IN RE CHEM LAB PRODUCTS, INC.

FIFRA Appeal No. 02-01

FINAL DECISION

Decided October 31, 2002

Syllabus

Region IX of the U.S. Environmental Protection Agency ("EPA" or "Agency") appeals an Initial Decision issued on January 2, 2002, by Administrative Law Judge ("ALJ") Spencer T. Nissen. The appeal arises out of an administrative enforcement action initiated by Region IX against Chem Lab Products, Inc. ("Chem Lab") of Ontario, California, for alleged violations of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. §§ 136-136y. In the proceedings below, Region IX charged Chem Lab with selling an unregistered swimming pool sanitizer/clarifier, called "Shock Quick," in violation of FIFRA section 12(a)(1)(A) on twenty-four separate occasions between June and September 1998. The Region proposed assessment of the maximum FIFRA civil penalty, $5,500, for each of the twenty-four violations, for a total penalty of $132,000. Chem Lab did not dispute its liability for the unlawful sales but requested a hearing as to the appropriate penalty, arguing that the proposed penalty was too high. After holding a hearing on the penalty issue, Judge Nissen agreed with Chem Lab that the proposed penalty was inappropriate. He reduced the penalty to $50,000 on the grounds that EPA Region IV had treated BioLab, Inc., a large competitor of Chem Lab's, more leniently in similar circumstances, and that Region IX, in proposing the penalty for Chem Lab, had overstated the potential harm and the gravity of Chem Lab's misconduct in light of events in the BioLab case. BioLab had sold a similar unregistered swimming pool sanitizer/clarifier, called "Shock Plus," for a period of years in the 1990s, and an enforcement case brought against it by EPA Region IV was settled in September 1998.

Held: By comparing this litigated case to the BioLab case, which was settled rather than litigated, and by choosing to reduce the penalty in this litigated case on the basis of events in the settled BioLab case, the ALJ clearly erred. The Board finds that the inappropriateness of comparing settled versus litigated cases has long been established in EPA administrative case law, which holds that because consent agreements necessarily involve some element of compromise, in that parties sometimes give up something they might have otherwise won, such agreements cannot provide a meaningful reference point for matters litigated to judgment.

Three other foundational principles provide support for the proposition that penalty assessments are sufficiently fact- and circumstance-dependent that the resolution of one case cannot determine the fate of another. Those principles are, first, that the environmental statutes EPA is charged with administering set forth a variety of penalty factors that must be carefully and collectively evaluated in assessing administrative penalties. As applied to a particular case, the penalty evaluation will yield unique results, and any attempt to compare one penalty outcome to another would necessarily entail comprehensive, de-

tailed comparisons of the unique facts and circumstances of such cases. The second principle is that of judicial economy. If every respondent in a penalty case were to submit comparative penalty information on a case or cases allegedly similar to its own, the Board and ALJs would soon be mired in details pertaining to cases other than the ones immediately before them. The third rationale for disfavoring case-to-case comparisons is the long-established principle that unequal treatment is not an available basis for challenging agency law enforcement proceedings; i.e., as long as a particular administrative sanction is warranted in law and fact, it will not be overturned simply because it is more severe than sanctions imposed in other cases.

The ALJ in this case found dispositive the EPA policy, spelled out in the Agency's general and FIFRA-specific penalty guidelines, favoring uniformity of penalties for like violations. The Board, however, is not persuaded that the policy of uniformity should overcome all the important principles just mentioned. Agency penalty policies do not, by aiming for consistency and fairness, necessarily suggest identical penalties in every case. The Board recently explained that "[v]ariations in the amount of penalties assessed in other cases, even those involving violation of the same statutory provisions or regulations, do not, without more, reflect an inconsistency" with the EPA policy advocating fair and equitable penalty assessment.

In assessing a penalty, the ALJ chose not to apply the FIFRA penalty policy in this instance at all, finding the result inequitable. The Board points out the regulatory requirement that ALJs must "consider" applicable penalty policies in calculating penalties and observes that the requirement is not perfunctory. By requiring penalty policies to be considered, and by further requiring an ALJ to explain his or her reasons for imposing a penalty different than the one proposed by complainant (which would typically be based on a penalty policy), the regulations clearly intend a serious consideration of any applicable penalty policy. In cases where, as here, an ALJ has decided to forego application of a penalty policy in its entirety, the Board has previously stated that it will closely scrutinize the ALJ's reasons for choosing not to apply the policy to determine whether the reasons are compelling. The term "compelling," as used here, is intended to mean "persuasive" or "convincing" in the context of the "closer scrutiny" suggested in *In re Ray Birnbaum Scrap Yard*, 5 E.A.D. 120 (EAB 1994). That case noted that "when a penalty deviates substantially from the Agency's penalty guidelines, closer scrutiny of the [ALJ's] rationale may be warranted." The Board's use of the term "compelling" in defining its standard of review 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.

Because the Board concludes the ALJ's reliance on the BioLab settlement was in error, it finds that the ALJ's reasons for choosing not to apply the FIFRA penalty policy are inadequate to warrant deference. The Board therefore vacates the ALJ's penalty determination and performs its own penalty analysis in accordance with its authority under 40 C.F.R. § 22.30(f), assessing a penalty of $132,000 against Chem Lab for its unlawful sales of the unregistered pesticide Shock Quick.

Before Environmental Appeals Judges Scott C. Fulton, Edward E. Reich, and Kathie A. Stein.

Opinion of the Board by Judge Reich:

This is an appeal by the Cross Media Division, U.S. Environmental Protection Agency ("EPA" or "Agency") Region IX, from an Initial Decision issued on January 2, 2002, by Administrative Law Judge ("ALJ") Spencer T. Nissen. The appeal arises out of an administrative enforcement action initiated by Region IX against Chem Lab Products, Inc. ("Chem Lab") of Ontario, California, for alleged violations of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA" or "Act"), 7 U.S.C. §§ 136-136y. In the proceedings below, Region IX charged Chem Lab with selling an unregistered pesticide in violation of FIFRA section 12(a)(1)(A) on twenty-four separate occasions between June and September 1998. The Region proposed assessment of the maximum FIFRA civil penalty, $5,500, for each of the twenty-four violations, for a total penalty of $132,000. Chem Lab did not dispute its liability for the unlawful sales but requested a hearing as to the appropriate penalty, arguing that the proposed penalty was unduly severe. After holding a hearing on the penalty issue, Judge Nissen agreed that the proposed penalty was inappropriate. He reduced the penalty to $50,000 on the grounds that EPA Region IV had treated BioLab, Inc., a large competitor of Chem Lab's, more leniently in similar circumstances, and that Region IX, in proposing the penalty for Chem Lab, had overstated the potential harm and the gravity of the misconduct.

On appeal, Region IX argues that the ALJ erred in reducing the penalty. The Region asks the Environmental Appeals Board ("Board") to reinstate the proposed penalty. For the reasons set forth below, we vacate the ALJ's penalty determination and assess a total civil penalty of $132,000 against Chem Lab.

I. *BACKGROUND*

A. *Statutory and Regulatory Background*

FIFRA regulates "pesticides," which include, among other things, "any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest." FIFRA § 2(u), 7 U.S.C. § 136(u); *see* 40 C.F.R. § 152.3(s). The term "pest" is defined as "any insect, rodent, nematode, fungus, [or] weed," FIFRA § 2(t), 7 U.S.C. § 136(t), or "[a]ny plant growing where not wanted, including any moss [or] alga * * * or * * * [a]ny fungus, bacterium, virus, or other microorganisms, except for those on or in living man or other living animals * * *." 40 C.F.R. § 152.7; *see* FIFRA § 2(t), 7 U.S.C. § 136(t).

Under FIFRA, pesticides must be registered with EPA before they can be sold or distributed. FIFRA §§ 3(a), 12(a)(1)(A), 7 U.S.C. §§ 136a(a), 136j(a)(1)(A); *see* 40 C.F.R. § 152.15. To register a pesticide, an applicant must submit, among other things, the name and complete chemical formula of the pesticide, a copy of the proposed labeling and the pesticidal claims to be made for the pesticide, a request that the pesticide be classified for general or restricted use, and a description of the toxicity and other scientific tests conducted to substantiate the pesticidal claims and to determine the safety of the pesticide. FIFRA § 3(c), 7 U.S.C. § 136a(c); 40 C.F.R. §§ 152.40-.55.

A majority of the pesticide registrations granted pursuant to FIFRA are registrations for "end-use" or "formulated" products. These products contain at least one active ingredient (registered separately as a "manufacturing use" or "technical" product under FIFRA) that will, among other things, "prevent, destroy, repel, or mitigate any pest." FIFRA § 2(a)(1), 7 U.S.C. § 136(a)(1). Manufacturers of end-use pesticide products combine active ingredients with inert ingredients to "dissolve, dilute, or stabilize the active ingredient[s] or otherwise improve [the active ingredients'] pesticidal performance." *Monsanto Co. v. EPA*, 564 F. Supp. 552, 554 (E.D. Mo. 1983), *vacated & remanded on other grounds sub nom. Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984). End-use products may not be used to manufacture or formulate other pesticide products, but are designed to be used as is or in some cases after dilution by the user. *See id.*; 40 C.F.R. § 152.3(k) (definition of "end use product"). EPA typically requires applicants for end-use product registrations to submit six acute toxicity studies in support of their applications: (1) acute oral LD_{50};[1] (2) acute dermal LD_{50};[2](3) acute inhalation LC_{50};[3] (4) primary eye irritation;[4] (5) primary skin irritation;[5] and (6) dermal sensitiza-

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[1] The term "acute oral LD_{50}" means "a statistically derived estimate of the single oral dose of a substance that would cause 50 percent mortality to the test population under specified conditions." 40 C.F.R. § 152.3(e).

[2] The term "acute dermal LD_{50}" means "a statistically derived estimate of the single dermal dose of a substance that would cause 50 percent mortality to the test population under specified conditions." 40 C.F.R. § 152.3(c).

[3] The term "acute inhalation LC_{50}" means "a statistically derived estimate of the concentration of a substance that would cause 50 percent mortality to the test population under specified conditions." 40 C.F.R. § 152.3(d).

[4] The term "primary eye irritation" means testing to determine whether the pesticide, as formulated, "is corrosive to the eye (causes irreversible destruction of ocular tissue) or results in corneal involvement or irritation persisting for more than" a specified number of days. 40 C.F.R. § 152.170(b)(1)(iv); *see id.* § 152.170(b)(2)(v).

[5] The term "primary skin irritation" means testing to determine whether the pesticide, as formulated, "is corrosive to the skin (causes tissue destruction into the dermis and/or scarring) or causes severe irritation (severe erythema or edema)" after a certain amount of time. 40 C.F.R. § 152.170(b)(1)(v); *see id.* § 152.170(b)(2)(vi).

tion.[6] *See* 40 C.F.R. §§ 152.85, .170(b); Hearing Transcript ("Tr.") at 47. These tests aid the Agency in determining whether a particular end-use product should be restricted to use by certified applicators and/or for certain uses, or should be labeled in a particular way. *See* 40 C.F.R. § 152.170.

If a pesticide is sold or distributed prior to being properly registered, the seller or distributor may be assessed a civil penalty of up to $5,500 for each offense.[7] FIFRA § 14(a)(1), 7 U.S.C. § 136*l*(a)(1); 40 C.F.R. § 19.4 & tbl. 1. The Act mandates that three factors be taken into consideration in determining such a penalty: "[1] the appropriateness of [the] penalty to the size of the business of the person charged; [2] the effect on the person's ability to continue in business; and [3] the gravity of the violation." FIFRA § 14(a)(4), 7 U.S.C. § 136*l*(a)(4). EPA has published a FIFRA Enforcement Response Policy ("ERP") to guide analyses of these three statutory factors. *See* U.S. EPA, Office of Compliance Monitoring & Office of Pesticides & Toxic Substances, *Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)* (July 2, 1990). The ERP establishes a civil penalty matrix that assigns base penalties as a function of the nature of the violation and the size of the violator's business. *See* ERP at 18-20. The base penalty is then adjusted upward or downward to reflect a number of "gravity of the violation" factors, such as pesticide toxicity, actual or potential harm to human health and the environment, and the violator's compliance history and culpability. *See* ERP apps. A-B. Finally, other factors, such as the ability of the violator to continue in business or the voluntary disclosure of FIFRA violations to state or federal regulators, may be considered in determining whether to adjust the penalty. *See* ERP at 23-26.

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[6] The term "dermal sensitization" is used to mean testing to indicate whether, "[w]hen used in accordance with label directions, or widespread and commonly recognized practice, the pesticide may cause significant subchronic, chronic, or delayed toxic effects on man as a result of single or multiple exposures to the product ingredients or residues." *See* 40 C.F.R. § 152.170(b)(1)(vi), (2)(vii).

[7] The statutory maximum civil penalty for unlawful sales or distribution of unregistered pesticides as specified in FIFRA is $5,000. *See* FIFRA § 14(a)(1), 7 U.S.C. § 136*l*(a)(1). However, this maximum penalty has been increased by 10 percent, to $5,500, in accordance with EPA regulations promulgated pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. No. 101-410, 104 Stat. 890 (1990) (codified at 28 U.S.C. § 2461 note), *amended by* Debt Collection Improvement Act of 1996, Pub. L. No. 104-134, § 31001(s), 110 Stat. 1321, 1321-373 (1996). *See* 40 C.F.R. pt. 19; 61 Fed. Reg. 69,360 (Dec. 31, 1996). These two penalty-related congressional acts direct EPA (and other federal agencies) to adjust maximum civil penalties on a periodic basis to reflect inflation. The EPA regulations currently in effect apply to violations occurring after January 30, 1997. 40 C.F.R. § 19.2.

Moreover, criminal penalties, including larger fines and/or imprisonment, may be assessed under FIFRA for "knowing" violations of the provisions of the statute. *See* FIFRA § 14(b)(1), 7 U.S.C. § 136*l*(b)(1).

The FIFRA ERP, like other EPA penalty policies, is intended primarily to assist Agency enforcement personnel in calculating fair and consistent civil penalties for like violations across the country. *See, e.g., In re M.A. Bruder & Sons, Inc.*, 10 E.A.D. 600. 605 n.11 (EAB 2002); *In re Lyon County Landfill*, 10 E.A.D. 417 (EAB 2002), *appeal docketed*, No. 02-907JEL/AJB (D. Minn. Apr. 30, 2002); *In re Bollman Hat Co.*, 8 E.A.D. 177, 179 (EAB 1999); *In re DIC Americas, Inc.*, 6 E.A.D. 184, 189 (EAB 1995). The ERP contains guidance only; its provisions are not binding on enforcement personnel, ALJs, or the Board. *See, e.g., In re Employers Ins. of Wausau*, 6 E.A.D. 735, 758-62 (EAB 1997); *In re Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 522, 535 (EAB 1998); *DIC Americas*, 6 E.A.D. at 189.

Under the Consolidated Rules of Practice that govern these administrative enforcement proceedings, ALJs must "determine the amount of [a] recommended civil penalty based on the evidence in the record and in accordance with any penalty criteria" set forth in the relevant statute. 40 C.F.R. § 22.27(b). In so doing, ALJs "*shall consider* any civil penalty guidelines issued under" that statute, *id.* (emphasis added), such as the FIFRA ERP in this case. Further, ALJs must "explain in detail * * * how [a] penalty to be assessed corresponds to any penalty criteria" set forth in the statute, and, if an ALJ decides to assess a different penalty than the one proposed in accordance with the ERP, the ALJ must explain his "specific reasons for the increase or decrease." *Id.*

B. *Factual Background*

Chem Lab Products, Inc. owns and operates a chemical manufacturing and distributing facility at 5160 Airport Drive, Ontario, California. The facility produces a wide variety of pesticide products that are used to sanitize and clarify water in swimming pools and spas. Over the past thirty or so years, Chem Lab has registered fifty-four pesticide products with EPA pursuant to FIFRA. Tr. at 46, 53. Eighteen of these registrations were active in May 2001 at the time Administrative Law Judge Nissen held a hearing in this case. Tr. at 47.

The most popular product in many swimming pool lines, including Chem Lab's, is a product used to "shock" or "superchlorinate" pool water. Tr. at 82. When applied to pools or spas, shock products introduce into the water an extra heavy dose of chlorine to oxidize organic debris such as swimmer's waste, and to kill algae, bacteria, viruses, and other organisms that may have developed tolerances to existing chemical conditions in the pool. Initial Decision ("Init. Dec.") at 4 n.3; Respondent's Exhibit ("R Ex.") B attachs. (pool shock information). Typically, consumers are encouraged to shock their pools on a frequent basis (e.g., weekly, biweekly, monthly) as part of routine pool maintenance. *See* R Ex. B attachs.; Complainant's Exhibit ("C Ex.") 10. As a consequence of this use, consumers tend to judge competing pool product lines by the safety, efficacy, and utility of each company's shock products. *See* Tr. at 82.

For years prior to the mid-1990s, the swimming pool shock products on the market were extremely flammable. Several large retail stores, such as Home Depot, Lowe's, and Wal-Mart, apparently incurred destructive fires as a result of shock product explosions during storage or shipping. Thus, the retailers were purportedly considering discontinuing their sales of swimming pool chemicals altogether. Init. Dec. at 4; Tr. at 68-69.

In the Fall of 1995, BioLab, Inc., a major producer of swimming pool chemicals,[8] began to market an unregistered pool shock product called "Shock Plus 4-in-1 Pool Shock" that it touted as being safer to ship and store than the old-style shock products because it was nonflammable under normal conditions. Tr. at 69; R Exs. A-B attachs. (Shock Plus marketing materials). Shock Plus contained as its active ingredient sodium dichloro-s-triazinetrione, an antimicrobial compound in the chlorinated isocyanurates family that is registered under FIFRA for use as a disinfectant, sanitizer, algicide, and fungicide. *See* Respondent's Response to Appellant's Notice of Appeal and Brief attach. 1 (U.S. EPA, Office of Prevention, Pesticides & Toxic Substances, EPA-738-F-92-010, *R.E.D. Facts: Chlorinated Isocyanurates* 1-2 (Sept. 1992)). Retailers were purportedly eager to stock pool chemicals that were safer to ship and store, and BioLab allegedly gained significant market share (at the expense of Chem Lab and other competitors) with its new product. *See* Tr. at 69-70.

In November 1996, Chem Lab wrote several letters to EPA Region IV regarding BioLab's "Shock Plus" product.[9] *See* R Ex. 1 (Letter from Jeffrey R. Cornett, President & CEO, Chem Lab Products, Inc., to Carlton Layne, Chief, Pesticide Section, U.S. EPA Region IV (Nov. 18, 1996) ("Cornett Letter"); Letter from Dana W. Somesla, Chief Chemist, Chem Lab Products, Inc., to Carlton Layne, Chief, Pesticide Section, U.S. EPA Region IV (Nov. 18, 1996) ("Somesla Letter")). Chem Lab observed that BioLab had not obtained a FIFRA registration for Shock Plus but had nonetheless proceeded with sales and distribution of the product. By writing the letters, Chem Lab was attempting, among other things, to determine whether it could lawfully produce and market its own similar pool shock product without the regulatory delays and expense associated with FIFRA registration, which it believed would be significant. *See* Cornett Letter at 1-2; Somesla Letter at 2; Tr. at 87.

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[8] BioLab is a wholly-owned subsidiary of Great Lakes Chemical Company, which, according to testimony at the hearing, had in excess of $1.5 billion in sales in the late 1990s, compared to $23 million for Chem Lab. Tr. at 71, 83-84.

[9] Chem Lab contacted EPA Region IV rather than Region IX because Region IV regulates pesticide activities in Georgia, where BioLab's Shock Plus was being manufactured and marketed. *See* Tr. at 71.

EPA Region IV responded to Chem Lab's inquiries nearly a year later, in September 1997. By that time, Chem Lab had hired new management: specifically, a new president and chief executive officer in the person of Randall Hitchens, who had worked at BioLab for twenty-four years prior to his employment with Chem Lab. *See* Tr. at 68. In its September 4, 1997 letter, Region IV informed Chem Lab that EPA considered BioLab's Shock Plus product to be a pesticide that required registration prior to sale. C Ex. 12 (Letter from Cheryn L. Jones, Compliance Officer, Pesticide Section, EPA Region IV, to Dana W. Somesla, Chief Chemist, Chem Lab Products, Inc. (Sept. 4, 1997)). Region IV observed that the Shock Plus label listed chlorinated isocyanurates as an ingredient and explained that those chemicals are registered for use in swimming pools as disinfectants, sanitizers, and algicides. *Id*. In addition, Region IV noted that the name "Shock Plus" and the claim on the product label that it "produces super clear water" are consistent with other swimming pool products of this type that are subject to the FIFRA registration requirements. *Id*.

In March 1998, Chem Lab responded to Region IV's letter, stating, among other things, that there had been a management change at Chem Lab and that Chem Lab wanted to withdraw its objections to these new types of chlorinated isocyanurate pool shock products. R Ex. B (Letter from Thomas R. Kincaid, Vice President of Marketing, Chem Lab Products, Inc., to Sharon Jones, Pesticide Section, U.S. EPA Region IV (Mar. 3, 1998)). By this point, Chem Lab had become acutely aware that BioLab had been selling its Shock Plus product for two years, gaining significant market share, and that buyers no longer wanted Chem Lab's old style shock product because it was perceived to be unsafe. Tr. at 70-72. In fact, a number of buyers had purportedly informed Chem Lab that if the company was not able to supply the safer-style shock product, they would switch to the BioLab product. *See* Tr. at 72, 74. Chem Lab therefore had begun to produce and sell "Shock Quick," a shock product containing the active ingredient trichloro-s-triazinetrione, another antimicrobial compound in the same chlorinated isocyanurates family as that of sodium dichloro-s-triazinetrione (the active ingredient in BioLab's Shock Plus), that offered the virtue of nonflammability under normal shipping and storage conditions. Chem Lab began to sell the new product, without benefit of FIFRA registration, to its existing customer base, in an attempt to halt further erosion of that base.[10] Tr. at 71-74, 81; *see* Answer to Complaint and Request for Hearing 3 (Aug. 7, 2000) ("This was a period of desperate competition with Bio-Lab's unregistered products for Respondent, which, because of severe business conditions, ultimately was forced to shut down its plants in Florida and Texas.").

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[10] It appears that Chem Lab began selling unregistered Shock Quick as early as October 1997. *See* Init. Dec. at 10 (noting collection of Chem Lab invoices showing Shock Quick sales in October 1997 through June 1998); C Ex. 2 (investigation summary documenting collection of October 1997 invoices).

Chem Lab justified its decision to sell unregistered Shock Quick on several grounds. First, Chem Lab noted the two-years-and-continuing sales by BioLab of unregistered Shock Plus without any apparent action by EPA to enforce the FIFRA registration requirements, despite Region IV's full knowledge of BioLab's activities. Chem Lab speculated that the lack of pesticidal "kill" claims on the Shock Plus label possibly provided a basis upon which registration could be deemed unnecessary. Tr. at 72-74. Second, and in this same vein, Chem Lab calculated that household bleach products do not require FIFRA registration if they do not make pesticidal claims, such as "kills bacteria" or "controls algae," and, because the Shock Quick label did not contain any "kill" claims, it similarly did not require registration. Tr. at 73-74. Third, Chem Lab maintained open lines of communication with Cheryn Jones, a compliance officer at Region IV, about its intention to market unregistered Shock Quick, and thus the company felt that EPA was fully aware of its activities in this regard. Tr. at 71-74. However, due to the continuing uncertainty Chem Lab perceived regarding its legal obligation to register Shock Quick, Mr. Hitchens directed his sales force to market the product only to Chem Lab's existing customers (no efforts purportedly were made to solicit new business). In so proceeding, Chem Lab's intent was to defend its market share against further infringements by BioLab until such time as EPA reached a definitive decision regarding registration of these chlorinated isocyanurate products. Tr. at 74, 77.

On April 27, 1998, EPA Region IV issued two Stop Sale, Use, or Removal Orders ("SSUROs") to BioLab with respect to the company's Shock Plus and "BioGuard Lite Oxidizing Clarifier" products, which Region IV had determined were pesticides requiring registration prior to sale or distribution. R Ex. 3. As a courtesy, Cheryn Jones of Region IV faxed copies of the SSUROs to Chem Lab that same day. Tr. at 74. On May 8, 1998, Thomas Kincaid, Chem Lab's vice president of marketing, contacted Amy Miller, a Region IX enforcement officer, to inform the Region that Chem Lab was selling and distributing Shock Quick and was in the process of getting the product registered. Tr. at 30. Ms. Miller told Mr. Kincaid to stop selling Shock Quick immediately and warned him that if Chem Lab continued to sell the product, it could face a FIFRA enforcement action. *Id*. Ms. Miller also informed Mr. Kincaid that the California Department of Pesticide Regulation ("CDPR") would be scheduling a visit to Chem Lab's facility. *Id*. Meanwhile, on May 6, 1998, a federal district court issued a temporary restraining order blocking enforcement of Region IV's SSUROs against BioLab for its Shock Plus and BioGuard Lite products. *See* R Ex. D (*BioLab, Inc. v. EPA*, Civil Action No. 1:98CV01113 (RCL), Temporary Restraining Order (D.D.C. May 6, 1998)).

Chem Lab proceeded to file for registration of its Shock Quick product on May 19, 1998, under the name "Shock Power." C Ex. 2 (Letter from Dana W. Somesla, Chem Lab Products, Inc., to Robert Brennis, U.S. EPA (May 19, 1998)); Tr. at 79-80. EPA required Chem Lab to supply three of the six toxicity studies

generally required for end-use registrations: the acute oral test, acute inhalation test, and primary skin irritation test.[11] Tr. at 47-49. Due to the strong competitive pressures exerted by BioLab,[12] Chem Lab did not cease its sales of unregistered Shock Quick during the pendency of its Shock Power registration application. Tr. at 80-81, 85.

On June 18 and 22, 1998, the CDPR inspected Chem Lab's facility in Ontario, California. C Exs. 1-3 (Notices of Inspection and Investigation Summary). CDPR collected a physical sample of Shock Quick, invoices showing Shock Quick sales, a copy of Chem Lab's new product registration application for Shock Power, and other documents. C Exs. 2, 4. In a follow-up inspection a year later, on June 3, 1999, CDPR collected copies of invoices reflecting numerous and repeated sales of Shock Quick to various Orchard Hardware Supply stores in California during the period June 19, 1998, through September 23, 1998. C Exs. 7-9.

Chem Lab obtained a FIFRA registration for Shock Power on May 5, 1999, at which time it stopped selling and distributing its unregistered Shock Quick product. C Ex. 11; Tr. at 80-81.

C. *Procedural History*

On July 7, 2000, under the authority of FIFRA section 14(a), 7 U.S.C. § 136*l*(a), EPA Region IX filed an administrative complaint charging Chem Lab with twenty-four counts of sale and distribution of the unregistered pesticide Shock Quick, in violation of FIFRA section 12(a)(1)(A), and proposing the assessment of an administrative penalty of $132,000 therefor. *See* Complaint and Notice of Opportunity for Hearing (July 7, 2000). In answer to the complaint, Chem Lab admitted that it had sold or distributed unregistered Shock Quick as alleged and requested a hearing. *See* Answer to Complaint and Request for Hearing (Aug. 7, 2000). On October 19, 2000, Region IX filed a motion for accelerated decision as to liability in this matter. Administrative Law Judge Nissen granted the Region's motion (to which Chem Lab had not responded) on January 26, 2001, finding that Chem Lab had violated FIFRA § 12(a)(1)(A) as alleged in

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[11] EPA waived the acute dermal study because "acute dermal for this particular type of compound is not very severe," concluding that the Shock Plus product could be no worse than the source product (i.e., the separately registered active ingredient). Tr. at 48. As for the dermal sensitization study, EPA determined "by looking at the nature of the compounds within this product" that it would not be a dermal sensitizer, and thus that test was waived as well. Tr. at 48-49. Finally, with respect to the primary eye irritation study, EPA and Chem Lab agreed that this product would be in the most severe category and thus that it was not necessary to "damag[e] a lot of animals" to establish something they already knew. Tr. at 49.

[12] Chem Lab's president and CEO testified that as a result of BioLab's pressure, Chem Lab lost its Kmart account nationwide and found it necessary to close manufacturing plants in Texas and Florida due to reductions in sales in those states. Tr. at 81-82.

all twenty-four counts of the complaint. *See* Order Granting Complainant's Motion for Accelerated Decision as to Liability (Jan. 26, 2001). Thus, the only matter left to resolve at the hearing was the determination of the appropriate penalty.

Region IX had calculated the proposed penalty, $132,000, in accordance with the FIFRA penalty factors as reflected in the FIFRA ERP. The Region began by determining that Chem Lab's violation, the sale and distribution of an unregistered pesticide in violation of FIFRA section 12(a)(1)(A), constituted a "gravity level 2" (on a scale of one to four, one being the most grave) under the ERP. Tr. at 19-20; C Exs. 16-17; *see* ERP app. A, at A-1. Next, because Chem Lab, a registrant and distributor of pesticides, had pesticide sales in excess of $1 million annually, the Region placed the company in size of business "Category I" (of three categories, with Category I containing companies with the highest annual sales). Tr. at 20-22; C Exs. 16-17; *see* ERP tbl. 2, at 20. Using these two objective factors, Region IX turned next to the civil penalty matrix, in which the gravity level and size of business factors intersect. That matrix indicated that Chem Lab's base penalty should be set at $5,000 per violation (or actually $5,500 because of inflation, *see supra* note 7), the statutory maximum. Tr. at 22; C Exs. 16-17; *see* ERP tbl. 1, at 19 (Civil Penalty Matrix for FIFRA Section 14(a)(1)).

Region IV next examined five possible gravity adjustments that can be made to a base penalty: (1) pesticide toxicity; (2) harm to human health; (3) environmental harm; (4) compliance history; and (5) culpability. In accordance with ERP guidelines, a numeric figure ranging from zero to five is assigned to each of these adjustment factors, and the figures are then summed to determine whether the base penalty should be increased, decreased, or left unchanged. The Region assigned Chem Lab a "2" for pesticide toxicity because the active ingredient in Shock Quick has the potential to cause severe eye damage. Tr. at 24; C Exs. 16-17; *see* ERP app. B, at B-1. "Harm to human health" received a "3," which equates under the ERP to "potential serious or widespread actual or potential harm to human health." *See* Tr. at 25-29; C Exs. 16-17;ERP app. B, at B-1 & n.2. The Region reasoned that the Shock Quick label, read by residential users who may not have extensive training in the proper use of pool chemicals, did not contain certain explicit warnings and directions for use that were later included in Chem Lab's registered label for Shock Power, such as "May be fatal if inhaled" and "If On Skin: Immediately brush off excess chemical and flush with plenty of soap and water. Remove contaminated clothing. Wash clothing before reuse. Get medical attention if irritation persists." Tr. at 25-29. The Region then assigned Chem Lab a "1" for environmental harm, which is "minor potential for actual harm to the environment," because Shock Quick was used in confined areas (i.e., pools and spas) and was not likely to escape into the environment. Tr. at 29; C Exs. 16-17; *see* ERP app. B, at B-1 & n.3. Chem Lab received a zero for the compliance history factor, because the company had no record of prior FIFRA violations within the preceding five-year period. Tr. at 29; C Exs. 16-17; *see* ERP app. B, at B-2 & n.4. The final gravity adjustment factor, culpability, ranges

in the ERP from zero, which means the "violation was neither knowing nor willful and did not result from negligence," to four, which indicates a "knowing and willful violation of the statute." ERP app. B, at B-2 & nn.5-6. Region IX assigned Chem Lab a value of "2," which is given when culpability is unknown or the violation resulted from negligence, on the ground that Chem Lab had been warned or notified at least three times that Shock Quick had to be registered prior to sale.[13] Tr. at 29-32; C Exs. 16-17.

After summing the five gravity adjustment figures and obtaining a value of eight, Region IX did not adjust the base penalty established by the penalty matrix. This decision is consistent with the ERP, which indicates that the matrix value should be assessed when the gravity adjustments fall within the range of eight to twelve. Tr. at 32; C Exs. 16-17; *see* ERP tbl. 3, at 22 & app. C, tbl. 3. The Region concluded its penalty analysis by considering, but finding inapplicable, several other adjustment factors listed in the ERP, including the violator's ability to continue in business/ability to pay the penalty and the presence of voluntary disclosure. Tr. at 32-33; C Ex. 17, at 9-10; *see* ERP at 23-26.

In February 2001, Region IX and Chem Lab each filed prehearing exchanges in accordance with the ALJ's scheduling orders in this case. As part of its exchange, Chem Lab submitted the names of Randall Hitchens and Dana Somesla as prospective witnesses who would testify, among other things, to Chem Lab's belief that Shock Quick was not a pesticide requiring registration. *See* Respondent's Prehearing Exchange Memorandum (Feb. 22, 2001). Chem Lab also proposed to introduce into evidence six exhibits relating to BioLab's sales of unregistered Shock Plus and EPA's eventual enforcement action against that company, including the 1998 SSUROs, a subsequent consent agreement/consent order, and other documents.[14] *Id.*; *see* R Exs. A-F.

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[13] The three warnings/notices were: (1) Ms. Amy Miller's explanation to Mr. Kincaid during their May 8, 1998 telephone conversation that Shock Quick was an unregistered pesticide and Chem Lab should stop selling it; (2) the Notice of Inspection for the June 18, 1998 CDPR visit, which explained the reason for the inspection to be "possible selling of unregistered pesticide product"; and (3) the Notice of Inspection for the June 22, 1998 CDPR visit, which gave the same reason for the inspection. Tr. at 30-31; C Exs. 1, 3.

[14] On September 14, 1998, EPA Region IV entered into a consent agreement and consent order with BioLab, which resolved Region IV's enforcement action against BioLab for its alleged sales and distribution of unregistered pesticides. Unlike Chem Lab, BioLab denied the violations of FIFRA alleged in the complaint in its case, but waived its right to a hearing. In reaching a settlement with Region IV, BioLab reaffirmed that it was not admitting to liability for FIFRA violations, but it agreed, among other things, to pay a civil penalty of $319,000, plus interest. *See* R Ex. F (*In re BioLab, Inc.*, Consent Agreement and Consent Order, IF & R No. 04-98F040-C (Sept. 14, 1998)). According to EPA's press release announcing the settlement, BioLab's penalty is "the largest FIFRA penalty ever assessed by the Southeastern Regional Office of EPA." R Ex. E.

On March 1, 2001, the Region filed a motion to exclude the exhibits in Chem Lab's prehearing exchange pertaining to the EPA enforcement action against BioLab, as well as all testimony regarding whether Shock Quick qualified as a pesticide. The Region argued that the proposed testimony and exhibits were not relevant to the only remaining issue to be determined, the assessment of an appropriate penalty. The ALJ denied Region IX's motion on April 12, 2001. *See* Order Denying Motion to Exclude (Apr. 12, 2001). The ALJ found that the proposed testimony of Randall Hitchens and Dana Somesla concerned both the gravity of the harm or potential for harm and the gravity of misconduct in this case, and thus was directly relevant to determining a penalty under FIFRA. *Id*. at 6-7. The ALJ similarly found, among other things, that the proffered BioLab exhibits were relevant to the harm or potential for harm resulting from Chem Lab's distribution and sale of Shock Quick "to the extent that the products distributed and sold by Bio[]Lab, Inc. involved in the settlement [were] similar." *Id*. at 9.

On May 8, 2001, Administrative Law Judge Nissen presided over a hearing in this matter, at which both Region IX and Chem Lab presented evidence and testimony. On January 2, 2002, Judge Nissen issued his Initial Decision assessing a penalty of $50,000 for the twenty-four FIFRA violations.[15] In so doing, Judge Nissen concluded that there was no evidence or allegation of actual harm from the use of Shock Quick and therefore that the "gravity of the harm" component of the penalty calculation should be limited to the potential for harm to human health and the environment or to the regulatory program. Init. Dec. at 22, 24. Judge Nissen determined that Region IX's assessment of this potential was overstated, in light of the facts that: (1) the Agency had permitted Chem Lab's competitor, BioLab, to continue selling Shock Plus, a similar unregistered chlorinated isocyanurate pool shock product, simply by posting placards in retail outlets and labels on the product itself stating, "This product has not been approved by EPA as a disinfectant, sanitizer, or algicide"; and (2) the Agency allowed BioLab to continue to sell existing stocks of Shock Plus for a certain number of days after BioLab filed for registration of the product. *Id*. at 23-25. Judge Nissen also found excessive the "gravity of the misconduct" component of the Region's penalty calculation. He accepted Chem Lab's contention that it had a good faith belief that Shock Quick did not require registration because, among other things, a federal court issued a temporary restraining order blocking enforcement of EPA's SSUROs against BioLab for its Shock Plus and BioGuard Lite Oxidizing Clarifier products. *Id*. at 23, 25-26; *see* R Ex. D (*BioLab, Inc. v. EPA*, Civil Action No. 1:98CV01113 (RCL), Temporary Restraining Order (D.D.C. May 6, 1998)). Judge Nissen therefore chose not to follow the guidance of the ERP and instead proceeded directly on the basis of the penalty criteria set forth in FIFRA section

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[15] In so doing, the ALJ noted that Chem Lab's invoices revealed 25, rather than 24, sales of Shock Quick to various Orchard Hardware Supply stores during the referenced time frame. *See* Init. Dec. at 10 & n.5.

14(a)(4), through which he determined $50,000 was the appropriate penalty here. *Id*. at 26-28.

The ALJ's penalty analysis centered on the gravity of the violation, because Chem Lab had made no contention that the penalty proposed by the Region would adversely affect its ability to continue in business or that it otherwise lacked the ability to pay that penalty (i.e., the other FIFRA penalty factors, *see* FIFRA § 14(a)(4), 7 U.S.C. § 136*l*(a)(4)). The ALJ noted that at the hearing, Mr. Hitchens, Chem Lab's president and CEO, had asserted that Chem Lab's proposed penalty was disproportionate to the penalty assessed against BioLab. Mr. Hitchens pointed out that BioLab was fined $319,000 for selling seven unregistered pesticides over four years, which equaled approximately $45,000 per product, whereas Chem Lab was facing a $132,000 penalty for selling one product over a three-month period. Tr. at 83; Init. Dec. at 26. The ALJ determined that a penalty of $2,000 to $2,083.33 per sale would be adequate to "deter future violations and will adequately compensate for damage to the regulatory program." Init. Dec. at 27. As justification for this finding, the ALJ construed the criterion "appropriateness of the penalty to the size of the person charged" in FIFRA section 14(a)(4) as contemplating that comparisons of penalties among firms of the same or different sizes should be conducted. *Id*.

In short, Administrative Law Judge Nissen's penalty analysis did not consist simply of a penalty-figure-to-penalty-figure comparison between the Chem Lab and BioLab cases. Rather, Judge Nissen engaged in a more sophisticated analysis that involved examining EPA conduct pertaining to similar swimming pool shock products in different contexts, as well as respondent behavior in anticipation of and response to that Agency conduct. Thus, the ALJ did not limit his consideration of the Chem Lab penalty to the Chem Lab facts alone, but rather evaluated the interwoven BioLab and Chem Lab facts as they were presented to him.

On March 5, 2002, Region IX filed an appeal of the Initial Decision with this Board. *See* Brief of the Appellant ("R9 Br."). Chem Lab filed a response to the appeal on April 1, 2002. *See* Respondent's Response to Appellant's Notice of Appeal and Brief ("CL Resp.").

II. *DISCUSSION*

The Board reviews an administrative law judge's factual and legal conclusions on a *de novo* basis. 40 C.F.R. § 22.30(f) (the Board shall "adopt, modify, or set aside" the ALJ's findings of fact and conclusions of law or discretion); *see* Administrative Procedure Act § 8(b), 5 U.S.C. § 557(b) ("[o]n appeal from or review of the initial decision, the agency has all the powers [that] it would have in making the initial decision except as it may limit the issues on notice or by rule").

Matters in controversy must be established by a preponderance of the evidence. 40 C.F.R. § 22.24(b); *In re Antkiewicz*, 8 E.A.D. 218, 227 (EAB 1999).

With respect to the determination of civil penalties, ALJs are not required to employ the provisions of an applicable Agency penalty policy (in this case the FIFRA ERP), but they are obliged, as noted in Part I.A above, to consider the policy's application and to explain their reasons for departing from a proposed penalty based on that policy. 40 C.F.R. § 22.27(b); *see In re Chempace Corp.*, 9 E.A.D. 119, 131 (EAB 2000); *In re Sav-Mart, Inc.*, 5 E.A.D. 732, 737-38 (EAB 1995); *In re Johnson Pac., Inc.*, 5 E.A.D. 696, 701-04, 706-07 (EAB 1995); *In re Lin*, 5 E.A.D. 595, 598-99 (EAB 1994). In prior cases, we have explained this obligation by noting that "[t]he Agency has issued penalty policies to create a framework whereby the decisionmaker can apply his discretion to the statutorily-prescribed penalty factors, thus facilitating the uniform application of these factors." *In re Great Lakes Div. of Nat'l Steel Corp.*, 5 E.A.D. 355, 374 (EAB 1994) (quoted in *In re Mobil Oil Corp.*, 5 E.A.D. 490, 515 (EAB 1994)). Accordingly, "[b]y referring to the penalty policy as a basis for assessing a particular penalty, the [ALJ] 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." *In re DIC Americas, Inc.*, 6 E.A.D. 184, 189-90 (EAB 1995).

The regulatory requirement that an ALJ "consider" a penalty policy is not perfunctory. By requiring that such policies be considered, and further requiring an ALJ to explain his or her reasons for imposing a penalty different than the one proposed by complainant (which would typically be based on a penalty policy), the regulations clearly intend a serious consideration of any applicable penalty policy. In cases where the penalty assessed by the ALJ "falls within the range of penalties provided in the penalty guidelines, the Board will generally not substitute its judgment for that of the [ALJ] absent a showing that the [ALJ] has committed an abuse of discretion or a clear error in assessing the penalty." *In re Ray Birnbaum Scrap Yard*, 5 E.A.D. 120, 124 (EAB 1994); *accord Chempace*, 9 E.A.D. at 131; *In re B & R Oil Co.*, 8 E.A.D. 39, 64 (EAB 1998); *In re Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 522, 536 (EAB 1998); *DIC Americas*, 6 E.A.D. at 192; *In re Pac. Ref. Co.*, 5 E.A.D. 520, 524 (EAB 1994).

In 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." *In re M.A. Bruder & Sons, Inc.*, 10 E.A.D. 598, 613 (EAB 2002); *accord In re Carroll Oil Co.*, 10 E.A.D. 635, 656 (EAB 2002); *see also Birnbaum*, 5 E.A.D. at 124 ("when a penalty deviates substantially from the Agency's penalty guidelines, closer scrutiny of the [ALJ's] rationale may be warranted"). If the Board determines that they are not, the Board will not grant deference to the ALJ's determination but rather will conduct a *de novo* penalty determination in accordance with

its authority under 40 C.F.R. § 22.30(f). The term "compelling," as used in the recent *Bruder* and *Carroll Oil* cases, is intended to mean "persuasive" or "convincing" in the context of the "closer scrutiny" suggested in *Birnbaum*. It is meant to convey the seriousness of the inquiry, recognizing the value that penalty policies provide,[16] while simultaneously protecting the ALJ's discretion to depart from penalty policy guidelines where the totality of the circumstances warrant.

In this case, Region IX raises two issues: (1) whether Judge Nissen inappropriately relied on a settlement agreement in the BioLab case in assessing a civil penalty against Chem Lab; and (2) whether the Board should modify or set aside the penalty recommended in the Initial Decision and recalculate the penalty in accordance with the penalty proposed in the complaint. We address each of these issues in turn below. Because we conclude that the ALJ's reliance on the BioLab settlement was in error, we find that his reasons for choosing not to apply the ERP are not compelling, and we will not grant deference to his penalty assessment but rather will perform our own penalty analysis.

A. *Reliance on BioLab Settlement Agreement*

1. *Arguments*

In this appeal, Region IX argues that the ALJ improperly used the facts and circumstances of Region IV's enforcement action against BioLab to craft Chem Lab's penalty. R9 Br. at 9-10. According to the Region, the ALJ's improper reliance on the BioLab case formed the "linchpin" for his conclusion that Chem Lab's sales of Shock Quick "did not pose a significant potential harm to human health and the environment, that the gravity of [Chem Lab's] violations was slight, and that [Chem Lab] was entitled to a substantially reduced penalty." *Id*. at 11-12.

Region IX contends that the administrative record lacks evidence of the type needed to establish that harm caused or potentially caused by Chem Lab's Shock Quick sales can reasonably be estimated by examining harm caused or po-

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[16] In *Employers Insurance of Wausau*, the Board undertook a detailed analysis of Agency use of penalty policies. Among many other things, the Board stated:

> [U]se of a written policy to assist in developing penalty proposals should not be presumed to eliminate the exercise of sound professional judgment from that process; nor should it be presumed to result in penalty proposals that do not fairly reflect the circumstances of a particular violation or a particular violator. To the contrary, fairness in enforcement might well be better served if penalty proposals are developed in a regular and consistent manner, such as by consulting a written policy document, than if those proposals are generated *ad hoc*. *In re Employers Ins. of Wausau*, 6 E.A.D. 735, 761-62 (EAB 1997).

tentially caused by BioLab's Shock Plus sales. *Id*. at 12. Specifically, the Region points out that Chem Lab failed to submit evidence "that would shed light on the chemical and physical properties of the 'Shock Plus' product, its toxicity profile relative to 'Shock Quick,' or dangers posed by its use." *Id*. Instead, argues the Region, one simple fact — i.e., that the active ingredients in Shock Plus and Shock Quick are both in the chlorinated isocyanurates family — formed the basis upon which the ALJ determined that Shock Quick sales posed minimal harm to human health and the environment. *Id*. at 12-13. The Region claims that in accepting that one fact as persuasive, the ALJ ignored testimony identifying shortcomings in Chem Lab's labeling of Shock Quick and evidence indicating that approximately two hundred adverse health-and-safety incidents (e.g., eye/skin irritation, vomiting, explosions) had resulted from the misuse of or defects in other swimming pool products containing trichloro-s-triazinetrione, the active ingredient in Shock Quick. *Id*. at 13 (citing C Exs. 10-11; C Ex. 17, at 5; Tr. at 25-26, 50-51).

Region IX believes that if Judge Nissen's ruling is allowed to stand, it will have "a serious and deleterious impact on EPA's enforcement activities in the future." *Id*. at 14. "Henceforth," the Region argues, "any respondent could rely on a settlement agreement in a case allegedly involving 'similar' facts and argue that such an agreement, or some aspects thereof, justify a reduction in penalties or limitations on liability. Inevitably, the focus of the proceeding would shift away from the facts and circumstances of the particular case to a comparative analysis of prior settlements. This would have a chilling effect on settlements, because any concession made as part of a settlement in one case may bind the Agency's hand in another." *Id*. at 14-15. "Such a result," the Region concludes, "would also undermine the federal policy of encouraging settlements." *Id*. at 15.

Chem Lab responds to Region IX's contentions by claiming the BioLab case contained important facts that influenced Chem Lab's state of mind during the time period at issue here, and that those facts were relevant to the ALJ's determinations as to the gravity of the harm and Chem Lab's purported "good faith belief" that Shock Quick did not require registration prior to distribution. CL Resp. at 2-3. Furthermore, Chem Lab argues that although the active ingredients of Chem Lab's Shock Quick and BioLab's Shock Plus were "technically different," they were "sufficiently similar to make the comparison entirely valid." *Id*. at 3. In this regard, Chem Lab asks the Board to judicially notice an EPA publication, entitled *R.E.D. [Reregistration Eligibility Document] Facts: Chlorinated Isocyanurates*, which, Chem Lab claims, "summarizes EPA's homogeneous view of the entire family of swimming pool chlorinators as substantially the same." *Id*. & attach. 1, at 3 (U.S. EPA, Office of Prevention, Pesticides & Toxic Substances, EPA-738-F-92-010, *R.E.D. Facts: Chlorinated Isocyanurates* 3 (Sept. 1992)) ("The chlorinated isocyanurates do not appear to cause acute (except eye irritation), subchronic, or chronic toxicity. * * * [T]he chlorinated isocyanurates' human health risks are adequately mitigated by product label precautions.").

2. *Analysis*

The Board and its predecessors have consistently held, in a number of statutory contexts, that "penalty assessments are sufficiently fact- and circumstance-dependent that the resolution of one case cannot determine the fate of another." *In re Newell Recycling Co.*, 8 E.A.D. 598, 642 (EAB 1999) (ALJ did not err in failing to address penalties assessed in other cases when calculating penalty amount in instant case), *aff'd*, 231 F.3d 204 (5th Cir. 2000); *see also In re Titan Wheel Corp.*, 10 E.A.D. 526 (EAB 2002), *appeal docketed*, No. 4:02-CV-40352 (S.D. Iowa July 19, 2002); *In re SchoolCraft Constr., Inc.*, 8 E.A.D. 476, 493-94 (EAB 1999); *In re Spang & Co.*, 6 E.A.D. 226, 242 (EAB 1995); *In re Chautauqua Hardware Corp.*, 3 E.A.D. 616, 626-27 (CJO 1991); *In re Briggs & Stratton Corp.*, 1 E.A.D. 653, 666 (JO 1981). This holding is based on three foundational principles.

First, the environmental statutes EPA is charged with administering typically set forth a variety of penalty factors that must be carefully evaluated in assessing administrative penalties. Depending on the statute, these factors may include such matters as the size of a violator's business; the violator's culpability, history of prior violations, and ability to pay a penalty; and the nature, circumstances, extent, and gravity of the specific violation. *See, e.g.*, FIFRA § 14(a)(4), 7 U.S.C. § 136*l*(a)(4); Toxic Substances Control Act ("TSCA") § 16(a)(2)(B), 15 U.S.C. § 2615(a)(2)(B); Clean Water Act § 309(g)(3), 33 U.S.C. § 1319(g)(3); Resource Conservation & Recovery Act § 3008(a)(3), 42 U.S.C. § 6928(a)(3); Clean Air Act § 113(e)(1), 42 U.S.C. § 7413(e)(1); Emergency Planning & Community Right-to-Know Act ("EPCRA") § 325(b)(1)(C), 42 U.S.C. § 11045(b)(1)(C). As applied to a particular case, these generic penalty factors naturally become unique to that case on the basis of the evidence and testimony introduced into the administrative record. Thus, one violator might find its penalty reduced, for example, as a result of its good faith efforts to comply with the law, while another might have its penalty increased for prior culpable acts or severe impacts on sensitive environmental resources. The uniqueness of the penalty inquiry is such that if the penalties assessed against two violators of the same statutory or regulatory provision are compared in the abstract simply as dollar figures, without any (or even with bits and pieces) of the unique record information that is so central to the penalty determinations themselves, then meaningful conclusions regarding the comparative proportionality or uniformity or "fairness" of the penalties cannot reasonably be drawn. *See Titan Wheel*, 10 E.A.D. 526, 533-34 (EAB 2002) ("comparing penalties between disparate cases does not account for the multiplicity of factors" that may affect a penalty determination). Any inquiry as to alleged unfairness, based on the Agency's actions in purportedly similar cases, would necessarily entail comprehensive, detailed comparisons of all the unique facts and circumstances of such cases.

This ties into the second rationale for the Board's holding, which is the principle of judicial economy. The Consolidated Rules of Practice that govern these penalty proceedings encourage the "*efficient*, fair and impartial adjudication of issues," 40 C.F.R. § 22.4(a)(2), (c)(10) (emphasis added), thereby "demonstrat[ing] a solicitude for judicial economy." *In re Carroll Oil Co.*, 10 E.A.D. 652; *see In re Spitzer Great Lakes Ltd.*, 9 E.A.D. 302, 313 (EAB 2000) (Consolidated Rules serve same purpose in administrative context as Federal Rules of Civil Procedure serve in federal district court context, "namely, to 'secure the just, speedy, and inexpensive determination' of judicial [or administrative] proceedings") (quoting Fed. R. Civ. P. 1). Obviously, the Board and ALJs routinely decide cases involving highly technical issues and lengthy, detailed administrative records, so these types of fact- and analysis-intensive burdens are not unknown to them. However, one can easily imagine the increase in burdens presented to these decisionmakers if every respondent in a penalty case were to think it advantageous to submit comparative penalty information on a case or cases allegedly "similar" to its own. The Board and ALJs would soon be awash in a sea of minutiae pertaining to cases other than the ones immediately before them. *See, e.g.*, *Titan Wheel*, 10 E.A.D. 626 (EAB 2002) (attempt to introduce large number of unrelated penalty assessments issued by EPA and State of Missouri); *Newell Recycling*, 8 E.A.D. at 642-43 (offer of data on other TSCA penalty cases that have come before Board or Board predecessors); *Chautauqua*, 3 E.A.D. at 626-27 (seeking discovery of information on twenty-one unrelated EPCRA cases); *Briggs & Stratton*, 1 E.A.D. at 665-66 (submitting information on approximately forty other cases). For this among other reasons, we have consistently declined to pursue this avenue of inquiry.

The third rationale for disfavoring case-to-case comparisons is the general principle that "'unequal treatment is not an available basis for challenging agency law enforcement proceedings.'" *In re Spang & Co.*, 6 E.A.D. 226, 242 (EAB 1995) (quoting Koch, 1 *Administrative Law and Practice* § 5.20, at 361 (1985)); *see* Charles H. Koch, Jr., 2 *Administrative Law and Practice* § 5.30[3][a] (2d ed. Supp. 2001-2002). This principle classically arises in the context of selective enforcement (i.e., where one entity is prosecuted and others in similar circumstances are not), but it is equally applicable in the penalty context. As the Supreme Court has explained:

> [I]n the shaping of its remedies within the framework of regulatory legislation, an agency is called upon to exercise its specialized, experienced judgment. Thus, the decision as to whether or not an order against one firm to cease and desist [unlawful behavior] should go into effect before others are similarly prohibited depends on a variety of factors peculiarly within the expert understanding of the [federal agency].

Moog Indus. v. Fed'l Trade Comm'n, 355 U.S. 411, 413 (1958). With respect specifically to administrative penalties, the Supreme Court has stated:

> It is a fundamental principle * * * that where Congress has entrusted an administrative agency with the responsibility of selecting the means of achieving the statutory policy "the relation of remedy to policy is peculiarly a matter for administrative competence." * * * Only if the remedy chosen is unwarranted in law or is without justification in fact should a court attempt to intervene in the matter.

Am. Power & Light Co. v. SEC, 329 U.S. 90, 112 (1946) (citation omitted) (quoted in *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 185 (1973)). In *Glover Livestock*, the Supreme Court construed a circuit court's opinion as suggesting that a particular administrative penalty was "unwarranted in law" because "uniformity of sanctions for similar violations" was "somehow mandated by" the Packers and Stockyards Act. The Court stated, "We search in vain for that requirement in the statute." 411 U.S. at 186. In light of the discretion to impose sanctions granted by Congress to executive agencies, the Court held that "[t]he employment of a sanction within the authority of an administrative agency is * * * not rendered invalid in a particular case because it is more severe than sanctions imposed in other cases." *Id*. at 187; *accord Newell Recycling Co. v. U.S. EPA*, 231 F.3d 204, 210 n.5 (5th Cir. 2000) (administrative penalty need not resemble those assessed in similar cases); *Cox v. USDA*, 925 F.2d 1102, 1107 (8th Cir.) (where a sanction is warranted in law and fact, it will not be overturned simply because it is more severe than sanctions imposed in other cases), *cert. denied*, 502 U.S. 860 (1991).

The inappropriateness of comparing settled versus litigated cases has also long been established. EPA administrative case law holds that penalties assessed in litigated cases cannot profitably be compared to penalties assessed via settlements. More than twenty years ago, EPA's Judicial Officer set forth the basis for this holding:

> [Respondent] seeks to compare the penalties assessed by a presiding officer after a hearing with penalties assessed after negotiation [in settlement proceedings] with the enforcement staff. Such comparisons are difficult, if not impossible, to make. Consent decrees necessarily involve some element of compromise, and it is generally recognized that parties to a consent decree sometimes give up something they might have won had the case been fully litigated.

In re Briggs & Stratton Corp., 1 E.A.D. 653, 666 (JO 1981) (citing *United States v. Armour & Co.*, 402 U.S. 673, 681 (1971)[17]); *accord In re Titan Wheel Corp.*, 10 E.A.D. 526, 533 n.14 (EAB 2002) (same), *appeal docketed*, No. 4:02-CV-40352 (S.D. Iowa July 19, 2002); *In re SchoolCraft Constr., Inc.*, 8 E.A.D. 476, 493-94 (EAB 1999) (same); *see also In re Chautauqua Hardware Corp.*, 3 E.A.D. 616, 626-27 (CJO 1991) (holding that information about other EPCRA cases, including settlement agreements, does not have "significant probative value" within the meaning of 40 C.F.R. § 22.19). This is true as to all terms of the settlement, not just the penalty amount.

Juxtaposed against the principle that penalties should be assessed on an individual basis, without considering other similar penalty cases, is EPA's long-established policy favoring consistency and fairness in enforcement. The Agency's general enforcement policy states in this regard that "[f]air and equitable treatment requires that the Agency's penalties must display both consistency and flexibility."[18] EPA General Enforcement Policy #GM-21, *Policy on Civil Penalties* 4 (Feb. 16, 1984). While thus recognizing the value of consistency, the policy states:

> [A]ny system for calculating penalties must have enough flexibility to make adjustments to reflect legitimate differences between similar violations. Otherwise the policy might be viewed as unfair. Again, the result would be to undermine the goals of the Agency to achieve swift and equitable resolutions of environmental problems.

Id. This enunciation of the policy is echoed in the FIFRA ERP, which states that it "is designed to provide fair and equitable treatment of the regulated community by

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[17] The Court in *Armour* stated:

> Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms. The parties waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation. Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation.

Armour, 402 U.S. at 681.

[18] The Administrative Procedure Act ("APA") acts as a further guard against arbitrariness. That statute requires that an agency's choice of sanction be rationally related to the offense committed, i.e., that the chosen sanction not be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. APA § 10(e)(2)(A), 5 U.S.C. § 706(2)(A); *see In re Employers Ins. of Wausau*, 6 E.A.D. 735, 757-59 (EAB 1997).

ensuring that similar enforcement responses and comparable penalty assessments will be made for comparable violations." ERP at 1.

The apparent tension between these two EPA policies — one discouraging the examination of any case other than the one in question, and the other seemingly designed to provide a measure of equity among comparable violations — is resolved when one understands that the penalty policies do not, by aiming for the high ideals of consistency and fairness, necessarily "suggest identical penalties in every case." *Titan Wheel*, 10 E.A.D. at 533 n.14. As we recently explained in another setting, "[v]ariations in the amount of penalties assessed in other cases, even those involving violation of the same statutory provisions or regulations, do not, *without more*, reflect an inconsistency" with the EPA policy advocating fair and equitable penalty assessment. *Id*. (emphasis added). The "more" that would be needed has never been directly addressed by this Board, but the term recognizes that there may be circumstances so compelling as to justify, despite judicial economy concerns and Supreme Court precedent affirming agency penalty discretion, our review of other allegedly similar cases. In the case presently before us, such compelling information is lacking.

Applying the foregoing principles to this case, we conclude that the ALJ erred by comparing the terms of a litigated case to a settled case, BioLab. The ALJ explicitly recognized that "there is substantial authority for the proposition that, because of the myriad factors [that] may lead to or be involved in settlements, amounts by which seemingly similar cases are settled are not relevant to determining a penalty in a particular case." Init. Dec. at 26 (citing cases). However, he chose to ignore this settled law, terming it "anomalous," in view of the EPA policy favoring uniformity of penalties for like violations, to "hold that penalties purportedly determined in accordance with an applicable penalty policy are not relevant to the penalty for a similar violation in the case at bar." *Id*. at 27. He stated further:

> Moreover, the effect of the cited decisions [rejecting pleas to examine other penalty cases] is to preclude a defense that a proposed penalty is arbitrary, because a respondent seeking to make such a showing has little chance of success unless he can compare the proposed penalty with penalties assessed in other cases.

Id. Thus, the ALJ chose to ignore the Agency case law that rejects attempts to compare penalties assessed through settlement activities with those assessed via litigation and relied instead on bits and pieces of information about the BioLab case, such as the placarding and continued sales issues, that were authorized as terms of the BioLab/Region IV consent agreement. *See* R Ex. F (*In re BioLab, Inc.*, Consent Agreement and Consent Order, IF & R No. 04-98F040-C, at 5-21 (Sept. 14, 1998)). In so doing, the ALJ clearly erred. *See, e.g., Titan Wheel*,

10 E.A.D. at 533 n.14; *SchoolCraft*, 8 E.A.D. at 494; *Briggs & Stratton*, 1 E.A.D. at 666.

Compounding this error is the fact that the administrative record contains little or no information on the chemical or physical properties of BioLab's Shock Plus, Shock Plus's toxicity profile relative to that of Shock Quick, or the specific dangers posed by Shock Plus's use. Accordingly, we are unable to draw any informed conclusions regarding how similar or how different Shock Quick and Shock Plus truly are in terms of their effects on human health and the environment or the risks posed by their routine or occasional residential or commercial use, transport, and storage. The fact sheet Chem Lab asked us to judicially notice in this appeal gives us some assurance that the active ingredients in the two products are related and may be similar in certain respects, but that document is not nearly specific or detailed enough to establish sufficient unity between the active ingredients as to justify a finding that the harm posed by Chem Lab's sales of Shock Quick can be accurately gauged by considering the harm posed by BioLab's sales of Shock Plus.[19] *See generally R.E.D. Facts* at 1-5 & attach. A (discussing general characteristics of and labeling requirements for five antimicrobial compounds, including sodium dichloro-s-triazinetrione and trichloro

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[19] In circumstances where two cases involve products with the same active ingredients and which are substantially the same chemically, we might be open to the possibility of using the Agency's actions in one case for the limited purpose of adjusting the gravity of the harm figure selected in the other case. It strikes us as entirely logical and sensible to look to actual experience on the ground, in the form of EPA's treatment of a particular chemical, to estimate the harm or potential for harm posed by that chemical. Such a real-world indication of what EPA thinks about a chemical is likely to be superior in many respects to the hypothesizing encouraged by the ERP guidelines. In the instant case, however, there is too much uncertainty as to the similarity of or difference between the Shock Quick and Shock Plus constituents to allow such use of the BioLab information. For example, during questioning by Region IX counsel at the hearing, Chem Lab's president and CEO, Randall Hitchens, answered the following:

Q. * * * Now you would agree that Bio-Lab's "Shock Plus" is in the — has a chemical ingredient that is or has an active ingredient that is similar to Chem Lab's —

A. Yes.

Q. — "Shock Power"?

A. Yes.

Q. In the sense that they all belong to chlorinated isocyanurates?

A. Chlorinated isocyanurates.

Q. But these two products are not identical?

A. They're not identical.

Q. And it's, again, my understanding that they also have different active ingredients, don't they?

A. They have different active ingredients.

Continued

-s-triazinetrione, in chlorinated isocyanurates family). This very finding, of course, forms the basis for the ALJ's conclusions that Region IX overstated the gravity of the potential harm caused by Shock Quick sales and the gravity of Chem Lab's misconduct. *See* Init. Dec. at 24-26. As such, the ALJ's conclusions are clearly erroneous: the evidence in this administrative record allows us to reach no other finding than that the pesticides at issue here contain different active ingredients.

After closely scrutinizing the ALJ's reasons for declining to apply the FIFRA ERP in this case, we find them inadequate to warrant our deference under the standard previously discussed. *Cf. Carroll Oil Co.*, 10 E.A.D. 635 (EAB 2002); *In re M.A. Bruder & Sons, Inc.*, 10 E.A.D. 600 (EAB 2002). The ALJ's laudable interest in consistency is, in our view, better served by utilization of the ERP than by comparison of adjudicated outcomes with prior settlements. Accordingly, for the reasons set forth above justifying the principle of case-by-case penalty determinations (including the fact that we lack many salient details of the BioLab case), and because the BioLab settlement undoubtedly reflects compromises about which we know nothing, we find the ALJ's choice in this regard to be clearly erroneous.[20] We therefore vacate his penalty determination.

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Q. And it's also my understanding that the active ingredient of "Shock Plus" is sodium Dichloro-Triazinetr[i]one whereas the active ingredient for "Shock Quick" is Trichloro-S-Triazinetr[i]one.

A. If you look at the ingredient statement, you'll find that "Shock Plus" is 60 percent sodium — Bio-Lab's is 60 percent sodium Dichloro; ours is 40 percent Trichloro. Chlorine-wise they are identical. They both — they both release 36 percent available chlorine.

Q. But there are different active ingredients?

A. They're the same family but different — I mean same family isocyanurates but different in dissolving characteristics.

Tr. at 88-89.

[20] One of the statutory penalty factors, the "appropriateness of the penalty to the size of the business of the person charged," FIFRA § 14(a)(4), 7 U.S.C. § 136*l*(a)(4), is cited by the ALJ as a basis upon which to conclude that case-to-case comparisons of penalty assessments are legitimate. *See* Init. Dec. at 27. In advancing this rationale for his holding, the ALJ cites neither legislative history nor federal or administrative case law to support his position. He simply asserts the following:

> It should also be noted that, while the ERP purports to consider the criterion in FIFRA § 14(a)(4) "appropriateness of the penalty to the size of the person charged" by placing all firms with gross revenues of over $ one million in Category I, a strong argument can be made that the quoted language contemplates comparing the penalty assessed against a firm of one size with the penalty for a similar violation assessed against firms of the same or a different size.

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B. *Penalty Calculation*

In the interest of expediting the resolution of this case, we will now proceed to determine the appropriate penalty for Chem Lab's twenty-four violations rather than remand the case to the ALJ for establishment of the penalty. We choose to use the FIFRA ERP guidelines to derive such a penalty. The Board, of course, "is not bound by, nor expressly required to consider, the guidelines, which are designed primarily to guide [r]egional enforcement personnel in determining the appropriate enforcement response and penalties for violations of FIFRA." *In re Johnson Pac., Inc.*, 5 E.A.D. 696, 702 n.11 (EAB 1995); *see* 40 C.F.R. § 22.27(b). However, because Agency penalty guidelines "'reasonably implement[] the statutory criteria, with a range of penalties to reflect differing circumstances,'" *In re DIC Americas, Inc.*, 6 E.A.D. 184, 189 (EAB 1995) (quoting *In re Genicom Corp.*, 4 E.A.D. 426, 431 (EAB 1992)), "the guidelines provide a useful frame of reference for the Board's exercise of its discretion, and therefore the guidelines are in fact considered by the Board in formulating its own penalty assessment when the Board differs with the [ALJ's] penalty assessment." *Johnson Pac.*, 5 E.A.D. at 702 n.11.

With respect to the gravity of the violation, EPA Region IX conducted a careful penalty analysis in accordance with the ERP, as briefly summarized in Part I.C above and set forth more fully in the hearing transcript and exhibits. *See* Tr. at 17-41; C Exs. 16-17. Chem Lab has not challenged the gravity level or size of business ERP factors that produce, from the penalty matrix, a base penalty equivalent to the maximum statutory figure of $5,500. Nor has Chem Lab challenged the Region's analysis of "other factors," such as its ability to continue in business/ability to pay the proposed penalty or the issue of voluntary disclosure. Chem Lab instead focused its defense on Region IX's treatment of the gravity adjustment factors set forth in the ERP, targeting in particular the Region's analysis of the gravity of the harm to human health and the gravity of the misconduct. As discussed above, Chem Lab's argument as to the harm to human health founders because it is based solely on an invalid and incomplete attempt to draw parallels between a settled case and this litigated one. Further, we disagree with Chem Lab's assertion that there is sufficient evidence in the record to establish that

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Id. As the ALJ finds, this statutory factor is indeed represented in the ERP in the penalty matrix as the size of the business factor. However, all penalty factors must be considered together in ultimately arriving at an appropriate penalty. *See In re Employers Ins. of Wausau*, 6 E.A.D. 735, 756 (EAB 1997); *In re New Waterbury, Ltd.*, 5 E.A.D. 529, 538 (EAB 1994). We do not understand, in light of the three reasons set forth above justifying the principle of case-by-case penalty determinations, what the "strong argument" in favor of penalty comparisons based on this single factor might be. We have already held on the basis of the fact that the BioLab case was settled rather than litigated, combined with the three reasons explained above, that the ALJ clearly erred in engaging in such a comparison. We find no reason to alter that finding here.

Shock Quick and Shock Plus contained the same active ingredients and were otherwise substantially the same chemically. Thus, we believe the Region, for the reasons set forth earlier, appropriately assigned a numeric figure of "3" for the harm to human health gravity adjustment factor.

With respect to the gravity of Chem Lab's misconduct (i.e., culpability), the ALJ concluded that:

> [A]lthough Chem Lab was aware of facts indicating that EPA considered Bio[]Lab's similar products to be pesticides requiring registration, the fact, among others, that even after issuance of the "Stop Sale," Bio[]Lab was permitted by the [Temporary Restraining Order ("TRO")] to continue the sale of its products, supports Chem Lab's contention that it had a good faith belief that "Shock Quick" did not require registration.

Init. Dec. at 23. This reliance on a procedural order seems to us an attempt to prove too much. Aside from the fact that the TRO was issued as part of the BioLab, rather than the Chem Lab, case, the order was not a final determination on the merits, and Chem Lab's reliance on it, in the face of contrary advice from the Region, was at its own peril. Further, we note that Chem Lab's decision to sell Shock Quick predated the TRO, with sales occurring as early as October 1997, while the TRO was not issued until May 1998.

It is important, in analyzing the appropriateness of a penalty for Chem Lab's unlawful behavior, not to lose sight of the fact that Chem Lab and BioLab do not comprise the entire universe of swimming pool chemical manufacturers/distributors. There may well exist one or more competitors of Chem Lab and BioLab who fully complied with the laws governing pesticide registration in introducing new swimming pool chemicals to the marketplace. These law-abiding entities should not, under any circumstances, find themselves at a competitive disadvantage because they followed the law. We should not lose sight of the need to assure that complying companies are not disadvantaged by their compliance, and this requires more than a comparison of the respective egregiousness of violators.

At bottom, Chem Lab is responsible for complying with all federal, state, and local laws applicable to its business. In this case, the company claimed to have been unsure whether its Shock Quick product required FIFRA registration, and, as a consequence, it 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 for its swimming pool chemical line. *See* Tr. at 73-77. Notably, however, until May 8, 1998, Chem Lab never asked EPA Region IX for its opinion regarding Shock Quick's status, despite its frequent questioning of EPA Region IV (which began in late 1996 and stretched into mid-1998) pertaining to

BioLab's Shock Plus product. Moreover, Chem Lab then ignored the warning it received from Region IX not to continue sales of Shock Quick until the product was registered. These facts, combined with the fact that Chem Lab is not an unsophisticated or new pesticide manufacturer/distributor (it has registered fifty-four pesticides with EPA over the years, and its president and CEO had more than two decades of prior experience with BioLab), lead us to conclude that Chem Lab placed more emphasis on protecting its business position than on complying with FIFRA. The Act is intended to protect the public and the environment from the unregulated manufacture and distribution of potentially dangerous chemicals, however inconvenient Chem Lab may have found it.

The penalty proposed by the Region here is warranted in law and justified in fact, and we therefore assess it — $132,000 — against Chem Lab for selling and distributing the unregistered pesticide Shock Quick in June through September 1998.

III. *CONCLUSION*

For the foregoing reasons, a civil penalty of $132,000 is assessed against Chem Lab for violating FIFRA by selling and distributing the unregistered pesticide Shock Quick in June through September 1998. Payment of the entire amount of the civil penalty shall be made within thirty (30) days of service of this final order (unless otherwise agreed to by the parties), by cashier's check or certified check payable to the Treasurer, United States of America, and forwarded to:

U.S. Environmental Protection Agency, Region IX
Regional Hearing Clerk
Post Office Box 360863M
Pittsburgh, Pennsylvania 15251.

So ordered.