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Office of Enforcement and Compliance Assurance
Office of Civil Enforcement
Waste and Chemical Enforcement Division

**ENFORCEMENT RESPONSE POLICY
FOR FIFRA SECTION 7(c)**

**ESTABLISHMENT REPORTING REQUIREMENTS
Updated May 2010**

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I. Introduction

A. Summary

This Enforcement Response Policy (“ERP” or “Policy”) supersedes the *Enforcement Response Policy for FIFRA Section 7(c) Pesticide Producing Establishment Reporting Requirement*, dated June 2007. The ERP is revised to update the size-of-business discussion (see Section IV.C.1) and to add a penalty matrix for violations occurring after January 12, 2009 (see Section IV.E.2). The purpose of this ERP is to provide predictable and consistent enforcement responses and penalties for violations of FIFRA Section 7(c) while retaining the flexibility to allow for individual facts and circumstances of a particular case.

This ERP sets forth guidelines for the Environmental Protection Agency (“EPA” or the “Agency”) to use in determining the appropriate enforcement response and penalty amount for violations of Section 7(c) of the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 136 *et seq.*, as amended (“FIFRA” or the “Act”).

B. Effective Date

This policy is immediately applicable and should be used to determine enforcement responses and to calculate penalties for all administrative actions concerning FIFRA Section 7(c) initiated after the issuance date of this policy.

C. Disclaimer

The procedures set out in this document are intended solely for the guidance of government personnel. They are not intended and cannot be relied on to create substantive or procedural rights that are enforceable by any party in litigation with the United States. The Agency reserves the right to act at variance with the Policy and to change it at any time without public notice.

II. Background

A. Establishment Registration

FIFRA Section 7(a) and the implementing regulations at 40 CFR Part 167 require producers of pesticides, active ingredients, and devices (“pesticidal products”) to register the establishment(s) in which their pesticidal products are produced with EPA prior to production. EPA Form 3540-8, *Application for Registration of Pesticide-Producing and Device-Producing Establishments*, is used to submit the information required by this section. EPA assigns a unique

establishment number for each registered establishment as a facility identifier.

B. Production Reports

FIFRA Section 7(c) and 40 CFR Part 167 require producers operating an registered establishment to submit initial and annual production reports, using EPA Form 3540-16, *Pesticide Report for Pesticide-Producing and Device-Producing Establishments*.

C. Uses of Production Information

Annual reports are generally the only mechanism available for obtaining information on the type and quantity of pesticidal products produced in registered domestic and foreign establishments. This information is important to Agency efforts to protect human health and the environment and maintain the integrity of the pesticide program. The information reported includes the types and amounts of pesticidal products: (1) produced during the past year, (2) sold or distributed during the past year, and (3) estimated to be produced during the current year. EPA uses this information to effectively prioritize and target inspections and for a variety of risk assessment and risk reduction activities. For example, production information is used by EPA to:

- Notify producers of required label changes and to verify that the changes have been made;
- Locate and contact producers of specific pesticides or devices in critical situations, such as adulteration of a pesticide or cancellation of a pesticide due to human health or environmental harm impacts;
- Trace ineffective, contaminated, or otherwise violative products to their source, minimizing any adverse environmental impact that might arise from their production or distribution; and
- Notify pesticide or device producers in preparation for, and in response to, natural disasters.

D. Establishment Reporting Requirements

1. Who Must Report?

The regulations at 40 CFR § 167.85(a) require producers who operate registered establishments to submit annual production reports to the EPA. Listed below are typical producing establishments that submit annual production reports to EPA:

- Producers of end-use pesticides, including re-packagers;

- Producers of technical grade active ingredients and other manufacturing use pesticides;
- Producers of devices;
- Producers of pesticides in bulk form;
- Foreign producers who export any pesticide to the United States;
- Producers of pesticides under a FIFRA Section 5 experimental use permit or an exemption from an experimental use permit;
- Producers of pesticides under a FIFRA Section 18 exemption;
- Producers of pesticides under a FIFRA Section 24(c) state local needs registration; and
- Producers of pesticides/devices under contract.

2. Can Reports be Combined?

Producers must submit a separate report for each registered establishment and must not combine reports, even if a company has several establishments. The company headquarters may complete the report forms for each of its producing establishments.

3. When is the Initial Report Due?

For newly registered establishments, the initial report must be submitted within 30 days after notification of the registration of their establishment.

4. When is the Annual Report Due?

After submitting the initial report, producers are required to submit annual reports. The due date, as set forth in 40 CFR § 167.85(d), is on or before March 1st, for the prior calendar year. EPA will consider the postmark date or equivalent dispatch information (such as a date stamp) on the report or mailing envelope as the date of submission for reports.

5. What is the Appropriate EPA Office to Send the Reports to?

Where a producer operating an establishment is in the same location as the company headquarters, the producer must submit the application and reports to the EPA Regional Office that serves the area where the headquarters and establishment are located. Where the establishment is not found in the same location as the company headquarters, the company headquarters must submit the application and reports to the EPA Regional Office that serves the area where the company headquarters is located. Foreign producers must submit their reports to the Office of Compliance, Agriculture Division.

6. Can Producers Obtain an Extension of the Deadline to File An Annual Production Report?

No. EPA's regulations do not provide for any extensions to the March 1st due date for the annual production report for any reason. If a facility is late in submitting its annual production report, EPA will follow this ERP (see Section III.B.2 below) in determining the appropriate response.

7. What Information Must be Reported?

Information must be reported on the products that were produced at the registered establishment. This includes products distributed or sold from the registered establishment and any pesticide, active ingredient, or device packaged, repackaged, labeled or re-labeled at the establishment. The producer must report the following information:

- Name and address of the establishment;
- Amount of each pesticidal product produced during the previous calendar year;
- Amount of each sold or distributed during the previous calendar year; and
- Estimated amount of each to be produced in the current year.

Products distributed or sold from, but not produced at, the registered establishment should not be reported. If no production occurred at the registered establishment, the report must be filed indicating zero production. Reports submitted by foreign establishments should cover only those pesticidal products that are exported to the United States.

III. ENFORCEMENT RESPONSES

A. Level of Action

EPA is authorized under FIFRA to use a range of enforcement actions to address violations of FIFRA Section 7(c) including those relating to the initial report and the annual production reports. These actions include: notices of warning (NOWs), civil administrative penalties, termination of establishment registrations, and criminal sanctions. Each action is briefly described below.

1. Notices of Warning (FIFRA §§ 9(c)(3) and 14(a)(4))

A NOW should generally be issued for FIFRA Section 7(c) violations when the violation occurred despite the exercise of due care and the violation did not cause harm to human health or the environment. NOWs may not be used to assess penalties against the violator.

2. Civil Administrative Penalties (FIFRA § 14(a)(1))

An administrative penalty action (pursuant to 40 CFR Part 22) should generally be issued for violations of FIFRA Section 7(c), as described in this policy. Under FIFRA, the maximum penalty EPA is authorized to assess is \$5,000 per violation. However, the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Debt Collection Improvement Act of 1996 (collectively referred to as the “Inflation Adjustment Act”), requires federal agencies to periodically adjust the maximum penalties under their statutes for inflation. Pursuant to the Inflation Adjustment Act, EPA has increased the maximum penalty amount for FIFRA violations through periodic rulemakings. The following table describes those increases.

Table 1 – Changes to Civil Administrative Penalties

	Statutory Penalties, As Enacted	1996 Rule	2004 Rule	2008 Rule
Effective Dates	Up to January 30, 1997	January 31, 1997 - March 14, 2004	March 15, 2004 - January 12, 2009	January 13, 2009 – present
Penalty Amount	\$5,000	\$5,500	\$6,500	\$7,500

In determining the amount of a civil penalty, FIFRA § 14(a)(4) requires EPA to consider three factors: the appropriateness of the penalty to the size of the business, the effect on the ability to continue in business, and the gravity of the violation. Each of these factors should be considered in accordance with guidelines and procedures established in this policy.

3. Criminal Enforcement (FIFRA § 14(b)(1))

This penalty policy does not address criminal violations of FIFRA. However, if the civil case team has reason to believe that a producer knowingly violated any provision of FIFRA, it should promptly refer the matter to the Criminal Investigation Division (CID) office located in that region. FIFRA’s criminal penalties are found in Section 14(b). In addition, pursuant to 18 U.S.C. Section 1001, it is a criminal violation to knowingly and willfully make a false or

fraudulent statement in any matter within EPA's jurisdiction. In addition, it may be considered a criminal violation to knowingly or willfully falsify information provided to the Agency.

4. Termination of Establishment Registration (40 CFR § 167.20(f))

In addition to assessing civil and/or criminal penalties, EPA may terminate the establishment registration of a producer that fails to submit a report.

B. Determining the Appropriate Enforcement Response.

The enforcement responses discussed in this ERP are intended to provide national consistency in FIFRA Section 7(c) enforcement actions. The facts and circumstances of each case, including the company's compliance history, should be carefully considered, and documented by the case officer in accordance with this policy to ensure that the response is appropriate for the violation. There are four general types of FIFRA Section 7(c) violations discussed in this penalty policy: (1) incomplete reporting; (2) late reporting; (3) non-reporting; and (4) false reporting. Incomplete, late and non-reporting violations are unlawful acts under FIFRA Section 12(a)(2)(L). To knowingly falsify any information submitted pursuant to FIFRA Section 7 is an unlawful act under FIFRA Section 12(a)(2)(M) (and may also violate 18 U.S.C. § 1001). The appropriate enforcement response for each type of violation is discussed below.

1. Incomplete Reporting

A report that does not contain all the required information or contains incorrect information is considered an incomplete report. Incomplete reporting violations are categorized as either minor or major incomplete reporting violations, based on the seriousness of the error, and treated accordingly.

a. Minor Incomplete Reporting

EPA considers a minor reporting violation to be missing or incorrect information in a report that is non-substantive and easily corrected by the producer. Examples of minor errors are: no date on the signature line, no telephone number, incorrect market codes, incorrect product types, incorrect use classifications, typographical errors, and all other information the Agency has determined to be necessary to include on the annual production report to help clarify and support the purpose of the report.

ENFORCEMENT RESPONSE: Enforcement personnel should notify the producer of the error and request a corrected report or the missing information, usually via telephone. Typically, the producer will be given 30 calendar days to submit a corrected report or the missing information. A NOW should be issued in cases where the producer repeatedly submits reports with minor errors or does not submit the corrected report within the time-frame specified by the

Agency.

b. Major Incomplete Reporting

EPA considers a major reporting violation to be all other missing or incorrect information in a report that cannot be classified as a minor error. For example, a producer fails to report a pesticide that was produced in the preceding year or fails to report the amount of the pesticide that was produced in the preceding year. Other examples of major errors are: failing to report the amounts of pesticide sold or distributed and no EPA registration number.

ENFORCEMENT RESPONSE: Enforcement personnel should typically issue a NOW for a first time major incomplete reporting violation. Staff should generally issue a civil administrative penalty if the producer does not submit the corrected report within the specified time-frame and for subsequent Section 7 violations.

2. Late Reporting

If a company official submits the report 30 or fewer days after the March 1st due date or 30 or fewer days after the due date of the initial report, it is a late report. Reports not postmarked but received via mail by March 5th are considered to have been postmarked by March 1st.

ENFORCEMENT RESPONSE: Enforcement personnel should generally issue a NOW for a first time late reporting violation, unless, due to the specific facts and circumstances of the case, an alternate enforcement response would be more appropriate. If the case team determines that factors in a specific case warrant an enforcement response other than a NOW, these factors and the reasoning must be documented in the case file. Enforcement personnel should issue a civil administrative penalty for subsequent Section 7 violations, unless EPA determines that a penalty action would be inappropriate based on the totality of circumstances of the late reporting incident, in which case, EPA may exercise its discretion to forgo a penalty action and document its justification for the alternate enforcement response in the case file.

3. Non-Reporting

If a company official fails to submit the annual report within 30 days after the March 1st due date, or the initial report within 60 days after the initial report is due, the establishment will be considered as non-reporting. Establishments where no production occurred during the year are still required to submit a report (indicating no production) within the 30-day time-frame for annual reports or they will be considered as non-reporting.

ENFORCEMENT RESPONSE: Enforcement personnel should generally issue a NOW for a first time non-reporting violation and specify in the NOW a date for the report to be submitted. If the producer does not submit the completed report by the date specified in the

NOW, staff should then issue a civil administrative complaint. However, if case-specific facts demonstrate a producer had direct notification from EPA of reporting requirements prior to the due date, the case team may respond with a civil administrative penalty, even for first time violations. Enforcement personnel should issue a civil administrative penalty for subsequent Section 7 violations.

Non-producing establishments are treated the same as producing establishments, except that, if the non-producing establishment requests termination of its establishment registration within 20 calendar days after written notification of the violation by EPA, enforcement personnel generally should reduce the civil penalty to zero unless there are serious factors making such a reduction inappropriate. If the establishment is re-registered during the five-year statute of limitation time period, any subsequent non-reporting violations are subject to a civil penalty without the option of the zero penalty reduction.

EPA may also initiate procedures to terminate the establishment's registration for non-reporting. Termination of establishment registration will be independent of any other enforcement action. See paragraph C below for procedures for terminating an establishment's registration.

4. Falsification of Information in Reports

EPA considers submitting false information in the report to occur when the producer knowingly reported fraudulent information.

ENFORCEMENT RESPONSE: EPA considers falsification of information to be a serious violation which, under the appropriate facts and circumstances, may subject the producer to criminal proceedings. For example, a criminal referral may be appropriate in circumstances where the violator has a previous history of falsifying information in its Section 7 report. The case team, after consulting with CID, should issue a civil administrative penalty for falsification of information in a report. In addition to violating FIFRA, falsification of information may be a violation of 18 U.S.C. § 1001 (falsifying information submitted to the U.S. government).

C. Terminating Establishment Registrations

1. Termination For Cause

EPA regulations at 40 CFR § 167.20(f) state that an establishment's registration is subject to termination if an annual report is not submitted. If a producer fails to submit a report and EPA decides to terminate its establishment registration, EPA will attempt to notify the producer by issuing a Notice of Intent to Terminate Establishment Registration (NOIT). The NOIT provides notice to the producer that its establishment registration will be terminated unless EPA receives the report within 30 calendar days. If the report is not received within the specified time frame,

EPA will issue a Notice of Termination (NOT). If the NOIT is returned to EPA because the addressee moved, was unknown, or could not be located, EPA may immediately issue a NOT. The case file should document all attempts made to contact the company and why they were unsuccessful. Foreign producers whose establishment registrations have been terminated may not export pesticide products to the United States. This action is independent of any other EPA enforcement response.

2. Notification of Establishments That Can Not be Located

When a producer did not receive a NOIT because the Agency was not able to locate it at the establishment's last address of record, the Agency may attempt to notify the producer through public notice. Public notice may be accomplished through a notice in the Federal Register containing the name and number of the producing establishment or other appropriate means, such as publication on the Regional website.

3. Registration After Termination for Cause

Producers requesting re-registration of their establishments after termination for cause must resolve the issues that triggered the termination for cause and re-apply for establishment registration pursuant to the requirements of 40 CFR § 167.20.

IV. Assessing a Civil Administrative Penalty

A. Penalty Policy Authority

FIFRA Section 14(a)(4) requires EPA to consider the appropriateness of the penalty to the size of the business of the person charged, the effect of the penalty on the person's ability to continue in business, and the gravity of the violation when calculating the civil penalty amount. The gravity-based portion of the penalty is determined by the seriousness of the violation. Thus, the more serious violations should receive a higher dollar penalty than the less serious violations.

B. Penalty Policy Guidelines

This policy establishes guidelines for gravity-based penalty amounts based on the harm that could result from the violation and the importance of the requirement in achieving the goals and maintaining the integrity of the statute. It also provides guidelines for further penalty adjustments to take into account the respondent's compliance history and the size of the respondent's business. This penalty policy is intended for use as a guideline to promote consistency in the Agency's penalties assessed for FIFRA Section 7(c) violations. EPA should consider the individual circumstances of each case together with this policy to determine the

appropriate penalty amount. Case teams should document the basis for each calculation and include it in the case file.

C. Gravity-Based Penalty

The FIFRA Section 7(c) civil penalty matrices found below in Section IV.E. contain the gravity-based penalties for FIFRA Section 7(c) violations. These penalties take into consideration the respondent's prior compliance history and the size of respondent's business. The FIFRA Section 7(c) civil penalty matrices form a framework for making penalty determinations that are consistent with FIFRA Section 14(a)(4). While this policy cannot cover all cases, most cases should fit within this policy.

1. Size of Business

In order to provide equitable penalties and yet provide an effective deterrent value, civil penalties 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 Section 7(c) civil penalty matrices below in Section IV.E., the appropriateness of the penalty to the size of the respondent's business is based on three distinct size-of-business categories. The size-of-business categories for FIFRA § 7(c) violators are listed below. Revenue includes all revenue within the corporate family. When no information of any kind is available concerning a respondent's size of business, the penalty should be calculated using Category I.

The size-of-business categories are:

Category I (C-I)	Over \$10,000,000 a year
Category II (C-II)	\$1,000,000 - \$10,000,000 a year
Category III (C-III)	Under \$1,000,000 a year

2. Prior Compliance History

In assessing the gravity of a violation, EPA evaluates the compliance history of the violator. If a similar enforcement action was recently taken against the same violator with no corresponding improvement in behavior, it is reasonable to conclude that a higher penalty is necessary to gain compliant behavior. Prior enforcement actions include: NOWs, administrative orders, complaints, consent decrees, and consent agreements involving any violation of the Section 7 requirements by a particular company, regardless of where the violation occurred. Because this ERP is applicable only to FIFRA Section 7(c) violations and FIFRA Section 7 is a federally-implemented program, prior state violations are not relevant. For purposes of calculating the gravity penalty, the Agency's issuance of the prior violation must have occurred within five years of the current violation. This five-year period begins on the date the prior violation was resolved.

D. Incorporating a Section 7 Count in a Civil Complaint

When a Section 7 count is not the sole count in a civil complaint and a NOW is the appropriate enforcement response for the Section 7 violation, it may be included as a lesser included count with no penalty. When the Section 7 violation requires a penalty assessment, that amount should be included in the overall penalty calculation.

E. FIFRA Section 7(c) Civil Penalty Matrices

The penalties in these charts reflect the current maximum penalties allowed under FIFRA of \$6,500 per violation (occurring on or before January 12, 2009) and \$7,500 per violation (occurring after January 12, 2009) based on increases to the original statutory penalty pursuant to the Inflation Adjustment Act.

1. Violations Occurring On or Before January 12, 2009

Type of Violation	First Time Violator	Second Time Violator*	Third and Subsequent*
Late Reporting	NOW	C-I - \$3,000 C-II - \$1,500 C-III - \$1,000	\$6,500
Non-Reporting	NOW If no response C-I - \$3,000 C-II - \$1,500 C-III - \$1,000	C-I - \$4,500 C-II - \$3,000 C-III - \$1,500	\$6,500
Incomplete Report- Minor	Informal Response/NOW	NOW	NOW or C-I- \$3,000 C-II - \$1,500 C-III-\$1,000
Incomplete Report- Major	NOW	C-I - \$3,000 C-II - \$1,500 C-III - \$1,000	\$6,500
False Reporting	\$6,500	\$6,500	\$6,500

* Repeat violations refer to violations that occurred within five years of the current violation

2. Violations Occurring After January 12, 2009

Type of Violation	First Time Violator	Second Time Violator*	Third and Subsequent*
Late Reporting	NOW	C-I - \$3,300 C-II - \$1,650 C-III - \$1,100	\$7,500
Non-Reporting	NOW If no response C-I - \$3,300 C-II - \$1,650 C-III - \$1,100	C-I - \$4,950 C-II - \$3,300 C-III - \$1,650	\$7,500
Incomplete Report- Minor	Informal Response/NOW	NOW	NOW or C-I- \$3,300 C-II - \$1,650 C-III-\$1,100
Incomplete Report- Major	NOW	C-I - \$3,300 C-II - \$1,650 C-III - \$1,100	\$7,500
False Reporting	\$7,500	\$7,500	\$7,500

* Repeat violations refer to violations that occurred within five years of the current violation.

Note: For both matrices, after calculating the gravity-based penalty for each count, the total applicable gravity-based penalty for all counts in a particular case/matter should be rounded to the nearest unit of \$100 as required in the memorandum from Granta Nakayama, dated December 29, 2008.

F. Adjustment for Specific Penalty Factors

In addition to the statutory adjustment factor for the violator's ability to continue in business (ability to pay), EPA may also consider adjusting the penalty for good faith efforts to comply with FIFRA. Penalty adjustments for each of these factors are described below.

1. 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 should 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.¹

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.² In exceptional circumstances, EPA may also consider further adjustment below the calculated ability to pay.

Finally, EPA should 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. If such a 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 actions 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).³

¹ 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.

² See, 40 C.F.R. § 13.18.

³ See, 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."

2. 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.

3. Special Circumstances/ Extraordinary Adjustments

The case may present other factors that the case team believes justify a further reduction of the penalty. For example, a case may have particular litigation strengths or weaknesses that the case team believes have not been adequately captured in other areas of this Policy. If the facts of the case or the nature of the violation(s) at issue reduce the strength of the Agency's case, then an additional penalty reduction may be appropriate. In such circumstances, the case team should contact OECA to discuss. If after careful consideration the case team determines that an additional reduction of the penalty is warranted, it should ensure the case file includes substantive reasons why the extraordinary reduction of the civil penalty is appropriate, including: (1) why the penalty derived from the FIFRA civil penalty matrices and gravity adjustment is inequitable; (2) how all other methods for adjusting or revising the proposed penalty would not adequately resolve the inequity; (3) the manner in which the adjustment of the penalty effectuated the purposes of the Act; and (4) documentation of management concurrence in the extraordinary reduction.

G. Supplemental Environmental Projects

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.