UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	)	
	)	
Rhee Bros., Inc.,	)	Docket No. FIFRA-03-2005-0028
	)	
RESPONDENT	)	
_____	)	

INITIAL DECISION

DATED: September 19, 2006

FIFRA: Pursuant to Section 14(a)(1) of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136*l*(a)(1), Respondent Rhee Bros., Inc., is assessed an aggregate penalty of $235,290 for its violations of FIFRA Section 12(a)(1)(A), 7 U.S.C. § 136j(a)(1)(A), resulting from its distribution and sale of an unregistered pesticide.

PRESIDING OFFICER: CHIEF ADMINISTRATIVE LAW JUDGE SUSAN L. BIRO

APPEARANCES:

For Complainant:
Jennifer M. Abramson, Esquire
Russell S. Swan, Esquire
Assistant Regional Counsel
U.S. Environmental Protection Agency - Region III
1650 Arch Street
Philadelphia, PA 19103-2029

For Respondents:
Neil J. Bixler, Esquire
Bae & Bixler, LLC
10019 Reisterstown Road, Suite 301-A
Owings Mill, MD 21117

Lowell M. Rothschild, Esquire
Venable, LLP
575 7th Street, N.W.
Washington, D.C. 20004-1601

I. PROCEDURAL HISTORY

This proceeding was initiated on January 25, 2005, by the Associate Director for Enforcement, Waste and Chemicals Management Division, United States Environmental Protection Agency, Region III ("EPA" or "Complainant"), filing an Administrative Complaint pursuant to Section 14(a)(1) of the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136*l*(a)(1), charging Rhee Bros., Inc. ("Rhee" or "Respondent"), with the distribution and sale of unregistered pesticides in violation of FIFRA Section 12(a)(1)(A), 7 U.S.C. § 136j(a)(1)(A), and associated regulations codified as 40 C.F.R. §§ 150-189. Specifically, the Complaint alleges, in a single count, that from January 2000 through July 2003, Respondent sold and/or distributed approximately 469 units of the unregistered pesticide identified as "JOMYAK (naphthalene), OXY 12514K, 12515K, and/or 12519K" ("JOMYAK"). While the Complaint does not propose a specific monetary penalty, it does assert that each sale or distribution of an unregistered pesticide constitutes a separate violation of FIFRA for which a civil penalty up to $5,500, as adjusted for inflation, may be assessed pursuant to FIFRA Section 14(a)(1), 7 U.S.C. § 136*l*(a)(1).

Rhee, through counsel, filed an "Answer to Complaint" on February 25, 2005, admitting that it was a corporation and a "person" under FIFRA Section 2(s), 7 U.S.C. § 136(s), and that it owned and operated an Asian wholesale grocery business in Columbia, Maryland. Respondent further admitted that on February 2, 2004, the Maryland Department of Agriculture conducted an inspection of its headquarters during which computerized records documenting Rhee's sale of approximately 469 units of JOMYAK, between January 2000 through July 2003, were collected. However, Respondent denied knowledge as to whether JOMYAK was a pesticide and whether it was registered as such with EPA.

Pursuant to a Prehearing Order issued on May 23, 2005, both parties submitted their Initial Prehearing Exchanges, and subsequently submitted amendments and/or supplements thereto. In its Initial Prehearing Exchange, Complainant included documentary and narrative support for its assertion that JOMYAK is an unregistered pesticide, and for its proposed penalty of $1,316,700 based upon 266 separate *distributions* of JOMYAK by Rhee, assessed at $4,950 per distribution. In its initial Prehearing Exchange, Respondent raised a number of arguments as to why the proposed penalty should be reduced, including that the violation was unintentional, that its net profits on the sales were minimal, and that no one was harmed by any of the products at issue.

On August 18, 2005, Complainant filed a Motion for Accelerated Decision as to Liability asserting that there was no genuine issue of fact or law as to Respondent's liability for 469 *sales* of the unregistered pesticide. Respondent filed a Response to the Motion for Accelerated Decision on or about September 9, 2005. By Order dated September 27, 2005, this Tribunal granted the Complainant's Motion for Accelerated Decision finding Respondent liable for 467

violations of FIFRA Section 12(a)(1)(A), 7 U.S.C. § 136j(a)(1)(A).[1]

A hearing on the remaining issue in the case, that of the appropriate penalty to be imposed upon Respondent for the violations found, was held before the undersigned in Rockville, Maryland on December 6 and 7, 2005.[2] At the hearing, Complainant introduced into evidence 41 exhibits (hereinafter cited as "C's Ex. __") and presented the oral testimony of five witnesses: Richard Gruenhagen, Philip B. Davidson, Dr. Samuel Rotenberg, Daniel Peacock, and Melissa Toffel. Respondent introduced into evidence nine exhibits (hereinafter cited as "R's Ex. __") and the oral testimony of three witnesses: David Lee, Chang J. Yum, and Robert Fuhrman.[3] In addition, the parties' Joint Stipulations dated December 2, 2005 were admitted into evidence as Joint Exhibit 1 ("Jt. Ex. 1").

The transcript of the hearing was filed with the Regional Hearing Clerk on January 12, 2006.[4] The parties submitted post-hearing briefs on or about March 1, 2006, upon which the record closed.[5]

II. FACTUAL BACKGROUND

Respondent, Rhee Bros., Inc., is a Maryland corporation headquartered at 9505 Berger Road in Columbia, Maryland, which owns and operates an Asian grocery wholesale, retail and distribution business. Complaint ¶ 2, Answer ¶ 2; C's Exs. 12E and 23. It imports products through R&G Corporation, f/k/a Sung Won Commercial Co., Ltd., a Korean exporter with a

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[1] In its Reply to Respondent's Response to the Accelerated Decision Motion, Complainant reduced the number of violations on which it sought a determination of liability by two, from 469 to 467, based upon statute of limitations grounds.

[2] In an Amended Prehearing Exchange filed on October 12, 2005, Complainant reduced its proposed administrative penalty to $1,306,800 based upon 264 combined distributions of JOMYAK.

[3] The testimony of Messrs. Lee and Yum was provided through and/or with the assistance of a certified Korean/English interpreter.

[4] Citation to the transcript of the hearing will be in the following form: "Tr. __".

[5] Respondent included with its Post-Hearing Brief the Declaration of Lowell Rothschild, its counsel, to which it attached, presumably for the convenience of this Tribunal, 17 additional documents consisting primarily of final decisions issued in various legal actions involving pesticides, and EPA news releases concerning pesticides downloaded from EPA's website. Respondent did not specifically request that these documents be admitted as evidence in the record and, in that there appears to be no need to do so, they have not been identified by exhibit number nor admitted.

family connection to Rhee's owner,[6] utilizing the assistance of an American customs broker, AMCO Brokers & Forwarders, Inc., located in Baltimore, Maryland. Tr. 327. Rhee distributes its products primarily to Korean-owned grocery stores located in 20 states across the country. Tr. 333-34; C's Ex. 19.

Among the products Rhee imported and distributed from January 2000 through July 2003, was "JOMYAK (naphthalene), OXY 12514K, 12515K, and/or 12519K" ("JOMYAK"). "Jomyak" is the common noun word in Korean for "mothballs" and these products are balls or bars made from naphthalene (CAS No. 91-20-3), which is their sole chemical ingredient. Tr. 246-47, 340; C's Ex. 12F. The numerical designations of "12514K, 12515K, and/or 12519K" refer to different size, shape, or packaging of the exact same chemical product. C's Ex. 12F; Tr. 246-47. *See also*, fn 17, *infra*. JOMYAK is manufactured by Oxy Co., Ltd, a "leading household company in Korea," which was purchased in March 2000 or 2001 by Reckitt Benckiser, a British corporation which touts itself as "the world's number one household cleaning company." R's Exs. 7 and 8; Tr. 326-27. JOMYAK is a pesticide which has never been registered with EPA as such under FIFRA and thus cannot legally be sold or distributed in any state.[7] *See*, Order Granting Motion for Accelerated Decision and Rescheduling Hearing dated September 27, 2005; C's Ex. 10; Tr. 173-74.

On April 22, 2003, Mr. Richard D. Gruenhagen, a licensed inspector with the State of New Jersey Department of Environmental Protection (NJ DEP), as part of a training exercise for county inspectors focusing on unregistered imported pesticides, conducted an inspection of, among other places, the Han Mi Supermarket in Palisades Park, New Jersey. C's Ex. 6; Tr. 30-31, 34-37, 60-61. During that inspection, packages of one type of JOMYAK were found among the products available for sale in the store. C's Ex. 1, 6; Tr. 37-45. The specific JOMYAK product found consisted of a cellophane type bag, the front of which was imprinted with some Korean language product labeling along with a cartoon-like hippopotamus and an opaque greenish-blue border surrounding a smaller, clear see-through panel. The rear of the bag exhibited four drawings of a storage box, drawer, suitcases and toilet, and more extensive labeling written almost exclusively in Korean.[8] The front labeling and see-through panel

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[6] Testimony at hearing indicated that Syng M. Rhee, the President of Rhee Bros. Inc., is the brother-in-law of the owner of the R&G Corporation, but the two companies themselves are not related. Tr. 377, 379.

[7] As indicated in the Order on Accelerated Decision, FIFRA § 2(u) (7 U.S.C. § 136(u)) defines a "pesticide" as including "any substance . . . intended for preventing, destroying, repelling, or mitigating any pest;" a "pest" includes "any insect;" moths are insects; the labeling on JOMYAK packages indicates its intended purpose is to repel moths, thus JOMYAK is a pesticide under FIFRA. FIFRA § 3(a) (7 U.S.C. § 136a(a)) makes it illegal to sell or distribute any pesticide not registered under its provisions in any state.

[8] The minimal labeling in English on the package states "MADE IN KOREA" and "OXY." *See*, C's PHE Ex. 1

suggested the bag contained 48 white tablet shaped objects each weighing 3.6 grams. C's Ex. 1; Tr. 38-40. The package did not evidence a U.S. EPA pesticide registration number.[9] Tr. 41-42. Based upon the package, Mr. Gruenhagen suspected that it was an unregistered imported pesticide product. Tr. 42. However, he took no immediate action in response to the discovery other than to photograph the product found because, while the store clerk identified the product to him as "mothballs," Mr. Gruenhagen felt he first needed to have more knowledgeable staff in his office confirm that the product was indeed a substance regulated by FIFRA, which they did within a few days. Tr. 58-59. Thereafter, on May 20, 2003, at Mr. Gruenhagen's request, the Supermarket provided NJ DEP, by facsimile, with a copy of an invoice evidencing its' purchase of packages of "JOMYAK (naphthalene), OXY" from Rhee. Tr. 46-49; C's Exs. 2 and 6.

Not considering the situation an "emergency," when he could "program it back into [his] inspection schedule," which was on June 9, 2003, six weeks after the initial inspection, Mr. Gruenhagen returned to the Han Mi Supermarket, inventoried the store's then existing stock of JOMYAK products, and issued the Supermarket a Notice of Violation as well as a Notice of Pesticide Stop Sale in regard thereto, based upon the product being unregistered with either U.S. EPA or NJ DEP.[10] Tr. 49-53, 59; C's Exs. 3, 4 and 6. The Supermarket was advised in the Notice of Violation that, within 30 days, it was required to either register the product with EPA and NJ DEP or to properly dispose of the nine packages of the product then remaining in its possession. Tr. 52; C's Ex. 3. About a week later, the Supermarket provided Mr. Gruenhagen with a copy of a "return sheet" dated June 17, 2003, indicating that it had returned the nine packages of JOMYAK to Rhee.[11] Tr. 54-55; C's Exs. 5 and 6. NJ DEP took no further

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[9] FIFRA regulations require, *inter alia,* that registered pesticides display their registration number on their packaging. 40 C.F.R. § 156.10(a)(1).

[10] Although he has EPA inspector credentials, Mr. Gruenhagen cited Han Mi solely for violating state regulation New Jersey Administrative Code (N.J.A.C.) 7:30-2.1(a), which provides that "[n]o person shall hold, use, distribute, sell, or offer for sale within this State . . . any pesticide unless it is currently registered with the Department." C's Ex. 3.

[11] The Return Sheet does not indicate the reason why the product was being returned by the supermarket to Rhee, although there is a space allocated on the form for providing a reason. C's Ex. 5. Also interestingly, the Stop Sale Order specifically refers to "9 packages of 3.6g x 48 pieces" of JOMYAK (naphthalene) mothballs with no EPA registration number, the product Mr. Gruenhagen appears to have found and photographed in the store on his initial inspection in April, and presumably the same product Mr. Gruenhagen also found on Han Mi's shelves upon his return to the store in June. C's Ex. 4. The invoice dated March 26, 2003 provided by Han Mi to NJ DEP purportedly evidencing its purchase of this product identified it as product number "12514K." C's Ex. 2. The Return Sheet, however, identifies the item number of the product returned as "12515K," which appears from the computerized printout photograph of OXY JOMYAK products and the Chemical Composition sheets to be a package containing only *2* product pieces, each weighing 30 grams, *i.e. not* a bag of 48 mothballs. *See*, C's Ex. 12F. *See also*, fn 17 *infra.*

enforcement action against the Supermarket and *never* contacted Rhee regarding its distribution of unregistered pesticide products. Tr. 61-62.

However, about ten weeks later, on August 27, 2003, Mr. Gruenhagen did refer the matter of the unregistered JOMYAK mothballs to U.S. EPA Region 2[12] for evaluation as to its "compliance or non-compliance with FIFRA registration and importation" requirements and "[f]ollow-up action as appropriate." C's Ex. 7; Tr. 56-57, 60. In the referral letter, Mr. Gruenhagen noted that while NJ DEP had issued a "'Stop Sale' order" to Han Mi Supermarket, the product's distributor, Rhee, may be continuing to distribute the product to other retail outlets in New Jersey and other states, and that the product's Korean manufacturer, OXY, may be making it available to distributors other than Rhee. C's Ex. 7.

Approximately a week thereafter, on September 4, 2003, EPA Region 2 further referred the matter to EPA Region III, for "investigative purposes" identifying Rhee Bros. Inc. in Columbia, Maryland as the unregistered product's distributor.[13] C's Ex. 8; Tr. 236. The matter was assigned within Region III to Ms. Melissa A. Toffel, a biologist with the Region's Pesticide and Asbestos Programs and Enforcement Branch who, on September 12, 2003, after acquiring information on "Hippo the Mothbuster" products from OXY's website, in turn referred the matter to EPA Headquarters for an "Enforcement Case Review" ("ECR"), *i.e.* a formal determination as to whether the product is a "pesticide" requiring EPA registration, and whether OXY is a registered establishment.[14] C's Ex. 9; Tr. 170, 231, 238-41, 282-83.

In response to Ms. Toffel's referral, on October 16, 2003, Mr. Daniel Peacock, a biologist with 32 years of experience in the Registration Division of the Office of Pesticides Program, Insecticide-Rodenticide Branch in EPA Headquarters, conducted an ECR of the OXY JOMYAK product found by Mr. Gruenhagen on his inspection of the Han Mi supermarket. C's Exs. 25 and 10; Tr. 160, 171-72. From his review, Mr. Peacock concluded that the product was a pesticide requiring registration under FIFRA, based upon the pesticidal claims made in regard to it on OXY's website (as evidenced in the printouts from the site provided to him by Ms. Toffel) and the fact that Rhee's invoice to Han Mi for the product indicated that it contained "naphthalene," an ingredient contained in other moth control products which the Agency has

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[12] U.S. EPA divides its nationwide jurisdiction among ten Regional Offices and a Headquarters Office. New Jersey falls within the geographical area covered by EPA Region 2.

[13] Activities or entities within the State of Maryland fall primarily within the jurisdiction of EPA Region III, which is what necessitated the referral from Region 2 to Region III. To the best of this Tribunal's knowledge there is no logical explanation for the anomaly of some EPA Regions being identified with Arabic numerals and others with Roman numerals.

[14] FIFRA § 7 (7 U.S.C. § 136e(a)) requires that establishments producing pesticides "*in any state*" also be registered. A producer is a person who "manufacturers, prepares . . . or processes" any pesticide. 7 U.S.C. § 136(w). In that OXY produces JOMYAK outside of the United States, it is not clear that OXY was required to obtain an establishment number.

registered for over 40 years. C's Ex. 10; Tr. 173. Further, Mr. Peacock determined that the product was not registered as a pesticide with EPA and that EPA files did not contain any supporting data regarding the product's chemistry or toxicity. C's Ex. 10; Tr. 173-74. Additionally, Mr. Peacock found that the label on the JOMYAK mothball product shown in Mr. Gruenhagen's photographs contained serious deficiencies, including the fact that the "label omits most English text."[15] C's Ex. 10; Tr. 174.

Two months later, on December 18, 2003, EPA Headquarters forwarded the results of Mr. Peacock's ECR to Region III confirming that the OXY JOMYAK mothball product found upon NJ DEP's inspection of the Han Mi supermarket was a pesticide, requiring EPA registration under FIFRA.[16] C's Ex. 10; Tr. 241, 285.

Thereafter, on or about January 14, 2004, Ms. Toffel issued a FIFRA Investigative Referral to the Maryland Department of Agriculture (MDA) requesting that it conduct an inspection of Rhee Bros. regarding JOMYAK, a "suspected unregistered pesticide," and in connection therewith, collect records and other information pertaining to Rhee's purchase and distribution of the product. C's Ex. 11; Tr. 73-74, 242-43, 285. This appears from the record to be the first effort any governmental entity made to contact Rhee regarding its distribution of OXY JOMYAK.

MDA Agricultural Inspector Mr. Philip Davidson was assigned to lead the investigation of Rhee regarding JOMYAK. Tr. 73; C's Exs. 12A and 12E. Mr. Davidson's initial contact with the company was by telephone on January 22, 2004. C's Exs. 12B and 12C; Tr. 77. At that time, he spoke with Mr. C.J. Yum, an Assistant Manager at Rhee, requested that Rhee produce the various documents EPA had requested MDA to collect, and set up a date for a subsequent

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[15] Mr. Peacock's ECR was limited to the one JOMYAK product photographed by Mr. Gruenhagen - the package containing "3.6g x 48JH" with the cartoon hippopotamus on the front which appears from the Chemical Composition sheets later produced by Rhee to be Product No. 12514K. He was not provided with copies of the packaging for the other JOMYAK products (Nos. 12519K or 12515K) at issue here and therefore could not testify from personal knowledge in regard thereto at hearing. Tr. 216-18. However, Respondent does not appear to dispute Complainant's assertions that none of JOMYAK products distributed by Rhee during the relevant period were registered with EPA or had extensive English language labeling.

[16] While three months might seem an unduly long time for EPA to confirm that *naphthalene mothballs* are a pesticide and that this particular product was not registered with EPA, especially since as discussed *infra*, EPA had already taken enforcement action in regard to the same or similar OXY moth repellant products in the *Hannam Chain* case, and since it appears that nothing of substance actually occurred during the two months after Mr. Peacock's review, Ms. Toffel stated in her experience the turn-around time on this ECR request was "*short*." Tr. 285. Mr. Peacock stated he was not concerned about the delay because he presumed that EPA had followed its typical practice of stopping the sale of the pesticide as soon as it was discovered to be unregistered. Tr. 204-06.

meeting. C's Exs. 12B and 12C; Tr. 77, 367. Subsequently, at Mr. Yum's request, Mr. Davidson faxed a list of six categories of documents to Rhee, indicating he would collect the documents at their upcoming meeting. C's Ex. 12D; Tr. 77-78, 93, 368.

Mr. Davidson followed up this initial contact by meeting in person with Mr. Yum at Rhee's facility on February 2, 2004. Tr. 78, 368. In response to MDA's prior request, Mr. Yum produced at the meeting some 46 documents, including a Purchase Record summary by arrival date of Rhee's importation since 1999 of three OXY products (nos. 12514K, 12515K and 12519K), a computer compiled Sales Record evidencing Rhee's distribution of JOMYAK products to retail stores over the past five years, an undated computer generated photograph of three types of OXY JOMYAK products (identified thereon as nos. 12514K, 12515K and 12519K), Chemical Composition Sheets issued by OXY on January 29, 2004 for three products (identified as nos. 12514K, 12515K and 12519K) , and the Material Safety Data Sheet for Naphthalene.[17] C's Exs. 12E and 12F; Tr. 81-86, 93-94, 368. Additionally, at Mr. Davidson's request, Mr. Yum produced copies of some invoices from R&G Corporation reflecting Rhee's importation of JOMYAK and Rhee's invoices to customers who purchased JOMYAK from it.

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[17] The computer generated photograph of the three OXY products, identifying each by product number in *computer generated print*, is inconsistent with both the Chemical Composition Sheets which are *handmarked* with the same three product numbers as well as Rhee's Invoices (both for import and sale) on which the product numbers and a description thereof appear in print. *Compare*, C's Exs. 2 and 12F. For example, the photograph identifies the OXY product found and photographed by Mr. Gruenhagen at Han Mi - a bag containing "3.6g x 48JH" mothballs, displaying a cartoon hippopotamus- as product number "12519K." C's Exs. 2, 12F p. 2. However, the Chemical Composition sheet hand-marked with the number "12519K" and Rhee's Invoices for product number 12519K, describe a different JOMYAK (Naphthalene) OXY product by that number, specifically a product containing only *six* (6) *pieces*, each weighing *36 grams*. C's Ex. 12F pps. 5, 42. The product (the bag of moth tablets displaying the hippopotamus) Mr. Gruenhagen found at Han Mi appears from the Chemical Composition sheets and Invoices to instead be product no. "12514K." C's Ex. 12F pps.1, 3, 33, 36. OXY JOMYAK product number 12515K appears from the photograph, Chemical Composition Sheet, and Invoices to be a packet containing two bar shaped pieces weighing 30 grams each, wrapped in opaque packaging with a drawing of a wardrobe, dresser, *etc*., but no cartoon characters appearing thereon. C's Ex. 12F pps. 1, 2, 4, 27, 40. The record does not appear to contain any Chemical Composition sheet for the third product reflected in the photograph (a bag containing small white tablets the stated number and weight of which cannot be visualized, exhibiting on its packaging drawings of a dresser, suitcase, toilet, *etc*., but no hippopotamus). *More importantly*, the record does not contain a photograph or any narrative description of the third OXY JOMYAK product sold by Rhee, product no. 12519K containing 6 pieces each weighing 36 grams, and thus it is impossible from the record to make any findings regarding the shape of this product or its packaging except to say that, by virtue of number and weight, the items would not likely be a package of traditionally shaped or sized moth*balls*.

C's Exs. 12E and 12F; Tr. 81-86, 93-94, 368. Rhee's Purchase Record indicated that it imported 600 cartons of JOMYAK products (each containing 20 individual packages) between 1999 and May 2003, and sold or distributed 467 cartons of product between January 25, 2000 and July 2003. C's Ex. 12F; Tr. 246-48.

During the meeting, Mr. Yum also provided MDA with background information about Rhee's business and operations generally, and particularly with reference to OXY JOMYAK naphthalene products. C's Ex. 12E. Specifically, Mr. Yum advised Mr. Davidson that, while Rhee had imported and distributed OXY JOMYAK products consistently for a number of years, it had "stopped receiving Jomyak last May (03) and they stopped distributing it to their retailers as of *July (03)*." C's Ex. 12E (italics added).

At the conclusion of the meeting, at MDA's request, Mr. Yum voluntarily gave the state inspectors access to Rhee's warehouse, so they could confirm for themselves that Rhee no longer held JOMYAK products for distribution. Tr. 89, 93; C's Ex. 12E. Finding no product, Mr. Davidson testified, he saw no reason at that point to issue a stop sale order to Rhee and so did not do so. Tr. 100.

Subsequently, to further confirm the accuracy of Mr. Yum's representations regarding the fact that Rhee had not distributed JOMYAK since July 2003, over the following few weeks the MDA inspectors visited two retail outlets to which Rhee had previously sold products. No JOMYAK mothball products were found at either location and one store told the inspectors that it "hasn't seen any Jomyak for a long time." Tr. 89-91, 97-98; C's Ex. 12E.

On February 19, 2004, MDA returned the case to EPA Region III along with the results of its inspection. Tr. 91-92, 243, 285; C's Ex. 12A. No government entity contacted Rhee further regarding its sale of JOMYAK until the Complaint in this case was filed on January 25, 2005, almost a year after the MDA inspection of the facility. Tr. 245-46, 286.

III. PENALTY CRITERIA

The assessment of civil administrative penalties is governed by the Consolidated Rules of Practice, 40 C.F.R. Part 22, which provide in pertinent part that:

> [i]f the Presiding Officer determines that a violation has occurred and the complaint seeks a civil penalty, the Presiding Officer shall determine the amount of the recommended civil penalty based upon the evidence in the record and in accordance with any civil penalty criteria in the Act. The Presiding Officer shall [also] consider any civil penalty guidelines issued under the Act.

40 C.F.R. § 22.27(b). The Complainant bears the burdens of presentation and persuasion to show that the relief sought in this case is "appropriate." 40 C.F.R. § 22.24(a).

In regard to any relevant "civil penalty criteria in the Act," Section 14(a)(1) of FIFRA, 7 U.S.C. § 136*l*(a)(1), provides that "[a]ny . . . distributor who violates any provision of this subchapter may be assessed a civil penalty by the Administrator of not more than $5,000 for each offense." The Debt Collection Improvement Act of 1996 authorized a 10 percent upward adjustment in such penalty, thus raising the maximum penalty to $5,500 per offense. 31 U.S.C. § 3701; 40 C.F.R. § 19.4. *See also*, C's Ex. 17; Tr. 248-49.

FIFRA Section 14(a)(4) further provides in pertinent part that:

> In determining the amount of the penalty, the Administrator shall consider the appropriateness of such penalty to
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> [1] the size of the business of the person charged,
>
> [2] the effect on the person's ability to continue in business, and
>
> [3] the gravity of the violation.

7 U.S.C. § 136*l*(a)(4)(numeration added).

In terms of civil penalty guidelines issued under the Act, on July 2, 1990, EPA's Office of Compliance Monitoring, Office of Pesticides and Toxic Substances issued an Enforcement Response Policy for the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) (hereinafter cited as "the ERP"). C's Ex. 15. The ERP sets forth a "five stage process" for computing a penalty in consideration of the three statutory (FIFRA Section 14(a)(4)) penalty criteria. *Id.* at 18.

IV. DISCUSSION OF PENALTY CRITERIA

At the hearing, Complainant proposed a revised civil penalty of $1,306,800 for Rhee's distribution of JOMYAK. Complainant argues that it properly applied the FIFRA statutory penalty factors and the ERP, it has met its burdens, and the imposition of a penalty of $1,306,800 is appropriate in this case. Ms. Melissa Toffel testified that she calculated this penalty for the Agency utilizing the ERP's five step process in regard to *264 separate distributions* by Rhee of one or more of the three sizes/types of "JOMYAK (naphthalene), OXY," products between January 25, 2000 through July 2003. Tr. 249-51, C's Ex. 32.

Respondent argues that such a penalty is excessive and a penalty in the range of $118,000 is more appropriate.

A. Gravity of the Violation

Complainant argues that the proposed penalty of approximately 1.3 million dollars is appropriate in light of the "gravity" of the violations which it calculated utilizing the methodology set forth in the ERP. Citing various cases, Complainant states that Administrative Law Judges (ALJs) and the Environmental Appeals Board (EAB) have fairly "consistently considered" the violations at issue here, *i.e.* selling an unregistered pesticide, as a "level 2" type violation under the ERP based upon the fact that such violation undermines the FIFRA program's purpose, which was described by Mr. Peacock at hearing as "assuring that pesticides sold in the United States are effective and do not cause unreasonable harm to man and the environment," and ensuring that pesticide labels provide "all the information that users would need in order to use the product safely and effectively." C's PHB at 12-13, Tr. 165.

Specifically, Ms. Toffel explained at the hearing that her first step in the penalty calculation process was to look at the ERP's Appendix A, entitled "FIFRA Charges and Gravity Levels," which assigns to the various types of FIFRA violations a numerical "level" ranging from 1 to 4, with 1 being deemed the most severe type of violation, and 4 being deemed the least severe. Tr. 252; C's Ex. 15 at Appendix A-1 to A-7. Level 1 type violations are those that are knowing and willful such as violating a "Stop Sale" Order or "knowingly falsifying" any part of an application for registration. C's Ex. 15 at Appendix A-5 to A-6. Level 4 type violations include such less significant acts as distributing a registered pesticide with a label not bearing the registration number or submitting a late report to the Administrator. C's Ex. 15 at Appendix A-1, A-6. Ms. Toffel stated that in this instance Appendix A reflects that the severity level for a violation involving the sale of an unregistered pesticide (a FIFRA § 12(a)(1)(A) violation) is "Level 2." Tr. 252; C's Ex. 15 at Appendix A-1, C's Ex. 32.

B. Size of Business

The second step in the ERP penalty calculation process undertaken by Ms. Toffel involved determining the "size of business category" for Rhee using ERP Table 2. Tr. 252-53; C's Ex. 15 at 20. Table 2 divides FIFRA Section 14(a)(1) violators (registrants, wholesalers, distributors) into three business size categories - Category I are businesses with over $1,000,000 in gross revenues in the prior calender year, Category II applies to businesses with prior year gross revenues from $300,001 to $1,000,000, and Category III are businesses with gross revenues at or below $300,000. C's Ex. 15 at 20; Tr. 290-91. Relying upon a Dun & Bradstreet report she acquired in January 2004 (C's Ex. 23), which reflected that Respondent's annual gross sales exceeded $95,000,000, Ms. Toffel placed Rhee in size of business Category I (gross revenues over $1 million) for penalty calculation purposes.[18] Tr. 253-54; C's Ex. 32.

[18] The ERP states that the gross revenue figure to be used in categorizing businesses is that for the "prior calendar year," although it does not specify which "prior" calendar year, *i.e.*, the year preceding either the violation, the penalty calculation, or the action being filed. C's Ex. 15 at 20. However, in context, it appears that the prior year would be the calendar year preceding the year in which the penalty was being calculated using the ERP. In this case, that would be the

In response, relying upon computerized sales records, Mr. David Lee, Respondent's managing director responsible for supervising its general operations, purchases and sales, testified at hearing that Rhee's total gross sales for all OXY products during the relevant time period of January 2000 through July 2003 totaled only $11,263.25, and its net profit, before taxes, was only $1,000, taking into account expenses including the wholesale and retail price, shipping and handling expenses, customs tax, ocean freight, harbor/airport fee, and customs broker fee. Tr. 321, 325, 351, 355-56; R's Ex. 1. He explained that Rhee's primary business is the sale of food items and that non-food items, such as household goods, represent less than three percent of Rhee's total sales, and OXY products, in particular, represented only 0.004 percent of Rhee's total sales. Tr. 323, 337-38.

In its Post-Hearing Brief, Complainant elaborates on its position that the 1.3 million dollar proposed penalty is appropriate in relation to the size of Respondent's business because of: (a) the 2004 Dun & Bradstreet Report indicating that in its 2003 fiscal year (July 1, 2002 through June 30, 2003), Rhee's gross annual sales totaled $95,332,226 (C's Ex. 23); and (b) the statement in the ERP that such gross sales figures are to be used to categorize respondents "[i]n order to provide equitable penalties, the civil penalties that will be assessed for violations of FIFRA will generally decrease as the size of business decreases and vice versa." C's PHB at 14-15 (quoting C's Ex. 15). Complainant states that it did not take into account Rhee's profit margins in calculating the penalty because the ERP does not provide for consideration of profit margins in setting penalties, nor did it account for the small amount percentage of Rhee's overall sales represented by OXY products, and because the "EAB has specifically rejected the argument that lower penalties are indicated when the value of sales of the unregistered product represents only a small percentage of a company's total gross sales," citing *Green Thumb Nursery, Inc.*, 6 E.A.D. 782, 802-03 (EAB 1997) as well as *Kirlin Enterprises, Inc.*, 2 E.A.D. 290, 291 n.6 (CJO 1986) for the proposition that the Agency looks to the entire corporate entity's size of operation to determine a penalty and not merely to the size of a particular legally indistinct division. C's PHB at 16-17; Tr. 301-02. As stated in the ERP, EPA argues that measuring a company upon gross sales is a more "economically pure indicator of size than profits and therefore more likely to 'ensur[e] . . . comparable penalty assessments for comparable violations.'" C's PHB at 17 (quoting C's Ex. 15). Further, EPA argues that it believes that "judging a company's 'size of business' based on profits may unfairly penalize companies that operate their businesses more efficiently." C's PHB at 17. In addition, Complainant points out in its Brief that economic benefit is not a statutory factor for penalty determinations under FIFRA and that Respondent has

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2004 calendar year, in that the proposed penalty in this case was calculated in 2005. Ms. Toffel, however, did not rely upon any statements of Rhee's gross revenues in calender year 2004 in calculating the penalty. Rather, she testified that she obtained a Dun and Bradstreet report containing data as to Rhee's gross revenues from July 1, 2002 to June 30, 2003 on January 7, 2004, and that she "submitted another Dun and Bradstreet request in November to see if anything had changed, but there was no new updated information." Tr. 253-54. In that Respondent has not suggested its gross sales for the 2004 calendar year would be significantly less, *i.e.* under the 1 million threshold so as to not be considered a Category I business under the ERP, this error appears to be of no significance in this particular case.

not raised an inability-to-pay defense. C's PHB at 60-61.

In its Post-Hearing Brief, Respondent reiterates that it obtained minimal economic benefit from its sale of JOMYAK as evidenced by the small gross and net profits it made on the products sold. Further, Rhee notes that in fiscal year 2003, when it had the gross annual sales of approximately $95 million referred to by Complainant, its net income before federal taxes was only $737,731, and a net income *after federal taxes* was a mere $256,753. R's PHB at 2, 15, 22, 32; C's Ex. 23. Moreover, Respondent implies that these modest net income figures are not aberrations but fairly represent its customary net income, in that its net income before taxes for the prior fiscal year (2002) was similar ($749,880).[19] *See* R's PHB at 2; C's Ex. 23. Taking into account the financial figures presented, imposing the proposed penalty of $1.3 million is grossly excessive, Respondent argues. R's PHB at 15. Respondent also argues in a footnote that the fact that it is classified as a "large business" does not itself warrant such a large penalty, citing to the ALJ's decision in *FRM Chem, Inc.*, EPA Docket No. FIFRA-07-2004-0041 (ALJ, Feb. 16, 2005). R's PHB at 32 and n. 20.

Since Respondent's Post-Hearing Brief was filed, the ALJ's penalty assessment, including the reasoning for mitigation based on size of business, was rejected by the EAB in *FRM Chem, Inc*, 2006 EPA App. LEXIS 28 (EAB 2006). *Green Thumb* better illustrates Rhee's concerns, and is an interesting case for the Agency to cite in this instance particularly when it is discussing size of business, the ERP's use of gross sales figures, and "comparable penalty assessments for comparable violations." *Green Thumb* involved a company which was *in the business of selling chemicals* used for pools, lawns and gardens, under its own brand name. 6 E.A.D. at 783. It sold "thousands of gallons" of an unregistered pesticide product for 4-5 years, and the evidence indicated that the Respondent waited *a year* after its supplier notified it of the need to register the product before it did so. *Id.* at 785-86. Green Thumb's gross revenue from all its product sales was about 1.8 million dollars per year and it estimated that its sales of the unregistered pesticide totaled "*only a few thousand dollars a month.*" *Id.* at 802 (emphasis added). In comparison, Rhee, with 52 times the amount of gross sales as Green Thumb, only grossed about $262 per month from its sales of the pesticide at issue, according to Mr. Lee's figures. In *Green Thumb*, the EAB noted that the ERP uses gross sales figures to categorize businesses, and it was unpersuaded to lower the *$4,000* assessed penalty in that case on grounds that the sales of the offending product was perhaps two percent of the company's yearly gross sales. On the one hand, Green Thumb is a much smaller company than Rhee in terms of total gross sales, and on the other hand, it is a much larger company than Rhee in terms of gross sales of the pesticide at issue, an even larger company than Rhee in terms of gross sales of pesticides in general, and an extreme magnitude larger than Rhee in terms of net profits from pesticide sales, but the two companies are classified in the same "size of business" category. As recognized by the EAB in the *Green Thumb* decision, the ERP's penalty guidelines "are not regulations and are not binding." *Id.* n.38.

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[19] The Dun & Bradstreet Report further indicates that Rhee's net income for its 2001 fiscal year was only *$44,873*, and for its 2000 fiscal year was $648,970. C's Ex. 23.

Moreover, it is well known that certain businesses have large amounts of gross sales, but small net profit margins, such as grocery stores, whereas other companies, like those in the automobile manufacturing industry, have much higher profit margins on far less sales. As a result, two companies, both with gross sales of $95 million, both equally well run, can net far different profits *i.e.* a one percent profit equaling $950,000 in one case and a five percent profit totaling $4,750,000 in another. As the Agency would have it, under the ERP both companies committing the same violations would pay the same penalty but obviously the impact of the penalty on one company would be far greater than the impact on the other. This suggests that the same penalty may not necessarily be equally "appropriate" to the size of both businesses. In certain circumstances, particularly where numerous units of violation are alleged with correspondingly high proposed penalties, financial figures other than gross profits may be considered along with gross profits in determining whether a particular penalty for a certain violation is "appropriate" in relation to the size of the violator's business, in penalty determinations under FIFRA Section 14(a)(4).[20]

C. The Matrix in the ERP

The third step in the ERP calculation process followed by Ms. Toffel was to apply the violation level number of "2" and the size of business category of "I" to the "Gravity Based Penalty Matrix for FIFRA Violations Which Occur After January 30, 1997" for FIFRA Section 14(a)(1) violators, set out in the ERP. C's Ex. 15 at 19-A; Tr. 288-89. Such application establishes a base penalty amount of $5,500 per violation, the maximum penalty permitted by law, for each of Rhee's FIFRA violations.[21] Tr. 254-55; C's Ex. 32.

D. Adjustments under the ERP

In terms of the fourth step in the penalty calculation process, the ERP provides that because "the actual circumstances of the violation [may] differ from the 'average' circumstances assumed in each gravity level of the Civil Penalty Matrices, the dollar amount derived from the matrix should be adjusted upward or downward." C's Ex. 15 at 21. To accomplish this fashioning of a penalty more closely aligned to the *actual* circumstances of the violation, the ERP lists a total of five adjustment factors to be considered in determining a proposed penalty. Three

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[20] It is noted that the statute, FIFRA Section 14(a)(4) does not provide any guidance as to what evidence should be taken into account in evaluating the three factors set forth therein.

[21] The base penalties in this Matrix range from $1,100 for a Level 4 violation by a Category III business to $5,500, the maximum penalty allowed by law, for a Level 2 violation by Category I size business (as in this case) or a Level I violation by *any Category size business*. Thus, in this case, under the ERP, it was immaterial whether EPA's ERP designated the violation as Level 1 or 2, since the base penalty would be the same based upon the size of business as Category I.

of the adjustment factors: "pesticide toxicity," "human harm," and "environmental harm," are geared towards reflecting the actual *gravity of the harm*. The two other adjustment factors, "compliance history" and "culpability," reflect the actual *gravity of the misconduct*. C's Ex. 15 at 21. Numerical values for these adjustments factors - ranging from zero to five, are set forth in the ERP's Appendix B entitled "Gravity Adjustment Criteria." Unlike the FIFRA Violation Levels and Size of Business categories in Appendix A, the lower numerical values in Appendix B represent the least serious violations, *i.e.*, those with the smallest risk of harm or potential for harm. The ERP provides that the gravity adjustment numbers from each of the five adjustment factors are to be added (up to a maximum total value of 21) and, based upon Table 3 in the ERP (C's Ex. 15 at 22), the gravity base penalty is either assessed as is, raised or lowered. *See*, Tr. 289. If the sum of the adjustment factors is 7 or below, the penalty is reduced or eliminated, if the sum is between 8 to 12, the base penalty is assessed, and if the sum of adjustments is 13 or above the penalty is theoretically increased.[22] C's Ex. 15 at 22.

E. Toxicity

To account for the relative toxicity of the specific pesticide involved in the violations, the first of the five adjustment criteria, set forth in Appendix B or the ERP provides only two numerical choices, *i.e*. either "1" or "2." Pesticides rating a "1" are those in Toxicity Categories II through IV, pesticides assigned the signal word "warning" or "caution,"[23] and those with no known chronic effects. Pesticides rating a "2" are Toxicity Category I pesticides, pesticides requiring the signal word of "danger," restricted use pesticides, pesticides that are flammable or explosive, or pesticides with chronic health effects. C's Ex. 15 at Appendix B-1. Ms. Toffel stated that based on the Material Safety Data sheet for naphthalene, she determined that the missing signal word from the JOMYAK Pesticide label was "warning." Tr. 313; C's Ex 12F. She therefore assigned the lower value of "1" to "pesticide toxicity." Tr. 256; C's Ex. 32; C's PHB at 18. However, in a footnote to its Post-Hearing Brief, EPA cites Dr. Rotenberg's testimony regarding the existence of some scientific evidence suggesting that naphthalene is carcinogenic, suggesting it could have justified assigned the higher value of "2" for toxicity to

[22] Of course, in cases such as this involving a Level 2 violation by a Category I violator or in any case involving a Level 1 violation, the penalty cannot be *increased* through the application of adjustment factors relevant to the particular case because the base penalty set forth in the Matrix is *already* the maximum penalty allowed by law.

[23] EPA requires that certain "signal words" be placed on the labels of registered pesticides to epitomize the toxicity level of the pesticide (40 C.F.R. § 156.64(a)). Four toxicity levels are established ranging from I to IV with Category I representing the highest toxicity (40 C.F.R. § 156.62). A Category I pesticide requires the signal word "Danger" and, depending on the reason for the assignment of Toxicity Category I, the word "poison" in red on a contrasting background with the "skull and crossbones" in immediate proximity. A Category II pesticide requires the signal word "Warning." The word "Caution" is required on the labels of Category III pesticides and, if a signal word is used, on Category IV pesticides.

JOMYAK under the ERP.[24] C's PHB at 18 n.13.

F. Harm to Human Health

The second adjustment factor to be used to modify the penalty to the actual violation is "Harm to Human Health." As to this, the ERP provides for three numerical values: 1, 3, and 5. The value of "1" represents "minor potential or actual harm to human health, neither serious nor widespread;" the value of "3" represents the "potential for serious or widespread harm to health or where harm to health is unknown;" and the value of "5" applies to cases where "actual serious or widespread harm to human health occurred." C's Ex. 15 at Appendix B-1; Tr. 256. For ERP purposes, "minor harm" is defined as harm "which is or would be of short duration, no lasting effects or permanent damage, effects are easily reversible . . . does not or would not result in significant monetary loss." C's Ex. 15 at Appendix B-3, n. 3. At the hearing, Ms. Toffel stated that because Rhee distributed its unregistered products during a period of three and a half years (from January 2000 to July 2003) to over 20 states, with 9300 individual packages being sold, and the material safety data sheet regarding naphthalene evidences its potentially harmful effects to human health, she determined that Rhee's violations had the potential to cause "serious or widespread harm to human health" and so assigned each of them a value of "3."[25] Tr. 256-61, 293, 304-05; C's Exs. 19, 20, 32.

In support of this assessment, Complainant introduced the testimony of Dr. Samuel Rotenberg, a regional toxicologist with EPA Region III, who testified without objection as an expert in the field of "naphthalene exposure pathways and the health effects associated with exposure to naphthalene mothballs." C's Ex. 26; Tr. 102, 108. A "common chemical found in lots of petroleum products," Dr. Rotenberg indicated that naphthalene is an "aromatic hydrocarbon" made up of "two fused benzine [sic] rings." Tr. 135-36, 107. Dr. Rotenberg relied for his testimony on his own personal and professional knowledge as well as upon various reference authorities, including EPA's Integrated Risk Information Database System (IRIS) (C's Ex. 28), EPA's Air Toxics Website Summary Report (C's Ex. 30), and a toxicology profile from the Children's Health Environmental Coalition (CHEC) website (C's Ex. 31). Dr. Rotenberg opined that the three main pathways by which one could be exposed to naphthalene products, particularly naphthalene mothballs, are oral ingestion, vapor inhalation, and dermal absorption. Tr. 111. Short term exposure to naphthalene affects the central nervous system, causing dizziness, nausea, blurred vision, and possibly hemolytic anemia, which can be life threatening, particularly to those individuals who are glucose 6-phosphate dehydrogenase deficient. Tr. 112-13, 119, 152. Dr. Rotenberg testified that although naphthalene-induced hemolytic anemia can

[24] Ms. Toffel testified at hearing that she was unaware of this fact at the time she rated JOMYAK as a level "1" pesticide. Tr. 313.

[25] On cross-examination, Ms. Toffel acknowledged that the ERP definition of "serious and widespread harm" does not reference the extent of geographical distribution of a product. C's Ex. 15 at Appendix B-3, n 2; Tr. 294-95, 302-03.

occur in any population, it is most commonly observed in males of African or black descent, Jews who are also black, and in a variety of Asian populations. Tr. 118-20, 149-50. The subset of people affected by the condition ranges from one to twenty percent, depending on the specific population group. Tr. 120. Further, Dr. Rotenberg opined that recent animal studies suggest that naphthalene is carcinogenic. Tr. 135-36; C's Ex. 40.

As part of his testimony, Dr. Rotenberg reported on data collected on naphthalene moth repellant poisoning incidents by The American Association of Poison Control Centers (AAPCC) through its Toxic Exposure Surveillance System. Tr. 120-21; C's Ex. 39. He stated that the data he reviewed, covering a period of about 20 years leading up to 2002,[26] evidences the consistent reporting to AAPCC of 1500 to 2000 incidents per year of naphthalene exposure. He opined that those cumulative figures likely underestimate the actual number of yearly poisoning incidents occurring, since the data only captures 95 percent of the calls made to poison control centers and does not include people who went to emergency rooms for treatment. Tr. 121, 123-24; C's Ex. 39. Additionally, *where the data is available to it*, the AAPCC reports provide a breakdown in exposure incidences in terms of the age of the person exposed (<6, 6-19, >19 years), the reason for exposure (unintentional, intentional, "other," adverse reaction), whether treated in a health care facility, and the outcome of exposure - either as "None," "Minor" (defined as having developed some signs or symptoms of illness which were minimally bothersome and generally resolved rapidly with no residual disability or disfiguration), "Moderate" (more pronounced or prolonged symptoms usually requiring some form of treatment), "Major" (life threatening exposure or resulted in significant residual disability or disfigurement), or "Death." Tr. 127-30. For example, for 2002, the AAPCC data indicated that of the total of 1,883 such naphthalene moth repellant exposures reported to it, 1,367 involved children under age six. Tr. 131; C's Ex. 39. Further, 1,831 of the 1,883 total exposures were reported as unintentional, with 404 being treated in a health care facility. C's Ex. 39. In terms of outcome, the AAPCC seems to have collected data from slightly less than half (902) of the exposure incidents reported to it for that year, and of those, 740 suffered no effect, 135 reportedly suffered a "minor effect," 23 had "moderate effect," four had a "major effect," and there were no deaths.[27] Tr. 131; C's Ex. 39.

At the hearing, Dr. Rotenberg testified that his main concern about naphthalene mothballs

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[26] Dr. Rotenberg indicated that he could not access the data for years 2003 and 2004 presumably because those reports are only accessible for a fee. Tr. 122. Further, the selections of AAPCC data Complainant submitted into the record are for the years 1998, 1999, and 2002, only. C's Ex. 39.

[27] It is impossible to determine from the AAPCC data if the 27 moderate and major effects suffered were incurred by some or all of the 50 or so persons who that year *intentionally* exposed themselves to naphthalene, probably in particularly high doses and who probably also intentionally avoided seeking medical care for such exposure in a timely manner, and although one might well imagine that to be the case. What is interesting is that of the 50 or so intentional exposures that year, no deaths were reported, suggesting that naphthalene is not a particularly efficient poison.

is that while adults are likely to recognize a naphthalene mothball's distinct chemical odor as making it a non-food item, children may not, and "they would simply take a mothball and eat it, because it's small and round and has the appearance of some candies." Tr. 111-15, 138-40. Furthermore, because children weigh less, the actual dose (concentration per unit mass) in the bloodstream of a child consuming even one mothball would be greater than that for an adult. Tr. 115. For an adult, Dr. Rotenberg said, a lethal dose of naphthalene is 15 to 30 grams, whereas for a child it is about two grams. Tr. 115-16. Thus, untreated, the ingestion of a single mothball could be fatal to a child and, for this reason Dr. Rotenberg stated that he was in agreement with the CHEC's ranking naphthalene among those chemicals with the highest classification rating in regard to potential risks to children from exposure.[28] Tr. 115-18; C's Ex. 31. Dr. Rotenberg opined that the extent of the effect children suffer from naphthalene exposure is generally attributable to the point at which intervention occurs. Tr. 156.

Upon cross-examination, Dr. Rotenberg acknowledged that the AAPCC data does not distinguish between exposures involving registered and non-registered pesticides. Tr. 154-55. In addition, he admitted that according to the AAPCC report for 1999, 97 to 98 percent of all naphthalene exposure cases reporting an outcome, indicated it as either having no effect or a minor effect, and that the AAPCC definition of "minor outcomes" would fall within the ERP definition as having a "*minor* potential for actual harm to human health," *i.e.* of short duration, reversible, no lasting effect.[29] Tr. 143-44. He further agreed with the fact that no other toxic substance reported on same page in the AAPCC report had so little negative effect on those who came in contact with it. Tr. 141-142. In addition, Dr. Rotenberg acknowledged that the AAPCC report for 1998 indicates that many other common household substances have higher pediatric poisoning incident rates and higher incidences of causing significant effect than naphthalene. For example, pine oil, for which the 1998 report indicated a yearly incident rate for children under age 6 of 7,030, with only 69 percent of the total cases reporting outcomes (2,843 of 4,095 cases) stating "no effect" occurred, and air fresheners as to which 11,620 cases of pediatric exposures

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[28] Dr. Rotenberg stated that this Coalition is a "non-profit grouping of interested scientists and probably public health advocates . . . . " Tr. 116.

[29] At the hearing, Respondent asked Dr. Rotenberg to extrapolate from the AAPCC data assuming that 99% of all reported naphthalene exposure cases resulted in at most a minor outcome, the number of the 467 *sales* of JOMYAK that would result in a minor outcome. Dr. Rotenberg responded that if 400 children ate a mothball, he would be surprised if no fatality occurred, but that 99% of 467 is 462. Tr. 147-149. This statistical hypothetical is clearly fallacious because on the one hand the number 467 represents *cartons* of product sold and the record indicates that each carton contained 20 individual packages, and each package contained as many as four dozen mothballs, so the total potential product available to potentially cause a negative incident of exposure is much greater than 467. On the other hand, there is absolutely no evidence in the record as to the total number of naphthalene moth repellant products (registered and unregistered) sold and/or utilized each year in the United States. Thus, merely by knowing the absolute number of outcomes with a significant effect in a given year, one cannot extrapolate what percentage of poisoning incidences can be expected from Respondent's sales.

were reported in 1998 with only 61 percent of the total incidences reporting outcome (3,588 of 5,869 cases) indicating "no effect" had occurred. Tr. 141-42, 144-47; C's Ex. 39. Furthermore, Dr. Rotenberg admitted that, despite his mantra that mothballs can be lethal, the AAPCC reports indicated that no fatalities *at all* had been reported for 1998, 1999 and 2002, and that warning labels on packages are unlikely to be read by and influence to action children under age 6. Tr. 138, 148, 154; C's Ex. 39. In addition, he acknowledged that an almost statistically insignificant number of major or even moderate consequences occurred as a result of exposure.[30] Tr. 143-45. In addition, there is no evidence in this case, which involves hundreds of thousands of individual naphthalene balls or bars sold primarily to the Asian community, of *anyone* suffering any actual illness, much less a significant illness as a result, related to having glucose 6-phosphate dehydrogenase deficiency or otherwise. Tr. 118-19.

In further support of its assessment on the harm to human health, Complainant introduced the testimony of Mr. Daniel Peacock who, as indicated above, at Ms. Toffel's request, performed the Enforcement Case Review (ECR) on the *one* type JOMYAK product photographed by Mr. Gruenhagen.[31] Mr. Peacock testified that he is a biologist with 32 years of experience working in the Registration Division of EPA's Office of Pesticide Programs. Without objection, he was qualified and testified at hearing as an expert in the field of FIFRA's registration review process and pesticide label requirements.[32] Tr. 160, 169; C's Ex. 25. Mr. Peacock described his primary duties as reviewing 200 to 300 FIFRA pesticide registration applications per year (for a total of approximately 6,000 to date), informing companies of FIFRA's registration requirements, developing labeling guidance, and performing three to four ECRs per year, which involve determining whether a particular product needed to be registered or whether it otherwise complied with the law. Tr. 160-61, 163, 166-68. Mr. Peacock explained that the purpose of pesticide registration was to assure that pesticides sold in the United States "are effective, but don't cause unreasonable adverse effects upon man or the environment." Tr. 162. He indicated that, through registration, a pesticide producer obtains a "license" to market its product in the United States. Tr. 162. Registration generally involves Agency review of various forms, supporting toxicological data, and proposed labels submitted by an applicant to determine compliance with FIFRA and its implementing regulations. Tr. 163, 166. Mr. Peacock stated that

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[30] Dr. Rotenberg later clarified in his testimony that the reported adult deaths from naphthalene mothballs were the result of "successful" suicide attempts. Tr. 113. He also subsequently acknowledged that "we are not seeing deaths" of children from mothballs and that there "have been no deaths [of children] in this country" from mothballs." Tr. 133, 148.

[31] At hearing, Mr. Peacock acknowledged that he had not examined the other two package types of JOMYAK sold by Respondent, so he could not testify from personal knowledge with regard to those other products and their labeling. Tr. 218.

[32] It is noted that Complainant has not made an allegation of violation in this case as to "improper labeling." Tr. 221. The testimony of Mr. Peacock was merely directed at the factors to be considered in determining the penalty for Respondent's violations for selling an unregistered pesticide.

FIFRA assumes that people read and comply with product labels and thus the purposes of the labels are to provide users with all the information needed to use the product safely and effectively, to set the standard for enforcement actions for misuse, to mirror the data submitted in regard to it, and provide information to consumers, first responders and health care professions in the event of improper exposure. Tr. 165-66, 185-90. Mr. Peacock noted that there are specific statutory, regulatory and policy requirements regarding pesticide labels based upon toxicological data concerning acute exposures via various pathways. Tr. 164. The requirements include that labels be written in English, be of a certain type size and format, and include certain specified text. Tr. 164-65. To facilitate the registration process for naphthalene products, in 1998 the Agency developed a "format label" indicating all the combined labeling requirements for such product, which is periodically updated and announced to the regulated community through the issuance of Pesticide Registration Notices. Tr. 164, 175-79, 210-11; C's Exs. 14 and 33.

Mr. Peacock further testified that as part of the ECR he performed in connection with this case, he had compared the label in Korean on the OXY JOMYAK product shown in the photographs taken by Mr. Gruenhagen (C's Ex. 1) with the Format Label (C's Ex. 14) and found that the JOMYAK label thereon did not meet the legal requirements under FIFRA for registration and opined that the untranslated label was "perhaps the worst label I've ever reviewed in my entire career." Tr. 179-80, 192, 203-04; C's Exs. 9 and 10. Specifically, Mr. Peacock noted the JOMYAK label had numerous "serious" deficiencies in that it failed to include, *in English*, (1) the product name; (2) its use pattern on the front label (describing exact product use and in this particular case that product was to be used in an airtight container); (3) an ingredient statement (advising that the product contained naphthalene so that persons particularly sensitive to it could avoid purchasing the product); (4) the signal word "warning" ("encapsulating the overall toxicity to the potential buyer"); (5) a child hazard warning (*i.e.*, "keep out of reach of children"); (6) a referral statement on the front label panel (referring potential users to additional cautionary statements on side or back labeling panel); (7) the net weight in ounces and pounds; (8) a statement of hazard to humans (*i.e.* "fatal if inhaled, harmful if swallowed, avoid breathing vapors"); (9) a first-aid statement (providing necessary information to a user and/or first responder as to who to call and what to do in case of exposure); (10) a note to physician (providing information to physicians as to proper treatment for exposure); (11) a misuse statement (reminding users that it is against Federal law to misuse the product); (12) use restrictions (*i.e.* a warning not to use the product in containers such as dry cleaning bags where vapors may escape, or with other moth control chemicals); (13) pre-application directions (advising the user what to do prior to applying the product); (14) application directions (how to apply the product and application rates, such as how much to apply in a closet); (15) post-application directions (what a user should do after applying the product); (16) retreatment directions (*i.e.* what to do to use the product long term); (17) storage and disposal text (regarding how to properly store and dispose of the product, *i.e.* "never place unused product down indoor or outdoor drain"); (18) registration number (evidencing registration and used by EPA personnel for tracking products); (19) establishment registration number (which allows for tracking in the event of, for example, a leak incident); and (20) the company name *and address* (facilitating contact with the company in the event of incident or questions). Tr. 179-90; C's Ex. 34.

Mr. Peacock acknowledged that if the JOMYAK label was legally allowed to be written *in Korean*, instead of English, it would meet more, but not all, of the legal requirements for a pesticide label under FIFRA because it does state (in Korean as translated) certain directions as to how and where to use the product (*i.e* in closets, drawers and clothes storage, for deodorization in bathrooms, "use hygiene sheets enclosed when using in drawer or for clothing"), what it is and what it contains ("Insecticide," "Naphthalene"), as well as certain warnings ("Special Notices for Use. Be careful that children's hands not come in contact. Store out of direct sunlight. Be careful that it not be eaten or get into the eyes. Please consult with physician if eaten or if it gets in the eye."). Tr. 198-202; C's Exs. 13 and 36; Jt. Ex. 1 (Stips.) at 1-2. Additionally, the label in Korean provides OXY's address, telephone number, e-mail address and website.[33] C's Exs.13 and 36; Jt. Ex. 1 (Stips.) at 1-2. However, even in Korean, Mr. Peacock opined that the deficiencies in the label were serious and that as written it deprived users of important information on the product's safe and proper use, including information that it may be fatal if inhaled, to avoid inhalation exposure, how to respond to dermal or inhalation exposure, to store the product in a location inaccessible to children, and how to properly dispose of it. Tr. 200-02, 210, C's Ex. 36.

Furthermore, Mr. Peacock stated that in his professional judgment and based upon his personal experience as a father, he had "serious problems" with the packaging of the JOMYAK mothball product he had examined. Specifically, he was concerned that the package might be very attractive to a young child, who might want to get access to the product, because the package exhibited a graphic of a cartoon character and through the clear bag you could see what looked like white, sweet mints. Tr. 193-94, 206-09. Mr. Peacock stated that had OXY applied to register the product he would have requested the company change the packaging to remove the cartoon and replace the clear bag with an opaque box.[34] Tr. 194.

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[33] Mr. Peacock noted that the regulations (40 C.F.R. § 156.10(a)(3)) provide that the mandatory text on labels for pesticide products sold in the United States be written in English and make no allowances for foreign products, sold in ethnic markets, catering to persons literate in a language other than English, to appear instead in another language. However, the regulations do permit the labels on pesticides sold in the United States to include additional labeling in other languages as well. Tr. 191-92.

[34] At the hearing, Mr. Peacock could not cite to any legal authority for EPA demanding such a labeling and packaging change as a condition to registration under FIFRA. Tr. 221-23. Perhaps Mr. Peacock had in mind EPA's Labeling Review Manual, an Agency "instructional aid" publically available on its website, which he initiated. Tr. 161, 227. The Manual states in Chapter 18, Section VIII under the heading "Child-Attracting Packaging ('Attractive Nuisance')" that --

> [f]rom time to time, registrants package pesticides in containers attractive to children. Bait-type pesticides for rodents and roaches have been marketed in little doll houses, fire trucks, and other toy-like dispensers or containers that look like food containers, e.g., a milk-carton shape. The Agency has not found these types of packages to be acceptable. It may be difficult for the reviewer to determine the

However, during his testimony, Mr. Peacock did acknowledge that naphthalene products, essentially exactly the same as JOMYAK mothballs, have been on the market and registered for over 40 years and that if properly labeled, OXY's JOMYAK product would have been accepted for registration as a lawful pesticide under FIFRA. Tr. 175, 218-20. Further, Mr. Peacock stated that EPA considers mothball products such as JOMYAK to be effective, to have a "low" risk to human health, and to not cause "any unreasonable adverse effects to man or the environment." Tr. 220-21. Thus, he suggested that it is only the product's insufficient labeling, *not the product itself*, which accounts for EPA's classification under ERP as having a risk for causing "potentially serious and widespread harm to human health." Tr. 221.

In its Post-hearing Brief, EPA argues that its categorization of these violations as being in the middle of the range, *i.e.* a "3" on a 1 to 5 scale as to harm to human health, is justified based upon their potential for causing both "serious and widespread" harm., relying upon more than the insufficient labels as suggested by Mr. Peacock. C'S PHB at 19. Complainant claims that the violations represent a "serious" risk of harm to human health because Dr. Rotenberg testified that between 1500 and 2000 incidents of naphthalene exposure are reported yearly to the poisoning center, the majority of such exposures involve children under the age of 6, naphthalene can have short term negative health side effects, and it can even be lethal. *Id.* at 21-26. Furthermore, as to "widespread" nature of the harm, EPA reiterates that the evidence of record shows that Rhee sold 467 cases, each containing 20 packages of JOMYAK from January 25, 2000 through July 2003, a period three and a half years, in over 20 different states. *Id.* at 26. In its Post-Hearing Brief, Complainant acknowledges that while geographic scope of sales is not explicitly considered in the ERP, it asserts that risk of harm to human health "is a function of the number of households that use [the violative product]" and citing *Safe & Sure Products, Inc.*, 8 E.A.D. 517, 530, 1999 EPA App. LEXIS 24 (EAB 1999) and *Chempace Corp.*, 9 E.A.D. 119, 142, 2000 EPA App. LEXIS 15 (EAB 2000) and asserts that the EAB has recognized that "the large number of violations, the long period of time over which they occurred and the widespread distribution" as factors which can magnify the gravity of FIFRA violations. C's PHB at 27. In addition, EPA suggests that the pesticide products at issue here were packaged in such a way, with limited labeling in Korean, pastel colors, a cartoon hippopotamus, in clear bag through which objects looking like candy could be seen, that they created an attractive nuisance to kids and increased the risk of harm to all users. C's PHB at 27-36. Finally, in regard to this category, Complainant cites the decision in *Hing Mau, Inc.*, EPA Docket No. FIFRA-9-2001-0017, 2003 EPA ALJ LEXIS 63 (ALJ, August 25, 2003) where the Administrative Law Judge found that similar unregistered Asian naphthalene mothballs, which had more English labeling, were held to be

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> package style when the final printed label is only a printer's proof and is not usually given a final review. However, certain types of products amenable to such unacceptable packaging should be checked and if any doubt or suspicion arises, the applicant should be required to submit the intended packaging before the product is registered. The Agency can require child-resistant packaging when the toxicity criteria and use criteria are met. See 40 CFR. 157.22.

Http://www.epa.gov/oppfod01/labeling/lrm/chap-18.htm.

correctly characterized as a level "3" violation in terms of the risk of harm to human health. C's PHB at 36-38.

In its Post-Hearing Brief, Respondent argues to the contrary that the violations were minor and had little potential for harm to human health. R's PHB at 17. Mothballs are a ubiquitous, well known household insect repellant, with a "real telltale odor," that have been registered and sold for at least 40 years, Rhee states. R's PHB at 17. The adverse health effects of mothballs is 50 percent less than other common household products such as pine oil or air fresheners, as indicated by data presented by EPA. R's PHB at 17-18. Properly labeled, EPA would have registered JOMYAK as a pesticide, evidencing that its does not cause any "unreasonable effects to man or the environment." R's PHB at 18. Moreover, Rhee argues NJ DEP's and EPA's lax enforcement response "belies" the claim that naphthalene has the potential to cause major harm, noting that NJ DEP waited about two months after its inspection of Han Mi supermarket to issue a stop sale order, never penalized that retailer, never notified Rhee of its concerns, and waited almost three months to even notify EPA. *Id*. Similarly, EPA waited five months after NJ DEP's referral before asking MDA to investigate the matter, never issued a stop sale order, never investigated sales outside of Region III, and waited a year before bringing an action against Rhee, all suggesting EPA did not, in fact, consider JOMYAK to have the "serious and widespread" potential for harm it now alleges.[35] R's PHB at 18-19. Moreover, in determining the potential for harm as "serious and widespread," EPA considered factors not called for by the ERP such as the length of time JOMYAK was sold and the geographical dispersion of the sales. R's PHB at 19.

Additionally, Respondent argues that EPA's assertion that JOMYAK could be mistaken for candy is unsupported by any expert opinion. R's PHB at 19. Naphthalene products have a unique recognizable odor and the vast majority of the purchasers of the products were Koreans who could read the labeling, Rhee states. R's PHB at 20. JOMYAK was sold by Rhee's retailers in the household section of stores apart from food products. *Id*. EPA's own non-Korean witnesses acknowledged that they would not buy something and eat it or place it where a child could eat it without knowing what it was. Only one of the three package types of JOMYAK displayed the cartoon hippopotamus and that package type was not the one most often sold by Rhee.[36] R's PHB at 20-21. The other packages displayed a dresser and suitcase. *Id.* Unlike

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[35] I do not necessarily find the lack of alacrity in the state or federal government's efforts to contact Rhee regarding its wrongful distribution of OXY mothballs after the Han Mi inspection as clear evidence that the Agency had, inconsistently with its position here, previously concluded that the violations were not serious, as suggested by Respondent.

[36] Using the product numbers reflected on the Chemical Composition sheets (rather than the photograph, *see*, fn. 17, *supra*), the evidence shows that the JOMYAK package type most sold by Rhee during the relevant time period was product no. 12515K which contained two bars each weighing 30 grams. Rhee sold about 180 cartons of this product during the relevant period. During that same period it sold 176 cartons of product no. 12514K, the bag of 48 white tablets (weighing 3.6 grams each) displaying the cartoon hippopotamus, and 111 cartons of product no.

other mothball products in cases prosecuted by EPA, none of the products here were multicolored balls. R's PHB at 20-21.

Respondent further points out that there is no evidence in the record that any retailer or consumer ever complained to Rhee about JOMYAK or that anyone ever suffered any harm as a result of Rhee's sale of OXY JOMYAK moth control products. Mr. Lee's subordinate, Chang (C.J.) Yum, Rhee's purchasing manager, stated that he is not aware of any person being harmed as a result of exposure to the OXY mothballs sold by Rhee. Tr. 375-76. Mr. Lee stated that Rhee targets its products to Korean customers, over 90 percent of its retail customers are Korean-operated stores, and over 80 percent of the customers of those retail stores are Korean. Tr. 333-34. Mr. Lee further stated that based upon his visits to at least 300 of the retail stores to which Rhee distributes its products, he knows that OXY JOMYAK mothballs were sold in the household items section of the stores, which is separate from food items. Tr. 335-36, 345. Additionally, Mr. Lee testified that OXY mothballs were the only pesticide product Rhee ever sold.[37] Tr. 323.

Upon consideration of all the evidence presented, for the reasons suggested above and below, Complainant's rationale for characterizing the violations here as presenting a particularly "serious or widespread" risk of harm to human health is not very persuasive. Obviously, labeling, and pesticide registration under FIFRA, in which EPA determines a pesticide's effectiveness and sets measures to prevent any unreasonable adverse effects to man and the environment from the pesticide before it is publically marketed, is clearly of greater import for newly developed pesticide products which have as yet unknown risks, or for potentially highly toxic pesticides. Naphthalene moth repellant, however, is a very old, well established pesticide product, its proper use and effect is commonly known by all adults, and EPA made a favorable determination regarding its efficacy and risks *over 40 years ago* when it first registered such products and has continually approved the registration of the product ever since.[38] C's Ex. 10. In fact, registration of such products is so routine that the Agency has developed a "format label" which can be used for all such similar products. C's Ex. 14. Thus, as acknowledged by Mr. Peacock at hearing, had OXY sought registration of the products there is no question that, with proper labeling, that they would have been registered. Tr. 221.

12519K which contained 6 pieces (36 grams each), an example of the shape and packaging of which is not contained in the record. *See*, C's Ex. 18; Tr. 270-272 (regarding elimination of 2 product sales falling outside statute of limitations).

[37] Relying upon one of Rhee's import invoices (R's Ex. 2), Mr. Peacock suggested that Rhee *might have* imported other products which he suggested might be classified as "pesticides,' such as OXY Clean (a non-pollution oxygen bleach for clothes), but there is no proof of the accuracy of this suggestion in the record. Tr. 428-29; R's Ex. 2.

[38] It should be remembered that Mr. Peacock testified that EPA considers the chemical composition of naphthalene mothball products such as JOMYAK themselves to have a "low" risk to human health. Tr. 220-21.

Furthermore, Dr. Rotenberg and Complainant's other witnesses broadly suggested the "risk of harm" in this case was increased by the mothballs' "candy like" appearance and the child attractive packaging. However, as Respondent points out, the OXY product it *most sold* was not moth*balls*, but approximately 6-inch long *bars* (JOMYAK 12515K), in opaque packaging, which are not likely to be confused with candy or swallowed by children or adults. C's Exs.12F, 18; fn 36 *supra*. Only *one* of three products Rhee sold were mothballs and displayed a cartoon hippopotamus character.[39] *See*, fn. 17 and 36 *supra*. Further, the evidence suggests each package of JOMYAK sold by Rhee displayed pictures indicating placement or use of the products in suitcases, closets, drawers and toilets, clearly indicating to any normally intelligent adult that the product was not candy. C's Exs. 1, 12F; 6 (NJ DEP Compliance Evaluation Summary "The pictorial portion of the packaging printed in the Korean language suggested the pellets were to be used for the control of clothes moths."). Moreover, all of the mothballs at issue here had a traditional white appearance, unlike those in other Agency mothball enforcement cases which were multi-colored pastel and thus more "candy-like" in appearance. *See, e.g. Hing Mau, Inc.*, EPA Docket No. FIFRA-9-2001-0017, 2003 EPA ALJ LEXIS 63 *17-18 (ALJ, Aug. 25, 2003)(multicolored mothballs) and Lowell Declaration, Attachment (EPA Region 9 Press Release dated December 9, 2004, indicating that the Agency "fined a San Francisco importer [American Wah Ta] *$3,960* for allegedly selling and distributing an unregistered pesticide" described and appearing in the picture within the Press Release (found at http://yosemite.epa.gov/opa/admpress.nsf/34cef4854b892b8b8525645a004de9a4/b5ba9ae86e245b2e852570d8005e16d7!OpenDocument) as small multicolored camphor/naphthalene balls looking exactly like candy in a clear bag without proper labeling.). Nevertheless, Complainant's penalty calculation regarding risk of harm makes no distinction at all between the products sold in this case and those appearing far more candy-like in other cases, such as in *Hing Mau*, or even among the three various shaped or packaged products sold in this case. *See*, fn. 17 *supra.*

G. Environmental Harm

The third adjustment factor in the ERP's Appendix B, "Environmental Harm," has the same three levels of 1, 3, and 5 as for Harm to Human Health and they are defined and divided the same as those for the second adjustment factor but in regard to the environment. C's Ex. 15

[39] It is also noted that the information on JOMYAK which Ms. Toffel obtained from OXY's website in September 2003 during her preparation of the case (and which she provided to Mr. Peacock for use in his ECR) indicates that at that point OXY's "Hippo the Mothbuster" products were being packaged in such a way so as to minimize the risk of human contact, in that the products are described therein as being: "packed conveniently by plastic case or non-woven fabric can be used easily. *As it does not touch clothes directly*, it can be used safely and its effect continues constantly." C's Ex. 9 (emphasis added). However, there is no evidence in the record that the protective product packaging as described on the website at that time was on the packages Rhee sold during the period at issue here (January 2000 through July 2003) . This is but one more example of the lack of clarity in the evidence regarding the specific products at issue here proffered by Complainant in this case.

at Appendix B-1; Tr. 261. The MSDS sheet for naphthalene provides no information as to environmental toxicity. C's Ex. 12F p. 7. Ms. Toffel assigned a value of "1" to environmental harm in this case, suggesting that the violations' potential for actual harm to the environment was minor and neither serious nor widespread. Tr. 261; C's Ex. 32.

H. Compliance History

Turning to the two remaining adjustment factors relating to the gravity of the misconduct, under the fourth adjustment factor for "Compliance History," Appendix B provides four numerical options, starting at zero for no prior violations, and increasing from 2, to 4, to 5 based upon the severity and number of prior FIFRA violations. C's Ex. 15 at Appendix B-2; Tr. 261. In calculating the penalty in this case, Ms. Toffel assigned a value of zero to compliance history because Respondent had no prior FIFRA violations. Tr. 262; C's Ex. 32.

I. Culpability

The final of the five gravity adjustment factors provided for by the ERP is "Culpability." This category has three numerical options: zero if the "[v]iolation was neither knowing nor willful and did not result from negligence [and the] [v]iolator instituted steps to correct the violation immediately after discovery of the violation;" "2" if the violation resulted from negligence or culpability was unknown; and "4" if it was a "[k]nowing or willful violation of the statute." C's Ex. 15 at Appendix B-2, Tr. 262. Ms. Toffel took into consideration Rhee's "size of business, how big they were, how long they'd been in business. And that they've been in the same park for a long time, and that they should probably have had a lot of resources at their disposal for them to know what regulations they had to follow." Tr. 262. She also took into account EPA's conclusion, based on the MDA investigation report, that Rhee continued to sell the product for a few months after becoming aware of the need for registration through the facsimile received from R&G, but ceased selling it several months before it was inspected. In addition, she considered the lack of other corrective efforts, such as instituting a product recall. Therefore, Ms. Toffel assigned a value of "2" in this category, determining that the violation was the result of negligence. Tr. 262-64, 298; C's Ex. 32. Ms. Toffel said that in her opinion, the minuscule fraction the sale of this particular pesticide represented to Rhee's total business was not relevant to culpability. Tr. 299.

Rhee states it was not negligent. R's PHB at 21. Mothballs are such common household items that they do not immediately evoke the image of a "pesticide requiring registration," Respondent argues, noting that even Mr. Gruenhagen sought expert advice before concluding JOMYAK was covered by FIFRA. R's PHB at 23. Moreover, the Asian community in general and Rhee in particular was unaware of FIFRA and as primarily a grocery importer, it had no reason to know. R's PHB at 21-23. Rhee reasonably relied on its exporter and customs broker and their attorneys (since it has none of its own) as well as FDA review for regulatory compliance. R's PHB at 22. In concluding that Rhee should have known of the registration

requirement, EPA erroneously characterized it as having vast financial resources based upon gross sales figures, ignoring its modest net income, and erroneously assumed it had received a facsimile from OXY advising it of the need to register. R's PHB at 23-24. Rhee argues that it did what a reasonable person would have "done under the circumstances." It suggests that EPA has assigned this same level of culpability in cases where the violator had been thrice warned of the need to register, citing *Chem Lab Products*, 10 E.A.D. 711 (EAB 2002). R's PHB at 21.

Mr. Lee suggested in his testimony that prior to July 2003, Rhee reasonably relied upon its customs broker (and the broker's attorneys) in particular, as well as JOMYAK's manufacturer, Rhee's exporter, and various U.S. government agencies, to assure its compliance with U.S. laws regarding importation.[40] Tr. 326-27, 333, 353. He explained that for each of the twenty JOMYAK shipments Rhee received, the exporter provided an invoice of products which was reviewed first by the customs broker and then by the U.S. Food & Drug Administration (FDA), the U.S. Customs Service, and the U.S. Department of Agriculture.[41] Tr. 332-33, 348. Mr. Lee stated that it was his understanding that those government entities examined *all* items in a shipment (both food and non-food items) and, unless Rhee and its customs broker were advised

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[40] However, upon questioning by this Tribunal, Mr. Lee acknowledged that Rhee had never entered into any written agreement with OXY or its customs broker which explicitly placed upon any of those entities the legal responsibility for assuring its FIFRA compliance and he acknowledged that Rhee's customs broker had never provided it with any written assurances that the products it was importing could be legally sold in the United States. Tr. 352-53.

[41] The FIFRA ERP itself notes that "A shipment of a pesticide or device being imported into the United States cannot be brought into the country until EPA makes a determination of the admissibility of that shipment." It goes on to note that U.S. Customs service has enforcement authority in regard to FIFRA, citing 19 C.F.R. § 12.110-12.117. C's Ex. 15 at 4. However, under those regulations, an importer of pesticides has the burden to submit *to EPA* for completion prior to entry a "Notice of Arrival" ("NOA") indicating the intended disposition of the shipment. This completed NOA is then submitted to the Director of the port of entry. If pesticides arrive in the U.S. without an NOA completed by EPA, they are supposed to be detained for thirty days to give the importer an opportunity to acquire a completed NOA. EPA is allowed to sample the products. The regulations provide for a hearing process for merchandise refused entry as not in compliance with FIFRA. Apparently, in regard to JOMYAK, Rhee never submitted an NOA and U.S. Customs never caught the undocumented entries. It is interesting that in this case the government seeks to severely punish Rhee for its negligent failures to comply with FIFRA regulations when the government clearly failed, on *20 separate occasions* over a three year period, to detain pesticides explicitly listed on an international distributor's invoice, when the requisite form (EPA Form 3540-1 "Notice of Arrival (NOA) of Pesticides and Devices") was not presented to the U.S. Customs Service at the port of entry. *See*, 7 U.S.C. § 136*o*(c) and 19 C.F.R. §§ 12.113-12.117 (customs regulations providing for the examination of arriving pesticides, the presentation of an NOA, and the detention and destruction of pesticides lacking an NOA), and http://www.epa.gov/compliance/monitoring/programs/fifra/inportexport.html#import.

otherwise, they were approving Rhee's sale of *all* of the imported products, noting that the FDA form states "All products in this entry not listed above may proceed without FDA examination."[42] Tr. 327-32, 343, 348-50; R's Exs. 2, 3, 4, and 5. Further, he stated that while in the past the FDA and Rhee's customs broker had notified Rhee regarding labeling requirements for food products, neither the FDA nor any other government agency, nor its customs broker, ever advised it regarding labeling requirements for mothballs or the need for registration. Tr. 333, 346-47.

Mr. Davidson's testimony at hearing, and his undated Memo memorializing the activities undertaken in regard to the inspection, suggest that Mr. Yum advised MDA during the discussion on February 2, 2004 that Rhee became aware that it needed an EPA registration number to distribute JOMYAK products in the *Spring of 2003*, when Rhee "received a fax from R&G, the distributor, informing him that the [product] needed an EPA registration number," thus suggesting that Rhee continued to distribute the product for a few months (from the spring of 2003 until July 2003), after it had been advised that it required registration. Tr. 88, C's Ex. 12E. However, the handwritten statement Mr. Yum signed at the conclusion of the meeting, confirming the statements he had made orally to Mr. Davidson during the meeting, makes no mention of a facsimile from OXY regarding JOMYAK and instead indicates, in the present tense, that "We are not aware that we needed EPA Reg #." Tr. 369-70; C's Ex. 12G.

Moreover, Mr. Yum stated at the hearing that the statement in Mr. Davidson's report to the effect that the facsimile Rhee received from R&G in May 2003 advised it that it was no longer distributing JOMYAK because the product was not properly registered, is untrue. Tr. 373-74. The facsimile indicated that "OXY could not export anymore," and Messrs. Yum and Lee denied that the facsimile provided any reason for discontinuing exportation and credibly testified that they were unaware of the registration requirement until the meeting with MDA in February 2004.[43] Tr. 373-74. They stated that R&G did not indicate in the facsimile the reason

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[42] Upon cross-examination, Mr. Lee acknowledged that, in fact, the FDA forms provided to Rhee evidences that the Agency only examined a portion of the items Rhee imported, and JOMYAK was not one of the products it examined. Tr. 342; R's Exs. 2, 3, 4, and 5. Mr. Lee also acknowledged that the FDA form states "This notice does not constitute assurance that the products involved comply with provisions of the Food, Drug, and Cosmetic Act or related acts, and does not preclude actions should the products later be found violative." Tr. 343.

[43] Mr. Yum testified that the facsimile from R&G indicated that it was investigating why OXY was not able to export JOMYAK anymore and it would advise Rhee further, but that R&G never did provide Rhee with such further information. Tr. 373-74. There is no evidence in the record that MDA or EPA ever requested a copy of this facsimile from Rhee or R&G and neither party presented it as evidence at the hearing. C's PHB at 49. There was no translator present at the meeting between MDA and Mr. Yum, and while his testimony at the hearing evidenced that Mr. Yum's ability to speak and understand English is good, it is certainly not perfect. Tr. 375. Further, Mr. Lee testified that no one at Rhee inquired of OXY as to why it was ceasing distribution of the product, because to Rhee the product was fiscally insignificant. *See*, Tr. 363.

why it would no longer be exporting JOMYAK, and Rhee never asked, and thus, they were unaware of any registration requirement for JOMYAK until February 2004, when the MDA contacted him. Tr. 373-76. Mr. Lee explained that Rhee did not bother to inquire as to the reason because the mothballs were "small items in terms of sales; therefore, we didn't pay too much attention to it." Tr. 359-364; *See*, Tr. 351.

Mr. Lee also testified that he was unaware that Han Mi supermarket had returned nine JOMYAK products to Rhee at the direction of the NJ DEP because they were unregistered, noting that many products are returned to Rhee for many different but innocuous reasons, like broken packaging. Tr. 353-54, 357-58. As a result, he acknowledged that Rhee did not stop selling JOMYAK mothballs until July 2003 when its supplies ran out. Tr. 325-26, 341, 360.

Mr. Lee testified that he only first became aware of the JOMYAK registration issue in February 2004 when MDA inspected its offices. Tr. 347, 360, 363. He testified that thereafter he was tasked with supervising his subordinates' compliance with EPA regulations and in July 2004 arranged for Rhee to distribute a mothball product registered in the United States. Tr. 336, 360-61.

Complainant argues that its assignment of a "culpability" rating of "2," the middle rating in this category, is warranted on the basis that Respondent was negligent. C's PHB at 42. It argues that Rhee should have been aware of legal requirements of FIFRA as they pertain to its business operations because it has been in business in the United States for over thirty years, conducts business in English, and it is a relatively large business with 240 employees, 95 million dollars a year in gross sales, and is valued at over 6.5 million dollars. Thus, EPA states Rhee was in a position to devote greater resources to environmental compliance. *Id*. at 42-43. The Agency further argues that the fact that the sales of JOMYAK account for only a small percentage of Rhee's business does not affect its duty to comply with the law and that it should not have a competitive advantage over those businesses who do comply. *Id.* at 43. It additionally suggests that Rhee's reliance upon its product manufacturers, exports, and customs brokers to assure compliance was not reasonable in that none of those entities had a legal or contractual duty to Rhee in this regard, and the EAB has held that a duty to register a pesticide cannot be delegated, citing *Green Thumb*. *Id.* at 44-46. EPA further notes that the FDA does not regulate pesticides and, as its own forms explicitly state, its actions inspecting some of Respondent's imports provides no assurance of legal compliance. *Id*. at 46-47. While acknowledging that it is "not clear" from the record that Rhee had actual knowledge that registration was required before JOMYAK could be lawfully sold, based upon Han Mi's return of the products after the NJDEP inspection and Mr. Davidson's field notes regarding the facsimile it received from its exporter, Complainant suggests that Rhee *should have known* "that something might be wrong with JOMYAK" and that it failed to exercise the due diligence required of it to determine the registration status of the product and instead continued to sell the product until July 2003 when

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After weighing all the evidence on this issue in the record, I cannot find by a preponderance of the evidence that as a result of this facsimile it received in the Spring of 2003 from R&G, Rhee was on notice that JOMYAK could not lawfully be distributed without proper registration.

its supplies ran out. *Id*. at 47-50. Furthermore, having been finally clearly notified in regard to the registration issues by the MDA inspectors in February 2004, Rhee failed to undertake any extraordinary corrective efforts in light thereof, such as instituting a product recall, Complainant argues. *Id.* at 50. Citing *Hing Mau, Inc*., once again, EPA states other similarly situated sellers of unregistered Asian mothball products have been found to be "negligent," for failing to realize the products were pesticides. *Id.* at 51.

Complainant is correct in characterizing Respondent as having been "negligent." "Negligence" is not defined in the statute or the ERP and "it may be assumed that the term is used in its ordinary sense, which is . . . characterized by a person's failure to exercise the degree of care that someone of ordinary prudence would exercise under the same circumstances." *Hing Mau*, 2003 EPA ALJ LEXIS 63, at *44-45 (citing Black's Law Dictionary 1058 (7th ed. 1999)). Under FIFRA and its implementing regulations, Respondent was legally prohibited from selling an unregistered pesticide. While Respondent may claim that the Asian community in general and it in particular was not aware of FIFRA, such ignorance is of no legal significance in that everyone is charged with constructive knowledge of the statutes of the United States and of the Federal regulations promulgated thereunder. *See e.g., F.C. Haab Company, Inc*., 1998 EPA ALJ LEXIS 46, at *34 n.11 (ALJ 1998) (and cases cited therein). To do otherwise would encourage ignorance of the law. As to Rhee's further claim that it did not actually know that JOMYAK was a "pesticide," the record makes it clear that it certainly *should have known* since by its own admission mothballs are a "well known household *insect repellant*," *i.e. a pesticide*. R's PHB at 17. Respondent clearly breached the regulatory duty imposed upon it in this case by its sales of JOMYAK. *See*, *Hing Mau, Inc.*, 2003 EPA ALJ LEXIS 63, at *45-46 (Respondent's failure to recognize naphthalene balls as pesticides fell below conduct of reasonably prudent person). Complainant is also correct in stating that Rhee cannot shift the blame for its failure to obtain such approval to either its custom's broker, exporter, or any governmental agency, in that none of those entities legally bore any responsibility for assuring Rhee's regulatory compliance, and there is no evidence that Rhee consulted these entities specifically with regard to its importation of JOMYAK and received erroneous advice. Moreover, the extended length of time it has been in business and its size of business suggest that Rhee should have known and/or had the resources to secure expert advice regarding the matter.

That being said, however, the level of negligence of Respondent in selling an unregistered pesticide is tempered by the fact that Rhee is not at all in the business of manufacturing, nor is it primarily in the business of selling, pesticides or chemicals, that mothballs are such a ubiquitous household product, and that Mr. Lee indicated in his testimony that JOMYAK was the first and only pesticide it had ever sold and that it sold only a minuscule amount of it in comparison to its other products. Tr. 323.

J. Complainant's Calculation of the Total Penalty

Ms. Toffel testified at the hearing that to complete this fourth step in the penalty calculation process under the ERP, she added together the values she had assigned to the five

adjustment factors of pesticide toxicity (1), human harm (3), environmental harm (1), compliance history (0), and culpability (2), and obtained a numerical total of "7." Tr. 264; C's Ex. 32. Noting that under the ERP an adjustment figure of "7" calls for a ten percent reduction in the base penalty set forth in the matrix, she reduced by $550 the $5,500 base penalty, obtaining an adjusted penalty of $4,950 per violation. Tr. 265; C's Ex. 32. Multiplying $4,950 by 264, the number of distributions, Complainant calculated a total proposed penalty of $1,306,800.

K. Effect on Violator's Ability to Continue in Business

The fifth and final step in the penalty calculation process under the ERP takes into consideration "the effect that payment of the total civil penalty will have on a violator's ability to continue in business." C's Ex. 15 at 18. Ms. Toffel said she considered Rhee's ability to pay 1.3 million dollars and the effect that the payment of that penalty amount would have upon the Respondent's ability to continue in business. Tr. 273. In this regard, the ERP provides three alternative methods for determining a violator's ability to pay a proposed penalty: (1) a detailed tax, accounting, and financial analysis, (2) a guideline of four percent of average (*current* and three prior years') gross income; or (3) using the ABEL computer model of estimated strength of internally generated cash flows. C's Ex. 15 at 23. Choosing the method of calculating four percent of the company's average gross sales for the three prior years (2000-2002) as reflected on the Dun & Bradstreet report, Complainant determined that the proposed penalty was less than four percent of Rhee's average gross income, was less than four percent of the gross income for 2003, and in fact was less than 1.5 percent of Rhee's average gross sales for FY 2000 through 2003, and thus was within Rhee's ability to pay without affecting its ability to continue in business.[44] Tr. 273-74; C's Ex. 32; C's PHB at 57-58. Complainant also considered the fact that Rhee had not raised an inability to pay claim in this proceeding nor had the Agency become aware of any other information relevant to ability to pay. Tr. 274-75; C's PHB at 58.

At hearing, Respondent presented testimony that while the company's gross profit margin on product sales has historically ranged from 17 to 20 percent, its net profit margin before taxes is only one to two percent, with the net profit margin on food items, which represents 97 percent of Rhee's business, being less than that for non-food items. Tr. 426-27. As a result, Mr. Lee testified, assessing a 1.3 million dollar penalty in this case would necessitate Rhee reducing its

[44] As indicated above, the income figures Ms. Toffel relied upon for this calculation were not quite "*current*," as required by the ERP, at the point she undertook her ability to pay calculation in early 2005 in that the most recent figure of $95 million in gross sales covered the period of July 1, 2002 to June 30, 2003. The Report indicated prior fiscal years gross sales for the company of 93 million in 2001-2002, 85 million in 2000-2001, and 77 million in 1999-2000. C's Ex. 23. Ms. Toffel further indicated that based upon her calculations even the highest penalty figure the Agency could have requested under the statute, that of 2.3 million dollars representing 467 sales multiplied by a penalty of $4,950 per sale, would still have been within four percent of Rhee's gross sales and as such within its ability to pay, according to the Agency. Tr. 306.

expenses by cutting salaries, incurring layoffs and "rearranging" medical benefits. Tr. 337.

In its Post-Hearing Brief, Respondent argues that while it has the ability to pay the 1.3 million dollar penalty and continue in business, doing so would cause it to suffer significant hardship. Respondent points out that the Dun & Bradstreet Report characterized its financial condition only as "Fair."[45] C's Ex. 23, R's PHB at 2, 12. It notes out again that Rhee's net income before taxes was only $737,731 and its net income after taxes was $256,753. R's PHB at 32-33. Further, as testified to by its witnesses at hearing, Respondent states that a 1.3 million dollar penalty would result in layoffs, reductions in medical benefits and reduced pay to its 240 employees. R's PHB at 32-33; C's Ex. 23.

It is noted that Rhee has not proffered any financial statements, tax returns or other financial records of its own supporting its claim as to the negative impact the penalty would have on its business. However, its claim in this regard seems reasonable, if not particularly well supported, by the fact that the one financial record in evidence -- the Dun & Bradstreet Report -- reflects that 1.3 million dollars would represent Rhee paying in a penalty what amounts to *five years of net profits*, when its financial condition is characterized by the company as only "fair." As such, I find that such evidence undermines EPA's position that the proposed penalty of approximately 1.3 million dollars is "appropriate" in relation to Rhee's ability to continue in business, especially when considered in relation to the other statutory factors in this case.

V. DISCUSSION OF METHODOLOGY AND ASSESSMENT

A. Complainant's Position as to Methodology

Respondent has been found liable for 467 violative sales and the EAB has held that "[e]ach sale or distribution of a pesticide constitutes a distinct unit of violation, and thus is grounds for the assessment of a separate penalty. C's PHB at 53 (citing *Chempace Corp.*, 9 E.A.D. 199, 127-31 (EAB 2000)). EPA states that, to Respondent's benefit, it nevertheless exercised its discretion and deviated from that holding and the ERP and chose the methodology based upon the number of combined distributions that "yielded the lowest penalty." C's PHB at 54-56.

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

Specifically, as noted above, Ms. Toffel multiplied the $4,950 adjusted penalty per violation by *264 distributions*, rather than the 467 violations for which Rhee was found liable. In doing so, Ms. Toffel explained that normally, as stated in the ERP, "the Agency considers violations that occur from each *shipment* of a product (by product registration number, not individual containers), or each sale of a product . . . to be independent offenses of FIFRA . . . subject to civil penalties up to the statutory maximum. . . " Tr. 266; C's Ex. 15 at 25 (emphasis in original), C's Ex. 24. Further, the ERP states that "independent violations which can be documented as both per sale or per shipment violations are to be calculated only as either per sale or per shipment, whichever is more appropriate based upon the supporting documentation *and whichever approach yields the highest civil penalty*." C's Ex. 15 at 25, footnote (italics added); Tr. 267, 296. Relying upon these directives, Ms. Toffel testified that since Rhee's own records reflected that it sold 467 cartons or cases of various JOMYAK products to customers during the relevant time period of January 25, 2000 through July 30, 2003, the Agency could have proposed a total penalty of $2,311,650 or $4,950 for each of those 467 sales. Tr. 265; C's Ex. 20. However, the Agency exercised its enforcement discretion and instead chose to calculate the penalty by treating each sale or shipment of JOMYAK products to a customer on a certain day, no matter how many cartons were sold and regardless if the shipment contained various sizes or types of JOMYAK, as "one shipment or distribution."[46] Tr. 296-97, 306, 310-11. Using this calculation method, the Agency determined that there were 264 "distributions" of JOMYAK products by Rhee between January 25, 2000 and July 30, 2003 and used this lower multiplier to determine the total civil penalty in this case of $1,306,800.[47] Tr. 270-73; C's Ex. 32.

Complainant argues that while lower than the maximum penalty permitted, the proposed penalty of 1.3 million dollars is still substantial enough to carry out the consumer protection goals of FIFRA and the need to address the pervasiveness of the illegal pesticide importation problem. *Id*. at 63-65. Further, EPA asserts the reduced proposed penalty amount adequately addresses Respondent's cooperation, that economic benefit from a violation is not a statutory factor in FIFRA and is not used as a mitigating factor in terms of penalties, and that the fact that the proposed penalty in this case is more severe than that previously imposed in others does not render it invalid. *Id*. at 59 -63.

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[46] Ms. Toffel stated she considered a "shipment" to be the same as a "distribution," meaning in this case a sales transaction to a customer on a particular date. Tr. 267-68. Ms. Toffel also testified that the Agency considered calculating the proposed penalty in this case by grouping each size or type of JOMYAK product sold to a particular customer on a particular date, regardless of quantity, as "one distribution" which resulted in a total of 358 distributions, but in the end rejected this penalty calculation methodology as well. Tr. 268-71.

[47] The figure of 264 distributions used at hearing is slightly reduced from the number of distributions initially calculated by Complainant as shown in its initial Prehearing Exchange and various hearing exhibits, in consideration of distributions that fell outside of the 5 year statute of limitations period. *See*, Complainant's Amended Prehearing Exchange; C's Ex. 22; Tr. 272.

Respondent's Position as to Methodology

At the hearing, Respondent asserted that the proposed penalty was unreasonably high and out of proportion to the violations, that Complainant's penalty analysis overstates both the gravity of the harm and the gravity of the misconduct relative to the violations at issue, and that this Tribunal should reject the ERP framework as inapplicable here and independently examine the fairness and equity of the proposed penalty. Respondent suggested an alternative penalty amount of $118,250, calculated by multiplying *half* of the maximum statutory penalty amount (*i.e*. half of $5,500, or $2,750) per violation by the number of months (43) during which violations occurred (*i.e*. from January 2000 through July 2003).

As grounds for rejecting the calculation of a penalty within the framework of the ERP, Respondent asserts that EPA's reliance on the ERP is "simultaneously too rigid and overly flexible." R's PHB at 26. The process is too rigid, Respondent states, in that after "plugging in" a few certain facts on gross sales and violation type, "a penalty emerges" from the ERP which is subject to only limited modification, creating the potential that less significant violators pay as much as those who commit more significant violations. On the other hand, Respondent states, the process is too flexible in that EPA has ignored the mandate of the ERP regarding calculating the number of violations and has instead exercised "virtually unfettered discretion" in this regard, noting that EPA has alternatively reckoned the number of violations charged based upon months of sale (*Avril, Inc*., 1997 EPA ALJ LEXIS 176 (ALJ 1997) (complaint against "chemical blender" combined invoices showing 22 separate sales on 13 days into five counts of violation by combining sales within the same calendar month into single counts, with a total proposed penalty of $17,500 on these counts)); years of sale (*Hanlin Chemicals-West Virginia, Inc*., 1995 EPA ALJ LEXIS 91 (ALJ 1995) (chemical manufacturer charged with one count for each year it sold approximately 171,000 gallons of unregistered pesticide after cancellation, for a proposed penalty $10,000)); or number of product types (*Hing Mau, Inc.*, 2003 EPA ALJ LEXIS 63 (ALJ 2003) (despite evidence of sales of 32 bags of unregistered mothball products and of 168 packages held for sale, grocer charged with one count of violation for each of the two types of unregistered mothball products sold, for a total proposed penalty of $9,900)). Lowell Declaration, Attachments 5, 6, 7; Tr. 391-392, 405-08.

At hearing, Respondent introduced the testimony of Mr. Robert H. Fuhrman, an economic consultant with 18 years of experience working for a number of private firms including his own, Seneca Economics and Environment. Tr. 380-81, 398; R's Ex. 9. Prior to that time, from 1977 until 1983, Mr. Fuhrman was employed as an economist with EPA. Tr. 382, 399; R's Ex. 9. Without objection from Complainant, Mr. Fuhrman testified as an expert in the field of the "application of EPA penalty policies." Tr. 384.

Mr. Fuhrman testified that EPA, without going through the notice and comment procedure provided for "rulemaking" under the Administrative Procedure Act, has issued statute specific penalty policies or Enforcement Response Policies (ERPs) to guide its own internal decisionmaking about appropriate administrative penalty amounts. Tr. 385. These policies were promulgated under the aegis of Agency's 1984 Civil Penalty Policy guidance which has three

goals: (1) deterrence; (2) fair and equitable treatment of the regulated community; and (3) swift resolution of environmental problems. Tr. 385, 403. Mr. Fuhrman stated that "the Agency properly uses the ERP[s] as a way of trying to obtain consistency across a broad range of cases . . . . And it still leaves flexibility for the administrative law judge or the Environmental Appeals Board to say 'In this case application of the policy is not applicable.'" Tr. 404-05.

However, Mr. Fuhrman opined that the FIFRA ERP, applicable here, is far more "rigid" than EPA's other ERPs such as those issued in regard to the Clean Air Act, the Resources Conservation and Recovery Act (RCRA), or the Clean Water Act, in that it gives the decisionmaker significantly less flexibility about how to calculate the gravity part of a civil penalty.[48] Tr. 386-87. Specifically, as in this case, under the FIFRA ERP, merely the type of violation and size of business can result in assessment of the maximum statutory penalty, effectively mooting the impact of gravity factors intended to increase the penalty for more severe violations. Tr. 386-87. Furthermore, Mr. Fuhrman opined, by virtue of how the FIFRA ERP matrix is designed, it "compresses" violations, so if a violator's size of business is above $1 million in sales, regardless of the type of violation and actual gravity, the penalty is the statutory maximum. He stated, "[a]fter you get a score of about seven . . . you're cooked. You know, the game is over. Whether it's a carcinogen or whether it's a mothball product, if it had been submitted it would have been registered and it would have been appropriately labeled." Tr. 417. Additionally, Mr. Fuhrman opined that, unlike other EPA penalty policies, the FIFRA ERP does not explicitly consider the amount of economic benefit the company may have obtained by violating the Act.[49] Tr. 387, 400.

Mr. Fuhrman suggested that EPA enforcement personnel deal with the lack of flexibility in the FIFRA ERP in terms of the amount of the penalty to be charged by varying the *number* of violations they decide to charge in a particular case in relation to what they perceive as the egregiousness of the offense. Tr. 387-88. Thus, a violator who engaged in what the Agency perceives as a more substantial deviation from the law is charged with more violations, and a

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[48] In regard to Mr. Fuhrman's reference to an EPA ERP for the Clean Water Act (CWA), it is noted that the EPA has never issued a penalty policy to be used for setting proposed penalties in CWA Administrative Complaints, but has only issued a penalty policy to be used for settlement of CWA cases. *See, C.W. Smith*, 2004 EPA ALJ LEXIS 128, *139 (EPA ALJ 2004). Further, as Mr. Fuhrman acknowledged at hearing, FIFRA has a significantly lower per-violation maximum penalty cap than other statutes such as Clean Air Act or RCRA; however, he did not attribute its rigidity to this limitation. Tr. 415-17.

[49] However, on cross-examination, Mr. Fuhrman acknowledged that FIFRA, unlike other environmental statutes enforced by the Agency, such as the Clean Air Act, does not require consideration of economic benefit in determining administrative penalties. Tr. 400, 410. Additionally, Mr. Fuhrman acknowledged that economic benefit alone cannot be basis for setting a penalty because it may not deter violations by large companies. Tr. 418-19. He could not state a figure or rule of thumb for a penalty as a percentage of gross sales that would likely deter a company of Rhee's size. Tr. 420-22.

violator who is seen by the Agency as having committed a less significant deviation is charged with fewer violations. The Agency provides itself with this leeway by varying the methodology it uses to calculate the number of violations it alleges has occurred, *i.e.*, by counting either the total number of sales, the number of sales in a given month, the number of products at issue, or number of different types of products. Tr. 387-88. In support of this assertion, Mr. Fuhrman cited a variety of FIFRA cases where he implied that EPA calculated the number of violations by different methodologies, resulting in vastly different penalty proposals. *See*, Tr. 387-92. In addition, in comparison to the 1.3 million dollar penalty proposed here, Mr. Fuhrman stated that the highest penalty previously proposed in any mothball case by the Agency was that of $59,950 in the 2001 *Hannam Chain* case.[50] Tr. 395-96, 407-08.

Therefore, Mr. Fuhrman opined that the proposed penalty in this case is "disproportionate to the penalties EPA was seeking in other mothball cases." Tr. 396. Mr. Fuhrman suggested that it would be more appropriate to penalize the Respondent here by determining the penalty based upon the number of months of sale. Tr. 397. Thus, presuming a total gravity factor of "3" (instead of "7" as calculated by Ms. Toffel) which provides for a 50 percent reduction of the statutory penalty of $5,500, he proposes multiplying that amount by 43 months of violation, yielding a proposed penalty of $118,250. Tr. 397.

Discussion and Conclusions as to Methodology and Penalty Assessment

In utilizing the ERP it must be kept in mind that the ERP has never been put out for notice and comment, lacks the force of law and is merely "a non-binding agency policy whose application is open to attack in any particular case," *McLaughlin Gormley King Co.*, 6 E.A.D. 339, 350, 1996 EPA App. LEXIS 1, at *23 (EAB 1996) (citing *James C. Lin and Lin Cubing, Inc.*, 5 E.A.D. 595, FIFRA Appeal No. 94-2, *slip op.* at 5 (EAB 1994) ("While Agency penalty policies 'facilitate application of statutory penalty criteria, they serve as guidelines only and there is no mandate that they be rigidly followed.'"). The "matter of concern is . . . whether the penalty is appropriate in relation to the facts and circumstances at hand" and "in light of the highly discretionary nature of penalty assessment, there is no precise formula by which statutory criteria must be considered in every case." *FRM Chem, Inc.*, slip op. at 15, 16. Thus, while this Tribunal must "consider" the applicable penalty policy, it has the "discretion either to adopt the rationale of an applicable penalty policy where appropriate or to deviate from it where the circumstances warrant." *M.A. Bruder & Sons*, RCRA (3008) App. No. 01-04, 2002 EPA App. LEXIS 12, at *28

[50] See, *Hannam Chain USA, Inc.*, 2001 EPA Consent LEXIS 661, at *5–7 (EPA, Sept. 26, 2001) (Complaint/Consent Decree and Final Order reflecting that Respondent was charged in 12 counts with selling 12 different types of unregistered pesticides including two unregistered pesticides identified as "OXY MOTH REPELLANT *FOR CLOSET* and "OXY MOTH REPELLANT *FOR DRAWER.*). *See also*, EPA Region 9 Press Release entitled "EPA FINES 15 WESTERN BUSINESSES $200,000 FOR ILLEGAL INSECTICIDE SALES," dated September 26, 2001, http://yosemite.epa.gov/opa/admpress.nsf/9e50770d29adb32685257018004d06fd/8b7cefea7a63b1df852570d8005e1453!OpenDocument.

(EAB, July 10, 2002) (citing *DIC Americas, Inc.*, 6 E.A.D. 184, 189 (EAB 1995)). *See also, Employers of Wausau, Inc.*, 6 E.A.D. 735, 759 (EAB 1997)(ALJ is free to deviate from the penalty policy in a particular case); *Rybond, Inc.*, 6 E.A.D. 614, 639 (EAB 1996) ("Under the circumstances of a given violation, reduction of a penalty assessment may be appropriate even if the penalty has been properly calculated in accordance with [the appropriate] Penalty Policy."). However, EAB decisions indicate that the Tribunal should only deviate from applying the penalty policy if the reasons for doing so are "compelling" or "persuasive and convincing." *Chem Lab Products, Inc.*, FIFRA App. No. 02-01, 2002 EPA App. LEXIS 17 *40 (EAB, Oct. 31, 2002); *FRM Chem, Inc.*, FIFRA App. No. 05-01, 2006 EPA App. LEXIS 28 (EAB 2006), slip op. at 19-20. The Consolidated Rules provide that if this Tribunal "decides to assess a penalty different in amount from the penalty proposed by complainant, the Presiding Officer shall set forth in the initial decision the specific reasons for the increase or decrease." 40 C.F.R. § 22.28(b).

Upon consideration of the three statutory factors, the parties' arguments and the evidence, I am not persuaded that Complainant has shown that a penalty of $1,306,800 is appropriate in this case, nor am I persuaded that Respondent's alternative methodology, yielding a significantly lower penalty of $118,250, is appropriate either. While I am normally inclined to follow the framework of a penalty policy for penalty assessments, in my opinion this case presents sufficient compelling reasons to depart from such routine. In particular, I am struck by the magnitude of the proposed penalty here in relation to the totality of the circumstances in this case. While certainly a penalty of the magnitude proposed here might be warranted under certain circumstances in a FIFRA case, I do not deem it warranted in this case, for the following reasons.

First, Respondent's point is well taken that the FIFRA ERP appears to compress violators and violations into a few select categories and thereby, in the circumstances of this case, is too inflexible and over-inflates the penalty such that it does not adequately weigh the specific gravity factors in Respondent's favor. It is noted that the proposed penalty here is only ten percent less than the *maximum penalty* allowed by law which should normally be reserved for the most horrific violator, who has committed the most horrific violations such as a respondent with a long history of committing serious FIFRA violations, who then commits other egregious violations, which were knowing and willful, involving a pesticide of the highest toxicity, and/or which caused *actual* serious or widespread harm to human health and the environment.[51] Respondent and its conduct here is not merely 10% better than that, it is far better than that in that *none* of those aggravating factors are at play here. Perhaps this penalty "compression" would not be significant if only one violation was involved, since under such circumstances the difference in penalties would be only $550, and this small difference could be justified on the basis that the penalties against both violators must be substantial enough to have a deterrent effect. However, in a case such as this, where a very large number of violations is charged, it is clear that such compression results in the factors favorable to Respondent not being appropriately

[51] This Tribunal recognizes that in large measure this inflexibility in the ERP is not the fault of the Agency, but may well be attributable to the low maximum penalty of $5,500 per violation provided for by FIFRA (7 U.S.C. § 136*l*(a)(1)).

accounted for and makes a very significant monetary difference in the penalty above any baseline necessary for deterrence. Thus, where the Agency chooses to charge a Respondent with a large number of violations which potentially yield in aggregate a correspondingly high maximum penalty, the amount of the penalty per violation must be determined with more flexibility than that strictly permitted by the ERP, so that the significance of the "gravity of the violations," in a particular case is not lost.[52]

Indeed, the Agency has recognized that where there are many units of violation, penalties can become out of proportion to the facts of the case, and it has therefore reduced such potentially large penalties in the exercise of its discretion by choosing not to assess penalties for some violations. As stated by the EAB, "the agency . . . retains the discretion to seek to impose liability for less than the maximum number of possible violations." *Microban Products, Inc.*, FIFRA Appeal No. 02-07, 2004 EPA App. LEXIS 13 n. 30 (EAB, May 12, 2004)(EPA only charged 32 violations in the complaint although it had evidence (invoices) of at least 54 shipments to the same company); *Chempace Corp.*, 9 E.A.D. 119 n. 16 (EAB 2000)(Lowell Declaration, Attachment 8)(EPA has enforcement discretion to choose not to charge separate violations). *See also,* RCRA Civil Penalty Policy, June 2003 p. 22 and 26 ("[W]here multiple violations result from a single initial transgression, assessment of a separate penalty for each distinguishable violation may produce a total penalty which is disproportionately high" and in those circumstances "enforcement personnel have discretion to forgo separate gravity-based and multi-day penalties for certain distinguishable violations, so long as the total penalty for all related violations is appropriate considering the gravity of the offense and is sufficient to deter similar future behavior and recoup economic benefit." Multi-day penalties for violations after the first 180 days, and certain less severe violations, are discretionary).[53]

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[52] For example, compare two cases where one company which sells 400 units of an unregistered not particularly toxic pesticide, with no prior history of violations, where no harm occurred and another company (with the same financial circumstances), but with a history of violations, sells 400 units of an unregistered, very toxic pesticide causing actual harm. Under the ERP, the first company, might get a 10% discount off the statutory maximum as Rhee did here and have a proposed penalty of $1,980,000, and the second a proposed penalty of $2,200,000, the statutory maximum. The difference in the absolute penalty figures of $220,000 in no way reflects the comparative difference in the actual gravity of the two violations as one might place them on a sliding scale from "0" to the statutory maximum of $2,200,000. Therefore, to not have the factor of the number of violations outweigh the factor as to the comparative gravity of the violations, the penalty per violation must be able to shift further downward the sliding scale as the number of violations shift upward.

[53] Even in this case, it appeared implicit in Ms. Toffel's rather nebulous explanation at hearing as to why the Agency chose to use the penalty calculation method it did, *i.e.* number of distributions combining all products, which of all the methods it considered yielded the lowest penalty, and the leeway it acknowledged this Tribunal had to further decrease the penalty, that EPA recognized that all the potential methodologies it considered for calculating penalties yielded a proposed penalty far out of proportion to the gravity of the violations in this case. Tr.

Second, in setting the proposed penalty, EPA assessed the factor of "harm to human health," at level "3," to account for what it saw as a risk of "serious and widespread harm," based upon the fact that Rhee sold 467 cases, each containing 20 packages, of JOMYAK in over 20 different states. Tr. 256-61, 293, 304-05; C's Ex. 19, 20, 32. If the "harm to human health" is considered for only one shipment of JOMYAK, then the appropriate value is "1," representing minor potential or actual harm to human health, neither serious nor widespread, so the total gravity value would be "5," resulting in a reduction of 30 percent of the matrix value, or $3,850 for one violation. C's Ex. 15, Table 3, p. 22. To assess the value of "3" for harm to human health for *each* violation because there were many (yielding a total gravity value of 7 and thus a penalty of $4,950 for one violation), and then to multiply this increased assessment by each of the many (264) distributions themselves, grossly exaggerates the level of potential for harm to human health and erroneously escalates the final penalty. Complainant's position to the contrary is not supported by the cases it cites (C's PHB at 27), *Safe & Sure Products, Inc.*, 8 E.A.D. 517, 1999 EPA App. LEXIS 24 (EAB 1999) and *Chempace Corp.*, 9 E.A.D. 119, 142, 2000 EPA App. LEXIS 15 (EAB 2000). In *Chempace,* the ALJ and EAB considered the harm to the integrity of the FIFRA regulatory program resulting from activities of a pesticide producer resulting not only from the number of sales, but from the large number of misbranded and unregistered pesticides at issue and the resultant lack of data to the EPA, and the extended problem of the respondent having engaged in illegal sales and pesticide production activities. In *Safe & Sure Products,* 8 E.A.D. 517 n. 32, it was noted that the penalty was greatly reduced (to $30,000) on the basis of the respondent's inability to pay the proposed penalty, and the magnitude of this reduction "virtually supersedes the other penalty factors related to the gravity of the violations."

A value of "3" is also not warranted on the basis of potential "serious and widespread" risk of harm to human health, considering that the products are so pervasively well known, that only one of the three JOMYAK products sold by Rhee (about 1/3 of the sales) were moth *balls* (the others were larger shaped pieces (36 g.) or bars (30 g.)), that the mothballs were not multi-colored, that only one of the packages was decorated with a cartoon hippopotamus, that the packaging evidenced illustrations of proper use in drawers and closets, that there was only a very small percentage (2-3%) of health effects which were more than minor reported from improper exposure by the AAPCC, that the products were sold in the household section of stores, and that there is only a small amount of pesticide represented by each violation. Considering that there were 467 cases at issue, each case containing 20 bags, shipped in 264 separate shipments, each violation only represents approximately 35 bags of JOMYAK.

Third, and to further illustrate that the risk to human health is over-magnified in the proposed penalty, it is striking that there is no evidence in the record that the Agency made any effort to directly contact OXY or any of its wholesale distributors in the United States, such as Rhee, or to notify the U.S. Customs Service or FDA, in an effort to stave off further distribution of what it now describes as such dangerous, even lethal, OXY products, when it appears it first became aware of them being sold in the U.S., in or about *August 2000*, just a few months into the

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310-12, 315-316.

period of violations at issue here. *See, Hannam Chain USA, Inc.*, 2001 EPA Consent LEXIS 661, at *5–7 (EPA, Sept. 26, 2001) (Complaint/Consent Decree and Final Order reflecting that Respondent was found, *in ter alia*, to have sold, in August 2000, unregistered pesticides identified as "OXY MOTH REPELLANT *FOR CLOSET* and "OXY MOTH REPELLANT *FOR DRAWER.*); Tr. 300. Had EPA made such a timely effort to follow the distribution trail of those OXY products, in all likelihood it would have prevented Rhee from committing the vast majority of the violative distributions and thereby avoided the occurrence of the "serious and widespread" risk of harm for which it now seeks to so severely penalize Rhee.[54] *Cf. Agri-Fine Corporation*, EPA Docket No. EPCRA-V-019-92, 1995 EPA ALJ LEXIS 70, at *9 (ALJ, Order on Discovery, Sept. 1, 1995)(where penalty policy under the Emergency Planning and Community Right to Know Act provides that the amount of penalty is based on the number of days forms were submitted after the due date, the Agency may not assess penalties beyond a reasonable time after it became aware of the violation and failed to inform respondent thereof). Furthermore, the Agency's six month deliberative process in late 2003 and early 2004 to obtain a formal ECR from Mr. Peacock at Headquarters (*after* the *Hannam Chain* case), and formal delegation to MDA of inspection responsibility, all prior to contacting Rhee, seems a bit uselessly attenuated. These facts lend support to Respondent's claim that the Agency did not see the matter as one involving "potential serious or widespread" danger to human health, and further support deviation from a strict application of the ERP in this case. Although Complainant boldly

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[54] At hearing, Ms. Toffel explained that one of the factors in its decision to not contact OXY, a foreign manufacturer of unregistered, allegedly dangerous, pesticides being imported into the country illegally, was that it might not be "appropriate" to do so since the Agency might not have "jurisdiction" over it. Tr. 300. Be that as it may, it appears that if the Agency *had decided* that for the protection of the public health and safety it would try to ward of the importation of unregistered OXY products at their source, it would have been rather simple for the Agency to do so. At hearing, Ms. Toffel testified that upon receiving the Rhee case referral from NJ DEP, she was able to quickly and easily obtain information on OXY and its products from its website (tr. 238) and the evidence shows that OXY has been owned during the relevant time by the British firm of Reckitt Benckiser, which is a U.S. registrant of other pesticides, such as Lysol. Tr. 431-32. Of course, the mere absence of evidence in the record that the Agency attempted to follow the distribution trail does not prove it did not, but it appears undisputed that no one contacted Rhee regarding the unlawful distributions until January 2004, more than three years after the Agency became aware of the issues regarding OXY moth repellant products, and the Agency *never* contacted OXY. Tr. 300. Moreover, raising this issue, this Tribunal here is not suggesting that the Agency did nothing in response to discovering the importation of unregistered Asian pesticides. In fact, Ms. Toffel testified at hearing that sometime prior to her involvement in the instant case a few Regional Offices had put out "alerts" and/or flyers regarding such products and that such alerts were discussed during nationwide conference calls. Tr. 237, 282. However, Ms. Toffel did not believe the alerts or flyers related specifically to any OXY products. Tr. 282. Similarly, Mr. Gruenhagen testified that, prior to the Han Mi inspection, he had accompanied U.S. EPA officials to two other retail outlets looking for such products and that state inspectors had been recruited to aid the federal enforcement effort in regard to terminating the sale of such products. Tr. 38.

characterizes its proposed penalty in this case as exemplifying "smart enforcement" (C's PHB at 64), the facts to me suggest otherwise.

Fourth, the Agency's ERP calculation does not take into account in any way the economic benefit or lack thereof resulting from the violation. A violator who greatly profited from the violation, and thus had more incentive to commit it, as in *Green Thumb* where the violator made over $100,000 in sales of the violative product, can be charged with the same penalty, or even less, apparently, both in absolute terms or proportionally than Rhee, who made a gross profit of only about $11,000 from selling JOMYAK. The EAB has considered a violator's economic benefit of $500 per package in overturning an ALJ's penalty reductions on the basis that the resulting penalty assessment was not enough of a deterrent. *FRM Chem*, slip op. at 28. In the present case, there is almost no economic benefit to recoup in a penalty.

Fifth, Complainant's ERP calculation does not credit Respondent for its high degree of cooperation. Mr. Yum stated that Rhee voluntarily cooperated with MDA's inspection - providing the documents requested by the inspectors, answering their questions about OXY mothballs, and writing out and signing a truthful statement for them about the matter. Tr. 368-70. MDA inspector Philip Davidson testified at the hearing that Rhee "cooperated fully" with his investigation, stating specifically that upon being contacted by MDA, Rhee voluntarily agreed to promptly meet with the inspectors; Rhee fully responded to MDA's substantial document request and did so in *less than a week*; Rhee voluntarily provided MDA with background information on its operations and a written statement regarding this matter; and in response to MDA's *impromptu* request, provided the MDA inspectors a tour of the facility's warehouse so they could confirm for themselves that Rhee had no supplies of JOMYAK left for distribution. Tr. 93-94. Furthermore, in the course of this litigation, Respondent has been extremely cooperative: it acknowledged its violations, timely filed its pleadings, filed no frivolous pleadings, stipulated to the admission of exhibits, and expedited the hearing. Rhee even consented to holding the hearing in this case in a county other that in which it is located -- although it is entitled by regulation to have the hearing in the county in which it is located (40 C.F.R. § 22.35(b)) -- just so the original hearing date convenient to this Tribunal and Complainant could be maintained.[55]

On one hand, Complainant implies that Rhee's cooperation was not particularly special since Section 8(b) of FIFRA (7 U.S.C. §136f(b)) and 40 C.F.R. §169.3(b)) require companies to provide EPA with access to pesticide shipping records. C's PHB at 59 n.59. On the other hand, EPA states that while it "recognizes that there is no clear evidence in the record" to support its

[55] I find unpersuasive Complainant's attempt to cast aspersions on Respondent's actions after being notified about the violations on the basis that it did not issue a product recall. First, the MDA inspectors never suggested to Rhee that such action was necessary and the record suggests that Respondent, being otherwise extremely cooperative and compliant, would have initiated such recall if requested. Second, it appears from the record that such action would have been pointless. Following up on Rhee's representations that it had not distributed JOMYAK since July 2003, after their inspection in February 2004, MDA went to a number of retail customers and found no products there.

decision not to assess a $2,311,650 penalty based on the number of sales, the reason therefor was, in fact, Rhee's cooperation of which it was aware at the time it calculated the penalty in this case and, as discussed below, that it "exercised substantial discretion in basing its penalty on the number of 'combined distributions' [instead of] either the number [of] 'individual distributions' or 'sales.'" C's PHB at 59-60.[56]

The ERP provides that "attitude or good faith efforts to comply with FIFRA" is only to be considered as an adjustment factor after the initial penalty has been calculated under the ERP and proposed in the Complaint and even then, only "during the course of settlement discussions."[57] C's Ex. 15 at 27. The EAB has made clear that cooperation which is not beyond what the law requires does not merit any penalty reduction. *FRM Chem,* slip op. at 27. However, some of Rhee's actions clearly go beyond what Rhee was required by law to do or could have been compelled by law to do and deserve to be factored into the penalty in Respondent's favor. Where settlement of a case with a very large proposed penalty is highly unlikely and where even the Agency recognizes the Respondent's cooperation in mitigation of the proposed penalty, it seems particularly unfair not to consider Respondent's cooperation in the circumstances of this case. *Cf., C.W. Smith,* 2004 EPA ALJ LEXIS 128, at *167-168 (ALJ 2004)(the obstreperous conduct of a respondent and its counsel which falls far *below* the standard of appropriate conduct may be taken into account in establishing the appropriate penalty to be assessed), and cases cited therein.

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[56] This whole suggestion on Complainant's part is specious. Ms. Toffel was specifically asked by this Tribunal at the hearing, "what was it about this product or this sale that caused you to exercise that discretion and reduce it [the penalty calculation] from the number of sales to the number of distributions?" Tr. at 310. In response, while Ms. Toffel did say that the decision was done as a team, of which she was one member, she made absolutely no mention of Rhee's cooperation as having been a factor the team considered. Tr. 310-11. Further, Ms. Toffel went on to agree specifically with this Tribunal's observations that, in this litigation context, the ERP does not provide for any adjustment for cooperation in the investigation or litigation process, and admitted that therefore she did not take those two factors into account in determining the proposed penalty. Tr. 312.

[57] The ERP provides, "*[d]uring the course of settlement negotiations*, the EPA may consider the respondent's attitude or good faith efforts to comply with FIFRA to reduce the penalty as much as 20 percent below the proposed penalty, if such reduction would serve the public interest, " and provides that where "EPA determines that there are no grounds for adjustment of the proposed civil penalty based upon new financial information or other facts, or on a showing of inability to continue in business, and that equity would not be served by adjusting the proposed penalty by only the allowable 20 percent good faith attitude adjustment, the Regional Program Division Director may approve an extraordinary adjustment to the proposed penalty for up to an additional 20%" but only "in extraordinary circumstances" and "is not to be used routinely." C's Ex. 15 at 28. However, good faith was formerly *required* to be considered by the Presiding Judge in determining FIFRA penalties, pursuant to the Consolidated Rules of Practice, 40 C.F.R. § 22.35(c) (1998). *E.g., Green Thumb,* EPA Docket No. IF&R-V-014-94, 95 EPA ALJ LEXIS 98 (ALJ, Aug. 31, 1995), *aff'd,* 6 E.A.D. 782 (EAB 1997).

Sixth, regardless of what the statute, ERP or the EAB directs, the Agency frequently does not assess FIFRA violations on a per sale or per shipment basis, as it did here, resulting in a lack of consistency in assessing penalties. FIFRA provides that "Any . . . distributor who violates any provision of this subchapter may be assessed a civil penalty . . .of not more than $5000 for each offense," and that "it shall be unlawful for any person . . . to distribute or sell to any person . . . [a]ny pesticide that is not registered . . . ." FIFRA §§ 12(a)(1)(A), 14(a)(1). Based on these provisions, as stated in the ERP, the Agency's policy is to consider[] violations that occur from each shipment of a product (by product registration number, not individual containers), or each sale of a product. . . . to be independent offenses of FIFRA," each of which are "subject to civil penalties up to the statutory maximum." C's Ex. 15 at 25. As explained by the EAB, "[e]ach sale or distribution of a pesticide to any person constitutes a distinct unit of violation, and thus is grounds for the assessment of a separate penalty." *Chempace Corp.*, 9 E.A.D. at 129-130 (penalties for 98 alleged violations based on 98 separate sales or distributions). The EAB explained further that treating multiple sales or distributions as a single violation "undermines the deterrent purpose . .. and would no longer provide an incentive to a seller or distributor of unregistered pesticides to refrain from continuing that unlawful activity after the first illegal sale or distribution." *Id.* at 130. The EAB has stated that "linking the number of violations to the number of distributions or sales . . . is consistent, not only with FIFRA's plain language, but with the consumer protection goals of FIFRA." *Microban Products,* 2004 EPA App. LEXIS 13 at *57. *See also*, *Sultan Chemists*, Inc., 1999 EPA ALJ LEXIS 46, at *4 (EPA ALJ 1999), 2000 EPA App. LEXIS 24 (EAB 2000), *aff'd Sultan Chemists, Inc. v. United States EPA*, 281 F.3d 73 (3rd Cir. 2002)(89 violations of FIFRA section 12(a)(1)(A) charged for 89 individual sales by company with 25 years of experience as a registrant of four types of unregistered pesticides, namely antimicrobial sprays and towelettes used in dental offices, with fraudulent registration number, misleading information as to effectiveness, and unknown toxicity); *Super Chem Corp*., 2002 EPA ALJ LEXIS 25 (EPA ALJ 2002)(15 FIFRA §12(a)(1)(A) violations charged based on 15 sales over a one year period); *Chem Lab Products, Inc*. (24 counts of FIFRA §12(a)(1)(A) based upon sales over a four month period).

It has been held that "fairness, equity and other matters as justice may require" are appropriate considerations in assessing civil penalties under FIFRA, even if not specifically mentioned in the penalty provisions of FIFRA. *Johnson Pacific, Inc.*, 5 E.A.D. 696, 704 (EAB 1995); *FRM Chem*, slip op. at 12-13 (equity and fairness may also be considered). To this end, the FIFRA ERP states that it is intended to "provide fair and equitable treatment of the regulated community by ensuring that similar enforcement responses and comparable penalty assessments will be made for comparable violations." C's Ex. 15 at 1. *See also*, Lowell Declaration, Attachment 1 (EPA General Enforcement Policy # GM-21, Policy on Civil Penalties p. 4 (Feb. 16, 1984), available at http://www.epa.gov/compliance/resources/policies/civil/penalty/epapolicy-civilpenalties021684.pdf (noting "fair and equitable treatment requires that the Agency's penalties must display both consistency and flexibility."))

The statutory language together with these policies suggests that each sale or distribution of pesticide at issue in any given case generally should be assessed a separate penalty. The Agency, however, frequently has not done so. As Mr. Fuhrman testified, this is the first, *and*

only, unregistered mothball case in which the Agency has charged a violation for each separate sale or distribution. Tr. 387-92. Previously, whether in regard to a retailer or distributor, it appears that EPA has limited the number of violations to the number of different unregistered pesticide product types sold, regardless of the number of sales or distributions. In *Hing Mau, Inc.*, 2003 EPA ALJ LEXIS 63, at *2, *8, *34-35 (ALJ 2002), actual sales could be inferred from the facts that each carton contained 100 bags of product and that 78 bags of one product and 90 bags of the other product remained on the shelves, but the Agency charged only two violations, for distributing or selling each of two pesticide products. In *William Myers*, EPA Docket No. I F & R VII-344-C, 1980 EPA ALJ LEXIS 4, at *5 (ALJ, July 31, 1980), the Agency charged a manufacturer of the mothball product with only two FIFRA violations for the sale on one day of two unregistered mothball products, although evidence indicated that the respondent "with a knowing disregard of statutory requirements," had shipped "quantities" of the products interstate and that at one time the respondent had 10,000 boxes of unregistered products on hand. 1980 EPA ALJ LEXIS 4, at *5, *20. Twelve FIFRA violations were charged for the sale of twelve different types of unregistered pesticides, including four naphthalene-containing mothball products, two of which may have been the *exact same products* at issue here in that they were identified in that case as "OXY MOTH REPELLANT *FOR CLOSET* and "OXY MOTH REPELLANT *FOR DRAWER.*" in *Hannam Chain USA, Inc.*, 2001 EPA Consent Lexis 661 (Sept. 26, 2001).[58] As indicated in a EPA Region 9 Press Release entitled "EPA FINES 15 WESTERN BUSINESSES $200,000 FOR ILLEGAL INSECTICIDE SALES," dated September 26, 2001, http://yosemite.epa.gov/opa/admpress.nsf/9e50770d29adb32685257018004d06fd/8b7cefea7a63b1df852570d8005e1453!OpenDocument, the Agency announced that it had proposed fines against various companies, and listed the proposed fines and the number of different unregistered pesticide products sold. The amounts of proposed penalties and the listing by the number of types of products indicate that the companies were charged not on the basis of the number of sales or distributions, but on the number of different pesticide products sold (proposed penalties of $29,700 for the sale of six types of unregistered moth repellant products; $9,900 for the sale of one type of unregistered moth repellant and one insecticidal chalk product; $24,750 for the sale of five different unregistered moth repellant products; $24,750 for the sale of five different unregistered moth repellant products; $3,960 for the sale of one unregistered moth repellant product; and $34,650 for the sale of seven unregistered moth repellant products.)[59]

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[58] The Complaint/Consent Agreement and Final Order filed in *Hannam Chain* does not provide any indication as to the total number of sales or distributions of the 12 unregistered pesticides, but it defies logic to imagine that only one sale or distribution of each product occurred within the statute of limitations period. In that the proposed penalty, $59,950, and settlement amount in *Hannan Chain* differ significantly, there is no reason to suspect that the per-product proposed penalty assessment reflects a matter of compromise in anticipation of settlement.

[59] EPA's website contains a number of "Complaint/ Consent Agreement and Final Orders" regarding the sale of unregistered moth repellants which appear to have been simultaneously filed on the day of the Press Release. *See, Han Sun Reep*, 2001 EPA Consent LEXIS 666 (EPA CAFO, Sept. 26, 2001) (warehouser charged with one count of distributing an

In other types of FIFRA cases, too, the Agency has chosen not to allege violations on a per-sale or per-distribution basis, as noted by Respondent. *See, Avril, supra* (penalties based on number of months of sales), and *Hanlin Chemicals, supra* (penalties based on number of years of sales). In *FRM Chem, Inc.*, slip op. at 2, a pesticide producer was charged with three violations of FIFRA, although evidence indicated that it made a total of six sales (two sales to each of three municipalities) of one to four 50-gallon pails, during four separate months, of an unregistered pesticide which can cause irreversible eye damage, respiratory damage and skin corrosion, and requires the signal word of "Danger." In *Sporicidin International,* 3 E.A.D. 589 n. 26 (EAB 1991), there were at least three sales and three corresponding shipments of one pesticide product and one shipment of another pesticide product, but the respondent was only charged with two violations, one for each unregistered product. In *Green Thumb,* the respondent was charged with a single violation for distributing an unregistered pesticide, based upon the inspector finding that the product was held for sale at the respondent's facility, although EPA knew that the respondent had sold thousands of gallons of the pesticide in multiple sales over a multi-year period, and knew that the respondent continued to sell the product for a year even after it was specifically advised by its supplier of the need for registration. *Green Thumb,* 6 E.A.D. at 785-86.

Ms. Toffel testified that, in working up her penalty calculation, she spoke to someone in Region IX about another mothball case, who indicated that they were limited to seeking small penalties by the little amount of information collected by the inspectors, and Ms. Toffel suggested that because Rhee had provided the inspectors with more information on the violations, the Agency was able to calculate a higher penalty than that requested in other mothball cases. Tr. 314-15. The reason for the lack of information collected by the inspectors in

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unregistered naphthalene product); *The Int'l Supermarket, Inc.*, 2001 EPA Consent LEXIS 663 (EPA CAFO, Sept. 26, 2001)(respondent charged with one count of distributing an unregistered naphthalene pesticide); and *Sang H. Beck,* 2001 EPA Consent LEXIS 667 (EPA, Sept. 26, 2001)(supermarket charged with one count of distributing a single type of unregistered naphthalene pesticide). However, in that the complaints were filed with the consent agreement resolving the matter, the number of violations charged *may* have been an element of compromise and therefore are not being relied upon to provide an appropriate reference in this litigated case. *See, Chem Lab Products, Inc.*, 2002 EPA App. LEXIS 17, at *2 (EAB 2002) (because consent agreements necessarily involve some element of compromise, in that parties sometimes give up something they might have otherwise won, such agreements cannot provide a meaningful reference point for matters litigated to judgment). Two other Region IX cases, both commenced after the instant action was initiated, suggest that the Agency is still using the same type of restrictive violation calculation methodology in moth repellant cases. *See, Flash Int'l Trading Inc.*, 2005 EPA RJO LEXIS 541 (EPA RJO, Aug. 22, 2005) (consent decree in which importer/exporter/wholesaler was charged with one count of holding for sale unregistered naphthalene mothballs); and Region 9 Pesticide Enforcement Accomplishments Report for Fiscal Year 2004, http://www.epa.gov/region9/enforcement/2004.pesticides.html (noting EPA fined Bally's Brother Company $3,168 for the alleged sale and distribution of unregistered mothballs to Lion Food Center, an Asian supermarket in California).

some FIFRA cases is contained in Section 8(b) of FIFRA, which governs FIFRA inspections and states in pertinent part:

> For purposes of enforcing the provisions of this subchapter, any producer, distributor, carrier, dealer, or any other person who sells or offers for sale . . .any pesticide . . . shall, upon request of any officer or employee of the Environmental Protection Agency or of any State . . . duly designated by the Administrator, furnish or permit such person . . . to have access to and to copy: (1) all records showing the delivery, movement or holding of such pesticide . . . including the quantity, the date of shipment and receipt, and the name of the consignor or consignee . . . .
> Any inspection with respect to any records and information referred to in this subsection *shall not extend to . . . sales data other than shipment data* . . . .

The inspectors are thus prohibited from gathering evidence of pesticide sales unless it is shipment data. Such data would be kept by pesticide distributors and wholesalers, whereas sales data other than shipment data would be kept by retail establishments. Thus, without sales data, evidence from retail establishments may not support assessment of penalties for each sale or distribution. Section 2(gg) of FIFRA, 7 U.S.C. § 136(gg), defines "to distribute or sell" as "to distribute, sell offer for sale, hold for distribution, hold for sale, hold for shipment, ship, deliver, deliver for shipment, release for shipment, or receive and (having so received) deliver or offer to deliver." In retail establishments, therefore, EPA may assess a single violation based on offering or holding a pesticide product for sale or on a single sale to an inspector. *See e.g.*, *Johnson Pacific, Inc.*, 5 E.A.D. 696, 1995 EPA App. LEXIS 4 (EAB 1995)(inspector observed large bucket containing unlabeled bags of highly corrosive pool sanitizing tablets held for sale and purchased one bag; a single sale to the inspector was alleged); *Sav Mart, Inc.*, 5 E.A.D. 732, 1995 EPA App. LEXIS 13, at *1-5 (EAB 1995)(retailer charged with one violation of FIFRA 12(a)(1)(A), along with other types of FIFRA violations, although evidence indicated that respondent produced and offered for sale ten bottles of unregistered pesticide and made one sale of two bottles to the inspector).

This lack of consistency in assessing penalties on a per-sale or per-distribution basis under the ERP weakens the argument for assessing penalties on a per-distribution basis under a strict application of the ERP methodology. It suggests that the Agency recognizes that the ERP method of multiplying the penalty for one violation by the number of sales or shipments (whichever is higher) of a pesticide product is not appropriate in many cases. Despite having the burden to show the appropriateness of the penalty, Complainant has not adequately explained why Rhee deserves such vastly different treatment from other establishments which sold unregistered pesticides. The evidence proffered in this case suggests that the Agency did not properly consider whether the penalty being proposed here of 1.3 million dollars for these violations represents "fair and equitable" treatment of a member of the regulated community, or a comparable penalty for comparable violations.

Complainant argues in its brief that the penalty proposed in this case is not

disproportionate to other mothball cases, comparing the present 1.3 million dollar proposed penalty for 9,340 individual packet units of unregistered moth repellant products sold, with a $9,900 penalty for 32 packet units of mothball products sold by Hing Mau. C's PHB at 62. Unlike Hing Mau, a retailer, Rhee is a wholesaler, and the "units," *i.e.* cartons of product it sold, totaled only 467. As a result of the ALJ's decision in *Hing Mau* reducing the penalty to $7,920, that entity paid $247.50 for each unit of unregistered product it *sold* (it paid no penalty for the 168 units of unregistered product which it held for sale). In this case, the Agency is seeking $2,784 for each unit of unregistered product sold, more than ten times as much. The Agency has never sought a penalty of anywhere near this magnitude in regard to any other case alleging the sale of unregistered moth repellants under FIFRA section 12(a)(1)(A) .

This fact may not be a determining factor here, as the EAB has suggested that it would be inappropriate to consider the magnitude of penalties charged or assessed in other cases. In *FRM Chem*, slip op. at 20-21, the EAB stated that basing a penalty decision in part on comparison with other cases, or a suggestion that a penalty should be reflective of penalties assessed in other cases, is "inappropriate" and "inconsistent with the Board's case law." The EAB reasons that the "substantial variability in case-specific fact patterns" makes "meaningful comparison between cases for penalty assessment purposes impracticable," and "not efficient because of the detailed inquiry it would require," and that "the penalty policies offer a better means of pursuing consistency than attempts to align a given case with outcomes in other cases, marked as they are with their distinguishable facts and circumstances."[60] *Id.; see also, Chem Lab*, 10 E.A.D. at 728.

Upon considering all of the evidence, including the foregoing, I find sufficient compelling reasons to depart from the Agency's calculation of the penalty in this case under the ERP. The simple multiplication of the penalty calculated under the ERP for one violation by the number of distributions yields a penalty which does not reflect the total circumstances of this case. The methodology to be applied must effectuate the intent of the ERP to "provide fair and equitable treatment of the regulated community by ensuring that similar enforcement responses and comparable penalty assessments will be made for comparable violations." It must also serve the purpose of deterrence, and not only remove the (very nominal) economic benefit to Rhee, but also include an additional amount reflecting the seriousness or gravity of the violations. See, Lowell Declaration, Attachment 1 (EPA General Enforcement Policy # GM-21, Policy on Civil Penalties) p. 3. The general policy is that the gravity or seriousness of a violation should be based primarily on the risk of harm or actual harm from the violation, which includes consideration of the amount and concentration of the pollutant and its toxicity. *Id.* p. 14-15. The FIFRA ERP provides that the gravity of the violation is primarily based on the type of violation – here, selling an unregistered pesticide product – which reflects the degree of nonfeasance or misfeasance of the violator.

[60] Of course, this suggestion would carry more weight if the enforcement arm of the Agency consistently followed the FIFRA ERP in reckoning the number of penalties it charged in cases falling under it.

As to alternative methodologies used by EPA in other cases, the number of months or years in violation is not a consistent measure, among different FIFRA cases, of the potential for harm or extent of misfeasance or nonfeasance. Assessment of violations by number of years or months in violation does not account for the variability of the frequency and amount of noncompliant pesticide being distributed per month or per year, and thus the variability of the risk of harm and the extent of nonfeasance or misfeasance, per month or year. For example, one company that makes very few noncompliant shipments per month of a small amount of pesticide for ten months could be penalized five times more than a company with similar violations but which makes many noncompliant shipments per month of a large amount of the same pesticide for two months.

The number of different products sold also is not a consistent measure of the potential for harm or extent of deviation. Adopting a method of assessing violations by number of illegal products does not account for the variability in frequency and amount of each noncompliant pesticide product being distributed, and thus the variability of the risk of harm and extent of nonfeasance or misfeasance, per product. For example, one company that makes only a few distributions of small amounts of several noncompliant pesticide products could be penalized many times more than a company which distributes numerous large shipments of only one of those pesticide products.

After considering the alternative methods for assessing units of violation in other cases involving sales of unregistered pesticide, *i.e*. by number of months, years, or products, I am not convinced any of those methods leads to a more appropriate penalty in this case. There is no solid reason in this case to depart from the policy of assessing a separate penalty for each distribution of unregistered pesticide, as each distribution represents both an increased risk of harm to human health and an additional act on the part of Respondent of shipping a pesticide without ensuring that it was registered. The policy of assessing a separate penalty per distribution is also appropriate considering the size of Respondent's business. While assessing a separate penalty for each case or carton shipped (467) may more accurately measure the risk of harm, as it consistently reflects the volume of product, it does not represent the number of acts of nonfeasance or misfeasance on the part of Respondent, and appears not to be consistent with the ERP's instruction to consider violations that occur "from each shipment of a product (by product registration number, not individual containers), or each sale of a product," considering that "each sale" likely includes several cases or cartons. *See*, C's Exs. 20, 22.

The most appropriate method of calculating the penalty in this case is to assess the full penalty of $3,850 for the first day of violation within the time period of the statute of limitations, which represents Respondent's initial failure to register the products before selling them, and add a significantly lesser amount for each of the subsequent 263 shipments of pesticide product sold, representing each of the Respondent's subsequent failures to ensure the products were registered before distributing them. This method seems most appropriate because Rhee's most significant negligent act, one which it is not even being charged with in this case, involved its failure to seek and obtain EPA approval prior to its first import of JOMYAK, which apparently occurred in 1999. Had it done so, then all the subsequent negligent acts, which involve merely continuing to

distribute the same unregistered product it had improperly imported, would in all likelihood not have occurred. This subsequent continuing negligence, which alone is the subject of this action, is of a lesser degree of nonfeasance or misfeasance than the original act, and does not represent 263 separate significant acts of active malfeasance each warranting a multiple of the same substantial monetary penalty.

This method of assessing lesser amounts of penalties for multiple violations of the same statutory or regulatory provision is commonly used with regard to administrative penalties imposed for violations of the Resource Conservation and Recovery Act. *See*, EPA RCRA Civil Penalty Policy, June 2003 ed., ("RCRA Penalty Policy") http://www.epa.gov/compliance/resources/policies/civil/rcra/rcpp2003-fnl.pdf. Under Section 3008 of RCRA the statutory maximum penalty per day of noncompliance for each violation is $27,500. The RCRA Penalty Policy provides (at pp. 22-23), "where a facility has through a series of independent acts or omissions repeatedly violated the same statutory or regulatory requirement, the violations may begin to closely resemble multi-day violations in their number and similarity to each other," particularly where they occur close in time to each other and are based on similar acts, in which circumstances "enforcement personnel have discretion to treat each violation after the first in the series as multi-day violations (assessable at the rates provided in the multi-day matrix) if to do so would produce a more equitable penalty calculation." The RCRA Penalty Policy (at p. 27) explains that it is not appropriate to use the multi-day penalty matrix where significant harm has in fact occurred and immediate compliance is required to avert a continuing threat to human health or the environment. The multi-day matrix of the RCRA Penalty Policy (at p. 26) provides for penalties ranging from $110 to $5,500, which is 20 percent of the maximum statutory penalty.

The same reasoning, and the same ratio of statutory maximum penalty to multi-day penalty, should be applied to the present case. As the maximum penalty under Section 14(a)(1) of FIFRA is $5,500, the maximum multi-day penalty would be $1,100. Considering the circumstances of this case as discussed above, particularly the gravity of failure to register the pesticide, its toxicity, the risk of harm to human health, the risk of harm to the environment, Respondent's level of culpability, its cooperation, its lack of prior violations, the lack of significant economic benefit from the violations, and the size of its business, including the fact that it is not in the pesticide business generally, its financial status and net profits, and that the offending product represented a minuscule portion of its sales, the maximum multi-day penalty should be reduced by 20 percent. The total penalty is $3,850 for the first distribution plus $880 for each of 263 additional distributions, yielding a total penalty of $235,290.

This penalty is sufficiently large enough to reflect the harm to the FIFRA regulatory program that comes from failing to properly register this otherwise easy-to-register mothball product and to serve as a deterrent to Respondent and other companies committing similar violations in the future. In this regard it is noted that this penalty amount represents in excess of *20 times* the *gross* profit from sales of the offending products and *235 times* the total *net* profit made by Respondent from the sales.

This penalty amount is also not significantly different from an alternative calculation under the general methodology of the ERP. Starting with the matrix figure of $5,500, reflecting a Level 2 gravity of violation and Category I size of business, the risk of harm to human health from each of the Respondent's violations, as discussed above, is a value of "1." However, the values for toxicity and risk of harm to the environment should be "0," considering these factors relative to the fact that each of the 264 violations represents only one shipment of JOMYAK, or an average of about 35 bags of JOMYAK, and considering, as discussed above, that the effect of each factor is magnified, and that there should be a larger range of penalties, where there are numerous multiple violations. The ERP itself suggests that values of "0" may be considered for the "gravity of harm" factors, which list "1" as the lowest value, as it specifically provides for total gravity values of "3 *or below*," which would be impossible without allowing for values of "0" for those factors. C's Ex. 15 p. 22, Table 3 (emphasis added) and Appendix B. The compliance history is a value of "0." As to the factor of culpability, in the circumstances of this case, Respondent should not be considered at the average level of negligence in a FIFRA case in the context of multiplying the penalty 264 times for each violation, which magnifies the effect of the factor. Thus, instead of a culpability value of "2," Respondent's level of culpability should be a value of "1." Under the ERP Table 3, the total gravity value would be "2," which results in a reduction in the matrix value of 50 percent, regardless of whether the gravity value is "2" or "3." *Id.* To reflect the difference between a value of "2" and a value of "3," as the ERP provides that each successively lower gravity value generally results in a 10 percent decrease, a value of "2" should result in a 60 percent reduction from the matrix value. *Id.* I would further reduce the penalty by 25 percent considering Respondent's cooperation, that the Agency had the ability to prevent the vast majority of violations from occurring, the minuscule economic benefit from the violations, and the nature of Respondent's business, financial status, and net profits. Therefore, the $5,500 matrix figure would be reduced by 85 percent, yielding a penalty of $825 per violation, or a total penalty of $217,800 for 264 violations, which is very close to the $235,290 penalty assessed herein.

VIII. CONCLUSION

After considering all the evidence adduced at hearing in this case, it is determined that Complainant has not met its burden of proof to show that the proposed penalty of $1,306,800 is appropriate for the violations for which Respondent has been found liable. The evidence clearly establishes that Respondent did not exercise legally sufficient due care when it decided to start importing and distributing JOMYAK, a foreign pesticide. However, that misfeasance essentially occurred once - when the decision to start importing the product was first made, and that erroneous decision merely continued unchecked and unchanged thereafter, but the evidence indicates it was not made anew at any later point. Therefore, it is determined that a more appropriate way of calculating the penalty in this case is to assess a penalty of $3,850 for the first violation, utilizing the ERP for the initial violation, and add $880 for each of the 263 subsequent violations of distributing the unregistered product thereafter, for a total of $235,290. This figure is deemed appropriate in light of the three statutory factors set forth in FIFRA Section 14(a)(4) as discussed in more detail above.

ORDER

1. For the violations of FIFRA § 12(a)(2)(A) found to have been committed, Respondent Rhee Bros, Inc., is hereby assessed a civil penalty of $235,290.

2. Payment of the full amount of this civil penalty shall be made within thirty (30) days after this Initial Decision becomes a final order under 40 C.F.R. § 22.27(c), as provided below. Payment shall be made by submitting a certified or cashiers' check(s) in the requisite amount, payable to the Treasurer, United States of America, and mailed to:

EPA - Region III
P.O. Box 360515
Pittsburgh, PA 15251

3. A transmittal letter identifying the subject case and the EPA docket number, as well as the Respondent's name and address, must accompany the check.

4. 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.

5. Pursuant to 40 C.F.R. § 22.27(c), this Initial Decision shall become a final order forty-five (45) days after its service upon the parties and without further proceedings unless: (1) a party moves to reopen the hearing within twenty (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 thirty (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, pursuant to 40 C.F.R. § 22.30(b).

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Susan L. Biro
Chief Administrative Law Judge

Date: September 19, 2006
Washington, D.C.