IN RE WILLIAM E. COMLEY, INC. & BLEACH TEK, INC.

FIFRA Appeal No. 03-01

FINAL DECISION

Decided January 14, 2004

Syllabus

William E. Comley, Inc. ("WECCO") and Bleach Tek, Inc. ("TEK") (collectively "Respondents") appeal an Initial Decision of Administrative Law Judge Carl C. Charneski ("ALJ") finding WECCO liable for violating provisions of section 12 of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. §§ 136a-y, as alleged by United States Environmental Protection Agency ("Agency") Region IV ("Region") in a four-count Amended Complaint. Specifically, the Initial Decision determined that WECCO was liable for producing its sodium hypochlorite pesticide product at an unregistered establishment, for knowingly providing false information regarding the product to EPA, and for selling a "misbranded" pesticide due to lack of required labeling information on the product. The Initial Decision imposed a $22,000 civil penalty upon WECCO for these alleged violations. In addition, the Initial Decision held that TEK, as successor in interest to WECCO, was jointly and severally liable for the violations alleged in the Amended Complaint as well as the civil penalty.

On appeal, the Respondents contend that the ALJ abused his discretion in determining "through sanction" at the start of the evidentiary hearing that TEK was WECCO's successor for purposes of liability should WECCO be found liable for the alleged FIFRA violations, and that the facts otherwise do not establish that TEK was a successor in interest to WECCO's liability. The Respondents also maintain that the ALJ's liability and penalty determinations were not supported by a preponderance of the evidence in the record.

Held: The ALJ properly exercised his discretion under 40 C.F.R. § 22.19(g) to conclude that TEK was a successor in interest to WECCO's liability. In accordance with § 22.19, the ALJ was entitled to draw an inference adverse to the Respondents for their refusal, in response to the ALJ's discovery order, to provide information under their control bearing on the issue of corporate succession. Alternatively, TEK's status as a successor in interest to WECCO's liability is amply supported by application of traditional, judicially-created exceptions to the general rule that an asset purchaser or transferee does not ordinarily assume the liability of the seller. In particular, a preponderance of factors supports TEK's status as successor in interest under the "de facto merger" exception given the strong continuities in ownership and operations between WECCO and TEK following WECCO's dissolution.

The Respondents' limited arguments challenging the ALJ's detailed findings on how WECCO's actions satisfied the elements of FIFRA liability on all four counts of the

Amended Complaint are undeveloped, unresponsive, based on fallacious legal theories, or unsupported by reference to facts or governing law. Therefore, the Board simply adopts and incorporates the ALJ's findings and conclusions as to liability as its decision, and accordingly holds that WECCO is liable on all four counts of the Amended Complaint.

The Board affirms the ALJ's imposition of a $22,000 penalty upon the Respondents as supported by a preponderance of evidence in the record. The ALJ properly applied the FIFRA statutory penalty factors to determine that the Respondents merited the maximum penalty allowable under FIFRA for the four counts of the Amended Complaint.

Before Environmental Appeals Judges Ronald L. McCallum, Scott C. Fulton, and Edward E. Reich.

Opinion of the Board by Judge McCallum:

I. *INTRODUCTION*

On February 28, 2003, Appellants William E. Comley, Inc., d/b/a WECCO ("WECCO"), and Bleach Tek, Inc. ("TEK") (collectively "Respondents") filed an appeal of a January 31, 2003 Initial Decision ("Init. Dec.") issued by Administrative Law Judge ("ALJ") Carl C. Charneski finding WECCO liable for violating provisions of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. §§ 136a-y, as alleged by United States Environmental Protection Agency ("Agency") Region IV ("Region") in an Amended Complaint. These provisions require producers of pesticides to register the establishments at which they produce pesticides, prohibit knowingly providing false information associated with FIFRA requirements to the Agency, and forbid selling or distributing improperly labeled pesticide products. The Initial Decision also assesses a $22,000 civil penalty against WECCO, as proposed by the Region. In addition, the Initial Decision holds that TEK, as successor in interest to WECCO, is jointly and severally liable for the violations alleged in the Amended Complaint as well as the civil penalty. For the reasons discussed below, we affirm the Initial Decision.

II. *BACKGROUND*

A. *Regulatory Background*

FIFRA requires pesticide producers to register, by application to the EPA, the sites or establishments at which they produce pesticides. *See* FIFRA § 7(a), 7 U.S.C. § 136e(a). In particular, FIFRA § 7(a) provides that:

> No person shall produce any pesticide subject to this [Act] * * * unless the establishment in which it is produced is registered with the Administrator. The application for registration of any establishment shall include the

> name and address of the establishment and of the producer who operates such establishment.

7 U.S.C. § 136e(a). Upon receipt of an application for an establishment registration, the Agency is required to register the establishment and assign it an "establishment number." FIFRA § 7(b), 7 U.S.C. § 136e(b).

FIFRA and its implementing regulations define the terms "pesticide" and "produce" in considerable detail. A "pesticide" is defined to be "(1) any substance or mixture of substances intended for preventing, destroying, or mitigating any pests," and a "pest" is defined by FIFRA as a "virus, bacteria, or other microorganism." FIFRA § 2(u), 7 U.S.C. § 136(u). Under FIFRA, "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). Consistent with the broad statutory definition of "produce," FIFRA's implementing regulations, at 40 C.F.R. pt. 167, define "produce" to include "packag[ing], repackag[ing], label[ing], relabel[ing], or otherwise chang[ing] the container of any pesticide or device." 40 C.F.R. § 167.3.

FIFRA also makes it illegal for persons subject to the statute to knowingly falsify information in registrations, applications, and other information required by FIFRA. In particular, FIFRA § 12(a)(2)(M) provides in relevant part that:

> (2) It shall be unlawful for any person -
>
> (M) to knowingly falsify all or part of any application for registration, application for experimental use permit, any information submitted to the Administrator pursuant to [§ 7], any records required to be maintained pursuant to [the Act], any report filed under this [Act] * * * .

7 U.S.C. § 136j(a)(2)(M).

Moreover, FIFRA prescribes strict standards for packaging and labeling of pesticide products. In this regard, FIFRA § 12(a)(1)(E) provides that "it shall be unlawful for any person in any State to distribute or sell to any person * * * any pesticide that is adulterated or misbranded." 7 U.S.C. § 136j(a)(1)(E). FIFRA § 2(q) sets forth extensive criteria for what constitutes "misbranding" a pesticide product's packaging and labeling. *See* U.S.C.§ 136(q). Of relevance to the current proceeding, misbranding includes omitting from a pesticide label the following types of information: the EPA establishment number (§ 2(q)(1)(D)); necessary warning or caution statements (§ 2(q)(1)(F)); directions for use (§ 2(q)(1)(F)); a statement of ingredients (§ 2(q)(2)(A)); the net weight or measure of contents (§ 2(q)(2)(C)(iii)); the EPA registration number of the product (§ 2(q)(2)(C)(iv));

and a statement of a practical treatment (first aid or otherwise) in case of poisoning by the pesticide (§ 2(q)(2)(D)(iii)).

B. *Factual and Procedural Background*

Respondent WECCO was incorporated in the State of Kentucky but was subsequently dissolved after the alleged violations occurred. The assets and business of WECCO were then transferred to TEK, a newly created Indiana corporation owned and controlled by William E. Comley, Sr. During the time of the actions giving rise to this proceeding, WECCO's principal place of business was located in Erlanger, Kentucky and its chairman and sole shareholder was the same William E. Comley, Sr. Joint Stipulations (Feb. 23, 2001). According to a 1997 statement by Mr. Comley, WECCO had been a chemical and equipment distributor for 42 years. Complainant's Evidentiary Hearing Exhibit ("CX") 2. One of WECCO's activities involved packaging, relabeling, and distributing a 12.5% sodium hypochlorite solution that it received in bulk form from the product's manufacturer, HVC, Inc. ("HVC"). Hearing Transcript ("Tr.") at 89.

On August 5, 1997, inspector Calvin Crupper of the Kentucky Department of Agriculture, Division of Pesticides, visited the Public Works Department of the City of Covington, Kentucky. Mr. Crupper determined that WECCO had provided a City of Covington swimming pool, the Randolph Pool, with 285 gallons of sodium hypochlorite solution on July 2, 1997. Tr. at 63.

On September 16, 1997, Mr. Crupper and EPA Inspector James West conducted a Producer Establishment Inspection of WECCO's facility located in Erlanger, Kentucy. The inspectors spoke with Mr. Comley, who informed them that the company packaged and distributed sodium hypochlorite, which it received in bulk form from HVC, for use as an antimicrobial product to disinfect pools. CX 2. Mr. WECCO had pesticide registrations for sodium hypochlorite for "approximately twelve" years, but had dropped the registrations around 1990 to avoid pesticide registration maintenance fees. *Id.* At the time of their visit, the inspectors were able to retrieve copies of shipping records indicating that on August 6, 1997, WECCO had made another delivery of 250 gallons of sodium hypochlorite solution to the City of Covington's Goebel Park Pool. *Id*. In their inspection report, Mr. Crupper and Mr. West noted that "it appears that WECCO is repackaging and distributing an unregistered pesticide" and indicated that WECCO had committed a suspected violation by "produc[ing] * * * a pesticide in [an] unregistered producer establishment." *Id.*[1]

[1] An investigation of pesticide producer registrations by the Agency revealed that WECCO had requested cancellation of its EPA establishment number in 1993. CX 13.

The inspectors also indicated in their inspection report that the labeling on WECCO's product did not comply with FIFRA requirements. *Id.* Mr. Crupper noted that the label WECCO used on its product was "more or less a generic label," Tr. at 95, and the two inspectors observed that WECCO's label was deficient with respect to FIFRA requirements to post such information as the amount of active ingredients (the sodium hypochlorite), a "danger" sign with skull and crossbones, warnings against use by children, and directions for use. Tr. at 65-66, 156; CX 2. Mr. West recounted that during the inspection, he and Mr. Crupper communicated to Mr. Comley that WECCO was not in compliance with FIFRA pesticide labeling requirements as well as with the requirement to register pesticide-producing establishments. Tr. at 157.

Through the September 16, 1997 inspection and a previous inspection of HVC's facility in Cincinnati, Ohio, the Agency learned more about the arrangement by which HVC authorized WECCO to repackage, relabel, and distribute, i.e., market and sell, HVC's 12.5 % "HI-TEST Sodium Hypochlorite" product under the FIFRA product registration number (Registration Number 8176-20001) that HVC had obtained from EPA.[2] Amended Complaint at 2; CX 5. Pursuant to EPA Form 8570-5, titled "Notice of Supplemental Distribution of a Registered Pesticide Product," which both WECCO and HVC signed, on January 2, 1997, and May 6, 1997, respectively, WECCO agreed to distribute HVC's manufactured product subject to certain specified conditions set forth in the form.[3] CX 5. These included, among others: (1) agreeing to market WECCO's "HI-TEST Sodium Hypochlorite" under the distributor product name "Aqua Pure 16 Sodium Hypochlorite"; (2) agreeing to label the distributor product so that it would bear the EPA registration number of HVC's product, followed by a hyphen and WECCO's EPA establishment number; and (3) agreeing to label the distributor product so that the label would bear WECCO's name and address qualified by such terms as "packed for," "distributed by," or "sold by" to show that WECCO

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[2] With limited exceptions, FIFRA requires a person who distributes or sells a pesticide to obtain a registration for that pesticide. *See* FIFRA § 3(a), 7 U.S.C. § 136(a).

[3] Supplemental distribution allows an existing pesticide registrant, such as HVC, upon notification to the Agency, to market its registered product, bearing a different name and address, through a distributor, such as WECCO. *See* 40 C.F.R. § 152.132 (describing procedures for supplemental distribution). Supplemental distribution requires submission to the Agency of a statement signed by both the registrant and the distributor listing the names and addresses of the registrant and the distributor, the distributor's company registration number, the additional brand names to be used, and the registration number of the registered product. *Id.* As explained by EPA inspector Mr. West at the evidentiary hearing, the purpose of the "Notice of Supplemental Distribution" (EPA Form 8570-5), an Agency form, was to allow companies such as WECCO to "distribute pesticides under their name without having to go through a separate registration process when the product already exists and is registered by another company." Tr. at 154.

was not the manufacturer.[4] *Id.*In a letter dated July 18, 1997, the Agency's Office of Pesticide Programs acknowledged receipt of the supplemental distribution form signed by HVC and WECCO. *Id.*

The WECCO label that the inspectors obtained during their August 16, 1997 inspection did not conform to conditions specified in the notice of supplemental distribution form since, among other things: (1) the label was designated only generically as "Sodium Hypochlorite," not the agreed-upon "Aqua Pure 16 Sodium Hypochlorite," CX 2; (2) the label did not include the EPA Registration number of the product nor a valid EPA establishment number, *id.*; and (3) the label did not indicate that WECCO was not the manufacturer of the pesticide product. Tr. at 154; CX 5.[5]

As a result of the 1997 inspections, the Region, on September 29, 2000, filed a four-count Civil Complaint and Notice of Opportunity For Hearing against WECCO, charging the company with the following violations:

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[4] EPA Form 8570-5 requires that a pesticide product registrant and distributor submit to EPA the name under which the product will be distributed and the distributor's company number (establishment number). In addition, Form 8570-5 requires that the product registrant and the distributor adhere to the following listed conditions:

- The distributor product must have the same composition as the basic product.
- The distributor product must be manufactured and packaged by the same person who manufactures and packages the registered basic product.
- The labeling for the distributor product must bear the same claims as the basic product, provided, however, that specific claims may be deleted if by doing so, no other changes to the label are necessary.
- The product must remain in the manufacturer's unbroken container.
- The label must bear the EPA registration number of the basic product, followed by a hyphen and the distributor's company number.
- Distributor product labels must bear the name and address of the distributor qualified by such terms as "packed for...," distributed by...," or sold by..." to show that the name is not that of the manufacturer.
- All conditions of the basic registration apply equally to distributor products. It is the responsibility of the basic registrant to see that all distributor labeling is kept in compliance with requirements placed on the basic product.

CX 5.

[5] Much later, on May 4, 2001, Inspector Crupper conducted another inspection of Covington's Public Works Department. CX 4; Tr. at 90. As part of his visit, he inspected the City's Randolph Pool. In the pool's storage area, Mr. Crupper found several large sodium hypochlorite tanks with generic labeling, which he photographed and videotaped. CX 4; Tr. at 90. Mr. Crupper testified that these labels were identical to the generic label he obtained from WECCO at the September 16, 1997 inspection. CX 4; Tr. at 91.

Count I: WECCO, at its Erlanger, Kentucky facility, produced a pesticide, sodium hypochlorite solution, at an unregistered establishment, in violation of FIFRA § 12(a)(2)(L), 7 U.S.C. § 136j(a)(2)(L);[6]

Count II: WECCO knowingly falsified information provided to EPA in the supplemental distribution form it signed with HVC, Inc., in violation of FIFRA § 12(a)(2)(M), 7 U.S.C. § 136j(a)(2)(M);

Count III: WECCO sold or distributed to the City of Covington, on July 2, 1997, a "misbranded" pesticide product lacking required labeling information, in violation of FIFRA § 12(a)(1)(E), 7 U.S.C. § 136j(a)(1)(E); and

Count IV: WECCO sold or distributed to the City of Covington, on August 6, 1997, a misbranded pesticide product lacking required labeling information, in violation of FIFRA § 12(a)(1)(E), 7 U.S.C. § 136j(a)(1)(E).

The Complaint also proposed a penalty of $22,000 for the alleged violations pursuant to FIFRA § 14(a), 7 U.S.C. § 136l(a).

At approximately the time of these events, WECCO was undergoing a series of corporate changes and reorganizations. In late 1999, WECCO changed its business address from Erlanger, Kentucky to Aurora, Indiana. CX 15. In November 2000, TEK incorporated in the State of Indiana, consolidating the operations of WECCO, T.W.C. Transportation Company, and T.W.C. Property Corporation. CX 23; Tr. at 34-36.[7] WECCO dissolved its corporate status shortly afterwards on December 20, 2000. CX 23. From the same Aurora, Indiana business address where WECCO had relocated, TEK continued WECCO's business operations of selling and distributing sodium hypochlorite solution it received from HVC, with Mr. Comley serving as TEK's Chairman. Joint Stipulations (Feb. 23, 2001). TEK's business operations included the continued sale and distribution of sodium hypochlorite solution to city pools in Covington. Tr. at 248-49, 465-66

In a prehearing exchange dated February 7, 2001, WECCO, represented by Mr. Comley, disclosed for the first time WECCO's dissolution and TEK's incorporation. WECCO's prehearing exchange described TEK as an "Indiana Corpora-

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[6] In accordance with FIFRA § 12(a)(2)(L), 7 U.S.C. § 136j(a)(2)(L), it is illegal for pesticide producers to fail to register the establishments at which they produce pesticides, as required by FIFRA § 7(a), 7 U.S.C. § 136e(a).

[7] Mr. Comley explained in his testimony that T.W.C. Transportation Company transported WECCO's products and that T.W.C. Property Corporation served as T.W.C. Transportation Company's base of operations. Tr. at 35.

tion and successor to [WECCO]." *See* Pretrial Claim for Relief (Feb. 7, 2001).[8]

On February 22, 2001, with leave of the ALJ, the Region filed an Amended Complaint adding TEK as a respondent, alleging that TEK was WECCO's successor in interest. Amended Complaint (Feb. 22, 2001). The Amended Complaint was served upon TEK. The Amended Complaint was otherwise unchanged from the original Complaint.

On April 17, 2001, pursuant to 40 C.F.R. § 22.19(e), the Region moved for additional discovery to obtain from the Respondents: (1) corporate documents in their possession "describ[ing] or explain[ing] the relationship" between and among WECCO, TEK, and Mr. Comley; (2) WECCO's financial statements, income tax returns, and chart of accounts; and (3) TEK's financial statements, federal income tax returns, and chart of accounts. Complainant's Motion for Further Discovery (Apr. 17, 2001) at 3. The Region's motion also sought issuance of an order requiring the Respondents to answer a list of interrogatories and a requested list of admissions concerning the continuity of operations between WECCO and TEK. *Id.* (Atts. A & B). In its Motion, the Region explained that it sought, through additional discovery on "the corporate structure and business dealings of both [WECCO] and TEK," to demonstrate these two corporations were "essentially the same business entity" and that therefore TEK is a corporation "liable in succession to WECCO." Complainant's Motion For Further Discovery at 2. Mr. Comley declined to provide the information sought in the Region's motions, arguing that the information would delay the proceedings, lacked probative value, was burdensome, and that requests for information concerning TEK were "moot" because TEK was not a party to the case. *See* Respondent's Objections For Further Discovery, Interrogatories, and Admissions (May 7, 2001); Respondent's Response to Production of Documents (June 22, 2001).

On June 28, 2001, the ALJ issued an order granting in part, and denying in part, a May 16, 2001 motion by the Region to compel production of documents by the Respondents. Order Granting in Part, and Denying in Part, Motion to Compel the Production of Documents; Complainant's Motion to Compel Production of Documents and Opposition to Respondents' Motion to Dismiss. Except for a limited amount of material the ALJ termed "overly broad" and unreasonable, the Order directed the Respondents to produce the majority of the information the Region sought in its May 16, 2001 motion. *Id.* The Respondents declined to produce the documents identified in the ALJ's Order on the grounds that the Region's request for documents constituted a violation of the Respondents' privacy rights. Respondent's [sic] Decline to Produce Documents (July 13, 2001).

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[8] During pre-trial discovery and the evidentiary hearing, Mr. Comley represented both WECCO and TEK *pro se.* In this appeal of the Initial Decision, the two companies are represented by outside counsel.

In an August 30, 2001 Order, the ALJ ruled that in light of the Respondents' refusal to comply with his June 28, 2001 discovery order, he would address the "matter of sanctions" at the upcoming evidentiary hearing scheduled for September 11, 2001.

At the start of the evidentiary hearing held September 11, 2001, the ALJ ruled that, as a sanction for the Respondents' noncompliance with his discovery order, TEK was held to be WECCO's successor in interest for purposes of liability in this proceeding. Tr. at 38. The evidentiary hearing was abruptly cut short because of the terrorist attacks on that date, and resumed on October 17 and 18, 2001. The parties filed post-hearing briefs.

In his January 31, 2003 Initial Decision, the ALJ determined that WECCO violated Counts I through IV of the Complaint as alleged by the Region, and that TEK, as WECCO's successor in interest, was liable for each of the these violations. Init. Dec. at 2-3, 5-10. In addition, the ALJ assessed a penalty of $22,000 against the Respondents, as requested by the Region. *Id.* at 10-13.

In their appeal brief, filed February 28, 2003, the Respondents assert that "substantial evidence and application of the law"[9] failed to support the ALJ's Initial Decision. Appeal Brief ("App. Br.") at 4. In claiming that the ALJ committed reversible error, the Respondents assert that:

(1) The ALJ erroneously determined "through sanction" that TEK was WECCO's successor in liability, and that the facts otherwise do not establish TEK was a successor in interest to WECCO's liability;

(2) The ALJ's determination of liability on the four counts of the Amended Complaint is not supported by a preponderance of the evidence in the record; and

(3) The penalty imposed is inappropriate and not supported by a preponderance of the evidence in the record.

Id. at 4-9.

The Region filed a response brief on April 15, 2003. Appellee's Response Brief ("Response Brief").

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[9] The Region correctly indicates that the Respondents err by suggesting that the appropriate standard of review the Board should adopt in this proceeding is whether the Initial Decision is supported by "substantial evidence." *See* Response Brief at 10. The Board reviews the ALJ's factual and legal conclusions on a *de novo* basis. *See* 40 C.F.R. § 22.30(f). In so doing, any factual findings made by the Board (whether directly or by relying on the ALJ's findings) must be supported by a preponderance of the evidence. 40 C.F.R. § 22.24.

III. *DISCUSSION*

A. *Successor Liability*

At the start of the evidentiary hearing, the ALJ imposed a sanction against the Respondents for their non-compliance with his discovery order, ruling that TEK was a successor in interest to WECCO's liability. Tr. at 38. In his ruling, the ALJ invoked a provision in the regulations governing these proceeding at 40 C.F.R. pt. 22 that allows an ALJ to sanction a party's refusal to provide information within its control required to be submitted during pretrial information exchange and discovery. 40 C.F.R. § 22.19(g); *see generally* 40 C.F.R. § 22.19 (describing prehearing information exchange, prehearing conference, and other discovery procedures). This sanction provision provides in relevant part that:

> Where a party fails to provide information within its control as required by [40 C.F.R. § 22.19], the [ALJ] may, in his discretion:
>
> (1) Infer that the information would be adverse to the party failing to provide it;
>
> (2) Exclude the information from evidence; or
>
> (3) Issue a default order under § 22.17(c).

40 C.F.R. § 22.19(g).

On appeal, the Respondents contend that the ALJ's application of the sanction "was in error" because the ALJ "abused his discretion when he created a factual determination through sanction." App. Br. at 5.

In our view, the ALJ properly exercised his discretion in applying the sanction provision at 40 C.F.R. § 22.19(g) in response to the Respondents' failure to provide information probative of whether TEK was a successor in interest to WECCO's liability. The Respondents' assertion that the ALJ erroneously "created a factual determination through sanction," App. Br. at 5, is mistaken, since an ALJ in accordance with 40 C.F.R. § 22.19(g), is allowed to draw factual inferences that are adverse to a party that fails to comply with a discovery order. Thus, the ALJ in this case was simply following what the regulations prescribe. Also, as the Region notes in its Reply Brief, by inferring from the Respondents' refusal to obey his discovery order that TEK was WECCO's successor for purposes of liability, the ALJ imposed the less severe of the sanctions available. Response Brief at 2. The ALJ did not take the harsh step of issuing a default order, which would have determined liability and imposed a penalty without an evidentiary hearing. *Id.* at 3. Rather, the ALJ simply ruled that TEK was WECCO's successor for

purposes of liability in the event that WECCO was subsequently found liable for the alleged violations. *Id.*

We also endorse the Region's view that the ALJ's sanction is justified in light of the Respondents' failure to provide any legitimate justification for refusing to provide the information required in the ALJ's discovery orders. *Id.* In light of the Respondents being the parties most likely to possess detailed information touching on the issue of corporate succession, their failure to produce this information warrants an adverse ruling against them. *Id.* at 4; *see also In re New Waterbury, Ltd.*, 5 E.A.D. 529, 540 (EAB 1994) (holding that adverse factual inferences under Agency's discovery rules are justified against respondents that refuse, during prehearing discovery, to provide financial information under their control bearing on their ability to pay a proposed penalty).

For the foregoing reasons, it is our view that the ALJ did not err or abuse his discretion in exercising his sanction power under 40 C.F.R. pt. 22 to rule that TEK would be liable as a successor in interest to WECCO should WECCO be found liable for the violations alleged.

There is also an alternative basis for concluding that TEK is liable as WECCO's successor in interest. In his Initial Decision, the ALJ, referring to portions of the record, also stated that, "even absent the sanction for non-compliance * * * there is evidence * * * establishing that TEK is the successor in interest to WECCO." *See* Init. Dec. at 3 n.3. On appeal, the Respondents counter by declaring that "TEK is a separate entity with no succession of interest from WECCO" and fault the ALJ for not "recit[ing] * * * facts establishing such status." App. Br. at 5.

While the ALJ did not discuss the facts supporting TEK's status as a successor in interest (he limited himself to identifying relevant portions of the administrative record), we find that the law and evidence in the case amply support TEK's status as a successor in interest to WECCO. As the Region argues in considerable detail in its Response Brief, such a finding is justified by application of traditional, widely-established equitable theories developed by courts to carve out an exception to the general rule that an asset purchaser or transferee does not acquire the liabilities of the corporation that sold or transferred the assets. Response Brief at 5. These equitable theories are animated by the concern that "where the essential and relevant characteristics of the selling corporation survive the asset sale, * * * it is therefore equitable to charge the purchaser with the seller's liability." *Id.* at 152; *see, e.g., North Shore Gas Co. v. Salomon, Inc.*, 152 F.3d 642, 651 (7th Cir. 1998).

As surveyed by the Region in its response brief, the traditional, judicially-created exceptions to the general rule that the purchaser (or transferee) does not ordinarily assume the liability of the seller consist of the following:

(1) the parties agree to the transfer of liability;

(2) the transaction is a de facto merger or consolidation;

(3) the transaction is fraudulently entered into to escape liability; or

(4) the purchaser is a mere continuation of the seller.

Response Brief at 5 (citing *Philadelphia Elec. Co. v. Hercules, Inc.*, 762 F.2d 303, 308 (3rd Cir. 1985); *North Shore Gas Co. v. Salomon, Inc.*, 152 F.3d 642 (7th Cir. 1998)). *See also* 15 Fletcher, *Cyclopedia of the Law of Private Corporations* § 7122 (perm. ed. rev. vol. 1999).

We agree with the Region's argument that TEK's status as a successor in interest is justified under the "de facto" merger theory of successor liability. Response Brief at 5-6. In this respect, the Region argues that TEK should derivatively assume the liability of WECCO, if established, because the operations and personnel of WECCO were in effect merged or absorbed into the new entity TEK. *Id.*

In applying the de facto merger theory of liability, courts take the following factors into consideration:

> (1) There is a continuation of the enterprise of the seller corporation, so that there is a continuity of management, personnel, physical location, assets, and general business operations;
>
> (2) There is a continuity of shareholders which results from the purchasing corporation paying for the acquired assets with shares of its own stock, this stock ultimately coming to be held by the shareholders;
>
> (3) The seller corporation ceases its ordinary business operations, liquidates, and dissolves as soon as legally and practically possible; and
>
> (4) The purchasing corporation assumes those obligations of the seller ordinarily necessary for the uninterrupted continuation of normal business operations of the seller corporation.

See Response Brief at 5-6 (citing *Philadelphia Elec. Co.*, 762 F.2d. at 310-312 (determining that successor company was potentially liable as a successor in interest because transactions between it and its predecessor resulted in a "de facto"

merger and because the successor was merely a "continuation" of the predecessor's business)).

The following facts, among others, demonstrate the existence of a preponderance of factors supporting application of the de facto merger theory of successor liability to TEK: Mr. Comley's statement that he merged WECCO and two related corporations into TEK to avoid paying multiple gross receipt taxes in Indiana (Tr. at 35); WECCO's address in Indiana, after the company moved to Indiana, was identical to TEK's (CXs 15, 23); Mr. Comley was formerly Chairman of WECCO and is currently Chairman of TEK (Joint Stipulations (Feb. 23, 2001)); TEK, as did WECCO, markets and distributes sodium hypochlorite obtained from HVC and sells this product to City of Covington pools (Tr. at 248-49, 465-66); Mr. Comley owned 100% of the stock of WECCO and owns 100% of the stock of TEK (Joint Stipulations (Feb. 23, 2001)); WECCO was dissolved on December 20, 2000, almost immediately following TEK's incorporation in November 27, 2000 (CXs 23,24); the voucher forms the City generated for purchases of WECCO's and TEK's sodium hypochlorite identified the two companies with the same vendor number (Tr. at 247; CXs 6, 7); and in 2001, TEK and HVC continued negotiations over supplemental distribution and labeling of HVC's hypochlorite product that HVC and WECCO had initiated in 2000. (CXs 20, 21). [10,11]

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[10] The Region also contends that successor liability for TEK is justified under a "mere continuation" theory exception to a purchaser or transferee's non-assumption of liability from a predecessor corporation. Under the "mere continuation" theory, courts allow recovery against a purchasing corporation where the purchaser continues the corporate entity of the seller, based primarily on such factors as an identity of officers, directors, and stock between the selling and purchasing corporation, as well as a continuity of ownership and control between the two corporations. *See Philadelphia Elec. Co.,* 762 F.2d at 654. In our view, the identity of personnel, ownership, and control between WECCO and TEK (in the form of Mr. Comley, as noted above) meets the conditions for TEK's status as a successor in liability to WECCO under the "mere continuation" theory.

[11] In deciding the merits of whether TEK is a successor in liability to WECCO, we should consider the issue of whether to apply state law, or instead, a judicially-created "federal common law." Although this issue was not briefed by the parties, we note that the choice of law question has divided several circuit courts in environmental cases, particularly in the context of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601-9674. For example, some federal courts state that a federal common law on successor liability under CERCLA is justified by the need for national uniformity and to advance the statute's remedial purpose, while other federal courts have held that applicable state law is sufficient to decide successor liability under CERCLA. *See, e.g., United States v. Carolina Transformer Co.*,978 F.2d 832, 837 (4th Cir. 1992) (supporting application of federal common law to successor liability); *North Shore Gas Co. v. Salomon Inc.*, 152 F.3d 642, 650-51 (7th Cir. 1998) ("assum[ing]" that federal common law supplies the rule of decision on successor liability). *See also Oner II, Inc. v. U.S. EPA*, 597 F.2d 184 (9th Cir. 1979) (affirming without reference to state law EPA's imposition of corporate successor liability in FIFRA administrative action). *But see United State v. Davis*, 261 F.3d 1 (1st Cir. 2001) (state law should decide question whether purchasing company was a successor to seller's CERCLA liability); *Atchison, Topeka and Santa Fe Ry. Co v. Brown & Bryant, Inc.*, 159 F.3d 358 (9th Cir. 1998) (same); *Anspec Co., Inc. v. Johnson Controls, Inc.*, 922 F.3d 1240, 1246 (6th Cir. 1991) (state law should decide

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In sum, these facts regarding WECCO and TEK illustrate the kind of close identity between predecessor and successor, and strong continuity between their operations, that have justified courts' imposition of successor liability, on equitable grounds, applying the de facto merger theory. We therefore find that the preponderance of evidence supports TEK's status as a successor in liability to WECCO.

B. *Liability on the Four Counts of the Amended Complaint*

Contesting their liability on the four counts of the Amended Complaint, the Respondents assert that the ALJ's liability determination is not supported by a "preponderance of the evidence." App. Br. at 9. In their appeal brief, however, the Respondents devote a mere one-and-a-half pages, *see* App. Br. at 5-7, to challenging the ALJ's detailed findings of how WECCO's actions met the elements of liability on all counts. Init. Dec. at 5-10. The Respondents' limited arguments are, depending on the issue, either undeveloped, unresponsive, based on fallacious legal theories, or unsupported by reference to facts or governing law.

For example, with respect to Count I, the Respondents contend that under WECCO's supplemental distribution agreement with HVC, "[i]f HVC, the manufacturer or the hypochlorite, were properly registered, as the evidence showed," then WECCO could "lawfully distribute the product under subregistration," even if WECCO did not have an establishment number at the time of their agreement. App. Br. at 5. The Respondents cite no statutory, regulatory, or judicial authority for this argument.[12] Also, the Respondents fail to contest the ALJ's detailed find-

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CERCLA liability of company formed after merger). With regard to the instant case, the choice of law issue appears to be a confusing one, since the Sixth and Seventh Circuits, which include, respectively, Kentucky and Indiana (where the incidents that gave rise to this proceeding took place), differ on whether state or federal common law should be controlling on successor liability, at least in the CERCLA context. *Compare Anspec with North Shore Gas, supra.* However, we regard this issue as an academic one that we need not resolve in this proceeding since application of either federal common law or relevant state law yields the same result. Federal common law, as articulated in *North Shore*, as well as Kentucky and Indiana state common law, equally embrace the four traditional successor liability exceptions, including the "de-facto merger" and "mere continuation" exceptions TEK satisfies in this case. *See North Shore Gas*, 152 F.3d at 651 (applying traditional successor liability exceptions as part of federal common law); *Pearson v. Nat. Feeding Sys., Inc.*, 90 S.W.3d 46 (Ky. 2002) (applying traditional successor liability exceptions pursuant to Kentucky law); *Sorenson v. Allied Products*, 706 N.E.2d 1097, 1100 (Ind. Ct. App. 1999) (applying traditional successor liability exceptions pursuant to Indiana law). Therefore, whatever potentially relevant body of law we apply — federal common law or the state laws of Kentucky or Indiana — TEK qualifies as a successor in interest to WECCO's liability.

[12] The Respondents completely misapprehend the difference between registering pesticides *products* under FIFRA § 3, 7 U.S.C. § 136(a), and registering pesticide-producing establishments. While the supplemental distribution agreements signed with HVC did allow WECCO to distribute its
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ing that by packaging sodium hypochlorite solution for an antimicrobial purpose, WECCO met the statutory and regulatory definitions of a "producer" of "pesticides," *see supra* Part II.A, and that as such, the company was required to register its Erlanger, Kentucky site as a pesticide-producing establishment pursuant to FIFRA § 7(a).

Moreover, ignoring the ALJ's detailed findings on Counts III and IV that the labels on the sodium hypochlorite solution WECCO sold to the City of Covington did not meet EPA's pesticide labeling requirements, WECCO attempts to cast doubt on the ALJ's liability determination by indicating that no violation notice or "stop sale" was issued in 1997, the year the Agency reported WECCO's labeling deficiencies. *See* CX 2. But as the Region correctly observes in its reply brief, the decision to issue a "stop sale" order under FIFRA § 13(a) in response to a FIFRA violation is "completely discretionary and has no mitigating effect on Appellants' FIFRA liability."[13,14]

In sum, none of the Respondents' arguments serve as a basis for overturning the ALJ's findings and determinations, which are thoroughly discussed in his decision. *See* Init. Dec. at 5-10. For that reason, we simply adopt and incorporate the ALJ's finding and conclusions as to liability as our decision,[15] and accordingly hold that WECCO is liable on all four counts of the Region's Amended Complaint.

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sodium hypochlorite under HVC product registration, *see supra* note 3, the agreement did not relieve, WECCO, as a pesticide producer, from its obligation to register its Erlanger, Kentucky pesticide-producing *establishment* in accordance with FIFRA § 7.

[13] FIFRA § 13(a) provides, in relevant part, that the Agency "*may* issue a written or printed 'stop sale' * * * order to any person who owns, control, or has custody of [a] pesticide" in the event "any pesticide * * * is found by the [Agency] and there is reason to believe on the basis of inspection or tests that such pesticide * * * has been or is intended to be distributed or sold in violation of any of the provisions of [FIFRA], or that such pesticide * * * has been or is intended to be distributed or sold in violation of any such provision * * * ." FIFRA § 13(a), 7 U.S.C. § 136k(a) (emphasis added). As indicated, the issuance of a stop sale order is purely discretionary. Therefore, contrary to the Respondents' suggestion, the fact that the Region did not issue a "stop sale" order in this case has no bearing on their liability under the Count III and Count IV misbranding charges.

[14] The Respondents' argument challenging the ALJ's Count II finding that WECCO "knowingly" provided false information to the Agency in its supplemental distribution form is incomprehensible. Nowhere do the Respondents dispute the Region's convincing evidence of knowing falsification on the form, in particular the company's providing an establishment number it had admitted canceling years earlier, *see* CX 2, and committing to place the establishment number on its label. CX 5; *see supra* Part II.B.

[15] It is well settled that an appellate administrative tribunal may adopt the findings, conclusions, and rationale of a subordinate tribunal without extensive restatement. *In re Envtl. Protection Corp.*, 3 E.A.D. 318, 319 n.4 (CJO 1990) (citing *United States v. Orr*, 474 F.2d 1365 (2d Cir. 1973); *Carolina Freight Carrier Corp. v. United States*, 323 F.Supp 1290 (W.D.N.C. 1971)).

C. *Penalty Determination*

In his Initial Decision, the ALJ imposed on WECCO a $22,000 penalty, the penalty amount proposed by the Region. In assessing this penalty, the ALJ stated that the "facts" in this case supported the assessment of the maximum penalty allowable ($5,500) for each of the four violations. Init. Dec. at 10.[16] In accordance with the regulations governing this proceeding at 40 C.F.R. pt. 22, the Agency has the burden of demonstrating that a penalty is appropriate in light of the statutory penalty factors. 40 C.F.R. § 22.24.

The regulations at 40 C.F.R. pt 22 also direct an ALJ to "determine the amount of the recommended civil penalty based on the evidence in the record and in accordance with any civil penalty criteria set forth in the Act." 40 C.F.R. § 22.27(b). Accordingly, in arriving at a final penalty amount, the ALJ applied the FIFRA statutory penalty factors, which provide that:

> 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 environment, the Administrator may issue a warning in lieu of assessing a penalty.

7 U.S.C. § 136l.

In assessing a penalty, ALJs are required to consider any penalty policies issued under the Act. 40 C.F.R. § 22.24(b). However, ALJs are not required to apply such penalty policies in calculating penalties. 40 C.F.R. § 22.27(b); *see also Chem Lab Products, Inc.*, 10 E.A.D. 711 (EAB 2002); *In re B & R Oil Co.*, 8 E.A.D. 39, 63 (EAB 1998). Nevertheless, we have noted on numerous occasions that penalty policies serve to facilitate the application of statutory penalty criteria and, accordingly, offer a useful mechanism for ensuring consistency in civil penalty assessments. *See, e.g., 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).

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[16] FIFRA § 14(a) authorizes a civil penalty of up to $5,000 for each violation of the statute. 7 U.S.C. § 136l(a). The maximum penalty amount for a FIFRA violation has been increased to $5,500 to account for inflation pursuant to the Debt Collection Improvement Act of 1966, 31 U.S.C. § 3701 and 40 C.F.R. pt. 19.

The $22,000 penalty assessed by the ALJ ratified the penalty amount the Region calculated using the FIFRA Enforcement Response Policy ("ERP"), which is the Agency's penalty policy under FIFRA. *See* CX 12 (U.S. EPA, Office of Compliance Monitoring & Office of Pesticides & Toxic Substances, *Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)* (July 2, 1990)). In imposing a penalty, the ALJ analyzed each of WECCO's alleged violations with respect to the three FIFRA § 14(a)(4) statutory penalty factors but did not discuss the ERP.[17] *See* Init. Dec. at 10-13.

First, the ALJ considered the issue of WECCO's "business size." He concluded that information submitted by the Region from the American Business Directory,[18] dated October 2000, showing that Aquatic World, a division of WECCO,[19] had sales of $3,075,000, would be "accepted as establishing the size of respondents' business." Init. Dec. at 11 (citing CX 16). In reaching this conclusion, the ALJ refused to admit financial information submitted by the Respondents challenging the Region's business size estimate on the grounds that the information was submitted after the evidentiary hearing and therefore was not admissible as evidence. *Id.* at 11.[20]

With regard to the related "ability to continue in business" penalty factor, the ALJ determined that the above information submitted on the size of WECCO's business ($3 million + sales) would be "sufficient to establish that respondents can pay the assessed penalty." *Id.* In support of this determination, the ALJ cited Board cases upholding the proposition that in order to establish a *prima*

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[17] Although the regulations governing this procedure direct ALJs to "consider" any civil penalty guidelines, 40 C.F.R. § 22.24(b), we regard the ALJ's omission of the ERP in his penalty discussion as a technical oversight. Where as here, the ALJ did not depart from the amount recommended by the Region through application of the ERP, where the ALJ was extensively briefed by the Region on how direct application of the statutory penalty factors also supported imposition of the maximum penalty amount, and where the ALJ's analysis incorporated the elements of Region's ERP analysis and discussion, *see* CX 11 (FIFRA Civil Penalty Calculation Worksheet); Tr. at 356-75, we do not consider the ALJ's omission to be a clear error or an abuse of discretion. Therefore, we will proceed to examine the ALJ's penalty analysis based on his application of the FIFRA statutory penalty factors without direct reference to the ERP.

[18] American Business Directory, produced by *Info*USA, contains company addresses, telephone numbers, actual and estimated financial data, and corporate linkages for over 12 million U.S. business establishments. *See* http://www.infousa.com (last visited Jan. 8, 2004); Thomson Corp., Bluesheet for American Business Directory, File No. 531, at:
http://library.dialog.com/bluesheets/html/bl0531.html (last updated Mar. 12, 2003).

[19] The proceedings below yielded little information on the "Aquatic World of WECCO" besides this entity being a division of WECCO. The name "Aquatic World -A Division of Wecco Corporation," identified as having the same Kentucky address as WECCO, appears on an invoice for a shipment of sodium hypochlorite sold to the City of Covington in July 2000. *See* CX 6.

[20] We find no error in this aspect of the ALJ's decision.

facie case that a penalty amount is appropriate in light of a respondent's ability to pay, the Region need not provide specific financial information on the matter; instead it is sufficient to provide generalfinancial information, such as gross sales volume, "from which it can be inferred that the respondent's ability to pay should not affect the penalty amount." *Id.* at 11 (citing *In re James C. Lin and Lin Cubing, Inc.*, 5 E.A.D. 595, 599 (EAB 1994), and *In re New Waterbury, Ltd.*, 5 E.A.D. 529, 541-42 (EAB 1994)). The ALJ noted that "while WECCO has since dissolved and TEK has taken its place, respondent TEK does not argue that the penalty sought by EPA in this case would adversely affect its ability to continue in business." *Id.*

The ALJ concluded his application of the penalty factors by considering the "gravity" associated with each count of the Amended Complaint. With regard to Count I, the ALJ emphasized that WECCO's failure to properly register its establishment, despite its long experience in the chemical industry, demonstrated that the company was "highly negligent." *Id.* In this respect, the ALJ noted that the company had requested the cancellation of its establishment registration approximately four years before the Agency's inspection in 1997, and that in light of its "42 years of experience" in the chemical business, the company "should have known that a producer establishment number was required under these circumstances." *Id.* at 12 (citing CXs 2, 14).

With regard to Count II, the ALJ concluded that the maximum penalty was appropriate because of WECCO's apparent deception in promising to place on the label of its distributed sodium hypochlorite product an EPA establishment number it had previously canceled. *Id.* The ALJ also determined that imposition of the maximum penalty was appropriate for the misbranding violations contained in Counts III and IV on the ground that WECCO's mislabeling "presented a significant hazard to the public." Init. Dec. at 13. In discussing these counts, the ALJ recounted the testimony of the Region's witnesses who stressed the importance of use directions — missing from WECCO's labeling — in safely applying sodium hypochlorite solution for the purpose of pool disinfection. *Id.* For example, the ALJ referred to the testimony of an EPA expert on swimming pool disinfectants, Robert Brennis, of EPA's Office of Pesticide Programs, who explained that pool water likely presented the highest level of human exposure to a registered pesticide "because you're bathing in it." *Id.* (citing Tr. at 283). In this respect, Mr. Brennis testified that over-treatment of this pesticide could lead to serious skin burns and irreversible eye damage due to sodium hypochlorite's "acute toxicity,"[21] while, on the other hand, under-treatment could allow the growth of pathogens such as E. coli and cryptosporidium. *Id.* (citing Tr. at 284). The ALJ also noted that the testimony of Mr. West, the EPA inspector, was in agreement with Mr.

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[21] Mr. Brennis testified that 12.5% sodium hypochlorite is the "highest level of sodium hypochlorite" that EPA registers as a pesticide product. Tr. at 278.

Brennis' statements about the dangers of misapplying sodium hypochlorite and the consequent need for use directions. *Id.* (citing Tr. at 159).

On appeal, the Respondents argue that a penalty is inappropriate because the Region failed to show by a preponderance of the evidence that WECCO could stay in business and was of sufficient size to pay the penalty. App. Br. at 7. In particular, the Respondents characterize the American Business Directory informationsubmitted by the Region showing that a division of WECCO exceed $3 million in sales, *see supra,* as "pure hearsay" and contend that "substantial evidence and finding of fact cannot be based on such hearsay alone." *Id.* at 8. The Respondents also discount the severity of the violations under Count I and II, describing them as "administrative," and asserting that "compliance with the supplemental agreement would be satisfied by inserting the number on the label." App. Br. at 9. With respect to the ALJ's gravity findings on Counts III and IV, the Respondents contend that the Region's actions "belie the existence of a grave situation" because the Region did not take prompt action after inspecting WECCO's facility and waited three years to file a complaint against the Respondents. *Id.* In addition, the Respondents claim the penalty was excessive because the record did not show that WECCO's sodium hypochlorite product caused harm to persons or the environment. *Id.* Finally, the Respondents contend that the fact that WECCO had no history of violating FIFRA "establishes their good faith," thus warranting mitigation of the penalty. *Id.*

The Respondents request, as relief for the ALJ's penalty assessment, that the penalty be vacated, or in the alternative, "if the determination of the violations is sustained, * * * that the final order reduce the penalty to the minimum provided for under the Act, or * * * remand the case for a hearing on appropriate penalty determination." App. Br. at 9-10.

As explained below, we affirm the ALJ's assessment of the maximum penalty amount for the four counts of the Amended Complaint as supported by the preponderance of the evidence in the record, and reject the Respondents' objections.

In our view, the ALJ, consistent with our holdings in *New Waterbury* and *Lin Cubing,* did not err in determining that imposing the maximum penalty amount upon WECCO was appropriate in light of the related penalty factors of WECCO's business size and "ability to continue in business." In accordance with the holdings of these cases, once the Region established a *prima facie* case that the proposed $22,000 penalty amount was appropriate in terms of these factors (via records showing that a WECCO division's sales had exceeded $3 million), it was incumbent upon the Respondents to respond with "*specific* evidence to show that despite [their] sales volume or apparent solvency" they could not pay the penalty. *See New Waterbury,* 5 E.A.D. at 547; *Lin Cubing,* 5 E.A.D. at 600. Through the course of this proceeding, both during prehearing discovery (when they de-

clined to provide any financial information) and during the evidentiary hearing, the Respondents have failed to provide any such *specific* financial information to rebut the Region's *prima facie* case.[22] Also, as the Region notes, the $22,000 penalty amount represents less than 1% of the WECCO division sales figure, which is considerably less than the 4% of gross annual income from all sources of revenue that the Board has cited as a "measure of a company's ability to remain in business." Response Brief at 21 (citing *New Waterbury,* 5 E.A.D. at 547; *Lin Cubing,* 5 E.A.D at 601).[23]

In addition, we reject as groundless the Respondents' contention that the Region's WECCO sales figures are inadmissible as "hearsay" evidence. Hearsay evidence is clearly admissible under the liberal standards for admissibility of evidence in the 40 C.F.R. pt. 22 rules, which are not subject to the stricter Federal Rules of Evidence. The Part 22 rules provide, in relevant part, that the ALJ "shall admit all evidence which is not irrelevant, unduly repetitious, or otherwise unreliable or of little probative value * * * ." 40 C.F.R. § 22.22(a). *See In re J.V. Peters & Co.,* 7 E.A.D. 77, 104 (EAB 1997) (holding that hearsay evidence is not excluded by the Part 22 rules); *accord In re Great Lakes Div., Nat'l Steel Corp.*, 5 E.A.D. 355, 368-69 (EAB 1994). The Respondents here have not offered any argument tending to show that gross sales figures for a WECCO division (which is similar in type to the general financial information we held was sufficient in *New Waterbury* and *Lin Cubing* to demonstrate adequate consideration of a respondent's ability to pay a penalty) is irrelevant, unduly repetitious, or otherwise unreliable or of little probative value.

Furthermore, we agree with the ALJ's gravity assessment of WECCO's violations and disagree with the Respondents' arguments seeking to downplay their severity. WECCO was a seasoned registrant of pesticides under FIFRA, and thus demonstrated a high degree of culpability with respect to Count I by not having a valid establishment registration for its Erlanger, Kentucky establishment. The

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[22] The Respondents never entered information in the record documenting the specific gross sales of WECCO. At the evidentiary hearing, the Respondents presented some evidence suggesting that WECCO's and TEK's yearly gross sales were at or slightly less than $1 million from 1994 to 2001, but provided no precise sales figures. *See* Tr. at 418, 443-45, 544-45.

[23] The ERP recommends using, as a measure of a company's ability to pay a penalty, 4% of a company's "average gross income [gross sales] * * * from all sources of revenue for the current year and the prior three years." *See* ERP at 23. In other words, ability to pay is presumed if the penalty amount does not exceed 4% of gross income. Thus, even if we were to accept the Respondents' evidence suggesting that WECCO's and TEK's yearly gross sales were close to $1 million from 1994 through 2001, the proposed $22,000 penalty represents only 2.2% of $1 million, which is below the ERP's 4% ability to pay threshold. In addition, while the ERP recommends averaging a company's gross sales over a *four*-year time frame, as noted above, here the evidence indicates the company's ability to sustain average annual gross sales close to $1 million over an *eight*-year time frame, which provides a more representative demonstration of the company's ability to pay using a 4% of gross sales benchmark.

company's commitment to include on its distributor product label an establishment number that it clearly knew was invalid involved a knowing deception that merits the most severe penalty under Count II.[24] The Respondents' arguments that Count I and II involve only "administrative" violations, App. Br. at 8, are misplaced. Both counts involve evasion by WECCO of the statutory obligation to register pesticide-producing establishments, and we have recognized that violations of this requirement are harmful to FIFRA's regulatory program. *See In re Sav Mart, Inc.*, 5 E.A.D. 732, 738 n.13 (EAB 1995) (holding that penalty was appropriate for respondent's failure to register pesticide-producing establishment because "failure to register [a pesticide-producing] establishment deprives the Agency of necessary information and therefore weakens the statutory scheme").

The misbranding violations in Counts III and IV also merit the maximum penalties because of the serious potential harm that deficient labeling, particularly lack of use directions, posed to humans and the environment, as described by the Region's witnesses. The fact that the Region did not take immediate enforcement action against WECCO does not in anyway mitigate this potential harm in light of sodium hypochlorite's "acute toxicity," high degree of human exposure to this pesticide involved in the public's use of swimming pools, and dangers of improper application detailed in the record. Moreover, although "actual harm" to humans and the environment was not demonstrated in this case, the potential harms of WECCO's violation are serious enough to warrant imposition of the maximum penalty. *See In re High Plains Coop., Inc.*, 3 E.A.D. 228, 229 (CJO 1990) (stating that "gravity of the violation" in FIFRA statutory penalty factors "is a function of the gravity of the potential harm and the gravity of the misconduct."); *see also* ERP at B-1 (including both actual and potential harm as circumstances in adjusting gravity of a penalty). Finally, although WECCO's lack of previous FIFRA violations merits some favorable consideration, this circumstance is strongly outweighed by the company's negligence in not complying with FIFRA regulations given its long experience in the pesticide business, its knowing falsification of information, and the significant harm its violations posed to the public.[25]

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[24] We reject, as grounds for penalty mitigation, the Respondents' argument that WECCO's distribution of sodium hypochlorite under HVC's product registration (in accordance with the supplemental distribution agreement) relieved WECCO of its obligation to register its pesticide-producing establishment under FIFRA § 7. We have already discussed the fallacy of this argument in our discussion of WECCO's liability. *See supra* note 12.

[25] Contrary to the suggestion of the Respondents, WECCO's lack of previously documented FIFRA violations was considered in calculating the company's penalty. As the Region notes in its reply brief, it assigned a favorable value to WECCO's compliance record in calculating a penalty pursuant to the ERP. Response Brief at 27 n.10; CX 11.

For the foregoing reasons, we uphold the ALJ's imposition of a $22,000 penalty on WECCO for the four counts of the Amended Complaint.

IV. *CONCLUSION*

Upon consideration of the issues raised on appeal by the Respondents, we affirm the ALJ's Initial Decision determining that WECCO committed the FIFRA allegations alleged in the Region's Amended Complaint. Pursuant to FIFRA § 14(a), a civil penalty of $22,000 is assessed against WECCO. We also affirm the ALJ's holding that TEK is jointly and severally liable for the above FIFRA violations and civil penalty, as WECCO's successor in interest. The Respondents are directed to pay this civil penalty within 30 days of the filing of this Final Decision. Payment shall be made by forwarding a certified cashier's check payable to the Treasurer, United States of America, at the following address:

The Citizens and Southern National Bank
U.S. Environmental Protection Agency
Region IV
(Regional Hearing Clerk)
P.O. Box 100142
Atlanta, GA 30384

So ordered.