UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of:	)	
	)	
FRM Chem, Inc.,	)	**Docket No. FIFRA-07-2004-0041**
a.k.a. Industrial Specialties,	)	
	)	
Respondent	)	
	)	

INITIAL DECISION

I. Introduction

In this Complaint, brought under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"or "Act"), as amended, 7 U.S.C. §§ 136-136y (2004), the United States Environmental Protection Agency, Region VII ("Complainant"or "EPA") alleges that the Respondent, FRM Chem, Inc., a.k.a. Industrial Specialties ("FRM"), violated that Act by selling its product, "Root Eater," without registering the product as a pesticide and because the product was "misbranded" in that its label used the incorrect warning word, did not list the percentage of active ingredients, and did not have registration numbers. Applying the "Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act" (July 2, 1990) ("ERP" or "Policy"), Complainant seeks a penalty of $5,500 per count, totaling $16,500. A hearing was held on August 26, 2004 in East St. Louis, Illinois. Respondent proceeded *pro se*.

For the reasons that follow, the Court finds that Complainant has established by a preponderance of the evidence that Respondent violated FIFRA §§12(a)(1)(A)&(E) in the transactions identified in the three Counts which make up the Complaint and that Respondent has the ability to pay the proposed penalty. However, this Court departs from Complainant's application of the ERP, and assesses a total civil penalty of $1,800. 40 C.F.R. § 22.27(b).

II. Evidence.

FRM "is registered with the EPA as a producer, EPA establishment number 10366-MO, and has been for approximately thirty-five years." CX 6.[1] On an order basis, Respondent manufacturers and distributes Root Eater from its Washington, Missouri facility. *Id.*; Hearing

[1]Respondent purchased the company Industrial Specialities (IS) in January, 1998. From that point on, IS has also been registered as an EPA producer. CX 6.

Transcript ("Tr.") at 15-16. The business is headed by its President, Raymond Kastendieck.[2] Respondent's employees include other members of the Kastendieck family. Karlen Kastendieck is "employed by [FRM] . . . as the sales manager," and also assumes responsibilities such as "forklift instruction, graphic artist, and writing labeling for products." CX 6. Keith Kastendieck is FRM's Plant Manager. CX 9.[3] Respondent has no prior history of having violated FIFRA. Tr. at 51. Respondent sells Root Eater to "end-users or to entities that will distribute the product to end-users." CX 6. Root Eater is marketed as a "tree root remover for sewer systems." CX 2. Respondent also refers to it more generally as a cleaning agent. Respondent's Response ("Response") at 2.[4] The product is "made strictly to order;" no stock is kept on hand. CX 6.

Root Eater's label indicates that it contains cupric sulfate. CX 2.[5] Cupric sulfate is also known as copper sulfate. Tr. at 90-91.[6] Copper sulfate is a known pesticide ingredient that has some toxicity. *Id.* at 45; 64. Specifically, copper sulfate causes irreversible eye damage and skin corrosion, *Id.* at 83, and is toxic to respiratory tissue. *Id.* at 50. There are a number of registered pesticide products whose active ingredient, like Root Eater's, is copper sulfate. *Id.* at 81.

Root Eater's label contains, among other information, the following language:

> **CAUTION – Contains Cupric Sulfate / In case of eye contact with solution, flush eyes immediately. If swallowed, drink large amounts of water, followed by milk, egg whites, or gelatin solution. Seek immediate medical attention.**

CX 2. (the bold print appears on the label) Respondent sought to do "everything [it could] to avoid wording on a label that will cause or sustain a product to be registered, because of the cost." Tr. at 111.

Craig Uthlaut is a "pesticide use investigator" for the Pesticide Bureau of the Missouri Department of Agriculture (MDA). Tr. at 11. His primary responsibility in that capacity is to gather facts regarding potential FIFRA violations. *Id.* at 40. On September 12 and 13, 2002, Uthlaut inspected the FRM facility. *Id.* at 11-12; CX 1. Uthlaut was dispatched by the MDA,

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[2]Raymond Kastendieck served as the *pro se* representative for Respondent. He is not an attorney.

[3]Unless otherwise noted, reference to "Kastendieck" without an accompanying first name will be to Raymond Kastendieck.

[4]Respondent did not file a post-hearing brief, but did submit a two-page "Summary and Response" to EPA's post-hearing brief. EPA did not submit a Reply Brief.

[5]The label does not contain the concentration of the ingredient. Tr. at 66.

[6]Testimony of EPA witness Kerry Leifer

which the U.S. EPA had contacted concerning Root Eater. Tr. at 13. The purpose of this inspection was "to conduct an investigation of the Root Eater product." *Id.* at 26. However, this was not the first time inspector Uthlaut conducted an inspection of the Respondent's facility. In fact, his earlier inspection, *conducted some three years and four months earlier*, in May 1999, was for the exact same reason – he was there to inspect regarding the Respondent's Root Eater product. Tr. 26. At that time in May 1999, as in September 2002, Respondent forthrightly acknowledged that it manufactured and distributed Root Eater.[7] As in the 2002 inspection, Uthlaut, in 1999, obtained copies of the Root Eater label and sales records. In 1999 he advised Respondent that "the wording on the product label may be questionable." Tr. 15. For *both* investigations, the sole reason for the inspector's presence was Respondent's Root Eater product. Accordingly neither instance was a general inspection. Tr. 35. With both investigations Uthlaut prepared a report. EPA Exhibits 8 and 9.

At the 2002 inspection, Uthlaut met with Karlen Kastendieck. Tr. at 15; CX 1; CX 6. Uthlaut collected samples of the Root Eater label. Tr. at 16-17; CX 2; CX 6; CX 7.[8] Uthlaut also collected invoices reflecting Respondent's sale of Root Eater. Tr. at 21, 22. There was no product in stock when Uthlaut visited the facility. CX 8. Accordingly, while EPA Exhibit 7 is described as a "Receipt for Samples," the exhibit actually reflects, and Uthlaut conceded, that he received only a copy of the Root Eater labeling and sales records, not any sample(s) of the actual product. Tr. 28, 29. Not since the issuance of the administrative complaint has Respondent manufactured Root Eater. As Kastendieck expressed it: "As soon as the EPA notified us that they thought this product was regulated, we ceased production."[9] Tr. at 105.

At first Uthlaut stated that it was his belief that the wording on the label that Root Eater eliminated roots and had residual, or long term, activity, constituted a pesticidal claim. Tr. 35. He also noted that the label included that the product contained 'insoluable copper.' He had never heard of the term 'cupric sulfate' prior to the inspection. Tr. 36. However, he then hedged

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[7]At the hearing a confidential business information ("CBI") issue arose and almost immediately became moot. Respondent initially raised a CBI claim regarding the information in EPA exhibits 3, 4, and 5. These exhibits are copies of invoices, offered by EPA to establish that Respondent sold Root Eater, as alleged in the Complaint. However, Respondent has never contested the alleged sales and admits they occurred. Respondent also stipulated that the invoices were accurate. Therefore, while the exhibits have been sealed and marked as "CBI" material in the official file, there is no need to refer to the details within them, given the Respondent's admission and stipulation. In short, EPA has established the sale element of the violations.

[8]Uthlaut did not obtain a sample of the actual product. Tr. at 28.

[9]While EPA objected to this statement by Kastendieck, as it was not under oath, the individuals embodying the Respondent, as non-lawyers, did not appreciate the formalities of evidence. Nevertheless, EPA has never claimed that the Respondent continued to produce or market Root Eater, once EPA finally got around to notifying it that there was a problem.

his view, explaining that, upon visiting Respondent's facility, *he had not concluded* that the label made pesticidal claims, but rather his opinion was "that *EPA would believe* that [the label] made pesticidal claims." Tr. 36. (emphasis added). Thus, it was not his interpretation that the label made such claims, only his anticipation of how EPA would view it. *Id.* Yet, as EPA took note of, Uthlaut was no novice inspector. He had conducted *hundreds* of inspections over the years, However, despite this vast experience he essentially left it to EPA to conclude whether a pesticidal claim was present.[10]

At the conclusion of the inspection, Uthlaut a submitted a Marketplace Inspection, containing his account of what transpired at the inspection. CX 9; Tr. at 30. The report reflects that Uthlaut "informed Mr. [Karlen] Kastendieck that the product's labeling contained wording that [he] believed constituted a pesticidal claim." CX 9. Uthlaut "also suggested that [Kastendieck] contact EPA for guidance." *Id.*

As mentioned, the September, 2002 inspection was not the first occasion Uthlaut had to investigate Respondent's manufacturing and distribution of Root Eater. In fact, Uthlaut had conducted a prior inspection of FRM on May 11, 1999. Tr. at 14; CX 8. As was the case with the 2002 inspection, Uthlaut performed the 1999 inspection after being instructed by EPA that "a product was being manufactured that may be a pesticide." Tr. at 37. Along those lines, Uthlaut made no personal conclusions or interpretations, but rather formed an opinion "that the EPA would believe that [Root Eater's label contained] pesticidal claims." *Id.*

During the May 1999 inspection, Uthlaut met with Keith Kastendieck. CX 9. At that time, focused as he was "solely on the one issue" of the Root Eater product, Uthlaut reviewed the Root Eater label and took note of its reference to "insoluble copper," rather than the presence of the term "cupric sulfate," which followed the signal word "**CAUTION**." Tr. at 36; CX 2. The reason for this, Uthlaut explained, is that he was not familiar with the term "cupric sulfate." Tr. at 36-37. At the conclusion of the inspection, Uthlaut told Keith Kastendieck that "the wording on the product label may be questionable," and that Respondent "may wish to contact the EPA for additional guidance." *Id.* at 15; CX 9. Thus, Uthlaut's opinion that the label presented *an issue* of pesticidal claims dates back as far as the 1999 inspection. Tr. at 31.

Respondent claimed that at the May 1999 inspection, Uthlaut promised Karlen

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[10]At the hearing EPA attempted to shift the burden regarding the uncertainty about the label by suggesting that the Respondent could contact EPA on questions regarding the label and seek guidance from the agency. Tr. 40-41. Given that this was the second EPA visit over a span of three years and four months, the Court is not particularly impressed that EPA could blithely suggest that the Respondent should initiate guidance after the second visit. The Respondent did not initiate either visit and it must be observed that the label was not so obviously a problem, given that it took so long and two visits before EPA concluded there was a violation.

Kastendieck[11] that the company "would be getting an opinion from the EPA as to whether the product required registration or not." Tr. at 109. Raymond Kastendieck personally did not request to receive such an opinion in writing. *Id.* at 110.[12] Regarding the 1999 inspection, Uthlaut denied that he promised to send a written statement to the Respondent expressing his view that the label made a pesticidal claim. Tr. 31-32. Yet, contrary to what one would expect, he was less certain about whether he agreed to provide such a written opinion following his more recent 2002 inspection. Instead, he offered: "I don't recall that he [Kastendieck] asked anything from me in particular, personally, no." Tr. 33.

Just as he did regarding his 1999 Marketplace Investigation, Uthlaut forwarded his materials surrounding the September, 2002 inspection, which included "an inspection report, notice of inspections, a receipt for samples, invoices, and some various inspection forms relating to the inspection" to Complainant. Tr. at 44.

The case was then assigned to EPA's Mark Lesher, a Region VII case review officer with over six years experience in that capacity. *Id.* at 43-44. Lesher believed the label made pesticidal claims based on stating that it "removes tree roots without damage to sewage systems, that it also removes undesirable fungi and symbiotic organisms whose growth is promoted by root obstruction ..." Tr. 45. He also noticed there was no registration number, no EPA establishment number on the label, no appropriate warning or signal word on the label, and it was missing first aid statements. *Id*. Lesher stated that copper sulfate is a "known pesticide ingredient that has some toxicity." *Id*. He then drafted an enforcement case review memo and sent it to headquarters "to confirm [his] suspicions of it being a violative product." *Id*. Subsequently, he received word that the product label made pesticidal claims, that it was misbranded, and that it should be registered as a pesticide. Tr. 46.

Lesher used the statutory criteria and the Enforcement Response Policy, 'ERP,'for determining the penalty. Tr. 47. The Respondent, with a Dun and Bradstreet report indicating annual gross revenues greater than one million, was placed in category 'one,' the higher of the two available categories. In addition to the size of business, gravity is considered upon evaluating toxicity level, any effect on human health, violative history, and culpability. Tr. 49. Based on the presence of copper sulfate, Lesher considered the toxicity to be the higher of the

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[11]There is no evidence that Uthlaut interacted with *Karlen* Kastendieck in 1999, or at any time other than the 2002 inspection.

[12]At the hearing, Raymond Kastendieck was Respondent's only witness. He was not at the facility at either of Uthlaut's inspections. Tr. at 109. Hence, his testimony is that *he personally* made no request that the EPA opinion be in writing. *Id*. at 109-110. While Raymond Kastendieck was testifying, Karlen Kastendieck attempted to establish for the record that it was he who made such request. Tr. at 109. This Court advised him that "you'll have to come up and testify to that." *Id*. However, Respondent did not enter Karlen Kastendieck's statement on the record.

two categories and that it should have had the warning "danger" on the label. Tr. 49. As for harm to human health, Lesher assigned a value of 3, from a scale of 1 to 5, based on a "potential for serious or widespread danger to human health, due to the fact that copper sulfate is toxic to eyes, skin, and respiratory tissue." Tr. 50. Also, using a 1 to 5 scale, he assigned a 3 to the category of environmental harm. He viewed the potential for such harm to be serious or widespread because he asserted that copper sulfate is toxic to fish, many invertebrates, including honeybees, other insects and "other wildlife." For violative history, another O to 5 scale applies, and a zero was applied.[13] Regarding culpability, which has 0 to 4 scale, Lesher assigned a 2, which he based on determining that "the violation was caused by negligence." Tr. 51-52. This produced a total of 10, which resulted in the maximum penalty being assessed. Tr. 52-53, 55. Attachment "A" is the penalty calculation drafted by Lesher and dated April 15, 2004. (Admitted as Exhibit 10.) Tr. 53. On cross-examination, Lesher admitted that copper sulfate is listed by the Food and Drug Administration as "generally recognized as safe," which is referred to by the acronym "GRAS." Tr. 54. Lesher also agreed that copper sulfate is used in baby formula and cattle feeds. Tr. 55.

Under the Court's questioning, Lesher agreed that prior to his April 15, 2004 letter, he made a written inquiry asking for guidance from EPA about his suspicions about the product. Tr. 55. He admitted he wanted upper level guidance regarding the particular label. Tr. 56. Thus, Lesher felt he needed some feedback on the matter, "to confirm [his] suspicions." He did not simply start drafting a complaint. Tr. 56 -57. The Court expressed the view that if EPA had some doubts about whether there were pesticidal violations, it would indicate it would be fair to consider that perhaps the Respondents had reason to doubt there was a problem as well. Tr. 58. The letter, at the Court's instance, was admitted as EPA Exhibit 11. The letter is dated July 9, 2003. Tr. 59.

Still, Lesher believed that, despite the letter, there were violations. Tr. 60. Lesher then added that he would send the same letter every time, even where he was certain that a product was a pesticide and that he would employ the same language each time. Tr. 62. Thus it was his practice to always express that "[i]t appears this product makes pesticidal claims" regardless of his personal confidence on the matter. Tr. 63. The Court also asked Lesher if one is running an establishment and producing a product that contains cupric sulfate if there is a source one can consult in the Code of Federal Regulations that will advise whether that substance is a subject of regulation for pesticidal concerns. Lesher said he believed one can check the Code of Federal Regulations for such information. Tr. 63. But when pressed, he backed off that assertion, stating: "I'd have to see that before I can comment on it." Tr. 64. When asked, "Can you state with any assurance that [the Court] would find cupric sulfate listed in the code of federal

[13]Not that a "zero" signifying a spotless violative history helps a respondent. Under EPA's penalty policy, such a history only works to have the penalty not be increased. This approach is premised on the theory that everyone's violative history should be spotless anyway, with the consequence that a respondent receives no reduction for having a previously pristene compliance record.

regulations, under the FIFRA regulations?" Lesher, answered: "Under FIFRA, I'm not sure." *Id.*

Next, the Court inquired about the signal word, and the witness's view that the label should have stated "danger" instead of "caution." Tr. 64. Lesher explained that copper sulfate is "in a lot of other registered pesticides ... [and EPA toxicologists] ... determined that [it] is a toxic material...." Tr. 65. Lesher believed that the word 'danger' signifies a very harmful substance, whereas 'caution' conveys that the substance is 'somewhat dangerous' and still must be used carefully. Tr. 65. He did not know if FIFRA defines either term. Tr. 66. When asked by the Court if he would have issues if the label had an EPA registration number, and had it listed 'danger' on the label, he responded that he would still want to know the amount of the active ingredient in order to know its concentration.[14] He believed that the Complaint, in its general allegations referred to the issue of active ingredient concentration. Tr. 67. He also believed that the first aid instructions would have been more detailed, had 'danger' been listed on the label. Lesher stated that one can go to the material safety data sheet for the chemical and determine what should be included on the label. Tr. 68. He acknowledged that EPA had recently issued new regulations regarding first aid labeling. Tr. 69. Lesher did not know if one reviewed the EPA regulations, if one could find one specifically addressing cupric sulfate. Tr. 73.

EPA's next witness was Kerry Leifer, who is a team leader with EPA's emergency response branch of the pesticide registration division. That office evaluates products for "registerability." Tr. 77. Leifer was allowed to testify as an expert to confirm that Root Eater is a pesticide and accordingly must be registered. Tr. 79. He determined that the product was a pesticide and therefore subject to EPA registration because of "the pesticidal claims and other information." Tr. 79. In determining that the product had to be registered, Leifer first determined whether it met the definition of a pesticide and did so by considering the label's claims. This translates into determining whether a claim is made that the product prevents, repels, mitigates or destroys pests. Tr. 80. He also stated that there is a data base within EPA for registered products and he found no registration for this product. From the same data base he also determined that there were a number of products that made claims similar to Root Eater and had copper sulfate in them and that these products are registered with EPA. Tr. 81-82. Accordingly, Leifer believed Root Eater should be registered and that it was misbranded.[15] He also stated that companies are to submit documents to EPA for approval regarding product registration. While he could not state whether such a request for EPA approval was ever made,

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[14]Leifer did not cite any FIFRA or other regulatory requirement that concentration be listed.

[15]Leifer's memo, dated September 30, 2003, was admitted as EPA exhibit 12. Leifer's contention that because *other* products with copper sulfate are registered, Root Eater should also be registered, is nothing more than an attempt by EPA to bootstrap its case and is rejected. The determination of whether something is a pesticide is determined by the statute, not by whether other products contain copper sulfate.

he could state that no registration exists for the product, Root Eater. Tr. 86.

Leifer stated that are a number of sources within the EPA pesticide program which indicate the regulatory status of copper sulfate as a pesticide. Tr. 92. However, Leifer admitted that there is no outright ban on the use of copper sulfate. In short, had the Respondent received a registration number and the signal word 'danger' been present and the label had otherwise been sufficient, EPA would not have had a problem with the product. Tr. 92-93.

In evaluating Respondent's ability to pay the proposed $16,500 penalty, Complainant enlisted Joyce Hughes, an accountant in Region VII's Resource Financial Management Branch, to "review some tax returns and financial documents regarding [FRM]." Tr. at 95-96. Hughes was qualified as an expert for the purpose of making a determination of Respondent's ability to pay and it was her view that the Respondent could pay the full proposed penalty. Tr. 97-101. The Respondent, while of the view that the penalty is excessive under the circumstances, does not contest its ability to pay the proposed amount.

Mr. Raymond Kastendieck testified on behalf of Respondent, FRM Chem. He stated that the company had gone out of its way to word the label to avoid being classified as a pesticide. It tried to accomplish this by using the term 'remove' as indicative of a cleaning term. He stated that his company was primarily in the cleaning business and it was their intention to sell the product Root Eater as a sewer *cleaner* and not as a pesticide root remover. Tr. 108. Kastendieck.stated that he was told by others in his company that EPA would be providing an opinion on this matter. He stated that the company sells so little of the product that the cost of registering would not be worth it. Tr. 111.

III. Determination of violations

A. Statutory and Regulatory Framework

FIFRA defines "pesticide" as "any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest . . . ." FIFRA § 2(u). Under the statute, "pest" means "(1) any . . . fungus, weed, or 2) any other form of terrestrial or aquatic plant or animal life or virus, bacteria, or other micro-organism . . . which the Administrator declares to be a pest . . . ." FIFRA § 2(t). The Act requires that manufacturers of pesticides register any such product before selling it for commercial use. FIFRA §3. FIFRA makes it is unlawful "to distribute or sell any pesticide that is not registered" in accordance with § 3. FIFRA § 12(a)(1)(A). It also prohibits the sale or distribution of "any pesticide which is . . . misbranded." FIFRA § 12(a)(1)(E). A pesticide is "misbranded" in the event it lacks a warning or caution statement adequate to protect health and the environment. *Id.* at § (2)(q)(1)(G). A product's toxicity level shall determine whether its label should include the signal word "Danger," "Caution," or "Warning." 40 C.F.R. pt. 156, Subpart D.

B. Application to the Facts

As mentioned at the outset, the Complaint consists of three counts, with each count alleging that the Respondent violated Section 12(a)(1)(A) and 12(a)(1)(E) of FIFRA. Specifically, Count 1 alleges that the Respondent sold Root Eater to the city of Covington, Oklahoma in January and July 2002 and that by making those sales it was selling an unregistered pesticide. In addition, the Count alleges that product label was misbranded by not listing the correct signal word and by failing to include an EPA Registration Number, Establishment Number and the percentage of active ingredients. Count 2, alleges that the Respondent sold Root Eater to the city of Hoisington, Kansas in June 2002 and that the same violations, namely selling an unregistered pesticide with same label misbranding identified in Count 1, were present. Last, Count 3 alleges the same violations as Counts 1 and 2, with the only distinguishing facts being that the Root Eater was sold to the city of Lucas, Kansas in August 2002.

In its post-hearing brief, EPA notes that the label for Root Eater states:

> Root Eater Tree root remover for sewer systems. Root Eater's foaming action removes tree roots from sewer lines without damage to sewer systems. Root Eater coats the walls of the system with insoluble copper resulting in long term activity. Root Eater also removes undesirable slime, fungi, and symbiotic organisms whose growth is prompted by root obstruction.

EPA exhibit 2, EPA brief at 15.

EPA asserts that these label statements are claims to mitigate or destroy tree roots, slime, fungi, and symbiotic organisms and as such they constitute pesticidal claims. Such claims identify Root Eater as a pesticide. As Root Eater is not registered with EPA and as Respondent sold that product to the buyers identified in the Complaint, Respondent is in violation of FIFRA Section 12(a)(1)(a). Regarding the misbranding claim, EPA asserts that the Root Eater did not contain first aid information and that, as the product contained cupric sulfate, the label should have listed "Danger," not "Caution," as the correct signal word. The incorrect signal word constitutes an inadequate warning or caution statement, which constitutes misbranding. EPA Brief at 15-16.

The Respondent's post-hearing arguments may be succinctly stated. It believes that there was fundamental unfairness by EPA's delay until December 11, 2003 to file the Complaint, when it had first inspected the Respondent's facility several years earlier concerning this issue. EPA took no action toward Respondent between the first inspection on May 11, 1999 and the subsequent inspection some three years and four months later. Respondent believes this casts doubt on the degree of hazard that was presented to humans and the environment. It notes that label copies and sales information concerning the product were obtained during the 1999 inspection, so EPA had long had the necessary information at hand. Respondent also expressed that its intention was to hold the product out as a cleaner and to that end it used the term "remove" to convey its use as a cleaner. Respondent submits that the word "remove" is a "cleaning term," and that there are many products on the market that "use[] the word remove(s)

on their labels." Response at 2; *see also* Tr. at 112. Respondent fails to realize that, under FIFRA, a product is not exempt from registration requirements simply by virtue of being a cleaning product. It believes EPA should have provided some sort of warning that it had a problem with the label and its failure to register the product. It also notes that the product is not banned. Had it complied with the registration and labeling requirements, it could have sold the product without running afoul of EPA. Thus, it feels the penalty was excessive.

Respondent also denies that Root Eater's label included pesticidal claims, and asserts that "copper sulfate is listed under FDA regulations as Generally Accepted as Safe ('GRAS')." Response at 2; 21 C.F.R. § 184.1261. Further, Respondent argues that its use of the term "remove" on the label is not a pesticidal claim but rather an expression showing that the product is a cleaning agent.

The Court finds that Complainant has met its burden of establishing Respondent's violations in Counts I, II, and III.[16] Under FIFRA a pesticide is defined as "any substance or mixture of substances intended for preventing, destroying, repelling or mitigating any pest, and ... any substance or mixture of substances intended for use as a plant regulator, defoliant, or desiccant ..." 7 U.S.C. § 136 (u). The regulations implementing FIFRA and the case law make it clear that if a reasonable consumer, considering the product's label, would use the product as a pesticide, the statute applies. *N. Jonas & Co., Inc. v. E.P.A.*, 666 F. 2d 829, 832 (3rd Cir. 1981). Pesticidal intent is measured objectively; it is not based on the subjective intent of manufacturer, seller or distributor. *Id.* at 832. Here, the intended use of the product along with the statements on the label establish that Root Eater is a pesticide. Respondent's other defenses to Complainant's §12(a)(1)(A) charge are also insufficient, at least to defeat liability. While Respondent assigns fault to Uthlaut for never providing it with "written notification" that the Root Eater label made pesticidal claims, neither the statute nor the regulations require such a notice.

Regarding the misbranding claim,[17] while EPA has also established that the label failed to

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[16]Respondent did not dispute a number of factors that Complainant is charged with proving. Regarding the Section 12(a)(1)(A) claim of distribution or sale of an unregistered pesticide, EPA witness Leifer testified that he "made a check" of EPA's registration database, and did not locate Root Eater on it. Tr. at 81. Respondent did not challenge Complainant's establishment of this element of the violation. In addition, it is unchallenged that Respondent sold Root Eater to the three municipalities, which is another element to the finding of a violation. Nor has Respondent challenge its status as a "person" within the meaning of FIFRA.

[17]At the hearing Complainant asserted that there was a lack of appropriate first aid information on the product label and that this also supports its misbranding claim. Compl. Br. at 15. Complainant's basis for the misbranding violation rests upon the label's bearing an incorrect signal word. The Complaint makes no mention of this issue and EPA never moved to conform the pleading to the facts. Accordingly, this claim will not be considered.

reflect an EPA registration number, nor did it have an EPA establishment number, this is subsumed within the claim that the Respondent was selling an unregistered pesticide. It follows that one would not have a registration number where one is selling an unregistered pesticide. However, it is not redundant to cite the Respondent for failing to have the establishment number on the label. Respondent has an establishment number and 40 C.F.R. § 156.10(a)(1)(v) requires that number on the label. EPA exhibits 2 and 6. Similarly, the label did not list the percentage of active ingredients, per 40 C.F.R. § 156.10(g)(1). The evidence concerning these aspects was unrebutted. Resolving the claim that the incorrect signal word was employed is more involved. The subject of "signal word" is addressed by 40 C.F.R. § 156.64. The word "DANGER" is required where a pesticide is classified as Toxicity Category I. This category applies where the product can be fatal or if it is corrosive, causing eye and skin damage. *See*, 40 C.F.R. § 156.70. Leifer testified that copper sulfate causes irreversible eye damage and skin corrosion. Copper sulfate, aka, "cupric sulfate" is listed as a hazardous substance. *See* Table 116.4A at 40 C.F.R.§ 116.4. The Food and Drug Administration's listing of copper sulfate as "GRAS" does not refute that it can cause eye or skin damage, and Respondent's own warning of CAUTION supports this conclusion. Therefore the Court concludes that the correct signal word[18] was not on the label.

IV. Civil Penalty

Complainant seeks the maximum penalty of $5,500 per count, amounting to $16,500 in total. EPA arrived at the proposed penalty upon application of the FIFRA penalty policy. An Administrative Law Judge, ("ALJ" or "judge") presiding over a hearing conducted in accordance with the Rules of Practice set forth in 40 C.F.R. Part 22 "shall determine the amount of a civil penalty based on the evidence in the record and in accordance with any penalty criteria set forth in the Act." 40 C.F.R. § 22.27(b). The judge must "consider any civil penalty guidelines issued under the Act." *Id*. If the ALJ decides to assess a penalty different in amount from the penalty proposed by EPA, "the ALJ's decision must contain a reasoned analysis of the basis for the penalty assessment . . . ." *U.S. Army, Fort Wainwright Central Heating & Power Plant*, CAA Appeal No. 02-04 at 61, 11 E.A.D. ____ (EAB, June 5, 2003). Diverging from the ERP calculation does not constitute, in and of itself, an ALJ's failure to "'meaningfully' consider" the ERP, as required by 40 C.F.R. § 22.27(b). *Sav-Mart, Inc.*, 5 E.A.D. 732, 737 (EAB 1995); *see also John A. Capozzi*, RCRA Appeal No. 02-01 at 40, 11 E.A.D. ___ (EAB Mar. 25, 2003). *See also, Aero-Master, Inc. v. E.P.A.*, 765 F.2d 746, (8th Cir. 1985), recognizing that an administrative law judge has discretion in determining the penalty to be imposed, but urging that, among other factors, a nonwillful violation and prompt correction upon EPA's determination that a violation was present, merited consideration of reducing the penalty from the $2,100. that had

[18]EPA was not particularly helpful in identifying the applicable regulatory sections. Leifer's ECR is without citation to either FIFRA regulations or even guidance memoranda, and does not explain his basis of his knowledge that copper sulfate "is corrosive to the eyes." Further, the ECR does not formally identify Root Eater as a "Category I" product in terms of toxicity, which is necessary to trigger the requirement that the signal word be "Danger."

been imposed.

EPA itself does not always impose the maximum penalty for failing to register a pesticide. For example, in *N. Jonas & Co. v. E.P.A.*, 666 F.2d 829 (3rd Cir. 1981), the agency assessed a $2,500 penalty where a producer failed to register a swimming pool oxidizer as a pesticide and *Sultan Chemists, Inc., v. E.P.A.*, (3rd Cir. 2002), where 89 violations were assessed a penalty averaging $1,966. per violation, upon the judge's determination, among other factors, that the violator did not intentionally violate the Act. *Katzon Bros., Inc. v. E.P.A.*, 839 F.2d 1396, (10th Cir. 1988) is instructive as well. There, the court remanded for, among other reasons, reconsideration of the penalty, where a $4,200. fine was imposed. The court, describing itself as "troubled by the severity of the penalty," noted that the violator, like FRM here, had a "spotless prior compliance record." The court also noted that EPA had "shown greater temperance in the past," citing *Turner Copter Services*, FIFRA No. 85-4 (EPA) (Nov. 5, 1985), where the agency fined the respondent $1,500 for *three* violations involving use of a pesticide in a manner contrary to its label and *even though sensitive crops and a person were sprayed*.

The Environmental Appeals Board ("EAB"or "Board") has a long history of respecting the trial judge's determination of an appropriate penalty. It has noted that while penalty policies facilitate the application of statutory penalty criteria, they serve as guidelines only and there is no mandate that they be rigidly followed. *In re Pacific Refining Company*, EPCRA Appeal No. 94-1, at 8 (EAB, Dec. 6, 1994). The ERP contains guidance only; its provisions are not binding on enforcement personnel, ALJs, or the Board." *In re: Chem Lab Products, Inc.*, FIFRA Appeal No. 02-01, (Oct. 31, 2002). Further, the EAB has declined to "examine the penalty assessment with a microscope [where] ... the real disagreement is over value judgments involving relatively insignificant sums of money." *See* also, *In re Sav-Mart, Inc.*, FIFRA Appeal No. 94-3 (EAB, March 8, 1995), a case in which the Board found that the judge erred in reducing the penalty from $20,000 to $14,000 in adjusting the gravity, yet ultimately upholding the judge's bottom line penalty determination that the total penalty for the four violations should be $5,000. Consequently, the Board reserves its most careful scrutiny of penalties "for those cases where important legal or policy questions are implicated by the calculation." *Id.*

For the reasons which follow, the Court departs from the penalty policy, applies the statutory factors, and imposes a penalty of $1,800.00.

A. Identification of the Statutory Factors and the ERP Approach

Section 14(a)(1) of FIFRA authorizes the assessment of civil administrative penalties of up to $5,000 per each offense. The Debt Collection Improvement Act of 1996 authorizes a 10% upward adjustment in any penalty, thus raising the maximum penalty to $5,500 per offense. 31 U.S.C. § 3701; 40 C.F.R. Pt. 19. FIFRA Section 14(a)(4). provides that: "[i]n determining the amount of the penalty, the Administrator shall consider the appropriateness of such penalty to the size of the business of the person charged, the effect on the person's ability to continue in business, and the gravity of the violation. Whenever the Administrator finds that the violation occurred despite the exercise of due care or did not cause significant harm to health or the environment, the

Administrator may issue a warning in lieu of assessing a penalty." 7 U.S.C. § 136*l* (a)(4).

B. Consideration of the Statutory Factors[19]

1. Size of Respondent's business

The size of Respondent's business is the first of three factors that Congress requires be taken into account prior to the issuance of a civil penalty. FIFRA § 14(a)(4). What the statute implies, and what the ERP more directly conveys, is that an appropriate penalty is one that is directly proportionate to the size of the violator's business. ERP at 20. To that effect, the ERP creates three "size of the business" categories, based on the total gross revenues of the business. *Id.* A Category I business receives over $1,000,000 in gross revenue, a Category II business receives between $300,000 and $1,000,000 in gross revenue, and a Category III business is considered to be one receiving less than $300,000 in gross revenue. *Id.*

Complainant argues that Respondent is a Category I business. Indeed, Complainant did establish that Respondent's gross sales exceeded the $1,000,000 threshold. Lesher testified that he performed a Dun and Bradstreet report indicating that Respondent's "business exceed one million dollars in annual gross sales" in 2001, the year prior to his review. Tr. at 48. Hughes also testified that Respondent's gross receipts exceeded $1 million. *Id.* at 101.

Although the testimony surrounding the size of Respondent's business technically substantiates the assignment of a Respondent in "Category I," such a conclusion does not, in turn, justify that a maximum penalty be assigned. First, this Court takes notice that the ERP was created in 1990, and has not been adjusted for inflation. Indeed, a one million dollar business operation in 2002 is not necessarily as large as that in 1990. This is significant because if Complainant had determined that the size of Respondent's business placed it in Category II, all else being equal, the penalty determination could not be more than $4,400 per count. *See* ERP Table 1.[20] More importantly, it is abundantly clear from the record as a whole that FRM is a family business of humble size, and therefore should not, objectively, when applying the statutory criterion, be deemed a "Category I" outfit. While Respondent, acting *pro se* in this matter, did not directly put forth a defense with respect to the "size of the business" issue, this Court cannot overlook that the size of Respondent's business is, put most conservatively, modest. *See* Part II, *supra*. As such, the Court departs from Complainant's viewing the size of Respondent's business as a basis upon which to attach the maximum penalty allowed under the

[19]To the extent that this Court's analysis of the statutory penalty factors compares Complainant's own consideration of such factors, the following discussion constitutes a "consideration" of Complainant's use of the ERP. 40 C.F.R. § 22.27(b).

[20]The Civil Penalty Matrix does call for a $5,500 penalty in the event that a Category II business commits a violation deemed to be of the "level 1" gravity. Complainant, however, assigned the gravity of Respondent's violation at "level 2." Compl. Br. at 16; Tr. at 46-47.

statute.

2. Ability to pay

The next statutory factor due for consideration is Respondent's ability to pay a proposed penalty. FIFRA § 14(a)(4). The Respondent raised the ability to pay issue in its Answer:

> Our Federal Tax Return for 2002 reports a net operating loss of $179,000. This is the tenth consecutive year that we have operated at a loss. We currently have a loss carryforward [sic] of over one million dollars for our 2003 tax return. We have only managed to remain in the business through extensive borrowing. Any unexpected expenditures such as your proposed penalty will adversely effect [sic] our ability to continue in business. This constitutes a bona fide issue of ability to pay.

Ans. at ¶ 2. However, Respondent never provided evidence supporting this assertion. As long as EPA puts forth a modicum of evidence to establish an ability to pay, which it has, a court faced with no additional evidence from a respondent, "may conclude that any objection to the penalty based upon ability to pay has been waived." *Spitzer Great Lakes* at 320 (*quoting New Waterbury, Ltd.*, 5 E.A.D. 529, 542 (EAB 1994)). *See also, CDT Landfill*, CAA Appeal No. 02-02 at 46-47, 11 E.A.D. ___ (EAB Jun. 5, 2003). Further, EPA independently presented additional evidence to support that the Respondent has the wherewithal to pay the maximum penalty. EPA's Hughes reviewed Respondent's "tax returns and financial documents" for the purpose of making an ability to pay determination. Tr. at 96-97, 99. Upon doing so, she determined that Respondent is "a viable, ongoing corporation." *Id.* at 98. Hughes pointed to, among other things, Respondent's having consistently met their interest payments, amounting to $122,000 annually and she noted . that the proposed penalty of $16,500 is less than 4 percent of Respondent's gross revenue. Such information is regarded as a factor supporting a finding of ability to pay. *See* ERP at 23; *Donald Cutler*, CWA Appeal No. 02-01, 11 E.A.D. __ (EAB Sep. 2, 2004).[21]

Accordingly, while the Court has determined that Respondent possesses the ability to pay the civil penalty as proposed by EPA, it should be remembered that this action is not a veiled tax scheme; it's purpose is to assess a civil penalty for violating FIFRA.

[21]Hughes testified to Respondent's ability to pay at least $16,500. Accordingly, her conclusion also supports a finding of an ability to pay for any penalty less than that, as is the case here.

3. Gravity of the Violation

The final statutory factor due for consideration is the gravity of Respondent's violations. FIFRA § 14(a)(4). Although the Court acknowledges that EPA's application[22] of its ERP results in the maximum penalty being assessed, such a conclusion is inappropriate under a real world application of the facts to the statutory criteria. After all, even the ERP acknowledges that the penalty should take into account *the actual set of circumstances that are involved in the violation*." ERP at 21 (emphasis added). For the following reasons, this Court departs from Complainant's view that the gravity of Respondent's violations supports an assessment of the maximum penalty.

Although copper sulfate has some toxicity, insofar as it is toxic to eyes, skin and respiratory tissue, EPA's Lesher acknowledged assigning "middle level" values to the "harm to human health" and "environmental harm" criteria. Compl. Br. at 17; Tr. 45, 55. Further, Complainant assessed a value of "2" out of "4" with respect to the culpability criterion, upon belief that the violations arrived out of Respondent's negligence. Compl. Br. at 18; Tr. at 51. Despite determining that most qualities about Respondent's violations were not of the "upper level" variety, Complainant still seeks the maximum penalty allowable under the statute. This Court will not join Complainant in this assessment.

Other considerations also show that the penalty EPA seeks is excessive. In this regard it is noted that the product would be appropriate to sell, that it there is no ban on its use, had the Respondent registered it with EPA and had the label conformed to FIFRA's requirements. Further, the assessment of gravity by EPA did not adequately take into account that the label did

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[22]EPA applying its ERP, cites the § 12(a)(1)(A) and § 12(a)(1)(E) violations as a basis for assigning a gravity level of "2." Compl. Br. at 16; ERP at 19, App. A. Complainant then applied the "2" gravity level to the Civil Penalty Matrix, in conjunction with its finding that Respondent's business size falls in "Category I." *See* Part III.B.1, *supra*. As discussed above, the upshot of Complainant's viewing Respondent's case as falling into "Category I-Gravity Level 2" on the matrix is that Complainant could pursue a penalty as high as $5,500 per count. The ERP then ostensibly takes into account any factors that would either increase or decrease the penalty figure determined by the matrix. According to the ERP, the rationale for any such adjustment is to correct the "base penalty figure, as determined from the gravity level [and the size of the business], and to consider *the actual set of circumstances that are involved in the violation*." ERP at 21 (emphasis added). The ERP sets forth for consideration five gravity adjustment criteria. ERP at 21; App. B. Each criterion has a range of "values" having scales varying from either 1-2, 1-4, or 1-5. The ERP instructs Complainant to total the five values so as to determine the extent to which, if any, it should depart from whatever penalty for which the matrix would call, otherwise. When the sum of the five values falls anywhere from "8" to "12," the ERP calls for no diversion from the matrix. ERP at 21. Having arrived at a value of "10," Complainant concluded that each violation warranted the maximum penalty.

have significant warnings, albeit not to the extent that would have been included had the signal word "danger" been employed. Beyond these observations, EPA's assessment of the gravity ignores its own history with this Respondent and this very product. Nothing happened, that is EPA took no action whatsoever when it first visited the Respondent to make an assessment of the product in issue. Indeed the same state inspector visited on both occasions, and his visit was solely for an evaluation of Root Eater and it was initiated *by EPA,* not the state. It is also clear that the inspector, as well as EPA based on its inaction following the first inspection, did not consider the issue of whether the product was a pesticide to be as obvious as it now claims. Thus it was not outlandish for the Respondent to believe that it had avoided making a pesticidal claim. For the Agency to now assert, some 3 plus years after its first inspection, and when nothing had changed in terms of the information it originally had before it, and where EPA's own people had to check with others in the chain of authority, that this violation warrants the maximum penalty, represents some hubris on the Agency's part. EPA offered no explanation for its inaction following the first inspection. On both occasions, the Respondent was cooperative, providing EPA with all the information it requested. As Kastendieck expressed it: "[a]s soon as the EPA notified us that they thought this product was regulated, we ceased production."[23] Tr. at 105. Clearly, given the facts presented, this was no willful violation on the part of this Respondent, which had no previous FIFRA violations.

Conclusion

As described above, this Court finds that Complainant has established by a preponderance of the evidence that Respondent, FRM Chem, Inc., committed fundamental violations of FIFRA §§ 12(a)(1)(A)&(E), as alleged in Counts I through III of its administrative complaint. Having considered each of the statutory penalty factors and the applicable policies, this Court concludes that a civil penalty totaling $1,800 is appropriate for these violations.

ORDER

A civil penalty in the amount of $1,800 (one thousand eight hundred dollars) is assessed against the Respondent, FRM Chem, Inc., a.k.a. Industrial Specialties. Payment of the full amount of the civil penalty assessed shall be made within 30 (thirty) days after this Initial Decision becomes a final order under 40 C.F.R. § 22.27(c). Payment shall be submitted by a certified check or cashier's check made payable to the Treasurer, United States of America and mailed to:

United States Environmental Protection Agency, Region VII
Regional Hearing Clerk
P.O. Box 360748M

[23]While EPA objected to this statement by Kastendieck, as it was not under oath, the individuals embodying the Respondent, as non-lawyers, did not appreciate the formalities of evidence. Nevertheless, EPA has never claimed that the Respondent continued to produce or market Root Eater, once EPA finally got around to notifying it that there was a problem.

Pittsburgh, PA 15251

A transmittal letter identifying the subject case and EPA docket number, plus the Respondent's name and address, must accompany the check. Failure of the Respondent to pay the penalty within the prescribed statutory time frame after entry of the final order may result in the assessment of interest on the civil penalty.

Pursuant to 40 C.F.R. § 22.27(c), this Initial Decision shall become a final order 45 (forty-five) days after its service upon the parties and without further proceedings unless: (1) a party moves to re-open the hearing with 20 (twenty) days after service of the Initial Decision pursuant to 40 C.F.R. § 22.28(a); (2) an appeal to the EAB is taken from it by a party to this decision within 30 (thirty) days after the Initial Decision is served upon the parties pursuant to 40 C.F.R. § 22.30(a); or (3) the EAB elects, upon its own initiative, to review the Initial Decision pursuant to 40 C.F.R. § 22.30(b).

So ordered.

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William B. Moran
United States Administrative Law Judge

Decided: February 16, 2005