**UNITED STATES**
**ENVIRONMENTAL PROTECTION AGENCY**
**BEFORE THE ADMINISTRATOR**

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| **In the Matter of:** | ) | |
| | ) | |
| **Timothy Wilson, d/b/a** | ) | **Docket No. FIFRA-07-2023-0135** |
| **Wilson's Pest Control,** | ) | |
| | ) | |
| **Respondent.** | ) | |

# INITIAL DECISION AND ORDER

**DATED:** September 1, 2026

**BEFORE:** Chief Administrative Law Judge Michael B. Wright

**APPEARANCES:** For Complainant:

Adam Hilbert, Esq.
Assistant Regional Counsel
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U.S. Environmental Protection Agency, Region 7
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For Respondent:

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<u>**PROCEDURAL BACKGROUND**</u>

On February 8, 2024, Complainant, the Director of the Enforcement and Compliance Assurance Division at the United States Environmental Protection Agency ("EPA" or "Agency"), Region 7, initiated this proceeding by filing a Complaint and Notice of Opportunity for Hearing ("Complaint") against Respondent Timothy Wilson, d/b/a Wilson's Pest Control, under Section 14 of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA" or "Act"), 7 U.S.C. § 136*l*. Specifically, Complainant charged Respondent with 21 separate counts of violation in the Complaint. The first 10 counts alleged that Respondent violated Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), by distributing or selling 10 different pesticides that were not registered under the Act. Compl. ¶ 52. Counts 11 through 20 alleged that Respondent violated Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), by distributing or selling those same 10 pesticides as misbranded under the Act. Compl. ¶ 63. Finally, Count 21 alleged that Respondent violated Section 12(a)(2)(B)(iii) of FIFRA, 7 U.S.C. § 136j(a)(2)(B)(iii), by refusing EPA employees access to one of his business's facilities for the purpose of carrying out an inspection. Compl. ¶ 69. For these violations, Complainant seeks to assess a civil administrative penalty of $149,659 against Respondent. Compl. ¶ 70.

On March 9, 2024, Respondent, through counsel, filed an Answer of Respondent to Complaint and Request for Hearing ("Answer"). The Regional Hearing Clerk subsequently transmitted the matter to this Tribunal for adjudication, and on March 20, 2024, my former esteemed colleague, Chief Administrative Law Judge Susan L. Biro, was designated to preside over the proceeding. That same day, she issued a Prehearing Order directing the parties to engage in a prehearing exchange of information. *See* Prehr'g Order (Mar. 20, 2024) at 2-4. The parties timely filed their respective prehearing exchanges.

Thereafter, Complainant filed a series of motions. Specifically, on June 21, 2024, Complainant filed a Motion for Additional Discovery, or in the Alternative, Motion in Limine, asking Judge Biro to compel Respondent to produce certain documents relevant to his ability to pay the proposed penalty and to bar Respondent from raising an inability to pay should he fail to comply. Then, on August 9, 2024, Complainant moved for leave to amend the Complaint to make a number of corrections and additions, while not substantively changing the general charges or relief sought. *Compare* Compl. ¶¶ 52, 63, 69, 70, *with* Am. Compl. ¶¶ 51, 61, 67, 68. That motion was followed by Complainant's motion to supplement its prehearing exchange on August 27, 2024, in which Complainant moved to add three new proposed exhibits to its prehearing exchange and revise a previously filed proposed exhibit. Judge Biro granted all three of these motions. *See* Order on Complainant's Mots. for Additional Disc. and Extension of Time (July 10, 2024); Order on Complainant's Mots. (Sept. 5, 2024); Order Barring Resp't from Presenting Certain Evid. at Hr'g (Nov. 8, 2024). The Amended Complaint and Notice of Opportunity for Hearing ("Amended Complaint") was deemed to have been filed and served on September 5, 2024. Respondent did not file an answer to the Amended Complaint.

Complainant subsequently filed a Motion for Accelerated Decision as to Liability on October 31, 2024, which Respondent did not challenge and which Judge Biro granted in part and denied in part. Order on Complainant's Mot. for Accelerated Decision as to Liability (Jan. 17, 2025) ("AD Order"). Specifically, Judge Biro granted accelerated decision as to Respondent's liability for Counts 8 through 10 and 11 through 20 but denied accelerated decision as to the remaining counts.

Finally, on January 28, 2025, Complainant moved to supplement its prehearing exchange with three new proposed exhibits, which Judge Biro granted. Order on Complainant's Mot. to Suppl. (Feb. 5, 2025).

On February 19, 2025, I was designated to preside over this matter because of Judge Biro's approaching separation from the Agency. I proceeded to conduct an evidentiary hearing in St. Louis, Missouri, on February 25, 2025, as previously scheduled by Judge Biro. At the hearing, Complainant presented the testimony of two witnesses: Candace Bednar, a Chemical Branch Chief for Region 7 of the EPA with years of experience as an inspector of businesses like those operated by Respondent Wilson, Tr. at 10-12, 51-52, and Kash Kruep, a FIFRA inspector and enforcement officer with the EPA with prior experience as the Chief Pesticide Use Investigator with the Missouri Department of Agriculture, Tr. at 104-05. Respondent testified on his own behalf. In addition to the foregoing testimony, I admitted into evidence the following exhibits: Complainant's Exhibits ("CX") 1-14 and 17-32; Respondent's Exhibits ("RX") 1 and 2; and a Joint Set of Stipulated Facts, Exhibits, and/or Testimony, a fully signed copy of which had been filed on February 21, 2025, as Joint Exhibit ("JX") 1.

Upon this Tribunal's receipt of the official transcript of testimony taken at the hearing, electronic copies were sent to the parties by email, and I issued an Order Scheduling Post-Hearing Submissions on March 28, 2025.[1] Pursuant to that Order and subsequent scheduling orders, the parties filed post-hearing briefs, with Complainant filing its Initial Post-Hearing Brief ("Complainant's Initial Brief") on May 15, 2025; Respondent filing his Intial [sic] Post-Hearing Brief ("Respondent's Initial Brief") on July 5, 2025; and Complainant filing its Reply Post-Hearing Brief ("Complainant's Reply Brief") on July 21, 2025.

## **LEGAL BACKGROUND**

First enacted in 1947 and amended periodically thereafter, FIFRA requires that all pesticides distributed or sold in the United States be registered with the Administrator of the EPA, who is authorized to limit the distribution and sale of unregistered pesticides "[t]o the extent necessary to prevent unreasonable adverse effects on the environment." 7 U.S.C. § 136a(a). In essence, "[a] registration . . . functions as a license setting forth the conditions under which the pesticide may be sold, distributed, and used." *NRDC v. EPA*, 38 F.4th 34, 40 (9th Cir. 2022). Section 3 of the Act establishes the detailed procedures that registrants[2] must

[1] Citations to the transcript will be in the following format: "Tr. at [page number]."

[2] The term "registrant" is defined simply as "a person who has registered any pesticide pursuant to

follow to register a pesticide. 7 U.S.C. § 136a(c). In turn, Section 12 of FIFRA provides, in pertinent part:

> (1) Except as provided by subsection (b), it shall be unlawful for any person in any State to distribute or sell to any person—
>
> (A) any pesticide that is not registered under section 3 or whose registration has been canceled or suspended, except to the extent that distribution or sale otherwise has been authorized by the Administrator under this Act;
>
> * * * * *
>
> (E) any pesticide which is adulterated or misbranded.

7 U.S.C. § 136j(a)(1)(A), (a)(1)(E).

Section 2 of FIFRA defines the operative terms contained in Section 12. For example, the term "person" is defined as "any individual, partnership, association, corporation, or any organized group of persons whether incorporated or not." 7 U.S.C. § 136(s). The phrase "'to distribute or sell' means to distribute, sell, offer for sale, hold for distribution, hold for sale, hold for shipment, ship, deliver for shipment, release for shipment, or receive and (having so received) deliver or offer to deliver." *Id.* § 136(gg). Conversely, it does not mean "the holding or application of registered pesticides . . . by any applicator who provides a service of controlling pests without delivering any unapplied pesticide to any person so served." *Id.* The term "pesticide" is defined, in pertinent part, as "any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest." *Id.* § 136(u)(1). And the term "pest" is defined as including "any insect [or] rodent," among other organisms. *Id.* § 136(t).

## I. REPACKAGING PESTICIDES INTO REFILLABLE CONTAINERS FOR DISTRIBUTION OR SALE

The EPA has enacted certain regulations for purposes of "establish[ing] requirements for repackaging some pesticide products into refillable containers for distribution or sale." 40 C.F.R. § 165.60(a). The regulations apply to, among others, "refiller[s] of a pesticide product . . . [who] are not the registrant of the pesticide product." 40 C.F.R. § 165.60(b). Further, the regulations "apply to all pesticide products other than manufacturing use products, plant-incorporated protectants, and antimicrobial products that are exempt . . . ." 40 C.F.R. § 165.63(f).

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provisions of [FIFRA]." 7 U.S.C. § 136(y).

According to those regulations, a registrant may allow others to repackage the registrant's pesticide into refillable containers for distribution or sale of the repackaged product under the registrant's existing registration if all of the following criteria are met:

> (1) The repackaging results in no change to the pesticide formulation.
>
> (2) One of the following conditions regarding a registered refilling establishment is satisfied:
>
> > (i) The pesticide product is repackaged at a refilling establishment registered with EPA as required by § 167.20 of this chapter.
> >
> > (ii) The pesticide product is repackaged by a refilling establishment registered with EPA as required by § 167.20 of this chapter at the site of a user who intends to use or apply the product.
>
> (3) The registrant has entered into a written contract with [the refiller] to repackage the pesticide product and to use the label of the registrant's pesticide product.
>
> (4) The pesticide product is repackaged only into refillable containers that meet the standards of subpart C of this part.
>
> (5) The pesticide product is labeled with the product's label with no changes except the addition of an appropriate net contents statement and the refiller[']s EPA establishment number.

40 C.F.R. § 165.70(b). Repackaging a registered pesticide for distribution or sale without meeting the foregoing conditions or obtaining a new registration constitutes "a violation of section 12 of the Act." 40 C.F.R. § 165.70(c).

The regulations define the operative terms contained therein as follows:

> Container means any package, can, bottle, bag, barrel, drum, tank, or other containing-device . . . used to enclose a pesticide. Containers that are used to sell or distribute a pesticide product and that also function in applying the product (such as spray bottles, aerosol cans and containers that become part of a direct injection system) are considered to be containers for the purposes of this part.
>
> * * * * *
>
> Establishment means any site where a pesticidal product, active ingredient, or device is produced . . . .

*  *  *  *  *

> Produce means to manufacture, prepare, propagate, compound, or process any pesticide, including any pesticide produced pursuant to section 5 of the Act, and any active ingredient or device, or to package, repackage, label, relabel, or otherwise change the container of any pesticide or device.
>
> *  *  *  *  *
>
> Refillable container means a container that is intended to be filled with pesticide more than once for sale or distribution.
>
> Refiller means a person who engages in the activity of repackaging pesticide product into refillable containers. This could include a registrant or a person operating under contract to a registrant.
>
> Refilling establishment means an establishment where the activity of repackaging pesticide product into refillable containers occurs.
>
> Repackage means, for the purposes of this part, to transfer a pesticide formulation from one container to another without a change in the composition of the formulation, the labeling content, or the product's EPA registration number, for sale or distribution.

40 C.F.R. § 165.3.

The foregoing regulations make clear that the act of changing the container of a registered pesticide for sale or distribution amounts to "producing" a new pesticide, which triggers the requirement to register the pesticide in its new form. However, 40 C.F.R. § 165.70 creates an exception to that requirement, such that the pesticide may be sold or distributed under the registrant's existing registration as long as it is "repackaged" in accordance with the criteria set forth in 40 C.F.R. § 165.70(b).

## II. MISBRANDED PESTICIDES

Having made unlawful the act of selling "any pesticide which is adulterated or misbranded," FIFRA specifies when a pesticide is considered to be "misbranded." In pertinent part, FIFRA declares that:

> (1) A pesticide is misbranded if—
>
> *  *  *  *  *

(D) its label does not bear the registration number assigned under section 7 to each establishment in which it was produced;

*     *     *     *     *

(F) the labeling accompanying it does not contain directions for use which are necessary for effecting the purpose for which the product is intended and if complied with, together with any requirements imposed under section 3(d) of this Act, are adequate to protect health and the environment;

(G) the label does not contain a warning or caution statement which may be necessary and if complied with, together with any requirements imposed under section 3(d) of this Act, is adequate to protect health and the environment;

*     *     *     *     *

(2) A pesticide is misbranded if—

(A) the label does not bear an ingredient statement . . . .;

(B) the labeling does not contain a statement of the use classification under which the product is registered[3];

(C) there is not affixed to its container . . . a label bearing—

> (i) the name and address of the producer, registrant, or person for whom produced;
>
> *     *     *     *     *
>
> (iii) the net weight or measure of the content, except that the Administrator may permit reasonable variations . . . .

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[3] As part of the registration process for a pesticide, the pesticide is classified as a Restricted Use Pesticide ("RUP"), a General Use Pesticide ("GUP"), or both. 7 U.S.C. § 136a(d)(1)(A). A pesticide is classified as an RUP if "the pesticide, when applied in accordance with its directions for use, warnings and cautions and for the uses for which it is registered, . . . may generally cause, without additional regulatory restrictions, unreasonable adverse effects on the environment, including injury to the applicator." 7 U.S.C. § 136a(d)(1)(C). The statute requires that an RUP be applied only by or under the direct supervision of a certified applicator. 7 U.S.C. § 136a(d)(1)(C)(i), (ii).

7 U.S.C. § 136(q)(1)(D), (q)(1)(F)-(G), (q)(2)(A)-(C); *see also* 40 C.F.R. §§ 156.10, 156.60-156.85 (regulations imposing labeling requirements). In turn, the terms "label" and "labeling" are defined by FIFRA as follows:

> (1) Label. The term "label" means the written, printed, or graphic matter on, or attached to, the pesticide or device or any of its containers or wrappers.
>
> (2) Labeling. The term "labeling" means all labels and all other written, printed, or graphic matter—
>
> > (A) accompanying the pesticide or device at any time; or
> >
> > (B) to which reference is made on the label or in literature accompanying the pesticide or device, except to current official publications of the Environmental Protection Agency, the United States Departments of Agriculture and Interior, the Department of Health and Human Services, State experiment stations, State agricultural colleges, and other similar Federal or State institutions or agencies authorized by law to conduct research in the field of pesticides.

7 U.S.C. § 136(p).

## III. INSPECTION AUTHORITY

To aid in enforcement, Section 9 of FIFRA authorizes the EPA to conduct inspections to ensure that those subject to the Act's requirements are in compliance:

> For purposes of enforcing the provisions of this Act, officers or employees of the Environmental Protection Agency . . . are authorized to enter at reasonable times . . . any establishment or other place where pesticides or devices are held for distribution or sale for the purpose of inspecting and obtaining samples of any pesticides or devices, packaged, labeled, and released for shipment, and samples of any containers or labeling for such pesticides or devices . . . .

7 U.S.C. § 136g(a)(1). FIFRA imposes certain procedures to which EPA staff are required to adhere while conducting such an inspection. Specifically, Section 9 provides:

> Before undertaking such inspection, the officers or employees must present to the owner, operator, or agent in charge of the establishment or other place where pesticides or devices are held for distribution or sale, appropriate credentials and a written statement as to the reason for

> the inspection, including a statement as to whether a violation of the law is suspected.

*Id.* § 136g(a)(2). Finally, Section 12 makes it unlawful for any person to refuse to "allow any entry, inspection, copying of records, or sampling authorized by [the] Act." *Id.* § 136j(a)(2)(B)(iii).

## FACTUAL BACKGROUND

### I. WILSON'S PEST CONTROL

Respondent began operating Wilson's Pest Control, a business offering both pest control products and pest control services, over 35 years ago. *See, e.g.*, CX 1 at 2, 3; CX 27; Tr. at 159, 163. Over the course of its operation, he employed multiple family members in the business. Tr. at 159-60. At the times relevant to this proceeding, Respondent himself was responsible only for retail sales, while other employees both engaged in sales and provided pest control services. Tr. at 160, 173-74. Respondent held a number of licenses related to the business at the time, which were issued by the Missouri Department of Agriculture. Tr. at 61, 157-59; CX 12 at 2 (record of a pesticide dealer outlet license issued to Respondent, with an expiration date of June 30, 2022).

As of 2022, the business operated out of two locations. Tr. at 156. The first was 2400 North Grand Boulevard in St. Louis, Missouri ("Grand Facility"), Answer ¶ 7; *compare* Compl. ¶ 32 *with* Am. Compl. ¶ 31; CX 1 at 2; Tr. at 156, and the second was 2616 Woodson Road in Overland, Missouri ("Woodson Facility"), Answer ¶ 16; *compare* Compl. ¶ 41 *with* Am. Compl. ¶ 40; CX 17 at 1; Tr. at 156-57. The Grand Facility was registered with the EPA as a pesticide-producing establishment, with an EPA establishment number of 69040-MO-1. CX 1 at 2; CX 14; RX 2; Tr. at 54.

At the time, according to Respondent, 75 to 85 percent of the business's customers were "commercial applicators,"[4] who primarily worked as independent contractors, while 15 to

[4] FIFRA defines the phrase "commercial applicator" as "an applicator . . . who uses or supervises the use of any pesticide which is classified for restricted use for any purpose or on any property other than [property owned or rented by the applicator or the applicator's employer or, if applied without compensation, the property of another person]." 7 U.S.C. § 136(e)(3). Meanwhile, the State of Missouri defines the phrase "certified commercial applicator" as:

> any individual, whether or not the individual is a private applicator with respect to some uses, who is certified by the director as authorized to use, supervise the use of, determine the need for the use of, or supervise the determination of need for any pesticide, whether classified for restricted use or for general use, while the individual is engaged in the business of using pesticides on the lands of another as a direct service to the public in exchange for a fee or compensation.

25 percent were individual consumers. Tr. at 160-61; *see also* Tr. at 171 (testifying that he sold to technicians employed to apply pesticides at multiunit housing). Upon the arrival of an individual consumer at the business, Respondent's practice was first to ask about the pest problem that the customer was experiencing and then to recommend a product that would be effective in resolving the problem and advise the customer on how to apply it. Tr. at 166. Respondent would also provide the customer with a safety data sheet for the product and advise the customer that the most current labeling for the product could be located online.[5] Tr. at 169-70.

## II. INSPECTION OF THE GRAND FACILITY

On June 15, 2022, two inspectors from the EPA, Candace Bednar and Andrew Landry, inspected the Grand Facility, documenting their observations in photographs taken during the inspection and a written report compiled by Mr. Landry after the inspection's conclusion. Answer ¶ 7; *compare* Compl. ¶ 32 *with* Am. Compl. ¶ 31; CX 1; CX 2; Tr. at 17-18, 21-22. It was the first inspection of the business that the EPA had performed since operations began. Tr. at 178. According to Ms. Bednar, she learned of Wilson's Pest Control from a communication that the EPA had received from the Missouri Department of Agriculture, whose inspectors had attempted to conduct an inspection of the Grand Facility but who had reportedly encountered some resistance. Tr. at 17, 52-53; *see also* CX 11 at 1 (May 27, 2022 letter addressed to Respondent from a representative of the Missouri Department of Agriculture, advising that staff had attempted to inspect the Grand Facility without success). Upon receiving this communication, the EPA examined annual reports submitted by Wilson's Pest Control, as required of pesticide-producing establishments by the regulations, *see* 40 C.F.R. § 167.85 (establishing reporting requirements for pesticide-producing establishments), and identified an error in the business's 2021 annual report, at which point the EPA decided to perform its own inspection of the Grand Facility, Tr. at 17; CX 1 at 2-3 (inspection report indicating that Mr. Landry advised Respondent by telephone that "due to the annual report error, [he] would like to conduct an inspection reviewing all [Respondent's] pesticide products," which Mr. Landry and Respondent ultimately scheduled for June 15, 2022); *see also* CX 14 (Pesticide Report for Pesticide-Producing and Device-Producing Establishments submitted by Wilson's Pest Control for reporting year 2021); RX 2 (same).

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MO. REV. STAT. § 281.020(2)(b).

[5] Respondent described a safety data sheet as coming from the maker of the pesticide and including certain information:

> It pretty much, kind of, point out if – if anybody come in – if any kid come in contact with it, how to induce vomiting, how to call 1-800, how to – just anything that happen. And not just the kid; it can be the dog, how to induce vomiting, how to give them milk, how to make them throw up, just different things. That's what that – the safety data sheet would, kind of, cover.

Tr. at 170.

Upon arriving at the Grand Facility at approximately 10 a.m., Ms. Bednar and Mr. Landry first photographed the exterior of the building and then entered the business, where they observed Respondent present behind a large counter, as well as shelving and display cases containing pesticides and devices. CX 1 at 3; Tr. at 18-19. Mr. Landry presented his credentials and a Notice of Inspection to Respondent,[6] which Respondent signed, and Respondent consented to the inspection. CX 1 at 3; Tr. at 19, 97.

At the outset, Mr. Landry explained the inspection process and stated that he and Ms. Bednar wished to review all pesticide products present in the Grand Facility. CX 1 at 3. Ms. Bednar, Mr. Landry, and Respondent also discussed the error that the EPA had found in the 2021 annual report. Tr. at 19; CX 1 at 3. The inspection of the pesticide products then ensued. According to Ms. Bednar, she and Mr. Landry observed products that did not appear to be "traditional pesticides," insofar as the brand names were unfamiliar to Ms. Bednar and "the labeling wasn't smooth," and when asked about it, Respondent explained that he prepares the products in the rear of the building. Tr. at 19. At their request, during a lull in business,[7] Respondent briefly showed this area to Ms. Bednar and Mr. Landry, who observed the workbench where Respondent would engage in the practice of transferring substances from one container to another and applying his own label for the product to the new container, along with numerous containers, labels, and funnels that Respondent used for this activity. Tr. at 20; CX 1 at 10; CX 2 at 70-75; *see also* Tr. at 179 (Respondent's testimony that he showed Ms. Bednar and Mr. Landry "the room where we mixed the chemical"). Respondent related to Ms. Bednar and Mr. Landry that he did not have agreements with the registrants of the products he transferred into his own containers, explaining "that all these companies asked of him was his credit card number." CX 1 at 8.

As for the particular products reviewed during the inspection, Ms. Bednar and Mr. Landry identified concerns with the following 10 items[8]:

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[6] At the hearing, Ms. Bednar explained that a Notice of Inspection specifies whether a reason exists for the inspection, such that it is considered a "for cause inspection"; that it is provided, along with the inspector's credentials, upon arrival at the facility to be inspected; that the inspector and a representative of the facility sign it upon consent being given by the facility's representative to perform the inspection; and that a copy is subsequently provided to the representative. Tr. at 94-97, 99-100. The inspection report for the June 15, 2022 inspection of the Grand Facility identifies eight attachments to the report, including a Notice of Inspection, *see* CX 1 at 12, but none of the attachments are appended to the report as it appears in the evidentiary record, and a Notice of Inspection associated with that inspection is not otherwise contained in the record.

[7] Mr. Landry documented in the inspection report that during the inspection, the business "was busy with customers" and Respondent "had to stop and assist customers with purchasing pesticide products, answering questions, and managing scheduling logistics with applications [sic] sites over the telephone." CX 1 at 10. He also documented more specifically that Ms. Bednar observed Respondent selling two insecticides (which Ms. Bednar and Mr. Landry reviewed, among other products, during the inspection) to a walk-in customer after recommending the products as effective against cockroaches. CX 1 at 8. Ms. Bednar likewise testified about observing a customer entering the Grand Facility and purchasing items recommended by Respondent, who was "very busy." Tr. at 19-20.

[8] Herein, the substances are identified in the order in which they were described in the inspection report,

1. Professional Pest Control Concentrate, Permethrin Insecticide 36.8%. The first product that Ms. Bednar and Mr. Landry reviewed was a liquid substance packaged in 16-ounce and 32-ounce containers bearing the name "Professional Pest Control Concentrate, Permethrin Insecticide 36.8%." CX 1 at 4; *see* CX 2 at 4-15, 27-29. Respondent explained to Ms. Bednar and Mr. Landry that he purchases 55-gallon containers of a pesticide registered with the EPA as "Termite Kill III"; that he stores these containers at another location, where he transfers some of the product into a smaller container; and that he then brings the smaller container to the Grand Facility, where he transfers the product into the 16-ounce and 32-ounce containers offered for sale by his business. CX 1 at 4. Respondent further explained that the labeling that he applies to the containers is created through a third-party printing company. CX 1 at 4. This product was one of the two that Ms. Bednar observed Respondent selling to a walk-in customer based on his recommendation that the products would be effective against the cockroaches she was seeking to eradicate. CX 1 at 8.

2. Wilson's Termite & Carpenter Ant Control. Ms. Bednar and Mr. Landry reviewed another liquid substance packaged in a 16-ounce container, this one bearing the name "Wilson's Termite & Carpenter Ant Control." CX 1 at 5; *see* CX 2 at 20-26. While Respondent did not identify the substance or describe its original container, he did relate to the inspectors that he "repackage[s] this product at his store and uses a third-party printing company to make the labeling." CX 1 at 5. When the inspectors asked Respondent about deficiencies with the labeling that the inspectors observed, he responded that he advises customers to search for the given product online to obtain the most updated information about it. CX 1 at 5-6.

3. Final Rodenticide Ready-To-Use Place Pacs. Ms. Bednar and Mr. Landry also reviewed three different products packaged in "throw packs,"[9] with the first ("Final Rodenticide") contained in 0.88-ounce throw packs bearing the name "Final Rodenticide Ready-To-Use Place Pacs." CX 1 at 6; *see* CX 2 at 32-35. The inspectors observed six of these throw packs bundled into zip top resealable plastic bags, without any additional labeling applied to the plastic bags. CX 1 at 6; *see* CX 2 at 30-32, 44, 46, 48, 51, 86. Respondent had organized the bags into a plastic basket stored behind the counter. Tr. at 20-21, 24-25; CX 2 at 84-86. Respondent related to the inspectors that he advises customers purchasing this product to purchase a bait trap station to use with it and to search online for more information but that he also occasionally provides the customers with a safety data sheet for the product. CX 1 at 6; *see* CX 2 at 44-45.

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which does not necessarily correspond with the counts of violation in the Amended Complaint.

[9] Ms. Bednar testified at the hearing that the term "throw pack" is used by the pesticide industry to describe a small packet containing a granular pesticide typically intended for rodents, which chew through the packet to access the product inside. Tr. at 21. Thus, as observed by Complainant in its Initial Brief, "a user would not remove the pesticides from the throw pack to use them." C's Initial Br. at 15. Rather, "[t]he packaging of the throw pack is part of how the pesticide is delivered to the pest." *Id.*

4. Talon G Rodenticide Bait Pack Mini-Pellets. The second product packaged in throw packs that Ms. Bednar and Mr. Landry reviewed ("Talon G Rodenticide") bore the name "Talon G Rodenticide Bait Pack Mini-Pellets" and was contained in 0.88-ounce throw packs. CX 1 at 6; *see* CX 2 at 38-39. Like the Final Rodenticide, the inspectors observed six of the throw packs containing Talon G Rodenticide bundled into zip top resealable plastic bags, without any additional labeling applied to the plastic bags, CX 1 at 6; *see* CX 2 at 36-37, 44, 46, 49-50; Respondent had organized the bags into a plastic basket stored behind the counter, Tr. at 20-21, 24-25; CX 2 at 84-85; and Respondent related to the inspectors that he advises customers purchasing this product to purchase a bait trap station to use with it and to search online for more information but that he also occasionally provides the customers with a safety data sheet for the product, CX 1 at 6; *see* CX 2 at 44-45.

5. Contrac Rodenticide Ready-To-Use Place Pacs. The third product packaged in throw packs that Ms. Bednar and Mr. Landry reviewed ("Contrac Rodenticide") bore the name "Contrac Rodenticide Ready-To-Use Place Pacs" and was contained in 1.5-ounce throw packs. CX 1 at 6; *see* CX 2 at 42-43. Like the Final and Talon G Rodenticides, the inspectors observed six of the throw packs containing Contrac Rodenticide bundled into zip top resealable plastic bags, without any additional labeling applied to the plastic bags, CX 1 at 6; CX 2 at 40-41, 44, 46-47, 52; Respondent had organized the bags into a plastic basket stored behind the counter, Tr. at 20-21, 24-25; CX 2 at 84-85; and Respondent related to the inspectors that he advises customers purchasing this product to purchase a bait trap station to use with it and to search online for more information but that he also occasionally provides the customers with a safety data sheet for the product, CX 1 at 6; *see* CX 2 at 44-45.

6. Red Rodenticide Mini-Blocks. Respondent informed Ms. Bednar and Mr. Landry that he sells the rodenticide products offered for sale in throw packs also in block form,[10] and the inspectors indeed observed unmarked red blocks packaged into zip top resealable plastic bags, without any product information or other labeling applied to the plastic bags. CX 1 at 7; *see* CX 2 at 46, 48, 51, 81, 89. Respondent had organized the bags into a plastic basket stored behind the counter. Tr. at 20-21; CX 2 at 84-85, 89. When asked how he and his customers distinguish between rodenticide mini-blocks without labeling, Respondent identified the red blocks as Final Rodenticide in block form. CX 1 at 7; *see* CX 2 at 46, 48, 51. Respondent related to the inspectors that he occasionally provides customers with a safety data sheet at the point of sale of the blocks and that he advises customers purchasing the product to search online for more information. CX 1 at 7.

[10] Ms. Bednar testified at the hearing that "bait blocks are hardened blocks that contain the . . . active ingredient and also an attractant to attract small mammals, and they chew through that block, eat it, and access the pesticide." Tr. at 21.

7. Blue Rodenticide Mini-Blocks. Ms. Bednar and Mr. Landry also observed unmarked blue blocks packaged into zip top resealable plastic bags, without any product information or other labeling applied to the plastic bags, which Respondent had also organized into a plastic basket. CX 1 at 7; Tr. at 20-21; *see* CX 2 at 46, 49-50, 90. Respondent identified the blue blocks as Talon G Rodenticide in block form. CX 1 at 7; *see* CX 2 at 46, 49-50. Respondent related to the inspectors that he occasionally provides customers with a safety data sheet at the point of sale of the blocks and that he directs customers purchasing the product to search online for more information. CX 1 at 7.

8. Green Rodenticide Mini-Blocks. Ms. Bednar and Mr. Landry also observed unmarked green blocks packaged into zip top resealable plastic bags, without any product information or other labeling applied to the plastic bags, which Respondent had also organized into a plastic basket stored behind the counter. CX 1 at 7; Tr. at 20-21; *see* CX 2 at 46-47, 52, 84-85, 88. Respondent identified the green blocks as Contrac Rodenticide in block form. CX 1 at 7; *see* CX 2 at 46-47, 52, 76-78. Respondent related to the inspectors that he occasionally provides customers with a safety data sheet at the point of sale of the blocks and that he advises customers purchasing the product to search online for more information. CX 1 at 7.

9. Brown Rodenticide Mini-Blocks. Ms. Bednar and Mr. Landry also observed unmarked brown blocks packaged into zip top resealable plastic bags, without any product information or other labeling applied to the plastic bags, which Respondent had also organized into a plastic basket. CX 1 at 7; Tr. at 20-21; *see* CX 2 at 53-54, 90. For this product, Respondent provided the inspectors with a printout of a partial label for a pesticide registered with the EPA as "Maki Mini Blocks." CX 1 at 7; *see* CX 2 at 55. Again, Respondent related to the inspectors that he occasionally provides customers with a safety data sheet at the point of sale of this product and that he advises customers purchasing the product to search online for more information. CX 1 at 7.

10. Wilson's Pest Control Professional Growth Regulator. As Mr. Landry photographed the rodenticide mini-blocks, Respondent identified another liquid substance that he transfers from its original container into ones of his own, which consisted of small white bottles bearing the name "Wilson's Pest Control Professional Growth Regulator." CX 1 at 8; *see* CX 2 at 56-57, 63-69. Describing the substance as "roach birth control," Respondent showed Ms. Bednar and Mr. Landry a larger container bearing the name "Tekko Pro Insect Growth Regulator Concentrate" and explained that he transfers that product into the small white bottles and applies his labeling to the bottles. CX 1 at 8; *see* CX 2 at 56-62. He further explained that he occasionally provides the customers purchasing the product with a safety data sheet but that he often advises customers to search online for more information about it. CX 1 at 8. This product was one of the two that Ms. Bednar observed Respondent selling to a walk-in customer based on his recommendation that the products would be effective against the cockroaches she was seeking to eradicate. CX 1 at 8.

Mr. Landry and Ms. Bednar completed their inspection of the Grand Facility at approximately 1 p.m. CX 1 at 11. Following the inspection, the EPA issued a Stop Sale, Use, or Removal Order ("Stop Sale Order") to Respondent on July 1, 2022. Therein, the EPA advised Respondent of its conclusion that Respondent had violated FIFRA based on the inspectors' observations during the June 15, 2022 inspection of the Grand Facility. CX 13 at ¶ 64. Accordingly, the EPA ordered Respondent "immediately not to distribute, sell, offer for sale, hold for sale, deliver for shipment, receive, or having so received, deliver, offer for delivery, move or remove from any present location, or use any [of the] repackaged" products that were identified above or "any other unregistered, illegally repackaged, and/or misbranded pesticides." CX 13 at ¶ 65.

## III. INSPECTION OF THE WOODSON FACILITY

On July 27, 2023, Ms. Bednar and another inspector from the EPA, Amelia Patterson, visited the Woodson Facility to perform an inspection, which Ms. Bednar and Ms. Patterson each subsequently documented. CX 17 at 1; CX 28 at 1; Tr. at 46-48. The purpose of the inspection was to perform a "Market Place Inspection"[11] and determine whether Respondent was complying with the Stop Sale Order. CX 17 at 1; Tr. at 46, 64. Unlike the inspection of the Grand Facility, the inspectors did not notify Respondent in advance of their visit. Tr. at 47, 64; Answer ¶ 34; *compare* Compl. ¶ 67 *with* Am. Compl. ¶ 65.

Upon their arrival at the Woodson Facility at approximately 2:15 p.m., Ms. Bednar photographed the exterior of the building and multiple motor vehicles bearing signage for "Wilson's Pest Control" in a parking lot adjacent to the building. CX 17; CX 28 at 1. Ms. Bednar and Ms. Patterson observed that the exterior entry door of the building was propped open and that an "Open" sign was displayed. CX 17 at 1; CX 28 at 1. Ms. Bednar and Ms. Patterson then entered the building, whereupon they observed five to six bins with clear tops, similar to bulk grocery store bins, along one wall. CX 17 at 1; CX 28 at 1; Tr. at 49. Within each bin appeared to be throw packs or clear zip top bags containing bait blocks, similar in appearance to products observed during the June 15, 2022 inspection of the Grand Facility, and each bin was labeled with a name and price. CX 17 at 1; CX 28 at 2; Tr. at 49. They also observed bottles containing liquids on shelves along a different wall. CX 17 at 1-2; CX 28 at 1; Tr. at 49.

Respondent was not present at the Woodson Facility at the time. Tr. at 189. Rather, a woman named Stacey Humphrey was behind the counter, Tr. at 49, 189; JX 1 ¶ 3, and Ms. Bednar proceeded to greet Ms. Humphrey, identify herself, present her credentials and a Notice of Inspection, and explain the reason for their visit, CX 17 at 1; CX 28 at 1; Tr. at 46-47; *see* CX 29. Ms. Humphrey responded first by stating that she would not have time for an inspection that day because she was in the process of completing an all-day online training and then by asking why the inspection was not arranged in advance. CX 17 at 1; CX 28 at 1; Tr. at

[11] Ms. Bednar explained at the hearing that such an inspection is performed at storefronts that are in the business of selling pesticide products to the public, such as grocery stores. *See* Tr. at 60-61.

47. After Ms. Bednar explained that the inspection was necessary, that a denial of an inspection could be a violation of FIFRA, and that prior notice is not necessarily provided, Ms. Humphrey advised that the contents of the above-described bins were not for sale but for the business's technicians to use. CX 17 at 1; Tr. at 69; *see also* CX 28 at 2. She then requested that Ms. Bednar and Ms. Patterson wait outside while she contacted the business's attorney. CX 17 at 1; CX 28 at 1; Tr. at 65. Ms. Bednar and Ms. Patterson obliged, and roughly 20 minutes later, Respondent arrived. CX 17 at 1; CX 28 at 1; Tr. at 65-66. Ms. Bednar and Ms. Patterson reentered the building with Respondent, and Ms. Bednar again explained the purpose of their visit and presented her credentials and the Notice of Inspection. CX 17 at 1; Tr. at 67, 99-101, 190. She also inquired about the contents of the bins that she and Ms. Patterson had observed, and Ms. Humphrey advised again that those products were for the business's technicians to use and that she would remove the pricing from the bins after Ms. Bednar and Ms. Patterson left. CX 17 at 2; Tr. at 69; *see also* CX 28 at 1; Tr. at 191 (Respondent's testimony that he advised the inspectors that "most" of the pesticides present were "for the technicians" and that Ms. Humphrey would "take all the service calls"). Respondent and Ms. Humphrey stated that their attorney was unavailable that day and that they would not consent to an inspection without an attorney present, notwithstanding Ms. Bednar cautioning that their denial could amount to a violation. CX 17 at 2; CX 28 at 1; Tr. at 101. With that, Ms. Bednar and Ms. Patterson departed the Woodson Facility at approximately 2:50 p.m. CX 17 at 2; CX 28 at 1.

## BURDEN OF PROOF

This matter is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Rules of Practice") set forth at 40 C.F.R. Part 22. Pursuant to Section 22.24(a) of the Rules of Practice:

> The complainant has the burdens of presentation and persuasion that the violation occurred as set forth in the complaint and that the relief sought is appropriate. Following complainant's establishment of a prima facie case, respondent shall have the burden of presenting any defense to the allegations set forth in the complaint and any response or evidence with respect to the appropriate relief. The respondent has the burdens of presentation and persuasion for any affirmative defenses.

40 C.F.R. § 22.24(a). In carrying their respective burdens of proof, the parties are subject to a preponderance of the evidence standard. 40 C.F.R. § 22.24(b). To prevail under this standard, a party must demonstrate that the facts the party seeks to establish are more likely than not to be true. *See, e.g., Smith Farm Enterprises, LLC*, 15 E.A.D. 222, 228-29 (EAB 2011) ("A factual determination meets the preponderance of the evidence standard if the fact finder concludes that it is more likely true than not.") (citing *Julie's Limousine & Coachworks, Inc.*, 11 E.A.D. 498, 507 n.20 (EAB 2004); *Lyon Cnty. Landfill*, 10 E.A.D. 416, 427 n.10 (EAB 2002), *aff'd*, 2004 U.S.

Dist. LEXIS 10651 (D. Minn. June 7, 2004), *aff'd*, 406 F.3d 981 (8th Cir. 2005); *Bullen Cos., Inc.*, 9 E.A.D. 620, 632 (EAB 2001)).

## LIABILITY

In her AD Order, Judge Biro found that Complainant had met its burden of establishing that no genuine issue of material fact existed, and that it was entitled to judgment as a matter of law, regarding Respondent's liability for Counts 8 through 10 and 11 through 20. Specifically, she granted accelerated decision as to the charges that Respondent distributed or sold repackaged pesticides without obtaining new registrations or satisfying all of the conditions set forth in 40 C.F.R. § 165.70(b), in violation of Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), when he repackaged and distributed or sold Wilson's Pest Control Professional Growth Regulator (Count 8), Professional Pest Control Concentrate, Permethrin Insecticide 36.8% (Count 9), and Wilson's Termite & Carpenter Ant Control (Count 10) (collectively, "the liquid insecticides"). She also granted accelerated decision as to the charges that Respondent distributed or sold misbranded pesticides, in violation of Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), when he distributed or sold the Green Rodenticide Mini-Blocks (Count 11), Red Rodenticide Mini-Blocks (Count 12), Blue Rodenticide Mini-Blocks (Count 13), Brown Rodenticide Mini-Blocks (Count 14), Contrac Rodenticide Ready-To-Use Place Pacs (Count 15), Final Rodenticide Ready-To-Use Place Pacs (Count 16), Talon G Rodenticide Bait Pack Mini-Pellets (Count 17), and the liquid insecticides (Counts 17-20).

As explained below, I now find that Complainant has also met its burden of proof regarding Respondent's liability for Counts 1-7. Conversely, I find that Complainant has not carried its burden with regard to the violation charged in Count 21.

### I. COUNTS 1-7

As previously discussed, Section 12 of FIFRA makes it unlawful for any person to distribute or sell to any person an unregistered pesticide. 7 U.S.C. § 136j(a)(1)(A). Repackaging a registered pesticide for distribution or sale without either registering the pesticide in its new form or fulfilling the criteria set forth at 40 C.F.R. § 165.70(b) is also considered a violation of Section 12 of the Act. 40 C.F.R. § 165.70(c).

In the Amended Complaint, Complainant alleges that Respondent first "produced" the pesticides at issue by repackaging registered pesticides in smaller quantities and different containers than how the pesticides had been registered with the EPA and then failed to register the pesticides in their new form or have written contracts with the registrants to repackage and distribute or sell their products under their existing registrations, among other allegations. *See* Am. Compl. ¶¶ 32, 35, 36, 37, 38. Complainant then charges Respondent in Counts 1 through 7 with violating Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), on the grounds that Respondent distributed or sold repackaged pesticides without obtaining new registrations or satisfying all of the conditions set forth in 40 C.F.R. § 165.70(b). Specifically, Counts 1 through 4 relate to Respondent's sale or distribution of the Green Rodenticide Mini-Blocks (Count 1), Red Rodenticide Mini-Blocks (Count 2), Blue Rodenticide Mini-Blocks (Count 3), and Brown Rodenticide Mini-Blocks (Count 4), while Counts 5 through 7 relate to Respondent's sale or distribution of the Contrac Rodenticide Ready-To-Use Place Pacs (Count 5), Final Rodenticide Ready-To-Use Place Pacs (Count 6), and Talon G Rodenticide Bait Pack Mini-Pellets (Count 7) (collectively, "the rodenticide mini-blocks and throw packs"). Tr. at 116, 122. To prevail on liability for those seven counts, Complainant must establish, consistent with the applicable law described above, that (1) Respondent is a "person"; (2) Respondent "distributed or sold" the rodenticide mini-blocks and throw packs; (3) the rodenticide mini-blocks and throw packs were "pesticides"; and (4) Respondent "produced" those pesticides when he changed the form of their packaging but then failed to register the pesticides in their repackaged form or satisfy all of the conditions of 40 C.F.R. § 165.70(b) at the time of distribution or sale.

Judge Biro found in her AD Order that the first three elements of liability were admitted by Respondent in his Answer and/or supported by undisputed proposed evidence, *see* AD Order at 13-15, and upon consideration of the admissions and evidence that she cited and the absence of any argument or evidence offered by Respondent in rebuttal, I deem those elements to have been established. As for the final element that must be proven, Judge Biro denied Complainant's request for an accelerated decision. AD Order at 17-18. The basis for her ruling was that Complainant had not pointed to any proposed evidence to support the allegations of Respondent having modified the packaging of the products. *See id.* at 16-18. Thus, the question to be resolved at the outset is whether Respondent "produced" the rodenticide mini-blocks and throw packs in a new form.

As noted above, for purposes of FIFRA, the term "produce" means, in relevant part, "to package, repackage, label, relabel, or otherwise change the container of any pesticide or device," and the term "repackage" means "to transfer a pesticide formulation from one container to another without a change in the composition of the formulation, the labeling content, or the product's EPA registration number, for sale or distribution." 40 C.F.R. § 165.3. In other words, the act of changing a registered pesticide's packaging amounts to "producing" a new pesticide, which triggers the requirement to register the new pesticide with the EPA or comply with the criteria of 40 C.F.R. § 165.70(b) in lieu of registration.

With regard to the rodenticide mini-blocks, Complainant alleges in the Amended Complaint that as observed during the June 15, 2022 inspection of the Grand Facility, the mini-blocks were "repackaged by Respondent into unlabeled clear resealable bags." Am. Compl. ¶ 32(b), (d), (f), (g). To substantiate this allegation, Complainant first points to the inspectors' observations at the Grand Facility of the rodenticide mini-blocks packaged in zip top resealable plastic bags. C's Initial Br. at 12 (citing CX 1 at 7; CX 2 at 46-54, 76-78, 88-90). Complainant then argues that those plastic bags were not the original containers for the mini-blocks. *Id.* Rather, Complainant contends, the "master labels" for the rodenticide mini-blocks, entered into evidence as CX 5, CX 30, CX 31, and CX 32 and discussed by Ms. Bednar at the hearing,[12]

[12] At the hearing, the terms "master label," "approved label," and "accepted label" were used

"describe what the proper container would be for the blocks." *Id.* at 12 n.2 (citing Tr. at 36-37, 38-39, 41, 42-43, 44). Complainant also points to Ms. Bednar's testimony regarding a photograph taken at the Grand Facility that depicts the Green Rodenticide Mini-Blocks "in their original packaging[,] which was an eighteen-pound sturdy plastic container with complete labeling and lid in the back of Mr. Wilson's facility." *Id.* (citing Tr. at 43). Finally, Complainant urges that Respondent or his employees were likely the ones to transfer the mini-blocks from their original containers to the plastic bags, based on Respondent asking the inspectors about packaging the mini-blocks in a plastic container he had as an alternative to the plastic bag and his undisputed practice of repackaging other pesticides. *Id.* (citing Tr. at 20, 35-36; AD Order at 15-17).

Respondent has not offered anything to refute the evidence cited by Complainant, and I find that it sufficiently establishes that Respondent modified the packaging of the rodenticide mini-blocks, thus "producing" those pesticides in a new form, within the meaning of that term. Specifically:

- Count 1, Green Rodenticide Mini-Blocks. During the inspection of the Grand Facility, Respondent identified the green mini-blocks observed by the inspectors as Contrac Rodenticide in block form. CX 1 at 7; *see* CX 2 at 46-47, 52, 76-78. The Label Amendment for Contrac All-Weather Blox, which Ms. Bednar identified at the hearing as the most recently approved labels for that pesticide at the time of the inspection, Tr. at 36, includes a graphic of a green mini-block and two labels, identified as an "outer label" and "inner label," approved for containers of the pesticide intended for "pest control operator use," CX 30 at 3-7, 8-12, 24.[13] Those labels reflect the acceptable net weight for containers of the pesticide and the acceptable number of mini-blocks per container. CX 30 at 3, 8. Specifically, the "outer label" identifies the acceptable net weight as being

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interchangeably to describe the labels registered to the pesticides at issue in this matter. Ms. Bednar explained the process for registering and amending a pesticide's label with the EPA as follows:

> [W]hen a label is initially registered with the Environmental Protection Agency, it goes through that long registration process, checking efficacy, checking safety, discussing the wording that should be on the label. Sometimes things have to be amended or changed slightly. Maybe a use of the pesticide is added or removed. And so a label will be amended along the way.

Tr. at 25.

[13] Ms. Bednar testified at the hearing that multiple labels can be registered for a product, explaining, "When a company registers them, they can register several different labels. Like this label is slightly different. It has a smaller size container." Tr. at 26. Indeed, I note that for each approved use, two labels are registered for a number of the rodenticide mini-blocks and throw packs and that the corresponding Label Amendments distinguish between the labels by identifying one as intended for the "outer" container and one as intended for the "inner" container, with the "inner" container having a smaller capacity. *See, e.g.*, CX 30 at 3-7 ("outer label"), 8-12 ("inner label"); CX 31 at 3-6 (label for "outer container"), 7-10 (label for "inner container"); CX 3 at 3-6 (label for "outer container"), 7-10 (label for "inner container"); CX 4 at 3-6 (label for "outer container"), 7-10 (label for "inner container"). At the hearing, Ms. Bednar did not explain the distinction between "outer" and "inner" containers for packaging purposes, and it is not otherwise clear from the record.

16 to 50 pounds, with the acceptable number of mini-blocks per container being at least 259 mini-blocks depending on the size of the mini-block, and the "inner label" identifies the acceptable net weight as being one to 10 pounds, with the acceptable number of mini-blocks per container being at least 16 mini-blocks depending on the size of the mini-block. CX 30 at 3, 8. Notwithstanding the smaller capacity reflected on the "inner label," both labels indicate that the product is not allowed to be sold in containers holding less than 16 pounds of bait, and the "inner label" indicates that "individual sale is prohibited by law." CX 30 at 3, 6, 8, 11. Finally, the Label Amendment identifies "pest control operator use" and "agricultural use" as the only acceptable uses of the product. *See* CX 30 at 3, 13. At the Grand Facility, the inspectors observed an 18-pound plastic lidded container of Contrac All-Weather Blox in the area where Respondent admitted generally to transferring substances from one container to another, and according to Ms. Bednar, that container was consistent with the Label Amendment. Tr. at 43-44; CX 2 at 76-79. The zip top resealable plastic bags of green mini-blocks observed by the inspectors appear from photographs to be unlabeled and contain approximately 10 of the green mini-blocks. *See* CX 2 at 46, 47, 52.

- Count 2, Red Rodenticide Mini-Blocks. Respondent identified the red mini-blocks observed by the inspectors at the Grand Facility as Final Rodenticide in block form. CX 1 at 7; *see* CX 2 at 46, 48, 51, 89. The Label Amendment for Final All-Weather Blox, which Ms. Bednar identified as the most recently approved labels for that pesticide at the time of the inspection, Tr. at 38, includes a graphic of a red mini-block and two labels, one for the "outer container" and one for the "inner container," approved for containers of the pesticide intended for "pest control operator use," CX 31 at 3-6, 7-10, 11. Those labels reflect the acceptable net weight for containers of the 20-gram mini-blocks, with 16 to 50 pounds identified as the acceptable net weight for the "outer container" and one to 10 pounds identified as the acceptable net weight for the "inner container." CX 31 at 4, 8, 11. That would equate to hundreds of mini-blocks in an "outer container" and at least 22 mini-blocks in an "inner container." Notwithstanding the smaller capacity reflected on the label for the "inner container," both labels indicate that the product is not allowed to be sold in containers holding less than 16 pounds of bait, and the label for the "inner container" indicates that "individual sale is prohibited by law." CX 31 at 5, 8, 9. Finally, the Label Amendment identifies "pest control operator use" and "agricultural use" as the only acceptable uses of the product. *See* CX 31 at 3, 12. The zip top resealable plastic bags of red mini-blocks observed by the inspectors at the Grand Facility appear from photographs to be unlabeled and contain approximately 12 of the red mini-blocks. *See* CX 2 at 46, 48, 51.

- Count 3, Blue Rodenticide Mini-Blocks. Respondent identified the blue mini-blocks observed by the inspectors at the Grand Facility as Talon G Rodenticide in block form. CX 1 at 7; *see* CX 2 at 46, 49-50. The Label Amendment for Talon Weatherblok XT, which Ms. Bednar identified as the most recently approved label for that pesticide at the time of the inspection, Tr. at 40, reflects that "individual sale [of the product is] prohibited by law"; that "[d]istribution to and sales in 'consumer' stores, including grocery stores, drug stores, hardware stores, and club stores, is prohibited"; and that the product is not allowed to be sold in "individual containers holding less than 16 pounds of bait," CX 32 at 3, 8. With each mini-block weighing 20 grams according to the Label Amendment, CX 32 at 8, a container of the product weighing a minimum of 16 pounds would equate to at least 365 mini-blocks per container. The zip top resealable plastic bags of blue mini-blocks observed by the inspectors at the Grand Facility appear from photographs to be unlabeled and contain approximately 10 of the blue mini-blocks. *See* CX 2 at 46, 49, 50.

- Count 4, Brown Rodenticide Mini-Blocks. Respondent identified the brown mini-blocks observed by the inspectors at the Grand Facility as Maki Mini Blocks. CX 1 at 7; *see* CX 2 at 53-55. The Label Amendment for Maki Mini Blocks, which Ms. Bednar identified as the most recently approved label for that pesticide at the time of the inspection, Tr. at 44, includes the label approved for containers of the pesticide intended for "PCO use" and reflects that the acceptable net weight for such containers is 16 to 2,000 pounds of the 28-gram mini-blocks, CX 5 at 3. That would equate to hundreds, if not thousands, of mini-blocks per container. The label indicates that "[i]t is illegal to sell this product in individual containers holding less than 16 pounds of bait." *Id.* Finally, the Label Amendment identifies "PCO use" and agricultural use as the only acceptable uses of the product. *See* CX 5 at 3-5, 6-8. The zip top resealable plastic bags of brown mini-blocks observed by the inspectors at the Grand Facility appear from photographs to be unlabeled and contain approximately 12 of the brown mini-blocks. *See* CX 2 at 53, 54.

It is abundantly clear from the above-described master labels that the EPA had not approved the registrants of the rodenticide mini-blocks to package those products in unlabeled plastic bags in quantities of 10 to 12 mini-blocks for sale to the general public. Ms. Bednar testified to this point as follows:

> So these bait blocks would be in a much larger container [than the zip top resealable plastic bags observed by the inspectors at the Grand Facility]. As discussed in all the labels, it's typically a larger size of 10 pound, 16 pound, 50 pounds. They're only supposed to be sold to professionals in the pesticide industry. The container itself would be sturdy with a closing lid to prevent accidental interaction with non-target species, pets, children, people, and it would have the full label on it. Full and complete label.

Tr. at 42-43. Thus, as noted by Judge Biro in her AD Order, it seems unlikely that the registrants of the rodenticide mini-blocks would have packaged those products in the manner observed by the inspectors at the Grand Facility. AD Order at 16. Rather, given the foregoing evidence and the absence of any opposition by Respondent, it is reasonable to infer that Respondent or his employees transferred small quantities of the mini-blocks from their larger, fully approved and labeled, original containers – as described in the master labels for those products and, in the case of the Green Rodenticide Mini-Blocks, as observed by the inspectors in the rear of the Grand Facility – into the unlabeled zip top resealable plastic bags, such that Respondent "produced" the mini-blocks in a new form for purposes of FIFRA.

Turning to the rodenticide throw packs, Complainant alleges in the Amended Complaint that during the June 15, 2022 inspection of the Grand Facility, the inspectors observed "Contrac Ready-to-Use Place Pacs Meal repackaged by Respondent into 1.5 ounce net weight insufficiently labelled bags"; "FINAL Ready-to-Use Place Pack Pellets repackaged by Respondent into 0.88 ounce net weight insufficiently labeled bags"; and "Talon G Bait Pack Mini-Pellets repackaged by Respondent into 0.88 ounce net weight insufficiently labeled bags." Am. Compl. ¶¶ 32(a), (c), (e). Like Judge Biro, AD Order at 16-17, I read those allegations as charging Respondent with transferring those three rodenticide formulations from their original containers into the 1.5 or 0.88 ounce net weight insufficiently labelled bags, which would be the throw packs themselves, *see* CX 1 at 6 (documenting the inspectors' observation that "[p]roducts Final and Talon G are in 0.88 oz net weight throw pack bags and Contrac is in 1.5 oz net weight throw pack bags"). Yet Complainant has since made clear that it is alleging, not that Respondent placed rodenticides into throw packs, but that Respondent transferred throw packs encasing the rodenticide formulations from their original containers into unlabeled zip top resealable plastic bags. *See, e.g.*, C's Initial Br. at 14 ("The EPA alleges that Respondent repackaged the throw packs by taking them out of the original fully labeled container and placing them into the clear resealable plastic bags."). Indeed, evidence entered into the record at the hearing clarifies that a throw pack is the vehicle for supplying a given pesticide to pests, such that the packaging of the throw pack and the formulation it encases are effectively inseparable, *see* Tr. at 21 (Ms. Bednar's testimony explaining how a throw pack is used), and that the inspectors documented Respondent's business "repackag[ing] six of these throw pack bags into zipper top resealable, plastic bags with no added labeling," CX 1 at 6.

Respondent has not challenged Complainant's shift from alleging that he repackaged rodenticides into the throw packs themselves, as pled in the Amended Complaint, to alleging that he repackaged the throw packs by transferring those articles from their original containers into unlabeled zip top resealable plastic bags, as presented at the hearing and in Complainant's post-hearing briefs. The shift appears attributable simply to imprecise pleading, and I note that Judge Biro considered similar circumstances in *New York State Department of Transportation*. There, Judge Biro observed, the complainant mistakenly conflated two distinct bases for enforcement under the Clean Water Act in the complaint but then later presented arguments and evidence with respect to only the one theory of liability it had intended to pursue, without addressing the elements of liability for the other, as would have been required because of how the violations were pled. *New York State Department of Transportation*, No. CWA-02-2016-3403 (EPA ALJ July 14, 2020), https://yosemite.epa.gov/oarm/ALJ/ALJ_Web_Docket.nsf/Filings-and-Attachments/373159C2917AA5E285258D6800673570/$File/2020-07-14%20-%20nysdot%20-%20corrected%20initial%20decision%20and%20order%20-%20issued.pdf. Looking to precedent from the Environmental Appeals Board ("EAB" or "Board"), Judge Biro held that it was appropriate to treat the complaint as implicitly amended to assert only the theory of liability for which the complainant had presented arguments and evidence, even though it had not been precisely pled, because that theory had been fairly litigated as the complainant had pursued it since the prehearing stages of the proceeding without objection from the respondent, such as claims that it was surprised or disadvantaged by the complainant's approach to the charged violations. *Id.* (citing *H.E.L.P.E.R., Inc.*, 8 E.A.D. 437, 448-51 (EAB 1999); *J.V. Peters & Co.*, 1986 EPA App. LEXIS 7, at *10 n.9 (CJO 1986)). I find that the principles guiding the EAB, and in turn, Judge Biro, apply here as well and that it is appropriate to treat the Amended Complaint as implicitly amended to conform to the arguments and evidence presented by Complainant. Thus, the relevant allegations in the Amended Complaint will be deemed to charge Respondent with modifying the containers in which the rodenticide throw packs were packaged, rather than with transferring rodenticides from their original containers into the throw packs themselves.

For support of those allegations, Complainant first points to the inspectors' observations at the Grand Facility of the throw packs packaged in zip top resealable plastic bags. C's Initial Br. at 14 (citing CX 2 at 30-44). Complainant then urges that those plastic bags were not the original containers for the throw packs. *Id.* Rather, Complainant contends, the master labels for the throw packs, entered into evidence as CX 3, CX 4, and CX 6 and discussed by Ms. Bednar at the hearing, "describe what the proper container would be for the throw packs." *Id.* at 14 n.3 (citing Tr. at 24-35). Finally, Complainant argues that Respondent or his employees were likely the ones to transfer the throw packs from their original containers to the plastic bags, as he unquestionably repackaged other pesticides at the Grand Facility. *Id.* at 14-15 (citing AD Order at 15-17; Tr. at 20).

As with the rodenticide mini-blocks, Respondent has not offered anything to refute the evidence cited by Complainant, and I find that it sufficiently establishes that Respondent transferred the rodenticide throw packs from their original containers into new ones, thus "producing" those pesticides in a new form, within the meaning of that term. Specifically:

- Count 5, Contrac Rodenticide Ready-To-Use Place Pacs ("Contrac Throw Packs"). During the inspection of the Grand Facility, the inspectors observed Contrac Throw Packs bundled into unlabeled zip top resealable plastic bags, with six throw packs per bag. CX 1 at 6; CX 2 at 40-43, 46-47, 52. The Label Amendment for Contrac Throw Packs, which Ms. Bednar identified at the hearing as the most recently approved label for that pesticide at the time of the inspection, Tr. at 26, includes two labels approved for containers of the throw packs intended for "pest control operator use," CX 3 at 3-6, 7-10. Consisting of a label for the "outer container" and a label for the "inner container," those labels identify the acceptable net weight for the "outer container" as 16 to 50 pounds and the acceptable new weight for the "inner container" as two to 10 pounds. CX 3 at 3, 7. The Label Amendment also includes the label approved for the throw packs themselves, with that label identifying the net weight of an individual throw pack as 1.5 ounces. CX 3 at 11. Thus, an "outer container" of the pesticide would be required to hold at least 170 throw packs, while an "inner container" would be required to hold at least 21 throw packs. Notwithstanding the smaller capacity reflected on the label for the "inner container," both labels indicate that the product is not allowed to be sold in containers holding less than 16 pounds of bait, and the label for the "inner container" reflects that "individual sale is prohibited by law." CX 3 at 6, 7, 10. The label for the throw packs themselves also contains the prohibition against "individual sale" of throw packs. CX 3 at 11. Finally, the Label Amendment identifies "pest control operator use" and "agricultural use" as the only acceptable uses of the product. CX 3 at 3-12, 13-23.

- Count 6, Final Rodenticide Ready-To-Use Place Pacs ("Final Throw Packs"). During the inspection of the Grand Facility, the inspectors observed Final Throw Packs bundled into unlabeled zip top resealable plastic bags, also with six throw packs per bag. CX 1 at 6; CX 2 at 30-35, 46, 48, 51, 86. The Label Amendment for Final Throw Packs, which Ms. Bednar identified at the hearing as the most recently approved label for that pesticide at the time of the inspection, Tr. at 29, includes two labels approved for containers of the throw packs, CX 4 at 3-6, 7-10. Consisting of a label for the "outer container" and a label for the "inner container," those labels identify the acceptable net weight for the "outer container" as 16 to 50 pounds and the acceptable net weight for the "inner container" as two to 10 pounds. CX 4 at 3, 7. The Label Amendment also includes the label approved for the throw packs themselves, with that label identifying the net weight of an individual throw pack as 0.88 ounces. CX 4 at 12. Thus, an "outer container" of the pesticide would be required to hold at least 290 throw packs, while an "inner container" would be required to hold at least 36 throw packs. Notwithstanding the smaller capacity reflected on the label for the "inner container," both labels indicate that the product is not allowed to be sold in containers holding less than 16 pounds of bait, and the label for the "inner container" reflects that "individual sale is prohibited by law." CX 4 at 4, 7, 8. The label for the throw packs themselves also contains the prohibition against "individual sale" of throw packs. CX 4 at 12.

- Count 7, Talon G Rodenticide Bait Pack Mini-Pellets ("Talon G Throw Packs"). During the inspection of the Grand Facility, the inspectors observed Talon G Throw Packs bundled into unlabeled zip top resealable plastic bags, again with six throw packs per bag. CX 1 at 6; CX 2 at 36-39, 46, 49-50. The Label Amendment for Talon G Throw Packs, which Ms. Bednar identified at the hearing as the most recently approved label for that pesticide at the time of the inspection, Tr. at 31-32, includes the label approved for containers of the throw packs, CX 6 at 3-8. It identifies the type of container intended to be used as a "pail for bait packs" and a "box for 2 pails," with the acceptable weight of a pail identified as eight pounds, four ounces, equating to 150 of the 0.88-ounce throw packs. CX 6 at 3. The label indicates that the product is not allowed to be sold in containers holding less than 16 pounds of throw packs. CX 6 at 6. Thus, a single pail could not be sold individually. Indeed, the Label Amendment also includes the label approved for the throw packs themselves, CX 6 at 9-11, and both labels indicate that "individual sale[is] prohibited by law," as well as that "[d]istribution to and sales in 'consumer' stores, including grocery stores, drug stores, hardware stores, and club stores, is prohibited," CX 6 at 3, 9.

Like with the rodenticide mini-blocks, it is abundantly clear from the above-described master labels that the EPA had not approved the registrants of the rodenticide throw packs to package six throw packs in an unlabeled plastic bag for sale to the general public. When asked about the form of packaging approved by the EPA for sale or distribution, Ms. Bednar testified on this point as follows:

> [The throw packs] would not be able to be sold in a clear, zipper-top bag. They would require a sturdy container that prevented accidental interaction with people, pets, wildlife. They would have a sturdy lid on it. They would be a larger size. And they would not be sold to ordinary consumers. They are for pesticide operators to use.

Tr. at 34-35. Thus, it seems unlikely that the registrants of the rodenticide throw packs packaged those products in the manner observed by the inspectors at the Grand Facility. Rather, based on the foregoing evidence and the absence of any opposition by Respondent, it is reasonable to infer that Respondent or his employees transferred small quantities of the throw packs from their larger, fully approved and labeled, original containers – as described in the master labels for those products – into the unlabeled zip top resealable plastic bags, such that Respondent "produced" those pesticides in a new form for purposes of FIFRA.

Having arrived at that conclusion, I now consider the remaining question of whether Respondent either registered the rodenticide mini-blocks and throw packs in their repackaged form or met the criteria of 40 C.F.R. § 165.70(b) in order to be excepted from the registration requirement. While Respondent denied the allegation that he had not obtained registrations for the rodenticide mini-blocks and throw packs, Answer ¶ 13; *compare* Compl. ¶ 38 *with* Am. Compl. ¶ 37, the basis for his denial was that "the EPA has never at any time notified or requested that Respondent obtain a registration, nor that Respondent was required to obtain a registration for any of the pesticides [at issue in this proceeding]," Answer ¶ 13. Given that justification, I find that Respondent, in effect, acknowledges that he did not register the rodenticide mini-blocks and throw packs as packaged by him or his employees in small quantities in the unlabeled zip top resealable plastic bags. And to be sure, the record does not contain any evidence of him holding such registrations.

In turn, one of the conditions set forth in 40 C.F.R. § 165.70(b)(3) is that repackaging of a registered pesticide can occur only pursuant to a written contract with the registrant to repackage the registrant's pesticide and use the registrant's label on the new packaging. 40 C.F.R. § 165.70(b)(3). Again, while Respondent denied the allegation that he had not entered into any such written contracts with the registrants of the pesticides at issue, Answer ¶ 14; *compare* Compl. ¶ 39 *with* Am. Compl. ¶ 38, the basis for his denial was that he had not been informed of that requirement by the EPA or any other source and that he was not subject to it "as a licensed pest control vendor and distributor," Answer ¶ 14, effectively admitting that he had not met the condition. Indeed, the inspection report for the June 15, 2022 inspection of the Grand Facility documents an exchange between Respondent and the inspectors on this point as follows:

> We asked Mr. Wilson if he had any repacking agreements with the product registrants for any of the pesticides, to which Mr. Wilson initially could not provide

> an answer. Ms. Bednar restated the question while providing a description and details on what repacking agreements were. Mr. Wilson said he does not have any repacking agreements with his repacked pesticide product, explaining to both Mr. [sic] Bednar and I that all these companies asked of him was credit card number.

CX 1 at 8. Respondent did not attempt to counter this evidence. He also did not point to any legal authority to support his claim that he was not subject to the requirement to enter into written contracts for repackaging the pesticides at issue in this matter.

Thus, it is undisputed that Respondent neither registered the rodenticide mini-blocks and throw packs as repackaged by him or his employees nor satisfied all of the criteria set forth in 40 C.F.R. § 165.70(b) in order to be excepted from the registration requirement. With that, each of the critical elements of liability has been established. Accordingly, I find that Respondent is liable for violating Section 12(a)(1)(A) of FIFRA, 7 U.S.C. 136j(a)(1)(A), as charged in Counts 1 through 7 of the Amended Complaint, by distributing or selling the rodenticide mini-blocks and throw packs after transferring small quantities of those pesticides from their larger, fully approved and labeled, original containers into unlabeled zip top resealable plastic bags, without registering the pesticides in their new form or satisfying all of the conditions set forth in 40 C.F.R. § 165.70(b).

## II. COUNT 21

As noted above, Section 12 of FIFRA makes it unlawful for any person to refuse to "allow any entry, inspection, copying of records, or sampling authorized by [the] Act." 7 U.S.C. § 136j(a)(2)(B)(iii). FIFRA authorizes inspections as follows:

> For purposes of enforcing the provisions of this Act, officers or employees of the Environmental Protection Agency . . . are authorized to enter at reasonable times . . . any establishment or other place where pesticides or devices are held for distribution or sale for the purpose of inspecting and obtaining samples of any pesticides or devices, packaged, labeled, and released for shipment, and samples of any containers or labeling for such pesticides or devices . . . .

7 U.S.C. § 136g(a)(1). Before such an inspection is undertaken, FIFRA requires the inspectors to "present to the owner, operator, or agent . . . appropriate credentials and a written statement as to the reason for the inspection, including a statement as to whether a violation of the law is suspected." 7 U.S.C. § 136g(a)(2).

In Count 21 of the Amended Complaint, Complainant charges Respondent with refusing to allow the EPA to inspect the Woodson Facility, in violation of Section 12 of FIFRA, 7 U.S.C. § 136j(a)(2)(B)(iii). For Respondent to be held liable for this alleged violation, Complainant must establish, consistent with the above applicable law, that on July 27, 2023, (1) the Woodson Facility held pesticides or devices for distribution or sale; (2) EPA officers or employees entered the Woodson Facility at a reasonable time for the purpose of inspecting and obtaining samples of those pesticides or devices; and (3) Respondent refused to allow the inspection.[14]

In its Initial Post-Hearing Brief, Complainant asserts that Judge Biro found in her AD Order that Complainant had already proven the second and third critical elements of liability.[15] C's Initial Br. at 16-17. Complainant goes on to argue that the record contains "ample evidence" supporting the conclusion that Respondent held pesticides or devices for distribution or sale at the Woodson Facility, such that the first element of liability has also been proven. *Id.* at 17. Specifically, Complainant points to the documented observations of Ms. Bednar and Ms. Patterson at the Woodson Facility, where they noted that the front door of the building was propped open and an "Open" sign was displayed, "indicating that the store was open to the public for business," and that rodenticides packaged in the same manner as those observed at the Grand Facility were displayed at the Woodson Facility with labels bearing their names and prices. *Id.* at 17 (citing CX 17 at 1; CX 28 at 1-2). Complainant also points to the testimony of Ms. Bednar on the subject, *id.* at 17 n.4 (citing Tr. at 49, 50, 64, 93, 94), and her conclusion "based on her experience as a credentialed FIFRA inspector" that pesticides were being held for sale at the Woodson Facility, *id.* Complainant then challenges the claim made to Ms. Bednar and Ms. Patterson that the subject rodenticides were kept at the Woodson Facility for the business's technicians to use, *id.* at 17 (citing CX 28 at 2), pointing out the testimony of Respondent that the bulk of his business was retail sales, *id*. at 17 (citing Tr. at 183, 188, 189). Complainant urges that "Respondent's lack of applicator business is confirmed by the testimony of the EPA's Kash Kruep, who testified that Wilson's Pest Control only has one applicator registered with the state of Missouri, the Respondent himself." *Id.* at 17 (citing Tr. at 107). This evidence, Complainant maintains, "shows that Respondent was still holding pesticides or devices for distribution or sale at the Woodson Facility at the time of the attempted EPA inspection." *Id.* at 17-18.

Respondent counters that Ms. Bednar conceded on cross examination that "she was not able to make a definitive conclusion that [Respondent] was offering pesticides for sale at the [Woodson Facility] in July 2023, only that 'it appeared' that rodenticides were still being offered

[14] In her AD Order, Judge Biro noted the absence of any legal precedent addressing whether adherence to the requirements of 7 U.S.C. § 136g(a)(2) is another critical element for finding liability under 7 U.S.C. § 136j(a)(2)(B)(iii) for refusal of an inspection. AD Order at 20 n.11. At the time of her ruling, Complainant had submitted as part of its prehearing exchange a copy of a Notice of Inspection, with the fields for "Facility Name" and "Facility Address" on the form reflecting the Woodson Facility. *See* CX 29. However, Complainant had not proposed evidence that the inspectors had presented this document, along with their credentials, to Respondent or Ms. Humphrey at the Woodson Facility on July 27, 2023, as required by 7 U.S.C. § 136g(a)(2). Ms. Bednar testified at the hearing that she did, in fact, present both her credentials and the Notice of Inspection at the time of the visit to the Woodson Facility, Tr. at 46-47, 67, 99-101, a point that Respondent concedes in his Initial Post-Hearing Brief, R's Initial Br. at 11. Thus, to the extent that adherence to the requirements of 7 U.S.C. § 136g(a)(2) is considered to be a critical element of liability for a violation of 7 U.S.C. § 136j(a)(2)(B)(iii), facts establishing that element have been shown.

[15] To be sure, Judge Biro noted that facts supporting the second and third elements of liability seemed to be undisputed. *See* AD Order at 20-21.

for sale at that facility." R's Initial Br. at 12 (quoting Tr. at 64, 65). But, Respondent points out, the Stop Sale Order explicitly prohibited him from moving or removing the rodenticides, *id.* at 12-13 (quoting CX 13 at ¶ 65; Tr. at 77), and as he explained at the hearing, he simply never removed the prices upon receipt of the Stop Sale Order, *id.* at 13 (citing Tr. at 196). As for the representations that the pesticides were being used by the business's technicians, Respondent points to his testimony that his business regularly performed pest control services at the times relevant to this proceeding, *id.* (citing Tr. at 173, 174); that his workforce included himself and "three other individuals who were licensed pesticide professionals, also referred to as 'technicians' or 'applicators,'" *id.* (citing Tr. at 157, 158, 159, 160, 173); and that he provided pesticides to those individuals, *id.* (citing Tr. at 196). Respondent also points to the testimony of Ms. Bednar that she was aware from the inspection of the Grand Facility that Respondent "'had pesticide technicians that he was sending out and coming back in.'" *Id.* (quoting Tr. at 52). Respondent maintains that "[t]his evidence establishes that [he] did not continue to sell pesticides in 2023" but that "he continued to supply the product to technicians whom he employed for the purpose of rendering pest control services to [his business's] clientele." *Id.* at 13-14. Finally, Respondent argues that the inspectors *did* conduct an inspection of the Woodson Facility on July 23, 2023, seeing as how they were allowed entry and had an opportunity to make observations inside the Facility, albeit for less time than they wanted. *Id.* at 14.

Judge Biro observed in her AD Order that facts supporting the second element of liability – that Ms. Bednar and Ms. Patterson entered the Woodson Facility at a reasonable time for the purpose of inspecting the pesticides present at the Facility – appeared to be undisputed, and indeed, I consider this element to have been proven by a preponderance of the evidence. Both Ms. Bednar and Ms. Patterson documented in their written accounts of their visit to the Woodson Facility that at the time of their arrival at approximately 2:15 p.m. on Thursday, July 27, 2023, the exterior entry door of the building was propped open and that an "Open" sign was displayed. CX 17 at 1; CX 28 at 1. Ms. Bednar also noted the presence of the "Open" sign during her testimony at the hearing. *See* Tr. at 94. This evidence compels the conclusion that the Woodson Facility was accessible to the public and conducting business at that time, such that it was not an unreasonable time for the inspectors to enter for the purpose of performing an inspection, and Respondent has not offered any evidence or argument in rebuttal.

While Judge Biro also observed that facts supporting the third element of liability – that Respondent refused to allow the inspection – appeared to be undisputed, Respondent argues now that an inspection did occur but was merely "cut short," such that Complainant has not met its burden of establishing that Respondent refused to allow the inspection. R's Initial Br. at 14. This characterization simply does not ring true. Ms. Bednar and Ms. Patterson may have been able to enter the Woodson Facility and make some observations about the products visible inside between their arrival at approximately 2:15 p.m. and departure at approximately 2:50 p.m. But Respondent undeniably declined to authorize an inspection at that time due to the unavailability of his attorney. *See, e.g.*, CX 17 at 2; CX 28 at 1; CX 29; Tr. at 101; Answer ¶ 16 (stating in response to the allegation that the EPA attempted to conduct an inspection of the Woodson Facility on July 27, 2023, that "Respondent had the right to have counsel present and exercised this right by referring the purported EPA representatives to Respondent's counsel of record"). As Ms. Bednar explained at the hearing, such a denial precludes inspectors from collecting information beyond what may have been initially perceived before the denial. Tr. at 68-69. Thus, she and Ms. Patterson were unable to observe and document the products present at the Woodson Facility in full. *See, e.g.*, CX 17 at 1 (Ms. Bednar describing her review of certain products visible upon their arrival at the Woodson Facility as "cursory" and stating that she "was unable to take time to observe the liquid pesticides on display on the south wall of the store," other than observing that the label on one of the bottles was not applied smoothly); CX 28 at 1 (Ms. Patterson recounting that she "was not able to observe the store's inventory for long"); Tr. at 70. The brevity of their observations – documented in two written reports, each fewer than two pages in length and without any accompanying photographs of the interior of the Facility – contrasts starkly with the scope of the information collected during the inspection conducted at the Grand Facility in 2022, which was recorded in nine pages of written observations and dozens of photographs from the interior of that location of the business. Nor were the inspectors able to ascertain conclusively whether Respondent was complying with the Stop Sale Order at the Woodson Facility. *See* Tr. at 68 (Ms. Bednar testifying in response to a question about whether she asked Respondent directly if he was still selling the products flagged during the inspection of the Grand Facility that she could not ask such questions of Respondent after he refused an inspection of the Woodson Facility). As related by Ms. Bednar in her written account and testimony, the purpose of the inspectors' visit to the Woodson Facility was to complete a "Market Place Inspection" and determine whether Respondent was complying with the Stop Sale Order, CX 17 at 1; Tr. at 46, 64, and with those objectives stymied, I can hardly agree with Respondent that an inspection, even a truncated one, was performed. Therefore, I find that a preponderance of the evidence establishes that Respondent did not allow an inspection of the Woodson Facility to be carried out as intended, such that this element of liability has been proven.

I turn now to the remaining element of liability – that the Woodson Facility held pesticides or devices for distribution or sale at the time of the attempted inspection. While I am unable to discern any details from the photographs taken by Ms. Bednar of the exterior of the Woodson Facility on July 27, 2023, as I previously noted, both she and Ms. Patterson documented in their written accounts of their visit that the exterior entry door of the building was propped open and that an "Open" sign was displayed, CX 17 at 1; CX 28 at 1, which Ms. Bednar also described during her testimony at the hearing, Tr. at 94. Ms. Bednar and Ms. Patterson also related their observations of pesticides on display, labeled with the names and prices of the products and accessible to anyone who entered, inside the Woodson Facility. CX 17 at 1-2; CX 28 at 1-2; Tr. at 49-50. Respondent does not dispute this evidence, and it plainly supports the inference that the Woodson Facility was open to the public and conducting business at the time, with the pesticides on display available to customers for purchase at the prices listed. Indeed, based on her observations and experience in this field,[16] Ms. Bednar

[16] Ms. Bednar's experience as an inspector of businesses like Wilson's Pest Control is undisputed. *See* Tr. at 10-12, 51-52.

concluded that pesticides were being held for sale at the Woodson Facility, notwithstanding the absence of direct evidence of sales transactions taking place or retail customers being present during the inspectors' visit.[17] Tr. at 49-50, 64-65, 69, 93-94.

While Respondent does not contest the observations of Ms. Bednar and Ms. Patterson, he nevertheless denies that the products on display in the Woodson Facility were being held for sale at the time of the inspectors' visit, arguing that there is an alternative explanation for their observations. After carefully considering the evidence, I am inclined to agree and find that the record supports Respondent's explanation enough to rule against Complainant on this matter. Specifically, as Ms. Bednar and Ms. Patterson both documented, Ms. Humphrey advised them at the time that the products were not for sale to customers but were being held for the business's technicians to use for its pest control services. CX 17 at 1-2; CX 28 at 2; *see also* Tr. at 69. Respondent testified to the same at the hearing and further explained that the labels bearing prices for the products simply had not been removed after the EPA had issued the Stop Sale Order.[18] Tr. at 191, 196, 197-98. As Respondent points out in his Initial Post-Hearing Brief, the Stop Sale Order explicitly directed him not to move or remove certain products from any location of the business without approval from the EPA, R's Initial Br. at 12-13 (quoting CX 13 at ¶ 65), and the record does not contain evidence of Respondent obtaining any such approval. Meanwhile, the record contains ample evidence reflecting that Respondent provided pest control services as part of his business, with multiple individuals employed as "technicians" who would apply the same products that the business sold to consumers. Such evidence includes Respondent's testimony about the operation of the business, *see, e.g.*, Tr. at 159-60, 173-74, 196; the description of the business in the report documenting the 2022 inspection of the Grand Facility, CX 1 at 2 ("Wilson's Pest Control ('Wilson's') serves as a local all-in-one pest control shop providing not only pesticide products but pest control service for over 35 years. . . . Wilson's uses [the same products it sells] to promote their pesticide application services for homeowners and businesses."), 3 ("Mr. Wilson said he . . . provides pesticide application

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[17] For additional support of her conclusion, Ms. Bednar also cited an inspection of the Woodson Facility performed by the Missouri Department of Agriculture, during which pesticides were found to be held for sale there. Tr. at 94. Ms. Bednar did not specify the particular inspection she considered, but she may have been referring to an investigation performed on May 2, 2022, and documented in a report entered into evidence as CX 10. That report reflects that on May 2, 2022, a state investigator visited the Woodson Facility to make a controlled purchase of pesticides and was sold multiple products intended to address the pest problems she claimed to be experiencing in her home. CX 10 at 1-2. As that investigation occurred over a year before the EPA's attempted inspection of the Woodson Facility on July 27, 2023, and two months prior to issuance of the Stop Sale Order on July 1, 2022, I do not consider it to be compelling evidence of Respondent's practices at the Woodson Facility at the time of the attempted inspection.

[18] Interestingly, Respondent advised Mr. Landry and Ms. Bednar during their inspection of the Grand Facility that he no longer sold a product observed at that location of the business, a liquid substance packaged in 16-ounce containers and bearing the name "Professional Pest Control Concentrate, Termiticide/Insecticide," despite the product still being displayed alongside the "Professional Pest Control Concentrate, Permethrin Insecticide 36.8%," as depicted in photographs taken during the inspection. CX 1 at 4; CX 2 at 4. When asked by Mr. Landry "why the product was still on store shelves," Respondent advised that he simply directs customers who ask about it to alternative products. CX 1 at 4. Thus, Respondent was known not to remove a product no longer for sale from the public-facing area of the business.

services to both homeowners and businesses."); the observations of Mr. Landry as recorded in that report, CX 1 at 10 ("[D]uring the inspection[,] Mr. Wilson had to stop and assist customers with . . . managing scheduling logistics with applications [sic] sites over the telephone."); and the testimony of Ms. Bednar about her observations at the Grand Facility, Tr. at 52 ("I was aware that [Respondent] had pesticide technicians that he was sending out and coming back in . . . ."). The presence of multiple motor vehicles bearing signage for "Wilson's Pest Control" in a parking lot adjacent to the Woodson Facility, as documented by the inspectors at the time of their visit, also lends support to a finding that at least at some point, Respondent employed multiple technicians who would provide pest control services with enough regularity to warrant a fleet of vehicles for the business. *See* CX 17 at 1-3; CX 28 at 1.

I do not find Complainant's attempts to refute this evidence to be especially persuasive. In particular, Complainant disputes the extent to which the business actually provided pest control services, citing Respondent's testimony about the bulk of the business being retail sales, C's Initial Br. at 17 (citing Tr. at 183, 188, 189), and the testimony of Kash Kruep that according to a public website maintained by the Missouri Department of Agriculture, Respondent's business had only one applicator registered, Respondent himself, *id.* (citing Tr. at 107). I note, however, that Complainant did not elicit testimony from Mr. Kruep or point to any documentary evidence concerning the time period when only one applicator was purportedly registered for Respondent's business. And while I see that the record contains two pages printed from a Missouri Department of Agriculture website with the heading "Pesticide Business/Applicator Summary," which seem to identify only Respondent as an employee of the business during the relevant time period, *see* CX 12, the record also contains a report dated November 2, 2022, entitled "OneStop Report,"[19] which Complainant relied upon in calculating the proposed penalty in this matter and which provides that the business employed not one but eight individuals total and was engaged in providing pest control services at the time, *see* CX 18 at 3. I also note that notwithstanding any testimony about the significance of retail sales to the business, Respondent never asserted that the business ceased providing pest control services altogether at any point, from the Woodson Facility or otherwise. Rather, Respondent testified variously that the business had "eased away" from that aspect of its operations by the time the Stop Sale Order was issued, Tr. at 183, but that "some service calls" were conducted from the Woodson Facility, Tr. at 188-89, and that while the Stop Sale Order then effectively put an end to the business's retail sales, it continues to this day to "do some service calls," albeit "nothing for the regular public." Tr. at 182-85. Respondent also elaborated that Ms. Humphrey would "take all of the service calls" at the Woodson Facility. Tr. at 191.

Weighing the foregoing evidence, I consider Respondent's explanation for the continued display of products at the Woodson Facility at the time of the attempted inspection – namely, that he had left the products in place as the Stop Sale Order had directed and simply neglected

[19] At the hearing, Kash Kruep explained that the Agency generates this document to compile "all the information related to the business," such as the "general or average revenue for the business, sales revenue, addresses associated, and number of employees." Tr. at 110. When questioned about the source of the data included in a OneStop Report, Mr. Kruep responded that he was unsure but that he simply requests one to be generated by the appropriate EPA staff and it is then provided to him. Tr. at 144-45.

to remove the labels providing their names and prices, that Wilson's Pest Control materially changed to a completely service-based business after issuance of the Stop Sale Order, and that the products were being held not for the public to purchase but for the business's technicians to use as part of those services – to be plausible and equally supported by the record, if not more so, than the view advanced by Complainant. And while Respondent did not address the inspectors' observations about the exterior entry door of the Woodson Facility being propped open and an "Open" sign being displayed, it seems just as conceivable that the open door and sign were a signal to the public that the business was open and available for hire to perform pest control services as it is conceivable that it was an indication of the business being open and available for the public to purchase pesticide products. Thus, I am compelled to rule in Respondent's favor on this issue and find that Complainant has not demonstrated by a preponderance of the evidence that as of July 27, 2023, Respondent was holding the products observed by the inspectors at the Woodson Facility for distribution or sale to customers, rather than for use by technicians in performing pest control services for the business's clientele. The latter activity is explicitly excluded from the statutory definition of the phrase "to distribute or sell." *See* 7 U.S.C. § 136(gg). Accordingly, I am unable to find based on the record before me that the Woodson Facility was holding pesticides or devices for distribution or sale at the time of the attempted inspection, such that this element of liability, and consequently, the violation alleged in Count 21 of the Amended Complaint, have not been proven.

## **PENALTY**

### I. BACKGROUND

As alleged in Counts 1 through 10 of the Amended Complaint, Respondent has been found to have distributed or sold repackaged pesticides without obtaining new registrations or satisfying all of the conditions set forth in 40 C.F.R. § 165.70(b), in violation of Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A). As alleged in Counts 11 through 20 of the Amended Complaint, Respondent has also been found to have distributed or sold misbranded pesticides, in violation of Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E). I must now consider the appropriate relief to award in this proceeding for those 20 counts of violation.

Where a violation is found to have occurred and the complainant seeks a civil administrative penalty, the Rules of Practice direct me to "determine the amount of the recommended civil penalty based on the evidence in the record and in accordance with any penalty criteria set forth in the Act" and "explain in detail in the initial decision how the penalty to be assessed corresponds to any penalty criteria set forth in the Act." 40 C.F.R. § 22.27(b). Section 14(a)(4) of FIFRA details the criteria applicable here, requiring that a determination of the amount of penalty to assess under FIFRA "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." 7 U.S.C. § 136*l*(a)(4).

The Rules of Practice also direct me to "consider any civil penalty guidelines issued under the Act" when calculating a penalty. 40 C.F.R. § 22.27(b). The EAB has noted that such guidelines lack the force of law and thus are not binding upon an Administrative Law Judge ("ALJ") in determining the appropriate penalty to assess. *See, e.g.*, *Carroll Oil Co.*, 10 E.A.D. 635, 655 (EAB 2002) (citing *City of Marshall*, 10 E.A.D. 173, 189 n.29 (EAB 2001); *B&R Oil Co.*, 8 E.A.D. 39, 63 (EAB 1998); *Employers Ins. of Wausau*, 6 E.A.D. 735, 759 (EAB 1997)) ("[T]he Agency's penalty policies, not having been subjected to rulemaking procedures under the Administrative Procedure Act, are not binding upon ALJs or the Board."). Nevertheless, the EAB urges that the EPA's civil penalty policies "be applied whenever possible because such policies 'assure that statutory factors are taken into account and are designed to assure that penalties are assessed in a fair and consistent manner.'" *Id.* at 656 (quoting *M.A. Bruder & Sons*, 10 E.A.D. 598, 603 (EAB 2002)).

The FIFRA Enforcement Response Policy ("ERP" or "Penalty Policy"), last updated by the EPA in December 2009, serves this purpose for the assessment of civil penalties under FIFRA. CX 20 at 1, 4. The ERP describes seven steps for calculating a penalty in keeping with the criteria set forth in the Act, consisting of determinations of (1) the number of independently assessable violations; (2) the size category of the violator's business; (3) the gravity of each violation; (4) the "base penalty amount" associated with the determined size of the violator's business and gravity of each violation; (5) the "adjusted" penalty amount based on case-specific factors; (6) the economic benefit of noncompliance; and (7) the effect that payment of the total penalty amount, coupled with the economic benefit of noncompliance, would have on the violator's ability to continue in business. CX 20 at 15-16.

Section 14(a)(1) of FIFRA sets a limit on the penalty amount that may be assessed, providing that "[a]ny registrant, commercial applicator, wholesaler, dealer, retailer, or other distributor who violates any provision of this Act may be assessed a civil penalty by the Administrator of not more than $5,000 for each offense." 7 U.S.C. § 136*l*(a)(1). This amount has been increased over time as required by the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461 note; Pub. L. 101-410, as amended by the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701 note; Pub. L. No. 104-134, Section 31001(s), and the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, 28 U.S.C. § 2461 note; Pub. L. 114-74, Section 701. Consequently, the maximum penalty for each violation occurring after November 2, 2015, where the penalty is assessed on or after January 8, 2025, is now $24,885. 40 C.F.R. § 19.4. However, Section 14(a)(4) further provides that "[w]henever 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).

Finally, if I exercise my discretion to assess a penalty differing from the penalty proposed by Complainant, the Rules of Practice require me to "set forth in the initial decision the specific reasons for the increase or decrease." 40 C.F.R. § 22.27(b).

## II. PARTIES' POSITIONS

Complainant proposes that a total penalty of $143,611[20] be assessed for Counts 1 through 20, apportioned as $40,705 for Counts 1 through 4; $18,317 for Counts 5 through 7; $18,317 for Counts 8 through 10; $40,705 for Counts 11 through 14; $7,250 for Counts 15 through 17; and $18,317 for Counts 18 through 20.[21] *See* CX 21. In support of its proposed penalty, Complainant proffered the ERP, penalty calculation worksheets outlining its calculation of the penalty for each grouping of counts, and other documentary evidence, as well as the testimony of the EPA's Kash Kruep, who testified to the Agency's practice of utilizing the ERP to calculate civil penalties in order to incorporate the statutory penalty criteria and promote consistency in the assessment of penalties. Tr. at 108.

Respondent testified on his own behalf and, in his Initial Brief, counters that the proposed penalty should not be assessed because of mitigating circumstances that warrant at least a significant reduction in the penalty. R's Initial Br. at 5-10. Specifically, Respondent points to testimony elicited at the hearing about his cooperation during the inspection of the Grand Facility and commitment to complying with the instructions of the inspectors and the Stop Sale Order. *Id.* at 7 (citing Tr. at 36, 73-74, 190-91). He also maintains that he violated FIFRA unwittingly and that he was never notified of any potential violations by the State of Missouri in the many years that it had inspected his business. *Id.* at 8 (citing Tr. at 174-76, 179). Nor, Respondent argues, did the EPA ever provide guidance on compliance. *Id.* (citing Tr. at 185-86, 199). Respondent further argues that Complainant did not present any evidence of actual harm to human health or the environment caused by Respondent's activities, with Respondent's "effort[s] in providing information to customers at the time of sale on how to use the pesticides safely [potentially] account[ing] for this, at least in part." *Id.* at 8-9 (citing Tr. at 75). Finally, Respondent urges that the effect of the proposed penalty on his ability to continue in business would be significant, citing for support his testimony regarding the harm that the business has already suffered due to the Stop Sale Order. *Id.* at 9-10 (Tr. at 160-61, 183, 186).

## III. PENALTY CALCULATION

In keeping with the EAB's direction to apply civil penalty policies whenever feasible, I will look first to the ERP to guide my calculation of the appropriate penalty to assess here, in conjunction with reviewing Complainant's application of the ERP and Respondent's arguments in favor of reducing the penalty assessed. I will then conclude with an overall examination of the appropriate penalty amount.

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[20] This amount is exclusive of the $6,049 proposed penalty for Count 21, for which I found Respondent not liable.

[21] As explained at the hearing, Complainant grouped the counts together for purposes of assessing a penalty based upon the similarity of the associated pesticide products and the manner in which they had been repackaged. C's Initial Br. at 19, 27 (citing Tr. at 116); C's Initial Br. at 23, 28 (citing Tr. at 122); C's Initial Br. at 25, 29-30 (citing Tr. at 127).

### A. Application of the ERP

#### 1. Number of Independently Assessable Violations

The first step of calculating a penalty in accordance with the ERP is identifying the number of independently assessable violations. As the ERP explains, a separate penalty will be assessed for each "independent violation of the Act," with a violation considered to be "independent" if it results from an act or failure to act that is not the result of any other violation for which a penalty is assessed or if at least one of the elements of proof differs from those for any other violation. CX 20 at 16. Especially relevant to this proceeding, the ERP explains further that "two unlawful acts [may] arise out of one sale or shipment, such as the sale of a product that is both a misbranded pesticide and an unregistered pesticide," and that "[e]ach of these independent violations" is subject to a separate penalty up to the statutory maximum. Thus, the ERP speaks directly to the circumstances present in this matter – where a single distribution or sale of a pesticide resulted in two offenses, namely, a violation of both Section 12(a)(1)(A) and Section 12(a)(1)(E) of FIFRA on account of the pesticide having been both unregistered and misbranded at the time of the distribution or sale – and advises that each of those offenses be deemed an independent violation subject to a separate penalty.

Neither Complainant nor Respondent addressed the appropriate number of independently assessable violations to consider in this proceeding, and in the absence of any argument on the point, I am inclined to follow the guidance of the ERP. *See Rizing Sun, LLC*, 2007 EPA App. LEXIS 39, at *11 (Sept. 25, 2007) (declining to rule on the issue of whether the sale of a single pesticide that is both unregistered and misbranded can result in independent violations of Section 12(a)(1)(A) and Section 12(a)(1)(E) of FIFRA, subject to separate penalties, without the benefit of "full adversarial briefing"). Consistent with that guidance, I will treat Respondent's violations of Section 12(a)(1)(A) and 12(a)(1)(E) of FIFRA as independently assessable violations for which separate penalties may be assessed.

#### 2. Size of Business

The second step of calculating a penalty in accordance with the ERP is categorizing the size of the violator's business. The ERP explains that "[i]n order to provide equitable penalties, civil penalties that will be assessed for violations of FIFRA will generally decrease as the size of the business decreases." CX 20 at 17. To determine the size of a violator's business for purposes of FIFRA, the ERP looks to the violator's gross revenues from all revenue sources during the prior calendar year or, if the revenue data from the prior calendar year appears to be unrepresentative of the general performance of the business, an average of the gross revenues for the three previous years. *Id.* The size of the violator's business is considered to be Category I if its gross revenues exceed $10,000,000 per year, Category II if its gross revenues range from $1,000,000 to $10,000,000 per year, and Category III if its gross revenues are less than $1,000,000 per year.[22] *Id.* at 18.

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[22] These categories apply to "section 14(a)(1) violators," meaning the persons listed in Section 14(a)(1) of

Here, Complainant relied upon the "OneStop Report," dated November 2, 2022, to conclude that the size of Respondent's business fell into the "making less than one-million-dollar category," or Category III. C's Initial Br. at 21 (citing CX 18). Indeed, the OneStop Report reflects that the business's sales amounted to approximately $450,000. CX 18 at 3. It is unclear whether that figure represents sales from the calendar year prior to the generation of the OneStop Report (2021), the calendar year to date in which the OneStop Report was generated (2022), or some other period. That uncertainty notwithstanding, Respondent has not offered any specific evidence to rebut it or any argument to oppose Complainant's categorization of the size of his business. Thus, it seems reasonable to conclude from the record that the gross revenues of Respondent's business did not exceed $1,000,000 per year, such that Category III is indeed the appropriate categorization.

#### 3. Gravity of Violation

For the third step of calculating a penalty – determining the gravity of the given violation – the ERP directs users to Appendix A, which lists the host of actions made unlawful by FIFRA and assigns each violation a gravity level representing an assessment of its relative severity, ranging from Level 1 for the most severe to Level 4 for the least severe. CX 20 at 18, 29-33. "The relative severity of each violation considers the actual or potential harm to human health and the environment which could result from the violation and the importance of the requirement to achieving the goals of the statute." *Id.* at 18.

In considering the gravity of the violations found in this matter, I begin with the violations of Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), charged in Counts 1 through 10, which relate to Respondent distributing or selling the 10 pesticides at issue in their repackaged forms without obtaining new registrations or satisfying all of the conditions set forth in 40 C.F.R. § 165.70(b). Complainant designated the gravity of these violations as Level 1, or the most severe, in alignment with the gravity level assigned in Appendix A of the ERP to the distribution or sale of unregistered pesticides. CX 21 at 1-6 (referring to CX 20 at 29). For support, Complainant urges that "[t]he sale of an unregistered pesticide is one of the most serious FIFRA violations because of the harm that can result from the sale of an unregistered product." C's Initial Br. at 20. Respondent does not specifically challenge Complainant's designation.[23]

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FIFRA, namely, "[a]ny registrant, commercial applicator, wholesaler, dealer, retailer, or other distributor." 7 U.S.C. § 136*l*(a)(1). As a commercial applicator and retailer, Respondent is part of this grouping.

[23] In arguing for a reduction of the assessed penalty, Respondent does point to the absence of evidence of actual harm to human health and the environment caused by his distribution or sale of the 10 pesticides at issue, which he urges "is the most important consideration in determining the gravity of any violations for which [he] is liable." R's Initial Br. at 9. Consideration of this argument seems to be more appropriate in the fifth step of calculating a penalty under the ERP, where a penalty can be adjusted upward or downward based on such case-specific factors as whether actual harm occurred, so it will be evaluated below.

I agree that the distribution or sale of an unregistered pesticide can be a grave violation. The purpose of FIFRA has evolved over time to include both the goal to "protect consumers from misrepresentations as to pesticides' efficacy, safety, or other qualities" and the goal to protect the environment from unreasonable adverse effects that could result from the use of those products. *Antkiewicz*, 8 E.A.D. 218, 242 (EAB 1999) (McCallum, concurring). Undoubtedly, the requirement to register pesticides before their distribution or sale in the United States is crucial to achieving those goals. *See, e.g. Green Thumb Nursery, Inc.*, 6 E.A.D. 782, 800-01 (EAB 1997) ("The registration program is the foundation for securing the Agency's ability to protect human health and the environment. Without that foundation in place, the Agency cannot efficiently exercise its other powers conferred under the Act."). Indeed, when FIFRA was enacted in 1947, repealing its predecessor, the Insecticide Act of 1910, it added the registration requirement to function as an "aid to enforcement" inasmuch as federal officials would, for the first time, "'have an opportunity to become familiar with the formula, label, and claims made with respect to any [pesticide] before it [was] offered to the public,'" thereby serving to "'prevent false and misleading claims, . . . prevent worthless articles from being marketed, and . . . provide a means of obtaining a speedy remedial action if any such articles [were] marketed.'" *Stearns Elec. Paste Co. v. EPA*, 461 F.2d 293, 302 n.29 (7th Cir. 1972) (quoting H. Rep. 313 (80th Cong., 1st Sess.), 1947 U.S. Code Cong. Serv. pp. 1201-02). Conversely, before registration was required, the federal government had:

> "no means of ascertaining or knowing what [pesticides] [were] being marketed, except by having a force of inspectors circulating through the country picking up samples here and there, wherever they may be found. Frequently, serious damage [was] suffered by agricultural producers and other users of [pesticides] through the use of misbranded or adulterated [pesticides] before the enforcement officials [had] any knowledge of the existence of such articles, or of their being offered to the public."

*Id.* (quoting H. Rep. 313 (80th Cong., 1st Sess.), 1947 U.S. Code Cong. Serv. pp. 1201-02). By enacting the registration requirement, Congress thus deemed that "'a great measure of protection can be accorded directly through the prevention of injury, rather than having to resort solely to the imposition of sanctions for violations after damage or injury has been done.'" *Id.* (quoting H. Rep. 313 (80th Cong., 1st Sess.), 1947 U.S. Code Cong. Serv. pp. 1201-02). In short, Congress intended "to protect against the risk of harm from pesticide products," *Sultan Chemists, Inc. v. EPA*, 281 F.3d 73, 83 (3d Cir. 2002), by creating a system through which the EPA could confirm the efficacy, safety, and other qualities of a pesticide before it ever entered the market. Now, to achieve the statute's goals, registration of a pesticide will be approved only when the EPA determines that:

> (A) its composition is such as to warrant the proposed claims for it;
>
> (B) its labeling and other material required to be submitted comply with the requirements of this Act;

(C) it will perform its intended function without unreasonable adverse effects on the environment; and

(D) when used in accordance with widespread and commonly recognized practice it will not generally cause adverse effects on the environment.

7 U.S.C. § 136a(c)(5).

By distributing or selling the 10 pesticides at issue in a repackaged form without obtaining new registrations or satisfying all of the conditions set forth in 40 C.F.R. § 165.70(b), Respondent clearly frustrated the purpose of the registration requirement and created a risk of harm. To be sure, there is no evidence in the record of Respondent having altered the formulations of the pesticides at the time of repackaging, meaning that certain qualities, like the pesticides' ingredients and the efficacy of those formulations, remained the same as those of the products as originally registered with the EPA. But Respondent did modify the manner in which the products were packaged and labeled without satisfying the criteria set forth in 40 C.F.R. § 165.70(b), which would have excepted him from the requirement to register the pesticides in their new forms. And by failing to apply for registration before he made the repackaged pesticides available to the public, he denied the EPA the opportunity to review the products to ensure that he had packaged and labeled them in such a way that would protect human health and the environment. The gravity of this – while seemingly less severe than the gravity of failing to register a pesticide that has never been registered in any form before, such that its packaging, labeling, *and* formulation have never been evaluated by the EPA – was still serious. The ERP broadly characterizes any violation involving the distribution or sale of an unregistered pesticide as having the most severe level of gravity, without distinguishing between the distribution or sale of a pesticide that was initially registered but then repackaged and the distribution or sale of a pesticide that has never been registered in any form before. To account for that distinction, as exemplified here where Respondent appears to have modified the packaging and labeling of the pesticides but left their formulations unchanged from the ones approved by the EPA as part of the pesticides' original registrations, I find that Level 2 would be the more appropriate gravity level to assign to Respondent's violations of Section 12(a)(1)(A).

I turn now to the violations of Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), alleged in Counts 11 through 20, which relate to Respondent distributing or selling the 10 pesticides at issue as misbranded. For Counts 11 through 14 concerning the rodenticide mini-blocks, Complainant designated the gravity as Level 1, or the most severe, based on the gravity level assigned in Appendix A to selling or distributing a pesticide that is misbranded insofar as the label lacks directions for use necessary to make the product effective and adequately protect human health and the environment. CX 21 at 7 (referring to CX 20 at 29). For support, Complainant argues that "[t]he sale of a misbranded pesticide is one of the most serious FIFRA violations because of the harm that can result from the sale of a misbranded product." C's Initial Br. at 27. In that vein, Complainant points out, Ms. Bednar testified to the significance of labeling under FIFRA, explaining that "the label is the law." *Id.* (citing Tr. at 13).

Respondent does not specifically contest Complainant's election of Level 1 as the gravity for Counts 11 through 14, and I can hardly disagree with it either. The provisions of FIFRA that address misbranding clearly focus on ensuring that the label for a pesticide product, determined to be safe and effective by the EPA during the registration process, provides members of the public with certain information deemed necessary to protect their health and that of the environment once the product has entered the market. *See* 7 U.S.C. § 136(q) (defining a pesticide as "misbranded" when its label lacks a statement of ingredients, directions for use, or an appropriate warning or caution statement, among other potential deficiencies). Here, Respondent distributed or sold the rodenticide mini-blocks devoid of any labels, such that even the identity of the mini-blocks as pesticides, let alone the proper directions for their use, would not have been evident. And while Respondent informed the inspectors at the Grand Facility of his practice of providing customers at the point of sale of the mini-blocks with a safety data sheet and guidance to look online for complete information about those products, it seems from the record that Respondent did not, in fact, engage in that practice with every sale. *See* CX 1 at 7 ("Mr. Wilson explained that he sometimes provides safety data sheets with the sale of these block rodenticides, but when asked to provide a sample, he was unable to provide one. Mr. Wilson also shared that he recommends to his customers to again use Google as a resource for obtaining information on his block rodenticide products."); CX 10 (report detailing an investigation of Wilson's Pest Control by the Missouri Department of Agriculture, during which state investigators visited the Grand and Woodson Facilities to make controlled purchases of pesticides on May 2, 2022, and both investigators documented that no written materials were provided with their purchases of insecticides and rodenticides). Even if Respondent had supplied such information with every sale, I would not be persuaded that that fact mitigates the seriousness of Counts 11 through 14. First, as Ms. Bednar testified without rebuttal, a safety data sheet would not provide all of the information required to be included on an approved label. Tr. at 87. Moreover, a separate safety data sheet could easily be lost by the customer, or a third party without the benefit of a safety data sheet, or even the registered names of the mini-blocks, could come into contact with the products. And anyone unaware of the registered names of the products would not necessarily know what terms to search online to obtain more information. Thus, supplying a separate safety data sheet or the direction to "use Google" is no substitute for a label affixed directly to a pesticide. For the foregoing reasons, I consider the severity of the misbranding of the rodenticide mini-blocks to be significant, such that Level 1 is indeed the appropriate gravity level to assign to this set of violations.

As for Counts 15 through 17 concerning the rodenticide throw packs, Complainant designated the gravity as Level 3, a lower severity, based on the gravity level assigned in Appendix A to selling or distributing a pesticide that is misbranded because of the label not prominently displaying information required by FIFRA, rendering it unreadable or incomprehensible. CX 21 at 9 (referring to CX 20 at 29). While the distribution or sale of a misbranded pesticide is one of the most serious violations of FIFRA, Complainant maintains, "in this instance, the throw packs did have some of the abbreviated labeling on them[,] which lowers the violation level from one to three." C's Initial Br. at 28-29. The ERP reflects that the

Agency indeed deems some cases of misbranding, such as the deficiency cited by Complainant here, as less severe than others, *see* CX 20 at 29-30, and once again, Respondent does not specifically object to the characterization. Upon consideration, I agree that Level 3 is the appropriate gravity level to assign to the misbranding of the rodenticide throw packs. The master labels for these pesticides include labels required to appear on the throw packs themselves,[24] and while the throw pack labels direct consumers to the labels of the outer containers for complete information on the products, the throw pack labels do contain some information, including the registered names and registration numbers of the products, statements of ingredients, first aid information, abbreviated directions for use (which first advise that it is unlawful to use the products in a manner inconsistent with its labeling and then refer consumers to the labels for the outer containers for complete directions for use), and, in the case of the Talon G Throw Packs, precautionary statements. CX 3 at 11-12; CX 4 at 11-12; CX 6 at 9-11. As shown in photographs taken at the Grand Facility, those labels appear to have been printed on the throw packs observed during the inspection, presumably at the time the throw packs were manufactured, and the labels can largely be seen through the transparent plastic bags in which Respondent bundled the throw packs. *See* CX 2 at 30-44. With those labels visible and providing partial information about the rodenticide throw packs, the seriousness of this set of violations is undeniably lessened, such that I consider Level 3 to be the appropriate designation for their gravity.[25]

Finally, for Counts 18 through 20 concerning the liquid insecticides, Complainant designated the gravity as Level 1, or the most severe, based on the gravity level assigned in Appendix A to selling or distributing a pesticide that is misbranded due to the label lacking directions for use. CX 21 at 11 (referring to CX 20 at 29). Like with the other violations, Respondent does not specifically challenge Complainant's characterization of the gravity of this set of violations. However, I am inclined to find that Level 2 is the appropriate gravity level to assign. As depicted in photographs taken at the Grand Facility, the labels applied to the bottles of "Professional Pest Control Concentrate, Permethrin Insecticide 36.8%" and "Wilson's Termite & Carpenter Ant Control," while devoid of directions for use, provide the registration numbers of the associated registered pesticides, statements of ingredients, precautionary statements, and first aid information. *See* CX 2 at 4-15, 20-29. The photographs further reflect that the label affixed to the bottle of "Wilson's Pest Control Professional Growth Regulator" bears only that name, the telephone number for "poison control," and graphics showing a skull and crossbones and a figure clad in protective clothing, which is indeed significantly deficient but at least offers some indication of the toxic nature of the product. *See* CX 2 at 56-57, 63-65. Based

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[24] Ms. Bednar testified that throw packs are labeled as a precautionary measure to alert anyone unexpectedly coming into contact with a throw pack what it is. Tr. at 86-87.

[25] As with the rodenticide mini-blocks, Respondent informed the inspectors at the Grand Facility that "he sometimes provides the safety data sheet [with the rodenticide throw packs at the point of sale] but recommends his customers Google the product for more information about the rodenticide." CX 1 at 6. For the reasons cited above, I do not find this practice to mitigate the seriousness of the misbranding of the rodenticide throw packs any further.

on those considerations, I find the seriousness of the misbranding of the liquid insecticides to be less severe than the misbranding of the rodenticide mini-blocks, which lacked any labeling whatsoever, but more severe than the misbranding of the rodenticide throw packs, which were labeled with information similar to that found on the labels for the "Professional Pest Control Concentrate, Permethrin Insecticide 36.8%" and "Wilson's Termite & Carpenter Ant Control," as well as directions for use, albeit largely incomplete ones. To account for these distinctions, I consider a designation of Level 2 to be appropriate for the gravity of this set of violations.[26]

### 4. Base Penalty

The fourth step of calculating a penalty in accordance with the ERP is determining the appropriate "base penalty amount." This figure derives from the ERP's Civil Penalty Matrix, which is comprised of one axis representing the size of business category and the other axis representing the gravity level of the violation. CX 20 at 18-19. The cell in the matrix corresponding to the size of the violator's business and the gravity of the violation is the base penalty amount for the given violation. *Id.*

Applying the size of Respondent's business and the gravity level of each set of violations, as determined above, to the Civil Penalty Matrix, the following base penalty amounts result: $4,250 for each of Counts 1 through 10; $7,150 for each of Counts 11 through 14; $2,830 for each of Counts 15 through 17; and $4,250 for each of Counts 18 through 20. CX 20 at 19.

### 5. Adjustments to the Base Penalty

As the fifth step of calculating a penalty, the ERP provides for the adjustment of the base penalty amount based upon certain case-specific factors: toxicity of the pesticide at issue; harm to human health and the environment; compliance history of the violator; and culpability of the violator. CX 20 at 19-20. In order to assign a numeric value to each of these factors, the ERP directs users to Appendix B, which provides numeric values reflecting severity. CX 20 at 19, 34-35. Those values are then added together, and the total is applied to Table 3 contained in the ERP, which lists potential total values and corresponding adjustments of the base penalty amount. CX 20 at 20.

#### a. Case-specific factors

i. <u>Toxicity</u>

For the first factor, toxicity of the pesticide, Mr. Kruep testified that at the time a pesticide is registered with the EPA, a "signal word" is assigned by the Agency based upon the

[26] As with the rodenticide mini-blocks and throw packs, Respondent informed the inspectors at the Grand Facility of his practice of providing safety data sheets and advising customers to search online for more information regarding "Wilson's Termite & Carpenter Ant Control" and "Wilson's Pest Control Professional Growth Regulator" at the point of sale of those products. CX 1 at 5, 8. Again, for the reasons cited above, I do not find this practice to mitigate the severity of the misbranding of the liquid insecticides any further.

active ingredients of the product, which then is required to appear on the product's label. Tr. at 111-12, 117-18. The Agency selects from "Caution," "Warning," and "Danger" for signal words, with each corresponding to a numeric figure provided in Appendix B to represent the pesticide's toxicity, ranging from "1" for "Caution," or the least toxic, to "3" for "Danger," or the most toxic. *See* Tr. at 111-12; CX 20 at 34. For the toxicity of each of the 10 pesticides at issue in this proceeding, Complainant assigned the lowest value of "1," CX 21, which Respondent does not appear to challenge.[27] I also do not see a reason to disturb those designations, insofar as the signal word assigned by the Agency to each of the pesticides or to related products, as reflected on the master labels,[28] was "Caution," CX 3 at 3; CX 4 at 3; CX 5 at 3; CX 6 at 3; CX 7 at

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[27] Respondent did not address the value assigned by Complainant specifically, but at the hearing, Respondent expressed his doubts about the toxicity of the pesticides, testifying, "[T]hat stuff is not that toxic. It can barely kill what it's designed to kill, the rats and the mice." Tr. at 187.

[28] The master labels for the rodenticide mini-blocks and throw packs are discussed above. The master labels for the liquid insecticides are as follows:

- Wilson's Pest Control Professional Growth Regulator. During the inspection of the Grand Facility, Respondent identified the bottles of "Wilson's Pest Control Professional Growth Regulator" as containing a pesticide called "Tekko Pro Insect Growth Regulator Concentrate." CX 1 at 8. The record includes a Label Amendment for a product registered as "N + P Regulator," which lists "Tekko Pro" as an "Alternate Brand Name" for the product. CX 7 at 3. Thus, I consider the Label Amendment for "N + P Regulator" to be the appropriate master label for "Wilson's Pest Control Professional Growth Regulator."

- Professional Pest Control Concentrate, Permethrin Insecticide 36.8%. Respondent identified the bottles of "Professional Pest Control Concentrate, Permethrin Insecticide 36.8%" observed by the inspectors at the Grand Facility as containing a pesticide registered as "Termite Kill III." CX 1 at 4. The record does not include a master label for "Termite Kill III." Rather, Complainant proffered a Label Amendment for a product called "Tengard HG Termiticide/Insecticide." CX 8. As observed by Judge Biro in her AD Order, a search of the EPA's online database of registered pesticide products for the registration number provided on the bottles of "Professional Pest Control Concentrate, Permethrin Insecticide 36.8%" returns a result for "Termite Kill III," which, in turn, identifies "Tengard HG Termiticide/Insecticide" as a "Related Registered Product." AD Order at 7 n.6 (referring to *Details for Termite Kill III*, U.S. ENV'T PROT. AGENCY, https://ordspub.epa.gov/ords/pesticides/f?p=PPLS:8:8975845673244::NO::P8_PUID,P8_RINUM:245920,70506-7-72693). Given that connection, I consider the Label Amendment for "Tengard HG Termiticide/Insecticide" to be the relevant master label for "Professional Pest Control Concentrate, Permethrin Insecticide 36.8%."

- Wilson's Termite & Carpenter Ant Control. Respondent did not identify the substance contained in the bottles of "Wilson's Termite & Carpenter Ant Control" observed by the inspectors at the Grand Facility. *See* CX 1 at 5. However, as noted by Judge Biro in her AD Order, Complainant alleges in the Amended Complaint that the registration number appearing on the bottles corresponds to a pesticide registered as "Monterey Termite and Carpenter Ant Control," AD Order at 8 n.7 (citing Am. Compl. ¶ 32(j)), and both parties use that name elsewhere in filings, *id.* (citing CX 1 at 9; RX 2 at 2). The record does not include a master label for "Monterey Termite and Carpenter Ant Control," but Complainant did proffer a Notification to Make Label Changes for a product called "Menace 2.4% ME Insecticide." CX 9. Judge Biro further noted in her AD Order that a search of the EPA's online database of registered pesticide products for the registration number provided on the bottles of "Wilson's Termite & Carpenter Ant Control" returns a result for a product with "No Product Name Found" but with "Monterey Termite & Carpenter Ant Control" listed as one of several inactive alternate brand names. AD Order at 8 n.7 (citing *Details for*

3; CX 8 at 3; CX 9 at 4; CX 30 at 3; CX 31 at 3; CX 32 at 3, and the record does not contain any specific evidence supporting a different conclusion regarding the relative toxicity of the pesticides. Thus, I consider the appropriate numeric value for this factor to be "1."

ii. Harm to human health and the environment

The next factors to consider are harm to human health and the environment. The numeric values provided by Appendix B of the ERP to measure such harm consist of "0," representing "negligible harm"; "1," representing "minor potential or actual harm"; "3," representing "unknown or potential serious or widespread harm"; and "5," representing "actual serious or widespread harm." CX 20 at 34-35. For the rodenticide mini-blocks, Complainant selected "3" as the appropriate numeric value to assign for these factors, citing Mr. Kruep's testimony regarding the anti-coagulation properties of the mini-blocks, which could cause uncontrolled bleeding and would be especially harmful if ingested by children or anyone with a smaller body size, as well as non-target species; the total lack of labeling on the packaging of the mini-blocks, which would increase the potential for human harm due to the absence of first aid instructions or even the identity of the products as pesticides; and the danger of the mini-blocks being consumed by children due to their resemblance to candy and the ease of opening the resealable plastic bags in which the mini-blocks had been packaged. C's Initial Br. at 22 (citing Tr. at 118-19, 149). As for the rodenticide throw packs, Complainant selected "1" as the appropriate numeric value to assign, citing Mr. Kruep's testimony that while the throw packs contained pesticides with the same anti-coagulation properties as the mini-blocks, they at least had some labeling, as well as more secure packaging than simply the resealable plastic bags into which the mini-blocks had been bundled. *Id.* at 24 (citing Tr. at 123-24). Finally, with regard to the liquid insecticides, Complainant selected "1" as the appropriate numeric value to assign, pointing for support to Mr. Kruep's testimony that while the insecticides, consisting of neurotoxins that could affect the nervous system and eyes of any exposed person or non-target species, were packaged in bottles lacking complete labeling, the bottles were at least secure. *Id.* at 26 (citing Tr. at 127-28).

Respondent counters that the record lacks evidence of actual harm to human health and the environment caused by his distribution or sale of the 10 pesticides at issue, which he urges "is the most important consideration in determining the gravity of any violations for which [he] is liable." R's Initial Br. at 9. Complainant acknowledges the absence of evidence of actual harm in its Reply Brief. C's Reply Br. 3. But, Complainant urges, as Ms. Bednar testified at the hearing, actual harm is difficult to demonstrate because of "anonymous poisoning reporting, lack of public knowledge about reporting procedures, and HIPAA restrictions." *Id.* at

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*228-459-54705*, U.S. ENV'T PROT. AGENCY, https://ordspub.epa.gov/ords/pesticides/f?p=PPLS:8:::::P8_PUID,P8_RINUM:496806,228-459-54705). Additionally, that webpage identifies "Menace 2.4% ME Insecticide" as a "Related Registered Product." *Details for 228-459-54705*, U.S. ENV'T PROT. AGENCY, https://ordspub.epa.gov/ords/pesticides/f?p=PPLS:8:::::P8_PUID,P8_RINUM:496806,228-459-54705. With that link, I consider the Notification to Make Label Changes for "Menace 2.4% ME Insecticide" to be the relevant master label for "Wilson's Termite & Carpenter Ant Control."

3-4 (citing Tr. at 87-88). "[T]he FIFRA ERP structures itself to account for these realities," Complainant goes on, particularly in this fifth step of calculating a penalty under the ERP where a penalty can be adjusted upward or downward based on such case-specific factors as whether actual harm occurred. *See id.* at 4. Complainant concludes that in the present matter, it appropriately considered only the potential harm that can result from the distribution or sale of unregistered and misbranded pesticides. *Id.*

Upon consideration, I am inclined to agree with Complainant. As Complainant explains, the ERP distinguishes between actual and potential harm in Appendix B, providing the highest numeric value of "5" when "actual serious or widespread harm" has occurred and providing lower numeric values when the actual harm is more minor or the harm is merely prospective. *See* CX 20 at 34. Here, Complainant did not select any numeric value above "3" in order to account for the absence of evidence of actual harm. And its evaluation of the potential harm to human health and the environment that could result due to the violations, considering the nature of the pesticides themselves and the choices that Respondent made with regard to the packaging and labeling of the pesticides, is supported by the cited testimony of Mr. Kruep, as well as the master labels of the pesticides, which describe the hazards that the pesticides pose to humans and non-target species. *See, e.g.*, CX 5 at 3 ("Harmful if [Maki Mini Blocks are] swallowed, absorbed through the skin, or if inhaled. Causes moderate eye irritation. Avoid contact with eyes, skin or clothing. Avoid breathing dust. Keep away from children, domestic animals and pets. All handlers (including applicators) must wear long pants, shoes, socks, and waterproof gloves."); CX 3 at 4 ("If swallowed or absorbed through the skin, [Contrac Throw Packs] may reduce the clotting ability of the blood and cause bleeding. . . . Harmful if swallowed. Causes moderate eye irritation. Keep away from children, domestic animals and pets. Do not get in eyes or on clothing. Remove or wash contaminated clothing before reuse. All handlers (including applicators) must wear: shoes plus socks, and gloves."); CX 9 at 5 ("Harmful if ["Wilson's Termite & Carpenter Ant Control" is] swallowed. Causes moderate eye irritation. Avoid contact with eyes, skin or clothing. Wash thoroughly with soap and water after handling and before eating, drinking, chewing gum, using tobacco or using the toilet. . . . This pesticide is extremely toxic to fish, and aquatic invertebrates. Drift and runoff from treated areas may be hazardous to aquatic organisms in neighboring areas. To protect the environment, do not allow pesticide to enter or runoff into storm drains, drainage ditches, gutters or surface waters."). Meanwhile, Respondent did not offer any compelling evidence or argument in rebuttal. Accordingly, I find that for the harm to human health and the environment that could have been caused, "3" is the appropriate value to assign to the rodenticide mini-blocks, "1" is the appropriate value to assign to the rodenticide throw packs, and "1" is the appropriate value to assign to the liquid insecticides.

iii. Respondent's compliance history

For the next factor, the compliance history of the violator, Appendix B of the ERP provides three potential numeric values depending on the number of prior violations of FIFRA committed by the violator: "0," for no prior violations; "2," for one prior violation; and "4," for more than one prior violation. CX 20 at 34. As acknowledged by Complainant, the record does not contain any evidence of Respondent having been cited for a violation of FIFRA before the present enforcement action. *See* C's Initial Br. at 22 (citing Tr. at 119). Accordingly, I find that Complainant appropriately selected a value of "0" for this factor.

iv. Respondent's culpability

Finally, I turn to Respondent's culpability. Mr. Kruep testified that when evaluating a respondent's culpability, the EPA considers "the knowingness or the willingness of the violation. So if somebody is more experienced in it, in say FIFRA or pesticides, their culpability would go up because of their experience." Tr. at 113. Looking to Appendix B in the ERP, Complainant selected "2" as the appropriate numeric value to assign to Respondent's culpability, CX 21 at 1-12 (referring to CX 20 at 34), based on its determination that the violations more than likely resulted from negligence, C's Initial Br. at 22-23 (citing Tr. at 120).

Upon consideration, I agree with the degree of culpability alleged by Complainant. The record reflects that Respondent openly operated his business in the community for more than 35 years, recognizing that his activities were subject to regulation under FIFRA to the extent that he registered the Grand Facility as a pesticide-producing establishment and annually submitted a Pesticide Report for Pesticide-Producing and Device-Producing Establishments, yet appearing to be genuinely unaware that this practice did not entirely fulfill his obligations and that his other activities, in fact, violated the statute. *See* CX 1 at 2, 3; CX 27; Tr. at 54, 159, 162-64, 175-76, 179, 185, 188; CX 14; RX 2. Thus, Respondent had *some* familiarity with FIFRA, but he lacked an adequate understanding of the requirements for repackaging pesticides. These facts do not absolve him. As a long-time participant in a heavily regulated industry involving materials that could cause harm to human health and the environment, Respondent bore the responsibility for staying informed of and abiding by *all* laws affecting his business. As observed by an esteemed former Administrative Law Judge, Barbara A. Gunning, in a case involving the sewage sludge disposal industry, "By entering into this line of work, Respondent has subjected himself to all applicable federal regulations and the presumption of knowledge. . . . Respondent cannot participate in the [subject] industry in a vacuum. Thus, it is incumbent on Respondent to keep abreast of knowledge pertinent to such industry." *Barber*, 2007 EPA ALJ LEXIS 17, at *131-32 (May 11, 2007) (citing *United States v. Int'l Mineral & Chems. Corp.*, 402 U.S. 558 (1971) ("anyone involved in the business of shipping dangerous materials would very likely know of the regulations involved")). In other words, Respondent should have known about each requirement applicable to his business under FIFRA and done his utmost to comply.

He clearly fell short of that duty of care. He did not explain how he came to know about the requirements to register his business and submit a Pesticide Report for Pesticide-Producing and Device-Producing Establishments but failed to ascertain his other responsibilities concerning repackaging pesticides. He did not offer any evidence of engaging in efforts to determine his obligations for himself or any argument that the subject requirements for repackaging pesticides were ambiguous or unascertainable. Rather, he seems to have counted on government authorities to seek him out and tell him what was required of him. *See, e.g.*, Answer ¶¶ 13 ("[T]he EPA has never at any time notified or requested that Respondent obtain a registration for any of the [subject] pesticides . . . ."), 14 ("[T]he EPA has never at any time notified Respondent that Respondent was required to obtain a contract with any registrants to repackage, distribute, or sell any of the [subject] pesticides . . . ."); R's Initial Br. at 8 ("Wilson noted that the EPA never provided him with any assistance regarding compliance with FIFRA's requirements as to repacking and labeling of pesticides prior to selling those products. . . . The EPA does not have any policy, procedure or practice of assisting those in the business of selling and distributing pesticides with compliance matters . . . . There is only information on the internet and online, according to Bednar.") (citing Tr. at 59-60, 185-86). I find that with this passive approach, Respondent did not exercise due care to ascertain and fulfill his regulatory responsibilities and, thus, acted negligently in his distribution or sale of the 10 pesticides at issue.

With that being said, I disagree with the numeric value that Complainant assigned to Respondent's culpability. According to Appendix B in the ERP, a value of "2" is appropriate for "[c]ulpability unknown or violation resulting from negligence." CX 20 at 34. Meanwhile, a value of "1" is appropriate under the following circumstances: "Violation resulted from negligence. Violator instituted steps to correct the violation immediately after discovery of the violation." *Id.* Based on the record before me, I find that such circumstances were present here. As noted by Respondent, Ms. Bednar testified at the hearing to his high degree of cooperation, describing him as "really receptive to the information that [the inspectors] provided during the inspection." Tr. at 56, 73-74. Both the inspection report and testimony elicited from Respondent also demonstrate that he was amenable to correcting any issues identified during the inspection and that he actively sought guidance from the inspectors, including asking whether certain alternative packaging for the rodenticide mini-blocks would be acceptable when the inspectors voiced concerns about the packaging they observed and attempting to communicate with the inspectors after the inspection in an effort to understand how he had erred. *See, e.g.*, CX 1 at 7, 8; Tr. at 180-82, 186, 192. The inspection report reflects that he also committed to the inspectors, in advance of receiving the Stop Sale Order, that he would cease sales of the rodenticide mini-blocks until such time that he received further direction from the EPA. CX 1 at 7. According to Respondent, that guidance never materialized, so, as he testified in response to a question about how he modified the way he operated the business following the inspection of the Grand Facility and receipt of the Stop Sale Order, he no longer repackaged and distributed or sold pesticides. Tr. at 180-85, 194. As I found above, the record lacks sufficient evidence to establish that he did, in fact, continue to distribute or sell repackaged pesticides beyond that time, at least at the Woodson Facility. Based on these facts and my observations of Respondent at the hearing, I am persuaded that Respondent sincerely wanted to comply with FIFRA but simply did not understand how to achieve compliance without support from regulators. I consider his readiness to remedy the violations and efforts to determine what was required of him once the violations were pointed out as fitting the spirit of the circumstances described in the ERP as warranting an assignment of "1" for culpability, such that that numeric value is more appropriate in this matter.

### b. Total adjustments

First adding the foregoing adjustment values together for each set of violations, and then applying those sums to Table 3 contained in the ERP, CX 20 at 20, results in the following adjustments to each base penalty amount:

| | Base penalty amount per count | Total adjustment value | Percent adjustment | Dollar adjustment | Resulting penalty amount per count[29] |
|---|---|---|---|---|---|
| **Counts 1-4** | $4,250 | 8 | -10% | -$425 | $3,800 |
| **Counts 5-7** | $4,250 | 4 | -50% | -$2,125 | $2,100 |
| **Counts 8-10** | $4,250 | 4 | -50% | -$2,125 | $2,100 |
| **Counts 11-14** | $7,150 | 8 | -10% | -$715 | $6,400 |
| **Counts 15-17** | $2,830 | 4 | -50% | -$1,415 | $1,400 |
| **Counts 18-20** | $4,250 | 4 | -50% | -$2,125 | $2,100 |

### 6. Economic Benefit of Noncompliance

Citing the EPA's "Policy on Civil Penalties, EPA General Enforcement Policy #GM-21" (Feb. 16, 1984),[30] the ERP identifies the sixth step in calculating a penalty as the determination of any "significant economic benefit," as defined in the ERP, that the violator received in the form of delayed costs, avoided costs, or illegal profits from sales. CX 20 at 20. That amount is then added to the gravity-based penalty component in order to remove any economic incentives for noncompliance. *Id.* As the ERP reasons, "[i]f, after the penalty is paid, violators still profit by violating the law, there is little incentive to comply." *Id.*

The ERP explains that the "[d]istribution and sale of unregistered and misbranded pesticides are examples of violations that are likely to result in significant economic benefits." CX 20 at 21. In the present matter, however, Complainant elected not to seek to recover any economic benefit that may have resulted from Respondent's noncompliance,[31] and the record does not contain any evidence from which I could compute that figure myself. Accordingly, this step is not applicable here.

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[29] As advised in the ERP, this figure is rounded to the nearest $100. CX 20 at 20.

[30] This document is publicly accessible at https://www.epa.gov/sites/default/files/documents/epapolicy-civilpenalties021684.pdf.

[31] Complainant did not present any evidence on this topic at the hearing, and in its prehearing exchange, Complainant explains that it is not seeking to recover any economic benefit for multiple reasons. C's Initial Prehr'g Exchange (May 3, 2024) at 20.

### 7. Effect of Penalty on Respondent's Ability to Remain in Business

The final step in calculating a penalty in accordance with the ERP is consideration of the effect of the penalty on the violator's ability to continue in business or its ability to pay the penalty.[32] The "EPA will generally not collect a civil penalty that exceeds a violator's ability to pay as evidenced by a detailed tax, accounting, and financial analysis." CX 20 at 24. Thus, the ERP advises, if the violator raises this issue, the EPA should request that it substantiate its claim with such documentation as tax returns and financial statements. CX 20 at 24. If the violator does not provide sufficient information, the EPA may then draw an inference from available information that the violator is able to pay the calculated penalty. *Id.*

Ahead of the hearing in this matter, Respondent contested the appropriateness of assessing a civil penalty but not specifically on the basis that it would impair his ability to remain in business or that he lacked the ability to pay. *See* Answer at 9. Nor did Respondent come forward with any financial records or other information to support such a claim, despite having been afforded multiple opportunities to do so and later having been ordered to do so by Judge Biro. *See* Order on Complainant's Mots. for Additional Disc. and Extension of Time (July 10, 2024). Consequently, Judge Biro decided that Respondent had waived his right to contest the proposed penalty on that basis and that Respondent was accordingly barred from entering any related evidence into the record at the hearing. Order Barring Resp't from Presenting Certain Evid. at Hr'g (Nov. 8, 2024), at 2-3.

While acknowledging his failure to provide any information on this issue, Respondent nevertheless argues in his Initial Brief that the effect of the proposed penalty on his ability to continue in business would be considerable and warrants at least a substantial reduction in the penalty assessed. Initial Br. at 9-10. For support, Respondent cites his testimony regarding the significance of retail sales to his business and the commensurate toll that the Stop Sale Order has already taken on his business's revenues. *Id.* at 10 (Tr. at 160-61, 183, 186). Complainant did not respond to this argument in its Reply Brief.

Based on my observations at the hearing, I found Respondent's testimony about the financial hardship experienced by his business after issuance of the Stop Sale Order to be sincere, and I am sympathetic to his circumstances. However, I am unable to ignore that at every opportunity afforded him prior to the hearing, he elected not to provide financial records or other information to substantiate his economic losses, which ultimately prompted Judge Biro to rule that he had waived his right to raise any claims about his ability to pay a penalty or the effect that a penalty would have on his ability to remain in business and that he was barred from presenting any related evidence at the hearing. Respondent has not pointed to anything to support a rescission of that ruling. Even if it was not in place, and the issue had been properly addressed by Respondent at an earlier stage of this proceeding, Complainant produced the OneStop Report, which reflects that the business's sales reached nearly $450,000

[32] As the ERP explains, an ability to continue in business and an ability to pay the calculated penalty are analogous. CX 20 at 24.

and from which it can be inferred that Respondent's financial circumstances do not warrant a reduction in the calculated penalty. *See New Waterbury, Ltd.*, 5 E.A.D. 529, 541-43 (EAB 1994) (holding that when this issue is properly raised and supported by a respondent ahead of the hearing, the complainant "must as part of its prima facie case produce some evidence regarding the respondent's *general* financial status from which it can be *inferred* that the respondent's ability to pay should not affect the penalty amount," which demonstrates that the complainant appropriately considered the matter). The burden to rebut that evidence would then shift to Respondent, who would be required to produce specific financial information facilitating an analysis of the effect that the calculated penalty would have on his business and the amount of penalty that could be assessed without exceeding his ability to pay. *See id.* His uncorroborated testimony at the hearing would not suffice to carry that burden.

Therefore, in accordance with the foregoing discussion, I am compelled to deny any claim that Respondent lacks the ability to pay the calculated penalty or that the assessment of the calculated penalty would impair his ability to continue in business, and I decline to adjust the penalty further on that basis.

### B. Conclusion

The foregoing application of the ERP yields a combined total penalty of $63,900, apportioned between the sets of violations as follows:

| | **Penalty amount per count as adjusted** | **Number of counts** | **Total penalty for set of violations** |
|---|---|---|---|
| **Counts 1-4** | $3,800 | 4 | $15,200 |
| **Counts 5-7** | $2,100 | 3 | $6,300 |
| **Counts 8-10** | $2,100 | 3 | $6,300 |
| **Counts 11-14** | $6,400 | 4 | $25,600 |
| **Counts 15-17** | $1,400 | 3 | $4,200 |
| **Counts 18-20** | $2,100 | 3 | $6,300 |

In its calculation of the proposed penalty, Complainant applied an "inflation multiplier" of 1.42324 to the penalty it had computed using the ERP to arrive at a total proposed penalty of $143,611 for Counts 1 through 20. The source of Complainant's inflation multiplier is not entirely clear from the record, with Mr. Kruep testifying simply that it comes from the Federal Register but without Complainant pointing to any particular Federal Register notice. Tr. at 115. I am not troubled by that lack of clarity, however, inasmuch as I consider the downward adjustments that I have already made through the mechanisms available in the ERP to be inadequate and the calculated penalty of $63,900, even before any upward adjustment to account for inflation, to be excessive given the circumstances in this matter. In particular, as Respondent noted in his Initial Brief, the EAB has held that a primary purpose of civil penalties imposed under FIFRA is deterrence, rather than punishment. *See, e.g.*, *Johnson Pac., Inc.*, 5

E.A.D. 696, 707 (EAB 1995) ("[C]ivil penalties under FIFRA 'are intended to deter through regulation, not reprimand through punishment.'") (citing *South Coast Chem., Inc.*, 2 E.A.D. 139, 141 (CJO 1986)). Here, I am persuaded that a penalty lower than $63,900 would be enough to deter Respondent from future violations. As discussed in detail above, the record reflects that Respondent did not exercise due care in ascertaining and fulfilling all of the regulatory requirements applicable to his business prior to the inspection of the Grand Facility. But it also reflects that during and after the inspection, he cooperated with the inspectors, committed to discontinuing his violative practices, and engaged in efforts to determine what was required of him, demonstrating a readiness to come into compliance that I found to be genuine from my observations of Respondent at the hearing. And I believe that with some assistance from regulators to guide his understanding, he would indeed be able to achieve compliance and reinvigorate his business. As Respondent has already shown an inclination to comply, I do not consider a penalty in the magnitude of $63,900 to be necessary to compel him to attend to his responsibilities under FIFRA more carefully going forward. Additionally, I find a lower penalty to be more commensurate with other considerations in this matter, such as the relatively small size of Respondent's business and the relatively low toxicity of the pesticides at issue. Accordingly, I hereby exercise my discretion to further reduce the penalty assessed for the violations found in Counts 1 through 20 to $45,000 total, or, in essence, $2,250 per count of violation, which I consider to be sufficient for purposes of specific deterrence and appropriate for the overall circumstances presented here.[33]

## ORDER

1. Respondent is liable for violating the Federal Insecticide, Fungicide, and Rodenticide Act as set forth above.

2. For these violations, Respondent is hereby assessed a civil penalty of **$45,000**.

[33] As discussed previously, while the EAB generally encourages the application of the Agency's civil penalty policies, it has recognized that ALJs are not bound by those guidelines. And it has recognized that departures from penalties calculated through the application of the ERP may be appropriate in some instances. As explained by the EPA's former Chief Judicial Officer:

> The civil penalty guidelines are designed to establish principles and procedures for the initial calculation of a proposed civil penalty. Their chief purpose is to facilitate the uniform application of FIFRA Section 14 so that persons with comparable financial circumstances who are charged with the same offense will, in most cases, incur substantially similar penalties. However, the guidelines were not drafted for strict application, but instead reveal an intent that they be applied flexibly so as to serve the interests of justice.

*Custom Chem. & Agric. Consulting, Inc.*, 2 E.A.D. 748, 756 (CJO 1989). Thus, I am not necessarily constrained by the ERP in determining the appropriate penalty to assess in this matter.

3. Payment of the full amount of this civil penalty shall be made within **30 days** after this Initial Decision becomes a final order under 40 C.F.R. § 22.27(c). Payment methods are described at the following webpages: https://www.epa.gov/financial/makepayment and https://www.epa.gov/financial/additional-instructions-making-payments-epa.

   If Respondent fails to pay the penalty within the prescribed statutory period after entry of this Initial Decision, interest on the penalty may be assessed. *See* 31 U.S.C. § 3717; 40 C.F.R. § 13.11.

4. Pursuant to 40 C.F.R. § 22.27(c), this Initial Decision shall become a final order **45 days** after its service upon the parties and without further proceedings unless: (1) a party moves to reopen the hearing within **20 days** after service of this Initial Decision, pursuant to 40 C.F.R. § 22.28(a); (2) an appeal to the Environmental Appeals Board is taken within **30 days** after this Initial Decision is served upon the parties pursuant to 40 C.F.R. § 22.30(a); or (3) the Environmental Appeals Board elects, upon its own initiative, to review this Initial Decision, under 40 C.F.R. § 22.30(b).

**SO ORDERED.**

Michael B. Wright
Chief Administrative Law Judge

Dated: September 1, 2026
Washington, D.C.

In the Matter of Timothy Wilson, d/b/a Wilson's Pest Control, Respondent
Docket No. FIFRA-07-2023-0135

**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing **Initial Decision and Order**, dated September 1, 2026, and issued by Chief Administrative Law Judge Michael B. Wright, was sent this day to the following parties in the manner indicated below.

Mary Angeles
Paralegal Specialist

Original by ALJD E-Filing System to:
U.S. Environmental Protection Agency
Administrative Law Judges Division
https://yosemite.epa.gov/OA/EAB/EAB-ALJ_Upload.nsf

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Environmental Appeals Board
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Dated: September 1, 2026
Washington, D.C.