IN RE RHEE BROS., INC.

FIFRA Appeal No. 06-02

FINAL DECISION AND ORDER

Decided May 17, 2007

Syllabus

Region 3 ("Region") of the United States Environmental Protection Agency ("EPA") has appealed an Initial Decision issued on September 19, 2006, by Chief Administrative Law Judge Susan L. Biro ("ALJ"). The Region brought this action based on allegations that Rhee Bros., Inc. ("Rhee") distributed and sold an unregistered pesticide in violation of FIFRA section 12(a)(1)(A), 7 U.S.C. § 136j(a)(1)(A). Specifically, the Region alleged that from January 2000 through July 2003, Rhee made 467 distributions or sales of three types of an unregistered pesticide product referred to as "JOMYAK (naphthalene), OXY" (hereinafter "JOMYAK"). JOMYAK is the Korean word for "mothballs." For purposes of determining liability, the Region relied on the total number of distributions and sales of JOMYAK within the five years preceding the filing of the complaint (467). However, for purposes of assessing an appropriate penalty, the Region relied on the number of JOMYAK transactions, regardless of the number of products included in a particular sale or distribution (264). The Region proposed a civil administrative penalty of $1,306,800, which it derived using EPA's *Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)* (July 2, 1990) ("ERP").

In the above-referenced Initial Decision, the ALJ found the Region's proposed penalty of $1,306,800 to be excessive under the circumstances of this case and, instead, assessed a penalty of $235,290. The most significant reduction of the Region's proposed amount resulted from the ALJ's conclusion that simple multiplication of the number of distributions by the penalty per violation calculated under the ERP yields a penalty that does not reflect the totality of the circumstances of this case. Although the ALJ agreed with the Region's determination to assess a penalty for each of Rhee's 264 combined distributions of JOMYAK, the ALJ determined that the more appropriate method of calculating the penalty would be to assess the full amount of the penalty for the first violation and add a significantly lesser amount for each of the subsequent 263 shipments of pesticide products sold. The ALJ assessed a penalty of $3,850 for the first distribution and an additional $880 for each of the subsequent 263 distributions for a total penalty amount of $235,290. The Region's appeal followed.

Concurrent with the filing of its appeal, the Region filed a joint stipulation with the Board reflecting an agreement between Rhee and the Region to accept the penalty amount assessed in the Initial Decision. In light of this stipulation, the Region states in its appeal that it does not seek to have the Board remand this matter for assessment of a different penalty amount or to have the Board assess an alternative penalty pursuant to its *de novo* authority under 40 C.F.R. § 22.30(f). Rather, the Region asserts that certain portions of the

ALJ's penalty analysis are erroneous and requests that the Board vacate those portions of the Initial Decision while leaving the penalty amount undisturbed.

Held: The Board affirms the amount of the penalty assessed by the ALJ ($235,290). However, the Board declines to parse the language of the Initial Decision in this case. Although the Board is troubled by some aspects of the ALJ's penalty analysis, the Board declines to vacate the ALJ's analysis where, as here, the parties have agreed on the outcome, where the ALJ prepared an alternative analysis under the ERP that produces essentially the same result that neither party has appealed, and where the ALJ's determination will have a limited effect on future cases.

Before Environmental Appeals Judges Scott C. Fulton, Kathie A. Stein, and Anna L. Wolgast.

Opinion of the Board by Judge Wolgast:

I. *INTRODUCTION*

Region 3 ("Region") of the United States Environmental Protection Agency ("EPA" or "Agency") has appealed an Initial Decision issued on September 19, 2006, by Chief Administrative Law Judge Susan L. Biro (the "ALJ"). *See* Initial Decision;[1] Appeal from Initial Decision of Chief Administrative Law Judge Susan L. Biro Issued September 19, 2006 (Nov. 20, 2006) ("Appeal"). The Region's appeal arises out of an administrative enforcement action initiated by the Region against Rhee Bros., Inc. ("Rhee") for alleged violations of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. §§ 136-136y. The Region charged Rhee with the distribution and sale of an unregistered pesticide in violation of FIFRA section 12(a)(1)(A), 7 U.S.C. § 136j(a)(1)(A), and associated regulations codified at 40 C.F.R. §§ 150-189. Specifically, the Region alleged that from January 2000 through July 2003, Rhee made 469 distributions or sales[2] of three types of an unregistered pesticide product referred to as "JOMYAK (naphthalene), OXY" (hereinafter "JOMYAK").[3] For these violations, the Region sought a penalty of $1,306,800. On September 27, 2005, the ALJ issued an order granting the Region's motion for accelerated Decision as to Rhee's liability. *See* Order Granting Motion for Accelerated Decision and Rescheduling Hearing (Sept. 27, 2005). Thereafter, on December 6-7, 2005, the ALJ held a hearing to determine an appropriate penalty amount. In the above-referenced Initial Decision, the ALJ assessed a total penalty of $235,290. The Region's Appeal followed.

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[1] The Initial Decision will be cited as "Init. Dec." followed by the applicable page number.

[2] The Region later reduced the number of alleged violations by two, from 469 to 467.

[3] JOMYAK is the common word in Korean for "mothballs." Init. Dec. at 4. The three types of JOMYAK all consist of the same chemical product and differ only in their size, shape, or packaging. *Id*. Some of the product was in the form of bars while others were in a smaller tablet form. *Id*. at 4-5.

Concurrent with the filing of its Appeal, the Region filed a joint stipulation with the Board reflecting an agreement between Rhee and the Region to accept the penalty amount assessed in the Initial Decision. *See* Joint Stipulation of Penalty Amount (Nov. 20, 2006) ("Stipulation"). The Stipulation states, in part, that "the parties, without reservation, hereby agree and stipulate to, and request approval of, a total penalty of $235,290 which [Rhee] has agreed to pay within 30 days after the Environmental Appeals Board files a Final Order in this matter." Stipulation at 1. In light of this stipulation, the Region states in its Appeal that it "does not seek to have the Board remand this matter for assessment of a different penalty amount, nor does [the Region] seek to have the Board assess an alternative penalty pursuant to its *de novo* authority under 40 C.F.R. § 22.30(f)." Appeal at 2. Rather, the Region asserts that certain portions of the ALJ's penalty analysis are erroneous and requests that the Board vacate those portions of the Initial Decision while leaving the penalty amount undisturbed.

On November 22, 2006, the Board issued an Order Setting Briefing Schedule, specifying a date for any response brief filed by Rhee. In that order, the Board stated that it would take the parties' stipulation under advisement, but would not be bound by it. Thereafter, on December 15, 2006, Rhee filed its response to the Region's Appeal.[4] *See* Brief of Appellee Rhee Bros., Inc. (Dec. 15, 2006). For the reasons stated below, we affirm the ALJ's assessment of a $235,290 civil penalty.

II. *BACKGROUND*

A. *Statutory Background*

FIFRA is a federal statute regulating the manufacture, sale, distribution, and use of pesticides in the United States by means of a national registration system. Pursuant to FIFRA sections 3 and 12, no pesticide may be lawfully sold or distributed unless it is registered with EPA.[5] FIFRA §§ 3(a), 12(a)(1)(A), 7 U.S.C. §§ 136a(a), 136j(a)(1)(A). FIFRA provides purchasers of pesticides with assurances of the safety of registered products.[6] *In re Sav-Mart, Inc.*, 5 E.A.D. 732, 738

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[4] Rhee has not appealed the ALJ's liability determination and has not filed a cross appeal. Thus, the only issue before this Board is the ALJ's penalty determination.

[5] The statutory procedure for registering a pesticide requires filing a statement with EPA containing information such as the pesticide's name and chemical formulation, a copy of the proposed label, any pesticidal claims to be made, and a description of the toxicity. *See* FIFRA § 3(c), 7 U.S.C. § 136a(c).

[6] "Pesticides" 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). The term "pest" includes "any insect, rodent, nematode, fungus, [or] weed." FIFRA § 2(t), 7 U.S.C.

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n. 13 (EAB 1995) (citing *Thornton v. Fondren Green Apartments*, 788 F. Supp. 928, 932 (S.D. Tex. 1992)). It is undisputed that the pesticide product at issue in this matter, JOMYAK, was not registered with EPA.

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 issued a FIFRA Enforcement Response Policy 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) ("ERP"). 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 at 21-22 & apps. A-B. 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. Finally, the Board's case law clarifies that equity and fairness, though not specifically mentioned in the main calculations of the ERP, may also be considered in making a penalty determination under FIFRA. *See In re FRM Chem, Inc.*, 12 E.A.D. 739, 748 (EAB 2006); *In re Johnson Pac., Inc.*, 5 E.A.D. 696, 704 (EAB 1995).

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§ 136(t). "Pesticide product" means "a pesticide in the particular form * * * in which the pesticide is, or is intended to be, distributed or sold." 40 C.F.R. § 152.3.

[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) (codified at 31 U.S.C. § 3701). *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.

B. *Factual and Procedural Background*

Rhee, a Maryland corporation headquartered in Columbia, Maryland, owns and operates an Asian grocery wholesale, retail, and distribution business. Init. Dec. at 3. Rhee imports products from a Korean exporter and distributes these products primarily to Korean-owned grocery stores located in 20 states across the country. *Id*. at 3-4. Among the products Rhee imported and distributed from January 2000 through July 2003 was JOMYAK. *Id.* at 4. In April of 2003, the New Jersey Department of Environmental Protection ("NJDEP") conducted an inspection of one of Rhee's customers, the Han Mi Supermarket, and discovered that it was selling JOMYAK.[8] *Id*. Thereafter, on August 27, 2003, NJDEP referred the matter to EPA Region 2, which, upon learning that Rhee was headquartered in Maryland, referred the matter to Region 3. *Id*. at 6. Following an investigation, the Region determined that JOMYAK was a pesticide requiring registration, the pesticide had not been registered with EPA, and that Rhee had imported 600 cartons of JOMYAK products, each containing 20 individual packages, between 1999 and 2003, and sold or distributed 467 cartons of the product between January 2000 and July 2003. Init. Dec. at 6-9. Thereafter, on January 25, 2005, the Region filed its administrative complaint in this matter seeking a penalty in excess of 1.3 million dollars based upon Rhee's 264 combined distributions of JOMYAK.[9] *Id*. at 9-10.

As stated above, the Agency has published the FIFRA ERP to guide its analyses of the three statutory penalty factors to determine an appropriate civil penalty in individual cases and "to provide fair and equitable treatment of the regulated community by ensuring that similar enforcement responses and comparable penalty assessments will be made for comparable violations." ERP at 1. The Region utilized the ERP in calculating its proposed penalty amount.

C. *The Initial Decision*

As stated above, on September 19, 2006, the ALJ, having previously found Rhee liable for the violations alleged in the complaint, issued an initial decision assessing a penalty of $235,290.[10] In so doing, the ALJ departed from the ERP in

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[8] FIFRA contemplates EPA cooperation with various other Federal, State, and local agencies in its pesticide monitoring and inspection activities under FIFRA. *See* FIFRA §§ 9(a), 22(b), 7 U.S.C. §§ 136g(a), 136t(b).

[9] For purposes of liability, the Region relied on the total number of distributions and sales of JOMYAK within the five years preceding the filing of the complaint (467). For purposes of assessing an appropriate penalty, however, the Region relied on the number of JOMYAK transactions (264), regardless of the number of products included in a sale or distribution, involving a particular customer on a particular day. *See* Appeal at 4 n.4.

[10] Hereinafter, we refer to this penalty amount as the "assessed penalty amount."

order to calculate what she determined to be a more appropriate penalty under the circumstances of this case. The ALJ explained her departure, in part, as follows:

> Upon consideration of the three statutory factors, the parties' arguments and the evidence, I am not persuaded that [the Region] has shown that a penalty of $1,306,800 is appropriate in this case * * * . While I am normally inclined to follow the framework of a penalty policy for penalty assessments, in my opinion this case presents sufficient compelling reasons to depart from such routine. In particular, I am struck by the magnitude of the proposed penalty here in relation to the totality of the circumstances in this case. While certainly a penalty of the magnitude proposed here might be warranted under certain circumstances in a FIFRA case, I do not deem it warranted in this case * * * .

Init. Dec. at 37. The ALJ thus found that compelling reasons existed to justify a departure from the Region's penalty calculation under the ERP and to reduce the penalty substantially.

The most significant reduction of the Region's proposed amount resulted from the ALJ's conclusion that "simple multiplication of the penalty calculated under the ERP for one violation by the number of distributions yields a penalty which does not reflect the total circumstances of this case." *Id.* at 47. While the ALJ agreed with the Region's determination to assess a penalty for each of Rhee's 264 combined distributions of JOMYAK, the ALJ determined that the more appropriate method of calculating the penalty would be to assess the full amount of the penalty ($3,850) for the first violation "which represents [Rhee's] initial failure to register the products before selling them, and add a significantly lesser amount for each of the subsequent 263 shipments of pesticide product sold, representing each of [Rhee's] subsequent failures to ensure the products were registered before distributing them." *Id*. at 48. According to the ALJ, the subsequent 263 distributions were "of a lesser degree of nonfeasance or misfeasance than the original act, and [do] not represent 263 separate significant acts of active malfeasance each warranting a multiple of the same substantial monetary penalty." *Id*. at 49. In reaching this conclusion, the ALJ purportedly borrowed from the approach used in assessing multi-day administrative penalties under the Resource Conservation and Recovery Act ("RCRA"). Using this approach, the ALJ determined that the maximum "multi-day" penalty for the violations in this matter should be $1,100. *Id*. The ALJ then reduced this amount by 20% (or $880), citing, among other things:

> [Rhee's] level of culpability, its cooperation, its lack of prior violations, the lack of significant economic benefit

> from the violations, and the size of the business, including the fact that it is not in the pesticide business generally, its financial status and net profits, and that the offending product represented a minuscule portion of its sales[.]

Id. Thus, the ALJ assessed a penalty of $3,850 for the first distribution and an additional $880 for each of the subsequent 263 distributions for a total penalty amount of $235,290.[11]

D. *Appeal*

As stated above, the Region does not challenge either the ALJ's assessed penalty amount, or the ALJ's ERP calculation. Indeed, the Region has stipulated to the assessed penalty amount and has expressly acknowledged that the ALJ has the authority to reduce the amount of a proposed penalty. Rather, the Region objects to the ALJ's rationale for departing from the ERP and her methodology in reaching the assessed penalty amount, and requests that the Board issue a published decision vacating certain allegedly erroneous portions of the Initial Decision.

The Region argues that, in reducing the Region's proposed penalty of $1,306,800 to $235,290, the ALJ committed clear error and an abuse of discretion. According to the Region, the ALJ departed from the ERP without a persuasive or convincing rationale. In addition, the Region asserts that the ALJ committed clear error or an abuse of discretion in her factual findings and legal conclusions related to Rhee's ability to continue in business, and in her methodology for calculating the assessed penalty amount. *See* Appeal at 1-2.

E. *Rhee's Response*

As stated above, on December 15, 2006, Rhee filed a response to the Region's Appeal. *See* Brief of Appellee Rhee Bros., Inc. (Dec. 15, 2006). Rhee asserts that the Initial Decision was based on the totality of the circumstances and that the Region "cannot simply dissect the Initial Decision, pull out rationales with which it disagrees, and ask for those to be stricken." *Id*. at 4. Rhee asserts that each of the Region's "piecemeal" arguments as to why the ALJ's determination to depart from the ERP in calculating her assessed penalty amount are flawed and unpersuasive, and that the Region's arguments "ignore[] the ALJ's findings, sup-

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[11] The Initial Decision also includes what the ALJ refers to as "an alternative calculation under the general methodology of the ERP." Init. Dec. at 50 (hereinafter "ERP Calculation"). Apparently, the ALJ included this calculation in the event that the Board disagreed with her decision to depart from the ERP. In this ERP Calculation, the ALJ purports to apply the ERP, albeit in a manner different from the Region, resulting in a penalty of $217,800, "which is very close to the $235,290 assessed herein." *Id*. The Region's Appeal does not challenge the ALJ's ERP calculation.

ported by 50 pages of rationale, regarding the unfairness and inequity of strictly applying the ERP."[12] *Id.* at 6.

III. *DISCUSSION*

The Agency's Consolidated Rules of Practice govern the assessment of administrative penalties under FIFRA. *See* 40 C.F.R. § 22.1(a)(1). Under these rules, in assessing an administrative penalty the ALJ is required to consider any civil penalty guidelines and "explain in detail in the initial decision how the penalty to be assessed corresponds to any penalty criteria set forth in the Act." 40 C.F.R. § 22.27(b). Once a penalty policy, such as the FIFRA ERP, has been seriously considered, however, the ALJ is not bound to follow it. *See In re Chem Lab Prods., Inc.*, 10 E.A.D. 711, 725 (EAB 2002). Rather, an ALJ is free to disregard a penalty policy if the reasons for doing so are set forth in the initial decision. *See* 40 C.F.R. 22.27(b) ("If the Presiding Officer decides to assess a penalty different in amount from the penalty proposed by complainant, the Presiding Officer shall set forth in the initial decision the specific reasons for the increase or decrease."). This freedom to depart from the framework of a penalty policy preserves the ALJ's discretion to handle individual cases fairly where circumstances indicate that the penalty recommended by the penalty policy is not appropriate. *In re FRM Chem, Inc.*, 12 E.A.D. 739, 753 (EAB 2006).

In cases where an ALJ's penalty assessment "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." *Chem Lab Prods.*, 10 E.A.D. at 725 (quoting *In re Ray Birnbaum Scrap Yard*, 5 E.A.D. 120, 124 (EAB 1994)). However, where, as here, an ALJ has decided to forgo application of the relevant penalty policy, the Board will closely scrutinize the ALJ's penalty analysis to determine whether the ALJ's reasons for choosing not to apply the

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[12] Regarding the ALJ's ERP Calculation (*see supra* n. 11), Rhee states:

> [T]he Chief ALJ's Initial Decision contains two calculation methodologies, one deviating from the ERP and resulting in the imposed penalty assessment of $235,290, and one using the ERP framework which results in a penalty calculation of $217,800. In appealing the Chief ALJ's rationale for deviating from the ERP, the EPA completely ignores the significance of – and does not appeal – the ERP calculation resulting in a penalty of $217,800. Even if EPA persuades the Board to vacate certain portions of the Initial Decision and the Board determines that, as a result, there is insufficient rationale to support the [assessed penalty amount], there is no reason to overturn the Initial Decision's ERP Calculation.

Brief of Appellee Rhee Bros., Inc. at 2-3 (footnotes omitted).

policy in a particular case are persuasive and convincing. *FRM Chem*, 12 E.A.D. at 739, 753; *In re Morton L. Friedman & Schmitt Constr. Co.*, 11 E.A.D. 302, 341 (EAB 2004), *aff'd* No. 2:04-CV-00517-WBS-DAD (E.D. Cal. Feb. 25, 2005); *In re CDT Landfill Corp.*, 11 E.A.D. 88, 117-118 (EAB 2003); *In re Capozzi*, 11 E.A.D. 10, 32 (EAB 2003). Where the ALJ's analysis is neither persuasive nor convincing, the Board will not afford the ALJ's penalty analysis deference. *FRM Chem*, 12 E.A.D. at 753; *Capozzi*, 11 E.A.D. at 32. In such cases, the Board may, consistent with its *de novo* review authority, fashion its own penalty, which may be either higher or lower than the amount recommended in the initial decision or the amount sought in the complaint. *See* 40 C.F.R. § 22.30(f); *In re Microban Prods. Co.*, 11 E.A.D. 425, 451 (EAB 2004) (citing 40 C.F.R. § 22.30(f)).

Having said this, it is important to recognize that the posture of the case before us is unusual in that neither the Region nor Rhee disputes the outcome of the ALJ's penalty determination. That is, neither party contests the assessed penalty amount. As previously stated, the Region requests only that the Board vacate certain portions of the Initial Decision, presumably so that the disputed aspects of the ALJ's rationale are not replicated in a future penalty case. In support of such an outcome, the Region cites to an unpublished Board order indicating that the authority to review an Initial Decision may, in certain cases, be exercised to vacate the rationale of that decision without vacating the result in order "to assure that [the initial decision] does not establish an erroneous precedent." Appeal at 10 (citing *In re Hall Signs, Inc.*, EPCRA Appeal No. 97-6, at 7-8 (EAB Dec. 16, 1998) (unpublished Final Order) (quoting *In re Martin Electronics, Inc.*, 2 E.A.D. 381, 385 (CJO 1987))). However, the Board has also stated that where, as here, neither party has appealed the amount of a penalty, the Board is hesitant to be drawn into disputes concerning the language or analysis contained in an ALJ's penalty assessment. *In re Burlington Northern R.R.*, 5 E.A.D. 106, 108-109 (EAB 1994) (stating that "the Board does not want to be drawn routinely into parsing the language of an initial decision assessing a penalty when neither party has appealed the amount of the penalty assessment."). As we suggested in *Burlington Northern*, the posture of such an appeal does not necessarily lend itself to the full and balanced briefing of the issues. *See id.* at 110. A party with little or no monetary stake in the outcome of an appeal may have only a limited incentive to fully research and address the issues involved. *Id*. Absent a compelling justification, the Board generally will not engage in reviewing the ALJ's penalty rationale in such circumstances. *See In re Cavenham Forest Indus., Inc.*, 5 E.A.D. 722, 731 n.15 (EAB 1995) (noting that if the Board had properly been requested to provide an advisory opinion, the Board would decline to do so); *In re Simpson Paper Co.*, 4 E.A.D. 766, 771 n.10 (EAB 1993) (declining to provide advisory opinion).

Upon review of the matter before us, we find nothing erroneous in the ALJ's determination that the Region's application of the ERP in this case results

in an excessive penalty amount given the facts of this case.[13] For the most part, the ALJ's determination is based on fact-specific determinations that find support in the administrative record and that have limited precedential value in subsequent penalty cases.[14] This conclusion, coupled with the fact that there is no dispute at this juncture over the *amount* of the penalty, leaves us disinclined to engage in parsing the Initial Decision. *See CDT Landfill*, 11 E.A.D. at 120 (holding that ALJ's alternative penalty analysis was not clear error or an abuse of discretion). While we are troubled by portions of the ALJ's rationale in arriving at her assessed penalty amount,[15, 16] because the parties are not in dispute as to the out-

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[13] *See In re James C. Lin & Lin Cubing, Inc.*, 5 E.A.D. 595, 602 (EAB 1994) (holding that assessed penalties were "excessive" even though they were assessed in accordance with the FIFRA penalty policy).

[14] As the Board has previously stated, penalty assessments are fact and circumstance dependant and must be made on a case-by-case basis. *See In re John A. Capozzi*, 11 E.A.D. 10, 28 (EAB 2003); *see also In re Newell Recycling Co., Inc.*, 8 E.A.D. 598, 642 (EAB 1999) (penalty assessment in one case cannot determine the fate of another case), *aff'd*, 231 F.3d 204 (5th Cir. 2000). Moreover, an ALJ's initial decision in a particular matter does not establish binding precedent for future cases.

[15] In determining that the Region's proposed penalty was excessive under the circumstances of this case, the ALJ relied, in part, on testimony indicating that the Region's proposed penalty would cause Rhee economic hardship. In particular, Rhee presented testimony claiming that, because Rhee's net profit margin before taxes amounted to only one to two percent of sales, a $1.3 million penalty would require that Rhee reduce expenses by "cutting salaries, incurring layoffs and 'rearranging' medical benefits." Init. Dec. at 31-32 (citing Hearing Transcript at 337). We are troubled by the ALJ's reliance on this testimony as part of her rationale for a reduction in the proposed penalty when Rhee did not allege that it was unable to pay the penalty and did not offer any financial statements, tax returns, or other financial records to support such a claim. However, because the ALJ's conclusions on this issue were based on fact-specific considerations, including considerations of fairness and equity, which had sufficient support in the administrative record, and because the parties were in agreement regarding a reduced penalty amount, we decline to address the Region's objection in the context of this appeal. *See In re FRM Chem, Inc.*, 12 E.A.D. 739, 748 (EAB 2006) (stating that equity and fairness are appropriate considerations in FIFRA penalty determinations).

[16] As stated above, the most significant reduction of the Region's proposed penalty amount resulted from the ALJ's conclusion that all of Rhee's violations after the first were "of a lesser degree of nonfeasance or misfeasance than the original act" and her assessment of a lower penalty for all subsequent violations. *See* Init. Dec. at 49. In so doing, the ALJ borrowed from the RCRA Civil Penalty Policy's discussion on the assessment of penalties for multi-day violations. *See* RCRA Enforcement Division, Office of Regulatory Enforcement, U.S. EPA, *RCRA Civil Penalty Policy* (June 2003) ("RCRA Penalty Policy"). Under the RCRA Penalty Policy, in assessing an appropriate penalty amount, the Agency first calculates a gravity-based penalty for the violation utilizing a penalty assessment matrix, and then, if appropriate, adds an additional amount to that gravity-based penalty to account for the duration of the violation, i.e., where a single violation continues over an extended period of time. *See* RCRA Penalty Policy at 1-2, 25-26. The additional amount is calculated using a separate multi-day penalty matrix. *Id*. at 25-26. In this way, the Agency may consider the duration of a violation as a factor in determining an appropriate total penalty amount. The RCRA penalty policy also provides the Agency with discretion to treat repeated violations of the same statutory provision as if they were multi-day violations "if to do so would produce a more equitable penalty calculation." RCRA Penalty Policy at 22-23. The ALJ relied on this provision in assessing a reduced penalty for

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come of this matter, and because the ALJ has articulated an alternative penalty calculation, which produces essentially the same result and which the Region has not challenged on appeal, *see supra* note 11, we decline to vacate the ALJ's rationale in the context of this appeal.

IV. *CONCLUSION*

For the reasons stated above, the penalty amount assessed in the Initial Decision ($235,290) is affirmed. In reaching this conclusion, we rely on the fact that the parties have agreed that this amount is appropriate under the facts of this case. Further, upon review of the record, we find nothing erroneous in the ALJ's determination that the penalty amount proposed by the Region ($1,306,800) was excessive. Our conclusion in this regard should not be interpreted as affirming the ALJ's rationale for departing from the ERP or her method for calculating the assessed penalty amount. We hold only that the record in this matter supports a reduction in the penalty proposed by the Region.

Rhee shall pay the entire amount of the civil penalty ($235,290) within thirty (30) days of service of this Final Decision and Order, by cashier's check or certified check payable to the Treasurer, United States of America, and forwarded to:

U.S. EPA, Region 3
Regional Hearing Clerk
P.O. Box 360582M
Pittsburgh, PA 15251

So ordered.

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violations 2 through 263. *See* Init. Dec. at 49. We are troubled by the ALJ's methodology for discounting subsequent violations. Even assuming that the concept articulated in the RCRA penalty policy has relevance in the FIFRA context, we question whether that concept would sanction the approach taken by the ALJ here – discounting all similar, subsequent violations vis-a`-vis the original violation. Further, we see nothing in FIFRA or the ERP that would countenance the ALJ's approach. We note that, while we question what the ALJ took away from the RCRA Penalty Policy, we don't fault her consulting it, particularly since the FIFRA ERP provides no guidance as to how to treat circumstances where the penalty calculated under the ERP is disproportionately high.