IN RE SAFE & SURE PRODUCTS, INC. AND LESTER J. WORKMAN

FIFRA Appeal No. 98–4

FINAL DECISION

Decided July 27, 1999

Syllabus

Safe & Sure Products, Inc. ("Safe & Sure") and Lester J. Workman ("Mr. Workman") (collectively "Respondents") appeal an Initial Decision in which the Presiding Officer assessed a $30,000 civil penalty against them jointly and severally for multiple violations of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. §§ 136–136y. The Presiding Officer held that Mr. Workman is individually liable for one violation of FIFRA § 12(a)(2)(B) and 40 C.F.R. § 167.20 for failing to submit a 1989 annual establishment pesticide production report for Safe & Sure Pesticides Company, a sole proprietorship Mr. Workman formerly owned and operated (Count 1). He further held that Mr. Workman and Safe & Sure are jointly and severally liable for an additional 84 violations (Counts 2–85). These 84 violations consisted of: (1) 44 violations of FIFRA § 12(a)(1)(A) by selling or distributing a pesticide product that was not registered with EPA; (2) 36 violations of FIFRA § 12(a)(1)(E) by selling or distributing a "misbranded" pesticide; (3) two violations of FIFRA § 12(a)(2)(B)(iii) by refusing to allow EPA and Florida state inspectors to inspect Safe & Sure's business premises and copy records; and (4) two violations of FIFRA § 12(a)(2)(B)(i) by refusing to prepare, maintain or submit records. The Presiding Officer based his holding that Mr. Workman is individually liable for the violations alleged in Counts 2–85 on two independent legal doctrines: (1) he held Mr. Workman individually liable as the alter ego of Safe & Sure, based on the doctrine of "piercing the corporate veil"; and (2) he held Mr. Workman individually liable as a "person" (within the meaning of FIFRA § 2(s)) who engaged in the unlawful acts specified in the complaint.

Respondents argue on appeal that the Presiding Officer should not have held Mr. Workman individually liable for the violations alleged in Counts 2–85 based on the doctrine of piercing the corporate veil. They also maintain that the Presiding Officer should not have assessed a civil penalty of $30,000 against Respondents. They contend that the Presiding Officer should have issued a warning, rather than assessing a civil penalty, because there was no showing that Respondents' sale of unregistered pesticides caused any harm. For similar reasons, they argue that, if any penalty is assessed, it should be minimal. Finally, they contend that Safe & Sure is no longer financially solvent and therefore would be unable to pay any civil fines levied against it.

Held: (1) Since Respondents did not appeal the Presiding Officer's holding that Mr. Workman is individually liable for the violations alleged in Counts 2–85 as a "person" who engaged in the unlawful conduct specified in the complaint, the Presiding Officer's holding is dispositive as to Mr. Workman's individual liability as a person. The Presiding

Officer's holding on this issue is well supported by the law and the administrative record. Because that holding is affirmed, the Environmental Appeals Board declines to decide whether the Presiding Officer's holding on the "piercing the corporate veil" doctrine is also correct.

(2) Respondents' arguments relating to the $30,000 penalty assessment lack merit.

(a) The Board rejects Respondents' arguments that the Presiding Officer should have either issued a warning or assessed a minimal penalty. FIFRA authorizes, but does not require, the Agency to issue warnings, and the facts here show that a penalty is appropriate. The Board disagrees that only a minimal penalty is warranted, given the harm to the FIFRA registration program that results from a failure to comply with registration requirements. Additionally, a substantial penalty is appropriate because of the large number of violations, the widespread distribution of Respondents' unregistered and misbranded products, and the long time period over which the violations occurred.

(b) The Presiding Officer carefully analyzed the statutory factors in FIFRA § 14(a)(4) and considered and weighed the testimony of witnesses and the evidence or lack thereof on key contested issues such as ability to pay. He properly relied on Region IV's expert testimony that Respondents could collectively pay a $30,000 penalty. Respondents did not rebut the Region's *prima facie* case with respect to ability to pay/continue in business. The Board finds no clear error of law or abuse of discretion in the Presiding Officer's assessment of a $30,000 penalty.

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

Opinion of the Board by Judge Stein:

I. *INTRODUCTION*

Safe & Sure Products, Inc. ("Safe & Sure"), a corporation doing business in Sarasota, Florida, and Lester J. Workman ("Mr. Workman") (collectively "Respondents") have appealed an Initial Decision of Administrative Law Judge William B. Moran ("Presiding Officer"), issued June 26, 1998, assessing against them jointly and severally a civil penalty of $30,000 for multiple violations of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. §§ 136–136y.

The Presiding Officer held that Mr. Workman is individually liable for one violation of FIFRA § 12(a)(2)(B), 7 U.S.C. § 136j(a)(2)(B), and 40 C.F.R. § 167.20, for failing to submit a 1989 annual establishment pesticide production report for Safe & Sure Pesticides Company, a sole proprietorship that Mr. Workman formerly owned and operated (Count 1). Initial Decision at 28. The Presiding Officer also held that Mr. Workman and Safe and Sure are jointly and severally liable for an additional 84 violations (Counts 2–85). *Id.* at 29, 31, 33, 46. Specifically, he held that Mr. Workman and Safe & Sure: (1) violated FIFRA § 12(a)(1)(A), 7 U.S.C.

§ 136j(a)(1)(A), on 44 occasions by selling or distributing a pesticide product that was not registered with EPA, as required by FIFRA § 3(a), 7 U.S.C. § 136a(a);[1] (2) violated FIFRA § 12(a)(1)(E), 7 U.S.C. § 136j(a)(1)(E), on 36 occasions, by selling or distributing a "misbranded" pesticide;[2] (3) violated FIFRA § 12(a)(2)(B)(iii), 7 U.S.C. § 136j(a)(2)(B)(iii), on two occasions by refusing to allow EPA and Florida state inspectors to inspect the Safe & Sure facility at 9239 Derek Way, Sarasota, Florida, and to copy records;[3] and (4) violated FIFRA § 12(a)(2)(B)(i), 7 U.S.C. § 136j(a)(2)(B)(i), on two occasions by "refus[ing] to * * * prepare, maintain or submit any records required by or under sections 5, 7, 8, 11 or 19 [of FIFRA]."[4]

Prior to the issuance of the Initial Decision, Respondents entered into a joint stipulation that Mr. Workman is liable for the violation alleged in Count 1 of the Complaint, and that Safe & Sure is liable for the violations alleged in Counts 2–85 of the Complaint. Joint Proposed Findings of Fact and Conclusions of Law (Mar. 13, 1998) ("Joint Stipulation") ¶¶ II.4, .9, .13, .16, .18. The only issues Respondents raise on appeal relate to Mr. Workman's individual liability for the violations alleged in Counts 2–85, and the total penalty amount. Notice of Appeal of Appellant Safe & Sure Products Inc. and Lester J. Workman ("Appeal") at 1.

For the reasons stated below, we reject Respondents' arguments on appeal. Accordingly, we hold Mr. Workman individually liable for the violation alleged in Count 1 of the Complaint, and we hold Mr. Workman and Safe & Sure jointly and severally liable for the violations alleged in Counts 2–85 of the Complaint. We further affirm the Presiding Officer's assessment of a $30,000 civil penalty against the Respondents.

II. *BACKGROUND*

A. *Statutory Background*

FIFRA regulates the manufacture, sale, and use of pesticides in the United States by means of a national registration system. In pertinent part, the statute requires (with some exceptions not relevant here) that pesticides manufactured for sale within the United States be registered with

[1] Initial Decision at 29.

[2] *Id.* at 31.

[3] *Id.* at 32–33.

[4] *Id.* at 33.

EPA, FIFRA § 3(a), 7 U.S.C. § 136a(a); that pesticide-producing establishments be registered with EPA, FIFRA § 7, 7 U.S.C. § 136e; and that pesticide-producing establishments file an annual establishment pesticide production report, FIFRA § 7(c), 7 U.S.C. § 136e(c); *see* 40 C.F.R. § 167.20. Additionally, among other things, FIFRA § 12(a)(1)(A), 7 U.S.C. § 136j(a)(1)(A), makes it unlawful for any person to sell or distribute unregistered pesticides. Furthermore, FIFRA § 12(a)(1)(E), 7 U.S.C. § 136j(a)(1)(E), makes it unlawful to sell a pesticide that is "misbranded," as defined in FIFRA § 2(q), 7 U.S.C. § 136(q).[5] Pursuant to FIFRA § 14(a), 7 U.S.C. § 136l(a), a civil penalty of $5,000 may be assessed for each violation of FIFRA.[6]

B. *Factual and Procedural Background*

Mr. Workman has manufactured pesticide products in Sarasota, Florida since 1978, and has sold them throughout the United States to distributors, veterinarians, kennels, animal hospitals, and pet stores.[7] Joint Stipulation ¶¶ I.5, .7; Hearing Transcript ("Tr.") at 254–55. From 1978 to 1990, Mr. Workman conducted business as a sole proprietorship under various names, including Safe and Sure Pest-Kill Company and Safe and Sure Pesticides Company. Initial Decision at 3–4. He incorporated the business as Safe & Sure Products, Inc. on December 27, 1990. *Id.* Respondents have stipulated that:

> From 1978 through the present, Lester Workman has been the president, operator and owner of the various business manifestations of Safe and Sure and as such is individually responsible for the actions of the businesses.

[5] FIFRA § 2(q) defines a pesticide as "misbranded" if, among several other matters, its labeling bears any statement relative thereto or to its ingredients that is false or misleading in any particular. A pesticide is also misbranded if its label does not bear the registration number assigned to each establishment at which it was produced.

[6] Subsequent to the violations at issue in this case, Congress enacted the Debt Collection Improvement Act of 1996, which directs EPA and other federal agencies to adjust maximum civil penalties on a periodic basis to reflect inflation. The Agency has published inflation-adjusted maximum penalties that apply to violations occurring after January 30, 1997. *See* 40 C.F.R. pt. 19.

[7] *See* Books and Records Inspection Report (Mar. 23, 1994) (Government's Exhibit ("G Ex") 54), for invoices reflecting sales of Respondents' pesticide products to purchasers in Alabama, California, Florida, Georgia, Indiana, Iowa, Louisiana, Kentucky, Massachusetts, Mississippi, Missouri, Nebraska, New York, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Vermont, Virginia, and Wisconsin. *See* Initial Decision at 5–27.

Joint Stipulation ¶ I.6. Respondents acknowledge that Mr. Workman and Safe & Sure have been "unsuccessful in complying with numerous statutory requirements [of FIFRA] for the past ten years." Tr. at 157. A summary of Respondents' history of noncompliance and government efforts to bring Respondents into compliance follows.

Between December 1983 and March 1985, the Florida Department of Agriculture and Consumer Services ("FLDACS") conducted an investigation of Mr. Workman's sales of the pesticide "De-Flea Concentrate." Joint Stipulation ¶ I.8. Based on that investigation, FDLACS sent Mr. Workman several warnings advising him that he was violating FIFRA by distributing an unregistered pesticide product and by operating an unregistered pesticide-producing establishment. *Id.* Mr. Workman subsequently obtained a conditional EPA registration for "De-Flea Concentrate" on September 9, 1985. *Id.* ¶ I.9. However, EPA cancelled the conditional registration effective July 1, 1987, because of Mr. Workman's "fail[ure] to provide EPA with testing data on the product as required by 40 C.F.R. §§ 152 *et seq.*, 158 *et seq.*"[8] *Id.* ¶ I.10; Initial Decision at 4. Respondents have stipulated that they did not appeal the cancellation order, and that "neither Respondent has ever applied to have any [] product [other than De-Flea Concentrate] registered with EPA." Joint Stipulation ¶ I.10.

FLDACS inspector Kathleen Osgood visited Mr. Workman's residence at 3612 South Lockwood Ridge Road, Sarasota, Florida (which was also the business address of Safe & Sure Pest-Kill Company) on February 22, 1986, and January 6, 1987, "trying to get Mr. Workman to complete the paperwork to apply for an EPA registration number."[9] Tr. at 57. Ms. Osgood returned there on July 22, 1987, and "had [Mr. Workman] complete the paperwork [for an EPA establishment registration] while [she] was there." Tr. at 57–58; G Ex 22. Mr. Workman obtained EPA establishment registration number 45729–FL–001 for Safe and Sure Pesticides Company in July 1987. Joint Stipulation ¶ I.11.

On October 27, 1987, FDLACS sent Mr. Workman a letter advising him that "[r]ecordkeeping is a significant aspect of pesticide production

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[8] EPA also issued an order on October 10, 1989, in which it cancelled the registration of De-Flea Concentrate for non-payment of an annual registration maintenance fee. G Ex 10. The October 10, 1989 order states that if the registration of De-Flea has been previously cancelled for some other reason, the date of the earlier cancellation controls. *Id.*

[9] She observed during the visit that Mr. Workman was holding for sale misbranded containers of De-Flea Concentrate. Among other things, Respondents were using the establishment registration number of the Tampa Bay Chemicals Company, although the pesticide products had been produced by Safe & Sure. Tr. at 60–61; G Ex 22.

and marketing" and that he should familiarize himself with FIFRA's recordkeeping requirements. G Ex 25. Despite FLDACS's efforts to bring Mr. Workman into compliance with FIFRA, Mr. Workman did not file an annual establishment report for either 1987 or 1988, as required by FIFRA § 7(c), until after the deadline had passed and he had received warning letters from EPA.[10] Initial Decision at 5; Joint Stipulation ¶ I.12.

EPA conducted five marketplace inspections (inspections at locations where products are distributed on a retail level)[11] between July 10, 1991, and December 6, 1991, at various locations in Florida. EPA inspectors documented during these inspections that Safe & Sure was selling and had sold several unregistered and misbranded pesticides. Initial Decision at 5–11.

On March 17, 1992, FLDACS inspectors attempted to conduct a pesticide-producing establishment inspection at 4329 Derek Way, Sarasota, Florida, a location where Safe & Sure maintains an office and storage space, Tr. at 87, but they were not allowed to enter the facility, to inspect, to copy records, or to collect samples.[12] Joint Stipulation ¶ I.39; Initial Decision at 11. They returned to the Derek Way premises on May 28, 1992, with an Administrative Search Warrant that had been issued by a United States Magistrate on May 22, 1992, pursuant to FIFRA § 9(c). Tr. at 87; G Ex 12. The inspectors were initially admitted and given access to corporate records by a Safe & Sure employee, who told them that Mr. Workman was out of town. G Exs 13, 35. However, later that afternoon, Mr. Workman telephoned the facility and told the inspectors to leave. G Ex 35. In accordance with instructions from Mr. Workman, the employee did not allow the inspectors to remove certain records for copying. G Exs 13, 35; *see also* Initial Decision at 11. Before leaving, the inspectors documented that Safe & Sure was holding seven unregistered pesticides for

[10] U.S. EPA Region IV sent warning letters to Mr. Workman on July 5, 1988, and July 31, 1989, when he missed the filing deadlines for his 1987 and 1988 reports. *See* G Exs 1, 3.

[11] Tr. at 48.

[12] The inspectors had first presented their credentials to Mr. Workman at 3612 South Lockwood Ridge Road, Sarasota, Florida and had been told by Mr. Workman that Safe & Sure had been sold and that he did not know who owned it or where it was located. Tr. at 82–83; G Ex 33. When the inspectors subsequently arrived at 4239 Derek Way, Mr. Workman was present and told the inspectors that he was a "consultant" who had been given authority to speak on behalf of the owners and that "the owners told him to not allow the inspectors any access to the firm and any shipping documentation." G Ex 33.

distribution or sale, some of which were also misbranded. Initial Decision at 11–12; Joint Stipulation ¶¶ I.16, .17, .39–.44.[13]

U.S. EPA Region IV ("Region IV" or "the Region") conducted additional marketplace inspections at businesses in Florida, Georgia, Kentucky, and Tennessee between June 2 and June 11, 1992. At fifteen locations, inspectors documented the presence of unregistered pesticide products that had been distributed or sold by Safe & Sure. *See* Initial Decision at 12–26.

Region IV issued the original complaint in this matter on September 27, 1990. Initial Decision at 3; Joint Stipulation ¶ I.13. The complaint alleged a single violation of FIFRA against Safe and Sure Pesticide Company and Mr. Workman for the failure to file an annual pesticide-producing establishment report for calendar year 1989. The Region sought a penalty of $3,000. Respondents filed an answer on October 18, 1990, denying the alleged violation. The Region filed a third amended complaint[14] on August 31, 1993, against Mr. Workman and Safe & Sure, alleging 85 violations of FIFRA, *see supra* Part I, for which it proposed a total civil penalty of $423,000 ("Third Amended Complaint," also referred to herein as the "Complaint").

When settlement discussions proved unsuccessful, the Presiding Officer held a hearing on November 13, 1997.[15] The Region informed the Presiding Officer at the hearing that it had reduced the proposed penalty amount from $423,000 to $229,800 based on a revised estimate of Safe & Sure's business revenues. Tr. at 9.[16]

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[13] The United States District Court for the Middle District of Florida, Tampa Division, issued an Order on March 7, 1994, finding Mr. Workman in civil contempt of court for failing to comply with the Administrative Warrant. G Ex 21.

[14] The Region first amended the complaint on March 8, 1991, to name Safe and Sure Pesticide Company as the sole respondent. The Region subsequently amended the complaint on July 23, 1991, to name both Safe and Sure Pesticide Company and Mr. Workman individually as respondents.

[15] The Region moved for a partial accelerated decision on Mr. Workman's liability for Count 1 and Safe & Sure's liability for Counts 2–85, arguing that the record contained no evidence that refuted these charges. Tr. at 11–12. The Presiding Officer denied the motion "in the spirit of giving [Mr. Workman] the full and fair opportunity to defend against these charges." Tr. at 14.

[16] Cheryl Jones, an enforcement specialist with Region IV, testified that she had calculated a revised penalty of $229,800 in accordance with the Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act (July 2, 1990) ("ERP") (G Ex 55). Tr. at 142. Under the ERP, a base penalty amount is determined for each violation based

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C. *The Initial Decision*

The Presiding Officer issued the Initial Decision on June 26, 1998, in which he held that Mr. Workman and Safe & Sure had violated FIFRA as alleged. As noted *supra* Part I, Respondents had acknowledged, prior to the issuance of the Initial Decision, that Mr. Workman is liable for the reporting violation alleged in Count 1 of the Complaint, and that Safe & Sure is liable for all of the violations alleged in Counts 2–85 of the Complaint. Therefore, the Presiding Officer's Initial Decision primarily focused on Mr. Workman's individual liability for the violations alleged in Counts 2–85 and the penalty amount.

The Presiding Officer stated that he based his holding that Mr. Workman is individually liable for the violations alleged in Counts 2–85 on two independent legal doctrines. Initial Decision at 41. First, he held, after examining available case law and the evidence in the record, that "the corporate veil should be pierced," resulting in Mr. Workman's personal liability for the violations. *Id.* at 39. Second, and more significantly in the context of the issues raised in this appeal, the Presiding Officer held that, apart from any corporate veil issue, Mr. Workman is individually liable for violating FIFRA. *Id.* at 40–42. Under FIFRA § 12, it is unlawful for any "person" to engage in the unlawful acts specified therein. The parties have stipulated (and the Presiding Officer concluded) that Mr. Workman is a "person" within the meaning of FIFRA § 2(s). Joint Stipulation ¶ I.3; Initial Decision at 28. The Presiding Officer found that "Mr. Workman, and no one else, is the person who has always made the decisions for Safe & Sure" and therefore that he is individually liable for the violations. Initial Decision at 42.

The Presiding Officer concluded that a $30,000 penalty, assessed jointly and severally against both Respondents, is appropriate for the violations. Initial Decision at 45. The Presiding Officer determined that Respondents have the ability to pay a $30,000 penalty, relying principally on the testimony of EPA witness Mr. Willard Waisner ("Mr. Waisner"), an EPA financial analyst. He noted that the Region has not formally amended its penalty proposal from $229,800 to $30,000, but he concluded, based on the testimony of Mr. Carlton Layne, Chief of Region IV's

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on the gravity "level" of the violation and the size of business category of the violator. ERP at 18. Ms. Jones stated that she had initially calculated a total penalty of $423,000, based on her assumption that Respondent was a Category I business (with business revenues in excess of $1 million), but had subsequently re-classified the business as a Category III business, the lowest "size of business" category. Tr. at 142, 146. She characterized the business as at "the upper end of the small business category." Tr. at 146.

Pesticide Division, that the Region had amended its penalty proposal *"de facto."* [17] *Id.* at 44.

The Presiding Officer concluded that:

> [B]ased upon the testimony provided by EPA witnesses Carlton Layne and Willard Waisner in this matter and the lack of any evidence to the contrary concerning the Respondent Workman's financial condition and the financial information available concerning Safe & Sure's financial condition, EPA's *de facto* amendment of the penalty amount it is seeking in this matter, and my consideration of the statutory factors, I find that the proper amount of penalty in this matter to be $30,000.00.

Initial Decision at 45.

D. *The Appeal*

Respondents raise only two basic issues on appeal. First, they argue that the Presiding Officer erred when he held Mr. Workman individually liable for the violations alleged in Counts 2–85 based on the legal doctrine of "piercing the corporate veil." Appeal at 1, 3, 4. Second, they argue that the $30,000 penalty amount assessed against the Respondents is excessive, and that the Respondents "cannot absorb [it] and still remain in business." *Id.* at 4. Accordingly, they urge the Board to impose either a nominal penalty or a warning. *Id.* at 5–6.

In response, Region IV urges the Environmental Appeals Board ("Board") to reject Respondents' arguments on appeal and to affirm the

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[17] In response to a question from the Presiding Officer whether the Region was seeking a penalty of $229,800 or a penalty of $30,000, Mr. Layne testified that "[i]t's not an easy yes or no." Tr. at 236. He further testified that he would have accepted a $30,000 penalty amount if that amount had been offered as a settlement by Respondents. Tr. at 237. Mr. Layne further stated that "Mr. Waisner's evaluation is probably accurate," *id.,* presumably referring to Mr. Waisner's testimony that Respondents could collectively pay a $30,000 penalty. Tr. at 204. The Region's attorney stated at the hearing that "[t]here's no explicit amendment of the [$229,800] penalty proposal." Tr. at 205. Nevertheless, the Presiding Officer concluded that Mr. Layne has final authority in setting penalty amounts in FIFRA cases, and that "it is clear from his testimony that EPA has, *de facto,* amended the penalty amount it is seeking in this matter to $30,000." Initial Decision at 44. Regardless of whether the Region has amended its penalty request, a question we do not reach, the Presiding Officer has the "discretion to assess a penalty different in amount from the penalty requested in the complaint." *In re Predex Corp.,* 7 E.A.D. 591, 596 (EAB 1998); *see also In re Lin,* 5 E.A.D. 595, 599 (EAB 1994).

Initial Decision. Region IV's Response Brief ("Response Brief") at 2. The Region asserts that the Presiding Officer held Mr. Workman individually liable on two independent grounds. *Id.* It points out that Respondents have only appealed the Presiding Officer's liability holding regarding piercing the corporate veil and have not appealed the Presiding Officer's other liability holding—i.e., that Mr. Workman is liable as a "person" who violated FIFRA. *Id.* It contends, therefore, that Mr. Workman's individual liability for the violations "is already established" and that the issue of whether Mr. Workman is personally liable under a veil-piercing theory is moot. *Id.* at 2–3.

Region IV further asserts that the record supports the Presiding Officer's assessment of a $30,000 civil penalty against Respondents. Region IV did not file an appeal of the $30,000 penalty assessment, but it nonetheless requests in its Response Brief that the Board modify the Presiding Officer's order to increase the assessed penalty to "$229,000," in light of the "number, duration and scope of the violations of FIFRA in this matter." *Id.* at 30.

III. *DISCUSSION*

For the reasons stated below, we deny the appeal and affirm the civil penalty assessment of $30,000 against both Respondents.

A. *Mr. Workman's Individual Liability*

The Region correctly points out that the Presiding Officer held Mr. Workman personally liable for the violations alleged in Counts 2–85 based on two independent legal grounds. As noted *supra*, he first concluded that the corporate veil should be pierced, resulting in Mr. Workman's personal liability for the violations. Initial Decision at 39–40. He then separately considered "[w]hether, *independent of any corporate veil theory,* Lester Workman should be liable for his actions as a person under FIFRA." *Id.* at 40 (emphasis added). He concluded:

> As the Government's Exhibits demonstrate beyond any doubt, it is clear that Lester J. Workman is, effectively, Safe & Sure, in the sense that he is its controlling figure. As the principal stockholder and the only functioning corporate officer, Mr. Workman, and no one else, is the person who has always made the decisions for Safe & Sure. Among others, Government Exhibits 13, 20, 21, 23–29, 33–35, 61–62 and Transcript Pages 57–59, 70, 72,

> 81–83, 85–86, 114, 118, 134 amply demonstrate this. These Exhibits also reveal recalcitrance and dissemination of misleading information by Mr. Workman to state and federal environmental enforcement authorities as well as longstanding efforts by these enforcement authorities, as far back as 1985, to get Mr. Workman to comply with EPA pesticide registration requirements.

Initial Decision at 42; *see also id.* at 4. Therefore, Mr. Workman is "clearly liable for his actions as a 'person' under FIFRA." *Id.* at 42.

Under the Agency's Consolidated Rules of Practice, Respondents had the opportunity to challenge the Presiding Officer's adverse ruling that Mr. Workman is liable as a "person" who violated FIFRA by filing a timely appeal of that holding. 40 C.F.R. § 22.30(a) (any party may appeal an "adverse ruling" or order of the presiding officer; the notice of appeal should specify alternative findings of fact and conclusions of law and a statement of the issues for review). Respondents have not done so. Therefore, the Presiding Officer's holding is dispositive as to Mr. Workman's individual liability as a person. *See In re J.V. Peters & Co.,* 7 E.A.D. 77, 105–06 (EAB 1997) (Respondents' appeal fails to address the substance and findings of liability and the amount of the penalty; therefore, we need not consider these substantive issues); *see also* 40 C.F.R. § 22.27(c) (initial decision of the presiding officer shall become the final order of the Board unless an appeal is taken or the Board reviews the decision *sua sponte); cf. In re Everwood Treatment Co.,* 6 E.A.D. 589, 600 n.20 (EAB 1996) (by failing to file an appeal, Everwood failed to secure its right to review on issues outside the scope of the Region's appeal), *aff'd,* No. 96–1159–RV–M (S.D. Ala., Jan. 21, 1998). It is unnecessary to decide whether the Presiding Officer correctly found Mr. Workman liable based on a veil-piercing theory since Mr. Workman's liability has been independently established on another ground.

In any event, the Presiding Officer's holding that Mr. Workman is individually liable as a person for the unlawful conduct alleged in the Complaint is well-supported by the law and the administrative record. As stated *supra* in Part II.C, FIFRA § 12(a)(2), 7 U.S.C. § 136j, provides that it is unlawful for "any person" to perform the actions specified therein. Respondents have stipulated that Mr. Workman is a "person" within the meaning of FIFRA § 2(s),[18] who is "subject to FIFRA and the regulations promulgated thereunder." Joint Stipulation ¶ I.3. Furthermore, they stip-

[18] Under FIFRA § 2(s), 7 U.S.C. § 136(s), the term "person" means "any individual, partnership, association, corporation, or any organized group of persons whether incorporated or not."

ulated that "[f]rom 1978 through the present, Lester Workman has been the President, operator and owner of the various business manifestations of Safe & Sure, and as such he is individually responsible for the actions of the businesses." *Id.* ¶ I.6. These stipulations alone are tantamount to an admission that Mr. Workman is accountable as an individual for the violations of FIFRA alleged in Counts 2–85 of the Complaint. We recently stated in *In re Antkiewicz,* 8 E.A.D. at 230 (EAB 1990), that Mr. Antkiewicz, in addition to the corporation, is individually liable for violations because:

> [G]iven his active involvement and oversight of all aspects of [the corporation's] operations, he should have ensured his company's compliance with the pesticide laws. * * * [He,] the person with the greatest responsibilities in the conduct of PEPA's business, was plainly the "guiding spirit" and "central figure" in [the corporation's] activities * * *. Accordingly, he will be held to account for the company's shortcomings.

Id. (citations omitted.) Accordingly, for similar reasons, Mr. Workman is liable as an individual for Counts 2–85 of the Complaint, and it is unnecessary to reach the question whether it is appropriate to pierce the corporate veil.

B. *Civil Penalty Assessment*

Respondents appeal the $30,000 penalty assessment, raising essentially three arguments. We will address each in turn.

1. *A Warning Is Not Appropriate*

Respondents argue that the "appropriate action" in this case is the issuance of a warning, rather than the assessment of a civil penalty, because Safe & Sure's products are "completely non-toxic," and pose no threat to people, animals, or the environment. Appeal at 6. They urge that absent a showing that "some harm, no matter how small, resulted from [Respondents'] sale of unregistered pesticides, a warning should be issued." *Id.*

We find no merit to their argument. FIFRA § 14(a)(4) provides that the Administrator may issue a warning whenever the Administrator finds that "the violation occurred despite the exercise of due care or did not cause significant harm to health or the environment."[19] 7 U.S.C.

§ 136l(a)(4). Notably, FIFRA "does not require the Agency to issue warnings instead of penalties," even if one of the conditions for issuing a warning exists. *In re Green Thumb Nursery, Inc.,* 6 E.A.D. 782, 799–800 (EAB 1997). The Administrator nevertheless retains discretion to assess a penalty. *Id.* at 800; *In re Arapahoe County Weed Dist.,* 8 E.A.D. 381, 392 (EAB 1999).

Contrary to Respondents' assertion that "it is uncontroverted" that Safe & Sure's pesticide products pose no threat to people, animals, or the environment, we note that the Region disputes that Respondents' products are completely non-toxic. Mr. Layne testified, for example, that although De-Flea Concentrate is not acutely toxic, "[t]here are risks associated with its use," Tr. at 230, including the risks posed by dermal absorption, inhalation, and eye contact. Tr. at 230, 233–34; *see* Response Brief at 22.

Furthermore, apart from whether or not the violation caused harm to health or the environment, as we stated in *Green Thumb*:

> [F]ailure to register pesticides under FIFRA section 3(a) is harmful to the FIFRA program and to the public. * * * The registration program is the foundation for securing the Agency's ability to protect human health and the environment. Without that foundation in place, the Agency cannot efficiently exercise its other powers conferred under the Act. Without * * * [registration], the Agency cannot, for example, prescribe labeling requirements for the product that set forth effective warnings and specific directions for use intended to protect human health and the environment.

Green Thumb, 6 E.A.D. at 800–01. Therefore, here, as in *Green Thumb,* the "circumstances surrounding the violation[s] weigh heavily in favor of assessing a penalty," even if "the harm from the violation consists of a general harm to the FIFRA pesticide registration program rather than to the health of specific individuals or to components of the ecosystem." *Id.* at 801.

Mr. Workman's past conduct makes clear why a penalty, rather than a warning, is appropriate. He has already received, but largely ignored,

[19] Respondents do not argue that they exercised due care.

numerous warnings from both EPA and state officials.[20] Given the nature and extent of the violations, which have persisted for many years, we find no merit whatsoever to Respondents' request for a warning.

2. *A Substantial Penalty Is Appropriate*

Respondents also argue that any penalty that is assessed against Respondents should be minimal because the products pose "no risk to the public or the environment." Appeal at 5. As noted *supra* Part III.B.1, we disagree that the record is uncontroverted on the issue of whether the products pose a risk to health or the environment. Moreover, even if Respondents' products posed no risk to health or the environment, Respondents' failure to register its establishment or pesticide products "deprives the Agency of necessary information and therefore weakens the statutory scheme." *In re Sav-Mart, Inc.,* 5 E.A.D. 732, 738 n.13 (EAB 1995). As we recently reiterated in *Arapahoe County Weed District,* "we have previously held that 'harm to the program alone is sufficient to support a substantial penalty.'" *In re Arapahoe County Weed Dist.,* 8 E.A.D. 381, 392–93 n.14 (EAB 1999) (citing *In re Predex Corp.,* 7 E.A.D. 591, 601 (EAB 1998); *Green Thumb,* 6 E.A.D. at 800–01).

The Region persuasively argues that the large number of violations, the long time period over which they occurred, and the "widespread distribution of * * * Respondents' unregistered and misbranded pesticidal products" all magnify the gravity of these violations.[21] *See* Response Brief at 22; Initial Decision at 45. We thus reject Respondents' arguments that a minimal penalty is appropriate.

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[20] *See,* e.g., G Exs 1, 3, 9, 10, 22, 23, 24, 27, 46, 49; *see also* Initial Decision at 45–46.

[21] FIFRA § 14(a)(4) provides that "[i]n determing 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." 7 U.S.C. § 136l(a)(4). As noted *supra* note 16, Ms. Cheryl Jones, an enforcement specialist with Region IV, testified that she had calculated the penalty in accordance with the ERP. Specifically, Ms. Jones calculated a base penalty of $3,000 for each of the 85 violations in the Complaint, based on the penalty criteria in the ERP, and then reduced the base penalty amount for Counts 2–85 based on the ERP's gravity adjustment criteria. Tr. at 149–55. These calculations produced a proposed penalty of $229,800. *Id.* at 155. The business was included in the smallest "size of business" category. *See supra* note 16. Ms. Jones acknowledged that a $229,800 penalty amount is "unusually large" for FIFRA violations, but explained that "[i]t's very infrequent" to have "so many counts" and "such a wide spread of violations in so many different states while [it's] just one individual or one company." Tr. at 156.

3. *Respondents Have Failed to Rebut the Region's Evidence Regarding Ability to Pay/Continue in Business/Size of Business*

Finally, Respondents contend that "Safe & Sure is no longer financially solvent and therefore would be unable to pay any civil fines levied against it." Appeal at 2. They also contend the penalty is in an amount that "Appellant cannot absorb and still remain in business." *Id.* at 4. More specifically, they state that Mr. Waisner, EPA's expert witness, based his assessment of Safe & Sure's ability to pay "solely upon books and records from 1992" and, therefore, that his assessment does not demonstrate that Safe & Sure or Mr. Workman is presently able to pay a $30,000 penalty. *Id.* at 5.

Region IV responds that it met its burden "of establishing Respondents' ability to pay a penalty." Response Brief at 19.[22] Further, EPA contends that, in this case, "[i]t may be appropriate to weigh a factor such as gravity as heavily, or even more heavily than ability to pay, in view of the long-term and widespread noncompliance of Safe & Sure and Mr. Workman." *Id.* at 20.

Pursuant to 40 C.F.R. § 22.24, the Region bears the initial burden of proof (i.e., the burden of going forward) that the proposed penalty is appropriate, after which the burden of going forward shifts to the Respondents to rebut the Region's *prima facie* case. *In re New Waterbury, Ltd.,* 5 E.A.D. 529, 538–39 (EAB 1994); *see In re Britton Constr. Co.,* 8 E.A.D. 261, 290–91 (EAB 1999). The ultimate burden of persuasion, however, rests with the Region as the proponent of the penalty. *New Waterbury,* 5 E.A.D. at 538. The EAB discussed the allocation of these burdens at length in *New Waterbury, supra; In re Lin,* 5 E.A.D. 595, 599 (EAB 1994). As we stated in *Lin:*

> [I]f a respondent puts its ability to pay (or continue in business) at issue going into a hearing, the Region must show as part of its *prima facie* case that it considered the appropriateness of the proposed penalty in light of the penalty's effect on respondent's ability to continue in business. * * * If the respondent cannot offer sufficient, specific evidence as to its inability to continue in business or rebut the Region's *prima facie* showing, the Presiding Officer may conclude that the penalty is appropriate, at

[22] The ERP equates the terms "ability to continue in business and ability to pay." ERP at 23. Although discussed largely herein as ability to pay, this section of the opinion also addresses the provisions of FIFRA § 14(a)(4) that require consideration of size of business and the effect of the penalty on the ability to continue in business. *See supra* note 21.

> least insofar as it affects the respondent's ability to continue in business.

Lin, 5 E.A.D. at 599 (footnote omitted).

As set forth below, we find Respondents' factual demonstration on these issues inadequate in light of the foregoing framework, and we conclude that the Presiding Officer properly assessed a $30,000 penalty. Region IV demonstrated that it considered Respondents' ability to pay in determining the penalty and it came forward with evidence that Respondents have the ability to pay a $30,000 penalty. As noted *supra* Part II.C., EPA's expert,[23] Mr. Waisner, testified that it was his opinion that Respondents can collectively pay a $30,000 penalty. Tr. at 196–97, 202–04.[24] The Region having made a *prima facie* showing that the penalty amount is appropriate (including a demonstration that it considered Respondents' ability to pay),[25] the burden thus shifted to Respondents to rebut the Region's showing or provide specific evidence of their inability to pay the proposed penalty. This Respondents have failed to do.

Respondents contend that Mr. Waisner's "reliance upon * * * records from 1992 does not rise to the level of competent substantial evidence" that either Respondent can pay a $30,000 penalty. Appeal at 5. Respondents argue that Mr. Waisner's opinion that they can pay a $30,000 penalty should be discounted because he relied solely on Safe & Sure's 1992 financial records, and did not consider Safe & Sure's more recent financial picture. *Id.* The record does not support Respondents' assertion that Mr. Waisner relied solely on 1992 records. Mr. Waisner testified that he relied on Safe & Sure's tax returns from the six-year period of 1991 to 1996, *see* Tr. at 187, 188, 190, 197, 199, 202–04, and that Safe & Sure had gross receipts ranging from $326,088 in 1991 to $183,534 in 1996. Tr. at 196; *see* G Exs 61, 62.

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[23] Mr. Waisner has received extensive training in financial analysis, and has made "ability to pay" determinations in enforcement actions approximately 500 times. Tr. at 173.

[24] At Region IV's request, Andrew McFarlane, a civil investigator with EPA's National Enforcement Investigation Center, also performed an assessment of Respondents' ability to pay a $30,000 civil penalty, and prepared a report, dated April 28, 1994, that supports Mr. Waisner's testimony. G Ex 63. His report states that Safe & Sure's federal income tax returns for the years 1991 through 1996 indicate that funds were available to pay a $30,000 penalty during each of these six years. G Ex 63.

[25] In addition to Mr. Waisner's testimony, the Region's showing of appropriateness was also based on the testimony of Mr. Layne and Ms. Jones. *See supra* notes 16, 17.

Furthermore, Respondents have not supported their inability to pay assertions with specific financial evidence of their own. The Presiding Officer conducted the hearing in this matter on November 13, 1997. Safe & Sure's corporate income tax returns for the years 1991 through 1996 were part of the hearing record and were "duly considered by Mr. Waisner." Initial Decision at 45. Respondents did not introduce any expert testimony on their behalf with regard to Safe & Sure's inability to pay/continue in business. Nor did they introduce any documentation which supports the notion that Safe & Sure's income has declined substantially.[26]

The Presiding Officer found that Respondents provided no documentation at all with regard to Mr. Workman's personal finances and his alleged inability to pay. Initial Decision at 44–45 & n.7. Although Mr. Workman asserts that "any civil penalty imposed upon him would place him in a position of bankruptcy," Appeal at 4, the Presiding Officer found that Mr. Workman had failed to provide any supporting documentation for that assertion.

As the Presiding Officer had the opportunity to personally observe and evaluate the credibility of witnesses at the hearing, we find ourselves in no position in this instance to disagree with his determinations in this regard.[27] *In re Ocean State Asbestos Removal, Inc.,* 7 E.A.D. 522, 530 (EAB 1998) ("[W]ith respect to findings where credibility of witnesses is at issue * * *, we generally defer to the presiding officer's factual findings because the presiding officer had the opportunity to observe the

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[26] Mr. Workman testified, when asked to compare the amount of product sold on a monthly basis in October of 1997 to the amount of the product sold by the business in October of 1996, "[m]aybe the same, or it might be a little bit less. * * * It's been going down." Tr. at 254. Ms. Carolyn Doyle, a Safe & Sure employee, testified that, in her opinion, "from last year to this year," Safe & Sure's business had declined "a good 60 percent." Tr. at 266. However, Ms. Doyle was not qualified as an expert, and she acknowledged that she does not maintain Safe & Sure's corporate records — that was done by a certified public accountant. Tr. at 267. As no documentation was provided to support these assertions, the Presiding Officer properly concluded there was an absence of financial documentation to support an inability to pay defense. Initial Decision at 44–45.

[27] Mr. Workman provided no personal income tax returns for any year. Initial Decision at 44–45. Mr. Workman did testify at the hearing that he does not have "any money," Tr. at 253; that he has never drawn a salary or drawn income from Safe & Sure, Tr. at 251–52, 262; that he is not "sure" whether Safe & Sure has paid him any royalties for a patent, Tr. at 262–63; that he does not have a personal bank account, Tr. at 256–57; that he does not own the house he lives in, Tr. at 252; and that he lends the $450 a month he receives as a social security payment to Safe & Sure, Tr. at 252. The Presiding Officer did not find these assertions credible evidence to support Mr. Workman's claim of inability to pay. *See* Initial Decision at 44–45 & n.7.

witnesses testify and to evaluate their credibility."); *In re Great Lakes Div. of Nat'l Steel Corp.,* 5 E.A.D. 355, 372 (EAB 1994). It is clear from the Initial Decision that he found credible Mr. Waisner's testimony that a penalty in the range of $30,000 would allow the Respondents to continue in business. Initial Decision at 43–45. The Presiding Officer carefully analyzed the statutory factors in FIFRA § 14(a)(4) and considered and weighed the testimony of the witnesses and the evidence or lack thereof on key contested issues such as ability to pay. *See* Initial Decision at 45 (quoted *supra* Part II). We find no clear error of law or abuse of discretion that would cause us to disturb his judgment. *See In re Schoolcraft Constr., Inc.,* 8 E.A.D. 476, 492 (EAB 1999) (citing *In re Pacific Ref. Co.,* 5 E.A.D. 607, 612 (EAB 1994)) (where presiding officer assesses penalty that falls within range of penalties provided in penalty guidelines, the Board will generally not substitute its judgment for that of the presiding officer absent a showing of abuse of discretion or clear error).

The Region also contends that "the imposition of a penalty is not automatically precluded by a demonstration of an inability to pay" and that, even if Respondents were successful in demonstrating an inability to pay, "it may be appropriate to weigh a factor such as gravity as heavily, or even more heavily than ability to pay, in view of the long-term and widespread noncompliance of Safe & Sure and Mr. Workman." Response Brief at 20. The Region's statement is accurate that "inability to pay" does not "automatically justify the non-payment of a penalty." *See New Waterbury,* 5 E.A.D. at 541. However, in light of our conclusion that Respondents have not demonstrated an inability to pay, we need not reach that issue here.[28]

Mr. Workman is entitled to no leniency in light of his longstanding noncompliance and disregard for FIFRA. Mr. Layne testified that he considered

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[28] The Region argues in its Response Brief that "the penalty of $229,000 [*sic*] which Appellee/Complainant proposed to assess is appropriate." Response Brief at 30. It asks the Board to modify the Presiding Officer's Initial Decision and "to increase the assessed penalty to $229,000." *Id.* Although we have the authority to increase the penalty amount pursuant to 40 C.F.R. § 22.31(a), we deny the Region's request that we do so here. The Region had the opportunity to challenge the Presiding Officer's penalty assessment by filing a timely appeal of the penalty amount, but it did not file an appeal. Accordingly, we decline to increase the penalty. *See In re J.V. Peters & Co.,* 7 E.A.D. 77, 92 n.24 (EAB 1997); *In re Ashland Oil, Inc.,* 4 E.A.D. 235, 238 (EAB 1992).

the situation "particularly egregious." Tr. at 234.[29] He added that, notwithstanding efforts by compliance inspectors to "go the extra mile to make sure there was an understanding of the requirement[s]," Tr. at 235, he saw Safe & Sure's products:

> [B]eing spread to California and New Jersey and all the states in between essentially, [in what] I considered * * * almost a reckless disregard of what I have dedicated my professional career of doing, and that's enforcing the pesticide law and protecting people that I serve.

Id. We find, as the Presiding Officer did, that "Mr. Workman has shown a longstanding disregard for the requirements of FIFRA," and that evidence in the record evinces a continuing unrepentant attitude towards compliance. Initial Decision at 45. A penalty of $30,000 is fully appropriate.

IV. *CONCLUSION*

For all of the foregoing reasons, we affirm the Presiding Officer's Initial Decision assessing a civil penalty of $30,000 jointly and severally against Mr. Workman and Safe & Sure in accordance with FIFRA § 14(a)(1), 7 U.S.C. § 136l(a)(1). Payment of the penalty shall be made by mailing or delivering a certified or cashier's check in the amount of $30,000 payable to the Treasurer of the United States to the following address within sixty (60) days of this order (unless otherwise agreed by the parties):

Regional Hearing Clerk
U.S. EPA, Region IV
P.O. Box 100142
Atlanta, GA 30384

So ordered.

[29] Respondents are mistaken in their assertion that Mr. Layne testified that a $30,000 civil penalty was "unusually large." *See* Appeal at 5. They have apparently misunderstood Mr. Layne's testimony. His testimony related to the proposed penalty of $229,800, not the reduced penalty of $30,000. *See* Tr. at 234.