IN RE JOHNSON PACIFIC, INCORPORATED

FIFRA Appeal No. 93-4

FINAL ORDER

Decided February 2, 1995

Syllabus

U.S. EPA Region IX appeals an Initial Decision reducing the Region's proposed civil penalty for three violations of Section 12 of the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 136, from $9,600 to $4,080. The violations arise out of the sale of unlabeled and illegally repackaged swimming pool sanitizing tablets for use as hot tub sanitizing tablets. On appeal, the Region asserts, among other things, that the Presiding Officer erred by taking equity into consideration in assessing an appropriate penalty against the Respondent, Johnson Pacific, Incorporated. The Region also seeks to hold the Presiding Officer to a strict standard of explaining his reasons for reducing the proposed penalty assessment set forth in the Region's complaint. The Region also asserts that the Presiding Officer misclassified the size of Respondent's business, which resulted in a lower base penalty calculation.

Respondent did not file a timely appeal of either the liability determination or the amount of the penalty assessed.

Held: The Board affirms the Initial Decision and assesses a penalty of $4,080. Equity is clearly a permissible consideration in assessing penalties under the statute, and the Region is clearly wrong in arguing otherwise. Moreover, the Board declines to examine the Presiding Officer's penalty assessment under a microscope where, as here, relatively insignificant sums are at issue and no important legal or policy questions are at stake. Finally, the Presiding Officer did not err in classifying the size of Respondent's business.

Before Environmental Appeals Judges Nancy B. Firestone, Ronald L. McCallum, and Edward E. Reich.

Opinion of the Board by Judge McCallum:

Johnson Pacific, Incorporated ("Respondent"), is a Nevada corporation that services and sells supplies for swimming pools and spas under the name Sierra Nevada Spas. It is wholly owned by Douglas F. Johnson, who is not an attorney and who has represented his company *pro se* at the hearing and in this appeal. The Presiding Officer assessed a civil penalty of $4,080 against Respondent for three violations of the Federal Insecticide, Fungicide, and Rodenticide Act, 7

U.S.C. §136 *et seq.*, at its business premises in Reno, Nevada. The Complainant, U.S. EPA Region IX, has appealed the Presiding Officer's Initial Decision for the sole purpose of asking the Board to increase the amount of the penalty from $4,080 to $9,600, the amount the Complainant had proposed in the complaint for the three violations. Since the Presiding Officer acted within his discretion in assessing a penalty of $4,080, we are affirming his penalty assessment.

I. *BACKGROUND*

This proceeding stems from a January 11, 1989 inspection of Respondent's Reno store[1] by Charles Moses, an EPA field inspector. On that occasion, Moses purchased 30 BioGuard Brominating Tablets, EPA Reg. No. 1720-131-5185 ("BioGuard for Swimming Pools"), in an unlabeled transparent orange plastic bag from Michael Seal, an employee of Respondent, who retrieved the bag from a large bucket labeled "BioGuard Brominating Tablets—Sanitizer for Swimming Pools." The bucket contained other similar unlabeled bags of BioGuard for Swimming Pools. The product is a sanitizer and disinfectant that is registered for use in swimming pools under section 3 of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136a. It is undisputed that Seal told Moses that BioGuard for Swimming Pools can be used in spas (also called "hot tubs") as well as swimming pools. *See* Initial Decision at 6-8.

The Complainant filed an administrative complaint against Respondent on September 27, 1989, alleging four violations of FIFRA, for which it proposed a total civil penalty of $14,600. Specifically, Count 1 alleged that Respondent had unlawfully offered BioGuard for Swimming Pools for sale in plastic bags that did not conform to Agency child resistant packaging standards, in violation of FIFRA § 12(a)(1)(E); Count 2 alleged that Respondent had offered the product for sale in plastic bags that did not bear required labels or labeling, in violation of FIFRA § 12(a)(1)(E); Count 3 alleged that Respondent had repackaged (and therefore produced) the product at an unregistered establishment, in violation of FIFRA § 12(a)(2)(L); and Count 4 alleged that Respondent had made the oral claim that BioGuard for Swimming Pools could be used in spas, although that product is registered solely for use in swimming pools, in violation of FIFRA § 12(a)(1)(B).

The Complainant calculated the proposed penalty amounts for the violations in accordance with the Guidelines for the Assessment of

[1] At the time the violations occurred, Respondent operated two stores, one in Reno and the other in Carson City, Nevada. Respondent closed its Reno store in October 1990 but continues to operate the Carson City store. Initial Decision at 15.

Civil Penalties Under Section 14(a) of FIFRA ("the Guidelines"), 39 Fed. Reg. 27711 (July 31, 1974).[2] The Complainant determined a base penalty amount for each violation from the Guideline's Civil Penalty Assessment Schedule ("the Assessment Schedule") which lists specific violations of the Act (by charge code) along the vertical axis, and five size-of-business categories (based on the violator's gross revenues for the fiscal year preceding the violation) along the horizontal axis. Each cell where the axes intersect specifies a base penalty amount.

The base penalty amounts are as follows:

> Count 1: Charge Code E41, "Misbranding" (non-compliance with child-resistant packaging requirements), Toxicity Level Danger" ($5,000).
>
> Count 2: Charge Code E3, "Deficient Precautionary Statements," with "Adverse Effects Highly Probable" ($5,000).
>
> Count 3: Charge Code E33, "Failure to Register Producer Establishment" with "No knowledge of the Registration Requirement" ($1,800).
>
> Count 4: Charge Code E17, "Directions for Use Differ From Those in Connection with Product's Registration" with "Adverse Effects Unknown" ($2,800).

Consistent with a uniform practice among Regional enforcement offices, the Complainant used the base penalty figures for size-of-business category V (gross sales exceeding $1 million), the highest category, because it had no information at the time the case was developed as to Respondent's actual gross sales.[3] Tr. 103-104.

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[2] The Guidelines were superseded by the Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act, issued July 2, 1990, which applies to complaints filed after that date and therefore is inapplicable to the complaint filed in this case.

[3] The Guidelines contemplate that the Complainant will recalculate base penalties "[u]pon presentation by respondent of reliable data demonstrating that his business size is other than that employed by complainant in computing the proposed civil penalty * * *." 39 Fed. Reg. at 27712. *Cf. In re New Waterbury, Ltd.*, TSCA Appeal No. 93-2 (EAB, Oct. 20, 1994) (discussing EPA's burden of proving the appropriateness of a penalty).

The Complainant then determined that no discretionary adjustments in any of the base penalty figures were warranted. The Guidelines confer discretion on the Complainant to reduce the base penalty amount upward or downward by a total of 10% based on seven so-called gravity factors,[4] which, in general terms, reflect the seriousness of the unlawful conduct, the attitude of the violator, and the particular circumstances of the violation. The Complainant also has discretion to reduce further the penalty thus calculated by as much as 40% based on unspecified mitigating factors brought to its attention by the violator. The Complainant may also make additional "extraordinary" adjustments under "special circumstances" when "equity" will not be served by applying the preceding 10% and 40% adjustments. 39 Fed. Reg. 27712. Thus, taken as a whole, the Guidelines allow Complainant to make downward adjustments to the base penalty amount in excess of 50% without any specific limit on the upper end of the adjustments.

In its Amended Answer (an eleven-page, single-spaced narrative), Respondent admitted that it had repackaged BioGuard for Swimming Pools and offered the tablets for sale to its spa customers in late 1988 and early 1989 because tablets registered for spa use were not available from its suppliers during that time period.[5] Amended Answer (August 14, 1990), at 1. Respondent maintained that it intended to sell BioGuard for Swimming Pools in unlabeled bags only to those of its regular customers who agreed to transfer the tablets into previously-purchased containers bearing the required labeling. It claimed that Michael Seal was an inexperienced sales clerk who had violated Respondent's instructions when he sold the repackaged tablets to Charles Moses who had not previously purchased bromine tablets for spa use from Respondent. Respondent added that it was unaware of FIFRA at the time of the sales and discontinued the practice as soon as it became aware that it was unlawful.

The Presiding Officer held a hearing on May 7, 1991, and issued an Initial Decision on August 11, 1993. He held that Counts 1 and 2 of the complaint are duplicative, since they were both "premised upon the single sale of BioGuard to Moses on January 11, 1989," and dismissed Count 1. He further held that the Complainant had established

[4] The seven gravity factors are: (1) the potential that the act committed has to injure man or the environment; (2) the severity of such potential injury; (3) the scale and type of use anticipated; (4) the identity of the persons exposed to a risk of injury; (5) the extent to which the applicable provisions of the Act were in fact violated; (6) the particular person's history of compliance and actual knowledge of the Act; and (7) evidence of good faith in the instant circumstances. 39 Fed. Reg. at 27712.

[5] Respondent customarily also sells bromine tablets that hold an independent registration authorizing their use in spas.

that Johnson had violated FIFRA as alleged in Counts 2, 3 and 4. The Presiding Officer's findings with regard to liability were not challenged by the Complainant and are not at issue in this appeal. *See* Appeal Brief at 2. The Presiding Officer assessed a penalty of $4,080 for the violations. He found that Respondent had demonstrated that it is a Category IV business (gross sales of $700,000 to $1 million), based on evidence that Respondent had gross revenues of $875,868 during the year preceding the violation (1987-88). He recalculated the base penalty amounts for Counts 2, 3 and 4 from the Assessment Schedule accordingly: $4,250 for Count 2, $1,530 for Count 3, and $2,380 for Count 4 (totalling $8,160).[6] The Presiding Officer then reduced the total $8,160 base penalty amount by 50%, based on his conclusion that $4,080 is "the maximum amount that the facts and law, coupled with equity, can command in this case." *Id.* at 22. He concluded that a $4,080 penalty would not significantly affect Respondent's ability to remain in business.

The Complainant argues in its appeal that the Presiding Officer did not assess an appropriate civil penalty in accordance with the FIFRA guidelines and the Agency's Consolidated Rules of Practice. It asks the Board to increase the civil penalty to $9,600, the total of the base penalty amounts for Counts 2, 3 and 4 of the complaint if Respondent were a Category V business. The Complainant argues that: (1) the Presiding Officer lacked adequate evidence to categorize Respondent as a Category IV business and therefore should have assessed the penalty indicated for a Category V business; (2) the Presiding Officer did not provide findings of fact, as expressly required by 40 C.F.R. § 22.27(a); (3) the Presiding Officer lacked justification for reducing the base penalty indicated on the Assessment Schedule; and (4) the Presiding Officer's penalty reduction, based on "opinion and equity," did not satisfy the regulatory requirement, 40 C.F.R. § 22.27(b), that he set forth "specific reasons" for reducing the Complainant's proposed penalty.

Respondent did not challenge the Presiding Officer's penalty assessment in a timely appeal[7] but argued in response to the Region's appeal that it should not be required to pay any civil penalty, because

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[6] As noted *supra* at nn. 4, 5 and 6, the Complainant proposed penalties of $5,000, $1,800, and $2,800, respectively, for the violations, based on an assumption that Respondent is a Class V business.

[7] In its response to the Complainant's appeal, the Respondent states at one point that "upon receiving the Initial Decision and Order [Respondent] had decided to pay the penalty of $4,080.00." Response at 16. Nevertheless, at the conclusion of the response, the Respondent asks to have all penalties dismissed completely. *Id.* at 17. In its response to the appeal, Respondent also asks the Board to hold that it is not liable for the violations alleged in Counts 2 and 4. The Board will not address these issues since Respondent did not challenge the Presiding Officer's liability determinations and penalty assessment in a timely appeal. *See* 40 C.F.R. § 22.30. *See In re General Electric Co.*, TSCA Appeal No. 92-2a, at 29 n.32 (EAB, Nov. 1, 1993).

it had no knowledge of FIFRA at the time the violations occurred and because it came into compliance as soon as it was informed of FIFRA's existence.[8] However, it maintains that if the Board assesses a civil penalty for any of the violations, it should classify Respondent as a Category IV business for purposes of calculating a penalty amount under the Guidelines. Response, October 14, 1993.

II. *DISCUSSION*

Under the Agency's Consolidated Rules of Practice, a Presiding Officer has considerable latitude in assessing a civil penalty for a violation of FIFRA, provided the penalty assessed is "in accordance with any criteria set forth in the Act relating to the proper amount of a civil penalty"[9] and consideration has been given to any civil penalty guidelines issued under the Act. 40 C.F.R. § 22.27(b). The Presiding Officer is free to substitute his or her own penalty assessment for the Complainant's proposal provided specific reasons are given for the substitution. *See* 40 C.F.R. § 22.27(b); *also In re James C. Lin and Lin Cubing, Inc.*, FIFRA Appeal No. 94-2, at 5 (EAB, Dec. 6, 1994); *In re Great Lakes Division of National Steel Corp.*, EPCRA Appeal No. 93-3, at 23-24 (EAB, June 29, 1994); *In re General Electric Company*, TSCA Appeal No. 92-2a, at 28 (EAB, Nov. 1, 1993) (accepting the Presiding Officer's penalty assessment while noting that "the Presiding Officer disregarded the 1980 PCB Penalty Policy"); *In re 3M Company*, TSCA Appeal No. 90-3, at 22 (CJO, Feb. 28, 1992); *In re ALM Corp.*, TSCA Appeal No. 90-4 (CJO, Oct. 11, 1991); *In re High Plains Cooperative, Inc.*, FIFRA Appeal No. 87-4, at 6 (CJO, July 3, 1990); *In re Empire Ace Insulation Mfg. Corp.*, TSCA Appeal No. 86-4 (CJO, June 28, 1990); *In re A.Y. McDonald Industries, Inc.*, RCRA (3008) Appeal No. 86-2, at 18-19 (CJO, July 23, 1987) ("An ALJ's discretion in assessing a penalty is in no way curtailed by the Penalty Policy so long as he considers it and adequately explains his reasons for departing from it."); *In re Sandoz, Inc.*, RCRA (3008) Appeal No. 85-7, at 7-8 (CJO, Feb. 27, 1987) (citing additional cases at note 13).

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[8] Respondent asks the Board to issue an order clarifying the legal use of bromine, chlorine and biguanide in "inner connected [sic] pools and spas." Respondent's Reply Brief at 17. Pursuant to 40 C.F.R. § 22.31(a), the Board may adopt, modify, or set aside the findings and conclusions of the Presiding Officer. Respondent's request for relief falls outside the scope of the Board's authority in an appeal and therefore it is denied.

[9] FIFRA § 14(a)(4) provides that, in determining the amount of a penalty, the Administrator shall consider the appropriateness of the 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."

[10] 40 C.F.R. § 22.31(a)

Although the Board has discretion to increase or decrease the amount of a civil penalty assessed by a presiding officer,[10] we customarily defer to the Presiding Officer if the Presiding Officer has provided a reasonable explanation for the assessment and if the penalty amount is within the range prescribed by any applicable guidelines.[11] As we stated in a recent decision affirming a civil penalty assessment under the Toxic Substances Control Act:

> When the penalty assessed by the Presiding Officer falls within the range of penalties provided in the penalty guidelines, the Board will generally 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.

In re Ray Birnbaum Scrap Yard, TSCA Appeal No. 92-5, at 5 (EAB, March 7, 1994) (upholding the Presiding Officer's 15% reduction in the Complainant's proposed penalty based on Respondent's cooperative attitude).

We have carefully considered the Complainant's objections to the penalty assessment and have concluded that no increase in the Presiding Officer's penalty assessment is warranted. As discussed below, the Presiding Officer had sufficient evidence to classify Respondent's size-of-business as Category IV on the Assessment Schedule and to recalculate a base penalty amount of $8,160 based on that classification. Moreover, as to the Complainant's remaining objections, we are not persuaded that they are sufficiently well founded for us to exercise our discretion to interfere with the latitude which FIFRA affords a Presiding Officer when deliberating over the "appropriateness" of the penalty. *See* FIFRA § 12(a)(4). Indeed, where, as here, relatively insignificant sums are at issue and no important legal or policy questions are at stake, common sense dictates that the Board not use the same level of scrutiny it applies to appeals where more substantial questions are

[10] 40 C.F.R. § 22.31(a)

[11] The Board is not bound by, nor expressly required to consider, the guidelines, which are designed primarily to guide Regional enforcement personnel in determining the appropriate enforcement response and penalties for violations of FIFRA. However, the guidelines provide a useful frame of reference for the Board's exercise of its discretion, and therefore the guidelines are in fact considered by the Board in formulating its own penalty assessment when the Board differs with the Presiding Officer's penalty assessment. *See In re Helena Chemical Co.*, FIFRA Appeal No. 87-3 (Order on Motion for Reconsideration)(CJO, Jan. 24, 1990); *In re Custom Chemical & Agricultural Consulting, Inc.*, FIFRA Appeal No. 86-3 (CJO, March 6, 1989). Nevertheless, the Board reserves the right to assess a different penalty when the interests of justice so require. *See, e.g., In re James C. Lin and Lin Cubing, Inc.*, at 11 ("the gravity of the harm should be assessed without regard to the complex formulation used in the penalty policy because the formulation overstates the actual gravity.").

raised. In declining the Region's request that we examine the penalty assessment with a microscope, we hope to make clear that our most careful scrutiny of penalty amounts will be reserved for those cases where important legal or policy questions are implicated by the calculation, not where the only real disagreement is over value judgments involving relatively insignificant sums of money.

Although reasonable people may disagree over the amount of penalty in a particular case, and such disagreements may indeed provide legitimate bases for appealing virtually any penalty assessment, we are nevertheless concerned that the Complainant's zeal to exact an additional sum in this case is misguided. In that regard we note that Complainant devotes part of its appeal to criticizing the penalty determination because the Presiding Officer stated that it was based on equitable considerations. Specifically, near the end of his decision, the Presiding Officer stated that the 50% reduction in the penalty to $4,080 was "the maximum amount that the facts and law, coupled with equity, can command in this case." Initial Decision at 22. Because the Presiding Officer did not go back and identify or enumerate the specific factors that caused him to reach this conclusion, it is possible, as the Complainant contends, that the decision lacked the requisite degree of specificity to support the reduction.[12] Be that as it may, the Complainant's decision to appeal nevertheless appears to be driven in major part by finding fault in the very fact that the Presiding Officer allowed equity to enter into his decision. According to the Complainant, "[our] main concern here is the Presiding Administrative Law Judge's reliance on opinion and equity in determining the amount of the civil penalty to be assessed." Complainant's Appeal Brief at 11. Because neither the statute nor the regulations refer to "equity," the Complainant argues that the Presiding Officer had no right to apply equitable considerations in assessing a penalty. More particularly, the Complainant states:

> The requirement at 40 C.F.R. § 22.27(b) that "specific reasons" be stated in the initial decision for reducing the civil penalty proposed by Complainant does not allow for the use of opinion in fixing the civil penalty to be assessed. This leaves the matter of equity being applied in connection with that determination.

[12] Although it would have been preferable in the case at hand for the Presiding Officer to have provided a fuller explanation of his reasons for departing from the Complainant's penalty proposal, especially in light of the requirement in section 22.27(b) to provide "specific reasons" for the decrease, we cannot say that his explanation is not commensurate with our own views of how much ink needs to be devoted to this particular matter. As the Presiding Officer put it, "the penalty assessed must not be arrived at with all the understanding of a Grand Inquisitor." Initial Decision at 22.

> The Presiding Administrative Law Judge's statement does not make clear the manner in which the word "equity" is being used. In view of the size of the cut and the absence of explanation one can assume that the word "fairness" can be substituted for the word "equity".
>
> Until the publication of the FIFRA ERP on July 2, 1990,[13] there was no authority under either the statute or the penalty policy to adjust the civil penalty based on a concept of fairness. Section 16(2)(B) of the Toxic Substances Control Act (TSCA) [15 U.S.C. § 2615(B)] on the other hand, has always provided for an adjustment based on "such other matters as justice may require." Such language will permit the Presiding Administrative Law Judge's concern with fairness to be applied in an action under TSCA. Perhaps the Presiding Administrative Law Judge had TSCA in mind when he applied equity in reducing the amount of the civil penalty in this case.

Id. at 11-12. Notwithstanding the foregoing remarks of the Complainant, fairness and equity are appropriate considerations in assessing civil penalties under FIFRA. Although "fairness," "equity," and "other matters as justice may require" are not specifically mentioned in the penalty provisions of FIFRA, they are nonetheless fundamental elements of the regulatory scheme. Why else would the statute require the Agency to hold a hearing before imposing a penalty, except to ensure that the proceedings and the penalty itself are fair? *See* FIFRA § 14(a)(3). Why else would the statute instruct the Agency in determining the amount of the penalty to "consider the appropriateness of such penalty to the size of the business of the person charged, the effect of the person's ability to continue in business, and the gravity of the violation," except to ensure that the penalty is fair? *See* FIFRA § 14(a)(4). Why for that matter would the statute confer discretion on the Agency to impose a range of civil penalties (not to exceed $5,000 for a single violation), except to ensure that the penalty is fair? *See* FIFRA § 14(a)(1). We think the answer in each case is self-evident. Moreover, as noted earlier, the penalty guidelines applicable to this case specifically allow extraordinary adjustments under special circumstances when "equity" requires.[14] Accordingly, we reject the Complainant's suggestion that the

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[13] *See* note 2 *supra.*

[14] As to the consideration of equity, the penalty guidelines provide in relevant part as follows:

> (3) *Special circumstances.* Should a case arise in which * * * there are no grounds for adjustment of the proposed penalty

Continued

Presiding Officer erred by taking equitable considerations into account in reducing the penalty below the amount called for by the guidelines.

We turn now briefly to several other specific contentions of the Complainant.

A. *Size-of-Business*

The Presiding Officer classified Respondent's business as a Category IV business based on the testimony of Leonard M. Faike, a Certified Public Accountant, that Respondent's gross revenues for the year preceding the violation (1987-1988) were $875,068, and based also on Respondent's Exhibit 15, which contains a graph and chart purporting to provide "business statistics" with regard to Respondent's business for fiscal years 1985-86 through 1989-90. Initial Decision at 23. The Complainant contends that the Presiding Officer erred in classifying Respondent as a Category IV business because the Guidelines require the Presiding Officer to assume that Respondent is a Category V business unless it furnishes certified financial records demonstrating otherwise. The Complainant is mistaken. The Guidelines do not require the violator to produce *certified financial records* to demonstrate the size of its business; they merely require that the violator provide *reliable data.*[15] 39 Fed. Reg. 27712. *See In re Custom Chemical and Agricultural Consulting, Inc.*, FIFRA Appeal No. 86-3 (CJO, March 6, 1989). The Presiding Officer found Mr. Faike's testimony reliable and the Complainant did not introduce any evidence to rebut it.[16]

> based on either new financial or other facts or on a showing of inability to continue in business, and that *equity* cannot be served by adjusting the proposed penalty the allowable forty percent (40%), [the relevant officials may make] an extraordinary adjustment in the proposed penalty. In such case, a "special circumstances" statement shall be sent * * * setting forth with particularity (1) the facts of the case involved, (2) why the penalty provided by the Assessment Schedule would be *inequitable*, (3) how all methods for adjusting or revising the unadjusted penalty will not adequately resolve the *inequity*, and * * *.

39 Fed. Reg. 27712 (July 31, 1974) (emphasis added).

[15] In contrast, certified records *are* required to prove that a proposed penalty would impair the violator's ability to remain in business. 39 Fed. Reg. 27711.

[16] The Board relies on Mr. Faike's testimony for its decision. Respondent's statistical evidence (*see* RX 15) is consistent with Faike's testimony but is too cryptic to be of much probative value.

Respondent appended several documents containing financial information that are not part of the administrative record to its Reply Brief. The Region's motion to strike these documents from the record on appeal is granted.

Therefore, the Presiding Officer did not err when he considered Respondent a Category IV business for purposes of calculating base penalty amounts on the Assessment Schedule.

B. *Gravity of Violations*

In concluding that a penalty of $4,080 was appropriate in this case, the Presiding Officer stated that his decision to reduce the penalty had been influenced by three considerations that had "weigh[ed] heavily in Respondent's favor": first, that Respondent was not aware of FIFRA at the time of the violations; second, that it had "demonstrated good faith" because it "immediately came into compliance when informed of the violation[s];" and third, that it had no history of prior FIFRA violations. *Id.* at 22. The Presiding Officer added that the single sale of BioGuard "in a plain plastic bag is, simply on the totality of facts in this matter, not as serious as portrayed by the complainant." *Id.* at 22. He noted earlier in the decision that bromine tablets registered for pool and spa use contain the same active pesticidal ingredient and that pool and spa waters often intermingle in a single system, inferring that the two products may be used interchangeably without significant risk. *See id.* at 10-11.

In its appeal, the Complainant does not dispute that Agency regulations permit a Presiding Officer to deviate from the Complainant's penalty recommendation. Rather, the Complainant asserts that, in this case, the Presiding Officer did not assess a penalty in accordance with "applicable law and policy" in three respects. The Complainant argues, first, that the Presiding Officer erred in not making "ultimate findings of fact," as required by 40 C.F.R. § 22.27(b). Second, the Complainant contends that the Presiding Officer gave undue weight to Respondent's lack of knowledge of the requirements of FIFRA as a basis for reducing the base penalty amount for the violations. Third, as previously discussed, the Complainant claims that the Presiding Officer based his penalty assessment on "opinion and equity," in violation both of the FIFRA guidelines and the regulatory requirement that he provide "specific reasons" for deviating from the Complainant's penalty proposal. *See* 40 C.F.R. § 22.27(b). Complainant's Appeal Brief at 11.

As explained previously, we are not persuaded that the Complainant's arguments warrant putting the Presiding Officer's penalty assessment under a microscope. Among other things, there is nothing about the higher penalty advocated by the Complainant that would have any discernable deterrent effect on the Respondent. We agree wholly with the Complainant that Respondent should have made more

vigorous efforts to acquaint itself with the law.[17] However, the Complainant has not convinced us that the Presiding Officer abused his discretion in concluding, based on the entire circumstances of these violations, that Respondent acted in good faith.[18] The Presiding Officer was influenced not only by Respondent's ignorance of the law but by Respondent's favorable compliance history, its cooperative attitude during the investigation of the violations, and its prompt compliance upon notification of the violations. He had the opportunity to observe the demeanor of Respondent's personnel at the hearing and he presumably also took those observations into account in evaluating the gravity of Respondent's misconduct. The Presiding Officer may properly consider all of these factors in determining an appropriate penalty amount. *See, e.g., In re High Plains Cooperative, Inc.* (reducing a civil penalty from $5,000 to $500 based on the circumstances of the violation).

Moreover, we note that civil penalties under FIFRA "are intended to deter through regulation, not reprimand through punishment." *In re South Coast Chemical, Inc.*, FIFRA Appeal No. 84-4, at 4 (CJO, March 11, 1986), quoting from *In re Briggs & Stratton Corp.*, TSCA Appeal No. 81-1 (Feb. 4, 1981). Respondent's president has expressed contrition and a commitment that the violations will not occur again. As noted *supra* at n.2, he has closed the Reno store where the violations occurred. Based on the entire record of this case, we conclude that a penalty of $4,080 will be of sufficient magnitude to deter Respondent from future violations, and the Complainant has not presented any basis for believing otherwise.

One remaining matter requires discussion. Although the Complainant has not taken issue in this appeal with the Presiding Officer's description of these violations as "not as serious as portrayed by complainant," we feel compelled, despite our affirmance, to make clear that we strongly disagree with his conclusion. BioGuard for Swimming Pools contains a highly toxic active pesticidal ingredient. Tr. 135. According to Respondent, simply counting out these bromine tablets for repackaging required "rubber gloves, safety goggles, and a chemical

[17] According to Ms. Sherrie Brundage, Respondent's office manager, Respondent was "unaware of FIFRA at the time * * * [and] could not come up with a legal reason" why it could not sell bromine tablets registered for pool use to its spa customers. Tr. 246.

[18] In *In re Custom Chemical & Agricultural Consulting, Inc. et al.*, it was held that a pesticide seller who believed that his conduct fell in a "gray area of the law" but made no effort to determine whether his conduct was legal had not demonstrated good faith. However, the *Custom Chemical* case is factually distinguishable. The violator in that case had deliberately falsified reports to conceal his unlawful activity.

dust mask" and was an "extremely unpleasant" task. Amended Answer at 3. The sale of such a product in an unlabeled plastic bag, in conjunction with an oral statement to the purchaser that the product can be used for an unregistered purpose, poses an obvious risk of injury. If the container in which the BioGuard for Swimming Pools were sold had been properly labeled, it would have borne the warnings: "Danger. Keep Out of Reach of Children." Corrosive. Causes eye and skin damage. "May be fatal if swallowed." It would have stated that adding BioGuard for Swimming Pools to a container that has remnants of other products may cause "a violent reaction leading to fire and explosion." *Id.* It would have contained directions about dosages and instructions for handling and storage. The lack of these warnings and instructions creates a risk that the product will be misused either by its immediate purchaser or by other persons who may come in contact with it. Tr. 135. The risk of harm is particularly high here because the product is sold for residential use in packaging that might make it accessible to and attractive to children.[19] Moreover, although bromine tablets registered for pool use and spa use have the same active pesticidal ingredient, they are used in bodies of water that are substantially dissimilar in size. The record contains no evidence to suggest that the same dosages are appropriate for both locations. Therefore, although the Board is affirming the penalty assessment, we wish to make it clear that violations of this nature should not be regarded as insignificant and may warrant substantially higher penalties under other circumstances.

III. *CONCLUSION*

For the reasons stated above, we hereby assess a total civil penalty of $4,080 against Respondent, consisting of a civil penalty of $2,225 for the violations alleged in Count 2, $750 for the violation alleged in Count 3, and $1,290 for the violation alleged in Count 4. The Complainant is directed to devise an appropriate payment schedule after consultation with the Respondent. Payment shall be made in accordance with the schedule by sending a certified or cashier's check, payable to the Treasurer, United States of America, to:

EPA—Region IX
Regional Hearing Clerk
P.O. Box 360863M
Pittsburgh, PA 15251

So ordered.

[19] Since the gravity of a violation is measured by *potential* rather than actual risk, the fact that the sale was made to an EPA inspector who did not in fact take the product home is irrelevant.

Supplemental Opinion of Judge McCallum, individually:

By announcing today that we are disinclined to examine a Presiding Officer's penalty determination under a microscope in a case where relatively insignificant sums are at issue and the appealing party does not raise any important legal or policy questions, I believe it is fair to say that this "rule of reason" will also serve to discourage frivolous and vexatious appeals by Agency enforcement personnel, and thereby ensure that the process afforded by Board review does not become an unwitting accomplice to overzealous prosecutorial conduct. The Region's argument against the application of equitable principles in making penalty determinations is an example of unchecked zeal that this rule should serve to discourage.

Supplemental Opinion of Judge Reich, individually:

The Board's Opinion in this case articulates a common sense approach to our review of enforcement appeals. Where relatively insignificant sums of money are at issue and no important legal or policy questions are at stake, the Board will not use the same level of scrutiny it applies to appeals where more substantial issues are raised. This is simply an exercise of judicial economy.

In his Supplemental Opinion, Judge McCallum further articulates his views relative to this approach and that compels me to do so as well. I understand but do not fully share Judge McCallum's concern with "frivolous and vexatious appeals" born of Agency overzealousness. Relatively few of the appeals we receive fit within that category. Further, such appeals will invariably be unsuccessful, and thereby ultimately discouraged. If our articulation of how we approach such cases expedites this learning process, then it serves a useful purpose.

In this regard, the Agency should assure in considering an appeal that it does not lose sight of the purposes behind administrative penalty assessments. EPA's *Policy on Civil Penalties* dated February 6, 1984 sets forth three goals for penalty assessment-deterrence, fair and equitable treatment of the regulated community, and swift resolution of environmental problems. Even if the penalty assessed by the Presiding Officer is not the full amount sought by the Agency, the Agency should carefully evaluate the penalty relative to the particular facts and circumstances of the violator and violation and its stated goals for penalty assessment in deciding whether to appeal.