IN RE FRM CHEM, INC., A/K/A INDUSTRIAL SPECIALITIES

FIFRA Appeal No. 05-01

FINAL DECISION AND ORDER

Decided June 13, 2006

Syllabus

Region 7 ("Region") of the United States Environmental Protection Agency filed this appeal from an Initial Decision issued on February 16, 2005, by Administrative Law Judge ("ALJ") William B. Moran. The Region brought this action based on allegations that FRM Chem, Inc. ("FRM Chem") sold an unregistered and misbranded pesticide product called "Root Eater" to three different municipalities in violation of the provisions of section 12 of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136j. The Region proposed a civil administrative penalty of $16,500, which it derived using the *Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)* ["*Penalty Policy*"] (July 2, 1990). FRM Chem disputed both its liability and the amount of the penalty. After a hearing, the ALJ found that FRM Chem was liable but declined to use the *Penalty Policy* to determine a penalty, relying solely on FIFRA's statutory factors in setting a penalty of $1,800. On appeal, the Region contends that the ALJ erred in making his penalty decision by not explaining the basis for the penalty in sufficient detail and by not providing persuasive and convincing reasons for his departure from the *Penalty Policy*.

Held: The Board rejects the penalty assessment in the Initial Decision and fashions its own assessment against FRM Chem in the amount of $16,500. Specifically, the Board concludes the following:

(1) The ALJ explained his reasons for departing from the *Penalty Policy* in sufficient detail but inadequately explained his ultimate choice of a $1,800 penalty. The ALJ need not relate the penalty separately to each statutory penalty factor or apportion a penalty by count, but he or she must nonetheless explain his or her reasoning for the penalty assessed in sufficient detail so that the parties and an appellate body are informed of the basis for the penalty decision. Here, the ALJ provided no meaningful explanation of how he arrived at the alternate number of $1,800 or why that number was sufficient under the facts and circumstances of this case. While the ALJ did not adequately explain or justify the sufficiency of his penalty in this case, the Board will not remand for further amplification because it rejects the ALJ's penalty assessment on other grounds.

(2) The Board finds that the ALJ's rationale for departing from the framework of the *Penalty Policy*, though clearly explained, was not convincing or persuasive for the reasons noted below and thus will not defer to it.

(a) Any reliance the ALJ may have placed on comparison to penalties assessed in other cases is inappropriate.

(b) The ALJ's reduction of the penalty based on his characterization of the size of FRM Chem's business lacks foundation. In addition, the ALJ did not explain the reduction he gave for the size of FRM Chem's business except to the extent that he impermissibly relied upon a legal issue that the Region was not afforded the opportunity to address an approach that was in error in any event.

(c) The ALJ underestimated the seriousness of the violation and its potential harm. In addition, he relied on factual conclusions that were not supported by the record. Furthermore, FRM Chem's attempts at labeling and in cooperating during the investigations of the violation did not merit a departure from the *Penalty Policy*. Finally, a larger penalty is necessary for a deterrent effect.

(3) The proposed penalty of $16,500 is properly calculated under the *Penalty Policy*, is supported by the evidence, and is appropriate based on the facts and circumstances of the case.

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

Opinion of the Board by Judge Reich:

I. *INTRODUCTION*

Region 7 ("Region") of the United States Environmental Protection Agency ("EPA" or "Agency") filed this appeal, as authorized by 40 C.F.R. § 22.30, from an Initial Decision issued by Administrative Law Judge ("ALJ") William B. Moran on February 16, 2005. The appeal arises out of an administrative enforcement action initiated by the Region against FRM Chem, Inc., a/k/a Industrial Specialties ("FRM Chem"), for alleged violations of the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136-136y (2000)("FIFRA"). In the proceeding below, the Region claimed that FRM Chem sold an unregistered and misbranded pesticidal product called "Root Eater" to three different municipalities in violation of FIFRA subsections 12(a)(1)(A) and (E). 7 U.S.C. § 136j(a)(1)(A), (E). Relying on the Agency's policy on FIFRA penalties, the Region sought the statutory maximum civil penalty of $5,500 for each of the three counts, for a total penalty of $16,500.[1] The ALJ found that FRM Chem had committed the violations and was

[1] The statutory maximum penalty was increased from $5,000 pursuant to the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701. For further discussion, *see infra* Part IV.A.

able to pay the penalty, but declined to adopt the Region's proposed penalty. Ultimately, the ALJ found that a penalty of $1,800 was more appropriate under the factual circumstances of the case.

The Region filed this appeal, arguing that the ALJ erred in imposing the reduced penalty. The Region requests that the Environmental Appeals Board ("Board") reject the ALJ's penalty determination and exercise its de novo review authority to recalculate the penalty. Brief of Complainant at 1, 5, 29. FRM Chem has not filed a response to the Region's appeal brief nor has it cross-appealed. As neither party has appealed the issue of FRM Chem's liability, the only matter at issue is the size of the penalty. For the reasons stated below, we reject the ALJ's civil penalty determination and assess a civil penalty of $16,500 against FRM Chem.

II. *STATUTORY AND REGULATORY BACKGROUND*

The federal government has regulated pesticides since 1910, with the first pesticide legislation intended to ensure the quality of agricultural pesticides. *See* Federal Insecticides Act of 1910, 7 U.S.C. §§ 121-134 (*now repealed*). FIFRA was enacted in 1947 to provide purchasers of pesticides with assurances of both the effectiveness and safety of the products. *In re Sav-Mart, Inc.*, 5 E.A.D. 732, 738 n. 13 (EAB 1995) (citing *Thornton v. Fondren Green Apartments*, 788 F. Supp. 928, 932 (S.D. Tex. 1992). In carrying out its purpose, FIFRA's statutory scheme requires proper labeling and registration of pesticide products with EPA before sale or distribution. FIFRA § 3(a)(c)(5), 12(a)(1)(A), (E), 7 U.S.C. §§ 136a(a), (c)(5), 136j(a)(1)(A), (E), 40 C.F.R. § 152.15. Today, in many cases, EPA has waived the statutory requirement to submit data on a product's performance as part of proposed pesticide registrations. FIFRA § 3(c)(5), 7 U.S.C. § 136a(c)(5); 40 C.F.R. § 158.640, note 1.[2] Therefore, EPA's pesticide oversight now focuses largely on the safety of pesticide products and not their effectiveness.

Under FIFRA, it is unlawful to sell or distribute any pesticide product that has not been registered with EPA. FIFRA § 12(a)(1)(A), 7 U.S.C. § 136j(a)(1)(A); 40 C.F.R. § 152.15. The statutory definition of "pesticide" includes "any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest." FIFRA § 2(u), 7 U.S.C. § 136(u). The definition of "pest" includes "any insect, rodent, nematode, fungus, or weed."

[2] Note 1 reads, "The Agency has waived all requirements to submit efficacy data unless the pesticide product bears a claim to control pest microorganisms that pose a threat to human health and whose presence cannot be readily observed by the user * * * . The Agency reserves the right to require, on a case-by-case basis, submission of efficacy data for any pesticide product registered or proposed for registration."

FIFRA § 2(t), 7 U.S.C. § 136(t). Finally, the term "weed" means "any plant which grows where not wanted." FIFRA § 2(cc), 7 U.S.C. § 136(cc). The statutory procedure for registering a pesticide requires filing a statement with the EPA Administrator with information such as the pesticide's name, a copy of the label and formula, and results from certain tests. FIFRA § 3(c)(1)(B)-(D), (F), 7 U.S.C. § 136a(c)(1)(B)-(D), (F).

In addition to its registration requirements, FIFRA also prohibits the sale or distribution of any pesticide that is misbranded. FIFRA § 12(a)(1)(E), 7 U.S.C. § 136j(a)(1)(E). A pesticide is "misbranded" if, among many other things, "its labeling bears any statement * * * which is false or misleading in any particular," "the label does not bear an ingredient statement," or "the label does not contain a warning or caution statement which may be necessary and if complied with * * * is adequate to protect health and the environment." FIFRA § 2(q)(1)(A), (G), (2)(A), 7 U.S.C. § 136(q)(1)(A), (G), (2)(A). These required warning or caution statements should include instructions for safe use and one of three signal words ("danger," "caution," or "warning"). 40 C.F.R. §§ 156.60, 156.64(a)(1)-(3). The appropriate signal word is determined by the pesticide's toxicity category. *See id.* § 156.64(a)(1)-(3). EPA regulations set out the criteria by which pesticides trigger the categorization in each of the four pesticide toxicity categories. 40 C.F.R. §§ 156.62, 156.64.[3]

III. *FACTUAL BACKGROUND*

FRM Chem purchased Industrial Specialties in January 1998 and now does business under both names. Initial Decision ("Init. Dec.") at 1; Complainant's Exhibit ("C Ex.") 6 at 1; C Ex. 8 at 2; C Ex. 9 at 2.[4] FRM Chem is located in Washington, Missouri. Init. Dec. at 1; C Ex. 1 at 1-2. FRM Chem has operated as a registered pesticide producer for decades.[5] Init. Dec. at 1; C Ex. 6 at 1; C Ex. 8 at

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[3] The toxicity categories in these regulations are denoted I, II, III, and IV. 40 C.F.R. § 156.62. Category I is the highest level of toxicity and IV is the lowest level. *Id*. Placement of a pesticide in one of the four categories is based on five possible hazard indicators. *See id*. A pesticide product falls into the highest category level indicated by any of the five hazard indicators. *Id.* § 156.64(a). For example, a pesticide that is corrosive to the skin or the eyes triggers Toxicity Category I the highest level for which the use of the strongest signal word (i.e., "danger") is necessary. *Id.* §§ 156.62, 156.64(a)(1).

[4] Unless otherwise noted, exhibit numbers cited in this opinion follow the numbering of the exhibits at the administrative hearing, which vary from pre-hearing exchange numbers in a few instances

[5] Pesticide producers must register their establishments with the Agency before they can legally start production. FIFRA § 7(a), 7 U.S.C. § 136e(a). "The term produce means to manufacture, prepare, compound, propagate, or process any pesticide or device or active ingredient used in producing a pesticide." FIFRA § 2(w), 7 U.S.C. § 136(w).

2; C Ex. 9 at 2. Prior to 2002, FRM Chem had no history of having violated FIFRA. Init. Dec. at 2; Transcript ("Tr.") at 51; C Ex. 10 at 4.

In 2002, FRM Chem sold multiple 50-pound pails of a product called "Root Eater" to the municipalities of Covington, Oklahoma; Hoisington, Kansas; and Lucas, Kansas. Init. Dec. at 10, n.16; C Exs. 3-5; Tr. at 24; C Ex. 6 at 1. FRM Chem completed two sales with each municipality, and each sale consisted of the purchase of between one and four pails of Root Eater. Complaint ¶¶ 18, 25, 32.[6] There were no other sales of Root Eater in 2002. C Ex. 6. Root Eater was not registered as a pesticide with the Agency at the time of the sales. Init. Dec. at 10 n.16; C Ex. 10 at 1; Tr. at 86.

Root Eater's label included the following language:

> Tree root remover for sewer systems. Root Eater's foaming action removes tree roots from sewer lines without damage to sewage systems. Root Eater coats the walls of the system with insoluble copper resulting in long term activity. Root Eater also removes undesirable slime, fungi and symbiotic organisms whose growth is promoted by root obstruction. * * * Preventative applications may be recommended, depending on continued root growth, and degree of obstruction. * * * CAUTION: Contains Cupric Sulfate. In case of eye contactwith solution, flush eyes immediately. If swallowed, drink large amounts of water, followed by milk, egg whites, or gelatin solution. Seek immediate medical attention.

C Ex. 2 at 6-7.

Cupric sulfate, the only listed ingredient of Root Eater, is a form of copper sulfate. Init. Dec. at 2; Tr. at 90. Copper sulfate can cause irreversible eye damage, respiratory damage, and skin corrosion in humans. Init. Dec. at 2; Tr. at 65, 83; C Ex. 10 at 2. It is a known pesticidal ingredient contained in pesticide products registered with EPA as far back as approximately 1963. Init. Dec. at 2; Tr. at 81; C Ex. 12 at 2. In addition, EPA regulations under the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301-399, have established food-related pesticide tolerances for copper sulfate, 40 C.F.R. § 180.538(a), and exemptions from such pesticide tolerances for certain irrigation and agricultural uses, *id.* § 180.1021. These food-related regulations do not apply to the facts of this case but are men-

[6] During the administrative hearing, the parties stipulated to the accuracy of the invoices for these sales.

tioned as indicative of EPA's comprehensive treatment of copper sulfate as a regulated pesticide.

The Pesticide Bureau of the Missouri Department of Agriculture investigated FRM Chem in 1999 and again in 2002.[7] Init. Dec. at 2-3; C Ex. 8, 9; Tr. at 12, 14-15. FRM Chem cooperated with these inspections, handing overa sample product label and business records to the investigator. Init. Dec. at 16; C Ex. 6-9. FRM Chem disagreed about whether the product was indeed a pesticide requiring registration or just a cleaning agent for sewer lines. Init. Dec. at 10; C Ex. 6 at 1; C Ex. 8 at 2.

There are three areas of factual dispute at issue in this appeal, all of which relate to the interpretation of the circumstances surrounding the violations. As previously noted, liability has not been challenged on appeal and these factual disputes pertain only to the question of penalty, not liability. First, the parties dispute whether the State investigator told FRM Chem during the 1999 investigation to expect a written notice of violation. *See* Init. Dec. at 4-5. *Compare* C Ex. 8 at 2, C Ex. 9 at 2, *and* Tr. at 15, 31-32 *with* Tr. at 109 *and* Respondent's Summary Response to EPA Trial Brief Proposed Finding of Fact at 1. The investigator's report and his testimony at trial indicate that he warned FRM Chem of a possible pesticide violation with regard to Root Eater and suggested that FRM undertake consultation with EPA. Init. Dec. at 4; C Ex. 8 at 2; C Ex. 9 at 2; Tr. at 15, 31-32. The investigator testified that he did not agree to send FRM Chem anything in writing as that would not be part of the scope of his investigative duties. Tr. at 32. Raymond Kastendieck, President of FRM Chem, testified that although he was not present during the investigator's 1999 visit, someone later told him to expect a decision in writing from EPA. Init. Dec. at 5; Tr. at 109.[8]

Second, the parties dispute whether EPA delayed bringing its enforcement action against FRM Chem. The state investigator prepared written reports of his investigations. Init. Dec. at 4-5; C Ex. 8, 9; Tr. at 26, 29-30. The investigator signed and dated the 2002 report on September 23, 2002. C Ex. 8. He did not sign or date the 1999 investigation report, but apparently attached and thereby incorporated it into the 2002 report. *Id.*, C Ex. 9. The ALJ assumed that the State investigator forwarded each report to the Region immediately after the investigation and

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[7] FIFRA contemplates EPA cooperation with other Federal, State, and local agencies in its pesticide monitoring and inspection activities under FIFRA. FIFRA §§ 9(a), 22(b), 7 U.S.C. §§ 136g(a), 136s(b). While the State conducted the investigations in this case, it referred the case to EPA for enforcement.

[8] In addition, another FRM Chem employee, Karlen Kastendieck, stated during the hearing that the investigator told him he would be getting a notice in writing from EPA, but that statement was not given as testimony under oath or otherwise made part of the record of this proceeding. Init. Dec. at 4-5 n.12; Tr. at 109.

that EPA therefore unfairly delayed enforcement of the violations for several years. Init. Dec. at 16. However, the record does not reflect when each of the reports was forwarded to EPA, nor most significantly, whether EPA received the 1999 report before it was attached to the 2002 report.

The third and last area of factual dispute relates to a memorandum the EPA Regional case review officer sent to EPA Headquarters to confirm the Root Eater's status as a pesticide, and to confirm that misbranding and non-registration had occurred. Init. Dec. at 5; Hearing Ex. 11.[9] The ALJ characterized the case review officer's need to secure Headquarters approval as an indication that the violation was in doubt or not serious. Init. Dec. at 6, 16. The case review officer testified however that he had simply followed the standard EPA practice of confirming every suspected unregistered pesticide violation with Headquarters before proceeding with enforcement. Tr. at 45-46, 60-63, 71-72.

The case review officer reviewed the reports and accompanying materials, decided to issue a complaint, and prepared a written penalty calculation relying on the *Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Ace (FIFRA)* ["*Penalty Policy*"] Init. Dec. at 5; Tr. at 44, 52-53. The ALJ conducted a hearing in this case on August 26, 2004, in East Saint Louis, Illinois. Init. Dec. at 1. The Region presented four witnesses and introduced into evidence twelve documentary exhibits. Tr. at 4-5. FRM Chem presented one rebuttal witness.[10] Init. Dec. at 8. The ALJ issued his Initial Decision on February 16, 2005, finding FRM Chem liable for the alleged violations and finding a penalty of $1,800 appropriate under the circumstances. *Id.* at 16-17. The ALJ found adherence to the *Penalty Policy* to be inappropriate in the circumstances of this case and assessed a penalty considerably lower than the $16,500 penalty sought by the Region. *Id.* at 12-16.

Following the issuance of the Initial Decision, the Region filed an appeal, and later a brief,[11] objecting to the amount of the penalty. Notice of Appeal at 2; Brief of Complainant at 1. Next, the Region filed a motion seeking to clarify the

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[9] This exhibit number, assigned during the administrative hearing, differs from the Complainant's pre-hearing exchange numbering. The exhibit was requested by the ALJ during the hearing and had not been included in the Complainant's previous list of exhibits.

[10] FRM Chem did not comply with the ALJ's March 8, 2004, Pre-hearing Order with regard to exchange of evidence and was accordingly limited to presenting rebuttal testimony at the hearing. 40 C.F.R. §§ 22.19(a)(1), (g)(2), 22.22(a)(1).

[11] The Region requested an extension of time to file its appeal brief. Motion for Extension of Time to File Appeal Brief. FRM Chem objected to the Region's request citing the hardship the company allegedly faces from delayed resolution of the case. Motion for Denial of Extension Time to Appeal Brief at 1. After consideration, the Board granted the Region's request for an extension despite the objection. Order Granting Motion for Extension of Time (Mar. 25, 2005).

record because the ALJ had cited a document it had never seen. Motion for Clarification of Record on Appeal at 1. The Board subsequently ordered FRM Chem to provide copies to both the Region and the Board of its post-hearing brief, which was cited in the Initial Decision but never served on the Region nor made part of the official record maintained by the Regional Hearing Clerk. Order Regarding Motion for Clarification of Record at 1 (Mar. 25, 2005).[12] FRM Chem has now served its post-hearing brief in question on both the Region and the Board. After reviewing the document, the Region indicated that it did not wish to file a reply to the document nor request a remand to the ALJ for reconsideration, but instead requested that the Board resolve the case on appeal. Response to Order Regarding Motion for Clarification of Record at 1. FRM Chem did not cross-appeal nor file a responsive brief. Thereafter, we issued an order indicating that we intended to proceed with our evaluation of the appeal based on the record now before us. Order on Failure to File a Response at 2 (June 23, 2005).

IV. *DISCUSSION*

A. *Legal Framework for Penalty Determinations*

Section 14(a)(1) of FIFRA, 7 U.S.C. § 136*l*(a)(1), authorizes the Administrator to impose civil administrative penalties against certain persons for violations of FIFRA. That section provides, "Any registrant, commercial applicator, wholesaler, dealer, retailer, or other distributor who violates any provision under this subchapter may be assessed a civil penalty by the Administrator of not more than $5,000 for each offense."

Section 4 of the Federal Civil Penalties Inflation Adjustment Act of 1990, requires EPA, among other agencies, to adjust maximum civil penalties periodically to account for inflation. Pub. L. No. 101-410, 104 Stat. 890 (1990) (codified at 28 U.S.C. § 2461 note), amended by the Debt Collection Improvement Act of 1996, Pub. L. No. 104-134, § 31001(s), 110 Stat. 1321, 1321-373 (1996) (codified at 31 U.S.C. § 3701). In response, EPA promulgated the Civil Monetary Penalty Inflation Adjustment Rule, 61 FR 69,360 (Dec. 31, 1996) (codified at 40 C.F.R. § 19 (1997)). This rule increased the maximum penalty for a FIFRA violation from $5,000 to $5,500.[13] *Id.*

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[12] The Board's order on this matter declined to declare the contested document not part of the official record as it had been considered by the ALJ and should have been part of the record. Order Regarding Motion for Clarification of Record at 1.

[13] An additional increase for violations occurring after March 15, 2004, has since come into effect but does not apply to violations in this case. *See* 40 C.F.R. § 19.2, 19.4 (2005).

Section 14(a)(4) of FIFRA provides the criteria the Administrator must consider in determining the amount of the penalty:

> The Administrator shall consider the appropriateness of such penalty to the size of the business of the person charged, the effect on the person's ability to continue in business, and the gravity of the violation. Whenever the Administrator finds that the violation occurred despite the exercise of due care or did not cause significant harm to health or the environment, the Administrator may issue a warning in lieu of assessing a penalty.

7 U.S.C. § 136*l*(a)(4).

EPA regulations impose further requirements for a penalty determination. They state:

> If the Presiding Officer determines that a violation has occurred and the complaint seeks a civil penalty, the Presiding Officer shall 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. The Presiding Officer shall consider any civil penalty guidelines issued under the Act. The Presiding Officer shall explain in detail in the initial decision how the penalty to be assessed corresponds to any penalty criteria set forth in the Act. If the Presiding Officer decides to assess a penalty different in amount from the penalty proposed by complainant, the Presiding Officer shall set forth in the initial decision the specific reasons for the increase or decrease.

40 C.F.R. § 22.27(b).

As noted above, EPA has issued guidelines for civil penalty determinations under FIFRA. This *Penalty Policy* can be summarized as follows:

> Computation of the penalty amount is determined in a five stage process in consideration of the FIFRA section 14(a)(4) criteria listed above. These steps are: (1) determination of gravity or "level" of the violation using Appendix A * * * ; (2) determination of the size of business category for the violator, found in Table 2; (3) use of the FIFRA civil penalty matrices found in Table 1 to determine the dollar amount associated with the gravity level

> of violation and the size of business category of the violator; (4) further gravity adjustments of the base penalty in consideration of the specific characteristics of the pesticide involved, the actual or potential harm to human health and/or the environment, the compliance history of the violator, and the culpability of the violator, using the "Gravity Adjustment Criteria" found in Appendix B; and, (5) consideration of the effect that payment of the total civil penalty will have on the violator's ability to continue in business * * * .

Penalty Policy at 18.

In addition, the Board's case law clarifies that equity and fairness, though not specifically mentioned in the main calculations of the *Penalty Policy*, may also be considered in making a penalty determination under FIFRA. *In re Johnson Pac., Inc.*, 5 E.A.D. 696, 704 (EAB 1995). With this general framework in mind, we next summarize the ALJ's penalty determination.

B. *The ALJ's Penalty Analysis*

In his Initial Decision, the ALJ found that FRM Chem had committed the alleged FIFRA violations. Init. Dec. at 10. The ALJ did not adopt the Region's proposed penalty of $16,500, finding that $1,800 was more appropriate under the circumstances of the case. *Id.* at 16. Although he considered the applicable *Penalty Policy*, the ALJ expressly departed from the *Penalty Policy* in his Initial Decision, *id.* at 12, and substantially reduced the proposed penalty based on his consideration of FIFRA's statutory criteria — the size of the FRM Chem's business, FRM Chem's ability to pay, and the gravity of the violation, *id.* at 12-16, (relying on FIFRA § 14(a)(4), 7 U.S.C. § 136*l*(a)(4)).

The ALJ's basis for departing from the FIFRA *Penalty Policy* were as follows. First, with regard to the size of the Respondent's business, the ALJ did not agree that FRM Chem should be treated as falling within the category of the largest businesses in the *Penalty Policy* simply because its gross receipts exceeded $1 million.[14] *Id.* at 13 The ALJ characterized FRM Chem as a family business of modest size. *Id*. The ALJ also observed that while the penalties have been increased to account for inflation, the size of business categories have not been adjusted and that FRM Chem should be treated as a smaller business. *Id*.

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[14] There is no dispute that FRM Chem's gross receipts exceeded $1 million and therefore under the *Penalty Policy* would be characterized as Size of Business Category I. Init. Dec. at 13. In conducting its financial analysis, the Region relied on financial documents provided by FRM Chem and on publicly-available Dun & Bradstreet reports. Tr. at 48, 99-101

Second, with respect to the gravity of the violations, the ALJ found that the penalty based on the *Penalty Policy* was too high. Init. Dec. at 15-16. The ALJ noted that the *Penalty Policy* would impose the maximum penalty even though, with respect to some of the factors considered, the violation did not score at the highest levels. *Id*. at 15. The ALJ emphasized that Root Eater is not banned and could be legally sold if properly labeled and registered. *Id*. The ALJ also credited FRM Chem with making some attempts at cautionary labeling, even though it was ultimately deficient, and with cooperating with the investigation. *Id.* at 15-16. Based on EPA's alleged inaction following the first investigation, the ALJ further noted that FRM Chem may have doubted whether Root Eater was considered a pesticide. *Id*. at 16. Finally the ALJ asserted that, because the case review officer felt the need to confirm the violation with headquarters, the violation was in doubt and it would thus be unfair to impose the maximum penalty. *Id*.[15]

Rejecting the Region's proposed penalty based on the *Penalty Policy*, the ALJ then fashioned an alternative penalty of $1,800 reflecting his consideration of the statutory criteria. Apart from his discussion of why he thought the penalty proposed by the Region was excessive, which by implication would argue in favor of a lower penalty, however, there is no meaningful explanation in the ALJ's decision regarding why a penalty as low as the one assessed is adequate under the circumstances of this case. As discussed below, we find a number of problems with the ALJ's approach.

C. *Issues on Appeal*

On appeal, the Region raises three areas in which it asserts the ALJ erred in the penalty determination in the Initial Decision. We first address the Region's claims that the Region erred in failing to articulate the basis for the penalty assessed. Next, we review the Region's arguments that the ALJ's rationale for departing from the *Penalty Policy* were inappropriate, finding that the rationales put forth in the Initial Decision are not sufficiently persuasive or convincing to merit the Board's deference. Finally, in the course of reviewing these rationales, we address the Region's claims that the ALJ relied on erroneous factual findings and conclusions of law in his justifications for departing from the *Penalty Policy*.

We note at the outset that the ALJ's approach appears to have been driven by a concern that the Region's proposed penalty would result in an assessment of the statutory maximum penalty. We understand the ALJ's desire to ensure that penalties be assessed at the statutory maximum only when appropriate and de-

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[15] As to the remaining statutory factor — ability to pay — the ALJ found that the Region had met its burden to prove that FRM Chem could pay the Region's suggested $16,500 penalty and that FRM Chem had not provided any contrary evidence. Init. Dec. at 14. Neither party has raised ability to pay as an issue in this appeal; and therefore, we will not address this factor in our decision.

serving. However, in the case before us, the *Penalty Policy*-based penalty — $16,500 — is not on its face excessive, particularly in a case in which ability to pay is not in dispute. Moreover, penalty assessments are necessarily relational, reflecting the particular facts and circumstances pertaining to violators and their violations, with the underlying objective of serving as an appropriate deterrent in response to a given circumstance of environmental misconduct. Thus, 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. As indicated below, we arrive at a different conclusion on this point than did the ALJ.

We address now each of the Region's challenges in turn.

1. *Specificity of the Initial Decision*

The Region makes two arguments that relate to specificity of the penalty decision. Brief of the Complainant at 1, 14-17.The Region argues first that the ALJ did not sufficiently relate the amount of the penalty to each of the penalty factors in Section 14(a)(4) of FIFRA, 7 U.S.C. § 136*l*(a)(4), and second that he did not allocate a portion of the total penalty to each of the three counts of the violation. *Id*. at 1, 14-17. We do not agree with either of these two particular arguments as they are not supported by the Agency's regulations or the Board's decisions. We are nonetheless troubled by the paucity of analysis in the Initial Decision explaining why the substantially reduced penalty of $1,800 is appropriate under the facts of this case.

The assessment of administrative civil penalties for violations of FIFRA is governed by the Agency's Consolidated Rules of Practice located in part 22 of Title 40 of the Code of Federal Regulations. *See* 40 C.F.R. § 22.1(a)(1). These rules specify that "[t]he Presiding Officer shall explain in detail in the initial decision how the penalty to be assessed corresponds to any penalty criteria set forth in the Act. If the Presiding Officer decides to assess a penalty different in amount from the penalty proposed by the complainant, the Presiding Officer shall set forth in the initial decision the specific reasons for the increase or decrease." 40 C.F.R. § 22.27(b). While these regulations require a detailed explanation of how the facts of the case relate to the penalty criteria and set forth specific reasons for an increase or decrease, no particular formula, framework, or numerical calculation is dictated within the rule.

The Board's previous decisions have confirmed that, in light of the highly discretionary nature of penalty assessment, there is no precise formula by which statutory criteria must be considered in every case. *In re Pepperell Assocs.*, 9 E.A.D. 83, 107-08 (EAB 2000), *aff'd*, 246 F.3d 15 (9th Cir. 2001); *In re Britton Constr. Co.*, 8 E.A.D. 261, 282-83 (EAB 1999). Instead, our decisions simply require that an ALJ should make clear his or her reasoning such that the par-

ties and an appellate body are informed of the basis for the penalty decision. *In re Marshall*, 10 E.A.D. 173, 190 (EAB 2001); *Britton*, 8 E.A.D. at 282-83. The Board has further explained that one should not have to engage in conjecture in order to identify the reasons for which a Presiding Officer has deviated from a recommended penalty. *E.g.*, *Marshall*, 10 E.A.D. at 188; *In re EK Assocs.*, 8 E.A.D. 458, 474-75 (EAB 1999).

The assignment of a numerical value to each statutory factor may occur naturally as a result of careful consideration of an applicable *Penalty Policy*. We will not, however, reject an ALJ's penalty for lack of such numerical precision so long as the decision meets the standard articulated above.

We have previously addressed a complainant's burden of proof as to the appropriateness of its proposed civil penalty. We have held that the Region's burden of proof as to the penalty, "does not mean that there is any specific burden of proof with respect to any individual factor; rather the burden of proof goes to the Region's consideration of all the factors." *In re New Waterbury, Ltd.*, 5 E.A.D. 529, 539 (EAB 1994).

We find that this analysis of the Region's burden of proof is instructive regarding the specificity required of ALJs in articulating their penalty rationale. The ALJ must demonstrate that he or she applied the statutory penalty criteria and explain any increase or decrease from the penalty proposed by the complainant. However, the ALJ need not justify each penalty factor separately by creating a numerical value for each factor.

With the foregoing as our framework, we turn to the ALJ's analysis in the case before us and the Region's arguments relating to that analysis. With respect to the Region's argument that the ALJ did not sufficiently relate the amount of the penalty to each of the statutory penalty factors, we find that the ALJ weighed the evidence as it related to each of the statutory factors and sufficiently explained his analysis of the facts as they related to the factor, at least for purposes of explaining why he was choosing to depart from the *Penalty Policy*-based number. Init. Dec. at 12-16. In particular, the ALJ indicated that size of business and the gravity of the violation, but not ability to pay, influenced his decision to depart from the Region's proposal in the Complaint. *Id.* Accordingly, we disagree with the Region's argument on this point.

The Board also disagrees with the Region's second argument, that a separate amount must be apportioned to each of the three counts in this case. We have held that apportioning part of the total penalty to each count is not required in all instances. *See In re Sav-Mart, Inc.*, 5 E.A.D. 732, 740 (EAB 1995) (upholding 75% reduction in penalty without apportioning to each count where ultimate factor determining penalty was amount necessary for deterrence). Failure to apportion a penalty by count may be problematic if a finding of liability were over-

turned for some but not all counts, but that is not the case here. While apportioning the penalty by count may be preferable because of the clarity it affords, we will not reject the penalty in the case before us solely for failure to apportion the penalty to each of the three counts.

While we reject the particular arguments made by the Region, we are nonetheless troubled by the ALJ's decision. While his analysis offers a sufficient explanation of why he regards the Region's proposed penalty as being too high, thus satisfying the obligation to give specific reasons for any decrease from the proposed penalty, he offers no meaningful explanation of how he arrived at the alternative number of $1,800 or why that number is sufficient under the facts and circumstances of this case. All we have to work with in this regard is his discussion of why he thought the penalty proposed by the Region was excessive. Although we can infer from this discussion that the ALJ clearly favored a lower penalty, this without more is an insufficient explanation of how a penalty as low as the one assessed is adequate under the circumstances of this case. The ALJ is required to "explain in detail in the initial decision how the penalty to be assessed corresponds to any penalty criteria set forth in the Act." 40 C.F.R. § 22.27(b). As we have observed, this requires that an ALJ make clear his or her reasoning so that the parties and an appellate body are informed of the basis for the penalty decision. *Marshall*, 10 E.A.D. at 190; *Britton*, 8 E.A.D. at 282-83. We find the ALJ's decision in the case at hand insufficient in this regard. We will not remand for further amplification, however, because, as discussed below, we reject the ALJ's penalty assessment on other grounds.

2. *Rationale for Departing from Penalty Policy*

In addition to its arguments on the issue of specificity, the Region also challenges the basis for the ALJ's decision to depart from the FIFRA *Penalty Policy* and to assess an alternative penalty of $1,800. Upon consideration of the ALJ's penalty assessment rationale, we find that he has not persuaded or convinced us that the departure was appropriate and deserving of deference. Accordingly, we decline to defer to the ALJ's penalty and for the reasons explained below fashion our own penalty assessment.

FIFRA mandates that three statutory criteria be considered in making penalty determinations — the size of business of the person charged, the gravity of the violation, and the effect of the penalty on the person's ability to continue in business. FIFRA § 14(a)(4), 7 U.S.C. § 136*l*(a)(4). EPA has produced penalty policies under the various environmental statutes it administers, including FIFRA, to assist in the consistent and fair enforcement of these laws. *E.g.*, *Penalty Policy* at 1. The Board has repeatedly noted that while such penalty policies are not rules and thus cannot be applied as if they were such, *e.g.*, *In re Employers Ins. of Wausau*, 6 E.A.D. 735, 761 (EAB 1997), such penalty

policies nonetheless facilitate the application of statutory penalty criteria to the facts of a case and thus "offer a useful mechanism for ensuring consistency in civil penalty assessments." *In re William E. Comley, Inc.*, 11 E.A.D. 247, 262 (EAB 2004); *accord In re CDT Landfill Corp.*, 11 E.A.D. 88, 117 (EAB 2003); *In re Chempace Corp.*, 9 E.A.D. 119, 131 (EAB 2000).

EPA regulations require an ALJ to consider such policies in making a penalty decision. 40 C.F.R. § 22.27(b) (requiring, in part, that "[t]he Presiding Officer shall consider any civil penalty guidelines issued under the Act"). Once a *Penalty Policy* has been seriously considered, however, an ALJ is not ultimately bound to follow it. *Comley*, 11 E.A.D. at 262; *In re Chem Lab Prods., Inc.*, 10 E.A.D. 711, 725 (EAB 2002). Rather, an ALJ is free to disregard a policy if reasons for doing so are set forth in the Initial Decision. *Chem Lab*, 10 E.A.D. at 725. This 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 a *Penalty Policy* is not appropriate. *See Wausau*, 6 E.A.D. at 759.

Generally, the Board 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. *E.g.*, *In re Friedman*, 11 E.A.D. 302, 341 (EAB 2004), *aff'd*, No. 2:04-CV-00517-WBS-DAD (E.D. Cal. Feb. 25, 2005); *In re Capozzi*, 11 E.A.D. 10, 32 (EAB 2003); *Chem Lab*, 10 E.A.D. at 725. Where the ALJ chooses to depart substantially from the relevant *Penalty Policy*, however, the Board will closely scrutinize the ALJ's penalty analysis to determine whether the ALJ's reasons for rejecting the policy framework are "persuasive and convincing." *Friedman*, 11 E.A.D. at341 (quoting *Capozzi*, 11 E.A.D. at 32); *CDT Landfill*, 11 E.A.D. at 117-18 (same); *accord Chem Lab*, 10 E.A.D. at 725. If the ALJ's rationale is neither persuasive nor convincing, then the Board will not afford the ALJ's penalty analysis deference. *Capozzi*, 11 E.A.D. at 32; *Chem Lab*, 10 E.A.D. at 725-26. In such cases, the Board may, consistent with its de novo review authority, fashion its own penalty assessment.[16] *In re Microban Prods. Co.*, 11 E.A.D. 425, 451 (EAB 2004) (citing 40 C.F.R. § 22.30(f)); *Capozzi*, 11 E.A.D. at 32; *Chem Lab*, 10 E.A.D. at 725-26. As discussed below, in this case, theALJ provided several reasons for his departure from the *Penalty Policy*, none of which we find persuasive or convincing. Accordingly, we will not defer to the ALJ's penalty determination and will instead fashion an assessment of our own.

[16] Alternatively, the Board may, where circumstances warrant, remand the penalty determination to the ALJ. *Microban*, 11 E.A.D. at 451. In the case at hand, there being no interest to be served through a remand, the Board fashions its own penalty.

a. *Comparison to Other Penalty Determinations*

In the Initial Decision, the ALJ begins by referencing several judicial decisions in which penalties more modest than the statutory maximum had been imposed for failure to register a pesticide. Init. Dec. at 12. It is unclear if the ALJ was suggesting that the penalty in this case should be reflective of the penalty assessed in these other cases. If so, such an approach would be inconsistent with the Board's case law on this question.

As the Board has stated on numerous occasions, penalties should be determined on a case-by-case basis, reflecting the differing factual circumstances of each violation. *E.g., Chem Lab*, 10 E.A.D. at 728-33 (citing *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187 (1973)); *In re Newell Recycling Co.*, 8 E.A.D. 598, 642-43 (EAB 1999), *aff'd*, 231 F.3d 204 (5th Cir. 2000). The policy underlying case-by-case penalty assessments is one of fairness and economy. *See Penalty Policy* at 1. It is only fair to respondents in penalty proceedings that sanctions take into account the unique facts of each case. USEPA, *EPA General Enforcement Policy* at 4 (Feb. 16, 1984) (unpublished). There is naturally substantial variability in case-specific fact patterns, making meaningful comparison between cases for penalty assessment purposes impracticable. *See Chem Lab*, 10 E.A.D. at 728. Furthermore, as the Board has previously explained, incorporating a review of penalties in other cases into each penalty determination would not be efficient because of the detailed inquiry it would require. *Id.* at 729. An approach emphasizing comparison to other penalty determinations would sacrifice the goal of fast and efficient resolution of cases by placing consistency above all other goals.

This does not mean consistency is unimportant. Indeed, one of the primary objectives of EPA's various penalty policies is to provide a consistent framework and methodology for application of statutory penalty criteria so that like violations produce comparable penalties. *See Penalty Policy* at 1. While providing a consistent methodology, the penalty policies allow for case-specific variability within that methodology. *See Chem Lab*, 10 E.A.D. at 728. It is precisely because the penalty policies provide a means of assuring consistency in approach that the Board defers to ALJ penalty determinations that deploy the *Penalty Policy* methodology. To our way of thinking, the penalty policies offer a better means of pursuing consistency than attempts to align a given case with outcomes in other cases, marked as they are by their distinguishable facts and circumstances. *Id.*

In short, to the extent that the ALJ may have based his penalty decision in part on comparison with other cases, we find this to be inappropriate.

b. *Size of Business*

The ALJ next finds that circumstances surrounding the size of FRM Chem's business justify departing from the *Penalty Policy*. The size of the Respondent's business is a factor that must be considered in FIFRA penalty determinations. FIFRA § 14(a)(4), 7 U.S.C. § 136*l*(a)(4). In its guidelines for evaluating the facts of a particular case under this factor, the *Penalty Policy* subdivides businesses into three categories based on the business' average annual gross revenue. *Penalty Policy* at 20-21. For violators described in section 14(a)(1) of FIFRA ("[a]ny registrant, commercial applicator, wholesaler, dealer, retailer, or other distributer"), Category I includes business with revenues over $1,000,000. *Id*. at 20. Category II businesses have revenues between $300,001 and $1,000,000. *Id.* Category III businesses have revenues of $300,000 or less. *Id.* If such financial information is not available, the penalty is calculated using the Category I size of business unless the violator can establish that it should be placed in a smaller size of business category. *Id.* at 21.

The relevant facts with regard to the size of the business in this case are not in dispute. Under the *Penalty Policy*, FRM Chem was a Category I business because its gross receipts for the applicable years exceeded $1,000,000. Init. Dec. at 13; Tr. at 101; *see Penalty Policy* at 20. Despite this evidence, the ALJ indicated that it was, "abundantly clear from the record as a whole that FRM is a small family business of humble size and therefore should not, objectively, when applying the statutory criterion, be deemed a 'Category I' outfit." Init. Dec. at 13. The ALJ further found that the *Penalty Policy* was flawed to the extent that it classifies FRM Chem as a Category I business, the largest business category, unfairly subjecting it to the maximum penalty. *Id*.

Except for his conclusory statement that FRM is a "small family business of humble size," the ALJ provides no support for his decision except by questioning the appropriateness of the $1,000,000 threshold for being considered a Category I business. *See id.* In this regard, the ALJ emphasized that the *Penalty Policy*'s size of business categories have not been periodically adjusted for inflation in the same way that the penalty amounts have been.[17] *Id.* The Board notes, however, that the Region did not have the opportunity to put on evidence or make legal arguments on this issue because it was not raised by any party nor by the ALJ before the appearance of this issue in the Initial Decision. It is error for an ALJ, without warning, to effectively require additional evidence or argument of a party after the hearing, when such demand can no longer be satisfied. *In re Employers Ins. of Wausau*, 6 E.A.D. 735, 763 (EAB 1997). Further, when the Region had

[17] As noted previously, the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701, requires EPA, among other agencies, to adjust maximum civil penalties periodically to account for inflation, and EPA has done so. *See* Part IV.A. *supra.*

the opportunity to address the issue on appeal, the Region demonstrated that FRM Chem would still be a Category I business even after taking inflation into account. *See* Brief of Complainant at 11. Thus, the ALJ's analysis of size of the violator's business does not provide a persuasive or convincing reason to depart from the *Penalty Policy* because the ALJ's reasoning either lacks foundation or is not explained except to the extent that it impermissibly relies on a legal argument the Region could not have predicted was at issue and that was in error in any event.

c. *Gravity of the Violation*

The ALJ's treatment of the "gravity of the violation" statutory factor also fails to convince us that there is a persuasive or convincing reason to depart from the *Penalty Policy*. The *Penalty Policy* relates facts to the statutory criteria of the gravity of the violation in two steps: "(1) determination of the appropriate 'gravity level' that EPA has assigned to the violation, and (2) the adjustment of that base penalty figure, as determined from the gravity level, to consider the actual set of circumstances that are involved in the violation." *Penalty Policy* at 21. EPA's FIFRA *Penalty Policy* assigns the gravity level within a range of one to four, based on the average set of circumstances, for each FIFRA provision. *Id*. at 21, app. A at A-1. This gravity level is combined with the size of business category derived from Table 1 to arrive at a base penalty amount. *Id*. at 19-A.

As the next step, "[t]he Agency has assigned adjustments, based on the gravity adjustment criteria listed in Appendix B [of the *Penalty Policy*], for each violation relative to the specific characteristics of the pesticide involved, the harm to human health and/or harm to the environment, compliance history of the violator, and the culpability of the violator." *Id*. at 21. These gravity adjustments values for the criteria are totaled, and the initial base penalty figure is then increased, decreased, or retained, based on the total gravity values in Table 3. *Id*. at 21-22.

In the Initial Decision, the ALJ admitted that the gravity of the violation using the *Penalty Policy* points to the maximum penalty amount, but declined to use the *Penalty Policy*. Init. Dec. at 15. In justifying this decision, the ALJ indicated that since FRM Chem's violation ranks only in the middle of the ranges of several of the gravity adjustment criteria, imposing the statutory maximum penalty seems excessive. *Id.* The ALJ noted that Root Eater is not so dangerous as to be totally banned from use if properly registered and labeled. *Id.* at 15-16. The ALJ emphasized on the alleged delay in EPA enforcement of this case shows that the violation was in doubt or may have led FRM Chem to believe it was not in violation. *Id*. at 16. The ALJ further suggested that the EPA case review officer's memorandum to headquarters raised a question as to whether FRM Chem could have predicted that Root Eater's label indeed made a pesticidal claim. *Id*. Finally, the decision notes that FRM Chem cooperated with the investigations and characterizes the violation as not willful. *Id.* We address each of these rationales in turn, finding none of them persuasive or convincing.

The Initial Decision first minimizes the gravity of this violation by suggesting that because Root Eater falls only in the middle level of harmfulness both to humans and the environment that the maximum penalty is not appropriate. *Id.* at 15. The copper sulfate in Root Eater does carry the risk of serious harm to humans or the environment. The record includes expert testimony on copper sulfate's potentially serious and irreversible harm to humans and the environment. *Id.* at 2, 15; Tr. at 65, 81, 83; C Ex. 12 at 2. Copper sulfate is so dangerous it falls within the highest pesticide toxicity category in EPA's FIFRA regulations. Tr. at 83; *see* 40 C.F.R. §§ 156.62-156.64.

In addition, one of the central purposes of FIFRA is to ensure that pesticides are adequately labeled and registered so that they can be safely used. *See In re Green Thumb Nursery, Inc.*, 6 E.A.D. 782, 800-01 (EAB 1997). Proper registration and labeling provides pesticide users and EPA with the information they need to protect themselves, others, and the environment from harm. *See id.* at 801. Pesticide registration violations under FIFRA are harmful to the FIFRA regulatory program. *In re Microban Prods.* Co., 11 E.A.D. 425, 453 n.39 (EAB 2004); *In re Predex Corp.*, 7 E.A.D. 591, 601 (EAB 1998); *Green Thumb*, 6 E.A.D. at 800. Contrary to FRM Chem's assertions, registration and labeling violations are not trivial because they undermine the program's protective regulatory scheme. We find that EPA has rightfully concluded that the maximum penalty would generally be appropriate.

Next, the ALJ's emphasis on the fact that FRM Chem's Root Eater product is not altogether banned, but could be sold if properly registered and labeled, is misplaced. Under FIFRA's scheme, many pesticides are not absolutely banned but rather are considered acceptable for use with EPA-approved labeling intended to ensure that they are safely and effectively used with any risk to humans or the environment minimized. Therefore, pesticides that are useful but potentially very harmful can be used because of EPA's regulatory oversight. For example, in the case of Root Eater, serious permanent injury including loss of vision could result if the product is not handled carefully. *Id.* at 2, 15; Tr. at 65, 81, 83; C Ex. 12 at 2. The 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 EPA strikes in allowing potentially harmful pesticides to be used with EPA-approved labeling designed to minimize the harm that will actually occur.

The ALJ also focused on an alleged EPA enforcement delay as a gravity-related factor for departing from the *Penalty Policy*. Init. Dec. at 16. The ALJ concluded that the Region showed no urgency in bringing an enforcement action and that the Region's alleged inaction suggests that the issue of whether Root Eater was a pesticide was not as obvious as the Region now claims. *Id.* This would further suggest that FRM Chem's belief that it had avoided making a pesticidal claim was not "outlandish." *Id.* However, the only evidence in the record on this point tends to show that the Region did not receive the investigation re-

ports until after the State's second investigation in 2002 because the earlier report was unsigned and was attached to the 2002 report. C Ex.8; C Ex. 9. The record does not reflect when each of the reports was forwarded to EPA for enforcement, nor whether EPA received the 1999 report at some time before it was attached to the 2002 report. Furthermore, EPA's case review officer who initiated enforcement testified that he did not receive the file until after the 2002 investigation. Tr. at 44. The ALJ cites no evidence, and the Board finds none, supporting the assumption that the Region knew of the results of the State of Missouri's investigation before this time and delayed enforcement. Thus the ALJ's finding is not supported by the record.[18] Furthermore, the alleged EPA delay in no way changes the actual toxicity and harmfulness of the Root Eater product. *In re William E. Comley, Inc.*, 11 E.A.D. 247, 267 (EAB 2004). Therefore, delay in enforcement is not a persuasive or convincing reason to depart from the *Penalty Policy*.[19]

The ALJ also suggested that because the EPA case review officer wrote a memorandum requesting confirmation of the violation from a higher office, the violation itself was somehow doubtful and FRM Chem could not have foreseen its violation. Init. Dec. at 16. We reject this conclusion. The only evidence in the record indicates that EPA enforcement staff were expected to confirm all their FIFRA pesticide registration cases with the registration office as a matter of regular practice before proceeding with enforcement. Tr. at 60-63, 71-72, 87-90. The ALJ's emphasis on EPA's supposed doubts regarding this violation is simply not based on any evidence in the record. This kind of judicial speculation without supporting evidence is not a reason to depart from the *Penalty Policy*.

The ALJ credits FRM Chem for its attempts to include cautionary statements on Root Eater's label. Init. Dec. at 15-16. It is not disputed that the label did not provide the information legally required to protect persons working with the Root Eater product from the most serious level of harm that EPA recognizes under FIFRA. For example, there are no instructions for use of goggles and other protective equipment that would prevent permanent loss of vision and skin corrosion. *See* C Ex. 2. In fact, a label that provides insufficient safety warnings tends to mislead users into believing the product is more safe than it really is, thereby

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[18] An ALJ's civil penalty decision must be based on evidence in the record. An ALJ "shall determine the amount of a 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).

[19] We note further that, under certain other environmental laws, maximum penalties may be calculated based on the number of days for which the respondent is not in compliance. *See* Resource Conservation and Recovery Act § 3008(a)(3), 42 U.S.C. § 6928(a)(3); Clean Water Act § 309(d), (g)(2)(B), 33 U.S.C. § 1319(d), (g)(2)(B). FIFRA's penalties, however, are not based on the number of days of violation. Thus, even if there were a delay in the enforcement action and thus a longer period of non-compliance, this would not have increased FRM Chem's potential liability for penalties under FIFRA.

increasing the risk of harm through mishandling of the product. Providing less than complete information on the product label potentially misleads the user into thinking all necessary information has been included and that the defective information may be fully relied upon. Thus, FRM Chem's attempt at labeling is not a persuasive or convincing reason to depart from the *Penalty Policy*.

The ALJ also credited FRM Chem with cooperating during the two investigations. Init. Dec. at 16. Positive attitude and good faith attempts to comply with the law can be appropriate considerations for up to a twenty percent penalty reduction during settlement negotiations with EPA and a second twenty percent reduction if those circumstances are extraordinary and equity so requires. *Penalty Policy* at 26-28. In this case, however, the parties litigated the case instead of negotiating a settlement so this provision does not apply. *See id.* In addition, as discussed below, FRM Chem did nothing beyond what the law required it to do that would merit a reduction in the otherwise appropriate penalty.

FRM Chem's President, Raymond Kastendieck, testified that due to the company's financial situation, FRM Chem could not sustain the cost of registration of Root Eater and that FRM Chem does "everything [it] can to avoid wording on a label that will cause or sustain a product to be registered, because of the cost." Init. Dec. at 2; Tr. at 111. This behavior demonstrates that FRM Chem was aware of the risk that its product might be a pesticide product requiring registration and failed to comply with the labeling and registration requirements notwithstanding this risk. As the ALJ noted, FRM Chem did cooperate with the investigations by allowing access to its facilities and handing over a label and relevant sales records. Init. Dec. at 16; Tr. at 15-17 (describing investigation activities and FRM Chem's participation and admissions). FIFRA, however, allows access to such establishments by investigators as a matter of law. FIFRA § 9(a), 7 U.S.C. § 136g(a). It would not be appropriate to make a penalty reduction for simply following the law. *See In re Pepperell Assocs.*, 9 E.A.D. 83, 114-15 (EAB 2000) (no reduction where respondent took only a legally required action, recognizing concern for deterrence), *aff'd*, 246 F.3d 15 (1st Cir. 2001). Therefore, FRM Chem's cooperation during the investigations in this case is not a persuasive or convincing reason to depart from the *Penalty Policy*.

The Region argues on appeal that the penalty assessed in the Initial Decision is insufficient to serve as a deterrent. Brief of Complainant at 27-28. A small penalty is even more inappropriate because FRM Chem explained its motivations for violating FIFRA as financial ones. The Region cites testimony by FRM Chem that not registering Root Eater saved the company as much as $500 per package of product sold. *Id*. at 28, citing Tr. at 111. Therefore, a reduced penalty fails to achieve the important goals of deterring FRM Chem itself from repeating the same behavior, as well as deterring others from committing similar violations. Deterring persons from violating the law is a primary goal of penalty assessments. *In re Rybond*, 6 E.A.D. 614, 641 (EAB 1996) (citing *In re Sav-mart, Inc.*,

5 E.A.D. 732, 738 (EAB 1995)); USEPA, *EPA General Enforcement Policy* at 3 (Feb. 16, 1984); *Penalty Policy* at 1. The need for deterrence of FRM Chem and other potential violators raises serious questions about the ALJ's approach to penalty assessment in this case.

In sum, we find that none of the ALJ's rationales for departing from the *Penalty Policy* are persuasive or convincing. They variously either lack support by a preponderance of the evidence, are based on legal errors, or understate the seriousness of the violations. Thus, the ALJ's rationale for departing from the *Penalty Policy* does not withstand our scrutiny. In view of the foregoing, the Board will not grant the deference normally accorded to ALJ penalty determinations. *See In re Donald Cutler*, 11 E.A.D. 622, 654 (EAB 2004).

D. *Penalty Determination*

Having declined to defer to the penalty assessed in the Initial Decision, the Board may impose an appropriate penalty instead of remanding the case. 40 C.F.R. § 22.31; *Cutler*, 11 E.A.D. at 654; *In re Chem Lab Prods., Inc.*, 10 E.A.D. 711, 725-26, 734 (EAB 2002). We find that it is in the interest of expedient resolution of this case to assess the penalty instead of remanding the case back to the ALJ. FRM Chem has made clear that it desires a swift and financially affordable process to resolve this matter. Mot. for Denial of Extension of Time to Appeal Br. at 1. Because, as explained above, the *Penalty Policy* offers a consistent methodology for applying the statutory factors to individualized cases, and because we conclude it produces an appropriate penalty for the case at hand, we deploy it for purposes of our own analysis. After reviewing the record, we find that the Region's application of the *Penalty Policy* is sound and well-supported by the evidence. Accordingly, as described below, we adopt the Region's proposed penalty as our own.

In Step One of the *Penalty Policy*, the evidence indicates that FRM Chem is a Category I business with average annual gross receipts exceeding $1,000,000. *Penalty Policy* at 20. In Step Two, sales of an unregistered and sales of a misbranded pesticideare Level 2 violations. *Id.* at A-1. Applying Step Three's penalty matrix indicates that the maximum statutory penalty is appropriate for a Category I business which has committed Level 2 violations. *Id.* at 19-A. In Step Four, adjustments based on the actual set of circumstances are not warranted in this case, as determined using the formula in the *Penalty Policy*'*s* Appendix B. *Id.* app. B. Copper Sulfate is a Category I pesticide because it has the highest level of toxicity by at least one indicator. *Id.* app. B at B-1; *see* 40 C.F.R. § 156.62. Harm to human and environmental health are both mid-range on a one-to-five scale due to potential serious and permanent effects. *Id.* app. B at B-1. FRM Chem has no prior violations and, as to culpability, was at least negligent in committing this violation.The combined gravity adjustment criteria value for these factors is ten, which indicates that the maximum penalty need not be further adjusted from the

amount determined in Step Three. *Id.* at 22. Because FRM Chem has the ability to pay a $16,500 penalty, no reduction is necessary for ability to pay in Step Five. Furthermore, the maximum penalty is appropriate in fairness and equity under the circumstances of this case involving violations of FIFRA's important registration and labeling requirements and the need for deterrence. FRM Chem can and justly should pay a $16,500 penalty.

V. *CONCLUSION*

For the foregoing reasons, a civil administrative penalty of $16,500 is assessed against FRM Chem, Inc., a/k/a Industrial Specialities, for three counts of violating FIFRA. Payment of the entire amount of the civil penalty shall be made within thirty (30) days of service of this Final Decision and Order, by cashier's check or certified check payable to the Treasurer, United States of America, and forwarded to:

Mellon Bank
U.S. Environmental Protection Agency, Region VII
Regional Hearing Clerk
P.O. Box 360748
Pittsburgh, PA 15251-6748

So ordered.