BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON D.C.

In The Matter Of:

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

FIFRA Appeal No. 06-02

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

Issued September 19, 2006

BRIEF OF APPELLEE RHEE BROS., INC.

December 15, 2006

TABLE OF CONTENTS

I. INTRODUCTION

On September 19, 2006, the Chief Administrative Law Judge ("ALJ") issued a 50-page, single-spaced ruling in this matter, assessing a penalty of $235,290 against Appellant Rhee Bros., Inc. ("Rhee Bros."). That ruling ("the Initial Decision") finds it proper to deviate from the Enforcement Response Policy ("ERP") issued by the United States Environmental Protection Agency ("EPA" or "the Agency") to guide enforcement of the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA") matters. It also provides a secondary penalty calculation under the ERP which would result in a penalty of $217,800. In appealing the Initial Decision, EPA does not dispute the amount of the penalty assessed, the authority of the Chief ALJ to deviate from the ERP, or the Initial Decision's secondary penalty calculation. Rather, all the Agency argues is that some of the rationales articulated in detail by the Chief ALJ for departing from the ERP are erroneous and should be individually vacated. In so arguing, EPA ignores the entirety of the Initial Decision, takes several of the Chief ALJ's conclusions out of context, and, in places, mischaracterizes the record.

Even if the Environmental Appeals Board ("EAB" or "the Board") is persuaded by some or all of EPA's arguments, the end result should be, at most, vacation of certain of the rationales set forth in the Initial Decision in support of the primary penalty calculation. EPA has not asked for remand of the penalty decision, and the Board should not do so, particularly in light of the lack of any challenge to the Chief ALJ's secondary penalty calculation.

II. ARGUMENT

A. EPA's Appeal is extremely limited

EPA's appeal is extremely limited. The Agency does not appeal the specific amount of the penalty assessed in the Initial Decision. Brief of the Complainant-Appellant U.S. Environmental Protection Agency, Region III ("EPA Br."), p. 2. As such, it neither seeks to have the Board remand the matter for assessment of a different penalty amount or to assess an alternative penalty *de novo*. *Id.*

EPA also does not dispute that the Chief ALJ has the discretion to deviate from the ERP. EPA Br., p. 8 ("The Board has made it clear that an ALJ is 'free to disregard a penalty policy if reasons for doing so are set forth in the Initial Decision.'"). The Agency only disputes certain of the Chief ALJ's rationales for deviating from the penalty policy, along with her analysis of Rhee Bros.'s "ability to continue in business, and her alternative penalty calculation methodology." EPA Br., p. 9.[1]

Finally, and perhaps most significantly, the 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.[2] Even if EPA persuades the Board to vacate certain portions of the Initial

---

[1] This "alternative penalty calculation methodology" is the penalty calculation which applies a discounted penalty for violations 2 through 264 and results in a penalty assessment of $235,290. See EPA Br., pp. 36-40.

[2] EPA alludes to the Initial Decision's ERP calculation in its brief, but appears not to view it as an "actual" penalty calculation. EPA Br., p. 26, n. 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

Decision and the Board determines that, as a result, there is insufficient rationale to support the alternative penalty calculation, there is no reason to overturn the Initial Decision's ERP calculation.[3]

B. The Initial Decision is based on the totality of circumstances in this case

The Initial Decision is exhaustive and extensively supported. It presents six single-spaced pages of background facts (Initial Decision, pp. 3-9), twenty-one single-spaced pages of facts and argument specific to application of the ERP (Initial Decision, pp. 11-32), and eighteen pages of single-spaced argument and conclusions (Initial Decision, pp. 32- 50). In so doing, the Court makes over twenty-five separate legal conclusions and twenty-five factual conclusions. See Exhibit 1, providing excerpts of several of these conclusions.

---

differently."). Contrary to EPA's interpretation, the Chief ALJ's ERP calculation is not a hypothetical exercise showing how she could have utilized the ERP if she had chosen to do so. It is clearly an alternative penalty methodology provided to the EAB in case of an appeal of her decision to depart from the ERP and an EAB determination that such departure was inappropriate. The ERP calculation is full and complete, described in its entirety and supported by the factual and legal conclusions in the first 48 pages of the Initial Decision. Initial Decision, p. 50. It is described in almost the same detail as her main calculation methodology. Indeed, the explanation of the "main" methodology comprises one-and-one quarter pages of the Initial Decision (Initial Decision, pp. 48-49), while the ERP calculation comprises three-quarters of a page. Initial Decision, p. 50. It is obviously an alternative rationale, a fact completely misunderstood by EPA.

[3] There is a significant possibility of confusion in the use of the term "alternative penalty calculation," since EPA uses the term to refer to a penalty calculation different from that referred to by the same name in the Initial Decision. EPA's appeal refers to the penalty calculation methodology which results in the $235,290 assessment as an "alternative penalty calculation" because it deviates from the ERP. *See, e.g.*, EPA Br., pp. 5 and 9. In contrast, the Initial Decision describes its "alternative calculation" (Initial Decision, p. 50) as the one performed "under the general methodology of the ERP." *Id.* This latter penalty calculation, not appealed by EPA, is the one which results in the $217,800 assessment. *Id.* In an attempt to minimize this confusion, this brief adopts EPA's use of the term "alternative penalty calculation" rather than the Court's. Consequently, when using that term, this brief is referring to the calculation resulting in the $235,290 assessment. The calculation resulting in the $217,800 assessment will be referred to as the Initial Decision's "ERP calculation."

As noted in the Initial Decision, "[t]he 'matter of concern. . . is whether the penalty is appropriate in relation to the facts and circumstances at hand.'" Initial Decision, p. 36, citing *In re FRM Chem, Inc.* slip opinion, pp. 15, 16 (EAB, June 13, 2006). In determining whether a penalty based on the ERP is appropriate, the Chief ALJ makes plain that she based her decision on the totality of the circumstances in this case. For example, the Initial Decision states that:

- "I am struck by the magnitude of the proposed penalty here in relation to the totality of the circumstances in this case." Initial Decision, p. 37.
- "The simple multiplication of the penalty calculated under the ERP for one violation by the number of distribution(s) yields a penalty which does not reflect the total circumstances of this case." Initial Decision, p. 47.
- "Upon consideration of all of the evidence, including the foregoing, I find sufficient compelling reasons to depart from. . . the ERP." Initial Decision, p. 47.
- "Upon consideration of the three statutory factors, the parties' arguments and the evidence, I am not persuaded that Complainant has shown that a penalty of $1,306,800 is appropriate. . . ." Initial Decision, p. 37.

Given that the Chief ALJ's decision to depart from the ERP was based on the totality of the circumstances and the entirety of the evidence, Initial Decision, p. 47, EPA cannot simply dissect the Initial Decision, pull out rationales with which it disagrees, and ask for those to be stricken. It is the sum of those rationales that resulted in the ALJ's decision, not their individual merits. Yet EPA challenges only a portion of the ALJ's conclusions, as seen by comparing the arguments raised by EPA in its Brief with the excerpted conclusions in Exhibit 1. Further, EPA makes no effort to challenge the numerous arguments presented below by Rhee Bros. and specifically relied upon by the Chief ALJ in reaching her decision. Initial Decision, pp. 37, 47.

EPA's failure to challenge more than a fraction of the evidence and argument requires the rejection of EPA's request to vacate those parts of the ALJ's decision that depart from the ERP.

Rhee Bros. notes that EPA's limited request for relief is the necessary result of its limited appeal. EPA has not requested a remand, EPA Br., p. 40-41, and a remand is not warranted, because even if the Board were inclined to vacate the portions of the Initial Decision identified by EPA, the Initial Decision could still stand as modified by the Board. Furthermore, as an alternative, the Board could affirm the Initial Decision based on the ALJ's ERP calculation and its supporting rationale, which EPA does not appear to oppose.

C. As in the case below, EPA has failed to properly consider fairness and equity

Significantly, EPA has not challenged the heart of the Initial Decision - the holding that "The evidence proffered in this case suggests that the Agency did not properly consider whether the penalty being proposed here of 1.3 million dollars for these violations represents 'fair and equitable' treatment of a member of the regulated community, or a comparable penalty for comparable violations." Initial Decision, p. 46; *see also* Initial Decision, p. 47 ("The methodology to be applied must effectuate the intent of the ERP 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.'"); and Initial Decision, p. 43 ("'[F]airness, equity and other matters as justice may require' are appropriate considerations in assessing civil penalties under FIFRA.").

Instead, EPA steadfastly sticks to the ERP, arguing that even in situations where the Initial Decision found inequities in applying the ERP to the facts of this case, the ALJ should have applied the ERP and then used a modifier to reduce the penalty. *See, e.g.,* EPA Br. p. 15 ("The ALJ's determination that EPA 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."); p. 24 ("[T]here is no reason the ALJ could not have generally applied the penalty policy and then deviated, in one small respect, by applying a downward adjustment. . . in order to account for Respondent's 'high degree of cooperation.'"); and p. 26 ("The ALJ Could Have Made Adjustments To The Penalty Calculated Using The Penalty Policy Framework To Arrive At A Lower Penalty Than Complainant Calculated."). EPA's arguments suggest that the Chief ALJ should have somehow deviated from the ERP within its confines, rather than outside of it, as she chose to do. EPA's approach is not only illogical, but it ignores the ALJ's findings, supported by 50 pages of rationale, regarding the unfairness and inequity of strictly applying the ERP. The Board has routinely upheld ALJ determinations in cases like this:

> While it is true that the ALJ's criticism of the proposed penalty. . . rais[es] the question of whether the ALJ might have worked within the framework of the Penalty Policy in developing an alternative penalty assessment, we are not inclined to reverse his choice to instead limit his focus to the statutory factors. Rather, we find that his articulated rationale, on the whole, reflects a serious inquiry and is predicated on sufficiently persuasive considerations to warrant our deference. . . .

In re CDT Landfill Corporation, 11 E.A.D. 88, 120 (EAB 2003). In this case, as in *CDT Landfill*, EPA's collection of piecemeal arguments – taken as a whole - is not persuasive to vacate even portions of the Initial Decision.

D. None of EPA's piecemeal individual arguments are persuasive

In addition to failing as a whole, even on an individual basis, most, if not all, of EPA's piecemeal arguments are flawed, as addressed below. All of these arguments were thoroughly addressed in Rhee Bros.'s Post-Hearing Brief. For the sake of judicial economy, Rhee Bros.

does not here repeat those arguments or the entire factual background of the case, but instead incorporates by reference Rhee Bros.'s Brief and its 186-item Findings of Fact filed with the Court below, which are already part of the record in this appeal.

1. The ALJ did not adopt a new rule regarding multi-violation cases

EPA's first concern relates to the "per se" rule for treatment of multiple violation cases which the Agency believes the Chief ALJ has adopted. To the contrary, the Initial Decision makes clear that the Chief ALJ's concerns lie with the applicability of the ERP to the specific violations charged in this case. Indeed, the paragraph which concludes with the "per se" rule of concern to EPA, stresses that:

- "[T]he FIFRA ERP appears to compress violators and violations into a few select categories and thereby, in the circumstances of this case, is too inflexible and over-inflates the penalty." Initial Decision, p. 37 (emphasis added).
- "[T]he proposed penalty here is only ten percent less than the *maximum penalty* allowed by law which should normally be reserved for the most horrific violator. . . ." Initial Decision, p. 37 (underlining added).
- "Respondent and its conduct here is not merely 10% better than that, it is far better than that in that *none* of those aggravating factors are at play here." Initial Decision, p. 37 (underlining added).
- "[I]n a case such as this, where a very large number of violations is charged, it is clear that compression results in the factors favorable to Respondent not being appropriately accounted for. . . ." Initial Decision, p. 37 (emphasis added).

This analysis leads to the Chief ALJ's conclusion 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.

Initial Decision, p. 38 (emphasis added). Read in context, it is clear that the ALJ is concerned that, under the facts of this particular case, the significance of the gravity of the violations would be lost in strictly applying the ERP. Thus, no "per se" rule is being established.[4]

2. The ALJ's rationale regarding harm to human health was adequately supported by the record.

There was extensive evidence provided below regarding the potential harm to human health caused by naphthalene. *See* Rhee Bros.'s Post-Hearing Brief, pp. 17-22 and its Proposed Findings of Fact numbers 75, 76, 83-86, 94, 95, 100, and 104-113.[5] The Chief ALJ specifically found that, among other things:

- "To assess the value of '3' for harm to human health for *each* violation because there were many [violations]. . . . and then to multiply this increased assessment by each of the many (264) distributions themselves, grossly exaggerates the level of potential for harm to human health and erroneously escalates the final penalty." Initial Decision, p. 39.

[4] This argument highlights the flaw in EPA's approach of parsing out the Initial Decision's individual rationales rather than examining the totality of the circumstances. It is that totality which provides the basis for this finding and yet, rather than look to that totality, EPA singles out what it views as a *per se* rule of universal applicability. EPA then argues that "[t]o 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 on the evidence in the record." EPA Br. p. 12. To the contrary, the evidence in the record, and the totality of that evidence, is exactly the basis for the ALJ's decision.

[5] Among other things, one of EPA's witnesses stated that, at present, the EPA's conclusion is that naphthalene products are "effective products and they don't cause any unreasonable adverse effects to man or the environment." Transcript page 220, line 20 through page 221, line 6 ("Tr. 220:20-221:6.")

- "A value of '3' is also not warranted on the basis of potential 'serious and widespread' risk of harm to human health, considering that the products are so pervasively well known. . . ." Initial Decision, p. 39.
- A value of "3" is not warranted, considering "that only one of the three JOMYAK products sold by Rhee (about 1/3 of the sales) were mothballs. . ." Initial Decision, p. 39.
- A value of "3" is not warranted, considering "that the mothballs were not multi-colored. . . ." Initial Decision, p. 39.
- A value of "3" is not warranted, considering "that only one of the packages was decorated with a cartoon hippopotamus. . . ." Initial Decision, p. 39.
- A value of "3" is not warranted, considering "that the packaging evidenced illustrations of proper use in drawers and closets. . . ." Initial Decision, p. 39.
- A value of "3" is not warranted, considering "that there was only a very small percentage (2-3%) of health effects which were more than minor reported from improper exposure by the AAPCC. . . ." Initial Decision, p. 39.
- A value of "3" is not warranted, considering "that the products were sold in the household sections of stores. . . ." Initial Decision, p. 39.
- A value of "3" is not warranted, considering "that there is only a small amount of pesticide represented by each violation. . . ." Initial Decision, p. 39.
- "[T]here is no evidence in the record that the Agency made any effort to directly contact OXY or any of its wholesale distributors in the United States, such as Rhee, or to notify the U.S. Customs Service or FDA, in an effort to stave off further distribution of what it now

describes as such dangerous, even lethal, OXY products, when it appears it first became aware of them being sold in the U.S. in or about *August 2000*." Initial Decision, p. 39.[6] These findings are in addition to the others made in the factual section of the Initial Decision and Rhee Bros.'s arguments, both of which were incorporated by the Chief ALJ into the rationale of the Initial Decision.

EPA fails to address many of these conclusions. As to the ones the Agency does address, all of those challenges are belied by the evidence in the record and several are based on mischaracterizations of that record. For example, EPA states that "[t]he ALJ's conclusion that the products 'would have been registered' [if properly labeled] is conjecture." EPA Br., p. 17, n. 12. To the contrary, Daniel Peacock, the EPA employee called by the Agency to testify regarding pesticide labeling and registration, admitted this exact point upon questioning by the Chief ALJ. *See* Tr. 218:18-22 ("Q. This product, the one that you looked at with mothballs, 99 percent naphthalene, if it bared [sic] the proper labeling, is there any reason why EPA wouldn't register the product? A. No.").

Similarly, EPA states that "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." EPA Br., p. 18. Again, an EPA witness acknowledged this point in response to questions posed by the Court. *See* Tr. 65:22-67:1 ("Q. So your parents even 30, 40, or more years ago were familiar with the dangers of mothballs. This is common knowledge; would you agree? A. Yeah. Q. Would you agree with me that it's common knowledge among adults that

[6] EPA appears to take issue more with the ALJ's factual findings regarding the potential effects of naphthalene than her use of those findings to depart from the ERP. *See* EPA Br., pp. 16-18 (Presenting three pages of argument addressing why, "[m]ore 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.") (emphasis added).

mothballs have some danger to them in regard to children in particular? A. Yes, I would have to agree with you on that.") This specific exchange was cited by the Court in reaching its conclusion. Initial Decision, p. 22.

Thus, EPA is incorrect in stating that the "factors [relied upon by the Chief ALJ] are not necessarily sufficient to support her determination that harm to human health is not serious or widespread." EPA Br., p. 16.[7] In a similar case, the Board "disagree[d] with the Region's assertion that the ALJ failed to provide a 'reasoned, independent determination' for his alternative penalty assessment." *CDT Landfill*, 11 E.A.D. at 119. In that case, as here, "[t]he ALJ in the Initial Decision sets out in some detail the particular circumstances which he deemed significant in determining the appropriate penalty." *Id.* The Board upheld that ALJ's decision and should do so here. EPA's attempt to distinguish *CDT Landfill* on the basis that "the ALJ in Rhee Bros., did not articulate a persuasive rationale deserving the Board's deference," EPA Br. p. 15, is unconvincing.

3. The ALJ's discussion of EPA's failure to stave off the violations is simply another rationale related to the potential seriousness of the violations

EPA also takes issue with the ALJ's discussion of EPA's failure to stave off the violations "because it improperly shifts the blame for the continuing legal conduct from Respondent to EPA." EPA. Br., p. 20. To the contrary, the ALJ simply uses this factor "to further illustrate that the risk to human health is over-magnified in the proposed penalty." Initial Decision, p. 39. In no way does the ALJ blame EPA for the violation. This, and the other

[7] This argument again shows the problem with parsing the Chief ALJ's rationales, concluding as EPA does that "[t]he ALJ's determination that EPA 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." EPA Br. p. 15. (emphasis added). Whether it is a "sufficiently" convincing reason for departure from the ERP is irrelevant in light of the fact that it was one of a multitude of factors cited by the Court in reaching its decision to depart.

examples provided in the Initial Decision regarding EPA's response to the violations at issue (and to other similar violations) were cited because "they lend support to Respondent's claim that the Agency did not see the matter as one involving 'potential serious or widespread' danger to human health." Initial Decision, p. 40.[8]

4. The ALJ's reliance on economic benefit is reasonable

In deciding whether the proposed ERP penalty was reasonable, it was well within reason for the Chief ALJ to compare EPA's proposed penalty to the economic benefit received as a result of the violation. Such a comparison examines the proportionality of the penalty to the violations and therefore assists the court in determining if the penalty is fair and equitable.[9] EPA's citation to EPA's 1984 Policy on Civil Penalties that the "sole purpose of seeking benefit recapture is to 'level the playing field' such that a violator gains no economic advantage" as a result of its violation, EPA. Br., p. 23, is unpersuasive. The Chief ALJ in this case did not analyze "benefit recapture," but instead examined the magnitude of the violation using economic benefit as one of several proxies. In any case, Rhee Bros. clearly gained no benefit not recaptured by the alternative penalty calculation or the ERP penalty calculation. Both far exceed the profit made by Rhee Bros. on these sales.

---

[8] It is interesting to note that in attempting to defend the timing of its response in this matter, and after erroneously accusing the ALJ of making factual findings unsupported by the record, EPA provides a detailed rationale of the purpose and nature of the Enforcement Case Review ("ECR") program without citation to any statute, regulation, guidance, policy, or fact. EPA Br. p. 20, n. 15.

[9] "[F]airness and equity are appropriate considerations in assessing civil penalties under FIFRA." *In Re Johnson Pacific, Inc.*, 5 E.A.D. 696, 704 (February 2, 1995). *See also* Section II.C., *supra.* The same is true under the ERP, which notes in its first paragraph that it "is designed 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, p. 1.

5. The ALJ's rationale regarding cooperation is convincing

In identifying Respondent's "high degree of cooperation," the ALJ has identified another factor which is not considered under the ERP. Given that failing, it was another reasonable consideration for her to use in determining whether to apply the ERP. EPA insists that this rationale "is not a persuasive or convincing reason to support the ALJ's complete departure" from the ERP, EPA Br., p. 24, and that, instead, "there is no reason the ALJ could not have generally applied the Penalty Policy and then deviated, in one small respect, by applying a downward adjustment." *Id.* Whether it warrants a "complete departure" is irrelevant to EPA's argument, since EPA asks the Board to vacate this factor on the basis that it should not have been considered at all. The Chief ALJ did not rely on this factor as her sole basis for departure – it was one of many, and was a valid one.

6. Comparison to other penalties is reasonable to achieve fairness and equity.

Similar enforcement responses and comparable penalty assessments are additional, reasonable factors for the Chief ALJ to examine to help her determine whether the penalty proposed under the ERP was fair and equitable. For the reasons stated in the Initial Decision at pages 43-46, the Chief ALJ believed the proposed penalty would not be fair and equitable. *See also* Rhee Bros.'s Post-Hearing Brief at pages 33 through 36. Regardless of whether "EPA has the discretion to allege what it believes to be the appropriate number of violations in any enforcement proceeding," EPA Br., p. 26, EPA does not have the right to the award of an unfair and inequitable penalty.[10]

[10] Although EPA has not argued that it does, it should be noted that the EAB's ruling in *In Re Chem Lab Products*, 10 E.A.D. 711 (October 31, 2002) does not restrict the ALJ's examination of the penalties sought in these other cases in order to determine the appropriate penalty in this case. *Chem Lab* only stands for the proposition "that 'penalty assessments are sufficiently fact- and circumstance-dependent that the resolution of one case cannot determine the fate of

E. The alternative penalty calculation methodology was reasonable

Having elected to depart from the ERP, the Chief ALJ examined multiple penalty calculation methodologies and selected what she believed to be the most appropriate one. Initial Decision, pp. 48-49. The factors she used to formulate and examine that methodology were reasonable.

1. Rhee Bros.'s financial status and net profits are a reasonable consideration under the alternate penalty calculation methodology

In identifying a methodology which would result in a fair and equitable penalty, the Chief ALJ reasonably relied on evidence of Rhee Bros.'s financial status and net profits (which evidence was largely introduced by EPA itself). Initial Decision, pp. 11-14. These factors provided one of several benchmarks against which she judged whether her proposed methodology was reasonable.[11]

---

another.'" *Id.* at 728. Unlike in *Chem Lab*, the other cases described in the Initial Decision were not analyzed so that the Court could mimic the penalty sought or obtained, but to examine how they were charged. The nature of these charges informs both the fairness and equity of the penalty charge in this case. They also provide insight into EPA's historic view of the gravity of other mothball cases. Moreover, the *Chem Lab* court explicitly acknowledged the tension between the need to assess penalties on an individual basis and "EPA's long-established policy favoring consistency and fairness in enforcement." *Id.* at 731. The court resolved this tension by ruling "that the penalty policies do not, by aiming for the high ideals of consistency and fairness, necessarily 'suggest identical penalties in every case.'" *Id.* at 732. The Initial Decision did not find that the penalty in this case be identical to those in the other cases. Finally, the *Chem Lab* court acknowledged "that there may be circumstances so compelling as to justify. . . [a] review of other allegedly similar cases." *Id.* If the Board is inclined to view the examination of these other cases as an exercise which would contravene the general *Chem Lab* prohibition, Rhee Bros. suggests that this case – where EPA is seeking a penalty five times Rhee Bros.'s annual after-tax income and 88 times higher than expected based on EPA's historic charges in mothball cases – presents "compelling circumstances" that justify invoking the exception to that general prohibition.

[11] EPA's reference to the "ability to pay" discussion on page 32 of the Initial Decision does not indicate that the ALJ analyzed this factor in making her decision to depart from the ERP. Page 32 of the Initial Decision is the conclusion of the Chief ALJ's factual analysis. Her legal analysis, in which she determines to depart from the ERP, begins in the next section. That

EPA argues extensively that the *New Waterbury* standard applies, that EPA met its burden under the standard and that Rhee Bros. failed to provide adequate rebuttal evidence. EPA apparently does not object to the Chief ALJ's consideration of this evidence, only that she was convinced by it. EPA Br., p. 29 ("In this case, Complainant more than satisfied its burden [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.")

EPA's arguments are unpersuasive for several reasons. First, Rhee Bros. never argued it would be unable to pay a higher penalty. It offered evidence of the impact that payment would have on its business. [12] The ALJ reasonably took that evidence into consideration – outside of the ERP's "ability to pay" stricture – in identifying a fair and equitable penalty.[13]

Second, Rhee Bros. did present its own evidence of the financial impact of the penalty – the sworn testimony of Mr. David Lee, Rhee Bros.'s Managing Director. Initial Decision, p. 12. EPA is evidently unhappy that the Chief ALJ, sitting as trier of fact, believed the evidence he

---

analysis does not examine ability to pay. Ability to pay is not specifically addressed again until page 48 of the Initial Decision, after the Court found that it should depart from the ERP.

[12] EPA, in contrast, identifies what it sees as alleged errors in the ALJ's decisions "with Regard to Determining Respondent's Ability to Continue in Business," EPA Br., p. 28 (Heading V.C.1.) and p. 32 (Heading V.C.2.) (emphasis added). This confusion between ability to pay and impact of payment permeates EPA's arguments in these two sections of its Brief. For example, EPA expresses concern that "the ALJ established a new benchmark for ability to pay: comparing the penalty to annual net profits." EPA Br., p. 35. The ALJ does not use annual net profits as a mandatory benchmark of ability to pay, but instead uses them to guide her analysis of the fairness and equity of her proposed methodology.

[13] EPA's arguments concerning the three Penalty Policy tests for ability to pay (EPA Br., pp. 29-30) are irrelevant, as they apply under the ERP. Here, the ALJ was examining the fairness of the penalty after having departed from the ERP.

provided, and calls his testimony "uncorroborated," "undocumented" and "self-serving." EPA Br., p. 31. Attaching pejorative adjectives to his unrebutted testimony does not change the fact that Mr. Lee's statements were supported by other evidence – placed into the record by EPA itself – and given credibility by the ALJ. Thus, despite EPA's characterizations, that testimony constitutes "reliable evidence or information" properly relied upon the ALJ.

As to the Chief ALJ's use of the Dun & Bradstreet ("D&B") reports submitted into evidence by EPA, Initial Decision p. 11, to help determine her view of the credibility of Mr. Lee's testimony, that, too, was reasonable. Notwithstanding EPA's assertion that no reasonable inference can be garnered from the D&B reports, the Initial Decision specifically notes that:

- "The Report indicates that this 'fair' rating was assigned because of 'D&B's overall assessment of the company's financial, payment, and its historical information.' C's Ex. 23. Dunn *[sic]* & Bradstreet's website indicates that it designates a company's financial condition as either 'strong,' 'good,' 'fair' or 'unbalanced' by reviewing up to 11 financial ratios and comparing them to industry averages for each of the company's lines of business." Initial Decision, p. 32, n. 45.
- "The Report also assigned Rhee a 'PAYDEX' rating of 64, which D&B's website indicates as D&B's unique dollar-weighted numerical indicator of how a firm paid its bills over the past year, based on trade experiences reported to D&B by various vendors. The D&B PAYDEX Score ranges from 1 to 100, with higher scores indicating better payment performance. *See,* http://www.dnb.com/us/managebusinesscredit/glossary.asp." Initial Decision, p. 32, n. 45.

It was well within the ALJ's authority to use these facts to assist her in concluding that Mr. Lee's testimony on the financial impact of a $1.3 million penalty was reasonable.[14, 15]

2. The ALJ reasonably drew guidance from the Resource Conservation and Recovery Act ("RCRA") penalty policy

As indicated in the Initial Decision, there are numerous methodologies under which prior penalties have been calculated by both EPA and ALJs, including ones assessed per violation, per sale, per product, per day of sale, per month of sale, and per year of sale. Initial Decision, pp. 43-46. The ALJ did not find these methodologies appropriate for this case, Initial Decision, p. 38, and rather than choose an arbitrary penalty figure, formulated a different methodology. It was not unreasonable for the Chief ALJ to formulate a methodology similar to that used in the EPA RCRA penalty policy.

The Chief ALJ's rationale is well stated and need not be repeated herein. Instead, it should be noted what it is not. It is not a "determination that Respondent's 'misfeasance essentially occurred once.'" EPA Br., p. 37. To the contrary, the Initial Decision clearly states

[14] *In Re Sultan Chemists*, 9 E.A.D.323, 325 (EAB 2000) cited by EPA for the proposition that "[t]his Board has recognized this sort of manipulation can skew profitability," EPA Br., p. 35, does not support the Agency's position that net income evidence is inherently unreliable. It simply upholds an ALJ's finding that the net profitability of one particular company did not affect its ability to pay in light of the pass-through to its president and sole shareholder of $300,000 to $400,000. *Id.* It is not a blanket statement regarding the reliability of profit data. Here, unlike in *Sultan Chemists*, there is no evidence contradicting the D&B report at issue, which was placed into evidence by EPA. As to EPA's examples of how net income can be manipulated (EPA Br., p. 35 and note 28), they are offered without citation to fact or law and should not be considered.

[15] EPA asserts that the Board should conclude that Rhee Bros. had no "colorable claim of ability to pay" in part because Rhee Bros. called an expert witness that EPA characterizes without evidence as "probably the most widely used defense expert witness in regard to. . . ability to pay" (EPA Br., p. 32, n. 26) and that expert did not testify about ability to pay. That assertion is spurious and is not worth a response other than to note that no conclusion can legitimately be drawn from evidence not presented. Similarly without merit is EPA's inference that Mr. Lee lied under oath on the basis that he "would have had access to all sorts of company financial reports" supporting his statements and did not offer them into evidence. EPA Br., p 32, n. 26 (emphasis added).

that Rhee Bros.'s " failure to seek and obtain EPA approval prior to its first import of JOMYAK" was its "most significant negligent act," Initial Decision, p. 48, but not its only one. Rhee Bros. "subsequent continuing negligence," Initial Decision, p. 49, was not nullified by the ALJ's methodology, but placed in context as "of a lesser degree of nonfeasance or misfeasance." Initial Decision, p. 49.

The Chief ALJ's methodology was not issued "in reliance on the RCRA Penalty Policy," EPA Br., p. 38. Instead, after identifying the methodology (Initial Decision, p. 49), the Chief ALJ notes with approval that the proposed methodology "is commonly used with regard to administrative penalties imposed for violations of [RCRA.]," Initial Decision, p. 49 – not that it was derived from that policy.

Finally, it is simply incorrect for EPA to claim that "the ALJ does not explain why this particular per cent reduction is appropriate under the facts of this case," EPA Br., p. 38, and that "she failed to explain why it is appropriate to use *any* ratio." EPA Br., p. 39. In fact, the point of almost the entire 50-page opinion is to provide this explanation. The Chief ALJ grappled with an exceedingly difficult issue in this case – the identification of a fair and equitable penalty, based on a defensible formula, in a situation where she determined that EPA has not approached past similar violations in a manner that could be fairly translated to the facts of this case. Her rationale is exhaustively documented and supported by cited law and evidence and should not now be dismissively rejected by EPA as being made "without explanation." A fair reading of the Chief ALJ's Initial Decision belies EPA's specious claims.

For the above reasons, the ALJ's alternate penalty calculation should not be vacated.

F. If the alternate penalty calculation is rejected, the ERP calculation should be adopted

If the Board is persuaded by EPA's arguments and believes that, as a result, the ALJ's alternative penalty calculation must be rejected, the ALJ's ERP calculation should be substituted for it. EPA has made no substantive objection to this calculation and, indeed, much of its appeal brief is devoted to argument that the findings by the ALJ should be incorporated into the ERP. Perhaps anticipating those arguments, the Chief ALJ provided a lengthy calculation, with extensive explanation, based on the ERP. EPA makes no argument as to why that calculation should be disturbed. Therefore, even if the EAB determines that the alternative penalty calculation is somehow not appropriate, it should still find that the Chief ALJ's ERP penalty calculation is.

III. CONCLUSION

For the reasons set forth above, Appellee respectfully requests the EAB affirm the Initial Decision of Chief Administrative Law Judge Susan L. Biro issued September 19, 2006, and not

piecemeal vacate portions of it as argued by EPA.

Respectfully submitted,

Date: December 15, 2006

Lowell Rothschild
Venable LLP
575 7th Street NW
Washington, DC 20004
Phone: (202) 344-4000
Fax: (202) 344-8300

Neil Bixler
Bae & Bixler LLC
10019 Reisterstown Road, Suite 301-A
Owings Mills, MD 21117
Phone: (410) 363-1703
Fax: (410) 363-1097

Counsel for Appellee,
RHEE BROS., INC.

EXHIBIT 1

EXCERPTED FACTUAL CONCLUSIONS

1. This suggests that the same penalty may not necessarily be equally "appropriate" to the size of both businesses. In certain circumstances, particularly where numerous units of violation are alleged with correspondingly high proposed penalties, financial figures other than gross profits may be considered along with gross profits in determining whether a particular penalty for a certain violation is "appropriate" in relation to the size of the violator's business, in penalty determinations under FIFRA Section 14(a)(45). Initial Decision, p. 14
2. Of the 50 or so intentional exposures to naphthalene in 2002, no deaths were reported, suggesting that naphthalene is not a particularly efficient poison. Initial Decision, p. 17.
3. Dr. Rotenberg acknowledged that the AAPCC report for 1998 indicates that many other common household substances have higher pediatric poisoning rates and higher incidences of causing significant effects than naphthalene, including pine oil and air fresheners. Initial Decision, p. 18.
4. Mr. Peacock did acknowledge that naphthalene products, exactly the same as JOMYAK mothballs, have been on the market and registered for over 40 years and that, if properly labeled, OXY's JOMYAK product would have been accepted for registration as a lawful pesticide under FIFRA. Initial Decision, p. 22.
5. Dr. Rotenberg acknowledged that an almost statistically insignificant number of major or even moderate consequences occurred as a result of exposure. Initial Decision, p. 19.
6. Labeling and pesticide registration is of greater import for newly developed pesticide products which have as yet unknown risks, or for potentially highly toxic pesticides. Initial Decision, p. 24.

7. Naphthalene moth repellant is a very old, well-established pesticide product. Initial Decision, p. 24.

8. Naphthalene moth repellant's proper use and effect is commonly known by all adults. Initial Decision, p. 24.

9. EPA made a favorable determination regarding naphthalene moth repellant's efficacy and risks over 40 years ago when it first registered such products and has continually approved the registration of the product ever since. Initial Decision, p. 24.

10. Registration of naphthalene moth repellant is so routine that the Agency has developed a format label which can be used for all such similar products. Initial Decision, p. 24.

11. As acknowledged by Mr. Peacock at the hearing, had OXY sought registration of the products there is no question that, with proper labeling, that they would have been registered. Initial Decision, p. 24.

12. The OXY product it most sold was not mothballs, but approximately 6-inch long bars, in opaque packaging, which are not likely to be confused with candy or swallowed by children or adults. Initial Decision, p. 25.

13. Only one of three products Rhee sold were mothballs and displayed a cartoon hippopotamus character. Initial Decision, p. 25.

14. Each package of JOMYAK sold by Rhee displayed pictures indicating placement or use of the products in suitcases, closets, drawers and toilets, clearly indicating to any reasonable adult that the product was not candy. Initial Decision, p. 25.

15. All of the mothballs at issue here had a traditional white appearance, unlike those in other Agency mothball enforcement cases which were multi-colored pastel and thus more "candy-like" in appearance. Initial Decision, p. 25.

16. Complainant's penalty calculation regarding risk of harm makes no distinction at all between the products sold in this case and those appearing far more candy-like in other cases, such as in *Hing Mau* or even among the three various shaped or packaged products sold in this case. Initial Decision, p. 25.

17. It is interesting that in this case the government seeks 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 was not presented to the U.S. Customs Service at the port of entry. Initial Decision, p. 27.

18. The level of negligence of Respondent in selling an unregistered pesticide is tempered by the fact that Rhee is not at all in the business of manufacturing. Initial Decision, p. 30.

19. The level of negligence of Respondent in selling an unregistered pesticide is tempered by the fact that Rhee is not at all in the business of manufacturing pesticides or chemicals. Initial Decision, p. 30.

20. The level of negligence of Respondent in selling an unregistered pesticide is tempered by the fact that Rhee is not primarily in the business of selling, pesticides or chemicals. Initial Decision, p. 30.

21. The level of negligence of Respondent in selling an unregistered pesticide is tempered by the fact that mothballs are such a ubiquitous household product. Initial Decision, p. 30.

22. The level of negligence of Respondent in selling an unregistered pesticide is tempered by the fact that Mr. Lee indicated in his testimony that JOMYAK was the first and only pesticide Rhee had ever sold. Initial Decision, p. 30.

23. The level of negligence of Respondent in selling an unregistered pesticide is tempered by the fact that Rhee sold only a minuscule amount of JOMYAK in comparison to its other products. Initial Decision, p. 30.

24. Rhee's claim of the negative impact on its business seems reasonable, if not particularly well supported, by the fact that the one financial record in evidence – the Dun & Bradstreet Report – reflects that 1.3 million dollars would represent Rhee paying in a penalty what amounts to five years of net profits. Initial Decision, p. 32.

25. Rhee's claim on the negative impact of its business seems reasonable, if not particularly well supported, by the fact that the one financial record in evidence – the Dun & Bradstreet Report – reflects that its financial condition is characterized by the company as only "fair." Initial Decision, p. 32.

25a. The Report indicates that this "fair" rating was assigned because of "D&B's overall assessment of the company's financial, payment, and its historical information." C's Ex. 23. Dun & Bradstreet's website indicates that it designates a company's financial condition as either "strong," "good," "fair" or "unbalanced" by reviewing up to 11 financial ratios and comparing them to industry averages for each of the company's lines of business. Initial Decision, p. 32, n. 45.

25b. The Report also assigned Rhee a "PAYDEX" rating of 64, which D&B's website indicates as D&B's unique dollar-weighted numerical indicator of how a firm paid its bills over the past year, based on trade experiences reported to D&B by various vendors. The D&B PAYDEX Score ranges from 1 to 100, with higher scores indicating better payment performance. *See,* http://www.dnb.com/us/managebusinesscredit/glossary.asp. Initial Decision, p. 32, n. 45.

EXCERPTED LEGAL CONCLUSIONS

1. The FIFRA ERP appears to compress violators and violations into a few select categories and thereby, in the circumstances of this case, is too inflexible and over-inflates the penalty. Initial Decision, p. 37.
2. The proposed penalty here is only ten percent less than the maximum penalty allowed by law which should normally be reserved for the most horrific violator. Initial Decision, p. 37.
3. Respondent and its conduct here is not merely 10% better than that, it is far better than that in that none of those aggravating factors are at play here. Initial Decision, p. 37.
4. In a case such as this, where a very large number of violations is charged, it is clear that compression results in the factors favorable to Respondent not being appropriately accounted for. Initial Decision, pp. 37-38.
5. Thus, 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. Initial Decision, p. 38.
6. The Agency has recognized that where there are many units of violation, penalties can become out of proportion to the facts of the case. Initial Decision, p. 38.
7. To assess the value of "3" for harm to human health for each violation because there were many . . . and then to multiply this increased assessment by each of the many (264) distributions themselves, grossly exaggerates the level of potential for harm to human health and erroneously escalates the final penalty. Initial Decision, p. 39.

8. A value of "3" is also not warranted on the basis of potential "serious and widespread" risk of harm to human health, considering that the products are so pervasively well known. Initial Decision, p. 39.

9. A value of "3" is also not warranted on the basis of potential "serious and widespread" risk of harm to human health, considering that only one of the three JOMYAK products sold by Rhee (about 1/3 of the sales) were mothballs. Initial Decision, p. 39.

10. A value of "3" is also not warranted on the basis of potential "serious and widespread" risk of harm to human health, considering that the mothballs were not multi-colored. Initial Decision, p. 39.

11. A value of "3" is also not warranted on the basis of potential "serious and widespread" risk of harm to human health, considering that the only one of the packages were decorated with a cartoon hippopotamus. Initial Decision, p. 39.

12. A value of "3" is also not warranted on the basis of potential "serious and widespread" risk of harm to human health, considering that the packaging evidenced illustrations of proper use in drawers and closets. Initial Decision, p. 39.

13. A value of "3" is also not warranted on the basis of potential "serious and widespread" risk of harm to human health, considering that there was only a very small percentage (2-3%) of health effects which were more than minor reported from improper exposure by the AAPCC. Initial Decision, p. 39.

14. A value of "3" is also not warranted on the basis of potential "serious and widespread" risk of harm to human health, considering that the products were sold in the household sections of stores. Initial Decision, p. 39.

15. The value of "3" is also not warranted on the basis of potential "serious and widespread" risk of harm to human health, considering that there is only a small amount of pesticide represented by each violation. Initial Decision, p. 39.

16. There is no evidence in the record that the Agency made any effort to directly contact OXY or any of its wholesale distributors in the United States, such as Rhee, or to notify the U.S. Customs Service or FDA, in an effort to stave off further distribution of what it now describes as such dangerous, even lethal, OXY products, when it appears it first became aware of them being sold in the U.S. in or about August 2000. Initial Decision, p. 39.

17. The Agency's six-month deliberative process in the late 2003 and early 2004 to obtain a formal ECR from Mr. Peacock at Headquarters, and formal delegation to MDA of inspection responsibility, all prior to contacting Rhee, seems a bit uselessly attenuated. Initial Decision, pp. 40, 41.

18. The Agency's ERP calculation does into take into account in any way the economic benefit or lack thereof resulting from the violation. Initial Decision, p. 41.

19. Complainant's ERP calculation does not credit Respondent for its high degree of cooperation. Initial Decision, p. 41. Some of Rhee's actions clearly go beyond what Rhee 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. Initial Decision, p. 42.

20. In *less than a week*, Rhee voluntarily provided MDA with background information on its operations and a written statement regarding this matter; and in response to MDA's *impromptu* request, provided the MDA inspectors a tour of the facility's warehouse so they could confirm for themselves that Rhee had no supplies of JOMYAK left for distribution.

Furthermore, in the course of this litigation, Respondent has been extremely cooperative. Initial Decision, p. 41.

21. Where settlement of a case with a very large proposed penalty is highly unlikely and where even the Agency recognizes the Respondent's cooperation in mitigation of the proposed penalty, it seems particularly unfair not to consider Respondent's cooperation in the circumstances of this case. Initial Decision, p. 42.

22. 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. Initial Decision, p. 43.

23. "Fairness, equity and other matters as justice may require" are appropriate considerations in assessing civil penalties under FIFRA. Initial Decision, p. 43.

24. The statutory language together with these policies suggests that each sale or distribution of pesticide at issue in any given case generally should be assessed a separate penalty. The Agency, however, frequently has not done so. Initial Decision, p. 43. In other types of FIFRA cases, the Agency has chosen not to allege violations on a per-sale or per-distribution basis, as noted by Respondent. Initial Decision, p. 45.

25. This is the first, and only, unregistered mothball case in which the Agency has charged a violation for each separate sale or distribution. Previously, whether in regard to a retailer or distributor, it appears that EPA has limited the number of violations to the number of different unregistered pesticide product sold, regardless of the number of sales or distributions. Initial Decision, pp. 43-44. Two other Region IX cases, both commenced after the instant action was initiated, suggest that the Agency is still using the same type of restrictive violation calculation methodology in moth repellant cases. Initial Decision, p. 45, n. 59.

26. This lack of consistency in assessing penalties on a per-sale or per-distribution basis under the ERP weakens the argument for assessing penalties on a per-distribution basis under a strict application of the ERP methodology. Initial Decision, p. 46.

27. Despite having the burden to show the appropriateness of the penalty, Complainant has not adequately explained why Rhee deserves such vastly different treatment from other establishments which sold unregistered pesticides. Initial Decision, p. 46.

28. The evidence proffered in this case suggests that the Agency did not properly consider whether the penalty being proposed here of 1.3 million dollars for these violations represents "fair and equitable" treatment of a member of the regulated community, or a comparable penalty for comparable violations. Initial Decision, p. 46.

29. The Agency has never sought a penalty of anywhere near this magnitude in regard to any other case alleging the sale of unregistered moth repellants under FIFRA section 12(a)(1)(A). Initial Decision, p. 47.

CERTIFICATE OF SERVICE

I certify that I caused a copy of the foregoing BRIEF OF APPELLEE RHEE BROS., INC. to be sent by overnight mail this 15th day of December, 2006, to the following:

William Early
Jennifer M. Abramson
Russell S. Swann
U.S. Environmental Protection Agency, Region III
1650 Arch Street (3RC10)
Philadelphia, PA 19103-2029

Eurika Durr
Clerk of the Board
Environmental Appeals Board
Colorado Building
1341 G Street, N.W., Suite 600
Washington, DC 20005

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

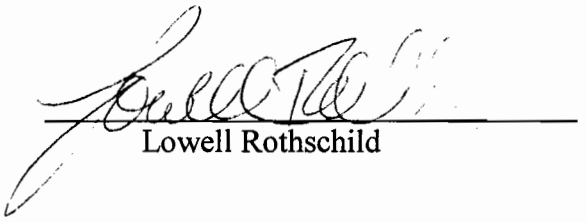
Carl Eichenwald, Chief
Eastern Branch, Toxics and Pesticides Enforcement Division
U.S. Environmental Protection Agency
Office of Civil Enforcement (2245A)
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Jonathan Libber
Senior Attorney-Advisor
U.S. Environmental Protection Agency
Office of Civil Enforcement (2248A)
1200 Pennsylvania Avenue, N.W.
Washington, DC 20469

Ilana Saltzbart
Attorney-Advisor
U.S. Environmental Protection Agency
Office of Civil Enforcement (2245A)
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

The Hon. Susan L. Biro
Chief Administrative Law Judge
Office of Administrative Law Judges
Mail Code 1900L
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Lydia Guy
Regional Hearing Clerk
U.S. Environmental Protection Agency, Region III
1650 Arch Street, Mail Code 3RC00
Philadelphia, PA 19103



Lowell Rothschild