whether Applebee Aviation needed a CPO license to perform the BLM job was an open question of which even the Department was uncertain.

Although Mr. Applebee had every right to disagree with Mr. Mitchell's (and the Department's) position that a CPO license was required for Applebee Aviation to spray on BLM land in Oregon, any difference of opinion he held on the issue does not justify his decision to go forward with the BLM applications, in contravention of the Department's directives.

Mr. Applebee also testified at hearing that he believed it was relevant that the Department did not require Applebee Aviation to physically surrender the paper copy of its CPO license when the license became suspended, and that because Applebee Aviation still retained the actual physical license, the company may have likewise retained the rights that went along with having the license. Testimony of Applebee; *see also* Respondents' Closing Argument at 6 ("Also important to Mr. Applebee's mindset, at the September 29th meeting the Department never asked him to surrender the CPO license[.]") That testimony and Respondents' corresponding argument somewhat contradict Mr. Applebee's and Respondents' assertions that Mr. Applebee reasonably believed that Applebee Aviation *did not need* a CPO license to perform the BLM job.

As previously noted, "willful misconduct" means an act or omission "characterized by or resulting from calculation and consideration of effects and consequences, and with awareness that the act or omission will be incompatible with any purpose of the State Pesticide Control Act." OAR 603-057-0500(13). "Gross negligence" is defined as "an act or omission that does not reflect an exercise of reasonable care under the circumstances and that is characterized by

conscious indifference to or reckless disregard of any purpose of the State Pesticide Control Act. *Id.*(5).

Mr. Applebee's decision to spray the BLM land on October 1 and 2, 2015 does not demonstrate an exercise of reasonable care because, after the September 29, 2015 meeting, he did not make any efforts to obtain more information or guidance about the federal jurisdictional issue, and whether the BLM job required a CPO license. He did not, for example, contact an attorney for legal advice; he did not contact the BLM to inquire about the necessity of a CPO license; and he did not contact Mr. Mitchell (or anyone else at the Department) for additional information or guidance. Instead, he recklessly disregarded the Department's instructions not to perform any pesticide applications—including the BLM applications—until the CPO license was reinstated, in the apparent hope that his opinion regarding the necessity of having a CPO license to spray on BLM land in Oregon was the correct one.

At the very least, his decision to perform the BLM applications on October 1 and 2, 2015 constitutes gross negligence, as defined in OAR 603-057-0500(5).

Consequently, it is appropriate for the Department to consider the violations on October 1 and 2, 2015 as part of a pattern of pesticide-related misconduct by Mr. Applebee and Applebee Aviation.

B. Allowing a pesticide to drift off-target

On or about April 16, 2014, Apple Aviation violated ORS 634.372(4) (performing pesticide applications activities in a faulty, careless, or negligent manner) when pesticide was deposited in a creek located beyond the target unit and the label of the pesticide prohibited applications to water.

Pilot Patrick Hall was the pesticide applicator involved in the drift incident. The Department initiated an enforcement action, and issued notices of violation to both Mr. Hall and Applebee Aviation. Mr. Hall testified at hearing that after receiving the Notice of Violation, he learned that while he had been flying, the wind died down below the minimum speed that the label on the pesticide container required. He testified that at the time he was spraying, he was unaware that wind conditions had changed.

Mr. Hall subsequently discussed the notice he received, and the wind conditions that were present when the violation occurred, with Mr. Applebee. Mr. Hall elected not to contest the violation and the Department's proposed fine, and Applebee Aviation chose the same course. Both notices became final. In response to the violation, Applebee Aviation increased buffers along waterways.

Respondents contend that the drift violation "should be considered in the context that it occurred, a unique change in wind conditions that neither [Applebee Aviation] nor Mike Applebee [could] have directly prevented." Respondents' Closing Argument at 9.

In conclusion, the drift violation appears to have been a rather isolated incident in Applebee Aviation's spray history, and there is no evidence that Applebee Aviation has had other substantiated drift issues since the violation. Moreover, the record establishes that Applebee Aviation responded to the incident by increasing its buffers along waterways. Thus, while it is appropriate for the Department to consider the violation when assessing Applebee Aviation's recent history of compliance with the Pesticide Control Act, the existence of this violation should not carry significant weight when determining whether license revocation, or some lesser sanction, is warranted in the present case.

C. Allowing application of a pesticide to a site for which it was not labeled

In September 2014, Applebee Aviation violated ORS 634.372(2) (prohibiting the intentional or willful application of a pesticide in a manner inconsistent with its labeling) by applying a pesticide to a site for which it was not labeled.

A client provided Applebee Aviation with a chemical, Rotary 2SL, to be used for spraying over the client's forest property. Even though the label on the Rotary 2SL only allowed for agricultural application, Pilot McDaniels performed two forest applications using the Rotary 2SL.

Upon hearing about the Rotary 2SL matter, Applebee Aviation informed its employees that Rotary 2SL was not to be used for forest applications. Before the Department issued any notices regarding the matter, Mr. Applebee instituted a protocol requiring that every chemical container have a checklist sticker placed upon it. Under the new protocol, the customer, the applicator, and an agent from Applebee Aviation would sign the sticker to confirm that the chemical had been inspected and was appropriate for the intended application. Mr. Applebee also instituted a policy requiring that Applebee Aviation source and confirm all chemicals intended for jobs to prevent the application of improper, outdated, or contaminated pesticides.

On September 25, 2015, the Department issued separate notices to Mr. McDaniels and Applebee Aviation, alleging two violations of ORS 634.372(2). The notice to Applebee Aviation became final on October 9, 2015.

Respondents contend that the misapplication of the chemical, when considered under the totality of the circumstances, "cuts against a pattern of misconduct." Respondents' Closing Argument at 10. Respondents further contend that Applebee Aviation's decision to institute new protocols after learning of the incident shows Applebee Aviation's "commitment to adhering to the pesticide label requirements and following the Pesticide Control Act." *Id.*

As with the drift matter previously discussed, it is appropriate for the Department to consider the misapplication of the Rotary 2SL when assessing Applebee Aviation's recent history of compliance with the Pesticide Control Act. However, the existence of this particular violation should not weigh heavily when determining whether license revocation, or some lesser sanction, is warranted in this case.

D. Allowing workers to perform activities without required PPE

The Department contends that Applebee Aviation allowed one or more workers to perform pesticide application activities without the PPE required by the pesticide labels.

Applebee Aviation hired Mr. Ivy as a truck driver on or about April 8, 2015. Within hours, he was on his way to Roseburg to work on the Seneca Jones project for Applebee Aviation. While at the project site, in addition to driving, Mr. Ivy mixed chemicals, handled concentrated pesticides, loaded chemicals onto the helicopter, and fueled the helicopter. Mr. McDaniels was the pilot/crew leader on the project.

During his approximately 17 days of employment, Mr. Ivy took numerous videos of work conditions at the Seneca Jones site. The videos show very little PPE being used at the site. However, the videos do not identify which chemicals are being handled at any particular time, so it is not known from the videos alone whether PPE violations occurred. However, when considered in conjunction with application records and the hearing testimony of Mr. Metzer, Mr. Ivy, and Mr. Applebee, the preponderance of the evidence establishes that one or more Applebee Aviation workers performed pesticide application activities without the required PPE.[40]

From July 2014 until the late fall of 2015, John Metzer worked for Applebee Aviation as a batch truck driver. His testimony establishes that it was not until the last three to six months of his employment that he had access to coveralls, and not until approximately the last six months of his employment that Applebee Aviation informed its drivers/handlers that they needed to wear thicker chemical gloves that extended past the wrist. His testimony also establishes that the handlers did not like wearing the thicker, longer gloves and that pilots with whom Mr. Metzer worked did not require him to wear such gloves in the field. His testimony further establishes that he did not know of any eyewash on the batch trucks, except for bottled water that could potentially have been used for eyewash purposes.

Prior to working for Applebee Aviation, Mr. Ivy had never previously worked with pesticides. He received no safety, hazardous substance, or PPE training from Applebee Aviation

---

[40] At hearing, Mr. Vanderlei (a former driver/handler) testified that he considered the PPE on Applebee Aviation jobs to be "minimal." Testimony of Vanderlei. He further testified that available PPE included latex gloves that came just past the wrist, safety glasses, and coveralls, and that there were no available goggles, chemical aprons, or eyewash mechanisms. In contrast, Mr. Clark testified at hearing that Mr. Vanderlei had appropriate PPE when he was on Mr. Clark's crew in April 2015, because his crew had PPE available for their use that included coveralls, 3M respirator masks, various disposable gloves (including 14 mm "Thicksters"), bottles of eyewash, and fully encompassed safety goggles.

Mr. Clark provided seemingly credible, reliable testimony regarding the PPE that was available to his crews, and he has no known bias or motive to provide untrue testimony in this case. Mr. Vanderlei, on the other hand, has potential grounds for bias, and motive to provide unreliable testimony, because Applebee Aviation discharged him from employment and he has an OSHA claim against Applebee Aviation. For these reasons, when weighing the persuasiveness of Mr. Vanderlei's testimony against that of Mr. Clark, I find Mr. Clark's more reliable and persuasive. Thus, Mr. Vanderlei's testimony does not support the Department's contention that Applebee Aviation allowed workers to perform pesticide activities without required PPE.

prior to joining the Seneca Jones project. The only training he received during his employment consisted of him observing Mr. McDaniels and the other driver/handler at the Seneca Jones site. At hearing, Mr. Applebee testified that in April 2015, Applebee Aviation had a "fairly broad" safety program that covered topics such as hauling fuel and chemicals and being safe around aircraft.[41] Testimony of Applebee. However, there is no evidence that Mr. Ivy was the beneficiary of any such program, as he received no safety training before heading to the field on his initial day of hire. Mr. Applebee admitted at hearing that Applebee Aviation could have done more to train Mr. Ivy and get him ready for work in the field. *Id.*

Applebee Aviation provided Mr. Ivy with one or two orange long-sleeved cotton shirts and black rubber gloves that went to the wrist. He eventually elected to purchase his own Mr. Clean rubber gloves that went up to the elbow, but Mr. McDaniels told him that they were the wrong type of gloves for the job. Mr. Ivy was not aware until he had worked for Applebee Aviation for three or four days that he was supposed to launder his clothes each day.

During an interview with OR-OSHA and Department personnel, Mr. McDaniels reported that some dish soap and a roll of shop towels were stored in a tunnel box on the side of the one-ton truck for cleaning purposes. However, Mr. Ivy was not aware of any soap or paper towels available to him at the project site. Towards the end of his employment, the chemical Atrazine splashed onto Mr. Ivy's face and mouth and — because there either was no soap and towels available, or because he did not know of their existence and location — he used some wet wipes he had previously purchased to clean the chemical off his face and mouth.

The record establishes that while working on the Seneca Jones project, the crew handled the following chemicals: Velossa; Clean Slate; Transline; Element 4; Agri Star 2,4-D LV6; Weedone 2,4D; Sipcam Atrazine 4L; Drexel Atrazine 4L; and Mana Atrazine 4L. The vast majority of the chemicals applied on the project were Atrazine (3,712 ounces), Velossa (2,560 ounces), and Clean Slate (344 ounces). *See* Exhibit A3 at 72.[42]

Velossa causes irreversible eye damage and requires handlers to wear protective eyewear (goggles, face shield, or safety glasses). It does not require gloves for handling. The three formulations of Atrazine used on the Seneca Jones project all require handlers to wear chemical-resistant gloves (including those made of barrier laminate, butyl rubber, nitrile rubber, polyethylene, or polyvinyl chloride) and a chemical-resistant apron. Clean Slate requires handlers to wear chemical-resistant gloves made of any waterproof material and protective eyewear. Transline requires handlers to wear chemical resistant gloves made of any waterproof material. Weedone requires handlers to wear chemical-resistant gloves and a chemical-resistant apron. Agri Star 2, 4-D LV6 requires that handlers wear chemical-resistant gloves (including those made of neoprene or nitrile rubber) and a chemical-resistant apron. Element 4 requires only long-sleeved shirts, pants, shoes, and socks.

---

[41] At hearing, when asked whether Applebee Aviation's safety program changed between April 2015 and September 25, 2015, Mr. Applebee was unable to articulate with any reasonable degree of certainty whether and how the training program had changed during that time period.

[42] By contrast, only 76 ounces of Agri Star 2,4-D LV6, 88 ounces of Weedone, 76 ounces of Element 4, and 8 ounces of Transline were used. (Ex. A3 at 72.)

To summarize the PPE criteria: 1) Velossa and Clean Slate require protective eyewear; 2) Clean Slate, Transline, Agri Star 2, 4-D LV6, Atrazine, and Weedone require chemical-resistant gloves; and 3) Agri Star 2, 4-D LV6, Atrazine, and Weedone require a chemical-resistant apron.

Video D shows Mr. Ivy and Mr. Taylor loading a helicopter with chemical. Mr. Ivy is wearing leather gloves and no eye protection, and Mr. Taylor is wearing no gloves and no eye protection. The only scenario under which this video does *not* establish a PPE violation is if the chemical being handled is solely Element 4 (which requires neither gloves nor protective eyewear). However, the table at Exhibit A3 at 71 shows all the herbicide applications performed on the Seneca Jones project and, according to the table, Element 4 was only applied in conjunction with Weedone or Agri Star 2, 4-D LV6 (both of which require chemical-resistant gloves and a chemical-resistant apron). *See* Exhibit A3 at 71.

Video F shows open chemical being poured and/or mixed. Mr. Ivy is wearing black gloves, but no protective eyewear or apron. The only scenario under which this video potentially does *not* establish a PPE violation is if the chemical being handled is solely Transline (which requires neither protective eyewear nor a chemical-resistant apron). However, according to the table at Exhibit A3 at 71, Transline was only applied in conjunction with Velossa (which requires protective eyewear). *See* Exhibit A3 at 71.

When asked at hearing what kind of PPE Applebee Aviation provided to its employees, Mr. Applebee replied, "Everything the label required, and up and beyond, times two." Testimony of Applebee. He admitted, however, that it was difficult to get employees to use required PPE in the field, particularly aprons and 22 ml gloves. *Id.* He further admitted at hearing that some of Mr. Ivy's videos showed inadequate PPE being used, and that Mr. McDaniels could have done a better job at managing field work. *Id.*

In sum, the record establishes that Applebee Aviation allowed one or more workers to perform pesticide application activities without the PPE required by the pesticide labels. However, to Applebee Aviation's credit, once it learned of the full extent of the Department's PPE concerns (via the Emergency Suspension Order, and the September 29, 2015 meeting), it took swift and reasonable steps to improve its PPE protocols and supplies, and alleviate the Department's (and OSHA's) concerns.

It is appropriate for the Department to consider Applebee Aviation's PPE practices — both past and present — when assessing Applebee Aviation's recent history of compliance with the Pesticide Control Act.

3. Civil Penalties

As set forth above, the Department has proven that Applebee Aviation committed 16 violations of ORS 634.372(9). The Department contends that the 12 violations that occurred on September 26 and 28, 2015 each warrant a civil penalty of $814, for a total civil penalty of $9,768 for the 12 violations. The Department contends that the four violations that occurred on

September 29, 2015, October 1, 2015, and October 2, 2015 resulted from willful misconduct, and that each violation therefore warrants a civil penalty of $10,000, for a total civil penalty of $40,000 for the four violations. Thus, the Department proposes a total civil penalty of $49,768 for Applebee Aviation's 16 violations.

Respondents contend that no civil penalties should be imposed for the applications that occurred on September 26, 28, or 29, 2015, because Applebee Aviation did not have "reasonable notice" of the Emergency Suspension Order until the morning of September 29, 2015, and there was no way to stop the applications already occurring that morning. Respondents' Closing Argument at 7. As previously discussed, the Department has established that violations occurred on September 26, 28, and 29, 2015. Although the violations on September 26 and 28, 2015 occurred *before* Mr. Applebee had reasonable knowledge of the Emergency Suspension Order (and he lacked the incentive, opportunity, and/or means to prevent the applications on those dates), those violations are nonetheless subject to civil penalties as per ORS 634.900(1).

Respondents further contend that Applebee Aviation acted without willful misconduct or gross negligence when performing the two BLM applications on October 1 and 2, 2015, and that a civil penalty of only $814 per violation is therefore appropriate. Thus, Respondents argue that the total civil penalty against Applebee Aviation should be merely $1,628. As discussed extensively in the previous section, the record establishes, more likely than not, that the BLM applications resulted from at least gross negligence by Mr. Applebee (and by extension, Applebee Aviation), as did the September 29, 2015 applications. Thus, those four violations are subject to enhanced civil penalties, as set forth below.

ORS 634.900 states, in relevant part:

> (1) In addition to any other liability or penalty provided by law, the Director of Agriculture may impose a civil penalty on a person for violation of any of the provisions of this chapter relating to pesticide application, sale or labeling. The civil penalty for a first violation shall be not more than $2,000[.]
>
> (2) Notwithstanding subsection (1) of this section, if the violation of a provision relating to pesticide application, sale or labeling results from gross negligence or willful misconduct, the civil penalty for a first or subsequent violation may not exceed $10,000.

ORS 634.915 requires the Department to adopt by rule a civil penalty schedule establishing the penalty amount that may be imposed for a particular violation and provides, in part:

> (2) In imposing the penalty pursuant to the schedule authorized by this section, the Director of Agriculture shall consider the following factors:
>
> (a) The past history of the person incurring a penalty in taking all feasible steps or procedures necessary or appropriate to correct any violation.

(b) Any prior violations of statutes, rules or orders pertaining to pesticide application, sale or labeling.

(c) The gravity and magnitude of the violation.

(d) Whether the violation was repeated or continuous.

(e) Whether the cause of the violation was an unavoidable accident, negligence or an intentional act.

(f) The violator's cooperativeness and efforts to correct the violation.

(g) The immediacy and extent to which the violation threatens the public health or safety.

OAR 603-057-0502 is titled "Civil Penalties Generally" and states, in part:

(1) In addition to any other penalty provided by law, the Director may assess a civil penalty for violation of any provision of ORS 634 relating to pesticide application, sale or labeling.

* * * * *

(3) Where the Director determines that a violation did not result from gross negligence or willful misconduct, and if the violation occurred between June 25, 2007 and December 31, 2015, the Director will determine the amount of any civil penalty for that violation using OAR 603-057-0525 and 603-057-0530. The amount of such civil penalty for a first violation shall not exceed $1,000, and the amount of such civil penalty for any subsequent violation of the same provision shall not exceed $2,000.

* * * * *

(5) Where the Director determines that a violation resulted from gross negligence or willful misconduct and occurred on or after June 25, 2007, the Director will determine the amount of any civil penalty for that violation using OAR 603-057-0525 and 603-057-0532. The amount of such civil penalty for a first or a subsequent violation shall not exceed $10,000.

OAR 603-057-0505 provides:

> Notwithstanding that each and every violation is a separate and distinct act and in cases of continuing violations, each day's continuance is a separate and distinct violation, proceedings for the assessment of multiple civil penalties for multiple violations against a person may be consolidated into a single proceeding.

A. Twelve violations on September 26 and 28, 2015

As previously discussed, the 12 violations that occurred on September 26 and 28, 2015 were not the result of any gross negligence or willful misconduct by Mr. Applebee or Applebee Aviation. Thus, OAR 603-057-0530 applies to those violations as follows:

> (1) When the Director determines that the violation did not result from gross negligence or willful misconduct, and if the violation occurred between June 25, 2007 and December 31, 2015, the Director will determine the amount of the civil penalty using this section. To determine the amount of the civil penalty, calculate it utilizing the formula: NB + [(.1 x NB) x (P + H + R + C)] = Penalty Amount where:
>
> (a) N = the number of times, within a period of three years prior to and including the date of the current violative act, that the person has been determined by the Director to have committed that violative act;
>
> (b) B = the base penalty determined using the following matrix: * * *.
>
> (A) The Magnitude of Violation is determined according to OAR 603-057-0525(2).
>
> (B) The Gravity of Effect is determined according to OAR 603-057-0525(3).
>
> (c) P = past occurrence of unrelated violations under ORS Chapter 634 for a period of three years prior to the date of the current violative act. P will be weighted from O to 6 in the following manner:
>
> * * * * *
>
> (D) 3 = past occurrence of an unrelated Category I violation, two unrelated Category II violations or three unrelated Category III violations;
>
> * * * * *

(d) H = History of the person in taking all feasible steps or procedures necessary or appropriate to correct a violative action. H will be weighted from -2 to 2 in the following way:

(A) -2 = the person took all feasible steps or procedures to correct any prior violations;

(B) O = there is no prior history or insufficient information on which to base a finding;

(C) 1 = the person took some, but not all feasible steps or procedures to correct prior violations;

(D) 2 = the person took no action to correct prior violations.

(e) R = preventability of violation. R will be weighted from -2 to 7 in the following way:

(A) -2 = the person's actions determined to be violative were unavoidable;

(B) O = information is insufficient to make any finding;

(C) 3 = the person's actions determined to be violative were reasonably avoidable;

(D) 7 = the person's actions were flagrant.

(f) C = cooperativeness on the part of the person to assist the department in its investigation and to the extent possible, rectify the violation. C will be weighted from -2 to 2 in the following way:

(A) -2 = the person is cooperative;

(B) -1 = the person provides limited cooperation;

(C) O = the person is neither cooperative nor uncooperative;

(D) 1 = the person is generally uncooperative;

(E) 2 = the person is uncooperative.

(2) If the calculation utilizing the formula in this section results in an amount more than $1,000 for a first violation of any provision of ORS 634, the Director shall assess a civil penalty of $1,000. If the calculation utilizing the formula in this section results in an amount more than $2,000 for any subsequent violation of the same provision of ORS 634, the

> Director shall assess a penalty of $2,000. In addition, the Director may consider this adjustment if the Director remits or reduces the amount as provided in ORS 634.910 or OAR 603-057-0502(6).

The Department determined that the value of "N" is 1. Respondents do not contest that determination, and the record supports it.

Pursuant to OAR 603-057-0525,[43] the Department determined that the magnitude of the violations was Category I (MAJOR), that the gravity of their effect was HIGH LEVEL, and that the base penalty for each violation is $370. *See* February 15, 2016 Notice to Applebee Aviation at 13. Respondents did not contest these determinations, and the record supports them.

The Department determined that the value of "P" is 3, based on the April 16, 2014 unrelated Category I violation of ORS 634.372(4). Respondents did not contest that determination, and the record supports it.

---

[43] OAR 603-057-0525 sets forth the criteria for determining the magnitude of a violation and the gravity of its effect, in relevant part, as follows:

> (2)(a) Category I (Major):
>
> * * * * *
>
> (E) Perform pesticide application activities in a faulty, careless or negligent manner (ORS 634.372(4));
>
> * * * * *
>
> (K) As a pesticide operator, engage in the business of, or represent or advertise as being in the business of, applying pesticides on the property of another, without first obtaining and maintaining a pesticide operator's license * * *[;]
>
> (i) Firm licensing — No license;
>
> * * * * *
>
> (3) Gravity of Effect: The Director shall rank the violation as to its gravity of effect. Following are the factors that may be considered in assigning a gravity ranking to a specific violation. The existence of one or more factors determined to be of high level shall result in the gravity being ranked high level. * * * * *.
>
> (a) Rank — High Level:
>
> * * * * *
>
> (D) Conditions of Usage:
>
> (i) Wide area of application[.]

The Department determined that the value of "H" is zero because there is no prior history of Applebee Aviation taking steps to correct past violations, or there is insufficient information on which to base a finding. Respondents have asserted, however, that once Applebee Aviation became aware of each past violation, the company took reasonable steps to correct the violation, change protocols (if necessary), and prevent future occurrences. As previously discussed, the record supports Respondent's assertions. Thus, the appropriate value of "H" is -2.

The Department determined that the value of "R" is 7 because the violations involving the 12 forest applications occurring on September 26 and 28, 2015 were preventable and Applebee Aviation's conduct in committing the violations was flagrant.[44] As already discussed, those violations were not knowingly committed by Applebee Aviation because it did not have reasonable knowledge of the existence and terms of the Emergency Suspension Order when the applications occurred. Consequently, the 12 violations are more appropriately deemed unavoidable and the value of "R" should be -2.

The Department determined that the value of "C" is 2 because Applebee Aviation "was uncooperative and disregarded ODA's explicit statement of the scope of the license suspension order." February 15, 2016 Notice to Applebee Aviation at 12-13. While the record supports that determination for the BLM applications, it does not support the determination for the 12 forest applications on September 26 and 28, 2015. With regard to those violations, Applebee Aviation demonstrated some cooperativeness by calling for a meeting with the Department after learning of the Emergency Suspension Notice and subsequently halting all further pesticide applications operations. However, Applebee Aviation was uncooperative with regard to those violations in that it was not forthcoming about the existence of the applications during the September 29, 2015 Department meeting and the October 8, 2015 site visit by Mr. Mitchell and Mr. Odenthal. Because Applebee Aviation provided limited cooperation with respect to these violations, the appropriate value of "C" is -1.

The civil penalty for each of the 12 violations is then calculated as follows:

$$NB + [(.1 \times NB) \times (P + H + R + C)]$$

$$1(\$370) + [(.1 \times \$370) \times (3 + (-2) + (-2) + (-1)]$$

$$\$370 + [(\$37) \times (-2)]$$

$$\$370 + (-74) = \$296 \text{ civil penalty per violation}$$

$$\$296 \times 12 \text{ violations} = \$3,552$$

In sum, for each of the 12 violations that occurred on September 26 and 28, 2015 Applebee Aviation is subject to a civil penalty of $296, for a total civil penalty of $3,552 for those violations.

[44] OAR 603-057-0500(3) defines "flagrant" as "any violation where the Department has documented evidence that the respondent had actual knowledge of the law and knowingly committed the violation."

B. Four violations on September 29, 2015, October 1, 2015, and October 2, 2015

As previously discussed, the violations that occurred on September 29, 2015, October 1, 2015, and October 2, 2015 resulted from gross negligence. OAR 603-057-0532 therefore applies to those violations as follows:

> (1) When the Director determines that the violation resulted from gross negligence or willful misconduct and that the violation occurred on or after June 25, 2007, the Director will determine the amount of the civil penalty using this section. To determine the amount of the civil penalty, calculate it utilizing the formula: NB + [(.1 x NB) x (P + H + C)] = Penalty Amount where:
>
> (a) N = the number of times, within a period of three years prior to and including the date of the current violative act, that the person has been determined by the Director to have committed that violative act;
>
> (b) B = the base penalty determined using the following matrix: * * *.
>
> (A) The Magnitude of Violation is determined according to OAR 603-057-0525(2).
>
> (B) The Gravity of Effect is determined according to OAR 603-057-0525(3).
>
> (c) P = Past occurrence of unrelated violations under ORS Chapter 634 for a period of three years prior to the date of the current violative act. P will be weighted from O to 6 in the same manner as described in OAR 603-057-0530(1)(c).
>
> (d) H = History of the person in taking all feasible steps or procedures necessary or appropriate to correct a violative action. H will be weighted from -2 to 2 in the same manner as described in OAR 603-057-0530(1)(d).
>
> (e) C = Cooperativeness on the part of the person to assist the department in its investigation and to the extent possible, rectify the violation. C will be weighted from -2 to 2 in the same manner as described in OAR 603-057-0530(1)(f).
>
> (2) If the calculation utilizing the formula in this section results in an amount more than $10,000, the Director will assess a penalty of $10,000. In addition, the Director may consider this adjustment if the Director remits or reduces the amount as provided in ORS 634.910 or OAR 603-057-0502(6).

As with the September 26 and 28, 2015 violations, for the remaining four violations the value of "N" is 1; the magnitude is Category I (MAJOR), the gravity of their effect is HIGH LEVEL, the value of "P" is 3, and the appropriate value of "H" is -2. The Department determined that the base penalty for each of the four remaining violations is $1,000. February 15, 2016 Notice to Applebee Aviation at 12. The record supports that determination.

As previously discussed, the Department determined that the value of "C" is 2 because Applebee Aviation "was uncooperative and disregarded ODA's explicit statement of the scope of the license suspension order." February 15, 2016 Notice to Applebee Aviation at 12-13. The record supports that determination for the BLM applications on October 1 and 2, 2015.

With regard to the September 29, 2015 violations, however, Applebee Aviation did not demonstrate as significant a level of uncooperativeness and disregard for the Emergency Suspension Order as with the BLM applications. Even so, Applebee Aviation was not forthcoming about the existence of the September 29 applications during the September 29 Department meeting and the October 8, 2015 site visit by Mr. Mitchell and Mr. Odenthal. Because Applebee Aviation was generally uncooperative with respect to the September 29 violations, the appropriate value of "C" is 1 for those violations.[45]

The civil penalty for the two violations on September 29, 2015 is calculated as follows:

NB + [(.1 x NB) x (P + H + C)]

1($10,000) + [(.1 x $10,000) x (3 + (-2) + 1)]

$10,000 + [$1,000 x 2]

$10,000 + 2,000 = $12,000 civil penalty per violation

However, pursuant to OAR 603-057-0532(2), the maximum civil penalty per violation is $10,000. Thus, the total civil penalty for the two violations on September 29, 2015 is $20,000 ($10,000 + $10,000).

The civil penalty for the two violations on October 1 and 2, 2015 is calculated as follows:

NB + [(.1 x NB) x (P + H + C)]

1($10,000) + [(.1 x $10,000) x (3 + (-2) + 2)]

$10,000 + [$1,000 x 3]

$10,000 + 3,000 = $13,000 civil penalty per violation

[45] It is worth noting that regardless of whether the value of "C" is accorded a value of 1 (generally uncooperative) or 2 (uncooperative), the civil penalty for the September 29 applications is the same (*i.e.* $10,000 per violation).

Again, because OAR 603-057-0532(2) limits the civil penalty to no more than $10,000 per violation, the total civil penalty for the two violations on October 1 and 2, 2015 is $20,000 ($10,000 + $10,000).

In sum, for each of the four violations that occurred on September 29, 2015, October 1, 2015, and October 2, 2015, Applebee Aviation is subject to a civil penalty of $10,000, for a total civil penalty of $40,000 ($10,000 x 4) for those violations.

The total civil penalty for all 16 violations established against Applebee Aviation is $43,552 ($3,552 + $40,000).

ORDER

I propose that that the Oregon Department of Agriculture issue the following order:

Applebee Aviation, Inc. shall pay a total civil penalty of $43,552 for 16 violations of ORS 634.372(9). In addition, the Commercial Pesticide Operator license held by Applebee Aviation, Inc. shall be suspended for a period of one (1) year.

Jennifer H. Rackstraw
Senior Administrative Law Judge
Office of Administrative Hearings

EXCEPTIONS TO PROPOSED ORDER

The party in this case and Oregon Department of Agriculture staff have the right to file written exceptions to the Administrative Law Judge's Proposed Order. Because of the timelines set forth in OAR 137-003-0560(3), any exceptions must be filed with the Department within **five (5) calendar days** after issuance of the Proposed Order.

Any exceptions must be mailed to Katy Coba, Director of the Department of Agriculture, State Lands, 635 Capitol Street NE, Salem, Oregon 97301.

After considering any exceptions, the Director will issue a Final Order.

APPEAL

If you wish to appeal the Final Order, you must file a petition for review with the Oregon Court of Appeals within sixty (60) days after the Final Order is served upon you. *See* ORS 183.480 *et seq.*

CERTIFICATE OF MAILING

On June 30, 2016, I mailed the foregoing PROPOSED ORDER issued on this date in OAH Case No. 1504424.

By: First Class and Certified Mail
Certified Mail Receipt #7015 0640 0001 7130 3040

Robert Ireland
Attorney at Law
Ireland & Ireland
PO Box 273
Banks OR 97106

By: First Class Mail

Dale Mitchell
Dept. of Agriculture
635 Capitol Street NE
Salem OR 97301

Lore Bensel
Senior Assistant Attorney General
Department of Justice
1162 Court St NE
Salem OR 97301-4096

Alesia Vella
Administrative Specialist
Hearing Coordinator

CERTIFICATE OF SERVICE

I hereby certify that on August 24th, 2016, I served a courtesy copy of the FINAL ORDER by first-class mail to Jennifer H. Rackstraw, Administrative Law Judge, Office of Administrative Hearings, 7995 S.W. Mohawk Street, Tualatin, Oregon, 97062 and by e-mail to jennifer.h.rackstraw@oregon.gov and emp.oahreferral@oregon.gov.

I further certify that on August 24th, 2016, I served a copy of the FINAL ORDER by first-class mail to the persons at the addresses listed below:

Robert J Ireland
Ireland & Ireland PC
9003 NW Hwy 47
PO Box 273
Banks OR 97106
rob@irelandpc.com

DATED this 24th day of August, 2016.

ELLEN F. ROSENBLUM
Attorney General

Lore Bensel

Lore Bensel, OSB #891646
Senior Assistant Attorney General
Of Attorneys for Oregon Department of Agriculture

BEFORE THE DIRECTOR

OF THE DEPARTMENT OF AGRICULTURE

IN THE MATTER OF:	)	OAH Case No. 1504424
	)	Agency Case No.: 150406
	)	
APPLEBEE AVIATION, INC.	)	**FINAL ORDER**
	)	

This is the Director's Final Order in the contested case proceeding arising from the Third Amended Notice of Imposition of Civil Penalty, Proposed Revocation of Operator License, and Opportunity for a Hearing (Notice) dated February 15, 2016, and issued to Applebee Aviation, Inc. Administrative Law Judge Jennifer H. Rackstraw issued her Proposed Order on June 30, 2016. The Department did not receive exceptions to the Proposed Order.

I have decided to adopt Judge Rackstaw's Proposed Order as my Final Order, subject to the following changes:

1. The first sentence of the fifth full paragraph on page 6 of 53 is replaced with the following:

On April 15, 2016, Respondents filed a Stay Request with the Department, requesting a stay of OAH Case Nos. 1504399 and 1504424.

2. A sentence is added at the end of paragraph number 6 on page 8 of 53 that states as follows:

I accept these findings for purposes of this contested case only.

3. A sentence is added to the middle of the second full paragraph on page 31 of 53 that states as follows:

General information regarding registered agents and service upon them is provided in ORS 60.111 *et seq*.

4. The last two sentences of the first full paragraph on page 34 of 53 are replaced with the following:

I direct, instead, that Applebee Aviation's CPO license will be revoked for a one-year period as described in the Order section of this document. There shall be no opportunity to reissue or renew Applebee Aviation's CPO license during the second portion of the one-year period. Such a revocation is still a significant sanction to levy against a licensee and, in this matter, is more commensurate with the number and severity of Applebee Aviation's current and past violations.

5. The Order section on page 52 of 53 is replaced with the following:

ORDER

Applebee Aviation, Inc. shall pay a total civil penalty of $43,552 for sixteen violations of ORS 634.372(9). The total payment shall, as provided in ORS 183.745(2), be due ten (10) days after this Order becomes final by operation of law or on appeal. Provided, however, Applebee Aviation, Inc. may elect to pay the total amount in five equal annual installments of $8,710.40 by notifying the Department in writing of its election by no later than September 16, 2016. If the election is timely made, then the first installment shall be paid no later than the tenth (10th) day after this Order becomes final by operation of law or on appeal. The four subsequent installments shall be made on or before that date (month and day) of the following four years.

In addition, Applebee Aviation, Inc's commercial pesticide operator's license (CPO) is revoked, and shall not be reissued or renewed, for a one-year period to be served in two portions. The first portion is a total of one (1) month of credit that reflects time when the CPO was suspended, minus the time when there was a temporary restraining order or stipulated injunction in effect. The second portion is a total of 11 months, beginning September 15, 2016, and ending on August 15, 2017.

/

/

/

/

All other portions of the Proposed Order are incorporated by reference. The Proposed Order is attached to this Final Order as Attachment 1.

Dated this 23rd day of August, 2016.

Katy Coba
Director
Department of Agriculture

NOTICE OF RIGHT TO APPEAL: You are entitled to seek judicial review of this order. Judicial review may be obtained by filing a petition with the Oregon Court of Appeals within sixty (60) days from the service of this Final Order. Judicial review is pursuant to the provisions of ORS 183.482.

ATTACHMENT 1

(Proposed Order for OAH Case No. 1504424)

BEFORE THE DIRECTOR

OF THE OREGON DEPARTMENT OF AGRICULTURE

IN THE MATTER OF:	)	OAH Case No. 1504399
	)	Agency Case No.: 150406
	)	
MICHAEL APPLEBEE	)	**FINAL ORDER**
	)	

This is the Director's Final Order in the contested case proceeding arising from the Amended Notice of Proposed Imposition of Civil Penalty, Proposed Revocation of Applicator License, and Opportunity for a Hearing (Notice) dated February 15, 2016, and issued to Michael Applebee. Administrative Law Judge Jennifer H. Rackstraw issued her Proposed Order on June 30, 2016. The Department did not receive exceptions to the Proposed Order.

I have decided to adopt Judge Rackstaw's Proposed Order as my Final Order, subject to the following changes:

1. The first sentence of the fifth full paragraph on page 6 of 49 is replaced with the following:

On April 15, 2016, Respondents filed a Stay Request with the Department, requesting a stay of OAH Case Nos. 1504399 and 1504424.

2. A sentence is added at the end of paragraph number 6 on page 8 of 49 that states as follows:

I accept these findings for purposes of this contested case only.

3. A sentence is added to the middle of the third full paragraph on page 31 of 49 that states as follows:

General information regarding registered agents and service upon them is provided in ORS 60.111 *et seq.*

4. The last two sentences of the third full paragraph on page 36 of 49 are replaced with the following:

I direct, instead, that Mr. Applebee's CPA license will be revoked for a one-year period as described in the Order section of this document. There shall be no opportunity to reissue or renew Mr. Applebee's CPA license during the one-year period. Such a revocation is still a significant sanction to levy against a licensee and, in this matter, is more commensurate with the number and severity of Mr. Applebee's current and past violations.

5. The Order section on page 48 of 49 is replaced with the following:

ORDER

Michael Applebee shall pay a total civil penalty of $10,000 for one violation of ORS 634.372(4). The total payment shall, as provided in ORS 183.745(2), be due ten (10) days after this Order becomes final by operation of law or on appeal.

In addition, Michael Applebee's commercial pesticide applicator's license (CPA) is revoked, and shall not be reissued or renewed, for a one-year period beginning September 15, 2016, and ending on September 14, 2017.

All other portions of the Proposed Order are incorporated by reference. The Proposed Order is attached to this Final Order as Attachment 1

Dated this 23rd day of August, 2016.

Katy Coba
Director
Department of Agriculture

NOTICE OF RIGHT TO APPEAL: You are entitled to seek judicial review of this order. Judicial review may be obtained by filing a petition with the Oregon Court of Appeals within sixty (60) days from the service of this Final Order. Judicial review is pursuant to the provisions of ORS 183.482.

ATTACHMENT 1

(Proposed Order for OAH Case No. 1504399)