

FIFRA ENFORCEMENT RESPONSE POLICY
FEDERAL INSECTICIDE, FUNGICIDE, AND RODENTICIDE ACT

Waste and Chemical Enforcement Division
Office of Civil Enforcement
Office of Enforcement and Compliance Assurance
United States Environmental Protection Agency

December 2009

FIFRA ENFORCEMENT RESPONSE POLICY

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I. INTRODUCTION

This document sets forth guidance for the U.S. Environmental Protection Agency (EPA or the Agency) to use in determining the appropriate enforcement response and penalty amount for violations of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA or the Act).¹ The goal of this Enforcement Response Policy (ERP) is to provide fair and equitable treatment of the regulated community, predictable enforcement responses, and comparable penalty assessments for comparable violations. The policy is designed to allow swift resolution of environmental problems and to deter future violations of FIFRA by respondents, as well as other members of the regulated community.

This policy supersedes the “Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)” issued on July 2, 1990 and other FIFRA penalty policies, except for the following policies, which remain in effect: the June 2007 “Enforcement Response Policy for FIFRA Section 7(c), Pesticide Producing Establishment Reporting Requirement”; the September 1997 “FIFRA: Worker Protection Standard (WPS) Penalty Policy – Interim Final”; and the September 1991 “Enforcement Response Policy for the FIFRA Good Laboratory Practices (GLP) Regulations.” These policies are to be used as supplements to this policy to determine the appropriate enforcement response for the referenced programs. We have attached these policies as appendices to this document for ease of use.

This guidance applies only to violations of EPA’s civil regulatory programs. It does not apply to enforcement pursuant to criminal provisions of laws or regulations that are enforced by EPA. The procedures set forth in this document are intended solely for the guidance of government professionals. They are not intended and cannot be relied on to create rights, substantive or procedural, enforceable by any party in litigation with the United States. The Agency reserves the right to act at variance with this policy and to change it at any time without public notice.

II. OVERVIEW OF THE POLICY

This Enforcement Response Policy is divided into three main sections. The first section, “Determining the Level of Action,” describes the Agency’s options for responding to violations of FIFRA. The second section, “Assessing Civil Administrative Penalties,” elaborates on EPA’s policy and procedures for calculating civil penalties to be assessed in administrative cases against persons who violate FIFRA. The third section, the appendices, contains tables to be used in calculating civil penalties for this ERP and the other FIFRA penalty policies that remain in effect. The appendices to this ERP are: (1) Appendix A - FIFRA Violations and Gravity Levels; (2) Appendix B - Gravity Adjustment Criteria; (3) Appendix C - The Summary of Tables; (4) Appendix D - The FIFRA Civil Penalty Calculation Worksheet; (5) Appendix E - “Enforcement Response Policy for FIFRA Section 7(c), Pesticide Producing Establishment Reporting Requirement” (June 2007); (6) Appendix F – “FIFRA: Worker Protection Standard (WPS) Penalty Policy – Interim Final” (September 1997); and Appendix G – Enforcement Response Policy for the FIFRA Good Laboratory Practices (GLP) Regulations.

¹ For purposes of this Policy and its Appendices, the terms “pesticide” and “pesticide product” include, as applicable, “pesticide,” “antimicrobial pesticide,” “device,” “pesticide product,” “pesticidal substance,” and/or “plant incorporated protectant” as these terms are defined and used in FIFRA § 2(u), (mm), and (h), and 40 C.F.R. Parts 152 - 174.

III. DETERMINING THE LEVEL OF ACTION

Once the Agency finds that a FIFRA violation has occurred, EPA will need to determine the appropriate level of enforcement response for the violation. FIFRA provides EPA with a range of enforcement options. These options include:

- Notices of Warning under sections 9(c)(3), 14(a)(2), and 14(a)(4);
- Notices of Detention under section 17(c);
- Stop Sale, Use, or Removal Orders under section 13(a);
- Seizures under section 13(b);
- Injunctions under section 16(c);
- Civil administrative penalties under section 14(a);
- Denials, suspensions, modifications, or revocations of applicator certifications under 40 C.F.R. Part 171;
- Referral for criminal proceedings under section 14(b); and
- Recalls.

To ensure national consistency in FIFRA enforcement actions, EPA enforcement professionals should use this ERP as a guide in considering the facts and circumstances of each case and the company's compliance history to ensure an enforcement response appropriate for the particular violations. Each of the potential enforcement responses is discussed below.

A. Notices of Warning

FIFRA §§ 14(a)(2), 14(a)(4), and 9(c)(3) provide EPA with the authority to respond to certain violations of FIFRA with a Notice of Warning (NOW) to the violator. Under FIFRA § 14(a)(2), EPA may not assess a penalty for violations by a private applicator or other person not covered by section 14(a)(1) without having issued a written warning or citation for a prior violation of FIFRA by that person, "except that any applicator not included [in paragraph 14(a)(1)] who holds or applies registered pesticides, or uses dilutions of registered pesticides, only to provide a service of controlling pests without delivering any unapplied pesticide to any person so served . . . may be assessed a civil penalty . . . of not more than \$500 for the first offense nor more than \$1,000 for each subsequent offense." For all persons not covered by the exception in section 14(a)(2), EPA should issue a Notice of Warning for a first-time violation.

A state citation for a violation that would also be considered a violation under FIFRA, can be used to meet the requirement of a citation for a prior violation under FIFRA § 14(a)(2). For this purpose, the prior citation may be a notice of warning and does not have to include a penalty. The prior citation does not have to be related to the current violation; it may be for any FIFRA violation.

Regions may issue a NOW or assess a penalty of up to \$500² for the first offense by any applicator within the scope of the exception set forth in section 14(a)(2). Section 9(c)(3) permits EPA to issue a written Notice of Warning for minor violations of FIFRA in lieu of instituting a penalty action if the Administrator believes that the public interest will be adequately served by this course of action. Generally, a violation will be considered minor under this section if the total “gravity adjustment value,” as determined from Appendix B of this ERP, is three or less. A Notice of Warning may also be appropriate for certain first-time recordkeeping violations as listed in Appendix A (for example, late Section 7 reports that meet the guidelines of the FIFRA Section 7 ERP). FIFRA § 14(a)(4) provides that EPA may choose to issue a Notice of Warning in lieu of a penalty action if EPA determines that the violation occurred despite the exercise of due care or the violation did not cause significant harm to health or the environment.

B. Notices of Detention

A shipment of a pesticide or device may not be imported into the United States until EPA makes a determination of the admissibility of that shipment. FIFRA § 17 authorizes EPA to refuse admission of a pesticide or device into the United States if EPA determines that the pesticide or device violates any provisions of the Act. EPA may deny entry of a pesticide or device by refusing to accept the Notice of Arrival or by issuing a Notice of Detention and Hearing. Upon receiving a copy of the Notice of Detention, the Department of Homeland Security, through the U.S. Customs and Border Protection (Customs), will refuse delivery to the consignee. If the consignee has neither requested a hearing nor exported the pesticide or device within 90 days from the date of the notice, Customs will oversee destruction of the pesticide or device.

Customs regulations for enforcement of FIFRA § 17(c) (19 C.F.R. Part 12.110 - 12.117) allow Customs to release a shipment to the importer or the importer’s agent before EPA inspects the shipment only if (1) the Customs District Director receives a completed Notice of Arrival signed by EPA indicating the shipment may be released and (2) the importer executes a bond in the amount of the value of the pesticide or device, plus duty. When a shipment of pesticides is released under bond, the shipment may not be used or otherwise disposed of until the Administrator has determined the admissibility of that shipment. Should the shipment subsequently be refused entry and the importer or agent fails to return the pesticide or device, the bond is forfeited.

C. Stop Sale, Use, or Removal Orders (SSURO)

FIFRA § 13 provides EPA the authority to issue a Stop Sale, Use, or Removal Order (SSURO) to any person who owns, controls, or has custody of a pesticide or device, whenever EPA has reason to believe on the basis of inspection or tests that:

- (1) a pesticide or device is in violation of any provision of the Act;
 - (2) a pesticide or device has been, or is intended to be, distributed in violation of the Act;
- or
- (3) the registration of a pesticide has been cancelled by a final order or has been suspended.

² Each of the FIFRA penalty amounts referenced in this document has been increased pursuant to the Debt Collection Improvement Act of 1996, which requires federal agencies to periodically adjust the statutory maximum penalties to account for inflation. The inflation adjustment is based on the date of the violation. See 40 C.F.R. Part 19.

EPA should generally seek a civil penalty in addition to the SSURO when EPA confirms that a violation of FIFRA has occurred. EPA has established criteria to ensure judicious use of the authority to stop the sale or use of a pesticide and to order its removal. SSUROs can be a useful enforcement response, particularly for more serious violations and situations that pose a significant risk, as described further below.

1. Issuance of a SSURO

A SSURO is among the most expedient and effective remedies available to EPA in its efforts to prevent illegal sale, distribution, and use of pesticides. Unlike a seizure, EPA does not need to bring action in federal court and does not need to take custody of the materials. The advantages of a SSURO over other responses are that: (1) it may be issued whenever EPA has *reason to believe* that the product is in violation of the Act; (2) it is easier to prepare and issue than a seizure; (3) it governs all of the product under the ownership, custody, or control of the individual receiving the SSURO regardless of where the product is located; (4) it can be written to include future amounts of the product that may come into custody of the respondent; and (5) it can easily be adapted to particular circumstances.

EPA should issue a SSURO against persons who own, control, or have custody of pesticides in the following categories:

- Pesticides for which there is reason to believe that there is a potential hazard to human health or the environment because they are either not registered or are over-formulated, under-formulated, or adulterated as to present a potentially serious health hazard.³
- Pesticides or devices with labeling that is materially misleading or fraudulent and, if followed by a user, is likely to cause a significant health hazard or serious adverse environmental effect. For example, a pesticide lacking a required restricted use label is an especially serious labeling violation. A SSURO should be issued for labeling on products that: (1) are ineffective for the purposes claimed; (2) are so chemically deficient as to affect the product's efficacy; or (3) bear false or misleading safety claims.
- Pesticides or devices that are the subject of a recall in instances where the responsible party refuses to remove, is recalcitrant in removing, or is unable to remove the product from the channels of trade.
- Pesticides or devices that are in violation of FIFRA and for which a civil penalty has been issued but the registrant has not brought the product into compliance.
- Pesticides that have been suspended under FIFRA § 6.

EPA may also issue a SSURO if a product has been cancelled under any section of FIFRA or suspended under FIFRA §§ 4 or 3(c)(2)(B) and the existing stock deadlines have expired at that level of sale, distribution, or use. In addition, EPA may issue a SSURO to address serious violations that present a threat of harm where there has also been a large volume of sales.

³ This may include pesticides packaged in improper or damaged containers, or pesticides that are so inadequately labeled as to make their safe or effective use unlikely or impossible.

When a SSURO is issued to a basic registrant for a registered pesticide product, the issuing office should ensure that the terms of the SSURO are equally applicable to the supplemental registrations of the product, as appropriate. In those cases, the SSURO should separately cite the supplemental registrations and copies should be sent to all known supplemental registrants.

D. Seizures

FIFRA § 13(b) gives EPA the authority to initiate *in rem* condemnation proceedings in U.S. District Court. Once a court grants EPA's request for authority to conduct a seizure, FIFRA § 9(b)(3) authorizes officers or employees designated by the Administrator to obtain and execute warrants for the purpose of seizing any pesticide or device that is in violation of the Act. Seizures may be executed with the assistance of the U.S. Marshals Service.

Under FIFRA § 13(b), EPA may initiate seizure actions in District Court against any pesticide or device that is being transported or, having been transported, remains unsold or in original unbroken packages, or that is sold or offered for sale in any state, or that is imported from a foreign country, if:

- (1) a pesticide is adulterated or misbranded;
- (2) a pesticide is unregistered;
- (3) a pesticide has labeling that does not bear the information required by the Act;
- (4) a pesticide is not colored or discolored as required;
- (5) a pesticide bears claims or directions for use that differ from those made in connection with its registration;
- (6) a device is misbranded; or
- (7) a pesticide or device causes unreasonable adverse effects on the environment even when used in accordance with FIFRA requirements.

These circumstances are similar to the circumstances under which EPA would issue a SSURO. Because a SSURO is an administrative action, it can be issued more quickly than a seizure, which requires judicial action. The SSURO is therefore the more expedient enforcement response. Nevertheless, the Agency should consider initiating a seizure in the following circumstances:

- EPA has issued a SSURO but the recipient of the order has not complied with it;
- EPA has reason to believe that a person, if issued a SSURO, would not comply with it;
- The pesticide at issue is so hazardous that it should be removed from the marketplace, place of storage, or place of use to prevent any chance of harm to human health or the environment;
- The seizure will be used to support a recall; or
- It is necessary to dispose of products being held under a SSURO for which the responsible party has indicated it will not take corrective action.

E. Injunctive Relief

FIFRA § 16(c) gives EPA the authority to initiate actions in U.S. District Court seeking permanent injunction, preliminary injunction, or temporary restraining order. Because an injunction is an extraordinary form of relief, the Agency's arguments supporting injunction must be clear and compelling. As a party seeking permanent injunction, EPA would need to demonstrate one of the following: (1) other remedies would be inadequate or not available administratively either in restraining the violation or in preventing unreasonable risk to human health or the environment; (2) the Agency has already diligently exercised all appropriate administrative remedies (such as SSUROs and civil penalties) yet the violation or threat of violation continues unabated; or (3) irreparable injury, loss, or damage will result if the relief sought is not granted.

When seeking a preliminary injunction or temporary restraining order, the U.S. must demonstrate that: (1) immediate and irreparable injury, loss, or damage will result if the requested relief is not granted; and (2) EPA is likely to prevail at trial, based on the facts before the court.

Under FIFRA, a number of specific circumstances may justify injunctive relief. These include:

- Violation of a Section 6 suspension or cancellation order;
- Violation of a SSURO where a civil penalty or criminal prosecution would not provide a timely or effective remedy to deter further violations;
- Continued production, shipment, sale, distribution, or use of an unregistered pesticide after the Agency has taken civil or criminal action;
- A person continues to sell, distribute, or make available for use a restricted use pesticide (RUP) other than in accordance with FIFRA § 3(d), after the Agency has taken an enforcement response;
- A person continues to violate the FIFRA § 17 import or export requirements after the Agency has taken an enforcement response;
- A person continues to use a pesticide in a manner inconsistent with its labeling, in a manner contrary to an experimental use permit, or repeats any violation of FIFRA, after EPA has taken an enforcement response.

F. Civil Administrative Penalties

A civil penalty is the preferred enforcement response for most violations. A civil penalty is appropriate where the violation:

- (1) presents an actual or potential risk of harm to humans or the environment,⁴ or would impede EPA's ability to fulfill the goals of the statute; and
- (2) was apparently committed as a result of ordinary negligence (as opposed to criminal negligence), inadvertence, or mistake; and the violation either:
 - (a) involves a violation by any registrant, commercial applicator, wholesaler, dealer, retailer, or other distributor, or any applicator within the scope of the exception set forth in FIFRA § 14(a)(2) (no prior warning is required by FIFRA for violators in this category); or
 - (b) involves a private applicator or other person not listed above who has received a prior Notice of Warning or citation for a FIFRA violation (as described in section III.A).

FIFRA § 14(a)(1) provides that a registrant, commercial applicator, wholesaler, dealer, or other distributor may be assessed a civil penalty of up to \$5,000 for each violation. FIFRA § 14(a)(2) authorizes the Administrator to assess a private applicator or other person a penalty of up to \$1,000 for each violation occurring after the issuance of a Notice of Warning or a citation for a prior FIFRA violation. Additionally, any applicator within the scope of the exception set forth in FIFRA § 14(a)(2) may be assessed a civil penalty of up to \$500 for the first offense, and up to \$1,000 for each subsequent offense.

Each of these penalty amounts has been increased pursuant to the Debt Collection Improvement Act of 1996, which requires federal agencies to periodically adjust the statutory maximum penalties to account for inflation. EPA has thus increased the maximum penalty amounts for FIFRA violations. For violations of FIFRA § 14(a)(1) that occur on or after January 12, 2009, the maximum civil penalty has increased to \$7,500 for each violation. Violations prior to that date may be assessed up to \$6,500 for each violation. For violations of FIFRA § 14(a)(2) that occur on or after January 12, 2009, the maximum civil penalty has increased to \$1,100 for each violation following the first offense by both private applicators and any applicator within the scope of the exception set forth in FIFRA § 14(a)(2). Additional penalty inflation increases are expected to occur periodically and such increases are incorporated by reference into this ERP.

As the statutory definitions of "distribute or sell" and "commercial applicator" indicate, and as the conference report for the Federal Pesticide Act of 1978⁵ confirms, any applicator, including a "for hire" applicator, who holds or applies an unregistered pesticide to provide a service of controlling pests without delivering any unapplied pesticide, will be considered a distributor of pesticides and will be subject to the higher penalties set forth in FIFRA § 14(a)(1) and 14(b)(1). Any applicator, other than a private applicator, who uses or supervises the use of a restricted use pesticide (RUP), whether or not that applicator is certified, is a commercial applicator and is subject to the higher penalties set forth in section 14(a)(1) and 14(b)(1). Any applicator, including a certified applicator, who holds or applies a general use pesticide (GUP) or an unclassified pesticide in violation of FIFRA will be subject to the lower penalties set forth in section 14(a)(2) and 14(b)(2).

⁴ In such cases, the Agency should consider issuing a SSURO or other injunctive relief in addition to a civil penalty.

⁵ Senate Report No. 95-1188, September 12, 1978, pp. 44 and 45.

G. Denials, Suspensions, Modifications, or Revocations of Applicator Certifications

Regulations governing certification of pesticide applicators (40 C.F.R. Part 171) authorize EPA to deny, suspend, or revoke a federally issued applicator certification if the holder of the certification violates FIFRA or its regulations. The Agency views enforcement actions affecting certification status as a very strong measure, to be taken only when the “public health, interest, or welfare warrants immediate action,” 40 C.F.R. § 171.11(f)(5)(i). Therefore, EPA will deny, suspend, modify, or revoke a federal certification only in response to serious violations or against persons with a history of noncompliance.

1. Suspension

In response to violations by applicators that have previously received a civil complaint for FIFRA violations and where none of the factors for revocation (discussed in paragraph G.2. below) are present, EPA will seek suspension of the individual applicator’s federal certification, as well as assess a civil penalty against the employer. EPA may also suspend certifications of commercial applicators who violate restricted use pesticides recordkeeping requirements, 40 C.F.R. § 171.11(c)(7); 40 C.F.R. § 171.11(f)(1)(iii). For purposes of this section of the policy, EPA will not distinguish between commercial and private applicators. A suspension has a more substantial impact on commercial applicators because it affects their primary business activity. Recommended suspension periods are set forth on the chart below.

Recommended Suspension Periods

| | First enforcement action | Second enforcement action⁶ | Third enforcement action |
|---|---------------------------------|--|---|
| Enforcement remedy | Penalty action | Penalty action | Penalty action |
| Base suspension period | N/A | 4 months | 6 months |
| Additional suspension time for multiple violations | N/A | 2 months for each additional violation (up to a limit of 8 months total) | 2 months for each additional violation (up to a limit of 12 months total) |

If EPA decides to suspend certification, it must notify the applicator of the grounds upon which the suspension is based and the time period during which the suspension will be in effect. In order for the suspension to function as a deterrent, the suspension should take effect during the time when the applicator is most likely to be applying restricted use pesticides. In cases where the violation involved keeping fraudulent records (*i.e.*, where the violator intentionally concealed or misrepresented the true circumstances and the extent of the use of restricted use pesticides), EPA may revoke the violator’s certification in response to the initial infraction.

⁶ For purposes of this section, the second and third enforcement actions must occur within five years of the original civil administrative complaint.

2. Denial/Revocation

The denial or revocation of a certification deprives an applicator of the authority to apply restricted use pesticides and forces the applicator to acquire or re-acquire certification. EPA will not consider an application to acquire or re-acquire certification for at least six months following a denial or revocation. Therefore, EPA will deny or revoke a certification only where:

- (1) a violation resulted in a human fatality or created an imminent danger of a fatality;
 - (2) a violation resulted in severe damage to the environment or created an imminent danger of severe damage to the environment;
 - (3) a misuse violation has resulted in significant contamination of food and water;
 - (4) the violator's certification has been suspended as a result of a previous serious violation;
 - (5) the violator's certification has been suspended three times within the past five years;
- or
- (6) a person has maintained or submitted fraudulent records or reports.

If EPA pursues an action to deny, revoke, or modify an applicator's certification, EPA will notify the applicant or federal certificate holder of:

- (1) the ground(s) upon which the denial, revocation, or modification is based;
 - (2) the time period during which the denial, revocation, or modification is effective, whether permanent or otherwise;
 - (3) the conditions, if any, under which the individual may become certified or recertified;
- and
- (4) any additional conditions EPA may impose.

EPA must also provide the federally certified applicator an opportunity to request a hearing prior to final Agency action to deny, revoke, or modify the certificate.

H. Recalls

1. Suspended or Cancelled Products

FIFRA § 19(b) gives EPA the authority to recall pesticide products if the registration of a pesticide has been suspended and cancelled and EPA finds that a recall is necessary to protect public health or the environment. Where the product registration has been suspended or cancelled, EPA will request either a voluntary or mandatory recall. When EPA believes that a recall is necessary to protect public health or the environment and the product registration has not been suspended or cancelled, EPA may request an informal recall, which is also voluntary.

EPA should only request a recall where the evidence clearly supports the need for such action. EPA will base the decision that a product should be withdrawn from the market on information in the sample file, including laboratory analyses, staff evaluations and opinions, and other available information. All information supporting a recall decision should be included in the official file.

a. Mandatory Recalls

If a product is suspended and cancelled, a voluntary recall by the registrant and others in the chain of distribution may be sufficient. However, if the Agency believes that a voluntary recall will not ensure protection of human health or the environment, mandatory recall procedures under FIFRA §§ 19(b)(3) and (4) can be used to require registrants, distributors, or

sellers of a cancelled pesticide to:

- (1) recall the pesticide;
- (2) make available storage facilities to accept and store existing stocks of the suspended and cancelled pesticide;
- (3) inform the EPA of the location of the storage facility;
- (4) inform the EPA of the progress of the recall;
- (5) provide transportation of the pesticide on request; and
- (6) take reasonable steps to inform holders of the recall and transportation provisions.

Persons conducting the recall must comply with transportation, storage, and disposal requirements set forth in the recall plan developed and approved under FIFRA § 19(b).

b. Voluntary Recalls

Recalls other than those described in section 1.a., above, are voluntary. A voluntary recall is appropriate if EPA finds that it can be “as safe and effective as a mandatory recall.” Voluntary recalls can be used where the cancelled product is either potentially hazardous when used as directed, ineffective for the purposes claimed, or significantly violative in nature. For a voluntary recall, EPA will ask the registrant to develop a recall plan. The effectiveness of these recalls depends on the cooperation of the company involved. The company may seek EPA’s assistance in developing or implementing a recall plan, but it is not required to do so.

2. Other Recalls

A product does not have to be suspended or cancelled for EPA to request a recall. The Agency should consider asking the company to do an informal recall of a product when its use as directed by the label is likely to result in:

- (1) injury to the user or handler of the product;
- (2) injury to domestic animals, fish, wildlife, or plant life;
- (3) physical or economic injury because of ineffectiveness or due to the presence of actionable residues; or
- (4) identifiable adverse effects on the environment.

For example, EPA may issue an informal recall for an antimicrobial product that fails efficacy testing for a public health organism when the product is distributed to hospitals or other health care facilities.

In cases posing more serious threats, the Agency may monitor the progress of an informal recall and may ask the company to submit progress reports and to notify state officials to ensure that the recall occurs. These informal recalls are generally accompanied by a civil penalty action or a SSURO. In cases where a recall is necessary but the level of potential hazard is not great or when it is unlikely that significant amounts of the defective product remain in the marketplace, the recall may be conducted entirely by the company with no monitoring by EPA or state officials.

I. Criminal Proceedings

FIFRA § 12 specifically lists the unlawful acts that are subject not only to civil and administrative enforcement but also to criminal enforcement. (For further information on criminal enforcement investigations see Chapter 18 of the Pesticides Inspection Manual, “FIFRA

Criminal Enforcement.”) Section 14(b) provides the authority to proceed with criminal sanctions against violators, as follows.

- A registrant, applicant for a registration, or producer who knowingly violates the Act is subject, upon conviction, to a fine of not more than \$50,000 or imprisonment for up to one year, or both.
- A commercial applicator of a restricted use pesticide, or any other person not described above who distributes or sells pesticides or devices, who knowingly violates the Act is subject, upon conviction, to a fine of not more than \$25,000 or imprisonment for up to one year, or both.
- A private applicator or other person not included above who knowingly violates the Act is subject, upon conviction, to a fine of not more than \$1,000, or imprisonment for not more than 30 days, or both.

FIFRA § 14(b)(1) and (2) include the requirement that the violation be committed “knowingly.” An act is committed “knowingly” by a person who has the general intent to do the action(s) constituting the violation. A specific intent to violate FIFRA or knowledge of its regulations is not a necessary element of the crime. Thus, the government must generally prove that the defendant knew of the conduct that constituted the violation and that the person’s action(s) was voluntary and intentional and not the result of an accident or mistake of fact.

In addition, pursuant to the Alternative Fines Act (18 U.S.C. § 3571), the FIFRA criminal fine amounts for an individual or an organization⁷ may be substantially increased if the violation results in death. All acts of the regulated community exhibiting actual or suspected criminal conduct should be discussed with EPA’s regional or Headquarters Criminal Enforcement Counsel or brought to the attention of the Criminal Investigation Division (CID) for possible investigation.

1. Parallel Criminal and Civil Proceedings

Although the majority of EPA’s enforcement actions are brought as either a civil action or a criminal action, there are instances when it is appropriate to bring both a civil and a criminal enforcement response. These include situations where the violations merit the deterrent and retributive effects of criminal enforcement, yet a civil action is also necessary to obtain an appropriate remedial result, and where the magnitude or range of the environmental violations and the available sanctions make both criminal and civil enforcement appropriate.

Active consultation and cooperation between EPA’s civil and criminal programs, in conformance with all legal requirements including OECA’s Parallel Proceedings Policy (September 24, 2007), is critical to the success of EPA’s overall enforcement program. The success of any parallel proceedings depends upon coordinated decisions by the civil and criminal programs as to the timing and scope of their activities. For example, it will often be important for the criminal program to notify civil enforcement managers that an investigation is about to become overt or known to the subject. Similarly, the civil program should notify the criminal

⁷ As used in Title 18 of the United States Code, the term “organization” means a person other than an individual.

program when there are significant developments that might change the scope of the relief. In every parallel proceeding, communication and coordination should be initiated at both the staff and manager levels and should continue until resolution of all parallel matters.

J. State and Federal Roles in Enforcement of FIFRA

State governments have primary enforcement authority for both civil and criminal pesticide use violations under FIFRA §§ 26 and 27. States are allowed 30 days to commence appropriate enforcement actions for such violations. While Congress delegated to the states primary enforcement authority for pesticide use violations, FIFRA does not create exclusive enforcement jurisdiction in the states. A state may waive its primary enforcement responsibility or make a referral to the United States for federal action.

EPA has primary enforcement authority over violations concerning the sale or distribution of pesticides. Examples of such violations include failure to report a pesticide's unreasonable adverse effects on the environment, distribution of an unregistered pesticide, violations of a cancellation order or an EPA SSURO, and fraudulent labeling, advertising, or registration of a pesticide. FIFRA violations that are not use violations may be investigated and prosecuted on the federal level without waiting for state authorities to exercise their enforcement responsibility. Under most circumstances EPA will inform the state of an EPA investigation being conducted within its borders.

K. Press Releases and Advisories

EPA may, at its discretion, issue a press release or advisory to notify the public of the filing of an enforcement action, settlement, or adjudication concerning a person's violation of FIFRA. A press release can be a useful tool to notify the public of Agency actions for FIFRA noncompliance and to educate the public on the requirements of FIFRA. Some regions routinely issue press releases to inform the public of FIFRA settlements. Issuance of a press release or advisory must not be an item of negotiation during settlement.

IV. ASSESSING CIVIL ADMINISTRATIVE PENALTIES

A. Computation of the Penalty

In determining the amount of a civil penalty, FIFRA § 14(a)(4) requires EPA to consider the appropriateness of the penalty to the size of respondent's business, the effect of the penalty on respondent's ability to continue in business, and the gravity of the violation.

For each type of violation associated with a particular product, the penalty amount is determined in a seven-step process considering the Section 14(a)(4) criteria listed above. These steps are:

(1) determine the number of independently assessable violations [Section IV.A.1. Independently Assessable Violations];

(2) determine the size of business category for the violator, using Table 1 [Section IV.A.2. Size of Business];

- (3) determine the gravity of the violation for each independently assessable violation using Appendix A [Section IV.A.3. Gravity of Violation];
- (4) determine the “base” penalty amount associated with the size of business (Step 2) and the gravity of violation (Step 3) for each independently assessable violation, using the matrices in Table 2 [Section IV.A.4. Base Penalty Amount];
- (5) determine the “adjusted” penalty amount based on case-specific factors using the Gravity Adjustment Criteria in Appendix B and Table 3 [Section IV.A.5. Adjustment for Case-Specific Factors];
- (6) calculate the economic benefit of noncompliance [Sections IV.A.6. Economic Benefit of Noncompliance]; and
- (7) consider the effect that payment of the total penalty amount plus economic benefit of noncompliance derived from the above calculation will have on the violator’s ability to continue in business [Section IV.A.7 Ability to Continue in Business/Ability to Pay].

A civil penalty may be further modified in accordance with Section IV.B.1. Graduated Penalty Calculations, Section IV.B.2. Voluntary Disclosure, and Section IV.B.3. Adjusting the Proposed Civil Penalty in Settlement.

1. Independently Assessable Violations

A separate civil penalty, up to the statutory maximum, will be assessed for each independent violation of the Act. A violation is considered independent if it results from an act (or failure to act) which is not the result of any other violation for which a civil penalty is to be assessed or if at least one of the elements of proof is different from any other violation.

Consistent with the above criteria, the Agency considers violations that occur from each sale or shipment of a product (by product registration number, not individual containers) or each sale of a product to be independent violations.⁸ There may also be situations where two unlawful acts arise out of one sale or shipment, such as the sale of a product that is both a misbranded pesticide and an unregistered pesticide. Similarly, under the pesticide use regulations, one application of a pesticide may lead to multiple misuse violations. For example, if an applicator mixes pesticides over the rate prescribed by the label and during the same application allows pesticide to drift onto non-target areas, each of those acts would be a separately assessable violation of FIFRA § 12(a)(2)(G).

Each of these independent violations of FIFRA is subject to civil penalties up to the statutory maximum. For example, when EPA can document that a registrant has distributed a misbranded product (one single EPA product registration number) in four separate shipments, EPA will allege four counts of selling or distributing a misbranded product. Similarly, when EPA can document that a registrant has shipped four separate misbranded products (four separate EPA product registration numbers) in a single shipment, EPA will plead four counts of selling or

⁸ Independent violations which can be documented as both per sale and per shipment are to be calculated only as either per sale or per shipment, whichever is more appropriate based on the supporting documentation.

distributing a misbranded product. In use cases that EPA handles, the Agency will allege three misuse violations when a commercial applicator who misuses a restricted use product on three occasions (either three distinct applications or three separate sites). If a dealer sells a restricted use pesticide (RUP) to six uncertified persons, other than in accordance with FIFRA § 3(d), EPA will plead six violations of FIFRA.

On the other hand, the Agency will assess a penalty for one violation arising from a single event or action (or lack of action) that is an unlawful act under FIFRA for multiple reasons unless the event or action results in two unlawful acts for which at least one element of proof differs. For instance, a person can be assessed a civil penalty of up to the statutory maximum for the sale and/or distribution of an unregistered, cancelled or suspended pesticide under FIFRA § 12(a)(1)(A). If the unregistered pesticide is actually a product whose registration had been cancelled, EPA cannot allege two separate violations of FIFRA § 12(a)(1)(A) since the sale or distribution related to a single event or transaction. However, the Agency could separately allege a violation of a cancellation order under FIFRA § 12(a)(2)(K). In this example, the violation of the cancellation order is independent of the sale and distribution of the unregistered product.

Another example of a dependent violation is multiple misbrandings on a single product label. EPA may assess a count of misbranding each time that a misbranded product is sold or distributed. For example, a registrant who sells or distributes four distinct shipments of a misbranded pesticide product generally may be assessed four counts of misbranding. If a single product label is misbranded in one way or ten ways, as defined by FIFRA § 2(q), it is still misbranding on a single product label and is considered a single violation of FIFRA § 12(a)(1)(E). Note, however, for pesticide use regulations, where the applicator fails to follow two label requirements, for example, does not follow the prescribed application rate and does not provide the prescribed personal protective equipment, there are two separate violations.

When a product label is grossly misbranded such that two or more misbrandings assigned Level 2 in Appendix A are present, the gravity level is adjusted upward to a Level 1 to address the seriousness of the misbranding.

2. Size of Business

In order to provide equitable penalties, civil penalties that will be assessed for violations of FIFRA will generally decrease as the size of the business decreases. Size of business is determined based on an individual's or a company's gross revenues from all revenue sources during the prior calendar year. If revenue data for the previous year appears to be unrepresentative of the general performance of the business or the income of the individual, an average of the gross revenues for the three previous years may be used. Further, the size of business and gross revenue figures are based on the corporate family rather than a specific subsidiary or division of the company which is involved with the violation (including all sites owned or controlled by the foreign or domestic parent company) unless the subsidiary or division is independently owned.

As shown in the FIFRA Civil Penalty Matrices in Table 2, the appropriateness of the penalty to the size of the respondent's business is based on three distinct size of business categories. Further, because gross revenues of persons listed in FIFRA § 14(a)(1) [registrants, commercial applicators, wholesalers, dealers, retailers, or other distributors] will generally be higher than gross incomes of persons listed in FIFRA § 14(a)(2) [private applicators and other

persons not listed in 14(a)(1)], the policy has separate size of business categories for Section 14(a)(1) persons and Section 14(a)(2) persons. The size of business categories for FIFRA § 14(a)(1) and Section 14(a)(2) violators are listed in Table 1. Revenue includes all revenue from an entity and all of the entity's affiliates. When no information of any kind is available concerning a respondent's size of business, the penalty should be calculated using the Category I size of business.

TABLE 1

For section 14(a)(1) violators, the size of business categories are:

- I - over \$10,000,000 a year
- II - \$1,000,000 - \$10,000,000 a year
- III - under \$1,000,000 a year

For section 14(a)(2) violators, the size of business categories are:

- I - over \$1,000,000 a year
- II - \$300,000 - \$1,000,000 a year
- III - under \$300,000 a year

3. Gravity of the Violation

The "gravity level" established for each violation of FIFRA is listed in Appendix A of this ERP. The level assigned to each violation of FIFRA represents an assessment of the relative severity of each violation. The relative severity of each violation considers the actual or potential harm to human health and the environment which could result from the violation and the importance of the requirement to achieving the goals of the statute. The gravity level, which is determined from the chart in Appendix A, is then used to determine a base penalty figure from the FIFRA Civil Penalty Matrices in Step 4 below. In Step 5, the dollar amount derived from the matrix can be adjusted upward or downward depending on the actual circumstances of each violation.

4. Base Penalty Amount

The size of business categories and gravity levels are broken out in the FIFRA Civil Penalty Matrices shown in Table 2. Each cell of the matrix represents the Agency's assessment of the appropriate civil penalty, within the statutory maximum, for each gravity level of a violation and for each size of business category. Because FIFRA imposes different statutory ceilings on the maximum civil penalty that may be assessed against persons listed in FIFRA Section 14(a)(1) and persons listed in Section 14(a)(2), this policy has separate penalty matrices for Section 14(a)(1) violators and Section 14(a)(2) violators.

With the exception of any applicator within the scope of the exception set forth in FIFRA § 14(a)(2), EPA will only use the Section 14(a)(2) penalty matrix for persons falling under FIFRA § 14(a)(2) who have previously been issued a Notice of Warning or prior citation.⁹

⁹ FIFRA § 14(a)(2) states that private applicators are only subject to civil penalties after receiving a notice of warning or following a citation for a prior violation. A notice of warning or citation for a prior

When a civil penalty is the appropriate response for a first-time violation by any applicator within the scope of the exception set forth in FIFRA § 14(a)(2), EPA will seek the statutory maximum civil penalty. Subsequent violations will be assessed using the FIFRA § 14(a)(2) civil penalty matrix below.

TABLE 2

Civil Penalty Matrix for FIFRA § 14(a)(1)

| LEVEL OF VIOLATION | SIZE OF BUSINESS | | |
|--------------------|-----------------------|----------------------------------|-------------------------|
| | I – over \$10,000,000 | II -- \$1,000,000 - \$10,000,000 | III – under \$1,000,000 |
| Level 1 | \$7,500 | 7,150 | 7,150 |
| Level 2 | 7,150 | 5,670 | 4,250 |
| Level 3 | 5,670 | 4,250 | 2,830 |
| Level 4 | 4,250 | 2,830 | 1,420 |

Civil Penalty Matrix for FIFRA § 14(a)(2)¹⁰

| LEVEL OF VIOLATION | SIZE OF BUSINESS | | |
|--------------------|----------------------|-------------------------------|-----------------------|
| | I – over \$1,000,000 | II -- \$300,000 - \$1,000,000 | III – under \$300,000 |
| Level 1 | \$1,100 | 1,100 | 1,100 |
| Level 2 | 1,100 | 1,030 | 770 |
| Levels 3 & 4 | 1,030 | 770 | 650 |

5. Adjustments for Case-Specific Factors

The Agency has assigned adjustments, based on the gravity adjustment criteria listed in Appendix B, for each violation relative to the specific characteristics of the pesticide involved, the harm to human health and/or harm to the environment, compliance history of the violator,

violation may include an action by either EPA or a delegated state if the prior violation would be a violation of federal law.

¹⁰ This 14(a)(2) matrix is only for use in determining civil penalties issued subsequent to a notice of warning or following a citation for a prior violation, or in the case of a “for hire” applicator using a registered general use pesticide, subsequent to the issuance of a prior civil penalty.

and the culpability of the violator. Then the gravity adjustment values from each gravity category listed in Appendix B are to be totaled. The dollar amount found in the matrix will be raised or lowered, not to exceed the statutory maximum, based on the total gravity values in Table 3. Once this base penalty amount is calculated, it should be rounded to the nearest \$100, in accordance with [Amendments to Penalty Policies to Implement Penalty Inflation Rule 2008](#) - (Nakayama, 2008).¹¹

TABLE 3

| Total Gravity Value from Appendix B | Enforcement Remedy |
|---|--|
| 3 or below | No action or Notice of Warning (60% reduction of matrix value recommended where multiple count violations exist) |
| 4 | Reduce matrix value 50% |
| 5 | Reduce matrix value 40% |
| 6 | Reduce matrix value 30% |
| 7 | Reduce matrix value 20% |
| 8 | Reduce matrix value 10% |
| 9 to 11 | Assess matrix value |
| 12 | Increase matrix value 10% ** |
| 13 | Increase matrix value 20% ** |
| 14 | Increase matrix value 30% ** |
| 15 | Increase matrix value 40% ** |
| 16 | Increase matrix value 50% ** |
| 17 or above | Increase matrix value 60% ** |
| ** Matrix value can only be increased to the statutory maximum. | |

6. Economic Benefit of Noncompliance

The Agency’s Policy on Civil Penalties (EPA General Enforcement Policy #GM-21), dated February 16, 1984, mandates the recapture of any significant economic benefit of noncompliance (EBN) that accrues to a violator from noncompliance with the law. Economic benefit can result from a violator delaying or avoiding compliance costs or when the violator realizes illegal profits through its noncompliance. A fundamental premise of the 1984 Policy is that economic incentives for noncompliance are to be eliminated. If, after the penalty is paid, violators still profit by violating the law, there is little incentive to comply. Therefore, enforcement professionals should always evaluate the economic benefit of noncompliance in calculating penalties. Note that economic benefit can only be added to the proposed penalty up to the statutory maximum penalty.

An economic benefit component should be calculated and added to the gravity-based penalty component when a violation results in “significant” economic benefit to the violator. “Significant” is defined as an economic benefit that totals more than \$10,000 for all violations alleged in the complaint. In the interest of simplifying and expediting an enforcement action, enforcement professionals may use the “rules of thumb” (discussed in section 6.b below) to

¹¹ <http://www.epa.gov/compliance/resources/policies/civil/penalty/amendmentstopenaltypolicies-implemmentpenaltyinflationrule08.pdf>

determine if the economic benefit will be significant. Distribution and sale of unregistered and misbranded pesticides are examples of violations that are likely to result in significant economic benefits. For certain FIFRA requirements, the economic benefit of noncompliance may be relatively insignificant (e.g., failure to submit a report on time).

EPA generally will not settle cases for an amount less than the economic benefit of noncompliance. However, the Agency's 1984 Policy on Civil Penalties explicitly sets out three general areas where settling for less than the economic benefit may be appropriate. Since the issuance of the 1984 Policy, the Agency has added a fourth exception for cases where ability to pay is a factor. The four exceptions are:

- The economic benefit component is an insignificant amount (defined for purposes of this policy as less than \$10,000);
- There are compelling public concerns that would not be served by taking a case to trial;
- It is unlikely, based on the facts of the particular case as a whole, that EPA will be able to recover the economic benefit in litigation; and
- The company has documented an inability to pay the total proposed penalty.

a. Economic Benefit from Delayed Costs and Avoided Costs

Delayed costs are expenditures that have been deferred by the violator's failure to comply with the requirements. The violator eventually will spend the money to achieve compliance. Delayed costs are either capital costs (i.e. equipment), if any, or one-time non-depreciable costs (e.g., registration fees for pesticides that are eventually registered).

Avoided costs are expenditures that will never be incurred, as in the case of an unlawfully distributed unregistered pesticide that is subsequently removed from commerce and never registered by the Agency. In this example, avoided costs include all the costs associated with product registration because the product was never registered. Those costs were never and will never be incurred. Those avoided costs might include the registration fees, annual maintenance fees, and costs associated with the testing that would have been required to support a pesticide registration or to support specific claims about the product.

b. Calculation of Economic Benefit from Delayed and Avoided Costs

Since 1984, it has been Agency policy to use either the BEN computer model or "rules of thumb" to calculate the economic benefit of noncompliance. The "rules of thumb" are straight-forward methods to calculate economic savings from delayed and avoided compliance expenditures. They are discussed more fully in the Agency's General Enforcement Policy #GM-22, entitled "A Framework for Statute-Specific Approaches to Penalty Assessments," issued on February 16, 1984, at pages 7-9. The "rule of thumb" methodology is available in a Lotus spreadsheet available to EPA enforcement professionals from the Special Litigation and Projects Division of the Office of Civil Enforcement. Enforcement professionals may use the "rules of thumb" whenever the economic benefit penalty is not substantial (generally under \$10,000) and use of an expert financial witness may not be warranted. If the "rules of thumb" yield an amount

over \$10,000, the case developer should use the BEN model and/or an expert financial witness to calculate the higher economic benefit penalty. Using the “rules of thumb,” the economic benefit of delayed compliance may be estimated at: 5% per year of the delayed one-time capital costs, if any, and/or one-time non-depreciable costs for the period from the date the violation began until compliance was or is expected to be achieved. For avoided annual costs, the “rule of thumb” is the annual expenses avoided until the date compliance is achieved less any tax savings. These rules of thumb do not apply to avoided one-time or avoided capital costs. Enforcement professionals should calculate the economic benefit of avoided one-time and avoided capital costs, if any, by using the BEN model.

The primary purpose of the BEN model is to calculate economic savings for settlement purposes. The model can perform a calculation of economic benefit from delayed or avoided costs based on data inputs, including optional data items and standard values already contained in the program. Enforcement professionals wishing to use the BEN model should take the Basic BEN training course offered by the Special Litigation and Projects Division in cooperation with NETI. Enforcement professionals who have questions while running the model can access the model’s help system which contains information on how to: use BEN, understand the data needed, and understand the model’s outputs.

The economic benefit component should be calculated for the entire period for which there is evidence of noncompliance, i.e., all time periods for which there is evidence to support the conclusions that the respondent was violating FIFRA and thereby gained an economic benefit. Such evidence should be considered in the assessment of the penalty assessed for the violations alleged or proven, up to the statutory maximum for those violations. In certain cases, credible evidence may demonstrate that a respondent received an economic benefit for noncompliance for a period longer than the period of the violations for which a penalty is sought. In such cases, it may be appropriate to consider all of the economic benefit evidence in determining the appropriate penalty for the violations for which the respondent is liable. For example, in a case where credible evidence demonstrates that a respondent sold an unregistered pesticide during the past four years but the specific violations for which EPA has chosen to seek a penalty all occurred within the past two years, the economic benefit should be calculated for the four-year period. In such a case, the economic benefit component of the penalty for the specific sales transactions during the past two years should be based on a consideration of the economic benefit gained for the four-year period, but the total penalty is limited to the statutory maximum for the specific violations alleged and proven.¹²

In most cases, the violator will have the funds gained through non-compliance available for its continued use and/or competitive advantage until it pays the penalty. Therefore, for cases in which economic benefit is calculated by using BEN or by a financial expert, the economic benefit should be calculated through the anticipated date a consent agreement would be entered. If the matter goes to hearing, this calculation should be based on a penalty payment date corresponding with the relevant hearing date. It should be noted that the respondent will continue to accrue additional economic benefits after the hearing date, until the assessed penalty is paid. However, there are exceptions for determining the period of economic benefit when

¹²When considering the economic benefit of noncompliance that accrued to the respondent more than five years prior to the filing of a complaint or a pre-filing Consent Agreement, the litigation team should consult with the Waste and Chemical Enforcement Division.

using a “rule of thumb.” In those instances, the economic benefit is calculated in the manner described in the first paragraph of this subsection.

c. Economic Benefit Gained from Illegal Sales of Unregistered Pesticides

In addition to delayed and avoided costs, an economic benefit may accrue to a violator of FIFRA from the sale of unregistered or misbranded pesticides. The economic benefit derived from sales of unregistered or misbranded pesticides is sometimes referred to as “illegal profits” or “illegal competitive advantage.” Illegal profits economic benefit is fundamentally different from the economic benefit calculated by using the BEN model. Unlike the delayed/avoided benefits addressed through BEN, this type of economic benefit is based on the profits generated by violating the law. Care should be taken to insure that any calculation of a benefit derived from illegal profits does not include profits attributable to lawful operations of the facility or delayed or avoided costs already accounted for in the BEN calculation. In most cases, a violator will realize either benefits from delayed/avoided costs or from illegal profits; however, whenever the facts and circumstances of the case provide a sufficient basis to calculate illegal profits and the Region is able to obtain sufficient information, the Region should calculate the benefits due to illegal profits and add it to any other type of economic benefit that has been calculated.

7. Ability to Continue in Business/Ability to Pay

FIFRA § 14(a)(4) requires the Agency to consider the effect of the penalty on the respondent’s ability to continue in business when determining the amount of the civil penalty. There are several sources available to assist enforcement professionals in determining a respondent’s ability to pay. Enforcement professionals considering a respondent’s ability to continue in business should consult “A Framework for Statute-Specific Approaches to Penalty Assessments,” (cited above) and EPA General Enforcement Policy PT.2-1 (previously codified as GM-#56), entitled “Guidance on Determining a Violator’s Ability to Pay a Civil Penalty” (December 16, 1986). In addition, the Agency has three computer models available to help assess whether violators can afford compliance costs and/or civil penalties: ABEL, INDIPAY and MUNIPAY. INDIPAY analyzes individual taxpayers’ claims about inability to pay. MUNIPAY analyzes cities, towns, and villages’ ability to pay. These models are designed for settlement purposes only.

ABEL is an EPA computer model that is designed to assess inability to pay claims from corporations and partnerships. The evaluation is based on the firm’s excess cash flow. ABEL looks at the money coming into the entity, and the money going out. It then looks at whether the excess cash flow is sufficient to cover the firm’s environmental responsibilities (i.e., compliance costs) and the proposed civil penalty. Because the program only focuses on a violator’s cash flow, there are other sources of revenue that should also be considered to determine if a firm is unable to pay the full penalty. These include:

- Certificates of deposit, money market funds, or other liquid assets;
- Reduction in business expenses such as advertising, entertainment, or compensation of corporate officers;
- Sale or mortgage of non-liquid assets such as company cars, aircraft, or land;

- Related entities (e.g., the violator is a wholly owned subsidiary of Fortune 500 company).

The complaint will notify the respondent of its right under the statute to have EPA consider its ability to continue in business in determining the amount of the penalty. Any respondent may raise the issue of ability to pay/ability to continue in business in its answer to the complaint or during the course of settlement negotiations. If a respondent raises the inability to pay as a defense in its answer or in the course of settlement negotiations, the Agency should ask the respondent to present appropriate documentation, such as tax returns and financial statements. The respondent must provide records that conform to generally accepted accounting principles and procedures at its expense. If the proposed penalty exceeds the respondent's ability to pay, the penalty may be reduced to a level consistent with FIFRA § 14(a)(4). If a respondent does not provide sufficient information to substantiate its claim of inability to pay the calculated penalty, then EPA may draw an inference from available information that the respondent has the ability to pay the calculated penalty.¹³

A respondent may argue that it cannot afford to pay the proposed penalty even though the penalty as adjusted does not exceed EPA's assessment of its ability to pay. In such cases, EPA may consider a delayed payment schedule calculated in accordance with Agency installment payment guidance and regulations.¹⁴ In exceptional circumstances, EPA may also consider further adjustment below the calculated ability to pay.

Finally, EPA will generally not collect a civil penalty that exceeds a violator's ability to pay as evidenced by a detailed tax, accounting, and financial analysis. However, it is important that the regulated community not choose noncompliance as a way of aiding financially troubled businesses. Therefore, EPA reserves the option, in appropriate circumstances, of seeking a penalty that might exceed the respondent's ability to pay, cause bankruptcy, or result in a respondent's inability to continue in business. Such circumstances may exist where the violations are egregious or the violator refuses to pay the penalty. However, if the case is generated out of an EPA regional office, the case file must contain a written explanation, signed by the regional authority duly delegated to issue and settle administrative penalty orders under FIFRA, which explains the reasons for exceeding the "ability to pay" guidelines. To ensure full and consistent consideration of penalties that may cause bankruptcy or closure of a business, the regions should consult with the Waste and Chemical Enforcement Division (WCED).¹⁵

¹³ Note that under the Environmental Appeals Board ruling in *In re: New Waterbury, LTD*, 5 E.A.D. 529 (EAB 1994), in administrative enforcement actions for violations under statutes that specify ability to pay (which is analogous to ability to continue in business) as a factor to be considered in determining the penalty amount, EPA must prove it adequately considered the appropriateness of the penalty in light of all of the statutory factors. Accordingly, enforcement professionals should be prepared to demonstrate that they considered the respondent's ability to continue in business as well as the other statutory penalty factors and that their recommended penalty is supported by their analysis of those factors. EPA may obtain information regarding a respondent's ability to continue in business from the respondent, independent commercial financial reports, or other credible sources.

¹⁴ See, 40 C.F.R. § 13.18.

¹⁵ In accordance with the November 1, 1994 memorandum entitled, "Final List of Nationally Significant Issues and Process for Raising Issues to TPED." This final implementation guidance was developed in follow-up to Steve Herman's July 11, 1994 memorandum on "Redelegation of Authority and Guidance on Headquarters' Involvement in Regulatory Enforcement Cases."

B. Modifications of the Penalty

1. Graduated Penalty Calculations

In instances where inspectors or case developers obtain records which evidence multiple sales or distributions for the same violations, the Region may apply a “graduated” penalty calculation. The graduated method should only be applied after a consideration of the actual or potential serious or widespread harm caused by the violations, the toxicity of the pesticides involved, and the culpability of the violator. The graduated penalty method should not be used in cases involving highly culpable violators or violations that caused an actual serious or widespread harm to human health or the environment. In cases involving violations that present *potential* serious or widespread harm to human health or the environment, the Region should decide whether application of the graduated penalty method is appropriate based on the circumstances of the individual case.

In no case is the graduated penalty method mandated and the Agency maintains its statutory right to assess penalties of up to the statutory maximum for each violation, when appropriate. For highly culpable parties the penalty should be calculated at the full value for all violations. After considering the factors described above and determining that a graduated penalty method is appropriate, the Region may calculate the penalty in accordance with Table 4 below. Table 4 provides for three separate graduated systems based on the three “size of business” categories.

TABLE 4

Graduated Penalty Tables

| Number of Distributions | CATEGORY I “SIZE OF BUSINESS” RESPONDENTS |
|--------------------------------|--|
| 1 – 100 | 100% of calculated per violation penalty |
| 101 – 400 | 25% of per violation penalty |
| > 400 | 10% of per violation penalty |

| Number of Distributions | CATEGORY II “SIZE OF BUSINESS” RESPONDENTS |
|--------------------------------|---|
| 1 – 20 | 100% of calculated per violation penalty |
| 21 – 40 | 25% of per violation penalty |
| > 40 | 10% of per violation penalty |

| Number of Distributions | CATEGORY III “SIZE OF BUSINESS” RESPONDENTS |
|--------------------------------|--|
| 1 – 5 | 100% of calculated per violation penalty |
| 6 – 20 | 10 % of per violation penalty |
| > 20 | 5% of per violation penalty |

Graduated penalties should generally be calculated separately for each type of violation and for each product (in other words, on a “per product violation” basis). In cases involving similar product violations (for example, violations involving products that contain the same

active ingredient and the same violative conduct on the part of the respondent), the Agency has the discretion to group together similar product violations for the graduated penalty calculation.

To calculate penalties using the graduated penalty method, the “adjusted” penalty amount must first be determined in accordance with Steps 1-5 of section IV.A Computation of the Penalty, above. The next step is to apply the graduated penalty calculation separately for each product violation, beginning with the first sale/distribution at 100% and proceeding to calculate the reduced penalty depending on the size of business. After the graduated penalty amount is calculated for each separate product violation, the Agency should add together the graduated penalty amounts for all of the product violations.

For example, a Category II business distributes two products with a total of three violations. For Product 1, the Agency is alleging misbranding (a Level 3 violation) and distribution of an unregistered pesticide (a Level 1 violation), each for 61 shipments. For Product 2, the Agency is alleging distribution of an unregistered pesticide (a Level 1 violation) for 90 shipments. After applying the case-specific factors, no adjustments to the base penalties were made. The graduated penalty calculation would proceed as follows:

Product 1, Misbranding (Level 3):

| | | |
|---------------------------|----------------------------|-----------|
| Violations 1-20 @ 100% = | 20 violations @ \$ 4,250 = | \$ 85,000 |
| Violations 21- 40 @ 25% = | 20 violations @ \$ 1,063 = | \$ 21,260 |
| Violations 41- 61 @ 10% = | 21 violations @ \$ 425 = | \$ 8,925 |

Product 1, Unregistered (Level 2):

| | | |
|---------------------------|----------------------------|-----------|
| Violations 1-20 @ 100% = | 20 violations @ \$ 5,670 = | \$113,400 |
| Violations 21- 40 @ 25% = | 20 violations @ \$ 1,418 = | \$ 28,360 |
| Violations 41- 61 @ 10% = | 21 violations @ \$ 567 = | \$ 11,907 |

Product 2, Unregistered (Level 2):

| | | |
|---------------------------|----------------------------|-----------|
| Violations 1-20 @ 100% = | 20 violations @ \$ 5,670 = | \$113,400 |
| Violations 21- 40 @ 25% = | 20 violations @ \$ 1,418 = | \$ 28,360 |
| Violations 41- 90 @ 10% = | 50 violations @ \$ 567 = | \$ 28,350 |

When the graduated penalty method is applied to the example case, the penalty is \$438,962, which is significantly lower than the \$1,115,420 [(61 x 4,250) + (61 x 5,670) + (90 x 5, 670)] penalty that would be calculated without applying the graduated penalty.

2. Voluntary Disclosure

Facilities that conduct an environmental audit or implement a compliance management system and promptly self-disclose any violations may be eligible for a significant reduction in the gravity-based penalty if they meet the nine criteria established in EPA’s Audit Policy (Incentives for Self-Policing: Disclosure, Correction and Prevention of Violations: Final Policy Statement, April 11, 2000). A facility may also be eligible for penalty reductions if they meet the specific criteria outlined in the “Small Business Compliance Policy” (May 11, 2000). If a facility self-discloses violations that do not qualify under the Audit Policy or Small Business Compliance Policy, the Agency may consider a company’s willingness to disclose as good faith (see Section IV.B.3.b.i. Good Faith Adjustments).

3. Adjusting the Proposed Civil Penalty in Settlement

Certain circumstances may justify adjustment of the proposed penalty. These circumstances may come to EPA's attention when a respondent files an answer to a civil complaint or during pre-filing settlement discussions under the *Consolidated Rules of Practice Governing Administrative Assessment of Civil Penalties*, 40 C.F.R. Part 22.

a. Factual Changes

EPA will recalculate the proposed penalty if the respondent can demonstrate that the size of business category, the gravity level, or the gravity adjustment criteria (Appendix B) used to derive the penalty is inaccurate. Adjustments to the proposed civil penalty may also be appropriate if the respondent can demonstrate an inability to pay the civil penalty (see Section IV.A.7. Ability to Continue in Business/Ability to Pay). Where additional facts indicate that the original penalty is not appropriate, EPA will calculate a new penalty consistent with the new facts. The burden is on the respondent to raise those factors which may justify the recalculation.

b. Negotiations Involving Only the Amount of the Penalty

In some cases the respondent may admit to all jurisdictional and factual allegations alleged in the complaint and may desire a settlement conference limited to the amount of the proposed penalty. The following sections describe adjustments that EPA may consider during settlement negotiations if the specific case meets the criteria set forth below.

i. Good Faith Adjustments

During the course of settlement negotiations, EPA may consider evidence of significant good faith efforts by the respondent to comply with FIFRA prior to the discovery of the violation(s) by EPA or a state as well as the respondent's good faith efforts to comply with FIFRA expeditiously after the discovery of the violation(s) by EPA or a state. In such instances, EPA may reduce the penalty by as much as 20 percent below the proposed penalty, if such a reduction would serve the public interest. A reduction for good faith efforts to comply is not mandated in any case. Such a reduction in penalty should only occur where there is an appropriate showing by respondent and finding by the Agency. Additionally, no reduction based on good faith efforts of the respondent should extend beyond a total of 20 percent of the proposed penalty without a showing of "special circumstances," as discussed below. No downward adjustment should be made if the Respondent fails to correct the violation(s) promptly after EPA or a state discovers the violation(s). Moreover, no downward adjustment should be made because respondent lacks knowledge concerning either applicable requirements or violations committed by respondent.

ii. Special Circumstances/Extraordinary Adjustments

Should EPA determine in a particular case that equity would not be served by adjusting the proposed penalty by only the allowable 20 percent adjustment for good faith, the FIFRA program manager may approve an adjustment to the proposed penalty for up to an additional 20 percent. In such cases, the case file must include substantive reasons why the extraordinary reduction of the civil penalty was appropriate, including: (1) setting forth the facts of the case; (2) why the penalty derived from the FIFRA civil penalty matrices and gravity adjustment was

inequitable; (3) how all other methods for adjusting or revising the proposed penalty would not adequately resolve the inequity; and (4) the manner in which the adjustment of the penalty effectuated the purposes of the Act. The FIFRA program manager's concurrence in the extraordinary reduction must be included in the case file.

iii. Supplemental Environmental Projects (SEPs)

To further EPA's goals to protect and enhance public health and the environment, certain environmentally beneficial projects, or Supplemental Environmental Projects (SEPs), may be included in the settlement. SEPs are environmentally beneficial projects which a respondent agrees to undertake in settlement of an environmental enforcement action, but which the respondent is not otherwise legally required to perform. In return, some percentage of the cost of the SEP is considered as a factor in establishing the final penalty to be paid by the respondent. EPA has broad discretion to settle cases with appropriate penalties. Evidence of a violator's commitment and ability to perform a SEP is a relevant factor for EPA to consider in establishing an appropriate settlement penalty. While SEPs may not be appropriate in settlement of all cases, they are an important part of EPA's enforcement program. Whether to include a SEP as part of a settlement of an enforcement action is within the sole discretion of EPA. EPA will ensure that the inclusion of a SEP in settlement is consistent with "EPA Supplemental Environmental Projects Policy," effective May 1, 1998, or as revised.

APPENDICES

Appendix A - FIFRA Violations and Gravity Levels

Appendix B - Gravity Adjustment Criteria

Appendix C - Summary of Tables

Appendix D - FIFRA Civil Penalty Calculation Worksheet

Appendix E – Enforcement Response Policy for FIFRA Section 7(c) – Pesticide Producing Establishment Reporting Requirements

Appendix F – FIFRA: Worker Protection Standard (WPS) Penalty Policy – Interim Final

Appendix G – Enforcement Response Policy for the FIFRA Good Laboratory Practices (GLP) Regulations

APPENDIX A

FIFRA VIOLATIONS AND GRAVITY LEVELS

| FIFRA SECTION | CODE | VIOLATION | LEVEL |
|--|-------------|--|----------------|
| 12(a)(1)(A) | 1AA | Sold or distributed a pesticide NOT REGISTERED under section 3 or one whose registration was CANCELLED or SUSPENDED, except to the extent authorized by the administrator. | 1 |
| 12(a)(1)(A) | 1AB | Registrant, wholesaler, dealer, retailer, or any other distributor ADVERTISED, or otherwise “offered for sale” in any medium a pesticide that was NOT REGISTERED under section 3 or that was CANCELLED or SUSPENDED, other than in accordance with Agency policy. | 2 |
| 12(a)(1)(B) | 1BA | CLAIMS made for a pesticide as part of its sale or distribution differed substantially from those accepted in connection with registration | 2 |
| 12(a)(1)(B) | 1BB | Registrant, wholesaler, dealer, retailer, or the other distributor ADVERTISED, or otherwise “offered for sale” in any medium a registered pesticide product for an UNREGISTERED USE, other than in accordance with Agency policy. | 2 |
| 12(a)(1)(C) | 1CA | Sold or distributed a pesticide whose COMPOSITION DIFFERED from the composition represented in the registration | 2 |
| 12(a)(1)(D) | 1DA | Sold or distributed a pesticide that has not been COLORED or DISCOLORED pursuant to section 25(c)(5) | 2 |
| 12(a)(1)(E) 12(a)(1)(F) 2(q)(1)(A) | 1EA | Sold or distributed a pesticide or device which is MISBRANDED in that the labeling has a statement, design, or graphic representation that is false or misleading. | 2 ¹ |
| 12(a)(1)(E) 12(a)(1)(F) 2(q)(1)(B) | 1EB | Sold or distributed a pesticide or device which is MISBRANDED in that the package or other container or wrapping does not conform to the standards established pursuant to section 25(c)(3) (e.g., not contained in child-resistant packaging or safety containers). | 2 ¹ |
| 12(a)(1)(E) 12(a)(1)(F) 2(q)(1)(C) | 1EC | Sold or distributed a pesticide or device that is MISBRANDED in that it is an imitation of, or is offered for sale under the name of, another pesticide. | 2 ¹ |
| 12(a)(1)(E) 12(a)(1)(F) 2(q)(1)(D) | 1ED | Sold or distributed a pesticide or device that is MISBRANDED in that the label did not bear the registration number assigned under section 7. | 4 |
| 12(a)(1)(E) 12(a)(1)(F) 2(q)(1)(E) | 1EE | Sold or distributed a pesticide or device that is MISBRANDED in that any words, statements, or other information required by the Act were not prominently placed on the label or labeling in such a way as to make it readable or understandable. | 3 |
| 12(a)(1)(E) 12(a)(1)(F) 2(q)(1)(F) | 1EF | Sold or distributed a pesticide or device that is MISBRANDED in that the label, or labeling accompanying it, did not contain directions for use necessary to make the product effective and to adequately protect health and the environment. | 1 |
| 12(a)(1)(E) | 1EG | Sold or distributed a pesticide or device that is MISBRANDED in | 2 ¹ |

| FIFRA SECTION | CODE | VIOLATION | LEVEL |
|----------------------------|-------------|---|------------------|
| 12(a)(1)(F) 2(q)(1)(G) | | that the label did not contain a warning or caution statement adequate to protect health and the environment (precautionary statements) | |
| 12(a)(1)(E) 2(q)(1)(H) | 1EH | Sold or distributed a non-registered pesticide intended for export that is MISBRANDED in that the label did not have a prominently displayed “Not Registered for Use in the United States of America” | 2 ¹ |
| 12(a)(1)(E) 2(q)(2)(A) | 1EI | Sold or distributed a pesticide that is MISBRANDED in that the label did not bear an ingredient statement on the immediate container which is presented or displayed under customary conditions of purchase. | 3 |
| 12(a)(1)(E) 2(q)(2)(B) | 1EJ | Sold or distributed a pesticide that is MISBRANDED in that the labeling does not contain a statement of the use classification under which the product was registered | 2 |
| 12(a)(1)(E) 2(q)(2)(C) | 1EK | Sold or distributed a pesticide that is MISBRANDED in that there is not a label affixed to the pesticide container, and to the outside wrapper of the retail package if the required information on the immediate container cannot be clearly read, a label bearing all of the following information: <ul style="list-style-type: none"> (i) the name and address of the producer, registrant, or person for whom produced (ii) the name brand, or trademark under which the pesticide is sold (iii) the net weight or measure of the contents; and (iv) when required by regulation, the registration number assigned to the pesticide. | 3 4 4 3 |
| 12(a)(1)(E) 2(q)(2)(D) | 1EL | Sold or distributed a pesticide that is MISBRANDED in that the pesticide is sold in quantities highly toxic to man and the label failed to bear the skull and crossbones, and the word “poison,” prominently in red on a contrasting background color, and a statement of practical treatment. | 1 |
| 12(a)(1)(E) 2(c)(1)-(3) | 1EM | Sold or distributed a pesticide that is ADULTERATED in that: (i) the strength or purity falls below the professed standard of quality expressed on the labeling; (ii) any substance has been substituted wholly or in part for the pesticide; or (iii) any valuable constituent of the pesticide has been wholly or in part abstracted. | 2 |
| 12(a)(2)(A) | 2AA | DETACHED, ALTERED, DEFACED, OR DESTROYED, in whole or in part, any LABELING required under the Act. | 2 |
| 12(a)(2)(B)(i) | 2BA | Refused to PREPARE, MAINTAIN, or SUBMIT any RECORDS required under sections 5, 7, ⁱⁱ 8, 11, or 19. | 2 |
| 12(a)(2)(B)(ii) | 2BB | Refused to SUBMIT any REPORTS required by or under sections 5, 6, 7, ² 8, 11, or 19. | 2 |
| 12(a)(2)(B)(ii) | 2BC | A registrant refused to submit REPORTS under section 6(a)(2) regarding UNREASONABLE ADVERSE EFFECTS of their pesticide. | 1 |
| 12(a)(2)(B)(iii) | 2BD | Person refused to allow ENTRY, INSPECTION, COPYING OF RECORDS, or SAMPLING authorized by this Act. | 2 |
| 12(a)(2)(C) | 2CA | Person gave a GUARANTY or undertaking provided for in section | 2 |

| FIFRA SECTION | CODE | VIOLATION | LEVEL |
|-------------------------------------|-------------|---|--------------|
| | | 12(b) which was FALSE in any particular. | |
| 12(a)(2)(D) | 2DA | Person used their personal advantage or revealed to persons other than those authorized by the Act any INFORMATION acquired under the Act that was CONFIDENTIAL. | 3 |
| 12(a)(2)(E) | 2EA | Registrant, wholesaler, dealer, retailer, or other distributor ADVERTISED a RESTRICTED USE PESTICIDE without indicating that the product was restricted. | 2 |
| 12(a)(2)(F) | 2FA | Person DISTRIBUTED, SOLD, MADE AVAILABLE FOR USE, or USED a RESTRICTED USE PESTICIDE for a purpose other than in accordance with section 3(d) or regulations issued. | 3 2 |
| 12(a)(2)(F) | 2FB | Person distributed, sold, or made available for use, or used, a RESTRICTED USE PESTICIDE without maintaining the RECORDS required by regulations (A Notice of Warning should be issued for first-time partial violations. Violations continuing subsequent to the issuance of a civil complaint are to result in a suspension- see “Denials, Suspensions, Modifications, or Revocations of Applicator Certifications” section of this ERP). | 2 |
| 12(a)(2)(G) | 2GA | Person USED a registered pesticide in a manner inconsistent with its labeling. | 2 |
| 12(a)(2)(H) | 2HA | Person USED a pesticide under an EXPERIMENTAL USE PERMIT contrary to the provisions of the permit. | 2 |
| 12(a)(2)(I) | 2IA | Person violated any order issued under section 13 (i.e., STOP SALE, USE, OR REMOVAL ORDER, or SEIZURES. | 1 |
| 12(a)(2)(J) | 2JA | Person violated any SUSPENSION ORDER issued under section 6. | 1 |
| 12(a)(2)(J) | 2JB | Person violated any SUSPENSION ORDER issued under section 3(c)(2)(B) or 4. | 2 |
| 12(a)(2)(K) | 2KA | Person violated any CANCELLATION ORDER issued under the Act on grounds of UNREASONABLE ADVERSE EFFECTS. | 1 |
| 12(a)(2)(K) | 2KB | Person violated any CANCELLATION ORDER issued under the Act on grounds OTHER THAN UNREASONABLE ADVERSE EFFECTS. | 2 |
| 12(a)(2)(K) | 2KC | Person failed to submit a SECTION 6(g) NOTICE when required. | 2 |
| 12(a)(2)(K) | 2KD | Person submitted a NOTABLY LATE SECTION 6(g) NOTICE. | 3 |
| 12(a)(2)(K) | 2KE | Person submitted an INCOMPLETE or INCORRECT SECTION 6(g) NOTICE. | 3 |
| 12(a)(2)(L) 7(a) ² | 2LA | PRODUCED a pesticide or active ingredient subject to the Act in an UNREGISTERED ESTABLISHMENT. | 2 |
| 12(a)(2)(L) 7(c)(1) ² | 2LB | Producer FAILED TO SUBMIT, or submitted NOTABLY LATE, a REPORT to the administrator, under SECTION 7, which indicates the types and amounts of pesticides or active ingredients which they are currently producing, which they produced during the year, and which they sold or distributed during the past year. | 2 |
| 12(a)(2)(L) 7(c)(1) ² | 2LC | Producer submitted a LATE REPORT to the administrator, under SECTION 7, which indicates the types and amounts of pesticides or active ingredients which they are currently producing, which they produced during the year, and which they sold or distributed during | 4 |

| FIFRA SECTION | CODE | VIOLATION | LEVEL |
|-------------------------------------|-------------|---|--------------|
| | | the past year (civil complaint issued only if the producer does not respond to a Notice of Warning or there is a subsequent violation within three year timeframe from the first violation). | |
| 12(a)(2)(L) 7(c)(1) ² | 2LD | Producer submitted an INCOMPLETE SECTION 7 REPORT with MINOR OMISSIONS of the required information (civil complaint issued only if the producer does not respond to a Notice of Warning or there is a subsequent violation within three year timeframe from the first violation). | 3 |
| 12(a)(2)(L) 7(c)(1) | 2LE | Producer submitted an INCOMPLETE or a FALSE SECTION 7 REPORT with MAJOR OMISSIONS or ERRORS of the required information. | 2 |
| 12(a)(2)(L) 7(c)2 | 2LF | Upon request of the administrator for the purposes of the issuance of a section 13 Stop Sale Orders, a PRODUCER FAILED TO PROVIDE the names and addresses of any recipients of any pesticides produced in any of his registered establishments. | 1 |
| 12(a)(2)(M) | 2MA | Person KNOWINGLY FALSIFIED all or any part of an application for registration, application for an experiment use permit, any information submitted under section 7, any records required to be maintained by the Act, any reports filed under the Act, or any information marked as confidential and submitted to the administrator under any provision of the Act. | 1 |
| 12(a)(2)(N) | 2NA | A registrant, wholesaler, dealer, retailer, or other distributor FAILED TO FILE REPORTS (other than reports addressed in the section 7(c) ERP) required by the Act. | 2 |
| 12(a)(2)(O) | 2OA | Person ADDED A SUBSTANCE TO or TOOK any substance from a pesticide in a manner that may defeat the purpose of the Act. | 2 |
| 12(a)(2)(P) | 2PA | Person USED a pesticide in TESTS ON HUMAN BEINGS in violations of the conditions specified by the Act. | 1 |
| 12(a)(2)(Q) ³ | 2QA | Person FALSIFIED INFORMATION RELATING to the TESTING of any pesticide (or any of its ingredients, metabolites, or degradation products)that the person knows will be furnished to the administrator, or will become a part of any records required to be maintained by the Act | 1 |
| 12(a)(2)(Q) ³ | 2QB | Person falsely represented compliance with the FIFRA Good Laboratory Practice (GLP) regulations as a result of a HIGH LEVEL GLP violation. | 2 |
| 12(a)(2)(Q) ³ | 2QC | Person falsely represented compliance with the FIFRA Good Laboratory Practice (GLP) regulations as a result of a MID LEVEL GLP violation. | 3 |
| 12(a)(2)(Q) ³ | 2QD | 14(a)(1) person falsely represented compliance with the FIFRA Good Laboratory Practice (GLP) regulations as a result of a LOW LEVEL GLP violation. | 4 |
| 12(a)(2)(Q) ³ | 2QE | 14(a)(2) person falsely represented compliance with the FIFRA Good Laboratory Practice (GLP) regulations as a result of a LOW LEVEL GLP violation. | 3 |
| 12(a)(2)(R) ³ | 2RA | Person submitted DATA KNOWN TO BE FALSE in support of registration. | 1 |

| FIFRA SECTION | CODE | VIOLATION | LEVEL |
|--------------------------|-------------|---|--------------|
| 12(a)(2)(S) ⁴ | 2SA | Person sold, distributed, or used an UNREGISTERED pesticide in violation of a REGULATION ISSUED UNDER SECTION 3(a). | |
| 12(a)(2)(S) ⁴ | 2SB | Person violated any REGULATION ISSUED UNDER SECTION 19. | |

¹ If a label has two or more Level 2 misbranding violations, the appropriate gravity level is increased to Level 1.

² Section 7(c)(1) violations are covered in the Enforcement Response Policy for FIFRA Section 7(c), Pesticide producing Establishment Reporting requirement dated June 2007.

³ Violations regarding laboratory practice are covered in the FIFRA Good Laboratory Practice (GLP) Regulations dated September 30, 1991.

⁴ Gravity levels for these violations will be assigned in subsequent ERPs.

APPENDIX B

GRAVITY ADJUSTMENT CRITERIA¹

| VIOLATION GRAVITY OF HARM | VALUE | CIRCUMSTANCES |
|---------------------------------|-------|--|
| Pesticide | 3 | Toxicity - Category I pesticides, signal word “Danger,” restricted use pesticides (RUPs), pesticides with flammable or explosive characteristics (<i>i.e.</i> , signal words “Extremely Flammable” or “Flammable”), or pesticides that are associated with chronic health effects (mutagenicity, oncogenicity, teratogenicity, etc.) or pesticide is unregistered and the ingredients or labeling indicate Category I toxicity. |
| | 2 | Toxicity - Category II, signal word “Warning” or pesticide unregistered and unknown, but not expected to meet Category I toxicity criteria. |
| | 1 | Toxicity – Category III or IV, signal word “Caution” or pesticide unregistered and ingredients lower or minimum risk category. |
| Harm to Human Health | 5 | Actual serious or widespread ¹ harm to human health. |
| | 3 | Unknown or potential serious or widespread harm to human health |
| | 1 | Minor ² potential or actual harm to human health. |
| | 0 | Negligible ³ harm to human health anticipated. |
| Environmental Harm | 5 | Actual serious or widespread ¹ harm to the environment (<i>e.g.</i> , crops, water, livestock, wildlife, wilderness, or other sensitive natural areas). |
| | 3 | Unknown or potential serious or widespread ¹ harm to the environment health |
| | 1 | Minor ² potential or actual harm to the environment. |
| | 0 | Negligible ³ harm to the environment anticipated. |
| Compliance History ⁴ | 4 | Violator with more than one prior violation of FIFRA. |
| | 2 | Violator with one prior violation of FIFRA. |
| | 0 | No prior FIFRA violations. |
| Culpability ⁵ | 4 | Knowing or willful violation of the statute. ⁶ Knowledge of the general hazardousness of the activity. |
| | 2 | Culpability unknown or violation resulting from negligence. |
| | 1 | Violation resulted from negligence. Violator instituted steps to correct the violation immediately after discovery of the violation. |
| | 0 | Violation was neither knowing nor willful and did not result from negligence. Violator instituted steps to correct the violation immediately after discovery of the violation. |

APPENDIX B NOTES

¹ For the purposes of this ERP, serious or widespread harm refers to actual or potential harm which does not meet the parameters of minor harm or negligible harm, as described below.

² For the purposes of this ERP, minor harm refers to actual or potential harm which is, or would be of short duration, no lasting effects or permanent damage, effects are easily reversible, and harm does not, or would not result in significant monetary loss.

³ For the purposes of this ERP, negligible harm refers to no actual or potential harm or actual or potential harm which is insignificant or unnoticeable and has no lasting effects or permanent damage or monetary loss.

⁴ The following considerations apply when evaluating compliance history for the purposes of Appendix B:

(a) In order to constitute a prior violation, the prior violation must have resulted in: (1) a final order, either as a result of an uncontested complaint, or as a result of a contested complaint which is finally resolved against the violator; (2) a consent order, resolving a contested or uncontested complaint by the execution of a consent agreement; (3) the payment of a civil penalty by the alleged violator in response to the complaint, whether or not the violator admits to the allegations of the complaint; or (4) conviction under the FIFRA's criminal provisions.

A notice of warning (NOW) will not be considered a prior violation for the purposes of the gravity adjustment criteria, since no opportunity has been given to contest the notice. Additionally, a stop sale, use, or removal order (SSURO) issued under FIFRA section 13 will not be considered as compliance history.

(b) To be considered a compliance history for the purposes of Appendix B, the violation must have occurred within five years of the present violation. This five-year period begins on the date of a final order, consent order, or payment of a civil penalty.

(c) Generally, companies with multiple establishments are considered as one when determining compliance history. If one establishment of a company commits a FIFRA violation, it counts as history when another establishment of the same company, anywhere in the country, commits another FIFRA violation

(d) An enforcement action or citation issued by a state lead agency will count as a prior violation if all the above considerations are met.

⁵ EPA enforcement officials are not required to determine culpability at the time the complaint is issued (especially if this information is not readily available). EPA enforcement officials may instead assign a weighting factor of 2 (culpability unknown), at the time of the issuance of the complaint. Culpability adjustments may be reconsidered during settlement negotiations.

⁶ The Agency may also consider criminal proceedings for "knowing and willful" violations. See the "Criminal Proceedings" section of this ERP.

**APPENDIX C
SUMMARY OF TABLES**

TABLE 1

SIZE OF BUSINESS CATEGORIES

| | |
|------------------------------------|------------------------------------|
| Section 14(a)(1) violators: | Section 14(a)(2) violators: |
| I - over \$10,000,000 a year | I - over \$1,000,000 a year |
| II - \$1,000,000 - \$10,000,000 | II - \$300,000 - \$1,000,000 |
| III - under \$1,000,000 | III - under \$300,000 |

TABLE 2

FIFRA CIVIL PENALTY MATRICES

Civil Penalty Matrix for FIFRA § 14(a)(1)

| LEVEL OF VIOLATION | SIZE OF BUSINESS | | |
|---------------------------|------------------------------|--|--------------------------------|
| | I – over \$10,000,000 | II - \$1,000,000 - \$10,000,000 | III – under \$1,000,000 |
| Level 1 | 7,500 | 7,150 | 7,150 |
| Level 2 | 7,150 | 5,670 | 4,250 |
| Level 3 | 5,670 | 4,250 | 2,830 |
| Level 4 | 4,250 | 2,830 | 1,420 |

Civil Penalty Matrix for FIFRA § 14(a)(2) *

| LEVEL OF VIOLATION | SIZE OF BUSINESS | | |
|---------------------------|-----------------------------|-------------------------------------|------------------------------|
| | I – over \$1,000,000 | II - \$300,000 - \$1,000,000 | III – under \$300,000 |
| Level 1 | \$1,100 | 1,100 | 1,100 |
| Level 2 | 1,100 | 1,030 | 770 |
| Level 3 & 4 | 1,030 | 770 | 650 |

* This 14(a)(2) matrix is only for use in determining civil penalties issued subsequent to a notice of warning or following a citation for a prior violation, or in the case of a “for hire” applicator using a registered general use pesticide, subsequent to the issuance of a prior civil penalty.

TABLE 3

GRAVITY ADJUSTMENT CRITERIA

| Total Gravity Value from Appendix B | Enforcement Remedy |
|--|--|
| 3 or below | No action or Notice of Warning (60% reduction of matrix value recommended where multiple count violations exist) |
| 4 | Reduce matrix value 50% |
| 5 | Reduce matrix value 40% |
| 6 | Reduce matrix value 30% |
| 7 | Reduce matrix value 20% |
| 8 | Reduce matrix value 10% |
| 9 to 11 | Assess matrix value |
| 12 | Increase matrix value 10% ** |
| 13 | Increase matrix value 20% ** |
| 14 | Increase matrix value 30% ** |
| 15 | Increase matrix value 40% ** |
| 16 | Increase matrix value 50% ** |
| 17 or above | Increase matrix value 60% ** |

** Matrix value can only be increased to the statutory maximum.

APPENDIX D
FIFRA CIVIL PENALTY CALCULATION WORKSHEET

| Respondent: Docket No.: | <u>Brief Description of Violation</u> |
|---|---------------------------------------|
| <u>APPENDIX A</u> 1. Violation | |
| 2. FTTS Code & Violation Level | |
| <u>TABLE 1</u> 3. Violator Category & Size of Business Category | |
| <u>APPENDIX A</u> 4. Gravity of the Violation | |
| <u>TABLE 2</u> 5. Base Penalty | |
| <u>APPENDIX B</u> 6. Gravity Adjustments | |
| a. Pesticide Toxicity | |
| b. Harm to Human Health | |
| c. Environmental Harm | |
| d. Compliance History | |
| e. Culpability | |
| f. Total Gravity Adjustment (Add 6a - 6e) | |
| <u>TABLE 3</u> 7. Percent & Dollar Adjustment | |
| 8. Economic Benefit | |
| <u>TABLE 4</u> 9. Graduated Penalty | |
| 10. Final Penalty | |

Case Development Officer

Date

Example
FIFRA CIVIL PENALTY CALCULATION WORKSHEET

| Respondent: Docket No.: | <u>Brief Description of Violation</u> |
|---|---|
| <u>APPENDIX A</u> 1. Violation | §12(a)(1)(C) |
| 2. FTTS Code & Violation Level | 1CA / 2 |
| <u>TABLE 1</u> 3. Violator Category & Size of Business Category | §14(a)(1) / Category I |
| <u>APPENDIX A</u> 4. Gravity of the Violation | 2 |
| <u>TABLE 2</u> 5. Base Penalty | \$7,150 |
| <u>APPENDIX B</u> 6. Gravity Adjustments | 1 |
| a. Pesticide Toxicity | |
| b. Harm to Human Health | 3 |
| c. Environmental Harm | 3 |
| d. Compliance History | 0 |
| e. Culpability | 2 |
| f. Total Gravity Adjustment (Add 6a - 6e) | 9 |
| <u>TABLE 3</u> 7. Percent & Dollar Adjustment | Assess Matrix Value |
| 8. Economic Benefit | |
| <u>TABLE 4</u> 9. Graduated Penalty | Not applied |
| 10. Final Penalty | \$7,150 x 10 Violations = \$71,500 |

Case Development Officer

Date