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

In that Matter of:

Rhee Bros., Inc., Docket No. FIFRA-03-2005-0028

Appeal No. FIFRA 06-02

Appeal from Initial Decision of Chief Administrative Law Judge Susan L. Biro

Issued, September 19, 2006

BRIEF OF THE COMPLAINANT-APPELLANT

U.S. ENVIRONMENTAL PROTECTION AGENCY, REGION III

November 20, 2006

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTORY AUTHORITIES

ADMINISTRATIVE CASES

REGULATORY AUTHORITIES

U.S. EPA POLICIES AND GUIDANCE

I. Introduction

Complainant-Appellant, the Director of the Waste and Chemicals Management Division, U.S. Environmental Protection Agency, Region III ("Complainant" or "Region"), files this brief in support of the Notice of Appeal filed on October 12, 2006, pursuant to Section 22.30(a) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Consolidated Rules of Practice"), 40 C.F.R. § 22.30(a), and the Order Granting Region III's Motion For Extension of Time to File Appeal Brief, issued on October 18, 2006, by the Environmental Appeals Board ("Board" or "EAB"). Complainant is seeking review of the Initial Decision issued by Chief Administrative Law Judge ("ALJ") Susan L. Biro, dated September 19, 2006, in In re Rhee Bros., Inc., Docket No. FIFRA-03-2005-0028. Complainant respectfully requests that the Board vacate, in a published order, certain portions of the ALJ's Initial Decision.

II. Summary of the Issues Presented for Review and Relief Sought

As noted in Complainant's Motion For Extension of Time, this appeal concerns the ALJ's flawed penalty analysis. Complainant asserts that the ALJ erred in her penalty analysis and respectfully asks the Board to vacate the erroneous portions of her Initial Decision as described more fully below. In particular, Complainant argues that the ALJ committed clear error or an abuse of discretion in completely departing from EPA's July 2, 1990 Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") (hereinafter, "Penalty Policy" or "FIFRA ERP") without a persuasive or convincing rationale. Because the ALJ committed clear error and/or an abuse of discretion in departing from the Penalty Policy, Complainant respectfully requests the Board to vacate this portion of her Initial Decision. Additionally, the ALJ committed clear error or an abuse of discretion in her factual findings and

conclusions of law related to Respondent's ability to continue in business. Accordingly, Complainant also respectfully requests the Board to vacate those portions of the Initial Decision. Finally, Complainant submits that the ALJ committed clear error or an abuse of discretion in the alternative penalty calculation methodology that she employed to assess the penalty and accordingly, Complainant respectfully requests that the Board vacate that portion of her Initial Decision as well.

Concurrent with the filing of this appeal brief, Complainant is filing with the Board a Joint Stipulation on Penalty Amount reflecting the agreement of the parties as to the penalty that Complainant has agreed to accept and Respondent has agreed to pay within thirty (30) days after the Board files a Final Order resolving this matter.[1] Complainant does not seek to have the Board remand this matter for assessment of a different penalty amount, nor does Complainant seek to have the Board assess an alternative penalty pursuant to its *de novo* authority under 40 C.F.R. § 22.30(f). Therefore, Complainant's brief does not discuss issues relating to the appropriateness of the $235,290 penalty that the ALJ assessed.[2]

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[1] Notwithstanding the partial settlement embodied in the Joint Stipulation on Penalty Amount, the Board retains the authority to review the issues raised in Complainant's appeal and order appropriate relief. See 64 Fed. Reg. 40138, 40157, cols.1-2 (July 23, 1999). In In re Hall Signs, Inc., EPCRA Appeal No. 97-6 (EAB, Dec. 16, 1998), the Board stated that "the power to review a presiding officer's decision may be exercised to vacate the rationale (even without vacating the result) of a presiding officer's decision 'to assure that it does not establish an erroneous precedent.'" Hall Signs, slip op. at 7-8 (quoting In re Martin Electronics, 2 E.A.D. 381, 385 (CJO 1987)(Unpublished Final Order). Here, the ALJ's penalty analysis (irrespective of the penalty amount) raises many issues of significance to the national pesticides program and Complainant urges the Board to rule on such issues and, consistent with the Board's precedent, vacate the erroneous portions of the ALJ's Initial Decision, as further described in Section V, below.

[2] As stated in the Joint Stipulation on Penalty Amount, Complainant takes "no position (continued...)

III. Nature of the Case

This appeal arises under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. §§ 136 et seq., and the regulations promulgated thereunder. Complainant initiated this enforcement proceeding through the filing of a Complaint on January 25, 2005, against Rhee Bros., Inc. ("Respondent" or "Rhee"). Complainant alleged that Respondent distributed or sold unregistered pesticides, thereby committing unlawful acts under Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), for which penalties may be assessed pursuant to Section 14(a) of FIFRA, 7 U.S.C. § 136l(a). More specifically, Complainant alleged that from January 2000 through July 2003, Respondent made 469 distributions or sales of three types of unregistered pesticidal products referred to as "JOMYAK (naphthalene), OXY" ("JOMYAK") in violation of FIFRA.[3]

On August 18, 2005, EPA filed a Motion for Accelerated Decision as to Liability requesting that the ALJ issue an order finding Respondent liable for 469 violations of FIFRA. In the Reply to Respondent's Response to EPA's Motion for Accelerated Decision as to Liability, filed on September 15, 2005, Complainant reduced the number of violations for which it sought a determination of liability by two (2), from 469 to 467, on statute of limitations grounds. Subsequently, on September 27, 2005, the ALJ issued an Order granting EPA's Motion for

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[2](...continued)
as to the appropriateness of the $235,290 civil penalty" and the parties entered into the Joint Stipulation on Penalty Amount concluding that a resolution of the penalty is in "their best interests, as well as in the interest of judicial economy." See Stipulation at 1.

[3] The three unregistered naphthalene products are identified as JOMYAK (naphthalene) OXY 12514K, 12515K, and 12519K. See Initial Decision at 4. These numerical designations refer to different size, shape, or packaging of the same chemical product. Id.

Accelerated Decision as to Liability, finding Respondent liable for 467 separate violations of FIFRA § 12(a)(1)(A). In Complainant's Initial Pre-hearing Exchange filed on June 17, 2005, and later amended, Complainant sought a penalty of $1,316,700 based upon Respondent's 264 combined distributions of JOMYAK.[4]

Respondent, a Maryland corporation headquartered at 9505 Berger Road in Columbia, Maryland, owns and operates an Asian grocery wholesale, retail and/or distribution business. See Initial Decision at 3 (citing Complaint ¶ 2, Answer ¶ 2). Respondent is a "person" under Section 2(s) of FIFRA, 7 U.S.C. § 136(s). See Initial Decision at 2, Answer ¶ 2. Respondent is a "wholesaler, dealer, retailer, or other distributor" under Section 14(a) of FIFRA, 7 U.S.C. § 136l(a). See Initial Decision at 3. Respondent imports products through a Korean exporter, and distributes its products primarily to Korean-owned grocery stores located in 20 states across the country. See Initial Decision at 3-4 (citing Transcript ("Tr.") at 333-34 and Complainant's Exhibit ("Ex.") 19).

In April 2003, the New Jersey Department of Environmental Protection inspected a customer of Respondent, the Han Mi Supermarket, and discovered that it was selling JOMYAK. See Initial Decision at 4. The state inspector suspected that JOMYAK was an unregistered

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[4] Complainant's approach to its *penalty* calculation differed from its approach on *liability*. For liability purposes, EPA relied on the number of distribution and sales of all three (3) sizes/types of JOMYAK (i.e., 467) within the five years preceding the filing of the Complaint. For penalty purposes, EPA relied on the number of JOMYAK transactions, no matter what product size/types or how many products were involved, involving a particular customer on a particular day (i.e., 264) within the five years preceding the filing of the Complaint. See Complainant's Post-Hearing Brief, Section III.A.4. Thus, Complainant's approach for penalty purposes is best described as a "combined distribution" approach.

pesticidal product and referred the matter to EPA Region 2 on or around August 27, 2003.[5] See Initial Decision at 4, 5. EPA Region 2 referred the matter to Complainant on September 7, 2003, upon learning that Respondent's headquarters is within Complainant's Region. See Initial Decision at 6. In order to determine the regulatory status of the JOMYAK product, Complainant requested an Enforcement Case Review ("ECR") from EPA Headquarters on September 12, 2003, and received a response from EPA Headquarters on December 18, 2003. See Initial Decision at 6, 7. On January 14, 2004, through a FIFRA Investigation Referral, Complainant requested that the Maryland Department of Agriculture collect records and conduct an inspection of Respondent's wholesale facility for the unregistered JOMYAK products. See Initial Decision at 7. That inspection was conducted on February 2, 2004, and on February 19, 2004, the Maryland Department of Agriculture provided its response to the FIFRA Investigative Referral to Complainant. See id.

With her Order finding that Respondent was liable for 467 violations of FIFRA for distributing or selling various unregistered JOMYAK products, the ALJ held a hearing on December 6 and 7, 2005, for the purpose of assessing an appropriate penalty. In her Initial Decision, the ALJ rejected Complainant's proposed penalty and Respondent's proposed penalty (and the parties respective supporting analyses), and abandoning the Penalty Policy framework, the ALJ created her own penalty calculation methodology. This alternative penalty calculation methodology was based upon a *per se* rule that the ALJ enunciated in the Initial Decision that, in cases where the Agency chooses to charge a large number of violations which potentially yields

[5] The New Jersey state inspector received an invoice from Han Mi Supermarket on May 20, 2003 indicating that Rhee Bros., Inc. was its supplier. See Complainant's Post-Hearing Brief at 38 (citing Tr. At 46:18-48:18).

a high penalty, the *amount of the penalty per violation* must be determined with more flexibility than strictly permitted by the Penalty Policy. See Initial Decision at 38 (emphasis added). Applying this rule, the ALJ assessed a total penalty of $235,290.

The ALJ assessed a separate penalty for each distribution[6] of the unregistered products, "as each distribution represents both an increased risk of harm to human health and an additional act on the part of Respondent of shipping a pesticide without ensuring that it was registered." Initial Decision at 48. However, the ALJ determined that:

> The most appropriate method of calculating the penalty in this case is to assess the full penalty of $3,850[7] for the first day of violation within the time period of the statute of limitations, which represents Respondent'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 Respondent's subsequent failures to ensure the products were registered before distributing them.

Id.

In concluding that each distribution violation warranted a separate penalty, and that each of the subsequent negligent acts of distributing the unregistered products "is of a lesser degree of nonfeasance or misfeasance than the original act and does not represent 263 separate significant acts of active malfeasance each warranting a multiple of the same substantial monetary penalty," the ALJ applied the same approach as in EPA's Resource Conservation and Recovery Act

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[6] Technically, the ALJ did not assess a penalty for each distribution of each of the three sizes/types of JOMYAK but rather, each "combined distribution". See supra, n.4, discussing "combined distribution". This approach of assessing a separate penalty for each combined distribution was put forth by Complainant.

[7] The ALJ does not directly discuss the calculation leading to her selection of $3,850 in the portion of her Initial Decision in which she assessed the penalty. It is likely that, in arriving at the $3,850 "full" penalty for the first violation, the ALJ is relying upon her earlier discussion on page 39 of her Initial Decision.

("RCRA") Civil Penalty Policy, June 2003 ed. ("RCRA Penalty Policy") as the basis for a multi-day penalty for the 263 subsequent distributions of JOMYAK. Initial Decision at 49. Thus, the ALJ arrived at the $235,290 penalty by assessing a penalty in the amount of $3,850 for the first distribution plus $880[8] for each of the 263 additional distributions. Id.

IV. Legal Framework for Penalty Determinations

Section 14(a)(1) of FIFRA, 7 U.S.C. § 136*l*(a)(1), authorizes EPA to assess a civil penalty of not more than $5,000 for each violation of FIFRA. The Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701, in conjunction with the Adjustment of Civil Penalties for Inflation rule promulgated at 40 C.F.R. Part 19, authorize the assessment of a civil penalty of up to $5,500 for each violation of FIFRA occurring between January 30, 1997 and March 15, 2004. In calculating penalties, Section 14(a)(4) of FIFRA requires EPA to consider the appropriateness of such penalty to the size of the business of the person charged, the effect on the person's ability to continue in business, and the gravity of the violation (together "the FIFRA statutory penalty factors"). The FIFRA statutory penalty factors are applied through the FIFRA Penalty Policy. The Board generally views penalty policies such as the FIFRA Penalty Policy to be useful mechanisms for ensuring consistency among civil penalty assessments by facilitating the application of statutory penalty criteria. William E. Comley, Inc. & Bleach Tek, Inc., 11 E.A.D 247, 262 (EAB 2004); In re Chempace Corp., 9 E.A.D. 119, 131 (EAB 2000).

[8] Applying the RCRA Civil Penalty Policy rationale and multi-day penalty ratio, the ALJ determined that the maximum multi-day penalty for FIFRA would be $1,100. Considering the "circumstances" of this case, the ALJ further adjusted the "multi-day penalty" of $1,100 by 20% to arrive at $880. See Initial Decision at 49.

The Consolidated Rules of Practice provide that the ALJ must "determine the amount of the recommended civil penalty based on the evidence in the record and in accordance with any penalty criteria set forth in the Act." 40 C.F.R. § 22.27(b). An ALJ must also "consider any civil penalty guidelines issued under the Act," and, if he or she "decides to assess a penalty different in amount from the penalty proposed by the Complainant, . . . set forth in the initial decision the specific reasons for the increase or decrease." Id.

The Board's decisions have established that once an ALJ has seriously considered the penalty policy, the ALJ is not bound to follow it. In re FRM Chem, Inc., a/k/a Industrial Specialties, FIFRA Appeal No. 05-01, 12 E.A.D. ___, slip op. at 19 (EAB, June 13, 2006) (citations omitted). The Board has made clear that an ALJ is "free to disregard a penalty policy if reasons for doing so are set forth in the Initial Decision." Id. An ALJ's "freedom to depart from the framework of a Penalty Policy preserves an ALJ's discretion to handle individual cases fairly where circumstances indicate that the penalty suggested by the Penalty Policy is not appropriate. See FRM, slip op. at 19 (citing In re Employers Ins. of Wausau, 6 E.A.D. 735, 759 (EAB 1997)). In appeals seeking review of the assessed penalty, the Board's general rule is that it will defer to an ALJ's penalty determination "if it falls within the range of an applicable Penalty Policy absent a showing that the ALJ has committed an abuse of discretion or clear error." See FRM, slip op. at 19.

V. Argument

A. The ALJ Committed Clear Error Or An Abuse of Discretion In Departing From The FIFRA Penalty Policy.

1. Applicable Standard of Review in Cases Where the ALJ has Departed From the Relevant Penalty Policy.

While the Board generally defers to an ALJ's penalty determination absent clear error or abuse of discretion, the Board's case law demonstrates that when an ALJ substantially or completely departs from the relevant penalty policy, the Board will "closely scrutinize the ALJ's penalty analysis to determine whether the ALJ's reasons for rejecting the policy framework are 'persuasive or convincing.'" See FRM, slip op. at 20. See also In re Chem Lab Prods., Inc., 10 E.A.D. 711, 725 (EAB 2002) (quoting In re M.A. Bruder & Sons, Inc., 10 E.A.D 598, 613 (EAB 2002) ("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.'"). If the Board concludes that the ALJ's rationale is not persuasive or convincing the Board will not afford the ALJ's penalty analysis any deference and may fashion its own penalty assessment or remand the penalty determination to the ALJ. See FRM, slip op. at 20. See also FRM, slip op. at 20 n.16.

As discussed above, Complainant is not seeking review of the amount of the ALJ's penalty assessment. Rather, Complainant seeks review of the ALJ's rationale for departing from the Penalty Policy, her analysis of Respondent's ability to continue in business, and her alternative penalty calculation methodology. Complainant recognizes that the Board's case law cited above has involved Agency appeals seeking review of the amount of the penalty assessed in cases where the ALJ departed from the relevant Penalty Policy. However, Complainant

submits that the "close scrutiny" case law is an appropriate analytical construct to review the case at bar since the ALJ departed from the Penalty Policy.[9] See Initial Decision at 37 ("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.") See also Initial Decision at 37 – 50 (discussing all of the reasons supporting her departure and her alternative penalty calculation methodology).

While Complainant does not seek review of the penalty assessed, the reasons the ALJ articulated to depart from the Penalty Policy will not survive the Board's scrutiny as they are neither persuasive nor convincing. The relief Complainant seeks is not the Board's *de novo* review of the amount of the penalty assessed but, rather, a published order vacating the erroneous portions of the ALJ's Initial Decision. See Hall Signs, Inc., EPCRA Appeal No. 97-6 (Dec. 16, 1998) (Unpublished Final Order).

2. The ALJ's Reasons To Depart From The Penalty Policy Are Based Upon Clear Error or An Abuse of Discretion And, As Such, Are Not Persuasive Or Convincing.

a. The ALJ's New Rule Regarding Multi-Violation Cases Goes Beyond The Facts of this Case And Is Clear Error And An Abuse of Discretion.

The first reason the ALJ articulated as a basis for her departure from the Penalty Policy involved what she perceived as an over-inflation of the penalty. This characterization of

[9] There is no doubt that the ALJ departed from the Penalty Policy for purposes of assessing a penalty for distributions 2 through 264. See Initial Decision at 48-49. However, the first distribution, for which she assessed a penalty of $3,850, appears to have been calculated by applying the Penalty Policy, albeit differently than as Complainant proposed. See Initial Decision at 39, 48. Complainant's discussion in this brief that the ALJ completely departed from applying the Penalty Policy is applicable to distributions 2 through 264.

Complainant's proposed penalty is based upon the large number of violations that Complainant alleged in the Complaint (and which the ALJ subsequently upheld in her Accelerated Decision on Liability) coupled with the Judge's view that the Penalty Policy compresses violators and violations into a few select categories. See Initial Decision at 37. In the ALJ's opinion, the Penalty Policy did not adequately weigh the specific gravity factors in Respondent's favor. See id. To demonstrate this point, the ALJ noted that the proposed penalty that Complainant calculated pursuant to the Penalty Policy was only ten percent less than the maximum penalty allowed by law. See id. The ALJ compared Respondent's violations to that of a hypothetical "horrific violator", who has a history of non-compliance and who knowingly or willfully commits the most horrific violations involving pesticides of the highest toxicity resulting in actual serious or widespread harm to human health or the environment. Id. The ALJ concluded that the difference between Respondent's actions and the hypothetical "horrific violator" needed to be greater than ten percent, since Respondent's actions were "far better" than that of the hypothetical violator. Id.

The ALJ went on to find that in a case "where a very large number of violations [are] charged, it is clear that such compression results in the factors favorable to Respondent not being appropriately accounted for and makes a very significant monetary difference in the penalty above any baseline necessary for deterrence." Id. at 37-38. In response to this conclusion, the ALJ established a *per se* rule applicable beyond the facts and circumstances of this case, that "where the Agency chooses to charge a Respondent with a large number of violations which potentially yield in aggregate a correspondingly high maximum penalty, the amount of the penalty per violation *must* be determined with more flexibility than that strictly permitted by the

ERP, so that the significance of the 'gravity of the violations,' in a particular case is not lost."[10] Id. at 38 (emphasis added).

The *per se* rule that the ALJ established for all cases involving a large number of violations goes beyond any evidence in the record and as such, is clear error and an abuse of discretion. Part 22 directs an ALJ to "determine the amount of the recommended civil penalty based on the evidence in the record and in accordance with any penalty criteria set forth in the Act." 40 C.F.R. § 22.27(b). Under this *per se* rule, regardless of whether or not the facts support a correspondingly high maximum penalty, the ALJ has declared that it is always appropriate, indeed, it is required, to depart from the Penalty Policy. See Initial Decision at 38 (stating that amount of penalty "must" be determined with more flexibility that permitted by ERP.)

To the extent that, in this case, the ALJ applied her new rule, the ALJ committed clear error because she failed to fulfill her obligation to assess a penalty based upon the evidence in the record. See infra, Section IV.C.3 at 37 (discussing the ALJ's failure to explain why 20% of the penalty assessed for the first distribution is appropriate for the subsequent 263 distributions). This *per se* rule is incongruous with her obligation under 40 C.F.R. § 22.27(b) to assess a penalty based upon the evidence in the record.

On its face, the ALJ's rule is fatally vague in that there is no definition of what a "large" number of violations would be or what value represents a "correspondingly high maximum penalty." Moreover, the ALJ improperly considered Complainant's exercise of prosecutorial

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[10] The ALJ further concluded that "the penalty per violation must be able to shift further downward the sliding scale as the number of violations shift upward." Initial Decision at 38 n. 52. However, the Board has rejected this approach finding that "the matter of concern is, in our view, not whether the penalty is set at the statutory maximum, but whether the penalty is appropriate in relation to the facts and circumstances of the case at hand." FRM, slip op. at 15.

discretion as a basis to depart from the Penalty Policy. It is EPA, not the ALJ, that determines the appropriate counts to plead under the facts and circumstances of a particular case. By using the number of violations pled as a basis to depart from the Penalty Policy and to therefore employ an alternative calculation methodology, the ALJ is effectively undermining the Agency's prosecutorial discretion. A *per se* rule that allows an ALJ to invalidate the penalty calculation methodology in the Penalty Policy in any case in which EPA exercises its discretion to allege a large number of violations is extremely troubling.

Complainant also notes that each of the 467 violations at issue in this case involves the sale or distribution of an unregistered pesticide. With regard to the role of pesticide registration in terms of protecting human health and the environment, the EAB has stated that:

> the registration program is the foundation for securing the Agency's ability to protect human health and the environment. Without that foundation in place, the Agency cannot efficiently exercise its other powers conferred under the Act. Without [registration], the Agency cannot, for example, prescribe labeling requirements for the product that set forth effective warnings and specific directions for use intended to protect human health and the environment. It also cannot effect a recall of an unregistered product whose name does not appear in the registration database.

In re Green Thumb Nursery, Inc., 6 E.A.D. 782, 800-01 (EAB 1997).

Additionally, the EAB has consistently considered the failure to register pesticides to be harmful to the FIFRA program, and has found such 'harm to the program' to be a sufficient basis for a substantial penalty. See, e.g., FRM, slip op. at 25 (statutory maximum generally appropriate for registration and labeling violations because they undermine the program's protective regulatory scheme); In re Safe & Sure Products, Inc. and Lester J. Workman, 8 E.A.D. 517, 529 (EAB 1999) (finding substantial penalty justified even though violation involves a general harm to the FIFRA registration program rather than a harm to human health or the environment)

(citing Green Thumb Nursery, Inc., 6 E.A.D. at 800-01 and In re Arapahoe County Weed Dist., 8 E.A.D. 381, 392, 392 n.14 (EAB 1999)); In re Sav-Mart, Inc., 5 E.A.D. 732, 738 n.13 (EAB 1995) (finding failing to register weakens statutory scheme and that finding no harm would impermissibly reward businesses who fail to register by depriving EPA of information which could be used in an enforcement action). The Board's case law is clear that "the matter of concern is . . . not whether the penalty is set at the statutory maximum, but whether the penalty is appropriate in relation to the facts and circumstances of the case at hand." FRM, slip op. at 15. Complainant submits that against this legal and judicial backdrop, the lack of evidence in the record that Respondent's conduct actually caused harm to human health or the environment or that Respondent is a repeat violator does not support departure from the Penalty Policy in light of the specific violations in this case, i.e., selling/distributing unregistered pesticides.

b. The ALJ's Rationale Regarding Harm To Human Health Relied On Facts Not In Evidence.

The ALJ's second reason for departing from the Penalty Policy relates to Complainant's assignment of a level three for the harm to human health component of the gravity penalty factor. In particular, the ALJ disagreed that level three is appropriate because she concluded that the potential risk of harm to human health from Respondent's violations is neither serious nor widespread. The ALJ indicated that a level one would be more appropriate.[11] See id. at 39.

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[11] Complainant submits that the ALJ's determination that level one is more appropriate is not supported by the record and thus, an erroneous factual conclusion. The record establishes that each violation at issue could result in serious harm. See Initial Decision at 21 (discussing EPA expert witness's testimony that Korean label deprived users of important information on the product's safe and proper use). See also Complainant's Post-Hearing Brief at 28-34. The ALJ appeared to focus on the "widespread" component and disagreed with Complainant's position that the violations were widespread because of the significant number of violations. See Initial (continued...)

The ALJ's determination that EPA had failed to persuade her that a level three is the appropriate value for harm to human health is not a sufficiently convincing reason to depart from the Penalty Policy. Rather, the ALJ should have worked within the framework of the Penalty Policy to develop a penalty based upon a level one value for harm to human health.

This is not unlike an argument that the Board addressed in In re CDT Landfill Corporation, 11 E.A.D. 88 (EAB 2003). In CDT Landfill, Administrative Law Judge Nissen concluded that the proposed penalty that the Region calculated pursuant to the penalty policy overstated the seriousness of the violations at issue and the Judge fashioned his own penalty based upon the statutory penalty factors. The Board recognized that the ALJ's criticism of the Region's proposed penalty was "more appropriately viewed as questioning the Region's application of the Penalty Policy rather than pointing out weaknesses in the Penalty Policy itself," which raised the question of whether the ALJ could have worked within the framework of the Penalty Policy to develop an alternative penalty. Id. at 120. Yet, the Board did not disturb Administrative Law Judge Nissen's decision to depart from the penalty policy because the Board concluded that "his articulated rationale . . . is predicated on sufficiently persuasive considerations to warrant our deference." Id.

The case at bar is distinguishable from CDT Landfill in that the ALJ in Rhee Bros., did not articulate a persuasive rationale deserving the Board's deference. First, Complainant notes that the ALJ concluded that a level one value is more appropriate. See Initial Decision at 50. See also Initial Decision at 24-25. As such, the ALJ did not sufficiently explain why she must

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[11](...continued)
Decision at 22, 39. Focusing on whether each violation was widespread, the ALJ discounted EPA's evidence establishing that each violation posed a serious risk of harm to human health.

depart from the Penalty Policy rather than simply assign a lower value, such as level one, for harm to human health. More importantly, the ALJ's rationale in this portion of her Initial Decision for departing from the Penalty Policy is based upon erroneous factual and legal conclusions. For instance, the ALJ indicated that, inter alia, a level of three is not warranted on the basis of "the potential 'serious and widespread' risk of harm to human health" because products like JOMYAK are pervasively well known, that only one of the three types of unregistered JOMYAK products consisted of mothballs, that the packaging included illustrations of use in drawers or closets, and that there was only a small amount of pesticide represented by each violation. See Initial Decision at 39. Such factors are not necessarily sufficient to support her determination that harm to human health is not serious or widespread.

The appropriate inquiry should focus on the risk of harm to human health created by the registration and labeling violations. For instance, setting aside the fact that the label was not written in English but only in Korean, the label provided insufficient safety warnings. A label that provides insufficient safety warnings tends to mislead users into thinking that all necessary information has been included and prevents them from taking the proper safety precautions. See FRM, slip op. at 27. For purposes of the case at bar, the Korean label for the JOMYAK mothball product should have advised consumers to store the product in an air-tight container, to avoid breathing vapors, and to be aware that JOMYAK could be fatal if inhaled. See Complainant's Post-Hearing Brief at 30; Tr. at 181:13-14. Because that important safety information was missing from the product label, consumers could have exposed themselves to inhalation exposure. Additionally, the Korean label did not identify the product ingredient or provide the First Aid Statement which, in the event of accidental exposure, would make it difficult for a first

responder or other medical professional to quickly or properly treat the effects. See Complainant's Post-hearing Brief at 31; Tr. at 186:3-16.

Moreover, the ALJ's characterization that the risk of harm to human health from Respondent's violations could not be serious or widespread because "[n]aphthalene moth repellant [] is a very old, well established pesticide product, its proper use and effect is commonly known by all adults, and EPA made a favorable determination regarding its efficacy and risks *over 40 years ago* when it first registered such products" is seriously misplaced. Initial Decision at 24 (emphasis in original). First, the ALJ is suggesting that the level of harm to human health presented by a violation should be minimized in cases where the product would have qualified for registration if Respondent had sought registration with the proper labeling.[12] Id. The Board addressed this type of reasoning in FRM, and the Board's discussion about "Root Eater", the unregistered pesticide at issue in that proceeding, is especially relevant here.

In FRM, the only listed ingredient of Root Eater was copper sulfate. See FRM, slip op. at 6. While recognizing that copper sulfate "is a known pesticidal ingredient contained in pesticide products registered with EPA as far back as 1963," see id., the Board concluded "the

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[12] EPA's expert in FIFRA's registration review process described the Korean label as "perhaps the worst label I've ever reviewed in my entire career" and that the product would not have been registered unless all of the missing required text for all of the required label elements were included. See Tr. at 192; 203. The ALJ's conclusion that the products "would have been registered" is conjecture. See Initial Decision at 24. In order to register the JOMYAK products, Respondent would need to have submitted 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. See FIFRA § 3(c); 40 C.F.R. §§ 152.40-55. Without this information, there can be no speculation as to whether the JOMYAK products would have been registered. The ALJ's statement trivializes the importance of the registration and labeling requirements of FIFRA.

lack of a total ban on Root Eater is not a persuasive reason to depart from the Penalty Policy because it is merely part of the balance that EPA strikes in allowing potentially harmful pesticides to be used with EPA-approved labeling designed to minimize the harm that will actually occur," see FRM, slip op. at 25. Thus, the Board found that the ALJ's reliance on the fact that Root Eater could have been sold if properly registered and labeled was misplaced. See FRM, slip op. at 25.

Second, there is no evidence in the record to support the ALJ's factual conclusion that "the proper use and effect" of "Naphthalene moth repellant" "is commonly known by all adults." Accordingly, the ALJ made a factual conclusion not based upon the record. This conclusion is also inconsistent with the FIFRA regulatory scheme. Under FIFRA, the pesticide label must include this type of information which is aimed at minimizing the risk of exposure as well as minimizing the adverse health effects in the event of an exposure, which directly bears on the potential for harm to human health. See 40 C.F.R. §156 et seq.

c. The ALJ's Rationale Regarding EPA's Failure To "Stave Off" Respondent's Violations Is An Abuse Of Discretion.

Another reason the ALJ articulated as support for her decision to depart from the Penalty Policy is the lack of evidence that "the Agency" made any effort to directly contact Respondent or the company Respondent purchased the products from, or to notify the U.S. Customs Service or Food and Drug Administration, in an effort to "stave off further distribution . . . when it appears it first became aware of them being sold in the U.S., in or about August 2000, just a few months into the period of violations at issue here."[13] Initial Decision at 39-40. According to the

[13] It is critical to note that this August 2000 date bears no relationship to events at issue (continued...)

ALJ, this further illustrates that the risk to human health is over-magnified in Complainant's proposed penalty thereby supporting her decision to depart from the Penalty Policy.

The ALJ concluded that if EPA Region IX, the Region that "first learned" in August 2000 about another retail company selling OXY moth repellant products and entered into the settlement with Hannam Chain USA (see supra, n.13), had "made such a timely effort to follow the distribution trail of those OXY products, *in all likelihood* it would have prevented Rhee from committing the vast majority of the violative distributions and thereby avoided the occurrence of the 'serious and widespread' risk of harm for which it [meaning Complainant] now seeks to so severely penalize Rhee."[14] Initial Decision at 40 (emphasis added). Such a statement is

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[13](...continued)
in this case but rather refers solely to a settlement that Region IX entered into with Hannam Chain USA, Inc. See Initial Decision at 40. Additionally, there is no evidence in the record to suggest that Complainant, EPA Region III, was aware of the settlement that EPA Region IX entered into with Hannam Chain USA prior to it investigation in the case at bar. See Initial Decision at 40 n.54.

[14] Judge Biro seemingly admonishes the government for seeking to "severely punish Rhee for its negligent failures to comply with FIFRA regulations when the government clearly failed, *on 20 separate occasions* over a three year period, to detain pesticides explicitly listed on an international distributor's invoice, when the requisite form (EPA Form 3540-1 "Notice of Arrival (NOA" of Pesticides and Devices") was not presented to the U.S. Customs Service at the port of entry." Initial Decision at 27 n.41 (emphasis in original). This is another instance of Judge Biro's judicial speculation without supporting evidence in the record.

When goods are imported into the customs territory of the U.S. the goods are required to be "entered", "classified", and "valued" by the importer. See generally 19 C.F.R. Parts 142, 152. When a shipment containing pesticides is "entered", the importer must use a harmonized tariff code specific to the particular pesticide in the shipment. In order for U.S. Customs and Border Patrol ("CBP") to determine whether a shipment triggers other applicable legal requirements, such as a Notice of Arrival form signed by an authorized EPA official, it is necessary for the importer to correctly classify the imported pesticide. If the importer uses a harmonized tariff code other than those reserved for classifying pesticides, the CBP will not know that the shipment contains a pesticide and, accordingly, requires a Notice of Arrival form. The "invoice" the ALJ is referring to bears no relationship to whether Respondent properly identified to CBP
(continued...)

troubling because it improperly shifts the blame for the continuing illegal conduct from Respondent to EPA. Moreover, it is impossible for the ALJ to make such a conclusion because there is no way to know that even if Region IX had contacted the OXY, the manufacturer, when the Region first became aware of those products being sold to the California retailer, that that would have "prevented" Respondent from committing these violations. As such, the ALJ committed clear error and an abuse of discretion.

An additional factor the ALJ mentions in this portion of her Initial Decision is the "six month" process during which Complainant (Region III, not Region IX) obtained an Enforcement Case Review ("ECR")[15] for the unregistered pesticidal product that the New Jersey Department of Environmental Protection obtained from the Han Mi Supermarket and formally requested the Maryland Department of Agriculture to inspect Respondent[16] after the ECR confirmed that the

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[14](...continued)
that it was importing a pesticide because the "description on the international distributors invoice" refers only to "JOMYAK". See Respondent's Ex. 2-5. See also Complainant's Post-Hearing Brief at 46. The record is silent as to whether Respondent used the appropriate harmonized tariff code that would necessarily inform CBP that a Notice of Arrival form was required upon "entry". In fact, there is nothing in the record to support the ALJ's contention that the government was aware that the shipment contained a pesticide and merely "failed" to detain it.

[15] The purpose of the ECR is to establish the claims that identify a product as a pesticide, and to ascertain the registration status of the product. Since all pesticides can only be registered through Headquarters, a Regional office cannot determine by itself whether a product is unregistered or registered but simply missing the registration number on the label. In addition to identifying the registration status of the product, the Headquarters recipient of the ECR will identify other characteristics of the product such as, inter alia, whether the active ingredient is registered for use as a pesticide in other products and the toxicity of the active ingredient.

[16] Under FIFRA § 8(b), in order to conduct an inspection on behalf of EPA, a state employee must be "duly designated by EPA." Additionally, FIFRA § 8(b) requires the inspector to "present to the owner, operator, or agent in charge . . . appropriate credentials and a written statement as to the reason for the inspection, including a statement as to whether a violation of
(continued...)

product sold at the Han Mi Market was an unregistered pesticide.[17] It is standard operating procedure for Complainant (and the other EPA Regions) to obtain an ECR for a potential violation of FIFRA involving an unregistered pesticide. See supra, n.16. Complainant's observance of standard operating procedure to request an ECR and to then follow appropriate inspection protocols to officially request Maryland Department of Agriculture to perform an inspection on behalf of EPA, consistent with Section 8(b) of FIFRA, 7 U.S.C. § 136f, and Agency policy, cannot be a sufficiently persuasive or convincing reason to depart from the Penalty Policy because it would justify departure in every FIFRA enforcement action in which an unregistered pesticide is at issue. In a case involving the sale of misbranded pesticides, the EAB specifically rejected the argument that EPA's enforcement response "belies the existence of a grave situation". William E. Comley, 11 E.A.D. at 267 (finding EPA's failure to take prompt enforcement action after the inspection and waiting three years to file a Complaint does not in

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[16](...continued)
law is suspected." See FIFRA § 8(b).

[17] First, Complainant notes that it was only 6 months from the time that EPA Region 2 received the referral from the New Jersey Department of Environmental Protection for Complainant to submit and receive a response to its ECR, for Complainant to initiate the FIFRA Investigative Referral to the Maryland Department of Agriculture, and for Complainant to receive back Maryland Department of Agriculture's response to the FIFRA Investigation Referral. See supra, at 5. More significantly, the ALJ's characterization of Complainant's process as "uselessly attenuated" is further support that the ALJ felt that EPA did not view these violations as involving potentially "serious or widespread" harm to human health is inconsistent with the record. Complainant construes the ALJ's characterization to mean that if Complainant had considered these violations to be serious, Complainant would have acted more quickly. The record demonstrates that at least as early as July 23, 2003, Respondent had ceased selling or distributing the JOMYAK products at issue in this enforcement proceeding. See Complainant's Ex. 12F; Tr. 246-48. Therefore, when Complainant received the response to its FIFRA Investigative Referral from the Maryland Department of Agriculture, the violative conduct was wholly past. Second, Complainant notes that a span of 6 months to investigate and confirm Respondent's violative conduct demonstrates the expediency of Complainant's conduct.

any way mitigate the potential harm to humans posed by the violations). To the extent that the ALJ relied upon this factor in mitigating Respondent's penalty, the ALJ abused her discretion.

d. The ALJ's Rationale Regarding Economic Benefit is Clear Error And/Or An Abuse of Discretion.

The ALJ used the apparently low gross profit of about $11,000 from the sales of the unregistered pesticides as support for her departure from the Penalty Policy. See Initial Decision at 41. While FIFRA and the Penalty Policy are silent as to considering the economic benefits from noncompliance, the Agency's Policy on Civil Penalties, does urge the routine consideration of economic benefit in penalty assessments. See Policy on Civil Penalties (February 16, 1984)(recodified by EPA as, and hereinafter cited as, "PT. 1-1") at 3. Its companion document, A Framework for Statute-Specific Approaches to Penalty Assessments, allows the Region the discretion not to assess an economic benefit component in the civil penalty under the appropriate circumstances. See A Framework for Statute-Specific Approaches to Penalty Assessments (February 16, 1984)(recodified by EPA as, and hereinafter cited as, "PT. 1-2") at 11-12. Considering the apparently small amount of gross profits Respondent realized from the sales of this pesticide *vis a vis* the size of the gravity component of the penalty, in this case, that approach made sense and is consistent with the Framework's guidance on the subject. Nevertheless, the lack of economic benefit should never be a mitigating factor and thus, cannot support the ALJ's departure from the Penalty Policy.

The approach discussed in the Policy on Civil Penalties is that the economic benefit component is an entirely separate calculation from the gravity component. See PT.1-1 at 3, 8.[18]

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[18] In fact, none of the Agency's over thirty penalty policies has economic benefit as a (continued...)

It never is a mitigating factor. The rationale behind this is clear: the cornerstone of the Policy on Civil Penalties is the recapture of the violator's economic benefit derived from its violations. The sole purpose of seeking benefit recapture is to "level the playing field" such that a violator gains no economic advantage over its complying competitors. PT. 1-1 at 3. Using economic benefit as a mitigating factor stands this whole policy on its head. Applying the ALJ's reasoning more generally, a violator with a relatively small economic savings will not only get to keep those savings, but it will get a reduction of the gravity component as well. The ALJ's use of benefit as a mitigating factor undermines both the letter and spirit of Agency policy and is clear error and/or an abuse of discretion.[19]

e. The ALJ's Rationale Regarding Respondent's Cooperation is Not Sufficiently Persuasive or Convincing to Support a Complete Departure from the Penalty Policy.

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[18](...continued)
mitigating factor. It can increase the penalty but never decrease it.

[19] The ALJ's evaluation of economic benefit played another role in her penalty assessment, i.e., her conclusion regarding the extent to which the penalty assessed in this case serves as a deterrent for Respondent. Though the ALJ concluded that the penalty she assessed is "large enough . . . to serve as a deterrent to Respondent and other companies committing similar violations in the future," Initial Decision at 49, she based this conclusion on the profit Respondent made in selling the unregistered pesticide product. See Initial Decision at 49 (stating that, "In this regard it is noted that this penalty amount represents in excess of 20 *times* the *gross* profit from sales of the offending products and 235 *times* the total *net* profit made by Respondent from the sales.")(emphasis in original). Complainant objects to measuring the deterrent effect of a penalty by comparing it to an economic benefit amount so apparently small that it was not even part of the proposed penalty. Thus, the ALJ's assertion that the penalty was large enough to serve as a deterrent is meaningless. Applying this approach could lead to extremely low penalties any time the economic gain was small despite how egregious the gravity component may have been.

Another reason the ALJ provides in support of her departure from the Penalty Policy is that Complainant's Penalty Policy-based penalty calculation did not credit Respondent for its "high degree of cooperation" either during the investigation of Respondent's unlawful conduct or during litigation. Initial Decision at 41. The ALJ expressly concludes that some of Respondent's actions "clearly go beyond what Respondent was required by law to do or could have been compelled by law to do and deserve to be factored into the penalty in Respondent's favor." Id. at 42.

It is unclear which actions "clearly go beyond" what Respondent was required to do by law. See id. at 41-42 (discussing Respondent's cooperation). However, in fashioning an appropriate penalty, there is no reason why the ALJ could not have generally applied the Penalty Policy and then deviated, in one small respect, by applying a downward adjustment that the ALJ deemed appropriate, in light of her discretion to assess an appropriate penalty under FIFRA § 14(a)(4), in order to account for Respondent's "high degree of cooperation." The fact that the Penalty Policy itself does not have a specified adjustment for "cooperation" or "attitude" outside of the settlement context is not a persuasive or convincing reason to support the ALJ's complete departure from the Penalty Policy.

f. The ALJ's Comparison Of The Violations Charged In This Case To The Violations Charged In Other Cases And Settlements Is Clear Error.

As a final reason supporting her departure from the Penalty Policy, the ALJ stated that "regardless of what the statute, ERP or the EAB directs, the Agency frequently does not assess FIFRA violations on a per sale or per shipment basis, as it did here, resulting in a lack of consistency in assessing penalties." Id. at 43. After recounting the statute, EAB case law and

the Penalty Policy, the ALJ stated that "each sale or distribution of [a] pesticide at issue in any given case generally should be assessed a separate penalty" but that the Agency "frequently has not done so." Id. The ALJ cited a few mothball cases and settlements as support that EPA does not "assess" a separate penalty for each FIFRA violation in "similar" cases.[20]

Fundamentally, what seems to concern the ALJ is a perceived "inconsistency" in the way that EPA pleads its FIFRA cases as opposed to application of the Penalty Policy in EPA's FIFRA cases, to determine the penalty for the violations that have been pled. See id. at 43 (discussing the other mothball cases, the ALJ only focused on the number of violations charged in each of the cases). In the Complaint in the case at bar, Complainant charged Respondent with 467 violations of FIFRA reflecting each sale of an unregistered pesticide product from January 2000 through July 2003. Complainant's decision to plead each unlawful sale is not a persuasive or convincing reason to support the ALJ's departure from the Penalty Policy.

In the same way that it is inappropriate to compare penalties assessed in different cases it too is inappropriate to compare the number of violations pled in different cases. There is no

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[20] In this portion of her Initial Decision, the ALJ inappropriately and unnecessarily discusses EPA's authority under Section 8(b) of FIFRA. Regardless of whether the Board vacates the ALJ's rationale, Complainant urges the Board to vacate this portion of her Initial Decision. See Initial Decision at 45-46. In particular, the ALJ speculated that the reason why penalties in other mothball cases have not been as high as in the case at bar is because FIFRA § 8(b) precludes EPA from obtaining "sales data" from retail establishments to support assessment of penalties for each sale or distribution. Id. at 46. The ALJ's speculation that the extent of EPA's investigations in other enforcement proceedings is due to the scope of EPA's authority under FIFRA § 8(b) is not supported by the record and should be vacated. EPA does have the authority to obtain evidence of a sale kept by retail establishments, otherwise the statutory prohibition against selling an unregistered pesticide would be circumvented. The ALJ's legal conclusions regarding the scope of EPA's authority under FIFRA § 8(b) could have far-reaching negative impacts in future enforcement proceeding if not vacated, as EPA may have to defend frivolous arguments by retailer companies seeking to exclude or limit evidence of a sale.

doubt that EPA has the discretion to allege what it believes to be the appropriate number of violations in any enforcement proceeding. See In re Helena Chemical Company, FIFRA Appeal No. 87-3, 1989 WL 253193 (EAB, Nov. 20, 1989)(decision to charge respondent with all twenty violations to deter respondent from future violations well within prosecutorial discretion); In re Microban Products, Inc., 11 E.A.D. 425, 446 n. 30 (EAB 2004). The fact that Complainant exercised its discretion to charge Respondent with each of the violations for which it had evidence even though other EPA Regions may not have done so in other cases or settlements, is not a sufficiently persuasive or convincing reason to depart from the Penalty Policy.

B. The ALJ Could Have Made Adjustments To The Penalty Calculated Using The Penalty Policy Framework To Arrive At A Lower Penalty Than Complainant Calculated.

Some of the ALJ's reasons to depart from the Penalty Policy either lack support in the record, are based upon factual or legal error, or understate the seriousness of the violations. However, in exercising her discretion to assess an appropriate penalty, she could have adjusted the penalty based upon some considerations she discussed in her initial decision.[21] Such considerations include the gravity component, and in particular, culpability.[22]

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[21] The ALJ, herself, explains how she could have arrived at a different penalty by applying the facts of this case and the Penalty Policy differently. See Initial Decision at 50. Complainant does not believe that the record in this case supports her conclusion with regard to harm to human health, culpability, or ability to continue in business. Specifically, the evidence in the record is uncontroverted that the potential risk to human health from naphthalene is serious, that Respondent's culpability level is negligence, or that Respondent's business would not have been negatively impacted by Complainant's proposed penalty. But, as Complainant argues, the ALJ could have made adjustments to the penalty produced by the Penalty Policy to account for her conclusions regarding culpability.

[22] This would be equally applicable to the ALJ's conclusions regarding "cooperation."

With regard to culpability, the ALJ agreed that Complainant had appropriately assigned a rating of two for Respondent's culpability on the basis that Respondent was negligent. See Initial Decision at 30. However, the ALJ opined that Respondent's level of negligence in selling an unregistered pesticide should be "tempered" by the fact that Respondent is "not at all in the business of manufacturing, nor is it primarily in the business of selling, pesticides or chemicals." Id. Complainant does not agree that a respondent's culpability should be "tempered" because that entity is not in the business of manufacturing or primarily selling pesticides. But in any case, rather than depart from the Penalty Policy, the ALJ could have determined that it is appropriate to reduce the penalty by some percentage to reflect this "tempered" culpability.

For the purpose of Respondent's ability to continue in business, the record demonstrates that Respondent could pay the proposed penalty and continue in business. See Initial Decision at 31-32. At hearing, Respondent testified that while it could pay the proposed penalty, "doing so would cause it to suffer significant hardship." Id. at 32. While Respondent did not "proffer any financial statements, tax returns or other financial records of its own supporting its claim as to the negative impact the penalty would have on its business" the ALJ found Respondent's testimony "reasonable" and supported by the one financial record admitted into evidence. Id. Accordingly, the ALJ concluded that the evidence undermined EPA's position that the proposed penalty was appropriate in relation to Respondent's ability to continue in business. Id. Complainant submits that if the record supported it, the ALJ could have relied upon such a conclusion to adjust a penalty calculated under the Penalty Policy to arrive at a number that she believed to be "appropriate" in light of the evidence in the record with regard to Respondent's ability to continue in business. However, as Complainant discusses in Section V.C.1, below, the

record did not support such a finding and thus, the ALJ's conclusion that Complainant's proposed penalty would have a negative impact on Respondent's business is erroneous.

C. The ALJ Committed Clear Error and/or Abuse of Discretion by Making Factual Findings and Conclusions of Law Not Supported by the Record.

1. The ALJ Committed Clear Error by Factoring into the Penalty Calculation the Respondent's Ability to Continue in Business Despite the Fact that Respondent Failed to Meet its Burden of Production.

In its 1994 New Waterbury decision, the Board rejected the contention that "inability to pay" is an affirmative defense for which a respondent bears the burden proof. 5 E.A.D. 529, 540 (EAB 1994).[23] The Board went on to set forth a now well-established process for considering and proving in the context of an administrative hearing a violator's ability to pay a civil penalty:

> Where ability to pay is at issue going into a hearing, the Region will need to present some evidence to show that it considered the respondent's ability to pay a penalty. The Region need not present any *specific* evidence to show that the respondent *can pay* or obtain funds to pay the assessed penalty, but can simply rely on some *general* financial information regarding the respondent's financial status which can support the *inference* that the penalty assessment need not be reduced. Once the respondent has presented *specific* evidence to show that despite its sales volume or apparent solvency it cannot pay any penalty, the Region as part of its burden of proof in demonstrating the "appropriateness" of the penalty must respond either with the introduction of additional evidence to rebut the respondent's claim or through cross examination it must discredit the respondent's contentions.

New Waterbury, 5 E.A.D. at 542-43 (emphasis in original). See also In re Chempace Corp., 9 E.A.D 119, 133 (EAB 2000).

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[23] While the statute specifically uses the term "ability to continue in business", the FIFRA Penalty Policy at page 23 treats that term as equivalent to ability to pay. The Board has accepted this approach. Safe & Sure Products, 8 E.A.D. at 531; In re James C. Lin and Lin Cubing, Inc., 5 E.A.D. 595, 599 (EAB 1994).

Accordingly, while Complainant has the initial burden of production to establish that a respondent has the ability to pay the proposed penalty, once Complainant meets its burden of production "[t]he burden then shifts to the respondent to establish with specific information that the proposed penalty assessment is excessive or incorrect." Chempace, 9 E.A.D. at 133. Failure by a respondent to provide specific evidence substantiating a claimed inability to pay results in waiver of that claim. Id. at 133 n.20 (citing New Waterbury, 5 E.A.D. at 542).

In this case, Complainant more than satisfied its burden of production under New Waterbury, while Respondent failed to enter into the record *any* reliable evidence or information indicating that it would be unable to pay the proposed civil penalty in full. Respondent did cite to evidence Complainant entered into evidence, but that evidence did not support Respondent's claim. In light of this record, the ALJ should have ruled that the Respondent had failed to meet its burden of production, and as a consequence, Complainant had prevailed on that issue. Instead she took into consideration Respondent's "financial status and net profits" in reducing the civil penalty. Initial Decision at 49. This constitutes clear error.

As the ALJ noted in her decision, the Penalty Policy "provides three alternative methods for determining a violator's ability to pay a proposed penalty: (1) a detailed tax, accounting, and financial analysis, (2) a guideline of four percent of average (*current* and three prior years') gross income; or (3) using the ABEL computer model of estimating strength of internally generated cash flows." Initial Decision at 31 (citing Penalty Policy at 23)(emphasis in original). While alternative (1) provides the most precise determination of a violator's ability to pay, the other alternatives were added to simplify what can be a very complicated analysis. The 4% of gross sales is the most simplistic of these alternatives. It is a reasonable measure of financial

strength and has been the standard for cases under the Toxic Substances Control Act for over 25 years (since issuance of the TSCA Penalty Policy in 1980) and the standard in FIFRA cases for over 16 years (since issuance of the FIFRA Penalty Policy since 1990). In addition, this approach has been accepted by the Board. New Waterbury, 5 E.A.D. at 547 (applying TSCA PCB penalty policy); Chempace Corp., 9 E.A.D. at 138 (applying FIFRA penalty policy); William E. Comley, 11 E.A.D. at 266 (applying FIFRA penalty policy).

In applying the 4% benchmark alternative, the Agency's witness, Ms. Toffel, looked to the Dun & Bradstreet reports on this company to determine the Respondent's average gross sales for the three prior years. She determined that the proposed penalty was less than 1.5% of Respondent's average gross income and thus affordable. Initial Decision at 31 (citing Tr. at 273-74, Complainant's Ex. 32, Complainant's Post-Hearing Brief at 57-58). At this point in the hearing, Complainant had met its burden of production. Now that burden shifted to Respondent. In response, Respondent never provided any company documentation of its inability to pay. See Initial Decision at 32. It never raised ability to pay as an issue in its answer, and it never raised it in any of the pre-hearing exchanges. Respondent did offer the testimony of Mr. David Lee, Respondent's managing director. Mr. Lee testified that a penalty of $1.3 million would force the company to reduce salaries, incur layoffs and rearrange medical benefits. Tr. at 337. In its Post Hearing Brief, Respondent pointed to a statement in the Dun & Bradstreet report that its financial condition was only "fair;" that its net income before taxes was only $737,731; and that its net income after taxes was only $256,753. See Respondent's Post-Hearing Brief at 32-33. The ALJ also noted that the Dun & Bradstreet report rated Respondent's payment of its bills only a 64 out of 100 on Dun & Bradstsreet's PAYDEX system. See Initial Decision at 32 n.45.

None of this information met the specific evidence test set out in New Waterbury, yet the ALJ relied on them in determining that Respondent could not afford the full proposed penalty. In so doing, she allowed Respondent to avoid meeting its burden of production. First, the statements of Mr. Lee were the completely uncorroborated assertions of a company officer about the impact of the proposed penalty. Undocumented, self-serving statements by a company's officers about a company's financial condition have been given little weight in determinations of whether a respondent has met its burden of production. In re Dearborn Refining, RCRA (3008) Appeal No. 03-04 (EAB, Sept. 10, 2004); In re Bil-Dry Corp., 9 E.A.D. 575, 614 (EAB 2001).[24] See also In re Robert Wallin, 10 E.A.D. 18, 37 (EAB 2000). Thus, the testimony of Mr. Lee does not meet the Board's specific evidence test set out by the Board in New Waterbury, for a Respondent meeting its burden of production.

While the statement from the Dun & Bradstreet report that the company is in only "fair" condition at the time of the report is not very positive, this does not provide any useful guidance as to what the Respondent can afford to pay. No evidence was proffered at the hearing to explain the underlying basis for the "fair" characterization to enable an understanding of whether it would inform an ability to pay judgment. Similarly, the PAYDEX rating of 64 simply relates to the Respondent's timeliness of payment of its bills. There is no evidence as to what a score of 64 means in regard to Respondent's ability to pay, or how it would guide a judgment about the

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[24]Both these decisions are RCRA cases where the burden of proof on the ability to pay factor is on the violator. When the burden of proof is on the violator in these cases, the burden relates to proving the violator cannot afford the penalty. When the burden of proof is on the Agency, the burden is to prove that the Agency considered the factor. While the burden of proof in those cited cases was different than here, the point remains that self-serving, undocumented statements regarding financial condition are unreliable no matter who has the burden of proof.

amount that Respondent can pay.[25] Thus this information also fails to meet the specific evidence test. In fact, the ALJ even noted in her decision that the Respondent's Post-Hearing Brief admitted the company could afford the full proposed penalty.[26] See Initial Decision at 32. This admission undercuts any evidence Respondent presented. Thus the Respondent failed to meet its burden of production on this issue. But instead of ruling that the Respondent had failed to meet its burden of production, the ALJ considered Respondent's "financial status and net profits" in reducing the civil penalty. Initial Decision at 49. For this reason alone, it was clear error for the ALJ to have considered Respondent's ability to pay in reducing the civil penalty. Therefore the ability to continue in business rationale for the penalty calculation should be vacated.

2. The ALJ Committed Clear Error or Abuse of Discretion By Establishing A New Benchmark with Regard to Determining Respondent's Ability to Continue in Business.

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[25]All the PAYDEX score means is that this company's payments to its suppliers averaged "19 days beyond terms, weighted by dollar amounts." Complainant's Ex. 23 at 2. It further explains that when the weighting factor is not considered, "approximately 84% of the company's payments are within terms." Id.

[26]Interestingly, Respondent brought in Robert Fuhrman as its expert witness. Mr. Fuhrman is probably the most widely used defense expert witness in regard to financial matters such as economic benefit and ability to pay in environmental enforcement actions. But Mr. Fuhrman never testified regarding the ability to pay. Instead he was qualified as a penalty policy expert and confined his testimony to the FIFRA penalty guidelines and their application. If Respondent had any colorable claim of inability to pay, it is highly likely that it would have had Mr. Fuhrman address this issue in his testimony. In addition, Mr. Lee, the officer of a corporation doing $95 million in gross sales per year would have access to all sorts of company financial reports. Yet none of this information was entered into evidence. Finally, page four of the Respondent's initial prehearing exchange of July 7, 2005, states that Respondent is not taking a position that it cannot afford the civil penalty. All three of these observations taken with Respondent's admission in its Post-Hearing Brief add substantial credence to the Agency's position that Respondent could have afforded the full proposed penalty.

As mentioned previously, Complainant based its consideration of the ability to continue in business factor on the 4% of gross sales benchmark contained in the Penalty Policy. While there are more precise ways of assessing the financial strength of a violator, this benchmark has been used for over 25 years and has been accepted by the Board, as discussed in section V.C.1, above. The ALJ, in addressing the size of business factor, correctly points out that "two companies, both with gross sales of $95 million, both equally well run, can net far different profits i.e., a one percent profit equaling $950,000 in one case and a five percent profit totaling $4,750,000 in another." Initial Decision at 14. But regardless of whether the factor is size of business or ability to pay, the essence of any penalty policy is not to craft penalties that are exactly right for each violation. Rather the goal is to provide guidance to the Agency personnel on how to come up with penalties that meet the Agency's stated goals of producing penalties that result in deterrence, fair and equitable treatment of the regulated community, and swift resolution of environmental problems. See PT. 1-1 at 1.

The purpose of the 4% rule was to provide a simple but fair way to quickly assess the ability of a firm to continue in business. The statute does not require that the penalties all have exactly the same financial impact on similarly situated violators. By comparison, the assessment of economic benefit can result in rather large civil penalties. Here the Agency has voluntarily taken upon itself generally to produce more precise calculations of economic savings than other factors such as history of noncompliance.[27] Yet the standard of accuracy set by this Board in

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[27]While the Agency usually generates benefit figures by employing the BEN model for negotiations and expert witnesses for hearings and trials, it has on occasion employed a "rule of thumb" approach which acts similar to the 4% rule. The asbestos "rule of thumb" was expressly approved by the Board in In re Friedman & Schmitt Construction Company, 11 E.A.D. 302, 351 (continued...)

Clean Air Act cases and Clean Water Act cases is "reasonable approximation." In re U.S. Army, Fort Wainwright Central Heating and Power Plant, 11 E.A.D. 126,149,156 (EAB 2003)(Clean Air Act); In re B.J. Carney Industries, Inc., 7 E.A.D. 171, 221 (EAB 1997)(Clean Water Act).

While Complainant applied the Penalty Policy's 4% rule and determined the proposed penalty of $1.3 million was affordable, the ALJ rejected that analysis and instead concluded that a penalty of that size was inappropriate "in relation to Rhee's ability to continue in business, especially when considered in relation to the other statutory factors in this case." Initial Decision at 32. As mentioned in the previous section, Respondent's witness, Mr. Lee, testified that a penalty of $1.3 million would force the company to reduce salaries, incur layoffs and rearrange medical benefits. Tr. at 337. The ALJ acknowledged that "Rhee never proffered any financial statements, tax returns or other financial records of its own supporting its claim as to the negative impact the penalty would have on its business." Initial Decision at 32. But she found the claim "reasonable, if not well supported" based upon the fact that the penalty would amount to five years of net profits and that the Dun & Bradstreet report characterized Respondent's condition as only "fair." Id.

The ALJ, in rejecting Complainant's application of the Penalty Policy's 4% benchmark, substituted a highly defective alternative analysis. She evidently relied on three things in making

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[27](...continued)
(EAB 2004), affirmed No. Civil S-04-0517 WBS DAD (E.D. Cal, Feb. 24, 2005). The Agency attempted to use the UST rule of thumb in In re Euclid of Virginia, Inc., and Clark Automotive Services, Inc., Nos. RCRA-03-2001-5001, RCRA-03-2001-5002 (May 1, 2003). The ALJ rejected the calculation, but it was not because the Agency was using a "rule of thumb" approach. The problem was that the data entered into the rule were so seriously flawed that the ALJ described the resulting calculation of economic benefit as "divorced from reality." See Euclid, slip op. at 26. It is important to note that the ALJ had no objection to applying this rule of thumb. He only objected to the cost of capital data.

this rejection. She first seems to have taken some stock in the totally undocumented, self-serving statements of Mr. Lee that paying the full penalty would result in financial hardship for the company. As mentioned above, this Board has given little weight to such statements.

The ALJ then established a new benchmark for ability to pay: comparing the penalty to annual net profits. This new "benchmark" is thoroughly flawed and totally unreliable. Owner operated companies have ample opportunity to legally manipulate their finances to make themselves look minimally profitable or even unprofitable.[28] This Board has recognized this sort of manipulation can skew profitability of a respondent. See In re Sultan Chemists, 9 E.A.D. 323, 353 (EAB 2000). The statement in Dun & Bradstreet about Respondent's net income before taxes and its net income after taxes are therefore meaningless. But even if these figures were real numbers, one would still have to consider other sources of funds such as assets that could be liquidated without harming the business.[29]

With regard to the ALJ's reliance on Respondent's company being characterized as "fair" and its PAYDEX of 64 out of 100, there is no explanation of what these statements mean in regard to their impact on Respondent's ability to continue in business. Does a "fair" condition

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[28] For example, one of the most common issues facing owner operated companies is avoiding double taxation. This occurs if the company shows profit in a tax year. The company will pay taxes on the profits, and when the owners take it into income, they will pay taxes again on the same money. To avoid this, the company minimizes any taxes by getting rid of the profits prior to the end of the tax year. This can easily be done by increasing the benefits to the owners in the form of increased salaries, enhanced health insurance, children's tuition payments, etc. Thus the net profits will be artificially low or nonexistent.

[29] For example, a real estate investment firm might have some very bad years financially, even though it owns thousands of acres of prime development land. Some of that land could be sold or mortgaged to allow that firm to pay a penalty and/or compliance costs without any impact on its ability to continue in business.

mean the company is having financial difficulties, or will face them if it pays a civil penalty of $1.3 million? We certainly cannot tell from the record or the initial decision. All the PAYDEX score means is that this company's payments to its suppliers averaged "19 days beyond terms, weighted by dollar amounts." Complainant's Ex. 23 at 2. It further explains that when the weighting factor is not considered, "approximately 84% of the company's payments are within terms." Id. This inappropriate reliance on the Dun & Bradstreet information, the creation of a new, highly defective benchmark, and Respondent's admission that it has the ability to pay the full penalty in its Post-Hearing Brief demonstrates that the ALJ's consideration of Respondent's "financial status and net profits" in reducing the civil penalty was clear error or an abuse of discretion. See Initial Decision at 49. Thus, the ALJ's rationale for reducing the civil penalty for the ability to continue in business factor should be vacated.

3. The ALJ Committed Clear Error or Abuse of Discretion In Devising The Alternative Penalty Calculation Methodology She Used To Assess the Penalty.

The ALJ concluded that Respondent's misfeasance essentially occurred once, when the decision to import JOMYAK was first made, and that this "erroneous decision merely continued unchecked and unchanged thereafter, but that the evidence indicates it was not made anew at any later point."[30] Initial Decision at 50. In making this conclusion about Respondent's unlawful

[30] The ALJ inconsistently concluded on the one hand that "each distribution of unregistered pesticide" should be assessed a separate penalty because "each distribution represents both an increased risk of harm to human health and an additional act on the part or Respondent, "see Initial Decision at 48, while on the other hand concluding that Respondent's (continued...)

conduct, the ALJ committed clear error because Respondent's act of selling and distributing JOMYAK without proper registration is the act of misfeasance and Respondent actively engaged in this conduct repeatedly, each time earning a monetary profit as a result. This is not a case whereby an initial act such as land disposal merely remains unremediated. Rather, active and conscious conduct was behind every sale and distribution. The ALJ's determination that Respondent's "misfeasance essentially occurred once" is an erroneous legal conclusion, especially in light of her Order granting EPA's Motion for Accelerated Decision on Liability in which she concluded that Respondent had committed 467 separate violations of FIFRA.

This erroneous conclusion impacts the ALJ's penalty calculation methodology. As previously discussed, the ALJ established a new rule that, in cases with a large number of violations which potentially yield a high penalty, the amount of the penalty per violation must be determined outside of the Penalty Policy. In applying this rule, because the ALJ found support for treating violations 2 through 264 as merely a continuation of the initial malfeasance, the ALJ's penalty calculation methodology applies a discounted penalty amount for each of Respondent's violations subsequent to the "initial malfeasance."

The ALJ's decision to apply a discounted penalty for violations 2 through 264 is not supported by the record. That each violation, from 1 through 264, involved distribution of the same unregistered pesticidal product, is uncontroverted. Accordingly, in determining an

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[30](...continued)
"misfeasance essentially occurred once - when the decision to import the product was first made, and that erroneous decision merely continued unchecked and unchanged thereafter, but the evidence indicates it was not made anew at any later point," see Initial Decision at 50. This inconsistency is further indicia of the ALJ's flawed reasoning.

appropriate penalty for each violation, there is no basis, under the record of this proceeding, to assess a differently penalty for violations 2-264 than the penalty for the first distribution.

Moreover, the ALJ's reliance on the RCRA Penalty Policy as the basis for establishing the discounted rate for violations 2 through 264 further supports Complainant's position that she committed clear error. The RCRA Penalty Policy discusses treating multiple violations of the same requirement as "multi-day" violations, assessable at discounted rates as provided in the multi-day matrix. See RCRA Civil Penalty Policy at 22-23 ("Where a facility has through a series of independent acts or omissions repeatedly violated the same statutory or regulatory requirement, the violations may begin to closely resemble multi-day violations in their number and similarity to each other.") Under the RCRA Penalty Policy, enforcement personnel have the discretion to treat multiple violations as *multi-day* violations if to do so "would produce a more equitable penalty calculation.[31] Id. at 23.

In her penalty calculation methodology, the ALJ imports not only the "same reasoning" but also the "same ratio" for multi-day penalties that is used in the RCRA Penalty Policy. See Initial Decision at 49. This ratio is 20% of the maximum statutory penalty. Id. While the ALJ explains that she is applying a 20% reduction for the multi-day violations, i.e., violations 2 through 264, the ALJ does not explain why this particular per cent reduction is appropriate under the facts of this case. There is no meaningful explanation as to why a number that is 20% of the

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[31] Though not the principle thrust of Complainant's argument on the ALJ's use of the RCRA Penalty Policy, it is worth noting the fact that EPA's inclusion of the multi-day concept for multiple violations in the RCRA Penalty Policy and EPA's silence in the FIFRA Penalty Policy, demonstrates that EPA knows how to include this concept in a penalty policy and chose not to do so in the FIFRA Penalty Policy. This may be the case because of the different statutory penalty authority in the two statutes. Compare RCRA § 3008(g)($25,000 civil penalty) with FIFRA §14(a)($5,000 civil penalty).

penalty assessed for the first violation is an appropriate penalty and a sufficient deterrent other than the fact that this is the "same ratio" that the RCRA Penalty Policy uses. By merely using the 20% ratio because it is the ratio that the RCRA Penalty Policy uses, the ALJ failed to explain how the penalty assessed corresponds to any penalty criteria set forth in the Act. See 40 C.F.R. § 22.27(b). As such, the Board should conclude that the ALJ's analysis is insufficient and clear error. See FRM, slip op. at 15-16, 18 (discussing the ALJ's "paucity of analysis" with regard to the appropriateness of the substantially reduced penalty).

Complainant does not mean to imply that the ALJ easily could have rectified this flaw merely by making minimal changes to her discussion of this issue. Not only did the ALJ fail to explain why 20% is the correct ratio, but also she failed to explain why it is appropriate to use *any* ratio, especially a ratio of penalties assessed for the initial violation compared with penalties for subsequent violations. Such a ratio is meaningless in the context of this case. If any ratio should be used, it should be the ratio of raw total penalties assessed compared to amounts that reflect Respondent's ability to pay or continue in business, because such a ratio relates to the ultimate goal of providing a fair and equitable deterrent. The 20% ratio that the ALJ borrowed from the RCRA Civil Penalty Policy has no relationship to what is an appropriate deterrent amount for an individual FIFRA violator and it is particularly inappropriate to apply in this case because the statutory maximum penalty in FIFRA cases is only $6,500 (as adjusted). While penalizing multi-day RCRA violations at 20% of the initial violation might yield a total penalty amount that make sense in order to achieve a fair and equitable deterrent given the RCRA statutory penalty maximum of $32,5000 (as adjusted), it is woefully deficient to penalize continuing FIFRA violations at 20% of a statutory maximum that is only 20% of the statutory

maximum of most EPA statutes that EPA enforces, particularly for registration and labeling violations that the Board has acknowledged are such important parts of the FIFRA regulatory program. Accordingly, the ALJ committed clear error and an abuse of discretion not only for failing to explain why 20% of the penalty assessed for the first distribution is an appropriate discounted penalty but also why any ratio is appropriate at all.

For all of the reasons stated in this Section V.C.3, the Board should conclude that the ALJ committed clear error and/or abuse of discretion by using this alternative penalty calculation methodology and accordingly, this portion of her Initial Decision should be vacated.

VI. Conclusion

The ALJ committed clear error and an abuse of discretion in her penalty analysis and Complainant respectfully asks the Board vacate certain erroneous portions of her Initial Decision. In particular, the ALJ committed clear error or abuse of discretion in her rationale to completely depart from EPA's FIFRA Penalty Policy. Because the ALJ committed clear error and/or an abuse of discretion, her rationale to depart from the Penalty Policy cannot survive the Board's close scrutiny and Complainant respectfully requests the Board to vacate this portion of her Initial Decision. Additionally, the ALJ committed clear error or abuse of discretion in her factual findings or conclusions of law related to Respondent's ability to continue in business. Accordingly, Complainant also respectfully requests the Board vacate this portion of her Initial Decision.

Finally, Complainant submits that the ALJ committed clear error or abuse in discretion in the alternative penalty calculation methodology that she employed to assess the penalty and accordingly, respectfully requests that the Board vacate this portion of her Initial Decision.

November 20, 2006

Respectfully submitted,

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In re Rhee Bros., Inc., FIFRA Appeal No. 06-02

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of November, 2006, one original and one copy of Complainant-Appellant's Appeal Brief was filed with:

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and that one electronic copy was submitted to the EAB through U.S. EPA's Central Data Exchange (CDX),

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