IN RE TIFA LIMITED

FIFRA Appeal No. 99-5

FINAL DECISION

Decided June 5, 2000

Syllabus

The United States Environmental Protection Agency Region II Director of the Division of Enforcement and Compliance Assistance, and the Director of the Toxics and Pesticides Enforcement Division, Office of Regulatory Enforcement (collectively "Appellant" or "EPA"), appeal an Initial Decision of the presiding Administrative Law Judge ("Presiding Officer"), arising out of an administrative enforcement action against Tifa Limited ("Tifa") for alleged violations of section 12 of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136j.

The complaint, which consisted of thirty-four counts, alleged that Tifa had imported, offered for sale, sold, and distributed pesticide products containing the active ingredient "rotenone," in violation of a Final Order of Suspension ("Suspension Order"), and proposed a civil penalty of $170,000. However, at the start of the hearing in this matter, EPA withdrew two counts of the complaint. Thus, with thirty-two counts remaining in the complaint, EPA requested that a penalty of $160,000 be assessed against Tifa.

At issue during an evidentiary hearing held in this matter was whether Tifa, after receiving the Notice of Intent to Suspend the Registration of Pesticides Products Containing Rotenone for Failure to Comply with the Rotenone Data Call-In Notice ("NOITS") on October 23, 1995, had requested a hearing to contest the NOITS, thereby preventing the NOITS from becoming a Suspension Order.

The Presiding Officer ruled that Tifa had not requested a hearing, but rather, had submitted "inquiries" to EPA. The Presiding Officer also ruled that Tifa was entitled to a response from EPA, and EPA's failure to respond to these inquiries required a reassessment of the effective date of the Suspension Order before a determination could be made regarding the propriety of the violations alleged in the Complaint. The Presiding Officer then found that the effective date of the Suspension Order could be established only in the context of Tifa's actual knowledge of the Suspension Order's issuance, which the Presiding Officer determined to be April 8, 1996. Consequently, the Presiding Officer viewed the effective date of the Suspension Order not as November 22, 1995 — the date on which the NOITS would become effective by operation of law — but April 8, 1996, and dismissed Counts 1 through 6 and 13 through 17 because the underlying transactions for those counts occurred before April 8, 1996. The Presiding Officer found Tifa liable under Counts 7, 8, 11, 18 through 25, 33 and 34, and assessed a civil penalty in the total amount of $65,000.

EPA has appealed from the portion of the Presiding Officer's Initial Decision that dismissed Counts 1 through 6 and 13 through 17 of EPA's complaint. EPA argues on appeal that the Presiding Officer did not have the discretion to change the effective date of the Suspension Order, which was issued in accordance with FIFRA § 3(c)(2)(B)(iv), 7 U.S.C. § 136a(c)(2)(B)(iv). EPA urges the Board to reverse the portion of the Presiding Officer's Initial Decision that dismissed Counts 1 through 6 and 13 through 17 of the complaint, and assess an additional civil penalty against Tifa in the amount of $55,000, bringing the total penalty in this case to $120,000.

Held:

(1) The Presiding Officer erred in changing the statutorily-mandated effective date of the Suspension Order on equitable grounds. The effective date of a suspension order is determined in accordance with FIFRA § 3(c)(2)(B)(iv), 7 U.S.C. § 136a(c)(2)(B)(iv), which does not provide for the consideration of equitable factors in determining when a suspension order becomes effective. Equitable concerns cannot serve to defeat liability under a strict liability statute like FIFRA; rather, they are relevant only in the context of assessing a penalty.

(2) The Board reverses the Presiding Officer's Initial Decision dismissing liability for Counts 1 through 5 and 13 through 17 of EPA's complaint alleging violations arising from the importation, offer for sale, sale, and distribution of pesticides whose registrations were suspended by EPA. The Board does not reverse the Presiding Officer's Initial Decision with respect to Count 6, because the evidence in the record is not sufficient to meet EPA's burden of proving that a price quote by Tifa was sufficiently definite and explicit to constitute an "offer for sale" within the meaning of FIFRA.

(3) In accordance with statutory penalty factors, the Board assesses an additional civil penalty of $25,000 for the ten additional counts for which the Board finds Tifa liable. This amount is less than the amount sought by EPA because of equitable considerations peculiar to the case. With the Presiding Officer's earlier penalty determination of $65,000, the Board's additional penalty assessment of $25,000 brings the total penalty to $90,000 for twenty-three violations of FIFRA § 12, 7 U.S.C. § 136j.

Before Environmental Appeals Judges Scott C. Fulton, Ronald L. McCallum and Edward E. Reich.

Opinion of the Board by Judge Fulton:

The United States Environmental Protection Agency Region II Director of the Division of Enforcement and Compliance Assistance, and the Director of the Toxics and Pesticides Enforcement Division, Office of Regulatory Enforcement (collectively "Appellant" or "EPA"), appeal an Initial Decision by Administrative Law Judge Stephen J. McGuire ("Presiding Officer"), arising out of an administrative enforcement action against Tifa Limited ("Tifa") for alleged violations of section 12 of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136j.

The complaint, which consisted of thirty-four counts, alleged that Tifa had imported, offered for sale, sold, and distributed pesticide products containing the

active ingredient "rotenone," in violation of a Final Order of Suspension ("Suspension Order"), and proposed a civil penalty of $170,000. However, at the start of the hearing in this matter, EPA withdrew two counts of the complaint. Thus, with thirty-two counts remaining in the complaint, EPA requested that a penalty of $160,000 be assessed against Tifa.

At issue during an evidentiary hearing held in this matter was whether Tifa, after receiving the Notice of Intent to Suspend the Registration of Pesticides Products Containing Rotenone for Failure to Comply with the Rotenone Data Call-In Notice ("NOITS") on October 23, 1995, had requested a hearing to contest the NOITS, thereby preventing the NOITS from becoming a Suspension Order.

The Presiding Officer ruled that Tifa had not requested a hearing, but rather, had submitted inquiries to which EPA did not respond. The Presiding Officer characterized this lack of response as requiring a reassessment of the effective date of the Suspension Order before a determination could be made regarding the propriety of the violations alleged in the complaint. Consequently, the Presiding Officer dismissed Counts 1 through 6 and 13 through 17 of EPA's complaint as prematurely filed, but found Tifa liable under Counts 7, 8, 11, 18 through 25, 33 and 34, and assessed a civil penalty in the total amount of $65,000. EPA, but not Tifa, filed an appeal from the Presiding Officer's Initial Decision.

For the reasons stated below, we reverse the Presiding Officer's decision with respect to changing the effective date of the Suspension Order and dismissing Tifa's liability under Counts 1 through 5 and 13 through 17 of EPA's complaint. In addition, we assess an additional $25,000 civil penalty against Tifa, thus bringing the total penalty for Tifa's violation of FIFRA § 12, 7 U.S.C. § 136j, to $90,000.

I. *BACKGROUND*

A. *Statutory Background*

FIFRA is a federal statute regulating the manufacture, sale or distribution, and use of pesticides in the United States by means of a national registration system. FIFRA § 12(a) makes unlawful a number of actions relating to the sale or distribution of pesticides, including the violation of any suspension order issued under FIFRA § 3(c)(2)(B), 7 U.S.C. § 136a(c)(2)(B), FIFRA § 4, 7 U.S.C. § 136a-1, or FIFRA § 6, 7 U.S.C. § 136d.

B. *Factual and Procedural Background*

Tifa owns a production and distribution facility located at Tifa Square, Millington, New Jersey. Tifa manufactures, repackages and re-labels industrial or-

ganic chemicals, including, but not limited to, the pesticides "Chem-Sect Brand Cube Root" (EPA Reg. No. 1439-236), "Chem-Sect Brand Rotenone Resins" (EPA Reg. No. 1439-259), "Chem-Sect Brand ChemFish Regular" (EPA Reg. No. 1439-157), and "Chem-Fish Synergized" (EPA Reg. No. 1439-159). *See* Complainant's Exhibit ("CX") 25[1] at Joint Motion to Move Stipulated Facts and Law in Evidence ("Joint Motion I"), ¶ 5. Tifa's president is Carol J. Blochlinger. Initial Decision at 2.

In 1987 and 1988, EPA's Office of Pesticides Programs ("OPP") conducted a systematic reassessment and reregistration of certain then-currently registered pesticides. Transcript of Hearing (Oct. 27-29, 1998) ("Hearing Tr.") vol. I at 35, 37. On October 7, 1988, EPA issued a registration standard for pesticide products containing "rotenone" as an active ingredient. The registration standard included a Data Call-In Notice letter which required registrants of pesticide products containing the active ingredient "rotenone" to develop and submit detailed specified data to EPA. Hearing Tr. vol. I at 36-37. Failure to comply with the data requirements of the registration standard constituted a basis for suspension under FIFRA § 3(c)(2)(B), 7 U.S.C. § 136a(c)(2)(B). CX 9 at 1.

In 1988, Tifa was a rotenone registrant. Hearing Tr. vol. I at 37. As such, Tifa was required to develop and submit data under the Data Call-In Notice requirements, as there were certain data that EPA did not have for Tifa's rotenone pesticide products. Hearing Tr. vol. I at 37. Tifa did not submit the data required by the Data Call-In Notice. Hearing Tr. vol. I at 37-38.

On October 18, 1995, EPA issued Tifa a Notice of Intent to Suspend the Registration of Pesticides Products Containing Rotenone for Failure to Comply with the Rotenone Data Call-In Notice ("NOITS"). *See* CX 9. The NOITS informed Tifa that it could take appropriate steps to comply with the Rotenone Data Call-In Notice or request a hearing before the NOITS became a Suspension Order by operation of law thirty days after Tifa's receipt of the NOITS.[2] CX 9 at 3. Tifa

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[1] CX 25 includes two separate Joint Motions: 1) Joint Motion to Move Stipulated Facts and Law in Evidence ("Joint Motion I"); and 2) Joint Motion to Move Stipulated Exhibits in Evidence ("Joint Motion II").

[2] The NOITS notified Tifa that the registration of certain of its specified pesticides would be automatically suspended thirty days after receipt of the NOITS unless Tifa either requested a hearing and/or took steps to comply with the requirements of the Data Call-In Notice. CX 9 at 1. The NOITS also provided that in order to request a hearing, Tifa was required to provide three copies of the hearing request to the EPA Hearing Clerk and a copy to Rick Colbert, the signatory of the NOITS. CX 9 at 2, 5. Specifically, the NOITS stated that Tifa's request for a hearing "must be received by the Hearing Clerk by the 30th day of your receipt of this Notice in order to be legally effective," and warned that "failure to meet the thirty day time limit will result in automatic suspension of your registration(s) by operation of law and [such suspension] * * * will be final and effective at the close of business thirty days after your receipt of this Notice." CX 9 at 3.

received the NOITS on October 23, 1995. CX 10. Thus, unless Tifa either took appropriate steps to comply with the Data Call-In Notice or requested a hearing by November 22, 1995, the NOITS was to take effect on that date as a Suspension Order. Initial Decision at 4.

Tifa sent two letters (Respondents Exhibits ("RX") 5 and 6) dated November 20, 1995, to EPA. In RX 5, Tifa advised EPA that the requested Skin Sensitization Study was being undertaken and "should be completed within the next 90 to 120 days * * * [t]herefore, we request that you delay this matter of suspension until April 30, 1995 [sic]." In RX 6, Tifa advised Rick Colbert, the signatory of the NOITS that:

> [I]n view of the difficulties the laboratory had in obtaining standard samples of known impurities in or associated with rotenone and the new analytical technique work involved, it will take approximately 6-9 months to complete this work. We request that you grant Tifa an additional 12 months delay on this procedure 62-1(b) and hold this matter of proposed suspension in abeyance.[3]

A shutdown of federal government operations occurred from November 14-19, 1995, and another occurred from December 18, 1995, to January 6, 1996. In addition, a major snow storm in Washington, D.C. prevented the government from functioning from January 6, 1996, through January 10, 1996. Hearing Tr. vol. I at 81. The shutdowns affected EPA's operations such that Tifa's November 20, 1995 submissions (RX 5 and RX 6) were not received by Mr. Colbert until January 16, 1996. Hearing Tr. vol. I at 89-90.

On or about April 15, 1996, June 25, 1996, September 18, 1996, and October 1, 1996, EPA conducted inspections of Tifa's facility pursuant to FIFRA §§ 8 and 9, 7 U.S.C. §§ 136f and 136g, to determine Tifa's compliance with the provisions and regulations of FIFRA. CX 25 at Joint Motion I at ¶ 10.

On September 30, 1997, EPA issued a complaint against Tifa alleging thirty-four counts of violations of FIFRA § 12(a), 7 U.S.C. § 136j(a), based on information collected during these inspections. *See* CX 24. The thirty-four counts contained in the complaint asserted the following alleged violations: [1] importation of pesticide products whose registrations had been suspended in violation of FIFRA § 12(a)(2)(J), 7 U.S.C. § 136j(a)(2)(J) (Counts 1 through 3); [2] offering for sale of pesticide products whose registration had been suspended in violation

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[3] RX 5 referred to the Skin Sensitization Study for "Chem-Sect Brand ChemFish Regular" (EPA Reg. No. 1439-157) and "Chem-Fish Synergized" (EPA Reg. No. 1439-159), and RX 6 referred to the fish toxicity studies for "Chem-Sect Brand Cube Root" (EPA Reg. No. 1439-236) and "Chem-Sect Brand Rotenone Resins" (EPA Reg. No. 1439-259).

of FIFRA § 12(a)(1)(A), 7 U.S.C. § 136j(a)(1)(A) (Counts 4 through 12); [3] distribution and sale of pesticide products whose registrations had been suspended in violation of FIFRA § 12(a)(1)(A), 7 U.S.C. § 136j(a)(1)(A) (Counts 13 through 25); [4] distribution and sale of suspended pesticides during the effective period of a Stop, Sale or Removal Order in violation of FIFRA § 12(a)(2)(I), 7 U.S.C. § 136j(a)(2)(I) (Counts 26 and 27); [5] offering for sale of pesticide products for non-registered uses in violation of FIFRA § 12 (a)(1)(B), 7 U.S.C. § 136j(a)(1)(B) (Counts 28 through 30); [6] distribution and sale of registered pesticide products for non-registered uses in violation of FIFRA § 12(a)(1)(B), 7 U.S.C. § 136j(a)(1)(B) (Counts 31 and 32); and [7] production of pesticides in a non-registered pesticide-producing establishment in violation of FIFRA § 12(a)(2)(L), 7 U.S.C. § 136j(a)(2)(L) (Counts 33 and 34). *See* CX 24. The complaint proposed a civil penalty of $170,000. *Id.* At the inception of the hearing before the Presiding Officer in this matter, EPA withdrew Counts 26 and 27 of the complaint. Thus, with thirty-two counts remaining in the complaint, EPA requested that a penalty of $160,000 be assessed against Tifa. At the hearing, both parties had the opportunity to present evidence regarding the remaining thirty-two counts.

C. *The Initial Decision*

In his Initial Decision, the Presiding Officer denied Tifa's Motion to Dismiss Counts 1 through 25 of the Complaint in their entirety. However, the Presiding Officer dismissed Counts 1 through 6 and 13 through 17 of the Complaint as "prematurely filed."[4] The Presiding Officer found Tifa liable under Counts 7, 8, 11, 18 through 25, 33 and 34 of the complaint and assessed a civil penalty in the total amount of $65,000. Initial Decision at 19, 21-22, 26-28, 35.[5]

At issue during the evidentiary hearing was whether Tifa had requested a hearing after receiving the NOITS on October 23, 1995, an issue embedded in all

[4] Counts 1 through 3 alleged that on January 30, 1996, February 2, 1996, and April 1, 1996, respectively, Tifa imported pesticide products whose registrations had been suspended in violation of FIFRA § 12(a)(2)(J), 7 U.S.C. § 136j(a)(2)(J); Counts 4 through 6 alleged that on April 2, 1996, December 21, 1995 and February 29, 1996, respectively, Tifa offered for sale, pesticide products whose registrations has been suspended in violation of FIFRA § 12(a)(1)(A), 7 U.S.C. § 136j(a)(1)(A); and Counts 13 through 17 alleged that on March 11, 1996, February 5, 1996, February 22, 1996, February 27, 1996, and March 18, 1996, respectively, Tifa distributed and sold pesticide products whose registrations had been suspended in violation of FIFRA § 12(a)(1)(A), 7 U.S.C. § 136j(a)(1)(A).

[5] The Presiding Officer dismissed Counts 9, 10, and 12 after he determined that EPA had not met its burden of proof. Initial Decision at 21. In addition, Counts 28 through 32 were dismissed by the Presiding Officer for EPA's failure to establish that Tifa had violated FIFRA § 12(a)(1)(B), 7 U.S.C. § 136j(a)(1)(B). Initial Decision at 25.

of the counts of the complaint.[6] Tifa claimed that it had mailed a letter in which it requested a hearing. Initial Decision at 11. As support for its assertion, Tifa introduced RX 8, an unsigned letter prepared by Tifa's general manager, Mr. Arnold Livingston, dated November 5, 1995, and addressed to Rick Colbert, the signatory of the NOITS. Initial Decision at 5.[7] EPA Hearing Clerk, Bessie Hammiel, and Francesca Liem of EPA's Office of Compliance were indicated as receiving "carbon copies" of the alleged request for a hearing. *Id*. EPA had no record of having received any request for hearing by Tifa. Initial Decision at 12. EPA presented testimony from Mr. Colbert, Ms. Hammiel and Ms. Liem to the effect that the alleged request for hearing was never received by any of them as required by the NOITS. Initial Decision at 14.

The Presiding Officer questioned Tifa's credibility on this issue and determined that, based on the evidence and testimony presented at the hearing, Tifa had not established that it "properly addressed, stamped, and deposited" RX 8 in an appropriate postal receptacle. Initial Decision at 14-15. The Presiding Officer thus concluded that Tifa was not entitled to the legal presumption of delivery, and that EPA had offered persuasive testimony that in fact, RX 8 was not delivered to EPA. Initial Decision at 15.[8]

Also at issue during this evidentiary hearing was whether the two letters dated November 20, 1995 (RX 5 and RX 6), served to put EPA on notice that Tifa objected to the NOITS, and in fact, wanted a hearing. The Presiding Officer ruled that neither RX 5 nor RX 6 reasonably could be construed as a request for a hearing from Tifa. Initial Decision at 15. Instead, the Presiding Officer ruled that RX 5 and RX 6 were "properly submitted inquiries" under the NOITS. Initial Decision at 15. The Presiding Officer also ruled that Tifa was entitled to a response from EPA, and EPA's failure to respond to these inquiries required a "reassessment" of the effective date of the Suspension Order before a determination could be made

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[6] The basis of EPA's complaint was that since the terms of the NOITS/Suspension Order automatically became effective upon Tifa's failure to take appropriate steps to comply with the Data Call-In Order, or request a hearing in a timely manner, Tifa's subsequent activities involving the stated pesticides whose registrations were suspended constituted violations of FIFRA. Consequently, the question of whether Tifa did, in fact, request a hearing is pivotal to the entire case.

[7] Mr. Livingston testified that the original of RX 8 had been signed, but it was his practice to retain unsigned copies of documents in his office files. Hearing Tr. vol. II at 133.

[8] While Tifa has not challenged this finding on appeal, we note that we typically defer to the Presiding Officer's determination on matters which turn on the credibility of witnesses at hearings. *See In re Port of Oakland and Great Lakes Dredge and Dock Co.*, 4 E.A.D. 170, 201 (EAB 1992) ("Where the credibility of witnesses is involved, the Board will give substantial weight to the presiding officer's findings."); *In re Wego Chem. & Mineral Corp.*, 4 E.A.D. 513, 522 (EAB 1993) ("The Presiding Officer's credibility determinations are entitled to deference.").

regarding the "propriety" of the violations alleged in the Complaint.[9] Initial Decision at 17.

The Presiding Officer then found that the effective date of the Suspension Order could be established only in the context of Tifa's actual knowledge of the Suspension Order's issuance. Initial Decision at 18. During the evidentiary hearing, Tifa's general manager, Mr. Livingston, testified that he did not learn of the Suspension Order's issuance until April 15, 1996, when EPA hand-delivered to Tifa, a Stop Sale, Use, and Removal Order (SSURO). Hearing Tr. vol. II at 134. However, the Presiding Officer determined that CX 20, a letter dated April 8, 1996, from Tifa's consultant, Mr. Stewart, to Robert A. Forrest, an EPA employee, imputed notice to Tifa that, as of that date, the Suspension Order was in effect.[10] Initial Decision at 18. Consequently, the Presiding Officer viewed the effective date of the Suspension Order not as November 22, 1995, but April 8, 1996, and dismissed Counts 1 through 6 and 13 through 17 because the underlying transactions for those counts occurred before April 8, 1996. Initial Decision at 18-19.

D. *The Appeal*

EPA's appeal raises the issue of whether the Presiding Officer has the discretion to change the effective date of a suspension order issued in accordance with FIFRA § 3(c)(2)(B)(iv), 7 U.S.C. § 136a(c)(2)(B)(iv). EPA urges the Board to reverse the portion of the Presiding Officer's Initial Decision that dismissed Counts 1 through 6 and 13 through 17 of the complaint, and assess the civil penalty it proposed in the complaint against Tifa for these counts in the amount of $55,000 (11 counts x $5,000 per count), bringing the total penalty in this case to $120,000. Appellant's Brief in Support of Notice of Appeal of the Initial Decision ("Appellant's Brief") at 21-31, 40.

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[9] The Presiding Officer ruled that Tifa was entitled to a response because EPA had responded to Tifa's other requests on related matters in the past. Initial Decision at 15. Specifically, the Presiding Officer cited to RX 4, a fax transmittal from Tifa's registration agent, Bob Stewart, to Tifa's general manager, Mr. Livingston, which referenced a telephone call from Susan Jennings of EPA's Special Review and Reregistration Division (SRRD), in response to Tifa's "requests for waivers of the acute fish toxicity studies. Susan said that she has sent a letter in response in March of this year * * *. Susan did say that EPA will be unable to grant waivers of the acute studies." Initial Decision at 15-16; RX 4 at 1.

[10] The Presiding Officer also determined that CX 21, a letter dated April 9, 1996, from EPA to Tifa's registration agent, Mr. Stewart, clearly notified Tifa that the Suspension Order was in effect and advised that, "YOU CANNOT MARKET THESE PRODUCTS UNTIL YOU RECEIVE FORMAL NOTIFICATION FROM OUR OFFICE OF COMPLIANCE THAT THE AGENCY LIFTED THE SUSPENSION." CX 21 at 2; Initial Decision at 18.

In response, Tifa argues that the Presiding Officer's analysis challenged by the Agency is supportable. Alternatively, Tifa urges that, should we find that the Presiding Officer erred with respect to the dismissed counts, the question of the penalty to be assessed for those counts be remanded to the Presiding Officer. Respondent's Brief in Opposition to Appeal ("Respondent's Brief") at 7.

II. *DISCUSSION*

The Board reviews the Presiding Officer's factual and legal conclusions on a *de novo* basis. 40 C.F.R. § 22.31(a). We first address EPA's appeal of the eleven dismissed counts. Finding the Presiding Officer's decision should be reversed on ten of these counts, we then turn to the question of the penalty.

A. *Whether the Presiding Officer had the Discretion To Alter The Effective Date Of The Suspension Order*

We reverse the Presiding Officer's decision to alter the effective date of the Suspension Order. The NOITS and the Suspension Order were issued in accordance with FIFRA § 3(c)(2)(B)(iv), 7 U.S.C. § 136a(c)(2)(B)(iv). That section states in part:

> Any suspension proposed under this subparagraph shall become final and effective at the end of thirty days from receipt by the registrant of the notice of intent to suspend, unless during that time a request for hearing is made by a person adversely affected by the notice or the registrant has satisfied the Administrator that the registrant has complied fully with the requirements that served as a basis for the notice of intent to suspend.

Id. The general rule of statutory construction in questions of federal law is to look first to the language of the statute and then to the legislative history if the statute is unclear. *Blum v. Stenson*, 465 U.S. 886 (1984). "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A. v. NRDC*, 467 U.S. 837, 842-43 (1984).

By its terms, the statute recognizes only two circumstances that can prevent a NOITS from ripening into a suspension order — compliance with the requirements that served as a basis for the NOITS, or a request for a hearing — either of which must occur within thirty days of the issuance of the NOITS. The Presiding Officer's determination that the effective date of the Suspension Order could be influenced by an "inquiry" from a person adversely affected by the NOITS has the effect of creating a third exception clearly not recognized by the statute. This strikes us as incompatible with the cannon of construction that statutory excep-

tions are to be construed narrowly. *See Korheur v. Bumb*, 262 F.2d 157 (9th Cir. 1958) ("An exception contained in a statute is to be strictly construed."); *Sutherland, Statutory Construction* § 47.11 (5th ed. 1992) ("Exceptions * * * operate to restrict the general applicability of legislative language [and] * * * should be strictly construed."). Accordingly, the better reading of FIFRA § 3(c)(2)(B) is that it does not permit mere "inquiries" to substitute for a request for hearing in determining whether or when a suspension order becomes final and effective, nor does it contemplate that EPA's failure to respond to an inquiry regarding a NOITS can serve to extend the effective date of a suspension order. Consequently, having determined that Tifa was neither in compliance with the requirements that served as a basis for the NOITS, nor had requested a hearing within thirty days of the NOITS, the Presiding Officer was duty bound to treat November 22, 1995, as the effective date of the Suspension Order.[11]

The Presiding Officer thus also erred when he concluded that the effective date of the Suspension Order could be established only in the context of Tifa's actual knowledge of the Suspension Order's issuance, which he determined to be April 8, 1996, based on CX 20, a letter dated April 8, 1996, which imputed notice to Tifa that, as of that date, the Suspension Order was in effect. By virtue of the explicit language contained in the NOITS,[12] Tifa had adequate notice that the NOITS would and did become a Suspension Order by operation of law on November 22, 1995.[13] Tifa plainly failed to do what the statute required to prevent the NOITS from becoming a Suspension Order.

In sum, by its terms, the NOITS took effect as a Suspension Order on November 22, 1995, thirty days after receipt of the NOITS by Tifa. The Presiding

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[11] Nevertheless, the totality of the circumstances could be relevant for the purpose of penalty assessment. *See infra* Section II. D.

[12] Tifa's argument that it had no knowledge of the issuance of the Suspension Order until April 1996 is without basis. *See* Respondent's Brief at 2. The NOITS explicitly warned Tifa that:

> [F]ailure to meet the thirty day time limit will result in automatic suspension of your registration(s) by operation of law and, under such circumstances, the suspension of the registration for your affected product(s) will be final and effective at the close of business thirty days after your receipt of this Notice and will not be subject to further administrative review.

CX 9 at 2-3. That EPA failed to respond to RX5 and RX6 is irrelevant, since neither were requests for a hearing, and FIFRA does not require EPA to respond to inquiries before a NOITS becomes a suspension order.

[13] Moreover, Tifa made statements in RX 5 and RX 6 which demonstrate that on November 20, 1995, it understood the imminence of the Suspension Order's effective date. Specifically, RX 5 contains the statement, "we request that you delay this matter of suspension," and RX 6 contains the statement, "We request that you * * * hold this matter of proposed suspension in abeyance." This language shows clearly Tifa's knowledge of the imminence of the November 22, 1995 effective date of the Suspension Order.

Officer ruled that neither RX 5 nor RX 6 could be characterized as a request for a hearing.[14] Initial Decision at 15. Tifa did not submit the data EPA requested under the Data Call-In Notice letter which served as the basis for the NOITS. Hearing Tr. vol. I at 37-38. Consequently, the Presiding Officer erred by not honoring the effective date of the Suspension Order pursuant to the statute.

B. *Equitable Factors Cited by the Presiding Officer Are Relevant Only To the Issue of Penalty*

We are not persuaded by Tifa's argument that it "makes absolutely no difference" whether the Presiding Officer considered equitable factors in dismissing liability or only considered equitable factors in determining whether to mitigate the penalty. Respondent's Brief at 3. Simply put, the difference is between abrogating the terms of a statute or giving them effect.

The Presiding Officer in this matter relied on our ruling in *Britton Construction Co.*, 8 E.A.D. 261 (EAB 1999), in determining that the equitable factors of the government shutdowns and EPA's failure to respond to the two letters dated November 20, 1995 (RX 5 and RX 6) were grounds for dismissing Tifa's liability for Counts 1 through 6 and 13 through 17 of EPA's complaint. The Presiding Officer's reliance on *Britton* is misplaced. In *Britton*, we affirmed a presiding officer's decision *to mitigate a penalty* against a party found liable for violating the Clean Water Act ("CWA") § 301(a), 42 U.S.C. § 7601. The equitable factors considered in that case were the respondent's successful completion of a mitigation plan, and EPA's delayed intervention in an enforcement action initiated by the Army Corps of Engineers. We affirmed the presiding officer's decision to mitigate the penalty to avoid punishing the respondents for EPA's dilatory action; we did not extend the Presiding Officer's authority beyond the mitigation of the penalty. The case provides no support for the proposition that equitable concerns can

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[14] Although Tifa has not challenged this finding on appeal, we note nonetheless our concurrence with the Presiding Officer's conclusion on this point. RX 5 provides a status update on the Skin Sensitization Study for "Chem-Sect Brand ChemFish Regular" and "Chem-Fish Synergized," and requests a delay in the Suspension. Specifically, Tifa wrote:

> [B]e advised that the various reports that were requested, were all submitted to the US EPA this past summer with the exception of the Skin Sensitization Study. * * *. The laboratory has been instructed to commence the study promptly * * *. [T]herefore we request that you delay this matter of suspension until April 30, 1995 [sic] to permit filing the necessary report.

Similarly, RX 6 provides an update on the data required by the Data Call-In Notice for "Chem-Sect Brand Cube Root" and "Chem-Sect Brand Rotenone Resins" and requests a delay in the Suspension: "We request that you grant Tifa an additional 12 months delay on this one procedure 62-1 (b) and hold this matter of proposed suspension in abeyance." These letters are not requests for hearing.

serve to defeat liability under a strict liability statute like FIFRA.[15]

The Presiding Officer's concerns regarding the possible confusion created by the government shutdowns, and EPA's treatment of the inquiries it received from Tifa, are relevant in mitigating penalty only, and we will consider them in that context, in Section II D, below.

C. *Tifa is Liable for Counts 1-5 and 13-17 of the Complaint*

Consistent with our conclusions as discussed above, we reverse the Presiding Officer's dismissal of liability for Counts 1 through 5 and 13 through 17 as alleged in the complaint. Because the factual record related to these counts is fully developed, we will, in the interest of expeditiously resolving this matter, proceed to findings relative to these counts, rather than remanding the matter for such findings. 40 C.F.R. part 22.30(f). *See In re Commercial Cartage Co.*, 7 E.A.D. 784 (EAB 1998) (Board reversed Presiding Officer's liability determination and assessed a penalty directly in the interest of expediting the resolution of the matter).

The Suspension Order, which we have concluded became effective on November 22, 1995, advised Tifa that it "may not legally distribute, sell, use, offer for sale, hold for sale, ship, deliver for shipment, receive and (having so received) deliver or offer to deliver, to any person, the product(s) listed in Attachment I." CX 9 at 4. The products listed in Attachment I include: "Chem-Sect Brand Chem Fish Regular," "Chem-Fish Synergized," "Chem-Sect Brand Cube Root," and "Chem-Sect Brand Rotenone Resins."

1. *Counts 1-3: Importation of Suspended Pesticide Products*

Counts 1 through 3 of EPA's complaint alleged that Tifa had imported pesticide products whose registrations had been suspended in violation of FIFRA § 12(a)(2)(J), 7 U.S.C. § 136j(a)(2)(J). That section provides that "[i]t shall be unlawful for any person to violate any suspension order issued under section 136a(c)(2)(B), 136a-1, or 136d of this title." *Id*. The advent of the Suspension Order rendered unlawful the subsequent importation of covered pesticides. CX 9 at 4. Tifa stipulated that it had received shipments of the pesticide, "Chem-Sect Brand Cube Root" from Lima, Peru on January 30, 1996 (Count 1); and received shipments of the pesticide, "Chem-Sect Brand Cube Root Rotenone Powder" from

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[15] *See In re Arapahoe County Weed Dist.*, 8 E.A.D. 381, 388 (EAB 1999) ("FIFRA is a strict liability statute"); *In re Green Thumb Nursery, Inc*., 6 E.A.D. 782, 796 (EAB 1997) ("The environmental statutes are intended to be action forcing, and brook no excuse for failure to achieve the required result. * * * The environmental statutes * * *, including FIFRA, consistently have been construed as imposing strict liability to meet their requirements.").

Lima, Peru on February 2, 1996 (Count 2). CX 25 at Joint Motion I, ¶¶ 13-14. In addition, Tifa's President, Carol J. Blochlinger, signed an affidavit during the course of EPA's inspection of Tifa's facility on April 15, 1996, wherein she stated that, "[i]n January and February 1996, we imported from Peru 2 shipments of Rotenone Powder (EPA Reg. # 1439-236) with a total of 45,305 pounds." Affidavit of Carol J. Blochlinger ("Blochlinger Aff.") ¶ 2; CX 2. Tifa also consented to the admission into evidence of a Notice of Arrival of Pesticides and Devices (CX 8) revealing that Tifa had received a shipment of "Chem-Sect Brand Cube Root Rotenone Powder" from Lima, Peru on April 1, 1996 (Count 3). CX 25 at Joint Motion II.

As the November 22, 1995, Suspension Order prohibited the receipt of the pesticides that Tifa received on January 30, 1996, February 2, 1996, and April 1, 1996, we find that Tifa violated FIFRA § 12(a)(2)(J), 7 U.S.C. § 136j(a)(2)(J), when it received shipments of these products, as alleged in Counts 1 through 3 of the complaint.

2. *Counts 4-6: Offering for Sale Suspended Pesticide Products*

Counts 4 through 6 of EPA's complaint alleged that Tifa had offered for sale[16] pesticide products whose registrations had been suspended in violation of FIFRA § 12(a)(1)(A), 7 U.S.C. § 136j(a)(1)(A). That section states in relevant part:

> Except as provided by subsection (b) of this section, it shall be unlawful for any person in any State to distribute or sell to any person - (A) any pesticide that is not registered under section 136a of this title or whose registration has been canceled or suspended.[17]

Id. Tifa stipulated that it offered to sell the pesticides "Chem-Sect Brand Fish Synergized" and "Chem-Sect Brand Cube Root Rotenone Powder" to the Wisconsin State Department of Natural Resources on April 2, 1996 (Count 4); and offered to sell the pesticide "Chem-Sect Brand Fish Synergized" to the Iowa State Department of Natural Resources on December 21, 1995 (Count 5). CX 25 at Joint Motion I, ¶¶ 15-16. Since these transactions occurred after the Suspension Order's effective date of November 22, 1995, Tifa indisputably violated FIFRA

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[16] FIFRA § 2 (gg), 7 U.S.C. § 136(gg), provides that the term "to distribute or sell" means "to distribute, sell, *offer for sale*, hold for distribution, hold for sale, hold for shipment, ship, deliver for shipment, release for shipment, or receive and (having so received) deliver or offer to deliver." (Emphasis added).

[17] Since FIFRA § 2 (gg), 7 U.S.C. § 136(gg) provides that the term "to distribute or sell" includes "to offer for sale," it is a violation of FIFRA § 12(a)(1)(A), 7 U.S.C. § 136j(a)(1)(A), to offer for sale any pesticide product whose registration has been suspended.

§ 12(a)(1)(A), 7 U.S.C. § 136j(a)(1)(A), as alleged in Counts 4 and 5 of the complaint.

With regard to Count 6, however, Tifa did not stipulate that it offered to sell the pesticide, "Chem-Sect Brand Fish Regular" to the Missouri State Department of Conservation ("MSDC") on February 29, 1996, as alleged in the complaint. Indeed, Tifa disputes, as a matter of law, that it ever made "offers for sale" with respect to Count 6. *See* Answer of Tifa Limited to the Complaint and Notice of Opportunity for Hearing, at 4.

The only evidence offered by Appellant to support a finding of liability with respect to Count 6 is CX 2(c), a facsimile from Ms. Deirdre A. Cerciello, a Tifa employee, to Ms. Sheryl Wilbers of the MSDC, Jefferson City, Missouri, dated February 29, 1996. That facsimile contains the statements: "Reference your telephone inquiry of yesterday afternoon regarding Rotenone. We are pleased to confirm our prices as follows." *Id.* The facsimile also contains the statements, "Prices are all delivered Missouri. Material in stock available prompt shipment." *Id.*

Appellant argues that while the phrase "offer for sale" has not been specifically defined by FIFRA or the underlying regulations, the quoted response from Tifa contains terms that are sufficiently definite and explicit to make it an offer for sale. Appellant's Brief at 24-25. Appellant relies on *In the Matter of Willis Stores*, 1981 WL 27906, (EPA, June 11, 1981), wherein the ALJ defined "an offer" as "a proposal, presenting for acceptance, undertaking, proffer or attempt." *Id.* at *3. In *Willis*, EPA alleged that the Respondent, Willis Stores, had violated a suspension order by, *inter alia*, offering for sale, pesticide products containing Silvex. We do not find *Willis* altogether instructive on the issue of what constitutes "an offer for sale" under FIFRA, because, although the ALJ defined "an offer," he never applied that definition to the facts before him to determine whether the activities as charged in the complaint constituted "an offer for sale."[18] Consequently, *Willis* does not contain a meaningful discussion of "offers for sale" under FIFRA that could assist our examination here.

The issue of what constitutes "an offer for sale" under FIFRA is a matter of first impression before the Board. Neither FIFRA nor the underlying regulations define "offer for sale." Furthermore, the parties have not cited any relevant cases on this point, and there is no legislative history to provide guidance in this area.

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[18] The Respondent, Willis Stores, had been charged with offering for sale pesticides products containing Silvex in violation of FIFRA § 12(a)(2)(J), 7 U.S.C. § 136j(a)(2)(J). However, the suspension order at issue did not prohibit the *offering for sale* of pesticide products containing Silvex. 1981 WL 27906 at *4 (emphasis added). The ALJ, therefore, concluded that the activities of Respondent charged in the complaint did not constitute a violation of the suspension order and dismissed the complaint. *Id.* at *4.

Consequently, we will consult general contract law to assist us in determining whether the evidence in the record supports a finding of an "offer for sale."

In contract law, the general rule is that a quotation of prices is not an offer, for a mere quotation of price leaves unexpressed many terms that are necessary to the making of a contract. 1 *Corbin, Contracts* § 2.5 (ed. rev. 1993). A published price list is not an offer to sell the goods listed at the published prices. Even where parties are dealing exclusively with one another language that at first sight may seem to be an offer may be found merely preliminary in its character. I *Williston, Contracts* § 27, (3d ed. 1957). *See also, Maurice Elect. Supply Co., Inc. v. Anderson Safeway Guard Rail Corp.*, 632 F. Supp. 1082, 1087 (1986) ("The general rule is that a mere price quotation is not an offer, but rather is an invitation to enter into negotiations or a mere suggestion to induce offers by others."); *White Consolidated Indus., Inc. v. McGill Mfg. Co. Inc*., 165 F.3d 1185, 1190 (8th Cir.1999) ("Typically, a price quotation is considered an invitation for an offer, rather than an offer to form a binding contract."); *Litton Microwave Cooking Prods. v. Leviton Mfg. Co.*, 15 F.3d 790, 794 (8th Cir.1994) ("[P]rice quotes * * * generally are not offers to form a contract."); *Maryland Supreme Corp. v. Blake Co.*, 369 A.2d 1017, 1024 (1977) ("[A] mere quotation or a statement of a price or prices and an invitation to enter into negotiations, are not offers which may be turned into binding contracts upon acceptance.").

The Court in *Maurice Electrical*[19] stated, "an offer must be definite and certain, and must be made under circumstances evidencing the express or implied intent of the offeror that its acceptance shall constitute a binding contract." 632 F. Supp. at 1087. This being said, there are circumstances in which a price quotation would constitute an offer to sell. For example, the court in *White Consolidated*[20] found that a seller's price quotation was a valid offer, because it was sufficiently detailed and explicitly provided that its offer was subject to immediate acceptance by the buyer. 165 F.3d at 1190.

The determination of whether a given communication by one party to another is an operative offer, and not merely a step in the preliminary negotiations, is a matter of interpretation in light of all the surrounding circumstances. 1 *Corbin, Contracts* § 2.2 (ed. rev. 1993). The only evidence in the record to

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[19] *Maurice Electrical* arose from a breach of contract action brought by the plaintiff, Maurice Electrical Supply Company, Inc., against defendant, Anderson Safeway Guard Rail Corporation, for its alleged failure to perform a contract to supply high mast lighting poles. The U.S. District Court for the District of Columbia held that the price quote on electrical fixtures to be used in the construction project was not an offer as it was not sufficiently "definite and certain."

[20] *White Consolidated* concerned a suit by a refrigerator manufacturer against a seller of refrigerator components alleging breach of contract and breach of warranty after the refrigerator components proved to be defective.

support a finding of liability for Count 6 shows that Tifa, in responding to a telephone inquiry from Ms. Sheryl Wilbers of the MSDC regarding "Chem Fish Regular 5% Rotenone Liquid," informed Ms. Wilbers that the rotenone was "in stock and available for prompt shipment," supplied a list of "Current Prices (1996)," and "Anticipated Prices in 18 months (1997/1998)," and specified that "prices are all delivered Missouri." CX 2(c). With the authorities cited above as our guide, we disagree with Appellant's argument that the terms of the price quote before us are sufficiently definite and explicit to constitute an offer to sell. There is nothing in this communication to suggest that the price quote was intended to serve as an offer or that assent to the price quote was all that was needed for the offer to evolve into a contract between Tifa and MSDC. Thus, we find that the evidence in the record is not sufficient to meet Appellant's burden of proof with regard to Count 6 of EPA's complaint.

3. *Counts 13-17: Distribution and Sale of Suspended Pesticide Products*

Counts 13 through 17 of EPA's complaint alleged that Tifa had distributed and sold pesticide products whose registrations had been suspended in violation of FIFRA § 12(a)(1)(A), 7 U.S.C. § 136j(a)(1)(A).

Tifa stipulated that it distributed and sold the pesticide, "Chem-Sect Brand Cube Root Rotenone Powder" to King Pesticides, Ontario, Canada on March 11, 1996 (Count 13); distributed and sold the pesticide, "Chem-Sect Brand Rotenone Resins" to Bonide Products, Yorksville, New York on February 5, 1996 (Count 14); distributed and sold the pesticide, "Chem-Sect Brand Fish Regular" to Mr. Jaffer Chambers, Karachi, Pakistan on February 22, 1996 (Count 15); distributed and sold the pesticide, "Chem-Sect Brand Fish Regular" to the Kentucky State Department of Fish & Wildlife Resources on February 27, 1996 (Count 16); and distributed and sold the pesticide, "Chem-Sect Brand Fish Regular" to Mr. Jeff Sweet, Franksville, Wisconsin on March 18, 1996 (Count 17). CX 25 at Joint Motion I, ¶¶ 20-24.

By Tifa's own admission, each of the above transactions occurred after November 22, 1995. Accordingly, Tifa violated FIFRA § 12(a)(2)(J), 7 U.S.C. § 136j(a)(2)(J), as alleged in Counts 13 through 17 of the complaint.

D. *Penalty*

The Presiding Officer did not assess a penalty for Counts 1 through 6 and 13 through 17, because he dismissed these counts of the complaint. As stated above, we are reversing the Presiding Officer's liability determination as to all these counts, except for Count 6, and are finding that Tifa is liable for ten additional violations of FIFRA § 12, 7 U.S.C. § 136j. Although the Board may in such situations remand the case to the Presiding Officer for a penalty determina-

tion, the Board may also choose to assess a penalty on appeal in the interest of bringing a case to conclusion without further delay. 40 C.F.R. § 22.30 (f). Because the record to support the assessment of a penalty is fully developed, we will in the interest of facilitating a prompt conclusion to this case proceed to assess a penalty for the reversed counts.

EPA's regulation regarding administrative penalty assessments requires penalties to be assessed in accordance with "any penalty criteria set forth in the Act. The Presiding Officer shall consider any civil penalty guidelines issued under the Act." 40 C.F.R. § 22.27(b). Although these directions apply specifically to a penalty assessed by the Presiding Officer, the Board has in fact taken into account both the relevant statutory criteria and any penalty policy when conducting its own penalty assessments. *See, e.g., In re Roger Antkiewicz & Pest Elimination Products of America, Inc.*, 8 E.A.D. 218 (EAB 1999); *In re Commercial Cartage Co.*, 7 E.A.D. 784, 805 (EAB 1998).

FIFRA authorizes a civil penalty of up to $5,000 for each violation of the statute.[21] 7 U.S.C. § 136*l*(a)(1). The Act mandates that three factors be taken into consideration in determining a penalty: "[1] the appropriateness of [the] penalty to the size of the business of the person charged, [2] the effect on the person's ability to continue in business, and [3] the gravity of the violation." 7 U.S.C. § 136*l*(a)(4). The Board must consider EPA's FIFRA Enforcement Response Policy ("ERP") in its analysis of these factors, but it is not required to follow the ERP. *Antkiewicz*, 8 E.A.D. at 239; *see* U.S. EPA, Office of Compliance Monitoring & Office of Pesticides & Toxic Substances, *Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)* (July 2, 1990).

The Appellant has proposed a penalty of $5,000 per count for Tifa's violation of the Suspension Order for Counts 1 through 5 and 13 through 17. Appellant's Brief at 29. In arriving at this figure, Appellant conducted a detailed analysis of the three statutory penalty factors and relied on the FIFRA ERP in its calculations. Appellant's Brief at 29; Initial Decision at 30-35. Pursuant to the ERP, Appellant evaluated the following factors: the gravity of the violation, the size of Tifa's business, pesticide toxicity, harm to human health and the environment, compliance history, culpability, good faith efforts, and ability to continue in business. *Id.*

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[21] On June 27, 1997, EPA promulgated the Civil Monetary Penalty Inflation Adjustment Rule, 40 C.F.R. § 19 *et seq.*, as mandated by the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701. The statute authorizes EPA to adjust the maximum civil penalties on a periodic basis to incorporate inflation. Currently, the maximum allowable penalty for a FIFRA violation is $5,500. 40 C.F.R. § 19.1.

Tifa submitted little information to dispute the calculations of the proposed penalty by EPA. Initial Decision at 35. Tifa also declined to challenge Appellant's proposed penalty calculations in its brief in opposition to this appeal. Instead, Tifa argues that the Presiding Officer intended to mitigate the penalty to zero dollars, and urges the Board to remand the matter so that the Presiding Officer may reconsider this issue and assess any penalty which he deems appropriate under the circumstances. Respondent's Brief at 3, 7.

Nevertheless, Tifa did stipulate to three very important financial issues in this case: [1] it would not argue inability to pay the then-proposed larger penalty of $170,000 (CX 25 at 5); [2] it would not contest EPA's determination of its business size (CX 25 at 6); and [3] it would not question its ability to continue its business, except in regard to requesting installment payments.[22] *See* CX 25 at 6.

We note that the Presiding Officer found that EPA had considered the factors enumerated in the statute appropriately when it determined that Tifa should be assessed a civil penalty in the amount of $5,000 for each of its violations, and accordingly assessed a civil penalty in the amount of $5,000 for each count where he found liability.[23] We have reviewed the Presiding Officer's determination that the record supports Appellant's calculation and determination of penalty, and his conclusion that Appellant properly considered the factors delineated in the statute and the penalty policy,[24] and find them to be reasonable. Therefore, we believe that, but for any mitigating circumstances, $5,000 per count would be an appropriate penalty for the additional violations determined by our decision.

We turn now to the issue of the mitigation of the penalty against Tifa in light of the possible confusion created by the government shutdowns, and EPA's inconsistent treatment of the inquiries it received from Tifa. With regard to the government shutdowns, we fail to see how they, in isolation, had a genuine impact on Tifa's failure to request a hearing. Indeed, if the government shutdowns had not occurred, and if EPA had actually received RX 5 and RX 6 by Novem-

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[22] With regard to Tifa's request for installment payments at hearing, EPA's financial expert, Dr. Meyer, testified that there was no evidence that Tifa could not pay the penalty sought in this matter in one lump sum immediately upon judgment, and that Tifa would have the ability to remain in business if it paid the full penalty of $160,000. Hearing Tr. vol. II at 67. Tifa was unable to refute Dr. Meyer's testimony. The Presiding Officer thus concluded that Tifa had "failed to show by sufficient evidence that it is unable to pay the entire [$65,000] penalty assessment upon judgment." Initial Decision at 31, 33.

[23] The Presiding Officer assessed a $5,000 per count penalty for Counts 7, 8, 11, and 18 through 25 against Tifa. Initial Decision at 37. These counts are similar to Counts 1-5 and 13 through 17; indeed, the only difference is that the underlying transactions for Counts 7, 8, 11 and 18 through 25 occurred after the later date the Presiding Officer erroneously selected as the effective date of the Suspension Order.

[24] Initial Decision at 35

ber 22, 1995, the NOITS still would have become an effective Suspension Order on November 22, 1995. As the Presiding Officer determined, these letters were not requests for a hearing, and as such, were insufficient to prevent the NOITS from becoming a valid Suspension Order on November 22, 1995.

Regarding EPA's failure to respond to RX 5 and RX 6, we agree with the Appellant that FIFRA does not require EPA to respond to inquiries and reassert the effective date of suspension orders in order for them to become or remain effective. Appellant's Brief at 16. However, it is possible that the combination of the government shutdowns and EPA's prior course of dealing with Tifa may have caused some confusion on Tifa's part. There is evidence in the record to suggest that Tifa and EPA had established an ongoing practice of communicating by telephone conferences and in writing regarding issues such as a waiver for the fish toxicity studies, and that EPA had responded to Tifa's inquiries in the past.[25] EPA's silence on the issue of whether Tifa's request for additional time to complete the required studies would be granted, coupled with the unavailability of EPA staff for a period of five weeks during the government shutdowns, may well have played some role. Accordingly, we find that some reduction in the penalty is appropriate in light of these unusual circumstances.

Nevertheless, in light of Tifa's own culpability here, we find that these factors do not warrant a mitigation of the additional penalty from $50,000 (10 count x $5,000 per count) down to zero as Tifa urges. Given the November 22, 1995 effective date of the Suspension Order, Tifa's submission of letters requesting relief as late as November 20, 1995, was not very well considered.[26] Moreover, the prudent course would have been for Tifa to discontinue its merchandising of the problem pesticides until after it heard from the Agency. Accordingly, given all of the foregoing considerations, we assess an additional civil penalty of $25,000, rather than the $50,000 proposed by the Region, for the ten additional counts for which we are finding Tifa liable. With the Presiding Officer's earlier penalty determination of $65,000, our additional penalty assessment of $25,000 brings the total penalty to $90,000, which we find appropriate in light of the twenty-three counts of Tifa's violation of FIFRA § 12, 7 U.S.C. § 136j.

III. *CONCLUSION*

For the foregoing reasons, we reverse the portion of the Presiding Officer's Initial Decision dismissing liability for Counts 1 through 5 and 13 through 17 of

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[25] *See* Initial Decision at 15-16

[26] There is no indication in the record that the November 20, 1995 letters were sent by means other than regular mail. Thus, with or without a government shutdown, there is some question whether the letters would have been received before the Suspension Order became effective.

EPA's complaint, and assess an additional civil penalty of $25,000 against Tifa for these counts. Therefore, we assess a total penalty of $90,000 for twenty-three counts of violating FIFRA § 12, 7 U.S.C. § 136j. Payment of the entire amount of the civil penalty shall be made within thirty (30) days of receipt of this final order (unless otherwise agreed to by the parties), by cashier's check or certified check payable to the Treasurer, United States of America, and forwarded to:

U.S. Environmental Protection Agency,
Region II
Regional Hearing Clerk
P.O. Box 360188
Pittsburgh, PA 15251-6188

So ordered.