IN RE PREDEX CORPORATION

FIFRA Appeal No. 97-8

FINAL DECISION

Decided May 8, 1998

Syllabus

This is an appeal by United States Environmental Protection Agency Region V ("Region") from an Initial Decision by Administrative Law Judge Spencer T. Nissen ("Presiding Officer") arising out of an administrative enforcement action against Predex Corporation ("Predex") for two alleged violations of section 12 of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended ("FIFRA"), 7 U.S.C. § 136j. In an earlier accelerated decision, the Presiding Officer found that Predex violated FIFRA § 12(a)(1)(A) by selling an unregistered pesticide and FIFRA § 12(a)(1)(L) by producing a pesticide in an establishment that was not registered.

After entering the accelerated decision, the Presiding Officer held an evidentiary hearing regarding the amount of a penalty to be assessed for Predex's two violations of FIFRA's registration requirements. Thereafter, the Presiding Officer issued his Initial Decision, holding that no penalty should be imposed and that a warning should be issued to Predex instead.

The Presiding Officer found that, while Predex was negligent in two respects, Predex nevertheless held a good faith belief that its product, "PRED-X," was not required to be registered as a pesticide. The Presiding Officer determined that consideration of Predex's good faith warranted a reduction in the amount of penalty that otherwise would have been imposed for Predex's violation of FIFRA's registration requirements. In addition, the Presiding Officer held that consideration of Predex's ability to pay warranted further mitigation of the penalty to a zero dollar amount and issuance of a warning.

The Region has appealed from the Presiding Officer's decision not to impose a penalty and to issue only a warning. The Region argued that harm to the FIFRA regulatory program warranted imposition of a substantial penalty; that the penalty should not be reduced on account of Predex's good faith because Predex was found to have been negligent; and that no reduction in the penalty should have been made on account of Predex's alleged inability to pay. Predex did not file an appeal.

Held: 1. While failure to register a pesticide product causes significant harm to the FIFRA regulatory program, the Presiding Officer did not err in determining that consideration of Predex's good faith that its product was not subject to FIFRA's registration requirements warranted reducing the amount of penalty that would otherwise have been assessed. More particularly, he did not err in assessing a nominal penalty after balancing the factors of harm to the program, negligence (which he found to be minimal), and his finding that Predex acted in good faith.

2. The Presiding Officer did not err in further mitigating the penalty to a zero dollar amount after consideration of Predex's ability to pay.

Before Environmental Appeals Judges Ronald L. McCallum, Edward E. Reich and Kathie A. Stein.

Opinion of the Board by Judge McCallum:

This is an appeal by United States Environmental Protection Agency Region V ("Region") from an Initial Decision by Administrative Law Judge Spencer T. Nissen ("Presiding Officer") arising out of an administrative enforcement action against Predex Corporation ("Predex") for two alleged violations of section 12 of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended ("FIFRA"), 7 U.S.C. § 136j. In an earlier accelerated decision, the Presiding Officer found that Predex violated FIFRA § 12(a)(1)(A) by selling an unregistered pesticide and FIFRA § 12(a)(1)(L) by producing a pesticide in an establishment that was not registered with the Administrator of the U.S. Environmental Protection Agency ("Agency").

After entering the accelerated decision, the Presiding Officer held an evidentiary hearing regarding the amount of a penalty to be assessed for Predex's two violations of FIFRA's registration requirements. The Presiding Officer then issued his Initial Decision, holding that no penalty should be imposed and that a warning should be issued to Predex instead. The Region has appealed from the Presiding Officer's decision not to impose a penalty and to issue only a warning. Predex did not file an appeal, nor did it file a reply brief to the Region's appeal as it was entitled to do under 40 C.F.R. § 22.30(a)(2). Accordingly, we will not review the Presiding Officer's finding of liability, and we only review the issues raised by the Region to determine whether there was any error in the Presiding Officer's penalty determination. However, a brief summary of the facts underlying the finding of liability is necessary for an understanding of the issues that arose at the penalty phase of the case.

I. *BACKGROUND*

Predex manufactured and sold a product under the name of "PRED-X," which consisted of an ear tag for calves and lambs. PRED-X was sold for use by farmers and ranchers to reduce the number of lambs and calves killed by predators such as coyotes. PRED-X was determined to be a pesticide, not because of the physical properties of the ear tags themselves or any danger posed by the ear tags, but instead because of their intended use.[1]

[1] Indeed, the uncontroverted evidence established that the active ingredient in the ear tags, butyric acid, is nontoxic and is present naturally in butter and in the blood of humans and cattle. Hearing Transcript at 55-56 ("Tr."). The evidence also established that butyric acid has a rating by the FDA as generally accepted as safe for human consumption as a synthetic flavor and is used as flavoring in cheese, candy, cookies, syrups and liqueurs. Tr. at 56, 58, 60.

FIFRA § 2(u), 7 U.S.C. § 136(u), defines "pesticide" as "any substance or mixture of substances *intended* for preventing, destroying, repelling, or mitigating any pest." (Emphasis added). The regulations promulgated under FIFRA make clear that the intention that a substance will be used as a pesticide may be determined from claims made by the manufacturer or seller, and from the intent of the user if the seller has actual or constructive knowledge of such intent. 40 C.F.R. § 152.15. The Region argued that the intended use for PRED-X was to mitigate predation by coyotes and foxes and that such intended mitigation of pests made PRED-X a pesticide within the statutory and regulatory definition.[2]

Predex had sought to defend against liability on the basis of a regulatory exception which provides that deodorizers are not pesticides, unless a pesticidal claim is made on labeling or in connection with sale and distribution. 40 C.F.R. § 152.10(a). Predex argued that its product, PRED-X, was intended to reduce the number of lambs and calves lost to predators such as coyotes and foxes not by repelling predators, but instead by covering up the lambs' or calves' natural odors, in other words by deodorizing the lambs and calves, so that the predators cannot find them. Predex also argued that its labeling only claimed that PRED-X worked as a deodorant or cover scent.

The Presiding Officer found, however, that "'PRED-X' is a pesticide because it mitigates the behavior of pests (predators) within the meaning of FIFRA § 2(u) and the regulation, 40 C.F.R. § 152.15," and that the advertisements, which claimed that PRED-X prevents predators from locating lambs and calves, made mitigation claims. Initial Decision at 27; Order Granting In Part Motion For Accelerated Decision at 10-11 ("Accelerated Decision"). Thus, the Presiding Officer found that, because the intended use of PRED-X was to mitigate predators and because mitigation claims were made in the labeling of PRED-X, it was required to be registered prior to sale, and the facility in which PRED-X was produced was required to be registered. The failure to register PRED-X and the failure to register the facility in which PRED-X was produced were found to be violations of FIFRA § 12(a)(1)(A) and (L). Accelerated Decision at 12.

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[2] The term "pests" is defined to include any form of "terrestrial or aquatic plant or animal life" which the Administrator declares "is injurious to health and the environment." FIFRA §§ 2(t) and 25(c)(1). The regulations state that any vertebrate animal, other than man, is a pest "under circumstances that make it deleterious to man or the environment." 40 C.F.R. § 152.5. The Region argued, *inter alia*, that predators are pests in that they are deleterious to man or the environment by their predation of lambs and calves, and that the intended effect of PRED-X was to deter predators and mitigate their deprivation of lambs and calves. Region's Motion for Accelerated Decision at 7.

At the penalty hearing, Predex contended that it had a good faith belief that no pesticidal claims were being made in the labeling or advertisement of PRED-X and that, prior to manufacturing and selling PRED-X, it made a good faith effort to determine whether registration was required. Predex supported its claim of good faith by submitting evidence of, among other things, the business background of its president in the manufacture and sale of cover scents used by hunters (the testimony established that the same active ingredient, butyric acid, is used in products sold to deer hunters to mask their human scent; the Region stipulated that deer can be pests; and it was uncontroverted that the Agency does not require registration of such products). Initial Decision at 5.

Predex also supported its claim of good faith with evidence regarding (1) Predex's efforts, prior to manufacture and sale of PRED-X, to obtain information from various governmental agencies regarding registration requirements and the responses received that no registration was required so long as pesticidal claims were avoided, (2) Predex's hiring a registration consultant who purportedly advised Predex that no registration was required, (3) Predex's actual advertisements and labeling which generally described PRED-X as a deodorant or cover scent, and (4) Predex's efforts to cease selling PRED-X when it was advised by the EPA that registration was required. Predex's evidence was primarily presented in the form of testimony from Predex's president, Dr. Bambenek, who was found by the Presiding Officer to be "a forthright and completely credible witness." Initial Decision at 15.

Predex also submitted evidence that it does not have the ability to pay a civil penalty. Its evidence in this regard showed that Predex's only business was the manufacture and sale of PRED-X, that it ceased operations and had no income after it stopped selling PRED-X, and that it was only able to pay creditors by capital infusions from its parent corporation. Predex also submitted evidence showing that its parent company was losing money, that the capital stock of the parent had no value, and that the parent company required loans from Dr. Bambenek to fund operations. Initial Decision at 17-21.

In its complaint, the Region had requested that a penalty be assessed against Predex in the amount of $3,500 for each violation, with a total penalty of $7,000. After exchange of prehearing information, the Region reduced the proposed penalty to $2,100 for each violation, with a total penalty of $4,200. The Region contended that Predex was negligent and, therefore, not entitled to any further reduc-

tion in the amount of the penalty on account of good faith.[3] It also contended that Predex had the ability to pay the proposed civil penalty.[4]

At the penalty hearing, the Region supported its proposed penalty of $2,100 for each violation by the testimony of Ms. Dea Zimmerman, an environmental protection specialist employed by EPA, Region V, who testified regarding application of the statutory penalty factors and the Agency's penalty guidelines to the circumstances of Predex's violations of FIFRA.

In determining to assess no penalty and issue a warning to Predex, the Presiding Officer considered the testimony of Ms. Zimmerman, the Agency penalty guidelines, and the statutory criteria. He also considered the testimony of Predex's witness, Dr. Bambenek. The Presiding Officer made detailed findings of fact in 39 numbered paragraphs comprising approximately 23 pages of the Initial Decision. The Presiding Officer also gave an extensive discussion of his analysis applying the statutory factors to the facts as found by him.

The Presiding Officer determined that Predex's negligence "might warrant a nominal penalty on the order of $200 per violation," that a nominal penalty is sufficient in light of the lack of harm to the environment and human health, that any alleged damage to the FIFRA regulatory program did not warrant a substantial penalty, and that consideration of Predex's ability to pay warranted further mitigation of the penalty to a zero dollar amount and issuance of a warning. In its appeal, the Region requests that the Board impose a significant penalty, arguing that the Presiding Officer erred with respect to his consideration of Predex's alleged good faith, with respect to the significance of the harm to the regulatory scheme, and with respect to Predex's alleged inability to pay. For the following reasons, we find no reversible error in the Presiding Officer's analysis and assessment of no penalty in this case.

II. *DISCUSSION*

At the time of the violations in this case, the Agency was authorized by FIFRA to assess civil penalties in cases such as this of up to

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[3] *See* Complainant's Findings of Fact, Conclusions of Law, Proposed Order and Trial Brief (Oct. 28, 1996) at 25-27.

[4] *Id*. at 22.

$5,000[5] for each violation. Specifically, FIFRA authorizes the Administrator to assess a civil penalty against "[a]ny registrant, commercial applicator, wholesaler, dealer, retailer, or other distributor" found liable for a violation of FIFRA, at the time of the violations in this case, "of not more than $5,000 for each offense." FIFRA § 14(a)(1), 7 U.S.C. § 136*l*(a)(1).[6] The statute also specifies criteria that must be considered by the Agency in assessing a civil penalty. Those criteria are as follows:

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

FIFRA § 14(a)(4), 7 U.S.C. § 136*l*(a)(4). In addition, "[w]henever the Administrator finds that the violation occurred despite the exercise of due care or did not cause significant harm to health or the environment, the Administrator may issue a warning in lieu of assessing a penalty." FIFRA § 14(a)(4), 7 U.S.C. § 136*l*(a)(4).

The regulations governing the administrative assessment of civil penalties provide that the presiding officer also must "consider" any civil penalty guidelines or policies issued by the Agency. 40 C.F.R. § 22.27(b). The Agency has prepared a penalty policy applicable to assessment of civil penalties under FIFRA. *See* the Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act dated July 2, 1990 ("ERP").[7]

We have held that the presiding officer has discretion to assess a penalty different in amount from the penalty requested in the complaint. *In re James C. Lin and Lin Cubing, Inc.*, 5 E.A.D. 595, 598 (EAB

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[5] Subsequent to the violations at issue in this case, the Debt Collection Improvement Act of 1996 was enacted directing the Agency to make periodic adjustments of maximum civil penalties to take into account inflation. The Agency has published inflation adjusted maximum penalties at 61 Fed. Reg. 69,360 (Dec. 31, 1996).

[6] The Presiding Officer found that Predex is a wholesaler or other distributor within the meaning of FIFRA § 14(a)(1) "[b]ecause it sold and distributed 'PRED-X.'" Initial Decision at 28. Therefore, a penalty of up to $5,000 may be assessed pursuant to FIFRA § 14(a)(1) against Predex for each of the violations. As noted *infra* n.5, the Agency subsequently has increased maximum penalties to take into account inflation.

[7] A Notice of Availability regarding the ERP was published in the Federal Register. 55 Fed. Reg. 30,032 (July 24, 1990).

1994). We also have held on numerous occasions that although the presiding officer must "consider" any penalty guidelines, in any particular instance the presiding officer may depart from the penalty policy so long as the reasons for departure are adequately explained. *Id.* at 598-599 and 603 (reducing the amount of the penalty because the penalty policy "formulation overstates the actual gravity"); *In re Sav-Mart, Inc.*, 5 E.A.D. 732 (EAB 1995) (upholding presiding officer's reduction of a FIFRA penalty from $20,000 as requested in the complaint to $5,000). *See also In re Green Thumb Nursery, Inc.*, 6 E.A.D. 782 (EAB 1997) (presiding officer reduced FIFRA penalty from $4,000 as requested in the complaint to $3,000). Ultimately, of course, any penalty assessed must "reflect" a reasonable application of the statutory penalty criteria to the facts of the particular violations." *In re Employers Ins. of Wausau*, 6 E.A.D. 735, 758 (EAB 1997).

The applicable regulation also confers discretion on the Board to increase or decrease the civil penalty assessed by the presiding officer. 40 C.F.R. § 22.31(a). However, we have held that when the presiding officer assesses a penalty that falls within the range of penalties provided in the penalty guidelines, the Board generally will not substitute its judgment for that of the presiding officer absent a showing that the presiding officer has committed an abuse of discretion or a clear error in assessing the penalty. *See, e.g., In re Johnson Pacific, Inc.*, 5 E.A.D. 696, 702-703 (EAB 1995) (declining to review FIFRA penalty assessment under a "microscope"); *In re Pacific Refining Co.*, 5 E.A.D. 607, 613 (EAB 1994); *In re Ray Birnbaum Scrap Yard*, 5 E.A.D. 120, 124 (EAB 1994). In the present case, we find that the Presiding Officer has not committed an abuse of discretion or a clear error in assessing the penalty and, therefore, we decline to modify the Presiding Officer's penalty assessment.

Upon review, we find that the Presiding Officer carefully analyzed the evidence submitted at the hearing, reasonably applied the statutory penalty criteria and adequately explained his reasons for departing from the penalty proposed by the Region. The Presiding Officer began by reviewing the evidence within the analytical framework of the ERP. He analyzed the issues of good faith and negligence as a question of whether Predex should be assigned a culpability value of 2 in the "gravity" component of the penalty as proposed by the Region and its witness, Ms. Zimmerman, or a culpability value of 0 as suggested by Predex. A value of 0 for culpability, when added to the other values assigned by Ms. Zimmerman to other gravity factors identified in the ERP, would have resulted in a total "gravity" value of 3, for which the ERP directs that the Administrator's delegatee may (1) take no action on the violation, (2) issue a notice of

warning, or (3) assess a penalty at a 50% reduction from the $3,000 penalty otherwise specified by the matrix. Initial Decision at 27 and 32. In contrast, a value of 2 for culpability would produce a total value of 5, and the penalty of $2,100 for each violation as proposed by the Region. *Id*.

In reviewing the evidence within this framework, the Presiding Officer first found that Predex "had a good faith belief that 'PRED-X' was a deodorant rather than a pesticide." Initial Decision at 28. He based this finding in part on Dr. Bambenek's background in the business of cover scents used by deer hunters. The Presiding Officer explained as follows:

> The fact that deer are pests under some circumstances and that cover scents used by hunters are not regarded as pesticides despite the names given to such products and that Complainant has some difficulty in articulating the precise reason for this result tends to support Dr. Bambenek's good faith in the belief that such products must have some kind of an exemption, namely they are within an exception for deodorants.

Initial Decision at 31. The Presiding Officer then observed that both FIFRA § 14(a)(4) and 40 C.F.R. § 22.35(c) require that any penalty must take into account his finding that Predex acted in good faith (which the Presiding Officer stated is the opposite of culpability). Initial Decision at 32.

The Presiding Officer, next, considered the Region's contention that Predex was negligent in the claims made in its advertising and in not recalling its product more quickly once it was notified by a State agency that PRED-X was a pesticide. In reviewing the evidence, the Presiding Officer held that the Region's argument that Predex continued to produce and sell PRED-X after the Colorado Department of Agriculture ("CDA") determined that PRED-X was a pesticide "fails to recognize that the context in which the production and sales were taking place supports Dr. Bambenek's good faith in the matter, *i.e.*, he truly believed 'PRED-X' was a deodorizer rather than a pesticide." Initial Decision at 32. The Presiding Officer supported this determination by noting that Predex promptly responded to the notice from the CDA by ceasing to sell its product in Colorado, by seeking to convince the CDA that the advertisements did not make pesticidal claims but instead made deodorant or cover scent claims, by later contacting the EPA on its own initiative after an exchange of correspondence with the CDA, and by ceasing to sell PRED-X nationwide after receiving the

first letter response from the EPA. Initial Decision at 33-34.[8] The Presiding Officer also noted that Predex had contacted the EPA prior to manufacturing or selling the product and received advice very similar to that obtained from its registration consultant. *Id*. at 34.

The Presiding Officer, however, did agree that Predex was negligent in making pesticidal claims on the labels for PRED-X and in at least one advertisement.[9] The Presiding Officer balanced the competing observations as follows:

> Although Dr. Bambenek's good faith in the matter is established and is unquestioned, he did not exercise due care in placing testimonials on the labels or in placing the mentioned ad, because he should have realized that pesticidal claims were being made. It is concluded that this want of due care * * * might justify a nominal penalty for the violations at issue.

Initial Decision at 34.[10] Thus, within the framework of the ERP, the Presiding Officer determined that a balancing of the evidence of good faith and evidence of some degree of negligence as indicators of Predex's culpability would warrant a nominal penalty.

Next, the Presiding Officer considered the statutory criteria for issuance of a warning instead of a penalty. Noting that FIFRA

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[8] The Presiding Officer, thus, viewed the chronology of events as starting with Predex having a good faith belief that a deodorant exception applied to its product, which belief was not directly rejected in Colorado by the CDA until late November 1992 and on a national basis until Predex received the letter from the EPA in December 1992 responding to Predex's inquiry. The Presiding Officer found that Predex ceased selling its product nationwide at that time in December 1992. Initial Decision at 33-34. While the Region argues that Predex received "numerous contrary determinations" prior to ceasing sale of its product (Region's Brief at 14), we are convinced that the Presiding Officer understood all of the relevant facts, including the ambiguities inherent in the circumstances of this case and Predex's good faith as established by a "forthright and completely credible witness," and that the Presiding Officer made a reasoned balancing which took those facts into account. We do not find any clear error or abuse of discretion in this balancing that would persuade us to substitute our judgment for the judgment of the Presiding Officer.

[9] Predex's negligence in making pesticidal claims was material because the exemption from the registration requirements for deodorants is only applicable if no pesticidal claims are made on labeling or in conjunction with sale and distribution. 40 C.F.R. § 152.10(a).

[10] The Region had also argued that Predex was negligent in its efforts to notify distributors that PRED-X could no longer be sold. On this issue, the Presiding Officer found that "Dr. Bambenek's culpability, if any, for not doing more to notify distributors and dealers that 'PRED-X' could not be sold is minimal or slight." Initial Decision at 34.

§ 14(a)(4) provides for a discretionary option of issuing a warning in lieu of a penalty either where the violation occurred despite the exercise of due care or when it did not cause "significant" harm to health or the environment, the Presiding Officer again determined that consideration of the relevant factors led him to conclude that the Region's proposed penalty was "grossly excessive." *Id*. at 36. The Presiding Officer found that "[h]ere, no harm to human health or the environment resulted from the violations at issue and it is only Respondent's want of due care in making pesticidal claims for the 'PRED-X' ear tag and in failing to immediately recall the product when EPA determined it was a pesticide that might warrant imposition of a penalty rather than merely a warning." *Id*. at 35-36.[11]

The Presiding Officer rejected the Region's contention that harm to the FIFRA regulatory scheme warranted imposition of a significant penalty in this case. The Presiding Officer first noted that harm to the regulatory scheme caused by a failure to register is taken into account under the framework of the ERP. The Presiding Officer noted that the ERP guidelines are expressly based on "an average set of circumstances" taking into account actual harm to human health and the environment and the importance of the requirement to the goals of the statute. Initial Decision at 37 (quoting the ERP at 21). Noting further that "the circumstances of the violation at issue here are in no sense average," the Presiding Officer held that "Complainant's argument that damage to the FIFRA program warrants a substantial penalty is rejected." *Id*. at 37.[12]

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[11] The Region objects on appeal that "there is no evidence cited, or in the record, that indicates that no harm resulted from the use of PRED-X" and "the best that can be said by a finder-of-fact is that it is unknown whether or not there was harm to human health or the environment from the use of the product." Region's Brief at 18 n.10. The Region's statement is consistent with our similar observation in *Green Thumb. In re Green Thumb Nursery, Inc.*, 6 E.A.D. 782, 801 n.37 (EAB 1997). However, in *Green Thumb,* the evidence showed that the product at issue had a potential to cause significant harm to health or the environment. *Id*. at 803 n.40 (citing *In re Green Thumb Nursery, Inc.*, FIFRA Docket No. I.F.& R.-V-014-94, at 11-12 (ALJ, Aug. 31, 1995)(finding a high degree of toxicity)). In contrast, here, the record contains sufficient evidence supporting the Presiding Officer's determination that butyric acid does not have harmful effects. *See* Tr. at 55-60. Thus, the Region has not shown, based on the record in this case, that the Presiding Officer erred in finding that there was no actual harm to human health or the environment. (The Presiding Officer's finding in this case regarding butyric acid's lack of harmful effects, and our decision upholding that finding, are based solely upon the record before us and do not purport to constitute a formal determination that butyric acid's use as a pesticide product does not pose unreasonable adverse effects upon the environment for purposes of sections 3 (registration) and 6 (cancellation and suspension) of FIFRA.)

[12] The Presiding Officer also rejected Predex's contention that harm to the FIFRA regulatory program should not be considered on the grounds, as argued by Predex, that such harm is

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The Presiding Officer, thus, balanced the findings of good faith, negligence, and no harm to human health or the environment, as discussed above, along with the Region's argument that the violations caused harm to the FIFRA regulatory scheme[13] and determined that the circumstances of this case "might warrant a nominal penalty on the order of $200 per violation." Id. at 38. In addition, as discussed below, the Presiding Officer further mitigated the penalty to a zero dollar amount when considering Predex's inability to pay the civil penalty. We do not find any reversible error in the Presiding Officer's resolution of these issues.

On appeal, the Region argues that the Presiding Officer erred by failing to discuss the Board's decisions in the *Sav-Mart* and *Green Thumb* cases, which the Region characterizes as requiring imposition of a substantial penalty on the grounds that the violations of FIFRA's registration requirements caused harm to the FIFRA regulatory scheme. *See In re Green Thumb Nursery, Inc.*, 6 E.A.D. 782 (EAB 1997); *In re Sav-Mart, Inc.*, 5 E.A.D. 732, 738 n.13 (EAB 1995). In *Green Thumb*, we held that "[f]ailure to properly register a pesticide is not harmless or insignificant." *Green Thumb*, 6 E.A.D. at 800. *Accord Sav-Mart*, 5 E.A.D. at 738 n.13. This observation remains as true in this case as it was in *Green Thumb*. Such harm to the program alone is sufficient to support a substantial penalty. However, as explained below, we believe that the Presiding Officer neither erred in imposing a lower penalty in this case based on Predex's good faith, nor erred in mitigating the penalty to zero based on Predex's inability to pay.

Green Thumb does not show that the Presiding Officer committed reversible error here. In *Green Thumb*, we determined that the respondent's appeal of the penalty assessment was without merit because "Respondent's failure to register its pesticide product under

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not considered under the guidelines of the ERP. The Presiding Officer was correct in rejecting this contention because, as noted above, the ERP does take into account harm to the FIFRA regulatory scheme. The Presiding Officer, however, also stated that "FIFRA § 14(a)(4) * * * authorizes a warning in lieu of a penalty under circumstances such as present here 'where there is no significant harm to health or the environment' and, to that extent, the ERP is contrary to the Act." Initial Decision at 37. It is not clear to us the "extent" to which the Presiding Officer viewed the ERP to be contrary to FIFRA and, therefore, we reject the Presiding Officer's statement that the ERP is contrary to FIFRA. Nevertheless, as discussed throughout this decision, we believe the Presiding Officer's penalty determination was a reasonable exercise of his discretion.

[13] The Region had also submitted proposed findings of fact with supporting references to the record in this case. *See* Initial Decision at 37 (citing Region's Proposed Findings ¶¶ 18-21, Region's Trial Brief at 18 and 19).

FIFRA section 3(a) was harmful to the FIFRA regulatory program and to the public," and also because "there was a complete lack of due care by the Respondent." *Green Thumb*, 6 E.A.D. at 800.[14] It is the "complete lack of due care" in *Green Thumb* that distinguishes that case from the present case.

In *Green Thumb*, the evidence of the respondent's complete lack of due care was the respondent's failure to make any attempt to determine whether there was any applicable registration requirement. *Id.* at 797 ("Respondent's failure to take control of its responsibilities under FIFRA is evidence of culpability, not innocence").[15] In contrast, in the present case, the evidence showed that Predex actually made a good faith attempt to determine whether there were any applicable registration requirements and Predex's lack of due care was isolated to two specific acts. Initial Decision at 6-10 and 34. Therefore, insofar as *Green Thumb* stands for the proposition that the regulatory program is harmed in some significant way by a respondent's failure to make any attempt at determining whether there is an applicable registration requirement, a corollary of that proposition is that the penalty may nonetheless be mitigated by a respondent's good faith efforts to research whether there are any such registration requirements.[16] Predex exemplifies the corollary, and the Presiding Officer found that a penalty reduction was in order.

Moreover, the Presiding Officer did not hold that Predex's good faith was a sufficient basis to reduce the penalty to zero. The Presiding Officer only held that the evidence of harm to the FIFRA regulatory scheme did not require imposition of the size of penalty requested by the Region. In the portion of the Initial Decision where the Presiding Officer balanced his findings of good faith, negligence

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[14] In *Green Thumb*, we recognized that in addition to the harm to the regulatory scheme, which is inherent in any failure to register, the respondent's complete lack of due care in failing to even attempt to determine whether any registration requirements existed was a factor warranting consideration in determining the appropriate penalty. In the present case, there was not a complete lack of due care — the finding of lack of due care in this case was limited in scope, and there also was a countervailing finding of good faith, which as discussed below can serve to mitigate the amount of the penalty. In this regard, the facts of this case support the Presiding Officer's determination that a lower penalty is appropriate here.

[15] Likewise, in *Sav-Mart* the respondent had taken no action to determine whether there was a registration requirement. *Sav-Mart*, 5 E.A.D. at 735 n.7. Moreover, harm to the regulatory program did not form a central part of our analysis in *Sav-Mart* as such harm was noted only in a footnote. *Id.* at 738 n.13.

[16] The Supplemental Rules require that any penalty take into account the respondent's good faith. 40 C.F.R. § 22.35(c).

and lack of harm to human health or the environment and the Region's argument regarding harm to the FIFRA regulatory scheme, the Presiding Officer, in fact, determined that a penalty of $400 was appropriate based on the gravity of the violations in this case.[17] While we can understand the Region's concern about the penalty reduction assessed by the Presiding Officer, we do not find any clear error or abuse of discretion that would cause us to substitute our judgment for that of the Presiding Officer.

With respect to the issue of ability to pay, the Presiding Officer concluded that "Respondent has rebutted Complainant's evidence as to ability to pay, and a warning in lieu of a penalty will be issued as permitted by FIFRA § 14(a)(4)." Initial Decision at 38. The Presiding Officer made this finding based on evidence admitted at the hearing which he characterized as the "more recent data which reflect that [Predex's parent company] has sustained continuing losses over the three year period ending December 31, 1995, that the capital stock of [the parent] had no value as of December 31, 1995, and that Dr. Bambenek was putting his own money into the [parent] company as loans." *Id*.

The Presiding Officer also determined that, when considering the likelihood that Predex would be able to obtain additional funds to pay a civil penalty, it is not appropriate in this case to look beyond Predex's parent to Dr. Bambenek under the reasoning of *In re New Waterbury, Ltd.*, 5 E.A.D. 529 (EAB 1994), because liquidation of Predex's parent "has the potential of presenting its owner with a liability." Initial Decision at 39. We also note that the facts of this case are distinguishable from those of *New Waterbury* in that *New Waterbury* involved interrelated entities which provided a substantial income to the individual owner/manager. *New Waterbury*, 5 E.A.D. at 548-549. Under those circumstances, the Board inferred that there was an ability to pay. In contrast, here, there is no evidence that Dr. Bambenek has received substantial income from these related entities in recent years and, therefore, the evidence is not as compelling in this case as it was in *New Waterbury*. We, therefore, believe that the evidence in the record and the Presiding Officer's analysis on the

[17] The evidence in the record regarding Dr. Bambenek's prior experience with unregulated cover scents used by deer hunters and regarding Dr. Bambenek's multiple attempts to ascertain whether there were any applicable registration requirements and the Presiding Officer's determination that Dr. Bambenek was a credible witness, all support the Presiding Officer's departure from the ERP guidelines and his statement that this is not an average case.

issue of ability to pay is sufficient[18] to support his determination to further mitigate the $400 penalty to a penalty of zero amount. Thus, we do not disturb the Presiding Officer's issuance of a warning to Predex.[19]

III. *CONCLUSION*

For the reasons set forth above, we adopt the Presiding Officer's assessment of no penalty for Predex's violations of FIFRA's registration requirements.

So ordered.

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[18] The Region argues that some of the evidence relied upon by the Presiding Officer should have been given reduced weight because such evidence was produced at the hearing without prior disclosure to the Region. We take the Region's argument seriously because we agree that the Region should not be allowed to be prejudiced by a late disclosure of evidence. Nevertheless, it is significant that the Presiding Officer found Predex's witness, Dr. Bambenek to be forthright and completely credible. Initial Decision at 15. In addition, any prejudice would not be great because only "relatively insignificant sums are at issue and no important legal or policy questions are at stake" as we have adopted the Presiding Officer's gravity component analysis on other grounds. *See In re Johnson Pacific, Inc.*, 5 E.A.D. 696, 702 (EAB 1995).

[19] We note that, in this case, the Presiding Officer decided to issue a warning only after determining that Predex had no ability to pay even the modest penalty he might otherwise have assessed. Thus, in this sense, the warning does not really *substitute* for a penalty as would normally be the case under FIFRA § 14(a)(4). Since the issuance of the warning as opposed to the assessment of a zero penalty was not the real basis for the Region's appeal and, further, since Predex did not appeal the issuance of a warning, we find it unnecessary to address the propriety of a warning under the criteria of section 14(a)(4) in this case.