BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, DC

In the Matter of:

FRM CHEM, INC.
a.k.a. Industrial Specialties
Docket No. FIFRA-07-2004-0041

Appeal No. FIFRA 05-01

Appeal from the Initial Decision, Dated February 16, 2005,
of the Presiding Officer,
Administrative Law Judge William B. Moran

BRIEF OF THE COMPLAINANT-APPELLANT

May 5, 2005

COUNSEL FOR COMPLAINANT-APPELLANT

Chris R. Dudding
Assistant Regional Counsel
U.S. Environmental Protection Agency
Region 7
901 N. 5th Street
Kansas City, KS 66101
Voice: (913) 551-7524
Fax: (913-551-9524

Rupert G. Thomas
Senior Assistant Regional Counsel
U.S. Environmental Protection Agency

Region 7
901 N. 5th Street
Kansas City, KS 66101
Voice: (913) 551-7282
Fax: (913-551-7925

Of Counsel:

Gary Jonesi
Senior Counsel for Strategic Litigation
U.S. Environmental Protection Agency
Office of Enforcement and Compliance Assurance
1200 Pennsylvania Avenue, NW
Mail Code 2241-A
Washington, DC 20460

TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. Statutory Authorities

II. Administrative Authorities

III. Regulatory Authorities

IV. U.S. EPA Policies and Guidance Documents

V. Federal Register Citations

I. INTRODUCTION

Appellant, the Director of the Water, Wetlands, and Pesticides Division, U.S. Environmental Protection Agency, Region VII ("Region" or "Complainant-Appellant"), by delegation from the Administrator of the EPA, and the Regional Administrator, EPA, Region VII, files this brief in support of its Notice of Appeal from the Initial Decision, dated February 16, 2005, of the Presiding Officer, Administrative Law Judge William B. Moran, in In the Matter of FRM Chem, Inc., a.k.a. Industrial Specialties, Docket No. FIFRA-07-2004-0041.

II. SUMMARY OF COMPLAINANT-APPELLANT'S POSITION

Complainant-Appellant asks the Environmental Appeals Board ("Board") to exercise its *de novo* review of the penalty assessment in the case at bar. In his Initial Decision, while the Presiding Officer found the Respondent-Appellee liable on all three counts in the Complaint, he substantially reduced the Region's proposed penalty of $16,500 to $1,800 – a reduction of nearly 90%. Complainant-Appellant avers that the Presiding Officer in his Initial Decision committed clear error and/or abuse of discretion by basing his penalty assessment upon factual findings and conclusions of law not supported by the record and by failing to relate the FIFRA statutory penalty factors to the penalty recommended in the Initial Decision with sufficient clarity. Furthermore, in assessing the penalty of $1,800, the Presiding Officer did not indicate how that total assessment would be applied to each of the three counts. Thus, it is appropriate for the Board to exercise its *de novo* review. Moreover, the Presiding Officer completely departed from the FIFRA Enforcement Response Policy ("ERP") in assessing a penalty in the Initial Decision, providing an additional reason for the Board to exercise its *de novo* review of the penalty calculation. Accordingly, the Board should substitute its judgment for that of the Presiding Officer and make a *de novo* penalty calculation.

III. BACKGROUND

FRM Chem, Inc. ("FRM" or "Respondent-Appellee"), also known as Industrial Specialties, is registered as a pesticide producer with the EPA, EPA Est. 10366-MO-001, and has been for over thirty (30) years.[1] Complainant-Appellant's Exhibit ("CX") 6. Respondent-Appellee owned and operated a pesticide production and distribution facility in Washington, Missouri. An inspector employed by the Missouri Department of Agriculture performed an inspection at Respondent-Appellee's place of business in May of 1999, and informed Respondent-Appellee that an unregistered product that it kept in stock and sold, called "Root-Eater," contained wording he believed constituted a pesticidal claim and suggested that Respondent-Appellee contact EPA for guidance. Transcript of Administrative Hearing ("Tr.") at 15; CX 8. Despite the state inspector's warning, Respondent-Appellee declined to contact EPA following the May 1999 inspection and continued to manufacture and sell the unregistered Root-Eater. CX 8. In September 2002, in response to a tip that FRM was continuing to manufacture Root-Eater without registering the product, the same state inspector once again visited Respondent-Appellee's place of business and documented sales of twelve 50-pound containers of the unregistered Root-Eater to three different municipalities in six different transactions that occurred between January and August of 2002. CX 3-5; CX 8. Following the September 2002 inspection, the Missouri Department of Agriculture forwarded the case file and supporting documentation to EPA for review.[2]

Complainant-Appellant filed an administrative complaint against Respondent-Appellee,

---

[1] FRM bought the company Industrial Specialties in January of 1998. From that point on, Industrial Specialties has also been registered with the EPA as a pesticide producer, EPA Est. 43679-KS-001. CX 6.

[2] In his Initial Decision the Presiding Officer assumes that the Region received the results of the first (1999) inspection from the Missouri Department of Agriculture prior to receiving the 2002 inspection results, yet chose to take no action against Respondent-Appellee until after the 2002 inspection. I.D. at 16. This assumption is not supported by the record. There is no indication that the Region was aware of the results of the 1999 inspection until it received the state's 2002 inspection report.

on December 11, 2003, seeking a penalty of $16,500 for three (3) violations of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA" or "Act"), under Section 14 of the Act, 7 U.S.C. § 136*l*.[3] The Complaint alleged that the Respondent-Appellee violated FIFRA by engaging in the distribution or sale of an unregistered and misbranded pesticide.[4]

Respondent-Appellee answered the Complaint on January 13, 2004. Complainant-Appellant filed its Prehearing Exchange on May 3, 2004. Respondent-Appellee did not file a prehearing exchange.[5] On July 15, 2004, Complainant-Appellant filed a supplement to the Prehearing Exchange, adding an additional expert witness to testify to the size of Respondent-Appellee's business and to Respondent-Appellee's ability to pay the proposed penalty, two of the three statutory factors used to assess penalties under FIFRA.

An evidentiary hearing was held in this matter in East Saint Louis, Illinois, on August 26, 2004. During the hearing, Complainant-Appellant introduced twelve exhibits, all of which were admitted into evidence, and presented four witnesses.[6] Complainant filed its post-hearing brief in

---

[3] FIFRA Section 14, 7 U.S.C. § 136*l*, provides that "Any registrant, commercial applicator, wholesaler, dealer, retailer, or other distributor who violates any provision of this subchapter may be assessed a civil penalty by the administrator . . . ."

[4] FIFRA Section 12(a)(1)(A), 7 U.S.C. § 136j(a)(1)(A), states that it shall be unlawful for any person to distribute or sell to any person any pesticide that is not registered under FIFRA. FIFRA Section 12(a)(1)(E), 7 U.S.C. § 136j(a)(1)(E), states that it shall be unlawful to distribute or sell any pesticide which is misbranded. FIFRA Section 2(q), 7 U.S.C. § 136(q), states that a pesticide is misbranded if, *inter alia*, its label does not bear the registration number assigned under section 7 of FIFRA to each establishment in which it was produced, and if the label does not contain a warning or caution statement which may be necessary and if complied with, is adequate to protect health and the environment.

[5] Despite Respondent-Appellee's failure to file a prehearing exchange, the Presiding Officer allowed Respondent-Appellee to present witness testimony at hearing, over Complainant-Appellant's objection. Tr. at 107. 40 C.F.R. § 22.19(a)(1) states that "any witness whose name and testimony summary has not been included in prehearing information exchange shall not be allowed to testify," absent good cause for the failure to submit such information via the prehearing exchange or to all parties at least 15 days prior to the hearing date. *Cf.* 40 C.F.R. § 22.22(a)(1).

[6] In order of appearance, the witnesses at hearing for Complainant-Appellant were: C. Alan Uthlaut, Pesticide Use Investigator for the Missouri Department of Agriculture; Mark K. Lesher, (continued...)

the case on October 13, 2004.[7] The Presiding Officer issued the Initial Decision on February 16, 2005, finding for Complainant-Appellant on the issues of law, and recommending that a total penalty of $1,800 be imposed on Respondent-Appellee for its three violations of FIFRA, a reduction of nearly 90% from the penalty proposed in the Complaint. On March 17, 2005, Complainant-Appellant filed a Motion for Extension of Time to File Appeal Brief with the Environmental Appeals Board ("EAB" or "Board"). On March 18, 2005, Complainant-Appellant filed with the Board a Notice of Appeal, a Supplemental Motion for Extension of Time to File Appeal Brief, and a Motion for Clarification of Record on Appeal.

IV. NATURE OF THE APPEAL

Section 14 of FIFRA, 7 U.S.C. § 136*l*, authorizes the Administrator of the U.S. Environmental Protection Agency ("EPA" or the "Agency") to issue orders assessing civil penalties for violations of FIFRA, and specifies that "[i]n determining the amount of the penalty, the Administrator shall consider the appropriateness of such penalty to the size of the business of the person charged, the effect on the person's ability to continue in business, and the gravity of the violation." Part 22 of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Consolidated Rules"), 40 C.F.R. Part 22, provides that "the Presiding Officer shall determine the amount of the recommended civil penalty based on the evidence in the record and in

---

[6](...continued)
Pesticides Case Review Officer for EPA Region VII; Kerry B. Leifer, Acting Chief of the Fungicide Branch of the Registration Division, EPA Headquarters; and Joyce M. Hughes, Accountant with EPA Region VII.

[7] In the Initial Decision, the Presiding Officer noted that Respondent-Appellee submitted a two-page "Summary and Response" to EPA's post-hearing brief, and that EPA did not submit a reply brief thereto. I.D. at 2, n. 4. Complainant-Appellant notes that Respondent-Appellee's "Summary and Response" was neither served on the Region nor filed with the Regional Hearing Clerk prior to the issuance of the Initial Decision. In response to the Board's March 25, 2005 Order regarding the Region's Motion for Clarification of Record, Respondent-Appellee served a copy of its "Summary and Response" upon the Region by April 8, 2005. The Region opted to pursue its appeal before the Board rather than request remand to the Presiding Officer for reconsideration.

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

Complainant-Appellant calculated the penalty proposed in the complaint by applying the statutory penalty factors listed in FIFRA Section 14(a)(4), 7 U.S.C. § 136*l*(a)(4), to the facts of this case in a manner consistent with the FIFRA Enforcement Response Policy ("ERP"), issued by the Agency on July 2, 1990. However, in the Initial Decision, the Presiding Officer's penalty determination completely departed from the FIFRA ERP[8] (a departure that was not warranted under the circumstances), failed to correctly take into account facts established at the administrative hearing, failed to relate the FIFRA statutory penalty factors to the penalty recommended in the Initial Decision with sufficient clarity, and failed to provide sufficient deterrence to future violations. Complainant-Appellant objects to the penalty thus determined by the Presiding Officer (including its amount) and asks the Board to set aside the penalty recommended in the Initial Decision and recalculate the penalty.

V. ARGUMENT

A. The Board Should Exercise its *De Novo* Review of the Penalty Assessment in the Case at Bar.

1. Requirements of Initial Decision

The Consolidated Rules provide that, in an administrative hearing, the Presiding Officer must "determine the amount of the recommended civil penalty based on the evidence in the record and in accordance with any penalty criteria set forth in the Act." 40 C.F.R. § 22.27(b). The Consolidated Rules also require that a presiding officer "consider any civil penalty guidelines issued under the Act," and must, if he or she "decides to assess a penalty different in amount from

---

[8] To the extent that this brief advocates for application for the Board's *de novo* review, Complainant-Appellant notes that the Presiding Officer completely departed from the applicable ERP. *See* I.D. at 12 (stating that "[f]or the reasons which follow, the Court departs from the penalty policy, applies the statutory factors, and imposes a penalty of $1,800.00"). Therefore, the type of review appropriate for something less than a complete departure is not at issue and accordingly, not addressed in this brief.

the penalty proposed by complainant, . . . set forth in the initial decision the specific reasons for the increase or decrease." *Id.* Accordingly, as the Board has consistently held, while a presiding officer must consider any applicable guidelines, he or she retains considerable discretion to deviate from an agency penalty policy where circumstances warrant and as long as the deviation remains within the bounds set by the statutory penalty criteria. *E.g., In re DIC Americas, Inc.*, 6 E.A.D. 184, 189 (EAB 1995) ("[A] presiding officer has *the discretion either to* adopt the rationale of an applicable penalty policy where appropriate or to deviate from it where the circumstances warrant.") (emphasis in original).

The Board has emphasized that – above all – a presiding officer must "ensure that the penalty he or she ultimately assesses reflects a reasonable application of the statutory penalty criteria to the facts of the particular violations," *In re Employers Insurance of Wausau and Group Eight Technology, Inc.*, 6 E.A.D. 735, 758 (EAB 1997). The Board also requires that "a presiding officer provide a detailed discussion of how the applicable statutory penalty criteria relate to the assessed penalty [to serve] the purposes of ensuring both that interested parties are fairly informed of the reasons driving the presiding officer's penalty assessment and 'that the (presiding officer's) reasons for the penalty assessment can be properly reviewed on Appeal.'" *In re City of Marshall, Minnesota*, 10 E.A.D. 173, 188 (EAB 2001). The Board has explained that "we should not have to 'engage in conjecture . . . in order to discern a Presiding Officer's reasons for deviating from a recommended penalty.'" *In re EK Assocs., LP*, 8 E.A.D. 458, 474 (EAB 1999). *Accord In re Pacific Refining Co.*, 5 E.A.D. 607, 613 n.7 (EAB 1994).

2. Standard Applicable to The Board's Review of Initial Decisions

The standard employed by the Board in reviewing the initial decision of a presiding officer is based on the Administrative Procedure Act, which provides in part:

> On appeal from or review of the initial decision, the agency [or its delegated representative, the Board] has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.

5 U.S.C. § 557(b). The Consolidated Rules specify that the Board, on appeal, "shall adopt,

modify, or set aside the findings of fact and conclusions of law or discretion contained in the decision or order being reviewed . . . and may assess a penalty that is higher or lower than the amount recommended to be assessed in the decision or order being reviewed or from the amount sought in the complaint." 40 CFR § 22.30(f). Although the Board has discretion to increase or decrease the amount of a civil penalty assessed by a presiding officer, it customarily defers to a presiding officer "absent a showing that the Presiding Officer has committed an abuse of discretion or a clear error in assessing the penalty," *Pacific Refining* 5 E.A.D. at 613. *Accord In re Mobil Oil Corporation*, 5 E.A.D. 490, 515 (EAB 1994), *In re Johnson Pacific, Inc.*, 5 E.A.D. 696, 702 (EAB 1995).

"[T]reating similar situations in a similar fashion is central to the credibility of EPA's enforcement effort and to the success of achieving the goal of equitable treatment." *A Framework for Statute-Specific Approaches to Penalty Assessment*, EPA General Enforcement Policy #GM-22, at 27 (February 16, 1984).[9] Responsibility for ensuring consistency in Agency adjudications has been expressly given to the Board:

> The EAB is responsible for assuring consistency in Agency adjudications by all of the ALJs and RJOs. The appeal process of the [Consolidated Rules] gives the Agency an opportunity to correct erroneous decisions before they are appealed to the federal courts. The EAB assures that final decisions represent with the position of the Agency as a whole, rather than just the position of one Region, one enforcement office, or one presiding officer.

"Consolidated Rules of Practice Governing Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation or Suspension of

---

[9] Agency penalty policies are based on two guidance documents, the 1984 *Policy on Civil Penalties,* EPA General Enforcement Policy #GM -21 (February 16, 1984) and a companion document, *A Framework for Statute-Specific Approaches to Penalty Assessments: Implementing EPA's Policy on Civil Penalties*, EPA General Enforcement Policy #GM-22 (February 16, 1984). The *Policy on Civil Penalties* declares:

> This document, *Policy on Civil Penalties*, establishes a single set of goals for penalty assessment in EPA administrative and judicial enforcement actions. These goals [are] – deterrence, fair and equitable treatment of the regulated community, and swift resolution of environmental problems . . . .

Id. at 1.

Permits," 64 Fed. Reg. 40138, 40165 (July 23, 1999).

The Board has stated that "Agency-issued penalty policies provide a framework that allows a presiding officer to apply his or her discretion to statutory penalty factors, thereby facilitating a uniform application of the factors." *In re Allegheny Power Service Corp. and Choice Insulation, Inc.*, CAA Appeal No. 99-4, slip op. at 28 (February 15, 2001) (citations omitted). In addition, the Board has observed that "[b]y conforming to the guidelines, a presiding officer provides a clear, reviewable explanation of the rationale for his penalty assessment." *DIC Americas*, 6 E.A.D. at 190 (citing *In Re National Coatings, Inc.*, 2 E.A.D. 494, 498 (CJO 1988)).

It is therefore not surprising that the Board has made it quite clear that it "reserves the right to closely scrutinize substantial deviations from the relevant penalty policy and may set aside an ALJ's penalty assessment and make its own *de novo* penalty calculations where the ALJ's reasons for deviating from the penalty policy are not persuasive or convincing." *In re Morton L. Friedman and Schmitt Construction Co.*, CAA Appeal No. 02-07, slip op. at 53 (EAB, Feb. 18, 2004), 11 E.A.D.__ (quoting *In re John A. Capozzi*, RCRA Appeal No. 02-01, slip op. at 31-32 11 E.A.D. __ (EAB, Mar. 25, 2003)). *See also In re CDT Landfill Corp.*, CAA Appeal No. 02-02, slip op. at 40 (EAB, June 5, 2003), 11 E.A.D.__; *In re Chem Lab Prods.*, 10 E.A.D. 711 (EAB 2002), (rejecting penalty assessment where presiding officer's reason for departure was based on an impermissible comparison of penalties derived in a settlement context with the penalty to be assessed in a fully litigated case); *In re M.A. Bruder & Sons, Inc.*, 10 E.A.D. 598 (EAB 2002), (rejecting penalty assessment where presiding officer's departure from penalty policy was based on a misunderstanding as to how the penalty policy should be applied); *In re Carroll Oil Co.*, 10 E.A.D. 635 (EAB 2002); *In re Ray Birnbaum Scrap Yard*, 5 E.A.D. 120 (EAB 1994), The Board reserves its highest level of scrutiny of a presiding officer's penalty determination "for those cases where important legal or policy questions are implicated by the calculation." *Johnson Pacific*, 5 E.A.D. at 703.

Indeed, "[i]n cases where an ALJ has decided to forego application of a penalty policy in

its entirety, the Board 'will closely scrutinize the ALJ's reasons for choosing not to apply the policy to determine [whether the reasons] are compelling.'" *Chem Lab*, 10 E.A.D. at 725 (quoting *Bruder*, 10 E.A.D. at 613). The Board has further explained that the term "compelling," as used in *Bruder* "is meant to convey the seriousness of the inquiry, recognizing the value that penalty policies provide, while simultaneously protecting the ALJ's discretion to depart from penalty policy guidelines where the totality of the circumstances warrant." *Chem Lab*, 10 E.A.D. at 726. The Board has explained that "[b]y referring to the penalty policy as a basis for assessing a particular penalty, the presiding officer is incorporating the underlying rationale of the policy into her decision. The reference to the policy becomes, in effect, a form of 'shorthand' for explaining the rationale underlying the penalty assessment." *DIC Americas*, 6 E.A.D. at 189-90. That this "shorthand" is a mechanism for assuring consistency among Agency penalty assessments has been repeatedly affirmed by the Board. *See, e.g., Morton Friedman*, slip op at 54, n. 42 ("Our substantial deference to an ALJ decision to assess a penalty that falls within the range of penalties provided by a penalty policy is justified in large measure by our determination 'that penalty policies serve to facilitate the application of statutory penalty criteria and, accordingly, offer a useful mechanism for ensuring consistency in civil penalty assessments.'") (citing *CDT Landfill Corp.*, slip op. at 40).

In this case, as argued below, the Presiding Officer's complete departure from the FIFRA ERP leads to a penalty determination that does not reflect a reasonable application of the statutory factors, and is neither supported by compelling reasons nor warranted by the circumstances. Such unwarranted departure would, if unchecked, lead to inconsistent and unfair assessments of penalties by the Agency and, accordingly, the Board should set aside the Presiding Officer's penalty determination.

B. The Presiding Officer Committed Clear Error and/or Abuse of Discretion by Making Factual Findings and Conclusions of Law not Supported by the Record.

1. Erroneous Factual Findings or Conclusions of Law Based upon Size of Business

The Region's expert witness established at hearing that the Respondent-Appellee's average gross revenue was $1.5 million annually, a showing uncontested by Respondent-Appellee. Tr. at 101. The Presiding Officer conceded in the Initial Decision that the Region had established that Respondent-Appellee's gross annual sales exceeded $1,000,000, the threshold amount for a "Category I" business in the ERP. Initial Decision ("I.D.") at 13. The Presiding Officer did not question the Region's "size of business" finding at the administrative hearing. However, in the Initial Decision, the Presiding Officer questions the appropriateness of applying the ERP's size of business categories, on the grounds that the Agency had not adjusted the threshold amounts for the three size of business categories for inflation since the adoption of the ERP on July 2, 1990.[10] The Presiding Officer raised, *sua sponte* in the Initial Decision the question of whether the Agency should adjust the size of business thresholds for inflation, providing the Region with no opportunity to address this issue, either at hearing or otherwise prior to the issuance of the Initial Decision. Though it is certainly within the Presiding Officer's discretion to demand, on his own initiative, and in the absence of any challenge by Respondent-Appellee, further support for the Region's penalty analysis, it is error for a presiding officer "to articulate that demand only after the hearing, when the demand could no longer be satisfied." *Wausau*, 6 E.A.D. at 763. The Presiding Officer did not raise this issue prior to the issuance of the Initial Decision. Since neither the Presiding Officer nor the Respondent-Appellee had

---

[10] For section 14(a)(1) violators, the size of business categories are:

I	-	over $1,000,000
II	-	$300,001 - $1,000,000
III	-	$0 - $300,000

ERP at 20.

challenged the ERP's threshold for classifying a violator's size of business at hearing, Complainant-Appellant "had no reason to anticipate or to address challenges of that nature in its evidentiary presentation or its briefs." *Id.*

Moreover, Complainant-Appellant avers that, had it been given the opportunity, it would have been able to adequately address the concerns articulated by the Presiding Officer. The record reflects that Respondent-Appellee's gross annual receipts averaged $1.5 million for the years 1998-2002, based on financial information provided by Respondent-Appellee. Tr. at 99-101. The average inflation rate for the years 1990 through 2002 (the final year of Respondent-Appellee's reviewed financial data) is 2.912%. *See* www.inflationdata.com.[11] Applying a 2.912% average inflation rate to $1.5 million in 2002 dollars results in a July 2, 1990 value of $1,049,271. Therefore, even with inflation taken into account, Complainant-Appellant nevertheless would have established that Respondent-Appellee falls into the "Category I" size of business.

The Presiding Officer erred in discarding the Region's Category I classification of Respondent-Appellee's size of business pursuant to the thresholds given in the ERP without providing the Region an opportunity to respond. Had the Region had the opportunity to address this issue, it would have demonstrated that Respondent-Appellee is a Category I business, with substantial assets and gross annual receipts averaging in excess of $1 million in 1990 dollars.

2. Erroneous Factual Findings or Conclusions of Law Based Upon Gravity Assessment

a. Toxicity and Potential Harm to Human Health/Environment

Root-Eater, the product at issue in this case, is a Toxicity Category I pesticide, based on the corrosive nature of its active ingredient, Copper Sulfate.[12] Respondent-Appellee did not use the signal word "DANGER" on the label of its product as is required of Toxicity Category I

---

[11] Complainant-Appellant notes that this website incorporates data from the federal Consumer Price Index.

[12] "Cupric Sulfate," as used on the Root-Eater label is synonymous with Copper Sulfate. Tr. at 90-91; CX 2; CX 12.

pesticides, substituting instead the word "CAUTION" along with other warning notices on its label. CX 2. The Presiding Officer stated: "EPA did not adequately take into account that the label did have significant warnings, albeit not to the extent that would have been included had the signal word "DANGER" been employed." I.D. at 15-16. However, by this assertion, the Presiding Officer ignores the regulatory distinction which is represented by the signal words.

The signal word "CAUTION," misleadingly employed on the Root-Eater label, is reserved for a Toxicity Category III pesticide, the second lowest toxicity level. CX 2; 40 C.F.R. § 156.64(a)(3). A pesticide product containing an active ingredient which is corrosive and may cause skin irritation and irreversible eye damage, such as Root-Eater, is classified as Toxicity Category I, the highest category of toxicity. Tr. 83; 40 C.F.R. § 156.62. A Toxicity Category I pesticide product must bear the signal word "DANGER." 40 C.F.R. § 156.64(a)(1). Furthermore, the required precautionary statements for pesticides in Toxicity Category I regarding irritation of eyes and skin require that users take actual protective measures such as the use of face shield and rubber gloves prior to use of the product, while Category III products bearing the signal word "CAUTION" only require avoidance measures instead of the use of protective equipment. 40 C.F.R. §156.70. Though the Root-Eater label advised users to flush eyes immediately in case of eye contact, and to drink large amounts of water followed by milk, egg whites or gelatin solution in case of ingestion, it contained no instructions regarding the product's corrosive effect on skin nor language promoting the use of protective gloves, clothing or eyewear. CX 2. The direct consequence of Respondent-Appellee's mislabeling by using the incorrect signal word and inadequate precautionary language creates a significant potential for harm to workers who would not be cognizant of the necessary protective measures to take in order to avoid harm when handling Root-Eater. Complainant-Appellant therefore submits that, to the extent the Presiding Officer bases his penalty reduction on his assertion that "EPA did not adequately take into account that the [Root-Eater] label did have significant warnings," I.D. at 15, and on his belief that the

label contained adequate precautionary language indicating the toxicity level of the product, such a reduction constitutes clear error.

b. The Presiding Officer Erroneously Assumed that the Region Knew the Results of the 1999 State Inspection Yet Took No Action Is Incorrect

The Presiding Officer in the Initial Decision takes Complainant-Appellant to task for "ignor[ing] its own history with this Respondent" on the apparent assumption that the Region knew the results of the May 1999 state inspection prior to its receipt of the 2002 inspection report, and, with full knowledge that FRM was in violation, took no action. *See* I.D. at 16. There is nothing in the record to show that EPA received a copy of the 1999 inspection report prior to receiving the 2002 report. In fact, EPA received copies of the 1999 and 2002 report at the same time – as the 2002 report states, "a copy of the prior investigation's narrative report is attached to this report." CX 8 at 2. Therefore, to the extent that the Presiding Officer based his penalty reduction on what he perceived as the Region's knowing inaction, that reduction is in error.

c. The Presiding Officer Made Erroneous Conclusions about the Agency's Use of an Enforcement Case Review

The record reflects that, upon receiving the State's inspection report regarding the unregistered Root Eater product, the Regional Case Review Officer assigned to the case referred the question of the product's pesticidal status to an expert at EPA Headquarters ("Headquarters expert") for a finding via a standard procedure referred to as an Enforcement Case Review ("ECR"). Tr. at 45, 87-9; CX 12. From this, the Presiding Officer reasoned that, since "its [EPA's] own people had to check with others in the chain of authority" regarding the pesticidal status of the product, this is evidence that the Agency was doubtful about the status of the product as a pesticide. This is an erroneous conclusion.

The Region's actions in requesting an ECR were not based on doubt. It is a standard operating procedure for an EPA Regional office to request an ECR from EPA Headquarters in a registration enforcement action, as both the Regional Case Review Officer and the Headquarters

expert witness attested at hearing. Tr. at 60, 72, 89. "It is standard procedure for us to confirm our suspicions by sending an Enforcement Case Review to Headquarters." Tr. at 60. When the Presiding Officer posed several hypothetical situations where a pesticide was obviously unregistered, the Regional Case Review Officer repeatedly asserted that it was customary to send a request for an Enforcement Case Review to EPA Headquarters. Tr. at 61-63.

The purpose of the ECR Review is not only to establish the claims that identify the product as a pesticide, but also identify the registration status of the product. Tr. at 79-80. Since all pesticides are registered at EPA Headquarters, a Regional office cannot determine by itself whether a product is one without a registration number is registered and simply missing a registration number, pending registration, or for which no registration application has ever been submitted. Furthermore, in addition to identifying the registration status of the product, the Headquarters expert will identify other characteristics of the product. In the case of Root-Eater the Headquarters expert identified Copper Sulfate as a well-known pesticide registered as an active ingredient for use in a pesticide, and that due to Copper Sulfate's corrosive nature, it warranted the signal word "DANGER." CX 12 at 2. The reviewer also noted that there was a long history of the use of Copper Sulfate to prevent root formation in sewer pipes. CX 12 at 1. In other words, it was not just the overt claims made on the label that identified Root-Eater as a pesticide but also the decades-long historical pattern of use of its active ingredient Copper Sulfate in sewer lines for the control of tree roots. Tr. at 81-82. Therefore, to the extent that the Presiding Officer based his departure from a penalty policy on his assumption the Agency's adherence to a standard enforcement procedure evinced indecisiveness or doubt as to Root-Eater's regulatory status, that departure is erroneous.

C. The Initial Decision Fails to Relate the FIFRA Penalty Factors To the Assessed Penalty With Sufficient Clarity

Section 22.27(b) of the Consolidated Rules requires the Presiding Officer to explain in detail in the initial decision how the penalty to be assessed corresponds to any penalty criteria set

forth in the Act. The relevant statutory penalty criteria are size of the business, effect of the penalty on the violator's business, and the gravity of the violation. *See* FIFRA § 14(a)(4), 7 U.S.C. § 136*l*(a)(4). While the Consolidated Rules does contemplate some degree of specificity, it does not dictate the ways in which such specificity must be achieved. *See In re Britton Construction Co. et al*, 8 E.A.D. 261, 281 (EAB 1999). The Board has indicated that a Presiding Officer need not assign dollar figures to each penalty factor. *Id.* at 282. However, the Board has also explained that the Initial Decision should inform the parties of the reasons driving the Presiding Officer's penalty assessment. *See City of Marshall,* 10 E.A.D. at 188. *See also EK Assocs.*, 8 E.A.D at 474 (stating that "we should not have to 'engage in conjecture . . . in order to discern a Presiding Officer's reasons for deviating from a recommended penalty").

Against this backdrop, Complainant-Appellant urges the Board to conclude that the Presiding Officer failed to sustain his obligation to explain in detail how the penalty he assessed corresponds to the FIFRA statutory penalty criteria, thereby rendering the Initial Decision susceptible to a clear error and/or an abuse of discretion finding by the Board. *See* 40 C.F.R. § 22.27(b). The Presiding Officer did not explain, at all, in what way the penalty he assessed corresponds to, or otherwise takes into account, FIFRA's statutory factors. While he mentions the three statutory factors in discrediting the Agency's proposed penalty, he does not identify what particular methodology, if any, he used to calculate the penalty based upon those factors to arrive at the assessment of $1,800 total for the three counts. Nor does he give any indication how the penalty is apportioned based upon the three factors. Complainant-Appellant is left wondering whether the penalty is driven exclusively by the gravity penalty factor, rendering the portions of the Initial Decision discussing size of business and ability to pay merely dicta. Alternatively, his decision may be driven mostly by the size of business criterion, for which the Presiding Officer created his own subjective category for FRM, "modest," without any indication as to what measure he is using to classify it as such and how such a classification achieves the intent of

Congress in using such a criterion. *See* FIFRA Section 14(a)(4), 7 U.S.C. § 136*l*(a)(4) ("[T]he Administrator shall consider the appropriateness of such penalty to the size of the business of the person charged . . . ."). Ultimately, it is unclear how the three statutory factors correspond to his penalty assessment, thereby making it virtually impossible to obtain a meaningful review of this penalty on appeal.

Complainant has established that the Respondent-Appellee has the ability to pay the proposed penalty.[13] Thus, this penalty factor seemingly is not implicated by the Presiding Officer's penalty assessment. Complainant-Appellant can only assume that the other two statutory criteria must therefore account for his penalty assessment. With regard to the size of business criterion, the Presiding Officer recognizes that Congress intended the Agency to determine an appropriate penalty by considering, *inter alia*, the extent to which the penalty is proportionate to the size of the violator. I.D. at 13. The Presiding Officer classifies Respondent-Appellee as "modest" but doesn't explain in detail in what way the $1,800 assessment corresponds to the size of Respondent-Appellee's business. Though the Presiding Officer does state that he departs from "viewing the size of Respondent's business as a basis upon which to attach the maximum penalty allowed under the statute," I.D. at 13, it is impossible to ascertain what portion of the $1,800 penalty is based upon this penalty criterion.

This same criticism regarding a lack of specificity applies equally to the Presiding Officer's discussion regarding the gravity penalty factor. He states that "the actual set of circumstances that are involved in the violation" do not support the assessment of a maximum penalty. I.D. at 15. While the Presiding Officer lists reasons for departing from EPA's proposed penalty, the Presiding Officer does not offer any detailed explanation of how the gravity penalty factor is accounted for in the penalty assessment. Again, it is not clear what portion of the $1,800

[13] In fact, the proposed penalty, $16,500, is less than 2% of Respondent-Appellee's 1.5 million gross receipts. See Tr. 101.

penalty accounts for the gravity of the violation.

Complainant-Appellant is left without any real understanding of how the penalty assessed by the Presiding Officer corresponds to FIFRA's penalty criteria. The Board has explained that in light of the discretionary nature of penalty assessments, a detailed discussion of how the applicable statutory penalty criteria relate to the assessed penalty serves dual purposes. First, it ensures that interested parties are fairly informed of the reasons driving the Presiding Officer's penalty assessment. *See In re City of Marshall*, 10 E.A.D. at 188. Complainant-Appellee is not so informed by the Presiding Officer's Initial Decision. Second, it ensures that the Presiding Officer's reasons for the penalty assessment can be properly reviewed on appeal. *See id.* Complainant-Appellant respectfully submits that the Presiding Officer provided no basis for the Board to review how he calculated the penalty based upon the statutory penalty criteria.

In the end, it seems as though the Presiding Officer "whimsically produc[ed] a penalty number." *In re B&R Oil Co.*, 8 E.A.D. 39, 63 (EAB 1998). He abandoned the guidance of the ERP, but provided no discussion of how he calculated a total penalty of $1,800 for three violations from applying the statutory penalty criteria to the facts of the case–indeed, it is impossible even to state whether the Presiding Officer intended the $1,800 to be apportioned equally among the three counts of violation, at $600 per count. Accordingly, the Board should conclude that, because the Presiding Officer failed to relate the FIFRA penalty criteria to the assessed penalty, he committed clear error and/or abused his discretion.

D. The Presiding Officer's Reasons for Completely Departing from the FIFRA ERP are Not Compelling.

1. The Board Should Determine Whether the Presiding Officer Has Articulated Compelling Reasons for His Complete Departure from the Penalty Policy

When a presiding officer "'has chosen not to apply the [applicable penalty] policy at all,'" the Board "'will closely scrutinize the ALJ's reasons for choosing not to apply the policy to determine if they are compelling.'" *Morton Friedman*, slip op. at 54 n. 42 (quoting *Bruder*, 10

E.A.D. at 613). The Board has explained that its "substantial deference to an ALJ decision to assess a penalty that falls within the range of penalties provided by a penalty policy is justified in large measure by [its] determination 'that penalty policies serve to facilitate the application of statutory penalty criteria.'" *Id.* (quoting *CDT Landfill,* slip op. at 40). It further clarified that such deference "cannot be justified on these grounds" to a presiding officer's decision departing altogether from a penalty policy's systemic framework. *Id.* Since the Presiding Officer in the case at bar completely "depart[ed] from the penalty policy," I.D. at 12, the Board should determine whether the reasons given for such a departure are compelling. Complainant-Appellant submits that, upon review, the Board should conclude that the Presiding Officer did not have compelling reasons to support his complete departure from the FIFRA ERP.

2. The Presiding Officer Could Have Reduced the Penalty by Applying Adjustment Factors in the ERP

The principal thrust of the Presiding Officer's argument for completely departing from the Region's application of the FIFRA ERP in calculating the penalty for the violations appears to be his general belief that the application of the ERP produces too high a penalty, given "the actual set of circumstances that are involved in the violation," and the Region's assessment of the statutory maximum penalty for the violations committed. I.D. at 15. Complainant-Appellant disagrees with this characterization, since nonregistration of a Category I toxicity pesticide is one of the more serious offenses under FIFRA. ERP at A-1. However, even if the Board concludes that Respondent-Appellee's multiple sales of an unregistered and misbranded pesticide of Category I toxicity after it had notice that it was potentially in violation of FIFRA's registration and labeling requirements, does not warrant the statutory maximum penalty amount, the fact still remains that the Presiding Officer could have reached an alternate yet appropriate penalty without completely abandoning the framework of the ERP. The ERP itself has built-in flexibility that provides for adjustments to alleviate what otherwise might be unduly harsh results from a rigid application of the policy.

Because Respondent-Appellee elected to appear *pro se*, the Presiding Officer may have felt the assessment of a penalty equivalent to the statutory maximum to be inequitable, or perhaps he felt that they had exhibited some good faith efforts to comply with the law. As an initial matter, the Presiding Officer could have addressed such concerns by simply using the flexibility that the ERP itself provides to further reduce the penalty from that calculated by the Region. In that way, he could have adjusted the penalty downward rather than depart from the policy altogether. To this end, the policy provides both for a "Good Faith Adjustment" based on a respondent's attitude or good faith efforts to comply and also a "Special Circumstances/ Extraordinary Adjustment." FIFRA ERP at 27 and 28. Admittedly, the Region determined that Respondent-Appellee did not qualify for a Good Faith Adjustment, since it ceased neither the production nor the sale of Root Eater following notification by the state inspector that it was likely in noncompliance with FIFRA, and because it made no attempt to comply with FIFRA's registration and labeling requirements prior to Agency action being taken. However, it is certainly conceivable that the Presiding Officer might have adjusted the penalty downward within the parameters of the ERP, based on his finding that Respondent-Appellee "was cooperative" and that their noncompliance was "no[t] willful." I.D. at 16.

3. The Presiding Officer Could Have Calculated a Different Penalty Amount Using the ERP than that Reached by the Region

Complainant-Appellant does not deny that a presiding officer possesses the discretion to assess a penalty in a different manner than proposed by EPA, but it submits that in the case at bar, the Presiding Officer could have done so while using the ERP. As it stands, however, perhaps the strongest argument that the Presiding Officer fails to present a compelling reason for his complete departure from the ERP is given by a demonstration that it is possible to apply the ERP and reach a different result than that advocated by the Region. The ERP is not a rigid rule, but rather a flexible guideline for the Agency to follow when applying the FIFRA penalty factors so that it can ensure not only that similar violators are treated similarly, but also that the unique "actual set of

circumstances that are involved in the violation" are taken into account when assessing an appropriate penalty. ERP at 21.

As explained in Complainant-Appellant's post-hearing brief, Respondent-Appellee was cited for three counts for violations of Sections 12(a)(1)(A) and 12(a)(1)(E) of FIFRA, for multiple sales of an unregistered and misbranded pesticide. Following the ERP, violations of these sections of FIFRA warrant a gravity level of 2. Tr. 46-47; ERP at A-1; Post-hearing Brief at 6. As noted above, review of financial and tax documents submitted by Respondent-Appellee, in addition to Respondent-Appellee's Dun and Bradstreet report, indicated that Respondent-Appellee's business exceeded one million dollars in annual gross sales, placing them in the size of business Category I. Tr. 48, 101; CX 10; Post-hearing Brief at 6. Applying the applicable civil penalty matrix from the ERP, violations with a gravity level 2, committed by size of business Category I violators have a base penalty amount of $5,500. ERP at 19A. Respondent-Appellee's three counts of violation therefore resulted in a total base proposed penalty of $16,500, as calculated by Complainant-Appellant. Tr. 47; ERP at 19A; Post-hearing Brief at 6.

After ascertaining the base penalty amount for Respondent-Appellant, the Region applied the penalty adjustment factors from the ERP, which allow EPA to take into account the specific circumstances of the violation. The five adjustment factors considered by the Region in accordance with the ERP, were the pesticide's toxicity level, its actual or potential harm to human health, its actual or potential harm to the environment, the violator's compliance history, and the violator's degree of culpability. ERP at Appendix B; Post-hearing Brief at 6-8. The Presiding Officer was unconvinced by the Region's finding that the violations at issue warranted the statutory maximum penalty. However, his disagreement with the Region's assessment does not constitute a compelling reason for completely departing from the ERP, particularly when he could have reached a different penalty amount from factoring in the factual conclusions that he made regarding the specific circumstances of Respondent-Appellee's violations.

For instance, the ERP assigns point values to the five adjustment factors, reflecting relative severity of the specific circumstances surrounding a violation. The points for the five factors are added together, and the resulting value indicates how much downward or upward adjustment, if any, to the base penalty amount is appropriate. In this way, the Agency both takes into account the specific circumstances of a violation, and also ensures consistency *vis-a-vis* similar violators with similar violations. Given the weight that the Presiding Officer in this case gave to the fact that Respondent-Appellee's "violations were not of the 'upper level' variety," I.D. at 15, and that there was "no willful violation," I.D. at 16, he conceivably might have assigned the lowest point value of "1" for each of the harm to human health and environmental harm adjustment factors. Factoring in a reduced culpability point value of "0," reflecting the weight the Presiding Officer gives his finding that Respondent-Appellee was "no[t] willful," with the toxicity level point value of 2, this gives a total gravity adjustment value of 4 points. If the Presiding Officer had thus followed the ERP, this calculation would have resulted in a 40% downward adjustment of the penalty based on the "actual set of circumstances" of the sale or distribution of an unregistered and misbranded pesticide product of Level 1 toxicity with the active ingredient of corrosive Copper Sulfate by a violator with no prior FIFRA violations who was neither willful nor negligent, but who took corrective steps immediately after discovery of the violation, and in which the violation posed only minor potential harm to human health or the environment. *See* ERP at Table 3. Treating FRM as a Category I business, a 40% downward adjustment to the base $5,500 penalty would produce an adjusted penalty of $3,300 per violation. *Id.* In light of the Presiding Officer's concern that FRM should not be a Category I business because it is "modest" and family-owned, if it is further assumed that FRM should be treated as a Category II business, then the base penalty would be $4,400, and, with a 40% downward adjustment, the penalty would still come to $2,640 per count for a total penalty of $7,920. *Id.* The Presiding Officer could then have applied the Good Faith or Special Circumstances Adjustments to further reduce the penalty,

consistent with the ERP.

Either of these computations would result in the substantial reduction of the assessed penalty in a manner that serves to show how the assessed penalty relates to the statutory criteria and ensures "both that interested parties are fairly informed of the reasons driving the presiding officer's penalty assessment and 'that the (presiding officer's) reasons for the penalty assessment can be properly reviewed on Appeal.'" *City of Marshall*, 10 E.A.D. at 188. Though the Region would likely disagree with the Presiding Officer's adjusted final penalty assessment, since it reads the "actual set of circumstances" differently than does the Presiding Officer, it would nonetheless be able to follow how the Presiding Officer reached his final penalty figure. Since the Presiding Officer could have effected significant adjustments to the penalty without departing from the ERP, such a departure absent a compelling reason is unwarranted.

4. The Presiding Officer's Assessment of Respondent-Appellee's Size of Business is Not a Compelling Reason to Depart from ERP

In the Initial Decision, the Presiding Officer notes that Respondent-Appellee's business is family owned and states that it is "abundantly clear" to him that it is of humble and modest size. I.D. at 13. He does concede that, if the Respondent-Appellee was determined to be a Category II size of business under the ERP, with gross annual receipts of less than $1 million and more than $300,000, then "all else being equal, the penalty determination could not be more than $4,400 per count." *Id.* However, rather than recalculate the penalty consistent with Agency practice as embodied in the ERP, based on one of the smaller size of business categories, he simply cites the "modest" size of Respondent-Appellee's business as the overarching reason he "departs from [. . .] viewing the size of Respondent's business as a basis upon which to attach the maximum penalty." *Id.* Complainant-Appellant argues that, absent more, the Presiding Officer has failed to articulate a compelling reason to depart from the ERP.[14]

---

[14] Moreover, Complainant-Appellant submits that the Presiding Officer's conclusion that (continued...)

E. The Board should Substitute Its Judgment for that of the Presiding Officer and Make a De Novo Penalty Calculation.

1. The Presiding Officer Leaves the Agency Without Clear Guidance as to How Penalties Should be Assessed

The Presiding Officer in the case at bar provides no clear guidance explaining the process by which he arrived at a penalty of $1,800. Though he lists a number of reasons for the departure, he fails to provide any coherent explanation of how he came up with $1,800. From the reasons he lists, the Agency might perhaps infer that in similar situations where the violator is a family business, the size of business categories in the FIFRA ERP should be discarded and replaced by a subjective assessment of the size of business. The Agency might also reconsider its understanding of "negligence" and "willfulness," so that a violation that is the result of a person's genuine desire to avoid incurring pesticide registration costs will not be an instance where the violator is culpable. Perhaps the most absurd lesson the Agency might take from the various justifications given in the Initial Decision is that in situations where, "had the Respondent registered [the product] with EPA and had the label conformed to FIFRA's requirements," the product would be appropriate to sell – in other words, in all situations where there would be no violation if only the Respondent had complied with the law – EPA would greatly reduce the penalty well below the range given in the ERP.

Such logic provides no clarity in guiding the Agency in the assessment of an appropriate penalty. Indeed, it seems that if the Agency were to abandon across the board the current understanding of the ERP, such an approach could well result in a willy-nilly arbitrariness in the

---

[14](...continued)
Respondent-Appellee's size of business is "modest"and "of humble size" is simply not supported by the evidentiary record, which shows Respondent-Appellee to have average gross annual receipts of $1.5 million, based on review of corporate tax returns submitted by Respondent-Appellee for the years 1998-2002. Tr. at 101. The record also shows Respondent-Appellee to have annual rental income of about $120,000, accounts receivable of approximately $300,000, and notes receivable of $115,000, in addition to over $200,000 in goodwill. Tr. at 99-101. At the very least, given these facts, it is difficult to gauge the criteria by which the Presiding Officer determined that Respondent-Appellee's business is "modest."

assessment of penalties by the various EPA Regions.

2. Significant Penalty Reduction is Not Warranted in Light of Evidence at Hearing Regarding Respondent-Appellee's Culpability

In assessing Respondent-Appellee's culpability level for the violations at issue, the Region determined Respondent-Appellee's level of culpability to be one of negligence, which warrants a gravity adjustment point value of "2." Tr. at 51; ERP at B-2. Accordingly, Complainant-Appellant respectfully disagrees with the Presiding Officer to the extent that he bases his reduction of the proposed penalty on his pronouncement that "this was no willful violation on the part of Respondent." I.D. at 16. The Region did not base its penalty calculation on a presumption that Respondent's conduct was willful, but rather that it was negligent. Moreover, the Presiding Officer's pronouncement is contradicted by the evidentiary record established at the administrative hearing, including Respondent-Appellee's own witness testimony, which shows that Respondent-Appellee made a calculated decision to avoid registration of its product and the concomitant costs.

At the hearing, Respondent-Appellee established by its own witness testimony that it was well aware of the cost of registering and maintaining the registration of a pesticide.[15] In fact, Respondent-Appellee's witness testified that he and his company did everything they could "to avoid wording on a label that will cause or sustain a product to be registered [as a pesticide], because of the cost." Tr. at 111. Indeed, by the testimony of its own witness, Respondent-Appellee apparently realized a financial benefit from not registering its product by as much as

---

[15] The statutory annual maintenance fee alone (not even counting any preregistration costs) effective in 1999 for a single pesticide ranged from $650 for the first regristration to $1,300 for each additional registration. FIFRA Section 4(i)(5), 7 U.S.C. § 136a-1(1)(5). FIFRA was amended effective March 23, 2004, creating an enhanced registration fee program and extending the existing maintenance fee program for another five years. *See* 69 Fed. Reg. 12772-12780 (2004).

"$500 a package of what [FRM] sold."[16] *Id.* Even if Respondent-Appellee's witness exaggerated the cost per package of the product, it is clear from the record that FRM knew that the avoided cost of initiating and maintaining the registration of Root-Eater was not insignificant.

Moreover, Respondent-Appellee is not an unsophisticated violator, nor is it new to pesticide production and distribution. Respondent-Appellee has been registered as a pesticide producer with the EPA for over thirty (30) years. CX 6. By its own testimony, it sold registered pesticides or pesticides subregistered under larger companies. Tr. at 111. Furthermore, Respondent-Appellee demonstrated its awareness of how to research federal regulations and of federal regulatory requirements generally when it cited to the Food and Drug Act "Generally Recognized as Safe" (GRAS) list regarding Copper Sulfate's status as a food additive in trace amounts[17] and referred to itself as a "long time FDA regulated veterinary preparation producing establishment." Tr. at 54-55, 73-75; Summary and Response at 2. As the Region's expert witness noted, there are a number of sources of information both at EPA and available to the public at other locations that would indicate the regulatory status of pesticides containing Copper Sulfate as an active ingredient. Tr. at 92. Despite Respondent-Appellee's decades of experience as a pesticide producer and its demonstrated ability to research federal regulations, Respondent-Appellee offered no testimony explaining what efforts it had made to determine if its product was

---

[16] Complainant-Appellant notes that Respondent-Appellee's witness did not explain how he had reached this amount.

[17] The Respondent and makes much of the irrelevant fact that copper sulfate is listed in the Food and Drug Act as a nutrient supplement that is "Generally Recognized as Safe" (GRAS) "at levels not to exceed good manufacturing practice." 21 C.F.R. § 184.1261. RX 1, I.D. at 6, 10. Complainant-Appellant concedes that Copper Sulfate may well be allowed in the food chain in minuscule quantities, but it submits that "good manufacturing practice" for a food producer utilizing trace amounts of Copper Sulfate in a product is quite far removed from "good manufacturing practice" of a pesticide producer who manufactures a product with Copper Sulfate as its active ingredient that is intended to disintegrate tree roots in clogged sewer lines. Complainant-Appellant also notes that, somewhat ironically, the language on the Root Eater label includes an instruction to "[s]eek immediate medical attention" if the product is ingested. CX 2.

a pesticide other than that it had taken care to word the language on the Root-Eater label in order to avoid registration as a pesticide. Tr. at 112.

3. Reduction of the Penalty Based on Respondent-Appellee's Own Failure to Seek Guidance Absolves Respondent-Appellee of its Responsibility to Comply with Applicable Laws

The Presiding Officer appears to reason that EPA "inaction" following the 1999 Missouri state inspection excused Respondent-Appellant's continuing violations.[18] I.D. at 16. Complainant-Appellant respectfully disagrees with this reasoning. Respondent-Appellee's witness testified that, despite being notified by the state inspector that the Root-Eater label was in possible violation of Federal pesticide law, he did not request anything in writing from EPA regarding the product. Tr. at 110. Indeed, it would appear that the only step that Respondent-Appellant took following the 1999 state inspection was to cease keeping manufactured stock of Root-Eater in inventory by the time the state performed 2002 inspection, stating that it was now "made strictly to order." CX 7; CX 8. Given these facts, the case at bar bears a strong resemblance to the situation in *Chem Lab Products, Inc.*, where a pesticide company claimed to have been unsure whether its product required EPA Regulation, never asked the EPA Region for its opinion regarding the product's status, and offered, "presumably as some kind of mitigation," the fact that it restricted its sales of the product to its existing customer base rather than pursuing new clients. *Chem Lab,* 10 E.A.D. at 736 (EAB 2002). Appositely, the Board in *Chem Lab* notes that, "[a]t bottom, [a pesticide producer] is responsible for complying with all federal, state, and local laws applicable to its business. *Id.* It is thus Respondent-Appellee's responsibility to ensure that it takes the appropriate actions to ascertain that a product it manufactures, sells, or distributes is properly registered, and has a label that meets the FIFRA labeling requirements of 40 C.F.R. § 156. For the Presiding Officer to criticize the Region's enforcement action against Respondent-

---

[18] As discussed, *infra* at pp 12-13, the Region did not receive the State inspector's 1999 report until 2002.

Appellee for continuing to sell an unregistered and misbranded Category I pesticide product without seeking guidance from EPA and after having notice that it was likely in violation, as "hubris on the Agency's part," and to slash the Region's proposed penalty by 90%, is unwarranted.

4. Respondent-Appellee's Degree of "Cooperation" Does Not Warrant Reduction in Penalty

Respondent-Appellee was informed of possible noncompliance with federal pesticide law, chose not to seek guidance from the Region, and continued to produce its unregistered and misbranded product until EPA initiated enforcement proceedings. Respondent-Appellee was warned by a state inspector on no less than two occasions, in 1999 and again in 2002, that its Root Eater product was likely subject to EPA registration as a pesticide; it ignored the warnings on both occasions and declined either to seek EPA guidance or to discontinue the manufacturing and sale of the product until EPA initiated an administrative action in September of 2003. Tr. at 105. These facts, combined with the evidence indicating that Respondent-Appellee is not an unsophisticated or new pesticide manufacturer/distributor renders this case similar to the EAB decision in *In re Chem Lab Products, Inc.*, where the Board reinstated the Region's proposed penalty, concluding that the violator had "placed more emphasis on protecting its business position than on complying with FIFRA." *Chem Lab*, 10 E.A.D. at 737.

5. The Penalty Recommended by the Presiding Officer Provides Insufficient Deterrence, as to Both Respondent-Appellee and Others

As recognized by the Agency's 1984 penalty policy guidance documents,[19] civil penalties must be sufficient both to deter future violations not only of the Respondent, but also of the other members of the public whose activities are subject to the requirements of FIFRA. *See, e.g., Policy on Civil Penalties*, EPA General Enforcement Policy # GM - 21, February 18, 1994, at 3 ("Specifically, the penalty should persuade the violator to take precautions against falling into

---

[19] *See* n. 9, *infra.*

noncompliance again (specific deterrence) and dissuade others from violating the law (general deterrence).")The Board has also recognized the two aspects of deterrence that a civil penalty must serve. *See, e.g., Rogers Corporation*, 9 E.A.D. 534, 565 (EAB 2000) ("The civil penalty serves the very important purpose of deterring future behavior of like kind, both by the violator and others.")

Complainant-Appellant submits that a 90% reduction of the proposed penalty of $16,500, already less than 2% of Respondent-Appellee's gross annual receipts of $1.5 million, would result in a penalty so minuscule as to provide no significant deterrence to either the Respondent-Appellee or to others. Indeed, by its own witness testimony, Respondent-Appellee apparently benefitted from not registering their product by as much as "$500 a package of what [FRM] sold." Tr. at 111. Since the two State inspection reports document sales of at least forty containers of the product, CX 8 and 9, a penalty of merely $1,800 for three violations seems disproportionate. Moreover, such a reduced penalty would ensure that Respondent-Appellee will profit at the expense of its competitors who abided by the registration requirements of FIFRA and concomitant costs. As the Board stated in *Chem Lab*, "[w]e should not lose sight of the need to assure that complying companies are not disadvantaged by their compliance . . . ." *Chem Lab,* 10 E.A.D. at 736.

Complainant-Appellant accordingly submits that the reduction of a penalty imposed for violations involving multiple sales of unregistered and improperly labeled pesticide products of Category I Toxicity from $16,500 to just $1,800, fails to supply a necessary deterrent either for Respondent-Appellee or for other future potential violators. Should the Board determine to recalculate the penalty, Complainant-Appellant respectfully requests that the Board take this into consideration.

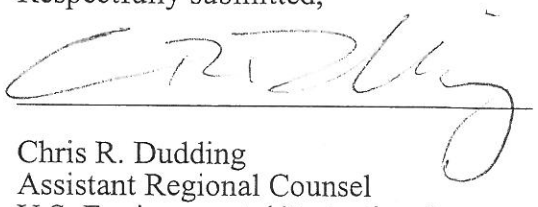
VI. CONCLUSION

The Presiding Officer's penalty determination departed completely from the FIFRA

penalty policy (a departure that was without warrant under the circumstances), failed to take certain evidence into account appropriately, failed to relate the FIFRA statutory penalty factors to the penalty recommended in the Initial Decision with sufficient clarity, and failed to articulate compelling reasons for departing from the FIFRA ERP. Complainant-Appellant objects to the penalty thus determined by the Presiding Officer (including its amount) and asks the Board to set aside the penalty recommended in the Initial Decision and recalculate the penalty *de novo*.

May 5, 2005

Respectfully submitted,

By: 

Chris R. Dudding
Assistant Regional Counsel
U.S. Environmental Protection Agency
Region 7
901 N. 5th Street
Kansas City, KS 66101

Rupert G. Thomas
Senior Assistant Regional Counsel
U.S. Environmental Protection Agency
Region 7
901 N. 5th Street
Kansas City, KS 66101

Of Counsel:

Gary Jonesi
Senior Counsel for Strategic Litigation
U.S. Environmental Protection Agency
Office of Civil Enforcement
1200 Pennsylvania Avenue, NW
Mail Code 2241-A
Washington, DC 20460

CERTIFICATE OF SERVICE

I certify that the original and five copies of the foregoing Complainant-Appellant's Brief on Appeal was hand delivered to:

U.S. Environmental Protection Agency
Clerk of the Board, Environmental Appeals Board
Colorado Building
1341 G Street, N.W., Suite 600
Washington, D.C. 20005

and that a true and correct copy of the said document was sent by First Class United States Mail, addressed to the following:

Raymond E. Kastendieck
President
FRM Chem, Inc.
P.O. Box 207
50 Hiline Dr.
Washington, MO 63090

William B. Moran
Administrative Law Judge
Office of Administrative Law Judges (M/C 1900L)
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Kathy Robinson
Regional Hearing Clerk
U.S. EPA Region 7
901 N. 5th Street
Kansas City, KS 66101

Dated: May 5, 2005 By: _____

Chris R. Dudding
Assistant Regional Counsel
U.S. EPA Region 7
901 N. 5th Street
Kansas City, KS 66101