Original –
Rec'd by U.S. Postal Service
SA

John Conner, Jr
Peter L. Gray
Amy Symonds
Dentons US LLP
1900 K Street N.W., Ste. 100
Washington, DC 20006
Email: peter.gray@dentons.com
amy.symonds@dentons.com
john.conner@dentons.com
Attorneys for Syngenta Seeds, LLC

** FILED **
10MAR2017 - 03:40PM
U.S.EPA - Region 09

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 HAWTHORNE STREET
SAN FRANCISCO, CALIFORNIA, 94105

IN THE MATTER OF:	)	Docket No.: FIFRA-09-2017-0001
SYNGENTA SEEDS, LLC d/b/a Syngenta Hawaii, LLC,	)	ANSWER TO COMPLAINT AND REQUEST FOR HEARING
Respondent.	)	

Respondent Syngenta Seeds, LLC hereby responds to the Complaint and Notice of Opportunity for Hearing ("Complaint") issued by the United States Environmental Protection Agency Region IX ("Complainant" or "EPA Region 9") and makes its request for hearing.[1]

I. PRELIMINARY STATEMENT

EPA Region 9 alleges that on January 20, 2016, Respondent committed 261 violations of EPA's Worker Protection Standard ("WPS"), 40 C.F.R. pt. 170. EPA Region 9 seeks to impose a penalty of $18,750 for each of these 261 violations, pursuant to Sections 12(a)(2)(G) and 14(a)(1) of the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), which would yield an unprecedented $4,893,750 in civil penalties.

[1] EPA Region 9 has improperly named "Syngenta Seeds, LLC d/b/a Syngenta Hawaii, LLC" as Respondent. As discussed below, the alleged violations occurred at a farm operated by Syngenta Hawaii, not Syngenta Seeds, and they are wholly separate entities.

The Complaint represents a gross overreach by EPA Region 9, and Syngenta disputes many of the allegations and the proposed assessment of civil penalties. EPA Region 9 has ignored exculpatory factual information presented by Respondent and separately documented by the Hawaii Department of Agriculture ("HDOA"). EPA Region 9 has usurped the primary enforcement authority of HDOA, which conducted a comprehensive investigation prior to EPA Region 9's own investigation and determined that a Notice of Warning, not civil penalties nearing $5 million, was appropriate. And EPA Region 9 has misapplied the penalty provisions of FIFRA and disregarded EPA's own guidance on assessing penalties under the circumstances presented. EPA Region 9's proposed penalty of nearly $5 million for alleged WPS violations is particularly inappropriate because nobody was injured and there was no intentional misconduct. To the contrary, Syngenta made a good faith attempt to comply with the law, and it cooperated fully with state and federal authorities.

A. Summary of Pertinent Facts

Syngenta Hawaii, LLC operates an agricultural research farm located in Kauai, where the company grows and evaluates corn. On Wednesday, January 20, 2016, a worker employed through a contract employment agency made a mistake while working in one of Syngenta Hawaii's corn fields. This mistake led 19 other workers to prematurely enter a field that had been treated the prior day with the restricted use pesticide Lorsban Advanced ("Lorsban") -- a field that the workers had been instructed not to enter. Earlier that day, a Syngenta employee had reviewed the work to be performed by the workers. The workers were told they would be attaching identification tags ("row bands") to corn plants in 11 sections within Field 312-A, specifically, in Sections 21-24 and 31-37. The workers were also expressly instructed not to enter Sections 25-30, which had been treated with Lorsban a day earlier and for which entry was

restricted for 24 hours. The contract worker who made the mistake had been asked to help place bundles of row bands next to Sections 21-24 and 31-37 for workers to pick up and attach to the plants. Unfortunately, he mistakenly laid out row bands for use in Section 25, contrary to his instructions and contrary to the "Do Not Enter" warning sign that marked Section 25. Shortly thereafter, nineteen workers picked up those row bands and began attaching them to plants in Section 25 approximately four hours before entry was permitted.

As soon as a crew leader realized that workers had mistakenly entered Section 25, the workers were instructed to leave the field immediately. On the way out of the field, an unidentified worker inexplicably, and without Syngenta's authorization, tampered with the posted "Do Not Enter" sign that marked the entrance to Section 25, folding it closed.

Syngenta immediately initiated its decontamination protocol, directing that workers first wash their hands at a break area near Section 25. The workers were then transported to an accessory building where they were asked to shower. None of the workers expressed any complaints or adverse symptoms. The decontamination protocol includes advising potentially exposed workers of typical symptoms of insecticide exposure (e.g., headaches and weakness). After receiving this information, several of the workers expressed their belief that they had or may have such symptoms. Consequently, ten workers were taken to a local hospital for examination. The attending physician at the hospital stated that he did not believe the workers were actually exposed to or impacted by the pesticide. Nonetheless, in accordance with guidance from the state poison control hotline, the attending physician decided that three of the ten workers should remain in the hospital overnight for observation. The seven workers discharged on Wednesday, January 20, returned to work the next day (Thursday). The three workers held for observation were released the next day and returned to work the following week.

Coincidentally, Ann Kam, an HDOA Environmental Health Specialist, was meeting with Syngenta at the farm when the workers entered Section 25. Syngenta immediately notified Ms. Kam, and she participated in and observed the decontamination efforts. Ms. Kam thereafter conducted interviews, collected statements, and completed an investigation pursuant to HDOA protocols. HDOA determined a Notice of Warning was consistent with its enforcement matrix guidelines. Months later, however, EPA Region 9 unilaterally decided to send its own inspectors to the site to duplicate HDOA's investigation. Although EPA Region 9 uncovered no new substantive information or facts, it proceeded with the present enforcement action.

B. Summary of Significant Errors by EPA Region 9

EPA Region 9's total proposed penalty of $4,893,750 for alleged WPS violations is the product of significant errors. Four of the most significant errors are summarized below.

1. EPA Region 9 Ignored Exculpatory Facts, Which Defeat Many, if not All, of the Counts

For many of the counts in the Complaint, EPA Region 9 has completely ignored evidence collected by HDOA and/or provided by Syngenta that flatly contradicts the grounds on which the counts are based. For example, EPA Region 9 alleges that Syngenta "allowed or directed each of 19 workers to enter or remain in 312-A25 [i.e., Section 25] before the expiration of the applicable 24-hour REI [reentry interval] for the application of Lorsban, in violation of 40 C.F.R. § 170.112(a)(1)." (*See* Complaint, ¶ 71.) This allegation ignores evidence that a Syngenta employee orally instructed all of the workers not to enter Section 25 during a 7:00 a.m. meeting that day. EPA Region 9 also casts aside the finding of Ms. Kam, documented by her inspection report, that the contractor who laid out row bands for workers to use in Section 25 had "read the field sign at field 312-A25 before laying out the row bands in field 312-A25." These circumstances indicate that the third-party contractor did not follow oral instructions prohibiting

entry into Section 25 and also disregarded the warning sign prohibiting entry into Section 25. Thus, contrary to the allegations in the Complaint, Syngenta did not "allow or direct" the workers to enter Section 25.

Another example illustrating EPA Region 9's decision to ignore exculpatory evidence concerns the allegation that Respondent failed "to post required warning sign features." (*See* Counts 20-22 of the Complaint.) In this regard, EPA Region 9 states that a warning sign must include: (1) the words "Danger" and "Pesticides" (in English and Spanish) at the top of the sign; (2) the words "Keep Out" (in English and Spanish) at the bottom of the sign; and (3) a "stern-faced man with an upraised hand." (Complaint, ¶ 77.) EPA Region 9 claims that because the warning sign "was 'up' or 'closed,'" Respondent "fail[ed] to post a Warning Sign with each of the three required features," leading to three "independently assessable violations." (Complaint, ¶¶ 76-77.) However, the Complaint does not mention HDOA's findings that Syngenta had in fact posted a compliant warning sign (containing all three of the aforementioned features) in the "down" or "open" position, with a pink label in the right-hand corner identifying when the 24-hour reentry interval began and ended. EPA Region 9 also ignored evidence collected by HDOA that the contractor "read" the warning sign before putting row bands in front of Section 25 and before workers entered the field. Someone closed the sign at some point after the workers entered Section 25. Thus, the only arguably viable allegation is Count 45 -- that Respondent "failed" to post a sign for the duration of the REI (although that count should fail as discussed below).

2. <u>EPA Region 9 Violated Agency Policy by Multiplying Each Alleged WPS Violation by the Number of Workers</u>

The vast majority of the 261 alleged violations in the Complaint result from EPA Region 9's improperly multiplying each alleged WPS violation by the number of workers. Consider

Counts 46-90 ("Failure to Provide Oral Warnings Containing Treated Area's Description and Location"). EPA Region 9 assessed a separate violation for each worker that allegedly did not receive this oral warning. As noted *supra*, Syngenta did in fact provide the required oral warnings, but, assuming for the sake of argument that it failed to do so, EPA's published policy prevents the Agency from multiplying each WPS violation by the number of affected workers. EPA's *FIFRA Enforcement Response Policy* (December 2009) ("ERP") states that a separate civil penalty may only be assessed for each "independent" violation of the Act, noting:

> A violation is considered independent if it results from an act (or failure to act) which is not the result of any other violation for which a civil penalty is to be assessed or <u>if at least one of the elements of proof is different from any other violation</u>.

ERP at 16 (emphasis added).

Multiplying each alleged WPS violation by the number of workers contravenes this standard, as there is no separate element of proof as to each worker. Indeed, EPA makes this clear in an illustrative example ("Scenario 2") in the Agency's *FIFRA Worker Protection Standard Enforcement Interim Final Penalty Policy* (October 21, 1997). Scenario 2 involves a failure to provide decontamination supplies at a 100-worker farm. EPA states that the failure to provide decontamination supplies constitutes one violation, not 100. (WPS Penalty Policy at 20.) Applying EPA's policy to the allegations in the present case would result in, at most, one violation for "failure to provide oral warnings," not 35, at most one violation for "failure to post warning signs visible" from all "usual points of worker entry," not 22, etc. In sum, EPA Region 9's attempt to multiply the alleged WPS violations by the number of affected workers is contrary to EPA policy and should be summarily dismissed.

3. EPA has Misapplied the FIFRA Penalty Provisions

Another example of EPA Region 9's overreach is its attempt to inflate the penalty by incorrectly using FIFRA §14(a)(1) as the basis for the penalty calculation. Under Section 14(a)(1), the maximum penalty is $18,750 per violation, but that figure may only be assessed against a "registrant, commercial applicator, wholesaler, dealer, retailer or other distributor." The Kauai farm where the alleged WPS violations occurred is operated by Syngenta Hawaii, and Syngenta Hawaii is not a "registrant, commercial applicator, wholesaler, dealer, retailer or other distributor." Syngenta Hawaii would only be subject to penalties under FIFRA §14(a)(2), which provides a maximum penalty of $2,750 per violation committed by "private applicators or other persons not listed in Section 14(a)(1)." In an effort to circumvent this limitation, EPA Region 9 summarily named "Syngenta Seeds, LLC d/b/a Syngenta Hawaii, LLC" as the respondent. Syngenta Seeds is a registrant, which is one of the entities subject to Section 14(a)(1) penalties, but Syngenta Seeds does not operate the Kauai farm; the operator of the farm is Syngenta Hawaii, LLC, a Hawaii limited liability company formed in 2008 and wholly separate from Syngenta Seeds, LLC.

Even assuming for the sake of argument that Syngenta Seeds, LLC could somehow be deemed an operator of the Kauai farm -- which it is not -- EPA Region 9 could not base the penalty calculation on Section 14(a)(1). The alleged violations of EPA's Worker Protection Standard pertain to the duties of an "agricultural employer," which EPA defines as "any person who hires or contracts for the services of workers, for any type of compensation, to perform activities related to the production of agricultural plants, or any person who is an owner of or is responsible for the management or condition of an agricultural establishment that uses such workers." 40 C.F.R. § 170.3. In the Complaint, EPA Region 9 alleges that Syngenta Seeds,

LLC failed to perform various duties that an "agricultural employer" owes to agricultural workers (e.g., posting warning signs, providing decontamination supplies, etc.). The categories of parties listed in Section 14(a)(1) of FIFRA do not include or encompass "agricultural employer." The only category that is potentially applicable to an "agricultural employer" is the catchall "other person," which is found in Section 14(a)(2). In sum, EPA Region 9 should have based its penalty calculation on Section 14(a)(2), not Section 14(a)(1).

4. EPA Region 9 Has Violated the Civil Monetary Penalty Inflation Adjustment Rule

In addition to improperly using FIFRA §14(a)(1) to seek $18,750 for each alleged WPS violation, EPA's own regulation and policy prohibit use of the new statutory maximum penalty figures that went into effect August 1, 2016.[2] Under EPA's *Civil Monetary Penalty Inflation Adjustment Rule*, 81 Fed. Reg. 43,091 (July 1, 2016), EPA may only seek the new maximum penalty (i.e., $18,750 under FIFRA §14(a)(1) and $2,750 under FIFRA §14(a)(2)) for "civil penalties assessed on or after August 1, 2016." *Id.* at 43,092. For cases in which the penalty is assessed prior to August 1, 2016, EPA is limited to imposition of the prior statutory maximums, namely, $7,500 under FIFRA § 14(a)(1) and $1,000 under FIFRA § 14(a)(2). In the present case, EPA Region 9 assessed the penalty well before August 1, 2016 (the date on which the higher penalties went into effect). Specifically, in an April 29, 2016 letter, EPA Region 9 notified Respondent that the Agency "is prepared to issue a civil administrative complaint against Syngenta Seeds, LLC" for the same set of WPS violations that are now stated in the Complaint. Then, on June 7, 2016, EPA Region 9 provided Respondent with a spreadsheet identifying each alleged violation with specificity and also listing the penalty for each violation.

[2] Section 14(a)(1) of FIFRA authorizes penalties of up to $5,000. Section 14(a)(2) authorizes penalties of up to $1,000. In 2016, the maximum penalty figures of $5,000 and $1,000 increased to $18,750 and $2,750, respectively, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended. This statute was implemented through EPA's Civil Monetary Penalty Inflation Adjustment Rule.

Because EPA Region 9 had already assessed (that is, analyzed, calculated, and communicated) the penalty months before August 1, 2016, the proposed penalty in the Complaint must be calculated using the prior scheme. EPA Region 9 cannot seek the new statutory maximum penalty in this case; it is limited by its own regulation.

Even assuming that EPA Region 9 could seek the new statutory maximum penalty available after August 1, 2016, EPA has published guidance stating that it would not immediately do so. Specifically, in a July 27, 2016 memorandum from EPA Headquarters to all EPA Regional Offices, EPA states that the new maximum statutory penalty amounts are to be phased in by applying a small inflation factor to the prior maximum statutory penalty amounts (i.e., $7,500 and $1,000 under FIFRA § 14(a)(1) and (a)(2), respectively). Pursuant to this guidance, the factor applicable to a WPS violation is 1.1002. Thus, the maximum penalty that EPA Region 9 could seek for a WPS violation is $1,100 ($1,000 x 1.1002), not $2,750.[3] There is no valid reason for EPA Region 9 to deviate from EPA's published policy, and any such upward deviation would be arbitrary and capricious.

Set forth below is Respondent's response to the individual paragraphs of the Complaint (using the same paragraph numbering and order as the corresponding allegations in the Complaint). To the extent an allegation is not specifically admitted, it is hereby denied.

II. AUTHORITY AND PARTIES

1. This Paragraph contains Complainant's characterization of the Complaint and/or conclusions of law, to which no response is required. To the extent a response is deemed required, Respondent denies Paragraph 1.

2. Denied with respect to the appropriateness of the delegation. Otherwise admitted.

[3] As noted *supra*, FIFRA § 14(a)(1) is not applicable to WPS violations, but if it were applicable the maximum penalty that would be permissible under EPA's *Civil Monetary Penalty Inflation Adjustment Rule* is $8,252 ($7,500 x 1.1002), not $18,750.

3. Admitted that Syngenta Seeds, LLC has headquarters in Minnetonka, MN and is a wholly owned subsidiary of Syngenta AG. Denied that Syngenta Seeds, LLC does business as Syngenta Hawaii, LLC. Syngenta Hawaii, LLC is a Hawaii limited liability company wholly separate from Syngenta Seeds, LLC.

III. STATUTORY AND REGULATORY BACKGROUND

4. This is a recitation of a statutory provision to which no response is required.

5. This is a recitation of a statutory provision to which no response is required.

6. This is a recitation of a statutory provision to which no response is required.

7. This is a recitation of a statutory provision to which no response is required.

8. This is a recitation of a statutory provision to which no response is required.

9. This is a recitation of statutory and regulatory provisions to which no response is required.

10. This is a recitation of a regulatory provision to which no response is required.

11. This is a recitation of a regulatory provision to which no response is required.

12. This is a recitation of a regulatory provision to which no response is required.

13. This is a recitation of a regulatory provision to which no response is required.

14. This is a legal conclusion to which no response is required.

IV. GENERAL ALLEGATIONS

15. Admitted as to Syngenta Hawaii, LLC, but otherwise denied. This is the first of numerous paragraphs of the Complaint that are denied on the ground that Complainant has inappropriately conflated Syngenta Hawaii, LLC and Syngenta Seeds, LLC as "Respondent." *See* also the first numbered defense, *infra*.

16. Admitted as to Syngenta Seeds, LLC but otherwise denied. Respondent affirmatively asserts that Syngenta Seeds' status as a registrant is legally irrelevant to the counts of the Complaint as explained in the Preliminary Statement, *supra*.

17. Admitted as to Syngenta Hawaii, LLC, but otherwise denied.

18. Admitted as to Syngenta Hawaii, LLC, but otherwise denied. Additionally, the Facility does more than "develop new varieties of seed corn"; it grows the new varieties of corn to ensure quality and grows the corn for seeds for commercial distribution by others.

19. Admitted.

20. Admitted as to Syngenta Hawaii, LLC, but denied as to Syngenta Seeds, LLC.

21. Admitted.

22. Admitted.

23. Respondent admits that contract workers from Hawaii Employment and Global Ag Services, Inc. worked on Syngenta Hawaii's farm. Respondent lacks sufficient information to form a belief as to the truth of the allegation regarding other Hawaiian farming operations that were serviced by contract workers employed Global Ag and Hawaii Employment. Otherwise denied.

24. Denied in that not all of the individuals were "workers" as defined under 40 C.F.R. § 170.3, but otherwise admitted that some individuals were such "workers."

25. Admitted as to Syngenta Hawaii, LLC; denied as to Syngenta Seeds, LLC.

26. This is a legal conclusion, to which no response is required.

27. This paragraph recites the text of the pesticide label for Lorsban Advanced, to which no response is required.

28. This paragraph recites the text of the pesticide label for Lorsban Advanced, to which no response is required.

29. This paragraph recites the text of the pesticide label for Lorsban Advanced, to which no response is required.

30. This paragraph recites the text of the pesticide label for Lorsban Advanced, to which no response is required.

31. This paragraph recites the text of the pesticide label for Lorsban Advanced, to which no response is required.

32. This paragraph recites the text of the pesticide label for Lorsban Advanced, to which no response is required. (Respondent notes an error in Complainant's recitation of the label language, "If in eyes: [h]old open." The label actually states "If in eyes: [h]old eye open.")

33. Admitted.

34. Admitted that on January 19, 2016, between approximately 12:33 p.m. and 1:42 p.m., Mr. Gutierrez and Mr. Balauro, certified pesticide applicators, applied the quantity of Lorsban, Permethrin, and Indicate 5 referenced in Paragraph 34 to 19 acres of Syngenta Hawaii's farm, including Section 312-A25. However, the REI for Section 312-A25 extended from 12:57 p.m. on January 19 until 12:57 p.m. on January 20. Otherwise denied.

35. Admitted.

36. Denied in that the REI extended until 12:57 p.m., on January 20, 2016 (not 12:51 p.m.). Otherwise admitted.

37. Denied with respect to "35 contract workers"; although 35 workers arrived at the stated time, only 33 of the 35 were contract workers. Otherwise admitted.

38. Denied. The morning meeting was led by Cullen Rapozo, not Jerry Kanahele and Matthew McClallen, and the assignment to attach row bands was limited to Section 21-24 and 31-37, and not in Sections 25-30.

39. Denied in that at the time of the incident there was only one "crew lead" in field 312, Jerry Kanahele (a Syngenta employee); Marvin Olores (an employee of Hawaii Employment) was not designated as a "crew lead," and he did not "supervise" the contract workers. Otherwise admitted.

40. Denied.

41. Admitted.

42. Admitted

43. Denied.

44. Admitted that 19 workers entered Section 25 approximately four hours before the REI had expired in order to apply row bands to corn stalks and that none of the 19 workers wore personal protective equipment. Respondent lacks sufficient information to form a belief as to the truth of the allegation that the 19 workers entered Section 25 "from random positions."

45. Denied in that the Warning Sign was "down" or "open" when the workers entered Section 312-A25, but, on information and belief, one of the workers "closed" the Warning Sign, putting it "up" upon exiting Section 312-A25. Otherwise admitted.

46. Admitted.

47. Admitted.

48. Denied with respect to the allegation that "a prior complaint" had been filed against Respondent. The "prior complaint" had been made against Syngenta Hawaii, LLC, not Syngenta Seeds. Otherwise admitted.

49. Admitted that at approximately 9:05 a.m., Mr. Brun, the Third Party Coordinator at the Syngenta Hawaii farm, informed Ms. Wedekind that workers had entered a field for which an REI was still in effect. Otherwise denied.

50. Admitted that Ms. Wedekind met with Mr. Hausam, the Health Safety Environmental and Security Lead at the Syngenta Hawaii farm, to discuss the situation. Otherwise denied.

51. Respondent lacks sufficient information to form a belief as to the truth of the allegation that Ms. Kam "documented what she observed," but otherwise admitted.

52. Respondent lacks sufficient information to form a belief as to the truth of the allegations as to what Ms. Kam observed or what she said to workers.

53. Admitted. However, even with the Warning Sign closed, the REI expiration information was still visible.

54. Denied. First, it is unclear if Mr. Hausam left the break station before decontamination commenced. Second, Mr. Hausam did not determine that all 35 workers "would need to be decontaminated" but instead elected to decontaminate everyone due to uncertainty regarding which workers had entered Section 25.

55. Admitted that at approximately 10:00 a.m., workers were transported by van to an accessory building at the Syngenta Hawaii farm for additional decontamination. Otherwise denied.

56. The allegations of this Paragraph are admitted but are incomplete. In addition to being used for storage of equipment, the accessory building is used as a locker room for pesticide handlers. Moreover, in addition to the decontamination supplies listed in Paragraph 56, Tyvek suits are stored in the accessory building.

57. Admitted.

58. Admitted. However, the decision to decontaminate all workers was made out of an overabundance of caution, and not actual contamination or cross-contamination. *See* para. 54, *supra*.

59. Denied as regards the workers' transportation occurring "[b]etween 11:10 a.m. and 11:30 a.m."; the workers arrived at the Hospital during this timeframe. The transportation of the workers began earlier. Also denied that the Hospital placed 7 of the 10 workers "under observation." Rather, the Hospital placed 7 patients in observation beds, and shortly after examining them they were discharged. None of the workers were injured. Otherwise admitted.

60. Respondent admits that HDOA employee Ann Kam conducted an investigation, but Respondent lacks sufficient information to form a belief as to the truth of the allegations of paragraph 60, and directs attention to the inspection report prepared by Ms. Kam.

61. Respondent lacks sufficient information to form a belief as to the truth of the allegations of Paragraph 61, beyond what is stated in the referenced report.

62. Respondent lacks sufficient information to form a belief as to the truth of the allegations of paragraph 62.

63. Admitted.

64. Admitted.

65. Admitted.

66. Respondent lacks sufficient information to form a belief as to the truth of the allegations of Paragraph 66, beyond what is stated in the referenced report.

67. Respondent lacks sufficient information to form a belief as to the truth of the allegations of Paragraph 67, beyond what is stated in the referenced reports.

68. This is a legal conclusion to which no response is required. To the extent a response is deemed necessary, Respondent denies the allegations of Paragraph 68.

V. SPECIFIC ALLEGATIONS - VIOLATIONS

Counts 1-19: Allowing or Directing Workers Entry to Treated Area

69. Respondent incorporates by reference Paragraphs 1 through 68 of this Answer as though fully set forth herein.

70. This is a recitation of a regulatory provision to which no response is required.

71. Denied. Respondent did not "direct" workers to attach row bands to corn stalks in in Section 312-A25 and did not "allow[] or direct[] each of the 19 workers to enter or remain in field 312-A25 before the expiration of the applicable 24-hour REI for the application of Lorsban Advanced in violation of 40 C.F.R. §170.112(a)(1)." In fact, the workers were specifically instructed not to enter Section 25 on January 20, 2016.

72. This is a legal conclusion to which no response is required. To the extent a response is deemed necessary, Respondent denies the allegations of Paragraph 72 for the reasons stated in Paragraph 71 and in the Preliminary Statement, *supra*.

Counts 20-22: Failure to Post Required Warning Sign Features

73. Respondent incorporates by reference the admissions, denials, and assertions contained in paragraphs 1 through 72 of this Answer as though fully set forth again.

74. This is a recitation of a regulatory provision to which no response is required.

75. This is a recitation of a regulatory provision to which no response is required.

76. Denied as to the allegations that the Warning Sign was "up" or "closed" for the entirety of January 20, 2016, and that "Respondent did not have a sign posted in field 312-A25 that" satisfied the requirements identified in paragraph 75. *See* Paragraph 45, *supra*.

77. Denied for the reasons stated in Paragraph 76 and the Preliminary Statement, *supra*, and the response to the Complaint's "Proposed Civil Penalty" section, *infra*.

Counts 23-44: Failure to Post Visible Signage

78. Respondent incorporates by reference the admissions, denials, and assertions contained in Paragraphs 1 through 77 of this Answer as though fully set forth herein.

79. This is a recitation of a regulatory provision to which no response is required.

80. Denied. The requirement under 40 C.F.R. § 170.120(c)(4) is to post a sign at "all usual points of worker entry" (not at "all points of worker entry," as the Complaint states). Syngenta Hawaii, LLC did post a sign at the only authorized point of worker entry -- the front left corner of Section 25 -- and all workers present on January 20, 2016 had received training in which they were instructed to enter only from the front left corner of every section.

81. Denied for the reasons stated in Paragraph 80 and the Preliminary Statement.

Count 45: Failure to Post a Sign Throughout REI

82. Respondent incorporates by reference Paragraphs 1 through 81 of this Answer as though fully set forth herein.

83. This is a recitation of a regulatory provision to which no response is required.

84. Denied because the closing of the Warning Sign for a portion of the REI was not due to any act or omission by Respondent; it was the result of an unauthorized action by a worker. Syngenta Hawaii, LLC satisfied its regulatory obligation in posting the Warning Sign.

85. Denied for the reasons stated in Paragraph 84 and the Preliminary Statement.

Counts 46-90: Failure to Provide Oral Warnings Containing Treated Area's Description and Location

86. Respondent incorporates by reference Paragraphs 1 through 85 of this Answer as though fully set forth herein.

87. This is a recitation of a regulatory provision to which no response is required.

88. This is a recitation of a regulatory provision to which no response is required.

89. Denied. A supervisor did provide the oral warnings, including the location and description of the treated area, during the January 20, 2016 morning meeting that was attended by all 35 workers.

90. Denied for the reasons stated in Paragraph 89 and the Preliminary Statement.

Counts 91-115: Failure to Provide Oral Warnings Containing Treated Area's REI in Effect

91. Respondent incorporates by reference Paragraphs 1 through 90 of this Answer as though fully set forth herein.

92. This is a recitation of a regulatory provision to which no response is required.

93. Denied. A supervisor did provide the oral warnings, including the times that Section 25 was restricted, during the January 20, 2016 morning meeting that was attended by all 35 workers.

94. Denied for the reasons stated in Paragraph 93 and the Preliminary Statement.

Counts 116-150: Failure to Provide Oral Warnings Instructing Workers to Not Enter the Treated Area

95. Respondent incorporates by reference Paragraphs 1 through 94 of this Answer as though fully set forth herein.

96. This is a recitation of a regulatory provision to which no response is required.

97. Denied. A supervisor did provide the oral warnings, including the instruction not to enter Section 25, during a January 20, 2016 morning meeting attended by all of the workers.

98. Denied for the reasons stated in Paragraph 97 and the Preliminary Statement.

Counts 151-188: Failure to Provide Water for Routine and Emergency Eye-flushing

99. Respondent incorporates by reference Paragraphs 1 through 98 of this Answer as though fully set forth herein.

100. This is a recitation of a regulatory provision to which no response is required.

101. Denied. Syngenta Hawaii, LLC provided the workers and crew leads with immediate access to at least 90 gallons of water (located on three vans, one truck, and totes located at the edge of Section 312-A), which is sufficient for both "routine washing" and "emergency eyeflushing" under the referenced WPS regulation.

102. Denied for the reasons stated in Paragraph 101 and the Preliminary Statement.

Counts 189-226: Failure to Provide Accessible Decontamination Supplies

103. Respondent incorporates by reference Paragraphs 1 through 102 of this Answer as though fully set forth herein.

104. This is a recitation of a regulatory provision to which no response is required.

105. Denied. As discussed in Paragraph 101, above, Syngenta Hawaii, LLC provided sufficient water for "routine washing" and "emergency eyeflushing" well within the ¼ mile maximum distance specified in 40 C.F.R. § 170.150(c)(1). The transport vehicles (3 vans and one truck) also provided the other required decontamination supplies, i.e., soap and single-use towels, in quantities that were sufficient for the workers and crew leads. To the extent Complainant intended to allege a violation of the separate requirements pertaining to "decontamination after early entry activities," including an area for "thorough washing," the "accessory building" at the farm satisfies the WPS requirements under 40 C.F.R. § 170.150(d). Notably, that provision does not specify that this facility must be located within ¼ mile. *Id.*

106. Denied for the reasons stated in Paragraph 105 and the Preliminary Statement.

Counts 227-261: Failure to Provide Prompt Transportation to an Appropriate Medical Facility

107. Respondent incorporates by reference Paragraphs 1 through 106 of this Answer as though fully set forth again.

108. This is a recitation of a regulatory provision to which no response is required.

109. Denied.

110. Respondent incorporates it responses to Paragraphs 55 and 59 of the Complaint.

111. Denied.

VI. PROPOSED CIVIL PENALTY

The portion of the Complaint entitled "Proposed Civil Penalty" contains a prayer for relief, as to which no response is required. To the extent a response is deemed necessary, Respondent denies that Complainant is entitled to any relief in this action. Furthermore, Respondent asserts that the Complainant has calculated the penalty in a manner that violates the statute, EPA regulations, and policy, as described in the Preliminary Statement, *supra*, and the fourth numbered defense, *infra*.

VII. THE CIRCUMSTANCES OR ARGUMENTS THAT CONSTITUTE GROUNDS OF DEFENSE AND FOR OPPOSING THE PROPOSED PENALTY

Respondent restates and incorporates by reference all applicable averments submitted above in response to the allegations in the Complaint and adds the following additional grounds for defense of the Complaint and for opposing the proposed penalty:

1. Complainant has named the wrong party ("Syngenta Seeds, LLC d/b/a Syngenta Hawaii, LLC") as Respondent, in that: (i) Syngenta Hawaii, LLC, not Syngenta Seeds, LLC, operates the Kauai farm where the alleged WPS violations occurred; and (ii) Complainant has no grounds for conflating Syngenta Seeds, LLC and Syngenta Hawaii, LLC.

2. Complainant has improperly invaded, usurped and abrogated the State of Hawaii's primary authority over enforcement of pesticide misuse violations under FIFRA, in violation of FIFRA §§ 26 and 27, an EPA interpretative rule (48 Fed. Reg. 404 (1983)), and a cooperative agreement between EPA Region 9 and the State of Hawaii, justifying dismissal of the Complaint.

3. Complainant's allegations are not supported by substantial evidence. In fact, the allegations are contrary to the evidence.

4. The proposed penalty is inappropriate, contrary to law, and unreasonable for the following reasons: (i) Complainant improperly multiplied each alleged WPS violation by the number of workers involved, contrary to EPA policy; (ii) Complainant improperly bifurcated a single act into multiple violations and thus improperly imposed duplicative independent penalties for the same alleged act; (iii) Complainant used the wrong subsection of FIFRA §14, namely, §14(a)(1), in calculating the penalty for each alleged WPS violation; (iv) Complainant applied the maximum statutory penalty in a manner that contravenes the terms of EPA's *Civil Monetary Penalty Inflation Adjustment Rule* and EPA's memorandum describing the application of that rule; and (v) Complainant utilized statutory maximums rather than the figures set forth in EPA's *FIFRA Enforcement Response Policy* (2009) and *FIFRA Worker Protection Standard; Enforcement Interim Final Penalty Policy* (October 21, 1997), without a proper justification for this deviation and without proper consideration of mitigation factors. *See* Preliminary Statement, *supra*.

5. The proposed penalty is excessive, unreasonable and disproportionate to the actual gravity of the alleged violations, and thus violates the Eighth Amendment of the U.S. Constitution.

6. Respondent reserves the right to amend this answer and to raise additional defenses, including those which may become apparent through responses to Freedom of Information Act requests, discovery and case development.

VIII. NOTICE OF OPPORTUNITIES FOR HEARING AND SETTLEMENT

Respondent requests a hearing to contest certain matters of law and fact in the Complaint and to contest Complainant's proposed number of violations and penalty per violation, which lead to an inappropriate proposed penalty.

DATED: March 6, 2017

SYNGENTA SEEDS, LLC

BY: John D. Conner, Jr.

John D. Conner, Jr.
Peter L. Gray
Amy Symonds
Counsel for Respondent

102459709\V-3

Case Name: In the Matter of Syngenta Seeds, LLC
Case No.: FIFRA-09-2017-0001

CERTIFICATE OF SERVICE

I certify that the foregoing Answer to Complaint and Request for Hearing was sent this 6th day of March, 2017, in the following manner to the below addressees:

Original and one copy by USPS Certified Mail and by Courier to:	Steven Armsey Regional Hearing Clerk EPA – Region 9 75 Hawthorne Street San Francisco, CA 94105
Copy by USPS Regular Mail and by E-mail to:	Christina E. Cobb Attorney-Advisor U.S. Environmental Protection Agency 1200 Pennsylvania Ave. N.W. (MC: 2843) Washington, DC 20460 E-mail: Cobb.Christina@EPA.gov
Copy by USPS Regular Mail to:	Steven L. Jawgiel Regional Judicial Officer EPA – Region 9 75 Hawthorne Street San Francisco, CA 94105

Dated: March 6, 2017

John D. Comnes Jr.

102459709\V-3